Dealing with Social Goals when Negotiating and Securing Economic Development Incentives

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In addition to pursuing job creation and economic development goals, it has become increasingly common for state and local governments to tie their incentives to a wide range of social goals. While there have always been a few strings attached to various incentives, if you feel as if there is an ever-growing variety of ancillary goals an incentives recipient needs to manage, you are not alone. It is therefore vital that as you contemplate whether an incentive will work for your project, you have a clear understanding of all the costs of any string that may be attached to it. The following are a few key best practices to keep in mind.

No Surprises

It is in the best interest of all parties to make sure that at the earliest discussion of any incentive package, the complete details of any additional requirements are clearly articulated. Mere references to requirements to comply with a state law on prevailing wage or a local ordinance to comply with wage theft regulations should raise red flags. The earlier you begin a deep dive on the full costs of incentives, the better positioned you will be to negotiate the best package.

Identify the True Cost of Compliance

When evaluating the cost of satisfying a social program, it is essential that all of the costs be identified and quantified. For instance, if a property tax abatement requires that 20% of the housing units be rented at affordable rates and to low-income tenants, the cost of compliance is far more than just the reduced rents that will be collected from 20% of the housing units. In order to comply with the affordable housing program, you also need to quantify the additional costs of income-qualifying your affordable tenants, additional marketing costs that may arise from a different housing product and any potential impact of the affordable units on your market-rate units.

Elements of your business plan may not be compatible with rules that are applicable to the affordable housing program, and those rules are often adopted and administered outside of the economic development office that is your primary contact. The impact of venturing into the affordable housing business when you have only previously dealt with market-rate rentals should not be underestimated. If the social goal is new, either to the political subdivision or to the developer or the company, factor in additional time to the project to fully understand and negotiate the implementing agreements.

Understand the Impact of Noncompliance

At times, certain social goals that are trying to be addressed are limited to requiring the use of "good faith efforts". While such language may appear to be comforting, there should be a clear and mutually agreed upon understanding of what good faith efforts will entail, as well as what evidentiary or documentary materials need to be provided to demonstrate that good faith efforts were made. Even if good faith efforts can be demonstrated, however, that does not necessarily mean that failure to achieve a stated goal (such as a minimum percentage of minority or women owned business contractors for a construction project) will be without consequences. While the incentive that was granted may not be in jeopardy, future incentives may be harder to receive if a provider misses the mark even if the contractual effort was limited to good faith efforts. Furthermore, reporting of compliance is almost always a publicly available document, and it is not unheard for a legislative body to require a public explanation as to why targets were not achieved. Before agreeing to a good faith efforts goal, make sure you understand how similar projects have performed and what the implication of non-compliance has been.

Understand the Reporting Framework and Timeline

Before a letter of intent is entered into, it is vitally important to have a clear understanding of the information that will be required, the frequency of the reporting and the number of years the reporting will be required. What reporting obligations will need to be passed through to contractors and subcontractors? Is the reporting limited to the construction period? Is it a stabilization period or the full life of the incentive? Do you have the personnel in place to timely gather and report the required information, or will you task a third-party management firm with the obligation? As alluded to earlier, do you understand how the reports are used? Is the information aggregated in public reports, or will each separate report be published? Will there be required public reviews of the reports and approval, or do the reports just sit on a website (or a desk file)?

Using incentives for more than just economic development is here to stay, and if implemented correctly can be an effective, and at times, relatively low cost for achieving significant improvements or advancing otherwise challenging objectives. Ultimately, as with any aspect of an incentive, a full understanding is necessary to properly evaluate the true value being obtained in order to determine whether the incentive makes the chosen locality more attractive than other alternatives.

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