

APPELLATE DIVISION UPHOLDS IDA DENIAL OF APPLICATION AND CONFIRMS ATTORNEYS' FEES AWARD

Hodgson Russ Municipal Law Alert
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On May 9, New York's Appellate Division, Third Judicial Department, decided a major case relating to the review and evaluation of applications for proposed projects involving tax abatements by industrial development agencies (IDAs). *See In the Matter of 2-4 Kieffer Lane LLC v. County of Ulster and Ulster County Industrial Development Agency, et al.*, 2019 WL 2031231. In upholding the determination by the Ulster County Industrial Development Agency (UCIDA) to deny an application for tax abatements, the Court held that granting of benefits by an IDA is discretionary, **even if all criteria for eligibility are achieved**. Prior to providing any financial assistance (i.e. tax abatement) on a project, IDAs are required under the General Municipal Law to conduct a cost benefit analysis that evaluates certain criteria, including:

- The extent to which the project will create or retain permanent or private sector jobs;
- The estimated value of any tax exemptions to be provided;
- The amount of private sector investment generated or likely to be generated by the proposed project;
- The likelihood of accomplishing the proposed project in a timely fashion;
- The extent to which the proposed project will provide additional sources of revenue for municipalities and school districts; and
- Any other public benefits that might occur as a result of the project

Since the petitioner in this case did not meet the threshold levels of such criteria to the satisfaction of the UCIDA, the Court found that the application was properly denied by the UCIDA. Further, the Court held that even if the petitioner had met the eligibility criteria for sales and use tax exemptions, the relevant statute under the General Municipal Law does not mandate that an IDA confer such benefit, thereby making an approval of tax benefits a discretionary act on the part of an IDA.

Also of particular note was the Court upholding the trial court's award of attorneys' fees and expenses to the UCIDA. The Court found that the indemnification provision provided in the application was broad enough to include intra-party

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claims, particularly given that the provision required indemnification where the application is denied.

Takeaways: The Third Department upheld traditional principles of agency deference in reviewing the denial, applying the long-standing “arbitrary and capricious” standard to the determination by the UCIDA. However, the Court additionally opined that IDA benefits are unique, given that the statute provides only that IDAs *may* confer benefits if eligibility criteria are met – rather than IDAs being required to do so. This is in accord with traditional principles of contract law, given that an IDA award requires an IDA to enter into contractual arrangements with an applicant to confer the benefits. In other words, requiring an IDA to award benefits would essentially force the IDA to enter into a contract. Additionally, the decision illustrates the importance for an IDA to maintain a solid administrative record and a written decision with respect to whether to provide tax benefits for a project, addressing all applicable factors being key to defending any such decision. Finally, indemnification agreements in IDA applications should be evaluated to ensure they are broad enough to encompass intra-party claims. This could be accomplished by including a provision for indemnification in the event of a denial, and, better yet, by specifically including language listing “intra-party claims.”

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