State of New York Court of Appeals

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To be argued Thursday, November 16, 2017

No. 128 Matter of The Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan; Matter of Wright v New York State Department of Health

In December 2014, the State Department of Health (DOH) approved an application by Jewish Home Lifecare, Manhattan, to build a 20-story nursing home adjacent to an elementary school, P.S. 163, on Manhattan's Upper West Side. The school has about 600 students between the ages of 3 and 11. After an environmental review, DOH concluded that mitigation measures it imposed would reduce exposure to toxic dust, noise, and other construction impacts to acceptable levels. It said measures in the Remedial Action Plan (RAP) and Construction Health and Safety Plan (CHASP) to limit exposure to airborne lead dust, which included wetting exposed soil and air monitoring, would ensure that lead levels did not exceed federal standards. Two groups -- parents and teachers of students at the school led by The Friends of P.S. 163; and residents of four nearby apartment buildings -- brought these actions to challenge DOH's determination, arguing it did not comply with the State Environmental Quality Review Act (SEQRA).

Supreme Court vacated DOH's approval and directed it to reconsider the impacts of noise and lead dust on the students next door. It said DOH "did not address the particular adverse effects of elevated noise levels on children's learning abilities or performance in school," nor "take a sufficiently hard look at additional noise mitigation measures." Noting "the severe and lasting consequences to children of lead exposure," the court said "the circumstances here, involving young children at a school very close to the construction site, present extraordinary and uniquely difficult challenges.... Given the special concerns here, DOH's determination that containment measures, such as a tent, were not warranted because the RAP and CHASP were sufficient to control and measure dust levels, does not demonstrate that DOH took a hard enough look at all relevant mitigation measures or made a reasoned elaboration for its failure to consider containment measures."

The Appellate Division, First Department reversed on a 3-1 vote, finding DOH "took the requisite 'hard look'" at the project's noise impact. It said SEQRA "'does not require an agency to impose every conceivable mitigation measure, or any particular one. Rather, in accordance with its balancing philosophy, SEQRA requires the imposition of mitigation measures only "to the maximum extent practicable" "consistent with social, economic and other essential considerations"....'" It said, "DOH reasonably relied on federal standards ... in determining what measures to employ to mitigate the possibility of off-site migration of lead-bearing dust.... Its mitigation measures reflect its considered judgment and meets the required 'hard look' under SEQRA. In short, we find that [Supreme Court] erroneously 'substituted its analysis for the expertise of the lead agency' simply because the agency rejected what the court considered to be better measures in mitigation."

The dissenter said, in part, "[T]he majority fails to acknowledge that DOH failed to comply with the [City Environmental Quality Review] Technical Manual, which requires ... that a public health analysis consider the potential for exposure to contamination by vulnerable populations, including children. A striking example of its failure to do so is that the RAP requires that ... construction workers wear protective clothing but there is no comparable protection for the children attending school next to the construction site."

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For respondent Jewish Home Lifecare: Henry M. Greenberg, Manhattan (212) 801-9200
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To be argued Thursday, November 16, 2017

No. 129 Matter of Lisa T. v King E.T. *(papers sealed)*

Lisa T. and her ex-husband, King E.T., have one son, who was born in July 2010; and they "have been embroiled in a multitude of bitter legal disputes," according to Family Court, having filed 24 family offense, custody, and violation petitions since 2012. In December 2012, Lisa filed a family offense petition alleging that King had committed second-degree harassment by sending her threatening and harassing emails and text messages. The court issued her a temporary order of protection that directed King not to contact her at work and, at other times, to contact her only "in the event of an emergency regarding the child or visitation arrangements."

The temporary order was repeatedly extended until July 2015 when, after a hearing, Family Court dismissed the family offense petition, finding King did not commit second-degree harassment because he "did not send the subject e-mails with the intention of harassing, annoying, or alarming" his former wife. "[T]here appear to be no threats, other than implied court action." However, the court found that King had twice willfully violated the temporary orders of protection "by sending the mother a communication that did not relate to an emergency regarding the child or visitation arrangements." Based on those violations, the court issued a final one-year order of protection that directed King not to contact Lisa "except as necessary to arrange visitation."

The Appellate Division, First Department affirmed on a 4-1 vote, rejecting the dissenter's argument that Family Court lacked jurisdiction to issue the final order of protection after it found that King had not committed a family offense. The majority said Family Court Act § 846-a permits a court "to issue a new order of protection if the respondent is 'brought before the court for failure to obey [a] ... temporary order of protection issued pursuant to this act ... and if, after a hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey ... such order.'" It said, "The Family Court adhered to the prescribed procedure and did not exceed its jurisdiction by issuing this final order of protection.... Family Court Act § 846-a does not require a finding of the commission of a family offense.... [W]e read Family Court Act § 846-a as prescribing the remedies available to the court when a respondent violates a temporary order of protection, which is what is at issue here."

The dissenter argued, "Upon a finding of willful violation of a 'lawful' order of protection, the Family Court may 'make a new order of protection in accordance with section eight hundred forty-two' (Family Ct Act § 846-a). As the reference in this provision to section 842 suggests, since the Family Court only has jurisdiction to issue a final order of protection where a petition alleges that a family offense has been committed and the allegations in the petition are proved (Family Ct Act §§ 812, 841, 842...)..., section 846-a must be read to provide that the Family Court may only issue a final order of protection under this section upon a finding that the respondent willfully violated a final order of protection issued upon a finding that a family offense was committed, or a finding that the respondent's violation of a temporary ... or a final order of protection constituted a family offense."

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For respondent Lisa T.: Randall S. Carmel, Jericho (603) 313-1951

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To be argued Thursday, November 16, 2017

No. 130 Prometheus Realty Corp. v New York City Water Board

In April 2016, after the New York City Water Board proposed a 2.1 percent rate increase for customers in 2017 to close a $76 million budget gap, the City announced that it would forgo rental payments owed by the Board for leasing the City-owned water system through fiscal year 2020. The Board adopted the City's recommendation that it use the savings to provide a one-time credit of $183 to class one property owners of one-, two-, and three-family homes in 2017, totaling about $122 million; and to provide rate mitigation for all water and sewer customers over the term of the rate schedule through 2020, totaling about $988 million.

The Rent Stabilization Association and three corporate landlords filed this suit to annul the Board's action, arguing that adoption of the 2.1 percent rate increase and the one-time credits was arbitrary and capricious. Supreme Court annulled the Board's resolution and enjoined it from implementing the rate increase and the credits for class one customers.

The Appellate Division, First Department affirmed in a 3-1 decision, ruling that "the one-time credit adopted for some, but not all, water customers at the same time the Water Board needed to increase overall water rates to fund a projected budget shortfall for that particular year, has no rational basis.... There is no factual basis to conclude ... that class one property owners have been more financially burdened by paying water bills than other classes of users.... The Water Board claims that a rational basis derives from the fact that class one property owners clearly include 'seniors and low or moderate income homeowners.' It is equally clear, however, that class one includes owners of luxury brownstones and other high value dwellings in the City; just as it should be clear that class two properties consist of other types of residential buildings ... also occupied by seniors and persons of low or moderate income, none of which derive any benefit ... from this credit." It said, "The Water Board's justification for the [rate] increase as necessary to ensure funding for the costs of repairing or replacing existing portions of the City's water and sewer system, while consistent with its mission statement and statutory mandate, is irreconcilable with [its] implementation of a credit if the Water Board still needed funds to balance its books for the year."

The dissenter argued that the Board's adoption of the rate increase and the credit was not arbitrary or capricious, saying, "[T]he record reflects that the credit was approved for the purpose of providing expedited financial relief to class 1 property owners, including financially overburdened lower and middle-class homeowners, many of whom are seniors, who had been disproportionately and adversely affected by the rise in water rates in recent years.... [T]he credit furthers the economic and public policy goal of providing financial relief to the low and middle-income homeowners comprising many, if not most, of the class 1 property owners" and "is consistent with the Board's mission to 'proactively consider [] the optimal level [of rates] ... and sustainable provision of high-quality service at a fair price for our customers'...." Regarding the rate increase, she cited the Board's explanation that it would be "an increase in the base rates not only in FY 2017, but over the course of four fiscal years to FY 2020, during which the consumption of City water is expected to further decline.... In the absence of a rate increase, this decline would result in a reduction of needed revenues."

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