



MEMORANDUM

TO: Members of the Authority

FROM: Tim Sullivan
Chief Executive Officer

DATE: October 12, 2022

SUBJECT: Proposed New Rules for the
Brownfields Redevelopment Incentive Program (Sections 9 through 19 of P.L. 2020 c.
156)

Request

The Members are asked to approve:

1. The attached special adopted new rules and concurrent proposed new rules for the new Brownfields Redevelopment Incentive Program (Appendix A) and to authorize staff to (a) submit the special adopted new rules and concurrent proposed program rules for promulgation in the New Jersey Register and (b) submit the proposed program rules as final adopted rules for promulgation in the New Jersey Register if no formal comments are received; subject to final review and approval by the Office of the Attorney General and the Office of Administrative Law;
2. Delegation of authority to the CEO and/or his/her subdelegates in accordance with the Authority's Delegation Policy to:
 - to establish a date/s for the availability of the application and the date/s by when applications must be submitted on an annual basis;
 - to add the Brownfields Redevelopment Incentive Program to existing delegated authority for certain minor administrative changes and for extensions to conditions of approval; and
 - to approve up to four six-month extensions to the dates by when a progress report or an annual report is due, when the redevelopment project must be completed, and when the documents evidencing completion of remediation and the redevelopment project must be submitted.

3. The creation of the Brownfields Redevelopment Incentive Program, as initially authorized by the New Jersey Economic Recovery Act of 2020 (Sections 9 through 19 of P.L. 2020, c. 156 and later amended by Sections 5 through 10 of P.L. 2021 c.160), to incentivize developers of redevelopment projects located on brownfield sites for remediation costs by providing tax credits in an amount based on a percentage of the project's eligible costs, subject to final adopted rules.

New Jersey Economic Recovery Act

On January 7, 2021, Governor Phil Murphy signed the New Jersey Economic Recovery Act of 2020, P.L. 2020, c.156 (ERA) into law. The ERA presents a strong recovery and reform package that will address the ongoing economic impacts of the COVID-19 pandemic and position New Jersey to build a stronger and fairer economy that invests in innovation, in our communities, and in our small businesses the right way, with the protections and oversight taxpayers deserve. Tax incentives and other investment tools are critical to economic development, and when used correctly they can drive transformative change that uplifts communities and creates new opportunities for everyone.

The ERA includes 15+ economic development programs, including:

- Tax credits to incentivize job creation and capital investment;
- Investment tools to support and strengthen New Jersey's innovation economy;
- Tax credits to strengthen New Jersey's communities including revitalization of brownfields and preservation of historic properties;
- Financial resources for small businesses, including those impacted by the COVID-19 pandemic;
- Support for new supermarkets and healthy food retailers in food desert communities; and
- Additional tax credits for film and digital media.

On July 7, 2021, Governor Murphy signed P.L. 2021 c.160 amending P.L. 2020, c.156 and further improving the programs established under the ERA.

The program being presented for the Members' approval in this memorandum is the Brownfields Redevelopment Incentive Program – one of the 15+ programs under the ERA. The Brownfields Redevelopment Incentive Program (BRIP) is a tax credit program to encourage investment in remediating brownfields throughout New Jersey in order to prepare these sites for redevelopment and community development.

This memorandum provides a summary about the BRIP including program limits, eligibility criteria, specific program requirements, application process, and general details about the program. The specific details – and what will be promulgated and will govern the program –are included in the attached rules proposed for Board approval.

Program Purpose and General Description

The BRIP focuses on remediating brownfields as a component of community development, encouraging long-term private investment into the State while cleaning up properties that are former or current

commercial or industrial sites that are currently vacant or underutilized and on which there has been, or there is suspected to have been a discharge of a contaminant or on which there is contaminated building material. The amount of tax credits a redevelopment project receives is a percentage of the project's eligible remediation costs, subject to a statutory cap determined by the location of the property. The overview provided here highlights key aspects of the program. Additional program details are included in the sections below, and full program details are contained in the draft rules (attached), scoring document (attached), reasonable and appropriate return on investment (attached), and the statute.

To be eligible for the BRIP, a project must meet various eligibility criteria at the time of application. For example, the applicant must:

- Demonstrate and certify that the project site is a brownfield site.
- Provide a letter of support from the governing body
- Demonstrate at time of application that without the tax credit, the redevelopment project is not economically feasible.
- Prove that a project financing gap exists, and the tax credit award being considered for the project is equal to or less than the project financing gap.
- Certify that the applicant is not in any way responsible or liable for the contamination and is not a corporate successor to the discharger.
- Not have commenced any remediation, unless the full extent of contamination could not reasonably have been known prior to commencing remediation. (Assessment and investigation prior to application are allowed.)
- Contribute equity that equals at least 20 percent of the total cost of remediation, or if located in a government-restricted municipality or qualified incentive tract, the equity shall be at least 10 percent of the total cost of remediation.
- Provide estimates for remediation costs that are reasonable and appropriate. Remediation costs will be reviewed by the New Jersey Department of Environmental Protection (DEP) prior to EDA board approval.

Projects under the BRIP are subject to an annual program cap of \$50 million, for a total of \$300 million for a period of six years. Annual unused amounts may be included in the amounts available for approval in the subsequent year.

The BRIP is a competitive program, under which developers must apply within a defined application window, with all applications to be considered following the closure of the application period. The Authority, on an annual basis, will establish a date for the availability of the application and a date by when applications must be submitted. Awards are scored on a competitive basis.

The BRIP awards are calculated based on a percentage of the remediation costs (eligible costs). Most eligible projects can receive tax credits worth up to 50% of eligible costs up to a project cap of \$4 million. Eligible projects located within a Qualified Incentive Tract or in Government-Restricted Municipalities can receive tax credits worth up to 60% of eligible project costs up to a project cap of \$8 million.

In addition to meeting the program eligibility, the developer must be in substantial good standing with the NJ Department of Labor and Workforce Development, the NJ Department of Environmental Protection,

and the Department of Treasury (as determined by each Department). If a compliance issue exists, the eligible developer may have an agreement with the respective Department that includes a practical corrective action plan, as applicable. The eligible developer must have no unpaid liability in excess of any threshold dollar amount(s) that may be established by each respective Department. Furthermore, the developer will be required to provide, prior to execution of a redevelopment agreement, a valid tax clearance certificate from the NJ Division of Taxation within the NJ Department of Treasury.

The BRIP rules also require that the redevelopment project pay prevailing wages for construction work (which includes remediation work) for the duration of the project, as well as pay prevailing wages for building service workers for until 10 years following the completion of the redevelopment project.

Some of the areas described above are outlined in greater detail further in this board memorandum and in the attached rule proposal.

Eligibility Criteria

The following highlights key requirements for the BRIP. Full eligibility details are contained in the draft proposed rules in section N.J.A.C. 19:31-27.3, based on P.L. 2020, c.156, Sections 9 through 19 as amended by Sections 5 through 10 of P.L. 2021 c.160. To be eligible, a project must meet the definition of a redevelopment project and meet various eligibility criteria at application, which the Board ascertains when the project is presented to the Board, at the completion of remediation, when the developer must submit certifications evidencing satisfaction of the completion of remediation to DEP and to the Authority, and at project completion (if the project includes post-remediation redevelopment), when the developer must submit certifications evidencing satisfaction of BRIP requirements and conditions to EDA.

Redevelopment Project

Redevelopment project means a specific construction project or improvement undertaken, pursuant to the terms of a redevelopment agreement, by a developer within an area of land whereon a brownfield site is located. A redevelopment project may involve construction or improvement upon lands, buildings, improvements, or real and personal property, or any interest therein, including lands under water, riparian rights, space rights, and air rights, acquired, owned, developed, or redeveloped, constructed, reconstructed, rehabilitated, or improved. Redevelopment projects shall include a project that consists solely or primarily of remediation costs.

Brownfields

Brownfield site means any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant or on which there is contaminated building material. The BRIP definition includes contaminated building material so demolition, asbestos, and contaminated paint and wood will also be eligible for this program.

Eligible Activities

Eligible remediation costs include soil and groundwater investigation, site remediation, hazardous materials assessment and survey, hazardous materials or waste disposal, infrastructure remedial activities (fences, warning signs, site control, and drainage control), and building and structural issues for demolition, asbestos removal, PCB removal, contaminated wood, or contaminated paint removal. In addition, DEP site remediation program fees and DEP permit fees are eligible. Environmental assessment and investigation costs incurred up to 24 months prior to the application date are the only eligible pre-application costs for this program.

Ineligible costs include acquisition of the brownfield property, financing of the property, legal fees, incentive consultant fees, Authority fees and penalty or violation fees.

Only remediation costs are eligible for the tax credits for the BRIP. Subsequent redevelopment project costs, such as vertical construction costs that are not associated with remediation, are not considered eligible costs.

Economic Feasibility

The developer must demonstrate at time of application that without the tax credit, the redevelopment project is not economically feasible. Financial information on the redevelopment project, must include, but is not limited to, any Federal, State, or local financial assistance for the project, proposed terms of financing, purchase contract agreement for the brownfield site, projected reasonable and appropriate return on investment, and any other documentation needed to demonstrate status of economic feasibility.

Project Financing Gap (including the Reasonable and Appropriate Rate of Return)

Given that the BRIP is intended to incentivize redevelopment projects that would not be possible without the BRIP tax credits, the statute requires that a project must demonstrate the existence of a project financing gap in order to be eligible for tax credits under this Brownfields Redevelopment Incentive Program.

This means that the project must demonstrate that there is part of the total remediation cost, including reasonable and appropriate return on investment, that remains to be financed after all other sources of capital have been accounted for, including, but not limited to, developer contributed capital, which shall not be less than 20 percent of the total remediation cost, and investor or financial entity capital or loans for which the developer, after making all good faith efforts to raise additional capital, certifies that additional capital cannot be raised from other sources; provided, however, that for a redevelopment project located in a Government-Restricted municipality or Qualified Incentive tract, the developer contributed capital shall not be less than 10 percent of the total remediation cost.

The project financing gap analysis shall include, but not be limited to, an evaluation of the total cost of remediation, amount of capital sufficient to complete the remediation, and reasonable and appropriate return on investment.

The reasonable rate of return will be evaluated utilizing the Authority's current hurdle rate model, as it may be updated from time to time (Appendix B).

If within four years of completion of the redevelopment project, a developer sells, leases, or subleases the brownfield site then the Authority shall determine if the developer's rate of return exceeded the reasonable and appropriate rate of return determined at Board approval. If the project's final rate of return exceeds the reasonable and appropriate rate of return determined at Board approval, the Authority shall require the developer to pay up to 20 percent of the amount of the excess, and such funds shall be deposited in the State General Fund.

Project Equity

Equity means developer contributed capital that may consist of cash, deferred development fees, costs for project feasibility incurred within the 12 months prior to application, property value less any mortgages when the developer owns the project site, and any other investment by the developer in the project deemed acceptable by the Authority. Property value shall be valued at the lesser of the purchase price, provided the property was purchased pursuant to an arm's length transaction within 12 months of application; or the value as determined by a current appraisal acceptable to the Authority. Equity shall include Federal or local grants and tax credits. Equity shall not include State grants or tax credits.

Minimum Environmental and Sustainability Standards

Minimum environmental and sustainability standards mean standards established by the Authority in accordance with the green building manual prepared by the Commissioner of the Department of Community Affairs pursuant to section 1 of P.L. 2007, c. 132, regarding the use of renewable energy, energy-efficient technology, and non-renewable resources to reduce environmental degradation and encourage long-term cost reduction.

Staff is developing Minimum Environmental and Sustainability Standards (such as Demolition Recycling/Soil Reuse/Building) for this program. Developers will prepare a plan on how to implement the minimum environmental sustainability standards for their redevelopment project.

Project Scoring

The Authority has established scoring criteria for the evaluation of proposed redevelopment projects. These criteria will be used to set a minimum acceptable score for reviewed redevelopment projects and to allocate tax credits in circumstances where the requests for tax credits exceeds the annual maximum cap established by the statute.

As required by the statute, applicants must be reviewed through a competitive application process. Based on the statute imposed annual cap for the BRIP, as well as data reviewed from other states with brownfield tax credits programs, staff anticipate that there is a possibility for the program to be oversubscribed. If the volume of BRIP tax credit award requests is less than currently anticipated, resulting in the program to be undersubscribed for any particular year, a minimum score approach to assess whether a proposed redevelopment project is consistent with the objectives, goals, and principles of the BRIP will be utilized.

As this tax credit is issued at the time of completion of the remediation and a developer is not required to

include construction as part of the redevelopment project, no post-remediation redevelopment – whether included as part of the redevelopment project or a vision for the subsequent redevelopment project --will not be included in scoring a project, although site location designations and land use will be a factor.

Because the BRIP statute states that the following factors may be considered, the scoring matrix will evaluate a project's:

- Economic feasibility
- Benefit to the community
- Job creation and economic development
- Reduction of environmental or public health stressors in an overburdened community
- If the board of directors (or partners or members, as applicable) is diverse and representative of the community.

Please refer to Appendix C for the “Brownfields Redevelopment Incentive Program Scoring Criteria” for the specific proposed criteria the Authority will consider in its scoring evaluation of proposed redevelopment projects.

Definitions for “diverse” and “representative of the community” are included in the rules and are specific to this program. The program will consider diversity of the owners and board of directors (or partners or members if no board of directors exist). To receive full points for this category, the applicant will need to include identity self-certification forms, information on the percentage of ownership held by each diverse owner, and an explanation on how the current board members (or partners or members) are representative of the community. NJEDA’s Diversity Equity and Inclusion (DEI) Department, will evaluate and score applications for this category.

Post-Approval Process

After the Board has voted to approve a redevelopment project, the developer must sign an approval letter and subsequently a redevelopment agreement with the terms and conditions to receive the tax credit.

The developer shall not start any remediation or clean up at the site other than the activities disclosed at the time of approval except for work required due to an immediate environmental concern or other emergency that requires the developer to undertake remediation activities.

Upon completion of remediation, the developer must submit satisfactory evidence of the completion of the redevelopment project and satisfaction of the program eligibility requirements. The redevelopment project must demonstrate compliance with eligibility criteria including affirmative action, prevailing wage and certification of completion from the DEP. The developer must also provide the following evidence: (1) certification by the licensed site remediation professional of record for all site remediation work and an appropriate licensed or certified professional that other remedial work is complete, (2) applicant has not defaulted (3) current tax clearance certificate, (4) complied with the terms of the redevelopment agreement, and (5) complied with minimum environmental standards. If the redevelopment project includes redevelopment after remediation (for example, if the redevelopment project includes construction financed together with the remediation), the developer must also submit satisfactory evidence of the completion of the redevelopment project.

There are several scenarios where a tax credit award may be recaptured.

The Authority will recapture and/or the developer will forfeit the tax credit award if the developer has made a material misrepresentation, fails to submit reports on time (without extenuating circumstances or extensions), fails to meet building services and construction prevailing wage requirements, fails to meet sister agency review, and fails to meet other requirements as detailed in the proposed new rules.

In the event of recapture, the Authority shall pursue recapture from the developer, and not from the purchaser or assignee of the tax credit transfer certificate.

Rulemaking Process

The ERA authorizes the Authority to promulgate special adoption rules for the Brownfields Redevelopment Incentive Program, which will be effective immediately upon filing with the Office of Administrative Law and continue for 360 days. Additionally, staff requests approval for concurrent publication of the proposed rules, which will include a 60-day public comment process pursuant to the Administrative Procedure Act's rulemaking procedures.

Compliance with Executive Order 63

In accordance with the Executive Order 63 directive to ensure outreach efforts are made to the public and affected stakeholders for agency rulemaking, the Authority issued a news release advising the public that information on the Brownfields Redevelopment Incentive Program was available for review and of the opportunity to provide informal input.

The Authority staff convened two virtual public "Listening Sessions", which provided an overview of the Brownfields Redevelopment Incentive Program and the opportunity for the public feedback, on:

- Wednesday, September 7th, 2022, at 2:00 p.m.
- Thursday, September 8th, 2022, at 1:00 p.m.

Additionally, the public were able to submit written feedback through the NJEDA's Economic Recovery Act transparency website (www.njeda.com/economicrecoveryact) or through the newly established email account (BFTaxCredit@njeda.com) through September 15th, 2022.

Chief Compliance Officer Certification of Draft Rule Proposal

Pursuant to Section 101(a) of the ERA, the Chief Executive Officer (CEO) is required to appoint a Chief Compliance Officer (CCO) to, among other things, "review and certify that the provisions of program rules or regulations provide the Authority with adequate procedures to pursue the recapture of the value of an economic development incentive in the case of substantial noncompliance, fraud, or abuse by the economic development incentive recipient, and that program rules and regulations are sufficient to ensure against economic development incentive fraud, waste, and abuse."

Jignasa Desai-McCleary has been designated the CCO. In that capacity, Ms. Desai-McCleary has reviewed

the proposed rules and regulations for the Brownfields Redevelopment Incentive Program and is prepared to sign the certification, subject to the Board taking action to approve the same for submission to the New Jersey Office of Administrative Law for publication in an upcoming issue of the New Jersey Register.

Fees

The fee structure as outlined below is also included in the proposed new rules. Prior to establishing the proposed fee structure for this program, Authority staff conducted an internal review to estimate the likely administrative costs to the Authority to administer the Brownfields Redevelopment Incentive Program. This review considered areas cross- organizationally where the Brownfields Redevelopment Incentive Program may require staff time, and the estimated percentage of staff time that would be required.

Fees are determined on a tiered basis based on a project’s total cost of remediation as a reasonable proxy for the complexity of a project and, therefore, the administrative expense and staff time required to evaluate the application. The two tiers are those projects with total cost of remediation \$5 million and under, and those with total cost of remediation over \$5 million.

The proposed rules specify the following tiered fees for the Program:

Fee Type	<u>Project Size</u> Up to \$5MM	<u>Project Size</u> > \$5 MM
Application Fee	\$2,000	\$7,000
Approval Fee	\$5,000	\$15,000
Tax Credit Issuance Fee	\$5,000	\$15,000
Transfer/Pledge/Assignment Fee (initial request)	\$5,000	\$7,500
Transfer Fee/Pledge/Assignment (additional request)	\$2,500	\$2,500
Minor Modifications and Extensions that do not require Board approval	\$2,500	\$5,000
Major Modifications and Extensions which require Board Approval	\$5,000	\$10,000
Extensions that do not require Board approval	\$2,500	\$5,000
Extensions that do require Board approval	\$7,500	\$15,000

Extensions

Because brownfield remediations have a greater risk of schedule delays due to the inherent uncertainties that impact timing and because the statute does not impose a specific deadline on the completion of the redevelopment project, staff is requesting delegated authority for the CEO to approve up to four six-month extensions, consistent with the Authority's Delegation Policy, to various deadlines. Under this delegated authority, the CEO, and/or his subdelegates may approve up to four six-month extensions for the progress reports and annual reports, for the completion of the redevelopment project, and for submission of documents evidencing the completion of remediation and (for projects that include post-remediation redevelopment) the redevelopment project. Additional extension requests will be presented to the Board.

Additionally, staff is requesting the addition of this program to the existing incentive delegated authority for certain minor administrative changes and for extensions to conditions of approval.

Reports on Implementation of Program

On or before December 31, 2022, and every two years thereafter, a State college or university shall prepare a report on the implementation of BRIP which will include program data regarding the effectiveness of the tax credit awards in promoting the redevelopment of the brownfield properties. The report will include a description of each redevelopment project receiving a tax credit under the program, a detailed analysis of the consideration given in each redevelopment project to the factors set forth in sections 12 and 13 of P.L. 2020, c. 156, the return on investment for incentives awarded, the redevelopment projects and subsequent redevelopment project impact on the State's economy, and any other metrics the State college or university determines are relevant based upon national best practices. This report will be submitted to the Authority, Governor, and Legislature. The Authority will prepare a written response to the report which will be submitted to the Governor and Legislature.

Recommendation

The Members are asked to approve:

1. The attached special adopted new rules and concurrent proposed new rules for the new Brownfields Redevelopment Incentive Program and to authorize staff to (a) submit the special adopted new rules and concurrent proposed program rules for promulgation in the New Jersey Register and (b) submit the proposed program rules as final adopted rules for promulgation in the New Jersey Register if no formal comments are received; subject to final review and approval by the Office of the Attorney General and the Office of Administrative Law;
2. Delegation of authority to the CEO and/or his/her subdelegates in accordance with the Authority's Delegation Policy to:
 - to establish a date/s for the availability of the application and the date/s by when applications must be submitted on an annual basis;
 - to add the Brownfields Redevelopment Incentive Program to existing delegated authority for certain minor administrative changes and for extensions to conditions

- of approval; and
 - to approve up to four six-month extensions to the dates by when a progress report or an annual report is due, when the redevelopment project must be completed, and when the documents evidencing completion of remediation and the redevelopment project must be submitted.
3. The creation of the Brownfields Redevelopment Incentive Program, as initially authorized by the New Jersey Economic Recovery Act of 2020 (Sections 9 through 19 of P.L. 2020, c. 156 and later amended by Sections 5 through 10 of P.L. 2021 c.160), to incentivize developers of redevelopment projects located on brownfield sites for remediation costs by providing tax credits in an amount based on a percentage of the project's eligible costs, subject to final adopted rules.



Tim Sullivan, CEO

Prepared by: Elizabeth Limbrick

Attachments:

- Appendix A – Proposed New Rules – Brownfields Redevelopment Incentive
- Appendix B – Reasonable and Appropriate Return on Investment
- Appendix C – Brownfields Redevelopment Incentive Scoring Criteria