

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

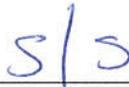
In the Matter

- of -

the Application of **SAGE AND COOMBE ARCHITECTS, LLP.**  
for Certification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 46848

RECOMMENDED ORDER



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Helene G. Goldberger  
Administrative Law Judge

March 6, 2020

## 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 Sage and Coombe Architects, LLP (Sage or applicant) certification as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

## PROCEEDINGS

In a letter dated February 22, 2017, the Division determined that Sage does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied Sage's application. *See*, Division Exhibit A and Sage Exhibit B.

By letter dated March 6, 2017, Ms. Jennifer Sage requested the opportunity to lodge a formal written appeal to the Division's determination to deny Sage WBE certification. Sage Exhibit C.

By notice dated April 4, 2017, the Division acknowledged Sage's request to proceed with a written appeal. The April 4<sup>th</sup> notice set June 5, 2017 as the due date for Sage's written appeal. The notice also reiterated the Division's bases for the denial. Sage Exhibit D.

On behalf of Sage, Sheila Di Gasper, Esq. of Ingram, Yuzek, Gainen, Carroll, Bertolotti, LLP filed a timely written appeal in the form of a letter dated May 22, 2017 and received by the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation on May 25, 2017 (Appeal). With this appeal, Ms. Di Gasper included Exhibits A-G. Exhibit E is the Partnership Agreement of July 26, 2004 that was part of Sage's application to the Division as well as an Amendment dated January 1, 2017 which was not. Exhibits F and G are documents associated with Sage's MWBE and DMWBE certifications with New York City and New Jersey, respectively. As discussed more fully below, I do not consider these latter submissions which were not a part of Sage's April 2016 application for WBE status.

Donald J. Tobias, Esq., Attorney for New York State Division of Economic Development, filed the Division's Memorandum of Law (MOL) as part of its response to the appeal dated February 18, 2020. With the MOL, the Division also filed the affidavit of Raymond Emanuel, the Certification Director of the Division to which are annexed Exhibits A-C.

## ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation. *See*, Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of information supplied through the application process. 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 supplemental submissions and, if appropriate, from interviews conducted by Division analysts. *See*, 5 NYCRR § 144.5(a).

## STANDARD OF REVIEW

On this administrative appeal, Sage, 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 § 306(1). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and the 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 the February 22, 2017 denial letter (Division Exhibit A, Sage Exhibit B), the Division determined that the application failed to meet the WBE certification criteria based on its conclusion that the relevant Partnership Agreement did not permit the woman owner to make decisions without restrictions pursuant to 5 NYCRR § 144.2(b)(2). Mr. Tobias notes that this Partnership Agreement – "the [a]pplicant's principal governance document" - submitted with Sage's application, specifically provides that the entity "shall be controlled, operated and managed by the Partners" and "a Supermajority Vote shall be required to approve any matter to be decided by the Partners." Sections 5.1(a) and (b) of the Partnership Agreement, Division Exhibit C and Sage Exhibit E. The Division concludes that given the terms of this Agreement, decisions involving the partnership require not only the approval of Jennifer Sage who holds a fifty-one percent share of the company, but also of Peter Coombe, who owns the remaining forty-nine percent share of the business.

Citing §§ 144.4(e) and 144.5(a) of 5 NYCRR, Mr. Tobias addresses the submission of the January 2017 Amendment to the applicant's Agreement by noting that this new document was not a part of the application to the Division and therefore could not be considered on this appeal. MOL, p. 6.

### Sage

On appeal, Ms. Di Gasper explains Ms. Sage "controlled the Partnership's business without restriction." Sage Appeal, p. 2. However, she also states that "[u]nfortunately, the Partnership Agreement did not properly reflect this." *Id.* She emphasizes that the Amendment to the Partnership Agreement provides that Ms. Sage is the Managing Partner of the firm and has "full and exclusive authority, responsibility and discretion in the day-to-day management, supervision and control of all aspects of the Partnership." Section 5.1(a) of the Amendment, Sage Exhibit E. In addition, Ms. Di Gasper points out that this Amendment removes all references in the Agreement that require a supermajority vote for any firm decision. Appeal, p. 2, Section 5.1(b) of the Amendment, Sage Exhibit E. Based upon these submissions as well as the documents relating to WBE status in New York City and New Jersey, Ms. Di Gasper argues that the Division's denial should be reversed. Appeal, pp. 2-3, Sage Exhibits F and G.

## FINDINGS OF FACT

1. Sage and Coombe Architects is an architecture firm established in December 2003 and located at 12-16 Vestry St, Floor 5, New York, New York. Sage Exhibit A, §§ 1.B, 1.D, 1.R.
2. Jennifer Sage and Peter Coombe are architect partners with Jennifer owning fifty-one percent and Peter owning forty-nine percent of the company. Sage Exhibit A, § 2.A.
3. In the Partnership Agreement dated July 26, 2004 that governs the operation of Sage, “a Supermajority Vote shall be required to approve any matter to be decided by the Partners.” Sage Exhibit E, Section 5.1(b).
4. A Supermajority vote is defined in this Agreement as “an affirmative vote of Partners holding seventy-five percent (75%) of the Percentages of the Partnership.” Sage Exhibit E, Article I, p. 3.

## DISCUSSION

This recommended order considers Sage’s May 22, 2017 appeal with Exhibits A-E excluding the second document contained in Exhibit E which is Sage’s January 2017 Amendment to its Partnership Agreement. In addition, I consider the Division’s response including the Memorandum of Law and Mr. Emanuel’s affidavit and the annexed Exhibits A-C.

### I. Control

Among the criteria that § 144.2(b) of 5 NYCRR sets forth as required for eligibility for WBE certification is:

“(2) Articles of incorporation, corporate bylaws, partnership agreements and other agreements including, but not limited to, loan agreements, lease agreement, supply agreements, credit agreements or other agreements must permit . . . women who claim ownership of the business enterprise to make those decisions without restrictions.”

Sage does not contest that its primary organizational document, the Partnership Agreement that was entered into between Jennifer Sage and Peter Coombe on July 26, 2004, set forth requirements that made it impossible for Ms. Sage to be the controlling owner in the enterprise. See, Appeal Letter, p. 2. Specifically, Section 5.1(b) of the Partnership Agreement requires that “. . . a Supermajority Vote shall be required to approve any matter to be decided by the partners.” Sage Exhibit E, WBE Exhibit C. Article I of the Partnership Agreement provides that a Supermajority Vote shall mean “an affirmative vote of Partners holding seventy-five percent (75%) of the Percentages of the Partnership.” *Id.* As Ms. Sage’s ownership of the partnership is fifty-one percent (51%), it would be impossible for her to control decisionmaking in the firm based on these requirements.

In order to attempt to rectify this self-acknowledged defect in its application, Sage submitted an Amendment that was entered into on January 1, 2017. Sage Exhibit E. In this document, the two partners agreed to make Ms. Sage the managing partner and to delete the supermajority requirement. Sage Exhibit E. However, because this record was not a part of Sage's application to the Division, I cannot consider it on this Appeal. As noted by Mr. Tobias in the Division's MOL, 5 NYCRR § 144.4, which governs the appeal protocol before the Division, provides in subsection (e): "[t]he request for a hearing shall state the bases upon which the denial of certification is being appealed and shall be based on information or documents provided with an application and pursuant to any site visit that may have been carried out." Additionally, § 144.5 (Appeals) sets forth in subsection (a): "[t]he hearing officer shall conduct a hearing based upon information set forth in the request for a hearing relating to the information provided with the certification application."

As Mr. Emanuel explains in his affidavit at ¶ 11, it is imperative that I adhere to the above referenced regulations that dictate I confine my review on this appeal to the application record because that record is the only one that was reviewed in detail by the Division's personnel. Any new material supplied by the Applicant on an appeal was not before the Division's analysts and therefore "were not examined by the agency and are not a part of the record upon which its determination was based [and therefore] cannot . . . be considered on appeal." *Id.*

For the same as well as additional reasons, I cannot consider Sage's Exhibits F and G, which are documents related to other WBE certifications with other jurisdictions. In addition to the fact that these records were not before the Division when the application was reviewed, there is no indication that the same criteria used by the Division are applied by these other governmental entities and are therefore not relevant to these proceedings. *See, Matter of Sunrise Credit Services Inc. v. Zapata*, (unreported), 67 Misc 3d 1225(A) (Sup. Ct. NY County 2017).

As has been emphasized repeatedly in certification appeals before the Division, the legislative intent of Article 15-A is meant to redress past discrimination experienced by minority and women business owners. *See, e.g., Matter of Corporate Branding, Inc.*, <https://esd.ny.gov/sites/default/files/CorporateBrandingRO.pdf> (ALJ Wilkinson, August 31, 2017). In order to meet constitutional standards, the Division must tailor this remedial program to confer benefits only to members of the protected class and who in fact, have control over the business. *See, Richmond v. J.A. Croson*, 488 US 469, 506 (1989).

Accordingly, applicant has failed to meet its burden to show that the record before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Ms. Sage was not in exclusive control of the enterprise as required by 5 NYCRR § 144.2(b)(2).

## **CONCLUSION**

With respect to the control criterion set forth at NYCRR § 144.2(b)(2), Sage did not meet its burden to show that the Division's February 22, 2017 was not supported by substantial evidence.

## **RECOMMENDATION**

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

Attachment: Exhibit Chart

**MATTER OF SAGE AND COOMBE ARCHITECTS, LLP**

**DED FILE No. 46848**

**EXHIBIT LIST**

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
Division A	Denial Letter dated February 22, 2017	√	√		
Division B	Sage and Coombe WBE Application submitted April 7, 2016	√	√		
Division C	Sage and Coombe, LLP Partnership Agreement of July 26, 2004	√	√		
Sage A	Sage and Coombe, LLP WBE Application submitted April 7, 2016	√	√		
Sage B	Denial Letter dated February 22, 2017	√	√		
Sage C	Sage and Coombe, LLP Request for Written Appeal dated March 6, 2017	√	√		
Sage D	Division Letter dated April 4, 2017 to Sage and Coombe, LLP permitting written appeal	√	√		
Sage E	Sage and Coombe, LLP Partnership Agreement dated July 26, 2004	√	√		I have <b>not received</b> the second part of this exhibit which contains the Amendment to the Agreement dated January 1, 2017
Sage F	Letter dated April 6, 2017 from NYC Small Business Services to Jennifer Sage re: MWBE Program w/WBE Certificate	√			
Sage G	State of New Jersey Selective Assistance Vendor Information re: Sage and Coombe Architects, LLP	√			