

# Economic Development, Tourism, Housing, Planning & Transit Committee

## Special Committee Meeting Minutes

**DATE & TIME:** May 8, 2018 – 6:00 PM  
**LOCATION:** Legislative Chairman's Office  
**PRESIDING OFFICER:** Legislator James Maloney  
**LEGISLATIVE STAFF:** Mary Beichert, Senior Legislative Employee  
**PRESENT:** Legislators Archer, Delaune, Litts, Maloney Maio, Rodriguez & Woltman, Chairman Ronk  
**ABSENT:** None  
**QUORUM PRESENT:** Yes

**OTHER ATTENDEES:** Legislator Manna Jo Greene, Legislator Jonathan Heppner, Legislator Joe Maloney, Legislator Kathy Nolan, Legislative Attorney Kyle Barnett, Legislative Attorney Nicholas Pascale, Legislative Minority Attorney Chris Ragucci.

Legislator Maloney called the meeting to order at 6:00 PM and thanked everyone for attending the meeting.

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### **Old Business – Ulster County Industrial Development Agency – Appointment Applicant Interviews**

Legislator Maloney stated at the last meeting opinions from the Legislative Attorney and the County Attorney would be reviewed.

Nick Pascale stated he reviewed the County Attorneys memorandum and felt the memo was a valid observation. The County Attorney submitted a legal opinion from Judge Mott where several legal arguments were made and County officials were sued. The County was successful in getting the claims dismissed from a lawsuit. Legislators on the IDA Board as members, although permissible under law, essentially entangles the two positions. The County Attorney's concern is having legislators as IDA board members blurring the lines.

Chris Ragucci stated all the attorneys agree under General Municipal Law a legislator can be appointed to the IDA. A legislator appointed to the IDA Board would be working on behalf of the IDA not the legislature. Regarding Judge Motts opinion, the argument that was used to dismiss the case could be used if members were or were not part of the IDA. Chris feels having a legislator on the IDA Board does not increase the County's liability.

Legislator Maloney stated not only did the company sue the IDA the company also sued the board members.

Nick Pascale stated the next issue involves voting on appointments and the interest of being on the IDA Board. Nick stated ethic opinions are not issued by Legislative and County Attorneys. Nick's informal opinion is not to vote on your own appointment and the IDA is an important agency with a lot of public attention and the public needs to have faith in the proceedings. Mr. Pascale also stated in this situation, there are seven seats and ten candidates and now legislators want to be on the board.

Legislator Archer stated she would like clarification as to why certain boards legislators can be appointed to and other boards legislators cannot be appointed. Legislator Archer also stated there are many board appointments within this organization and legislators vote on these positions.

Legislator Rodriguez stated in previous years Legislator Berardi served on the IDA Board. Discussion ensued.

Chairman Ronk stated there should be a discussion regarding having Legislators on the IDA Board prior to starting the process in the future. Legislator Maloney agreed.

Legislator Archer stated having representation from UCEDA, Economic Development on the Executive side & Economic Development on the legislative side would create a synergy.

Legislator Litts stated there are two points of view. This representation might be viewed as synergy or it could be viewed the Legislature is trying to take over the IDA and trying to take control.

Legislator Woltman stated having a legislator on the IDA is a good idea. However, Brian stated Nick made some valid points and would like to remove his name from consideration.

Legislator Archer said she will also remove her name from consideration as well. The purpose of submitting her name and Legislator Woltman's name was to have equal presentation on the IDA Board.

Legislator Delaune motioned to go into Executive Session and Legislator Litts seconded the motion. The Committee entered Executive Session at 6:23 PM.

Chairman Maloney motioned to exit Executive Session and Legislator Rodriguez seconded. With all in favor, the Committee exited Executive Session at 6:39 PM.

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Resolutions for the May 15, 2018 Session of the Legislature

**Resolution No. 164:** Appointing Member To The Ulster County Industrial Development Agency Board of Directors

**Resolution Summary:** This resolution appoints T.J Briggs to Ulster County Industrial Development Agency Board of Directors

**Motion No. 1:**                   **Motion to Adopt Resolution No. 164**

**Motion By:**                   Legislator Maio

**Motion Seconded By:** Legislator Litts

**Discussion:**

None

**Voting In Favor:** Legislators Litts Maio, Maloney & Woltman  
**Voting Against:** Legislators Archer, Delaune & Rodriguez  
**Votes in Favor:** 4  
**Votes Against:** 3  
**Disposition:** Resolution Adopted

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**Resolution No. 165:** Appointing Member To The Ulster County Industrial Development Agency Board of Directors

**Resolution Summary:** This resolution appoints Randall Leverette to Ulster County Industrial Development Agency Board of Directors.

**Motion No. 2:** **Motion to Adopt Resolution No. 165**  
**Motion By:** Legislator Rodriguez  
**Motion Seconded By:** Legislator Woltman

**Discussion:**

None

**Voting In Favor:** Legislators Archer, Delaune, Maloney, Rodriguez & Woltman  
**Voting Against:** Legislators Litts & Maio  
**Votes in Favor:** 5  
**Votes Against:** 2  
**Disposition:** Resolution Adopted

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**Resolution No. 166:** Appointing Member To The Ulster County Industrial Development Agency Board of Directors

**Resolution Summary:** This resolution appoints John Morrow to Ulster County Industrial Development Agency Board of Directors.

**Motion No. 3:** **Motion to Adopt Resolution No. 166**  
**Motion By:** Legislator Litts  
**Motion Seconded By:** Legislator Maio

**Discussion:**

None

**Voting In Favor:** Legislators Maloney, Litts & Maio  
**Voting Against:** Legislators Rodriguez, Archer, Delaune & Woltman  
**Votes in Favor:** 3  
**Votes Against:** 4  
**Disposition:** Resolution Failed

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**Resolution No. 167:** Appointing Member To The Ulster County Industrial Development Agency Board of Directors

**Resolution Summary:** This resolution appoints James Malcolm to Ulster County Industrial Development Agency Board of Directors.

**Motion No. 4:**                   **Motion to Adopt Resolution No. 167**

**Motion By:**                   Legislator Litts

**Motion Seconded By:** Legislator Maio

**Discussion:**

None

**Voting In Favor:**           Legislators Archer, Delaune, Litts, Maloney, Maio, Rodriguez & Woltman

**Voting Against:**           None

**Votes in Favor:**           7

**Votes Against:**           0

**Disposition:**           Resolution Adopted

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**Resolution No. 168:** Appointing Member To The Ulster County Industrial Development Agency Board of Directors

**Resolution Summary:** This resolution appoints Dan Savona to Ulster County Industrial Development Agency Board of Directors.

**Motion No. 5:**                   **Motion to Adopt Resolution No. 168**

**Motion By:**                   Legislator Maio

**Motion Seconded By:** Legislator Litts

**Discussion:**

None

**Voting In Favor:**           Legislators Archer, Delaune, Litts, Maloney, Maio, Rodriguez & Woltman

**Voting Against:**           None

**Votes in Favor:**           7

**Votes Against:**           0

**Disposition:**           Resolution Adopted

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**Resolution No. 169:** Appointing Member To The Ulster County Industrial Development Agency Board of Directors

**Resolution Summary:** This resolution appoints Paul Andreassen to Ulster County Industrial Development Agency Board of Directors.

**Motion No. 6:**               **Motion to Adopt Resolution No. 169**  
**Motion By:**               Legislator Maio  
**Motion Seconded By:** Legislator Rodriguez

**Discussion:**

None

**Voting In Favor:**       Legislators Archer, Delaune, Litts, Maloney, Maio & Rodriguez  
**Voting Against:**       Legislator Woltman  
**Votes in Favor:**       6  
**Votes Against:**       1  
**Disposition:**       Resolution Adopted

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**Resolution No. 170:** Appointing Member To The Ulster County Industrial Development Agency Board of Directors

**Resolution Summary:** This resolution appoints Mike Ham to Ulster County Industrial Development Agency Board of Directors.

**Motion No. 7:**               **Motion to Adopt Resolution No. 170**  
**Motion By:**               Legislator Rodriguez  
**Motion Seconded By:** Legislator Maio

**Discussion:**

None

**Voting In Favor:**       Legislators Archer, Delaune, Litts, Maloney, Maio, Rodriguez & Woltman  
**Voting Against:**       None  
**Votes in Favor:**       7  
**Votes Against:**       0  
**Disposition:**       Resolution Adopted

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There being no further business, Legislator Maio motioned to adjourn, seconded by Legislator Maloney.

**Time:**     6:44 PM

**Respectfully submitted: Mary Beichert, Senior Legislative Employee**  
**Minutes Approved: June 5, 2018**

# ULSTER COUNTY ATTORNEY

BEATRICE HAVRANEK  
County Attorney

CLINTON G. JOHNSON  
First Assistant County Attorney



MICHAEL P. HEIN  
County Executive

Assistant County Attorneys

KRISTIN A. GUMAER  
MARISA J. HANSEN  
MARIE F. BING  
ROBERT J. FISHER  
JENNIFER J. CLARK

## MEMORANDUM

TO: Hon. James F. Maloney  
Ulster County Legislator

FROM: Beatrice Havranek, Esq. *BH*  
Ulster County Attorney

DATE: May 8, 2018

RE: Ulster County Industrial Development Agency

You asked for my opinion as to the advisability of having sitting Ulster County Legislators appointed to the Ulster County Industrial Development Agency ("IDA.")

### FACTS

Per Sections 923 and 856(4) of General Municipal Law, the Ulster County Legislature may appoint an official or an employee of the County of Ulster ("County") as a member of the IDA. Currently, none of the members of the IDA are officials or employees of the County. You have advised, however, that there is currently a proposal being reviewed that would provide for the appointment of one or more Ulster County Legislators to the IDA.

### ANALYSIS

This office has been successful in having litigation brought against both the County and the IDA dismissed against the County based upon the autonomy of the IDA notwithstanding the County's power to name members to the IDA.

I call your attention to the most recent lawsuit that was commenced against the IDA, the County, and the individual members of the IDA for actions and/or determinations rendered by the IDA, to wit: 2-4 Kieffer Lane, LLC v. The County of Ulster and The Ulster County Industrial Development Agency, John Morrow, Randall Leverette, Robert Kinmin, Michael Bernholz, John Livermore and James Malcolm, Ulster County Supreme Court, at Index No. 17-2502. A copy of Decision/Order of the Hon. Richard Mott, J.S.C., dated January 24, 2018, dismissing the case against the County, is enclosed. Here, my office argued, among other things, that none of the members of the IDA (who are named in the lawsuit) were

officers or employees of the County and that the County did not participate in the IDA proceedings that resulted in the determination of the IDA that was being challenged by the Petitioner-Plaintiff.

#### **CONCLUSION**

While there is no legal impediment that would prevent a Legislator from being appointed to the IDA, the potential for liability on the part of the County and the individual legislators so named would exist. It would difficult, if not impossible, to argue when sued that the actions of the IDA, whose membership included sitting Legislators, was autonomous and that there was no liability on the part of the County and/or the IDA Legislator members.

BH:kpc  
Enclosure

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ULSTER

-----X  
In the Matter of

2-4 KIEFFER LANE LLC,

Petitioner-Plaintiff,

DECISION/ORDER

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules and a Declaratory Judgment  
Pursuant to Section 3001 of the Civil Practice Law  
And Rules

-against-

Index No. 17-2502  
R.J.I. No. 55-17-1414  
Richard Mott, J.S.C.

THE COUNTY OF ULSTER and THE ULSTER COUNTY  
INDUSTRIAL DEVELOPMENT AGENCY, JOHN MORROW,  
RANDALL LEVERETTE, ROBERT KINNIN, MICHAEL  
BERNHOLZ, JOHN LIVERMORE and JAMES MALCOLM,

Respondents-Defendants.  
-----X

Motion/Petition Return Date: December 1, 2017

APPEARANCES:

**Petitioner:** Timothy P. Colgan, Esq.  
20 Duzine Road  
New Paltz, NY 12561

**Respondent:** Charles W. Malcomb, Esq.  
Hodgson Russ LLP  
677 Broadway, Suite 301  
Albany, NY 12207

Mott, J.

Petitioner-Plaintiff 2-4 Kieffer Lane LLC, ("Petitioner") in this proceeding pursuant to Article 78 and action for declaratory judgment, challenges the denial of a sales and use tax exemption by Respondent-Defendant Ulster County Industrial Development Agency,



("IDA") as, *inter alia*, unsupported by substantial evidence.<sup>1</sup> Respondent-Defendant The County of Ulster ("Ulster") moves to dismiss the petition/complaint for failure to state a cause of action against it. Petitioner opposes. The IDA moves for summary judgment converting Petitioner's declaratory judgment claims to Article 78 claims and awarding contractual attorney's fees and expenses on its counterclaim. Petitioner opposes. Ulster takes no position on the IDA's motion or its counterclaim.

### ***Background***

Petitioner applied for a sales and use tax exemption ("exemption") from the IDA for the purchase and use of seven mobile construction cranes to be stored on its 4.2-acre property in a facility operated by US Crane LLC ("US Crane"). Petitioner and US Crane, each solely owned by Tom Auringer, have as their business purpose the lease and operation of cranes on projects from New York City to Buffalo.

Public hearings were held in May and July, 2017 on Petitioner's initial and second amended applications, the latter proposing the purchase of only tower cranes. Public comments, Petitioner's responses to queries and an outside expert report commissioned by the IDA were received. At the May, June and July regular monthly IDA meetings, opponents of the exemption appeared and made further public comment. On August 9, 2017, the IDA resolved unanimously<sup>2</sup> to deny the exemption ("Resolution").

The petition challenges the Resolution as, *inter alia*, unsupported by substantial evidence.

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<sup>1</sup> Respondents-Defendants John Morrow, Randall Leverette, Robert Kinnin, Michael Bernholz, John Livermore and James Malcom are members of the IDA and are referred to collectively herein as "IDA" together with the agency itself.

<sup>2</sup> All those present voted for the Resolution. One member was absent.

In conjunction with its application to the IDA, Petitioner signed an agreement

("Agreement") stating that:

"the Agency shall not be liable for and agrees to indemnify, defend and hold the Agency harmless for and against any and all liability arising from or expense incurred by (A) the Agency's examination and processing of, and action pursuant to or upon, the attached Application regardless of whether the application or the project described therein or tax exemptions and other assistance requested therein are favorably acted upon by the Agency, (B) the Agency's acquisition, construction and/or installation of the Project described therein, and (C) any further action taken by the Agency with respect to the Project, including without limiting the generality of the foregoing, all causes of action and attorney's fees and any other expenses incurred in defending any suits or actions which may arise as a result of any of the foregoing. If, for any reason, the applicant fails to conclude or consummate necessary negotiations, or fails, within a reasonable or specified period of time, to take reasonable, proper or requested action, or withdraws, abandons, cancels or neglects the Application, or if the Agency or the Applicant are unable to reach final agreement with respect to the Project, then, and in that event, upon presentation of an invoice itemizing the same, the Applicant shall pay to the Agency, its Agents or assigns, *all actual costs* incurred by the Agency in the processing of the Application, including attorney's fees, if any."

***Ulster's Motion***

***Parties' Contentions***

Ulster claims that because the IDA is autonomous and Ulster has no authority over its decision-making, the petition/complaint fails to state a claim against it. In support thereof, it cites the petition/complaint which fails to allege any acts by Ulster regarding the subject dispute and the affidavit of Victoria A. Fabella, clerk of the Ulster County Legislature, ("Legislature") stating that the Legislature "has taken no action with regards to the denial of Petitioner's application for sales and use tax exemption.". Further, Ulster avers that the Legislature's power to name IDA members in no way detracts from the latter's autonomy, nor renders the Legislature liable for the IDA's actions.

Petitioner contends that Ulster is a necessary party and would therefore subject its petition/complaint to dismissal were it not named. In support thereof, it states that because Ulster has the authority to name the IDA members who serve at the Legislature's pleasure, the two bodies have interests that are inextricably intertwined.

*Discussion*

A motion to dismiss may be appropriately granted only where the documentary evidence utterly refutes plaintiff's allegations, conclusively establishing a defense as a matter of law. *Crepin v Fogarty*, 59 AD3d 837 [3d Dept. 2009]. *Id.* CPLR § 3211(a) (1). Public corporations created by the State and subject to dissolution by same are, nonetheless, "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission." *Collins v Manhattan & Bronx Surface Tr. Operating Auth. (MABSTOA)*, 62 NY2d 361, 369 [1984]; General Municipal Law § 856 (industrial development corporations are public benefit corporations).

Given that the IDA is an autonomous entity and the absence of any allegations of wrongdoing by Ulster, no claim is stated against it. Further, Ulster is not a necessary party since there is no indication that Ulster will be inequitably affected by a judgment herein or that its joinder is necessary to afford complete relief to others. CPLR § 1001. Accordingly, Ulster's motion to dismiss is granted.

***IDA's Motion***

*Parties' Contentions*

The IDA claims that Petitioner's request for declaratory relief is duplicative of the CPLR Article 7803 relief sought, thereby requiring it to be subsumed in the Article 78

proceeding. Further, it contends that the Agreement's terms warrant summary judgment as to Petitioner's liability for the IDA's attorney's fees and expenses in this proceeding since same arises out of the IDA's "examination and processing of, and action pursuant to, [...Petitioner's] Application."

Petitioner<sup>3</sup> contends that the Agreement excludes inter-party<sup>4</sup> actions because, as strictly construed, it limits the types of actions requiring indemnification. It claims that only the expenses incurred in the IDA's examination and processing of the application are to be made whole, and that the language referring to "causes of action and attorney's fees and any other expenses incurred in defending any suits or actions which may arise" do not include inter-party actions because same are not explicitly included and they cannot be contemplated by the language of the Agreement.

#### ***Discussion***

##### ***Declaratory Judgment***

Injunctive and declaratory relief are extraordinary remedies and as such, "are available only where resort to ordinary actions or proceedings would not afford adequate relief." *Gaynor v Rockefeller*, 15 NY2d 120, 132 [1965] (internal citations omitted). The proper avenue to challenge an administrative determination is pursuant to CPLR Article 78, and not a declaratory judgment action. *Long Is. Coll. Hosp. v Axelrod*, 118 AD2d 177 [3d Dept 1986].

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<sup>3</sup> Petitioner offers no comment upon the IDA's motion to convert the declaratory judgment claims to Article 78 claims.

<sup>4</sup> Petitioner refers to inter-party actions, while case precedent employs the term "intra-party" to describe suits or actions between two contracting parties. See, e.g., *Crossroads ABL LLC v Canaras Capital Mgt, LLC*, 105 AD3d 645, 646 [1st Dept 2013].

Here, Petitioner's request for declaratory judgment seeks the nullification of an administrative determination allegedly reached in violation of lawful procedure, based upon an error of law, as arbitrary, capricious and an abuse of discretion and lacking a foundation in substantial evidence. The declaratory relief requested annulling the Resolution and compelling a grant of the exemption is duplicative of the relief available pursuant to Article 78, which contemplates mandamus and the nullification of administrative actions. Accordingly, declaratory relief cannot be sought in addition. *Gable Transp., Inc. v State*, 29 AD3d 1125, 1127-28 [3d Dept 2006] (a trial court may decline to entertain an action for declaratory judgment where other adequate remedies are available, such as a CPLR article 78 proceeding to challenge an administrative determination).

#### *Contractual Attorney's Fees*

Attorney's fees are incidents of litigation and generally a prevailing party is not entitled to collect same from its adversary, unless such an award is authorized by an agreement between parties, statute or court rule. *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]. "Words in a contract are to be construed to achieve the apparent purpose of the parties" and indemnity agreements to award intra-party attorney's fees, because they alter a general rule, are to be construed strictly. *Id.* However, highly inclusive language in an indemnification provision that fails to limit the types of proceedings to which it applies, is sufficiently explicit and clear to establish an agreement encompassing intra-party litigation. *Crossroads ABL LLC v Canaras Capital Mgt, LLC*, 105 AD3d at 646. Thus, reference to "any and all claims, demands, actions, suits or proceedings" encompasses intra-party claims where it is unaccompanied by limiting language or a finite list of types of proceedings, circumstances or subject matter. *Id.*

Here, the indemnity provision is highly inclusive since it contemplates:

*"(A) the Agency's examination and processing of, and action pursuant to or upon, the attached Application...and (C) any further action taken by the Agency with respect to the project, including without limiting the generality of the foregoing, all causes of action and attorney's fees and any other expenses incurred in defending any suits or actions which may arise as a result of any of the foregoing."*

Further, the Agreement does not specifically exclude intra-party actions or include a provision that would render such inclusion contradictory, illogical or contrary to policy. *Crossroads ABL LLC v Canaras Capital Mgt, LLC*, 105 AD3d 645; cf., *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d at 492 (extending the contract's indemnification clause to require defendant to reimburse plaintiff for attorney's fees in the breach of contract action against defendant would render the third-party action notice provisions therein, meaningless and without logical application). Indeed, the Agreement contemplates a suit upon an application denial when it states that it applies regardless of whether an application has been acted upon favorably.

Consequently, Petitioner is liable to the IDA for attorney's fees and expenses in this proceeding that addresses the examination and processing of Petitioner's application. *Crossroads ABL LLC v Canaras Capital Mgt, LLC*, 105 AD3d 645; cf., *Iskalo 5000 Main LLC v Town of Amherst Indus. Dev. Agency*, 147 AD3d 1414, 1416 [4th Dept 2017], lv to appeal denied, 149 AD3d 1626 [4th Dept 2017], and lv to appeal denied, 29 NY3d 919 [2017] (application indemnification provision with general language that the "applicant shall be and is responsible for all expenses incurred by [the agency] in connection with this application" insufficient to establish clear obligation to pay attorney's fees associated with proceeding challenging denial thereof).

Accordingly, Ulster's motion to dismiss is granted, the IDA's motion for summary judgment is granted, the declaratory judgment claims are converted to Article 78 claims, the IDA is granted attorney's fees and expenses herein in an amount to be determined at the close of proceedings and, there being no further objections in point of law, this Article 78 proceeding is hereby transferred to the Appellate Division Third Department to address the substantial evidence question and related issues herein. *Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390 [1st Dept 2006] (CPLR article 78 prohibits the Supreme Court from reaching the issue of whether an agency determination is supported by substantial evidence and requires that such petitions be transferred to the Appellate Division).

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Respondent-Defendant Ulster, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the proceeding. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York  
January 24, 2018

  
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RICHARD MOTT, J.S.C.

Papers Considered:

**Petition/Complaint**

1. Notice of Petition and Affirmation of Timothy P. Colgan, Esq., Verified Petition/Complaint of Thomas Auringer, dated September 18, 2017, with Exhibits A-U;

2. Verified Answer with Counterclaim and Affidavit and Certification of Record of John Morrow, with Exhibits 1-17 in two volumes, dated October 30, 2017, Memorandum of Law in Opposition to the Verified Petition of A. Joseph Scott, III, Esq., and Charles W. Malcomb, Esq., and Opposition Affirmation of Charles W. Malcomb, Esq., dated November 2, 2017 with Exhibits A-B;
3. Affirmation in Response to Respondent's Motion for Summary Judgment and Counterclaim of Clinton, G. Johnson, Esq., dated November 21, 2017;
4. Verified Answer to Counterclaim of Thomas Auringer, Reply Affidavit of Thomas Auringer with Exhibit 1, and Reply Memorandum of Law and Affirmation on the Verified Petition of Timothy P. McColgan, Esq., dated November 22, 2017.

#### **Ulster's Motion**

5. Notice of Motion to Dismiss Verified Petition and Complaint and Affirmation of Clinton G. Johnson, Esq., dated September 27, 2017;
6. Opposition Affirmation of Timothy P. McColgan, Esq., dated October 10, 2017;
7. Reply Affirmation of Clinton G. Johnson, Esq., dated October 24, 2017.

#### **IDA'S MOTION**

8. Notice of Motion for Summary Judgment and Attorney's Fees, Statement of Material Facts and Affirmation of Charles W. Malcomb, Esq., and Memorandum of Law of A. Joseph Scott, III, Esq., and Charles W. Malcomb, Esq., dated November 2, 2017 with Exhibits A-D and Affidavit of John Morrow, dated October 30, 2017 with Exhibits A-C;
9. Affirmation in Response to Respondent's Motion for Summary Judgment and Counterclaim of Clinton, G. Johnson, Esq., dated November 21, 2017;
10. Response to Material Facts, Opposition Affirmation and Memorandum of Law of Timothy P. McColgan, Esq., dated November 22, 2017;
11. Reply Memorandum of Law of Memorandum of A. Joseph Scott, III, Esq., and Charles W. Malcomb, Esq., dated November 30, 2017.



# ULSTER COUNTY LEGISLATURE

KENNETH RONK  
Chairman 845-340-3699

MARY BETH MAIO  
Majority Leader 845-340-3900

HECTOR RODRIGUEZ  
Minority Leader 845-340-3900



P.O. Box 1800  
KINGSTON, NEW YORK 12402  
Telephone: 845 340-3900  
FAX: 845 340-3651

VICTORIA FABELLA  
Clerk 845-340-3666

NICOLAS PASCALE  
Counsel 845-340-3900

CHRISTOPHER RAGUCCI  
Minority Counsel 845-340-3900

## MEMORANDUM

TO: Hon. Hector Rodriguez

FROM: Christopher P. Ragucci, Esq.  
Minority Counsel

DATE: May 8, 2018

RE: Ulster County Industrial Development Agency ("IDA")

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You have requested that I analyze whether sitting Ulster County Legislators may serve on the IDA Board and what legal implications may arise, if any, from a sitting Legislator serving in such a capacity.

1. Applicable Statutory Authority:

General Municipal Law Section 923 sets forth as follows:

"For the benefit of the county of Ulster and the inhabitants thereof, an industrial development agency, to be known as the ULSTER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, is hereby established for the accomplishment of any or all of the purposes specified in title one of article eighteen-A of this chapter. It shall constitute a body corporate and politic, and be perpetual in duration. It shall have the powers and duties now or hereafter conferred by title one of article eighteen-A of this chapter upon industrial development agencies and provided that the exercise of the powers by such agency with respect to the acquisition of real property whether by purchase, condemnation or otherwise, shall be limited to the corporate limits of the county of Ulster, and such agency shall take into consideration the local zoning and planning regulations as well as the regional and local comprehensive land use plans. It shall be organized in a manner prescribed by and be subject to the provisions of title one of article eighteen-A of this chapter. Its members shall be appointed by the governing body of the county of Ulster. The agency, its members, officers and employees and its operations and activities shall in all respects be governed by the provisions of title one of article eighteen-A of this chapter."

General Municipal Law Section 856(4) sets forth as follows:

"4. Any one or more of the members of an agency may be an official or an employee of the municipality. In the event that an official or an employee of the municipality shall be appointed as a member of the agency, acceptance or retention of such appointment shall not be deemed a forfeiture of his municipal office or employment, or incompatible therewith or affect his tenure or compensation in any way. The term of office of a member of an agency who is an official or an employee of the municipality when appointed as a member thereof by special act of the legislature creating the industrial development agency shall terminate at the expiration of the term of his municipal office."

2. May a sitting Ulster County Legislator be lawfully appointed to serve on the IDA Board?

- a. Yes. Pursuant to General Municipal Law Section 856(4), "[a]ny one or more of the members of an agency may be an official or an employee of the municipality. In the event that an official or an employee of the municipality shall be appointed as a member of the agency, acceptance or retention of such appointment shall not be deemed a forfeiture of his municipal office or employment, or incompatible therewith or affect his tenure or compensation in any way"

This language clearly permits a sitting Legislator to serve as a member of the IDA Board, without forfeiting her/his municipal office or employment, or having such appointment effect her/his tenure or compensation.

3. If a sitting Legislator is appointed to the IDA, is Ulster County exposed to additional liability if legal action stems from the action(s) or inaction(s) of the IDA?

- a. In my opinion Ulster County's liability is not significantly impacted if a sitting Legislator is appointed to the IDA.

Pursuant to General Municipal Law Section 856 and the matter of *Collins v. Manhattan & Bronx Surgace Tr. Operating Auth.*, 62 NY2d 361 (1984), public corporations created by the State, [like the IDA], and subject to dissolution, [like the IDA], are "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission." *Id.* See also *2-4 Kiefer Lane, LLC v. The County of Ulster et. al.*, Ulster County Index No. 17-25-2.

In the matter of *2-4 Kiefer Lane, LLC v. The County of Ulster et. al.*, cited above, the Court (Mott, J.) succinctly set forth the County's argument which comported with the general premise set forth in General Municipal Law Section 856 and echoed in the *Collins* case, to wit: that the IDA is autonomous and the County has no authority over its decision making. Judge Mott further cited the Affidavit of the Clerk of the Legislature, who had affirmed that "the Legislature has taken no action with regards to the denial of Petitioner's application for sales and use tax exemption". (*Id.*) It was based upon the foregoing statutory authority in conjunction with the Clerk's Affidavit that the Court granted Ulster County's motion for summary judgment. (*Id.*)

In my opinion, the legal principal upon which the Court granted the County's motion for summary judgment in the *2-4Kiefer Lane, LLC* matter is left undisturbed in the event a Legislator is appointed to the IDA board because a sitting Legislator, acting in her/his capacity as member of

the IDA board is *not* empowered to *take action* on behalf of Ulster County. A Legislator has but *one* vote in the *twenty-three member* Legislative body.

Indeed, if a Legislator was appointed to the IDA board, the Legislative Clerk could still affirm, like she did in *2-4Keifer Lane, LLC*, that the “Legislature has taken no action with regards to the denial of Petitioner’s application...” as a single Legislator cannot *act* on behalf of the Legislative body. (See *Id.*)

The alternative argument would ostensibly result in the County being held liable for the actions (or inaction) a sitting Legislator may take [or not take] in any capacity, whether it be in the Legislator’s professional life or personal life. The counter argument would result in a bridge too far and would not likely be accepted by a reviewing Court.