

**MINUTES OF THE MEETING  
OF THE  
MEMBERSHIP OF THE  
ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY (ECIDA)**

**DATE AND PLACE:** January 25, 2017, at the Erie County Industrial Development Agency, 95 Perry Street, 5<sup>th</sup> Floor ESD Conference Room, Buffalo, New York 14203

**PRESENT:** Hon. Diane Benczkowski, Rev. Mark E. Blue, Hon. Byron W. Brown, Dottie Gallagher-Cohen, Richard Lipsitz, Jr., Hon. Joseph C. Lorigo, David L. Lowrey, Louis Panzica, Hon. Mark C. Poloncarz, Sister Denise Roche, and Paul V. Vukelic

**EXCUSED:** James F. Doherty, Hon. Joseph H. Emminger, Brenda W. McDuffie<sup>1</sup>, John J. Mudie, Hon. Glenn R. Nellis, and Hon. Darius G. Pridgen, and Hon. Barry A. Weinstein

**OTHERS PRESENT:** Steve Weathers, Chief Executive Officer; John Cappellino, Executive Vice President, Karen M. Fiala, Assistant Treasurer; Gerald Manhard, Chief Lending Officer; and Robert G. Murray, Secretary

**GUESTS:** Andrew Federick, Erie County Senior Economic Development Specialist

At 9:24 a.m., in the absence of the presence of the Chair, Vice Chair, Mr. Lipsitz, called the meeting to order.

Mr. Lipsitz welcomed new ECIDA Board Member, Hon. Joseph C. Lorigo, Chair of the Erie County Legislature Economic Development Committee.

**MINUTES**

The minutes of the December 21, 2016 Meeting of the Members were presented. Mr. Poloncarz moved and Mr. Lowrey seconded to approve of the minutes. Mr. Lipsitz called for the vote and the minutes were unanimously approved.

**REPORTS/ACTION ITEMS/INFORMATION ITEMS**

Funding Buffalo Urban Development Corporation. Ms. Profic reviewed the \$75,000 budget item previously approved by the Agency in its 2017 budget to provide funding from the UDAG Reflow Funds for the Buffalo Urban Development Corporation (“BUDC”) for its

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<sup>1</sup> Ms. McDuffie participated via telephone conference call, however, she did not count for quorum purposes and is not considered present or eligible for purposes of voting on any action items.

downtown initiatives in 2017. Ms. Profic noted that the Agency had granted the BUDC funding of \$100,000 per year from 2013 through 2015, and \$75,000 in 2016. Ms. Profic commented that this decrease in funding requested reflects the establishment of BUDC's downtown loan fund, which provides a portion of the program's costs.

Ms. Benczkowski moved and Mr. Poloncarz seconded to approve of the grant and funding request.

Ms. Gallagher-Cohen stated that she would be recusing herself from this matter because she is a member of the Board of Directors of BUDC. Mr. Murray stated that only ten members are present, and with Ms. Gallagher-Cohen's recusal, that leaves only nine members able to vote, and as such there are not enough members present to consider the action. Mr. Lipsitz then stated that he will table this item until the Agency is able to obtain a quorum.

2016 Tax Incentive Induced/Closing Schedule/Backlog Report. Ms. Fiala presented this report. There being no questions, Mr. Lipsitz directed that this report be received and filed.

Policy Committee Update. Mr. Lipsitz noted that the Policy Committee approved of the Seneca Mortgage recapture item, to be discussed at the meeting today, and approved of the Riverwalk amendment with respect to retention and creation of jobs at two TM Montante facilities. He also stated that the Policy Committee reviewed the Niagara Blower recapture issue, however, it did not obtain the required 8 votes to make a recommendation to the board, as only 7 committee members voted for, and 4 committee members voted against, the sales tax recapture option #3, to be discussed at today's meeting. Mr. Lipsitz then directed that this report be received and filed.

## COMPLIANCE ISSUES

Seneca Mortgage/AMS Servicing, 611 Jamison Road, Elma, New York. Mr. Cappellino reviewed the financial assistance provided to Seneca Mortgage as approved in January, 2014, in connection with its relocation and build-out of new larger space at the Jamison Road location. Mr. Cappellino confirmed that the Agency only provided for a sales tax exemption benefit and that the company claimed a sales tax exemption benefit in the amount of \$219,000. Mr. Cappellino noted that Agency staff was made aware through media and other contacts that Seneca Mortgage had sold its Jamison Road operations to a third party, Nationstar Mortgage Holdings, in June of 2016 and that only five AMS Servicing employees were remaining on the site. Mr. Cappellino confirmed that the terms of the provision of the Agency's Financial Assistance required AMS Servicing to retain at least 270 employees on the site and to create 165 new positions within two years of project completion, and that the sale of the Jamison Road facility created a violation of the terms of the Agency's provision of financial assistance.

Mr. Cappellino confirmed that Agency staff reached out to AMS Servicing and did confirm that the issue of job retention and creation commitments did not come up during the sale negotiations and were not transferred to Nationstar upon the sale of AMS Servicing operations. Mr. Cappellino confirmed that the Agency's Policy Committee recommended recapture of all of the \$219,000 of sales tax exemption benefits claimed by AMS Servicing.

At this point in time, Mr. Brown joined the meeting.

Mr. Poloncarz moved to recommend recapture of the \$219,000 in sales tax exemption benefits, and Sister Denise Roche seconded the motion. Mr. Poloncarz then commented that this is the number one case study on why and how the Agency should recapture financial assistance. Here, the original company promised to retain and create a certain number of jobs, and then, without seeking the authorization of the Agency, sold its assets and did not inform the Agency of the sale, and the purchasing company determined that it would not assume the job retention and job creation obligations. Mr. Poloncarz continued on to state that the recapture policy says that if you don't maintain the jobs, then financial assistance will be recaptured and here the original company has only retained five employees and if the Agency does not recapture financial assistance in this instance, we will be sending the wrong message to the community and taxpayers of Erie County.

Ms. Gallagher-Cohen stated her agreement with Mr. Poloncarz and stated that this is an example of why the Agency has a recapture policy given that the company acted in bad faith and encouraged all members to feel comfortable in voting for recapture, in this case, in contrast to other recapture scenarios for example, the Niagara Blower situation which will be discussed later.

Ms. McDuffie expressed her agreement with Mr. Poloncarz and Ms. Gallagher-Cohen and commented on the Agency's deliberative and thoughtful process in developing the recapture policy and applying the recapture policy all for the benefit of Erie County taxpayers.

Mr. Brown commented that this situation is the poster child for recapture because the business has operated in bad faith.

Mr. Lipsitz then called for the vote, and the following resolution was then unanimously approved:

**RESOLUTION OF THE ERIE COUNTY INDUSTRIAL DEVELOPMENT  
AGENCY AUTHORIZING THE RECAPTURE OF NEW YORK STATE AND  
LOCAL SALES AND USE TAX EXEMPTION BENEFITS CLAIMED BY  
SENECA MORTGAGE SERVICING LLC**

Niagara Blower/Alfa Laval, 91 Sawyer Avenue, Tonawanda, New York. Mr. Cappellino reviewed the Niagara Blower potential recapture matter noting that the Agency provided an incentive package to Niagara Blower for sales tax benefits only relating to the company's \$1,035,000 renovation of a newly purchased 110,000 sq. ft. facility on Sawyer Avenue in Tonawanda, New York. Mr. Cappellino confirmed that the company used \$42,068.89 of sales tax benefits and that this same amount would be potentially subject to recapture as to be determined by the Agency. Mr. Cappellino explained that the company experienced layoffs in 2013, reporting only 94 FTE positions in contrast to their requirement to maintain 110 FTE positions. Mr. Cappellino recalled that in May 2014 the Policy Committee voted to have staff monitor the company's employment level for a 6 month period or until their employment level was back in compliance. The company did come back into compliance at that point in time. As of April 30, 2016, the company was to have met its job creation goal for two years after project completion of 127 FTE positions. As of August 2016, the company indicated 79 FTE positions and as such, the company is non-compliant for both the job retention goal of 110 FTE positions, and the job creation goal of 17 FTE positions for a total of 127 FTE positions.

Mr. Cappellino explained the straight pro rata recapture method that was put forward at the Policy Committee that relied on the 38% employment shortfall amount to take 38% of the \$42,068.89 sales tax benefit amount claimed resulting in a potential recapture figure of \$15,986.18. Mr. Cappellino confirmed that this straight pro-rata recapture method only obtained 7 votes at the Policy Committee, failing to obtain the required 8 votes to take action. Mr. Cappellino also commented that the Agency received email communication from the company asking the Agency to approve of the pro rata recapture method in the total dollar amount of \$15,986.18.

Ms. Gallagher-Cohen asked if the option of doing nothing was given to the company. Mr. Cappellino responded in the negative and that only option 3, the straight pro rata recapture method, was presented to the company consistent with the Policy Committee meeting consideration. Mr. Cappellino also commented that the state law requires that the Agency have a recapture policy, but does not require recapture if there is a job shortfall event.

Mr. Lorigo noted that he is currently not a member of the Policy Committee, requested that he be placed on the Policy Committee to take the place of departing Policy Committee member Legislator Rath and noted that in contrast to the prior bad faith behavior of Seneca Mortgage, Niagara Blower exhibited no bad faith here only bad market conditions which resulted in the job loss.

Mr. Lipsitz commented that Niagara Blower is a fine company, there is no bad faith exhibited here, that the company proactively disclosed its employment shortfall to the Agency and expressed concern that putting a company on a watch list at this point in time does nothing.

Ms. Gallagher-Cohen responded that putting a business on a watch list is negative, as it sends the wrong message to the company and its employees. Ms. Gallagher-Cohen continued to state that the Agency is not required to put a company on a watch list and is not required to recapture the sales tax benefit in this instance. She continued to state that the company had a downturn in its employment due to a decline in the worldwide oil and gas industry.

Mr. Poloncarz made a motion to authorize the recapture of sale tax exemption benefits in the amount of \$15,986.18. Mr. Blue seconded the motion.

Mr. Poloncarz confirmed that Niagara Blower is a good company acting in good faith. Mr. Poloncarz noted that the recapture consideration process requires a case-by-case analysis. Mr. Poloncarz commented that the company has asked for certainty such that if the Agency places the company on a watch list, and the company continues to experience layoffs such that they have even less employees than they do now, then the recapture amount could increase. Mr. Poloncarz stated that the Agency cannot act arbitrarily on a case-by-case basis because, theoretically, every company could argue that they were adversely affected by global downturn in their respective industry. Mr. Poloncarz argued for consistent application of the recapture policy, and just like Derrick Corporation was treated, in consideration of its downturn in employment numbers due to global conditions, to avoid being arbitrary. Mr. Poloncarz continued on to state that this comes down to the Agency enforcing a contract term and the Agency has an obligation to taxpayers to enforce this contract term to recover sales tax. In conclusion, Mr. Poloncarz stated that this is a minor penalty, it shows the Agency is enforcing its

policies, is not a reflection or statement on Niagara Blower, and it is a contract enforcement matter.

Mr. Vukelic stated that he disagrees with Mr. Poloncarz statement that all companies could cite to global trends to explain employment downturns noting that some businesses rely on local trends only, not global trends. Mr. Vukelic stated that his concern is that if Niagara Blower had been given the option of a watch list, they may have taken it.

Ms. Gallagher Cohen stated she wanted to clarify that the sales tax benefit was for building construction, such that there was no money taken from the government, because, if the building was not built in the first instance, there would be no sales tax revenue in any event. Here, the building has been built already and contractors were paid already.

Mr. Vukelic stated he doesn't believe the Agency would be acting in an arbitrary or capricious manner if it undertook an action different than what it did with respect to the Derrick matter, commenting that perhaps the Agency made a mistake with respect to the Derrick matter. Mr. Vukelic stated that the company made a promise to keep the jobs, and their intent is to do so, exhibited by the fact that in the past when they were placed on a watch list, they did thereafter increase employment numbers. Mr. Vukelic continued on to state that this business has suffered, it has gone from 114 employees to 74 employees. He stated that this looks like we are kicking the company when it is down and sends the wrong message.

Ms. Benczkowski expressed her agreement with Mr. Poloncarz noting that she had a big employer in town, Derrick, that was subject to a recapture action by this Agency and the Agency needs to be consistent and cannot pick and choose companies upon which to impose recapture actions.

Sister Denise Roche stated her agreement with Ms. Gallagher-Cohen and asked that the Agency not take advantage of a company when it is down and stated that the Agency should give the company a chance to improve its employment numbers.

Mr. Blue asked that if the Agency places the company on a watch list if this will be publicized. Mr. Lipsitz responded that yes the Agency is a public entity and its actions are public. Mr. Blue stated that here, there is no egregious violation, that the options were presented to the company, and that the company accepted the straight pro rata recapture method.

Mr. Cappellino noted that the two year monitoring period has expired, and the only way the Agency could extend its employment monitoring period would be to amend the agreement with the consent of the company.

Mr. Murray then confirmed that both the Agency and the company would be required to sign an amended agreement.

Ms. Gallagher-Cohen again asked if there is a fourth option, one stating that the Agency has reviewed the situation and the Agency forgives the penalty such that there is no recapture.

Mr. Poloncarz then stated he will withdraw his motion but will, at every meeting, ask for an employment update until the company's obligations have been met.

Ms. Gallagher-Cohen then asked if she could make a motion with respect to the fact that the Agency has thoroughly evaluated the global impact on the company, noting that the company has made a capital investment with respect to its new construction, and that in this case, she would like to make motion to take no action and to forgive the penalty.

Mr. Blue then asked if this would be a precedent for the Agency. Mr. Cappellino stated that this would not be a precedent.

Mr. Brown then stated his concern that the Agency is considering taking action on something that has not been evaluated by the Policy Committee and further the Board has not had a chance to evaluate the effect of taking no action. Mr. Brown expressed his desire to send the Niagara Blower matter back to Policy Committee with a request that the Policy Committee come up with a resolution satisfactory to all.

Mr. Lipsitz then asked Ms. Gallagher-Cohen if she would be willing to allow this matter to go back to Policy Committee for further discussion. Ms. Gallagher-Cohen stated she will withdraw her motion and is in agreement that this matter be referred back to Policy Committee.

Mr. Lipsitz then asked for a motion to send this matter to Policy Committee for further consideration. Mr. Poloncarz moved and Mr. Brown seconded to send the matter back to the Policy Committee. The motion was unanimously approved.

## **OTHER MATTERS**

555 Riverwalk TM Montante/FedEx. Mr. Cappellino reviewed this proposed project agreement amendment that would involve amending the Agency's 2013 agreement with 555 Riverwalk Parkway LLC to allow for the jobs of its tenant, Federal Express, at both the 170 Cooper facility and the 555 Riverwalk project facility to be counted to meet the employment obligations of the 2013 ECIDA approval. Mr. Cappellino explained that the amendment would increase the overall employment retention requirements by 630 jobs and maintain the original job creation requirement commitment at 70 new jobs. As such then, the company would be required to retain 168 jobs at the 555 Riverwalk location, and 603 jobs at the 170 Cooper facility location resulting in a requirement that a total of 771 jobs be retained through the duration of the PILOT Agreement. The 70 new job requirement at the 555 Riverwalk Parkway facility would remain the same such that the company would commit to a total of 841 jobs at the two facility locations. In addition, the amendment would require that 555 Riverwalk Parkway LLC agree to adhere to all of the required ECIDA material terms including the pay equity policy and the unpaid tax policy.

By way of background, Mr. Cappellino reminded members that the Agency approved of a \$10,628,000 investment to be made by 555 Riverwalk Parkway, LLC to construct a new 88,000 sq. ft. facility to be located at 555 Riverwalk Parkway in the Town of Tonawanda, New York, to be occupied by Federal Express. The project was approved for sales tax, mortgage recording tax and real property tax abatement benefits in 2013. Staff has had several conversations with the company and Federal Express since construction completion regarding the status of employment at the site. The Agency was informed that Federal Express created more than the required job number but some of the jobs were created at the related 170 Cooper

Avenue facility, a neighboring location in the Town of Tonawanda. Agency staff was able to confirm that the additional job growth shown at 170 Cooper was indeed new job growth and not the result of reshuffling jobs from one Erie County location to another. Mr. Cappellino also confirmed that both the 555 Riverwalk and 170 Cooper facilities are totally occupied by Federal Express as the single tenant, both are owned by TM Montante, and both facilities are located in close proximity to each other within the Town of Tonawanda.

Ms. Gallagher-Cohen moved and Mr. Blue seconded to approve of the project agreement amendment.

Mr. Poloncarz commented that this is a good example showing how the Agency works with the company that was in violation of its agreement, however, the company met with Agency staff and the Policy Committee, and agreed to be required to maintain and retain a much greater number of employees and to be subject to recapture at both the original and the additional site.

Ms. Gallagher-Cohen thanked the Agency staff and the County Executive for their efforts to review and analyze the company's expansion at two related facilities and its pledge to retain and create employment.

At this point in time, Mr. Lipsitz called for the vote and the following resolution was unanimously approved:

**RESOLUTION OF THE ERIE COUNTY INDUSTRIAL DEVELOPMENT  
AGENCY AUTHORIZING THE AMENDMENT OF THE INDUCEMENT  
RESOLUTION AND THE RELATED AGENT AGREEMENT WITH  
RESPECT TO THE 555 RIVERWALK PARKWAY, LLC PROJECT**

**INDUCEMENT RESOLUTIONS**

Latina Boulevard Foods, LLC, 1 Scrivner Drive, Cheektowaga, New York. Mr. Lipsitz stated that he will be recusing himself from the vote on the Latina Boulevard Foods project based on a conflict of interest found within the ECIDA Code of Ethics. Specifically, Mr. Lipsitz stated that he is a stipend employee of the International Brotherhood of Teamsters and a dues paying member of Teamsters Local No. 449. Mr. Lipsitz explained that the Agency will be asked to vote on an incentive package for Latina Boulevard Foods and although Mr. Lipsitz stated he voted yes on the project at the recent Policy Committee meeting, since that time, he has become aware that a competitor of the company, who has a collective bargaining agreement with Teamsters Local No. 449 could permanently lay off workers because of the incentive being proposed. Therefore, Mr. Lipsitz explained that this information makes it impossible for him to render an unbiased vote in this matter, and at this point of time, Mr. Lipsitz removed himself from the meeting room.

Mr. Cappellino reviewed this proposed sales tax exemption benefit project only involving the purchasing of the facility in which the company currently undertakes its operation and the expanding of their footprint within the facility from 80,000 sq. ft. to 190,000 sq. ft. This expansion involves the modification of 30,000 sq. ft. to house a freezer and the addition of a 10,000 sq. ft. cooler along with the purchase of machinery and equipment. Mr. Cappellino

explained that the remainder of the building remains unoccupied but for two tenants that occupy 39,000 sq. ft. and no sales tax benefits will accrue to those tenants.

As a condition precedent of receiving financial assistance and as a material term and condition established by the Agency in connection with its approval of the project, Mr. Cappellino noted that the Company must, subject to potential termination and/or modification and/or recapture of financial assistance, submit, on an annual basis or as otherwise indicated below through the conclusion of two (2) years following the construction completion date, a certification, as so required by the Agency, confirming:

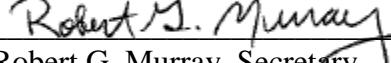
- (i) Investment Commitment- the total investment actually made with respect to the Project at the time of Project completion equals or exceeds \$10,000,000.00 (which represents the product of 85% multiplied by \$8,500,000.00, being the total project cost as stated in the Company's application for Financial Assistance).
- (ii) Employment Commitment - that there are at least 172 existing full time equivalent ("FTE") employees located at, or to be located at, the Facility as stated in the Company's application for Financial Assistance (the "Baseline FTE"); and
  - the number of current FTE employees in the then current year at the Facility; and
  - that the Company has maintained and created FTE employment at the Facility equal to 176 FTE employees representing the sum of the Baseline FTE plus 4, where the number 4 is the product of 85% multiplied by 5 (being the total number of new FTE employee positions as proposed to be created by the Company as stated in the Company's application for Financial Assistance within two years follow the construction completion date). In an effort to confirm and verify the Company's employment numbers, the Agency requires that, at a minimum, the Company provide employment date to the Agency on a quarterly basis, said information to be provided on the Agency's "Quarterly Employment Survey" form to be made available to the Company by the Agency.
- (iii) Local Labor Commitment - that the Company adheres to and complies with the Agency's Local Labor Workforce Certification Policy on a quarterly basis during the construction period.
- (iv) Equal Pay Commitment – that the Company adheres to and complies with the Agency's Pay Equity Policy.
- (v) Unpaid Real Property Tax Policy Commitment – that the Company is compliant with the Agency's Unpaid Real Property Tax Policy.

Ms. Gallagher-Cohen moved, and Mr. Lorigo seconded, to approve of the Project. Mr. Weathers called for the vote and the following Resolution was unanimously approved by a vote of 10 votes cast in favor of the motion, no votes cast against the motion, and with Mr. Lipsitz recusing himself:

RESOLUTION OF THE ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY: (i) ACCEPTING THE APPLICATION OF LATINA BOULEVARD FOODS, LLC, AND/OR INDIVIDUAL(S) OR AFFILIATE(S), SUBSIDIARY(IES), OR ENTITY(IES) FORMED OR TO BE FORMED ON ITS BEHALF (INDIVIDUALLY, AND/OR COLLECTIVELY, THE "COMPANY") IN CONNECTION WITH A CERTAIN PROJECT DESCRIBED BELOW; (ii) RATIFYING THE SCHEDULING, NOTICING, AND CONDUCTING OF A PUBLIC HEARING IN CONNECTION WITH THE PROJECT; (iii) MAKING A DETERMINATION PURSUANT TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT; (iv) APPOINTING THE COMPANY, OR ITS DESIGNEE, AS ITS AGENT TO UNDERTAKE THE PROJECT; (v) AUTHORIZING THE UNDERTAKING OF THE PROJECT TO PROVIDE FINANCIAL ASSISTANCE TO THE COMPANY IN THE FORM OF A SALES TAX EXEMPTION BENEFIT FOR PURCHASES AND RENTALS RELATED TO THE CONSTRUCTION, INSTALLATION, AND EQUIPPING OF THE PROJECT; AND (vi) AUTHORIZING THE NEGOTIATION AND EXECUTION OF AN AGENT AND FINANCIAL ASSISTANCE PROJECT AGREEMENT, AND RELATED DOCUMENTS

There being no further business to discuss, Mr. Lipsitz adjourned the meeting at 10:35 a.m.

Dated: January 25, 2017

  
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Robert G. Murray, Secretary