Key Considerations for Owners and Developers to Consider for Your Next Multifamily Construction Project

Jan 14, 2025

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As we settle into 2025, multifamily housing developers across the country are eager to break ground on new multifamily housing projects to address the significant nationwide housing shortage and to realize the opportunities that such shortage presents. While all developers understand the importance of proforma budgets and financial projections when determining the price to pay for the land for a project, developers may overlook the importance of the forms of design and construction contract documents, all of which may materially affect the project's likelihood of success. While not an exhaustive list, here are a few things that developers should consider when planning their next project:

Key consideration #1: Are you seeking financing for the construction of the project?

- If short-term financing, such as a construction loan, will be used to cover the costs associated with the project, be sure to review your due diligence checklist carefully and pay close attention to the timeline and the list of documents required prior to closing the short-term financing.
  - The lender will often require *executed* copies of agreements with the architect and/or contractor *prior* to closing and may need to review or comment on the agreements before they are executed. Multifamily design and construction agreements are complex documents tailored to the needs of the project and may take several weeks or even months of negotiations among the parties before they are executed. You should allow enough time to draft and negotiate agreements that are appropriate for the project and enable sufficient time for lender input.

    - The design and construction agreements may be required to include certain lender processes—for instance, the draw schedule, lien waiver forms, availability for lender inspections, and other information or documents required by the lender.

Key consideration #2: What are your project delivery and billing methods?

- One important factor in the project's success is selecting the appropriate project delivery method. The project delivery method outlines how the project team will work together in planning, designing, constructing and closing out the project and is something that needs to be discussed early in the project's planning phase.
    - Consider whether you will engage a single entity that will both design and construct the project (design-build), whether you will engage an architect and a contractor separately (design-bid-build), or if you intend to engage a construction manager to assist the design team and construct the project.
    - One issue to avoid is entering into a contract with an architect for professional services and then entering into a construction agreement with the same architect for the construction of the project. If the entity is the design-builder for the project, then you want to ensure that you use the appropriate type of agreement.
- The manner of how compensation will be paid to the consultant and contractor also impacts the type or form of agreement that you should use for the project. Consider whether the design services will be provided on a fixed-fee basis or on an hourly basis. Another consideration is whether the construction work will be done on a lump-sum basis, using a cost-plus fee without a guaranteed maximum price or on a cost-plus-fee basis with a guaranteed maximum price.

Key Consideration #3: Don’t wait until preparing the contract documents to evaluate the appropriate types and limits of insurance.

- Have your broker advise and review the insurance requirements for the project early and ensure that the insurance coverage and limits are adequate and appropriate for your project so you can build any added cost into the budget.
- There are often exclusions in consultants’ and contractors’ insurance policies for residential projects, for faulty workmanship, or exclusions if certain materials are used on a project. It is important to make sure there are no exclusions that are essential to your project.
- It may take some time to get your insurance in place. Make sure you are working with a broker as soon as possible and that coverage is in place before services are provided and work has commenced.

Key Consideration #4: You may need to start work and services or order materials to meet your schedule before the design and construction agreements are signed.

- If your design and construction agreements are not yet finalized or executed but it is necessary to commence limited design or construction services, and/or necessary to order materials, there are options you can use, such as a limited authorization to proceed to commence these activities while waiting for finalized or executed design and construction agreements.

Early and thoughtful preparation of the project’s contract documents with clear objectives, expectations and processes is essential for a smooth and successful project. An experienced construction lawyer can bring invaluable experience and insight to your next project.

Frost Brown Todd counsels owners, investors, developers and other key stakeholders on multifamily housing transactions in states across the country. We stay at the forefront of all critical issues affecting the multifamily housing industry, and we are ready to assist clients with navigating the rapidly changing environment. For more information, please contact the authors of this article or any attorney on Frost Brown Todd's Multifamily Housing Industry Team.

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