

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 3168

BY DELEGATES CRISS, HANSHAW (MR. SPEAKER), RILEY

AND ESPINOSA

[Passed March 9, 2023; in effect ninety days from passage.]

1 AN ACT to amend and reenact §5B-2E-3, §5B-2E-5, §5B-2E-6, §5B-2E-7 and §5B-2E-7a of the
2 Code of West Virginia, 1931, as amended; all relating to amending and modernizing the
3 Tourism Development Act; modifying definition of approved costs; allowing eligible
4 company to operate or intend to operate directly or indirectly through a management
5 company; modifying definition of tourism attraction; modifying definitions of tourism
6 development project and tourism development expansion project; providing discretion
7 regarding subjective criteria; modifying project requirements relating to production of
8 revenues; providing for application of effective date; modifying terms and provisions of
9 agreements between Department of Economic Development and approved company;
10 providing additional conditions under which allowable credit is increased; providing a
11 mechanism by which a project may amend the date by which it is to be complete;
12 extending availability of enhanced credits; extending enhanced credit to projects involving
13 historic structures; authorizing an additional fifteen-year term for companies to continue
14 taking authorized and outstanding tax credits; removing provisions for carry forward, carry
15 back and forfeiture of credits; providing for elections to not use credit; and updating
16 references to "department" and its secretary.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2E. WEST VIRGINIA TOURISM DEVELOPMENT ACT.

§5B-2E-3. Definitions.

1 As used in this article, unless the context clearly indicates otherwise:

2 (1) "Agreement" means a tourism development agreement entered into, pursuant to
3 section six of this article, between the department and an approved company with respect to a
4 project.

5 (2) "Approved company" means any eligible company approved by the department
6 pursuant to section five of this article seeking to undertake a project.

7 (3) "Approved costs" means:

8 (a) *Included costs*:

9 (i) Obligations incurred for labor and to vendors, contractors, subcontractors, builders,
10 suppliers, delivery persons and material persons in connection with the acquisition, construction,
11 equipping or installation of a project;

12 (ii) The costs of acquiring real property or rights in real property and any costs incidental
13 thereto;

14 (iii) The cost of contract bonds and of insurance of all kinds that may be required or
15 necessary during the course of the acquisition, construction, equipping, or installation of a project
16 which is not paid by the vendor, supplier, delivery person, contractor or otherwise provided;

17 (iv) All costs of architectural and engineering services, including, but not limited to:
18 Estimates, plans and specifications, preliminary investigations and supervision of acquisition,
19 construction, equipping and installation of a project, as well as for the performance of all the duties
20 required by or consequent to the acquisition, construction, equipping or installation of a project;

21 (v) All costs required to be paid under the terms of any contract for the acquisition,
22 construction, equipping or installation of a project;

23 (vi) All costs required for the installation of utilities, including, but not limited to: Water,
24 sewer, sewer treatment, gas, electricity, communications and off-site construction of utility
25 extensions to the boundaries of the real estate on which the facilities are located, all of which are
26 to be used to improve the economic situation of the approved company in a manner that allows
27 the approved company to attract persons; and

28 (vii) All other costs comparable with those described in this subdivision;

29 (b) *Excluded costs*. — The term "approved costs" does not include any portion of the cost
30 required to be paid for the acquisition, construction, equipping or installation of a portion of a
31 project that is financed with state grants or for which the eligible taxpayer elects to qualify for other
32 state tax credits, including, but not limited to, those provided by article thirteen-q, chapter eleven

33 of this code. The exclusion of certain costs of a project under this paragraph (b) does not disqualify
34 the remainder of the costs of the project.

35 (4) "Base tax revenue amount" means the average monthly amount of consumer sales
36 and service tax collected by an approved company, based on the twelve-month period ending
37 immediately prior to the opening of a new tourism development project for business or a tourism
38 development expansion project, as certified by the State Tax Commissioner.

39 (5) "Department" means the West Virginia Department of Economic Development as
40 provided in article two of this chapter.

41 (6) "Crafts and products center" means a facility primarily devoted to the display,
42 promotion and sale of West Virginia products and at which a minimum of eighty percent of the
43 sales occurring at the facility are of West Virginia arts, crafts or agricultural products.

44 (7) "Eligible company" means any corporation, limited liability company, partnership,
45 limited liability partnership, sole proprietorship, business trust, joint venture or any other entity
46 operating or intending to operate a project, whether owned or leased, within the state that meets
47 the standards required by the department. An eligible company may operate or intend to operate
48 directly or indirectly through a lessee or management company.

49 (8) "Ineligible company" means any West Virginia pari-mutuel racing facility licensed to
50 operate multiple video lottery machines as authorized by article twenty-two-a, chapter twenty-nine
51 of this code or any limited lottery retailer holding a valid license issued under article seven, chapter
52 sixty of this code.

53 (9) "Entertainment destination center" means a facility containing a minimum of two
54 hundred thousand square feet of building space adjacent or complementary to an existing tourism
55 attraction, an approved project, or a major convention facility and which provides a variety of
56 entertainment and leisure options that contain at least one major theme restaurant and at least
57 three additional entertainment venues, including, but not limited to, live entertainment, multiplex
58 theaters, large-format theaters, motion simulators, family entertainment centers, concert halls,

59 virtual reality or other interactive games, museums, exhibitions or other cultural and leisure time
60 activities. Entertainment and food and drink options shall occupy a minimum of sixty percent of
61 total gross area, as defined in the application, available for lease and other retail stores shall
62 occupy no more than forty percent of the total gross area available for lease.

63 (10) "Final approval" means the action taken by the Secretary of the department qualifying
64 the eligible company to receive the tax credits provided in this article.

65 (11) "Project" means a tourism development project and/or a tourism development
66 expansion project administered in accordance with the provisions of this article.

67 (12) "Qualified professional services destination facility" means a facility with a minimum
68 qualified investment, as defined in this article, of not less than \$80 million physically located in
69 this state and adjacent or complementary to a historic resort hotel, which primarily furnishes and
70 provides personal or professional services, or both types of services, to individuals who primarily
71 are residents of another state or foreign county.

72 (13) "State agency" means any state administrative body, agency, department, division,
73 board, commission or institution exercising any function of the state that is not a municipal
74 corporation or political subdivision.

75 (14) "Tourism attraction" means a cultural or historical site, a recreation or entertainment
76 facility, an area of natural phenomenon or scenic beauty, a West Virginia crafts and products
77 center, or an entertainment destination center or a qualified professional services destination
78 facility. A project or tourism attraction does not include any of the following:

79 (A) Lodging facility, unless:

80 (i) The facility constitutes a portion of a project and represents less than fifty percent of
81 the total approved cost of the project, or the facility is to be located on recreational property owned
82 or leased by the state or federal government and the facility has received prior approval from the
83 appropriate state or federal agency;

84 (ii) The facility involves the substantial reconstruction, restoration, or rehabilitation of a
85 structure that is listed individually in the national register of historic places or is located in a
86 national register historic district and certified by the state historic preservation officer as
87 contributing to the historic significance of the district and the substantial reconstruction,
88 rehabilitation, or restoration project has been approved in advance by the state historic
89 preservation officer; or

90 (iii) The facility involves the construction, reconstruction, restoration, rehabilitation or
91 upgrade of a full-service lodging facility or the reconstruction, restoration, rehabilitation or upgrade
92 of an existing structure into a full-service lodging facility having not less than five hundred guest
93 rooms, with construction, reconstruction, restoration, rehabilitation or upgrade costs exceeding
94 ten million dollars;

95 (B) A facility that is primarily devoted to the retail sale of goods, other than an
96 entertainment destination center, a West Virginia crafts and products center or a project where
97 the sale of goods is a secondary and subordinate component of the project; and

98 (C) A recreational facility that does not serve as a likely destination where individuals who
99 are not residents of the state would remain overnight in commercial lodging at or near the project
100 or existing attraction.

101 (15) "Tourism development project" means the acquisition, including the acquisition of real
102 estate by a leasehold interest with a minimum term of ten years; the design, construction, and
103 equipping of a tourism attraction; the construction and installation of improvements to facilities
104 necessary or desirable for the acquisition, construction, installation of a tourism attraction,
105 including, but not limited to, surveys, installation of utilities, which may include water, sewer,
106 sewage treatment, gas, electricity, communications and similar facilities; and off-site construction
107 of utility extensions to the boundaries of the real estate on which the facilities are located, all of
108 which are to be used to improve the economic situation of the approved company in a manner
109 that allows the approved company to attract persons.

110 (16) "Tourism development expansion project" means the acquisition, including the
111 acquisition of real estate by a leasehold interest with a minimum term of ten years; the design,
112 construction, equipping, and installation of additions, betterments, and improvements to facilities
113 necessary or desirable for the expansion of an existing tourism attraction including, but not limited
114 to, surveys, installation of utilities, which may include water, sewer, sewage treatment, gas,
115 electricity, communications, and similar facilities; and off-site construction of utility extension to
116 the boundaries of real estate on which the facilities are located, all of which are to be used to
117 improve the economic situation of the approved company in a manner that allows the approved
118 company to attract persons.

119 (17) "Tourism development project tax credit" means the tourism development project tax
120 credit allowed by section seven of this article.

121 (18) "Tourism development expansion project tax credit" means the tourism development
122 expansion project tax credit allowed by section seven-a of this article.

§5B-2E-5. Project application; evaluation standards; approval of projects.

1 (a) Each eligible company that seeks to qualify a project for the tourism development
2 project tax credit provided by section seven of this article, or for the tourism development
3 expansion project tax credit provided by section seven-a of this article, as applicable, must file a
4 written application for approval of the project with the department.

5 (b) With respect to each eligible company making an application to the department for a
6 tourism development project tax credit or a tourism development expansion project tax credit, the
7 department shall make inquiries and request documentation, including a completed application,
8 from the applicant that shall include: A description and location of the project; capital and other
9 anticipated expenditures for the project and the sources of funding therefor; the anticipated
10 employment and wages to be paid at the project; business plans that indicate the average number
11 of days in a year in which the project will be in operation and open to the public; and the anticipated
12 revenues and expenses generated by the project.

13 (c) On and after the effective date of this section as amended in 2023, the Secretary of
14 the Department, within sixty days following receipt of an application or receipt of any additional
15 information requested by the Department respecting the application, whichever is later, shall act
16 to grant or not to grant approval of the application, based on the following criteria, all subjective
17 criteria is subject to the sole discretion of the Department:

18 (1) The project will attract at least twenty-five percent of its visitors from outside of this
19 state;

20 (2) The project will have approved costs in excess of \$1,000,000;

21 (3) The project will have a significant and positive economic impact on the state
22 considering, among other factors, the extent to which the project will compete directly with or
23 complement existing tourism attractions in the state and the amount by which increased tax
24 revenues from the project will exceed the credit given to the approved company;

25 (4) The project is expected to produce sufficient revenues and public demand to be
26 operating and open to the public for a minimum of one hundred days per year, not accounting for
27 any unforeseen weather or other force majeure events;

28 (5) The project will provide additional employment opportunities in the state;

29 (6) The quality of the proposed project and how it addresses economic problems in the
30 area in which the project will be located;

31 (7) Whether there is substantial and credible evidence that the project is likely to be started
32 and completed in a timely fashion;

33 (8) Whether the project will, directly or indirectly, improve the opportunities in the area
34 where the project will be located for the successful establishment or expansion of other industrial
35 or commercial businesses;

36 (9) Whether the project will, directly or indirectly, assist in the creation of additional
37 employment opportunities in the area where the project will be located;

38 (10) Whether the project helps to diversify the local economy;

39 (11) Whether the project is consistent with the goals of this article;

40 (12) Whether the project is economically and fiscally sound using recognized business
41 standards of finance and accounting; and

42 (13) The ability of the eligible company to carry out the project.

43 (d) The department may establish other criteria for consideration when approving the
44 applications.

45 (e) The decision by the Secretary of the Department is final.

§5B-2E-6. Agreement between department and approved company.

1 The department, upon final approval of an application by the Secretary, may enter into an
2 agreement with any approved company with respect to its project. The terms and provisions of
3 each agreement shall include, but not be limited to:

4 (1) The estimated amount of approved costs of the project that qualify for a sales tax credit,
5 as provided in section seven or section seven-a of this article, as applicable. Within six months of
6 the actual completion date, which, for purposes of this section, means the date on which the
7 project is completed and opened to the public, the approved company shall document the actual
8 cost of the project through a certification of the costs to the department by an independent certified
9 public accountant acceptable to the department; and

10 (2) A date certain by which the approved company reasonably expects the project to be
11 completed and to be opened to the public: *Provided*, That such date may be updated and
12 amended as necessary, with the written approval of the department upon a submission by the
13 approved company outlining the reason for amendment, and, if approved, the completion and
14 opening of the project either prior to or after the initial proposed date shall not impact the
15 qualification of the approved company for the tax credit as provided in §5B-2E-7 or §5B-2E-7a of
16 this code.

§5B-2E-7. Amount of credit allowed for tourism development project; approved projects.

1 (a) Approved companies are allowed a credit against the West Virginia consumers sales
2 and service tax imposed by §11-15-1 *et seq.*, of this code and collected by the approved company
3 on sales generated by or arising from the operations of the tourism development project:
4 *Provided*, That if the consumers sales and service tax collected by the approved company is not
5 solely attributable to sales resulting from the operation of the new tourism development project,
6 the credit shall only be applied against that portion of the consumers sales and service tax
7 collected in excess of the base tax revenue amount. The amount of this credit is determined and
8 applied as provided in this article.

9 (b) The maximum amount of credit allowable in this article is equal to twenty-five percent
10 of the approved company's approved costs as provided in the agreement: *Provided*, That, if the
11 tourism development project site is located within the permit area or an adjacent area of a surface
12 mining operation, as these terms are defined in §22-3-3 of this code, from which all coal has been
13 or will be extracted prior to the commencement of the tourism development project; or the tourism
14 development project site is a structure that is listed individually in the national register of historic
15 places or is located in a national register historic district and certified by the state historic
16 preservation officer as contributing to the historic significance of the district; or the tourism
17 development project site is located on or within five miles of recreational property owned or leased
18 by the state or federal government and when the project is located on property owned or leased
19 by the state or federal government, the project has received prior approval from the appropriate
20 state or federal agency, the maximum amount of credit allowable is equal to thirty-five percent of
21 the approved company's approved costs as provided in the agreement.

22 (c) The amount of credit allowable may be taken over a 10-year period, at the rate of one
23 10th of the amount thereof per taxable year, beginning with the taxable year in which the project
24 is opened to the public, unless the approved company elects to delay the beginning of the 10-
25 year period until the next succeeding taxable year. This election may be made in the first
26 consumers sales and service tax return filed by the approved company following the date the

27 project is opened to the public. Once made, the election cannot be revoked. If any credit remains
28 after application of this initial ten-year period, the approved company may request an additional
29 15 year credit application period from the department. If any unused credit remains after the 25th
30 year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount
31 of any unused portion of any annual credit allowance.

32 (d) The amount determined under subsection (b) of this section is allowed as a credit
33 against the consumers sales and service tax collected by the approved company on sales from
34 the operation of the tourism development project. The amount determined under said subsection
35 may be used as a credit against taxes required to be remitted on the approved company's monthly
36 consumers sales and service tax returns that are filed pursuant to section sixteen, article fifteen,
37 chapter eleven of this code. The approved company shall claim the credit by reducing the amount
38 of consumers sales and service tax required to be remitted with its monthly consumers sales and
39 service tax returns by the amount of its aggregate annual credit allowance until such time as the
40 full current year annual credit allowance has been claimed. Once the total credit claimed for the
41 tax year equals the approved company's aggregate annual credit allowance no further reductions
42 to its monthly consumers sales and service tax returns will be permitted.

43 (e) Notwithstanding any other provision of this code, an approved company may elect not
44 to utilize the tax credit awarded in this article for any reason whatsoever, including, but not limited
45 to, utilizing other tax credits permitted in this code, after the project is completed and placed in
46 use but prior to making an election pursuant to subsection (c) of this section. Any decision not to
47 utilize the tax credit for an approved company in this article may not impact the approved
48 company's eligibility under this article or affect its designation as a Tourism Development District.

**§5B-2E-7a. Amount of credit allowed for tourism development expansion project;
approved projects.**

1 (a) Approved companies are allowed a credit against the West Virginia consumers sales
2 and service tax imposed by article fifteen, chapter eleven of this code and collected by the

3 approved company on sales generated by or arising from the operations of the tourism
4 development expansion project: *Provided*, That the tourism development expansion project tax
5 credit allowed under this section is separate and distinct from any credit allowed for a tourism
6 development project in accordance with the provisions of section seven of this article: *Provided*,
7 *however*, That if the consumers sales and service tax collected by the approved company is not
8 solely attributable to sales resulting from the operation of the tourism development expansion
9 project, the credit shall only be applied against that portion of the consumers sales and service
10 tax collected in excess of the base tax revenue amount. The amount of this credit is determined
11 and applied as provided in this article.

12 (b) The maximum amount of credit allowable in this article is equal to twenty-five percent
13 of the approved company's approved costs as provided in the agreement: *Provided*, That, if the
14 tourism development expansion project site is located within the permit area or an adjacent area
15 of a surface mining operation, as these terms are defined in section three, article three, chapter
16 twenty-two of this code, from which all coal has been or will be extracted prior to the
17 commencement of the tourism development project; or the tourism development expansion
18 project site is a structure that is listed individually in the national register of historic places or is
19 located in a national register historic district and certified by the state historic preservation officer
20 as contributing to the historic significance of the district; or the tourism development project site
21 is located on or with 5 miles of a recreational property owned or leased by the state or federal
22 government and when the project is located on property owned or leased by the state or federal
23 government, the project has received prior approval from the appropriate state or federal agency,
24 the maximum amount of credit allowable is equal to thirty-five percent of the approved company's
25 approved costs as provided in the agreement.

26 (c) The amount of credit allowable may be taken over a 10-year period, at the rate of one
27 10th of the amount thereof per taxable year, beginning with the taxable year in which the project
28 is opened to the public, unless the approved company elects to delay the beginning of the 10-

29 year period until the next succeeding taxable year. This election may be made in the first
30 consumers sales and service tax return filed by the approved company following the date the
31 project is opened to the public. Once made, the election cannot be revoked. If any credit remains
32 after application of this initial 10-year period, the approved company may request an additional
33 15 year credit application period from the Department. If any unused credit remains after the 25th
34 year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount
35 of any unused portion of any annual credit allowance.

36 (d) The amount determined under subsection (b) of this section is allowed as a credit
37 against the consumers sales and service tax collected by the approved company on sales from
38 the operation of the tourism development expansion project. The amount determined under said
39 subsection may be used as a credit against taxes required to be remitted on the approved
40 company's monthly consumers sales and service tax returns that are filed pursuant to section
41 sixteen, article fifteen, chapter eleven of this code. The approved company shall claim the credit
42 by reducing the amount of consumers sales and service tax required to be remitted with its
43 monthly consumers sales and service tax returns by the amount of its aggregate annual credit
44 allowance until such time as the full current year annual credit allowance has been claimed. Once
45 the total credit claimed for the tax year equals the approved company's aggregate annual credit
46 allowance no further reductions to its monthly consumers sales and service tax returns will be
47 permitted.

48 (e) Notwithstanding any other provision of this code, an approved company may elect not
49 to utilize the tax credit awarded in this article for any reason whatsoever, including, but not limited
50 to, utilizing other tax credits permitted in this code, after the project is completed and placed in
51 use but prior to making an election pursuant to subsection (c) of this section. Any decision not to
52 utilize the tax credit for an approved company in this article may not impact the approved
53 company's eligibility under this article or affect its designation as a Tourism Development District.

The Clerk of the House of Delegates and the Clerk of the Senate hereby certify that the foregoing bill is correctly enrolled.

.....
Clerk of the House of Delegates

.....
Clerk of the Senate

Originated in the House of Delegates.

In effect ninety days from passage.

.....
Speaker of the House of Delegates

.....
President of the Senate

The within is this the.....
Day of, 2023.

.....
Governor