To Be Argued by: Matthew J. Chachère

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

NEW YORK SUPREME COURT

APPELLATE DIVISION - FIRST DEPARTMENT

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-Respondents

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-Appellants.

RESPONDENTS' BRIEF

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

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

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PRELIMINARY STATEMENT

This appeal arises from a judgment entered February 22, 2001, in this action, [16],[1] in which Justice Louis B. York properly ruled that the New York City Council violated the New York State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq., and the New York City Rules of Procedure for Environmental Quality Review ("CEQR"), when enacting Local Law 38 of 1999 (LL 38). As a result of the lower court's ruling, LL 38 was nullified and the prior law reinstated.[2]

Justice York's underlying decision, [15b], made clear that it was neither his responsibility nor intention to pass judgment on the New York City Council's legislative process or the merits of LL 38 (although Appellants now urge this Court to do just that). Rather, Justice York explained that it was his obligation to review that process to see whether the Council had complied with SEQRA and CEQR when it approved a Negative Declaration of environmental impact in regard to LL 38.[15d]. SEQRA requires that all state and municipal agencies (which include both the City Council and Mayor) consider and minimize every potential environmental impact that may arise from a proposed action by preparation of a detailed "environmental impact statement" ("EIS") for any action that "may" have a single significant adverse effect on the environment, including creating a hazard to human health. [15e].

As a threshold matter, Justice York concluded that the presence of lead paint in the apartment of a young child — and the presence of lead-contaminated dust — are both a "potential danger to children" within the meaning of "the creation of a hazard to human health"

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

2. In the proceedings below, the parties agreed that if Petitioners-Plaintiffs-Respondents (hereafter "Petitioners") prevailed, LL 38 would no longer be in effect and the prior lead paint law would take its place. [15e].

standard found in both SEQRA and CEQR. [15g-15h]. In making this determination about lead paint, Justice York relied on the Court of Appeals decision in Juarez v. Wavecrest Management Team, 88 N.Y.2d 628, 640-41 (1996), and the decision of this Court in Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d 64, 66 (1st Dept 1996).

In his decision, Justice York painstakingly showed that LL 38 extensively overhauled the City's existing child lead poisoning prevention laws. It replaced the existing requirement that all lead paint be removed or covered in children's homes with one requiring the removal of only peeling lead paint — inexplicably ignoring intact lead paint on accessible surfaces and lead-dust generating friction and impact surfaces.[3] [15e-15j]. LL 38 also, inter alia, (i) eliminated lead dust and related conditions from the definition of a "lead-based paint hazard;" (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. [15j]. Justice York concluded that each of these changes may constitute an adverse environmental impact under SEQRA's framework, thus requiring an EIS.

After reviewing an extensive record and concluding that LL 38 wrought changes that "may" constitute the creation of a "hazard to human health," Justice York also concluded that the Council had failed to comply with the procedural and substantive requirements of the environmental laws in its enactment of this local law. While SEQRA allows an agency to dispense with an EIS if the proposed action "has no possible significant adverse impact," [15k],

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3. "Accessible" is a term used to describe protruding surfaces that teething infants may chew on. Window and door frames are examples of friction and impact surfaces.

the law still compels the preparation and issuance of a "negative declaration" which (1) identifies the relevant areas of environmental concern, (2) takes a "hard look" at them, and (3) makes a reasoned elaboration of the basis for the determination. H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979). Applying this long-established test set forth in H.O.M.E.S., Justice York carefully reviewed both the Negative Declaration and the considerable record and concluded that the City Council had done none of these things. Justice York characterized the Council's environmental review as "mostly perfunctory, only occasionally rising to the level of cursory, with the operative word being alacrity rather than analysis." [15m].

Justice York ended his decision with a specific reference to Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d at 66, 73, in which this Court declared that lead-contaminated dust generated by lead paint posed a significant environmental hazard that must be addressed in an EIS. Thus, he felt he could not

> now tell the Appellate Division that a regulatory scheme for lead paint abatement which does not even include lead dust in the definition of a hazard was adequately reviewed by the Council. [15t].

On appeal, Appellants essentially concede that the enactment of LL 38 violated both the strict substantive and procedural requirements of SEQRA. While Appellants argue that the City Council was "thoroughly informed about, and thoroughly considered every issue which petitioners' claim was required to be reviewed pursuant to SEQRA," Apps.' Br. at Question Presented, they are careful never to say that the Council thoroughly informed itself about and thoroughly considered the environmental issues through the legislatively mandated SEQRA (and CEQR) process. Nor do Appellants deny that LL 38's changes to pre-existing law could result in adverse environmental consequences to New York City's children. Furthermore, while Appellants would be expected to show this Court why Justice York was wrong in his application

of the H.O.M.E.S. test to the City Council's approval of the Negative Declaration, Appellants not only omit any specific argument showing compliance with H.O.M.E.S., they also fail to even cite H.O.M.E.S. in their Brief! Appellants also fail to cite virtually any of the relevant provisions of SEQRA and CEQR that Petitioners identify in their Petition as having been ignored in Appellants' decision-making process, [29-103], let alone explain why they should not be held in violation of those provisions.

Instead, Appellants want this Court to do what Justice York properly refused to do: to review and weigh the merits of LL 38 in order to judge whether the City Council overall accomplished more environmental good than environmental harm. This Court should decline that invitation. By enacting SEQRA and applying it to local legislative actions, the State Legislature without any exceptions established a specific mechanism for considering all potential adverse environmental impacts, holding local legislative decision makers fully accountable to the same standards as any other governmental decision maker, to determine beforehand whether a proposed action "may" give rise to a potential adverse effect. To make an exception in this case, as Appellants essentially urge, will open the floodgates to endless judicial reviews of the merits of legislative enactments. Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d 400, 416 (1986) ("[I]t 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.") And this Court has already rejected in Williamsburg Around the Bridge Block Association, 223 A.D.2d at 72-74, the very (and only) argument Appellants are making here — that an "EIS-like" alternative to SEQRA's strict processes can suffice. Indeed, Appellants pay only lip-service to this prior decision of this Court, Apps.' Br. at 52, and make no effort to distinguish Williams-burg from the present case.

In short, Justice York properly applied the H.O.M.E.S. test, to ensure that the required environmental review was made before the City Council acted. Upon review, he appropriately concluded that the Negative Declaration and the Council's overall review of environmental concerns failed each prong of the H.O.M.E.S. test. He emphasized that the Council failed to identify, let alone take a "hard look" at, many of the serious problems presented by lead paint in child-occupied apartments. See, e.g., [15s]. Quoting H.O.M.E.S., Justice York characterized the City Council's process as an avoidance and an abdication of its obligations under the environmental laws. [15s-15t].

QUESTIONS PRESENTED

1. Did the court below correctly determine that the enactment of Local Law 38 "may include the potential for at least one significant adverse environmental impact." (6 N.Y.C.R.R. § 617.7(a)(1)) ?

The court correctly determined that Local Law 38 easily met this "very low threshold." Desmond-Americana v. Jorling, 153 A.D.2d 4, 10 (3d Dep't 1989), lv. to app. den., 75 N.Y.2d 709 (1990). Appellants fail to even argue — much less demonstrate — otherwise.

2. Was the court below correct in striking down LL 38 for failing to meet the H.O.M.E.S. test?

The court below correctly determined that the City Council and Mayor failed all three aspects of the H.O.M.E.S. test. Again, Appellants do not even assert they met this test — the very test used by all the courts in reviewing SEQRA compliance.

3. Can Appellants' failure to comply with the substantive and procedural requirements of SEQRA be excused by the "ersatz EIS" defense now proffered by Appellants on appeal?

The court below correctly held that the process utilized by the City Council in the instant matter could in no way substitute for the far more detailed and deliberative process set forth in SEQRA. This Court has already soundly rejected the "ersatz EIS" concept in Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d at 72-74, holding that the City could not substitute an alternative means of engaging in environmental policy making for that provided in SEQRA. Appellants offer not one argument why Williamsburg should be overruled.

STATEMENT OF THE CASE

A. Exposure to Lead Paint and Lead Dust is an Environmental Hazard.

Today it is accepted that "[c]hildhood lead-paint poisoning may be the most significant environmental disease in New York City." Juarez, 88 N.Y.2d at 641 (emphasis added). The federal Centers for Disease Control and Prevention ("CDC") regard lead poisoning as "the most common and societally devastating environmental disease of young children." United States Department of Health & Human Services, CDC, Strategic Plan for the Elimination of Childhood Lead Poisoning (Feb. 1991) at xi; see E. Mauss Aff.[4] [164], Landrigan Aff. [116]. Previously, the City Health Department estimated that at least 35,000 children were lead poisoned, using the Health Code (24 R.C.N.Y. § 11.03) and CDC definition of 10 micrograms per deciliter. [2551].[5] See Rosen Testimony [1610].

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. In addition, in their early developmental stages, children's brains and nervous systems are particularly vulnerable. Environmental factors cause older children to be at risk as well. Rosen

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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 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. ##."

5. See also New York City Public Advocate, Lead & Kids: Why are 30,000 NYC Children Contaminated?, February 2, 1998, at 3 (Ex. 64). [998, 1035]. At least 81% of highly lead poisoned NYC children are known to be African-American, Latino, or Asian/Pacific. [1009]. In some minority and low income areas, up to 30% of one and two year old children are lead poisoned. [2551].

Aff. [295, 298, 304]; Needleman Aff. [193]; E. Mauss Aff.[6] [162-64]. Ingestion of lead particles by pregnant women also causes damage to the developing fetus. See Rosen Aff. [300].

Ingestion of lead-contaminated house dust is children's primary route of environmental exposure. Lanphear Aff. [252-53]; Gilbert Aff. [344].[7] 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]. The paint particles either fall off from deterioration or abrasion or are released during repairs. Lead dust is so toxic to children that in 1999 the United States 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 ($\mu g/ft^2$), 64 F.R. 50140, 50181 (1999), an amount that is less than half the mass of a single particle of coffee sweetener.[1518]; see also Lanphear Aff. [255]; Olmsted Aff. [234].[8]

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6. Evelyn A. Mauss, Sc.D, is an Adjunct Professor of Physiology at New York University. For more than 40 years she has been involved in research that included issues of childhood lead poisoning. She is the author of many scientific papers and between 1972 and 1978 was a consultant on lead poisoning for the New York State Attorney General. [161-79].

7. Charles E. Gilbert, Ph.D., 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 the United States Department of Housing and Urban Development 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. [340-93].

8. Edward Olmsted, C.I.H. is a Certified Industrial Hygienist and Accredited Lead-based Paint Inspector. [231-48].

B. New York City's Pre-existing Legal Framework to Prevent Environmental Hazards Related to Lead Paint

When the City Council adopted the Negative Declaration to support its enactment of LL 38, an extensive set of laws already existed in New York City to prevent lead poisoning. These laws, in order from the earliest to the latest, 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,[9] [2375], banned the use of lead paint on the interior surfaces of dwellings in New York City on January 1, 1960. A 1970 amendment, codified as § 173.13(d)(2), [2376], mandated that where the Department of Health ("DoH") received a report that a child's lead poisoning had already occurred, DoH must inspect and order the owner immediately to remove or permanently cover all lead paint in the dwelling; 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 assure 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. LL 38 eliminates this requirement in 1- and 2- family homes.

Admin. Code § 27-2013(h), [2383], enacted as Local Law 1 of 1982 (LL 1), [2394], required the owner of a multiple dwelling occupied by a child under age seven to eliminate all

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

lead paint on specified interior surfaces "in a manner approved by the department" in the child's apartment. Unless extended by the agency, the owner was expected to correct a violation within 24 hours of the service of a violation by HPD. See Admin. Code §§ 27-2013(h)(3), 27-2115(c)(3) [2383, 2385-86]. Unlike the prior laws, LL 1 did not require a child's poisoning nor a City inspection to trigger the duty to abate lead paint. Landlords had to abate wherever lead paint existed — whether or not the City cited had 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). This preventative measure was designed to abate environmental hazards before irreversible damage to children occurred.

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. Giuliani class action (herein "NYCCELP"), discussed infra, contained safety standards for work on lead paint. These standards followed guidelines promulgated by HUD and incorporated then- state of the art safety measures needed to prevent dispersing toxic lead dust during such work.

To fully set forth the full scope of prior obligations under New York City law, it is also necessary to briefly review the various decisions and orders of this Court and Supreme Court Justices Elliot Wilk, LeLand DeGrasse, Walter Tolub, and Louis York. The NYCCELP v. Giuliani class action — commenced over 16 years ago as NYCCELP v. Koch — sought proper enforcement of the City's lead paint laws. From the outset, the trial court found "ample evidence that municipal defendants do not adequately carry out their duties under [§ 2013(h) and § 173.13]." NYCCELP I, 138 Misc.2d 188, 193 (Sup. Ct. N.Y. Co. 1987), aff'd, 139 A.D.2d 404 (1st Dep't 1988); see also id. at 138 Misc.2d 191-92 (denying motions to dismiss because while "the method of enforcement may be discretionary, enforcement is not.")

In NYCCELP II, 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), 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 found civil contempt and imposed a continuing fine equal to one of the plaintiffs' monthly rent until the regulations were adopted. NYCCELP III, slip op. (Sup. Ct. N.Y. Co. May 4, 1993) [2463]; Order (Sup. Ct. N.Y. Co. Mar. 30, 1994) [2471], app. withdrawn, Stip. (Feb. 24, 1995). Two years later, this Court found that the City still "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).

The City still failed to enact the regulations required by NYCCELP II regarding relocation and timely inspection and enforcement of all lead paint conditions, and 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, 240 (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, the safety procedures (Health Code § 173.14) were limited in applicability to only violations cited by DoH and HPD (rather than all lead hazards as required by NYCCELP II), still failed to provide for relocation during lead abatements, and because the City had sought

to weaken Health Code § 173.13(d) by limiting inspections, in the case of already lead poisoned children, to only peeling paint.

Nearly a decade after NYCCELP II, on October 9, 1998 (City Record p. 3505) and October 15, 1998 (id. p. 3544), respectively, the City at long last proposed revisions of HPD's regulations and Health Code §§ 173.13 and 173.14 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, Health Commissioner Neal Cohen and HPD Commissioner Richard Roberts stated that the regulations would go into effect in early 1999.[10]

C. The Enactment of Local Law 38 of 1999

In January 1999, the parties in NYCCELP v. Giuliani — seeking to facilitate the request of the HPD and Health Commissioners to have the Council consider revision of LL 1 as an alternative to the new regulations taking effect, [54-55] — entered into a series of voluntary stays of that litigation "to assist the legislative process to proceed calmly and expeditiously." [55-58]. In response to this request, the City Council leadership by April 13 began to draft and by May

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10. Appellants have materially misstated the record as to this hearing's purpose. Although Appellants' brief devotes some 10 pages discussing this hearing under the explicit heading "CITY COUNCIL COMMITTEE HEARING OF DECEMBER 16, 1998 CONCERNING REPLACEMENT OF LOCAL LAW 1 OF 1982," and repeatedly cites it throughout, the announced purpose was quite clearly otherwise. The Council's official calendar for December 16, 1998, listed the hearing thus:

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

N.Y.C. Council, Proceedings, Dec. 9, 1998, at 3725. Indeed, the hearing's chair, Councilmember Spigner, at the very outset described its purposes the same way, [3135], and made clear as well that it was not a hearing on replacement legislation. [3179].

This appears to be a transparent attempt to make it seem, contrary to plain fact, that the City Council gave lengthy and careful consideration to LL 38's possible environmental consequences. In reality, of course, LL 38 was not even proposed, much less under consideration, until some six months later, and thus the December 16, 1998, hearing is utterly irrelevant. It is also disingenuous for Appellants to imply that a hearing occurred for the purposes of a SEQRA review prior to the City Council assuming "lead agency" status, which did not occur until about June 24, 1999.

3 informally circulate information, [15m], on new legislation that would completely overhaul the pre-existing lead paint laws. [56-60].

Subsequently, leading experts in childhood lead poisoning — along with 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. [57-62]; I. Mauss Aff. Ex. A [222]; E.Mauss Aff. [161, 174]; as Justice York noted, they received no response. [15m]. Rather than accept this invitation to begin a calm, careful review of the proposals, the Council leadership initiated a fast-tracked effort to enact legislation as quickly as possible, 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]; Ex. 28 [674-75]; Landrigan Aff. [113-14]; Needleman Aff. [191-92]; E. Mauss Aff. [161]. Justice York explained that beginning with May 28, 1999, a "draft" bill was first informally circulated, then during the next three weeks there was confusion about what proposal was actually under consideration, since more than one draft was floating around. [15m].

Justice York emphasized, [15n], that it was not until the afternoon of Friday, June 18, that the Council leadership printed [1172] and later released an unnumbered draft proposed local law [1148] and scheduled a public hearing for morning of the next business day (Monday, June 21) before the Housing Committee, chaired by Council member and Deputy Speaker Archie Spigner (listed as the sole sponsor). Pet. [60].

"Despite the very short notice given of the hearing," [15n], several experts in childhood lead poisoning and lead dust control issues appeared at the June 21 hearing 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. E. Mauss [1604-09]; Test. of Dr. Rosen [1593-95].[11] Written comments of numerous other public health experts on lead poisoning were also submitted. Exs. 26-30 (and subexhibits contained therein) [607-694]; Pet. [61-62]. Not one independent medical doctor or health expert testified in favor of the proposal at the hearing or subsequently, and all who testified or made written comments opposed it. Also, various public officials testified to their concerns about the proposal's adverse environmental health effects, including City Comptroller Alan G. Hevesi [1489-95]; see also Ex. 35 [729-33], and even the 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. [1485-86]. At the conclusion of the hearing, amendments were made to the draft "that very same day." [15n].[12]

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)

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11. 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.

12. In fact, the 8 and 1/2 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]. While Appellants tout that these changes included reduced time frames for enforcement, in fact these more stringent time frames had appeared all along in previous drafts [1110, 1113, 1135, 1142, 1161] but had suddenly (and without explanation) dramatically lengthened only in the June 18th draft, Pet. [65] — apparently so that a subsequent amended bill could then be cynically "improved" in "response" to criticism.

draft, [15o]; Pet. [66]; [1755]. Like the June 21 hearing, the testimony given at the June 24 hearing was "overwhelmingly negative," [15o], 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 experts testified in favor of the proposal; indeed, while the Health commissioner sent a letter supporting the new proposal, neither he nor anyone from his agency appeared, Pet. [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].

Thereafter, as described by Justice York, the Committee hearing concluded in the following way:

> [After defeating the proposed amendments, t]he next item addressed by the committee was the negative declaration, which the committee chair noted had been placed on the members' desks "for members who wish to review it" [1989]. Apparently no one did, because the vote was taken immediately thereafter, with the negative declaration approved by a vote of 7-2 [1989-91]. The bill itself was then also approved by the committee, 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].

[15p (citations changed to reflect Record on Appeal)]. The Negative Declaration was thus approved, without discussion, [1988-1989], as Resolution 883. [483]; see infra at 49. The "Notice of Negative Declaration," with a supporting "Environmental Assessment Statement," (herein, collectively, the "Negative Declaration," [417]), dated June 24, 1999, and distributed to the Committee near the end of the hearing, was signed only by a counsel to the Committee, and

asserted that the proposed local law would have no significant effect on the environment at all and declared that no EIS was required.

Over the next six days, many public health and medical experts, 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]; Exs. 43-57 [756-803].

Nonetheless, according to Justice York, 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. As described by Justice York, there was some debate (although no comprehensive analysis) about children being exposed to lead-contaminated dust but efforts to mitigate this problem and others were defeated on a roll-call vote, "with several members either voting against [proposed amendments] or abstaining only because they had not had adequate time to review them." [15p]. Furthermore, when several council members "identified specific health hazards that would be created by the proposed law," these concerns were "not addressed beyond general assurances by Council leadership 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." [15p-15q] . Justice York pointed out that 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]; [2241-2280].

Justice York concluded that:

> the record does not indicate that the Council gave . . . reasoned consideration to the environmental concerns raised at the public hearings or even through its own discussion of the proposed legislation. Indeed, the transcript of the Council's June

> 30 session clearly shows that almost all concerns raised by councilmembers were answered with "we know the legislation is not perfect, but we can address any problems with it as they come up." . . . "Clearly [the Council] failed to take a 'hard look' at the problems and adverse potential effects.... Not only did it fail to analyze the... problems entailed, but it vaguely recognized their existence and relied upon general assurances that after the problems developed the... City... would adequately mitigate them by some unspecified appropriate action.... It is inconceivable that the Legislature envisioned or intended that its EIS requirements could be avoided by an... agency which... declined to recognize egregious environmental problems. In Alice-in-Wonderland manner, respondents separated and put aside the realities of the... problems." H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d at 232. [15s-15t]

The Mayor held a public hearing on the proposal on July 15, 1999. [2306, 2730]. Three medical experts — Drs. Landrigan [2768],[13] Rosen [2755] and Mauss [2759] — testified that the law would increase children's exposure to toxic lead dust and lead paint hazards, and presented copies of 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.

D. Proceedings Below

On October 14, 1999, Petitioners commenced the instant combined declaratory judgment action and Article 78 proceeding by show cause Order [21-23] and a verified Petition [25-110], challenging Appellants' enactment of Local Law 38 on the ground that Appellants violated SEQRA. The underlying proceeding was fully briefed, [3574-611, 3664-701, 3613-638], and argued on November 15, 1999.[14] On October 11, 2000, the court below issued its written

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13. Philip J. Landrigan, M.D., 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. [133]-58]. Dr. Landrigan has been, since 1993, Chair of the New York State Advisory Council on Lead Poisoning Prevention, created pursuant to New York Public Health Law § 1370-b.

14. Appellants made three attempts to have Justice York removed from this case. They moved by (continued...)

decision, [15b], and on January 3, 2001, the court below issued its Judgment, entered February 22, 2001, nullifying the Negative Declaration and LL 38. [17-29].

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14. (...continued)
Show Cause order on October 27, 1999, to challenge his assignment to this case as "related" to the pending NYCCELP v. Giuliani case. The motion was fully briefed and argued on November 15, 1999, as well, and the Court denied it in a six page decision. NYCCELP v. Vallone, N.Y.L.J. Feb. 1, 2000, p. 26, col. 3. Appellants next sought review in a letter brief to Administrative Justice Stephen Crane on January 28, 2001, who on February 7, 2001, denied their motion "in all respects" and declared the proceeding "properly assigned."

A third attempt was made on April 13, 2000, [3558], and denied on October 11, 2000. [15b]. Petitioners are entitled to rely in good faith on Appellants' statement that the "issue will not be pursued on this appeal," Apps.' Br. at 50 note 20, and Appellants' CPLR 5531 statement, and thus do not brief this issue herein. Matter of Pessano, 269 A.D. 337, 341 (1st Dep't 1945), aff'd, 296 N.Y.2d 564 (1946).

ARGUMENT

I. THE COURT BELOW CORRECTLY IDENTIFIED NUMEROUS POTENTIAL ADVERSE IMPACTS ARISING FROM THE ENACTMENT OF LOCAL LAW 38, ANY ONE OF WHICH REQUIRED ISSUANCE OF A POSITIVE RATHER THAN A NEGATIVE DECLARATION AND THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT.

A. An EIS is Required Unless Appellants Can Demonstrate That There Is No Potential for Adverse Environmental Impacts.

Under SEQRA, a lead 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); see also ECL § 8-8109(2).[15] 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 at 10 (3d Dep't 1989); see also, Chemical Specialties Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 397 (1995); Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 364-65 (1986);[16] 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, 838-39 (2d Dept. 1994), mot. for lv. to app. dis'm, 84 N.Y.2d 1019 (1995) ("operative word triggering the requirement of an EIS is 'may'")

To determine whether an action may result in an adverse environmental impact, SEQRA requires the lead agency to compare the action against several "criteria for determining significance." 6 N.Y.C.R.R. § 617.7(c). Among the enumerated significant effects in SEQRA

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15. 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).

16. 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.

is "the creation of a hazard to human health." 6 N.Y.C.R.R. § 617.7 (c)(1)(vii). In Williamsburg Around the Bridge Block Ass'n, 223 A.D.2d at 70, this Court identified the "hazard to human health" criterion as relevant to an increased risk of lead poisoning.

Justice York correctly emphasized that lead poisoning falls squarely within SEQRA's purview and stated that "[t]here can be no doubt that this potential danger to children . . . constitutes the 'hazard to human health' contemplated by both SEQRA and CEQR." [15g] (citations omitted). In fact, this Court has already declared that "[t]he danger that lead-based paint presents to human health and safety, especially with regard to children, is today virtually beyond debate." City of New York v. Lead Indust. Ass'n, Inc., 190 A.D.2d 173, 176 (1st Dep't 1993); see Gilbert Aff. [343], Rosen Aff. [298]. These effects 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." Williamsburg Around the Bridge Block Ass'n v. Giuliani, 167 Misc. 2d 980, 984 (Sup. Ct. N.Y. Co. 1995), aff'd, 223 A.D.2d 64; see also E. Mauss Aff. [163-64] and Ex. A thereto; [174]; Rosen Aff. [299-300]; Piomelli Letter [558-60]; Needleman Aff. [193-94]; Landrigan Aff. [116-17] and Ex. A thereto [119-20]; I. Mauss Aff.[219].[17]

Justice York, therefore, was correct to recognize that this Court's decision in Williamsburg is controlling in this case as well. In Williamsburg, this Court required the preparation of an EIS in order to analyze the adverse health impact of lead dust released by work on the Williamsburg Bridge. In the confines of a residential dwelling, the likely exposure to lead

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17. 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. [218-221].

contaminated dust released by work to repair or remove lead paint obviously is significantly greater. But whether outside an apartment (as in Williamsburg) or inside an apartment (as under LL 38) where it "continues to cover the walls of two out of three City dwellings," Juarez v. Wavecrest Mgt. Team Ltd., 88 N.Y.2d at 641 (citation omitted),[18] the presence of lead paint and the potential presence of lead-contaminated dust are inexorably linked. Appellants agree that "any work to repair lead-based paint involves a hazardous substance." Apps.' Br. at 38.

Thus, presumably an EIS should to be prepared for any proposed local law that purports to protect children from residential exposure to lead-contaminated dust and lead poisoning — particularly where, as here, the law vastly altered obligations for landlords, tenants and City agencies regarding the inspection, maintenance and removal of lead paint, primarily in the apartments of children age 5 and under who reside in multiple dwellings. Among other things Justice York noted, LL 38 only requires landlords to inspect for and remove "peeling" lead paint, and allows them to ignore intact lead paint on "accessible," "friction" and "impact" surfaces; it defines a "lead-based paint hazard" as a peeling lead paint condition but it ignores the presence and potential hazard of lead-contaminated dust, even though lead dust is the primary source of childhood lead poisoning; it allows a landlord to use one set of weakened work practices if the violation is corrected within 21 days but requires compliance with the pre-existing more stringent set of work practices if the work takes longer than 21 days, although this two-tiered approach has no rational public health basis; and it allows the City to enforce violations in apartments where children age 5 and under live, although the old law protected children age 6 and under and roughly 1 in 10 children who become lead poisoned are age 6 or older. Appellants' burden in

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18. The City estimated that 2,000,000 housing units contain lead paint, [2550], and that children under 6 live in 323,000 of them. [2551]. Low income families occupy an estimated 174,000 of these units — in presumably the most deteriorated housing conditions. Id.

this appeal was to demonstrate that Justice York was wrong because not one of these activities, or any others contained in LL 38, "may" have the potential to cause an adverse environmental impact. They have utterly failed to do so.

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

The court below correctly found that LL 38 "altered" "core provisions" of the preexisting statutory and regulatory scheme for protecting children against lead poisoning, [15i], and that "[f]or purposes of the issues before the court, . . . on their face these changes could pose . . . a hazard [to human health]." [15j] (emphasis added). By indicating that an EIS had to be prepared to support the enactment of LL 38, Justice York was thus correct to point out the numerous changes in LL 38 that "may" present an adverse impact but also to focus particularly on the issue of lead-contaminated dust, because dust is the primary pathway for exposure. He also was correct in stating that the key question before the Council was whether LL 38 wrought so many changes that each — alone or in combination — "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." [15g-15h]. He correctly ascertained that the matters discussed below "may" result in an adverse environmental impact.

1. Changing the Requirement that All Lead Paint be Removed or Covered to Requiring That Only "Peeling" Lead Paint Be Removed — and Reducing Inspection Duties — Can Result in Adverse Impacts on Human Health.

Under LL 38, only peeling lead paint is the subject of a landlord's inspection obligation and only peeling lead paint is subject to a violation.[442]. While Appellants point to statements in the Record indicating support for changing local law to no longer automatically require the removal or covering of all lead paint — including from some of LL 38's opponents —

Appellants are unable to cite to any similar consensus supporting its new peeling paint only standard, weakened clean-up standards, and an extremely limited annual visual inspection by untrained personnel. Rather, all the experts were alarmed at the Council's focusing solely on peeling paint to the exclusion of all else, including intact paint on accessible, friction and impact surfaces and lead-contaminated dust.[19]

For example, Dr. Paul Mushak—an expert on childhood lead poisoning prevention — 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].[20]

Also, the Record contained the 1996 testimony before the Council Housing and Buildings Committee of then-City Health Commissioner Dr. Margaret 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).

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19. Indeed, a recent federal study found that one of 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, Peer Review Draft, January 12, 2001, at 5-15 (available online at www.hud.gov/lea/Vol1finalreport.pdf).

20. Dr. Mushak, an expert witness for the City of New York 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].

When LL 38 was before the full Council on June 30, 1999, participants raised the inconsistency between this prior testimony and the provisions in LL 38 (but the Council never analyzed it in the Negative Declaration or an EIS). Council member Linares said:

> 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 unrebutted 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].

HPD Commissioner Roberts 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 standard. [1353]. Other areas with intact lead paint that were identified as areas of concern were 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).

Appellants' brief does not deny that there might be adverse impacts from lead dust from friction, impact, and accessible surfaces, and at best merely assert that "the information before the Council was inconclusive as to whether friction surfaces were a substantial source of lead dust."Apps.' Br. at 58. But, leaving aside that not one of their record citations support the Council's decision to entirely ignore lead paint on friction surfaces, the way to resolve such alleged uncertainty was through the preparation of an EIS. 6 N.Y.C.R.R. 617.9(b)(6).

In sum, for the purpose of this Court determining 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. What must matter to this Court is that the City Council failed to produce an EIS in support of this decision, the outcome of which held the obvious potential to cause a significant adverse impact.

2. Eliminating "Lead-Contaminated Dust" and Related Conditions from the Definition of What Constitutes a "Lead-based Paint Hazard" Can Have an 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 occurs when lead paint is deteriorated or, as mentioned above, is generated by the abrasion of lead painted surfaces. It also occurs in large amounts when lead painted surfaces are improperly repaired. See, e.g., Walker Lett. [576].[21] 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. Id. When lead dust is present, it can only be detected by a lead-dust clearance test.[22] Moreover, the presence of lead-dust always is a potential health hazard and must be removed using appropriate, scientifically based work practices.

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

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21. 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 the former Health Commissioner for the States of Massachusetts and Michigan. [576-84].

22. See Part I.B.3, p. 31 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] .

enactment of LL 38, LL 1 required the removal or covering of all lead paint on deteriorated surfaces and on accessible, friction and impact surfaces, thereby virtually eliminating the risk of exposure from lead-contaminated dust. The prior law also required lead dust clearance testing when anymore 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 the Council's elimination of friction, accessible and impact surfaces from the protection of local law under LL 38 concerned lead poisoning prevention experts, the elimination of "lead-contaminated dust" as an area of concern drew the sharpest and most sustained criticism. See, e.g., Landrigan Aff. [115-16, 119-20]; comments of Council member Michels [1433-40]; Rosen Test. [1593-95],[23] and Rosen Aff. [296-97, 303-04], Ex. 15 [568-72].

Health Commissioner Cohen informed the Council that lead-contaminated dust is an issue of extreme concern in testimony before the Housing Committee on June 21, 1999:

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

[1423, 1473] (emphasis added). Other officials roundly criticized de-regulating toxic lead dust, such as 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

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23. 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].

poisoning, lead dust"), and Council member Michels. [1433]. ("There is no mention in this legislation about lead dust at all[;] [a]bsolutely none.")

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]; Ryan Test. [1530-32]; Silverman Test. [1667]; Goldiner Test. [1902-03]. Many other experts, unable to attend the hearings on the 1/2 day's notice granted by the Council, nonetheless alerted the Council to LL 38's failure to address lead dust. Dr. Bruce P. Lanphear, author of numerous peer-reviewed studies on lead dust, [252],[24] 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." [538]; see also, Lanphear Aff. [253]; Gilbert Aff. [346]. Dr. Mushak called the failure to address lead dust a "critical flaw,"[549], and stated that an increase in new lead poisoning cases as a result was "predictable." [551]; see also letters to Appellant Vallone from Dr. Mushak on June 10, 1999, [547], from Dr. Lynn Goldman on June 9, 1999, [536] ("a visual inspection alone will miss many homes with significant lead hazards"),[25] and from Dr. J. Routt Riegard (Dir., Children's Environmental Health Network) on June 18, 1999. [566].

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24. 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].

25. 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 the national standards for "lead-based paint hazard evaluation and control" in housing. [536-37].

In Williamsburg, this Court 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 is even more compelling, as young children live in the environment that will become hazardous and/or remain hazardous under LL 38. Similarly, in UPROSE v. Power Auth. of the State of N.Y., __ A.D. 2d __, 2001 WL 830817 (2d Dep't 2001), which concerned particulate matter that, like lead, is a "non-threshold pollutant" with adverse health effects, id. at *3,[26] an EIS was required, since it had the potential for at least one adverse impact. Id. at *4 (citing 6 N.Y.C.R.R. 617.7[a][1]).

Appellants do not deny that lead dust can have an adverse impact on children's health; all they can say is that their choice was based on "confusion in the record" as to how to deal with it, Apps.' Br. at 58, thus again demonstrating precisely why an EIS was required to thoroughly analyze the issues, consider the alternatives, and identify mitigation measures, and come up with a reasoned elaboration for the ultimate decision.[27]

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

27. Appellants' conclusion that lead dust could be simply "removed by regular washing of the floors with a detergent," Apps.' Br. at 59, only underscores their failure to take a hard look at the issues as required by SEQRA. They cite to the testimony of Nick Farr, but overlook that he was merely responding in the affirmative to a question from Council member Ognibene that washing the floor would be "helpful," [1554] — and never said it would be sufficient to remove the lead dust. Indeed, on the same page his colleague, Mr. Ryan, testified that floors must first be cleaned with a "High Efficiency Particle Accumulator" (HEPA) vacuum. [1554]. Appellants' only other citation on this issue is to non-expert testimony by a representative of the real estate industry, without reference to any scientific study.

Council member Quinn noted during the floor debate that several studies have shown that ordinary household cleaning is not effective in prevention of childhood lead exposure and that specialized cleaning methods are necessary to remove lead dust. [2209-10]. See Lanphear, et al., Primary Prevention of Childhood Lead Exposure: A Randomized Trial of Dust Control, 103 Pediatrics (4) 772-88 (April 1999); cited in Lanphear Aff. [256]; Olmsted Aff. [233-34].

3. Changes Made to the Work Safety Practices under LL 38 Can Have an Adverse Impact on Human Health.

Prior to the enactment of LL 38, the Board of Health designed Health Code § 173.14 to provide a rigorous set of safety standards for work that would disturb or remove lead paint. Under the orders affirmed by this Court in NYCCELP II [2461] and NYCCELP VII [2509], these procedures were required for all work on lead hazards.[28] 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 — which are 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." Only upon the failure to timely correct the violation would the landlord become obligated to use the more stringent and more protective § 173.14 practices. (HPD has the discretion to extend the 21 days up to 66 days before the more protective work practices will trigger.) The differences between § 173.14 and LL 38's "interim controls" are vast, and the chart following this section compares some of these differences.

Two changes rose particularly serious concerns. One placed a priority on removing violations quickly — rather than safely — by allowing landlords to use the weaker and cheaper so-called "interim controls" during the first 21 days following the issuance of a violation. The

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28. Appellants make the remarkable misstatement that "[n]o work safety protocol existed for violations issued under the Housing Maintenance Code pursuant to Local Law 1," Apps.' Br. at 65, and imply the same thing elsewhere. Apps.' Br. at 43-44. This is simply wrong, see pre-existing Health Code § 173.14(a)(1), [2363], ("this section shall apply... whenever ...abatement is ... [directed or ordered by] the Commissioner of Housing Preservation and Development"); Klitzman Test. [3556]. Appellants surely know this is not so — indeed, they litigated (and lost) before this Court in NYCCELP VII the very issue that § 173.14 had been improperly limited to only DoH and HPD Code violations.

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

other eliminated lead dust clearance testing under most circumstances; LL 38 only requires lead dust clearance testing when a violation is issued for peeling paint on windows, molding and door frames, and ignores peeling paint on walls and ceilings, no matter how large an area may require work. [2630]; Gilbert Aff. [356].[29] These key provisions were denounced as a grave threat to public health, not only by the lead poisoning prevention experts, [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, Health Commissioner 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 Piomelli Let.[30] The only concession the Council appears to have made to Commissioner Hamburg's concern was to reduce the period when interim controls may be used from 30 to 21

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29. Dr. Gilbert explained that LL 38's dust test methods are wholly inadequate. [357-59].

30. 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 procedures just because a violation would be corrected rapidly. [559-60].

days.[31]

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

> [e]ven 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).

Commissioner Cohen 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]. Two days later, in a letter to Housing Committee Chair Spigner, Commissioner Cohen 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).[32]

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:

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31. 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], and indeed has been implicated in childhood lead poisonings. See Grimes v. Kennedy Krieger Institute, __ Md. __, ___ A.2d __, 2001 WL 924552 (2001).

32. In one of Appellants' many inaccurate, post hoc rationalizations, they repeatedly assert that the Council eliminated lead dust tests for most situations because the "dust clearance testing was not uniformly regarded as scientifically reliable," Apps.' Br. at 57; see also id. at 29, and was "problematic" id. at 59 — thus openly contradicting the testimony of their own Health Commissioner. This rationale appears neither in the Negative Declaration nor the record, and indeed, Appellants' citations either do not state that dust tests are unreliable or are self-serving statements by non-expert real estate representatives, without any reference to scientific study. See Chemical Specialties Mfrs. v. Jorling, 85 N.Y.2d at 398.

Indeed, Appellants even argue — again without any authority — that in New York City lead dust could be blown in from elsewhere, Apps.' Br. at 58, yet acknowledge elsewhere expert testimony that there is little airborne-related dust anymore. Id at 24, [1555]. See Gilbert Aff. [344] and Lanphear Aff. [253] on sources of lead dust.

> [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 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).[33]

The record clearly shows that the Council simply ignored these issues and the warnings of lead poisoning experts on the impacts of weakening many other aspects of the safety procedures as well, far too numerous to be detailed here. See, 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].[34]

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33. Until the Fall of 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]. Even Health Commissioner Cohen did not deny that LL 38's "interim controls" were less stringent than Health Code § 173.14. [1436-38].

34. 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

(continued...)

Appellants do not at all deny that the work practices in LL 38's "interim controls" were significantly less stringent than the Health Code — in fact, they themselves characterize the Health Code as "stricter," Apps.' Br. at 59 — and do not deny that this change may result in adverse impacts on children's health.[35]

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34. (...continued)
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.

64 F.R. 50140, 50180 (1999) (emphasis added); see also Landrigan Aff. [112-120]; Gilbert Aff. [354-59]; Lanphear Aff. [253-56]; Olmsted Aff. [237-38]; Newman Aff. [184]; Shufro Test. [1732-33]. In the vast majority of situations LL 38 requires neither trained professionals nor clearance tests.

35. Appellants merely assert — again post hoc — that it "was reasonable to impose [the] stricter standards" of Health Code § 173.14 where children were already lead poisoned or after a delay in repairs. Apps.' Br. at 59. They point to no place whatsoever in the Negative Declaration or the record where the Council discussed, much less analyzed, these newly invented rationales.

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

Provision	Pre-existing Health Code § 173.14	LL 38's "Interim Controls"
Filing with City	Required to file notice with City so that City is alerted to work in progress and can inspect as needed	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 or 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 before family allowed to re-enter.
Disclosure of dust test results to tenant	Required	Not required

4. Eliminating All Lead Poisoning Preventative Measures for All Six-Year-Old Children In New York City Can Have An Adverse Impact on Human Health.

While LL 1 extended its preventative measures to children up to their seventh birthday, LL 38 removed them all for six-year-old children. [2625; 2627; 2632]. As Justice York 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].

This change obviously "may" have an adverse impact on six-year-olds — see Williamsburg, 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]; see also Rosen Aff. [304-05] (Montefiore saw hundreds of lead poisoned six-year-olds over the past 25 years); Pet. [79, 95]. Appellants' brief does not deny that this change may have an adverse impact. Apps.' Br. at 57.

5. By Significantly Prolonging the Time For Correction and Enforcement of Lead Paint Hazard Violations, Thus Significantly Increasing the Probability That Vulnerable Children Will Be Exposed, LL 38 Can Have an Adverse Impact on Human Health.

While existing law, §§ 27-2013(h) and 27-2115(c), required lead paint to be corrected within 24 hours, LL 38 allowed landlords 21 days after service of a notice of violation to correct it, which could be extended to a total of 66 days,[36] 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 had 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

36. 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].

to step in and correct the violation (amended § 27-2115(*l*)(3) & (4)) [2635-36]. All together, LL 38 allowed as much as 226 days after a tenant's first complaint until correction. Pet. [52].

Thus, even in the few limited situations where LL 38 considered lead paint a "hazard" — just peeling paint — over half a year could transpire before correction, far more than enough time to poison and irreparably injure young children. 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." Health Commissioner Cohen 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]. HPD Commissioner Roberts conceded that the longer lead hazards remain the greater the exposure of children to danger, [1356-58], and that HPD could act much quicker — that it generally responds 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 in their testimony, [1887, 1896, 1903]; see also I. Mauss Aff. [219]; Needleman Aff. [192].[37]

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37. 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.

Appellants do not deny that these lengthened time frames could cause adverse impacts on children's health;[38] at best, all they could say was that these were "outside limits." Apps.' Br. at 60. However, the City's own CEQR Technical Manual [2341] requires analysis of the potential adverse impact of "worst case" scenarios.

6. By Eliminating All Enforceable Deadlines for Correction of Lead Hazards in the Homes of Already Lead-Poisoned Children in 1- or 2-family Dwellings, LL 38 Can Have an Adverse Impact on Human Health.

As noted supra at page 9, pre-existing 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 amended § 27-2126(b), [2637], to limit these mandates to multiple dwellings (i.e. buildings with 3 or more units (Admin. Code § 27-2004(a)(7)), and deleted the mandates for lead poisoned children in 1- or 2-family dwellings.

Several persons noted that this would leave 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, will 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).

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38. Indeed, they admit that "delay present[s] the possibility that the condition could further deteriorate and thus require greater precautions." Apps.' Br. at 59.

Appellants do not deny that this change may result in an adverse health impact to children — in fact, Appellants' brief never even discusses this change in the law, even though it was a subject of the decision below. [15j].

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Appellants have neither argued nor proven that no adverse environmental impacts can occur from the foregoing changes to pre-existing law, and thus Justice York was correct and an EIS was required.

II. THE COURT BELOW WAS CORRECT TO INVALIDATE LOCAL LAW 38 BECAUSE THE CITY COUNCIL FAILED THE H.O.M.E.S. TEST AND OTHERWISE IGNORED SEQRA'S STRICT PROCEDURAL REQUIREMENTS

The courts scrutinize both the substance of the agency's decision not to issue an EIS as well as the procedure by which the agency arrived at that decision. Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 417. This Court will search Appellants' Brief in vain, however, for a thorough and systematic explanation of the steps the Council took to comply with the procedural and substantive requirements of SEQRA and CEQR - they virtually concede that they did not. See Apps.' Br. at 50-70. In fact, Appellants never cite the SEQRA statute or its implementing regulations in the "Argument" portion of their Brief to demonstrate that the Negative Declaration is a valid document, nor refer to the H.O.M.E.S. test to defend the validity of the Council's issuance of the Negative Declaration — even though Justice York relied on H.O.M.E.S. and it is referred to as the relevant test in virtually every case Appellants cite in their Brief. Id.

Instead, without any reference to the SEQRA statute, Appellants ask this Court to find an alternative environmental review process to apply to the City Council because if held strictly to the procedural and substantive requirements of SEQRA the adoption of LL 38 cannot be sustained. When this argument was made in the court below, Justice York appropriately

answered that it was not the role of a court in this case to pass judgment on the New York City Council's legislative process. [15d]. Rather, Justice York explained that the court's obligation was to review that process to see whether the Council had complied with SEQRA and CEQR when it adopted LL 38.

Courts assess a negative declaration's adequacy by applying the three part conjunctive test articulated in H.O.M.E.S. v. New York State Urban Dev. Corp. 69 A.D.2d at 232: a negative declaration must (1) identify the relevant areas of environmental concern, (2) take a "hard look" at them, and (3) make a "reasoned elaboration" of the basis for the determination to dispense with an EIS. Kahn v. Pasnik, 90 N.Y.2d 569, 574 (1997); Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 688 (1996); Fisher v. Giuliani, 280 A.D.2d 13 (1st Dep't 2001); see also Giuliani v. Hevesi, 228 A.D.2d 348, 352-53 (1st Dep't 1996), aff'd as modified, 90 N.Y.2d 27 (1997); Jackson v. N.Y.S. Urban Dev. Corp., 110 A.D.2d 304, 307-08 (1st Dep't 1986), aff'd 67 N.Y. 2d 400, 417. A properly issued negative declaration requires that the agency have "`made a thorough investigation of the problems involved and reasonably exercised [its] discretion.'" Har Enters. v. Town of Brookhaven, 74 N.Y.2d 524, 530 (1989) (citations omitted); see also Desmond-Americana v. Jorling, 153 A.D.2d at 12-13. Justice York properly utilized the test used by all reviewing courts, and found the Council's environmental review to be grievously lacking.

A. The Negative Declaration Failed to Identify Areas of Relevant Environmental Concern

Justice York began his review with the first prong of the H.O.M.E.S test — to see if all relevant areas of concern were identified in the Negative Declaration. He held that they were

not, indicating that the matters discussed above in Point I.B, among others, were not addressed.[39] Indeed, not only were virtually none of these issues even mentioned; Appellants failed to even identify, much less discuss, the issue of public health in the Negative Declaration, as required by 6 N.Y.C.R.R. § 617.7(c)(1)(vii), and CEQR, 43 R.C.N.Y. § 6-06 (a)(7). These omissions rendered the Negative Declaration invalid on its face.

To take one simple example: the Negative Declaration does not mention (much less explain or analyze) LL 38's elimination of prevention measures for 17% of the population previously protected, despite information provided to the Council that six-year-olds are at risk. See 6 N.Y.C.R.R. § 617.7(c)(3)(vii) (environmental significance determination must consider "the number of people affected").

Appellants post hoc seek to justify their failure to identify this issue by citing Health Commissioner Cohen's general comments that the "principal age for developing childhood lead poisoning [is] [1 1/2] to [2 1/2] years."[1418].[40] However, Dr. Cohen testimony's did not specifically cite, explain, or substantiate LL 38's significant age reduction, nor did he present any scientific basis or empirical data to show it would have no adverse environmental impacts for six-year-olds. Even Commissioner Cohen's statement, [3434], that less than 10% of the

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39. The enumerated list is certainly not exhaustive of the concerns petitioners raised [78-101]. For example, the Negative Declaration failed to identify as an environmental concern the elimination of all HPD enforcement for lead hazards in post-1960 dwellings. Pet. [90]. LL 1 required HPD to place violations for lead paint in dwellings of any age. NYCCELP II, [2443-44] 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 Rabin, Warnings Unheeded: A History of Child Lead Poisoning, 79 Am. J. Pub. Health (12) 1668, 1673 (noting NY City health agency tests found 10 percent 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).

40. Appellants' brief, at 57, inaccurately paraphrases Comm. Cohen's testimony as stating that "older children rarely developed elevated blood lead levels" [1418]. Such statement is not found in the record.

diagnosed cases involve children six years of age or older nonetheless means thousands of six year olds each year have elevated blood lead levels. [1028]. If an EIS is required for environmental hazards to the homes of rattlesnakes, Sour Mountain Realty,Inc. v. N. Y. S. Dep't of Envtl. Conservation, 260 A.D.2d 920, 920 (3d Dep't), lv. to app. den., 93 N.Y.2d 815 (1999), or striped bass, Sierra Club v. U.S. Army Corp of Engineers, 772 F.2d 1043, 1059 (2d Cir. 1985), surely a new policy that removes all lead protections in the homes of six year olds required an EIS as well.[41]

To gloss over the Council's failure to identify numerous environmental problems with LL 38, Appellants spend an inordinate portion of their Brief describing how LL 38 eliminated the "full" abatement requirement under LL 1. But as explained above in Point I, replacing the old law with LL 38 gave rise to significant other environmental problems that did not exist previously. Moreover, Appellants' simplistic assertion that their SEQRA obligation to identify these potential adverse consequences was completely satisfied by their belief in LL 38's beneficial aspects is supported by neither case law nor the record.

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41. Appellants' other post hoc explanation (not in the Negative Declaration) is similarly unavailing; whether some state or federal provisions related to lead paint hazards apply only to children up to age six is wholly irrelevant to the SEQRA determination of environmentally significant impact. SEQRA makes no such exemptions, but rather requires assessment of each and every potential area of environmental concern. See, e.g., Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d at 364-65.

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

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

In Williamsburg, after complaints arose concerning unsafe practices in the removal of lead paint from the Williamsburg Bridge, the City promulgated a "protocol" for the stated purpose of improving the control of lead dust during the removal of lead paint from the Bridge's steel structure. Since the "protocol" interjected lead dust controls where none had existed before, 167 Misc.2d at 985, the Williamsburg case presented an "action" that presumably would have only "beneficial" environmental effects, Apps.' Br. at 43, – indeed far more beneficial than any changes resulting from the repeal of Local Law 1 and the evisceration of Admin. Code 27-2126 and Health Code § 173.14 in the present case. Thus under Appellants' theory, this Court should have ruled in the City's favor in Williamsburg — but it did not.

Instead, this Court in Williamsburg invalidated this process and required the preparation of an EIS. Irrespective of whether the "protocol" would have a beneficial effect, this Court focused on the undisputed fact that work performed by on the Williamsburg Bridge "falls within the ambit of 'significant effect on the environment' so as to trigger the provisions of SEQRA...." 224 A.D.2d at 72. In the present case, similarly, there is no dispute that work performed in occupied apartments to remove or repair lead paint can have a significant effect on the environment, as "any work to repair lead-based paint involves a hazardous substance." Apps.' Br. at 38.

Secondly, while appellants spend much ink describing the critiques offered by various experts regarding the LL 1 "full abatement" standard, not one of those experts testified in favor of LL 38 (and in particular LL 38's peeling paint only standard), and in fact most of them

actively opposed it.[42] Dr. John Rosen — an expert on childhood lead poisoning prevention — explained that intact lead paint remains a concern in the scientific community. He said:

> I have reviewed the . . . Health Commissioner[‘s Affidavit and] I respectfully must point out that the Court should not conclude from these studies, as Dr. Cohen asserts, that “abatement of intact lead paint could actually increase the risk of lead exposure.” [3516] Instead, the conclusion from these studies is that improper 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).

Similarly, Dr. Herbert Needleman — another expert on childhood lead poisoning prevention [191] — said, “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].[43]

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42. Moreover, the vast majority of Appellants’ citations on this point are statements made in the Buildings Committee hearing of December 16, 1998, over half a year before LL 38 had even been proposed, much less released for comment, and thus made in a total vacuum. See supra, at 12, note 10.

43. Thus, while there is no dispute that the removal of intact lead paint under LL 1 could be hazardous — if not carried out properly — it is just as true that the removal of peeling lead paint is equally as hazardous — if not carried out properly. By refusing to acknowledge this fact, either in the Negative Declaration or in arguments to this Court, Appellants exposed the fundamental flaw of their analysis. Intact lead paint and peeling lead paint are both hazardous to repair or to remove. Indeed, under LL 38 a landlord could abate an entire ceiling covered with peeling lead paint 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 § 173.14. See Gilbert Aff. [356]. It is both irrational and misleading to claim that LL 1’s intact paint requirement was a justification for ignoring in the Negative Declaration the adverse impact of weakening work area containment, cleanup, and lead dust clearance testing, discussed supra.

In addition, while LL 1, coupled with the jurisprudence in Juarez, created a continuing obligation that landlords ensure no lead hazards are present,[44] LL 38 limited landlords' responsibilities to a single, annual visual inspection for just peeling paint — regardless of the building's general condition. The Negative Declaration cited no research to show that cutting landlord's obligations down to this "one size fits all" standard of care would adequately protect children's health, nor did any expert testify that it would. See Gilbert Aff. [345-46] (appropriate frequency of inspections depends many factors, including building's general condition).

Because the Negative Declaration failed to identify these and many other adverse impacts, see Pet. [78-101], the court correctly nullified LL 38. Chinese Staff and Workers Assoc. v. City of New York, 68 N.Y.2d at 368; Village of Westbury v. Department of Trans., 75 N.Y.2d 62, 69 (1989). The very purpose of SEQRA is to

> insure[] that agency decision-makers — enlightened by public comment where appropriate — will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.[45]

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

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

45. SEQRA surely does not permit the City Council to articulate the bases for its choices for the first time in a brief to the Appellate Division. Yet, because the Negative Declaration failed to do so, Appellants ask this Court to sit in judgment on the merits of their choices and numerous newly proffered rationales.

B. The Court Properly Found that Appellants Failed to Meet the Remaining Aspects of the H.O.M.E.S. Test.

1. The Negative Declaration On Its Face Reflected Neither a Hard Look Nor a Reasoned Elaboration.

Since the Negative Declaration fails to identify the relevant areas of environmental concern, as discussed in the prior section, the document ipso facto failed to provide a thorough analysis of them, i.e. a "hard look." Appellants do not argue otherwise — indeed, this Court need look no further than that portion of Appellants' brief (at 36-39) describing the Negative Declaration. There, Appellants do not identify any relevant analysis that would satisfy the application of the H.O.M.E.S. test and the explicit, technical requirements of 6 N.Y.C.R.R.§ 617.7(a) and (b). Indeed, no one — including Appellants — claims that the Council provided a written identification of all areas of relevant environmental concern and a "reasoned elaboration" of the basis for deciding to dispense with an EIS, in accordance with those regulations. See 6 N.Y.C.R.R.§ 617.7(a) and (b) (requiring a determination to be in writing).

Instead, Appellants offer numerous post hoc rationalizations throughout their brief in an attempt to remedy their utter failure to set out in the Negative Declaration (or even in the record) a reasoned elaboration for multiple decisions involving issues of environmental concern. For example, Appellants attempt to explain for the first time in the argument section of their appellate brief (rather than in the Negative Declaration, in the record, or even asserted to the court below) that they limited dust tests because "even one failed test remained perpetually reportable on a prospective leasing of a unit." Apps.' Br. at 58. While Appellants may favor protecting landlords from having to disclose prior lead problems to tenants — required by 42 U.S.C. § 4852d(a)(1) — this is surely not an environmental justification that protects children.

More importantly, it is not the reasoned elaboration required by SEQRA to have been made before the decision was made to approve the Negative Declaration and LL 38. Indeed, it is a

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

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

Moreover, the Council cynically and cavalierly ignored experts' testimony regarding LL 38's broad panoply of likely adverse impacts. "Like the proverbial ostrich, respondents have incredibly put out of sight and mind a clear environmental problem." H.O.M.E.S. v. N.Y.S. Urban Dev. Corp. 69 A.D.2d at 231.

By June 24, at least twenty-two medical professionals had warned the City Council of the likely adverse health impacts — especially for children of color living in poor communities — that changes to LL 38 will create. [535-39, 543-60, 564-84, 603-06]; I. Mauss Aff. [218], Ex. A [222]; Rosen Aff. [301, 321-25]; E. Mauss Aff. Ex. A [174]. **46** Similarly, public officials and Council members, including Council member Michels, [1961-79] — the author of LL 1 — raised many of the same concerns. See, e.g., Test. of Comptroller Hevesi [1489-95]; comments of Council members Linares [1539-40] and Freed [1817-18]; Test. of Manhattan Borough Fields [1819-23]; Test. of Dep. Comptroller Newman [1823-33]. Even the City's top public health official noted the critical importance of lead dust, safe work standards such as clearance tests,

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46. No medical professional testified that these changes would not create adverse environmental health impacts.

and adequate time frames. See supra, at 31, 36. Neither the Negative Declaration nor the briefing report to the Council (supplied to the Office of Environmental Coordination as the sole supporting document to the Negative Declaration) mention any of this testimony or correspondence. See Ex. 4 [490-506].[47]

In similar circumstances, courts routinely nullify negative declarations because 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 718, 720 (1985) (board disregarded potential adverse environmental impacts that the board itself identified); Golten Marine Co., Inc. v. New York State Dep't of Envtl. Conservation, 193 A.D.2d 742, 742 (2d Dep't 1993) (agency failed to examine relevant areas of environmental concern expressly contained in the implementing regulations); 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. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d at 227, 232, 234-35 (agency disregarded potential adverse environmental impacts that, among others, external critics identified); see also Kanaley v. Brennan, 119 Misc.2d 1003, 1008-11 (Sup. Ct., Onondaga Co. 1983), aff'd, 120 A.D.2d 979 (4th Dep't 1986) (agency failed to take a "hard look" at relevant areas of environmental concern). The Third Department overturned a negative declaration in a case in which a member of the public identified just one potential adverse effect of a project, stating:

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47. Nonetheless, the Negative Declaration merely stated in a conclusory fashion that LL 38 would not have a socioeconomic impact nor an impact on hazardous materials. [436].

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

West Branch Conservation Ass'n, Inc. v. Planning Bd., Town of Ramapo, 177 A.D.2d 917, 919 (3d Dep't 1991); see also Fernandez v. Planning Bd. of Village of Pomona, 122 A.D.2d 139, 141 (2d Dep't 1986). In this case, Appellants arbitrarily and capriciously, and in a blatant abuse of discretion, ignored the well-considered written comments of nationally and internationally known experts on lead poisoning and lead dust control in failing to find that LL 38 would, or even might, have an adverse environmental health effect.

In place of a negative declaration that meets SEQRA's requirements, however, all Appellants manage to describe is a legislative memo that typically supports most proposed legislation — a memo laying out the material aspects of the new law and the ways it is intended to change existing law. What they fail to describe is an identification of relevant areas of environmental concern, a "hard look" at those environmental concerns, or a "reasoned elaboration" of the basis for deciding to dispense with an EIS. In sum, all Appellants really describe is a "legislative" process and that is not enough to satisfy SEQRA. If it were, the State Legislature would not have required local legislative bodies — such as the New York City Council — to comply with the strict technical requirements of SEQRA in the same manner that an executive agency must comply with them.

2. The Record As Well Indicates the Council Failed to Take a "Hard Look" at the Likely Adverse Effects of the Implementation of LL 38.

Appellants assert that despite the failure of the Negative Declaration on its face to comply with the requirements of SEQRA and the H.O.M.E.S. test, this Court should go beyond it and examine "the record" to ascertain whether a "hard look" was undertaken. Appellants offer no excuse for the Negative Declaration's facial failure to meet SEQRA's requirements, nor any reason or authority for this Court to undertake a review of the record to supplant what Appellants failed to do in their Negative Declaration.[48]

However, even if the Court were to engage in such review of the "record," such review fails to show SEQRA's "hard look" mandate was met. When LL 38 was before the Council's Housing and Building Committee, the Committee failed to engage in any substantive review or discussion of the SEQRA requirements. The entire review was as follows:

> **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.

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48. Nor do Appellants clearly delineate just what "record" the Court should examine. Is it just the two hearings and full council meeting and vote on LL 38 -- all conducted within 10 days after LL 38 was proposed? Should it be expand to include the assorted 1998 hearings Appellants repeatedly cite to, even though LL 38 was not discussed since it had yet to be even proposed (see supra, at 12 note 10)? Or should its scope include the "years of discussions" (comments of councilmember Spigner [1845]; see also [2240] ("we have discussed it for years")), and hearings on the subject of lead paint — perhaps back to the enactment of LL 1 in 1982?

[1988-89].[49] The full Council never discussed it at all.

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

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

Thus, at the time the Committee voted to approve the Negative Declaration (containing the already-completed environmental assessment form ("EAF")),[50] the Committee as a whole never discussed the documents, let alone undertook the "environmental analysis" required by SEQRA and CEQR to complete the form. See 6 N.Y.C.R.R. § 617.7(b)(2) (stating that agencies

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49. In fact, the announcement, "discussion" and vote on the Negative Declaration [1988-89] took place after the discussion and defeat of votes on amendments to the proposed local law that might have cured some of its more egregious environmental shortcomings. [1957-1987].

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

making a determination of significance regarding an unlisted action must "review the [environmental assessment form]"). There was no revision of the Negative Declaration after the June 24th hearing to reflect concerns raised in the public testimony, cf. Chemical Specialties Mfrs. v. Jorling, 85 N.Y.2d at 397, and no discussion at all of the Negative Declaration at the full Council meeting on June 30. [2007-2283]; Pet. [75-76].

Similar to the cases discussed in Part II.B.1 above, the record shows that the City Council — as a body and in committee — failed to take a hard look at the environmental concerns raised in the uncontroverted, independent testimony of over a dozen medical and scientific experts, Pet. [61-62], and community advocates over the course of two public hearings . [1300-2002]. Notably, not one medical or toxicology expert testified in support of LL 38, id., and proponents of LL 38 failed to introduce into the Record even one study or report to support the provisions contained in the new law. Id. This is, indeed, the obverse of the case relied on by Appellants, Chemical Specialties Mfrs. v. Jorling, where the agencies' decision was supported by 44 scientific studies, and in which the challenge to the negative declaration was "unsupported by any responsible scientific study." 85 N.Y.2d at 398.

Because LL 38 is implemented in apartments with young children, it will be too late to rectify its apparent environmental flaws after the fact, given that the damages to children's health are generally irreversible. Williamsburg Around the Bridge Block Assn' v. Giuliani, 223 A.D.2d at 66. Justice York emphasized this danger by pointing out that when several Council members at the June 30 meeting identified specific health hazards that concerned them, the Council leadership attempted to assuage them with assurances 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," [15p-15q], and that "almost all concerns raised by councilmembers

were answered with ‘we know the legislation is not perfect, but we can address any problems with it as they come up.’” [15s]. In other words, Justice York described a process that is the antithesis of SEQRA. Penfield Panorama Area Community, Inc, Inc. v. Town of Penfield, 253 A.D.2d 342, 350 (4th Dep't 1999) ("[B]y deferring resolution of the hazardous waste remediation issue, the Planning Board failed to take the requisite hard look at an area of environmental concern.” (citation omitted)). Rather than take a hard look at the problems and provide a reasoned analysis of the choices made, the Council leadership instead decided for the present time to ignore the problems entirely.

The record of the Council's debate illustrated why SEQRA and the EIS process can be so vitally important. For example, no City official or public health or medical expert offered evidence into the record that LL 38's deregulation of lead dust was either desirable or at least benign with respect to its public health impacts. Yet the prime sponsor of LL 38 (Housing Committee Chair Spigner) stated at the conclusion of the debate and immediately prior to the full Council's final vote that there was “a great deal of confusion ... as to what and how to control and measure lead dust” and that lead dust was “very insidious,” [2238], and admitted:

> I don't know how you keep a room or an environment dust, lead dust ... free. So that is an issue that we have yet to talk about.

[2238-39]. The prime sponsor of LL 38's candid admission of a lack of understanding of lead dust issues — at the end of debate on legislation of overwhelming public health significance — underscored precisely why SEQRA requires environmental impact statements.

C. The Process Used by the City Council to Adopt LL 38 Did Not Comport with the Fundamental Requirements of SEQRA and CEQR For Injecting Environmental Considerations Into the Decision-Making Process.

The Court of Appeals has declared that SEQRA must be effectuated through strict compliance with the review procedures outlined in the environmental laws and regulations. King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d 341, 347 (1996) ("strict, not substantial, compliance is required."); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 73-74 (same); Golten Marine Co. v. New York State Dep't of Envtl. Conservation, 193 A.D.2d at 743 (same); Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 603 (2d Dept' 1988), lv to app. den., 72 N.Y.2d 807 (1988); Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 481 (2d Dep't 1981), app. dism., 56 N.Y.2d 985 (1982) (same). SEQRA's "elaborate procedural framework," which requires agencies "to consider the environmental ramifications of their actions '[a]s early as possible' and 'to the fullest extent possible,'" ensures that environmental concerns become an integral part of agencies' decision-making processes. King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d at 347 (citations omitted). This applies with special force to those portions of SEQRA and its implementing regulations that detail the requirements for determining whether a proposed action may have a significant effect on the environment. See, e.g., ECL §§ 8-0109(2) & (4); 6 N.Y.C.R.R. § 617.7.

For example, SEQRA requires agencies to "make an initial determination whether an environmental impact statement need be prepared for the action" "[a]s early as possible in the formulation of a proposal for an action." ECL § 8-0109(4) (emphasis added); see also 6 N.Y.C.R.R. § 617.6(a)(1). As Justice York noted, the "idea of amending Local Law 1 was first proposed in December 1998," [15m], and City Council members and staff began work on

revising New York City's lead poisoning prevention laws many months prior to LL 38's final enactment on June 30, 1999, probably as early as January 1999, or even before. The basic proposals had been conceptualized by mid-April, 1999, and developed into legislative text by May 3, or May 28, if not much earlier. Pet. [55-61]. The Council's failure to address SEQRA concerns at the earliest dates and its issuance and approval of the Negative Declaration at the very end of its law-making process, i.e., on June 24, 1999, the date on which LL 38 was finally approved by the Housing and Buildings Committee and six days before the Council's final vote, flew in the face of SEQRA's express statutory and regulatory requirements. This violation of SEQRA alone warranted nullification of the resulting local law. Compare Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 720 (annulling negative declaration, in part, due to agency's failure "to follow procedures requiring it to 'make an initial determination [of environmental significance] as early as possible'" (citation omitted)), with Fisher v. Giuliani, 280 A.D.2d at 18-19.[51]

Appellants' failure to comply with this SEQRA requirement, key to reasoned and careful deliberation over environmental concerns, resulted in a process that was characterized by uninformed and hurried decisions. For example, Councilmember Marshall could not attend the first hearing on June 21, called on less than a day's notice, [1959], and complained, even as she voted for LL 38 on June 30, that it was "confusing," [2256], and that she "would like to have more time." [2258]. Even the City Comptroller's office, an interested agency, got documents at

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51. In Fisher, the negative declaration, "supported by an Environmental Assessment Statement that included a 75-page single spaced report" was released on January 8, 1998, referred for review before 2 community boards, a borough board and the borough president, and brought before a public hearing at which 80 persons testified, before being adopted by the City Planning Commission five months later in June 1998, and then not adopted by the City Council until August 1998 after a further round of public hearings involving testimony of approximately 100 people.

the last moment, [1484-85],[52] and a request for time to prepare an analysis for the Council was denied. [1509, 1511, 1828-29] As Dep. Comptroller Newman testified: "Time and more studies are needed to craft an effective and responsible bill that can be monitored and fairly enforced."[1829].

While Appellants contend that the procedural and substantive requirements of the Negative Declaration can be dispensed with "[w]hen courts are asked to review negative declarations accompanying action by local legislatures. . . .," Apps.' Br. at 54 (emphasis added), and cite a string of Third Department cases, not one stands for this proposition. See Hoffman v. Town Board of the Town of Queensbury, 255 A.D.2d 752 (3rd Dep't 1998);[53] Wilkinson v. Planning Board of the Town of Thompson, 255 A.D.2d 738 (3rd Dep't 1998); Buerger v. Town of Grafton, 235 A.D.2d 984 (3rd Dep't 1997); Hare v. Molyneaux, 182 A.D.2d 908 (3rd Dep't 1992).

In Hoffman, 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. 255 A.D.2d at 752-54. Moreover, the petitioner in Hoffman did not challenge the Town Board for failing to identify relevant areas of environmental concern or failing to support its conclusions

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52. This City Council action violated the requirement in CEQR, 62 R.C.N.Y. § 5-06(a) [2314] to "make every reasonable effort to keep involved and interested agencies informed during the environmental review process and to facilitate their participation in such process."

53. Parenthetically, Hoffman is the only one of the four cases that pertains to the action of a "local legislature;" all the others pertain to local planning boards.

with a reasoned explanation. Rather, the question presented was whether the Town Board erred in issuing a "conditional negative declaration." 255 A.D.2d at 753.

The remaining cases Appellants cite are inapplicable as well. In Wilkinson, the EAF 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." 255 A.D.2d at 739-41. In Buerger, a local planning board retained an expert; it solicited comments; it held public hearings; and it made specific findings that all the identified potential adverse impacts had been eliminated. 235 A.D.2d at 985-86. Finally, in Hare, the Court said it was "satisfied" with the negative declaration issued by the local planning board. 182 A.D.2d at 909.

While there is no precedent for the exception Appellants' assert, on the other hand there is substantial precedent for upholding "strict" compliance with SEQRA's procedural and substantive requirements.

III. COURTS REQUIRE STRICT COMPLIANCE WITH THE SEQRA STATUTE AND IMPLEMENTING REGULATIONS, AND NEVER PERMIT SUBSTITUTION OF ALLEGEDLY EQUIVALENT, "ERSATZ" ENVIRONMENTAL REVIEW PROCESSES.

A. The City Council Must Follow SEQRA's Procedural and Substantive Mandates When Considering Environmental Issues.

The State Legislature enacted SEQRA in 1975 in order to "inject environmental considerations directly into governmental decision making." Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988) (citations omitted).

> SEQRA makes environmental protection a concern of every agency (ECL 8-0103 [8]; 6 N.Y.C.R.R. 617.1 [b]). In proposing action, an agency must give consideration not only to social and economic factors, but also to protection and enhancement of the environment (ECL 8-0103 [7]; see, 6 N.Y.C.R.R. 617.1 [d]).

Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d at 414-15. Thus, the purpose of SEQRA is "to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes ...." 6 N.Y.C.R.R. § 617.1(c) (emphasis added). It accomplishes this by requiring every local government body to prepare an EIS before enacting a local law that "may" have a significant effect on the environment, ECL § 8-0109; 6 N.Y.C.R.R. §§ 617.2(b)(3), 617.3; CEQR, 43 R.C.N.Y. § 6-12(a), in order to ensure that "the protection and enhancement of the environment, human and community resources . . . be given appropriate weight with social and economic considerations in determining public policy[;] and . . . be considered together in reaching decisions on proposed activities." 6 N.Y.C.R.R. § 617.1(d).

Thus, Appellants' prolix efforts to obtain this Court's blessing for the legislative process involved in LL 38's enactment and its outcome are completely besides the point. No one disputes that the legislative process involves compromise; indeed, Appellants' arguments are very much focussed on the reasonableness of LL 38's legislative compromises.[54] See, e.g., Apps.' Br. at 30. For example, they argue that the "limits on the [lead dust] testing were obviously responsive to the comments of operators of not-for-profit housing, who objected to the anticipated cost..." Apps.' Br. at 29. But leaving aside that this newly proffered post hoc rationale appeared neither in the Negative Declaration nor the record (nor was even asserted below), legislative compromises have nothing to do with compliance with the SEQRA process. See Desmond-

54. See comments of Council members Stabile (who supported LL 38 as "a compromised bill"), [2741], Marshall (who supported it even though it was "definitely a compromised bill"), [2256], and Mayor Giuliani ("it was a compromised legislation"). [2778].

Americana v. Jorling, 153 A.D.2d at 12 (fact that DEC took some comments into consideration and made alterations does not excuse failure to address concerns through an EIS).[55]

Therefore, Justice York correctly stated that it was not the court's role to second-guess "or in any other way impinge on the City's legislative process," but rather, to review whether the process complied with SEQRA. [15d]. And no matter how much Appellants advocate the merits of their legislative decision, they utterly fail to argue how they complied with the procedural (and substantive) requirements of SEQRA in their decision making process.

If anything, this case shows why the state Legislature — through SEQRA's strict procedural and substantive requirements — felt it was necessary to inject environmental concerns into all relevant decision making, through the preparation of an EIS, in order to ensure a particularized analysis of all the environmental issues. For here, Appellants were confronted not only with what they characterize as a major environmental policy choice — "lead free vs. lead safe"[56] — but with literally dozens of other complex environmental issues ranging from definitions of lead paint[57] and timetables for correction to the adequacy of measures to control

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55. Moreover, while an EIS reviews fiscal considerations, they have no part in the threshold determination of environmental significance. Compare 6 N.Y.C.R.R. § 617.7(c) with § 617.9(b)(5).

56. Even accepting arguendo Appellants' assertion that Local Law 1's requirement of covering or removing all lead paint had to be altered — which alone would no doubt require an EIS, given Appellants' admission that there is clearly no consensus as to what a lead hazard is — Appellants do not explain why they did not amend just this "one facet of the law" [15e], but rather made numerous other changes in the lead paint legal scheme that were indisputably less protective of children, such as eliminating legal protections for 6 year olds, eviscerating the application of the court-ordered safety standards, and so forth, as discussed supra. Appellants cannot sweep wholesale all these other changes under the carpet by simplistically asserting that LL 1's intact lead paint standard was incorrect.

57. Indeed, when in 1977 the federal Consumer Product Safety Commission banned the sale of lead paint, it first prepared an EIS to set standards for acceptable lead content in paint. Rabin, Warnings Unheeded: A History of Child Lead Poisoning, 79 Am. J. Pub. Health (12) 1668, 1673 n. 49.

lead dust during lead removal. In order for the City Council to choose intelligently among these alternatives, it had to collect, digest, and analyze a huge mass of scientific data.

Yet despite these complex issues, the prime (and sole) sponsor of LL 38 admitted he did not know what to do about lead dust. [2238-39]. And even Council member Michels, the author of LL 1 of 1982 [2115] who was involved in this issue for decades [1992] and who opposed LL 38, noted that "we ... as Council members [are] not experts on health and what should be done here." [1965-66]. Rarely has it been more important for a governmental body to look — in a deliberate, systematic, scientific way, using the SEQRA and CEQR mechanisms — before leaping. Indeed, if the City Council had prepared an EIS, then the first question it probably would have answered is the one Council member Spigner asks: How do you prevent a home environment from becoming contaminated with lead dust so that children do not get poisoned? [2238].

B. The Courts Do Not Permit "Ersatz" Environmental Review Processes in Place of SEQRA.

Having failed to comply with SEQRA's substantive and procedural requirements, Appellants seek instead to win over this Court by claiming that the City Council nonetheless "was thoroughly informed about, and thoroughly considered every issue which petitioners claim was required to be reviewed pursuant to SEQRA." Apps.' Br. at 1 ("Question Presented"). To justify this point, Appellants contend that there were three "lengthy informational hearings," id. at 51,[58] and that both sides of many issues were discussed. For the most part Appellants offer a mish-mash of arguments that were not in dispute nor raised before or by Justice York, asserting, for example, that a potentially large impact does not necessarily mean a "significant"

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58. But see supra, at 12 n.10.

impact under SEQRA, or that an EIS is not required just because the Council did not adopt "better" proposals for protecting children. Id. at 53.[59] These arguments are extraneous diversions, and should not deflect this Court's attention from the relevant issues.[60] While Appellants may be attempting to make a case that the "legislative" process was not arbitrary and capricious, Appellants make absolutely no case for having complied with SEQRA.

As much as Appellants may proclaim the effectiveness of their policy making process, they do not and cannot claim that it satisfies the lawful environmental review process under SEQRA and CEQR. Indeed, Appellants' true argument — despite their lengthy Brief — is set out on page 62. There Appellants say that an EIS is not required because it would merely "reiterate" information already elicited at public hearings. In other words, Appellants argue that if the process they used was not the same, then it is just as good. Certainly Appellants know that this claim requires a complete evisceration of the procedural and substantive requirements that form SEQRA and CEQR environmental review and decision making. Fortunately, this contention is not one of first impression because it was dealt with decisively by this Court previously in Williamsburg Around the Bridge Block Association v. Giuliani, a decision which was a cornerstone of Justice York's opinion and which Appellants utterly ignore.[61]

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59. What SEQRA does require, however, is the systematic identification and consideration of the full range of alternatives. 6 N.Y.C.R.R. §§ 617.2(n), 617.3(d), 617.8(f)(5), 617.9(a) and (b); Shawangunk Mountain Envtl. Ass'n v. Planning Bd. of Town of Gardiner, 157 A.D.2d 273, 276 (3d Dep't 1990).

60. Likewise, even though neither the Petition nor Justice York raised the issue, Appellants spend two pages in their argument section, Apps.' Br. at 60-62, attempting to explain away the personal injury bar's opposition to LL 38's limitation on the statutory presumption. Since Appellants have now raised it, however, it should be noted that the Negative Declaration as well never identified or analyzed this issue, even though there was certainly substantial disagreement over it, [1918-57, 2190-98, 2223], and there can be no doubt that the possible elimination of liability for injurious conduct by property owners can have significant impacts. Waters v. NYC Hous. Auth., 69 N.Y.2d 225, 230 (1987).

61. Appellants are free to disagree with that holding, or attempt to distinguish it, or ask this Court not (continued...)

In Williamsburg, the City asserted that its vigorous analysis by a Mayoral task force of independent experts (including one of Petitioners' experts in the instant matter, Dr. Philip Landrigan[62]), 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, Williamsburg invalidated this process and required the preparation of an EIS. Id. at 74. Calling the City's process an "ersatz EIS," id. at 72, this Court recognized that the City could not substitute an alternative means of engaging in environmental policy making for that provided in SEQRA. Id. at 74.

If this process failed in Williamsburg, despite the presence of a panel of experts, it fails even more in the instant matter, where no outside credentialed experts supported the proposal and most generally opposed it. Furthermore, even if an approximation, equivalent, or substitute for the SEQRA procedures could suffice in theory, the process here certainly could not, as it completely failed to recognize the uncertainties of LL 38's approach, let alone describe how the many choices embodied in that proposal were explored and analyzed, or any rational basis for making and rejecting specific and various choices. In fact, the process utilized here looks not at all like an EIS, which

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61. (...continued)
to follow it; but cannot ignore it. That Appellants do so can only mean that they cannot articulate any reason why Williamsburg is not controlling The courts have severely chastised litigants who fail to acknowledge contrary authority. For example, in Cicio v. City of New York, 98 A.D.2d 38, 40 (2d Dep't 1983), the City's failure to distinguish contrary cases "precisely on point" earned the following rebuke:

> This is most disturbing and clearly inexcusable because the city was a party in both [cases]. Had even a modicum of thought and research been given to this case, it would have been self-evident to the city that its position was untenable and this court and the taxpayers would have been spared the costs of a frivolous appeal. (citations omitted).

62. The City claimed there that Dr. Landrigan was "'an independent expert on the health risks associated with environmental exposure to lead.'" Williamsburg, 167 Misc. 2d at 985 (quoting City's answering affidavit).

> must identify the relevant areas of environmental concern, take a "hard look" at them, and present a "'reasoned elaboration'" of the basis for its determination. An EIS must include, inter alia, pertinent information regarding a project's long-term, short-term and cumulative environmental impact; alternatives to the proposed action; and mitigation measures proposed to minimize the project's environmental impact.

Williamsburg, 223 A.D.2d at 70 (emphases added) (citations omitted).[63]

Other courts have rejected Appellants' claim. For example, in Desmond-Americana v. Jorling, 153 A.D.2d at 11, the court noted that "[w]hile it is true that [the agency] may have considered" the issues that were not analyzed in a negative declaration, "an EIS was required to explore the entire issue thoroughly."

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

Id. at 12. SEQRA and CEQR and all the courts' decisions on the subject resoundingly reject the notion that local municipal legislative bodies' deliberations can serve as a substitute for the requirements of SEQRA in making environmental policy. The courts have repeatedly held that "literal compliance with SEQRA's procedural requirements for integrating environmental considerations into the decision-making process is mandated." Horn v. IBM, 110 A.D.2d 87, 92 (2d Dep't 1985), app. den., 67 N.Y.2d 602 (1986); accord, Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 603 (2d Dep't 1988); Inland Vale Farm Co. v. Ster-

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63. That Appellants made minor amendments of the proposal (mostly to restore it back to its less egregious prior versions, see supra, at 15 n.10) does not mean that they are absolved of their responsibilities under SEQRA. "[M]itigation measures will not obviate the need for an EIS unless they clearly negate the continued potentiality of the adverse effects of the proposed action." Merson v. McNally, 90 N.Y.2d 742, 754 (1997).

gianopoulous, 104 A.D.2d 395, 396 (2d Dep't 1984), aff'd, 65 N.Y.2d 718 (1985) ("substantial compliance will not suffice").

Rye Town/King Civic Association, 82 A.D.2d at 480-81, articulated the rationale for this policy.

> The Legislature itself has declared its intent that "to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in [SEQRA]." We read these provisions to mandate literal compliance with SEQRA; substantial compliance with the "spirit" of the act does not constitute adherence to its policies "to the fullest extent possible."
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> ....
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> ... We think it would be unwise to permit local agencies to substitute substantial compliance with SEQRA for literal compliance therewith, thereby inevitably giving rise to numerous lawsuits challenging the sufficiency of the agencies' environment-safeguarding procedures. Uniform and literal enforcement of SEQRA would render environmental review more objective, standardized and consistent, and would be more certain to promote the policies of the Legislature with respect to this fundamental concern of society.

(emphases in original).

West Branch Conservation v. Planning Bd., 177 A.D.2d at 918, expanded this reasoning:

> [P]ermitting substantial compliance would not only frustrate the laudable purposes behind SEQRA, but would inevitably lead to numerous lawsuits wherein courts would be asked to weigh the acceptability of alternative procedures....

(citations omitted). See also, Williamsburg, 223 A.D.2d at 73-74, and cases cited therein; Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Indus. Dev. Agency, 212 A.D.2d 958, 959 (4th Dep't 1995), app. den. 85 N.Y.2d 812 (1995); Martin v. Koppelman, 124 A.D.2d 24, 27 (2d Dep't 1987); Glen Head v. Town of Oyster Bay, 88 A.D.2d 484, 491 (2d Dep't 1982).

This is hardly the case to break with long established precedent and create the exception Appellants posit; if anything, the facts here demonstrate precisely why the State Legislature

imposed the uniform structure of SEQRA upon agency decision-making.[64]

C. SEQRA Fully Applies When the City Council Adopts Local Ordinances of General Application.

Appellants impermissibly raise for the first time on appeal, see Rivera v. Pocono Whitewaters Adventures, 241 A.D.2d 381, 382 (1st Dep't 1997), albeit in a page and a half long footnote, Apps.' Br. at 62-63 n.23, that SEQRA does not apply to local ordinances of "general application." In fact, the City Council issuance of a Negative Declaration here was an acknowledgment that local laws must comply with SEQRA.

Moreover, SEQRA's plain statutory and regulatory language unequivocally encompass laws such as LL 38. SEQRA defines "actions" to include "policy" and "regulations," ECL § 8-0105(4)(a)(ii), and makes no exemption for laws of "general application." § 8-0105(5) (enumerating enforcement proceedings, official ministerial acts, and maintenance or repair as SEQRA nonactions); see also § 8-0105 (2) and 6 N.Y.C.R.R. § 617.2(v) (defining local agency to include a governing body). Moreover, SEQRA regulations define actions to include "adoption of agency rules, regulations and procedures, including local laws . . . that may affect the environment." 6 N.Y.C.R.R. § 617.2(b)(3) (emphasis added). CEQR as well has a specific provision for "Local Laws," 62 R.C.N.Y. § 5-03(d).

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64. SEQRA, for example, provides extremely detailed requirements for comment. 6 N.Y.C.R.R. § 617.9(a)(3) specifically provides for a minimum comment period of 30 days on a draft EIS. There is no question that the process utilized in the instant case — a legislative proposal released and a hearing called on one day's notice, for which Appellants proffer no excuse or explanation whatsoever— is nothing like what SEQRA requires. Indeed, the Council leadership delayed releasing the proposed Negative Declaration until near the end of June 24 Committee hearing, thus denying the committee members — to say nothing of the public — any opportunity for a prior review of its contents. Pet.[70].

Appellants rely entirely on dicta in a footnote in one case, in SEQRA's infancy, that merely remarked that "[a]n argument can be made"[65] that an action under SEQRA requires a "definite project" — which issue the court expressly did not reach. Niagara v. Town Bd. of Niagara, 83 A.D.2d 335, 338 n.4 (4th Dep't 1981). Since 1981, New York jurisprudence has firmly established that SEQRA applies to local laws. For example, in Society of the Plastics Industry, Inc. v. County of Suffolk, the Court of Appeals took for granted that a county legislature's local law of "general application" (in that instance a ban on use of certain plastic products by retail food establishments) came under SEQRA's purview:

> Where, as here, the County Legislature acts as the lead agency under SEQRA, the Suffolk County Code requires it to submit an environmental assessment form (EAF) for review to the Council on Environmental Quality (CEQ), which then must make a recommendation as to the need for an environmental impact statement (EIS).

77 N.Y.2d 761, 765 (1991). Other courts have adjudicated local legislatures' compliance with SEQRA in enacting laws of "general application." See, e.g., Skenesborough Stone, Inc. v. Village of Whitehall, 229 A.D.2d 780, 780 (3d Dep't 1996); Norgate at Roslyn Association v. Village of East Hills, 104 A.D.2d 974, 974-75 (2d Dep't 1984); see also Gerrard, 1 Environmental Impact Review in New York § 2.01[4][e] (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)).[66]

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65. Although none of the parties in that case apparently thought it was worth making, however, so Appellants may be the first ever to make it.

66. Appellants' extensive reliance on the National Environmental Policy Act ("NEPA") is futile. First, while they assert that NEPA does not apply to federal agencies drafting of comprehensive environmental regulations, in New York even the state Department of Environmental Conservation ("DEC") is subject to SEQRA. See, e.g., Desmond-America v. Jorling, 153 A.D.2d at 10. Second, the cases Appellants cite on the limited use under NEPA of an EIS as an aid to legislation cannot be analogized to SEQRA. (continued...)

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

Appellants apparently recognize that they are not likely to prevail on appeal and that their failure to obey SEQRA rendered LL 38 a legal nullity, yet they nonetheless ask this Court to allow their invalid enactment to remain in effect for yet an additional year. Apps.' Br. at 69. Appellants' arguments are based on a fallacious pretense: that the voiding of LL 38 would leave the City without a working legal system for lead paint poisoning prevention. First, preexisting laws were in place for many years. Second, by late 1998 Appellants were finally on the verge of enacting a complete set of regulations (City Record, October 9, 1998, p. 3505; id., October 15, 1998, p. 3544) to fully enforce LL 1 and § 173.14 as directed by this Court in NYCCELP II, NYCCELP IV, NYCCELP VI, and NYCCELP VII; indeed, the same assertions Appellants make here regarding the viability and perceived inadequacies of LL 1 were fully and repeatedly articulated by them to this Court and roundly rejected in those four decisions.[67]

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66. (...continued)
NEPA does exempt Congress, as SEQRA exempts the State Legislature, but no subsidiary federal legislative bodies exist under NEPA, while under SEQRA all subsidiary local legislative bodies — village boards, town councils, county legislatures, and even the New York City Council— fall within its purview.

67. Appellants improperly ask this Court to consider documents and affirmations they submitted to this Court in support of their motion for a stay, as those recent submissions are completely dehors the record on appeal. Gintell v. Coleman, 136 A.D.2d 515, 517 (1st Dep't 1988) (affidavits submitted on motion for interim stay pending appeal are outside the record and will not be considered on appeal); S-M News Co. v. Simons, 279 A.D. 364, 370 (1st Dep't 1952) (same).

If this Court nonetheless intends to consider Appellants' arguments based on those submissions — such as Appellants' belief that LL 38 is responsible for a decline in lead levels (even though the Health Commissioner testified, [1415], that lead poisoning levels had declined by almost 50% since 1994 under LL 1) — Petitioners would respectfully urge review as well of the responding affirmation of Dr. Mauss (March 20, 2001), explaining that the figures on lead poisoning levels over the last five years indicate, if anything, a flattening of the rate of decline since LL 38 went into effect. Appellants themselves argue that under prior law lead poisonings had dramatically decreased. Apps.' Br. at 8, 65.
(continued...)

Appellants cite the recent decisions in Silvercup Studios, Inc. v. Power Auth. of the State of N.Y., __ A.D. 2d __, 2001 WL 831718 (2d Dep't 2001) and UPROSE v. Power Auth. of the State of N.Y., __ A.D. 2d __, 2001 WL 830817, but in both cases it was technically impractical to cease construction of almost completed physical projects — and even there the courts granted stays of only six months. Similarly, Golden v. Metropolitan Transportaiton Authority, 126 A.D.2d 128, 130 (2d Dep't 1987), was commenced after the physical action at issue had taken place. Here, however, the matter concerns not a physical project but changes in policy regarding clean-up of a toxic hazard, embodied in a local ordinance. Appellants cite no authority for allowing an invalid enactment to continue in effect for a year.

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67. (...continued)

Lastly, to the extent that Appellants' only articulated reason for revoking LL 1 was its requirement that all lead paint be abated even in homes where children are not already poisoned, Appellants neglect to mention — in the course of their extensive discussions of their stay motion submissions — that Petitioners were fully willing to stay that one aspect of the regulations pending determination of the appeal (and no doubt would not object to such a limited stay while the City complied with the EIS process for a new law to replace LL 1, as they were throughout the period leading up to the enactment of LL 38) See Test. of Comptroller Hevesi [1486]; see also supra, at 58 n.56.

CONCLUSION

For the above reasons, the judgment below should be affirmed.

Dated: New York, NY
September 5, 2001

Respectfully Submitted,

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

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BY: Matthew J. Chachère,
Theodora Galacatos,
James M. Baker
Attorneys for Petitioners-Plaintiffs-Respondents
76 Wadsworth Avenue
New York, NY 10033-7000
212-822-8300

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