STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

IN THE MATTER OF THE APPLICATION BY HUDSON RIVER VALLEY, LLC,

Plaintiff-Petitioner,

-against-

EMPIRE ZONE DESIGNATION BOARD; and MARIO MUSOLINO, as Acting Chair of the Empire Zone Designation Board; and NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT; EMPIRE STATE DEVELOPMENT CORPORATION; and DENNIS M. MULLEN, as Commissioner of New York State Department of Economic Development and Empire State Development,

Defendants-Respondents.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 01-11-ST2364 Index No. 1287-11

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

In 1986 the New York State Legislature enacted the New York State Economic Development Zones Act, codified as General Municipal Law ("GML") Article 18-B, § 955

et seq. (the "Act"). The purpose of the legislation was to provide a method of encouraging business development or expansion in economically distressed areas in exchange for certain financial incentives. The incentives included tax credits for investment and job creation.

In the mid-90's the principals of the plaintiff-petitioner, Hudson River Valley, LLC (hereinafter the "petitioner"), embarked upon a business venture to create and operate a traumatic brain injury treatment and rehabilitation facility in the City of Kingston, New York. Towards that end, the principals formed two separate entities. The first was KRNH, Inc. ("KRNH") the entity which currently operates the facility under the name Northeast Center For Special Care. The second was the petitioner, formed in August 1997, for the sole purpose of acting as the holding company of the real estate upon which the medical facility would be operated. The petitioner and KRNH are owned by the same principals in the same proportion of ownership interests. They maintain the same address for doing business, have a common management and common financial control.

In 1998 the petitioner, applied for, and was granted, a certificate of eligibility to participate in the State Economic Development Zone Program as a Qualified Empire Zone Enterprise ("QEZE"). The State Legislature subsequently (in 2000) amended the Economic Development Zones Act, *inter alia*, to change its name to the Empire Zones Program Act and to provide additional tax credits (see L 2000 Ch 63). Of great significance here, in April 2009 the Governor signed into law further amendments to the Empire Zones Program Act which altered the criteria for eligibility for business enterprises. The Program was overseen and administered, as relevant here, by the New York State Department of Economic

Development ("DED"). The 2009 legislation directed the Commissioner of DED to conduct a review of all businesses receiving benefits under the Program (see GML 959 [a] [v] [5], [6], [w]; L 2009, ch 57). Throughout the foregoing period of time (1998-2009), the petitioner continued to operate as a real estate holding company under its original certificate of eligibility.

As a result of the 2009 Empire Zone Program review, Randal D. Coburn, Director of the Empire Zones Program, issued on June 29, 2009 a determination informing the petitioner that its certificate of eligibility to continue in the Empire Zones Program had been revoked. The June 29, 2009 determination recited, in part, as follows:

> "Certain statutory reforms to the Empire Zones Program were enacted as part of the 2009-2010 State budget. The reforms require that the Department of Economic Development (DED), as the lead State agency responsible for administering the Program, review all existing Empire Zone certified businesses to verify that they qualify for continued participation in the Program based on the new statutory requirements. Specifically, DED must review businesses to determine whether, if certified prior to August 1, 2002, a business restructured and transferred employees or property from one business to another in order to maximize their Empire Zone benefits, or whether a business is providing economic returns to the State that exceed the tax benefits it is receiving.
>
> "The Commissioner of DED has conducted this review and is revoking the certification of Hudson River Valley, LLC [], as an Empire Zone certified business pursuant to Section 959 (a) (v) (5) and (6) of the General Municipal Law and 5 NYCRR 11.9 (c) (1) and (2). []
>
> "The certification of Hudson River Valley, LLC as an Empire Zone certified business is being revoked because Hudson River Valley, LLC:

1. Was first certified prior to August 1, 2002, and has either caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with Hudson River Valley, LLC or acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization; and

2. Failed to provide economic returns to the state in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits Hudson River Valley, LLC used and had refunded to it. []"[1]

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[1]The foregoing grounds for decertification are derived from GML 959 (a) (v) (5) and (6) which recite as follows:

"The Commissioner shall: (a) After consultation with the director of the budget, the commissioner of labor, and the commissioner of taxation and finance, promulgate regulations, which, notwithstanding any provisions to the contrary in the state administrative act, may be adopted on an emergency basis, governing [] (v) the decertification by the commissioner so as to revoke the certification of business enterprises for benefits referred to in section nine hundred sixty-six of this article with respect to an empire zone or zone equivalent area upon a finding of any one of the following: []

(5) the business enterprise, if first certified pursuant to this article prior to the first day of August, two thousand two, caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization;

(6) the business enterprise has failed to provide economic returns to the state in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its

The determination went on to provide information with regard to how the petitioner could take an appeal of the determination, and of particular significance here, recited that the effective date of the revocation was January 1, 2008.

The first ground for revocation, under GML § 959 (a) (v) (5), is commonly referred to as the "shirt-changer" test. It was enacted to prevent related companies (those with common ownership)from transferring employees or assets back and forth to create the illusion that there was genuine job creation and/or economic investment when in fact, that was not the case. The second ground for decertification, under GML § 959 (a) (v) (6) is commonly referred to as the 1:1 benefit-cost test. It requires that for each dollar received as a tax credit, the business enterprise will expend one dollar in wages and benefits to employees, and/or expend one dollar in capital investment in its facility (see also § 11.9 of the Rules of the Department of Economic Development, 5 NYCRR 11.9 [c] [1], [2]).

The petitioner appealed the determination by letter dated July 10, 2009, authored by its Corporate Manager, Catherine M. Martinez. The letter recited as follows:

> "Please consider this letter as our appeal to your revocation notice of June 29, 2009 in connection with the above entity.
>
> "Hudson River Valley, LLC is the owner of real property located at 300 Grant Avenue, Lake Katrine, NY 12449, home to the Northeast Center for Special Care. While there are some common ownership elements with other EZ certified entities, the operation of Hudson River Valley Stands completely on its own merit as a real estate entity and employer.

> facility greater in value to the tax benefits the business enterprise used and had refunded to it;"

> "Hudson River Valley, LLC has not re-incorporated, has not changed its Federal Employer Identification Number, and has not changed its business structure.
>
> "Those Empire Zone certified entities with some common but not identical ownership interests are :
>
> HCA Genesis, Inc. d/b/a mercy of Northern New York
> MGNH, Inc.
> KRNH, Inc., d/b/a Northeast Center For Special Care
> Cortland Community Reentry Program, Inc.
> CCNH, Inc., d/b/a Cortland Care Center
> Tallmadge, LLC
>
> "Please advise if anything further is needed at this time to prefect our appeal."

In a resolution dated October 15, 2010 the Empire Zone Designation Board (the "Board") upheld the decertification of the petitioner as an Empire Zone business. The determination of the Board (Resolution # 17 of 2010), recites, in part, as follows:

> "Therefore, Be it Resolved, that the Board, after careful consideration of the documentation presented by companies listed in Appendix A of this resolution, has determined that the companies listed in Appendix A of this resolution have not provide sufficient evidence to demonstrate that the Commissioner's findings with regard to revocation under GML §959 (a) (v) (6) was in error and therefore the Commissioner's determination to revoke the empire zones certification of these firms is upheld and the companies listed in Appendix A shall not have their certifications reinstated."

The petitioner commenced the above-captioned combined action/proceeding seeking review of the determination and a declaratory judgment that it is unlawful. The respondents have served an answer and have made a motion pursuant to CPLR 3211 (a) (7) to dismiss

the declaratory judgment action. Many of myriad issues raised by the petitioners in the instant proceeding are governed by the trilogy of cases decided by the Third Department Appellate Division on May 3, 2012: Matter of WL, LLC v Department of Economic Development, ___ AD3d ___, 943 NYS2d 661; Matter of Office Bldg. Assoc., LLC v Empire Zone Designation Board (95 AD3d 1402 [3d Dept., 2012]; and Matter of Morris Builders, LP v Empire Zone Designation Board, 95 AD3d 1381).

The Court observes that the Court's role in reviewing an administrative determination is not to substitute its judgment for that of the agency, but simply to ensure that it is not made in violation of lawful procedure or affected by an error of law, and was not arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; In the Matter of Terrace Court, LLC v. New York State Division of Housing and Community Renewal, 18 NY3d 446, 454 [2012]; Matter of Warder v Board of Regents, 53 NY2d 186, 194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363; Akpan v Koch, 75 NY2d 561, 570; Matter of Prestige Towing & Recovery, Inc. v State of New York, 74 AD3d 1606 [3rd Dept., 2010]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (Matter of Peckham v Calogero, supra), citing Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; Matter of Prestige Towing & Recovery, Inc. v State of New York, supra).

The Court further notes that GML § 959 (a) (v) (6) authorized the DED Commissioner to promulgate emergency regulations with respect to decertification of Empire Zone Program businesses, as relevant here, upon a finding that they did not satisfy

the 1:1 benefit-cost test (see GML § 959 [a] [v] [6]; Matter of J-P Group, LLC v New York State Department of Economic Development, 91 AD3d 1363, 1364-1365 [4th Dept., 2012]; Matter of WL, LLC v Department of Economic Development, ___ AD3d ___, 943 NYS2d 661 [3d Dept., 2012]; Matter of Office Building Associates, LLC v Empire Zone Designation Board, 95 AD3d 1402 [3d Dept., 2012]). The emergency regulation adopted pursuant to General Municipal Law § 959 (a) (v) (6) is set forth in 5 NYCRR 11.9 (c) (2).

Petitioner's First Cause of Action

The petitioner argues that the October 15, 2010 meeting of the Board was extremely brief; that while members of the public were permitted to make comments, the Board Members did not respond; that Board Members conducted no discussions or deliberations; and that it appeared that Resolution # 17 of 2010[2] had been drafted by staff members prior to the meeting. The foregoing arguments are similar to those considered and rejected in Matter of WL, LLC v Department of Economic Development (supra) and Matter of Hague Corporation v Empire Zone Designation Board, (supra, at footnote 1).

With regard to the alleged conclusory nature of the Board's determination (supra), the Court notes that Resolution 17 of 2010 recited that the petitioner (as well as the fourteen other Empire Zone companies) had not provided "sufficient evidence to demonstrate that the Commissioner's findings with regard to revocation under GML §959 (a) (v) (6) was in error". This language is substantially the same as that set forth in the determination in

[2]Which revoked the certification of fourteen other businesses in the same determination.

Matter of Office Bldg. Assoc., LLC v Empire Zone Designation Board (supra). While the Appellate Division in the Office Bldg. Assoc. case (supra) found the determination to be fatally deficient, a distinguishing factor is that the petitioner there submitted additional evidence in connection with its appeal (including revised BARs).[3] The Court found that the determination "sheds no light upon the manner in which petitioner's proof was deemed to be deficient, falls far short of delineating the particular grounds for the Board's determination and, in so doing, effectively precludes this Court from undertaking 'meaningful review of the rationality of the [Board's] decision'" (id.).

The decision in Matter of Morris Builders, LP v Empire Zone Designation Board (supra) involved the very same determination reviewed in Office Bldg. Assoc. (supra), but reached the opposite conclusion.[4] The difference there was that in Morris Builders, the petitioner had not submitted a timely administrative appeal. As a consequence, the Court found that "there was no additional documentation, explanation or evidence for the Board to consider beyond business annual reports previously reviewed by the Commissioner". "Under these circumstances, the Board had no choice but to uphold the Commissioner's revocation of Morris Builders' certification as an empire zone business [] and, therefore, the rationale for the Board's determination is readily apparent" (Matter of Morris Builders, LP v Empire Zone Designation Board, supra).

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[3]A BAR is a business annual report required to be filed by each Empire Zone entity, to determine if the business remained eligible for participation in the Empire Zone Program (see GML § 959 [w]).

[4]Both the Office Building Associates case (supra) and Morris Builders (supra) involved the Board's Resolution 3 of 2010, passed in March 2010.

In this instance, the Martinez letter dated July 10, 2009 appears only to challenge respondents' determination under the shirt changer rule, not the 1:1 benefit-cost test. In this respect the case at bar is analogous to the Morris Builders case (supra), where there was no timely appeal. In other words, in the absence in the administrative appeal of an argument (or evidentiary showing) challenging the respondents' findings concerning the 1:1 benefit-cost test, there was nothing further to consider beyond the business annual reports previously reviewed by the Commissioner, "and, therefore, the rationale for the Board's determination [was] readily apparent" (Matter of Morris Builders, LP v Empire Zone Designation Board, supra). Under such circumstances, the brevity of the respondent's decision (supra) does not operate to provide a basis for relief to the petitioner (see also Matter of Hague Corporation v Empire Zone Designation Board, supra, footnote 1).

The petitioner asserts that the Board erred in not considering the petitioner's special or extraordinary circumstances. In support of the argument, the petitioner cites contributions it has made to the City of Kingston and Town of Ulster, including monetary investments of some $37,000,000.00, and the fact that the head trauma facility has a $12,000,000.00 annual payroll. In a similar but somewhat related argument, the petitioner maintains that respondent, in reviewing petitioner's administrative appeal, erred in not considering the petitioner and KRNH together, as a single enterprise, for purposes of satisfying the 1:1 benefit-cost test. In response, the respondents point out that the petitioner never advanced these arguments in its administrative appeal; that, consequently, the Board never had the opportunity to consider them during the administrative review process; and

that therefore the petitioner failed to exhaust its administrative remedies with respect to such issues. In addition, with regard to petitioner's single enterprise argument, the respondents also point out that this contention was not alleged in the petition.

GML § 959 (w) authorizes the consideration of certain discretionary factors in two respects. First, it permits the commissioner to consider "after consultation with the director of the budget, and in his or her sole discretion, *other economic, social and environmental factors* when evaluating the costs and benefits of a project to the state and whether continued certification is warranted on such facts" (see GML 959 [w], emphasis supplied). Here, the petitioner's appeal dated July 10, 2009 did not address or mention other economic, social and environmental facts.

The second situation where other factors may be considered is set forth as follows:

> "The empire zone designation board shall consider the explanation provided by the business enterprise, but shall only reverse the determination to revoke the business enterprise's certification if the empire zone designation board unanimously finds that there was sufficient[5] evidence presented by the business enterprise demonstrating that the commissioner's finding, with respect to subparagraph six of paragraph (v) of subdivision (a) of this section, was in error, or that, with respect to subparagraph five of paragraph (v) of subdivision (a) of this section, any extraordinary circumstances occurred which would justify the continued certification of the business enterprise."

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[5]In the version of GML § 959 (w) enacted in 2009, it incorrectly recited that the board shall only reverse the determination to revoke the business enterprise's certification if it unanimously found, as relevant here, that there was insufficient evidence that its finding under GML § 959 (a) (v) (6) was in error. This error was corrected by the State Legislature the following year (see L 2010 ch 57 Part R, Section 3). While the petitioner maintains that the use of the word "insufficient" resulted in there being no standard at all by which the Board could render a determination, the Court will follow the Morris Builders, LP case (supra) which, in construing legislative intent, rejected a similar argument.

(GML § 959 [w])

Inasmuch as the Board did not affirm the Commissioner's determination based upon GML § 959 (a) (v) (5) (the shirt changer test), but rather affirmed the Commissioner's determination under GML § 959 (a) (v) (6) (the 1:1 benefit-cost test), there is no basis upon which to consider extraordinary circumstances. Moreover, as noted, the petitioner failed to present such circumstances in its appeal.

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375; see also Matter of East Lake George House Marina v Lake George Park Commission, 69 AD3d 1069, 1070 [3rd Dept., 2010]; Matter of Connor v Town of Niskayuna, 82 AD3d 1329, 1330-1331 [3d Dept., 2011]; Matter of Connerton v Ryan, 86 AD3d 698, 699-700 [3d Dept., 2011]). "This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, §5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgement'" (Watergate v Buffalo Sewer, supra, citing, Matter of Fisher [Levine], 36 NY2d 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). In Roggemann v Banes (223 AD2d 854 [3d Dept., 1996]), the Court

commented "the doctrine of exhaustion of administrative remedies requires that judicial review of administrative action be limited to a consideration of the issues actually raised before the administrative agency making the determination" (id., at 856-857).

In this instance, inasmuch as the petitioner did not mention, in its administrative appeal (the Martinez letter dated July 10, 2009) issues related to the existence of extraordinary circumstances, or its single enterprise theory, the Court finds that the petitioner is precluded from raising the arguments in the instant proceeding. "Simply put, although the Board indeed must 'consider the explanation provided by the business enterprise' as to 'why its certification should be continued' (General Municipal Law § 959 [w]), the Board certainly cannot be faulted for failing to consider information that petitioners neglected to properly put before it in the first instance" (Morris Builders, LP v Empire Zone Designation Program, supra). Thus, if the petitioner desired to have the respondent consider other economic, social or environmental factors (see GML § 959 [w]), it should have presented such arguments to the respondent as part of its administrative appeal. Not having done so, the Court finds that the petitioner failed to exhaust its administrative remedies with respect to such factors.

With respect to a somewhat related issue, a significant portion of the petition is devoted to the argument (again, never advanced in petitioner's appeal) that the respondent improperly limited its review to BARs submitted by the petitioner for years 2001 through 2007 (as required under GML § 959 [a] and 5 NYCRR 11.9 [c] [2]). In petitioner's view, the respondent should have considered petitioner's expenditures for employees and

investments during the period prior to 2001. Notably, use of the period of 2001 to 2007 by the respondent has been repeatedly upheld (see Matter of J-P Group, LLC v New York State Department of Economic Development, 91 AD3d 1363, 1365-1366 [4th Dept., 2012]; Matter of WL, LLC v Department of Economic Development, ___ AD3d ___, 943 NYS2d 661[3d Dept., 2012]; Matter of Hague Corporation v Empire Zone Designation Board, ___ AD3d ___, 2012 NY Slip Op. 04452 [3d Dept., June 7, 2012]). Thus, the respondent did not err in limiting its review of BARs to the years 2001 through 2007. Moreover, the respondent failed to exhaust its administrative remedies with respect to the issue.

While the Court is mindful that there are exceptions to the exhaustion doctrine (such as where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, where resort to an administrative remedy would be futile, or where its pursuit would cause irreparable injury, see Watergate v Buffalo Sewer, supra), the Court finds that none of the exceptions have been shown to directly relate to the foregoing issues. Moreover, as correctly pointed out by the respondent, the petitioner did not allege its single enterprise theory in the petition.

The Court finds that the petitioner failed in its burden to demonstrate that the determination to revoke petitioner's certification was made in violation of lawful procedure, was affected by an error of law, was irrational, arbitrary and capricious, or an abuse of discretion.

Petitioner's Second Cause of Action

The petitioner alleges in its second cause of action that the retroactive revocation of

its certification, to January 1, 2008, is arbitrary and capricious and in violation of law. As noted, the review process of Empire Zone businesses was initiated through a 2009 amendment of GML § 959 (see L 2009 ch 57, Part S-1, Section 3). It was adopted on April 7, 2009, and made effective immediately (see L 2009, ch 57, Part S-1, Section 44). As pointed out by the petitioner, it did not contain language directing that the revocation of a certificate of an Empire Zone business was to be effective as of January 1, 2008. In a decision dated June 11, 2010 in James Square Associates, LP v Mullen (Sup. Ct., Onondaga Co., unreported, Index No. 09-6792), Acting Supreme Court Justice John C. Cherundolo, found that GML § 959 could not be applied retroactively to January 1, 2008, based upon a finding that this was not the legislative intent of GML § 959. The Legislature promptly responded by adding language to GML § 959 (a) "clarifying and confirming" that the revocation of a certificate retroactive to January 1, 2008 (see L 2010, ch 57, Section 1, Part R, Section 1). The 2010 amendment was enacted on August 11, 2010, and made effective immediately (see L 2010 ch 57, Part R, Section 18).

In the meantime, the James Square Associates case (supra) had been appealed to the Fourth Department Appellate Division. In James Square Associates, LP v Mullen (91 AD3d 164 [4th Dept., 2011]) the Court affirmed the decision of Justice Cherundolo, not on the absence of legislative intent to make the revocation of Empire Zone certificates retroactive, but rather on substantive due process grounds. With regard to legislative intent, the Court took the view that it should consider L 2009, ch 57 as a whole. In so doing, it noted that L 2009, ch 57 expressly included an amendment to the Tax Law imposing a retroactive loss

of tax credits (effective January 1, 2008) upon those Empire Zone businesses whose certificates were revoked. The Appellate Division found the 2010 legislation, in clarifying and confirming the intent of L 2009 ch 57, to be "entirely consistent with the 2009 amendments", and supported by the legislative history of the L 2009 ch 57 (which indicated that the legislation was intended to be, in part, a revenue generating measure) (St. James Associates, LP v Mullen, 91 AD3d 164, 171-172, supra). A number of Courts have now held that the retroactive application of the amendment to GML § 959 (a) constitutes an unlawful taking without due process of law (see James Sq. Assoc. LP v Mullen, supra, at 172-174]; Matter of J-P Group, LLC v New York State Department of Economic Development, supra, at 1364; Matter of WL, LLC v Department of Economic Development, ___ AD3d ___, 943 NYS2d 661 [3d Dept., 2012]; Matter of Morris Builders, LP v Empire Zone Designation Board, 95 AD3d 1381, [3d Dept., 2012]; Matter of Hague Corporation v Empire Zone Designation Board, ___ AD3d ___, 2012 NY Slip Op. 04452 [3d Dept., June 7, 2012]). The Court finds that the June 29, 2009 determination (as confirmed on October 15, 2010) must be vacated to the limited extent that the revocation of petitioner's certificate was made retroactive to January 1, 2008.

Petitioner's Third Cause of Action

The petitioner alleges in its third cause of action that the notice of revocation and decertification procedures violate petitioner's rights to due process. It has been held that the statutory scheme under GML Art. 18-B satisfies due process, including pre-deprivation and

post-deprivation remedies (Matter of Morris Builders, LP v Empire Zone Designation Board, 95 AD3d 1381, [3d Dept., 2012]). The statutory notice has been found to be sufficient (Matter of Hague Corporation v Empire Zone Designation Board, ___ AD3d ___, 2012 NY Slip Op. 04452 [3d Dept., June 7, 2012]; Matter of WL, LLC v Department of Economic Development, AD3d ___, 943 NYS2d 661 [3d Dept., 2012]; Matter of Morris Builders, LP v Empire Zone Designation Board, supra). A hearing was not required Matter of WL, LLC v Department of Economic Development, ___ AD3d ___, 943 NYS2d 661 [3d Dept., 2012]). The Court finds that petitioner failed to allege facts sufficient to demonstrate that the determination to revoke petitioner's certification as an Empire Zone business violated its rights to due process. As set forth in the Court's discussion of petitioner's second cause of action however, the Court is of the view that petitioner did establish a valid cause of action with respect to violation of its due process rights to the limited extent that the determination was made retroactive to January 1, 2008. The Court finds that the petitioner satisfied it burden of demonstrating that the June 29, 2009 determination, as confirmed by the Board on October 15, 2010, was affected by an error of law in making the determination effective on January 1, 2008. The Court will therefore direct that this portion of the determination be vacated and annulled.

Petitioner's Fourth Cause of Action

The petitioner alleges that GML § 959 violates the Contract Clause of the United States Constitution. The petitioner has not produced evidence of an express contract

between it and the respondent. The respondent points out that the initial certificate of eligibility, dated May 18, 1998, contained the following language: "such eligibility shall be in effect as of 3/11/98 and continue in effect until terminated by operation of law or by action taken pursuant to such laws, rules and regulations as may be applicable." In the Court's view, even if the amendments could be interpreted as impairing an implied contract, there was no Constitutional violation inasmuch as petitioner's eligibility remained subject to state law and regulation, and because respondent has demonstrated that decertification of the petitioner was reasonable and necessary to accomplish a legitimate public purpose (see Matter of Collins v Dukes Plumbing and Sewer Service, Inc., 75 AD3d 697, 701 [3rd Dept., 2010]). The Court finds that petitioner failed to allege facts sufficient to state a cause of action under the contract clause of the United States Constitution.

Petitioner's Fifth Cause of Action

The petitioner alleges that GML 959 violates petitioner's right to equal protection under the US Const. Amend. XIV, § 15 and NY Const. art I, § 11. The Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia,

427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). Inasmuch as the challenged classification here does not appear to involve fundamental right or a suspect class, it is not entitled to heightened scrutiny. As such, the rational basis test applies (see Massachusetts Bd. of Retirement v Murgia, supra; Maresca v Cuomo, supra; Matter of Niagara Mohawk Power Corporation v. New York State Department of Transportation, 224 AD2d 767, 768-769 [3d Dept., 1996]).

As stated in Analytical Diagnostic Labs, Inc. v Kusel, (626 F3d 135 [2d Cir., 2010, cert denied 131 Sup. Ct., 2970 [2011]):

> "A class-of-one claim exists 'where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' Village of Willowbrook v Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). We have held that to succeed on a class-of-one claim, a plaintiff must establish that: (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake. Neilson v D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005), abrogated on other grounds, Appel v. Spiridon, 531 F.3d 138 (2d Cir. 2008)." (Analytical Diagnostic Labs, Inc. v Kusel, supra, at

Much of petitioner's argument focuses on naming other Empire Zone businesses which were not decertified from the Empire Zones Program. Notably however, the petitioner failed to set forth facts to establish how or in what respect it was similarly situated to such other Empire Zoning businesses (see Matter of Sour Mountain Realty Inc. v New York State

Department of Environmental Conservation, 260 AD2d 920, 923-924 [3d Dept.1999], lv to app denied 93 NY2d 815 [1999]). The Court finds that the petition's allegations with regard to violations of petitioner's equal protect rights are nonfactual and conclusory, and therefore the cause of action must be dismissed.

Petitioner's Sixth Cause of Action

The Court finds that petitioner's sixth cause of action, which alleges a violation of Public Officers Law Article 7, the Open Meetings Law, fails to adequately state a cause of action. The petitioner indicates that during the October 15, 2010 meeting of the Board, the Board members did not respond to public comments; did not conduct public discussions or deliberations; offered no explanations for their determination, which was drafted prior to the meeting. Nevertheless, because the proceeding was quasi-judicial in nature (in which evidence submitted by an appellant would be reviewed and considered, after which the Board would apply the law and reach a determination), it was exempt from the Public Officers Law (see Public Officers Law § 108 [1]; Matter of Concerned Citizens Against Crossgates v Town of Guilderland Zoning Board, 91 AD2d 763, 764[3d Dept., 1982]).

Petitioner's Seventh Cause of Action

The petitioner alleges that the respondent, in adopting § 11.9 of the Rules of the Department of Economic Development (see 5 NYCRR § 11.9) did not comply with the State Administrative Procedure Act ("SAPA"). Included in the argument is the contention that the respondent failed to properly support and document the adoption of said Rule on an

emergency basis. Such arguments have been reviewed by other Courts and rejected (see Matter of J-P Group, LLC v New York State Department of Economic Development, 91 AD3d 1363, 1366-1367 supra; Matter of Hague Corporation v Empire Zone Designation Board, ___ AD3d ___, 2012 NY Slip Op. 04452, supra). Under the circumstances the Court finds that the claim fails to state a cause of action upon which relief may be granted, and must be dismissed.

Petitioner's Eighth Cause of Action

The petitioner, in its eighth cause of action, requests a declaratory judgment that it satisfied the 1:1 benefit-cost test under GML § 595 (a) (v) (6). The petitioner again advances the argument that it's total investment in the facility totals $37 Million when pre-2001 investment expenses are included (as well as a payment in lieu of taxes of $2.5 Million to the Town of Ulster); and that such payments should have been considered under the category of "other economic, social and environmental facts", and/or as "extraordinary circumstances" under GML 959 (w) and 5 NYCRR § 11.9 (c) (2). For the reasons set forth in its discussion of petitioner's first cause of action, the Court finds that the claim fails to set forth facts sufficient to state a cause of action. As such, it must be dismissed.

Lastly, as noted, the instant matter is a combined action and proceeding. The petitioner, in addition to seeking relief under CPLR Article 78 sought alternative relief, a declaratory judgment finding that portions of GML 959 (a) are unconstitutional. The Court has already addressed the constitutional issues here, finding that the only issue having merit

is that which challenges the effective date of the revocation of petitioner's certificate. Because the declaratory relief was requested in the alternative, because there is overwhelming judicial authority (cited above) that the January 1, 2008 effective date is a violation of due process and constitutes an unlawful taking, and by virtue of the determinations already made herein, the Court deems it unnecessary to reach the alternative relief, which is dismissed as moot.

Accordingly, it is

ORDERED, that respondents' motion to dismiss petitioner's causes of action requesting a declaratory judgment pursuant to CPLR 3211 (a) (7) is granted to the extent that petitioner's Fourth, Fifth, Sixth, Seventh and Eighth Causes of action be and hereby are dismissed; and it is further

ORDERED and ADJUDGED, that petitioner's first cause of action be and hereby is dismissed; and it is further

ORDERED and ADJUDGED, that the petitioner have judgment on its second and third causes of action cause of action, to the limited extent that they challenge the January 1, 2008 effective date of the revocation of petitioner's certificate, but said causes of action are otherwise dismissed; and it is further

ORDERED and ADJUDGED, that that portion of the determination dated June 29, 2009, as confirmed in the determination dated October 15, 2010, which recites "the effective date of revocation will be January 1, 2008" be and hereby is vacated and annulled, and the determination to revoke petitioner's certificate shall be prospective only; and it is further

ORDERED and ADJUDGED, that the balance of the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the petitioner. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: July 9, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition and Complaint dated February 24, 2011, Supporting Papers and Exhibits
2. Defendants-Respondents Answer dated July 8, 2011 and Exhibits
3. Respondent's Cross-Motion Dated July 8, 2011 To Dismiss Declaratory Judgment Action
3. Affirmation of Justin C. Levin, Assistant Attorney General, dated July 8, 2011, and Exhibits
4. Affidavit of Randal D. Coburn, sworn to July 7, 2011
5. Defendants-Respondents Notice of Cross-Motion dated July 8, 2011
6. Affidavit of Harry Satin, sworn to September 7, 2011
7. Affidavit of Catherine M. Martinez, sworn to September 8, 2011
8. Affirmation of Eric L. Gordon, Esq., dated September 8, 2011