SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: EDMEAD Justice PART 35

THE CITY-WIDE COUNCIL OF PRESIDENTS, ET AL.
-v-
THE N.Y.C. HOUSING AUTHORITY, ET AL.

INDEX NO. 100283/18
MOTION DATE 4/17/18
MOTION SEQ. NO. 02

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____
Answering Affidavits — Exhibits ____ No(s). ____
Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

Pursuant to the accompanying memorandum decision, it is

ORDERED, ADJUDGED and DIRECTED that NYCHA, within 90 days, compile a list of NYCHA apartments where a child under the age of 8 resides and which (1) were required to receive annual lead inspections at any point after 2012; (2) received an open, unresolved lead-related tenant complaint; or (3) received a lead-related complaint that was closed out by NYCHA within the past three years; and NYCHA is further required to conduct inspections on those apartments within 90 days;

and it is further

ORDERERED that City Council members Alicka Ampry-Samuel, Laurie A. Cumbo, and Ritchie J. Torres shall file, within 30 days, an *amici curiae* brief; NYCHA has 20 days from filing to respond to the brief; and it is further

ORDERED that all parties shall appear for a conference on Wednesday, August 8, 2018 at 10:00 a.m.; and it is further

ORDERED that counsel for petitioners shall serve a copy of this order along with notice of entry upon all parties within 5 days of entry.

Dated: 4/23/18

HON. CAROL R. EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of:

THE CITY-WIDE COUNCIL OF PRESIDENTS and AT-RISK COMMUNIY SERVICES INC.

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

–against–

THE NEW YORK CITY HOUSING AUTHORITY and SHOLA OLATOYE, as Chair of the New York City Housing Authority,

Respondents.

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Index No. 100283/18
Motion Seq. No. 002

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:[1]

In an Article 78 Petition, petitioners The City-Wide Council of Presidents and At-Risk Community Services Inc. move by order to show cause for a preliminary injunction/mandamus requiring respondents The New York City Housing Authority (NYCHA) and Shola Olatoye (Olatoye), as Chair of NYCHA,[2] to compile a list of apartments where a child under the age of 8 resides and which (1) were required to receive annual lead inspections at any point after 2012; (2) received an open, unresolved lead-related tenant complaint; or (3) received a lead-related complaint that was closed out by NYCHA within the past three years; and requiring NYCHA to conduct inspections on those apartments within 90 days.

[1] The court thanks John Eckert, Temple University School of Law, Class of 2006, and Daniel Palmisano, Rutgers School of Law, Class of 2013, for their assistance with this Decision.

[2] Since this petition was filed, Olatoye has announced that she is resigning her position at NYCHA.

BACKGROUND

In November 2017, the New York City Department of Investigations (DOI), issued a report (the DOI report) following an investigation into whether NYCHA was fulfilling its obligations to inspect for and remediate lead conditions within NYCHA apartments. The DOI report concluded that NYCHA "violated city and federal laws by failing to conduct mandatory safety inspections for lead paint" (DOI report, at 1). Additionally, the DOI report found that, since 2013, NYCHA has "falsely certified to the United States Department of Housing and Urban Development (HUD) that it was in compliance with federal law" (*id.*). Moreover, the report found that Olatoye, NYCHA's former Chair & CEO, "knew that NYCHA was out of compliance both with city and federal lead laws when she submitted a false certification to HUD" (*id.*).

The violation of federal law referred to in the DOI report involves 24 CFR 35.1355 (a), a US Department of Housing and Urban Development (HUD) regulation entitled "Ongoing lead-based paint maintenance and reevaluation activities; Maintenance," which requires NYCHA, and all public housing authorities, to conduct annual visual assessments of apartments where lead-based paint is present in public housing units.

Recently, in another action arising from NYCHA's failure to comply with its obligations related to lead testing brought in federal court by different plaintiffs, Judge Pauley of the Southern District of New York describe found these failures to be tantamount to "bureaucratic malfeasance" and noted that "NYCHA's numerous problems are well-documented, and this case offers a paradigm of the agency's abject failure to ensure the safety and well-being of its tenants" (*Paige v New York City Housing Authority*, 2018 WL 1226024 at 5 [SDNY 2018]). However, Judge Pauley rejected the plaintiffs' application for a preliminary injunction because plaintiffs

were not likely to succeed on the claims on which the plaintiffs based their application for injunctive relief: the Fair Housing Act and Constitutional Due Process claims (*id.* at 3-5).

Petitioners here are a coalition of NYCHA tenants and tenant-rights advocates. Instead of the Fair Housing Act and Constitutional Due Process, they allege that NYCHA has violated the New York City Childhood Lead Poisoning Prevention Act (Local Law 1 of 2004) New York City Local Law 1, as well as the federal Lead-Based Paint Poisoning Prevention Act (the LBPPPA).

The Petition was filed on March 22, 2018 and seeks appointment of an independent monitor for NYCHA to address alleged systemic failures relating to toxic lead paint, provision of heat and hot water during winter months, sharing economic opportunity with its tenants, and including tenants in important policy-making decisions. The present application for a preliminary injunction relates solely to NYCHA's obligation to investigate and remediate toxic lead conditions.

Local Law 1 requires that landlords annually inspect all apartments built before 1960 when the apartment houses children under six, as well as all apartments built between 1960 and 1978 where the "owner has actual knowledge of the presence of lead-based paint" (Administrative Code § 27-2056.4). The LBPPA provides, among other things, for periodic risk assessment in accordance with a schedule determined by HUD. As chronicled in the DOI report, NYCHA failed to meet HUD's requirements, despite its certifications to the contrary.

The court held oral argument on petitioners' application for a preliminary injunction seeking an order on April 17, 2018.[3]

[3] City Council members Alicka Ampry-Samuel, Laurie A. Cumbo, and Ritchie J. Torres filed an application, on April 16, 2018, seeking leave to file a brief, as *amici curiae*, supporting petitioners. The court granted that relief on an interim basis at oral argument, to the extent that counsel for Ampry-Samuel, Cumbo, and Torres was permitted to

DISCUSSION

CPLR 6301, "Grounds for preliminary injunction and temporary restraining order" provides that

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had"

The Court of Appeals has distilled the standard for a preliminary injunction to a showing of: "(1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities" cut in favor of the moving party *(J.A. Preston Corp. v. Fabrication Enterprises Inc.*, 68 NY2d 397, 406 [1986]).

A. Likelihood of Success on the Merits

NYCHA argues that petitioners cannot demonstrate a likelihood of success on the merits because they lack "standing" and this Article 78 petition is improper. That is, NYCHA contend that: (1) petitioners cannot enjoin a governmental agency to act without basing their application on the violation of a law which confers a private right of action; and that (2) the LBPPPA and Local Law 1 do not confer any private rights of actions. Petitioners contest both points.

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participate. Subsequently, NYCHA stipulated to allowing the counsel-members to submit a brief and requested an opportunity to respond.

Standing to Request Injunctive Relief Under Article 78

Petitioners argue that, under Article 78 of the CPLR, courts may fashion injunctive relief against a governmental agency even where no violation of a law conferring a private right of action has been alleged. NYCHA, on the other hand, insists that the opposite is true.

Article 78 proceedings may be brought against a governmental agency when a petitioner brings a question as to "whether the body or officer failed to perform a duty enjoined upon it by law" (CPLR § 7803 [1]). Here, the testing and remediation at issue would plainly represent a duty enjoined upon NYCHA by law – specifically the LBPPPA and Local Law 1. Thus, the plain statutory language would militate in favor of allowing the petitioners to bring this special proceeding to obtain mandamus against NYCHA without regard to a private right of action. Indeed, courts have long upheld the principle that whether a governmental agency "failed to perform a duty enjoined upon it by law is ... reviewable by article 78 proceedings" (*Matter of Albany Med. Ctr. Hosp. v Breslin*, 47 Misc 2d 208, 210 [Sup Ct, Albany Ct 1965]). CPLR § 7801 specifically notes that it was replacing the former system of obtaining "[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition."

Petitioners, in short, may seek the injunctive relief of mandamus through an Article 78 proceeding. "It is hornbook law that a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists" (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841 [1st Dept 2005]). Pursuant to CPLR 7803 (1), a petitioner "must have a clear legal right to the relief demanded and there must be a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]).

At oral argument, NYCHA declined to answer whether the testing and remediation sought by preliminary injunction is ministerial, arguing that the court need not reach that question because petitioners do not have a private right of action under either Local Law 1 or the LBPPPA (tr at 80-81). It is, however, plain that NYCHA has a ministerial duty under both laws to undertake the testing and remediation sought here. A ministerial duty, of course, arises from "the execution of the law,"[4] and this comports with the Court of Appeals' determination that an order of mandamus "requires a showing of a clear legal right to the relief sought" (*Matter of Association of Surrogates & Supreme Ct. Reporters within City of N.Y. v Bartlett*, 40 NY2d 571, 574 [1976]).

Here, NYCHA's duty to perform lead testing and remediation clearly derives from the LBPPPA and Local Law 1. In short, Congress and the City Council placed the duty on NYCHA to protect its residents, particularly its youngest residents, through the lead testing NYCHA failed to do, despite falsely certifying that the work was done. Similarly, those laws place a ministerial duty on NYCHA to remediate any lead hazards revealed by testing. Thus, half of the formulation in *Matter of Scherbyn* is satisfied.

Along with a duty on the part of an administrative agency, *Matter of Scherbyn* requires a showing that petitioners have a "clear legal right" (77 NY2d at 757). This is separate question from whether petitioners have a private right of action. Indeed, the Appellate Division has held that the LBPPPA affords legal right to tenants, but not a private right of action (*Gibbs v Paine*, 276 AD2d 743, 743 [2d Dept 2000]). In *Gibbs*, where plaintiffs alleged lead poisoning in non-NYCHA housing for which they received section 8 housing subsidies,[5] the Court held that the

[4] The Oxford English dictionary defines ministerial, in its legal sense, as "[r]elating to or entrusted with the execution of the law or the commands of a superior; relating to or having authority delegated from above" (http://www.oed.com/view/Entry/118880?redirectedFrom=ministerial#eid, [accessed April 20, 2018]).
[5] In *Gibbs*, NYCHA was the section 8 administrator, but not the property owner, as is the case here.

LBPPPA "and the relevant implementing regulations ... create a Federal right in favor of the plaintiffs" (*id.* at 744). While there does not appear to be any caselaw similarly acknowledging that Local Law 1 provides petitioners with a right, it clearly provides petitioners with a right to certain safeguards from the dangers of lead poisoning. There would be no principled way to find that the LBPPPA provides tenants with a right, but Local 1 does not.

Thus, as the LBPPPA and Labor Law 1 place a duty on NYCHA and, conversely, confer a right to petitioners, the requirements of *Matter of Scherbyn* are satisfied. Accordingly, petitioners may bring an application for mandamus. Petitioners argue that there is nothing remarkable, procedurally, about what they are asking the court to do. Indeed, the Court of Appeals, as petitioners point out, has explicitly held that courts may issue preliminary injunctions against governmental agencies where those agencies have failed to carry out their duties (*see McCain v Koch,* 70 NY2d 109 [1987]).

McCain involved an application for a preliminary injunction against the City's Departments of Social Services and Housing, Preservation and Development to provide emerging housing that satisfied certain minimum standards for homeless families. The Court of Appeals held that "[t]here is no question that in a proper case Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct by municipal agencies" (*id.* at 116). The court also found that certain regulations, which were promulgated during the pendency of the suit, were binding on the agencies, and that, as a result, the injunction entered by the trial court was valid (*id.* at 120-121).

Similarly, in *Doe v Dinkins*, the Appellate Division upheld, in another case involving homeless services, "a preliminary injunction directing the municipal defendants to reduce the population at two homeless shelters to 200 beds each, to cease the placement of individuals in

certain areas of one of the shelters and to cure existing fire code violations" (192 AD2d 270, 271 [1st Dept 1993]). The Court reasoned that the City had violated various subdivisions of 18 NYCRR 491.3 and stressed that "[h]uman safety is at issue" (*id.* at 271-275, 275). The Court did not consider whether 18 NYCRR 491.3 afforded petitioners a private right of action.

That *McCain* and *Doe* were not Article 78 petitions does not militate against the court's authority to issue a preliminary injunction requiring NYCHA to act. If trial courts have the authority to issue preliminary injunctions requiring action from governmental agencies in plenary actions, then, *a fortiori*, trial courts have that power in the context of Article 78 petitions, the device the Legislature fashioned for determining whether such orders of mandamus are appropriate.

NYCHA builds their argument that petitioners lack standing from analysis of cases arising out of 42 USC § 1983 (section 1983), such as *Gonzaga University v Doe* (536 US 273). Moving from section analysis to Article 78 analysis, NYCHA cites to *Delgado v New York City Hous. Auth.* (66 AD3d 607 [1st Dept 2009]). In *Delgado*, the First Department held that the petitioners lacked standing to bring an Article 78 proceeding against NYCHA for enforcement of certain provisions of the City's Housing Maintenance Code that require apartments to be painted every three years (Administrative Code § 27-2013 [a] [2]; [b] [2]), and to enjoin NYCHA from carrying out a plan to eliminate paint supervisors positions from NYCHA's apartment painting procedures.

Delgado held that "[o]nly the Commissioner of the New York City Department of Housing Preservation and Development is authorized to seek such relief or other sanctions and remedies for violations of the Housing Maintenance Code. Therefore, petitioners do not have a

private right of action for the injunctive and declaratory relief sought" (66 AD3d at 608 [internal citation omitted]).

Respondents also cite to *Hill v Giuliani* (272 AD2d 157 [1st Dept 2000]) and *Matter of Subway Surface Supervisors Assn. v New York City Tr. Auth.* (22 NY3d 1182 [2014]). In *Hill*, the First Department upheld dismissal of an action brought as a claim for declaratory and injunctive relief, which was, "essentially a CPLR article 78 proceeding in the nature of a mandamus to compel, challenging ... the budget allocations made by the City of New York for the Health and Hospital Corporation in each of the several fiscal years" (*id.* at 157). The Court reasoned that the action violated the statute of limitations for article 78 petitions (*id.*). As an alternative bases for dismissal, the Court held that "no private right action exists" under the City's Health and Hospitals Corporation Act, reasoning that:

> "[t]o hold otherwise would neither promote the purpose of that statute to establish an independent corporation to manage New York City's health facilities nor be consistent with a legislative scheme under which the corporation is to submit a program budget to the City in time for inclusion in the Mayor's budget, at least where, as here, there is no showing that the corporation ever submitted to the City a program budget that was rejected"

(*id.*).

Subway Surface Supervisors involved a claim by a labor union that its members were being paid too little under Civil Service Law § 115. The Court of Appeals noted that courts "have routinely interpreted section 115 ... as merely enunciating a policy, conferring no jurisdiction on a court to enforce what is simply that—a statement of policy" (22 NY3d 1184). Thus, the Court held that the article 78 petition should be dismissed, as "[i]t is clear that section 115 is a preamble to Civil Service Law article VIII, and no private right of action flows from it. Article 14 of the Civil Service Law (the Taylor Law) provides the mechanism for represented employees to challenge alleged wage disparities between classifications" (*id.* 1185).

The distinction between *Delgado*, *Subway Surface Supervisors*, as well as other cases cited by NYCHA, such as *Matter of Home Care Assn. of N.Y. State v Bane* (3d Dept 1995 [involving calculation of reimbursement rates]), and cases where injunctions were issued against City agencies, like *McCain* and *Dinkins,*[6] is that the former set involve, primarily, financial and employment matters, whereas the latter set involve matters of public safety. Local Law 1 does not, as the provision in *Subway Surface Supervisors*, merely enunciate policy. It requires action. As in *Dinkins*, petitioner makes an uncontroverted showing that NYCHA violated a law wherein "human safety is at issue." This is well within the ambit of an application for mandamus. Accordingly, *Delgado* should not be extended to cover Local Law 1, and petitioners should be able an article 78 petition for mandamus without a showing that Local Law 1 and the LBPPPA create a private right of action.

For the sake of completeness, the court will evaluate whether the LBPPPA and Local Law 1 create private rights of action.

The LBPPPA

In a negligence case where plaintiffs, NYCHA tenants, sought money damages for lead poisoning, the Appellate Division, Second Department, held that while LBPPPA created a right in favor of plaintiffs, it did not create a private remedy for that right, as the statute "and its regulatory provisions, which place primary responsibility on [HUD] to ensure that property owners and public housing authorities comply with LPPPA" (*Gibbs v Paine*, 276 AD2d 743, 743 [2d Dept 2000]).

Federal Courts have come to differing conclusions as to whether the LBPPPA confers a private right of action to tenants. In *Johnson v City of Detroit*, an action brought under 42 U.S.C.

[6] NYCHA is incorrect that *Dinkins* only involved obligations under the New York constitution – as it involved violations of the NYCRR.

§ 1983 (section 1983), the Sixth Circuit held that the "LBPPPA does not confer individual federal rights," reasoning that the "statute does not evince a clear congressional intent to create an enforceable federal right" (446 F3d 614, 625 [6th Cir 2006]). In arriving at its conclusion, the Sixth Circuit relied on the Supreme Court's decision in *Gonzaga Univ. v Doe*, which held that the Family Education Rights and Privacy Act of 1974 (FERPA) did not create a private right of action enforceable through section 1983 (536 US 273 [2002]).

The Third Circuit, on the other hand, has held, in *Davis v Philadelphia Hous. Auth*, that the LBPPA does confer a private right of action that was enforceable through section 1983 (121 F3d 92 [3d Cir 1997]). While Davis was decided before *Johnson* and *Gonzaga*, the Third Circuit has not revisited the subject since those decisions were filed (*but see Reynolds v PBG Enters*, 2011 US Dist LEXIS 72448 [USDC, Eastern District of Pennsylvania 2011] [applying the reasoning of *Johnson* and holding that the LBPPPA does not confer a private right of action]).

Here, as *Johnson* is the last time a federal circuit court of appeals has opined on this subject, and since no other federal court of appeals, or the Supreme Court, has entertained the issue since it was issued more than ten years ago, the court accepts its holding that the LBPPPA does not confer a private right of action that can be asserted through a section 1983 action in federal court. This conclusion accords with the decisions of district courts, which accept the holding of *Johnson*, instead of the holding of *Davis*, even within the Third Circuit's territory (*see Reynolds*, 2011 US Dist LEXIS 72448); it also accords with the Appellate Division's holding in *Gibbs*. As such, LBPPA does not create a private right of action.

Local Law 1

The question of whether Local Law 1 creates a private right of action for tenants is a question of first impression. In *Gibbs*, the Second Department ruled out a private right action for

the LBPPPA because Congress ceded enforcement of the law to HUD. The Court, therefore, concluded that Congress created a right with no private remedy to enforce that right (276 AD2d at 744).

In contrast to the LBPPPA, enforcement of Local Law 1 has not been exclusively turned over to a governmental agency. Instead, New York courts have allowed plaintiffs to pursue personal injury actions that allege violations of Local Law 1 (*see Mendoza v Mortlen Realty Corp.*, 88 AD3d 611 [1st Dept 2011] [finding violations of Local Law 1 and granting plaintiff partial summary judgment as to liability]); *Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327 [1st Dept 2008] [granting defendants summary judgment in a negligence action based on a violation of Local Law 1 where the subject apartment was not in New York City, and, thus, not subject to Local Law 1]; *Duarte v Community Realty Corp.*, 42 AD3d 480 [2007] [granting defendants summary judgment where defendants made an unrebutted showing that they did not have notice that a child younger than six resided in the subject apartment]).

The Court of Appeals noted, in *Uhr v East Greenbush Cent. School Dist.*, that "[t]he availability of a private right of action--as opposed to one grounded in common-law negligence--is not a new concept" (94 NY2d 32, 38 [1999]). "When a statute itself expressly authorizes a private right of action, there is no need for further analysis," but [w]hen a statute is silent ... courts have had to determine whether a private right of action may be fairly implied" (*id.*). The Court of Appeals has laid out a three-pronged analysis for whether a private right of action exists: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*id.* [internal quotation marks and citation omitted]).

Here, as to the first prong, petitioners are clearly members of the class for whom Local Law 1 was enacted to protect, as they are tenants who may be affected by lead paint. Second, recognition of a private right of action would promote the legislative purpose by offering an enforcement means to augment what has proven to be insufficient oversight by the City. Indeed, the courts have already, essentially, visaged a private right of action through cases like *Mendoza* and *Duarte*. As to the third prong, it would distort the legislative scheme of Local Law 1 to hold that tenants can recover monetary damages for an injury caused by a violation of the law, but that violation of the law cannot serve as a predicate to injunctive relief through an Article 78 proceeding. The intent of Local Law 1 is to prevent lead poisonings, and to hold otherwise would subvert the intent of the law.

Accordingly, Local Law 1 provides an implied private right of action. Thus, petitioners have standing to bring an action for mandamus against NYCHA whether or not a violation of a law creating a private right of action is required.

B. Irreparable Harm

This factor cuts for petitioners. The Court of Appeals has recognized the dangers of lead: "Lead is a poison that affects virtually every system in the body and is particularly harmful to brain and nervous system development .... Even low levels of blood lead have been linked to diminished intelligence, decreased stature or growth and loss of hearing acuity" (*Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 342-343 [2003]).

While NYCHA argues that it has already undertaken the necessary steps to remedy the problem, at oral argument NYCHA conceded that not all of the apartments within the scope of petitioners' application have been tested. Moreover, NYCHA waived its right to a hearing at which the steps it has taken could have been more closely evaluated. In short, the factor

irreparable harm plainly cuts in favor of petitioners because the threat of lead poisoning to NYCHA tenants is substantial in the absence of further testing and remediation.

C. Balancing of the Equities

NYCHA contends that the equities balance in its favor, as petitioners impermissibly seek ultimate relief in an application for a preliminary injunction. This is not the case, as the Petition also seeks relief not addressed in the preliminary injunction, such as: the appointment of a monitor, functional heat and hot water, employment and economic opportunities pursuant to the Housing and Urban Development Act of 1968, as well as meaningful involvement in all decisions affecting NYCHA operations under 24 CFR § 964 and 42 USC § 1437 (c).

The preliminary injunction is appropriate given the emergent nature of possible toxic lead conditions that may have gone undiscovered through NYCHA's failure to live up to its obligations, as well as NYCHA's false statements about that failure. Moreover, NYCHA has waived its right to a hearing that would allow the court to reach the ultimate issue. Nor is the forthcoming *amici curiae* brief from the three City Council members likely to change the outcome, as they are supportive of petitioners' position.

NYCHA's assertion that petitioners merely mirror the relief "already being addressed" by the United States Department of Justice, HUD, the DOI, the City Council is fatally flawed. None of these entities has expressly directed immediate inspection, identification, and remediation of the affected NYCHA units.

In a startling display of sophistry, NYCHA posits that it can be trusted to expeditiously complete the requisite inspections and remediations. This rings hollow in light of NYCHA's record of making false statements about its compliance with its lead paint inspection requirements. That NYCHA has brought stellar stalwarts on board -- Stanley Brezenoff, as

Interim Chairman and Edna Wells Handy, as acting Chief Compliance Officer -- is reason to cheer. These are steps in the right direction. However, it strains credulity to expect that NYCHA's apparent systemic malaise is susceptible to a quick fix, even by these two "get it done" champions.

NYCHA's residents deserve and have a right to immediate redress of the lead paint morass. Simply, the equities balance in favor to the tenants whose safety is at risk because NYCHA's failures to comply with laws designed to protect them.

CONCLUSION

Due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of petitioners and against respondent New York City Housing Authority (NYCHA) and that petitioners are entitled to a preliminary injunction on the ground that NYCHA is, on an ongoing basis, committing an omission that violates petitioners' rights respecting the subject matter of this Petition and tending to render judgment ineffectual, as set forth above, petitioners are entitled to a judgment requiring NYCHA to act, which, if not done during the pendency of the Petition, would produce injury to the petitioners, it is

ORDERED, ADJUDGED and DIRECTED that NYCHA, within 90 days, compile a list of NYCHA apartments where a child under the age of 8 resides and which (1) were required to receive annual lead inspections at any point after 2012; (2) received an open, unresolved lead-related tenant complaint; or (3) received a lead-related complaint that was closed out by NYCHA within the past three years; and NYCHA is further required to conduct inspections on those apartments within 90 days;

and it is further

ORDERERED that City Council members Alicka Ampry-Samuel, Laurie A. Cumbo, and Ritchie J. Torres shall file, within 30 days, an *amici curiae* brief; NYCHA has 20 days from filing to respond to the brief; and it is further

ORDERED that all parties shall appear for a conference on Wednesday, August 8, 2018 at 10:00 a.m.; and it is further

ORDERED that counsel for petitioners shall serve a copy of this order along with notice of entry upon all parties within 5 days of entry.

Dated: April 23, 2018

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.