

MEMORANDUM

January 11, 2011

TO: Genesee County Legislature

CC: Genesee County Economic Development Corporation Board of Directors

FROM: Robert J. Ryan, Esq.

RE: Response Letter to Authorities Budget Office (ABO) Concerning GCEDC Compensation Practices

The Authorities Budget Office (“ABO”) conducted a review of Genesee County Industrial Development Agency’s (the “Agency”) compensation practices (the “Report”). The Report does not review or discuss Agency successes, job creation/retention or any other practices of the Agency. The Report unilaterally concludes that some of the Agency's compensation practices are improper. Harris Beach PLLC, as counsel to the Agency, along with the Agency’s board of directors strongly disagrees with every aspect of the Report and rejects its conclusions and recommendations for the following reasons:

First, the **ABO Report concludes that the Agency does not have the legal authority to pay incentive or additional compensation. This is the opinion of the ABO and not based in law.** The General Municipal Law explicitly provides the Agency the ability to establish and pay compensation out of Agency funds. We are unaware of, and the ABO has not provided any legal authority that would prohibit the Agency’s compensation package being based upon salary and a performance incentive.

The Agency’s performance incentive payment is based upon a review of individual and organizational performance. Organization performance criteria are established prior to the start of the year and employees are informed of such criteria. At the end of the year after the financial position of the organization is known, the compensation committee recommends to the full board whether to fund an incentive pool and the amount, if any. The ABO states that the amount of the incentive pool must be established at the *beginning* of the year, rather at the end when the financial health of the organization is better known. The Agency disagrees with this approach as it may provide the ability for the manipulation of performance criteria in order to achieve results. The funding of an incentive pool will depend on the performance of the organization for that particular year based upon the pre-established criteria and goals. The amounts of the incentive payment, if any, to the employees are determined within the annual performance reviews. The amount allocated to the President and CEO and other staff depends upon individual performance in achieving the goals and accomplishments of the Agency. The process is transparent. The Agency Board of Directors discusses and approves additional compensation payments in public session and records those decisions / votes in the meeting minutes of the Agency which are posted on the Agency’s website.

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The Agency's compensation practices are legal, proper and utilize sound and recognized methodologies.

Secondly, when assessing the value of the overall compensation paid to the executive director, the ABO takes the position that such compensation should be comparable to other non-performance based pay of IDA executive directors and county officials. The ABO's position that IDA employee compensation should be comparable to that of the government fails to recognize: (1) that the Agency has its own private revenue source derived from businesses seeking IDA services (these are NOT tax dollars), and (2) that performance based pay programs incentivize superior performance, which result in organizational benefits that outweigh the costs. **Performance based pay programs are common and a critical component of executive compensation plans across the private sector and the economic development industry in general.** In addition, a pay for performance model was a new initiative emphasized in Governor Cuomo's recent state of the state address. **The Agency's executive compensation model is consistent with the new Governor's pay for performance guiding principle announced in his recent state of the state address and is ahead of the game since it has been in practice, to incentivize superior agency performance, since 2004.** The Agency's Executive Director's (CEO) total compensation, including incentive payments, is completely aligned with the average compensation paid to economic development CEO's of similar size organizations. **In a 2008 executive compensation study of 26 similar sized economic development organizations, conducted by Jorgenson Consulting, the Executive Director's total compensation was at par of the average paid to CEO's running similar sized economic development organizations.** The Agency made a determination on executive director salary which it believes was appropriate to attract and maintain the level of quality it is looking for to achieve its goals. The Board has specific knowledge of the executive director recruitment process which involved candidate experiences, qualifications and salary requirements. It is not productive for the ABO to summarily second guess the Board's decision, especially when the ABO was not involved in the recruitment process and made no inquiry into the Board's goals and objectives for the Agency and what the President and CEO has accomplished since the inception of his employment.

Third, the Agency has a low level of confidence in the quality of the ABO's review process and work product. Harris Beach, as counsel to the Agency, found that the ABO review process was poorly structured and lacks statutorily based standards. The Report blurs distinctions between compliance with law and compliance with recommended practices. In the Report, the ABO gives an incredible amount of weight to non-existent standards and then reaches misplaced conclusions that give the reader an impression that the IDA may be acting improperly. Such a process lacks fundamental fairness and objectivity. For example, the ABO evaluated the Agency's compensation practices against a 10 year old, non-binding State Comptroller Advisory Opinion that does not have the force or effect of law. **The Agency did nothing improper or contrary to law both in the establishment of pay for performance**

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incentive pay practices or as it relates to the base compensation practices of its Executive Director (CEO). The Report should have made clear that the Advisory Opinion is being used as best practice guidance and not as an evaluation of compliance with law. Also, any standard, other than law, which the ABO intends to evaluate the Agency against, should be published by the ABO and widely communicated to the regulated community.

Lastly, the Agency has consistently received national acclaim for strong performance helping Genesee County and the Batavia Micropolitan area achieve Top 10 Micropolitan status in the nation for economic development activity for the last 6 years in a row as measured by Site Selection Magazine.

The Agency has always expressed a willingness to receive constructive comments to improve management practices and procedures; however, this Report provides no such guidance.

If you have any questions or would like to discuss, please contact me at (518) 427-9700 or via email at ryan@harrisbeach.com. Thank you