NEW YORK SUPREME COURT

APPELLATE DIVISION - FIRST DEPARTMENT

In the Matter of the Application of NEW YORK CITY COALITION TO END LEAD POISONING, INC; NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.; NEW YORK STATE TENANTS & NEIGHBORS COALITION, INC.; MET COUNCIL, INC.; SINERGIA, INC.; ALIANZA DOMINICANA, INC.; CITY PROJECT, INC.; EAST NEW YORK UNITED FRONT, by its Chairperson, CHARLES BARRON; EL PUENTE OF WILLIAMSBURG, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, INC.; MAKE THE ROAD BY WALKING, INC.; NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE, INC.; SOUTH BRONX COALITION FOR CLEAN AIR, INC.; QUEENS LEAGUE OF UNITED TENANTS, INC.; INOCENCIA NOLASCO, GRECIA MARIA VASQUEZ, and her minor child, KATHERINE FIGUEREO by her next friend and mother, GRECIA MARIA VASQUEZ; CATHERINE RODRIGUEZ, and her minor children, DESTINY ALONSO, BIANCA RODRIGUEZ, and JOANNE MARRERO, by their best friend and mother, CATHERINE RODRIGUEZ; ANA GOMEZ, and her minor children, CHRISTIAN GOMEZ and STEPHANIE GOMEZ, by their next friend and mother, ANA GOMEZ; MARIA CELIA NOLASCO and her minor grandchildren JUSTIN AGRAMONTE and JUAN NOLASCO, JR., by their next friend and guardian, MARIA CELIA NOLASCO; and DAVID M. MONAHAN and JULIE MONAHAN, and their minor child IRIS EVE MONAHAN, by her next friends and parents, DAVID M. MONAHAN and JULIE MONAHAN,

Petitioners-Plaintiffs-Respondents

for a Judgment pursuant to Article 78 and § 3001 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.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION BY THE RENT STABILIZATION ASSOCIATION *ET AL.* FOR LEAVE TO SUBMIT AN *AMICI CURIAE* BRIEF

ANDREW GOLDBERG, Esq.
Attorney for Petitioner-Plaintiff-Respondent NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.
9 Murray Street
New York, NY 10007-2272
212-349-6460

KENNETH ROSENFELD, Esq.
Northern Manhattan Improvement Corp. Legal Services
BY: Matthew J. Chachère,
Theodora Galacatos,
James M. Baker
Attorneys for Petitioners-Plaintiffs-Respondents
76 Wadsworth Avenue
New York, NY 10033-7000
212-822-8300

October 9, 2001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS, RULES, and LOCAL LAWS

OTHER AUTHORITIES

Petitioners-Plaintiffs-Respondents ("petitioners") respectfully submit this memorandum of law in opposition to the October 1, 2001, motion by the Rent Stabilization Association and several other real estate lobbying organizations for leave to file an Amici Curiae brief in support of the respondents-defendants-appellants ("appellants").

ARGUMENT:

THE MOTION SHOULD BE DENIED

The decision [15b][1] and judgment [16] being appealed from in this matter concerned the question of whether the New York City Council and Mayor complied with the New York State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq., and the New York City Rules of Procedure for Environmental Quality Review ("CEQR"), when enacting Local Law 38 of 1999 (LL 38). Proposed amici's brief utterly fails to discuss or analyze why the Supreme Court's decision — based entirely on SEQRA — should not be affirmed; indeed, not once does it even cite SEQRA or CEQR, or any of the implementing SEQRA and CEQR regulations, much less a single case pertaining to SEQRA. In fact, outside of a general reference to the various decisions of this Court in New York [City] [*sic*] Coalition to End Lead Poisoning v. Giuliani, proposed amici cite no case law whatsoever.[2]

The issue on appeal is whether the City complied with the substantive and procedural requirements of SEQRA. Not only is the issue before this Court quite clear, the standard to be applied is clear. H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979). Yet proposed amici's brief (like appellants' brief) does not address any of these concerns, and instead

---

1. References to Record on Appeal are indicated in brackets [].

2. As Chief Judge Judith Kaye has observed, if amici's "submissions have nothing to deliver by way of a cite or an insight[,] they can be placed in the circular file." Hon. Judith S. Kaye, One Judge's View of "Friends of the Court," Vol 61, No. 3, N.Y.S.B.J at 12-13 (April 1989).

merely parrots the very same — and irrelevant — assertions offered by appellants as to the merits of the underlying legislation, even though "[a]n amicus brief should never be filed simply to echo the position of one of the parties...." Newman, New York Appellate Practice § 7.16[1]. These reasons alone are sufficient to deny the motion. Rourke v. New York State Dept. of Correctional Services, 159 Misc.2d 324, 327 (Sup. Ct. Albany Co. 1993), aff'd 201 A.D.2d 179 (3d Dep't 1994) (motion for leave to appear as amicus curiae denied where movant added nothing to the contentions already presented to the court); Franklin v. Krause, 83 Misc.2d 42 (Sup. Ct. Nassau Co. 1995) (same).

Moreover, the very purpose of an amicus is to "`give information to the court on some matter of law in respect of which the court is doubtful.'" Kemp v. Rubin, 187 Misc. 707, 708 (Sup. Ct. Queens Co. 1946) (citation omitted); see also, Colmes v. Fisher, 151 Misc. 222, 224 (Sup. Ct. Erie Co. 1934) ("`an amicus curiae is one who, as a stander by, when a judge is in doubt or mistaken in a matter of law, may inform the court.'") Here, however, proposed amici — who profess to be experts in the "myriad City, State and Federal regulations" concerning lead paint and who purport to train their members in this area — rather than correct a mistake of law, mislead this Court as to the law.

For example, on page 12 of their proposed brief, proposed amici assert that "unlike Local Law 1, the remedial measures contained in Local Law 38 do not only apply to violations." The clear inference of this statement is the Local Law 1 only applied to cited violations; yet the case law is indisputedly to the contrary. Decisions such as Juarez v. Wavecrest Mgt. Team Ltd., 88 N.Y.2d 628 (1996); New York City Coalition to End Lead Poisoning v. Koch, 173 Misc. 2d 235 (Sup. Ct. N.Y. Co. 1997), aff'd, 248 A.D.2d 120 (1st Dep't 1998), lv. to app. den., 1998 N.Y.App. Div. LEXIS 8108 (June 25, 1998) ("NYCCELP VII"); and Valdez v. Sherman Estates, Inc., 224 A.D.2d 240, 241 (1st Dep't 1996) make it quite clear that under Local Law 1 landlords had an obligation to inspect for and

safely remove all lead hazards regardless of whether the condition was cited as a violation.[3] Indeed, one of the name partners in the law firm representing proposed amici proclaimed this in an article published over four years ago, explaining that under Local Law 1

> every landlord had an affirmative and ongoing obligation to inspect their premises for lead-based paint.
>
> The Court of Appeals in New York said . . . "once you have notice that a child under seven resides in the premises, you then have notice of any condition that exists within the premises. .. Therefore, you are going to be held to be on notice of any condition that the inspection would have yielded."

Rosmarin, How the Courts Are Viewing Landlords' Liabilities in Lead Poisoning Cases, Deleading, Sept. 1997, p. 22 (emphasis in original).[4]

Likewise, proposed amici misrepresent to this Court that "[t]he Health Code was unaffected by either repeal of Local Law 1 or the adoption of Local Law 38." Yet as former Assistant Health Commissioner Dr. Susan Klitzman testified before the Board of Health on November 5, 1999, [3556-57] Local Law 38 deleted numerous safety requirements in the lead safety regulations in Health Code § 173.14. Indeed, even Appellants themselves do not at all deny that the work practices in Local Law 38's "interim controls" were significantly less stringent than the Health Code — in fact, they characterize the Health Code as "stricter," Apps.' Br. at 59.

Rather than present any legal arguments pertaining to the issue under appeal — i.e., whether Justice York was correct in holding that appellants failed to comply with SEQRA — proposed amici merely assert that Local Law 38 is, in their belief (for they cite essentially nothing from the record whatsoever pertaining to testimony or proceedings in the City Council regarding Local Law 38), a

---

3. Proposed amicus Rent Stabilization Association is surely familiar with this outcome in the Juarez case, since it filed an amicus brief in that case arguing to the contrary. 88 N.Y.2d at 633 (points of counsel).

4. A copy is attached as Ex. 131 to the October 9, 2001, Affidavit of Matthew J. Chachère, submitted herewith.

better law than its predecessor.[5] While there appears little doubt that the real estate industry prefers Local Law 38,[6]

> [t]he court is not a super-legislature called upon to review the wisdom of any law enacted. Nor can the court ignore valid constitutional challenges to a law, regardless of how well intentioned or necessary the law might be . . . . [Thus] submissions from amici on the [merits of the law under review], while interesting, do not address the . . . legal issues before the court . . . [and thus] cannot properly be considered, and are not to be part of the record.

Tops Markets, Inc. v. County of Erie, 156 Misc.2d 49, 55 (Sup. Ct. Erie Co. 1992).

Lastly, proposed amici assert that statistics on lead poisoning rates subsequent to the enactment of Local Law 38 "prove" that it was a better approach. Proposed amici's entire authority for this argument is a City Health Department press release from 2001 and a graph from December 1999, neither of which were provided to this Court or the parties in proposed amici's motion (and thus cannot be fairly considered or responded to) and both of which are, in any event, dehors the record on appeal. And even if this were not the case, proposed amici offer no expert authority for the epidemiological conclusions they attempt to draw from these purported statistics.[7] But in any event,

---

5. Even there, however, proposed amici's arguments are somewhat contradictory. While their proposed brief asserts that the cost to abate lead paint would be $15,000 per dwelling unit and $2 billion citywide, proposed Amici Br. at 8, they also assert that 73% of units do not contain lead and of those that do, only 17% of the walls contain lead paint. Proposed Amici Br. at 11.

6. For example, a recent article in a real estate trade publication noted that the executive director of one of the proposed amici, the Associated Builders and Owners of Greater New York, was "part of a negotiating team that worked on provisions of" LL 38 and that "the industry supported [LL 38] in part, because it shifted some of the burden on tenants to inform owners of lead paint hazards." Natalie Kieth, ABO Watches Paint Appeal, Real Estate Weekly, November 8, 2000, at 1.

7. Because these matters are dehors the record on appeal, petitioners are constrained not to respond in kind, even though they would dispute proposed amici's conclusions, and indeed have previously rebutted similarly unfounded pseudo-epidemiological assertions by way of expert affidavits. The Court is respectfully referred to Petitioners' Appellate Brief at p. 66, note 67, however, for further comment on this issue and the citations therein.

such post hoc materials, even if properly before this Court, could have absolutely no bearing on the propriety of the City Council's compliance with SEQRA in the summer of 1999.

CONCLUSION

For the above reasons, the Motion should be denied.

Dated: New York, NY
October 9, 2001

Respectfully Submitted,

KENNETH ROSENFELD, ESQ.
Northern Manhattan Improvement Corp. Legal Services

BY: Matthew J. Chachère,
Theodora Galacatos,
James M. Baker
Attorneys for Petitioners-Plaintiffs-Respondents
76 Wadsworth Avenue
New York, NY 10033-7000
212-822-8300

ANDREW GOLDBERG, Esq.
Attorney for Petitioner-Plaintiff-Respondent New York Public Interest Research Group, Inc.
9 Murray Street
New York, NY 10007-2272
212-349-6460

MJC-M:\141\VAL-OPP.BRF