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Review of Public Complaint

Economic Development Corporation Warren County

April 13, 2016

PC-2016-01

The Complaint

The Authorities Budget Office (ABO) is empowered by its governing statutes to “initiate formal investigations in response to complaints or appearance of noncompliance by an authority” (Sections (6)(2)(d) of Title 2 of Public Authorities Law).

The ABO received a series of complaints from the public regarding a property transaction between Warren County, the Economic Development Corporation of Warren County (EDC) and the Hacker Boat Company. The complaints were primarily concerned with the sale of three lots located in the Queensbury Business Park with a combined assessed value of \$525,000 to EDC and subsequently sold to the Hacker Boat Company for \$75,000. The complaints allege that there was inadequate public notice regarding the property sale and that the sale of the property for significantly below fair market value was inappropriate. The complaints cite provisions in Section 859-a of General Municipal Law, which require industrial development agencies to hold public hearings in respect to proposed projects when more than \$100,000 of financial assistance is being provided. The complaints also cite provisions of Section 2896 and 2897 of Public Authorities Law, which require that real property be disposed of for not less than fair market value.

Scope of the Review

As part of our inquiry, we interviewed EDC staff and select board members. We reviewed the minutes of EDC’s board meetings from January 2012 through December 2015 and examined EDC’s documents and emails related to the Hacker Boat property transaction. We also reviewed board meeting minutes for the Hudson River Local Development Corporation for the period January 2012 through January 2015. Individuals were not placed under oath, no subpoenas were issued, and the information obtained was voluntarily provided and gathered through a review of public records. This report is based on and reflects only the information and documents known to be available and provided to the ABO at the time it was written.

Economic Development Entities in Warren County

There are several not-for-profit entities that exist in Warren County for the purposes of supporting the expansion and retention of existing businesses, attracting new businesses and related economic development functions. Three of these entities were involved with the specific property that is the subject of the complaints: the Economic Development Corporation Warren County, the Hudson River Local Development Corporation, and the Queensbury Economic Development Corporation.

Economic Development Corporation Warren County

The Economic Development Corporation Warren County (EDC) was initially established in 1992 and is a local development corporation formed under Section 1411 of the Not-

For-Profit Corporation Law. Its mission is to plan, promote, coordinate and execute programs in the Warren County region of New York State aimed at improving the quality of life of its residents by enhancing and diversifying the economy of the region. EDC is governed by a board of directors comprised of up to 11 members including 5 officers. EDC's current bylaws stipulate that the Chair of the Warren County Board of Supervisors, the Queensbury Town Supervisor and the Mayor of Glens Falls are members of the board.

Hudson River Local Development Corporation

The Hudson River Local Development Corporation (HRLDC) was formed in 2005 under Section 1411 of the Not-For-Profit Corporation Law. Its mission was to relieve and reduce unemployment, better and maintain job opportunities, develop industrial parks and other real estate, carry on scientific research for the purpose of aiding Warren County, and attract new business and industry to the County. According to EDC officials, HRLDC was created by EDC to limit EDC's potential liability related to real property transactions. HRLDC had no staff, and its board was comprised of the five officers from the EDC board. In May 2014, HRLDC's board approved its merger with EDC to form a single entity and the merger was finalized in July 2015.

Queensbury Economic Development Corporation

The Queensbury Economic Development Corporation (QEDC) was formed in 1986. Its mission was to foster economic stability and selective growth in the Town of Queensbury by supporting expansion and retention of existing business, attracting new business that fits the economic profile, and actively joining in efforts to develop the entire region's economy. QEDC was governed by a board of directors comprised of 3 members. In October 2010, QEDC's board determined that continuing QEDC as a separate entity was no longer an efficient way to fulfill its mission of promoting economic development in the Town of Queensbury and approved its merger with HRLDC.

The ABO initially contacted EDC in 2008 and HRLDC in 2009 to notify them that the ABO had determined the organizations met the definition of a local authority per the Public Authorities Accountability Act of 2005, and as such were subject to the public disclosure, reporting and corporate governance provisions of Public Authorities Law. This determination was made in part on EDC's and HRLDC's affiliation with and reliance on the City of Glens Falls and Warren County. Both EDC and HRLDC disagreed with the ABO's determination, and proceeded to exchange documents, meet and correspond with the ABO to support its position. In April 2013, EDC informed the ABO that it was beginning efforts to restructure and consolidate various economic development entities, and in May 2013 agreed that the restructured entity would be subject and compliant with the accountability and reporting provisions of Public Authorities Accountability Act. EDC has been reporting on its operations since 2013, in compliance with these provisions, and incorporated HRLDC's activities in those reports upon its merger in 2015.

Queensbury Business Park

In 2000, Warren County acquired a total of 72 acres of land located in the Town of Queensbury through tax foreclosure. This land was appraised at \$115,000 and eventually became known as the Queensbury Business Park, which was earmarked for economic development. EDC initially agreed to pay \$5,750 for an option to purchase the property from the County within two years for a total price of \$115,000. This agreement was revised in 2001 to allow for the purchase of only a portion of the property, to extend the option for 10 years, to reduce the payment to \$2,560 and to allow for the periodic purchase of portions of the property at \$1,600 per acre.

In 2006, EDC purchased 14 acres in the Queensbury Business Park designated as lot 7 from Warren County at no cost, with the provision that the property be transferred to the New York State Office of General Services for the construction of a National Guard Armory. In return, New York State contributed a total of \$300,000 for park improvements. This contribution, combined with a \$100,000 grant from National Grid, \$200,000 from Warren County, a \$528,000 grant from the U.S. Economic Development Administration, and \$200,000 from EDC was used to construct a road and provide water, sewer, gas, electric and telecommunication services in the park. In 2007, EDC obtained the funds for its share of this project by purchasing 11.5 acres in the park designated as lot 3 from Warren County for \$18,448, and then selling that property to QEDC for \$200,000. The infrastructure improvements were completed in the park in 2009.

The purchase option agreement with the County was transferred by EDC to HRLDC in 2007 for the remainder of the term, which would expire November 15, 2011. In 2008 HRLDC exercised its option to purchase 3.8 acres in the park designated as lot 4 from Warren County for \$6,080. In 2010 as a result of the merger with QEDC, HRLDC obtained ownership of lot 3 in the park, and was the owner of both lots 3 and 4 in the park.

In November 2011 the purchase option agreement with the County expired. However, HRLDC petitioned the County in May 2012 to extend the terms of the agreement. This request was approved by the County, extending the terms of the agreement from November 16, 2011 through November 15, 2015. This extension was subject to the same terms and conditions as the original agreement.

Marketing Efforts

In 2012, HRLDC and EDC initiated a business plan competition to encourage economic development and develop interest in the land available in the park. The winner of the competition would receive the 3.8 acre lot 4 at no cost, although the winner would be responsible for transfer fees of \$20,000. The value of this land was estimated to be between \$200,000 and \$250,000. The competition was open to all non-retail businesses willing to locate and develop facilities on the awarded lot in the Queensbury Business Park. EDC officials indicated that they believed offering the land for free would be a successful marketing initiative to stimulate investment and bring private sector business

into the community. However, EDC officials told us that no applications were received under this initiative.

EDC decided in 2013 to expand the competition and promoted an “Open for Business” site competition. Under this initiative, non-retail businesses could submit a business plan proposal for one of three parcels. The parcels consisted of lot 3 and lot 4 in the Queensbury Business Park and another parcel located about a mile from the park. Up to three winners were to be selected in July 2013 to receive the designated property. EDC officials indicated that they believed expanding the competition to include the additional lots would generate more inquiries. However, EDC officials told us that no applications were received under this initiative either.

Hacker Boat Project

In 2012, representatives from the Hacker Boat Company (Hacker Boat) expressed an interest in relocating and expanding their current boat manufacturing operations. The company was seeking a new location to house new boat production and restoration facilities, corporate offices and a new showroom. The company indicated that it needed a larger and more efficient facility to expand its boat production capabilities since it intended to build larger boats and also needed additional space to produce a new line of boats. Hacker Boat’s expansion plans included hiring additional employees. The company indicated it had trouble attracting skilled employees at its existing location in Ticonderoga, New York. EDC officials told us that initially Hacker Boat was only interested in available vacant buildings and did not want to obtain vacant land where it could construct new facilities. EDC officials met with the Hacker Boat representatives on several occasions to tour various facilities located in Warren County.

After failing to identify suitable facilities, Hacker Boat decided in 2013 to also consider the possibility of constructing buildings on vacant land and toured additional sites throughout Warren County with the help of EDC. Although these locations included the Queensbury Business Park, Hacker Boat did not submit an application for the properties that were part of the “Open for Business” site competition.

On July 25, 2013 Hacker Boat made a formal offer to HRLDC to purchase lots 1, 2 and 3 in the Queensbury Business Park for \$75,000, and this offer was accepted by the HRLDC board on July 29, 2013. The HRLDC board did not hold a meeting to discuss the offer, but instead communicated its approval of the offer via email. EDC officials state that email discussion and votes are permissible for not-for-profit corporations. However, the documents provided to us do not show that email votes were made by each board member. Instead, the HRLDC chair sent an email to the board members requesting a response regarding the offer, and proposing to hold a meeting to discuss and pass a resolution to accept the proposal. Only one board member’s email vote to accept the proposal was provided to us, in addition to the chair’s email response to four board members indicating that the board supported the proposed sale. Although the HRLDC board did not take any further action, it discussed the offer at its August 12, 2013 board meeting. The board was informed by EDC staff that a contract was being negotiated

between Hacker Boat and an attorney. While the property transaction was between Hacker Boat and HRLDC, the attorney had not been appointed or approved by the HRLDC board, and there was no written contract with the attorney stipulating the services that would be provided or the fee. This attorney negotiated the terms of the contract with Hacker Boat, which was signed on September 4, 2013. During this negotiation, there was email correspondence between the attorney, HRLDC's chair and an EDC staff, but there was no record indicating that the HRLDC board was included in the discussions or informed of the status of the negotiations.

Under the terms of the contract, Hacker Boat was required to get all approvals necessary for the construction of a boat manufacturing facility, and the transfer of title for the property was expected to take place by February 28, 2014. The contract stipulated that if Hacker Boat had not (1) received a building permit or (2) had received the building permit but had not begun construction within two years of the date of the closing, HRLDC had the right to repurchase the property for \$75,000 within sixty days of the second anniversary date of the closing.

Hacker Boat was delayed in obtaining Planning Board approval for the project, which delayed the February 28, 2014 date for the transfer of title on the property for several months. Yet, there was no discussion reflected in either the HRLDC or the EDC board meeting minutes during this timeframe regarding the project progress, the impending target date for closing or reasons for delays in obtaining necessary approvals. On April 22, 2014 Hacker Boat presented its plan to construct a 90,000 sq. ft. manufacturing building as an initial phase and a 40,000 sq. ft. building as a second phase to the Town of Queensbury Zoning Board and the plan was approved. The approval was valid for one year from the date of approval but could be extended prior to its expiration. This Planning Board approval is necessary for Hacker Boat to obtain a building permit; if the building permit is not obtained while the Planning Board approval is in effect, the project would be required to reapply for Planning Board approval. It was not until May 2014 that there was any discussion reflected in HRLDC or EDC board meeting minutes regarding whether the project was progressing as planned or whether any issues were arising that would cause delays. EDC officials told us that they were not under any pressure to move this project ahead in accordance with the timeframes stipulated in the purchase contract since it was new construction on vacant land, and because the prospect of new jobs being created was more significant than any project delays that occurred. They also told us that many individual discussions took place among the board members and staff that are not captured in board meeting minutes, but did not provide us with any record indicating when these discussions took place or their content.

Although the property was being sold by HRLDC to Hacker Boat, the HRLDC board did not take any action to hire an attorney for the closing. Instead, in March 2014 the EDC board agreed to retain the same attorney to facilitate the property closing that HRLDC had used to negotiate the contract. The closing was expected to take place in September 2014, although HRLDC only had ownership of one of the three lots. On September 17, 2014 HRLDC exercised its option to purchase a total of 6 acres designated as lots 1 and 2 in the Queensbury Business Park from Warren County for \$10,181. However, there

were no payments made by HRLDC to Warren County at this time to reflect the purchase price of the property or other closing costs. Instead the deeds to the lots were held in escrow. Two days later, on September 19, 2014 Hacker Boat purchased the three lots from HRLDC. At the closing, payments made by Silver Bay B, LLC – a real estate holding entity of Hacker Boat – consisted of \$10,181 to Warren County for the costs of HRLDC’s purchase of lots 1 and 2; \$8,375 for property taxes, title and recording fees; \$1,000 for HRLDC’s legal fees; and \$59,488 to HRLDC for the purchase of lots 1, 2 and 3. There were no additional requirements or benchmarks regarding the development of the property that were established at the time of the property closing. In July 2015 EDC became the successor in interest in the property via its merger with HRLDC.

On April 21, 2015 Hacker Boat requested a one year extension from the Town of Queensbury Planning Board for their site plan approval, and the extension was approved through April 22, 2016. Local newspaper articles in 2015 indicated that the owners of Hacker Boat were considering using the property for possible installation of a solar panel grid system for the generation of electricity, rather than constructing the planned boat manufacturing building. However, EDC officials told us that this would be an inappropriate use of the land since it would not create the number of jobs anticipated and therefore EDC would not allow it.

During our review EDC officials also told us that they no longer expected the project to proceed as initially proposed, and they anticipated that EDC would exercise its option to repurchase the property. They indicated that Hacker Boat representatives were continuing to explore other locations for the proposed boat manufacturing facility. On March 9, 2016, EDC officials contacted Hacker Boat to verify that the company no longer intended to construct a boat manufacturing facility on the three lots, and to explore the possibility of expediting the repurchase provisions. On March 11, 2016 Hacker Boat notified EDC that it agreed to waive the 2-year performance period and agreed to sell the lots to EDC prior to the option trigger date of September 19, 2016. As a result, EDC repurchased the three parcels in the Queensbury Business Park from Hacker Boat at the agreed to price of \$75,000 on March 17, 2016. At the closing, EDC made payments of \$12,225 for property taxes, \$1,721 for title and recording fees, \$925 for Hacker Boat’s attorney and \$67,256 to Silver Bay, B LLC for the property.

The property transactions related to this project resulted in EDC receiving a total of \$60,488: a \$1,000 deposit on September 4, 2013 and \$59,488 from the September 19, 2014 sale to the Hacker Boat Company. EDC had a total cash outlay of \$82,127 in March 17, 2016 to repurchase the property. The net result to EDC was a reduction in cash of \$21,639.

Results of Investigation of Complaint

Complaint: The sale of lots 1, 2, and 3 to Hacker Boat for \$75,000 may be in violation of Sections 2896 and 2897 of Public Authorities Law because the amount paid was significantly less than fair market value.

Section 2896 of Public Authorities Law requires public authorities to establish guidelines regarding the disposal of property and Section 2897 of Public Authorities Law addresses the process by which a public authority is to dispose of its property. In general, Section 2897 stipulates that property may not be disposed of for less than fair market value, and that disposal shall be made through public advertising for bids. However, Section 2897 (7) provides exceptions to the fair market value and public advertising requirements. These exceptions allow for property to be disposed of for less than fair market value and without public advertising for bids if the purpose of the disposition is within the mission of the public authority. At the time of the property disposition HRLDC was not being held subject to the accountability and reporting requirements of the Public Authority Accountability Act. Instead, HRLDC was operating under the provisions of Not-For-Profit Corporation Law at that time, which does not have similar accountability and reporting requirements. Additionally, HRLDC's mission is to encourage economic development in Warren County, and the purpose of selling the property to Hacker Boat was to enable the expansion of Hacker Boat's operations and create jobs. As such, if HRLDC was being held to the provisions of Public Authorities Law, this disposition falls under the exception to the fair market value and public advertising requirements.

Conclusions:

At the time of the property transactions, the HRLDC was not subject to the provisions of Section 2896 and 2897 of Public Authorities Law. Even so, since the sale of the property from HRLDC to Hacker Boat was within the mission of HRLDC, the property did not need to be sold for fair market value and was not required to be publicly bid.

Complaint: There was inadequate public notice regarding the property sale and therefore it was in violation of Section 859-a of General Municipal Law, which requires industrial development agencies to hold public hearings in respect to proposed projects when more than \$100,000 of financial assistance is being provided.

Section 859-a of General Municipal Law pertains to the operations of Industrial Development Agencies (IDAs), and provides guidance with regards to financial assistance of more than \$100,000 being provided to any project. Specifically, when an IDA provides more than \$100,000 in financial assistance to a project, the IDA must hold a public hearing highlighting the proposed financial assistance being contemplated. Such public hearing shall be held in the town where the project proposes to locate, and provide interested parties with the opportunity to present their views with respect to the project. The IDA must give at least ten days published notice of the public hearing and shall provide notice of such hearing to the chief executive officer of each affected tax

jurisdiction within which the project is located. However, since HRLDC is not an IDA, it is not subject to Section 859-a of General Municipal Law. Instead, HRLDC is a local development corporation established under Section 1411 of Not-For-Profit Corporation Law. Section 1411(d) of Not-For-Profit Corporation Law pertains to the purchase of property owned by a municipality, and allows for a local development corporation to purchase property from a municipality without following public bidding requirements. This section of law also requires that the municipality hold a public hearing prior to authorizing the sale of property to a local development corporation.

Conclusions:

HRLDC was not subject to the provisions of General Municipal Law since it is not an industrial development agency. Further, Warren County was required to have a public hearing prior to authorizing the sale of property to HRLDC, and it appears that this requirement was met prior to the original purchase options agreement in 2001. The ABO's investigation did not consider whether the County was required to hold a second public hearing regarding the proposed property sale prior to extending the purchase option agreement that expired in November 2011.

Other Issues

While HRLDC and EDC were not subject to the accountability and reporting requirement of the Public Authorities Accountability Act during the period of this property transaction, the boards were subject to general corporate governance expectations of board members. In particular, Section 717 of Not-For-Profit Corporation Law addresses the duties of directors and officers, and stipulates that these individuals shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. Board members should be knowledgeable, informed and active in overseeing the not-for-profit's operations and finances. They should ensure that the organization's funds and assets are appropriately accounted for and that there is proper oversight of the operation. In addition, the board chairman should convene, organize, and encourage discussions at board meetings.

As part of our investigation, we noticed multiple occasions where it appeared that the board of directors of HRLDC and EDC were not adequately overseeing and monitoring the operations of the entities. For example:

- Once Hacker Boat made an offer to purchase the property in the Queensbury Business Park, HRLDC relied on an attorney that was paid on a contractual basis to negotiate and develop the terms of the purchase contract for the property. However, there is no indication that the HRLDC board discussed or approved the hiring of the attorney, and there was no written contract between HRLDC and the attorney stipulating the services to be provided or the anticipated costs of the services.

- The HRLDC board accepted the offer from Hacker Boat in July 2013, relying on email communications to obtain acceptance from each board member. This process did not enable the board to openly discuss potential benefits or concerns with the offer, and email records of individual board member votes were not maintained.
- The HRLDC board did not meet to discuss the progress of the contract negotiations between the attorney and Hacker Boat, or to approve concessions that were made as part of the negotiations. An initial provision within the contract would require Hacker Boat to obtain a certificate of occupancy within two years of the property closing date. A certificate of occupancy is generally issued once construction of the planned facilities are complete. However, this provision was replaced during the negotiation process with the requirement that a building permit be obtained and construction begin within two years of the property closing date, which reduces the assurance that the project will be completed as anticipated. Yet, there is no indication that the HRLDC board discussed or approved this significant change in the contract terms.
- The HRLDC board did not appear to monitor the project progress and ensure that the terms of the final contract were met. Although the purchase contract indicated that the property closing would occur by February 28, 2014, necessary approvals were not obtained until April 22, 2014. In spite of this delay, there is no record indicating that the HRLDC board was informed of the delay, the reasons for failing to meet the terms of the contract, or to determine whether any appropriate actions were needed.

Conclusions:

Although HRLDC and EDC were not subject to the accountability and reporting requirements of the Public Authorities Accountability Act during the property transaction, as not-for-profit corporations the board members were required to discharge their duties in good faith and with reasonable care. We believe that at times the actions of HRLDC's and EDC's board members did not meet the fiduciary duties expected of not-for-profit corporation board members.