

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**207 GENESEE STREET**  
**UTICA, NEW YORK 13501**

**In the Matter**

**- of -**

**the Application of Long Island Sound Transport Inc. dba A&R Materials  
for Recertification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 52841**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**December 31, 2024**

This matter considers the appeal by Long Island Sound Transport Inc. dba A&R Materials (“LIST” or “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 recertification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On September 1, 2023, Ms. Elta Bergold, as President, applied on behalf of LIST for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On March 1, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification must demonstrate 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);
  - (b) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1); and
  - (c) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2).
3. On March 26, 2024, LIST submitted a Request to Appeal via a Hearing. (DED Exhibit 3).
4. On September 3, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 4).

5. A hearing was held and concluded on December 18, 2024.

### **FINDINGS OF FACT**

6. LIST is engaged in the business of supplying and delivering construction materials (DED Exhibit 1).
7. Ms. Elta Bergold is the President and 100% owner of LIST (DED Exhibit 1).
8. Ms. Bergold contributed specialized hauling permits valued at \$ [REDACTED] for a 95% ownership interest in LIST in 2000; and purchased the remaining 5% ownership interest for \$ [REDACTED] in 2010 from Robert Bergold, the applicant's husband. Applicant submitted a share purchase agreement and bank check in the amount of \$ [REDACTED] payable to Mr. Bergold. Ms. Bergold testified that she was gifted the specialized hauling permits that she contributed to LIST (DED Exhibits 1, 5, and 15; Hearing Testimony of Elta Bergold).
9. Ms. Bergold's resume indicates that her areas of expertise include Financial Controller, where she is the final decision maker on all financial matters, handles banking, taxes, oversees accounts receivable and payable, and payroll; Sales and Client Relations; Obtaining and Maintaining Permits and Certifications; Human Resources/Benefits Administration; Negotiating Insurance; and Equipment. She holds a degree in Business Management (DED Exhibit 7).
10. A Narrative provided in the application states Ms. Bergold's experience as follows: "From 1985 to 1988, I worked for Mike Hamblin and Sons Trucking Company, gaining proficiency in aggregate materials, permits, dispatching, purchasing and sales, spec'ing and operating heavy equipment, mechanically sorting materials, and bookkeeping. During this period, I also did some work for a precast company and gained a knowledge of precast and concrete products..." (DED Exhibit 1).

11. A Narrative provided in the application provides that Ms. Bergold's day-to-day duties and responsibilities include handling bids, payroll, 401K spreadsheets for operators, tax filings, permits registration, auditing, insurance claims, human resource trainings, accounts payable and receivable, banking, review and approval of major purchases, new hires, and terminations (DED Exhibit 26).
12. Ms. Bergold testified that she worked with her father in the industry since she was fifteen (15) years old. She learned how to drive the trucks, load the trucks, and maintain the trucks. She worked for the family business in the lumber yard and at a pre-cast company. She has 37 years of experience in the industry dealing with customers and producers. Her testimony established her knowledge of materials, regulations, weight and height restrictions of the trucks on the roads, and the necessary permits. She testified that she handles the bids, sales, schedules materials/work, dispatches the drivers, works with the project managers, negotiates and signs contracts, handles all hiring/firing, trains the drivers, personally supervises the road tests with new hires, trains employees with safety and post-accident training, schedules the materials and loads, ensures that materials are available and meet specifications, and is in the field at the jobsites. She makes sure each truck meets maintenance requirements, has the necessary permits, and that each driver knows where they are going and how to safely enter and exit the jobsite. She is responsible for the oversight of the daily activities and employees in the office and in the field. (Hearing Testimony of Elta Bergold).
13. Robert Bergold testified that Ms. Bergold has her hands on "everything" "from start to finish." She meets with customers, goes to the jobsites, speaks with the drivers. She handles the bids, estimates, and client relationships. She trains employees, purchases materials, etc. (Hearing Testimony of Robert Bergold).

## 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 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(c) states in relevant part as follows:

Operation. Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
  - (i) The products or services the business enterprise provides to clients; and
  - (ii) The means by which the business enterprise obtains contracts or orders.

## **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 LIST for recertification 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**

Mr. Henry Chan, Esq., of Wilson & Chan, LLP, appeared at the hearing on behalf of LIST. The following witnesses testified on behalf of LIST: Ms. Elta Bergold, President of LIST, and Mr. Robert Bergold, employee of LIST. LIST offered APP Exhibit 1, which was not admitted into evidence since a prior WBE certification is not relevant to the current application. LIST did not offer APP Exhibits 2-15, and they were not admitted into evidence.

Ms. Dennie Byam, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Glenn Butler, Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 30.

I. Prior Certification

The Division acknowledges that LIST was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify LIST based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, LIST had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the September 1, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

The Division denied LIST's application for certification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Bergold made a contribution 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(b)(2).

Ms. Bergold testified that she made a capital contribution of \$[REDACTED] in the form of specialized hauling permits for a 95% ownership interest in 2000, and purchased the remaining 5% ownership interest for \$[REDACTED] in 2010 from Robert Bergold, the applicant's husband. Applicant

submitted the share purchase agreement and a bank check in the amount of \$ [REDACTED] payable to Mr. Bergold. (DED Exhibits 5 and 15).

On cross-examination, Ms. Bergold testified that she was gifted the permits that she contributed to LIST. She did not assign a value to the permits until 2010, 10 years after the contribution to the company. She testified that the permits were valued as of the date of contribution, in 2000. She obtained the value by speaking with the owner of a company that values permits. She testified that she has no documentation to show the value of the permits and has no documentation to show the value of the business at the time of the contribution (Hearing Testimony of Elta Berger).

Glenn Butler testified that Ms. Bergold did not provide any documentation or testimony as to the valuation of the permits contributed and did not provide any documentation or valuation as to the value of the business at the time of the contribution. Mr. Butler further testified that Ms. Bergold did not provide any proof of the source of the \$ [REDACTED] cash paid for the additional 5% ownership. He testified that Applicant submitted a bank check in the amount of \$ [REDACTED] payable to Mr. Bergold but provided no documents or testimony to show the source of those funds (Hearing Testimony of Glenn Butler; DED Exhibit 5).

Ms. Bergold testified that the source of the funds for the \$ [REDACTED] purchase were from a joint bank account held with Mr. Bergold (Hearing Testimony of Elta Bergold). Capital contributions from a jointly owned bank account does not meet the requirement that the contribution came from assets solely belonging to the woman-owner. *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

Where a woman relied upon for certification obtains her ownership interest through a transfer from another person, the applicant “must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria...” 5 NYCRR §144.2(b)(5).



The applicant must show how the woman-owner's contribution was proportionate to her equity interest even where the business has been either inherited or gifted. See *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order dated October 31, 2016, Final Order 16-55 dated November 1, 2016.

Ms. Bergold failed to demonstrate that her capital contribution was proportionate to her equity interest in LIST. She testified that she was gifted the permits and she has no documentation to show the value of the permits and has no documentation to show the value of the business at the time of the contribution. She further testified that the source of the funds for the \$[REDACTED] payment was from a joint bank account held with Mr. Bergold (Hearing Testimony of Elta Bergold).

Based on the foregoing, I find that the Division's determination with regard to 5 NYCRR § 144.2(b)(2) is supported by substantial evidence.

### III. Operation

The Division found that the woman-owner does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR §144.2(c)(1).

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." *Matter of Northern Scapes Inc.*, Recommended Order dated May 18, 2018, Final Order 18-31, dated July 5, 2018 (applicant relied on for certification, who has managed projects through oversight of project managers and possesses managerial experience has the competence to operate the applicant business). Further, there is no regulatory requirement for any formal academic training, only that the woman owner possesses adequate competence to make decisions and to make those decisions on a day-to-day basis. See *Northern Scapes, supra*.

The Division also found that the woman-owner did not make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required by 5 NYCRR §144.2(c)(2). The regulation states that “The critical functions of a business enterprise shall be determined by the division based upon the following factors but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders”. The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4<sup>th</sup> Dept. 2018).

The eligibility criteria for WBE certification requires that the woman owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3<sup>rd</sup> Dept. 2020). The minority/woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4<sup>th</sup> Dept. 2018).

Ms. Bergold’s resume indicates that her areas of expertise include Financial Controller, where she is the final decision maker on all financial matters, handles banking, taxes, oversees accounts receivable and payable, and payroll; Sales and Client Relations; Obtaining and Maintaining Permits and Certifications; Human resources/Benefits Administration; Negotiating Insurance; and Equipment. She holds a degree in Business Management (DED Exhibit 7).

A Narrative provided in the application describes Ms. Bergold’s experience as follows: “From 1985 to 1988, I worked for Mike Hamblin and Sons Trucking Company, gaining proficiency in aggregate materials, permits, dispatching, purchasing and sales, spec’ing and

operating heavy equipment, mechanically sorting materials, and bookkeeping. During this period, I also did some work for a precast company and gained a knowledge of precast and concrete products...” (DED Exhibit 1).

A Narrative provided in the application provides that Ms. Bergold’s day-to-day duties and responsibilities include handling bids, payroll, 401K spreadsheets for operators, tax filings, permits registration, auditing, insurance claims, human resource trainings, accounts payable and receivable, banking, review and approval of major purchases, new hires, and terminations (DED Exhibit 26).

Glenn Butler testified that Ms. Bergold does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are supplying and delivering construction materials. He stated that Ms. Bergold’s resume reflects that she does not have the education, training, or experience to oversee the critical functions of the business. He noted that Ms. Bergold does not possess a Commercial Driver’s license. He testified that Ms. Bergold’s day-to-day responsibilities listed in the application make no reference to trucking or hauling. He stated that Ms. Bergold’s resume included a detailed description of her office/administrative work but lacked any description showing her industry-specific competence. (Hearing Testimony of Glenn Butler; DED Exhibits 1, 7 and 26).

Ms. Bergold testified that she worked with her father in the industry since she was fifteen (15) years old. She learned how to drive the trucks, load the trucks, and maintain the trucks. She worked for the family business in the lumber yard and at a pre-cast company. She has 37 years of experience in the industry dealing with customers and producers. Her testimony established her knowledge of materials, regulations, weight and height restrictions of the trucks on the roads, and the necessary permits. She testified that she handles the bids, sales, schedules materials/work, dispatches the drivers, works with the project managers, negotiates and signs contracts, handles all

hiring/firing, trains the drivers, personally supervises the road tests with new hires, trains employees with safety and post-accident training, schedules the materials and loads, ensures that materials are available and meet specifications, and is in the field at the jobsites. She makes sure each truck meets maintenance requirements, has the necessary permits, and that each driver knows where they are going and how to safely enter and exit the jobsite. She is responsible for the oversight of the daily activities and employees in the office and in the field. (Hearing Testimony of Elta Bergold).

Robert Bergold testified that Ms. Bergold has her hands on “everything” “from start to finish.” She meets with customers, goes to the jobsites, speaks with the drivers. She handles the bids, estimates, and client relationships. She trains employees, purchases materials, etc. (Hearing Testimony of Robert Bergold).

Ms. Bergold’s testimony revealed her substantial industry-specific competence, and that she controls the day-to-day operations of the business (Hearing Testimony of Elta Bergold).

Based on the foregoing, I find that the Division’s determination to deny LIST’s certification under 5 NYCRR §§144.2(c)(1) and 144.2(c)(2) was not based on substantial evidence.

### **CONCLUSION**

LIST did not meet its burden to demonstrate that the Division’s determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §144.2(b)(2) was not based on substantial evidence. LIST met its burden to demonstrate that the Division’s determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(c)(1) and 144.2(c)(2), was not based on substantial evidence.

## **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director modify the Division's determination to deny LIST's application for recertification as a woman-owned business enterprise, and as modified, affirm the determination.

In the Matter of Long Island Sound Transport Inc. dba A&R Materials  
DED File ID No. 52841  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1	LIST's NYS WBE Certificate dated 9/7/2018	Y	N
APP 2	LIST's NYC Dept. of Small Business Services WBE Certificate	N	N
APP 3	LIST's WBE Profile – NYC Dept. of Small Business Services	N	N
APP 4	LIST's WBE Certificate – Nassau County	N	N
APP 5	LIST Article concerning Elta Bergold	N	N
APP 6	NYSDOT Bank Weight Audit	N	N
APP 7	Westchester Solid Waste Commission Permit	N	N
APP 8	NYSDOT Divisible Load Permit	N	N
APP 9	FMSCA Controlled Access Permit	N	N
APP 10	USDOT FMCSA Permit	N	N
APP 11	USDOT Permit	N	N
APP 12	NYS Tax Dept. Certificate of Tax Clearance	N	N
APP 13	Local 15 Union	N	N
APP 14	MTA Quality Control Plan	N	N
APP 15	Elta Bergold Resume	N	N
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y

DED 4	Notice of Hearing	Y	Y
DED 5	November 16, 2010 Share Purchase Agreement	Y	Y
DED 6	Dawnmarie Thatcher Resume	Y	Y
DED 7	Elta Bergold Resume	Y	Y
DED 8	List of LIST's A&B CDL Drivers	Y	Y
DED 9	How Goods Are Delivered Narrative	Y	Y
DED 10	Certification Application Affidavit	Y	Y
DED 11	Various Companies Explanation Narrative	Y	Y
DED 12	October 13, 2023 Tilcon Testing Results Letter	Y	Y
DED 13	August 11, 2021 Subcontractor Agreement	Y	Y
DED 14	Local Union Agreement	Y	Y
DED 15	October 19, 2023 Narrative	Y	Y
DED 16	July 16, 2021 PSL Industries Invoice	Y	Y
DED 17	May 4, 2023 Michels Construction Inc. Invoice	Y	Y
DED 18	January 1, 2023 MTA Contract	Y	Y
DED 19	January 2, 2023 MTA Contract	Y	Y
DED 20	January 3, 2023 MTA Contract	Y	Y
DED 21	April 8, 2022 Quintal Construction Contract	Y	Y
DED 22	September 5, 2023 Town of Huntington Bid	Y	Y
DED 23	November 1, 2009 Robert Bergold Resignation	Y	Y

DED 24	December 3, 2022 Waste Transporter Permit	Y	Y
DED 25	September 25, 2023 Waste Transporter Renewal	Y	Y
DED 26	October 16, 2023 Narrative Response: Day-to-Day	Y	Y
DED 27	2021 LIST Tax Return	Y	Y
DED 28	2022 LIST Tax Return	Y	Y
DED 29	February 15, 2024 Zoom Interview	Y	Y
DED 30	June 29, 2023 Galvin Brothers Inc. Lien Release	Y	Y