May 6, 2019

By Hand Delivery and Email

Jim Walden, Esq.
Walden Macht & Haran LLP
One Battery Park Plaza
New York, NY 10004

Re: Task Force on EDA's Tax Incentives

Dear Mr. Walden:

On behalf of our respective clients, we write to object to the unlawful process you are conducting on behalf of the Task Force on the Economic Development Agency's Tax Incentives ("Task Force"). For the reasons set forth herein, the Task Force's chair, Mr. Chen, lacks statutory authority over the Economic Development Agency ("EDA"), which is an independent authority not subject to the gubernatorial powers set forth in N.J.S.A. 52:15-7. Moreover, the arbitrary restrictions you imposed on our clients' rights to respond to false accusations against them denies each of them the opportunity to exercise their First Amendment rights as well as their right to publicly confront accusers within the same public forum. Given your stated intention to publicly adduce "adverse" evidence against our clients, these restrictions are particularly noxious. We therefore demand an opportunity to submit a public presentation to the Task Force at its next scheduled hearing.

Background

This process has been tainted from the outset. Practicing without a valid law license in New Jersey, on or about April 18, 2019, you issued document subpoenas to our clients on behalf of Professor Chen. Those subpoenas exceeded the delegated statutory authority under N.J.S.A. 52:15-7, as well as the express terms of the Executive Order No. 52, which authorized the Task Force to seek voluntary witness cooperation only. After being advised of the lawlessness of your

subpoenas, you orally represented that Professor Chen had withdrawn them. We continue to await written confirmation.

At the opening of the May 2, 2019 public hearing, Professor Chen cryptically but nonetheless specifically referred to "entities of concern." It is plain that he has targeted our clients but has refused to disclose anything further about this dubious designation. Soon thereafter, Task Force attorney Pablo Quiñones stated that such entities may face "real criminal exposure" for federal "mail and wire fraud," even though the United States Attorneys' office has already investigated these matters and found no wrongdoing. Statements such as these, coupled with the manner of the questioning of witnesses at the May 2, 2019 hearing, suggests you are operating under explicit instructions to develop "adverse facts" against particular individuals and entities, including our clients. This one-sided investigation smacks of political retribution and undermines the credibility of your exercise. We reserve all rights to seek full remedies to the extent any of these false and defamatory accusations were directed at our clients.

There Is No Statutory Authority Over the EDA.

Through a delegation letter dated March 22, 2019, Governor Murphy purportedly conferred on Mr. Chen an investigatory power set forth in N.J.S.A. 52:15-7. That statute empowers the Governor, or persons appointed by him, "to examine and investigate the management by any State officer of the affairs of any department, board, bureau or commission ***of*** the State . . ." *Id.* (emphasis added). It does not extend to independent authorities like the EDA.

The EDA was created by statute in 1974 as an independent authority "in, but ***not of***, the Department of the Treasury." N.J.S.A. 34:1B-4(a) (emphasis added). For this reason, the EDA is not "of the State" executive branch. It is expressly made "in, but not of," any executive branch department. N.J.S.A. 34:1B-4(a). This "in but not of" designation is a special term of art in state

government, used to "signify an agency's independence" and to "insulate the agency from complete Executive Branch control." In re Plan for Abolition of Counsel on Affordable Housing, 214 N.J. 444, 448, 464 (2013). Governor Murphy recognized this designation in his letter appointing Professor Chen, which acknowledged: "The EDA is a public body corporate and politic established in, but ***not of***, the Department of Treasury . . ." (emphasis added). Because of this independence from the executive branch, the EDA is beyond the reach of N.J.S.A. 52:15-7.

The Governor's March 22 letter revealed a second, independent defect in the Task Force's authority: notably absent from the list of governmental entities subject to investigation under N.J.S.A. 52:15-7 are independent "public bod[ies] corporate" such as the EDA. Indeed, the Governor's subpoena authority is limited to any "department, board, bureau or commission of the State." While the notion of "public corporations" long predated the enactment of N.J.S.A. 52:15-7 in 1941, see, e.g., N.J. Turnpike Auth v. Parsons, 3 N.J. 235, 243 (1949) (relying on the longstanding existence of the Port of New York Authority); L. 1921, c. 151, p. 417 ("The Port Authority shall constitute a body, both corporate and politic . . . ."), the Legislature conspicuously omitted such entities from the list of those subject to gubernatorial investigation under this statute.

The Task Force's Attempts to Limit the Ability of its Targets to Respond is Unlawful.

In the May 1 letters you served on our clients, you advised that anyone seeking to respond to adverse facts "will be afforded the opportunity to submit a sworn, written statement to be incorporated into the record of the Task Force's investigatory Public Hearing . . . This statement of facts **must relate solely to matters relevant to any testimony or evidence the Company believes to be adverse to its interests . . .**" (emphasis added) (See **Exhibit A**). This limitation implies that the Task Force may reject any affidavit that it believes exceeds the bounds of these arbitrary limitations. Moreover, there is no provision made to protect the rights of our clients, the

obvious targets of your "inquiry," to present live testimony and documents, and to refute any accuser or accusation. In addition, the stated limitations of your directive are designed to prevent us from adducing evidence of the bias and unlawfulness of the proceedings themselves. Under these circumstances and in light of applicable law, such restrictions are unlawful.

As an initial matter, by arrogating the right to accept or reject a respondent's affidavit based upon a unilateral determination as to relevance, the Task Force has imposed an unlawful prior restraint. See Alexander v. United States, 509 U.S. 544, 550 (1993) (the term "prior restraint" refers to administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur") (internal citation and quotation marks omitted).

The Task Force's inquiry, self-described as a "public hearing," is a limited public forum for First Amendment purposes. See Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 225 (3d Cir. 2003) (internal citation and quotation marks omitted). For the state to enforce a content-based exclusion in such a forum, "it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." State v. DeAngelo, 197 N.J. 478, 486 (2009), quoting Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

Speech on public issues and political matters lies at the heart of protected speech. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992). Where such speech is involved, "courts insist that government 'allow the widest room for discussion, the narrowest range for its restriction.'" D'Angelo, 197 N.J. at 485, quoting Thomas v. Collins, 323 U.S. 516, 530 (1945). Even in a limited public forum, the government may never "regulat[e] speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the

restriction." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); see also Monteiro v. City of Elizabeth, 436 F.3d 397, 404 (3d Cir. 2006) ("viewpoint-based restrictions violate the First Amendment regardless of whether they also serve some valid time, place, manner interest").

The Task Force may not limit our clients' participation on the basis of their anticipated speech. Nor can our clients be prevented from telling their side of the story through testimony and their counsel. Through the restrictions communicated in your May 1, 2019 letter, however, such content and viewpoint discrimination is exactly what the Task Force seeks to impose. Limiting parties to respond to live testimony and evidence through affidavits alone is not reasonably related to "the mission of the Task Force . . . to conduct an in-depth examination of the deficiencies in the design, implementation, and oversight of Grow NJ and ERG . . ." *See* EO-52 at para. 1. Moreover, your restrictions privilege the evidence offered by some speakers over others, on the sole basis of the anticipated views to be offered. By drawing this distinction among speakers, the Task Force has engaged in unlawful discrimination. And limiting responses to "any testimony or evidence . . . believed to be adverse . . ." likewise restricts speakers in a way not rationally related to the purpose of this limited public forum.

* * *

Each of our clients is proud of its investment in Camden's future. Those investments were made in reliance on grants approved and issued lawfully by the EDA. As some of us have communicated to you previously, our clients enthusiastically support government transparency and demand the opportunity to set the record straight with respect to their contracts with the EDA.

While we believe the Task Force has been unlawfully constituted and is operating outside of any recognized statutory authority, it is evident that you intend to continue. Thus, while we

reject the authority of the Task Force, and dispute that its participants are cloaked with any immunity from liability for their defamatory conduct, the Task Force's application of public monies to fund its investigation demands that the accused be afforded an opportunity to respond fully to allegations made against them. We therefore request that you advise of the next public hearing date and assure us that we will have an opportunity to present evidence to the Task Force on behalf of our clients, including live witness testimony and documentary evidence, as appropriate. Should you refuse to do so, we intend to seek legal relief.

Very truly yours,

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cc: Professor Ronald Chen (by hand and email)