SPECIAL ADOPTION

OTHER AGENCIES

(a)

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

Authority Assistance Programs
Food Desert Relief Tax Credit Program

Specially Adopted and Concurrently Proposed New Rules: N.J.A.C. 19:31-28

Specially Adopted and Concurrently Proposed New Rules Authorized: April 27, 2023, by the New Jersey Economic Development Authority, Tim Sullivan, Chief Executive Officer.
Filed: May 4, 2023, as R.2023 d.072.

Authority: P.L. 2020, c. 156; P.L. 2021, c. 160; and P.L. 2022, c. 47.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Concurrent Proposal Number: PRN 2023-053.

Effective Date: May 4, 2023.
Expiration Date: October 25, 2024.

Submit written comments by August 4, 2023, to:

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Take notice that the rules in this subchapter are specially adopted by the New Jersey Economic Development Authority ("NJEDA" or "Authority") and immediately effective to implement the provisions of the New Jersey Economic Recovery Act of 2020 (ERA), establishing the New Jersey Food Desert Relief Act ("FDRA" or "Act"), sections 35 through 42 of P.L. 2020, c. 156, as amended by P.L. 2021, c. 160, and P.L. 2022, c. 47 (N.J.S.A. 34:1B-303 et. seq.). Pursuant to the Act, the Authority is authorized to administer several programs to increase access to nutritious foods in food desert communities. This rulemaking is promulgated specifically for the administration of the Food Desert Relief Tax Credit Program (Program) to encourage the development and operation of supermarkets and grocery stores through the provision of tax credit awards.

The new rules became effective on May 4, 2023, upon acceptance for filing by the Office of Administrative Law. The specially adopted new rules shall be effective for a period not to exceed 360 days from the date of filing, that is, until April 28, 2024. N.J.S.A. 34:1B-309.

Concurrently, the provisions of the new rules are being proposed for readoption in accordance with the normal rulemaking requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. As the NJEDA has filed this notice of readoption before April 28, 2024, the expiration date is extended 180 days to October 25, 2024, pursuant to N.J.S.A. 52:14B-5.1.c. The concurrently proposed new rules will become effective and permanent upon acceptance for filing by the Office of Administrative Law (see N.J.A.C. 1:30-6.4(g)) if filed on or before June 5, 2024 (the rules would expire on October 25, 2024, however, a notice of proposal is only valid for one year from the date of publication, pursuant to N.J.A.C. 1:30-6.4(g)).

The specially adopted and concurrently proposed new rules follows:

Summary

As set forth at proposed N.J.A.C. 19:31-28, the Food Desert Relief Tax Credit Program is a program to provide tax credits to developers and operators of supermarkets and grocery stores located in NJEDA-designated, food desert communities (FDCs) for a portion of project costs or initial operating costs, in accordance with N.J.S.A. 34:1B-306.

The Program focuses on attracting and retaining supermarkets and grocery stores as a component of community development, strengthening food security, and increasing access to nutritious foods. As supermarket developers and operators are both needed to attract and retain supermarkets and grocery stores in New Jersey's food deserts, the FDRA establishes two types of tax credits:

- A Financing Gap Tax Credit for developers provides up to 40 percent of project costs for the first new supermarket in an FDC, capped at the project financing gap, and up to 20 percent of project costs for the second new supermarket in an FDC, capped at the project financing gap. This includes a reasonable and appropriate return on investment, based on at least 20 percent of capital contributed by the developer (equity). Applicants for the financing gap tax credit may be eligible for a higher cap on their tax credit amount if the supermarket or grocery store has an agreement. A developer approved for a Financing Gap Tax Credit can take the tax credit over a period of four years (the eligibility period) and must remain in compliance with the Program for an additional three years (the commitment period).
- An Initial Operating Cost Tax Credit for supermarket operators provides for the lower of either the initial operating shortfall or 100 percent of initial operating costs for the first new supermarket in an FDC, and the lower of either the initial operating shortfall or 50 percent of initial operating costs for the second new supermarket in an FDC. An operator approved for an Initial Operating Cost Tax Credit can take the tax credit over a period of up to three years (the eligibility period) and must remain in compliance with the Program for an additional four years (the commitment period).

To be eligible for the Program, a project must meet various eligibility criteria at the time of application, including, but not limited to:

- Demonstrating that the project is not economically feasible without the incentive award;
- Demonstrating that the new supermarket or grocery store will operate on a full-time basis during both the eligibility period and commitment period;
- Demonstrating that the new supermarket or grocery store will be economically and commercially viable by the last year of the commitment period;
- That the project is located in an NJEDA-designated food desert community;
- Commitment to accept benefits from Federal nutrition assistance programs, including, but not limited to: the Supplemental Nutrition Assistance Program (SNAP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC);
- Commitment to devote at least 10 percent of retail space to fresh and/or frozen fruits and vegetables; and
- Commitment to hold a community listening session at least once per year.

In addition to the eligibility requirements, the developer and the operator must also be in substantial good standing with the Department of Labor and Workforce Development, the Department of Environmental Protection, and the Division of Taxation within the Department of the Treasury or have a corrective action plan. The Program rules also require that all projects that receive Food Desert Relief Tax Credits must comply with the EDA's prevailing wage requirements at P.L. 2007, c. 245 (N.J.S.A. 34:1B-5.1) and N.J.A.C. 19:30-4. Applications for this Program will be accepted on a rolling basis.

The new rules implement the Food Desert Relief Tax Credit Program and do not establish the auctions, grants, and technical assistance programs created pursuant to N.J.S.A. 34:1B-306(d), 306(e), and 306(f).

The following summarizes the contents of each section of the new rules implementing the Food Desert Relief Tax Credit Program.

N.J.A.C. 19:31-28.1 sets forth the applicability and scope of the rules pursuant to the provisions of the New Jersey Economic Recovery Act of 2020 establishing the New Jersey Food Desert Relief Act of 2020 ("FDRA" or "Act"), sections 35 through 42 of P.L. 2020, c. 156, as amended pursuant to P.L. 2021, c. 160, and P.L. 2022, c. 47, establishing the New Jersey Food Desert Relief Tax Credit Program (N.J.S.A. 34:1B-303 et. seq.).

N.J.A.C. 19:31-28.2 sets forth the definitions used in this subchapter.

N.J.A.C. 19:31-28.3 sets forth the eligibility criteria necessary for an applicant to be eligible to receive an incentive award.

N.J.A.C. 19:31-28.4 sets forth the application submission requirements for the Financing Gap Tax Credit and/or the Operating Tax Credit. The requirements include, but are not limited to, a description of the project, the breakdown of retail space (for example, a planogram), the applicant's experience with similar project(s), a copy of a market and/or feasibility study, the projected number of permanent part-time and full-time employees at the project, a list and status of all required permits and zoning board approvals, and a letter evidencing support for the project from the governing body of the municipality or municipalities in which the project is located.

N.J.A.C. 19:31-28.5 sets forth the Program fees.

N.J.A.C. 19:31-28.6 sets forth the requirements of both the financing gap and the initial operating shortfall tax credits. For an application for a Financing Gap Tax Credit, the Authority shall review the proposed total development cost and evaluate and validate the project financing gap estimated by each applicant applying for an incentive award. For an application for an Initial Operating Cost Tax Credit, the Authority shall review the proposed initial operating costs, and evaluate and validate the initial operating shortfall estimated by each applicant applying for an incentive award.

N.J.A.C. 19:31-28.7 sets forth the process of approving completed applications and tax credit amounts. The Authority's review will determine whether the applicant: complies with the eligibility criteria; satisfies the submission requirements; and provides adequate information for the subject application. Provided that the requirements are satisfied, the Authority shall allocate incentive awards to projects until the available tax credits are exhausted. If insufficient funding exists to fully fund all eligible projects, a project may be offered partial funding.

N.J.A.C. 19:31-28.8 sets forth the requirements of the approval letter and the incentive award agreement. Upon receipt of a recommendation from the Authority staff on the project, the Authority Board shall determine whether or not to approve the application, the maximum amount of tax credits, and the maximum percentage amount of allowed tax credits. The Authority Board's award of the credits will be subject to conditions subsequent that must be met in order to retain the credits. An approval letter setting forth the conditions subsequent will be sent to the applicant and any co-applicant. Following satisfaction of the requirements for the execution of an incentive award agreement, the Authority shall enter into an incentive award agreement with the applicant and any co-applicant. The award of tax credits shall be conditioned on the applicant's and any co-applicant's compliance with the requirements of the agreement.

N.J.A.C. 19:31-28.9 sets forth the reporting requirements, including the annual report. An applicant approved for an incentive award and enters an incentive award agreement shall submit, annually, commencing in the privilege period for which the incentive award is issued and for the remainder of the commitment period, a report. Failure to timely submit the report, absent extenuating circumstances and the written approval of the Authority, shall result in a forfeiture of the tax credits for that privilege period.

N.J.A.C. 19:31-28.10 sets forth the basis for reduction, forfeiture, and recapture of tax credits, such as, but not limited to, if, during the eligibility period, the applicant ceases to operate the project as a supermarket or grocery store, the supermarket or grocery store ceases to operate on a full-time basis, the project ceases to meet the program criteria set forth at N.J.A.C. 19:31-28.3(a)7, and/or the requirements at N.J.A.C. 19:31-28.10(a) through (j) are not satisfied, the applicant and any co-applicant may forfeit, or be subject to recapture for, all or some of the incentive award.

N.J.A.C. 19:31-28.11 sets forth the application process for tax credit transfer certificate. An applicant or co-applicant may apply to the Director of the Division of Taxation in the Department of the Treasury (Director) and the Chief Executive Officer of the Authority for a tax credit transfer certificate, covering one or more years, in lieu of the applicant or co-applicant being allowed any amount of the credit against the tax liability of the applicant. The Authority shall publish, on its Internet website, information concerning each tax credit transfer certificate approved by the Authority and the Director pursuant to this section.

N.J.A.C. 19:31-28.12 sets forth the process of assignment of rights of an incentive award agreement. An applicant who has entered into an incentive award agreement may, upon notice to and written consent of the Authority and State Treasurer, pledge, assign, transfer, or sell any or all of its right, title, and interest in, and to, the incentive award agreement and the incentive award payable pursuant to the incentive award agreement, and the right to receive the incentive award, along with the rights and remedies provided to the applicant pursuant to the incentive award agreement.

N.J.A.C. 19:31-28.13 sets forth both the affirmative action and prevailing wage requirements of the Program. For a Financing Gap Tax Credit, the Authority's affirmative action requirements will apply to the project, including, but not limited to, construction contracts for work performed before the application and after May 4, 2023, the effective date of this subchapter, and included in the project cost. For an initial operating cost tax credit, the Authority's affirmative action requirements and the prevailing wage requirements will apply to the project, including, but not limited to, construction contracts for work performed after the application is approved and construction contracts for work performed after the date of the application if included in the initial operating shortfall.

N.J.A.C. 19:31-28.14 sets forth the appeals process of the Program. An applicant may appeal the Board's action by submitting, in writing, to the Authority, an explanation as to how the applicant has met the Program criteria. Such appeals are not contested cases subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq.; and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

N.J.A.C. 19:31-28.15 sets forth the statutory requirement for the Authority to submit annual reports regarding the effectiveness of the Program to the Governor, the State Treasurer, and the Legislature.

N.J.A.C. 19:31-28.16 sets forth the severability of this subchapter.

The NJEDA has provided a 60-day comment period on this notice of concurrent proposal, therefore, this notice is excepted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The specially adopted and concurrently proposed new rules, which establish the Food Desert Relief Tax Credit Program to encourage investment into development and operation of supermarket and grocery stores in food desert communities, are intended to have a positive social impact on the State. The development of supermarkets and grocery stores in communities is a critical component of smart development that provides multiple social benefits, including increasing access to fresh and nutritious food. This leads to healthier communities and reduces the time that residents spend traveling outside their community for groceries. A September 2022 Feeding America study found that one in 13 New Jerseyans, including one in 11 children, struggle with hunger. Additionally, the rate of food insecurity among Black and Latino residents is even more pronounced than that of White residents—17 percent versus three percent.

The Food Desert Relief Tax Credit Program is primarily focused on community development, and the development of supermarkets and grocery stores, thereby making a positive impact on neighborhoods and communities.

Economic Impact

The specially adopted and concurrently proposed new Food Desert Relief Tax Credit Program rules are intended to bolster the State's economy by stimulating new high-quality economic development. The Food Desert Relief Tax Credit Program, one of several community development tools in the New Jersey Economic Recovery Act of 2020, encourages smart, targeted investments in communities in the form of private capital investment that is, by definition, a durable and sustainable investment in the State's economic infrastructure. This Program will provide investments focused in supporting the development and operation of supermarkets or grocery stores in food desert communities. A 2017 study from the Food Industry Association noted that the overall economic impact of New Jersey supermarkets was in excess of $30 billion. The resulting investments will support long-term economic benefits after tax credits have been fully utilized, in the form of increased access to healthy, nutritious foods in food desert communities.

Federal Standards Statement

A Federal standards analysis is not required because the new rules are not subject to any Federal requirements or standards.

Jobs Impact

The NJEDA anticipates that the specially adopted and concurrently proposed Food Desert Relief Tax Credit Program rules will incentivize an indeterminate amount of increased job creation throughout New Jersey immediately and continuing throughout the operation of supported projects. With the core focus of encouraging investment in the development and operation of supermarkets or grocery stores in food desert communities, the Food Desert Relief Tax Credit Program will result in job creation needed to build and support projects approved thereunder. This includes the creation of jobs subject to prevailing wage rates needed to perform construction services on projects, as well as permanent full-time jobs tied to the completed project. In 2017, the supermarket industry in New Jersey employed over 85,000 workers, an average of about 34 per store, according to U.S. Census data. Prior to implementation, it is not possible to accurately forecast the number of jobs that will be supported by the Food Desert Relief Program; however, the proposed new rules provide transparency measures, including annual reports, to ensure regular reporting of the number of jobs created.

Agriculture Industry Impact

The specially adopted and concurrently proposed new rules will have minimal impact on the agriculture industry in New Jersey. The impacts to the agricultural industry would be related to food items bought and subsequently offered for sale at a supermarket or grocery store participating in the Food Desert Relief Tax Credit Program.

Regulatory Flexibility Analysis

The specially adopted and concurrently proposed new rules may impose reporting, recordkeeping, or other compliance requirements on small business, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Generally, a small business would be required to comply with the NJEDA's standard online application process; however, any costs will be minimal and offset by the amount of financial assistance received. The proposed fees for the Program are intended to ensure a source of necessary administrative fee revenue for NJEDA to more fully cover the costs of the Program. The specially adopted and concurrently proposed new rules provide features that allow approved applicants to use third-party, independent certified public accounting firms to support the tax credit certification process. This is meant to improve regulatory compliance processes for all businesses and the Authority. There are no reporting, recordkeeping, or compliance requirements as a result of the specially adopted and concurrently proposed new rules beyond those discussed in the Summary above.

Housing Affordability Impact Analysis

The specially adopted and concurrently proposed new rules may have indirect effects on the affordability of housing in New Jersey and may evoke a change in the average costs associated with housing units, including multi-family rental housing and for-sale housing in the State, as the rules pertain to tax credit incentives of the Food Desert Relief Tax Credit Program.

Smart Growth Development Impact Analysis

The specially adopted and concurrently proposed new rules will have an insignificant impact on smart growth and there is an extreme unlikelihood that the proposed amendments and new rules would evoke a change in housing production in Planning Areas 1 or 2, or in designated centers, under the State Development and Redevelopment Plan because the specially adopted and concurrently proposed new rules pertain to tax credit incentives of the Food Desert Relief Tax Credit Program.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The specially adopted and concurrently proposed new rules will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning juveniles and adults in the State. Accordingly, no further analysis is required.

Full text of the specially adopted and concurrently proposed new rules follows:

SUBCHAPTER 28. FOOD DESERT RELIEF TAX CREDIT PROGRAM

19:31-28.1 Applicability and scope

The rules in this subchapter are promulgated by the New Jersey Economic Development Authority to implement the provisions of the New Jersey Food Desert Relief Act (Act) (N.J.S.A. 34:1B-303 et seq.). Pursuant to the Act, the Authority is authorized to administer several programs to increase access to nutritious foods in food desert communities. The rules are promulgated for the administration of a tax credit program to encourage the development and operation of supermarkets and grocery stores through the provision of tax credit awards. The Authority Board may approve the award of a tax credit award to an applicant upon application to the Authority pursuant to N.J.S.A. 34:1B-306. The value of all tax credits approved by the Authority pursuant to the Act shall be subject to the limitations set forth at N.J.S.A. 34:1B-362.

19:31-28.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Act" means the New Jersey Food Desert Relief Act, N.J.S.A. 34:1B-303 through 310.

"Affiliate" means an entity that directly or indirectly controls, is under common control with, or is controlled by, the applicant. Control exists in all cases in which the entity is a member of a controlled group of corporations, as defined pursuant to section 1563 of the Internal Revenue Code of 1986 (26 U.S.C. § 1563), or the entity is an organization in a group of organizations under common control, as defined pursuant to subsection (c) of section 414 of the Internal Revenue Code of 1986 (26 U.S.C. § 414).

"Applicant" means a person who enters, or proposes to enter, into an incentive award agreement pursuant to the provisions of the Act pursuant to N.J.S.A. 34:1B-307, including, but not limited to, a lender that completes a project, operates a project, or completes and operates a project.

"Applicant contributed capital" or "equity" means capital contributed by the applicant 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 applicant owns the project site, the cost of infrastructure improvements in the public right-of-way, and any other investment by the applicant in the project deemed acceptable by the Authority. Equity shall include Federal or local grants and proceeds from the sale of Federal or local tax credits, including, but not limited to, the Historic Rehabilitation Tax Credit, 26 U.S.C. § 47, and New Market Tax Credit, 26 U.S.C. § 45D. Equity shall not include State grants or tax credits or proceeds from redevelopment area bonds. If the supermarket or grocery store is a component of a facility, the equity contributed by the applicant to the development of the facility shall be considered as equity for the project only to the extent of the supermarket or grocery store's pro-rata share, based on square footage, of the facility.

"Authority" means the New Jersey Economic Development Authority, as established at section 4 of P.L. 1974, c. 80 (N.J.S.A. 34:1B-4).

"Board" means the Board of the New Jersey Economic Development Authority, as established at section 4 of P.L. 1974, c. 80 (N.J.S.A. 34:1B-4).

"Cash flow" means the profit or loss that an investment property earns from rent, deposits, and other fees after financial obligations, such as debt, maintenance, government payments, and other expenses, have been paid. For purposes of cash flow, government payments shall not include, among other things, payments that are the result of a violation or a settlement of a violation or any payment that is not reasonable and customary, as determined by the Authority.

"Commitment period" means a period that commences after the eligibility period. This period together with the eligibility period equals seven years.

"Co-applicant" means an entity that:

1. Is non-profit for taxation purposes pursuant to the provisions of section 501(c)3 of the Internal Revenue Code (26 U.S.C. § 501);

2. Contributes capital, real property, or services related to the project that directly affect and serve the anticipated customers or directly support the project or operations of the supermarket or grocery store; and

3. Enters into a participation agreement with the applicant that specifies the co-applicant's participation in the project.

"Director" means the Director of the Division of Taxation in the Department of the Treasury.

"Eligibility period" means the period of four years for a financing gap tax credit award and up to three years for an initial operating cost tax credit award during which an applicant or a co-applicant, if applicable, may claim a tax credit pursuant to the Program.

"Financing gap tax credit" means the tax credit awarded pursuant to N.J.A.C. 19:31-28.7 to mitigate a project financing gap.

"First or second new supermarket or grocery store" means the first and second new supermarket or grocery store within each food desert community to be approved for tax credits pursuant to the Program by the Authority, except that a supermarket or grocery store may lose the designation of first or second new supermarket or grocery store if the project does not meet milestones designated by the Authority in a timely manner, as determined by the Authority.

"Food desert community" means a physically contiguous area in the State in which residents have limited access to nutritious foods, such as fresh fruit and vegetables, and that has been designated as a food desert community pursuant to N.J.S.A. 34:1B-306, a list of which is located at https://www.njeda.gov.

"Incentive award" means an award of tax credits to an applicant or a co-applicant, if applicable, to reimburse an applicant or a co-applicant, if applicable, for all or a portion of the project financing gap or initial operating shortfall pursuant to the provisions of the Act and this subchapter.

"Incentive award agreement" means the contract executed between an applicant, any co-applicant, if applicable, and the Authority pursuant to N.J.S.A. 34:1B-307, which sets forth the terms and conditions under which the applicant and co-applicant, if applicable, shall receive the incentive award.

"Infrastructure improvements in the public right-of-way" means public structures or improvements, including public electric vehicle charging stations, located in the public right-of-way that are located within a project area, and public utilities such as water, sewer, electric, and gas, either of which are dedicated to or owned by a governmental body or agency upon completion of the improvement, or any required payment in lieu of the structures, improvements, or projects, or any costs of remediation associated with the structures, improvements, or projects, and that are determined by the Authority, in consultation with applicable State agencies, to be consistent with and in furtherance of State public infrastructure objectives and initiatives.

"Initial operating costs" means expenditures by the applicant for the operation of a first or second new supermarket or grocery store within the first three years after the opening of the supermarket or grocery store for business to the public, but within a standard range based upon industry standards, as determined by the Authority. Initial operating costs shall not include inventory, incentive consultant fees, or Authority fees. Initial operating costs may include expenditures for the operation of a first or second new supermarket or grocery store incurred within one month prior to the opening of the supermarket or grocery store for business to the public. Initial operating costs may additionally include expenditures by an affiliate of the applicant for costs incurred at the site of the project.

"Initial operating cost tax credit" means the tax credit awarded pursuant to N.J.A.C. 19:31-28.8 to mitigate the initial operating costs of a new supermarket or grocery store.

"Initial operating shortfall" means, on an annual basis, initial operating costs, including a net operating profit acceptable to the Authority, reduced by the income to the applicant associated with the operation of the new supermarket or grocery store after cost of goods sold, including, but not limited to, sales income and income from the supermarket or grocery store tenants, sub-tenant, and licensees. If the result is negative, the initial operating shortfall shall be $0.00.

"Labor harmony agreement" means an agreement between a business that serves as the owner or operator of a supermarket or grocery store and one or more labor organizations, which requires, for the duration of the agreement: that any participating labor organization and its members agree to refrain from picketing, work stoppages, boycotts, or other economic interference against the business; and that the business agrees to maintain a neutral posture with respect to efforts of any participating labor organization to represent employees at a supermarket or grocery store, agrees to permit the labor organization to have access to the employees, and agrees to guarantee to the labor organization the right to obtain recognition as the exclusive collective bargaining representatives of the employees at a supermarket or grocery store by demonstrating to the New Jersey State Board of Mediation, Division of Private Employment Dispute Settlement, or a mutually agreed-upon, neutral, third-party, that a majority of workers in the unit have shown their preference for the labor organization to be their representative by signing authorization cards indicating that preference. The labor organization or organizations shall be from a list of labor organizations that have requested to be on the list and that the Commissioner of Labor and Workforce Development has determined represent substantial numbers of supermarket or grocery store employees in the State.

"Net operating profit" means pre-income tax operating profit.

"New supermarket or grocery store" means a supermarket or grocery store that commenced new construction of the building or commenced rehabilitation of at least 75 percent of its square footage, after January 7, 2021 (the effective date of the Act). For purposes of this definition, rehabilitation of at least 75 percent of the square footage of a supermarket or grocery store means the repair or replacement of two or more major systems, including, but not limited to: roof, plumbing, heating and cooling (including refrigeration), electrical, load bearing structural systems, or weatherization (for example, solar panels, siding, replacement windows, and doors), where the costs of such repair or replacement, exclusive of soft costs that exceed 20 percent of the total costs of repair and replacement, exceeds 60 percent of the fair market value of a rehabilitated supermarket or grocery store after such repair and replacement, and the rehabilitation affects at least 75 percent of square footage of the supermarket or grocery store.

"Opening of the supermarket or grocery store for business to the public" means the date a new supermarket or grocery store has received a temporary certificate of occupancy and all certifications from State and local health departments required to operate; met the requirements of the incentive award; and starts operating the supermarket or grocery store on a full-time basis.

"Operating the supermarket or grocery store on a full-time basis" or "operating on a full-time basis" means operating the new supermarket or grocery store at least 60 hours per week every week of the year, absent unavoidable closures or other circumstances approved by the Authority.

"Program" means the New Jersey Food Desert Relief Tax Credit Program established by the Act and administered pursuant to this subchapter.

"Project" means, pursuant to the approval letter described at N.J.A.C. 19:31-28.8: for a financing gap tax credit, the development and opening of the new supermarket or grocery store for business to the public; or for an initial operating cost tax credit, owning, leasing, or subleasing the first or second new supermarket or grocery store and operating the supermarket or grocery store on a full-time basis.

"Project area" means land or lands on which the new supermarket or grocery store is located and land or lands adjacent and necessary to the operation of the new supermarket or grocery store, including, but not limited to, parking lots and loading docks.

"Project cost" means the costs incurred in connection with the establishment of a new supermarket or grocery store within a food desert community by the applicant until the opening of the supermarket or grocery store for business to the public and the certification of costs pursuant to N.J.A.C. 19:31-28.8, including the costs relating to lands, buildings, improvements, real or personal property, or any interest therein, including leases discounted to present value, lands under water, riparian rights, space rights, and air rights acquired, owned, developed or redeveloped, constructed, reconstructed, rehabilitated, or improved, and any environmental remediation costs, plus soft costs of an amount not to exceed 20 percent of the project costs, and the cost of infrastructure improvements, including ancillary infrastructure projects. For the purposes of this subchapter, ancillary infrastructure projects may include off-site self-contained temperature-controlled lockers located in a food desert community that is exclusively serviced from the supermarket or grocery store. Project costs shall include otherwise qualifying costs incurred by an affiliate of the applicant. The fees paid by the applicant or a co-applicant, if applicable, to the Authority associated with the application or administration of an incentive award shall not constitute a project cost. Project costs shall not include the cost of acquisition of land. If the supermarket or grocery store is a component of a facility, the otherwise qualifying costs of any shared structures or improvements, including, but not limited to, foundations or parking lots, may be included as project cost only to the extent of the supermarket or grocery store's pro-rata share, based on square footage, of the facility.

"Project financing gap" means the part of the total development costs, 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, applicant contributed capital, which shall not be less than 20 percent of the total project cost, which may include the property value of any existing land and improvements in the project area owned or controlled by the applicant, and the cost of infrastructure improvements in the public right-of-way, and investor or financial entity capital or loans for which the applicant, after making all good faith efforts to raise additional capital, certifies that additional capital cannot be raised from other sources on a non-recourse basis.

"Property value" means 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.

"Reasonable and appropriate return on investment" means the discount rate at which the present value of the future cash flows of an investment equals to the cost of the investment. For purposes of the analysis of the reasonable and appropriate return on investment, an investment shall not include any Federal, State, or local tax credits and grants.

"Retail space" means the areas of the supermarket or grocery store where customers are allowed to find and purchase items.

"Soft costs" means costs not directly related to construction, including capitalized interest paid to third parties, real estate taxes, utility connection fees, accounting, title/bond insurance, fixtures/equipment with a useful life of five years or less, affordable housing fees, pre-opening costs, and all costs associated with financing, design, engineering, legal, or real estate commissions, including, but not limited to, architect fees, permit fees, loan origination and closing costs, construction management, and freight and shipping costs. The term does not include early lease termination costs, airfare, mileage, tolls, gas, meals, packing material, marketing and advertising, temporary signage, incentive consultant fees, Authority fees, loan interest payments on permanent financing, escrows, reserves, commissions and fees to the applicant, project management, or other similar costs.

"Square feet" or "square footage" means the sum of all areas on all floors of an enclosed retail outlet included within the outside faces of its exterior walls, including all vertical penetration areas for circulation and shaft areas that connect one floor to another, but disregarding cornices, pilasters, buttresses, and similar structures that extend beyond the wall faces.

"Supermarket or grocery store" means a retail outlet with a lease or ownership of at least 16,000 square feet, of which at least 80 percent is occupied by food and related products, which products shall be based on industry standards, as determined by the Authority, except that the food and related products shall not include alcoholic beverages and products related to the consumption of such beverages. The square footage of a supermarket or grocery store shall include any space that the supermarket or grocery store subleases, licenses, or otherwise allows another entity to occupy.

"Tax credit" means credit against a tax liability pursuant to section 1 of P.L. 1950, c. 231 (N.J.S.A. 17:32-15), N.J.S.A. 17B:23-5, section 5 of P.L. 1945, c. 162 (N.J.S.A. 54:10A-5), and sections 2 and 3 of P.L. 1945, c. 132 (N.J.S.A. 54:18A-2 and 3).

"Total development cost" means any and all costs incurred for and in connection with the project by the applicant and any affiliate of the applicant until the opening of the supermarket or grocery store for business to the public, or upon such other event evidencing project completion as set forth in the incentive grant agreement, which shall include, but is not limited to, project costs, soft costs, and cost of acquisition of land and buildings. If the supermarket or grocery store is a component of a facility, the costs of any shared structures or improvements, including, but not limited to, foundations or parking lots, may be included as total development costs only to the extent of the supermarket or grocery store's pro-rata share, based on square footage, of the facility.

"Unavoidable closures" means any closure due to weather, strikes, acts of God, governmental restrictions, enemy action, civil commotion, fire, unavoidable casualty, or other causes similarly beyond the control of the operator of the supermarket or grocery store as determined in the sole discretion of the Authority.

19:31-28.3 Eligibility criteria

(a) An applicant and co-applicant, if applicable, shall be eligible to receive an incentive award for a project only if the applicant demonstrates to the Authority, at the time of application, that:

1. Without the incentive award, the project is not economically feasible;

2. With the incentive award, the new supermarket or grocery store will operate on a full-time basis during both the eligibility period and commitment period, and will be economically and commercially viable by the last year of the commitment period;

3. The application is for a project located in a food desert community;

4. If the applicant is seeking a financing gap tax credit:

i. A project financing gap exists; and

ii. Except for demolition and site remediation activities, the applicant has not commenced any construction at the site of the project prior to submitting an application, unless the Authority determines that the project would not be completed without the award;

5. If the applicant is seeking an initial operating cost tax credit, an initial operating shortfall will exist;

6. The applicant will comply with the prevailing wage and affirmative action requirements at N.J.A.C. 19:31-28.13;

7. The supermarket or grocery store shall:

i. Accept benefits from Federal nutrition assistance programs, including, but not limited to: Supplemental Nutrition Assistance Program (SNAP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC);

ii. Maintain at least 10 percent of retail space dedicated to fresh and/or frozen fruit and vegetables;

iii. Meet the definition of new supermarket or grocery store; and

iv. Hold at least one public listening session annually in the food desert community in which the supermarket or grocery store is located about the supermarket or grocery store's product offerings and operations. Notice of the listening session shall be prominently displayed at the entrance of the supermarket or grocery store and provided to the Authority at least seven days in advance of the meeting. The applicant shall keep reasonably comprehensible minutes of all its listening sessions showing the time and place, the subjects discussed, and any public comment, which minutes shall be promptly made available to the public;

8. The opening of the supermarket or grocery store for business to the public shall be within the earlier of six months of the receipt of a temporary certificate of occupancy for the supermarket or grocery store or three years of executing the incentive award agreement corresponding to the project. The Authority may approve six-month extensions if the applicant is using best efforts, with all due diligence, to proceed with the project;

9. The applicant has complied with all requirements for filing tax and information returns and for paying or remitting required State taxes and fees by submitting, as a part of the application, a tax clearance certificate, as described at N.J.S.A. 54:50-39; and

10. If the application includes a co-applicant, the applicant and co-applicant must demonstrate the following:

i. The co-applicant has complied with all requirements for filing tax and information returns and for paying or remitting required State taxes and fees by submitting, as a part of the application, a tax clearance certificate, as described at N.J.S.A. 54:50-39;

ii. The co-applicant's organizational purpose encompasses the proposed participation;

iii. The co-applicant has the financial and operational capability to provide the proposed contribution or services;

iv. The co-applicant's proposed capital, real property, or services will materially affect and serve the anticipated customers or support the project or operation of the supermarket or grocery store; and

v. The co-applicant's receipt and sale of the tax credits is necessary to finance the project.

(b) The only costs incurred prior to application for a financing gap tax credit that may be included as project costs are demolition, site remediation, and acquisition of buildings or other site improvements not including any land acquisition costs incurred within two years prior to the date of application.

(c) The incentive award for an initial operating cost tax credit shall not include any initial operating shortfall incurred prior to the date of the application.

(d) To determine that the project has a project financing gap, the applicant shall demonstrate that the project has applicant-contributed capital of at least 20 percent of the total development cost.

(e) To demonstrate that the project will have an initial operating shortfall, the applicant shall submit a feasibility study(s) acceptable to the Authority that demonstrates that:

1. An initial operating shortfall is projected during the eligibility period;

2. The initial operating cost tax credit will be sufficient to fill the initial operating shortfall; and

3. The supermarket or grocery store is projected to operate on a full-time basis during both the eligibility period and commitment period and will be economically and commercially viable by the last year of the commitment period.

19:31-28.4 Application submission requirements

(a) Each application to the Authority made by an applicant shall include the following information in an application format prescribed by the Authority:

1. The name of the business;

2. The contact information of the person identified as the primary contact for the business;

3. The prospective future address of the business (if different);

4. The type of the business;

5. The principal products and services and three-digit North American Industry Classification System number;

6. The New Jersey tax identification number;

7. The Federal tax identification number;

8. A description of the project, including a breakdown of uses and related square footage and costs, the breakdown of retail space (for example, a planogram), and the applicant's experience with similar project(s);

9. For the financing gap tax credit:

i. The total projected number of construction employees and permanent full-time and part-time employees at the project;

ii. A copy of a market and/or feasibility study for the proposed use of the project site by an independent third party, which must include the third party's position regarding the marketability and underwriting of the revenue and expense components of the proposed project for the duration of the eligibility period and commitment period;

iii. An anticipated construction schedule;

iv. Financial information of the project including, but not limited to, estimated project costs and total development costs, any State or local financial assistance for the project, proposed terms of financing, projected reasonable and appropriate return on investment on the applicant-contributed capital, net margin, cash-on-cash yield, and a certification from the chief executive officer or equivalent officer of the applicant, that additional capital cannot be raised from other sources on a non-recourse basis after making all good faith efforts to raise additional capital, and any other documentation demonstrating economic and commercial viability pursuant to N.J.A.C. 19:31-28.3(a)2;

v. The status of control of the entire project area, shown for each block and lot of the site as indicated on the local tax map;

vi. A list and status of all required local, State, and Federal government permits and local planning and zoning board approvals that have been issued for the project, or will be required to be issued to construct the project and to open the supermarket or grocery store to the public, pending resolution of financing issues; and

vii. A binding agreement between the applicant and the operator of the new supermarket or grocery store regarding the operation of the new supermarket or grocery store;

10. For the initial operating cost tax credit:

i. The total projected number of permanent part-time and full-time employees at the project;

ii. A copy of a market and/or feasibility study for the proposed operation of the project by an independent third party, which must include the third party's position regarding the marketability, and underwriting of the project and satisfy the criteria set forth at N.J.A.C. 19:31-28.3(c);

iii. Financial information for the project, including, but not limited to, projected income statement, any Federal, State, or local financial assistance for the project, proposed terms of financing, projected net operating profit, and any other documentation demonstrating economic and commercial viability;

iv. A binding agreement between the prospective landlord and the applicant for the new supermarket or grocery store at the site of the project and an acknowledgment by the prospective landlord that the applicant is applying for an incentive award for the supermarket or grocery store, that may include, but is not limited to, a letter of intent and a verification by the prospective landlord of proposed rent; and

v. A list and status of all required local, State, and Federal government permits and local planning and zoning board approvals that have been issued for the project, or will be required to be issued to operate the supermarket or grocery store on a full-time basis;

11. A list of all of the New Jersey Department of Labor and Workforce Development, the New Jersey Department of Environmental Protection, and the New Jersey Department of the Treasury permits and approvals or obligations and responsibilities with which the applicant is associated or has an interest in. The list shall identify the entity that applied for or received such permits and approvals or have such obligations and responsibilities, such as by program interest numbers or licensing numbers. The applicant shall also submit a written certification by the chief executive officer or equivalent officer of the applicant, stating that the applicant applying for the program satisfies the criteria at N.J.A.C. 19:31-28.7(b) to be in substantial good standing with the New Jersey Department of Labor and Workforce Development, the New Jersey Department of Environmental Protection, and the New Jersey Department of the Treasury;

12. A certification that any contractors or subcontractors that will perform work at the project are registered as required by the Public Works Contractor Registration Act (N.J.S.A. 34:11-56.48 et seq.), have not been debarred by the Department of Labor and Workforce Development from engaging in or bidding on public works contracts in the State, and possess a tax clearance certificate issued by the Division of Taxation in the New Jersey Department of the Treasury;

13. A certification by the chief executive officer or equivalent officer of the applicant, that the officer has reviewed the application information submitted and that the representations contained therein are accurate;

14. A completed legal questionnaire disclosing all relevant legal matters in accordance with the Authority debarment and disqualification rules at N.J.A.C. 19:30-2;

15. Submission of a tax clearance certificate, pursuant to N.J.S.A. 54:50-39;

16. A list of all the development subsidies, as defined at N.J.S.A. 52:39-3, that the applicant is requesting or receiving, the name of the granting body, the value of each development subsidy, and the aggregate value of all development subsidies requested or received;

17. Information required by the Authority to evaluate and determine the eligibility of the application pursuant to N.J.A.C. 19:31-28.3(a)7; and

18. Any other necessary and relevant information as determined by the Authority for a specific application, including, but not limited to, information needed to complete project financial review and applicant capacity.

(b) If the applicant is applying with a co-applicant, the application shall also include the following information of the co-applicant:

1. The name of the business;

2. The contact information of the person identified as the primary contact for the business;

3. The prospective future address of the business (if different);

4. The type of the business;

5. The principal products and services and three-digit North American Industry Classification System number;

6. The New Jersey tax identification number;

7. The Federal tax identification number;

8. A list of all of the New Jersey Department of Labor and Workforce Development, the New Jersey Department of Environmental Protection, and the New Jersey Department of the Treasury permits and approvals or obligations and responsibilities with which the co-applicant is associated, or has an interest in. The list shall identify the entity that applied for or received such permits and approvals or has such obligations and responsibilities, such as by program interest numbers or licensing numbers. The co-applicant shall also submit a written certification by the chief executive officer, or equivalent officer of the eligible co-applicant, stating that the co-applicant applying for the program satisfies the criteria at N.J.A.C. 19:31-28.7(b) to be in substantial good standing with the New Jersey Department of Labor and Workforce Development, the New Jersey Department of Environmental Protection, and the New Jersey Department of the Treasury;

9. A certification by the chief executive officer or equivalent officer of the co-applicant, that the officer has reviewed the application information submitted and that the representations contained therein are accurate;

10. A completed legal questionnaire disclosing all relevant legal matters, in accordance with the Authority debarment and disqualification rules at N.J.A.C. 19:30-2;

11. Submission of a tax clearance certificate, pursuant to N.J.S.A. 54:50-39;

12. A list of all the development subsidies, as defined at N.J.S.A. 52:39-3, that the co-applicant is requesting or receiving for the project, the name of the granting body, the value of each development subsidy, and the aggregate value of all development subsidies requested or received;

13. Organizing documents of the co-applicant and a narrative regarding the activity of the co-applicant generally, and in the State and municipality;

14. A description of the long-term participation agreement between the co-applicant and the applicant, including a description of: how the co-applicant will take an active role in the project, the capital, and the real property or services related to the project that the co-applicant will provide that directly affect and serve the anticipated customers or directly support the project or operations of the supermarket or grocery store;

15. An explanation of the need for a co-applicant to receive and sell the tax credits to finance the project; and

16. Any other necessary and relevant information as determined by the Authority for a specific application, including, but not limited to, information needed to complete review of the project financial review and applicant capacity.

(c) Applications for a financing gap tax credit and an initial operating cost tax credit that relate to the same supermarket or grocery store must include the same financial information to the Authority. The Authority shall consider applications for a financing gap tax credit and an initial operating cost tax credit related to the same supermarket or grocery store at the same time. The Authority shall not approve one type of tax credit to a supermarket or grocery store for which the Authority previously approved the other type of tax credit.

(d) The Authority shall not consider an application for a project unless the applicant submits with the application a letter evidencing support for the project from the governing body of the municipality or municipalities in which the project is located.

(e) The Authority may, in its sole discretion, consider two or more applications for the same type of tax credits as one application for one project based on factors including, but not limited to, the location of the projects, the types of uses proposed, and the applicants' financing and operational plans.

(f) If circumstances require an applicant to amend its application to the Authority, the chief executive officer or equivalent officer of the applicant, shall certify to the Authority that the information provided in its amended application is true and correct pursuant to the penalty of perjury.

19:31-28.5 Fees

(a) An applicant applying for benefits pursuant to this Program shall submit a one-time non-refundable application fee. The application fee shall be as follows:

1. For a financing gap tax credit with a project cost of less than $10 million, the fee shall be $2,500. For other financing gap tax credit projects, the fee shall be $10,000.

2. For an initial operating cost tax credit with average annual total sales over the eligibility period and the commitment period of less than $20 million, the fee shall be $2,500. For other initial operating cost tax credit projects, the fee shall be $5,000.

(b) An applicant shall pay to the Authority the full amount of direct costs of due diligence, including, but not limited to, debarment/disqualification reviews or other analyses by a third party retained by the Authority, if the Authority deems such retention to be necessary.

(c) The applicant shall pay to the Authority a non-refundable fee prior to the approval of the tax credit by the Authority as follows, except that the fee shall be refunded, if the Authority does not approve the tax credit:

1. For a financing gap tax credit with a project cost of less than $10 million, the fee shall be $5,000. For other financing gap tax credit projects, the fee shall be $15,000.

2. For an initial operating cost tax credit with average annual total sales over the eligibility period and the commitment period of less than $20 million, the fee shall be $5,000. For other initial operating cost tax credit projects, the fee shall be $10,000.

(d) The applicant shall pay, to the Authority, a non-refundable fee prior to the receipt of the tax credit certificate. The fee shall be as follows:

1. For a financing gap tax credit with a project cost of less than $10 million, the fee shall be $5,000. For other financing gap tax credit projects, the fee shall be $15,000.

2. For an initial operating cost tax credit with average annual total sales over the eligibility period and the commitment period of less than $20 million, the fee shall be $2,500. For other initial operating cost tax credit projects, the fee shall be $5,000.

(e) An applicant shall pay to the Authority an annual servicing fee, beginning with the tax accounting or privilege period in which the Authority accepts the certification that the applicant has met the eligibility requirements of the program for the respective project, and for the duration of the eligibility period and the commitment period. The annual servicing fee shall be paid to the Authority by the applicant at the time the applicant submits its annual report, as follows:

1. For a financing gap tax credit with a project cost of less than $10 million, the fee shall be $2,500. For other financing gap tax credit projects, the fee shall be $10,000.

2. For an initial operating cost tax credit with annual total sales in the tax accounting or privilege period of less than $20 million, the fee shall be $2,500. For other initial operating cost tax credit projects, the fee shall be $5,000.

(f) An applicant applying for a tax credit transfer certificate, permission to pledge a tax credit transfer certificate purchase contract as collateral, or to pledge, assign, transfer, or sell any or all of its right, title, and interest in, and to, an incentive award agreement and in the incentive awards payable thereunder shall pay to the Authority a fee, as follows:

1. For a financing gap tax credit with a project cost of less than $10 million, the fee shall be $5,000. For other financing gap tax credit projects, the fee shall be $15,000.

2. For an initial operating cost tax credit with average annual total sales over the eligibility period and the commitment period of less than $20

million, the fee shall be $5,000. For other initial operating cost tax credit projects, the fee shall be $10,000.

(g) An applicant shall pay to the Authority a non-refundable fee for each request for any administrative changes, additions, or modifications to the tax credit as follows:

1. For a financing gap tax credit with a project cost of less than $10 million, the fee shall be $2,000 for each request for any minor administrative changes, additions, or modifications to the tax credit, and $5,000 for any major changes, additions, or modifications to the tax credit, such as those requiring extensive staff time and Board approval. For other financing gap tax credit projects, the fee shall be $5,000 for each request for any minor administrative changes, additions, or modifications to the tax credit and $15,000 for any major changes, additions, or modifications to the tax credit, such as those requiring extensive staff time and Board approval.

2. For an initial operating cost tax credit with average annual total sales over the eligibility period and the commitment period of less than $20 million, the fee shall be $2,500 for each request for any minor administrative changes, additions, or modifications to the tax credit, and $5,000 for any major changes, additions, or modifications to the tax credit, such as those requiring extensive staff time and Board approval. For other initial operating cost tax credit projects, the fee shall be $5,000 for each request for any minor administrative changes, additions, or modifications to the tax credit, and $10,000 for any major changes, additions, or modifications to the tax credit, such as those requiring extensive staff time and Board approval.

(h) A non-refundable fee shall be paid for six-month extensions to the date by which the applicant shall complete the project pursuant to N.J.A.C. 19:31-28.3(a)8 and submit the satisfactory evidence with respect to the eligibility requirements of the program pursuant to N.J.A.C. 19:31-28.9(f), as follows:

1. For a financing gap tax credit with a project cost of less than $10 million, the fee shall be $2,000. For other financing gap tax credit projects, the fee shall be $7,500.

2. For an initial operating cost tax credit with average annual total sales over the eligibility period and the commitment period of less than $20 million, the fee shall be $2,000. For other initial operating cost tax credit projects, the fee shall be $4,000.

19:31-28.6 Financing gap and initial operating shortfall

(a) For an application for a financing gap tax credit, the Authority shall review the proposed total development cost and evaluate and validate the project financing gap estimated by each applicant applying for an incentive award, as follows:

1. The Authority shall evaluate the proposed total development costs to develop, and the components of, the project against reasonable market costs and components of comparable projects;

2. The Authority shall determine if the applicant's submitted financial information for the project is satisfactory. If satisfactory, the Authority shall incorporate the financial information in the project financing gap analysis, including the reasonable and appropriate return on investment; and

3. The project financing gap analysis shall include, but not be limited to, an evaluation of the total development cost, amount of capital sufficient to complete the project, proposed rental rates, vacancy rates, reasonable and appropriate return on investment, and, in the Authority's sole discretion, a comparison to alternative financing structures for a comparable project available to the applicant. If the supermarket or grocery store is a component of a facility, the Authority shall additionally consider the reasonable and appropriate return on investment of the facility and may adjust the reasonable and appropriate return on investment of the supermarket or grocery store so that together the supermarket or grocery store and the facility yield a reasonable and appropriate return on investment.

(b) For an application for an initial operating cost tax credit, the Authority shall review the proposed initial operating costs, and evaluate and validate the initial operating shortfall estimated by each applicant applying for an incentive award, as follows:

1. The Authority shall evaluate the proposed initial operating costs against reasonable market costs to operate, and components of, the project against reasonable market costs and components of comparable projects. The applicant shall also provide written verification from the landlord, if applicable, about the proposed rent;

2. The Authority shall determine if the applicant's submitted financial information for the project is satisfactory. If satisfactory, the Authority shall incorporate the financial information in the initial operating shortfall analysis, including the reasonable and appropriate net operating profit; and

3. The initial tax credit shortfall analysis shall include, but not be limited to, an evaluation of the initial operating costs, proposed rental rates paid to the landlord, proposed rental rates or fees paid by sub-tenants or licensees, and the reasonable and appropriate net operating profit.

19:31-28.7 Approval of completed application; tax credit amounts

(a) The Authority shall award incentive awards based on the order in which complete, qualifying applications are received by the Authority. If interest in the Program so warrants, at the Authority's discretion and upon notice, the Authority may institute a competitive application process whereby all completed applications submitted by a certain date will be evaluated as if submitted on that date. The Authority's review will determine whether the applicant:

1. Complies with the eligibility criteria;

2. Satisfies the submission requirements; and

3. Provides adequate information for the subject application.

(b) Before the Board may consider an application for tax credits:

1. The Authority shall confirm with the New Jersey Department of Labor and Workforce Development, the New Jersey Department of Environmental Protection, and the New Jersey Department of the Treasury that the applicant and any co-applicant, if applicable, is in substantial good standing with the statutes, rules, and other enforceable standards of the respective department, or, if a compliance issue exists, the applicant or any co-applicant, has entered into an agreement with the respective department, which may include a corrective action plan, as applicable.

i. Substantial good standing shall be determined by each department and mean, at a minimum, that the applicant and any co-applicant:

(1) As to the Department of Labor and Workforce Development and the Department of Environmental Protection:

(A) Is in substantial compliance with all material statutes, rules, and other enforceable standards of the respective department that apply to the applicant and any co-applicant; and

(B) Has no material violations of those statutes, rules, or other enforceable standards that remain substantially unresolved through entry into a corrective action plan or other agreement with the department, with respect thereto; and

(2) As to all other departments, has no unpaid liability in excess of any threshold dollar amount(s) that may be established by each respective department.

ii. If the Department of Labor and Workforce Development, the Department of Environmental Protection, or the Department of the Treasury promulgates or issues its own more stringent rule or standard defining the term "substantial good standing," the respective department shall use such rule or standard to determine whether an entity is in substantial good standing.

2. The Authority may contract with an independent third party to perform a background check on the applicant and any co-applicant.

3. Any contractors or subcontractors that will perform work at the project shall be registered as required by the Public Works Contractor Registration Act, N.J.S.A. 34:11-56.48 et seq., shall not have been debarred by the Department of Labor and Workforce Development from engaging in or bidding on public works contracts in the State, and shall possess a tax clearance certificate issued by the Division of Taxation in the Department of the Treasury.

(c) Provided that the requirements at (b) above are satisfied, the Authority shall allocate incentive awards to projects until the available tax credits are exhausted. If insufficient funding exists to fully fund all eligible projects, a project may be offered partial funding.

(d) For a financing gap tax credit, and in accordance with an incentive award agreement, beginning upon completion of the capital investment, the receipt of the temporary certificate of occupancy or upon any other event evidencing completion of construction as set forth in the incentive award agreement, and the opening of the supermarket or grocery store for business to the public, an applicant shall be allowed a total financing gap tax credit pursuant to this Program to reimburse all or a portion of the project financing gap as follows:

1. For a project with a supermarket or grocery store that has a labor harmony agreement, not to exceed 40 percent of project costs for the first new supermarket or grocery store and 20 percent of project costs for the second new supermarket or grocery store. In lieu of a labor harmony agreement, the applicant may provide a collective bargaining agreement for the supermarket or grocery store.

2. For a project in which the supermarket or grocery store does not have a labor harmony agreement, not to exceed 30 percent of project costs for the first new supermarket or grocery store and 15 percent of project costs for the second new supermarket or grocery store.

(e) For an initial operating cost tax credit, and in accordance with an incentive award agreement, upon receipt of evidence that the applicant is operating the supermarket or grocery store on a full-time basis, an applicant shall be allowed a total initial operating cost tax credit pursuant to the Program to reimburse all or a portion of the initial operating shortfall for the eligibility period that shall not exceed 100 percent of initial operating costs for the first new supermarket or grocery store and 50 percent of initial operating costs for the second new supermarket or grocery store.

(f) The maximum amount of financing gap tax credits available to an applicant to apply annually shall be equal to the total credit amount divided by the duration of eligibility period in years, fractions of a dollar rounded down.

(g) The maximum amount of initial operating cost tax credits available to an applicant to apply annually shall be the lesser of the actual annual initial operating shortfall and the amount of tax credit not applied previously during the eligibility period.

19:31-28.8 Approval letter; incentive award agreement

(a) Upon receipt of a recommendation from the Authority staff on the project, the Board shall determine whether or not to approve the application, the maximum amount of tax credits and the maximum percentage amount of allowed tax credits, and promptly notify the applicant, any co-applicant, and the Director of the Division of Taxation in the New Jersey Department of the Treasury of the determination.

1. The Board's award of the credits will be subject to conditions subsequent that must be met in order to retain the credits. An approval letter setting forth the conditions subsequent will be sent to the applicant and any co-applicant. Such conditions shall include, but not be limited to, the requirement that the project complies with the Authority's prevailing wage requirements, N.J.S.A. 34:1B-5.1, and affirmative action requirements, N.J.S.A. 34:1B-5.4, as set forth at N.J.A.C. 19:31-28.13, and that the project does not violate any environmental law requirements, including, but not limited to, the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13. The approval letter shall also provide the requirements necessary for the Authority to execute the incentive award agreement.

2. For a financing gap tax credit the approval letter shall:

i. Require documentation evidencing project financing and planning approvals, including the submittal of executed financing commitments, documents that evidence site control by the applicant or an affiliate of the applicant, a copy of the site plan approval, a copy of an executed agreement with the operator of the supermarket or grocery store at the site of the project, and a copy of all required permits and planning and zoning approvals and permits; and

ii. Provide estimated dates of completion for the opening of the supermarket or grocery store for business to the public and include a requirement for periodic progress reports.

3. For an initial operating cost tax credit the approval letter shall:

i. Require documentation evidencing project and financing approvals, including the submittal of executed financing commitments, documents that evidence site control by the applicant or an affiliate of the applicant, a copy of all executed leases, licenses, or other occupancy agreements executed by the applicant for space at the supermarket or grocery store, and a copy of all required permits; and

ii. Provide the estimated date of the opening of the supermarket or grocery store for business to the public and include a requirement for periodic progress reports.

4. Absent extenuating circumstances or the Authority's determination, in its sole discretion, the Authority's approval of the tax credits shall expire if the applicant or co-applicant, as applicable, does not submit the documentation required at (a)2 and 3 above within one year after approval of the application.

5. If the Authority does not receive a periodic progress report when required, or if the progress report demonstrates unsatisfactory progress or inadequate information, then the Authority may rescind the commitment of the incentive award. If the Authority rescinds an incentive award or the approval of an award expires, the Authority may designate another new supermarket or grocery store as the first or second new supermarket or grocery store.

6. If the terms of the financing commitment in the evidence required by the approval letter are materially different from the projected terms in the application, the Authority may re-evaluate the project financing gap or the amount of initial operating shortfall and reduce the size of the incentive award accordingly or may rescind the commitment of the incentive award.

(b) Following satisfaction of the requirements for the execution of an incentive award agreement, the Authority shall enter into an incentive award agreement with the applicant and any co-applicant. The award of tax credits shall be conditioned on the applicant's and any co-applicant's compliance with the requirements of the agreement.

(c) The incentive award agreement shall specify and include:

1. A detailed description of the proposed project;

2. The duration of the eligibility period and the commitment period;

3. An ongoing requirement to provide the Authority with current personnel information that will enable the Authority to administer the Program;

4. A requirement that the supermarket or grocery store shall not cease operating on a full-time basis during the eligibility period and the commitment period;

5. A method for the applicant to certify that it has met the project costs or initial operating costs and other eligibility requirements of the Program;

6. A requirement for the applicant to provide annual financial statements, as certified by a certified public accountant and accompanied by an unqualified opinion reporting the project's financial performance. For the initial operating cost tax credit, the financial statements during the eligibility period shall list initial operating costs on an income statement approved by the Authority;

7. Representations that the applicant and any co-applicants are in substantial good standing and that the project will comply with all applicable laws, including, but not limited to, prevailing wage requirements as set forth at N.J.A.C. 19:31-28.13(b) and (c), affirmative action requirements as set forth at N.J.A.C. 19:31-28.13(a), and environmental laws, including, but not limited to, the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13;

8. A provision acknowledging the Authority's right to confirm with the New Jersey Department of Environmental Protection, the New Jersey Department of Labor and Workforce Development, and the New Jersey Department of the Treasury, as set forth at N.J.A.C. 19:31-28.7(b)1, that the applicant and any co-applicant is in substantial good standing or has entered into an agreement with the respective department that includes a corrective action plan, as applicable;

9. A provision providing that if the applicant and any co-applicant is not in substantial good standing with the New Jersey Department of Environmental Protection, the New Jersey Department of Labor and Workforce Development, and the New Jersey Department of the Treasury, and has not entered into an agreement with the respective department, as set forth at N.J.A.C. 19:31-28.7(b)1, and after being given written notice thereof and an opportunity to be heard or to contest the determination by the respective department, then the applicant and any co-applicant may forfeit or the Authority may recapture tax credits in any year or in proportion to any year in which the applicant and any co-applicant is neither in substantial good standing with each department nor has entered into a corrective action;

10. A requirement that the applicant shall confirm that each contractor or subcontractor performing work at the project: is registered as required by the Public Works Contractor Registration Act, N.J.S.A. 34:11-56.48 et seq., has not been debarred by the New Jersey Department of Labor and Workforce Development from engaging in or bidding on public works contracts in the State, and possesses a tax clearance certificate issued by the Division of Taxation in the New Jersey Department of the Treasury. The incentive award agreement shall also include a provision that the Authority may suspend the tax credits, if the applicant and any co-applicant is not in compliance with this requirement, and if the suspension continues for two years, then, at the Authority's sole option, the applicant and any co-applicant may forfeit or the Authority may recapture the tax credits for those years or in proportion to those years;

11. A provision permitting an audit of evidence and documentation of the applicant and any co-applicant supporting the certifications pursuant to (e) below, and the annual reports pursuant to N.J.A.C. 19:31-28.9, as the Authority deems necessary, including, but not limited to, site visits and verification with the United States Department of Agriculture Food and Nutrition Service;

12. Reporting requirements pursuant to N.J.A.C. 19:31-28.9;

13. A provision permitting the Authority to amend the agreement;

14. A provision establishing the conditions pursuant to which the Authority, the applicant and any co-applicant, or all parties, may terminate the agreement;

15. A provision allowing the Authority to extend, in individual cases, the deadline for any annual report, project completion certification, or the opening of the supermarket or grocery store for business to the public;

16. Indemnification and insurance requirements from the applicant and any co-applicant;

17. Events that would trigger forfeiture, reduction, or recapture of the tax credits, including, but not limited to, provisions in this subchapter;

18. Default and remedies, including, but not limited to, a default if an applicant made a material misrepresentation on its application;

19. For a financing gap tax credit, the incentive award shall additionally specify and include:

i. The maximum amount of project cost and the maximum percentage of the project cost that will be used to calculate the amount of tax credits. If the actual project costs are less than the project cost set forth in the application, the tax credit shall be calculated based on the actual project cost;

ii. A description of the temporary certificate of occupancy permit, or other event evidencing completion of construction, and the opening of the supermarket or grocery store for business to the public, that begins the eligibility period;

iii. Milestones for the project, that shall include the estimated dates of commencement and completion of the project, and the opening of the supermarket or grocery store for business to the public, and a provision that the Authority may rescind the commitment of the award of tax credits if a project fails to advance in accordance with milestones in the incentive award agreement and may designate another new supermarket or grocery store as the first or second new supermarket or grocery store;

iv. A provision to verify the project financing gap at the time the applicant provides executed permanent financing commitments to the Authority and a verification of the applicant's projected cash flow at the time the applicant submits the evidence of the completion of the project pursuant to (f) below. To ensure the protection of taxpayer money, if the Authority determines at project certification that the actual capital financing approach utilized by the project has resulted in a project financing gap that is smaller than the project financing gap determined at Board approval, the Authority shall reduce the amount of the tax credit or accept payment from the applicant on a pro-rata basis. If there is no project financing gap due to the actual capital financing approach utilized by the project, then the applicant shall forfeit the incentive award;

v. A provision requiring that at the conclusion of the third year of the eligibility period, the Authority shall evaluate the applicant's reasonable and appropriate return on investment and compare that reasonable and appropriate return on investment to the reasonable and appropriate return at the time of Board approval. If the actual return on investment exceeds the reasonable and appropriate return on investment at the time of Board approval by more than 15 percent, the Authority shall reduce the amount of tax credits allowed in the certificate of compliance for the fourth year by 20 percent of the amount in excess of the reasonable and appropriate return on investment to the Authority; and

vi. A provision stating that if the applicant sells, leases, or subleases the supermarket or grocery store during the eligibility period or the commitment period, the Authority shall determine if the applicant's return on investment exceeded the reasonable and appropriate return on investment determined at Board approval. The applicant shall provide to the Authority any information that the Authority determines is necessary to re-evaluate the applicant's return on investment, including, but not limited to, the purchase price. If the applicant's final return on investment exceeds the reasonable and appropriate return on investment determined at Board approval by more than 15 percent, the applicant shall pay 20 percent of the amount of the excess to the Authority, and the Authority shall deposit such funds in the State General Fund; and

20. For an initial operating cost tax credit, the incentive award agreement shall additionally specify and include:

i. A detailed description of the operating years for which the tax credit is applicable;

ii. The maximum amount of initial operating shortfall and the maximum percentage of initial operating costs that will be used to calculate the amount of tax credits. If the actual initial operating costs are less than the initial operating costs set forth in the application, the tax credit shall be calculated based on the actual initial operating costs and the annual operating costs shortfall;

iii. The opening of the supermarket or grocery store for business to the public that begins the eligibility period; and

iv. Milestones for the project, that shall include the estimated date of commencement of construction, if applicable, the estimated date of commencement and completion of any tenant improvements undertaken by the applicant, the estimated date of the opening of the supermarket or grocery store to the public, and a provision that the Authority may rescind the commitment of the award of tax credits if a project fails to advance in accordance with milestones in the incentive award agreement and may designate another new supermarket or grocery store as the first or second new supermarket or grocery store.

(d) A labor harmony agreement shall be required if the State has a proprietary interest in a supermarket or grocery store and the agreement shall remain in effect for as long as the State acts as a market participant in the project. The provisions of this subsection shall apply to a supermarket or grocery store that will have more than 10 full-time employees. A labor harmony agreement shall not be required if the Authority determines that the supermarket or grocery store would not be feasible if a labor harmony agreement is required. The Authority shall support the determination by a written finding, which provides the specific basis for the determination.

(e) An applicant shall submit, prior to the issuance of tax credits pursuant to the incentive award agreement, satisfactory evidence of the opening of the supermarket or grocery store for business to the public and the Program eligibility requirements, that shall include, but not be limited to, the documents in this subsection:

1. Evidence that the supermarket or grocery store meets the definition of a new supermarket or grocery store and the supermarket or grocery store is operating on a full-time basis, which may include, but not be limited to, access to reports from an independent scanning data company and, if applicable, a certification from a licensed engineer that the major systems, as approved by the Authority, have been repaired or replaced for the supermarket to satisfy the definition of a new supermarket or grocery store;

2. A floor plan identifying the actual uses of the supermarket or grocery store, including square footage for any alcoholic beverages and products related to the consumption of such beverages, all retail space (for example, planogram), and the retail space dedicated to fresh and/or frozen fruit and vegetables;

3. A copy of a permit from the Supplemental Nutrition Assistance Program (SNAP) and an executed vendor agreement from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) within 90 days of the opening of the supermarket or grocery store for business to the public or evidence of applications for SNAP and WIC

retailer authorization made prior to the opening of the supermarket or grocery store for business to the public;

4. A certification indicating whether or not the applicant is aware of any condition, event, or act that would cause the applicant or any co-applicant not to be in compliance with the approval, the Act, or this subchapter;

5. A certification by the chief executive officer or equivalent officer of the applicant that the information provided pursuant to this subsection is true and correct pursuant to the penalty of perjury;

6. If the Authority approval included a co-applicant, a certification that the participation agreement between the applicant and the co-applicant remains in effect and is not in default;

7. Copies of all government permits and approvals required to open the supermarket or grocery store for business to the public and for operating the supermarket or grocery store on a full-time basis;

8. If applicable, satisfactory evidence that the applicant complies with the labor harmony agreement requirement pursuant to (d) above or as required for the tax credit pursuant to N.J.A.C. 19:31-28.7(d)1. For a financing gap tax credit award calculated as set forth at N.J.A.C. 19:31-28.7(d)1, if the applicant does not provide satisfactory evidence of the executed agreement, the incentive award shall be reduced to the amount set forth at N.J.A.C. 19:31-28.7(d)2;

9. For a financing gap tax credit, the documents shall additionally include:

i. Evidence of a temporary certificate of occupancy or other event evidencing completion of construction, and the opening of the supermarket or grocery store for business to the public that begins the eligibility period indicated in the incentive award agreement;

ii. A certification by a qualified independent certified public accountant of the actual project costs. The certification shall be made pursuant to an “agreed upon procedures” letter acceptable to the Authority. If applicable, the certification shall include the costs of the repair or replacement of the major systems, as approved by the Authority, for the supermarket or grocery store to satisfy the definition of a new supermarket or grocery store. If the project cost in the certification is less than the project cost in the approval of the application, the Authority may reduce the size of the tax credits accordingly. The Authority shall qualify certified public accountants and provide to the applicant the list of qualified certified public accountants; provided, however, the applicant may select a certified public accountant that is independent to the applicant and not on the Authority’s list of qualified certified public accountants for purposes of the project cost certification if the applicant demonstrates an extenuating circumstance prohibiting the applicant from retaining a qualified certified public accountant. Such circumstances include, but are not limited to, the unavailability of any of the qualified certified public accountants to timely complete the certification or none of the qualified certified public accountants are independent to the applicant; and

iii. Verification of the applicant’s projected cash flow at the time of the submission of the documents; and

10. For an initial operating cost tax credit, evidence of continued financing approvals, including the submittal of executed financing commitments.

(f) The documents required at (e) above shall be submitted by the following dates:

1. For a financing gap tax credit, no later than six months following the opening of the supermarket or grocery store for business to the public.

2. For an initial operating cost tax credit, no later than six months after the later of the opening of the supermarket or grocery store for business to the public or the date of approval of the application.

(g) Once the Authority accepts the documentation required at (e) above and the Authority determines that other required conditions have been met, within 90 days of the Authority’s acceptance of the documentation and evidence satisfactory to the Authority, the Authority shall notify the applicant, any co-applicant, and the Director of the Division of Taxation in the Department of the Treasury, and the applicant shall receive its tax credit certificate that will be based on the information submitted in the documents, provided it shall not exceed the maximum amount determined by the Board pursuant to N.J.A.C. 19:31-23.7(d) and (e). The use of the tax credit certificate shall be subject to the receipt of an annual certificate of compliance issued by the Authority. Notwithstanding this subsection, if the applicant submitted a copy of the application for Supplemental Nutrition Assistance Program (SNAP) or Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) retailer authorization, the Authority shall only review all other documents and shall not finalize its acceptance of the documentation until the applications for SNAP and WIC retailer authorization have been approved. If an application for SNAP or WIC retailer authorization is denied by the administrative agency, the Authority shall not accept the documentation, shall rescind the commitment of the incentive award, and may designate another supermarket or grocery store as the first or second new supermarket or grocery store.

(h) For a financing gap tax credit, the eligibility period shall start with the privilege period in which the applicant establishes and opens the supermarket or grocery store for business to the public.

(i) For an initial operating cost tax credit award, the eligibility period shall start with the later of the privilege period in which the applicant opens the supermarket or grocery store for business to the public or in which the applicant submits a completed application to the Authority. Notwithstanding the date when the eligibility period starts, the eligibility period shall terminate at the end of the third year after the opening of the supermarket or grocery store for business to the public.

(j) Any modification to the project as approved by the Board, including, but not limited to, a reduction in the amount of the project cost, square feet, or initial operating costs, shall require review and approval by the Authority to determine that the project as modified does not undermine the basis for the tax credit award approved. The Authority may re-evaluate the project financing gap or the amount of initial operating shortfall and reduce the size of the incentive award accordingly.

19:31-28.9 Reporting requirements and annual report

(a) An applicant that is approved for an incentive award and that enters an incentive award agreement shall submit annually, commencing in the privilege period for which the incentive award is issued and for the remainder of the commitment period, a report indicating whether the applicant is aware of any condition, event, or act that would cause the applicant or any co-applicant not to be in compliance with the incentive award agreement or the provisions of this subchapter, the Act, and any additional reporting requirements in the incentive award agreement or tax credit certificate. The applicant, or an authorized agent of the applicant, shall certify that the information provided pursuant to this subsection is true and correct pursuant to the penalty of perjury.

(b) The annual report shall consist of:

1. A certification indicating whether the applicant is aware of any condition, event, or act that would cause the applicant or any co-applicant not to be in compliance with the approval, the Act, and the incentive award agreement, including, but not limited to, covenants that relate to the operation of the project and the use of space;

2. A certification indicating that the project does not violate any environmental law requirements, including, but not limited to, the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13;

3. If applicable, for the two years after the first certificate of compliance is issued, evidence that the project remains in compliance with the Authority’s affirmative action requirements pursuant to N.J.A.C. 19:31-28.13;

4. If applicable, for the two years after the first certificate of compliance is issued, evidence that the project remains in compliance with the Authority’s prevailing wage requirements pursuant to N.J.A.C. 19:31-28.13;

5. A tax clearance certificate as described at section 1 at N.J.S.A. 54:50-39 for the applicant and any co-applicant;

6. A certification from the applicant that the supermarket or grocery store is operating on a full-time basis, which may include, but not be limited to, access to reports from an independent scanning data company;

7. A list of all tenants, sub-tenants, or licensees of the supermarket or grocery store, the gross leasable area leased by each tenant or sub-tenant or occupied by a licensee, and whether the tenant or sub-tenant is operating its business at the premises;

8. Annual financial statements, as certified by a certified public accountant and accompanied by an unqualified opinion, reporting the project's financial performance;

9. If applicable, satisfactory evidence that the applicant complies with the labor harmony agreement requirement pursuant to N.J.A.C. 19:31-28.8(d) or as required for the tax credit pursuant to N.J.A.C. 19:31-28.7(d)1. For a financing gap tax credit award calculated as set forth at N.J.A.C. 19:31-28.7(d)1, if the applicant does not provide satisfactory evidence of the executed agreement in effect for the relevant privilege period, the amount of the tax credit specified in the certificate of compliance shall be reduced to an annual amount corresponding to an award pursuant to N.J.A.C. 19:31-28.7(d)2;

10. For a tax credit that has been awarded before the completion of construction of the supermarket or grocery store, the first annual report shall include the permanent certificate of occupancy covering the entire project;

11. A floor plan identifying the actual uses of the supermarket or grocery store for each quarter of the relevant privilege period, including square footage for any alcoholic beverages and products related to the consumption of such beverages, all retail space (for example, planogram), and the retail space dedicated to fresh and/or frozen fruit and vegetables. The calculation of the square footage of uses shall be determined as the average of the quarterly floor plans for the period;

12. A copy of a permit from the Supplemental Nutrition Assistance Program (SNAP) and an executed vendor agreement from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), unless an application for SNAP or WIC retailer authorization is pending pursuant to N.J.A.C. 19:31-28.8(g);

13. If the Authority approval included a co-applicant, a certification that the participation agreement between the applicant and the co-applicant remains in effect and is not in default and that the co-applicant is making the contribution(s) required pursuant to the participation agreement;

14. Evidence satisfactory to the Authority of the listening session required pursuant to N.J.A.C. 19:31-28.3(a)7iv, including, but not limited to, providing a copy of the notice of the listening session and the minutes of such listening session;

15. For a financing gap tax credit, the annual report shall additionally include, for the third year of the eligibility period, verification of the applicant's projected cash flow;

16. For an initial operating cost tax credit:

i. The annual financial statement shall include initial operating costs for the relevant privilege period and an income statement in a form satisfactory to the Authority that indicates the initial operating shortfall; and

ii. Evidence of continued financing approvals, including the submittal of executed financing commitments; and

17. In conducting its annual review, the Authority may require an applicant to submit any information determined by the Authority to be necessary and relevant to its review.

(c) The annual reports required at (a) above are due 120 days after the end of the applicant's tax privilege period. Failure to timely submit the report, absent extenuating circumstances and the written approval of the Authority, shall result in a forfeiture of the tax credits for that privilege period. The Authority reserves the right to audit any of the representations made and documents submitted in the annual report.

(d) Upon receipt, review, and acceptance of each annual report submitted during the eligibility period, the Authority shall provide to the applicant and the Director of the Division of Taxation in the Department of the Treasury a certificate of compliance indicating the amount of tax credits that the applicant or any co-applicant may apply against the applicant's tax liability. If the Authority approval included a co-applicant, the Authority shall provide the certificate of compliance to the co-applicant with a notice to the applicant. No tax credit certificate will be valid without the certificate of compliance issued for the relevant tax privilege period.

(e) Upon receipt by the Director of the certificate of compliance, the Director shall allow the applicant or any co-applicant a credit against the tax imposed pursuant to N.J.S.A. 54:10A-5, 54:18A-2 and 3, 17:32-15, or 17B:23-5. An applicant or any co-applicant shall apply the credit awarded against the applicant's liability for the tax period in which the supermarket or grocery store opens for business to the public.

(f) Credits granted to a partnership or a New Jersey S corporation shall be passed through to the corporate partners, corporate members, or corporate owners, respectively, pro-rata, or pursuant to an executed agreement among the partners, members, or owners documenting an alternate distribution method provided to the Director and accompanied by any additional information as the Director may prescribe, consistent with any rule, guidance, or other publication issued by the Division of Taxation.

(g) The Director shall prescribe the order of priority of the application of the credit allowed pursuant to this section and any other credits allowed by law against the tax imposed pursuant to N.J.S.A. 54:10A-5. The amount of the credit applied pursuant to this section against the tax imposed pursuant to N.J.S.A. 54:10A-5, together with any other credits allowed by law, shall not reduce the tax liability to an amount less than the statutory minimum provided at N.J.S.A. 54:10A-5.e. Any credit shall be valid in the privilege period in which the certification is approved, and any unused portion thereof may be carried forward into the next 10 privilege periods or until exhausted, whichever is earlier.

19:31-28.10 Reduction, forfeiture, and recapture of tax credits

(a) If, during the eligibility period, the applicant ceases to operate the project as a supermarket or grocery store, the supermarket or grocery store ceases to operate on a full-time basis, or the project ceases to meet the criteria at N.J.A.C. 19:31-28.3(a)7, the applicant and any co-applicant may forfeit or be subject to recapture for all or some of the incentive award.

(b) During the commitment period, the Authority may recapture a proportionate amount of the tax credit if the project ceases to be a supermarket or grocery store, the supermarket or grocery store ceases to operate on a full-time basis, or the project ceases to meet the criteria at N.J.A.C. 19:31-28.3(a)7.

(c) If the supermarket or grocery store is disqualified from the Supplemental Nutrition Assistance Program (SNAP) or is subject to a Federal sanction leading to disqualification from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), then the applicant and any co-applicant shall forfeit all credits for the relevant tax period and each subsequent tax period and the Authority shall recapture a proportionate amount of the tax credit.

(d) If any labor harmony agreement requirement pursuant to N.J.A.C. 19:31-28.8(d) is not satisfied during the relevant tax period, then the applicant and any co-applicant shall forfeit, or the Authority shall recapture some or all of the tax credits for the tax period in which the labor harmony agreement requirements are not satisfied and each subsequent tax period until the first tax period for which documentation demonstrating compliance has been reviewed and approved by the Authority, for which tax period and each subsequent period the full amount of the credit shall be allowed.

(e) As of the date of the annual report pursuant to N.J.A.C. 19:31-28.9, if any worker employed to perform construction work at the project is paid less than the prevailing wage rate for the worker's craft or trade during the relevant tax period as required pursuant to N.J.A.C. 19:31-28.13(b), then the applicant and any co-applicant shall forfeit, or the Authority shall recapture some or all of the tax credits for the tax period in which the prevailing wage is not paid and each subsequent tax period until the first tax period for which documentation demonstrating compliance has been reviewed and approved by the Authority, for which tax period and each subsequent period the full amount of the credit shall be allowed.

(f) If, based on new information, the Authority determines that forfeiture or recapture should have been applicable pursuant to any of the provisions in this section, the Authority shall recapture some or all of the tax credits for the relevant tax period(s).

(g) If, at any time, the Authority determines that the applicant or co-applicant made a material misrepresentation on the applicant's application, project completion certification, annual report, or any related submissions, the applicant and any co-applicant shall forfeit, and the Authority may recapture any or all of the incentive award and all tax credits awarded pursuant to the Program, which shall be in addition to any other remedies in the incentive award agreement and any criminal or civil penalties to which the applicant, co-applicant, and the respective officers may be subject.

(h) Any recapture amount pursuant to this section may include interest on the recapture amount, at a rate equal to the statutory rate for tax deficiencies, plus any statutory penalties, and all costs incurred by the Authority and the Division of Taxation in the Department of the Treasury in connection with the pursuit of the recapture, including, but not limited to, counsel fees, court costs, and other costs of collection. The Authority shall confer with the Division of Taxation to determine the recapture amount.

(i) If all or part of a tax credit sold or assigned pursuant to N.J.S.A. 34:1B-331 and N.J.A.C. 19:31-28.11(a) is subject to recapture, then the Authority shall pursue recapture from the applicant, and to the extent the co-applicant is involved with the basis for the recapture, any co-applicant, and not from the purchaser or assignee of the tax credit transfer certificate.

(j) Any funds recaptured pursuant to this section, including penalties and interest, shall be deposited into the General Fund of the State.

19:31-28.11 Application for tax credit transfer certificate

(a) An applicant or co-applicant may apply to the Director of the Division of Taxation in the Department of the Treasury and the Chief Executive Officer of the Authority for a tax credit transfer certificate, covering one or more years, in lieu of the applicant or co-applicant being allowed any amount of the credit against the tax liability of the applicant. The tax credit transfer certificate, upon receipt thereof by the applicant or co-applicant from the Director and the Chief Executive Officer of the Authority, may be sold or assigned, in full or in part, in an amount not less than $25,000, in the privilege period during which the applicant or co-applicant receives the tax credit transfer certificate from the Director, to another person, who may apply the tax credit against a tax liability pursuant to N.J.S.A. 54:10A-5, 54:18A-2 and 54:18A-3, 17:32-15, or 17B:23-5. The certificate provided to the applicant or co-applicant shall include a statement waiving the applicant's or co-applicant's right to claim the amount of the credit that the applicant or co-applicant has elected to sell or assign against the applicant's or co-applicant's tax liability.

(b) The applicant or co-applicant shall not sell or assign, including a collateral assignment, a tax credit transfer certificate allowed pursuant to this section for consideration received by the applicant or co-applicant of less than 85 percent of the transferred credit amount before considering any further discounting to present value which shall be permitted. The applicant or co-applicant shall submit to the Authority documentation evidencing the value of the tax credits that may include, but not be limited to, the purchase agreement.

(c) The tax credit transfer certificate issued to an applicant or co-applicant by the Director shall be subject to any limitations and conditions imposed on the application of original State tax credits issued pursuant to the Act and any other terms and conditions that the Director may prescribe including, but not limited to, any applicable statutes of limitations for claiming a refund or credit.

(d) A purchaser or assignee of a tax credit transfer certificate pursuant to this section shall not make any subsequent transfers, assignments, or sales of the tax credit transfer certificate. If a lender that holds a tax credit certificate as collateral on a redevelopment project forecloses on the project, the foreclosure and resulting transfer of the certificate shall not be considered a sale of the transfer certificate.

(e) The Authority shall publish, on its Internet website, the following information concerning each tax credit transfer certificate approved by the Authority and the Director pursuant to this section:

1. The name of the transferor;
2. The name of the transferee;
3. The value of the tax credit transfer certificate;
4. The State tax against which the transferee may apply the tax credit; and
5. The consideration received by the transferor.

19:31-28.12 Assignment of rights of incentive award agreement

(a) An applicant who has entered into an incentive award agreement may, upon notice to and written consent of the Authority and State Treasurer, pledge, assign, transfer, or sell any or all of its right, title, and interest in, and to, the incentive award agreement and in the incentive award payable pursuant to the incentive award agreement, and the right to receive the incentive award, along with the rights and remedies provided to the applicant pursuant to the incentive award agreement. To decide whether to consent, the Authority and State Treasurer will consider the purchase price and terms of the pledge, assignment, transfer, or sale; the allocation of the purchase price to the tax credit; and the impact of the transaction to the reasonable and appropriate return on investment for the seller(s) and the purchaser. Any assignment shall be an absolute assignment for all purposes, including the Federal bankruptcy code. If the Authority approval included a co-applicant, prior to requesting the consent of the Authority and State Treasurer, the applicant shall obtain, in writing, the co-applicant's consent, and the applicant shall provide the co-applicant's written consent to the Authority and State Treasurer with the applicant's notice.

(b) A co-applicant who has entered into an incentive award agreement may, upon notice to and written consent of the Authority and State Treasurer, assign, transfer, or sell any or all of its right, title, and interest in, and to, the incentive award agreement and in the incentive award payable pursuant to the incentive award agreement, and the right to receive the incentive award, along with the rights and remedies provided to the co-applicant pursuant to the incentive award agreement, provided that the purchaser shall be a non-profit pursuant to Section 501(c)3 of the Internal Revenue Code. To decide whether to consent, the Authority and State Treasurer will consider the contributions of the co-applicant, the proposed contributions by the purchaser, the purchase price and terms of the assignment, transfer or sale, and the allocation of the purchase price to the tax credit. The new purchaser shall be the co-applicant and shall be required to receive an assignment of the co-applicant's participation agreement or to execute a new participation agreement with the applicant. Any assignment shall be an absolute assignment for all purposes, including the Federal bankruptcy code. Prior to requesting the consent of the Authority and State Treasurer, the co-applicant shall obtain, in writing, the applicant's consent, and the co-applicant shall provide the applicant's written consent to the Authority and State Treasurer with the co-applicant's notice.

(c) Any pledge of an incentive award made by the applicant shall be valid and binding from the time the pledge is made and filed in the records of the Authority. The incentive award pledged and thereafter received by the applicant shall immediately be subject to the lien of the pledge without any physical delivery thereof or further act, and the lien of any pledge shall be valid and binding against all parties having claims of any kind, in tort, contract, or otherwise against the taxpayer irrespective of whether the parties have notice thereof. As a condition of any incentive grant, the grantee, assignee, pledgee, or subsequent holder of the incentive grant shall immediately file notice of the same with the clerk of the county in which the project is located.

(d) The Authority shall publish, on its Internet website, the following information concerning each pledge, assignment, transfer, or sale approved by the Authority pursuant to this section:

1. The name of the person or entity offering the pledge, assignment, transfer, or sale of a right, title, or interest in an incentive award agreement;
2. The name of the person or entity receiving the pledge, assignment, transfer, or sale of a right, title, or interest in the incentive award agreement;
3. The value of the right, title, or interest in the incentive award agreement; and
4. The consideration received by the person or entity offering the pledge, assignment, transfer, or sale of the right, title, or interest in the incentive award agreement.

19:31-28.13 Affirmative action and prevailing wage

(a) For a financing gap tax credit:

1. The Authority's affirmative action requirements at N.J.S.A. 34:1B-5.4 and N.J.A.C. 19:30-3 shall apply to the project, including, but not limited to, construction contracts for work performed before the application and after May 4, 2023 (the effective date of this subchapter), and included in the project cost.
2. The Authority's prevailing wage requirements at N.J.S.A. 34:1B-5.1 and N.J.A.C. 19:30-4 shall apply to the project, but not be limited to,

construction contracts for work performed before the application and included in the project cost.

(b) For an initial operating cost tax credit, the Authority's affirmative action requirements at N.J.S.A. 34:1B-5.4 and N.J.A.C. 19:30-3, and the prevailing wage requirements at N.J.S.A. 34:1B-5.1 and N.J.A.C. 19:30-4 shall apply to the project, including, but not limited to, construction contracts for work performed after the application is approved and construction contracts for work performed after the date of the application, if included in the initial operating shortfall.

(c) The Authority's affirmative action and prevailing wage requirements shall continue to apply to the project for two years after the first certificate of compliance is issued.

19:31-28.14 Appeals

(a) The Board's action shall be effective 10 business days after the Governor's receipt of the minutes, provided neither an early approval nor veto has been issued.

(b) An applicant may appeal the Board's action by submitting, in writing, to the Authority, within 20 calendar days from the effective date of the Board's action, an explanation as to how the applicant has met the program criteria. Such appeals are not contested cases subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(c) Appeals that are timely submitted shall be handled by the Authority as follows:

1. The Chief Executive Officer shall designate an employee of the Authority to serve as a hearing officer for the appeal and to make a recommendation on the merits of the appeal to the Board. The hearing officer shall perform a review of the written record and may require an in-person hearing. The hearing officer has sole discretion to determine if an in-person hearing is necessary to reach an informed decision on the appeal. The Authority may consider new evidence or information that would demonstrate that the applicant meets all of the application criteria.

2. Following completion of the record review and/or in-person hearing, as applicable, the hearing officer shall issue a written report to the Board containing his or her finding(s) and recommendation(s) on the merits of the appeal. The hearing officer's report shall be advisory in nature. After reviewing the report, the Chief Executive Officer of the Authority may also include a recommendation to the written report of the hearing officer. The applicant shall receive a copy of the written report of the hearing officer, which shall include the recommendation of the Chief Executive Officer, if any, and shall have the opportunity to file written comments and exceptions to the hearing officer's report within five business days from receipt of such report.

3. The Board shall consider the hearing officer's report, the recommendation of the Chief Executive Officer, if any, and any written comments and exceptions timely submitted by the applicant. Based on that review, the Board shall issue a final decision on the appeal.

19:31-28.15 Reports on implementation of program

By January 7, 2022 (one year after the effective date of the Act), and annually thereafter, the Authority shall submit a report to the Governor, the State Treasurer, and, pursuant to N.J.SA. 52:14-19.1, the Legislature, on the effectiveness of the program in establishing supermarkets and grocery stores in food desert communities.

19:31-28.16 Severability

If any section, subsection, provision, clause, or portion of this subchapter is adjudged to be unconstitutional or invalid by a court of competent jurisdiction, the remaining portions of this subchapter shall not be affected thereby.