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To be argued by:
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NEW YORK COURT OF APPEALS

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 ROADBY 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 FIGUEROO 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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STATEMENT OF CORPORATE RELATIONSHIPS

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.; El Puente, Inc.; Make the Road by Walking, Inc.; New York City Environmental Justice Alliance, Inc.; South Bronx Coalition for Clean Air, Inc.; and Queens League of United Tenants, Inc. are non-profit corporations with no parent companies and no subsidiaries or affiliates.

Greater New York Labor-Religion Coalition and East New York United Front are unincorporated associations.

PRELIMINARY STATEMENT

In June 1999, in a politically charged and hurried manner, the New York City Council (Council) enacted Local Law 38 (LL 38), [439]¹ repealing Local Law 1 of 1982 (LL1) [2394], and limiting the scope of Local Law 50 of 1972 [2392], and New York City Health Code § 173.14 [2363]. This legislation radically revised the prior local regulatory scheme for the control and reduction of environmental hazards to children from lead paint and lead dust. This case concerns whether the Council's actions complied with the State Environmental Quality Review Act (SEQRA); N.Y. Environmental Conservation Law (ECL) § 8-0101 et seq.

SEQRA seeks to inject environmental considerations into decision-making. To this end mandates that government decision makers — including local legislatures — follow a two-step process for evaluating proposed actions. First, agencies must make a threshold inquiry as to whether “the action may include the potential for at least one significant adverse environmental impact,” 6 N.Y.C.R.R. § 617.7(a)(1) (emphasis added), using 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) and 6 N.Y.C.R.R. § 617.7(b) (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). If the answer is yes, the agency issues a positive declaration and prepares an environmental impact statement (EIS). If the answer is no, the agency issues a negative declaration and the SEQRA process ends, but negative declarations must meet SEQRA's detailed requirements and the H.O.M.E.S. test.

There is no dispute that children's environmental exposure to lead, and in particular to lead dust, has devastating, long-term and irreversible adverse effects. Juarez v. Wavecrest

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

Management Team Ltd., 88 N.Y.2d 628, 640-41 (1996); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64, 71-73 (1st Dep't 1996) [“WABBA v. Giuliani”].

There is likewise no genuine dispute that LL 38's enactment had adverse environmental impacts, since, *inter alia*, it deregulated lead dust — the primary pathway for childhood lead poisoning — and completely eliminated protections for six-year-olds. And while LL 38 mandates that landlords remove peeling lead paint, it permits them to do so with weaker controls for lead dust than under prior law. As a result, 30 public health experts — including the foremost experts in childhood lead poisoning in the nation and three former presidents of the American Public Health Association — opposed LL 38 as inconsistent with current scientific understanding. Not one credentialed independent expert supported it. [111-225, 231-69, 282-329, 339-93, 536-84, 591-93, 595-96, 603-06, 738-40, 746-47, 757-64, 1541-61, 1593-97, 1604-10, 1729-37, 2755-56, 2759-61, 2768-70, 3538-49]

And lastly, there is no dispute that the negative declaration here failed to identify — let alone analyze — lead dust as an area of environmental concern, as well as many of the other adverse changes wrought by LL 38. Thus, under the H.O.M.E.S. test, it could not pass muster, and on this basis the IAS court below invalidated it and LL 38.

The Appellate Division reversed, and it is submitted that the court's decision misapprehended the law and record. The court incorrectly found the issue to be a choice between what it characterized as LL 1's “total removal approach” and LL 38's “containment” approach. [3744] (citations omitted).² The Appellate Division then proclaimed — without

2. The proper distinction is that LL 1 requires the permanent removal or covering of all lead paint hazards — embracing (i) peeling lead paint, (ii) intact lead paint on friction and impact surfaces (which create lead dust), and (iii) lead-contaminated dust — while LL 38 only requires the repair of peeling lead paint. See *infra* note 46, p 54.

support in the record — that it is “undisputed ... that moving from abatement to containment reduces environmental threats to human health.” [3744-45]. And relying on this paradigm, the Appellate Division proceeded with the premise that the many discrete adverse impacts of LL 38 could be overlooked or subordinated to the overall legislative wisdom and merits of LL 38.

However, this case is not about the whether LL 38 is a good or bad law. Clearly, legislative bodies can and do make political choices about the merits of legislation; and just as clearly, courts should not.

Rather, this case concerns a much simpler and straightforward issue: whether the Council complied with SEQRA’s procedural and substantive requirements. The Appellate Division was able to conclude that it did only by overturning the long established principles of SEQRA review enunciated in the H.O.M.E.S. test. It did so by creating three novel exceptions: (1) legislation that is thought by a reviewing appellate court to be broadly beneficial need not be examined in all of its potentially harmful particulars; (2) a local legislature’s public hearings and questioning of witnesses can substitute for compliance with SEQRA’s procedural requirements; and (3) a governmental entity need not strictly comply with SEQRA when dealing with an environmental hazard not of its own making. A leading authority on SEQRA jurisprudence recently pronounced these unprecedented departures from H.O.M.E.S. and a quarter century of SEQRA jurisprudence “incomprehensibl[e]”:

In New York City Coalition to End Lead Poisoning v. Vallone, 293 A.D.2d 85 ... (1st Dep’t 2002), the court incomprehensibly reversed a lower court judgment ... that had directed an EIS. The local law at issue substantially amended an earlier law, reducing inspection requirements by apartment-house owners and replacing abatement measures with containment. It also narrowed both the definition of lead-based paint and the class of children to be protected under the provision. These surely constitute significant impacts, as the trial court had found. Yet

the Appellate Division, while scarcely disputing the severity of the possible impacts, ruled the Council's hearings and legislative process met the Act's requirements.

This flies in the face of decisions mandating meaningful compliance with SEQRA, such as Rye Town [King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 482 (2d Dept. 1981), appeal dis'm, 56 N.Y.2d 985 (1982)] and West Branch Conservation Ass'n [Inc. v. Planning Bd. of Town of Clarkstown, 207 A.D.2d 837, 841 (2d Dept. 1994), mot. for lv. to app. den., 84 N.Y.2d 1019 (1995)].... The Legislature explicitly made SEQRA applicable to municipal legislative bodies, see § 8-0105(2) ("Local agency means any local ... governing body"), as the courts have consistently held. If the routine legislative processes of committee hearings and debate are held to satisfy SEQRA, then this court has itself legislated away a major slice of what the State Legislature so clearly mandated, and deprived the citizens of the Act's protection. Ironically, the court rebuffed a claim by the City that SEQRA did not apply to local laws, but then went on to effectively exempt this one anyway. (emphasis added)

Weinberg, Practice Commentaries, McKinney's Cons. Laws of NY, Book 17½, ECL C8-0109:3 (2003 Cumulative Pocket Part, at 30) (herein Weinberg, Practice Commentaries).³

The Appellate Division's unprecedented rationales seriously undermine the efficacy of SEQRA. For example, the Council failed to provide a complete written elaboration identifying all potential adverse impacts and the reasoning to support its conclusion that there were no potential adverse environmental consequences. See 6 N.Y.C.R.R. § 617.7(b)(4) (agency must

3. Professor Weinberg continued:

The Court relied heavily on the City's insistence that "removal of intact lead-based paint poses a greater public health threat than containment." This was not in dispute, and in no way justifies the City's defiance of SEQRA's mandate when significantly undermining its own lead containment law.

Id. at 30-31. In fact, as discussed in the Argument at Point III.A (p. 55), there was and is significant dispute as to whether "interim controls" — i.e., in essence leaving in place toxic lead painted surfaces in homes where young children reside — are in the long run a poorer choice than abatement of lead-based paint using appropriate safety controls. But this discrepancy does not detract from Professor Weinberg's ultimate conclusion.

“set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation”). With neither a written identification of potential adverse impacts nor a written “reasoned elaboration,” all that remains is the bare municipal legislative process — but not the SEQRA process.

Petitioners-Plaintiffs-Appellants (petitioners) urge this Court to apply the H.O.M.E.S. test, to make no exception for the New York City Council which could have complied with the procedural requirements of SEQRA, and to invalidate the negative declaration supporting LL 38.

QUESTIONS PRESENTED

Question 1:

Did the New York City Council properly issue a SEQRA negative declaration excusing the preparation of an EIS regarding Local Law 38 — a controversial measure which, among other things, deregulated lead dust as an environmental hazard, eliminated all protections for six year olds, and significantly relaxed safe work rules?

The Appellate Division upheld the validity of the Council’s negative declaration and held that no EIS was required.

Question 2:

May a court excuse substantial compliance with the H.O.M.E.S. test — according to which a negative declaration must identify all relevant areas of environmental concern, thoroughly analyze them, and set out a written reasoned elaboration for the determinations made — on the basis of a court’s own conclusions regarding the overall beneficial aspects of the legislation?

The Appellate Division’s decision, in effect, excused full compliance with the H.O.M.E.S. test because it concluded that any legislative scheme which relied upon “containment” of some lead hazards was necessarily preferable to Local Law 1’s full abatement scheme.

Question 3:

Can the deliberations of a local legislature substitute for the minimal contents of a negative declaration required under the H.O.M.E.S. test?

The Appellate Division’s decision indicates that the courts can look instead to the record of legislative deliberations to determine the sufficiency of SEQRA consideration and

cure deficiencies in an otherwise inadequate negative declaration.

Question 4:

Can an inadequate negative declaration under the H.O.M.E.S. test be excused when a local government acts concerning toxic substances created by third parties?

The Appellate Division's decision indicates that governmental agencies are not fully subject to SEQRA when dealing with environmental hazards not of their own creation.

PROCEDURAL HISTORY

On July 15, 1999, LL 38 was signed by the Mayor and became effective November 12, 1999. On October 14, 1999, petitioners moved by order to show cause pursuant to Article 78 and C.P.L.R. § 3001 for a judgment annulling LL 38. In an October 11, 2000, decision [15a] the IAS court (York, J.) held the enactment violated SEQRA and entered judgment nullifying LL 38 on February 22, 2001.

Respondents-defendants-respondents (respondents) appealed from the judgment to the Appellate Division, First Department. By leave of the Appellate Division, two amici curiae briefs were filed in support of petitioners by the State of New York and by a group of 24 physicians, medical researchers, and other public health experts on lead poisoning, and one amici curiae brief was filed in support of respondents by four real estate lobby organizations. On March 26, 2002, the Appellate Division reversed the IAS court and reinstated the negative declaration and LL 38. New York City Coalition to End Lead Poisoning (NYCCELP) v. Vallone, 293 A.D.2d 85 (1st Dep't 2002).[3736]. On April 17, 2002, respondents served by regular mail notice of entry of the Appellate Division's decision and order.[3759] On May 22, 2002, petitioners timely served a motion to the Appellate Division pursuant to CPLR

§ 5602(a)(1)(i), for permission to appeal to this Court. On July 25, 2002, the Appellate Division denied this motion, NYCCELP v. Vallone, 2002 N.Y. App. Div. LEXIS 7706 (1st Dep't 2002),[3761] and on August 2, 2002, respondents served by mail notice of entry of the Appellate Division's order denying leave to appeal.[3763] On September 6, 2002, petitioners timely served a motion to this Court for leave to appeal pursuant to CPLR §§ 5513(b),(d) and 5602(a)(1)(i) and § 500.11 of this Court's Rules of Practice; said motion was granted on November 21, 2002. NYCCELP v. Vallone, 99 N.Y.2d. 502.

JURISDICTIONAL BASIS FOR APPEAL

This Court has jurisdiction of this appeal pursuant to Article VI, § 3(a) of the New York State Constitution and CPLR § 5602(a)(1)(i). The Appellate Division's March 26, 2002, decision and order, which reversed the IAS Court's grant of the Article 78 petition, constituted a final determination of the action as it completely disposed of the case. This case originated in Supreme Court, one of the courts specified in CPLR § 5602(a)(1). This Court has jurisdiction to review the questions of law presented herein pursuant to CPLR § 5501(b).

STATEMENT OF THE CASE

A. Exposure to the Environmental Hazards of Lead Paint and Lead Dust Can Permanently Harm Children.

Lead paint is the major source of lead poisoning in children, [536, 539, 544, 548, 580, 1009-10, 1035-54]; Gilbert Aff. [343],⁴ and as this Court has recognized, “[c]hildhood lead paint poisoning may be the most significant environmental disease in New York City.” Juarez, 88 N.Y.2d at 641 (citation omitted); see also United States Department of Health & Human Services, Centers for Disease Control and Prevention (CDC), Strategic Plan for the Elimination of Childhood Lead Poisoning (Feb. 1991) at xi (“the most common and societally devastating environmental disease of young children”); E. Mauss Aff. [164]; Landrigan Aff. [116-17]. Lead-induced injuries include “nervous ... system disorders, delays in neurological and physical development, cognitive and behavioral changes, and hypertension, [and other brain damage,] most of which are irreversible.” WABBA v. Giuliani, 167 Misc. 2d at 984, aff’d, 223 A.D.2d at 66.

Children are at risk of lead poisoning, particularly from birth until at least age seven, because their normal hand-to-mouth activity causes frequent ingestion of lead particles. Needleman Aff. [193] In addition, in their early developmental stages children’s brains and nervous systems are particularly vulnerable. E. Mauss Aff. [162-64, 175-76]. Environmental factors cause older children to be at risk as well. Rosen Aff. [304]; Needleman Aff. [193]; E. Mauss Aff. [162-64], and children continue to be at risk through the age of seven and beyond.

4. Affidavits supporting the Petition are referenced as follows: Landrigan Aff. (Philip Landrigan, M.D.), Lanphear Aff. (Bruce P. Lanphear, M.D.), I. Mauss Aff. (Irving Mauss, M.D.), Needleman Aff. (Herbert Needleman, M.D.), Rosen Aff. and Rosen Reply Aff. (John F. Rosen, M.D.), Gilbert Aff. (Charles E. Gilbert, Ph.D.), E. Mauss Aff. (Evelyn Mauss, Sc.D.), Newman Aff. (David Newman, M.S.), Olmsted Aff. (Edward Olmsted, C.I.H.). Exhibit references are indicated as “Ex. ##.”

[79, 95, 163, 174-76, 219, 304-05] Ingestion of lead particles by pregnant women also causes damage to the developing fetus. See Rosen Aff. [300].⁵ Research has shown that lead's damage to children's mental and physical development is irreversible and permanent. [1009, 1032-35]⁶

5. Moreover, lead is absorbed into the bones, and studies indicate that the accumulated stored lead from a mother's earlier exposures (even from childhood) can become demineralized into the blood and passed on to her child either during pregnancy (as blood lead readily crosses the placenta) or via breast feeding. Rothenberg, Khan, Manalo, Jiang, Cuellar, Reyes, Acosta, Jauregui, Diaz, Sanchez, Todd, Johnson, Maternal Bone Lead Contribution to Blood Lead During and after Pregnancy, 82 *Environmental Research* (1) 81-90 (Jan. 2000); Goyer, Transplacental Transport of Lead, 89 *Environmental Health Perspectives* 101-105 (Nov. 1990); Tellez-Rojo, Hernandez-Avila, Gonzalez-Cossio, Romieu, Aro, Palazuelos, Schwartz and Hu, Impact of Breastfeeding on the Mobilization of Lead from Bone, 155 *American Journal of Epidemiology* (5) 420-428 (2002).

There are long term impacts on older children and adults as well. See, e.g., Lustberg, Silbergeld, Blood Lead Levels and Mortality, 162 *Ach. Intern. Med.* 2443-2449 (Nov. 2002) (individuals with elevated blood lead levels experienced significantly increased circulatory and cardiovascular mortality, and lead exposure may increase susceptibility to cancer); Schwartz, Stewart, Bolla, Simon, Bandeen-Roche, Gordon, Links, Todd, Past Adult Lead Exposure Is Associated with Longitudinal Decline in Cognitive Function, 55 *Neurology* 1144-50 (2000).

6. [T]he data do not indicate that lead-induced cognitive defects are reversible. Primary prevention and preventing additional increases in blood lead levels among children whose blood lead levels are high remain the only effective means of dealing with lead poisoning.

Liu, Dietrich, Radcliff, Regan, Rhoads, Rogan, Do Children with Falling Blood Lead Levels Have Improved Cognition? 110 *Pediatrics* (4) 787-791, at 791 (Oct. 2002)

Childhood lead poisoning imposes substantial costs on individual children, their families, and society. The heavy toll of meeting lead-poisoned children's special needs has been extensively documented. New York City Public Advocate, Lead & Kids: Why are 30,000 NYC Children Contaminated?, Feb. 2, 1998, at 27- 28, 53-55 [1032-33, 1058-60]. Schwartz, Societal Benefits of Reducing Lead Exposure, 66 *Environmental Research* 105-124 (1994). The societal costs of childhood lead poisoning dwarf those of other pediatric environmental illnesses such as asthma and cancer. Researchers estimate the total annual costs of childhood lead poisoning in the United States to be \$43.4 billion. Landrigan, Schechter, Lipton, Fans, Schwartz, Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs of Lead Poisoning, Asthma, Cancer, and Developmental Disabilities, 110 *Environmental Health Perspectives* (7) 721-728 (July 2002).

Experts now consider lead dust to be the main pathway for ingestion of lead by children. Gilbert Aff. [344]; Lanphear Aff. [252-53]; [282, 285-89, 291, 329, 544, 548, 580]. Lead dust is invisible to the naked eye and highly toxic even in very small quantities. [536, 541] Indeed, in 1999 the U.S. Department of Housing and Urban Development (HUD) lowered its safety standards to only 40 micrograms (millionth's of a gram) per square foot of floor area ($\mu\text{g}/\text{ft}^2$), 64 F.R. 50140, 50181 (1999), an amount less than half the mass of a single particle of coffee sweetener.[1518]; see also Lanphear Aff.⁷ [255]; Olmsted Aff. [234].⁸

Lead dust can be inhaled or swallowed when present on contaminated surfaces, such as children's toys, hands, and food, and is generated not only from peeling or chalking lead paint on aging or damaged structures, Rosen Aff. [296-97], but also from normal abrasion of intact painted surfaces, such as window and door frames. United States Department of Health & Human Services, CDC, Preventing Lead Poisoning in Young Children (1991) at 18; Rosen Aff. [296]; [549-50].

Lead paint on impact surfaces such as baseboards and door frames generates lead dust through regular wear and tear. Rosen Aff. [297], [570]. Lead-based paint on accessible surfaces such as window sills poses a great risk to toddlers who explore the world through

7. Dr. Lanphear is an Associate Professor of the Department of Pediatrics and the Director of the General Pediatric Research Fellowship Training Program at Children's Hospital Medical Center and the University of Cincinnati. He has devoted much of his professional career to lead poisoning prevention, serving as the scientific consultant to the National Center for Lead-Safe Housing and chairing HUD's Committee on Lead-Contaminated House Dust and Soil with Children's Blood Lead Levels from 1995 to 1998. [251] He has published original research and written extensively on lead poisoning, with a particular focus on lead-contaminated dust. [252]. HUD's 1999 standards relied extensively on Dr. Lanphear's research. See 64 F.R. 50140, at 50178-83, 50199.

8. Edward Olmsted, C.I.H., is a Certified Industrial Hygienist and Accredited Lead-based Paint Inspector. [233].

“mouthing.” Rosen Aff. [296] Lead paint on surfaces breaks down over time and also generates lead dust. Id. [296-97] Even intact lead-based paint can generate lead dust through regular wear and tear. Id. Because of lead’s toxicity, unsafe lead paint repairs can generate dangerous levels of lead dust and create extremely hazardous conditions. Gilbert Aff. [347], [536, 542, 570-71, 576] Thus, even when covered by several subsequent coats of lead-free paint, lead paint transforms from a potential hazard to an actual hazard when the paint begins to deteriorate, the surface it rests on becomes unsound, or it is broken, abraded, scraped or sanded.

Because so many dwellings were erected before 1960, when the use of lead paint was banned in New York City, lead paint “continues to cover the walls of two out of three City dwellings,” Juarez, 88 N.Y.2d at 641, and “its widespread use thus renders lead poisoning a continuing threat to the health of young children in New York City, especially those in older and poverty ridden neighborhoods.” Id. (citing New York City Coalition to End Lead Poisoning v. Koch, 138 Misc.2d 188, 189 (Sup. Ct. N.Y. Co. 1987), aff’d, 139 A.D.2d 404 (1st Dep’t 1988)(NYCCELP I)). Indeed, the problem of lead paint is particularly acute throughout New York State:

Because the concentration of lead in paint steadily declined before 1978, older homes are more likely to have paint with higher concentrations of lead. The risk for lead exposure associated with this source is greatest in homes built before 1950; in New York, both the number (3,401,416) and proportion (47%) of housing units built before 1950 are greater than any other state.

“Children with Elevated Blood Lead Levels Attributed to Home Renovation and Remodeling Activities — New York, 1993-1994,” in CDC, Morbidity and Mortality Weekly Report, (Jan. 3, 1997) at 1122 (emphasis added). According to the New York State Division of Housing Conservation and Renewal (DHCR),

approximately 6 million (or 88 percent) of the State’s housing units were built before 1980 and may, therefore, be contaminated with lead-based paint.

...
... 59 percent of all units built before 1940 are inhabited by households with incomes classified by HUD as “low” or “very low”.... Low and very low income households also occupy 49 percent of all units built between 1940 and 1979.

DHCR, New York State Consolidated Plan: Federal Fiscal Years 1996-1997, at 71-72.

Within New York City, an estimated 2,000,000 housing units contain some lead paint, [2550], and the City estimated that children under 6 live in 323,000 of them and are thus exposed to this potentially devastating disease. [2551] Low-income families occupy an estimated 174,000 of these units — in presumably the most deteriorated housing conditions. Id. In the year 1995 — the most current data available when the Council acted — the City estimated that over 30,000 of these children were poisoned by lead paint. [2551]⁹

B. Regulation of Lead Hazards in New York City

1. Pre-Existing Local Laws on Lead Hazards

Prior to enactment of LL 38, an extensive set of laws already existed in New York City to prevent lead poisoning. These laws, in order of promulgation, consisted of: Health Code § 173.13; Administrative Code § 27-2126; Administrative Code § 27-2013(h) (Local Law 1); and Health Code § 173.14.

Health Code § 173.13,¹⁰ [2375] banned the use of lead paint on the interior surfaces of dwellings in New York City on January 1, 1960. A 1970 amendment, § 173.13(d)(2), [2377]

9. See also New York City Public Advocate, Lead & Kids: Why are 30,000 NYC Children Contaminated?, Feb. 2, 1998, at 3 (Ex. 64). [998, 1008]. At least 81% of highly lead poisoned NYC children were known to be African-American, Latino, or Asian/Pacific. [1009].

10. The Health Code is published in Title 24 of the Rules of the City of New York.

mandated that where the Department of Health (DoH)¹¹ received a report that a child's lead poisoning had already occurred, DoH must inspect and order the dwelling owner immediately to remove or permanently cover all lead paint; if the owner failed to comply within 5 days, DoH had to request the Department of Housing Preservation and Development (HPD) to correct the lead paint conditions. [2376-77].

Admin. Code § 27-2126, [2392] enacted as Local Law 50 of 1972, [2398] added a mandate that whenever a landlord failed to remove a DoH lead violation, DoH — within 16 days of the complaint or inspection (whichever occurred first) — must request HPD to correct, and HPD must do so within 18 days thereafter. Together, § 27-2126 and Health Code § 173.13 thus required the City to insure the correction of all lead paint violations in the home of any lead-poisoned child, in 1- and 2- family homes as well as in multiple dwellings, within 34 days after discovery of lead poisoning.

Admin. Code § 27-2013(h), [2383] enacted as Local Law 1 of 1982 (LL 1), [2395] was a preventive measure designed to abate environmental hazards before irreversible damage to children occurred, and unlike the prior laws, LL 1 did not require a child's poisoning or a City inspection to trigger the duty to abate lead paint. It required the owner of a multiple dwelling unit occupied by a child under age seven to remove or permanently cover all lead paint on specified interior surfaces “in a manner approved by” HPD. [2383] LL 1's lead hazard definition encompassed not only peeling lead paint but also presently “intact” lead paint on friction, impact, and child accessible surfaces that can constantly generate toxic lead dust or can otherwise expose children. If a violation was issued by HPD, the owner had to correct

11. DoH has now been renamed the Department of Health and Mental Hygiene (DoHMH) after a revision to the City Charter that became effective July 1, 2002.

within 24 hours, see Admin. Code §§ 27-2013(h)(3), 27-2115(c)(3), [2383, 2385-86], but landlords had a duty to abate whether or not the City had cited the violation. See Admin. Code § 27-2013(h)(1); see also Juarez, 88 N.Y.2d at 647; Valdez v. Sherman Estates, Inc., 224 A.D.2d 240, 241 (1st Dep’t 1996).

Health Code § 173.14, [2363] promulgated in 1993 as a result of orders in the pending New York City Coalition to End Lead Poisoning v. Koch class action (herein “NYCCELP”) discussed infra, prescribed safe work practices for activities disturbing lead paint. These standards followed federal guidelines and incorporated state of the art safety measures needed to prevent dispersing toxic lead dust during such work, and addressed the multiple hazards posed by lead dust through, inter alia: the safe disposal of hazardous materials; the prevention of lead dust contamination of the premises, its contents, and surrounding area; the proper licensing and training of lead abatement workers; and the safe clean up after lead paint work including stringent dust clearance testing to ascertain that no hazardous lead dust remained.

To fully set forth the full scope of prior obligations under New York City law, a brief review is needed of the various decisions and orders in the NYCCELP class action, which was commenced 17 years ago and sought proper enforcement of the City’s lead paint laws because there was “ample evidence that municipal defendants [did] not adequately carry out their duties under [§§ 2013(h) and 173.13].” NYCCELP I, 138 Misc.2d at 193, aff’d, 139 A.D.2d 404; see also id., 138 Misc.2d at 191-92 (denying motions to dismiss because while “the method of enforcement may be discretionary, enforcement is not.”)

In NYCCELP II, NYLJ July 21, 1989, at 18 (Sup. Ct. N.Y. Co.) [2432]; Order (Sup. Ct. N.Y. Co. Aug. 2, 1990) [2454], aff’d, 170 A.D.2d 419 (1st Dep’t 1991), the court found the City’s interpretation of LL 1 — as limiting its inspection and enforcement duties regarding lead

paint solely to peeling painted surfaces and solely to pre-1960 buildings — contrary to the law’s plain meaning. The court ordered the City to enact: regulations to enforce LL 1 in line with this decision; regulations on safe work practices for abatement of lead hazards; and regulations for relocating children and pregnant women during abatements. [2460-61].

When — after four years — the City failed to enact any of these regulations, the court imposed continuing contempt penalties equal to the monthly rent of one of the plaintiffs. NYCCELP III, NYLJ May 12, 1993, at 29 (Sup. Ct. N.Y. Co.) [2463]; Order (Sup. Ct. N.Y. Co. Mar. 30, 1994) [2471], app. withdrawn, Stip. (Feb. 24, 1995). Two years later, the Appellate Division declared that the City had again “failed to fulfill that mandate in numerous respects in direct violation of a lawful order.” NYCCELP IV, 216 A.D.2d 219, 220 (1st Dep’t 1995). After the City again failed to enact the regulations required by NYCCELP II regarding relocation and timely inspection and enforcement of all lead paint conditions, the court found contempt again and certified a class. NYCCELP VI, dec. (Sup. Ct. N.Y. Co. Dec. 14, 1995) [2479], Order (May 1, 1996) [2499], aff’d as modified, 245 A.D.2d 49, 50-51 (1st Dep’t 1997).

The City was yet again held in contempt in 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), because, inter alia, 1) the recently promulgated safety procedures (Health Code § 173.14) had been made applicable only to violations cited by DoH and HPD (rather than all lead hazards, as required by NYCCELP II), 2) still failed to provide for relocation during lead abatements, and 3) because the City had sought to weaken Health Code § 173.13(d) to limit inspections — in the case of already lead poisoned children — to only peeling paint.

In October of 1998 — nearly a decade after NYCCELP II — the City proposed revisions of HPD’s regulations (City Record, Oct. 9, 1998, p. 3505) and Health Code

§§ 173.13 and 173.14 (City Record, Oct. 15, 1998, p. 3544), for the stated purpose of complying with the various NYCCELP orders. At a December 16, 1998, oversight hearing of the Council’s Housing Committee concerning those regulations, the Health Commissioner and the HPD Commissioner stated that these regulations would go into effect in early 1999.

2. Local Law 38 of 1999

a. The Enactment Process

In January 1999, in response to the request by the HPD and Health Commissioners to the Council to consider revising LL 1 as an alternative to the new regulations taking effect, Pet. [54-55] the parties in the NYCCELP class action entered into a series of voluntary stays of that litigation “to assist the legislative process to proceed calmly and expeditiously.” Pet. [55-56] In response to the Commissioners’ request, the City Council leadership by April 13 began to draft and by May 3 informally circulate information, [15m, 56, 396-97] on new legislation that would completely overhaul the pre-existing lead paint laws. [56-60]

Subsequently, leading childhood lead poisoning experts and other health professionals called on the Council leadership to provide them and the public the opportunity to participate in a thorough and open review of any proposed new legislation on lead paint. Pet. [57-62]; I. Mauss Aff. Ex. A [223-25]; E. Mauss Aff. [161, 174]. These experts received no response. [15m, 58]. Instead, the Council leadership initiated an effort to enact legislation as quickly as possible,¹² successfully managing to keep petitioners, health experts and other child health advocates off balance and in the dark about the timing of the legislative process and the substance of the final proposal. See, e.g. Pet. [56-61]; [674-75]; Landrigan Aff. [113-14];

12. See, for example, Editorial, Get the Lead Dust Out, N.Y. Times, June 21, 1999 [810] and various other news articles in the record [805-21], urging the City Council to carefully address all lead paint hazards, rather than to act precipitously in response to political pressures.

Needleman Aff. [191-92]; E. Mauss Aff. [161]. Beginning with May 28, 1999, a “draft” bill was first informally circulated, then during the next three weeks more than one version circulated simultaneously. [15m, 58-60, 396, 401, 1100, 1122].

As the IAS court emphasized, [15n], not until the afternoon of Friday, June 18, [60, 396-97] did the Council leadership print [1172] and later release an unnumbered draft proposed local law. [1148]. It then scheduled a public hearing for the morning of the next business day (Monday, June 21) before the Housing Committee, chaired by Deputy Council Speaker Archie Spigner (listed as the sole sponsor). [60, 685, 1631-32, 1658-59, 1724-26, 1728, 1730].

Despite the extremely short notice of the hearing, [15n], several experts in childhood lead poisoning and lead dust control issues appeared on June 21 and “raised substantive concerns,” id., warning that the proposal would increase poisoning of children due to exposure to toxic lead dust and paint chips. Test. of Dr. Rosen [1593-95];¹³ Test. of Dr. E. Mauss [1604-09].¹⁴ Written comments of numerous other public health experts on lead poisoning were also submitted. Exs. 14, 26-30 (and subexhibits contained therein) [565-66, 608-94]; Pet. [61-62].

Not one independent medical doctor or health expert testified in favor of the proposal at the

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

14. Evelyn A. Mauss, Sc.D was an Adjunct Professor of Physiology at New York University. For more than 40 years she was involved in research that included issues of childhood lead poisoning. She authored many scientific papers and between 1972 and 1978 was a consultant on lead poisoning for the New York State Attorney General. [161-79]. Dr. Mauss died a few days before this brief was completed.

hearing or subsequently, [62], and all who testified or offered written comments opposed it.¹⁵

Also, various public officials testified to their concerns about the proposal's adverse environmental health effects, including then- City (now State) Comptroller Alan G. Hevesi [1489-95]; see also Ex. 35 [729-33], and even the City's Health Commissioner. [1430, 1440]. Comptroller Hevesi complained as well of the lack of time to analyze a proposal released only the prior business day, [1484], and that balancing the many important considerations could not be done on "a draft that is introduced on Friday and passed on Wednesday." [1505]. He urged that the Council not rush enactment of the proposal. [750-51, 1485-86]. At the conclusion of the hearing, amendments were made to the draft "that very same day." [15n].¹⁶

After Council staff made "selected telephone calls" to some interested parties on June 23, a second hearing was held on the morning of June 24 on this revised (and still unnumbered) draft, [15o, 66, 1755-2005]. The testimony given at the June 24 hearing was again overwhelmingly negative, [15o, 68-69], with many speakers testifying against the revised proposal's failure to adequately protect children, including Manhattan Borough President C. Virginia Fields, [1819-23], Deputy City Comptroller Steven Newman, [1823-33], and Megan Charlop, director of Montefiore Medical Center's Lead Safe House. [1837-47]. Again no

15. Other experts were unable to testify on such extremely short notice, [161, 218], such as Dr. Philip J. Landrigan, M.D., who had grave concerns about the proposed local law and had urged an opportunity for careful and thorough review of any proposed new legislation. Landrigan Aff. [113-14]. Dr. Landrigan has been, since 1993, Chair of the New York State Advisory Council on Lead Poisoning Prevention, created pursuant to NY Public Health Law § 1370-b. Dr. Landrigan is a pediatrician and Chair of the Department of Community and Preventative Medicine at Mount Sinai School of Medicine. For more than 30 years he has undertaken research into childhood lead poisoning. He is the author of over 100 scientific papers. [128-58].

16. In fact, the 8 and ½ hour hearing concluded at 7:20 pm, [1748], and the amendments were completed and a new draft, [1242], was printed just 85 minutes later, [1269], with minor changes from the prior draft. Pet. [63-65]; [2777].

experts testified in favor of the proposal [69]; indeed, while the Health Commissioner sent a letter supporting the new proposal, neither he nor anyone from his agency appeared, [69], to the dismay of council members who had unanswered questions about his position and the proposal. [1804-07]. One member suggested several amendments, [1961- 82], “which ... might have substantially eliminated the potential adverse environmental hazards identified at the hearing,” [15o], but these amendments were defeated. [1982-88].

Near the close of public testimony at the June 24 hearing, the Council staff delivered a negative declaration [88-89, 417] to the Committee members. The document, dated June 24, 1999, was signed only by a counsel to the Committee [421] and asserted that the proposed local law would have no significant effect on the environment and that no EIS was required.[419] The proposed negative declaration was not provided to the public prior to or during the hearing, nor was any notice of it provided; consequently, members of the public had no opportunity to prepare and provide testimony on the document.¹⁷ No mention or discussion of the proposed negative declaration occurred before the council members’ vote on amendments to the bill [1961-82]. The committee’s review in its entirety consisted of the following:

CHAIRPERSON SPIGNER: Okay, let’s move on now to the negative declaration, which is a part of the procedure I am told we must comply with. . . . Let me turn to Terzah Nasser, Counsel for the Committee.

MS. NASSAR: Okay, the next vote will be on a resolution . . . [on] which we will shortly have a vote, [that] local law [38] . . . will not have a significant adverse impact on the

17. SEQRA requires agencies “[a]s early as possible in the formulation of a proposal for an action ... [to] make an initial determination whether an [EIS] need be prepared” ECL § 8-0109 (4) (emphasis added); see also 6 N.Y.C.R.R. § 617.6(a)(1). It also requires agencies to “make every reasonable effort to involve . . . the public in the SEQR process,” 6 N.Y.C.R.R. § 617.3(d).

environment. There are copies of the negative declaration available for members who wish to review it. Actually, it has been on your desks. Thank you.

CHAIRPERSON SPIGNER: As has been described, a roll call now on the negative declaration, which was explained to you by counsel. Roll call, please.

[1988-89]. The Committee approved the proposed negative declaration by a vote of 7 to 2

[1989-91]. The bill was then immediately approved by the Committee by the same vote,

although several members argued that more time was needed to consider it carefully before it was enacted and objected to the rushed nature of the process [1992-95].

Over the next six days, many public health and medical experts,¹⁸ advocacy organizations, public officials, and others wrote to council members urging them to reject the proposal because it would weaken the protections for children from exposure to toxic lead. Pet. [68, 71-72]; [541-42, 562-63, 756-803].

Nonetheless, the full Council, at a stated meeting held on June 30, undertook its environmental review obligations of the proposed law (by then designated “Preconsidered Int. No. 582.”) in much the same manner as the Committee. Although several council members identified specific health hazards that would be created by the proposed law, [2115-41, 2166-82, 2197-203, 2208-11, 2216-17, 2222-24, 2234-35, 2237, 2244, 2268, 2271-72, 2277] these concerns were not addressed beyond general assurances by other council members and leaders that the legislation at hand was but a starting place and any resulting health hazards or implementation problems would be addressed if and when they developed. [2070, 2206-08,

18. See, e.g., June 28, 1999, letter [541-42] from George Friedman-Jimenez, M.D., Medical Director of the Bellevue/NYU Occupational and Environmental Medicine Clinic, and Stephen M. Levin, M.D., Medical Director of the Mount Sinai Irving J. Selikoff Center for Occupational and Environmental Medicine; June 29, 1999, letter [760-61] from Joel Shufro, Ph.D., Executive Director, New York Committee for Occupational Safety and Health

2220, 2226, 2238, 2243, 2245-46, 2250-51, 2256-57, 2263] Amendments to mitigate some of the identified problems were defeated on a roll-call vote, “with several members either voting against [the proposed amendments] or abstaining only because they had not had adequate time to review them.” [15p], see also [2152-53]. The negative declaration “was passed as an adjunct to the bill without any discussion, or even acknowledgment as a separate matter to be considered.” [15q], see also [2241-80].

The Mayor held a public hearing on the proposal on July 15, 1999. [2306, 2730]. Three medical experts — Drs. Landrigan [2768-70], Rosen [2755-56] and Mauss [2759-60] — testified that the law would increase children’s exposure to toxic lead dust and lead paint hazards, and presented letters from many other medical and technical experts who voiced similar concerns. [822]. Immediately after the close of testimony, and without reading any of the hearing submissions, the Mayor signed the proposal into law, as LL 38. [2778-79]

b. The Numerous Substantive Changes Effected by Local Law 38

LL 38 vastly altered almost all facets of the laws governing whether, how, when, and by whom lead hazards – especially lead dust hazards – are identified and addressed. The Petition detailed nearly forty subsidiary changes in lead hazard controls altered by LL 38. [32, 78-89] Outlined below are just some of the more significant changes, discussed in further detail infra.

LL 38 narrowed the definition of a “lead-based paint hazard” from the existence of lead paint in any condition to peeling paint or paint on a deteriorated subsurface only. LL 38’s narrowed definition omitted conditions with intact lead paint that nonetheless generate lead dust, such as friction, impact, and accessible surfaces. In addition, LL 38 increased the amount of lead content permitted on painted surfaces from 0.7 mg/cm² to 1.0 mg/cm². Compare LL 38,

N.Y.C. Admin Code §§ 27-2056.1(2), 27-2056.7(3) with LL 1, Admin. Code § 27-2013(h)(1).

LL 38 reduced the age of children protected by its lead paint poisoning prevention and enforcement measures from under 7 years to under 6 years. Compare Admin. Code § 27-2056.1(2) with Admin. Code § 27-2013(h)(1).

LL 38 enlarged the time frame for enforcement of correction of violations. Under LL 1 lead paint hazards constituted a class C immediately hazardous violation that had to be corrected within twenty-four hours. Admin. Code §§ 27-2013(h)(3), 27-2115(c)(1). LL 38 permits from between 176 to 226 days to elapse from complaint to correction. Admin Code §§ 27-2056.7(a), 27-2115(l).

LL 38 altered, and in some respects reduced, landlords' inspection duties. This Court had interpreted LL 1 as placing a continuing duty on landlords to eliminate all lead paint hazards on specified interior surfaces. Juarez, 88 N.Y.2d at 642, 647; Chapman v. Silber, 97 N.Y.2d 9, 19-20 (2001). LL 38 only requires landlords to conduct a visual inspection for peeling paint once a year of those premises for which they have received notice that a child under 6 resides. Admin. Code §§ 27-2056.3(d) & (e). For lead paint violations that arise subsequent to the visual inspection, LL 38 now requires landlords to either have actual notice of peeling paint or receive written notice from tenants. Unlike LL 1, LL 38 limited the inspection duties of landlords and HPD to pre-1960 buildings.¹⁹

19. LL 1 required HPD to place violations for lead paint in dwellings of any age. NYCCELP II, (City “should not ... rely on the naive presumption that no lead based paints were ever utilized in violation of the law in post-1960 buildings”) [2444]; see Rabin, Warnings Unheeded: A History of Child Lead Poisoning, 79 Am. J. Pub. Health (12) 1668-1674, at 1673 (Dec. 1989) (DoH found 10% of interior paints offered for sale in 1971 in New York City had illegal levels of lead); Woolfalk v. New York City Housing Auth., S. Ct. N.Y. Co. May 12, 1998, Goodman, J., Index No. 112405/93, [2553], aff'd, 263 A.D.2d 355 (1st Dep’t 1999) (child poisoned by lead paint in home built in 1973; LL 1 applied).

LL 38 eliminated HPD's mandate in Local Law 50, Admin. Code § 27-2126(b), to correct lead paint hazards within 18 days in one- and two-family homes where a child had already been poisoned when landlords had failed to do so.

LL 38 altered safe work requirements for renovations on lead paint. LL 38 allows a landlord to use one set of weakened work practices (titled "interim controls") if the violation is corrected within 21 days, only requiring compliance with the preexisting more stringent work practices in Health Code § 173.14 if the work takes longer. In part, LL 38's "interim controls" eliminate filing notices with HPD about renovation work; eliminate warning signs; eliminate licensing and training requirements for persons performing lead paint work; relax record-keeping requirements; and omit lead dust clearance tests to assure work is properly cleaned up. LL 38's "interim controls" also eliminate numerous discrete requirements related to work area preparation; daily cleanup; final cleanup; and final inspection. See infra at 39 (table summarizing changes in work safety rules).

c. The Negative Declaration

The negative declaration issued by the City Council consisted of an environmental assessment statement (EAS) and a seven-page narrative "attachment." Most notably, the City Council's important and highly controversial decision to deregulate lead dust, which occupied hours of debate by council members and the warnings of numerous experts and witnesses, [199, 287, 291, 731-33]²⁰ is not alluded to anywhere within the four corners of this composite document. Indeed, the majority of the regulatory changes enacted by LL 38 are not mentioned in this document, such as the enlarged time frames for enforcement, the shift in inspection

20. Don Ryan, Executive Director of the Alliance to End Childhood Lead Poisoning, testified that "for all intents and purposes, [the bill] ignores the hazards of lead dust." [1553]

duties from landlords to tenants, or the elimination of inspections in post-1960 buildings.

The few issues which do gain some passing mention in the negative declaration are nowhere truly “identified.” The document refers to the new “interim controls,” [471] but nowhere mentions the critical fact that these controls are much less stringent than the controls required by prior law. It states that the new legislation applies to dwelling units inhabited by children under six years of age without mentioning that coverage for six-year-olds is being eliminated. [469] It solemnly declares that “it is reasonable and necessary to set forth time frames” for enforcement but does not explain that LL 38 in fact greatly lengthens the time in which landlords are allowed to effect repairs. [470] It notes that the legislation “imposes” on landlords “an affirmative obligation” to conduct annual visual inspections [471] but fails to note that this replaces the much more stringent continuing obligation to inspect for lead hazards at all times, Juarez, 88 N.Y.2d at 644, 649, including some that may not be readily visible. Chapman v. Silber, 97 N.Y.2d at 20-21 (“[B]ecause lead in paint is undetectable to the senses, a landlord cannot actually know of its presence without testing.”). Indeed, a council member, or a reviewing court, could read the entire negative declaration without learning how LL 38 changed any of the 40 separate provisions identified by petitioners.

C. The Decisions Below

1. The IAS Court’s Decision

The IAS court’s decision found that LL 38 had extensively “altered” “core provisions” of the preexisting statutory and regulatory scheme for protecting children against lead poisoning, [15i] which “may increase the likelihood of lead being introduced into the bodies of children living in affected housing units, thereby creating a possible hazard to the health of those children.” [15h] While petitioners had identified more than 40 discrete changes in lead

poisoning prevention practices that could have an adverse impact on children's health, the IAS

Court focused on just five:

[P]etitioners argue that Local Law 38 poses potential hazards to human life and health in that it: (i) eliminated lead dust and related conditions from the definition of lead-paint hazards; (ii) removed six-year olds from the class to be protected from lead-based paint; (iii) established a 21-day period in which landlords cited for violations could escape the Health Code standards for safe lead-based paint removal; (iv) allowed inordinately long periods for lead hazard removal and enforcement; and (v) eliminated the deadline for HPD's enforcement of lead-based paint violations in one- and two-family dwellings.

Whether all these changes pose a possible hazard to human health is something to be determined by careful consideration of expert opinion, available scientific data and pertinent statistical information — a review properly made by respondents through the SEQRA rather than by this court. For purposes of the issues before the court, it suffices that on their face these changes could pose such a hazard. The fact that Local Law 38 lowers the age of children to be protected and raises the lead content required to deem paint lead-based, without any explanation for such change, is enough to raise questions that must be answered.

[15j] (emphasis added). Applying the H.O.M.E.S. test, the IAS court concluded that the negative declaration was deficient, because it failed to identify, analyze, and explain these changes. Id. The court focussed particularly on the issue of lead contaminated dust, and relied on the First Department's holding in WABBA v. Giuliani, 223 A.D.2d at 66, 73, that lead-contaminated dust generated by lead paint posed a significant environmental hazard, and that policy-making concerning lead dust must be addressed under SEQRA via an EIS. [15t]

2. The Appellate Division's Decision

The Appellate Division reversed the IAS court and reinstated LL 38 and the negative declaration. The court, reasoning that LL 1 required “removal” of lead paint and was therefore per se hazardous, held that LL 38 would, on balance, reduce rather than create these hazards by moving to “containment.” [3740, 3744-45, 3752-53]. The court also concluded that none of the respondents’ actions would increase health risks beyond those already created by third parties [3745, 3747, 3752].²¹ The court did not analyze the Council’s negative declaration itself using the three part H.O.M.E.S. test, but concluded that the record of the Council’s overall legislative review of the environmental issues was sufficient under SEQRA [3747, 3750-52, 3754, 3756-57]. Thus, the court concluded the negative declaration was valid.

21. The Appellate Division parsed petitioners’ concerns thus:

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

[3746-47] The Appellate Division’s decision did not address at all petitioners’ claims and extensive discussions of the impact of the elimination of lead dust and related conditions from the definition of lead hazards, the weakening of the work safety practices, the lengthening of the time frames for correction of lead hazards, and the elimination of deadlines for the correction of lead hazards in non-multiple dwellings, all of which the IAS court as well had identified as environmentally significant issues. [15j].

ARGUMENT

POINT I.

ANY ONE OF THE NUMEROUS POTENTIAL ADVERSE IMPACTS ARISING FROM THE ENACTMENT OF LOCAL LAW 38 REQUIRED ISSUANCE OF A POSITIVE DECLARATION AND THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT.

A. An EIS is Required Unless There Is No Potential for Significant Adverse Environmental Impacts.

SEQRA seeks to inject environmental considerations into governmental decision making, Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988), and requires local legislatures to determine in a precise and prescribed manner whether an action may have a significant environmental effect. ECL § 8-0109; 6 N.Y.C.R.R. § 617.7. Under SEQRA, an agency must issue a positive declaration and prepare an EIS if it contemplates an “action” that “may include the potential for at least one significant adverse environmental impact.” 6 N.Y.C.R.R. § 617.7(a)(1) (emphases added), § 617.9.²² It is well settled that SEQRA requires only a very low threshold of environmental impact before mandating an EIS. Desmond-Americana v. Jorling, 153 A.D.2d 4, 10 (3d Dep’t 1989), lv. to app. den., 75 N.Y.2d 709 (1990); see also Chinese Staff and Workers Ass’n v. City of New York, 68 N.Y.2d 359, 364-65 (1986);²³ H.O.M.E.S., 69 A.D.2d at 232; West Branch Conservation Ass’n, Inc. v. Planning Bd. Of the Town of Clarkstown, 207 A.D.2d 837, 838 (2d Dept. 1994), mot. for lv. to app.

22. The New York City Council’s adoption of a local law is governed by SEQRA, 6 N.Y.C.R.R. §§ 617.2(b)(3), 617.2(v), and CEQR, 62 R.C.N.Y. §§ 5-03(d), 5-05(a).

23. Chinese Staff, in discussing just how low this threshold is, notes that SEQRA is far stronger than the federal equivalent, the National Environmental Policy Act (NEPA), which only applies if the action will significantly affect the quality of the human environment; and moreover, that an earlier proposed version of SEQRA would have set the standard as “likely to have significant effects.” Id. at 365 n. 6.

dis'm, 84 N.Y.2d 1019 (1995) (“operative word triggering the requirement of an EIS is ‘may’”). As the First Department recently held — in a decision completely at odds with this one — “any uncertainty as to the assessment of the environmental impact of an agency’s action should normally lead to the conclusion that an EIS is required” Spitzer v. Farrell, 294 A.D.2d 257, 260-61 (1st Dep’t 2002), lv. to app. granted, 98 N.Y.2d 615 (2002).

Regulations implementing SEQRA specifically mandate the preparation of an EIS for any “action” that may lead to “the creation of a hazard to human health.” 6 N.Y.C.R.R. § 617.7 (c)(1)(vii). That lead, and particularly lead dust, constitutes such a hazard to human health is surely beyond cavil. City of New York v. Lead Indust. Ass’n, Inc., 190 A.D.2d 173, 176 (1st Dep’t 1993) (“The danger that lead-based paint presents to human health and safety, especially with regard to children, is today virtually beyond debate.”); see Gilbert Aff. [343], Rosen Aff. [298-300]; E. Mauss Aff. [163-64] and Ex. A thereto; [174]; Piomelli Lett. [559-60]; Needleman Aff. [193-94]; Landrigan Aff. [116-17] and Ex. A thereto [119-20]; I. Mauss Aff. [219].²⁴ In WABBA, 223 A.D.2d at 71, the First Department squarely held that an activity which in any way increases the risk of lead poisoning, particularly from lead dust, is a potential “hazard to human health” and therefore requires the preparation of an EIS. Indeed, under this Court’s precedents, recognizing that childhood lead poisoning may be the most significant environmental disease in New York City, Juarez, 88 N.Y.2d at 641, no other conclusion seems possible. It follows from this, as the IAS court held, that any alteration of the “core provisions”

24. Irving H. Mauss, M.D., is a Professor Emeritus of Clinical Pediatrics at Cornell University College of Medicine and Chairperson Emeritus of the Committee on Environmental Health of the Long Island Section of the American Academy of Pediatrics. He is a Fellow of the American Academy of Pediatrics and the New York Academy of Medicine, and has also served as a Member of the National Committee on Environmental Health of the American Academy of Pediatrics. [218].

[15i] of the statutes and regulations that govern the inspection, maintenance, containment, and removal of lead paint necessarily implicates the health of young children and requires the preparation of an EIS.

The specific changes to these core provisions were not only presumptively potential hazards; on the record developed in the IAS Court they were demonstrably hazardous. Indeed, in at least six separate areas, there seems very little doubt that LL 38 not only may, but will expose New York City’s children to significantly enhanced risks of lead poisoning.

B. The Enactment of LL 38 Created Numerous Potential Significant Adverse Environmental Impacts.

1. LL 38's Elimination of Lead-Contaminated Dust and Related Conditions from the Definition of What Constitutes a “Lead-Based Paint Hazard” “May” Have a Significant Adverse Impact on Human Health.

Although lead-based paint is the primary source of childhood lead poisoning, the foremost mechanism or cause of exposure is from lead-contaminated dust. Lead-dust often results when lead paint deteriorates or when lead painted surfaces abrade. It also occurs in large amounts when lead painted surfaces are improperly repaired. See, e.g., Goldman Lett. [536], Walker Lett. [576].²⁵ Science shows that the presence of lead dust in a child’s apartment is the “best indicator” of that child’s risk of lead poisoning. Walker Lett. [576]²⁶

25. Bailus Walker, Jr., M.D., is a Professor of Environmental and Occupational Medicine at Howard University Medical Center and Chairman of the Committee on Toxicology of the National Academy of Sciences. He is also a former President of the American Public Health Association and a former Health Commissioner for Massachusetts and Michigan. [62, 576-84]

26. See, also, Jacobs, Clickner, Zhou, Viet, Marker, Rogers, Zeldin, Broene, Friedman, The Prevalence of Lead-Based Paint Hazards in U.S. Housing, 110 Environmental Health Perspectives (10) 599-606, at 599 (Oct 2002) (herein “Jacobs, Prevalence of Lead-Based Paint Hazards”) (“A large body of evidence shows that a common source of lead exposure for children today is lead-based paint hazards in older housing and the contaminated dust and soil
(continued...)”) (continued...)

When lead dust is present, it can only be detected by a lead-dust clearance test.²⁷ Moreover, the presence of lead dust always is a potential health hazard and must be removed using appropriate, scientifically based work practices.²⁸

Given that lead-contaminated dust is the foremost pathway for exposure, its omission as a potential hazard in LL 38's definition of a "lead-based paint hazard" is inexplicable. In contrast, federal law defines a "lead-based paint hazard" as including "any condition that causes exposure to lead from lead-contaminated dust" 42 U.S.C. § 4851b(15). Prior to the enactment of LL 38, LL 1 required the permanent removal or covering of all lead paint on deteriorated surfaces and on accessible, friction and impact surfaces using the safe work practices in Health Code § 173.14 and trained workers, thereby virtually eliminating the risk of

26. (...continued)

it generates.... Recent studies indicate that dust lead is the strongest predictor of childhood blood lead levels."); Lanphear, Weitzman, Winter, Eberly, Yakir, Tanner, Emond, Matte, Lead-Contaminated House Dust and Urban Children's Blood Lead Levels, 86 *Amer. J. of Public Health* (10) 1416-1421, at 1420 (Oct. 1996) ("study confirms lead-contaminated house dust is a significant source of lead exposure for urban children with low-level elevations in blood lead"); 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 57 (1998) ("In the multivariate regression, floor dust lead loading was the most significant environmental predictor of children's blood lead levels.").

27. See Part I.B.2, p. 37 *infra*; see also *Olmsted Aff.* [238] (dust clearance test is required to sample dust generated by the deteriorated paint condition itself.) Clearance tests also measure both how well a lead renovation team kept the lead paint dust from dispersing and the effectiveness of post-abatement cleanup. *Gilbert Aff.* [357].

28. See, e.g., Lanphear, Eberly, Howard, Long-Term Effect of Dust Control on Blood Lead Concentrations, 106 *Pediatrics* (4) 48 (Oct. 2000) ("We conclude that dust control, as performed by families and in the absence of lead hazard controls to reduce ongoing contaminations from lead-based paint, was not effective in preventing children's exposure to residential lead hazards."); Lanphear, Howard, Eberly, Auinger, Kolassa, Weitzman, Schaffer, Alexander, Primary Prevention of Childhood Lead Exposure: A Randomized Trial of Dust Control, 103 *Pediatrics* (4) 772-777, at 776 (April 1999) (same)

exposure from lead-contaminated dust. The prior law also required lead dust clearance testing when any more than a minimal amount of lead-paint was repaired or removed. Together, these provisions of prior law addressed many of the significant concerns associated with lead-contaminated dust.

While LL 38's deregulation of friction, accessible and impact surfaces alarmed health experts, its deregulation of lead-contaminated dust drew the sharpest and most sustained criticism. See, e.g., Landrigan Aff. [115-16, 119-20]; comments of Council Member Michels [1433-38]; Rosen Test. [1593-95];²⁹ Rosen Aff. [296-97, 303-04]; [539, 568-72, 580, 583].

The City's then- Health Commissioner testified to the Housing Committee on June 21, 1999, that lead-contaminated dust is an issue of extreme concern:

We know now that lead-contaminated dust is the predominant source of lead poisoning, and most likely the best predictor of children's risk. [1423]

...
In my view we cannot ignore the dangers of lead contaminated dust, and dust should be incorporated into the bill in the language of what constitutes lead-based paint hazards. [1473] (emphasis added)

This recommendation was ignored. Other officials roundly criticized de-regulating toxic lead dust, including City Comptroller Hevesi [1489] ("bill only defines peeling paint as a hazard, but lead dust poses the greatest hazard to young children"), Borough President Virginia Fields, [1821] (proposal "ignores what scientific evidence [has] demonstrated to be the primary source of lead poisoning, lead dust"), and Council Member Michels. [1433]. ("There is no mention in this legislation about lead dust at all[;] [a]bsolutely none.")

29. Dr. Rosen testified as well that leading clinicians, scientists, and lead toxicologists had "expressed their dismay in writing" concerning LL 38, [1594] including Dr. Paul Mushak [546], Dr. Herbert Needleman, [552] Dr. Sergio Piomelli, [558] and Dr. Joseph Graziano. [770]

Housing advocates and other lead-paint poisoning specialists also testified that it was environmentally unsafe to omit lead dust from the definition of hazards. See, e.g., Farr Test. [1519]; Goldiner Test. [1902-03]. Many other experts, unable to attend the hearings on the ½ day’s notice granted by the Council, nonetheless alerted the Council to LL 38’s failure to address lead dust. Dr. Lanphear, author of numerous peer-reviewed studies on lead dust, [252]³⁰ said the proposed local law “fail[ed] to recognize that lead-contaminated house dust is the primary pathway for leaded paint to be ingested by young children.” [539]; see also Lanphear Aff. [253]; Gilbert Aff. [346]. Dr. Paul Mushak called the failure to address lead dust a “critical flaw,”[549];³¹ see also letters to Speaker Vallone from Dr. Mushak on June 10, 1999, [547-48] from Dr. Lynn Goldman on June 9, 1999, [536] (“a visual inspection alone will miss many homes with significant lead hazards”),³² and from Dr. J. Routt Riegard (Dir., Children’s Environmental Health Network) on June 18, 1999. [565-66].

The First Department’s WABBA decision held that the release of lead dust from the City’s bridges involved a toxic material and that lead dust policymaking implicated SEQRA and required an EIS. 223 A.D.2d at 71-72, 74. Here, the evidence was even more compelling, as young children live in the environment that will become hazardous and/or remain hazardous

30. See also footnotes 26 and 28, supra.

31. Dr. Mushak, an expert witness for the City in the pending City of New York v. Lead Industries Association case, N.Y. Co. Index. No. 14365/89, is an environmental toxicologist and author of the 1988 Report to Congress on the Nature and Extent of Lead Poisoning in Children. [547-51].

32. Lynn R. Goldman, M.D., is a pediatrician and epidemiologist on the faculty of Johns Hopkins University School of Public Health. Between 1993 and 1998, she served as an Assistant Administrator for the Office of Prevention, Pesticides and Toxic Substances for the U.S. Environmental Protection Agency. In that capacity, she was responsible for EPA’s national standards for “lead-based paint hazard evaluation and control” in housing. [536-37].

under LL 38. Similarly, in UPROSE v. Power Auth. of the State of N.Y., 285 A.D.2d 603, 607-08 (2d Dep’t 2001), lv. to app. den., 97 N.Y.2d 605 (2001), which concerned particulate matter that, like lead, is a “non-threshold pollutant” with adverse health effects, id.,³³ an EIS was required, since it had the potential for at least one adverse impact. Id. at 608 (citing 6 N.Y.C.R.R. § 617.7[a][1]); see also Spitzer v. Farrell, 294 A.D.2d at 260-61 (invalidating negative declaration which failed to address diesel soot emissions from increased truck traffic as a result of plan to ship solid waste).

Although this issue was extensively discussed in the Petition [31-33, 50, 80-84, 97-100] and identified as a concern by the IAS court [15j, 15t], and extensively addressed in the parties’ and amici’s appellate briefs, the Appellate Division eschewed any discussion of this issue. In fact, the Appellate Division’s sole mention of the word “dust” is in a single sentence alluding to the defeat of an amendment that would have defined dust as a hazard. NYCCELP v. Vallone, 293 A.D.2d at 92. [3752]

2. LL 38's Changes to the Work Safety Practices “May” Have a Significant Adverse Impact on Human Health.

Prior to the enactment of LL 38, the Board of Health promulgated Health Code § 173.14 to provide a rigorous set of safety standards for work that would disturb or remove lead paint. The orders in NYCCELP II [2461] and NYCCELP VII [2509] required these procedures for all work on lead hazards.³⁴

33. See Mauss Aff. [174], Rosen Aff. [298].

34. [The] use of lead-safe work practices on surfaces with lead-based paint is essential ... because only a small amount of lead-based paint is needed to produce very high dust lead levels. For example, if sanded and turned into contaminated dust that is spread across an average-sized room, only 1 [square foot] of

(continued...)

With the enactment of LL 38, the Council created a much less stringent set of work practices to replace those in § 173.14. Under the formulation set out in LL 38, landlords were to use these laxer procedures — referred to as “interim controls” — to correct peeling lead paint. LL 38 § 5 (§ 27-2056.2(a). [2626] A landlord cited with a LL 38 violation was granted an additional 21 days to correct the condition using these “interim controls.”³⁵ Only upon the failure to timely correct the violation would the landlord become obligated to use the more stringent and protective § 173.14 practices. HPD, however, in its discretion, could extend the 21 day interim control period to as much as 66 days. § 27-2115(l)(1) [2634].

Vast differences between § 173.14 and LL 38’s “interim controls” exist; the chart following this section lists some of these differences. To mention only one of the more worrisome from the point of view of public health, LL 38 eliminated lead dust clearance testing under most circumstances, requiring such testing only when a violation is issued for peeling paint on windows, molding and door frames, and completely ignoring violations placed for peeling paint on walls and ceilings — no matter how large an area may require work. [2630-

34. (...continued)

paint at a lead concentration of 1 [microgram per square centimeter] (the federal standard) is needed to produce a settled dust lead level of 9,300 [micrograms per square foot], several orders of magnitude above current dust lead standards.

Jacobs, Prevalence of Lead-Based Paint Hazards, at 605 (emphasis added).

35. The viability of “interim controls” in reducing lead dust levels to a point where children are not poisoned has not been scientifically established, see Lanphear Aff. [256]; Rosen App. Aff. [3542-43], Haynes, Lanphear, Tohn, Farr, Rhoads, The Effect of Interior Lead Hazard Controls on Children's Blood Lead Concentrations: A Systemic Evaluation, 110 Environmental Health Perspectives (1) 103-107, at 103 (Jan. 2002) (“We conclude that... there was no substantial effect on mean blood lead concentration.”); and indeed, interim controls have been implicated in childhood lead poisonings. See Grimes v. Kennedy Krieger Institute, 366 Md. 29, 782 A.2d 807 (2001).

31]; Gilbert Aff. [356].³⁶ These key provisions were denounced as a grave threat to public health, not only by the lead poisoning prevention experts, see, e.g., [541, 559], but also by two City Health Commissioners and the Assistant Health Commissioner who oversaw the lead poisoning prevention program.

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

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

See also Piomelli Lett.³⁷ [559] The only concession the Council appears to have made to this

36. Dr. Gilbert explained that LL 38’s dust test methods are wholly inadequate. [357-59]. Dr. Gilbert is a toxicologist and epidemiologist who has devoted a significant portion of his professional career to lead poisoning prevention. He was the first Director of the Northeast Regional Lead Training Center at the University of Massachusetts School of Public Health, a Scientific Advisor for a Lead Hazard Education and Abatement Project funded by HUD, and has served on numerous national, state and local lead advisory committees. He also was an Assistant Director, Chief of Field Operations, Inspector, and Research Analyst at the Massachusetts Childhood Lead Poisoning Prevention Program. [341, 340-93].

37. Sergio Piomelli, M.D., is the James A. Wolff Professor of Pediatrics and Director of the Pediatric Hematology Clinic at the College of Physicians & Surgeons of Columbia University. He has devoted a significant portion of his career to eradicating lead poisoning as a childhood disease and is the developer of the erythrocyte porphyrin test used to screen millions of American children. Dr. Piomelli wrote to City Council Speaker Peter Vallone urging the Council not to enact “watered down” work standards just because a violation would be corrected rapidly. [559-60].

concern was to reduce the period when interim controls may be used from 30 to 21 days.

In 1999, when the Council began consideration of LL 38, then- Health Commissioner Neal Cohen expressed similar concerns about hazards created by inadequate work practices:

Even when performed with care by highly trained professionals, repairing peeling paint will often unfortunately still leave dust hazards behind. And because lead dust can be invisible to the naked eye, clearance tests ... are important to confirm that the work has already been done safely....

In my view, clearance dust testing provides the best quality control check that [exists]. [1424] (emphasis added).

The Health Commissioner also testified that “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 advocated clearance dust testing. [1464].³⁸ Two days later, in a letter to Housing Committee Chair Spigner, the Health Commissioner proclaimed: “The dust wipe test is the single best way to ensure that an area has been thoroughly cleaned and is safe.” [1761] (emphasis added).

Subsequently, former Assistant Health Commissioner Dr. Susan Klitzman testified before the Board of Health on November 5, 1999, to state her concerns about LL 38. She said:

[T]he “exclusive interim controls” outlined in LL 38 and its related rules ... are less protective of health than the provisions of the current health code § 173.14 in at least 2 key respects:

First, they do not require that the person performing the

38. In 1999, HUD 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)

64 F.R. 50140, 50180 (1999); see also Landrigan Aff. [116]; Gilbert Aff. [355]; Lanphear Aff. [254]; Olmsted Aff. [237-38]; Newman Aff. [184]; Shufro Test. [1733]. In the vast majority of situations LL 38 requires neither trained professionals nor clearance tests.

work receive any training, licensing or certification in lead safety.

Second, they do not require that after lead-based paint hazards are corrected and the work area is cleaned, four dust wipe samples be collected by an independent third party, and that clearance levels be met before the area is cleared for re-occupancy by young children.

[There are]... dangers of lead-containing dust to young children which can result when work that disturbs lead-based paint is conducted in an unsafe manner, by untrained personnel, without proper cleaning and monitoring. You can't tell how much lead dust is present from a visual inspection. ...[T]hese dangers can be minimized when trained workers follow safety procedures, when post-clean up clearance dust testing is performed by an independent third party and when clearance standards are employed.

...
No scientific evidence has been presented to indicate that the safety measures which have been deleted [by LL 38] are unnecessary from a public health perspective. This remains a concern among many in the public health community. [3556-57] (emphases in original).³⁹

The record shows that the Council simply ignored these issues and the experts' warnings on the impacts of weakening many aspects of the safety rules, far too numerous to be detailed here. See, e.g., Farr. Test. [1516-19]; Ryan Test. [1530-32]; Shufro Test. [1733]; see also Landrigan Aff. [115-16]; I. Mauss Aff. [219]; Needleman Aff. [192]; Olmsted Aff. [234-40]; Newman Aff. [183-84]; Gilbert Aff. [350-59]; Lanphear Aff. [253-54]; Pet. [80-84].

The Appellate Division's decision makes no mention of this issue, even though, again, it was described at length in the Petition [58, 61-64, 68-69, 80-85, 89, 95] and the supporting affidavits, identified as a concern by the IAS court [15j], and extensively discussed in the various appellate briefs before it.

39. Until late 1999, Dr. Klitzman was the Assistant Health Commissioner for Environmental Risk Assessment and Communication, [3555], with the responsibility to "oversee the Department of Health's Lead Poisoning Prevention Program." [1429]

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

<u>Provision</u>	<u>Pre-existing Health Code § 173.14</u>	<u>LL 38's "Interim Controls"</u>
Filing with City	Required to file notice with City so that City is alerted to work in progress and can inspect as needed	Not required
Licensing and training of workers	Required, including federal certification requirements	Not required
Record keeping	Detailed records, kept for 7 years	Less detailed, only 3 years
Warning signs	Required	Not required
Furniture	Required to remove movable furniture from entire area	Not required
Plastic barriers	Specific detailed requirements on thickness and layers, taping, etc.	Not specified
Sealing of forced air ducts	Required	Not required
Sealing of windows and doorways	Required	Not required
Daily clean-up	Specific prohibitions on access to contaminated materials and areas, sealing and disposal of debris	No such provisions
Final cleanup	Requires 1 hour wait for dust to settle;	Not required;
	specific requirements for misting debris and sealing it; and	no specific requirements for misting debris and sealing it; and
	HEPA vacuuming of all surfaces, including furniture and carpets, then a detergent wash of all surfaces, then a 2nd HEPA vacuuming.	allows just one HEPA vacuuming <u>or</u> one detergent wash.
Final inspection	By an independent 3d party; who	Inspection can be done by one who is not independent; and
	must wait 1 hour before inspecting for dust to settle.	no waiting period.
Clearance dust testing	4 dust wipe samples — from window well, window sill, floor, and from adjacent room (for tracking) — and must meet dust levels set in accordance with federal law, before family is allowed to re-enter work area.	No dust wipe samples required for work on walls or ceilings — and not required at all if no violation placed. Only required if work done on doors or moldings or near windows in response to violation, and no sample required outside work area. No requirement to meet health standard <u>before</u> family allowed to re-enter.
Disclosure of dust test results to tenant	Required	Not required

3. LL 38's Deregulation of Lead Paint on Impact, Friction, and Child Accessible Surfaces and Reduced Inspection Duties Poses a Substantial Risk to Human Health and Therefore "May" Have a Significant Adverse Environmental Impact.

LL 38 in effect de-regulated lead paint on "intact" impact, friction, and child accessible surfaces (all of which are defined hazards in federal law, 42 U.S.C. § 4851b(15)). Under LL 1, which required the safe removal or permanent covering of all lead paint in whatever condition, the landlord of an apartment inhabited by a child under age 7 was under a continuing obligation to inspect for such hazards. See supra at 15. Under LL 38, however, the landlord is not required to abate lead paint on such surfaces unless and until it has visibly begun to peel.⁴⁰

[442] Together with LL 38's reduced inspection duties — replacing a continuing obligation to inspect with a limited visual inspection for only peeling paint — the new legislation creates a substantial risk of exposure to lead on surfaces that are intact or have begun to deteriorate in the months since the landlord's last visual inspection.

Most of the experts who testified or otherwise communicated with the City expressed grave misgivings over this aspect of LL 38. For example, Dr. Mushak said:

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

Also, the record contained the 1996 testimony before the Council Housing and

40. Yet a recent federal study found that one in three homes with lead based paint in good condition nonetheless have hazardous levels of lead dust. HUD, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, Revision 6.0 (April 18, 2001) at 5-15 (available at www.hud.gov/offices/lead/techstudies/HUD_NSLAH_Vol1.pdf (accessed Jan. 23, 2003)). HUD summarized these findings in Jacobs, Prevalence of Lead-Based Paint Hazards, at 603.

Buildings Committee of then-City Health Commissioner Hamburg about her Department's deep concern regarding intact lead paint on surfaces that are subject to friction or abrasion:

We believe that friction surfaces inside dwelling units are a greater risk than [lead paint in common areas]. . . . Friction surfaces refer to movable surfaces such as window frames that rub against each other. The rubbing motion will, over time, cause the paint to abrade and deteriorate, creating chips and dust. . . . Unless all the lead-based paint is removed or covered, over time the constant movement and rubbing will probably cause the hazard to recur.[622] (emphasis omitted).

When LL 38 was before the full Council on June 30, 1999, Council Member Linares pointed out the inconsistency between this prior testimony and the provisions in LL 38:

There has been no change in the intervening three years that should cause for a new evaluation of such a statement. Nor has there been any evidence presented to demonstrate that lead dust generated by friction surfaces is no longer a hazard. To the contrary.

The un rebutted testimony of experts before the Housing and Buildings Committee on June 21st, 1999 and June 24th, 1999, is that lead is a hazard. [2125-26].

The Council never analyzed this issue in the negative declaration.⁴¹

The HPD Commissioner also became entangled in this contradiction. When testifying in support of LL 38, he had to admit that lead dust from friction surfaces presents a hazard and he conceded that lead dust "could be" an issue, even though he supported LL 38's peeling paint only standard. [1353]. Experts identified other areas with intact lead paint as areas of concern,

41. HUD's recent study found that

the building components with the highest prevalence of lead-based paint were windows and doors. These are friction and impact surfaces that can generate significant levels of lead dust and paint chips.

Jacobs, Prevalence of Lead-Based Paint Hazards, at 603.

such as window and door frames, baseboards, and surfaces that teething infants can chew, such as window sills. Lanphear Aff. [253]; Gilbert Aff. [346]; see also Landrigan Aff. [115-16] (on the complexity of issues regarding change from “lead free” to “lead safe” policy); Ryan Test. [1529] (same).

The Appellate Division’s decision does not address at all the potential adverse impacts from lead dust from friction, impact, and accessible surfaces, all of which LL 38 deregulated. And for the purpose of this Court’s review of the Council’s compliance with SEQRA, what matters is not the merits of the Council’s ultimate choice to deal only with peeling paint to the exclusion of other hazards. Rather, what must matter is that the negative declaration failed to identify this change as a relevant environmental concern and take a hard look at it, despite the obvious potential to cause a significant adverse impact.

4. LL 38's Elimination of All Lead Poisoning Preventative Measures for Six-Year-Old Children In New York City “May” Have a Significant Adverse Impact on Human Health.

While LL 1 extended its preventative measures to children up to their seventh birthday, LL 38 removed them entirely for six-year-old children. [2625; 2627; 2632]. This change obviously “may” have an adverse impact on six-year-olds. See WABBA, 223 A.D.2d at 66 (noting well documented adverse impacts of lead exposure on “children under seven years old”); E. Mauss Aff. [163, 174-76]; I. Mauss Aff. [219]; Ex. 111 (9% of N.Y. City children poisoned were over 6 years of age) [2527]; Rosen Aff. [304-05] (Montefiore saw hundreds of lead poisoned six-year-olds over the past 25 years); Pet. [79, 95].⁴²

42. In 1999, 1,616 (i.e., 14%) of the 11,664 NYC children who were actually tested and found to have elevated blood lead levels were ages 6 through 8. New York City Department of Health and Mental Hygiene, Surveillance of Childhood Blood Lead Levels in New York (continued...)

As the IAS court noted, “[t]he fact that [LL 38] lower[ed] the age of children to be protected . . . without any explanation for such change, [was] enough to raise questions that must be answered.” [15j]. The Appellate Division’s decision does not explain why this change was not an adverse impact.

5. LL 38's Relaxed Times Frames For Correction and Enforcement of Lead Paint Hazard Violations “May” Have a Significant Adverse Impact on Human Health.

While pre-existing law, §§ 27-2013(h) and 27-2115(c), required lead paint violations to be corrected within 24 hours, LL 38 allows landlords 21 days after service of a notice of violation to correct it, which can be extended to a total of 66 days,⁴³ LL 38 §§ 5 (§ 27-2056.5(a)) [2629-30] and 6 (amended § 27-2115(l)(1)) [2634], then 5 days to mail a certification of correction (amended § 27-2115(l)(2)) [2634-35]. HPD then has 30 days to reinspect the work, a further 30 days to mail a notice of invalid certification if the work was not done, and then, finally, some 60 further days to step in and correct the violation (amended § 27-2115(l)(3) & (4)) [2635]. Altogether, LL 38 allows as much as 226 days from a tenant’s first complaint until correction, Pet. [87-88], even in the few remaining contexts where LL 38 considers lead paint a “hazard” — i.e., just peeling paint.

While over half a year may transpire before a hazard’s correction under LL 38, it takes

42. (...continued)

City, July 2002, at 64, (available at www.ci.nyc.ny.us/html/doh/html/lead/12002.html (accessed Jan. 23, 2003)). Moreover, since there is no present legal requirement for screening children for lead exposure at age 6, id. at 10, and very few children at or above age 6 are tested, id. at 16, fig. 6, the actual number of children at age 6 with elevated blood lead levels is undoubtedly higher.

43. The notice of violation itself may take a month to be issued after a tenant complaint, since LL 38 gave HPD 10 days (15 in heating season) to inspect in response to the complaint, (§ 27-2056.7(a)), [2632], and 20 days thereafter to issue the violation notice. (Amended 27-2115(l)(1)) [2634].

much less time to poison and irreparably injure a young child. See Rosen Aff. [298]. Many public health and lead poisoning specialists, advocates, and public officials repeatedly criticized LL 38's unreasonably long time frames because of the increased risks to children from prolonged exposure to lead hazards. The Health Commissioner stressed the critical importance of a quick response:

There is no question that from the public health perspective the quicker the better. There is no scientific data ... that I can give to you that would say if we get to it within six days, 15 days, 20 days, we will see different outcomes. There is no question, though, that we encourage there to be a rapid response — we encourage our sister agency, HPD, to be able to address and use its resources as they can to shorten the time frames once these violations have been cited to carry out reinspections, so that we minimize any opportunity that children would have to have continuing exposure to lead.

[1440]. The HPD Commissioner conceded that the longer lead hazards remain the greater the exposure of children to danger, [1356-58], and conceded that under LL 1 HPD had generally responded to Class C hazardous conditions within 24 to 72 hours. [1329-31, 1357-63].

Similarly, several council members expressed grave concern about LL 38's proposed time frames and whether they would adequately protect children, [1878, 2171-72], as did advocates' testimony. [1887, 1896, 1903]; see also I. Mauss Aff. [219]; Needleman Aff. [192].

The Appellate Division's decision overlooked this adverse impact entirely, even though, again, it was discussed in the Petition [58, 60, 64-65, 87-89, 95, 99-100], the trial court's decision [15j], and the briefs to the Appellate Division.

6. 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 “May” Have a Significant Adverse Impact on Human Health.

As noted supra at page 14, pre-existing Local Law 50, Admin. Code § 27-2126 — in conjunction with Health Code § 173.13(d)(2) — established that where DoH had placed a violation in any dwelling with a lead poisoned child and the landlord has failed to correct within 5 days, DoH was mandated to refer the matter to HPD within 16 days and HPD was mandated to intervene and correct the violation within 18 days of such referral. LL 38 deleted these mandates for lead poisoned children in 1- or 2-family dwellings, by amending § 27-2126(b), [2637] to make it applicable only to multiple dwellings (i.e. buildings with 3 or more units (Admin. Code § 27-2004(a)(7)).

Several persons noted that this change left a whole subpopulation of children vulnerable to increased lead poisoning. See, e.g., comments of Council Member Linares [1871]; Test. of Megan Charlop [1837-38]; see also Rosen Aff. [305-06] (about 35% of a sample of 3,000 children treated for lead poisoning at Montefiore Medical Center live in such homes). Allowing lead hazards to linger in these homes, with no date certain for removal, can have profound public health and environmental impacts. See Pet. [90-91]; Rosen Aff. [300-01] (medical necessity that after treatment a lead poisoned child be discharged to an environmentally safe home).

Even though this change was raised in the Petition, [58, 90-91, 99], was a subject of the IAS court's decision, [15j], and briefed before the Appellate Division, the Appellate Division made no mention of it.

POINT II.

THE NEGATIVE DECLARATION FAILED TO IDENTIFY, ANALYZE, AND SET OUT A REASONED ELABORATION FOR ACTIONS REGARDING THE ENVIRONMENTAL HEALTH AND SAFETY OF CHILDREN.

This Court has declared that:

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

Merson v. McNally, 90 N.Y.2d 742, 750 (1997) (emphasis added, citation omitted). For a quarter century the courts have relied upon the three part test first enunciated in H.O.M.E.S. to determine the validity of an agency’s negative declaration. This test, long adopted by this Court, see Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986), is straightforward:

“The relevant question before the court is [1] ‘whether the agency identified the relevant areas of environmental concern, [2] took a “hard look” at them, and [3] made a “reasoned elaboration” of the basis for its determination.’”

Kahn v. Pasnik, 90 N.Y.2d 569, 574 (1997) (citations omitted); accord, Neville v. Koch, 79 N.Y.2d 416, 424-25 (1992).

Where analysis under the H.O.M.E.S. test shows that a decision maker has failed to identify and consider potential adverse environmental impacts, courts must nullify negative declarations. See, e.g., Village of Westbury v. Department of Transp., 75 N.Y.2d 62, 69-71 (1989) (holding that failure to identify relevant concern warranted nullification of negative declaration); Chinese Staff and Workers Ass’n v. City of New York, 68 N.Y.2d at 368-69 (same); see also Kahn v. Pasnik, 90 N.Y.2d at 574 (holding that agency disregarded known potential environmental impacts and nullifying negative declaration); Inland Vale Farm Co. v.

Stergianopoulos, 65 N.Y.2d 718, 720 (1985) (same); Golten Marine Co., Inc. v. New York State Dep't of Env'tl. Conservation, 193 A.D.2d 742, 743 (2d Dep't 1993) (same); West Branch Conservation Ass'n, Inc. v. Planning Bd., Town of Ramapo, 177 A.D.2d 917, 919 (3d Dep't 1991)(same); Desmond-Americana v. Jorling, 153 A.D.2d at 11-12 (same).

The negative declaration here required careful scrutiny under the H.O.M.E.S. test, as LL 38 made dozens of alterations in New York City's lead hazard control system, some of which (as discussed in Point I) indisputably "may" have the "potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1). No decision maker could rationally conclude, for example, that the complete removal of all legal protections from lead paint poisoning for the tens of thousands of six-year-old children in New York City could not potentially have a significant adverse impact.

Here, however, the Appellate Division failed to properly apply the H.O.M.E.S. test because the negative declaration adopted by the City Council failed all three of the test's requirements. It failed even to mention the majority of the regulatory changes in New York City's lead hazard control system enacted by LL 38. It failed to take a hard look at any of them. It failed to state — much less give a reasoned elaboration for — the basis for dozens of separate and controversial determinations the Council made about how best to prevent childhood lead poisoning. In practical effect, the Appellate Division simply abandoned the H.O.M.E.S. test as its basis for decision making.

A. The Negative Declaration Failed to Even Identify the Majority of Changes Enacted by Local Law 38, Including the Total Deregulation of Toxic Lead Dust as a Hazard.

As discussed above at page 24, far from identifying the relevant areas of environmental concern, the negative declaration literally and remarkably fails even to mention many of them.

For example, while LL 1 required the permanent covering or removal of all lead paint on impact, friction, and child accessible surfaces, thus eliminating these sources of toxic lead dust, the negative declaration did not identify LL 38's deregulation of these hazards as a relevant area of concern, even though many independent experts asserted this change alone could result in significant adverse health impacts.

While the Appellate Division did note that the EAS failed to address public health impacts under a separate heading, it added that the EAS "found no threat to human health ... since the proposed legislation 'would not result in significant generation ... or disturbance of hazardous materials.'" [3750] (quoting EAS) (emphasis added). This conclusion was manifestly incorrect; LL 38 mandates that landlords disturb peeling lead paint, unquestionably a hazardous material. And SEQRA imposed on the Council a separate obligation to first identify relevant areas of environmental concern — such as "disturbance of hazardous materials" and public health impacts. 6 N.Y.C.R.R. § 617.7(c)(1)(vii). The negative declaration's failure to identify "disturbance of hazardous materials" as a relevant area of environmental concern is in itself sufficient to deem it invalid.

In the past, the courts of this state have not hesitated to nullify negative declarations, which, like this one, fail the very first prong of the H.O.M.E.S. test. For example, in Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d at 368, this Court nullified a conditional negative declaration that failed to identify the displacement of residents and businesses as a relevant factor even though the decision maker had identified other potential adverse impacts. Similarly, in Westbury v. Department of Transportation, 75 N.Y.2d at 71, this Court nullified a negative declaration that failed to identify the combined environmental effects of a proposed action. If these cases are still good law, then the failure of the City

Council to meaningfully identify any of the relevant areas of environmental concern in the negative declaration violated the H.O.M.E.S. test's most basic requirement.

B. The Negative Declaration Failed to Take a “Hard Look” at Lead Dust and Other Relevant Areas of Concern.

Inasmuch as the negative declaration failed to identify relevant areas of environmental concern, ipso facto it failed to take a “hard look” at them. To satisfy this second prong, the negative declaration should have thoroughly reviewed the available evidence in the record and evaluated that evidence for potential adverse impacts for each policy change undertaken by the Council.

For example, while the negative declaration failed even to identify the elimination of six-year-olds from the scope of lead poisoning prevention laws, a “hard look” in a valid negative declaration would have examined all the evidence in the record regarding this change. Such a review would have examined the number of six-year-olds who could be potentially affected by this change, 6 N.Y.C.R.R. § 617.7(c)(3)(vii) (“significance of a likely consequence . . . should be assessed in connection with the number of people affected”), as well as estimates of the number of six-year-olds statistically likely to be affected. § 617.7(c)(3)(ii) (“significance of a likely consequence . . . should be assessed in connection with its probability of occurrence). The document would also have contained a review of the scientific literature regarding the impact of lead poisoning on children of this age, §§ 617.7(c)(3)(iii) (“its duration), (iv) (“its irreversibility”), (vi) (“its magnitude”),⁴⁴ and referenced testimony by a

44. See, e.g., Wasserman, Liu, Lolancaon, Factor-Litvak, Kline, Popovac, Morina, Musabegovic, Vrenezi, Capuni-Paracka, Lekic, Preteni-Redjepi, Hadzialjevic, Slavkovich, Graziano, Lead Exposure and Intelligence in 7-Year-old Children: The Yugoslavia Prospective Study 105 Environmental Health Perspectives (9) 956-961, at 961 (Sept. 97) (“statistically
(continued...)”)

public health and childhood prevention expert that six-year-olds’ “cognitive and intellectual abilities . . . are compromised seriously by exposure of the brain” to lead. [1608]⁴⁵

Likewise, a hard look at safe work practices for lead abatement would have compared the requirements of prior law respecting occupant protection, worker protection, work site preparation, containment, renovation methods, daily clean up, control of off-site contamination, and final cleanup with the new “interim controls” — which the Health Commissioner did not deny were less stringent than Health Code § 173.14. [1436-38] The negative declaration contained no such analysis.

44. (...continued)

significant adverse associations between environmental Pb exposure and intelligence in school-aged children.”); Decker, Malkin, Kiefer, Exposures to Lead-Based Paint Dust in an Inner City High School 60 American Industrial Hygiene Assoc. Journal 191-194, at 193 (March/April 1999) (“Young children under 7 years of age are the group most at risk from lead contaminated soil and dust because of the greater amount of hand-to-mouth activity and increased ingestion of contaminated material.”); Baghurst, McMichael, Wigg, Vimpani, Robertson, Roberts, Tong, Environmental Exposure to Lead and Children’s Intelligence at the Age of Seven Years, 237 New England Journal of Medicine 1279-84 (Oct 29, 1992); Dietrich, Berger, Succop, Lead Exposure and the Motor Developmental Status of Urban Six-Year-Old Children in the Cincinnati Prospective Study, 91 Pediatrics 301-7 (1993).

45. All that the negative declaration stated regarding the lowered age limit was that “children under the age of six are more likely to suffer permanent damage to their physical and mental health as lead impedes their neurological development.” [469] This does not in the slightest identify the removal of the entire population of six-year-olds from the pre-existing legal protections from lead hazards, much less analyze or explain why there are no SEQRA cognizable “adverse impacts” for these children.

The Appellate Division, however, accepted the City’s entirely post hoc explanation (found nowhere in the negative declaration) that since federal lead hazard regulations apply to children under six years this change cannot constitute a significant adverse environmental factor. [3751, 3753] But this is entirely irrelevant to the significance inquiry of whether an action may have an adverse environmental impact and cannot excuse noncompliance with SEQRA. Farrell, 294 A.D.2d at 260 (significance determinations involve a “much broader undertaking” than merely ascertaining whether a provision complies with federal regulation). Moreover, it is utterly inconsistent, given the far more expansive federal definition of lead hazards as comprising friction, impact, and child accessible surfaces and lead dust. 42 U.S.C. § 4851b.

The courts routinely nullify the negative declarations that fail to take a “hard look,” such as where they mistakenly discounted or wilfully disregarded concerns raised by retained consultants, internal officials, or external critics. *See, e.g., Kahn v. Pasnik*, 90 N.Y.2d at 573-74 (board disregarded potential adverse environmental impacts that an environmental consultant identified); *Inland Vale Farm Co. v. Stergianopoulos*, 65 N.Y.2d at 720 (board disregarded potential adverse environmental impacts that the board itself identified); *Golten Marine Co., Inc. v. New York State Dep’t of Envntl. Conservation*, 193 A.D.2d at 742-43 (agency failed to examine relevant areas of environmental concern expressly contained in the implementing regulations); *West Branch Conservation Assoc., Inc. v. Town of Ramapo*, 177 A.D.2d at 919 (planning board failed to take a hard look at an environmental concern raised by advocate during a public hearing); *Desmond-Americana v. Jorling*, 153 A.D.2d at 11-12 (agency failed to take a hard look at relevant areas of environmental concern despite repeated and persistent warnings by agency critics of adverse environmental effects); *H.O.M.E.S.*, 69 A.D.2d at 227-28 (agency disregarded potential adverse environmental impacts that, among others, external critics identified); *c.f. Committee to Preserve Brighton Beach v. Planning Commission of the City of New York*, 259 A.D.2d 26, 35 (1st Dep’t 1999) (agency’s detailed studies analyzed “each of the relevant areas identified by petitioners”).

C. The Negative Declaration Failed to Set Out a “Reasoned Elaboration” of the Council’s Determination that Local Law 38 Would Create No Adverse Impacts.

The negative declaration failed as well to satisfy the third prong of the *H.O.M.E.S.* test: the requirement that the decision maker issue a reasoned elaboration for its determination. A reasoned elaboration would have had to explain why no EIS was needed because there was — beyond any real, credible dispute — no possible adverse impact.

A decision maker can look to SEQRA’s detailed implementing regulations for guidelines to satisfy this third prong. 6 N.Y.C.R.R. § 617.7; see also § 617.2(y) (“Negative declarations must be prepared, filed and published in accordance with §§ 617.7 and 617.12.”). In this case, a reasoned elaboration would have included identification and analysis of each discrete change LL 38 wrought with environmental or public health ramifications. At the very least, this discussion would have included a thorough treatment of lead dust as a relevant area of environmental concern and all its subsidiary issues. The reasoned elaboration would have thus examined “interim controls” and justified the substantiated changes related to occupant protection, worker protection, work site preparation, containment, renovation methods, daily clean up, controlling off site contamination, and final cleanup. A review of the Council’s negative declaration shows that it does not mention many — let alone set out a reasoned elaboration for any — of the lead control measures LL 38 changed, weakened, or eliminated.

D. Because the Negative Declaration Failed the H.O.M.E.S. Test, the Appellate Division’s Decision Must be Reversed

Since the negative declaration failed not just one, but in fact all three prongs of the H.O.M.E.S. test and express regulatory mandates, the facially invalid negative declaration cannot pass muster and the Appellate Division should have affirmed its nullification. See, e.g., Merson v. McNally, 90 N.Y.2d at 750 (strict procedural compliance required with SEQRA); King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d 341, 347 (1996) (same); Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417(same). Instead, the Appellate Division abandoned the H.O.M.E.S. analysis, only to inappropriately reach its own conclusions as to the merits and environmental significance of the legislation. Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 416. This error leaves New York City children at an illegal and unnecessary risk of

increased exposure to toxic lead hazards, and demonstrates why courts should not attempt to substitute their own conclusions on the environmental merits based on a de novo review of the record when faced with a local government's non-compliance with SEQRA's procedural and substantive mandates. An EIS serves that very purpose.

POINT III.

THE APPELLATE DIVISION'S RULING SET OUT NOVEL EXCEPTIONS TO SEQRA COMPLIANCE THAT ESTABLISH POTENTIALLY DANGEROUS PRECEDENTS.

Twenty-seven years since its enactment, SEQRA now exerts a broad influence over agency and legislative governance. Decision makers, overwhelmingly consisting of local governments, have issued an estimated 21,000 negative declarations between 1984 and 1994. Ruzow, Discussion: The Historical Development of SEQRA, 65 Alb. L. Rev. 323, 354 (2001).

The Appellate Division's decision, however, works great injury to the very fabric of SEQRA jurisprudence. To justify reversal of the IAS court decision, the Appellate Division not only reached several fundamentally flawed conclusions unsupported by the record, it also carved out not one, but three, novel exceptions. The Appellate Division's ruling appears to excuse noncompliance with H.O.M.E.S., and more particularly a facially invalid negative declaration: (1) where the action allegedly will have an overall beneficial effect (even if along the way it also has some adverse impacts); (2) where legislative deliberations substitute for compliance with SEQRA; and (3) where regulations govern remedies for existing hazardous substances created by third parties. These exceptions implicit in the ruling below will encourage local lawmakers and agencies to evade legally required impact review.

A. The Appellate Division Improperly Excused the Inadequate Negative Declaration Based on an Incorrect Assumption that No Dispute Existed Regarding Local Law 38's Overall Impact and on the Incorrect Premise that Specific Harmful Effects Could Be Ignored under SEQRA.

The Appellate Division declared that “[c]ritical to our analysis is the undisputed fact that total abatement, the underlying premise of Local Law 1, had proven itself over two decades to be an unintended health hazard,” [3752] (emphasis added), and that “it is undisputed that the policy should be containment rather than removal of lead paint because removal poses a greater threat than containment.” [3740] (emphasis added). This conclusion — central to the Appellate Division’s decision — is inaccurate as a matter of statutory construction,⁴⁶ is

46. LL 1 [2383] did not require total removal alone; rather, it required landlords to “remove or cover [lead paint] in a manner approved by the department” (emphasis added) (emphasis added). Juarez, 88 N.Y.2d at 644, 645 n.*; see also 24 R.C.N.Y. § 173.14(b)(1) (implementing regulations for LL 1; same). [2363] LL 1, thus, reflected a “containment” policy as well. Conversely, LL 38 does not require “containment” of leaded paint only: LL 38 affirmatively mandates “correction” of “lead hazards” and expressly requires removal of peeling lead paint through wet scraping, Admin. Code § 27-2056.2(a)(4). In any event, both LL 1 and LL 38 necessarily mandate disturbance of toxic lead paint (intact or peeling) to correct lead hazards.

Likewise, the Board of Health amended Health Code § 173.13 back in 1970 to permit covering lead painted surfaces as an alternative to removal, as the legislative history explains:

Subsection (d) was amended by resolution adopted on January 15, 1970 to authorize [DoH] to permit, as an alternate to removal of the lead paint from interior surfaces, the covering of such surfaces with materials and by methods prescribed by [DoH]. This will overcome the problems faced under the former provision occasioned by the hazards of existing paint removal methods. Such subsection was further amended to mandate [DoH] to order the removal of the lead paint or the covering of interior surfaces containing lead paint in those instances where a resident of the apartment is ... [lead poisoned], and when the person responsible for removal or covering of the lead paint fails to do so ... to request the Housing Development Administration to execute such order. [2377] (emphasis added)

Thus, the total removal of all lead paint was never a requirement of LL 1.

unsupported by substantial evidence in the record, and most importantly is non-dispositive as to the SEQRA significance determination.

The record plainly contradicts that court’s generalizations about “total abatement” versus “containment” or that they constituted “undisputed” facts. Indeed, the expert testimony before the Council during the hearings concerning LL 38 did not address at any length the relative merits of one approach over the other, but instead focused on discrete provisions because the crucial public health implications lay in the manner in which either approach — total abatement or containment — was to be carried out. Other than general comments by LL 38’s legislative supporters, few witnesses at the LL 38 hearings even mentioned this topic, and at best, the sparse evidence in the record shows disagreement over policy preferences. For example, Dr. Herbert Needleman stated that the “permanent removal of all lead paint from dwellings, when conducted using safe work protocols, is the best long-term solution to childhood lead poisoning.”[192]⁴⁷

Moreover, neither the record nor the negative declaration contained any analysis by the Council or referenced any study or scientific report in support of abandoning total abatement or in support of the specific and limited measures of LL 38. There was no baseline for comparison 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). The Appellate Division’s conclusion that there is a consensus that full abatement is environmentally less desirable than “containment” was thus without

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

Instead, a critical point central to this case, entirely disregarded by the Appellate

48. For example, as in LL 1, Massachusetts requires property owners where young children reside to remove or cover lead paint, Mass. Gen. L. ch. 111, § 197, and recent studies have documented extremely positive public health outcomes. Sargent, Dalton, Demidenko, Simon, Klein, The Association Between State Housing Policy and Lead Poisoning in Children, 89 Am. J. Pub. Health (11) 1690-1695 (1999) [3544]; Brown, Gardner, Sargent, Swartz, Hu, Timperi, The Effectiveness of Housing Policies in Reducing Children's Lead Exposure, 91 Am. J. Pub. Health (4) 621-624 (2001); Bailey, Sargent, Blake, A Tale of Two Counties: Childhood Lead Poisoning, Industrialization, and Abatement in New England, *Economic Geography* (extra issue) 96-111 (1998); Brown, Costs and Benefits of Enforcing Housing Policies to Prevent Childhood Lead Poisoning, 22 *Medical Decision Making* 482-492 (Nov. 2002) (finding that Massachusetts' abatement policies result in more than \$46,000 savings per building in lifetime costs related to medical care, special education, and lost productivity from lead poisoning).

Indeed, in 1999 HUD issued regulations (64 Fed. Reg. 50140-50231) requiring the full abatement of lead paint in certain HUD-assisted housing, see 24 CFR §§ 35.1120 and 35.1125, as part of HUD's long term strategy to eliminate lead paint hazards in U.S. housing rather than to repeatedly repair them.

Drs. Rosen and Mushak, commenting on new research on the irreversibility of lead-induced injuries to children, recently concluded:

For the primary prevention of lead poisoning from paint, we recommend permanent abatement — that is, the complete removal or replacement of lead paint before a child lives in a home. In contrast, "interim" measures, which were introduced for the short-term reduction of hazards associated with lead paint and which involve scraping and painting over deteriorated surfaces and controlling household dust, have been claimed by some to save substantial cost; however, there is no evidence of savings in terms of net benefit over cost in the long-term prevention of childhood lead poisoning. Lead-painted surfaces in good condition rarely remain so. What was once intact lead-based paint is the source of all lead-bearing dust and paint chips. Therefore, it is the presence of lead paint on surfaces that defines the hazard, not the condition of surfaces containing lead paint.

Rosen, Mushak, Primary Prevention of Childhood Lead Poisoning – The Only Solution, 344 *New England J. Med.* (19) 1421-26 (May 2001). See also CDC, Advisory Committee on Childhood Lead Poisoning Prevention, Managing Elevated Blood Lead Levels Among Young Children, March 2002, at 20 (emphasis added) (“The only certain way to prevent future exposure to lead from paint in a dwelling is to remove all leaded paint from the dwelling.”).

Division but put forward to the Council by leading national public health and medical experts on childhood lead poisoning, is that any work on toxic lead paint – whether involving “repair” (i.e., partial removal) or complete removal of intact or peeling paint – comprises an inherently hazardous activity. Newman Aff. [183]; Olmsted Aff. [233-34]; Lanphear Aff. [256]; Gilbert Aff. [345]. All lead paint work generates hazardous lead dust and has the potential to worsen contamination of children and harm workers and other inhabitants. [345-59] Dr. John Rosen, former Chair of the Centers for Disease Control and Prevention Advisory Committee on Lead Poisoning, explained:

[I]mproper work practices and the lack of proper lead dust controls will often result in the increase of lead contaminated dust and children’s blood lead levels, sometimes dramatically. On the other hand, the careful removal of lead paint is effective in reducing children’s blood lead levels and the dust lead levels in their homes.

These outcomes are not dependent on whether the paint is peeling or intact; instead, they are dependent on the amount of care used (1) in preparing the work area, (2) in using proven safe work practices, (3) in properly cleaning the work site at the work’s conclusion, and (4) in verifying that the work site is safe for re-occupancy by having an independent party conduct sufficient lead dust clearance tests. [3540-41] (emphasis in original)

Thus, Dr. Rosen, Dr. Needleman, and others point to perhaps the most important analytical error of the Appellate Division’s decision: while no dispute exists that the removal of intact lead paint under LL 1 could be hazardous — if not carried out properly⁴⁹ — similarly, the removal of peeling lead paint under LL 38 is equally hazardous — if not carried out properly. Indeed, while under LL 1 a landlord could abate a ceiling by simply covering it with

49. The negative declaration does not demonstrate, however, that such abatement would be hazardous if LL 1, including the underlying Health Code § 173.14 safe work practices, were properly enforced and if the work were conducted using certified workers.

a thin layer of sheetrock (creating little dust), under LL 38 a landlord can scrape an entire ceiling covered with peeling lead paint (creating lots of dust) without having to perform any clearance lead dust tests or follow numerous measures for lead dust protection and clean-up that were previously required by LL 1 and § 173.14. Gilbert Aff. [356].⁵⁰ Therefore, even accepting, arguendo, the Appellate Division's conclusion that the elimination of LL 1's intact paint abatement requirement was beneficial, it is no justification for the negative declaration's ignoring of the adverse impact of LL 38's weakening of the requirements for work area containment, cleanup, and lead dust clearance testing.

Thus, critical to lead poisoning prevention and central to the SEQRA significance determination is how LL 38's discrete provisions address the hazards innate to any disturbance of toxic lead paint and lead dust environmental controls. If, under LL 38 (unlike LL 1), children are now to be permitted to cohabitate with toxic lead paint, an examination was needed of the many facets of regulation that LL 38 changed, including, for example: what conditions are now legally defined as lead hazards; who is legally obligated to inspect for lead hazards; when inspections for lead hazards must occur; how inspections are performed; when lead abatements must be completed; how these provisions are enforced; and, perhaps most importantly, how lead abatements must occur. These are complex policy determinations with multiple public health ramifications. See, e.g., Gilbert Aff. [349].

Every single one of LL 38's weakened controls constituted a relevant environmental

50. Two former Presidents of the American Public Health Association specifically criticized these aspects of LL 38. Dr. Barry Levy warned that it was "irresponsible for New York City to call for repair of peeling paint and substrate without clearance dust tests to ensure that lead dust hazards are not left behind." [544] Dr. Bailus Walker, Jr., said: "To encourage paint repair in young children's homes by untrained crews without effective safeguards for lead dust threatens to make things worse." [583]

concern meriting scientific and public health-based analysis. And, based on the expert opinion provided to the City by childhood lead poisoning specialists, such study would have quickly shown that many of LL 38's discrete provisions in themselves almost certainly increase children's risk of lead dust exposure. Thus, even if, arguendo, the scientific evidence overwhelmingly supported and the public health community universally agreed that total abatement policy should be abandoned, LL 38's weakened controls in other aspects nonetheless warranted impact review.

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 1 in operation was per se hazardous and LL 38 in every regard is per se beneficial. In order for the passage of LL 38 to properly evade impact review, all aspects of LL 38 would have to have no significant adverse environmental effects. Indeed, under the Appellate Division's logic the Council could have revoked LL 1 and LL 50 altogether and not replaced them at all, and yet such action would have had no "environmental impact" for SEQRA purposes. This reasoning does not comport with the complexities of lead hazard control or with the very low threshold for significance determinations under SEQRA.⁵¹

51. Compare, for example, WABBA v. Giuliani, which required an EIS for a "protocol" promulgated by the Department of Transportation that interjected lead dust controls where none had existed before and which presumably would have only "beneficial" environmental effects — indeed far more beneficial than the 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. Moreover, in WABBA the City had asserted that its vigorous analysis by a Mayoral task force of independent experts resulted in a protocol that was a "good-faith effort to establish safety guidelines" to protect against lead emissions. 223 A.D.2d at 68. Nonetheless, the Appellate Division invalidated this process and required the preparation of an EIS. Id. at 74. The court called the City's process an "ersatz EIS," id. at 72, and barred the substitution of an alternative means of environmental review for that provided in SEQRA. Id. at 74.

Ultimately, then, the Appellate Division overlooked the patent adverse health impacts of LL 38's weakening of many discrete lead hazard controls because of the court's conclusion that the purported benefits of abandoning total abatement outweighed all these adverse impacts. However, "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 at 416, accord, Neville v. Koch, 79 N.Y.2d at 424. SEQRA expressly requires impact review of actions that may create even one single adverse effect. ECL § 8-0109(2); 6 N.Y.C.R.R. § 617.7(a). An "overall benefit" exception has no support in this Court's or other SEQRA rulings. Kahn v. Pasnik, 90 N.Y.2d at 574 (invalidating negative declaration where agency disregarded potential adverse environmental impacts that had been identified); Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 720 (same); West Branch Conservation Ass'n, Inc. v. Planning Bd., Town of Ramapo, 177 A.D.2d at 919 (same); Desmond-Americana v. Jorling, 153 A.D.2d at 11-12 (same); H.O.M.E.S. 69 A.D.2d at 227, 232, 234-35 (same).

B. The Appellate Division Incorrectly Ruled that the City Council Deliberations Contained the Analysis and Elaboration SEQRA Requires and Improperly Excused the Inadequate Negative Declaration on the Notion that Such Deliberations Could Substitute for a Properly Written and Approved Negative Declaration.

The Appellate Division's ruling permits the ordinary legislative process to substitute for the three-pronged requirements of the H.O.M.E.S. test. Instead of looking to the validity of the negative declaration document, the court asserted that "[w]hen courts review negative declarations accompanying action by local legislatures, the entire record is reviewed to

determine the sufficiency of consideration under SEQRA.” [3756].⁵² In doing so, the Appellate Division placed great emphasis on legislative deliberations. (“There was vigorous debate of all relevant environmental issues by the City Council Committee. . . .” [3751-52]; “Areas of environmental concern were identified early in the ordinance drafting process, explicitly and exhaustively addressed through witnesses and written submissions and considered through debate and proposed amendments.” [3756-57]).

But if municipal legislative deliberations alone had been sufficient, the State Legislature would never have added the additional requirements of SEQRA. See Weinberg, Practice Commentaries, at 30 (commenting on NYCCELP v. Vallone: “The Legislature explicitly made SEQRA applicable to municipal legislative bodies, see § 8-0105(2)”; 1 Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York § 2.01[4][e], at 2-34 (2002) (stating that “SEQRA’s regulations specifically exempt ... the Legislature of the State of

52. Although the court cited a string of Third Department cases, none stand for this proposition. In Hoffman v. Town Board of the Town of Queensbury, 255 A.D.2d 752 (3rd Dep’t 1998) (the only one that pertained a “local legislature”) the Town Board commissioned archeological, geological, and traffic studies; it retained experts to review the potential impacts; it solicited comments from the public and other involved agencies; it specifically discussed efforts to evaluate potential adverse environmental impacts; and it specifically made findings of no significant adverse effects. Id. at 752-54. Moreover, the Hoffman petitioner did not challenge the Board for failing to identify relevant areas of environmental concern or failing to support its conclusions with a reasoned explanation. Rather, the question presented was whether the Board erred in issuing a “conditional negative declaration.” Id. at 753.

In Wilkinson v. Planning Board of the Town of Thompson, 255 A.D.2d 738, 739-41 (3rd Dep’t 1998), the Environmental Assessment Form was prepared by a certified environmental engineering firm, a local planning board held meetings over a ten month period; it issued a comment letter; it requested additional information; and it issued a “lengthy and detailed rationale underlying its negative declaration.” In Buerger v. Town of Grafton, 235 A.D.2d 984, 985-86 (3rd Dep’t 1997), a local planning board retained an expert; solicited comments; held public hearings; and made specific findings that all the identified potential adverse impacts had been eliminated. Finally, in Hare v. Molyneaux, 182 A.D.2d 908, 910 (3rd Dep’t 1992) the Court said it was “satisfied” with the negative declaration document issued by the local planning board.

New York” ... “[t]his exemption expressly does not extend to local legislative bodies”). In Glen Head v. Town of Oyster Bay, 88 A.D.2d 484, 492 (2d Dep’t 1982), the Second Department soundly rejected the notion of such legislative equivalence: “For all the present record reveals, the town board adopted its rezoning resolution in the same manner to which it was accustomed before SEQRA’s enactment.” It warned that without strict compliance,

the various mechanisms SEQRA has devised to require agencies to consider the environmental impact of their actions simply become additional passages in a bureaucratic maze ... without compelling the decision maker to give the environment the attention it merits in determining the outcome of a proposal.

Id. at 493 (citations omitted).

Even if courts look to the entire record, the express regulatory mandates require the negative declaration in and of itself to at least minimally comply with SEQRA. By enacting SEQRA and applying it to local legislative actions, the State Legislature established a specific mechanism for considering all potential adverse environmental impacts, holding local legislatures 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 significant adverse effect. While no precedent exists for the exception created by the decision below, on the other hand substantial precedent supports upholding compliance with SEQRA’s procedural requirements. See, e.g., Merson v. McNally, 90 N.Y.2d at 750 (strict procedural compliance required with SEQRA); King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d at 347 (same); Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417 (same); see also Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 720 (annulling negative declaration for agency’s failure to “follow procedures”); WABBA v. Giuliani, 223 A.D.2d at 73-74 (same); Desmond-Americana v. Jorling, 153 A.D.2d at 11 (“While it is true that [the agency] may have considered” an issue

not analyzed in the negative declaration, “an EIS was required to explore the entire issue thoroughly.”(emphasis in original)).

In any event, the Appellate Division’s characterizations of the Council’s deliberations are unsupported by substantial evidence. Contrary to the Appellate Division’s decision, the record does not show that “[e]very provision of the amending ordinance had been the subject of extensive debate involving experts from various fields as well as representatives of interested organizations.” [3752] The record of the Council’s proceedings, for example, contains no discussion focused directly on many changes made to the safe work rules (such as work area preparation) or on the removal of all protections for six-year-olds.

Nor does “[t]he record well document[] the fair and thorough consideration of the environmental aspects of the new ordinance by the Council.” Id. Indeed, the prime sponsor of LL 38, Council Member Archie Spigner, moments before the full Council vote on LL 38 and the negative declaration, admitted the exact opposite:

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

[2238-39 (emphasis added)]. The kind of reasoning expressed by Council member Spigner and others has long been held to violate SEQRA. See H.O.M.E.S., 69 A.D.2d at 232 (rejecting reliance on “general assurances” that after any problems developed the City “would adequately mitigate them by some unspecified appropriate action,” especially as it “vaguely recognized” these problems’ existence).

Moreover, the record, rife with expert opinion overwhelmingly and universally critical

of LL 38's unsound public health policies, contrasts starkly with the Appellate Division's conclusion that "[t]here is no claim that any action undertaken or proposed by respondents would increase health risks beyond those already existing due to the use of lead-based paint by third parties." [3745] For example:

- Dr. Bruce Lanphear, a leading expert on childhood lead poisoning from lead dust [251-52], said the bill was "simplistic, regressive and . . . will result in an increase in childhood lead poisoning," and that "[i]t fails to recognize that lead-contaminated house dust is the primary pathway for leaded paint to be ingested by young children." [539]
- Dr. Paul Mushak, an environmental toxicologist, described LL 38's "elimination of the dust lead as a factor" as "scientific nonsense" and "professionally irresponsible." [548]
- Dr. Barry Levy, former president of the American Public Health Association, wrote that "[l]ead dust must be included in the definition of 'lead-based paint standards'" and that "[t]he proposed legislation would be a major step backward and put children at unnecessary significant risk of permanent harm due to lead exposure." [544-45]
- Dr. John Rosen, twice Chair of the CDC's Advisory Committee on Lead Poisoning, said that a treating physician would be committing medical malpractice to permit a lead-poisoned child to return to a home abated under LL 38's lax interim controls. [571]

The Council hearing and meeting records are totally devoid of any reasoned elaboration by the Council as a whole of any conclusion regarding the key environmental health issues raised by the experts. It is impossible for the reviewing court, based on this record, to know what the Council actually determined regarding those issues, or on what basis its determination was made. That is why SEQRA puts in place a specific mechanism of a written negative

declaration that analyzes the issues and provides a reasoned elaboration for its conclusions.⁵³

C. The Appellate Division’s “Third Party Hazard” Exemption Seriously Undermines SEQRA Governance.

The Appellate Division decision implicitly exempts local regulation of existing hazardous materials non-governmental in origin. [3747, 3750, 3754] The Appellate Division declared that “[w]here, as here, governmental action concerns remedies for existing environmental harm, it is important to keep the existing harm separate from the governmental action.” *Id.* [3747] The Appellate Division’s novel distinctions and unprecedented approach — unsupported by any authority — will drastically undermine SEQRA’s efficacy. Under this theory, nearly every governmental proposal that would change (or even eliminate) the regulation of air pollution, water pollution, pesticides, hazardous substances management or hazardous waste management — or require the disturbance of existing toxic substances — would be exempt from normal SEQRA review.⁵⁴

The exemption runs afoul of SEQRA implementing regulations, which expressly govern local regulation and policy. 6 N.Y.C.R.R. § 617.2(b)(2) (actions subject to SEQRA include “policy making activities that may affect the environment”); § 617.2(b)(3) (same as to “adoption of . . . local laws”). SEQRA does not restrict its purview to hazardous materials

53. Moreover, the hearings occurred before a Committee of the City Council, but LL 38 and the negative declaration were adopted by the full Council. The absence of a written evaluation of all potential adverse impacts, as required by SEQRA, therefore deprived many Council members of an informed evaluation of the environmental concerns previously raised. If anything, stricter compliance with SEQRA’s mandatory procedural requirements was warranted in this case — not weaker, alternative ones.

54. In any event, the Appellate Division conclusion that LL 38 “would [not] increase health risks beyond those already existing due to the use of lead-based paint by third parties” [3745] is simply incorrect. As noted previously, LL 38 mandates that landlords remove peeling lead-based paint, and increases the risks to occupants by eliminating the prior requirement that work involving this toxic substance be performed only by trained, certified personnel.

created solely by the government as opposed to those created by third parties. Similarly, SEQRA also does not limit its application to future hazards as opposed to existing conditions. The plain language of the statute and regulations does not characterize hazards as the court below did. Given the vast quantities of hazardous materials that industry has already produced, the State Legislature could not have intended to limit impact review in the way the Appellate Division suggests.

In addition, SEQRA cases concerning hazardous materials make none of the distinctions the Appellate Division drew. See, e.g., *Desmond-Americana v. Jorling*, 153 A.D.2d at 11-12 (concerning public notification of hazardous pesticides provision). Lead paint and lead dust unquestionably constitute hazardous materials, Juarez, 88 N.Y.2d at 641, and policy-making regarding lead dust hazards must comply with SEQRA. WABBA v. Giuliani, 223 A.D.2d at 73 (lead dust is a “toxic substance long recognized as a hazardous waste” subject to SEQRA); see also 6 N.Y.C.R.R. § 617.7(c)(1) (“indicators of significant adverse [environmental] impacts” include those that work “(i) a substantial adverse change in existing air quality”) and those that “(vii) ... creat[e] a hazard to human health”).

A “third party hazard” exemption has potentially devastating ramifications. For example, it would permit localities to weaken or eliminate their regulations of toxic substances — or launch programs that require the disturbance of toxic substances — without proper environmental review. Municipalities have the power to adopt and amend local laws related to the “safety, health and well-being of persons.” N.Y. Const. Art. 9, § 2(c)(10). In New York City alone, the Council has enacted many local laws related to hazardous materials that involve existing substances created by third parties. See, e.g., N.Y.C. Admin. Code §§ 16-117.1 (“transport, storage and disposal of waste containing asbestos”), 24-146.1 (“asbestos work”),

24-609 et seq. (governing “hazardous substance release” and “emergency response”). Under the Appellate Division’s rationale, for example, if the Council wanted to regulate (or deregulate) remedies for toxic contaminants in schools or preschools located in renovated industrial sites, it could do so without undergoing any environmental impact review.⁵⁵

Allowing local legislatures to evade SEQRA compliance will permit regulation of such hazardous substances without the guidance of informed, comprehensive, analytic, and open decision making. Hasty and ill-considered enactments, as in the instant case, can result in potentially irreversible, devastating public health effects on thousands if not hundreds of thousands of people. The New York State Legislature could not have intended such an outcome; SEQRA does not permit it.

55. Siting of preschools and elementary schools in locales with hazardous conditions has occurred in New York City and State. See, e.g., Joan Swirsky, Parents’ Fear: A Monster in the Playground, N.Y. Times, Mar. 17, 2002, at 14LI 1 (preschool located adjacent to Superfund toxic waste site); Elizabeth Kolbert, Bond Act Has Unsafe School as Backdrop, N.Y. Times, Oct. 16, 1997, at B1 (elementary school sited in former dry-cleaning plant).

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

Dated: New York, NY
February 4, 2003

Respectfully Submitted,

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