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Development Gap-Financing Under The Aspire Program

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In our article *Deciphering the New Jersey Economic Recovery Act of 2020*,[1] we provided an overview of the New Jersey Economic Recovery Act of 2020 (ERA),[2] with a specific emphasis on the Aspire and Emerge programs.[3] That article outlined the levels and amounts of gap-financing available under Aspire, the geographic areas where Aspire applied, various program and application requirements, including prevailing wage and labor, and compliance oversight provisions. In this article, we focus in more detail on certain specific aspects of the Aspire program.

EDA Monitoring will ensure that The Program is Limited to Projects with a Financing Gap

The developer must demonstrate that (1) the project is not economically feasible without the incentive award and that (2) there is a project financing gap or the Economic Development Authority (EDA) must determine that the project will generate a below market rate of return.[4] The EDA will evaluate and validate the project financing gap estimated by the developer, presumably determining what constitutes a below market return taking into consideration the risks on return based on the facts and circumstances of the project in relation to returns on comparable projects.

As a result of significant criticism concerning a lack of substantial verification and oversight for incentive programs under the Economic Opportunity Act of 2013, developers should expect a higher level of scrutiny from the EDA. Specifically, the EDA is now required to compare the developer's cash flow after three years into the eligibility period to the projected cash flow upon which the award was based and reduce the tax credits on a *pro rata* basis if the financing gap is smaller than determined at the approval of the award and, "if there is no project financing gap, then the developer shall forfeit the incentive award."[5]

Additionally, for commercial projects, "if the actual cash flow exceeds the projected cash flow at the time of board approval by more than 15 percent, the authority shall require the developer to pay up to 15 percent of the amount of the excess."[6] If the cash flow is significantly worse than expected, at least limiting the payment to the State to 15% allows the developer undertaking a risky project to earn a return commensurate with the risk being undertaken. In the case of residential projects, the developer's return on investment will be subject to the New Jersey Housing and Mortgage Financing Agency requirements under N.J.S.A. 55:14K-7, to the extent applicable.[7]

EDA Monitoring will also ensure that the Program is Limited, in the case of Commercial Projects, to Projects That Will Produce a Net Positive Benefit to the State

The ERA requires the EDA to "conduct a State fiscal impact analysis to ensure that the overall public assistance provided to the project will result in a net positive benefit to the State."[8] It does not specify how the net positive benefit will be determined and hopefully more guidance will become available when the EDA adopts regulations implementing the ERA.[9] In the past when undertaking the fiscal impact analysis, EDA included analysis of the State taxes that would be generated by the project, discounting those revenues to present value. However, unlike the prior redevelopment financing programs under the predecessor Economic Opportunity Act of 2013, in evaluating the net positive benefit under the ERA, EDA "shall not consider the value of any taxes exempted, abated, rebated, or retained" under redevelopment tax exemption and abatement statutes, urban enterprise zones or "any other law that has the effect of lowering or eliminating the

developer's State or local tax liability," nor can EDA consider "potential tax losses if the developer were to locate in another state," and EDA is required to "evaluate the net economic benefits on a present value basis under which the requested tax credit allocation amount is discounted to present value at the same discount rate as the projected benefits from the implementation of the proposed redevelopment project for which an award of tax credits is being sought."[10]

The ERA further provides that less of a net positive benefit will be required for projects located in government-restricted municipalities, which can be up to thirty-five percent (35%) lower than the net benefit for all other projects.[11] This net positive benefit test requirement does not apply to residential projects, certain qualifying supermarkets or grocery stores, and certain qualifying health care facilities in a municipality with a Municipal Revitalization Index (MRI) distress score of at least 50 that is lacking and adequate access to such facilities.[12]

Other Specific Requirements For Commercial Projects

In addition, commercial projects must include at least 100,000 square feet of predominantly commercial space, including office and retail, industrial or film industry uses, inclusive of a parking component.[13] The Economic Development Authority (EDA) will also require a letter of support from the governing body of the municipality in which the commercial project is located.[14] Developers of commercial projects must have a minimum equity participation of twenty percent (20%) of the total project cost.[15]

Specific Requirements For Residential Projects

Minimum Investment Required

Residential projects re quire minimum investment levels to be eligible for Aspire. Projects located in a municipality with a population greater than 200,000 (Newark and Jersey City) must have a total project cost of at least $17.5 million, while municipalities with populations under 200,000 must have a total project cost of at least $10 million.[16] A total project cost of at least $5 million is required for projects located in a qualified incentive tract or government-restricted municipality.[17]

Affordable Housing Component

Residential projects will also be required to set aside twenty-five percent (25%) of the units for affordable and workforce housing.[18] The specific mix of such units will depend upon whether the municipality in which the project is located has obtained substantive certification of its fair share housing plan from the Council on Affordable Housing (COAH) or a judgment of repose or compliance from the court.[19] For projects in municipalities without an approved housing plan, at least a 20% but not more than 50% of the units must be set aside for low- and moderate-income housing and 5% set aside for workforce housing, while those municipalities with an approved plan must include at least a 10% but not more than 50% low- and moderate-income units and 15% workforce units.[20]

Workforce housing units are defined as "households with a gross household income of more than 80 percent, but less than 120 percent, of the median gross household income …[21]" While the State and many municipalities in recent years have recognized an increasing need for availability and development of housing affordable to the local communities' "workforce" (such as police officers, teachers and nurses), the ERA is the first statute requiring or otherwise making specific provisions for workforce housing. It is not clear if the EDA will adopt regulations addressing workforce housing compliance or if this signals that the Legislature may seek to expand the Fair Housing Act and COAH regulations to make provision for addressing workforce housing needs.

One concern with these requirements is that the ERA is imposing a 20% affordable housing requirement upon municipalities that otherwise would have no COAH obligation to construct new affordable units. Urban aid municipalities (of which there are currently around 60) often have significant rehabilitation obligations but are exempted under COAH from any new construction obligation. Further, as a result of this exemption, urban aid

municipalities are not generally vulnerable to builder's remedy lawsuits and are thus less likely to have petitioned COAH or the courts for approval of a fair share plan.

Aspire Awards Are Competitive

Incentives will be awarded on a competitive basis, "based on the order in which complete, qualifying applications were received by the authority" and the EDA "shall allocate incentive awards to redevelopment projects according to the redevelopment project's score and until either the available incentive awards are exhausted or all redevelopment projects obtaining the minimum score receive an incentive award, whichever occurs first."[22] "If insufficient funding exists to fully fund all eligible projects, a project may be offered partial funding."[23] The scoring system to be used will be established by EDA regulations. Transformative projects are not subject to this competitive scoring approval process.[24]

Special Prevailing Wage and Labor Requirements

Developers receiving an incentive award under the Aspire program, as with all ERA incentive programs, will be required to pay prevailing wages for construction work in development of the project but in addition, "during the eligibility period, each worker employed to perform … building services work at the redevelopment project shall be paid not less than the prevailing wage rate …"[25] Building services are defined as "cleaning or routine building maintenance work, including but not limited to sweeping, vacuuming, floor cleaning, cleaning of rest rooms, collecting refuse or trash, window cleaning, securing, patrolling, or other work in connection with the care or securing of an existing building, including services typically provided by a door-attendant or concierge."[26] Thus, the payment or prevailing wages for building services would continue for up to 15 years for commercial projects and 10 years for residential projects after completion of the project.

Additionally, when Aspire incentives are awarded for a project undertaken by a tenant with a lease of "more than 55 percent of space in the building owned or controlled by the developer, the requirement that each worker employed to perform building service work at the building be paid not less than the prevailing wage shall apply to the entire building."[27] It is not clear how this might apply where, for example, other tenants are responsible for providing certain building services for their own leased space, and how this would be enforced. As the EDA could not directly require these tenants to pay prevailing wages, presumably the owner would be obligated to impose this requirement upon the other tenants, which may be problematic under the terms of their leases.

Community Benefits Agreement For Projects Exceeding $10 Million

For projects that exceed $10 million in total project costs, and which are not subject to a redevelopment agreement with the municipality, the developer will be required to enter into a community benefits agreement with the EDA and the municipality or county in which the project is located.[28] These agreements will include provisions for employment, training, youth and community services and provide for an advisory board comprised of a diverse group of local stakeholders to oversee the implementation and success of the agreement.[29] Projects will be exempt from the community benefit agreement requirement if the developer submits to the EDA a copy of the developer's redevelopment agreement that is certified by the municipality in which the redevelopment project is located."[30]

Labor Harmony Agreements For Retail and Hospitality Businesses

If the State has a proprietary interest in the development project and for as long as the State acts as a market participant in"[31] commercial or mixed-use projects that include a retail or hospitality establishment with more than 10 employees or a distribution center with more than 20 employees, then any businesses that serve as the owner or operator of the retail, hospitality or distribution entity shall enter into a labor harmony agreement[32] with a labor organization that represents retail, hospitality or distribution center employees for such project.[33] Recent case law involving federal preemption on certain labor issues has raised considerable question about whether and under what circumstances a municipal redevelopment entity can be determined to be a market participant or be determined to be acting as a market participant.[34] Therefore whether this

requirement is enforceable seems to have been resolved by the Legislature limiting the requirement to situations where those conditions have been met.

It is unclear what role, if any, EDA will pay in the determination as to whether the State has a "proprietary interest" or is a "market participant" in a project or if the Legislature intended to effectively make these findings based upon the grant of an incentive award, which may be clarified through regulations. Interestingly, the ERA defines "project labor agreement" under both the Aspire and Emerge programs but never references them.

The EDA may waive the requirement for a labor harmony agreement but "only if the authority determines that the redevelopment project would not be feasible if a labor harmony agreement is required …", which determination must be supported "by a written finding, which provides the specific basis for the determination."[35]

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] Deciphering the New Jersey Economic Recovery Act of 2020: Part I

[2] https://1e7pr71cey5c3ol2neoaoz31-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/A4_R1-NJERA-PL-2020-c156.pdf

[3] https://www.njeda.com/economicrecoveryact/#Programs

[4] See Section 57.

[5] See Section 60 b and c.

[6] Id.

[7] Sec 60 c.

[8] Sec 58 c. That same provision of the ERA, however, goes on to state that the "net benefit analysis shall not apply to capital investment for … a residential project." Sec 58 c.

[9] See Section 58(c).

[10] See Section 58(c).

[11] See Section 58(d).

[12] Section 58(c).

[13] See Section 55.

[14] See Section 58(b).

[15] See Section 57(b).

[16] See Section 57(c).

[17] Id.

[18] See Section 57(d).

[19] Id.

[20] Id.

[21] See Section 56.

[22] See Section 59(b).

[23] Id.

[24] See Section 65(b).

[25] See Section 57(a)(7).

[26] See Section 55.

[27] See Section 57(a)(7).

[28] See Sec. 60 (f) (1).

[29] Id.

[30] See Section 60(f) (4).

[31] See Section 60(e)(2).

[32] Such labor harmony agreements will be required to include provisions for "participating labor organization and its members agree to refrain from picketing, work stoppages, boycotts, or other economic interference against the business; and that the business agrees to maintain a neutral posture with respect to efforts of any participating labor organization to represent employees at an establishment or other unit in the retail establishment or distribution center, agrees to permit the labor organization to have access to the employees, and agrees to guarantee to the labor organization the right to obtain recognition as the exclusive collective bargaining representatives of the employees in an establishment or unit at the retail establishment or distribution center …" Sec. 60 e (3).

[33] See Sections 60(e)(1).

[34] The Third Circuit in *Associated Builders and Contractors, Inc. v. Jersey City*, 836 F.3d 412 (3d Cir. 2016), found that by providing for long term tax exemptions for redevelopment projects the City did not have a proprietary interest nor act as a market participant and, therefore, its requiring a project labor agreement as a condition of such exemption may be preempted by federal labor laws. The Third Circuit has also held, however, that a redevelopment agency was acting a market participant with a proprietary interest by issuing tax increment financing bonds. See *Hotel and Restaurant Employees; Union v Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004).

[35] Id.