

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Committee Substitute

for

House Bill 3168

By Delegates Criss, Hanshaw (Mr. Speaker), Riley

and Espinosa

[Originating in the Committee on Finance;

February 13, 2023]

1 A BILL 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 ~~development office~~ department and an approved company
4 with respect to a project.

5 (2) "Approved company" means any eligible company approved by the ~~development office~~
6 department 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 to
26 be used to improve the economic situation of the approved company in a manner that allows the
27 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 governmental incentives grants or bonds~~ or for which the eligible
32 taxpayer elects to qualify for other state tax credits, including, but not limited to, those provided by

33 article thirteen-q, chapter eleven of this code. The exclusion of certain costs of a project under this
34 paragraph (b) does not automatically disqualify the remainder of the costs of the project.

35 (4) "Base tax revenue amount" means the average monthly amount of consumer sales and
36 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) "~~Development office~~" "Department" means the West Virginia ~~Development Office~~
40 Department of Economic Development as provided in article two of this chapter.

41 (6) "Crafts and products center" means a facility primarily devoted to the display, promotion
42 and sale of West Virginia products and at which a minimum of eighty percent of the sales occurring
43 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 ~~development office~~ department. An eligible company may operate or
48 intend to operate 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 ~~executive director~~ Secretary of the
64 ~~development office~~ department qualifying the eligible company to receive the tax credits provided
65 in this article.

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

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

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

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

80 (A) Lodging facility, unless:

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

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

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

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

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

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

111 ~~substantially owned, managed or controlled by an eligible company with an existing project~~
112 ~~located within a ten mile radius, or by a person or persons related by a family relationship,~~
113 ~~including spouses, parents, children or siblings, to an owner of an eligible company with an~~
114 ~~existing project located within a ten mile radius~~

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

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

126 (18) "Tourism development expansion project tax credit" means the tourism development
127 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 ~~Development Office~~ department.

5 (b) With respect to each eligible company making an application to the ~~Development Office~~
6 department for a tourism development project tax credit or a tourism development expansion
7 project tax credit, the ~~Development Office~~ department shall make inquiries and request
8 documentation, including a completed application, from the applicant that shall include: A

9 description and location of the project; capital and other anticipated expenditures for the project
10 and the sources of funding therefor; the anticipated employment and wages to be paid at the
11 project; business plans that indicate the average number of days in a year in which the project will
12 be in operation and open to the public; and the anticipated revenues and expenses generated by
13 the project.

14 (c) On and after the effective date of this section as amended in ~~2014~~ 2023, the ~~executive~~
15 ~~director~~ Secretary of the ~~Development Office~~ Department, within sixty days following receipt of an
16 application or receipt of any additional information requested by the ~~Development Office~~
17 Department respecting the application, whichever is later, shall act to grant or not to grant approval
18 of the application, based on the following criteria, all subjective criteria is subject to the sole
19 discretion of the Department:

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

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

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

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

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

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

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

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

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

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

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

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

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

45 (d) The ~~Development Office~~ department may establish other criteria for consideration
46 when approving the applications.

47 (e) The decision by the ~~executive director~~ Secretary of the ~~Development Office~~ Department
48 is final.

49 ~~(f) This section as amended and reenacted in 2014 shall apply to applications under review~~
50 ~~by the director of the development office prior to the effective date of this section as well as to~~
51 ~~applications filed on and after the effective date of this section as amended and reenacted in 2014~~

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

1 The ~~Development Office~~ department, upon final approval of an application by the ~~executive~~
2 ~~director~~ Secretary, may enter into an agreement with any approved company with respect to its
3 project. The terms and provisions of 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 ~~three~~
6 months of the actual completion date, which, for purposes of this section, means the date on which
7 the project is completed and opened to the public, the approved company shall document the
8 actual cost of the project through a certification of the costs to the ~~Development Office~~ department

9 by an independent certified public accountant acceptable to the ~~Development Office~~ department;
10 and

11 (2) A date ~~certain~~ by which the approved company shall reasonably expects the project to
12 be have completed and to be opened the project to the public: *Provided*, That such date may be
13 updated and amended as necessary, with the written approval of the department upon a
14 submission by the approved company outlining the reason for amendment, and, if approved, the
15 completion and opening of the project either prior to or after the initial proposed date shall not
16 impact the qualification of the approved company for the tax credit as provided in §5B-2E-7 or
17 §5B-2E-7a of this code. Any approved company that has received final approval may request and
18 ~~the Development Office may grant an extension or change, however, in no event shall the~~
19 ~~extension exceed three years from the date of final approval to the completion date specified in the~~
20 ~~agreement with the approved company~~

§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: *Provided*,
4 That if the consumers sales and service tax collected by the approved company is not solely
5 attributable to sales resulting from the operation of the new tourism development project, the credit
6 shall only be applied against that portion of the consumers sales and service tax collected in
7 excess of the base tax revenue amount. The amount of this credit is determined and applied as
8 provided in this article.

9 (b) The maximum amount of credit allowable in this article is equal to twenty-five percent of
10 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 adjacent to within five miles of recreational property
18 owned or leased by the state or federal government and when the project is located on property
19 owned or leased by the state or federal government, the project has received prior approval from
20 the appropriate state or federal agency, the maximum amount of credit allowable is equal to thirty-
21 five percent of the approved company's approved costs as provided in the agreement.

22 (c) The amount of credit allowable ~~must~~ may be taken over a ~~ten~~ 10-year period, at the rate
23 of one ~~tenth~~ 10th of the amount thereof per taxable year, beginning with the taxable year in which
24 the project is opened to the public, unless the approved company elects to delay the beginning of
25 the ~~ten-year~~ 10-year period until the next succeeding taxable year. This election ~~shall~~ may be
26 made in the first consumers sales and service tax return filed by the approved company following
27 the date the project is opened to the public. Once made, the election cannot be revoked. If any
28 credit remains after application of this initial ten-year period, the approved company may request
29 an additional 15 year credit application period from the department. If any unused credit remains
30 after the 25th year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed
31 for the amount 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 the
34 operation of the tourism development project. The amount determined under said subsection may
35 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 tax
41 year equals the approved company's aggregate annual credit allowance no further reductions to
42 its monthly consumers sales and service tax returns will be permitted.

43 ~~(e) If any credit remains after application of subsection (d) of this section, the amount of~~
44 ~~credit is carried forward to each ensuing tax year until used or until the expiration of the third~~
45 ~~taxable year subsequent to the end of the initial ten year credit application. If any unused credit~~
46 ~~remains after the thirteenth year, that amount is forfeited. No carryback to a prior taxable year is~~
47 ~~allowed for the amount of any unused portion of any annual credit allowance. Notwithstanding any~~
48 ~~other provision of this code, an approved company may elect not to utilize the tax credit awarded in~~
49 ~~this article for any reason whatsoever, including, but not limited to, utilizing other tax credits~~
50 ~~permitted in this code, after the project is completed and placed in use but prior to making an~~
51 ~~election pursuant to subsection (c) of this section. Any decision not to utilize the tax credit for an~~
52 ~~approved company in this article may not impact the approved company's eligibility under this~~
53 ~~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 tax

9 collected in excess of the base tax revenue amount. The amount of this credit is determined and
10 applied as provided in this article.

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

25 (c) The amount of credit allowable ~~must~~ may be taken over a ~~ten~~ 10-year period, at the rate
26 of one ~~tenths~~ 10th of the amount thereof per taxable year, beginning with the taxable year in which
27 the project is opened to the public, unless the approved company elects to delay the beginning of
28 the ~~ten-year~~ 10-year period until the next succeeding taxable year. This election ~~shall~~ may be
29 made in the first consumers sales and service tax return filed by the approved company following
30 the date the project is opened to the public. Once made, the election cannot be revoked. If any
31 credit remains after application of this initial 10-year period, the approved company may request
32 an additional 15 year credit application period from the Department. If any unused credit remains
33 after the 25th year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed
34 for the amount of any unused portion of any annual credit allowance.

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

46 ~~(e) If any credit remains after application of subsection (d) of this section, the amount of~~
47 ~~credit is carried forward to each ensuing tax year until used or until the expiration of the third~~
48 ~~taxable year subsequent to the end of the initial ten-year credit application. If any unused credit~~
49 ~~remains after the thirteenth year, that amount is forfeited. No carryback to a prior taxable year is~~
50 ~~allowed for the amount of any unused portion of any annual credit allowance. Notwithstanding any~~
51 ~~other provision of this code, an approved company may elect not to utilize the tax credit awarded in~~
52 ~~this article for any reason whatsoever, including, but not limited to, utilizing other tax credits~~
53 ~~permitted in this code, after the project is completed and placed in use but prior to making an~~
54 ~~election pursuant to subsection (c) of this section. Any decision not to utilize the tax credit for an~~
55 ~~approved company in this article may not impact the approved company's eligibility under this~~
56 ~~article or affect its designation as a Tourism Development District.~~