

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN

PART 33

Justice

-----X
In the Matter of the Application of
RESTAURANT ACTION ALLIANCE, et.al.
Petitioners,

INDEX NO. 100734/2015

MOTION DATE _____

- v -

THE CITY OF NEW YORK; GARCIA, KATHRYN, in her capacity
as Commissioner of the New York City Department of Sanitation;
et. al.

MOTION SEQ. NO. 003 and 004

Respondents.

DECISION AND ORDER

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The following papers, numbered 3, were read on this application to/for Article 78
Notice of Motion/ Petition/ OSC - Affidavits - No(s) 1
Answering Affidavits - No(s) 2
Replying No(s) 3

Upon the foregoing documents, the petition is denied.

This Article 78 petition concerns whether the recycling of food-service expanded polystyrene (EPS) or soft foam can be done in an environmentally effective or economically feasible manner. Petitioners brought an Article 78 proceeding on this issue in 2015 when respondent Kathryn Garcia, the Commissioner of the New York City Department of Sanitation (DSNY), determined that single-serve food-service EPS cannot be recycled in an environmentally effective or economically feasible manner (the 2015 determination). This court, by Decision and Order dated September 21, 2015, annulled and vacated the Commissioner's determination as arbitrary and capricious, and remanded the matter for her to reconsider (Mastro Aff, exh. 4). On May 12, 2017, the Commissioner reached the same conclusion she did in 2015 (the 2017 determination). Hence, petitioners submit the instant petition to again vacate and annul the Commissioner's 2017 determination. Respondents oppose the petition.

BACKGROUND

The use of food-service EPS was banned during Mayor Michael Bloomberg's term. Mayor Bill DeBlasio continued the ban when he was elected in 2013. The City Council passed Local Law 142 on December 19, 2013, requiring the Commissioner

of the New York City Department of Sanitation, Kathryn Garcia (the Commissioner), to conduct a study and determine by January 1, 2015, whether EPS food-service products can be recycled “in a manner that is environmentally effective, economically feasible, and safe for employees” (NY Admin. Code § 16-329). Local Law 142 (LL 142) specifically charged the Commissioner to:

determine, after consulting with the department’s designated recycling contractor for metal, glass and plastic materials, manufacturers and recyclers of expanded polystyrene, and, in the commissioner’s discretion, any other person or group having expertise on expanded polystyrene, whether expanded single service articles can be recycled at the designated recycling processing facility at the South Brooklyn Marine Terminal in a manner that is environmentally effective, economically feasible, and safe for employees. . . . If the commissioner determines that expanded polystyrene single service articles can be recycled in such manner, the commissioner shall adopt and implement rules designating expanded polystyrene single service articles and, as appropriate, other expanded polystyrene products, as a recyclable material and require the source separation of such expanded polystyrene for department-managed recycling

(Mastro Aff in Support of Petitioners’ OSC, exh. 1).

The Commissioner determined that recycling food-service EPS could not be done in an environmentally effective and economically feasible manner. Petitioners brought an Article 78 petition to challenge the Commissioner’s determination in 2015. This court found the Commissioner’s basis for her determination to be lacking, thus rendering her conclusions arbitrary and capricious. In the Decision and Order dated September 21, 2015, this court laid out the shortcomings of the Commissioner’s conclusions on each of the issues that led her to her negative determination. The matter was remanded to the Commissioner for reconsideration and determination consistent with this court’s findings. Respondents appealed this court’s 2015 Decision and Order (2015 Order). The Appellate Division, First Department, dismissed the appeal.

The Commissioner then conducted another study into the recyclability of single-serve food-service EPS and rendered a determination that EPS recyclability cannot be done in an environmentally efficient or economically feasible manner (the 2017 Determination). Petitioners¹ again challenge the Commissioner’s determination in the instant Article 78 petition. Quoting Yogi Berra, petitioners

¹ Petitioners are various New York City restaurant owners; Dart, an expanded polystyrene manufacturer; Plastics Recycling, Inc, a plastics recycler; Pactiv LLC and Genpack LLC, food-service packaging manufacturer; Commodore Plastics, LLC, an EPS food packaging designer and manufacturer; and Reynolds Consumer Products, LLC, a consumer products company.

muse that “[t]his case is ‘like déjà vu all over again’” (2d Verified Petition at 1). In many aspects, this case is “like déjà vu all over again” (*id.*), but this time, the Commissioner’s findings are based on reviews of petitioners’ evidence and on DSNY’s further studies and research. Thus, petitioners challenge the Commissioner’s *de novo* review of the “economic feasibility” and “environmental effectiveness” requirements of LL 142 in the 2017 Determination because the review strayed from this court’s remand 2015 Order and because the Commissioner expanded Local Law 142.

FACTS

Petitioners’ Evidence²

In the prior proceeding, Dart offered DSNY the following:

- Purchase and installation of sorting equipment at Sims’ South Brooklyn facility;
- paying for PRI’s expansion of its operations to clean and sort mixed polystyrene, including post-consumer EPS and rigid polystyrene from New York City;
- purchase mixed polystyrene bales from Sims at a guaranteed price of five years for the PRI facility;
- pay Sims for the disposal of the mixed bales if the program is unsuccessful at the end of the program period.

(exh. 4 - Decision and Order dated September 21, 2015, at 4).

Petitioners’ evidence in this proceeding, while voluminous, ranging from exhibits 1 to 79, does not differ significantly from that offered in the previous proceeding, including Dart’s subsidy commitment (Petr’s Memo at 2; exh. 6 – Shaw Aff, ¶¶ 9-12). Petitioners maintain that Dart, PRI, and other EPS-associated operators have shown that not only can EPS be recycled but also that it can be done in an environmentally efficient and economic feasible manner. Indeed, they tout Dart’s recycling plan as a “win-win” solution for New York City since the plan will cost the City nothing and save it millions of dollars (Petr’s Memo at 7). As to the post-recycled food-service EPS, petitioners assert that the market is “thriving” and proffers affidavit from NEPCO’s president to illustrate the growing demand (*id.* at 10; exh. 26 – Hwang Aff). NEPCO is an end-user that takes the recycled post-consumer EPS and turns it into products such as picture frames, commercial paper spools, tape dispensers, etc. (*id.*). Finally, petitioners point out that the post-consumer EPS recycling market has grown since 2015; San Diego is an example. San Diego requires recycling of all EPS as of June 2017 (Petr’s Memo at 2; exh. 5 – Centers Aff, ¶¶ 6-8; and exh. 59).

² Unless otherwise indicated, petitioners’ exhibits are simply cited as ‘exh _’ with a number, and can be found attached to Randy Mastro’s Affirmation in Support of Petitioners’ Order to Show Cause.

Petitioners claim that Dart's recycling plan is environmentally efficient, and they run through the several steps of the recycling process. They point out that the Commissioner admitted in the 2015 Determination that EPS can be seamlessly integrated into the collection process, and therefore that collecting food-service EPS is not a problem (Petr's Memo at 10). The EPS then gets sorted and baled along with the rigid polystyrene through an optical sorter paid for and installed by Dart at the Sims facility in Brooklyn, NY. The baled EPS and rigid polystyrene at Sims would then be recycled by PRI in its new and expanded facility, which is now operational.

Petitioners state that PRI has a high demand for recycled polystyrene both internally – about 5 million pounds per year – and from its 100 or so customers. The demand is more than PRI can supply, and therefore PRI is looking to the New York market (*id.* at 10-12; exh. 6 – Shaw Aff, ¶ 10; and exhs. 31, 32, 33, and 54). As the demand is growing for recycled food-service EPS to make household goods and office supplies, the price for virgin polystyrene is ever-increasing, according to Plastics News and the Berkeley Research Group (BRG) (Petr's Memo at 11, exh. 28 – Plastics News; exh. 29 – 2016 BRG Report).

Currently, the EPS is landfilled together with the rigid polystyrene (Petr's Memo at 11). Robin Cantor, an economist and a managing director of BRG, using DSNY's estimate that over 58,300 tons of polystyrene are landfilled, calculated that if food-service EPS were banned³, it would reduce the amount going to landfill by 12,000 tons. Cantor estimates that the Dart proposal would divert about 50% more away from landfill than a food-service EPS ban (Petr's Memo at 13; exh. 35 – Cantor Aff, ¶ 4). Petitioners point out that DSNY's calculations failed to include rigid EPS and other EPS subject to the ban. Adding them to the calculation, based on DSNY's own numbers, Dart's proposal would divert about 17,497 tons of EPS, both rigid and soft foam, from landfill (*id.*).

Respondents' Evidence⁴

DSNY's evidence in this proceeding differs from that in the previous proceeding, but its determination does not. For the 2017 Determination, DSNY obtained updated information from Dart, PRI, and Natural Resources Defense Council (NRDC); consulted with an economist and a post-consumer plastics recycling expert; conducted "significant" in-house research; visited recycling facilities; and reevaluated the information it previously had in rendering the 2015 Determination (Resps' Memo at 8-10).

³ The calculation incorporates the exception of the food-service EPS ban for hardship waivers, enforcement limitations, and non-compliance.

⁴ Unless otherwise indicated, reference to respondents' exhibits are simply cited as "exh _" with a letter, and can be found attached to the Affirmation of Kathleen C. Schmid in support of respondents' opposition to the Petition.

As a result of DSNY's exhaustive effort wherein the evidence submitted ranged from A to III with subsets, the Commissioner rendered a determination on May 12, 2017 (the 2017 Determination), finding that the food-service EPS cannot be recycled in an environmentally effective and economically feasible manner. The findings are broken down into eight categories as follows⁵ (exh. A – 2017 Determination [hereinafter cited as 2017 Determination]):

1. 30-Year History of Failure for Subsidized Markets of Foam Recyclers of Foam

The Commissioner presents a report by Michael Schedler, DSNY's expert consultant with 30 years of experience in post-consumer plastic recycling. Schedler reports that six post-consumer plastic recycling plants that were heavily subsidized by the National Polystyrene Recycling Company (NPRC) failed and closed because of the excessive food contamination and when the two-year subsidies ended (2017 Determination at 18-19; exh. G – Schedler Report at 5). The Commissioner pointed to Canadian municipalities that ended their post-consumer plastics recycling because of the “bad economics of collecting, handling and shipping Food Service Foam” (*id.*).

2. No Market Exists for Recycled Post-Consumer Foam

The Commissioner presents an affidavit and report by economist Christopher Behr, who concludes: “Given the lack of demand for recycled post-consumer EPS and the high costs of converting dirty EPS into a marketable product, there is no evidence of a market for this material” (2017 Determination at 20; exh. F – Behr Report at 2-3; Behr Aff, ¶ 6). The Commissioner cites three organizations — the World Economic Foundation, the Ellen MacArthur Foundation, and McKinsey and Company — to support Behr's finding that EPS is a “hard-to-recycle” material because of food contamination and because EPS contaminates other recycling streams (2017 Determination at 20).

3. Food-Service Foam Breaks in Sorting: Mixes with Other Valuable Recyclables

The Commissioner presents a 2015 Materials Recovery Facility (MRF) Material Flow study released by Plastic Partners in 2016 analyzing the flow of plastic bottles, plastic cups, plastic containers, and plastic clamshells made of different resins. Only seven percent of the food-service foam products ended up in the proper bales after going through the sorting machines, and they had a high loss rate because they flattened out and/or broke into pieces. Given this poor performance, the Commissioner surmised that should New York City switch to a single-stream recycling process, 60 to 75 percent of the food-service EPS would contaminate the paper stream (*id.* at 21-22; exh. I – Plastic Partners Report at 54 and 58). DSNY's

⁵ The eight enumerated category headings are as written in the Commissioner's 2017 Determination.

own MRF, Sims, ran a one-day test on its own sorting equipment on August 30, 2016, that showed similar results (2017 Determination at 23-24; exh. J – Sims EPS Sorting Report).

4. DSNY Visit to PRI and Problems at Facility

DSNY staff and Michael Schedler visited the PRI Recycling facility in Indianapolis on April 15, 2016. DSNY and Schedler found the PRI facility to be in the development phase as it is not fully operational and still requires extensive retrofits, assembling, installing, and waiting for new equipment. Schedler surmised that PRI will have to spend \$5.7 million to upgrade its facility to handle recycling of food-service EPS (exh. 4 at 8; 2017 Determination at 7). Their finding controverted Dart's video, which stated that PRI would be ready to recycle polystyrene in April 2015. They also learned from this PRI visit that taking in New York City's food-service EPS would be its first experience in processing post-consumer EPS. Dart and PRI explained that PRI was waiting to take New York City's food-service EPS. The Commissioner saw this lack of experience reflected an untested facility (2017 Determination at 24-25).

5. The Sexton Report Concludes that Food-Service Foam is Not Recyclable

The Commissioner presents an investigation by Sexton Consulting, which investigated the 137 companies listed in the Berkeley Research Group report as processors and/or end users of recycled EPS, including a few companies that petitioners had represented as major EPS end users or recyclers in their 2015 petition. The conclusion of the investigation was that there was not a market for post-consumer EPS market (2017 Determination at 25-26; exh. D2.1 – Sexton Report at 2).

6. EPS Industry Information Indicates That Only Clean Foam Is Recycled and Not Food-Service Foam

The Commissioner presents three websites that provide EPS recycling: the EPS Industry Alliance website states that unclean and food-service foam is generally not accepted for recycling; the Dart website identifies forty-eight companies that have interest in purchasing post-consumer foam, but DSNY's research shows that the majority of these companies are interested in only clean foam, while eight companies have indicated "TBD" as to the material they accept; and the Home For Foam Website, which is copyrighted by Dart, has an interactive map showing the cities that have EPS recycling programs from curbside collection – those cities accept only clean EPS. The Commissioner concluded from this website research that only recycled clean foam has a market (2017 Determination at 28-29).

7. Research on Cities that Collect Foam with Recycling

The Commissioner presents four cities in California: Los Angeles, Long Beach, Riverside, and Sacramento; and six jurisdictions in Ontario, Canada: Toronto, Hamilton, Niagara Region, Peel, Owen Sound, and Peterborough, to show that while these municipalities collect EPS, they do not recycle it. From its research, and through interviews, DSNY learned that these jurisdictions uniformly complain about the cost of trying to recycle foam. The problem MRFs have with sorting the foam is that it contaminates other product streams and the lack of market for food-service foam. Further, as reported by a study by NRDC submitted to DSNY in February 2016, of the twenty-eight major cities in the United States, ranked by population, only three cities had designated foam as recyclable: Los Angeles, San Antonio, and Jacksonville. San Antonio, TX, no longer accept food-service or solid block EPS, and Jacksonville, FL, no longer accept any EPS for recycling. NRDC reported that many major cities such as San Francisco, Oakland, San Jose, Minneapolis, and Portland, ME, have banned food-service foam (2017 Determination at 29-36; exh. D – Randell Aff at 6; exh. ZZ – Goldstein Aff, ¶ 21).

8. Foam Contaminates Organics and is the Leading Plastic Pollutant in New York Harbor

The Commissioner presents WeCare, DSNY's composting contractor, to illustrate the problems EPS create for its operation, as EPS tend to break into small pieces that are difficult to remove even with advanced machinery. The Commissioner also presents The NY/NJ Baykeeper February 2016 Plastic Collection Report, which concluded that foam constituted thirty-eight percent of the 165 million plastic particles in the NY-NJ Harbor Estuary waters at any given time (2017 Determination at 36-37).

DSNY's various studies and research led the Commissioner to conclude that food-service EPS are hard to collect because they break up into small pieces; they are hard to sort and contaminate other valuable resource streams; they are hard to store because they must be stored for months to amass enough of the light-weight EPS before shipping it economically; and it is hard to find a market for food-service EPS. Based on the experience of many large municipalities that have designated food-service EPS as recyclable, their food-service EPS ended up in landfill. Finally, the Commissioner posits that "[a] subsidized program is not a market" (2017 Determination at 39). The DSNY research shows that when the subsidies ended, or when end-use companies no longer buy the food-service EPS, these cities end up closing processing facility or storing the EPS until a solution arises or landfilling the EPS. Accordingly, the Commissioner found that pursuant to the mandate of Local Law 142, recycling food-service EPS is not environmentally effective or economically feasible.

DISCUSSION

In a proceeding pursuant to CPLR Article 78, the scope of judicial review is limited to the issue of whether the administrative action has a rational basis for its determination (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]). “The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.” (*id.* at 231).

Petitioners first argue that DSNY exceeded the scope of this court’s remand direction in the 2015 Order. DSNY did not.

The September 2015 Order pointed out the shortfalls that led the Commissioner’s findings in the 2015 Determination. The 2017 Determination meaningfully addressed those shortfalls, which were, among others, petitioner’s list of NFR’s, post-consumer EPS market, PRI’s recycling plant in Indianapolis, the capture and sorting of the EPS for recycling, and evaluating Dart’s subsidy offer. The Commissioner is not constrained to use the same information in the same manner that formed her 2015 Determination, especially when this court found that some of that information led to the arbitrary and capricious conclusions. To illustrate, the Commissioner’s previous conclusion that Dart’s facility was too small to recycle New York City’s EPS was based on a report by a DSNY staff member who visited Dart’s demonstration project in Corona, CA. The negative determination based in part on this report was arbitrary when Dart, an EPS manufacturer, and not a recycler, used its small facility only to demonstrate the process of recycling of EPS (exh. 4 at 11-12). This one point shows the subpar consideration given to the evidence in the 2015 Determination. The 2017 Determination gives due “reconsideration” as directed by the September 2015 Order.

Petitioners next argue that DSNY also went beyond the scope of the remand order because it added new information after the 2015 Determination. Indeed, much of DSNY’s newly added information is from 2016. But, DSNY is within its right to obtain new evidence on a remanded matter (*see Yonkers v Maltbie*, 251 AD 204, 206 [3d Dept 1937], citing *St. Joseph Stock Yards Co. v United States*, 298 US 38 [1936]; 6A NY Jur 2d, Article 78 § 398).

Petitioners also contend that the Commissioner engrafted an additional requirement onto LL142 by considering the state of recycling food-service EPS once Dart’s five-year subsidy ends (Petr’s Memo at 36). Contrary to petitioners’ contention, it would be delinquent of the Commissioner not to consider the EPS recycling issues after the subsidy ends. After all, LL142 did not direct the Commissioner to assess the food-service EPS recycling for only five years.

With the new evidence it amassed, DSNY reviewed the recyclability of food-service or post-consumer EPS in terms of whether it can be done in an environmentally efficient and economically feasible manner. The Commissioner's conclusion that food-service EPS is hard to collect and recycle is supported by studies and interviews with other municipalities' experiences, tests performed by DSNY's MFR – Sims, and analysis by experts in the relevant fields to explain the problems in the capturing, sorting, storing, and shipping of the light-weight EPS.

The Commissioner's finding of a lack of a sustainable market of food-service EPS was based on a 30-year history of municipalities in California and Canada that had ended recycling their food-service EPS as indicated in the above-listed categories 1 and 7 of the 2017 Determination. DSNY's evidence of the lack of a sustainable market is also derived from a study by an economist – Christopher Behr and the Sexton Consulting group, among others, which found the cost too high to recycle soiled EPS to marketable products.

The Commissioner also addressed Dart's recycling plan and subsidy offer to DSNY. Dart's offer to subsidize DSNY includes paying Sims for the baled EPS, both rigid and soft foam EPS, for a period of five years. Dart represents that market forces for EPS will be more than sufficient to make recycling food-service EPS profitable for New York City. The Commissioner found Dart's representation contradicted by six subsidized post-consumer plastic recycling plants that closed after the subsidies ended. Studies showing EPS industry MFR's non-acceptance of post-consumer food-service EPS for recycling also discourages a positive finding.

Further, while the Commissioner was hesitant in 2015 about PRI's touted expansion of its Indianapolis recycling plant, her hesitancy was then unsupported by facts or any indications to the contrary (2015 Order). This time, a visit to the PRI facility on April 15, 2016, by DSNY staff together with a recycling expert, Michael Schedler, confirmed a reason for the Commissioner's hesitancy. Schedler discusses the problems he observed, and ultimately concluded that PRI's facility was nowhere near completion (Resps' exh. G – Schedler Report at 7-11). Petitioners' interpretation of one of Schedler's observation – that "PRI was able to sort, clean, and 'flake' EPS, pelletize the clean flake, and turn that material into usable, valuable product" (Petr's Memo at 42) does not alter Schedler's conclusion. What Schedler observed and wrote described the area he visited, but he was unable to see the operation because the equipment broke down (Resps' exh. G at 7). PRI's readiness aside, the Commissioner has legitimate concern about PRI's ability to handle New York City's post-consumer EPS bales since it has not accepted post-consumer EPS from other municipalities.

Much of DSNY's study and research on food-service EPS focused on a viable and sustainable market for food-service EPS. Whereas for the 2015 Determination, the Commissioner paid little attention to petitioners' evidence to conclude that

there is no market of recycled food-service EPS (2015 Order), the Commissioner delved into petitioners' evidence for the 2017 Determination. For example, previously, the Commissioner did not consider Burrtec, the largest privately owned Solid Waste Collection and Processing Company in California, that processed 10,000 pounds of EPS per month. For the 2017 Determination, the Commissioner looked closely at Burrtec. And in doing so, she found that while Burrtec handles five tons of EPS monthly, most of that EPS consists of large packing block EPS rather than food-service EPS (Garcia Aff, ¶ 82). And DSNY learned from Burrtec's client, the municipality of Riverside, CA, that the food-service EPS Burrtec collects is not recycled and ultimately dumped as waste (Garcia Aff, ¶ 85; Anderson Aff, ¶ 25).

DSNY searched the forty-eight companies Dart identified as EPS purchasers. DSNY's website research show that most of these companies prefer to buy clean EPS. And DSNY's search into the 137 companies from the NRDC report in the prior petition shows that only four companies accept food-service foam, two of which would charge for pick-up, and two that would not pay for the food-service foam (Anderson Aff, ¶ 30).

Petitioners contend that the Commissioner failed to consider their evidence of a February 2016 BRG report; the SERA Report by Skumatz Economic Research Associates, and an affidavit by Patty Moore, a recycling expert on cities that recycle foam (Petr's Memo at 44). The February BRG report examines the economic consequences of rejecting Dart's proposal (Resps' exh. at 29). The SERA report discusses the profit opportunities in rigid and soft polystyrene recycling based on its models (*id.*, exh. 37). The SERA report assumes costs on different aspects of the recycling process and reports a number that represents a profit. The Patty Moore affidavit is barely two pages and attaches a list of selected communities in California and Canada that have EPS and food-service EPS collection or drop off programs (*id.*, exh. 50). Petitioners' contention is belied by DSNY's research into the specific topics that those reports or lists were meant to address (2017 Determination at 17-19, 25-26, 29-36; exh. D2.1 – Sexton Report; exh. D – Randell Aff; exh. F – Behr Report; exh. I – Plastics Partners Report; exh. ZZ – Goldstein Aff).

CONCLUSION

In sum, in reaching her 2017 Determination, the Commissioner addressed the material aspects of the petition, reviewed petitioners' recycling plan and evidence supporting their plan, and conducted studies and research into petitioners' proposal. The Commissioner's rejection of petitioners' proposal and its finding that food-service EPS cannot be recycled in an environmentally effective and economically feasible manner, pursuant to LL142, is rational. Indeed, as presented by the evidence, the 2017 Determination was a painstakingly studied decision and was in no way rendered arbitrarily or capriciously. Thus, the petition is dismissed.

Accordingly, it is
ORDERED that the Article 78 petition is denied; it is further
ORDERED that the Article 78 proceeding is dismissed, and it is further
ORDERED that the Clerk of the Court is directed to enter judgment as written.
This constitutes the decision and order of the court.

6/5/2018

DATE



MARGARET A. CHAN, J.S.C.

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CASE DISPOSED

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DENIED

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SETTLE ORDER

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NON-FINAL DISPOSITION

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FIDUCIARY APPOINTMENT

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: