WINDELS MARX

TRADITION. INNOVATION. DISTINCTION.

The Aspire Tax Credit Program

The New Jersey Economic Recovery Act of 2020 (“ERA”)

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

P.L. 2021, Chapter 46

Regulations, NJAC 19:31-23 et seq.

August 2022

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.

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- Representation of Debtors
- Representation of Secured & Unsecured Creditors
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- Securities
- Corporate Governance
- General Corporate Matters

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- Financial Transactions
- Asset-Based Lending
- Corporate Finance & Syndicated Lending
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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.

What's new for Aspire?

NJEDA has begun accepting online applications.

https://www.njeda.com/aspire/

- **The new Aspire webpage has a summary of the program eligibility, award size, and rules including:**
  - A Sample Application with details on all of the materials needed
  - NJEDA Board memo with program summary and goals
  - Proposed regulations
  - Description of the Reasonable Return on Investment Analysis
  - Description of the Net Benefit Test applicable to Commercial Projects
  - Scoring Criteria
  - Green Building Standards
  - Mapping Tool for determining eligible incentive locations

The Aspire Program

Sections 54-67 of ERA
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.
- Up to 60% for new residential construction that receives "4% allocation" Low Income Housing Tax Credits.
- Up to 40% of eligible project costs for a Transformative Project (percentage is lower but the tax credit cap is much higher).

Aspire Tax Credit Project Caps

$42M Project Cap for most projects (Phase cap for phased projects).

$60M Project Cap for certain projects and locations (Phase cap for phased projects).

- Residential projects that receive a 4% LIHTCs
- Government Restricted Municipalities – Atlantic City, Paterson and Trenton
- Qualified Incentive Tract (Low income census tracts)
- Municipalities with MRI Distress Score 50 or over

$350M Project Cap for Transformative Projects.

- Must be located in an "Incentive Area" GRM, Distressed Municipality, Enhanced Area (Enhanced Area includes
  Urban Transit Hub, five municipalities with the highest poverty rate, and three municipalities with the highest SNAP recipients).
- Only two Transformative Projects can be approved in any one municipality.
- Amended to permit project phases under a "transformative phase agreement." All phases must be completed within eight years of signing the incentive agreement or the first phase agreement.

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

Project Location

Utilize NJEDA Mapping Tool to determine if your project is located in an eligible incentive area.

Aspire Projects must be located in "Incentive Area":

- Planning Area 1 (Metropolitan)
- Aviation District
- Port District
- Planning Area 2 (Suburban) or Designated Center, but only if located within ½ mile of a rail transit station or high frequency bus stop
  (as determined by NJ Transit).

Transformative Projects must be located in:

- Incentive Area
- GRM
- Enhanced Area, or
- Distressed Municipality

Film Studio Project may be located anywhere in the State

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 (but doesn't count toward 100,000 sf minimum)

Residential Projects:

- Predominantly residential for multi-family residency and may include parking
- Minimum project costs based on location
  - ✓ $17.5M if in a city with > 200,000 people (Newark and Jersey City)
  - ✓ $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 but Regulation counts workforce housing in scoring criteria.

Types of Aspire Projects (continued)

Transformative Projects:

Qualify for up to 40% of project costs subject to cap of $350M.

Must meet the following criteria:

1. Total Project Cost of at least $100M and
2. Include at least:
   a) 500,000 sf new or substantially renovated industrial, commercial or residential space, or
   b) 250,000 sf of infrastructure space for film production.
3. Cannot be more than 50% retail, and
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, and
5. Located in Incentive Area, Distressed Municipality, GRM or Enhanced Area (Film studio project can be located anywhere)

Residential Transformative Projects

Must Demonstrate Special Economic Importance

For Residential Projects:

1. Be located in a GRM, Enhanced Area or Distressed Municipality, or
2. Include 20% new residential units for low and moderate income households or workforce housing (This is in addition to 20% low and moderate income housing set aside required for all residential Aspire projects.), or
3. Substantial renovation of vacant commercial building.

Additionally, the project must have:

1. 1,000 new residential units, or
2. Mixed-use with 100K sf retail or commercial space (excluding parking) and:
   - ✓ If in a GRM, 250 residential units,
   - ✓ If in Enhanced Area, 350 residential units, or
   - ✓ Any other Incentive Area, 600 residential units.
3. Leverage mass transit, higher education, or other economic development assets in attracting employers and skilled workers by providing employment or housing.

Commercial Transformative Projects
Must Demonstrate Special Economic Importance

For Commercial Projects:

1. Either Creation of 500 new full-time jobs (based on average industry density per sf) <u>or</u> Involves substantial renovation of a vacant commercial building, <u>and</u>
2. Provides opportunities to leverage leadership in high-priority targeted industry (such as a developer making an industry leading investment in a new technology or high-growth sub-industry).

A project with 250,000 sf related to film production <u>does not</u> need to meet criteria #1.

Basic Aspire Program Requirements:

Equity

20% Developer Contributed Capital

- Amendment lowered to 10% for projects in GRMs.
- 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.
- Regulations define "equity" as developer contributed capital that can be cash, deferred development fee, costs for project feasibility (incurred within 12 months), property value less mortgage and other investment deemed acceptable by NJEDA.
- Equity shall include federal or local grants and tax credits but not RABs.

Basic Aspire Program Requirements:
Net Positive Benefit (Appendix C)

Commercial Projects must demonstrate that the incremental increase in State revenues will exceed the amount of tax credits needed to fill the financing gap.

- NJEDA will utilize the IMPLAN Model ("Impact Analysis for Planning) to measure a project's predicted economic benefit. Projects in North Jersey and South Jersey will use separate geographic-based data.
- For each application, 2 scenarios will be run: ongoing activities at the project and upfront construction costs.
- The model includes State taxes. (Municipal payroll taxes and property taxes for new construction may be included under circumstances.)
- NJEDA will model average employment scenarios, with regional averages for wages and industry standards for employment density per sf.
- Projects must demonstrate a minimum net benefit to the State of 185% of the tax credits. 150% for projects in a GRM.

Basic Aspire Program Requirements:
Financing Gap and Reasonable Rate of Return (Appendix B)

Project Financing Gap: To be eligible for tax credits, the Applicant must show a financing gap. This will be demonstrated by a below market rate of return.

- After taking into account developer equity and a reasonable and appropriate rate of return, and after good faith efforts to obtain loans and capital on a non-recourse basis, the amount of project costs remaining. NJEDA using JLL hurdle rate model for determining the reasonable and appropriate return on investment. NJEDA will use consultant for analysis of large and highly specific projects.

- **Financing Gap at Project Completion:** If NJEDA determines that the gap is smaller than projected at approval, NJEDA shall reduce the amount of tax credits or accept payment from the developer on a pro rata basis. (The Developer will have the option to make an equivalent payment to the State.)
- If there is no financing gap, the award will be forfeited.

- **For Residential Projects receiving LIHTC**: Developer's ROI is subject to the NJHMFA limitations (maximum ROI of 15%).

Aspire Program:
Reasonable and Appropriate Rate of Return and Profit Sharing with the State

Profit Sharing with State:

- **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 must pay in escrow 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 the reasonable and appropriate rate of return at approval by more than 15%, developer to pay 20% of excess to General Fund. If rate of return did not exceed reasonable and appropriate, escrow will be released to the developer.

Recapture of Tax Credits

Certain Events could trigger NJEDA seeking to recapture tax credits already issued to the developer. Events include:

- A material misrepresentation in the application, completion certification, annual report, or related materials.
- Failure to submit financing documentation to NJEDA to evaluate the Reasonable and Appropriate Return on Investment.
- Penalties and interest may be assessed.
- NJEDA will not pursue recapture against the purchaser of the tax credits.
- NJEDA will not pursue a co-applicant who had no involvement in the basis for the recapture.

Forfeiture of Current or FutureTax Credits

Developer will forfeit current year and future tax credits if:

1. Project changes from a residential to commercial or vice versa.
2. Project approved as a film production project is no longer used for film production.
3. Without prior consent of NJEDA, developer changes any uses that were utilized to measure the net economic benefit. For a transformative project, the uses utilized to determine the anticipated employee occupancy count.
4. Developer changes the project to score less than the minimum.
5. Any labor harmony agreement is not satisfied.
6. Occupancy level is reduced to less than 60% during the eligibility period. Tax credits can resume once occupancy is at 60% again. Occupancy measured by residential units leased, and for commercial projects, space leased and tenant operating in leased space.

Aspire Program Details

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

- ✓ 10 years for Commercial and Residential Projects

Construction: Must not have begun prior to application, but phases are permitted. Completed within 4 years after executing incentive agreement, except for Phased Projects which get 8 years to complete all phases.

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. Failure to pay prevailing wages shall result in forfeiture of the award at completion or on an ongoing basis (annual report).

Community Benefit Agreement: For projects ≥ $10M in project costs, must have agreement with EDA or municipality to provide benefits to community. If the applicant is not in compliance with the CBA, the award will be forfeited.

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% of face value (before considering any discounting to present value).
- No subsequent sales after 1st transfer. However a bank that holds the certificate for collateral and forecloses on the project may transfer the certificate.
- **Tax Liabilities satisfied:** CBT and Insurance Premium Taxes.
- As per P.L. 2022 Chapter 46, carry forward for unused tax credits now permitted for 7 years.
- 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.

Questions, Comments?

Julie Tattoni
732.448.2559
jtattoni@windelsmarx.com

Chuck Liebling
732.448.2526
cliebling@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 Julie, Chuck, Jeet or your relationship lawyer.