To be argued by
ELIZABETH I. FREEDMAN
(20 minutes requested)

COURT OF APPEALS
STATE OF NEW YORK

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 AND 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 next 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; DAVID M. MONAHAN and JULIA MONAHAN, and their minor child, IRIS EVE MONAHAN, by their next friends and parents, DAVID M. MONAHAN and JULIA MONAHAN,

Petitioners-Plaintiffs-Appellants,

For a Judgment pursuant to CPLR Article 78 and § 3001 of the Civil Practice Law and Rules

-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-Respondents.

RESPONDENTS' BRIEF

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April 11, 2003

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PRELIMINARY STATEMENT

Petitioners-plaintiffs-appellants New York City Coalition to End Lead Poisoning, Inc. et al. ("petitioners" or "NYCCELP") appeal from a decision and order of the Appellate Division, First Department entered March 26, 2002, which reversed an order and judgment of the Supreme Court, New York

County (York, J.) entered February 22, 2001, and upheld as valid respondents' negative declaration and New York City Local Law 38 of 1999, which regulates lead paint in multiple dwellings. The Appellate Division rejected petitioners' challenge to Local Law 38, and overturned the Supreme Court's ruling that had declared Local Law 38 null and void based on the City's alleged failure to comply with the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law § 8-0101 et seq., and City Environmental Quality Review ("CEQR") procedures (43 RCNY § 6-01 et seq. and 62 RCNY § 5-01 et seq.). The Supreme Court accepted petitioner's contentions that preparation of an Environmental Impact Statement ("EIS"), rather than adoption of a resolution issuing a negative declaration as to environmental impact, was required before passage of Local Law 38.

In its extensive, well-reasoned decision, the First Department unanimously reversed, and ruled that the New York City Council properly adopted Local Law 38 of 1999. Local Law 38 established a comprehensive framework for both preventing and correcting lead paint hazards in residential dwellings. It imposes extensive requirements on the owners of multiple dwellings. Owners must annually inspect units in which children under six years old reside, and must correct lead paint hazards using safe work practices regardless of whether a violation has been issued. If a violation has been issued, there are precise time periods to correct the violation. The law sets specific statutory time frames with respect to complaints of lead-based

paint hazards for inspections, service of violations, owner repair, and owner certification of completion of repairs. Local Law 38 also requires owners to ensure that windows and doors are properly hung to eliminate binding that may cause lead dust dispersion, and to ensure that floors are smooth and cleanable to eliminate collection of dust. Local Law 38 imposes specific duties on the City's housing agency, the Department of Housing Preservation and Development ("HPD"), including specific time frames to inspect a dwelling unit after it receives a complaint of a possible lead paint hazard, and thereafter to reinspect the unit where violations were placed to ensure that such violations were properly corrected. Most significantly, Local Law 38 mandates that HPD correct any lead hazard violation if an owner fails to timely do so, which requirement is apparently unique to this law, as no similar mandate is, to our knowledge, imposed on any municipality or other governmental entity in this country. The law also provides public information and health care linkages for children possibly affected by lead paint.

Local Law 38 repealed Local Law 1 of 1982, including its antiquated mandate that all intact lead paint -- which is not hazardous -- must be abated immediately. In fact, the enactment of Local Law 38 avoided a public health disaster; full implementation of Local Law 1 would have disturbed vast amounts of intact lead paint, thereby creating lead dust hazards that would have resulted in a dramatic increase in childhood lead poisoning.

The New York City Council adopted Local Law 38 after extensive consideration of the viewpoints of numerous parties with an interest in preventing childhood lead poisoning; commissioners of the City's health and housing agencies, public health experts, medical professionals, lead abatement experts, trial lawyers, representatives of advocacy organizations and not for profit and private real estate owners all testified or submitted written materials at one or more of the three City Council committee hearings. There was also a lengthy debate before the entire City Council prior to the proposed legislation being passed. Throughout these four hearings, and in written submissions, the various environmental concerns, such as lead dust and safe work practices, were comprehensively addressed and considered. The record of the deliberations of the New York City Council establish exhaustive consideration of the claimed advantages and disadvantages of all of the debated provisions of Local Law 38, with massive input from professionals with expertise in issues of lead paint poisoning and the means for prevention thereof. The City Council was thoroughly informed about, and thoroughly considered every issue which petitioners claim was required to be reviewed pursuant to SEQRA and CEQR. The City Council fully complied with the environmental laws when it adopted Local Law 38.

The Appellate Division properly held that this extensive record before the Council amply demonstrated compliance with all applicable environmental review laws, and

that the Council correctly found no basis to conclude that Local Law 38 could have a significant adverse impact on the environment. The First Department properly analyzed the lengthy record before the City Council leading to passage of Local Law 38, and correctly ruled that this record established that the Council took the requisite SEQRA "hard look" at the potential environmental impact of Local Law 38.

QUESTION PRESENTED

Whether the Appellate Division correctly upheld Local Law 38 and the negative declaration, and properly rejected petitioners' challenge under SEQRA and CEQR, as the record amply demonstrates respondents' compliance with all applicable environmental laws in enacting Local Law 38.

STATEMENT OF FACTS

Local Law 38

Petitioners seek to invalidate Local Law 38 of 1999 (2623-2638).[1] The law, inter alia, repealed the Local Law 1 provision, codified in New York City Administrative Code ("Admin. Code") § 27-2013(h), that required that an owner of a multiple dwelling in which a child six years of age or under resided to remove or cover any paint or similar surface-coating material having a reading of 0.7 milligrams of lead per square centimeter or greater or containing more than 0.5 percent of metallic lead based on the non-volatile content of the paint or similar surface-coating material on the interior walls,

[1] Numbers in parentheses refer to pages in the Record on Appeal.

ceilings, doors, window sills or moldings. The total abatement of lead-based paint is no longer recognized as the most reasonable and effective method of minimizing the danger posed by lead-based paint; and the removal of intact lead-based paint could itself create a lead-poisoning hazard (492). Local Law 1, Admin. Code § 27-2013(h), had consistently been interpreted to require full removal or covering of all lead-based paint in any apartment in which a child six years of age or under resided.[2] Local Law 38 requires repair of a lead-based paint hazard, or presumed lead-based paint, when it is peeling or on a deteriorated subsurface (an unstable or unsound surface) (492, 494), a condition which can be readily observed by visual inspection (494). Admin. Code § 27-2056.1 (2625). The bill defines "a lead-based paint hazard" as lead-based paint that is peeling on any surface or on a deteriorated subsurface in a multiple dwelling in which a child under the age of six resides, or peeling paint that is presumed to be lead-based paint because it is in a multiple dwelling erected prior to January 1, 1960, in which a child under the age of six resides, as provided for

[2] See New York City Coalition to End Lead Poisoning (NYCCELP) v. Giuliani, 138 Misc.2d 188 (Sup. Ct. N.Y. Co. 1987), aff'd for reasons stated by Justice Wilk, 139 A.D.2d 404 (1st Dept., 1988); Decision of Supreme Court, New York County, (DeGrasse, J.) (2432-2452), effected by Order, entered August 2, 1990 (2454-2461), aff'd for reasons stated by Justice DeGrasse, 170 A.D.2d 419, (1st Dept., 1991); 216 A.D.2d 219 (1st Dept., 1995); Decision dated December 14, 1995 (2479-2497) (York, J.), effected by Order dated May 1, 1996 (2499-2505), aff'd as modified, 245 A.D.2d 49 (1st Dept., 1997); 173 Misc.2d 235 (York, J.), Order, entered August 1, 1997 (2507-2511), aff'd, 248 A.D.2d 120 (1st Dept., 1998).

in § 27-2056.4 of the NYC Admin. Code (493, 494, 2625). For purposes of mandating repair as a lead-based paint hazard, this presumption is similar to a presumption in Local Law 1. Under § 27-2056.4(a), an owner can seek to rebut the presumption by submitting to HPD sworn proof concerning lead-based paint testing or sampling results. Under § 27-2056.1(3), "lead-based paint" means paint or similar surface coating material containing 1.0 milligram of lead per square centimeter or greater, as determined by laboratory analysis or by x-ray fluorescence (XRF) analyzer. Admin. Code § 27-2056.1(3) Local law 1 required that an owner of a multiple dwelling in which a child six years of age or under resided remove or cover any paint or similar surface-coating material having a reading of .07 milligrams of lead per square centimeter or greater or containing more than 0.5 percent of metallic lead based on the non-volatile content of the paint or similar surface-coating material on the interior walls, ceilings, doors, window sills or moldings.

Local Law 38 enacted a prohibition against dry sanding or scraping of lead paint, Admin. Code § 17-181 (2624), which was not contained in Local Law 1 (493). The new law also added a provision, Admin. Code § 17-179 (2624), comprehensively providing for referrals for blood lead screening (493).

Local Law 38 (Admin. Code § 27-2056.3) adopted new provisions for issuing a notice to tenants when a lease is signed, and annually thereafter (between January 1 and January

16), inquiring as to whether a child under the age of six resides, or, in the case of a new leasing, will reside, in the dwelling unit. If the tenant informs the owner that a child under the age of six does reside in the unit, subsequently advises the owner that a child under the age of six has become a resident of the unit, or the owner otherwise has actual knowledge of the presence of such a child, the owner must annually perform a visual inspection of the unit and correct all lead-based paint hazards identified in the inspection (495, 2627-2628). Under Admin. Code § 27-2056.2, an owner is required to correct all lead-based paint hazards (494, 2626). When no violation has been served, or if repairs are made within the time limits provided under § 27-2115(l) (within 21 days, unless granted an extension to a maximum of up to 45 additional days, based on specified circumstances set forth in the law), the owner shall correct the defective condition using the work safety provisions provided in § 27-2056.5, and the rules promulgated thereunder at 28 RCNY Chapter 11.[3] If the owner does

[3] These measures include sealing the work area until all work and clean-up are achieved; advising occupants not to enter the work area until work has been completed, preparing the work area by covering all moveable objects with polyethylene, plastic or equivalent sheeting, or removing the objects and HEPA-vacuuming the objects prior to removal; keeping work area coverings and debris safely stored in the work area while the work is being performed, wet scrape all affected surfaces in the work area or wash all surfaces in the work area with a detergent prior to repainting to remove any dust that may have accumulated and safely dispose of peeling paint, paint chips or dust in accordance with all applicable laws, rules and regulations; repaint all affected areas; thoroughly wet-mop or HEPA-vacuum the work area at the end of each work day; upon completion of the work, remove sheeting and drop cloths in a safe manner and

not correct the lead-based paint hazard in the time provided under the law, then the condition must be corrected using the protocol set forth in § 173.14 of the New York City Health Code. § 27-2056.4(d) (498, 2631, 2634). Under § 27-2056.6, when a dwelling unit in a multiple dwelling erected before January 1, 1960 becomes vacant, the owner is required to repair all peeling paint surfaces, make floors smooth and adjust all doors and windows so they do not bind (2631-2632).

Local Law 38, § 27-2056.7, sets time frames for inspection by HPD, and for issuance of any notice of violation with respect to a complaint as to the existence of peeling paint in a dwelling unit in a multiple dwelling erected prior to January 1, 1960, in which a child under the age of six resides. A pamphlet is to be provided to the tenant concerning interim controls and notice that they may call the New York City Department of Health ("DOH") for referral of any child who may require blood-lead screening (2632). The owner is required to certify correction of the condition to HPD, which must reinsert within specified time periods to insure accuracy of the certification. § 27-2115(1),(2),(4) (2634-2635). Local Law 38

HEPA-vacuum or wash with detergent all surfaces exposed to peeling paint, paint chips dust or other work-related debris, and adjust all doors, including cabinet doors, and windows to ensure that they are properly hung so that no painted surfaces bind. When lead-based paint violations have been corrected on any interior wood trim, window, window sill, or door, after final clean-up, a surface dust test shall be conducted immediately adjacent to the work area, with the test conducted by an individual who has passed a course approved by the Department of Health, and the samples forwarded to an independent state certified laboratory for analysis (2630).

adds a provision not present in Local Law 1 that if the owner fails to correct the violation, HPD itself must correct the violation within 60 days of the owner having failed to certify correction within the time specified in the law, or within 60 days of HPD's determination that the certification was invalid. Admin. Code § 27-2115(1), (3) (2635). An owner who fails to correct a violation is subject to a civil penalty of $250 a day, up to a maximum of $10,000. Admin. Code § 27-2115(7). A false certification is a misdemeanor, punishable by a fine of up to $1000 and imprisonment for up to one year, or both, and is subject to a civil penalty of not less than $10,000, nor more than $25,000. Admin. Code § 27-2115(6) (2635-2636).

City Council Committee Hearing of December 16, 1998 Concerning Replacement of Local Law 1 of 1982

On December 16, 1998, the City Council Committee on Housing and Buildings ("CHB"), chaired by City Council Member Archie Spigner, the Deputy Majority Leader of the City Council, held a hearing on the progress of drafting regulations to implement Local Law 1, and the overriding issue of the need to replace that law with legislation reflecting the current consensus concerning the safe management of surfaces containing lead-based paints.[4]

[4] In November 1998, prior to this City Council hearing, both HPD and DOH held hearings concerning regulations proposed at court direction to attempt to implement the ruling that Local Law 1 required removal of lead-based paint from intact surfaces (2874-2886; 2908-3116).

Richard T. Roberts, HPD Commissioner, testified before the Committee, answered questions, and submitted a written statement (3417-3431). Commissioner Roberts stated that the complete removal or covering of all lead paint in a multiple dwelling unit where a child six years of age or under resides would be an enormous and costly task, given the approximately three million housing units in the City, which would cost the City approximately $100 million annually and private owners an average of $15,000 a unit, exclusive of any costs of tenant relocation during the work. Children's blood lead levels had declined over the last ten years under the City's current lead poisoning prevention programs. Complete abatement of intact lead was not necessary or practical, and the current national consensus was that intact lead paint poses a possibility of a future hazard only if the paint becomes deteriorated, while disturbing intact lead paint creates an immediate hazard (3139-3141, 3419-3421). The objective should be to make housing "lead safe" rather than "lead free," by repairing lead hazards such as peeling and deteriorated lead paint, and controlling lead dust (3140, 3423).

Commissioner Roberts stated that the cost of total abatement was astronomical and would waste limited resources necessary to maintain affordable housing, causing abandonment of, and disinvestment in, affordable housing when the City had been working to prevent abandonment and to increase the supply of affordable housing (3141-3142, 3424-3425).

Commissioner Roberts further testified how Local Law 1 should be changed to adopt a feasible approach that reflected current scientific opinions. A sound lead paint poisoning prevention program would require owners to insure that paint is kept intact and to safely perform work to address peeling paint, particularly in child occupied units, in a manner that would not create additional hazards from lead dust. Owners should be required to take basic actions to improve the lead safety of units upon vacancy, such as dust clean up (3144-3145, 3425-3429). The legislation should make clear that it is the owner's responsibility to maintain the property, not the City's, and the City should have discretionary authority, but should not be compelled, to intervene and take over the compliance responsibilities of a recalcitrant owner (3145-3146, 3429-3430).

Neal L. Cohen, M.D., the Commissioner of DOH, also testified and submitted a written statement (3432-3439). Dr. Cohen stated that the total abatement of all lead-based paint, by disturbing intact lead-based paint, would have exactly the opposite effect of what was originally intended, and as an expert had stated, "create a new wave of childhood lead poisoning cases that would dwarf the current caseload" (3149-3150, 3433). Such an approach would undo the dramatic success in reducing the occurrence of childhood lead poisoning over the past 30 years. In 1970, there were 2649 cases of children with blood lead levels of 55 micrograms per deciliter, while in 1997 there were 1153 new cases, using a measure of 20 micrograms per

deciliter, with fewer than 5% of these cases having a blood lead level of 55 micrograms. Since 1994, newly diagnosed cases had declined by over 40% (3150, 3433).

There was no evidence that intact lead-based paint poses an immediate health hazard, and there was a growing consensus that intact lead-based paint should not be disturbed. Intact paint would not produce lead dust. Children were exposed to lead dust mostly by crawling where the dust was, putting their hands in the dust and then in their mouths, actions most common with small children. The peak age for lead poisoning was between 1½ and 2½ years old, with less than 10% of cases occurring among children six years and older (3434). There were studies showing that the removal of intact lead-based paint, creating lead dust, actually increased the risk of lead exposure to young children (3151-3153, 3434).

Dr. Cohen also described as antiquated the Local Law 1 definition of lead paint as paint containing at least 0.7 milligrams of lead per square centimeter or at least 0.5% lead by weight. Testing equipment was geared to the EPA standard of 1.0 milligram per square centimeter and was not validated to test at the 0.7 standard. As a consequence, inspection time was greatly increased, and owners would contest test results, with some success (3156-3159, 3435-3436).

Dr. Cohen proposed four key principles of a workable health-based approach to regulating lead-based paints. The definition of lead-based paint should be established at the

federal 1.0 milligram standard; the definition of lead-based paint hazard should encompass a risk-based approach which only requires testing and abatement of paint that is peeling or covering a deteriorated surface in a dwelling unit; the law should apply to dwelling units built before 1960, or even 1950; and safety precautions should be required when work is performed that can potentially disturb lead-based paint. Plastic sheeting in the immediate work area should be securely taped down to form a continuous barrier to the penetration of lead dust, work methods such as wet scraping should minimize the creation of lead dust, the room where work was done should be HEPA-vacuumed or thoroughly washed after completion of the work, and children under 6 years of age should be removed from the immediate work area until the work is completed (3165-3166, 3438).

During questioning of the Commissioners by members of the Council Committee, Council Member Michels, the author of Local Law 1 of 1982 (3171, 3190), stated that it was never meant to require the removal of intact paint. Local Law 1 was never intended to require a lead-free environment, and Mr. Michels had repeatedly so indicated (3190). Council Member Michels claimed he was in total agreement with Dr. Cohen's four principles (3172), and a law he had proposed, Intro. 205, to replace Local Law 1, accomplished all those objectives (3177-3178).[5] [6] Mr.

[5] By joint letter, dated February 9, 1999, Commissioners Roberts and Cohen informed Council Member Michels of their many concerns with Intro. 205 (3493-3498). These included the definition of "lead paint hazard", which had a blanket inclusion of lead paint "present on accessible surfaces" which "could create the

Michels stated that Local Law 1 never intended the abatement of intact paint, that court rulings to that effect were the product of the lack of implementation of regulations by City agencies, and that Local Law 1 was a good law, but had now outlived its

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unworkable situation created by the court's interpretation of Local Law 1 -- an obligation to abate intact lead paint." (3494). The proposed bill provided for overly broad City inspections which actually involved risk assessments which are the duty of the property owner. Time frames for City inspections and for correction of unabated violations by the City were unrealistic. The decision on whether the City should itself repair conditions constituting uncorrected violations should be within the City's discretion, and not mandated (3493). The owner's inspection duties were not clear, and appeared to be self-contradicting (3498). Reporting requirements and required liaison with DOH duplicated existing provisions to track the conditions in the unit and to obtain screening and health care for children residing in affected units (3496). The proposed bill required protection of occupants during some repair work without specifying the nature or circumstances, thereby creating a ground for further litigation and court interpretation (3496). The proposed legislation combined an unnecessarily elaborate description of a work protocol with a very general directive that DOH "ensure" that the work is done safely, an unworkable combination sure to be productive of litigation which might expose the City to tort liability claims (3495). The bill also covered common areas of multiple dwellings, which is unnecessary (3493). The plans to cover Board of Education facilities required comment from that body. The provisions were duplicative of existing DOH regulations covering kindergartens, while day care centers were under the jurisdiction of the New York State Department of Social Services (3497)). Statements in the proposed declaration of findings were alarmist and incorrect; for example, the statement that a child with a blood lead level at or over 20 micrograms per deciliter was seriously lead poisoned and requires hospitalization (3497).

[6] In testimony before the Council Committee, Matthew Chachere, counsel for petitioners herein, after providing his version of the NYCCELP litigation history (3287-3297), stated that Intro. 205 was a reasonable compromise meeting the concerns about abating intact lead-based paint (3298). It was not in itself another full abatement bill, as contended by landlords, but required that the property be made safe and be inspected by the landlord sufficiently to make sure lead paint hazards were not occurring (3299). NYPIRG, a petitioner herein, also supported adoption of Intro. 205.

usefulness because of the manner in which it had been interpreted and given the current state of scientific expertise (3308-3309). One property owner's representative, Nicholas LaPorte, of the Associated Builders and Owners of Greater New York, agreed with Council Member Michels to the extent that Local Law 1, as enforced by HPD, to require scraping, bonding and repainting a peeling paint surface in a pre-1960 building, which was presumed to contain lead-based paint, was proven to be effective in that it had led to a dramatic decline in lead poisoning in the last 15 to 20 years (3310-3311).

The Committee also heard expert testimony, with accompanying written submissions, that the "lead free" approach of Local Law 1 constituted a public health threat. It would disturb intact paint and, by dispersing lead paint, create a poisoning hazard to children, with the consequent likelihood of an increase in childhood lead poisoning cases. These experts advocated adoption of a "lead safe" approach consistent with the national consensus on the issue, as reflected in HUD and EPA recommendations and standards based, in turn, on research studies of the problem. Under the "lead safe" approach, the emphasis is on repair of deteriorated paint conditions in buildings which may contain lead paint, as only deteriorated paint is capable of creating a lead dust hazard. See testimony of Jack Caravanos, Professor of Environmental Health, Hunter College (3351-3355; 3442-3447); Alicia Lukacho, M.P.H., American Council on Science and Health (3262-3266, 3471-3474) analogizing

to the health problems caused by abating intact asbestos) (3264, 3472); Vincent Coluccio, Doctor of Public Health, of ATC Associates and the New York Academy of Medicine (intact lead paint was not a hazard, and research established that disturbing it, particularly in the absence of an adequate number of contractors trained to safely abate lead paint, would "create a new wave of childhood lead poisoning cases that would dwarf the current caseload" (3463) and would also multiply the litigation caseload. "We expect the real bonanza will be among litigation attorneys" (3462). Nick Farr, the Executive Director of the National Center For Lead Safe Housing, "strongly urge[d] the New York City Council to amend Local Law 1 so that it not require the removal of intact lead-based paint," which was not recommended by HUD or EPA even when a child with an elevated blood lead level resides in the affected unit. "The presumption that the mere presence of lead-based paint constitutes a hazard to children's health is simply not supported by the growing body of scientific research. Indeed numerous studies have shown that removal of intact lead-based paint generates large amounts of lead contaminated dust that can increase children's lead exposure unless meticulous care is taken in dust control, containment, and clean up" (3448-3449). Even on friction and impact surfaces, HUD regulations governing housing it finances call for lead hazard controls only if there is excessive dust on window sills or on floors adjacent to a door or window (3449). "The risks attendant to wide scale abatement of intact lead-

based paint must not be underestimated" (3450). The appropriate response was "interim controls" which, as recommended in HUD's proposed regulations, address lead-based paint in poor condition where there is more than 2 square feet of deteriorated paint on interior components with large surface areas (walls, ceilings, floors and doors, or more than 10% of the total surface area of the component is deteriorated on interior or exterior components with small surface areas (e.g. window sills, baseboards, soffits, trim) (3449-3450).

Professor Caravanos, Nick Farr and property owners all recommended adoption of the 1.0 milligram per square centimeter standard for measuring the presence of lead in paint, which was accepted by federal agencies, EPA, HUD and the CDC; rather than continuing to utilize the 0.7 standard of Local Law 1. The difference in standards had no health significance. XRF equipment was calibrated and designed to measure at the generally accepted and utilized 1.0 standard, and could not reliably measure for the 0.7 level (3445, 3550, 3478, 3480).

Representatives of owner's groups provided testimony and written submissions that the cost of implementing Local Law 1 was at least $15,000 per unit (3475), as developed by a Mayor's Advisory Committee consisting of housing experts, architects and contractors (3348-3349). With approximately 1.5 million units of pre-1960 construction in the City, the cost of total abatement would be over $2 billion. The cost of total abatement would cause abandonment of buildings, particularly

since many of the affected properties were in areas of the City where the risk of abandonment was greatest (3478), while total abatement was unnecessary and a counterproductive threat to public health (3313, 3314-3315, 3477-3478, 3481). The owners also objected to potential relocation costs of tenants in the event it was required during full abatement of units (3314-3315, 3480-3481).

Representatives of groups specializing in the development, operation and financing of low-income housing also testified and submitted statements as to the need to replace Local Law 1, with its obsolete, counterproductive, prohibitively expensive requirement to abate all lead-based paint. John McCarthy, the Executive Vice President of the Community Preservation Corporation, stated that the organization's efforts, which had provided 60,000 affordable apartments, raising $1.8 billion for that purpose, could not have been carried out if the properties had actually undergone unnecessary abatement of intact lead-based paint, which contradicted the recognized "lead safe" approach to managing lead-based paint in older housing by safely addressing lead paint hazards caused by deteriorated surfaces (3361-3367, 3484-3485). The $15,000 cost per unit for total abatement was double the cost per unit of replacing all of the worn out mechanical units in older buildings of the type subject to the Local Law 1 total abatement requirement (3483). Rachel Kleinberg, of the New York Housing Conference, and Frank Braconi of the Citizens Housing and

Planning Council stressed that low income cooperatives could not absorb the cost of the unnecessary full abatement and that owners of smaller, older buildings would abandon these properties if compelled to absorb the cost of full abatement, which the rents were inadequate to cover (3267-3272; 3369-3371; 3452-3453, 3475-3476).

Proceedings to Adopt Local Law 38

By various stipulations in the NYCCELP litigation, further compliance proceedings were stayed until June 30, 1999, to give the City Council time to consider alternative legislation to Local Law 1 (2512-2516, 3501-3504).

Prior to a hearing before the City Council Committee on Housing and Buildings ("CHB") on June 21, 1999, concerning a proposed law to replace Local Law 1 of 1982, the Council received considerable correspondence from pediatricians, public health specialists and environmental scientists, both from and outside New York City, criticizing the proposed legislation. Virtually all of the criticism centered on either the lack of inclusion of lead dust as a lead-based paint hazard, and the absence of a provision for clearance lead dust testing after completion of repair of deteriorated paint believed to contain lead (544-557, 578-581, 591-596, 645-646, 660-664).

CHB Hearing of June 21, 1999

On June 21, 1999, the CHB held a public hearing on a proposed bill to replace Local Law 1 of 1982 (1187-1213). The main features and purposes were described in a report of the

Infrastructure/Human Services Division of the Council (1176-1186). A principal objective was to eliminate the requirement to totally abate lead-based paint. The abatement of intact lead-based paint could create a hazard (1178). The bill provided for repair of peeling lead-based paint or peeling paint that is presumed to be lead-based by reason of being located in a residential unit where a child under the age of six resides, in a multiple dwelling erected prior to January 1, 1960 (1180-1181), when such paint is peeling or covering a deteriorated subsurface (one that is unsound or unstable, as determined by visual observation) (1181). The proposed law banned dry scraping or dry sanding of lead-based paint (1179).

The law provided a notification procedure to determine whether a child under the age of six resided in a unit. Upon signing of a lease for a unit in a multiple dwelling erected prior to 1960, and annually thereafter, in January of each year, an owner was required to provide the tenant with a form inquiring whether a child under the age of six resided in the unit. If the tenant answered the form in the affirmative, if in the course of a year a tenant informed the owner that a child of that age moved into the unit, or the owner otherwise had actual knowledge of the presence of such a child, the owner was required to conduct an annual visual inspection for lead-based paint hazards (1180-1181).

The proposed law established time frames for inspections of complaints of peeling paint in a pre-1960

building, for issuance of a notice of violation, for the owner to effect repairs, and to certify completion thereof (1183-1184). It provided requirements for performing such repair work (1181-1182). The bill provided penalties for failure to make repairs and for false certification (1185). It provided for the first time that if the owner did not correct a violation of a lead-based paint hazard, HPD itself would be required to correct the violation within 90 days of the failure to certify correction, or from an inaccurate certification (1184-1185).

At the hearing on June 21, 1999, HPD Commissioner Roberts summarized the provisions of the bill (1315-1325). Answering questions by Council members, Commissioner Roberts indicated that the time frames in the bill for various HPD actions, which certain Council members believed were excessively long (1342, 1356), were outside limits. For example, upon a complaint of a possible Class C hazardous violation, such as peeling possibly lead-based paint, HPD usually inspected within 72 hours (1357, 1363). Responding to a specific contention by Council Member Michels that the total time to correct a violation could be 221 days, Commissioner Roberts responded that this assumed the owner was granted every possible extension, while the granting of extensions was actually not routine, but governed by rather stringent, specific statutory standards, and if after having been granted extensions the owner still did not do the work, HPD itself was obligated to perform it (1343-1344), a point later reiterated by Nicholas LaPorte, a representative

of an owner's association (1692-1693).[7] Assistant Department of Health ("DOH") Commissioner Susan Klitzman, Ph.D., who had oversight of the DOH Lead Poisoning Prevention Program (1429), indicated that while repair work is pending on DOH violations, DOH counselors effectively educate affected families as to how to keep lead dust from further injuring the child (by keeping the child away from the affected area, regularly cleaning the area and washing the child's hands), and nutritional counseling is also provided, all of which typically results in reduction of the child's blood lead levels before repairs are done (1442, 1461). Questioned by Council Member Christine Quinn as to why friction surfaces were not included as a source of lead-paint dust, Commissioner Roberts responded that the statutory definition of a lead-based paint hazard focused on deteriorated surfaces causing peeling of paint wherever these were found (1352-1353). Commissioner Roberts further indicated that the basic protocol for repair work in the proposed law provided appropriate safety standards even if the Health Code contained additional ones (1396-1399), a view in which the DOH Commissioner, Dr. Cohen, also concurred (1436-1438).

Dr. Cohen testified that the bill was in accordance with current scientific understanding and met the need to avoid disturbance of intact lead-based paint, which could cause a new wave of lead poisoned children (1415-1416) and undermine the

[7] Council Member Kathryn Freed voiced the opposite concern that the statutory incentives for owners to voluntarily complete the work promptly encouraged sloppy repairs (1360).

extensive progress made in combating childhood lead poisoning.[8] The bill addressed the most critical lead-based paint hazard; lead-based paint that is peeling or on a deteriorated subsurface in multiple dwelling units where a child under the age of six resides (1418). The peak age for lead poisoning is between 1½ and 2½ years of age, with older children outgrowing the hand-to-mouth behavior that puts them at risk for lead poisoning (1418).

The bill adopted the scientifically recognized, technically feasible 1.0 milligram per square centimeter definitional measurement of lead-based paint, rather than the 0.7 standard of Local Law 1, and eliminated the alternative of measurement by weight, which utilized paint chips as samples and caused a risk of further deterioration through the collection of paint chips from an already deteriorated surface (1416-1417). The bill mandated use of specified safe work practices even for corrective work done before issuance of a violation, and banned dry scraping (1419), established a specified means for owners to determine whether a child under the age of six resided in a unit, and required annual inspection by the owner in that event (1420). Furthermore, for the first time owners had an

[8] Dr. Cohen provided updated statistics to the figures cited at the December 16, 1998 hearing (3150, 3433). Since 1970, when the Health Code was first amended to require environmental investigation for children with elevated blood lead levels, there had been a dramatic decline in lead poisoning. In 1970 there were 2,649 cases, with a case defined as a blood lead level of 55 micrograms per deciliter. In 1998 there were 1,074 cases, defined as a blood lead level of 20 micrograms per deciliter, with fewer than five percent of the cases having a blood lead level of 55 micrograms per deciliter (1414-1415).

obligation to attend to peeling paint and deteriorated subsurfaces when a unit became vacant (1420-1421). The bill provided incentives for responsible owners to repair lead-based paint hazards prior to issuance of a violation, which was an appropriate approach since 96% of properties where there was a possible risk of poisoning from lead-based paints had never been issued a violation by DOH; and, where violations had been issued, the vast majority had been repaired (1421). The proposed legislation retained the right of the Board of Health and DOH to direct specific abatements in specific time frames for units in which lead poisoned children resided (1422).

Responding to questions by Council members, Dr. Cohen stated that a clearance dust test after performance of repair work involving lead-based paint is the best predictor of whether the work created risks to children, since the dust can be invisible to the naked eye (1423-1424). Clearance dust testing was not perfect, and its flaws had been subject to many challenges, but it provides the best quality control available (1424). The test was not expensive and probably did not require a great deal of expertise to administer (1427-1428). Dr. Cohen testified that common areas of a building did not pose a significant risk to the young children who were at primary risk for lead poisoning, and a risk-based approach warranted excluding these areas from legislation, otherwise the bill would contain so many different categories that it could not responsibly be carried out (1449-1450). DOH also did not see a

need for further inter-agency notification provisions between HPD and DOH as to units where HPD found lead-based paint violations, because the primary method to test young children for elevated blood lead levels was the mandated universal health care testing through age six, to be provided by their health care provider (1453, 1481-1482).

Nick Farr, the Executive Director for the National Center For Lead Safe Housing (1512), testified that he agreed that Local Law 1 needed to be changed because studies had shown that disturbing intact lead-based paint could be dangerous (1513-1514). Peeling paint is the source of lead contaminated dust and the dust is the pathway of exposure (1553, 1555).[9] That dust could be reduced to acceptable limits through careful repair work and clean up (1517). There was little airborne dust anymore (1555). A study of 3000 units nationwide conducted by Mr. Farr's organization indicated that over a two or three year period, interim controls are as effective in addressing lead hazards as full abatement (1548).

Mr. Farr advocated inclusion in legislation of lead dust clearance testing after completion of clean up work in the area where the work was done, not over the entire dwelling unit (1513, 1549). A study done in New York City indicated that even after full clean up, there was a failure rate of 3.5% on dust

[9] Council Member Michels appreciated this point, correcting a witness reading a prepared statement for Manhattan Borough President Virginia Fields, which statement contended that lead dust was produced primarily by friction surfaces and had little to do with peeling paint (1564, 1566).

tests after lead paint repair work involving windowsills, 8% after work involving window wells, and 8.5% after work involving floors (1517-1518). Lead dust was not always visible to the naked eye (1518). If a site failed the dust clearance test, it would have to be cleaned until it passed (1520). The Environmental Protection Agency ("EPA") was considering allowing such testing by clearance technicians, who would not require the full training for abatement workers (1522-1523). The laboratory charge for a test was $4.75, and the result could be obtained within 24 hours (1524). The person conducting the clean up test should not be the person who did the cleaning (1525). Lead dust testing was normally done on smooth surfaces, but Mr. Farr's organization, the National Center for Lead Safe Housing, was working with EPA to develop a standard for lead dust measurements in carpets, although EPA had not yet set such a standard (1521). Mr. Farr also indicated that he supported a provision requiring both wet washing and HEPA-vacuuming in clean up, since the vacuuming removed the larger particles and the wet washing absorbed the smaller ones (1526). In response to a question by Council Member Thomas Ognibene, Mr. Farr indicated that washing apartment floors with a detergent twice a week would be helpful in controlling lead dust hazards (1554). Mr. Farr urged that notice requirements to a property owner about the presence of a child under the age of six replicate those under the existing window guard law (1527), and also believed that common areas should be lead stabilized upon building

turnover (1525-1526), but the inclusion of lead dust clearance testing was his most important recommendation (1513).[10]

Mr. Farr's organization conducted XRF tests in 425 dwelling units constructed before 1950 in New York City, finding lead in 27% of the units (1515). Seventeen percent of the buildings with lead had walls that contained lead (1536), 45% of these buildings had lead in interior trim, and 46% of the buildings had lead in the paint in the windows (1515-1516). The amount of lead and lead dust found in window wells was much higher than that found on floors (1544-1545).

Don Ryan from the Alliance to End Childhood Lead Poisoning, fully supported the fundamental shift from worrying about the presence of lead paint to worrying about lead-based paint hazards and controlling these hazards (1529). The condition of the paint was more important than its content, and peeling paint was always a concern, because children can eat paint chips and peeling paint is the primary source of lead dust (1530). Mr. Ryan advocated inclusion of lead dust in the definition of "lead paint hazard" and stated that dust clearance testing should be done both at turnover of the unit and after paint repair work (1532).

[10] In response to questions, Mr. Farr and Don Ryan, of the Alliance to End Childhood Lead Poisoning, indicated that other jurisdictions with lead paint control laws, Maryland and Vermont, did not require lead dust clearance testing. Massachusetts legislation contained such a requirement (1558-1560). A not-for-profit housing expert stated that the Massachusetts law was so onerous that virtually all low and moderate income housing renovation ceased there (1575).

Witnesses from not-for-profit housing organizations opposed the inclusion in the law of the proposed dust wipe clearance test. According to Carol Lamberg, Executive Director of the Settlement Housing Fund (1567), which developed and operates 22 buildings providing over 7,500 units of affordable housing (1568), the dust wipe laboratory test might cost $10, but the cost of a technician to conduct the test would be several hundred dollars a unit (1571). That cost projected for each unit owned by the organization would total $800,000 and put the organization out of business (1571-1572). John McCarthy of the Community Preservation Corporation, a not-for-profit organization which has been involved in the renovation and maintenance of over 65,000 apartments in low and moderate income areas of New York City (1574), also opposed the dust wipe clearance test. A dust wipe test involves using a damp cloth that thoroughly wipes up a measured area. The cloth is analyzed by a laboratory to measure the micrograms of lead particles per square foot. Although the laboratory charge was about $8, given the time charged for the technician to come to an apartment to conduct the wipe test, the test for a single apartment would cost several hundred dollars (1577-1578, 1581). Nor had EPA yet approved any course for certification of such a technician (1579). The test was also unreliable since it also includes in the measure lead dust brought in from outside, which will be a recurring problem even after repair and clean up (1581). Any lead dust from whatever source could be addressed by cleaning

floors regularly with detergent (1582-1583). Furthermore, under HUD disclosure rules, an owner would be required to perpetually report even one failed lead dust clearance test to prospective tenants and purchasers (1587-1588).

Matthew Chachere, counsel for the NYCCELP petitioners, indicated a willingness to adjourn the court matter and extend the stay against enforcement until autumn, to give the Council the opportunity to consider Intro. 205 (1634), which his organization, NYCCELP, favored (1641-1643), as did NYPIRG, the Legal Aid Society and Sinergia (1659, 1703, 1720-1721) .[11] [12]

[11] By letter dated June 23, 1999, 15 members of the City Council wrote to Justice York, the NYCCELP presiding Judge, asking for an adjournment of the matter and a stay of activity until October 15, 1999, noting that in his testimony Comptroller Alan Hevesi had urged further consideration of the legislation until that date (2518-2519). The Supreme Court declined to adjourn the matter. The City had argued that the adjournment could discourage the Council from completing consideration of the legislation (1826, 1833).

[12] Representatives of plaintiffs' bar associations objected to the proposed legislation because it provided that the presumption that peeling paint in a building erected before 1960 was presumed to be lead-based paint applied only to compel repairs under the statutory protocol and time limits, and not to personal injury actions brought on behalf of a child claiming to have been injured by consumption of lead-based paint. These witnesses claimed it would be impossible to establish that the owner had actual notice of the presence of lead based paint, undermining the ability to make the prima facie showing of liability by constructive notice in the manner provided in Juarez v. Wavecrest Management Team, Ltd., 88 N.Y.2d 628 (1996) (1597, 1602, 1652-1657). Questioned by Council members, Steven Levi, the Chief of the Lead Paint Unit of the Corporation Counsel's Tort Division, disagreed with the trial lawyers' assessment of the law (1375-1376, 1379). Furthermore, with respect to the argument that the threat of tort liability was a substantial deterrent encouraging repair of lead-based paint conditions, Mr. Levi observed that hundreds of millions of dollars of such claims were outstanding and multi-million dollar verdicts had been awarded, but the problem of lead-based paint

Amendments and CHB Hearing of June 24, 1999

The CHB hearing reconvened on June 24, 1999, to consider amendments to the proposed law, based on prior testimony, submissions and comments of Council members. The amendments were summarized in a report of the Infrastructure/Human Services Division of the Council (1223-1240, at 1235-1240), and were described by CHB Chairperson Spigner at the start of the hearing (1755-1760).

The amendments included a surface clearance dust test for work performed to correct a lead-based paint hazard on any interior wood trim or door, or near or immediately adjacent to a window. The test would be performed by a trained individual who has passed a course approved by DOH, and all samples were to be forwarded to an independent state certified laboratory for analysis (1235-1237, 1247, 1256, 1755-1756). The inclusion of this test was a partial response to testimony from DOH Commissioner Cohen, Nick Farr and Don Ryan, as to the importance of having such testing done upon completion of work involving lead-based paint, which work generates lead dust (1423-1424, 1513, 1517-1518, 1520, 1532). The limits on the testing were obviously responsive to the comments of operators of not-for-profit housing, who objected to the anticipated cost of several

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persisted (1379). Mr. Levi stated that the provisions in the proposed law limiting actions against the City to relief under Article 78 of the CPLR with respect to its role in enforcing the law and doing lead paint repairs when the landlord failed to do so was needed to prevent new municipal liability arising from HPD's new mandate to do lead paint repair work when the owner failed to do it (1369-1370).

hundred dollars per unit for universal dust clearance testing after all lead-based paint work, the permanent reporting consequences under federal law of even one failed dust clearance test, which is actually intended only as a measure to effect thorough cleaning; and the lack of universal acceptance of the scientific reliability of the measure (1571-1572, 1577-1579, 1581, 1587-1588). The areas selected for the dust clearance test following lead-based paint work were those which Mr. Farr indicated were the ones identified in a study by his organization as most often containing lead-based paint (1515-1516, 1544-1545). Chairperson Spigner had suggested this approach in a discussion with Mr. Farr on June 21, 1999, with the Chairperson noting that in a democracy consensus is required to pass legislation, and compromise is often necessary. Mr. Spigner asked whether research indicated if particular areas of buildings had heavier lead concentrations, and Mr. Farr identified such areas (1535-1536). At the CHB hearing of June 24, 1999, a letter from Commissioner Cohen was read into the record indicating continued approval of the proposed legislation, as amended, and commenting favorably on the inclusion of the clearance dust wipe testing in certain instances (1760-1763, 2294-2295).[13]

[13] Mr. Farr subsequently sent a letter (746-747) stating that the amendment was inadequate and a clearance dust test should be performed in any areas where there were lead-based paint repairs.

The amendments also reduced times for various activities required under the law. The time for service of a notice of violation was reduced from 60 days to 20 days. An owner now could only obtain one extension of the time to perform work, not to exceed 45 days upon a showing of being unable to complete the work under the criteria in the bill (serious technical difficulties, lack of access, lack of funds, materials or labor (§ 27-2115(l)(l) (1263)), instead of being able to obtain the unlimited number of 30 day extensions under the prior version. HPD was required to inspect upon a complaint of a lead-based paint hazard within 10 days of the date of the complaint or within 15 days therefrom during the heating season, rather than the earlier proposed time frames of 15 and 25 days respectively. HPD was required to reinspect within 30 days of the owner's certification of completion of the work, not 70 days, as provided in the earlier version of the bill. HPD was required to correct a violation for a lead-based paint hazard within 60 days (rather than the 90 day period in the earlier version), from the date of the owner's failure to certify the correction or HPD's determination that the certification was invalid (1237-1239, 1756-1757). The fine for false certification was increased from a range of no less than $1000 to no more than $3000 to no less than $10,000 and no more than $25,000 (1239, 1758).

These changes responded to testimony and submissions from various persons, as well as expressed opinions of several

Council members, taking the position that the time frames in the first version of the law were excessively long for violations of this nature (637, 1331, 1342, 1356-1357, 1362-1364, 1383, 1385, 1405, 1490), and indications from Commissioner Roberts that with the full complement of inspectors available, the time frames in the proposed statute were outer limits of compliance (1337, 1363). The increased penalties were responsive to concerns about the possibility of false certifications, particularly given prior findings upon audit by the Comptroller of a substantial number of false certifications by owners with respect to violations generally (832-934, 940-946, 1382-1385, 1507-1508).

Other amendments included allowing cooperatives to allocate responsibility for lead-based paint repairs (1238, 1759), as requested at the CHB hearing of June 21, 1999 (1238, 1346-1348); and a procedure for exempting from the law pre-1960 buildings which had undergone gut rehabilitation, thereby removing or containing lead-based paint (as advocated by not-for-profit organizations renovating and operating low-income housing) (1236, 1407-1408, 1569, 1758-1759).

HPD Commissioner Roberts again testified, indicating, in substance, that notwithstanding concerns of council members about whether HPD had a sufficient number of inspectors (1809, 1816), his agency would be able to comply with the reduced time frames in the amendments to the proposed statute, given that the agency’s 240 person inspection staff was at its highest level

since 1991 (1766-1767, 1795, 1808-1810).[14] In response to doubts expressed by Council Member Kathryn Freed about the adequacy of self-certification, Commissioner Roberts noted recent criminal prosecutions for false certifications (1812, 1817-1818).

First Deputy Comptroller Steven Newman stated that the Comptroller sought delayed consideration of the bill to provide a fiscal impact analysis (1824),[15] and other analysis (1825-1827). Chairperson Spigner noted that the issue of lead-based paint controls had been before the Council for 12 years, the committee had "heard experts from A to Z" and the time had come to bring the legislation to a vote (1827).

Council Member Guillermo Linares commented that the amendment for a dust clearance test still did not cover work on walls and ceilings, which was likely to constitute the majority of lead-based paint repairs (1806). Council Member Michels made a similar point (1856), as did Andrew Goldberg, the attorney for

[14] Andrew Goldberg, the lawyer for NYPIRG, Matthew Chachere, the lawyer for NYCCELP, and representatives of the Legal Aid Society, contended that the time frames for inspecting, serving violations, repair work, and any required remediation by HPD were still too long (1896-1897, 1903, 1916-1917).

[15] A Fiscal Impact Statement for the bill had been prepared by the City Council's Finance Division (1215-1216). Without consideration of likely tax revenue losses due to J-51 abatements which may possibly be granted for performing lead-based repairs, the increased cost of HPD enforcement in the first year of the law was estimated at $40 million, an increase over the $10 million annual cost. Remediation work by the Emergency Repair Program was estimated at $28 million of the $40 million amount. This estimate was based on work on 7,320 private units, at a cost of $3,850 per unit. The traditional reimbursement rate for HPD emergency repair work was 25 to 50% (1216). Accordingly, the cost of this legislation would be between $16 and $23 million.

NYPIRG, a petitioner herein, who added that the provision did not insure the independence of the tester or require provision of the result to HPD or the tenant (1895). Frank Ricci of the Rent Stabilization Association and Marilyn Davenport of the Real Estate Board of New York objected to the amendment providing for some dust clearance testing. They claimed the dust clearance test was unnecessary and scientifically unreliable, and would cause owners to spend money on testing for presence of lead in the walls to try to rebut the presumption that walls contained lead, rather than simply proceeding to make the repairs of deteriorated paint (1850-1855, 1861-1864).

Representatives of the trial lawyers appeared again to object to the limitation of the statutory presumption that peeling paint in pre-1960 buildings in units where a child under the age of six resided is lead-based to the requirement that repairs thereof be made in accordance with the law, contending that the change would make it impossible for a plaintiff in a personal injury action to prove that the landlord was on notice of the existence of lead-based paint (1919-1927, 1940-1946, 1951, 1955-1956).

Council Member Michels proposed several additional amendments to the law. Under these amendments, lead contaminated dust would be added to the definition of “lead-based paint hazard” (1961). The owner would be required to correct the “underlying defect” causing a lead paint hazard (1963). The bill would require use of the notice provisions in

the window guard law for determining whether a child under the age of six resided in a unit (1963). The presumption that peeling paint in units occupied by a child under the age of six in pre-1960 buildings was lead-based would not be limited and thus would be preserved for civil liability purposes in personal injury suits (1964). All lead-based paint on windows and friction surfaces would have to be removed. The bill would apply to common areas (1966). Prior to occupancy of a unit all lead contaminated dust would have to be removed (1966-1967). DOH procedures for work and clean up would be applicable to all lead-based repair work, which procedures included comprehensive dust clearance tests (1965-1966). HPD inspectors would be authorized to inspect for lead-based paint violations when conducting inspections concerning complaints of other violations (1967);[16] there would be cyclical inspections by HPD for lead-based paint violations (1968); and HPD would be required to send DOH a weekly list of all violations posted for lead-based paint (1969). HPD would investigate the needs of occupants of housing with lead-based paint for medical screening services (1970). Notice of a violation would be required to be sent to occupants, no extension on performing work could exceed 60 days, and a written decision would have to be issued to the owner and tenant explaining the reason for the extension (1972). No violation could be removed through the certification procedure unless it

[16] Commissioner Roberts testified that HPD had that authority, and that its inspectors performed such lead-paint inspections (1793-1794).

was actually determined that the violation was corrected (1974). The bill would also apply to schools and day care centers (1976).

By vote of the Committee, the Michel amendments (which were coupled for consideration as a whole), were defeated by a vote of 6 to 1, with 1 abstention (1987). The proposed legislation under consideration was voted out of Committee by a vote of 7-2 (1992-2001). The Committee also passed by a vote of 7 to 2 a resolution approving a Negative Declaration under SEQRA and CEQR with respect to lack of significant adverse impact of this legislation upon the environment (483, 1989-1992).

Negative Declaration

The Negative Declaration (419-488) identifies the proposed legislation as an unlisted action (427), which, under SEQRA regulations, 6 NYCRR § 617.4(a)(1), and City environmental review procedures, Executive Order No. 91 ("CEQR"), 43 RCNY § 6.15(a), is not presumed to be more likely to require the filing of a full Environmental Impact Statement than other actions. Using the form approved under the regulations, the Negative Declaration shows that the legislation has city-wide implications, but is not the type of land use that has specific consequences in a specific area (423-435). It did not involve a change of use of any building, did not involve any change in land use, did not involve use of vacant land and did not affect traffic or parking. It would not change existing air quality or noise levels. It had no effect on infrastructure, open space,

community facilities, natural or archaeological resources or landmarks.[17] It did not affect commercial buildings, involve any manufacturing use or affect the waterfront (423-436).

The proposed draft legislation was included in the Negative Declaration statement (439-466). An attachment (469-475) addressed the specifics of this rather unusual subject of environmental review. It summarized the basic premise of the legislation: that the prevention of childhood lead poisoning is not best served by removal of intact lead-based paint (469), and that the best way to prevent lead poisoning was to keep paint in pre-1960 buildings in good repair, or if paint was peeling, to repair it using safe repair practices (469). The bill did not repeal Health Code provisions governing work on lead-based paint in units where a lead-poisoned child resides (470). For purposes of mandating repair work, it preserved the statutory presumption that paint in apartments in pre-1960 buildings where a child under the age of six resides is lead-based paint. The legislation established a new prohibition on dry scraping and sanding of lead-based paint (471). It provided a new procedure to require owners to determine if a child under the age of six resided in a unit, by providing the tenant with a notice upon leasing inquiring whether the tenant would have a child under the age of six living in the unit. Thereafter, an annual

[17] As noted in the attachment (474), while some repairs of buildings could alter landmark buildings, any such specific alterations would require approval of the Landmarks Preservation Commission.

written inquiry was to be made. If the tenant responded that such a child resided in the apartment, informed the owner that such a child had taken up residence in the home between the annual notification procedures, or the owner otherwise had actual notice of the presence of such a child, for the first time the owner was specifically obligated to conduct an annual visual inspection of the unit for possible lead-based paint hazards (446-449, 470-471). The proposed law required for the first time that informational pamphlets be developed by DOH and distributed by HPD to tenants and owners, describing the hazards of lead-based paints and the measures owners must use to prevent lead-based paint hazards, the latter information to be mailed with any notice of violation concerning such a condition (472). The proposed law established a specific work safety protocol for performance of work involving lead-based paint applicable either when no violation had been issued or when there was timely compliance with an HPD notice of violation. An owner remained free to follow the NYC Health Code protocol in all instances, and would be required to do so if the violation was not corrected within statutory time frames. The law had specific time frames for HPD inspections, owner repairs, and certification of completion. For the first time HPD was mandated to itself perform such repair work if, after a statutorily specified period, the owner failed to do so (471).

The only waste disposal issue presented by the legislation was the required use of polyethylene plastic at work

sites, which would have to be disposed of along with debris from the work, which did not constitute a significant adverse environmental impact (474). Any work to repair lead-based paint involves a hazardous substance, but this legislation mandated the use of safe work practices to minimize the amount of lead dust generated in such work (use of plastic sheeting, wet scraping, clean-up using a HEPA vacuum or wet washing, and in some instances, dust clearance tests). The bill provided for the correction of lead-paint hazards and would reduce the spread of hazardous or potentially hazardous materials (475).

The bill would result in significant efforts to repair deteriorated surfaces potentially containing lead-based paint. The legislation provided owners with an incentive approach for correcting lead-based hazards in a timely and professional manner, and thus would improve maintenance of the housing stock in the City of New York. To the extent owners did not comply, for the first time HPD itself was mandated to make the repairs. It was estimated that 7,320 units would be repaired by HPD in the first fiscal year following implementation of the law (473).

June 30, 1999 Hearing by Full City Council And Passage Of Local Law 38

Prior to a hearing on the proposed legislation, the City Council continued to receive a substantial number of communications from doctors, legislators and office holders, advocacy groups and trial lawyers in opposition to the legislation (541, 562, 757, 760, 763, 766, 786, 793, 797-799,

802). The pending proposed legislation attracted substantial news coverage (805-821, 1281-1285).

At the June 30, 1999 full Council session, four amendments were proposed for the bill, debated and ultimately defeated. These were to require a dust clearance test after all lead-based paint work (2122) (defeated by a vote 28 to 20, with 2 abstentions (2160)); to include lead dust in the definition of lead-based paint hazard (2123) (defeated by a vote of 32 to 16 with 2 abstentions (2160)); that the presumption that in an apartment in a pre-1960 building where a child under the age of six resides, peeling paint is lead-based paint should remain applicable to a personal injury action (2123) (defeated by a vote of 31 to 17 with 2 abstentions (2160)); and that the window guard law notice provisions apply to the procedure for an owner to determine whether a child under the age of six resides in a unit (2123) (defeated by a vote of 30 to 18 with 2 abstentions (2160)).

Opponents of the bill cited various concerns, including the lack of complete dust clearance testing for all work (2169), contentions that the Health Department protocol or the HUD provisions applicable to full lead abatement work should cover all work under this statute (2173-2174), the lack of inclusion of lead dust in the definition of a lead-based paint hazard (2232-2233), contentions that the time frames for various actions under the law were too long (2171, 2222), claims that the law placed too onerous obligations on the tenant to notify

the owner of a possible violation, objections to the certification procedure (2198-2200), claimed inadequacy of health screening provisions (2180), lack of inclusion of provisions requiring correction of lead-based paint hazards in common areas as well as playgrounds (2181), and the abolition in personal injury actions of the presumption that peeling paint in a unit in a pre-1960 building in which a child under the age of six resided was lead-based paint, allegedly preventing a personal injury plaintiff from ever prevailing in a suit claiming injury as a result of lead-based paint poisoning (2155, 2160-2167, 2223).[18]

Supporters of the bill indicated that it finally eliminated the unworkable dangerous directive to abate intact lead-based paint (2197, 2219, 2249, 2273), while adding substantial provisions for safe work practices, a specified procedure requiring an owner of a pre-1960 building to determine if a child under the age of six resided there, and, if so, to conduct an annual inspection for lead-based paint hazards (2108, 2249); an owner's duty to correct all lead-based paint hazards (2108), higher civil penalties for false certification, time frames for performance of the work (2239), a duty to correct all lead-based paint hazards upon vacancy (2109), and a requirement

[18] CHB Chairperson Spigner and Council Member Ognibene contested the premise that the absence of the presumption effectively precluded the action, with Mr. Spigner citing a written communication from Michael D. Hess, then Corporation Counsel, disagreeing with the contention that suit could never effectively be brought (2141-2143, 2196).

that, if necessary, HPD itself make the unit lead safe (2108, 2248). One Council member stated that it was preferable to rely on legislation passed upon by the Council than on an unknown program imposed by a judge (2252). Another Council member stated that the legislation presented was certainly preferable to the court-ordered enforcement of the unworkable Local Law 1 (2269-2270). The fact that the legislation did not cover every possible situation and priority was not a reason to reject it (2219-2220, 2225-2227, 2245-2246, 2257, 2260, 2263). With respect to the proposal to regulate lead dust, Mr. Spigner pointed out that there was a great deal of confusion even among advocates as to what to regulate, how to control and how to measure lead dust (2238).

Council member Spigner observed that the process of drafting and considering the legislation was exhaustive, involving meetings with council members, advocates for children and for tenants, doctors and public health experts, trial lawyers, and representatives of the real estate industry and labor unions. Research by federal and state agencies was also considered (2109). The basic issues had been discussed for years, and very intensely in the few months preceding passage of the bill (2240). Every aspect of the legislation had been discussed in great detail, and in his many years on the Council, Mr. Spigner had seldom seen an issue given more careful consideration than this bill (2239).

By a vote of 36-15, the City Council passed Local Law 38 and the resolution adopting the Negative Declaration (2242, 2280). On July 15, 1999, Mayor Giuliani (to whom NYCCELP sent a package of 78 documents opposing the law (823-828)) held a public hearing at which several Council members testified either in favor of or against the legislation, and thereafter, 16 organizational representatives testified (2729-2781). After consideration of the matter, the Mayor signed the legislation into law. Local Law 38 became effective four months later, on November 12, 1999.

As is demonstrated above, the New York City Council adopted Local Law 38 after extensive consideration of the viewpoints of numerous parties with an interest in preventing childhood lead poisoning; commissioners of the City's health and housing agencies, public health experts, medical professionals, lead abatement experts, trial lawyers, representatives of advocacy organizations and not-for-profit and private real estate owners all testified or submitted written materials to one or more of the three City Council committee hearings. And there was also a lengthy debate before the entire City Council before the proposed legislation was passed. Throughout these four hearings, and in written submissions, the various environmental concerns, such as lead dust and safe work practices, were comprehensively addressed and considered.

The Instant Proceeding

Petitioners commenced this proceeding on or about October 13, 1999, seeking to invalidate Local Law 38 on a theory that it was preceded by inadequate environmental review, and that preparation of an Environmental Impact Statement (EIS) was required because the law could have a significant adverse impact on the environment (21-110). According to petitioners, the law could have a significant adverse impact upon public health (6 NYCRR § 617.7(c)(1)(vii)) (100-102). Petitioners contended that the law weakened various existing provisions governing control of lead-based paint hazards.

Respondents contended in their verified answer on or about November 5, 1999 that the law had beneficial effects (2559-2621). It eliminated the impractical dangerous requirement to abate intact lead-based paint, which, if implemented, would have caused a new wave of childhood lead poisoning. The law added provisions to the Housing Maintenance Code with time limits to inspect for possible lead-based paint violations, to correct the violations using specified safe work practices, to provide notification to an owner as to whether a child under the age of six resided in a unit in a pre-1960 multiple dwelling, and, if so, for the owner to annually inspect the unit for possible lead-based paint hazards (2610-2618). Petitioners incorrectly argued that these provisions were less protective than provisions of the NYC Health Code. However, the Health Code provisions were not repealed by this legislation,

and governed abatement in all dwellings (not just the multiple dwellings covered by the Housing Maintenance Code), when DOH issued a violation or declared a nuisance by reason of residence in a unit by a lead poisoned child. The safety precautions of Local Law 38 applied to lead-based paint repairs required under the Housing Maintenance Code. Such repairs were mandated for hazardous lead-based paint conditions even if no notice of violation had been issued. Local Law 38 applied to all repairs to correct conditions for which violations had been issued under the Housing Maintenance Code. All of these innovations to provide a specific mandated procedure to remove lead-based paint hazards did not constitute an adverse environmental impact.

Before passage of Local Law 38, the City Council had engaged in an exhaustive inquiry, with testimony and submissions before the Council itself concerning the advisability of virtually each adopted provision. There was also testimony and submissions before the City Council advocating alternative and additional provisions which had not been adopted in Local Law 38. Expert opinion in support of and in opposition to virtually every provision of the law was elicited. The Council made thoroughly informed legislative choices as to what practicable measures should be enacted in the interest of public health. Petitioners' claim that the law was not based on adequate environmental consideration was merely a disguised attack on the wisdom of the legislation, not a valid basis for review under SEQRA.

DECISION AND JUDGMENT OF THE NEW YORK COUNTY SUPREME COURT

By Decision dated October 11, 1999 (15b-15u), effected by Judgment entered February 22, 2001 (17-19), the New York County Supreme Court (York, J.) granted the petition and declared Local Law 38 and the City Council resolution approving the Negative Declaration therefor, null and void (19).

The Supreme Court accepted petitioner's contention that the legislation concerning lead-based paint hazards involved a possible "creation of a hazard to human health" (6 NYCRR § 617.7[c][1][vii]; 43 RCNY § 6-06[a][7]) (15f-g). The Court initially recognized that there was little dispute that the change from a "lead free" to "lead safe" approach to lead-based paint hazards was universally accepted, and that it was not the basic premise of the law but the particulars which petitioners contend may pose adverse environmental impacts warranting an EIS (15h). The Court then summarized various alleged differences between Local Law 38 and Local Law 1 which petitioners claimed created the possible significant adverse environmental impact (paint is deemed lead-based if it contains 1.0 milligrams or more of lead per square centimeter rather than the previous 0.7 level, and six year old children are no longer protected) (15i). Finding these changes to have possible significant environmental impact, the Supreme Court ignored evidence in the record showing that the change to the 1.0 standard reflected federal recommendations and was universally recommended in the legislative process, and the age limit change

also was not controversial. The Supreme Court also noted that under Local Law 38, all lead based paint is no longer to be covered, but is addressed on a case-by-case basis (the approach the Supreme Court had just identified as representing the current scientific consensus for dealing with lead-based paint (15i)).

The Supreme Court also incorrectly stated that Local Law 38 did not regulate lead dust while Local Law 1 did so (15j). Relevant testimony before the Council at extensive hearings which the Supreme Court found to be "mostly perfunctory, only occasionally rising to the level of cursory" (15m), indicated that Local Law 1 did not, as such, regulate lead dust, since the approach thereunder was to abate all lead paint, including intact paint. The issue of regulating lead dust was in fact extensively discussed before the Council both by expert witnesses and among the Council members. The Council ultimately determined that lead dust emanates primarily from deteriorated paint surfaces, and the repair of deteriorated lead-based paint hazards, followed by clean-up, reduces lead dust. Requirements in Local Law 38 that were not included in Local Law 1 provided for reduction and clean-up of dust generated during repair work. The Council also rejected full clearance dust testing, opting only for testing for work on areas known to have the highest levels of lead (doors, trim and windows), after hearing extensive testimony that clearance dust testing was not universally regarded as scientifically reliable,

that it imposed substantial expense upon not-for-profit housing operators, and that it was questionable whether there were scientifically recognized procedures to train technicians to perform the tests. Petitioners' contentions that the Health Code protocol for repair work was replaced by Local Law 38 (15j) ignored that the Health Code was not repealed and remained in effect for all dwellings, including one and two family dwellings never covered by the lead paint provisions of the Housing Maintenance Code (governing multiple dwellings), with the Health Code provisions remaining applicable, as these were before Local Law 38, under the specific circumstances when a unit is occupied by a child who is lead poisoned.

In characterizing the consideration of the legislation as "perfunctory" and at most "cursory," the Supreme Court totally ignored the massive evidence and submissions to the City Council, as well as the detailed discussion among Council members concerning each legislative choice for regulating lead-based paint hazards. The massive record, described at length, supra, with extensive testimony from environmental scientists, doctors, and real estate professionals, shows the hard look taken by the Council concerning the various issues involved in the legislative process. Furthermore, in the actual ruling the Court ignored the basic principle, recited in the decision itself and reflective of case law, that it was "not the role of this court to second-guess the councilmembers and decide whether or not Local Law 38 helps or hurts the children, or to in any

other way impinge on the City's legislative process" (15d). The Supreme Court readily accepted petitioners' challenge to the merits of the law, disguised as a SEQRA claim.

In substance, the Supreme Court erroneously ordered further environmental review and declared Local Law 38 null and void because the Court believed another version of a law regulating lead-based paints, Intro. 205, proposed by Council Member Michels, and favored by petitioners and other advocacy groups (1641-1643, 1659, 1703, 1720-1721), was preferable to, and more protective of the environment than Local Law 38. With respect to the various amendments proposed by Council Member Michels, which would have substantially changed the law, the Supreme Court opined that "[t]he amendments, which if passed might have substantially eliminated the potential environmental hazards identified at the hearings ... were overwhelmingly defeated at the committee stage," and that Michell's proposed amendments would have rendered the legislation "'an effective child protection bill' instead of a 'landlord protection bill.'" (15o). Referring to amendments proposed by Mr. Michels before the full Council, the Supreme Court further stated: "Again, passage of these amendments might have sufficiently addressed the environmental concerns so as to obviate the need for an EIS. However, the amendments were defeated" (15p).

In sum, the Supreme Court disregarded applicable law and massive evidence of record clearly showing that the Council took the requisite hard look at the relevant concerns before

determining that Local Law 38 would not have a significant adverse environmental impact.

DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT

By decision and order entered March 26, 2002, the Appellate Division, First Department unanimously reversed the Supreme Court's order and judgment, on the law, declared that the negative declaration and Local Law 38 of 1999 are valid, and otherwise denied the petition and dismissed the proceeding (3737-3758). The Court found that the record amply demonstrates respondents' compliance with all applicable environmental laws, and accordingly reversed and dismissed the petition (3740).

The Appellate Division extensively reviewed the parties' contentions, the nature of the parties' dispute, and history of prior litigation concerning lead-based paint, including a comparison of Local Law 38 with Local Law 1, the ordinance it amended (3741-3747). The Court identified the "salient, undisputed point" as being the reduction of environmental threats to human health caused by the change from abatement to containment of lead paint (3744-3745). Significantly, there is no dispute over whether lead-based paint poses risks to human health, and that respondents should attempt to reduce those risks, nor is there any claim that any action undertaken or proposed by respondents would increase health risks beyond those already existing by virtue of the use of lead-based paint by third parties (3745). The Court identified the issue before it as "whether respondents complied with

procedures intended to ensure that 'due consideration is given to preventing environmental damage'" (3745). The Court distinguished between the existing harm resulting from the use of lead paint, and the governmental action designed to alleviate that harm, concluding that "[a] review of the ample record of the Council's consideration of these changes reveals that all relevant environmental issues were identified, explored and resolved as mandated by SEQRA" (3747).

The Appellate Division reviewed respondents' obligations under SEQRA, and the City Council's adoption of a negative declaration which was based upon an environmental assessment statement ("EAS") (3748-3749). The Court observed that the EAS identified no significant effects on or arising from (1) neighborhood character, (2) socioeconomic displacement, (3) community facilities, (4) open space, (5) historic and archaeological resources, (6) transportation, (7) air quality, (8) infrastructure and energy, (9) natural resources, (10) waterfront revitalization, (11) hazardous materials, (12) noise, and (13) solid waste. The Court concluded that the EAS, which included extended narrative addressing a wide range of potential environmental impacts, as well as the hearing transcripts and written submissions, demonstrate that all relevant areas of environmental concern were identified, and all arguments concerning standards and methodologies for ascertaining and addressing lead paint hazards were carefully considered (3750-3752):

> The negative declaration's findings that no significant adverse environmental impact would result from adoption of the ordinance was amply supported by expert testimony as well as the existence of and reliance upon State and Federal standards. We can reject those findings only by ignoring the extensive and intensive review performed by respondents and by adopting wholesale petitioners' views. The obvious result of such a review would be to grant petitioners the political victory they failed to achieve in the legislative forum. The record evidence consists of testimony or written submissions by physicians, environmental scientists, government officials and property management experts. There was a vigorous debate of all relevant environmental issues by the City Council Committee on Housing and Buildings and by the full City Council. Before the Committee and full Council, amendments were proposed and defeated (1) concerning greater dust clearance testing, including lead dust in the definition of "lead based paint hazard," (2) retaining a presumption concerning apartments built before 1960, and (3) using alternative methods of determining the presence of children under the age of six. 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. It was not "cursory." Rather, this review clearly satisfied the requirements of SEQRA and CEQR.

The Court further pointed out that nothing in SEQRA requires the government to perfectly solve environmental problems that are not of its own making (3752); nor does SEQRA require the government to select perfect hazard-reduction methods (3753-3754). The Appellate Division accordingly ruled that the SEQRA review and negative declaration gave the

environmental issues the requisite "hard look," by identifying the relevant areas of environmental concern, analyzing those areas to ascertain whether the ordinance may have a significant adverse environmental impact, and setting forth a written reasoned elaboration explaining such determination (3754).

The Supreme Court should not have "re-judged" the City Council's assessment of the weight accorded to the arguments, and its resolution of any disputes during review of Local Law 38 (3754). The City Council undoubtedly engaged in a thorough review of every area of relevant environmental concern, notwithstanding different viewpoints on the merits of the law, and clearly took a "hard look" at the law's potential environmental impact (3756). The Court summarized its ruling as follows (3756-3757):

> Areas of environmental concern were identified early in the ordinance drafting process, explicitly and exhaustively addressed through witnesses and written submissions and considered through debate and proposed amendments. While petitioners clearly preferred alternative outcomes for which they lobbied and while the IAS court may have preferred consideration over a longer time frame, the record amply demonstrates that respondents satisfied the procedural requirements of SEQRA and CEQR. The City Council struck that "suitable balance of social, economic and environmental factors" in its consideration and passage of Local Law 38 (6 NYCRR § 617.1[d]). The environmental review laws have, consequently, had their intended beneficial effect.

The Appellate Division accordingly reversed the Supreme Court's order and judgment, on the law, and declared

that the negative declaration and Local Law 38 are valid (3757).[19]

ARGUMENT

POINT I

THE APPELLATE DIVISION CORRECTLY RULED THAT THE ENACTMENT OF LOCAL LAW 38, REGULATORY LEGISLATION THAT ADDED STATUTORY PROTECTIONS CONCERNING LEAD-BASED PAINT HAZARDS, AND INVOLVED NUMEROUS FULL HEARINGS DURING WHICH EXTENSIVE RELEVANT INFORMATION CONCERNING THE SUBJECT OF THE PROPOSED LEGISLATION WAS OBTAINED AND CONSIDERED, FULLY COMPLIED WITH SEQRA AND CEQR.

As the Appellate Division concluded in its carefully considered and well-reasoned decision, the procedure utilized in

[19] Respondents also served and filed a notice of appeal (4-5) from a decision and order of Justice York entered November 9, 2000, which denied respondents' motion for his recusal (10-15). The basis of the recusal motion was Justice York's participation as a panelist in the April 2000 Mealey's National Lead Litigation Conference which, according to an outline apparently prepared in part by Justice York (3640-3646), included a discussion of the history of the NYCCELP litigation (3642), and a comparison of Local Law 1 and Local Law 38, entitled "Changes From Prior Law." This section commented briefly on differences between the provisions of the prior and present law (3643-3644).

The City's motion contended that Justice York's participation in this seminar raised issues under Canon 3 (8), as "public comment about a pending proceeding", specifically a proceeding pending before the Justice himself. See Matter of Bruhn, NYLJ 7/13/98; Matter of McKeon, NYLJ 8/19/98; Cohen v. Cohen, 172 A.D.2d 522 (2d Dept., 1991). Respondents did not raise this issue on appeal, however, in the absence of significant evidence of bias, the fact that the ruling involves solely a question of law (i.e., the level of environmental review required), and the great deference given on appeal to the trial court's discretionary decision to deny the recusal motion. The Appellate Division, First Department dismissed that appeal as abandoned, in its March 26, 2002 order under review herein (3758).

enacting Local Law 38 did not violate SEQRA or CEQR. In ruling otherwise, the Supreme Court ignored decisions interpreting and construing SEQRA which regularly counsel that the wisdom of the action undertaken is not at issue, but only the adequacy of the environmental review process. Merson v. McNally, 90 N.Y.2d 742, 752 (1997); Neville v. Koch, 79 N.Y.2d 416, 424 (1992); Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 528-529 (1989). It has also been noted that SEQRA can readily be used by those opposed to the merits of particular actions to delay those actions. Society of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 770-771 (1991).[20] Petitioners' objections here, allegedly only to the process under which the statute was adopted, merge regularly with objections as to the content of the law, and complaints that in passing it the Council disregarded information indicating the statute was unwise, and with petitioners' complaints that the lengthy informational hearings at which numerous experts from various fields testified and at which a wide variety of views were elicited on virtually every provision of the law, were

[20] In this regard, while several physicians and environmental scientists urged delay in passage of the law for further consultation with them (see, e.g., 283, 290, 321-322, 660-661), the Comptroller urged delay for consideration of the financial impact and other issues (1824-1827), and various Council members and organizational representatives, including petitioners' counsel, who testified at all three Council hearings (1641-1643, 1908-1918, 3287-3301), urged delay to consider passage of Intro. 205 instead, at no time did petitioners' counsel or anyone else present any view that an EIS was required prior to a vote on passage of the legislation concerning lead-based paint hazards.

nevertheless inadequate. The Supreme Court erroneously relied on such arguments in declaring the law null and void.[21]

By contrast, the Appellate Division, First Department correctly concluded that the ample record of the Council's consideration of the changes effected by Local Law 38 indicate that all relevant environmental issues were fully identified, explored and resolved, as required by SEQRA (3747). The City Council had obtained an environmental assessment statement which addressed a wide variety of potential environmental impacts, and included very specific analysis of potential environmental effects of the ordinance, as well as testimonial and written submissions on practically every aspect of Local Law 38 (419-481, 3750). The Court observed (3751-3752):

> The EAS, hearing transcripts and written submissions demonstrate that all relevant issues of environmental concern

[21] Incredibly, the Supreme Court opined that "[t]he Council's entire legislative review process was mostly perfunctory, only occasionally rising to the level of cursory, with the operative word being alacrity rather than analysis" (15m); had the Council adopted Council Member Michels' amendments, that "might have substantially eliminated the potential environmental hazards identified at the hearing" … and "sufficiently addressed the environmental concerns so as to obviate the need for an EIS" (15p), and rendered the bill "an effective 'child protection bill' instead of 'a landlord protection bill'" (150). It is not, however, the Court's role under SEQRA to substitute its judgment for that of the lawmakers or to weigh the desirability of any action or choose among alternatives. Merson v. McNally, 90 N.Y.2d 742, 752 (1997); Neville v. Koch, 79 N.Y.2d 416, 424 (1992); Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 528-529 (1984). It is obvious that under the Supreme Court's clearly erroneous approach, a law which that Court deemed to be a wise measure to address an issue bearing on the environment would not require preparation of an EIS, whereas a law which the Court deemed ineffective to accomplish the legislative purpose would require extended environmental review.

> were identified and that due consideration was given to all of the arguments made by petitioners and others concerned about standards for ascertaining lead paint hazards and methods for addressing them. Petitioners' real complaint is that their views did not prevail. ...
>
> The negative declaration's findings that no significant adverse environmental impact would result from adoption of the ordinance was amply supported by expert testimony as well as the existence of and reliance upon State and Federal standards. We can reject those findings only by ignoring the extensive and intensive review performed by respondents and by adopting wholesale petitioners' views. The obvious result of such a review would be to grant petitioners the political victory they failed to achieve in the legislative forum.

The Appellate Division correctly found that the record fully documents the City Council's careful and thorough consideration of the environmental aspects of Local Law 38. Far from being "cursory," as the Supreme Court found, the extensive review undertaken herein clearly satisfied the mandate of SEQRA and CEQR (3752). As the Appellate Division noted, the Supreme Court should not have "re-judged" the weight ultimately given the arguments in favor of and opposed to the ordinance, or the City Council's resolution of any disputes (3754). Regardless of one's views on the merits of Local Law 38, the City Council engaged in a "thorough review of each area of relevant concern," as required by SEQRA and CEQR (3756), which review unquestionably had its intended beneficial effect as contemplated by the environmental laws (3757).

The City Council unquestionably took a hard look at the relevant areas of environmental concern, and reasonably exercised its discretion in deciding to issue the Negative Declaration, making a reasoned elaboration of the basis for its determination, as the Appellate Division properly concluded. Merson v. McNally, 90 N.Y.2d at 751-752; Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 688 (1996); Chemical Specialties Manufacturers Association v. Jorling, 85 N.Y.2d 382, 397 (1995); Har Enterprises v. Town of Brookhaven, 74 N.Y.2d at 530. While lead-based paint is obviously a hazardous substance, see Williamsburg Around The Bridge Block Association v. Giuliani, 223 A.D.2d 64, 65-66 (1st Dept., 1996), that alone does not require that an EIS be prepared in connection with this ordinance, if the Negative Declaration was preceded by a hard look at the possibility of significant adverse environmental impact arising from the legislation. See Chemical Specialties Manufacturers Association v. Jorling, 85 N.Y.2d at 397; City of New York v. State of New York, 715 F.2d 732, 751-752 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984) (transport of radioactive materials on City highways). The presentation of expert opinion indicating that the legislation would not effectively control lead-based paint hazards did not require the Council to accept that testimony to the extent of finding that the legislation may have a significant adverse impact on the environment. Chemical Specialties Manufacturers Association v. Jorling, 85 N.Y.2d at 397-398; United Petroleum

Association v. Williams, 102 A.D.2d 491, 493-494 (3d Dept., 1984), aff'd for reasons stated in opinion at App. Div., 65 N.Y.2d 708 (1985). Nor did the comprehensive scope of the law necessarily indicate that it would have a significant adverse impact on the environment. The fact that an impact is potentially large does not mean that it is also necessarily significant. See Merson v. McNally, 90 N.Y.2d at 751.

Claims that a different law or regulation would be more protective of the environment do not mandate preparation of an EIS, as long as the claims were considered, and the record shows a reasonable basis for determining that the choices made would not have a significant adverse impact on the environment. The First Department correctly held that the City Council was not required to find potential environmental significance sufficient to warrant preparation of an EIS simply because there was some testimony and alternative legislative proposals before the Council favoring more extensive regulation than that enacted. See, e.g., Neville v. Koch, 79 N.Y.2d 416, 425 (1992) (an "agency's responsibility under SEQRA must be viewed in light of a 'rule of reason'; not every conceivable environmental impact, mitigating measure or alternative need be addressed in order to meet the agency's responsibility"). A full EIS was not required simply because the City Council could have adopted a law with an even more detailed work safety protocol or different time limits for performance of the work. See Chemical Specialties Manufacturers Association v. Jorling, 85 N.Y.2d at

395-398. While the City Council was required to consider environmental concerns raised, it was not required to find that the concerns raised were significant enough to require preparation of an EIS. See Hingston v. New York State Department of Environmental Conservation, 202 A.D.2d 877, 879 (3d Dept., 1994), appeal denied, 84 N.Y.2d 809 (1994). An EIS was not required simply because the City Council, after assessing the relative benefits and disadvantages of proposals concerning control of lead-based paint, did not adopt all of the proposals which advocates claimed would provide additional protection against lead-based paint hazards. Briarwood Community Association v. City of New York, 147 A.D.2d 639, 640 (2d Dept., 1989), appeal denied, 74 N.Y.2d 601 (1989) (sustaining a negative declaration concerning construction of a residence for homeless families, this Court stated: "While the agency must consider ways in which adverse impacts might be minimized, the law 'does not require an agency to impose every conceivable mitigation measure' [Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 421]").

The First Department correctly determined that its "central task, then, is to determine whether respondents engaged in a 'thorough review of each area of relevant concern' Application of Committee to Preserve Brighton Beach v. Planning Commission of City of New York, supra, 259 A.D.2d at 34. There is no doubt, whatever one's view on the merits of Local Law 38, that the City Council did just that" (3756).

The record in this case shows that all environmental concerns were fully and extensively considered. Even the Supreme Court correctly rejected petitioners' contention that the adequacy of environmental review supporting the Negative Declaration be judged solely by evaluation of the Environmental Assessment Form. When Courts review negative declarations accompanying action by local legislatures, the entire record before the legislative body -- testimony at public hearings, submissions to the legislators and deliberations -- is reviewed to determine the sufficiency of consideration of environmental issues. Hoffman v. Town Board of the Town of Queensbury, 255 A.D.2d 752, 753-754 (3d Dept., 1998), appeal denied, 93 N.Y.2d 803 (1999) (the "entire record" of public hearings, comments received from the public and public meetings showed that the Town Board considered the potential environmental impacts of the proposed action before determining that the two potentially large impacts it identified were not significant and issuing a negative declaration); Wilkinson v. Planning Board of Town of Thompson, 255 A.D.2d 738, 739-740 (3d Dept., 1998), appeal denied, 93 N.Y.2d 803 (1999) (in addition to the environmental assessment form there were a number of open meetings and comments with respect to the environmental concerns before issuance of a negative declaration sustained by the court); Buerger v. Town of Grafton, 235 A.D.2d 984, 985-986 (3d Dept., 1997), appeal denied, 89 N.Y.2d 816 (1997) (negative declaration was based on adequate consideration, including advice of a

professional engineer, comments from interested government agencies and information from two public hearings); Hare v. Molyneaux, 182 A.D.2d 908, 910 (3d Dept., 1992) (review of the minutes of several board meetings indicated that the board complied with SEQRA by taking a hard look at the areas of environmental concern before issuing a negative declaration); see also Boyles v. Town Board of Bethlehem, 278 A.D.2d 688, 691 (3d Dept., 2000); Save Easton Environment v. Marsh, 234 A.D.2d 616, 618-619 (3d Dept., 1996), appeal denied, 90 N.Y.2d 802 (1997); Balsam Lake Anglers Club v Dep't of Environmental Conservation, 199 A.D.2d 852, 855 (3rd Dept., 1993), appeal withdrawn, 83 N.Y.2d 907 (1994); Horn v. County of Westchester, 106 A.D.2d 612, 614 (2d Dept., 1984); Sutton Area Community v. Board of Estimate, 78 N.Y.2d 945, 947 (1991) ("The record, viewed as a whole, reveals that the Board was fully informed of all pertinent environmental issues, including those dealing with the sewage treatment plan change"), reversing 165 A.D.2d 456 (1st Dept., 1991) (which held that a change in plans not reflected in an EIS already before the board prevented adequate consideration of environmental issues, although the change was fully explained and discussed at the board meeting). Accord, Akpan v. Koch, 75 N.Y.2d 561, 568, 571, (1990) (upholding adequacy of environmental review for Atlantic Terminal Project, where even though lead agencies concluded in EIS that the project would not have a significant impact on secondary displacement, the record revealed that "the issue of secondary

displacement was raised at every level of the SEQRA review process").

Before Local Law 38 was passed, and the Negative Declaration approved, the City Council Committee on Housing and Buildings held three lengthy informational hearings, heard extensive expert testimony and received extensive written submissions on all of the issues from, among others, the Commissioners of City's Department of Health and Department of Housing Preservation and Development, environmental scientists with expertise in control of lead paint hazards, and real estate professionals, from the private and not-for-profit sectors. The Council considered and debated other proposals rejecting amendments to the law concerning the definition of lead-based paint hazard; the type of work protocol, including the extent of dust clearance testing; the type of notice provisions, and the retention of the presumption that paint in a unit in which a child under the age of six is lead-based not only to compel repairs but for personal injury actions (1961, 1963-1967, 2122-2123, 2160).

At the hearing on December 16, 1998, about the need to amend Local Law 1, and the hearings of June 21 and June 24, 1999, specifically concerning Local Law 38, there was very extensive testimony that Local Law 1 had to be replaced because of its unsafe "lead-free" approach, which required covering or removal of all lead-based paint, including intact paint. There was virtually universal agreement among the physicians,

environmental scientists, government officials and property management experts that the disturbance of intact lead-based paint was a threat to public health that would create a new wave of childhood lead poisoning and reverse the enormous progress made in prior years resulting from doing lead-based paint repairs under a "lead-safe" approach (1415-1416, 1513-1514, 1529, 1548, 3150, 3262-3266, 3351-3355, 3433-3434, 3442-3447, 3449-3450, 3453, 3462-3463, 3471-3474, 3477-3478, 3481).[22] Representatives of the real estate industry, not-for-profit operators of affordable housing and the HPD Commissioner all agreed that the cost of total lead abatement was prohibitive; estimated at $15,000 per unit, and $2 billion City-wide, and implementation of such an approach would unquestionably cause large scale abandonment in low and moderate income sector housing, an older housing stock, a considerable portion of which was at one time painted with lead-based paint (3139-3142, 3267-3272, 3361-3371, 3419-3421, 3452-3453, 3475, 3483).

The comprehensive framework embodied in Local law 38 contains numerous improvements when compared to the mere five paragraphs of Local Law 1. Contrary to petitioners' assertions,

[22] Petitioners audaciously contend that it was not firmly established before the City Council that the lead safe approach of Local Law 38 was far preferable to the antiquated lead free approach of Local Law 1 (Pet.'s Br. at 55). In fact, the bulk of the December 18, 1998 hearing was dedicated to this precise topic. See, e.g., Testimony of Nick Farr, Executive Director of the National Center for Lead Safe Hosing: "The risks attendant to wide scale abatement of intact lead paint must not be underestimated" (3450).

none of these improvements “may” have a significant adverse impact on human health.

Local Law 38 also modernized and updated the definition of lead paint. Under Local Law 38, § 27-2056.1(3), “lead-based paint” is defined as paint or similar surface coating material containing 1.0 milligrams of lead per square centimeter or greater, as determined by laboratory analysis or by x-ray fluorescence (XRF) analyzer. Admin. Code § 27-2056.1(3). Local Law 1 required that an owner of a multiple dwelling in which a child six years of age or under resided remove or cover any paint or similar surface-coating material having a reading of 0.7 milligrams of lead per square centimeter or greater or containing more than 0.5 percent of metallic lead based on the non-volatile content of the paint or similar surface-coating material on the interior walls, ceilings, doors, window sills or moldings. The record demonstrates that there was virtually uniform agreement among physicians, government officials, environmental scientists and property managers about adopting a 1.0 milligram per square centimeter standard for measuring the presence of lead in paint, rather than the 0.7 standard of Local Law 1. The 1.0 standard was a nationwide one and equipment was designed to measure it, but did not efficiently measure for the 0.7 level and did not assure accurate measurement under the 0.7 standard. (Intro. 205 similarly provided for the 1.0 standard). The difference

between the two standards with respect to lead content was insignificant (3156-3159, 3435-3436, 3445, 3450, 3478-3480).

The one year reduction in the age of a child to which the statutory presumption concerning the lead-based content in an apartment in a pre-1960 building applied was raised during the testimony of Dr. Neal Cohen, DOH Commissioner, who testified that the principal age of developing childhood lead poisoning was 1½ to 2½ years, when crawling and hand-to-mouth activity were most prevalent, and that older children rarely developed elevated blood lead levels (1418). This uncontroversial change was in harmony with federal and state law.[23] (Intro. 205 also provided for this change).

While there was considerable support for dust clearance testing after work on any area to correct a deteriorated paint condition suspected to involve lead-based paint (1423-1424, 1433, 1513, 1520, 1532), there was also testimony that dust clearance testing was not uniformly regarded as scientifically reliable, that it cost several hundred dollars per unit, and if required for each unit could put not-for-profit housing operators of low and moderate income housing out of

[23] See 42 U.S.C § 4852(d)(1), selection criteria for grants for lead paint hazard reduction include extent to which activities will reduce risk to children under 6; 15 U.S.C. § 2681, risk assessment defined as an investigation for lead paint hazards in housing occupied by children under 6; 24 C.F.R. § 35.1120, interim controls for lead hazards in certain residential structures where children under 6 reside; 10 N.Y.C.R.R. § 67-1.2, mandating that primary health care assess children at least six months old and under six years of age for high dose lead exposure.

business; and that EPA still had not developed a program to train and certify technicians. Although the test was designed to identify a temporary condition that needed to be cleaned, under HUD rules even one failed test remained perpetually reportable on a prospective leasing of a unit or a sale of the building (1424, 1522-1523, 1571-1572, 1577-1579, 1581, 1587-1588). The areas in the statute for which lead dust clearance testing was required were those identified by Nick Farr as having been identified in a field research study as the ones in which the highest levels of lead-based paint were located (windows, trim and doors) (1515-1516, 1544-1545).[24]

While some witnesses favored application of the Health Code protocol (which applies to lead-based paint repairs ordered by DOH in a dwelling unit because of the presence of a lead poisoned child in the unit) to all lead-based paint repairs under Local Law 38, Commissioners Roberts and Cohen indicated that the work protocol of Local Law 38 was safe (1396-1399, 1436-1438). It was reasonable to impose stricter standards for work to remediate a hazardous lead-based paint condition in a unit where a case of lead poisoning had already occurred -- with

[24] While some experts opined and petitioners argue, that this component of the legislation was ineffective, the City Council was not required to accept that testimony to the extent of finding that the legislation may have a significant adverse impact on the environment. Chemical Specialties Manufacturers Association, 85 N.Y.2d at 397-398; United Petroleum Association. v. Williams, 102 A.D.2d 491, 493-494 (3d Dept., 1984), aff'd, 65 N.Y.2d 708 (1985).

DOH often required to issue orders to perform extensive work to remediate such a lead paint hazard -- than the standards imposed for the more routinely performed work on paint presumed to be lead-based paint because it was located in a pre-1960 building, where a violation had not been issued, or where work was timely performed after service of a notice of a violation. Furthermore, delay in making repairs was a basis to impose stricter work standards, since delay presented the possibility that the condition could further deteriorate and thus require greater precautions in the correction process.

Nevertheless, petitioners contend (by text and chart) that the Local Law 38 safe work practices that apply when correcting lead paint hazard violations only within the first 21 days[25] are "much less stringent" (Pet.'s Br. at 34-39). However, an actual analysis of Local Law 38's safe work practices, together with Local Law 38's implementing regulations, indicate otherwise:

[25] After 21 days, Health Code § 173.14 applies to the correction of lead paint hazard violations.

PRE-EXISTING HEALTH CODE § 173.14 AND LL 38'S "INTERIM CONTROLS"

Provision	Pre-existing Health Code § 173.14 (also applicable as specified under Local Law 38)	LL 38's "Interim Controls"
Filing with City	Required to file notice with City so that City is alerted to work in progress and can inspect as needed	Local Law 38, § 17-179(h), required the Department of Health and Mental Hygiene to develop a pamphlet that explained lead paint hazards that included, among other things, the telephone numbers "to report unsafe lead-based paint work practices." Local Law 38, § 27-2056.7(c), requires that pamphlet to be left in the dwelling unit when HPD conducts a Local Law 38 lead paint inspection.
Licensing and training of workers	Required, including federal certification requirements	Local Law 38, § 27-2056.5(b)(12), requires that all "surface dust tests shall be completed by an individual who has passed a course approved by the department of health on how to conduct a surface dust wipe test." See also 28 RCNY § 11-08(a) (dust tests to be submitted to HPD).
Record keeping	Detailed records, kept for 7 years	Local Law 38 requires owners to retain the following records for 3 years. Federal law similarly requires that records be maintained for 3 years. 24 C.F.R. § 35.175. • Records of any work performed following an HPD violation. § 27-2056.2(b)(13). See also 28 RCNY § 11-

		02(c)(2). • Records of any work performed without an HPD violation. § 27-2056.2(a)(12). See also 28 RCNY § 11-02(b)(3). • Records of annual visual inspections, and any work performed following these visual inspections. § 27-2056.3(9). See also 28 RCNY § 11-05(c). • Records of any work performed during a vacancy pursuant to Local Law 38, § 27-2056.6. See 28 RCNY § 11-03(b).
Warning signs	Required	Local Law 38, § 27-2056.2(a)(8) & § 27-2056.5(b)(8), requires an owner correcting lead hazards with or without an HPD violation to advise occupants to "not enter the work area." See also 28 RCNY § 11-02(b)(2)(i) & (c)(1) (caution tape to be used at entrance to sealed work area; warning sign to be used at entrance to unsealed work area).
Furniture	Required to remove movable furniture from entire area	Local Law 38, § 27-2056.2(a)(2) & § 27-2056.5(b)(2), requires moveable furniture to be removed from the work area or covered with sheeting when correcting a lead hazard with or without an HPD violation.
Plastic barriers	Specific detailed requirements on thickness and layers,	Regulations implementing Local Law 38, 28 RCNY § 11-02(b)(2)(iii) &

	taping, etc.	(c)(1), require that all sheeting "shall be of sufficient thickness and durability to prevent tearing" and shall, among other things, "be adequately secured to prevent movement of the sheeting during the performance of the work" when correcting a lead hazard with or without an HPD violation.
Sealing of forced air ducts	Required	Local Law 38, § 27-2056.2(a)(1) & § 27-2056.5(b)(1), requires an owner where practicable [i.e. where not blocking a fire exit], to "seal off the work area" when correcting a lead hazard with or without an HPD violation or during a vacancy. See also 28 RCNY § 11-02(b)(2)(ii) & (c)(i).
Sealing of windows and doorways	Required	Local Law 38, § 27-2056.2(a)(1) & § 27-2056.5(b)(1), requires an owner where practicable [i.e. where not blocking a fire exit], to "seal off the work area" when correcting a lead hazard with or without an HPD violation or during a vacancy. See also 28 RCNY § 11-02(b)(2)(ii) & (c)(i).

Daily clean-up	Specific prohibitions on access to contaminated materials and areas, sealing and disposal of debris	Local Law 38, § 27-2056.2(a)(3)(7) & § 27-2056.5(b)(3) & (7), requires that contaminated material "shall remain in the work area or be stored or removed from the work area in a safe manner," owners shall "conduct a visual examination at the end of each work day to ensure that no . . . work–related debris [has] been released from [the work] area" when correcting a lead hazard with or without an HPD violation. See also § 27-2056.6(a) (similar requirements when performing work on vacant apartments).
Final cleanup	Requires 1 hour wait for dust to settle;	HPD's Owner's Pamphlet, "Lead Poisoning Prevention and Control Work Practices and Procedures," at 11, provides that the cleaning process shall start one hour after the abatement. See HPD's website, www.ci.nyc.ny.us/html/hpd/pdf/lead pamphlet.pdf.
	specific requirements for misting debris and sealing it; and	Local Law 38, § 27-2056.2(a)(8) § 27-2056.5(b) (9), requires an owner to arrange and supervise the work area so as to minimize the dispersion of … dust" when correcting a lead hazard with or without an HPD violation. See also § 27-2056.2(a)(3) & § 27-2056.5(b)(3) ("work-related debris shall … be ... removed from the work area in a safe manner")
	HEPA vacuuming of all surfaces, including furniture and carpets, then a detergent wash of all surfaces, then a 2nd HEPA vacuuming.	Local Law 38, § 27-2056.2(a)(5) & § 27-2056.5(b)(5), requires one HEPA vacuum or one detergent wash when correcting lead hazards with or without an HPD violation. See also 28 RCNY § 11-02(b)(2)(v) (detailed detergent wash requirements).
Final inspection	By an independent 3d party; who	Local Law 38, § 27-2056.5(b)(12), requires that dust tests be performed by trained individuals.

	must wait 1 hour before inspecting for dust to settle	performed by trained individuals. HPD's Owner's Pamphlet, "Lead Poisoning Prevention and Control Work Practices and Procedures," at 12, provides that the final clearance evaluation take place one hour after the final cleaning. See HPD's website, www.ci.nyc.ny.us/html/hpd/pdf/lead pamphlet.pdf.
Clearance dust testing	4 dust wipe samples – from window well, window sill, floor, and from adjacent room (for tracking) – and must meet dust levels set in accordance with federal law, before family is allowed to re-enter work area.	Local Law 38, § 27-2056.5(b)(12), requires one dust test on the floor if work has been done on interior wood trim or door; two dust tests if work has been done on interior wood trim or a door that is located near a window; and three dust tests when work has been done on a window. See also 24 C.F.R. § 35.1340(b)(2)(iii).
Disclosure of dust test results to tenant	Required	Local Law 38, § 27-2115(b)(2), requires that tenants be provided copies of an owner's certification that lead hazard violations were corrected. Pursuant to pre-existing federal disclosure requirements, 24 CFR § 35.82(d)(2), a lessor must disclose lead dust test results at lease renewal.

With regard to the time frames for inspection, service of violations, correction of the condition, reinspection and performance of the work by HPD in the event the owner did not do it, Commissioner Roberts testified that these time frames were

outside limits for a workable program (1343-1344, 1392-1393).[26] The focus on an incentive based program to obtain repair work prior to issuance of a violation was appropriate because 96% of apartments believed to contain lead-based paint had never been cited for a violation by DOH, and when violations were placed, in the vast majority of cases repair work was satisfactorily completed (1421-1422, 1442, 1461). With respect to concerns about the reliability of owner certification of correction of violations -- the standard HPD procedure for all violations -- this law provided additional extensive civil and criminal penalties for false certification; and Commissioner Roberts pointed to recent criminal prosecutions of owners for false certification (832-946, 1382-1383, 1507-1508, 1812, 1817-1818).

The retention of the presumption concerning presence of lead-based paint in an apartment in a pre-1960 building in which a child under the age of six resided only for the purpose of compelling repair and not for use in a personal injury suit, was opposed by plaintiffs' personal injury lawyers. However, their view that the change automatically precluded successful suit was contested by opinion of the Corporation Counsel (2141-2142) as well as by a Law Department attorney with special expertise in the area (1375-1376). That attorney also

[26] Contrary to petitioners' implications (Pet.'s Br. at 44), HPD Commissioner Roberts testified that HPD generally responded to "all [class] C violations within a 24 to 72 hour period" (1357); such testimony does not indicate, however, that previously Local Law 1 violations were corrected within that time frame.

questioned the assumption that the potential for civil suit encouraged repairs, noting the persistence of the lead paint problem despite a heavy docket of such cases (1379). Furthermore, the owners' representatives argued that the presumption was not fact-based. In a survey conducted by an organization to prevent childhood lead poisoning, 73% of pre-1960 apartments did not contain lead-based paint, and of the ones that did contain lead, only 17% of the walls in such apartments contained lead-based paint. In about 85% to 90% of the instances when owners contested the presumption and actually had the unit tested for presence of lead content, the tests were negative (1515-1516, 1536, 1615, 1681-1682). If this information was correct, while it is reasonable to apply the presumption in order to obtain the public health benefit of prompt safe repairs in a unit suspected of containing lead-based paint (when peeling paint had to be repaired in any event), it was questionable whether the presumption should be extended to personal injury actions which could result in extensive monetary awards.

Petitioners further claim that Local Law 38 deregulated lead paint dust. But Local Law 1 was never construed to regulate lead dust as a hazard, and thus there was nothing in the prior law for Local law 38 to "deregulate." See, e.g., NYCCELP v. Giuliani, No. 42780/95 (Sup. Ct. N.Y. Co., May 1, 1996) (2498). As to the possible inclusion of lead dust in the statutory definition of "lead-based paint hazard,"

Committee Chairperson Spigner cited to the confusion in the record as to how the condition would be identified or what an owner would be required to do if the dust could not be traced to a deteriorated paint condition (2238), which was identified by experts as the primary source of lead dust (1352-1353, 1530, 1553, 1555, 3262-3266, 3351-3353, 3442-3447, 3471-3474). Furthermore, the lengthy record before the Council did not demonstrate that friction surfaces were a substantial source of lead dust (569-571, 1352-1353, 1564-1566, 3449). Without an identifiable apartment defect, the dust could be due to outside conditions and could have been blown or tracked into the unit, making it unreasonable to require the owner to correct it; and, in any event, whatever the source of this or other dust, it could be removed by regular washing of floors with a detergent (1554, 1581-1583). The hearing record indicates that the Council fully and adequately considered the environmental concerns raised by the lead dust issues. See Hingston, 202 A.D.2d at 879.

Similarly, petitioners contend that Local Law 38 deregulated intact impact, friction and child accessible surfaces. Petitioners fail, however, to point to specific provisions of Local Law 1, or the draconian implementing regulations that the City was on the verge of enacting,[27] to support their contention that Local Law 1 addressed this issue

[27] In January 1999, the lead petitioner here stipulated in NYCCELP to postpone enactment of these draconian regulations (2513-2516).

or the lead dust issue. This failure is not surprising, since neither Local Law 1 nor its implementing regulations contained such provisions. Rather, petitioners apparently reason that if Local Law 1 -- with its antiquated and dangerous requirement that all lead paint (whether hazardous or not) be immediately abated -- had been fully enforced, then ipso facto there would be no lead dust or dangerous impact, friction or child accessible surfaces in an abated apartment since there would be no lead paint.

Petitioners' argument, however, ignores the critical fact that the City Council received extensive testimony that the total abatement approach encompassed by Local Law 1 would be a public health and housing disaster that would lead to an increase in childhood lead poisonings. Moreover, Local Law 38 contains comprehensive mandates that address lead dust and friction surfaces. For instance, Local Law 38 mandates that lead hazard work -- with or without an HPD violation – be performed using safe work practices. And when such work is performed, the owner is required to adjust all doors, including cabinet doors, and windows "to ensure that they are properly hung, so that no painted surfaces bind."

The debate in the Committee on Housing and Buildings, and before the full Council involved all of these issues (2155, 2160, 2169, 2173-2174, 2180, 2199, 2222-2223). In addition, before the CHB, Council Member Michels proposed extensive amendments relevant to most or all of these issues, which

amendments were defeated (1961-1977). Before the full Council amendments were proposed and defeated concerning greater dust clearance testing, including lead dust in the definition of "lead based paint hazard," retaining the aforementioned presumption in personal injury actions, and using window guard law notice provisions to determine the presence of a child under the age of six in affected apartments (2122-2123, 2160).

This extensive record not only established ample basis for the Council's conclusion that the law would not have a significant adverse impact on the environment, but also demonstrated that the EIS deemed necessary by the Supreme Court was not needed because this legislation of general application, which did not concern any specific project, had already been the subject of very extensive debate in which the advantages and disadvantages of every provision had been thoroughly discussed by experts from various fields, as well as by representatives of interested organizations.[28] Any EIS for this law of general

[28] The Appellate Division summarily rejected this contention, as having been already definitively resolved by regulation; and further noting that this issue of whether the environmental review laws apply to Local Laws of general environmental impact "was neither briefed nor argued before the IAS court" (3741). However, it is well settled that this Court has the power to review an issue of law that raises solely a question of statutory interpretation, or that turns on legislative intent, even though it was not presented below. See Richardson v. Fiedler Roofing, Inc., 67 N.Y.2d 246, 250 (1986); American Sugar Refining Company of New York v. Waterfront Commission of New York Harbor, 55 N.Y.2d 11, 25 (1982). A new argument can be raised for the first time in the appellate courts, where as here it could not have been obviated or cured by factual showings or legal argument countersteps in the Supreme Court. Rivera v. Smith, 63 N.Y.2d 501, 516 n. 5 (1984); Telaro v. Telaro, 25 N.Y.2d 433, 439 (1969). In any event, as this purely legal

application essentially would reiterate the information and opinions already elicited on the public health, economic and legal ramifications of Local Law 38.[29]

It is highly significant that the subject "action" under SEQRA is legislation passed by the City Council. A legislative act is not normally reviewable by the courts, is entitled to the strongest presumption of validity and must stand

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argument is merely a further refinement and amplification of the City's position in this litigation, it was properly asserted in the Appellate Division, and is properly before this Court for consideration, as a legal basis for affirming the Appellate Division's ruling.

[29] While SEQRA has been held to apply to local legislation, it almost always has been in the context of legislative consideration of projects or zoning in a specific site or area; and the environmental review is intended to inject consideration of the environmental consequences of the proposed project or zoning as part of the ultimate determination as to whether the action itself should be undertaken. See, e.g., Devitt v. Heimbach, 58 N.Y.2d 925 (1983) (sell public land); Tri-County Taxpayers v. Town Board of the Town of Queensbury, 55 N.Y.2d 41 (1982) (fund and construct sewer system); Fisher v. Giuliani, 280 A.D.2d 13 (1st Dept., 2001) (rezoning of theatre district). In this case, what petitioners identify as the actions that allegedly did not receive adequate environmental review involve the direct subject of the legislation itself, the laws governing identification and removal of hazardous lead-based paint. It has been questioned whether SEQRA even applies to such a law. Niagara Recycling, Inc. v. Town Board of the Town of Niagara, 83 A.D.2d 335 (4th Dept., 1981), affd for reasons stated at App. Div. (Hancock, J.), 56 N.Y.2d 859 (1982) involved a challenge to adequacy of environmental review of a local law to license and regulate the siting and operation of waste disposal and management facilities throughout a city. The Appellate Division noted, 85 A.D.2d at 338, n. 4, that despite the assumption of the parties that the legislation was an "action" under SEQRA, 8 E.C.L. § 8-0105 (4) (5), it was questionable whether SEQRA applied to a law that did not pertain to a particular project but constituted general regulation involving environmental consequences. It is of course the general rule that courts do not appraise the adequacy of information supporting legislation. People v. Shepard, 50 N.Y.2d 640, 645 (1980).

if there is any basis therefore. Church v. Town of Islip, 8 N.Y.2d 254, 258 (1960). The passage of Local Law 38 is obviously a legislative act, as is the Resolution approving the Negative Declaration. See Matter of Lori C., 49 N.Y.2d 161, 171 (1980) (rejecting a broad interpretation of Family Court Act § 255, which would have allowed Family Court to exercise extensive supervision of placement of foster children by the Departments of Social Services and Probation; "courts do not normally have overview of the lawful acts of appointive and elective officials involving questions of judgment, discretion, allocation of resources and priorities" (citations omitted)). Moreover, the fundamental doctrine of distribution of powers requires that each branch of government be free from interference in the discharge of its particular duties, by either of the others. Id.; see also New York State Inspection, Security, and Law Enforcement Employees v. Cuomo, 64 N.Y.2d 233, 239 (1984).

In addition, the legislation in issue is not in and of itself potentially harmful to the environment, but rather, seeks to alleviate the existing harm created by peeling lead paint. As the law itself does not cause any harm, but is legislative action seeking to remediate the already existing potential hazard, the only issue here is the degree of remediation necessary to adequately avert the existing harm. It cannot seriously be asserted that Local Law 38 itself does not adversely impact the environment (unlike its predecessor, Local

Law 1), and the statute is actually more beneficial to, and more protective of, the environment than the previous requirement in Local Law 1 of total abatement. Thus, as this case concerns regulatory legislation clearly designed to remediate existing harm, and does not itself negatively impact on the environment, regardless of how little or how much remediation is required under the law, respondents properly determined that no EIS was warranted or mandated in these circumstances. Nothing in Local Law 38 itself causes the harm, and petitioners' contention that more protective or remedial measures would have been wiser legislation is not sufficient to trigger environmental review in an EIS.

The Negative Declaration itself correctly answered "not applicable" to several categories of questions on the regulatory standard environmental assessment form (423-437), which was designed for the typical SEQRA review of a specific project, not for review of a statute of general applicability. The Attachment specifically discussed the proposals in the legislation (469-475) which constituted significant additional statutory protection against the hazards of lead-based paint, rendering the statute beneficial to what petitioners contend is the affected "environment" in this case, and thereby warranting issuance of a Negative Declaration. See Gernatt Asphalt Products, Inc v. Town of Sardinia, 87 N.Y.2d at 690; Patterson Materials Corp. v. Town of Pawling, 264 A.D.2d 510, 512 (2d Dept., 1999), appeal denied, 95 N.Y.2d 754 (2000); Valley Realty

Development Corp. v. Town of Tully, 187 A.D.2d 963, 964 (4th Dept., 1992), appeal dismissed and appeal denied, 81 N.Y.2d 880 (1993). The basic rationale of the Negative Declaration was that Local Law 38 was more protective of the environment than prior law and the requirement of total abatement, and thus did not require an EIS to be filed.

Notwithstanding petitioners' erroneous contentions, partially accepted by the Supreme Court, that Local Law 38 reduced existing statutory protections, a simple comparison of the involved statutes and the history of the NYCCELP litigation establish otherwise. It was conclusively established and uncontroverted that the principal statutory change from a "lead free" to a "lead safe" approach, eliminating the Local Law 1 requirement to abate all lead-based paint, including intact paint, was necessary to prevent a public health threat presented by removal of massive amounts of intact lead-based paint, which could have created a new wave of childhood lead poisoning. In addition, enforcement of the total abatement provisions of Local Law 1 would also have caused abandonment of low and moderate income housing, due to the prohibitive cost of total lead abatement in those units. Given the dangerous, impractical and prohibitively expensive nature of the Local Law 1 mandate to abate all lead paint, the statute admittedly had never been successfully implemented by the City, causing the various contempt findings in the NYCCELP case, although the actual means

of enforcement under Local Law 1 had dramatically reduced blood lead levels of children in the City (1414-1415, 3150, 3422).

Thus, the most important change in the law regulating lead-based paint was the abandonment of the "lead-free" approach, with its dangerous, prohibitively expensive, largely impossible mandate to abate intact lead paint, which, if actually fully carried out, would "create a new wave of childhood lead poisoning cases that would dwarf the current caseload" (3463), thereby reversing the steady decline in cases.[30] The total abatement would have had astronomical costs, causing abandonment of low and moderate income housing. This major change alone was highly beneficial to, and more protective of the environment.[31] The Appellate Division correctly recognized that the central premise of Local Law 38 was that the removal of intact lead paint, as required by Local Law 1, posed a much greater danger to public health than the containment approach of Local Law 38 (3744-45). See Gernatt Products, Inc.

[30] Since 1970, when the Health Code was first amended to require environmental investigation for children with elevated blood lead levels, there had been a dramatic decline in lead poisoning. In 1970 there were 2,649 cases, with a case defined as a blood lead level of 55 micrograms per deciliter. In 1998 there were 1,074 cases, defined as a blood lead level of 20 micrograms per deciliter, with fewer than five percent of the cases having a blood lead level of 55 micrograms per deciliter (1414-1415, 3150, 3433). While the Local Law 1 mandate to abate all lead paint admittedly had never been successfully implemented by the City, causing the various contempt findings in the NYCCELP case, the actual means of enforcement under Local Law 1 had dramatically reduced blood lead levels of children in the City (1414-1415, 3150, 3422).

[31] This precise topic was in fact a major focus of the December 18, 1998 hearing (3450).

v. Town of Sardinia, 87 N.Y.2d 668, 690 (1996) (given "the nature of the proposed action here, which would have only beneficial environmental effect, and the focus of the Assessment Form, which is to identify negative environmental effects of the proposed action, the Town Board's rapid review and completion of the Environmental Assessment Form was not arbitrary or capricious"); see also Patterson Materials Corp. v. Town of Pawling, 264 A.D.2d 510, 512 (2d Dept., 1999), appeal denied, 95 N.Y.2d 754 (2000); Valley Realty Development Corp. v. Town of Tully, 187 A.D.2d at 964. Accordingly, the basic conclusion that Local Law 38 was more protective of the environment than the predecessor law, Local Law 1, was undoubtedly correct. "[D]isagreement on whether certain standards, rules or methodologies would result in greater or lesser reductions of existing threats" (3745), did not constitute a significant environmental impact requiring preparation of an EIS.

In addition, Local Law 38 added time frames specific to lead-based paint hazards, with respect to inspections following complaints, issuance of violations, and time for correction, requiring for the first time that HPD itself correct the condition if after the specified period the owner had not done so. Local Law 38 substantially increased penalties for noncompliance and false certification. The law required repairs even in the absence of issuance of a notice of violation and required lead-based paint repairs in vacant units. It added provisions requiring notice to tenants upon leasing of a unit

and annually thereafter to inform an owner if a child under the age of six resided in a unit, and, if so, imposed annual inspection requirements for lead-based paint hazards. And "if an occupant informs the owner regarding the presence of a lead-based paint hazard at any time," a visual inspection for such hazards is to be performed. 28 RCNY § 11-05(a). The law included a work safety protocol for lead-based paint repairs, but did not repeal the Health Code provisions providing a protocol in the case of repairs ordered when a child with elevated lead levels resided in a unit, and actually required use of the Health Code repair protocol in full when an owner delayed in making repairs required under the Housing Maintenance Code.

Most of petitioners' claims as to reductions in statutory protection arise from their comparison of the work protocol in Health Code § 173.14, and that in Local Law 38. However, Local Law 38 did not repeal the Health Code, which continues to apply to violations and orders of abatement issued by DOH, upon finding a child with elevated blood levels living in a dwelling that contains lead paint hazards. Health Code. § 173.13(d)(2). However, until Local Low 38 was adopted, there was no work safety protocol in existence for violations issued under the Housing Maintenance Code pursuant to Local Law 1, a subject of prior litigation in NYCCELP, in which petitioners sought and obtained court directives concerning the manner of performing work under Local Law 1. Thus, prior to the enactment

of Local Law 38, there was no law that explicitly required every owner of a multiple dwelling where a child under the age of six resided to comply with any work safety standards while correcting lead paint hazards, whether or not the correction was ordered by DOH or HPD.[32] Indeed, previous court orders from the Local Law 1 litigation did not mandate that work be performed according to the specific Board of Health procedures, but left it up to the City to determine what the appropriate measure ought to be. See NYCCELP v. Giuliani, No. 42780/95 (Sup. Ct. N.Y. Co., May 1, 1996) (2499-2505).

Petitioners also argue that Local Law 38 eliminates any enforceable deadlines for the correction of lead paint hazards in one or two family dwellings housing lead poisoned children (Pet.'s Br. at 45). First, Local Law 38 specifically establishes that nothing within it affects the DOH authority with respect to any dwelling unit housing a child with an elevated blood lead level. See Admin. Code § 27-2056.1(b). Moreover, Local Law 38 does not affect DOH's well-established authority to order abated any condition deemed "dangerous to

[32] Local Law 38 added inspection and notice procedures to determine whether a child under the age of six resided in an apartment and, if so, whether the unit had peeling paint. No such provision previously existed, and the courts had to rely on a theory of constructive notice on the part of the owner in cases where suit was brought because a child had been poisoned by lead paint. Juarez v. Wavecrest Management Team, Ltd., 88 N.Y.2d 628, 647 (1996). Local Law 38 also added specific time frames for correction of violations in all instances, and provided for the first time for the City to correct the condition if, after a statutorily specified period, the owner failed to do so. Local Law 38 substantially increased penalties for noncompliance and for false certification.

life or health," Admin. Code § 17-145, or the authority to designate any City agency to execute such order when it has not been complied with within five days of service or attempted service of the order. Admin. Code § 17-147.

While petitioners contend that the now specified statutorily mandated procedures for an owner to determine if a child under the age of six resides in an affected apartment undermines the notice doctrine of Juarez v. Wavecrest Management Team, Ltd., 88 N.Y.2d 628 (1996), it is uncontroverted that Local Law 1 had no specific provisions under which an owner was to obtain notice of the presence of a child of an age to be at risk for lead poisoning, thereby necessitating the reliance in Juarez on a theory of constructive notice. This Court specifically held that Local Law 1 lacked any requirement that an owner ascertain whether a child of any specific age resided in a unit, comparing the statute to the window guard law, which imposed such obligations upon an owner. See Admin. Code § 17-123; 24 RCNY § 12-03[c]; Juarez, 88 N.Y.2d at 647. Other than general directives concerning Class C violations in the Housing Maintenance Code, upon which the time frames in this statute are based (1343), prior to the inclusion of such provisions in Local Law 38 there were no statutory time-frames governing lead-based paint repairs with respect to inspection, service of a violation, reinspection, or performance of the work by HPD itself if the owner failed to do so, which was not required of HPD under Local Law 1, and which it was estimated would result

in repair by HPD of 7320 units in one year (473, 1216). Local Law 38 also substantially increased penalties for noncompliance and false certification.

In sum, Local Law 38 added numerous protections against lead-based paint hazards that were not contained in Local Law 1. The City Council was warranted in concluding that for this reason, and based on the testimony, submissions and debate at extensive hearings, that issuance of a Negative Declaration was warranted.

The record clearly demonstrates that Local Law 38 was a carefully considered statute with substantial public health benefits, while Local Law 1, which it replaced, had proven unworkable over a 17-year period. There was virtually universal agreement that Local Law 1 had to be replaced. A declaration that Local Law 38 is null and void for insufficient environmental review, would have the effect of reinstating Local Law 1. The Appellate Division granted a stay pending appeal in this case by order entered May 10, 2001, after the City demonstrated the catastrophic effect of nullifying Local Law 38, which had been fully implemented since its effective date in November 1999, by promulgation and implementation of new HPD regulations and operative procedures, retraining staff, and changing the computer system. Numerous enforcement proceedings based on Local Law 38 are pending. In addition, HPD and real estate organizations have conducted extensive education programs for owners concerning obligations under the new law.

POINT II

IN THE UNLIKELY EVENT THIS COURT REVERSES THE ORDER BELOW, LOCAL LAW 38 SHOULD CONTINUE IN FULL FORCE AND EFFECT WHILE THE CITY COUNCIL EVALUATES THE DEFICIENCIES IDENTIFIED BY THIS COURT.

Invalidating Local Law 38 would leave the City without a working structure to combat lead-based paint hazards, thereby posing a health threat to the young children of the City. Local Law 1 has already been proven to be unworkable, and, in any event, real estate and HPD enforcement operations have been materially changed to combat lead-based paint hazards under the framework of Local Law 38, which conversion occurred while this matter was pending before the Supreme Court.[33] Under these unusual circumstances, and where petitioners' main actual practical complaint is that Intro. 205 did not receive fair consideration as an alternative to Local Law 38, the purposes of SEQRA should be appropriately balanced against the immediate public health need to protect children from lead poisoning through uninterrupted consistent enforcement of laws concerning

[33] The petition in this matter was filed before the effective date of Local Law 38 (108-109), and petitioners briefed the issues by November 10, 1999 (3638), with petitioners requesting injunctive relief (103). The answer was served on or about November 5, 1999 (2620), with a brief on the same date (3701); and petitioners replied by affirmation dated November 10, 1999 (3553). The NYCCELP matter had been assigned to Justice York since at least December 1995 (2479). No decision on the instant matter was rendered until October 11, 2000 (15u), and a Judgment was not entered until February 22, 2001 (19). During this time period, and before the litigation, Local Law 38 was implemented and became the City's established regulatory regime in response to the hazards caused by lead-based paint.

lead-based paint. Thus, in the extremely unlikely event this Court declares Local Law 38 to be null and void, due to any determination that SEQRA and CEQR have been violated, respondents respectfully request that any such declaration be stayed for a sufficient specified time period, e.g., one year, in order to thereafter afford the City Council the opportunity to conduct the appropriate environmental review of the deficiencies, if any, identified by this Court. Such an approach -- which has been followed in similar situations[34] -- would ensure that children continue to be protected by the lead paint protections of Local Law 38.

It is critical that Local Law 38 continue in force while the City Council evaluates any deficiencies identified by this Court. The record conclusively establishes that the alternative -- the immediate repeal of Local Law 38 and the

[34] See, e.g., Segal v. Town of Thompson, 182 A.D.2d 1043, 1047 (3rd Dept., 1992) (while municipality complies with SEQRA, to "avoid possible disruption of water and sewer service to existing homes, [the court] will not annul the determinations which created the water and sewer districts, despite the invalidity of the underlying negative declaration of environmental significance."); Golden v. Metropolitan Transportation Authority, 126 A.D.2d 128, 132-133 (2nd Dept., 1987) (where "sudden reversion" would entail considerable expense and would "cause 'havoc' as a result of driver confusion," SEQRA does not, "as a matter of law, [require] the court [to] remedy an apparent SEQRA violation by ordering a return to the status quo ante, that is, to conditions as they existed before the agency action was taken"); Silvercup Studios, Inc. v. Power Authority of the State of New York, 285 A.D.2d 598, 601 (2nd Dept., 2001) ("since construction has commenced and is practically complete, the injunction granted by the Supreme Court is stayed [for more than six months] to afford [respondent] an opportunity to comply with SEQRA").

resurrection of the antiquated mandates of Local Law 1[35] -- would result in a public health and housing disaster. Indeed, on December 16, 1998, CHB received extensive testimony about the detrimental effects that would unfold if Local Law 1 was fully implemented by HPD and DOH's enforcement of the requirement that all intact lead paint be removed.[36] In fact, it was accepted by the vast majority of those who testified or provided comments that full implementation would likely lead to a significant increase in childhood lead poisoning.[37] For instance, DOH Commissioner Neal L. Cohen testified that the total abatement of all lead paint, by disturbing intact lead paint, would have exactly the opposite effect of what was originally intended, and would "create a new wave of childhood lead poisoning cases that would dwarf the current caseload" (3149-3150, 3433).

Other experts also testified that the "lead free" approach of Local Law 1 constituted a serious public health

[35] In contrast to the comprehensive regulatory framework set forth in Local Law 38, Local Law 1 (formerly codified at Admin. Code § 27-2013(h)), consists of a mere 5 paragraphs.

[36] Because of ongoing litigation, Local Law 1 was never fully implemented. However, in November 1998, in accordance with court orders, both HPD and DOH held hearings on proposed regulations that implemented the Local Law 1 interpretation requiring abatement of lead paint from intact surfaces (2874-2886; 2908-3116).

[37] The overwhelming evidence of the detrimental effects of Local Law 1 even led the Supreme Court to conclude that it "is apparently the general consensus, shared by petitioners, that since the enactment of Local Law 1 experts have made a philosophical U-turn and removal of intact lead paint is now considered to have more detrimental consequences than its non-removal" (15h, emphasis added).

threat. See Testimony of Jack Caravanos, Professor of Environmental Health Hunter College (3351-3355; 3442-3447); Alicia Lukacho, M.P.H., American Council on Science and Health (3262-3266, 3471-3474) (analogizing to the health problems caused by abating intact asbestos); Vincent Coluccio, Doctor of Public Health, of ATC Associates and the New York Academy of Medicine (3463) ("The scientific literature clearly shows that intact lead paint is not a hazard but it can become hazardous in the course of renovation and improper abatements"). Nick Farr, the Executive Director of the National Center For Lead Safe Housing, wrote: "The presumption that the mere presence of lead-based paint constitutes a hazard to children's health is simply not supported by the growing body of scientific research. Indeed numerous studies have shown that removal of intact lead-based paint generates large amounts of lead contaminated dust that can increase children's lead exposure unless meticulous care is taken in dust control, containment, and clean up" (3448-3449, emphasis added).

CHB also received testimony about the adverse consequences on affordable housing if Local Law 1 was fully implemented. HPD Commissioner Richard T. Roberts stated that abatement of all lead paint in every multiple dwelling unit where a child six years of age or under resides would be an enormous and costly task, given the approximately three million housing units in the City, which would cost the City approximately $100 million annually, and private owners an

average of $15,000 per unit[38] (3140, 3423). Representatives of owners' groups agreed with Commissioner Roberts' testimony concerning the cost of implementing Local Law 1 (3475), and estimated the cost of total abatement to be over $2 billion (3478). Commissioner Roberts also noted that the cost of total abatement would waste limited resources necessary to maintain affordable housing (3141-3142, 3424-3425).

Representatives of groups specializing in the development, operation and financing of low-income housing also presented evidence as to the need to replace Local Law 1. John McCarthy, the Executive Vice President of the Community Preservation Corporation, stated that the organization's efforts, which had provided 60,000 affordable apartments, could not have been carried out if the properties had actually undergone unnecessary abatement of intact lead paint (3361-3367, 3484-3485). Rachel Kleinberg, of the New York Housing Conference, and Frank Braconi of the Citizens Housing and Planning Council, stressed that low income cooperatives could not absorb the cost of the unnecessary full abatement and that

[38] The Local Law 1 mandate to abate intact lead paint will undoubtedly lead to an increase in lead poisoning cases. Some owners who receive lead paint violations from either DOH or HPD requiring the abatement of intact lead paint will simply be unable to pay bills that could easily reach $15,000 per apartment unit. And others will be unwilling to incur such bills, and will attempt to correct the lead paint violations in a less expensive (albeit unlawful) manner by using unskilled contractors, thereby further increasing the potential for lead exposure. Under any of these scenarios, it is very probable that real lead paint hazards (involving deteriorated paint in units where children reside) will not be corrected in a timely and safe manner.

owners of smaller, older buildings would abandon these properties if compelled to absorb the cost of full abatement, which the rents were inadequate to cover (3267-3272; 3369-3371; 3452-3453, 3475-3476).

In addition to the devastating effect the resurrection of Local Law 1 would have on young children, a wholesale change in the regulatory framework would also cause significant confusion among owners, tenants and the New York City agencies charged with addressing lead paint hazards. Such confusion would cause enormous harm to young children while benefiting no one. Indeed, the lead petitioners in this case acknowledged as much in a nearly identical situation over four years ago. In January 1999, on the eve of full implementation of Local Law 1, NYCCELP agreed that full implementation of Local Law 1 would not take place, since (2514):

> it would be in the best interest of all parties that DOH and HPD not implement … major changes to complex enforcement practices and procedures concerning lead paint inspection and abatement once in response to [the trial] Court's orders, only to revise them once again in response to new legislation ….

If Local Law 1 is resurrected, there will most certainly be confusion among City agency staff, private landlords and tenants as they are forced to immediately adjust to a completely different regulatory structure. For example, HPD has issued thousands of lead paint violations predicated on Local Law 38. Some of these violations have not yet been corrected, and are the subject of litigation in housing court.

If Local Law 38 suddenly ceases to exist, tenants and HPD in its enforcement actions will be hard-pressed to insist that these violations be corrected, since they would have been issued pursuant to an inoperative law.

The burden on the agencies of enforcing Local Law 1 will also be enormous. The time for HPD and DOH inspections of lead paint hazards would increase dramatically, since all intact paint surfaces would have to be tested initially with an XRF analyzer, and if negative, by a paint chip analysis to determine if such surfaces contained lead paint.[39] If owners did not correct these lead paint violations, HPD would either have to initiate a court proceeding to force the owner to do so, or undertake such abatement jobs itself.

The burden on private multiple dwelling owners to comply with Local Law 1 would similarly be enormous. Owners would have to be immediately educated both that Local Law 38 was no longer operative, and about the substantially different obligations under Local Law 1. In addition, any owner that received a lead paint violation would be required to abate such violation within twenty-four hours, and would face lead abatement bills that, as noted above, could easily reach $15,000 to $20,000 per apartment. Private owners would also have to pay

[39] The burden described above is not theoretical. Specifically, in the fall of 1998 DOH was forced to implement Local Law 1's mandate to inspect for and order the abatement of intact lead paint when responding to a report of a child with an elevated lead level (3158-3159).. During that time, the time required for DOH inspections more than doubled, from an average of three hours to an average of seven hours per apartment unit(3159).

for the relocation of tenants when extensive intact lead paint abatements are performed.

Finally, to extricate New York City from this public health disaster, the City Council will have to enact new legislation that repeals Local Law 1, and presumably replaces it with some other lead hazard requirements. At that point there would be massive further confusion among both private multiple dwelling owners and tenants as they try to determine their rights and responsibilities under a lead paint regime that has repeatedly changed. For instance, many would be confused as to their rights and responsibilities pertaining to violations issued during this interim Local Law 1 period, as well as to the status of violations previously issued under Local Law 38. Both HPD and DOH would also have to change course yet again to begin enforcing Local Law 38. These repeated changes would place significant burdens on the agencies as they once again have to change their procedures and retrain their staff. The chaos that would result as the lead paint laws are repeatedly changed would not be conducive to the principal goal of any of the parties here: protecting children from lead paint hazards. Nullifying Local Law 38 would only be detrimental to children at risk of lead poisoning.

In any event, since the Appellate Division, First Department correctly upheld respondents' "hard look" and the extensive environmental review undertaken with respect to Local Law 38, in a thorough, well-reasoned decision, there is no basis

for invalidating that law. The enactment of Local Law 38, which was exhaustively considered by the City Council, did not require further environmental review prior to passage, as the Appellate Division correctly ruled. The decision and order appealed from, declaring Local Law 38 and the negative declaration valid, and dismissing petitioners' challenge to the law under SEQRA and CEQR, should be affirmed in its entirety.

CONCLUSION

THE DECISION AND ORDER APPEALED FROM, DENYING THE PETITION AND DISMISSING THE PROCEEDING, AND DECLARING LOCAL LAW 38 AND THE NEGATIVE DECLARATION TO BE VALID, SHOULD BE AFFIRMED.

DATED: New York New York
April 11, 2003

Respectfully Submitted,

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