



# Greene County Industrial Development Agency Management Practices

## Report of Examination

Period Covered:

January 1, 2011 — September 4, 2012

2013M-95



Thomas P. DiNapoli

# Table of Contents

	Page
<b>AUTHORITY LETTER</b>	2
<b>EXECUTIVE SUMMARY</b>	3
<b>INTRODUCTION</b>	5
Background	5
Objective	5
Scope and Methodology	6
Comments of GCIDA Officials and Corrective Action	6
<b>PROHIBITED INTEREST IN CONTRACTS</b>	7
Recommendation	9
<b>PROJECT APPROVAL AND EVALUATION</b>	10
Project Approval Process	11
Cost-Benefit Analysis	11
Recommendation	12
<b>PROJECT MONITORING</b>	13
Job Creation Performance	13
Recapture Provisions	14
Recommendations	15
<b>APPENDIX A</b> GCIDA — Uniform Tax Exemption Policy Factors	16
<b>APPENDIX B</b> Response From GCIDA Officials	17
<b>APPENDIX C</b> OSC Comments on the GCIDA’s Response	33
<b>APPENDIX D</b> Audit Methodology and Standards	38
<b>APPENDIX E</b> How to Obtain Additional Copies of the Report	41
<b>APPENDIX F</b> Local Regional Office Listing	42

# State of New York Office of the State Comptroller

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## **Division of Local Government and School Accountability**

March 2014

Dear Agency Officials:

A top priority of the Office of the State Comptroller is to help local government officials manage government resources efficiently and effectively and, by so doing, provide accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of local governments statewide, as well as compliance with relevant statutes and observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations and Board governance. Audits also can identify strategies to reduce costs and to strengthen controls intended to safeguard local government assets.

Following is a report of our audit of the Greene County Industrial Development Agency, entitled Management Practices. This audit was conducted pursuant to Article V, Section 1 of the State Constitution and the State Comptroller's authority as set forth in Article 3 of the General Municipal Law.

This audit's results and recommendations are resources for local government officials to use in effectively managing operations and in meeting the expectations of their constituents. If you have questions about this report, please feel free to contact the local regional office for your county, as listed at the end of this report.

Respectfully submitted,

*Office of the State Comptroller  
Division of Local Government  
and School Accountability*



## State of New York Office of the State Comptroller

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### EXECUTIVE SUMMARY

The Greene County Industrial Development Agency (GCIDA) was established in 1972 and is governed by a Board which comprises six members who are appointed by the Greene County Legislature. The Board is responsible for the general management and control of GCIDA's financial and operational affairs. The Executive Director, Project Manager and Office Manager manage GCIDA's day-to-day operations.

GCIDA generally assumes the title of the real and or/personal property owned by the businesses that are involved in GCIDA's approved projects, thereby allowing GCIDA to offer benefits to these businesses (e.g., sales and use tax exemptions, mortgage recording tax exemptions and real property tax abatements). GCIDA is not required to pay taxes or assessments on any property it acquires or that is under its jurisdiction, control or supervision. It provides a general payment in lieu of taxes (PILOT) agreement to approved projects governed by GCIDA's Uniform Tax Exemption Policy (UTEP) which outlines, among other things, the process of recapturing benefits if a company receiving a PILOT does not meet anticipated performance. GCIDA reported 10 active projects and processed 29 applications for assistance during our audit period.

#### **Scope and Objective**

The objective of our audit was to evaluate GCIDA management practices for the period January 1, 2011 through September 4, 2012. For selected projects we expanded the audit period back to March 2001 to include all activities from the projects' inception date. Our audit addressed the following related questions:

- Do any GCIDA officials have a prohibited interest in contracts with GCIDA?
- Did the GCIDA Board have formal criteria for selecting which firms or businesses received sponsorship and economic development incentives and were those criteria consistently applied when approving projects?
- Did the GCIDA Board design and implement an adequate system to monitor, evaluate and control benefits and incentives granted to firms or businesses?

#### **Audit Results**

GCIDA entered into contracts in which we believe former GCIDA Board members had prohibited conflicts of interest. Members of the Board served conflicting roles with businesses that received

benefits from GCIDA. This includes lease and PILOT agreements related to the construction and renovation of a ski facility; a lease and PILOT agreement relating to the construction of an aircraft component assembly facility; and the sale of land, a line-of-credit and the issuance of bonds with a bank. We acknowledge that in one instance the former Board member's interests were disclosed in writing, and in this same instance we were informed that the former Board member received legal advice indicating that his interests were not prohibited. We also were informed that in each of these instances the former Board members were either absent from the relevant GCIDA proceedings or abstained from voting and recused themselves during those proceedings. However, none of these circumstances cure a prohibited interest in a contract.

GCIDA had formal criteria for selecting which firms and businesses received sponsorship and economic development incentives. However, the Board cannot document that project incentives were consistently applied when approving projects because they did not prepare formal documented cost-benefit analyses.

Finally, GCIDA does have a process in place to monitor employment goals. However, it does not have a policy that would allow it to effectively hold businesses accountable when they do not comply with employment reporting requirements or meet specific employment goals. Four of 10 businesses receiving GCIDA benefits that we reviewed have not met their employment goals and one business did not comply with employment reporting requirements. In addition, six of 10 PILOT agreements reviewed did not have a recapture clause. As a result, taxpayers may not be receiving expected benefits and GCIDA does not have an effective way of recapturing benefits when businesses receiving assistance do not meet employment goals.

### **Comments of Local Officials**

The results of our audit and recommendations have been discussed with GCIDA officials and their comments, which appear in Appendix B, have been considered in preparing this report. GCIDA officials generally disagreed with our findings and recommendations. Appendix C includes our comments on the issues raised in the GCIDA's response letter.

# Introduction

## Background

An industrial development agency (IDA) is an independent public benefit corporation whose purpose is to promote, develop and assist industrial, manufacturing, warehousing, commercial, research and recreation facilities. The overall goal of IDAs is to advance the job opportunities, health, general prosperity and economic welfare for the people of the State. Typically, projects that receive IDA benefits involve the acquisition, construction, or major renovation of buildings or other structures and generate short-term and long-term employment in construction and operations-related jobs.

The Greene County Industrial Development Agency (GCIDA) was established in 1972 and is governed by a Board which comprises six members who are appointed by the Greene County Legislature. The Board is responsible for the general management and control of GCIDA's financial and operational affairs. The Executive Director, Project Manager and Office Manager manage GCIDA's day-to-day operations.

GCIDA generally assumes the title of the real and or/personal property owned by the businesses that are involved in GCIDA's approved projects, thereby allowing GCIDA to offer benefits to these businesses (e.g., sales and use tax exemptions, mortgage recording tax exemptions and real property tax abatements). GCIDA is not required to pay taxes or assessments on any property it acquires or that is under its jurisdiction, control or supervision. It provides a general payment in lieu of taxes (PILOT) agreement to approved projects governed by GCIDA's Uniform Tax Exemption Policy (UTEP) which outlines, among other things, the process of recapturing benefits if a company receiving a PILOT does not meet anticipated performance.

GCIDA focuses on developing "shovel ready" sites and the development/expansion of existing locations with the goal of attracting a diverse mix of business types and employment opportunities for local residents, and increasing local revenue. GCIDA reported 10 active projects and processed 29 applications for assistance during our audit period. GCIDA has provided incentives that have generated \$5.9 million of revenue for local governments in 2011 from businesses that have reported the employment of about 890 full-time and 650 part-time employees. Total tax exemptions in 2011 were about \$26.8 million and about \$525.6 million over the life of the 10 current PILOT agreements.

## Objective

The objective of our audit was to evaluate GCIDA management practices. Our audit addressed the following related questions:

- Do any GCIDA officials have a prohibited interest in contracts with GCIDA?
- Did the GCIDA Board have formal criteria for selecting which firms or businesses received sponsorship and economic development incentives and were those criteria consistently applied when approving projects?
- Did the GCIDA Board design and implement an adequate system to monitor, evaluate and control benefits and incentives granted to firms or businesses?

## Scope and Methodology

We examined GCIDA's records and project files for the period January 1, 2011 through September 4, 2012. For selected projects we expanded the audit period back to March 2001 to include all activities from the projects' inception date.

We conducted our audit in accordance with generally accepted government auditing standards (GAGAS). More information on such standards and the methodology used in performing this audit are included in Appendix D of this report.

## Comments of GCIDA Officials and Corrective Action

The results of our audit and recommendations have been discussed with GCIDA officials and their comments, which appear in Appendix B, have been considered in preparing this report. GCIDA officials generally disagreed with our findings and recommendations. Appendix C includes our comments on the issues raised in the GCIDA's response letter.

The Board has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and forwarded to our office within 90 days, pursuant to Section 35 of the General Municipal Law. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We encourage the Board to make this plan available for public review in the Secretary's office.



## Prohibited Interest in Contracts

General Municipal Law (GML) limits the ability of municipal officers and employees to enter into contracts in which both their personal financial interests and their public powers and duties conflict. Unless a statutory exception applies, GML prohibits municipal officers and employees from having an interest in a contract with the municipality for which they serve when they also have the power or duty – either individually or as a board member – to negotiate, prepare, authorize or approve the contract; to authorize or approve payment under the contract; to audit bills or claims under the contract or to appoint an officer or employee with any of those powers or duties.

Municipal officers and employees have an interest in a contract when they receive a direct or indirect monetary or material benefit as a result of a contract. Municipal officers and employees are also deemed to have an interest in the contracts of their spouse, minor children and dependents (except employment contracts with the municipality); a firm, partnership or association of which they are a member or employee; and a corporation of which they are an officer, director or employee, or directly or indirectly own or control any stock. As a rule, interests in actual or proposed contracts on the part of a municipal officer or employee, or his or her spouse, must be publicly disclosed in writing to the municipal officer's or employee's immediate supervisor and to the governing board of the municipality. This disclosure does not cure a prohibited interest, nor does an abstention or recusal.

We found that GCIDA entered into contracts that we believe were prohibited because there were prohibited interests between the businesses and GCIDA Board members. Some Board members served in conflicting roles with businesses that received benefits from GCIDA. This included PILOT agreements with a ski facility and an aircraft component assembly facility, and a sale of land, a line-of-credit and the issuance of bonds involving a bank. While the Board members disclosed or abstained from voting during the process, these actions do not cure a prohibited conflict of interest. For example:

- An application was submitted to GCIDA in connection with the construction and renovation of a ski facility. The application was made by a Corporation and indicated that the Corporation's wholly-owned subsidiary would be the occupant of the ski facility. A Board member of GCIDA at the time<sup>1</sup> was also the Chief Executive Officer of the wholly-

<sup>1</sup> This individual is no longer a member of the GCIDA Board.



owned subsidiary.<sup>2</sup> According to the application, the Board member also served as the “applicant’s representative,” and signed the application on behalf of the Corporation. GCIDA subsequently entered into a lease and PILOT agreement with the Corporation for the construction and renovation of the ski facility. Although the Board member may not have had an interest in the express contracts between GCIDA and the Corporation, we believe there was an implied contract between GCIDA and the wholly-owned subsidiary and under these particular circumstances, that the Board member had a prohibited interest in that contract.

We acknowledge in this instance that we were advised that the former Board member offered to resign from the GCIDA Board should it be necessary, and were also advised that the former Board member received legal guidance indicating that his interests in the contracts would not be prohibited by Article 18 of the GML. The former Board member’s relationship with the wholly-owned subsidiary was also disclosed in the Corporation’s application to the GCIDA. These circumstances, however, do not cure a prohibited interest in a contract.

- An application was submitted to GCIDA in connection with construction of a new 37,000 square foot aircraft component assembly facility, which was made by a Limited Liability Company (LLC). According to the application, the LLC would enter into a “build-to-suit” agreement with a Corporation which would be the occupant of the facility. The application indicated that the Corporation would use the facility primarily for assembly of aircraft components. Based on documents provided, the GCIDA subsequently entered into a lease and PILOT agreement with the LLC for, among other things, the construction of the facility to be used primarily for the assembly of aircraft components.

A GCIDA Board member<sup>3</sup> was also president of the Corporation when the agreements were entered into between GCIDA and the LLC. The Board member indicated that he was a 10 percent stockholder in the Corporation. Because the LLC applied to the GCIDA for assistance for the specific purpose of constructing a facility to be occupied by the Corporation, we believe that the LLC and the Corporation had an overlap, if not identity, of interest in the application and resulting lease and PILOT agreement. In our view, this overlap or identity of

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<sup>2</sup> The individual received paychecks from the Corporation which charged the amounts back to the wholly-owned subsidiary.

<sup>3</sup> This individual is no longer a member of the GCIDA Board.

interest is sufficient to cause the Corporation to be regarded as a party to these contracts. Therefore, we believe that under these circumstances, the Board member had a prohibited interest in the contract.

- Two GCIDA Board members<sup>4</sup> also served on the Board of Directors of a bank during the time that the bank extended a line of credit to GCIDA, purchased property from GCIDA and participated in the purchase of bonds sold by GCIDA. As GCIDA Board members, these individuals would also have had one or more of the powers and duties that we believe were prohibited interests in these agreements.

GCIDA officers are accountable to the public, especially when the expenditure of taxpayer money is involved. When GCIDA officers, in their private capacities, conduct business with GCIDA, the public may question the appropriateness of the transactions. There is also a risk that such transactions may create an actual conflict of interest.

## **Recommendation**

1. The Board should establish and implement controls to help ensure that GCIDA does not enter into contracts in which an officer or employee has a prohibited interest.

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<sup>4</sup> These individuals are no longer members of the GCIDA Board.

## Project Approval and Evaluation

GML provides that certain types of projects are eligible for IDA assistance including industrial projects (i.e., manufacturing, assembly processing, and product research and development) and non-industrial (i.e., warehouse, wholesale/distribution, qualified retail, office, hotel/motel and recreational businesses). Given the breadth of these possible activities, each IDA typically establishes its own individual project criteria based on the economic needs and goals of the community that it serves.

GML requires each IDA to establish a Uniform Tax Exemption Policy (UTEP) which provides the Board with guidelines to make project approval or denial decisions. Because business owners are eligible for real property tax exemptions and typically enter into PILOT agreements, the IDA's UTEP should list the specific reasons why a project would be eligible for exemptions and the standard PILOT agreement must include a procedure for any deviation from the UTEP.

GCIDA readopted its UTEP in 1998 with a general purpose of granting applicants with real property tax exemptions, and exemptions from sales, use and mortgage recording taxes. In addition, some projects may offset the loss of real property tax revenue in the form of a PILOT. GCIDA established a listing of eligible projects generally consisting of industrial and non-industrial. The UTEP lists factors that GCIDA may consider when determining amounts to be paid under PILOT agreements.<sup>5</sup> However, deviations are allowed and set procedures have been established to follow if a project deviates from the listing of eligible industries or payment schedules in the UTEP.

We reviewed 20 applications, comprising the GCIDA's 10 active PILOT projects and a sample of 10 applications for sales tax exemptions, to determine if GCIDA followed the established criteria when evaluating which firms or businesses received sponsorship and economic development incentives and if those criteria were consistently applied.

The UTEP adopted by the Board was consistent with and met the provisions set forth by GML. In addition, formal criteria for selecting which firms or businesses received sponsorship and economic development incentives were included in the policy. However, determining whether project incentives were consistently applied during the project approval process was difficult because GCIDA does not prepare a formal, documented cost-benefit analysis.

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<sup>5</sup> See Appendix A

## **Project Approval Process**

GCIDA requires an application for each project which provides for detailed project descriptions, and estimates of performance and costs so that interested parties are able to determine the project's scope and ascertain the cost and benefits that would accrue when the project is completed. GCIDA has established a UTEP and uses a standard application form which requires a narrative description of the project, project owners, type of entity, project cost and requested GCIDA benefits. GCIDA also has a separate application form for sales tax exemptions on items used to rebuild businesses affected by Hurricane Irene.

According to GCIDA officials, when an application is received, it is reviewed by the Executive Director for completeness and forwarded to GCIDA's legal counsel for further review. When the legal review has been completed, the application is presented to the Board for initiation of the approval process. This process involves multiple actions including, but not limited to, environmental reviews, preliminary resolutions and agreements, public hearings and approvals from the affected local jurisdictions.

Generally, GCIDA has provided benefits to major corporate entities in which possible benefits were very transparent. These businesses typically received incentives to either attract them to the area or keep them from closing. In some instances, discussions of project approvals involved State and local officials. The primary benefits are granted to those buying "shovel ready" land in one of the GCIDA-owned industrial parks, or established businesses looking for financial assistance to maintain employment levels.

We found that GCIDA consistently followed its procedures during the approval process. There was evidence of multiple legal procedures with the documents included, and resolutions and public hearings were conducted. In addition, as part of the approval process, GCIDA preceded with an inducement resolution stating, "The Agency has given due consideration to the application and the financial assistance provided by the Agency will be inducement for the company to undertake the project in Greene County;" in essence, making a determination that the project would not have been initiated without these incentives.

## **Cost-Benefit Analysis**

Good business practices dictate that officials prepare a cost-benefit analysis for each proposed GCIDA project based on the information provided in the application. It is important that the cost-benefit analysis include all the costs associated with the project and all benefits to the community that are expected to be derived from the project. This information helps the Board decide whether to approve or deny the project. The cost-benefit analysis has two components including the

amount of increase in revenue to the local jurisdictions and the cost of jobs created in the County. Once the cost-benefit analysis has been completed, GCIDA officials must compare it to the business owner's submitted application and GCIDA's UTEP criteria in order to make appropriate project sponsorship decisions.

We reviewed the applications and supporting documentation for the 10 active projects to determine if a cost-benefit analysis was performed during the approval process. GCIDA officials could not provide us a formal documented cost-analysis for any of the 10 projects. As such, there is no assurance that the total benefits granted to the businesses provided the most economic benefit for the County and affected local jurisdictions. In addition, GCIDA officials have no way of determining whether other entities could have provided a more beneficial return on investment to the local governments, such as more jobs produced with fewer incentives.

## **Recommendation**

2. The Board should perform a documented cost-benefit analysis for each proposed project.

## Project Monitoring

The Board is responsible for monitoring and evaluating the performance of businesses receiving financial assistance and determining whether they are meeting the goals established in their project applications. Without effective monitoring, GCIDA will not be able to identify and address business performance shortfalls and the community may not receive expected benefits from investments. In addition, GCIDA should have specific provisions included in all agreements as to the expectations of the businesses (i.e., reporting requirements) and also procedures in place to hold those businesses accountable if expectations are not met (i.e., a recapture clause).

GCIDA does have a process in place to monitor employment goals. However, it does not have a policy that would allow it to effectively hold businesses accountable when they do not comply with employment reporting requirements or meet specific employment goals. Four of 10 businesses receiving GCIDA benefits that we reviewed have not met their employment goals and one business did not comply with employment reporting requirements. In addition, six of 10 PILOT agreements did not have a recapture clause. As a result, taxpayers may not be receiving expected benefits and GCIDA does not have an effective way of recapturing benefits when businesses receiving assistance do not meet employment goals.

### Job Creation Performance

The overall goal of IDAs is to advance job creation opportunities. Typically, projects that receive IDA benefits involve the acquisition, construction, or major renovation of buildings or other structures and generate short-term and long-term employment in construction and operations-related jobs. GCIDA has the responsibility to establish a process to monitor and enforce agreed-upon job expectations. The process should include procedures to determine whether reporting requirements are met, employment data is reliable and that all businesses demonstrate that they have met employment goals.

Annually, in preparation of GCIDA's independent audit, a letter is sent to each company requesting current employment numbers. These forms are supposed to be certified by a company executive attesting to the reliability of the information reported.

GCIDA does not have an effective process in place to monitor and enforce job creation expectations. We examined the annual reporting forms for 10 businesses and found that one company had not returned its form for the fiscal year ending December 31, 2011, as required. Instead, GCIDA relied on the company's verbal assertions as the basis for the data reported to the New York State Authorities Budget

Office. In addition, we found that four of 10 businesses reported that they had not met their employment goals as of December 31, 2011, as shown in Table 1:

<b>Table 1: Job Creation Performance (Full-Time Jobs)</b>				
<b>Business</b>	<b>Proposed Jobs</b>	<b>Actual Jobs</b>	<b>Difference</b>	<b>Cost of Jobs Not Acquired<sup>a</sup></b>
1	105	52	(53)	\$83,100
2	357	285	(72)	\$21,900
3 <sup>b</sup>	65	49	(16)	\$0
4	240	139	(101)	\$31,000
<b>Total Difference</b>			<b>(242)</b>	<b>\$136,000</b>
<sup>a</sup> This is the difference between the estimated property tax and amount of PILOT payments for 2011.				
<sup>b</sup> This company remains on the tax rolls and pays the full amount for the first 10 years of its contract.				

These four companies will receive significant incentives over the life of their contracts in part because of their plan to create jobs in Greene County. They received a net reduction in property taxes of \$136,000 for jobs that were not created as of December 31, 2011. For example:

- Business #1 is a warehouse and distribution center for a grocery chain. It is located in one of the GCIDA's business parks and has a 15-year PILOT that started in 2003.
- Business #4 is a manufacturing plant for a major retailer. It is also located in one of the GCIDA's business parks and has a 20-year PILOT that started in 2005.

Per GCIDA, these firms that have not met projected job creation numbers because they are all victims of the national economic downturn that has been ongoing since 2007 or earlier. While specific impacts of the national economy on each business model may differ, the recession followed by a slow recovery has meant that these firms have not been able to meet expansion goals that were reasonable prior to the unforeseen economic collapse.

## Recapture Provisions

IDAs may place provisions in project contracts that allow them to recapture, or recover, economic benefits if companies do not meet their project goals. Penalties for non-performance, such as a shortfall in job creation or other promised benefits, could take various forms. For example, a company could be prohibited from reapplying for an incentive program or a recapture provision could require the company to return all or part of the tax exemptions received. A recapture provision may be based on the number of new jobs created, a specific length of time a company must stay at a subsidized location or other factors determined by the IDA.

We found that six of the 10 GCIDA PILOT agreements that we reviewed did not have a recapture clause. These include the four



businesses that had not met the agreed-upon job creation levels. The attorney, who was present during much of the negotiations with businesses, stated that these stipulations are not required practices. Therefore, the stipulations are usually excluded in order for the GCIDA to be competitive with other areas in the State that do not include them.

Because GCIDA does not have a policy and procedures in place to enforce lack of performance, businesses were able to receive a level of benefits that might not otherwise provide the best economic benefit to the County and local jurisdictions.

## **Recommendations**

3. The Board should ensure that all PILOT agreements contain a recapture clause that would allow GCIDA to recover the financial incentives if businesses do not produce the intended benefits and should invoke the recapture provision, as appropriate, if a recipient does not meet performance expectations.
4. The Board should consult with its legal counsel and determine whether some of the benefits that were provided to businesses that have not met their employment goals may be recouped.

## **APPENDIX A**

### **GCIDA — UNIFORM TAX EXEMPTION POLICY FACTORS**

1. The nature of the proposed project (i.e., manufacturing, commercial, civic, etc.)
2. The nature of the property before the project begins (i.e., vacant land, vacant building, etc.)
3. The economic condition of the area at the time of the application and at the economic multiplying effect the project will have on the area.
4. The extent to which the project will create or retain permanent, private sector jobs, the number of jobs to be created and retained, and/or the salary ranges of such jobs.
5. The estimated value of tax exemptions to be provided.
6. The economic impact of the project and the proposed tax exemptions on affected tax jurisdictions.
7. The impact of the proposed project on existing and proposed businesses and economic development projects in the vicinity.
8. The amount of private sector investment generated or likely to be generated by the proposed project.
9. The likelihood of accomplishing the proposed project in a timely fashion.
10. The effect of the proposed project upon the environment and surrounding property.
11. The extent to which the proposed project will require the provision of additional services including, but not limited to, educational, transportation, emergency medical or police and fire services.
12. The extent to which the proposed project will provide additional sources of revenue for municipalities and school districts in which the project is located.
13. The extent to which the proposed project will provide a benefit (economic or otherwise) not otherwise available within the municipality in which the project is located.
14. The length and duration of the project.

## **APPENDIX B**

### **RESPONSE FROM GCIDA OFFICIALS**

The GCIDA officials' response to this audit can be found on the following pages.



September 12, 2013

Office of the State Comptroller  
Division of Local Government and School Accountability  
33 Airport Center Drive, Suite 103  
New Windsor, NY 12553  
Attention: [REDACTED]

Dear [REDACTED],

This letter is the response of the Greene County Industrial Development Agency (GCIDA) to the DRAFT Management Practices Report of Examination January 1, 2011 to September 4, 2012 (August 13, 2013) proposed to be issued by the Office of the State Comptroller (OSC) (the "Draft Report"). First, while the Draft Report identified recommendations, it clearly validates that the GCIDA is operating consistent with the purposes for which it was organized. The OSC spent in excess of six months reviewing all aspects of the GCIDA's operations, but failed to identify and commend the many items that were found to be satisfactory and in compliance with sound accounting and management principals. The Draft Report fails to appropriately commend the obvious successes of the GCIDA in driving economic development where there had been none. Instead the Draft Report focuses only on the alleged deficiencies and fails to present a balance view in which the GCIDA has operated in full and complete compliance with applicable requirements of the law. We believe that the Draft Report is materially in error since the OSC is critical of limited aspects of the operations of the GCIDA while the OSC has failed to promulgate rules and regulations in this area.

See  
Note 1  
Page 33

The Draft Report commented on three areas of operation of the GCIDA including: (i) Project Approval and Evaluation, (ii) Project Monitoring and (iii) Prohibited Interest in Contracts. This letter is the response of the GCIDA to OSC's findings and opinion on these subjects that are contained in the Draft Report. The GCIDA believes that many of the conclusions in Draft Report are erroneous factually and legally.

See  
Note 2  
Page 33

1. General Comments:

The Draft Report does not recognize that during the initial audit period of January 1, 2011 to September 4, 2012, the GCIDA underwent a significant restructuring of its Board of Directors and Executive Staff. The replacement of the Executive Director and six of seven board members presented a situation where the current administration was not

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in place during the time when the bulk of the issues identified in the Draft Report occurred such that it is difficult to address certain factual allegations.

Although the GCIDA staff repeatedly directed OSC audit staff to direct specific questions on such prior period to the GCIDA's attorney who was present during the period in question, the OSC failed to contact our attorney to seek answers. During the initial field audit, OSC staff specifically noted that a number of administrative and financial issues had been addressed by the new administration and were no longer a concern to the OSC, yet the change in administration was not noted by the OSC in the Draft Report. The GCIDA is very disappointed that the OSC failed to seek factual answers from knowledgeable individuals after repeated referrals and requests.

See  
Note 3  
Page 33

The Draft Report completely ignores and fails to recognize the competitive challenges faced by counties in upstate New York that struggle to promote economic development that will slow or hopefully reverse the dwindling tax base and lack of employment opportunities.

## 2. Project Approvals and Evaluation:

In the Draft Report, the OSC acknowledges that the GCIDA has the proper policies and procedures in place as required by law and consistently follows these policies. In regards to project approvals and evaluation, the OSC contends that the lack of a formal cost benefit analysis as a component of the GCIDA's due diligence fails to recognize the loss of opportunity or the increased costs for the resultant benefits. The OSC states "GCIDA officials have no way of determining whether other entities could have provided a more beneficial return on investment."

This statement is fundamentally flawed as it assumes that at any given time the GCIDA has multiple "entities" to evaluate a development opportunity based on their respective benefits to the community and the resultant cost of these benefits. In the twenty years that our counsel has represented the GCIDA, there has never been a bidding war for a parcel. The facts are such that at no time in the GCIDA's history has it been in the position where it has had multiple entities concurrently considering locating in the County that would invoke the OSC's suggested opportunity to evaluate the cost-benefit relationship of one entity against another. The regrettable fact is that the GCIDA, as well as every other IDA in NYS, often goes extended periods of time, often years, with absolutely no project activity to evaluate. When leads have arisen for new development,

See  
Note 4  
Page 33



the GCIDA has always been in direct competition with surrounding counties or often other states for a single project.

See  
Note 5  
Page 33

The fact is if cost benefit analysis had been done it would not have been a matter of weighing one development opportunity against another, but rather a comparison of the proposed benefits verses no benefits at all. The Draft Report fails to recognize that the GCIDA's selection of which projects to support by providing benefits is also heavily influenced by community factors outside the control of the GCIDA. For example, in the area of the existing shovel ready business parks, the GCIDA cannot even consider the majority of opportunities that are presented due to limitations on public infrastructure. The GCIDA is fortunate if it can even respond to 1 out of 10 inquiries due to the inability to provide the necessary waste water capacity which directly limits the opportunity to consider additional projects and perhaps a better return to the community as suggested by the OSC. Other factors that impact the potential opportunities that could be evaluated include water supply, traffic, existing building inventory and others.

Under the new administration, the GCIDA has initiated a stronger effort to track, evaluate and communicate the benefits of the GCIDA's activities to the local communities. The GCIDA has initiated meetings with surrounding business owners to determine impacts of secondary spending and has started to collect information from tenants in the business parks on their direct spending in the community. To date, the GCIDA's findings have been:

- A recent analysis of the property tax benefits from the GCIDA's two initial business parks (GBTP/KCP) documented that had the land base stayed in a vacant state it would have generated total property tax revenue of approximately \$375,000 during the ten year period from 2002 to 2012. During the same period, the four primary tenants in these business parks paid actual taxes of \$6,252,122 which is a 1567% increase in tax revenues to the community. Without providing the PILOT and other benefits to recruit these businesses the benefit to the Town would not have been realized. The Draft Report fails to recognize this major fact and instead seeks to dwell on theoretical best management practices such as a cost benefit opportunity when the GCIDA realized that its ONLY option WAS "no economic growth" versus something to keep people in the community and combat the loss of tax base.
- Two primary businesses in the GCIDA's business parks have reported over \$1.4 million in direct spending in the community. Total estimated spending from all business park tenants represents over \$2 million in new economic activity in the

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3



community. This does not include secondary economic activity associated with employees in the business parks who make purchases at local retailers, use local services and provide significant activity to local restaurants and other food establishments.

- While smaller local businesses are at best hesitant to report sales figures, a wide number have indicated that they see significant economic activity from the firms recruited by the GCIDA or their employees. Some businesses have reported that they increased their employment to address the additional activity from the business parks.

**Proposed Actions:** The current administration of the GCIDA has acknowledged the need for improvements in project evaluation and reporting and has taken significant steps in the past two years to increase transparency and improve documentation. Steps the GCIDA intends to implement include but may not be limited to the following:

- Project applications will be redesigned to clearly indicate that the information is preliminary and subject to change as the applicant moves through the GCIDA's review process. In several instances the OSC relied solely on information presented in the preliminary application even though the GCIDA clearly indicated that project information is subject to change as negotiations on company needs and GCIDA benefits occur. The OSC seems to place an unreasonable emphasis and reliance on the original application even though the GCIDA clearly indicated that these applications are completed early in the process and the information presented is subject to change as a project winds through the GCIDA's review and approval process.
- Concurrent with the redesign of the application documents, the GCIDA intends on implementing a practice by which each project that has been determined to be eligible for GCIDA benefits and which the GCIDA Board of Directors has decided to approve, will have a detailed Findings Statement documenting the many factors considered in support of GCIDA benefits. This will include a standard cost benefit calculation as well as more detailed yet concise information on the many factors and benefits taken into consideration. Again, the cost benefit analysis will have limited value as it will only allow a comparison of the costs and benefits under the proposed action versus a no action scenario. It will also document any changes between the initial application and the final basis for the GCIDA's approval of benefits.

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### 3. Project Monitoring:

It is the position of the GCIDA that while the creation of job opportunities is a clearly a priority goal, helping communities expand their tax base has become an equal priority. As noted previously, in addition to the +/- 525 new jobs that were created by tenants in the business parks, in the period from 2002-2012 the local taxing jurisdictions realized an increase of \$5,877,122 in tax revenues in excess of what the undeveloped condition would have provided. Each and every one of the GCIDA's PILOTS is 100% compliant with the terms of their PILOT and all revenues have been received by the taxing jurisdictions and payments have been made on time.

3.1 Job Reporting: The OSC noted that in a single incidence, the GCIDA relied on the verbal reporting of one company on their job numbers. In this instance, the delay in receipt of the employment numbers was solely related to the fact that the NYS Authorities Budget Office (ABO) had requested that the GCIDA combine two projects with a single company into a single project for reporting purposes. The delay was the result of the GCIDA needing additional direction from the ABO on how they wanted the consolidation reporting done which caused the GCIDA to be pushed up against their reporting deadline. Once clarification was received, the GCIDA relayed those instructions to the company and had to rely on verbal reporting in order to meet the pending reporting deadline. Again, out of numerous projects the IDA reports on this was a single incidence and was directly related to actions of another state "watch dog" agency.

3.2 Job Creation: The OSC cited that 4 out of 10 of the projects examined did not meet their job performance goals based on the 12/31/11 reporting date. The Draft Report failed to include a brief summary of the GCIDA's response to the job creation issues since it is directly related to the impact of the local, national and even global economy over the past 6 years. The GCIDA staff has met with each of the four cited businesses and offers the following detailed explanation. It is regrettable that while NYS has been losing industry and manufacturing jobs the impact of the on-going business cycle was dismissed by the OSC since it is reality that NYS remains an inhospitable place to do business.

See  
Note 6  
Page 33



#### Business 1: Food Distribution

Proposed Jobs (105) Actual 12/31/11 (52) Actual 7/1/13 (58)

This business was the lead and initial tenant in our business park initiative. This initiative came about as a result of the fact that no developers were doing any business in Greene County. The County lost out on many opportunities because the businesses located in Saratoga and/or Rensselaer County as a result of the strength of Senator Bruno's representation of such areas. At the time of recruitment of this business, the parent corporation had aggressive goals for expansion of their retail facilities to be supported by the distribution center in question. When the economy was booming, adjustments in the parent company's strategy lead them to make several larger acquisitions of other grocery chains while still fully intending to expand the brand that would be serviced from the warehouse facility in the County. When the economy took a sudden and swift down turn in 2007, several of these acquisitions performed poorly having a negative impact on the company's balance sheet and cash flow. Combined with the near paralysis of any new expansions in NYS during 2007-2012, the company was unable to meet its retail expansion goals subsequently diminishing the growth of the supporting distribution system. Additionally, the company reports that it has also weathered shorter term employment increases and decreases directly related to the state of the economy and/or seasonally. As the economy weakened, consumer spending has fallen which is a direct adverse impact on the retail sector and distribution.

In addition, due to a simple administrative oversight at the time the company's application was completed in 2001, the state will not recognize that a significant number of jobs were created by this business. In this case, the company has an exclusive contract with a trucking firm which provides all the trucks, trailers, drivers and support staff. These positions are located within the community, directly across the road from the company in question and the positions are 100% dedicated to that business. This represents 34 drivers, 2 mechanics and 2 administrative positions for a total of 38 additional jobs. In addition, this support firm purchased property and now contributes to the community's tax base. While these jobs would not have been created had the distribution center not been located in the community, the OSC will not accept them as a benefit to the community due to reliance on information on the initial application to the GCIDA. While the OSC has found a convenient excuse to disallow the counting of these jobs, it does not change the fact that everyday these employees report to work in

See  
Note 7  
Page 34

See  
Note 8  
Page 34



the community and they contribute to secondary economic benefits. When added to the “allowed” jobs, the employment associated with this business is 96 positions.

Based on a recent meeting with GCIDA staff, the company reported that the parent firm has been working on a restructuring plan and has liquidated several of the acquisitions which were negatively impacting the brands ability to move forward with expansion. The company is currently looking to add 6 new positions and expects employment to steadily increase as long as the economic recovery moves forward.

#### Business 2: Spirits Distribution

Proposed Jobs (357) Actual 12/31/11 (285) Actual 7/1/13 (317)

This business is a distribution center for a product that is very highly impacted by consumer discretionary spending. When economic conditions are good consumers spend more on this product and when the economy is tight, spending on this product(s) is significantly tightened. In a meeting with the company’s management team, the poor state of the economy was cited as the primary reason that employment goals were not met. It is important to note that this firm was recruited and located in the county in 2007-2008 at the beginning of the economic collapse.

#### Business 3: Light Manufacturing - Aerospace components

Proposed Jobs (65) Actual 12/31/11 (49) Actual 7/1/13 (57)

This business is a light manufacturer with its primary business being the fabrication of parts for the aerospace industry. The project cited by the OSC was an expansion of a company that has been one of the leading employers in the community for over 20 years. In this case, the inability of the firm to meet employment projections is primarily due to three reasons. First, the federal sequestration process and its impact on the military budget have significantly reduced orders for a key aircraft that the local company supplies constituent parts for. Second, the company has experienced a reduced work load due to military budget cuts which have been underway since the period when the company expansion occurred. Lastly, a primary reason for not meeting employment goals is due to scheduling delays with the new Boeing Dreamliner which has been well documented in the



national press. Design problems with this aircraft has resulted in the delay of full scale production of an aircraft that the local firm has contracts to supply certain constituent parts.

While this company expects that military orders will be stagnate at best, the issues with the Boeing model are close to being addressed and they expect to see a need for increased production soon. As business picks up, the company will continue its employment expansion.

#### Business 4: Light Manufacturing – Consumer Goods

Proposed Jobs (240) Actual 12/31/11 (139) Actual 7/1/13 (163)

This company is a manufacturer of a product that is highly impacted by consumer discretionary spending. The product they produce is not an essential item and its purchase is strongly subject to deferment by a consumer that is cautious with their spending under a bad economy. It is also important to consider that this is a product that has an extended useful life and is not frequently purchased by the average consumer. Unlike some items that a consumer essentials, this product while not a luxury is something that can be delayed until the consumer feels it is in a better financial position to make a purchase.

In addition, the company has reported to the GCIDA that another impact on their business has been the recent acquisition of another major brand by its primary competitor. The acquisition of this brand has allowed that competitor to offer new integrated product lines that are impacting the market share of the local company and the product it makes.

In recent meetings with the GCIDA the firm has indicated that production is slowly increasing as the economy improves and they have slowly been adding new positions.

#### 4. Recapture Provisions:

The OSC cites the GCIDA for not having recapture or “claw back” provisions in 6 of 10 IDA contracts. The OSC fails to recognize that these companies would not have located in the County if a mandatory claw back were imposed. These companies had several

See  
Note 9  
Page 34



competitive opportunities outside of NYS such that the GCIDA exercised its business and fiduciary judgment that it was better to have the business investment in the community rather than continuing with economic stagnation. Further, the OSC fails to acknowledge the fact is that claw backs are not something that is achievable when the competition from other IDAs in Upstate New York will not impose them as a condition precedent to a transaction. Therefore, we believe that the position of the OSC is erroneous since the competitive landscape has not allowed for the imposition of such a condition. Further the conflict with New York State incentive grants which do include recapture provisions makes this request impossible to enforce.

See  
Note 10  
Page 34

It is the position of the GCIDA that it is unrealistic for the OSC to expect the GCIDA to immediately harm our competitive position by requiring recapture provisions in all contracts when the same is not a requirement of our competitors. If the OSC is concerned about the impacts to communities in the absence of recapture provisions the OSC should use its authority to advance programmatic legislation through the NYS Legislature to mandate such requirements essentially creating a level playing field between all IDA's in New York State. Given that the reality is that New York often finds itself in competition with other states to recruit new industries, the state should be cautious so as to not put the entire state at a competitive disadvantage with our neighboring or even distant states. This argument is bolstered by the fact that the four companies that did agree to recapture provisions are long standing companies in the community who were seeking IDA assistance to expand and stay viable. The ones that refused consideration of recapture provisions were those that were recruited by the GCIDA under an infra and interstate competitive process where a strict requirement of recapture terms would have immediately placed Greene County out of the running for the new facility.

See  
Note 11  
Page 34

See  
Note 12  
Page 35

The OSC has inserted a statement that the GCIDA should consult with Counsel on the viability of legal proceedings to determine if some benefits can be recouped. This position is baseless since it will harm our competitive position in New York State. OSC is simply in error since it is aware that the GCIDA does not have the legal ability to retroactively and unilaterally amend these contracts to insert claw back of benefits. This is a useless effort since the entities clearly have the competitive issues as an affirmative defense to any proceedings which would be meritless. The OSC's recommendation serves no purpose but to seed doubt in the public mind that the GCIDA had some recourse that they did not exercise. The OSC is clearly aware that there are no contractual provisions that would allow the GCIDA to retroactively change the terms and demand repayment.

See  
Note 13  
Page 35



Additionally, the OSC is also fully aware that a recent (June 4, 2013) ruling of the NYS Court of Appeals which occurred during the field work for the GCIDA audit, found against the State when they attempted to retroactively change the terms of Empire Zone benefits after the fact (James Square Associates LP, et al. v. Commissioner NYS Dept. of Economic Dev., et al). The Court of Appeals ruled that NYS was required to fully reinstate benefits which NYS erroneously sought to recapture. This court decision impacted an IDA decision in Ulster County where the IDA retroactively changed the terms of an agreement reducing benefits which then had to be fully restored as a result of this court action. In fact, the OSC is in error when it recommends the GCIDA take steps that the NYS Court of Appeals has determined were illegal.

The OSC also failed to note that the GCIDA Uniform Tax Exempt Policy already contains language that allows for inclusion of recapture provisions. GCIDA attempts to get companies to agree to these provisions but almost every single time has been informed that the requirement of recapture provisions will immediately take the County out of the running for consideration. Generally, while local companies that have been established in the community for a period of time are more comfortable with recapture requirements it is the outside firms the IDA seeks to recruit which refuse to have their incentive package subjected to recapture.

See  
Note 14  
Page 35

#### Proposed Actions – Project Monitoring:

- The GCIDA has implemented a new procedure under which the GCIDA staff will hold a minimum of one meeting a year with active projects to discuss their job performance and other issues. The GCIDA will also be implementing new reporting forms which will request further information from the companies on their direct spending in the community in an attempt to document secondary economic impacts. Meetings will be held in advance of the annual reporting period to insure companies are reporting accurate job numbers.
- The GCIDA will implement a practice of providing annual reports to host communities on the current status of companies within the community receiving IDA benefits to include current job numbers, secondary economic activity and any special “benefits” to the community. (For example the IDA is starting to see refinancing of some of the older buildings which results in significant mortgage tax revenues to the community).

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10





#### Proposed Actions – Benefit Recapture:

- In the absence of a statewide law or policy that provides a consistent and level playing field amongst competing IDAs, the GCIDA will review its current Uniform Tax Exempt Policy to determine if the current provisions for recapture of benefits are adequate in those circumstances where the requirement of a recapture clause will not immediately make the County non-competitive in recruiting new business investment.

#### i. Prohibitive Interests in Contracts:

The Draft Report identifies three (3) instances where the Agency entered into “contracts” with business entities where it is alleged that certain members of the Board of Directors of the Agency had prohibited conflicts of interest in violation of General Municipal Law. These include: (i) a lease related to the construction and renovation of a certain ski facilities at a local ski area; (ii) a lease and a PILOT agreement relating to the construction of an aircraft component assembly facility; and (iii) the sale of land, a line-of-credit, and the issuance of bonds with a local community bank.

The Draft Report commits serious error since it fails to address the statutory exceptions to prohibited interests in a contract. Specifically, the Draft Report recognizes the existence of statutory exceptions to prohibited conflicts of interest when it uses the language “Unless a statutory exception applies” (Draft Report, p.8). However, the Draft Report fails to address, apply or consider the statutory exceptions to the Conflict of Interest rules contained in General Municipal Law §802. No conflicts of interest existed because each transaction qualified for a statutory exemption under General Municipal Law §802. The Agency had a good faith basis for its determinations that the contracts qualified for the statutory exceptions in General Municipal Law §802. We believe that the Draft Report is materially erroneous since the Comptroller’s Office has made legal conclusions without previously issuing regulatory guidance on these enactments.

See  
Note 15  
Page 35

#### 5.1 The Ski Facility Project:

The Draft Report asserts that there was a conflict of interest in a certain Ski Facility Project which is a major employer in Greene County. The Draft Report asserts a conflict of interest since a former Agency Board Member was an employee of the





corporation which operated the Ski Facility. The Agency Board Member was not a shareholder of the corporation which owned the Ski Facility or operated such Ski Facility. His salary was not contingent on the success of the transaction in which the Agency provided financial assistance. Finally, the Ski Facility Project was installed as a result of the economic necessity since the ski area had to remain competitive with the ski areas owned by New York State. The public ski areas are heavily subsidized by taxpayer funds that help defray operating costs. In addition the public ski areas receive exemption from sales tax and property taxes when they make capital improvements. The transaction between the Agency and the Ski Facility provided a sales tax exemption for new capital improvements which simply leveled the playing field with the public ski areas operated by New York. The Ski Facility improvement enjoyed overwhelming support from the County Legislature and the Town Board since they recognized that the continued viability of such ski area was extremely important to Greene County and its residents. The Agency Board Member did not participate in the negotiation and execution of the documents with the Agency since all that the Ski Facility requested was to avail itself of the tax benefits available for ski areas that was contained in the Uniform Tax Policy of the IDA that had been adopted in accordance with applicable law. The Draft Report acknowledges that the Agency Board Member did not have an interest in the express contract with the Agency. Nonetheless, your office erroneously asserts that there was an “implied contract” between the Agency and the operating subsidiary of the Ski Facility.

See  
Note 16  
Page 35

See  
Note 17  
Page 35

The Draft Report fails to acknowledge that the transaction with Ski Facility qualified for two exceptions in General Municipal Law §802. Clearly, the transaction qualified for the General Municipal Law §802(1)(b) exception since: (1) it uncontroverted that the remuneration of such Agency Board Member was not directly affected by the contract with the Agency since the Ski Facility was making required ski facility upgrades to compete with the publically financed ski areas; and (2) the Agency Board member did not participate in the procurement, preparation or performance of any part of the agreements with the Agency. In addition the transaction with the Ski Facility Operator qualifies for the General Municipal Law §802(2)(a) exemption which does not prohibit an interest in a municipal contract with a corporation when the municipal officer or employee has an interest by reason of ownership of less than five percent (5%) of the outstanding stock of the corporation. See 1989 Opns St Comp No. 89-4. The Agency Board Member did not own any stock at the time of the contract with the Agency. The Agency Board Member disclosed that he did not have an ownership interest in the Ski Facility,

See  
Note 18  
Page 36

See  
Note 19  
Page 36

See  
Note 20  
Page 36



fully disclosed his position with Ski Area operator and recused himself from all participation in the negotiation of the documents executed with the Agency. Accordingly, since there were two different General Municipal Law §802 exceptions that were clearly satisfied by the Agency Board Member, there was no prohibited conflict of interest which was confirmed by the Agency Counsel who determined that the exceptions contained in General Municipal Law §802 were available based on the facts and circumstances in existence at the time that the Ski Facility undertook the capital improvements.

We have been advised that your office's implied contract theory was based on an interpretation of the Court of Appeal's precedent of *Rose v. Elchhorst*, 42 N.Y.2d 92 (1977). Reliance upon *Rose* is misplaced. In *Rose*, the Court of Appeals found a conflict of interest existed where a town employee purchased a parcel of real property at a county tax sale. Key to the court's analysis was the interrelationship of certain governmental functions relating to the tax sale and the personal benefit received by the employee that acquired the property. Here it is undisputed that the Agency Board Member received no financial benefit from the sales tax exemption received for the capital improvements since such capital improvements were necessary to ensure the competitive position of such Ski Facility. Moreover, neither *Rose* nor the State Comptroller address how *Rose* applies when there is a valid §802 exemption.

See  
Note 21  
Page 36

## 5.2 The Aircraft Component Assembly Facility Project:

The Draft Report erroneously asserts that there was a conflict of interest involving the construction of an Aircraft Component Assembly Facility Project. The company was seeking a new facility to manufacture component parts and it had competitive alternatives with the expansion of its existing labor force in California or in Europe closer to its major customer. If the Agency and Greene County lost the expansion of the new manufacturing facility then it would have been inevitable that the balance of the manufacturing jobs in Greene County would have been relocated out of Greene County. The manufacturing company sought to structure the transaction as a lease in which a third party independent party would be the landlord. The lease structure was desired by the manufacturing company to avoid tying up its capital into real estate facilities. The Draft Report alleges a conflict of interest from the execution of various agreements with the third party independent landlord. According to the application, the landlord agreed to enter



into a “build-to-suit” agreement with the operating company which would occupy the facility. An Agency Board Member was president of the Corporation when the agreements were entered into between the Agency and the third party independent landlord. The Agency did not provide any financial assistance to the Operating Company. The Agency did not execute and deliver any agreement or contracts with the Operating Company.

No remuneration was provided to the Agency Board Member from the lease transaction. The Agency Board Member was never affiliated with the independent landlord or a member, officer or director of the independent landlord. In addition, the Agency Board Member did not participate in the procurement, preparation or performance of any part of such contract. The operating company did eventually become a tenant in the building constructed by the landlord, but at the time of the initial occupancy by such operating company, the Agency Board Member had divested himself of any ownership interest in the operating company. Accordingly, there was no direct or indirect conflict of interest.

See  
Note 22  
Page 36

In addition, the Agency Board Member fully disclosed his interest as an officer of the Corporation, which disclosures were made part of the official Agency records, and recused himself from any discussions pertaining to the Project. In connection with the Agency Board Member’s disclosure, counsel undertook a review of the Agency’s Code of Ethics and determined that there was no prohibition thereunder.

See  
Note 23  
Page 37

The Draft Letter asserts a prohibited conflict of interest based on an “identity of interest” conflict of interest based on a constrained reading of Rose. The Agency Board Member and the independent landlord did not have any relationship. In addition, the financial assistance provided to the independent landlord resulted in the creation of additional tax base in Greene County and the retention of valuable manufacturing jobs which are not common in rural Greene County.

See  
Note 24  
Page 37

### 5.3 The Bank:

The last issue raised in the Draft Report erroneously alleges that a local community bank (the “Bank”) had an erroneously entered into prohibited contracts resulting from: (a) the sale of land by the Agency for the construction by the Bank of a branch bank facility; and (b) the provision by the Bank of a line-of-credit and the purchase of a bond, the proceeds of which were used by the Agency to construct



and install a business park in the County. The Draft Report alleges that a conflict of interest arose because two (2) Agency Board Members were also members of the Bank's Board of Directors. The transactions qualify for the General Municipal Law §802(1)(b) and the §802(2)(a) exemptions. It is uncontroverted that the Agency Board Members remuneration was not affected as a result of the contracts with the Agency since Board of Directors of such bank receive fixed remuneration regardless of the performance of the community bank. Further, the duties of such Agency Board Members were not involved in the procurement, preparation or performance of any part of such contract since they recused themselves from all aspects of participating in the transaction. In addition, General Municipal Law §802(2)(a) does not prohibit an interest in a municipal contract with a corporation when the municipal officer or employee has an interest by reason of ownership of less than five percent (5%) of the outstanding stock of the corporation. See 1989 Opns St Comp No. 89-4. Both of the Agency Board Members owned less than five percent (5%) of the stock of the community bank. There was simply no conflict of interest in any transaction with the community bank.

See  
Note 25  
Page 37

See  
Note 26  
Page 37

#### Conclusion:

Based upon our review of Article 18 of the General Municipal Law, we believe that the no conflict of interest exists with regards to the three (3) matters you raised.

Thank you for your time and attention. If you have any questions, do not hesitate to contact our office.

Very truly yours,

GREENE COUNTY INDUSTRIAL DEVELOPMENT AGENCY

Eric Hoglund, Chairman

Paul J. Goldman, Counsel

cc: Board of Directors of the Greene County Industrial Development Agency  
Greene County Legislature  
Greene County Administrator

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15

## APPENDIX C

### OSC COMMENTS ON THE GCIDA'S RESPONSE

#### Note 1

Our audits are focused on specific areas of operation identified during the risk assessment and planning phases in accordance with GAGAS. Our audit reports are exception-based and, therefore, include findings and recommendations that are needed to improve the operations of local governments. The rules and regulations that GCIDA are held to were promulgated through the General Municipal Law (GML), GCIDA's bylaws and the GCIDA's Uniform Tax Exemption Policy.

#### Note 2

Our audit was performed according to GAGAS standards which require us to obtain sufficient, competent evidence to support our conclusions and findings. Our audit report conclusions are factually and legally accurate.

#### Note 3

GCIDA assigned the Project Manager as the designated audit liaison, not the attorney. The Project Manager was also employed by GCIDA during the period of restructuring and was very familiar with issues addressed in the audit. Further, GCIDA officials were given time and opportunity to consult with their attorney to address any questions or issues they may have had.

#### Note 4

GCIDA did not perform a cost-benefit analysis for each approved project to demonstrate that GCIDA evaluated each project with due diligence to ensure that the project was in the best interest of the taxpayers. Insufficient competition does not excuse GCIDA officials from performing a cost-benefit analysis to help ensure that taxpayers will benefit from the investment.

#### Note 5

GCIDA officials have misinterpreted our comments related to cost-benefit analysis. Their response implies that such analyses are only beneficial if multiple projects are being considered for a particular parcel. We believe a cost-benefit analysis is essential for GCIDA officials to perform so that they and taxpayers have some assurance that the value of benefits provided by projects exceeds the cost of providing tax breaks and other benefits provided.

#### Note 6

Our report commented on whether or not the projects approved by the GCIDA met the employment goals set forth in the respective applications. Economic considerations should be taken into account by the GCIDA and partnering businesses before entering into PILOT agreements.

#### Note 7

The business did not meet the number of proposed jobs stated on its PILOT application and, hence, did not provide the agreed-upon benefits.

#### Note 8

Our report commented on whether or not the projects approved by the GCIDA met the employment goals set forth in the respective applications. The additional jobs mentioned in the GCIDA response are those of a third-party company and, therefore, were not included in the job totals reported for the company.

#### Note 9

GCIDA officials provided us no evidence to support their assertion that companies would not have located in the County if a clawback provision were imposed. It is unknown if other prospective companies would have agreed to a recapture provision, received tax breaks and provided an even greater benefit to the community. The finding simply states that due to a lack of recapture provisions, GCIDA does not have the ability to enforce lack of performance and that businesses were able to receive a level of benefit that might not otherwise provide the best economic benefit to the County and local jurisdictions if those same exemptions were provided to other businesses.

#### Note 10

Our audits have identified many instances throughout the State where IDAs require a recapture provision in their PILOT agreements. Further, GCIDA has entered into PILOT agreements with recapture clauses with four companies. GCIDA's UTEP is flexible enough so that it can design recapture provisions which are not so punitive as to discourage investment, but are strong enough to ensure that the PILOT agreements being entered into provide the best economic benefit to the County and local jurisdictions.

#### Note 11

The objective of our audit was to determine if GCIDA officials designed and implemented an adequate system to monitor, evaluate and control benefits and incentives granted to companies and businesses. The advancement of programmatic legislation through the New York State Legislature was not the objective of our audit.

The State Comptroller has proposed legislation, as an Office of the State Comptroller Program Bill, that would require IDAs to have a uniform project agreement which would include, among other things, a clawback provision (unless a waiver were granted) (Proposed GML Section 859-a[6][f] in S5551 of 2013).

In addition, earlier this year a new GML Section 875 was enacted relative to State sales tax exemptions for IDA projects. Among many other things, the new law has a clawback provision, which requires IDAs to recover/"clawback" State sales tax exemption benefits taken, or purported to be taken, to which the project operator or other person is not entitled, which are in excess of the amounts authorized, which are for property or services not authorized or taken in cases where the project operator or other person



failed to comply with a material term or condition to use property or services in the manner required by the agreement with the IDA. It also requires that the terms and conditions of the requirement be included in IDA project resolutions and documents.

#### Note 12

This statement assumes that the four companies that agreed to recapture provisions would not have been able to stay viable without GCIDA assistance. GCIDA officials provided us no evidence to support this assumption. The fact that four companies agreed to recapture provisions and were able to expand and remain viable businesses discounts the previous notions made by GCIDA officials concerning the negative effects of recapture provisions.

#### Note 13

We recommended that the GCIDA Board consult with its legal council to ascertain what benefits may be recouped under existing contract terms. We are not recommending that GCIDA unilaterally and retroactively amend existing contracts to include clawback provisions. The Court of Appeals case cited by GCIDA, concerning retroactive application of a statutory amendment, does not impact our recommendation.

#### Note 14

GCIDA has provided no documentary evidence to support the statement that outside firms refuse to have an incentive package subject to recapture.

#### Note 15

In finding that former members of the GCIDA Board had interests in contracts prohibited by Article 18 of GML, we considered the applicability of the exceptions provided by Section 802 of GML and concluded that none of the exceptions applied in these instances. The Comptroller may properly conclude that municipal officers and employees have prohibited interests in contracts without having previously issuing regulatory guidance. The Office of the State Comptroller has provided guidance on the application of GML Article 18 in the form of dozens of publicly available advisory opinions issued to local governments.

#### Note 16

As noted in the report, the application made to GCIDA by the Corporation that owned the facility was signed by the former Board member as the “applicant’s representative.” The lease and PILOT agreement between GCIDA and the Corporation were also signed on behalf of the Corporation by the former Board member.

#### Note 17

The reference in the report to an “implied contract” between GCIDA and the Corporation’s wholly-owned subsidiary was intended to mean that there were contracts between the two for purposes of Article 18 of GML.



#### Note 18

In our view, the exception provided by Section 802(1)(b) does not apply in this instance because the former Board member, acting on behalf of the Corporation that owned the facility, executed the application made to the GCIDA, as well as the lease and PILOT agreement between GCIDA and the Corporation. Under these circumstances, we believe that the former Board member was “directly involved in the procurement, preparation or performance” of the lease and PILOT agreement.

#### Note 19

We believe the exception provided by section 802(2)(a) does not apply in this instance because the former Board member did not have an interest in the lease or PILOT agreement between GCIDA and the Corporation “by reason of stockholdings.” In view of the overlap, if not identity, of interest between the Corporation and its wholly-owned subsidiary in the lease and PILOT agreement, the former Board member would be deemed to have an interest in the lease and PILOT agreement by virtue of being an officer or employee of the subsidiary (see, GML Section 800[3][c]).

#### Note 20

The report acknowledges these facts, but notes that disclosure, recusal or abstention does not cure a prohibited interest in a contract.

#### Note 21

Our reliance on *Rose v. Eichhorst* is not misplaced. We read the analysis in *Rose* as indicating that when a municipality enters into a contract with another entity, and that entity shares with a second entity “an overlap, if not identity, of interest” in the subject of the contract, the municipal contract implicates the second entity within the “statutory contemplation” of Article 18. Therefore, when such an overlap or identity of interest exists, we believe the second entity should be regarded as a party to the municipal contract for the purpose of applying Article 18 of GML.

In this case, the Corporation applied to the IDA for assistance in improving a facility which it owns for the specific purpose of having the facility occupied and operated by its wholly-owned subsidiary. Under these circumstances, we believe that the Corporation and its wholly-owned subsidiary had an overlap, if not identity, of interest in the application and resulting lease and PILOT agreement sufficient to cause the wholly-owned subsidiary to be regarded as a party to these contracts for purposes of applying Article 18. Therefore, as the chief executive officer of the wholly-owned subsidiary, the former Board member would be deemed to have an interest in the lease and PILOT agreement by virtue of being an officer or employee of the subsidiary, irrespective of whether he received a financial benefit as a result of those contracts (see, GML Section 800[3][c]).

#### Note 22

As noted in the report, at the time GCIDA and the “landlord” (referred to in the report as the “LLC”) entered into the lease and PILOT agreement, the former Board member was president and a 10 percent stockholder in the “operating company” (referred to in the report as the “Corporation”). The fact that the former Board member subsequently divested himself of his stockholdings “at the time of the initial

occupancy by such operating company” is not relevant to whether he had a prohibited interest in the lease and PILOT agreement.

#### Note 23

The former Board member’s disclosure and recusal are acknowledged in the report. The fact that the GCIDA’s code of ethics did not prohibit the lease and PILOT agreement has no bearing on whether the former Board member had a prohibited interest in these contracts under GML.

#### Note 24

Based on our reading of *Rose v Eichhorst* (discussed in Note 21), we believe the operating company should be regarded as a party to the lease and PILOT agreement between GCIDA and the landlord for the purpose of applying Article 18 of GML because the landlord applied to GCIDA for assistance for the specific purpose of constructing a building for the operating company. The former Board member is deemed to have an interest in those contracts because he was president and a 10 percent stockholder of the operating company at the time the lease and PILOT agreement were entered into, regardless of whether he had a relationship with the landlord (GML Section 800[3][c]).

#### Note 25

We believe that the exception provided by section 802(1)(b) is inapplicable in this instance because the exception only applies to interests in contracts “by reason of employment as an officer or employee” of the Bank. Here, the former Board members had an interest in GCIDA’s contracts with the Bank because they were members of the Bank’s board of directors, rather than officers or employees of the Bank.

#### Note 26

We believe that the exception provided by section 802(2)(a) does not apply in this instance because the former Board members did not have an interest in GCIDA’s contracts with the Bank “by reason of stockholdings.” The former Board members had an interest in GCIDA’s contract with the Bank because they were members of the Bank’s board of directors, rather than “by reason of stockholdings.”

## APPENDIX D

### AUDIT METHODOLOGY AND STANDARDS

During this audit, we evaluated the GCIDA's operations in general and specifically 20 approved projects that received GCIDA benefits during the period January 1, 2011 through September 4, 2012. For selected projects we expanded the audit period back to March 2001 to include all project activities from the date of the projects' inception.

We interviewed GCIDA officials to determine if GCIDA has established policies and procedures governing possible conflicts of interest. We also contacted former GCIDA officials regarding our conflict of interest finding.

We examined project applications and the approval and monitoring process for all 10 businesses receiving property tax exemptions during our audit period (as indicated in Table 2) and also 10 randomly selected businesses that received sales tax exemptions as part of a special "Disaster Reconstruction Program" that was designed to help businesses affected by Hurricane Irene (as indicated in Table 3).

Table 2: Active Agreements Receiving Property Tax Exemptions	
#	Business Name
1	Athens Generating Company, L.P.
2	Brew North LLC and Crossroads Brewing Company, Inc.
3	Clayco N.Y. LLC (Save-A-Lot, Ltd)
4	Empire Merchants North, LLC with guaranty by EMN Realty, LLC
5	GlaxoSmithKline LLC and Stiefel Laboratories Inc.
6	Dynabil, Greene Development Properties, LLC
7	Hunter Mountain Ski Bowl Inc
8	National Bedding Company, LLC (Serta International)
9	Peckham Asphalt Resale Corp.
10	Snow Time Inc (Windham Mountain Partners, LLC)

Table 3: Disaster Recovery Program	
#	Business Name
1	A.E. Huggins Carpentry, Plumbing and Heating
2	Catskill Mountain T-Shirts
3	Hensonville Frozen Food Lockers
4	KJA Mechanical
5	Moore's Motel
6	Prattsville Woodworking
7	Scribner Hollow Corp
8	The Creekside Restaurant
9	Village Bistro
10	Windham Equipment Rentals, Inc.

We assessed whether the GCIDA Board had established policies and procedures governing the types of projects eligible for tax exemptions and reviewed projects that did, and did not, qualify for assistance.

- We reviewed whether approved projects fall within the definition of “project” as stipulated in GML Section 854(4).
- We reviewed whether the GCIDA’s UTEP includes the provisions of GML Section 874(4)(a).

We interviewed GCIDA officials and gained an understanding of the GCIDA’s project application and approval process to determine if:

- GCIDA has established formal procedures over the application and approval process.
- There is a proper segregation of duties between prospective candidates and those making the final approval.

To determine whether GCIDA had followed the established criteria when evaluating which businesses received sponsorship and economic development incentives:

- We examined whether a sample of projects met the criteria listed in the UTEP or the 2011 Disaster Reconstruction Program.
- We examined whether GCIDA made a determination as to whether the project owner would have initiated the same project without GCIDA assistance.
- We verified that a comprehensive cost-benefit analysis was performed by GCIDA prior to approving the project.
- We examined whether applications were consistent with finalized agreements for significant aspects, including jobs produced and tax exemptions.

We gained an understanding of GCIDA project monitoring process.

- We interviewed GCIDA officials to determine if procedures have been implemented for timely reporting of employment data and capital investments.
- We documented what actions were taken by officials to monitor active projects.

We assessed whether GCIDA actively monitors approved projects to ensure fulfillment of proposed benefits or objectives.

- We determined if number of FTE promised on applications (benefit to taxpayers) had been achieved according to the latest annual filing.
- We examined whether PILOT payments were made in accordance with applications and agreements.

- We determined if GCIDA has a recapture agreement and whether sanctions or penalties are imposed for unfulfilled promises.

We conducted this performance audit in accordance with GAGAS. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

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