WEST VIRGINIA LEGISLATURE
Regular Session, 2004

ENROLLED

Committee Substitute for

SENATE BILL NO. 139

(By Senators Tomblin, McPresident, and Sprague, By Request of the Executive)

PASSED March 13, 2004

In Effect 90 days From Passage
ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 139

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,
BY REQUEST OF THE EXECUTIVE)

[Passed March 13, 2004; in effect ninety days from passage.]

AN ACT to amend the code of West Virginia, 1931, as amended,
by adding thereto a new article, designated §5B-2E-1, §5B-
2E-2, §5B-2E-3, §5B-2E-4, §5B-2E-5, §5B-2E-6, §5B-2E-7,
§5B-2E-8, §5B-2E-9, §5B-2E-10 and §5B-2E-11; and to
amend said code by adding thereto a new section, designated
§11-15-34, all relating to the West Virginia tourism develop­
ment act; establishing a tourism development project tax
credit; specifying short titles; specifying legislative findings
and purpose; defining terms; specifying additional powers
and duties of the development office; specifying activity that
qualifies for the credit; requiring filing of application for tax
credit as condition precedent to claiming tax credit; specify­
ing procedures for evaluation and approval of project;
providing for hiring of consultants; specifying criteria for
evaluating projects; specifying determination of amount of
allowable tax credits; providing maximum amount of credit;
specifying application of tax credits against sales tax collected; termination of applications after a certain date; providing for forfeiture of unused tax credits; providing for a recapture credit under certain circumstances; and specifying information required to be annually submitted to the state development office.

Be it enacted by the Legislature of West Virginia:

That the code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §5B-2E-1, §5B-2E-2, §5B-2E-3, §5B-2E-4, §5B-2E-5, §5B-2E-6, §5B-2E-7, §5B-2E-8, §5B-2E-9, §5B-2E-10 and §5B-2E-11; and that said code be amended by adding thereto a new section, designated §11-15-34, all to read as follows:

CHAPTER 5B. ECONOMIC DEVELOPMENT ACT OF 1985.

ARTICLE 2E. WEST VIRGINIA TOURISM DEVELOPMENT ACT.

§5B-2E-1. West Virginia Tourism Development Act.

1 This article shall be referred to as the “West Virginia Tourism Development Act”.

§5B-2E-2. Legislative findings.

1 The Legislature finds and declares that the general welfare and material well-being of the citizens of the state depend, in large measure, upon the development of tourism development projects in the state and that it is in the best interest of the state to induce the creation of new, or the expansion of existing, tourism development projects within the state in order to advance the public purposes of relieving unemployment by preserving and creating jobs and by preserving and creating new and greater sources of revenues for the support of public services provided by the state; and that the inducement for the creation or expansion of tourism development projects should be in the form of a tax credit to be applied to consumers sales and service taxes collected on the gross receipts generated directly from the operations of the new or expanded tourism
development projects, in lieu of tax credits on income that are largely deferred for a number of years after start up of a major tourism development project; and all of which new or expanded tourism developments are of paramount importance to the state and its economy and for the state's contribution to the national economy.

§5B-2E-3. Definitions.

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

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

7 (2) “Approved company” means any eligible company approved by the development office pursuant to section five of this article seeking to undertake a tourism development project.

11 (3) “Approved costs” means:

12 (A) Included costs:

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

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

20 (iii) The cost of contract bonds and of insurance of all kinds that may be required or necessary during the course of the acquisition, construction, equipping, installation or expansion of a tourism development project which is not paid by the vendor, supplier, delivery person, contractor or otherwise provided;
(iv) All costs of architectural and engineering services, including, but not limited to: Estimates, plans and specifications, preliminary investigations and supervision of construction, installation, as well as for the performance of all the duties required by or consequent to the acquisition, construction, equipping, installation or expansion of a tourism development project;

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

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

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

(B) **Excluded costs.** — The term “approved costs” does not include any portion of the cost required to be paid for the acquisition, construction, equipping and installation or expansion of a tourism development project that is financed with governmental incentives, grants or bonds or for which the eligible taxpayer elects to qualify for other tax credits, including, but not limited to, those provided by article thirteen-q, chapter eleven of this code.

(3) “Base tax revenue amount” means the average monthly amount of consumer sales and service tax collected by an approved company, based on the twelve-month period ending immediately prior to the opening of a new tourism development project for business, as certified by the state tax commissioner.
(4) “Council” means the council for community and economic development as provided in article two of this chapter.

(5) “Development office” means the West Virginia development office as provided in article two of this chapter.

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

(7) “Eligible company” means any corporation, limited liability company, partnership, limited liability partnership, sole proprietorship, business trust, joint venture or any other entity operating or intending to operate a tourism development project, whether owned or leased, within the state that meets the standards required by the council. An eligible company may operate or intend to operate directly or indirectly through a lessee.

(8) “Entertainment destination center” means a facility containing a minimum of two hundred thousand square feet of building space adjacent or complementary to an existing tourism attraction, an approved tourism development project or a major convention facility and which provides a variety of entertainment and leisure options that contain at least one major theme restaurant and at least three additional entertainment venues, including, but not limited to, live entertainment, multiplex theaters, large-format theaters, motion simulators, family entertainment centers, concert halls, virtual reality or other interactive games, museums, exhibitions or other cultural and leisure time activities. Entertainment and food and drink options shall occupy a minimum of sixty percent of total gross area, as defined in the application, available for lease and other retail stores shall occupy no more than forty percent of the total gross area available for lease.
“Final approval” means the action taken by the
council qualifying the eligible company to receive the tax
credits provided in this article.

“Preliminary approval” means the action taken by
the development office conditioning final approval by the
council.

“State agency” means any state administrative
body, agency, department, division, board, commission or
institution exercising any function of the state that is not
a municipal corporation or political subdivision.

“Tourism attraction” means a cultural or historical
site, a recreation or entertainment facility, an area of
natural phenomenon or scenic beauty, a West Virginia
crafts and products center or an entertainment destination
center. A tourism development project or attraction shall
not include any of the following:

(A) Lodging facilities, unless:

(i) The facilities constitute a portion of a tourism devel-
  opment project and represent less than fifty percent of the
total approved cost of the tourism development project, or
the facilities are to be located on recreational property
owned or leased by the state or federal government and the
facilities have received prior approval from the appropri-
ate state or federal agency.

(ii) The facilities involve the restoration or rehabilitation
  of a structure that is listed individually in the national
  register of historic places or are located in a national
  register historic district and certified by the state historic
  preservation officer as contributing to the historic signifi-
  cance of the district, and the rehabilitation or restoration
  project has been approved in advance by the state historic
  preservation officer; or

(iii) The facilities involve the construction, reconstruc-
  tion, restoration, rehabilitation or upgrade of a full-service
lodging facility or the reconstruction, restoration, rehabilitation or upgrade of an existing structure into a full-service lodging facility having not less than five hundred guest rooms, with construction, reconstruction, restoration, rehabilitation or upgrade costs exceeding ten million dollars;

(B) Facilities that are primarily devoted to the retail sale of goods, other than an entertainment destination center, a West Virginia crafts and products center or a tourism development project where the sale of goods is a secondary and subordinate component of the project; and

(C) Recreational facilities that do not serve as a likely destination where individuals who are not residents of the state would remain overnight in commercial lodging at or near the new tourism development project or existing attraction.

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

“Tourism development project tax credit” means the tourism development project tax credit allowed by section seven of this article.
§5B-2E-4. Additional powers and duties of the development office.

The development office has the following powers and duties, in addition to those set forth in this case, necessary to carry out the purposes of this article including, but not limited to:

(1) Make preliminary approvals of all applications for tourism development projects and enter into agreements pertaining to tourism development projects with approved companies;

(2) Employ fiscal consultants, attorneys, appraisers and other agents as the executive director of the development office finds necessary or convenient for the preparation and administration of agreements and documents necessary or incidental to any tourism development project; and

(3) Impose and collect fees and charges in connection with any transaction.

§5B-2E-5. Tourism development project application; evaluation standards; consulting services; preliminary and final approval of projects; limitation of amount annual tourism development project tax credit.

(a) Each eligible company that seeks to qualify a tourism development project for the tax credit provided by this article must file a written application for approval of the project with the development office.

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

(c) Based upon a review of the application and additional documentation provided by the eligible company, if the director of the development office determines that the applicant and the tourism development project may reasonably satisfy the criteria for final approval set forth in subsection (d) of this section, then the director of the development office may grant a preliminary approval of the applicant and the tourism development project.

(d) After preliminary approval by the director of the development office, the development office shall engage the services of a competent consulting firm or firms to analyze the data made available by the applicant and to collect and analyze additional information necessary to determine that, in the independent judgment of the consultant, the tourism development project:

(1) Likely will attract at least twenty-five percent of its visitors from outside of this state;

(2) Will have approved costs in excess of one million dollars;

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

(4) Will produce sufficient revenues and public demand to be operating and open to the public for a minimum of one hundred days per year; and

(5) Will provide additional employment opportunities in the state.
The applicant shall pay to the development office, prior to the engagement of the services of a competent consulting firm or firms pursuant to the provisions of subsection (d) of this section, for the cost of the consulting report or reports and shall cooperate with the consulting firm or firms to provide all of the data that the consultant considers necessary or convenient to make its determination under subsection (d) of this section.

The director of the development office, within thirty days following receipt of the consultant's report or reports, shall decide whether to recommend the tourism development project to the council for final approval. If the director of the development office recommends the tourism development project to the council, he or she shall submit the project application, the consulting report or reports and other information regarding the project to the council.

The council shall review all applications properly submitted to the council for conformance to statutory and regulatory requirements, the reasonableness of the project's budget and timetable for completion, and, in addition to the criteria for final approval set forth in subsection (d) of this section, the following criteria:

(1) The quality of the proposed tourism development project and how it addresses economic problems in the area in which the tourism development project will be located;

(2) Whether there is substantial and credible evidence that the tourism development project is likely to be started and completed in a timely fashion;

(3) Whether the tourism development project will, directly or indirectly, improve the opportunities in the area where the tourism development project will be located for the successful establishment or expansion of other industrial or commercial businesses;
(4) Whether the tourism development project will, directly or indirectly, assist in the creation of additional employment opportunities in the area where the tourism development project will be located;

(5) Whether the project helps to diversify the local economy;

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

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

(8) The ability of the eligible company to carry out the tourism development project.

(h) The council may establish other criteria for consideration when approving the applications.

(i) The council may give its final approval to the applicant’s application for a tourism development project and may grant to the applicant the status of an approved company: Provided, That the total amount of tourism development project tax credits for all approved companies may not exceed one million five hundred thousand dollars each calendar year. The council shall act to approve or not approve any application within thirty days following the receipt of the application or the receipt of any additional information requested by the council, whichever is later. The decision by the development office and the council is final.

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

1 The development office, upon grant of the council’s final approval, may enter into an agreement with any approved company with respect to its tourism development project. The terms and provisions of each agreement shall include, but not be limited to:
The amount of approved costs of the project that qualify for the sales tax credit, provided for in section seven of this article. Within three months of the completion date, the approved company shall document the actual cost of the project through a certification of the costs to the development office by an independent certified public accountant acceptable to the development office; and

A date certain by which the approved company shall have completed and opened the tourism development project to the public. Any approved company that has received final approval may request and the development office may grant an extension or change, however, in no event shall the extension exceed three years from the date of final approval to the completion date specified in the agreement with the approved company.

§5B-2E-7. Amount of credit allowed; approved projects.

Approved companies are allowed a credit against the West Virginia consumers sales and service tax imposed by article fifteen, chapter eleven of this code and collected by the approved company on sales generated by or arising from the operations of the tourism development project: Provided, That if the consumers sales and service tax collected by the approved company is not solely attributable to sales resulting from the operation of the new tourism development project, the credit shall only be applied against that portion of the consumers sales and service tax collected in excess of the base tax revenue amount. The amount of this credit is determined and applied as provided in this article.

The maximum amount of credit allowable in this article is equal to twenty-five percent of the approved company’s approved costs as provided in the agreement: Provided, That, if the tourism development project site is located within the permit area or an adjacent area of a surface mining operation, as these terms are defined in
section three, article three, chapter twenty-two of this code, from which all coal has been or will be extracted prior to the commencement of the tourism development project, the maximum amount of credit allowable is equal to fifty percent of the approved company's approved costs as provided in the agreement.

(c) The amount of credit allowable must be taken over a ten-year period, at the rate of one tenth of the amount thereof per taxable year, beginning with the taxable year in which the project is opened to the public, unless the approved company elects to delay the beginning of the ten-year period until the next succeeding taxable year. This election shall be made in the first consumers sales and service tax return filed by the approved company following the date the project is opened to the public. Once made, the election cannot be revoked.

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

(e) If any credit remains after application of subsection (d) of this section, the amount of credit is carried forward
57 to each ensuing tax year until used or until the expiration
58 of the third taxable year subsequent to the end of the
59 initial ten-year credit application period. If any unused
60 credit remains after the thirteenth year, that amount is
61 forfeited. No carryback to a prior taxable year is allowed
62 for the amount of any unused portion of any annual credit
63 allowance.

§5B-2E-8. Forfeiture of unused tax credits; credit recapture;
recapture tax imposed; information required to
be submitted annually to development office;
transfer of tax credits to successors.

1 (a) The approved company shall forfeit the tourism
development project tax credit allowed by this article with
respect to any calendar year and shall pay the recapture
tax imposed by subsection (b) of this section, if:

5 (1) In any year following the first calendar year the
6 project is open to the public, the tourism development
7 project fails to attract at least twenty-five percent of its
8 visitors from among persons who are not residents of the
9 state;

10 (2) In any year following the first year the project is open
11 to the public, the tourism development project is not
12 operating and open to the public for at least one hundred
13 days; or

14 (3) The approved company is not in good standing with
15 the state tax division, the workers' compensation commis-
16 sion or the bureau of employment programs as of the
17 beginning of each calendar year.

18 (b) In addition to the loss of credit allowed under this
19 article for the calendar year, any approved company or
20 successor eligible company that forfeits the tourism
21 development project tax credit under the provisions of
22 subsection (a) of this section, credit recapture shall apply
23 and the approved company, and successor eligible compa-
24 nies, shall return to the state all previously claimed
tourism development project tax credit allowed by this article. An amended return shall be filed with the state tax commissioner for the prior calendar year, or calendar years, for which credit recapture is required, along with interest, as provided in section seventeen, article ten, chapter eleven of this code: Provided, That the approved company and successor eligible companies who previously claimed the tourism development project tax credit allowed by this article are jointly and severally liable for payment of any recapture tax subsequently imposed under this section.

(c) Within forty-five days after the end of each calendar year during the term of the agreement, the approved company shall supply the development office with all reports and certifications the development office requires demonstrating to the satisfaction of the development office that the approved company is in compliance with applicable provisions of law. Based upon a review of these materials and other documents that are available, the development office shall then certify to the tax commissioner that the approved company is in compliance with this section.

(d) The tax credit allowed in this article is transferable, subject to the written consent of the development office, to an eligible successor company that continues to operate the approved tourism development project.


1 The council may promulgate rules to implement the tourism development project application approval process and to describe the criteria and procedures it has established in connection therewith. These rules are not subject to the provisions of chapter twenty-nine-a of this code but shall be filed with the secretary of state.

§5B-2E-10. Legislative review.

1 The development office shall report annually to the joint commission on economic development by the first day of
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3 December of each year on the number of applications
4 received from eligible companies as provided in this
5 article, the status of each application, the number of
6 projects approved, the status of each project, the amount
7 of credit allowed and the amount of consumers sales and
8 service tax generated by each project.

§5B-2E-11. Termination.

1 The development office may not accept any new applica-
2 tion on or after the first day of January, two thousand
3 seven, and all applications submitted prior to the first day
4 of January, two thousand seven, that have not been
5 previously approved or not approved, shall be deemed not
6 approved and shall be null and void as of the first day of
7 January, two thousand seven.

CHAPTER 11. TAXATION.

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

§11-15-34. Tourism development project tax credit.

1 (a) There is allowed as a credit against the consumers
2 sales and service tax collected and required to be remitted
3 pursuant to this article from the operation of an approved
4 tourism development project as defined in section three,
5 article two-e, chapter five-b of this code, the amount
6 determined under section eight, article two-e, chapter five-
7 b of this code relating to the tourism development project
8 tax credit.

9 (b) The tax commissioner may propose legislative rules
10 in accordance with article three, chapter twenty-nine-a of
11 this code designed to require the filing of forms designed
12 by the tax commissioner to reflect the intent of this section
13 and article two-e, chapter five-b of this code.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

President of the Senate

Speaker House of Delegates

The within is approved this the 1st Day of April, 2004.

Governor