

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

- MEETING:** January 5, 2017, at Erie County Industrial Development Agency, 95 Perry Street, 5<sup>th</sup> Floor Conference Room, Buffalo, New York
- PRESENT:** Hon. Johanna Coleman, Colleen DiPirro, Richard Lipsitz, Jr., Brenda W. McDuffie, John J. Mudie, Hon. Glenn R. Nellis, Laura Smith, David J. State, Hon. Geoff Szymanski, Paul V. Vukelic and Maria Whyte
- ABSENT:** Hon. Byron W. Brown, Frank B. Mesiah, Hon. Edward A. Rath, III,
- OTHERS PRESENT:** Steve Weathers, President and CEO; John Cappellino, Executive Vice President; Karen M. Fiala, Assistant Treasurer; Robert G. Murray, Secretary
- GUESTS:** Andrew Federick, Erie County Senior Economic Development Specialist; Mark Launter and David Raponi, on behalf of Latina Boulevard Foods, LLC; Christian Campos, on behalf of TM Montante Development; Bill McCarthy, a representative on behalf of FedEx

There being a quorum present at 8:34 a.m., the meeting was called to order by its Char, Mr. Lipsitz.

**MINUTES**

The minutes of the November 3, 2016 Policy Committee meeting were presented. Upon motion made by Mr. Mudie, and seconded by Mr. Nellis, the aforementioned Policy Committee meeting minutes were unanimously approved.

**PROJECT MATRIX**

Mr. Cappellino reviewed the Agency's project matrix. Mr. Lipsitz directed that the report be received and filed.

**PROJECT PRESENTATIONS**

Latina Boulevard Foods, LLC, 1 Scrivner Drive, Cheektowaga, New York. Mr. Cappellino reviewed this proposed sales tax exemption benefits project noting that the project involves the Company's acquisition of the facility that it currently occupies as a tenant and the

expansion of its 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 related machinery and equipment. The remainder of the building remains unoccupied but for two tenants that occupy approximately 39,000 sq. ft. No new sales tax benefits will accrual to these tenants.

Mr. Cappellino stated that in exchange for providing the sales tax exemption benefit, the approval of this project will be conditioned upon adherence to certain material terms and conditions with respect to potential modification, recapture and/or termination of financial assistance as follows:

**Draft Recapture Material Terms**

Condition	Term	Recapture Provision
Total Investment	At project completion	Investment amount equal to or greater than 85% of project amount. Total Project Amount = \$10,000,000 85% = \$8,500,000
Employment	2 Years after project completion	Maintain Base = 172 Create 85% of Projected Projected = 5 85% = 4 Recapture Employment = 176
Local Labor	Construction Period	Adherence to policy including quarterly reporting
Pay Equity	See recapture period	Adherence to policy
Unpaid Tax	See recapture period	Adherence to policy
Recapture Period	2 years after project completion	Recapture of state and local sales taxes and real property taxes

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

Mr. Lipsitz asked the company to confirm if it engages in retail or wholesale operations and also asked about employee wages. Mr. Launter, a representative on behalf of the company, stated that no general public retail occurs at the facility as the company is engaged in wholesale activities only. Mr. Launter also stated that lower end wages are provided to warehouse workers and higher end wages are provided to management and sales employees.

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

Ms. McDuffie asked the company to explain its benefits program. Mr. Launter responded that all employees and managers share the same health care program and all share the same 401(k) retirement program.

There being no further discussion, Mr. Lipsitz asked for a motion to send this project for approval to the Agency Board of Directors. Mr. Mudie moved, and Mr. Vukelic seconded, to approve of the project. Mr. Lipsitz called for the vote and the project was unanimously approved.

## **COMPLIANCE ISSUES – RECAPTURE DISCUSSION**

Seneca Mortgage. Mr. Cappellino briefly reviewed the AMS Servicing/Seneca Mortgage recapture issue involving the sale by AMS Servicing of its assets and related loss of employees resulting in the retention of approximately 5 employees and the related loss of over 270 employees of AMS Servicing such that the company is in violation of its job retention and job creation material terms and conditions that it is required to comply with. Mr. Cappellino noted that this project and recapture scenario was presented to the Policy Committee at its November 3, 2016 meeting whereat the Committee tasked Agency staff with developing recapture scenarios for consideration by the Policy Committee. Mr. Cappellino then presented the three recapture recommendations as developed by Agency staff and confirmed that staff, based upon AMS Servicing's violation of the material terms for employment and the fact that the company no longer owns or operates the Jamison Road facility for which the incentives were approved, recommends that the full sales tax incentive provided for the build-out and operations of the Jamison Road facility be recaptured in the total amount of \$219,000.

Mr. Lipsitz then asked for a motion to approve of staff's recommendation to recapture \$219,000 of state and local sales and use tax exemption benefits. Ms. McDuffie moved, and Ms. Whyte seconded, to approve of the motion.

Ms. Whyte commented that this is a frustrating compliance issue because either it occurred to AMS that they were in violation or it didn't occur to AMS that they were in violation and both situations are bad as they suggest that taxpayers are irrelevant. Ms. Whyte noted that County Executive Poloncarz has expressed a concern of a notion of entitlement held by many companies and stated such a notion must end and taxpayers must gain a benefit in return for incentives provided. Ms. Whyte then stated her support for full recapture option.

Ms. Smith agreed with Ms. Whyte that the Agency should recapture the sales tax benefits in this instance but disagreed with Ms. Whyte's general notion that companies believe they are entitled to tax benefits, and cautioned that the Agency should not be painting companies with such a broad brush of taking advantage of taxpayers. In this case, Ms. Smith expressed her opinion that recapture, here, is appropriate based on the fact pattern.

Ms. McDuffie commented that, according to the Policy Committee meeting minutes of November 3, 2016, that the company stated that the purchaser did not desire to assume the Agency's job commitment requirements.

Mr. Cappellino then reviewed the process related to the Agency's recapture policy noting the company will be given an opportunity to appear before the Board of Directors prior to the Board making its final determination.

At this point in time, Mr. Lipsitz called for the vote and the Policy Committee unanimously approved to recommend full recapture of \$219,000 of state and local sales and use tax exemption benefits.

Niagara Blower/Alfa Laval. Mr. Cappellino briefly reviewed the compliance issues related to Niagara Blower's inability to maintain the job creation and job maintenance material terms and conditions requirements. Mr. Cappellino noted that the Policy Committee had directed staff to develop recommendations for consideration by the Policy Committee. Mr. Cappellino then briefly reviewed the Agency's staff recommended three recapture options.

Ms. DiPirro commented that the economy is experiencing tumultuous times and in this case, through no fault of the company, it did not create this problem so it is important to condition the recapture policy to prevent abuse, and in this case, Ms. DiPirro then recommended the Agency opt to select the watch list recapture option.

Mr. Szymanski asked what is the role of the watch list with respect to job creation. Mr. Cappellino noted that the company is hoping that its new technology and products will allow it to hire new employees—hopeful, but not definitive on its ability to create new sales and new jobs.

Ms. DiPirro asked if there are hard and fast rules regarding when the Agency may request recapture.

Mr. Cappellino reminded Committee members that while the New York State law requires IDAs to develop material terms and conditions for the provisions of financial assistance, it doesn't then require mandatory recapture if a material term or condition is violated. To date, Mr. Cappellino noted that the Policy Committee and the Agency has looked at each recapture scenario on a case-by-case basis.

Ms. Whyte then spoke in favor of recapture option #3 involving a pro rata recapture of the state and local sales and use tax exemption benefits based on a percentage of employment shortfall. Ms. Whyte stated she prefers option #3 because the company has already been placed on a watch list, in the past, and at the same time this option does not require recapture of the full sales tax exemption benefit and thus is fairer. Ms. Whyte concluded that recapture option #3 is an appropriate compromise.

Mr. Szymanski stated his position that recapture option #2 would cripple the company and that recapture option #3 could affect the company's ability to make future investments. He then asked Mr. Cappellino to explain what happens with respect to recapture option #1. Mr. Cappellino stated that the watch list would be limited to a one year period based on employment reporting that the company would be required to submit every four months.

Ms. Smith expressed her preference for recapture option #1 because the Agency used a similar watch list concept in the past for the same company and noted that the company did meet its obligations during the watch period. In addition, Ms. Smith noted that the company did make a \$3.5 million dollar investment in Erie County, noted that there were positive impacts related to that investment within Erie County and concluded that a watch period will allow the business to potentially recover and put off a recapture until potentially later.

Mr. Lipsitz then spoke in favor of recapture option #3, expressed his belief that it is a compromise that is sensitive to the concerns of the business and the taxpayers.

Ms. Whyte then motioned for the Policy Committee to consider recapture option #3. Mr. Mudie seconded.

Ms. Coleman then asked Mr. Cappellino how often the Agency monitors for employment. Mr. Cappellino responded that the Agency surveys all of its companies on a quarterly basis, and if a violation is noted within any particular quarter, the Agency will reach out to the company to discuss but looks at an average number over the four quarters of any given year.

Mr. State expressed his support for recapture option #1 because the company has been on the watch list in the past, the company disclosed in a proactive manner its employment situation to the Agency, and because the industry is cyclical.

At this point in time, Mr. Lipsitz called for the vote. Mr. Lipsitz, Ms. McDuffie, Mr. Mudie, Mr. Nellis, Mr. Vukelic, Ms. Whyte and Ms. DiPirro voted in favor of the motion, Mr. State, Ms. Coleman, Ms. Smith and Mr. Szymanski voted against the motion, and by a vote of 7 in favor and 4 against, the motion failed as it did not obtain the required number of votes (8).

Mr. Murray commented that, per the requirements of the Agency's recapture policy, if a resolution does not have sufficient votes to be enacted by the ECIDA Policy Committee, than the matter, including a full record shall be submitted to the ECIDA Board without recommendation.

## **COMPLIANCE ISSUES – PRESENTATION**

555 Riverwalk TM Montante/FedEx. Mr. Cappellino noted that in April of 2013, the Agency approved a project for TM Montante for the construction of a new FedEx facility located in the Town of Tonawanda. In connection with construction of the facility, TM Montante was approved for sales, mortgage and PILOT incentives, and pledged to locate 168 retained jobs at the new facility and also pledged to create 70 new jobs for a total of 238 employees at the site by August 31, 2016. Per its 2016 third quarter survey, only 207 employees were actually located at the project site. Accordingly, there is a 31 job shortfall.

Mr. Cappellino then related to Policy Committee members that Agency staff have had several conversations and meetings with TM Montante and FedEx regarding status of the employment at the site. The Agency has been informed that tenant FedEx has created more than

the required number of jobs but some of those jobs were located at a facility located at 170 Cooper Avenue, a neighboring location in the Town of Tonawanda. The Agency also learned that FedEx made a request of Empire State Development Corporation (“ESD”) to consider multiple sites in Erie County to meet their required job goals under New York State’s Excelsior Jobs Program in December 2013. Mr. Cappellino commented that ESD did grant FedEx’s request to include multiple locations. However, Mr. Cappellino also noted that at that point in time, no such request was made to the ECIDA.

Mr. Cappellino explained that TM Montante/FedEx is asking that the Policy Committee consider the job growth that was made at the 170 Cooper Avenue location to count towards the job creation goal they committed to at the project facility site.

Mr. Cappellino then reviewed Agency staff recommendations and concluded that Agency staff recommends amending the inducement resolution and the 2013 agreement with TM Montante to allow for the jobs at the FedEx 170 Cooper Avenue facility and its 555 Riverwalk facility to be counted to meet the employment obligations. The amendment would increase the overall employment retention requirements by 603 jobs and maintain the original job creation requirements. As such then, Mr. Cappellino explained that the new job retention requirement would be the retention of 168 jobs at the original 555 Riverwalk project facility and the retention of 603 jobs at the 170 Cooper Avenue facility. A total of 771 jobs would be required to be retained during of the PILOT Agreement. With respect to the new job creation requirement, Mr. Cappellino stated that 70 new jobs above the retained amount of 771 jobs would be required and may be added at either site. This will result in a total job commitment of 841 jobs (771 jobs retained plus 70 new jobs). In addition, TM Montante would agree to adhere to the Agency’s pay equity policy and the Agency’s unpaid real property tax policy which they were previously not subject to.

Mr. Nellis moved to approve of the Agency’s recommendation. Ms. Smith seconded the motion.

Ms. McDuffie asked the company if they had any concerns with the recommendation and if FedEx would be able to give its signature to the new job retention and job creation requirements. Mr. Campos, on behalf of TM Montante, stated that FedEx is not willing to sign the agreement and as such the project entity, 555 Riverwalk Parkway LLC, will be the only entity to sign the agreement.

Ms. Smith stated this is a great solution and expressed support for the campus concept.

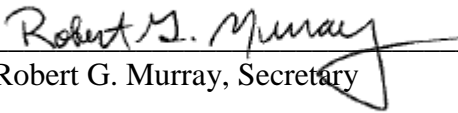
Mr. Lipsitz and Ms. McDuffie thanked Agency staff for coming up with this resolution.

Mr. Mudie queried as to whether the jobs were actual FedEx jobs or driver jobs. Mr. McCarthy, a representative on behalf of FedEx, stated that the jobs were FedEx jobs and not independent contractor or driver jobs.

At this point in time, Mr. Lipsitz called for the vote, and the Agency staff recommendation was unanimously approved.

There being no further business to discuss, Mr. Lipsitz adjourned the meeting at 9:35 a.m.

Dated: January 5, 2017

  
Robert G. Murray, Secretary