New York County Clerk's Index No. 120911/99

NEW YORK SUPREME COURT

APPELLATE DIVISION - FIRST DEPARTMENT

In the Matter of the Application of NEW YORK CITY COALITION TO END LEAD POISONING, INC; NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.; NEW YORK STATE TENANTS & NEIGHBORS COALITION, INC.; MET COUNCIL, INC.; SINERGIA, INC.; ALIANZA DOMINICANA, INC.; CITY PROJECT, INC.; EAST NEW YORK UNITED FRONT, by its Chairperson, CHARLES BARRON; EL PUENTE OF WILLIAMSBURG, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, INC.; MAKE THE ROAD BY WALKING, INC.; NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE, INC.; SOUTH BRONX COALITION FOR CLEAN AIR, INC.; QUEENS LEAGUE OF UNITED TENANTS, INC.; INOCENCIA NOLASCO, GRECIA MARIA VASQUEZ, and her minor child, KATHERINE FIGUEREO by her next friend and mother, GRECIA MARIA VASQUEZ; CATHERINE RODRIGUEZ, and her minor children, DESTINY ALONSO, BIANCA RODRIGUEZ, and JOANNE MARRERO, by their best friend and mother, CATHERINE RODRIGUEZ; ANA GOMEZ, and her minor children, CHRISTIAN GOMEZ and STEPHANIE GOMEZ, by their next friend and mother, ANA GOMEZ; MARIA CELIA NOLASCO and her minor grandchildren JUSTIN AGRAMONTE and JUAN NOLASCO, JR., by their next friend and guardian, MARIA CELIA NOLASCO; and DAVID M. MONAHAN and JULIE MONAHAN, and their minor child IRIS EVE MONAHAN, by her next friends and parents, DAVID M. MONAHAN and JULIE MONAHAN,

Petitioners-Plaintiffs-Respondents

for a Judgment pursuant to Article 78 and § 3001 of the CPLR,

-against-

PETER VALLONE, as Speaker of the New York City Council; THE NEW YORK CITY COUNCIL; RUDOLPH GIULIANI, as Mayor of the City of New York; and the CITY OF NEW YORK,

Respondents-Defendants-Appellants.

PETITIONERS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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OTHER AUTHORITIES

Bailey et al., A Tale of Two Counties: Childhood Lead Poisoning, Industrialization, and Abatement in New England, Economic Geography (extra issue) 96-111 (1998). 14

Brown et al., The Effectiveness of Housing Policies in Reducing Children's Lead Exposure, 91 Am. J. Pub. Health (4) 621 (2001) 14

Gerrard, Environmental Impact Review in New York § 7.04[1] 43

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Sargent, et al., The Association Between State Housing Policy and Lead Poisoning in Children, 89 Am. J. Pub. Health (11) 1690 (1999) 14

United States Department of Housing and Urban Development, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, April 18, 2001 (available online at www.hud.gov/lea/Vol1finalreport.pdf) 17

PRELIMINARY STATEMENT

Petitioners-plaintiffs-appellants ("petitioners") submit this brief in support of their motion for leave to appeal to the Court of Appeals pursuant to C.P.L.R. § 5602(a) from this Court's March 26, 2002, Decision and Order ("App. Dec."),[1] which reversed the IAS Court's judgment entered February 22, 2001, in this action.[16] Petitioners respectfully contend that this Court erred when it held that the New York City Council's issuance of a Negative Declaration of environmental impact [419] prior to enacting Local Law 38 of 1999 ("LL 38"), a lead hazard controls ordinance, complied with the State Environmental Quality Review Act ("SEQRA"). N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq.

SEQRA seeks to inject environmental consideration into decision-making. Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988), and to this end, requires government decision makers — including local legislatures — in all cases to determine whether an action may have a significant environmental effect. ECL § 8-0109(2). This threshold inquiry must comply with the long-accepted test in H.O.M.E.S. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979) (to determine significance of proposed action, agency must identify relevant areas of concern; analyze those areas of concern; and set out a reasoned elaboration for its determination; adopted by regulation at 6 N.Y.C.R.R. § 617.7(b)). If the agency determines that an action may result in a significant adverse impact, SEQRA requires the decision maker to undertake a comprehensive, evidence-based analysis of the proposed action and prepare an Environmental Impact Statement ("EIS"). §§ 617.7(a)(1), 617.9.

Childhood lead paint poisoning may be the most significant environmental disease in New

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1. Annexed as Exhibit "A" to the accompanying May 22, 2002, affirmation of Matthew J. Chachère. On April 17, 2002, the City served Notice of Entry of this Court's Decision by mail on petitioners, and therefore this motion is timely. References to Record on Appeal are indicated in brackets [].

York City, Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 641 (1996); and lead dust is a toxic substance that causes devastating, irreversible harm to young children and falls squarely under SEQRA. Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64, 71-73 (1st Dep't 1996) ["WABBA v. Giuliani"]. LL 38's enactment completely revamped the City's lead hazard controls, inter alia deregulating lead dust and completely eliminating protections for six-year-olds. And while LL 38 mandates that landlords remove peeling lead paint, it permits them to do so with weakened controls for lead dust. Since the Negative Declaration failed to identify — let alone analyze — lead dust as an area of environmental concern, it cannot pass muster, procedurally or substantively. The H.O.M.E.S. test does not exempt local legislatures, and thus the Council did not comply with SEQRA.

This Court's decision relied on a fundamentally flawed analysis of LL 38 and its enactment. This Court concluded — without substantial evidence and on an incorrect reading of the law — that the preexisting law, by requiring "total abatement," was per se hazardous. This Court further ascribed the supposed per se hazardous nature of "total abatement" to every independently operating provision of lead hazard control. This Court then concluded that LL 38, by shifting away from "total abatement," reduced environment hazards in every aspect LL 38 changed. This conclusion is unsupported by reason or fact, and can only be reached by overlooking entirely lead dust's patent public health risks and the record below.

This case merits Court of Appeals review, first and foremost, because its ultimate resolution will have a profound impact on the health of thousands of vulnerable New York City children.[2] As discussed herein, hundreds of thousands of children live in housing units

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2. Indeed, the Court of Appeals most recent decision on the issue of lead poisoning specifically noted the pendency of this litigation. Chapman v. Silber, 97 N.Y.2d 9, 19 n. 4 (2001).

containing leaded paint and stand at risk of exposure to lead hazards and lead poisoning. LL 38 increased the risk of children's exposure to lead hazards markedly and in multiple ways.

This case also merits Court of Appeals review because this Court's Decision conflicts directly with Court of Appeals decisions concerning the validity of negative declarations under SEQRA. After twenty-five years of existence, SEQRA exerts a broad influence over agency and legislative governance. For example, governmental actors issued an estimated 21,000 negative declarations between 1984 and 1994. Dan Ruzow, "Discussion: The Historical Development of SEQRA," 65 Alb. L. Rev. 323, 354 (2001). Moreover, "the number of state agency actions . . . is a fraction of [that of] local government actions." Id. Since SEQRA's inception, courts have struggled to strike an appropriate balance between granting governmental agencies necessary flexibility versus ensuring compliance with SEQRA's exacting procedural and statutory mandates. While a trade-off unavoidably exists between agency discretion and the constraints imposed by SEQRA on governmental actions that fall under its purview, this Court's Decision effectively sets a de minimis requirement for substantive and procedural compliance with SEQRA when local legislatures issue negative declarations. Having reached an apogee of agency accommodation in this case, local legislatures and other agencies need clarification regarding their obligations under SEQRA.

This Court's Decision also deviates from established precedent regarding regulation of preexisting hazardous conditions. This Court implies that more lax substantive obligations apply to localities vis-a-vis SEQRA depending on whether the hazardous materials at issue are of their own making or created by third parties and whether they are preexisting or not. This viewpoint has no basis in the statute or regulations and could set a potentially devastating precedent.

QUESTIONS PRESENTED

1. Can the determination that LL 38's enactment may not expose children to even one single potential significant adverse environmental impact be sustained, despite a facially invalid Negative Declaration — which failed to identify or analyze, inter alia, the adverse impact of removing all protections for children age six and of deregulating lead dust as a hazard — by accepting at face value agency deliberations or legislative processes as a substitute?

This Court let LL 38 stand, in part, by disregarding the Council's facially invalid Negative Declaration, which as Petitioners show below, utterly failed to comply with regulatory requirements and the H.O.M.E.S. test. The Negative Declaration failed to first identify relevant areas of environmental concern, then analyze (i.e., take a "hard look" at) those relevant areas of environmental concern, and finally set out a reasoned elaboration for its determination. Given the Negative Declaration's facial noncompliance with all three prongs of the H.O.M.E.S. test, this Court's decision effectively abandons any minimum standard of procedural compliance with SEQRA's statutory and regulatory mandates by local legislatures.

2. Can a local legislature's determination of environmental non-significance, even though substantively incorrect, be sustained solely on ground that "an ample record" ipso facto presumes that the local legislature identified and analyzed all relevant areas of environmental concern?

This Court's decision declared the Council's Negative Declaration valid based on its review of the record below. This Court departed from established precedent and appears to have enunciated a new legal principle: that regardless of the substantive invalidity of a Negative Declaration, a non-significance determination can be upheld if the record reveals legislative deliberation on a proposal's merits. By ruling that such legislative deliberations reflected in an

"ample record" resulted ipso facto in compliance with the H.O.M.E.S. test, this Court overlooked substantial evidence in the record below that LL 38 would create potential significant adverse environmental impacts. See Desmond-Americana v. Jorling, 153 A.D.2d 4, 12-13 (3d Dep't 1989), lv. to app. den., 75 N.Y.2d 709 (1990). ("While it is true that DEC may have considered the IPM program in promulgating the regulations, the evidence in the record decisively demonstrates that the regulations would have a major adverse impact ..., that DEC knew of this evidence and that, therefore, an EIS was required to explore the entire issue thoroughly."(emphasis in original)). In fact, given the facts and circumstances of this case and the record below — e.g., LL 38's elimination of all protections for six-year-olds; LL 38's deregulation of lead dust; LL 38's mandate that landlords remove peeling lead paint but allowing them to use untrained personnel and inadequate work practices or lead dust clearance testing in most instances; and all the experts' universal, detailed, substantiated opposition to LL 38 (in the face of only unsubstantiated agency support for the law) — no reasonable decision maker would conclude that in every aspect LL 38 would actually reduce lead hazards. A voluminous record doesn't point to due consideration — it simply demonstrates that there was a tremendous outcry against the Council's action and that the Council had ample notice from health experts that LL 38 may have adverse impacts.

This Court's ruling effectively carved out an exception for local legislatures from substantive compliance with SEQRA mandates and renders meaningless the significance determination, which under established SEQRA jurisprudence is triggered at a very low threshold. This Court's upholding of the Negative Declaration permits substitution of the legislative process for SEQRA's exacting procedural and substantive requirements, so long as deliberation occurred.

App. Dec. at 11, 16.[3]

3. Does SEQRA exempt government actions that may have a significant adverse impact on the environment where such actions involve regulation of pre-existing hazardous materials or conditions created by third parties?

This Court's Decision appears to have been premised, in part, on a holding that when government sets out to regulate pre-existing environmental hazards created by non-governmental actors, such actions are exempt from SEQRA review. This premises is not spelled out in SEQRA or its implementing regulations, and represents a substantial change in SEQRA jurisprudence.

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3. In actuality, the Council's Housing and Building Committee's did not engage in any substantive review or discussion of the Negative Declaration; its only "deliberation" consisted of the following:

> **CHAIRPERSON SPIGNER**: Okay, let's move on now to the negative declaration, which is a part of the procedure I am told we must comply with. . . . Let me turn to Terzah Nasser, Counsel for the Committee.
>
> **MS. NASSAR**: Okay, the next vote will be on a resolution . . . [on] which we will shortly have a vote, [that] local law [38] . . . will not have a significant adverse impact on the environment. There are copies of the negative declaration available for members who wish to review it. Actually, it has been on your desks. Thank you.
>
> **CHAIRPERSON SPIGNER**: As has been described, a roll call now on the negative declaration, which was explained to you by counsel. Roll call, please.

[1988-89]. As the IAS Court noted, the Committee did not review the Negative Declaration [15p], and the full Council as well never discussed it at all.[15q]

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Exposure to Toxic Lead Paint and Lead Dust is a Prevalent Environmental Hazard in New York City.

Today it is accepted that "[c]hildhood lead-paint poisoning may be the most significant environmental disease in New York City." Juarez, 88 N.Y.2d at 641 (emphasis added, citation omitted). Lead paint and lead dust constitute the major source of lead poisoning in children. [536, 539, 544, 548, 580] "The danger that lead-based paint presents to human health and safety, especially with regard to children, is today virtually beyond debate." City of New York v. Lead Industries Ass'n, Inc., 190 A.D.2d 173, 176 (1st Dep't 1993). While New York City banned the use of indoor lead-based paint in 1960, Juarez, 88 N.Y.2d at 641, it remains pervasive, as "[lead] paint continues to cover the walls of two out of three City dwellings," id.; the City estimated that 2,000,000 of the City's housing units contain lead paint, [2550-51] and that in 1998 some 473,000 young children were at risk of exposure. [2535]

Although some youngsters ingest lead-based paint chips, it is now undisputed that lead dust constitutes the major pathway for ingestion. [252-53, 344, 536, 539, 544, 548, 580, 1009] Lead dust is invisible to the naked eye and highly toxic even in very small quantities. [541, 545] Lead-based paint on friction surfaces such as windows and door jambs generates lead dust through abrasion. Lead-based paint on impact surfaces such as baseboards and door frames generates lead dust through regular wear and tear. [570] Lead-based paint on accessible surfaces such as window sills poses a great risk to toddlers who explore the world through "mouthing." Lead-based paint on surfaces breaks down over time and also generate lead dust. Even intact lead-based paint can generate lead dust through normal wear and tear. Because of lead's toxicity, improper and unsafe repairs or removal of leaded paint can generate dangerous levels of lead dust and create extremely hazardous conditions. [536, 542, 570-77]

Ingested or inhaled lead causes central nervous damage, loss of intelligence, and behavior disorders among other irreparable adverse health impacts. WABBA v. Giuliani, 223 A.D.2d at 67. Scientific research has shown and parents painfully know that lead poisoning impairs children's mental and physical development. [10009, 1032-36] Current research has demonstrated adverse health effects of lead on young children at increasingly lower and lower levels of exposure, indeed, no recognized safe level of exposure exists for young children. [162, 174, 298, 1007] Lead poisoning affects disproportionately poor families, [2551] and Department of Health records reveal that children afflicted with elevated blood-lead levels are overwhelmingly persons of color (i.e., at least 81% are African-American, Latino, or Asian/Pacific). [1022]

B. Regulation of Lead Hazards in New York City

1. Pre-existing Local Laws on Lead Paint

From 1982 until 1999, Local Law 1 of 1982 ("LL 1") (former N.Y.C. Admin. Code § 27-2013(h)) [2382], along with Local Law 50 of 1972 ("LL 50") (N.Y.C. Admin. Code § 27-2126)[2392], and various implementing regulations, provided the statutory and regulatory framework for lead hazard controls in New York City. LL 1 required landlords of multiple dwellings units home to children under seven years to either remove or permanently cover leaded paint of a requisite lead content. LL 1's definition of a lead hazard thus encompassed friction, impact, and child accessible[4] surfaces that generate toxic lead dust but do not necessarily involve peeling paint. The statute and regulations governed many facets of lead hazard control — from the definition of a lead hazard and inspection duties to enforcement time frames and safety

4. "Accessible" means protruding surfaces that teething infants may chew on. Window and door frames are respective examples of friction and impact surfaces. See, e.g., 42 U.S.C. § 4851b(2).

standards for work on lead paint, among others. See, Petitioners' Appellate Brief at 9 - 12.

Safety work practices regulations, codified in the Health Code at § 173.14,[2363] comprised a critical component of New York's lead hazard controls. Any time leaded paint is disturbed — either through abrasion or the normal breaking down process or, more particularly, during renovations — toxic lead dust is generated. The unsafe and improper abatement of lead hazards — through the generation and dispersal of highly toxic lead dust — creates significant risks of lead exposure and poisoning to young children. Under LL 1, New York City adopted then-state of the art safety measures in line with federal guidelines to prevent lead poisoning through unsafe work practices.[5] These safety standards sought to ensure, inter alia: the protection of residents from toxic lead dust and leaded paint; the safe disposal of hazardous materials; the prevention of lead dust contamination of the premises, its contents, and surrounding area; the proper licensing and training of workers undertaking the work; and the safe clean up of that work including stringent dust clearance testing to make certain that no hazardous lead dust remained. See Petitioners' Appellate Brief at 10, 34.

2. Local Law 38 of 1999

LL 38, enacted in June of 1999, [439] vastly altered obligations for landlords, tenants and City agencies regarding the inspection, maintenance and removal of lead paint. Among other changes, LL 38 requires landlords to inspect for and remove only peeling lead paint, and allows them to ignore intact lead paint on accessible, friction and impact surfaces; it defines a "lead-based paint hazard" as a peeling lead paint condition but it ignores the presence and potential

5. These regulations were adopted in response to several court orders in New York City Coalition to End Lead Poisoning v. Koch, slip op. (Sup. Ct. N.Y. Co. July 6, 1989) [2432]; Order (Sup. Ct. N.Y. Co. Aug. 2, 1990) [2454], aff'd, 170 A.D.2d 419 (1st Dep't 1991); slip op. (Sup. Ct. N.Y. Co. May 4, 1993) [2463]; Order (Sup. Ct. N.Y. Co. Mar. 30, 1994) [2471], app. withdrawn, Stip. (Feb. 24, 1995); 173 Misc. 2d 235, 240 (Sup. Ct. N.Y. Co. 1997); Order (Aug. 1, 1997) [2507], aff'd, 248 A.D.2d 120 (1st Dep't 1998).

hazard of lead-contaminated dust; it allows a landlord to use one set of weakened work practices if the violation is corrected within 21 days but requires compliance with the pre-existing more stringent set of work practices if the work takes longer than 21 days, although this two-tiered approach has no rational public health basis;[6] and applies only to apartments where children age five and under live, although the old law protected children age six and under and roughly 1 in 10 children who become lead poisoned are age six or older. Each and every one of these changes undoubtedly <u>may</u> have an adverse environmental impact. <u>See</u> Petitioners' Appellate Brief (pages 22-38), and references therein.[7]

C. The Statutory Framework of SEQRA

SEQRA seeks to "incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies." 6 N.Y.C.R.R. § 617.1(c). To this end, SEQRA imposes on governmental decision makers a two-step process for evaluating proposed actions. First, agencies must determine whether the proposal is subject to SEQRA impact review. This threshold inquiry or significance determination depends on whether "the action <u>may</u> include the potential for at least one

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6. When the Council considered a very similar provision in 1996, then-Health Commissioner Margaret Hamburg vigorously opposed it:

> Our first concern is that the safety procedures required when an owner repairs peeling paint voluntarily ... are not adequate. <u>Unfortunately, the risk to young children is actually increased by work that disturbs lead-based paint if it is done without appropriate safety precautions</u>. The safety procedures required in the Committee's proposal do not require adequate containment of work areas nor do they require clearance testing after work is completed to ensure that lead dust was cleaned up. Furthermore, the bill only requires full safety measures when an owner fails to voluntarily make the repair within 30 days. <u>To reduce safety requirements solely on the voluntary and rapid response of an owner, with no risk assessment, is not logical</u>. [621] (emphasis altered from original).

7. Two tables that were part of petitioners' brief to the IAS Court below, summarizing the changes imposed by LL 38, and the differences between the safe work practices in Health Code § 173.14 and LL 38's "interim controls," are attached as Exhibits B and C to the May 22, 2002, Chachère Aff.

significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1) (emphasis added). A very low threshold applies to the significance determination. Desmond-Americana v. Jorling, 153 A.D.2d at 4. If the answer is yes, the agency issues a Positive Declaration and prepares an EIS. If the answer is no, the agency issues a Negative Declaration and the SEQRA process ends, but Negative Declarations must meet SEQRA's detailed requirements and process set out in 6 N.Y.C.R.R. § 617.7 and the H.O.M.E.S. test, discussed infra at Point I.

D. The IAS Court's Decision

The IAS Court below found the Negative Declaration did not comply with SEQRA:

> [P]etitioners argue that Local Law 38 poses potential hazards to human life and health in that it: (i) eliminated lead dust and related conditions from the definition of lead-paint hazards; (ii) removed six-year olds from the class to be protected from lead-based paint; (iii) established a 21-day period in which landlords cited for violations could escape the Health Code standards for safe lead-based paint removal; (iv) allowed inordinately long periods for lead hazard removal and enforcement; and (v) eliminated the deadline for HPD's enforcement of lead-based paint violations in one- and two-family dwellings.
>
> Whether all these changes pose a possible hazard to human health is something to be determined by careful consideration of expert opinion, available scientific data and pertinent statistical information -- a review properly made by respondents through the SEQRA rather than by this court. For purposes of the issues before the court, it suffices that on their face these changes could pose such a hazard. The fact that Local Law 38 lowers the age of children to be protected and raises the lead content required to deem paint lead-based, without any explanation for such change, is enough to raise questions that must be answered.

[15j] (emphasis added). The IAS court correctly noted that, as these items were not identified and analyzed in the Negative Declaration, the Negative Declaration did not contain a reasoned elaboration for the determination and thus the law was void.

E. The Appellate Division's Decision

In reversing, the Appellate Division did not properly apply the H.O.M.E.S. test, as it did not address the Negative Declaration's facial failure to identify numerous (and, indeed, undisputed) potential adverse impacts, including many of those noted by the IAS court.[8] Instead, this Court based its entire decision on a supposition (unsupported by substantial evidence) that LL 38 was overall preferable to prior law, declaring at the outset that it "is undisputed that the policy should be containment rather than removal of lead paint because removal poses a greater threat than containment." App. Dec. at 4. In doing so, this Court did not adhere to the principle that "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively." Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d 400, 416 (1986).

This Court, declaring that "[c]ritical to our analysis is the undisputed fact that total abatement, the underlying premise of Local Law 1, had proven itself over two decades to be an unintended health hazard," App. Dec. at 16, thus constructed a completely different basis for reviewing the Council's actions, framing the dispute as a matter of competing approaches: i.e., what it called the "total removal" approach of LL 1 versus what it called the "containment"

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8. This Court's decision (App. Dec. at 10-11) parsed Petitioners' concerns thus:

> Petitioners' claim that Local Law 38 has increased the public health risks posed by lead-based paint by: (1) changing an owner's obligation from total removal to visual inspection and containment of peeling paint; (2) increasing the amount of lead allowable in paint; (3) decreasing the upper age of a child from six to five; and (4) narrowing the definition of a hazardous condition from all existing lead-based paint to peeling lead-based paint.

Inexplicably, this Court did not address petitioners' claims and extensive discussions of the impact of the elimination of lead dust and related conditions from the definition of lead hazards (discussed in Petitioner's Appellate Brief in pages 25 through 28), the weakening of the work safety practices (id. at 29 - 34), the lengthening of the time frames for correction of lead hazards (id. at 35 - 36), and the elimination of deadlines for the correction of lead hazards in the homes of lead poisoned children in non-multiple dwellings (id. at 37 - 38). The IAS court specifically noted these concerns as well [15j].

approach of LL 38. Id. at 15. Under this Court's reasoning, because "total abatement" constituted a per se health hazard, every provision of LL 38 in every aspect ipso facto "would undoubtedly reduce health hazards," id. at 16 (even though the vast majority of them had absolutely nothing to do with the change from "total abatement" to peeling paint only, and in fact removed many protections from exposure to lead hazards). It used this formulation as a basis to conclude categorically that every single change effected by LL 38 must be considered environmentally benign. Id. at 17.

In actuality, no known baseline existed because the Negative Declaration did not first gather and analyze data to determine how LL 1 operated (i.e., whether unintended hazards resulted and if so under what circumstances and how often). Lacking any such evidence, the only other baseline this Court could consult involved a facial comparison of the statutes as they are intended to operate. Such comparison quickly reveals a panoply of discrete provisions that on their face can create adverse environmental health impacts. These many discrete changes cannot be swept under the rug for the purposes of SEQRA compliance simply by a wholesale (and unsubstantiated) conclusion that LL 38 is in every respect preferable to prior law. As explained below, this Court's erred in its factual analysis on many bases.

1. The Court's "Total Removal" vs. "Containment" Formulation Conflicts with the Plain Language of the Relevant Laws.

First, the plain language of LL 1 [2383] did not require all lead paint be removed; rather, it provided that the "owner of a multiple dwelling shall remove or cover in a manner approved by the department any paint" having a lead content over a certain designated amount. (emphasis added) Likewise, implementing regulations for LL 1, found in the Health Code's safety standards for lead based paint abatement, 24 R.C.N.Y. § 173.14, defined "abatement" as the "reduction of a lead based paint condition or hazard through the wet scraping and repainting,

removal, encapsulation, enclosure, or replacement of lead based paint, ... as directed by the Commissioner of Housing Preservation and Development." § 173.14(b)(1) (emphasis added). [2363] Thus, LL 1 reflected as well a "containment" policy.

Conversely, LL 38 is not just a "containment" policy — it mandates the removal of hazardous peeling lead paint, Admin. Code § 27-2056.2, thus raising a host of issue regarding the adequacy of safe work practices and qualifications of those handling this toxic substance.

2. Substantial Evidence Shows No Universal Agreement Over "Total Abatement."

Second, the record flatly does not support this Court's conclusion that the petitioners and the experts agree with the City that full abatement is environmentally less desirable than "containment." App. Dec. at 4, 8, 14, 16. The expert testimony and submissions to Council differed in their opinions about total abatement; indeed, Dr. Herbert Needleman said the "permanent removal of all lead paint from dwellings, when conducted using safe work protocols, is the best long-term solution to childhood lead poisoning." [192].[9] The record below certainly does not contain substantial evidence that a national consensus has been reached about these approaches, either.[10]

Rather, as discussed infra, independent expert testimony indicated that total abatement poses a health hazard only when substandard, unsafe work practices occur and generate toxic lead

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9. Herbert Needleman, M.D., a Professor of Pediatrics and Science at the University of Pittsburgh, has conducted research on lead poisoning for 25 years, has treated lead poisoned children since the late 1950s, and has authored over 70 scientific papers. [191-215]

10. Indeed, no such national consensus exists. For example, as in LL 1, Massachusetts requires property owners where young children reside to remove or cover all lead paint, Mass. Gen L. ch. 111, § 197, and recent studies have documented extremely positive public health outcomes. Sargent et al., The Association Between State Housing Policy and Lead Poisoning in Children, 89 Am. J. Pub. Health (11) 1690 (1999) [3544]; Brown et al., The Effectiveness of Housing Policies in Reducing Children's Lead Exposure, 91 Am. J. Pub. Health (4) 621 (2001); Bailey et al., A Tale of Two Counties: Childhood Lead Poisoning, Industrialization, and Abatement in New England, Economic Geography (extra issue) 96-111 (1998).

dust. In any event, the Negative Declaration did not analyze or substantiate this policy shift, nor reference any study or scientific report in support of abandoning total abatement — let alone advancing a "national consensus" on the issue — but merely contained conclusory remarks regarding the total abatement approach.

3. The Record Shows No Analysis or National Consensus That a "Peeling Paint Only" Standard Protects Children from Toxic Exposure.

Conversely, the record below contained substantial evidence that the redefinition of what constitutes a "lead hazard" from a total abatement scheme to only peeling lead paint had other far-reaching implications. Although this Court's stated that the "negative declaration's finding that no significant adverse environmental impact would result from adoption [of LL 38] was amply supported by expert testimony as well as ... Federal standards," App. Dec. at 15, in fact not one independent expert testified in favor of LL 38 (and in particular LL 38's peeling paint only standard);[11] all the experts actively opposed it, particularly as it inadequately addressed lead dust.[12] LL 1 required the permanent covering or removal of all lead paint on impact, friction, and child accessible surfaces, thus eliminating these sources of toxic lead dust. LL 38's definition of lead hazards excluded impact, friction, and child accessible surfaces with intact lead paint that

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11. Dr. Paul Mushak, an environmental toxicologist and author of the 1988 Report to Congress on the Nature and Extent of Lead Poisoning in Children. [547-51] — and an expert witness for the City of New York in the pending City of New York v. Lead Industries Association case, N.Y. Co. Index. No. 14365/89 — said: "The revisionary argument, in my informed opinion, that only a lot of peeling lead paint is really an issue for child lead poisoning is totally wrong." [548] He further described LL 38's "elimination of the dust lead as a factor" as "scientific nonsense" and "professionally irresponsible." [548]

12. In a brief amici curiæ to this Court, twenty-four of the leading scientists, researchers, physicians, and public health experts in the field of childhood lead poisoning — most of whom had testified or made submissions to the Council — expressed alarm that LL 38 eliminated lead dust tests in most situations where lead violations were removed, even though required under prior law, and that no basis existed either in the record or science for this change. The experts cited the national consensus that lead dust is the primary pathway of childhood lead exposure, and the necessity of testing to ascertain lead dust's presence.

nonetheless generate toxic lead dust (and which under federal standards would be defined as hazards, see 42 U.S.C. § 4851b). Although the City's then-Health Commissioner stated that "[w]e know now that lead-contaminated dust is the predominant source of lead poisoning, and most likely the best predictor of children's risk," [1423] the Negative Declaration did not identify the deregulation of impact, friction, and child accessible surfaces as a relevant area of concern nor analyze and substantiate its deregulation, even though many independent experts asserted that this change alone could result in significant adverse health impacts.[13]

Thus, even accepting arguendo this Court's conclusion that "full abatement" is no longer preferred and that landlords will now be permitted to house young children in buildings with at least some lead paint, which surfaces and conditions need be regulated? This Court indeed acknowledged that at issue are "the details of how to measure risks presented by lead-based paint and how to contain those risks to ensure the safety of small children. ... The parties dispute how best to reduce those risks." App. Dec. at 8-9. However, the Negative Declaration (or, for that matter, all the proceedings in the Council) lacked entirely any scientific study or other environmental analysis in support of the choices ultimately made regarding those details. The

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13. Dr. Mushak said:

> Abrasion surfaces are well known to produce high lead exposures for infants and toddlers. Their natural curiosity or oral exploratory behavior places them at window sills, where abrasion lead paint particles are most pronounced and available to them for ingestion. The amounts of lead in these abraded particles are enormous [with potential fatal doses.] [548]

Before the Council as well was the 1996 testimony of then-City Health Commissioner Dr. Margaret Hamburg [2125-26] regarding intact lead paint on surfaces subject to friction or abrasion:

> Friction surfaces refer to movable surfaces such as window frames that rub against each other. The rubbing motion will, over time, cause the paint to abrade and deteriorate, creating chips and dust. . . . Unless all the lead-based paint is removed or covered, over time the constant movement and rubbing will probably cause the hazard to recur.[622] (emphasis omitted).

Council proffered no scientific studies, data, or any other analyses to support the Negative Declaration's implicit determination that children could be safely left in a home with toxic lead paint on friction, impact, and child accessible surfaces so long as an untrained landlord visually inspected once a year for only peeling paint;[14] indeed, the science does not support this policy.[15] These "details" in and of themselves constitute "relevant areas of environmental concern" under SEQRA, and warrant a proper significance determination.

4. The Court's Analysis Overlooked the Role of Safe Work Practices.

This Court's analysis failed to appreciate the critical role of safe work practices. Dr. John Rosen,[16] discussing the peer-reviewed studies, explained:

> [I]mproper work practices and the lack of proper lead dust controls will often result in the increase of lead contaminated dust and children's blood lead levels, sometimes dramatically. On the other hand, the careful removal of lead paint is effective in reducing children's blood lead levels and the dust lead levels in their homes.
>
> These outcomes are not dependent on whether the paint is peeling or intact; instead, they are dependent on the amount of care used (1) in preparing the work area, (2) in using proven safe work practices, (3) in properly cleaning the work site at the work's conclusion, and (4) in verifying that the work site is safe for re-occupancy by having an independent party conduct sufficient lead dust clearance tests. [3540-41(emphasis in original)]

Thus, Dr. Rosen, Dr. Needleman, and others point to perhaps the most important

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14. N.Y. City Admin. Code § 27-2056.3(d).

15. The federal government has found that one of three homes with lead based paint in good condition nonetheless have hazardous levels of lead dust. United States Department of Housing and Urban Development, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, April 18, 2001, at 5-15 (available online at www.hud.gov/lea/Vol1finalreport.pdf).

16. John Rosen, M.D., a Professor of Pediatrics at Albert Einstein College of Medicine and author of over 75 scientific articles on childhood lead poisoning., was twice Chair of the Centers for Disease Control and Prevention Advisory Committee on Lead Poisoning. The Second Circuit, in Campbell v. Metropolitan Property and Casualty Insurance Co., 239 F.3d 179 (2d. Cir. 2001), agreed with a trial court's conclusion that Dr. Rosen "'seems to be a preeminent expert in the field relied on by all the relevant government agencies to establish the science for the policies that the government has adopted.'" Id. at 186.

analytical error of this Court's decision: while no dispute exists that the removal of intact lead paint under LL 1 could be hazardous — if not carried out properly[17] — similarly, the removal of peeling lead paint under LL 38 is equally as hazardous — if not carried out properly. Indeed, while under LL 1 a landlord could abate a ceiling by simply covering it with a thin layer of sheetrock (creating little dust), under LL 38 a landlord can scrape an entire ceiling covered with peeling lead paint (creating lots of dust) without having to perform any clearance lead dust tests or follow numerous measures for lead dust protection and clean-up that were previously required by LL 1 and § 173.14. [356] A focus on LL 1's intact paint abatement requirement thus is no justification for ignoring in the Negative Declaration the adverse impact of weakening work area containment, cleanup, and lead dust clearance testing in LL 38.

5. Local Law 38 Changed Multiple Independently Operating Provisions — Not Just "Total Abatement."

In addition, LL 38 effected a complete overhaul of the City's lead paint laws that involved the independent operation of a host of provisions entirely unrelated to this Court's "total abatement" versus "containment" formulation. There is no dispute that among other significant changes LL 38 completely eliminated protections for six-year-old children,[18] weakened work

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17. The Negative Declaration does not demonstrate, however, that such removal would be hazardous if LL 1, including the underlying Health Code work safety provisions in § 173.14, were properly enforced and if the work were conducted using certified workers, as is now required under federal law. SEQRA does not sanction the notion that failure to enforce a law justifies failure to conduct an EIS on a proposal to weaken the law. Indeed, such a premise would establish a dangerous precedent.

18. This change obviously "may" have an adverse impact on six-year-olds — see WABBA v. Giuliani, 223 A.D.2d at 66 (1st Dep't 1996) (noting well documented adverse impacts of lead exposure on "children under seven years old"); E. Mauss Aff. [163, 174-76]; I. Mauss Aff. [219]; Ex. 111 (9% of N.Y. City children poisoned were over 6 years of age) [2527]; see also Rosen Aff. [304-05] (Montefiore saw hundreds of lead poisoned six-year-olds over the past 25 years); Pet. [79, 95].

safety rules governing lead dust risk management;[19] permitted paint with a higher lead content; reduced owner's inspection duties; extended enforcement time frames for correction of violations; eliminated enforceable deadlines that existed under LL 50 for correction of lead hazards in homes of already lead-poisoned children in one or two-family dwellings, and eliminated all enforcement for lead paint hazards in dwellings constructed after 1960.[20] There is no dispute that the Negative Declaration's two-and-a-half pages of conclusory remarks and general descriptions of

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19. Dr. Susan Klitzman, former Assistant Health Commissioner for Environmental Risk Assessment and Communication (who until the Fall of 1999 "overs[aw] the Department of Health's Lead Poisoning Prevention Program," [1429]) testified on November 5, 1999:

> [T]he "exclusive interim controls" outlined in Local Law 38 and its related rules ... are less protective of health than the provisions of the current health code Section 173.14 in at least 2 key respects:
>
> First, they do not require that the person performing the work receive any training, licensing or certification in lead safety.
>
> Second, they do not require that after lead-based paint hazards are corrected and the work area is cleaned, four dust wipe samples be collected by an independent third party, and that clearance levels be met before the area is cleared for re-occupancy by young children.
>
> [There are]... dangers of lead-containing dust to young children which can result when work that disturbs lead-based paint is conducted in an unsafe manner, by untrained personnel, without proper cleaning and monitoring. You can't tell how much lead dust is present from a visual inspection. ...[T]hese dangers can be minimized when trained workers follow safety procedures, when post-clean up clearance dust testing is performed by an independent third party and when clearance standards are employed.
>
> . . .
>
> No scientific evidence has been presented to indicate that the safety measures which have been deleted [by Local Law 38] are unnecessary from a public health perspective. This remains a concern among many in the public health community.

[3556-57] (emphases altered from original). Then-Health Commissioner Cohen as well did not deny that LL 38's "interim controls" were less stringent than Health Code § 173.14. [1436-38]

20. See Petition ¶ 171 [90], citing NYCCELP v. Koch, slip op.[2432], aff'd, 170 A.D.2d 419 (rejecting "naive presumption that no lead based paints were ever utilized, in violation of the law, in post 1960 buildings")[2444], and noting Woolfalk v. New York City Housing Auth., slip op. (S. Ct. N.Y. Co. May 12, 1998)[2553], aff'd, 263 A.D.2d 355 (1st Dep't 1999) (LL 1 applied where lead paint found in lead poisoned child's home, a Housing Authority building constructed in 1973). The City's Health Department found 10 percent of interior paints offered for sale in 1971 had illegal levels of lead. Rabin, Warnings Unheeded: A History of Child Lead Poisoning, 79 Am. J. Pub. Health (12) 1668, 1673 (1989).

LL 38 do not identify any of these changes as relevant environmental concerns nor analyze or substantiate the policy rationale for adopting LL 38's many other discrete changes independent of the change from “total abatement,” even though independent experts testified that these changes would create significant potential adverse health impacts. This Court either incorrectly analyzed or failed to address these other multiple discrete changes.

In sum, the fundamental error in this Court’s analysis lies in equating “total abatement” with New York City’s entire pre-existing statutory and regulatory framework for lead hazard control. This Court improperly ascribed a per se health hazard status to every single facet of lead hazard control — such as other aspects of the lead hazard definition; work safety regulations; the scope of protection of the law; enforcement time frames; inspection duties — and did not acknowledge the independent operation of these discrete provisions. In fact, the Decision went so far as to declare “[w]hen considering discrete methods of identifying and ameliorating hazards, all of the alternatives would result in a reduction, not a creation, of hazards to human health.” App. Dec. at 17.

Thus, under this Decision’s reasoning, eliminating protections for six-year-olds would reduce not create hazards; deregulating certain lead hazards (such as friction, impact, and child accessible surfaces) would likewise reduce not create hazards; and weakening safe work practice regulations to control dust when toxic lead paint is disturbed under LL 38 would not create hazards. Under this Court’s reasoning, the Council could have eliminated protections for four-year-olds and five-year-olds and six-year-olds and reduced rather than created health hazards. In fact, by this logic the Council could have revoked LL 1 altogether and not replaced it at all, and such action would have had no “environmental impact” for SEQRA purposes.

This reasoning does not comport with the complex reality of lead hazard control in New

York City or with the very low threshold for significance determinations under SEQRA.[21] And even accepting arguendo this Court's conclusion that LL 1 may have created an "unintended health hazard," App. Dec. at 16, it is equally true that LL 38 — enacted without proper environmental review under SEQRA — may have created unintended health hazards.

ARGUMENT

I. A NON-SIGNIFICANCE DETERMINATION CANNOT BE SUSTAINED IF ACCOMPANIED BY A PROCEDURALLY INVALID NEGATIVE DECLARATION AND CANNOT BE EXCUSED BY ACCEPTING AT FACE VALUE LEGISLATIVE DELIBERATIONS AS A SUBSTITUTE.

SEQRA's regulations stipulate the manner in which agencies must conduct the significance determination and the contents that must be included in the negative declaration. Because the Council's Negative Declaration failed to comply with these requirements, it was facially invalid. But this Court in effect ruled that a facially invalid negative declaration can be disregarded and that reviewing courts can instead look to the record. This approach effectively condones wholesale regulatory noncompliance and conflicts with the decisions of other Appellate Divisions and the Court of Appeals.

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21. This Court also stated as a basis of its Decision that because nullification of LL 38 would reinstate LL 1 "and place the City ... in immediate contempt of outstanding orders," the City "would be without any effective and safe methods of dealing with the persistent lead paint hazards." App. Dec. at 7 Yet preexisting laws operated for many years, and by late 1998 the City was finally on the verge of enacting a complete set of regulations [2402-30] to fully and safely enforce LL 1 and § 173.14 as repeatedly directed by this Court. This Court, in four prior decisions, had rejected the City's very same arguments regarding the viability, safety, and perceived inadequacies of LL 1. NYCCELP v. Koch, 170 A.D.2d 419 (1st Dep't 1991); 216 A.D.2d 219 (1st Dep't 1995); 245 A.D.2d 49 (1st Dep't 1997); 248 A.D.2d 120 (1st Dep't 1998). Moreover, as noted in Petitioners' Appellate Brief (at 66), petitioners were fully willing to stay that one aspect of the regulations concerning intact lead paint pending determination of the appeal, or while the City complied with the EIS process for a new law to replace LL 1, as they were throughout the period leading up to the enactment of LL 38. See Test. of Comptroller Hevesi. [1486]

A. SEQRA Regulations Mandate Explicit Requirements for Negative Declarations.

Implementing regulations require agencies to determine "[a]s early as possible in [its] formulation of an action it proposes to undertake," 6 N.Y.C.R.R. § 617.6(a)(1), whether the action is subject to SEQRA and, if so, whether it is a Type I, Type II, or Unlisted action. Id. The Council designated the proposed enactment of LL 38 as an Unlisted action. [427]

To make a significance determination, the regulations set out a three-step process that mirrors the H.O.M.E.S. test. First, the agency "must . . . identify the relevant areas of environmental concern." § 617.7(b)(2). It does so by reviewing the Environmental Assessment Form, the criteria contained in § 617.7(c), and any other supporting information. Id.; see also § 617.4(a)(1).[22] Second, the agency "must ... thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment." § 617.7(b)(3). Third, the agency "must set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." § 617.7(b)(4).

To determine whether an action may have a significant adverse environmental impact, "the impacts that may be reasonably expected to result from the proposed action must be compared to the [set out] criteria." § 617.7(c)(1). The applicable criteria include consequences such as "a substantial adverse change in existing air quality," § 617.7(c)(1)(i), and "the creation of a hazard to human health." § 617.7(c)(1)(vii). To determine whether the proposed action may result in either of these two consequences, the agency "must consider reasonably related long-

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22. "For all individual actions which are . . . Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in subdivision 617.7(c) of this Part."

term, short-term, direct, indirect and cumulative impacts . . . ." § 617.7(c)(2). In addition, "[t]he significance of a likely consequence . . . should be assessed in connection with: (i) its setting . . .; (ii) its probability of occurrence; (iii) its duration; (iv) its irreversibility; (v) its geographic scope; (vi) its magnitude; and (vii) the number of people affected." § 617.7(c)(3).

If the agency deems the proposed action to be Unlisted, as the Council did, it must use the short Environmental Assessment Form ("EAF") to determine the significance of such action unless the short EAF "would not provide the lead agency with sufficient information on which to base its determination." See § 617.6(a)(3). In such an instance, the agency should use the full EAF. § 617.6(a)(2). The full and short EAFs each contain a second part that asks the agency to identify the potential adverse impacts, compare § 617.20 App. A, Pt. 2 with § 617.20 App. C, Pt. II, and a third part that requires the agency to evaluate whether the identified impacts are significant. Compare § 617.20 App. A, Pt. 3 with § 617.20 App. C, Pt. III. A review of the short and full EAFs indicates that the Council should have used the full EAF in determining the significance of enacting LL 38.[23] Clearly, a local law directing the removal of toxic lead paint (either intact or peeling) would "affect public health and safety,"§ 617.20 App. A, Pt. II.18, and potentially "cause a risk of . . . release of hazardous substances."§ 617.20 App. A, Pt. 2, § 18.

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23. The State's short EAF requires the agency in Part II to identify potential adverse effects on, among other relevant areas of concern, "existing air quality" and to briefly explain that impact. § 617.20 App. C, Pt. II. § C1. Part III instructs the agency in determining the significance of identified relevant areas of concern:

> For each adverse effect identified [in Part II], determine whether it is substantial, large, important or otherwise significant. Each effect should be assessed in connection with its (a) setting . . . ; (b) probability of occurring; (c) duration; (d) irreversibility; (e) geographic scope; and (f) magnitude. If necessary, add attachments or reference supporting materials. Ensure that explanations contain sufficient detail to show that all relevant adverse impacts have been identified and adequately addressed.

§ 617.20 App. C, Pt. III. By contrast, the full EAF expressly identifies impacts on "public health" as well as on "air" as relevant areas of concern. § 617.20 App. A, Pt. 2.

B. The City Council's Negative Declaration is Facially Invalid.

The City Council used neither the State's short or full EAF form. Rather, the Council used an amended EAF form developed under New York City Rules of Procedure for Environmental Quality Review ("CEQR"). State regulations, however, expressly mandate that "[n]egative declarations must be prepared, filed and published in accordance with sections 617.7 and 617.12 of this Part." § 617.2(y); see also § 617.14(e) ("All agencies . . . must apply the criteria provided in section 617.7(c) of this Part."); § 617.14(b) ("Individual agency procedures to implement SEQR must be no less protective of environmental values . . and agency . . . review than the procedures contained in this Part."). As shown below, the Negative Declaration fails to meet each of the three prongs of the H.O.M.E.S. test set out in the SEQRA regulations.

1. The City Council's Negative Declaration Failed to Expressly Identify Any Relevant Areas of Concern.

The Negative Declaration claims to identify "impact categories" in its Attachment 2. [424] The listing of all the impact categories contained in the CEQR form, [435] along with conclusory remarks that LL 38 would not create any significant adverse environmental impact related to those concerns hardly constitutes "identifying relevant areas of environmental concern." 6 N.Y.C.R.R. § 617.7(b)(2). Attachment 2, a seven-page document with this listing of all the impact categories, contains two-and-a-half pages of generalizations related to the "purpose," "need," and "description" of the proposed legislation. [469-71] Another three-and-a-half pages explains why LL 38 would not have a significant impact on "land use," "zoning," "neighborhood character," "socioeconomic impacts / displacement,"[24] "community facilities," "open space," and

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24. The Negative Declaration devotes two pages to a discussion of LL 38's effect on "socioeconomic impacts / displacement." This discussion addresses in great part issues of cost and financial benefits — issues that SEQRA omits from the significance determination and expressly injects into the full EIS (continued...)

"historic and archaeological resources." [471-74] Attachment 2 devotes another half-page to LL 38's impact on "solid waste," "waterfront revitalization," and "infrastructure, energy and natural resources." [474-75]

With regard to air quality, the Negative Declaration does not identify this as a relevant area of environmental concern even though LL 38 mandates the removal of peeling lead paint — a process that generates lead dust and most certainly does affect air quality. WABBA v. Giuliani, 223 A.D.2d at 73-74.[25]

With regard to hazardous materials, the Negative Declaration expressly states that the proposal would not have any significant effect with respect to hazardous materials [436], and states in a conclusory fashion in the narrative section that "[t]he proposed legislation would not result in significant generation, storage or disturbance of hazardous materials." [475] (emphasis added). Yet again, a local law that mandates the removal of lead paint (whether intact or peeling) inherently involves "disturbance of hazardous materials." In addition, although the narrative implies that work on leaded paint necessarily involves hazardous materials it does not identify as relevant areas of concern all the discrete provisions in LL 38 that most definitely implicate "hazardous materials." These changes include: altering the definition of a lead hazard; deregulating lead-dust-generating conditions such as impact, friction, and accessible surfaces;

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24. (...continued)
process. Compare 6 N.Y.C.R.R. § 617.7(c) with ECL § 8-0109(8).

25. Instead, all Attachment 2 blithely asserts in a section on "Transportation, Air Quality, Noise" is that:

> The proposed action would not generate new development nor alter patterns of future development. Therefore there would be no changes to vehicular or pedestrian patterns as a result of this action. Since the action would have no change to traffic volumes or patterns, there would be no related mobile-source air quality impacts. The action would not result in any new or changes to existing stationary emission sources. Therefore there would be no regular noise intrusion as a result of this action. [474]

weakening the work practice safety standards for correction of lead violations; and lengthening enforcement time frames. [475]

Nor does the Negative Declaration identify as a relevant area of concern (as contained in the full EAF) public health impacts. All of the discrete provisions noted above and others as well fall under this category, and all that patently either affected public health and or concerned hazardous materials should have been affirmatively and expressly identified as a relevant area of concern.

2. The City Council's Negative Declaration Failed to "Thoroughly Analyze" Relevant Areas of Environmental Concern or To Set Forth A Reasoned Elaboration for its Significance Determination.

Implementing regulations required the City Council in its Negative Declaration to "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment." 6 N.Y.C.R.R. § 617.7(b)(3). As noted above, the Negative Declaration contained no thorough analysis whatsoever but rather inserted general descriptive and conclusory remarks about LL 38. The Negative Declaration failed to identify and "consider reasonably related long-term, short-term, direct, <u>indirect</u> and cumulative impacts," § 617.7(c)(2),(emphasis added) as mandated by regulation. In addition, the Negative Declaration also failed to assess the "likely consequences" of LL 38 — such as on public health, air quality, or hazardous materials — "in connection with: (i) its setting . . .; (ii) its probability of occurrence; (iii) its duration; (iv) its irreversibility; (v) its geographic scope; (vi) its magnitude; and (vii) the number of people affected." § 617.7(c)(3). If it had done so, the Negative Declaration would have likely included references and supporting evidence related to, <u>inter</u> <u>alia</u>: estimates of the prevalence of housing units containing young children that are contaminated with leaded paint; estimates of the number of children at risk of elevated blood lead

levels and of lead poisoning; explanations of the geographic areas where lead contamination is concentrated; and descriptions of lead poisoning and its irreversible and permanent damage to children.

Instead of "thorough analyses," the Negative Declaration contained conclusory remarks, some of which touched upon patent relevant areas of concern but none of which, however, the Negative Declaration expressly identified as such or gave due consideration. Examples of such conclusory remarks (among many others) include the following:

- **Change in Lead Hazard Definition That Deregulated Impact, Friction, and Accessible Surfaces and Limited Regulation to Peeling Paint:** "[T]he Council by enacting this bill recognizes that the best way to prevent poisoning from paint containing lead is to ensure that such paint is kept in good repair or, if it is peeling or located on a deteriorated subsurface, that it is repaired using safe work practices." [469] The Negative Declaration does not contain: any other discussion of this topic; any acknowledgment of the effect of deregulating impact, friction, and accessible surfaces; or any reference to supporting evidence or studies for this conclusion.
- **Change in Requisite Lead Level in Lead Hazard Definition**: "Lead-based paint is defined as paint or other similar surface coating material containing 1.0 milligram of lead per square centimeter (mg/cm^2) or greater, or more than 0.5 percent of metallic lead, based on the non-volatile content of the paint or other similar surface-coating material." [470] Again, the Negative Declaration failed to explain that this constituted a change from prior law (which had a more stringent standard of 0.7 mg/cm^2), [2383] why it adopted this change, or reference any

study or supporting evidence to substantiate this policy shift.

- **Elimination of All Protection for Six-Year-Olds:** "Significantly, children under the age of six are more likely to suffer permanent damage to their physical and mental health as lead impedes their neurological development." Id. [469] Again, the Negative Declaration failed to note that this constituted a change in policy or explain why it completely eliminated protections for six-year-olds, to reference any study or supporting evidence to substantiate this policy shift, or to explain the impact on six-year-olds.

- **Extending Enforcement Time Frames:** "The Council declares that it is reasonable and necessary to set forth time frames for owners and for HPD to diligently perform their duties so that lead-based paint hazards shall be controlled in all applicable housing to the maximum extent possible." [470] And, "[T]he legislation establishes certain procedures and time frames for enforcement actions by HPD personnel. The legislation also imposes strict time frames for an owner to correct a lead-based paint hazard after a violation has been issued." [471] Again, the Negative Declaration failed to explain why it lengthened enforcement time frames (or even to note that it did)[26] or to reference any study or supporting evidence to substantiate this policy shift.

- **Change in Inspection Duties from Continuous Obligation to Annual Visual Inspection:** "[T]he legislation imposes an affirmative obligation on the owner to inspect for lead-based paint hazards by conducting an annual visual inspection in

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26. Under LL 1 lead paint was a "C" violation, required to be removed within 24 hours, Admin. Code § 27-2115 [2384], unless extended by the Dep't of Housing Preservation and Development for good cause.

such dwelling unit." [471] Again, the Negative Declaration failed to note that or explain why it effected this change or to reference any study or supporting evidence to substantiate whether annual inspections suffice on public health grounds, or whether untrained owners can capably inspect for lead hazards. Compare, e.g., 40 C.F.R. §§ 745.226, 227 (setting out federal training and certification requirements for individuals engaging in lead paint inspections).[27]

The Negative Declaration also failed completely to analyze LL 38's two-tiered system for work safety rules. Although the document makes passing references to "interim controls" it fails to describe the discrete changes that these interim controls wrought on work safety standards, see Petitioners' Appellate Brief at 29-34 (describing changes to work safety standards effected by LL 38); see also supra, at 19 n. 19, or to substantiate the policy rationale for creating a two-tiered system for correction of lead hazard violations. All the Negative Declaration contains is conclusory remarks, such as that the interim controls "are intended to minimize the amount of work-related dust, which may contain lead, that remains in the dwelling unit after the work is completed" [475] (incidentally the only reference to lead dust in the entire document).

In sum, by even the most liberal standards, the Negative Declaration failed to identify relevant areas of environmental concern; failed to thoroughly analyze them; and failed to set forth a reasoned elaboration for its significance determination.

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27. Moreover, under LL 1, landlords were on constructive notice at all times of lead hazards, not merely upon an annual inspection. Compare Juarez, 88 N.Y.2d at 648-49, with LL 38, § 27-2056.3(f) (exempting owners from civil penalties or liability if conditions arose subsequent to an annual inspection and owner did not have actual notice).

C. This Court's Disregard of the Facial Invalidity of the Negative Declaration Conflicts with SEQRA's Express Regulatory Mandates and Established Precedent.

Notwithstanding the absence of expressly identified patent areas of environmental concern, this Court concluded that the "EAS contained extensive narrative addressing a wide variety of potential environmental impacts." App. Dec. at 14. This Court did note that the EAS failed to address public health impacts under a separate heading, but added that LL 38 created "no threat to human health" since the legislation "would not result in significant generation ... or disturbance of hazardous materials." Id. (emphasis added). This conclusion was incorrect; LL 38 mandates that landlords disturb peeling lead paint, unquestionably a hazardous material. And SEQRA imposed on the Council a separate obligation to first identify relevant areas of environmental concern — such as "disturbance of hazardous materials" and public health impacts. 6 N.Y.C.R.R. §§ 617.7(b)(2), 617.7(c)(1)(vii). This Court need not have gone further than the Negative Declaration's failure to identify "disturbance of hazardous materials" as a relevant area of environmental concern in order to deem the Negative Declaration invalid. Moreover, the Negative Declaration's conclusion that LL 38 would not generate any hazardous materials, by itself, does not constitute a thorough analysis of, or reasoned elaboration for, all the discrete provisions that changed how the City regulates lead hazards in this regard.

This Court asserted that "[w]hen courts review negative declarations accompanying action by local legislatures, the entire record is reviewed to determine the sufficiency of consideration under SEQRA." App. Dec. at 20. Surely, however, even if courts look to the entire record, given the express regulatory mandates, the Negative Declaration must in and of itself at least facially comply to pass muster. While no precedent exists for the exception created by this Court decision, on the other hand substantial precedent supports upholding compliance with SEQRA's

procedural requirements. See, e.g., Merson v. McNally, 90 N.Y.2d 742, 750 (1997) (strict procedural compliance required with SEQRA); King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d 341, 347 (1996) (same); Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417 (same); see also Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d 718, 720 (1985) (annulling negative declaration for agency's failure to "follow procedures"); WABBA v. Giuliani, 223 A.D.2d at 73-74 (same).

D. The City Council's Enactment of Local Law 38 Violated SEQRA's Procedural Requirements For Injecting Environmental Considerations Into Decision Making.

The Court of Appeals has declared that:

> "SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making." This policy is effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations.

Merson v. McNally, 90 N.Y.2d at 750 (emphasis added, citation omitted); see also King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d at 347 ("Thus it is clear that strict, not substantial, compliance is required."); Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417 ("Court review . . . insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures. . . .").

The Council failed to strictly comply with SEQRA's procedural requirements in numerous ways. The Petition at ¶¶ 142-147 [75-78] cited multiple claims regarding the Council's procedural noncompliance with SEQRA, among them the Council's failure to "make an initial determination whether an environmental impact statement need be prepared for the action" "[a]s early as possible in the formulation of a proposal for an action." ECL § 8-0109 (4) (emphasis added); see also 6 N.Y.C.R.R. § 617.6(b)(1)(i). Although addressed by the IAS Court [15m-15q], and briefed to this Court, see Petitioners' Appellate Brief at 53-55, this Court's decision

inexplicably did not address any of petitioners' procedural claims. For purposes of this Motion for Leave to Appeal to the Court of Appeals, petitioners would respectfully reserve their right to raise these issue if this Court grants their Motion.

II. GIVEN THE FACTS AND CIRCUMSTANCES OF THIS CASE, SUCH AS THE ELIMINATION OF ALL PROTECTION FOR SIX-YEAR-OLDS AND THE DEREGULATION OF LEAD DUST, NO REASONABLE DECISION-MAKER COULD CONCLUDE THAT LOCAL LAW 38 MAY NOT CREATE POTENTIAL SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS.

Part I, supra, demonstrated the Council's sweeping failure to comply with SEQRA's procedural requirements. This Part shows that this Court's ruling failed to address the Council's blanket non-compliance with SEQRA's substantive mandates as well. Alternatively, this Court's substantive review departs from settled law and sets out a new exception for local legislatures whereby non-significance determinations need not conform to the "rule of reasonableness" whatsoever, so long as a record exists and deliberations occurred below.

This Court's Decision declared that "[w]hether respondents' negative declaration complied with SEQRA and CEQR does not depend on the final outcome of their deliberations but on whether relevant areas of environmental concern were identified, a 'hard look' was given to those areas and a 'reasoned elaboration' made for the final outcome." App. Dec. at 11 (citing Comm. to Preserve Brighton Beach v. Planning Comm. of City of New York, 259 A.D.2d 26 (1st Dep't 1999)). Reviewing courts, however, must also assess agency determinations that an action may not have the potential for a single significant adverse environmental impact "in light of a rule of reason." Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 688 (1996); Coca Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d at 682; Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417. To that end, reviewing courts must determine whether the agency determination had a basis in reason and a foundation in fact. Pell v. Board of Educ., 34 N.Y.2d 222, 231

(1974). Thus, while the IAS Court was criticized for evaluating "the arguments aired during review of the proposed ordinance and the City Council's resolution of [those] disputes." App. Dec. at 18, this Court appears to have taken for granted that the Council's deliberation in and of itself satisfied the H.O.M.E.S. test. See, e.g., App. Dec. at 20 ("Our central task, then, is to determine whether respondents engaged in a 'thorough review of each area of relevant concern; [t]here is no doubt, whatever one's view on the merits of LL 38, that the City Council did just that." (citation omitted); id. at 15 ("The record evidence consists of testimony or written submissions by physicians, environmental scientists, government officials and property management experts."); id. at 15-16 ("There was vigorous debate of all relevant environmental issues by the City Council Committee on Housing and Buildings and by the full City Council."). Most tellingly, this Court stated:

> Every provision of the amending ordinance had been the subject of extensive debate involving experts from various fields as well as representatives of interested organizations. The record well documents the fair and thorough consideration of the environmental aspects of the new ordinance by the Council.

Id. at 16. But a record of lengthy legislative deliberations does not ipso facto mean the Council took a "hard look" at all the relevant areas of environmental concern, especially since the Council failed to even identify many areas of environmental concern.

A. Judicial Review for SEQRA Significance Determinations Implicates the Rule of Reasonableness, the Arbitrary and Capricious Standard, and the Substantial Evidence Rule.

The Court of Appeals proclaimed in Coca Cola Bottling Co. v. Board of Estimate that "the statutorily required early determination of whether a project may have a significant environmental effect" cannot "be separated from the policy decision involved in approving a project." 72 N.Y.2d at 682 (1988) (invalidating negative declaration). That Court further stated (in sharp contrast to the instant case where the Council lacked any substantiated evidence upon

which to base its Negative Declaration) that:

> [t]he question of significance is not arrived at solely by gathering data and making calculations; instead it is ultimately a policy decision, governed by the rule of reasonableness, that the particular facts and circumstances do or do not call for a preparation of a full impact statement.

Id. (emphasis added). One facet of the "rule of reasonableness" involves the degree of detail with which the decision maker considers each relevant area of environmental concern. Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d at 688 ("While the judicial review must be genuine, 'the agency's substantive obligations under SEQRA must be viewed in light of a rule of reason' and the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration." (citing Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417)). Thus, the Court of Appeals has made clear that substantive compliance with SEQRA depends, in part, on the factual context of individual cases. Akpan v. Koch, 75 N.Y.2d 561, 571 (1990) (stating that SEQRA determination best reviewed on a "case-by-case basis" "in light of the circumstances of [the] particular case").

Judicial review of substantive compliance with SEQRA must also look to whether a determination that was "arbitrary, capricious, or unsupported by substantial evidence." Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417; see also Merson v. McNally, 90 N.Y.2d at 752 (same); Har Enters. v. Town of Brookhaven, 74 N.Y.2d 524, 530 (1989) (same). The Court of Appeals, in one of its most thorough treatments of the judicial review of agency determinations, explained that:

> 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.

Pell v. Board of Education, 34 N.Y.2d at 231 (emphasis added)(citations omitted). Thus the

reviewed agency choice must meet some minimum substantive compliance with SEQRA — i.e., have a sound basis in reason and a foundation in fact. Pell also declared that "[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard." Id.(citations omitted) As the rule is applied, "substantial evidence is found where there is enough in the entire record for the administrative agency to have reasonably concluded as it did." 2 Thomas R. Newman, New York Appellate Practice, § 15.12, at 15-53 (2001) (emphasis added).

And, of course, courts reviewing SEQRA significance determinations also apply the H.O.M.E.S. test and ask: whether the lead agency identified the relevant areas of concern; whether the lead agency took a "hard look" at those areas; and whether the agency make a "reasoned elaboration of the basis for its determination." H.O.M.E.S. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d at 232.

B. This Court Erred in Upholding the City Council's Capricious Non-Significance Determination Despite Patent Adverse Health Impacts.

In its review of the City Council's substantial compliance with SEQRA, this Court overlooked multiple environmental areas of environmental concern implicated by LL 38, such as extending enforcement time frames and the myriad of policy decisions involved in LL 38's two-tiered work safety rules. By way of illustration, however, the analysis below focuses on just two examples of changes with obvious adverse impacts.[28]

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28. This is not to diminish the host of other potential impacts, discussed in the Petition and Petitioners' Appellate Brief in considerable detail but not addressed in either the Negative Declaration or by this Court's decision. See supra at 12 n. 8.

1. This Court Disregarded the Rule of Reasonableness in Ignoring Local Law 38's Elimination of Protections for Six-Year-Olds.

In the instant case, the Council, inter alia, eliminated entirely protections for six-year-olds, even though the record shows:

· that approximately nine percent of lead-poisoned children in New York City were over six years of age [2527];

· that Montefiore Hospital had treated hundreds of lead-poisoned six-year-olds during the past twenty-five years [304]; and,

· that six-year-olds' "cognitive and intellectual abilities . . . are compromised seriously by exposure of the brain" to lead [1608].

During Council testimony, the Health Commissioner neither identified the elimination of protections for six-year-olds as a discrete change wrought by LL 38 nor gave any environmental or health rationale for this significant policy shift. The Commissioner merely indicated that "[t]he peak age for childhood lead poisoning is between one and a half and two and a half years of age" and that "[f]ocusing on hazards in multiple dwelling units in which a child under six resides, will lead to more effective enforcement by enabling the private and public sectors to concentrate the expenditure of scarce housing and maintenance resources most appropriately." [1418] No other mention — let alone discussion — occurred regarding this policy change by any Council member during the remaining deliberations. No one testified that there would not be adverse health effects for six-year-olds, as quite obviously they must result.

Given the circumstances of this case — i.e., changing lead hazard controls and, more specifically, entirely eliminating protection for six-year-olds in New York City from the irreversible and devastating impacts of lead poisoning — surely this policy change warranted some evidence and some analysis. A reasonable decision maker would undoubtedly have

requested to know how many six-year-olds could potentially be affected, see 6 N.Y.C.R.R. § 617.7(c)(3)(vii) ("significance of a likely consequence . . . should be assessed in connection with the number of people affected"), and how many six-year-olds would statistically be likely to be affected. See § 617.7(c)(3)(ii) ("significance of a likely consequence . . . should be assessed in connection with its probability of occurrence).

With no support in the record, the City proffered an after-the-fact argument — with which this Court agreed — that since federal lead hazard regulations apply to children under six years this change cannot constitute a significant adverse environmental factor. App. Dec. at 17. In fact, this Court stated that "[a]doption of uniform standards consistent with State and Federal governments would likewise reduce, not create, hazards," id., even though the Council changed from a more protective standard to the less protective federal standard.[29] In all cases, however, SEQRA requires agencies to undertake a statutorily prescribed analysis (i.e., the significance determination) of relevant areas of environmental concern. Where LL 38 eliminated protections for six-year-olds entirely, SEQRA's "hard look" requirement demands more than mere reliance on the lowest common denominator of federal standards. In any event, the Council did not even appreciate that LL 38 had effected this change or consider this obviously inadequate rationale.

Thus, the Council's non-significance determination — in light of the discrete change as to six-year-olds and the total lack of information before the Council — constituted an arbitrary and capricious determination that did not comport with the rule of reasonableness and this Court should not have upheld it.

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29. It is worth noting again that in other contexts, LL 38's provisions are significantly less protective than federal standards, such as a definition of "lead hazards" that omitted the federal definition's inclusion of lead dust and lead paint on friction, impact, and accessible surfaces, 42 U.S.C. § 4851b(15). Likewise, the clean-up standards in LL 38 are weaker than federal standards. 40 C.F.R. §§ 745.226, 227.

2. This Court Disregarded the Rule of Reasonableness in Ignoring Local Law 38's Deregulation of Lead Dust in Connection with Impact, Friction, and Child Accessible Surfaces.

As discussed supra, the Council, inter alia, deregulated lead dust generated by impact, friction, and child accessible surfaces. With regard to this major policy change, the record shows that every single expert who testified before the Council and addressed this issue warned that this discrete change would create significant adverse health risks to children. The examples cited below have been selected from the testimony or correspondence of over a dozen independent medical or environmental experts.

- Dr. Rosen submitted written testimony to the Council that LL 38 excluded "leaded friction surfaces on wooden doors and wooden window frames (characteristically found in pre-1960 housing)" and that "it [is] just these surfaces that yield small particles of lead-based paint in household dust in particle sizes that are most readily absorbed into the bodies of young children." [606]
- Dr. Bruce Lanphear, another environmental health specialist with expertise in lead poisoning, wrote to the Council Speaker that the bill was "simplistic, regressive and . . . will result in an increase in childhood lead poisoning," and that "[i]t fails to recognize that lead-contaminated house dust is the primary pathway for leaded paint to be ingested by young children." [539]
- Dr. Paul Mushak, a toxicologist and health scientist, wrote to the Council Speaker to explain that deregulation of lead dust was insupportable from a scientific point of view since "[e]xtensive scientific documentation shows conclusively that interior dusts, and exterior dusts . . . are a major component of childhood lead poisoning." [548]

- Dr. Barry Levy, a physician specializing in environmental health, wrote to the Council Speaker that “[l]ead dust must be included in the definition of ‘lead-based paint standards’” and that “[t]he proposed legislation would be a major step backward and put children at unnecessary significant risk of permanent harm due to lead exposure.” [544-45]
- Don Ryan, a representative of the Alliance to End Childhood Lead Poisoning, testified that “as an advocate for children’s health, [he] was deeply concerned” about LL 38 “because of its failure to control and to check for lead dust.” [1531]. He went on to testify that “science tells us that we need to worry about . . . the pathway of exposure which is lead dust,” [1530] and that “lead dust hazards must be put on the same level with peeling paint” and “[t]he definition of a lead-based paint hazard must encompass lead dust.” [1532]

Even the City’s then-Health Commissioner acknowledged the critical importance of lead dust, testifying that “we cannot ignore the dangers of lead contaminated dust, and dust should be incorporated into the bill in the language of what constitutes lead-based paint hazards.”[30] [1473] Strikingly, the Prime Sponsor of LL 38, Council member Archie Spigner, moments before the full Council vote on LL 38 and the Negative Declaration, admitted:

> I must say that as it relates to lead dust, there is a great deal of confusion even among advocate groups as to what and how to control and measure lead dust. I mean, dust is very insidious, it can intrude through a number of ways, and it is a constant challenge to keep the dust [safe]. <u>I don’t know how you keep a room or an environmental dust, lead dust or other kind of dust free. So that is an issue that we have yet to talk about.</u>

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30. Notably, while the substantial evidence in the record does not support this Court’s conclusion that universal agreement existed about the demerits of the “total abatement” approach, it does show that universal agreement existed that lead dust constitutes the primary mechanism for childhood lead poisoning.

[2238-39 (emphasis added)]. Surely this is not a substitute for the reasoned elaboration required by SEQRA in a Negative Declaration.

Conversely, no one — not an independent expert, not the City's Health Commissioner, not any Council member — provided any evidence (either through testimony or reference to the scientific literature, studies, or any other substantiated source) that LL 38's change in the lead hazards definition would not result in adverse health impacts to children. Independent medical and environmental experts all warned that LL 38's "peeling-paint only" definition could not be supported by science or on public policy grounds. The Health Commissioner as well alerted the Council to the dangers of toxic lead dust. Not even one scintilla of evidence in the entire record can be found to counter these conclusions.

Surely, given the circumstances of this aspect of the case and the information before the Council, a reasonable decision maker would have determined that deregulation of lead dust generated by impact, friction, and child accessible surfaces may create significant adverse health impacts. This Court on this ground too should have invalidated the Negative Declaration for being an unreasonable and capricious determination.

C. Reviewing Courts Must Annul Unreasonable and Capricious Non-Significance Determinations.

Reviewing courts must invalidate significance determinations that are affected by an error of law, arbitrary and capricious or an abuse of discretion. Jackson v. N.Y.S. Urban. Dev. Corp., 67 N.Y.2d at 416. The Court of Appeals in Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 368 (1986), declared a negative declaration invalid on substantive grounds; the agency's failure to identify or "consider the potential long-term secondary displacement of residents and businesses in determining whether a proposed project may have a significant effect on the environment" did not comply with SEQRA and thus constituted an "arbitrary and

capricious" determination. Id. Likewise, this Court should have invalidated the Council's Negative Declaration for its failure to affirmatively identify and consider in appropriate detail the elimination of protections for six-year-olds and the deregulation of lead dust generating conditions as significant environmental factors.

In another Court of Appeals case concerning substantive review of a SEQRA determination, Kahn v. Pasnik, 90 N.Y.2d 569 (1997), the Court affirmed the invalidation of a negative declaration. Unlike the instant case, where an entire cadre of the nation's leading medical, public health, and environmental experts alerted the Council to a host of potentially adverse environmental factors, in Kahn the agency's own consultant identified in a report nine relevant areas of environmental concern. Id. at 573. The Court ruled that the agency failed to "take[] a hard look at the relevant areas of environmental concern," id. at 574, because it failed to wait for the necessary information to examine those relevant areas of environmental concern and chose instead to issue prematurely the negative declaration. Id. Similarly, in the instant case, the Council failed to collect the information necessary to reasonably consider whether reducing the age of children protected may result in adverse health impacts and (as shown by Councilmember Spigner's admission in the record quoted above) unreasonably failed to acknowledge that deregulation of lead dust may also result in adverse health impacts warranting a Positive Declaration. On these grounds as well the Negative Declaration was invalid.

D. Reviewing Courts Must Annul Negative Declarations That are Unsupported by Substantial Evidence.

Reviewing courts must annul agencies' SEQRA determinations that are unsupported by substantial evidence. Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417; see also Merson v. McNally, 90 N.Y.2d at 752; Har Enters. v. Town of Brookhaven, 74 N.Y.2d at 530. As demonstrated above, expert testimony alerted the Council to the fact that six-year-olds can suffer

permanent and devastating brain damage from lead. The Council collected and evaluated absolutely no other evidence regarding this matter; the record below did not contain any evidence whatsoever that this policy change would not result in adverse health impacts. The record below also shows, that the Council's deliberations failed to devote any attention to this marked policy shift. The Council failed to affirmatively identify elimination of all protections for six-year-olds as a relevant area of environmental concern or to consider any substantiated evidence regarding this issue although it not only may, but indeed will, have significant adverse environmental impacts on those children. The Council's determination that LL 38 may not have any potential adverse environmental impacts in the context of the elimination of protections for six-year-olds, thus, was not supported by substantial evidence and on that ground as well the Negative Declaration was invalid.

Similarly, expert testimony alerted the Council that lead dust constituted the major pathway for lead poisoning in children and thus a relevant area of environmental concern. The record below did not contain any expert testimony or substantiated evidence at all that deregulation of surfaces that create lead dust would not create adverse health effects or, as this Court concluded, would actually reduce health hazards. The Council's determination that LL 38 may not have any potential adverse environmental impacts in the context of its deregulation of lead dust generating impact, friction, and accessible surfaces, thus, was not supported by substantial evidence and on that ground as well the Negative Declaration must be invalidated.

E. The Standard of Review for Significance Determinations Differs Markedly from That of Final Environmental Impact Statements.

The review of a determination as to whether an action requires an EIS invokes one standard of review (i.e., the H.O.M.E.S. test), while review of either the contents of an EIS or the findings statements that follows an EIS involves a somewhat different standard. 2 Michael

B. Gerrard et al., Environmental Impact Review in New York § 7.04[1], at 7-44. A lead agency must issue a positive declaration and prepare an EIS if it contemplates an "action" that "may include the potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1) (emphases added); see also ECL § 8-0109(2). The distinguishing feature of the significance inquiry is that SEQRA requires only "a very low threshold" of environmental impact before mandating an EIS. Desmond-Americana v. Jorling, 153 A.D.2d at 10 (emphasis added); Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d at 364-65; Omni Partners v. County of Nassau, 237 A.D.2d 440, 442 (2d Dep't 1997) ("Because the operative word triggering the requirement of an EIS is `may,' there is a relatively low threshold for the preparation of an EIS."); UPROSE v. Power Auth. of the State of N.Y., 285 A.D.2d 603, 607-08 (2d Dep't 2001), leave to app. den., __ N.Y.2d ___ (2001) (proposal involving "a non-threshold pollutant, which means there is some possibility of an adverse health impact . . . at any concentration," may include potential for significant environmental effect and thus EIS required.)

The rule of reasonableness and the determination whether — given the circumstances of the instant case — the Council had a sound basis in reason and a foundation in fact to issue a Negative Declaration is properly and solely focused on whether LL 38 may have included the potential for one single significant adverse environmental impact — not on the overall benefits of one approach over another. Thus, that some "[a]reas of environmental concern were . . . explicitly and exhaustively addressed through witnesses and written submissions and considered through debate and proposed amendments," App. Dec. at 20-21, does not necessarily satisfy SEQRA's requirements vis-a-vis the significance determination, which requires simply an assessment whether relevant areas of environmental concern may create significant adverse environmental effects. 6 N.Y.C.R.R. § 617.7(a)(1). That an amendment to "includ[e] lead dust

in the definition of `lead based paint hazard'" was proposed and defeated, App. Dec. at 16, is irrelevant to the fundamental question of whether the deletion of lead dust as a defined hazard should have been identified as environmentally significant in the Negative Declaration.

In effect, this Court conflated the EIS inquiry with the significance determination. It is appropriate for an EIS inquiry — and not the threshold SEQRA inquiry — to consider, for example, what measures might "achieve greater reductions" in lead hazards. App. Dec. at 17. Likewise, the Council improperly focused on EIS-related concerns during its rushed and confused significance determination. See e.g. Neg. Dec. [473-74] (discussing financial benefits of LL 38); Health Commissioner Cohen testimony supra (noting potential financial efficiencies in eliminating protections for six-year-olds) [1418]. SEQRA permits a balancing of competing social and economic factors related to an action in its full-scale impact review process, not in the threshold determination of environmental significance. Compare ECL § 8-0109(8) with 6 N.Y.C.R.R. § 617.7.

Rather, this Court should have considered whether, in light of the circumstances of this case (e.g., the substantial weakening of lead hazard control and safety regulations concerning inherently hazardous work on leaded paint), the Council could reasonably determine that LL 38's enactment would not create even a single potential significant adverse environmental impact. Because the record points to manifest significant adverse health threats as a result of LL 38, the Council unreasonably, arbitrarily, and capriciously made its non-significance determination. The substantial evidence shows that the Council disregarded overwhelming expert opinion that pointed to the need for a Positive Declaration. See, e.g., Desmond-Americana v. Jorling, 153 A.D.2d at 12; H.O.M.E.S. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d at 232 (agency "[i]n Alice-in-

Wonderland manner" "separated and put aside the realities of the . . . problem"). This Court erred as a matter of law in holding that the Council satisfied SEQRA's substantive mandates.

III. COURT OF APPEALS REVIEW IS WARRANTED BECAUSE THIS COURT DEVIATES FROM FIRM PRECEDENT IN EXEMPTING A GOVERNMENTAL ACTOR FROM SEQRA COMPLIANCE WHERE THE ACTOR REGULATES PREEXISTING HAZARDOUS CONDITIONS CREATED BY THIRD PARTIES.

This Court's Decision made a distinction between preexisting and potential future hazardous conditions. App. Dec. at 14 ("The primary environmental hazards addressed by Local Laws 1 and 38 have arisen from pre-existing lead-based paints."). This Court also drew a distinction between hazardous conditions created by third parties and those created by the government itself. Id. at 11 ("Where, as here, governmental action concerns remedies for existing environmental harm, it is important to keep the existing harm separate from the governmental action."). This Court also incorrectly concluded that "[t]here is no claim that any action undertaken or proposed by respondents would increase health risks beyond those already existing due to the use of lead-based paint by third parties." Id. at 9.[31] Finally, this Court emphasized that SEQRA did not place an affirmative obligation on the Council to address lead paint hazards. Id. at 11 ("The government has not been made responsible for environmental risks created by third parties as a result of SEQRA."), 18 ("SEQRA, by its own terms, would not have required the City Council to adopt either [LL] 1 or [LL] 38 since the hazards were not created by municipal action.").

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31. In reality, LL 38 commanded the removal of peeling lead paint, and throughout the record the experts testified that LL 38 would increase health risks in numerous areas, including the undisputed fact that it significantly weakened the safe work practices required by LL 1 and Health Code § 173.14. [536-84] Under the Decision's reasoning, the Council could have issued a Negative Declaration if it had simply revoked all the lead paint laws entirely, since it would not have "increased health risks beyond those already existing due to the use of lead-based paint by third parties."

However, any regulation and/or policy making — whether of preexisting hazardous conditions created by third parties or by the government itself or of any other potential future hazardous conditions — is subject to SEQRA by the express terms of its implementing regulations. It is firmly established that leaded paint constitutes a hazardous material with the potential for devastating individual and societal public health consequences. Moreover, this Court has previously ruled that as they concern a hazardous material, policies regarding lead dust must comply with SEQRA. WABBA v. Giuliani, 223 A.D.2d at 72-73 (stating that lead is a "toxic substance long recognized as a hazardous waste"). This Court's Decision has the potential to seriously compromise SEQRA by essentially exempting local legislative regulation of hazardous materials — particularly if they are pre-existing and of non-governmental origin.

A. Municipal Regulation of Preexisting Hazardous Materials and/or Conditions — Even if Created by Third Parties — Falls Squarely Under SEQRA's Purview.

SEQRA's central tenet is that it governs all agency actions that may have adverse environmental impacts. E.C.L. § 8-0109(2). As this Court noted in WABBA v. Giuliani, SEQRA applies to lead paint and lead dust because of their hazardous nature. 223 A.D.2d at 71-73. More specifically, lead paint and lead dust fall under two criteria, which are "considered indicators of significant adverse impacts on the environment," 6 N.Y.C.R.R. § 617.7(c)(1) :

- "a substantial adverse change in existing air quality," § 617.7(c)(1)(i); and
- "the creation of a hazard to human health." § 617.7(c)(1)(vii).

In addition, SEQRA regulations define "actions" to include "agency . . . policy making activities that may affect the environment," § 617.2(b)(2), as well as "adoption of agency rules, regulations and procedures, including local laws, codes, [and] ordinances . . . that may affect the environment." § 617.2(b)(3). The regulations do not qualify SEQRA's purview to hazards to

human health or hazardous materials created solely by the government as opposed to those created by third parties. Similarly, the regulations also do not limit SEQRA's application to future hazards to human health or hazardous materials as opposed to pre-existing conditions. The plain language of SEQRA does not strike any of the distinctions this Court makes — either by statute or by regulations.

In addition, none of the SEQRA cases that concern hazardous materials make any of the distinctions this Court draws. See, e.g., Chemical Specialties Mfgs. Ass'n v. Jorling, 85 N.Y.2d 382, 396 (1995) (involving SEQRA review of agency promulgation of a regulation governing pesticide DEET concentration; regulation concerned a hazardous material created by third parties and applied to both preexisting and future pesticides); Desmond-Americana v. Jorling, 153 A.D.2d at 11-12 (involving SEQRA review of agency promulgation of regulation concerning public notification of pesticides; regulation concerned a hazardous material created by third parties and applied to both preexisting and future pesticides). Thus, the enactment of LL 38, which regulates lead hazards, falls squarely under SEQRA's ambit.

B. This Court's Decision Establishes a Precedent that Severely Undercuts SEQRA Policy.

This Court's decision sidesteps the heart of the instant case — that the Council's regulatory changes contained in LL 38 (regardless of the fact that they address preexisting hazards created by third parties) can themselves result in potential environmental harm. Although this Court does acknowledge that "[t]he potential environmental harm addressed by SEQRA review is that which may be created by the action of the government," App. Dec. at 11, this Court incorrectly ascribes potential harm to LL 1 alone, stating:

> The only environmental hazards which may be, in some fashion, attributed to action of the municipality actually arose from Local Law 1's now-discredited resort to total abatement, a practice repudiated by the proposed ordinance.

Id. at 14. As petitioners have argued, this Court either misapplied the standard of review for SEQRA procedural and substantive compliance or else fashioned a new standard for local legislative bodies regulating preexisting hazardous conditions created by third parties that is so lax as to render review meaningless. Neither SEQRA's explicit mandates nor SEQRA jurisprudence supports the latter ruling.

Moreover, such a ruling has far-reaching ramifications for local legislative governance. The State Constitution grants local governments the power to adopt and amend local laws related to the "safety, health and well-being of persons" within it. N.Y. Const. Art. 9, § 2(c)(10). In New York City alone, the Council has enacted many local laws related to hazardous materials and conditions that involve pre-existing substances created by third parties. See, e.g., N.Y.C. Admin. Code §§ 16-117.1 ("transport, storage and disposal of waste containing asbestos"); 24-146.1 ("asbestos work"); 24-609 et seq. (governing "hazardous substance emergencies"). Allowing local legislatures to evade SEQRA compliance will permit local governments to adopt or amend local laws concerning hazardous substances without the guidance of informed, comprehensive, analytic, and open decision making. Hasty and ill-considered enactments, as in the instant case, can result in potentially irreversible, devastating public health effects that affect thousands if not hundreds of thousands of people. SEQRA does not permit this. See, e.g., Miller v. City of Lockport, 210 A.D.2d 955, 958 (4th Dep't 1994) ("To hold otherwise, would, in contravention of the intent of SEQRA, reduce the accountability of the lead agency, lessen the public access to the process and permit governmental approval of [a] massive project without consideration of [relevant factors].").

CONCLUSION

The Motion for Leave to Appeal to the Court of Appeals should be granted.

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