

## NEW YORK CITY DEPARTMENT OF CITY PLANNING

### **Notice of Public Hearing and Opportunity to Comment on Proposed Rules**

**What are we proposing?** The Department of City Planning proposes to amend its rules by adding a new Chapter 12 establishing 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 proposed 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 concurrently proposed zoning text amendment to the FRESH regulations. The Department of City Planning is also proposing two corrections to Chapter 3 of its rules governing the fee structure for land use applications.

**When and where is the Hearing?** The Department of City Planning will hold a public hearing on the proposed rule. The public hearing will take place at 10:00 on September 22, 2021. The hearing will be held at the Department of City Planning, located at the lower level arcade of 120 Broadway, New York, New York 10271.

**How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department of City Planning through the NYC rules Web site at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to [danswin@planning.nyc.gov](mailto:danswin@planning.nyc.gov).
- **Mail.** You can mail comments to Dominick Answini, Counsel’s Office, Department of City Planning, 120 Broadway, 31<sup>st</sup> Floor, New York, New York 10271.
- **Fax.** You can fax comments to the Department of City Planning at 212-720-3303.
- **Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling us at 212-720-3676. You can also sign up in the hearing room before the hearing begins on September 22, 2021. You can speak for up to three minutes.

In support of the City’s efforts to contain the spread of COVID-19, the City Planning Commission will hold this public hearing remotely as well. To join the meeting and comment, please visit **NYC Engage** at <https://www1.nyc.gov/site/nycengage/events/city-planning-commission-public-meeting/287261/1> or dial **877-853-5247** (US Toll-free), **888-788-0099** (US Toll-free), **(253) 215-8782** (Toll number) or **(213) 338-8477** (Toll number). If calling into the meeting, please use the following **Meeting ID 618 237 7396**, and when prompted for a participation code, please enter “#” followed by the password “1” when prompted. Instructions on how to participate, as well as materials relating to the meeting, will be posted on NYC Engage in advance of the meeting. To help the meeting host effectively manage the meeting, those who do not intend to actively participate are invited to watch the meeting through the livestream/LINK provided on NYC Engage or the recording that will be posted after the meeting on DCP’s website.

**Is there a deadline to submit written comments?** Written comments will be accepted until September 22, 2021.

**What if I need assistance to participate in the hearing?** You must tell us if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by email or mail at the addresses given above. You may also tell us by telephone at 212-720-3676. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by September 8, 2021.

**Can I review the comments made on the proposed rules?** You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public between the hours of 9:00 a.m. and 5:00 p.m. at the Freedom of Information Law Desk, 120 Broadway, 31<sup>st</sup> Floor, telephone number 212-720-3208.

**What authorizes the Department of City Planning to make this rule?** Sections 1043 and 191(b)(2) of the City Charter and ZR Section 63-00, *et seq.* (as amended by proposed N 210380 ZRY) authorize the Department of City Planning to make this proposed rule. This proposed rule was not included in the Department of City Planning's regulatory agenda for this Fiscal Year because it was not contemplated when the Department of City Planning published the agenda.

**Where can I find the Department of City Planning's rules?** The Department of City Planning's rules are in Title 62 of the Rules of the City of New York.

**What laws govern the rulemaking process?** The Department of City Planning must meet the requirements of Section 1043 of the New York City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the New York City Charter.

## Statement of Basis and Purpose of Proposed 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 proposed rule is being introduced concurrently with a proposed ZR text amendment (N 210380 ZRY) that would limit the amount of total additional residential floor area (“Residential Floor Area”) to 40,000 sq within a half-mile radius of any proposed FRESH food store, to avoid an overconcentration of FRESH food stores. The proposed ZR text amendment was referred into public review by the City Planning Commission on May 19, 2021.

Given this new limitation in the proposed ZR text amendment, 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 of City Planning (“the Department”) to determine the priority of such projects within the radius. This proposed 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 proposed text amendment.

The Department also proposes to amend 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 proposes to amend 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 has a gap of 999 square-feet due to a drafting error in a prior rule revision and this proposed rule would close that gap.

The Department’s authority for 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 proposed 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.

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.

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, <u>[000]999</u> 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

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.

## § 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 shall 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 shall have priority to obtain all of its requested FRESH Residential Floor Area. The project that is next in the Queue shall 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 shall 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, whichever is applicable, and the project will be removed from the Queue. The previously claimed FRESH Residential Floor Area corresponding to the removed project will now 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 shall 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 shall become 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.

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS  
253 BROADWAY, 10<sup>th</sup> FLOOR  
NEW YORK, NY 10007  
212-788-1400**

**CERTIFICATION / ANALYSIS  
PURSUANT TO CHARTER SECTION 1043(d)**

**RULE TITLE: Application Procedure for Food Retail Expansion to Support Health Program**

**REFERENCE NUMBER: DCP-10**

**RULEMAKING AGENCY: Department of City Planning**

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro  
Mayor's Office of Operations

August 16, 2021  
Date

**NEW YORK CITY LAW DEPARTMENT  
DIVISION OF LEGAL COUNSEL  
100 CHURCH STREET  
NEW YORK, NY 10007  
212-356-4028**

**CERTIFICATION PURSUANT TO  
CHARTER §1043(d)**

**RULE TITLE:** Application Procedure for Food Retail Expansion to Support Health Program.

**REFERENCE NUMBER:** 2021 RG 053

**RULEMAKING AGENCY:** New York City Department of City Planning

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN  
Acting Corporation Counsel

Date: August 16, 2021