

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

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In the Matter of the Application of
NEW YORK CITY COALITION TO END LEAD
POISONING, INC., et al.,

**AFFIDAVIT OF JESSICA
LEIGHTON IN SUPPORT OF
DEFENDANTS' MOTION**

Plaintiffs-Respondents,

New York County Index
No. 120911/99

For a Judgment pursuant to Article 78 and § 3001 of the
Civil Practice Law and Rules

-against-

PETER VALLONE, as Speaker of the New York City
Council, et al.,

Defendants-Appellants.
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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

JESSICA LEIGHTON, Ph.D, being duly sworn, deposes and says:

1. I am the Assistant Commissioner for Environmental Risk Assessment and Communication at the City of New York's Department of Health ("DOH"). I hold a doctorate in Epidemiology and a Masters in Public Health from Columbia University. I have been employed by DOH since 1989. My responsibilities within DOH include supervision of DOH's Lead Poisoning Prevention Program ("LPPP"). I am fully familiar with the facts and circumstances stated herein based upon personal knowledge and upon conversations with DOH and City employees. I submit this affidavit in support of defendants' motion to declare an automatic statutory stay of the trial court's declaratory judgment pending determination of defendants' appeal, or in the alternative, for a stay of that judgment pending appeal.

2. Maintaining the status quo -- Local Law 38 of 1999 -- during the appeal process is critical to continuing the success under Local Law 38 of declining numbers of children with elevated blood lead levels. In stark contrast, if Local Law 38 is no longer operative and the LPPP is required to enforce the antiquated mandates of Local Law 1 of 1982, the recent success in declining numbers of children with elevated blood lead levels will be set back significantly.

3. Under Local Law 1, the LPPP will be forced to test for and order the abatement of every lead paint surface in a unit where a child with an elevated blood lead level resides, or spends a significant amount of time. Such an antiquated mandate would at a minimum double the length of inspections, with a resulting significant strain on the resources of the LPPP staff, as well as on the families whose apartments we inspect. Even more troubling is that implementation of Local Law 1 will create new lead paint hazards that will generate a dramatic increase in childhood lead poisoning cases; such an increase -- completely avoidable -- would be a public health disaster.

4. Under Local Law 1, the LPPP will also be forced to adopt Local Law 1's antiquated definition of lead paint; a 0.7 mcg/cm² or at least 0.5% of lead weight in comparison to Local Law 38's nationally accepted standard of 1.0 mcg/cm². The Local Law 1 definition is an invalid standard for lead paint testing equipment that exists today. And relying on a standard that has not been scientifically validated will result in an increase in the number of owners who contest LPPP test results. Such contestations will further delay timely abatement of lead paint hazards, to the detriment of children.

5. In fact, since Local Law 38 became effective in late 1999, there has been a significant decrease in the number of children with elevated lead levels of 20 micrograms per deciliter (mcg/dL) or greater in New York City. This decrease is even more remarkable since

during the same time period the number of children tested for elevated blood lead levels increased. Specifically, in 1999 there were 707 children 6 months to 6 years of age reported with an elevated blood lead level of 20 mcg/dL or above; in 2000, this number decreased by 24.2% to 536. During the same period,¹ in 1999 296,726 children were tested; in 2000, this number increased by 7.5%, to 318,907. A copy of the DOH press release discussing these statistics is attached hereto as Exhibit J.

* * *

6. The LPPP conducts a computer review of hundreds of thousands of blood lead tests of children per year.² When the LPPP learns of a child with a blood lead test of 20 mcg/dL or greater (or two blood lead level tests between 15 and 19 mcg/dL drawn at least three months apart), pursuant to NYC Health Code § 173.13(d)(2), the LPPP immediately intervenes to provide case management and environmental assessment. We seek to determine if the child is obtaining proper medical supervision and to educate the parent or guardian of the child about how to reduce risk and protect against future lead exposure. We also inspect for evidence of current exposure to lead paint hazards at the child's residence or any other place where the child spends a significant amount of time. If a lead paint hazard is identified, a Commissioner's Order to Abate is issued that requires the owner of the premises to correct the lead paint hazards.

¹ During the same period, for children under 18 those tested increased from 369,451 to 401,644.

² Pursuant to New York Law, every child at the ages of one and two is required to be tested for (or to be referred for testing of) blood lead by the child's health care provider. 10 NYCRR § 67-1.2(a)(3). Additionally, health care providers must assess the risk of high dose lead exposure among children between the ages of six months and six years, and provide or refer for additional blood lead tests children found to be at high risk. 10 NYCRR § 67-1.2(a)(1). Every test result is required to be reported to the New York State Department of Health, and the State or the laboratory also reports the test results for every New York City resident to DOH. 10 NYCRR § 67.3.1(b).

7. If the City is forced to implement Local Law 1 during the short appeal process, DOH will be mandated to, among other things, order the abatement of any lead paint from any interior surface in a dwelling unit where a child with an elevated blood lead of 20 mcg/dL or greater or two blood test levels of 15 to 19 mg/dL at least three months apart resides, and redefine the definition of lead paint from 1.0 mcg/cm² or greater to 0.7 mcg/cm² or greater. Both of these changes will be detrimental to children's health, and will also impose significant strains on the LPPP program.

8. The Local Law 1 mandate to abate intact lead paint is an antiquated concept that will have precisely the opposite effect on the lead paint hazards Local Law 1 was intended to address. Specifically, throughout the country there is a consensus that intact lead paint is not a hazard, and should not be disturbed; this consensus is evidenced by federal legislation, federal guidelines and national reports.³ Local Law 1's mandate is completely contrary to this national consensus, and rather than eliminating lead paint hazards, new lead paint hazards will be created.

9. Much more troubling, however, is that the Local Law 1 mandate to abate intact lead paint will, in fact, lead to an increase in lead poisoning cases. Owners who receive a Commissioners' Order to Abate all intact lead paint will face costs that could easily reach \$15,000 to \$20,000 per apartment unit. Our experience has been that some owners will simply be unable to pay such bills. Others will be unwilling to incur such bills, and will attempt to

³ See Residential Lead-Based Paint Hazard Reduction Act of 1992; Lead Based Paint Hazard Reduction and Financing Task Force, Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing (1995); Alliance to End Childhood Lead Poisoning, National Action Plan for Preventing Childhood Lead Poisoning (January 1993); U.S. Department of Housing and Urban Development, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (1995).

correct the lead paint violations in a less expensive (albeit unlawful) manner by using unskilled contractors, thereby further increasing the potential for lead exposure. And even owners who are able and willing to incur \$15,000 to \$20,000 bills will often be unable to abate intact lead paint and correct lead hazards in a timely manner since there is currently a severe shortage of EPA licensed lead abatement contractors. Under any one of these three scenarios, it is very probable that real lead paint hazards (involving deteriorated paint in units where children reside) will not be corrected in a timely and safe manner. And young children -- the very population intended to be protected by Local Law 1-- will suffer the most from this failure.

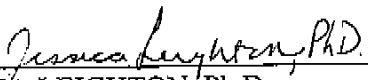
10. In addition to the hazards to children if Local Law 1 is fully implemented, based on our experience, the burdens on DOH to enforce Local Law 1 will be enormous. In the fall of 1998, DOH was forced to implement Local Law 1's mandate to inspect for and order the abatement of intact lead paint when responding to a report of a child with an elevated lead level. During that time, LPPP inspections more than doubled, from three hours to seven hours per apartment unit. And one inspection lasted fifteen hours. Not surprisingly, this added burden was a severe strain on the LPPP staff, as well as on the families who lived in these apartment units. Indeed, in at least one instance LPPP staff was physically threatened while carrying out an inspection.

11. Local Law 1's definition of lead paint as 0.7 mcg/cm² or at least 0.5% lead by weight, adopted in 1982, is similarly antiquated. Specifically, this is an invalid standard for the lead paint testing equipment that exists today. The 1.0 mcg/cm² standard of Local Law 38 is based on the 1995 U.S. Department of Housing and Urban Development Guidelines for the Evaluation and Control of Lead-Based paint Hazards. The 1.0 standard is based on scientific testing that established the validity and reliability of x-ray fluorescent ("XRF") analyzers that are

used to test for lead paint. In contrast to the 1.0 standard that has been scientifically established, the 0.7 standard has no scientific support.

12. Relying on a standard that has not been scientifically validated will result in an increased number of owners that contest LPPP XRF test results since they will be faced with abatement orders that could cost up to \$20,000. This contestation process will further delay timely abatement, again to the detriment of children with elevated lead levels. Moreover, owners may challenge LPPP test results by collecting lead paint chip samples for laboratory analysis. But the process of collecting paint chip samples, where intact surfaces are broken, will create lead hazards where none existed. This too will be detrimental to children.

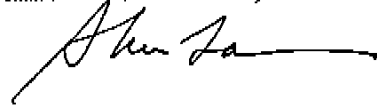
13. In sum, reverting to Local Law 1 during the appeal process in this action will lead to a completely avoidable public health disaster: the increase in childhood lead poisoning cases. Accordingly, it is respectfully requested that defendants' motion be granted.



JESSICA LEIGHTON, Ph.D.

Sworn to me this
12 day of March 2001

SHELDON TANNER
Commissioner of Deeds
City of New York - No. 2-0510
Certificate filed in _____ County
Commission Expires 2-27-02



Notary Public