



Developer-Oriented Highlights of the New Jersey Economic Stimulus Act of 2009

This is a summary of a complex law. You should consult an attorney for its particular application to your circumstances.

The New Jersey Economic Stimulus Act of 2009, which the Legislature passed last week and which is awaiting the Governor's signature into law, provides four major economic stimuli to the development community – (1) a new tax increment grant/financing program to be known as “ERGG”, (2) an expanded and improved business attraction incentive program in urban transit hubs, (3) a new tax credit for developers of residential projects in urban transit hubs, and (4) a full moratorium on the affordable housing fee for certain non-residential projects, a total or partial refund of the affordable housing fee for certain non-residential projects and a corresponding reduction or elimination of the municipal actual growth share obligation generated by such exempted non-residential projects to the extent State or Federal funds are not available to partially or fully fund the fee such projects would otherwise have generated:

- A New “Economic Redevelopment Growth Grant” (ERGG) Program – The “RAD” financing program has been replaced with the Economic Redevelopment Growth Grant (ERGG) program which utilizes up to 75% of the incremental increase in certain State and local revenue sources to provide gap financing of up to 20% of the project cost for certain projects. An ERGG:
 - is available to a project located in Planning Area 1, Planning Area 2, designated Centers and Transit Villages (however, Transit Villages can only receive proceeds from local revenue sources)
 - requires a minimum of 20% developer capital investment
 - is paid out over a period of up to 20 years
 - is implemented through Incentive Grant Agreement(s) between the State and/or the municipality, and the Incentive Grant Agreement(s) can be collateralized
 - is funded through State revenue sources – incremental increases in corporate business taxes; taxes on savings institutions and insurers; utility franchise, gross

receipts and excise taxes; taxes on net profits from other businesses; distributive shares of partnership income or pro-rata share of S corporation income; sales taxes; and hotel and motel occupancy fees

- is also funded through local revenue sources - incremental revenue increases from PILOTs property taxes, lease payments made to the municipality; payroll taxes, parking taxes, admissions and sales taxes, taxes from the operation of a public facility (to the extent the municipality is authorized to impose these taxes); sales and use taxes retained by municipality in a UEZ; and taxes from a motor vehicle rental tax pending as part of the Stimulus Act (Newark Airport)
- requires local ordinance approval to initiate the program
- also requires State and local approval
- An Expanded and Improved Urban Transit Hub Tax Credit ("UTHTC") Program –
 - The definition of “urban transit hub” is expanded to include (in addition to the already-included 1/2-mile* radiuses surrounding all commuter rail stations in the eligible municipalities**):
 - the 1/2-mile* radiuses surrounding all light rail stations in the eligible municipalities
 - the 1/2-mile radiuses surrounding the first two subway stops on the Newark Subway line after Penn Station
 - any property in an eligible municipality that is adjacent to, or connected by rail spur to, a freight rail line so long as the business utilizes that freight line for loading and unloading freight cars on trains
 - * Note: In the City of Camden, the radius has been increased to one-mile for all commuter rail and light rail stations.
 - ** Note: One of the two criteria for determining “eligible municipalities” has been pegged to a fixed tax year (2006) – accordingly, the eligible municipalities for the duration of the program will remain: Jersey City, Hoboken, Newark, Elizabeth, Paterson, East Orange, New Brunswick, Trenton and Camden.
 - For a business, other than a tenant in a multi-occupant building (i.e., a full-building occupant), the minimum required capital investment in a qualified business facility is lowered from \$75,000,000 to \$50,000,000. (The other requirement, a minimum of 250 full-time employees#, has not been changed.)
 - For a business in a multi-occupant building, the minimum required capital investment in a qualified business facility by the owner of the facility## is similarly lowered from \$75,000,000 to \$50,000,000 and the allocable share

thereof attributable to the business (based on the leased area of the business within the qualified business facility or the area within the qualified business facility owned by the business as a condominium) is lowered from \$25,000,000 to \$17,500,000. Also, the 250 full-time employee# requirement can be satisfied through the aggregation of up to two other tenants' employees.###

Note: Employees counted toward this threshold cannot also be counted toward any BEIP grant or BRRAG tax credit received by the business. Also, the tax credit will be reduced by 20% if less than 200 of the employees are new, unless the business applies for the program before January 1, 2010 and is relocating to an urban transit hub from another location in the same eligible municipality.

Note: Capital investments by a tenant in a qualified business facility can be included in calculating the owner's capital investment, but only to the extent required to meet the owner's \$50,000,000 minimum investment threshold; any excess will be added exclusively toward the tenant's capital investment for purposes of calculating its tax credit amount.

Note: This provision arguably entitles all three businesses to the UTHTC program – even if none meets the job threshold – so long as each meets the \$17,500,000 minimum capital investment threshold. Like many components of the UTHTC program, this provision will need to be clarified in the implementing regulations.

- Tax credits are still payable for every dollar of capital investment, from dollar one, over a 10-year period at the rate of one-tenth per year; however, these tax credits are now transferable provided that the transferor receives a payment for the tax credit of at least 75% of the amount of the transferred tax credit.
- Businesses are now only allowed to use the credits against corporate income tax, not gross income tax. Accordingly, businesses which do not pay corporate income tax will need to transfer the credits as provided above.
- There is now a cap of \$1,500,000,000 on the total amount of tax credits that can be granted under UTHTC program, of which at least \$150,000,000 is dedicated to qualifying residential projects in urban transit hubs as described below.
- The business must apply for the program by January 2013 and must satisfy the eligibility requirements by January 2016.
- The UTHTC program is no longer an “as of right” program if the business meets the two objective requirements (capital investment and employment thresholds) -- there is now a “public benefit test”: a business must demonstrate at the time of application that its proposed project will “yield net positive benefit to both the State and the eligible municipality.” This requirement, like many components of the UTHTC program, will need to be clarified in the implementing regulations.

- Businesses are allowed to use the capital investments and full time employees of their “affiliates” to meet the employee and investment thresholds of the UTHTC program.
- The definition of full-time employee is expanded to include:
 - Contract employees, who work at least 35 hours a week, leased to the business by a professional employer organization,
 - Persons who render any other standard of service generally accepted by custom or practice as full-time employment and
 - Employees who are residents of another state but whose income is not subject to the New Jersey Gross Income Tax Act.
- The definition of “business” is expanded to include S corporations and “limited liability corporations.” Although there is no such thing as a “limited liability corporation” (the correct term is “limited liability company”), the problems caused by this should be minimal because limited liability companies that elect to be treated as partnerships for federal income tax purposes are already included within the definition of business under UTHTC program.
- A New Tax Credit for Developers of Residential Projects in Urban Transit Hubs –
 - The developer of a “qualified residential project” can receive a tax credit equal to up to 20% of its capital investment in the qualified residential project.
 - The “developer” is required to satisfy the \$50 million investment threshold under the UTHTC program as described above, but is relieved of the 250-job requirement.
 - “Qualified residential project” means any building, complex of buildings or structural components of buildings, including a mixed use project, consisting predominantly of residential units, located in an urban transit hub within an eligible municipality.
 - “Residential unit” means a residential dwelling unit such as a rental apartment, a condominium or cooperative unit, a hotel room, or a dormitory room.
 - There is some discretion on the part of the State in terms of eligibility: the developer will be required to demonstrate, through a pro-forma analysis, that the tax credits make the project feasible and is not likely to be accomplished by private capital without the tax credits.

- A Moratorium on the Affordable Housing Fee for Certain Non-Residential Projects/Fee Refunds/Reduction or Elimination of Certain Projects' Actual Growth Share Obligation to the Extent that State or Federal funds are not Available –
 - Fee Moratorium - No municipality can charge the 2.5% Statewide Non-Residential Development Fee to a developer of a non-residential project that has received or receives preliminary or final site plan approval prior to July 1, 2010, provided that the developer obtains a building permit for the project prior to January 1, 2013.
 - Fee Refunds - A developer of a non-residential project that received preliminary or final site plan approval prior to July 17, 2008 (the effective date of the Statewide Non-Residential Development Fee Act [A-500]) and who paid the 2.5% Statewide Non-Residential Development Fee will be entitled to refund of the difference between the amount of the affordable housing fee that the developer committed to pay prior to July 17, 2008 and the amount of the 2.5% Statewide Non-Residential Development Fee that the developer paid.
 - Examples:
 - A developer received a preliminary or final site plan approval for a non-residential development, prior to July 17, 2008, in a municipality that charged non-residential developers the then-permitted affordable housing fee equal to 2% of the equalized assessed value of the development. The developer agreed to pay the municipality that 2% fee. The developer obtained a certificate of occupancy for the development after July 17, 2008 and was required to instead pay the municipality the Statewide Non-Residential Development Fee equal to 2.5% of the equalized assessed value of the development. The developer will now be entitled to a refund of an amount of money equal to .5% of the equalized assessed value of the development.
 - A developer received a preliminary or final site plan approval for a non-residential development, prior to July 17, 2008, in a municipality that did not charge non-residential developers an affordable housing fee. The developer obtained a certificate of occupancy for the development after July 17, 2008 and was required to pay the municipality the Statewide Non-residential Development Fee equal to 2.5% of the equalized assessed value of the development. The developer will now be entitled to a full refund of the Statewide Non-Residential Development Fee that it paid.
 - Timing of Refund Claims and Refunds – A claim for the refund must be submitted to the governmental entity to which the fee was paid within 120 days of the effective date of the New Jersey Economic Stimulus Act of

2009. The governmental entity to which the claim is made must refund the applicable amount of the fee within 30 days of its receipt of the claim.

- Actual Growth Share Obligation for Particular Projects – A non-residential development which is exempt from payment of the Statewide Non-residential Development Fee by reason of the New Jersey Economic Stimulus Act of 2009 will only generate an actual growth share obligation for a municipality if and to the extent COAH, in consultation with the DCA, determines that there are State or Federal funds available to the municipality in an amount equal to all or some portion of the Statewide Non-Residential Development Fee that the developer of the Project would have otherwise paid. For example, if funds, equal to half of the Statewide Non-Residential Development Fee that the developer of a particular non-residential project would have otherwise paid, are available, then that project generates half the actual growth share for the municipality that it otherwise would have. If no State or Federal funds are available, then the project does not generate any actual growth share obligation for the municipality.