New York Supreme Court Appellate Division: First Department

In the Matter of the Application of

RESTAURANT ACTION ALLIANCE, NYC, et al.

Petitioners,

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

against

DEPARTMENT OF CONSUMER AFFAIRS, DEPARTMENT OF PARKS AND RECREATION, and THE CITY OF NEW YORK,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION FOR PERMISSION TO APPEAL

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PRELIMINARY STATEMENT

In this article 78 proceeding, respondents seek permission to appeal to this Court from a decision of Supreme Court, New York vacating a citywide determination of the County (Chan, J.), Commissioner of the Department of Sanitation and remanding the matter to the Commissioner for further consideration. The Commissioner determined that the City's consumer foam waste, such as coffee cups and food containers, could not be sustainably recycled within the City's recycling program. That determination triggered a ban of those products from the City, effective July 1, 2015, according to the express directives of a local law enacted by the City Council. The local law and the determination of the Commissioner address matters of exceptional public and environmental importance. The issues raised by Supreme Court's decision should be reviewed by this Court, and they are well developed and teed up for review now. Permission to appeal should therefore be granted.

Over a hundred municipalities in the United States have banned foam consumer products such as foam cups and take-out containers. In 2013, City Council also acted to address the environmental impact of the vast amounts of consumer foam products like coffee cups, packaging peanuts, and food clamshells entering the City's waste steam—an amount that exceeds 28,000 tons every year. The City Council enacted Local Law 142 to ban consumer foam products by July 1, 2015 *unless* the Commissioner of the Department of Sanitation determined in the Commissioner's judgment that such foam waste could instead be sustainably incorporated into the City's recycling program.

Following extensive consideration over six months and consulting with numerous stakeholders, the Commissioner determined that the City's foam waste could not be feasibly or sustainably included in the City's recycling program. Petitioners, led by the world's largest manufacturer of the foam products being banned, Dart Container Corporation, brought an Article 78 proceeding challenging the Commissioner's determination, leading to Supreme Court's decision to annul the Commissioner's determination and remand the matter for further consideration.

This Court should grant respondents' motion for permission to appeal not only because the matter carries great public and environmental importance, but also because the local law reflects the Council's considered judgment that the matter is pressing. In enacting Local Law 142, the City Council mandated that the City completely change how it handles its vast quantities of foam waste by July 1, 2015: such waste would either be eliminated from the City's waste stream altogether or diverted into the City's recycling program. That date has passed, and Supreme Court's annulment of the Commissioner's determination spells further delay. The City's eight million residents should not be deprived of the environmental benefits and protections the City Council intended to confer without review by this Court.

The Court's review will also provide crucial guidance for all affected parties. While the parties to this proceeding sharply dispute many issues, such as the feasibility of recycling the volume of the City's foam waste or the existence of a viable market that has a strong likelihood of buying such recycled material over the long-term, one thing remains clear. The issues before the Commissioner regarding the ability to sustainably recycle the City's foam waste—particularly in dirty condition and on the vast scale generated within the City each year—raise questions of first impression. Even if the Court were ultimately to agree with Supreme Court that the matter should be

remanded for further administrative consideration—a point respondents strongly dispute—those proceedings would benefit from the guidance of this Court.

Respondents will show in this appeal that the City Council prudently left determination of predictive questions about the future feasibility and sustainability of recycling foam waste to the judgment of the Commissioner, and that Supreme Court was wrong to second guess the Commissioner's determination based primarily on a short-term recycling plan proposed by the world's largest foam manufacturer. Petitioners will no doubt forcefully argue the opposite position. But it is clear that the issues here are of great significance to all parties and to the public. Review by and guidance from this Court is thus both needed and appropriate.

BACKGROUND

A. City Council Directed the Sanitation Commissioner to Determine Whether Used Foam Cups and Take-Out Containers Could Be Feasibly Included in the City's Recycling Program.

Over a hundred municipalities in the United States have banned foam consumer products such as foam cups and take-out containers.¹ In 2013, the New York City Council decided to ban those foam products from being sold or used in the City effective July 1, 2015 unless the Sanitation Commissioner determined that such foam waste could be sustainably incorporated into the City's recycling program. N.Y.C. Admin. Code § 16-329 ("Local Law 142"). In short, Local Law 142 set a firm deadline by which time the City was required to completely alter the way foam waste is handled. Id. § 16-329(b)-(d). By January 1, 2016, following a six month grace period during which the city agencies were expected to provide guidance and warnings to affected businesses, City Council expected the ban to be enforced with monetary fines. Id. § 16-324(f).

¹ Katie Pyzak, "The Foam Fight," Scrap (March/April 2015) at 185.

The City's recycling program is a commingled program, which means all materials designated as recyclable are not pre-sorted or cleaned: recycled materials are collected together and delivered to a vendor who sorts, packages, and sells the resulting raw materials to other processors. The program works when there is an established market for the quantity and quality of the recycled materials generated after sorting.

In New York City, foam cups, packing peanuts, and foam food containers account for about 28,000 tons a year of the City's waste stream. In addition, any foam waste collected in the City's recycling program would necessarily be dirty from either their prior use as food containers, for example, or from having been commingled with other materials in the recycling stream. (Order at 5.)

B. The Sanitation Commissioner Determined Styrofoam Materials Could Not Be Feasibly or Sustainably Included within the City's Program.

Waste disposal and recycling are quintessential core municipal functions. The Sanitation Department is not simply charged with managing the logistical complexity of keeping New York City clean; it must do so while safeguarding the long-term environmental and health concerns of eight million people. When it enacted Local Law 142, City Council decided that the Sanitation Commissioner was the best individual to make the best judgment about whether the City's foam waste could be feasibly and sustainably disposed of within its recycling program. (Order at 2-3.)

Pursuant City Council's the to mandate, Commissioner and met with numerous investigated this issue stakeholders. (Order at 3.) In response to Local Law 142, the world's largest foam manufacturer, Dart Container Corporation, attempted to stave off the ban by proposing to pay for a temporary five-year scheme to recycle the City's dirty foam waste. (Order at 4.) Such a plan did not (and does not) exist because of the cost and difficulty of cleaning large volumes of dirty foam. Indeed, recognizing the very real possibility that this scheme might fail, Dart ginned up its proposal by agreeing to buy, again for a temporary time period, the foam waste from the City even if prospective buyers for any cleaned and recycled foam could not be found. (*Id.*)

The Commissioner and her staff considered Dart's proposal but ultimately determined that recycling foam products was not environmentally effective or feasible within the City's recycling program. (Order at 4-7.) While noting that recycling *clean* foam products was mechanically possible, the Commissioner also noted the predominance of dirty foam within the City's waste stream, the absence of an established or reliable secondary market for the volume of dirty foam the City would generate, and the speculative nature of Dart's proposal. (Order at 5-6, 8, 12-13.)

C. The World's Largest Manufacturer of Foam Products Challenged the Commissioner's Determination.

On April 30, 2015, Dart challenged the Commissioner's determination in the court below, claiming that there was no rational basis for the Commissioner's decision because Dart had proposed to deal with the City's foam waste for a temporary five year period. (Order at 1, 4, 7-8.)

Over the course of briefing through July 2015, a fully developed record was created across thirty affidavits, several expert reports, and approximately 115 exhibits. (Stodola Aff. Ex. C.) The effective date of the foam ban remains July 1, 2015 but the uncertainty arising from the decision below impedes the City's ability to comply with City Council's mandate to implement the necessary guidance for the ban and prepare

for the imposition of penalties, which City Council expected would begin on January 1, 2016. (Order at 3; see also N.Y.C. Admin. Code § 16-324(f).)

D. The Court Below Annulled the Sanitation Commissioner's Determination and Remanded to the Department for a New Determination.

On September 21, 2015, the court below granted the petition, annulled and vacated the Commissioner's determination, and directed the Commissioner to issue a new determination "consistent with the Court's decision." (Order at 14.) The Supreme Court annulled the determination because it disagreed with how the Commissioner had weighed the evidence in the record. (*Id.* at 7-13.) Respondents seek leave to appeal to this Court from all parts of the order.

ARGUMENT

PERMISSION TO APPEAL SHOULD \mathbf{BE} GRANTED BECAUSE OF THE COMPELLING **PUBLIC** INTEREST IN TIMELY AND EFFECTIVE **IMPLEMENTATION** OF LOCAL LAW 142

Permission to appeal should be granted in this article 78 proceeding for several independent and mutually reinforcing reasons:

(1) the Council's local law and the Commissioner's determination raise

matters of immense public importance; (2) the Council has determined that time is of the essence; (3) the issues are well developed for appellate review; and (4) the Court's review and guidance will benefit all parties and advance the resolution of this matter, whatever the ultimate outcome of the appeal.

Though the parties dispute many things in this case, the importance of the matter is beyond controversy. It is also clear that the City Council has determined that the matter is pressing: the Council mandated that the environmental impact of consumer foam products be redressed by July 1, 2015, a date certain for either eliminating or recycling foam waste. That date has already passed, and each day that implementation of the Council's directive is delayed imposes environmental harm: seventy-six tons of dirty foam waste generated in the City are being sent to landfills.

The public importance of the matter is alone sufficient reason to grant permission to appeal. The pressing character of the matter only amplifies the grounds for respondents' motion. Absent appellate review, Supreme Court's remand order—by mandating further administrative review—will impose even further delay, thereby frustrating the intent

and strict remedial timetable of Local Law 142. The remand (and the legal challenge that will no doubt follow any new determination by the Commissioner) will delay implementation of the foam ban far beyond the timetable that the City Council intended. Such delayed implementation of Local Law 142 effectively invalidates the timing provisions of the law. The City Council specifically structured the law to ensure that a ban or implementation of recycling would be in place by July 2015. Millions of city residents should not be deprived of the Council's intended environmental protections without this Court's review.

Moreover, Supreme Court's remand order also causes confusion, making the scope of the remand uncertain. Because large-scale foam recycling is a new and untested endeavor, the City Council delegated questions about the feasibility of incorporating foam in the City's recycling program to the expert judgment of the Commissioner. But Supreme Court made assumptions and countermanded the Commissioner's judgment and ordered the Commissioner to make findings on remand "consistent with [the] court's decision." Supreme

Court's order thus imposes a legal directive different from the broad and deferential delegation the City Council made in Local Law 142.

Supreme Court's order also interferes with the City Council's directive in other ways. Sanitation, waste treatment, and recycling are core municipal functions. Local Law 142 addresses how the world's largest sanitation department manages a waste product that has negative environmental implications. N.Y.C. Admin. Code § 16-329. Not surprisingly, the law identified the Commissioner as the person whose expert judgment was best suited to determine whether the City's foam waste could be recycled sustainably within the City's existing recycling program. *Id.* § 16-329(b).

No entity has attempted—let alone proven successful—at recycling dirty consumer foam waste on the scale that would be required for recycling foam products in New York City. The expert reports and submissions to the Commissioner were therefore based on projections, estimates, and extrapolations about the possibility of successfully recycling foam at the levels generated by the City annually. Only Dart, a foam manufacturer, came forward with a plan, one that was both temporary and hypothetical, to argue about the mechanical

feasibility of recycling foam. But nothing in Local Law 142 required the Commissioner to give decisive weight to an industry-led, time-limited, and untested proposal.

Even if Supreme Court were correct in second-guessing the Commissioner's determination (which the court was not), the resulting legal questions would raise issues of first impression that this Court should address. Other than Supreme Court, no court, certainly not an appellate court, has weighed in on the complex issues raised in this proceeding about the sustainable recycling of foam within the context of the City's recycling program. Those technical questions, and the underlying risk assessments and predictions involved, are best left to the Commissioner's expert analysis. But if judicial restrictions on the inquiry are to be imposed, they should be imposed by this Court, not by the order of a single trial court.

Finally, immediate review by this Court will speed resolution of this case, avoid further unnecessary proceedings, and sharpen and guide any further proceedings that might occur. Because the record is fully developed and includes all of the affidavits, expert reports, and exhibits before the Commissioner, there is no reason to delay review of the decision below. And review is beneficial regardless of the correctness of Supreme Court's ruling. Respondents will demonstrate that Supreme Court was wrong in annulling the Commissioner's determination, and we thus believe that immediate review will avoid the delay caused by an unnecessary remand and further litigation over a new determination.

But the need for permission to appeal is no less even if Supreme Court were correct in ordering a remand. The record in this case confirms that further litigation is all but certain—making it critically important that the scope of the Commissioner's inquiry be clear. Even if Supreme Court were correct in annulling the Commissioner's foam-recycling determination, the issues decided by the trial court are so novel and complex that all parties would benefit from this Court's definitive guidance on what matters should be addressed if a remand is necessary. Immediate review would help ensure that any revised determination by the Commissioner is not subject to new and different legal challenges, causing even greater delay in implementing Local Law 142.

* * * * *

There are sharply divided views on whether a foam ban is good

policy. The City Council considered those viewpoints and made a policy

judgment to mandate that consumer foam products be banned by July

2015, unless the Commissioner determined that foam would be

sustainably recycled through the City's recycling program. At bottom,

Supreme Court invalidated the Commissioner's determination—a

determination at the core of the Commissioner's expertise—based on a

untested recycling plan proposed by a foam manufacturer. This Court

should review Supreme Court's ruling that the Commissioner must

defer municipal functions—with vast environmental on core

consequences at stake—to short-term proposals made by manufacturers

with a vested financial stake in the determination. The City Council's

law should not be effectively invalidated and delayed for years before

this Court has an opportunity to consider the issues.

CONCLUSION

For all of the foregoing reasons, permission to appeal should be

granted.

Dated: New York, NY

October 26, 2015

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