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August 13, 2007

Ms. Judy Cherry
Director, Delaware Economic Development Office
99 Kings Highway
Dover, DE 19901

Re: DEDA Brownfields Grant Application

Dear Ms. Cherry:

For many years, the Delaware Economic Development Office (DEDO) and the Department of Natural Resources and Environmental Control (DNREC) have worked cooperatively together to promote brownfields redevelopment in the State of Delaware. DEDO staff have a history of being accessible and professional when contacted by the public regarding brownfields issues and DEDO's continuous, active participation on the DNREC Brownfields Advisory Committee is but one example of good government coordination.

The Brownfields Advisory Committee (BAC) meets regularly to discuss ways to improve the Delaware brownfields program. Common to brownfields programs across the country, the issue of accessibility to funding for site investigations, cleanups and redevelopment is always timely. The Delaware Economic Development Authority (DEDA, a independent entity chaired by the Director of DEDO) is authorized to disburse money from the Delaware Strategic Fund (Fund) for brownfields redevelopment. As discussed at a recent BAC meeting, there may be an opportunity to improve access to this funding in order to promote greater utilization of the funds and, ultimately, enhance the effectiveness and visibility of the State brownfields program. On behalf of the BAC, we would like to present to you our thoughts for your consideration.

As you have correctly pointed out, disbursement of money from the Fund is constrained by the state statute creating the Fund (29 Del. C. Subch. I-B) and the regulations adopted by the Council on Development Finance (Council) governing the disbursement of the funds. Under the statute and regulations, applicants for the funding must be evaluated by DEDO and the Council and meet certain criteria.

Eligibility Criteria under the Statute and the Regulations

Specifically, with regard to funding brownfield environmental assessment and remediation, the statute requires that the funds be used only at DNREC certified brownfield sites with the amount and type of assistance based upon the following criteria:

(1) Consistency with state economic development strategies;

(2) Number of jobs created or retained;

(3) Competitiveness of Delaware versus other locations under consideration as measured by tax comparison and relative site location factors;

(4) Quality of jobs using measures such as the average wage and benefits of the jobs to be created or retained as compared to labor force characteristics of the county and community in which the project will be located;

(5) Comparative overall economic impact of the project at the state, county and local levels as measured by job creation and retention, private investment leverage and revenue generation;

(6) Feasibility of the project as determined by the applicant's business plan, business history and collateral or other financial resources available to adequately secure assistance; and

(7) Any environmental consideration related to siting decisions, manufacturing processes or byproducts.

29 Del. C. § 5029(d)(1)-(7).

The regulations further set forth eligibility standards and project approval standards by stating:

"In determining whether the Project may assist in creating or retaining employment in the State, the Applicant shall demonstrate to the Authority [DEDA] that the Applicant, operator or principal user thereof has the capability to operate and maintain such Project efficiently and that the Applicant has not been convicted of a major labor law violation or of a violation involving moral turpitude by any agency or court of the federal government or agency or court of any state in the 2-year period immediately prior to the approval of the Applicant's Application....

An Applicant shall, if requested by the Authority or required in the Application, submit such information as is requested or required for each proposed operator or principal user of the Eligible Project. The Authority shall apply the same standards with respect to the operators and principal users of the Eligible Project as are applied to the Applicants, unless the Applicant establishes good reason to make the findings and determinations with respect to the Applicant alone."

Memo to the Council on Development Finance, Re: Brownfield Fund Criteria for Awards, July 13, 2006, Sections 19.3.1.1 and 19.3.1.2.

Clearly, DEDO is required to inquire into an applicant's type of proposed business, number of potential employees, types of proposed jobs, the applicant's business plan, business history, collateral or other investment in the proposed project, and into whether or not the applicant has been convicted of a major labor law violation or violation involving moral turpitude by any state or federal court or agency within the 2-year period prior to approval of the application. Also, DEDO is required to inquire into the identity of any principal user or operator of the proposed business and subject such to the same standards of review of the applicant absent a show of good reason why the applicant alone should be considered.

These review requirements are certainly necessary and important in reviewing an application for funds from the Fund. However, the translation of these requirements into the current application for funding (the Delaware Economic Development Authority, Delaware Strategic Fund, Brownfields Grant Application, "Application"), is not directly correlative and, in some cases, may be seen by potential applicants as unduly burdensome or unnecessarily intrusive.

Delaware Economic Development Authority, Delaware Strategic Fund, Brownfields Grant Application

The Application requires the listing of anyone having partial ownership in the entity submitting the Application. For instance, if the applicant is a limited liability company, each person or other entity having an ownership interest in the Application would have to be listed on the Application along with the person's/entity's social security or tax identification number, percent ownership and address. If the project site is to be occupied or used by an entity other than the applicant, they, too, would need to be listed. Then, each person/entity listed would have to answer a number of questions. Those questions include:

1. Have you ever been the subject of or party to, any formal or informal inspection, inquiry, investigation, ...by any federal or state agency...or private person seeking relief under ...labor law matters?

2. Have you ever been the subject of or a party to any formal or informal inspection, inquiry, investigation, ... by any federal or state agency...or private person seeking relief under state or federal environmental statutes or regulations?

3. Have you ever been the defendant in any civil litigation in which any type of fraud, misrepresentation, unfair or deceptive trade practices were alleged?

4. Have you ever been convicted of a crime?

Once answered, the applicant must agree that the Application becomes subject to the Delaware Freedom of Information Act and that DEDA has the right to disclose any of this information at any public hearing on the application by the Council.

Comparing the information required in the Application to the information required by the statute and regulations shows that there is some over-reaching in the Application. Certainly, DEDO has the authority to require more stringent review of the applicants than is required by the statute or regulations, but there is a point at which the inquiry is so extensive that potential applicants are discouraged and will not apply. We believe that point may have been reached with the Application in its current form.

For instance, all of the items mentioned above clearly go beyond the regulation's requirement to disclose any conviction of a major labor law violation or violation of moral turpitude within the 2 year period prior to the approval of the application. A conviction is certainly much different than a formal or informal inspection, inquiry, investigation – especially one by a private individual. The applicant may not even know if he has been the subject of an informal inquiry by an individual or agency. Also, being the defendant in a civil litigation matter, regardless of the allegations, does not equate with being convicted of a crime of moral turpitude. Item #4 is particularly intrusive in that one must disclose conviction of any crime at any time in the past (i.e., shoplifting or graffiti as a late teen, recreational drug use, ticket scalping at Dover Downs, disorderly conduct, public intoxication, loan or sale of a "bootleg" copy of a DVD, etc.). The potential embarrassment alone, knowing that any disclosure then becomes public information, is enough to cause thoughtful applicants pause. Additionally, there would certainly be security issues with respect to the disclosure of an individual's social security number at a public hearing or on a public document (which the Application becomes upon its execution).

Path Forward

We hope that you will reflect upon these issues and consider crafting a slightly revised Application. Please be assured that the members of the BAC stand ready to assist you in this endeavor should you desire our participation. DEDO's cooperation in the past on other issues of major importance to the State brownfields program has been greatly appreciated and has enhanced the program significantly. For instance, when DNREC funds could not be leveraged to cover the cost of demolition and asbestos removal (a major stumbling block for the program) DEDO stepped up to the plate and now offers to cover these expenses. As a result, brownfields projects which might not otherwise ever come to fruition have a fighting chance. Removal of perceived impediments in the DEDA brownfields grant application could be another significant step in clearing away roadblocks in our brownfields program.

Thank you very much for your time and attention to this matter. As always, it is a pleasure working with you and your office. Please feel free to contact me at any time.

Very truly yours,

Stephanie L. Hansen, Esq.

SLH:clm

cc: Mr. James Werner, DNREC