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.

PETITIONERS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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

June 13, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS, RULES, and LOCAL LAWS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioners-plaintiffs-respondents ("petitioners") submit this reply brief in further support of their motion for leave to appeal to the Court of Appeals pursuant to C.P.L.R. § 5602(a) from this Court's March 26, 2002, Decision and Order ("App. Dec."),[1] which reversed the IAS Court's judgment entered February 22, 2001, in this action.[16]

Respondents-defendants-appellants' ("respondents") June 4, 2002, affirmation in opposition ("Resp. Aff.") utterly fails to address the questions presented in petitioners' motion as to why this matter merits Court of Appeals review. Respondents apparently do not disagree that this case has an enormous impact on the health of thousands of vulnerable New York City children. Respondents seemingly do not disagree that this Court effectively carved out an exception for local legislative enactments from full review under the State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq.,[2] or an exception for provisions regulating pre-existing hazardous materials or conditions created by third parties, both of which have vast statewide implications. Nor do respondents disagree that this Court misapprehended Local Law 1 ("LL1") and Local Law 38 ("LL38") with respect to whether one or the other required "removal" versus "containment".

In fact, respondents' opposition papers do not really even address whether the Court of Appeals should review this matter, but rather focus solely on whether this Court's decision was correct, and consist predominately of quotations from the decision, without any substantive analysis. Indeed, respondents — apparently conceding the inability to measure the negative

---

1. Annexed as Exhibit "A" to the May 22, 2002, affirmation of Matthew J. Chachère in support of the underlying motion for leave to appeal. References to Record on Appeal are indicated in brackets [].

2. Indeed, respondents apparently concede that this Court applied a different standard "with respect to review of determinations of environmental significance by local legislatures." Resp. Aff. at 5.

declaration, the record, and this Court's decision against the long-accepted test in H.O.M.E.S. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979) — instead offer extensive rationales for the outcome and merits of the legislation. But the instant motion concerns not whether this Court's decision was correct or incorrect (this is not a motion for reargument), but rather, whether this case merits Court of Appeals review. And given the issues raised in this motion, and the significance and impact of those issues, the Court of Appeals should have the final say on these matters.

ARGUMENT

I. A NEGATIVE DECLARATION THAT FAILS TO IDENTIFY AND THOROUGHLY ANALYZE THE RELEVANT AREAS OF ENVIRONMENTAL CONCERN AND SET FORTH A REASONED ELABORATION FOR ITS DETERMINATION MUST BE ANNULLED, AND NO EXCEPTION SHOULD BE MADE FOR LEGISLATIVE ENACTMENTS

Just last month, this Court, in Spitzer v. Farrell, _ A.D.2d _, 2002 WL 1059934 (1st Dep't 2002) reiterated the black letter SEQRA principle that an agency's negative declaration "must 'identify the "relevant areas of environmental concern" and take a "hard look" at them ... [and] set forth a reasoned elaboration for its determination,'" id. at *2 (citations omitted), and on that basis declared an agency's negative declaration invalid. The divergent outcomes in Farrell and Vallone illustrate the extent to which in the latter this Court has constructed an exception for legislative enactments.

Farrell concerned SEQRA review of the New York City Department of Sanitation's ("DoS") plan to truck garbage to solid waste facilities in New Jersey, adopted after New York State enacted legislation requiring the City to close its Staten Island landfill by 2002. The City prepared an environmental assessment as to whether the addition of diesel truck traffic would have a significant adverse impact, since, among other issues, diesels emit very fine particulate

matter. This Court noted: that "particulate matter can enter the lungs" and "cause or aggravate pulmonary health conditions;" that "the finer the particles, the deeper they may penetrate into the lungs and the more likely they are to contribute to adverse health impacts;" and that over 90% of diesel soot is less than 2.5 microns in size ("PM2.5"). Farrell, 2002 WL 1059934 at *2.

DoS issued a negative declaration, declaring that the plan would not cause potentially significant traffic-related air quality impacts and had no adverse public health impacts. DoS's analysis only examined PM10 levels (for larger particles), which was the federal Environmental Protection Agency standard then in effect under the federal Clean Air Act, and ignored PM2.5 levels. However, although EPA did not have in effect at the time a standard regarding PM2.5 emissions, a great deal of extant evidence showed that the PM10 standard did not adequately protect public health and that PM2.5 emissions needed to be considered. In fact, EPA had declared in 1997 that PM2.5 soot was a matter of concern and promulgated new standards, but had called for three years of monitoring and data collection before they went into effect.

This Court ruled the negative declaration invalid on its face, because DoS had "failed to identify — much less take 'a hard look at' the plan's potential PM2.5 impact — clearly a 'relevant area of environmental concern.'" Id., 2002 WL 1059934 at *4. It rejected arguments that reliance on federal standards ipso facto excused the failure to identify and analyze potential significant impacts:

> Determination under SEQRA of whether an agency action "may have a significant impact on the environment" (ECL §8-0109(2)) and thus whether an EIS is required, is a much broader undertaking than simply determining whether such action might violate air quality standards promulgated as a regulatory matter under the Clean Air Act. The absence of legally enforceable PM2.5 [standards] under the Clean Air Act does not relieve DoS of its obligation to consider potential PM2.5 impacts under SEQRA.

2002 WL 1059934, at *3 (emphasis added, citations omitted).

Moreover, this Court held that:

> even if there were no means of fully assessing the plan's PM2.5 impacts, DoS was not justified in simply ignoring the issue. Given the structure and purpose of SEQRA, any uncertainty as to the assessment of the environmental impact of an agency's action should normally lead to the conclusion that an EIS is required -- particularly where, as here, the action involves issues of recognized air pollutants.

2002 WL 1059934, at *4 (emphasis added).

The factual similarities between Farrell and Vallone are manifest:

- Both cases involved negative declarations that failed to identify and analyze the potential adverse impacts of toxic fine particulates that are recognized public health hazards: in Farrell, PM2.5 diesel soot particles, in Vallone, lead dust;

- In Farrell, the agency ignored federal guidelines regarding PM2.5 soot. In Vallone, the Council ignored federal guidelines regarding lead dust and the conditions that generate it, such as impact, friction, and accessible surfaces;

- In Farrell, the agency was uncertain as to the impact of PM2.5, so it ignored the issue in the negative declaration. In Vallone, the City Council was apparently uncertain what to do about lead dust, so it ignored it in the negative declaration as well. Indeed, the prime sponsor of LL 38 explained on the record:

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

[2238-39 (emphasis added)];

- Both Farrell and Vallone concerned situations where the elimination of a perceived environmental menace (in Farrell, a landfill; in Vallone, what this Court saw as LL1's

dangerous mandates)[3] may have caused other, albeit unintended, adverse impacts.

In sum, in both cases the negative declaration "failed to identify — much less take a 'hard look at,'" Farrell, 2002 WL 1059934, at *4, clearly relevant areas of environmental concern: in Farrell, PM2.5 soot, in Vallone, lead dust. The only palpable difference between Farrell and Vallone is that the latter concerned a local legislative (rather than an administrative agency) decision, and this Court construed a record of legislative debate — however perfunctory and uninformed by hard data[4] — as ipso facto supplying the "hard look" required by SEQRA. This distinction is contrary to SEQRA's purposes and language. In Glen Head v. Town of Oyster Bay, 88 A.D.2d 484, 492 (2d Dep't 1982), the notion of such legislative equivalence was soundly rejected: "For all the present record reveals, the town board adopted its rezoning resolution in the same manner to which it was accustomed before SEQRA's enactment." The Second Department warned that without strict compliance,

---

3. That this Court misunderstood the prior legal regime as always mandating removal rather than containment can be further demonstrated by the fact that Board of Health amended Health Code § 173.13 back in 1970 to permit covering lead painted surfaces as an alternative to removal. The legislative history to § 173.13 [2377] explains:

> Subsection (d) was amended by resolution adopted on January 15, 1970 to authorize the Department to permit, as an alternate to removal of the lead paint from interior surfaces, the covering of such surfaces with materials and by methods prescribed by the Department. This will overcome the problems faced under the former provision occasioned by the hazards of existing paint removal methods. Such subsection was further amended to mandate the Department to order the removal of the lead paint or the covering of interior surfaces containing lead paint in those instances where a resident of the apartment is found to have a blood-lead level of 0.06 milligrams percent or higher, and when the person responsible for removal or covering of the lead paint fails to do so within five days after service of such order upon him, to request the Housing Development Administration to execute such order.

(emphasis added). Likewise, LL1 provided that the "owner of a multiple dwelling shall remove or cover in a manner approved by the department" lead paint. (emphasis added)

4. There is no dispute that critical environmental issues — such as the total elimination of all protection for six-year-old children — were never identified (much less analyzed) either in the negative declaration or the legislative debate.

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

Id., at 493 (citations omitted)

It is worth noting in this regard another First Department SEQRA decision, Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d 64 (1st Dept 1996), affirming 167 Misc.2d 980 (Sup. Ct. N.Y. Co. 1995) ("WABBA v. Giuliani") in which this Court declared that lead-contaminated dust generated by lead paint posed a significant environmental hazard and that under SEQRA, an agency's promulgation of a protocol governing work on the City's transportation infrastructure required the preparation of an EIS in order to analyze the adverse health impact of lead dust released by such activity. Id. 223 A.D.2d at 71-72, 74.[5] Again, the only palpable distinctions that could explain the different outcomes in this Court's Vallone and Williamsburg decisions is that the latter (as in Farrell) involved an administrative agency's SEQRA review, rather than that of a legislative body.

Given these divergent outcomes, and the multitude of local legislative bodies throughout the State of New York who fall under SEQRA, review by the Court of Appeals is needed as to whether legislative bodies should be treated differently than administrative agencies for the purposes of SEQRA compliance.

---

5. WABBA v. Giuliani involved review of a "protocol" promulgated by the Department of Transportation. Since the protocol interjected lead dust controls where none had existed before, 167 Misc.2d at 985, WABBA concerned an "action" that presumably would have only "beneficial" environmental effects – indeed far more beneficial than the changes resulting from the repeal of LL 1 and the evisceration of Admin. Code 27-2126 and Health Code § 173.14 in the present case. Thus under the Vallone reasoning this Court should have ruled for the City's in WABBA — but it did not. Moreover, in WABBA the City had asserted that its vigorous analysis by a Mayoral task force of independent experts resulted in a protocol that was a "good-faith effort to establish safety guidelines" to protect against lead emissions. 223 A.D.2d at 68. Nonetheless, this Court invalidated this process and required the preparation of an EIS. Id. at 74. This Court called the City's process an "ersatz EIS," id. at 72, and barred the substitution of an alternative means of environmental review for that provided in SEQRA. Id. at 74.

II. RESPONDENTS' CONTENTIONS WITH RESPECT TO THE SUBSTANTIVE VALIDITY OF THE ENVIRONMENTAL ASSESSMENT'S DETERMINATION OF ENVIRONMENTAL NON-SIGNIFICANCE ARE UNFOUNDED, AND, IN ANY EVENT, IRRELEVANT TO THE MOTION BEFORE THE COURT

Although respondents' opposition papers argue to a surprising degree as to the relative merits of LL38, respondents do not address the issue raised by the motion: whether a negative declaration that fails to identify and analyze relevant areas of environmental concern can be excused because of legislative deliberations. No one disagrees that lead dust is a hazard.[6] And no one disagrees that the negative declaration did not even identify lead dust as a hazard, or identify the deregulation of surfaces that create lead dust, such as impact, friction, and child accessible surfaces, as relevant areas of concern nor analyze and substantiate their deregulation.

Indeed, respondents do not deny that there might be adverse impacts from lead dust from friction, impact, and accessible surfaces,[7] and at best merely assert that there was "confusion in the record as to how the condition would be identified or what an owner would be required to do if the dust could not be traced to a deteriorated paint condition." Res. Aff. at 9. But as this Court just held in Farrell, 2002 WL 1059934, at *4, "any uncertainty as to the assessment of the

---

6. Even the City's then-Health Commissioner stated that "[w]e know now that lead-contaminated dust is the predominant source of lead poisoning, and most likely the best predictor of children's risk," [1423] and "we cannot ignore the dangers of lead contaminated dust, and dust should be incorporated into the bill in the language of what constitutes lead-based paint hazards" [1473]

7. Notably, only a few months before LL38's enactment, the City's Department of Housing Preservation and Development ("HPD") issued a press release lauding an initiative, the "Primary Prevention Program," which was "protecting the City's most valuable resource - our children - from the harmful effects of lead dust." The press release explained:

> Treatment concentrates on friction surfaces – door jams, windows sills and wells, and cabinets – because friction creates lead dust.

New York City HPD, Housing Preservation and Development Commissioner Roberts Announces 750 City Apartments Are Now `Lead Safe' Release #08-99 (April 6, 1999), ("HPD Release #08-99") available at www.ci.nyc.ny.us/html/hpd/html/archive/lead-safe-pr.html (accessed June 10, 2002).

environmental impact of an agency's action should normally lead to the conclusion that an EIS is required...."(emphasis added). Leaving aside that not one of respondents' record citations support their decision to entirely ignore lead paint on friction, impact, and accessible surfaces,[8] the way to resolve such alleged uncertainty was through the preparation of an EIS. 6 N.Y.C.R.R. § 617.9(b)(6).

Thus, respondents' recitations of the many uncertainties and disputed facts regarding the environmental merits and demerits of LL 38 only reinforce precisely why an EIS was required in this instance. For example, respondents also argue that the elimination of dust clearance tests from many situations where they were previously required was appropriate because it was "not uniformly regarded as scientifically reliable." Res. Aff. at 8. Notwithstanding that this assertion was neither set out nor explained in the negative declaration, and putting aside, again, that under Farrell such uncertainty mandates an EIS, petitioners note that the same unfounded statement in the City's appellate brief to this Court engendered a brief amici curiæ[9] to this Court by twenty-four of the leading scientists, researchers, physicians, and public health experts in the field of childhood lead poisoning. These experts — most of whom had testified or made submissions to the Council in opposition to LL38 — explained:

---

8. For example, respondents cite the testimony of Don Ryan at [1530], yet at that very page Mr. Ryan says that "this is where the Vallone bill fails, because it does not pay attention to lead dust." Respondents cite HPD commissioner Roberts' testimony at [1353], even though Mr. Roberts testified on that same page that friction surfaces with lead dust "could be" a problem. Remarkably, respondents assert that "the dust could have been blown into ... the unit" from elsewhere, Res. Aff. at 9, yet they cite only the record at [1555] — where Mr. Nick Farr testifies that "there is very little airborne-related dust anymore."

9. Brief of Amici Curiæ Cathy Falvo, M.D., Nick Farr, Esq., H. Jack Geiger, M.D., M.Sci. Hyg., Charles Gilbert, Ph.D., Lynn R. Goldman, M.D., Philip Landrigan, M.D., Bruce Lanphear, M.D., Michael McCalley, M.D., Ph.D., Evelyn Mauss, Sc.D., Irving H. Mauss, M.D., Herbert Needleman, M.D., David Newman, M.A., M.S., Edward Olmsted, C.I.H., Leo Orris, M.D., Sergio Piomelli, M.D., John Rosen, M.D., Martin Rutstein, Ph.D., Don Ryan, M.U.R.P., Monroe Schneider, M.D., Joel Shufro, Ph.D., Victor W. Sidel, M.D.; Irwin Solomon, M.D., Rebecca G. Solomon, M.D., and Bailus Walker, Jr., Ph.D., M.P.H., in Support of Petitioners-Plaintiffs-Respondents, October 16, 2001 (herein "Experts' Amici Br.").

> There is no basis for this statement in current science, nor are amici aware of any contrary testimony by credentialed experts before the City Council ... These statements by Appellants underscore their failure to take a hard look at the issues as required by SEQRA, given that the body of peer-reviewed studies in the scientific literature demonstrate the contrary — both the necessity of lead dust clearance testing and its reliability.

Experts' Amici Br. at 13-14. These expert amici cited nine peer reviewed studies in support; respondents offer no contrary authority whatsoever.

Respondents also assert that lead dust "could be removed by regular washing of floors with a detergent." Res. Aff. at 10. But again, the negative declaration does not discuss this, or even discuss lead dust at all. And moreover, the body of peer-reviewed studies in the scientific literature demonstrates the contrary:

> [A]s to Appellants' repeated conclusion that lead dust could be simply "removed by regular washing of the floors with a detergent," . . . scientific studies do not show that such measures will reduce lead dust to levels below regulatory concern. See Lanphear, et al., Primary Prevention of Childhood Lead Exposure: A Randomized Trial of Dust Control, 103 Pediatrics (4) 772-88 (April 1999); United States Department of Housing and Urban Development, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing, (1995, rev. 1997) at 15-5 ("previous studies have indicated that cleaning can be accomplished only with great care and skill ... some type of clearance is required for all forms of lead hazard control").

Experts' Amici Br. at 15.

Respondents also claim (without citation) that lead dust clearance testing was properly omitted because "it would cost several hundred dollars per unit, and if required for each unit could put out of business" owners of low and moderate income housing." Res. Aff. at 8. This statement is completely irrelevant to whether LL 38's elimination of lead dust as a defined hazard and the elimination of lead dust clearance testing in many instances might have a significant adverse environmental impact, which was the question before the Council in the Negative

Declaration and before this Court.[10] Likewise, respondents' affirmation offers the post hoc explanation (offered neither in the Negative Declaration, in the record, or even asserted to the court below) that they limited dust tests because "under HUD rules even one failed test remained perpetually reportable on a prospective leasing of a unit or a sale of the building." Res. Aff. at 9. While respondents may have bona fide political or other legislative reasons for shielding landlords from having to disclose prior lead problems to tenants — even though required by 42 U.S.C. § 4852d(a)(1) — this is surely not an environmental or public health justification that protects children, nor an excuse as to why the negative declaration failed to identify it as a relevant area of environmental concern, as required by SEQRA.[11]

Respondents' arguments such as these confirm that they believe that legislative compromises are to be treated as a category distinct from agency decisions and exempt from SEQRA review — and underscore precisely why this case merits Court of Appeals review.

Moreover, respondents do not in the slightest deny that the negative declaration does not mention (much less explain or analyze) LL 38's complete elimination of all prevention measures

---

10. Moreover, the federal government has estimated that it would cost only $60 for lead dust clearance testing in multi-family housing where repairs or rehabilitation work costing under $5,000. United States Department of Housing and Urban Development, Office of Lead Hazard Control, Economic Analysis of the Final Rule on Lead-Based Paint: Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, (Sept. 7, 1999) at 2-22.

11. This cannot substitute for 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....").

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"). Instead, respondents offer a post hoc justification by citing then-Health Commissioner Cohen's general comments that the "principal age for developing childhood lead poisoning [is] [1 1/2] to [2 1/2] years."[1418].[12] Presumably, by this logic the City could just as well have eliminated all protections for all children except those between 1-1/2 and 2-1/2 years of age, with no "adverse impact." However, Commissioner 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.

Respondents' other post hoc explanation on this issue (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. Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 364-65 (1986). And as noted above, in Farrell, 2002 WL 1059934, at *2-3, this Court concluded a City agency could not limit its SEQRA review to simply a question of whether its actions would be consistent with federal regulations.[13]

---

12. Respondents' affirmation, at 12, inaccurately paraphrases Commissioner Cohen's testimony as stating that "older children rarely developed elevated blood lead levels." Such statement is not found in the record, nor in the testimony of anyone who appeared before the Council.

13. Respondents offer no legal support for their claim that the Negative Declaration did not need to identify this issue because it was (they assert) a "noncontroversial change." SEQRA has no such exemption; instead it looks to credible evidence – not the controversial nature – to substantiate environmental significance. See Chemical Specialties Mfctrs. v. Jorling, 85 N.Y.2d 382, 395, 398 (1995)(discussing the scientific studies and empirical data upon which the agency based its decision).

(continued...)

Lastly, respondents argue that petitioners have "inaccurately" claimed that LL 38 undercut the provisions of § 173.14, pointing out that § 173.14 still remains applicable to violations issued by DoH where a child is already lead poisoned. But there can be no dispute that the plain language of the pre-existing Health Code § 173.14(a)(1), [2363], made it applicable "whenever ... abatement is ... [directed or ordered by] the Commissioner of Housing Preservation and Development,"[14] nor that the provisions in LL 38 are significantly weaker than § 173.14. See Testimony of Dr. Susan Klitzman, former Assistant Health Commissioner for Environmental Risk Assessment and Communication [3556] ("the "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 . . . No scientific evidence has been presented to indicate that the safety measures which have been deleted [by Local Law 38] are unnecessary from a public health perspective." (emphasis added)). Nor does any dispute exist that then-Health Commissioner Cohen agreed that LL 38's "interim controls" were less stringent than Health Code § 173.14. [1436-38].[15]

---

13. (...continued)

Conversely, with respect of those aspects of LL38 where respondents concede there was significant controversy, respondents 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 those matters 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.

14. The number of violations placed by HPD dwarf those placed by DoH. For example, in 1995 there were 66,000 lead paint violations in HPD's database, New York City Office of the Comptroller, Audit Report on the New York City Department of Housing Preservation and Development's Enforcement of the Housing Maintenance Code MJ95-098A (June 30, 1995) at 23 [830, 870]. As to DoH, however, there were 1,074 cases at or above the action level for a DoH environmental investigation in 1998. Testimony of Health Commissioner Cohen. [1414]

15. Respondents also attempt to excuse the dilution of the safety standards by asserting (again without citation) that the federal EPA "still had not developed a program to train and certify technicians." Resp. (continued...)

In sum, the motion before this Court is not about whether LL 38 constituted better or worse public policy. All the experts agreed that LL 38 had adverse impacts. No one disagrees that the negative declaration, which did not identify numerous areas of environmental concern, was facially deficient — indeed, respondents don't even attempt to defend it. Under this Court's holdings in Spitzer v. Farrell and WABBA v. Giuliani, no further inquiry should have been needed; an EIS was mandated. The Court of Appeals should give consideration to whether legislative bodies will be treated differently than executive agencies under SEQRA.

---

15. (...continued)
Aff. at 9. In reality, EPA had a certification program in effect, as HPD itself noted earlier in 1999 in a press release regarding its "Primary Prevention Program," under which "Owners . . . hire contractors who are EPA certified and state licensed in lead treatment [and] HPD inspects the work." See p. 7 note 7, supra, HPD Release #08-99. And even if this were not so, such arguments are unavailing under Spitzer v. Farrell, 2002 WL 1059934 at * 3 (lack of federal standards does not excuse City agency's failure to analyze environmental impacts).

CONCLUSION

The Motion for Leave to Appeal to the Court of Appeals should be granted.

Dated: New York, NY
June 13, 2002

Respectfully Submitted,

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

/s/

BY: Matthew J. Chachère,
Theodora Galacatos,
James M. Baker
Attorneys for Petitioners-Plaintiffs-Petitioners
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

M:\206\VAL-RPL.BRF