SUPREME COURT OF THE STATE OF NEW YORK
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.

New York
County Clerk's
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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITIONERS' CROSS-MOTION TO VACATE AUTOMATIC STAY, IF NECESSARY

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PRELIMINARY STATEMENT

Petitioners-Plaintiffs-Respondents (hereinafter "Petitioners") respectfully submit this reply memorandum of law in further support of their cross-motion for an Order, if necessary, pursuant to C.P.L.R. § 5519(c) vacating any automatic stay of the Order and Judgment (hereinafter "Judgment") of the Supreme Court, New York County, entered on February 22, 2001. (Exhibit 121 to the March 29, 2001, Affirmation of Theodora Galacatos, filed with the Petitioner's Cross-Motion) (herein "Galacatos Aff.")[1]

Petitioners have denominated their cross-motion as an application to "vacate the automatic stay, if necessary" because, as set out in their initial opposition papers to appellants' motion, they believe that neither § 5519(a)(1) nor § 5519(c) provide Respondents-Defendants-Appellants ("appellants") with any cognizable grounds for relief from a declaratory judgment. As the instant papers are by their very nature only a reply in support of the cross- motion, petitioners are constrained not to proffer herein a sur-reply to appellants' reply arguments on their motion. However, two observations need be made.

First, appellants — apparently recognizing that no relief may be available to them under § 5519 (the very grounds upon which they moved in their notice of motion) — attempt to request for the first time, in a footnote in their reply papers (Muschenheim Reply Aff. at footnote 3), an entirely different remedy based on entirely different grounds — not merely a stay of enforcement

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1. To avoid confusion with the 115 numbered exhibits petitioners submitted below, petitioners commenced the enumeration of additional exhibits submitted in opposition to appellants' motion and in support of their cross-motion at number 116. The papers petitioners submitted below were provided as appendices to their cross-motion in four volumes, as follows:

Volume I - Show Cause Order, Verified Petition, Affirmations and Affidavits in Support, Initial and Reply Memoranda of Law
Volume II - Exhibits 1 - 63
Volume III - Exhibits 64 - 77
Volume IV - Exhibits 78 - 115

below, but rather "a suspension of the operation of the trial court's judgment pursuant to the inherent power of this Court." Id. Appellants blithely ignore CPLR § 2214(a) ("notice of motion shall specify ... the relief demanded and the grounds therefor" (emphasis added), and petitioners' strongly object to appellants' belated attempt to amend both the grounds and relief sought in their motion at the reply stage. Indeed, as plainly set out in petitioners' initial brief at page 21, it is reversible error for a court to grant relief on grounds other than those set forth in the notice of motion. See, e.g., McLearn v. Cowen & Co., 60 N.Y.2d 686, 689 (1983).

Apparently recognizing the procedural implausibility of the above, appellants thus on reply as well press a remarkable new argument, attempting to relegate a declaration of the Supreme Court to the status of a mere advisory statement, with no substantive content or impact unless and until plaintiffs (or some other party) takes steps to "enforce" it. (Muschenheim Reply Aff. at ¶ 3). Yet a Supreme Court declaration of the law is very much the law of this state, unless and until overturned on appeal, Da Sivla v. Musso, 76 N.Y.2d 436, 440 (1990), and this Court should not countenance the City's — or any other litigant's — open assertion of an intent to simply ignore a valid declaration of the law by a court of record in this state.

Secondly, appellants' reply cites to — but fails to attach copies of — two unpublished decisions (Reynolds v. City of New York and Saunders v. City of New York), thus rendering it extremely difficult for either the Court or petitioners to independently appraise the significance and relevance of those decisions, and thus petitioners respectfully urge that these decisions should merit no consideration in this Court's decision.

Again, while petitioners believe no basis for an automatic stay exists for the reasons set forth in their initial brief, in the event this Court nonetheless finds that an automatic stay applies here, petitioners assert for the reasons set forth in their initial papers and herein below that such stay

should be vacated. Appellants will not prevail on appeal because their enactment of Local Law 38 of 1999 (“LL38") plainly violated both the substantive and procedural mandates of the State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq. On that basis alone, this Court need not engage in further inquiry before vacating any automatic stay. And even if that were not the case, the balance of equities do not favor a continuation of an automatic stay.

ARGUMENT

IN THE EVENT THIS COURT CONCLUDES AN AUTOMATIC STAY IS IN EFFECT, SUCH STAY SHOULD BE VACATED

A. The City's Appeal Has No Merit

Appellants' papers largely repeat precisely the same arguments they made below[2] which were heard and rejected by the Supreme Court. In the interests of brevity, petitioners will not herein respond to each of these repeated arguments in kind, but instead respectfully refer this Court to Petitioners' reply brief below,[3] wherein petitioners meticulously responded to all of these previous contentions, and incorporate them by reference herein.

1. Appellants Fail to Address, Much Less Distinguish, the Controlling Authority of This Court's Decision in Williamsburg Around the Bridge Block Association v. Giuliani

Appellants — in neither their initial papers nor their reply — fail to even mention this Court's decision in Williamsburg Around the Bridge Block Association v. Giuliani, 223 A.D.2d 64 (1st Dep't 1996), much less attempt to distinguish it, even though Williamsburg is not only directly on point on a host of issues in this case, but indeed, was extensively relied upon by the court below. The City is free to disagree with that holding, and it may attempt to distinguish it, or ask this Court not to follow it; but it cannot ignore it. That the City does so can only be read as proof that the City cannot articulate any reason why Williamsburg is not controlling, and a tacit recognition that the City realizes it has no possibility of prevailing on appeal.

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2. See, Respondents' Memorandum of Law in Opposition to the Petition and to the Motion for a Preliminary Injunction (Nov 5, 1999), attached as Ex. C to appellants' reply papers in the pending motions; and transcript of proceedings below, Ex. 130.

3. Petitioners-Plaintiffs' Reply Memorandum of Law in Further Support of Petition and Motion for Preliminary Injunction (November 10, 1999), found at the end of Volume I of the Appendix submitted herewith.

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 (2d Dep't 1983), the City's failure to cite contrary cases "precisely on point" engendered the following rebuke:

> None of these cases are cited in the city's brief submitted to this court. 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.

Id. at 41 (citations omitted). Yet here, as well, the City, though having advanced the same losing arguments in Williamsburg, chooses not to even mention it, even though this failure to do so has been repeatedly brought to its attention.

2. Local Law 38 Obviously May Have an Adverse Environmental Impacts

SEQRA requires advance preparation of a detailed "environmental impact statement" ("EIS") for any action which "may" have even a single significant adverse effect on the environment, including creating a hazard to human health. See, e.g., ECL §§ 8-0109 (2), (4); 6 N.Y.C.R.R. §§ 617.7(a)(1-2), 617.7 (c)(1)(vii).

Measured against that standard, the City's appeal must fail. No matter how many post hoc rationalizations appellants offer, it remains unalterably clear that the enactment of LL 38 may have many, not just a single, significant adverse effects, and it remains equally clear that appellants did not address these impacts in compliance with SEQRA.

For example, as the court below noted (slip op. at 7), LL 38 stripped six year olds of protection from lead paint poisoning, even though DoH data indicates that about 1 out of 10 children lead poisoned are six years of age or older. Ex. 111, at 47. Appellants do not deny this. Instead, they attempt to belatedly justify it — not in their negative declaration, but in their attorney's affirmation to this Court — as a matter of "resource-allocation priorities." Muschenheim Reply Aff.

¶ 18. While petitioners do not dispute that the City Council might ultimately, in its wisdom, decide not to protect an entire class of vulnerable children due to "resource-allocation priorities," this explanation does not negate the fact that this decision obviously has an adverse impact on those children, which should have been addressed through a proper environmental review, prior to the enactment of the legislation.[4]

The Court below also concluded that the LL 38's relaxation of the definition of lead paint from 0.7 milligrams per square centimeter ("mg/cm²") to 1.0 mg/cm² could result in a potential adverse impact. Slip op. at 7. Notwithstanding appellants' post hoc arguments regarding testing technology that amount to considerations of streamlining the regulatory burden (and for which there are countervailing technological arguments — see March 27, 2001, Affidavit and April 20, 2001, Reply Affidavit of Dr. Martin Rutstein, submitted herewith), the fact remains that the permissible level of lead was raised by nearly 50%. Thus, LL 38 permits many lead paint conditions to escape regulatory control by arbitrarily classifying them as "lead free," and thus undeniably there "may" be adverse health impacts from permitting children to remain in the presence of these conditions. The Negative Declaration did not address this issue.

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4. Petitioners fully concur with appellants that it is not the task of the courts to determine the desirability of legislation. As the Court of Appeals stated in Akpan v. Koch,

> an agency, acting as a rational decision maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors.

75 N.Y.2d 561, 571 (1990) (emphasis added). Yet appellants, notwithstanding their assertions that the Court's role here is limited, have in essence asked this Court to sit in judgment on the very merits of their environmental policymaking, claiming that the totality of the record demonstrates that LL 38 has no adverse impacts. This, however, is precisely what SEQRA requires a negative declaration to establish — by a detailed, thorough, written analysis.

The Negative Declaration did not address numerous other changes in the law that "may" have adverse impacts, such as LL 38's deletion of friction surfaces from the definition of "lead hazards," despite the universal agreement of the experts in the field, the 1996 testimony of then- Health Commissioner Margaret Hamburg (Ex. 26-a), and even the definition in the federal Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4851b(15), that intact lead paint on friction surfaces must be treated as a lead hazard.[5]

Having failed to do so, the Negative Declaration clearly was inadequate, and the City cannot prevail on appeal.

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5. Appellants' half-hearted attempt to explain away the affidavit of Mary Gearhart, submitted with petitioners' cross-motion, is unavailing. First, appellants don't explain why HPD failed to cite obvious lead paint violations even under LL 38, nor explain why, in response to Ms. Gearhart's complain about lead dust the Health Department merely sent her some pamphlets, and did not conduct an inspection until three months later, and even then, did not take any dust samples. As Dr. Rutstein notes in his April 20, 2001, reply affidavit, the only way to detect lead dust is by a dust wipe test, since the particles are far too small to be visibly observable. Indeed, the current federal definition of a floor lead dust hazard, 40 micrograms (millionth's of a gram) per square foot of floor area ($\mu g/ft^2$), 64 F.R. 50140, 50181 (1999), is an amount that is less than half the mass of a single particle of coffee sweetener. Ex. 77 (Tr. of June 21, 1999, at 218)(testimony of Nick Farr, Executive Director of the National Center for Lead Safe Housing).

Secondly, appellant argue that, notwithstanding the deletion of numerous mandates via the enactment of LL 38, DoH still has some residual power under Health Code § 3.09 ("general standards to protect health and safety"). However, "this section was designed as a catchall whose general purpose is to cover situations where there are no other express, explicit or specific provision in the Health Code" and is not viable where specific statutory provisions are enacted. People v. Kaszovitz and Beauty Realty Co., N.Y.LJ. 2/7/1996, p. 28, col. 4 (Crim. Ct., Bx Co) Appellants do not explain how LL 38's deletion of specific mandates, such as the specific mandate in former Admin. Code § 27-2126 that directed HPD to complete repairs where children are poisoned in non-multiple dwellings within 18 days, are not less protective of children, or how tenants can invoke the now discretionary, general powers of code enforcement agencies, such as under Administrative Code § 17-145, whereas litigants could rely on specific mandates.

3. The Record Graphically Illustrates and the Negative Declaration Epitomizes Appellants' Patent Violations of SEQRA.

Appellants misstate the law as well as petitioners' arguments. First, appellants assert that "[n]either SEQRA nor the case law specify what must be included in the Negative Declaration itself. . . ." Muschenheim Reply Aff. ¶ 6. In actuality, implementing regulations contain very specific provisions regarding the extensive substantive analysis required in Negative Declarations. See 6 N.Y.C.R.R. § 617.7(a)-(c) (detailing the steps and criteria for determining significance); see also §§ 617.2(m) (setting out environmental assessment form (EAF) requirements used to determine environmental significance and noting that agencies can modify forms so long as "the scope of the modified form is as comprehensive as the model"), 617.20 (containing model full and short EAFs).

Second, in stark contrast to petitioners' straightforward arguments, appellants suggest that petitioners urge the review of the City Council's determination be limited to the Negative Declaration alone. Contrast Muschenheim Reply Aff. ¶ 10 ("[P]laintiffs now say that it is not the record as a whole which is determinative but the content of the Negative Declaration itself..." with petitioners' March 29, 2001, Memorandum of Law at 23 ("A review of the Negative Declaration (as well as the record as a whole) amply demonstrates that appellants' actions were arbitrary . . . ."). Petitioners simply assert that the Negative Declaration on its face failed to identify as well as analyze such patently relevant areas of concern as public health and community character (see Petitioners' Reply Memorandum of Law below at 13-14 (in App. Vol. 1) (outlining numerous omissions in the Negative Declaration)). These and other glaring inadequacies in the Negative Declaration illustrate what the record also amply demonstrates: that appellants failed to comply with SEQRA's required step-by-step analysis for determining whether an action may have a significant environmental impact

and that both the Negative Declaration and record as a whole show appellants' wholesale disregard of expert testimony of LL 38's potential adverse effects.

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. Yet to support their position, appellants repeatedly hail their unspecified "years of debate" as a substitute for the procedural requirements of SEQRA for a full environmental analysis.[6] Appellants would have this Court accept that a policy-making body can dispense with an EIS, and a proper Negative Declaration as well, as long as a court can somehow divine that the legislative body somehow performed a proper environmental review "in their minds."

This Court's decision in Williamsburg Around the Bridge Block Ass'n v. Giuliani is directly on point. There, the City asserted that its vigorous analysis by a Mayoral task force of experts (including one of petitioners' experts in the instant matter, Dr. Philip Landrigan[7]), 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. 223 A.D.2d at 74. Calling the City's process an "ersatz EIS," the First Department

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6. Appellants offer no guidance as to what time period should be considered relevant in such a broad inquiry. Where would the line get drawn? How many years of generalized policy debates concerning lead should be evaluated?

In reality, however, the draft of the bill that became LL 38 was not released or introduced until the afternoon of the business day before its hearing (when the hearing as well was announced), Petition, ¶¶ 89, 92, and the negative declaration was not released until just before the vote on it in committee, Id., ¶ 120 whereupon it was immediately voted upon without review or discussion. Id., ¶¶ 124-25. Thus, in any event, appellants violated SEQRA's mandate that agencies declare whether an EIS is needed as early as possible in the formulation of a proposed action to insure that environmental concerns become an integral part of decisionmaking. ECL § 8-0109 (4); 6 N.Y.C.R.R. § 617.6 (b)(1)(i).

7. 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).

explicitly recognized that the City could not substitute an alternative means of engaging in environmental policy making for that provided in SEQRA, 223 A.D.2d at 72, 74, i.e., that "good faith" was not enough.

Yet that is precisely what the City appellants again attempt to assert here — that despite the lack of an EIS, or even an adequate negative declaration, the Council was somehow informed of all the environmental consequences of each and every aspect of the many provisions of LL 38 because it the Council "has discussed it for years."[8] This approach has been long ago rejected by the courts. For example, in Desmond-Americana v. Jorling, 153 A.D.2d 4 (3d Dep't 1989), app. den., 75 N.Y.2d 709 (1990), the court noted that "while 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's] 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 (emphasis added). The State Legislature did not exempt the City Council from the strict procedural and substantive requirements of SEQRA.

Conversely, even if the Court accepts appellants' contention that this Court should evaluate a much larger record "as a whole," that record easily establishes that the changes in the City's regulatory environment put in place by LL 38 "may" have an adverse impact, sufficient to require

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8. Of course, the specific provisions of LL 38 were not "discussed for years," given that the draft bill was first released less than two weeks before its enactment by the Council. In fact, it was not introduced into the Council until the June 30, 1999, stated Council meeting — the same meeting at which the Council adopted it.

an EIS. Every local and nationally recognized expert who wrote or testified concerning the specifics of LL 38 itself indicated that it would have adverse impacts; appellants found no credentialed outside experts to support LL 38.[9] The federal EPA indicated it put children at risk.[10] The former head of the Health Department's lead program testified that "Local Law 38 and its related rules ... are less protective of health than the provisions of the current health code ..." Ex. 115, at 2. The former Health Commissioner testified in 1996 that "To reduce safety requirements solely on the voluntary and rapid response of an owner, with no risk assessment, is not logical" — precisely what LL 38 did. Ex. 26-a (emphasis added).

Appellants simply cannot demonstrate, from their much-vaunted "record as a whole," that LL 38 may not have adverse environmental impacts. Indeed, the more appellants argue their numerous post hoc rationales for why they made certain environmental policy choices over others, the more they establish that this was precisely the policy activity that requires an EIS. While appellants seize on the statement of Councilmember Archie Spigner that this matter has been "discussed for years," (Muschenheim Rep. Aff ¶ 13), it was Mr. Spigner, the prime sponsor of LL 38, who nonetheless confessed before the full Council that same day — just before the final vote — that there was "a great deal of confusion ... as to what and how to control and measure lead dust" and that "I don't know how you keep a room or an environment dust, lead dust ... free...[s]o that is an issue that we have yet to talk about." Id. at 232-33 (emphasis added). SEQRA exists so that policy

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9. As noted in the Petition, at ¶ 79, a group of some of the leading medical experts in this City wrote to the appellant Vallone requesting an opportunity for a thorough review of any proposed legislation on lead poisoning; Speaker Vallone did not respond.

10. Letter from Jeanne M. Fox, EPA Regional Administrator, to appellants Vallone and Giuliani September 18, 2000. (Galacatos Aff. Ex. 126.)

makers can make the most informed choices, especially in areas of complex environmental policy with a potential adverse impact.

B. The Balance of Equities Do Not Favor Continuing the Stay

Appellants' first argument is that a stay must be maintained because otherwise the regulatory environment will flip-flop from LL 38 to Local Law 1 of 1982 ("LL 1") and then back again. This argument can only have merit, if at all, if appellants can show they are likely to prevail on appeal. Since, as demonstrated above, appellants cannot do so, this contention has no validity, and there is no reason to continue to apply a law that has already been declared illegal and is unlikely to be reversed.

Appellants' strident arguments on the impact of the enforcement of LL 1 are basically the same arguments they have made to this Court, time and again, in the long-standing NYCCELP v. Koch/Giuliani class action,[11] arguments which this court has rejected again and again. See. e.g.,

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11. At least two affirmation by HPD's Harold M. Shultz, on July 24, 1992, and October 27, 1995, repeat the arguments he offers yet again here. Mr. Shultz's Reply Affirmation indicates that his perspective is not just that of the regulator, but as well in HPD's dual role as the regulated, since it is "a landlord of more than 13,000 apartment units." Shultz Aff. at ¶ 1.

Mr. Schultz assertion of a dramatic costs to abate an apartment appears to ignore a recent study by the United State Department of Housing and Urban Development ("HUD"), which found that:

> although a large number of homes have lead-based paint, most of them have relatively small surface areas of it. The average home with lead-based paint has an estimated 259 square feet of interior lead-based paint ...

(i.e., a figure approximating the wall area of a small, eight foot by eight foot room). HUD, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, Peer Review Draft, January 12, 2001, at ES-1 (available online at www.hud.gov/lea/Vol1finalreport.pdf) (herein "HUD National Survey").

Similarly, the appellants' Reply Affidavit of Dr. Jessica Leighton references a prior affidavit submitted by her predecessor, Dr. Susan Klitzman, in the NYCCELP v. Koch/Giuliani case in 1996, yet fails to acknowledge that this Court rejected those arguments in NYCCELP VII, 248 A.D.2d 120 (1st Dep't 1998), and that Dr. Klitzman herself has testified that LL 38 and its rules deleted important safety requirements and thus was "less protective of health deleted important requirement." (Ex. 115, at 2.)

NYCCELP II, 170 A.D.2d 419 (1st Dep't 1991) (affirming on opinion below, N.Y.L.J., July 21, 1989, at 18 (Sup. Ct. N.Y. Co.)(Ex.101)); NYCCELP IV, 216 A.D.2d 219 (1st Dep't 1995); NYCCELP VI, 245 A.D.2d 49 (1st Dep't 1997); NYCCELP VII, 248 A.D.2d 120 (1st Dep't 1998). In those decisions, this Court has told the City to enforce that very law; yet appellants come to this Court yet again in the instant motion asserting that their continued non-obedience of those decisions has been transmogrified into a status quo that must be maintained above all else, allegedly to avoid confusion, regardless of the merits.

Appellants' arguments concerning their perceived difficulties in enforcing the pre-existing laws, after all of the years of repeated noncompliance with this Court's declarations that they must do so, are simply not compelling.[12] While petitioners do not disagree with appellants that the removal of intact lead paint under LL 1 can be hazardous — if not carried out properly; it is also true that the removal of peeling lead paint is equally as hazardous — if not carried out properly.[13] Reply Affirmation of John Rosen, M.D. November 10, 1999 (in appendix Vol. 1) at ¶¶ 3-4, 6-9. By refusing to acknowledge this fact, either in the Negative Declaration or in arguments to this Court,

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12. Appellants do not discuss why they refused to even enter into negotiations with petitioners, even though petitioners made a good faith, unconditional offer to stay HPD's enforcement of intact lead paint violations pending the appeal.

13. Nor is there, contrary to appellants' contention, universal agreement that intact lead paint is not a hazard in and of itself, as demonstrated by the recent HUD findings that one out of three homes with lead based paint in good condition nonetheless have hazardous levels of lead dust. HUD National Survey, at 5-15. Nor do appellants demonstrate a basis for their assertion that the many petitioners in this case are in accord with the appellants' view that public health policy should ignore intact paint.

In Williamsburg, there was no disagreement that hazardous lead paint needed to be removed from the city's bridges and other elevated transportation infrastructure; the issue was (as here) that setting policy concerning safe work practices for handling, among other things, toxic lead dust was necessarily an activity that mandated an EIS because it might have an adverse impact, given that "there can be no doubt in the face of overwhelming medical evidence that the ingetion of lead leads to irreversible and serious medical problems." Id., 223 A.D.2d at 74.

appellants have exposed the fundamental flaw of their analysis. Intact lead paint and peeling lead paint are both hazardous to repair or to remove. Thus it is irrational and misleading for appellants to claim that a "focus" on LL 1's intact paint requirement was a justification for their ignoring in the Negative Declaration the adverse impact of weakening work area containment, cleanup, and lead dust clearance testing.[14]

Lastly, appellants offer the entirely specious argument that the declaratory judgment must be "stayed" because otherwise under LL 1 work will have to be performed by trained, EPA certified workers (and they allege — without citation or proof — that such trained workers are in short supply). In making this argument, appellants thus admit precisely what petitioners claim: that LL 38 weakened the protection of children by, among other things, deleting the requirement that only properly qualified persons perform hazardous lead work.[15] Indeed, in testimony before the Housing Committee in 1998, appellants' Health Commissioner that

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14. The Negative Declaration does not demonstrate, however, that such removal would be hazardous if LL 1, including the underlying Health Code work safety provisions, § 173.14, were properly enforced and if the work were conducted using certified workers, as is now required under federal law. Instead, appellants' conclusion is based in large part on the City's own failure to establish a proper program to enforce LL 1. SEQRA does not sanction the notion that failure to enforce a law justifies failure to conduct an EIS on a proposal to weaken the law. Indeed, such a premise would establish a dangerous precedent.

15. Oddly enough, in the same affirmation appellants also argue to the contrary: that the "previous court orders [in NYCCELP v. Koch/Giuliani] did not mandate that work be performed according to specific Board of Health procedures, but left it up City to determine what the appropriate measures out to be." Muschenheim Reply Aff at ¶ 17. Appellants miss the point, however. The failure to make the Health Code's requirements for trained, certified workers using safe work practices applicable to all lead abatement work was indeed the precise subject of the contempt decision in NYCCELP VII, 173 Misc. 2d 235 (Sup. Ct. N.Y. Co. 1997), aff'd, 248 A.D.2d 120. And the underlying Health Code provisions themselves were the product of the orders in NYCCELP II, N.Y.L.J., July 21, 1989, at 18 (Sup. Ct. N.Y. Co.), aff'd, 170 A.D.2d 419 and NYCCELP III, N.Y.L.J., May 12, 1993, at 29 (Sup. Ct. N.Y. Co.), appeal withdrawn, (1995).

> there are numerous scientific studies and reports which show that lead abatement if not performed safely may actually create lead containing dust and increase the risk of lead exposure to young children. ...
>
> In the absence of training, licensing, and certification requirements for lead abatement workers and contractors in New York City and New York State, there is a very real possibility that lead abatement may be performed by unskilled personnel further [] increasing the potential for exposure to lead containing dust and paint chips.

Testimony of Health Commissioner Cohen, Tr. Dec. 16, 1998 at 22-24. (Appellants' Ex. D). Since March 1, 2000, however, a worker training and certification program has been in place in New York State under the supervision of the federal Environmental Protection Agency (EPA) pursuant to EPA's regulations (40 CFR Part 745, Subpart L).[16] If arguendo, as appellants claim, a shortage of trained, certified workers exists, that paucity surely stems from the City's deregulation of lead abatement work and the resulting decreased market demand for such skilled services.

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16. As the federal EPA noted, LL 38 "falls short of the protection that children deserve and need," because

> [w]ithout trained workers and clearance testing, experience clearly dictates that some intervention actions are likely to result in greater lead hazards, a higher potential for a lead poisoned child and, in some circumstances, a child with a higher blood lead level than before the cleanup.

Letter from Jeanne M. Fox, EPA Regional Administrator, to appellants Vallone and Giuliani September 18, 2000. (Galacatos Aff. Ex. 126.)

CONCLUSION

This Court should deny appellants' motion and declare that no automatic stay exists pursuant to C.P.L.R. § 5519(a)(1).

Dated: New York, New York
March 29, 2001

Respectfully Submitted,

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