

Ordinance No. 123284

Council Bill No. 116843

AN ORDINANCE relating to the New Markets Tax Credit program; establishing program policies and procedures, including governance structure, investment criteria, and reporting requirements.

The City of Seattle – Legislative Department

Council Bill/Ordinance sponsored by: Conlin

Committee Action:

Date	Recommendation	Vote
4/20/10	passed unanimously	3-0 yes
	Conlin, Orddon, O'Brien	

Related Legislation File:

Date Introduced and Referred: 4-19-10	To: (committee): Regional Dev. + Sustainability
Date Re-referred:	To: (committee):
Date Re-referred:	To: (committee):
Date of Final Action: 4-26-10	Date Presented to Mayor: 4-27-10
Date Signed by Mayor: April 30, 2010	Date Returned to City Clerk: May 3, 2010
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Published in Full Text <input type="checkbox"/>	
Date Veto Published:	Date Passed Over Veto:
Date Veto Sustained:	Date Returned Without Signature:

This file is complete and ready for presentation to Full Council.

Full Council Action:

Date	Decision	Vote
4-26-10	Passed	9-0

Law Department

ORDINANCE 123284

AN ORDINANCE relating to the New Markets Tax Credit program; establishing program policies and procedures, including governance structure, investment criteria, and reporting requirements.

WHEREAS, the federal government established the New Markets Tax Credit ("NMTC") program in December 2000 to spur the investment of private sector capital in low income areas by permitting taxpayers to receive a credit against federal income taxes for making equity investments in entities known as Community Development Entities ("CDEs"); and

WHEREAS, State law, RCW 35.21.735, authorizes The City of Seattle (the "City") to create partnerships and limited liability companies and enter into agreements with public or private entities, including partnership agreements and limited liability company agreements, to implement within its boundaries the NMTC program; and

WHEREAS, pursuant to such authority, the City's Office of Economic Development created Seattle Investment Fund LLC ("Primary Allocatee") as a Washington limited liability company comprised of the City as its sole and managing member, and caused the Primary Allocatee to be recognized by the United States Department of the Treasury ("Treasury") as a qualified CDE for purposes of the NMTC program; and

WHEREAS, the City's Office of Economic Development also created Seattle Subsidiary Investment Fund I LLC, Seattle Subsidiary Investment Fund II LLC, Seattle Subsidiary Investment Fund III LLC and Seattle Subsidiary Investment Fund IV LLC (each, a "Subsidiary Allocatee") as Washington limited liability companies comprised of the Primary Allocatee as their sole and managing member, and caused each Subsidiary Allocatee to be recognized by the Treasury as a qualified CDE for purposes of the NMTC program; and

WHEREAS, Seattle Investment Fund LLC submitted an application to the Treasury for an allocation of NMTCs to create flexible financing that will support catalytic projects in low-income communities that leverage other public investments, fill financing gaps caused by the contraction of credit in the real estate and business financing markets, and promote the development of small businesses in low-income communities; and

WHEREAS, Treasury awarded the Primary Allocatee an allocation of \$40,000,000 in NMTC eligible investments; and

WHEREAS, as managing member of the Primary Allocatee, the City will be responsible for maintaining the existence of the Primary Allocatee and the Subsidiary Allocatees, for



1 certain reporting and filing requirements pursuant to the Allocation Agreement among
2 the Community Development Financial Institutions Fund, the Primary Allocatee and the
3 Subsidiary Allocatees, and for fulfilling other duties, the breach of which could result in
4 the recapture of NMTCs by the Internal Revenue Service; and

5 WHEREAS, the City Council finds and determines that it is appropriate to authorize the
6 indemnification of investors if the City, through fraud, material misrepresentation, gross
7 negligence, or willful misconduct, causes the recapture of NMTCs under certain
8 circumstances; and

9 WHEREAS, it is desirable to establish the policies and procedures under which the NMTC
10 program will operate; NOW, THEREFORE,

11 **BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

12 **Section 1.** The New Markets Tax Credit Program Policies (the "Policies") attached to
13 this ordinance as Exhibit A, are hereby adopted. Any modification of the Policies shall be
14 authorized by ordinance.

15 **Section 2.** The Policies shall be interpreted so as to conform to all requirements of
16 applicable laws and regulations, but in case of any conflict between anything in the Policies and
17 any valid applicable provision of any federal or Washington State law or regulation, such law or
18 regulation shall control.

19 **Section 3.** The City approves the form Indemnity Agreement in substantially the form
20 attached to this Ordinance as Exhibit B and authorizes the City to execute and deliver such an
21 agreement with respect to each NMTC transaction in which a "qualified equity investment" is
22 made in a Subsidiary Allocatee, if requested by investors. The manager of the Primary Allocatee,
23 as identified from time to time pursuant to the Policies ("Manager"), is hereby delegated the
24 authority to execute and deliver any such agreement on behalf of the City. The Manager, in
25 consultation with the City Attorney's Office, is further authorized to modify the form Indemnity
26



1 Agreement as he or she may deem necessary, so long as the Indemnity Agreement does not
2 purport to extend the City's potential liability beyond acts of fraud, material misrepresentation,
3 gross negligence, or willful misconduct.

4 **Section 4.** The City is authorized to continue as the sole member and managing
5 member of the Primary Allocatee. The City shall execute its rights and obligations as managing
6 member of the Primary Allocatee pursuant to the Policies. The City is authorized on behalf of the
7 Primary Allocatee, and solely in its capacity as managing member of the Primary Allocatee, to
8 execute, file (if necessary) and deliver such documents and agreements as are deemed by the
9 Manager to be necessary or desirable to implement the City's NMTC program pursuant to the
10 Policies. Without limiting the foregoing grant of authority, as the Primary Allocatee's managing
11 member, the City shall cause the Primary Allocatee to do all things reasonably necessary to
12 (a) act as the manager (or managing member) of any investment entity created for purposes of
13 making "qualified equity investments" in the Subsidiary Allocatees, (b) admit one or more
14 investors as additional members of the Subsidiary Allocatees, and (c) cause one or more of the
15 Subsidiary Allocatees to make one or more qualified low-income community investments in (or
16 to) one or more qualified active low-income community businesses.

17 **Section 5.** The operating agreement, which was ratified by Ordinance 123146,
18 between the City of Seattle and the Seattle Investment Fund LLC may not be amended without
19 Council action by ordinance.

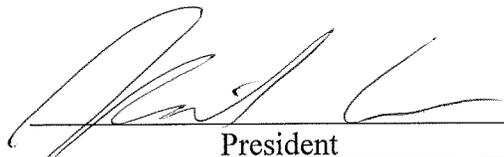
20 **Section 6.** If any one or more provisions of this ordinance shall for any reason be held
21 invalid, such invalidity shall not affect any other provision of this ordinance, but this ordinance
22 shall be construed and enforced as if such invalid provisions had not been contained herein.



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Section 7. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

Passed by the City Council the 26th day of April, 2010, and signed by me in open session in authentication of its passage this 26th day of April, 2010.



President _____ of the City Council

Approved by me this 30 day of April, 2010



Michael McGinn, Mayor

Filed by me this 3rd day of ~~April~~ May, 2010.



City Clerk

(Seal)

Exhibit A: New Markets Tax Credit Program Policies

Exhibit B: Indemnity Agreement



Exhibit A:
New Markets Tax Credit Program Policies
April 2, 2010

Background:

The City of Seattle's - Office of Economic Development ("OED") created the Seattle Investment Fund LLC (the "CDE") to apply for an allocation of federal New Markets Tax Credits ("NMTCs") from the federal government in order to attract financing for catalytic business and real estate projects. The CDE created four Washington LLCs in which the CDE is the sole member and manager (each, a "Subsidiary Allocatee"). The CDE and each Subsidiary Allocatee were certified by the Community Development Financial Institutions Fund (the "CDFI Fund") as "qualified community development entities" for purposes of Section 45D of the Internal Revenue Code of 1986, as amended (the "Code"). On October 30, 2009, the CDFI Fund allocated to the CDE the authority to use NMTCs on \$40 million worth of business and real estate investments, and approved the Subsidiary Allocatees to receive sub-allocations of such NMTCs from the CDE. On November 16, 2009, the Seattle City Council approved Ordinance 123146, authorizing OED to execute an Allocation Agreement with the CDFI Fund on behalf of the CDE and the Subsidiary Allocatees evidencing the allocation of NMTCs to the CDE. The Allocation Agreement acknowledges that the City of Seattle is the CDE's sole and managing member.

This document describes the policies and procedures for the City's NMTC program (the "NMTC Program"). It also establishes how the City, in its capacity as the CDE's managing member, will evaluate, approve, and manage investments for the CDE's current and future NMTC allocations and investments in other economic development projects.

Management and Operations:

The Director of OED (or successor agency) or the Mayor's Designee shall administer the NMTC Program, including the City's activities as the CDE's managing member. If the Mayor chooses someone other than the Director of OED (or successor agency) to manage the program and the CDE, that individual shall be confirmed by the Council. The Director of OED (or successor agency) or designee, hereafter referred to as the "Manager", is responsible for the day to day operations of the NMTC program and the CDE. The Manager is authorized to execute, deliver, endorse, modify, accept, administer, perform, and enforce such agreements (including without limitation, contracts for legal, financial or other expert services), instruments, and other documents; and to establish separate accounting and financial accounts as he or she shall deem necessary or appropriate to implement the NMTC Program, consistent with applicable laws and ordinances. By way of example (and not limitation), the Manager will be able to rely on this delegation of authority to sign contracts on behalf of the City as the managing member of the CDE and to sign contracts on behalf of the CDE as managing member of each Subsidiary Allocatee.

Staffing:

Under a contractual agreement with the CDE, OED (or successor agency) staff may provide (on behalf of the City) any or all of the following management services to the CDE:



- Maintenance of legal existence: maintain the CDE's and each Subsidiary Allocatee's existence as Washington limited liability companies, including the preparation and submission of all forms required by law.
- Compliance with operating agreements: cause the CDE and each Subsidiary Allocatee to comply with the requirements of their respective operating agreements, as the same may be amended from time to time.
- Compliance with allocation agreements: cause the CDE and each Subsidiary Allocatee to comply with the requirements of the Allocation Agreement and any future allocation agreement with the CDFI Fund.
- Initial project review: discussions with project sponsors regarding federal program rules, the CDE's policy requirements, tax credit availability, and overall benefits to their project.
- Project proposal: preparation of investment proposals for the Investment Committee that document compliance with the CDE's investment criteria described below (the "Investment Criteria"), confirmed investment sources and underwriting analysis. This underwriting analysis will be provided by a qualified third party consultant under contract with the CDE.
- Closing: issuance of the CDE's term sheet, collection of commitment fee from the project sponsor (QALICB), finalizing agreements with NMTC investors, qualified active low-income community businesses ("QALICBs"), and other related parties, and collection of other required due diligence documents with assistance of legal counsel.
- Loan servicing: managing the collection of loan payments from QALICBs, payments to any required reserve accounts, and distributing required payments to NMTC investors.
- Asset management and regulatory compliance: project monitoring, required federal audits, annual tax returns, and regulatory compliance reports with assistance provided by a qualified third party consultant under contract to the CDE.
- Close-out: actions necessary for the CDE and/or the applicable Subsidiary Allocatee to exit out of the transaction following the end of the seven-year NMTC period.

In carrying out the duties described above, the Manager shall work under the direction of the Investment Committee to select financial consultants and, in consultation with the Seattle City Attorney's Office, to select legal counsel to assist OED (or successor agency) staff.

Investment Committee Structure and Investment Review & Approval Process:

Investment decisions for the NMTC program shall be made by an Investment Committee comprised of the following five-members:

- A designated representative of the Mayor;
- The Chair of the City Council Committee for Regional Development & Sustainability (or the successor City Council committee with lead responsibility over economic development issues) or his/her designated representative;
- Two individuals with expertise in the area of finance and/or economic development policy, appointed by the Mayor and confirmed by the City Council; and
- A member of the Advisory Board who has expertise in the area of community development finance and/or community banking, as selected by the Advisory Board.



A quorum of three members is required for any meeting and action taken. Meeting participation shall be in person or remotely by telephone or other electronic means. All decisions of the Investment Committee shall be made by a majority vote of members participating in the meeting, and require at least three affirmative votes. The members will elect a chair of the Investment Committee.

In evaluating potential investments, the Investment Committee will determine whether the proposed project meets the Investment Criteria and whether risk analysis has been documented in underwriting analysis completed by a qualified third party consultant under contract to the CDE.

The Investment Committee shall meet on a quarterly basis, or more frequently if a majority of members agree, to review potential investments and consider possible recommendations regarding the Investment Criteria. Before the Manager causes the CDE to make an allocation of NMTCs, the qualified low-income community investment ("QLICI") for which such allocation is being made must be approved by the Investment Committee, which approval shall be evidenced by a written approval letter, signed by the Chair of the Investment Committee.

Advisory Board Structure and Responsibilities:

In addition to the Investment Committee, an Advisory Board will be established and maintained at all times in such a manner as to comply with the requirements of Section 45D(c)(1)(B) of the Code. The Advisory Board will provide input to the CDE and the Investment Committee regarding the following:

- (i) The particular needs of any "low-income communities" within the City of Seattle to attract QALICBs by using loans with favorable terms;
- (ii) The effectiveness of QLICIs made by the CDE or any Subsidiary Allocatee (or any other qualified community development entities to which the CDE has transferred an allocation of NMTCs) in fulfilling the CDE's primary mission;
- (iii) What types of qualified businesses and projects should be targeted by the Program;
- (iv) Projects that have applied for funding from the Program, including the small business investment program;
- (v) What existing QALICBs could be targeted to relocate into a "low-income community" within the City of Seattle; and
- (vi) Any other information the Advisory Board believes would assist in the implementation of the NMTC program.

The Advisory Board will consist of 7 members, each having a membership term of 3 years, except that the initial terms of 3 members shall be for two years:

- At least 5 of the 7 Advisory Board members must reside or work in NMTC eligible areas or otherwise represent low income persons. For purposes of satisfying this requirement,



the determination of whether an appointee to the Advisory Board represents a low-income community will be made in reference to materials published by the CDFI with respect to the certification of “qualified community development entities” for purposes of Section 45D of the Code.

- Two of the 7 Advisory Board members may be selected due to their expertise with NMTCs and/or banking/finance experience.

The Advisory Board members will be selected by the Mayor and confirmed by City Council, consistent with Section 3.5(a) of the CDE’s operating agreement.

OED (or successor agency) staff will meet with the Advisory Board on a quarterly basis to seek input of the type referenced above. Special meetings may also be held.

The Advisory Board shall designate one of their members to serve as a member of the Investment Committee with full voting rights. The term of such membership on the Investment Committee shall be for one year ending on December 31st of the year. In the following year, the Advisory Board shall re-appoint the same member or select another member to serve as an Investment Committee member.

Investment Criteria:

The Investment Criteria are as follows:

- *Compliance with Allocation Agreement(s)*
 - The foremost criterion is that each QLICI for which an allocation (or sub-allocation) of the CDE’s NMTC allocation is made must satisfy the requirements of the Allocation Agreement (and, in particular, Sections 3.2 and 3.3 thereof) and any future allocation agreement(s) with the CDFI Fund.
- *Geographic Eligibility*
 - Minimum eligibility: NMTC projects must be located in census tracts meeting minimum criteria set by the federal government regarding poverty and resident income data.
 - Areas of deeper economic distress: beyond minimum eligibility, the CDE will give strong preference to projects located in areas of deeper economic distress regarding poverty, resident income and unemployment data. The CDE has made a commitment to the federal government to allocate a majority of its NMTC allocation with respect to QLICIs benefiting such deeper distress areas.
 - Exception to the geographic eligibility rule: a QALICB may be eligible for NMTC investment if it serves a “Targeted Population” (as defined by the U.S. Treasury Department) in services provided to, employment of, or ownership of the business by low income individuals.
- *Project Readiness*
 - The Investment Committee will not consider proposed QLICIs until the CDE has obtained letters of interest from the lenders/NMTC investors needed to finance the transaction.



- Evidence is submitted to confirm that the QALICB's proposed use of proceeds from the QLICI is feasible and that the QLICI can be completed within the proposed timeline.
- *Public Benefits*
Priority will be given to QLICIs that achieve one or more of the following economic development benefits:
 - Create or retain permanent jobs in low-income communities;
 - Increase the availability of goods and services needed by residents within one or more low-income communities;
 - Serve as an anchor for future economic development in one or more low-income communities;
 - Enhance the local tax base through increased sales and/or property taxes from the QALICB's operations;
 - Include energy efficient building or process improvements; and/or
 - Increase the amount of affordable housing (i.e. housing serving households at 50% - 80% of median income) available for nearby residents (subject to the limitations set forth in Section 45D(d)(3) of the Code).

Modifications to the Investment Criteria shall require approval by the Seattle City Council.

Investment Proposals:

The Investment Committee will consider a QLICI only after OED (or successor agency) staff submits an investment proposal that contains the following analysis:

- Confirmation that the proposed QLICI meets the Investment Criteria.
- Underwriting analysis, provided by a qualified third party consultant to the CDE that evaluates the QALICB's ability to meet the stated criteria of the NMTC investor and all other financing sources to the transaction. For mixed-use projects including a housing component, underwriting analysis shall include input provided by the Office of Housing. Analysis will include a development budget and operating pro forma and will address the following:
 - Key terms offered by each investor or lender to the transaction including loan term, interest rate, amortization, and disbursement conditions.
 - Reasonableness of project costs, including an explanation whether cost reflects analysis from a credible third party such as a contractor, appraiser or other cost estimator.
 - Description of favorable financing terms for the QALICB. Favorable financing terms may include interest only payments during the seven-year tax credit period; interest rates approximately 25-50% below market; and, for leveraged transactions, any portion of the loan funded from NMTC equity to be converted into permanent equity for the QALICB.
 - Summary of the proposed transaction fees.
 - Evidence of site control.
 - The QALICB's ability to repay the QLICI (e.g., to the extent applicable, anticipated lease-up period to project stabilization, reasonableness of lease rates, and cash flow coverage including debt coverage ratio).



- Collateral/security pledged by the QALICB and analysis of loan to value requirements (or equity distribution expectations) of the NMTC investors and lenders (with reference to appraisals or other evidence of value).
- Development team capacity and experience.
- Exit issues after seven-year tax credit period, including any refinancing assumptions.
- Financing schedule.

Small Business Investments:

Of the CDE’s initial \$40 million NMTC allocation (2009 round), the CDE is authorized to utilize no more than \$5 million to enable small business loans. Loan funds can be used to finance business needs such as real estate acquisition, tenant improvements, equipment purchases and working capital. The CDE may utilize NMTCs to enable one or more small business lenders to facilitate loans for multiple projects. Underwriting analysis for the loans will be conducted by the lenders providing the capital. Lenders will determine the specific terms of the QLICI (e.g., loan term, interest rate and amortization). Small business loans must meet the Investment Criteria. The Investment Committee will develop other rules and procedures for utilization of NMTCs for small business projects. For individual loans up to \$500,000, the CDE manager shall have the authority to approve investment of NMTCs. The Investment Committee shall approve all individual loans exceeding \$500,000.

The Manager shall provide a quarterly report to the Investment Committee and Advisory Board on any small business loans approved and disbursed pursuant to this authority.

For any NMTC allocations made to the CDE by the CDFI Fund in future funding rounds, the City Council shall establish the amount of the NMTC allocation designated for small business investments.

NMTC Fees and Program Income

The Investment Committee’s approval of individual QLICIs will describe the anticipated fees and third party expenses (i.e., financial consultants and legal counsel) to be collected from and/or paid by the QALICB, the CDE, the Subsidiary Allocatees, and the NMTC investor. The CDE may use fee revenue received by the CDE, any income distributed by the Subsidiary Allocatees to the CDE, any investment earnings on the CDE’s invested funds, and any program income derived by the CDE from re-investing and re-lending its funds (collectively, “Available CDE Money”), to pay Program expenses including administrative and management services provided by the City or another entity, maintain appropriate capitalization of the CDE and invest in future economic development projects that achieve public benefits identified in the Investment Criteria. Disbursement of fees or program income for investment in other economic development projects shall require the approval of the Investment Committee. The Manager may cause the CDE to pay a LLC management fee to the City (or distribute cash to the City) so the City has sufficient funds to compensate OED staff for providing the administrative and management services pertaining to the CDE.

Fees or program income generated from the NMTC program shall be used only for economic development related activities and not for City of Seattle general fund purposes.



Annual Report to City Council

The Investment Committee shall provide an annual written report to the City Council Committee for Regional Development & Sustainability (or the successor City Council committee with lead responsibility over economic development issues), regarding all QLICs made by the CDE and/or any of the Subsidiary Allocatees during the previous year and an update on the status of all investments made pursuant to Program.



Exhibit B:

INDEMNIFICATION AGREEMENT

This **INDEMNIFICATION AGREEMENT** ("**Agreement**") is entered into as of this _____ day of _____, 20__ by and between SEATTLE INVESTMENT FUND LLC, a Washington limited liability company ("**Managing Member**"), and THE CITY OF SEATTLE, a municipal corporation and first-class charter city of the State of Washington (the "**City**" and collectively with the Managing Member, the "**Indemnitors**"), for the benefit of _____, a _____ ("**Investor**").

Recitals

A. Investor invested in _____, a _____ limited liability company (the "**Fund**"), as its sole Member, pursuant to that certain Operating Agreement dated _____, 20__ (the "**Fund LLC Agreement**"). The Fund, in turn, invested in Seattle Subsidiary Investment [I/II/III/IV] LLC, a Washington limited liability company (the "**CDE**"), pursuant to that certain Amended and Restated Operating Agreement of the CDE dated _____, 20__ (the "**CDE LLC Agreement**"), which investment was intended to constitute a "qualified equity investment" ("**QEI**") eligible for New Markets Tax Credits under Section 45D of the Code ("**Tax Credits**").

B. The CDE intends to make one or more "qualified low-income community investments" as such term is defined for purposes of Section 45D of the Code (a "**QLICI**"). The status of the Fund's investment in the CDE as a QEI is dependent on, among other things, (i) the CDE constituting a "qualified community development entity" for purposes of Section 45D of the Code, and (ii) the CDE utilizing "substantially all" (as defined for purposes of Section 45D of the Code) of such investment to make QLICIs.

C. By reason of (i) Investor's investment in the Fund, (ii) the Fund's use of the proceeds of that investment to make QEIs in the CDE in the amount of \$ _____ (the "**Designated QEI Amount**"), and (iii) the CDE's use of the respective QEI received by it to make a QLICI, Investor will be entitled to claim Tax Credits in an aggregate amount equal to \$ _____ (i.e., 100% of 39% of \$ _____).

D. Investor has made its investments in the Fund based on the assumption that it will obtain Tax Credits in the amount set forth above, and as more specifically set forth in the NMTC Assumption (defined below), based in part on various representations, warranties and covenants of the Managing Member contained in the CDE LLC Agreement relating to compliance with NMTC Program Requirements. In connection with such investment and the investment by the Fund in the CDE, the Managing Member expects to receive certain fees in connection with the closing of one or more QLICIs pursuant to the CDE LLC Agreement.

E. As a condition to Investor making its investment, and therefore as a condition to the Managing Member receiving the fees described above, the Indemnitors have been required to enter into this Agreement to provide assurances with respect to compliance by the Managing Member with NMTC Program Requirements, the failure of which could cause a Specified NMTC Recapture Event (as defined below).



F. Managing Member will benefit from the receipt of the fees referred to above and the furtherance of its purposes as a result of the investments to be made by Investor and the Fund, and the City will benefit from the same by virtue of the City being a member and manager of the Managing Member.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Indemnitors agree as follows:

1. Tax Assumptions. Indemnitors acknowledge that, by virtue of each equity investment in the CDE that was intended to constitute a QEI, and assuming no Recapture Event occurs, Investor expects to be entitled to claim Tax Credits in an amount, with respect to each such QEI, equal to (i) 5% of such QEI on the Credit Allowance Date for such QEI and on each of the next two anniversary dates of such Credit Allowance Date, and (ii) 6% of such QEI on each of the next four anniversary dates of such Credit Allowance Date (the "**NMTC Assumption**"). Indemnitors acknowledge that on _____, 20__ a QEI in the amount of \$ _____ was made in the CDE.

2. Indemnification for Certain Recapture Events. Subject to the provisions of Section 4 hereof, in the event any Specified NMTC Recapture Event shall occur, the Indemnitors shall pay the NMTC Recapture Amount to the Investor within thirty (30) calendar days of receipt of notice provided by the Investor of such Specified NMTC Recapture Event. For purposes of this Agreement:

"Accountants" shall mean _____.

"After-Tax Basis" shall mean, with respect to any payment to be received by Investor, the amount of such payment supplemented by a further payment or payments so that, after taking into account all income taxes imposed on Investor by any governmental authority with respect to such payments, the aggregate payments received by Investor achieve the after-tax internal rate of return stated in the definition of NMTC Recapture Amount below, based on the same assumptions and methods (including, but not limited to, tax rates, and timing of tax credit recognition) as reflected in the Financial Projections.

"Credit Investment Period" shall mean the period beginning on _____, 20__ occurs and ending on _____, 20__.

"Financial Projections" shall mean those certain financial and tax benefit projections prepared by the Accountants, dated on or about the date of this Agreement, for the transaction described herein.

"NMTC Recapture Amount" shall be an amount equal, on an After-Tax Basis, to the sum, as determined by the Accountants, necessary to be paid to Investor to cause the after-tax internal rate of return ("IRR") to Investor on its Capital Contribution to the Fund through and including the date of payment, to equal an IRR of ____% as stated in the Financial Projections. For purposes of determining the NMTC Recapture Amount, all assumptions and methods (including, but not limited to, tax rates, timing of tax credit recognition and IRR), will match those used in the Financial Projections. All tax benefits and obligations, as determined by the Accountants, realized by Investor plus any interest



and penalties resulting from the Specified NMTC Recapture Event will be considered in the determination of the NMTC Recapture Amount.

“Specified NMTC Recapture Event” means recapture or disallowance of any Tax Credits attributable to the QEI made by the Fund in the CDE:

(a) under Section 45D(g)(3)(A) of the Code as a result of the CDE failing to qualify or ceasing to qualify as a “qualified community development entity”;

(b) under Section 45D(g)(3)(B) of the Code, but only to the extent that the CDE has failed or ceased to use “substantially all” of the proceeds of the QEI made into the CDE to make QLICs during the Credit Investment Period and such failure has resulted solely or primarily from actions or omissions of the Managing Member in violation of its reinvestment-related obligations under the CDE LLC Agreement; or

(c) under Section 45D(g)(3)(C) of the Code, but only to the extent any redemption is the result of any distribution made by the Managing Member contrary to the terms of the CDE LLC Agreement (unless with the written consent or approval of the Investor).

All other terms appearing as initially capitalized terms and not otherwise expressly defined herein shall have the respective meanings given them in the CDE LLC Agreement.

3. Additional Payments. In addition to the foregoing, the Indemnitors, to the extent required to pay the NMTC Recapture Amount, shall also pay interest on any unpaid portion of the NMTC Recapture Amount outstanding from time to time, if any, at the rate of two percent (2%) over the long-term applicable federal rate (as prescribed under Section 1274(d) of the Code), from the date on which the NMTC Recapture Amount is required to be paid, until paid in full.

4. Limitation on Liability. Notwithstanding the preceding sections hereof:

a. The Indemnitors shall pay the NMTC Recapture Amount if there is a Final Determination (as defined in the Fund LLC Agreement) that a recapture, disallowance, or loss of Tax Credits attributable to all or a portion of the Designated QEI Amount has occurred; provided, however, that the Indemnitors’ recapture liability under this Agreement shall be limited as described in Section 4(e) below.

b. All computations required under Section 2 shall be made by the Accountants, and the results of such computations, together with a statement describing in reasonable detail the manner in which such computations were made, shall be delivered to the Indemnitors in writing.

c. Notwithstanding anything herein to the contrary, Investor covenants and agrees that it will promptly give written notice to the Indemnitors of the occurrence of any audit by the IRS if the adverse resolution of such audit (or portion thereof) would result in liability for the Indemnitors under this Agreement (such audits or relevant portions thereof being hereinafter referred to as an “Audit”). Upon request by the Indemnitors, Investor shall permit the Indemnitors



to file written materials (provided the same shall have been approved by the Investor) with the IRS in connection with any Audit or any tax administrative or judicial appeals process relating to any Audit. Investor shall consult in good faith with the Indemnitors regarding the nature and content of all actions to be taken and defenses to be raised in response to any Audit. In addition, Investor shall not agree to any proposed Determination (a "**Proposed Determination**") in connection with any Audit until it shall have given the Indemnitors at least twenty (20) business days written notice of its intent to do so and shall have obtained either (i) the written consent of the Indemnitors regarding such action or (ii) assurance satisfactory to Investor that the Indemnitor(s) are and will remain ready, willing, and able to satisfy their obligations under this Agreement in the event of an adverse Final Determination giving rise to liability under Section 2 hereof. Notwithstanding the foregoing, the consent of the Indemnitors shall not be required in the event of any fraud, willful misconduct, gross negligence or material misrepresentation on the part of any Indemnitor in connection with the matters at issue in the Audit.

d. Indemnitors shall not be obligated to pay the NMTC Recapture Amount to the extent any Tax Credits attributable to the Designated QEI Amount are recaptured or disallowed for any reason other than a Specified NMTC Recapture Event. Indemnitors shall not be obligated to pay the NMTC Recapture Amount to the extent that the applicable Specified NMTC Recapture Event is the result of changes in the Code or the NMTC Program Requirements that cause the Investor to receive less than the amount of New Markets Tax Credits it would have otherwise been eligible to receive, unless the adverse effects thereof could reasonably have been mitigated by the Managing Member.

e. The City shall not be liable under this Agreement for any NMTC Recapture Amount or any related obligations that would be payable under Sections 2 and 3 above, unless the Specified NMTC Recapture Event shall have arisen as a result of fraud, material misrepresentation, gross negligence, or willful misconduct on the part of the City or the Managing Member. In addition, the Managing Member's liability under this Agreement with respect to the QEI made in the CDE shall not exceed the aggregate amount of fees paid to the Managing Member pursuant to the Fund LLC Agreement, if any, or Section ____ of the CDE LLC Agreement, unless the Specified NMTC Recapture Event shall have arisen as a result of fraud, material misrepresentation, gross negligence, or willful misconduct on the part of the City or the Managing Member. By way of example (and not limitation), it is expressly agreed that failure by the Managing Member to provide written notice to the Fund and Investor of any notice from the CDFI Fund of any non-compliance by the CDE with NMTC Program Requirements affecting the CDE's status or certification as a "qualified community development entity" shall be deemed to constitute gross negligence or willful misconduct by Indemnitors for purposes of this Agreement. Except as expressly set forth in this Section 4(e), Investor shall look solely to the Managing Member, and shall have no claim or recourse against the City, on account of any Specified NMTC Recapture Event or for recovery of any NMTC Recapture Amount or related obligations under Sections 2 and 3 of this Agreement.

f. In the event that the Managing Member is terminated or removed pursuant to Section ____ of the CDE LLC Agreement, Indemnitors shall have no liability with respect to a Specified NMTC Recapture Event which occurs subsequent to the date of the termination or removal of such Managing Manager (the "**Removal Date**"), except that Indemnitors shall be responsible and liable for any Specified NMTC Recapture Event (in accordance with the provisions of Section 2 hereof) that occurs after the Removal Date that was caused solely or



primarily as a result of actions or omissions that occurred prior to the Removal Date (rather than actions or omissions that occurred after the Removal Date).

5. General.

a. In the event of any adjustments or claims for indemnity hereunder, each party shall be entitled to review such documents and shall be provided with such information by the other as shall be reasonably required in order that it may reasonably satisfy itself as to the requested amount of such indemnification; provided, however, that Investor shall not be obligated to make available any confidential information relating to its federal or state income tax returns or any issues relating thereto nor any computer program employed to calculate any such amount.

b. In the event of any action at law or in equity to enforce the provisions of this Agreement or to secure relief or damages for the breach of this Agreement, the prevailing party shall be entitled to its costs (including reasonable attorneys' fees) incurred in such proceedings.

c. All payments made hereunder shall be made in U.S. dollars in immediately available funds (unless the paying party is otherwise instructed by the recipient of such payment) to the account of the recipient.

d. This Agreement shall be binding upon and shall inure to the benefit of, and shall be enforceable by, the parties hereto and their respective successors and permissible assigns whether or not an express assignment to any such holder of rights under this Agreement has been made.

e. This Agreement shall be interpreted and enforced according to the laws of the State of Washington. In the event of any action at law or in equity to enforce the provisions of this Agreement or to secure relief or damages for the breach of this Agreement, the parties consent to the jurisdiction of, and agree that sole venue will lie, in the state and federal courts located in King County, Washington.

f. No amendment or modification of this Agreement, and no approvals, consents or waivers by Investor hereunder, shall be valid or binding unless in writing and executed by the party to be bound.

g. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof, and supersedes in their entirety any and all written or oral agreements previously existing between the parties with respect to such subject matter.

h. Should any one or more provisions of this Agreement be determined to be illegal or unenforceable, all other provisions nevertheless shall be effective.

i. The Indemnitors hereby agree that this Agreement and the indemnified amounts as described in Sections 2 and 3 hereof shall remain in full force and effect at all times hereinafter until paid and/or performed in full notwithstanding any action or undertakings by, or against the Managing Member, the Indemnitors, and/or any member of the Managing Member or the Indemnitors, in any proceeding in the United States Bankruptcy Court, including, without limitation, any proceeding relating to valuation of collateral, election or imposition of secured or



unsecured claim status upon claims by any Investor pursuant to any Chapter of the Bankruptcy Code or the Rules of Bankruptcy Procedure as same may be applicable from time to time. The Indemnitors' obligations hereunder shall terminate in their entirety if and to the extent that written notice of a claim or claims hereunder provided in accordance with Section 2 has not been given prior to the earlier of three (3) years following the year in which Investor's tax return is filed for the year in which the Credit Investment Period ends or such time as the IRS is prohibited from assessing additional tax liability against Investor for any year in which it claimed Tax Credits with respect to the Designated QEI Amount.

j. Each Indemnitor covenants, represents and warrants as to itself, to and for the benefit of Investor, as follows:

(i) the execution, delivery and performance by it of this Agreement does not contravene or conflict with any law, order, rule, regulation, writ, injunction or decree now in effect of any government, governmental instrumentality or court or tribunal having jurisdiction over it, or any contractual restriction binding on or affecting it;

(ii) it has all necessary power and authority to enter into and perform this Agreement, and there are no facts or circumstances of which it is aware that could in any way impair or prevent it from performing its obligations under this Agreement; and

(iii) with the assistance of counsel of its choice, it has read and reviewed this Agreement and such other documents as it and its counsel deemed necessary or desirable to read.

k. The obligations of the Indemnitors hereunder are independent of the obligations of any Affiliate or any other party which may be initially or otherwise responsible for performance or payment of the obligations hereunder guaranteed and each other Indemnitor, and, in the event of any default hereunder, a separate action or actions may be brought and prosecuted against any one or more Indemnitors, whether or not any Affiliate is joined therein or a separate action or actions are brought against any Affiliate.

l. All notices, demands, requests or other communications to be sent by one party to the other hereunder or required by law shall be in writing and shall be deemed to have been validly given or served upon delivery of same in person to the addressee or by depositing same with a nationally recognized overnight courier service for next business day delivery or by depositing same in the United States mail, postage prepaid, registered or certified mail, return receipt requested, addressed as follows:

Investor: [to be determined]

With a copy to: [to be determined]

Managing Member: Seattle Investment Fund LLC
c/o The City of Seattle
Attn. Director of the Office of Economic Development
700 Fifth Avenue, Suite 5752



P.O. Box 94708
Seattle, WA 98124-4708

City:

The City of Seattle
Attn. Director of the Office of Economic Development
700 Fifth Avenue, Suite 5752
P.O. Box 94708
Seattle, WA 98124-4708

With a copy to:

Seattle City Attorney's Office
Civil Division
600 Fourth Ave., 4th Floor
PO Box 94769
Seattle, WA 98124-4769

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IN WITNESS WHEREOF, the Indemnitors have caused this instrument to be executed by their duly authorized officers as of the date first written above.

MANAGING MEMBER:

SEATTLE INVESTMENT FUND LLC,
a Washington limited liability company

By: The City of Seattle, Washington, its Manager

By: _____

Name:

Title:

CITY:

THE CITY OF SEATTLE, WASHINGTON

By: _____

Name:

Title:



FISCAL NOTE FOR NON-CAPITAL PROJECTS

Department:	Contact Person/Phone:	DOF Analyst/Phone:
Office of Economic Development	Ken Takahashi/684-8378	Amanda Allen/684-8894

Legislation Title:

AN ORDINANCE relating to the New Markets Tax Credit program; establishing program policies and procedures, including governance structure, investment criteria, and reporting requirements.

• **Summary of the Legislation:**

The proposed ordinance establishes the policies and procedures for the New Markets Tax Credit program and how the Seattle Investment Fund LLC will evaluate, approve, and manage investments for its current and future NMTC allocations and investments in other economic development projects.

• **Background:** *(Include brief description of the purpose and context of legislation and include record of previous legislation and funding history, if applicable):*

In 2000, the federal government established the New Markets Tax Credit program to spur the investment of private sector capital in low income areas by permitting taxpayers to receive a credit against federal income taxes for making equity investments in investment vehicles known as Community Development Entities (CDEs). The federal government awards New Markets Tax Credits to CDEs through an annual competitive application process.

Washington State Law, RCW 35.21.735, authorizes the City to create partnerships and limited liability companies and enter into agreements with public or private entities, including partnership agreements and limited liability company agreements, to implement within their boundaries the New Markets Tax Credit program. Pursuant to RCW 35.21.735, the Office of Economic Development, on behalf of the City of Seattle, created a limited liability company known as Seattle Investment Fund LLC to apply for an allocation of New Markets Tax Credits. The City of Seattle is the sole and managing member of Seattle Investment Fund LLC.

On October 30, 2009, Treasury announced an award of \$40 million in New Markets Tax Credit allocation to Seattle Investment Fund LLC. Treasury requires that Seattle Investment Fund LLC enter into an Allocation Agreement which sets out the basic terms and conditions that must be met in order to receive and retain an allocation of tax credits.

With an allocation of New Markets Tax Credits, Seattle Investment Fund LLC will support catalytic projects that leverage other public investments; (2) fill financing gaps caused by the contraction of credit in the real estate and business financing markets; and (3) promote the development of small businesses.



- *Please check one of the following:*

x **This legislation does not have any financial implications.** *(Stop here and delete the remainder of this document prior to saving and printing.)*

Seattle Investment Fund LLC will collect fees from individual projects to pay for NMTC program expenses, maintain appropriate capitalization of the LLC and invest in future economic development projects. Due to NMTC program requirements and legal requirements regarding the LLC structure, fees and program income generated from the NMTC shall be used only for economic development related activities and not for City of Seattle general fund purposes.





City of Seattle
Office of the Mayor

April 12, 2010

Honorable Richard Conlin
President
Seattle City Council
City Hall, 2nd Floor

Dear Council President Conlin:

I am pleased to transmit the attached proposed Council Bill that establishes the policies and procedures for the New Markets Tax Credit ("NMTC") program and how the Seattle Investment Fund LLC will evaluate, approve, and manage investments for its current and future NMTC allocations and investments in other economic development projects.

In 2000, the federal government established the NMTC program to spur the investment of private sector capital in low-income areas by permitting taxpayers to receive a credit against federal income taxes for making equity investments in investment vehicles known as Community Development Entities (CDEs). The federal government awards NMTCs to CDEs through an annual competitive application process. On behalf of the City, the Office of Economic Development ("OED") created Seattle Investment Fund LLC as a CDE to apply for an allocation of NMTCs. On October 30, 2009, the federal Treasury Department announced an award of \$40 million in New Markets Tax Credit allocation to Seattle Investment Fund LLC. The City is the sole and managing member of Seattle Investment Fund LLC.

With the allocation of New Markets Tax Credits, Seattle Investment Fund LLC will support catalytic projects that leverage other public investments, fill financing gaps for real estate and business projects, and promote the development of small businesses. Thank you for your consideration of this legislation. Should you have any questions, please contact Ken Takahashi at 684-8378.

Sincerely,

Michael McGinn
Mayor of Seattle

cc: Honorable Members of the Seattle City Council

Michael McGinn, Mayor
Office of the Mayor
600 Fourth Avenue, 7th Floor
PO Box 94749
Seattle, WA 98124-4749

Tel (206) 684-4000
Fax (206) 684-5360
TDD (206) 615-0476
mike.mcgin@seattle.gov



STATE OF WASHINGTON – KING COUNTY

--SS.

254327
CITY OF SEATTLE, CLERKS OFFICE

125283
No. 12383,84 31202,06

Affidavit of Publication

The undersigned, on oath states that he is an authorized representative of The Daily Journal of Commerce, a daily newspaper, which newspaper is a legal newspaper of general circulation and it is now and has been for more than six months prior to the date of publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of this newspaper. The Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of King County.

The notice in the exact form annexed, was published in regular issues of The Daily Journal of Commerce, which was regularly distributed to its subscribers during the below stated period. The annexed notice, a

CT: TITLE ONLY

was published on

05/07/10

The amount of the fee charged for the foregoing publication is the sum of \$ 61.43, which amount has been paid in full.



[Handwritten Signature]

Subscribed and sworn to before me on

05/07/10

[Handwritten Signature]

Notary public for the State of Washington,
residing in Seattle

Affidavit of Publication

State of Washington, King County

City of Seattle

TITLE-ONLY PUBLICATION

The full text of the following ordinances, passed by the City Council on April 26, 2010, and published here by title only, will be mailed upon request, or can be accessed at <http://clerk.ci.seattle.wa.us>. For further information, contact the Seattle City Clerk at 684-8344.

ORDINANCE NO. 123283

AN ORDINANCE appropriating money to pay certain audited claims and ordering the payment thereof.

ORDINANCE NO. 123284

AN ORDINANCE relating to the New Markets Tax Credit program; establishing program policies and procedures, including governance structure, investment criteria, and reporting requirements.

RESOLUTION NO. 31202

A RESOLUTION recognizing the Puget Sound Regional Council Regional Food Policy Council as an advisory body to the City of Seattle.

RESOLUTION NO. 31206

A RESOLUTION concerning the renewal of the Families and Education Levy; setting forth a structure, process and schedule to develop and place a seven-year Families and Education Levy on the November 8, 2011 ballot to fund various educational services and programs that promote student academic achievement within the City of Seattle; providing for a Families and Education Levy Advisory Committee to make recommendations concerning a Levy renewal; establishing criteria for the appointment of citizen representatives to the Advisory Committee; and identifying the purpose, criteria and policy framework to be followed in developing Levy renewal recommendations.

Date of publication in the Seattle Daily Journal of Commerce, May 7, 2010.

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