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JOB CREATION, COMMERCE AND INDUSTRY
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AUTHORITIES AND COMMISSIONS
ASSEMBLY STANDING COMMITTEE ON LABOR
PUBLIC HEARING
on
EMPIRE ZONES PROGRAM REFORM

Hamilton Hearing Room (B)
Legislative Office Building, 2nd Floor
Albany, New York

Monday, April 26, 2004
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ALSO PRESENT:
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federal agencies, OSHA, which has a website which is not the most easy to decipher, it becomes literally hard work, phone calls, detective work.

MS. JOHN: All right. So, I mean, would it be fair to say that you would mostly be relying on the collective bargaining representatives to bring to your attention if there were an NLRB action going on?

MR. DUBOWSKY: Yes, ma'am.

MS. JOHN: Thank you.

MR. FARRELL: Thank you, Doctor.

MR. DUBOWSKY: Thank you, sir.

MR. FARRELL: Frank Mauro, Executive Director, Fiscal Policy Institute.

MR. FRANK MAURO, EXECUTIVE DIRECTOR, FISCAL POLICY INSTITUTE: Since Richard left, does that mean I can read my testimony?

MR. FARRELL: I'm sorry?

MR. MAURO: I said since Richard left, can I read my testimony? You asked everybody to summarize their testimony. Or should I summarize it?

MR. FARRELL: No, you're given an option. You can do whatever you wish, Doctor.
MR. MAURO: I will not read my testimony. You can read it. I think it makes sense. I'll focus on a few of the things in it.

First of all, there has been a discussion of the boundary amendment process, and I'm going to focus on that specifically. I think that while there are many aspects of the Empire Zones Program that could be improved, I think the boundary drawing, the boundary amendment process in the last several years has been contrary to the law and risks the program passing constitutional muster.

The root of many of the current problems with the Zones Program date to 2002, when the rules were amended to excise a phrase, quote, "Provided, however that no Zone shall consist of more than three noncontiguous areas." While the department certainly could have initiated a rule-making process to make that change, it did not initiate a regular rule-making process.

In 1998, the State Administrative Procedures Act was amended to provide for a new expedited rule-making process that State Agencies could use for making noncontroversial technical
amendments to their existing rules and for adopting
new noncontroversial rules. This was Chapter 210 of
the Laws of 1998 on the bottom of page two, signed
into law by Governor Pataki on July 7th. It replaced
three separate provisions of SAPA that had previously
existed for the adoption of minor rules and for the
repeal of obsolete and invalid rules with a single
expedited process for the adoption of what it defined
as a consensus rule. That change took effective on
October 1st of 1998.

In order to use this new consensus
rule-making process, an agency must conclude that no
person is likely to object to adoption because the
rule merely - and it lists three things - repeals
regulatory provisions which are no longer applicable
to any person; implements or conforms to
non-discretionary statutory provisions; or makes
technical changes or is otherwise non-controversial.

And it then must include in its
notice of its proposed consensus rule-making in the
State Register a statement setting forth a clear and
concise explanation of the basis for the agency's
determination that no person is likely to object to
the adoption of the rule as written.
In the March 8th, 2000 edition of the State Register, the New York State Economic Development Department proposed to use this new provision in a way that was clearly inconsistent with the letter and intent of the law. In this rule-making, DED used the new consensus rule-making process to repeal a requirement that New York State Economic Development Zones, and now called Empire Zones, could not consist of more than three non-contiguous areas. It proposed to do this by simply excising the following clause from Section 10.6 of its rules: "Semi-colon, provided, however, that no Zone shall consist of more than three noncontiguous areas."

The required statement as to why this proposal qualified as a consensus rule concluded with the following sentences: Quote, "With no limit on the number of non-contiguous areas allowed in the Zone, EDZs will eventually include only property used for productive business activity. The proposed rule would thereby enhance the Department's mission of job growth and job retention. Due to the beneficial nature of the proposed rule, the Department has determined that no person is likely to object to the
adoption of the rule as written."

   While this statement certainly --
end quote. While this statement certainly explains
why the Department believed that this rule change
would be good, it did not endeavor to explain in any
way how this proposal met the definitional standards
of SAPA for a consensus rule. The only one of the
standards that could conceivably have applied in this
case was that the Department concluded that no person
is likely to object to adoption because it merely is
otherwise noncontroversial. It is hard to believe
that the Department believed this. But in any event,
it did not endeavor to say why the proposal was
otherwise noncontroversial. And subsequent events
have certainly demonstrated that this was a quite
controversial proposal.

   Note, for example, the Assembly's
efforts in the 2002 amendments to the Zones Law to
address the problems created by this rule change
through the 75/25 provisions and the Governor's
efforts this year to deal with these problems through
the superboundary and related proposals in the
Article VII revenue bill that he submitted in
conjunction with this year's Executive Budget.
The Commissioner of Economic
Development should be held accountable for this
misuse of a reasonable safety-valve mechanism that
was added to the State Administrative Procedures Act
to deal with truly technical and noncontroversial
rules.

The Department tried to use this
consensus rule-making process again in 2002 to
further eviscerate the standards for targeting. And
I've attached here that 2002 rule-making and my
comments on that. Under the consensus rule-making
law, if the Department receives any negative
comments, it must withdraw the rule, and it did. And
it could have re-issued the rule as a real
rule-making and withstood public comment, but it
chose not to do that.

As indicated above, I do not
believe that DED's 2000 rule changes and the way it
was subsequently implemented, that rules change,
would have proven to be problematical as it has if
the benefits available under the program had not been
greatly enriched by legislative action later in the
year. I have been told on several occasions by
Assembly staff that they were unaware of DED's rule
change at the time that the enrichment of the program
was being negotiated. This seems logical to me since
the Assembly worked expeditiously to close this barn
door through the 75/20 (sic) rule once the nature and
use of the rules change became known.

When the 75/25 rule was first being
negotiated, when the budget was close to adoption in
the spring of 2002, in a conversation, the Director
of the Zones program was complaining to me about the
intricate nature of this rule and its complicated
nature. I mentioned that the rule that they had
adopted in the first place that made this 75/25 rule
necessary had been done on a consensus rule-making
process, which was not applicable in this case. And
the Director's response was, "Well, the Assembly
could have objected to that rule the way you objected
to our current one."

I don't think that this is a game
that they should be trying to get rules adopted when
people don't happen to read a particular week's issue
of the State Register. I think this should be
investigated, and I think there's a good chance that
this rule would be found null and void.

While the 2000 rules change
certainly allow a Zone to be comprised of more than three noncontiguous areas, even if it was legally adopted, I believe that the Department has been incorrect in its conclusion that this rules change allows for many of the kinds of scatter-shot spot zoning boundary changes that it has approved since the adoption of this rule.

Why is that? My conclusion in this regard is based on the language of the opening sentence of Subdivision (a) of Section 958, which says, "To be eligible for designation as an Empire Zone, an area must be characterized by pervasive poverty, high unemployment, and general economic distress, must correspond to traditional neighborhood or community boundaries, and where appropriate be bounded by major natural or man-made physical boundaries such as bodies of water, railroad lines, or limited-access highways, and must meet the following requirements," and then it goes through the statistical requirements.

Under current law, this provision that I just quoted of Section 958(a) also applies to the Zones designated pursuant to 959(b), (c), and (d) since each of these latter sections only
notwithstanding paragraph (i) of Subdivision (a), not any of the other parts of Subdivision (a). Paragraph (i) of Subdivision (a) establishes the quantitative criteria for Zone designation. Subdivisions (b), (c) and (d) provide alternative criteria which can be used in lieu of paragraph (i) of Subdivision (a), but they do not notwithstand the general requirement.

When I mentioned this to some officials, some local Zone administrators, or to the former Director of the Zones Program, I said, "Well, what does community or neighborhood mean?" I mean, I think they really need to buy dictionaries for the people at Department of Economic Development. They don't know what noncontroversial means. They don't know what community means. They don't know what neighborhood means. This is not anything that we ever envisioned in writing this law in the first place.

My recommendation in dealing with this: The Commissioner of Economic Development should be required to review all of the existing Zones to determine if and how the requirements of the opening sentence of Section 958 are being complied with and make appropriate changes in all of the Zone
boundaries to ensure compliance with this
requirement. Appropriate transition rules should be
adopted by the Legislature for businesses that are
outside of boundaries complying with these statutory
requirements, but which have already been fully
certified. No additional certifications should be
made until such boundary changes are made.

While the Legislature has broad
discretion in establishing classes for purposes of
tax laws, there must be a rational basis to the
distinction drawn by the Legislature in order to pass
muster under the equal protection clauses of the U.S.
and New York State Constitutions. The way in which
the boundary amendment process has been implemented
in the last several years undercuts the
classifications that have been established by
statute. The statute, in effect, creates classes.
It establishes rules by which some people are taxed
in one way and other businesses are taxed in another
way. That's pretty powerful that you can be taxed in
that different way. And the Legislature has a
legitimate classification. But the implementation of
the rules has undercut the validity of that. And so,
we have today a situation where there are many
businesses who are in exactly the same circumstances
as people who are in Zones who aren't getting
benefits that people in Zones are.

In order for a program like the
Zones Program to be constitutional, there have to be
clear criteria, clear distinctions, for where those
Zones are and what benefits they get.

What does the current law do? The
current law sets the general standard I read about an
area being characterized by pervasive poverty, high
unemployment, and general economic distress, and
corresponding to traditional neighborhood and
community boundaries. And then it has four different
sets of quantitative criteria, at least one of which
have to be made. But that's not all. Then, it has
to apply, and it has to be designated as Zone. But
on the basis of what? Something that hasn't been
evaluated at all.

What the Zones have to do to be an
applicant for a Zone, what you have to show to be
designated is you have to show that you're going to
do all these other coordination of services, that
you're going to work to make child care available,
you're going to work to make job training available.
It's an entire long list. And the Governor's proposed bill would repeal many of those requirements on the part of the Commissioner of Economic Development.

I think that the law as it currently stands, if implemented properly, would probably pass Constitutional muster. But as it has been implemented, I think if you review this in a thorough way, based on any constitutional review of the -- or for any rational basis, they have administered this program in a way that totally undercuts its constitutionality.

There are also possible legal problems with the amount of discretion that the Legislature has granted to administrative officials in determining which businesses are taxed one way and which similarly taxed businesses are treated in a different way. The way the law is set up, it distinguishes between the boundary amendment process and the certification process. The law does not envision that the boundaries will be amended for specific businesses. It envisions that there can be boundary changes for changes in circumstances, but the certification process is separate from the
boundary amendment process. And local governments
are required to, by local law, to designate a
certification officer who cannot be a member of the
Zone Administrative Board.

The Zone Administrative Board is
the body which approves boundary amendments and
otherwise runs the program. But they create this
separation to try to make this program
constitutional. I worked on the original drafting of
this legislation in 1986, and that is what we are
trying to do is to figure out a way to establish a
constitutional process.

Now, what's going on in practice is
that the boundary amendments are frequently made to
fit particular businesses. The Commissioner of
Economic Development is the only gatekeeper on the
boundary amendments, whereas certifications have to
be approved also by Labor and by the local
certification officer. Boundary amendments coming
from the local Zone Administrative Board and the
local government only have to be approved by the
Commissioner of Economic Development.

There are several problems that
have occurred. The Commissioner of Economic
Development is required to hold a hearing when land is being excised from a Zone, but the Commissioner deems that the hearing that the local governing body holds on the local law with the boundary changes meets that requirement. If you read the law, it's clear that that is supposed to be on the application. And the applications, with the reasons why the boundary amendments are made, are frequently not available, and never to my knowledge are presented at the time the hearing by State law for a local law are held on the local law amendment.

So, the required hearings are not being held. And in many cases, the Commissioner of Economic Development, through his staff, approaches the local Zone bodies with parcels that he would like to see in. And I know of a case in my home Zone where there is a parcel that was being added for what was really a local project that was a remote parcel. Everybody I've ever talked to at the staff of the Department of Economic Development thought it was a stinker, but they had to approve it. Why?

My conclusion is they had to approve it because in the same package was a parcel that the Commissioner of Economic Development through
his staff had approached the local people to put in.
So, they had him over a barrel. So, he had to
approve it.

The stuff he said earlier about
doing what the locals want, I mean, when you read the
rules on certification and the law on boundary
amendments, the Commissioner's job isn't to do what
the local governments wants. He has standards he has
to follow. When it comes to certification, he has
standards that are the same as Labor and local
government, and he has some additional ones. And
Labor has some additional ones.

I think this problem of conflicts
of interest is most severe in cases where Zone
administration has been contracted out to
nongovernmental organizations. And this is ironic,
because some of these nongovernmental organizations
do a very good job of administering the program. But
here you have a private body not subject to the
Freedom of Information Law, not subject to the Open
Meetings Law, administering the program and making a
decision that this business will pay taxes on one law
and this business will pay taxes on a much more
onerous law.
The Governor has actually proposed in his bill that they amend the law to eliminate the requirement for a separate Zone Certification Officer, and that they let the Zone Coordinator be the certifier, totally eliminating the needed and intended checks and balances. The Zone Coordinator is frequently an employee of this nongovernmental organization. They are, to a degree, quite responsive, and the Governor's goal is to make them more responsive to the Department of Economic Development, and it is not a separate check.

But I think this whole idea, even though some of these nongovernmental organizations do a decent job, I think the idea of allowing nongovernmental organizations to determine which businesses pay taxes in one way and which businesses pay taxes in another way could not conceivably be right or constitutional.

In addition to what's in my prepared testimony, we have a ten-point plan for reforming the Zones that go into things that I think are important, but don't strike at the heart of the program as much as this misuse of the boundary amendment process since 2000.
MR. FARRELL: Thank you, Susan John?

MS. JOHN: Mr. Mauro --.

MR. FARRELL: And by the way, I'm glad you gave us the short version.

MR. MAURO: Thank you, Denny.

MS. JOHN: Mr. Mauro, are most of the county Zone programs administered by nongovernmental entities?

MR. MAURO: I don't know. I think they're -- I don't know which are which. I think there's a good number of Zone programs that are run by these nongovernmental organizations.

MS. JOHN: And --?

MR. MAURO: But since you mentioned the county Zones, I should mention, just if I could, one of the things that I think is very important. We say that we should be strengthening rather than weakening the program's focus on the State's neediest areas. This is in our ten-point plan. I think one of the good things about the Assembly Bill is that it would repeal Subdivision (c) of 958. It is a basis on which you can be certified, not on the basis of anything in your county or your municipality, but you
can be certified on some phenomenon in the
metropolitan area, even a foreseen phenomenon.

So, if there's some reason to
anticipate sudden and severe economic disruption
someplace in the metropolitan area, a county can be
certified. All the Zones certified in the last round
in 2002 were certified under this 958(c). And when
you look at the list, I don't think you could
conclude that these are among the State's neediest
areas.

MS. JOHN: You may have heard
earlier I was questioning about communities that have
an increasing tax base as opposed to those with a
decreasing tax base, that that is a factor that ought
to be taken into consideration. You know, am I
correct in surmising that you would see that as being
consistent with the reforms that you're advising?

MR. MAURO: Sure. If they were
administering the program the way it should be
administered, according to the law, I don't think
this problem would come up. I don't think the kind
of scatter-shot spot zoning that has gone on is
legal. They think it's legal because they took out
the rule that said you can have more than three
noncontiguous parcels. But they're missing the fact
that there's this other requirement that says that
all Zones, whether they're county Zones or any other
Zones, have to meet that definition of being
characterized by pervasive poverty, high
unemployment, and general economic distress and must
correspond to traditional neighborhood or community
boundaries.

I think that there needs to be a
review. And for any Zones that have reached a point
where they don't comply with that anymore, the
Commissioner should have to change the boundaries
back to what they are, and the Legislature should
adopt an appropriate transition rule. By what that
means, I say I think the businesses that are already
certified in the scatter-shot places, I think there
has to be some transition mechanism where they
receive benefits for a while, but I don't think any
more businesses should be certified until all the
Zones are reviewed to make sure they comply with the
first sentence of Section 958.

MS. JOHN: Is it fair to
characterize your testimony here today as demanding a
measure of accountability under the statute as it's
reauthorized?

MR. MAURO: Sure. I think not just accountability, but I think there has to be compliance with the law. I think this law has been administered in a cavalier manner. I don't know if it's intentional or unintentional, but the law has not been implemented as written.

MS. JOHN: Thank you, Mr. Mauro.

MR. FARRELL: Robin?

MR. SCHIMMINGER: Mr. Mauro, I really enjoyed your testimony. Let me assume that you were the king and that you put in place all the recommendations that you have now gave. And then you visited Western New York, and you heard about a company called GEICO, which I'm sure you're familiar with. They made a decision, a corporate decision, maybe even an international one. They made a decision to open up a new regional facility in Western New York in reliance on Empire Zone benefits. And they're locating - despite what Ambassador Gargano said, Buffalo - they're locating in Amherst, an affluent suburb. Okay. The Zone in the town of Tonawanda is sending acreage across municipal lines into Amherst because that's where
GEICO wanted to locate. Send the Zone to you.
They've made a corporate decision to open in Western
New York and to provide as many as 2,500 jobs.
When the announcement was made,
people in Western New York were dancing in the
street. If you are the king and if you enact all of
your recommendations, what will you say to GEICO and
those people who were dancing in the streets?

MR. MAURO: Well, what I have
recommended here is that there be a transition rule
and that GEICO would get those benefits, you know,
for a period to be determined by the Legislature, but
it shouldn't have happened in the first place; that
that was inconsistent with the law when it was done.
That was wrong, but I'm saying that the companies
that have relied on that and have made investments.

So, what I say here is appropriate
transition rules should be adopted by the Legislature
for businesses that are outside of boundaries
complying with the statutory requirements but which
have -- the existing statutory requirements, but
which have already been fully certified.

So, I think that -- now, I think
that one of the real problems with the GEICO deal is
if we make it clear, as we did with the GEICO deal, that you can get the same tax discounts for locating in the nicest office parks in the wealthiest suburbs, that this program is losing its ability to revitalize Buffalo. I mean, this is a very rich program, and it can't be that everybody's below average. And, you know, I think this idea that every county should have a Zone really undercuts the validity of this program.

There are probably counties that have Zones right now that shouldn't. I mean, I can understand this motivation when the first boundary amendment occurred in Rochester and a parcel of the town of Henrietta was brought in. That's when the Livingston County Legislature began the move, passed the resolution calling for every county to have a Zone. Their view was quite simple. Henrietta is better off than we are. When Saratoga becomes a Zone, how can you say to other counties they can't be a Zone? But you're making the entire program meaningless.

My written testimony begins with something I didn't read about what happened to the Urban Job Incentive Program started in 1968 as part of Nelson Rockefeller's response to the problem with
the cities and the assassination of Martin Luther
King. By 1979 that program had become a grab bag.
It was a statewide program with very loose criteria.
We tried to reform it for four years. The
Professional Economic Development Community kept
being very resistant to that, saying it's too
valuable, we can't fix it. And finally, in '83 it
had become so scandalous that both houses of the
Legislature readily went along with the repeal of it.

So, I think that the Empire Zones
Program cannot be -- unless we had a lot of money and
we wanted to make it our General Tax Law, if we had
that much money, that would be fine, where it was the
Tax Law every place. But leaving aside it being the
Tax Law every place, you have to have a rational
basis for where it applies. And it has to be
consistently applied.

MR. SCHIMMINGER: When this
company, GEICO, made its decision to locate in New
York State, Western New York, more particularly the
town of Amherst precisely, they said, "What triggers
our decision is the fact that we can get Empire Zone
benefits." This company could have gone to a lot of
other states in the northeast. The Governor has a
proposal in his recommendations for Flex Zones. I take it you don't like that proposal?

MR. MAURO: Well, I don't. But I think there's an argument for it, although I think it would pass Constitutional muster, because the Legislature would be establishing a clear standard that I think it has to create at least 300 jobs outside of --

MR. SCHIMMINGER: It's an inducement.

MR. MAURO: -- low-income Zones or 150 jobs. So, I think it would pass muster. I think the problem with these programs where you get money for the new -- let's take GEICO. Now, why in the world should New York State be subsidizing GEICO's cost of doing business to compete with State Farm? There are two or three auto insurance companies that employ as many people in New York State as GEICO. Just because GEICO is new, what logic does that create for the State to tax them differently?

MR. SCHIMMINGER: Well, that is the age-old question.

MR. MAURO: Right.

MR. SCHIMMINGER: The age-old
question.

MR. MAURO: Right. So, I don't think that it's good.

MR. SCHIMMINGER: Why do we give specific benefits to specific companies who threaten to leave, or who say they're going to create jobs --

MR. MAURO: Right.

MR. SCHIMMINGER: -- and maybe do create jobs --

MR. MAURO: Right.

MR. SCHIMMINGER: -- when maybe the better approach is to reduce the burden for everybody --

MR. MAURO: Yeah, sure.

MR. SCHIMMINGER: -- across the State?

MR. MAURO: Yeah.

MR. SCHIMMINGER: But Ambassador Gargano has sat at that very table at previous hearings and said, "Look, other states have similar programs, the carrots that attract companies. And if we don't have them" --.

MR. MAURO: Well, I don't think anyone has a program which is this rich. I mean,
there are states that -- take Ohio's Enterprise Zone
Program. All the benefits are local. If local
governments want to have an Enterprise Zone they can
if it meets certain criteria. The benefits are
local. There's great disclosure. I mean, this
program, the State -- I mean, local governments have
no reason not to want this program. The State pays
your property tax for ten years. Why did the
Governor last year propose that local governments
have to pay half the cost? Because he knew what you
learned today, that this program was exploding in
cost.

Why did the Governor propose this
year to create a ratchet that you only get the full
benefit under current law if you create 100 jobs and
other than that you get it prorated? He's trying to
stem the red ink.

MR. SCHIMMINGER: Let me just go
back to transition rules for a minute. And I hear
what you're saying in regard to the GEICO situation.
There was this phenomenon, and the loophole has now
been closed, by which entities would reincorporate
and become a new business and take advantage of the
program. But the benefits continue. I guess that's
a transition rule.

MR. MAURO: No, a transition rule would be to -- I think a transition rule would be something like the Governor's proposing. I mean, he could have proposed a tougher transition rule. But what he did propose was that these firms be treated by the new rules rather than the old rules, by the ratcheting, by the prorating.

So, what the theory is, that you will save most of the money that you would save anyway by taking them out by the per-job thing. Because I think, say, an example of big property tax drain on this, it's my understanding that a company that bought some of Niagara Mohawk's small hydropower plants when this rich program came along, they had automated their plants. They created like one employee for one plant, or two, got into the program. So, the State's paying enormous property taxes on those hydroplants to local communities with the company hiring one person. Sometimes one person to cover two plants.

So, I think this program I can understand from a local government perspective. You can give away someone else's money, and there's no
local cost. I can also understand why counties that
don't have Zones want a Zone. Because they're
saying, "Well, you know, how can I be in this
business?" I guess if you're an economic developer
and you don't have this, you know, you want it. But
I don't think that's the basis on which we should be
doing this. I don't think that we can steer
development and that we can revitalize distressed
areas if you can get the same benefits for building
in a greenfield as building in a brownfield.

MR. SCHIMMINGER: Thank you.

MR. FARRELL: Thank you.

MR. MAURO: Okay.

MR. FARRELL: To close, Brian

McMahon, Executive Director, New York State Economic
Development Council.

(Off-the-record discussion)

MR. BRIAN MCMAHON, EXECUTIVE

DIRECTOR, NEW YORK STATE ECONOMIC DEVELOPMENT
COUNCIL: Good evening. We will shorten our
testimony considerably. I'm Brian McMahon. Joining
me is Bill Mannix, who is the Empire Zone Coordinator
for the Town of Islip; and Don Western, who is the
Zone Coordinator for Onondaga County.