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Michael Smilowitz
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May 15, 2024

RE: Request for Letter Ruling
Industrial & Commercial Abatement Program
FLR 22-5026

Dear XXXX:

This is in response to your request dated February 9, 2023, on behalf of XXXX ("Applicant") for a letter ruling regarding whether the Applicant is eligible for Industrial & Commercial Abatement Program ("ICAP") benefits. Your firm provided supplemental information via email on August 14, 2023, February 5, 2024, February 15, 2024, and February 27 through February 29, 2024.

FACTS

The pertinent facts presented are as follows: the Applicant seeks benefits under the ICAP program for a commercial development near XXXX ("Hospital"). The project proposes to merge multiple lots, known on the XXXX Tax Map as XXXX, and excess Floor Area Ratio ("FAR") from XXXX. The proposed building in question would consist of approximately 150 "apartment hotel" units and community facility space ("Subject Property").

Your firm represents that the Applicant states that the majority of units, which the Applicant expects to be more than 90% of the project's total floor area, will serve patients, families, graduate students, visiting faculty, and locum tenens[1] employees at the Hospital for short-term transient stays, or be dedicated to use as a community facility. The Applicant expects that the complement of the space—less than 10% of the building—will use the same short-term hotel structure but will house students of neighboring undergraduate schools, such as XXXX. According to the letter ruling request, no individual unit occupancy agreement would exceed six months. Proposed hotel services would include housekeeping and linen services. The Applicant expects that the community facility space will be occupied by a charter school. The site of the Subject Property is zoned for residential and community facility use.

[1] This term, supplied by the Applicant, translates from Latin to mean "holding the place[.]" *Locum Tenens*, BLACK'S LAW DICTIONARY (11th ed. 2019). It generally refers to a substitute employee. *See id.*

ISSUE

Will the Subject Property, constructed as a "apartment hotel" building where individual occupancies would not exceed six months, be eligible for ICAP benefits?

CONCLUSION

While the Subject Property as described could possibly be eligible for ICAP benefits based on the above-described fact pattern, it is questionable whether the Subject Property would meet all eligibility requirements for such benefits. Eligibility for ICAP benefits would depend on, among other factors, the structure of the Subject Property, the terms and dates upon which the apartment hotel component of the Subject Property would be available for rental, and the population to whom such portion would be available for rental.

DISCUSSION

Title 2-F of the Real Property Tax Law ("RPTL") and Part 5 of Subchapter 2 of Chapter 2 of Title 11 of the Administrative Code of the City of New York govern the ICAP program. DOF has promulgated rules for the ICAP program, which are codified in Chapter 36 of Title 19 of the Rules of the City of New York. This ICAP statutory and regulatory framework provides for a partial abatement of taxes for eligible industrial or commercial properties that are constructed, modernized, rehabilitated, expanded, or otherwise physically improved in certain geographical areas of the City. As illustrated below, this framework generally treats hotels as eligible for ICAP benefits.

RPTL § 489-aaaaaa(3) provides that:

> "Commercial property" means nonresidential property on which will exist after completion of commercial construction work a building or structure, or portion thereof, used for the buying, selling or otherwise providing of goods or services **including hotel services,** or for other lawful business, commercial or manufacturing activities . . .

(Emphasis added.)

Administrative Code § 11-268(c) features a definition for the term "commercial property" that is identical in every material respect.

RPTL § 489-cccccc(3)(a) provides that "[t]o be eligible for benefits, the property may not be used for a non-permissible purpose . . . No abatement benefits under this title shall be granted for construction work for residential purposes[.]" *See also* Administrative Code § 11-270(c). RPTL § 489-cccccc(3)(a)(iii) clarifies that "[h]otel uses. . . shall not be considered residential." *See also* Administrative Code § 11-270(c)(1)(c).

This statutory framework includes additional clarification regarding the permissibility of "hotel uses" in RPTL § 489-cccccc(4), which provides that:

> Hotel uses. Benefits shall be available for commercial construction work or renovation construction work on a building or structure for the property's square footage used to provide lodging and support services for transient guests, provided the applicant is not otherwise disqualified pursuant to [RPTL §§489-cccccc(5)(c), 489-eeeeee or 489-iiiiii].

The distinction between hotel uses and residential uses is further clarified in DOF's regulatory gloss. The term "[c]ommercial activities" is further defined in 19 RCNY § 36-01(b)(2) to include "[o]perating a transient hotel[,]" with several exceptions. *See also id.* § 36-01(d) and (w) (elaborating on statutory definitions to provide that a "commercial property" includes "hotel services[.]" These rules provide that "'residential property' . . . means property primarily used for dwelling purposes except for dwelling units in a hotel[.]")

ANALYSIS

The primary question posed is whether an "apartment hotel" building, as described above, would be considered a commercial use and constitute "commercial activities" for purposes of determining eligibility for ICAP benefits.

As illustrated above, RPTL § 489-cccccc(3)(a)(iii), Administrative Code §11-270(c)(1)(c), and 19 RCNY § 36-01(d) and (w) identify hotel uses as distinct from residential uses. RPTL §§ 489-aaaaaa(3), 489-cccccc(4), Administrative Code § 11-268(c), and 19 RCNY § 36-01(b)(2), identify hotel uses as a subset of commercial activities.

RPTL § 489-cccccc(4) suggests a definition of what constitutes a hotel, indicating that it includes a property "used to provide lodging and support services for transient guests." Based on the information that you provided, the proposed establishment will provide "lodging" and "support services" –including housekeeping and linen services— to "guests" at the property. With respect to whether these guests are "transient" guests and thus whether the hotel is a "transient hotel" potentially eligible for ICAP benefits, 19 RCNY § 36-01(b), defining the term "[c]ommercial activities[,]" provides additional guidance. This definition provides two exceptions where a transient hotel would not qualify as a "commercial activit[y.]" This definition provides that "condominium hotel units" may constitute a "transient hotel" for the purposes of qualifying as a "commercial activit[y] . . . where the property as a whole is operated as a transient hotel[,]" and where the unit is:

> (A) made available to the general public at large for a minimum of 183 days during the calendar year on terms and dates which are consistent with standards in the hotel industry; and
>
> (B) not occupied for more than 183 days in any calendar year by
>
> (I) the owner or any relative of the owner; or

(II) any employee of the owner, or any employee of any corporation, partnership, limited liability corporation or other entity owner or controlled by such owner.

19 RCNY § 36-01(b)(2)(ii).

This provision is, of course, not directly applicable, as the proposed use is not as a "condominium hotel[.]" However, the general principle articulated by this rule is that where a property is not owner occupied for more than 183 days in a calendar year and is instead properly available for rental for a minimum of 183 days during the calendar year, it may constitute a transient hotel that may constitute a "commercial activit[y]" eligible for ICAP benefits. In the Subject Property, guests would not be eligible for rental for a period exceeding 183 days.

Hospital Apartment Hotel Units

Your firm notes that the Applicant represents that the Hospital apartment hotel portion of the Subject Property would generally be available for patients, families, graduate students, visiting faculty, and locum tenens employees. 19 RCNY § 36-01(b)(2)(ii)(A) provides that condominium hotel units must be available to the "general public[.]" A similar principle would apply here. The population your firm suggested would have the opportunity to occupy the Hospital portion of the Subject Property as guests potentially represents a broad cross section of society. But catering to a broad cross section of society is not enough for the Hospital portion to be eligible for ICAP benefits. To be eligible for ICAP benefits, it would be necessary for the cross section of society to which the Hospital portion is available to be roughly approximate to the general public. If the population of individuals who may occupy this portion of the apartment hotel is more limited, or over time becomes more limited, then DOF would conclude that this portion of the Subject Property is not eligible for ICAP benefits.

Further, it is noteworthy that 19 RCNY § 36-01(b)(2)(ii)(A) provides that condominium hotel units must be rented "on terms and dates which are consistent with standards in the hotel industry[.]" The same principles would apply to the Subject Property. If the terms of rental ultimately are inconsistent with those standards of the hotel industry, then DOF would conclude that the Subject Property is not eligible ICAP benefits. The provision of linen and housekeeping services is consistent with such standards, but alone is not sufficient to satisfy this requirement. The provision of linen and housekeeping services is one of many factors that DOF would consider in determining ICAP eligibility. Other factors DOF would consider include, but are not limited to, the nature of the contractual relationship between the guest and the Applicant, including the pricing structure for occupancy; the flexibility of guests in reserving units; the Applicant's control of access to units; and the degree to which the units are outfitted for transient occupancy. DOF will ultimately determine eligibility, in relevant part, on the Applicant's written presentation of its rental practices, which should accompany its application for ICAP benefits.

Based on the description you provided, it is theoretically possible that the Hospital portion of the Subject Property could potentially constitute a "transient hotel[,]" that the guest could potentially constitute "transient guests[,]" and the apartment hotel units could be potentially be eligible for

ICAP benefits.[2] However, actual eligibility for ICAP benefits would be contingent on the Subject Property satisfying the requirements described above.

Community Facility

Your firm notes that the Subject Property would also contain a Community Facility, possibly a charter school. A charter school would generally be eligible for ICAP benefits as a "commercial property[,]" engaged in the "providing of. . . services" – specifically education. *See* RPTL § 489-aaaaaa(3); *see also* Administrative Code § 11-268(c); 19 RCNY § 36-01(d). However, if the Applicant elects to include a facility other than a charter school in the Subject Property, this opinion provides no assurance regarding its eligibility for ICAP benefits.

The analogous condominium hotel provision, 19 RCNY § 36-01(b)(2)(ii), discussed above, suggests that a property may constitute a "transient hotel where the property ***as a whole*** is operated as a transient hotel." (Emphasis added) This provision does not directly apply to the instant fact pattern—but it is nevertheless instructive. If ICAP benefits are sought for both an eligible community facility and an apartment hotel complex, they would need to constitute separate "propert[ies]" and therefore be subject to separate ICAP applications. *See id.* § 36-01(t).

Neighboring University Apartment Hotel Units

You have informed us that the Subject Property would contain apartment hotel units other than those contained within the Hospital portion. Your firm states the Applicant asserts that 90% of the property will be used as an apartment hotel by the Hospital and for a community facility. The complement of that percentage, 10% of the Subject Property, will potentially be used as an apartment hotel by a neighboring university to house undergraduates. The principles expressed above regarding the Hospital apartment hotel and its eligibility for ICAP benefits apply equally to the neighboring university apartment hotel portion. Therefore, it is uncertain whether the neighboring university apartment hotel portion satisfies the requirements for eligibility for ICAP benefits. To be eligible for ICAP benefits, the population that may stay as guests at the neighboring university portion of the Subject Property must be a sufficiently broad cross section of society such that it is roughly approximate to the general public. It is doubtful that making the rooms available to students of only a handful of universities would meet this criterion; however, DOF would consider additional nuance included in the Applicant's submission. Similarly, these apartment hotels would also be subject to the 183-day restriction and must be occupied on terms and dates that are consistent with standards in the hotel industry, as discussed above. The written presentation of rental practices, which should accompany its application for ICAP benefits, will ultimately determine whether the Applicant meets this requirement for eligibility for ICAP benefits.

[2] A separate regulatory framework has been established for defining "apartment hotels" under the New York City Zoning Resolution. *See* Zoning Resolution § 12-10; *see also City of New York v. 330 Cont'l LLC*, 60 A.D.3d 226 (1st Dept. 2009) (construing an earlier definition of the term "apartment hotel"). That framework is not applicable here.

Notably, unlike the community facility, discussed above, the Hospital apartment hotel units and the neighboring university apartment hotel units could be integrated within the same property.[3]

Additional Steps

Assuming that the Applicant can merge the relevant tax lots,[4] to receive the ICAP benefits, the Applicant is required to file with the DOF Exemption Unit, meet all applicable requirements — particularly the ones detailed above— and not be subject to an otherwise applicable exclusion. *See, e.g.,* RPTL § 489-cccccc(4). Notwithstanding the analysis and conclusions discussed above, DOF reserves the right to review any further information submitted in connection with this inquiry. Further, please note that, in circumstances where ICAP benefits are granted, "[f]or the duration of the benefit period, the recipient of benefits shall file biennially with the department, on or before the appropriate taxable status date, a statement of the continuing use of such property and any changes in use that have occurred[.]" *See id.* § 489-eeeeee(1); Administrative Code § 11-272; 19 RCNY § 36-13. In such statements, any property containing an apartment hotel would be required to thoroughly document its continued operations as a hotel.

Sincerely,

Michael Smilowitz
General Counsel/Deputy Commissioner

[3] To the extent that any portion of the apartment hotel portion of this project is ineligible for ICAP benefits, and is instead residential, RPTL § 489-cccccc(3)(a) provides that, "where less than five percent of a property's rentable square footage is or will be dedicated to residential purposes, that use shall be considered de minimus and shall not be considered in determining benefits under this title." *See also* Administrative Code § 11-270(c)(1); 19 RCNY § 36-06(g)(1). Further, the Applicant would be required to designate in its application a fixed portion of the property's square footage as purely residential and thus excludable for the purpose of ICAP benefits. Stated differently, the portion of ineligible square-footage could not be a floating, ever-changing percentage distributed across the entire property.

[4] In order to effectuate a tax lot merger, the Applicant will need to comply with applicable DOF policies and procedures, including but not limited to, completing Form RP-602 and following the provisions of 19 RCNY § 54-02. This letter ruling did not consider whether a tax lot merger will be granted to these tax lots.