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Anchor Institutions Will Bring Investment to NJOZs and Attract Targeted Industries

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With the authorization of the Community Anchor Institution Program (the "Program") in the Economic Recovery Act of 2020 (the "ERA"), New Jersey has joined what Nancy Cantor, Chancellor of Rutgers Newark, characterized as "the developing anchor institution movement across the nation" which seeks to "harness the resources" of "enduring organizations" such as higher education and healthcare organizations to achieve certain State goals.[1] An anchor institutions ("AI")[2] can be awarded tax credits to invest in, incentivize and oversee the establishment of a large scale (over $10 million) Community Anchored Project ("CAP")[3]. The tax credits are only available for CAPs that (1) result in capital investment in the continued development of New Jersey Opportunity Zone (NJOZs) (that is a federal population census tract that *was eligible to be designated* as a Federal Opportunity Zone, regardless of whether the area was selected to be designated under the Federal program)[4] or 2) designed to result in economic investment in or expansion of certain targeted industries[5] in any area designated for growth in the State (PA1 areas) or a municipality with an Municipal Revitalization Index ("MRI") distress score of at least 50.

In what ways is the Program the same as other ERA Programs

The Program is similar in many respects to other ERA programs in that it is funded by tax credits (up to $200 million per year[6]) awarded by the New Jersey Economic Development Authority ("EDA") which can be applied against liability for Corporate Business Tax and Insurance Premium Taxes.[7] Application must be made prior to March 1, 2027. Many of the application requirements are similar to those of other ERA programs. For example, the AI or its business partner shall not have commenced any construction on the project site prior to submitting the application, and there are requirements for: payment of prevailing wages on construction and building services, green building standards, affirmative action, and to be in good standing with the Departments of Labor, Treasury and Environmental Protection. A letter of support is also required from the governing body of the municipality in which the CAP is located. Although there is no requirement to prove a "project financing gap" as required under other ERA programs, the applicant does have to show that the value of tax credits sought is "necessary" to finance the CAP.

How the Anchor Institution Program is different

The Program is different than most other ERA programs in that it uses an investment model designed to convert the tax credits into an investment by EDA in a CAP. For CAPs financed *solely* by governmental and nonprofit entity investments, EDA is required to negotiate an agreed upon formula which shall include, but not be limited to, the potential recapture (return) of the value of the tax credits awarded. For CAPs that are not financed solely by governmental and nonprofit entity investments, EDA is required to negotiate an agreed upon formula which shall include, but not be limited to, the potential recapture (return) of the value of the tax credits awarded *and additional return on investment on the EDA's investment (ROI)*, which may be current or deferred. EDA's interest in the CAP will, however, be subordinate to the investments made by an AI and, if applicable, each partner AI.

The application must include the "structure and terms of the financial, corporate, and real estate instruments to be utilized to successfully complete and then operate the CAP, including, but not limited to, the proposed

economic and business relationship between the [AI and any partner business]." The application must also show that the CAP is viable and that the AI is a credible partner for completing the CAP and providing the agreed-upon potential returns to EDA.

An AI receiving tax credits under the Program will be required to use the proceeds derived from the sale or financing of tax credits to make an equity investment in or to provide a loan or other financial support to the CAP that will permit the AI, a partner AI, or both to develop the CAP and to attract tenants, owners, investors, lenders, partners, collaborators, and other beneficial parties to the CAP. An agreement with EDA will detail terms by which the AI will convert the tax credits into an investment by EDA into the CAP, subject to potential ROI to EDA based on an agreed-upon formula as noted above, and for the distribution of returns, including upon the sale of a CAP or at the end of the commitment period.

How can the Program benefit the AI

The Program is also designed to incentivize AIs to look beyond the borders of their host communities, permitting them to invest in other locales that lack strong AIs, thus expanding their influence and impact. The legislative intent of the Program is also broad enough to permit the addition of other beneficial uses to a qualifying project, including facilities of an AI itself.

How does AI proceed to obtain Tax Credits and how much support can be made available

The AI, independently or in collaboration with one or more partner businesses[8] or governmental entities, submits an application to EDA. The AI of an approved CAP will be awarded a base tax credit of $5 million and may be allowed a tax credit in excess of the base, provided that the total tax credit allowed per CAP shall not exceed $75 million. The total investment of all State resources in a CAP, not including any rent payments by the State, shall not exceed 40% percent of the total cost of the project.[9]

An agreement with EDA must contain certain requirements, including the establishment of the duration of the eligibility period, which shall not exceed 10 years, during which an AI may claim, sell, transfer, or otherwise use a tax credit. The eligibility period shall begin with the tax period in which EDA accepts certification of the business that it has met the capital investment requirements of the Program. It shall also specify the length of the commitment period and the time to distribute to EDA the agreed upon ROI for the award of tax credits, which shall not be less than 10 years. At the election of the EDA or upon the request of an AI in order to benefit the CAP, and as determined by the EDA, the EDA may grant up to two consecutive five-year extensions of the commitment period.

It's a competitive process, but with potentially different criteria depending on whether the AI is improving a NJOZ or attempting to attract economic expansion of a targeted industry

The Act provides a non-exhaustive list of competitive criteria that shall be included in the scoring system which has yet to be developed by EDA.[10] However the Act authorizes EDA to apply separate criteria when ranking applications for CAPs that make an investment in a NJOZ, and CAPs that are primarily designed to result in economic expansion of targeted industries which may be located an area that is a PA1 or a municipality with an Municipal Revitalization Index ("MRI") distress score of at least 50.[11] The statute provides that the applicant shall describe "the significant economic, social, planning, employment, environmental, fiscal, and other benefits that would accrue to the State, county, or municipality from" the project. Thus, EDA's measurement of the benefit is not limited to financial considerations but is broader. With an application for a project designed to attract a targeted industry, presumably EDA will be more focused on the economic impact of the application.

The EDA will have two award rounds per year, without providing any preference for early submissions, and prior to commencement of each of the two award rounds each year, EDA will determine the minimum score. EDA will be required to consider at least the following:

- Financial Considerations: for example the overall investment required for the CAP, potential ROI on EDA investment, amount of tax credit, if any, that is unlikely to be realized as ROI to the State; ability of the CAP to absorb and adapt to changing environmental conditions, and qualified business accelerator or incubator facilities;
- Policy Objectives: for example the extent of economic and social distress, advancement of planning strategies, and diversity of any board of directors of the AI;
- Housing Considerations: for example whether the CAP will provide for development of workforce or special needs housing, and extent to which the CAP provides help for creating investment in development of a mixed-use CAP;
- Employment Considerations: for example the number of new and, to a lesser extent, retained jobs, and apprenticeship or workforce programs;
- Local Community Considerations: for example consideration of financial benefits and advancement of local development strategies.

How does the AI obtain and use the support of the tax credits?

During each year when the AI is eligible to receive a tax credit, the EDA receives and reviews the AI's sworn certification regarding whether it is aware of any condition, event, or act that would cause it or its partner institutions not to be in compliance with the tax credit agreement or the Act. After such submission, the EDA shall provide AI and the Division of Taxation a certificate of compliance. The certificate will indicate the amount of tax credits awarded to AI for conversion into an EDA investment in the CAP, which the AI may: (a) offer for sale through the provision of a tax credit transfer certificate; or (b) use as collateral or to secure any financial instrument approved by EDA to provide financing for the CAP. The tax credit transfer certificate cannot be transferred by the AI for less than 85 percent of the transferred credit amount before considering any further discounting to present value which shall be permitted. The EDA or the State may purchase tax credits offered for sale by an AI for 90 percent of the stated value of the tax credit before considering any further discounting to present value which shall be permitted.\

This is a summary of a complex law, the regulations for which have not been fully adopted. You should consult an attorney and tax adviser for the law's particular application to your circumstances.

About the Authors

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Footnotes

[1] Keynote address given at the launch of the New Jersey Coalition of Anchor Institutions initiated and hosted by New Jersey Secretary of Higher Education Rochelle Hendricks, May 30, 2017. nj_anchor_coalition_speech_final_formatted_for_web.

[2] An "anchor institution" means an entity that EDA must certify is 1) a governmental entity or nonprofit entity 2) that is a comprehensive health care system, a public research university (e.g., Rutgers), a private research university (e.g., Princeton), a major cultural scientific, research, or philanthropic institution, or a public college which is separate from public research universities, or an experienced nonprofit or governmental economic or community development entity, and 3) that has a primary mission and specific policy goals that align with those of EDA under the program.

[3] "Community-anchored project" means "a capital project that is located in the areas [designated in the Act] for which an AI is to be awarded tax credits pursuant to an agreement which establishes the award of tax credits as an investment by EDA in the project, provided that the project will result in a capital investment of at

least $10,000,000 in a New Jersey State opportunity zone or in a targeted industry in any other [presumably authorized] area of the State."

[4] Tax credits can be made available "in a New Jersey State opportunity zone [a federal population census tract in this State that *was eligible to be designated* as a qualified opportunity zone pursuant to 26 U.S.C. s.1400Z-1, regardless of whether it was selected to be designated] or, if the CAP is primarily designed to result in the economic expansion of a targeted industry in this State, in an area of the State designated pursuant to the "State Planning Act," N.J.S.A.52:18A-196 et seq, as Planning Area 1 (Metropolitan) or in a municipality with a Municipal Revitalization Index distress score of at least 50."

[5] "Targeted industry" means "any industry identified from time to time by the authority which shall initially include advanced transportation and logistics, advanced manufacturing, aviation, autonomous vehicle and zero-emission vehicle research or development, clean energy, life sciences, hemp processing, information and high technology, finance and insurance, professional services, film and digital media, non-retail food and beverage businesses including food innovation, and other innovative industries that disrupt current technologies or business models."

[6] A specific amount of the credits are designed to be awarded in South Jersey: "[EDA] shall annually award tax credits valuing no greater than $130 million for projects located in the 13 northern counties of the State, and the authority shall annually award tax credits valuing no greater than $70 million for projects located in the eight southern counties of the State. If during any of the first six years of the seven-year period, the authority awards tax credits in an amount less than the annual limitation for projects located in northern counties or southern counties, as applicable, the uncommitted portion of the annual limitation shall be available to be deployed by the authority in a subsequent year, provided that the uncommitted portion of tax credits shall be awarded for projects located in the applicable geographic area, except that (i) after the completion of the third year of the seven-year period, the authority may deploy 50 percent of the uncommitted portion of tax credits from any previous year without consideration to the county in which a project is located; and (ii) after the completion of the sixth year of the seven-year period, the authority may deploy all available tax credits, including the uncommitted portion of the annual limitation for any previous year, without consideration to the county in which a project is located."

[7] N.J.S.A. 54:10A-5, 54:18A-2, 54:18A-3, 17:32-15, or 17B:23-5.

[8] "Partner business" means a corporation, partnership, firm, enterprise, franchise, association, trust, sole proprietorship, or other legal entity, but shall not include a public entity that enters into an agreement with an anchor institution or, if applicable, a partner anchor institution to rent and occupy commercial space within a [CAP]. Under the program a partner business, subject to agreement with the AI, may lease one or more portions of the partner business's space in the [CAP] to one or more other persons or entities.

"Private research university" means Princeton University and any other institution of higher education in this State designated by the board as a private research university, based on criteria and metrics established by the board.

"Public research university" means Rutgers, The State University of New Jersey, Rowan University, the New Jersey Institute of Technology, and Montclair State University.

[9] The AI can be required, in the EDA's discretion, to submit satisfactory evidence of actual project costs, as certified by a certified public accountant.

[10] Those criteria can also be adjusted to respond to prevailing economic conditions.

[11] Section 49N.J.S.A. 34:1B-317 (b)(2).