

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

In the Matter

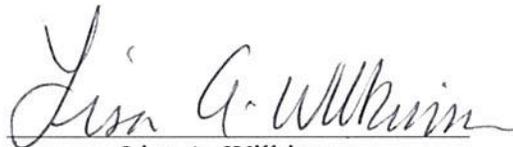
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the Application of **Plant Connection, Inc.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51403

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson
Administrative Law Judge
February 22, 2017

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 Plant Connection, Inc. (Plant Connection or applicant) certification as a woman-owned business enterprise should be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal, 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, by Plant Connection challenging the determination of the Division that its application does not meet eligibility criteria requirements for certification as a woman-owned business enterprise (WBE).

On behalf of Plant Connection, Melissa Daniels, then vice president, submitted an application for certification as a woman owned business enterprise to the Division on December 3, 2013 (Exhibit [Exh] 1). Subsequently, by letter dated April 12, 2016, the Division denied the application for failing to meet the eligibility criteria under 5 NYCRR 144.2 with respect to Melissa Daniel's control of Plant Connection (Exh 2).

By letter dated May 9, 2016, Melissa Daniels filed a notice of appeal on behalf of Plant Connection and stated her intent to appeal in writing (Exh 3). By letter dated June 13, 2016, the Division notified applicant that the appeal should be filed on or before July 20, 2016 (Exh 4). The notice also reiterated the Division's basis for the denial. Plant Connection filed its appeal as directed on July 20, 2016 (Exh 5). The Division responded to applicant's appeal on February 15, 2017 (Exh 6). The matter was assigned to me on February 16, 2017.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). To determine whether an applicant should be granted WBE status, 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, Plant Connection, 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 [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 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 April 12, 2016 denial letter, the Division determined that applicant failed to demonstrate that the woman owner listed on the corporate documents and relevant business agreements could make business decisions without restrictions (5 NYCRR 144.2[b][2]; *see* Exh 2).

Plant Connection

With a letter dated July 20, 2016, Melissa Daniels appealed from the Division’s April 12, 2016 determination to deny Plant Connection WBE certification (*see* Exh 3). Ms. Daniels stated that she owns a majority of the corporate stock, is the only owner pledging her assets as collateral for corporate financing, and has the final say and full authority to make all financial, legal, and managerial decisions for the company (Exh 3).

FINDINGS OF FACT

1. Plant Connection is a nursery and landscape firm located in Riverhead, New York that provides products and services related to installing and maintaining “green walls” and “green roof products” (*see* Exh 1 § 5.A).
2. Melissa Daniels is the chief financial officer of Plant Connection and owns a 51% ownership interest in the business enterprise (Exh 1 § 3.A).
3. Anthony Caggiano is the general manager of Plant Connection and has a 49% ownership interest in the business enterprise (Exh 1 § 3.A).
4. Ms. Daniels and Mr. Caggiano are not related (Exh 1 § 3.D).
5. Plant Connection was established on April 3, 2002 (Exh 1 § 1.R).
6. Ms. Daniels and Mr. Caggiano executed a shareholders’ agreement on November 22, 2002 for “the harmonious and effective management of the [c]orporation and in furtherance of its business purposes” (Exh 6, Exhibit 2, shareholders agreement at 2).
7. The shareholders’ agreement submitted with the application designated Anthony Caggiano as the president and secretary of the corporation and Melissa Daniels as the vice president and treasurer, and provided that the officers would continue in those positions until the shareholders unanimously agreed otherwise (Exh 6, Exhibit 2 shareholders’ agreement, Article 1 ¶ 2).

8. The corporate bylaws of Plant Connection state that the president “shall be the chief executive officer of the corporation; he shall preside at all meetings of the shareholders and of the board; he shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect” (Exh 6, Exhibit 4 By-Laws of Plant Connection, Inc. [undated] Article IV ¶ 3 [“bylaws”]).
9. The bylaws state with respect to vice presidents, “[d]uring the absence or disability of the president, the vice-president, or if there are more than one, the executive vice-president, shall have all the powers and functions of the president. Each vice-president shall perform such other duties as the board may prescribe” (*id.* ¶ 4).
10. The bylaws state that unanimous approval of the corporate officers is required to (1) set the compensation paid to any party or any relative of any party, (2) make any capital expenditure or purchase of real or personal property by the corporation in excess of \$500, (3) execute any real estate leases or contracts for the manufacture of apparel, or (4) incur any debt obligation with any lending institution in excess of \$1,000 (Exh 6, Exhibit 4 By-Laws of Plant Connection, Inc. [undated] Article IV ¶ 10).
11. According to the shareholders’ agreement, unanimous consent of the shareholders is necessary to authorize purchases in excess of \$5,000 or enter into contracts with suppliers for a term of more than one year (Exh 6, Exhibit 2 shareholders agreement, Article I ¶ 3).
12. Following the submission of the application on April 4, 2013, the directors of Plant Connection passed a resolution to take effect on January 1, 2016 appointing Melissa Daniels as president/secretary and Anthony Caggiano as vice-president/secretary (Exh 5, Unanimous Written Consent of the Directors of Plant Connection, Inc., [effective as of January 1, 2016]).

DISCUSSION

This recommended order considers Plant Connection’s May 9, 2016 appeal from the Division’s April 12, 2016 determination to deny certification of Plant Connection as a woman-owned business enterprise pursuant to Executive Law article 15-A. According to the Division, the corporate documents do not permit Ms. Daniels to make decisions without restrictions (Exh 2). The Division’s determination is supported by substantial evidence.

Section 144.2(b)(2) of 5 NYCRR requires that, in order for a business to be certified as women-owned, “articles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make decisions without restrictions.” The intent of this regulation is to ensure that the woman owner possesses the legal authority to control the business enterprise.

Restrictions on Decision Making

The administrative record in this matter establishes overwhelmingly that Ms. Daniels cannot make business decisions without restrictions. Article 1 of the shareholder's agreement states that Anthony Caggiano shall be president and secretary and that Melissa Daniels shall be vice president and treasurer and that this arrangement will continue in effect "until otherwise agreed to in writing by all of the [s]hareholders" (Exh 6, Exhibit 2 at 2). Thus, at the time the application was filed, Ms. Daniels could not remove Mr. Caggiano from the office of president, notwithstanding her majority ownership interest in Plant Connection, unless she obtained his consent.

The shareholders' agreement requires unanimous consent of all shareholders to enter into contracts for a period of more than one year or make purchases in excess of \$5,000. Additionally, approval of all the shareholders is required to purchase or sell real estate or co-operative property, declare dividends or withdraw capital contributions, terminate the corporation's election to be taxed as a small business, borrow money or obtain credit (except in the ordinary course of business). Melissa Daniels must obtain the consent of her male partner Anthony Caggiano to undertake any of these restricted activities.

The corporate bylaws restrict Ms. Daniel's ability to control the operations and management of the business enterprise to an even greater extent. Unanimous consent of the directors is required to determine the amount of compensation paid to any party or relative of any party, make any capital expenditure or purchase real estate or personal property in excess of \$500, enter any real estate leases, or incur any debt obligation with any lending institution in excess of \$1,000 (Exh 6, Exhibit 4 Article IV ¶ 10).

Designation under Shareholders' Agreement

At the time the application was filed, the shareholders' agreement designated Anthony Caggiano as the president of Plant Connection and Melissa Daniels as vice president. According to Plant Connection's corporate bylaws, "[t]he president shall be the chief executive officer of the corporation; he shall preside at all meetings of the shareholders and of the board; he shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect" (Exh 6, Exhibit 4, Article IV ¶ 3). The vice president acts on behalf of the president if the president is disabled or unavailable (Exh 6, Exhibit 4, Article IV ¶ 4). Based on this formal designation of authority, Ms. Daniels' position with Plant Connection was clearly subordinate to the president, Anthony Caggiano, at the time the application was filed (*see Matter of C.W. Brown Inc. v Canton*, 216 AD2d 841 [3d Dept 1995] [where corporate by laws provided that the woman owner's husband, as president and chief executive officer, had sole management authority, the business was a family-owned business]).

Ms. Daniels submitted a resolution of the board of directors appointing her as president of Plant Connection, effective January 1, 2016, with applicant's appeal as evidence of her control of the corporation (*see* Exh 5, Unanimous Written Consent of the Directors of Plant Connection, Inc., [undated]). This information was not before the Division at the time it made its decision,

however, and directly contradicts information that was included with the application. The Division reviews an application for certification based upon the information provided, and if an applicant does not supply information sufficient to establish control by the woman owner, the Division may deny the application.

Ms. Daniels also submitted letters of reference from suppliers, customers and other business colleagues attesting to her status in the corporation as the decision maker and primary owner of Plant Connection (*see* Exh 5). Ms. Daniels stated that she was insulted that the Division questioned her decision making authority when she has worked so hard to make the company successful (*see id.*).

Notwithstanding the testimonials, and even if Ms. Daniels had submitted the shareholders resolution with the application, the Division's regulations require corporate documents and business agreements to demonstrate that the woman owner has the legal authority to make business decisions without restrictions (*see* 5 NYCRR 144.2[b][2]). Here, the shareholders' agreement and corporate bylaws demonstrated otherwise. Ms. Daniels, for example, must obtain Mr. Caggiano's consent to incur any debt greater than \$1,000 and make any purchase greater than \$500 (*see* Exh 6, Exhibit 2 shareholders agreement, Article I ¶ 3; Exh 6, Exhibit 4 By-Laws of Plant Connection, Inc. [undated] Article IV ¶ 10). These and other limitations on Ms. Daniels's ability to act are not consistent with her having control over the business enterprise. Accordingly, the Division reasonably concluded, based on the application and supplemental materials, that Ms. Daniels is not empowered to direct the operation and management of Plant Connection without restrictions and, appropriately, denied the application for WBE certification.

CONCLUSION

Plant Connection has not meet its burden to show that the Division's April 12, 2016 determination to deny its application for WBE certification based on the control criterion at 5 NYCRRR 144.2(b)(2) is not based on substantial evidence.

RECOMMENDATION

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

Attachment: Exhibit List

Division of Minority and Women's Business Development

**Exhibit Chart
Matter of Plant Connections, Inc.
WBE File No. 71561**

Exhibit No.	Description
1	Plant Connection, Inc. Certification Application Application No. 8134739 Submitted: December 4, 2013
2	The Division's April 12, 2016 denial letter
3	Plant Connection's Request to Appeal dated May 9, 2016
4	The Division's Notice of Appeal dated June 13, 2016
5	Plant Connection's Appeal dated July 20, 2016 with attachments
6	The Division's Response to Plant Connection's Appeal dated February 15, 2017 with Exhibits 1-4