

CITY CLERK DEPT.

CITY OF EL PASO, TEXAS

10 APR 14 AM 9:04 AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Office of Economic Development
AGENDA DATE: April 20, 2010 - Regular Agenda
CONTACT PERSON/PHONE: Kathryn Dodson, PhD, Director 541-4670
DISTRICT(S) AFFECTED: ALL

SUBJECT:

Discussion and action on the establishment of a non-profit corporation (Corporation) for the purpose of applying for a New Markets Tax Credit (NMTC) allocation under federal program, approval of the Corporation's certificate of formation and bylaws, appointment of the Corporation's Board of Directors, the City staff and City attorneys to file the Corporation's certificate of formation with the Secretary of State, and the Corporation to apply for certification as a Community Development Entity and for NMTC allocations from the United States Department of the Treasury for qualified projects in designated areas. [All Districts] [Economic Development, Kathryn Dodson (915)541-4670]

BACKGROUND/DISCUSSION:

On September 29, 2009, City Council voted to authorize the City Manager to sign an agreement for New Markets Tax Credits consulting services with the National Development Council for \$90,000.00. Upon consultation with the National Development Corporation, a Community Development Entity needs to be formed to apply for New Markets Tax Credits.

PRIOR COUNCIL ACTION:

Has the Council previously considered this item or a closely related one?

Yes. On September 29, 2009, City Council voted to authorize the City Manager to sign an agreement for New Markets Tax Credits consulting services with the National Development Council.

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

N/A

BOARD/COMMISSION ACTION:

Enter appropriate comments or N/A.

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



(Example: If RCA is initiated by Purchasing, client department should sign also). Information copy to appropriate Deputy City

Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

RESOLUTION

RESOLUTION AUTHORIZING ESTABLISHMENT OF A NON PROFIT CORPORATION FOR THE PURPOSE OF APPLYING FOR A NEW MARKETS TAX CREDIT ALLOCATION AND RELATED MATTERS

WHEREAS, the United States Department of Treasury has established the New Markets Tax Credit (NMTC) program to stimulate investments in predominately low-income communities; and

WHEREAS, the NMTC program is administered by the Treasury Department through its Community Development Financial Institutions (CDFI) Fund and the Internal Revenue Service; and

WHEREAS, under the NMTC program, tax credits are competitively awarded annually by the CDFI Fund to qualified Community Development Entities (CDEs) after review and evaluation of applications submitted by CDEs, which are then made available to investors; and

WHEREAS, to qualify as a CDE, an entity must satisfy the following (1) be a duly organized entity with a federal employer identification number; (2) have a primary mission of serving or providing investment capital to low-income communities or low-income persons; (3) maintain accountability to residents of low-income communities through board participation; and (4) be certified as a CDE by the CDFI fund; and

WHEREAS, the City is committed to supporting enhanced economic development opportunities for low-income communities within the City and to low-income persons residing within those communities; and

WHEREAS, the goals and purposes of the NMTC program are consistent with and complementary to the economic development programs previously established by the City to support expanded economic development opportunities for low-income communities within the City and to low-income persons residing within those communities; and

WHEREAS, the City supports: (1) the establishment of the El Paso Development Fund (the "Corporation"), a non-profit corporation with a primary mission of providing investment capital for low-income communities and low-income persons within the City; (2) the Corporation's application for certification as a CDE, including satisfying the requirement that the Corporation maintain accountability to residents of low-income communities benefiting from the NMTC program; (3) the Corporation's application for an allocation of tax credits under the NMTC program; and (4) the Corporation's transfer of tax credits allocated by the CDFI fund to the Corporation (if any) to one or more for-profit subsidiaries.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

Section 1. That the creation of a non-profit corporation to be named El Paso Development Fund (the "Corporation") is hereby authorized for the purpose of serving or

providing investment capital for low-income communities or low-income persons in the geographic area of the city that is defined as NMTC eligible by the laws and regulations of the NMTC program.

Section 2. That the certificate of formation to be used in organizing the Corporation, a copy of which is attached hereto as “Exhibit A”, and the bylaws to be used by the Corporation, a copy of which is attached hereto as “Exhibit B”, are hereby approved and the City Manager is authorized to initiate the incorporation of the Corporation and is directed to file the certificate of formation with the Secretary of State.

Section 3. That the City Council, by approval of the Corporation’s certificate of formation, hereby confirms the members of the Board of Directors as named therein.

Section 4. That the Corporation is hereby authorized to apply for certification as a Community Development Entity and to apply for NMTC allocation and to transfer any awarded tax credits to a for-profit CDE established by the Corporation.

Section 5. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City, and it is accordingly so resolved.

APPROVED AND ADOPTED this 20th day of April 2010.

John F. Cook
Mayor, City of El Paso, Texas

ATTEST:

Richarda Duffy Momsen
City Clerk, City of El Paso, Texas

(SEAL)

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Sylvia Firth
Chief of Staff / Director of Government Affairs

Kathryn Dodson, Director
Economic Development

**BYLAWS
OF
EL PASO DEVELOPMENT FUND**

ARTICLE I

PURPOSES

The El Paso Development Fund (the “Corporation”) is organized for the purpose of aiding, assisting, and acting on behalf of the City of El Paso, Texas, a home rule municipality (the “City”) in the performance of its governmental functions to promote the common good and general welfare of the City, including, without limitation, assisting the City in carrying out the economic development programs and objectives of the City, for the benefit of the City, by generating private investment capital through the New Markets Tax Credit Program (the “N.M.T.C. Program”) to be made available for investment in low-income communities (as defined in the law and regulations governing the N.M.T.C. Program).

The Corporation is formed pursuant to the provisions of the Texas Business Organizations Code, including specifically the Texas Nonprofit Corporation Law, Chapters 20 and 22, Texas Business Organizations Code, as amended (“the Act”).

The Corporation shall have and exercise all of the rights, powers, privileges, authority, and functions given by the general laws of the State of Texas to non-profit corporations incorporated under the Act.

The Corporation shall have all other powers of a like or different nature not prohibited by law which are available to non-profit corporations in Texas and which are necessary or useful to enable the Corporation to perform the purposes for which it is created, including the power to issue bonds, notes or other obligations, and otherwise exercise its borrowing power to accomplish the purposes for which it was created.

ARTICLE II

BOARD OF DIRECTORS

Section 1. *Appointment, Powers, Number, Eligibility, and Term of Office.* All powers of the Corporation shall be vested in a Board of Directors (the “Board”) consisting of seven (7) persons. The initial Board of Directors shall be as named in the Certificate of Formation of the Corporation. Upon the expiration of the initial terms of Class I Directors, the positions shall be re-filled by majority vote of the Class I Directors on the Board. Upon the expiration of the initial terms of the Class II Directors, the positions shall be re-filled by appointment by the City Manager of the City (the “City Manager”). To be eligible to serve as a Director, a person must be a resident of the City and at least eighteen (18) years of age. In addition, at least two (2) members of the Board shall be representative of a “low-income community” (as defined in the law and regulations governing the N.M.T.C. Program).

Board members, other than the members of the initial Board, shall serve for a term of two (2) years from the date of their election (in the case of Class I Directors) or their appointment (in the case of Class II Directors); provided, however, if such Board member has been appointed or elected to fill an unexpired term, then the term of such Board member shall expire on the expiration date of the term of the Board member who he or she was appointed or elected to replace. Board members shall be eligible for reappointment; provided however that no Director may serve for longer than six (6) years consecutively, unless such service is required to complete an unexpired term. Any Class I Director may be removed, at any time, with or without cause by majority vote of all of the Directors on the Board; and, any Class II Director may be removed from office, at any time, with or without cause, only by the City Manager.

Section 2. *Meetings of Directors.* The Directors may hold their meetings and may have an office and keep the books of the Corporation at the City Hall of the City, or such other place or places within the City as the Board may from time to time determine; provided, however, in the absence of any such determination, the City Hall shall be the registered office of the Corporation in the State of Texas.

The Board shall meet in accordance with and file notice of each meeting of the Board for the same length of time and in the same manner and location as is required of a City under Chapter 551, Texas Government Code, as amended, (the "Open Meetings Act") and as is required of a corporation under Subchapter B of Chapter 6, Texas Business Organizations Code, as amended.

The Corporation is subject to Chapter 552, Government Code (the "Public Information Act").

Section 3. *Annual Meetings.* The annual meeting of the Board shall be held at the time and at the location in the City designated by the resolution of the Board for the purposes of transacting such business as may be brought before the meeting.

Section 4. *Regular Meetings.* Regular meetings of the Board shall be held at such times and places as shall be designated, from time to time, by resolution of the Board.

Section 5. *Special and Emergency Meetings.* Special and emergency meetings of the Board shall be held whenever called by the President of the Board or by a majority of the Directors who are serving duly appointed terms of office at the time the meeting is called.

The Secretary shall give notice of each special meeting in person, by telephone, electronic transmission (e.g., facsimile transmission or electronic mail) or mail at least three (3) days before the meeting to each Director. Notice of each emergency meeting shall also be given in the manner required of the City under the Open Meetings Act. Unless otherwise indicated in the notice thereof, any and all matters pertaining to the purposes of the Corporation may be considered and acted upon at a special or emergency meeting.

Section 6. *Quorum.* A majority of the Board shall constitute a quorum for the consideration of matters pertaining to the purposes of the Corporation; **provided, however,** that no matter regarding any amendment, revision, change, modification or repeal of the Certificate of Formation or Bylaws and no matter regarding any investment or business act, action, agreement or decision involving the use or transfer of a N.M.T.C. tax credit may be considered by the Board unless at least one (1) of the Class I Directors and at least a majority of the Class II directors are present at the meeting of the Board. If, at any meeting of the Board there is less than a quorum present, a majority of those present may adjourn the meeting from time to time. The act of a majority of the Directors present and voting at a meeting at which a quorum is in attendance shall constitute the act of the Board, unless the act of a greater number is required by law, by the Certificate of Formation, or by these Bylaws.

A Director who is present at a meeting of the Board at which any corporate action is taken shall be presumed to have assented to such action, unless his or her dissent shall be entered in the minutes of the meeting or unless he or she shall file a written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the Secretary of the Corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a Director who voted in favor of the action.

Section 7. *Conduct of Business.* At the meetings of the Board, matters pertaining to the purposes of the Corporation shall be considered in such order as from time to time the Board may determine.

At all meetings of the Board, the President shall preside, and in the absence of the President, the Vice President shall preside. In the absence of the President and the Vice President, an acting presiding officer shall be chosen by the Board from among the Directors present.

The Secretary of the Corporation shall act as secretary of all meetings of the Board, but in the absence of the Secretary, the presiding officer may appoint any person to act as secretary of the meeting.

Section 8. *Compensation of Directors.* Directors, as such, shall not receive any salary or compensation for their services as Directors.

Section 9. *Director's Reliance on Consultant Information.* A Director shall not be liable if while acting in good faith and with ordinary care, the Director relies on information, opinions, reports, or statements, including financial statements and other financial data, concerning the Corporation or another person that were prepared or presented by:

- (a) one or more other officers or employees of the Corporation;
- (b) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

ARTICLE III

OFFICERS

Section 1. *Titles and Term of Office.* The officers of the Corporation shall be the President, the Vice President, the Secretary, the Treasurer, and such other officers as the Board may from time to time elect. One person may hold more than one office, except that one person shall not concurrently hold the offices of President and Secretary or the offices of Vice President and Secretary. The term of office for each officer shall be one (1) year. Officers may be re-elected.

Section 2. *Powers and Duties of the President.* The President shall be a member of the Board and shall preside at all meetings of the Board. The President shall be the principal executive officer of the Corporation and, subject to the Board, he or she shall be in general charge of the properties and affairs of the Corporation. In furtherance of the purposes of the Corporation and subject to the limitations contained in the Certificate of Formation, the President or any Vice President may sign and execute all bonds, notes, deeds, conveyances, franchises, assignments, mortgages, notes, contracts and other obligations in the name of the Corporation. The President shall have such other duties as are assigned by the Board. The President may call special and emergency meetings of the Board as provided in these Bylaws.

Section 3. *Powers and Duties of the Vice President.* The Vice President shall be a member of the Board. The Vice President shall perform the duties and exercise the powers of the President upon the President's death, absence, disability, or resignation, or upon the President's inability to perform the duties of his or her office. Any action taken by the Vice President in the performance of the duties of the President shall be conclusive evidence of the absence or inability to act of the President at the time such action was taken. A Vice President shall have such other powers and duties as may be assigned to him or her by the Board or the President.

Section 4. *Treasurer.* The Treasurer shall have custody of all the funds and securities of the Corporation which come into his or her hands. When necessary or proper, he or she may endorse, on behalf of the Corporation, for collection, checks, notes and other obligations and shall deposit the same to the credit of the Corporation in such bank or banks or depositories as shall be designated in the manner prescribed by the Board; he or she may sign all receipts and vouchers for payments made to the Corporation, either alone or jointly with such other officer as is designated by the Board; whenever required by the Board, he or she shall render a statement of his or her cash account; he or she shall enter or cause to be entered regularly in the books of the Corporation to be kept by him or her for that purpose full and accurate accounts of all moneys received and paid out on account of the Corporation; he or she shall perform all acts incident to the position of Treasurer subject to the control of the Board; and he or she shall, if required by the Board, give such bond for the faithful discharge of his or her duties in such form as the Board may require. The Treasurer need not be a member of the Board.

Section 5. *Secretary.* The Secretary shall keep or cause to be kept the minutes of all meetings of the Board in books provided for that purpose; he or she shall attend to the giving and serving of all notices; in furtherance of the purposes of the Corporation and subject to the limitations contained in the Certificate of Formation, he or she may sign with the President in the name of the Corporation and/or attest the signatures thereof, all contracts, conveyances,

franchises, bonds, deeds, assignments, mortgages, notes and other instruments of the Corporation; he or she shall have charge of the Corporation's books, records, documents and instruments, except the books of account and financial records and securities of which the Treasurer shall have custody and charge, and such other books and papers as the Board may direct, all of which shall at all reasonable times be open to the inspection of any Director upon application at the office of the Corporation during business hours; and, he or she shall in general perform all duties incident to the office of Secretary subject to the control of the Board. The Secretary need not be a member of the Board.

Section 6. *Staff.* The City Manager or the designee thereof shall initially serve as the Executive Director of the Corporation. Any subsequent Executive Director shall be elected by a majority vote of the Class II Directors and the majority vote of all of the Directors regardless of class. The City Manager's office shall provide administrative support services for the Corporation, and shall perform duties as prescribed by the Board and the City Council of the City (the "City Council"). Staff functions for the Corporation may be performed by City staff, as authorized by the City Manager and directed by the Executive Director of the Corporation, and the Corporation shall pay the reasonable costs for such services as from time to time shall be billed to the Corporation by the City.

Section 7. *Compensation.* Officers, as such, shall not receive any salary or compensation for their services as Officers.

Section 8. *Officer's Reliance on Consultant Information.* In the discharge of a duty imposed or power conferred on an officer of the Corporation, the officer may in good faith and with ordinary care rely on information, opinions, reports, or statements, including financial statements and other financial data, concerning the Corporation or another person, which were prepared or presented by:

(a) one or more other officers or employees of the Corporation, including members of the Board; or

(b) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

ARTICLE IV

MISCELLANEOUS PROVISIONS

Section 1. *Fiscal Year.* The fiscal year of the Corporation shall be the same as the City.

Section 2. *Seal.* The seal of the Corporation shall be such as from time to time may be approved by the Board.

Section 3. *Notice and Waiver of Notice.* Whenever any notice whatever is required to be given under the provisions of these Bylaws, such notice shall be deemed to be sufficient if given by depositing the same in a post office box in a sealed postpaid wrapper addressed to the person entitled thereto at his or her post office address, as it appears on the books of the

Corporation, and such notice shall be deemed to have been given on the day of such mailing. A waiver of notice, signed by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto.

Section 4. *Resignations.* Any Director or officer may resign at any time. Such resignations shall be made in writing and shall take effect at the time specified therein, or, if no time be specified, at the time of its receipt by the President or Secretary. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation.

Section 5. *Gender.* References herein to the masculine gender shall also refer to the feminine in all appropriate cases, and vice versa.

Section 6. *Appropriations and Grants.* The Corporation shall have the power to request and accept any allocation, appropriation, grant, contribution, donation, or other form of aid from the federal government, the State, any political subdivision, or municipality in the State, or from any other source.

Section 7. *Establishment of Subsidiaries.* The Corporation shall have the power to create and establish both non-profit and for-profit subsidiaries of the Corporation as the Board determines may be necessary or useful to enable the Corporation to perform the purposes for which it is created.

Section 8. *Financial Records and Annual Reports.* The Corporation shall maintain current and accurate financial records and shall annually prepare or approve a financial report for the Corporation for the preceding year as required by Section 22.352 of the Act. Such annual financial report shall be presented to the City Council. Such financial records, books, and annual reports shall be kept for at least three years and shall be made available to the public for inspection and copying at the Corporation's registered office during regular business hours. The Corporation may charge a reasonable fee, as determined by the Board, for the preparing a copy of a record or report.

ARTICLE V

INDEMNIFICATION OF DIRECTORS AND OFFICERS

Section 1. *Right to Indemnification.* Subject to the limitations and conditions as provided in this Article V and the Certificate of Formation, each person who was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative or investigative (hereinafter a "proceeding"), or any appeal in such a proceeding or any inquiry or investigation that could lead to such a proceeding, by reason of the fact that he or she, or a person for whom he or she is the legal representative, is or was a Director or officer of the Corporation or while a Director or officer of the Corporation is or was serving at the request of the Corporation as a director, officer, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other enterprise shall be indemnified by the

Corporation to the fullest extent permitted by the Act, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than said law permitted the Corporation to provide prior to such amendment) against judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements and reasonable expenses (including, without limitation, attorneys' fees) actually incurred by such person in connection with such proceeding, and indemnification under this Article V shall continue as to a person who has ceased to serve in the capacity which initially entitled such person to indemnity hereunder. The rights granted pursuant to this Article V shall be deemed contract rights, and no amendment, modification or repeal of this Article V shall have the effect of limiting or denying any such rights with respect to action taken or proceedings arising prior to any such amendment, modification or repeal. It is expressly acknowledged that the indemnification provided in this Article V could involve indemnification for negligence or under theories of strict liability.

Section 2. *Indemnification of Employees and Agents.* The Corporation, by adoption of a resolution of the Board, to the extent that such resources are available, may indemnify and advance expenses to a Director or officer of the Corporation; and the Corporation may indemnify and advance expenses to persons who are not or were not Directors, officers, employees or agents of the Corporation, but who are or were serving at the request of the Corporation as a Director, officer, partner, venture proprietor, trustee, employee, agent or similar functionary of another foreign or domestic corporation, partnership, joint venture, sole proprietorship, trust, or other enterprise against any liability asserted against him or her and incurred by him or her in such a capacity or arising out of his or her status as such a person.

Section 3. *Appearance as a Witness.* Notwithstanding any other provision of this Article V, the Corporation may pay or reimburse expenses incurred by a Director or officer in connection with his or her appearance as a witness or other participation in a proceeding involving the Corporation or its business at a time when he or she is not a named defendant or respondent in the proceeding.

Section 4. *Non-Exclusivity of Rights.* The right to indemnification and the advancement and payment of expenses conferred in this Article V shall not be exclusive of any other right which a Director or officer or other person indemnified pursuant to Section 3 of this Article V may have or hereafter acquire under any law (common or statutory), provision of the Certificate of Formation of the Corporation or these Bylaws, agreement, vote of disinterested Directors or otherwise.

Section 6. *Insurance.* The Corporation may purchase and maintain insurance, at its expense, to protect itself and any person who is or was serving as a Director, officer, employee or agent of the Corporation or is or was serving at the request of the Corporation as a Director, officer, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic corporation, partnership, joint venture, proprietorship, trust or other enterprise against any expense, liability or loss, whether the Corporation would have the power to indemnify such person against such expense, liability or loss under this Article V.

Section 7. *Notification.* Any indemnification of or advance of expenses to a Director or officer in accordance with this Article V shall be reported in writing to the members of the Board with or before the notice of the next regular meeting of the Board and, in any case, within the 12-month period immediately following the date of the indemnification or advance.

Section 8. *Savings Clause.* If this Article V, or any portion hereof, shall be invalidated on any ground by any court of competent jurisdiction, then the Corporation shall nevertheless indemnify and hold harmless each Director, officer or any other person indemnified pursuant to this Article V as to costs, charges and expenses (including attorneys' fees), judgments, fines and in amounts paid in settlement with respect to any action, suit or proceeding, whether civil, criminal, administrative or investigative, to the full extent permitted by any applicable portion of this Article V that shall not have been invalidated and to the fullest extent permitted by applicable law.

ARTICLE VI

CODE OF ETHICS

Section 1. *City Ethics Code.* The members of the Board and the officers of the Corporation shall be subject to the provisions of Chapter 2.92 (titled "Ethics") of the Municipal Code of the City of El Paso, Texas (as now in effect and as hereinafter amended, the "Ethics Ordinance"), which establishes the minimum standards that officers and employees of the City must meet to ethically fulfill the responsibilities of their positions. For purposes of the Ethics Ordinance and regardless of the nature of the appointment of the Board, the Board is hereby deemed a "Board" under the Ethics Ordinance and members of the Board and officers of the Corporation are "Officers" under the Ethics Ordinance and, as such, are subject to and must comply with the provisions contained therein.

ARTICLE VII

AMENDMENTS

Any subsequent revisions, amendments or changes adopted by the Board that, in any way, amends, modifies, changes, revises or dilutes the provisions of Article II, Article III, Section 6, or this Article VII of these Bylaws must be approved by a majority vote of the Class II Directors and a majority vote of all the Directors regardless of class. Any other subsequent revision, amendment or change of these Bylaws adopted by the Board shall be approved by majority vote of all of the Directors, regardless of class.

**CERTIFICATE OF FORMATION
OF
EL PASO DEVELOPMENT FUND**

I, the undersigned natural person, having the legal capacity to contract, acting as organizer of a nonprofit corporation under the provisions of the Texas Business Organizations Code, including specifically the Texas Nonprofit Corporation Law, Chapters 20 and 22, Texas Business Organizations Code, as amended, (the “Act”), do hereby adopt the following Certification of Formation for such corporation:

ARTICLE I

The name of the corporation is EL PASO DEVELOPMENT FUND (the “Corporation”).

ARTICLE II

The Corporation is a Texas non-profit corporation.

ARTICLE III

Subject to the provisions of Article XI hereof, the period of duration of the Corporation shall be perpetual.

ARTICLE IV

Unless otherwise determined by the Board of Directors in accordance with the Bylaws of the Corporation, the street address of the initial registered office of the Corporation is 2 Civic Center Plaza, 9th Floor, El Paso, Texas 79901, which is within the city limits of the City, and the name of its initial registered agent at such address is Charlie McNabb, City Attorney.

ARTICLE V

The Corporation shall have no members and shall have no stock.

ARTICLE VI

A. This Corporation is formed exclusively for the benefit of, and to assist in carrying out the economic development program and objectives of the City by generating private investment capital through the New Markets Tax Credit Program (the “N.M.T.C. Program”) to be made available for investment in low-income communities (as defined in the law and regulations governing the N.M.T.C. Program). In order to fulfill this purpose, and as required by the N.M.T.C Program, the Corporation shall (1) apply to the United States Treasury Department’s Community Development Financial Institution Fund (the “C.D.F.I. Fund”) for designation as a “Community Development Entity” as required by the N.M.T.C. Program and (2) apply for an allocation of tax credits under the N.M.T.C. Program and (3) if the Corporation receives an allocation of tax credits under the N.M.T.C. Program, to transfer that allocation to

one (1) or more for-profit subsidiaries established in accordance with the regulations governing the N.M.T.C. Program for purposes of making investments in low-income communities in the City. Notwithstanding any other provision in this Certificate or the Bylaws of the Corporation to the contrary, the Corporation is expressly authorized to establish such subsidiaries, as needed, in accordance with applicable law, without further action of the City.

B. The Corporation is organized and shall be operated exclusively for the purposes described in subsection A. The Corporation shall have all such powers as are required by and are consistent with its purposes.

C. The Corporation, in accordance with and as set out in the provisions of Article XIII of this Certificate, shall also have the power to acquire and receive funds and property of every kind and nature, whatsoever whether by purchase, conveyance, lease, gift, grant, bequest, legacy or otherwise, own hold, expend, make gifts, grants, loans, and contributions of, and to convey, transfer and dispose of any funds and property and the income therefrom, all in furtherance of the purposes of the Corporation as hereinabove set forth; and which are afforded to the Corporation under the Act, as now enacted or as hereafter amended.

ARTICLE VII

The Corporation shall have and exercise all of the rights, powers, privileges, authority, and functions given by the general laws of the State of Texas to non-profit corporations incorporated under the Act subject to the following limitations:

In the exercise of its powers, and in accordance with and as set out in the provisions of Article XIII of this Certificate, the Corporation may enter into loan, lease, trust, or other agreements as authorized by the Act and under the N.M.T.C. Program that are necessary and appropriate to the fulfillment of the public purpose of the Corporation, all of which agreements, and the specific uses, methods of withdrawal, and expenditures of proceeds from bonds, notes, or other debt instruments are to be determined by the Corporation, subject, if applicable, to the provisions involving tax credit use, allocation or transfer set out in Article XIII.

In furtherance and not in limitation of its purposes set forth in Article VI above, it is expressly provided that the Corporation, in accordance with and as set out in the provisions of Article XIII of this Certificate, shall have the following powers:

A. to enter into, make and perform contracts of every sort and kind with any person, firm, association, corporation, municipality, body politic, housing authority, county, state, or with the federal government or any agency or instrumentality thereof; including, without limitation, contracts with the City for such staff support and financial assistance as may be required by the Corporation;

B. to advance or lend money or provide equity capital to any person, association, corporation, municipality, body politic, housing authority, county or state in such manner and upon such terms as is deemed expedient;

C. to borrow money, to acquire, own, hold, sell, negotiate, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of mortgages, notes, evidences

of indebtedness, and all other securities or choses in action issued or created by any person, firm, association, corporation, municipality, body politic, housing authority, county, state, or with the federal government or any agency or instrumentality thereof;

D. to sell, lease, sublease, or otherwise make available to any person, firm, association, corporation, municipal, body politic, housing authority, county or state any real estate or interest therein acquired by the Corporation;

E. to employ agents, employees, consultants and independent contractors necessary to carry out the purposes of the Corporation and to fix their compensation and terms and conditions of employment;

F. to solicit proposals from low-income businesses and from potential investors in the N.M.T.C. Program for projects meeting the economic development goals and objectives of the City and satisfy the requirements of the N.M.T.C. Program;

G. to attain and maintain its status as a qualified community development entity for purposes of the N.M.T.C. Program;

H. to do everything necessary, proper, convenient or incident to effect any or all of the purposes for which the Corporation is organized; and

I. without limiting the generality of the foregoing, the Corporation shall have all of the powers, privileges, rights, and immunities necessary or convenient for carrying out the purposes for which the Corporation is formed, and the directors hereby claim for the Corporation all the benefits, privileges, rights and powers created, given, extended or conferred, now or hereafter, by the provisions of all applicable laws of the State of Texas, pertaining to not-for-profit corporations, and any additions or amendments thereto.

ARTICLE VIII

All powers of the Corporation shall be vested in a Board of Directors (the "Board") consisting of "Class I Directors" and "Class II Directors" totaling the number of persons as provided in the Bylaws of the Corporation. The initial members of the Board shall be appointed by the City Council of the City (the "City Council"). The Bylaws of the Corporation shall govern the selection of and terms for each member of the Board of Directors other than the initial members thereof specified in Article IX below. To be eligible to serve as a Director, a person must be a resident of the City and at least eighteen (18) years of age. Any Class I Director may be removed at any time, with or without cause, by majority vote of all of the Directors on the Board. Any Class II Director may be removed from office at any time, with or without cause, by the City Manager of the City.

The Corporation is organized on a nonstock basis only. There shall be no shareholders in the Corporation. The Corporation shall be deemed to be performing essential public functions.

All other matters pertaining to the internal affairs of the Corporation shall be governed by the Bylaws of the Corporation, so long as such Bylaws are not inconsistent with this Certificate of Formation or the laws of the State of Texas.

ARTICLE IX

The number of directors constituting the initial Board of Directors of the Corporation is seven (7) members, consisting of four (4) "Class I Directors" and three (3) "Class II Directors". The names and street addresses of the initial Directors, and the expiration of each Director's initial term, are:

Class I Directors

<u>NAMES</u>	<u>ADDRESSES</u>	<u>INITIAL TERM EXPIRES</u>
1. Robert Gonzalez	Centro de Salud Familiar La Fe, Inc. 1314 E. Yandell, El Paso, Texas 79902	April 30, 2011
2. Bill Schlesinger	Project Vida Health Center 3607 Rivers Avenue, El Paso, Texas 79905	April 30, 2011
3. Sandra Almanzan	Fannie Mae, El Paso Office 201 E. Main Street, El Paso, Texas 79901	April 30, 2012
4. Eli Velazquez	TransPecos / El Paso Regional Center of Innovation and Commercialization 500 W. Overland Ave., Ste. 220, El Paso, Texas 79901	April 30, 2012

Class II Directors

<u>NAMES</u>	<u>ADDRESSES</u>	<u>INITIAL TERM EXPIRES</u>
1. Kathryn Dodson	City of El Paso, Director of Economic Development 2 Civic Center Plaza, El Paso, Texas 79901	April 30, 2011
2. William Lilly	City of El Paso, Director of Community Development 2 Civic Center Plaza, El Paso, Texas 79901	April 30, 2012
3. Carmen Arrieta-Candelaria	City of El Paso, Financial Services CFO 2 Civic Center Plaza, El Paso, Texas 79901	April 30, 2013

ARTICLE X

No Director shall be liable to the Corporation for monetary damages for an act or omission in the Director's capacity as a Director, except for liability (i) for any breach of the Director's duty of loyalty to the Corporation, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) for any transaction from which the Director received an improper benefit, whether the benefit resulted from an act taken within the scope of the Director's office, or (iv) for acts or omissions for which the liability of a Director is expressly provided by statute. Any repeal or amendment of this Article X by the Board shall be prospective only, and shall not adversely affect any limitation on the personal

liability of a Director existing at the time of such repeal or amendment. In addition to the circumstances in which a Director is not personally liable as set forth in the preceding sentences, a Director shall not be liable to the fullest extent permitted by any amendment to the Texas statutes hereafter enacted that further limits the liability of a Director.

ARTICLE XI

In accordance with the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), and regardless of any other provisions of this Certificate of Formation or the laws of the State of Texas, the Corporation: (a) shall not permit any part of the net earnings of the Corporation to inure to the benefit of any private individual (except that reasonable compensation may be paid for personal services rendered to or for the Corporation in effecting one or more of its purposes); (b) shall not direct any of its activities to attempting to influence legislation by propaganda or otherwise; (c) shall not participate in or intervene in (including the publication or distribution of statements), any political campaign on behalf of any candidate for public office; and (d) shall not attempt to influence the outcome of any election for public office or to carry on, directly or indirectly, any voter registration drives. Any income earned by the Corporation after payment of reasonable expenses, debt and such reserves as may be necessary as set forth in the authorizing documents related to the issuance of debt by the Corporation shall accrue to the City.

The Corporation shall not afford pecuniary gain, incidentally or otherwise, to its members, and no part of the net income or net earnings of the Corporation shall inure to the benefit of any member, private shareholder or individual, and no substantial part of its activities shall consist of carrying on propaganda or otherwise attempting to influence legislation.

The Corporation shall not participate in or intervene in (including the publishing or distributing of statement) any political campaign on behalf of any candidates for public office.

The Corporation shall not lend any of its assets to any officer or director or member of the Corporation or to any close relative of any such person or guarantee the repayment of a loan made to any such person. The term "close relative" as used herein shall mean any brother or sister of any director or officer, the forbearers and descendents of a director or officer or any such brothers or sister or any spouse of a director or officer or any of the aforesaid persons.

If the Board of Directors determines by resolution that the purposes for which the Corporation was formed have been substantially met and all debt obligations, if any, issued by, and all other obligations incurred by, the Corporation have been fully paid or provision made for such payment, the Board shall execute a certificate of dissolution which states those facts and declares the Corporation dissolved in accordance with the requirements of the Act, or with applicable law then in existence. In the event of dissolution or liquidation of the Corporation, all assets will be turned over to the City for deposit into such account or fund as the City Council shall direct to the extent allowed under the law and regulations governing the N.M.T.C. Program.

ARTICLE XII

If the Corporation is a private foundation within the meaning of Section 509(a) of the Internal Revenue Code, the Corporation (a) shall distribute its income for each taxable year at

such time and in such manner as not to become subject to the tax on undistributed income imposed by Section 4942 of the Internal Revenue Code; (b) shall not engage in any act of self-dealing as defined in Section 4941 (d) of the Internal Revenue Code; (c) shall not retain any excess business holdings as defined in Section 4943(c) of the Internal Revenue Code; (d) shall not make any investments in such manner as to subject it to tax under Section 4944 of the Internal Revenue Code; and (e) shall not make any taxable expenditures as defined in Section 4945(d) of the Internal Revenue Code.

ARTICLE XIII

Subject to the provisions contained in this Article XIII, the business and conduct of the affairs of the Corporation shall be regulated by the Bylaws of the Corporation adopted by the majority vote of the members of the Board of Directors. The Bylaws shall not be inconsistent with this Certificate of Formation. The initial Bylaws shall be substantially in the form attached as Exhibit B to the resolution referenced in Article XVII of this Certificate. Notwithstanding any other provision contained in this Certificate or the Bylaws to the contrary, Class II Directors, by their majority vote shall have the power to control all aspects of and must approve the terms of any development or other agreement regarding the transfer, investment allocation or any other use of tax credits received by the Corporation under the N.M.T.C. Program. Any written development or investment agreement that involves the use, transfer or allocation of N.M.T.C. tax credits must be approved by the majority vote of the Class II Directors and the majority vote of all of the Directors regardless of class.

ARTICLE XIV

Any revisions, amendments, or changes adopted by the Board to either the Certificate of Formation or the Bylaws that in any way amends modifies, changes, revises, or dilutes the provisions of Article VIII, Article XIII or this Article XIV of this Certificate, or the provisions in the Bylaws governing the terms, classification, and removal of Board members, must be approved by the majority vote of the Class II Directors and the majority vote of all of the Directors regardless of class, unless otherwise provided or restricted by the Texas Business Organizations Code. Any other revision, amendment, or change of this Certificate or the Bylaws adopted by the Board shall be approved by a majority vote of all of the Directors, regardless of class, unless otherwise provided or restricted by the Texas Business Organizations Code.

ARTICLE XV

A. The Corporation shall encourage public awareness of the activities of the Corporation to the maximum extent possible.

B. The Corporation shall, in its notice and conduct of meetings, comply with Chapter 551 of the Texas Government Code (the “Texas Open Meetings Act”), as now enacted or as hereafter amended, and the Corporation is subject to the provisions of Chapter 552 of the Texas Government Code (the “Texas Public Information Act”), as now enacted or as hereafter amended, relating to public records.

ARTICLE XVI

The name and address of the organizer is as follows:

Corey Admire
Fulbright & Jaworski L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784

Such organizer is a natural person over the age of eighteen (18) years of age, is a citizen of the United States and a resident of the State of Texas, and is qualified to act as an organizer under the Act.

ARTICLE XVII

A resolution approving the form of this Certificate of Formation has been adopted by the City Council of the City on April 20, 2010.

EXECUTED by the undersigned as organizer under the Texas Business Organizations Code, this ___ day of April, 2010.

Corey Admire
Fulbright & Jaworski L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784



New Markets Tax Credit (NMTC) Overview

A financial tool for new investment
and development in El Paso



New Markets Tax Credit (NMTC) Overview

- **NMTC attract private investment** for business and real estate developments in **Low Income Neighborhoods**
- Other cities have formed Community Development Entities (CDEs) and been very successful acquiring and utilizing NMTC in their communities
 - Phoenix allocations totaling \$210 million
 - Los Angeles allocations totaling \$170 million
 - Dallas allocation of \$55 million
- NMTC is **federal tax credit program** created in 2000 and renewed through 2009 (expected to be renewed by Congress)
 - U.S. Treasury administers
 - Allocations made directly to local Community Development Entity (CDE)
 - Tax credit is **39% of original investment over 7 years** (5% first three years, 6% last four)
- NMTC program offers **additional financial tool** to achieve development goals and promote economic development in under-served areas of El Paso



NMTC Overview (cont'd)

- Funds can be used for debt or equity financing in combination with Public Private Partnership and TIF subsidies
- Targets commercial, industrial, not-for-profit and operating businesses and mixed use (rental housing less than 80% of income)
- A **community development entity (CDE)** (nonprofit or for-profit) must be **formed to apply** for the program and a for-profit sub-CDE must be **formed to accept** the NMTC allocation.



Types of Eligible Projects (cont.)

- Several types of projects are not eligible:
 - Those that derive more than 80% of gross rental income from rental dwelling units
 - Golf courses, race tracks, gambling facilities, country clubs, massage parlors, hot tub facilities, suntan facilities, liquor stores
- All projects must be in NMTC-eligible areas / census tracts
 - Eligible areas determined by poverty rate, unemployment and median family income

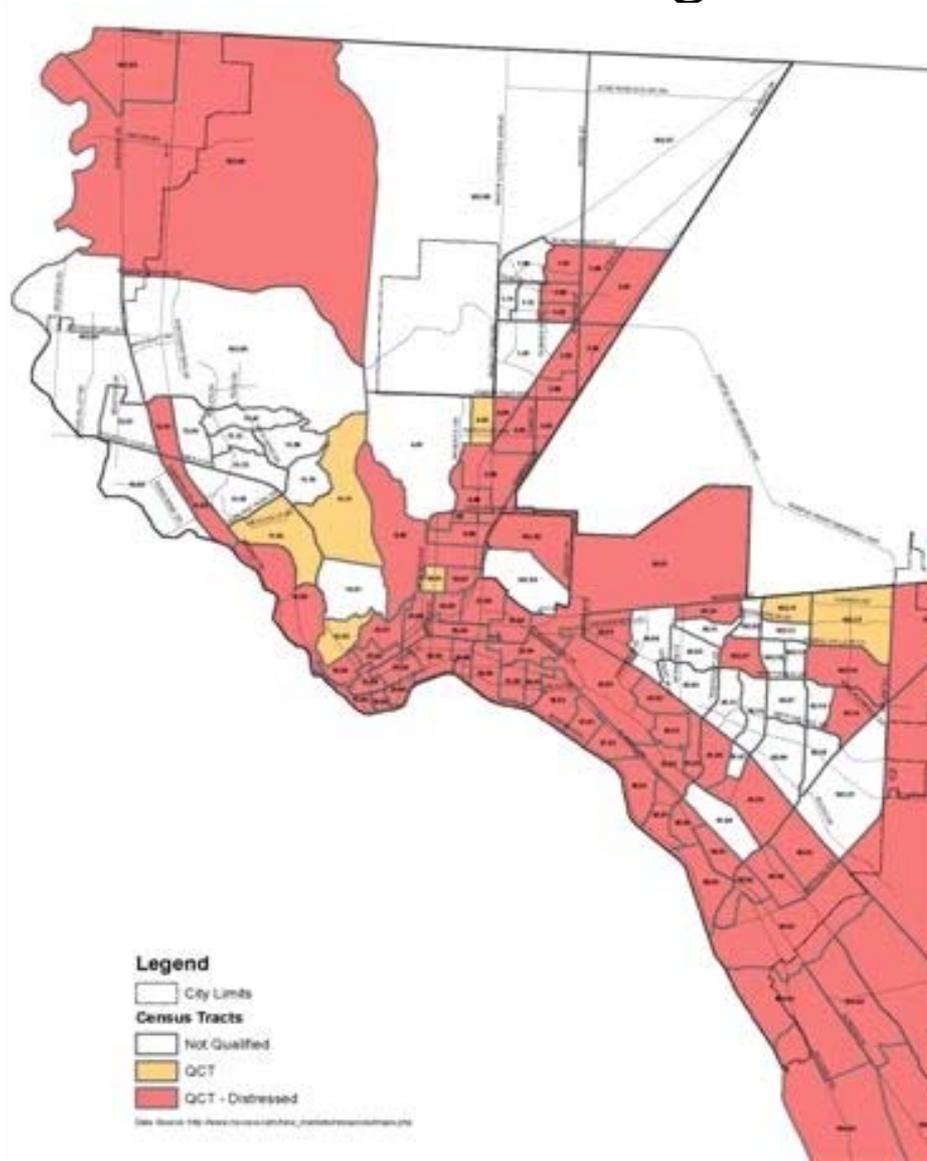


Project Example

\$10,000	Total project costs (includes debt & equity from investment fund)
<u>x 39%</u>	Credit Percentage
\$ 3,900	NMTC
<u>x 0.70</u>	Price (NMTCs are sold on open market; we are assuming \$1 tax credit is sold for \$0.70)
\$ 2,730	NMTC Equity
\$10,000	Total project costs
<u>-2,730</u>	NMTC Equity
\$7,270	Debt Required for project



New Markets Tax Credits eligible census tracts



Legend

City Limits

Census Tracts

Not Qualified

QCT

QCT - Distressed

Data Source: <http://www.census.gov/geo/www/qc/qc.html>



Proposed CDE Board

- 7 member board based on Dallas and Phoenix models
 - 2 must meet low-income representative criteria

- Class I Board Members
 - 4 at large members of community
 - Bill Schlesinger, Director, Project Vida
 - Robert Gonzalez, CFO, La Fe
 - Sandra Almanzan, Fannie Mae, Director of Rural and Border initiatives
 - Eli Velazquez, Director, Trans Pecos/El Paso RCIC

- Class II Board Members
 - 3 City staff appointed by City Manager
 - Carmen Arrieta-Candelaria, Chief Financial Officer
 - Bill Lilly, Community and Human Development Director
 - Kathy Dodson, Economic Development Director



Risk Mitigation/Program Compliance (cont.)

- Projects would be solicited and initially reviewed by City Staff, but underwritten by third party consultant with expertise in structuring NMTC deals (NDC or other consultant)
- El Paso CDE would be primarily staffed by City Staff, with experienced third-party assistance for underwriting and deal structuring, accounting and compliance and possibly legal counsel
- Initial start-up costs could be covered by City with payback and future costs provided through NMTC deals