

February 2, 1998

The Honorable Seiji F. Naya, Ph.D.
Director of Business, Economic
Development, and Tourism
State of Hawaii
No. 1 Capitol District
250 South Hotel Street
Honolulu, Hawaii 96813

Dear Dr. Naya:

Re: Enterprise Zones

By memorandum dated July 7, 1997, you asked for our opinion on an amendment to the State Enterprise Zone Law, chapter 209E, Hawaii Revised Statutes, which legislatively designates a new enterprise zone in the Waialua District of Oahu ("new EZ"). Your memorandum poses the following questions:

1. Will businesses located in the new EZ⁽¹⁾ be eligible for state EZ tax benefits for seven consecutive years, or only until the five-year sunset date of June 30, 2002, when authorization for the new EZ expires?
2. Will the City and County of Honolulu be required to offer its county-level enterprise zone ("EZ") incentives to participating businesses in the new EZ?
3. Will the City and County of Honolulu be required to perform its EZ administrative responsibilities in the new EZ?

We conclude that qualified businesses in the new EZ will be eligible for tax benefits for the full seven-year period; but, the City and County is not required to provide incentives or perform administrative responsibilities in the new EZ.

As stated in section 209E-1, Hawaii Revised Statutes, the purpose of the State Enterprise Zone Law is to promote neighborhood revitalization by stimulating business and industrial growth by means of tax incentives and regulatory flexibility. Generally, qualified businesses within an EZ may obtain state tax credits, excise tax exemptions, and other county incentives for up to seven consecutive years as provided by sections 209E-10 through 209E-12, Hawaii Revised Statutes. [\(top\)](#)

Pursuant to section 209E-3, Hawaii Revised Statutes, the Department of Business, Economic Development, and Tourism ("DBEDT") administers the Enterprise Zone Law. The governing body of any county may apply to DBEDT to have an area declared an EZ, and upon the DBEDT director's recommendation, the Governor shall approve the designation of up to six areas in each county for a period of twenty years, pursuant to section 209E-4(a) and (b), Hawaii Revised Statutes. [\(2\)](#)

Section 2 of Act 262, Session Laws of Hawaii 1997, which took effect retroactive to December 31, 1996, amended section 209E-4 by adding a new subsection (d):

Notwithstanding subsection (b) or (c), only lands classified as agricultural in the Waialua district on Oahu, as defined in section 4-1(3)(D), shall be designated an enterprise zone on July 1, 1997, and the designation shall remain in effect until June 30, 2002.

In designating agricultural lands in the Waialua District as an EZ until June 30, 2002, the legislature bypassed the county application and executive approval process and limited the term of the newly created EZ to five years rather than the usual twenty years. ([top](#))

An existing EZ at Waialua-Haleiwa, approved by the Governor on October 17, 1996, is not affected because it was established prior to December 31, 1996, the retroactive effective date of Act 262. According to accepted rules of statutory construction:

Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment.

1A Norman J. Singer, Sutherland Statutory Construction § 22.36 (5th ed. 1993) (footnotes omitted). We find nothing in the legislative history or the circumstances surrounding the enactment to suggest an intent to repeal an existing EZ. ([top](#))

Section 209E-13, Hawaii Revised Statutes, provides in part:

Qualified businesses located in the enterprise zone shall be eligible to receive the state tax incentives provided by this chapter even though the zone designation has terminated. No business may become a qualified business after the date of zone termination.

Thus, in answer to your first question, qualified businesses located in the new EZ in the Waialua District will be eligible for state tax incentives for the seven-year period set forth in sections 209E-10(a) and 209E-11, Hawaii Revised Statutes, although a portion of that seven-year period extends beyond the new EZ's five-year sunset date of June 30, 2002. ([top](#))

Regarding county incentives, where a county applies for designation of an EZ, section 209E-12, Hawaii Revised Statutes, provides that the county "may propose local incentives," and the county's application "may contain proposals for regulatory flexibility." Section 209E-13 provides that county proposals become binding as follows:

Upon designation of an area as an enterprise zone, the proposals for regulatory flexibility, tax incentives, and other public incentives specified in this chapter shall be binding upon the county governing body to the extent and for the period of time specified in the application for zone designation. [Emphasis added.]

Here, the county governing body had no opportunity to "apply in writing" because the new EZ was created legislatively by Act 262. In the absence of a county application, there can be no "local incentives" or proposals for "regulatory flexibility" that would bind the county governing body. Thus, in answer to your second question, Act 262 does not require the City and County of Honolulu to offer county-level incentives to qualified businesses in the new EZ. ([top](#))

As to your third question regarding the City and County's administrative responsibilities in the new EZ, section 15-6-17(b), Hawaii Administrative Rules, adopted by DBEDT to implement the EZ program, provides in part:

- (1) The department shall require from each county a survey of existing zone business conditions, to be submitted within sixty days of zone designation.
- (2) Within sixty days after the anniversary date of zone designation, each county shall submit a report evaluating this program's effectiveness.

DBEDT promulgated the foregoing rules pursuant to its duty "[t]o conduct a continuing evaluation program of the enterprise zones," under section 209E-3(3), Hawaii Revised Statutes. Each county

is uniquely situated to report on the effect of "local incentives" and "regulatory flexibility" offered to EZs in their respective jurisdictions. DBEDT's rules, requiring an initial survey and annual report from the participating county, provide the most rational and practical way for DBEDT to perform its statutory duty to evaluate the EZ programs. ([top](#))

But Act 262 is silent regarding the City and County's obligation to provide administrative support for the new EZ created by the legislature. Section 5 of article VIII of the Constitution of the State of Hawaii provides as follows:

If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost.

If extending the survey and reporting requirements to the new EZ will result in an "increase in the level of service" under the City and County's existing program, then, unless DBEDT is willing to share in the cost, the City and County is not required to submit an initial survey or annual report on the new EZ. ([top](#))

Very truly yours,
Guy P. D. Archer
Deputy Attorney General

APPROVED:
Margery S. Bronster
Attorney General

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¹We have taken the liberty of rephrasing your three questions by deleting the words "expanded portion of the Waialua-Haleiwa EZ" and "expanded part of the zone" and substituting therefor the words "new EZ" because we find no basis in the legislation for the notion that the amendment expands an existing EZ located at Waialua-Haleiwa. ([back to document](#))

²The full text of section 209E-4(a), (b), and (c) reads as follows:

§209E-4 Enterprise zone designation. (a) The governing body of any county may apply in writing to the department to have an area declared to be an enterprise zone. The application shall include a description of the location of the area or areas in question, and a general statement identifying proposed local incentives to complement the state and any federal incentives. ([top](#))

(b) The governor, upon the recommendation of the director, shall approve the designation of up to six areas in each county as enterprise zones for a period of twenty years. Any such area shall be located in one United States census tract or two or more contiguous United States census tracts in accordance with the most recent decennial United States Census. The census tract or tracts within which each enterprise zone is located also shall meet at least one of the following criteria:

- (1) Twenty-five per cent or more of the population have incomes below eighty per cent of the median family income of the county; or
- (2) The unemployment rate is 1.5 times the state average.

(c) Notwithstanding subsection (b), census tract #405 within the county of Kauai shall be eligible for designation as an enterprise zone. The eligibility for designation shall remain in effect until January 1, 1997, unless the governor earlier determines that the

eligibility is no longer necessary. ([back to document](#)) ([top](#))
