



## **MEMORANDUM**

**TO:** Members of the Authority

**FROM:** Tim Sullivan  
Chief Executive Officer

**DATE:** January 22, 2025

**SUBJECT:** Special Adoption New Rules / Concurrent Proposal New Rules for the Cultural and Arts Facility Expansion (CAFE) Program (N.J.A.C. 19:30BB et seq.)

### **Request:**

The Members are asked to approve:

- 1) The attached special adoption new rules and concurrent proposal new rules for the Cultural and Arts Facilities Expansion (CAFE) Program and to authorize staff to (a) submit the special adoption new rules and concurrent proposal new rules for publication in the New Jersey Register (b) submit the proposed new rules as final adopted rules for publication in the New Jersey Register if no substantive formal comments are received; subject to final review and approval by the Office of the Attorney General, Governor's Rules Office (GRO), and the Office of Administrative Law (OAL).
- 2) The creation of the Cultural and Arts Facilities Expansion (CAFE) Program as authorized by P.L. 2023, c. 197, the "Cultural Arts Incentive Program Act" (the "Act," codified at N.J.S.A. 34:1B-383 through – 393) under the name of the Cultural Arts Incentive Program.
- 3) Delegated authority to the CEO to approve administrative changes to approved CAFE as currently exists for Economic Recovery Act (ERA) products.

### **Goals:**

The CAFE Program is a robust competitive tax credit program aimed at:

1. Elevating arts and culture as a key sector of the State's economy.
2. Attracting visitors, who will spend additional dollars locally, to the State and local communities.
3. Increasing the number of new and improved art and cultural facilities for residents and visitors.

4. Promoting equitable engagement with the arts for underrepresented groups and underserved communities.

### **Legislative History:**

On January 7, 2021, Governor Phil Murphy signed the New Jersey Economic Recovery Act of 2020 (ERA), P.L. 2020, c. 156, into law. The ERA includes 15+ economic development programs, including:

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

The ERA included the creation of the Community-Anchored Development Program (CAP), which was amended by P.L.2021, c.160, and is codified at N.J.S.A. 34:1B-311 to -321. In 2023, the Legislature passed S4011 to amend CAP in various ways, including adding specialized criteria applicable only to projects involving cultural arts facilities. Governor Murphy issued a conditional veto of S4011. Instead of amending the CAP as initially proposed, this veto led to the creation of the Cultural Arts Incentive Program, also known as the Cultural and Arts Facilities Expansion (CAFE) Program. In creating this program, the Governor and legislature found that:

1. The Authority can effectively utilize cultural arts institutions to catalyze economic growth in targeted communities. By selling State tax credits, these institutions can fund development projects that attract tourism and businesses to the State, and the State benefits by leveraging the incalculable economic and cultural benefits of building and supporting world class cultural arts institutions.
2. Developing or renovating cultural arts facilities are “inherently beneficial to the State because they provide vital contributions to the communities in which they are located,” and that, collectively, these projects enhance both the economy and culture of New Jersey. Therefore, the Act does not require a net benefit test. This is also the case for the Historic Property Reinvestment Program, Brownfields Redevelopment Incentive Program, Food Desert Relief Supermarket Tax Credit Program, and certain Aspire projects such as those that are predominantly residential.
3. Providing spaces for arts and culture to flourish will result in thriving communities and that establishing an incentive program that better aligns with the unique financial needs of these facilities, beyond what existing real estate programs offer, is necessary.

### **Program Purpose and General Description**

CAFE encourages arts and cultural economic development in the State by providing tax credits during an eligibility period. The amount of tax credits a Cultural Arts Institution (or “applicant”) receives is 100 percent of the eligible project costs and is subject to a statutory cap of \$75 million per project. The

overview provided here highlights key aspects of the program. Additional program details are included in the sections below, and full program details are contained in the rules (attached) and the Act.

CAFE is subject to a program cap of \$1.2 billion over the lifetime of the program. The program may not accept applications on or after March 1, 2029.

CAFE is a competitive program, under which applicants must apply within a defined application window, with all applications considered following the closure of the application period. The Authority will establish a date for the availability of the application and a date by when applications must be submitted and will post the dates on the Authority's website.

To be eligible for CAFE, a "cultural arts project" (or "project") must meet various eligibility criteria at the time of application, including, but not limited to:

- Result in a capital investment of at least \$5,000,000.
- Demonstrate that a project financing gap exists, including a reasonable and appropriate return on investment, and that the tax credits are necessary to finance the project, including both completion of the construction as well as operation of the project. Staff proposes to review operations for the duration of the eligibility period, as that is the period imposed by the Act for compliance.
- Not have commenced construction before application submission unless the Authority determines that the cultural arts project would not be completed without an award of tax credits under the program. Staff recommends the following additional exceptions: demolition and environmental remediation, consistent with Aspire, or the work was ordered by a building code or other official with jurisdiction over the site of the cultural arts project to correct a health, safety, or other hazard, consistent with the Historic Property Reinvestment Program.
- Include at least 20% equity in the project, or 10% for projects in government-restricted municipalities (GRMs) defined as Atlantic City, Paterson, and Trenton.
- Comply with minimum environmental and sustainability standards.
- Ensure all construction and building services workers are paid prevailing wages.
- Partner with an organization(s) that supports Work First New Jersey recipients.
- While the Act does not specify the time by when the project must be completed, staff proposes that the cultural arts institution obtain a temporary certificate of occupancy within four years of executing the tax credit agreement, consistent with the requirement for non-transformative, non-phased Aspire projects.
- Meet a minimum eligible score as outlined in the CAFE Program scoring criteria.

In addition to meeting the program eligibility, the cultural arts institution and any co-applicant must be in substantial good standing with the New Jersey Department of Labor and Workforce Development (DLWD), the New Jersey Department of Environmental Protection (DEP), and the New Jersey Department of Treasury (Treasury), as determined by each Department. The method for determining substantial good standing is the same that has been included in ERA tax credit incentive programs.

Similar to the Aspire Program, staff proposes reviewing the Lead Development Entity for substantial good standing with DLWD, DEP, and Treasury. The Lead Development Entity is responsible for overseeing

the redevelopment project and is relied upon by the Authority to demonstrate operational and financial capability, expertise, and experience to complete the project.

All projects that receive CAFE support must also meet minimum environmental and sustainability standards (green building requirements) and pay prevailing wage during construction and the eligibility period to both construction workers and building service workers.

In addition, the applicant must execute a tax credit agreement that contains the Program terms and conditions, with which the applicant must comply.

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

### **Eligibility Criteria**

The following highlights key eligibility requirements for the CAFE Program. Full eligibility details are contained in the draft proposed rules in section N.J.A.C. 19:31BB-3, based on N.J.S.A. 34:1B-387. To be eligible, a project must meet various eligibility criteria at application, which the Board ascertains based on staff's review and presentation of a project to the Board, and at project completion, when staff reviews the cultural arts institution's certifications evidencing satisfaction of Program requirements and conditions.

#### **Cultural Arts Institution**

The definition of Cultural Arts Institution defines includes the following types of entities:

1. Government entities, nonprofit entities, governmental economic or community development entities (incorporated pursuant to Title 15 of the Revised Statutes or Title 15A of the New Jersey Statutes), all of which must have a primary mission and specific policy goal of arts education or artistic enrichment; or
2. For-Profit businesses receiving a federal historic rehabilitation tax credit or a tax credit from New Jersey's "Historic Property Reinvestment Act" with a cultural arts institution facility open to the public.

#### **Cultural Arts Institution Facility**

"Cultural arts institution facility" means an existing or proposed cultural arts facility within this State, operated and maintained by a cultural arts institution. Consistent with the intent of the Act, staff proposes that all cultural arts institution facilities must be "open to the public." A "cultural arts institution facility" includes, without limitation, an aquarium, botanical society, historical society, library, museum, gallery, performing arts center, arts-based community centers, or any related facility that is principally for the support and benefit of any of the foregoing. The term "cultural arts institution facility" shall not include facilities predominately used for athletics, recreation, and non-arts based community centers.

To ensure that State subsidized cultural arts institution facilities provide benefits to as visitors and residents in general, staff proposes to define "open to the public" as: no special membership, invitation,

appointment, or private status shall be required, and any member of the general public who wishes may enter, visit, participate, or attend. Access may be during specified hours and/or ticketed. As applied to a cultural arts facility in which primarily (i) objects of cultural and/or artistic interest are exhibited, the facility shall be accessible on average at least 20 hours per week; (ii) performances are held in front of a live audience, the facility shall conduct on average at least four events per month; or (iii) arts education is conducted, the facility shall conduct art educational offerings, workshops, programs, or classes on average at least four times per month. The Authority may determine a different number of hours per week or other standard of “open to the public” either based on a standard generally accepted by custom or practice or due to unavoidable closures or other circumstances approved by the Authority.

### Cultural Arts Project

“Cultural arts project” or “project” means a capital project for the construction or improvement of a cultural arts institution facility that is located in the State for which a cultural arts institution is to be awarded tax credits by the Authority under the program pursuant to a tax credit agreement, provided that the project for which the tax credits are awarded will result in a capital investment (that is, eligible project cost) of at least \$5,000,000.

### Project Size / Cost Thresholds

A project must result in a capital investment of at least \$5,000,000. If the cultural arts facility is part of a larger building, any shared parts like foundations or parking lots can only be counted as project costs in proportion to the square footage that the cultural arts facility occupies in the building.

### Equity

Staff proposes a definition of equity similar to Aspire. The Authority will consider as equity sources of capital: cash, funds raised by the cultural arts institution, costs for project feasibility incurred within the 12 months prior to application, property value less any mortgages when the applicant owns the project site, and any other investment by the applicant in the project deemed acceptable by the Authority. Property value shall be valued at the lesser of: the purchase price, provided the property was purchased pursuant to an arm’s length transaction within 12 months of application; or the value as determined by a current appraisal acceptable to the Authority.

The CAFE Program requires that the Cultural Arts Institution include at least 20% equity in the project, or 10% for projects in a GRM.

For CAFE, equity also includes State grants except assistance provided by the Authority. This differs from other real estate tax credit incentive programs, which only count Federal and local grants as equity.

Additionally, as detailed in the attached proposed rules, staff proposes that the value of the property included in the equity contribution shall not be 50 percent or more of the equity. The limitation that not more than 50% of the equity contribution can come from the property value is to ensure that applicants bring other sources of funding for the project and maintain a substantial stake in the project to encourage commitment and accountability in the project. The differs from Authority programs, as this program offers a 100% tax credit, which is higher than other NJEDA programs.

### *Project Financing Gap and Reasonable Rate of Return*

Given that the CAFE Program is intended to catalyze arts and cultural capital projects that need the CAFE tax credits, the Act requires that a project must demonstrate the existence of a project financing gap in order to be eligible for tax credits under this program. The Act defines project financing gap to include a review of the project's reasonable and appropriate return on investment. As with Aspire, staff will compare a project's return on investment against a market rate of return. The Act specifically requires that the Authority consider past and projected fundraising efforts of the applicant to make the determination.

This means that the project must demonstrate part of the "total project cost," including reasonable and appropriate return on investment, remains to be financed after all other sources of capital have been accounted for. "Total project cost" is used to evaluate the return and is based upon all costs incurred by the cultural arts institution prior to completing the project.

Reasonable and appropriate return on investment means the discount rate at which the present value of the future operating cash flows of an investment equals the total project cost. Although this is similar to Aspire, one key difference due to the structure of the program is that CAFÉ applicants are operating entities rather than real estate developers that lease the project.

### *Economic Feasibility and Capacity*

The cultural arts facility must demonstrate at time of application the tax credit is necessary to finance the cultural arts project. The applicant must also demonstrate that they have the ability to successfully complete and then operate the cultural arts project throughout the eligibility period. The applicant will be required to provide a market / feasibility study along with a project budget and operating costs to demonstrate that they have the ability to complete and operate the project as well as demonstrate that the tax credit is needed.

### *Commencement of Construction*

Pursuant to the Act, projects applying for assistance under the CAFE must not have commenced any construction at the site of the cultural arts project, unless the Authority determines that the cultural arts project would not be completed without an award of tax credits under the program.

Additionally, staff recommends the following additional exceptions:

- Consistent with Aspire, demolition and environmental remediation,
- Consistent with the Historic Property Reinvestment Program, if the cultural arts institution has been ordered by a building code or other official with jurisdiction over the site or the cultural arts project to correct a health, safety, or other hazard if:
  - The cultural arts institution provides a copy of the order to the Authority;
  - The cultural arts institution documents to the Authority's satisfaction that the proposed construction activity is limited to resolve the hazard; and
  - Any construction or at the site of the cultural arts facility project was conducted by an entity that is not the current owner or cultural arts institution, or an affiliate of the current owner or cultural arts institution and was not done at the direction of or under contract with the owner, business entity, or an affiliate of the owner or cultural arts institution.

### Completion of Construction

While the Act does not specify the time by when the project must be completed, staff proposes Construction of the project must be completed and issued a temporary certificate of occupancy within four years of executing the tax credit agreement. This is consistent with the requirement for non-transformative, non-phased Aspire projects.

### Partnership with an organization(s) that supports Work First New Jersey recipients.

During the eligibility period, the cultural arts institution is statutorily required to partner with one or more local community organizations that provide support and services to Work First New Jersey program recipients, in order to provide work activity opportunities and other appropriate services to Work First New Jersey program recipients. These activities and services may include, but are not limited to: work-study programs, internships, sector-based contextualized literacy training, skills-based training in growth industries in the State, and job retention and advancement services;

### Project Operation

The CAFE Program requires that the cultural arts institution have ownership of, or lease space in, the cultural arts institution facility and operate, cause to operate, or hold an operating agreement for at least the eligibility period, after the project is completed. To allow the cultural arts institution to use some of the facility for amenities for visitors and as a source of revenue, such as restaurants or other retail not operated by the institution, staff proposes allowing the institution to lease or sublease (or reduce the institution's tenancy or space) up to 40 percent of 15,000 square feet of the facility, whichever is less.

### Project Scoring

The Authority is statutorily obligated to establish scoring criteria for the evaluation of proposed projects. The Act requires that the Authority set a minimum acceptable score and use scoring to "determine priority for an award." Priority among applicants is necessary to allocate tax credits in circumstances where there are more project requests than available credits. The program is well funded, with \$1.2 billion in credits available. Given the relatively large pool of available credits, staff does not anticipate that the CAFE Program will be oversubscribed. Accordingly, staff are recommending that priority be set through the minimum score approach to assess whether a proposed project is consistent with the objectives, policy goals, and principles of the CAFE Program, rather than using scoring as a means to competitively rank or compare projects against each other. If the volume of CAFE tax credit award requests is greater than currently anticipated, staff will present to the Board a revised scoring evaluation process that can be used for comparative project ranking.

The Authority has established scoring criteria in consultation with the New Jersey Council on the Arts. Please refer to Appendix B for the "CAFE Scoring Criteria" for the specific proposed criteria, and further clarification on each of the different aspects the Authority will consider in its scoring evaluation of proposed projects.

The Act requires the Authority to include the following factors in scoring, which have been included into the scoring matrix for the program and addressed in the rules:

- 1) Amount of tax credits requested compared to the amount needed to complete the project (leveraging other sources of funding)
- 2) Advancement of State, regional, and local goals of arts & cultural facilities in underserved communities
- 3) The relationship of the project to a comprehensive local development strategy
- 4) Job creation and economic development
- 5) Project location (economic and social distress locations)
- 6) Number of new full-time jobs
- 7) Diverse board which is representative of the community.

The Act also allows the Authority to include additional scoring criteria. As such, staff recommends including 8) Plan for affordable offerings to the general public.

Please refer to Appendix B for the “CAFE Scoring Criteria” for the specific proposed criteria the Authority will consider in its scoring evaluation of proposed CAFE projects.

Similar to the Brownfield Redevelopment Incentive Program, previously approved by this Board, the definitions for “diverse” and “representative of the community” are included in the rules and are specific for this program purpose. In accordance with the Act, the program will consider diversity of the owners and board of directors (or partners or members if no board of directors exist). To receive full points for this category, the applicant will need to include identity self-certification forms, as well as information on the percentage of ownership held by each diverse owner, and an explanation on how the current board members are representative of the community. NJEDA’s Diversity Equity and Inclusion (DEI) Department, will evaluate and score applications for this category.

### *Green Building Standards*

As with nearly all Authority tax credit incentive program, the Act requires projects to comply with the standards established by the Authority based on the green building manual prepared by the Commissioner of the Department of Community Affairs (DCA) pursuant to N.J.S.A. 52:27D-130.6, regarding the use of renewable energy, energy-efficient technology, and non-renewable resources in order to reduce environmental degradation and encourage long-term cost reduction. The Authority has developed a “Green Building Standards” document that reflects the requirements of the DCA Green Building Manual to ensure projects meet these standards. The Green Building Standards lists options that apply the best practice principles of the Green Building Manual to the applicant’s specific type of project.

### **Post-Approval Process**

CAFE is a performance-based program. After approval, the cultural arts institution must sign an approval letter with standard post-approval conditions, such as site control and executed financing commitments, and subsequently a tax credit agreement. Upon completion of the project, the cultural arts institution must submit satisfactory evidence of the completion of the project and satisfaction of the program eligibility requirements. Thereafter, on an annual basis during the eligibility period, the cultural arts institution must demonstrate compliance with eligibility criteria and, among other things, affirmative action, and prevailing wage. During the eligibility period, the cultural arts institution must also certify that the project



is still open to the public and operating in a manner that is consistent with the approval for which the tax credit award was based.

Assuming the project is in compliance each year, the cultural arts institution may use – through a sale or transfer – an amount of tax credit equal to the total divided by the duration of the eligibility period in years. The Act authorizes an eligibility period between five and ten years and does not specify the amounts of the tax credit that the institution may have available each year. Staff proposes a five-year eligibility period as it facilitates project financing by reducing risk and enhancing the ability to secure bridge lending sources. This approach also allows recipients to maximize the proceeds from the award.

There are several scenarios where a tax credit award may be reduced or forfeited. These include, but are not limited to, the following, where applicable:

- A project change so that it would not have been eligible or would have been reviewed under different eligibility criteria including but not limited to characteristics used in initial project scoring so that the project no longer achieves the minimum requisite score under the CAFE Program Scoring Criteria;
- Non-compliance with affirmative action or prevailing wage;
- Failure to operate the project as a cultural arts institution facility, including but not limited to the requirements related to being open to the public; or
- A material misrepresentation on the cultural arts institution's application, project completion certification, annual report, or any related submissions. In this case, the rules also state that the Authority may recapture any and all tax credits.

Further information regarding reduction, forfeiture, and recapture of tax credits under CAFE can be found in N.J.A.C. 19:31BB-10.

### **Rulemaking Process**

The CAFE legislation authorized the Authority to promulgate special adoption rules for the CAFE Program, which will be effective immediately upon filing with the Office of Administrative Law. In addition, Staff proposes concurrently proposing the rules, which will include a formal 60-day public comment period pursuant to the Administrative Procedure Act's rulemaking procedures, so the rules can ultimately be adopted as final program rules.

### **Compliance with Executive Order 63**

In accordance with Executive Order 63, to ensure outreach efforts are made to the public and affected stakeholders, the Authority issued a media release advising the public that information on CAFE was available for review and informal input.

The Authority staff convened a virtual public “Listening Session,” which provided an overview of the CAFE Program and the opportunity for public feedback on November 26, 2024. The listening session was recorded and posted the Authority’s website.

Additionally, the public was invited to submit written feedback through the NJEDA’s website from November 26, 2024, through December 20, 2024.

### **Chief Compliance Officer Certification of Draft Rule Proposal**

Pursuant to N.J.S.A. 34:1B-365, the Chief Executive Officer is required to appoint a Chief Compliance Officer (CCO) to, among other things, “review and certify that the provisions of program rules or regulations provide the authority with adequate procedures to pursue the recapture of the value of an economic development incentive in the case of substantial noncompliance, fraud, or abuse by the economic development incentive recipient, and that program rules and regulations are sufficient to ensure against economic development incentive fraud, waste, and abuse”.

Jignasa Desai-McCleary has been designated the CCO. In that capacity, Ms. Desai-McCleary has reviewed the proposed compliance portion of rules and regulations for the CAFE Program and is prepared to sign the certification, subject to the Board taking action to approve the same for submission to the New Jersey Office of Administrative Law for publication in an upcoming issue of the New Jersey Register.

### **Fees**

The fee structure as outlined below is also included in the new rules. Prior to establishing the fee structure for this program, Authority staff conducted an internal review to estimate the likely administrative costs to the Authority to administer the CAFE Program. This review considered staff time and third party or contractor fees for reviews and services such as marketing.

Fees are determined based on a project’s total cost. The two tiers are those projects with total cost of eligible project costs of less than \$20 million and those with total cost of eligible project costs of \$20 million and more.

The rules specify the following tiered fees for the Program:

<b>Total Project Cost</b>	<b>&lt;\$20MM</b>	<b>≥\$20MM</b>
Application Fee	\$ 5,000	\$ 10,000
Approval Fee	\$ 15,000	\$ 30,000
Issuance Fee / Certification Fee	\$ 25,000	\$ 50,000
Annual Servicing Fee	\$ 10,000	\$ 25,000
Transfer / Assignment Fee	\$ 5,000	\$ 7,500
Minor Modification	\$ 2,500	\$ 5,000
Major Modification	\$ 5,000	\$ 10,000
6-Month Extensions (post-agreement)	\$ 2,500	\$ 5,000
Termination Fee	\$ 5,000	\$ 10,000

### **Delegated Authority**

On November 18, 2024, the Members approved a delegation to the CEO to approve routine administrative changes to ERA products, including applicant/awardee name changes, site identification updates, affiliate additions (program permitting), updates to reflect internal reorganizations and organizational changes, and the re-designation the recipient of an award as a result of an acquisition and/or merger.

Presently, we are seeking the Members' approval to delegate to the CEO, who pursuant to existing delegated authority policy may further sub-delegate authority to staff, authority to approve routine administrative changes for CAFE.

### **Recommendation**

The Members are asked to approve:

1) The attached special adoption new rules and concurrent proposal new rules for the Cultural and Arts Facilities Expansion (CAFE) Program and to authorize staff to (a) submit the special adoption new rules and concurrent proposal new rules for publication in the New Jersey Register (b) submit the proposed new rules as final adopted rules for publication in the New Jersey Register if no substantive formal comments are received; subject to final review and approval by the Office of the Attorney General, Governor's Rules Office (GRO), and the Office of Administrative Law (OAL).

2) The creation of the Cultural and Arts Facilities Expansion (CAFE) Program as authorized by P.L. 2023, c. 197 (codified at N.J.S.A. 34:1B-383 through –393).

3) Delegated authority to the CEO to approve administrative changes to approved Café as currently exists for Economic Recovery Act (ERA) products.

A handwritten signature in blue ink, appearing to read 'T. Sullivan', is positioned above a horizontal line.

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Tim Sullivan, CEO

Prepared by: Elizabeth Limbrick, Dan Jennings, and Jorge Santos

Attachments:

Appendix A – Proposed New Rules – CAFE Program

Appendix B – CAFE Program Scoring Criteria