STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE
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In the Matter of the Application of

PARTNERSHIP FOR THE PUBLIC GOOD, INC., *et al.*,

Petitioners-Plaintiffs,

v.

Hon. Michael A. Siragusa, J.C.C.
Index No. 809062/2024

CITY OF BUFFALO,
BYRON BROWN, MAYOR OF THE CITY OF BUFFALO, in his Official Capacity,
and CATHERINE AMDUR, COMMISSIONER OF PERMIT AND INSPECTION SERVICES FOR THE CITY OF BUFFALO, in her Official Capacity,

Respondents-Defendants,

For a Judgment pursuant to §3001 and Articles 9 and 78 of the CPLR.
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MEMORANDUM OF LAW

This memorandum of law is submitted in support of the respondents-defendants (collectively, the Commissioner's) motion to dismiss the verified petition and class action complaint (the petition) pursuant to CPLR 3211(a)(7) and 7806.

THE PETITION

The petitioners-plaintiffs (collectively, the petitioners') first cause of action under CPLR 7803(1) seeks relief in the nature of mandamus to compel the Commissioner to comply with Buffalo's Proactive Rental Inspection Law (PRI Law). The petitioners' second cause of action pursuant to CPLR 3001 seeks a declaratory

judgment that the Commissioner's failure to enforce the PRI Law violates New York's Green Amendment.

STANDARDS OF REVIEW

Mandamus to compel "is an extraordinary remedy" that is available only where the petitioner has demonstrated a "clear legal right" to require a public official "to perform a duty enjoined by law." *All. to End Chickens as Kaporos v. New York City Police Dep't*, 32 N.Y.3d 1091, 1093 (2018) (cleaned up). Mandamus to compel is an appropriate remedy "to enforce the performance of a ministerial duty," but it will not be awarded "to compel an act in respect to which a public officer may exercise judgment or discretion." *Id.*[1] If there is any "reasonable doubt or controversy" about the right to performance, mandamus must be denied. *Ass'n of Surrogate & Supreme Ct. Reps. Within City of New York v. Bartlett*, 40 N.Y.2d 571, 574 (1976).

In assessing a CPLR 3211(a)(7) motion, the court must determine whether the facts alleged in the complaint, taken as true, "fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Where no questions of fact are presented by the controversy, a CPLR 3211(a)(7) motion to dismiss a declaratory judgment action "should be taken as a motion for a declaration in the defendant's

[1] Discretionary acts "involve the exercise of reasoned judgment which could typically produce different acceptable results," whereas a ministerial act "envisions direct adherence to a governing rule or standard with a compulsory result." *Id.*

favor and treated accordingly." *Kaplan v. State*, 147 A.D.3d 1315, 1316 (4th Dept. 2017).

ARGUMENT

POINT I

PETITIONERS FAILED TO PLEAD A COGNIZABLE GREEN AMENDMENT CLAIM

The Commissioner begins by addressing the petitioners' second cause of action under the January 1, 2022 amendment to the State Constitution (Green Amendment), which provides, in its entirety, that: "Each person shall have a right to clean air and water, and a healthful environment." NY Const, art I, §19. Petitioners' second cause of action should be dismissed for two primary reasons.

First, the petition does not allege that the Commissioner engaged in any conduct that violated the Green Amendment. It is not alleged that the Commissioner affirmatively caused any lead paint injuries. Rather, the petition alleges that the Green Amendment was violated as a result of the Commissioner's failure to enforce the PRI Law. *See* Doc. No. 1 at ¶¶ 145-52. Similarly, in *Fresh Air*, the plaintiff alleged that New York City violated the Green Amendment when it "failed to abate" the odors and fugitive emissions from a landfill owned and operated by WM, which was an "abdication of [NYC's] duty under the New York City Charter to ensure the proper disposal of NYC Garbage." *Fresh Air for the Eastside, Inc. v. State*, 2022 WL 18141022, *3 (Sup. Ct., Monroe County, 2022).

On appeal, the Fourth Department held that the complaint failed to state a cause of action against NYC because "the complaint alleges that plaintiff's members have been deprived of clean air and a healthful environment as a result of WM's inadequate operation of the landfill, not through any improper action by the City." 229 A.D.3d 1217, 1219 (4th Dept. 2024). The same can be said here, as the petitioners ask the Court to impose liability on the Commissioner because she failed to abate lead-based paint hazards caused by third persons—landlords who fail to maintain healthy housing—who are the actual wrongdoers.

Second, the plain text of the Green Amendment shows that it is not self-executing. In interpreting a law, the court should attempt to effectuate the intent of the legislature, and the clearest indicator of legislative intent is the language of the law itself. *See People v. Carroll*, 3 N.Y.2d 686, 689 (1958). Here, the Green Amendment—unlike the green amendments passed in other states on which it was modeled—does not expressly require state or local governments to enforce the amendment, or expressly authorize members of the public to enforce the amendment through legal proceedings. *See* Exhibit B hereto; *Fresh Air for the Eastside, Inc. v. State*, Index No. E2022000699 (Sup. Ct., Monroe County) (Doc. Nos. 36, 56).

Also, the New York State Bar Association Task Force recommended that the amendment "provide for any person to enforce the right against the State and its subdivisions through appropriate legal proceedings." 38 Pace L.Rev. 182, 208 (2017). That the amendment omitted the Task Force's recommendation

demonstrates that the legislature did not want to expose state and local governments to liability for Green Amendment violations. If the legislature "had intended to impose new liability" on state and local governments with the passage of the Green Amendment, "it would have said so" in the amendment. *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013).

Additionally, because the phrases "clean air," "clean water," and "healthful environment" are not detailed or defined, the Green Amendment on its face is not self-executing. *See Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 531 (1949) (holding that New York Constitution's civil rights clause was not self-executing because it did not declare what civil rights it would protect). The legislature would later pass enabling statutes to implement the civil rights clause. *See Brown v. State*, 89 N.Y.2d 172, 190 (1996) (citing the enabling statutes).

Since the non-self-executing nature of the Green Amendment is apparent from its face, it is unnecessary to look at the amendment's legislative history. Nonetheless, the legislative history supports the Commissioner's position. For example, the sponsors' memos for the amendment indicate that the fiscal implications for state and local governments are "none." *Fresh Air for the Eastside, Inc. v. State*, Index No. E2022000699 (Sup. Ct., Monroe County) (Doc. Nos. 36, 56).

Additionally, during the Assembly floor debates, the sponsor of the amendment, Assemblyman Steve Englebright, consistently stated that the amendment was not intended to create a private right of action. *Id.* at Doc. No. 38,

PDF page 12 ("This does not create anything new in terms of rights of action. Anyone who wants to use the legal system to bring an action now can do that. No, that's not the purpose"); *Id.* at Doc. No. 38, PDF page 57 ("That is certainly not an intent because we have not spoken to it and we have not attempted in the language of the measure to create a right of action"); *Id.* at Doc. No. 47, PDF page 6 ("No. It really doesn't change -- it doesn't add new powers or give anybody new leverage"); *Id.* at Doc. No. 47, PDF page 27 ("It doesn't pretend to add specifics. It doesn't pretend to be a cause of action"); *Id.* at Doc. No. 55, PDF page 21 ("This does not empower any particular lawsuit"); *see also Id.* at Doc. No. 55, PDF page 63 (Assemblywoman Jo Anne Simon: "I can assure my colleagues that this Constitutional Amendment does not [create a private right of action for environmental damage]").

In sum, the petition does not allege that the Commissioner engaged in any direct conduct that is violating the Green Amendment. But even if the petition did state a valid Green Amendment claim, the legislature did not intend to create a new cause of action for any person to sue the government over an alleged Green Amendment breach.[2]

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[2] While state constitutional provisions are presumptively "self-executing," in *Fresh Air*, supra, the Fourth Department declined to consider the issue of whether the Green Amendment is self-executing or requires enabling legislation to be judicially enforceable, a question that had been briefed by the parties. The Commissioner's position is that the legislature's intent was clear—the amendment is not self-executing.

POINT II

THE EXTRAORDINARY REMEDY OF MANDAMUS TO COMPEL SHOULD BE DENIED

Initially, contrary to petitioners' contention, the PRI Law does not require "annual" inspections. The PRI Law requires the Commissioner to inspect a rental unit "that is the subject of an application for a license issued pursuant to this Chapter." Buffalo Code §264-8. Under the PRI Law, "licenses are represented by certificates." *Id.* §264-2. A "certificate of rental compliance" (CRC) issued pursuant to the PRI Law expires three years after its issuance. *Id.* §264-21. Therefore, the PRI Law requires the Commissioner to make an inspection once every three years, not annually.[3]

Furthermore, where, as here, "a public officer is required to perform an act within a specified time, it will be considered as directory only, unless the nature of the act to be performed or the language used by the Legislature shows that the designation of the time was intended as a limitation of the power of the officer." *Sullivan v. Siebert*, 70 A.D.2d 975 (3rd Dept. 1979) (denying mandamus to compel

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[3] Petitioners argue that because rental unit registrations must be renewed yearly, the Commissioner is "obligated to inspect on an annual, not triannual, basis." Doc. No. 33 at PDF page 14. That is incorrect. A "rental dwelling unit registration" is not a "certificate." In fact, the prior law required a "rental dwelling unit registration *certificate*." Exhibit C hereto, §264-3(A) (emphasis added). In contrast, the PRI Law removed the word "certificate" in the same section of the law, now renumbered §264-16(A). *See* Doc. No. 4 at PDF page 15.

where an Assembly member sought to compel heads of executive departments to make timely annual reports to the legislature as required by statute).

Thus, here, even assuming, arguendo, that the Commissioner has a nondiscretionary ministerial duty to perform inspections, the time period in which to do so is directory, not mandatory, and petitioners therefore have no "clear legal right" to any relief. To be sure, the petition alleges that the Commissioner has failed to act in a timely manner—not that the Commissioner has totally abdicated her responsibility. *See* Doc. No. 1 at ¶65. In this sense, the petitioners are seeking to require the Commissioner to act in a certain way, and it well settled that mandamus "may not direct *how* the officer shall perform" her duty. *Kaporos*, 32 N.Y.3d at 1093 (cleaned up) (emphasis added).

More fundamentally, the spirit and purpose of the PRI Law is to prevent lead-based paint poisoning through code enforcement, including the provision for inspections, an enforcement-based measure. In essence, the petition seeks to compel the Commissioner to take enforcement action against herself, but "the court cannot impose mandamus relief to compel an act in respect to which the administrative agency may exercise judgment or discretion, such as an enforcement proceeding." *Fresh Air*, 229 A.D.3d at 1220 (cleaned up). This is because

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, unless the administrative agency has consciously and expressly adopted a general policy that is so extreme as to amount to an

> abdication of its statutory responsibilities, the responsibility for balancing those factors is lodged in a network of executive officials, administrative agencies and local legislative bodies, and private parties—however well-intentioned—may not interpose themselves and the courts between the agencies and the difficult policy determinations they must make regarding whether and when to take regulatory action.

Id. at 1219 (cleaned up). Here, it is evident from the record that the Commissioner is not refusing to perform inspections. *See* Exhibit A hereto. Her decision-making ability has been affected by a number of factors, and the timely completion of inspections depends on discretionary determinations made by the Commissioner. *Id.*

Further, although the plaintiff in *Fresh Air* sought to compel the state to take enforcement actions against a private party (and not itself), that distinction does not affect the outcome here. For example, in *Cmty. Action Against Lead Poisoning v. Lyons*, the petitioners, in order to protect children from lead poisoning, brought a mandamus proceeding to compel Albany County officials to, among other things, "inspect and cause to be inspected" all dwelling units in designated census tracts for lead-based paint hazards, as prescribed by law. 43 A.D.2d 201 (3rd Dept. 1974), reversing 72 Misc.2d 662 (Sup. Ct., Albany County, 1973). Without "minimizing the tremendous problem of lead poisoning and its terrible threat to the well-being of young children," the Third Department dismissed the petition on the ground that mandamus did not lie. Said the court:

> That these acts, and each of them individually, which petitioners seek to compel [the county] to perform . . . involve the exercise of a great deal of judgment and discretion is obvious.

Id. at 43 A.D.2d at 203. The court also observed that mandamus is not available where, as here, the petitioner seeks "to compel a general course of official conduct or a long series of continuous acts," the performance of which it is impossible for a court to oversee. *Id.* at 202-03. The Court of Appeals affirmed *Lyons* on the Appellate Division opinion below. 36 N.Y.2d 686 (1975).[4]

Here, as in *Fresh Air* and *Lyons*, the petitioners raise questions of judgment, discretion and allocation of resources and priorities in the enforcement of eliminating public health hazards, questions that are inappropriate for resolution in the judicial branch of government. The inappropriateness of this legal proceeding is further highlighted by the large number of public agencies and local partners directly concerned and involved in the remediation of lead-based paint hazards in housing. *See generally Abrams v. New York City Transit Auth.*, 39 N.Y.2d 990, 992 (1976) (standing for the proposition that the court should not substitute its judicial oversight "for the discretionary management of public business by public officials").

Finally, while petitioners indicate that the Commissioner has failed to promulgate an application for a CRC, a mandamus to compel proceeding must be

[4] Also, notably, the Fourth Department in *Fresh Air* cited *Lyons* as authority for the rule that the court "cannot impose mandamus relief" to compel an administrative agency to take enforcement action. *Fresh Air*, 229 A.D.3d at 1220.

preceded by a demand and refusal to perform. *See Hoffmann v. New York State Indep. Redistricting Comm'n*, 41 N.Y.3d 341, 365 (2023) (it is "necessary to make a demand and await a refusal before bringing a proceeding in the nature of mandamus . . ."). Here, the organizational petitioners demanded the Commissioner to provide "documentation that the City is fully complying with the rental inspections required by the PRI Law." Doc. No. 8 at 3. Since no demand was made upon the Commissioner to create an application for a CRC, the petitioners are precluded from instituting this mandamus proceeding insofar as it seeks such relief.

In sum, the petitioners have not demonstrated that they have a "clear legal right" to the relief demanded or a corresponding "nondiscretionary duty" on the Commissioner's part. Therefore, petitioners are not entitled to the extraordinary remedy of mandamus to compel.

CONCLUSION

The Commissioner's motion should be granted and the petition should be dismissed in its entirety.

Dated: Buffalo, New York
September 16, 2024

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify that the foregoing contains approximately 2,537 words as calculated by Microsoft Word and complies with court rule 22 NYCRR 202.8-b.

s/David M. Lee