

**MINUTES OF A MEETING OF THE
POLICY COMMITTEE OF THE
ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY**

- MEETING:** April 7, 2016, at Erie County Industrial Development Agency, 95 Perry Street, 5th Floor Conference Room, Buffalo, New York
- PRESENT:** James J. Allen, Richard Lipsitz, Jr., Brenda W. McDuffie, Frank B. Mesiah, John J. Mudie, Hon. Glenn R. Nellis, Hon. Edward A. Rath, Laura Smith, David J. State, Paul V. Vukelic and Maria Whyte
- ABSENT:** Hon. Byron W. Brown, Chris T. Johnston, and Hon. Geoff Szymanski
- OTHERS PRESENT:** Steve Weathers, Chief Executive Office; John Cappellino, Executive Vice President; Karen M. Fiala, Assistant Treasurer and Robert G. Murray, Secretary
- GUESTS:** Fred Heimle, on behalf of Mayor Szymanski, Rebecca Gandour, City of Buffalo Office of Strategic Planning, and Dan Ronan, on behalf of Derrick Corporation

At 8:30 a.m., a quorum being present, Mr. Lipsitz called the meeting to order.

MINUTES

The minutes of the January 7, 2016 Policy Committee meeting were presented. Upon motion made by Mr. Allen and seconded by Mr. State, the aforementioned Policy Committee meeting minutes were unanimously approved.

The minutes of the March 10, 2016 Policy Committee meeting were presented. Upon motion made by Mr. Nellis and seconded by Mr. Mesiah, the aforementioned Policy Committee meeting minutes were unanimously approved.

PROJECT MATRIX

Mr. Lipsitz reviewed the Agency's project matrix. There being no comments, Mr. Lipsitz directed that the report be received and filed.

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

COMPLIANCE ISSUE – EMPLOYMENT – DERRICK CORPORATION

Mr. Cappellino provided members with background regarding the Derrick Corporation 2014 and 2015 project and the retention of existing full time employment material term

condition/commitment. Mr. Cappellino also reviewed the ECIDA financial assistance recapture policy addressing what can happen if a company does not meet a material term or condition.

Mr. Cappellino then reviewed the 2014 Derrick Corporation project for sales tax and real property tax abatement benefits requiring that the company retain the existing 477 jobs and create 8 new jobs, and the 2015 Derrick Corporation project for sales tax and real property tax abatement benefits requiring, as a material term of providing such financial assistance, that the company retain the existing 477 jobs. As of December 31, 2015, the Agency received the company's annual employment survey indicating that 359 employees were employed as of 12/31/15. Mr. Cappellino noted that the company reached out to the Agency as early as October 2015, to let the Agency know that they were struggling and were forced to make layoffs. Mr. Cappellino then noted that the Company has received sales tax exemption benefits of approximately \$440,000 in 2014 and \$65,000 in 2015, and as such, approximately \$509,000 of sales and use tax exemption benefits may be subject to recapture.

Mr. Cappellino also commented that the PILOT Agreements were on record but will not take effect until the 2016/2017 school district tax year and the 2017 county and town tax year.

At this point in time, Ms. McDuffie joined the meeting.

Mr. Cappellino referred to the ECIDA recapture policy which allows for a company to meet with the Policy Committee to discuss, in this case, the employment issues and Mr. Cappellino confirmed that the recapture policy is and has been properly followed and implemented to date.

Mr. Allen asked if Agency staff have made any recommendations. Mr. Cappellino responded that staff has given this issue a lot of thought and commented that this is only the second case to arise and stated that staff does have some ideas to present to the Committee but also is looking for input and guidance from the Committee as well. Mr. Cappellino confirmed that all of the other material terms have been met and noted that the Company has completed the proposed improvements, paid all the local wages related to the construction and in addition to local wages associated with the new construction, the community is also getting the benefit of the increased assessed value associated with the improvements.

Mr. Rath asked what the timeline could be to allow the company to try to come back into compliance. Mr. Lipsitz then stated that company representatives are here today, and he would like to hear from the company itself.

At this point in time, Mr. Lipsitz stated he would like to move into Executive Session to have discussion with the company that will include a discussion regarding financial and employment history and status of the company. Ms. McDuffie moved to enter into Executive Session. Ms. McDuffie then stated that, during Executive Session, there may be a time when the Agency will confer with its counsel and would like to invoke the attorney-client privilege to solicit legal advice related to this issue.

At this point in time, Mr. Allen suggested that the Committee consider undertaking the remainder of the agenda now, and then enter into Executive Session last. Mr. Lipsitz stated that he will table Item No. 4, the Derrick Corporation compliance issue, at this point in time, and delay entering into Executive Session to discuss that item, and will now move to agenda item number 6, the New York State Office of State Comptroller Legislation Implementation.

OSC LEGISLATION IMPLEMENTATION

Mr. Cappellino briefly reviewed the new IDA reform legislation that will take place effective on June 15, 2016. Mr. Cappellino noted that the Agency will need to amend its existing recapture and termination policy and the plan will be for the Agency Board to approve of those changes at its May 2016 meeting.

At this point in time, Ms. Whyte joined the meeting.

Recapture/Clawback Policy. The committee then reviewed the proposed amendments to the Recapture and Termination Policy. Ms. Smith asked if the policy could be further revised to limit material factors to just jobs and investment, and eliminate the other stated material terms so that the policy could be a template for other IDAs to follow. Mr. Rath stated he would like the material factors definition to be consistent with what other IDAs are doing and also questioned as to whether the current 10 business day time period, in which a company is required to respond to a notice of a potential material term default, is sufficient. Mr. Lipsitz and Mr. Cappellino suggested that that section of the policy be amended to keep the 10 business day time period in place but allow for the Chair, for good cause shown, to extend the response time period.

Mr. Lipsitz then asked for a motion to approve of the amended recapture and termination policy with a change to the definition of material factors to only include job and investment criteria, and to change the response time frame to allow the Chair, for good cause shown, to extend the response time frame and as such Mr. Lipsitz stated the action would be to approve of the policy and recommend that the full Board approve it as well. Ms. McDuffie moved and Mr. Messiah seconded, to approve of the requested action. Mr. Lipsitz called for the vote and the action was then unanimously approved.

Project Agreement. Mr. Cappellino then asked Mr. Murray to review a new agreement, called a "Project Agreement", that must become a component part of all Agency transactions as required by the new IDA reform legislation. Mr. Murray then reviewed the new "Project Agreement" noting that the statute requires an IDA to include, in such a project agreement, the terms and conditions under which financial assistance shall be provided, that no financial assistance shall be provided in the absence of the execution of such a project agreement, requires the agreement contain a description of the financial assistance including the amount and type to be provided, the purposes to be achieved by providing such financial assistance, a requirement that the company receiving financial assistance provide, on an annual basis, a certified statement documenting the number of jobs retained and created and indicating the salary and fringe benefits for each categories of such jobs created and retained, include a schedule of real property tax payments, and provide for the suspension or discontinuance or modification of any PILOT agreements as well as for the return of all or a part of the financial assistance provided to the

company. Mr. Murray noted that the Erie County Industrial Development Agency already has many of these requirements within its existing Agent and Financial Assistance Agreement and that only minimal changes are required to that agreement to come into compliance with the new IDA statute. Mr. Murray then briefly reviewed the proposed changes.

SALES TAX INCENTIVE OVERAGE

Mr. Cappellino next reviewed the evolution of the Agency and New York State law, involving monitoring of sales and use tax exemption benefits and new requirements related to such recapture of sales and use tax exemption benefits and the Agency's processes related to same. Mr. Cappellino commented that the ECIDA has had four instances of companies claiming sales and use tax exemption benefits in an amount greater than what was approved by the Agency, and in those instances, upon notice to the companies, each of those four companies opted to remit the sales tax otherwise due.

Mr. Cappellino then reviewed a new sales tax overage case for Zaepfel Development Company, where the Agency noticed, upon receipt of the company's ST-340 form that the company had claimed more sales tax exemption benefit than had been originally authorized. Upon notification of the overage, the company responded that it would like the Board to consider amending its project inducement to allow for a greater amount of sales and use tax exemption benefits than originally authorized.

Mr. Cappellino noted there is no case law or other guidance on this issue as it relates to the recapture provisions of Section 875 of the IDA statute and as to whether the Agency may increase an amount of sales and use tax exemption benefit above and beyond what was originally authorized when a company has already made such overage expenditures. Mr. Cappellino stated that staff actively reviews company expenditures and encourages companies, when approaching the maximum amount of sales tax exemption benefits so authorized to come back to the Agency to allow the Agency to consider increasing the benefit before the company makes such expenditures.

Mr. Cappellino referenced the memorandum that staff has prepared to Committee members and in conclusion stated that due to the lack of guidance and clarity in the law and regulatory process, that staff would recommend that the Board not undertake any requests for retroactive approval to increase the authorized amount of sales tax incentives, and seek an opinion from the New York State Office of the State Comptroller regarding the IDA's ability to consider or undertake such an action.

Mr. Lipsitz thanked Mr. Cappellino for his presentation and at this point in time stated that he would like the Policy Committee to consider the Derrick Corporation compliance issue and would be looking for a motion to enter into Executive Session to discuss the financial and employment history and status of the company. Mr. Lipsitz also stated that during Executive Session, it is likely that the Policy Committee will also avail itself to an attorney-client privilege to seek legal advice from its counsel. Ms. Whyte moved and Mr. Vukelic seconded to enter into Executive Session. The Policy Committee then resolved to enter into Executive Session.

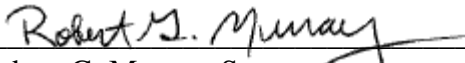
At 9:17 a.m., the Policy Committee entered into Executive Session with only Policy Committee members and Mr. Dan Ronan, on behalf of Derrick Corporation, being present.

At 10:35 a.m. Mr. Allen moved and Ms. McDuffie seconded to end Executive Session, and the Policy Committee then resolved to end Executive Session and open the meeting to the public once again.

Mr. Allen then moved and Ms. McDuffie seconded to authorize Agency staff to seek and opinion from the New York State Office of State Comptroller regarding the IDA's ability to consider or undertake a request for retroactive approval to increase and authorize the amount of sales and use tax incentive benefit.

There being no further business, Mr. Lipsitz adjourned the meeting at 10:36 a.m.

Dated: April 7, 2016


Robert G. Murray, Secretary