SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter of NEW YORK CITY COALITION TO END LEAD POISONING, INC., NEW YORK PUBLIC INTEREST RESEARCH GROUP, et al.,

Petitioners Plaintiffs-Respondents,

For a Judgment pursuant to Article 78 of the CPLR

-against-

PETER VALLONE, as Speaker of the New York City Council; THE NEW YORK CITY COUNCIL; RUDOLPH GIULIANI, as Mayor of the City of New York, and the CITY OF NEW YORK,,

Respondents-Defendants-Appellants.

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

N.Y. Co. Clerk's Index No. 120911/99

GEORGE GUTWIRTH, an attorney admitted to practice before the courts of the State of New York, affirms under penalties of perjury:

1. I am an attorney in the office of MICHAEL A. CARDOZO, Corporation Counsel, attorney for Respondents-Defendants-Appellants. I represented these parties on the appeal before this Court and have the requisite information to make this affirmation in opposition to the motion for leave to appeal to the New York Court of Appeals from this Court's Decision and Order, entered March 26, 2002.

2. By an extensive opinion (Buckley, J.), this Court unanimously reversed an Order and Judgment, entered February 22, 2001, of Supreme Court, New York County (York, J.), which had declared null and void Local Law 38 of 1999, regulating lead-based paint in multiple dwellings. The basis of that declaration was the alleged failure to comply with the State Environmental Quality Review Act (SEQRA) § 8-0101 et. seq., and City Environmental Quality Review (CEQR) procedures (43 RCNY § 6-0, et. seq. and 62 RCNY § 5-01 et. seq.). The IAS Court accepted petitioners' contentions that preparation of an Environmental Impact Statement (EIS), rather than adoption of a resolution issuing a Negative Declaration as to environmental impact, was required before passage of the law. This Court held that the record amply demonstrated compliance with applicable environmental review laws, reversed the Judgment of Supreme Court, New York County, and dismissed the petition.

3. The motion for leave to appeal to the Court of Appeals should be denied. This Court correctly analyzed and evaluated the extensive record of testimony and debate by the City Council which preceded passage of Local Law 38 of 1999, with this Court correctly concluding that this record showed that the "Council clearly took a 'hard look' at the potential environmental impact of Local Law 38" (Decision, p. 20); and that the Council's consideration of environmental concerns was

"fair and thorough", not "cursory", as claimed by the IAS Court (Decision, p. 16). Petitioners' mischaracterizations of the adequacy of the record and misstatements as to the content of Local Law 38 raise no issues of law requiring review by the Court of Appeals. This Court applied the correct legal standard in determining whether the record showed that before issuance of a negative declaration the Council took a "hard look" at potential areas of relevant environmental concern and reasonably exercised its discretion in deciding to issue a Negative Declaration. Unlike the IAS Court, this Court did not erroneously rule on compliance with SEQRA based on whether this Court agreed with the Council's determination as to environmental significance or the advisability of the law itself, citing Merson v. McNally, 90 NY2d 742, 752 (1997); Chemical Specialties Mfrs. Assn. v. Jorling, 85 NY2d 382, 396 (1995); Neville v. Koch, 79 NY2d 416, 424 (1992); Akpan v. Koch, 75 NY2d 561, 570 (1990). This Court also correctly held that the Council was not required to find potential environmental significance sufficient to warrant preparation of an EIS simply because there was some testimony and alternative legislative proposals before the Council favoring more extensive regulation than that proposed and enacted, citing Fisher v. Giuliani, 280 AD2d 13, 21 (1st Dept. 2001); Neville v. Koch, supra, 79 NY2d at 428. A full EIS was not required simply because the City

Council could have adopted a law with an even more detailed work safety protocol or different time limits for performance of the work. See Chemical Specialty Mfrs. v. Jorling, supra, 85 NY2d 395-398. An agency is required to consider environmental concerns raised, but is not required to find that the concerns raised are significant enough to require preparation of an EIS. Matter of Hingston v. New York State Department of Environmental Conservation, 202 AD2d 877, 879 (3d Dept. 1994) lv. to appl. den. 84 NY2d 809 (1994). An EIS was not mandated simply because the City Council, after assessing the relative benefits and disadvantages of proposals concerning control of lead-based paint, did not adopt all of the proposals which advocates claimed would provide additional protection against lead-based paint hazards. Matter of Briarwood Community Association v. City of New York, 147 AD2d 639, 640 (2d Dept. 1989) lv. to appl. den. 74 NY2d 601 (1989): "While the agency must consider ways in which adverse impacts might be minimized, the law 'does not require an agency to impose every conceivable mitigation measure' (Matter of Jackson v. New York State Urban Dev. Corp., 67 NY2d 400, 421)." This Court correctly determined that "the central task, then, is to determine whether respondents engaged in a 'thorough review of each area of relevant concern' (Application of Committee to Preserve Brighton Beach v. Planning Commission of City of New York, 259 AD2d, supra, AD2d [26] at 34

[1st Dept. 1999]). There is no doubt, whatever one's view on the merits of Local Law 38, that the City Council did just that." (Decision, p. 20).

4. This Court also correctly applied applicable law with respect to review of determinations of environmental significance by local legislatures. When courts are asked to review negative declarations accompanying action by local legislatures, the entire record before the legislative body -- testimony at public hearings, submissions to the body and deliberations -- is reviewed to determine the sufficiency of consideration of environmental issues. Matter of Hoffman v. Town Board of the Town of Queensbury, 255 AD2d 752, 753-754 (3d Dept. 1998) lv. to appl. den. 93 NY2d 803 (1999); Wilkinson v. Planning Board of Town of Thompson, 255 AD2d 738, 739-740 (3d Dept. 1998) lv. to appl. den. 93 NY2d 803 (1999); Matter of Buerger v. Town of Grafton, 235 AD2d 984, 985-986 (3d Dept. 1997) lv. to appl. den. 89 NY2d 816 (1997); Matter of Hare v. Molyneaux, 182 AD2d 908, 910 (3d Dept. 1992). Before Local Law 38 was passed, and the Negative Declaration approved, the Council held three lengthy informational hearings, heard extensive expert testimony and received extensive written submissions on all of the issues from the Commissioners of the City Department of Housing Preservation and Development (HPD) and the Department of Health (DOH), environmental scientists

with expertise in control of lead paint hazards, and real estate professionals from the private and not-for-profit sectors. The Council considered and debated other proposals, rejecting amendments to the law concerning the definition of lead-based paint hazard; the type of work protocol, including the extent of dust clearance testing; the type of notice provisions, and the retention of the presumption that paint in a unit in which a child under the age of six resides is lead-based not only to compel repairs but for personal injury actions (Record on Appeal, 1961, 1963-1967, 2122-2123, 2160). Some expert opinion that the legislation would not effectively control lead-based paint hazards did not require the Council to accept that testimony to the extent of finding that the legislation may have a significant adverse impact on the environment. Chemical Specialty Mfrs. Assn. v. Jorling, supra, 85 NY2d at 397-398; Matter of United Petroleum Assn. v. Williams, 102 AD2d 491, 493-494 (3d Dept. 1984) affd for reasons stated in op. at App. Div. 65 NY2d 708 (1985).

5. In deciding this matter, this Court correctly recognized that the central premise of Local Law 38 was that the removal of intact lead-based paint, as required by the prior applicable law, Local Law 1 of 1982, posed a greater danger to the public health than the "lead safe" containment approach of Local Law 38. The abandonment of the "lead free" total

abatement approach, which, if actually fully carried out, would "create a new wave of childhood lead poisoning cases that would dwarf the current caseload" (Record, 3463), itself was highly beneficial to the environment. "The salient, undisputed point here is that moving from abatement to containment reduces environmental threats to human health." (Decision pp. 8-9). Accordingly, the basic conclusion that Local Law 38 was more protective of the environment than the predecessor law was undoubtedly correct. "[D]isagreement on whether certain standards, rules or methodologies will result in greater or lesser reductions of existing threats" (Decision p. 9) did not constitute a significant environmental impact requiring preparation of an EIS. Legislation was not the cause of the existing lead paint hazard. It was meant to address it. "The potential environmental harm addressed by SEQRA review is that which may be created by the action of the government. Where, as here, governmental action concerns remedies for existing environmental harm, it is important to keep the existing harm separate from the governmental action. The government has not been made responsible for environmental risks created by third parties as a result of SEQRA." (Decision, p. 11).

6. In any event, the claims of deficiencies relied upon by petitioners as demonstrative of a potential significant environmental impact are inaccurate. Petitioners continue to

claim that Local Law 38 repealed the protections of § 173.14 of the Health Code, which actually remains applicable to violations and orders of abatement issued by the New York City Department of Health (DOH), upon finding a child with elevated blood levels living in a unit. NYC Health Code § 173.13(d)(2). Until Local Law 38 was adopted, there was no law which explicitly required every owner of a multiple dwelling in which a child under the age of six resided to comply with any work safety standards for protection of the immediate environment in which correction of lead-based paint hazards takes place, whether or not the correction was ordered by a City agency, DOH or HPD. The Local Law 38 work safety protocol was taken largely from the requirements of NYC Health Code § 173.14, with the main difference being the scope of required dust clearance testing. In this regard, while there was considerable support for dust clearance testing of the type required under the Health Code after work on any area to correct a deteriorated paint condition suspected to involve lead-based paint (Record, 1423-1424, 1433, 1513, 1520, 1532), there was also testimony that dust clearance testing was not uniformly regarded as scientifically reliable, that it would cost several hundred dollars per unit, and if required for each unit could put out of business not-for-profit housing operators of low and moderate income housing, such as the Community Preservation Corp., which renovated and operated

over 65,000 units in New York City, and the Settlement Housing Fund, which developed and managed over 7500 units. Furthermore, the Federal Environment Protection Agency (EPA) still had not developed a program to train and certify technicians. Although the test was designed to identify a temporary condition that needed to be cleaned, under HUD rules even one failed test remained perpetually reportable on a prospective leasing of a unit or a sale of the building (Id. 1424, 1522-1523, 1568-1574, 1577-1579, 1581, 1587-1588). The areas in the statute for which lead dust clearance testing was required were those identified by Nick Farr as having been identified in a field research study as the ones in which the highest levels of lead-based paint were located (windows, trim and doors) (Id. 1515-1516, 1544-1545).

7. With respect to the possible inclusion of lead dust in the statutory definition of "lead-based paint hazard", the Committee on Housing and Buildings Chairperson Spigner cited to the confusion in the record as to how the condition would be identified or what an owner would be required to do if the dust could not be traced to a deteriorated paint condition (Id. 2238), which was identified by experts as the primary source of lead dust (Id. 1352-1353, 1530, 1553, 1555, 3262-3266, 3351-3353, 3442-2447, 3471-3474). Without an identifiable apartment defect the dust could be due to outside conditions and could have been blown or tracked into the unit, making it unreasonable

to require the owner to correct it; and, in any event, whatever the source of this or other dust, it could be removed by regular washing of floors with a detergent (Id. 1554, 1581-1583). In addition, the identification of the dust depended on the dust clearance test, which was problematic for the reasons stated above.

8. Local Law 38 added inspection and notice procedures to determine whether a child under the age of six resided in an apartment and, if so, whether the unit had peeling paint. No such provision previously existed, and the courts had to rely on a theory of constructive notice on the part of the owner in cases where suit was brought because a child had been poisoned by lead paint. Juarez v. Wavecrest Management Team, 88 NY2d 628, 647 (1996) Local Law 38 also added specific time frames for correction of violations in all instances, and provided for the first time for the City to correct the condition if, after a statutorily specified period, the owner failed to do so. Local Law 38 substantially increased penalties for noncompliance and for false certification. The environmental assessment accompanying the Negative Declaration correctly concluded that abandonment of total abatement, coupled with the addition of a statutory work safety protocol for performance of work possibly involving lead-based paint rendered Local Law 38 beneficial to what petitioners contend is the

affected environment in this case, thereby warranting issuance of a negative declaration. See Gernatt Products, Inc. v. Town of Sardinia, 87 NY2d 668, 690 (1996); Patterson Materials Corp. v. Town of Pawling, 264 AD2d 510, 512 (2nd Dept. 1999) lv. to appl. den. 95 NY2d 754 (2000); Matter of Valley Realty Development Corp. v. Town of Tully, 187 AD2d 963, 964 (4th Dept. 19992) appl. dism., lv. to appl. den. 81 NY2d 882 (1993).

9. Local Law 38 modernized and updated the definition of lead-based paint. Under Local Law 38, § 27-2056.1 (3), "lead-based paint" shall mean paint of similar surface coating material containing 1.0 milligrams of lead per square centimeter or greater, as determined by laboratory analysis or by x-ray fluorescence (XRF) analyzer. NYC Admin. Code § 27-2056.1 (3) (2625). Local Law 1 required that an owner of a multiple dwelling in which a child six years of age or under resided remove or cover any paint or similar surface-coating material having a reading of 0.7 milligrams of lead per square centimeter or greater or containing more than 0.5 percent of metallic lead based on the non-volatile content of the paint or similar surface-coating material on the interior walls, ceilings, doors, window sills or moldings. The record showed there was also virtually uniform agreement among physicians, government officials, environmental scientists and property managers about adopting a 1.0 milligram per square centimeter

standard for measuring the presence of lead in paint, rather than the 0.7 standard of Local Law 1. The 1.0 standard was a nationwide one and equipment was designed to measure it, but did not efficiently or accurately measure for the 0.7 level (Intro. 205, which was proposed and supported by opponents of Local Law 38 who supported more extensive legislation, provided for the 1.0 standard.). Furthermore, the difference between the two standards with respect to lead content was insignificant (Record, 3156-3159, 3435-3436, 3445, 3450, 3478-3480).

10. The one year reduction in the age of a child to which the statutory presumption concerning the lead-based content in an apartment in a pre-1960 building applied was based on testimony from Dr. Neal Cohen, the Commissioner of DOH, indicating that the principal age for developing childhood lead poisoning was 1½ to 2½ years, when crawling and hand-to-mouth activity were most prevalent, and older children rarely developed elevated blood lead levels (Id. 1418). This uncontroversial change also was in harmony with federal and state law (Intro. 205 also provided for this change.).

11. As this Court stated, "[t]his judicial proceeding has never been the forum in which a decision should or could be made regarding the best public health measures for protecting children from lead-based paint; that legislative function belongs to the New York City Council, where it must remain."

(Decision pp. 9-10). "Nothing in SEQRA, however, requires that governmental remedial actions perfectly solve environmental problems not originally created by the government. SEQRA does not guarantee that petitioners' views will become law, only that they will be considered as the regulations require." Id. pp. 16-17. "While petitioners clearly preferred alternative outcomes for which they lobbied and while the IAS Court may have preferred consideration over a longer time frame, the record amply demonstrates that respondents satisfied the procedural requirements of SEQRA and CEQR." Id. p. 21. The Court could rule in petitioners' favor only by "ignoring the extensive and intensive review performed by respondents and by adopting wholesale petitioners' views. The obvious result of such a review would be to grant petitioners the political victory they failed to achieve in the legislative forum." Id. p. 15. That is not the purpose of SEQRA. This Court correctly sustained the Negative Declaration, and vacated the Judgment of the IAS Court invalidating Local Law 38. There is no valid legal basis for appeal to the New York Court of Appeals; and this Court is

respectfully urged to deny the motion for leave to appeal this Court's Decision and Order of March 26, 2002.

Dated: June 4, 2002
New York, N.Y.

GEORGE GUTWIRTH