The New Jersey Economic Recovery Act of 2020: An Overview of the New Jersey Aspire Program

Steven G. Mlenak
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The New Jersey Economic Recovery Act of 2020 (ERA), a seven-year, $14 billion package of incentive programs intended to encourage New Jersey job growth, property development and redevelopment, community partnerships, and numerous other economic development initiatives, was signed into law by Governor Phil Murphy on January 7, 2021.

This Client Alert focuses on the New Jersey Aspire Program, enacted as part of the ERA to provide tax credit incentives to developers to help close project financing gap costs associated with commercial, mixed use, and residential real estate development projects that could otherwise prevent those projects from becoming a reality. The Aspire Program is poised to serve as the replacement program for the Economic Redevelopment & Growth (ERG) Program.

Although redevelopment projects can sometimes obtain the benefits of an exemption or abatement for property taxes, a gap may still remain in available financing, or a project simply may not be able to obtain a commercially viable return on investment. The Aspire Program aims to close some of those gap costs through the provision of transferable tax credit incentives.

Administering the New Jersey Aspire Program

The Aspire Program is being administered by the New Jersey Economic Development Authority (EDA). Applications will be reviewed and decided by the Board of the EDA in accordance with statutory requirements and regulations will be promulgated by the EDA. The EDA is to establish a minimum score necessary for an application to be approved for an incentive award. Applications that reach the required minimum score will be approved for an incentive award on a first come, first served basis until funding is exhausted.

Attorneys

Steven G. Mlenak

Incentive Awards for Developers Under New Jersey Aspire Program

An eligible developer may obtain a tax credit for a qualifying project of up to $32 million. However, if the project is located in a "qualified incentive tract," "government-restricted municipality," or municipality with a Municipal Revitalization Index distress score of at least 50, the maximum available tax credit increases to $50 million. Developers should consult with legal counsel to determine whether their project is located in a municipality that falls within one of the aforementioned designations.

The tax credit amount that a developer may obtain is based on the project financing gap. Tax credits will be issued to satisfy a project financing gap of up to 45% of the total project cost for most projects. If the project is a commercial project located in a government-restricted municipality, then tax credits may be awarded for up to 50% of the total project cost.

If the project falls under the definition of a "transformative project" (one which has a total project cost of at least $100 million, meets minimum square footage or unit count requirements based upon the type of project, and meets several other unique requirements set forth under the program), tax credits of up to 30% of the total project cost, the total value of the project financing gap, or $250 million (whichever is less) may be awarded. Up to ten transformative project awards may be issued by the EDA.

Project Eligibility

To be eligible for incentive awards under the Aspire Program, the following criteria must be satisfied:

- The developer must submit the application prior to March 1, 2027;
- The developer must demonstrate that the "project is not economically feasible" without the incentive award;
- The developer must demonstrate, and the EDA must determine, that (i) a "project financing gap" exists or (ii) that the "project will generate a below market rate of return";
- The project must be located in an "incentive area"; and
- Unless one of the exceptions set forth below applies, the developer has not commenced any construction at the site of the project except for demolition or site remediation activities.

In addition, the developer has to comply with all requirements for filing tax and information returns and for paying or remitting required state taxes and fees by submitting, as part of the application, a tax clearance certificate. Further, the developer may not be more than 24 months in arrears at the time of application.

It should be noted that while Aspire Program requires the project to be a "redevelopment project," its definition of "redevelopment project" does not tie the project to the Local Redevelopment and Housing Law. Rather, it simply requires that it be "a specific construction project or improvement undertaken by a developer, owner or tenant, or both, and any ancillary infrastructure project."

Designated Incentive Areas

The incentive areas are those designated by the "State Planning Act" N.J.S.A 2:18A-196 et seq., as Planning Area 1 (Metropolitan), Planning Area 2 (Suburban), or a Designated Center, provided an area designated as Planning Area 2 (Suburban) or a Designated Center shall be located within a one-half mile radius of the mid-point, with bicycle and pedestrian connectivity, of a New Jersey Transit Corporation, Port Authority Transit Corporation, or Port Authority Trans-Hudson Corporation rail, bus, or ferry station, including all light rail stations, or a high frequency bus stop as certified by the New Jersey Transit Corporation.

Exceptions to Requirement Concerning Commencement of Construction Activities

As set forth above, in order to be eligible for incentive awards under the Aspire Program, the developer must not have commenced construction at the project site at the time of the application other than for demolition and site remediation activities. There are, however, two exceptions to this rule, as follows:

- If the EDA determines that the project that has been started would not be completed without the incentive award; or
- In the event the project is to be undertaken in phases, the requested incentive award is limited to only those phases for which construction has not yet commenced.

Additional Requirements Based on Type of Project

In addition to the general requirements above, there are additional requirements based upon the project type, as follows:

Commercial Projects (100,000 or more square feet)

For commercial projects, the developer must also demonstrate that (1) the incremental increase of state revenues realized from the commercial project upon its completion will be in excess of the amount necessary to reimburse the developer for its project financing gap; and (2) the developer will have an equity participation of at least 20% of the total project cost. Further, the developer must also submit a letter evidencing support for the project from the governing body of the municipality.

Residential Projects

For residential projects, in addition to the affordable housing requirements set forth below, the developer must also demonstrate that the project will:

- Have a total project cost of at least $17.5 million if the project is located in a municipality with a population greater than 200,000 according to the latest federal decennial census;
- Have a total project cost of at least $10 million if the project is located in a municipality with a population less than 200,000 according to the latest federal decennial census; or

- Have a total project cost of at least $5 million if the project is in a qualified incentive tract or government-restricted municipality.

Developers with residential projects with a total project cost of between $5 million and $10 million should consult with legal counsel to determine whether its project is located in a qualified incentive tract or government-restricted municipality.

Any Project with a Total Project Cost Exceeding $10 Million

For any project that exceeds $10 million in total project costs, and which is 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 county and municipality.

Labor Harmony Agreement

In certain circumstances, if the State of New Jersey has a proprietary interest in the project, “labor harmony agreements” between certain businesses to be operated at the project and a labor organization or cooperating labor organization may be required.

Affordable Housing Requirements for Residential Projects

If the project will consist of newly constructed residential units, the development must set aside 25% of the units for affordable or workforce housing units. If the municipality has received substantive certification or a judgment of repose and such reservation of units is not required under the approved affordable housing plan, then at least a 10% set-aside (but not more than 50%) for low-income housing & moderate-income housing and a 15% set-aside for workforce housing must be provided. If not, then at least a 20% set-aside (but not more than 50%) for low-income housing and moderate-income housing and 5% set-aside for workforce housing must be provided.

Obligations of Developer Obtaining an Incentive Award

By accepting an incentive award, a developer will need to comply with (i) “minimum environmental sustainability standards,” (ii) the EDA’s affirmative action requirements, and (iii) prevailing wage requirements for each worker employed to perform construction work or building services work at the project.

Minimum Environmental Sustainability Standards

"Minimum environmental sustainability standards” are standards that must be established by the EDA in accordance with the green building manual" regarding the use of renewable energy, energy-efficient technology, and non-renewable resources to reduce environmental degradation and encourage long-term cost reduction.” Developers interested in the Aspire Program should keep an eye out for these standards once promulgated to understand the additional costs, if any, they will impose upon a project to determine whether it would offset the benefit of an incentive award.

Prevailing Wage Impact

Prevailing wage has been estimated to increase the construction costs of a project by significant margins, sometimes as high as 30% or more. For this reason, the projects that would benefit most from Aspire Program incentive awards would be those already required to use union labor (such as steel structured buildings). Other projects may find that the imposition of prevailing wage offsets the benefits of the incentive award.

Project Completion Requirement

The project must be completed, and the developer must be issued a certificate of occupancy for the project, within four years of executing the incentive award agreement.

Application Requirements – What We Know Now

The application for the Aspire Program has not yet been released, as regulations are still being promulgated. However, we do know that the application process will require the developer to satisfy its eligibility as set forth above.

In addition, the Aspire Program requires that the New Jersey Department of Labor and Workforce Development, the New Jersey Department of Environmental Protection, and the New Jersey Department of the Treasury each report to the EDA that the developer is in substantial good standing.

Finally, we know that residential projects will also be required to submit its application to the New Jersey Housing and Mortgage Finance Agency (NJHMFA).

Agreement Between Developer and EDA

If an application for the Aspire Program is approved, the developer and the EDA must enter into an "incentive award agreement." This agreement will specify the amount of the incentive award, the duration of the eligibility period (not to exceed 15 years for a commercial or mixed-use project or 10 years for a residential project), an estimated date of completion, a requirement for periodic progress reports, and provisions for various other reporting obligations. The agreement may also provide for a verification of the financing gap at the time the developer provides executed financing commitments to the EDA, and a verification of the developer's projected cash flow at the time of certification that the project is completed.

EDA Reduction or Elimination of Incentive Awards

At the end of the third year of the eligibility period, the EDA must evaluate the developer's cash flow and compare that to the projected cash flow at the time of board approval. If there is no project financing gap, the developer must then forfeit the award. If there is a smaller project financing gap than projected, the EDA will reduce the incentive award on a pro rata basis. For a commercial project, if the actual cash flow exceeds the projected cash flow by more than 15%, the EDA will require the developer to pay up to 15% of the amount of the excess. With respect to residential projects, any excess in the developer's cash flow as compared to the projected cash flow will be subject to any restrictions on rates of return set by the

NJHMFA.

Transferring Tax Credits

If the developer does not wish to utilize the tax credits, it may transfer those credits by applying to the EDA for a tax credit transfer certificate, covering one or more years. The tax credit transfer certificate may be sold or assigned, in full or in part, in an amount not less than $25,000, for a limited period of time (the "privilege period"). The tax credit transfer certificate may not be sold for consideration of less than 85% of the transferred credit amount (subject to present value discounting) except for certain residential project developers that obtain permission from the EDA to sell for less than 85%. The incentive award may also be pledged.

Next Steps

Comprehensive regulations are expected to be promulgated by the EDA in furtherance of the New Jersey Aspire Program. We will keep you updated on these rules and other developments related to the New Jersey Economic Recovery Act of 2020. Please contact the author of this Alert, **Steven G. Mlenak** smlenak@greenbaumlaw.com | 732.476.2526 with questions concerning the incentives outlined in this overview or to discuss your specific business circumstances. Mr. Mlenak is Chair of the firm's **Financial Incentives & Economic Development Practice Group**.

RECOMMENDED

Greenbaum, Rowe, Smith & Davis LLP Announces Launch of Financial Incentives & Economic Development Practice Group
February 23, 2021
Greenbaum, Rowe, Smith & Davis LLP Press Release