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. 809862/2024

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 will reply to the arguments raised by petitioners in opposition to the Commissioner's motion to dismiss.

I.

Petitioners failed to plead a cognizable Green Amendment claim. Petitioners argue that because the amendment is silent on whether it can be enforced in court, that means it can be. The opposite is true. Constitutional provisions are presumptively self-executing where the right at issue "is evidenced by the insertion of operational details." *People v. Carroll*, 3 N.Y.2d 686, 691 (1958). Because the Green

Amendment has no operational details or definitions at all, "the presumption [is] that [its provisions] [are] merely general directions and that legislation [is] necessary to effectuate them." *Id.*

While petitioners argue that New York courts have defined the meaning of such terms as "cruel and unusual" and "equal protection," those terms are embodied in fundamental rights under U.S. Constitution. The courts therefore are able to draw upon a well-developed body of case law for guidance when applying those principles. Conversely, here, the "right to clean air . . . and a healthful environment" has no historical analogue or objective standards under which courts could apply the right in a principled and consistent manner.

While it is not surprising that petitioners want this Court to ignore the amendment's legislative history, legislative history is important to identify intent. And, contrary to petitioners' contention, there is unequivocal evidence in the legislative record indicating that the amendment was not intended to be self-executing. Doc. No. 41 at 5-6. Indeed, the petitioners rely on excerpts that are not expressions of intent, but rather conclusory remarks of opinion as to how the amendment might be interpreted by courts.

Petitioners argue that *Fresh Air* does not control on the present facts because the plaintiff in *Fresh Air* did not allege that the city violated any duty owed to the public. That is incorrect. *Fresh Air* involved gas emissions emanating from a privately owned landfill. The plaintiff in *Fresh Air* argued on appeal that the city

"has a duty to abate the constitutional violations pursuant to its Charter" and that the city "is still liable for the violation" even if it was "not the direct cause." 2024 WL 2678530, at *5, 42. Likewise, here, the petitioners allege that the City's duty to act arises from the PRI Law and that the City is legally responsible for lead-based paint violations caused by private landlords. Just as the city in *Fresh Air* did not cause the emissions at the landfill, the City has not caused the hazardous lead paint conditions at rental properties. Consequently, just as the Fourth Department dismissed plaintiff's complaint against the city in *Fresh Air*, the same result should occur here.

The petitioners' Green Amendment claim should be dismissed because the amendment is non-self-executing and the petitioners fail to allege action taken by the City in violation of their Green Amendment rights.

II.

Mandamus to compel should be denied. *See All. to End Chickens as Kaporos v. New York City Police Dep't*, 32 N.Y.3d 1091, 1093 (2018) ("mandamus may only issue to compel a public officer to execute a legal duty; it may not direct how the officer shall perform that duty") (cleaned up). Here, the enforcement of the PRI Law involves some exercise of discretion, and mandamus is not the appropriate vehicle to compel a particular outcome, i.e., inspections of 36,000 rental units at least once every three years. *See* Petition, Doc. No. 1 at ¶137.

The petitioners cite *Nat. Res. Def. Council, Inc. v. New York City Dep't of Sanitation*, 83 N.Y.2d 215 (1994). There, the record established that the city

department of sanitation "purposefully failed" to comply with various provisions of a local law that required the department to implement a citywide recycling program. *Id.* at 219. Here, the Commissioner is not refusing to inspect properties covered by the PRI Law. The outcome of this case could be different if no inspections were ever performed. But that is not what is happening here.

Furthermore, while petitioners allege delay in performance, a "time frame is not ministerial but discretionary and mandamus to compel will generally not lie" (*Arnot-Ogden Med. Ctr. v. Chassin*, 229 A.D.2d 833, 836 (1st Dept. 1996)), and this rule is to be followed particularly "where the acts are to be done for the benefit of the public." Statutes §172 (comment).

Petitioners argue that they do not seek to compel the Commissioner to take enforcement action against herself. But that is precisely what they are doing, and it is well settled that mandamus may not be granted to compel the enforcement of laws. Moreover, mandamus is particularly inappropriate to compel a government official to engage in an ongoing course of regulatory enforcement. Doc. No. 41, MOL at 8-10.

The Commissioner certainly did not concede that the petition does not seek to enforce the PRI Law against landlords. There is no doubt that the central objective of this proceeding is to prevent lead poisoning by removing lead paint hazards from rental properties. An inspection itself will not do that. Ultimately, the landlord, not the Commissioner, has the responsibility "to fully remediate" any lead

hazards detected during an inspection. City Code §264-10(D). Ultimately, the petition seeks to compel the Commissioner to enforce lead violations against landlords, and mandamus is typically not available to compel administrative enforcement action against a private entity. The petition draws attention to inspections as a means to an end - the end being landlord remediation of lead-based paint hazards in rental properties in Buffalo.

Petitioners argue that *Lyons*[1] is different from our case because the laws at issue in *Lyons* did not require state officials to inspect an area of the city for lead poisoning hazards. To the contrary, the trial court decision in *Lyons* laid out the laws that required state officials to institute certain procedures for the control of lead poisoning, including an inspection program. *See Cmty. Action Against Lead Poisoning v. Lyons*, 72 Misc.2d 662 (Sup. Ct., Albany County, 1973). The Appellate Division, in its opinion, recognized "a relevant statutory duty" (43 A.D.2d at 203) but ultimately denied mandamus because, as here, the required acts involved "a general course of official conduct or a long series of continuous acts" and "the exercise of a great deal of judgment and discretion." *Id.* Because petitioners do not - and cannot - distinguish *Lyons*, mandamus should be denied.

Petitioners argue that lack of resources is not a defense to a mandamus proceeding, citing *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984). The petitioners in

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[1] *Cmty. Action Against Lead Poisoning v. Lyons*, 43 A.D.2d 201 (3rd Dept. 1974), affirmed 36 N.Y.2d 686 (1975).

Klostermann were patients at state psychiatric hospitals who sought mandamus relief compelling the responsible state agency to prepare written aftercare plans pursuant to state law before the patient's release into the community. The court found that the allocation of resources defense was inapplicable since it was well settled that "the continuing failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities." *Id.* at 537 (cleaned up). Here, the Commissioner has not failed to abate lead hazards, as landlords, not the government, bear the ultimate responsibility for compliance. Thus, our situation is closer to that in *Abrams v. New York City Transit Auth.*, which stands for the principle of proper judicial restraint when the creation of a government program entails "questions of judgment, discretion, allocation of resources and priorities." 39 N.Y.2d 990, 992 (1976).

Finally, the Commissioner is not refusing to promulgate an application for a certificate of rental compliance. However, the petitioners' pre-suit demand letter did not refer to this issue.

For all those reasons, the petitioners are not entitled to the extraordinary remedy of mandamus to compel.

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

Dated: Buffalo, New York
October 13, 2024

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify that the foregoing contains approximately 1,310 words as calculated by Microsoft Word and complies with court rule 22 NYCRR 202.8-b.

s/David M. Lee