WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2007

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ENROLLED

COMMITTEE SUBSTITUTE
FOR

House Bill No. 2309

(By Mr. Speaker, (Mr. Thompson) and Delegate Armstead)
[By Request of the Executive]

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Passed March 10, 2007

In Effect Ninety Days from Passage
AN ACT to amend and reenact §5B-2E-3, §5B-2E-4, §5B-2E-5, §5B-2E-6, §5B-2E-7, §5B-2E-8, §5B-2E-9 and §5B-2E-11 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §5B-2E-7a, all relating to tourism development act tax credits; providing definitions; making certain entities ineligible for the credit; modifying total amount of tourism development project tax credit available on or near reclaimed surface mining operation; setting certain deadlines; modifying total amount of tourism development project tax credit available during calendar years; creating a tourism development expansion project credit; implementing a one million five hundred thousand dollar tax credit maximum availability for tourism development expansion projects; authorizing the promulgation of rules to establish a tourism development expansion project application process; and establishing a termination date for action on applications for tourism development projects and validity of such projects not previously approved.

Be it enacted by the Legislature of West Virginia:
That §5B-2E-3, §5B-2E-4, §5B-2E-5, §5B-2E-6, §5B-2E-7, §5B-2E-8, §5B-2E-9 and §5B-2E-11 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §5B-2E-7a, all to read as follows:

**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 section six of this article, between the development office and an approved company with respect to a project.

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

4. (3) "Approved costs" means:

   a. **Included costs:**

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

      ii. The costs of acquiring real property or rights in real property and any costs incidental thereto;

      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, or installation of a 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 or installation of a project;

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

(4) "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 or a tourism development expansion project, as certified by the State Tax Commissioner.

(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 project, whether owned or leased, within the state that meets the standards required by the development office. An eligible company may operate or intend to operate directly or indirectly through a lessee.

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

(9) "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 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 executive director of the development office qualifying the eligible company to receive the tax credits provided in this article.

"Preliminary approval" means the action taken by the executive director of the development office conditioning final approval.

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

"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 project or tourism attraction does not include any of the following:

(A) Lodging facility, unless:

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

(ii) The facility involves the restoration or rehabilitation of a structure that is listed individually in the national register of historic places or is located in a national register historic district and certified by the state historic preservation officer as contributing to the historic significance of the district and the rehabilitation or restoration project has been approved in advance by the state historic preservation officer; or
(iii) The facility involves the construction, reconstruction, 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) A facility that is primarily devoted to the retail sale of goods, other than an entertainment destination center, a West Virginia crafts and products center or a project where the sale of goods is a secondary and subordinate component of the project; and

(C) A recreational facility that does 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 project or existing attraction.

(15) "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 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, but does not include a project that will be substantially owned, managed or controlled by an eligible company with an existing project located within a ten mile radius, or by a person or persons related by a family relationship, including spouses, parents, children or siblings, to an owner of an eligible company with an existing project located within a ten mile radius.
(16) "Tourism development expansion project" means the acquisition, including the acquisition of real estate by a leasehold interest with a minimum term of ten years; the construction and installation of improvements to facilities necessary or desirable for the expansion of an existing 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 extension to the boundaries of 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.

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

(18) "Tourism development expansion project tax credit" means the tourism development expansion project tax credit allowed by section seven-a 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 and final approvals of all applications for projects and enter into agreements pertaining to 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 project; and

(3) Impose and collect fees and charges in connection with any transaction.
§5B-2E-5. **Project application; evaluation standards; consulting services; preliminary and final approval of projects.**

(a) Each eligible company that seeks to qualify a project for the tourism development project tax credit provided by section seven of this article, or for the tourism development expansion project tax credit provided by section seven-a of this article, as applicable, 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 a tourism development project tax credit or a tourism development expansion 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 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. The executive director of the development office shall act to grant or not to grant any preliminary approval of an application within forty-five days following its receipt or receipt of additional information requested by the development office, whichever is later.

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

(d) After preliminary approval by the executive 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 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 project will compete directly with or complement
existing tourism attractions in the state and the amount by
which increased tax revenues from the 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.

(e) 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.

(f) The executive director of the development office,
within sixty days following receipt of the consultant's final,
written report or reports, shall review, in light of the
consultant's report or reports, 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 project and how it addresses economic problems in the area in which the project will be located;

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

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

(4) Whether the project will, directly or indirectly, assist in the creation of additional employment opportunities in the area where the 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 project.

(g) The development office may establish other criteria for consideration when approving the applications.

(h) The executive director of the development office may give its final approval to the applicant's application for a project and may grant to the applicant the status of an approved company.

The executive director of the development office shall act to approve or not approve any application within sixty days following the receipt of the consultant's final, written report.
or reports or the receipt of any additional information requested by the development office, whichever is later. The decision by the executive director of the development office is final.

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

The development office, upon final approval of an application by the executive director, may enter into an agreement with any approved company with respect to its project. The terms and provisions of each agreement shall include, but not be limited to:

(1) The amount of approved costs of the project that qualify for a sales tax credit, as provided in section seven or section seven-a of this article, as applicable. 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

(2) A date certain by which the approved company shall have completed and opened the 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 for tourism development project; approved projects.

(a) 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.

(b) 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 thirty-five 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 to each ensuing tax year until used or until the expiration of the third taxable year subsequent to the end of the initial ten-year credit application period. If any unused credit remains after the thirteenth year, that amount is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

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

(a) 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 expansion project: Provided, That the tourism development expansion project tax credit allowed under this section is separate and distinct from any credit allowed for a tourism development project in accordance with the provisions of section seven of this article: Provided, however, 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 tourism development expansion 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.
(b) 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 expansion 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 thirty-five 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 expansion 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 to each ensuing tax year until used or until the expiration of the third taxable year subsequent to the end of the initial ten-year credit application period. If any unused credit remains after the thirteenth year, that amount is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

(f) The total amount of tourism development expansion project tax credits for all approved companies pursuant to this section may not exceed one million five hundred thousand dollars each calendar year.

§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.

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

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

(2) In any year following the first year the project is open to the public, the project is not operating and open to the public for at least one hundred days; or
(3) The approved company, as of the beginning of each calendar year, has an outstanding obligation to a Workers' Compensation Fund, as defined in article two-c of chapter twenty-three of this code, an outstanding obligation under the West Virginia Unemployment Compensation Act, or an outstanding obligation under the West Virginia state tax and revenue laws.

(b) In addition to the loss of credit allowed under this article for the calendar year, any approved company or successor eligible company that forfeits the tourism development project tax credit or the tourism development expansion project credit under the provisions of subsection (a) of this section, credit recapture shall apply and the approved company, and successor eligible companies, shall return to the state all previously claimed tourism development project tax credit or tourism development expansion project 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 or the tourism development expansion project 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 project.


The executive director of the development office may promulgate rules to implement the 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-11. Termination.

The development office may not accept any new project application after the thirty-first day of December, two thousand thirteen, and all applications submitted prior to the first day of January, two thousand thirteen, that have not been previously approved or not approved, shall be deemed not approved and shall be null and void as of the first day of January, two thousand thirteen.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within was approved this the 22nd day of March, 2007.

Governor