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

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 ROAD BY WALKING, INC.; NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE, INC.; SOUTH BRONX COALITION FOR CLEAN AIR, INC.; QUEENS LEAGUE OF UNITED TENANTS, INC.; INOCENCIA NOLASCO, GRECIA MARIA VASQUEZ, and her minor child, KATHERINE FIGUEREO by her next friend and mother, GRECIA MARIA VASQUEZ; CATHERINE RODRIGUEZ, and her minor children, DESTINY ALONSO, BIANCA RODRIGUEZ, and JOANNE MARRERO, by their best friend and mother, CATHERINE RODRIGUEZ; ANA GOMEZ, and her minor children, CHRISTIAN GOMEZ and STEPHANIE GOMEZ, by their next friend and mother, ANA GOMEZ; MARIA CELIA NOLASCO and her minor grandchildren JUSTIN AGRAMONTE and JUAN NOLASCO, JR., by their next friend and guardian, MARIA CELIA NOLASCO; and DAVID M. MONAHAN and JULIE MONAHAN, and their minor child IRIS EVE MONAHAN, by her next friends and parents, DAVID M. MONAHAN and JULIE MONAHAN,

Petitioners-Plaintiffs-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.

PETITIONERS' MOTION FOR LEAVE TO APPEAL

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September 6, 2002

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

NOTICE OF MOTION

PLEASE TAKE NOTICE that for the reasons set forth in the accompanying Petitioners' Brief in Support of Motion for Leave to Appeal to the Court of Appeals, dated September 6, 2002, and the exhibits thereto; and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a term to be held at the Courthouse, Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 23rd day of September, 2002, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an Order pursuant to CPLR §§ 5513(b) and 5602(a)(1)(i) and § 500.11 of this

Court's Rules of Practice, granting leave to appeal from the Order of the Appellate Division, First Department, dated March 26, 2002, on the grounds that the questions presented are of great public importance, and that permission to appeal should be granted in the interests of substantial justice, and for such other and further relief as to the Court seems just and proper.

Dated: New York, New York
September 6, 2002

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TO:

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

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PETITIONERS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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September 6, 2002

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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.

STATEMENT OF QUESTIONS PRESENTED

Question 1:

In this case involving the New York State Environmental Quality Review Act ("SEQRA"), did the Appellate Division err in upholding the adequacy of a negative declaration issued by the New York City Council 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 weakened work safety rules, and which the experts agree may increase children's risk of exposure to lead hazards?

Yes. The Appellate Division did not properly apply the H.O.M.E.S. test, under which the Council's negative declaration was hopelessly inadequate since it failed even to identify, much less thoroughly analyze, many relevant areas of environmental concern, nor set out a reasoned elaboration.

Question 2:

Did the Appellate Division err in excusing non-compliance with the H.O.M.E.S. test on the ground that the deliberations of a local legislature could substitute for a minimally adequate negative declaration?

Yes. No court has ever before exempted local legislatures from SEQRA on this basis. In other contexts, the courts have squarely rejected ersatz forms of SEQRA compliance.

Question 3:

Did the Appellate Division err in excusing non-compliance with the H.O.M.E.S. test on the grounds that local governments need not prepare minimally adequate negative declarations when dealing with toxic substances created by third parties?

Yes. Governmental agencies are fully subject to SEQRA even when dealing with environmental hazards not of their own creation. Substantial public policy concerns argue against the creation of a "third party hazard" exemption for local governments.

Question 4:

Did the Appellate Division err in excusing non-compliance with the H.O.M.E.S. test on the basis of the Appellate Division's conclusion that Local Law 38 was wholly beneficial?

Yes. The supposed consensus relied upon by the Appellate Division did not exist, but even if, arguendo, all parties had agreed that some sort of "containment" approach to the hazards of lead paint was preferable to a total abatement regime, the City Council was still obligated to apply the H.O.M.E.S. test to the specific and highly controversial choices it made among many possible, different, containment schemes. And the adverse impacts of the many other discrete changes that had nothing to do with the "containment" versus "removal" issue cannot be swept under the rug for the purposes of SEQRA compliance simply by a wholesale and unsubstantiated conclusion that Local Law 38 is in every respect preferable to prior law.

STATEMENT OF PROCEDURAL HISTORY OF CASE

This case concerns whether the New York City Council complied with the State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq., when it enacted Local Law 38 of 1999 ("LL 38").[439][1] LL 38 completely replaced and revised the prior local legislative scheme for the control and reduction of environmental hazards to children from lead paint. On July 15, 1999, LL 38 was signed by the Mayor and became effective November 12, 1999. On October 14, 1999, petitioners-plaintiffs-appellants ("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 [15b] (Ex. A) the IAS court held that LL 38's enactment violated SEQRA, and on February 22, 2001, entered judgment (Ex. B) nullifying LL 38.

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

Respondents appealed from the judgment to the Appellate Division, First Department.[2] On March 26, 2002, the Appellate Division reversed the IAS court and reinstated LL 38. On April 17, 2002, respondents served by regular mail notice of entry of the Appellate Division's decision and order. (Ex. C) 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 August 2, 2002, respondents served by mail notice of entry of the Appellate Division's order (dated July 25, 2002) denying leave to appeal. (Ex. D)

Petitioners now make this timely September 6, 2002, 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.

JURISDICTIONAL BASIS FOR LEAVE TO APPEAL

This Court has jurisdiction of the motion and appeal requested 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, constitutes a final determination of the action since it completely disposed of the case. In addition, this case originated in Supreme Court, New York County, one of the courts specified in CPLR § 5602(a)(1). Finally, petitioners may not appeal this case as of right since two justices did not dissent in the Appellate Division's decision below and petitioners did not raise any constitutional question. This case presents

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2. Two briefs amici curiæ were submitted in support of petitioners, one by the State of New York (Ex. L), and one by twenty-four of the leading scientists, researchers, physicians, and public health experts in the field of childhood lead poisoning (Ex. M) (herein "Experts' Amici Br."). An amici curiæ brief was submitted in support of respondents by four real estate trade organizations (Ex. J.)

Petitioners will cite references to their various briefs filed below as follows:

"Pets.' Br. I": Petitioners-Plaintiffs' Memorandum of Law in Support of Petition and Motion for Preliminary Injunction (to IAS Court) (Ex. E)

"Pets.' Br. III": Petitioners-Plaintiffs-Respondents' Appellate Brief (to Appellate Division) (Ex. I)

"Pets.' Br. IV": Petitioners-Plaintiffs-Respondents' Brief in Support of Motion to First Department for Leave to Appeal to the Court of Appeals (Ex. N)

"Pets.' Br. V": Petitioners-Plaintiffs-Respondents' Reply Brief in Further Support of Motion to First Department for Leave to Appeal to the Court of Appeals (Ex. P)

questions of law and thus meets all the requirements set out in CPLR § 5602(a)(1)(i) as to this Court's jurisdiction over motions for leave to appeal.

PRELIMINARY STATEMENT

For more than 40 years, New York City has struggled with the intractable disease of childhood lead poisoning. In 1960, the New York City Department of Health ("DoH")[3] banned the use of lead paint in all residential dwellings to prevent childhood lead poisoning. A decade later, DoH began to use its enforcement powers to require the immediate correction of lead paint but only after a child was lead poisoned. No longer satisfied with waiting for children to become lead poisoned, the City Council in 1982 enacted Local Law 1 ("LL 1"). This groundbreaking law sought to eliminate most lead paint hazards before a child was exposed to toxic lead because lead is known to have significant, long-term and irreversible adverse affects on young children. See Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 640-41 (1996). Among other things, LL 1 required landlords to remove or permanently cover hazardous lead paint using mandatory safe work practice rules issued by the DoH in apartments with children under 7 years old. See Juarez, 88 N.Y.2d at 644-45, n.*. LL 1 remained in effect for nearly 17 years, during which time the number of children found to be lead poisoned — although still too high — decreased significantly.[4]

In 1999, the City Council repealed LL 1 and replaced it with LL 38. LL 38 was an entirely new legislative scheme for the control and reduction of lead paint hazards, that in many ways was less stringent than the law it was replacing. It did so in a politically charged and hurried manner. Pet.

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3. 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.

4. While LL 1 was in effect, the number of children requiring immediate medical intervention for lead poisoning declined by approximately 92%. DoHMH, Surveillance of Childhood Blood Lead Levels in New York City, July 2002, at 7 (available at www.ci.nyc.ny.us/html/doh/html/lead/12002.html) [herein Surveillance of Childhood BLLs].

¶¶ 72-136 [55-74].[5]

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(2); 6 N.Y.C.R.R. § 617.7. If an action may result in a significant adverse impact, SEQRA requires the preparation of a comprehensive Environmental Impact Statement ("EIS"). §§ 617.7(a)(1), 617.9. There is a low threshold for this determination; an agency may issue a negative declaration that no EIS is required only if the foreseeable environmental impact is truly inconsequential. § 617.7.; Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 364-65 (1986).

Petitioners contend that the Council's negative declaration failed to specifically address numerous areas of potential adverse environmental impact. The most egregious omission was the Council's complete failure within the four-corners of the negative declaration to identify and analyze the potential adverse impact associated with lead-contaminated dust. In a well-reasoned decision, the IAS court agreed with petitioners, holding that the negative declaration not only violated SEQRA because it had not identified lead-contaminated dust in the negative declaration, but also based on the failure to identify and analyze at least four other potential hazards to children's health and well-being:

(1) the removal of six-year-olds from the class to be protected from lead-based paint;

(2) the establishment of a 21-day period in which landlords cited for violations could escape the more stringent Health Code standards for safe lead paint abatement;

(3) the allowance of inordinately long periods for lead hazard removal and enforcement; and

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5. See, for example, Editorial, Get the Lead Dust Out, N.Y. Times, June 21, 1999 [810] and various other news articles in the record [804-821], urging the City Council to carefully address all lead paint hazards, rather than to act precipitously in response to the political pressures of the moment. The City Comptroller similarly and repeatedly criticized the rushed process. [750-51][1484-87]

(4) the elimination of the deadline for the City's housing agency to enforce the correction of lead-based paint violations in one- and two-family dwellings.

In a decision that is discussed below, the Appellate Division reversed the IAS court. In summary, the Appellate Division's decision is flawed because it did not analyze all of the potential adverse impacts identified by the IAS court and, as a result, has significantly departed from the well-established doctrine governing judicial review of SEQRA, namely the "H.O.M.E.S. test." H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979).

This case merits review by this Court for two reasons: First, and foremost, the outcome of this case will affect the health and well-being of tens of thousands of New York City children. 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).[6]

An estimated 473,000 New York City children live in dwellings constructed before the 1960 ban on use of indoor lead paint, and are thus exposed to this potentially devastating disease. [2535] 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. [1001, 2551] Moreover, national public health experts on lead poisoning warned the City that LL 38 increased the risk of lead poisoning to these children by weakening some critical aspects of New York City's lead hazard controls. [282-292, 536-84, 595-6, 603-06, 738-40, 746-47, 757-64] Indeed, not one credentialed independent expert supported LL 38, and a great many opposed it. [111-225, 231-269, 282-329, 339-393, 536-84, 595-6, 603-06, 738-40, 746-47, 757-64, 1541-61, 1592-97, 1604-10, 1729-37, 2755-56, 2759-61, 2768-70, 3538-3549] See also, Experts' Amici Br. (Ex. M) Should the Appellate Division's decision stand, these potential health hazards will never be evaluated in the manner that SEQRA commands.

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6. In addition to Juarez, this Court has spoken in several cases in the past few years arising from lead poisoning, most recently in Chapman v. Silber, 97 N.Y.2d 9 (2001). Indeed, in Chapman this Court noted the pendency of the instant litigation concerning the viability of New York City's lead paint laws, upon which Juarez (and hundreds of other lower court decisions) was premised. Chapman at 20 n.4.

The second reason for review by this Court is the Appellate Division's departure from the three part analysis of the H.O.M.E.S. test, which directs reviewing courts to confirm that an agency has identified all relevant areas of environmental concern, analyzed these concerns thoroughly, and set forth a reasoned elaboration in writing for its determination. Id., 69 A.D.2d at 232.

Here, the Appellate Division did not review and analyze each of the potential adverse impacts identified by the IAS court. Most notably, the Appellate Division does not say one word about the hazards associated with lead-contaminated dust in its analysis of the potential adverse environmental consequences of LL 38. In short, the Appellate Division validated the Council's negative declaration without ever stating whether the Council adequately reviewed the issue of lead-contaminated dust.

Furthermore, the Appellate Division, unlike the IAS Court, did not apply a strict H.O.M.E.S. test analysis to review the negative declaration's adequacy. As a substitute for H.O.M.E.S., the Appellate Division granted the Council a great deal of leeway in fulfilling its obligation to comply with SEQRA, and presumed that in hearings before the Council's Housing and Buildings Committee and then in the full Council debate, all the issues of environmental concern were raised and discussed (a presumption not borne out by the record). The Appellate Division concluded that to obviate the need for an EIS, the agency must merely have "made a thorough investigation of the problems involved and reasonably exercised its discretion ...." App. Dec. at 19. But the Appellate Division remained silent about the Council's failure to strictly comply SEQRA's procedural requirements.

For example, the Council failed to provide a complete written elaboration identifying all potential adverse impacts and the reasoning to support the conclusion that there were no potential adverse environmental consequences. See 6 NYCRR § 617.7(a)(4) (the lead agency must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation") (emphasis added). With neither a written identification of potential adverse impacts nor a written "reasoned elaboration," all that remains is the bare legislative process — but not the SEQRA process. By allowing the City Council to proceed with an

inadequate negative declaration, the Appellate Division has judicially negated the Legislature's intent to require local legislative bodies to comply with the strictness of SEQRA.

Instead, the Appellate Division's decision incorporates new rationales that are unprecedented under the prior H.O.M.E.S. test, presumably because SEQRA in this case is applied to a legislative body. These new rationales are: (1) legislation that is perceived by a reviewing court to be broadly beneficial need not be examined in all of its potentially harmful particulars; (2) the City Council'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, even if the indirect consequences of its action may cause environmental harm. These far-reaching and unprecedented rationales ought to be reviewed by this Court before they are incorporated and applied by other lower courts, because they may seriously undermine the efficacy of SEQRA in a broad array of new cases.

STATEMENT OF FACTS

A. Lead Paint and Lead Dust Can Permanently Harm Children.

Lead paint, the major source of lead poisoning in children, [536, 539, 544, 548, 580] "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)).

Experts consider lead dust to be the main pathway for ingestion of lead by children. [252-53, 344, 536, 539, 544, 548, 580, 1009] Lead dust is invisible to the naked eye and highly toxic even in very small quantities. [541, 545] Lead-based paint on friction surfaces such as windows and door jambs generates lead dust through abrasion. [549-50] Lead paint on impact surfaces such as baseboards and

door frames generates lead dust through regular wear and tear. [570] Lead-based paint on accessible surfaces such as window sills poses a great risk to toddlers who explore the world through "mouthing." Lead paint on surfaces breaks down over time and also generates lead dust. [396] Even intact lead-based paint can generate lead dust through regular wear and tear.[296-97] Because of lead's toxicity, unsafe lead paint repairs can generate dangerous levels of lead dust and create extremely hazardous conditions. [347, 536, 542, 570-77]

Ingested or inhaled lead causes central nervous damage, loss of intelligence, and behavior disorders, among other irreparable injuries. Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64, 66 (1st Dep't 1996) [hereinafter WABBA]. Research has shown — and parents painfully know — that lead poisoning permanently impairs children's mental and physical development.[7] [1009, 1032-36] Children continue to be at risk through the age of seven and beyond. [79, 95, 163, 174-76, 219, 304-05, 2527].

B. Regulation of Lead Paint Hazards in New York City

1. Pre-Existing Local Laws on Lead Paint

From 1982 until 1999, LL 1 (former N.Y.C. Admin. Code § 27-2013(h)) [2382], along with Local Law 50 of 1972 ("LL 50") (N.Y.C. Admin. Code § 27-2126) [2392], and various implementing regulations, provided the legal framework for lead hazard controls in New York City. 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. LL 1 and implementing regulations governed many facets of lead abatement

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7. 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?, February 2, 1998, at 27-28, 53-55 [1032-33, 1058-60] 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. Philip J. Landrigan, et al., 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: 721-28 (July 2002).

– from the lead hazard definition and inspection duties to enforcement time frames and safety standards for work on lead paint, among others. See Pets.' Br. III (Ex. I) at 9 - 12 (referencing pertinent cites).

Under LL 1, the City's regulations governing safe work practices, 24 R.C.N.Y. § 173.14, [2363] comprised a critical component of lead hazard controls, because toxic lead dust is generated any time lead paint is disturbed. Abatement of lead hazards — whether peeling or intact paint — conducted without proper safety precautions results in significant risks of lead exposure for young children. LL 1's comprehensive safety regulations were in line with federal guidelines that prevent lead poisoning from unsafe work practices, see Pets.' Br. III (Ex. I) at 10, 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 remains. See Pets.' Br. III (Ex. I) at 10, 34.

2. Local Law 38 of 1999

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. In papers below, petitioners detailed nearly forty subsidiary changes in lead hazard controls altered by LL 38. See Petition [32, 78-89]; Pets.' Br. I (Ex. E). Outlined below are just some of the more significant changes that petitioners contend are deleterious.

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 omits 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 necessary for a condition to require abatement from 0.7 mg/cm^2 to 1.0 mg/cm^2. 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 limit from 7 years to 6 years for lead paint prevention and enforcement measures. 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) (LL1). 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 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, 97 N.Y.2d at 19-20. 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, under LL 38 the inspection duties of landlords and of the City's Department of Housing Preservation and Development ("HPD") are limited to pre-1960 buildings.[8]

LL 38 reduced HPD's enforcement obligations as to one- and two-family homes. Under LL 50, where landlords failed to correct lead paint hazards in such dwellings where a child had already been poisoned, HPD was mandated to correct the hazard within 18 days time. Admin. Code § 27-2126(b). This mandated time frame was deleted by LL 38 for one and two-family dwellings.

LL 38 altered safe work requirements for renovations on lead paint. LL 38 allows a landlord to

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8. LL 1 required HPD to place violations for lead paint in dwellings of any age. NYCCELP v. Koch, slip op. (Sup. Ct. N.Y. Co. July 6, 1989) [2432]; Order (Sup. Ct. N.Y. Co. Aug. 2, 1990) [2454], aff'd, 170 A.D.2d 419 (1st Dep't 1991) (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"); see Richard Rabin, Warnings Unheeded: A History of Child Lead Poisoning, 79 Am. J. Pub. Health (12) 1668, 1673 (DoH found 10% of interior paints offered for sale in 1971 had illegal levels of lead); Woolfalk v. New York City Housing Auth., Index No. 112405/93 slip op. (S. Ct. N.Y. Co. May 12, 1998), [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).

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 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 Pets.' Br. III (Ex. I) at 34 (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." The majority of the regulatory changes enacted by LL 38 are not even mentioned in this composite document. There is no mention of enlarged time frames for enforcement. There is no mention of the shift in inspection duties from landlords to tenants. There is no mention of the elimination of inspection responsibilities in post-1960 buildings. Most remarkably, 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][9] is not alluded to anywhere within the four corners of this document.

The minority of 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

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9. 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." [1533]

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 a 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 ("Because lead in paint is undetectable to the senses, a landlord cannot actually know of its presence without testing.").[10] Indeed, a Council member or member of the public could read the entire negative declaration without learning how LL 38 changed any of the 40 separate provisions identified by petitioners.

When LL 38 was before the Council's Housing and Building Committee, the Committee failed to engage in any substantive review or discussion of the SEQRA requirements or the negative declaration.[11] The full Council never discussed it at all.

D. The Decisions Below

In the IAS court's decision, Justice Louis B. York painstakingly showed that LL 38 extensively overhauled the City's existing child lead poisoning prevention laws. The IAS Court concluded that each of the changes identified by petitioners may constitute an adverse environmental impact under

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10. Dr. Lynn R. Goldman, who until 1998 was the Assistant Administrator in the federal Environmental Protection Agency "responsible for the national standards for lead based paint hazard evaluation and control," warned the Council that "a visual inspection alone will miss many homes with significant lead hazards." [282]

11. The entire review was as follows [1988-89]:

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

SEQRA's framework,[12] and applying the H.O.M.E.S. test it concluded that the negative declaration was deficient, since it failed to identify, analyze, and explain these changes.[15j] For Justice York, most troubling was the issue of lead contaminated dust; he pointed out that in WABBA v. Giuliani, 223 A.D.2d at 66, 73, the Appellate Division had held lead-contaminated dust generated by lead paint posed a significant environmental hazard for which policy-making must be addressed under SEQRA by the preparation of an EIS.

The Appellate Division reversed the IAS court and reinstated LL 38 and the negative declaration. Relying on a fundamentally flawed analysis of LL 38 and its enactment, it concluded — based on an incorrect reading of LL 1[13] and without substantial evidence[14] — that LL 1, by requiring

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12. The IAS court noted [15j] i) the elimination of lead dust and related conditions from the definition of a "lead-based paint hazard;" (ii) the removal of six-year olds from the class to be protected from lead-based paint; (iii) the 21-day period in which landlords cited for violations could escape the Health Code standards for safe lead-based paint removal; (iv) the inordinately long periods for lead hazard removal and enforcement; and (v) the elimination of the deadline for HPD's enforcement of lead-based paint violations in one- and two-family dwellings.

13. The Appellate Division characterized LL 1 as a "total removal approach," while LL 38 was characterized as "one of containment." App. Dec. at 8 (citations omitted). In reality, the redefinition of lead paint hazards did not constitute an absolute replacement of "paint repair" for "paint removal" but reflected a far more complex change. LL 1 [2383], for example, did not require total removal alone; rather, it required landlords to "remove or cover" (emphasis added) applicable leaded paint. 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.

14. The record contradicts the Appellate Division's generalizations about "total abatement" versus "containment" or that they constituted "undisputed" facts. The expert testimony before the Council did not address at any length the relative merits of one approach over the other. The testimony focused instead on discrete provisions because the crucial public health implications lay in how revised measures effected the overarching approaches. Other than general comments by LL 38's legislative supporters, few witnesses even mentioned this topic. At best, the sparse evidence in the record shows disagreement over policy preferences. For example, Dr. Herbert Needleman, a researcher on childhood lead poisoning for the past twenty-five years, 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] See also John F. Rosen, et al., Primary Prevention of Childhood Lead Poisoning – The Only Solution, New England J. Med., 1421-26 (May, 2001); United States Centers for Disease Control, 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 (continued...)

"total abatement," was per se hazardous. The court further ascribed the supposed per se hazardous nature of "total abatement" to every independently operating provision of lead hazard control. It then concluded that by shifting away from "total abatement," LL 38 in each and every regard would reduce rather than create adverse environmental impacts. App. Dec. at 17 This conclusion is unsupported by reason or fact, and can only be reached by overlooking entirely lead dust's patent public health risks and the record.[15]

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14. (...continued)
dwelling."). More importantly, 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 more limited measures of LL 38. See discussion in Pets.' Br. IV (Ex. N) at 12-21.

15. The Appellate Division's decision (App. Dec. at 10-11) parsed Petitioners' concerns thus:

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

Inexplicably, the Appellate Division's decision did not address whatsoever petitioners' claims and extensive discussions of the impact of the elimination of lead dust and related conditions from the definition of lead hazards (Pets.' Br. III (Ex. I) at 25 - 28), the weakening of the work safety practices (id. at 29 - 34), the lengthening of the time frames for correction of lead hazards (id. at 35 - 36), and the elimination of deadlines for correction of lead hazards in lead poisoned children's homes in non-multiple dwellings (id. at 37 - 38).

ARGUMENT

I. THIS CASE MERITS REVIEW BECAUSE THE NEGATIVE DECLARATION FAILED TO IDENTIFY AND ANALYZE SIGNIFICANT POTENTIAL ADVERSE EFFECTS OF THE PROPOSED ACTION REGARDING THE ENVIRONMENTAL HEALTH AND SAFETY OF CHILDREN.

A. The Sweeping Changes Made by Local Law 38 to the City's Lead Paint Control Program Required Full and Proper Analysis to Determine Whether or Not They Might Cause a Significant Adverse Environmental Effect — Especially on 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) (citation omitted). To this end, SEQRA imposes on governmental decision makers a two-step process for evaluating proposed actions. First, agencies must determine whether the proposal is subject to SEQRA impact review. This threshold inquiry or significance determination depends on whether "the action may include the potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1) (emphases added); see also ECL § 8-0109(2). A "very low threshold" applies to the significance determination. 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 Chemical Specialties Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 397 (1995) (EIS triggered by relatively low threshold); Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d at 364-65 (same); West Branch Conservation Ass'n, Inc. v. Planning Bd. of Clarkstown, 207 A.D.2d 837, 838-39 (2d Dept. 1994), ("operative word triggering the requirement of an EIS is 'may'"), mot. for lv. to app. den., 84 N.Y.2d 1019 (1995), H.O.M.E.S., 69 A.D.2d at 232. (same)

Lead hazard controls, such as those contained in LL 1 and LL 38, determine the magnitude of lead hazards to which children may lawfully be exposed. As described above, LL 38 made at least 40 discrete alterations in New York City's lead hazard control system. LL 38 narrowed the definition of

what is considered a hazard; relaxed work safety rules regarding how abatement must be conducted; enlarged time frames for when abatement must occur; and lowered the age limit for who benefits from prevention and enforcement measures. Indisputably, some of those alterations "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 have an adverse impact.[16] Thus, a negative declaration concerning LL 38 needed to be carefully analyzed under the H.O.M.E.S. test.

B. The Negative Declaration Failed to Meet the H.O.M.E.S. Test.

For nearly a quarter century, the Courts have relied upon the H.O.M.E.S. test to determine whether an agency subject to SEQRA has correctly decided whether an EIS is required. Under this test,

> "A court's authority to examine a SEQRA review conducted by an entity that was required to do so is limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. The relevant question before the court is 'whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination.'"

Kahn v. Pasnik, 90 N.Y. 569, 574 (1997) (quoting Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 688 (1996)).

Where analysis under the H.O.M.E.S. shows that a decision maker 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

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16. In 1999, 1,616 (i.e., 14%) of the 11,664 NYC children who were tested and found to have elevated blood lead levels were ages 6 through 8. DoHMH, Surveillance of Childhood BLLs, at 64. Moreover, since there is no requirement for screening children for risk of 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 significantly higher.

(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 Envtl. Conservation, 193 A.D.2d 742, 742-43 (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 Appellate Division failed to properly apply the H.O.M.E.S. test in this case 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.

1. The Negative Declaration Failed Even to Mention 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 12, far from identifying the relevant areas of environmental concern, the negative declaration quite literally and remarkably fails even to mention them.

For example, LL 1 required the permanent covering or removal of all lead paint on impact, friction, and child accessible surfaces, thus eliminating these sources of toxic lead dust. LL 38's definition of lead hazards excluded impact, friction, and child accessible surfaces with intact lead paint that nonetheless generate toxic lead dust (and which under federal standards, 42 U.S.C. § 4851b(15), are defined as hazards). Although the City's then-Health Commissioner stated that "[w]e know now that lead-contaminated dust is the predominant source of lead poisoning, and most likely the best predictor of children's risk," [1423] the negative declaration did not identify the deregulation of impact, friction, and child accessible surfaces as a relevant area of concern (nor analyze and substantiate its

deregulation), even though many independent experts asserted this change alone could result in significant adverse health impacts.[17]

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.'" App. Dec. at 14, (quoting EAS) (emphasis added). This conclusion was clearly 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 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

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

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

(emphasis omitted). Toxicologist Dr. Paul 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, said:

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

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.

2. 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 any relevant areas of environmental concern, it ipso facto failed to take a "hard look" at them. Although this point requires little elaboration, it would perhaps be useful, with regard to several of these areas, to describe what a "hard look" would look like. 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 contained 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"),[18] 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,[19]

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18. The record indicated that Montefiore Hospital had treated hundreds of lead-poisoned six-year-olds during the past twenty-five years, [304] and that at least 9% percent of lead-poisoned children in New York City were six or older. [2527] Newly released data, supra page 17, n.16, indicates that this percentage was even higher.

19. See e.g., Kin N. Dietrich, et al., Lead Exposure and the Motor Developmental Status of Urban Six-Year-Old Children in the Cincinnati Prospective Study, 91 Pediatrics 301-7 (1993); Peter A. Baghurst, et al., Environmental Exposure to Lead and Children's Intelligence at the Age of Seven Years, 237 N. Eng. J. Med. 1279-85 (1992).

§§ 617.7(c)(3)(iii) ("its duration), (iv) ("its irreversibility"), (vi) ("its magnitude"), and referenced testimony by a 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][20]

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][21] The negative declaration contained no such analysis.[22]

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20. 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] Respondents have repeatedly offered in their briefs in this case the post hoc justification of then-Health Commissioner Cohen's general comments that the "principal age for developing childhood lead poisoning [is] [1 1/2] to [2 1/2] years."[1418]. By this logic, the City could have eliminated all protections for all children except those between 1-1/2 and 2-1/2 years of age, with no "adverse impact" cognizable under SEQRA.

The Appellate Division also accepted the City's post hoc explanation that since federal lead hazard regulations apply to children under six years this change cannot constitute a significant adverse environmental factor. App. Dec. at 15, 17. 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. Spitzer v. Farrell, _ A.D.2d __, 742 N.Y.S.2d 285, 288 (1st Dep't 2002) (significance determinations involve a "much broader undertaking" than merely ascertaining whether a provision complies with federal regulation).

21. The viability of "interim controls" in reducing lead dust levels to a point where children are not poisoned has not at all been scientifically established. See Lanphear Aff. [256]; Rosen App. Aff. [3542-43]. Indeed, interim controls have been implicated in childhood lead poisonings. See Grimes v. Kennedy Krieger Institute, 366 Md. 29, 59, 782 A.2d 807, 825 (2001).

22. Dr. Susan Klitzman, now a Board of Health member, and who until the fall of 1999 was Assistant Health Commissioner for Environmental Risk Assessment and Communication, [3555] and "overs[aw] the Department of Health's Lead Poisoning Prevention Program," [1429] testified to the Board on November 5, 1999, that

> [T]he "exclusive interim controls" outlined in Local Law 38 and its related rules ... are less protective of health than the provisions of the current health code Section 173.14 in at least 2 key respects:
>
> First, they do not require that the person performing the work receive any training, licensing or certification in lead safety.
>
> Second, they do not require that after lead-based paint hazards are corrected and the work area is cleaned, four dust wipe samples be collected by an independent third party, and that clearance levels be met before the area is cleared for re-occupancy by young children.
>
> [There are]... dangers of lead-containing dust to young children which can result when

(continued...)

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 234-35 (agency disregarded potential adverse environmental impacts that, among others, external critics identified).

3. The Negative Declaration Failed to Constitute 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

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22. (...continued)

> 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).

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 sections 617.7 and 617.12 of this Part."). 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 and 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 undeniably that it does not contain reasoned elaboration for any of the lead control measures LL 38 changed.

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Thus, by even the most liberal standards, the negative declaration failed to identify relevant areas of environmental concern; failed to thoroughly analyze them; and failed to set forth a reasoned elaboration for its significance determination. Given 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 400, 417 (1986) (same). The court below's error puts New York City children at an illegal and unnecessary risk of increased exposure to toxic lead hazards. For this reason, this case merits this Court's review.

II. THIS CASE MERITS REVIEW BECAUSE THE APPELLATE DIVISION'S RULING SETS OUT NOVEL EXCEPTIONS TO SEQRA COMPLIANCE THAT ESTABLISH POTENTIALLY DANGEROUS PRECEDENTS.

At stake in this case is the proper enforcement of New York's environmental protection laws. Twenty-six 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. Daniel A. 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 fabric of SEQRA jurisprudence. To justify reversal of the IAS court decision, the Appellate Division not only reached several fundamentally flawed conclusions unsupported by substantial evidence, 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 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," App. Dec. at 16 (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." Id. at 4 (emphasis added). As noted above (see page 14, nn. 13, 14) this conclusion – central to the Appellate Division's decision – is unsupported by substantial evidence in the record, is

inaccurate as a matter of statutory construction, and most importantly is non-dispositive as to the SEQRA significance determination.

Instead, a critical point central to this case, entirely disregarded by the Appellate Division but put forward to the City Council by leading national public health and medical experts on childhood lead poisoning, is that any work on toxic leaded paint – whether involving "repair" (i.e., partial removal) or complete removal of intact or peeling paint – comprises an inherently hazardous activity. [183, 233, 256, 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 this Court's decision: while no dispute exists that the removal of intact lead paint under LL 1 could be hazardous — if not carried out properly[23] — similarly, the removal of peeling lead paint under LL 38 is equally as hazardous — if not carried out properly. Indeed, while under LL 1 a landlord could abate a ceiling by simply covering it with a thin layer of sheetrock (creating little dust), under LL 38 a landlord can scrape an entire ceiling covered with peeling lead paint (creating lots of dust) without

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23. 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, as is now required under federal law. SEQRA does not sanction the notion that failure to enforce a law justifies failure to conduct an EIS on a proposal to weaken the law. Indeed, such a premise would establish a dangerous precedent.

having to perform any clearance lead dust tests or follow numerous measures for lead dust protection and clean-up that were previously required by LL 1 and § 173.14. [356][24] Thus, 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 ignoring the adverse impact of LL 38's weakening of the requirements for work area containment, cleanup, and lead dust clearance testing.

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 (especially with regard to children) lead dust environmental controls. If under LL 38 (unlike LL 1) children are now permitted to coexist with toxic lead paint in their homes, 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. Revising these provisions involved complex policy determinations with multiple public health ramifications. For example, regulations governing renovations of premises with lead paint implicate occupant protection, worker protection, work site preparation, containment, renovation methods, daily clean up, controlling off site contamination, and final cleanup. [349]

Every single one of LL 38's weakened controls constituted relevant environmental concerns meriting scientific and public health-based analyses. And, based on the expert opinion provided to the

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24. 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., M.D. (Professor of Environmental and Occupational Medicine at Howard University Medical Center, Chair of the Committee on Toxicology of the National Academy of Sciences, and former Health Commissioner for Massachusetts and Michigan) [576-84] 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]

City by childhood lead poisoning specialists (all of whom vigorously opposed passage of LL 38), 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 — an assumption entirely unsupported by the record — LL 38's weakened controls 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 altogether and not replaced it at all, and such action would have had no "environmental impact" for SEQRA purposes. This reasoning does not comport with the complex reality of lead hazard control in New York City or with the very low threshold for significance determinations under SEQRA.

Ultimately, then, the Appellate Division disregarded the patent adverse health impacts of LL 38's weakening of many discrete lead hazard controls because of its own 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. 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. § 167.7(a). An "overall benefit" exception, as well, 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 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, 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." App. Dec. at 20. In doing so, the court below placed great emphasis on legislative deliberations. See e.g., id. at 15-16 ("There was vigorous debate of all relevant environmental issues by the City Council Committee. . . ."); id. at 20-21 ("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.").

But if local legislative deliberations alone had been sufficient, the state legislature would never had added the additional requirements of SEQRA. See Michael B. Gerrard, et al., 1 Environmental Impact Review in New York § 2.01[4][e], at 2-34 (1999) (stating that "SEQRA's regulations specifically exempt from their scope the action of the Legislature of the State of New York" and that "[t]his exemption expressly does not extend to local legislative bodies" (emphasis added)). In Glen Head v. Town of Oyster Bay, 88 A.D.2d 484, 492 (2d Dep't 1982), the notion of such legislative equivalence was soundly rejected: "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." The Second Department 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 without any exceptions 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 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).

In any event, the court's characterizations of the Council's deliberations are unsupported by substantial evidence. Contrary to the decision below, 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." App. Dec. at 16. The record of the Council's proceedings, for example, contains no discussion focused directly on the many subsidiary changes made to safe work rules (such as work preparation) or on the lowered age limit.

Nor does "[t]he record well document[] the fair and thorough consideration of the environmental aspects of the new ordinance by the Council." Id. For example, leading medical and lead poisoning

experts unanimously opposed LL 38 for placing children at greater risk of lead poisoning; not one independent expert supported LL 38's enactment. Examples of experts' warnings include the following:

- Dr. Bruce Lanphear, a medical expert on childhood lead poisoning [251], wrote to the Council Speaker that the bill was "simplistic, regressive and . . . will result in an increase in childhood lead poisoning," and that "[i]t fails to recognize that lead-contaminated house dust is the primary pathway for leaded paint to be ingested by young children." [539]
- Dr. Paul Mushak, a environmental toxicologist, in correspondence to the Council Speaker, described LL 38's "elimination of the dust lead as a factor" as "scientific nonsense" and "professionally irresponsible." [548]
- Dr. Barry Levy, a physician specializing in environmental health, wrote to the Council Speaker that "[l]ead dust must be included in the definition of 'lead-based paint standards'" and that "[t]he proposed legislation would be a major step backward and put children at unnecessary significant risk of permanent harm due to lead exposure." [544-45]
- Dr. John Rosen, professor of pediatrics at Albert Einstein College of Medicine and twice Chair of the Centers for Disease Control and Prevention Advisory Committee on Lead Poisoning, stated 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]

Such reprobate assessments contrast starkly with the Appellate Division's factual conclusions.[25]

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:

I must say that as it relates to lead dust, there is a great deal of confusion even among

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25. In papers below, petitioners exhaustively cited medical expert opinion in the record, which was overwhelmingly and universally critical of LL 38 's unsound public health policies. See Pets.' Br. I (Ex. E) at 10, 17-19. 22-23; Pets.' Br. III (Ex. I) at 14. Despite a record rife with such expert opinion opposing LL 38 on health grounds, the Appellate Division inexplicably asserted 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." App. Dec. at 9.

> 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 environmental 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)]. Surely such "deliberation" is not a substitute for the "hard look" and reasoned elaboration the H.O.M.E.S. test demands of negative declarations. Indeed, "any uncertainty as to the assessment of the environmental impact" of the lead hazard redefinition should normally be resolved in favor of preparing an EIS. Spitzer v. Farrell, __ A.D.2d __, 742 N.Y.S.2d at 289.[26]

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. It is impossible for the reviewing court, based on this record, to know what the Council actually determined regarding any of those issues, or on what basis its determination was made. That, in large part, is why a written negative declaration that analyzes the issues and provides a reasoned elaboration of conclusions is required.

C. The Appellate Division's "Third Party Hazard" Exemption Would Potentially Seriously Undermine SEQRA Governance.

The Appellate Division decision implicitly exempts local regulation of existing hazardous materials non-governmental in origin. App. Dec. at 11, 14, 18. The court below 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. at 11. 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 the regulation of air pollution, water pollution, pesticides, hazardous substances management or hazardous

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26. Spitzer, which came down shortly after the First Department's decision in the instant case, concerned a different dust hazard — diesel soot. Both Spitzer and the instant case concerned environmental policy making that was intended to be beneficial. The only palpable difference between Spitzer and the instant case is that the latter concerned a local legislative (rather than an administrative agency) decision, and the Appellate Division construed a record of legislative debate — however perfunctory and uninformed by hard data — as ipso facto supplying the "hard look" required by SEQRA. See Pets.' Br. V (Ex. P) at 2-6.

waste management — or require the disturbance of existing toxic substances — would be exempt from SEQRA.

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 "agency . . . policy making activities that may affect the environment"); § 617.2(b)(3) (same as to "adoption of . . . local laws"). SEQRA does not qualify its purview to hazardous materials 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 do 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 court suggests.

In addition, SEQRA cases concerning hazardous materials make none of the distinctions the Appellate Division drew. See, e.g., Chemical Specialties Mfgs. Ass'n v. Jorling, 85 N.Y.2d at 396 (involving regulation of the hazardous pesticide DEET, which (like leaded paint) was produced by industry; regulation applied to existing and future stocks); 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)(i) ("indicators of significant adverse [environmental] impacts" include those that work "a substantial adverse change in existing air quality"), 617.7(c)(1)(vii) ("indicators of significant adverse [environmental] impacts" include those that "creat[e] a hazard to human health").

A "third party hazard" exemption has potentially devastating ramifications. For example, wide application of the Appellate Division's ruling would permit, in a case such as Chemical Specialties

Manufacturers Association v. Jorling, 85 N.Y.2d at 386, an agency to deregulate more concentrated — and thus potentially more dangerous — existing and future stocks of the pesticide DEET without undergoing any environmental impact review.

Such an exemption would also permit localities to weaken 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" within it. N.Y. Const. Art. 9, § 2(c)(10). In New York City alone, the Council has enacted many local laws related to hazardous materials 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 ruling, if the Council wanted to regulate (or deregulate) remedies of toxic contaminants in schools or preschools located in renovated industrial sites, it could do so without undergoing any environmental impact review.[27]

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 and SEQRA does not permit it.

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27. 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 Motion for Leave to Appeal should be granted.

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