

RESOLUTION # 1A OF 2012
De Novo Review of Uniland Partnership of Delaware LP (Monroe)

WHEREAS, Uniland Partnership of Delaware LP (hereinafter “Uniland (Monroe)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Monroe Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Uniland (Monroe) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/20/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

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authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Uniland (Monroe) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

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Appellant's written submissions include the following explanations for why its certification should be continued:

- decertification violated due process rights and should be reinstated because of promissory estoppel
- regulations were not promulgated pursuant to SAPA
- assets were transferred from a related entity but transferring assets among related entities is a core function of a real estate development company
- employees were never transferred between various entities
- extraordinary circumstance exists because the company has invested over \$20M in their Empire Zones facilities and exceeded the projections made when first certified
- shirtchanger test should not apply to 3 of the entities because they received certificate of eligibility into program after August 1, 2002
- benefit-cost analysis should be done for all of Uniland's certified locations and if done this way, the benefit-cost ratio for all of its certified locations would be over 4:1 (Monroe entity failed test)
- decertification should not be retroactive to January 1, 2008

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

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- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Uniland (Monroe) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Uniland (Monroe) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

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De Novo Review of Uniland Partnership of Delaware LP (Monroe)

DATE: May 4, 2012

Secretary: _____

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RESOLUTION # 2A OF 2012
De Novo Review of Uniland Partnership of Delaware LP (Tonawanda)

WHEREAS, Uniland Partnership of Delaware LP (hereinafter “Uniland (Tonawanda)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Tonawanda Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Uniland (Tonawanda) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/20/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

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De Novo Review of Uniland Partnership of Delaware LP (Tonawanda)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Uniland (Tonawanda) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

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Appellant's written submissions include the following explanations for why its certification should be continued:

- decertification violated due process rights and should be reinstated because of promissory estoppel
- regulations were not promulgated pursuant to SAPA
- assets were transferred from a related entity but transferring assets among related entities is a core function of a real estate development company
- employees were never transferred between various entities
- extraordinary circumstance exists because the company has invested over \$20M in their Empire Zones facilities and exceeded the projections made when first certified
- shirtchanger test should not apply to 3 of the entities because they received certificate of eligibility into program after August 1, 2002
- benefit-cost analysis should be done for all of Uniland's certified locations and if done this way, the benefit-cost ratio for all of its certified locations would be over 4:1 (Monroe entity failed test)
- decertification should not be retroactive to January 1, 2008

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

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- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Uniland (Tonawanda) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Uniland (Tonawanda) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 3A OF 2012
De Novo Review of Uniland Partnership of Delaware LP (Buffalo)

WHEREAS, Uniland Partnership of Delaware LP (hereinafter “Uniland (Buffalo)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Buffalo Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Uniland (Buffalo) was decided by the court, which annulled the Board's determination and remitted the case back to the Board for reconsideration pursuant to 5 NYCRR Part 14;

WHEREAS, the Board has appellant's original 2009 submission to the Board in support of its appeal from the Commissioner's revocation determination;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby provides a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to

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De Novo Review of Uniland Partnership of Delaware LP (Buffalo)

provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and

- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Uniland (Buffalo) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that appellant has requested, and the Board has agreed to provide, a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

Appellant’s written submissions include the following explanations for why its certification should be continued:

- decertification violated due process rights and should be reinstated because of promissory estoppel
- regulations were not promulgated pursuant to SAPA

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- decertification should not be retroactive to January 1, 2008

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

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- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
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While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Uniland (Buffalo) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Uniland (Buffalo) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

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Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

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- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
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- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Uniland (Buffalo) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Uniland (Buffalo) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

RESOLUTION # 4A OF 2012
De Novo Review of Uniland Partnership of Delaware LP (Buffalo)

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 5A OF 2012
De Novo Review of ICC South (Tonawanda)

WHEREAS, ICC South (hereinafter “ICC South (Tonawanda)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Tonawanda Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by ICC South (Tonawanda) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/20/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 5A OF 2012
De Novo Review of ICC South (Tonawanda)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on ICC South (Tonawanda) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 5A OF 2012
De Novo Review of ICC South (Tonawanda)

Appellant's written submissions include the following explanations for why its certification should be continued:

- decertification violated due process rights and should be reinstated because of promissory estoppel
- regulations were not promulgated pursuant to SAPA
- assets were transferred from a related entity but transferring assets among related entities is a core function of a real estate development company
- employees were never transferred between various entities
- extraordinary circumstance exists because the company has invested over \$20M in their Empire Zones facilities and exceeded the projections made when first certified
- shirtchanger test should not apply to 3 of the entities because they received certificate of eligibility into program after August 1, 2002
- benefit-cost analysis should be done for all of Uniland's certified locations and if done this way, the benefit-cost ratio for all of its certified locations would be over 4:1 (Monroe entity failed test)
- decertification should not be retroactive to January 1, 2008

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

RESOLUTION # 5A OF 2012
De Novo Review of ICC South (Tonawanda)

- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by ICC South (Tonawanda) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by ICC South (Tonawanda) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 6A OF 2012
De Novo Review of BTC Block 1/21, Inc. (Buffalo)

WHEREAS, BTC Block 1/21, Inc. (hereinafter “BTC (Buffalo)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Buffalo Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by BTC (Buffalo) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/20/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 6A OF 2012
De Novo Review of BTC Block 1/21, Inc. (Buffalo)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on BTC (Buffalo) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 6A OF 2012
De Novo Review of BTC Block 1/21, Inc. (Buffalo)

Appellant's written submissions include the following explanations for why its certification should be continued:

- decertification violated due process rights and should be reinstated because of promissory estoppel
- regulations were not promulgated pursuant to SAPA
- assets were transferred from a related entity but transferring assets among related entities is a core function of a real estate development company
- employees were never transferred between various entities
- extraordinary circumstance exists because the company has invested over \$20M in their Empire Zones facilities and exceeded the projections made when first certified
- shirtchanger test should not apply to 3 of the entities because they received certificate of eligibility into program after August 1, 2002
- benefit-cost analysis should be done for all of Uniland's certified locations and if done this way, the benefit-cost ratio for all of its certified locations would be over 4:1 (Monroe entity failed test)
- decertification should not be retroactive to January 1, 2008

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

RESOLUTION # 6A OF 2012
De Novo Review of BTC Block 1/21, Inc. (Buffalo)

- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by BTC (Buffalo) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by BTC (Buffalo) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 7A OF 2012
De Novo Review of ACN Companies (Watertown)

WHEREAS, ACN Companies (hereinafter “ACN (Watertown)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Watertown Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by ACN (Watertown) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 7A OF 2012
De Novo Review of ACN Companies (Watertown)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on ACN (Watertown) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 7A OF 2012
De Novo Review of ACN Companies (Watertown)

Appellant's written submissions include the following explanations for why its certification should be continued:

- did not cause individuals to transfer from existing employment with another business enterprise with similar ownership and located in NY state to similar employment with the company
- did not acquire, purchase, lease or have transferred to it real property previously owned by an entity with similar ownership
- extraordinary circumstances was that it would pass new business test in Sec. 14 of Tax Law if it were certified on or after August 1, 2002
- no action of the company resulted in an artificial increase in benefits available under the program
- company was erroneously omitted from Resolution #4 of 2010
- preparer of BAR incorrectly responded to a question in Section E of 2006 BAR which triggered decertification

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or

RESOLUTION # 7A OF 2012
De Novo Review of ACN Companies (Watertown)

- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

Appellant claims that it did not transfer employees or assets from a related entity, and the Board has accepted that as an extraordinary circumstance justifying the continued certification of business enterprises, as set forth above. In this case, however, appellant has not satisfied its burden of providing sufficient evidence to demonstrate that it did not transfer employees or assets. The Board has made it clear, through its published regulations, that 'written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate' the requisite error and extraordinary circumstances. 5 NYCRR 14.2(b). General conclusory allegations that simply track the statutory language without providing specific factual information and supporting documentation necessary fail to provide the requisite sufficient evidence to demonstrate extraordinary circumstances justifying continued certification. The Board needs to be able to be presented with the underlying facts that would allow the Board to conclude that appellant's employees and properties were not transferred from related entities. The remaining explanations offered by appellant do not fall squarely within any of the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by ACN (Watertown) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by ACN (Watertown) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 8A OF 2012
De Novo Review of ACN Companies (Syracuse)

WHEREAS, ACN Companies (hereinafter “ACN (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by ACN (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 8A OF 2012
De Novo Review of ACN Companies (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on ACN (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 8A OF 2012
De Novo Review of ACN Companies (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- did not cause individuals to transfer from existing employment with another business enterprise with similar ownership and located in NY state to similar employment with the company
- did not acquire, purchase, lease or have transferred to it real property previously owned by an entity with similar ownership
- extraordinary circumstances was that it would pass new business test in Sec. 14 of Tax Law if it were certified on or after August 1, 2002
- no action of the company resulted in an artificial increase in benefits available under the program
- company was erroneously omitted from Resolution #4 of 2010
- preparer of BAR incorrectly responded to a question in Section E of 2006 BAR which triggered decertification

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or

RESOLUTION # 8A OF 2012
De Novo Review of ACN Companies (Syracuse)

- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

Appellant claims that it did not transfer employees or assets from a related entity, and the Board has accepted that as an extraordinary circumstance justifying the continued certification of business enterprises, as set forth above. In this case, however, appellant has not satisfied its burden of providing sufficient evidence to demonstrate that it did not transfer employees or assets. The Board has made it clear, through its published regulations, that 'written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate' the requisite error and extraordinary circumstances. 5 NYCRR 14.2(b). General conclusory allegations that simply track the statutory language without providing specific factual information and supporting documentation necessary fail to provide the requisite sufficient evidence to demonstrate extraordinary circumstances justifying continued certification. The Board needs to be able to be presented with the underlying facts that would allow the Board to conclude that appellant's employees and properties were not transferred from related entities. The remaining explanations offered by appellant do not fall squarely within any of the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by ACN (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by ACN (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 9A OF 2012
De Novo Review of ACN Companies (Troy)

WHEREAS, ACN Companies (hereinafter “ACN (Troy)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Troy Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by ACN (Troy) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 9A OF 2012
De Novo Review of ACN Companies (Troy)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on ACN (Troy) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 9A OF 2012
De Novo Review of ACN Companies (Troy)

Appellant's written submissions include the following explanations for why its certification should be continued:

- did not cause individuals to transfer from existing employment with another business enterprise with similar ownership and located in NY state to similar employment with the company
- did not acquire, purchase, lease or have transferred to it real property previously owned by an entity with similar ownership
- extraordinary circumstances was that it would pass new business test in Sec. 14 of Tax Law if it were certified on or after August 1, 2002
- no action of the company resulted in an artificial increase in benefits available under the program
- company was erroneously omitted from Resolution #4 of 2010
- preparer of BAR incorrectly responded to a question in Section E of 2006 BAR which triggered decertification

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or

RESOLUTION # 9A OF 2012
De Novo Review of ACN Companies (Troy)

- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

Appellant claims that it did not transfer employees or assets from a related entity, and the Board has accepted that as an extraordinary circumstance justifying the continued certification of business enterprises, as set forth above. In this case, however, appellant has not satisfied its burden of providing sufficient evidence to demonstrate that it did not transfer employees or assets. The Board has made it clear, through its published regulations, that 'written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate' the requisite error and extraordinary circumstances. 5 NYCRR 14.2(b). General conclusory allegations that simply track the statutory language without providing specific factual information and supporting documentation necessary fail to provide the requisite sufficient evidence to demonstrate extraordinary circumstances justifying continued certification. The Board needs to be able to be presented with the underlying facts that would allow the Board to conclude that appellant's employees and properties were not transferred from related entities. The remaining explanations offered by appellant do not fall squarely within any of the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by ACN (Troy) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by ACN (Troy) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 10A OF 2012
De Novo Review of Northern Health Care Linen Services Co. (Watertown)

WHEREAS, Northern Health Care Linen Services Co. (hereinafter “Northern Linen (Watertown)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Watertown Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Northern Linen (Watertown) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 10A OF 2012

De Novo Review of Northern Health Care Linen Services Co. (Watertown)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Northern Linen (Watertown) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 10A OF 2012

De Novo Review of Northern Health Care Linen Services Co. (Watertown)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that extraordinary circumstances should be fact that they paid wages in excess of \$5 million at its Zone location (like Board recognized for capital investments in Res 7 and 9 of 2010)
- argues that employment and wages are more valuable to an economically distressed area such as Troy than "bricks and mortar" capital investments
- affirmative response to section E of 2006 BAR does not constitute valid statutory or regulatory basis for decertification
- very significant investment and number of jobs created in very distressed and blighted areas is extraordinary circumstances

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

RESOLUTION # 10A OF 2012
De Novo Review of Northern Health Care Linen Services Co. (Watertown)

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Northern Linen (Watertown) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Northern Linen (Watertown) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 11A OF 2012
De Novo Review of Capital Health Care Linen Services (Troy)

WHEREAS, Capital Health Care Linen Services (hereinafter “Capital Linen (Troy)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Troy Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Capital Linen (Troy) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 11A OF 2012
De Novo Review of Capital Health Care Linen Services (Troy)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Capital Linen (Troy) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 11A OF 2012
De Novo Review of Capital Health Care Linen Services (Troy)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that extraordinary circumstances should be fact that they paid wages in excess of \$5 million at its Zone location (like Board recognized for capital investments in Res 7 and 9 of 2010)
- argues that employment and wages are more valuable to an economically distressed area such as Troy than "bricks and mortar" capital investments
- affirmative response to section E of 2006 BAR does not constitute valid statutory or regulatory basis for decertification
- very significant investment and number of jobs created in very distressed and blighted areas is extraordinary circumstances

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

RESOLUTION # 11A OF 2012
De Novo Review of Capital Health Care Linen Services (Troy)

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Capital Linen (Troy) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Capital Linen (Troy) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 12A OF 2012
De Novo Review of Gateway Business Center (Rochester)

WHEREAS, Gateway Business Center (hereinafter “Gateway (Rochester)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Rochester Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Gateway (Rochester) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 12A OF 2012
De Novo Review of Gateway Business Center (Rochester)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Gateway (Rochester) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 12A OF 2012
De Novo Review of Gateway Business Center (Rochester)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that company acquired its real property prior to its August 2002 certification from three separate unrelated third parties in arms length transactions
- argues company never hired employee previously employed by a related entity
- argue ts that company has met the primary factors given consideration by DED when their application was approved; namely they created new employment in the zone and enhanced its economic climate
- argues that company meets the extraordinary circumstances criteria stated by the Board in Resolution #6 of 2010 because it acquired and re-developed its property that resulted in a lease with the USPS which currently employs more than 350.
- argues that a complete analysis of wages, benefits and investment made by company since acquisition as compared to credit received get them a benefit-cost ratio of 1.33:1
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

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De Novo Review of Gateway Business Center (Rochester)

- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Gateway (Rochester) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Gateway (Rochester) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

RESOLUTION # 12A OF 2012
De Novo Review of Gateway Business Center (Rochester)

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 13A OF 2012
De Novo Review of Lyell Business (Rochester)

WHEREAS, Lyell Business (hereinafter “Lyell (Rochester)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Rochester Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Lyell (Rochester) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 13A OF 2012
De Novo Review of Lyell Business (Rochester)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Lyell (Rochester) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 13A OF 2012
De Novo Review of Lyell Business (Rochester)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that property was transferred to Lyell Business & Shopping Center, LLC from related parties but the transfer was appropriate under the Program and that Lyell BSC was formed for a valid business purpose
- argues that tax credit information previously reported on the 2002 BAR was incorrect and according to the company's amended BARS, the benefit to cost ratio for 2001-07 is 1.03
- argues Commissioner should have contacted company to get accurate information regarding receipt of certain tax credits
- argues that extraordinary circumstances is the fact that the company has regularly invested in the property, investing more than \$2M from 2001-2007 (including the acquisition costs) and that the company's benefit-cost ratio exceeds 1:1.
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or

RESOLUTION # 13A OF 2012
De Novo Review of Lyell Business (Rochester)

- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Lyell (Rochester) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Lyell (Rochester) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

RESOLUTION # 13A OF 2012
De Novo Review of Lyell Business (Rochester)

Secretary: _____

DRAFT

RESOLUTION # 14A OF 2012
De Novo Review of Lyell Mt Read Business (Rochester)

WHEREAS, Lyell Mt Read Business (hereinafter “Lyell Mt Read (Rochester)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Rochester Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Lyell Mt Read (Rochester) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 14A OF 2012
De Novo Review of Lyell Mt Read Business (Rochester)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Lyell Mt Read (Rochester) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 14A OF 2012
De Novo Review of Lyell Mt Read Business (Rochester)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that the transfer of property from Lawrence Glazer, a partner in Lyell Mt. Read Business Center, to the company does not violate law because this provision only applies to property owned by an "entity" with similar ownership. This transfer was between an individual and Lyell Mt. Read Business Center
- argues transfer occurred three years before enactment of program and had nothing to do with certification
- argues that the company was decertified in error for violating the benefit-cost test because the actual investment made at the property, including negotiated lease reductions to facilitate direct tenant investment should be included in the analysis. If included, Lyell Mt. Read Business Center would pass the test
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or

RESOLUTION # 14A OF 2012
De Novo Review of Lyell Mt Read Business (Rochester)

- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Lyell Mt Read (Rochester) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Lyell Mt Read (Rochester) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 15A OF 2012
De Novo Review of Sack & Associates Consulting Engineers (Syracuse)

WHEREAS, Sack & Associates Consulting Engineers (hereinafter “Sack (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Sack (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 15A OF 2012

De Novo Review of Sack & Associates Consulting Engineers (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Sack (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 15A OF 2012

De Novo Review of Sack & Associates Consulting Engineers (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that the company reincorporated for a valid business purpose, specifically to isolate Sack & Associates from the liabilities of Christen & Sack, not to obtain Empire Zone benefits
- argues company continues to expand its operations and creates high paying jobs
- company met and exceeded employment and investment goals set forth in its application for certification
- should be allowed in because no reason why commissioner should have let manufacturers with 10:1 benefit-cost ratio in but not professional organization with a benefit-cost ratio of 20:1
- argue they should have been let in under Resolution #5 of 2010
- attorney also states that twenty two (22) employees were hired between 2003 and 2008 and the company invested in leasehold improvements in an economically distressed area
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

RESOLUTION # 15A OF 2012

De Novo Review of Sack & Associates Consulting Engineers (Syracuse)

- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Sack (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Sack (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 16A OF 2012
De Novo Review of One Forman Park LLC (Syracuse)

WHEREAS, One Forman Park LLC (hereinafter “One Forman (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by One Forman (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 16A OF 2012
De Novo Review of One Forman Park LLC (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on One Forman (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 16A OF 2012
De Novo Review of One Forman Park LLC (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that the Commissioner erred in decertifying One Forman Park as a shirtchanger because the company acquired its real property in an arm's length transaction and never hired an employee from a related entity
- argues that One Forman Park and Sack & Associates Consulting Engineers, PLLC, should be considered a single business enterprise. He argues that the combined investment and wages of the two companies exceeds \$10 M and the combined benefit-cost ratio would be over 20:1
- claims disparate treatment of entities providing services rather than manufacturing goods. He states that businesses other than manufacturers should be allowed to use the collective investment and wages and benefits of their related entities to reach the 20:1 benefit-cost ratio threshold
- also argues that One Forman Park and Sack & Associates, as a single business enterprise, are in compliance with Board Resolution #5 of 2010 and that this extraordinary circumstance would justify reinstating their certification
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

RESOLUTION # 16A OF 2012
De Novo Review of One Forman Park LLC (Syracuse)

- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by One Forman (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by One Forman (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 17A OF 2012
De Novo Review of Hazen Enterprises (Potsdam)

WHEREAS, Hazen Enterprises (hereinafter “Hazen (Potsdam)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Potsdam Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Hazen (Potsdam) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 17A OF 2012
De Novo Review of Hazen Enterprises (Potsdam)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Hazen (Potsdam) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 17A OF 2012
De Novo Review of Hazen Enterprises (Potsdam)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that transfer of assets and employees was done for a valid business purpose
- urges the Board to consider the fact that Hazen Enterprises satisfied its job and investment commitments made at the time of certification and that its benefit-cost ratio since first certified in 2000 exceeds 64:1
- argues company made consistent and continuous commitment to Potsdam NY
- argues that there were extraordinary circumstances because the merger transactions took place, and Hazen Enterprises was certified, prior to the enactment of the legislation that created the present day Empire Zones Program. Therefore, the transfer of assets was not done to obtain Empire Zone benefits
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or

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De Novo Review of Hazen Enterprises (Potsdam)

- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Hazen (Potsdam) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Hazen (Potsdam) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 18A OF 2012
De Novo Review of Trezza Realty (Potsdam)

WHEREAS, Trezza Realty (hereinafter “Trezza Realty (Potsdam)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Potsdam Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Trezza Realty (Potsdam) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 18A OF 2012
De Novo Review of Trezza Realty (Potsdam)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Trezza Realty (Potsdam) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 18A OF 2012
De Novo Review of Trezza Realty (Potsdam)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that transfers of real property from an individual to an Empire Zone Enterprise are not grounds for decertification
- states that the transfer of property was completed prior to the enactment of the legislation that created the present day Empire Zones Program. Therefore, the transfer of assets was not done to obtain Empire Zone benefits
- argues that the creation of a separate, limited liability company to own the real property of a related company is an important and valid business practice, and that the combined benefit-cost ratio of the related entities should be considered
- argues segregation of liability from transfer enables company to contribute more fully to Potsdam and become stable source of jobs in the area
- claims disparate treatment of entities providing services rather than manufacturing goods
- states that businesses other than manufacturers should be allowed to use the collective investment and wages and benefits of their related entities to reach the benefit-cost threshold
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or

RESOLUTION # 18A OF 2012
De Novo Review of Trezza Realty (Potsdam)

- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Trezza Realty (Potsdam) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Trezza Realty (Potsdam) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

RESOLUTION # 18A OF 2012
De Novo Review of Trezza Realty (Potsdam)

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 19A OF 2012
De Novo Review of Duke's Realty of Syracuse (Syracuse)

WHEREAS, Duke's Realty of Syracuse (hereinafter "Duke's Realty (Syracuse)" or "appellant"), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the "Commissioner"), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board ("the Board") pursuant to General Municipal Law ("GML") § 959(w) and 5 NYCRR Part 14, challenging the Commissioner's revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board's determination, dated October 25, 2010, upholding the Commissioner's revocation determination ("2010 Challenge Determination");

WHEREAS, the judicial proceeding commenced by Duke's Realty (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner's revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board's 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor's appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner's June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board's authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner's determination. Specifically, the Board is only

RESOLUTION # 19A OF 2012
De Novo Review of Duke's Realty of Syracuse (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Duke's Realty (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 19A OF 2012
De Novo Review of Duke's Realty of Syracuse (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues Company did not acquire, purchase, lease, or have transferred to it real property previously owned by an entity with similar ownership
- states the Company did not cause individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York State to similar employment with the Company
- company should have been included on Resolution #4 of 2010
- capital investment in property was delayed because of need for cleanup of property, need to wait for termination of leasehold tenancies at property, Syracuse's inaction regarding planning and development approval
- commissioner permitted other companies to remain certified due to delays in project commencement even when those companies have not made capital investments and paid wages in excess of credits received
- board should remand matter to Commissioner to see if the certification should be treated as a "need more info" company and allow longer time period for determination of the ratio
- argues the company's capital investment and wages and benefits paid to employees in the Syracuse Empire Zone exceed the tax credits used and refunded to the Company. The benefit-cost analysis conducted by the company is based on information for 2008 and beyond
- argues that "extraordinary circumstances" should be considered in favor of the company and its certification reinstated. Specifically, had the business been certified after August 1, 2002, it would have passed the "new business test" in Sec. 14 of the Tax Law. No actions taken by the company resulted in an "artificial" increase in Empire Zone benefits
- company incorrectly responded to question section E of the 2006 BAR

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or

RESOLUTION # 19A OF 2012
De Novo Review of Duke's Realty of Syracuse (Syracuse)

- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

Appellant claims that it did not transfer employees or assets from a related entity, and the Board has accepted that as an extraordinary circumstance justifying the continued certification of business enterprises, as set forth above. In this case, however, appellant has not satisfied its burden of providing sufficient evidence to demonstrate that it did not transfer employees or assets. The Board has made it clear, through its published regulations, that 'written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate' the requisite error and extraordinary circumstances. 5 NYCRR 14.2(b). General conclusory allegations that simply track the statutory language without providing specific factual information and supporting documentation necessary fail to provide the requisite sufficient evidence to demonstrate extraordinary circumstances justifying continued certification. The Board needs to be able to be presented with the underlying facts that would allow the Board to conclude that appellant's employees and properties were not transferred from related entities. The remaining explanations offered by appellant do not fall squarely within any of the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Duke's Realty (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

RESOLUTION # 19A OF 2012
De Novo Review of Duke's Realty of Syracuse (Syracuse)

The Board has considered the remaining explanations and evidence presented by Duke's Realty (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 20A OF 2012
De Novo Review of Duke's Root Control (Syracuse)

WHEREAS, Duke's Root Control (hereinafter "Duke's Root (Syracuse)" or "appellant"), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the "Commissioner"), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board ("the Board") pursuant to General Municipal Law ("GML") § 959(w) and 5 NYCRR Part 14, challenging the Commissioner's revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board's determination, dated October 25, 2010, upholding the Commissioner's revocation determination ("2010 Challenge Determination");

WHEREAS, the judicial proceeding commenced by Duke's Root (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner's revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board's 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor's appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner's June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board's authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner's determination. Specifically, the Board is only

RESOLUTION # 20A OF 2012
De Novo Review of Duke's Root Control (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Duke's Root (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 20A OF 2012
De Novo Review of Duke's Root Control (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that certification should be reinstated on the basis of "extraordinary circumstances" indicating treating the investment in "bricks and mortar" as more valuable than the investments made in people is contrary to the purpose of the Empire Zone Program and that if the company's investment in wages are counted, it meets the criteria for these extraordinary circumstances (over \$10 million paid within investment zone)
- because they invested more than \$55 million in wages at industrial site this is equivalent to \$5 million in capital investment and therefore Board should allow certification for extraordinary circumstances
- two valid business purposes for creating a new business entity: separate sales of product and liability from service business; separate products from contingent liability that might exist from old products
- transfer not done to maximize Zone benefits
- affirmative response to question in section E of 2006 BAR does not constitute valid statutory reason for decertification
- because of significant number of jobs created in very distressed and blighted area of Syracuse

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or

RESOLUTION # 20A OF 2012
De Novo Review of Duke's Root Control (Syracuse)

- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Duke's Root (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Duke's Root (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 21A OF 2012
De Novo Review of Piccolo Properties LLC (Auburn)

WHEREAS, Piccolo Properties LLC (hereinafter “Piccolo (Auburn)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Auburn Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Piccolo (Auburn) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 21A OF 2012
De Novo Review of Piccolo Properties LLC (Auburn)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Piccolo (Auburn) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 21A OF 2012
De Novo Review of Piccolo Properties LLC (Auburn)

Appellant's written submissions include the following explanations for why its certification should be continued:

- an affirmative answer to valid business purpose attestation cannot be equated to violation of GML and resulted in erroneous decertification of company
- argues that this was not a transfer of assets between related entities as defined in the 2009 Empire Zone reform statute [GML §959 (a)(v)(5)] because it was from an individual to Piccolo Properties, LLC
- cites "extraordinary circumstances" to justify continued certification of the business. Specifically, Piccolo Properties, LLC purchased and rehabilitated vacant property in an economically distressed area of Auburn
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or

RESOLUTION # 21A OF 2012
De Novo Review of Piccolo Properties LLC (Auburn)

- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Piccolo (Auburn) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Piccolo (Auburn) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 22A OF 2012
De Novo Review of Reudelatat (City of Albany)

WHEREAS, Reudelatat (hereinafter “Reudelatat (City of Albany)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in City of Albany Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Reudelatat (City of Albany) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 22A OF 2012
De Novo Review of Reudelatat (City of Albany)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Reudelatat (City of Albany) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 22A OF 2012
De Novo Review of Reudelatat (City of Albany)

Appellant's written submissions include the following explanations for why its certification should be continued:

- changes to Chapter 57 of the Laws of 2009 violate the Contracts Clause of the US Constitution, equal protection under the 14th Amendment and due process
- company had reasonable expectation that its Zone benefits would continue throughout its benefit period

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

RESOLUTION # 22A OF 2012
De Novo Review of Reudelatat (City of Albany)

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Reudelatat (City of Albany) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Reudelatat (City of Albany) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 23A OF 2012
De Novo Review of Sal-Mark Restaurant Corp (Kingston)

WHEREAS, Sal-Mark Restaurant Corp (hereinafter “Sal-Mark (Kingston)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Kingston Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Sal-Mark (Kingston) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 23A OF 2012
De Novo Review of Sal-Mark Restaurant Corp (Kingston)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Sal-Mark (Kingston) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 23A OF 2012
De Novo Review of Sal-Mark Restaurant Corp (Kingston)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that the company did not transfer assets
- owner indicates basis for appeal is the temporary nature of employment in the restaurant business, business is subject to its location and weather
- for seasonal restaurants like Mariner's Harbor, employees necessarily move from employer to employer. Waiters, cooks or kitchen staff work at Frank Guido's Little Italy in the winter months

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

RESOLUTION # 23A OF 2012
De Novo Review of Sal-Mark Restaurant Corp (Kingston)

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Sal-Mark (Kingston) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Sal-Mark (Kingston) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 24A OF 2012
De Novo Review of 2255 Kenmore Avenue LLC (Tonawanda)

WHEREAS, 2255 Kenmore Avenue LLC (hereinafter “2255 Kenmore (Tonawanda)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Tonawanda Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by 2255 Kenmore (Tonawanda) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 24A OF 2012
De Novo Review of 2255 Kenmore Avenue LLC (Tonawanda)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on 2255 Kenmore (Tonawanda) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 24A OF 2012
De Novo Review of 2255 Kenmore Avenue LLC (Tonawanda)

Appellant's written submissions include the following explanations for why its certification should be continued:

- an affirmative answer to valid business purpose attestation cannot be equated to violation of GML and resulted in erroneous decertification of company
- argues company did not acquire, purchase, lease or have transferred to it real property previously owned by an entity with similar ownership
- indicates real estate transaction documentation is provided showing that property was purchased by 2255 Kenmore Avenue in an "arms length" transaction and not from a related entity.
- argues company did not cause employees to be transferred to company from similar employment with a related entity
- acknowledges a former employee of a related company was hired by 2255 Kenmore Avenue, but this employee had been fired six months earlier from Speed Motor Express for "cause" and this is not a violation of shirtchanger statute
- argues if Board determines hiring a former employee of related business is grounds for decertification, the circumstances of the hiring and firing (rehire after completion of substance abuse rehab program) is extraordinary circumstance.
- argues that extraordinary circumstances exist warranting continued certification of 2255 Kenmore Avenue because the company far exceeded its capital investment projections.

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or

RESOLUTION # 24A OF 2012
De Novo Review of 2255 Kenmore Avenue LLC (Tonawanda)

- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by 2255 Kenmore (Tonawanda) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by 2255 Kenmore (Tonawanda) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 25A OF 2012
De Novo Review of PG Erie Properties (Syracuse)

WHEREAS, PG Erie Properties (hereinafter “PG Erie (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by PG Erie (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 25A OF 2012
De Novo Review of PG Erie Properties (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on PG Erie (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 25A OF 2012
De Novo Review of PG Erie Properties (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues Company did not acquire, purchase, lease, or have transferred to it real property previously owned by an entity with similar ownership
- states the Company did not cause individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York State to similar employment with the Company
- company would pass the new business test set forth in sSec. 14 of the Tax Law if it were certified on or after August 1 2002
- argues company was erroneously omitted from Board Resolution #4 of 2010, because no assets were transferred between companies with similar ownership.
- claims that PG Erie Properties LLC capital investment and wages exceed the tax credits used and that they exceed the 1:1 threshold
- an affirmative answer to valid business purpose attestation cannot be equated to violation of GML and resulted in erroneous decertification of company

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or

RESOLUTION # 25A OF 2012
De Novo Review of PG Erie Properties (Syracuse)

- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

Appellant claims that it did not transfer employees or assets from a related entity, and the Board has accepted that as an extraordinary circumstance justifying the continued certification of business enterprises, as set forth above. In this case, however, appellant has not satisfied its burden of providing sufficient evidence to demonstrate that it did not transfer employees or assets. The Board has made it clear, through its published regulations, that 'written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate' the requisite error and extraordinary circumstances. 5 NYCRR 14.2(b). General conclusory allegations that simply track the statutory language without providing specific factual information and supporting documentation necessary fail to provide the requisite sufficient evidence to demonstrate extraordinary circumstances justifying continued certification. The Board needs to be able to be presented with the underlying facts that would allow the Board to conclude that appellant's employees and properties were not transferred from related entities. The remaining explanations offered by appellant do not fall squarely within any of the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by PG Erie (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by PG Erie (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 26A OF 2012
De Novo Review of McNeil Development Co, LLC (Cortland)

WHEREAS, McNeil Development Co, LLC (hereinafter “McNeil (Cortland)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Cortland Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by McNeil (Cortland) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 26A OF 2012

De Novo Review of McNeil Development Co, LLC (Cortland)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on McNeil (Cortland) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 26A OF 2012
De Novo Review of McNeil Development Co, LLC (Cortland)

Appellant's written submissions include the following explanations for why its certification should be continued:

- assets were transferred from Mr. Mc Neil into an LLC prior to certification for asset protection purposes and estate planning, not to gain Empire Zone benefits
- argues that no employees were transferred; when Mr. Mc Neil was a sole proprietor he had no employees and employees were not hired until the LLC was formed
- the transfer of properties was not the kind of transfer the "shirtchanger" amendments were intended to address and that in itself is an extraordinary circumstance
- company exceeded job and investment goals in the original application and made vital contribution to revitalizing downtown Cortland
- company facilitated creation of numerous jobs by its tenants and contractors in the Cortland Zone and relied on the promise of Zone benefits to charge tenants below market rent
- alternative argument – reinstate properties that were not transferred between businesses with similar ownership because Commissioner's determination was in error (applies to 9 Main Street, 13-15 Central Ave, 21 Crawford Street, 12-16 Court Street)
- argues decision by Commissioner and board was arbitrary and capricious, violated due process, violates the Contracts Clause, should be barred by doctrine of estoppel
- company formed prior to any discussion of empire zone application
- company met its new employment requirements
- company made investment over and above the tax refunds it received
- company is very active providing quality space for non-profit organizations

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or

RESOLUTION # 26A OF 2012
De Novo Review of McNeil Development Co, LLC (Cortland)

- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by McNeil (Cortland) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by McNeil (Cortland) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 27A OF 2012
De Novo Review of Hoblan Development Corp (Syracuse)

WHEREAS, Hoblan Development Corp (hereinafter “Hoblan (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Hoblan (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 27A OF 2012
De Novo Review of Hoblan Development Corp (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Hoblan (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

RESOLUTION # 27A OF 2012
De Novo Review of Hoblan Development Corp (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- chapter 57 of the Laws of 2009 violates the Contract Clause of the US Constitution, equal protection clause of the 14th amendment and due process
- Commissioner's failure to consider additional information from company regarding its plans for future investment is a violation of its right to equal protection (since the Commissioner continued the certification of other entities)
- argue for extraordinary circumstance that: property owned by Hoblan Development Corp. is only partially occupied and located in an area plagued by increasing vacancies; company indicates it is setting aside a significant portion of the refunds it receives under the Zones program for future use in making tenant improvements and the benefits received help to reduce tenant rates

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or

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De Novo Review of Hoblan Development Corp (Syracuse)

- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Hoblan (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Hoblan (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 28A OF 2012
De Novo Review of Costello, Cooney & Fearon (Syracuse)

WHEREAS, Costello, Cooney & Fearon (hereinafter “Costello (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Costello (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 28A OF 2012
De Novo Review of Costello, Cooney & Fearon (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Costello (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

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De Novo Review of Costello, Cooney & Fearon (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- extraordinary circumstances applies because the business has a benefit-cost ratio of over 20:1 and also the Board previously determined that an investment of over \$10M is an "extraordinary circumstance" so payment of wages of \$12M should be treated the same. Treating investment in "bricks and mortar" as more valuable than people is contrary to the Program
- argues Board previously determined capital investment of \$5 M for redevelopment/reuse of property was an extraordinary circumstance and investment made in people working at a rehabilitated historic structure through payment of wages and benefits is the equivalent of this and should be extraordinary circumstance
- argues should have been included on Board r Resolution #5 because it had greater than 20:1 benefit-cost ratio but left off because it didn't meet job and investment projections
- argues projections were so far off they were obviously made in error and company should not be penalized for projections
- argues that 20:1 benefit-cost ratio itself should be enough for extraordinary circumstances
- an affirmative answer to valid business purpose attestation cannot be equated to violation of GML and resulted in erroneous decertification of company
- should be certified because of very significant investment and significant number of jobs company has created in blighted area of Syracuse

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or

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De Novo Review of Costello, Cooney & Fearon (Syracuse)

- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Costello (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Costello (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 29A OF 2012
De Novo Review of MacKenzie Hughes (Syracuse)

WHEREAS, MacKenzie Hughes (hereinafter “MacKenzie (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by MacKenzie (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

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De Novo Review of MacKenzie Hughes (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on MacKenzie (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

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De Novo Review of MacKenzie Hughes (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- states that assets were transferred when the new LLP was formed in 2002 in order to resolve an internal dispute over management of the firm
- states that employees were transferred for a valid business reason when the new LLP was formed in 2002 in order to resolve an internal dispute over management of the firm.
- indicateds extraordinary circumstances occurred because the company has made \$850,000 in leasehold improvements (financed through increased monthly rent) in the downtown Syracuse Zone, instead of moving to a suburban location
- business has a benefit-cost ratio of over 20:1 and the Board previously determined that an investment of over \$10M is an "extraordinary circumstance" so payment of wages of \$12M should be treated the same. Treating investment in "bricks and mortar" as more valuable than people is contrary to the Program
- argues decision by Commissioner and Board was arbitrary and capricious, violates due process, violates the Contracts Clause, should be barred by doctrine of estoppel

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010) (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

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De Novo Review of MacKenzie Hughes (Syracuse)

- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by MacKenzie (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by MacKenzie (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 30A OF 2012
De Novo Review of Nojaim, Inc. (Syracuse)

WHEREAS, Nojaim, Inc. (hereinafter “Nojaim (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Nojaim (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 30A OF 2012
De Novo Review of Nojaim, Inc. (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Nojaim (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 30A OF 2012
De Novo Review of Nojaim, Inc. (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that a related entity did transfer related employees and property to Nojaim as part of a succession plan that had culminated since 1999 (prior to the EZ Program) but that the reincorporation was for a valid business purpose
- indicates that extraordinary circumstances occurred which justify continued certification of the business. Nojaim, Inc. owns and operates Nojaim Bros. Supermarket in an area with 50% of the population living below the poverty level
- company has made many contributions to the community, including a \$40,000 investment to establish a food and nutrition center and implemented a summer education program providing urban youth with valuable work experience
- continued certification of Nojaim would be consistent with the Board reinstating Schell Pharmacy and Elmira ASC, LLC which "are in medically underserved areas and met or exceeded their job goals from the original application"
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also

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De Novo Review of Nojaim, Inc. (Syracuse)

- had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Nojaim (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

The Board has considered the remaining explanations and evidence presented by Nojaim (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 31A OF 2012
De Novo Review of Dunk & Bright Furniture Co, Inc (Syracuse)

WHEREAS, Dunk & Bright Furniture Co, Inc (hereinafter “Dunk & Bright (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Dunk & Bright (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 31A OF 2012

De Novo Review of Dunk & Bright Furniture Co, Inc (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Dunk & Bright (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 31A OF 2012

De Novo Review of Dunk & Bright Furniture Co, Inc (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues company has benefit-cost ratio of 16:1 and Commissioner made error
- argues that "extraordinary circumstances" should be considered for reinstating Dunk & Bright to the Program. The company is located in one of the most economically-depressed and crime-ridden areas of the City of Syracuse and has demonstrated its commitment to the area by investing in its business
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

RESOLUTION # 31A OF 2012
De Novo Review of Dunk & Bright Furniture Co, Inc (Syracuse)

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Dunk & Bright (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Dunk & Bright (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 32A OF 2012
De Novo Review of New Hope Mills (Auburn)

WHEREAS, New Hope Mills (hereinafter “New Hope Mills (Auburn)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Auburn Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by New Hope Mills (Auburn) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 32A OF 2012
De Novo Review of New Hope Mills (Auburn)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on New Hope Mills (Auburn) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 32A OF 2012
De Novo Review of New Hope Mills (Auburn)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that real property was acquired from a third-party in an "arms length" transaction
- when the business separated the manufacturing and retail operations, a "de minimus" number of employees with key knowledge in the manufacturing aspect were transferred
- the company exceeded its employment and investment projections as set forth on its application for certification. The company has grown its manufacturing operation and hired people beyond those transferred from the related entity. The company has a benefit-cost ratio in excess of 9.64 for the years 2002-2007 and exceeds 10:1 if its 2008 investments are included in the analysis
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or

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- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by New Hope Mills (Auburn) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by New Hope Mills (Auburn) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 33A OF 2012
De Novo Review of Kruth, Stein et. al. (Syracuse)

WHEREAS, Kruth, Stein et. al. (hereinafter “Kruth (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Kruth (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 33A OF 2012
De Novo Review of Kruth, Stein et. al. (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Kruth (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 33A OF 2012
De Novo Review of Kruth, Stein et. al. (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that extraordinary circumstances warrant continued certification of the firm; specifically, the business is located in Syracuse's "Little Italy" which is an area that both the City and State targeted to stabilize employment and facilitate redevelopment efforts as indicated in the City's Empire Zone Development plan.
- company has invested over \$3.5M and has an over 77:1 benefit-cost ratio
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

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De Novo Review of Kruth, Stein et. al. (Syracuse)

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Kruth (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Kruth (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 34A OF 2012
De Novo Review of Melvin &Melvin (Syracuse)

WHEREAS, Melvin &Melvin (hereinafter “Melvin (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Melvin (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

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De Novo Review of Melvin &Melvin (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Melvin (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

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De Novo Review of Melvin & Melvin (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- does not deny transfer of assets in the appeal documents, but states Melvin LLP was merged into Melvin & Melvin, PLLC June 27, 2002, to best help the owners of the business, the business and its investments while affording it the greatest flexibility to expand the business
- Melvin & Melvin, PLLC does not deny transfer of employees in the appeal documents, but states that at the time Melvin & Melvin, PLLC became the owner of the practice, the Program had no prohibition against the transfer of real property and/or employees between related entities
- argues that the members of Melvin & Melvin f, PLLC formed the company in 2002 to facilitate the transition of their respective law practices into new markets. It was not formed solely to obtain Empire Zone benefits and has been recognized as being formed for a valid business purpose via Division of Tax Appeals Order
- argues that extraordinary circumstances exist with regard to this business. The building that houses them is in a very unique section referred to as the "200 Block of South Salina Street" which is infamous as being the location of frequent violent criminal incidents arising from the presence of many homeless people, mentally ill individuals and loiterers. This condition exists because the main hub of the CENTRO bus system is located here. These criminal incidents and lack of parking has caused reluctance of clients of Melvin and Melvin, PLLC to visit and difficulty in retaining employees
- there is no building in downtown Syracuse subject to these circumstances and notwithstanding these negative conditions they still entered into a long term lease and exercised its option to renew in anticipation of continued participation in the Program
- the stability of the 200 Block of Syracuse is imperative to the redevelopment of the now vacant 300 Block of Syracuse
- Melvin & Melvin , PLLC argues that their level of investment alone warrants reinstatement as the Commissioner recertified entities related to manufacturers when their combined (manufacturing entity and related entity) benefit-cost ratio exceeded 10:1. Treating Melvin & Melvin, PLLC dissimilarly from combined entities is not justifiable as Melvin & Melvin, PLLC's investments and employee remuneration are just as valuable to the State as those of manufacturers and their related entities
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals

RESOLUTION # 34A OF 2012
De Novo Review of Melvin &Melvin (Syracuse)

where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Melvin (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Melvin (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

RESOLUTION # 34A OF 2012
De Novo Review of Melvin & Melvin (Syracuse)

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 35A OF 2012
De Novo Review of Dermody, Burke & Brown (Syracuse)

WHEREAS, Dermody, Burke & Brown (hereinafter “Dermody (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Dermody (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/16/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

RESOLUTION # 35A OF 2012
De Novo Review of Dermody, Burke & Brown (Syracuse)

authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Dermody (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

RESOLUTION # 35A OF 2012
De Novo Review of Dermody, Burke & Brown (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues there was no transfer of assets from a related entity or entities
- argues there was no transfer of employees from a related entity or entities
- argues that "extraordinary circumstances" should be considered in favor of the company and its certification reinstated -- specifically, had the business been certified after August 1, 2002, it would have passed the "new business test" in Sec. 14 of the Tax Law. No actions taken by the company resulted in an "artificial" increase in Empire Zone benefits
- decision to decertify Dermody et.al. should have been reversed because of extraordinary circumstances as part of the Board Resolution #7 or #9 of 2010.
- indicates that the company met the criteria for Resolutions #7 and #9 if wages are counted as investments.
- argues that employment and wages are more valuable to an economically distressed area than "bricks and mortar" capital investments. Dermody is located in Franklin Center, in the Franklin Square historic district
- argues company incorrectly responded to question in Section E of 2006 BAR and because correct answer is "no" the company should not be subject to decertification

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or

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De Novo Review of Dermody, Burke & Brown (Syracuse)

- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

Appellant claims that it did not transfer employees or assets from a related entity, and the Board has accepted that as an extraordinary circumstance justifying the continued certification of business enterprises, as set forth above. In this case, however, appellant has not satisfied its burden of providing sufficient evidence to demonstrate that it did not transfer employees or assets. The Board has made it clear, through its published regulations, that 'written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate' the requisite error and extraordinary circumstances. 5 NYCRR 14.2(b). General conclusory allegations that simply track the statutory language without providing specific factual information and supporting documentation necessary fail to provide the requisite sufficient evidence to demonstrate extraordinary circumstances justifying continued certification. The Board needs to be able to be presented with the underlying facts that would allow the Board to conclude that appellant's employees and properties were not transferred from related entities. The remaining explanations offered by appellant do not fall squarely within any of the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Dermody (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

In questioning the Commissioner's determination that it met the statutory shirt-changer test, appellant appears to invite this Board to exercise a broader authority to review such determinations for error. When the legislature wanted this Board to review the Commissioner's determination for error, it knew how to do so, as evidenced by the language the legislature used in providing for the Board to determine whether the Commissioner's cost-benefit determination 'was in error.' GML § 959(w). The Board's prior unanimous reversal of the Commissioner's shirt-changer determinations in certain cases where businesses substantiated, and the Board was able to confirm, that there were no transfers of employees or assets covered by the shirt-changer test does not compel the Board to disregard the statutory standard of review and engage in wholesale reviews for error in other cases that do not involve the exact same claims, substantiation, and verification.

RESOLUTION # 35A OF 2012
De Novo Review of Dermody, Burke & Brown (Syracuse)

The Board has considered the remaining explanations and evidence presented by Dermody (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 36A OF 2012
De Novo Review of Alexander & Catalano (Syracuse)

WHEREAS, Alexander & Catalano (hereinafter “Alexander (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Alexander (Syracuse) was *marked off the calendar* pursuant to a written stipulation and there was an agreement between the parties that the Board would provide a de novo review of its administrative appeal;

WHEREAS, on 12/19/2011 the Board received correspondence on behalf of appellant requesting a de novo review by the Board of its administrative appeal from the Commissioner’s revocation determination together with supplemental submissions provided in accordance with the verbal stipulation;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby grants the request for a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009, together with any supplemental materials provided in December 2011 in accordance with the verbal stipulation; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only

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authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and
- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Alexander (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that the Board is providing a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5) and also on a finding that appellant failed the cost-benefit provision of GML § 959(a)(v)(6).

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De Novo Review of Alexander & Catalano (Syracuse)

Appellant's written submissions include the following explanations for why its certification should be continued:

- argues that there were extraordinary circumstances to justify continued certification of the business. Alexander & Catalano, LLC has made a significant contribution to the economy of downtown Syracuse, an area where the poverty rate is over 47%, and it has elected to stay in that area due to empire zone benefits.
- argues that the lease was set to expire in January 2009, prior to the April 2009 reforms being enacted. "Without the promise of Empire Zone benefits, Alexander & Catalano, would not have renewed this lease and would have likely moved to a suburban office setting – a setting long desired by Alexander & Catalano's clients and employees."
- also argues company has expanded employment through its participation in the program and has maintained a benefit-cost ratio in excess of 5:1
- Chapter 59 of Laws of 2009 is unconstitutional because it violates the Contracts Clause, equal protection and constitutional right to due process

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or

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De Novo Review of Alexander & Catalano (Syracuse)

- invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
- were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Alexander (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Alexander (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

In this case, the Commissioner also based his decertification upon the additional ground that Appellant failed the Benefit-Cost test. Since the Board has not found extraordinary circumstances justifying appellant's continued certification under the shirt-changer test, a ruling by this Board on the Benefit-Costs test would have no impact on appellant's revoked certification. Nevertheless, the Board has reviewed appellant's explanations and the numbers underlying the Commissioner's determination and the Board finds appellant has not provided sufficient evidence that the Commissioner's determination was in error.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

RESOLUTION # 37A OF 2012
De Novo Review of Dannible & McKee (Syracuse)

WHEREAS, Dannible & McKee (hereinafter “Dannible (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by Dannible (Syracuse) was decided by the court, which annulled the Board's determination and remitted the case back to the Board for reconsideration pursuant to 5 NYCRR Part 14;

WHEREAS, the Board has appellant's original 2009 submission to the Board in support of its appeal from the Commissioner's revocation determination;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby provides a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to

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De Novo Review of Dannible & McKee (Syracuse)

provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and

- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on Dannible (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that appellant has requested, and the Board has agreed to provide, a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

Appellant’s written submissions include the following explanations for why its certification should be continued:

- provides a benefit cost analysis showing firm has met projections and commitments

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De Novo Review of Dannible & McKee (Syracuse)

- argues that the firm has provided and continues to provide substantial economic and social benefits to the City of Syracuse which would not otherwise be available had the firm relocated its offices out of the zone
- argues that in 2005, two major tenants moved from the building. The building began to deteriorate. The firm remained in the building as an anchor tenant based on their commitment to the City and the availability of the Empire Zone benefits
- argues that purpose of the program is to stimulate private business development, private investment and job creation and this company has met those goals

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

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De Novo Review of Dannible & McKee (Syracuse)

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by Dannible (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by Dannible (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 38A OF 2012
De Novo Review of Bond Schoeneck & King (Syracuse)

WHEREAS, Bond Schoeneck & King (hereinafter “BS&K (Syracuse)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Syracuse Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by BS&K (Syracuse) was decided by the court, which annulled the Board's determination and remitted the case back to the Board for reconsideration pursuant to 5 NYCRR Part 14;

WHEREAS, the Board has appellant's original 2009 submission to the Board in support of its appeal from the Commissioner's revocation determination;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby provides a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to

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De Novo Review of Bond Schoeneck & King (Syracuse)

provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and

- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on BS&K (Syracuse) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that appellant has requested, and the Board has agreed to provide, a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

Appellant’s written submissions include the following explanations for why its certification should be continued:

- argues social and economic impact on downtown Syracuse is substantial; impact on Albany, Buffalo and Oswego is substantial as well
- loss of Zones benefits would eliminate one of the last advantages a downtown location offers (they are negotiating lease up for renewal)

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De Novo Review of Bond Schoeneck & King (Syracuse)

- they have invested \$6.8M in Zone facilities and paid more than \$60M in compensation to employees in Zone locations; this is type of business growth program is supposed to sustain
- admit to restructuring the business but argues it was part of strategic plan developed 2 years before the zones were enacted and consider the significance of their presence in downtown Syracuse
- intent of program originally was to spur economic activity in severely blighted areas, particularly urban cores
- exceeds 1:1 benefit-cost test

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

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The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by BS&K (Syracuse) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by BS&K (Syracuse) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 39A OF 2012
De Novo Review of Bond Schoeneck & King (Buffalo)

WHEREAS, Bond Schoeneck & King (hereinafter “BS&K (Buffalo)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Buffalo Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by BS&K (Buffalo) was decided by the court, which annulled the Board's determination and remitted the case back to the Board for reconsideration pursuant to 5 NYCRR Part 14;

WHEREAS, the Board has appellant's original 2009 submission to the Board in support of its appeal from the Commissioner's revocation determination;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby provides a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to

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De Novo Review of Bond Schoeneck & King (Buffalo)

provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and

- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on BS&K (Buffalo) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that appellant has requested, and the Board has agreed to provide, a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

Appellant’s written submissions include the following explanations for why its certification should be continued:

- argues social and economic impact on downtown Syracuse is substantial; impact on Albany, Buffalo and Oswego is substantial as well
- loss of Zones benefits would eliminate one of the last advantages a downtown location offers (they are negotiating lease up for renewal)

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- they have invested \$6.8M in Zone facilities and paid more than \$60M in compensation to employees in Zone locations; this is type of business growth program is supposed to sustain
- admit to restructuring the business but argues it was part of strategic plan developed 2 years before the zones were enacted and consider the significance of their presence in downtown Syracuse
- intent of program originally was to spur economic activity in severely blighted areas, particularly urban cores
- exceeds 1:1 benefit-cost test

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

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De Novo Review of Bond Schoeneck & King (Buffalo)

The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by BS&K (Buffalo) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by BS&K (Buffalo) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

DRAFT

RESOLUTION # 40A OF 2012
De Novo Review of Bond Schoeneck & King (Albany)

WHEREAS, Bond Schoeneck & King (hereinafter “BS&K (Albany)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Albany Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by BS&K (Albany) was decided by the court, which annulled the Board's determination and remitted the case back to the Board for reconsideration pursuant to 5 NYCRR Part 14;

WHEREAS, the Board has appellant's original 2009 submission to the Board in support of its appeal from the Commissioner's revocation determination;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby provides a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only authorized to hear appeals from revocation determinations that were based on the following provisions:

- The “Benefit-Cost” or “One to One” test, which calculates whether the dollar value of economic returns provided by the business enterprise failed to

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De Novo Review of Bond Schoeneck & King (Albany)

provide greater economic returns than the tax benefits received and is codified at GML § 959(a)(v)(6) and 5 NYCRR § 11.9(c)(2) and

- The “Shirt-Changer” test, which evaluates certain transfers of employees or real estate to business enterprises that were first certified prior to August 1, 2002, and is codified at General Municipal Law § 959(a)(v)(5) and 5 NYCRR § 11.9(c)(1).

In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on BS&K (Albany) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that appellant has requested, and the Board has agreed to provide, a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

The Commissioner revoked appellant’s certification based on the Shirt-Changer provision of GML § 959(a)(v)(5).

Appellant’s written submissions include the following explanations for why its certification should be continued:

- argues social and economic impact on downtown Syracuse is substantial; impact on Albany, Buffalo and Oswego is substantial as well
- loss of Zones benefits would eliminate one of the last advantages a downtown location offers (they are negotiating lease up for renewal)

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- they have invested \$6.8M in Zone facilities and paid more than \$60M in compensation to employees in Zone locations; this is type of business growth program is supposed to sustain
- admit to restructuring the business but argues it was part of strategic plan developed 2 years before the zones were enacted and consider the significance of their presence in downtown Syracuse
- intent of program originally was to spur economic activity in severely blighted areas, particularly urban cores
- exceeds 1:1 benefit-cost test

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

- Did not transfer assets or employees from a related entity. Resolution 4 of 2010 (74 business enterprises) and Resolution 11 of 2010 (6 business enterprises); or
- Constructed a facility on behalf of a single tenant that created at least 100 net new jobs in New York State. Resolution # 6 of 2010 (3 business enterprises); or
- Were manufacturers, (or entities related to manufacturers), that when viewed as a single business enterprise, had a benefit-cost ratio of at least 10:1 from 2001 through 2007. Resolution # 8 of 2010 (17 companies); or
- Invested at least \$5 million in the redevelopment or reuse of its Empire Zones Program property from 2001 through 2007. (Resolution # 9 of 2010 (5 business enterprises) or
- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

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The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by BS&K (Albany) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by BS&K (Albany) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

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De Novo Review of Bond Schoeneck & King (Oswego)

WHEREAS, Bond Schoeneck & King (hereinafter “BS&K (Oswego)” or “appellant”), has filed administrative and judicial appeals concerning the June 29, 2009, revocation of its Empire Zone certificate in Oswego Empire Zone by the Commissioner of Economic Development (the “Commissioner”), pursuant to GML § 959(w) and 5 NYCRR § 11.9(c), which appeals are identified as (1) an administrative appeal filed with the Empire Zone Designation Board (“the Board”) pursuant to General Municipal Law (“GML”) § 959(w) and 5 NYCRR Part 14, challenging the Commissioner’s revocation, and (2) a judicial appeal filed with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Board’s determination, dated October 25, 2010, upholding the Commissioner’s revocation determination (“2010 Challenge Determination”);

WHEREAS, the judicial proceeding commenced by BS&K (Oswego) was decided by the court, which annulled the Board's determination and remitted the case back to the Board for reconsideration pursuant to 5 NYCRR Part 14;

WHEREAS, the Board has appellant's original 2009 submission to the Board in support of its appeal from the Commissioner's revocation determination;

WHEREAS, the Board has new members who did not participate in the Board’s 2010 challenged determination, including the Commissioner of Taxation and Finance and his designee, the member appointed by the Senate Majority Leader, and his designee, one of the Governor’s appointees, and the designee for the member appointed by the Assembly Speaker;

THEREFORE, BE IT RESOLVED, that the Board hereby provides a de novo review and determination based on the written submissions provided for by GML § 959(w) and 5 NYCRR § 14.2(b) that were timely filed in 2009; and

BE IT FURTHER RESOLVED, that that the Board hereby upholds the Commissioner’s June 29, 2009, decertification determination based on the following findings and conclusions:

Standard of Review

The Board’s authority in this case is subject to statutory and regulatory limitations on the types of determinations that may be appealed, the issues that may be decided by the Board, and the requirement that findings must be unanimous in order to reverse the Commissioner’s determination. Specifically, the Board is only authorized to hear appeals from revocation determinations that were based on the following provisions:

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In ruling on appeals raising these issues, the Board “shall only reverse” if it “unanimously finds that there was sufficient evidence presented by the business enterprise demonstrating that the commissioner’s finding with respect to” the cost benefit test “was in error, or that, with respect to” the Shirt-Changer test, “any extraordinary circumstances occurred which would justify the continued certification of the business enterprise. GML § 959(w) and 5 NYCRR § 14.3 (“Authority of the Empire Zone Designation Board”).

The burden is on BS&K (Oswego) to present sufficient and specific evidence on these issues regarding error in Benefit-Cost cases and extraordinary circumstances in Shirt-Changer cases. The statute provides that appellants have 60 days to “present a written submission ... explaining why its certification should be continued,” and that the Board “shall consider the explanations provided by the business enterprise.” GML § 959(w). The implementing regulations clarify that such “written submission must contain specific factual information (along with documentation establishing that information) and all legal arguments that demonstrate” the requisite error and extraordinary circumstances. 5 NYCRR § 14.2(b).

The fact that appellant has requested, and the Board has agreed to provide, a de novo review and determination does not alter the applicable standard of review identified above. In this context, the de novo review and determination simply means that the Board is not giving any weight or consideration to its previous resolution and determination to uphold the Commissioner’s revocation determination and is taking a fresh look at the merits of this appeal.

Findings of Fact

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Appellant’s written submissions include the following explanations for why its certification should be continued:

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- intent of program originally was to spur economic activity in severely blighted areas, particularly urban cores
- exceeds 1:1 benefit-cost test

Viewing these explanations, individually, and cumulatively, against the applicable standard of review, the Board does not find that they rise to the level of establishing that extraordinary circumstances occurred that would justify the continued certification of this business enterprise, for the reasons set forth below.

While the term extraordinary circumstances is not defined by statute or regulation, its meaning is informed by the Board's resolutions in prior appeals where the Board unanimously found extraordinary circumstances justifying the continued certification of a total of 123 business enterprises, where sufficient evidence was presented to establish that the business enterprises:

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- Met or exceeded their job goals as stated in their application for certification and also
 - had a benefit-cost ratio of at least 20:1 from 2001 through 2007. Resolution # 5 of 2010 (13 business enterprises); or
 - invested at least \$10 million in its Empire Zones Facility from 2001 through 2007. Resolution # 7 of 2010 (3 business enterprises); or
 - were located in a medically underserved area as defined and designated by the United States Department of Health and Human Services. Resolution # 10 of 2010 (2 business enterprises).

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The Board does not find that any of the explanations provided by appellant fall squarely within the extraordinary circumstances that the Board has previously accepted as justifying continued certifications in the past.

While the Board is not limited to the extraordinary circumstances that it has previously recognized, the Board is not persuaded that the explanations provided by BS&K (Oswego) demonstrate that extraordinary circumstances have occurred that justify its continued certification.

The Board has considered the remaining explanations and evidence presented by BS&K (Oswego) and concludes that it has not provided sufficient evidence of extraordinary circumstances to justify continued certification.

Accordingly, the Commissioner's revocation determination is upheld for the reasons set forth above.

DATE: May 4, 2012

Secretary: _____

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