

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

October 12, 2017

MINUTES OF THE MEETING

Members of the Authority present: Chairman Thomas Scrivo; Commissioner Richard Badolato of the Department of Banking and Insurance; State Treasurer Ford M. Scudder; Jeffrey Stoller representing Commissioner Aaron Fichtner of the Department of Labor and Workforce Development; Public Members: Larry Downes, Vice Chairman; Philip Alagia, Fred B. Dumont, Louis Goetting, and John Lutz, Third Alternate Public Member.

Present via conference call: Colleen Kokas representing Commissioner Bob Martin of the Department of Environmental Protection; Public Members Charles Sarlo, William Layton, Massiel Medina Ferrara, William J. Albanese, Sr., Second Alternate Public Member; and Rodney Sadler, Non-Voting Member.

Absent: Public Members: Patrick Delle Cava, First Alternate Public;

Also present: Melissa Orsen, Chief Executive Officer of the Authority; Timothy Lizura, President and Chief Operating Officer; Deputy Attorney General Gabriel Chacon; Thomas Huth, Governor's Authorities' Unit; and staff.

Mr. Scrivo called the meeting to order at 10:00 a.m.

Pursuant to the Internal Revenue Code of 1986, Ms. Orsen announced that this was a public hearing and comments are invited on any Private Activity bond projects presented today.

In accordance with the Open Public Meetings Act, Ms. Orsen announced that notice of this meeting has been sent to the *Star Ledger* and the *Trenton Times* at least 48 hours prior to the meeting, and that a meeting notice has been duly posted on the Secretary of State's bulletin board at the State House.

MINUTES OF AUTHORITY MEETING

The next item of business was the approval of the September 14, 2017 annual meeting minutes. A motion was made to approve the minutes by Commissioner Badolato, and seconded by Mr. Downes, and was approved by the 11 voting members present.

Mr. Lutz abstained because he was not present for the meeting.

Mr. Goetting abstained because he was not present for the meeting.

Treasurer Scudder entered the meeting at this time.

**FOR INFORMATION ONLY:** The next item was the presentation of the Chief Executive Officer's Monthly Report to the Board.

**AUTHORITY MATTERS**

**ITEM:** Dissolution of New Jersey Community Development Entity, LLC (“NJCDE”)

**REQUEST:** Approve the dissolution of NJCDE as this special purpose New Markets Tax Credit entity is no longer required.

**MOTION TO APPROVE:** Mr. Downes **SECOND:** Commissioner Badolato **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT: 1**

**ITEM:** Microsoft Software and Services Enterprise Agreement

**REQUEST:** To approve the recommendation that the Authority renew the Microsoft Software and Services Enterprise Agreement in accordance with the specifications, terms and conditions of the State Contract.

**MOTION TO APPROVE:** Mr. Stoller **SECOND:** Mr. Downes **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT: 2**

**ITEM:** Proposed Rule Readoption/ Title 19, Chapters 30 and 31

**REQUEST:** To approve the proposed readoption of the EDA’s rules, with amendments for submission to the Office of Administrative Law.

**MOTION TO APPROVE:** Commissioner Badolato **SECOND:** Treasurer Scudder **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT: 3**

**INCENTIVE PROGRAMS**

**Grow New Jersey Assistance Program**

**ITEM:** Bauer Media Group USA, LLC APPL.#44553

**REQUEST:** To approve the finding of jobs at risk.

**MOTION TO APPROVE:** Mr. Stoller **SECOND:** Commissioner Badolato **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT: 4**

**ITEM:** Bauer Media Group USA, LLC APPL.#44553

**REQUEST:** To approve the application of Bauer Media Group USA, LLC for a Grow New Jersey Assistance Program Grant to encourage the applicant to make a capital investment and locate in Englewood Cliffs Borough, NJ. Project location of Englewood Cliffs Borough, Bergen County qualifies as a Priority Area under N.J.S.A. 34:1B-242 et seq and the program’s rules, N.J.A.C. 19:31-18. The estimated annual award is \$219,615 for a 10-year term.

**MOTION TO APPROVE:** Mr. Downes **SECOND:** Mr. Stoller **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT: 5**

**ITEM:** Boomerang USA Inc. APPL.#44273  
*THIS PROJECT WAS WITHHELD FROM CONSIDERATION.*

**ITEM:** Kontos Foods, Inc. APPL.#44224  
**REQUEST:** To approve the finding of jobs at risk.  
**MOTION TO APPROVE:** Mr. Downes **SECOND:** Mr. Alagia **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 6**

**ITEM:** Kontos Foods, Inc. APPL.#44224  
**REQUEST:** To approve the application of Kontos Foods, Inc. for a Grow New Jersey Assistance Program Grant to encourage the applicant to make a capital investment and locate in Paterson City, NJ. Project location of Paterson City, Passaic County qualifies as a Garden State Growth Zone under N.J.S.A. 34:1B-242 et seq and the program's rules, N.J.A.C. 19:31-18. The project is eligible, pursuant to the statute, for bonus increases to the tax credit award for Deep Poverty Pocket, Transit Oriented Development, Targeted Industry (Manufacturing), GSGZ Ind. Project w/ Cap. Inv. In Excess of Min. The estimated annual award is \$2,968,000 for a 10-year term.  
**MOTION TO APPROVE:** Commissioner Badolato **SECOND:** Mr. Downes **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 7**

**ITEM:** Kuehne + Nagel International, AG  
**REQUEST:** To uphold the hearing officer's recommendation not to disqualify.  
**MOTION TO APPROVE:** Mr. Downes **SECOND:** Mr. Stoller **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 8**

**ITEM:** Kuehne + Nagel Inc. APPL.#44559  
**REQUEST:** To approve the finding of jobs at risk  
**MOTION TO APPROVE:** Mr. Downes **SECOND:** Commissioner Badolato **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 9**

**ITEM:** Kuehne + Nagel Inc. APPL.#44559  
**REQUEST:** To approve the application of Kuehne + Nagel Inc. for a Grow New Jersey Assistance Program Grant to encourage the applicant to make a capital investment and locate in Jersey City, NJ. Project location of Jersey City, Hudson County qualifies as an Urban Transit Hub Municipality under N.J.S.A. 34:1B-242 et seq and the program's rules, N.J.A.C. 19:31-18. The project is eligible, pursuant to the statute, for bonus increases to the tax credit award for Transit Oriented Development, Jobs with Salary in Excess of County Average, Large Number of New/Retained F/T Jobs, Targeted Industry (Logistics). The estimated annual award is \$1,422,226 for a 10-year term.  
**MOTION TO APPROVE:** Mr. Stoller **SECOND:** Commissioner Badolato **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 10**

**ITEM:** Tumi, Inc. APPL.#44551  
**REQUEST:** To approve the finding of jobs at risk.  
**MOTION TO APPROVE:** Mr. Stoller **SECOND:** Mr. Downes **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 11

**ITEM:** Tumi, Inc. APPL.#44551  
**REQUEST:** To approve the application of Tumi, Inc. for a Grow New Jersey Assistance Program Grant to encourage the applicant to make a capital investment and locate in Edison Township, NJ. Project location of Edison Township, Middlesex County qualifies as a Priority Area under N.J.S.A. 34:1B-242 et seq and the program's rules, N.J.A.C. 19:31-18. The project is eligible, pursuant to the statute, for bonus increases to the tax credit award for Transit Oriented Development, Jobs with Salary in Excess of County Average. The estimated annual award is \$288,750 for a 10-year term.  
**MOTION TO APPROVE:** Commissioner Badolato **SECOND:** Mr. Downes **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 12

## BOND PROJECTS

### Preliminary Bond Resolutions

**ITEM:** Port Newark Container Terminal LLC APPL.#44597  
**LOCATION:** Newark, Essex County  
**PROCEEDS FOR:** Machinery & Equipment, Construction, Environmental Investigation and Remediation  
**TOTAL COSTS:** \$155,000,000  
**MOTION TO APPROVE:** Commissioner Badolato **SECOND:** Mr. Stoller **AYES:** 12  
**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 13  
**PUBLIC HEARING:** Yes  
**PUBLIC COMMENT:** None

Chairman Scrivo abstained from the vote because the Port Authority of NY and NJ is the lessor to this applicant, and his law partner is the Chairman of the PANYNJ.

Mr. Alagia recused himself because Essex County applied for a federal grant on behalf of the applicant.

Public Hearing Only

**ITEM:** Port Newark Container Terminal LLC APPL.#44598  
**LOCATION:** Newark, Essex County  
**PROCEEDS FOR:** Refund of Bond  
**TOTAL COSTS:** \$145,000,000  
**PUBLIC HEARING:** Yes  
**PUBLIC COMMENT:** None

Preliminary Bond Resolutions

**ITEM:** UMM Energy Partners, LLC APPL.#44560  
**LOCATION:** Little Falls Township, Passaic County  
**PROCEEDS FOR:** Machinery & Equipment, Construction, Working Capital  
**TOTAL COSTS:** \$24,800,000  
**MOTION TO APPROVE:** Mr. Dumont **SECOND:** Mr. Stoller **AYES:** 13  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 14**

Chairman Scrivo abstained from the vote because the applicant is a client of his firm.

**ITEM:** Schuster Meat Corporation APPL.#44582  
**LOCATION:** Lodi Borough, Bergen County  
**PROCEEDS FOR:** Acquisition, Renovation, Machinery & Equipment  
**TOTAL COSTS:** \$16,691,904  
**MOTION TO APPROVE:** Mr. Goetting **SECOND:** Mr. Downes **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 15**

Bond Modifications

**ITEM:** Uncommon Properties LLC APPL.#41792  
**REQUEST:** To consent to change in project location from for the North Star Academy Charter School of Newark from 571 18<sup>th</sup> avenue to 108 South 9<sup>th</sup> Street, and 43 Alexander Street, Newark.  
**MOTION TO APPROVE:** Mr. Lutz **SECOND:** Mr. Stoller **AYES:** 13  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 16**

Mr. Goetting abstained from the vote because it is not clear if the firm his son works for does business with the applicant.

**ITEM:** Uncommon Properties LLC

APPL.#37823

**REQUEST:** To consent to change in project location from for the North Star Academy Charter School of Newark from 571 18<sup>th</sup> avenue to 108 South 9<sup>th</sup> Street, and 43 Alexander Street, Newark.

**MOTION TO APPROVE:** Mr. Stoller **SECOND:** Mr. Treasurer Scudder **AYES:** 13

**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 17

Mr. Goetting abstained from the vote because it is not clear if the firm his son works for does business with the applicant.

### LOANS/GRANTS/GUARANTEES

#### Hazardous Discharge Site Remediation Fund

**ITEM:** Summary of NJDEP Hazardous Discharge Site Remediation Fund Program projects approved by the Department of Environmental Protection.

**MOTION TO APPROVE:** Commissioner Badolato **SECOND:** Mr. Downes **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 18

**PROJECT:** City of Newark (Scientific Chemical Processing)

APPL.#44253

**LOCATION:** Newark, Essex County

**PROCEEDS FOR:** Remedial Investigation

**FINANCING:** \$304,686

**PROJECT:** City of Paterson (BDA Paterson Steam Plant)

APPL.#44174

**LOCATION:** Paterson City, Passaic County

**PROCEEDS FOR:** Remedial Action

**FINANCING:** \$420,308

#### Petroleum Underground Storage Tank (PUST)

**ITEM:** Summary of NJDEP Petroleum UST Remediation, Upgrade & Closure Fund Program projects approved by the Department of Environmental Protection.

**MOTION TO APPROVE:** Mr. Stoller **SECOND:** Mr. Downes **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 19

**PROJECT:** Walter and Jean Putz

APPL.#39408

**LOCATION:** Franklin Township, Gloucester County

**PROCEEDS FOR:** Upgrade, Closure Remediation

**FINANCING:** \$101,858

**PROJECT:** Fern Bliss-Morgan  
**LOCATION:** Camden, Camden County  
**PROCEEDS FOR:** Remediation  
**FINANCING:** \$289,357

APPL.#44324

**PROJECT:** Lucille Virgilio Trust  
**LOCATION:** West Orange Township, Essex County  
**PROCEEDS FOR:** Remediation  
**FINANCING:** \$86,600

APPL.#44354

**EDISON INNOVATION FUND**

**Technology Business Tax Certification Transfer Program (NOL)**

Chairman Scrivo asked if representatives from doforms NJ, Inc., and Myos Rens Technology, Inc. wanted to address the board prior to the vote.

David J. Shipley, McCarter and English, counsel for doForms, NJ, Inc. addressed the board. See attached statement.

There was no response from Myos Rens Technology, Inc.

**ITEM:** Technology Business Tax Certification Transfer Program Appeals

**REQUEST:** To consent to the Hearing Officer's recommendation to reverse the declination of NOL application for EOS Energy Storage, LLC and to uphold the declination of NOL applications for doForms NJ, Inc. and Myos Rens Technology, Inc.

**MOTION TO APPROVE:** Mr. Dumont **SECOND:** Mr. Alagia **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT: 20**

**NJ CoVest Fund Program**

**PROJECT:** Reflik, Inc.  
**LOCATION:** Franklin Township, Somerset County  
**PROCEEDS FOR:** Working Capital  
**FINANCING:** Up to \$250,000  
**MOTION TO APPROVE:** Mr. Alagia **SECOND:** Treasurer Scudder **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 21**

APPL.#44558

Ashish Vachhani, CEO and Co-founder of Reflik, Inc. thanked the board for its approval.

### NJ Founders & Funders All-Stars Program

**ITEM:** 2017 NJ Founders & Funders All-Stars Program Award

**REQUEST:** To approve an award of up to \$50,000 for a selected registered, presenting early-stage NJ technology or biotechnology company for the 2017 NJ Founders & Founders All-Stars Program.

**MOTION TO APPROVE:** Mr. Goetting **SECOND:** Commissioner Badolato **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 22

### REAL ESTATE

**ITEM:** Award of Demolition Contract- Tech VI Building, Technology Centre of NJ

**REQUEST:** To approve the authorization to award a demolition services contract to Tricon Enterprises, Inc of Keyport, NJ for the demolition of the Tech VI Building.

**MOTION TO APPROVE:** Mr. Dumont **SECOND:** Treasurer Scudder **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 23

**ITEM:** Update to Operating Authority- Real Estate Division

**REQUEST:** To approve to the modification to the Real Estate Division Operating Authority by level to: 1. Clarify authority for staff to enter into settlement agreements or final dispositions of litigation matters; 2. Clarify signatory requirements and delate authority for staff to enter into recorder/permanent easement agreements; 3. Update the Real Estate Division Operating Authority Chart to reflect TLS staff's administration of Lease Agreements for the BDC Leases; 4. Clarify TLS Program Manager ability to recommend CCIT tenants to CCIT advisory Board; 5. Clarify CCIT Leasing Operating Authority regarding leases to professional service provider tenants.

**MOTION TO APPROVE:** Mr. Downes **SECOND:** Mr. Stoller **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT:** 24

### BOARD MEMORANDUMS

**FOR INFORMATION ONLY:** Incentives Modifications- 3rd Quarter 2017

**FOR INFORMATION ONLY:** Credit Underwriting Projects approved under Delegated Authority

**Premier Lender Program:** 2 Municipal LLC (44535), 1245 Virginia St NJ LLC (44545)

**Small Business Fund Program:** Northwood Avenue LLC (P44547)

**NJ Main Street Program - Modification:** Patella Construction Corp. dba Patella Woodworking (P44574)



**FOR INFORMATION ONLY:** Post Closing Credit Delegated Authority Approvals for 3rd Quarter 2017

**FOR INFORMATION ONLY:** Hazardous Discharge Site Remediation Fund - Delegated Authority 3rd Quarter 2017 Approvals

**FOR INFORMATION ONLY:** Petroleum Underground Storage Tank Program-Delegated Authority 3rd Quarter 2017 Approvals

**FOR INFORMATION ONLY:** Technology and Life Sciences- Delegated Authority 3rd Quarter 2017 Approvals

**FOR INFORMATION ONLY:** Real Estate Division Delegated Authority for Leases, CCIT Grants, and Right of Entry (ROE)/ Licenses for Third Quarter 2017

#### **PUBLIC COMMENT**

There was no public comment.

#### **EXECUTIVE SESSION**

The next item was to adjourn the public session of the meeting and enter into Executive Session to discuss a legal matter. The minutes will be made public when the need for confidentiality no longer exists.

**MOTION TO APPROVE:** Commissioner Badolato **SECOND:** Treasurer Scudder **AYES:** 14  
**RESOLUTION ATTACHED AND MARKED EXHIBIT: 25**

The Board returned to Public Session.

**REAL ESTATE**

**ITEM:** Sale of Property, 2099 Center Square Road, Logan Township


**REQUEST** To approve the disposition of property in Logan Township.

**MOTION TO APPROVE:** Mr. Downes    **SECOND:** Mr. Lutz    **AYES:** 14

**RESOLUTION ATTACHED AND MARKED EXHIBIT: 26**

There being no further business, on a motion by Mr. Stoller, and seconded by Mr. Downes, the meeting was adjourned at 11:21am.

Certification:                    The foregoing and attachments represent a true and complete summary of the actions taken by the New Jersey Economic Development Authority at its meeting.

  
\_\_\_\_\_  
Erin Gold, Director, Marketing & Public Affairs  
Assistant Secretary

doForms, Inc.

Comments before New Jersey Economic Development Authority Board

**A. Background**

1. I am David Shipley, a partner with McCarter & English, LLP, and I am appearing on behalf of doForms, Inc. With me is Robert Bothe, the Chief Financial Officer of doForms.

2. My background with the Tax Benefit Certificate Transfer Program goes back to 1998 and 1999 where I worked with the Biotechnology Council, Technology Council and EDA to amend the statute (P.L. 1999, chapter 140) to properly determine the value of Net Operating Losses by applying the Corporation Business Tax allocation factor, to ensure that the Certificate was fully transferrable by making the seller liable for any changes to its prior year tax returns and to determine a method for allocating the statutory amount of benefits among applicants. I subsequently was part of an EDA working group that drafted the initial regulations and initial applications.

3. In my comments this morning, I'd like to address both the application and review process that doForms went through and the substantive reasons that doForms application should be approved.

4. The starting point of my analysis is that the application process should be straightforward and that the EDA should be looking to assist companies in receiving statutory benefits not throwing up obstacles. Further, as the New Jersey Tax Court has held in Lowe's Home Centers, Inc. v. City of Millville, 25 N.J. Tax 591, 602 (Tax 2010), the "proper administration of our tax laws and the successful implementation of statutes designed to encourage economic development demand consistency and fairness" from the implementing authority. As that case points out, the relevant authority is required to turn square corners in administering economic development programs.

5. Under N.J.S.A. 34-1B-7.44 the EDA is required to adopt regulations "to effectuate the purposes of this act." The purposes of the act are provided in N.J.S.A. 34:1B-7.38(e) which provides that "the State can best stimulate and encourage private investment in emerging technology and biotechnology companies by directing the New Jersey Economic Development Authority to provide financial assistance to emerging technology and biotechnology companies located in the State."

6. N.J.S.A. 34-1B-7.44 continues by instructing the EDA that "In developing procedures and forms to be used in connection with the application for and approval of financial assistance pursuant to this act, the authority shall consider the special needs and problems of emerging technology and biotechnology companies in the State."

7. In determining what is required to qualify under the Tax Benefit Certificate Transfer Program, we have the statutes, the regulations and the EDA's Frequently Asked Questions. The plain language of the statutes is the clearest indication of the legislative intent. Regulations can interpret a statute, but regulations cannot enlarge or restrict the language of a statute. The New Jersey Supreme Court in GE Solid State, Inc. v. Director, Div. of Taxation, 132 N.J. 298, 306,

625 A.2d 468 (1993) held that “an administrative agency may not, under the guise of interpretation, extend a statute to give it greater effect than its language permits”) (citations omitted) and in Fedders Fin. Corp. v. Director, Div. of Taxation, 96 N.J. 376, 392, (1984) the court held that “an administrative interpretation which attempts to add to a statute something which is not there can furnish no sustenance to the enactment.”

8. Administrative pronouncements, such as the EDA’s “Frequently Asked Questions” are not binding on the EDA, an applicant or this Board because those pronouncements have not gone through the process provided for in the Administrative Procedure Act.

## **B. “Certified Financial Statements”**

1. EDA is recommending denial of doForms application because doForms did not provide certified financial statements that included 2016 as part of their June 30, 2017 application.

2. The EDA’s application requires that an applicant provide its “Two most recent years of independent accountant (CPA) prepared consolidated financial statements or annual reports.” doForms submitted their two most recent years of audited financial statements. Those are the same financial statements that would have been submitted for any other financial purposes. Thus, that portion of doForms application was complete.

3. There is no statutory requirement that certified financial statements be submitted by June 30<sup>th</sup> with the initial application. The statute, N.J.S.A. 54:34:1B-7.32a(b)(5), provides:

No application for a corporation business tax benefit transfer certificate shall be approved in which the new or expanding emerging technology or biotechnology company (1) has demonstrated positive net operating income in any of the two previous full years of ongoing operations as determined on its financial statements issued according to generally accepted accounting standards endorsed by the Financial Accounting Standards Board;

The statute only requires that “no application shall be approved” if you don’t provide the certified financials demonstrating a lack of positive net operating income. The statute does not require that the certified financials be provided as part of the application or that they be provided by any particular date.

4. The EDA’s regulation, N.J.A.C. 19:31-12.4(c), provides that “a complete application shall include... financial statements for the two most recent full years of operation.” There are several problems with the EDA’s application of this regulation.

5. The first problem is that it discriminates against the small businesses this program is designed to help. The requirement that the audited financial be submitted by June 30<sup>th</sup> with no ability to submit those financials at a later point in the evaluation process disadvantages the smallest of businesses that are the last to be audited by the accounting firms. Most companies the size of doForms that use the major accounting firms are not audited until after publically held

companies and large businesses. Additionally, small businesses who use the major accounting firms typically wait until August to begin their audit because it saves them a significant amount of money. As a result, those small businesses' certified financials are not completed until late August to mid-September.

6. The second problem with that regulation is that the EDA does not uniformly enforce that provision. In the EDA's FAQs under Financial Statements, Question 7, the EDA provides that a fiscal year company, but not a calendar year company, can provide draft financials and supplement those financials. The EDA's letter recommending the rejection of doForms' application appears to indicate that the "draft financial statement" exception would apply to any taxpayer that doesn't have their certified financials completed by June 30<sup>th</sup>. That exception is not in the regulation, not in the FAQs and not in the application. In administering economic development programs, there should not be a set of secret rules and exceptions that are not ascertainable by the public.

7. To the extent that the EDA has permitted exceptions to its regulation, the rule should be that any financial information submitted with the application should be permitted to be supplemented.

8. Further, and I think significantly, the EDA officer reviewing doForms' application requested that we provide the 2016 financials as part of her review. In response to that request, doForms provided draft financials to the EDA and doForms subsequently provided certified financials to the hearing officer. The EDA officer reviewing doForms' application also indicated that the certified financials could be provided to the EDA as part of an appeal. Nonetheless, the EDA has recommended denial of doForms application on the basis that the financials were due on June 30<sup>th</sup> and any subsequent information would be "new" information. If the EDA's own employees charged with reviewing the application requested that doForms provide that information, it would seem that the information is clarifying information that could be considered. Remember, in administering economic development programs, the EDA must turn square corners.

9. Finally, the focus needs to be on the eligibility criteria. The eligibility criteria is whether doForms "has demonstrated positive net operating income in any of the two previous full years of ongoing operations as determined on its financial statements issued according to generally accepted accounting standards endorsed by the Financial Accounting Standards Board." Based on the certified financial statements for 2015 and 2016, doForms meet that requirement as of June 30, 2017.

### **C. "Certificate of Incorporation of Predecessor Entity"**

1. The EDA is recommending denial of doForms' application because doForms failed to provide the "incorporation/formation documents for its earliest predecessor entity."

2. The EDA's application is on-line and it asks "Was the applicant created by a merger or acquisition?" If you answer "yes", the application form asks for the incorporation or formation date of the earliest predecessor and for the state of incorporation or formation for that entity. The application form then instructs the applicant to provide the predecessor entity's certificate of

formation or incorporation. If you answer "no", you go on to the next question and the information boxes and instructions as to what to include with your application do not appear. doForms checked the "no" box because it was not created by a merger or acquisition. Rather, doForms was created by the conversion of a Maine LLC into a Maine corporation and a conversion of the Maine corporation into a Delaware corporation. Thus, based on the EDA's application, a copy of any other entities certificate of incorporation or merger was not required.

3. There is no statutory requirement regarding providing a certificate of incorporation for the applicant or for any predecessor entities. N.J.S.A. 34:1B-7.42b references the date that the company was incorporated in the definition of a "new or expanding" company by using the phrase "if the company has been incorporated for less than" a specified number of years. In addition to not requiring any certificates of incorporation, the statute does not look to the date of incorporation for any predecessor entities.

4. The EDA's regulation N.J.A.C. 19:31-12.4(c)12, does provide that the certificate of incorporation for the applicant and its earliest predecessor entity be submitted as part of the application, but the term "predecessor entity" is not defined in that regulation. However, the EDA's application appears to define a predecessor entity as an entity that was merged or acquired by the applicant. There also is a reference to predecessor entity in the EDA's Frequently Asked Questions but it references "an LLC formed 4 years ago but that entity ceased to exist upon our recent incorporation." The FAQ is not specific if the LLC ceased to exist as a result of a merger or acquisition or if the EDA considered a conversion result in the existence of a predecessor entity. Under New Jersey corporate law, which I will discuss in a moment, the only way the business of an LLC could transfer its business to a corporation is by a merger or acquisition of assets.

5. Since the term predecessor entity is not mentioned in the statute and not defined in the regulation, we have to look to corporate and tax law to determine what is a predecessor entity. Under New Jersey corporate law, a conversion of a limited liability company into a corporation and the conversion of a foreign corporation into a New Jersey corporation are not permitted. The only actions permitted under New Jersey law are a merger, a consolidation or an acquisition of assets. As a result of a conversion not being authorized under New Jersey law, New Jersey does not recognize conversions that occur in other states. doForms was formed by the conversion of a Maine limited liability company into a Maine corporation and a subsequent conversion of the Maine corporation into a Delaware corporation. For New Jersey corporate law and commercial recording purposes, the Maine corporation was required to withdraw from the state and the Delaware corporation was required to register with the state as a new corporation. Similarly, for tax purposes, the Maine entity had to file a tax return through the date of the conversion and the Delaware entity was required to begin filing tax returns. The tax attributes of the Maine corporation did not carry over to the Delaware corporation, resulting in doForm's loss of net operating losses valued at approximately \$50,000. Thus, for corporate law and tax purposes, the Delaware corporation is a separate and distinct entity from the Maine corporation and the Maine corporation is not a predecessor entity.

6. Further, and again significantly, the EDA officer reviewing doForms's application requested that we provide the incorporation or formation documents related to the Maine

corporation and Maine limited liability company. In response to that request, doForms provided those documents. However, the EDA has recommended denial of doForms application on the basis that those documents were due on June 30th and any subsequent information would be "new" information. If the EDA's own employees charged with reviewing the application requested that doForms provide that information, it would seem that the information is clarifying information that could be considered. Remember, in administering economic development programs, the EDA must turn square corners.

7. Finally, the focus needs to be on the eligibility criteria. N.J.S.A. 34:1B-7.42b references the date that the company was incorporated in the definition of a "new or expanding" company by using the phrase "if the company has been incorporated for less than" a specified number of years. As part of its review of doForms application, the EDA had all the information required to determine the company's date of incorporation.

#### D. "10 Full Time Employees"

1. The EDA is recommending denial of doForms' application because doForms failed to have the required number of employees.

2. The statute requires doForms to only have one employee because doForms was incorporated for less than three years. The specific statutory language in N.J.S.A. 34:1B-7.42b provides:

[O]n June 30 of the year in which the company files such an application, [the company] has at least one full-time employee working in this State **if the company has been incorporated for less than three years...** and (3) on the date of the exchange of the corporation business tax benefit certificate, the company has the requisite number of full-time employees in New Jersey that were required on June 30 as set forth in part (2) of this definition."

There is no reference to a predecessor entity. The clear statutory language is evidence that the legislature had a simple test which requires only to looking at the incorporation date of the company applying for the benefits. Regulations cannot add requirements that do not exist in the statute. Had the legislature intended to look to predecessor entities, the statute would have said, "if the company **or any predecessor entity** had been incorporated..." and the legislature would have defined predecessor entity. Such a definition would have made it clear whether a conversion under another state's law creates a predecessor entity or whether New Jersey corporate law controls and a predecessor entity only includes entities where there was a merger or acquisition of assets. When we stray from the statutory language we end up with unpublished rules that are ambiguous in scope.

3. Further, there is no basis for looking at a predecessor entity's date of incorporation or formation in the EDA's regulations. Effective June 18, 2012, the EDA amended its regulation, N.J.A.C. 19:32-12.2, by adding the words "or formed, irrespective of corporate structure or tax status" to the statutory language. Although there is an issue with adding to the statutory language, what is most relevant here is that the EDA's intent for that change in its regulations

was to expand the program to cover pass through entities such as limited liability companies and partnerships and NOT to change the statutory test to include predecessor entities. In proposing that amendment to its regulation, the EDA provided the following explanation:

The proposed amendment amend the definition of "new or expanding" to add to the eligibility provisions pertaining to incorporation "or formed, irrespective of corporate structure or tax status" to eliminate any distinction between a company's incorporation date (for corporations) and its formation date (for LLCs) as both corporations and LLCs are eligible to participate in the program. By utilizing the inception date, regardless of corporate structure or tax status, the Authority may better determine whether an applicant has created the requisite number of jobs since inception for participation in the program.

44 N.J.R. 665(a). Thus, under the language of both the statute and the EDA's regulation, there is no inquiry into predecessor entities. Under both the language of the statute and the EDA's regulation, doForms had more than the required one employee based on being incorporated for less than three years.

4. Even if the EDA goes beyond the statute to look at the formation date of the Maine LLC, doForms had 10 employees under the statutory definition. The statutory definition under N.J.S.A. 34:1B-7.42b of a "full-time employee" is:

[A] person employed by a new or expanding emerging technology or biotechnology company for consideration for at least 35 hours a week, or who renders any other standard of service generally accepted by custom or practice as full-time employment and whose wages are subject to withholding as provided in the "New Jersey Gross Income Tax Act"

The EDA has questioned whether Justin Slavin qualifies as a full-time employee, Justin was hired in January 2017 and worked full-time in New Jersey during that month. He returned to school and continued to work part-time outside of New Jersey, In May, 2017, Justin resumed working full time in New Jersey. As of June 30, 2017, Justin was a full-time employee, working at least 35 hours a week and his wages were subject to withholding. At the end of August 2017, Justin returned to college but continued to work part-time outside New Jersey. As of early 2017, Justin will have graduated college and will be working full-time in New Jersey.

5. The EDA's regulation, N.J.A.C. 19:31-12.2, goes beyond the statutory language to provide that a "Full-time employee" "means a person employed by a... company on a permanent or indefinite basis" and "shall not include any person who works as an intern, as a temporary employee, or in a temporary position." Despite adding requirements that are not in the statute, Justin's employment meets the expanded criteria of the EDA's regulation. Justin was employed on "permanent or indefinite basis." Justin is not a temporary employee and his position is not a temporary position. Justin is not an "intern" insomuch as he is performing significant functions



for doForms and is being paid accordingly rather than merely working at the company to gain experience. The statement that we provided to the EDA characterizing Justin as a "temporary employee who is working for the company over the summer" was unfortunate because it was not based on a complete understanding of Justin's situation and position.

6. After the EDA's officer reviewing doForms' application indicated that there was a problem regarding counting Justin as a full-time employee, I left a detailed voice mail with that officer explaining the basis for our determination that Justin does not qualify as a full-time employee of doForms. In a July 27, 2016 telephone conversation, the EDA officer told me that she spoke with her supervisor and they concluded that doForms should submit: 1) A letter from the CEO of doForms providing that Mr. Slavin was employed full-time by doForms as of June 30, 2017 and continues to be employed by doForms; 2) A letter from Mr. Slavin providing that he was employed full-time by doForms as of June 30, 2017 and continues to be employed by doForms; and 3) a healthcare waiver from Mr. Slavin. We submitted that information and the EDA then determined that Justin did not qualify as a full-time employee. Companies are entitled to rely on the representations of the EDA, especially when it is represented to the company that a supervisor had approved a certain course of action to remedy a problem. Again, the EDA must turn square corners.

7. Assuming that you look at the date of formation of predecessor entities and assuming a conversion under another state's law that is not recognized for New Jersey corporate or tax purposes creates a predecessor entity, doForms is required to have 10 full-time New Jersey based employees under N.J.S.A. 34:1B-7.42b as of June 30, 2017 and "on the date of the exchange of the corporation business tax benefit certificate." Justin was a full-time, permanent employee based 100% in New Jersey as of June 30, 2017. If doForms is approved to sell its Net Operating Losses, doForms will hire an additional full-time New Jersey based employee by the date of the exchange of that certificate. The only reason that doForms has not hired that employee yet is because of the uncertainty related to their approval to sell their Net Operating Losses. If this Board approves doForms application, in 2017 doForms will have at least 11 employees counting the new hire as well as Justin who will return to full-time employment in New Jersey.

## **E. Conclusion**

1. The EDA's regulation, N.J.A.C. 19:31-12.6, specifically provides:

The Authority cannot consider new evidence or information about the project other than evidence or information that would demonstrate that the applicant met all of the application criteria by the June 30 deadline.

The EDA hearing officer has interpreted this as prohibiting ANY new evidence or information. A closer reading proves differently. The regulation provides that you cannot provide new evidence or information UNLESS that evidence or information demonstrates that the applicant met all of the application criteria by June 30<sup>th</sup>. doForms certified financial statements and doForms predecessor incorporation and formation documents (if they are required) demonstrate

that doForms met the application criteria as of June 30<sup>th</sup>. Therefore, even if the information is "new" as opposed to "supplemental", that information is permitted to be considered.

2. The relevant statutes provide clear guidance how this program works. doForms meets the statutory criteria. Where things become complicated is where the EDA's regulations go beyond the statute, where the EDA's rules and applications are unpublished or unclear and where the EDA staff provides guidance that may or may not contradict the unpublished rules.

3. Based on all of the issues that I've addressed, doForms is entitled to be approved to participate in the Tax Benefit Certificate Transfer Program.

Thank you.