

## **NEW YORK CITY DEPARTMENT OF CITY PLANNING**

### **NOTICE OF ADOPTION OF FINAL RULE RELATING TO APPLICATIONS RELATING TO THE FRESH PROGRAM**

NOTICE IS HEREBY GIVEN in accordance with the requirements of Section 1043 of the New York City Charter and pursuant to the authority vested in the Director of the Department of City Planning (“the Department”) by Section 1043(a) of the New York City Charter that the Department adopts the following rule that establishes procedures for the queuing of applications to obtain certifications pursuant to the FRESH program regulations of Section 63-00, et seq. of the New York City Zoning Resolution (“ZR”) (as amended by recently approved text amendment N 210380 ZRY) to obtain additional floor area for developments with fresh food stores. The purpose of the queue is to manage the even distribution of stores subject to the FRESH program and prevent their overconcentration in a given area of the City, consistent with a recently enacted zoning text amendment to the FRESH regulations. The Department is also making two corrections to Chapter 3 of its rules governing the fee structure for land use applications.

The Department published a Notice of Opportunity to Comment on the rule in the City Record on August 23, 2021. On September 22, 2021, the Department held a public hearing on the rule.

### **STATEMENT OF BASIS AND PURPOSE OF FINAL RULE**

The Food Retail Expansion to Support Health Program (FRESH) was developed in 2009 to offer zoning incentives and financial benefits in communities that are underserved by neighborhood grocery stores. Its goal is to encourage the development and retention of convenient, accessible stores that provide fresh meat, fruit and vegetables, and other perishable goods in addition to a full range of grocery products. The program offers a set of zoning incentives that provide additional floor area in mixed buildings, reduce the amount of required parking for food stores and permit larger grocery stores as-of-right in light manufacturing districts. The financial benefits, administered by the NYC Industrial Development Agency, exempt or reduce certain taxes for qualifying FRESH food stores.

Since the adoption of the FRESH program in 2009, to date there are 27 certified FRESH Projects, eight of which have been built. Approximately half of the certified projects are concentrated in Brooklyn, and applications have been concentrating in specific areas with strong housing markets, such as Bedford-Stuyvesant and Harlem. While seeking to expand opportunities to attract development of FRESH stores, it is also critical to prevent an oversaturation of stores to maintain market balance.

The New York City Zoning Resolution (“ZR”) contains provisions for the implementation of these zoning incentives found at ZR Section 63-00, and what follows. Upon a Certification by the Chair of the City Planning Commission for a development, and upon a demonstration that the application for that development has provided the requisite drawings, a commitment from the

store operator, and restrictive declaration for the proposed development, the program allows for an additional square foot of residential floor area in the development for every square foot provided in the development for a FRESH food store, up to a maximum of 20,000 square feet. This rule is being introduced concurrently with a recently adopted ZR text amendment (N 210380 ZRY) that limits the amount of total additional residential floor area (“Residential Floor Area”) to 40,000 square feet within a half-mile radius of any proposed FRESH food store, to avoid an overconcentration of FRESH food stores. The ZR text amendment was approved by the City Planning Commission on October 20, 2021 and the New York City Council on December 9, 2021 (the effective date of the ZR text amendment)

Given this new limitation in the new ZR FRESH text, if there is more than one application for Certification of a FRESH food store within a given radius, there needs to be a way for the Department to determine the priority of such projects within the radius. This rule does that by:

- Queueing all projects according to when the project’s pre-application statement or draft application (whichever is applicable) for Certification of a FRESH food store is received by the Department.
- Ensuring that projects ahead in the queue can obtain their proposed Residential Floor Area, to the extent available, within a radius prior to those projects later in the queue.
- Giving the Department the ability to put projects with unresponsive sponsors “on hold” and eventually, if the sponsors remain unresponsive, removing such projects from the queue.
- Giving the Department the ability to return Residential Floor Area to a given radius if a previously obtained Certification lapses as a result of the associated project failing to vest or otherwise qualify in accordance with the FRESH regulations, as modified by the text amendment.

The rule would not apply to a FRESH food store with a prior Certification that has not lapsed pursuant to section 63-30 of the Zoning Resolution, and which store is the subject of a new Application but is not seeking any Residential Floor Area beyond the amount previously certified.

The Department is also amending Section 3-07(e) of the Department’s rules to update a cross-reference to a ZR provision that was renumbered by the “Key Terms Clarification Zoning Text Amendment” (N 110090 (A) ZRY of 2011. Finally, the Department is amending Section 3-07(g) of the Department’s rules to correct an error in the Supplemental Fee for Large Projects schedule. The schedule provides for a supplemental fee for projects based on whether such project’s floor area falls within one of three ranges based on square footage. The range resulting in a \$120,000 supplemental fee had a gap of 999 square-feet due to a drafting error in a prior rule revision and this rule closes that gap.

The Department’s authority to promulgate these rules is found in sections 1043 and 191(b)(2) of the New York City Charter and ZR Section 63-00, *et seq.* (as amended by N 210380 ZRY).

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Paragraph (1) of subdivision (e) of § 3-07 of title 62 of the Rules of the City of New York is amended to read as follows:

(1) For certification for public school space pursuant to § 107 – [123]121 of Article X, Chapter 7 (Special South Richmond Development District) of the Zoning Resolution, the fee shall be \$160.

Section 2. Subdivision (g) of § 3-07 of title 62 of the Rules of the City of New York is amended to read as follows:

(g) Supplemental Fee for Large Projects. In addition to all applicable fees as set forth above, a supplemental fee shall be required for the following applications:

Applications that may result in the development of 500,000 to 999,999 square feet of floor area	\$80,000
Applications that may result in the development of 1,000,000 to 2,499,[000]999 square feet of floor area	\$120,000
Applications that may result in the development of at least 2,500,000 square feet of floor area	\$160,000

Section 3. Title 62 of the Rules of the City of New York is amended by adding a new chapter 12 to read as follows:

Chapter 12: Rules for the Processing of Applications for FRESH Certifications Pursuant to Section 63-30 of the Zoning Resolution of the City of New York

§ 12-01 Scope

This chapter governs the queuing of applications for the Food Retail Expansion to Support Health Program (“FRESH”) pursuant to section 63-00 et seq. of the Zoning Resolution as well as the effect such queuing has on closed projects, terminated applications, and lapsed certifications related to such program. This chapter does not apply to a FRESH Food Store that has received a prior Certification which has not lapsed pursuant to section 63-30 of the Zoning Resolution, where such FRESH Food Store is the subject of a new Application but is not seeking any FRESH Residential Floor Area beyond the amount previously certified, as such terms are defined in this chapter.

§ 12-02 Definitions

For the purposes of this chapter:

Application. The term “Application” means materials filed with the Department pursuant to section 10-09 of these rules to obtain a Certification in connection with a project.

Certification. The term “Certification” means a Certification by the Chair of the Commission pursuant to section 63-30 of the Zoning Resolution for a FRESH Food Store.

Commission. The term “Commission” means the City Planning Commission.

Department. The term “Department” means the Department of City Planning.

FRESH. The term “FRESH” means the Food Retail Expansion to Support Health Program pursuant to section 63-00 et seq. of the Zoning Resolution.

FRESH Application Statement (“FAS”). The term “FRESH Application Statement” or “FAS” means a PAS in accordance with section 10-04 of this title or, if the Department determines that such statement is not necessary, a draft land use application in accordance with section 10-07 of this title, both of which are submitted in connection with a prospective Application.

FRESH Food Store. The term “Fresh Food Store” shall have the same meaning as that term is defined in section 63-01 of the Zoning Resolution.

FRESH Residential Floor Area. The term “FRESH Residential Floor Area” means the additional residential floor area permitted in accordance with this chapter and section 63-21 of the Zoning Resolution as a result of the provision of “FRESH Food Store Floor Area,” as that term is defined in section 63-01 of the Zoning Resolution.

Pre-Application Statement (“PAS”). The term “Pre-Application Statement” or “PAS” means the Pre-Application Statement described in section 10-04 of this title.

Queue. The term “Queue” means a list of projects ranked relative to each other in the order in which the Department received the FAS for each such project, subject to the provisions of this chapter.

Radius. The term “Radius” means a half-mile radius measured from zoning lots of the proposed FRESH Food Store where the total FRESH Residential Floor Area for all FRESH Food Stores within such radius may not exceed more than 40,000 sq ft. A FRESH Food Store with FRESH Residential Floor Area will be deemed to be included in such radius if any portion of such store’s zoning lot is located within such radius.

#### § 12-03 Review and Queuing of Applications

(a) The Department will queue all projects in the order that their respective FAS was received by the Department, provided that, with respect to an FAS that is a PAS, such PAS has been determined by the Department to be complete in accordance with section 10-04(b) of this title.

(b) When two or more projects, including the proposed project, are located within a Radius and the total of FRESH Residential Floor Area among them exceeds 40,000 sq ft, the project for which an FAS was first received and is deemed in compliance with this title will have priority to obtain all of its requested FRESH Residential Floor Area. The project that is next in the Queue will then have priority to obtain all the remaining FRESH Residential Floor Area within such Radius which has not been claimed by a project earlier in the Queue. The use of remaining FRESH Residential Floor Area unclaimed by projects earlier in the Queue will continue in this manner for subsequent projects until there is no additional unclaimed FRESH Residential Floor Area within the Radius.

(c) After a project has been added to the Queue, if there is no response from the project sponsor within two (2) months after the interdivisional meeting, held in accordance with section 10-05 of this title, or the last communication of instructions from the Department, whichever is later, the Department will notify the project sponsor that its project will be placed on hold if it does not respond within a specified period of time from such notice. If the project sponsor responds within the specified timeframe but does not provide the requested materials, if any, within thirty (30) days of such response, the project will be placed on hold. If a project is on hold for twelve (12) months, the project record will be closed or the corresponding Application terminated, as applicable, and the project will be removed from the Queue. The previously claimed FRESH Residential Floor

Area corresponding to the removed project will then be available to projects remaining in the Queue. For terminated Applications, if the Department permits the applicant to proceed directly to filing a new Application, the Department will place such Application in the Queue in accordance with subdivision (a) of this section as if such Application were a new FAS.

#### § 12-04 Effect of Lapse of Certification

If a Certification lapses pursuant to section 63-30 of the Zoning Resolution, the amount of FRESH Residential Floor Area permitted by such Certification becomes available for other projects within the same Radius as the project with the lapsed building permit. The project sponsor may reapply for FRESH Residential Floor Area but must submit a new FAS Queued in accordance with section 12-03 of this chapter.