Welcome to
Corporate Real Estate Law
a blog hosted by Sills Cummis & Gross P.C.
focused on corporate real estate law Issues
Editor in chief
Ted Zangari
Editor
Mark Levenson

Attention Corporate Real Estate Site Selectors:

Move to a Build-to-Suit Location in One of Nine New Jersey Cities and Save Approx. 65%* on Rent… or Purchase Premises for the Price of the Land!

***see Exhibit A**

<u>Highlights of the *New* Urban Transit Hub Tax Credit (UTHTC) Program</u>

by Ted Zangari

- **Who is eligible for the UTHTC program?** Any in-state or out-of-state company seeking a business facility regardless of the nature of its business (other than casinos and not-for-profits such as hospitals).

- **What kinds of properties qualify for the program?** Any commercial real estate including office, industrial and distribution facilities.

- **What properties qualify for the program?** Any site located in Newark, Elizabeth, Jersey City, Hoboken, Paterson, East Orange, New Brunswick, Trenton or Camden, provided the site is:

    - situated within a 1/2-mile radius surrounding any light rail or commuter rail station in the municipality (or within a one-mile radius in the case of sites within the City of Camden), or

    - adjacent to, or connected by rail spur to, a freight rail line, so long as the business utilizes the freight line for loading and unloading freight cars on trains.

NOTE: This is a summary of a complex law, the regulations for which have not been fully adopted. Precise answers to questions posed in this summary may depend on business-specific or site-specific facts, or may depend on NJEDA regulation or interpretation. You should consult an attorney and tax advisor for the law's particular application to your circumstances. This summary may be updated from time to time at: www.corporaterealestatelaw.com (under "Featured Articles").

Note: A site that is partially located within a radius will not qualify unless more than 50% of its land area falls within the radius.

- **What are the eligibility requirements?** There are two requirements, each of which varies according to whether a business will occupy an entire building or a multi-occupant facility:

  - Business occupying a *full-building*: The business must make a minimum "capital investment" in a facility of $50,000,000 and must employ at least 250 full-time employees at the facility.

  - Business occupying a *portion of a building*: The owner/landlord of the building must make a minimum capital investment of $50,000,000 in the facility, and the allocable share thereof attributable to the business (based on the area in the facility leased or occupied by the business) must be at least $17,500,000. Note: If an owner/landlord's capital investment does not reach the $50,000,000 minimum investment threshold, a business leasing or occupying space in the facility may contribute a portion of its own capital investment in the facility (e.g., fit-up improvements) to the extent necessary for the owner/landlord to satisfy the $50,000,000 minimum investment threshold; any excess capital investment by the business will be added exclusively toward the business's total capital investment amount for purposes of calculating its tax credit amount (discussed below).

    In addition, the business must employ – together with up to two other businesses in the building – at least 250 full-time employees at the facility. Note: The aggregation of 250 jobs by up to three businesses arguably entitles all three businesses to the UTHTC program – even if none of the businesses by itself meets the job threshold – so long as each meets the $17,500,000 minimum capital investment threshold; like many components of the new program, this provision will need to be clarified in the implementing regulations.

- **What does the eligible business receive?** A full-building occupant gets a transferable tax credit equal to the full amount of its capital investment in the facility. A business in a multi-occupant building gets a transferable tax credit equal to its allocable share of the capital investment made by the owner/landlord of the facility (as described above), plus the full amount of its own capital investment in the facility. Note: The tax credits will be reduced or forfeited if certain job thresholds are not maintained throughout the 10-year pay-out period, as described below.

- **How are the tax credits issued and utilized?** Tax credits are payable for every dollar of capital investment, from dollar one, over a 10-year period, at the rate of one-tenth per year. Note, however, that in the case of a business which *leases* premises in a facility, the one-tenth yearly allocation of tax credits may not exceed the yearly rent paid by the business to its landlord during the same tax period.

The credits may be applied against the business's corporate income tax and insurance premium tax to the State of New Jersey. If, in any tax period during the 10-year pay-out period, the one-tenth allocation of tax credits exceeds the business's actual tax liability, the business may transfer (sell) the unused credit to a third-party, provided that the business receives a payment for the tax credit of at least 75% of the amount of the transferred tax credit.

- **Is there any limit on the amount of tax credits a business may receive?** No, although there is a cap of roughly $1.35 Billion on the total amount of tax credits that can be granted to businesses under UTHTC program. Also, note again that in the case of a business which *leases* premises in a facility, the one-tenth yearly allocation of tax credits may not exceed the yearly rent paid by the business to its landlord during the same tax period.

- **What may be included in "capital investment?"** Virtually all site and construction costs – excluding the cost of land – as well as the cost of most furnishings and machinery, apparatus and equipment. Use of green building technology, high-tech gadgetry such as state-of-the-art conveyor systems, on-site structured parking decks and other big-ticket items will generate maximum tax credit value. All such costs must be incurred after January 13, 2008 to qualify as a capital investment (except site prep costs, which may be incurred earlier than January 13, 2008).

- **Must the facility be a newly-constructed building?** No, an existing facility may qualify. However, if the acquired building was constructed prior to January 13, 2008, an additional capital investment of at least 50% of the total acquisition cost must be expended (presumably for renovation or expansion work) and, of course, the combined amount of acquisition costs and additional capital investment costs must meet the $50,000,000 minimum threshold.

- **If an existing building is acquired, how is the land component valued?** The value of the land would be appraised as vacant land, and the land value amount would be subtracted from the purchase price for purposes of calculating the amount of capital investment.

- **Can the building be part of a mixed-use facility?** Yes. In fact, the capital investment attributable to those portions of the facility not intended for businesses (for example, any hotel or residential component) may nevertheless count toward the $50,000,000 minimum threshold – in which event businesses will benefit from their allocable share thereof.

- **How is a "full-time employee" defined?** A full-time employee means:

NOTE: This is a summary of a complex law, the regulations for which have not been fully adopted. Precise answers to questions posed in this summary may depend on business-specific or site-specific facts, or may depend on NJEDA regulation or interpretation. You should consult an attorney and tax advisor for the law's particular application to your circumstances. This summary may be updated from time to time at: www.corporaterealestatelaw.com (under "Featured Articles").

- Any employee (or person employed by a professional employer organization) who works at least 35 hours a week

- Any person who renders any other standard of service generally accepted by custom or practice as full-time employment

Specifically excluded from the definition of "full-time employee": any person working as an independent contractor or on a consulting basis for the business. Note: Health benefits must be paid to all full-time employees of the business.

- **Must any of the required 250 full-time jobs be "new" to New Jersey?** No. However, if fewer than 200 employees of a business at the facility are "new" (i.e., jobs relocating to the site from out-of-state or jobs being created at the site) in any tax period during the 10-year pay-out period, the tax credit for such tax period will be reduced by 20%. Note: This 20% reduction will not apply to a business that applies for the UTHTC program before January 1, 2010 and relocates to a qualifying site from another location in the *same* eligible municipality. Note also: It remains unclear how the NJEDA will treat such a situation where the business involved had aggregated its full-time employees with those of up to two other businesses, as discussed above.

- **What if a business lowers its job-count?** If a business reduces the number of full-time employees at the facility below 250 in any tax period during the 10-year pay-out period, the tax credit for such tax period will be forfeited. Note again: It remains unclear how the NJEDA will treat such a situation where the business involved had aggregated its full-time employees with those of up to two other businesses, as discussed above

  In addition, if a business, in any tax period during the 10-year pay-out period, reduces the number of full-time employees in its total statewide employment (i.e., all company locations in New Jersey including the transit hub facility) by more than 20% from the number of full-time employees in its total statewide employment at the time its credit amount was approved by the NJEDA, the tax credit for such tax period will be forfeited.

- **Can a business aggregate its jobs or capital investment with affiliated companies to meet the eligibility requirements?** Yes. The business satisfying the employment requirement does not need to be the same entity as the business satisfying the capital investment requirement; it may utilize the capital investment of affiliated companies and/or employees of affiliated companies working at the facility.

- **If a business will satisfy the two eligibility requirements and relocate to a qualifying site in an eligible municipality, is participation in the UTHTC automatic?** No. The UTHTC program is not an "as of right" program – there is a "public benefit test": a building owner 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.

- **Does participation in the UTHTC program preclude a business from obtaining other public grants and incentives?** Yes, in some cases. For example, employees counted toward the 250-employee job threshold in the UTHTC program cannot also be counted toward any BEIP grant, BRRAG tax credit, or InvestNJ grant received by the business.

- **What if a business leasing its premises elects to sublet its space?** If a business sublets its tenancy in whole or in part during the 10-year pay-out period, the subtenant will not acquire the tax credits of its sublessor, and the sublessor will forfeit all tax credits for the term of the sublease and all subsequent tax periods.

- **When will the first installment of the tax credits be issued?** When proof of the satisfied eligibility requirements is submitted to NJEDA, but not sooner than the date when the business obtains a Certificate of Occupancy and commences the operation of its business in the facility with the minimum number of required full-time employees.

- **Are there any time-sensitive aspects to the UTHTC program?** Yes. The business must apply for the program by January 13, 2013 and must satisfy the eligibility requirements by January 13, 2016. Also, as previously noted, there is a cap of roughly $1.35 Billion on the total amount of tax credits that can be granted to businesses under UTHTC program – making this a first-come, first-eligible program, details of which have yet to be clarified.

###

Sills Cummis & Gross P.C.

Ted Zangari, Member
d. (973) 643-5781 | f. (973) 643-6500

One Riverfront Plaza
Newark, NJ 07102

tzangari@sillscummis.com

NOTE: This is a summary of a complex law, the regulations for which have not been fully adopted. Precise answers to questions posed in this summary may depend on business-specific or site-specific facts, or may depend on NJEDA regulation or interpretation. You should consult an attorney and tax advisor for the law's particular application to your circumstances. This summary may be updated from time to time at: www.corporaterealestatelaw.com (under "Featured Articles").

ASSUMPTIONS

– Building Size	200,000 sf
– Base Building Construction Costs (excl. land)	$275.00 psf
– Leasehold Improvements by Landlord	$ 37.50 psf
– TI & FFE Investments by Tenant	$ 37.50 psf
– Total Capital Investment	$350.00 psf
– % of Costs Ineligible for Tax Credit (excl soft cost) (Soft costs e.g., A&E, and furnishings excluded)	25%
– Tax Credit Eligible Construction Costs PSF	$206.25 psf
– Eligible TI Costs PSF (Landlord + Tenant)	$ 56.25 psf
– Total Investment Eligible for Credit	$262.50 psf

Tax Credit vs. Rent

	Years 1-5 (000s)	Years 6-10 (000s)	10 Year Ave. (000s)
Annual Rent	$37.50 psf	$41.13	$40.31
UTHTC	-26.25	-26.25	-$26.25
Rent After Tax Credit	**$11.25**	**$16.88**	**$14.06**
% Reduction	**70%**	**61%**	**64.5%**

Assume rent of $37.50 per square foot, with a 12.5% increase in years 6 – 10.