The Real Estate Finance Journal Vol. 36 No. 4 SPRING 2021

REFJ

The Real Estate Finance Journal

A THOMSON REUTERS PUBLICATION SPRING 2021

FROM THE EDITOR

Loan Purchases: Lenders and Investors Weathering the COVID-19 Economic Downturn to Find the Other Side of the Rainbow
Michael J. McCarthy, Peter David Ballance, and Albert M. Singer

Commercial Landlords (and Their Lenders) Beware: Bankruptcy Courts Are Shifting Risks to Lessors in Response to the Exigent Circumstances Brought on by COVID-19
Brett H. Miller, Mark S. Edelstein, and Erica J. Richards

LIBOR Remediation Raises Lien Priority and Title Insurance Questions
Emanuel Tsourounis II and Alan W. Lawrence

Corporate Transparency Act: New Beneficial Ownership Reporting Requirements for All Entities with U.S. Operations
Andrius R. Kontrimas, Mayling C. Blanco, Robert J. Kovacev, and Lacey Stevenson

Despite Limited Success for Housing Bills in the 2020 Legislative Session, 2021 Should Present Opportunities for Developers
Timothy M. Hutter and Spencer B. Kallick

Negotiating the Right Remedy in Commercial Real Estate Purchase Agreements
Larry N. Woodard

Consumer Financial Protection Bureau Issues "Seasoned Qualified Mortgage" Rule
Stephen Ornstein

Section 1031 Like-Kind Exchange Limitations: Final Regulations Released on "Real Property" Definition
Richard Shevak and Derek Weaver

Shifting from 20th Century Rigidity to 21st Century Agility in the Workplace
Chris Kane

New Jersey Enacts Significant Economic Development Legislation Targeting Businesses and Commercial Real Estate
Frank J. Vitolo and Anthony K. Lombardo

Complying with New Jersey's Upcoming Site Remediation Action Deadline
Alexa Richman-La Londe

Dropping Anchor in the (Safe) Harbor: Colorado "True Lender" Litigation Settles
Nancy R. Thomas and Crystal N. Kaldjob

Courts Resolve Wide Range of Title Issues in Recent Rulings
Michael J. Heller, David P. Leno, Peter P. McNamara, and Matthew V. Spero

THOMSON REUTERS

REFJ

The Real Estate Finance Journal

A THOMSON REUTERS PUBLICATION

Spring 2021

FROM THE EDITOR 3

Loan Purchases: Lenders and Investors Weathering the COVID-19 Economic Downturn to Find the Other Side of the Rainbow
Michael J. McCarthy, Peter David Ballance, and Albert M. Singer 7

Commercial Landlords (and Their Lenders) Beware: Bankruptcy Courts Are Shifting Risks to Lessors in Response to the Exigent Circumstances Brought on by COVID-19
Brett H. Miller, Mark S. Edelstein, and Erica J. Richards 11

LIBOR Remediation Raises Lien Priority and Title Insurance Questions
Emanuel Tsourounis II and Alan W. Lawrence 17

Corporate Transparency Act: New Beneficial Ownership Reporting Requirements for All Entities with U.S. Operations
Andrius R. Kontrimas, Mayling C. Blanco, Robert J. Kovacev, and Lacey Stevenson 21

Despite Limited Success for Housing Bills in the 2020 Legislative Session, 2021 Should Present Opportunities for Developers
Timothy M. Hutter and Spencer B. Kallick 25

Negotiating the Right Remedy in Commercial Real Estate Purchase Agreements
Larry N. Woodard 29

Consumer Financial Protection Bureau Issues "Seasoned Qualified Mortgage" Rule
Stephen Ornstein 53

Section 1031 Like-Kind Exchange Limitations: Final Regulations Released on "Real Property" Definition
Richard Shevak and Derek Weaver 59

Shifting from 20th Century Rigidity to 21st Century Agility in the Workplace
Chris Kane 63

New Jersey Enacts Significant Economic Development Legislation Targeting Businesses and Commercial Real Estate
Frank J. Vitolo and Anthony K. Lombardo 67

Complying with New Jersey's Upcoming Site Remediation Action Deadline
Alexa Richman-La Londe 73

Dropping Anchor in the (Safe) Harbor: Colorado "True Lender" Litigation Settles
Nancy R. Thomas and Crystal N. Kaldjob 77

Courts Resolve Wide Range of Title Issues in Recent Rulings
Michael J. Heller, David P. Leno, Peter P. McNamara, and Matthew V. Spero 81

Mat #42576055

THE REAL ESTATE FINANCE JOURNAL (ISSN 0898-0209) is published quarterly by Thomson Reuters, 610 Opperman Drive, Eagan, MN 55123-1396.

Editorial Offices: Thomson Reuters, 50 Broad Street East, Rochester, NY 14694. All editorial correspondence, manuscripts, etc., should be sent to this address. Although the utmost care will be given material submitted, we cannot accept responsibility for unsolicited manuscripts.

Subscription: For subscription information or for customer service, call 1-800-328-4880. Periodicals postage paid at St. Paul, MN.

New Jersey Enacts Significant Economic Development Legislation Targeting Businesses and Commercial Real Estate

*Frank J. Vitolo and Anthony K. Lombardo**

The authors discuss a new law in New Jersey that provides significant financial incentives to those in the commercial real estate sector - specifically, developers, investors, institutions, and others that do business in New Jersey.

The New Jersey Legislature has passed a 219-page bill known as the New Jersey Economic Recovery Act of 2020 (the "Act") that Governor Phil Murphy signed into law. The Act is being touted as an economic "shot in the arm" for a state crippled by the COVID-19 pandemic.

The Act provides significant financial incentives to those in the commercial real estate sector - specifically, developers, investors, institutions, and others that do business in New Jersey. The Act comes over a year after expiration of the Grow NJ/ERG legislation and would be a departure from the Murphy Administration's apparent ambivalence toward such programs.

Below is a summary of the Act's provisions as they relate to commercial real estate development and investment.

Historic Property Reinvestment Act

The Historic Property Reinvestment Act ("HPRA") was created to encourage the preservation and redevelopment of historically significant buildings throughout the state. Two types of properties qualify for the program - a "qualified property" and/or a "transformative project."

A qualified property is a property that is used in a trade or to produce rental income and is either registered in certain historic place registries or located within historic preservation districts (among other criteria).

A transformative project is a property:

- Used in a trade or to produce rental income, not including a residential property;
- Whose rehabilitation would substantially

*Frank J. Vitolo, a partner with Riker Danzig Scherer Hyland & Perretti LLP, concentrates his practice in litigation, products liability, land use, aviation, school law, and government affairs. Anthony K. Lombardo is an associate in the firm's Litigation and Real Estate Groups. The authors may be contacted at fvitolo@riker.com and alombardo@riker.com, respectively.

increase business activity in the surrounding areas;

- Listed in certain enumerated historic place registries;
- Located within a one-half mile radius of the center of a transit area; and
- In a "first class" city as defined by New Jersey law.

To qualify, a business must first make a "successful application" to the New Jersey Economic Development Authority ("NJDEA") and commit to pay the prevailing wage. Upon satisfaction of both conditions, the business will be entitled to certain tax credits for up to 40 percent of the cost of rehabilitation of a qualified property or transformative project, if the cost of rehabilitation is not less than the greater of the adjusted basis of the structure of the qualified property or transformative project used for federal income tax purposes as of the beginning of the business entity's selected rehabilitation period, or $5,000.

Moreover, a rehabilitation project is eligible for a tax credit only if the business entity demonstrates at the time of the application that, without the tax credit, the rehabilitation project is not economically feasible, and a project financing gap exists.

Tax credits are capped at $50 million annually for six years under the HPRA.

Brownfields Redevelopment Incentive Program Act

The Brownfields Redevelopment Incentive Program Act ("BRIPA") is a compliment to the current brownfield clean-up programs. The BRIPA will, by issuing tax credits, compensate developers of redevelopment projects located on brownfield sites for remediation costs. A developer seeking to participate in the Program must first submit an application to the NJDEA for tax credit incentives.

The project will be eligible only if, at the time of application:

- The developer has not commenced any remediation or clean up at the site of the redevelopment project outside of preliminary assessments, but intends to remediate and redevelop the site immediately upon approval of the tax credit (subject to certain exceptions under the Act);
- The project is located on a brownfield site;
- Without the tax credit, the redevelopment project is not economically feasible;
- A project financing gap exists;
- The developer submits a letter of support from the local municipal body where the project is located; and
- The developer agrees to pay the prevailing wage.

Tax credits under the BRIPA are capped at $50 million annually for six years.

Food Desert Relief Act

The Food Desert Relief Act ("FDRA") provides tax credits to incentivize businesses and developers to construct and retain supermarkets and grocery stores in underserved "food desert" communities. Under the FDRA, the NJDEA, in consultation with other State agencies, will designate a maximum of 50 New

Jersey "food desert" communities that are in need of a supermarket or grocery store.

To receive a tax credit under FDRA, a "taxpayer" must submit an application to the NJDEA which, at a minimum, includes a commitment to accept certain nutrition assistance programs (such as SNAP and WIC). Following approval of an application, the NJDEA may award tax credits to an eligible taxpayer that develops and opens for business to the public the first or second supermarket or grocery store in a designated food desert community, or owns and operates the first or second supermarket or grocery store in a designated food desert community.

The FDRA empowers the NJDEA to award tax credits to qualifying supermarkets, grocery stores, mid-sized food retailers, and small food retailers. Tax credits under the FDRA are capped at $40 million annually for six years.

New Jersey Community-Anchored Development Act

The New Jersey Community-Anchored Development Act ("NJCADA") provides tax credits to certain "anchor" institutions in New Jersey by incentivizing investment in them and their continued development in select geographical areas. The NJCADA seeks to "overcome cost-of-occupancy differences between New Jersey and less expensive options" by allowing anchor institutions to partner with business entities for real estate development projects that may be awarded tax credit incentives.

An "anchor institution" is defined as a governmental entity or nonprofit entity incorporated pursuant to New Jersey law and having a primary mission that aligns with the NJDEA. Examples include health care systems, public/private research universities, public colleges, cultural scientific, research, and or philanthropic institutions, certain nonprofits and governmental/community development entities.

Under the NJCADA, the NJDEA will award tax credits to an anchor institution, or "partner anchor institution," for the investment in, or establishment of a "Community Anchored Project." A Community Anchored Project is a capital project that is located in an area designated as a New Jersey State opportunity zone, or in a "distressed" municipality meeting a certain threshold distress score as defined in the Act. The project must also result in a capital investment of at least $10,000,000 in a New Jersey opportunity zone or be primarily designed for economic expansion of a targeted industry in the state.

The NJDEA may award tax credits to qualifying anchor institutions, which in turn may convert the credit into an investment in a community-anchored project, on the condition that the anchor institutions either sell and transfer the tax credit, or adopt a plan to use the tax credits to finance the completion of the community-anchored project. The proceeds from the tax sale or financing must be used to make an equity investment in or to provide a loan or other financial support for the community-anchored project to attract tenants, owners, investors, lenders, partners, collaborators, and other beneficial parties to the community-anchored project.

Tax credits under the NJCADA are capped at $200 million annually for six years.

New Jersey Aspire Program Act

The New Jersey Aspire Program Act ("Aspire

Program") provides incentive awards to reimburse developers for gap financing costs on development projects that would "not be economically feasible" without such reimbursement. The Aspire Program targets commercial and residential projects that focus on mixed-use, transit-oriented development and affordable housing in distressed communities.

To be eligible to receive an incentive award for a redevelopment project, a developer must demonstrate, among other things, that at the time of the application to the NJDEA:

- Without the incentive award, the redevelopment project is not economically feasible;
- A project financing gap exists, or the authority determines that the redevelopment project will generate a below market rate of return;
- The redevelopment project is located in the incentive area;
- Except for demolition and site remediation activities, the developer has not commenced any construction at the site of the redevelopment project prior to submitting an application, with certain exceptions;
- The project complies with certain environmental, sustainability, and affirmative action requirements;
- Workers on the project will be paid prevailing wages;
- A certificate of occupancy will be issued within four years from execution of the incentive agreement;
- Developer is in compliance with certain tax filing requirements; and
- Developer is no more than 24 months "in arrears" at time of application.

The Aspire Program contains additional requirements depending on whether the project is commercial or residential. For example, for a commercial project to qualify for an incentive award, the developer must demonstrate that the increase in State revenues realized from the completed commercial project are in excess of the amount necessary to reimburse the developer for its project financing gap, and the developer has an equity participation of at least 20 percent of the total project cost.

For a residential project to qualify for an incentive award, the project must have a total project cost of at least:

- $17,500,000, if the project is located in a municipality with a population greater than 200,000;
- $10,000,000, if the project is located in a municipality with a population less than 200,000; or
- $5,000,000 if the project is in a qualified incentive tract or government-restricted municipality.

Additionally, for newly-constructed residential projects, at least 20 percent, but not more than 50 percent, of the residential units must be constructed for low and moderate household incomes, subject to certain exceptions.

The Emerge Program Act

The Emerge Program Act ("Emerge Program") provides tax credits to encourage economic development, job creation and the retention of significant numbers of jobs in imminent danger of leaving the state. The Emerge Program specifically targets businesses that build, acquire, or lease space in the state with plans to create or retain full-time jobs.

To be eligible for a tax credit under the Emerge Program, a business's chief executive officer, or equivalent officer, must demonstrate to the NJDEA at the time of application that, among other things:

- The business will make, acquire, or lease a capital investment at the qualified business facility in a certain amount;
- The business will create or retain new and retained full-time jobs at the qualified business facility in a certain amount;
- The qualified business facility is located in a qualified incentive area;
- The award of tax credits will be a material factor in the business's decision to create or retain the number of new and retained full-time jobs set forth in its application;
- The award of tax credits, the capital investment resultant from the award, and the resultant creation and retention of new and retained full-time jobs will yield a net positive benefit to the state equaling at least 400 percent of the requested tax credit allocation amount, subject to other conditions and exceptions (which may reduce yield requirement to 200 percent);
- Minimum environmental, sustainability, and affirmative action standards are met at the business facility; and
- Prevailing wage requirements are satisfied, subject to certain exceptions.

HPRA, BRIPA, FDRA, NJCADA, the Aspire Program, and the Emerge Program also contain provisions for compliance and oversight by the NJDEA, labor and wage requirements, and other criteria that are specific to each act or program.