

State Enhancements of the Federal Opportunity Zone Program

by Bethany Breeze Davenport and James E. Long Jr.

Reprinted from *Tax Notes State*, September 7, 2020, p.1007

State Enhancements of the Federal Opportunity Zone Program

by Bethany Breeze Davenport and James E. Long Jr.



Bethany Breeze Davenport



James E. Long Jr.

Bethany Breeze Davenport is an associate with Bradley Arant Boult Cummings LLP's tax and bankruptcy practice groups in Nashville, Tennessee, and James E. Long Jr. is a partner and chair of the firm's state and local tax practice group in Birmingham, Alabama.

In this installment of From the SALT Minds, the authors examine Opportunity Zones and the various programs and additional incentives offered by Alabama, Connecticut, Louisiana, Maryland, New Jersey, New Mexico, Ohio, and Wisconsin for projects in the zones.

Copyright 2020 Bethany Breeze Davenport and James E. Long Jr.
All rights reserved.

The Tax Cuts and Jobs Act of 2017¹ established the popular Opportunity Zone (OZ) program to encourage investment in economically distressed communities while allowing taxpayers to defer and potentially exclude some of their capital gains from federal income taxes. The proceeds of the sale must be timely reinvested in qualifying businesses or property located in census tracts that have been

designated as OZs within the approved state. As with many TCJA income tax changes, some states automatically incorporated this incentive into their corporate or individual income tax codes (or both). On the other hand, many states had to legislatively incorporate the OZ program for income tax purposes, often as part of a larger effort to adopt or decouple from certain TCJA changes.

Several states took the opportunity (pun intended) created by the OZ program to offer enhanced income tax incentives or additional tax or other incentives for qualifying projects in an OZ. This article highlights programs and additional incentives offered by Alabama, Connecticut, Louisiana, Maryland, New Jersey, New Mexico, Ohio, and Wisconsin — including the often-unique features of each state's program. We expect more states to follow suit as competition for scarce jobs and capital investment intensifies in the midst of the COVID-19 pandemic.

Alabama

In the final hour of its 2019 session, the Alabama Legislature passed the Alabama Incentives Modernization Act (Act 2019-392), which provides tax benefits and state support for approved investments in OZ projects (among other changes to the existing statutory incentives). For "approved" OZ funds, the bill conforms individual income tax laws to provide investors with state tax benefits parallel to the federal tax benefits allowed for OZ investments. On the other hand, corporate income taxpayers should be entitled to claim OZ benefits for state tax purposes because of Alabama's rolling IRC conformity, regardless of project location or whether the fund is approved under the state's

¹P.L. 115-97.

program.² In addition to individual and corporate income taxpayers, the act extends the OZ tax benefits for approved OZ funds to banks and other financial institution investors that are subject to Alabama's financial institution excise tax.³

Recognizing that the state must compete for OZ projects and investment, the law provides Alabama with an innovative path to attract these projects. The Alabama Department of Economic and Community Affairs, which determines whether the OZ fund is approved for the benefits, may also enter into project agreements with approved opportunity funds to invest in OZ projects. In addition to infusing capital, the agreements may provide the funds' investors with "impact tax credits" against state income or financial institution excise tax liability (as appropriate) if the investment does not meet a minimum agreed-upon rate of return within a prescribed period. The total state tax credits allocated to approved OZ funds cannot exceed \$50 million and will not be available for a project if an approved OZ fund committed to invest in the project before the new law's effective date. State investments under the new program will be available until December 31, 2024.⁴

Connecticut

Connecticut enacted Public Act No. 19-54 ("An Act Concerning Opportunity Zones") in June 2019, enabling the Department of Economic and Community Development to prioritize economic development efforts that promote investment in OZs.⁵ The act appoints the department's deputy commissioner as the primary point of contact for all state programs related to the federal OZ program.⁶ Also, the deputy commissioner prioritizes applications for development in the state's OZ.⁷ This was designed to streamline the approval process of

applications for development in any of Connecticut's 72 census tracts designated as OZs.⁸

The act gives additional priority to investors rehabilitating certified historic structures in OZs.⁹ A certified historic structure is one that is either in a historic district and has been certified as contributing to the historic character of that district or a building listed on a state or national historic places registry.¹⁰ A 30 percent income tax credit voucher is available for qualified rehabilitation expenditures if the certified historic structure is in an OZ.¹¹ Certified rehabilitation expenditures are any expenses related to the rehabilitation of a building for the following permitted uses:

- (A) residential use of five units or more,
- (B) mixed residential and nonresidential uses, or
- (C) nonresidential use consistent with the historic character of such property or the district in which such property is located.¹²

Louisiana

On June 11, 2019, Gov. John Bel Edwards (D) signed the Louisiana Restoration Tax Abatement Program (Act No. 304) into law to encourage development of OZ projects by providing a property tax abatement to specific investments in an OZ.¹³ The program provides a five-year abatement of ad valorem property taxes on the increased value resulting from the restoration, improvement, development, or expansion of an existing structure on qualifying property.¹⁴ This abatement program resembles traditional tax increment financing.

² Ala. Code section 40-18-6.1(a); *see also* Alabama Department of Revenue, "Analysis of Federal Tax Law Revisions on the State of Alabama" (July 30, 2018).

³ Ala. Code section 40-18-6.1(a)(2).

⁴ Ala. Code section 40-18-6.1(b)-(g).

⁵ S.B. 570 (Conn. 2019).

⁶ *Id.*

⁷ *Id.*

⁸ Choose Connecticut, "Opportunity Zones" (last visited Aug. 3, 2020).

⁹ S.B. 570 (Conn. 2019).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Louisiana State Legislature, 2019 Regular Session (last visited Aug. 3, 2020).

¹⁴ H.B. 585 (La. 2019).

Louisiana Economic Development in late 2019 launched the helpful Louisiana Opportunity Zones web portal, which assists investors in exploring potential projects in OZs throughout the state.¹⁵

Finally, Edwards signed Act No. 22 into law on July 13.¹⁶ This new law provides investments made on or after July 1 in OZs within the state with enhanced angel investor tax credits.¹⁷ The enhancement allows for a 35 percent income tax credit instead of the regular 25 percent angel investor credit.¹⁸ This credit can be taken over two tax years and is subject to a \$7.2 million annual statewide cap.¹⁹

Maryland

OZ enhancement legislation enacted in Maryland on April 30, 2019, expands or creates several new state programs to encourage investments in those zones.²⁰ As a result, seven programs offer enhanced tax credits for use in an OZ:

- job creation;
- One Maryland;
- More Jobs for Marylanders;
- enterprise zone;
- enterprise zone focus area;
- biotechnology investor incentives; and
- cybersecurity investor incentive.²¹

Further, the new law authorizes localities to establish additional tax credits to encourage OZ investment.²²

To foster the program's expansion, the Maryland Department of Housing and Community Development created the

Opportunity Zone Information Exchange — an interactive online resource²³ that helps connect locations, developers, and businesses.²⁴

On May 8 the General Assembly passed two additional bills dealing with the Opportunity Zone enhancement tax credits: H.B.s 45 and 566.²⁵ H.B. 45 extends the availability of the Opportunity Zone enhancement tax credit until 2026,²⁶ while H.B. 566 broadens the credits' availability to properties affected by lead-based paint.²⁷ H.B. 566 also removed massage parlors from the list of entities that could not qualify for the tax credit.²⁸

New Jersey

On November 14, 2019, the New Jersey Economic Development Authority awarded five municipalities with grants of \$100,000 each to develop and support OZ projects in their respective communities.²⁹ Effective January 1, the state's angel investor income tax credit increased from 10 percent to 20 percent.³⁰ There is also a 5 percent bonus tax credit available for investments in an OZ, a low-income community, or a business that is certified by the state as minority- or woman-owned.³¹ Applications for the tax credit must be submitted within six months of the investment.³²

New Mexico

On August 27, 2019, the New Mexico Department of Economic Development announced an earmarking of \$1 million from the state's local economic development act grants for

²³ Maryland Department of Housing and Community Development, "Maryland Opportunity Zones" (last visited Aug. 3, 2020).

²⁴ *Id.*

²⁵ H.B. 45 (Md. 2020); H.B. 566 (Md. 2020).

²⁶ H.B. 45 (Md. 2020).

²⁷ H.B. 566 (Md. 2020).

²⁸ *Id.*

²⁹ New Jersey Economic Development Authority, "NJEDA Announces 5 Communities Selected to Receive Opportunity Zone Challenge Grants" (Nov. 14, 2019).

³⁰ New Jersey Economic Development Authority, "New Jersey's Angel Investor Tax Credit Program Now Providing Increased Benefits to Investors" (Jan. 3, 2020).

³¹ *Id.*

³² *Id.*

¹⁵ Louisiana Economic Development, "Opportunity Zones Web Portal to Feature Louisiana Projects" (Aug. 15, 2019).

¹⁶ Louisiana State Legislature, 2020 Regular Session (last visited Aug. 10, 2020).

¹⁷ S.B. 24.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ S.B. 581 (Md. 2019).

²¹ Maryland Department of Commerce, "Maryland Opportunity Zone Enhancement Credits" (last visited Aug. 3, 2020).

²² *Id.*

specific OZ projects.³³ In addition to meeting the normal requirements for these grants, the project must involve one of the following key industry sectors selected by the governor: aerospace, biosciences, cybersecurity, film and television, global trade, intelligent manufacturing, green energy, or sustainable value-added agriculture. The projects must also have a minimum \$15 million capital investment, create a minimum of \$2.5 million in annual payroll (\$3.5 million if located in the cities of Albuquerque, Rio Rancho, or Santa Fe), and pay salaries that are at least 2 percent above the respective county average.

Ohio

As part of the state's fiscal 2021 budget, the Ohio Opportunity Zone Investment Credit offers an individual income tax credit for some projects in OZs.³⁴ The credit, equal to 10 percent of a qualified investment in an Ohio OZ,³⁵ is limited to \$1 million per biennium per taxpayer.³⁶ To receive the credit, the OZ investment must be in OZ property exclusively located in Ohio.³⁷ The credit is capped at \$50 million for all applicants per biennium.³⁸ Applications for the tax credit for investments made in 2019 were open during January.³⁹ Applications for investments in 2020 will likely follow a similar schedule.

Wisconsin

As a result of legislation enacted this year, Wisconsin doubled the OZ basis adjustments for individual investors or members of passthrough entities that invest in qualifying opportunity funds, which invest at least 90 percent of their assets in qualified Opportunity Zone property in Wisconsin OZs.⁴⁰ Thus, for state income tax

purposes, investors in these qualifying projects should receive either a 20 percent or 30 percent reduction in the deferred capital gains that would otherwise be recognized — provided that the investment is held for at least five years or seven years, as applicable.

Wisconsin adopted the federal OZ program for state income tax purposes as a result of 2017 Wisconsin Act 231,⁴¹ and the enhanced state OZ benefit is available for investments made on or after December 31, 2019. Qualified opportunity funds must certify their ongoing qualification to the Wisconsin Department of Revenue each year by January 31, and if these funds fail to meet the 90 percent asset test described above, their owners will be subject to a penalty equal to one-third of the applicable federal penalty.⁴² ■

³³ New Mexico Economic Development, "New Mexico Offers \$1 Million Bonus to Opportunity Zone Projects" (Aug. 27, 2019); *see also* Ron Davis, "State Unveils New Opportunity Zone Incentives," *Albuquerque Business First* (Aug. 28, 2019).

³⁴ H.B. 166 (Oh. 2019).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Ohio Development Services Agency, "Ohio Opportunity Zone Tax Credit Program" (last visited Aug. 3, 2020).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 2019 Wisconsin Act 136 (A.B. 532).

⁴¹ Wisconsin DOR, "Qualified Opportunity Zones" (note that the published guidance has not been updated to reflect the changes made by Act 136).

⁴² 2019 Wisconsin Act 136 (A.B. 532).