WINDELS MARX

TRADITION. INNOVATION. DISTINCTION.

The Community-Anchored Development, Aspire and Innovation Evergreen Programs

Economic Recovery Act of 2020 ("ERA")

P.L. 2020, Chapter 156, as amended by P.L. 2021, Chapter 160

New Tax Incentive Programs

September 2021

Tradition.

Windels Marx and its predecessor firms began practicing law in the 1830s. A tradition of leadership is evident throughout our history, including founding members and officers of the preeminent New York State Bar Association and the Association of the Bar of the City of New York.

Innovation.

We are a midsize firm that has great pride in our ability to offer sophisticated legal services on a par with larger law firms, while also providing the focused attention often associated with boutique firms.

Distinction.

Our tireless work on behalf of clients has been recognized among numerous industry and legal benchmarking surveys.

Windels Marx is a full service, midsize law firm based in New York, NY, with offices in New Brunswick and Madison, NJ, and Stamford, CT. We have nearly 150 lawyers across more than 20 practice groups, the largest of which by volume of business are financial transactions, real estate, litigation and bankruptcy.

Practices

Banking

Bankruptcy & Creditors' Rights
- Representation of Trustees
- Representation of Debtors
- Representation of Secured & Unsecured Creditors
- Bankruptcy-Related Litigation & Transactions

Corporate & Securities
- Mergers & Acquisitions
- Corporate Formation& Finance
- Securities
- Corporate Governance
- General Corporate Matters

Employment & Employee Benefits
- Employment Litigation
- Environmental Law
- Environmental & Toxic Tort
- Financial Transactions
- Asset-Based Lending
- Corporate Finance & Syndicated Lending
- Cross-Border Transactions
- Middle-Market Lending
- Trade Finance

Governmental Relations

Health Law

Hospitality

Infrastructure Development & Finance

Insurance
- Insurance Litigation
- IP, Technology & e-Commerce
- Data Privacy & Security
- IP-Hatch-Waxman Act
- IP Licensing Litigation
- Litigation & Alternative

Dispute Resolution
- Appellate Litigation
- Class Action Defense
- Commercial Litigation
- Tobacco Litigation
- White Collar Defense & Corporate Investigations

Private Client Services, Estates & Trusts
- Probate Litigation

Public Finance & Not-for-Profit

Real Estate
- — Acquisitions & Sales
- Construction
- Development & Land Use
- Finance
- Joint Venture/Equity Investments
- Leasing
- Redevelopment
- Real Estate Litigation

Renewable Energy & Sustainability

Tax

Tax Lien & Mortgage

Foreclosure

Transportation

Workouts & Restructurings

American inventor Thomas Edison once said, "Genius is one percent inspiration and ninety-nine percent perspiration." When that genius was tested, Windels Marx represented Edison in litigation that confirmed his claim to be the inventor of the incandescent electric light.

Community–Anchored Development Program

Sections 43-53 ERA

- Semi-annual competitive solicitation to award tax credits to Anchor Institutions as NJEDA investment in a Community-Anchored Project
- Base award of $5 million up to a maximum of $75 million.
- All sources of State funding must be 40% or less of total project costs.
- Annual cap of awards: $200 Million

  - $130M for Northern counties *
  - $70M for Southern counties *

* Ability to reallocate if unused

Community–Anchored Development Program (continued)

- **Capital Investment**: At least $10 million
- **Location**:
  - Designated Opportunity Zone or an area that qualified for such designation (OZ)
  - State Planning Area 1 (Metropolitan)
  - Municipality with a MRI Distress Score of 50 or more
- **Targeted Industry**: If the project is not located in an OZ, then it must promote a targeted industry – 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.

Community–Anchored Development Program (continued)

- **Types of Projects**: Large-scale development projects with desirable employment and geographical characteristics that will impact the broader community and can include as a component part housing, public amenities, parking, other mixed uses, and facilities of an Anchor Institution.
- **Partnership**: Between NJEDA, Nonprofit or governmental Anchor Institutions, and Business Partners.
- **Investment Model**: Utilize proceeds from the sale of tax credits as an investment in a project instead of a grant. NJEDA to receive a negotiated current or deferred economic return on the tax credit investment.
- **Occupancy Costs**: Amount of tax credits necessary for the project to establish occupancy costs at a competitive level.

Community–Anchored Development Program (continued)

What are Anchor Institutions (“AI”)?

- A governmental entity or nonprofit with a primary mission aligned with goals of NJEDA and is a:
  - ✓ comprehensive health care system
  - ✓ public or private research university, or public college
  - ✓ major cultural, scientific, research or philanthropic institution
  - ✓ experienced nonprofit or governmental economic or community development entity.
- Can have Partner AIs or Partner Businesses.
- AI can develop a project in a city/town outside of its home area.

Scoring Criteria

NJEDA will establish Scoring Criteria through Regulations.

Minimum score per round:

- amount requested compared to overall investment and potential return on NJEDA's investment
- financial benefit to the community
- apprenticeship
- job creation and training
- workforce housing – deleted and amended to housing for special needs
- infrastructure, parking, retail, green space
- business accelerator or incubator
- commitment period
- quality plus number of full time jobs
- quality plus number of retained jobs (score for retained is 1/3 that of new jobs)
- diversity of AI Board

Anchor Institution Tax Credit Agreement

Terms of Return on Investment to NJEDA:

- For projects **solely financed with public or nonprofit funds**, formula shall include potential recapture of the value of the tax credits awarded.
- For projects **partially financed with private funds**, the agreed upon formula shall include the potential recapture of the value of the tax credits awarded. *Plus* an additional return on investment.
- NJEDA's reimbursement rights are subordinate to investments made by the AI and Partner Businesses.
- ROI to NJEDA must occur prior to project being sold.

Discussion: What could qualify as an return on investment to NJEDA? Could ownership in the property or business qualify even if revenues were not sufficient to recapture the value of the tax credits?

Anchor Institution Eligibility Period

Eligibility Period is the time period during which an Anchor Institution can claim, sell or use a tax credit.

- Begins in the year that NJEDA accepts the completion certification.
- Extends for a period of 10 years.

Commitment Period

- Standard is between 10 and 20 years.
- But can be extended to 30 years in discretion of NJEDA.
- Period of time during which Anchor Institution and Partner Business distributes ROI to EDA.

Sale of Anchor Institution Tax Credits

- Tax Credits must be sold for at least 85% of their face value (before discounting to present value).
- Tax Credits can be resold after initial transfer. The State has the option to purchase the tax credits at 90% of face value.
- Corporate Business Tax (CBT), Insurance Premium Tax (IPT) and other insurance company taxes may be satisfied by Anchor Institution Tax Credits.

Annual Reporting Requirement by Anchor Institution to remain in compliance.

The Aspire Program

Sections 54-67 of ERA and Sections 22-29 of P.L.2021, C.160

Overview: Aspire is the replacement for ERG. It provides tax credits to a developer based on a percentage of total eligible projects costs.

- Up to 45% of eligible project costs for most projects.
- Up to 50% of eligible project costs for projects located in a Government Restricted Municipality (GRM):
  - ✓ AC, Trenton and Paterson. The Amendment expanded eligible cities.
  - ✓ New category: 60% for new residential construction that receives "4% allocation" Low Income Housing Tax Credits.
- Up to 30% of eligible project costs for a Transformative Project (percentage is lower but the tax credit cap is much higher).
  - ✓ Amended to provide tax credits up to 40% of eligible project costs.

Aspire Tax Credit Project Caps

$32M project cap for most projects. Amendment increased project cap (or phase cap) to $42M.

$50M project cap for certain locations. Project cap increased to $60M per amendment. Also permits project phases for residential projects receiving 4% LIHTCs (cap of $60M per phase).

- Government Restricted Municipalities – The Amendment expanded eligible cities.
- Low income census tracts
- Municipalities with MRI Distress Score 50 or over
- Expanded to include other "incentive areas" except that film studio projects with 250K sf may be located anywhere.

$250M project cap for Transformative Projects. Amendment increased project cap to $350M.

- Must be located in a GRM, Distressed Municipality, Urban Transit Hub. Amended to include "enhanced incentive areas."
- Only 10 Transformative Projects can be approved, and no more than 2 in any one municipality. Amendment lifted limit of 10 total projects and 2 per municipality. There is no longer any statewide or municipal limits.
- Amended to permit project phases under a "transformative phase agreement." All phases must be completed within 8 years.

Program sunsets on March 1, 2027, unless extended by the Legislature.

Types of Aspire Projects

Commercial Projects:

- Predominantly commercial and contains 100,000 sf or more of office, retail, industrial, or film studios and related space. Amendment revised to include redevelopment projects, not just a building.
- May include parking component

Residential Projects:

- Predominantly residential for multi-family residency and may include parking component
- Minimum project costs based on location
  - ✓ $17.5M if in a city with > 200,000 people
  - ✓ $10M if located in a municipality with < 200,000 people
  - ✓ $5M if in a GRM or low income tract
- At least 20% but no more than 50% low and moderate income set aside
- At least 5% workforce housing. Amendment deleted this requirement.

Types of Aspire Projects (continued)

Transformative Projects:

Qualify for up to 40% [revised up from 30%] of project costs subject to cap of $350M [revised up from $250M]. Must meet the following criteria:

1. Total Project Cost of $100M <u>and</u>
2. Include at least:
   a) 500,000 SF new or substantially renovated industrial, commercial or residential space, <u>or</u>
   b) 250,000 SF of infrastructure space for film production;
3. Cannot be more than 50% retail, <u>and</u>
4. Be of special economic importance as measured by the level of jobs, new capital investment, opportunities to leverage leadership in high priority targeted industries or other State priorities.

Basic Aspire Program Requirements

20% Developer Contributed Capital

- Amendment lowered to 10% for projects in GRMs.
- Undefined term, should be defined in regulations.
- Amendment defined "developer contributed capital" to include cash, deferred development fee, cost of feasibility study, property value less any mortgage. Or any other investment by the developer deemed acceptable by EDA regulations.

Net Positive Benefit

- **Commercial and Transformative Projects** must demonstrate that the incremental increase in State revenues will exceed the amount of tax credits needed to fill the financing gap. EDA will conduct a State Impact Analysis of the Net Benefit.

Basic Aspire Program Requirements (continued)

- **Project Financing Gap:** After taking into account developer equity and a reasonable ROI, and after good faith efforts to obtain loans and capital on a non-recourse basis, the amount of project costs remaining. Amendment excluded land acquisition costs from eligible project costs.

- **Financing Gap at Project Completion:** If EDA determines that the gap is smaller than projected at approval, EDA shall reduce the amount of tax credits or accept payment from the developer on a pro rata basis.

- **Rate of Return:** At the end of the 7th year of the eligibility period, EDA will evaluate developer's rate of return on investment. If the actual rate of return exceeds the reasonable and appropriate rate of return at the time of approval by more than 15%, developer to pay in escrow up to 20% of the amount in excess of the reasonable and appropriate rate of return.

- After the final year of eligibility period, if rate of return exceeds reasonable and appropriate rate of return at approval, developer to pay up to 20% of excess to General Fund. If rate of return did not exceed reasonable and appropriate, escrow will be released.

Basic Aspire Program Requirements (continued)

Rate of Return Analysis Revised by Amendments

- **At the end of the 7th year** of the eligibility period, EDA will evaluate developer's rate of return on investment. If the actual rate of return exceeds the reasonable and appropriate rate of return at the time of approval by more than 15%, developer to pay in escrow up to 20% of the amount in excess of the reasonable and appropriate rate of return.

- **After the final year** of eligibility period, if rate of return exceeds reasonable and appropriate rate of return at approval, developer to pay up to 20% of excess to General Fund. If rate of return did not exceed reasonable and appropriate, escrow will be released to the developer.

Aspire Program Details

Eligibility Period: The period during which a developer can claim a tax credit.

- ✓ 15 years for Commercial Projects
- ✓ 10 years for Residential Projects

Construction: Must not have begun prior to application, but phases are permitted. Completed within 4 years after executing incentive agreement.

Green Building + Affirmative Action

Prevailing Wage: During eligibility period, construction work and building services. If a tenant with an incentive occupies > 55% of building, applicable to entire building.

Community Benefit Agreement: For projects ≥ $10M in project costs, must have agreement with EDA or municipality to provide benefits to community.

Aspire Compliance & Verification

Verification of Financing Gap: EDA will verify the financing gap at the time that financing commitments are executed. Verification of projected cash flow at time the project is certified complete and during 3rd year of Eligibility Period. This evaluation was replaced by rate of return analysis at Year 7 and after the final year of eligibility period.

Reduction or Forfeiture of Award:

- If financing gap is smaller than at approval, EDA will reduce the award on a pro rata basis. Added option for developer to make an equivalent payment instead.
- If there is no financing gap, then award will be forfeited.

Cash Flow Limitations:

- "Cash Flow" definition amended to permit excluding as expenses government payments from profit calculation.
- **Commercial Projects:** If cash flow exceeds projected cash flow at approval by > 15%, Developer to pay up to 15% of excess to State. Replaced by rate of return analysis at Year 7 and after the final year of eligibility period.
- **Residential Projects**: Developers ROI is subject to the NJHMFA limitations (maximum ROI of 12%). Replaced by rate of return analysis at Year 7 and after the final year of eligibility period.

Sale, Pledge, Assignment of Aspire Tax Credits

- Developer can sell tax credits for no less than 85% of face value, except for Residential projects that also receive LIHTC, which must sell for no less than 65% [revised down from 75%] of face value.
- No subsequent sales after 1st transfer
- **Tax Liabilities satisfied:** CBT, Insurance Premium and other Insurance Company Taxes.
- 2 year carry-forward with limited exceptions.
- State can buy back unused tax credits after 2 years at 75% of face value.
- **Pledge:** Upon written consent of EDA and Treasurer. Pledge details will be published on website for transparency.

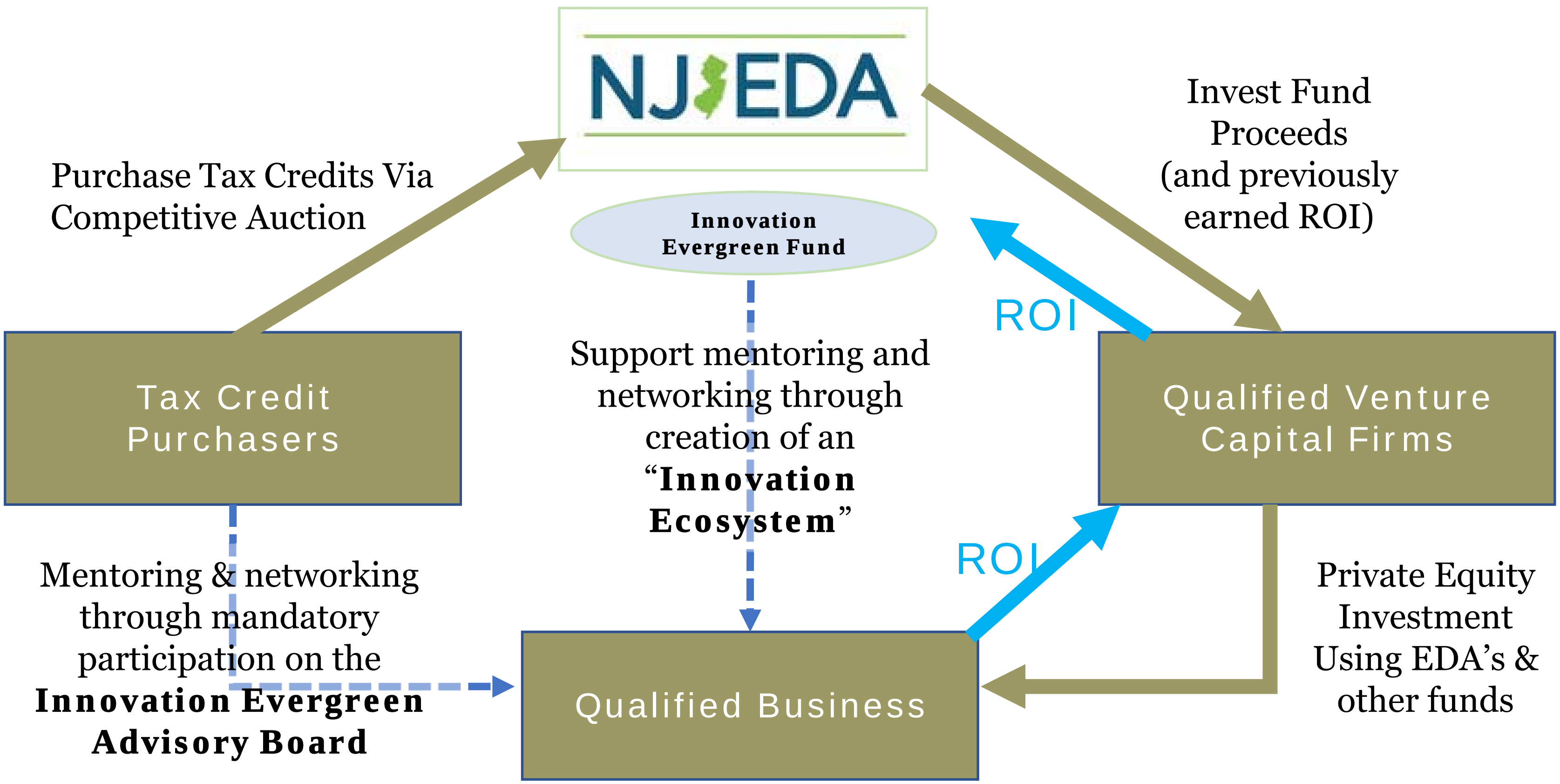
The Innovation Evergreen Program

Sections 19-34 of ERA

Innovation Evergreen Program is the State's attempt to attract and benefit from innovative high-growth companies of the future **as a venture capital equity investor**.

EDA will (1) raise funds by auctioning off State tax credits, (2) invest those funds in venture capital firms and use the expertise of these firms to (3) select promising investments in high-growth companies within targeted industries

The Innovation Evergreen Program
3 Constituencies



The Innovation Evergreen Program
Qualified Businesses

"Qualified business" means a business that ... has its principal business operations **located in the State** and intends to maintain its principal business operations in the State after receiving a qualified investment under the program; is **engaged in a targeted industry**; and **employs fewer than 250 persons** at the time of the qualified investment.

Qualified investments must be either in a Planning Area 1 (Metropolitan) or an Opportunity Zone.

- Statutory goal of having 25% of the investments from the Fund go to Opportunity Zones.

The Innovation Evergreen Program Qualified Businesses (continued)

"Targeted industry" means any industry identified from time to time by EDA 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.

The Innovation Evergreen Program
Qualified Venture Firms

EDA to create a process for venture firms to apply to become QVFs under the program.

- Must consider the usual—management structure, fee structure, quality of the leadership, investment experience

QVFs must have not less than $10mm of equity capitalization, net assets, or written commitments.

QVFs must have at least two principals with 5 years of money management experience in venture capital or private equity.

EDA's investment in QVF can *initially* be no more than $5mm

- (or $6.25mm for Minority or Women Owned businesses, businesses that use a technology core to their businesses that was developed at a NJ college or university, or businesses considered a university spin-off)
- No cap on "follow-on investments," which are subsequent investments into a successful qualified business

The Innovation Evergreen Program
Tax Credit Purchasers

Tax credits must be auctioned off by EDA through *a competitive bidding process*.

- Exact process is TBD.
  - ✓ There is an option in the Act for EDA to outsource conducting the competitive auction to a third-party.

Bidding minimum requirements:

- Bids must be for at least $1,000,000 in tax credits. Lowered to $500,000.
- Bids must offer at least 85¢ per dollar of tax credits. Lowered to 75¢.
- Bidders must commit to serve on the **New Jersey Innovation Evergreen Advisory Board**.
  - ✓ Board to provide mentoring and networking opportunities for qualified businesses.

Tax credits transferable <u>only once</u>

- 10% of consideration received must be paid as a fee to EDA.
- 85¢-per-dollar minimum price also applicable to transfer
- All details (seller, buyer, purchase price, etc.) must be made public on EDA's website.

Questions, Comments?

Chuck Liebling
732.448.2526
cliebling@windelsmarx.com

Julie Tattoni
732.448.2559
jtattoni@windelsmarx.com

Jeet Gulati
732.448.2537
jgulati@windelsmarx.com

To learn more about any of the programs under the New Jersey Economic Recovery Act of 2020, please contact Chuck, Julie, Jeet or your relationship lawyer.