

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

In the Matter

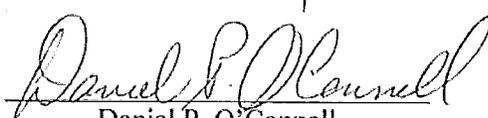
- of -

the Application of Northern Scapes Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 56296

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

May 18, 2018

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny the application filed by Northern Scapes, Inc. (Northern Scapes or applicant) for recertification as a woman-owned business enterprise (WBE) be reversed, for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal by Northern Scapes, 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 (NYCRR) parts 140-144, challenging the determination of the Division that Northern Scapes does not meet the eligibility criteria for recertification as a WBE.

Pamela Allen, President, submitted an application on behalf of Northern Scapes for recertification as a WBE on October 28, 2015 (*see* WBE Exhibit 1). The Division denied Northern Scapes's application by letter dated April 18, 2017 (*see* WBE Exhibit 21). The April 18, 2017 denial letter sets forth two grounds pursuant to 5 NYCRR 144.2(b)(1), with respect to the operation of the business enterprise, for the denial. Specifically, the Division contended that applicant failed to demonstrate that Ms. Allen makes decisions pertaining to the operation of the business enterprise in accordance with 5 NYCRR 144.2(b)(1), and that Northern Scapes did not show that Ms. Allen has adequate managerial experience or technical competence to operate the enterprise as required by 5 NYCRR 144.2(b)(1)(i).

With letters dated May 4, 2017 and May 16, 2017 from Ms. Allen (*see* WBE Exhibit 22), Northern Scapes responded to the Division's April 18, 2017 denial letter, and requested a hearing. The Division issued a Notice of Appeal Hearing dated March 5, 2018, which scheduled the hearing for March 20, 2018, at 11:00 a.m. at the Division's offices located at 625 Broadway, Albany, New York.

The hearing convened as scheduled. Jennifer K. Harvey, Esq. (Couch White, LLP, Albany, New York) appeared at the hearing on behalf of Northern Scapes. During the hearing, Pamela Allen testified for her company. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Raymond Emanuel, Senior Certification Analyst, testified for the Division.

During the hearing, the Division asked the administrative law judge (ALJ) to take official notice of pages from the New York State Department of Environmental Conservation's web site concerning the requirements to become certified as a commercial pesticide applicator (*see* <https://www.dec.ny.gov/permits/45618.html>). In addition, applicant requested the ALJ to take official notice of a blank application form (9 pages) for certification as a woman-owned business enterprise, which is available on the Department of Economic Development's web site. Each party provided hard copies of the respective documents. (*See* attached Exhibit Chart.)

Section 145.1 of 5 NYCRR outlines the procedures for the conduct of an appeal hearings. These regulations, however, are silent about requests for taking official notice. Nevertheless, State Administrative Procedure Act (SAPA) § 306(4) states, in relevant part, that official notice may be taken of facts within the specialized knowledge of an agency. Pursuant to SAPA § 306(4), I took official notice of the two documents identified by the parties (Compact Audio Disk [CD] 1 at 04:24, and 05:37; CD 4 at 38:35).

The parties offered 23 exhibits during the hearing. An exhibit chart is attached to this recommended order.

An audio recording of the administrative adjudicatory hearing was made. The Office of Hearings and Mediation Services received a copy of four compact audio disks on March 22, 2018. Whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise. Staff reviews the business enterprise as it existed at the time the application was filed based on representations in the application as well as information filed in supplemental submissions (*see* 5 NYCRR 144.4[e] and 144.5[a]).

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division staff's determination to deny the application filed by Northern Scapes for recertification as a WBE is not supported by substantial evidence (*see* 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 Division staff'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 NY 3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Division Staff

In the April 18, 2017 denial letter (*see* WBE Exhibit 21), Division staff contended that Northern Scapes failed to meet two criteria for WBE certification set forth in 5 NYCRR 144.2 concerning Ms. Allen's operation of the business enterprise. According to staff, Northern Scapes did not demonstrate that Ms. Allen makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). In addition, staff concluded that Northern Scapes failed to demonstrate that Ms. Allen has adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i).

Northern Scapes, Inc.

The Division initially certified Northern Scapes as a woman-owned business enterprise in 2012. Subsequently, Northern Scapes timely filed a renewal application for recertification in 2015. According to Northern Scapes, the application form used to obtain WBE certification, in the first instance, and the form used to renew WBE certification are significantly different. For example, Section 4 of the application form for WBE certification requests information about business operations. However, the questions in Section 4 on the initial application form do not appear in any part of the renewal application form. Rather, Section 4 of the renewal application form inquires whether the applicant has any relationships with other businesses and, if so, the nature of those relationships. Northern Scapes noted that Section 2 of the renewal application form inquires whether the company has had any material changes to its organizational structure and operations since the original date of certification. With reference to its 2015 renewal application for recertification, Northern Scapes contended that it had no material changes to its key personnel, ownership, operations, or control since the original date of certification. (*See* Exhibit 1 at § 2; CD 4 at 26:00-27:34).

Given the differences between the application forms, Northern Scapes contended that past certifications are relevant in determining the woman-owner's experience in operating and managing the business enterprise. Northern Scapes argued further that issues related to operations are not at issue during the renewal process, where, as here, the company has had no material changes to its key personnel, ownership, operations, or control since the original date of certification. To support these arguments, Northern Scapes cited *Matter of Beach Erectors, Inc.*, Final Order 17-38, dated June 20, 2017. (*See* CD 4 at 28:29.)

Northern Scapes asserted that Ms. Allen has worked in almost all capacities within the landscaping business for decades. Furthermore, Northern Scapes argued that Ms. Allen has prepared estimates for job contracts for years. Northern Scapes observed that licensing requirements generally do not apply to the activities associated with providing landscape services. These activities include, for example, selecting plants, planting vegetation and seeding lawns, mowing, weeding, mulching, and installing concrete pavers, among other things. (*See* CD 4 at 29:12, 32:48.)

Northern Scapes contended that Ms. Allen has adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i). Although Willie Worthing is the project supervisor, Northern Scapes asserted that Ms. Allen has ultimate power to hire and dismiss Mr. Worthing and other employees, and that Ms. Allen makes other substantial decisions, which reflect her control of the business enterprise as provided by 5 NYCRR 144.2(c)(3).

FINDINGS OF FACT

1. Northern Scapes, Inc. was established in January 1983, and operates a landscaping business in the Southern Tier of New York from offices located in Endicott (*see* WBE Exhibit 1).

2. Ms. Allen has worked in the landscaping business for over 20 years. Since 2012, Pamela Allen has been the president of Northern Scapes, and owns 60% of the business enterprise. Robert W. Allen has been the company's vice-president since 2012, and owns 40% of Northern Scapes. Robert Allen is Ms. Allen's spouse. (See WBE Exhibit 1; CD 1 at 07:11-08:05, 11:01; CD 2 at 37:02, 37:08; CD 4 at 34:44.)
3. In 2012, the New York State Department of Economic Development, Division for Minority and Women's Business Development certified Northern Scapes as a woman-owned business enterprise. On behalf of Northern Scapes, Ms. Allen filed a renewal application for WBE recertification on October 28, 2015. (See WBE Exhibit 1; CD 1 at 09:26.)
4. Since the original date of certification, Northern Scapes has had no material change to its key personnel, ownership, operations, or control. (See Exhibit 1 at § 2; CD 1 at 10:18, 22:02.)
5. In the 2015 renewal application for WBE recertification, Northern Scapes listed the following services, among others: installation of concrete pavers for patios, sidewalks, and driveways; lawn seeding and mowing; as well as fertilization and weed control. The renewal application noted that two of Northern Scapes's personnel are certified by the New York State Department of Environmental Conservation (DEC) with respect to the application of fertilizers and other lawn care products. (See WBE Exhibit 1 at § 5.A, WBE Exhibit 17 at 0065-0068, and 0070; CD 1 at 22:38, 23:30.)¹
6. In section 5 of the renewal application, Northern Scapes requested WBE recertification for landscape care and maintenance services, landscape installation services, and paver brick (e.g., driveway, patio, and sidewalk) installation services. These correspond to the following North American Industry Classification System (NAICS) codes: 561730 and 238990. Northern Scapes's renewal application does not include WBE certification to apply lawn fertilizers, pesticides, and other lawn care products. (See WBE Exhibit 1 at §§ 5.C-5.E; CD 1 at 24:28-26:26.)
7. By letter dated April 18, 2017, the Division denied Northern Scapes's renewal application for WBE recertification. (See WBE Exhibit 21; CD 2 at 50:18-50:39; CD 4 at 33:26.)
8. With letters dated May 4, 2017 and May 16, 2017, Ms. Allen responded to the Division's April 18, 2017 denial letter, and requested a hearing on behalf of Northern Scapes (see WBE Exhibit 22; CD 2 at 51:41-52:16).

¹ WBE Exhibit 17 is a 70-page document. Prior to the hearing, Northern Scapes identified the document as Exhibit R. The Division offered excerpts from WBE Exhibit 17 as part of its direct case. The first two pages of WBE Exhibit 17 are a list of questions prepared by Division staff. The remaining pages, which are not paginated, are the various documents filed by Northern Scapes in response to the questions. (See CD 2 at 11:54.) Given its length, the ALJ consecutively numbered the pages of WBE Exhibit 17 with a Bates stamp. References to WBE Exhibit 17 include the Bates-numbered page or pages.

Operation

9. In a request dated April 5, 2017, Division staff asked Northern Scapes to provide a narrative of the duties and responsibilities of Pamela Allen and Robert Allen, as well as updated résumés. (See WBE Exhibit 17 at 0001 [Questions 5 and 7]; CD 3 at 11:54, 13:32, 27:39.)
10. On April 14, 2017, Ms. Allen responded to staff's April 5, 2017 inquiry. Based on the description provided, Ms. Allen meets twice daily with Robert Allen to review the work schedule. Ms. Allen then focuses on the administrative management aspects of the business. At the end of the season, Ms. Allen collects and prepares the financial documents that the company's accountant will need to prepare the annual tax returns. (See WBE Exhibit 17 at 0061-0062; CD 2 at 27:39, 28:16; CD 3 at 46:43.)
11. In addition to reviewing the daily work schedule with Ms. Allen, Robert Allen's other duties include meeting with customers, supervising field operations, and undertaking landscaping and hardscaping activities. Mr. Allen and the other estimators at Northern Scapes provide preliminary information to Ms. Allen as part of the estimating process. (See WBE Exhibit 17 at 0063; CD 1 at 15:02, 15:20; CD 3 at 48:10.)
12. Ms. Allen's April 14, 2017 response to Division staff also included a copy of her résumé and that of Robert Allen. Based on Pamela Allen's résumé, her professional duties and responsibilities include daily accounting entries related to accounts receivable and accounts payable, payroll, billing, and quarterly reports. Ms. Allen is responsible for all banking activities. She prepares quotes and contracts.² Ms. Allen orders plantings, landscaping, hardscaping, and related materials and, when necessary, purchases new equipment and vehicles. Ms. Allen obtains the appropriate insurance coverage for each job, files credit applications, and addresses customers' concerns. (See WBE Exhibit 17 at 0069; CD 1 at 45:49; CD 2 at 31:53, 35:37; CD 3 at 53:31; CD 4 at 09:31.)
13. According to Robert Allen's résumé, he prepares estimates, addresses customers' concerns, and maintains the company's vehicles and equipment. (See WBE Exhibit 17 at 0070; CD 3 at 54:23.)
14. In the April 5, 2017 request, Division staff asked Northern Scapes to provide a list of key employees and a narrative of their respective duties and responsibilities. In Northern Scapes's response, Ms. Allen identified Willie Worthing and Steve Tagliaferro as the company's key employees. Mr. Worthing is Northern Scapes's project supervisor, and Mr. Tagliaferro manages the company's fertilization division. (See WBE Exhibit 17 at 0001 [Question 3] and 0056; CD 2 at 18:03, 19:13; CD 3 at 44:18.)
15. As the project supervisor, Mr. Worthing meets twice daily with Ms. Allen to discuss the work schedule and the status of current projects. At the job sites, Mr. Worthing assigns the crews, identifies the landscaping and hardscaping materials for each job, as well as

² Ms. Allen uses the terms "quote" and "estimate" interchangeably (see CD 3 at 17:05).

the required equipment. During his visits to the job sites, Mr. Worthing collects information related to the materials and equipment used, job costs and payroll information. Mr. Worthing reports this information to Ms. Allen for the company's records. (See WBE Exhibit 17 at 0056; CD 1 at 08:38, 01:02:55; CD 2 at 18:03; CD 3 at 45:01.)

16. Mr. Tagliaferro manages the fertilizer division at Northern Scapes. Consistent with the regulations implemented by DEC, Mr. Tagliaferro is a certified pesticide applicator. He supervises Northern Scapes's employees who apply fertilizers, pesticides and other lawn care products. Northern Scapes has over 500 customers who subscribe to this service, which is intended to complement the company's mowing and seasonal cleanup services. Mr. Tagliaferro contacts customers to schedule site visits, which occur four times during the season. He is responsible for ordering all supplies, and tracking the costs associated with these services. On a regular basis, Mr. Tagliaferro meets with Ms. Allen to update her about the division's activities. (See WBE Exhibit 17 at 0056, 0068; CD 1 at 31:23; CD 2 at 19:13, 26:41; 35:03-35:37; CD 3 at 10:27, 12:05, 12:54, 35:32, 36:15, 37:24, 45:39, 52:16.)
17. Based on the revenue collected in 2017, the fertilization division contributed about [REDACTED] to Northern Scapes's total revenues (see CD 1 at 23:12, 31:45; CD 2 at 20:49; CD 3 at 09:03).
18. Services related to the application of fertilizers, pesticides, and other lawn care products are not part of public contracts. Contractors do not include requests for these services in their bids. Rather, public works projects focus on new construction. Consequently, Northern Scapes's work with respect to public works projects includes grading and site preparation for new lawns, hydroseeding lawns, and installing pavers and retaining walls. (See CD 1 at 48:07; CD 3 at 14:03, 14: 51.)

Technical Competence and Managerial Experience

19. As president of Northern Scapes since 2012, Ms. Allen has the exclusive authority to hire and dismiss all employees, and to determine the wages and salaries paid to employees. As noted above (see Finding No. 12), Ms. Allen is responsible for all administrative duties associated with business operations. In addition, Ms. Allen prepares and signs all contracts before sending them to residential customers. With respect to commercial projects, Ms. Allen reviews the terms and conditions of the contracts after receiving them from the site or general contractors. (See WBE Exhibit 14; CD 1 at 09:41, 10:39, 39:34; 52:59, 53:40, 54:36; CD 2 at 00:31, 01:15, 31:10, 33:15; CD 3 at 19:42.)
20. Ms. Allen supervises Mr. Worthing, who is the project supervisor, and Mr. Tagliaferro, who is the director of the fertilization division (see WBE Exhibit 17 at 0056; CD 1 at 01:01:51-01:02:55; CD 2 at 18:03, 19:13, 21:10).
21. In 2001, Ms. Allen attended a workshop developed by [REDACTED] a landscape consultant. The purpose of the workshop was to learn how to prepare estimates to bid landscape jobs. To prepare each estimate, Ms. Allen uses a [REDACTED]

[REDACTED] Ms. Allen explained that Northern Scapes's estimators, whom she trained after attending the workshop, complete the upper portions of the bid sheets with preliminary information. Ms. Allen then reviews the bid sheets, and completes them by entering [REDACTED] among other things. As part of the recertification application, Northern Scapes did not explain who prepares estimates. Although Ms. Allen reviews and finalizes all estimates before they are incorporated into the contracts, she did not include this information in the description of her duties and responsibilities, and on her résumé. (See WBE Exhibit 17 at 0061 and 0069; WBE Exhibit 20; CD 1 at 11:09-20:52; CD 2 at 16:26, 17:58; CD 3 at 05:57, 06:51.)

DISCUSSION

This recommended order considers applicant's appeal from the Division's April 18, 2017 determination (see WBE Exhibit 21) to deny the recertification of Northern Scapes as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in 5 NYCRR 144.2, the Division identified the two bases for the denial with respect to the operation of the business enterprise. First, the Division determined that Pamela Allen does not make decisions for the business enterprise as required by 5 NYCRR 144.2(b)(1). Second, the Division determined that Pamela Allen does not have the managerial expertise or technical competence to operate the business as required by 5 NYCRR 144.2(b)(1)(i). Each basis is addressed below.

Based on the renewal application materials and the hearing record, I find that applicant has met its burden to demonstrate that the Division's denial of WBE recertification to Northern Scapes is not based on substantial evidence, and should be reversed.

I. Prior Certification and Notice

The Division acknowledged that Northern Scapes was previously certified as a woman-owned business enterprise. The Division argued, however, that it is not bound to recertify a previously certified business enterprise if the Division's prior determinations were made in error. The Division argued that based on the renewal application and supplemental materials, Division staff correctly determined that Northern Scapes was not eligible for recertification.

The Division is correct that it is not obligated to recertify Northern Scapes as a WBE based on prior determinations. It is well settled that the doctrine of equitable estoppel cannot be invoked against a governmental agency in the exercise of its governmental function (see e.g. *Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988] [State could correct and retroactively reduce nursing home reimbursement rates which had been calculated in error]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143 [2014], *lv denied* 23 NY3d 905 [2014]; *Matter of Atlantic States Legal Found., Inc. v New York State Dept. of Envtl. Conservation*, 119 AD3d 1172, 1173 [2014]).

After filing a renewal application, Northern Scapes has the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR 144.2. Nevertheless, the Division's

determination must be supported by substantial evidence. As applicant's counsel pointed out, the Division, in the April 18, 2017 denial letter, did not discuss any prior errors it had made with respect to the initial certification of Northern Scapes or explain why it was changing course with the recertification application that is the subject of this appeal (*see* WBE Exhibit 21; CD 4 at 27:34).

In addition, Northern Scapes's prior certification is relevant in terms of evaluating the woman owner's experience managing and operating the subject business enterprise, particularly given the format of the WBE renewal application (*see* CD 4 at 28:29). The renewal application for WBE recertification does not include a reconsideration of the business enterprise's operational functions. The questions in Section 4 of an application for WBE certification, in the first instance, are absent from the recertification application. Rather, Section 2 of the recertification application inquires whether the business enterprise, seeking to renew its WBE certification, has had any material change to its key personnel, ownership, operations, or control. At the hearing, Ms. Allen credibly testified that Northern Scapes has had no material changes, and the Division offered nothing to show otherwise. (*See* WBE Exhibit 1 at § 2; CD 1 at 10:18, 22:02.)

Based on the format of the recertification application, Northern Scapes argued that it did not receive notice that Division staff would be reconsidering the business enterprise's operations as part of the renewal process. Absent such notice, Northern Scapes argued that it was not provided with the opportunity to demonstrate Northern Scapes's compliance with the eligibility criteria related to operation, which are the exclusive bases for the Division's denial. (*See* WBE Exhibit 21; CD 4 at 27:34.)

The differences between the initial application for WBE certification and the renewal application for recertification were developed at hearing. However, the significance of these differences is not known. Nevertheless, the Division has two different applications for WBE certification available on its website. Applicants use the first when making an initial request for WBE certification. To renew their WBE certifications, which is the case here, business enterprises use the renewal application.

Based on these circumstances, I am persuaded by Northern Scapes's argument that the Division inappropriately reconsidered the operational criterion, which serves as the bases for denying WBE recertification to Northern Scapes. If the Director is also persuaded, then she may rely upon the hearing record to consider whether Northern Scapes complies with the eligibility criteria at issue in this proceeding.

II. Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise be made by the woman owner. According to the Division, Ms. Allen primarily oversees financial and administrative matters while male individuals, particularly her husband and others identified as key employees, oversee the core functions of the business enterprise, including, but not limited to estimating and project management (*see* Exhibit WBE Exhibit 21). For the following reasons, the Division's denial on this ground is not based on substantial evidence.

Ms. Allen has been the president and the majority shareholder (60%) of Northern Scapes since 2012. She oversees all projects at Northern Scapes. As provided for by 5 NYCRR 144.2(c)(3), Ms. Allen assigns project managers and other staff to do the work, while retaining ultimate authority to hire and dismiss these managers (*see* WBE Exhibit 1, WBE Exhibit 17 at 0061-0062; CD 1 at 07:11-07:27, 08:38, 10:39; CD 2 at 18:03, 37:02). The supplemental materials filed as part of the renewal application, and Ms. Allen's testimony demonstrate that she meets with Northern Scapes's project supervisor, Mr. Worthing, twice daily to discuss the work schedule and the status of current projects. For each active project, Mr. Worthing provides Ms. Allen with updates for the company's records. (*See* CD 1 at 08:38, 01:02:55; CD 2 at 18:03; CD 3 at 45:01).

Ms. Allen credibly testified about the details related to the process of preparing estimates or quotes. In 2001, Ms. Allen attended a workshop developed by [REDACTED] a landscape consultant. The purpose of the workshop was to learn how to prepare estimates to bid landscape jobs. To prepare an estimate, Ms. Allen adopted a set of bid sheets for Northern Scapes from forms [REDACTED]. Ms. Allen explained that Northern Scapes's estimators, whom she trained, complete the upper portions of the bid sheets with preliminary information. Ms. Allen then reviews the bid sheets, and completes them by entering [REDACTED] among other things. (*See* WBE Exhibit 17 at 0061 and 0069, WBE Exhibit 20; CD 1 at 11:09 – 20:52; CD 3 at 05:57, 06:51.)

Ms. Allen's reliance on estimators to provide her with preliminary information to complete the bid process does not mean that she is uninvolved or plays a secondary role in preparing estimates. Ms. Allen testified that any errors in preparing estimates or quotes could ruin her company. These circumstances provide a strong incentive for Ms. Allen to conduct a very detailed and careful review. (*See* CD 1 at 57:19; CD 2 at 16:26.)

Ms. Allen's testimony is corroborated by the renewal application materials. Significantly, Ms. Allen finalizes and signs all contracts (*see* WBE Exhibit 14; CD 1 at 09:41, 54:36). In addition, the renewal application materials identify no other employee of Northern Scapes with the authority to sign bid proposals, complete estimates, enter into contracts, or make binding financial decisions on behalf of the business enterprise. (*See* WBE Exhibit 14; CD 1 at 09:41, 11:09, 52:28, 54:36).

Division staff testified that Ms. Allen's husband and other male employees primarily oversee the core functions of the business enterprise, including estimating, project management, and field supervision (*see* CD 3 at 48:10, 49:22). Staff's dismissal of Ms. Allen's role in Northern Scapes is contradicted by the record and does not reflect the nature of Ms. Allen's role in the business enterprise.

In sum, the application and hearing testimony demonstrate that Ms. Allen has a high degree of engagement in all aspects of Northern Scapes's business operations and makes critical decisions for the business enterprise. Applicant has met its burden to show that the Division's denial based on 5 NYCRR 144.2(b)(1) is not based on substantial evidence. I recommend that the Division's determination with respect to 5 NYCRR 144.2(b)(1) be reversed.

III. Managerial Experience or Technical Competence

The Division also determined that Ms. Allen lacks adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i). The Division stated in the April 18, 2017 denial letter that Robert Allen has completed training for the installation of concrete pavers and is certified as a pesticide applicator. The denial letter also stated that Ms. Allen has not demonstrated any training or certifications relevant to the landscaping industry. (*See* WBE Exhibit 21). The Division's determination with respect to this criterion, however, is not supported by substantial evidence for the following reasons.

An important consideration in this recertification application is the experience of the woman owner in the industry. As discussed above, the record establishes that Ms. Allen has operated Northern Scapes since 2012, and oversees the company's project supervisor, Mr. Worthing (*see* WBE Exhibit 17 at 0056; CD 1 at 01:01:51-01:02:55; CD 2 at 18:03). Ms. Allen assigns project managers and determines the appropriate size of the work crews. The project managers keep Ms. Allen informed about the status of the project, which includes the materials and equipment used, and the labor costs. (*See* CD 1 at 08:38, 01:02:55; CD 2 at 18:03; CD 3 at 45:01). She prepares and finalizes bid documents and estimates, as well as negotiates contracts before they are sent out. She also handles insurance, equipment purchases, and hiring and dismissing personnel. (*See* WBE Exhibit 14, WBE Exhibit 20; CD 1 at 11:09-20:52, 57:19; CD 2 at 16:26, 17:58; CD 3 at 05:57, 06:57). Ms. Allen testified that she must delegate tasks to others because she could not be everywhere at once (*see* CD 1 at 01:02:55).

A plain reading of 5 NYCRR 144.2(b)(1)(i) supports the interpretation that adequate managerial experience and technical competence in the business enterprise are two independent bases for certification. Although Ms. Allen can satisfy both criteria for certification, satisfying either criterion is sufficient for Northern Scapes to be eligible for recertification as a WBE. With respect to Ms. Allen's managerial experience, the facts presented on this record, and discussed above, demonstrate that Ms. Allen has worked in the landscaping field for more than 20 years, has managed projects through her oversight of project managers, and possesses the requisite business and technical acumen to operate Northern Scapes (*see* WBE Exhibit 1, WBE Exhibit 17 at 0061,0062, 0069; CD 1 at 07:50, 08:05).

I conclude that Mr. Emanuel's contention that Ms. Allen lacks technical competence is unavailing (*see* CD 4 at 52:16, 53:31, 54:23). The Division's regulations do not require an applicant to possess formal academic training or to have completed an apprenticeship in order to demonstrate technical competence to operate a business. It would be unreasonable to impose such a requirement on a woman owner who possesses significant industry and managerial experience acquired over more than 20 years, as does Ms. Allen, who retains ultimate authority to control the operations of the business enterprise seeking recertification. (*See Matter of Era Steel Const. Corp. v Egan*, 145 AD2d 795 [3d Dept 1988].) Therefore, in the case of a landscaping business, managerial experience is of greater importance than technical competence, given the nature of the work performed.

With respect to the denial, staff's reliance on which Northern Scapes employees may be certified as pesticide applicators is misplaced. Northern Scapes is not seeking WBE certification

to apply fertilizers and other lawn care products. The NAICS code for these functions does not appear in the renewal application. (See WBE Exhibit 1 at §§ 5.B-5.E; CD 4 at 05:31). Staff acknowledged that the Division has certified particular functions of a business enterprise, and not others (see CD 4 at 04:29-05:25), which Northern Scapes requests here. Ms. Allen credibly testified that public works projects do not include requests for services related to the application of fertilizers and other lawn care products (see CD 1 at 48:07; CD 3 at 14:03, 14:51). Consequently, whether Northern Scapes has employees certified to apply fertilizer and other lawn care products, regardless of their gender, is not relevant to this renewal application for WBE certification.

In summary, the application, supporting materials, and hearing testimony demonstrate that Ms. Allen has the technical competence and managerial experience to operate Northern Scapes as required by 5 NYCRR 144.2(b)(1)(i). Northern Scapes has met its burden to demonstrate that the Division's denial based upon applicant's failure to meet 5 NYCRR 144.2(b)(1)(i) is not based on substantial evidence.

CONCLUSION

For the reasons outlined above, applicant has met its burden to demonstrate that the Division's determination to deny Northern Scapes's application for recertification as a woman-owned business enterprise was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director reverse the Division's determination to deny Northern Scapes's application for recertification as a woman-owned business enterprise.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart
Matter of Northern Scapes, Inc.
NYS DED File No. 56296
Hearing Date: March 20, 2018

WBE Exhibit No.	Applicant	Division	Description	Received
1	A	1	Recertification Application (Application No. 9716424 [8 pages]). Filed October 28, 2015	✓
2	B		2013 and 2012 Personal Tax Returns (IRS Form 1040) of Pamela and Robert Allen	✓
3	C		Recertification Application Notarization	✓
4	D	3	Licenses and Certificates (See Applicant's Exhibit N [duplicates])	✓
5	E		2014, 2013, and 2012 (IRS Form 1120S) of Northern Scapes, Inc.	✓
6	F		Personal Net Worth Affidavit	ID only
7	G		Vehicle Registrations	ID only
8	H		Largest Contracts from Prior Two Years	ID only
9	I		Northern Scapes, Inc. Profit and Loss Statement (January 1, 2015 – October 27, 2015)	✓
10	J		Statement regarding delivery of items	ID only
11	K		Statement regarding Inventory dated October 21, 2015	ID only
12	L		List of Suppliers and Lines of Credit	✓
13	M		Invoices and Payments Received	✓
	N	3	Commercial Pesticides Applicator Licenses Robert W. Allen [REDACTED] Steven R. Tagliaferro [REDACTED] (See Applicant's Exhibit D [duplicates])	CD 1 at 52:28 CD 4 at 34:59

14	O		Contracts and Agreements (<i>Compare</i> Applicant's Exhibit H)	✓
15	P		Payroll Records	✓
16	Q		New Equipment Purchases	ID only
17	R		<p>Questions and Answers [Bates Nos. 0001-0070]</p> <p>2015 IRS Form 1120S and attached Schedules (<i>Compare</i> Applicant's Exhibit E) [Bates Nos. 0003-0016]</p> <p>2015 NYS Form CT-3-S and attached Schedules [Bates Nos. 0017-0038]</p> <p>2015 IRS Form 1040 of Pamela and Robert Allen (<i>Compare</i> Applicant's Exhibit B) [Bates Nos. 0039-0045]</p> <p>2015 NYS Form IT-201 of Pamela and Robert Allen [Bates Nos. 0046-0055]</p> <p>4 Key Employees – Willie Worthing and Steve Tagliaferro [Bates Nos. 0056]</p> <p>4 October-December 2015 NYS Form 45-WEB [Bates Nos. 0057-0058]</p> <p>4 October-December 2016 NYS Form 45-WEB [Bates Nos. 0059-0060]</p> <p>4 Daily Duties of Pamela J. Allen [Bates Nos. 0061-0062]</p> <p>4 Daily Duties of Robert W. Allen [Bates No. 0063]</p> <p>5 2017 Licenses and Permits [Bates Nos. 0064-0068]</p> <p>5 Resume of Pamela J. Allen [Bates No. 0069]</p> <p>5 Resume of Robert W. Allen [Bates No. 0070]</p>	✓

18	S		Empire State Development Utilities Pages	✓
19	T		Emails between Applicant and Division Staff	✓
20	U		Estimating Form	✓
21	V	2	Division's April 18, 2017 Denial Letter	✓
22	W		Applicant's Notices of Appeal dated May 4 and 16, 2017	✓
23	X		Letters from Business Partners and Clients	✓

Official Notice	Pesticide Applicator/Technician Certification https://www.dec.ny.gov/permits/45618.htm
Official Notice	Division of Minority and Women's Business Development Application Type: New Application