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POLICY BRIEF
FRESH ZONING TEXT AMENDMENT

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For the CHPC Zoning Committee
August 2009

CHPC has reviewed the proposed text amendment submitted by the Department of City Planning (DCP), pursuant to Section 200 of the New York City Charter, for an amendment of the Zoning Resolution of the City of New York which would further the city's Food Retail Expansion to Support Health (FRESH) program by providing zoning incentives to grocery stores carrying fresh food in underserved neighborhoods.

CHPC recognizes the dire need for food markets in New York City's neediest neighborhoods and applauds DCP's efforts to incentivize the creation and retention of fresh food markets across the city. Fresh fruits, vegetables, dairy, and meats are indeed scarce in many neighborhoods in New York City and incentivizing fresh food groceries in those areas is a welcome step toward ensuring the availability of fresh, healthful food for all New Yorkers. Despite CHPC's support for the FRESH program's goals, however, CHPC has serious reservations about the unintended disincentives that this proposed amendment may create for developers. We anticipate that prospective grocery developers or owners will find the program restrictions excessively costly and burdensome. Developers of mixed-use property experience heightened cost-sensitivity as they attempt to simultaneously produce low-income housing appropriate for the targeted neighborhoods. As drafted, the amendment may in fact discourage, rather than encourage, new grocery development and ownership in New York City's neediest and most economically depressed neighborhoods.

This brief describes our concerns with the proposed text amendment as currently drafted and recommends changes to make the program more workable for developers. In particular, we recommend easing the threshold requirements for obtaining certain incentives and for conversion in the event that a store becomes economically unviable. We also recommend implementing a long-term review of underserved neighborhoods to ensure that the neediest areas continue to benefit from the FRESH program.

1. Allow Modification To Maximum Base Height and Building Height

Section 63-22 provides that the City Planning Commission (CPC) may authorize an increase of up to 15 feet to the maximum building height for mixed use buildings containing FRESH food stores to accommodate additional floor area as provided in Sections 63-211 and 63-212. Allowing additional floors only above the street wall setback is more costly and less appealing to potential developers than increasing the maximum base height along the street wall. Additional floors above the setback suffer from inefficient layout and are costlier to build than floors along the street wall, especially considering the additional rear setback requirements required in many neighborhoods.

CHPC recommends amending Section 63-22 to allow an increase of up to 15 feet to the maximum base height in addition to an increase of up to 15 feet to the maximum building height of buildings containing a FRESH food store.

2. Modification to Maximum Building or Base Height Should Be As-of-Right

As discussed above, Section 63-22 allows CPC to authorize the applicable maximum building height to be increased by up to 15 feet to accommodate additional floor area. CHPC understands CPC's desire to review all potential building height increases to ensure the continued preservation of the character and history of the neighborhood, to ensure continued access to light and air of adjacent properties, and to ensure minimal adverse affects on the surrounding area. However, CHPC stresses that New York City's neediest neighborhoods already present extreme challenges and low profit margins to even the most intrepid grocery store developers. The extra time and added costs of the authorization process, which includes CEQR analysis, at the inception of the project would discourage developers from participating in the FRESH program. Development projects often require extra height to accommodate additional floor area; by making the height bonus burdensome, the amendment, as written, would effectively eliminate the floor area bonus.

Accordingly, CHPC recommends amending Section 63-22 to allow modifications under Sections 35-24 and 123-66 as-of-right, or, at the very least, by certification. Easing this particular aspect of a developer's entrance into the FRESH program, while still retaining the certification requirements of Section 63-30, the retail space restrictions of Section 63-01, the transparency requirements of Sections 63-23 and 63-24, the sign regulations of Section 63-26, and the conversion restrictions of Section 63-50, ensures that the FRESH program does not present unduly burdensome regulatory hurdles to developers who are already committing themselves to a restrictive program.

3. Residential Floor To Ceiling Height Should Remain At Eight Feet

Section 63-22 allows an increase of maximum building height, provided that any story occupied by a FRESH food store has a minimum finished floor to finished ceiling height of 14 feet above the sidewalk, and that residential stories have a minimum finished floor to finished ceiling height of 8 feet 6 inches.

As a matter of policy we believe that floor to ceiling heights should be governed solely by the New York City Building Code. The minimum residential floor to ceiling height is 8 feet, as set forth in the New York City Building Code, Section 1208.02. Differing minimum ceiling heights in two municipal regulatory schemes will only serve to create confusion.

An increase in the minimum residential floor to ceiling height will increase the construction costs of a creating a use which the City's study has already found in woefully short supply. The cost of additional masonry, sheetrock, and plumbing for each additional 6 inches of height is not insignificant. Housing in the affected neighborhoods is most likely low-income, with little to no margin for added costs. Moreover, each additional 6 inches per floor subtracts from the extra 15 feet provided for the maximum building height, and quickly eats into the supposed extra height benefit. Imposing these additional costs seems to run directly counter to the purpose of the amendment of fostering fresh food stores.

For the above reasons, CHPC recommends that the minimum floor to ceiling height provision for residential stories in Section 63-22 be deleted.

4. Change of Use of a FRESH Food Store Should Be As Of Right or By Certification

Section 63-40 provides that a FRESH food store may be changed to any use permitted by the underlying district upon certification by CPC, while Section 63-50 provides that a FRESH food store may be changed to any use permitted by the underlying district upon authorization by CPC of modifications to the bulk and accessory off street parking requirements. The combined effect of Sections 63-40 and 63-50 is to provide that a FRESH food store which has taken advantage of the bulk and parking requirements must obtain authorization from CPC to change its use. Surely an owner would not obtain FRESH food certification without availing itself of the floor area bonus, height increase, and parking reduction benefits, so in only the most limited circumstances would an owner seeking to convert a FRESH food building to another use have the benefit of the less burdensome certification process.

CHPC anticipates that requiring owners of a building with FRESH food store certification to obtain authorization from CPC prior to changing the use for their building will be unduly burdensome and discouraging to prospective developers. The mutability of uses over time is a vital (and inevitable) characteristic of urban land; as demographics change and time passes, so too does commercial enterprise. Although CHPC recognizes the importance of requiring a continuing commitment from FRESH food store operators, the proposed text amendment must allow for the natural fluctuation of uses over time by lessening the burden of converting the site to another use in the event that the FRESH food store becomes economically unviable.

Accordingly, CHPC recommends modifying Section 63-40 so that an owner may, as of right, change the use of a building with a FRESH food store to a complying use if there is no non-compliance. In such a case, an owner might record a declaration (in a form pre-approved by DCP) stating that the FRESH use has been discontinued. Additionally, in Section 63-50, modifications to bulk and accessory off-street parking requirements should be allowed only by certification of CPC upon a finding of the provisions in (a) through (e).

5. Provide for Long-Term Review of Underserved Neighborhoods

As drafted, the proposed text amendment does not provide a mechanism for ensuring that the FRESH program continues to serve those communities most in need of fresh food incentives. New York City has enjoyed unprecedented economic growth over the past few decades, and neighborhoods will undoubtedly continue to evolve alongside and in response to the city's changing demographics; after many years, those neighborhoods identified in Section 63-021 may not require incentives for grocery stores and new neighborhoods may require assistance.

To ensure the long-term viability of the FRESH program, CHPC recommends implementing a sunset provision, with an option to extend, in the text amendment. After a period of time (perhaps ten years), the FRESH program should automatically terminate, unless extended by CPC, in which case CPC shall undertake a mandatory review of the NYC neighborhoods underserved by grocery stores and amend the program so as to include those underserved areas.

Conclusion

Following our review we have concluded that, while we are supportive of the FRESH program and all measures to encourage markets offering fresh foods to develop and operate in underserved neighborhoods, we have serious reservations about the cost and burden that the regulatory requirements promulgated by the proposed text amendment would have on prospective FRESH food store developers in such neighborhoods. We fear the proposed text amendment might go unused if it is not calibrated to match the realities of development in low-income neighborhoods.

In order to mitigate some of the disincentives that the proposed text amendment creates for developers, we recommend the above measures to encourage developers to avail themselves of the benefits of the FRESH program and lessen the regulatory and monetary hurdles presented by such an endeavor. We believe our proposals adequately balance the competing needs of cost-viable grocery development and sensible urban design and planning.