A Report From:

Policy Matters Ohio

Steelyard Secrets

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Executive Summary

Investors in Steelyard Commons are receiving tax subsidies worth $12.48 million over seven years. These federal tax credits were funneled through a for-profit corporation controlled by the Cleveland-Cuyahoga County Port Authority, a public entity whose board is appointed by the City of Cleveland and Cuyahoga County. While these are not direct subsidies from the city, they are scarce resources granted by a publicly controlled entity in virtual secrecy, with little or no opportunity for public scrutiny or debate.

Policy Matters Ohio has attempted to learn more of the details of the use of this credit and the role of the Port Authority. Among our findings are:

- The Port Authority has not taken steps to follow the rules its own board laid out for selecting the projects that would benefit from these credits;
- The Port Authority, while providing numerous documents to Policy Matters Ohio, has not supplied the information needed to understand how the public came to be subsidizing this project, which has become especially controversial because a major tenant will be Wal-Mart Stores Inc. Whether or not this violates Ohio's open records requirements, it leaves Clevelanders in the dark over this important transaction, which will influence the city for years to come. The Port Authority has shielded records, maintaining they are not public, while at the same time declaring it has never received them; it has refused a request for another document that is publicly available elsewhere; and it has not produced documentation that clearly must exist related to board actions and staff activity. Policy Matters Ohio will continue to request additional information.
- Much of what was promised in the application for the tax credits has not come to pass, including the role the Port Authority was to play and the type of investments that were to be made.
- Questions should be raised about the close relationship between the public Port Authority and the private, for-profit company that received the federal tax credits.

The private company that is the vehicle for these credits, the Northeast Ohio Development Fund LLC (NEODF), was set up in 2003 and successfully won $47 million in New Markets Tax Credits from the U.S. Department of the Treasury in the spring of 2004.[1] The Port Authority, named as NEODF's controlling entity in the application, was instrumental in the company's success in winning the credits. Port Authority President Gary L. Failor is chairman of the NEODF board, to which he appointed himself and a majority of board members. These also include two Port Authority board members, John J. Carney and Michael Wager, and Linda Highsmith-Poole, the Port Authority's vice president in charge of development finance.

[1] NEODF was notified in April, though the credits were officially allocated October 8, 2004

While Failor argues that the lack of Port Authority involvement in financing of projects supported by the tax credits limits its role, the Port Authority already has spent tens of thousands of dollars on legal work connected with the tax credits, and collected $310,000 as a result of the Steelyard Commons financing in June. This further underlines the project's significance to the Port Authority, and therefore, the public.

Policy Matters Ohio recommends that this issue be opened up for public debate. The full details of the Port Authority's involvement with NEODF in general and the Steelyard Commons project in particular should be made public. Future NEODF credits should require approval of the Port Authority board, with arrangements for prior public input.

The New Markets Tax Credit program

The New Markets Tax Credit program, passed in the waning days of the Clinton Administration, is aimed at pumping capital into low-income communities that badly need such investment. It allows taxpayers to receive federal income tax credits for investments in certain Community Development Entities certified by the U.S. Department of the Treasury.[2] The CDEs, which must have a primary mission of serving or providing investment capital for low-income communities or low-income persons, compete to win the credits. They attract investors with the credits, and then in turn invest the capital in businesses operating in low-income areas.[3] Generally, these businesses must generate at least 50 percent of their income from within a low-income community, and certain businesses, such as golf courses, massage parlors and residential rental property, may not participate in NMTC projects. The credits, which are claimed over a seven-year period, amount to 39 percent of the $32 million investment, or $12.48 million for investors in Steelyard Commons. The Treasury Department has handed out the authority to issue credits against $8 billion worth of investments since the program began.[4]

Cleveland-based KeyBank received one of the largest allocations of credits, $150 million, in 2003, and what was then Cleveland Tomorrow received $15 million. The competition for such credits is stiff: During the 2003-04 round in which NEODF applied, 271 applications were received for an aggregate total of $30.4 billion; only 63 organizations received a total of $3.5 billion in credit-giving authority.[5] Such credits already have been used for a number of projects in the Cleveland area, including Arbor Park Plaza. In short, the $32 million in New Markets Tax Credits earmarked for Steelyard Commons is a scarce asset that could be used for other productive investments in Cleveland's neighborhoods.

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[2] "A CDE must have a primary mission of serving or providing investment capital for low-income communities or low-income persons, and must maintain accountability to residents of these low-income communities by filling at least 20 percent of the CDE governing or advisory board positions with low-income community representatives." *New Markets Tax Credit Program: Progress Made in Implementation, but Further Actions Needed to Monitor Compliance*, Government Accountability Office, January 2004, p. 6. http://www.gao.gov/new.items/d04326.pdf accessed Sept. 15, 2005

[3] Low-income communities, as defined in the program, are census tracts with a poverty rate of at least 20 percent, or median family income that does not exceed 80 percent of whichever is higher, the median family income of the metropolitan area or the state as a whole. Federal Register, Vol. 66, No. 245, Thursday, Dec. 20, 2001, Department of the Treasury, Community Development Financial Institutions Fund, Guidance for Certification of Community Development Entities, New Markets Tax Credit Program; Notice http://cdfifund.gov/docs/2002_nmtc_cde_certification_guidance.pdf, accessed Sept. 20, 2005. About 85 percent of the Cleveland's census tracts and 25 percent of other areas of Cuyahoga County qualify as investment areas, according to the Port Authority. May 6, 2004, press release, Cleveland-Cuyahoga County Port Authority to Offer Lower Interest Rates, http://www.portofcleveland.com/news/newsdetail.asp?NewsID=89, accessed Sept. 15, 2005

[4] *Fourth Round of New Markets Tax Credit Competition Open,* U.S. Department of the Treasury, Office of Public Affairs, July 15, 2005

[5] CDFI Fund, U.S. Department of the Treasury, New Markets Tax Credit Program: Second Round (2003-2004) General Information. http://www.cdfifund.gov/docs/nmtc/2004/NMTC_GENERAL_COMMENTS.pdf, accessed Sept. 21, 2005

The Port Authority became involved in helping to seek an allocation of the credits after it was approached by Annette Stevenson, then a partner at the Cleveland accounting firm Cohen & Co., and Radhika Reddy, then president of Cohen International LLC, a financial consulting company she had formed, which was then partly owned by Cohen & Co.[6] "We felt the New Markets Tax Credit would be a great adjunct to our existing finance tools," said Failor in an interview.[7] The Port Authority believed that the credits could help reduce the interest rates it charges on bonds that it issues to support local development projects.[8]

In June 2003, the Port Authority board approved the expenditure of $30,000 for legal expenses to explore and develop its role in the NMTC program in June 2003.[9] The new limited liability company was founded in July, 2003, to win New Markets Tax Credits and invest in low-income communities. Its owners are two companies, one owned by some partners at Cohen & Co., the other apparently by Reddy and Stevenson.[10] "The Port Authority, in conjunction with Cohen & Co. Ltd. and Cohen International LLC, created the Northeast Ohio Development Fund to administer the tax credit program," the Port Authority later noted. "The collaboration combines Cohen's tax credit compliance and program expertise with the development financing experience of the port authority."[11]

Four days after NEODF's founding, the Port Authority board approved a cooperative agreement with the new company and others to cooperate in the NEODF application for New Markets Tax Credits and enable the Port Authority to make loans in connection with the credit program.[12] In August, Failor appointed himself and three others to the NEODF board: Port Authority director and vice chairman John J. Carney; Dennis R. Wilcox of the law firm Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co. LPA, who serves as the

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[6] Stevenson and Reddy had become very familiar with the credits before approaching the Port Authority. Since NEODF applied for the credits, Cohen International has changed its name to Ariel Ventures LLC, Stevenson has joined Ariel and Cohen has sold its stake in that company to Reddy and Stevenson. Interviews with Reddy and Stevenson, July 12, 2005, and Randall Myeroff, managing partner of Cohen & Co., Sept. 26, 2005

[7] Interview with Gary L. Failor, Aug. 31, 2005

[8] See for instance minutes to the Port Authority board meeting of July 18, 2003. "This program will allow the Port Authority to enhance its marketing position and offer a reduced rate of interest to qualified companies," it says in connection with the NMTC program.

[9] Cleveland-Cuyahoga County Port Authority Board of Directors, A Resolution Regarding Authorization to Proceed with Negotiation of Cooperative Agreement and Approving Expenditure of Funds Respecting the Port Authority's Participation in the New Markets Tax Credit Program, Resolution No. 2003-16, June 6, 2003

[10] Operating Agreement of Northeast Ohio Development Fund, LLC, and Interview with Randall Myeroff, Sept. 26, 2005. Cohen & Co. itself has no direct ownership, Myeroff said.

[11] "Cleveland-Cuyahoga County Port Authority to Offer Lower Interest rates," Cleveland-Cuyahoga County Port Authority news release, May 6, 2004. The Port Authority said in its own board resolutions that NEODF was "created in conjunction with Cohen & Company Ltd. and Cohen International LLC…" Port Authority, Resolution No. 2004-24, approved June 4, 2004.

[12] Cooperative Agreement among Cleveland-Cuyahoga County Port Authority, Newco, LLC, Northeast Ohio Development Fund, LLC, Cohen & Co. Investment Partners, LLC, and Economic Development Fund, LLC, Dated As of September 29, 2003. The Port Authority board resolution authorized its officers, including Failor, to execute the final agreement. Resolution No. 2003-22, A Resolution Regarding Authorization and Approval of a Cooperative Agreement Respecting the Cleveland-Cuyahoga County Port Authority's Participation in the New Markets Tax Credit Program, approved July 18, 2003.

Port Authority's general counsel; and Linda Highsmith, vice president for development finance (Wilcox later was replaced by another Port Authority director, Michael Wager, the Port Authority board secretary/fiscal officer).[13]

Failor also appointed the majority of the seven-member NEODF advisory board:[14] Rev. Sterling E. Glover, a pastor who is the Port Authority board chair; Joe Lopez, owner of New Era Builders in Cleveland; Bertha Villanueva, senior vice president at Indian Hills Senior Community in Euclid; and John J. Carney, another Port Authority board member. Other advisory board members include Steven J. Williams, owner of Elsons International in Cleveland, another Port Authority board member; India Pierce Lee, then senior program director at the Local Initiatives Support Corp. in Cleveland, and now at Neighborhood Progress Inc.; and David Yen, executive director of World Trade Center Cleveland. Thus, three of the seven-member advisory board are Port Authority board members. The World Trade Center Cleveland is operated by an alliance of which the Port Authority is a member.[15]

In a letter, Failor cited the NEODF operating agreement – which the Port Authority is unwilling to release – in making the appointments to both boards.[16] Failor volunteered in an interview that "you may find that a little unusual," but that he has the authority as president of the Port Authority to appoint the NEODF governing board. "The Port board sets policy. The staff executes on that," he said.[17]

The tax-credit program requires a role for low-income community representatives in the program. Under federal regulations, at least 20 percent of either the governing board or advisory board of the entity applying for the credits must consist of low-income community representatives. NEODF named five of the seven as low-income community representatives in its application for the credits: Rev. Glover, who is considered a low-income community representative on the advisory board because Emmanuel Baptist Church, where he is pastor, is located in a low-income community; Lopez and Williams, as small business owners in a low-income community that provide goods or services to residents of the community or principally employ community residents; and Villanueva

[13] The other NEODF board members are Stevenson, Reddy and Myeroff.
[14] Letter from Gary L. Failor to Annette Stevenson and Radhika Reddy, August 26, 2003
[15] "The World Trade Center is a public-private partnership operated by the Greater Cleveland International Trade Alliance, consisting of the City of Cleveland, Cuyahoga County, Cleveland-Cuyahoga County Port Authority, the Growth Association and Cleveland Tomorrow." The Growth Association and Cleveland Tomorrow subsequently have merged.
http://www.clevelandgrowth.com/business_assistance/International/index.asp, accessed Sept. 20, 2005
[16] Gary L. Failor letter to Annette Stevenson and Radhika Reddy, August 26, 2003. The Operating Agreement, which Policy Matters Ohio obtained from the U.S. Treasury Department and is dated the same day as this letter, says that the Port Authority shall select four directors to each board, without specifying how that would be done. Failor and the three other initial Port Authority board members are named in the agreement. Operating Agreement of Northeast Ohio Development Fund, LLC (part of NEODF's CDE certification application)
[17] Interview with Gary Failor, Aug. 31, 2005.

and Lee, as employees or board members of non-affiliated community-based or charitable organizations.[18]

NEODF no doubt is in compliance with the federal regulation, which does not require low-income community representatives to have low incomes themselves. However, it seems unlikely that an advisory board three of whose seven members are also directors of the Port Authority board is what the NMTC framers had in mind when they sought a body that would get input from the community and bring it to the governing board. In NEODF's application to be certified as a Community Development Entity, a necessary element in winning the tax credits, the company certified that none of its five advisory board members listed as representatives of a low-income community were principals or staff members of NEODF, its affiliated entities or its investors.[19]

While this may have been technically accurate, it doesn't pass the smell test. Rev. Glover and Williams, both listed as low-income community representatives, are board members of the Port Authority, NEODF's controlling entity. And nowhere in NEODF's application to become a Community Development Entity is it disclosed that Rev. Glover, Williams and Carney are Port Authority board members (though Carney's contact information as a governing board director lists a Port Authority address and phone number). Asked if NEODF should have disclosed their Port Authority board membership, Failor said: "I have no idea."[20]

NEODF applied for $100 million in credits, and in May, 2004, the Port Authority announced that the Treasury Department had selected NEODF to receive $47 million of them. "The Cleveland-Cuyahoga County Port Authority will use $47 million in federal tax credits to lower the interest rates of its financing programs," the Port Authority said in a press release.[21] Failor boasted at a meeting of the development finance committee that the Port Authority "was the only Port Authority in the county (sic) to receive an allocation."[22]

There is little doubt that the Port Authority's status as Controlling Entity and its track record and resources were essential to NEODF's success in winning the credits. The company's application is replete with examples of the Port Authority's critical role, from the Port Authority's history of financing to the background of its personnel. For instance, when asked in the NMTC application about its financial health, NEODF depended entirely on the Port Authority by checking the line saying "For the Controlling Entity (if

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[18] CDFI Application, September 30, 2003, p. 122. In one subsequent document, NEODF said that Villanueva was not a low-income community representative. See Northeast Ohio Development Fund, LLC, Governance, 6/8/04.
[19] Accountability Chart, Application for certification as a Community Development Entity, Northeast Ohio Development Fund, LLC, Aug. 26, 2003
[20] Interview with Failor, Sept. 26, 2005
[21] "Cleveland-Cuyahoga County Port Authority to Offer Lower Interest rates," Cleveland-Cuyahoga County Port Authority news release, May 6, 2004.
[22] Cleveland-Cuyahoga County Port Authority Development Finance Committee, Minutes to the May 25, 2004 meeting

the Applicant has not been operating for more than 12 months)."[23] Thus, it cited the Port Authority's positive net income, unqualified financial audits, and lack of defaults or bankruptcy filings. At the time it applied for the tax credits, NEODF had total assets of $100.[24]

Port Authority staff play key roles at the company, and its top officials are intimately involved in the decision-making of NEODF. Failor is chair of the NEODF governing board. Highsmith, the Port Authority's director of development finance, is listed as chairman of the NEODF board's Investment Committee, to be spending 10 hours a week acting in that capacity. NEODF's application for credits states of its President Annette Stevenson, who oversees day-to-day operations: "In the area of capital deployment, she will report directly to Linda Highsmith and the investment committee."[25] Failor said he had "no doubt" that the Port Authority's track record was important in NEODF's winning the credits.[26]

A shortage of public information

Yet, the Port Authority has resisted providing information about NEODF and the Steelyard Commons project. For more than two weeks, it refused even to release the names of the NEODF board members appointed by the Port Authority. While it has provided more details after additional requests, it declined to release a copy of the NEODF Operating Agreement, which provided the authority from NEODF for the Port Authority to name the majority of the company's governing and advisory boards. This is ironic, since NEODF made a public filing of that document to the Treasury Department, which produced it for Policy Matters Ohio in response to a broader records request. In short, the Port Authority will not provide written records on some of the most significant developments relating to the tax credits.

Only a handful of written communications from prior to late 2004 between Port Authority staff, board and those they were working with on the credits were provided to Policy Matters Ohio. Even with Policy Matters Ohio requests and statements by Dennis Wilcox, the Port Authority's lawyer, that it would supply all public documents related to the New Markets Tax Credit allocation and the Steelyard Commons project,[27] the Port Authority has not supplied written information relating to:

- The creation of NEODF, including inquiries and contacts the Port Authority had over the beginning of the NMTC program. "For several months, Port staff along with the Port's investment banker and legal counsel have been exploring the possibility of establishing a relationship with Cohen & Company and Cohen International to participate in this program," stated the Port Authority's Development Finance Group in a June 6, 2003, memo to the Port Authority board, asking for continued

[23] CDFI Application, Sept. 30, 2003, Question 50, p. 73
[24] CDFI Application, p. 15
[25] CDFI Application, p. 101
[26] Interview with Gary Failor, Aug. 31, 2005
[27] Dennis R. Wilcox letter to Zach Schiller, August 23, 2005

authority to explore a possible cooperative agreement to make loans under the tax credit program and the expenditure of $30,000 for legal fees related to the exploration and development of the Port Authority's role in the NMTC program.[28] Yet virtually no evidence has been produced of any work done by the Port Authority as part of this exploration, or of any communications about it.

- The change in direction by the Port Authority, so that it now does not expect to use the New Markets Tax Credit to lower interest rates on its own financings, the original reason for its involvement. Nor is there any mention whatever of the court decisions that Failor said resulted in this change (see below).
- Contacts the Port Authority had over possible use of the credit for the Steelyard Commons project, including how it came to be involved with the project in the first place and what appears to be the transformation of a different project NEODF hoped to support at the same site into what is now Steelyard Commons. The project was cited in verbal reports to the Port Authority's development finance committee meeting on Nov. 30, 2004, and Jan. 11, 2005, but nothing was produced by the Port Authority on these reports despite specific requests.
- The policy statement adopted by the Port Authority guiding decisions about the projects for which the credit would be used. According to the Port Authority's minutes for its June 4, 2004, meeting, Director Michael Wager noted that the board and staff were in the process of developing these guidelines.[29] The statement was discussed in the development finance committee and by the full board, for which we have some documentation. However, the Port Authority did not produce any further documents related to the development of this policy. Moreover, the policy statement was just one of four resolutions passed by the Port Authority board relating to the credits. Apart from the consideration of these resolutions by the development finance committee that preceded their endorsement by the full board and discussion at board meetings, the Port Authority has released virtually no documents in connection with them. So far as we can tell from the documents that have been released, these resolutions were passed with no previous work on them and no written communications involving Port Authority employees and board members.

Wilcox, the Port Authority's lawyer, explained in a Sept. 7, 2005, letter providing access to some documents why others would not be released. These documents include those protected by attorney-client privilege, he said, and financial and proprietary information that is not a public record under the Ohio Revised Code.[30]

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[28] Port Authority board meeting agenda, June 6, 2003, Agenda Item 4(D)(1)(b) – New Markets Tax Credit Program

[29] Minutes to the Port Authority board meeting, June 4, 2004, p. 7

[30] Ohio law exempts from disclosure "financial and proprietary information, including trade secrets, submitted by or on behalf of an employer to a port authority or to a nonprofit corporation engaged by contract to provide economic development services for a port authority, in connection with the relocation,

Among those documents he described as protected from disclosure under the revised code were Steelyards Commons transactional documents, NEODF operating agreements and other documents, and proprietary or financial information submitted to the Port Authority by or on behalf of an employer, such as term sheets from lenders. Wilcox said further that the Port Authority is not a party to these documents, and, using language from the state public records statute, "that none of these documents contain any information that reflect the organization, policies, functions, decisions, procedures or other activities of a public office."

While certain documents legitimately may fall under the exclusions Wilcox cites, the above list reveals that the Port Authority has not disclosed what it should about its involvement with the New Markets Tax Credits and Steelyard Commons. Policy Matters is contacting the Port Authority in a further attempt to obtain documents, but believes the issues should be put on the table now, before additional time elapses. As a public entity controlling the use of tax credits – and one whose board is appointed by the City of Cleveland and Cuyahoga County – the Port Authority has a responsibility to fully disclose how those credits are used.

The Steelyard Commons deal

According to documents released by the Port Authority, the development finance committee received a report on Steelyard Commons and the tax credits at a November 2004 meeting. NEODF's governing board discussed a possible transaction at a December meeting, and in January, approved a new structure for the transaction.[31]

The financing of Steelyard Commons involves $32 million of the $47 million that NEODF received in New Markets Tax Credits.[32] While full details of the financing are not available from the Port Authority, according to a memo by Port Authority staffer Brent R. Leslie, the qualifying investment consists of a $23,264,000 loan from Fifth Third Bank, and $8,736,000 from Fifth Third Community Development Corp.[33] The $23.3 million is being used for a construction loan that closed in June. This replaced a January financing by U.S. Bank that apparently helped allow First Interstate Properties to purchase the land for the development. Fifth Third will receive credits worth about $11.28 million over a six-year period, while U.S. Bank, which was a qualified tax-credit investor only during this year, will get $1.2 million.[34]

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location, expansion, improvement or preservation of the business of that employer." Ohio Revised Code, Section 4582.091

[31] Agenda, Development Finance Committee Meeting, Tuesday, Nov. 30, 2004; E-mail from Timothy Long to Mitchell Schneider, Dec. 9, 2004; and E-mail from Annette Stevenson to Kelly Hoy and others, Jan. 11, 2005.

[32] Steelyard Commons also is benefiting from the use of other New Markets Tax Credits besides those received by NEODF, but that is beyond the scope of this report.

[33] E-mail from Brent Leslie to Lynda Sudderberg and Linda Highsmith, June 27, 2005

[34] Numbers were calculated based on a conversation with Jim Rose, Fifth Third Community Development Corp., Sept. 23, 2005

The $8.7 million was the purchase price of the credits. Of that, $6.7 million apparently was loaned to the developer by NEODF, while $2 million was paid in fees to Ariel Ventures LLC (previously known as Cohen International), the Port Authority, NEODF and others who worked on the transaction.[35] *Reader's Note: After the completion of this report, the Port Authority said that it had included incorrect information in an internal e-mail that it had supplied to Policy Matters Ohio which showed the fees and proceeds from the Steelyard Commons financing. While the information on the Port Authority itself is correct, much of the information on Ariel's fees and proceeds contained in the rest of this paragraph is not. Some of those shown in fact went or will go to other parties. The correct numbers are shown in the following link (and are also included in Appendix C of this document):* http://www.policymattersohio.org/steelyard_secrets_readers_note.htm The largest amount of the fees went to Ariel: $500,000 as an issuer fee and $35,000 in transaction costs (also shown is $723,404 in prepaid annual compliance fees allocated for Ariel). The Port Authority received $310,000 and NEODF, $5,000. The Port Authority and Ariel also are scheduled to receive an estimated total of $1.78 million (45 percent for the Port Authority, 55 percent for Ariel) between now and 2013 in interest and principal on the NEODF loan to Steelyard Commons. Other details of the loan arrangements have not been made available by the Port Authority.

The Steelyard Commons site meets the federal program guidelines for a low-income community. Because of the project's location in a census tract in which more than 30 percent of the population is below the poverty line, NEODF has so far more than fulfilled the requirement in its agreement with the Treasury Department that at least 75 percent of its investments be made in distressed communities.[36]

However, with the use of most of the credits for the Steelyard Commons project, NEODF and the Port Authority have dramatically changed how they used the credits and the role of the Port Authority compared to what they said in their application. NEODF only received $47 million of the $100 million in credits it sought, so one could logically expect some changes from what it previewed in its application. Still, at that time it said it intended to make 10 prospective investments, ranging in size from $1.6 million to $50 million, including corporate headquarters, a medical office building, two manufacturing expansions, a day care center and a couple of mixed-use developments (see Appendix A for a list of qualified low-income community investments, or QLICIs, that NEODF identified at the time it applied).[37] While these did not represent firm commitments, NEODF also cited letters of commitment amounting to $40 million from National City Development Corp. and $5 million from Sherwin-Williams Co. for equity investments, along with $40 million in loans from Home Savings and Loan Company (this was in addition to the $100 million in loans pledged by the Port Authority).[38] NEODF expected that the bulk of the projects that would benefit from the credit would be non-real estate

[35] Leslie e-mail to Sudderberg and Highsmith, June 27, 2005
[36] Allocation Agreement for Northeast Ohio Development Fund LLC, New Markets Tax Credit Program, Community Development Financial Institutions Fund, Effective Oct. 8, 2004. Steelyard Commons is the only project so far to have received NEODF credits. Interview with Failor, Sept. 26, 2005
[37] CDFI Application, pp. 45-6
[38] CDFI Application, p. 52; see also letter from Gary Failor to Radhika Reddy, Sept. 16, 2003, included in CDFI Application filing.

projects. Instead, it has moved forward with one, large real estate project, considerably different from the smaller, $10 million mixed-use project at the same site that it had listed. Failor said in an interview that, "Whether it's NEODF or the Port Authority, we see tons of prospective transactions…We probably see 50 transactions if one happens." Thus, he said he was not surprised, though he had no idea about the specifics on why the other investments had not materialized.[39]

In its 2003 application for the tax credits, NEODF stated: "The NMTC allocation will enable the Applicant to significantly enhance or improve upon the current activity of the Cleveland-Cuyahoga Port Authority, Applicant's Controlling Entity."[40] As late as Oct. 15, 2004, the Port Authority still believed that it would be able to use the credits in tandem with its own financing. In its Development Finance 2005 Business Plan, the port added as a new objective to "leverage the New Markets Tax Credit allocation with Port Authority financing programs to maximize assistance to catalytic neighborhood and downtown projects."[41]

However, Failor explained in the Aug. 31 interview that, "We have now determined it's not a very good fit to use New Markets Tax Credits to buy down interest rates on Port Authority financing." After NEODF received the credit, he said, courts ruled that tax-exempt financing cannot be used in connection with the credits. This undercut the major reason the Port Authority had gotten involved in the effort to secure the credits. Such changes in direction are not unusual in a newly created program, Failor noted. He also said that, aside from the court rulings, the Steelyard Commons borrowers brought in commercial lenders with them, reducing the value the Port Authority could bring to the deal.

According to Failor, the court decisions mean the Port Authority won't play the role it had expected with the credits. Yet curiously, no documentation whatsoever was provided by the Port Authority on this major development, or how its officials reacted to it—one affecting up to $100 million in Port Authority financing and a major activity.

The Port Authority released a copy of an amended cooperative agreement from early this year between it, NEODF and others that allowed for NEODF to use the tax credit in projects that were not financed by the Port Authority.[42] However, only one e-mail was provided that appears to relate to that amended agreement: A Nov. 7, 2003, note containing the Final Cooperative Agreement from a lawyer at the Climaco firm to Reddy, Port Authority official Linda Highsmith and others.[43] No additional documents about this turn of events were provided.

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[39] Interview with Failor, Sept. 26, 2005

[40] CDFI Application, p. 19

[41] Cleveland-Cuyahoga County Port Authority, Development Finance, 2005 Business Plan, October 15, 2004, p. 1

[42] First Amended and Restated Cooperative Agreement among Cleveland-Cuyahoga County Port Authority, Newco, LLC, Northeast Ohio Development Fund, LLC, Cohen & Co. Investment Partners, LLC and Economic Development Fund, LLC, Dated As of January 21, 2005.

[43] It says, "Attached please find an image of the final version of the Cooperative Agreement. Our client is prepared to proceed with execution as soon as possible. Please contact me to coordinate execution." E-mail

While it collected a fee for its efforts in the Steelyard Commons financing, the Port Authority says that it only received draft versions, and not final documents, of most transactional documents. "Executed and/or final versions of these transactional documents have not been delivered to the Port Authority, as the Port Authority is *not* a party to these documents and has no financial or legal obligations under these documents," wrote general counsel Wilcox in his Sept. 7 letter (emphasis in the original).[44] Furthermore, he continued, "none of these documents contain any information that reflect the organization, policies, functions, decisions, procedures or other activities of a public office." Clearly, one of these statements is inaccurate, since it would be impossible for him to know what was in the documents if he had never received them.[45]

In addition, though some Steelyard Commons transactional documents may be protected under the Ohio Revised Code, it defies common sense to suggest that a transaction which already has netted the Port Authority $310,000[46] says nothing significant about that public body. That accounts for more than 5 percent of revenue the Port Authority received in the eight months ended Aug. 31.[47] Failor said he personally negotiated the fee the Port Authority received with Mitchell Schneider, president and chairman at First Interstate Properties Ltd., the Steelyard Commons developer.[48]

Policy Statement on the Credits

After NEODF won the credits, the Port Authority board on Sept. 10, 2004 unanimously approved a policy statement, covering both the Port Authority and NEODF, establishing criteria to be used in reviewing potential NMTC projects (see Appendix B for the resolution and the policy statement).[49] The policy states that the Port Authority and NEODF are "to focus on and give priority to" projects located in the areas with the

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from Joseph Fegen to Radhika Reddy, bjones@ssd.com, Erik J. Rickard, Michael Jordan and Linda Highsmith, copy to Dennis Wilcox, Nov. 7, 2003

[44] Letter from Dennis R. Wilcox to Zach Schiller, Sept. 7, 2005.

[45] Wilcox's firm was paid $65,000 for its work on the financings for the Port Authority and $25,000 for NEODF, as part of the fees withheld at the closing of the Steelyard Commons financing, according to a memo by Leslie. In the Climaco firm's bill to the Port Authority for its work, it cites "attendance at numerous conference calls and meetings, review of numerous transaction documents and preparation of resolutions, certificates and related documents and review and due diligence of real estate matters and other such matters as assigned." Statement from Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., LPA, to Brent Leslie, June 15, 2005. Wilcox has said fees paid to the firm have been reimbursed from revenue the Port Authority has generated from the tax-credit program. Interview with Dennis Wilcox, July 27, 2005

[46] E-mail from Brent Leslie to Lynda Sudderberg and Linda Highsmith, June 27, 2005. The ultimate amount possibly could exceed $1 million, based on interest and principal payments through 2013.

[47] Cleveland-Cuyahoga County Port Authority, Statement of Revenue and Expense For the Eight Months Ending August 31, 2005, Board of Directors Meeting agenda, Friday, Sept. 9, 2005, p. 20

[48] Interview with Failor, Aug. 31, 2005

[49] Cleveland-Cuyahoga County Port Authority Board of Directors, A Resolution Adopting a Policy Regarding the New Markets Tax Credit Program, Resolution No. 2004-30, September 10, 2004. The statement says that projects to be considered "will include, but not be limited to" the following: Neighborhood retail, industrial and commercial projects; downtown retail services which will contribute to an increase in downtown residency and/or that will help expand or retain the businesses in the downtown area; and biomedical, health care, research and development, and high technology industries." Steelyard Commons would not appear to fall in one of these categories.

greatest need. Since the Steelyard Commons project is located in a high-poverty census tract, it meets that requirement. However, among the policy statement's other criteria is one that states, "The project should demonstrate that the advantages and benefits that the NMTC Program brings to it are truly needed and will provide unique benefit." It also says that, "The project should act as a catalyst for redevelopment of the surrounding area (to be supported by data supplied by developer/borrower)."

Based on documents it provided, it appears that the Port Authority at the least has not followed through on that policy statement with its support of the Steelyard Commons development. No information has been provided on how this policy was followed by either the Port Authority or NEODF. The only relevant document provided was a map showing Cuyahoga County by census tract and which tracts have median income less than 80 percent of the metropolitan area median, which have a poverty rate greater than 25 percent, and which have both. The Port Authority has provided no evidence that any information was provided by Steelyard Commons's developers, as was required in the policy statement. While it's possible that such a submission might be covered by an exception to the public records law, or that NEODF made such a request and the Port Authority does not feel compelled to release it, there is nothing to suggest such information was provided. The Port Authority has not shown either how the project demonstrated that the tax-credit program was truly needed or how it would help redevelop the surrounding area.

Failor said that the Port Authority board passed the resolution approving the policy statement "when we thought we were going to be using Port Authority financing." But they are not doing so, and "as a result, the policy statement is very difficult to execute on. To the extent we can execute on it, we do. To the extent we can't execute on it, we don't." Given the Port Authority's control of NEODF and its continued role in the transaction, it is unclear why it would have lacked the ability to execute. Indeed, the policy as passed by the Port Authority covers NEODF itself.

Failor went on to say that, "It's a policy statement, not a law or a rule. It was written in that manner. You do what you can with the change in the circumstances on how the lending was structured." The board, Failor added, believes that Steelyard Commons is "transformative and catalytic, and the board believes it was an appropriate use of the credits. To that extent, it's complying with the policy, without being the financing institution."[50]

According to NEODF's application to be certified as a Community Development Entity, its advisory board is to "obtain feedback and relevant information from the low-income communities they represent through a variety of means, including, but not limited to: annual surveys of the low-income residents, employees and/or customers served by their organizations and other organizations in the community to which they are accountable, annual formal community meetings designed specifically to obtain such feedback and attendance at other community-based meetings and events where such issues related to

[50] Interview with Failor, Aug. 31, 2005

the needs of the low-income community will be discussed."[51] Minutes from the advisory board's meetings and recommendations it approves are to go to the governing board for discussion and vote.[52]

It is unclear from the documents the Port Authority has released how significant a role the NEODF advisory board played in evaluating the Steelyard Commons project before it was approved. The documents cite only one meeting of the advisory board, in September 2004.[53] The board is supposed to meet quarterly, and apparently has done so. Board member India Pierce Lee said she was unable to attend the first few meetings, where Steelyard Commons was discussed, but indicated some such discussions had taken place.[54] Failor, who chairs the advisory board, said that, "They don't have any authority to take action, but they met and discussed it and approved the concept." Asked more broadly about how the advisory board had been fulfilling its role, he said the board has "been doing what's required under the law."[55]

An unusual relationship

The relationship between NEODF and the Port Authority is unusual. While there is no evidence that any Port Authority board member or employee has benefited from this relationship, the close and entangled relations between a public body and a private, for-profit company raise questions about possible conflicts of interest.

The Ohio Ethics Commission, which has jurisdiction over public officials such as those at the Port Authority, has previously ruled on when a public official may serve on the board of directors of a nonprofit agency. It has ruled that is acceptable if the official serves in his or her "official capacity."[56] The Ethics Commission also has drawn certain parameters where a private company that employs a member of the board of directors of a port authority as an officer may apply for and receive financing from a bond program administered by the port authority.[57] However, there does not appear to be a precedent covering this sort of relationship. And no effort has been made by the Port Authority to seek an opinion from the Ohio Ethics Commission on propriety of this relationship. Failor sees no need to do so.

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[51] Application for certification as a Community Development Entity, Northeast Ohio Development Fund, LLC, answer to question 7.

[52] NEODF's application for the credits said that, "The Low-Income Community representatives on the Applicant's Advisory Board will be instrumental in the design, implementation and monitoring of the Applicant's business strategy, particularly as it relates to ensuring significant community impact." CDFI Application, p. 70

[53] Letter from Gary Failor, chairman, Northeast Ohio Development Fund, LLC, to advisory board members Lee, Williams, Yen, Carney, Rev. Glover, Villanueva and Lopez, Sept. 7, 2004, inviting them to a Sept. 24, 2004, meeting.

[54] Interview with India Pierce Lee, Sept. 20, 2005. Lee said she is trying to find a way for NEODF's credits to be used for smaller, neighborhood projects.

[55] Interview with Failor, Sept. 26, 2005

[56] Ohio Ethics Commission, Advisory Opinion No. 2001-05

[57] Ohio Ethics Commission, Advisory Opinion No. 2001-02

As Failor sees it, NEODF is a private entity, not a public one, despite the Port Authority's control of a majority of its board. Since the Port Authority is not providing financing, it is not playing a role. He sees no need for the Port Authority to have informed the Treasury Department of the change in its role. "We're in compliance with what the feds say," he said. "Just because it doesn't meet our expectations doesn't mean it doesn't comply with Treasury regulations."

The NMTC program allows government entities and non-profits along with for-profit companies to receive allocations of the tax credits, but in order for them to be used, the credits must flow through a for-profit entity.[58] Thus, a for-profit entity had to exist for the program to work here. Further, NEODF said in its application for credits that, "Due to the nature of products offered, the Applicant does not anticipate receiving a return on investments in excess of cost of funds."[59] It is possible for NEODF to be seen simply as an intermediary, attracting investments with the NMTC credits that it in turn plows into projects. Failor said that NEODF board members are not paid. And though Port Authority funds have been spent on the program,[60] information made available so far indicates that the Port Authority revenues from the tax-credit program have far exceeded out-of-pocket expenditures.

However, this kind of relationship is one that requires a maximum of openness to dispel any perception that dealings with a public body and a for-profit business are anything but perfectly pure. For example, with millions of dollars in fees and proceeds flowing from the Steelyard Commons financing to the Port Authority, NEODF and Ariel, can the public be assured that the division of them was fair? Can those representing both the Port Authority and NEODF impartially represent the interests of both?

Unfortunately, NEODF's use of the credits at Steelyard Commons have taken place outside of the light of day, and many of the details remain there even after a two-month-long effort to learn how these credits were won and used. Thus, the public as a whole has no way to know if the area is getting the best use out of this valuable resource, administered by a company controlled by the Port Authority. Are the credits being put to maximum effect for the benefit of the surrounding community and low-income Clevelanders?

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[58] "Both for-profit and non-profit entities may apply to the Fund for an allocation of NMTCs, but only CDEs that are for-profit entities are eligible to issue Qualified Equity Investments with respect to which investors will be entitled to claim NMTCs." Federal Register, Vol. 68, No. 138, Friday, July 18, 2003/Notices, p. 42808.

[59] CDFI Application, p. 48

[60] Besides the $30,000 the board approved spending in June 2003, a year later, after NEODF had won the credits, the Port Authority board approved another $50,000 for legal expenses associated with the allocation of the credits. Cleveland-Cuyahoga County Port Authority Board of Directors, A Resolution Authorizing and Approving the Expenditures of Funds for New Markets Tax Credit Legal Expenses, Resolution 2004-24, June 4, 2004. Lynda Sudderberg, the Port Authority's financial chief, told the author in July 2005 that a total of $86,000 had been spent on such legal expenses through May 2005.

Policy Matters Ohio recommends that this issue be opened up for public debate. The full details of the Port Authority's involvement with NEODF in general and the Steelyard Commons project in particular should be made public. Future NEODF credits should require approval of the Port Authority board, with arrangements for prior public input. This public entity has a responsibility to act transparently, in a way that the public can understand.

Question: 25

Indicate whether the *Applicant* will use the proceeds of its *QEIs* to (check one):

- ______ Support a single project, business or portfolio purchase that has already been identified (must be listed in Question #26 below)
- ______ Support a discrete number of *QLICIs* that have already been identified (must be listed in Question #26 below)
- checked **Support a general pipeline of *QLICIs* that may or may not have been identified at the time of this application (identified transactions should be listed in Question #26 below).**

Question: 26

Identify specific *QLICIs* (including execution of contracts to deliver *FCOS*) that the *Applicant* intends to make with its *QEI* proceeds. Detail Below

Saved Transactions

Name of Transaction	Projected $ Amount	Projected Closing Date	Address	Census Tract
ARRAS Group Corporate Headquarters	$3,000,000	7/1/2004	50 Public Square, Terminal Tower, Suite 444 Cleveland, OH 441141216	39-035-107600
Cedar-East 79th Medical Center	$44,000,000	9/1/2004	E79th Street at Cedar Avenue Cleveland, OH 441034192	39-035-113400
Aramark Uniform Service Expansion	$2,000,000	8/1/2004	3600 E 93rd Street Cleveland, OH 441051620	39-035-120100
Monroe Tool & Mfg Co. Manufacturing Expansion	$4,000,000	8/1/2004	3900 East 93rd Street Cleveland, OH 441054048	39-035-115500
EF Boyd Office Building	$1,600,000	9/1/2004	2165 East 89th Street Cleveland, OH 441063420	39-035-113500
Superior Products Manufacturing Expansion	$2,000,000	12/1/2004	3786 Ridge Road Cleveland, OH 441441127	39-035-137101
St. Luke's Medical Office Bldg.	$4,000,000	12/1/2004	11311 Shaker Blvd. Cleveland, OH 441043805	39-035-119300
Mount Pleasant Multipurpose Day Care/ Social Services	$2,000,000	11/1/2004	E140th at Kinsman Road Cleveland, OH 441204821	39-035-120802
Jennings Mixed-Use Development Project	$10,000,000	10/1/2004	3341 Jennings Road Cleveland, OH 441092315	39-035-104800
			3201 Carnegie Avenue	39-035-

Athersys Corporate Headquarters	$50,000,000	12/1/2004	Cleveland, OH 441152634	108700
Cudell Improvement Mixed-Use Development	$12,000,000	12/1/2004	11650 Detroit Avenue Cleveland, OH 441022320	39-035-101300

RESOLUTION NO. 2004-30

A RESOLUTION ADOPTING A POLICY REGARDING THE
NEW MARKETS TAX CREDIT PROGRAM.

WHEREAS, the Northeast Ohio Development Fund ("NEODF") has been awarded a New Markets Tax Credit ("NMTC") allocation of $47 million by the CDFI Fund of the U.S. Department of the Treasury, and the allocation will allow NEODF to provide loans and equity investments for a variety of projects in low-income census track areas in Cuyahoga County; and

WHEREAS, NEODF has entered into a Cooperative Agreement with the Cleveland-Cuyahoga County Port Authority ("Port Authority"), as well as Cohen & Co. Investment Partners, LLC, Economic Development Fund LLC, and NEWCO, a LLC to be formed; and

WHEREAS, the Port Authority controls appointment of the majority of NEODF's governing board and, in addition, the Port Authority Board of Directors has the authority to approve issuance of bonds for projects utilizing the NMTC Program; and

WHEREAS, this NMTC Program is a unique opportunity for the community and a NMTC allocation is an extremely limited resource, and NEODF and the Port Authority will use the NMTC Program to leverage available conventional, governmental and Port Authority financing products in a way which will maximize its assistance to Qualified Active Low-Income Community Businesses in the creation and retention of jobs; and

WHEREAS, it is therefore desirable to establish policy criteria for both the Port Authority's Board of Directors and the NEODF Governing Board in reviewing potential NMTC Program projects;

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Cleveland-Cuyahoga County Port Authority, Cleveland, Ohio:

Section 1. That a New Markets Tax Credit Program Policy Statement, a copy of which is attached hereto and marked Exhibit "A", is hereby adopted.

Section 2. That all formal actions of the Board of Directors of the Cleveland-Cuyahoga County Port Authority concerning and relating to the adoption of this Resolution were adopted in an open meeting of the Board of Directors and that all deliberations of this Board of Directors and any of its Committees that resulted in such formal action were in meetings open to the public in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

Section 3. That this Resolution shall take effect immediately upon its adoption.

ADOPTED: September 10, 2004

Yeas: 7

Nays: 0

____
CHAIR

____
SECRETARY

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NEW MARKETS TAX CREDIT PROGRAM
POLICY STATEMENT

This statement is designed to establish policy criteria for both the Cleveland-Cuyahoga County Port Authority's Board of Directors and Northeast Ohio Development Fund (NEODF) Governing Board in reviewing potential New Markets Tax Credit (NMTC) Program projects.

NEODF has been awarded a NMTC allocation of $47 million by the CDFI Fund of the U.S. Department of the Treasury. The allocation will allow NEODF to provide loans and equity investments for a variety of projects in low-income census track areas in Cuyahoga County. NEODF has entered into a Cooperative Agreement with the Cleveland-Cuyahoga County Port Authority (Port Authority), as well as Cohen & Co. Investment Partners, LLC (Cohen & Co.), Economic Development Fund LLC (EDF) and NEWCO, a LLC to be formed. The Cooperative Agreement sets forth the relationship and powers of the parties in administering the NMTC Program. Although NEODF's ownership is comprised of Cohen & Co. and EDF, the Port Authority controls appointment of the majority of NEODF's governing board. In addition, the Port Authority Board of Directors has the authority to approve issuance of bonds for projects utilizing the NMTC Program.

This NMTC Program is a unique opportunity for the community. Since a NMTC allocation is an extremely limited resource, NEODF and the Port Authority will use the NMTC Program to leverage available conventional, governmental and Port Authority financing products in a way which will maximize its assistance to Qualified Active Low-Income Community Businesses in the creation and retention of jobs.

It is the Port Authority and NEODF's current policy to focus on and give priority to projects based on the following criteria:

- The project must be located in one of the geographic areas of the community exhibiting the greatest need, consistent with the goals of the NMTC Program to assist poverty and low to median family income census tracks and the creation of employment opportunities.
- The project will be subject to current Port Authority policy respecting utilizing MBE/FBE firms, prevailing wage and county work force initiatives.
- The project should act as a catalyst for redevelopment of the surrounding area (to be supported by data supplied by developer/borrower).
- The total project cost should equal or exceed $5 million.
- The project should demonstrate that the advantages and benefits that the NMTC Program brings to it are truly needed and will provide unique benefit.
- This product is not intended to compete with or replace existing incentives.
- The types of projects to be considered will include, but not be limited to, the following:
  - Neighborhood retail, industrial and commercial projects;
  - downtown retail services which will contribute to an increase in downtown residency and/or that will help expand or retain the businesses in the downtown area; and
  - Bio-medical, health care, research and development, and high technology industries.

Resolution 2004-xx
Adopted x.xx.xx

Steelyard Secrets Reader's Note

After the completion of *Steelyard Secrets*, the Cleveland-Cuyahoga County Port Authority said that it had included incorrect information in an internal e-mail that it had supplied to Policy Matters Ohio regarding the fees and proceeds from the Steelyard Commons financing. While the information on the Port Authority itself is correct, much of the information on Ariel's fees and proceeds on page 10 of the report is not. Some of those shown in fact went or will go to other parties. Port Authority President Gary Failor provided a correction to that information. NEODF President and Ariel partner Annette Stevenson asked that it be included in the report.

The following numbers, which show a different division of these monies, are based on Failor s correction:

a) The $500,000 in fees was not paid to Ariel Ventures, LLC. It was paid to the two owners of NEODF, Cohen & Company Investment Partners (CCIP) and Economic Development Fund (EDF). CCIP, which received $370,000, is owned by some partners at Cohen & Co. EDF received $130,000 (EDF is owned by the three partners at Ariel, Annette Stevenson, Radhika Reddy and Irene Zawadiwsky, Stevenson said).

b) Of prepaid annual compliance fees of $723,404 to be paid over the next 8 years, 70 percent will go to Ariel Ventures and 30 percent to Cohen & Company Ltd.

c) As stated in the report, the Port Authority will be paid 45 percent of the estimated total of $1.78 million to be received on the NEODF loan between now and 2013. However, Cohen & Company Investment Partners will get 40.7 percent and Economic Development Fund, 14.3 percent.

Policy Matters Ohio is a non-profit research institute dedicated to bridging the gap between research and policy in Ohio. Policy Matters seeks to broaden debate about economic policy by providing quantitative and qualitative analysis of issues important to ohio's working people. Other areas of inquiry for Policy Matters include work, wages, and benefits; education; basic needs; privatization, and economic development. Generous funding has been provided by the George Gund Foundation, the St. Ann Foundation, the Nord Family Foundation, the Joyce Foundation, the Cleveland Foundation, Greater Cleveland Community Shares and other sources.

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