

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

In the Matter

- of -

the Application of
Artisan Gardens LLC
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60046

RECOMMENDED ORDER

- by -


P. Nicholas Garlick
Administrative Law Judge

June 22, 2016

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 Artisan Gardens LLC ("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 Artisan Gardens LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Artisan Gardens LLC's application was submitted on August 26, 2015 (Exh. DED2).

The application was denied by letter dated December 28, 2015, from Bette Yee, Director of Certification Operations (Exh. DED1). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet four separate eligibility criteria related to Linda Tauscher's ownership, operation, and control of the applicant.

By letter dated January 18, 2016, Linda Tauscher, on behalf of the applicant, requested a hearing on the Division's denial determination.

By letter dated April 1, 2016, the Division notified the applicant that the applicant's appeal hearing was scheduled for May 17, 2016 at the Division's New York City Office.

On April 13, 2016, this matter was assigned to me.

On May 12, 2016 a conference call was held with the parties to discuss the upcoming hearing.

The hearing was convened on May 17, 2016 at 11:30 a.m. in the Division's office located at 633 Third Avenue, New York and lasted approximately one hour. The applicant was represented by

Mark Ruffalo, Esq. who called two witnesses, Linda Tauscher and Brian Tauscher. The Division was represented by Phillip Harmonick, Esq. and he called one witness, Division analyst Glenn Butler.

The record closed with the receipt of the audio recording of the hearing on May 26, 2016.

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 four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner's, Linda Tauscher's, capital contributions are 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 applicant failed to demonstrate that the woman owner, Linda Tauscher, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Linda Tauscher, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

Fourth, the Division found that the applicant failed to demonstrate that the corporate documents (the Operating Agreement) and relevant business agreements permit the woman owner, Linda Tauscher, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Artisan Gardens LLC 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. Artisan Gardens LLC is in the business of landscape construction, landscape maintenance, tree planting, green roofs, basketball court construction, and tennis court construction (Exh. DED2 at 3). It has a business address of P.O. Box 761, Ridgewood, New Jersey (Exh. DED2 at 1).

2. Artisan Gardens LLC was established on February 22, 2005 at which time Brian Tauscher owned 100% of the firm (Exh. DED2 at 2). On June 23, 2015 Brian Tauscher transferred 51% of the firm to this wife, Linda Tauscher for no consideration (Exh.

DED4). On November 14, 2015, this transaction was amended (Exh. A2) and Ms. Tauscher paid [REDACTED] for her 51% interest; payment was made by check drawn on a joint account owned by Mr. and Ms. Tauscher (Exh. A3). Neither the amended agreement nor the cancelled check were provided to Division staff by the applicant before the application was denied (Exh. DED9 at 44:00).

3. Brian Tauscher has a Bachelor of Science in Landscape Architecture (Exh. DED6 at 2) and 25 years of experience in the landscaping business (Exh. DED9 at 43:00). There is nothing in the record to show Linda Tauscher has any training or experience as a landscaper.

4. Linda Tauscher is a full-time employee of SONY Electronics and has normal working hours from about 9:30 am until 5:30 pm (Exh. DED9 at 21:00).

5. The original operating agreement for Artisan Gardens LLC dated February 22, 2005 names Brian Tauscher as its sole member and states that he has sole management of the firm's business (Exh. DED3 at 3). On June 19, 2015 Brian and Linda Tauscher executed the first amended and reinstated operating agreement for the firm which states that all decisions requiring action of the members or relating to the business or affairs of the firm shall be decided by Linda Tauscher (Exh. A1 at 4). The amended operating agreement was not presented to Division staff before the denial of the application (Exh. DED9 at 17:00).

DISCUSSION

This report 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 four bases related to Ms. Tauscher's ownership, operation, and control of Artisan Gardens LLC. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division determined that the applicant failed to demonstrate that the woman owner's, Linda Tauscher's, capital contributions are 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).

At the hearing, Ms. Tauscher testified that she had been involved with the firm since it was started in 2005: setting up the registration for the business; getting the tax certificates from New York and New Jersey; establishing bank accounts; and setting up the firm's accounting and payroll systems (Exh. DED9 at 20:30). At the time the firm was established Mr. Tauscher was its sole owner (Exh. DED2 at 2). On June 23, 2015, Mr. Tauscher transferred 51% of the ownership to his wife for no consideration (Exh. DED2 at 2; DED9 at 10:40). Mr. Tauscher testified that after this was done, the firm's accountant suggested calculating the value of the firm and having Ms. Tauscher buy 51% of the company (Exh. DED9 at 11:00). This was done on November 14, 2015 when a revised agreement transferring 51% of the company was executed (Exh. A2) and a check was written for [REDACTED] (Exh. A3). This check was written on a bank account owned jointly by Mr. and Ms. Tauscher (Exh. DED9 at 19:30). Ms. Tauscher testified that the payment was "left pocket - right pocket" because they were married (Exh. DED9 at 22:15).

At the hearing Division staff member Glenn Butler testified that he reviewed the application materials. He stated that the application showed that Ms. Tauscher did not make a capital contribution to firm (Exh. DED2 at 2; DED9 at 35:45). He testified that Ms. Tauscher did submit certain bank records (Exh. DED5) but that these records were not relevant to the issue of whether she had made a capital contribution to the firm (Exh. DED9 at 36:30). On October 1, 2015 he again requested information about capital contributions and was supplied with two narratives (Exh. DED4). He testified that these documents assigned no value to Ms. Tauscher's contribution to the business (Exh. DED9 at 38:00). Mr. Butler did not receive copies of the agreement to transfer membership interest (Exh. A2) or a copy of the cancelled check (Exh. A3) which were dated November 14, 2015 (Exh. DED9 at 44:00).

At the time the denial determination was made, the applicant had not supplied any information to Division staff that Linda Tauscher had made a capital contribution to the firm.

Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that the woman owner's, Linda Tauscher's, capital contributions are 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).

Operation

The Division found that the applicant failed to demonstrate that the woman owner, Linda Tauscher, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

Mr. Tauscher testified that the firm engaged in no landscape design work and got most of its business from installations of plants and some from maintenance of existing landscapes (Exh. DED9 at 9:00). An example of one job was discussed at the hearing and involved the planting of trees in New York City (Exhs. A4 and A5). Mr. Tauscher testified that others had determined the location where the trees were to be planted, called regarding the location of underground utilities, and delivered the trees to the site. The firm only provided the labor for planting the trees and that the job was not technical (Exh. DED9 at 8:45). He also testified that none of the firm's four employees had any technical training (Exh. DED9 at 4:30).

At the hearing Division staff member Glenn Butler testified the applicant did not supply any information showing that Ms. Tauscher had any background or training in the field of landscape architecture (Exh. DED9 at 41:45). He also testified that Mr. Tauscher's resume (Exh. DED6 at 2) showed that he had a Bachelor of Science degree in Landscape Architecture and that he had twenty five years of experience in the business (Exh. DED9 at 43:00).

Nothing in the record shows that Ms. Tauscher has any experience working as a landscaper nor does the record contain any information about any training she might have in the field. Accordingly, based on this record and the discussion above, the applicant has failed to demonstrate that the woman owner, Linda Tauscher, has the experience or technical competence, working

knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

The Division also determined that the applicant failed to demonstrate that the woman owner, Linda Tauscher, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

At the hearing, both Mr. Tauscher and Ms. Tauscher testified that she had been involved in the business since it began in 2005 (Exh. DED9 at 11:30; 20:30). Ms. Tauscher also testified that she had been employed full-time for the last twenty four years as a senior marketing manager by SONY Electronics and her regular work hours were from after 9:00 am until 5:30 pm (Exh. DED9 at 21:00). She testified that the applicant is run from their home (Exh. DED9 at 28:15). She stated that she does not travel for work and gets a lunch hour (Exh. DED9 at 22:00). She further testified that during the work day she was able to conduct the firm's business on her phone and the computer at her desk (Exh. DED9 at 21:30) and that during the day she is available to return phone calls and answer emails (Exh. DED9 at 27:45). In answer to a question about when she conducts the firm's business, she replied that she uses her vacation time, enjoys a flexible schedule that allows her to work from home, and works in the evenings, if necessary (Exh. DED9 at 29:00).

At the hearing, Division staff member Glenn Butler testified that the application showed that Mr. and Ms. Tauscher perform all functions jointly at the firm (Exh. DED2 at 3-4). He stated that narratives of the duties and responsibilities of the Tauschers provided with the application (Exh. DED8) showed that Ms. Tauscher was primarily responsible for administrative functions and Mr. Tauscher was responsible for field operations (Exh. DED9 at 40:15). He continued that she works full time at Sony during the times when the applicant is operating in the field (Exh. DED9 at 41:00). As part of the application materials, Ms. Tauscher submitted a W2 form proving her full time employment at SONY (Exh. DED7). Mr. Butler further testified that during the telephone interview with Ms. Tauscher she stated that the operating hours of the applicant were 8:00

am until 5:00 pm and that the hours she worked at Sony were 9:00 am until 5:00 pm (Exh. DED9 at 44:15).

While Ms. Tauscher may have some availability during the day to attend to the firm's business, the fact that she has a full-time job that requires her to be engaged during the regular business hours of the applicant prevents her from devoting time on an ongoing basis to the daily operations of the business. Accordingly, the applicant has failed to demonstrate that the woman owner, Linda Tauscher, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1)(i)-(iii).

Control

The final ground for denial cited by the Division was the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Linda Tauscher, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

At the hearing Mr. Tauscher testified that the operating agreement for the firm that was submitted with the application materials authorized him (Exh. DED3) to make business decisions (Exh. DED9 at 16:15). The applicant introduced a revised operating agreement, dated June 19, 2015 (Exh. A1) which authorizes Ms. Tauscher to make business decisions, but Mr. Tauscher testified that this revised document was not filed with the application due to an oversight (Exh. DED9 at 17:00).

At the hearing Division staff member Glenn Butler testified he reviewed the operating agreement that was included with the application (Exh. DED3) and that the revised operating agreement (Exh. A1) was not submitted to the Division (Exh. DED 9 at 38:45). He also testified that the application stated that Mr. Tauscher was the managing member (Exh. DED2 at 2) and from this he concluded that Mr. Tauscher probably was in control of the business (Exh. DED9 at 39:30).

At the time the denial determination was made, the applicant had not supplied any information to Division staff that Linda Tauscher had authority to make business decisions for

the firm. Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Linda Tauscher, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner's, Linda Tauscher's, capital contributions are 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 demonstrate that the woman owner, Linda Tauscher, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

3. The applicant failed to demonstrate that the woman owner, Linda Tauscher, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

4. The applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Linda Tauscher, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

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

**Matter of
Artisan Gardens LLC**

**DED File ID No. 60046
Exhibit List**

Exh. #	Description	# of pages
A1	Amended operating agreement dated June 19, 2015	13
A2	Agreement to transfer ownership interest revised November 14, 2015	1
A3	Cancelled check dated November 14, 2015	1
A4	Planting Plan	1
A5	As built plan	1
DED1	Denial letter dated December 28, 2015	3
DED2	Application	9
DED3	Operating agreement dated February 22, 2005	7
DED4	Narratives on equity interest	2
DED5	Banking information	16
DED6	Resumes of Linda and Brian Tauscher	2
DED7	2014 W2 for Linda Tauscher	1
DED8	Narrative of duties and responsibilities	3
DED9	Audio recording of hearing	On disc