Key requirements, benefits of FRESH tax incentive program - by Erik Ortmann and Christopher McDonald

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The Food Retail Expansion to Support Health (FRESH) program was developed by the City of New York to enable broader access to healthy food in areas of the city lacking sufficient food options. To encourage the development of supermarkets in those neighborhoods, FRESH offers incentives to real estate owners, developers and tenants that help reduce costs of owning, leasing, developing, and/or renovating supermarket space. The FRESH program actually consists of two separate benefit programs—zoning benefits (administered by NYC Dept. of City Planning) and tax incentives (administered by NYC Industrial Development Agency (NYCIDA)). Although each program has its own rules and requirements, they both generally require that certain portions of space be dedicated to the sale of fresh produce, perishables (including dairy, fresh meat, poultry and frozen food) and other food products intended for home preparation and consumption. A developer can utilize either or both categories of FRESH benefits on a particular project.

The zoning benefits may include additional floor area in mixed-use buildings (allowing an increase in residential floor area up to the square footage of the FRESH store), reduced parking requirements for the food store, and larger grocery stores as-of-right in light manufacturing districts. Although the zoning benefits can be important to the success of a project, this article focuses on the tax incentive program with a concentration on its Minority and Women Business Enterprise (MWBE) requirements.

The tax incentives may include:

Stabilization of building taxes at pre-improvement levels for up to 20 years (phasing out over the last 5 years of the 25 year benefit period). This benefit is maximized for ground-up construction when the application is made before improvements begin.
Full abatement of land taxes for up to 20 years (phasing out over last 5 years of the 25 year benefit period).
Waiver of sales taxes on otherwise taxable materials used to construct, renovate, or equip the FRESH facilities.
Reduction of mortgage recording taxes to 0.3% for project mortgages.

To obtain the incentives, an applicant must submit a detailed application prior to entering into any lease, acquisition contract or renovation contract, unless the lease or contract is made contingent on receiving NYCIDA assistance. NYCIDA will assess the need for the financial assistance and the economic impact of the project. Stores must be located in an eligible area for program participation. Additional factors considered include:

Size of investment.
Jobs retained and/or created, average wages and benefits.
Neighborhood.
Financial condition of the applicant and supermarket operator.
Tenanting strategy and timeline (for developer applicants).
Environmental review.

The supermarket must be located on its own tax lot(s). If part of a larger project, this can be accomplished through a condominium structure.

Assuming NYCIDA approves the incentives, the parties will proceed to the closing process. To close on the incentives, the developer and/or supermarket operator must enter into intervening leases with NYCIDA. These leases impose requirements on the developer, supermarket operators and their respective contractors/subcontractors. In addition to normal leasehold provisions (including substantial insurance requirements), these leases may require compliance and/or participation in HireNYC (a workforce service that provides workforce recruitment and screening services), living wage (FRESH program participants are generally exempt), prevailing wage laws (projects receiving less than $1 million in benefits and projects under 100,000 s/f are not subject to or exempt), labor peace (projects under 100,000 s/f or retail space below 15,000 s/f are generally exempt). If any of these laws otherwise apply to an applicant, their participation in FRESH will not circumvent compliance. FRESH participants may also need to meet MWBE goals.

NYCIDA may require the utilization of MWBEs for FRESH projects, particularly where the supermarket construction costs exceed certain amounts. MWBE participation goals for the incentive program are generally set at 25% to 35% of the total construction costs for the development's supermarket portion. To comply with MWBE reporting requirements, it is important to confirm the type and percentage of goals set for the project (usually NYS and NYC MWBE goals). The applicant must then determine the construction cost for the supermarket and develop a plan to use certified firms for construction materials, services, and/or labor. The applicant must confirm that any firm used has valid certifications, and determine the amount of work being self-performed under each supply or subcontract agreement, in order to calculate the certified firm credits to be counted toward MWBE goals. The information developed/gathered must be put into a proposed MWBE Participation Plan form that must be submitted for approval by NYCIDA. The plan must provide total construction costs for the supermarket premises, total spend to be counted toward the goals, and the goal percentage. More specifically, the plan needs to list each certified firm being contracted, their scope of work/services, contract amounts, and the amount from each contract to count toward goals. A full or partial goal waiver may be sought if the applicant's planned participation falls short of goals. This will require a showing of good faith efforts to meet MWBE goals. Applicants must establish, maintain, and present documentary support for all aspects of its plan, including good faith efforts if short of these goals.

Obtaining FRESH Incentives can be challenging. It is important to work with an experienced team, including attorneys familiar with the FRESH program and its compliance requirements, to apply for, obtain and close the incentives transaction.

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