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.,

Plaintiffs-Respondents,

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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AFFIRMATION OF MARK MUSCHENHEIM IN FURTHER SUPPORT OF DEFENDANTS' MOTION, AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION

New York County Index No. 120911/99

MARK W. MUSCHENHEIM, an attorney admitted to practice in the courts of this State, affirms the following to be true, upon information and belief, under penalty of perjury:

1. I am an Assistant Corporation Counsel in the office of Michael D. Hess, Corporation Counsel of the City of New York ("City"), attorney for defendants in this matter. I am familiar with the facts stated herein based upon personal knowledge and upon conversations with City employees. I submit this affirmation in further support of defendants' motion for an order (1) declaring that there is in effect an automatic statutory stay pursuant to CPLR 5519(a)(1) such that all proceedings to enforce the declaratory judgment appealed from are stayed pending determination of this appeal, or (2) in the alternative to such a declaration, granting a stay pursuant to CPLR 5519(c) of all proceedings to enforce the declaratory judgment pending the determination of this appeal. This affirmation is also submitted in opposition to plaintiffs' cross-motion.

INTRODUCTION

2. Plaintiffs submitted a voluminous stack of opposition papers that, remarkably, failed to address many of the critical issue raised by defendants' motion. Most significantly, plaintiffs failed to dispute that changing the status quo -- Local Law 38 of 1999 -- during the appeal process would be a public health and housing disaster. Indeed, the lead plaintiff here, the New York City Coalition to End Lead Poisoning ("NYCCELP"), previously acknowledged as much in a nearly identical situation: "The children at risk of lead poisoning are better served by having changes [to a lead paint poisoning prevention regulatory scheme] made only once."[1] And as detailed infra ¶¶ 24 -34, plaintiffs also failed to dispute several other critical issues that all support maintaining the well established, comprehensive regulatory scheme for preventing and correcting lead paint hazards set forth in Local Law 38. Similarly, plaintiffs failed to address defendants' arguments showing a meritorious appeal. See infra ¶¶ 8 - 23. Consequently, defendants have conclusively established that they are entitled to a discretionary stay pursuant to CPLR 5519(c). This Court need not, however, reach the discretionary stay issue since defendants have also conclusively established that they are entitled to a statutory stay pursuant to CPLR 5519(a)(1).

ARGUMENT

I. Defendants are Entitled to a Statutory Stay Pursuant to CPLR 5519(a)(1).

3. Plaintiffs argue that the statutory stay is not applicable on an appeal from a declaratory judgment because no further enforcement of the judgment is needed. Plaintiffs cite Second Department cases that have not been adopted by this Court. However, in our prayer for

[1] See DR.Ex. A (12/22/98 Letter from Chachere [plaintiffs' counsel in NYCCELP v. Giuliani, Index # 42780/85 (S. Ct. N.Y. Co.)] to Richmond and Muschenheim, at 2). Exhibits designated "DR.Ex. _" are attached hereto. Exhibits designated "D.Ex. _" are attached to the defendants' moving papers. Exhibits designated "P.Ex. _" are attached to the plaintiffs' opposition papers.

relief in the instant motion, we requested an order either declaring (pursuant to CPLR 5519(a)(1)) or granting (pursuant to CPLR 5519(c)) a stay of all enforcement of the declaratory judgment, whether by contempt, mandamus or injunctive relief. Plaintiffs do not dispute that those steps are available to it in an attempt to enforce the declaratory judgment. Neither the statute involved, 5519, nor any judicial policy, requires a litigant to wait until actual steps to enforce an order are underway before seeking to protect itself from such enforcement.

4. In addition, Local Law 38's comprehensive regulatory scheme to address lead paint hazards is frequently implicated in judicial enforcement proceedings brought by HPD or tenants against recalcitrant landlords in Housing Court. These enforcement proceedings, to say the least, have been thrown into confusion by the lower court's declaration of invalidity of Local Law 38.[2] Action by this Court is needed to direct the lower courts to continue full enforcement of Local Law 38 pending the appeal. Without either a clear declaration that the statutory stay is in effect, or the grant of a discretionary stay, the lower courts will be without guidance on whether Local Law 38 may still be enforced in independent judicial proceedings in the Housing Court, even if plaintiffs refrain from seeking any judicial enforcement of the declaratory judgment.

5. Plaintiffs argue that the 5519(a)(1) automatic stay provision does not apply to the incidents of an order on appeal so as to stay subsequent proceedings in a litigation which flow from that order. They argue that judicial proceedings to enforce the declaratory judgment are analogous to such incidents of an order and are not stayed. Plaintiffs cite cases in other judicial departments supporting this view and argue that this Court has not passed on this

[2] Indeed, as noted in the defendants' moving papers, based on the trial court's decision in this action, since October 2000 Housing Court judges have postponed cases commenced by HPD's Housing Litigation Division that allege that an owner falsely certified correction of a Local Law 38 lead paint violation. See Shultz Aff. ¶ 21, n.8.

question since it held to the contrary in Eastern Paralyzed Veterans Association v. Metropolitan Transportation Authority, 79 A.D.2d 516 (1st Dept. 1980), app. dism. 52 N.Y.2d 895 (1981). However, this Court has more recently reaffirmed this principle that the § 5519(a)(1) automatic stay applies to subsequent proceedings in the litigation that flow from the order on appeal. Reynolds v. City of New York, Index No. 3100/90, (1st Dept., March 11, 1997), order on motion (declaring the CPLR 5519(a)(1) stay in effect, staying a retrial of the issue of damages and rejecting argument that once date set for retrial had passed, directive was no longer executory and thus not subject to stay); Saunders v. City of New York, Index No. 102129/99 (1st Dept. June 20, 2000), order on motion (recognizing, though vacating, application of statutory stay to stay discovery upon appeal from order denying motion to dismiss complaint).

6. Plaintiffs also cite Pokoik v. Department of Health Services, 220 A.D.2d 13, 14 (2d Dept. 1996) and other Second Department cases for the proposition that the automatic stay only applies to executory directives in the order or judgment appealed from – that is, directives which direct the performance of a future act. This rule has not been adopted in this Department. See, for example, 13th St. Coalition v. Wright, 217 A.D.2d 31 (1st Dept. 1995) (opinion reciting this Court's recognition of statutory stay effective to stay Supreme Court order annulling City's Vacate Orders).

II. Defendants are Entitled to a Discretionary Stay Pursuant to CPLR 5519(c) if A Statutory Stay is not in Effect.

7. As set forth below and in their moving papers, defendants have conclusively established a meritorious appeal, harm in the event a stay is denied, and no likely prejudice to the non-moving party if the stay is granted. Accordingly, a discretionary stay is appropriate if this Court determines that the defendants are not entitled to a statutory stay.[3] Conversely, if the

[3] In addition, if this Court determines that neither CPLR 5519(a)(1) nor CPLR 5519(c) are applicable here, the defendants respectfully request that the instant motion be construed to seek a

Court determines that the defendants are entitled to a statutory stay, for the reasons that follow plaintiffs' cross-motion to vacate such a stay should be denied.

A. Defendants Have Established a Meritorious Appeal.

8. Plaintiffs argue that Justice York's decision below is likely to be upheld on appeal because, as they assert, the Negative Declaration is "inadequate on its face." Plaintiffs' Opposition Brief at 23. Plaintiffs have misunderstood the applicable law. It is the record as a whole, rather than the specific content of the Negative Declaration, that is determinative here. And the record reveals that the Council acted lawfully and rationally in issuing the Negative Declaration. Even assuming, arguendo, that plaintiffs are correct in focusing on the "four corners" of the Negative Declaration, remand would be necessary to allow the court below to consider the content of the Negative Declaration, since it completely failed to do so in the first instance.

The Court Should Look to the Record as a Whole, Rather than to the "Four Corners" of the Negative Declaration as Plaintiffs Assert

9. Plaintiffs admit they are faced with a "large record" containing voluminous testimonial and documentary evidence on the proposed law. Before the court below, plaintiffs' primary contention was that the Council did not adequately investigate the potential environmental effects of Local Law 38 and should have prepared an environmental impact statement instead of issuing the Negative Declaration. Now, plaintiffs seek to turn attention away from the record that is properly before this Court by declaring that the Negative Declaration itself is "inadequate on its face." Plaintiffs' Opposition Brief at 23.

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suspension of the operation of the trial court's judgment pursuant to the inherent power of this Court. As Pokoik v. Dep't of Social Services, 220 A.D.2d 13, 16 (2nd Dept. 1996) indicated, such an application is appropriate in "extraordinary circumstances." As established in defendants' papers, such circumstances are present here.

10. Faced with a large and telling record, plaintiffs now say that it is not the record as a whole which is determinative but the content of the Negative Declaration itself – specifically, whether the Negative Declaration contains within its "four corners" evidence that the Council took a "hard look" at all the relevant areas of environmental concern. Id. A court's review, they say, "must begin and end with a careful inspection of the Negative Declaration, which [in this case] fails to address numerous and significant areas of environmental concern within the 'four corners' of the document." Id (emphases added). The Council, they say, cannot cure "facial omissions" in the Negative Declaration by trying to add "extrinsic materials" – i.e., the voluminous record documenting the Council's investigation. Id at 23 n. 19.

11. Plaintiffs have misunderstood the law. There is no such "four corners" requirement under SEQRA, and plaintiffs cite no case law for any such rule. Nowhere in the case law is it indicated that courts must look first and last to the content of a Negative Declaration for evidence that an agency conducted an adequate investigation of potential environmental impacts. Rather, what is determinative is whether the record as a whole contains sufficient evidence that an agency did in fact conduct an adequate investigation into potential environmental effects – not whether a Negative Declaration, standing alone, contains thorough documentation of such investigation within its "four corners." See, e.g., Society of the Plastics Industry v. Suffolk, 77 N.Y.2d 761 (1991); Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 689-690 (1996); Save the Pine Bush, Inc. v. Planning Board of Guilderland, 217 A.D.2d 767,769-770 (3d Dep't 1995); Balsam Lake Anglers Club v. Dept. of Environmental Conservation, 199 A.D.2d 852, 855 (3d Dep't 1993). Neither SEQRA nor the case law specify what must be included in the Negative Declaration itself, and in practice courts look to the record as a whole.

12. Justice York's decision below suggests that his understanding of the legal standard matches defendants' in this regard. While the Court's analysis was inappropriately limited to the record of Council proceedings leading up to the issuance of the Negative Declaration, the opinion did not even address the content of the Negative Declaration. Early in his opinion he quoted the appropriate standard:

> "In reviewing the issuance of a negative declaration [the court's] task is to determine whether the agency 'made a thorough investigation of the problems involved and reasonably exercised its discretion'. . . . In making such review, the agency's obligations under SEQRA 'must be viewed in light of a rule of reason'."

D.Ex. B (Decision at 16, quoting Matter of Har Enterprises v. Brookhaven, 74 N.Y.2d 524, 530 (1989)). While the court below reached an erroneous conclusion after reviewing the record, it was correct in looking to the record as a whole rather than focusing on the "four corners" of the Negative Declaration as plaintiffs now ask this Court to do. In short, what plaintiffs have called "extrinsic materials" are in fact central to a proper analysis under SEQRA.

The Record as a Whole Shows that the Council Took a "Hard Look" at the Relevant Areas of Environmental Concern

13. SEQRA's "fundamental policy is to inject environmental considerations directly into governmental decision making." Coca-Cola Bottling Co. v. Board of Estimate of the City of New York, 72 N.Y.2d 674, 679 (1988). The record reveals that this fundamental purpose was satisfied. The City's lead paint policy has been subject to multiple hearings over many years, and the legislation at issue was the subject of much public discussion. As one long-standing councilmember noted during debate, "I have seldom seen an issue that has been given more careful consideration than this bill we discussed today. We have discussed it for years and very intensely in the last few months." P.Ex. 79 (Council Member Spigner Tr., June 30 Stated

Council Mtg. at 234). Where the record shows that a legislative body was fully informed of all relevant environmental issues and considered them before taking action, the "hard look" standard is met. As the Court of Appeals held in Sutton Area Community v. Board of Estimate of the City of New York, 78 N.Y.2d 945, 946 (1991):

> The record, viewed as a whole, reveals that the Board was fully informed of all pertinent environmental issues . . . and considered these numerous factors before approving the project. Accordingly the "hard look" standard of judicial review is satisfied and the determination must be conformed.

See also Coalition for Responsible Development v. Town Planning Board of Lewisboro, 221 A.D.2d 626, 626 (2d Dep't 1995), Kelsky v. Town of Lewisboro Planning Board, 215 A.D.2d 483, 484 (2d Dep't 1995). The court below acknowledged that it is "evident" from the record that each councilmember "voted for what he or she thought would be in the best interests of the City's children after a full discussion of the many issues involved." D.Ex. B (Decision at 2). In short, the Council more than met SEQRA's requirement that an agency take a "hard look" at the relevant areas of environmental concern and have a reasoned basis for issuing a Negative Declaration.

14. Plaintiffs, however, in an effort to demonstrate that the Council could not possibly have issued the Negative Declaration properly, once again cite various adverse consequences that Local Law 38 would allegedly have upon the environment. Thus, plaintiffs claim, a stay of Justice York's order below would cause "irreparable harm" to the health of some children. But the question of whether a proposed action will have a significant adverse impact "is ultimately a policy decision," Coca-Cola Bottling, supra, 72 N.Y.2d at 682, and it is not for the Court to evaluate de novo the data presented to the Council during its consideration of Local Law 38. Apkan v. Koch, 75 N.Y.2d 561, 571 (1990). The sole issue before this Court is whether the City's lawmakers lawfully and rationally determined that there would be no significant adverse environmental impacts arising from the new law's comprehensive lead-safe framework. The merits of the new law and its ultimate environmental consequences are not in question on a SEQRA challenge. Har Enterprises, supra, 74 N.Y.2d at 529.

15. As before, however, plaintiffs seek to introduce data pertaining to the ultimate merits of Local Law 38, and as before, plaintiffs' arguments are unconvincing. Far from plaintiffs' claims, Local Law 38 creates for the first time a comprehensive system for preventing and abating lead hazards -- a system which imposes impressive and unprecedented burdens on the City, and which the Council had sound reason to believe would result in a net environmental benefit.

16. Plaintiffs are incorrect when they say that Local Law 38 "eliminated almost all regulation of lead dust and the housing conditions that create it." Plaintiffs' Opposition Brief at 4. Local Law 1 was never construed to regulate lead dust as a hazard, and thus there was nothing in the prior law for Local Law 38 to "deregulate." See, e.g., NYCCELP v. Giuliani, No. 42780/95 (Sup. Ct. N.Y. Co. entered May 1, 1996). Local Law 38, on the contrary, does impose regulations pertaining to lead dust. The law lays out specific work practices pertaining to the covering and removal of objects in the work area, the covering of floor areas, the use of appropriate sheeting materials, and other steps meant to prevent the dispersion of dust and debris from work areas. See Local Law 38 of 1999, NYC Administrative Code §§ 27-2056.2(a) and 27-2056.5(b); 28 R.C.N.Y. § 11-02(b).[4]

17. Plaintiffs are also incorrect in asserting that Local Law 38 weakens existing protections because it "exempts almost all [repair and abatement] work" from the safety

[4] Plaintiffs contend that a tenant whose apartment contains hazardous levels of lead dust (that may be generated by activities outside of the tenant's apartment) "has no legal remedies with respect to … the City's code enforcement agencies unless and until her child becomes lead poisoned." Pls.' Br. at 29. Plaintiffs are wrong. To start, Local Law 38 amended the City's Administrative Code to prohibit the dry scraping or dry sanding of "lead-based paint or paint of unknown content in any unit." See D.Ex. A (Local Law 38, at p. 2, §17-181). Moreover, the LPPP Lead Abatement Safety Unit ("LASU") responds to complaints about these conditions. Pursuant to NYC Health Code §§ 3.09 & 173.15, LASU investigates complaints of unsafe lead paint work practices in, among other places, tenants' apartments, one and two family homes and in common areas such as hallways. See Leighton Reply Aff. ¶ 7. Also, plaintiffs failed to point to any provision of Local Law 1 that would have addressed their contention.

regulations under prior law, which, they claim, required that repair and abatement activities comply with Board of Health safety measures. Plaintiffs' Opposition Brief at 5. Firstly, previous court orders did not mandate that work be performed according to the specific Board of Health procedures, but left it up to the City to determine what the appropriate measures ought to be. See NYCCELP, supra. Further, Local Law 38 mandates specific "interim controls" which require owners to correct lead paint hazards according to specified safe work practices, and to follow said practices whether or not a violation has been issued. See §§ 27-2056.2(a) and 27-2056.5(b); 28 R.C.N.Y. § 11-02(b).

18. Plaintiffs make much of the fact that Local Law 38 specifies that children under age six are its primary beneficiaries. In establishing the age six threshold, however, the Council was simply bringing City policy into harmony with the resource-allocation priorities of state and federal law. See, e.g., 42 U.S.C. § 4852(d)(1); 42 U.S.C. § 4851b(25)(A); 42 U.S.C. § 4851(b)(27); 10 N.Y.C.R.R. § 67-1.2; see also C.F.R. § 35.1120. Moreover, the plaintiffs recognized and supported the under-age-six threshold, as indicated by their support for the proposed City Council legislation known as Intro. No. 205. See DR.Ex. B (City Council Intro. 205, at p. 6, § 27-2056.3; see also DR.Ex. A at 1 ("It is well known that NYCCELP has supported compromise legislation . . . now titled Int. No. 205).

19. Plaintiffs similarly disparage the 21-day time frame for correction of lead hazard violations, because there is "no recognized safe period" for delay in correcting lead hazards. Plaintiffs' Opposition Brief at 6. While plaintiffs might have preferred shorter time frames,[5] the Council heard extensive testimony on this issue from all sides and decided that 21 days was appropriate. This standard is complemented with reporting requirements that can

[5] But see DR.Ex. B (City Council Intro. No. 205 at p. 17, § 27-2115(l)(1) (notice of violation shall be corrected within twenty-one days of service of notice)).

require surface dust wipes, and civil penalties ranging from $10,000 to $25,000 against owners who falsely certify that a particular violation has been corrected. See D.Ex. A (§§ 27-2056.5 and 27-2115(l)(6)). The Council also imposed upon HPD the unprecedented responsibility to correct a lead paint hazard violation when an owner fails to do so. Id. at § 27-2115(l)(3). In short, differences in policy preferences do not justify the plaintiffs' claim that the Council did not take a "hard look" at the relevant issues.

20. In addition to the above requirements, Local Law 38 also requires that owners perform specific measures to make a unit lead-safe whenever any such unit in a multiple dwelling erected prior to January 1, 1960 becomes vacant, and regardless of whether or not the unit will be re-occupied by a child under six. See § 27-2056.6; see also R.C.N.Y. § 11-03. It also imposes the new burden on owners to regularly ask occupants whether children under six are or will be residing, and to make visual inspections for lead paint hazards any time they receive knowledge that any such child resides there, or any time an occupant informs them of a lead paint hazard. See §§ 27-2056.3(a) and 27-2056.3(d); R.C.N.Y. § 11-05(a); see also R.C.N.Y. § 11-04. Contrast Local Law 1, which did not require landlords to affirmatively ascertain whether children under six lived in their buildings. See Juarez v. Wavecrest Management Team, Ltd., 88 N.Y.2d 628, 646 (1996). The new law also mandates that DOH refer anyone who requests assistance in blood lead screening, diagnosis, or treatment to appropriate medical providers, and that DOH arrange blood lead screening for any child who requires it but is unable to get it because he or she is uninsured or not covered under existing insurance. See D.Ex. A (§ 17-179(a)).

21. Finally, in arguing that Local Law 38 will allow lead hazards to go uncorrected "potentially forever" in one- or two-family dwellings, plaintiffs ignore the fact that

the new law specifically establishes that nothing within it at all affects the Board of Health's authority with respect to any dwelling unit housing a child with an elevated blood lead level. See § 27-2056.1(b). Moreover, Local Law 38 does not affect the Commissioner of Health's well-established authority to order abated any condition deemed "dangerous to life or health," see N.Y. Administrative Code § 17-145, or his or her authority to designate any City agency to execute such order when it has not been complied with within five days of service or attempted service. See supra at § 17-147.

22. All of the above issues were considered by the Council prior to passage of Local Law 38 – as were numerous other issues, from solid waste impact to the socio-economic effects of the new law. This comprehensive list of environmental concerns was addressed by a fully informed Council whose findings were summarized in the Negative Declaration and Environmental Assessment Statement. The Council had a reasoned basis for passing the new law. Thus, SEQRA's "hard look" requirement is satisfied.

Assuming, Arguendo, that a Court's Review Should Center on the Content of the Negative Declaration, Remand Is Necessary to Allow the Court Below to Conduct Such Analysis

23. Even assuming, arguendo, that plaintiffs are correct in saying that a court's review should center upon on the content of a Negative Declaration rather than on the record as a whole, remand would be necessary in this case to allow Justice York to consider the Negative Declaration itself. As noted above, nowhere in his opinion did he address the content of the Negative Declaration. Instead his analysis focused solely on the adequacy of the Council's investigation leading up to the issuance of the Negative Declaration. If this Court now feels, with plaintiffs, that review under SEQRA "must begin and end with a careful inspection of the Negative Declaration," Plaintiffs' Opposition Brief at 23, it should remand to allow the court below to conduct a proper analysis.

B. Plaintiffs Failed to Persuasively Dispute that Young Children, Defendants and Private Owners will Suffer Irreparable Harm if the Stay is Denied, and that Plaintiffs' will Not be Prejudiced if the Stay is Granted.

24. While plaintiffs submitted a voluminous stack of papers in opposition to defendants' motion,[6] remarkably they completely failed to address most of the significant issues raised by the motion. First, plaintiffs do not dispute that the act of repeatedly changing the regulatory framework embodied in Local Law 38 will harm the very population that Local Law 38 sought to protect, young children.

25. In fact, in a nearly identical context, NYCCELP argued that repeated changes to the City's regulatory scheme to address lead paint hazards would be detrimental to children. In December 1998, on the eve of full implementation of Local Law 1, NYCCELP proposed holding off full implementation, and stated:

> NYCCELP believes it would be a better practice not to change [the City's] complex [enforcement] procedures once in response to a court order and then, shortly afterwards, again in response to new legislation.

DR Ex. A at 2. And to avoid the detrimental consequences of repeated changes to the City's regulatory scheme, in January 1999 NYCCELP here agreed that full implementation of Local Law 1 would not take place, since:

> it would be in the best interest of all parties that [the Department of Health] and [the Department of Housing Preservation and Development] not implement … major changes to complex enforcement practices and procedures concerning lead paint inspection and abatement once in response to [the trial] Court's orders, only to revise them once again in response to new legislation ….

[6] Since plaintiffs found that it was appropriate to submit their briefs filed with the court below, defendants are compelled to do the same. See DR.Ex. C. The exhibits submitted to the court below by defendants will be provided to this Court upon request.

See P.Ex. 108 (1/29/99 Stipulation in NYCCELP v. Giuliani, at 2). Plaintiffs here fail to articulate why the changes they seek -- to "complex enforcement practices and procedures" -- would be any less disruptive now than it would have been two years ago.

26. Plaintiffs' opposition papers also do not dispute that Local Law 38's precise requirements relating to lead paint hazards have become a firmly established regulatory framework in the City's housing community.[7] Nor can plaintiffs contest the fact that in 2000 there was a 24 percent decrease in the number of children with elevated blood lead levels of 20 mcg/dL or greater in New York City, and that during the same period the number of children tested for elevated blood lead level increased by 7.5 percent.[8]

27. Plaintiffs also do not dispute that mass confusion will occur among City agency staff, private landlords and tenants if they are forced to immediately adjust to a completely different regulatory structure. As noted in defendants' moving papers, HPD has issued nearly 20,000 lead paint violations predicated on Local Law 38; some of these violations have not been corrected, and are the subject of litigation in Housing Court. Without a stay, tenants will be severely constrained in insisting that these violations be corrected since they would have been issued pursuant to an inoperative law. Moreover, private owners would also be

[7] As explained in the accompanying affidavit of Jessica Leighton, Local Law 38 mandates that owners of multiple dwellings deliver to occupants upon commencement of occupancy the DOH pamphlet on Local Law 38 and lead paint poisoning. See D.Ex. I. This pamphlet, as well as Local Law 38's annual notification requirement, may be one explanation of why testing for elevated blood lead levels in children increased by seven percent in 2000. See Leighton Reply Aff. ¶ 2 n.1.

[8] A comparison of the 1998 numbers is even more remarkable. In 1998, there were 944 children 6 months to 6 years of age reported with an elevated blood lead level of 20 mcg/dL or above. The same year, 306,410 children in this age group were tested. Leighton Reply Aff. ¶ 2. (In 2000, there were 536 children 6 months to 6 years of age reported with an elevated blood lead level of 20 mcg/dL or above; the same year, 318,907 children in this age group were tested. Id.) Moreover, these statistics certainly indicate that the Local Law 38 disaster scenarios painted by plaintiffs has not resulted in an increased incidence of lead poisoning.

confused as to their obligations in handling these violations. Young children will obviously suffer the most from the delays or failure to correct these violations.

28. Similarly, plaintiffs do not dispute that if defendants here ultimately prevail on appeal, Local Law 38 will come back into force, and at that point there would be a new, heightened round of confusion among private landlords and tenants as they try to determine their rights and responsibilities anew under a lead paint regulatory regime that has repeatedly changed.[9]

29. Plaintiffs' opposition papers also do not contest that there is currently a severe shortage of EPA licensed lead abatement contractors, or that owners who are mandated to remove all intact lead paint will not be able to do so in a timely manner because of this severe shortage.[10] Moreover, plaintiffs do not contest that intact lead paint abatement costs could easily reach between $15,000 and $20,000 per apartment. Finally, plaintiffs do not dispute that some owners will simply be unable or unwilling to incur massive bills for abatement costs, and that some will perform abatements in a less costly, but more dangerous manner, which will further

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[9] Moreover, since everyone (including, apparently, plaintiffs) agrees that full implementation of Local Law 1 is contrary to efforts to prevent lead paint poisoning, there is a good chance that new legislation would be adopted if the defendants ultimately do not prevail. Given the detrimental effects of repeated changes to the lead paint regulatory scheme, it obviously would be best if changes were made only once, rather than repeatedly.

[10] Incredibly, plaintiffs appear to contest the near universal agreement that that resurrection of Local Law 1 -- including its mandate to abate intact lead paint -- would be a public health and housing disaster that would likely lead to a significant increase in childhood lead poisoning. See, e.g., Pls. Br. at 32 ("Appellants' alarmist attempts to predict harms from enforcement of pre-existing law are wholly unconvincing."). Compare D.Ex. B (10/11/00 Decision at 6 (it "is apparently the general consensus, shared by petitioners, that since the enactment of Local Law 1 experts have made a philosophical U-turn and removal of intact lead-based paint is now considered to have more detrimental consequences than its non-removal."). As noted in the defendants' moving papers, on December 16, 1998, the City Council Committee on Housing and Buildings held a hearing on the effects of full implementation of Local Law 1. There was near universal agreement that full implementation of Local Law 1 would be a disaster. Copies of the transcript and the written testimony submitted at this hearing are attached as Exhibits D & E respectively.

increase the potential for lead paint exposure. Nor do plaintiffs dispute that it is likely that the consequence of the mandate to abate intact lead paint is that real lead paint hazards (involving deteriorated paint in units where children reside) will not be corrected in a timely and safe manner, to the detriment of young children.

30. Plaintiffs do argue that the defendants' extensive description of the hazards of abatement of intact lead paint are "contrived arguments."[11] Plaintiffs' apparently contend that the hazards of abating intact lead paint are only present when lead paint is removed, but not when it is covered. Plaintiffs are wrong. The term abatement "means any set of measures designed to permanently eliminate lead based paint or lead based paint hazards," including removal, permanent enclosure (i.e. safe covering), encapsulation or replacement. See 24 C.F.R. § 35.100. See also NYC Health Code § 173.14(b)(1). Most significantly, intact (and thus not harmful) lead paint will be disturbed regardless of the method utilized, thereby creating hazards where none existed. For this reason, the Department of Health's safety standards apply regardless of the method used. See NYC Health Code § 173.14(a)(1) ("This section shall apply to … enclosure … of [lead] paint ….").

31. In addition to the dangers that are posed when intact lead paint is abated utilizing the covering method, the per apartment cost remains the same. Specifically, the calculation of abatement costs at $15,000 to $20,000 per apartment was based on the permanent enclosure (i.e. sheet rocking) and component replacement (i.e. windows) methods. See Shultz Reply Aff. ¶ 4. Accordingly, the detrimental consequences of Local Law 1's mandated full

[11] See Pls.' Br. at 34-35 (defendants' "most contrived arguments are based entirely on one premise -- that unless a stay is granted the City will be required … to enforce the removal of all lead paint, intact or otherwise…. LL 1 did not require the removal of all lead paint. It required its removal or safe covering." [emphasis in original]).

abatement described in defendants' moving papers remain regardless of whether the abatement method is removal or "safe covering."

32. And plaintiffs' settlement proposal barely addressed the numerous concerns raised by defendants. (Plaintiffs had offered to stay section 11-05(b)(2) of HPD's 1998 proposed regulations implementing Local Law 1's full enforcement of Local Law 1. See P.Ex. 124(c) & 125. This provision related to HPD's testing of intact lead paint.[12]) For instance, the proposal fails to address the fundamental fact that the current status quo is Local Law 38, and to change back to Local Law 1 (in whatever form) will result in enormous confusion among tenants, landlords and agency staff, to the detriment of children. Moreover, under plaintiffs' proposal lead paint violations would still be corrected using expensive abatement methods that would require EPA certified workers, who are in short supply. The severe shortage of EPA certified workers will only be exacerbated if Local Law 1 is resurrected. Furthermore, under plaintiffs' proposal, multiple dwelling owners (including HPD) will still be obligated to "remove or cover … any lead-based paint on the interior walls, ceilings, doors, window sills or moldings in any dwelling unit in which a child" resides. P.Ex. 125, § 11.04(a).[13]

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[12] Nevertheless, plaintiffs contend that DOH must test for intact lead paint when investigating residences with children with elevated blood lead levels. Plaintiffs' biggest concern appears to be situations where children are repeatedly poisoned. See Pls.' Br. at 33, n. 30. Their solution to this very real problem is to require complete abatement in every case. However, as explained by Dr. Leighton, the LPPP's experience is that repeat poisonings are relatively infrequent. Moreover, the danger of these extreme cases driving public health policy is apparent; requiring abatement of all intact surfaces in every instance could, in fact, lead to an increase in lead poisoning. See Leighton Reply Aff. ¶ 8.

[13] Moreover, as explained by Dr. Leighton, neither plaintiffs nor Dr. Rutstein dispute that relying on a 0.7 standard will result in an increased number of owners that contest LPPP XRF test results, thereby further delaying timely abatement, to the detriment of children with elevated lead levels. See Leighton Reply Aff. ¶¶ 5-6. And curiously, neither plaintiffs nor Dr. Rutstein note that plaintiffs apparently concur with the wisdom of the 1.0 standard, since they supported legislation, Intro. 205, that proposed that this standard be adopted. See D.Ex. B (Intro. 205 at p. 5, § 27-2056.2(3)).

33. Plaintiffs' opposition papers also do not specifically dispute that the burden on the agencies of enforcing Local Law 1 will be enormous, with costs that could easily run in the millions of dollars. Instead, plaintiffs audaciously maintain that the City could begin to fully enforce Local Law 1 with "modest effort." Plaintiffs fail to mention that in accordance with an agreement with NYCCELP, Local Law 1 was never fully enforced. Indeed, on the eve of full enforcement, NYCCELP recognized that "as a practical matter, it is not easy to implement sweeping changes to an agency's enforcement practices." DR.Ex. A, at 2. Other than making various pronouncements based on an incomplete description of the factual background of Local Law 1, plaintiffs do not point to any circumstances to justify altering their late 1998 statement.

34. Finally, plaintiffs do not dispute that they did little to prevent Local Law 38 from coming into effect. Plaintiffs waited nearly three months after Local Law 38 was signed into law before commencing this action. Moreover, despite their purported concerns about Local Law 38, plaintiffs did not seek a temporary restraining order prohibiting Local Law 38 from coming into effect.[14]

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35. For the reasons set forth herein, in the accompanying affirmations and affidavits, and in the affirmations and affidavits submitted previously, it is respectfully requested that defendants' motion be granted, and that plaintiffs' motion be denied.

Dated: April __, 2001
New York, New York

[14] Plaintiffs' assertion that defendants brought "groundless motions to remove the Justice assigned to the case" is inaccurate. To start, no justice was randomly assigned to this case, since plaintiffs designated the case as related to NYCCELP v. Giuliani, a designation defendants objected to. And following Justice York's participation in an April 2000 panel discussion in which he discussed the differences between Local Law 1 and Local Law 38, defendants' moved to recuse the justice for improper public comments about the merits of the instant action while it was pending before him. Defendants have appealed Justice York's denial of this motion.

MARK MUSCHENHEIM