NEW YORK COURT OF APPEALS

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In the Matter of NEW YORK CITY COALITION TO END LEAD POISONING, INC., NEW YORK PUBLIC INTEREST RESEARCH GROUP, et al.,

Petitioners-Plaintiffs-Appellants,

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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

N.Y. Co. Clerk's Index No. 120911/99

-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.

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MARK W. MUSCHENHEIM, an attorney admitted to practice before the courts of the State of New York, affirms under penalties of perjury:

1. I am an attorney in the office of MICHAEL A. CARDOZO**,** Corporation Counsel of the City of New York, attorney for Respondents-Defendants-Respondents (collectively the "City"). I have represented these parties since this case was commenced, and have the requisite information to make this affirmation in opposition to the motion for leave to appeal to this Court from the Decision and Order, entered March 26, 2002 of the Appellate Division, First Department (Buckley, J.).

INTRODUCTION

2. In its extensive, well reasoned decision, the First Department unanimously 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 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.) 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. To my knowledge, no similar mandate is imposed on any municipality or other governmental entity in this country.

3. Local Law 38 also 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.

4. As a quick review of the table of contents of the eight-volume Record on Appeal makes apparent, Local Law 38 was adopted by the New York City Council 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. In its decision, the First Department held that this extensive record before the Council amply demonstrated compliance with applicable environmental review laws.[1]

5. Appellants now move for leave to appeal to this Court.[2] The motion should be denied. Appellants focus their arguments on the purported weaknesses of Local Law 38, as did the opinion of IAS court.[3] Those issues, however, are of no moment before the judicial branch, as the First Department properly ruled. Rather, the sole issue here is whether the

[1] The First Department decision reversed an Order and Judgment, entered February 22, 2001, of the Supreme Court, New York County (York, J.), which had declared null and void Local Law 38 based on the City's alleged failure to comply with the State Environmental Quality Review Act ("SEQRA") § 8-0101 *et seq*., and City Environmental Quality Review ("CEQR") procedures (43 RCNY § 6-0 *et seq*. and 62 RCNY § 5-01 *et seq*.). The IAS Court accepted appellants' 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.

[2] Appellants' motion to the First Department for leave to appeal was denied by order dated July 25, 2002.

[3] The IAS Court improperly weighed the merits of Local Law 38 -- as opposed to the adequacy of the environmental review process -- in reaching its decision. Indeed, the IAS Court expressed its clear opinion of the merits, going so far as to state that proposed amendments "might have substantially eliminated the potential environmental hazards identified at the hearings" and quoting a legislator who stated that these proposed amendments would have rendered the legislation "'an effective child protection bill' instead of a 'landlord protection bill.'" (15o). It is black letter law, however, that in construing SEQRA 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); Matter of Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 528-529 (1984).

City Council complied with SEQRA when it adopted Local Law 38. And the First Department correctly applied SEQRA to the facts at hand. It properly analyzed the lengthy record before the City Council leading to passage of Local Law 38, and properly ruled that this record established that the Council took the requisite SEQRA "hard look" at the potential environmental impact of Local Law 38.

FACTUAL BACKGROUND

6. This case stems from the 1999 adoption by the New York City Council of Local Law 38 (codified primarily at NYC Administrative Code ("NYC Ad. Code") § 27-2056.1 *et seq.*). For more than a decade before its enactment, there was an ongoing debate about appropriate legislation to prevent childhood lead paint poisoning. This debate resulted, in large part, from court rulings[4] interpreting the prior lead paint hazard law, Local Law 1 (formerly codified at NYC Ad. Code § 27-2013(h)), to require the immediate abatement[5] of all intact lead paint, even though such paint was not hazardous. More importantly, the abatement of intact lead paint would have created lead paint hazards to the serious detriment of children. Consequently, as the IAS Court recognized, it "is apparently the general consensus, shared by petitioners, that

[4] New York City Coalition to End Lead Poisoning 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).

[5] The term abatement "means any set of measures designed to permanently eliminate lead based paint or lead based paint hazards," including removal, permanent enclosure (i.e. safe covering), encapsulation or replacement. See 24 C.F.R. § 35.100. See also NYC Health Code § 173.14(b)(1). The Department of Health's safety standards apply regardless of the method used.

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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))[6]

The December 16, 1998 Hearing On The Looming Public Health Disaster If Local Law 1 Was Fully Implemented.

7. On December 16, 1998, the New York City Council Committee on Housing and Buildings ("Committee") received extensive testimony about the public health and housing disaster 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.[7] Indeed, it was accepted by most that full implementation would likely lead to a significant increase in childhood lead poisoning. For instance, Neal L. Cohen, M.D., the DOH Commissioner, 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)

8. Other experts also testified that the "lead free" approach of Local Law 1 constituted a serious public health threat. These experts advocated adoption of a "lead safe" approach consistent with the national consensus on the issue, as reflected in recommendations and standards of the federal Environmental Protection Agency ("EPA") and Department of

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See NYC Health Code § 173.14(a)(1) ("This section shall apply to … enclosure … of [lead] paint ….").

[6] References to the Record on Appeal are indicated by ( ).

[7] 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 concerning

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Housing and Urban Development ("HUD") 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 that may contain lead paint, as only deteriorated paint is capable of creating a lead paint 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); 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.").

9. Nick Farr, the Executive Director of the National Center For Lead Safe Housing, wrote: "We strongly urge the New York City Council to amend Local Law 1 so that it not require the removal of intact lead-based paint;" the removal of such paint was not recommended by HUD or EPA even when a child with an elevated blood lead level resides in an affected unit. Mr. Farr continued: "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)) 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

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proposed regulations that implemented the Local Law 1 interpretation requiring abatement of lead paint from intact surfaces. (2874-2886; 2908-3116)

adjacent to a door or window. (3449) The appropriate response was "interim controls" which, as recommended in HUD's proposed regulations, address lead 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 percent 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)

10. The Committee 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 a unit. (3140, 3423) Representatives of owner's groups provided testimony and written submissions that agreed with Commissioner Roberts' testimony of the cost of implementing Local Law 1. (3475) These organizations estimated the cost of total abatement would be over $2 billion. (3478) Commissioner Roberts also stated that the cost of total abatement would waste limited resources necessary to maintain affordable housing. (3141-3142, 3424-3425)

11. 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. 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 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)

The June 1999 Hearings on Proposed Legislation

12. In June 1999, the City Council considered proposed legislation that would replace Local Law 1. Before hearings were even held, the Council received considerable correspondence from medical professionals, public health specialists and environmental scientists about the proposed legislation. (535 - 538, 543 - 558, 564 - 578, 585 - 590) On June 21st and 24th, 1999, the Committee held hearings on proposed lead paint legislation. These hearings lasted more than twelve hours, and a broad spectrum of individuals and organization representatives testified or provided written comments on the proposed legislation.

The June 21st Hearing

13. On June 21st, the Committee held its first public hearing on the proposed legislation to replace Local Law 1. (1187-1213) The main features and purposes of the proposed legislation were described in a report of the Infrastructure/Human Services Division of the Council.[8] (1176-1186)

[8] A principal objective of the proposed legislation was to eliminate the requirement to totally abate lead paint. The proposed legislation provided for repair of paint that contains lead or is presumed to contain lead (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 legislation also provided a notification procedure to determine whether a child under the age of six resided in a unit, and if the owner had notice of the presence of such a child, the owner was required to conduct an annual visual inspection for lead paint hazards. (1180-1181) The proposed legislation established time frames for HPD inspections of complaints of peeling

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14. At the hearing, HPD Commissioner Roberts summarized the provisions of the proposed legislation. (1315-1325) Answering questions by Council Members, Commissioner Roberts indicated that the time frames in the bill for various HPD actions were outside limits. For example, upon a complaint of a possible Class C hazardous violation, such as peeling paint that is presumed to contain lead, HPD usually inspected within 72 hours. (1357, 1363) Commissioner Roberts also stated 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 also concurred in by the DOH Commissioner Cohen. (1436-1438)

15. Dr. Cohen testified that the proposed legislation was in accordance with current scientific understanding and met the need to avoid disturbance of intact lead paint. The proposed legislation addressed the most critical lead paint hazard; lead paint that is peeling or on a deteriorated subsurface in multiple dwelling units where a child under the age of six resides. (1418) Dr. Cohen also explained that the proposed legislation adopted the scientifically recognized, technically feasible 1.0 milligram per square centimeter definitional measurement of lead paint, rather than the 0.7 standard of Local Law 1, and eliminated the alternative of measurement by weight (that measurement utilized paint chips as samples and thereby caused a risk of further deterioration through the collection of paint chips from an already deteriorated surface). (1416-1417) The proposed legislation mandated use of specified safe work practices

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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 safe work practices for performing such repair work. (1181-1182) The proposed legislation provided penalties for failure to make repairs and for false certification. (1185) And it provided for the first time that if the owner did not correct a violation of a lead 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)

even for corrective work done before issuance of a violation, and banned dry scraping. (1419) Furthermore, for the first time owners had an obligation to repair peeling paint and deteriorated subsurfaces when a unit became vacant. (1420-1421) The proposed legislation provided incentives for responsible owners to repair lead paint hazards prior to issuance of a violation, which was an appropriate approach since 96 percent of properties where there was a possible risk of poisoning from lead paints had never been issued a violation by DOH. (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)

16. Responding to questions by Council Members, Dr. Cohen stated that a clearance dust test after performance of repair work involving lead 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) Dr. Cohen also 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 any proposed legislation, otherwise the proposed legislation would contain so many different categories that it could not responsibly be implemented. (1449-1450)

17. 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 paint could be dangerous. (1513-1514) Mr. Farr also testified that 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 controlling 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.[9] (1513-1549) 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) 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 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)[10]

18. Witnesses from not-for-profit housing organizations opposed the inclusion in the proposed legislation 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 (1574), also opposed the

[9] Mr. Farr's organization conducted XRF tests in 425 dwelling units constructed before 1950 in New York City. Of all the units tested, only 27% had lead paint on walls and ceilings, 45% 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)

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

dust wipe clearance test. Although the laboratory charge was under $10, 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) In addition, the EPA had not 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)

The June 24th Hearing on the Amended Proposed Legislation

19. The Committee hearing reconvened on June 24th to consider amendments to the proposed legislation, 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 Chairperson Spigner at the start of the hearing. (1755-1760)

20. The amendments included a surface clearance dust test for work performed to correct a lead 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, 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 paint. (1423-1424, 1513, 1517-1518, 1520, 1532) The scope of the testing responded to the comments of operators of not-for-profit housing, who objected to the anticipated cost of several hundred dollars per unit for universal dust clearance

testing after all lead paint work, the permanent reporting consequences under federal law of even one failed dust clearance test, and the lack of universal acceptance of the scientific reliability of the measure. (1571-1572, 1577-1579, 1581, 1587-1588) Although Mr. Farr subsequently submitted a letter stating his preference for clearance dust tests in any area where lead paint repairs had been conducted, the precise areas selected for such tests following lead paint work were those which Mr. Farr indicated were the ones identified in a study by his organization as most often containing lead paint. (1515-1516, 1535-36, 1544-1545) DOH Commissioner Cohen was unable to attend the hearing, and sent a letter that 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 tests. (1760-1763, 2294-2295)

21. The amendments to the proposed legislation 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 unlimited 30 day extensions. HPD was required to inspect upon a complaint of a lead 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 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)

22. 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 proposed legislation were excessively long for violations of this nature. (637, 1331, 1342, 1356-1357, 1362-1364, 1383, 1385, 1405, 1490) The increased penalties were responsive to concerns about the possibility of false certifications, particularly given prior audit findings 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)[11]

23. 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 paint repairs. (1806) Council Member Stanley Michels made a similar point. (1856) Frank Ricci of the Rent Stabilization Association and Marilyn Davenport of the Real Estate Board of New York returned to testify, objecting to the amendment providing for any dust clearance testing. They claimed that any 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 repair the deteriorated paint. (1850-1855, 1861-1864)

[11] Other amendments included allowing cooperatives to allocate responsibility for lead 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 abating lead paint (as advocated by not-for-profit organizations renovating and operating low-income housing). (1236, 1407-1408, 1569, 1758-1759)

24. Council Member Michels offered several additional amendments to the proposed legislation.[12] By vote of the Committee, the Michels 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)

The Negative Declaration

25. The Negative Declaration (421-488) 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), § 6.15 (a), is not presumed

[12] Under these amendments, lead contaminated dust would be added to the definition of "lead-based paint hazard." (1961) Owners would be required to correct the "underlying defect" causing a lead paint hazard. (1963) The amendment would require use of the notice provisions in the window guard law, NYC Health Code § 131.15, 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 would not be limited and thus would be preserved for civil liability purposes in personal injury suits. (1964) All lead 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 repair work, which procedures included comprehensive dust clearance tests. (1965-1966) HPD inspectors would be authorized to inspect for lead paint violations when conducting inspections concerning complaints of other violations (1967), there would be cyclical inspections by HPD for lead paint violations (1968), and HPD would be required to send DOH a weekly list of all violations posted for lead paint. (1969) HPD would investigate the needs of occupants of housing with lead 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 was actually determined that the violation was corrected. (1974) The proposed legislation would also apply to schools and day care centers. (1976)

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 proposed legislation has city-wide implications but is not the type of land use that has specific consequences in a specific area. (423-435)[13]

26. The proposed 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 best served not by removal of intact lead paint (469), but rather 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 work practices. (469) The proposed legislation did not affect Health Code provisions governing work on lead paint in units where a lead-poisoned child resides. (470) For purposes of mandating repair work, it preserved the statutory presumption contained in Local Law 1 that paint in apartments in pre 1960 buildings where a child under the age of six resides is lead paint. The proposed legislation established a new prohibition on dry scraping and sanding of lead paint. (471) It provided a new procedure to require owners to determine if a child under the age of six resided in a unit, and if owners knew such a child lived there, for the first time the owner was specifically obligated to conduct an annual visual inspection of the unit for possible lead paint hazards. (446-449, 470-471) The proposed legislation required for the first time that informational pamphlets be developed by

[13] The proposed legislation 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. It did not affect commercial buildings, involve any manufacturing use or affect the waterfront (423-436).

DOH and distributed by HPD to tenants and owners, describing the hazards of lead paints and the measures owners must use to prevent lead paint hazards. (472) The proposed legislation established specific safe work practices for performance of work involving lead paint applicable either when no violation had been issued or when there was timely compliance with an HPD notice of violation. An owner was free to follow the NYC Health Code protocol in all instances, but would be required to do so if the violation was not corrected within statutory time frames. The proposed legislation specified time frames for HPD inspections, owner repairs, and certification of completion. For the first time, a law mandated HPD to perform such repair work itself if, after a statutorily specified period, the owner failed to do so. (471)

27. 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 along with debris from the work in accordance with applicable law, which did not constitute a significant adverse environmental impact. (474) Any work to repair lead 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 proposed legislation provided for the correction of lead paint hazards and presumed lead paint hazards and would limit the spread of potentially hazardous materials. (475)

The June 30th Hearing before the Full City Council And Passage Of Local Law 38

28. Prior to the full City Council hearing on the proposed legislation, the Council continued to receive a substantial number of communications from doctors, legislators and office holders, advocacy groups and trial lawyers concerning the proposed legislation. (541, 562, 757, 760, 763, 766, 786, 793, 797-799, 802) The proposed legislation also attracted substantial news coverage. (805-821, 1281-1285)

29. At the June 30, 1999 full City Council session, four additional amendments were proposed for the bill, debated and ultimately defeated. These were to require dust clearance tests after all lead paint work (2122) (defeated by a vote 28 to 20, with 2 abstentions (2160)); to include lead dust in the definition of lead paint hazard (2123) (defeated 32 to 16 with 2 abstentions (2160)); that the presumption that in a pre 1960 dwelling unit where a child under the age of six resides, peeling paint is lead paint, should remain applicable to personal injury actions (2123) (defeated 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 30 to 18 with 2 abstentions (2160)).

30. 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 interim controls required by this statute (2173-2174), the lack of inclusion of lead dust in the definition of a lead 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 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 paint, allegedly preventing a

personal injury plaintiff from ever prevailing in a suit claiming injury as a result of lead paint poisoning.[14] (2155, 2160-2167, 2223)

31. Supporters of the bill indicated that it finally eliminated the unworkable dangerous directive to abate intact lead 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 paint hazards (2108, 2249); an owner's duty to correct all lead paint hazards (2108), higher civil penalties for false certification, time frames for performance of the work (2239), a duty to correct all lead paint hazards upon vacancy (2109), and a requirement 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 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 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, Council Member 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)

32. Council Member Spigner stated 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

[14] Committee 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, the Corporation Counsel for the City of New York, disagreeing with the contention that suit could never effectively be brought. (2141-2142, 2196)

of the real estate industry and labor unions. In addition, research by federal and state agencies was considered. (2109) The basic issues had been discussed for years, and very intensely in the last few months. (2240) Every aspect of the legislation had been discussed in great detail, and in his many years on the Council, Council Member Spigner had seldom seen an issue given more careful consideration than this bill. (2239)

33. 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 Appellant 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, sixteen 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.[15]

The Comprehensive Framework of Local Law 38

34. In addition to repealing Local Law 1, Local Law 38 required repair of lead paint hazards, when such hazards were peeling or on a deteriorated subsurface (an unstable or unsound surface) (492, 494), a condition which can be readily observed by visual inspection

[15] At footnote four of their brief, appellants claim that the number of children requiring immediate medical intervention declined by approximately 92% while Local Law 1 was in effect, citing the recently released DOH Surveillance of Childhood Blood Lead Levels in New York City, July 2002, at 7 (available at www.ci.nyc.ny.us/html/doh/html/lead/12002.html). A review of this citation indicates that the 92% figure included data from the year 2000, when Local Law 1 was no longer in effect. More importantly, the graph on which this figure was calculated indicates that the drop between 1999 and 2000 (the last year of Local Law 1 and the first year of Local Law 38) can be considered even more dramatic since there was a nearly 50% decline in that one year compared to an 85% decline over the 16 year period between 1983 and 1999. Id. at 28 (Figure 18).

(494). (2625) NYC Ad. Code § 27-2056.1. A "lead-based paint hazard" is defined as lead paint[16] 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 paint because it is in a multiple dwelling erected prior to January 1, 1960, in which a child under the age of six resides. (493, 494, 2625) NYC Ad. Code § 27-2056.4. For purposes of mandating repair as a lead paint hazard, this presumption was similar to the presumption in Local Law 1.

35. Local Law 38 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. NYC Ad. Code § 27-2056.3. 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 paint hazards identified in the inspection. (495, 2627-2628) Under NYC Ad. Code § 27-2056.2, an owner is required to correct all lead paint hazards. (494, 2626) When no violation has been served, or if repairs are made within the time limits provided under § 27-2115 (l), the owner shall correct the defective condition using the work safety provisions provided in § 27-2065.5, and the rules promulgated thereunder at 28 RCNY Chapter 11.[17] If the owner does

[16] Under § 27-2056.1 (3), "lead-based paint" shall mean 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. (2625) NYC Ad. Code § 27-2056.1 (3).

[17] 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

(Continued…)

not correct the lead paint hazard in the time provided under the law, then the hazard must be corrected using the protocol set forth in NYC Health Code § 173.14. (498, 2631, 2634) § 27-2056.4 (d). 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)

36. Local Law 38, § 27-2056.7, also sets time frames for inspection by HPD, and for issuance of a notice of violation with respect to a complaint as to the existence of peeling paint in a multiple dwelling unit 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 safe work practices and notice that they may call the DOH for referral of any child who may require blood-lead screening. (2632) The owner is required to certify correction of the violation to HPD, which must reinspect within specified time periods to insure accuracy of the certification. (2634-2635) § 27-2115 (1) (2) (4). Local Law 38 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

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(…continued)
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 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 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 DOH, and the samples forwarded to an independent state certified laboratory for analysis. (2630) Local Law 38 enacted a prohibition against dry sanding or scraping of lead paint, NYC Ad. Code § 17-181 (2624), which was not contained in Local Law 1. (493)

owner having failed to timely certify, or within 60 days of HPD's determination that the certification was invalid. (2635) § 27-2115 (1)(3). 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. § 27-2115 (7). False certifications are misdemeanors, punishable by a fine and imprisonment up to one year, and is subject to a civil penalty between $10,000 and $25,000. (2635) § 27-2115 (6).[18]

ARGUMENT

37. Under SEQRA, when an agency contemplates an action which, in its opinion, "may have a significant effect upon the environment," it must issue an EIS. N.Y. E.C.L. § 8-0109 [2]; Matter of Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 415 (1986). However, if an agency finds that the contemplated action is not likely to have an adverse impact upon the environment, it may instead issue a "negative declaration" to that effect, obviating the need to conduct a full environmental study and issue an EIS. 6 N.Y.C.R.R. § 617.2(h), § 617.7 (d), (e), (f); Jackson, 67 N.Y.2d at 430; Matter of Har Enterprises v. Brookhaven, 74 N.Y.2d 524, 528 (1989); Chinese Staff & Workers Assoc. v. City of New York, 68 N.Y.2d 359, 362, 364 (1986). The review of the issuance of a negative declaration is to be guided by the limited standards applicable to administrative proceedings: "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." C.P.L.R. §7803 [3]; Jackson, 67 N.Y.2d at 416; Aldrich v Pattison, 107 A.D.2d 258, 267 (2d Dept. 1985).

[18] In stark contrast to the comprehensive framework of Local Law 38, Local Law 1 essentially only provided that the owner of a multiple dwelling was to abate all lead paint, that peeling paint in a pre 1960 dwelling where a child six years on your resided was presumed to contain lead, and that lead paint or presumed lead paint was considered a Class C violation. NYC Ad. Code § 27-2013(h).

38. Under SEQRA, a Court must "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." Jackson, 67 N.Y.2d at 417; Matter of Kahn v. Pasnik, 90 N.Y.2d 569, 574 (1997); Apkan v. Koch, 75 N.Y.2d 561, 570 (1990). Here the First Department correctly evaluated the extensive record before the New York City Council that preceded passage of Local Law 38, and correctly concluded that this record showed that the "Council clearly took a 'hard look' at the potential environmental impact of Local Law 38" (Ex. C, at. 20)[19] and that the Council's consideration of environmental concerns was "fair and thorough." (Ex. C, at 16)

39. The First Department also 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 a more detailed work safety protocol or different time limits for performance of the work. See Chemical Specialty Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 395-398 (1995). 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. Matter of Hingston v. New York State

[19] The First Department Decision is attached as Exhibit C to appellants' motion, and will be referred to herein as Ex. C.

Department of Environmental Conservation, 202 A.D.2d 877, 879 (3d Dept.), lv. to appl. den., 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 paint, did not adopt all of the proposals that advocates claimed would provide additional protection against lead paint hazards. See, e.g., Matter of Briarwood Community Association v. City of New York, 147 A.D.2d 639, 640 (2d Dept.), lv. to appl. den., 74 N.Y.2d 601 (1989) (sustaining a negative declaration concerning construction of a residence for homeless families; 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'" (citing Jackson, 67 N.Y.2d at 421)). The First Department correctly determined that "'the central task', then, is to determine whether respondents engaged in a 'thorough review of each area of relevant concern' Committee to Preserve Brighton Beach, 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." (Ex. C, at 20).

40. The First Department also correctly applied applicable law with respect to review of determinations of environmental significance by local legislatures. When courts are asked to review negative declarations accompanying action by local legislatures, the entire record before the legislative body -- testimony at public hearings, submissions to the body and deliberations -- is reviewed to determine the sufficiency of consideration of environmental issues. See, e.g., Matter of Hoffman v. Town Board of the Town of Queensbury, 255 A.D.2d 752, 753-754 (3d Dept. 1998) (a "review of the entire record," including meeting minutes where the Town Board specifically discussed potential environmental impacts, "supports a finding that the Town Board took a 'hard look' at the two potentially, large impacts it identified and did not abuse its discretion in making specific findings of no significant adverse effects prior to issuing a

negative declaration"), lv. to appl. den., 93 N.Y.2d 803 (1999). See also Boyles v. Town Board of Bethlehem, 278 A.D.2d 688, 691 (3d Dept. 2000); Matter of Save Easton Environment v. Marsh, 234 A.D.2d 616, 618-619 (3d Dept. 1996); Matter of Balsam Lake Anglers Club v. Dep't of Environmental Conservation, 199 A.D.2d 852, 855 (3rd Dept. 1993); Horn v. County of Westchester, 106 A.D.2d 612, 614 (2d Dept. 1984); Wilkinson v. Planning Board of Town of Thompson, 255 A.D.2d 738, 739-740 (3d Dept. 1998), lv. to appl. den., 93 N.Y.2d 803 (1999); Matter of Buerger v. Town of Grafton, 235 A.D.2d 984, 985-986 (3d Dept.), lv. to appl. den., 89 N.Y.2d 816 (1997); Matter of Hare v. Molyneaux, 182 A.D.2d 908, 910 (3d Dept. 1992).

41. 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 City Council considered and debated other proposals, and rejected several amendments. (1961, 1963-1967, 2122-2123, 2160) While some experts opined that the legislation would not effectively control lead paint hazards, 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 Specialty Mfrs. Assn., 85 N.Y.2d at 397-398; Matter of United Petroleum Assn. v. Williams, 102 A.D.2d 491, 493-494 (3d Dept. 1984), aff'd, 65 N.Y.2d 708 (1985).

42. The First Department 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

greater danger to public health than the containment approach of Local Law 38. The abandonment of the "lead free" total abatement approach -- which if actually carried out would "create a new wave of childhood lead poisoning cases that would dwarf the current caseload" (3463) -- itself was highly beneficial to the environment.[20] "The salient, undisputed point here is that moving from abatement to containment reduces environmental threats to human health." (Ex. C, at 8-9) See Gernatt Products, Inc. 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), lv. to appl. den., 95 N.Y.2d 754 (2000); Matter of Valley Realty Development Corp. v. Town of Tully, 187 A.D.2d 963, 964 (4th Dept. 1992) appl. dism., lv. to appl. den. 81 N.Y.2d 882 (1993). Accordingly, the basic conclusion that Local Law 38 was more protective of the environment than the predecessor law was undoubtedly correct. "[D]isagreement on whether certain standards, rules or methodologies would result in greater or lesser reductions of existing threats" (Ex. C at 9) did not constitute a significant environmental impact requiring preparation of an EIS.

43. Finally, the claims of deficiencies relied on by appellants as demonstrative of a potential significant environmental impact are inaccurate. Appellants' primary claim is that

[20] Appellants' audaciously contend, at footnote 14 of their brief, that the record did not contain substantial evidence that the lead safe approach of Local Law 38 was far preferable to the antiquated lead free approach of Local Law 1. 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 Housing: "The risks attendant to wide scale abatement of intact lead paint must not be underestimated." (3450) See also *infra* ¶¶ 7 - 11.

Local Law 38 repealed the safe work practices of § 173.14 of Health Code.[21] Until Local Law 38 was adopted, however, 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.[22] 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 measures ought to be. See NYCCELP v. Giuliani, No. 42780/95 (Sup. Ct. N.Y. Co. entered May 1, 1996). (2498)

44. The Local Law 38 safe work protocol was taken largely from the requirements of NYC Health Code § 173.14, with the main difference being the scope of required dust clearance testing. While there was considerable support for dust clearance testing of the type required under the Health Code after work on any area to correct a deteriorated paint condition that contained lead or was presumed to contain lead (1423-1424, 1433, 1513, 1520, 1532), there was also testimony that dust clearance testing was not uniformly regarded as scientifically reliable, that it would cost several hundred dollars per unit, and if required for each

[21] These provisions were -- and continue to be -- applicable when complying with orders of abatement issued by DOH, which are based on finding a child with elevated blood levels living in a dwelling unit that contains lead paint hazards. NYC Health Code § 173.13(d)(2).

[22] Local Law 38 also 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, 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.

unit could put out of business not-for-profit housing operators of low and moderate income housing. (1571-72, 1577-78, 1581) Moreover, the EPA still had not developed a program to train and certify technicians. (1424, 1522-1523, 1568-1574, 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 paint were located (windows, trim and doors). (1515-1516, 1544-1545)

45. Appellants also 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. entered 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, 3442-2447, 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) It is patently apparent that the Council considered the environmental concerns raised by the lead dust issues. See Matter of Hingston, 202 A.D.2d at 879.

46. Local Law 38 also modernized and updated the definition of lead paint. Under Local Law 38, § 27-2056.1 (3), "lead-based paint" shall mean 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. NYC Admin. Code § 27-2056.1 (3). (2625) 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 showed there was also 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 or accurately measure for the 0.7 level. (Proposed legislation that was supported by appellants, New York City Council Intro. No. 205 of 1999 ("Intro. 205"), similarly provided for the 1.0 standard.[23] (3298, 3455)) The difference between the two standards with respect to lead content was insignificant. (3156-3159, 3435-3436, 3445, 3450, 3478-3480)

[23] While appellants also take issue with the time frames for correction of lead hazard violations, the Council heard extensive testimony on this issue from all sides and decided that time frames were appropriate. Moreover, Local Law 38's 21 day time frame for correction of lead paint hazards is identical to proposed legislation that was supported by appellants, Intro. 205 at §27-2115(l)(1).

47. The one year reduction in the age of a child to which the statutory presumption concerning the lead paint content in an apartment in a pre 1960 building applied was based on testimony from Dr. Neal Cohen, the Commissioner of DOH, indicating that the principal age for developing childhood lead poisoning was 1½to 2½years, when crawling and hand-to-mouth activity were most prevalent. (1418) Furthermore, this uncontroversial change was in harmony with federal and state law.[24] See, e.g., 42 U.S.C. § 4852(d)(1); 42 U.S.C. § 4851b(25)(A); 42 U.S.C. § 4851(b)(27); 10 N.Y.C.R.R. § 67-1.2; see also C.F.R. § 35.1120.

CONCLUSION

48. The First Department correctly ruled that the New York City Council conducted an "extensive and intensive review" of the environmental concerns raised by Local Law 38, and held that "the record amply demonstrates that [the City] satisfied the procedural requirements of SEQRA and CEQR." Ex. C, at 15 & 21. Consequently, since there is no valid legal basis to grant leave to appeal, this Court is respectfully urged to deny the motion for leave to appeal.

Dated: September 20, 2002
New York, New York

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MARK W. MUSCHENHEIM

[24] Proposed legislation supported by appellants, Intro. 205 at §27-2056.3, also contained this one year reduction.