

Development of Industrial Real Estate and Distribution Centers

Permitting and Zoning, Supply Chain and Force Majeure, Rights of First Refusal

THURSDAY, SEPTEMBER 22, 2022

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Today's faculty features:

Peter L. Curry, Partner, **Farrell Fritz, P.C.**, Uniondale, NY

Bobby W. Dishell, Attorney, **Moye White LLP**, Denver, CO

Lisa A. John-Basta, Member, **Chiesa Shahinian & Giantomasi PC**, West Orange, NJ

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PRESENTED BY: Peter L. Curry, Esq.
Partner
Farrell Fritz, P.C.

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Economic Development Issues Regarding Industrial and Logistical Development

- Developers increasingly seeking economic incentives to locate their projects in particular localities
- They point to the economic benefit to the proposed community resulting from the construction and the operation of the facility
- Skepticism exists in many communities about the “tax giveaway” that economic incentives are seen as, especially when given to facilities operated by Amazon and other large and profitable corporations

Economic Development Issues Regarding Industrial and Logistical Development

- Seeking such benefits also brings out the community to demand that the developer address the same issues raised in the land use process; i.e., traffic, infrastructure, environmental and social justice, etc.
- The level of opposition has only increased during the pandemic and now rising inflation
- Municipalities are also asking their economic development agencies to weigh on overbuilding and recapturing incentives from companies that do not deliver the benefits they signed covenants to fulfill

Tax Increment Financing (“TIF”)

- “The development should pay for itself and benefit the community”
- Establish a special district, usually in an area of underinvestment and economic blight
- 49 states have some form of TIF
- In New York, Article 18-C, Section 970 allows cities, counties, townships, boroughs, redevelopment authorities, IDA’s and public benefit corporations to establish the district

Tax Increment Financing (“TIF”)

- New Jersey – called the Economic Redevelopment and Growth Grant Program – N.J.S.A. 52:27D-489E et seq.
- Illinois-Tax Increment Allocation Redevelopment Act
- District must be a blighted area where
 - A predominance of buildings and structures are deteriorated or unfit or unsafe for use or occupancy; or
 - A predominance of unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well being of the people.

Tax Increment Financing (“TIF”)

- Different states limit the authority of local jurisdictions to establish a special district
- To obtain a TIF, there must be a specific proposed development which will address the underinvestment
- In New York City, extension of a subway line to Hudson Yards, a new commercial and residential mixed use community where trainyards used to be located
- Establish a program of infrastructure that will benefit not only the development but surrounding area

Tax Increment Financing (“TIF”)

- New York requires that the infrastructure be publicly owned
- Usually off-site infrastructure, including parking structures, roadway and traffic improvements, drainage systems, wastewater facilities, environmental remediation, etc.
- Show that “but for” the use of TIF, the proposed development would not proceed – right now, not a statutory requirement in each state that allows TIFs, but a practical requirement - New York has a statutory requirement

Tax Increment Financing (“TIF”)

- Pay for the infrastructure with the proceeds of a bond or other instrument offered by the special district not-for-profit development agency
- Less often, developers will pay for the infrastructure up front, and either be reimbursed for these expenses through lower taxes or payments from the special district
- Establish baseline real estate taxes – usually the current real estate taxes on vacant land or obsolete property

Tax Increment Financing (“TIF”)

- Those taxes continue to be paid to the taxing authorities, such as local governments, school districts, fire districts, and either the taxes or the assessment value is frozen re: those payments
- The increase in assessment and resulting revenues (the “increment”) on the property resulting from the construction of the project is used to pay for the infrastructure through repayment of the bond or other instrument
- Can also involve the use of sales taxes resulting from the project to pay the bond

Tax Increment Financing (“TIF”)

- In New York, school districts are not included in the TIF, but continue to get real estate taxes
- Important to ensure that entity issuing the bond can allocate incremental tax revenues to repayment of the bond as a first priority
- Any excess revenues are available to the taxing jurisdictions
- Upon maturity of the bond, all tax revenues go to the taxing jurisdictions

Industrial development agencies

- GML Article 18-A
- “...promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities ...”
- Ohio Enterprise Zone Program
- Typically, non-retail projects are the focus of IDA incentive programs
- New York allows retail incentives only for “tourist destinations,” highly distressed areas, and for goods and services not otherwise available in region

Industrial development agencies

- “But for” test
 - Issues with this test
- Avoidance of intra-state municipal competition
- Eminent domain powers
- Tax abatement powers
 - Real estate taxes
 - Sales taxes
 - Mortgage taxes

Industrial development agencies

- Effect of construction spending
 - EMSI modeling system
 - Concentration on local spending
 - Direct and indirect employment
 - Direct and indirect effects of materials spending
- Effect of operational spending
 - Employee spending
 - Indirect effects



Additional Questions

Peter L. Curry, Esq.
Partner
Farrell Fritz, P.C.
pcurry@farrellfritz.com



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and Distribution Centers
Zoning and Permitting

Presented by: Lisa John-Basta

September 2022

RENEWABLE ENERGY/ENVIRONMENTAL IMPACT

Solar-Ready Roofs (NJSA 52:27D-123.19)

- Amendment to Uniform Construction Act requiring warehouse roofs to be solar-ready (NJSA 52:27D-123.19)
 - Any building 100,000 sf or greater that is primarily used for the storage of goods intended for sale.
 - 40% of the roof area (minus skylights, roof decks, vegetative areas, mandatory access or setback areas by State UCC) shall be reserved for future installation of solar panels
 - Applies to any new warehouse building that has not been completed before July 1, 2022

ELECTRIC CHARGING STATIONS (NJSA 40:55D-66.20)

Required as a condition of preliminary site plan approval

- 1 make-ready 50 or fewer spaces
- 2 make-ready 51-75 spaces
- 3 make-ready 76 to 100 spaces
- 4 make-ready 101-105 with at least 1 ADA
- 150 spaces or more – 4% of total spaces, at least 5% ADA

Credit

- A parking space prepared with electric vehicle supply equipment or make-ready equipment shall count as at least 2 parking spaces for the purpose of complying with the minimum parking requirement
- Shall not result in a reduction of more than 10% of the total parking requirement

NJDEP ADVANCED CLEAN TRUCKS (“ACT”)

- Requires truck manufacturers to sell pollution-free zero-emission trucks (instead of diesel and gasoline vehicles) to New Jersey beginning in 2025
- Requires 40-75 percent new zero-emission truck sales by 2035
- The rule requires that electric truck sales ramp up 5% each year until they comprise 55% of all “Class 2b” vehicles (pickups and vans) sold in 2035
- By the same year, 75% of “Class 4-8” trucks (all buses and heavy-duty trucks) sold must be electrics

OVERBURDENED COMMUNITIES (NEW JERSEY'S ENVIRONMENTAL JUSTICE LAW NJSA 13:1D-157)

- NJDEP now maintains a list of overburdened communities
- “Overburdened communities” are defined as Census block groups with low-income, minority, or limited English-speaking populations categorized by specified thresholds.
- NJDEP is charged with ensuring its actions do not result in allowing additional noxious land uses in these neighborhoods
- Evaluate the environmental and public health impacts of certain specified facilities on overburdened communities when reviewing specific types of permit applications and before deeming the application complete.

LOCAL REZONING TO REGULATE WAREHOUSE
DEVELOPMENT

Distribution Warehousing and Goods Movement
Guidelines

Issued by NJ State Planning Commission

September 7, 2022

Warehouse Definitions:

- Differentiate between different types of warehouse. Historically generic use group. “industrial” or “warehouse”.
- Major Distribution center: large-scale regional and/or interstate distribution facility having a minimum gross floor area from 500,000 to more than 1.5 million square feet.
- Large Fulfillment center: a large format regional fulfillment facility having a minimum gross floor area from 150,000 to more than 500,000 square feet. In this category, a medium-sized fulfillment center would average between 250,000 to 350,000 square feet.
- Last-mile Fulfillment center: a smaller local or area fulfillment center/facility or station that primarily serves local markets (roughly the same function as retail shopping centers) having a minimum gross floor area from 50,000 to more than 150,000 square feet. This category could include micro/small fulfillment centers of 3,000 to more than 25,000 square feet.

Tools to Regulate

- Conditional Use
 - Example A: no warehouse within 500 feet of a residential zoning district.
 - Example B: min. setback for principal and accessory buildings 100 feet of an abutting property within a residential zone.
- Redevelopment Plan
 - BENEFITS: Will allow municipality to negotiate additional protective measures on a project-by-project basis

NJ State Recommendation:

- Only permit major largescale facilities (above 500,000 square feet of impervious surface), where there is direct access to interstate and major highways (of adequate capacity) and/or freight rail lines, preferably from industrial zoning districts.

Additional Site Plan Checklist Requirements

- Emergency Impact Statement
- Environment Impact Statement
- Enhanced Traffic Impact Statements
 - Study traffic throughout the entire day (i.e., not just peak hours)
 - Study of secondary road network to determine if constructed to handle increased traffic loads
 - Study where truck traffic will be diverted in emergency situations such as flood events.
 - Study whether patronage to access to local businesses or commercial areas will be impaired by levels of truck traffic not conducive to visitation?

IMPACT ANALYSIS

- Host municipality or developer to perform an impact analysis to determine if development will have a negative impact on adjacent or nearby communities
- At a minimum study if truck routes will negatively affect their neighborhoods, downtowns, historic areas, etc. outside the host municipality
- Send a copy of this evaluation to the potentially affected municipalities and counties at least 30 days prior to public hearing on the development application

“GOOD NEIGHBOR POLICY”

- Notify and seek non-binding informal comments from adjacent and nearby affected municipalities, overburdened communities, county, and other relevant stakeholders both at the Master Planning phase for the municipality and at the pre-application stage of each development project
- When concept plan or site plan filed with host municipality it should notice adjacent and nearby municipalities, affected counties, and relevant state agencies of the application and invite them to provide comments through the duration of the application approval process

CONCEPT PLAN REVIEW

- Requiring concept plan submission prior to filing a formal site plan application
- Appropriate County and State agencies (e.g., DEP, DOT, etc.), regional planning agencies should be encouraged to participate

REGIONAL TECHNICAL ADVISORY COMMITTEE FOR MASTER PLANNING

- TAC comprised of representatives from municipal and county government, their appointed staff, professionals, one or more representatives from an Environmental Commission or Green Team, an overburdened community representative, and relevant State agency representative.
- Assist in the evaluation of conceptual and/or preliminary and major site plans; recommend and review impact studies, and proposed design measures; and provide recommendation reports for local consideration of proposed projects against review criteria as appropriate.

COMMUNITY ENGAGEMENT

- Encourage robust community engagement. Examples include:
 - **Notice**
 - Notice to residents and schools in a certain radius of project and along transportation corridors
 - Posting signs on site advising of proposed development.
 - Notice Content: brief project description, how to access project info., and how to provide input on the project
 - **Community benefits agreement**
 - For developers to provide benefits to the community
 - Negotiated with input from affected residents and businesses

THANK YOU!

CSG law



Lisa John-Basta

Member

CSG Law

(973) 530-2083

ljohn-basta@csglaw.com

Moye|White

Development of Industrial Real Estate and Distribution Centers



PRESENTED BY

Bobby Dishell

Attorney, Moye White LLP

303 291 1531

bobby.dishell@moyewhite.com

Overview

- I. Development Process
- II. Economic Development Issues
- III. Tax Increment Financing
- IV. Industrial Development Agencies
- V. Zoning
- VI. Permitting
- VII. Force Majeure
- VIII. Right of First Refusal
- IX. Q&A



Development Process

- I. Key Pieces
 - A. Land
 - B. Finance – Equity
 - C. Finance – Debt
 - D. End User
- II. Key Time Frames
 - A. Pre Development
 - i. Sourcing / Evaluation
 - ii. Contracting
 - iii. Due Diligence
 - iv. Acquisition Closing
 - B. Development
 - i. Entitlements
 - ii. Construction
 - iii. Substantial Completion
 - C. Stabilization & Disposition

Pre Development

- I. Land
 - A. Analysis (Feasibility)
 - B. Brokerage
 - C. Consultants
 - D. NDA + LOI
 - E. Purchase and Sale Agreement
- II. Finance
 - A. Equity – Underwriting
 - B. Equity – NDA + LOI
 - C. Joint Venture
 - D. Lending – Underwriting
 - E. Lending – Applications / Approval
- III. User
 - A. Brokerage
 - B. NDA + LOI
 - C. Lease

Development

- I. Land
 - A. Governmental Approvals
 - B. Development Agreements
 - C. Easements, Covenants, etc.
 - D. Architect
 - E. General Contractor
 - F. Property and Asset Management
- II. Finance
 - A. Joint Venture
 - B. Construction Financing
- III. User
 - A. Lease

Stabilization

- I. Land
 - A. Marketing
 - B. Brokerage
 - C. Property and Asset Management
 - D. Punchlist, Offsites, Final Completion
 - E. NDA, LOI, PSA
- II. Finance
 - A. Joint Venture Waterfall
 - B. Permanent Financing
- III. User
 - A. Lease
 - B. ROFO / ROFR

Force Majeure + Supply Chain



Force Majeure

Elements of Force Majeure Clause

- I. Rights waived or obligations not required
- II. Beyond Reasonable Control & Unforeseen
- III. Included Acts / Force majeure Event
- IV. Connection to Obligation
- V. Scope of Relief
- VI. Carveouts
- VII. Caps

Creating Aligned Force Majeure Language

COVID-19 + Supply Chain

- I. Foreseeable Events and Force Majeure
- II. Supply Chain Issues – how far does this extend?
- III. Firm Bid Prices and Changes in Costs of Materials
- IV. Additional Site and Development Costs
- V. Impact to Substantial Completion and Scheduling
- VI. Tenant Occupancy

Right of First Refusal



Right of First Refusal

- I. ROFO vs ROFR
- II. Take to Market and Off Market
- III. Additional Site Space
- IV. Multi-tenant v single tenant considerations
- V. Tenant Lease Rights
- VI. Tenant Purchase Rights
- VII. Disposition Considerations
- VIII. Long Term Hold Considerations

Q&A

Bobby Dishell
Attorney, Moye White LLP
Bobby.dishell@moyewhite.com
303-291-1531

