

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FOREST CITY ENTERPRISES, INC. : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 825917
Corporation Franchise Tax under Article 9-A of the :
Tax Law for the Period February 1, 2009 through :
January 31, 2010. :

Petitioner, Forest City Enterprises, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period February 1, 2009 through January 31, 2010.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on July 9 and 10, 2015, in New York, New York, and continued to completion on September 2, 2015, in New York, New York, with all briefs to be submitted by March 30, 2016, which date began the six-month period for issuance of this determination. By letter dated September 30, 2016, this six-month period was extended for an additional three months (Tax Law § 2010[3]). Petitioner appeared by McConville Considine Cooman & Morin PC (Kevin S. Cooman, Esq., and Edward C. Daniel, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Clifford M. Peterson, Esq., and Ellen K. Roach, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to claim a qualified empire zone enterprise (QEZE) credit for real property taxes passed through from FC Yonkers Associates, LLC, because FC Yonkers Associates, LLC's employment increase factor was one for the fiscal year February 1, 2009

through January 31, 2010.

II. If petitioner is entitled to claim a QEZE credit for real property taxes passed through from FC Yonkers Associates, LLC, for fiscal year February 1, 2009 through January 31, 2010, whether payments that FC Yonkers Associates, LLC, made during 2009 qualify as “eligible real property taxes” for purposes of Tax Law § 15(e).

FINDINGS OF FACT

1. Petitioner, Forest City Enterprises, Inc., an Ohio corporation with a mailing address in Cleveland, Ohio, began doing business in New York State on March 23, 1962.

2. Petitioner is a developer and operator of diversified real estate projects throughout New York and the United States. Each of petitioner’s real estate development projects is developed through one or more project-specific special purpose entities.

3. Forest City Rental Properties Corporation is wholly-owned by petitioner.

4. F.C. Member, Inc. (F.C. Member), a New York corporation, is wholly-owned by Forest City Rental Properties Corporation.

5. FC Yonkers Associates, LLC (FC Yonkers) is a New York limited liability company that was formed on May 22, 2001. F.C. Member and RRG Yonkers, LLC (RRG Yonkers), a New York limited liability company, entered into an Operating Agreement dated as of August 2, 2002. FC Yonkers was formed to own and develop the Ridge Hill project (Ridge Hill or Project) in the City of Yonkers, New York, as its sole business focus.

6. F.C. Member and RRG Yonkers entered into an Amended and Restated Operating Agreement, on November 8, 2006 (FC Yonkers Amended Operating Agreement). F.C. Member and RRG Yonkers owned 70% and 30%, respectively, of FC Yonkers (FC Yonkers Amended

Operating Agreement, Article III, section 3.03). The “Managing Member” of FC Yonkers was RRG Yonkers.

7. Pursuant to Article V, section 5.01, of the FC Yonkers Amended Operating Agreement, the overall management and control of the business and affairs of FC Yonkers was vested in a management committee (Management Committee) comprised of three members, two designated by F.C. Member and one designated by RRG Yonkers. F.C. Member designated James A. Ratner and Charles A. Ratner, and RRG Yonkers designated Bruce C. Ratner, as their respective initial representatives on the Management Committee. Article V, section 5.01(d) of the FC Yonkers Amended Operating Agreement required the Managing Member, RRG Yonkers, to “keep the Management Committee and the other Member informed as to all material developments and transactions involving [FC Yonkers] and the [Ridge Hill] Property.”

8. RRG Yonkers, as managing member, was authorized by Article V, section 5.02, of the FC Yonkers Amended Operating Agreement, to “supervise, on behalf of the Management Committee and pursuant to the Development Plan, the day to day [sic] activities of [FC Yonkers]” and was “responsible for the implementation of the decisions of the Management Committee and affairs of [FC Yonkers].” RRG Yonkers also had “full power and authority to take any and all actions on behalf of [FC Yonkers],” and was required to “take all actions which may be necessary or appropriate for the development, maintenance, preservation and operation of the [Ridge Hill] Property and other assets of [FC Yonkers] in accordance with the provisions” of the FC Yonkers Amended Operating Agreement “and applicable laws and regulations.”

9. RRG Yonkers, as managing member, was required to arrange for payment of fees by FC Yonkers, including among others, site management fees due to Forest City Ratner Companies, an affiliate of F.C. Member, for performance of site management services pursuant

to “one or more separate agreements with [FC Yonkers]” (FC Yonkers Amended Operating Agreement, Article IV, section 4.04[b]). Although the record does not include any written agreement regarding site management services, it does include evidence that FC Yonkers included fees for site management services in the Ridge Hill project budget, and paid such site management fees on a monthly basis.

10. Articles of organization for RRG Yonkers were filed with the New York State Secretary of State on October 4, 2001, and its Limited Liability Company Operating Agreement was entered into by certain members on October 4, 2001. The Amended and Restated Limited Liability Company Operating Agreement of RRG Yonkers was executed on August 10, 2006 by Bruce C. Ratner, Managing Member of RRG Yonkers, and four Class A Members (RRG Yonkers Amended Limited Liability Operating Agreement). Pursuant to section 10 of the RRG Yonkers Amended Limited Liability Operating Agreement, the managing member, Bruce C. Ratner, has “all powers and rights necessary, appropriate or advisable to effectuate and carry out the purposes and business of [RRG Yonkers],” and is “responsible for the implementation of the decisions of [RRG Yonkers], and for conducting the ordinary and usual business and affairs of [RRG Yonkers]. . . .” Section 34 of the RRG Yonkers Amended Limited Liability Operating Agreement listed the following officers “elected to the offices set opposite their respective names:” (i) Bruce C. Ratner - President, (ii) David L. Berliner - Senior Vice President and Secretary, (iii) Joanne Minieri - Senior Vice President and Treasurer, (iv) Robert Sanna - Vice President, (v) Jeanne Mucci - Assistant Secretary, and (vi) Deborah Levinson - Vice President.

11. On November 28, 2006, the City of Yonkers Industrial Development Agency (YIDA) adopted “Inducement Resolution (FC Yonkers Associates LLC - Tenant Improvement Project),” Resolution No. 11/2006-02 (inducement resolution) that authorized (i) the appointment of FC

Yonkers (and/or its affiliates)¹ as its agent for the purpose of undertaking the Tenant Improvement Project pursuant to an agent agreement;² (ii) the YIDA Chairman, Vice Chairman, Chief Executive Officer, Chief Financial Officer and Executive Director, on behalf of YIDA, to negotiate (a) a Lease Agreement, pursuant to which FC Yonkers leases the Tenant Improvement Project to YIDA, (b) the related Leaseback Agreement conveying YIDA's interest in the Tenant Improvement Project back to FC Yonkers, and (c) any related documents as approved by counsel to YIDA or Transaction Counsel; (iii) the provision of financial assistance to FC Yonkers for the Tenant Improvement Project including (a) an exemption from all state and local sales and use taxes with respect to qualifying personal property, (b) an exemption from all mortgage recording taxes with respect to any qualifying mortgage on the Tenant Improvements, and (c) the retention by YIDA of title to or a leasehold interest in the Tenant Improvements by YIDA for a period of time so as to enable FC Yonkers to receive the financial assistance; and (iv) the holding of a public hearing with respect to the Tenant Improvement Project. The inducement resolution also limited the financial assistance provided by YIDA to \$100,000.00 until a public hearing was held and a subsequent resolution was passed by YIDA.

12. On December 18, 2006, YIDA held a public hearing with respect to the Tenant Improvement Project and the proposed financial assistance. On February 1, 2007, YIDA, by Resolution No. 02/2007-1, acknowledged the public hearing held on December 18, 2006, and

¹ FC Yonkers' affiliates included FC Commercial, LLC, as well as other named and unnamed affiliates.

² The Tenant Improvement Project consisted of the acquisition, construction and equipping on approximately 81.4 acres of land located at 1 Ridge Hill, Yonkers, New York (land) of a building or buildings containing in the aggregate approximately 1.3 million square feet of single- and multi-story retail space for use by several anchor tenants, numerous smaller tenants, restaurants and a multi-screen cinema, all designed and configured to replicate the layout of a traditional town square.

authorized YIDA to provide financial assistance in excess of \$100,000.00, which financial assistance included, among other things, a Leaseback Agreement.

13. On August 2, 2007, YIDA and FC Yonkers also entered into a Leaseback Agreement, entitled "Tax Benefit Leaseback Agreement" (Tax Benefit Leaseback Agreement), concerning the Ridge Hill Project. The Tax Benefit Leaseback Agreement "[c]overs "all of the Project other than certain roads covered by the Roadway Lease Agreement dated the date hereof," identified on the cover page as "Tax Parcel No. See Schedule A." Under the terms of this Tax Benefit Leaseback Agreement, FC Yonkers conveyed to YIDA "a leasehold interest in the real property including any buildings, structures or improvements thereon, described in Schedule A (see legal description attached)" and "all of the interest in the equipment" located at Ridge Hill (which, collectively, the parties identified as the "Facility") (Tax Benefit Leaseback Agreement, Article II, Section 2.1). The attached Schedule A contained a "Metes & Bounds Description" of "Former Lot 1, Block 4060 Less Proposed Parcel M, Ridge Hill Boulevard and Otis Drive, Part of Former Lot 1, Block 4060 City of Yonkers, Westchester County, New York." Pursuant to Article II, Section 2.6(a) of the Tax Benefit Leaseback Agreement, YIDA leased the Facility back to FC Yonkers, for rent of \$1.00 for the balance of the 2007 calendar year and for each subsequent year.

14. Pursuant to the Tax Benefit Leaseback Agreement, Article III, Section 3.3(a), entitled "Tax During Construction," FC Yonkers agreed, in relevant part,

"to make certain tax payments described in a Special Ordinance Authorizing the city manager to execute an agreement with the Loral Corporation ("Loral") providing for a payment of real property taxes on the Ridge Hill Property issued by the City of Yonkers in connection with an agreement (the "Loral Agreement") dated December 1979 (the "City Council Special Ordinance"). As of the date hereof, [YIDA] has determined that the amount due under the City Council Special Ordinance for a 27-month period intended to

approximate the construction period of the Project is an amount up to Eight Hundred Thirty-Six Thousand Thirty-Three and 00/100 (\$836,033.00) Dollars (the "Loral Tax"), which amount is based on the amount of \$371,570 per annum (or such lesser amount as is due to the City of Yonkers in accordance with the provisions of the City Council Special Ordinance), set forth on Exhibit A to the Loral Agreement for payments due through June 30, 2009, computed as follows:

\$371,570 per annum (\$30,964.16 per month) for 27 months = \$836,033.00

. . . . If the construction period exceeds 27 months (beyond June 30, 2009), [FC Yonkers] shall be obligated to pay an amount equal to the annual amount that would have been payable as the Loral Tax under the City Council Special Ordinance prorated based on the actual number of months, or partial months, until [FC Yonkers] commences making the payments contemplated in subsection (b) below. Although no representations are made herein regarding the time periods on which construction shall actually commence or be completed, [FC Yonkers] agrees to use commercially reasonable efforts to proceed with construction such that payments under Schedule 3.3 commence on or before February 1, 2010."

15. The Tax Benefit Leaseback Agreement, Article III, Section 3.3(d) provides, in pertinent part, that:

"[FC Yonkers] has been certified as eligible to receive the benefits afforded by the New York State Empire Zone Program in connection with the Facility which is located within the Yonkers Empire Zone. Such eligibility entitles the members of [FC Yonkers] to declare a QEZE credit against their New York State personal income taxes for real property taxes and/or in lieu of tax payments paid by [FC Yonkers] in respect to the Project."

16. The Tax Benefit Leaseback Agreement Schedule 3.3 has five specifically identified pages. On Schedule 3.3-3, the paragraph entitled "Real Property Tax Exemption" provides, in pertinent part, that:

"[t]he Land and existing improvements as of the date hereof are exempt from the payment of Real Estate Taxes (as defined below) based on interests held by the State of New York and or [YIDA] since prior to 1979. The Facility shall continue to be exempt from Real Estate Taxes for periods after the date hereof so long as [YIDA] has a continuing interest in this Facility through this Leaseback Agreement and related Lease Agreement. For purposes of this paragraph, "Real Estate Taxes" means all general real estate taxes levied against the Facility by the County and the City for its fiscally dependent schools excluding however, the Special Charges as described below Notwithstanding anything contained

herein to the contrary, in the event the exemption from Real Estate Taxes is denied for any reason, [FC Yonkers] shall pay (and hereby agrees to pay) all Real Estate Taxes levied upon the Facility as they become due, specifically including but not limited to Real Estate Taxes for years prior to and after the tax years covered by this Leaseback Agreement. . . .”

On Schedule 3.3-5, the paragraph entitled “Special District Charges, Special Assessments and other charges” provides as follows:

“Special district charges, special assessments, and special ad valorem levies (specifically including but not limited to any fire district charges or “curb charges”), and pure water charges and sewer charges (collectively, “Special Charges”) are to be paid in accordance with normal billing practices.”

17. The Tax Benefit Leaseback Agreement, Article III, Section 3.7 provides as follows:

“If [FC Yonkers] fails, after notice pursuant to Section 7.1(a) and the period to cure as described in Section 7.1(a) have expired, (i) to pay any tax, assessment or other governmental charge required to be paid by Section 3.3 hereof or (ii) to maintain any insurance required to be maintained by Section 3.4 hereof, [YIDA] may pay such tax, assessment or other charge or the premium for such insurance. [FC Yonkers] shall reimburse [YIDA] for any amount so paid together with interest thereon from the date of payment at twelve percent (12%) per annum.”

18. Located on an 80 acre site between the Grassy Sprain reservoir and the New York State Thruway approximately one-half mile north of Tuckahoe Road in Yonkers, New York, the Ridge Hill project involved the construction of approximately one million square feet of new retail space fitted out for tenants, as well as residential parcels and a hotel site. It was constructed on what was formerly a largely vacant site with a few existing buildings, some of which were demolished as part of the project. Entirely new utility infrastructure had to be created for the Ridge Hill site, including the roads, sanitary sewers, water service, cable and telephone service, gas service and electrical service installations.

19. Ridge Hill construction included five multi-story parking garages, a four-level retail building with a 12-plex movie theater, a two-story retail building including restaurants, Fountain

Plaza with water feature, a Town Square, interior access roads, and several other retail buildings for major national retailers and restaurants such as Apple, Whole Foods, LL Bean, Dick's Sporting Goods, Cheesecake Factory, Container Store and LA Fitness. The Ridge Hill site was also fitted out for high-rise residential and hotel construction. A portion of the site was sold by FC Yonkers to another developer for high rise condominium construction.

20. The Ridge Hill project also involved the reconstruction of New York State Thruway entrances and overpasses, and the new construction or improvement of access roads to Ridge Hill, along with associated traffic signalization systems. Additionally, the Ridge Hill project also included extensive environmental mitigation, including the off-site rehabilitation of native plant species.

21. Ridge Hill development resulted in the creation of many construction jobs for local employers, such as Yonkers Contracting Company, Inc., which FC Yonkers engaged as the largest single prime contractor for the project, with a contractual commitment of \$230,042,000.00.

22. As examples of the extensive job creation resulting from FC Yonkers' development of Ridge Hill, the average number of construction workers onsite at Ridge Hill on a daily basis was 287 in February 2009, 424 in June 2009, and 174 in January 2010.

23. FC Yonkers became certified under the Empire Zones Program (Article 18-B of the General Municipal Law) (the "Program") as a New York State QEZE effective March 8, 2004 to claim Empire Zone benefits in connection with the facilities located at 1 Ridge Hill, Yonkers, New York designated as zone property on March 1, 2002 within the boundaries of the Yonkers Empire Zone. The Empire State Development Corporation issued to FC Yonkers an Empire Zone Retention Certificate (EZRC) that was "[r]equired to claim Empire Zone and Qualified

Empire Zone Enterprise tax credits for tax year 2008 and later.”

24. The Ridge Hill project required an investment by FC Yonkers of more than \$800 million. The primary lender for the project, Bank of America, provided construction loan funding of approximately \$600 million.

25. As part of its capital budget for Ridge Hill, FC Yonkers included an expectation of receiving the QEZE credit for real property taxes as a certified eligible participant in the Empire Zones Program. FC Yonkers relied upon the QEZE credit, and if the QEZE credit is not received, FC Yonkers will have to raise and obtain an alternative equity funding source.

26. In the 2009 tax year, Ridge Hill was approximately midway through construction. During that year, the new Thruway bridge received planking, retail buildings A, H and J were under construction, parking garages B, AP and JK were taking shape, and the excavation and foundations for other retail buildings were taking place.

27. During the 2009 tax year, FC Yonkers invested approximately \$158 million dollars into the Ridge Hill project in the form of hard construction costs (including payments to contractors for labor and materials), and soft costs (including all site management fees, interest, and real estate taxes and charges). All these costs were capitalized on the 2009 income tax returns for FC Yonkers because the project was in development.

28. Petitioner and FC Yonkers have the same fiscal year with respect to the 2009 tax year, which is February 1, 2009 through January 31, 2010.

29. For the 2009 tax year, FC Yonkers reported its federal and New York State tax liability as if it were a partnership whose principal business activity was the development of real estate.

30. FC Yonkers is eligible to claim the QEZE credit for real property taxes for the 2009

tax year with respect to the Ridge Hill project.

31. On its U.S. Return of Partnership Income, Form 1065, filed for the fiscal year February 1, 2009 through January 31, 2010 (2009 tax year Form 1065), FC Yonkers reported gross receipts or sales in the amount of \$7,177,033.00, less cost of goods sold, per Schedule A listed as “Other Costs,” in the amount of \$6,220,214.00, for a total income in the amount of \$956,819.00. FC Yonkers did not report any salaries or wages as a deduction on line 9 of the partnership return because Ridge Hill was in development. As such, the salaries and wages of FC Yonkers’ employees were required to be capitalized rather than expensed. On the 2009 tax year Form 1065, Schedule L, Balance Sheets per Books, line 13, entitled “Other assets (attach statement),” FC Yonkers reported an end-of-year balance in the amount of \$530,626,803.00. The attached statement 2 listed “Schedule L - Line 13 - Other Assets” as “Construction in Progress” and reported a beginning balance in the amount of \$373,485,202.00 and an ending balance in the amount of \$530,626,803.00.

32. FC Yonkers did not report any salaries or wages on its New York State Partnership Return (Form IT-204) filed for the fiscal year February 1, 2009 through January 31, 2010 (2009 tax year IT-204). In Section 10 of the 2009 tax year IT-204, entitled “New York allocation schedule,” FC Yonkers indicated that it carried on business at 1 Ridge Hill, Yonkers, New York, and described its business as “LOTS.” On the return’s Section 11, entitled “Partners’ credit information, Part 2 - Pass-through credits, addbacks and recaptures,” FC Yonkers reported on line 147, entitled “Other pass-through credits,” a QEZE credit for real property taxes in the amount of \$327,866.00.³

³ The QEZE credit for real property taxes is actually \$311,028.00, the total amount of taxes paid by FC Yonkers in 2009 (*see* Finding of Fact 43).

33. On its Form IT-606, Claim for QEZE Credit for Real Property Taxes, for the 2009 tax year, FC Yonkers reported its date of first certification by the Empire State Development Corporation as March 8, 2004. On this form's Section 1 entitled "For QEZEs first certified prior to April 1, 2005, Schedule A - Employment test for QEZEs first certified prior to April 1, 2005, Part 1 - Empire Zone (EZ) employment - Computation of the employment number within all EZs for the current tax year and the five-year base period," FC Yonkers reported two full-time employees on March 31, 2009, June 30, 2009, September 30, 2009 and December 31, 2009. In the same section, FC Yonkers reported the current tax year employment number within all EZs as "2." On the form's Section 1, Schedule B, entitled "Computation of test year employment number within the EZs in which you are certified," FC Yonkers reported a test year employment number of zero. FC Yonkers reported a current tax year employment number of "1" on line 8 and an "employment increase factor of "1.0000" on line 13 of the Form IT-606, Section 1, Schedule C, entitled "Employment increase factor." On the form's Section 1, Schedule D, entitled "Computation of QEZE credit for real property taxes for QEZEs first certified prior to April 1, 2005," FC Yonkers reported a "benefit period factor" of "1.0000" on line 14; an "employment increase factor" of "1.0000" on line 15; "Eligible real property taxes" in the amount of \$327,866.00 on line 16; and "total QEZE credit for real property taxes" in the amount of \$327,866.00 on line 24.⁴

34. FC Yonkers's QEZE test date is March 8, 2004, its test year is the fiscal year ending January 31, 2004 (2003 tax year), and its base period is fiscal years ending January 31, 2002 (2001 tax year) and January 31, 2003 (2002 tax year). Its employment number for its base period is zero. The 2009 tax year was the sixth year of FC Yonkers's business tax benefit period.

⁴ See footnote 3.

35. For the 2009 tax year, FC Yonkers allocated 100% of its claimed QEZE credit for real property taxes to F.C. Member pursuant to the terms of Article IV of the FC Yonkers Amended Operating Agreement.

36. Petitioner filed a form CT-3-A, General Business Corporation Combined Franchise Tax Return (form CT-3-A), in the name of “Forest City Enterprises, Inc. & Subsidiaries” (combined group) for the 2009 tax year. Along with the form CT-3-A, petitioner filed a form CT-604-CP, Claim for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners, for the 2009 tax year (form CT-604-CP) in the name of FC Yonkers, the QEZE partnership. On line one of the form CT-604-CP, petitioner claimed a QEZE credit in the amount of \$327,866.00 for real property taxes passed through from FC Yonkers. On line 78 of its form CT-3-A, petitioner reduced the combined group’s tax liability by applying \$374,479.00 in credits, which credits included the QEZE credit in the amount \$327,866.00 passed through from FC Yonkers. On line 100a of its form CT-3-A, petitioner claimed a refund of unused tax credits in the amount of \$4,109,386.00.

37. By letter dated May 23, 2012, Diane Houck, a Tax Technician in the Division of Taxation’s (Division) Income/Franchise Desk Audit Bureau, Audit Group 12, notified petitioner that she was reviewing petitioner’s claim for QEZE credit for real property taxes and QEZE tax reduction credit for corporate partners in the name of FC Yonkers.⁵ In that letter, Ms. Houck requested information and documentation as follows:

A. Copies of the property tax bills and proofs of payment for all taxes that

⁵ Ms. Houck’s letter also requested information regarding petitioner’s claim for QEZE credit for real property taxes and QEZE tax reduction credit for corporate partners in the name of FC Gowanus Associates LLC (FC Gowanus Associates). FC Gowanus Associates’ claim for the QEZE credit for real property taxes is not at issue in this proceeding.

were the basis for the QEZE credit obtained from FC Yonkers.

B. For any payment in lieu of taxes (PILOT payments) made pursuant to a written agreement executed or amended after January 1, 2001, a computation of the PILOT payment limitation which is the product of (1) and (2) below divided by 1,000.

“1. The greater of the basis for federal income tax purposes on the certification date of real property (including buildings and structural components of buildings) owned by the QEZE and located in the Empire Zone for which it is certified or the basis on the last day of the tax year;

2. The full value tax rate within the county where such property is located as most recently reported to the Commissioner of Tax and Finance by the State Board of Real Property Services.”

C. A list of the employees that were claimed for the QEZE real property tax credit, including each employee’s name, social security number, hire date, termination date, a designation of full or part-time hire status, and the number of hours worked for each quarter of the fiscal year ended January 31, 2010.

D. A copy of all pages of the New York State Partnership Return filed by FC Yonkers for the fiscal year ended January 31, 2010.

38. Having received no response to her May 23, 2012 letter, Ms. Houck sent another letter dated July 17, 2012, requesting the same information. On or about August 1, 2012, Joseph Krivis, petitioner’s Director of Federal and State Income Taxes, responded by email and requested an extension to submit the requested information. Ms. Houck granted the extension. On October 16, 2012, Ms. Houck called Mr. Krivis to inquire about the status of the requested information. At that time, Mr. Krivis stated that they were working on getting the information. Subsequently, Ms. Houck left voice mail messages for Mr. Krivis on December 28, 2012 and

February 5, 2013 regarding the status of the requested information. Mr. Krivis did not respond to either of Ms. Houck's voice messages. None of the requested information was supplied to Ms. Houck.

39. On April 22, 2013, Ms. Houck mailed the Statement of Tax Reduction or Overpayment, dated February 27, 2013, to petitioner that allowed a net refund of \$3,606,386.00 for the period ended January 31, 2010. Ms. Houck allowed petitioner's Claim for Brownfield Redevelopment Tax Credit and Claim for QEZE Credit for Real Property Taxes based upon petitioner's ownership interest in a partnership, Tiago Holdings, LLC, adjusted to reflect the amount required to reduce the tax to the fixed minimum tax due. The Statement also advised that petitioner's claims for QEZE Credit for Real Property Taxes and QEZE Tax Reduction Credit for Corporate Partners from FC Gowanus Associates and FC Yonkers were being addressed under separate cover.

40. In March 2013, Ms. Houck closed the audit on petitioner's claim for the QEZE credit for real property taxes passed through from FC Yonkers for the fiscal year February 1, 2009 through January 31, 2010. On April 22, 2013, Ms. Houck issued a Notice of Disallowance denying petitioner's claims for pass through of the QEZE credit for real property taxes from FC Gowanus Associates and FC Yonkers in the respective amounts of \$243,306.00 and \$327,868.00 for the period ended January 31, 2010 because "we have not received the information requested in our letter dated May 23, 2012."

41. On October 15, 2013, petitioner commenced this petition before the Division of Tax Appeals to contest the Notice of Disallowance with respect to FC Yonkers. On January 15, 2014, the Division's counsel served and filed its Answer.

42. By letter dated October 18, 2013, Mr. Krivis responded to Ms. Houck's letters of May

23, 2012 and June 25, 2012 with some of the requested information for the fiscal years ended January 31, 2010 and January 31, 2011 with respect to FC Yonkers and FC Gowanus Associates. For FC Yonkers' 2009 tax year, Mr. Krivis provided copies of most of the property tax bills and proof of payments⁶ and a copy of its New York State Partnership Return for the fiscal year February 1, 2009 through January 31, 2010. In his letter, Mr. Krivis indicated that the employee data would be forthcoming in a separate response. He also stated that:

“the last 2009 check issued by FC Yonkers Associates, LLC was voided and then reissued February 5, 2010 which is within the tax year 2010. Thus the 2009 credit was reduced by that check and we are asking that [tax year] 2010 be increased by the appropriate amounts. In addition, the amount of the check was reduced to reflect that one Parcel was deeded to a new owner in the 4th quarter of 2009 and thus tax was not owed by the taxpayer.”

43. Included with Mr. Krivis' October 18, 2013 letter was a schedule of check payments made by FC Yonkers for 28 properties that were identified by their respective block and lot numbers on the schedule. This schedule contained detailed information regarding the reduction in the 2009 tax year pass-through QEZE credit generally referenced in the October 18, 2013 cover letter. Review of this schedule indicates that in the 2009 tax year, total taxes in the amount of \$311,028.00 were paid, a \$16,838.00 reduction in the amount of QEZE real property taxes claimed by petitioner as a pass through from FC Yonkers. According to the explanation at the bottom of the schedule, the difference was due to a \$31.00 keypunch error, voided check number 4344 in the amount of \$15,380.81,⁷ and an extra payment in the amount of \$1,487.65 for block

⁶ Mr. Krivis did not provide any billing invoice related to the \$185,784.96 payment to the City of Yonkers.

⁷ Voided check number 4344 included installment payments on bill numbers 17264, 35129, 35130, 35131, 35132, 35133, 35134, 35135, 35136, 35137, 35138, 35139, 35140, 35141, 35142, 35143, 35144, 35145, 35146, 35147, 35148, 35149, 35150, 35151, 35152, and 35153 issued to block - lot numbers 4000-130, 4061-001, 4061-002, 4062-001, 4063-001, 4064-001, 4065-001, 4066-001, 4067-001, 4068-001, 4069-001, 4069-002, 4070-001, 4071-001, 4072-001, 4072-002, 4072-003, 4072-004, 4072-005, 4073-001, 4074-001, 4075-001, 4076-001, 4076-002, 4077-001, and 4078-001, respectively.

4001 lot 214 included in check number 4247, “(-31 + 1,488 + 15,381 = 16,838).” As a result of this difference, the taxes paid by FC Yonkers in the 2009 tax year totaled \$311,028.00 (\$327,866.00 - \$16,838.00 = \$311,028.00). As such, the 2009 tax year QEZE credit for real property taxes passed through from FC Yonkers was \$311,028.00.

44. As part of his October 18, 2013 information submission to Ms. Houck, Mr. Krivis also included the computation of FC Yonkers’ PILOT limitation for the period February 1, 2009 through January 31, 2010 that follows:

“Federal basis of real property	537,276,131
Divide by 1,000	<u>1,000</u>
	537,276
Westchester county full value rate	<u>20.3</u>
PILOT Limitation	<u>10,906,703”</u>

Mr. Krivis indicated that the amount of the PILOT payment made by FC Yonkers, and claimed by petitioner for the 2009 tax year as part of the QEZE credit, \$185,784.96, does not exceed the annual cap amount limitation. He further indicated that FC Yonkers’ federal basis of real property was based upon the following balances as of January 31, 2010:

“Building Costs	8,550,361
Development	474,576,143
Land	41,234,492
Procurement Costs	<u>12,915,134</u>
	<u>537,276,131”</u>

45. Forest City Ratner Companies, LLC (FCRC), whose corporate offices are located at One MetroTech Center, Brooklyn, New York, is wholly owned by petitioner. FCRC is an overhead management company that provides centralized services, including accounting and legal services, for the separate Forest City entities that own and develop real estate projects, including FC Yonkers.

46. In order for petitioner to develop real estate projects in a cost-efficient manner, certain

centralized services are provided by FCRC for petitioner's individual project development entities, including FC Yonkers. Payroll, medical, dental and disability insurance, a 401(k) plan, legal services and accounting services are provided by FCRC for all of those individual project entities. This centralized services approach is the most economical way to provide services and benefit packages.

47. FCRC also furnishes IT services on a centralized basis, including the email accounts for all personnel who work for any of petitioner's development entities, like Theron Russell, who was working on FC Yonkers' Ridge Hill project during the 2009 tax year. This is the most efficient way to provide email services. FCRC also provided letterhead/stationery used by personnel working on development projects.

48. FCRC also issued on a centralized basis the payroll checks and annual forms W-2 to the employees of the various development entities. This was the most efficient way to distribute compensation across multiple development entities for personnel who, from time to time, moved from one specific project entity to another.

49. FCRC recovered the cost of its centralized services and the payroll costs expended for personnel of the various development projects through a site management fee that was budgeted by, charged to, and collected from each project entity.

50. The budget prepared and updated for the construction of Ridge Hill by FC Yonkers included various categories of costs, one of which was the site management fee. The site management fee was paid by FC Yonkers to reimburse FCRC for the cost of the centralized services which FCRC provided in support of the Ridge Hill project.

51. FCRC billed the budgeted site management fee systematically on a monthly basis to the various development entities, including FC Yonkers. FCRC would "true up," i.e., reconcile,

the billed site management fee to the actual time spent and costs incurred at the each project, such as Ridge Hill, on a quarterly basis.

52. Lauren Du holds a degree in accounting from New York University, is a CPA, and serves as Senior Vice President and Controller of FCRC. In that role, she is in charge of the accounting department, overseeing financial reporting, cash disbursements, payroll, and Sarbanes-Oxley compliance.

53. Prior to working at FCRC, Ms. Du worked with the public accounting firms of Kenneth Leventhal and Ernst & Young, primarily auditing real estate-related entities, including FCRC. Ms. Du had been promoted to the level of manager when she left Ernst & Young to work at FCRC in 1995.

54. At the hearing, Ms. Du explained, among other things, the method FCRC uses to make the quarterly “true-up” adjustments to the site management fee charged to, and collected from, each project entity. One or more of the following FCRC departments provide personnel services to the various development entities: the office building development group “20PDOF;” the retail sectors development group “40PDRT;” the construction group, “60CONT,” [Mr. Sanna’s group] that provided construction project managers; the legal group, “70LEGL;” the finance group “80FINC;” and the public relations group, “20GOVR.” For each quarter, the managers of each of these groups determine the amount of time their respective personnel spend on the various projects on a one hundred percent basis.⁸ Then, for each project, a weighted average is derived by taking the percentage of time spent on the project by each group, multiplying each percentage by the base wages of the respective group, totaling the products of the same, and then dividing

⁸ The total base wages for each group is also determined on a quarterly basis, as well as the sum total of the base wages for all six groups.

the sum total of the base wages of personnel devoted to the project by the sum total of the base wages for all six groups. In each quarter, FCRC determines its total overhead costs, which amount includes the total wages for all of the company's groups, all employee benefits, rent, light and water. To determine the total site management calculation, the weighted average percentage of each project is multiplied by the total overhead for the quarter. For each project, an up or down rounding of the quarterly site management allocation takes place. A site management analysis is then made for each project to determine any adjustments needed to be made to the budgeted site management fees collected for the quarter from that project to reflect the actual quarterly site management fees allocated to the same. Based upon the site management analysis, a debit or credit invoice will be issued to each project to reflect the true-up adjustment to the site management fees collected from it for the quarter.

55. The site management fee billings by FCRC to FC Yonkers included recovery of the wages and benefits of the personnel dedicated to Ridge Hill. The site management fee bills from FCRC to FC Yonkers were in fact paid by FC Yonkers for the months in the 2009 tax year.

56. The record includes information used to determine the "true-up" adjustments that FCRC made to site management fees collected from each project in the first and third quarters of the 2009 tax year. Review of those documents indicates that the following groups spent time in each of those quarters on the Ridge Hill project (referred to as "Yonkers-Retail"): the retail sectors development group, the construction group, the legal group, the finance group, and the public relations group.⁹

⁹ Neither of these time allocation documents contains the confidential base wage amounts for any individual group, or the confidential sum total wages for all six groups that were used as part of the time allocation computations. However, both time allocation documents list amounts for total overhead costs, and the site management allocation amounts determined to be due for each project.

57. The total (multi-year) budgeted site management fee for FC Yonkers' Ridge Hill project was \$33,433,622.00, and updated in December 2009 to \$34,931,999.00. The monthly site management fee payment from FC Yonkers to FCRC was \$547,468.00 in 2009, subject to the quarterly true-up adjustment. Prior to any quarterly true-up adjustment, the quarterly site management payments totaled \$1,642,906.00, or total site management payments in the amount of \$6,569,624.00 for the 2009 tax year. The true-up process with respect to the Ridge Hill site management fee charged by FCRC to FC Yonkers was done for each quarter in the 2009 tax year. Specifically, true-up credit adjustments of \$250,406.00, \$307,406.00, \$645,406.00, and \$752,406.00 were made to the billed and paid quarterly service management fees by invoices dated April 30, 2009, July 31, 2009, October 31, 2009, and January 31, 2010, respectively. As a result of the quarterly true-up credit adjustments made by FCRC, FC Yonkers paid site management fees in the total amount of \$4,614,002.00 in the 2009 tax year.

58. The personnel costs for Theron Russell (including his salary and benefits), which were paid in the first instance by FCRC, were recovered from FC Yonkers as part of the site management fee.

59. Mr. Russell submitted his expense reports to FCRC for reimbursement. Although business expenses were reimbursed to Mr. Russell by FCRC in the first instance, these costs were allocated and billed to FC Yonkers, and recovered from FC Yonkers.

60. Robert Sanna began his employment with the Forest City entities in 1989 after working 10 years for a construction company. Mr. Sanna holds Bachelor of Science and Bachelor of Architecture degrees received from City College of New York in 1978 and 1980, respectively, and is registered as an architect in New York. He first worked as a Forest City construction project manager on the One Metro Tech Project, and became Executive Vice

President of Design, Development and Construction in 1993.

61. Mr. Sanna held the title of Executive Vice President of Design, Development and Construction with FCRC, and also served as an officer of every one of the development entities (including FC Yonkers) that owned and developed the individual projects (like Ridge Hill).

62. Mr. Sanna has been a Vice President of RRG Yonkers since its inception in 2001. As Vice President of RRG Yonkers directing the work of FC Yonkers at Ridge Hill, Mr. Sanna's role was to assign and coordinate all the resources to the Ridge Hill project based upon experience and skill, to review the construction contracts and bidding, and to be sure that the personnel assigned to Ridge Hill were following corporate procedures for bidding, awarding and overseeing the work and processing the related documentation.

63. Mr. Sanna had responsibility for signing and entering into the contracts between FC Yonkers as the Ridge Hill project owner and the individual contractor entities. He did so in his capacity as an officer of the managing member of FC Yonkers.

64. Mr. Sanna, as Vice President of RRG Yonkers, was responsible for supervising the project managers who were working for FC Yonkers on Ridge Hill, including Mr. Russell.

65. Mr. Sanna originally hired Mr. Russell in 2003 to work as a construction project manager for a particular Forest City entity, FC Quarter Master Associates, L.P., which was developing the Quarter Master project in Philadelphia, Pennsylvania.

66. Mr. Sanna assigned Mr. Russell to work for FC Yonkers on Ridge Hill in 2005 based upon Mr. Russell's experience with large scale projects.

67. As an officer of the managing member of FC Yonkers charged with directing the work at Ridge Hill, Mr. Sanna required Mr. Russell to report directly to him. Mr. Sanna had the authority to fire Mr. Russell. He conducted Mr. Russell's in-person annual performance reviews,

including salary adjustments and bonus compensation adjustments. In the 2009 taxable year, Mr. Russell's bonus compensation was severely reduced by Mr. Sanna because of the "Great Recession."

68. The Agreement for Program Management Services between FC Yonkers Associates, LLC as Owner/Developer and The Whiting-Turner Contracting Company (Whiting-Turner) was entered into on November 14, 2007 (Whiting-Turner contract). Mr. Sanna, as Vice President of RRG Yonkers, signed the contract between FC Yonkers and Whiting-Turner, to engage Whiting-Turner as the program manager for the Ridge Hill project.¹⁰ A copy of this contract was distributed to Mr. Russell because he was going to have day-to-day administration of the Whiting-Turner contract for FC Yonkers.

69. Whiting-Turner, the program manager, was an independent contractor, not an agent or an employee of FC Yonkers. Under the Whiting-Turner contract, FC Yonkers as the owner/developer of Ridge Hill, designated Theron Russell and Scott Stutman as its representatives to act on its behalf with respect to the Ridge Hill project, and "[e]ach of these representatives and their designees may act individually on behalf of the owner." By this designation, Mr. Russell was given express authority to approve and act on behalf of FC Yonkers as the owner of Ridge Hill. Whiting-Turner served as an extension of the project manager services provided by Mr. Russell and Mr. Stutman at Ridge Hill.

70. Mr. Russell's delegated authority included the responsibility to approve and sign change orders for the Ridge Hill project. Exercising this authority on behalf of FC Yonkers, Mr.

¹⁰ This contract governed all services (pre-construction and construction phase) provided by Whiting-Turner for the Ridge Hill project from April 1, 2007 onward. Whiting-Turner had performed pre-construction services for FC Yonkers from November 2006 through March 31, 2007 under a separate pre-construction services agreement dated February 11, 2005 (*see* Whiting-Turner contract, Article 3, Section 1).

Russell approved and signed change orders, including one in September 2009 with Whiting-Turner for \$1,304,328.00.

71. On May 15, 2007, Mr. Sanna, as Vice President of RRG Yonkers, signed the \$230,042,000.00 Trade Contract for Construction Work between FC Yonkers and Yonkers Contracting Company, Inc. (Yonkers Contracting Company) for infrastructure construction at Ridge Hill. Mr. Russell was included on the distribution list for this executed contract.

72. Throughout 2009, Yonkers Contracting Company was paid monthly by FC Yonkers based upon an application for payment which was submitted to and approved by Mr. Russell for FC Yonkers. For example, Mr. Russell reviewed and approved the application for work performed in February 2009 totaling \$4,752,607.64, and in September 2009 totaling \$7,317,042.02. It was Mr. Russell's responsibility as an FC Yonkers project manager to ensure that the requested payment for work was appropriate.

73. Based upon the "blue sheets"¹¹ approved and signed by Mr. Russell, an FC Yonkers' check was issued by the FCRC accounting department in payment of the monthly payment applications from Yonkers Contracting Company for work performed at Ridge Hill. The FC Yonkers monthly checks were signed by Ms. Du, the comptroller.

74. On February 12, 2008, Mr. Sanna, as Vice President of RRG Yonkers, signed the \$67,280,028.00 contract between FC Yonkers and Worth Construction Company (Worth Construction) for the construction of retail buildings A1, A2, A3, B and C (plus pedestrian bridges AC, AB and BC) at Ridge Hill. Mr. Russell was included on the distribution list for this contract as a FC Yonkers' project manager at Ridge Hill.

75. Throughout 2009, Worth Construction was paid monthly by FC Yonkers based upon

¹¹ The "blue sheets" were so-named because of the blue paper on which the forms were printed.

applications for payment that were submitted to and approved by Mr. Russell for FC Yonkers. For example, Mr. Russell reviewed and approved the application for work performed by Worth Construction for payment by FC Yonkers in February 2009 and in September 2009 including the underlying change orders.

76. Based upon the “blue sheets” approved and signed by Mr. Russell, FC Yonkers’ checks were issued by the FCRC accounting department in payment of the monthly payment applications from Worth Construction for work performed at Ridge Hill. The FC Yonkers monthly checks were signed by Ms. Du, the comptroller. For example, Worth Construction was paid \$2,389,082.21 in February 2009 and \$2,539,927.80 in October 2009 by FC Yonkers on the approval of Mr. Russell.

77. In the same manner as with Whiting-Turner, Yonkers Contracting Company and Worth Construction, Mr. Russell acted with authority on behalf of FC Yonkers to review and approve monthly payment requisitions for the other contractors on the Ridge Hill project.

78. On June 25, 2007, Mr. Sanna, as Vice President of RRG Yonkers, signed the \$666,000.00 contract between FC Yonkers and Eastern Excavation for work at Ridge Hill.

79. Prior to a contract being signed, it was Mr. Russell’s responsibility on behalf of FC Yonkers to identify the work required, solicit proposals and bids for work, and then make a recommendation to Mr. Sanna as to the scope of the contract and the vendor to whom the contract would be awarded.

80. The FC Yonkers checks issued to pay the Ridge Hill contractors were signed by Ms. Du, as an authorized signer for FC Yonkers, after receiving all the necessary approvals, including that of Mr. Russell, as FC Yonkers’ Ridge Hill project manager.

81. Mr. Russell is a project manager in the real estate development industry with 40 years

of experience, including 18 years from 1985 to 2003 owning and operating his own construction company, which specialized in the renovation of commercial and institutional properties.

82. Mr. Russell began working for FC Yonkers on the Ridge Hill project in January 2005 as a construction project manager, and continued that work through June 2013.

83. Mr. Russell's principal responsibilities involved the procurement and management of design and construction contracts for construction of the development at Ridge Hill. In this role, he was responsible for the bidding and contracting process for the infrastructure construction work at Ridge Hill, the interface with project inspectors, and the management of municipal agency approvals for the project.

84. Mr. Russell held a full-time position, which required an average of 50 hours a week of work. He was devoted exclusively to FC Yonkers' Ridge Hill project during the 2009 tax year.

85. Mr. Russell was assigned to work for FC Yonkers at Ridge Hill, and was supervised by Mr. Sanna, who also provided the direction and control of Mr. Russell's work at Ridge Hill. This direction and control was provided in Mr. Sanna's capacity as an officer of the managing member of FC Yonkers. Mr. Sanna typically visited the Ridge Hill site once a month. Mr. Russell and Mr. Sanna were in frequent contact by email, occasional phone calls, and in person approximately once per week.

86. Mr. Sanna set forth the time, scope and budget objectives of the Ridge Hill development, and approved all the contracts entered into by FC Yonkers. Mr. Russell reported to Mr. Sanna on bid solicitations and recommendations for contracting by FC Yonkers with architects, engineers and contractors hired to build Ridge Hill. His recommendations to Mr. Sanna for contract approvals were transmitted either by paper copy, or later via an electronic delivery system known as LiveLink.

87. After the contracts between FC Yonkers and its contractors were signed by Mr. Sanna, Mr. Russell was sent a copy of the contracts for his information and use in administering them in his capacity as project manager.

88. Mr. Russell's work at Ridge Hill initially involved the bidding and purchase of demolition services in order to remove the remaining old buildings at the site, photographing the site, and making judgments with the engineers about the best way to design the site. He was also responsible for meeting with City of Yonkers officials, utility companies and New York State Thruway Authority personnel to plan the construction of Ridge Hill. Mr. Russell also oversaw the renovation of Building H at Ridge Hill.

89. FC Yonkers contracted with Whiting-Turner to serve as program manager for the Ridge Hill project, which Mr. Russell utilized as one of his resources in support of his responsibilities for administering the work at the site. Mr. Russell helped draft the requirements for the request for proposals (RFP), and the evaluation of the proposals, which led to the selection and hiring of Whiting-Turner.

90. Mr. Russell worked in collaboration with other FC Yonkers project managers at Ridge Hill, including Dennis Raucher, Marianna Circumaru and Scott Stutman. Mr. Russell was most actively involved in the administration of site work, i.e., at or below the ground, while Mr. Stutman was more involved with the buildings themselves, i.e., above the ground.

91. Mr. Russell had responsibility for overseeing the change order process with Whiting-Turner on any contracts where work at Ridge Hill was added or deleted. This included reviewing and approving change orders on behalf of FC Yonkers during 2009, resulting in the additional commitment by FC Yonkers to millions of dollars in additional payments.

92. Mr. Russell possessed and exercised signatory authority for the change orders as a

project manager on behalf of FC Yonkers, including the one signed by him on October 1, 2009, entitling Whiting-Turner to an additional \$1.3 million from FC Yonkers, and one dated February 3, 2009, entitling Yonkers Contracting Company to an additional \$51,000.00.

93. In preparation for the award by FC Yonkers of the project's largest single prime contract to Yonkers Contracting Company, Mr. Russell had responsibility for interviewing the prospective contractors, reviewing their qualification statements, assembling the bidding documents, and soliciting the bids. He did so on behalf of FC Yonkers. Mr. Russell then worked closely with Mr. Sanna to determine whether a responsive and accurate bid had been made by Yonkers Contracting Company, and to award the contract for \$230,042,000.00 of site work at Ridge Hill.

94. Mr. Russell's responsibilities for FC Yonkers included the review of monthly payment requisitions from the contractors, such as Yonkers Contracting Company, which were submitted specifically to him as the representative of FC Yonkers. This involved his review of the contractor's draft submissions in collaboration with the contractor, program manager and lender's representative to determine the accuracy of the requests. This monthly process often involved a field inspection at the site to determine or verify the percentage of completion of a particular item of work prior to approving payment for it.

95. Mr. Russell had responsibility on behalf of FC Yonkers to sign off on the "blue sheets" that approved the contractors' monthly payment applications. For example, on March 12, 2009, he approved the Yonkers Contracting Company application #24 resulting in FC Yonkers paying \$4,752,000.00 on April 1, 2009 to the contractor for its work at Ridge Hill in February 2009. In the fall of 2009, Mr. Russell reviewed and approved the Yonkers Contracting Company's payment requisition for the month of September 2009, which authorized FC Yonkers

to pay the contractor \$7.3 million.

96. During 2009, Mr. Russell reviewed and approved other monthly payment applications from other contractors on behalf of FC Yonkers, such as Worth Construction, which had responsibility for building the retail core, shell buildings and pedestrian bridges. For example, on March 12, 2009, Mr. Russell approved payment to Worth Construction for \$2,389,082.21 for its work in February 2009. This followed Mr. Russell's review and approval or adjustment of the application at a "pencil meeting" based upon his knowledge of the site and the amount of work completed. He similarly approved the Worth Construction payment requisition for September 2009 in the amount of \$2,539,927.80 on behalf of FC Yonkers.

97. During his work for FC Yonkers on Ridge Hill, Mr. Russell's principal office was located on the third floor of Building H at the Ridge Hill site (rather than a construction trailer), where there were also field offices for the seven or eight prime contractors, the City of Yonkers building inspector, other third party inspectors, and the resident engineer for the Thruway Authority.

98. The third floor of Building H also contained a large scale model of the Ridge Hill project for use in marketing the retail opportunities at the site to prospective tenants. In addition, almost all of the enormous volume of engineering and architectural drawings related to Ridge Hill were kept in a large room on the third floor of Building H.

99. Mr. Russell routinely attended design progress and construction progress meetings at the Ridge Hill site, as well as ad hoc meetings on an as needed basis with City of Yonkers officials and utility company representatives. At these meetings, Mr. Russell was representing FC Yonkers as the owner of Ridge Hill.

100. Mr. Russell had to be based at and working out of the Ridge Hill site field office,

because this was where the construction activity was actually taking place, where job meetings were held, and where municipal agency inspections occurred. He could not perform his project manager job for FC Yonkers at Ridge Hill without working at and out of the project site. Mr. Russell was FC Yonkers' "boots on the ground" to develop an intimate knowledge of the site conditions and activity, and to properly administer the construction activity.

101. In connection with his work for FC Yonkers at Ridge Hill, Mr. Russell also had to spend time at various offices offsite from Ridge Hill, including meetings at offices of Yonkers Contracting Company in Yonkers and at the City of Yonkers offices.

102. Mr. Russell's work for FC Yonkers was typically performed at Ridge Hill or in the City of Yonkers on Tuesday, Wednesday and Thursday each week. He also spent time in the Brooklyn offices of FCRC, where FCRC's legal and accounting personnel who had responsibilities for the Ridge Hill project were located. Mr. Russell typically interacted with legal and accounting staff at the FCRC offices in Brooklyn on Mondays.

103. Pursuant to an arrangement he made with Mr. Sanna, Mr. Russell performed his Ridge Hill responsibilities, including telephone conference calls and emails, from his home in Baltimore one day a week, usually on Fridays. Even though not physically present at Ridge Hill on those days when he worked from home, his work was nevertheless in connection with his responsibilities for FC Yonkers at Ridge Hill.

104. As noted above, FCRC provided the legal and accounting back office infrastructure needed to support the design and construction activities that were taking place in Yonkers at Ridge Hill. FCRC issued Mr. Russell his paycheck and, at year end, his Form W-2. Those personnel costs for Mr. Russell were then charged back by FCRC to FC Yonkers as the project entity/owner of Ridge Hill.

105. During 2009, Mr. Russell maintained an electronic calendar in the Outlook program which generally reflected his meetings and responsibilities. He also maintained a chronological day book in which he recorded his activities, meetings and decisions related to Ridge Hill during 2009. This day book was a contemporaneously maintained work diary. The day books were an aid to him in performing his job responsibilities.

106. Construction progress meetings for Ridge Hill were generally held weekly. Minutes of these meetings were kept by Whiting-Turner as program manager. The minutes provide a summary of the issues discussed and list the attendees at the meetings.¹² Mr. Russell and other project managers represented FC Yonkers at these meetings. The construction progress meetings were held at Ridge Hill in the third floor large conference room in Building H.

107. Design team meetings for Ridge Hill were also generally held weekly. Minutes of these meetings were kept by Studio Five Partners and Architects, and later by Whiting-Turner. These minutes contain a summary of the topics discussed and list the attendees.¹³ The design team meetings were held at Ridge Hill in the third floor large conference room in Building H.

108. As a representative of FC Yonkers, Mr. Russell also attended other meetings to address issues at the Ridge Hill site. For example, on February 25, 2009 he attended a meeting in the conference room in Building H pertaining to the preparation of construction documents that would satisfy Consolidated Edison's requirements for construction of a high voltage transformer vault at the north end of the completed site. Both the minutes of that meeting and Mr. Russell's

¹² The record includes site progress meeting minutes for Ridge Hill Village, FC Yonkers Associates, LLC, prepared by Whiting-Turner during the 2009 tax year. Each attendee's name and firm are listed at the beginning of each set of meeting minutes. "FCYA" attendees at various meeting included Messrs. Russell, Stutman and Rauchet, and Ms. Circiumaru.

¹³ The record includes Ridge Hill - Yonkers, New York Design/Owner Team meeting minutes for meetings held during the 2009 tax year. FCRC is the firm listed for Messrs. Russell, Stutman, and Rauchet, and other individuals, who attended these meetings.

day book document his attendance at the meetings.¹⁴

109. On another occasion, on May 27, 2009, Mr. Russell attended a meeting in the Building H third floor conference room to discuss the results of concrete testing to determine the cause of a deficiency in material that had been incorporated in curbs and buildings and to develop a plan to address the issue. Mr. Russell was listed in the attendance list for the meeting¹⁵ and also recorded the meeting in his day book.

110. Exhibit 34 is a schedule showing those days on which Mr. Russell was physically present at the Ridge Hill site during the 52 weeks of the 2009 taxable year from February 1, 2009 through January 31, 2010. The entries are confirmed by the source documents, consisting of Mr. Russell's Outlook calendar, his day book, the construction meeting minutes, the design meeting minutes, and his expense reports. Mr. Russell verified the accuracy of the schedule.

111. As summarized on page 21 of exhibit 34, Mr. Russell was physically present at Ridge Hill three days per week for 12 of the 52 weeks in the 2009 taxable year; two days per week for 33 of the 52 weeks in the 2009 taxable year, and one day per week in five of the 52 weeks in the 2009 taxable year. He was on vacation for two full weeks of the 52 weeks in the 2009 taxable year.

112. Mr. Russell documented his inspections of work being performed and assessed the progress of Ridge Hill construction for FC Yonkers by taking photographs. The record includes a series of photographs taken by Mr. Russell showing construction progress over the course of the 2009 taxable year on the Ridge Hill site south of Building H, including buildings I and J; and

¹⁴ Mr. Russell's company is listed as "FCYA" in the list of attendees in the minutes of the February 25, 2009 Vault A - Submittal Review Meeting.

¹⁵ Both Mr. Russell and Mr. Rauchet attended the meeting, with "Forest City" next to their respective names in the May 27, 2009 meeting minutes.

the north end of the site, including Building A (the multiplex theater), Building B, Building C, Building D, and Building G.

113. As noted above, Mr. Russell was issued a Form W-2 for the year 2009 which listed FCRC as his employer. His 2009 W-2 did not list any City of Yonkers tax withholding.

114. Mr. Russell was hired to work as a construction project manager within the Forest City group of companies by a FCRC letter of hire dated September 8, 2003. He was initially assigned to work on the Quarter Master project in Philadelphia, Pennsylvania. While working on the Quarter Master project, Mr. Russell reported directly to Mr. Sanna.

115. Mr. Russell worked full-time as project manager on petitioner's Quartermaster Plaza project (a retail development project) on a 40 acre site in Philadelphia, Pennsylvania until January 2005. No part of the Quarter Master project is located in New York State. While working on the Quartermaster Plaza project, Mr. Russell rented an apartment in the City of Philadelphia, where he resided Monday through Thursday.

116. While working in Pennsylvania, Mr. Russell received his paycheck and Form W-2 from FCRC. The 2004 Form W-2 issued to Mr. Russell only reported New York State wages and New York State taxes withheld from the same.

117. Mr. Russell originally filed a New York State tax return for the year 2004, which was prepared by his Maryland-based tax preparer, on which he erroneously declared and paid New York State income tax on his earnings, even though he was actually working in Pennsylvania during 2004.

118. After learning of this error at a hearing before the Division of Tax Appeals with respect to petitioner's 2008 tax year, Mr. Russell filed an amended New York State income tax return for 2004 declaring no income earned in New York for 2004, and requesting a refund of his

approximately \$9,000.00 overpayment to New York.

119. Mr. Russell also corrected his tax filings for 2004 by filing a 2004 State of Pennsylvania income tax return and a 2004 City of Philadelphia school tax return, paying the state and municipal income taxes due.

120. On his original New York State income tax filings for 2005 through 2011, Mr. Russell did not pay tax on his nonresident earnings from his employment in the City of Yonkers. He was not aware that the City of Yonkers imposed such a tax.

121. After being advised by the Division's counsel at petitioner's hearing for the 2008 tax year to correct his tax filings for 2005 and subsequent years to reflect the City of Yonkers tax, Mr. Russell filed amended New York State income tax returns for 2005 through 2011. On the amended returns he declared his City of Yonkers earnings, and paid the nonresident income taxes of approximately \$500.00 to \$1,500.00 owed for each of those years.

122. No City of Yonkers income tax had been withheld from Mr. Russell's paychecks by FCRC for 2005 through 2011. No FCRC development entity had ever constructed a project in the City of Yonkers prior to Ridge Hill.¹⁶

123. The YIDA issued Invoice # 09-COY-FCYONKERS, dated July 10, 2009, to FC Yonkers for "1 Ridge Hill Plaza," Yonkers, New York, "BLOCK/LOT: 4060/1" that referenced "Section 3.3 Taxes Assessments and Utility Charges (a) Tax During Construction" of the Tax Benefit Leaseback Agreement and stated the "Tax During Construction Payment" terms were "\$30,964.16 per month" for the "City Fiscal Year (Period Covered): July - December, 2009." The "Current Assessment" section of this invoice stated that the "Current Payment Due to the

¹⁶ The City of Yonkers is a unique municipality in New York in imposing an income tax on nonresidents who earn wages within the City.

City of Yonkers” was \$185,784.96. On September 11, 2009, FC Yonkers paid the City of Yonkers \$185,784.96 by a check drawn on its Bank of America checking account.

124. For the 2009 tax year, in addition to the payment in lieu of taxes (PILOT) payment that it made for 1 Ridge Hill Boulevard, FC Yonkers paid taxes imposed by the City of Yonkers and Westchester County on the following 26 properties:

(1) Block 4000 Lot 130, 1 Grassy Sprain Road (property valuation: \$10,400.00, Net Amt subj to County tax: \$10,400.00, Net Amt subj to Real Estate Tax \$10,400.00, New Amt subj to School Tax \$10,400.00, Sewer Dist: 1 S-Value: \$10,400.00, Solid Waste Value: \$10,400.00, and unit frontage 121 feet) -

(A) County taxes paid on April 1, 2009 in the total amount of \$2,003.23, consisting of County/State Tax of \$1,313.21, Solid Waste Tax of \$122.20, Total Sewer Tax of \$192.82 and Safety Inspection Fee of \$375.00.

(B) City taxes paid on April 1, 2009 in the total amount of \$6,188.08, consisting of Real Estate Tax of \$1,449.03, School Tax of \$4,458.90, Frontage Tax of \$169.40, and Sundry Interest of \$110.75.

(C) City Tax for tax year 2010, bill number 17264, total City tax due in the amount of \$7,803.75, consisting of Real Estate Tax of \$1,687.19, School Tax of \$4,560.61, Frontage Tax of \$169.40, and Sundry Interest of \$1,386.55. Partial payments of \$2,601.25 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$2,601.25 was included in check number 4344 that was voided after issuance.

(2) Block 4061 Lot 1, 100 Ridge Hill Boulevard (Assessed Value \$240,400.00, County Exempt Value \$240,400.00, City Exempt Value \$240,400.00, School Exempt Value \$240,400.00, “INDL.DEVLP” exemption type, 6.5 acres) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35208, total County tax in the amount of \$7,430.76 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$2,824.70, computed on a taxable value of \$240,400.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$4,606.06, computed on a taxable value of \$240,400.00 at a tax rate of \$19.16.

(B) City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 35129, total tax due in the amount of \$3,969.00 for unit frontage property taxes.¹⁷ Partial payments of \$1,323.00 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$1,323.00 was included in check number 4344 that was voided after issuance.

(3) Block 4061 Lot 2, 2 Lembo Drive (Assessed Value \$87,200.00, County Exempt Value \$87,200.00, City Exempt Value \$87,200.00, School Exempt Value \$87,200.00, "INDL.DEVL" exemption type, 2.36 acres, and unit frontage of 1,027 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35209, total County tax in the amount of \$2,695.35 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,024.60, computed on a taxable value of \$87,200.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$1,670.75, computed on a taxable value of \$87,200.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35130, total City tax due in the amount of \$1,437.80.00 for frontage tax. Partial payments were made in the following amounts: \$479.28 included in check number 4204 (July-August 2009), and \$479.26 included in check number 4288

¹⁷ The unit frontage line item in the Property Taxes section of this City of Yonkers Tax Statement did not have a taxable value listed, but did have a tax rate of \$1.40 listed.

(Sept-Oct 2009). A partial payment of \$479.26 was included in check number 4344 that was voided after issuance.

(4) Block 4062 Lot 1, 22 Lembo Drive (Assessed Value \$69,000.00, County Exempt Value \$69,000.00, City Exempt Value \$69,000.00, School Exempt Value \$69,000.00, "INDL.DEVLP" exemption type, 1.87 acres, and unit frontage of 813 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35210, total County tax in the amount of \$2,132.79 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$810.75, computed on a taxable value of \$69,000.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$1,322.04, computed on a taxable value of \$69,000.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35131, total City tax due in the amount of \$1,138.20 for frontage tax. Partial payments of \$379.40 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$379.40 was included in check number 4344 that was voided after issuance.

(5) Block 4063 Lot 1, 21 Market Street (Assessed Value \$21,000.00, County Exempt Value \$21,000.00, City Exempt Value \$21,000.00, School Exempt Value \$21,000.00, "INDL.DEVLP" exemption type, .57 acres, and unit frontage of "000000" feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35211, total County tax in the amount of \$649.11 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$246.75, computed on a taxable value of \$21,000.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$402.36, computed on a taxable value of \$21,000.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35132, total City tax due in the amount of

\$347.20 for frontage tax. Partial payments were made in the following amounts: \$115.74 included in check number 4204 (July-August 2009), and \$115.73 included in check number 4288 (Sept-Oct 2009). A partial payment of \$115.73 was included in check number 4344 that was voided after issuance.

(6) Block 4064 Lot 1, 22 Market Street (Assessed Value \$46,900.00, County Exempt Value \$46,900.00, City Exempt Value \$46,900.00, School Exempt Value \$46,900.00, “INDL.DEVLP” exemption type, 1.27 acres, and unit frontage of 553 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35212, total County tax in the amount of \$1,449.68 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$551.08, computed on a taxable value of \$46,900.00 at a tax rate of \$11.75, and North Yonkers Sewer District County Sewer Valuation tax of \$898.60, computed on a taxable value of \$46,900.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35133, total City tax due in the amount of \$774.20 for frontage tax. Partial payments were made in the following amounts: \$258.08 included in check number 4204 (July-August 2009), and \$258.06 included in check number 4288 (Sept-Oct 2009). A partial payment of \$258.06 was included in check number 4344 that was voided after issuance.

(7) Block 4065 Lot 1, 74 Market Street (Assessed Value \$115,600.00, County Exempt Value \$115,600.00, City Exempt Value \$115,600.00, School Exempt Value \$115,600.00, “INDL.DEVLP” exemption type, 2.59 acres, and unit frontage of 1,126 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35213, total County tax in the amount of \$3,948.20 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,358.30, computed on a taxable value of \$115,600.00 at a tax rate of

\$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$2,214.90, computed on a taxable value of \$115,600.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35134, total City tax due in the amount of \$1,576.40 for frontage tax. Partial payments were made in the following amounts: \$525.48 included in check number 4204 (July-August 2009), and \$525.46 included in check number 4288 (Sept-Oct 2009). A partial payment of \$525.46 was included in check number 4344 that was voided after issuance.

(8) Block 4066 Lot 1, 73 Market Street (Assessed Value \$474,200.00, County Exempt Value \$474,200.00, City Exempt Value \$474,200.00, School Exempt Value \$474,200.00, "INDL.DEVLP" exemption type, 2.55 acres, and unit frontage of 1,110 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35214, total County tax in the amount of \$15,032.52 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$5,571.85, computed on a taxable value of \$474,200.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$9,085.67, computed on a taxable value of \$474,200.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35135, total City tax due in the amount of \$1,554.40 for frontage tax. Partial payments of \$518.00 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$518.00 was included in check number 4344 that was voided after issuance.

(9) Block 4067 Lot 1, 135 Market Street (Assessed Value \$89,100.00, County Exempt Value \$89,100.00, City Exempt Value \$89,100.00, School Exempt Value \$89,100.00, "INDL.DEVLP" exemption type, 2.41 acres, and unit frontage of 1,050 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35215, total County tax in the amount of \$2,754.09 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,046.93, computed on a taxable value of \$89,100.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,707.16, computed on a taxable value of \$89,100.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35136, total City tax due in the amount of \$1,470.00 for frontage tax. Partial payments of \$490.00 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$490.00 was included in check number 4344 that was voided after issuance.

(10) Block 4068 Lot 1, 136 Market Street (Assessed Value \$34,900.00, County Exempt Value \$34,900.00, City Exempt Value \$34,900.00, School Exempt Value \$34,900.00, "INDL.DEVLP" exemption type, .94 acres, and unit frontage of 411 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35216, total County tax in the amount of \$1,078.76 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$410.68, computed on a taxable value of \$34,900.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$668.68, computed on a taxable value of \$34,900.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35137, total City tax due in the amount of \$575.40 for frontage tax. Partial payments of \$191.80 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$191.80 was included in check number 4344 that was voided after issuance.

(11) Block 4069 Lot 1, 77 Cole Street (Assessed Value \$102,400.00, County Exempt Value \$102,400.00, City Exempt Value \$102,400.00, School Exempt Value \$102,400.00,

“INDL.DEVLP” exemption type, 1.96 acres, and unit frontage of 853 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35217, total County tax in the amount of \$3,540.18 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,203.20, computed on a taxable value of \$102,400.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$1,961.98, computed on a taxable value of \$102,400.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35138, total City tax due in the amount of \$1,194.20 for frontage tax. Partial payments were made in the following amounts: \$398.08 included in check number 4204 (July-August 2009), and \$398.06 included in check number 4288 (Sept-Oct 2009). A partial payment of \$398.06 was included in check number 4344 that was voided after issuance.

(12) Block 4069 Lot 2, 500 Otis Drive (Assessed Value \$16,600.00, County Exempt Value \$16,600.00, City Exempt Value \$16,600.00, School Exempt Value \$16,600.00, “INDL.DEVLP” exemption type, .45 acres, and unit frontage of 196 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35218, total County tax in the amount of \$513.11 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$195.05, computed on a taxable value of \$16,600.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$318.06, computed on a taxable value of \$16,600.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35139, total City tax due in the amount of \$274.40 for frontage tax. Partial payments were made in the following amounts: \$91.48 included in check number 4204 (July-August 2009), and \$91.46 included in check number 4288 (Sept-Oct 2009). A partial payment of \$91.46 was included in check number 4344 that was voided after

issuance.

(13) Block 4070 Lot 1, 194 Market Street (Assessed Value \$74,100.00, County Exempt Value \$74,100.00, City Exempt Value \$74,100.00, School Exempt Value \$74,100.00, “INDL.DEVLP” exemption type, 2.00 acres, and unit frontage of 874 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35219, total County tax in the amount of \$2,290.44 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$870.68, computed on a taxable value of \$74,100.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,419.76, computed on a taxable value of \$74,100.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35140, total City tax due in the amount of \$1,223.60 for frontage tax. Partial payments were made in the following amounts: \$407.88 included in check number 4204 (July-August 2009), and \$407.86 included in check number 4288 (Sept-Oct 2009). A partial payment of \$407.86 was included in check number 4344 that was voided after issuance.

(14) Block 4071 Lot 1, 193 Market Street (Assessed Value \$83,700.00, County Exempt Value \$83,700.00, City Exempt Value \$83,700.00, School Exempt Value \$83,700.00, “INDL.DEVLP” exemption type, 2.26 acres, and unit frontage of 987 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35220, total County tax in the amount of \$2,587.17 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$983.48, computed on a taxable value of \$83,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,603.69, computed on a taxable value of \$83,700.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35141, total City tax due in the amount of

\$1,381.80 for frontage tax. Partial payments of \$460.60 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$460.60 was included in check number 4344 that was voided after issuance.

(15) Block 4072 Lot 1, 29 Fitzgerald Street (Assessed Value \$92,700.00, County Exempt Value \$92,700.00, City Exempt Value \$92,700.00, School Exempt Value \$92,700.00, "INDL.DEVLP" exemption type, 2.52 acres, and unit frontage of 1,093 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35221, total County tax in the amount of \$2,865.36 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,089.23, computed on a taxable value of \$92,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$1,776.13, computed on a taxable value of \$92,700.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35142, total City tax due in the amount of \$1,530.20 for frontage tax. Partial payments were made in the following amounts: \$510.08 included in check number 4204 (July-August 2009), and \$510.06 included in check number 4288 (Sept-Oct 2009). A partial payment of \$510.06 was included in check number 4344 that was voided after issuance.

(16) Block 4072 Lot 2, 230 Market Street (Assessed Value \$14,600.00, County Exempt Value \$14,600.00, City Exempt Value \$14,600.00, School Exempt Value \$14,600.00, "INDL.DEVLP" exemption type, .39 acres, and unit frontage of 172 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35222, total County tax in the amount of \$451.29 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$171.55, computed on a taxable value of \$14,600.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$279.74, computed

on a taxable value of \$14,600.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35143, total City tax due in the amount of \$240.80 for frontage tax. Partial payments were made in the following amounts: \$80.28 included in check number 4204 (July-August 2009), and \$80.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$80.26 was included in check number 4344 that was voided after issuance.

(17) Block 4072 Lot 3, 229 Market Street (Assessed Value \$20,900.00, County Exempt Value \$20,900.00, City Exempt Value \$20,900.00, School Exempt Value \$20,900.00, "INDL.DEVLP" exemption type, .57 acres, and unit frontage of 247 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35223, total County tax in the amount of \$646.02 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$245.58, computed on a taxable value of \$20,900.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$400.44, computed on a taxable value of \$20,900.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35144, total City tax due in the amount of \$345.80 for frontage tax. Partial payments were made in the following amounts: \$115.28 included in check number 4204 (July-August 2009), and \$115.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$115.26 was included in check number 4344 that was voided after issuance.

(18) Block 4072 Lot 4, 801 Otis Drive (Assessed Value \$120,200.00, County Exempt Value \$120,200.00, City Exempt Value \$120,200.00, School Exempt Value \$120,200.00, "INDL.DEVLP" exemption type, 3.25 acres, and unit frontage of 1,417 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number

35224, total County tax in the amount of \$3,715.38 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,412.35, computed on a taxable value of \$120,200.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$2,303.03, computed on a taxable value of \$120,200.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35145, total City tax due in the amount of \$1,983.00 for frontage tax. Partial payments were made in the following amounts: \$661.28 included in check number 4204 (July-August 2009), and \$661.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$661.26 was included in check number 4344 that was voided after issuance.

(19) Block 4072 Lot 5, 800 Otis Drive (Assessed Value \$9,800.00, County Exempt Value \$9,800.00, City Exempt Value \$9,800.00, School Exempt Value \$9,800.00, "INDL.DEVLP" exemption type, .27 acres, and unit frontage of 116 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35225, total County tax in the amount of \$302.92 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$115.15, computed on a taxable value of \$9,800.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$187.77, computed on a taxable value of \$9,800.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35146, total City tax due in the amount of \$162.40 for frontage tax. Partial payments were made in the following amounts: \$54.14 included in check number 4204 (July-August 2009), and \$54.13 included in check number 4288 (Sept-Oct 2009). A partial payment of \$54.13 was included in check number 4344 that was voided after issuance.

(20) Block 4073 Lot 1, 950 Ridge Hill Boulevard (Assessed Value \$178,700.00, County

Exempt Value \$178,700.00, City Exempt Value \$178,700.00, School Exempt Value \$178,700.00, "INDL.DEVLP" exemption type, 4.83 acres, and unit frontage of 2,106 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35226, total County tax in the amount of \$5,523.62 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$2,099.73, computed on a taxable value of \$178,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$3,423.89, computed on a taxable value of \$178,700.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35147, total City tax due in the amount of \$2,948.40 for frontage tax. Partial payments of \$982.80 were included in check number 4204 (July-August 2009) and check number 4288 (Sept-Oct 2009). A partial payment of \$982.80 was included in check number 4344 that was voided after issuance.

(21) Block 4074 Lot 1, 151 Ridge Hill Boulevard (Assessed Value \$133,000.00, County Exempt Value \$133,000.00, City Exempt Value \$133,000.00, School Exempt Value \$133,000.00, "INDL.DEVLP" exemption type, 3.60 acres, and unit frontage of 1,568 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35227, total County tax in the amount of \$5,425.07 paid on April 1, 2009, consisting of S M Valley Sewer District County Sewer Valuation tax of \$5,425.07 computed on a taxable value of \$133,000.00 at a tax rate of \$21.63.

(B) City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 35148, total tax due in the amount of \$2,195.20 for unit frontage property taxes, computed on a taxable value of 1,568 at a tax rate of \$1.40. Partial payments were made in the following amounts: \$731.74 included in check number 4204 (July-August 2009), and \$731.73 check number 4288 (Sept-Oct 2009). A partial payment of \$731.73 was included in check number 4344 that was

voided after issuance.

(22) Block 4075 Lot 1, 251 Ridge Hill Boulevard (Assessed Value \$186,200.00, County Exempt Value \$186,200.00, City Exempt Value \$186,200.00, School Exempt Value \$186,200.00, "INDL.DEVLP" exemption type, 4.77 acres, and unit frontage of 2,077 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35228, total County tax in the amount of \$6,130.44 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$2,187.85, computed on a taxable value of \$186,200.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$3,567.59, computed on a taxable value of \$186,200.00 at a tax rate of \$19.16, and a Safety Inspection fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35149, total City tax due in the amount of \$2,907.80 for frontage tax. Partial payments were made in the following amounts: \$969.28 included in check number 4204 (July-August 2009), and \$969.26 included in check number 4288 (Sept-Oct 2009). A partial payment of \$969.26 was included in check number 4344 that was voided after issuance.

(23) Block 4076 Lot 2, 499 Ridge Hill Boulevard (Assessed Value \$35,700.00, County Exempt Value \$35,700.00, City Exempt Value \$35,700.00, School Exempt Value \$35,700.00, "INDL.DEVLP" exemption type, .97 acres, and unit frontage of 421 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35230, total County tax in the amount of \$1,103.49 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$419.48, computed on a taxable value of \$35,700.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$684.01, computed on a taxable value of \$35,700.00 at a tax rate of \$19.16.

(B) City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 35151,

total tax due in the amount of \$589.40 for frontage tax, computed on a taxable value of 421 at a tax rate of \$1.40. Partial payments were made in the following amounts: \$196.48 included in check number 4204 (July-August 2009), and \$196.46 included in check number 4288 (Sept-Oct 2009). A partial payment of \$196.46 was included in check number 4344 that was voided after issuance.

(24) Block 4077 Lot 1, 849 Ridge Hill Boulevard (Assessed Value \$88,700.00, County Exempt Value \$88,700.00, City Exempt Value \$88,700.00, School Exempt Value \$88,700.00, "INDL.DEVLP" exemption type, 1.32 acres, and unit frontage of 574 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35231, total County tax in the amount of \$3,116.72 paid on April 1, 2009, consisting of a County Waste Disposal Tax of \$1,042.23, computed on a taxable value of \$88,700.00 at a tax rate of \$11.75, a North Yonkers Sewer District County Sewer Valuation tax of \$1,699.49, computed on a taxable value of \$88,700.00 at a tax rate of \$19.16, and a Safety Inspection Fee of \$375.00.

(B) City Tax for tax year 2010, bill number 35152, total City tax due in the amount of \$803.60 for frontage tax. Partial payments were made in the following amounts: \$267.88 included in check number 4204 (July-August 2009), and \$267.86 included in check number 4288 (Sept-Oct 2009). A partial payment of \$267.86 was included in check number 4344 that was voided after issuance.

(25) Block 4078 Lot 1, 949 Ridge Hill Boulevard (Assessed Value \$208,500.00, County Exempt Value \$208,500.00, City Exempt Value \$208,500.00, School Exempt Value \$208,500.00, "INDL.DEVLP" exemption type, 5.64 acres, and unit frontage of 2,458 feet) -

(A) 2009 County Tax Statement for January 1, 2009 to December 31, 2009, bill number 35232, total County tax in the amount of \$6,444.74 paid on April 1, 2009, consisting of a County

Waste Disposal Tax of \$2,449.88, computed on a taxable value of \$208,500.00 at a tax rate of \$11.75, and a North Yonkers Sewer District County Sewer Valuation tax of \$3,994.86, computed on a taxable value of \$208,500.00 at a tax rate of \$19.16.

(B) City Tax for tax year 2010, bill number 35153, total City tax due in the amount of \$3,441.20 for frontage tax. Partial payments were made in the following amounts: \$1,147.08 included in check number 4204 (July-August 2009), and \$1,147.06 included in check number 4288 (Sept-Oct 2009). A partial payment of \$1,147.06 was included in check number 4344 that was voided after issuance.

(26) Block 4076 Lot 1, 701 Ridge Hill Boulevard (Property Valuation: \$258,900.00, Exempt Real Estate Tax Value \$258,900.00, Exempt School Tax Value \$258,900.00, frontage 3,053 feet)-

(A) City Tax for tax year 2010, bill number 35150, total City tax due in the amount of \$4,274.20 for frontage tax. Partial payments were made in the following amounts: \$1,424.74 included in check number 4204 (July-August 2009), and \$1,424.73 included in check number 4288 (Sept-Oct 2009). A partial payment of \$1,424.73 was included in check number 4344 that was voided after issuance. Sometime in the last quarter of 2009, this property was deeded to a new owner.

125. For Block 4001 Lot 214, 373 Tuckahoe Road, a City of Yonkers Tax Statement for July 1, 2009 to June 30, 2010, bill number 17277, dated July 13, 2009, was issued to YIDA. The tax statement listed total tax due in the amount of \$4,462.93, consisting of City tax of \$1,135.61, School tax of \$3,069.64, Unit Frontage taxes of \$77.00 (Taxable value 55 feet at tax rate of \$1.40), Taxable Housing Unit taxes of \$3.00 (taxable value 1 at tax rate of \$3.00), and Sundry/Interest of \$177.68. Payment of this tax statement was approved by an unidentifiable

YIDA employee on July 28, 2009 with the handwritten reference “Acct. 5035 PILOT PAYABLE.” By its check dated July 28, 2009, YIDA paid \$4,462.93 to the City of Yonkers for 373 Tuckahoe Rd (Block 4001 Lot 214), invoice 17277. With respect to Block 4001 Lot 214, 373 Tuckahoe Road, FC Yonkers made a partial payment of \$1,487.65 to the City of Yonkers for City Tax year 2010, bill number 17277, which partial payment was included in its check number 4204 (July-August 2009).

126. Subsequently, YIDA issued an Invoice, Invoice Number: 113, dated August 11, 2009 to FC Yonkers in the total invoice amount of \$4,462.93 for “[p]roperty tax on Block 4001 Lot 214 (373 Tuckahoe Rd).” On September 11, 2009, FC Yonkers paid YIDA \$4,469.93 by a check drawn on its Bank of America checking account. As a result of this \$4,469.83 payment to YIDA, FC Yonkers made an extra payment in the amount of \$1,487.65 with respect to the City of Yonkers Tax Statement, bill number 17277, issued for 373 Tuckahoe Road.

127. The Division admits that all the payments at issue were in fact made by FC Yonkers, and not another entity, such as FCRC.

128. At the hearing, the Division presented the testimony of Frederick Houser, a Tax Technician III in the Division’s Income/Franchise Desk Audit Bureau, Audit Group 12, who currently supervises, among other tax technicians, Ms. Houck. Mr. Houser was not the assigned auditor for petitioner. He was not privy to the history of FC Yonkers previously receiving the QEZE credits in the 2006 and 2007 taxable years, as he was not then part of Audit Group 12, which was responsible for QEZE credit audits. Mr. Houser did not join Audit Group 12, and become Ms. Houck’s supervisor until June 2013, and did not start any review of petitioner’s 2009 tax year claim to the pass through of the QEZE credit from FC Yonkers until December 2013.

129. Mr. Houser explained that the data in the Division's historical wage reporting database is a summary of the information that employers report on the New York State Quarterly Combined Withholding, Wage Reporting, and Unemployment returns (forms NYS-45) that they file quarterly with New York State. In conjunction with his review of petitioner's claim for the pass-through QEZE credit, Mr. Houser reviewed information contained in the historical databases for both FC Yonkers and FCRC. That information indicated that FC Yonkers did not report wages earned by any employees in New York State in 2009, while FCRC reported wages earned by Mr. Russell in New York State for the period 2004 through 2010. Mr. Houser also explained that Audit typically requests forms W-2 from employers to confirm the information in the Division's historical wage reporting database. Prior to the hearing, petitioner furnished Mr. Russell's Form W-2 issued by FCRC for the year 2009.

130. Based upon the information in the Division's historical wage reporting databases and Mr. Russell's 2009 Form W-2, Mr. Houser determined that Mr. Russell was not an employee of FC Yonkers for the 2009 tax year and that he was an employee of FCRC for that year.

131. Based upon his review of the exhibits and transcript for the hearing for petitioner's claim for the pass-through QEZE credit for the 2008 tax year, Mr. Houser also determined that Mr. Russell was employed by a related party to FC Yonkers in the 60 months prior to the 2009 tax year and, accordingly, he would not include Mr. Russell in FC Yonkers' computation of its employment number.

132. Mr. Houser acknowledged that the proper test for determining which entity is the employer of a particular individual is "the direction and control test and the right to hire and fire an individual."

133. To qualify as an eligible employee for purposes of meeting the requirements for the

QEZE credit, a person must be “connected with or working out of” the Empire Zone - in this case, the Ridge Hill site in Yonkers. The Division’s audit management requires that an eligible employee work at the Empire Zone location every day, and start and end his day at that location, in order to meet this “connected with or working out of” test. The Division admits that there is no authority for such a requirement in a regulation or statute.

134. Although Mr. Houser concluded that Mr. Russell was an employee of FCRC, and not FC Yonkers, for the 2009 tax year, he was unable to name any task that Mr. Russell performed for FCRC. Mr. Houser admitted that: (1) he had no evidence that Mr. Russell worked on any other project other than Ridge Hill in 2009, and (2) that Mr. Russell worked totally on Ridge Hill. Mr. Houser also admitted that it is possible that a person might actually work in the City of Yonkers, but that the person’s employer might not have withheld City taxes, and the employee might not have paid City taxes as they should have.

135. Mr. Houser also acknowledged that a sizeable workforce and contractors were necessary in order to build Ridge Hill. It could not have been accomplished with only the zero, one or three employees reflected in the Division’s historic wage reporting database for FC Yonkers for 2007 through 2012.

136. In order to qualify for the QEZE credit for the 2009 tax year, FC Yonkers must satisfy an employment test, have an employment number of “1,” and have an employment increase factor of “1.” Mr. Houser admitted that if Mr. Russell was a common law employee of FC Yonkers for the 2009 tax year, he counts as the necessary “1,” and therefore, both the employment test and the employment increase test are satisfied.

137. Ms. Houck prepared a Schedule A, dated August 22, 2014, listing the payments made by FC Yonkers to the City of Yonkers which petitioner asserted were eligible real property taxes

for purposes of the QEZE credit. On Ms. Houck's Schedule A, she allowed a total of \$187,977.24 as eligible real property taxes for purposes of the QEZE credit.¹⁸

138. Just nine days before the hearing in this matter, Mr. Houser prepared a new Schedule A dated July 1, 2015. On this Schedule A, Mr. Houser allowed eligible real property taxes totaling only \$13,468.94. No adjustment for either the \$15,380.81 voided check or the \$1,487.65 erroneous payment was made by Mr. Houser.

139. For the parcel known as 1 Grassy Sprain Road, the Division conceded that three tax bills of \$1,313.21, \$5,907.93 and \$6,247.80 - totaling \$13,468.94 - were eligible real property taxes. For this parcel, Ms. Houck and Mr. Houser disallowed the "solid waste tax," the "total sewer tax" and the "safety insp[ection] fee" as eligible real property taxes, notwithstanding that they are listed on the County Tax bill. For this parcel, the Division also disallowed the charge shown on the tax bill for "frontage," because the charge was levied based upon the number of linear feet (121) of water main on the property.

140. The 2009 tax bill of \$7,430.76 for 100 Ridge Hill Boulevard was disallowed as an eligible real property tax by both Ms. Houck and Mr. Houser on the grounds that the "waste disposal" portion of the county tax and the "sewer valuation" portion of the county tax were "special assessments" that in their view do not qualify as eligible real property taxes under Tax Law § 15(e).

141. The Division similarly disallowed the waste disposal and sewer valuation taxes reflected on all the other bills submitted in support of the QEZE credit by petitioner.

142. Ms. Houck classified the \$185,784.96 payment by FC Yonkers of the YIDA bill for 1

¹⁸ Ms. Houck subtracted \$15,380.81 for the voided check and \$1,487.65 for the erroneous payment from \$204,845.70 to arrive at the amount of \$187,977.24 as eligible real property taxes for purposes of the pass-through QEZE credit.

Ridge Hill Blvd. as an allowed PILOT payment, and hence as “eligible real property taxes.”

143. Mr. Houser’s position at the hearing contradicted Ms. Houck’s determination, and he claimed that the \$185,784.96 bill paid by FC Yonkers does not qualify as real property taxes because “we can’t determine whether or not it’s based on an assessed value of the property.”

144. The Division concedes that the amount of the PILOT payment made by FC Yonkers, and claimed by petitioner for the 2009 tax year as part of the QEZE credit, does not exceed the annual cap amount.

145. With respect to the 373 Tuckahoe Road property, Ms. Houck allowed \$4,205.25 as a PILOT payment, and disallowed the unit frontage taxes of \$77.00, the taxable housing unit taxes of \$3.00 and sundry/interest of \$177.68. However, Mr. Houser determined that FC Yonkers’ payment of \$4,462.93 to YIDA would not qualify as a payment for eligible real property taxes because YIDA owned 373 Tuckahoe Road and, therefore, YIDA must have leased the property to FC Yonkers and FC Yonkers paid the \$4,462.93 to YIDA rather than to the City of Yonkers. Alternatively, Mr. Houser would disqualify \$257.68 of the \$4,462.93 because the charges for frontage, taxable housing unit and sundry/interest were for special assessments.

146. On January 26, 2016, the Division filed its post-hearing brief with five addenda attached, including, among others, 8 pages (pages bearing numbers 33 through 40) of what the Division described as “City of Yonkers, FY 2009 Results” (Addendum C), a one-page document entitled “Tax Rates, Exemption Maximums, Equalization Rates (ER), & Residential Ratios” dated April 9, 2015 (Addendum D), and a one-page document that the Division described as “Westchester County Tax Commission, 2009 Special District Rates” (Addendum E).

147. Petitioner submitted proposed finding of facts numbered 1 through 177 and two proposed conclusions of law. Proposed findings of fact 5, 6, 13, 14, 31, 58, 61, 107 through 109,

120, 138, 147, 150, 151, 161, 162, and 165 through 168 have been modified to more accurately reflect the record. Proposed findings of fact 22, 23, 41 and 155 are rejected as unsupported by the record. In ruling on petitioner's proposed findings of fact, if any part of a proposed finding of fact is unsupported by the record the proposed finding of fact has been rejected in its entirety. Proposed findings of fact 33, 52, and the second sentence of proposed finding of fact 87 are repetitious. Proposed findings of fact 42, 43, 164, and 173 are argumentative. Proposed finding of fact 149 is rejected as unnecessary to the proceeding. Proposed findings of fact 113, 137, 160, and 175 are conclusions of law. The State Administrative Procedure Act does not require a ruling upon a proposed conclusion of law.

SUMMARY OF THE PARTIES' POSITIONS

148. Petitioner contends that FC Yonkers had one eligible employee to count in its "employment number" in the Yonkers Empire Zone for the 2009 tax year. It claims that throughout the 2009 tax year, Theron Russell worked exclusively as a full-time project manager for FC Yonkers as its common law employee under the supervision of Robert Sanna. As for FCRC's issuance of Mr. Russell's form W-2 for the year 2009, petitioner maintains that FC Yonkers, not FCRC compensated Mr. Russell for his services because all of Mr. Russell's personnel costs were included in the monthly site management fee billed to FC Yonkers by FCRC and paid by FC Yonkers to FCRC, which service management fees were reconciled ("trued-up") on a quarterly basis to conform to the actual time and expenses of the real estate team at Ridge Hill. Petitioner also maintains that Mr. Russell had not worked in New York State for a "related person" of FC Yonkers in the prior 60 months.

149. Petitioner claims that the PILOT payment of \$185,784.96 made to the City of Yonkers by FC Yonkers in 2009 qualifies as an "eligible real property tax" for purposes of the

QEZE credit. It further claims that this payment was made pursuant to the terms of the Tax Benefit Leaseback Agreement related to the Ridge Hill project entered into by FC Yonkers, a certified QEZE, and YIDA, a public benefit corporation formed pursuant to General Municipal Law § 903. Petitioner points out that at the hearing, the Division conceded that \$13,468.94 paid by FC Yonkers with respect to 1 Grassy Sprain Road constituted eligible real property taxes. Petitioner further points out that the Division would disallow the other amounts shown on the 1 Grassy Sprain Road tax bills because the payments made for the “solid waste tax,” the “total sewer tax,” the “safety inspection fee” and frontage do not qualify as eligible real property taxes. Petitioner also points out that FC Yonkers paid tax bills for some 25 additional parcels that the Division would disallow because those tax bills were for waste disposal taxes, sewer valuation taxes, and frontage taxes. Although petitioner, in its brief, conceded that the Division is correct in disqualifying interest charges and safety inspection fees because such charges fall within the exclusion language of Tax Law § 15(e), petitioner asserts that the Division is wrong with respect to the waste disposal taxes, the sewer valuation taxes and the frontage taxes. It maintains that review of the tax bills indicates that the waste disposal taxes, specifically denominated as “County Taxes” on the bills, were based upon a uniform rate of \$11.75 per thousand of assessed value. As such, petitioner asserts that the waste disposal taxes are plainly “eligible real property taxes” because the waste disposal taxes were clearly assessed for the “general public welfare” and levied at a “like rate against all property.” Petitioner also contends that the sewer valuation taxes levied as “County Taxes” on each parcel’s tax bill, computed using a uniform tax rate of \$19.16 multiplied by the parcel’s assessed value, are for the “general public welfare.” Since the sewer valuation taxes are not based on any individualized “benefit to the property assessed,” such as how much sewage is disposed of from that parcel, or any specific and unique improvement of

that property that results in an increase in property value, petitioner argues that sewer valuation taxes are plainly “eligible real property taxes” that qualify for the QEZE credit. As for the bills paid by FC Yonkers that contained, within the listing of “property taxes,” a tax labeled “frontage,” petitioner asserts that the frontage tax is levied uniformly on each parcel at \$1.40 per foot of frontage in that parcel. Since for “all property in the territory” a “like rate” is used to levy the frontage tax, petitioner maintains that the frontage tax falls squarely within the definition of an eligible real property tax under Tax Law § 15(e). Petitioner avers that FC Yonkers made a PILOT payment of \$185,784.86, and other taxes that are “eligible real property tax payments,” and petitioner is entitled to a pass-through QEZE credit in the amount of \$323,439.78.

150. The Division asserts that the record shows that Mr. Russell was hired by FCRC, was paid by FCRC, that FCRC provided him with health benefits and a 401(k) plan and that FCRC issued him the Form W-2 for the 2009 tax year. It further asserts that FCRC reported wages earned by Mr. Russell to New York. The Division maintains that these are all indicia that FCRC was the employer of Mr. Russell for the period February 1, 2009 through January 31, 2010. As for petitioner’s claim that the site management fee billed to FC Yonkers by FCRC included FCRC’s labor costs for Mr. Russell, the Division argues it is possible that all of FCRC’s labor costs for Mr. Russell could have been included in the quarterly “actual” site management fees allocated to the projects on which Mr. Russell’s department, i.e., the construction group, did not work. The Division further argues that there is no proof that any of Mr. Russell’s costs were, in fact, included in the amounts of the quarterly site management fees FCRC billed to FC Yonkers. Even if Mr. Russell is a full-time employee of FC Yonkers for the 2009 tax year, the Division claims that Mr. Russell cannot qualify for inclusion in FC Yonkers’ computation of its employment number because he was employed by a related party to FC Yonkers, FCRC, within

the 60 months prior to February 1, 2009. The Division maintains that FCRC's issuance of forms W-2 to Mr. Russell for the years 2004 and 2008, and FCRC's reporting to the Division of wages earned by Mr. Russell for the years 2005 through 2008 clearly proves that Mr. Russell was employed by FCRC during the 60 months immediately proceeding February 1, 2009. Based upon its Form W-2 and wage reporting analyses, the Division avers that petitioner is not entitled to the passed-through QEZE credit from FC Yonkers because Mr. Russell cannot be included in FC Yonkers' computation of its employment number for the period February 1, 2009 through January 31, 2010.

151. With respect to the payment of \$185,784.96 made to YIDA, the Division argues that there is no evidence that this payment was based upon the assessed value of 1 Ridge Hill Boulevard. Therefore, the Division maintains that it does not qualify as an "eligible real property tax" for purposes of Tax Law § 15(e). The Division claims that the version of Tax Law § 15(e) that petitioner relies upon in its brief in support of its arguments regarding the waster disposal taxes, the sewer valuation taxes, and the frontage taxes is not applicable to taxable periods such as the 2009 tax year that began before January 1, 2010. The Division contends that the waste disposal and sewer valuation charges are special ad valorem levies and FC Yonkers' payments for these levies are not payments for "eligible real property taxes." It also contends that the City of Yonkers frontage tax is a special assessment and does not qualify as an "eligible real property tax." The Division points out that petitioner, in its brief, failed to address the \$4,462.93 payment that FC Yonkers made to YIDA to reimburse YIDA for an amount that it paid to the City of Yonkers for taxes related to the parcel, owned by YIDA, located at 373 Tuckahoe Road. The Division contends that this payment is not a payment in lieu of taxes and, as such, cannot qualify as a payment for "eligible real property taxes." It further maintains that there is no evidence that

375 Tuckahoe Road was part of the Ridge Hill property that was subject to the Tax Benefit Leaseback Agreement. The Division avers that FC Yonkers' payment of the \$4,462.93 does not qualify as a payment for "eligible real property taxes." Assuming petitioner is entitled to claim a QEZE credit for real property taxes passed through from FC Yonkers, the Division claims that only FC Yonkers' payments totaling \$13,468.94 qualify as "eligible real property taxes."

152. In its reply brief, petitioner argues that the issuance of a payroll form or a paycheck by FCRC to Mr. Russell does not establish FCRC as his employer. It further argues that the Division fails to recognize the legal principles and test which confirm Mr. Russell's common law employment by FC Yonkers. Petitioner maintains that the site management fee recoupment mechanism further establishes that FC Yonkers was the common law employer of Mr. Russell. It also maintains that Mr. Russell was always a common law employee of one of petitioner's development entities, not FCRC. Petitioner claims that the testimony and documentary evidence confirms that between 2003 and 2004 Mr. Russell was employed outside New York State with Quarter Master Associates, L.P., and from 2005 through June 2013 he was employed by FC Yonkers.

153. With respect to the \$185,784.96 payment in lieu of taxes made by FC Yonkers, petitioner argues that the language of Tax Law § 15(e) does not impose any restriction on how a PILOT is determined, requiring only that it be "pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation," and that the PILOT not exceed a defined cap. In response to the Division's arguments that FC Yonkers payments of waste disposal, sewer valuation and frontage taxes do not qualify as eligible real property taxes because they are either special ad valorem levies (Real Property Tax Law § 102[14]) or special assessments (Real Property Tax Law § 102[15]), petitioner contends that the

Division runs roughshod over well-established principles of statutory interpretation and application. It points out that the 2010 amendment of Tax Law § 15(e) created a self-contained definition of the word “tax” that is unique to Tax Law § 15(e) for purposes of the Empire Zones incentives. Petitioner further points out that the 2010 amendment of Tax Law § 15(e) is applicable to the 2009 tax year, as one of the “taxable years for which the statute of limitations for seeking a refund assessing additional tax is still open.” As for the \$4,462.93 tax payment for 373 Tuckahoe Road, petitioner contends that it is also a PILOT payment under Tax Law § 15(e). It maintains that in addition to the principal PILOT in a specified amount described in Section 3.3(a) of the Tax Benefit Leaseback Agreement, there were also “catch-all” provisions for PILOTs into which the 373 Tuckahoe Road tax payment falls. Petitioner, in its reply brief, agrees that the total eligible real property taxes in the amount of \$323,439.78 should be reduced by the voided check in the amount of \$15,380.81. As such, petitioner claims that a pass-through QEZE credit in the amount of \$308,113.97 should be allowed.

154. Lastly, in its reply brief, petitioner objects to the Division’s attachment of Addenda C, D, and E to its brief. Petitioner asserts that the attached addenda consist of various additional factual materials not submitted into evidence at the hearing. Petitioner asserts that the attempt to include these documents is highly improper, since it did not have an opportunity to question or object to them.

CONCLUSIONS OF LAW

A. Petitioner claims a QEZE credit for real property taxes under Tax Law §§ 15 and 210(27), which was passed through from FC Yonkers for the fiscal year February 1, 2009 through January 31, 2010, i.e., the 2009 tax year. Preliminarily, it is observed that “a tax credit is ‘a particularized species of exemption from taxation’ (*Matter of Grace v. New York State Tax*

Commn., 37 NY2d 193, 197 [1975], *lv denied* 37 NY 2d 708 [1975] and, therefore, petitioner[s] bore the burden of showing ‘a clear cut entitlement’ to the statutory benefit[s]’ (*Matter of Luther Forest Corp. v. McGuiness*, 164 AD2d 629, 632 [3d Dept 1991])” (*Matter of Golub Service Station v. Tax Appeals Tribunal*, 181 AD2d 216 [3d Dept 1992]; *see also* Tax Law § 1089[e]).

B. Subject to certain limitations not at issue, for a QEZE certified before April 1, 2005, “the amount of credit for real property taxes shall be equal to the product of (i) the benefit period factor, (ii) the employment increase factor, and (iii) the eligible real property taxes paid or incurred by the QEZE during the taxable year” (Tax Law § 15[b][1]).

C. Pursuant to Tax Law § 15(d), the term “employment increase factor” is defined as:

“the amount, not to exceed 1.0, which is the greater of:

(1) the excess of the QEZE’s employment number in the empire zones with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law for the taxable year, over the QEZE’s test year employment number in such zones, divided by such test year employment number in such zones; or

(2) the excess of the QEZE’s employment number in such zones for the taxable year over the QEZE’s test year employment number in such zones, divided by 100.

(3) For purposes of paragraph one of this subdivision, where there is an excess as described in such paragraph, and where the test year employment number is zero, then the employment increase factor shall be 1.0.”

D. As used in Tax Law § 15(d)(1), employment number means:

“[T]he average number of individuals, excluding general executive officers (in case of a corporation), employed full-time by the enterprise for at least one-half of the taxable year. Such number shall be computed by determining the number of such individuals employed by the taxpayer on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during the applicable taxable year, adding together the number of such individuals determined to be so employed on each of such dates and dividing the sum so obtained by the number of such dates occurring within such applicable taxable year. Such number shall not include individuals employed within the state within the immediately preceding sixty months by a related person to the QEZE, as such term “related person” is defined in [Internal Revenue Code § 465(b)(3)(c)]” (Tax Law § 14[g][1]).

E. As used in Tax Law § 15(d), the test year is the last taxable year of the business enterprise ending before the test date, or if the enterprise does not have such a taxable year then it shall be deemed to have a test year consisting of either the last calendar year or its last fiscal year ending on or before the test date (Tax Law § 14[d]). The test date is the later of July 1, 2000 or the date prior to July 1, 2011 on which the business enterprise was first certified under article 18-B of the General Municipal Law (Tax Law § 14[e]). Therefore, FC Yonkers' test date was March 8, 2004 and its test year was the fiscal year February 1, 2003 through January 31, 2004 (the 2003 tax year). FC Yonkers' employment number was zero for its test year.

F. Petitioner, FCRC and FC Yonkers were related persons as defined in Internal Revenue Code (IRC) § 465(b)(3)(c) and therefore related persons for purposes of Tax Law § 15(d) because FCRC was the wholly-owned subsidiary of petitioner, and petitioner was the indirect owner of 70% of FC Yonkers, i.e., petitioner wholly-owned Forest City Rental Properties, Forest City Rental Properties Corporation wholly-owned F.C. Member, and F.C. Member owned 70% of FC Yonkers.

G. FC Yonkers' computation of its employment increase factor requires it to determine the excess of its employment number for the 2009 tax year over its employment number for its test year (Tax Law § 15[d][1]), which determination cannot exceed one (Tax Law § 15[d][3]). Therefore, to compute the QEZE credit it claims, FC Yonkers must have an employment number of one for the 2009 tax year. To compute such an employment number, FC Yonkers must have had one eligible employee to count in its employment number in the Yonkers Empire Zone for the 2009 tax year (Tax Law § 14[g][1]).

H. At the hearing, petitioner asserted that it was entitled to the pass-through QEZE credit because FC Yonkers had one eligible employee to count in its employment number for the 2009

tax year. It claimed that FC Yonkers, which owned and developed the Ridge Hill project in Yonkers, New York, employed Theron Russell as its common law employee on a full-time basis for the entire 2009 tax year. It is the Division's position that Mr. Russell was employed by FCRC, not FC Yonkers. Although the Division acknowledges that the proper test for determining which entity is the employer of a particular individual is "the direction and control test and the right to hire and fire an individual," it argues that FCRC's issuance of a Form W-2 to Mr. Russell for the 2009 tax year and its reporting of wages earned by Mr. Russell to New York State prove that Mr. Russell was employed by FCRC.

I. As noted by the Tax Appeals Tribunal in *Matter of Knowledge Learning Corporation and Kindercare Learning Centers, Inc.* (Tax Appeals Tribunal, September 18, 2014), the indicia of a common law employer-employee relationship are well established and include the authority to hire and fire, the authority to control and direct the work of the employee, and the payment of wages. In other matters, the Tax Appeals Tribunal has referenced the list of 20 factors developed by the Internal Revenue Service, discussed in detail in Revenue Ruling 87-41 (1987 CB 296), to help determine whether sufficient direction and control is present in order to find the existence of an employer-employee relationship (*see e.g. Matter of Manhattan Fire Extinguisher, Inc.*, Tax Appeals Tribunal, September 18, 1997; *Matter of O'Keh Caterers Corporation*, Tax Appeals Tribunal, June 3, 1993).

The facts, established through the credible testimony of Robert Sanna, Theron Russell and Lauren Du, and the contemporaneous business records submitted into evidence, clearly show that Mr. Russell was a common law employee of FC Yonkers during the 2009 tax year. Mr. Sanna, as a vice president of RRG Yonkers, the managing member of FC Yonkers, was charged with the authority to supervise the day-to-day business of FC Yonkers, and the full power and authority to

take all actions necessary for the development of FC Yonkers' Ridge Hill project (*see* Findings of Fact 5, 7, 8, 10, 62, 63, 68, 71, 74, 78). In that role, Mr. Sanna assigned Mr. Russell to work full time for FC Yonkers at Ridge Hill, beginning in 2005 and continuing through June 2013, and required Mr. Russell to report directly to him (*see* Findings of Fact 64, 66 - 67, 82, 84 - 85, 121). Mr. Sanna gave Mr. Russell his annual performance reviews and compensation adjustments, determined where and when he would work, and had the authority to fire him at any time (Findings of Fact 67, 84, 97, 100 - 103). Mr. Russell reported to Mr. Sanna on bid solicitations and recommendations for contracting by FC Yonkers with architects, engineers and contractors hired to build Ridge Hill (Finding of Fact 86). He also helped draft the requirements for the RFP, and the evaluation of proposals that led to the selection and hiring of Whiting-Turner, the program manager for the Ridge Hill project (Finding of Fact 89). Under the Whiting-Turner contract, executed by Mr. Sanna, as an officer of RRG Yonkers, Mr. Russell was given express authority to approve and act on behalf of FC Yonkers. Pursuant to his delegated authority, Mr. Russell approved change orders submitted by Whiting-Turner, and reviewed and approved applications for work performed by the various contractors working on Ridge Hill (*see* Findings of Fact 70, 72 - 73, 75 - 77, 80, 91 - 92, 94 - 96). All of the work performed by Mr. Russell at Ridge Hill was in furtherance of FC Yonkers' development of the Ridge Hill project. As for FCRC's payment of Mr. Russell's wages and benefits in the first instance, those compensation costs were subsequently reimbursed to FCRC by FC Yonkers through the monthly site management fee that was paid by FC Yonkers to FCRC, which monthly site management fees were subject to a quarterly "true-up" adjustment (*see* Findings of Fact 45 - 51, 54 - 58). Additionally, while FCRC reimbursed Mr. Russell's business expenses in the first instance, those costs were recovered from FC Yonkers as well (Finding of Fact 59).

In sum, FC Yonkers, not FCRC, directed and controlled Mr. Russell, who was devoted exclusively to FC Yonkers and regularly connected to or working out of the Ridge Hill project site at all times during the 2009 tax year. Accordingly, Mr. Russell was FC Yonkers' common law employee for the 2009 tax year.

J. Pursuant to Tax Law § 14(g)(1), FC Yonkers would not be able to count Mr. Russell in its employment number if he was employed within New York State by a "related person" within the immediately preceding 60 months. There is no dispute that FCRC and FC Yonkers are related persons (*see* Conclusion of Law F). The Division argues that FCRC employed Mr. Russell during the period February 1, 2004 through January 31, 2009 because FCRC issued forms W-2 to Mr. Russell for the years 2004 and 2008, and FCRC reported wages earned by Mr. Russell in New York during the years 2005 through 2008. It also argues that petitioner's evidence fails to prove that Mr. Russell was not employed by FCRC for any part of the period February 1, 2004 through January 31, 2009.

The record clearly shows that Mr. Russell was not employed by a related entity, FCRC, within the period February 1, 2004 through January 31, 2009. In September 2003, Mr. Russell was hired to work as a construction project manager for one of petitioner's development entities, FC Quarter Master Associates, L.P., which was developing the Quartermaster Plaza project, a retail development located in Philadelphia, Pennsylvania (*see* Findings of Fact 65, 114). Mr. Russell worked as a common law employee of FC Quarter Master Associates, L.P. on its project in Philadelphia until January 2005 (*see* Finding of Fact 115 - 119). In January 2005, Mr. Sanna assigned Mr. Russell to work full time for FC Yonkers on Ridge Hill based upon Mr. Russell's experience with large scale projects (*see* Findings of Fact 66, 84). From January 2005 through January 31, 2009, Mr. Russell worked full time for FC Yonkers at Ridge Hill under the direction

and control of Mr. Sanna, an officer of FC Yonkers' managing member (*see* Findings of Fact 67 - 71, 74, 77, 79, 82 - 89, 91, 93 - 95, 97, 100 - 103, 120 - 121; *see also* Conclusion of Law I). As was the case for the 2009 tax year, FCRC recovered the costs of Mr. Russell's wages and benefits through the site management fee that was budgeted by, charged to, and collected from FC Yonkers on a monthly basis, subject to a quarterly "true-up" adjustment (*see* Findings of Fact 49 - 51, 55). It is noted that FC Yonkers updated its total (multi-year) budgeted site management fee in December 2009 to reflect the fact that construction continued at Ridge Hill (Finding of Fact 57).

Since Mr. Russell worked in Pennsylvania as a common law employee of an affiliated entity during the year 2004, and worked as a common law employee of FC Yonkers from January 2005 through January 31, 2009, he may be included in FC Yonkers' computation of its employment number for the 2009 tax year (Tax Law § 14[g][1]). As such, FC Yonkers had an employment number of one for the 2009 tax year. As FC Yonkers had a test year employment number of zero and an employment number of one, FC Yonkers had an employment increase factor of one (Tax Law § 15[d]).

K. The remaining issue to be resolved is whether payments that FC Yonkers made during 2009 qualify as "eligible real property taxes" for purposes of Tax Law § 15(e). During the year 2009, FC Yonkers made payments related to tax bills issued for some 28 properties to the City of Yonkers that petitioner asserted were eligible real property taxes for purposes of the QEZE credit (*see* Findings of Fact 42 - 43, 123 - 127). The Division conceded that \$13,468.94 paid by FC Yonkers with respect to 1 Grassy Sprain Road constituted eligible real property taxes (*see* Finding of Fact 138 -139). Petitioner, in its brief, conceded that interest charges and safety inspection fees included on some tax bills fall within the exclusion language of Tax Law § 15(e)

and therefore, are not eligible real property taxes. Remaining at issue are the \$185,784.96 payment made to the City of Yonkers, a \$4,462.93 payment made to YIDA related to property located at 373 Tuckahoe Road, waste disposal taxes and sewer valuation taxes, listed on the Westchester County tax bills, paid to the City of Yonkers, and payments of frontage taxes made to the City of Yonkers.

L. Tax Law § 15(e)¹⁹ defines the term “eligible real property taxes” as

“taxes imposed on real property which is owned by the QEZE and located in an empire zone with respect to which the QEZE is certified pursuant to article eighteen-B of the general municipal law, provided such taxes are paid by the QEZE which is the owner of the real property or are paid by a tenant which either (i) does not meet the eligibility requirements under section fourteen of this article to be a QEZE or (ii) cannot treat such payment as eligible real property taxes pursuant to this paragraph and such taxes become a lien on the real property during a taxable year in which the owner of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise. For purposes of this subdivision, the term ‘tax’ means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, provided that the charge is levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction, and provided that where taxes are levied pursuant to article eighteen or article nineteen of the real property tax law, the property must have been taxed at the rate determined for the class in which it is contained, as provided by such article eighteen or nineteen, which ever is applicable. The term ‘tax’ does not include a charge for local benefits, including any portion of that charge that is properly allocated to the costs attributable to maintenance or interest, when (1) the property subject to the charge is limited to the property that benefits from the charge, or (2) the amount of the charge is determined by the benefit to the property assessed, or (3) the improvement for which the charge is assessed tends to increase the property value. In addition, ‘eligible real property taxes’ shall include taxes paid by a QEZE which is a lessee of real property if the following conditions are satisfied: (1) the taxes must be paid by the lessee pursuant to explicit requirements in a written lease executed or amended on or after June first, two thousand five, (2) such taxes become a lien on real property during a taxable

¹⁹ Tax Law § 15(e) was amended by Laws of 2010 (ch 57, pt R, § 13), which took effect immediately and applied “to all taxable years beginning on or after January 1, 2010 and, except with respect to maintenance or interest charges, to all taxable years for which the statute of limitations for seeking a refund or assessing additional tax are still open” (L 2010, ch 57, pt R, § 18).

year in which the lessee of the real property is both certified pursuant to article eighteen-B of the general municipal law and a qualified empire zone enterprise, and (3) the lessee has made direct payment of such taxes to the taxing authority and has received a receipt for such payment of taxes from the taxing authority. In addition, the term, 'eligible real property taxes' includes payments in lieu of taxes made by the QEZE to the state, a municipal corporation or a public benefit corporation pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation. Provided, however, a payment in lieu of taxes made by the QEZE pursuant to a written agreement executed or amended on or after January first, two thousand one, shall not constitute eligible real property taxes in any taxable year to the extent that such payment exceeds the product of (A) the greater of (i) the basis for federal income tax purposes, calculated without regard to depreciation determined as of the effective date of the QEZE's certification pursuant to article eighteen-B of the general municipal law of real property, including buildings and structural components of buildings, owned by the QEZE and located in empire zones with respect to which the QEZE is certified pursuant to such article eighteen-B of the general municipal law and provided that if such basis is further adjusted or reduced pursuant to any provision of the internal revenue code, the QEZE may petition the department and the department of economic development to disregard such reduction or adjustment for the purpose of this subdivision or (ii) the basis for federal income tax purposes of such real property described in clause (i) of this subparagraph, calculated without regard to depreciation, on the last day of the taxable year, and provided that if such basis is further adjusted or reduced pursuant to any provision of the internal revenue code, the QEZE may petition the department, the department of economic development and the office of real property services to disregard such reduction or adjustment for the purpose of this subdivision; and (B) the estimated effective full value tax rate within the county in which such property is located, as most recently calculated by the commissioner. The commissioner shall annually calculate estimated effective full value tax rates with each county for this purpose based upon the most current information available to him or her in relation to county, city, town, village and school district taxes."

M. Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where the statute is clear, the courts must follow the plain meaning of its words, and "there is no occasion for examination into extrinsic evidence to discover legislative intent . . ." (McKinney's Cons Laws of NY, Book 1,

Statutes § 120; *see Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 108 [1997]; *Matter of Schein*, Tax Appeals Tribunal, November 6, 2003). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look “elsewhere in search of conjecture so as to restrict or extend that meaning” (*Matter of Erie County Agricultural Society v. Cluchey*, 40 NY2d 194, 201 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (*Matter of Automatique v. Bouchard*, 97 AD2d 183 [1983]).

N. Turning first to the \$185,784.96 payment made by FC Yonkers to the City of Yonkers, it satisfies the definition of Tax Law § 15(e). That payment was made pursuant to a Tax Benefit Leaseback Agreement dated August 2, 2007 (*see* Findings of Fact 13 - 14, 123). FC Yonkers is a certified QEZE and YIDA is a public benefit corporation formed pursuant to General Municipal Law § 903. Pursuant to the Tax Benefit Leaseback Agreement, Article III, Section 3.3(a), FC Yonkers was obligated to make a payment in lieu of real property taxes in the amount of \$30,964.16 per month after June 30, 2009 if construction at 1 Ridge Hill was not completed by that date (Findings of Fact 13 -14). Since construction was still ongoing throughout the remainder of 2009, YIDA invoiced FC Yonkers for six months of PILOT payments under the Tax Benefit Leaseback Agreement, covering the period from July 1, 2009 through December 31, 2009, totaling \$185,784.96 (Findings of Fact 26, 123). FC Yonkers paid that PILOT payment invoice directly to the City of Yonkers (Finding of Fact 123). The Division concedes that the PILOT payment made by FC Yonkers does not exceed the annual cap (Finding of Fact 144). As for the Division’s argument that the \$185,784.96 payment is not a PILOT payment because it is not based upon the assessed value of 1 Ridge Hill, and has to be in an amount that would otherwise have been levied as the actual real property taxes on the parcel, it is without merit. The

pertinent language of Tax Law § 15(e) does not impose any such constraint on how a PILOT payment is determined, requiring only that it be “pursuant to a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation,” and that the PILOT not exceed a defined cap (*see* Conclusion of Law L). Moreover, even if the definition of a PILOT set forth in General Municipal Law § 854(17)²⁰ were to be used for purposes of Tax Law § 15(e), it confirms by its own terms that PILOTs will not be based upon the assessed value of the property, and are likely to be only a portion of the taxes that would otherwise be levied. As such, the \$185,784.96 PILOT payment made by FC Yonkers to the City of Yonkers is within the definition of “eligible real property taxes” and therefore qualifies for the QEZE credit.

O. With respect to FC Yonkers’ \$4,462.93 payment made to YIDA related to property located at 373 Tuckahoe Road, petitioner argues that FC Yonkers made this payment directly to YIDA, reimbursing YIDA for the payment in the same amount that YIDA had made earlier to the City of Yonkers to pay the tax bill. It further argues that this reimbursement payment by FC Yonkers met the only criterion for a PILOT specified in Tax Law § 15(e): that it be made to a public benefit corporation, i.e., YIDA, pursuant to a written agreement entered into between the QEZE, i.e., FC Yonkers, and the public benefit corporation (the Tax Benefit Leaseback Agreement dated August 2, 2007). Petitioner maintains that “catch-all” provisions of the Tax Benefit Leaseback Agreement including the paragraph entitled “Real Property Tax Exemption”

²⁰ General Municipal Law § 854(17) defines “payments in lieu of taxes” as “[a]ny payment made to an agency, or affected tax jurisdiction equal to the amount, or a portion of, real property taxes, or other taxes, which would have been levied by or on behalf of an affected tax jurisdiction if the project was not tax exempt by reason of agency involvement.”

on Schedule 3.3-3, and Article III, Section 3.7 provide for the possibility that a Ridge Hill parcel, which in the normal course would be exempt because of YIDA's interest in it, might slip through the cracks such that a tax bill would be issued. Petitioner's argument is without merit. As the Division correctly points out, the record does not include a written lease under which YIDA leased 373 Tuckahoe Road (Block 4001 Lot 214) to FC Yonkers. The Tax Benefit Leaseback Agreement pertains only to 1 Ridge Hill, described in the attached Schedule A in a "Metes & Bounds Description" of "Former Lot 1, Block 4060 Less Proposed Parcel M, Ridge Hill Boulevard and Otis Drive, Part of Former Lot 1, Block 4060 City of Yonkers, Westchester County, New York" (*see* Finding of Fact 13). Accordingly, FC Yonkers' reimbursement payment of \$4,462.93 to YIDA, related to 373 Tuckahoe Road, does not qualify as eligible real property taxes under Tax Law § 15(e).

P. FC Yonkers' payments of waste disposal taxes and sewer valuation taxes listed on the Westchester County tax bills are also at issue. Petitioner points out that Tax Law § 15(e), as amended, created a self-contained definition of the word "tax" that is unique to Tax Law § 15(e) for purposes of the Empire Zone incentives. It further points out that Tax Law § 15(e)'s definition requires that a "tax" be "for the public welfare" and imposed "at a like rate against all property in the territory." Petitioner claims that the waste disposal taxes and the sewer valuation taxes are plainly for the "general public welfare," i.e., they are not based upon a metered amount of waste or sewage from a specified property, and the bills show that they are imposed based upon a "like rate," i.e., tax rate per thousand of assessed value. Review of the Westchester County tax bills in the record indicates that the waste disposal taxes imposed by the County are plainly for the general public welfare, and are levied against all property in the City of Yonkers at a uniform rate of \$11.75 per one thousand of assessed value. As such, the waste disposal taxes

qualify as eligible real property taxes pursuant to Tax Law § 15(e).

With respect to the North Yonkers Sewer District County sewer valuation taxes and the Saw Mill Valley Sewer District County sewer valuation taxes imposed on the County tax bills, those taxes included the costs of maintaining, repairing and operating in whole or in part the County outlet sewers and sewage disposal plants, and to reimburse the County for payment of and interest on any obligations issued for the benefit of those districts (*see* Westchester County Code of Ordinances § 237.211[1]). As noted above, in 2010, Tax Law § 15(e) was amended, the amendment's effective date was set forth in detail in the Laws of 2010 (ch 57, pt R, § 18), where it provided, in part, as follows:

“This act shall take effect immediately, provided that . . . section thirteen of this act [amending Tax Law § 15(e) and clarifying the definition of eligible real property taxes for purposes of the QEZE credit] shall take effect immediately and apply to all taxable years beginning on or after January 1, 2010 and, except with respect to maintenance and interest charges, to all taxable years for which the statute of limitations for seeking a refund or assessing additional tax are still open.”

Since the North Yonkers Sewer District county sewer valuation taxes and the Saw Mill Valley Sewer District county sewer valuation charges provide for maintenance as part of the assessment, the 2010 amendment to Tax Law § 15(e) does not apply to the sewer valuation taxes at issue.

Q. Former Tax Law § 15(e) defined eligible real property taxes as “taxes imposed on real property . . . provided such taxes become a lien on the real property during a taxable year in which the owner of the real property is both certified pursuant to Article 18-B of the General Municipal Law and a qualified empire zone enterprise” (Tax Law § 15[e]). The Tax Appeals Tribunal has addressed several matters involving claims for qualified Empire Zone credits and held that special assessments and ad valorem levies are excluded from the definition of tax for purposes of “eligible real property taxes” as that term is used in Tax Law former 15(e) (*see*

Matter of The Golub Corporation, Tax Appeals Tribunal, May 31, 2012, *confirmed Matter of The Golub Corporation v. New York State Tax Appeals Tribunal*, Tax Appeals Tribunal, 116 AD3d 1261 [2014]; *Matter of Landmark Tri-State, Inc.*, Tax Appeals Tribunal, March 22, 2012; *Matter of New Process Gear, Inc.*, Tax Appeals Tribunal, March 22, 2012; *Matter of Ginsberg*, Tax Appeals Tribunal, November 3, 2011; *Matter of Herrick*, Tax Appeals Tribunal, August 4, 2011, *confirmed Matter of Herrick v. New York State Tax Appeals Tribunal*, 106 AD3d 1149 [2013]; *Matter of Piccolo*, Tax Appeals Tribunal, August 4, 2011, *confirmed Matter of Piccolo v. New York State Tax Appeals Tribunal*, 108 AD3d 107 [2013]; *Matter of Stevenson*, Tax Appeals Tribunal, August 4, 2011, *confirmed Matter of Stevenson v. New York State Tax Appeals Tribunal*, 106 AD3d 1146 [2013]). The Tribunal found that it was proper to apply the definition of “tax” as contained in the Real Property Tax Law for purposes of interpreting the meaning of the phrase “taxes imposed on real property” as used in Tax Law former § 15(e) (*Matter of Herrick*).

R. Section 102(20) of the Real Property Tax Law defines the term “tax” as:

“[A] charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, but does not include a special ad valorem levy or a special assessment.”

The term “special assessment” is defined in Real Property Tax Law § 102(15) as:

“[A] charge imposed upon benefitted real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance, of a special district improvement or service or of a special improvement or service, but does not include a special ad valorem levy.”

The term “special ad valorem levy” is defined in Real Property Tax Law § 102(14) as:

“[A] charge imposed upon benefitted real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service, but not including any charge imposed by or on behalf of a city or village.”

The term “special district” is defined in Real Property Tax Law § 102(16) as:

“[A] town or county improvement district, district corporation or other district established for the purposes of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such district or to benefit the real property within such district, and in which real property is subject to special ad valorem levies or special assessments for the purposes for which such district was established.”

It is noted that Westchester County established, among other sanitary sewer districts, the North Yonkers Sanitary Sewer District and Saw Mill Valley Sanitary Sewer District (*see* Westchester County Code of Ordinances § 964.01). Those sanitary sewer districts are special districts (Real Property Tax Law § 102[16]). I find both the North Yonkers Sewer District and Saw Mill Valley Sewer District County sewer valuation taxes to be special assessments. As such, neither the North Yonkers Sewer District sewer valuation taxes, nor the Saw Mill Valley Sewer District sewer valuation taxes constitute a tax under Real Property Tax Law § 102(20). Accordingly, the North Yonkers Sewer District County sewer valuation taxes and the Saw Mill Valley Sewer District County sewer valuation taxes do not meet the definition of eligible real property tax under former Tax Law § 15(e).

S. Petitioner asserts that the City of Yonkers frontage charges paid by FC Yonkers qualify as eligible real property taxes under Tax Law § 15(e). In addition to the water rents charged pursuant to the Charter of the City of Yonkers, § C9-14(A), the City of Yonkers imposes a frontage tax of \$1.40 for each foot of a property that faces onto a street or alley in which a water main is laid or shall be laid (Charter of the City of Yonkers, § C9-14[C]). The water rents collected are used for the operation and maintenance of the waterworks, interest on water bonds and any surplus goes in the water bond sinking fund (City of Yonkers, § C9-17). The presence of water mains and water supply available to service a property clearly constitutes a benefit and

such availability of water services enhances the property value (*New York Cardiac Ctr., Inc. v. Kondzielaski*, 84 AD2d 746 [2d Dept 1981]). As such, the frontage tax is not a tax under Tax Law § 15(e), and does not qualify as an eligible real property tax for purposes of the QEZE credit.

T. In sum, the following payments made by FC Yonkers qualify as eligible real property taxes for purposes of the QEZE credit: the \$185,784.96 PILOT payment (*see* Conclusion of Law N), and the waste disposal taxes imposed on the Westchester County tax bills issued for various parcels (*see* Conclusion of Law P; *see also* Finding of Fact 124). The Division has also conceded that \$13,468.94 paid by FC Yonkers with respect to 1 Grassy Sprain Road constituted eligible real property taxes (*see* Findings of Fact 138 -139). However, it must be pointed out that FC Yonkers made two partial payments of \$2,601.25 (included in check number 4204 [July-August 2009] and check number 4288 [Sept-Oct 2009]) on the City Tax bill for the tax year 2010, bill number 17264, issued for 1 Grassy Sprain Road. Since the above eligible real property taxes qualify as eligible real property taxes for purposes of Tax Law § 15(e), petitioner is entitled to a pass-through of the QEZE credit for real property taxes from FC Yonkers for the 2009 tax year. The Division is directed to compute the amount of eligible real property taxes paid by FC Yonkers during 2009, and to compute the amount of QEZE credit for real property taxes that is passed through to petitioner.

U. It is noted that Addenda C, D, and E attached to the Division's brief have been disregarded. The submission of documents after the closing of the record denies the opposing party the opportunity to question the evidence in the record (*Matter of Saddlemire*, Tax Appeals Tribunal, June 14, 2001).

V. The petition of Forest City Enterprises, Inc., is granted to the extent of Conclusions of

Law I, J, and T; the Division is directed to issue a refund accordingly, but in all other respects the petition is denied.

DATED: Albany, New York
January 19, 2017

Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE