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COURT OF APPEALS

STATE OF NEW YORK

-----  
JAMES SQUARE ASSOCIATES LP, ET AL.,

Respondents,  
-against-

No. 87

DENNIS MULLEN, ET AL.,

Appellants.

-----  
MATTER OF J-P GROUP, LLC,

Respondent,  
-against-

No. 88

NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT,

Appellant.

-----  
MATTER OF MORRIS BUILDERS, LP,

Respondent,  
-against-

No. 89

EMPIRE ZONE DESIGNATION BOARD,

Appellant.

-----  
MATTER OF HAGUE CORPORATION,

Respondent,  
-against-

No. 90

EMPIRE ZONE DESIGNATION BOARD,

Appellant.

-----  
MATTER OF WL, LLC,

Respondent-Appellant,  
-against-

No. 91

DEPARTMENT OF ECONOMIC DEVELOPMENT,

Appellant-Respondent.  
-----

20 Eagle Street  
Albany, New York 12207  
April 23, 2013

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Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

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CHIEF JUDGE LIPPMAN: Good afternoon.  
Great to see all of you. It's a grey day outside,  
but the lights are on in here, and we're ready to go.  
And the first case, I can't read all the players in  
this, but it's 87 through 91.

And counselor, you're going to start, and  
you're also the respondent, right, on one case?

MR. BING: That's right, Your Honor, cross-  
respondent.

CHIEF JUDGE LIPPMAN: Okay. So you want  
any rebuttal time?

MR. BING: Yes, Your Honor. May I please  
reserve nine minutes for rebuttal?

CHIEF JUDGE LIPPMAN: Nine minutes, you  
have it; go ahead. We're ready.

MR. BING: Good afternoon, Your Honors, and  
may it please the court. Plaintiffs had every reason  
to know in 2008 that their Empire Zone eligibility  
was on borrowed time.

JUDGE READ: Let me ask you this: given  
the aims of this program, is there any reason for  
anybody to ever think they can rely on something? I  
mean, isn't it sort of a disincentive to get people  
to participate if they can't feel that - - - you

1 know, that it's not going to be pulled out from under  
2 them at some point?

3 MR. BING: Your Honor, the aims of the  
4 program were - - - from its inception, were job  
5 creation and new investment. And the inducements  
6 that were offered as part of the program were offered  
7 with that goal in mind.

8 JUDGE READ: I understand that but you  
9 know, the rules change then, and so you've made - - -  
10 I mean, some - - - these people all made some  
11 investment, right?

12 MR. BING: Well, the - - - the amount of  
13 the investment was - - - was - - -

14 JUDGE READ: I know that's in dispute in  
15 some of them, but I guess it's just that - - - I  
16 guess my question is doesn't it - - - isn't it kind  
17 of counter-productive to the overall aims of the  
18 program if people who enter into it can't have some  
19 kind of reasonable reliance that it will remain  
20 unchanged, for at least some period of time, so they  
21 can get some sort of return on their investment?

22 MR. BING: Well, the returns in question,  
23 Your Honor, are tax benefits. And - - -

24 CHIEF JUDGE LIPPMAN: Counselor, is it - -  
25 - so what - - - what you're saying in response to

1 Judge Read is your position that you can pull the rug  
2 out from them under any time - - - at any time - - -

3 MR. BING: We're not - - -

4 CHIEF JUDGE LIPPMAN: - - - because this is  
5 a tax benefit - - -

6 MR. BING: Well - - -

7 CHIEF JUDGE LIPPMAN: - - - and that's your  
8 prerogative. Is that - - -

9 MR. BING: No - - -

10 CHIEF JUDGE LIPPMAN: Is that your  
11 position?

12 MR. BING: - - - it's not such a sweeping  
13 claim, Your Honor.

14 CHIEF JUDGE LIPPMAN: What is it then?

15 MR. BING: Well, the rug - - -

16 CHIEF JUDGE LIPPMAN: What is your  
17 position?

18 MR. BING: The rug wasn't being pulled out  
19 from under anybody here. I think these were - - -  
20 the question really the - - -

21 CHIEF JUDGE LIPPMAN: No, but I'm talking  
22 about the broader strokes.

23 MR. BING: Um-hum.

24 CHIEF JUDGE LIPPMAN: Is your position,  
25 basically, in answer to what Judge Read is asking you



1 exact same position as a general taxpayer. I mean,  
2 they have tur - - - taken specific steps, submitted  
3 documentation. I mean, they've gone through a  
4 particular process. They're a little bit different  
5 than looking at this as, you know, Joe Smith, just a  
6 regular New York State individual taxpayer - - -

7 MR. BING: Your Honor, that - - -

8 JUDGE GRAFFEO: - - - how the rules can  
9 change.

10 MR. BING: - - - distinction has no  
11 Constitutional significance. The fact that they were  
12 certified doesn't change the due process analysis  
13 under Replan in this case.

14 JUDGE PIGOTT: You were going to say that  
15 they were on borrowed time? What - - -

16 MR. BING: Yes.

17 JUDGE PIGOTT: What did you mean by that?

18 MR. BING: On borrowed time because the  
19 shirt-changer loophole was an obvious abuse, and it  
20 had already been limited in 2002, and the limitation  
21 made retroactive in 2005 by statute. And a version  
22 of the cost-benefit requirement had already been  
23 imposed in 2005.

24 JUDGE PIGOTT: Does that mean that - - -

25 MR. BING: So these - - -



1                   JUDGE PIGOTT: - - - had the law not been  
2 changed you could have done what you did?

3                   MR. BING: It's unclear. I think that the  
4 fact that - - - the fact was that in 2008, in our - -  
5 - we were - - - we cite the - - - the controller's  
6 reports, and the controller's 2007 report mentions  
7 that in 2008 DED sent out 3,000 letters to the  
8 roughly - - - I guess the roughly 8 or 9,000  
9 participants. 3,000 letters went out to people  
10 saying you have not achieved at least sixty percent  
11 of your stated project objectives investment and job  
12 creation objectives. And it appears from the record  
13 in WL that WL, at least, was a recipient of one of  
14 those letters, since at page 120 there's - - -

15                   CHIEF JUDGE LIPPMAN: Counsel, is - - - is  
16 - - -

17                   MR. BING: - - - their response to it.

18                   CHIEF JUDGE LIPPMAN: - - - was it the  
19 State's desire to basically eliminate the program, in  
20 a large measure, because it turned out to be  
21 obviously - - - cost a lot of money?

22                   MR. BING: Well, that was one of the  
23 factors that's stated in the record with respect to  
24 the reason for the requirements. The governor's  
25 enacted budget document said this was an - - -

1 designed to "reign in long-documented abuses of the  
2 program" - - -

3 CHIEF JUDGE LIPPMAN: Right, but - - -

4 MR. BING: - - - "and to raise money."

5 CHIEF JUDGE LIPPMAN: - - - what I'm saying  
6 is, in effect - - - and again, I don't know the  
7 answer - - - in effect, did it really kind of  
8 eliminate the program and just say, gee, maybe this  
9 wasn't such a great idea after all?

10 MR. BING: Well, the program was closed to  
11 new entrance, I believe, as of 2010 - - -

12 CHIEF JUDGE LIPPMAN: Yeah.

13 MR. BING: - - - but as - - - not as to  
14 existing people. And I should point out that only  
15 about five percent - - -

16 CHIEF JUDGE LIPPMAN: But as to existing  
17 people, by making those changes, it really narrowed.

18 MR. BING: Well, only about five percent of  
19 the firms were actually decertified pursuant to these  
20 2009 amendments. So the plaintiffs were among the  
21 relative few that failed to meet a very low threshold  
22 here. So - - -

23 JUDGE GRAFFEO: I thought there were about  
24 ninety, weren't there? Didn't the record somehow  
25 indicate there were ninety firms that were

1 decertified, or am I wrong?

2 MR. BING: Initially, the commissioner  
3 revoked 545. 411 of those appealed; there were 257  
4 upheld. And added to the people who did not appeal,  
5 there were, by DED's computation, 391 - - -

6 JUDGE GRAFFEO: So it's more, okay.

7 MR. BING: - - - total decertifications - -  
8 -

9 JUDGE GRAFFEO: It's more.

10 MR. BING: - - - out of approximately  
11 between 8 and 9,000 total participants.

12 JUDGE SMITH: You say they had - - - they  
13 had no entitlement at all, that they knew that, so  
14 you could you have gone back to 2000 or 1995 - - -

15 MR. BING: No.

16 JUDGE SMITH: - - - if you wanted to?

17 MR. BING: Your Honor, the constitutional  
18 point under Article XVI is that there was no going-  
19 forward requirement. They could invest millions of  
20 dollars in year one and in year - - - for a fifteen-  
21 year deal, and in year two the legislature could  
22 repeal it, and under Article XVI, Section 1, there  
23 would be no claim for future benefits.

24 JUDGE SMITH: Yeah, but my question - - -

25 MR. BING: We're talking here about the

1 modest degree of retroactivity, so - - -

2 JUDGE SMITH: Okay. But how do you - - -  
3 how do you tell? How - - - when does it stop being  
4 modest? Why is it okay to go back to 2008 but not to  
5 2006 or 2004 or 2002?

6 MR. BING: Well, I don't say that it isn't,  
7 under the circumstances of this case, because of the  
8 fact that, again, what you're looking at is people  
9 who had failed after seven years - - -

10 JUDGE SMITH: Okay, but what's the test?

11 MR. BING: - - - to turn a profit for the  
12 program.

13 JUDGE SMITH: What's the test? How do we  
14 tell wha - - - how much is too much?

15 MR. BING: Well, the test is Replan, Your  
16 Honor, and all - - - the Third and the Fourth  
17 Department - - -

18 JUDGE SMITH: The test - - - so what does  
19 it say?

20 MR. BING: - - - both - - - Third and  
21 Fourth Departments both adopted that test, and that's  
22 a test for due proc - - - when is a retroactive task  
23 - - -

24 JUDGE SMITH: Humor me and tell me what it  
25 says.

1                   MR. BING: Well, what Replan says is that  
2                   it's a balancing test of three factors. The first  
3                   and most important factor is forewarning of change  
4                   and reasonableness of reliance during the period - -  
5                   - the retroactivity period. And the second is the -  
6                   - -

7                   CHIEF JUDGE LIPPMAN: So take them one at a  
8                   time, as you're giving Judge Smith the - - -

9                   MR. BING: Sure.

10                  CHIEF JUDGE LIPPMAN: - - - the test. How  
11                  does that work to your advantage, the first prong?

12                  MR. BING: Well, the first prong about  
13                  forewarning - - -

14                  JUDGE LIPPMAN: Warning, yeah.

15                  MR. BING: - - - and reasonableness, I  
16                  guess, first of all, looking at the require - - -  
17                  look at - - - looking at the requirements, just step  
18                  back, I guess, and take a look at what were these two  
19                  requirements. One was you can't have reincorporated  
20                  or transferred employees from one related party to  
21                  another and counted them as new employees. Again,  
22                  you could question how anybody could have ever  
23                  thought that that would work.

24                  But in any case, the second one was that  
25                  you had to provide new investment and remuneration at



1 that's what I'm wondering about.

2 MR. BING: The fact is that whether or not  
3 - - - I guess whether or not, to return to the  
4 factors whether or not the plaintiffs were in  
5 compliance during 2008 ultimately isn't relative to  
6 the question of how likely it was in 2008 that the  
7 State would continue to tighten the existing  
8 requirements, whether or not the plaintiffs were  
9 meeting them. So ultimately - - -

10 JUDGE SMITH: You say that's relevant or  
11 irrelevant?

12 MR. BING: I'm saying the question of  
13 whether they were meeting them in 2008 is really  
14 irrelevant to the question about forewarning - - -

15 JUDGE SMITH: And so you - - -

16 MR. BING: - - - how likely was it - - -

17 JUDGE SMITH: But - - - so Judge Pigott's  
18 question is, were they in compliance in 2008, and  
19 you're saying it's an irrelevant question.

20 MR. BING: Well, I'm saying two things,  
21 Your Honor. I'm saying not all of them may have been  
22 with the requirements of present law because of the  
23 fact that there were - - -

24 JUDGE SMITH: But you're assuming - - -

25 MR. BING: - - - substantial - - -

1 JUDGE SMITH: - - - you're assuming they  
2 were.

3 MR. BING: Pardon?

4 JUDGE SMITH: We're assuming, for present  
5 purposes, that they were in compliance?

6 MR. BING: I don't - - - I think W - - -  
7 there's a question about WL. They certainly, during  
8 2008, had a letter from DED to which they responded  
9 at page 120 in the WL record, which suggests that  
10 they were on notice at that point that their job  
11 creation and investments were not meeting their  
12 proposed targets.

13 JUDGE PIGOTT: Well, JP makes the argument  
14 that had we been told we would have restructured; we  
15 could have done something to comply and that's what  
16 the retroactivity took away.

17 MR. BING: Again, I think the question is  
18 ultimately how foreseeable was it that these changes  
19 would be applied. And again, in 2002 and in 2005,  
20 the legislature amended the Tax Law to basically  
21 adopt the precursor of the shirt-changer rule of 2002  
22 that was Tax Law, Section 14(j), and that was made  
23 retroactive in 2005 to people who had been in the  
24 program before 2002.

25 So there's already precedent for creating a



1 rule and applying it retroactively. The 2005  
2 retroactive application was to companies that could  
3 show no valid business purpose or reform solely to  
4 obtain Empire Zone benefits. So that statute - - -  
5 there was already a clear inclination that the  
6 legislature was focusing very clearly on companies  
7 that were shirt-changers.

8 JUDGE PIGOTT: But that apparently - - -

9 MR. BING: And - - -

10 JUDGE PIGOTT: You can stop me when I - - -  
11 I'll ask this for the last time. If shirt-changing  
12 in 2005 was not proper, then it was not proper in  
13 2008.

14 MR. BING: Well, it was a tax credit - - -  
15 in 2005 it was a limitation in Section 14(j) of the  
16 Tax Law and some of the tax credits. It wasn't per  
17 se an eligibility criterion for the entire program.  
18 And again, you not only had to satisfy these  
19 prerequisites for eligibility, but the - - - when you  
20 claimed your tax benefits, you were still subject to  
21 audit by the Department - - -

22 JUDGE GRAFFEO: Well - - -

23 MR. BING: - - - of Taxation and Finance.

24 JUDGE GRAFFEO: - - - during these years,  
25 did DE - - - before you had the new statute and the

1 new criteria, was DED randomly auditing these  
2 programs or sending warning letters? I mean, was  
3 there any way that any of these entities would be  
4 advised that perhaps they weren't in compliance with  
5 the requirements?

6 MR. BING: Well, as I said, the controller  
7 report that we cite in our brief, the second one, the  
8 2007 one, refers to the fact that DED had sent 3,000  
9 letters to participants who DED had determined failed  
10 to meet at least sixty percent of their target  
11 thresholds when they were - - - when they applied for  
12 the program.

13 JUDGE GRAFFEO: But what year was that  
14 letter?

15 MR. BING: That letter went out in either  
16 late 2007 or early 2008. So during the period that  
17 we're talking about here, there was widespread notice  
18 in the program, at least, that DED was looking into  
19 amounts of investment and amounts of employment to  
20 see whether people were meeting their targets which  
21 had been - - -

22 JUDGE GRAFFEO: Had they ever decertified  
23 any company that had been participating?

24 MR. BING: I - - - I - - - the record  
25 doesn't reflect that, Your Honor, but it does

1 reflect, at least, that at least one of these  
2 companies appears to have been the recipient of such  
3 a letter, um - - -

4 CHIEF JUDGE LIPPMAN: Counselor, why don't  
5 you go through the next prong? Let's give you a  
6 chance to go through - - -

7 MR. BING: Thank you, Your Honor. I  
8 appreciate - - -

9 CHIEF JUDGE LIPPMAN: - - - each of the  
10 parts and how it - - - how it works to your  
11 advantage.

12 MR. BING: One more thing on forewarning,  
13 if I may, Your Honor.

14 CHIEF JUDGE LIPPMAN: Yes, go ahead.

15 MR. BING: The other thing was that the  
16 cost-benefit analysis was also the subject of prior  
17 legislative action in 2005, which added the precursor  
18 of the one-to-one test that basically required that  
19 new entrants projected job creation and investment  
20 versus the benefits that they were going to claim had  
21 to - - - it would be compared to make sure that - - -

22 JUDGE SMITH: So - - - so you're - - -

23 MR. BING: - - - the company was going - - -

24 -

25 JUDGE SMITH: So you're saying, in a

1 nutshell, that these guys knew their - - - that they  
2 were taking advantage of loopholes and that somebody  
3 was already beginning to sniff around the loopholes  
4 and they couldn't have relied on them?

5 MR. BING: That's one way to put it, Your  
6 Honor, but yes, that's the essence of it, that it was  
7 no longer reasonable in 2008 - - -

8 JUDGE SMITH: What's the next thing?

9 MR. BING: The next thing is the scope of  
10 the period, and there's actually two pieces to that,  
11 I guess. We argue, and I think that the statute  
12 clearly establishes, that the retroactivity period  
13 here was fifteen months, from April of 2009 back to  
14 January of 2008, that the statute simply doesn't work  
15 if - - - if the legislature intended the  
16 decertification - - -

17 JUDGE SMITH: If the magic date is 2010,  
18 that weakens that part of the argument?

19 MR. BING: It weakens it slightly. I mean,  
20 our view is thirty-two months is still not an unduly  
21 long period - - -

22 CHIEF JUDGE LIPPMAN: Why is that not - - -

23 MR. BING: - - - of retroactivity.

24 CHIEF JUDGE LIPPMAN: - - - thirty-two  
25 months? Assume it's thirty-two months.

1 MR. BING: Because the purpose of the  
2 statute, Your Honor, is curative. It's to end long-  
3 documented abuses of the program, in the governor's  
4 words. And in curative statutes, this Court and  
5 other courts have made clear that even longer periods  
6 of retroactivity are permissible.

7 In the Astoria case, which was a, I  
8 believe, Second Department case that this Court  
9 dismissed the appeal from, it was a seven-year period  
10 of retroactivity. We cite that in our brief along  
11 with Canisius College, it was four years; in Tate &  
12 Lyle, it was six years. Curative statutes tend to  
13 have longer periods of retroactivity because the  
14 point is to try to address unanticipated costs and -  
15 - -

16 JUDGE SMITH: Suppose - - -

17 MR. BING: - - - and burdens of the  
18 program.

19 JUDGE SMITH: Suppose it's - - - suppose  
20 it's thirty-two months. Is it relevant that for  
21 fifteen months of that time it was a doubtful  
22 question? That is, nobody really knew for sure  
23 whether there - - - you had a retroactive repeal or  
24 not. Did that - - - did that sh - - - that would  
25 undermine their reliance claim, wouldn't it?

1 MR. BING: Well, that's - - - the fact is  
2 that in 2009 it was clear because the statute  
3 couldn't work.

4 JUDGE SMITH: And I know you say it's  
5 absolutely clear in 2009, but suppose we disagree  
6 with you. Then your fallback position is it wasn't  
7 so clear, right?

8 MR. BING: Well, our fallback position is  
9 that certainly as of 2009 - - - as of April 2009,  
10 these taxpayers were on notice that going forward - -  
11 -

12 JUDGE SMITH: Yeah. Reliance - - - you say  
13 reliance was never reasonable, but you would say it  
14 became even less reasonable at a point where nobody  
15 knew what the statute meant.

16 MR. BING: Well, obviously, we're - - -

17 JUDGE SMITH: You say you did know what it  
18 meant, but were - - -

19 MR. BING: We're putting - - - we're saying  
20 that - - - I mean, that the period at issue here is  
21 from January 1, 2008 until April 7th, 2009. I mean,  
22 that's really, I think, the - - - the relevant  
23 question, because after April - - -

24 JUDGE SMITH: But what's - - - what - - -

25 MR. BING: - - - after April 7th, 2009,

1           there was no doubt - - -

2                       JUDGE SMITH:  You're out of time, so let me  
3           ask you, but what - - - you said you had a three-  
4           factor test; what's the third?

5                       MR. BING:  The third factor is the public  
6           purpose behind the retroactive application.  And  
7           again, the fact that this was a curative statute is  
8           designed to end program abuses, to do away with  
9           shams, and to - - -

10                      JUDGE SMITH:  It was also to raise some  
11           money, wasn't it?

12                      MR. BING:  Immediately raise money in the  
13           2009-2010 year.

14                      JUDGE SMITH:  I mean, all - - - but all tax  
15           statutes are designed to raise money.

16                      MR. BING:  That's true, but that's a  
17           certainly - - -

18                      JUDGE SMITH:  And in this case, these were  
19           enacted at a time of great fiscal stress when - - -  
20           and were bragged about in the governor's financial  
21           program.  Wasn't that an important part of the  
22           purpose?

23                      JUDGE RIVERA:  And if I can just add to  
24           that, doesn't the immediate amendment or the  
25           clarification suggest that what you're really trying

1 to do is make clear we want to get this money as soon  
2 as possible?

3 MR. BING: I think that certainly it makes  
4 clear that the legislature's intent was always that  
5 the decertifications be effective as of January 1 - -  
6 -

7 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

8 MR. BING: - - - 2008.

9 CHIEF JUDGE LIPPMAN: - - - we're going to  
10 ask you more about that, I'm sure. Let's get to your  
11 adversaries one at a time.

12 Counselor, you represent James Square?

13 MR. FELLOWS: Yes, Your Honor. Jonathan  
14 Fellows, Bond Schoeneck & King.

15 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

16 MR. FELLOWS: All right. Your Honor, the  
17 State's position ignores two important things.  
18 First, this isn't a case where taxpayers simply read  
19 the Tax Code and relied on it. This is a case where  
20 each taxpayer applied for a benefit, was accepted  
21 into the program, and was con - - - issued a  
22 certificate, which is part of the record, which says  
23 - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but they - - -

25 MR. FELLOWS: - - - this will remain in - -



1 -

2 CHIEF JUDGE LIPPMAN: - - - could change  
3 their program, right? It's a tax statute.

4 MR. FELLOWS: Your Honor, the program is  
5 not a statute.

6 CHIEF JUDGE LIPPMAN: What is it?

7 MR. FELLOWS: The Empire Zone Program is an  
8 economic development program. It says so right in  
9 Section 959 - - -

10 CHIEF JUDGE LIPPMAN: Yeah, they could - -  
11 -

12 MR. FELLOWS: - - - of General Municipal  
13 Law.

14 CHIEF JUDGE LIPPMAN: - - - take away the  
15 benefits is what I mean; can't they?

16 MR. FELLOWS: Prospectively, Your Honor.

17 CHIEF JUDGE LIPPMAN: Yes.

18 MR. FELLOWS: And that's the big  
19 difference.

20 JUDGE SMITH: Are you saying that because  
21 there was a certificate, retroactivity is out and out  
22 forbidden, that's all there is to it?

23 MR. FELLOWS: Yes, Your Honor, it's a  
24 property right, and that's what the Third Department  
25 clearly held; this is a property right. When the

1 government - - - you apply for something - - -

2 CHIEF JUDGE LIPPMAN: It's a property right  
3 or the right to participate in the program?

4 MR. FELLOWS: The right to participate in  
5 the program is a property right, much like the Third  
6 Department cases cited being a minority - - -  
7 certified minority business or having - - -

8 JUDGE SMITH: So if they - - - suppose  
9 instead of printing up a nice little certificate they  
10 just wrote him a letter saying your application for a  
11 tax exemption is granted; is that still a property  
12 right?

13 MR. FELLOWS: Yeah, I don't think it's to  
14 form. But, Your Honor, what's also present - - -

15 JUDGE SMITH: But I mean, are you saying  
16 that all - - - all tax exemptions are property rights  
17 until they're appealed?

18 MR. FELLOWS: No, Your Honor. Where it's  
19 an exemption that you apply for, there's criteria you  
20 have to meet and there's things you have to do to get  
21 it. And the State's - - - whether it's in a letter,  
22 Your Honor, or in a nice certificate, George Pataki  
23 says you're in, you're in.

24 JUDGE PIGOTT: But the certificate - - -

25 MR. FELLOWS: And in this case, Your Honor

1           - - -

2                         JUDGE PIGOTT: - - - certificate says that  
3           "certification is in effect until terminated by  
4           operation of law or by action taken pursuant to such  
5           laws, rules and regulations as may be applicable".

6                         MR. FELLOWS: So Your Honor, in April of  
7           2009, the legislature took action by law and changed  
8           the requirements of the program, and they can do that  
9           prospectively.

10                        This program is a fifteen-year program,  
11           Your Honor. We didn't get our full fifteen years.  
12           I'm not here saying it's unconstitutional that we  
13           didn't get our fifteen years, but in April 2009, Your  
14           Honor, they can't say, oh, we're going to change the  
15           requirements because we no longer think this was good  
16           policy.

17                        JUDGE PIGOTT: But - - -

18                        JUDGE GRAFFEO: You mean even if in - - -

19                        JUDGE RIVERA: Well, why don't they change  
20           the - - -

21                        JUDGE GRAFFEO: - - - even if in 2009 the  
22           legislature had put explicit retroactivity language  
23           in there?

24                        MR. FELLOWS: Your Honor, I think - - -

25                        JUDGE GRAFFEO: Or going back a reasonable

1 period of time that, let's just assume, would meet  
2 Replan's factors, that still would mean you're - - -  
3 you were entitled?

4 MR. FELLOWS: I think the reason I say it's  
5 a property right, Your Honor, are two things. One is  
6 the issuance of the certificate based on an  
7 application and reliance on it to invest in the  
8 Empire Zone. But second, what the State created, DED  
9 regs, Department of Economic Development regs created  
10 a process to revoke these certificates, and - - -

11 JUDGE GRAFFEO: Yeah, but I'm asking you  
12 about legislative action. If the leg - - - because  
13 the original bill or the original legislative  
14 proposal did have express retroactivity language in  
15 it, and apparently, for whatever reason, the  
16 legislature didn't put that in - - -

17 MR. FELLOWS: Yes, Your Honor, the governor  
18 propo - - -

19 JUDGE GRAFFEO: - - - in the Tax Law. So  
20 if they had done that, you're still claiming it  
21 couldn't be retroactive?

22 MR. FELLOWS: I still believe it would be  
23 an unconstitutional taking of property without due  
24 process of law, Your Honor, because we'd been  
25 certified to be in it, we relied on it, our reliance

1 was reasonable. And if you want to go through the  
2 Replan - - -

3 JUDGE RIVERA: Why is your reliance  
4 reasonable if you're not meeting the goals?

5 MR. FELLOWS: Your Honor, we were meeting  
6 the goals as the program existed prior to April of  
7 2009. There's never been an allegation by the State  
8 before today that any of these respondents didn't  
9 meet the statutory criteria that were in effect  
10 before April of 2009.

11 And when Mr. Bing asked, well, how can  
12 anyone think this would work, people thought it would  
13 work because they went to the state-authorized  
14 officials, applied and were certified. And there's  
15 no indication that any applicant hid any of the facts  
16 from any of the state officials. Every - - -

17 JUDGE SMITH: So you're saying that in a  
18 situation like this not even a day's retroactivity is  
19 possible.

20 MR. FELLOWS: Correct, Your Honor, because  
21 it's property; you can't take it back retroactively.

22 JUDGE SMITH: Do you have a fallback  
23 argument? Is there a point at which it - - - if we -  
24 - - if we think maybe a day or two would have been  
25 okay, why isn't this okay? Or is that somebody

1 else's department?

2 MR. FELLOWS: Well, it's someone else's  
3 department, Your Honor, but I'd certainly be glad to  
4 answer Judge Smith's question, because the program  
5 would make no sense if you could say, well, we're  
6 going to create this economic incentive program, we  
7 want you businesses to come up and invest in these  
8 economically distressed zones, and in exchange for  
9 that investment we're going to give you tax benefits,  
10 economic incentives, but if we decide later this  
11 policy didn't make sense, we're going to take it  
12 away.

13 JUDGE PIGOTT: Well, let me ask you a  
14 question. Let's suppose you've got one of these  
15 zones that you're - - - that everybody's trying to  
16 help and in the zone right now is ABC Auto Parts, and  
17 ABC Auto Parts calls up and says, you know, I'm now  
18 CDE Auto Parts and I'm willing to stay in this Empire  
19 Zone if you give me tax breaks. And they say, well,  
20 you're a new - - - you're a new business, you're CDE  
21 Auto Parts, you fit all of our criteria, you're in.  
22 And somebody says, wait a minute, this isn't a - - -  
23 this has nothing to do with this program. So they  
24 run down to Albany and they get somebody to pass a  
25 bill saying auto part stores within Empire Zones west

1 of the Hudson don't qualify. Is that wrong?

2 MR. FELLOWS: Your Honor, I think they  
3 could take you out prospectively but not  
4 retroactively for years that have been closed where  
5 you - - -

6 JUDGE PIGOTT: Period.

7 MR. FELLOWS: - - - where you applied. And  
8 when you read - - -

9 JUDGE PIGOTT: In other words if - - -

10 MR. FELLOWS: - - - the statute - - -

11 JUDGE PIGOTT: - - - if CDE said, at least  
12 for the first year you've got to give me my tax  
13 breaks and then after that, you know, I'll go back to  
14 being ABC.

15 MR. FELLOWS: And when you read the  
16 statutory purpose as the legislature initially  
17 enacted the program, Your Honor, in 955 of the  
18 General Municipal Law, clearly retaining existing  
19 businesses in distressed zones was one of the  
20 statutory purposes.

21 JUDGE PIGOTT: Is that - - - when Mr. Bing  
22 talks about shirt-changing and that now being a  
23 reason to decertify, that's a change in the law that  
24 you say the original Empire Zone plan never intended.

25 MR. FELLOWS: There was no such provision

1 in the law at the time any of my clients applied for  
2 and were certified. And there's nothing in the  
3 record that indicates that the local officials  
4 administering the Empire Zone Program didn't know  
5 every single fact about the shirt-changers.

6 And Your Honor, in Replan, if you go to the  
7 three-step plan and - - - our position, essentially,  
8 is that Replan's a different case because it's not a  
9 property right case; it's a tax exemption case. But  
10 - - -

11 CHIEF JUDGE LIPPMAN: So the standards that  
12 they laid down aren't - - - isn't the test here?

13 MR. FELLOWS: Well, I understand why - - -  
14 both the Third and Fourth Departments looked to  
15 Replan, Your Honor, and I understand why they did so.  
16 But in our - - -

17 CHIEF JUDGE LIPPMAN: You would - - -

18 MR. FELLOWS: - - - in our view - - -

19 CHIEF JUDGE LIPPMAN: - - - not look to  
20 Replan?

21 MR. FELLOWS: - - - it's - - - we present  
22 an even stronger case for unconstitutional - - - and  
23 on step one of Replan, Your Honor - - -

24 CHIEF JUDGE LIPPMAN: Quickly, counselor,  
25 yes.



1 MR. FELLOWS: - - - the reason it was not  
2 reasonably foreseeable for the tax - - - was  
3 reasonably foreseeable for the tax plan in Replan is  
4 the statute had a sunset provision.

5 JUDGE PIGOTT: He was racing to get there.

6 MR. FELLOWS: And that is not the case  
7 here; we had a fifteen-year program. I thank you.

8 CHIEF JUDGE LIPPMAN: Thanks, counselor.  
9 Appreciate it.

10 Counselor?

11 MS. PERSICO: Good afternoon, Your Honors.  
12 Jennifer Persico on behalf of J-P Group. As you  
13 know, we split this up, so I'll be talking about the  
14 forewarning and reliance factors that other counsel  
15 have indicated are set forth by this Court in the  
16 Replan decision.

17 CHIEF JUDGE LIPPMAN: Well, does Replan  
18 apply? Your colleague - - -

19 MS. PERSICO: Well - - -

20 CHIEF JUDGE LIPPMAN: - - - says he's not  
21 sure it's really - - - if this is a property case,  
22 Replan isn't really - - - this is even a stronger  
23 case than that.

24 MS. PERSICO: This is even a stronger case.  
25 And I think if you analyze it under the factors set

1           forth in Replan, you'll see that that was - - -

2                   CHIEF JUDGE LIPPMAN:   So you think Replan  
3           still would be something for us to look to?

4                   MS. PERSICO:   I think as the Third and  
5           Fourth Department cases have held, that while it  
6           isn't - - - this isn't a tax case, per se, it's a  
7           property right case, that those are instructive and  
8           it is instructive to look at the factors set forth.

9                   CHIEF JUDGE LIPPMAN:   So go ahead, you want  
10          to talk of reliance?

11                   MS. PERSICO:   So - - -

12                   CHIEF JUDGE LIPPMAN:   Why was there  
13          reliance here?

14                   MS. PERSICO:   Well, there clearly was  
15          reliance, and it's not a matter of - - - as Mr. Bing  
16          indicated, it's not a matter of this being a period  
17          that commenced on January 1st, 2008 and ended on  
18          April 7th, 2009.   The State induced all of the  
19          petitioners here to make these investments years  
20          before this even became an issue.   The State came to  
21          these participants and said, if you invest in these  
22          economically disadvantaged areas - - -

23                   CHIEF JUDGE LIPPMAN:   Yeah, but they could  
24          change the rules, right?

25                   MS. PERSICO:   Sure they can, going forward,

1 and I think that's what everybody here agrees. If -  
2 - -

3 CHIEF JUDGE LIPPMAN: If they - - - what  
4 about the question Judge Graffeo had before? What if  
5 they had put that - - - had passed it with the  
6 language that clearly said it's retroactive; would  
7 that have been all right?

8 MS. PERSICO: I think we'd be right here  
9 again, Your Honor. I don't think that would be all  
10 right. I think that there is still an  
11 unconstitutional taking of a property right if - - -

12 JUDGE PIGOTT: I forget the time limits on  
13 this that - - - or the time frames, but going back to  
14 January 1st is not a tax year for the State. If they  
15 went back to April 1st and said, you know, going back  
16 to our tax year, wouldn't that be reasonable?

17 MS. PERSICO: I'm not sure if you mean  
18 April 1st of 2009?

19 JUDGE PIGOTT: 8.

20 MS. PERSICO: No, I don't think so. I  
21 think for the same reasons that Mr. Fellows said, we  
22 - - - the taxpayer became eligible and had a  
23 sufficient certainty and reliance in these tax  
24 exemptions when they made that investment, which is  
25 long before the - - -

1                   JUDGE SMITH: Why is this different from  
2                   the Carlson (sic) case where the taxpayer made - - -  
3                   yeah, obvi - - - he acted in reliance, but he acted  
4                   in reliance on a loophole. Weren't you relying on a  
5                   loophole?

6                   MS. PERSICO: No, I don't think so. And I  
7                   think there is a big distinction between the U.S. v.  
8                   Carlton and this particular circumstance, because in  
9                   that case there was a very short time period. There  
10                  was an amendment to the Tax Code that allowed a  
11                  particular exemption - - -

12                  JUDGE SMITH: Yeah, but the brev - - - how  
13                  can the brevity of the time period affect the  
14                  reasonableness of reliance? I mean, the time that  
15                  passes after you rely doesn't make a difference.  
16                  It's only - - -

17                  MS. PERSICO: Well, and Your Honor, with  
18                  all due respect, I think that they're sort of apples  
19                  and oranges. That case was, in fact, someone taking  
20                  advantage of a very short loophole. They were  
21                  forewarned that that loophole was no good in January  
22                  of 1987 when the loophole was created in October of  
23                  1986. So we're talking - - -

24                  JUDGE PIGOTT: Well, then take my auto  
25                  parts. Mr. Fellows makes the point that you were

1           trying to keep businesses in some of these Empire  
2           Zones. I know this is - - - this may or may not be  
3           your case, but if my auto parts person is there and  
4           he's going to get the benefit just because he's  
5           there, and he says we are now in an Empire Zone,  
6           you're going to get these breaks, and then they  
7           change them, he hasn't lost anything. I mean, he's  
8           lost a break that, you know, kind of was a windfall  
9           to him in the first place. Shouldn't we be looking  
10          at each one of these individually, these - - - in  
11          terms of - - - if you want to talk about reliance, my  
12          auto parts guy didn't rely on it at all; he just was  
13          there.

14                       MS. PERSICO: Well, and Your Honor, I think  
15          that that is sort of an unusual circumstance, and it  
16          isn't my case, but I don't think that that changes  
17          the argument. I think that all of these places, in  
18          order to qualify for the certi - - - for the  
19          certificate, which really - - - you know, you had to  
20          establish either an estimated amount - - - I guess  
21          what I'm trying to say, Your Honor, is that situation  
22          couldn't have happened because ABC couldn't just be  
23          there and get the benefit; they had to qualify and  
24          they had to meet either - - - at that time, when  
25          these businesses qualified, they had to meet a

1 certain number of criteria, how many jobs are you  
2 going to create, what's going to be the jobs you  
3 create, the benefits we're going to give you. You  
4 had to make an estimate, and then you had to make  
5 those goals every year. There was not a per se one-  
6 to-one test. But there were eligibility tests, and  
7 each and every one of the petitioners made those  
8 eligibility tests, met the criteria and were  
9 certified. And there's no allegation, and, in fact,  
10 there were findings of fact at the lower courts that  
11 each of these petitioners met all the criteria, and  
12 because they met all the criteria, they were entitled  
13 to the - - -

14 JUDGE RIVERA: So let me ask - - -

15 JUDGE GRAFFEO: They didn't get certified -  
16 - -

17 JUDGE RIVERA: I'm sorry. So property is a  
18 creature of the State, so this particular property  
19 that you say you have is based on goals, and to get  
20 the certificate, you make a guesstimate of how you're  
21 going to reach those goals, and when you don't, why  
22 is the State not able to say this didn't work for us  
23 and we're going to take away the credits?

24 MS. PERSICO: Because - - -

25 JUDGE RIVERA: How is that still property

1 when you know going in it's only something you have  
2 because you're trying to achieve a goal and you - - -  
3 all you did was make an estimate that you could do  
4 that?

5 MS. PERSICO: Well, because, Your Honor,  
6 that's all we had to do at that point. All the  
7 program said was you make an estimate that seems  
8 reasonable and you make an investment in the  
9 community, be it through wages or capital investment  
10 - - -

11 JUDGE RIVERA: So what did your client  
12 think would happen when you didn't meet the goal?

13 MS. PERSICO: Well, there was no - - -  
14 there was no goal to meet until 2009, and so what  
15 we're saying is that prospectively the legislature  
16 was well within its power to make a - - - a - - -  
17 here's a one-to-one test but - - -

18 JUDGE RIVERA: Right, but you made the  
19 guesstimate; what did your client think when you  
20 wouldn't get to the numbers?

21 MS. PERSICO: We di - - - did, though. I  
22 think everybody's here saying they did get to those  
23 numbers. Those numbers - - - the goalpost changed  
24 midway through the game.

25 JUDGE RIVERA: Okay.

1 MS. PERSICO: So at the time when we were  
2 evaluating it - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MS. PERSICO: Thank you.

5 CHIEF JUDGE LIPPMAN: Thank you, counselor.  
6 Appreciate it.

7 MR. HALPERN: May it please the court. My  
8 name is Philip Halpern. I represent the respondent  
9 Morris. My time is allocated to the subject of the  
10 period of retroactivity and its excessiveness.

11 My case, in particular, comes from the  
12 Third - - -

13 CHIEF JUDGE LIPPMAN: Your adversary says  
14 it's not excessive, that there are cases that say - -  
15 - that are longer than that and it's not a problem in  
16 these kind of tax situations.

17 MR. HALPERN: They're tax cases, Your  
18 Honor; they're not property right cases.

19 CHIEF JUDGE LIPPMAN: So that's why your ad  
20 - - - what your adversary's saying doesn't apply to  
21 this situation?

22 MR. HALPERN: Precisely why, Your Honor.  
23 We, Your Honor, had this issue - - - we've had this  
24 issue in this court in the Majewski case. And in  
25 that case, the court looked at the period of



1 retroactivity to be devolved from the language "shall  
2 take effect immediately". And the court said, well,  
3 how do we know that creates retroactivity? We said -  
4 - - you said to us, well, it's equivocal. So you  
5 need to go to the legislative intent to look at this  
6 period. And the legislative intent is quite clear  
7 here.

8 When 959 was enacted, the language that  
9 made 959 - - - not the tax laws, 959, that made it  
10 retroactive was taken out by the legislature. And if  
11 you follow the rule in Majewski, Majewski said, oh,  
12 if the legislature takes out that retroactive  
13 language then we have to assume they - - -

14 CHIEF JUDGE LIPPMAN: So then - - -

15 MR. HALPERN: - - - didn't want it.

16 CHIEF JUDGE LIPPMAN: Yeah, so there's no  
17 magic number on what's unreasonable, but it is  
18 significant where they choose not to include that  
19 language.

20 MR. HALPERN: Absolutely, Your Honor. And  
21 while I think, frankly, sixteen months or thirty-two  
22 months is a red herring for the court, I don't think  
23 it matters, because either period is excessive, and  
24 the reason it's excessive - - - and while Replan is a  
25 tax case, it is instructive. And I don't think we

1 have a case - - - hopefully this will be the case now  
2 that will guide us through property rights. But that  
3 case is instructive because it says - - -

4 CHIEF JUDGE LIPPMAN: Assuming it's a  
5 property right, right? You're assuming - - -

6 MR. HALPERN: I'm assuming - - -

7 CHIEF JUDGE LIPPMAN: - - - it's a property  
8 - - -

9 MR. HALPERN: - - - it is a property right,  
10 yes, Your Honor, because I believe it is a property  
11 right. But Replan says you look to determine whether  
12 a period is excessive - - -

13 CHIEF JUDGE LIPPMAN: So under Replan, even  
14 if it's not a property right, under Replan you win?

15 MR. HALPERN: Under Replan, whether or not  
16 it's not a property right - - -

17 CHIEF JUDGE LIPPMAN: Assuming it's not - -  
18 -

19 MR. HALPERN: - - - yes.

20 CHIEF JUDGE LIPPMAN: - - - a property  
21 right.

22 MR. HALPERN: Positively - - -

23 JUDGE SMITH: Wait, wait, wait.

24 MR. HALPERN: - - - absolutely.

25 JUDGE SMITH: How can you win if it's not a

1 property right? Which clause of the Constitution  
2 protects nonproperty?

3 MR. HALPERN: You may be right there, Your  
4 Honor; you may be right. But what I was trying to  
5 get at was - - -

6 CHIEF JUDGE LIPPMAN: If he may be right,  
7 then your whole case is contingent upon whether this  
8 is a property right?

9 MR. HALPERN: I believe that the  
10 legislature is not entitled to retroactively take  
11 away this property right. I do believe that - - -

12 CHIEF JUDGE LIPPMAN: So that is the key to  
13 your - - -

14 MR. HALPERN: Yes, Your Honor.

15 CHIEF JUDGE LIPPMAN: - - - the key to your  
16 case.

17 MR. HALPERN: That is the key to my case.  
18 And the key to the case is that either period is  
19 excessive because these parties relied - - - my case  
20 is a little different than everybody else's. My  
21 case, the client spent 1,098,000 dollars in ni - - -  
22 2008 in reliance on the fact that it had its  
23 certificate and it was going to get its tax credits.  
24 It would not have nor did it have to spend that money  
25 in 2008 if it had known that there wouldn't be any

1 tax credit coming its way.

2 And Your Honor, Judge Smith, you hit it on  
3 the head. Carlton says the key timing issue is did  
4 the change occur before the reliance. If the change  
5 occurred - - - whether the change occurred after the  
6 reliance, a long period after or a short period  
7 after, is of no consequence - - -

8 JUDGE PIGOTT: Well, your - - -

9 MR. HALPERN: - - - it doesn't matter.

10 JUDGE PIGOTT: - - - the court in your case  
11 said that it was not imposing a loss of benefits  
12 retroactively but rather it "renders Morris  
13 ineligible to receive future tax benefits and credits  
14 because of its past failures". Is that a difference?

15 MR. HALPERN: That - - - that was the lower  
16 court's ca - - -

17 JUDGE PIGOTT: Right.

18 MR. HALPERN: - - - finding.

19 JUDGE PIGOTT: Well, that's the one - - -  
20 that's the one that they like.

21 MR. HALPERN: That's the one that they  
22 like, Your Honor. That didn't make much sense to my  
23 mind in terms of the analysis that's required here.  
24 That's not English, in one sense.

25 JUDGE PIGOTT: Well, it says it's a future

1 benefit, and that - - -

2 MR. HALPERN: It is not a future benefit,  
3 because it - - - the benefit that was taken away was  
4 taken away in the year 2008, that the expenditures  
5 that were made in 2008 were taken away. It's not a  
6 future benefit that's being taken away. We spent  
7 that money, 1,098,000 dollars, and the others spent  
8 their money on wages, on capital improvements.

9 JUDGE PIGOTT: What did you lose? What did  
10 Morris lose or would have lost had this been pr - - -  
11 had the State prevailed in this thing? What was your  
12 tax bill? What was the difference?

13 MR. HALPERN: The difference would have  
14 been we would not have received 1,098,000 dollars'  
15 worth of tax credits.

16 JUDGE PIGOTT: That's what you said you  
17 spent and - - - oh, I see, and you're saying that you  
18 would have gotten a - - -

19 MR. HALPERN: Yes, Your Honor.

20 JUDGE PIGOTT: - - - tax credit.

21 MR. HALPERN: See, in my case, we were  
22 giving money to the City of Yonkers earmarked to do a  
23 remediation in a landfill. We didn't have to do  
24 that. We did it so we could get Empire Zone tax  
25 credits. And in our record, 404 to 425, the court

1 can see those contracts. We entered into those  
2 contracts.

3 JUDGE SMITH: But - - - but they would - -  
4 - your adversary's position, essentially, is when you  
5 did that you were taking advantage of a loophole, or  
6 what they think is a loophole, what you know they  
7 thought was a loophole they were trying to fix. So  
8 you took your chances like the guy on Carlton.

9 MR. HALPERN: No, no, Your Honor, we didn't  
10 take any chances. They sent us into blighted areas.  
11 The purpose of this was to get economic development  
12 in blighted areas. The area that I'm talking about  
13 is an area off of the New York State Thruway.

14 JUDGE SMITH: But they say, yeah, but we  
15 don't like giving two dollars for one dollar of  
16 economic development. And - - -

17 MR. HALPERN: But that's the law that  
18 passed - - -

19 JUDGE SMITH: - - - is it so surprising  
20 that they decided not to go for that?

21 MR. HALPERN: That's the law that passed,  
22 Your Honor.

23 JUDGE SMITH: Yeah, I understand.

24 MR. HALPERN: That's what was authorized.

25 JUDGE SMITH: But is that such a - - - but

1 sh - - - should you be so shocked that they got tired  
2 of paying you two dollars for every dollar you put  
3 in?

4 MR. HALPERN: And that's okay with me,  
5 prospectively, but they shouldn't be able to take the  
6 money that's spent in 2008, and in April of '09 or  
7 August of 2010, you pick it - - -

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. HALPERN: - - - okay, take that credit  
10 away from us.

11 CHIEF JUDGE LIPPMAN: Thanks, counselor.

12 MR. HALPERN: Thank you.

13 CHIEF JUDGE LIPPMAN: Appreciate it.

14 Counselor?

15 MS. MEROLA: Good afternoon. Michelle  
16 Merola on behalf of the Hague. My time was allotted  
17 to the issue of whether there was a legitimate public  
18 purpose.

19 I think the bottom line here is that the  
20 government had buyer's remorse that - - - because of  
21 a bad economy. They assert that there are two public  
22 purposes that legitimize their action in imposing  
23 this retroactively. First, the revenue raising, and  
24 we maintain that's really the true purpose of the  
25 publ - - - of the legislation. But they also throw

1 in this afterthought. They say that they're  
2 correcting the program abuses. And I think if you  
3 look corr - - - carefully at the record, there's  
4 really no support for that allegation that there was  
5 a corr - - -

6 JUDGE PIGOTT: Do we - - - how do we look -  
7 - - do that? I was thinking there are - - - there  
8 are legislators that don't think that Empire Zones of  
9 any kind ought to be - - - I mean, they - - - they're  
10 more of a libertarian, you know, government shouldn't  
11 interfere.

12 Now, if this thing was passed by those  
13 legislators, why would we look at their - - - at  
14 their motive? I mean, it would simply - - - you  
15 know, either the law is what it is or it isn't what  
16 it isn't. I mean, I don't know where we would say,  
17 well, because they were doing it to raise revenue,  
18 which, you know, as one of my colleagues pointed out,  
19 is generally why they have taxes, as opposed to we  
20 just don't believe in the governmental purpose of  
21 Empire Zones. Why would that make a difference?

22 MS. MEROLA: Well, I think you need to look  
23 at their purported interest in passing this policy.  
24 They're saying it's - - - you know, abuses have taken  
25 place, so what they're really saying is that



1 participants are gaming the system. And I do not  
2 thing - - -

3 CHIEF JUDGE LIPPMAN: Isn't that an abuse  
4 if participants are gaming the system?

5 MS. MEROLA: Excuse me?

6 CHIEF JUDGE LIPPMAN: Isn't that - - -  
7 what's the difference between saying participants are  
8 gaming the system or they're abusing the system?  
9 What - - -

10 MS. MEROLA: It's the same thing.

11 CHIEF JUDGE LIPPMAN: Yes.

12 MS. MEROLA: And my point is that - - -  
13 that that really isn't borne out by the record here,  
14 and especial - - - on a general basis, but especially  
15 with respect to these petitioners, and my client in  
16 particular, who is only decertified on the one-to-one  
17 ratio test. If you don't have - - -

18 CHIEF JUDGE LIPPMAN: So you're saying it's  
19 not an abuse because really - - - what they - - - the  
20 only thing they want is to get more money for the  
21 State - - -

22 MS. MEROLA: Yes.

23 CHIEF JUDGE LIPPMAN: And there's nothing  
24 you're doing wrong; is that what you're saying?

25 MS. MEROLA: Yeah, there was no - - -

1 JUDGE SMITH: But why is it not - - - or  
2 why could it not be perceived as an abuse for you to  
3 claim a dollar in tax credits for fifty cents of  
4 investment?

5 MS. MEROLA: Well, our clients relied on  
6 the laws that existed. Nobody modified their conduct  
7 in a manner to take advantage of tax incentive.

8 JUDGE SMITH: But - - - yeah, but - - -  
9 but, of course you relied on the laws that existed  
10 because you thought it was - - - because you thought  
11 the law gave you an advantage. That's the whole  
12 point, right? Did - - - why were you not on inv - -  
13 - on notice that somebody might think it was too big  
14 an advantage and the State thought the money looked  
15 better in their pocket than your pocket?

16 MS. MEROLA: I think we're on notice of  
17 that fact, but that can only impact our rights going  
18 forward, and I think that's the critical distinction  
19 that counsel have all already raised. Again, as for  
20 the legitimate purpose, we don't think correcting  
21 program abuses is - - - we think it's a disingenuous  
22 purpose, and if you only have the raising revenue  
23 purpose, then that's an issue that's dealt with on a  
24 prospective basis.

25 JUDGE SMITH: Well, you haven't quite - - -

1 JUDGE RIVERA: Do they have to be equally -  
2 - - I mean, why is it disingenuous? What - - -

3 MS. MEROLA: Be - - -

4 JUDGE RIVERA: Why can that not be a  
5 purpose, perhaps not the primary purpose, but a  
6 purpose?

7 MS. MEROLA: It - - - well, first of all,  
8 it - - - perhaps it could be a purpose. It isn't on  
9 this record. Now, the question is whether that pur -  
10 - - if there were abuses - - -

11 JUDGE RIVERA: Um-hum.

12 MS. MEROLA: - - - whether that, coupled  
13 with raising revenue, would be legitimate enough to  
14 apply these new criteria retroactively.

15 Under Carlton, which I think people have  
16 used sort of as the baseline test, there was even  
17 more than that. It wasn't just correcting abuses.  
18 In that case you had the unanticipated loss of  
19 revenue. Here, they - - - you can't say that this  
20 was an unanticipated loss of revenue. Everyone knew  
21 what tax - - -

22 CHIEF JUDGE LIPPMAN: Well, Carlton you  
23 were - - - you were correcting a Congressional error,  
24 right?

25 MS. MEROLA: Yes, you were - - - there was

1 a drafting error and then there was that limited  
2 period of - - - of retroactivity. So there - - -  
3 those - - - that case was different. But also  
4 remember, again, that's a tax case where - - - or a  
5 tax statute of general application, whereas again, we  
6 are dealing with a property right, and the due  
7 process analysis is much more rigorous under those  
8 circumstances.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.  
10 Thanks.

11 MS. MEROLA: Okay. Thank you, Your Honors.

12 CHIEF JUDGE LIPPMAN: Counselor?

13 MR. WEILER: May it please the court. My  
14 name is Robert Weiler. I'm here representing WL,  
15 LLC. My argument is - - - is addressing solely our  
16 argument as appellant in the - - - in the matter with  
17 respect to the application of the one-to-one cost-  
18 benefit test.

19 In 2009, and we've been talking about two  
20 tests that were enacted. One was called the shirt-  
21 changer test, again, trying to close what was  
22 allegedly a loophole that people who basically simply  
23 reorganized and transferred their assets and  
24 basically were trying to take advantage of taxes.

25 The second test is the one-to-one

1 benefit-cost test. That test was basically a simple  
2 statement by the legislature who said, look, we're  
3 going to look at the investments you made in the  
4 program, we're going to look at the labor and  
5 employees you provided in the program, and we're  
6 going to compare that to the tax benefits you got.  
7 And it's a very simple mathematical test. If you put  
8 more in than you took out, you passed; if not, you  
9 failed.

10 CHIEF JUDGE LIPPMAN: Counselor, let me  
11 just stop you for a second. Do you want any rebuttal  
12 time?

13 MR. WEILER: If I could have one minute,  
14 Your Honor?

15 CHIEF JUDGE LIPPMAN: You're the appellate,  
16 yeah.

17 MR. WEILER: Just one minute.

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MR. WEILER: Thank you, sir. Thank you.

20 In any event, what happened here was in 2 -  
21 - - in the year 2000 it's undisputed that WL invested  
22 1,667,000 dollars in an Empire Zone. This Empire  
23 Zone is in downtown Syracuse, New York. At the time  
24 the Empire Zone Program was enacted, downtown  
25 Syracuse, New York was not a place where anybody

1 would necessarily want to invest their 1.6 million  
2 dollars. They went into downtown Syracuse, New York  
3 to rebuild an urban area that needed this. The fact  
4 is, and the one thing nobody's talked about yet is  
5 the Empire Zone Program worked in distressed areas.  
6 It was intended to bring money into distressed areas  
7 so that people would make investments and it was a -  
8 - -

9 JUDGE SMITH: Are you - - - but I mean, is  
10 the argument you're now making a Constitutional  
11 argument or is - - - are you arguing your statutory  
12 interpretation?

13 MR. WEILER: I'm arguing the statutory  
14 interpretation. And what I'm arguing, essentially,  
15 is that there's been discussion about people who took  
16 advantage of loopholes. WL took advantage of no  
17 loophole, Your Honor. WL made its investment; it put  
18 in much more - - - almost - - - almost five times as  
19 much as much - - -

20 JUDGE SMITH: Well, but I mean, I'm trying  
21 to connect it to the statute, and you're saying that  
22 it is not reasonable to read the statute as looking  
23 at only three years of investment when they wanted  
24 you to make a much longer term investment?

25 MR. WEILER: No, Your Honor. I think it's

1 a simple matter of statutory construction, and let me  
2 take you through it because it's a different level;  
3 this is a much more detailed level. 959(a)(v)  
4 subdivision (6) said that to take away a benefit that  
5 had been granted to WL they would make a simple  
6 comparison. They were comparing total investments,  
7 1,600,000 dollars, plus total remuneration on one  
8 side and the benefits you took out on the other side.  
9 WL put in almost two million dollars of benefits and  
10 took out approximately 470,000 in benefits. They did  
11 what they were supposed to do.

12 JUDGE SMITH: Yeah, but the question is  
13 whether the statute includes that first year in which  
14 you ma - - - invested all that money, right?

15 MR. WEILER: That's right, Your Honor.

16 JUDGE SMITH: And why - - - I understand  
17 why you say your position is a very equitable one,  
18 but why - - - why does that affect the reading of the  
19 statute?

20 MR. WEILER: Because 959(w) was intended to  
21 attack a completely different point, and it's  
22 codified in the regulation. In 959(w) they said you  
23 had to look at least three years' history in order to  
24 make the one-to-one calculation. It wasn't to say  
25 they could look at only three years. For example,

1 nobody's alleging they could have looked at years  
2 2000, 2, 4 and 6.

3 CHIEF JUDGE LIPPMAN: Well, where does it  
4 say that you have to look at the year you want them  
5 to look at?

6 MR. WEILER: It says it because the statute  
7 says "total". It says it's a simple - - - what are  
8 the economic benefits you get when you were  
9 certified?

10 JUDGE SMITH: So you - - - I mean, and you  
11 also rely on the fact that the statute speaks in the  
12 past tense, that they have - - - I forget, have  
13 failed, that you get decertified only if you have  
14 failed - - -

15 MR. WEILER: That's right.

16 JUDGE SMITH: - - - not if you are failing  
17 - - -

18 MR. WEILER: In other words - - -

19 JUDGE SMITH: - - - but you have failed.

20 MR. WEILER: That's right. In other words,  
21 if you failed the test we didn't - - - the only  
22 reason that WL failed the test is because the  
23 Department of Economic Development said that they  
24 could look at only the year 2001 forward.

25 CHIEF JUDGE LIPPMAN: Yeah, but didn't the



1 program change between 2000 and 2001?

2 MR. WEILER: We would argue no, Your Honor.  
3 In fact, the program - - - and this was, again, part  
4 of the - - -

5 CHIEF JUDGE LIPPMAN: There was no  
6 difference in those two years?

7 MR. WEILER: Article 18(b) of the General  
8 Municipal Law sets forth the program. It is set  
9 forth in Section 959. The 2000 amendments which were  
10 enacted on May 15th, 2001, say specifically that  
11 they're dealing with taxes. They amend the tax - - -  
12 they have two - - - three new tax benefits. However,  
13 there was not one substantive change in Section 959.  
14 Nothing changed. The certification that we received  
15 on May 9, 2000 was the same. There was no language  
16 talking about transitions. There was nothing that  
17 said, well, the old program is repealed and the new  
18 program is now replacing it. It was the same  
19 certificate. And in fact, if you look at the 2000  
20 Business Annual Report that's at page 101 of the  
21 record, you'll see it says "Empire Zone Program".  
22 Well, how could it be an Empire Zone Program dealing  
23 with the 2000 BAR if it, in fact, started in 2001?

24 The 959(w) is a red herring, to answer your  
25 question, Your Honor. Basically, all it was saying

1 is you had to look at at least three years' history,  
2 because the problem is if you're applying a one-to-  
3 one test, you might not have given the State back the  
4 benefits unless you have some period of time to - - -

5 JUDGE PIGOTT: Are you arguing - - -  
6 because I asked this earlier about whether or not  
7 each one has to be handled individually. You're  
8 making a very equitable argument with respect to what  
9 your company did in one place. Now, is it possible  
10 that you could win and they could lose?

11 MR. WEILER: Yes, because there's two  
12 different questions completely. One deals with - - -  
13 and not on the retroactivity issue but on the  
14 Constitutional issue. They're arguing a  
15 Constitutional question. We're arguing strictly a  
16 question of a statutory interpretation. We're saying  
17 that in order to review the statute it should be  
18 reviewed de novo and there shouldn't be any deference  
19 to the agency.

20 The legislature made a patently plain  
21 statement. The legislature says it's a simple  
22 comparison: look a total benef - - - total  
23 investment and remuneration and tax benefits. That's  
24 all they asked you to do. There was nothing in that  
25 statute that said you start in 2001. And in fact - -

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CHIEF JUDGE LIPPMAN: So "total" means every year that you've been in business?

MR. WEILER: Every year that we've been certified - - -

CHIEF JUDGE LIPPMAN: That you've been eligible for this - - -

MR. WEILER: - - - yes, Your Honor.

CHIEF JUDGE LIPPMAN: - - - certified for this program.

MR. WEILER: Yes, Your Honor. And in fact

- - -

JUDGE GRAFFEO: So what did the three-year BAR, what was the purpose of that provision if it's -

- -

MR. WEILER: Because - - - because Your Honor - - -

JUDGE GRAFFEO: - - - if it's different from what's total?

MR. WEILER: Okay. What happened was this. You have 959(a)(v) - - - (a)(v)(6) that says "total". The problem, however, is you also have people who were certified in the years 2006 and 2007. So if you start applying a test to them, it wasn't fair.

JUDGE SMITH: So if the total - - - if the

1 total - - -

2 JUDGE GRAFFEO: They didn't have enough  
3 years of - - -

4 MR. WEILER: They didn't have enough years  
5 - - -

6 JUDGE GRAFFEO: - - - annual reports.

7 MR. WEILER: - - - so you had to look at at  
8 least three; it's a minimum. It's identifying to  
9 whom to provide the test. In other words, if you  
10 were certified in 2006, you never were tested because  
11 you - - -

12 JUDGE GRAFFEO: So you were given a pass -  
13 - -

14 MR. WEILER: - - - didn't have three years.

15 JUDGE GRAFFEO: - - - because you didn't  
16 have three years?

17 MR. WEILER: And that's right in the same  
18 regulation. What we're saying is there was no basis  
19 to allow the - - - there's no authority to the DED to  
20 put into the statute a statement - - - or put into  
21 the regulation, excuse me, Your Honor, a statement  
22 that says that you could look at only 2001 forward.  
23 And in fact, the proof of this is if you look at both  
24 statutes, if you look at 959(a)(v) - - -

25 JUDGE SMITH: But wouldn't it have been

1 clearer to write the statute as saying this - - - no  
2 participant shall be decertified until it has at  
3 least three years in? That's what you say it means,  
4 right?

5 MR. WEILER: That's what - - - it says it's  
6 a minimum. But that's what the regulation says, by  
7 the way. If you look at the regulation, 5 NYCRR  
8 11.9(c)(2), that's exactly what they interpret it to  
9 mean. It's right in the regulation. It says each  
10 entity that has at least three years of - - -

11 JUDGE SMITH: It would have been - - - I  
12 mean, maybe it's a silly question, since all - - -  
13 every time we get in an argument I could ask it. It  
14 would be li - - - they could have written it more  
15 clearly.

16 MR. WEILER: There's - - - I could arg - -  
17 - I could agree with that, but I don't think it was  
18 unclear. And if you look at - - - and we've gotten  
19 into a lot of the statutory interpretation here, but  
20 the important point I want to make is that if you  
21 look at (a)(5), it says for - - - the shirt-changer  
22 test only applied to - - - and to be certified prior  
23 to August 1, 2002. So the legislature knew how to  
24 put a time limit when they wanted to. In (a)(6)  
25 there is no time limit. And we're saying it was a

1 simple visceral test. They - - - if - - - you abused  
2 the statute if you didn't put in as much as you took  
3 out. All right? We did, Your Honor. And we believe  
4 that's the statement.

5 Unless the court has any questions for me -  
6 - -

7 CHIEF JUDGE LIPPMAN: Thanks, counselor.

8 MR. WEILER: - - - that's the heart of our  
9 argument.

10 CHIEF JUDGE LIPPMAN: Appreciate it.

11 MR. WEILER: Thank you.

12 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

13 MR. BING: Yes, thank you, Your Honor. A  
14 couple of things about property rights.

15 CHIEF JUDGE LIPPMAN: Is it a property  
16 right?

17 MR. BING: The only property right - - -  
18 the only right - - -

19 CHIEF JUDGE LIPPMAN: Is that a yes or a  
20 no?

21 MR. BING: This is a - - - it's a modified  
22 no, Your Honor.

23 CHIEF JUDGE LIPPMAN: It's a modified no,  
24 so - - -

25 MR. BING: Modified no. The only right - -

1 -

2 CHIEF JUDGE LIPPMAN: - - - how is the no  
3 modified?

4 MR. BING: The only right that the  
5 taxpayers had here was a limited substantive due  
6 process interest in not having tax benefits revoked  
7 retroactively. But I guess I would add - - -

8 JUDGE SMITH: Well, but that's the - - -  
9 that's - - - it's a limited interest and it's limited  
10 to when it's property, right?

11 MR. BING: Well - - -

12 JUDGE SMITH: And if it's property, they  
13 can't - - - you can't take it - - -

14 MR. BING: It's not an all or - - -

15 JUDGE SMITH: - - - if it's not, you can.

16 MR. BING: No. You see, that's the - - -  
17 the flaw in the reasoning. Even if it is a property  
18 right of some kind, the court's leading case on that  
19 proposition, in terms of what happens if it's a  
20 property right, is Alliance of American Insurers.  
21 And in that case, the court didn't say if it's a  
22 property right you can't touch it. What they said  
23 was you have to make an analysis which looks at  
24 basically the same factors as Replan.

25 CHIEF JUDGE LIPPMAN: Well, what about the

1 opposite? What if it's not a property right; why  
2 can't they win?

3 MR. BING: If it's not a property right - -  
4 -

5 CHIEF JUDGE LIPPMAN: Yeah, under Replan,  
6 why can't they win?

7 MR. BING: Because as I said, under Replan,  
8 I think the three-factor analysis favors the State's  
9 position here. There was the forewarning.

10 JUDGE SMITH: Is that - - - is that  
11 analysis a way of figuring out whether it's property  
12 or of whether - - - figuring out whether you're  
13 allowed to take it even if it is property?

14 MR. BING: The latter, Judge Smith, I  
15 think, because in - - -

16 JUDGE SMITH: So why - - -

17 MR. BING: - - - Alliance of American  
18 Insurers, the court found that there was a property  
19 right in funds that had been deposited with the  
20 State.

21 JUDGE SMITH: Did it - - - was - - - I was  
22 in that case, wasn't I?

23 MR. BING: I remember that, Judge.

24 JUDGE SMITH: Yeah, yeah.

25 MR. BING: But in that case - - -



1 JUDGE GRAFFEO: You mean even - - -

2 MR. BING: - - - there wasn't - - -

3 JUDGE GRAFFEO: - - - even if we were to  
4 assume it's a property right, that doesn't  
5 necessarily mean they win - - -

6 MR. BING: That's correct.

7 JUDGE GRAFFEO: - - - in your view?

8 MR. BING: That's correct. The standard -  
9 - -

10 CHIEF JUDGE LIPPMAN: But if we assume that  
11 it's not a property right, they could still win if  
12 the three-prong test goes to them instead of you,  
13 right?

14 MR. BING: I think the analysis is  
15 basically the same either way, Your Honor. We - - -

16 JUDGE SMITH: So if the statute says we  
17 hereby grant a property right, a vested property  
18 right to all participants in the program, then you  
19 nevertheless can balance it away by your balancing  
20 test?

21 MR. BING: That's what Alliance of American  
22 Insurers says, Your Honor.

23 CHIEF JUDGE LIPPMAN: You think this all  
24 semantics really, property right or not property  
25 right; is that what you're saying?

1 MR. BING: I think that, at most, it's  
2 conceivably a thumb on taxpayer's side of the scale,  
3 but it's a thumb that we don't think belongs there.

4 JUDGE PIGOTT: Well, if that's true, I - -  
5 -

6 MR. BING: And I - - -

7 JUDGE PIGOTT: Pardon me for getting back  
8 to the individual cases, but as Mr. Halpern points  
9 with respect to Morris, I mean, they - - - they write  
10 a check to the government saying here's a million  
11 bucks to help you out with your environmental plan,  
12 and then you guys come in and say, well, you know,  
13 retroactively we're decertifying any hope you've had  
14 of getting cre - - - credit for that.

15 MR. BING: Well - - -

16 JUDGE PIGOTT: Does that make sense?

17 MR. BING: - - - the - - - I think the  
18 things that were - - - that companies were expected  
19 to do or that companies could claim - - - potentially  
20 claim a reliance interest on were - - - were amounts  
21 expended for wages and benefits and investments, not  
22 tax payments or payments in lieu of taxes. I mean,  
23 companies pay those anyway. So the fact that there  
24 were pay - - - were payments in lieu of taxes  
25 pursuant to an agreement with the Yonkers IDA, an

1 agreement which appears to have dedicated those funds  
2 for use in remediating a parcel adjacent to Morris'  
3 parcel, doesn't - - - I guess doesn't really count as  
4 the kind of reliance that would be relevant for - - -

5 JUDGE PIGOTT: So that money wouldn't  
6 factor in?

7 MR. BING: - - - a Constitutional purpose  
8 here.

9 JUDGE PIGOTT: That money wouldn't factor  
10 into this thing?

11 MR. BING: No, I think - - - because we're  
12 talking about - - - the purpose of the program is, is  
13 what jobs did you create, what amounts of wages and  
14 benefits and investment did you pay during the  
15 relevant period.

16 JUDGE GRAFFEO: Did they know that wasn't  
17 an eligible expenditure, in view of the Agency?

18 MR. BING: Well, the way the - - - the way  
19 the tax benefit worked was you got a tax credit for  
20 amounts either that were real property taxes or  
21 payments in lieu of taxes under certain  
22 circumstances.

23 JUDGE PIGOTT: Well, maybe I misunderstood  
24 you. I thought you were saying that they weren't  
25 going to get a tax credit for their million dollars

1 no matter what.

2 MR. BING: No, what I was saying was that -  
3 - - that the - - - that the reliance - - - the things  
4 that they were suppo - - - their end of the bargain  
5 was supposed to be job creation and investment, so  
6 those are the types of - - - the types of things you  
7 would look at to see whether there was - - -

8 JUDGE PIGOTT: So they wouldn't get credit  
9 for that?

10 MR. BING: Pardon?

11 JUDGE PIGOTT: So they wouldn't get credit  
12 for that.

13 MR. BING: Well, that's what they would get  
14 if they did these other things. But they, I think,  
15 would have to say - - -

16 JUDGE PIGOTT: No - - - no, they give a  
17 million dollars to Yonkers for environmental cleanup.  
18 You're saying no matter what, they're not going to  
19 get a tax credit for environmental cleanup if - - -

20 MR. BING: Well, I'm saying I'm not sure  
21 whether that's a - - - a purpose for which the  
22 economic or the Empire Zone Program is - - -

23 JUDGE PIGOTT: Well, I understand that, but  
24 I'm talking about, they're saying we had a million  
25 dollar tax credit staring us in the face, we gave

1           them the money, and then the State came back and said  
2           retroactively you don't get that tax credit. Your  
3           argument is it was never a tax credit; you would  
4           never get tax credits for environmental cleanup paid  
5           to the city under the Empire Zone.

6                       MR. BING: I mean, I don't bel - - - I'm  
7           not sure whether that was - - -

8                       JUDGE PIGOTT: Well, if it's true, then - -  
9           - I mean, then their argument is even stronger, that  
10          it was a million dollar tax credit that you took away  
11          by passing a bill, you know - - -

12                      MR. BING: I guess my point, Your Honor,  
13          and I - - - I guess we'll move away from that, but my  
14          point is that we're here talking about relia - - -  
15          you know, what did they do - - -

16                      JUDGE PIGOTT: Right.

17                      MR. BING: - - - to earn that benefit, the  
18          benefit that the State would basically give them a  
19          credit for their property taxes? What did they do in  
20          reliance on the existence of that benefit? Did they  
21          - - -

22                      JUDGE PIGOTT: Well, that's why I asked you  
23          in the beginning - - -

24                      MR. BING: What jobs - - - I guess I'm  
25          saying the relevant question is what jobs did they

1 create, what investments did they make - - -

2 JUDGE PIGOTT: No, that's changing the  
3 game.

4 MR. BING: - - - during that period.

5 JUDGE PIGOTT: That's what they've been  
6 arguing all day. What I'm saying is that I thought  
7 early on that the commissioner could go and say  
8 you're not fulfilling the Empire Zone goals,  
9 therefore you're decertified, and this statute  
10 wouldn't have made any difference. I think you're  
11 saying that that's true with respect to Morris, that  
12 this would not have made any difference, they - - -  
13 they paid the million dollars, but they were not  
14 going to get a tax credit - - -

15 MR. BING: Well, I guess that's - - - I  
16 mean, under this - - - under the 2009 amendments, as  
17 retroactively applied, and I apologize if I  
18 misunderstood you, that's true. And I think,  
19 ultimately, the individual reliance of a particular -  
20 - -

21 JUDGE SMITH: But I thought Judge Pigott's  
22 question was before 2009, could you - - - before  
23 there were any amendments, would they get credit for  
24 the million bucks or not?

25 MR. BING: I don't know, Your Honor. But

1 the - - - but my point is that the question that's  
2 relevant for purposes of the retroactive application  
3 of the amendments is whether or not - - - ultimately  
4 whether or not there was forewarning that these  
5 amendment - - - that these - - -

6 JUDGE PIGOTT: Yeah, but - - -

7 MR. BING: - - - benefits were on borrowed  
8 time.

9 JUDGE PIGOTT: - - - I'll leave it after  
10 this. But if he's saying I wrote a check for a  
11 million dollars that I'm now not going to get back  
12 and I can't get - - - and everything was ducky until  
13 these amendments, and now you're telling me I don't  
14 get a tax credit for this, that's - - - when you talk  
15 about reliance, I would think it's pretty heavy  
16 reliance.

17 MR. BING: Well, I guess my point is, Your  
18 Honor, that the question is whether that reliance was  
19 reasonable - - -

20 JUDGE PIGOTT: Yes.

21 MR. BING: - - - under the circumstances.

22 JUDGE READ: You're saying - - -

23 JUDGE SMITH: You're saying - - -

24 JUDGE READ: - - - he took his chances and  
25 he lost.

1                   MR. BING:  And we're saying that - - - that  
2                   yes, in essence, that under the circumstances where  
3                   the legislature had been tightening these very same  
4                   requirements, or similar requirements, shirt-changer  
5                   and a cost-benefit analysis - - -

6                   JUDGE SMITH:  You're

7                   MR. BING:  - - - for years before, that  
8                   during that relatively limited period of  
9                   retroactivity involved here there was - - -

10                  JUDGE SMITH:  You're saying, again, that it  
11                  should have been recognized as a loophole; even if  
12                  they were entitled to it, they should have realized  
13                  that someone might - - - it's the sort of thing that  
14                  someone might want to take away.

15                  MR. BING:  That there was a cha - - - yes,  
16                  that there was a chance that that could happen, and  
17                  that it was unreasonable to expect that that kind of  
18                  thing would continue - - -

19                  JUDGE SMITH:  Did you - - -

20                  MR. BING:  - - - indefinitely under the  
21                  circumstances we have here.

22                  JUDGE SMITH:  I don't want to cut you off,  
23                  but do you need to spend some time on WL also?

24                  MR. BING:  All right.  Yeah, with respect  
25                  to WL, I guess, just a couple of points on the cross-



1 appeal. First of all, the statutory language was - -  
2 - that counsel relied on is "total remuneration", and  
3 it said "(wages and benefits and investment)". So  
4 it's not clear whether "total" modifies - - -

5 JUDGE SMITH: It's - - - granting it's  
6 ambiguous, wouldn't it be - - - isn't it sensible to  
7 assume that the legislature meant the people we're  
8 after are the ones who never put in more than they're  
9 going to get out? Why would you arbitrarily cut it  
10 off, it appeared, as little as three years? I mean,  
11 I understand you gave them more than three, but the  
12 statute only gives thr - - - could let you cut it off  
13 at three. And you could have somebody who had made  
14 an enormous investment four years before would  
15 forfeit his - - -

16 MR. BING: Your Honor, the legislature made  
17 a judgment to use at least three. In fact, DED, when  
18 seven were available - - -

19 JUDGE SMITH: Well, but the question - - -

20 MR. BING: - - - used seven. The entire  
21 program - - -

22 JUDGE SMITH: - - - the question is - - -

23 MR. BING: - - - BAR.

24 JUDGE SMITH: The question is what the  
25 legislature meant. Is it reasonable to say that they

1           meant you could cut it off after three, or is it  
2           reasonable to say, as your adversary says, that the  
3           three years was just to make sure that somebody  
4           didn't get snuffed out of the program before it was  
5           started?

6                         MR. BING:  I don't know why it couldn't  
7           mean both, Your Honor.  I think that's a perfectly  
8           reasonable interpretation.

9                         JUDGE SMITH:  Well, what's so - - - what's  
10          so reasonable about saying a guy can put in a billion  
11          dollars in year one and then when - - - and then you  
12          pay him tax credits of a small amount for three  
13          years, and then he - - - and then he forfeits his  
14          billion?

15                        MR. BING:  Well, this - - -

16                        JUDGE RIVERA:  Why is that reasonable?

17                        MR. BING:  The program here was  
18          substantially overhauled in 2000, and DED decided, in  
19          regulations, to focus on the new program.

20                        JUDGE SMITH:  Well, but the statute doesn't  
21          say anything about 2000; the statute says three  
22          years.

23                        MR. BING:  Well, but the sta - - - the prog  
24          - - - the Empire Zone Program itself, the first full  
25          year of program - - -

1 JUDGE SMITH: I understand that - - -

2 MR. BING: - - - eligibility was 2001.

3 JUDGE SMITH: - - - but the statute makes  
4 no reference to that at all.

5 MR. BING: Well, the statute says three  
6 years, and they ended up using as many as seven in -  
7 - -

8 JUDGE SMITH: Okay. But - - -

9 MR. BING: - - - in cases where seven were  
10 available.

11 JUDGE SMITH: But it's your position they  
12 could have used as few as three, right?

13 MR. BING: That's correct. But they - - -

14 JUDGE SMITH: And why does that make any  
15 sense to read the statute that way?

16 MR. BING: I think because the - - - the  
17 statute was telling them - - - you know, the  
18 legislature was saying, you know, you didn't have to  
19 look at everything.

20 CHIEF JUDGE LIPPMAN: Was there a different  
21 program in 2001 from 2000?

22 MR. BING: Yes, there were a lot of new  
23 benefits added in 2000. I mean, it wasn't just a  
24 name change.

25 CHIEF JUDGE LIPPMAN: It changed the basic

1 nature of the program?

2 MR. BING: Well, it made it a lot more  
3 lucrative, I think that the real property tax benefit  
4 was added at that point, the tax reduction credit and  
5 the wage tax credit.

6 JUDGE READ: So they invested a lot of  
7 money before it became so lucrative?

8 MR. BING: Well, I - - - one point on that  
9 too, if you look at 120 in the WL record, the BAR  
10 that they - - - the BAR they filed in 2000 didn't  
11 report this large investment. That didn't get  
12 reported until 2008.

13 JUDGE SMITH: But I mean, Judge - - -  
14 doesn't Judge Read's question go to the  
15 reasonableness of your interpretation? What sense  
16 does it make to say - - - to cut it off at - - - to  
17 make the people suffer who invested before the  
18 program became lucrative?

19 MR. BING: Well, I think that the - - - as  
20 I said, that the program was substantially revamped.  
21 DED made a reasonable judgment that they would re - -  
22 -

23 JUDGE SMITH: Revamped to be more  
24 attractive to the participants.

25 MR. BING: Right, and they would look at

1 2001 - - -

2 JUDGE SMITH: And why - - - why are you  
3 urging - - -

4 MR. BING: - - - to 2007.

5 JUDGE SMITH: - - - an interpretation that  
6 is harder on the people who came in when it was less  
7 appealing?

8 MR. BING: Well, it's not harder than - - -  
9 than - - - I mean, the legislature said at least  
10 three. DED used as many as seven when seven were  
11 available, from 2001 to 2007, to capture as much of  
12 that - - -

13 JUDGE SMITH: Isn't that seven - - -

14 MR. BING: - - - as it could.

15 JUDGE SMITH: Isn't that seven irrelevant  
16 to the statutory interpretation issue because the  
17 statute doesn't say seven?

18 MR. BING: I think it shows that DED was -  
19 - - was trying to be reasonable in its interpretation  
20 of the - - -

21 JUDGE SMITH: I grant that DED is trying to  
22 be reasonable. DED's reasonableness can't change the  
23 meaning of the statute, can it?

24 MR. BING: Well, it's a reasonable  
25 interpretation of the statute. It's a regulation

1 that reasonably increments - - -

2 JUDGE SMITH: You can't - - -

3 MR. BING: - - - at least three - - -

4 JUDGE SMITH: But you can't interpret three  
5 to mean seven.

6 MR. BING: You can interpret at least three  
7 to mean seven, Your Honor.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.  
9 Thanks.

10 MR. BING: Thank you, Your Honor.

11 CHIEF JUDGE LIPPMAN: Counselor, one minute  
12 rebuttal. Go ahead.

13 MR. WEILER: Your Honor, the only thing I  
14 want to add is that there's been some reference to  
15 this page 120 of the record that somehow it shows WL  
16 did something wrong. What happened is in April of  
17 2008, they simply amended their year 2000 BAR. They  
18 were requested, well, where's your investment, and we  
19 went back and looked at the BAR 2000 and realized  
20 that it didn't show their investment.

21 Just to - - - just for point of  
22 recollection and reference, in 2000 it had no  
23 meaning. The only time this really had meaning was  
24 in 2009 when they changed the rules. So what we're  
25 saying is basically - - - and I believe the Third

1 Department found there's no doubt in this record, and  
2 I think everybody's conceded that if the year 2000  
3 included we would have easily passed the test by over  
4 a four to one margin. Thank you.

5 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
6 counselor.

7 Thank you all. Appreciate it.

8 (Court is adjourned)

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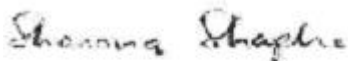
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## C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of JAMES SQUARE ASSOCIATES LP, ET AL. v. DENNIS MULLEN, ET AL., No. 87; MATTER OF J-P GROUP, LLC v. NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, No. 88; MATTER OF MORRIS BUILDERS, LP v. EMPIRE ZONE DESIGNATION BOARD, No. 89; MATTER OF HAGUE CORPORATION v. EMPIRE ZONE DESIGNATION BOARD, No. 90; and MATTER OF WL, LLC v. DEPARTMENT OF ECONOMIC DEVELOPMENT No. 91 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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