

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

In the Matter

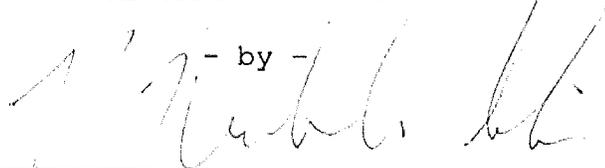
- of -

the Application of
Whispering Pines Development Corp.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61332

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

June 5, 2019

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 of Whispering Pines Development Corp. ("applicant") for certification as a woman-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") 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, by Whispering Pines Development Corp. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Whispering Pines Development Corp.'s application was submitted on February 5, 2016 (Exh. DED1).

The application was denied by letter dated January 20, 2017, from Bette Yee, Director of Certification Operations (Exh. DED2). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two eligibility criteria related to Kim Leonette's ownership and control of the applicant.

In a two-page letter dated February 6, 2017, Kim Leonette submitted a notice of appeal from the denial (Exh. DED6)

In a three-page letter dated May 8, 2017, Kim Leonette submitted an appeal. Attached to the appeal were nine exhibits described in the exhibit chart as A1 - A9.

In a five-page filing dated March 26, 2019, the Division responded to the applicant's appeal. Included with the Division's papers were eight exhibits described in the attached exhibit chart as DED1-DED8.

On March 29, 2019, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's 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 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

Position of the Division

In its denial letter, the Division asserts that the application failed to meet two separate criteria for certification. First, the Division found that the applicant failed to show that contribution of the women owner, Kim Leonette, was proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the corporate bylaws and other documents governing the business enterprise do not permit

the woman owner, Kim Leonette, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Whispering Pines Development Corp. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Whispering Pines Development Corp. is in the business of providing site preparation services, including construction of underground utilities (sewer, water, drainage, storm, and gas), sidewalks and curbs, stamped concrete, retaining walls, retention ponds, rain gardens, and landscaping (Exh. DED1 at 3). The firm has a business address of 50 Mertes Avenue, P.O. Box 716, Vails Gate, NY 12584 (Exh. DED1 at 1).

2. Whispering Pines Development Corp. was established in November 1988 (Exh. DED1 at 2). At the time the application for WBE certification was made, Kim Leonette owned 52% of the common stock, John M. Leonette owned 47%, and John Leonette owned 1% (Exh. DED1 at 3). Minutes of shareholder meetings show that Kim Leonette received 31% of the corporation as a gift from her father John Leonette (Exh. DED3 at 1) and 1% as a gift from her mother (Exh. DED3 at 2).

3. The application states that John Leonette contributed a [REDACTED] investment to the firm in 1998 and Kim Leonette contributed [REDACTED] in the form of loans, credit cards and credit line in 2008 (Exh. DED1 at 3) as well as loans of [REDACTED] since 2009 (Exh. DED6). The firm's 2014 financial statements (Exh. DED5 at 4) show [REDACTED] in additional paid-in capital, which Kim Leonette states was contributed by her parents prior to 2003 (Exh. DED5 at 4).

4. John Leonette is identified by numerous documents including the application itself, as the president of Whispering Pines Development Corp. (Exh. DED1 at 3). The corporation's bylaws empower the president of the corporation to have the management of the business (Exh. DED8 at F).

DISCUSSION

This recommended order considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth two bases related to Kim Leonette's ownership and control of Whispering Pines Development Corp. Each is discussed separately, below.

Ownership

The first denial ground is that applicant failed to show that the contribution of the woman owner, Kim Leonette, was proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The relevant facts cited in the denial letter are: (1) Kim Leonette owns 52% of the common stock of the applicant and the other owners John Leonette owns 1% and John M. Leonette owns 47%; (2) Kim Leonette received her majority ownership via gift from John Leonette on or about January 1, 2009; (3) John Leonette has contributed at least [REDACTED] to the firm in the form of paid-in capital; and (4) Kim Leonette's claimed capital contributions are significantly less than those of John Leonette and are, at least in part, in the form of shareholder loans (Exh. DED2).

In her February 6, 2017 letter, Kim Leonette states that since her father John Leonette retired from the firm in 2008, she has supported the company whenever necessary with credit cards, a credit line, and cash from her checking account, including a loan of over [REDACTED]. She also claims to have brought expertise, time and energy to the firm. She notes that during her time as majority owner of the firm, it has more than doubled in size. She also claims to have guaranteed over [REDACTED] in loans to the firm. (Exh. DED6). With the appeal, Kim Leonette provides cancelled checks showing loans to the company (Exh. A5), credit card statements showing her use of personal credit cards for company purchases (Exh. A9), bonding guarantees (Exh. A4), contracts she has signed (Exh. A8), and credit applications showing her as guarantor (Exhs. A6 & A7). On the appeal, she states that there has been no investment in

the company since 2002 and all loans since that time have been paid back.

In its response, the Division states that Kim Leonette received her majority interest in the corporation as a gift from her parents (Exh. DED3) and because she failed to demonstrate that she made contributions proportionate to her equity interest, the corporation is not eligible for WBE certification. The Division acknowledges that the application states that she contributed [REDACTED] in the form of loans, credit cards and credit line in 2008 (Exh. DED1 at 3). However, the firm's 2014 financial statements (Exh. DED5 at 4) show [REDACTED] in additional paid-in capital which Kim Leonette states was contributed by her parents prior to 2003 (Exh. DED5 at 4). With respect to Kim Leonette's claim to have served as guarantor of over [REDACTED] in loans to the firm, the Division responds that there was no evidence of this claim included with the application and, further, that the Division does not consider loans as contributions for WBE certification purposes.

Based on the evidence in the record, specifically the fact that Kim Leonette received her ownership interest as a gift, and has acknowledged that all the loans she made to the firm have been repaid, the applicant has failed to show that the contribution of the woman owner, Kim Leonette, was proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division's denial on this ground was based on substantial evidence.

Control

The second ground for denial cited in the denial letter was that the corporate bylaws and other documents governing the business enterprise do not permit the woman owner, Kim Leonette, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The relevant facts cited in the denial letter are: (1) the corporate bylaws of the applicant provide that the president shall be the chief executive officer of the corporation and shall have the management of the business; and (2) Mr. John Leonette is the president of the corporation (Exh. DED2).

On her appeal, Kim Leonette states that her father, John Leonette, retired in 2008 leaving her in control of the firm and, out of respect for him, she decided to leave him as its president.¹ She argues that at the time of the application, as a vice-president of the firm with a 52% ownership interest, she had the power to control the corporation. Included with the appeal are minutes of a shareholder meeting held on January 30, 2017, demonstrating that she had become president of the corporation and a February 6, 2017 printout of information from the New York State Department of State's website listing her as chief executive officer (Exh. A3). However, both of these documents post-date the denial and are, therefore, not relevant to the appeal. Also attached to the appeal are letters from the firm's insurance agents, accountants and another construction firm stating that Kim Leonette was managing the firm (Exh. A1). However, the question is not who was running the firm, but who had the ultimate authority under the bylaws and other relevant documents to make decisions on behalf of the firm.

In its response, the Division notes that John Leonette is identified by numerous documents in the record, including the application itself, as being the president of the corporation at the time the application was denied, a fact not contested on the appeal (Exh. DED1 at 3). The Division quotes the corporation's bylaws, which empower the president to have the management of the business (Exh. DED8 at 4). The Division argues that Kim Leonette's contention that her father was retired and absent from the business, so she was not restricted in her operation of the firm, is flawed because he still retained the ultimate authority to make decisions regarding the firm. His subsequent resignation as president is not relevant, the Division concludes, because this fact was not before the agency at the time of the denial of the application.

Based on the evidence in the record, specifically the fact that John Leonette was president of the corporation at the time the application was submitted and denied, the applicant has failed to show that the corporate bylaws and other documents governing the business enterprise permit the woman owner, Kim

¹ The appeal also includes a letter from John Leonette confirming these facts (Exh. A1).

Leonette, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial on this ground was based on substantial evidence.

CONCLUSION

1. The applicant failed to show that contribution of the women owner, Kim Leonette, was proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

2. The applicant failed to show that the corporate bylaws and other documents governing the business enterprise permit the woman owner, Kim Leonette, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

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

Matter of
Whispering Pines Development Corp.

DED File ID No. 61332
Exhibit List

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	Shareholder meeting notes dated 1/1/09 & 9/20/12
DED4	Information regarding contributions
DED5	Financial Statements for year ending 12/31/14
DED6	Appeal letter
DED7	Second appeal letter
DED8	Corporate bylaws
A1	Letter from John Leonette
A2	Letters regarding ownership and control
A3	Revised corporate documents
A4	Bonding guarantee
A5	Loan documentation
A6	Credit applications
A7	Banking documents
A8	Contracts
A9	Credit card documents