

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

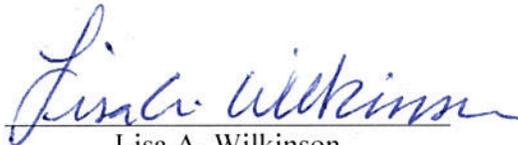
- of -

the Application of **Wolf Road Plaza II, LLC**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60337

RECOMMENDED ORDER

- by -

A handwritten signature in blue ink, reading "Lisa A. Wilkinson". The signature is written in a cursive style with a large initial "L".

Lisa A. Wilkinson
Administrative Law Judge
January 25, 2018

SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny Wolf Road Plaza II, LLC (WRP II or applicant) certification as a woman-owned business enterprise should be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal, pursuant to New York State Executive Law article 15-A and title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, by WRP II challenging the determination of the Division that its application does not meet eligibility criteria requirements for certification as a woman-owned business enterprise.

On behalf of WRP II, Susan Touhey, president¹, submitted an application for certification as a woman owned business enterprise (WBE) to the Division on January 29, 2016 (DED Exhibit 1). Subsequently, by letter dated October 3, 2016, the Division determined that WRP II does not meet the eligibility requirements to be certified as a woman-owned business and denied the application (*see* DED Exhibit 2.)

By letter October 27, 2016, Timothy E. Casserly, Esq. (Burke & Casserly, P.C.), on behalf of applicant, filed a notice of appeal of the Division's determination to deny WBE certification, and stated applicant's intent to file an appeal in writing. By letter dated January 9, 2017, the Division notified applicant that the appeal should be filed on or before March 6, 2017, and reiterated the Division's bases for the denial.

Applicant's attorney submitted a written appeal by letter dated March 1, 2017 (Appeal). The Appeal consists of a letter from Mr. Casserly and three unnumbered exhibits.² The Division filed a response dated January 19, 2018, including a memorandum of law and six exhibits (Response). The matter was assigned to me on January 22, 2018. An exhibit list is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). To determine whether an applicant should be granted WBE status, the Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in

¹ According to the application, Susan Touhey is the president of WRP II ((DED Exhibit 1 § 2.A). The Operating Agreement designates Susan Touhey as the manager of WRP II (see DED Exhibit 3 at Bates 29 [section 5.04]). The terms president and manager are used interchangeably to refer to Ms. Touhey's position with the company.

² Attached to the Appeal were an amended operating agreement; a summary of Schedule K-1, and excerpt pages from applicant's 2015 Partnership U.S. Return of Partnership Income. The latter two documents are included in the Division's exhibit 5 and are therefore are not listed separately under applicant's exhibits.

supplemental submissions and, if appropriate, from interviews conducted by Division analysts (*see* 5 NYCRR 144.5[a]).

STANDARD OF REVIEW

On this administrative appeal, WRP II, as applicant, bears the burden of proving that the Division's denial of its application for WBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act [SAPA] § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

The Division

In its October 3, 2016 denial letter, the Division determined based on the documents and information submitted with the application that the women owners failed to demonstrate that their contributions to WRP II were proportionate to their equity interest therein as required by 5 NYCRR 144.2(a)(1), and failed to demonstrate that the relevant corporate documents allowed Susan Touhey, the manager of WRP II, to make decisions without restrictions as required by 5 NYCRR 144.2(b)(2).

WRP II

Applicant states that the members of WRP II made their initial contributions to the business by check and that the checks for Willard Anderson II's and Robin Anderson's contribution and Gregory Wells Anderson's and Danielle Anderson's contribution³ came from their respective joint accounts instead of each party writing a separate check. Applicant contends that if the contributions from the joint accounts are proportionately attributable to the women, women contributed 66.67% of the [REDACTED] of the initial capital to the business. Applicant also notes that the gift of equity was allocated proportionately to the respective ownership interests, and that the same proportions have been set forth in other LLC documents, including tax documents. (*See* Appeal at 2.).

With respect to control, applicant asserts that the Operating Agreement was amended to give Susan Touhey sole voting power on all management decisions (*see* Appeal at 2, WRP Exhibit 1 [Amended and Restated Operating Agreement dated October 5, 2016]).

FINDINGS OF FACT

³ Gregory Wells Anderson (Gregory) and Danielle Anderson are married. Robin Anderson and Willard A Anderson II (Willard) are married. Gregory and Willard are Susan Touhey's (Susan) brothers. Susan, Gregory and Willard are the children of Gail Anderson. (*See* Finding of Fact nos. 3-6.)

1. Wolf Road Plaza II, LLC (WRP II) is located at 125 Wolf Road, Albany, NY (*see* DED Exhibit 1 § 1.D). Its primary business is commercial office space rental (*see id.* § 3.C).
2. WRP II was established on August 21, 2015 as a limited liability company (*see* DED Exhibit 1 § 1.R). The Operating Agreement for WRP II (Operating Agreement) that was submitted with the WBE application was executed on October 28, 2015 (*see* DED Exhibit 3 at Bates 29-31).
3. The members of WRP II include Susan Touhey, the president (manager), Robin Anderson, Willard A. Anderson II (Willard Anderson II), Danielle Anderson and Gregory Wells Anderson (Gregory Anderson) (*see* DED Exhibit 1 § 2.A).
4. The membership interests of WRP II are as follows: Susan Touhey 33%; Robin Anderson 8.8%; Danielle Anderson 8.8%; Willard Anderson II 24.5 %; and Gregory Anderson 24.5% (*see* DED Exhibit 1 § 2.A; *see also* DED Exhibit 3 at Bates 32).
5. Together Susan Touhey, Robin Anderson, and Danielle Anderson, all female, own 51.1% of the membership interests of WRP II (*see id.*).
6. Susan Touhey, Willard Anderson II, and Gregory Anderson are siblings. Gail Anderson is their mother. Robin Anderson is the spouse of Willard Anderson II, and Danielle Anderson is the spouse of Gregory Anderson. (*See* affidavit of Matthew Lefebvre sworn to January 17, 2018 [Lefebvre aff], ¶ 12.)

Capital Contribution

7. The Operating Agreement for WRP II (Operating Agreement) submitted with the application states that the members, upon the execution of the agreement, were to make a capital contribution to the company of █████ as follows: Susan Touhey █████ Robin Anderson █████; Daniel Anderson █████; Willard Anderson II █████; and Gregory Anderson █████ (*see* DED Exhibit 3 at Bates 32, 52).
8. According to the WBE application, the capital contribution of the member owners of WRP II consisted of a purchase money mortgage. Susan Touhey contributed █████, and Robin Anderson, Daniel Anderson, Willard Anderson II, and Gregory Anderson each contributed █████. (*See* DED Exhibit 1 § 2 C; DED Exhibit 6.)
9. On October 8, 2015, Gail Anderson transferred the commercial building located at 2 Computer Drive, Albany, New York 12205 to WRP II for no consideration. According to the bill of sale, the building had an equity value of █████ and was subject to a mortgage held by █████ in the amount of █████ (*See* DED Exhibit 4.)
10. The gift of property constituted █████ percent of the total capital contributed to WRP II upon its establishment in 2015 (*see* Response at 2 [table]).

11. In response to the Division's request for a narrative description of the capital contributions of each member in WRP II, Susan Touhey responded that "[t]he equity interests were established by personal checks from the members (██████████) and a gift of the equity of the building from their mother Gail (██████████). Further, the LLC assumed the mortgage of ██████████ held by ██████████ (attached are copies of the checks and Bill of Sale from Gail.)" (*see* DED Exhibit 1 at 9 [response no. 7]; *see also* DED Exhibit 6; *see also* Lefebvre aff ¶ 18).
12. According to WRP II's U.S. Return of Partnership Income for 2015, ██████████ in capital contributions were made to the business during that tax year (*see* DED Exhibit 5 at Bates 64 [Schedule M-2, line 2(a)]).

Control

13. Pursuant to the Operating Agreement, Susan Touhey was designated as the manager of WRP II (*see* DED Exhibit 3 at Bates 29 [section 5.04]).
14. The Operating Agreement prohibits the manager from expending sums on any fixtures, equipment, supplies, or improvements to real or personal property in an amount exceeding \$10,000, borrowing money for the business, mortgaging, encumbering or granting security interests in the assets of the business, or selling, exchanging, or otherwise disposing of the assets of the company without the consent of two-thirds of the members. (*See* DED Exhibit 3 at Bates 28 [section 5.02].)
15. On October 5, 2016, the members of WRP II executed an amended and restated operating agreement which provides that the approval and consent of a majority of members is sufficient to take any action on behalf of the company (*see* WRP Exhibit 1, section 5.04).

DISCUSSION

This recommended order considers WRP II's March 1, 2017 appeal from the Division's October 3, 2016 determination to deny WRP II certification as a woman-owned business enterprise pursuant to Executive Law article 15-A.

I. OWNERSHIP

To qualify for WBE certification, the women owners relied upon for certification must demonstrate that their contributions to the business enterprise are "proportionate to their equity interest in the business enterprise" (5 NYCRR 144.2[a][1]). In assessing capital contributions, the Division considers contributions of money, property, equipment or expertise from the women owners (5 NYCRR 144.2[a][1]).

As set forth in the application and supporting materials, WRP II was capitalized with money and property in the amount of ██████████ the year it was established (*see* DED Exhibit 5 at Bates 64 [Line 2(a) of Schedule M-2 of Form 1065 of WRP II's U.S. Return of Partnership Income]). The members of WRP II made cash contributions totaling ██████████ in October 2015;

█ of that amount was contributed by the women owners. The cash contributions are indicated on the WBE application as a “purchase money mortgage.” (See Exhibit 1 § 2.C and Bates 9 [response no. 7]; Exhibit 6 at Bates 126; *see also* Lefebvre aff ¶¶ 24-25.) In addition, as indicated in the supporting documents, on October 8, 2015, Gail Anderson gifted equity in property to WRP II valued at █ (see DED Exhibit 4; Finding of Fact no. 4). The gift of property was subject to a mortgage held by █ in the amount of █ (see *id.*), and constituted █ of the capital contributed to WRP II in 2015 (see Finding of Fact no. 10). WRP II’s 2015 U.S. Return of Partnership Income shows that the gifted property was allocated proportionally to the member owners (DED Exhibit 5 at Bates 74, 77, 82, and 86 [Schedule K-1s for Willard Anderson, Susan Touhey, Gregory Anderson, Robin Anderson, and Danielle Anderson, respectively]).

The Division argues that WRP II does not meet the eligibility criteria for certification at 5 NYCRR 144.2(a)(1) because its women owners did not make a capital contribution to the business in proportion to their respective equity interests. According to the Division, 5 NYCRR 144.2(a)(1) by its express terms requires that women who own a business seeking certification provide the capital for a business in proportion to their ownership interest, and does not allow a business to be capitalized by means of a gift from a non-owner. The Division contends that the women owners’ cash contribution was minimal compared to the total amount of capital contributed to the business (see Response at 2, table). The Division further argues that the allocation of the gift to the members on a proportionate basis for income tax purposes does not amount to a capital contribution by the women owners for purposes of determining eligibility for WBE certification under 5 NYCRR 144.2(a)(1).

Applicant argues that Ms. Anderson’s gift of equity to WRP II was allocated proportionally to the respective ownership interests established with the formation of the company and constitutes a contribution by each of the members to the business (Appeal at 2). Applicant also argues that the fact that one check was written from a joint bank account owned by Willard and Robin Anderson and another from a joint bank account owned by Danielle and Gregory Anderson should not preclude half of the contribution from being attributable to the women owners (see *id.*).

Applicant’s arguments are not persuasive. The Division is entitled to deference in the interpretation of its regulations, and a plain reading of 5 NYCRR 144.2(a)(1) supports the Division’s position that a business seeking WBE certification must demonstrate that the women owners made a capital contribution from their personal assets in an amount that is proportionate to their equity interest in the business. The record evidence establishes that the women owners contributed just █ to WRP II in 2015, although their respective ownership interests would have necessitated a far greater contribution to be proportionate given that the total capital contributed to the business was █. As to the allocation of Gail Anderson’s gift to the members of WRP II on a proportionate basis as indicated on WRP II’s U.S. Return of Partnership Income, the Division is entitled to conclude that the treatment of a gift for income tax purposes is not dispositive of whether the gift allocation constitutes a capital contribution by the women owners within the meaning of 5 NYCRR 144.2(a)(1).

Based on the foregoing, the Division's determination that applicant failed to demonstrate that the women owners made a contribution of money, property, equipment or expertise to WRP II proportionate to their equity interest, as required by 5 NYCRR 144.2(a)(1), is supported by substantial evidence. Accordingly, the Division's denial of certification on this ground should be affirmed.

II. CONTROL

For a business to be certified as a MWBE, the "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [] decisions without restrictions" (5 NYCRR 144.2[b][2]). Although Ms. Touhey is the managing member of WRP II, and is vested with the general management of the business, the Operating Agreement submitted with WRP II's WBE application significantly restricts her from undertaking certain actions without the consent of two-thirds of the members (*see* DED Exhibit 3 at Bates 26-29 [sections 5.01-5.04]).

Specifically, Ms. Touhey must obtain approval of two thirds of the company's members to spend more than \$10,000 on fixtures, supplies, or improvements to the property; borrow money from banks and other institutions; mortgage or grant a security interest in the property; or sell or dispose of the company's assets. (*See* DED Exhibit 3 at Bates 28 [section 5.02]; *see also* Lefebvre *aff* at ¶¶ 27-28.) As the Division points out, in a commercial real estate business, the expenditure of \$10,000 is reasonably foreseeable and necessary to engage in contracting, obtain credit for improvements to the property, perform custom modifications for tenants, undertake annual maintenance and upkeep, or take care of other matters incidental to the lease of commercial real estate (*see* Response at 7). Under the Operating Agreement, Ms. Touhey cannot perform these tasks without the approval of at least one of the male members of WRP II, which is inconsistent with the certification criterion at 5 NYCRR 144.2(b)(2) requiring that women owners be able to make decisions with respect to the operation of the business without restrictions.

Applicant submitted an amended operating agreement with its appeal, and contends that WRP II now meets the eligibility requirements of 5 NYCRR 144.2(b)(2). The amended operating agreement post-dates the Division's denial and, therefore, cannot be considered on this appeal (*see* 5 NYCRR 144.5[a]; Finding of Fact no. 15). Accordingly, the Division's determination that the women owners cannot make decisions for the business enterprise without restrictions is supported by substantial evidence.

CONCLUSION

WRP II has not met its burden to show that the Division's October 3, 2016 determination to deny its application for WBE certification based on the ownership criteria at 5 NYCRR 144.2(a)(1) and the control criteria at 5 NYCRR 144.2(b)(2) is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny WRP II's application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit List

Division of Minority and Women's Business Development

**Exhibit Chart
Matter of Wolf Road Plaza II, LLC
WBE File No. 60337**

| Exhibit No. | Description |
|--------------------|--|
| DED 1 | WRP II Certification Application No. 7252190 submitted January 29, 2016 |
| DED 2 | New York State Department of Economic Development Division of Minority and Women's Business Development (Division) Denial Letter October 3, 2016 |
| DED 3 | Operating Agreement of Wolf Road Plaza II, LLC (notarized October 28, 2015) |
| DED 4 | Bill of Sale Commercial Building October 8, 2015 |
| DED 5 | 2015 U.S. Return of Partnership Income Wolf Road Plaza II, LLC |
| DED 6 | Cancelled Checks |
| WRP 1 | Amended and Restated Operating Agreement October 5, 2016 |