

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

June 8, 2011

MINUTES OF THE SPECIAL MEETING

Members of the Authority present: Joe Latoof representing the Department of Labor and Workforce Development; and Public Member Joseph McNamara, Vice Chairman.

Present via conference call: Al Koeppe, Chairman; Steve Petrecca representing the State Treasurer; Wayne Staub representing the Commissioner of the Department of Environment Protection; Nancy Graves representing the Commissioner of the Department of Banking and Insurance; Public Members: Tim Carden, Laurence Downes, Marjorie Perry, Kate Whitman; Raymond Burke, First Alternate Public Member; and Kevin Brown, Third Alternate Public Member and Rodney Sadler, Non-Voting Member.

Absent: Matt McDermott representing the Lt. Governor's office; Public Member Richard Tolson, Charles Sarlo, and Elliot M. Kosoffsky, Second Alternate Public Member.

Also present: Caren Franzini, Chief Executive Officer of the Authority; Bette Renaud, Deputy Attorneys General; Nicole Crifo, Assistant Counsel, Governor's Authorities' Unit and guests

Chairman Koeppe called the meeting to order at 4pm.

In accordance with the Open Public Meetings Act, Ms. Franzini 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.

INCENTIVE PROGRAMS

URBAN TRANSIT HUB TAX CREDIT PROGRAM

Chairman Koeppe stated that the Members were here to discuss and act upon Motions to Settle the Record filed by Hartz Mountain Industries and the Township of Secaucus, NJ in connection with its appeal of the Authority's approval of a grant to Panasonic for its proposed project in Newark, NJ.

Ms. Franzini summarized the documents that the Board had received in order to review the motion and in consideration of final agency action.

EXECUTIVE SESSION

Chairman Koeppe requested a motion to enter executive session to seek advice on both legal and litigation matters relating to the Motion to settle the record. He noted that minutes would become available when the need for confidentiality was no longer required.

**MOTION TO APPROVE: Mr. Carden SECOND: Mr. McNamara. Perry AYES: 12
RESOLUTION ATTACHED AND MARKED EXHIBIT: 1**

The Board returned to Public Session.

Chairman Koeppe noted that Board had a lengthy discussion of the legal issues and he valued everyone's time and input on behalf of the board and staff. He summarized the Authority's response to Hartz and the Township of Secaucus:

After consideration of the motions and briefs that were submitted, the Authority finds:

1. The purpose of settling the record is to ensure that the record fully and truly discloses what occurred in the agency below. Rule 2:5-5(a).

2. Mr. Lizura's certification indicates that the entirety of the contents of the paper and electronic case files dedicated to the Panasonic application are attached to his certification. Mr. Lestuk's certification indicates that as underwriting officer for the Panasonic application, he saved in the electronic case file all information that he used to prepare the memorandum that was presented to the Board.

3. The Board finds that the paper and electronic case files (hereinafter, "Case File") attached to Mr. Lizura's certification contain all the documents and factual materials on which it relied when approving the Panasonic Hub grant.

4. The Authority Board finds that the Authority should put into the record the Case File attached to Mr. Lizura's certification. It should be noted that although it is not required by law, in order to expedite the appeal and consistent with the public policy of transparency, documents in the Case File were not redacted or withheld based on the deliberative process privilege.

5. Because the Case File attached to the Lizura certification contains all the documents and factual materials on which it relied when approving the Panasonic Hub grant, the Authority finds that these documents will enable the Appellate Division to evaluate whether there is sufficient credible evidence to substantiate the Authority's decision to approve the Hub grant to Panasonic.

6. Because the Case File attached to the Lizura certification contains all the documents and factual materials on which the Authority relied when approving the Panasonic Hub grant, there is no need to include any other documents related to this approval. The request to include the documents that were produced by the EDA pursuant to Hartz's OPRA request dated March 7, 2011 therefore is denied.

7. Because the Case File attached to the Lizura certification contains all the documents and factual materials on which the Authority relied when approving the Panasonic Hub grant, there is no need to include any other documents related to this approval, including any documents that the Authority might produce in the future in response to Hartz's OPRA request to receive documents that describe companies other than Panasonic that have considered applying for the Hub grant. The documents relating to these other companies were not before the Board at the time of the approval of either the Panasonic Hub grant or the promulgation of the Hub regulations. The request to include these documents relating to other companies that might be produced in the future therefore is denied.

8. In their appeal, Hartz and Secaucus assert that the Authority's policy of including retained jobs that are at risk of leaving the State in the net benefits test is ultra vires of the Hub Act, and that the June 8, 2010 board memo constituted impermissible rule-making. The Authority denies these allegations because the policy statement was consistent with the

Hub regulations and both are consistent with the legislative intent of the Hub Act. Most importantly, these issues on appeal are issues of law. Nevertheless, Hartz argues that the record must include all documents, regardless of their source, that the Authority reviewed before it promulgated its regulations and its subsequent policy statement.

In a challenge to agency rulemaking, the record consists of the rule proposal, all comments received in response to the proposal, the agency's responses thereto, the regulation adopted and any studies or data relied upon by the agency in promulgating the regulation. The record does not include any and all documents that the agency reviewed before promulgating its regulations. This is especially true here where the issues on appeal are issues of law, not fact and the only relevant question before the court with respect to this matter is one of statutory construction. Whether a policy is ultra vires is a determination of whether the policy is consistent with the legislative policy contained in the enabling legislation. Dept. of Labor v. Titan Constr. Co., 102 N.J. 1, 10-11 (1985). Whether the regulations and policy were properly promulgated is also a question of law. For the foregoing reasons, the request to include the files of Authority personnel involved in the Authority's regulation and policy relating to retained jobs at risk of being lost to another state is denied.

The Authority notes Hartz's accusation that the EDA's intent in adopting the regulations was to benefit Panasonic and strenuously denies this accusation. The measure of a regulation's validity is not the motive of an agency but whether the regulations are consistent with the legislative policy in the enabling legislation. Titan Construction, 102 N.J. at 10-11. Therefore documents relating to the Authority's development of the policy are irrelevant to the question of law on appeal.

The Authority does not consider the input that the Authority received from outside parties to be relevant to the legal question on appeal. In an effort to expedite the appeal, however, the Authority finds that the Authority should put into the record documents that it received from third parties related to the retained jobs at risk of leaving the State policy, from the period September 2009 to June, 2010.

9. The request to settle the record includes a NJ Biz article dated April 20, 2011. Because the article was not before the Authority when it approved the Panasonic Hub grant or the regulations, the request to include this document is denied.

Mr. McNamara stated that he agreed with the Chair's summary and felt the Board had spent a good deal of time discussing the issue. He also stated that he believes the Board is acting in the public interest and that the Board is acting in a transparent manner.

Mr. Staub and Ms. Perry also agreed that it was a good summation.

Mr. Carden noted that the summary fairly and accurately depicts the Board's discussion.

The next item was a request to approve the resolution in response to the Motion to Settle the Record filed by Hartz Mountain Industries and the Township of Secaucus, NJ as summarized by Chairman Koeppel as Final Agency Action.

**MOTION TO APPROVE: Mr. McNamara SECOND: Mr. Latoof AYES: 12
RESOLUTION ATTACHED AND MARKED EXHIBIT:2**

Chairman Koeppel alerted Ms. Crifo of the Governor's Authorities Unit that the Board would be seeking expedited approval of the minutes.

PUBLIC COMMENT

Alan Magrini, SVP, Land Use and Development, Hartz Mountain Industries, Inc., addressed the Board. He noted that there was a pending action before Judge Feinberg regarding other documents that were requested in the OPRA request. He stated that he believed that this decision should wait for the settlement of the OPRA request.

He further stated that he had been invited to participate in the process in the past and was surprised that the Authority has truncated the process by not allowing participation today.

Chairman Koeppe responded that he knew that Mr. Magrini was aware that oral arguments and reply briefs were at the discretion of the Authority.

Mr. Magrini continued that he felt that to speak after the members had voted was meaningless and not part of an open and transparent process. He contended that Hartz had revealed a \$70 million mistake in the net benefit at the February meeting, but was proven wrong, it was really a \$120 million mistake. He noted a Board memo from January 11, 2011 which was subsequently modified to take out the sentence regarding new jobs, after approval by the Board. He contended that the modified memo raised concerns. He questioned who has the authority to change the memo. He also requested a chain of emails between staff and applicants concerning the Panasonic application.

Mr. Magrini further questioned the economic model created by a consultant that was implemented in 2009, but in June 2010, the same model now equates at risk jobs with new jobs, which benefits Panasonic and other companies. Mr. Magrini questioned where this policy came from.

He also questioned the basic approval of the application, stating that the size of the building had been 410,000 sq ft in previous information, but Panasonic certified it as being 340,000 sf. Mr. Magrini questioned if the Board had been aware of this change. He also noted that Panasonic has announced a 17,000 job reduction and questioned if this impacts the project with a smaller building equaling fewer jobs.

He noted that the additional companies contemplating using the HUB tax credit intrastate must also use at risk jobs to be eligible. He commented that if Goya also leaves Secaucus for Jersey City using the HUB program, there will be a 2 million sq ft vacancy in Secaucus.

Mr. Magrini concluded by requesting that the Authority reconsider and hold off on its decision until the OPRA action before the court is concluded.

Bernadette Condon, attorney for the Township of Secaucus stated that the Township joins with Hartz Mountain on each and every count in the appeal. She also asked the board to hold its decision to settle the record until after the court date on Monday.

There being no further business, on a motion by Mr. McNamara, and seconded by Mr. Latoof, the meeting was adjourned at 5:45pm.

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.



Maureen Hassett, Assistant Secretary