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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 62

-----x

COMMUNITY PRESERVATION CORPORATION,
Petitioner,

Index No.
105626/04

-against-

A. GIFFORD MILLER, AS SPEAKER OF THE NEW YORK CITY COUNCIL, THE NEW YORK CITY COUNCIL, THE CITY OF NEW YORK, ET AL.,
Respondents.

-----x

RENT STABILIZATION ASSOCIATION OF
NEW YORK, INC.,

Petitioner,

Index No.
105627/04

-against-

A. GIFFORD MILLER, AS SPEAKER OF THE NEW YORK CITY COUNCIL, THE NEW YORK CITY COUNCIL, THE CITY OF NEW YORK, ET AL.,

Respondents.

-----x

May 6, 2004
80 Centre Street
New York, NY 10013

B e f o r e :
HON. DORIS LING-COHAN, Justice.

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MINUTES OF PROCEEDINGS

Reported By:
William L. Kutsch
Senior Court Reporter

Proceedings

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2 THE COURT: Good morning. Sorry to keep
3 you all waiting. I wanted to clear out some of the
4 courtroom, given that you have brought me so many new
5 people into the Courtroom.

6 Good morning to all of you.

7 I have received numerous correspondence
8 from all sides.

9 Why don't we start with identifying
10 yourself and proceed from there.

11 Sir?

12 MR. TEITELBAUM: Your Honor, my name is
13 Herb Teitelbaum, and I represent the petitioners in
14 105627/04, which I'll just refer to as the RSA
15 proceeding.

16 THE COURT: Thank you.

17 MR. GRAIS: Good morning, your Honor. My
18 name is David Grais. I'm here with my colleagues
19 Christine Chi and Elizabeth Haley. We represent the
20 petitioners in Community Preservation Corporation
21 against Miller, which is the case with the earlier
22 index number, 105626/04.

23 MR. MUSCHENHEIM: Good morning, your Honor.
24 My name is Mark Muschenheim, and I represent the City
25 of New York in both cases.

26 MR. CASE: Your Honor, I'm Clifford Case,

Proceedings

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2 with my colleague, Jean McCarroll. We represent the
3 Speaker of the City Council and the City Council in
4 both cases.

5 THE COURT: Okay. Anybody else need to be
6 identified? All right. Thank you very much.

7 MR. TEITELBAUM: Your Honor, sitting behind
8 me, I want to identify my partner, Philip Karmel.

9 THE COURT: All right. Before me are two
10 lawsuits challenging the new lead paint statute.

11 I issued an order last Friday, having
12 received a letter from counsel for RSA, I believe Mr.
13 Teitelbaum, requesting a conference on this matter.
14 And prior to addressing the issues addressed in the
15 letter, what I would like to do is do a disclosure as
16 to a few things.

17 For one thing, I wish to disclose that one
18 of my court attorneys -- that is, my part-time court
19 attorney, not my principal court attorney -- her
20 father is a member of the RSA.

21 In addition, I wish to also disclose that
22 my husband and I own a small multiple dwelling, which,
23 as I understand, would be impacted by this new
24 legislation.

25 And I would like to hear from counsel as to
26 how it would be impacted. And then my plan is to

Proceedings

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2 recess for ten minutes or so, or as long as you need,
3 for you to discuss among yourselves, with co-counsel,
4 and with your clients, as to whether you wish for me
5 to disqualify myself from this case. And at that
6 point, after the recess, we will reconvene, and you
7 can report back as to what you would wish the Court to
8 do. And believe me, I will not necessarily take
9 offense. I have plenty of work in any event, more
10 than enough to spare. But I think in all fairness, I
11 need to make that disclosure to you, give you an
12 opportunity to discuss among yourselves and with your
13 co-counsel, and then proceed from there.

14 So would somebody like to proceed in terms
15 of addressing how you believe this goes into my own
16 assessment as to whether it is fair for myself to
17 continue to keep this case?

18 I, as all parties and litigants to the
19 court, require that a judge be impartial, and I strive
20 to do that in all my cases. And so I need for myself
21 to understand basically the potential impact on any
22 interests that I may have and how that would affect
23 perhaps my ability to be impartial. And it is
24 something I think that requires us to have that
25 discussion at least.

26 Who would like to start?

1 Proceedings

2 MR. TEITELBAUM: Your Honor, I think you
3 have to give us a little bit of information about the
4 property that you and your husband own.

5 THE COURT: It's a small multiple dwelling.

6 MR. TEITELBAUM: How many units?

7 THE COURT: Three.

8 MR. TEITELBAUM: And when was it built?

9 THE COURT: Pre 1960.

10 MR. TEITELBAUM: Is there a child in that
11 residence?

12 THE COURT: It's empty now.

13 MR. TEITELBAUM: Then under the statute,
14 your Honor, you're not covered, at present.

15 THE COURT: All right. Now if there was a
16 child?

17 MR. TEITELBAUM: If there was a child under
18 seven, then as I understand it, that residence would
19 fall within the purview of the statute under those
20 circumstances.

21 THE COURT: And what would it require? As
22 an owner, what would it require the owner to do?

23 MR. MUSCHENHEIM: Your Honor, although you
24 don't have a child there right now, there is a
25 requirement that on vacancy, you perform a variety of
26 tasks to make the apartment lead safe. If a child

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2 were to move into one of the units, one of the units
3 that you rented, you would need to, initially at
4 initial lease-up, you would have to ask whether the
5 family has a child. You would also be required to
6 make the apartment lead safe. You would have to make
7 sure that there is no peeling paint. The paint that
8 is on in a pre-1960 building with a child under seven
9 is presumed to contain lead paint. You can rebut that
10 presumption by hiring an inspector and having the
11 inspector XRF it. Assuming you don't do that, you
12 would have to make the apartment lead safe. You would
13 have to -- and there is a variety of things you would
14 have to do. You would have to make sure that there is
15 no peeling paint. If there was peeling paint, you
16 would have to correct it using safe work practices.
17 You would have to make sure --

18 THE COURT: Safe -- I'm sorry?

19 MR. MUSCHENHEIM: Safe work practices.

20 You would have to make sure that any
21 chewable components, such as the windowsills,
22 especially the windowsills, did not have lead paint.
23 Even if they were intact, you would have to either
24 remove or cover those windowsills. You would have to
25 make sure that the --

26 THE COURT: When you say "cover," what does

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that mean?

MR. MUSCHENHEIM: You would either have to sheetrock it or use an encapsulant. You would have to have a trained worker perform it. Or you could remove the lead paint. And in the process of -- in removing it, you would also have to have a trained worker do that process.

There are also obligations as to friction surfaces, where windows touch the window frame, or where doors touch a door frame, those would have to be free of lead paint. Or you would have to have -- on the windows, you would have to have a guide in the window so that the paints weren't abrading or binding together.

After that, on an annual basis, you would have to inquire of the family as to whether they had a child under the age of seven. And if so, you would have to conduct a lead -- conduct an inspection of the apartment. And if you found any lead-based paint hazards, you would have to correct those using safe work practices and using trained workers.

In addition, if you know, if you learn that there are lead hazards, lead paint hazards or potential lead paint hazards, you have an obligation to correct them.

1 Proceedings

2 And obviously, if the tenant tells you that
3 there are lead paint hazards, you have an obligation
4 to correct them.

5 THE COURT: Okay. Thank you. Anything
6 else?

7 MR. CASE: Yes, your Honor.

8 Your Honor has obligations as an owner of
9 real property whether this law is in effect or not.

10 In fact, the obligations under the prior
11 law, which would come into effect if this law were to
12 be held invalid, are even more stringent than those
13 which would be in effect under Local Law One of 2004,
14 which is one of the reasons which we are confused as
15 to the petitioner's real goal in challenging this
16 statute.

17 MR. TEITELBAUM: We could address that
18 question, your Honor, but I don't think it is
19 appropriate to address it now.

20 THE COURT: I agree.

21 Anything else?

22 Okay. All right.

23 At this point, what I'm going to do is
24 recess for ten minutes so that you can discuss with
25 your clients, with your co-counsel, and with opposing
26 counsel, as to what you wish me to do, and we will

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reconvene.

All right. When you are ready, please tell my part clerk.

(At this time a brief recess was taken.)

THE COURT: All right. Everybody has had an opportunity to speak to their clients and to counsel; is that correct?

MR. TEITELBAUM: Yes your Honor.

MR. CASE: Yes, your Honor.

MR. MUSCHENHEIM: Yes, your Honor.

THE COURT: So talk to me.

MR. TEITELBAUM: Your Honor, I think I'm speaking accurately. I think we all agree that you can be fair in this case. And our preference is that in the present context, you continue doing what you are doing.

THE COURT: All right. Thank you.

What I would like to know is, in terms of my own assessment of my ability to sit on this case, has anybody ever done a study or an estimate as to what it would mean to bring a pre-1960 house or an apartment into compliance with this law? Because I think that would also enter into my decision.

MR. TEITELBAUM: Your Honor, I don't believe that in the deliberations of the City Council

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and on the record, and before the court and the record before the City Council, the costs involved in this new law were delineated.

MR. MUSCHENHEIM: If I may just add, also, without noticing the exact condition of your building, it is hard for us to opine on that.

THE COURT: Let me just give an example.

In terms of chewable surfaces that you refer to, the windowsill, and in terms of, for example, encapsulating an average windowsill, is that a small cost? I have no idea.

So it seems to me that that enters into the equation.

MR. CASE: Your Honor, I think there is information that is available in the record. But I do want to underline the point.

Your Honor's decision on this law will either be to uphold or to declare it improperly adopted. If it is the latter, your Honor is now perhaps as a building owner moving from the frying pan into the fire, because that would then restore the effectiveness of the prior law from 1982, which is more onerous, is more of a lead removal law than the present law and would, therefore, as a differential matter, increase your Honor's costs.

Proceedings

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2 So it is certainly possible, and I'm sure
3 when we get to the merits, we will explore issues such
4 as costs and how they are applied to particular units.
5 But we're not operating in a vacuum. Either this law
6 is in effect or the prior law is in effect.

7 There are proceedings pending, of course,
8 before the Supreme Court, pending matters, a class has
9 been certified and so forth to develop regulations and
10 carry out the '82 law. So I'm not sure that looking
11 at costs for your unit under this law, or your units
12 under this law, would necessarily give your Honor an
13 appropriate sense of the impact of lead abatement
14 requirements in general which you would have to comply
15 with.

16 MR. TEITELBAUM: Your Honor, we agree with
17 Mr. Case's last sentence. The rest of it, we'll get
18 into over time.

19 THE COURT: All right. I mean, my purpose,
20 to be clear, in assessing impact, is really to assess
21 whether I should recuse myself, whether it is to
22 uphold this law, or if I strike down this law, your
23 point is that the 1982 law would be more onerous,
24 which might in your mind cost more for me to comply
25 with it theoretically.

26 MR. CASE: That is true, your Honor.

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2 That's one reason why it would appear to us that there
3 really, in fact, logically could not be a conflict in
4 your deciding on the statute.

5 THE COURT: Well, I don't necessarily agree
6 with you, because then if you're saying that under the
7 old law it might be more expensive -- okay.

8 Would you like to respond?

9 MR. TEITELBAUM: Judge, I'm loath to try to
10 convince you that you can be fair, because obviously
11 you are the best person to make that call.

12 But one thing that I want to point out to
13 you, your Honor, is that this law is so broad in
14 scope; it affects nearly two million dwelling units in
15 the City of New York; that it is going to have an
16 impact on a lot of different categories of people;
17 somebody like yourself, for example, who may own a
18 three-unit dwelling, somebody who may be living in a
19 dwelling unit, somebody who may be renting a co-op to
20 somebody else, somebody who's living in a two-family
21 dwelling unit. The impact that the law has on each of
22 these different scenarios might differ one from the
23 other but there are impacts.

24 So my point is, is that there is a real
25 likelihood that whoever is wearing the robes in this
26 case can ask the same question.

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2 I agree with Mr. Case that -- I really
3 don't think that the costs of compliance with the law
4 under challenge or the '82 law -- and we differ with
5 Mr. Case's description of what's involved in that law
6 -- but I think for these purposes, I think it is
7 sufficient to say that counsel are in agreement that
8 the difference in cost between the two laws is really
9 -- ought to be of no moment in your doing an
10 assessment of whether you can be fair in the case.

11 THE COURT: All right. This is what I'm
12 going to do as to that particular issue.

13 I'm going to reserve as to that issue
14 pending my review of the law, which counsel has kindly
15 attached to one of the appendices. And so we will
16 review that.

17 In the interim, what I propose is that
18 given that the genesis of why we are here today
19 specifically was because of Mr. Teitelbaum's letter,
20 that we try to focus as to a scheduling order as to
21 what needs to be done.

22 I understand that the law goes into effect
23 August 2; is that correct?

24 MR. TEITELBAUM: That's correct, Judge.

25 MR. CASE: Yes, your Honor.

26 THE COURT: It is my understanding that

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2 everybody would like a decision before August 2. And
3 given that desire, it makes sense to at least focus on
4 the issues which were alluded to in Mr. Teitelbaum's
5 letter.

6 The other thing that I would also remark on
7 is that I also received numerous correspondence as to
8 a related case, and whether that is a related case or
9 not is not something for me to decide. As I indicated
10 in my order, that goes above me to Justice Silbermann.
11 And that's the appropriate place for that request to
12 be made. My order was issued last week. Obviously
13 you got it, so you are here. Has that request been
14 made, if I can ask?

15 MR. TEITELBAUM: Submissions have been made
16 to Justice Silbermann, your Honor.

17 MR. CASE: Yes, your Honor.

18 THE COURT: All right. Given that there is
19 this August 2 deadline, I would like to proceed, at
20 least for this appearance, as if we are going to be
21 together for the duration, and work on the issues Mr.
22 Teitelbaum has raised. So is that all right with
23 everybody?

24 Okay. Very good.

25 MR. GRAIS: Your Honor, may I just inform
26 the Court of one thing? Our clients are eight

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2 nonprofit organizations that are seeking the same
3 relief as Mr. Teitelbaum's clients. They decided only
4 a couple days before April 9, the day on which we
5 filed our petition, that they wanted to proceed to do
6 that as a coalition of nonprofit organizations. We
7 filed then because of a possibility that there would
8 be an argument that the statute of limitations would
9 elapse the following day.

10 We did not have time to prepare the full
11 set of papers that one would normally do on an Article
12 78 petition, including particularly the supporting
13 affidavits and memorandum of law. Those are now
14 finished. They are being delivered to all counsel
15 this afternoon.

16 I think that one of the factors that your
17 Honor would be asked to take into account in setting a
18 schedule is the fact that our papers will have come
19 later than Mr. Teitelbaum's. Of course, counsel for
20 the Speaker and the Council will make their own
21 assessment of this. But I think I can safely
22 represent to the Court that they amplify the treatment
23 of the same issues posed by Mr. Teitelbaum's papers,
24 but broaden the issues beyond those that Mr.
25 Teitelbaum's papers have already put forward.

26 THE COURT: All right. Let me address that

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first.

Does anybody object to basically the service of this affidavit and memo of law.

MS. MCCARROLL: Your Honor, we don't object to the service of those papers. We will receive them and review them. But that obviously does affect our ability to respond quickly with our papers.

And I do have a request on behalf of our clients for additional time. The return date on this proceeding is next Monday. We obviously have not submitted papers in response to the two petitions as of yet. And we will not be ready to argue on Monday. So we have a proposed schedule to give to your Honor when that point comes.

THE COURT: Have you discussed this proposed schedule with the opposing counsel?

MR. TEITELBAUM: Yes, your Honor.

MS. MCCARROLL: Yes.

MR. TEITELBAUM: And for ourselves, we don't find it acceptable. We think it's problematic for one basic reason, Judge.

As you point out, we're dealing with an August 2 implementation date for the statute. Nobody wants this statute implemented and then unimplemented. We think that that would be bad for the city as a

Proceedings

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2 whole. And we also think that your Honor is entitled
3 to sufficient time to consider the arguments of
4 everybody and make a decision. I have no --

5 THE COURT: Thank you. I appreciate that.
6 My court attorney appreciates that. Everybody does.

7 MR. TEITELBAUM: I have no doubt, your
8 Honor, that your decision will be a well considered
9 decision, but there may be somebody who disagrees with
10 it.

11 THE COURT: I'm sure.

12 MR. TEITELBAUM: Then we're going to be in
13 the appellate courts, and I've got August 2 on my
14 mind.

15 So the respondents' papers in our case were
16 due yesterday. They were to answer or move yesterday.
17 We gave an extra week in setting the return date from
18 the point in time that we served those papers, so it
19 wasn't the strict 20 days. We added another five days
20 to it.

21 I like litigating at a leisurely pace too,
22 but we're dealing with a very important statute here
23 that's going to impact on a lot of people.

24 And our aim is really to persuade you, your
25 Honor, to move this case very, very rapidly, to hold
26 all the attorneys' feet to the fire so that we can get

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2 this case fully submitted to you in time so that when
3 you make a decision, whoever might disagree with you
4 will have enough time to go to the First Department
5 and perhaps to the Court of Appeals, and that means,
6 honestly, a very, very quick schedule. I think that
7 our clients are entitled to it. I think Mr. Grais's
8 clients are entitled to it. And, quite frankly, I
9 think the respondents --

10 THE COURT: Okay. You are willing to give
11 how much more time?

12 MR. TEITELBAUM: What we propose, your
13 Honor, is that the merits of the case -- what I mean
14 by that, is that if the respondents want to file a
15 motion, that's fine. But they have to answer the
16 petition and put their papers in with respect to the
17 merits of the case by the 20th of this month. That
18 gives them an additional two weeks, plus the week that
19 they had built into the time period that we worked out
20 when we served the papers. We would respond, your
21 Honor, by the 28th.

22 THE COURT: So two weeks would be what?
23 What date?

24 MR. TEITELBAUM: The two weeks would be the
25 20th, Judge. And then we would respond by the 28th,
26 your Honor. And we would urge the Court to set an

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oral argument as soon as your calendar permits so we can get the merits disposed of. We think that is a fair schedule.

THE COURT: I heard from you.

Would you like to respond?

MS. McCARROLL: Yes, your Honor. I would.

First of all, this is the first I've heard of this schedule. When we initially were retained to represent --

THE COURT: So now this is new. Why don't we talk about this new schedule.

MS. McCARROLL: Just to make the record clear, we were retained in this case only just two weeks ago. We have not yet received Mr. Grais's papers, as he explained to the Court. It doesn't make sense to separate these two cases; it makes sense to have them go together.

And as soon as we were retained, I called Mr. Teitelbaum's office and asked for an extension, and it was refused unless we would agree not to make a motion.

We had not yet decided whether we were going to make a motion or not. If we can make a motion, that would simplify the issues before your Honor, and, therefore, facilitate a quicker decision.

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2 Because we need to review Mr. Grais's
3 papers and we need to become familiar with the record
4 on this law and because we need to become familiar
5 with the context in which this new law arose, which is
6 two decades of history on this, we request that the
7 Court give us until June 2nd to move or answer in this
8 case. And then the petitioners could have a week, two
9 weeks, whatever they needed. And if we made a motion,
10 we would like a few days to reply.

11 THE COURT: That would give us less than 30
12 days to decide the case basically.

13 MS. MCCARROLL: I don't believe so. If we
14 made a motion, it could go before your Honor on, say,
15 June 16th. If we answered instead, then it would be a
16 bit later.

17 THE COURT: That would still give us, given
18 vacation schedules, it would not give us enough time
19 to decide before August 2nd.

20 MR. TEITELBAUM: Your Honor, I think it's
21 even more difficult.

22 THE COURT: One second.

23 MR. MUSCHENHEIM: The city has no problem
24 with the petitioner's proposed schedule.

25 THE COURT: Okay.

26 MR. TEITELBAUM: The timing difficulty is

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2 even more serious than your Honor has just observed.

3 If they move, if the respondents make a
4 motion and the motion is denied, then they have time
5 to put an Answer in. So it even puts the clock back
6 further, and we will be bumping right up against
7 August 2nd.

8 THE COURT: When was the law passed?

9 MR. TEITELBAUM: The law was passed in
10 February, Judge.

11 MS. MCCARROLL: Your Honor, this law was
12 passed, and was passed in February, finally. But the
13 petitioners have known about this for a long time. It
14 was passed initially by the City Council in December.
15 The City Council agreed to extend the time of its
16 effectiveness for six month, 180 days. There has been
17 a lot of time in between.

18 I think it is -- the other date is August
19 4th, not August 2nd, by the way. That's a small
20 point.

21 THE COURT: Anything else?

22 We're going to recess for about five
23 minutes.

24 (At this time a brief recess was taken.)

25 THE COURT: Okay. The Court is mindful of
26 the deadline as well as the considerations advanced by

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the defendants. And accordingly, the defendants have until May 24th to move or answer.

As I understand, you haven't decided which yet?

MS. MCCARROLL: Correct.

MR. CASE: That's right, your Honor.

THE COURT: It is my preference that if you should move and assuming that you're not successful in your motion, that you have the Answer essentially ready to go so that you will not be asking for more time if the motion is denied.

In terms of the reply, June 2nd.

So I've given essentially four days or so to both sides. And it will be submitted on June 2nd in Room 130; I believe that is where the motions are. We have actually gotten the papers from 130, but they will be returned so that your submissions can be there. And the Court will advise you as to oral argument.

In terms of submissions, I'd ask that you supply two courtesy copies of everything, and that you supply at least the memo of law on disk, Word Perfect format please. We can convert everything up until 10.

MR. TEITELBAUM: Judge, would you like the papers that we have already submitted in that format?

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2 THE COURT: That would be great. That
3 would be helpful.

4 In terms of your submissions to Justice
5 Silbermann, is there anything additional that you've
6 made to Justice Silbermann as to the other related
7 matter that I should be aware of? If you do feel that
8 way, then perhaps you'll want to supply that to me. I
9 do not have anything to do with that decision. That
10 will be left to Justice Silbermann. She did ask me to
11 advise her as to what I intended to do vis-a-vis what
12 transpired today and I will do so.

13 Anything else for the record?

14 Okay. Very good. Have a great day.

15 MR. TEITELBAUM: You too, Judge.

16 MR. GRAIS: Thank you, your Honor.

17 MS. McCARROLL: Excuse me, your Honor. I
18 believe that there are some additional people who will
19 be intending to either get consent for intervention or
20 to make a motion for intervention. I presume that the
21 date that your Honor set for us to move or answer
22 would apply to any motion for intervention as well; is
23 that correct?

24 THE COURT: That would be fine.

25 MR. TEITELBAUM: Your Honor, we know about
26 the desire on a number of people and entities' part to

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2 come into this case and intervene. We haven't made a
3 decision on that. We're not going to delay this case
4 over, requiring people to file motions just for the
5 sake of doing that. That is not going to happen in
6 this case. The only concern that we have is that
7 intervention not delay your schedule.

8 THE COURT: In terms of the intervention,
9 are we talking about just as new parties? What are we
10 talking about?

11 MR. TEITELBAUM: New parties I believe,
12 your Honor.

13 MS. MCCARROLL: Yes, your Honor.
14 Children's Health Advocates, who are involved in the
15 matter before Justice York.

16 THE COURT: So we're not talking about
17 amicus. We're talking about joining as --

18 MS. MCCARROLL: I believe all parties
19 received letters, your Honor, from these entities,
20 seeking consent for intervention. And they are and
21 they have said that if consent were not given, they
22 would intend to make a motion.

23 THE COURT: All right. So there is a
24 possibility there will be consent.

25 MR. TEITELBAUM: There is, your Honor.
26 The only thing that I want to have

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1
2 clarified on the record is that if there are
3 intervenors in the case, that they live by the same
4 schedule of answering or moving that the respondents
5 are going to be living by, the present respondents.

6 MS. McCARROLL: I believe that the
7 potential intervenors are in the courtroom today. My
8 understanding from having spoken with them about this
9 intent to move or get consent to intervene is that
10 they would be willing to abide by the same schedule.

11 MR. TEITELBAUM: Okay.

12 THE COURT: All right. That would be my
13 preference as well.

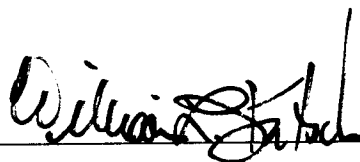
14 Okay. Very good. Thank you.

15 (At this time the proceedings were
16 concluded.)

17 -oOo-

C E R T I F I C A T I O N

18 This is to certify the within is a true and
19 accurate transcript of the proceedings as reported by
20 me.
21

22
23
24 
25 _____

26 William L. Kutsch, SCR