STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of New York City Coalition to End Lead Poisoning, Inc.; New York Public Interest Research Group, Inc.; (caption continued inside cover)

Petitioners-Appellants,

NY County Clerk's Index No. 120911/99

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-Respondents.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS-APPELLANTS

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Dated: April 10, 2003

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(Continuation of Caption, Petitioners-Appellants)

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,

PRELIMINARY STATEMENT

The State of New York respectfully submits this Brief as amicus curiae in support of Petitioners-Appellants' challenge to the enactment of Local Law 38 of 1999 by the New York City Council (the "City") as violating the State Environmental Quality Review Act ("SEQRA"), ECL §§ 8-0101 et seq. The City enacted Local Law 38 without first preparing an Environmental Impact Statement ("EIS"); it instead issued a Negative Declaration that Local Law 38 would not have any significant environmental impacts and that, therefore, preparation of an EIS was not required. Petitioners-Appellants' argument that an EIS was required and that the Negative Declaration was invalid prevailed in the Supreme Court, but was reversed by the Appellate Division. New York City Coalition to End Lead Poisoning v. Vallone, 293 A.D.2d 85 (1st Dept. 2002) ("NYCCELP"). This Court should reverse the Appellate Division.

Local Law 38 regulates the duties of property owners to abate lead paint hazards in multiple dwellings where young children reside. It replaced Local Law 1, a 1982 ordinance that regulated abatement of the same lead paint hazards in occupied apartments. Both local laws were designed to be protective of public health and the environment, i.e., to reduce and ultimately eliminate childhood exposure to lead paint. Local Law 38 narrowed the scope of targeted residences in Local Law 1, restricted the definition of lead paint hazards, and altered the means of abatement. These changes to existing law are at the center of this appeal.

SEQRA is designed to protect New York citizens, by ensuring that government bodies "look before they leap" – that they review possible environmental impacts before taking an action that has the potential for a significant adverse environmental effect. Where adverse environmental impacts may result from agency action, reasoned and public analysis of the adverse impacts by means of the EIS must be undertaken. Preparation of an EIS serves two

important ends. First, it forces the government agency to analyze potential significant adverse environmental impacts and requires reasoned consideration of measures to avoid or mitigate those impacts. Second, it informs and involves the public in the proposed agency action, allowing the public to clarify the issues and sometimes even identify adverse environmental impacts that the agency did not originally identify and that might be avoided through modifications to the proposed action.

The Appellate Division's decision dilutes SEQRA in significant respects. First, in holding that an EIS was not required, the court improperly limited the study of potential adverse impacts on the basis that the overall effect of the ordinance was beneficial. The court implied that complete and meaningful compliance with SEQRA may be excused when a municipality's action is designed to ameliorate environmental harm originally caused by someone other than the municipality. Second, in declaring that the City's Negative Declaration was valid despite the lack of reasoned analysis, the court ignored the well-established rule of strict compliance with SEQRA's procedural requirements. A leading commentator described the decision below as "incomprehensible," an apt characterization in the context of established SEQRA law. Weinberg, Supplementary Practice Commentaries to ECL § 8-0109, 17½ McKinney's Cons. Laws of NY at 30 (Supp. 2003).

This Court should therefore reverse the Appellate Division's attempt to impose judicially-created limitations on the type of potential adverse impacts that must be studied under SEQRA, and reaffirm the well-established principle of strict compliance with SEQRA's procedural requirements. SEQRA requires preparation of an EIS whenever an agency proposes to undertake an action that might give rise to significant adverse impacts, whether indirect or secondary to the

main purpose of the action, and a local government cannot comply with SEQRA with a conclusory Negative Declaration. SEQRA's "alarm bell" must be heeded by decision-makers so that the potential for adverse harm can be studied before the action becomes a fixed reality. Town of Henrietta v. Department of Environmental Conservation of the State of New York, 76 A.D.2d 215, 223 (4th Dept. 1980); Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 481 (2nd Dept. 1981), appeals dismissed, 55 N.Y.2d 747 (1981), 56 N.Y.2d 508 (1982) and 56 N.Y.2d 985 (1982).

INTEREST OF AMICUS CURIAE

The State of New York, on behalf of its citizens, has a compelling interest in the vigorous and effective enforcement of SEQRA and its implementing regulations, 6 N.Y.C.R.R. Part 617, to ensure that all municipalities and other governmental bodies in this State take actions only after full review of their environmental consequences. Concomitantly, New York's Attorney General has standing to take appropriate action to protect the State's interests under SEQRA. Abrams v. Love Canal Revitalization Agency, 134 A.D.2d 885, 886 (4th Dept. 1987).

The State's interest in this appeal is not dependent upon the outcome of the City's legislative and political process. The State does not argue here that Local Law 38 is either a good law or a bad law on its merits, or that it is better or worse than the legislation it replaced. Those are questions properly left to the City legislature. The State is concerned solely with the one relevant issue for this Court: whether the City complied with SEQRA when it enacted Local Law 38.

QUESTIONS PRESENTED

1. Is a generally applicable law enacted by a City Council considered an agency "action" subject to SEQRA compliance?

The court below answered in the affirmative.

2. Are municipalities exempt from the necessity of preparing an EIS under SEQRA where the proposed agency action is local legislation whose purpose and overall effect is to alleviate an existing environmental threat that was not created by the municipality, but where the legislation reduces protections existing under prior legislation?

The court below answered in the affirmative.

3. Can testimony submitted to a municipal legislature and legislative debate substitute for strict compliance with SEQRA's procedural mandate that a governmental agency take a "hard look" at potential environmental consequences of a proposed regulatory action and produce a reasoned written elaboration of the determination that those consequences are not significant before issuing a negative declaration?

The court below answered in the affirmative.

OVERVIEW OF SEQRA

SEQRA is a statute of broad reach to be interpreted liberally in a manner consistent with its stated purpose to protect the public welfare. See, e.g., Town of Henrietta, 76 A.D.2d at 223. The Legislature enacted SEQRA to "encourage productive and enjoyable harmony between man and his environment" and "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources." ECL § 8-0101. To advance this broad policy of environmental protection, the Legislature intended that "all agencies conduct

their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." ECL § 8-0103 (8). SEQRA is intended to "inject environmental considerations directly into government decision making," Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988), and to operate as an "environmental alarm bell" to "alert public officials to environmental shifts before those changes reach 'ecological points of no return.'" Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d 64, 71 (1st Dept. 1996) (citations omitted).

To ensure that agencies fully incorporate environmental and health concerns into their decision-making, SEQRA requires that they conduct a review of the environmental impacts of any non-exempt "action" they propose to undertake. The agency must identify the "relevant areas of environmental concern," take a "hard look at them," and "set forth a reasoned elaboration" as to whether any of an action's environmental impacts will be "significant" within the meaning of ECL § 8-0109(2). Merson v. McNally, 90 N.Y.2d 742, 751-52 (1997); H.O.M.E.S. v. New York State Urban Development Corp., 69 A.D.2d 222 (4th Dept. 1979). Preparation of the Environmental Assessment Form ("EAF") assists the lead agency in determining the significance of its proposed actions. Merson v. McNally, 90 N.Y.2d at 751; see 6 N.Y.C.R.R. § 617.20. Only when an agency determines that a proposed action poses no potentially significant adverse environmental impacts may it issue a "negative declaration" that must set forth the written reasoned elaboration of its conclusion.

If instead the assessment indicates that the action "may have a significant effect on the environment," the agency must prepare an environmental impact statement. ECL § 8-0109(2)

(emphasis added); Chinese Staff and Workers Ass'n. v. City of New York, 68 N.Y.2d 359, 364-65 (1986). The EIS requirement is the heart of SEQRA because the EIS process insures 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 relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.

Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 415 (1986).

Because of the critical and central role of the EIS under SEQRA, the threshold for requiring an EIS is "relatively low." Chinese Staff, 68 N.Y.2d at 364; see 6 N.Y.C.R.R. § 617.7(a)(1) (EIS necessary if "at least one significant adverse impact" is present). An EIS is mandated based on an action's potential, rather than certain, environmental effects. Id.; Williamsburg Around the Bridge Block Assn. v. Giuliani, 223 A.D.2d 64, 71 (1st Dept. 1996); Miller v. City of Lockport, 210 A.D.2d 955, 957 (4th Dept. 1994), appeal denied, 85 N.Y.2d 807 (1995). SEQRA does not provide any "magical formula or set of fixed objective standards for determining the environmental significance of any action." Gerrard, Ruzow & Weinberg, Environmental Impact Review in New York, § 2.06[2] at page 2-110 (2000). Instead, the agency must consider a number of areas of environmental concern, 6 N.Y.C.R.R. § 617.7(c)(1), and determine whether its proposed action, in the specific context in which it will be implemented, may have an adverse impact in any one of those areas.

Agency action, including legislative action that is generally beneficial to the environment, also can have severe adverse impacts. For example: assume that additional treatment of a municipality's water supply is needed because of pollution caused by persons outside its jurisdiction. The municipality decides to build a treatment plant in a particular city-owned open

space and enacts regulations to facilitate the project, covering issues such as a requirement to use low-sulphur fuel in all construction equipment. Building the plant is an action designed to protect the public against harm caused by someone other than the municipality. The regulations protect health by reducing air pollution from construction equipment. But the project, however well-intentioned, may cause changes in the environment in addition to the beneficial ones intended by the local government. For instance, the plant's construction may be noisy and dusty and increase neighborhood truck traffic, and its siting may cause a loss of public amenities such as open space, change traffic flow, and have aesthetic impacts. Preparation of an EIS is required to consider these potentially adverse impacts.

The analysis is no different when altering an existing law or regulatory scheme. In the example of the treatment plant, the local government examines the changes in the community and their impacts likely from the siting of the plant. In the case of a new ordinance, the local government must examine the changes from the status quo, and determine if any of these alterations in the law may have a significant adverse impact. The baseline for comparison of impacts is the existing law, not the situation absent any law at all.

BACKGROUND AND DECISION BELOW

In 1982, the City enacted Local Law 1, a comprehensive response to the public health threat posed, especially to children, by the continued presence of lead-based paint in residences.[1]

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[1] The dangers of lead-paint poisoning to children are well recognized and need no discussion here. Less well known are recent studies that indicate that adult mortality, especially through cardiovascular disease and cancer, may be closely correlated with blood lead levels, possibly resulting from childhood exposure. See, e.g., Lustberg and Silbergeld, "Blood Lead Levels and Mortality," 162 Archives of Internal Medicine 2443-2449 (Nov. 25, 2002) (individuals with elevated blood lead levels have 46% overall higher mortality than those with lower levels, and

(continued...)

See N.Y.C. Admin. Code § 27-2013(h). Under Local Law 1, once an owner knew or reasonably should have known that a child under seven was living in a multiple dwelling unit, the owner was responsible for the removal or permanent covering of any paint containing hazardous levels of lead in the residence. Further, abatement or containment of the paint had to be performed in accordance with strict safety rules designed to prevent the spread of lead dust. Id.

In 1999, the City replaced Local Law 1 with Local Law 38. While the new law made a number of changes to the lead hazard regulatory regime, for present purposes the important changes are those that may have given rise to significant adverse environmental impacts, discussed below.

Immediately prior to passing the new law, the City Council held hearings on the merits of the changes in the regulatory regime under consideration. Disregarding the changes that the amended law would make to existing law, the City issued a negative declaration, stating simply that enactment of Local Law 38 "will have no significant adverse impact on the quality of the environment." Joint Record on Appeal at 419 ("R. __"). Neither the Negative Declaration, nor the EAF prepared to support the Negative Declaration, identified or conducted any analysis of any potential adverse impacts. See R. 423-481.

Petitioners-Appellants challenged Local Law 38, charging that it was adopted in violation of SEQRA. The trial court ruled for Petitioners, holding that the City's Negative Declaration

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[1](...continued)
there exists a strong correlation with increased adult mortality from heart disease and cancer). See also Nash, et al., "Blood Lead, Blood Pressure, and Hypertension in Perimenopausal and Postmenopausal Women," 289 Journal of the American Medical Association 1523-1532 (March 26, 2003) (blood lead levels positively associated with hypertension, most pronounced in postmenopausal women).

was deficient because it failed to set forth a reasoned, written determination identifying each of Local Law 38's potential adverse impacts and explaining why they were not significant. Comparing Local Law 38 to its predecessor, Local Law 1, the court identified six such potential impacts: (i) removing children aged over six and under seven from the class of persons to be protected against lead paint hazards; (ii) removing lead dust and lead-contaminated house dust from the definition of a "lead-based paint hazard"; (iii) changing the homeowner's responsibilities to remove or cover all lead paint in homes occupied by young children to only require removal of visibly peeling lead paint; (iv) setting a twenty-one-day period for landlords to avoid Health Code violations for lead hazards; (v) setting longer time-frames for lead paint removal and enforcement; and (vi) eliminating the time period for the City Department of Housing Preservation and Development to enforce lead paint violations in certain dwellings. See R.15h-j.

The Supreme Court's decision invalidating Local Law 38 was reversed by the Appellate Division. Initially, the court agreed that the City's action was subject to SEQRA. NYCCELP, 293 A.D.2d at 87. Rather than consider the potential adverse impacts occasioned by Local Law 38's reduced scope as compared with Local Law 1, the Appellate Division then focused on what it termed the "central premise" that separates the regulatory regime of Local Law 38 from that of the former regulation. NYCCELP, 293 A.D. 2d at 93. Local Law 38 mandates the containment of intact lead paint, while providing for the removal of peeling lead paint. Local Law 1 generally

called for removal of all lead paint. This difference is characterized as the "lead-safe" versus "lead-free" approach to lead hazard abatement.[2]

The Appellate Division identified the primary hazard to human health at issue as the presence of peeling lead paint. Local Law 38 was designed to control and ameliorate that hazard, by following the lead-safe approach that would leave intact painted surfaces alone and focus only on visibly peeling surfaces. NYCCELP, 293 A.D. 2d at 88-89. Finding that the "salient, undisputed point here is that moving from abatement to containment reduces environmental threats to human health" (NYCCELP, 293 A.D. 2d at 89), the court deemed the lead-safe approach of the new law so preferable to the lead-free principle of Local Law 1 that it necessarily reduced rather than created environmental hazards.

It was significant to the court's analysis that the hazard was "not created by municipal action," but rather by the actions of third parties when dwellings that were painted with lead paint long ago had been allowed to deteriorate. On the basis of its recognition that "[n]othing in SEQRA . . . requires that governmental remedial actions perfectly solve environmental problems not originally created by the government," the court held that preparation of an EIS was not required. NYCCELP, 293 A.D. 2d at 93.

In other words, the Appellate Division decided that the Negative Declaration complied with SEQRA because the "central premise" of the City's legislative action was found overall to

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[2] Although this distinction is accepted as a given in the decision below, examination of the local laws reveals that the difference in approach may be less clear. For example, the regulations promulgated under Local Law 1 required that the "owner of a multiple dwelling shall remove or cover . . . any [lead] paint," (emphasis added) and included "encapsulation" and "enclosure" of lead paint in the definition of "abatement." See 24 R.C.N.Y. § 173.14(b)(1) (1997). Equally, Local Law 38 mandates the removal of peeling lead paint, specifying that containment of peeling lead paint is not a permissible alternative. See N.Y.C. Admin. Code § 27-2056.2.

reduce rather than create environmental threats that the City had not originally created. NYCCELP, 293 A.D. 2d at 88. In such a case, according to the Appellate Division, any adverse environmental consequences of the legislative action will by definition be insignificant, at least when measured against the beneficial impacts of the overall scheme. Accordingly, the conclusory Negative Declaration was deemed sufficient to satisfy SEQRA and preparation of an EIS not required, even though the Negative Declaration did not identify or examine any of the provisions of Local Law 38 that altered the protections afforded by the existing law. This is a principle found nowhere in SEQRA, and is one that must be repudiated in the interests of all citizens of the State.

With respect to compliance with SEQRA's procedural requirements, the Appellate Division focused on the extensive hearings and testimony presented to the City Council during its legislative deliberations on the adoption of Local Law 38. The court held that "[a]reas of environmental concern were identified early in the ordinance drafting process, explicitly and exhaustively addressed through witnesses and written submissions and considered through debate and proposed amendments." NYCCELP, 293 A.D. 2d at 95. Although noting SEQRA's requirement that in making a negative declaration an agency "shall have produced a written reasoned elaboration explaining such determination," NYCCELP, 293 A.D. 2d at 91 (citing 6 N.Y.C.R.R. §§ 617.7 [b] [2]-[4]), the Appellate Division did not discuss the fact that the Negative Declaration does not mention even one of the six potential adverse impacts arising from the changed coverage of Local Law 38 compared to Local Law 1 that were identified by the trial court, much less does it include a written, reasoned analysis of why those potential impacts are found not to be significant.

ARGUMENT

POINT I

THE ENACTMENT OF LOCAL LAW 38 IS AN "ACTION" SUBJECT TO SEQRA

In its brief submitted to the Appellate Division, the City argued that Local Law 38 is not subject to SEQRA at all because Local Law 38 is a law of general application that was not enacted in the context of legislative consideration of projects or zoning in a specific site or area. The Appellate Division properly rejected this contention.

First, the City's argument contravenes the plain meaning of the statute.[3] Agencies subject to SEQRA include "any . . . governing body, including a city . . . or other political subdivisions of the state." ECL § 8-0105(2). Thus, a municipality must comply with SEQRA's environmental review requirements before taking an action. ECL § 8-0105(2)-(3). A SEQRA "action" expressly includes "policy, regulations, and procedure-making." ECL § 8-0105(4)(ii). The only relevant exemption[4] from the broad definition of "action" contained in ECL § 8-0105(5)(ii) is "official acts of a ministerial nature, involving no exercise of discretion." If the Legislature had wanted to exclude laws of general application from the definition of a SEQRA action, it certainly could have done so. Moreover, inclusion of the term "policy" in ECL § 8-0105(4)(ii) shows that

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[3] "To interpret a statute where there is no need for interpretation, . . . or to engraft exceptions where none exist are trespasses by a court upon the legislative domain." McKinney's Statutes § 76 and the cases there cited.

[4] Actions of the State Legislature are not subject to SEQRA because the Legislature is not an "agency" as defined at ECL §8-0105(1)-(3); compare ECL § 8-0105(1) (definition of state agency) with § 8-0105(2) (local agency means ". . . governing body, including any city, county or other political subdivision of the state").

the Legislature intended the definition of "action" to be expansive, suggesting that it encompasses a law of general application.

Second, like the Act, the regulations implementing SEQRA promulgated by the State Department of Environmental Conservation ("DEC") pursuant to ECL § 8-0113 broadly define an "action" in the context of local legislation. Under the regulations, an "action" includes "agency . . . policy making activities that may affect the environment," 6 N.Y.C.R.R. § 617.2(b)(2), and the adoption of "local laws, codes, ordinances, executive orders and resolutions that may affect the environment." 6 N.Y.C.R.R. § 617.2(b)(3). These regulations contain no exemptions for laws of general applicability, suggesting that SEQRA covers broadly applicable laws, regulations and policy.

Third, the courts have consistently held that SEQRA applies to local laws of general applicability. For example, in Society of the Plastics Industry, Inc. v. County of Suffolk, 154 A.D.2d 179 (2nd Dept. 1990), reversed on other grounds, 77 N.Y.2d 761 (1991), the Suffolk County Legislature banned the use of certain non-biodegradable plastic packaging throughout the county to slow the filling of landfills. Although the legislation in issue was clearly of general application, unrelated to a specific project, site or area, the court found that the Legislature had failed to comply with SEQRA's requirement to take a "hard look" at the possible environmental consequences of its action. On appeal, this Court overturned the decision on standing grounds, but pointedly did not hold that SEQRA was inapplicable to the local law in question, instead noting "[w]here, as here, the County Legislature acts as the lead agency under SEQRA, the Suffolk County Code requires it to submit an . . . EAF for review to the Council on Environmental Quality, which then must make a recommendation as to the need for an

environmental impact statement." Society of the Plastics Industry, Inc., 77 N.Y.2d at 765. See also Tri-County Taxpayers Assoc., Inc. v. Town Board of the Town of Queensbury, 55 N.Y.2d 41 (1982) (SEQRA applies to a town board resolution creating a sewer district in a wide geographical area within a county sewer system); Williamsburg Around the Bridge Block Association, 223 A.D.2d 64 (SEQRA applies to City-wide bridge paint-removal protocol); Matter of Skenesborough Stone, Inc., v. Village of Whitehall, 229 A.D.2d 780 (3rd Dept. 1996) (SEQRA applies to local law regulating mineral extraction within entire village).

POINT II

SEQRA APPLIES TO LOCAL LEGISLATION THAT SEEKS TO AMELIORATE EXISTING HAZARDS REGARDLESS OF THE OVERALL BENEFICIAL PURPOSE OR EFFECT

The Appellate Division's ruling creates an exception to SEQRA's requirement that an EIS be undertaken whenever there may be a significant adverse environmental impact arising from local legislative action. This exception results from the court's concentration on the "central premise" of local legislation aimed at ameliorating an existing environmental hazard not created by the municipality itself. NYCCELP, 293 A.D. 2d at 93. The court found that such enactments could not create significant adverse impacts because they "reduce, not create" hazards, stating that "[w]hen considering discrete methods of identifying and ameliorating hazards, all of the alternatives would result in a reduction, not a creation, of hazards to human health." Id.

In other words, governmental action intended to remediate or reduce existing hazards for which the government is not itself responsible is necessarily exempt from the requirement to

prepare an EIS, since by definition such an action cannot have a significant adverse effect. In such a case, the Appellate Division implies that a determination of nonsignificance like that made by the City would stand because there could be no potential adverse impacts and thus no need to set forth a written, reasoned elaboration in the Negative Declaration of why any adverse impacts were not significant.

This cramped application of SEQRA is flawed because, contrary to SEQRA regulations and relevant case law, the Appellate Division misidentified the impacts of the proposed SEQRA action by focusing on the primary objective of Local Law 38 (reduction of lead paint hazards through adoption of the lead-safe approach) rather than on the impacts of the means by which that objective was realized (reduction in coverage and protections from Local Law 1). SEQRA requires study of all of the impacts of a law. The Appellate Division misidentified the baseline from which to measure the potential adverse impacts because it identified only pre-existing environmental conditions, and did not also take into account the scope and requirements of pre-existing local law that was being amended. This explains the Appellate Division's erroneous statement:

> The potential environmental harm addressed by SEQRA review is that which may be created by the action of the government. Where, as here, governmental action concerns remedies for existing environmental harm, it is important to keep the existing harm separate from the governmental action. The government has not been made responsible for environmental risks created by third parties as a result of SEQRA.

NYCCELP, 293 A.D. 2d at 90.

The Appellate Division here shows that it takes into account only the primary impact of legislative action, while disregarding other direct and any indirect and secondary effects. However, under SEQRA, the relevant potential impact is not merely the remediation of the

preexisting lead paint hazard, but rather any impact that may result from the reduction in health protection standards already established under local legislation. The potential impacts of a reduction in standards must be considered and, if found significant, studied in an EIS even if the overall result of the new legislation is beneficial, and even if the lead paint hazard itself was originally created by third parties.

A. Legislation with an Overall Beneficial Purpose or Effect Can Have Adverse Impacts Requiring SEQRA Analysis Regardless of Who Created the Harm Addressed by the Legislation

The "central premise" of agency action is not the only aspect of the proposed action that may give rise to adverse impacts under SEQRA. To determine whether a proposed action may result in a significant adverse environmental impact – and thus whether an EIS is required – an agency "must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts . . . ." 6 N.Y.C.R.R. § 617.7(c)(2). Although the primary objective or effect of an agency action may be remedial, an agency must issue a positive declaration and prepare an EIS if it contemplates an action that "may include the potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1) (emphasis added); see also ECL § 8-0109(2); Merson v. McNally, 90 N.Y.2d at 483 n. 3.

Of course, remedial government action ordinarily will not result in adverse environmental impacts, and the issuance of a negative declaration will often be appropriate. But that does not obviate either the need for analysis of the potential adverse environmental impacts of remedial legislation, or preparation of an EIS where there may be significant adverse impacts to examine and possibly to mitigate.

The general SEQRA principle that a beneficial overall purpose of local legislation does not itself determine whether an EIS is required under SEQRA is consistent with the decision in Matter of Niagara Recycling, 83 A.D.2d 335, aff'd 56 N.Y.2d 859 (1983). There, the Appellate Division found, and this Court affirmed, that an EIS was not required where a Town Board enacted a local law regulating the siting of solid waste management facilities, including the addition of environmental permitting "requirements and conditions beyond those in existence." Id. at 340. There, as with many remedial governmental actions, the "effect [of the added regulations] would necessarily be beneficial rather than detrimental to the environment." Id. at 339. This stands in clear contrast to the present case, where Local Law 1's regulatory scope was reduced in some respects rather than augmented across the board by Local Law 38.

The Appellate Division itself has recognized that well-intentioned remedial government actions may require preparation of an EIS. For example, in Williamsburg Around the Bridge Block Association, 223 A.D.2d at 67, the Appellate Division held that preparation of an EIS was needed when the City adopted a "protocol" governing the "procedures and methodologies . . . [to be] utilize[d] during all lead paint removal activity on the City's bridge structures." Prior to adoption of the protocol, City contractors had attempted the removal of lead-based paint – a preexisting hazard – by sandblasting. Sandblasting has some beneficial aspects: it takes off built-up, "rusted-on" paint better than other removal methods. But, unless properly contained, sandblasting causes clouds of dust containing lead paint to be emitted into the area. In response to public clamor at just such a release from lead paint removal at the Williamsburg Bridge in lower Manhattan, the City formed a task force and issued a general protocol establishing policies designed to ameliorate perceived hazards resulting from uncontained sandblasting.

The "central premise" of such a protocol is one "which would undoubtedly reduce health hazards," as the Appellate Division described Local Law 38 in the decision below. NYCCELP, 293 A.D.2d at 93. Nevertheless, in Williamsburg Around the Bridge Block Association, the Appellate Division required the City to follow the EIS procedure in adopting the Protocol, stating:

> By adopting [the Protocol], the [Department of Transportation] has set forth a City-wide policy under which it will conduct all future lead paint removal operations on City bridges. Given the effects of the respondents' expansive plan, we conclude that this is precisely the environmental policy making which, pursuant to SEQRA . . . requires a full environmental study and an opportunity for public feedback.

223 A.D.2d at 72.

So it should be in the present case. Here, if the City had actually undertaken an analysis of the potential adverse impacts cited by the trial court, and had explained why they were not significant, the Negative Declaration would have complied with SEQRA and passage of Local Law 38 would have been lawful. However, it did not do so. No provision in SEQRA or its regulations excuses an agency from preparation of an EIS just because its intentions are remedial, as long as one potential significant adverse impact is also present.

That the harm being addressed by a proposed ordinance originally was created by third-parties does not obviate the need to study the impacts of governmental action addressing that harm. Indeed, much local legislation in New York focuses on remedies for environmental and health hazards originally created by third parties. Zoning laws, for example, may be motivated by a desire to protect the amenity of open space from incursions by developers. Nonetheless, zoning regulations typically are subject to the preparation of an EIS, precisely because they may give rise to adverse environmental impacts. See e.g., Bonnie Briar Syndicate, Inc. v. Town of

Mamaroneck, 94 N.Y.2d 96 (1999), cert. den. 529 U.S. 1094 (2000) (rezoning of golf course from residential to recreational land use, although consistent with town's desire to protect open space from encroaching development, required preparation of EIS); Ginsburg Dev. Corp. v. Town Bd. of the Town of Cortlandt, 150 Misc. 2d 24 (Sup. Ct. West. Cy. 1990) (EIS was required prior to Town Board's adoption of a "steep slope" zoning amendment even though amendment was intended to be environmentally protective; EIS was required to study the amendment's potential negative impacts and whether other alternatives would better serve the Town preservationist agenda).

B. The City's Failure to Address the Removal of Seven-Year-Olds from the Protection of its Lead Paint Exposure Laws Is One Example of Its Deficient Negative Declaration

By looking only at the stated intention of the law – to reduce lead paint hazards – rather than the specifics of the action – legislating amending a pre-existing lead paint protection program – the Appellate Division did not correctly identify the impacts of the action. The reduction from seven to six of the age of children protected by Local Law 38 as compared to Local Law 1 is a telling example of a potentially adverse impact that the City failed to examine. The Appellate Division found that this age reduction was "adopted to bring the local law in line with already established federal and state standards." NYCCELP, 293 A.D. 2d at 92 (citations omitted). Nowhere in the City's Negative Declaration is this justification to be found. And, more importantly, the Appellate Division's justification begs the question of whether adoption of lower federal and state standards poses any significant adverse impact when compared against the baseline standard embodied in Local Law 1.

This failure to identify and consider possible adverse impacts of Local Law 38, particularly as compared to Local Law 1, demonstrates why SEQRA compliance is critical, and why the Appellate Division's insistence that "[n]othing in SEQRA . . . requires that governmental remedial actions perfectly solve environmental problems not originally created by the government," while certainly true, is irrelevant to the question of whether the City complied with SEQRA. NYCCELP, 293 A.D.2d, at 93. While most SEQRA requirements are purely procedural, proper consideration of environmental impacts can lead an agency to make substantive changes in a bill under consideration.

It is possible that removing dwellings inhabited by about 15% of formerly protected children from the purview of the lead paint exposure law (the group of seven-year-olds no longer covered by the law) would have no significant adverse impact on children, perhaps because seven-year-olds are at little risk of lead poisoning. If so, this should have been explained in the Negative Declaration and, if accurate, could have constituted a reasoned elaboration of why the potential risk is not significant. However, the Negative Declaration does not identify the removal of seven-year-olds from the scope of the law as a potential adverse impact from Local Law 38 at all, much less explain why the impact is not significant. Indeed, none of the potential impacts identified by Supreme Court are identified or analyzed in the City's Negative Declaration.

Alternatively, if it concluded that the age reduction was potentially significant, in performing the requisite EIS the City might have decided to adopt other measures in order to mitigate the impact of the age reduction. For example, it might have concluded that keeping the age unchanged from that in Local Law 1 would be appropriate, or perhaps instead testing children over six when a lead hazard is discovered. Indeed, after study in an EIS, the City could

decide to reduce the coverage as proposed in Local Law 38 because the impacts are found to be insignificant after all, or because benefits of the reduction in age coverage would outweigh "social, economic and other essential considerations"of the change. ECL § 8-0109(1)(8).

But, because the City failed properly to consider whether a negative declaration was appropriate, it never set the SEQRA environmental alarm bell. Not surprisingly, there is no evidence in the lengthy legislative record of the social or economic costs of keeping unaltered the age of protected children – evidence that would have informed the City's analysis of whether the potential adverse impact was significant, and if so, whether mitigation was appropriate. The Appellate Division permitted the City to bypass this environmental analysis in part due to its belief that the municipal legislative democratic process should prevail.[5] However, compliance with SEQRA, a duly enacted state law, is not inconsistent with municipal democratic processes. SEQRA compliance, including the preparation of an EIS if warranted by the reasoned identification and written elaboration of potential significant adverse impacts in the EAF, would have focused attention on the issue of reducing the age of children at risk, but by no means would it have been outcome determinative. SEQRA does not prevent municipal legislative action, instead it requires study of impacts and reasoned consideration of mitigation measures.

[5] The Appellate Division stated in its opinion: "Having lost the sustained political struggle, petitioners' ability to compel City Council action through judicial nullification depends upon whether the municipal determination is violative of SEQRA." NYCCELP, 293 A.D.2d, at 93 (citing Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Is. Operating Corp., 291 A.D.2d 40 (1st Dept. 2001); Save the Audubon Coalition v. City of New York, 180 A.D.2d 348, 355 (1st Dept. 1992), lv denied 81 N.Y.2d 702 (1993)).

POINT III

A CITY COUNCIL'S ROUTINE LEGISLATIVE PROCESS DOES NOT SATISFY SEQRA'S PROCEDURAL REQUIREMENTS FOR DETERMINING THAT AN EIS IS NOT REQUIRED

Before an agency can dispense with an EIS, SEQRA requires a reasoned, written elaboration as to why potential adverse impacts are not present, and if they are, why they are not significant. H.O.M.E.S., 69 A.D.2d 222. In this case, the Appellate Division abandoned the firmly-established requirement of strict compliance with the SEQRA procedures by holding that the requisite written, reasoned elaboration could be gleaned from the legislative hearings. NYCCELP, 293 A.D.2d at 94-95. The Appellate Division concluded that the testimony presented to the City Council as part of its legislative process prior to its adoption of Local Law 38, together with the debate among Council members, constituted the "hard look" at potential environmental consequences of a proposed action that SEQRA requires prior to dispensing with an EIS. NYCCELP, 293 A.D.2d at 95.

This approach to SEQRA compliance is wrong. Legislative debate may provide a factual basis for the analysis prerequisite to issuing a Negative Declaration (Matter of Niagara Recycling, 83 A.D.2d 335, aff'd 56 N.Y.2d 859 (1983)), but it cannot substitute for the written analysis itself. It cannot serve as the "functional equivalent" of strict compliance with SEQRA's procedural requirements because the policy objective of SEQRA to "inject environmental considerations directly into government decision making" is thwarted if the procedural requirements of the law are ignored or circumvented. Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d at 679. By holding that the City Council's routine legislative processes can serve as an ex post facto stand-in for, or functional equivalent of, the required method of

determining whether an EIS is warranted, the Appellate Division, in the words of a prominent commentator, "legislated away" the State's decision to subject local legislative decision-making to SEQRA's requirements. See Weinberg, Supplementary Practice Commentaries to ECL § 8-0109 at 30.

The elements of a negative SEQRA declaration are set forth in H.O.M.E.S., 69 A.D.2d at 232. Where an agency has identified no possible significant adverse environmental impact from a proposed action, it must issue a negative declaration that (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. Id.; see also Gerard, Ruzow & Weinberg, Environmental Impact Review in New York (Matthew Bender 1999) § 305[2][d] and the cases cited therein. As this Court stated in Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400 (1986), "SEQRA ensures 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." Id. at 414-415 (emphasis added).

This process of articulation of specific areas of environmental concern is crucial to the effective implementation of SEQRA. Strict compliance with the procedures and substantive requirements of SEQRA serves the goal of fostering public debate and information flow, especially in the legislative arena, and forces agencies to take the requisite "hard look" at environmental concerns. A negative declaration must discuss potential impacts and explain why

they have no potentially significant adverse effects, rather than curtly assert that all is well. H.O.M.E.S., 69 A.D.2d 222.

It cannot be denied that the City did not comply with the carefully laid out procedural steps mandated by SEQRA and its enabling regulations for determining whether an EIS was required. Neither the Negative Declaration nor the EAF included any discussion of the six areas of potential adverse impacts identified by the trial court, much less a reasoned analysis of the basis for the negative declaration's determination. R. 423-481. The Negative Declaration states in the "supporting" narrative statement only that "the above determination [of no significant adverse impact] is based on an environmental assessment that finds that no significant adverse effects upon the environment that would require an [EIS] are foreseeable." R. 419.

It is important to distinguish the process of preparing an EIS from the preliminary analysis that determines whether an EIS will be required, even though that preliminary analysis may be detailed and thorough, and although the conclusions of that analysis may look like the conclusions of an EIS. See Merson v. McNally, 90 N.Y.2d at 751. The Appellate Division did not make this distinction, concluding that "[t]he City Council struck that 'suitable balance of social, economic and environmental factors' in its consideration and passage of Local Law 38 (6 N.Y.C.R.R. § 617.1 [d]). The environmental review laws have, consequently, had their intended beneficial effect." NYCCELP, 293 A.D.2d at 95. This dictum shows that the Court below confused the City's ex post facto rationalization for its determination not to conduct an EIS with the possible conclusion of an EAF or EIS that should have been conducted. The Court mistakenly focused on the results of the agency action, rather than the process followed to attain those results.

The Appellate Division has already rejected similar efforts by the City to circumvent SEQRA's procedural requirements. In Williamsburg Around the Bridge Block Association, 223 A.D.2d 64, the City argued that the protocol for the removal of lead paint from City-owned bridges that it had adopted after lengthy hearings and submissions by a Mayoral task force substantially complied with SEQRA. Characterizing the protocol as "essentially an ersatz EIS," the Appellate Division rejected the City's effort to substitute another procedure for full compliance with SEQRA. The court held that "literal compliance with SEQRA's procedural requirements is mandated, as substantial compliance would not comply with SEQRA's underlying purposes, but would tempt State and local agencies to circumvent SEQRA's mandates." Id. at 73-74 (citations omitted).

The Appellate Division in this case cites no precedent for its holding that receiving testimony and submissions from witnesses during an agency's deliberations amounts to compliance with SEQRA. Nor could it, since "literal compliance" with SEQRA's procedural directives is required. Coalition for Future of Stony Brook Village v. Reilly, __ A.D.2d __, 750 N.Y.S.2d 126 (2nd Dept. 2002); see also, e.g., Desmond-Americana v. Jorling, 153 A.D.2d 4 (3rd Dep't 1989) (although agency took evidence of environmental concerns before issuance of a Negative Declaration, an EIS was required to explore the entire issue thoroughly); Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 88 A.D.2d 484, 490-91 (2nd Dept. 1982). "Substantial compliance will not do, for that would conflict with SEQRA's underlying purposes and tempt State and local agencies to circumvent SEQRA's mandates." Glen Head, 88 A.D.2d at 491; see also Schenectady Chems. v. Flacke, 83 A.D.2d 460, 463 (3rd Dept. 1981) (agency must have complied with both the letter and the spirit of SEQRA to discharge its

responsibility); Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d at 48 ("Uniform and literal enforcement of the provisions of SEQRA would render environmental review more objective, standardized, and consistent, and would be more certain to promote the policies of the Legislature . . ."), appeals dismissed, 55 N.Y.2d 747 (1981), 56 N.Y.2d 508 (1982) and 56 N.Y.2d 985 (1982).

If the Appellate Division's decision excusing the City from strict compliance with SEQRA's procedural mandates is upheld, the absurd result would be that a local legislative body could bypass the EIS requirement particularly when, as here, there was a substantial public outcry against the proposed enactment and consequently active opposition and debate in legislative hearings. In other words, SEQRA compliance would be excused in those very cases where its object, to ensure that the governmental agency "looks before it leaps," is most crucial. Under the SEQRA regulations, public interest in an agency action is one of the criteria favoring preparation of an EIS. See 6 N.Y.C.R.R. § 617.20, Appendix. A at 11 (EAF form, question 20).

CONCLUSION

For all of these reasons, the Court should reverse the Appellate Division's unsupportable construction of SEQRA and reinstate the IAS Court's decision invalidating Local Law 38 for failure to comply with SEQRA.

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Respectfully submitted,

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