

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**625 BROADWAY**  
**ALBANY, NEW YORK 12245**

**In the Matter**

**- of -**

**the Application of Farm & Site Supply, Inc.**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 70195**

**RECOMMENDED ORDER**

**-by-**



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**Theresa Wells**  
**Administrative Law Judge**  
**March 5, 2024**

This matter considers the written appeal by Farm & Site Supply, Inc, (“Applicant”) 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, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On July 28, 2022, Kathryn Geiger, as President, applied on behalf of Farm & Site Supply Inc. for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 31, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2); and
  - (b) The business enterprise must operate independently under 5 NYCRR § 144.2(e).
3. Farm & Site Supply, Inc. submitted its Request to Appeal by letter dated August 7, 2023. (APP Exhibit A).
4. A Notice to Proceed via Written Appeal was sent to the Applicant on August 14, 2023. (DED Exhibit 8).
5. The Applicant filed its written appeal submission via letter dated October 15, 2023. (APP Exhibit B).

6. The Division filed an Affidavit of Raymond Emanuel, Associate Director dated January 5, 2024, and a brief of Laurel A. Wedinger-Gyimesi, Esq., counsel for the Division, dated January 17, 2024.

### **FINDINGS OF FACT**

7. Farm & Site Supply, Inc. is a business providing leasing and rentals of farm and construction equipment. (DED Exhibit 1).
8. Kathryn Geiger is the President of Farm & Site Supply, Inc. and has a 100% ownership interest in the business enterprise. On December 2, 2020, Kathryn Geiger contributed \$0 for 10 shares of common stock of the business. (DED Exhibits 1 and 3).
9. On February 3, 2021, Kathryn Geiger made a capital contribution of \$ [REDACTED] to Farm & Site Supply, Inc. via check drawn from a joint-checking account she owns with her husband Randy W. Geiger, Jr. The remaining startup costs were borrowed from 716 Site Contracting Inc. and were paid back within six months. (DED Exhibits 1 and 5).
10. 716 Site Contracting Inc. is co-owned by Kathryn Geiger and Randy W. Geiger, Jr., Kathryn Geiger's husband. (DED Exhibits 1 and 6).
11. The business address for Farm & Site Supply, Inc. is 4901 Eckhardt Rd., Hamburg, New York. (DED Exhibit 1). There are several additional businesses operating from the same address including Boston Valley Farms, LLC, 716 Site Contracting Inc., and 391 Company. Kathryn Geiger has an ownership interest in each of these businesses. (DED Exhibit 1).
12. Farm & Site Supply, Inc. shares resources including the front door, office space, office equipment and owners with the three additional business entities located at the address. (DED Exhibit 7).

13. Farm & Site Supply, Inc. business is generated solely by these co-located businesses including 85% from 716 Site Contracting, Inc. and 15% from Boston Valley. (DED Exhibit 1).

14. Kathryn Geiger divides her time working for the Farm & Site Supply, Inc. business enterprise with the other businesses as follows (DED Exhibit 1):

- a. Farm & Site Supply, Inc. for 15 hours weekly performing accounts receivable, accounts payable and equipment management;
- b. 716 Site Contracting Inc. for 15 hours weekly performing administrative work, payroll account receivable and accounts payable;
- c. Boston Valley Farms for 25 hours weekly performing accounts payable, accounts receivable, planning planting, harvesting crops, animal management and marketing; and
- d. 391 Company for 2 hours per week performing accounts payable and receivable, building upkeep and marketing.

#### **APPLICABLE LAW**

5 NYCRR § 144.2 (b)(2) states as follows:

Capital contribution. Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of a capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one or more of the following:
  1. Money;
  2. Property;
  3. Equipment; or

4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

5 NYCRR § 144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Farm & Site Supply, Inc. for certification as a WBE 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 Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain

previously submitted materials will be considered, however new evidence will not be considered. (See Scherzi Systems, LLC v. White, 197 A.D.3d 1466 (3d Dept 2021).

## **DISCUSSION**

### I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR §144.2(b)(2). See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017); *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017). The Division has consistently denied certification where the source of the capital contribution came from a jointly owned bank account. See *Matter of Hertel Steel, Inc.*, Recommended Order dated February 10, 2017 (Final Order 17-12, dated March 15, 2017).

Applicant asserts that Kathryn Geiger has 100% equity interest in Farm & Site Supply, Inc. and made a capital contribution of \$ [REDACTED] towards the start-up costs of the business. The contribution amount was from a jointly held checking account owned by Kathryn Geiger and Randy W. Geiger, Jr. (DED Exhibit 1). Kathryn Geiger and her husband Randy W. Geiger, Jr. comingle their paychecks into the joint account (APP Exhibit B). The contribution was therefore not made from assets belonging solely to Kathryn Geiger. Additionally, on December 2, 2020, 10 shares of common stock were transferred to Kathryn Geiger for \$ [REDACTED] consideration. (DED Exhibits 1 and 3).

Farm & Site Supply's remaining startup costs were covered by a loan from 716 Site Contracting, Inc. which, according to Applicant, is a business owned by Kathryn Geiger and Randy

Geiger Jr. (DED Exhibits 1 and 6). No additional documentation was submitted to demonstrate any other source of capital contribution by Kathryn Geiger either through the infusion of money, property, equipment or expertise (DED Exhibit 1).

The Division evaluates the terms of a loan and whether the loan is guaranteed or repaid by the woman owner. (See *Matter of Mac Fhionnghaile & Sons Electrical Contracting*, Recommended Order dated November 16, 2017, Final Order 18-01 dated January 3, 2018). Regarding the loan from 716 Site Contracting, Inc., there are no written loan agreements to support the terms or conditions of the loan by either Kathryn Geiger individually or behalf of Farm & Site Supply Inc. There is no additional evidence to support repayment of the loan was made solely by the Applicant as the woman relied upon for certification. The documentation submitted fails to support any additional capital contributions to the business that complied with the regulations and proportionate to Kathryn Geiger's 100% equity interest.

On appeal, Kathryn Geiger states that she spent a considerable amount of time procuring financing for Farm & Site Supply's equipment. However, the application did not contain any additional documentation of the financing or proof of purchase of the equipment (APP Exhibit B). Additionally, this argument is first offered on appeal and will not be considered. (See *In Re the Application of Lida Strategic Solutions, Inc.*, Recommended Order, March 6, 2019, Final Order 19-02, June 5, 2019). While in Scherzi, LLC v. White, 197 AD3d 1466 (3rd Dept. 2021), the Court found there are instances whereby new information shall be considered, *Scherzi* is clear those circumstances are limited to matters that seek to clarify documents and information that were submitted with the certification application. In the present case, this argument is not seeking to clarify but rather seeking to add new information, which is also undocumented.

The Division's denial of Farm & Site Supply Inc.'s application for certification as a WBE on the basis that Farm & Site Supply Inc. failed to demonstrate that Kathryn Geiger made capital contributions to Farm & Site Supply Inc. in proportion to her ownership interest, as required by 5 NYCRR § 144.2 (b)(2) is supported by substantial evidence.

## II. Independence

5 NYCRR §144.2(e) requires the business seeking certification as a WBE must operate independently. In determining whether a business enterprise operates independently, the Division considers whether the business enterprise shares resources with another business such as personnel, equipment, and office space, whether the business enterprise transacts business primarily with one other entity, whether the business enterprise receives tangible benefits as a result of a connection to another entity and whether those benefits are consistent with standard industry practices. (5 NYCRR §144.2(e)(1), (2) and (3)).

Kathryn Geiger splits her work responsibilities between four businesses with responsibilities ranging between administrative functions such as accounts receivable, accounts payable and marketing to planning planting and harvesting crops and animal management. (DED Exhibit 1). Kathryn Geiger spends the majority of her time working for Boston Valley Farms with 25 hours per week, then 15 hours a week at both Farm & Site Supply, Inc. and 716 Site Contracting, Inc., and 2 hours weekly at 391 Company. The record establishes that Farm & Site Supply, Inc. shares personnel with these co-located businesses.

The business address for Farm & Site Supply, Inc. is 4901 Eckhardt Rd., Hamburg, New York (DED Exhibit 1). There are several additional businesses operating from the same address including Boston Valley Farms, LLC, 716 Site Contracting Inc., and 391 Company. Kathryn Geiger has an ownership interest in each of these businesses (DED Exhibit 1). Farm & Site Supply,



Inc. shares resources including the front door, office space, office equipment and owners with the three additional business entities located at the address. (DED Exhibit 7).

Farm & Site Supply, Inc. obtains business from these co-located businesses, including 85% of its business from 716 Site Contracting, Inc. and 15% of its business from Boston Valley Farms (DED Exhibit 1). These two additional family-owned businesses, owned by Kathryn Geiger and her husband, provide all of Farm & Site Supply Inc.'s business revenue.

The business enterprise receives a tangible benefit as a result of the connection to another entity and these benefits are not consistent with standard industry practices. Farm & Site Supply's start-up loan money came from 716 Site Contracting, Inc. which is owned, according to Applicant, by Applicant's husband (DED Exhibit 1). Tax documentation shows this business is co-owned between Applicant and her husband (DED Exhibit 6).

There is no written documentation outlining the terms or conditions of the loan. This practice is neither consistent with businesses practices between independent business entities, nor standard industry practice. Further, all of Farm & Site Supply Inc.'s is generated by two other family businesses owned by Applicant and/or her husband (DED Exhibit 1). These are tangible benefits as a result of a familial relationship between the owners of the businesses.

The Division's denial of Farm & Site Supply Inc.'s application for certification as a WBE on the basis that Farm & Site Supply Inc. failed to demonstrate that the business operates independently, as required by 5 NYCRR § 144.2 (e) is supported by substantial evidence.

## **CONCLUSION**

Farm & Site Supply Inc. did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2) and 144.2(e) was not based on substantial evidence.

## **RECOMMENDATION**

The Division's determination to deny Farm & Site Supply, Inc.'s application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Farm & Site Supply, Inc.  
 DED File ID No. 70195  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	Y	Y
APP B	Applicant Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Stock Certificate	Y	Y
DED 4	Farm & Site's Articles of Incorporation	Y	Y
DED 5	Check Submitted as Proof of Business Capitalization	Y	Y
DED 6	2021 Federal Tax Returns of 716 Site Contracting Inc.	Y	Y
DED 7	Shared Resources Document	Y	Y
DED 8	Notice of Appeal via Written Appeal	Y	Y