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NEW YORK COURT OF APPEALS

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

Petitioners-Plaintiffs-Appellants

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

-against-

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

Respondents-Defendants-Respondents.

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APPELLANTS' REPLY BRIEF

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ANDREW GOLDBERG, Esq.
Attorney for Petitioner-Plaintiff-Appellant NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.
9 Murray Street
New York, NY 10007-2272
212-349-6460

KENNETH ROSENFELD, Esq.
Northern Manhattan Improvement Corp. Legal Services
BY: Matthew J. Chachère,
James M. Baker,
Andrea Rodriguez, Law Graduate
Attorneys for Petitioners-Plaintiffs-Appellants
76 Wadsworth Avenue
New York, NY 10033-7000
212-822-8300

April 28, 2003

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PRELIMINARY STATEMENT

Respondents' brief essentially concedes that the enactment of Local Law 38 (LL 38), [439][1] violated both the substantive and procedural requirements of the State Environmental Quality Review Act (SEQRA); N.Y. Environmental Conservation Law (ECL) § 8-0101 et seq. Respondents do not deny that aspects of LL 38's changes to pre-existing law — the repeal of Local Law 1 of 1982 (LL 1) [2394] and the evisceration of Local Law 50 of 1972 [2392] and New York City Health Code § 173.14 [2363] — could result in adverse environmental consequences to New York City's children. Nor do they deny that the negative declaration failed to even identify these issues, much less analyze them thoroughly and set out a reasoned elaboration for the determination. But while Respondents argue that the City Council was "thoroughly informed about, and thoroughly considered every issue which Petitioners claim was required to be reviewed pursuant to SEQRA," Res. Br. at 4, they are careful never to say that the Council did these things through the legislatively mandated SEQRA (and CEQR) process.

Respondents would be expected to show this Court why the IAS court was wrong in its application of the long-accepted criteria set out in H.O.M.E.S. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979), codified in 6 N.Y.C.R.R. § 617.7(b),[2] to the City Council's approval of the negative declaration, and why the Petitioners' brief, the State of New York's amicus curiae brief, and the amici curiae brief filed by major child, environmental, and civil rights advocacy organizations, all were wrong in relying on the H.O.M.E.S. test. Yet Respondents' brief not only

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1. References to the Record on Appeal are indicated in brackets [].

2. To determine significance of proposed action, agency must [1] identify relevant areas of concern; [2] analyze those areas of concern; and [3] set out a reasoned elaboration in writing for its determination.

omits any specific argument showing compliance with the H.O.M.E.S. test, it also fails to even cite H.O.M.E.S. or 6 N.Y.C.R.R. § 617.7(b) at all! Respondents also cite very few of the relevant provisions of SEQRA and CEQR that the Petition identified as having been ignored in Respondents' decision-making process, [29-103] let alone explain why they should not be held to have violated those provisions.

Instead, Respondents' brief lays out nothing less than a stark challenge to this Court: to overturn a quarter century of SEQRA jurisprudence in order to justify the desired outcome. Respondents want this Court to do what the IAS court properly refused to do (and what, unfortunately, the Appellate Division did do): review and weigh the merits of LL 38 and the adequacy of the deliberative process of a local legislative body in order to judge whether the City Council overall accomplished more environmental good than environmental harm. This Court should decline that invitation, as:

> in reviewing a SEQRA determination, the court is solely concerned with the procedural and substantive mandates of SEQRA, not with the ultimate environmental consequences of the proposed action.

Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 530 (1989)

By enacting SEQRA and applying it to local legislative actions, the State Legislature without any exceptions established a specific mechanism for considering all potential adverse environmental impacts, holding local legislative decision makers fully accountable — to the same standards as any other governmental decision maker — to determine beforehand whether a proposed action "may" give rise to a potential adverse effect. To make an exception in this case, as Respondents urge, will open the floodgates to endless judicial reviews of the merits of legislative enactments. But "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure

that the agency itself has satisfied SEQRA, procedurally and substantively." Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d 400, 416 (1986).

To obfuscate their noncompliance with SEQRA, Respondents erect the "lead-free" approach of LL 1 as a strawman, in order to repeatedly knock it down, by adamantly portraying implementation of LL 1's "lead-free" approach to lead poisoning prevention as an Armageddon that would dramatically increase the incidence of childhood lead poisoning in New York City. Indeed, Respondents' brief makes that assertion no fewer than 27 times, interjecting the same Health Commissioner quote at eight different places in their Brief that total abatement will create "a new wave" of childhood lead poisoning cases.

While the record indicates that recognized experts in childhood lead poisoning prevention have an honest disagreement whether either the "lead-free" or "lead-safe" is the best approach, it also indicates their unanimous agreement that LL 38 is fundamentally flawed. The reasons they gave include its unacceptable definition of a lead paint hazard, because LL 38 omits lead-contaminated dust as a concern; its weakening of lead paint repair work practices; and its omission of a complete lead dust clearance testing requirement at the end of lead paint repair work. Even the Health Commissioner, on whom Respondents so frequently rely on, is on record as saying that he hoped changes would be made to LL 38, in order to more adequately protect children from lead paint and lead dust exposure. However, the changes he urged the City Council members to consider were ignored.

Thus, to focus solely on the "lead-free" vs. "lead-safe" issue — as Respondents do in their brief and the Appellate Division unfortunately did as well in the decision below — is a myopic reading of the full record. By enacting LL 38, Respondents not only replaced a lead-free system with a so-

called "lead-safe" system but also made literally dozens of subordinate choices about what kind of lead-safe system to adopt — a "lead-safe" system with significantly relaxed safety standards for removal and repair work, a "lead-safe" system with greatly enlarged time frames for correction and enforcement, a "lead-safe" system that no longer protects six year olds, etc. As the record demonstrates beyond the possibility of contradiction, each of these choices was fraught with potentially serious implications for the health and safety of New York City's most vulnerable population. Each, standing alone, would require the preparation of an environmental impact statement ("EIS"). Together, they make the case for preparation of an EIS both urgent and compelling.

Respondents have no answer to this. They do not deny that many of the choices before the City Council were extremely controversial and provoked bitter disagreement among experts and other witnesses. Respondents acknowledge, for instance, that there was "considerable support" for mandating dust clearance testing following all lead abatement work, which prior law required but which LL 38 did not. (Indeed, all of the medical experts, including two New York City Health Commissioners, supported mandatory dust clearance testing. The opposition on this point came from lay witnesses who objected to the cost.) Similarly, there was enormous controversy over the omission of lead dust from the statutory definition of lead-based paint hazards, with the Health Commissioner again expressing his extreme concern. There can thus be no question that many of the choices made by the City Council in enacting LL 38 constituted actions that "may include the potential for at least one significant adverse environmental impact," 6 N.Y.C.R.R. § 617.7(a)(1), and therefore satisfied SEQRA's "low threshold." Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 364 (1986).

Respondents can prevail only by persuading this Court that the mere presence in a piece of

legislation of one provision that (in their view) does not require environmental review nullifies the requirement to conduct environmental review for numerous other provisions that, standing alone, cry out for thorough and painstaking environmental analysis. Thus, even though Respondents made a vast number of alterations to City lead law that had absolutely nothing to do with the change from the supposed "lead-free" to supposed "lead safe" approach, Respondents would apparently have this Court find that no matter what changes they made in the City's law, a priori all of them would be environmentally benign for SEQRA purposes as long as LL 1 was repealed.[3] This effort at persuasion cannot succeed, not only because it finds no support in the text of SEQRA or in 25 years of judicial precedent, but because the controversy over how best to regulate the housing conditions in New York City that produce highly toxic lead paint chips and dust and continue to poison vast numbers of children every year is the paradigmatic situation calling for an EIS under SEQRA.

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3. Thus, under this reasoning, not only was it appropriate to eliminate all protections for six-year-olds from lead hazards, the Council could just as well have eliminated all protections for five-year-olds, four-year-olds, three-year-olds, and two-year-olds. Indeed, by this illogic, the City could have eliminated all protections for all children and still not have had to conduct any environmental review.

ARGUMENT

POINT I.

RESPONDENTS MISREPRESENT THE RECORD BECAUSE THEY RELY EXTENSIVELY ON REVIEW AND ACTIONS THAT OCCURRED BOTH BEFORE AND AFTER THE CITY COUNCIL BEGAN AND COMPLETED ITS REVIEW UNDER SEQRA

In an effort to bolster their legal argument that the deliberations of the City Council can be an acceptable substitute for the SEQRA process, Respondents describe those deliberations at great length. Indeed, more than half of Respondents' Brief is devoted to its "Statement of Facts," and much of the "Argument" section of the Brief consists of iterations of Respondents' favorite factual assertions about the City Council's supposedly painstaking legislative process. While Petitioners cannot fault Respondents' tactical decision to emphasize the facts, rather than the law, they do fault Respondents for blatantly mischaracterizing the factual record in at least two critical respects.

First, Respondents devote more than 10 pages of their brief (and profusely cite throughout) to describing the goings on at a December 16, 1998, oversight hearing of the City Council's Housing Committee, which are discussed under the explicit heading "CITY COUNCIL COMMITTEE HEARING OF DECEMBER 16, 1998 CONCERNING REPLACEMENT OF LOCAL LAW 1 of 1982." But, as Respondents are fully aware, the December 16, 1998, meeting was not called to consider LL 38 or any other legislation replacing LL 1, but rather as an oversight hearing on certain proposed agency revisions to LL 1's implementing regulations (City Record, Oct. 9, 1998, p. 3505)[2402-10] and Health Code §§ 173.13 and 173.14 (City Record, Oct. 15, 1998, p. 3544)[2411--30], which Respondents were ordered to make by four times in NYCCELP v. Koch (NYCCELP II, NYCCELP III, NYCCELP VI, and NYCCELP VII). The Council's official

calendar for December 16, 1998, describes the purpose of the hearing thus:

> Oversight -- Rules Pertaining to Lead-Based Paint Proposed by the Department of Housing Preservation & Development and the Department of Health.

N.Y.C. Council, Proceedings, Dec. 9, 1998, at 3725. The Chair of the committee, at the very outset of the hearing, described its purposes the same way ("today we will be conducting an oversight hearing on the proposed rules")[3135], and indeed, made it unequivocally clear that it was not a hearing on replacement legislation, and that only comments on the proposed rules would be relevant, chastising a colleague who had the temerity to presume otherwise. [3179-80] The Commissioner of HPD refused to comment on the only then-extant legislative proposal to replace LL 1. [3175-3184]

Under the circumstances, Respondents' description of the December 16, 1998, hearing as an integral part of the City Council's deliberations on the environmental impact of LL 38 is simply disingenuous.[4] LL 38 did not even exist as a piece of proposed legislation until six months after the December 16, 1998, hearing; and the City Council did not attain "lead agency" status with respect to LL 38 until on or about June 24, 1999.[5] Moreover, no more than 5 of the City Council's 51 members attended any part of the December 16, 1998, hearing, [3128] and there is no indication that

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4. See Merl v. Merl, 128 A.D.2d 685 (2d Dep't 1987) (admonishing appellate counsel who "mischaracterized events" in the record); Cicio v. City of New York, 98 A.D.2d 38, 40 (2d Dep't 1983) ("The function of an appellate brief is to assist, not mislead, the court.") The brief of amici curiae Rent Stabilization Association [RSA] et al. engages in the same artifice, citing testimony at this hearing as "evidence for the City Council's conclusion that Local Law 38 would be more effective in addressing childhood exposure to lead from lead paint than the Local Law 1 it replaced," id. at 12, when LL 38 was not proposed until half a year later.

5. If the City was nevertheless actually engaged in developing "replacement legislation" at the December 16, 1998, hearing, it clearly violated the SEQRA requirement that it make a determination of significance "as early as possible in the design or formulation of the action," 6 N.Y.C.R.R. § 617.6(b)(1)(I) and ECL § 8-0109(4).

the testimony at the hearing was ever made available to the other 46 members at any time prior to consideration or passage of LL 38. Certainly, the testimony at the December 16, 1998, hearing was never alluded to during the City Council's actual debate on LL 38 or in the Negative Declaration itself. In sum, the proceedings at the December 16, 1998, hearing, though of possible historical interest, were completely irrelevant to the SEQRA process concerning LL 38. For all of these reasons, this Court should disregard Respondents' copious references to the hearing transcript and submitted written testimony [3135-3491] and Respondents' arguments that rely on them.

Second, at the other end of the temporal spectrum, Respondents seek to demonstrate the City Council's sensitivity to environmental concerns by continually referring to regulations enacted pursuant to LL 38 governing safe work practices. Respondents omit to mention, however, that these regulations were promulgated in October 1999, i.e., four months after passage of LL 38, and so cannot be used to justify the City Council's decision to forego preparation of an EIS in connection with legislation enacted in June 1999. Moreover, the promulgation of these regulations — which, though considerably less protective of children than regulations issued under LL 1, may be more protective of children than LL 38 itself — clearly reflects a judgment by those agencies which issued them that the protections contained in LL 38 were inadequate.

Given that the SEQRA regulations state when and how SEQRA review begins and ends, Respondents' reliance on a "record" that was developed both before and after this process is a prima facie concession that it violated SEQRA's procedural mandates. And while Respondents urge this Court to uphold their abandonment of SEQRA's procedural and substantive requirements by a judicial review of this "record," they offer no clear delineation of just what "record" this Court should

examine. Does the record consist of the two hearings and full council meeting and vote on LL 38 — all conducted within 8 business days after LL 38 was proposed in June of 1999? Or, as Respondents urge, should it be expanded to include the assorted 1998 hearings Respondents profusely cite, when LL 38 was neither discussed nor yet to be proposed? Or should the record include the Housing Committee discussions (alluded to in Res. Br. at 35) regarding the topic of lead poisoning "for the last 12 years" [1827] (comments of council member Spigner, see also [1845] ("years of discussions"); [2240] ("we have discussed it for years")), and hearings on the subject of lead paint — perhaps back to the enactment of LL 1 in 1982, or the enactment of Local Law 50 in 1972, or the promulgation of Health Code § 173.13 in late 1959?

POINT II.

THE COURT SHOULD REJECT RESPONDENTS' BELATED CLAIM THAT SEQRA IS LESS THAN FULLY APPLICABLE TO THE ACTIONS OF A LOCAL LEGISLATIVE BODY

In 1999, Respondents issued a negative declaration, thus recognizing that SEQRA applied to their legislative actions concerning LL 38. Today, however, Respondents — apparently conceding that their actions in enacting LL 38 could not in any way pass muster under the H.O.M.E.S. test — ask this Court to cede them great deference as a legislative body that should be presumed free from interference by the judicial branch, Res. Br. at 81-82. In fact, they question whether SEQRA even applies to them. Id.

"As we have many times repeated, this Court with rare exception does not review questions raised for the first time on appeal." Bingham v. New York City Transit Authority, 99 N.Y.2d 355, 359 (2003). These arguments were not raised at the trial court level, [3741] and while the Appellate

Division held in Respondents' favor on the validity of LL 38, it disagreed with Respondents on this very point. It said:

> While Corporation Counsel for the City respondent has questioned whether these environmental review laws apply to local laws of general environmental impact, this issue was neither briefed nor argued before the IAS court and, in any event, was resolved years ago by regulatory definitions which expressly include local laws passed by governing authorities (6 NYCRR 617.2 [b] [3]; [v]; 62 RCNY 5-03 [d]; cf. Matter of Niagara Recycling v Town Bd. of Town of Niagara, 83 AD2d 335, 338 n 4, affd 56 NY2d 859; see also, Williamsburg Around the Bridge Block Assn. v Giuliani, 223 AD2d 64, 72).

[3741]. In this Court, Respondents fail to explain why the Appellate Division was mistaken.

Other courts have adjudicated local legislatures' compliance with SEQRA in enacting laws of "general application." See, e.g., Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 765 (1991) (county legislature's local law of general application came under SEQRA's purview); Skenesborough Stone, Inc. v. Village of Whitehall, 229 A.D.2d 780, 780 (3d Dep't 1996); Norgate at Roslyn Association v. Village of East Hills, 104 A.D.2d 974, 974-75 (2d Dep't 1984); see also Gerrard, Ruzow, Weinberg, 1 Environmental Impact Review in New York § 2.01[4][e] (2002) (stating that "SEQRA's regulations specifically exempt from their scope the action of the Legislature of the State of New York" and that "[t]his exemption expressly does not extend to local legislative bodies" (emphasis added)). The City's own CEQR technical manual [2334] specifically applies to, inter alia, "'Generic' actions... including regulatory changes, local legislation, and changes to the City Code," [2339].**[6]**

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6. The Manual states that "the potential for significant impacts from hazardous materials can occur when 1) hazardous materials exist on a site, and b) an action would increase pathways to their exposure ..."[2342], and goes on to discuss this in more detail:

> Is there the potential for human exposure to contaminants? This includes future on- site occupants.

(continued...)

Indeed, for SEQRA purposes, there is far less reason to defer to a local city council or other elected body than an administrative agency. Unlike an agency, the elected body often has a generalized understanding of problems, so it relies on the expertise and knowledge of administrative agencies when formulating policy and enacting legislation. See Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 682 (1988) ("lead agency under SEQRA is likely to be nonexpert in environmental matters, and will often need to draw on others[;] [t]he statute and regulations not only provide for this, but strongly encourage it." (citations omitted)). This obvious lack of environmental expertise, in fact, may have been what motivated the Legislature to include local legislative bodies under the SEQRA umbrella in the first place, particularly since their decisions often can have more widespread impact than the decisions of administrative agencies. See 6 N.Y.C.R.R. § 617.7(c)(3)(vii) (environmental significance determination must consider "the number of people affected").

Ironically, it is Respondents' unceasing refrain (based chiefly on the Health Commissioner's blanket statements) that LL 1 of 1982 — which the City Council enacted without SEQRA review — had turned out to be environmentally unsound and in fact would be a "disaster" if fully implemented. Given Respondents' position, it is all the more reason that they should have sought to avoid repetition of such error via full compliance with the environmental review procedures of SEQRA, to ring the "environmental alarm bell" of unforeseen dangers. Williamsburg Around the Bridge Block Ass'n v. Giuliani (herein "WABBA"), 223 A.D.2d 64, 71 (1st Dep't 1996), affirming 167 Misc.2d 980 (Sup.

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6. (...continued)

> ...
> Future occupants of the site may be exposed to on-site hazardous materials. For example, children at a residential site may ... ingest lead-laden particles [from] a building's interior....

[2334] (emphasis added).

Ct. N.Y. Co. 1995) (citations omitted).

Indeed, even the Council's reliance on the Mayor's Health Commissioner should have been questionable at the time because of the City Administration's obvious conflict of interest as owner of a large amount of low income housing, and because of warnings that lead poisoning experts within the Health Department did not support weakening of the Health Code safety standards.[7] The Health Commissioner admitted that his conclusions were based upon review of the legislation with his staff.[3519]

POINT III.

THE COURT SHOULD REJECT RESPONDENTS' ALTERNATIVE TO STRICT COMPLIANCE WITH THE H.O.M.E.S. TEST.

The Court of Appeals has declared that "strict, not substantial, compliance is required" with SEQRA's review procedures. King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d 341, 347 (1996). This Court will search Respondents' Brief in vain for a thorough and systematic explanation of the steps the Council took to comply with the procedural and substantive requirements of SEQRA and CEQR — they virtually concede that they did not. See Res.' Br. at 56-99.

"In reviewing determinations of significance, the courts in New York have uniformly come to apply the <H.O.M.E.S.' test." Gerrard, Ruzow, Weinberg, 1 Environmental Impact Review in New

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7. Dr. John Rosen had warned that the experts on lead poisoning within the Health Department were in opposition to its approach, [570] a warning vindicated shortly thereafter with the resignation of the person within the Department of Health most knowledgeable on the subject when LL 38 was enacted. Dr. Susan Klitzman, as the Assistant Health Commissioner for Environmental Risk Assessment and Communication, [3555], testified at the Housing Committee hearing on June 21, 1999, as the person who "oversees the Department of Health's Lead Poisoning Prevention Program." After resigning, she became professor of Environmental and Occupational Health Sciences at Hunter College, and testified against LL 38 later that year. [3554-57]

York § 7.04[3] (2002) But according to Respondents' formulation of SEQRA, the holding in H.O.M.E.S. v. New York State Urban Dev. Corp., is so inconsequential that Respondents fail to cite it; the SEQRA statute and its implementing regulations are so trivial that Respondents fail to rely on them in the argument portion of their brief; and the negative declaration is so unimportant that Respondents fail to demonstrate that all the required elements — the identification of all relevant areas of concern; an analysis of each of them; and a reasoned, written elaboration for its determination — are present in the one adopted by the City Council to support LL 38. To the contrary, H.O.M.E.S is the very template by which courts up to the present have reviewed the adequacy of a negative declaration. Moreover, the SEQRA statute and implementing regulations are intended to mean just what they say and must be followed. And finally, the inadequacy of the negative declaration issued by the City Council is both the beginning and the end of the matter now before this Court.

Nevertheless, Respondents have made a myriad number of arguments — even though most were not relied on by the court below — in urging this Court to sanctify an entirely new approach: that judicial review of local legislative actions with obvious potential for adverse environmental consequences can dispense with a negative declaration that meets the requirements of H.O.M.E.S. and 6 N.Y.C.R.R. § 617.7(b) and instead scrutinize the procedural and substantive outcomes of ordinary legislative processes to adjudicate whether such processes 1) sufficiently considered the environmental issues and 2) came up with rationales and conclusions that a court finds acceptable.

As indicated in Petitioners' initial brief, as well as the State of New York's amicus curiæ brief, there is no support for this in the legislative history or case law of SEQRA, as it "would not only frustrate the laudable purposes behind SEQRA, but would inevitably lead to numerous lawsuits wherein

courts would be asked to weigh the acceptability of alternative procedures." West Branch Conservation v. Planning Bd., 177 A.D.2d 917, 918 (3d Dep't 1991) (citations omitted)[8] But even if this Court were to agree that a judicial rewrite of SEQRA might someday be appropriate, this is surely not the exemplar case for overturning H.O.M.E.S.. In fact, both the process and the substance of the City's alternative review in this instance were a paltry substitute for SEQRA, and underscore precisely the need for preserving the long-standing requirement of either an EIS or a valid negative declaration that meets the H.O.M.E.S. standard.

A. The Council's Legislative Process In Enacting LL 38 Was In No Way An Adequate Substitute for the SEQRA Process

Even if this Court were to engage in such review of the "record" as propounded by Respondents, such review fails to show SEQRA's procedural "hard look" mandate was met. When LL 38 was before the Council's Housing and Building Committee, the Committee failed to engage in any substantive review or discussion of the SEQRA requirements or the negative declaration. The full Council never discussed the negative declaration at all.

In contrast, courts look to a thorough examination by the government agency in making a

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8. Most of the cases Respondents cite for this were addressed in Petitioners' Initial Brief, and the remaining cases are inapposite. Boyles v. Town Board of Bethlehem, 278 A.D.2d 688 (3d Dep't 2000) concerned merely a local board's decision not to reopen an apparently otherwise valid negative declaration after a smaller than planned for project was approved. In Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dep't 1993) the areas of concern addressed by the petitioners there had been identified in the environmental review documents, unlike the case at bar. And Horn v. County of Westchester, 106 A.D.2d 612 (2d Dep't 1984), Save Easton Environment v. Marsh, 234 A.D.2d 616 (3d Dep't 1996), Sutton Area Community v. Board of Estimate, 78 N.Y.2d 945 (1991), and Akpan v. Koch, 75 N.Y.2d 561 (1990) all concerned reviews of a completed EIS, a far more extensive document which is subject to far more deference under the substantial evidence and rule of reason tests. See Gerrard, Ruzow, Weinberg, 1 Environmental Impact Review in New York §§ 7.04[4] and 7.04[3] (2002) (comparing review of EISs to review of negative declarations).

determination of significance. See Gernatt Asphalt Prod. v. Town of Sardina, 87 N.Y.2d 688, 689 (1996) ("The record reveals that at a work session of the full Town Board, it reviewed and answered all of the questions posed on the Full Environmental Assessment Form."); cf. Phelps v. Town Bd. of Town of Alabama, 174 Misc. 2d 889, 895 (Sup. Ct. Genesee Co. 1997) (negative declaration annulled where Town Board — like the City Council here — essentially rubber stamped an Environmental Assessment Form without discussion and without making any attempt to independently assess conclusions contained therein).

Here, however, the Council staff delivered the proposed negative declaration, with an already completed environmental assessment form, to the Housing Committee members on June 24, 1999, while hearings were already underway — indeed, when they were nearing their conclusion, [1988-89]; Pet. [69], and after the discussion and defeat of potentially mitigating amendments. [1957-87]. The Committee Chair offered no explanation of the document or its findings, reasoning, or legal impact. [1988-89]; Pet.[68, 70].

Thus, at the time the Committee voted to approve the negative declaration (containing the already-completed environmental assessment form ("EAF")),[9] the Committee as a whole never discussed the documents, let alone undertook the "environmental analysis" required by SEQRA and CEQR to complete the form. See 6 N.Y.C.R.R. § 617.7(b)(2) (stating that agencies making a determination of significance regarding an unlisted action must "review the [environmental assessment form]"). There was no revision of the negative declaration after the June 24th hearing to reflect concerns raised in the public testimony, cf. Chemical Specialties Mfrs. v. Jorling, 85 N.Y.2d 382, 397

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9. The Council's failure to complete the environmental assessment form and conduct the environmental analysis that it requires, 6 N.Y.C.R.R. § 617.6(a)(3); 43 R.C.N.Y. § 6-02(5), was yet another violation of SEQRA that required nullifying LL 38. See Inland Vale Farm Co., 65 N.Y.2d 718, 720 (1985).

(1995), and no discussion whatsoever of the negative declaration at the full Council meeting on June 30. [2007-2283]; Pet. [75-76].

Moreover, although Respondents repeatedly mention Council member Spigner's statements regarding months and years of discussion and debate on the lead issue, (Res. Br. at 35, 44) they never offer the slightest explanation why they permitted just 8 business days for the release and introduction of the bill late on Friday June 18, 1999, two committee hearings, and full Council approval on June 30.[10] This is hardly a suitable alternative model to SEQRA, and reliance on such generalized discussion has been long ago rejected by the courts. For example, in Desmond-Americana v. Jorling, 153 A.D.2d 4 (3d Dep't 1989), lv. to app. den., 75 N.Y.2d 709 (1990), the court noted that "while it is true that [the agency] may have considered" the issues that were not analyzed in a negative declaration, "an EIS was required to explore the entire issue thoroughly:"

> Having recognized an area of significant concern, it was [the agency's] duty to address these concerns thoroughly by way of an EIS. The EIS would then have allowed [the agency's] to "intelligently ... assess and weigh the environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken in the best over-all interest of the people of the State." Since literal compliance with SEQRA is required, the challenged regulations must be annulled.

Id. at 12 (emphasis added) (citations omitted).

In fact, SEQRA requires agencies to "make an initial determination whether an environmental

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10. Indeed, according to Respondents, in June of 1999 the City argued against a stay through October 1999 of pending proceedings in the NYCCELP v. Koch class action — requested by many members of the Council and unconditionally offered by plaintiffs — because it would "discourage the Council from completing legislation." Res. Br. at 30. Clearly, the short timetable was a crisis of Respondents' own manufacture. Indeed, once Respondents enacted this legislation, their reluctance to enter into subsequent stays quickly evaporated. [3508, 3510-11]

impact statement need be prepared for the action" "[a]s early as possible in the formulation of a proposal for an action." ECL § 8-0109(4) (emphasis added); see also 6 N.Y.C.R.R. § 617.6(a)(1).[11] Respondents' failure to comply with this SEQRA requirement, key to reasoned and careful deliberation over environmental concerns, resulted in a process that was characterized by uninformed and hurried decisions. For example, Council member (and committee member) Marshall could not attend the first hearing on June 21, called on less than a day's notice, [1959], and complained, even as she voted for LL 38 on June 30, that it was "confusing," [2256] and that she "would like to have more time." [2258]. Even the City Comptroller's office, an interested agency, got documents at the last moment, [1484-85], and a request for time to prepare an analysis for the Council was denied. [1509, 1511, 1828-29] As Dep. Comptroller Newman testified: "Time and

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11. As the IAS court noted, the "idea of amending Local Law 1 was first proposed in December 1998," [15m], and City Council members and staff began work on revising New York City's lead poisoning prevention laws many months prior to LL 38's final enactment on June 30, 1999, probably as early as January 1999, or even before. The basic proposals had been apparently been conceptualized by mid-April, 1999, and developed into legislative text by May 3, or May 28, if not much earlier. Pet. [55-61].

The Council's failure to address SEQRA concerns at the earliest dates and its issuance and approval of the negative declaration at the very end of its law-making process, i.e., on June 24, 1999, the date on which LL 38 was finally approved by the Housing and Buildings Committee and six days before the Council's final vote, obviously flew in the face of SEQRA's express statutory and regulatory requirements. This violation of SEQRA alone warranted nullification of the resulting local law. Compare Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 720 (annulling negative declaration, in part, due to agency's failure "to follow procedures requiring it to 'make an initial determination [of environmental significance] as early as possible'" (citation omitted)), with Fisher v. Giuliani, 280 A.D.2d 13, 18-19 (1st Dep't 2001) (the negative declaration, "supported by an Environmental Assessment Statement that included a 75-page single spaced report" was released on January 8, 1998, referred for review before 2 community boards, a borough board and the borough president, and brought before a public hearing at which 80 persons testified, before being adopted by the City Planning Commission five months later in June 1998, and then not adopted by the City Council until August 1998 after a further round of public hearings involving testimony of approximately 100 people.)

more studies are needed to craft an effective and responsible bill that can be monitored and fairly enforced."[1829]

Furthermore, the Council cavalierly ignored experts' testimony regarding LL 38's likely adverse impacts. By June 24, at least twenty-two medical professionals had attempted to warn the City Council of the likely adverse health impacts — especially for children of color living in poor communities — that LL 38's changes to the prior laws would create. [535-39, 543-60, 564-84, 603-06]; I. Mauss Aff. [218], Ex. A [222]; Rosen Aff. [301, 321-25]; E. Mauss Aff. Ex. A [174]. In comparison, Respondents cannot point to a single expert who provided their unqualified support for LL 38, including the Health Commissioner who supported complete lead dust clearance testing in all circumstances. The proponents of LL 38 failed to introduce into the Record even one study or report to support the provisions contained in the new law. [1300-2002] This is, indeed, the obverse of the case relied on by Respondents, Chemical Specialties Mfrs. v. Jorling, where the agencies' decision was supported by 44 scientific studies, and in which the challenge to the negative declaration was "unsupported by any responsible scientific study." 85 N.Y.2d at 398. Conversely, the Third Department overturned a negative declaration in a case in which a member of the public identified just one potential adverse effect of a project, stating:

> It is clear from the record . . . that Levi identified one other relevant area of environmental concern [of the alleged presence of endangered plants on site] and ...brought it to the Planning Board's attention at June 28, 1988 public hearing. The record is devoid of any evidence that the Planning Board took a hard look at the issue raised by Levi. Additionally, the record is devoid of any reasoned elaboration relating to the threatened or endangered plants by the Planning Board.

West Branch Conservation Ass'n, Inc. v. Planning Bd., Town of Ramapo, 177 A.D.2d at 919; see also Fernandez v. Planning Bd. of Village of Pomona, 122 A.D.2d 139, 141 (2d Dep't 1986).

Similarly, public officials and Council members, including Council member Michels, [1961-79] — the author of LL 1 — raised many of the same concerns. See, e.g., Test. of Comptroller Hevesi [1489-95]; comments of Council members Linares [1539-40] and Freed [1817-18]; Test. of Manhattan Borough Fields [1819-23]; Test. of Dep. Comptroller Newman [1823-33]. Even the City's top public health official noted the critical importance of lead dust, safe work standards such as clearance tests, and adequate time frames. See infra, at 26, 30, 40. Neither the negative declaration nor the briefing report to the Council mention any of this testimony or correspondence. [490-506]

SEQRA mandates that agencies "make every reasonable effort to involve ... the public in the SEQR process." 6 N.Y.C.R.R. § 617.3(d). CEQR also requires appropriate participation of interested parties in the environmental review process. 62 R.C.N.Y. § 5-06(a) ("The lead agency ... shall make every reasonable effort to keep involved and interested agencies informed during the environmental review process and to facilitate their participation in such process."). Thus, in assessing agency conduct under SEQRA, agencies' efforts to make the environmental review process a broadly participatory and informed one are crucial. See, e.g., Merson v. McNally, 90 N.Y.2d 742, 753 (1997)("The environmental review process was ... [meant to be] an open process that also involves other interested agencies and the public."); King v. Saratoga Co. Bd. Of Supervisors, 89 N.Y.2d at 349 ("Procedurally, respondents ... took substantial steps to involve interested members of the public.... At each stage, respondents sought and considered other points of view and itself evaluated the environmental consequences of the proposed landfill."); Coalition Against Lincoln West v. City of New York, 86 N.Y.2d 123, 132 (1995) ("[A]n application cannot be deemed ‘complete' until all potential negative environmental impacts have been identified and are, thus, brought to the attention of

all interested parties for meaningful review and comment."). Conversely, exclusion of the public and other interested agencies in making the initial determination of significance is disfavored. See, e.g., WABBA, 223 A.D.2d at 74 ("The respondents ... have not ... complied with the public comment mandates of SEQRA ... and, in fact, only allowed limited public participation and scrutiny."); Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 603-04 (2d Dep't 1988) ("[T]here is no indication that the DEP took any steps prior to issuing its negative declaration to involve interested members of the public in the SEQRA process.").

Here, the process by which the City Council adopted its Negative Declaration could not have been more inimical to the spirit of public participation. Indeed, the Council delayed releasing the proposed negative declaration until near the end of the Housing Committee's June 24 hearing, thus completely denying the public any opportunity for a prior review of its contents and conclusions. [1988-89] Yet public review and comments are "key element[s] in the environmental review process," Coalition for Responsible Planning v Koch, 148 A.D.2d 230, 234 (1st Dep't, 1989), lv. to app. den. 75 N.Y.2d 704 (1990), so as to draw "on the reservoir of public information and expertise which SEQRA intends to tap" Rye Town/King Civic Assn. v Town of Rye, 82 A.D.2d 474, 482 (2d Dep't 1981), lv. dism. 56 N.Y.2d 985 (1982).

Thus, without either an EIS — or a carefully prepared negative declaration that identified the issues, thoroughly analyzed them, and set out a reasoned elaboration for the determinations — on what basis could a reviewing court (particularly in this instance) conclude that the full Council was informed about the environmental issues? There is, for example, nothing in the record to indicate that Commissioner Cohen or Speaker Vallone transmitted to the other council members the letters they received from the many doctors and other experts who wrote to expressing their concerns about LL

38. There is nothing to indicate that the transcripts of the Housing and Buildings Committee hearings of June 21 and 24 (or, for that matter, the much cited December 1998 hearing) were prepared and distributed to the full council prior to the full Council vote on June 30, nor did any witnesses testify before the whole Council on that date. The only record and the only documents known to have been before the full Council were the negative declaration documents.

Nor can the individual statements of Council members supplant the lack of a negative declaration that identified and analyzed the relevant areas of concern. In particular, such individual statements do not indicate what the Council as a whole considered or its reasoning and conclusions.

Nor, obviously, can Respondents' repeated discussions of regulations proposed and promulgated by HPD and DoH months after the negative declaration was issued and LL 38 was approved by the Council satisfy the legal requirements under SEQRA, since they were not in the negative declaration nor before the Council when it voted. (Moreover, these regulations do not and cannot cure LL 38's many adverse environmental effects — see testimony and comments on HPD regulations October 1, 1999 [2799-2840, 2847-2870].

B. The Council's Substantive and Legislative Determinations Regarding the Content of Local Law 38 Were No Substitute for SEQRA Analysis

Since the negative declaration fails to identify the relevant areas of environmental concern, the document ipso facto failed to provide a thorough analysis of them, i.e. a "hard look." Respondents do not argue otherwise — indeed, this Court need look no further than that portion of Respondents' brief (at 38-41) describing the negative declaration. There, Respondents do not identify any relevant analysis that would satisfy the application of the H.O.M.E.S. test and the explicit, technical

requirements of 6 N.Y.C.R.R.§ 617.7(a) and (b). Indeed, no one — including Respondents — claims that the Council provided a written identification of all areas of relevant environmental concern and a "reasoned elaboration" of the basis for deciding to dispense with an EIS, in accordance with those regulations. See 6 N.Y.C.R.R.§ 617.7(a) and (b) (requiring a determination to be in writing).

Instead, Respondents' appellate brief offers numerous post hoc rationalizations in an attempt to remedy Respondents' utter failure to set out in the negative declaration (or even in the record) a reasoned elaboration for multiple decisions involving issues of environmental concern. These do nothing but make the case that LL 38 raised the specter of legislation that "may" have a significant adverse impact on human health — and thus mandated an EIS. Respondents utterly fail to show why the five areas identified by the IAS Court [15j] and analyzed in Petitioners' initial brief did not have the potential for adverse environmental impacts.[12] Even Respondents do not deny that some of these provisions are environmentally retrograde — arguing, instead, that non-environmental considerations

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12. Unable to do this, Respondents instead expend considerable ink defending aspects of LL 38's changes to prior law that Petitioners have not even argued in this appeal. For example, in at least four places they discuss the merits of their change from a 0.7 mg/cm² to 1.0 mg/cm² definition of lead paint. In any event, Respondents' post hoc arguments regarding testing technology — amounting to considerations of streamlining the regulatory burden — do not surmount the fact that the permissible level of lead was raised by nearly 50%. Thus, LL 38 permits many lead paint conditions to escape regulatory control by arbitrarily classifying them as "lead free," and thus undeniably there "may" be adverse health impacts from permitting children to remain in the presence of these conditions. The negative declaration did not address this issue.

Likewise, although Petitioners did not raise it in their brief, Respondents defend the exclusion of common areas from LL 38 by citing Commissioner Cohen's testimony that admits these are areas of risk but not a priority. But see Wynn ex rel. Wynn v. T.R.I.P. Redevelopment Associates, 296 A.D.2d 176 (3d Dep't 2002) (lead poisoning may have been caused by peeling lead paint in common area where child played). Without proper SEQRA review, there was no quantification of this risk upon which the Council could base its decisions.

and the need for “compromise” excused the end result. If LL 38 was a “compromise,” as the Mayor admitted, [2778] then the negative declaration would be expected to explain which environmental impacts were subject to compromise, take a “hard look” at the compromise, and provide a detailed and reasoned analysis as to why the compromise will have <u>no</u> adverse results. It did not.

1. LL 38's Changes to the Work Safety Practices Indisputably Diluted Critical Public Health Protections for Children

This is perhaps most evident in the case of LL 38’s weakened standards for work safety practices. Although Respondents go through considerable contortions in their attempt to explain away their failure to comply with SEQRA on this issue, they do not deny that the so-called “interim controls” of LL 38 are weaker than the pre-existing safety standards (Health Code § 173.14) that applied to HPD violations under LL 1.   They really cannot, given that the director of Respondents’ lead poisoning prevention program when LL 38 was enacted subsequently stated in no uncertain terms that "the ‘exclusive interim controls’ outlined in LL 38 and its related rules .. are less protective of health than the provisions of § 173.14....” Klitzman testimony [3556-57].

Indeed, Respondents admit that § 173.14 is “stricter,” but merely argue that “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 has already occurred,” Res. Br. at 69, or where there was “delay in making repairs ... since delay presented the possibility that the condition could further deteriorate and thus require greater precautions.” <u>Id.</u> at 70.   However, they fail to point to anywhere in the negative declaration or even the record where the Council (or anyone else) stated, much less analyzed, these newly invented, <u>post hoc</u> rationales, and instead invite this Court engage in utter

conjecture and adopt rationales that lack any scientific (or even logical) underpinnings.[13] As Dr. Klitzman testified, "No scientific evidence has been presented to indicate that the safety measures which have been deleted [by LL 38] are unnecessary from a public health perspective." [3557] And the former Health Commissioner testified in 1996 that "[t]o reduce safety requirements solely on the voluntary and rapid response of an owner, with no risk assessment, is not logical" — precisely what LL 38 did. [621](emphasis added).

Respondents follow this with the remarkable misstatement that "until Local Low (sic) 38 was adopted, there was no work safety protocol in existence for violations issued under the Housing Maintenance Code pursuant to Local Law 1" (Res.' Br. at 87), and imply the same thing elsewhere. This is simply wrong; pre-existing Health Code § 173.14(a)(1) [2363] plainly stated that "this section shall apply... whenever ...abatement is ... [directed or ordered by] the Commissioner of Housing Preservation and Development;" see also Klitzman Test. [3556]. Respondents surely know this is not so — indeed, they litigated (and lost) the very issue that § 173.14 had been improperly limited to only DoH and HPD Code violations. NYCCELP VII, 173 Misc. 2d 235 (Sup. Ct. N.Y. Co. 1997); Order (Aug. 1, 1997) [2507], aff'd, 248 A.D.2d 120 (1st Dep't 1998). See also Juarez v.

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13. Indeed, it is a

> simple but fundamental rule of administrative law ... that a reviewing court, in dealing with a determination of judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action....

Securities & Exchange Comm. v. Chenery Corp., 332 U.S. 194, 196 (1947); see also Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action....").

Wavecrest Management Team Ltd., 88 N.Y.2d 628, 642 (1996) (LL 1 required lead hazards be removed "in a manner approved by the department").

Likewise, Respondents herald as "new" LL 38's prohibition of dry scraping of lead paint, yet ignore that this was already prohibited by § 173.14(d)(2)(bb), [2366], and NYCCELP VII. See Rosen Rep. Aff [3542].

Respondents then resort to an astonishing feat of legerdemain, inserting a five page chart claiming to be "an actual analysis of Local Law 38's safe work practices, together with Local Law 38's implementing regulations." Res.' Br. at 70 (emphasis added). Respondents, of course, neglect to inform this Court that the implementing regulations were promulgated by City agencies four months after the negative declaration and approval of LL 38, and are thus completely irrelevant to a review of the Council's SEQRA compliance. Indeed, Respondents' reliance on these subsequent implementing regulations to rectify the apparent shortcomings of LL 38's "interim controls" must be viewed as a concession that the "interim controls" could not withstand environmental scrutiny on their own. But even Respondents' chart points to many profound differences between Health Code § 173.14 and the "interim controls."[14]

But perhaps the most egregious failing of this alternative to SEQRA are the post hoc rationales Respondents now offer for the elimination of lead dust clearance testing in many circumstances. Respondents do not deny that a multitude of credentialed outside experts criticized this aspect of LL 38 (in its final form). Respondents do not deny that the Assistant Health Commissioner in charge of the lead poisoning prevention program in 1999 criticized this change as

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14. A detailed side-by-side analysis of Health Code § 173.14 as it existed prior to LL 38, and the "interim controls" the Council approved in LL 38, appears as an Addendum at page 48 at the end of this Reply Brief.

"less protective of health" and unfounded on "scientific evidence" [3556-57]. Respondents do not deny that their own Health Commissioner said that "clearance dust testing provides the best quality control check that [exists]," [1424] because "even with the best trained" lead abatement workers "there remains a risk of lead dust that can be invisible to the eye," [1433] and thus the "dust wipe test is the single best way to ensure that an area has been thoroughly cleaned and is safe." [1761] (emphasis added).[15]

Respondents, however, attempt to explain in their appellate brief (rather than in the negative declaration or even in the Council's reported deliberations) that the "limits on the [lead dust clearance] testing were obviously responsive to the comments of operators of not-for-profit housing" Res.' Br. at 29, who objected because of purported costs and because of the "reporting consequences under federal law of even one failed dust clearance test," Res.' Br. at 30, under which "an owner would be required to perpetually report even one failed lead dust clearance test to prospective tenants and

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15. In one of Respondents' many inaccurate, post hoc rationalizations, they repeatedly assert that the Council eliminated lead dust tests for most situations because it is not "scientifically reliable" Res. Br. at 49, 68 and was "problematic" id. at 59 — thus openly contradicting their own Health Commissioner. This rationale appears neither in the negative declaration nor the record, and indeed, Respondents' citations either do not state that dust tests are unreliable or are self-serving statements by non-expert real estate representatives, without any reference to scientific study. See Chemical Specialties Mfrs. v. Jorling, 85 N.Y.2d at 398. Indeed, Respondents even argue — again without any authority — that in New York City lead dust could be blown in from elsewhere, Res.' Br. at 78, yet elsewhere acknowledge expert testimony that there is little airborne-related dust anymore. Id at 26, [1555]. See Gilbert Aff. [344] and Lanphear Aff. [253] on sources of lead dust.

Respondents' position also contradicts that of the federal government, which has declared:

> [Numerous] studies demonstrate that without clearance testing and without adequate dust-lead standards, children's blood lead levels may worsen as a result of lead-based paint hazard control work in housing. Therefore, HUD has provided for clearance testing when lead hazard control work is done in housing covered by this rule. (emphasis added).

Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance; Final Rule 64 F.R. 50140, 50180 (1999)

purchasers." Id.

While Respondents may have favored assisting landlords in circumventing the federal requirement to disclose prior lead problems to tenants, (42 U.S.C. § 4852d(a)(1), 24 C.F.R. §§ 35.80 et seq., 40 C.F.R. §§ 745.100 et seq.) this is surely not an environmental justification that protects children. More importantly, this post hoc explanation is surely not the reasoned elaboration that SEQRA requires to be made in writing before the decision was made to approve the negative declaration and LL 38. Nor should a reviewing court have to engage in rank conjecture as to whether this rationale was "obvious." In determining whether an EIS was warranted, the Council's only consideration should have been whether the proposed change from LL 1 to LL 38 had any potential negative impacts on the environment. By importing non-environmental considerations, the Council tainted the process — and came to the wrong conclusions.

2. LL 38's Elimination of All Lead Poisoning Preventative Measures for Six-Year-Old Children Indisputably Removed Critical Public Health Protections for Thousands of Children

Like the Appellate Division, the City does not explain why LL 38's removal of all legal protections for six-year-old children from lead hazards was not an environmentally significant action. Nor do they deny that the negative declaration does not mention (much less explain or analyze) LL 38's elimination of prevention measures for 17% of the population previously protected, despite information provided to the Council that six-year-olds are at risk. See 6 N.Y.C.R.R. § 617.7(c)(3)(vii) (environmental significance determination must consider "the number of people affected"). Indeed, they concede that six-year-olds become lead poisoned in New York City. Res. Br. at 13.

Here again, Respondents post hoc seek to justify their failure to identify this issue, citing Health Commissioner Cohen's general comments that the "principal age for developing childhood lead

poisoning [is] [1 1/2] to [2 1/2] years."[1418][16] However, Dr. Cohen's testimony did not specifically cite, explain, or substantiate LL 38's significant age reduction, nor did he present any scientific basis or empirical data to show it would have no adverse environmental impacts for six-year-olds. Even Commissioner Cohen's statement, [3434] that less than 10% of the diagnosed cases involve children six years of age or older nonetheless means that thousands of six year olds each year have elevated blood lead levels. [1028].[17] If an EIS is required for environmental hazards to the homes of rattlesnakes, Sour Mountain Realty, Inc. v. N. Y. S. Dep't of Envtl. Conservation, 260 A.D.2d 920, 920 (3d Dep't), lv. to app. den., 93 N.Y.2d 815 (1999), or striped bass, Sierra Club v. U.S. Army Corp of Engineers, 772 F.2d 1043, 1059 (2d Cir. 1985), surely a new policy that removes all protections from environmental lead hazards in the homes of thousands of six year old human children required an EIS as well.

Respondents' other post hoc explanation (not in the negative declaration) is similarly

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16. Respondents' brief, at 68, inaccurately paraphrases Comm. Cohen's testimony as stating that "older children rarely developed elevated blood lead levels" [1418]. Such statement is not found in the record there.

17. More recent data indicates that this figure is significantly higher, see footnote 42 in Petitioners' Initial Brief. But in any event, the thousands of children in this age group who are exposed to lead hazards and become lead poisoned should not and cannot be so cavalierly dismissed for SEQRA (or any other) purposes.

The RSA amici argue that the many thousands of children who still suffer lead levels of 10 µg/dL should not be considered to have suffered adverse health effects. The science is otherwise, see Canfield, Henderson, Cory-Slechta, Cox, Jusko, Lanphear, Intellectual Impairments in Children with Blood Lead Concentrations below 10 µg/dL per Deciliter 348 New Eng. J. of Med. (16) 1517-1526 (April 2003) (reporting that IQ declined by 7.4 points with lifetime average blood leads of 10 µg/dL, and there are marked impairments below this level). They also imply that the source of childhood lead exposures in New York City may not be lead paint, yet one of the sources they cite, New York City Department of Health and Mental Hygiene, Preventing Lead Poisoning in New York City: Annual Report 2001, (December 2002) at 10, states that deteriorated lead-based paint is "the primary source of lead poisoning" and that "childhood lead poisoning remains a significant public health problem in NYC" — despite LL 38.

unavailing; whether some state or federal provisions related to lead paint hazards apply only to children up to age six is wholly irrelevant to the SEQRA determination of environmentally significant impact. SEQRA makes no such exemptions, but rather requires assessment of each and every potential area of environmental concern. See, e.g., Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d at 364-65.

Nor do Respondents offer any legal support for their claim that the negative declaration did not need to identify this issue because it was not (they assert) a "controversial" matter. SEQRA makes no such exemption, but rather looks to credible evidence – not the controversial nature – to substantiate environmental significance. See Chemical Specialties Mfctrs. v. Jorling, 85 N.Y.2d at 395, 398 (discussing the scientific studies and empirical data upon which the agency based its decision).[18]

3. LL 38's Deregulation of Lead Paint on Impact, Friction, and Child Accessible Surfaces, Reduced Inspection Duties, and Elimination of Lead-Contaminated Dust and Related Conditions from the Definition of What Constitutes a "Lead-Based Paint Hazard," Indisputably Diluted Critical Public Health Safeguards

Although the Appellate Division eschewed any mention or discussion of the lead dust issue, the failure to recognize lead dust (and many conditions that are likely to generate it) as a defined hazard was an extremely controversial aspect of LL 38.

Respondents' brief does not deny that there might be adverse impacts from lead dust from

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18. Conversely, where the Respondents generated tremendous controversy over aspects of LL 38, they simply (and wrongly — see 6 N.Y.C.R.R. Part 617 EAF forms) assert that SEQRA does not require them to pay any attention to it at all, citing Chemical Specialties. In that case, however, the purported controversy was asserted by economically interested parties who cited no scientific studies or credentials. In the instant case, the roles are reversed — the highly credentialed opponents of LL 38 cited many peer reviewed studies, while the proponents relied upon none.

friction, impact, and accessible surfaces, and at best merely asserts that "the lengthy record before the Council did not demonstrate that friction surfaces were a substantial source of lead dust" Res.' Br. at 78. But, leaving aside that not one of their record citations support the Council's decision to entirely ignore lead paint on friction surfaces,[19] (while Petitioners have provided numerous record citations to the contrary)[20] the way to resolve this issue was through the preparation of an EIS. 6 N.Y.C.R.R. 617.9(b)(6).

Respondents' own Health Commissioner testified that "dust should be incorporated into the bill in the language of what constitutes lead-based paint hazards." [1473] It was not. See LL 38, § 27-2056.1(a)(2) (definition of "Lead-based paint hazard")[442]

Respondents do not deny that lead dust can have an adverse impact on children's health; all they assert is that their choice was based on "confusion" as to how to deal with it, Res.' Br. at 44, thus again demonstrating precisely why an EIS was required to thoroughly analyze the issues, consider the alternatives, and identify mitigation measures, and come up with a reasoned elaboration for the

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19. In fact, the four record references offered by Respondents in support of this statement are unavailing. Dr. Rosen stated that "it [is friction] surfaces that yield small particles of lead-based paint in household dust in particle sizes that are more readily absorbed into the bodies of young children." [570] The HPD commissioner conceded friction surfaces could be an issue. [1353] Lastly, Nick Farr — writing in December of 1998, long before LL 38 was proposed — indicated that friction surfaces should be controlled if they create lead dust. [3449] Mr. Farr opposed LL 38 once it was proposed, among other reasons, because "dust tests ... are absolutely essential if you care about protecting children" [1519], and joined the amici curiæ brief of twenty-six experts in support of Petitioners in this appeal.

20. See also, Lanphear, Matte, Rogers, Clickner, Dietz, Bornschein, Succop, Mahaffey, Dixon, Galke, Rabinowitz, Farfel, Rohde, Schwartz, Ashley, Jacobs, The Contribution of Lead-Contaminated House Dust and Residential Soil to Children's Blood Lead Levels: A Pooled Analysis of 12 Epidemiologic Studies; 79 Environmental Research 51-68, at 64 (1998) ("It is imperative to identify and evaluate lead hazard controls for their ability to attain and sustain safe levels of lead in residential house dust without placing children at undue risk for lead exposure.")

ultimate decision.[21]

Lastly, Respondents argument that LL 1 didn't treat lead dust as a hazard is non-sensical. Respondents themselves characterize LL 1 as a "lead-free" law, so if there was no lead paint permitted, there was no real likelihood of lead dust.[22] Conversely, if one permits lead-based paint to remain in a dwelling, one must control the sources of lead dust. And all the experts — and the federal government — said that lead paint on abrasion and impact surfaces, intact or not, is a major source of lead dust.[23] See Petitioners' Initial Br. at 40-42.

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21. Respondents' assertion that lead dust could be simply "removed by regular washing of the floors with a detergent," Res.' Br. at 78, once again misrepresents the record. They cite to the testimony of Nick Farr, but overlook that he was merely responding in the affirmative to a question from Council member Ognibene that washing the floor would be "helpful," [1554] — and never said it would be sufficient to remove the lead dust. Indeed, on the same transcript page Mr. Farr's colleague, Mr. Ryan, testified that floors must first be cleaned with a "High Efficiency Particle Accumulator" (HEPA) vacuum. [1554]. Respondents' only other citation on this issue is to non-expert testimony by a representative of the real estate industry, without reference to any scientific study whatsoever.

Council member Quinn noted during the floor debate that several studies have shown that ordinary household cleaning is not effective in prevention of childhood lead exposure and that specialized cleaning methods are necessary to remove lead dust. [2209-10]. See Lanphear, Howard, Eberly, Auinger, Kolassa, Weitzman, Schaffer, Alexander, Primary Prevention of Childhood Lead Exposure: A Randomized Trial of Dust Control, 103 Pediatrics (4) 772-88 (April 1999); cited in Lanphear Aff. [256]; Olmsted Aff. [233-34]. Respondents' dissembling on this issue only further demonstrates why this court should not permit deviation from the SEQRA requirement to take a hard look at the issues.

22. The data shows that lead dust is almost never found in homes without lead paint, while lead dust at hazardous levels is found in 1 out of 3 homes with lead based paint in good condition. HUD, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, Revision 6.0 (April 18, 2001) at 5-16 (available at www.hud.gov/offices/lead/techstudies/HUD_NSLAH_Vol1.pdf (accessed April 24, 2003).

23. Respondents argue that the federal regulations may not require abatement of lead paint on window components unless lead dust is found, but neglect to mention that LL 38 does not require abatement of lead paint on window components even if lead dust is found.

4. LL 38's Relaxed Times Frames For Correction and Enforcement of Lead Paint Hazard Violations Indisputably Diluted Critical Public Health Protections For Children

Respondents do not deny that the lengthened time frames of LL 38 could cause adverse impacts on children's health;[24] at best, all they could say was that these were "outside limits." Res.' Br. at 22, 76. However, the City's own CEQR Technical Manual [2341] requires analysis of the potential adverse impact of "worst case" scenarios.

Respondents attempt to confuse the Court on this point by alluding to the testimony by then-Assistant Health Commissioner Susan Klitzman 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 ... and nutritional counseling is also provided, all of which typically results in reduction of the child's blood lead levels before repairs are done." Res. Br. at 23.[25] As Respondents are fully aware, this is completely irrelevant: Health Code violations are required to be remedied within five days, § 173.13(d)(2) [2376-77], and were not in any way at issue, as they were unaffected by LL 38. Moreover, DoH violations where children are already lead poisoned are far less common than HPD violations under the housing code (LL 1 or LL 38).[26]

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24. Indeed, they admit that "delay present[s] the possibility that the condition could further deteriorate and thus require greater precautions." Res. Br. at 70.

25. Shortly after this testimony, Dr. Klitzman resigned her position and testified <u>against</u> LL 38. [3554-57]

26. Respondents themselves argue that "96% of properties where there was a possible risk of poisoning from lead-based paints had never been issued a violation by DoH." Res. Br. at 25.

5. LL 38's Elimination of Enforceable Deadlines for Correction of Lead Hazards in the Homes of Already Lead-Poisoned Children in 1- or 2-family Dwellings Indisputably Reduced Critical Public Health Protections For Children

Respondents never explain why LL 38 removed the requirement in Admin. Code § 27-2126 that HPD must respond within 18 days to a DoH order to abate lead paint in a 1- or 2- family home where an owner fails to do so, much less why the removal of such mandatory timeframes does not have adverse impacts for lead poisoned children in such homes. This is all the more curious, since elsewhere Respondents argue the importance of mandatory time frames for other HPD action. The only explanation Respondents now offer — that LL 38 didn't remove DoH's authority to order abatement where children are lead poisoned in non-multiple dwellings — is a non-sequitur that ignores the fact that LL 38 removed the mandate that HPD do something (and by a date certain) in the not-uncommon instances where owners of 1 and 2 family dwellings fail to respond to DoH orders. That was the very reason that § 27-2126 was enacted (as LL 50 in 1972). [2398] And of course, Respondents fail to explain why these changes to Local Law 50 were necessary in the first place, as it had nothing to do with their claims regarding a "full abatement" crisis arising from enforcement LL 1.[27]

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27. Respondents misrepresent Petitioners' arguments, (Res.' Br. at 47, 50) asserting that Petitioners have incorrectly claimed that "the Health Code" provisions concerning safe work practices were repealed for repair work in non-multiple dwellings in response to Health Code § 173.13 lead poisoning violations issued by DoH. Petitioners made no such claim. As was carefully explained in Petitioner's initial brief, there are two Health Code provisions concerning lead paint:

- Section 173.13 concerns lead poisoning situations, and applies in any dwelling where a child is lead poisoned (multiple and non-multiple dwellings). LL 38 did not affect this (although it did remove Local Law 50's mandate, in one and two family dwellings, that if the landlord failed to correct within 16 days of the complaint then HPD must do so within 18 days)[2637]
- Section 173.14 contained safe work practices for lead abatement that by their terms applied whenever DoH or HPD violations were issued (and under the orders in NYCCELP v. Koch, were supposed to apply to all lead hazard removals). Petitioners correctly pointed out that the Health

(continued...)

POINT IV.

RESPONDENTS' ARGUMENT — THAT SPECIFIC HARMFUL EFFECTS CAN BE IGNORED BY SUBORDINATING THEM TO ASSERTIONS THAT LOCAL LAW 38'S OVERALL IMPACT IS BENEFICIAL — VIOLATES THE PURPOSES OF SEQRA

To gloss over both the negative declaration's and the Council's failure to identify numerous environmental problems with LL 38, Respondents spend an inordinate portion of their Brief describing how LL 38 eliminated the "full" abatement requirement under LL 1. But as explained above, replacing the old law with LL 38 gave rise to significant other environmental problems that did not exist previously. Respondents contend that LL 38 will have only a "beneficial impact" by erecting LL 1 as a "strawman" and then knocking it down. They do so by first asserting throughout their brief that LL 1 established a "dangerous" mandate to abate intact lead paint and then by alleging that LL 38 is a vast improvement over the status quo ante. This specious argument is based on flawed reasoning and ignores the overwhelming amount of expert testimony that Respondents received to the contrary.[28] Moreover, Respondents' simplistic assertion that their SEQRA obligation to identify these potential adverse consequences was completely satisfied by their belief in LL 38's beneficial aspects is supported by neither case law nor the record.

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27. (...continued)
Code § 173.14 work practices are no longer obligatory during the 21-60 day window period after the placement of a HPD violation.

28. While Respondents' brief goes on for page after page describing the critiques offered by various experts regarding the LL 1 "full abatement" standard, not one of those experts testified in favor of LL 38 (and in particular LL 38's peeling paint only standard), and in fact most of them actively opposed it. Moreover, the vast majority of Respondents' citations on this point are statements made in the Buildings Committee hearing of December 16, 1998, over half a year before LL 38 had even been proposed, much less released for comment, and thus made in a total vacuum.

In WABBA, after complaints arose concerning unsafe practices in the removal of lead paint from the Williamsburg Bridge, the City promulgated a "protocol" for the stated purpose of improving the control of lead dust during the removal of lead paint from the Bridge's steel structure. Since the "protocol" interjected lead dust controls where none had existed before, 167 Misc.2d at 985, the WABBA case presented an "action" that presumably would have only "beneficial" environmental effects — indeed far more beneficial than any changes resulting from the repeal of LL 1 and the evisceration of Admin. Code 27-2126 and Health Code § 173.14 in the present case. Thus under Respondents' theory, the court should have ruled in the City's favor in WABBA — but it did not.

Instead, WABBA invalidated this process and required the preparation of an EIS. Irrespective of whether the "protocol" would have a beneficial effect, the court focused on the undisputed fact that work performed on the Williamsburg Bridge "falls within the ambit of 'significant effect on the environment' so as to trigger the provisions of SEQRA...." 224 A.D.2d at 72. In the present case, similarly, there is no dispute that work performed in occupied apartments to remove or repair lead paint can have a significant effect on the environment, as "any work to repair lead-based paint involves a hazardous substance." Res.' Br. at 41.

Of course, as noted above, by asking this Court to make a final determination whether LL 38 overall will have a "beneficial impact," Respondents are inappropriately inviting the Court to step into the vacuum created by their own failure to substantiate this conclusion when the negative declaration was drafted. The purpose of SEQRA is to raise this kind of environmental analysis before a local law's enactment, and not after the fact. Indeed, Respondents themselves quote this Court's statement that "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), and aver that the IAS court wrongly did

so.

No one disagreed that the removal of intact lead paint under LL 1 could be hazardous — if not carried out properly. However it is also true that the removal of peeling lead paint is equally as hazardous — if not carried out properly. Rosen Reply Aff. [3540-41] By refusing to acknowledge this, either in the negative declaration or in arguments to this Court, Respondents expose the fundamental flaw of their "strawman" analysis. Intact lead paint and peeling lead paint are both hazardous to repair or to remove. Thus it is irrational and misleading for Respondents to claim that their "focus" on LL 1's intact paint requirement was a justification for their ignoring the adverse impact of weakening work area containment, cleanup, and lead dust clearance testing.[29]

In any event, Respondents claim they were acting to mitigate the adverse impacts they assert existed in LL 1. The issue, however, is that the City Council, in selecting among the many possible methods of creating a partial abatement scheme, could not have concluded that it was enacting a scheme that had no significant adverse environmental outcomes, because it failed to conduct the required environmental review to determine the significance of LL 38's effects. No known baseline existed because the negative declaration did not first gather and analyze data to determine how LL 1 operated (i.e., whether unintended hazards resulted and if so under what circumstances and how often). Lacking any such evidence, the only other baseline this Court can consult is a facial

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29. The negative declaration does not demonstrate, however, that such removal would be hazardous if LL 1, including the underlying Health Code work safety provisions, § 173.14, were properly enforced and if the work were conducted using certified workers, as would be required under federal law. Instead, Respondents' conclusion is based in large part on the City's own failure to establish a proper program to enforce LL 1. SEQRA does not sanction the notion that failure to enforce a law justifies failure to conduct an EIS on a proposal to weaken the law. Indeed, such a premise would establish a dangerous precedent.

comparison of the statutes as they are intended to operate. Such comparison quickly reveals a panoply of discrete provisions that on their face can create adverse environmental health impacts. These many discrete changes cannot be swept under the rug for the purposes of SEQRA compliance simply by a wholesale (and unsubstantiated) conclusion that LL 38 is in every respect preferable to prior law. Thus, even assuming, arguendo, that a move to something less than full abatement is desirable, the decision to replace LL 1 with something less than full abatement of lead paint entailed countless environmental decisions and should have required consideration of a great range of alternatives, as required by SEQRA.[30]

"In Alice-in-Wonderland manner, respondents separated and put aside the realities of [particular issues] from the totality of this project" H.O.M.E.S., 69 A.D.2d at 232. If Respondents' legal position were correct, it would mean, essentially, that the ends always justify the means — without any analysis of the environmental impact of the particulars of those means.

Thus, having utterly abandoned any effort to argue that the negative declaration was facially adequate by identifying the relevant areas of environmental concern and fully analyzing them, Respondents instead invite this Court to overlook their non-compliance with SEQRA's strict requirements by undertaking a review of the "record" as a whole to support their notion that no matter what the City council did, it could only be beneficial — in each and every aspect — if along the way it revoked LL 1. But even if the Court were to do so, it is obvious on this record that this assertion is

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30. Respondents and the RSA both assert non-environmental arguments concerning the costs of lead abatement, claiming that it would drive low-income housing off the market, although they cite no studies to this effect. Quixotically, Respondents point to a survey performed by owners that purported to find lead on only 17% of walls in pre-1960 apartments, Res. Br. at 77, which would thus indicate that the burden of assuring that homes are not hazardous to children cannot be so unattainable. See Petitioners' Initial brief at 56, note 48, on the studies documenting the positive outcomes in Massachusetts' abatement policy.

insupportable.

First, as noted in the Petition (¶¶ 6, 96, 117) [28, 62, 69] and in Petitioner's initial brief, every independent expert who testified or offered written submissions stated that LL 38 will have adverse environmental impacts. The City was unable to come forward with a single outside medical, environmental, or public health expert to testify to the contrary. See Rosen Reply Aff. [3538] Respondents' flawed reasoning is also obvious given their cited reliance on the testimony of Nick Farr, Executive Director of the National Center for Lead Safe Housing, even though Mr. Farr came up from Washington, D.C. specifically to testify against LL 38, and wrote two letters in opposition to the bill. [594, 745, 1512-61] Similarly, respondents cite the testimony of Don Ryan, Executive Director of the Alliance to End Childhood Lead Poisoning, in support of their position even though he also came up from Washington, D.C. specifically to testify against LL 38, and wrote three letters in opposition to the bill. [590, 738, 762, 1528-35]

Moreover, Respondents fail to explain how LL 38's deletion of friction surfaces from the definition of "lead hazards" will be "only beneficial," given the universal agreement of the experts in the field, the 1996 testimony of then- Health Commissioner Margaret Hamburg [620-23], and even the definition in the federal Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4851b(15), that intact lead paint on friction surfaces must be treated as a lead hazard.

Nor do Respondents explain how removing all protections for six year olds from the current law is "only beneficial" to the many thousands of six year old children living in dwellings with lead paint. Rosen Aff. [304-05] (stating that his clinic has seen hundreds of lead poisoned six-year-olds over the past 25 years). Incredibly, the Health Commissioner — in a post facto affidavit in November of 1999 — justifies such a change merely because it will "harmonize local law with

federal" law [3523]. Yet, as noted earlier, Respondents apparently chose not to "harmonize with federal law" with respect to its far broader definition of lead hazards. See, 42 U.S.C. § 4851b. Respondents offer no explanation of the basis upon which they essentially "cherry picked" those portions of federal law they chose to "harmonize" with.

Nor do Respondents ever explain how LL 38's removal of the requirement of Local Law 50 of 1972 (§ 27-2126) that HPD must respond within 18 days to a DoH order to abate lead paint in a 1- or 2- family home where an owner fails to do so can possibly be considered "beneficial" to lead poisoned children who have the misfortune of residing in such homes.

Nor do respondents offer any explanation why the substitution of "interim controls" — using untrained, uncertified workers[31] — for large aspects of the Health Code safety procedures can be considered "only beneficial." Respondents' assertion that the "interim controls" impose new requirements on owners and thus are beneficial is misleading and incorrect. Prior to LL 38, not only did the § 173.14 safety standards apply to all lead abatements ordered by DoH and HPD, see § 173.14 (a)(1)[2363]; they were also supposed to apply to all work on lead hazards, under the orders affirmed by the Appellate Division in NYCCELP II [2461] and NYCCELP VII [2509]. Moreover, in 1998 DoH proposed rules that would have modified § 173.14 to make this extended coverage explicit, in accordance with the forgoing NYCCELP orders. See City Record Oct. 15, 1998, 3544-46 [2421] (proposed § 173.14(a)(1)(cc)). In any event, as noted above, Dr. Klitzman

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31. While Respondents selectively invoke federal standards to defend their positions, 24 C.F.R. § 35.88 requires landlords to provide to tenants an EPA pamphlet, Protect Your Family From Lead In Your Home, (EPA737-K-99-001) (April 1999) which warns:

> Removing lead improperly can increase the hazard to your family by spreading even more lead dust around the house. Always use a professional who is trained to remove lead hazards safely. (emphasis added).

(head of Respondents' lead poisoning prevention program when LL 38 was enacted), has now demolished such arguments, stating in no uncertain terms that "the ‹exclusive interim controls' outlined in LL 38 and its related rules .. are less protective of health than the provisions of ... 173.14...." [3556-57]. Indeed, Health Commissioner Cohen testified that

> there are numerous scientific studies and reports which show that lead abatement if not performed safely may actually create lead containing dust and increase the risk of lead exposure to young children. ...
>
> In the absence of training, licensing, and certification requirements for lead abatement workers and contractors in New York City and New York State, there is a very real possibility that lead abatement may be performed by unskilled personnel further [] increasing the potential for exposure to lead containing dust and paint chips.

[3153-54].

Respondents also fail to explain why it is "only beneficial" to eliminate the pre-existing continuing duty of a landlord to inspect an apartment as needed for lead paint hazards. Under LL 1 and this Court's decision in Juarez, 88 N.Y.2d at 647, landlords' obligations to remedy lead hazards were continuous, and not limited to third party notification of lead hazards.[32] See also Valdez v. Sherman Estates, Inc., 224 A.D.2d 240, 241 (1st Dep't 1996) ("The plain effect of [LL 1] ... is to the contrary, and the entire remedial scheme would be meaningless if a landlord could suffer a lead condition in its building until given ‹notice' of the condition..."); Lane v. Ruiz, N.Y.L.J., May 29, 1996, p. 29 col. 3 (Sup. Ct. Queens Co.) ("A landlord is required to take action to remedy a lead condition prior to receiving any ‹notice' of the condition ..."). LL 38 drastically changed this mandate, limiting landlords' responsibilities to a single, annual visual inspection for just peeling paint —

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32. As the IAS Court noted, under prior law "the minute the landlord learned a child under seven was living in an apartment, he became responsible for removing or covering any paint with hazardous levels of lead ...."[15h-15i] (citing Woolfalk v. N.Y.C. Housing Auth., 263 A.D.2d 355 (1st Dep't 1999)).

regardless of the building's general condition, unless given notice of a hazard by the tenant. LL 38, §§ 27-2056.3(d), (e), and (f) [448-49].[33] Respondents cited no research to show that cutting landlord's obligations down to this "one size fits all" standard of care would adequately protect children's health, nor did any expert testify that it would. See Gilbert Aff. [345-46] (appropriate frequency of inspections depends on many factors, including building's general condition).

Respondents do not even attempt to demonstrate why it is "only beneficial" to remove all landlord obligations and City enforcement responsibilities for buildings constructed after January 1, 1960, even though children become lead poisoned in such dwellings. See Petitioners' Initial Brief at 24 n. 19, Woolfalk v. New York City Housing Auth., 263 A.D.2d 355 (1st Dep't 1999) (child poisoned by lead paint in home built in 1973; LL 1 applied).

Respondents do not demonstrate why the lengthy time frames they chose for enforcing the removal of lead paint in LL 38 are "only beneficial." Indeed, respondents misleadingly assert that LL 38 broke new ground by requiring time limits for HPD inspections and enforcement. Yet the City had been ordered long ago in NYCCELP VI, [2498] aff'd as modified, 245 A.D.2d 49 (1st Dep't 1997), to set time limits for enforcing HPD lead paint violations, and indeed, had proposed regulations that set time frames for HPD inspections and enforcement, including intervention when landlords failed to do so — with significantly stricter time limits than in LL 38. Proposed rule, October 9, 1998 [2907]. Respondents fail to show why these lengthier time frames in LL 38 are "only beneficial" (LL

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33. § 27-2056.3(f) provides:

> In the event of any ... claim by or on behalf of the occupant of the dwelling unit or a child under six years of age who resides therein, such owner may in defense or mitigation of such owner's liability show that ... the owner visually inspected the dwelling unit but the lead-based paint hazard arose subsequent to such inspection and the occupant did not provide notice to the owner of such hazard.

1 required violations to be removed in 24 hours), or even the manner by which the Council determined that these time frames are sufficient to prevent young children from becoming lead poisoned.

Finally, Respondents do not demonstrate why it would be "only beneficial" to allow surfaces that generate lead dust (such as friction and impact surfaces) to remain unabated, as compared to LL 1 (which did not permit such conditions). Respondents, incorrectly claiming that LL 1 did not regulate lead dust, fail to recognize the obvious: if all of the lead paint is safely removed or covered and the strict clean-up and dust clearance tests (under Health Code § 173.14) are complied with to ensure that the apartment is safe, the lead dust problem has been entirely — and permanently — eliminated.

Because neither the negative declaration nor the record of the Council deliberations of LL 38 identify and analyze these and many other adverse impacts, see Pet. [78-101], nullification is required. Chinese Staff and Workers Assoc. v. City of New York, 68 N.Y.2d at 368; Village of Westbury v. Department of Trans., 75 N.Y.2d 62, 69 (1989). The very purpose of SEQRA is to

> insure[] that agency decision-makers — enlightened by public comment where appropriate — will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.

Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 414-15 (emphases added).

POINT V.

RESPONDENTS' REQUEST FOR A ONE YEAR STAY OF THE JUDGMENT SHOULD BE REJECTED AS UNREASONABLE BECAUSE OF THE PERMANENT DAMAGE THAT CHILDREN CAN SUFFER WHEN LEAD PAINT AND LEAD DUST ARE INADEQUATELY CONTROLLED

Respondents apparently recognize that they may not prevail in this appeal and that their failure to obey SEQRA rendered LL 38 a legal nullity, yet they nonetheless ask this Court to allow their invalid enactment to remain in effect for yet an additional year. But this Court has previously expressed its grave concern against

> overrid[ing] legislative mandates establishing environmental review procedures. This consideration is more than theoretical. The State has made protection of the environment one of its foremost policy concerns. Thus, [SEQRA], unlike many others, imposes substantive duties on the agencies of government to protect the quality of the environment for the benefit of all the people of the State. We have given strong support to implementing this legislative policy, believing that unless a hard look is taken at the environmental factors found in the EAF before a finding of nonsignificance is made, there is a danger that the subsequent finding, made after the EAF is reviewed, would merely be a "rubber stamp" or afterthought. We have insisted, therefore, that the statutory environmental review requirements of SEQRA must be met and have held that if they are not the governmental action is void and, in a real sense, unauthorized.

E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 370 (1988).

Respondents' arguments are based on a fallacious pretense: that the voiding of LL 38 would leave the City without a working legal system for lead paint poisoning prevention. First, preexisting laws were in place for many years, and are hardly likely to be a vast source of "confusion" for landlords.[34] Second, by late 1998 Respondents were finally on the verge of enacting a complete set

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34. Whenever there is a change in law — whether it is because a new law has been enacted, or because a court has stricken an existing law, or because a court has restored a prior law — affected

(continued...)

of regulations (City Record, October 9, 1998, p. 3505; id., October 15, 1998, p. 3544)[2402-2430] to fully enforce LL 1 and § 173.14 as directed by the Appellate Division in NYCCELP II, NYCCELP IV, NYCCELP VI, and NYCCELP VII; indeed, the same assertions Respondents make here regarding the viability and perceived inadequacies of LL 1 were fully and repeatedly articulated by them to the Appellate Division and were roundly rejected in those four decisions.[35]

Respondents cite Silvercup Studios, Inc. v. Power Auth. of the State of N.Y., 285 A.D. 2d 598 (2d Dep't 2001), but in that case it was technically impractical to cease construction of an almost completed physical project — and even there the court granted a stay of only six months. Similarly,

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34. (...continued)
individuals might be confused. This is no different than the situation presented had the Council enacted an unconstitutional law, and one could hardly argue that an unconstitutional law should remain in effect for a year because otherwise the public might be confused.

35. The RSA amici ask this Court to consider as well statistics regarding the numbers of children lead poisoned since the enactment of LL 38, even though this is completely dehors the record on appeal — to say nothing of the record that was before the Council in 1999 (unless one imagines that the Council's environmental considerations were based on clairvoyant abilities to predict future statistical outcomes). No SEQRA case supports such retroactive analysis of potential impact.

If this Court nonetheless intends to consider the RSA's arguments based on those submissions — such as their belief that LL 38 is responsible for a decline in lead levels — the Court should take a skeptical view of such dilettante epidemiology. An article by two DoH employees explained a much more diverse set of reasons for the steady decline:

> The decline in the incidence of childhood lead poisoning in New York City coincides with national trends and has been attributed to regulatory bans on the use of lead in gasoline, paint, food and beverage cans, and plumbing.

Klitzman, Leighton, Decreasing Childhood Lead Poisoning in New York City: 1970-1998, 76 Journal of Urban Health: Bulletin of the New York Academy of Medicine (4) 542 (December 1999). Moreover, Respondents themselves argue that under prior law lead poisonings had dramatically decreased, Res. Br. at 12 and the Health Commissioner testified, [1415], that lead poisoning levels had declined by almost 50% since 1994 under LL 1. Thus, perhaps the more relevant inquiry would be the rate of decline in lead poisonings, and data in the DoH report cited by the RSA actually shows a flattening of the rate of decline since LL 38 went into effect.

Golden v. Metropolitan Transportation Authority, 126 A.D.2d 128, 130 (2d Dep't 1987), was commenced after the physical action at issue had taken place.[36] Here, however, the matter concerns not a physical project but changes in policy regarding clean-up of a toxic hazard, embodied in a local ordinance. Respondents cite no authority for allowing an invalid enactment to continue in effect for a year.

Lastly, to the extent that Respondents' only articulated reason for revoking LL 1 was its requirement that all lead paint be abated even in homes where children are not already poisoned,[37] Respondents neglect to mention that Petitioners repeatedly offered to stay that one aspect of the regulations pending determination of the appeal[38] (as Petitioners were willing to do throughout the period leading up to the enactment of LL 38, see Test. of Comptroller Hevesi [1486]). Even now, Petitioners would not object were this Court to find it necessary to include, in any order nullifying LL 38 and the negative declaration, a provision staying enforcement of the specific regulatory provision arising from the NYCCELP litigation, § 11-05(b)(2) [2403], that mandates the City to inspect for and

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36. The RSA amici cite two additional cases. But in King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d at 349, the agency had "procedurally and substantively .... actually performed each of the required steps in the SEQRA review process." And in Segal v. Town of Thompson, 182 A.D.2d 1043, 1047 (3d Dep't 1992) the court expressed the view that only those critical aspects of the sewer and water district operations should continue pending SEQRA compliance.

37. Respondents never explain why they did not amend just this "one facet of the law" [15e], but rather made numerous other changes in the lead paint legal scheme that were indisputably less protective of children, such as eliminating legal protections for 6 year olds, eviscerating the application of the court-ordered safety standards, and so forth, as discussed supra.

38. Specifically, § 11-05(b)(2) of the implementing regulations, [2403] which is the one and only aspect that Respondents really claim is onerous. Respondents have never asserted that they could not enforce all other aspects of the implementing regulations [2402-2430] they proposed in late 1998 to carry out enforcement of LL 1, LL 50, and Health Code §§ 173.13 and 173.14 in accordance with the Supreme Court's and Appellate Division's prior directives.

order the abatement of intact lead paint. But such a limited stay should not last more than 12 months, until the completion of the EIS process or until enactment of replacement legislation if needed (whichever occurs first).

But there is no equitable reason to allow all of the remaining portions of LL 38 which have absolutely nothing to do with the change from so-called "lead free" to "lead safe" — such as the reduction of safe work practices, the excising of 6-year-old children from the protection of the law, and so forth, be permitted to continue. Restoring the right of six-year-old children to share the same the legal protections from lead poisoning enjoyed by younger children will not disrupt the City's code enforcement system. Restoring the applicability of Health Code § 173.14 to all Housing Code violations — as was required prior to LL 38 [2363] — rather than continuing the 21 to 60 day "window period" under LL 38 where the less stringent "interim controls" may be followed using untrained workers and fewer lead dust clearance tests, will not disrupt the City's code enforcement system.

CONCLUSION: THE ORDER OF THE APPELLATE DIVISION SHOULD BE REVERSED AND THE ORDER OF THE SUPREME COURT REINSTATED

To reiterate Professor Weinberg's view regarding the instant case:

> If the routine legislative processes of committee hearings and debate are held to satisfy SEQRA, then [the Appellate Division] has itself legislated away a major slice of what the State Legislature so clearly mandated, and deprived the citizens of the Act's protection.

Weinberg, Practice Commentaries, McKinney's Cons. Laws of NY, Book 17½, ECL C8-0109:3 (2003 Cumulative Pocket Part, at 30). The citizens whose protection is sought are the most vulnerable: young, and mostly poor, urban children. This Court should reject the challenge to SEQRA jurisprudence posed by Respondents, and require that the City Council — like any other local legislative body — fully and strictly comply with SEQRA.

Dated: New York, NY
April 28, 2003

Respectfully Submitted,

KENNETH ROSENFELD, ESQ.
Northern Manhattan Improvement Corp. Legal Services

BY: Matthew J. Chachère, Esq.
James M. Baker, Esq.,
Andrea Rodriguez, Law Graduate
Attorneys for Petitioners-Plaintiffs-Appellants
76 Wadsworth Avenue
New York, NY 10033-7000
212-822-8300

ANDREW GOLDBERG, Esq.
Attorney for Petitioner-Plaintiff-Appellant New York Public Interest Research Group, Inc.
9 Murray Street
New York, NY 10007-2272
212-349-6460

ADDENDUM:
A Comparison of Safety Standards for Lead Paint Repairs with LL 38 "Interim Controls"

	Health Code 24 R.C.N.Y. § 173.14 [2363]	**LOCAL LAW 38 , §§ 27-2056.2, 27-2056.5 [2626, 2629]**
FILING	**Detailed filing requirement for any abatement work conducted:** ! Between 24 and 96 hours prior to beginning abatement work, the owner or deleader-contractor must file a notice, containing detailed information related to the project, of commencement of the abatement. §§ 173.14(c)(1)(aa), (bb). ! Purpose is to alert agencies, so that they may inspect work practices. § 173.14(c)(1)(cc). ! Warning sign ("Lead Hazard - do not enter") to be post outside abatement area, in English and Spanish, with agency phone numbers for complaints. § 173.14(e)(2)(aa)(i)	**No filing requirements or warnings.**
LICENSING AND TRAINING	**Licensing and training requirement of deleader-contractor:** "No person shall perform an abatement who has not complied with all federal, state and other applicable law requiring training, licensing, certification, or other authorization to carry on the activities specified in this section." § 173.14(c)(2).	**No licensing or training requirements.**
RECORD-KEEPING	**Detailed record-keeping requirements:** ! The owner and deleader-contractor must keep a record for every lead-based paint abatement performed, including name and address of contractor; location and description of the project; location of lead-based paint abated; summary of abatement methods used. § 173.14(c)(3)(aa). ! The owner and deleader-contractor shall maintain all records and environmental results, including dust clearance testing results. Id. § 173.14(c)(3)(bb). ! The owner and deleader-contractor must maintain such records for seven years after the date of the completion of the abatement. Id. § 173.14(c)(3)(cc).	**Does not specify what information must be contained in the records. Significantly shorter retention period:** "[T]he owner shall maintain or transfer to subsequent owners records of any work performed pursuant to this section. Such records shall be maintained for three years . . . ." Admin. Code §§ 27-2056.2(a)(12); 27-2056.5(b)(13).

	Health Code 24 R.C.N.Y. § 173.14 [2363]	LOCAL LAW 38 , §§ 27-2056.2, 27-2056.5 [2626, 2629]
PROHIBITED PAINT REMOVAL METHODS	**Comprehensive list of prohibited paint removal methods:** "The following methods of paint removal shall be prohibited: grinding or sanding without HEPA exhaust, heat gun operating above 1100 degrees Fahrenheit, open flame gas fired torch, dry scraping, uncontained hydro-blasting, dry abrasive blasting, chemical strippers containing methylene chloride or any other substances which are known or suspected human carcinogens ...." § 173.14(d)(2)(bb).	**Only prohibits dry scraping and sanding:** "The dry scraping or dry sanding of lead-based paint or paint of unknown lead content in any dwelling unit is hereby declared to constitute a public nuisance and a condition dangerous to life and health." Admin. Code § 17-181.
ENCLOSURE AND ENCAPSULATION	**Contains detailed regulations related to enclosure and encapsulation:** ! For example, requires that enclosures of walls be done with sheet rock, panelling or other materials permitted by DoH; that window sills and other chewable surfaces be enclosed with wood, metal, rigid vinyl, or other materials permitted by DoH; that all seems be tightly sealed; and that surfaces be sealed with a primer and two coats of non-lead based paint. See, e.g., § 173.14(d)(3). ! Among other provisions, encapsulation may not be done until ordered or authorized by DoH or HPD. See, e.g., § 173.14(d)(4).	**Omits regulations dictating manner of enclosure or encapsulation.**

	Health Code 24 R.C.N.Y. § 173.14 [2363]	LOCAL LAW 38 , §§ 27-2056.2, 27-2056.5 [2626, 2629]
WORK AREA **PRE-PARATION**	**Contains detailed requirements for abatement area preparation when wet scraping, repainting, encapsulating, or enclosing surfaces.** **If under 6 ft^2 feet per room, includes:** ! specific information contained in warning signs that must be posted; ! all movable objects (such as furniture, etc.) shall be HEPA- vacuumed or washed, then moved out of abatement area or otherwise covered with 2 layers of six-mil disposable polyethylene sheeting before abatement begins, and such sheeting shall be taped with waterproof tape to the floors or bottom of walls or baseboards in order to form continuous barrier to the penetration of dust; ! before and during abatement floor adjacent to area abated will be covered with 2 layers of disposable polyethylene sheeting of at least six-mil thickness, which shall be taped with waterproof tape to floors and extend 6 inches up walls and baseboards to form a continuous barrier to the penetration of dust; ! forced-air systems within the room where abatement is to occur shall be turned off and covered with two layers of six-mil polyethylene sheeting and waterproof tape; and ! violations or conditions that may cause paint to peel, such as water leaks, shall be corrected as part of the abatement. § 173.14(e)(2)(aa). **If greater than 6 ft^2 per room:** Most of the requirements cited above, plus ! the entire floor must be covered with 2 layers of 6 mil poly ! access must be restricted and that doorways and windows be sealed. § 173.14(e)(2)(bb).	**Weaker requirements related to the preparation of abatement areas:** "[P]repare the work area by either (i) covering all moveable objects in and adjacent to the work area and covering the floor adjacent to the work area with polyethylene, plastic or equivalent sheeting or (ii) removing all moveable objects in and adjacent to the work are and HEPA-vacuuming all such objects prior to removing such object and covering the floor with polyethylene, plastic or equivalent sheeting." Admin. Code §§ 27-2056.2(a)(2); 27-2056.5(b)(3). **Local Law 38 does not:** ! distinguish between small and large areas to be abated; ! does not specify the thickness or number of the sheeting and permits plastic or "equivalent sheeting" to be used; ! does not require waterproof tape or a "continuous barrier" ! does not specify that other violations that produce peeling paint such as water leaks be corrected; and ! does not require doors and windows to be sealed off ! does not require the sealing off of forced-air systems ! does not require removing movable objects such as furniture, etc. ! does not require restricting occupants' access

	Health Code 24 R.C.N.Y. § 173.14 [2363]	LOCAL LAW 38 , §§ 27-2056.2, 27-2056.5 [2626, 2629]
DAILY CLEAN-UP	**Contains detailed requirements for daily clean-up procedures, including:** ! prohibiting polyethylene sheeting, drop cloths and other potentially hazardous materials to be accessible outside abatement area; ! disposal of large debris by wrapping it in 6-mil polyethylene, sealing it with waterproof tape, and removing it to a trash storage area; ! disposal of small debris by HEPA vacuuming or wet sweeping it and removing it in double 4-mil or single 6-mil plastic bags, which shall be sealed and stored; ! visually examine area adjacent to and to the exterior of the abatement area to ensure that no lead debris has escaped. See, e.g., § 173.14(e)(4)(aa).	**Contains weaker daily clean-up provisions:** "[T]horoughly wet-mop or HEPA-vacuum the work area and conduct a visual examination at the end of each workday to ensure that no peeling paint, paint chips, dust or other work-related debris have been released from such area." Admin. Code §§ 27-2056.2(a)(7); 27-2056.5(b)(7).
FINAL CLEAN-UP	**Contains detailed requirements related to final clean-up procedures, including:** ! may commence no sooner than one hour after abatement activities cease; ! removal of polyethylene sheeting shall be preceded by misting, placed in double four-mil or single 6-mil plastic bags, and then sealing it and disposing of it; ! all surfaces in abatement area shall be HEPA vacuumed, beginning with ceilings and proceeding down the walls to the floors and including furniture and carpets; ! all surfaces in the abatement area shall be washed down with a detergent solution, beginning with ceilings and proceeding down the walls to the floors; ! all surfaces exposed to lead dust generated by the abatement process shall be HEPA vacuumed again, starting with ceilings and proceeding down the walls to the floors, including carpets and furniture; ! inspect all surfaces to ensure that they have been abated and that all visible dust and debris has been removed. See, e.g., § 173.14(e)(4)(bb).	**Contains far less stringent requirements related to final clean-up:** ! HEPA-vacuum affected surfaces and the floors in the work area or wash area with a detergent prior to repainting §§ 27-2056.2(a)(5); 27-2056.5(b)(5). ! "[U]pon the completion of the work, provide that any remaining polyethylene, plastic or equivalent sheeting, drop cloths or other materials be removed in a safe manner, and all surfaces exposed to peeling paint, paint chips, dust or other work-related debris during the course of work shall be HEPA-vacuumed or detergent washed beginning with ceilings, then down the walls and across the floors." §§ 27-2056.2(a)(9); 27-2056.5(b)(9) ! no misting required before removing plastic sheeting, no requirements for sealing debris ! no requirement to wait at least one hour before final clean-up for dust to settle ! no requirement of using lead-specific detergent

	Health Code 24 R.C.N.Y. § 173.14 [2363]	LOCAL LAW 38 , §§ 27-2056.2, 27-2056.5 [2626, 2629]
FINAL IN-SPECTION	**Contains stringent requirements regarding final inspection:** **!** after final clean-up (and repainting if necessary), an independent 3d party who is familiar with and experienced in lead based paint abatement will conduct a final inspection; **!** inspection can occur no sooner than at least one hour after the final clean-up; **!** final inspection shall entail a visual inspection and surface dust testing pursuant to protocols approved by DoH; **!** 3 wipe samples must be taken (one from a window well, one form a window sill, and one from the floor) and a 4th wipe sample must be collected and tested from the floor in a room or area adjacent to the abatement area. § 173.14(e)(4)(cc). **The clearance tests must pass set levels or else the clean-up and testing process must be repeated.** § 173.14(e)(4)(dd). **Clearance test results must be provided to tenants upon request.** Id.	**No requirement that final inspections be conducted by an independent third party.** **No requirement that dust test results pass minimum levels for clearance and that clean-up and retesting recur.** **Requires "surface dust tests" only where landlords correct a violation. However, the law does not require such tests for abatement work conducted on walls and ceilings -- only for abatement work conducted on an interior wood trim, door or window.** **Even where dust tests required: in some cases only 1 wipe test, in others, only 3 wipe tests (omits test outside of abatement area to check on the containment)** **No waiting period required for dust to settle before testing** **No requirement that dust test results be provided to tenants upon request.** § 27-2056.5(b)(12)