SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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 AND 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 next 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; DAVID M. MONAHAN and JULIA MONAHAN, and their minor child, IRIS EVE MONAHAN, by her next friends and parents, DAVID M. MONAHAN and JULIA MONAHAN;

Petitioners-Plaintiffs,

for a Judgment pursuant to Article 78 and § 3001 of the Civil Practice Law and Rules,

-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.

Index No.
120911/99

PETITIONERS-PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION AND MOTION FOR PRELIMINARY INJUNCTION

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November 10, 1999

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PRELIMINARY STATEMENT

Petitioners-plaintiffs respectfully submit this reply memorandum in support of their petition to annul Local Law ("LL") 38 of 1999 and in response to the memorandum served by respondents in opposition to the petition.

Petitioners' primary argument is that the Negative Declaration is inadequate on its face. Respondents have failed to identify and analyze all relevant areas of environmental concern, thus rendering impossible under SEQRA's requirements the subsequent steps of a "hard look" and reasoned analysis. Despite the large record, the Court's review must begin and end with a careful inspection of the Negative Declaration, which fails to address numerous significant areas of environmental concern within the "four corners" of the document. For example, the Negative Declaration omits the subject of lead-contaminated dust as an adverse environmental impact.

Respondents apparently recognize this, and instead ask this Court to search the record for support for the conclusory statements in the Negative Declaration. Their argument must fail; it is not the Court's job to do what respondents were required to do in the Negative Declaration. Moreover, a review of the record too, amply demonstrated respondents' wholesale abrogation of SEQRA's substantive and procedural requirements.

ARGUMENT

Petitioners agree wholeheartedly with respondents that the court should not engage in legislative policymaking by evaluating and passing final judgment on the relative merits of LL 38 versus LL 1 and that "[t]he sole issue before th[e] Court in this case is whether the City's lawmakers lawfully and rationally determined that there would be no significant adverse environmental impacts from [implementing LL 38]." Res.' Br. at 13-14. 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). A review of the Negative Declaration (as well as the record as a whole) will amply demonstrate that the City Council's actions were arbitrary and capricious and an abuse of discretion and in violation of the law, because in passing sweeping legislation that overhauled the existing comprehensive program for preventing childhood lead poisoning it failed to identify, let alone give due consideration to, LL 38's potential adverse environmental effects.

II. THE NEGATIVE DECLARATION FAILS ON ITS FACE TO COMPLY WITH SEQRA BY FAILING TO IDENTIFY AND ANALYZE THE RELEVANT AREAS OF ENVIRONMENTAL CONCERN

Respondents, 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.[1]

For example, respondents failed to even identify, much less discuss, the issue of public health in the Negative Declaration. Apparently the only allegedly "balanced" hard look that respondents can point to in the Negative Declaration is its analysis of the impact of LL 38 on solid waste, and it's conclusion that LL

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1. Moreover, even a review of the record as a whole cannot lead to any conclusion but that LL 38 will have adverse environmental impact, and than an EIS is mandated, as discussed infra at page 18.

38 would involve the "increased use of polyethylene plastic at work sites."[2] Res. Br. at 20.

Respondents cannot cure the facial omissions in the Negative Declaration by their attempts at this late date to add extrinsic materials. What is at issue is what was in the Negative Declaration upon which the Council made its decision (and the fact the virtually nothing was in it). The affirmation of Health Commissioner Neal Cohen (which is not soundly based in science, see, Reply Affirmation of Dr. John F. Rosen, Nov 10, 1999, submitted herewith) cannot ex post facto fill in the voids in the Negative Declaration. Nor, obviously, can respondents' extensive discussions of regulations proposed by HPD and DoH this autumn, months after the Negative Declaration was issued and LL 38 was approved by the Council, satisfy the legal requirements under SEQRA, since they were not in the Negative Declaration nor before the Council when it voted. (Moreover, these regulations do not and cannot cure LL 38's many adverse environmental effects -- see Res.' Ex. E and Ex. F).[3] Nor can the individual statements of Council members supplant the failure of the Negative Declaration to identify and analyze the relevant areas of concern. In particular, such individual statements do not indicate what the Council as a whole considered or its reasoning and conclusions. All of these are irrelevant.

Thus respondents inappropriately ask this Court, without the guidance of an EIS conducted in full and timely compliance with SEQRA's substantive and procedural requirements, to make a determination that LL 38 on balance will have a "beneficial impact" and is a “vast improvement over the status quo.” Res. Br. at 2 and 7. This specious argument ignores the clear requirements of SEQRA to consider all potential adverse effects of an action regardless of the lead agency’s opinion on the overall effect. It also ignores the substantial amount of expert testimony that respondents received regarding numerous potential adverse effects of LL 38. In addition, it is based on faulty legal reasoning that, if followed, would lead to bad public policy.

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2. And even there, the Negative Declaration is incorrect, since LL 38's so-called "interim controls" require much less use of protective plastic than the full set of safety measures in Health Code § 173.14.

3. For the same reason, respondents’ citations to testimony in a December 1998 Housing Committee hearing in support of a partial abatement rather than a full abatement program are irrelevant and misleading because LL 38 was not before the Committee at that time (or even proposed). The statements at that hearing were made in a vacuum, based solely on the abstract concept of moving from a full abatement to a partial abatement program. In any event, that testimony was not part of the Negative Declaration

"In Alice-in-Wonderland manner, respondents separated and put aside the realities of [particular issues] from the totality of this project" H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979). If respondents' legal position were correct, it would mean, essentially, that the ends always justify the means -- without any analysis of the environmental impact of the particulars of those means. Their assertion that one can entirely avoid a hard look at various adverse environmental consequences of one's actions by preemptively claiming that the overall outcome is beneficial is as logically insupportable as the concept of "sentence first, verdict afterwards." L Carroll, Alice in Wonderland, Chapter 12.

A. The Council Cannot Ignore Specific Adverse Environmental Impacts and Fail to Address Them in Its Negative Declaration By Claiming that the Overall Impact Would Be Beneficial

The situation in this proceeding is virtually indistinguishable from the situation in Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64 (1st Dept. 1996), affirming 167 Misc.2d 980 (Sup. Ct. N.Y. Co. 1995), where the City was ordered to produce an EIS. In Williamsburg, after complaints arose concerning unsafe practices in the removal of lead paint from the Williamsburg Bridge, the City promulgated a "protocol" to improve the control of lead dust during the removal of lead paint from the Bridge's steel structure. Since the "protocol" interjected lead dust controls where none had existed before, 167 Misc.2d at 985, the Williamsburg case presented an "action" that presumably would have "only beneficial environmental effects" – indeed far more beneficial than any changes resulting from the repeal of Local Law 1 in the present case. Thus under respondents' theory in the instant proceeding, the Appellate Division should have ruled in the City's favor -- but it did not.

Instead, the court in Williamsburg invalidated this process and required the preparation of an EIS. Calling the City's process an "ersatz EIS," the First Department recognized that the City could not substitute an alternative procedure for the strict and detailed procedures established by the Legislature under SEQRA. Irrespective of whether the "protocol" would have a beneficial effect, the Appellate Division focused on the undisputed fact that work performed by on the Williamsburg Bridge "falls within the ambit of 'significant effect on the environment' so as to trigger the provisions of SEQRA...." 224 A.D.2d at 72. In the present case, there is similarly no dispute that work performed in occupied apartments to remove or repair lead

paint will have a"significant effect on the environment." The lead paint is in these apartments (New York City having the highest concentration of older housing in the nation) and both parties agree that its presence, its repair, and its removal create a potential "adverse environmental impact" for apartment residents, particularly young children and pregnant women.

A negative declaration is inappropriate and an EIS is mandated if "the action may include the potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1) (emphases added). It is "well settled" that SEQRA requires only a very low threshold of environmental impact. West Branch Conservation Ass'n, Inc. v. Planning Bd. Of the Town of Clarkstown, 207 A.D.2d 837, 838-39 (2d Dept. 1994), mot. for lv. to app. dis'm, 84 N.Y.2d 1019 (1995); see also, Chemical Specialties Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 397 (1995); Chinese Staff and Workers Ass'n, 68 N.Y.2d 359, 364-65 (1986);[4] Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 603 (2d Dept' 1988), lv to app. den., 72 N.Y.2d 807 (1988); Save the Pine Bush, Inc. v. Planning Board of the City of Albany, 96 A.D.2d 986, 987 (3d Dep't 1983), lv. to app. den. 61 N.Y.2d 668 (1983); H.O.M.E.S., 69 A.D.2d at 232.

Thus, respondents are not allowed to ignore specific potential adverse effects of LL 38 simply because they believe that its overall effect will be beneficial. A negative declaration can be upheld only if respondents have identified all potential adverse environmental effects, thoroughly analyzed them and provided a reasoned, written elaboration on why they are not significant. Indeed, even where "the clear intent of the action [is] to have a beneficial effect," Balsam Lake Anglers Club v. DEC, 153 Misc. 2d 606, 611 (Sup. Ct. Ulster Co. 1991), an EIS must be prepared regarding any action that may have a significant effect on the environment. ECL § 8-0109(2).

The courts have roundly -- and correctly -- rejected respondents' line of reasoning. For example, the Court of Appeals has stated that:

> in reviewing a SEQRA determination, the court is solely concerned with the procedural and substantive mandates of SEQRA, not with the ultimate environmental consequences of the proposed action.

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4. Chinese Staff, in discussing just how low this threshold is, notes that SEQRA is far stronger than the federal equivalent, the National Environmental Policy Act (NEPA), which only applies if the action will significantly affect the quality of the human environment; and moreover, that an earlier proposed version of SEQRA would have set the standard as "likely to have significant effects." Id. at 365 n. 6.

Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 530 (1989) (citing Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416-17 (1986)); see also Whibco, Inc. v. Village of Round Lake, 149 Misc.2d 415, 417 (Sup. Ct. Saratoga Co. 1991) ("Though the statute may arguable beneficially affect the environment, its purported beneficence does not negate SEQRA and the regulations which implement it."(emphasis added)); Ginsburg Dev. Corp. v. Town of Cortlandt, 150 Misc. 2d 24 (Sup. Ct. Westchester Co. 1990) (rejecting argument that because the challenged amendment constituted a "preservation action" it would not result in a significant negative environmental impact under SEQRA and it did not require an EIS). The enactment of local legislation -- which presumably lawmakers always intend will either substantially benefit or at least not harm the environment -- necessarily falls under SEQRA, and legislatures must thus comply with its substantive and procedural requirements. See, e.g., Skenesborough Stone, Inc. v. Village of Whitehall, 229 A.D.2d 780 (3d Dep't 1996); Norgate at Roslyn Ass'n v. Village of East Hills, 104 A.D.2d 974, 974 (2d Dep't 1984).

The cases respondents cite on "beneficial impacts" do not stand for the legal proposition respondents advance. Rather, in each instance, the courts undertook the H.O.M.E.S. analysis and based their holdings on whether the governmental actors fully complied with SEQRA's substantive and procedural mandates in issuing negative declarations. See, e.g., Gernatt Asphalt Products v. Town of Sardinia, 87 N.Y.2d at 689-90 ("The record reflects that the Town Board identified the relevant areas of environmental concern as related to the proposed action, took the requisite 'hard look' at them and in its negative declaration set forth a reasoned elaboration of the basis for its determination."); Patterson Materials Corp. v. Town of Pawling, 694 N.Y.S.2d 708, 710 (2d Dep't 1999) (finding that the Town Board took a hard look at potential environmental impacts and made a reasoned elaboration of the basis for its negative declaration); Philger Realty Corp. v. Town of East Hampton, 692 N.Y.S.2d 455, 456 (2d Dep't 1999) ("[R]espondents identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration for the basis of its determination.").[5]

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5. The Court of Appeals decision in Gernatt Asphalt is particularly instructive. There, the Town Board -- unlike the City Council -- undertook an "actual review of the Environmental Assessment Form." 87 N.Y.2d at 689 ("The record reveals that at a work session of the full Town Board, it reviewed and answered all of the questions posed on the Full Environmental Assessment Form.").

The mention of such intended "beneficial environmental effects" in these cases merely lent further support to the courts' already determined findings of compliance with SEQRA's substantive and procedural mandates and these serve as dicta rather holdings. Gernatt Asphalt Products, 87 N.Y.2d at 690 ("Given the nature of the proposed action here, which would have only beneficial environmental effect, and the focus of the Assessment Form, which is to identify negative environmental effects of the proposed action, the Town Board's rapid review and completion of the Environmental Assessment Form was not arbitrary or capricious." (emphasis added); see also Patterson Materials Corp., 694 N.Y.S.2d at 710 ("In the instant case, the Town Board designated the Local Law as a 'Type I' action, completed a full Environmental Assessment Form, held a public hearing . . ., and adopted a detailed and comprehensive negative declaration . . . . Under these circumstances, including the fact that the proposed action 'would have only beneficial environmental effect,' the issuance of the negative declaration [must be upheld]." (emphasis added)).

Moreover, the above opinions qualify these potential environmental effects as being "only beneficial." See, e.g., Gernatt Asphalt Products, 87 N.Y.2d at 690; Patterson Materials Corp., 694 N.Y.S.2d at 710; Philger Realty Corp., 692 N.Y.S.2d at 456. Thus, under the standard that respondents themselves have articulated, unless they can show that all of the changes in LL 38 are beneficial -- in each and every aspect -- their defense fails and an EIS must be prepared. The respondents have set a standard of review for themselves which they cannot possibly meet (see infra page 18). Competent testimony and comments from a variety of technical and medical experts as well as concerned and well-informed members of the public identified many potential adverse environmental effects of LL 38.

In addition, SEQRA requires mitigation of all potential adverse environmental effects even if the action as a whole is beneficial in many ways. For example, in United Petroleum v. Williams, 102 A.D.2d 491 (3d Dep't 1984), aff'd, 65 N.Y.2d 708 (1985), the Court affirmed the negative declaration on new waste oil regulations only because the Department of Environmental Conservation had identified the one potential adverse environmental effect and had already revised the regulations to avoid it. Similarly, in Ginsburg, 150 Misc.2d at 33, the Court found that while the purpose of the proposed law was to protect the environment, "the Town Board failed to consider any alternatives to the proposed action which might

be expected to serve the putative purpose of protecting steep slopes" while avoiding an adverse effect on availability of housing.

B. A Reasoned Analysis to Support Respondents' Claim of "Only Beneficial Impacts" is Not Found in the Negative Declaration

Respondents gloss over the issue of the Negative Declaration's facial inadequacy by asserting that it was justifiably "focused" on the repeal of Local Law 1 alone. Res. Br. at 14-21. Respondents contend that LL 38 will have only a "beneficial impact" by erecting LL 1 as a "strawman" and then knocking it down. They do so by first asserting that LL 1 established a "dangerous mandate to abate intact lead paint" and then by alleging (solely on the affidavit of the Health Commissioner) that LL 38 is a "vast improvement over the status quo." Res. Br. at 2 and 7.[6]

This specious argument is based on flawed reasoning and ignores the substantial amount of expert testimony that the respondents received to the contrary. Of course, as noted above, by asking this court to make a final determination whether LL 38 overall will have a "beneficial impact," respondents are inappropriately inviting the Court to step into the vacuum created by their own failure to substantiate this conclusion when the Negative Declaration was drafted. The purpose of SEQRA is to raise this kind of environmental analysis before a local law's enactment, and not after the fact.

In truth, petitioners agree with respondents that the removal of intact lead paint under LL 1 can be hazardous -- if not carried out properly. However it is also true that the removal of peeling lead paint is equally as hazardous -- if not carried out properly. Rosen Reply Aff. at ¶¶ 3-4, 6-9. By refusing to acknowledge this fact, either in the Negative Declaration or in arguments to this Court, respondents have exposed the fundamental flaw of their "strawman" analysis. Intact lead paint and peeling lead paint are both

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6. Respondents misrepresent the so-called "status quo." First, LL 1 does not require the removal of all lead paint, but rather, specifies that landlords "shall remove or cover" lead paint § 27-2013(h)(1). Moreover, the NYCCELP petitioners in the related NYCCELP v. Giuliani class action remain willing to stay enforcement of the LL 1 requirement for total removal of all lead paint, pending reasonably expeditious City Council action on a "lead-safe" law that is adopted in proper and full compliance with SEQRA and other applicable laws. Indeed, it is the respondents who demanded at the last conference on the matter, before the Council adopted LL 38, that the stay be lifted. Petitioners offered to extend it for several months and remain willing to negotiate a reasonable schedule for lawful adoption of a new law in compliance with SEQRA. Quixotically, respondents have argued, in their pending motion to reassign this case, that is was not "accurate" to assert that LL 38 was enacted in response to orders in the NYCCELP v. Giuliani action. Nov. 5, 1999 Reply Aff. of Mark Muschenheim, at ¶ 5.

hazardous to repair or to remove. Thus it is irrational and misleading for respondents 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.[7]

In any event, respondents claim they were acting to "mitigate" the adverse impacts they assert existed in LL 1. The issue, however, is that the City Council, in selecting among the many possible methods of creating a partial abatement scheme, could not have concluded that it was enacting a scheme that had no significant adverse environmental outcomes, because it failed to conduct the required environmental review to determine the significance of LL 38's effects. Thus, even assuming, arguendo, that a move to something less than full abatement is desirable, the decision to replace LL 1 with something less than full abatement of lead paint entailed countless environmental decisions and should have required consideration of a great range alternatives, as required by SEQRA. See Ginsburg, 150 Misc. 2d at 30 (Town board failed to consider alternatives).

In fact, what respondents adopted was a “lead unsafe” program that, among other things: (1) eliminates the requirement to remove or cover toxic dust-generating paint on friction and impact surfaces; (2) weakens landlords’ responsibilities to inspect for lead paint hazards; (3) allows even obviously peeling lead paint to remain in children’s homes for unreasonably long periods, and (4) sanctions cheap, sloppy paint removal practices that independent experts in lead poisoning and lead dust control universally condemned and that will create new toxic lead hazards.

Respondents’ flawed reasoning is also obvious given that they cite the testimony of Nick Farr, Executive Director of the National Center for Lead Safe Housing, in support of their position even though Mr. Farr came up from Washington, D.C. specifically to testify against LL 38, and wrote two letters in opposition to the bill. Similarly, respondents cite the testimony of Don Ryan, Executive Director of the Alliance to End Childhood Lead Poisoning, in support of their position even though he also came up from

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7. 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, respondents’ 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.

Washington, D.C. specifically to testify against LL 38, and wrote three letters in opposition to the bill. Most galling, they cite statements by Council member Stanley Michels and City Comptroller Alan Hevesi even though these elected officials vociferously opposed LL 38.

Furthermore, the respondents' claim that the enactment of Local Law 38 did not require a Negative Declaration is contradicted by the Mayor, who admitted that the new law was a "compromise." Tr. July 15, 1999 (Res. Ex. D) at 49. If it was a "compromise," then the Negative Declaration would be expected to explain which environmental impacts were subject to compromise, take a "hard look" at the compromise, and provide a detailed and reasoned analysis as to why the compromise will lead to only beneficial results. None of this is found in the Negative Declaration under review here.

C. Respondents Wrongly Urge the Court to Use an Incorrect Standard of Review

The respondents misstate the Court's standard of review in this case. They argue that the Court may not consider the affidavits and evidence presented with the Petition and Complaint because "this is essentially the same evidence ... presented to the City's lawmakers before the passage of Local Law 38" and the Court's role is "supervisory only." Res. Br. at 14. Their admission that this information was presented to respondents, however, is exactly the reason that the information is relevant.[8] The Court, in its "supervisory" role under SEQRA, must review this information to determine whether or not the respondents identified and evaluated the potential environmental effects of their proposed action. The Third Department overturned a negative declaration in a case in which a member of the public identified just one potential adverse effect of a project, stating:

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

West Branch Conservation Ass'n, Inc. v. Planning Bd., Town of Ramapo, 177 A.D.2d 917, 919 (3d Dept.

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8. Respondents do not deny that they only released the draft bill and announced the hearing one business day beforehand. The Council leadership did its very best to discourage members of the public, especially experts, from attending the hearing or submitting written comments. See Pet. ¶¶ 76-90; 94-95, Ex. 28 at 1-2, I. Mauss Aff. Ex. A.; Landrigan Aff ¶ 4-8. Thus, respondents should not be heard to complain that elucidation of the issues raised in petitioners' affidavits should have been put forward in testimony instead.

1991); see also Kahn v. Pasnik, 90 N.Y.2d 569, 573-74 (1997) (board disregarded potential adverse environmental impacts that an environmental consultant identified); Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d 718, 720 (1985) (board disregarded potential adverse environmental impacts that the board itself identified); Golten Marine Co., Inc. v. New York State Dep't of Envtl. Conservation, 193 A.D.2d 742, 742-43 (2d Dep't 1993) (agency failed to examine relevant areas of environmental concern expressly contained in the implementing regulations), Desmond-Americana v. Jorling, 153 A.D.2d 4, 11-12 (3d Dep't 1989), app. den., 75 N.Y.2d 709 (1990) (agency failed to take a hard look at relevant areas of environmental concern despite repeated and persistent warnings by agency critics of adverse environmental effects); H.O.M.E.S. 69 A.D.2d at 227, 232, 234-35 (agency disregarded potential adverse environmental impacts that, among others, external critics identified); Kanaley v. Brennan, 119 Misc.2d 1003, 1008-11 (Sup. Ct., Onondaga Co. 1983), aff'd, 120 A.D.2d 974 (4th Dep't 1986) (agency failed to take a "hard look" at relevant areas of environmental concern); Meschi v. New York State Dep't of Envtl. Conservation, 114 Misc.2d 877, 879 (Sup. Ct., Albany Co. 1982) (same); Center Square Ass'n, Inc. v. Corning, 105 Misc.2d 6, 12 (Sup. Ct., Albany Co. 1980) (same); Kravetz v. Plenge, 102 Misc.2d 622, 631-32 (Sup. Ct. Monroe Co. 1979)(same). In this case, respondents arbitrarily and capriciously, and in a blatant abuse of discretion, ignored the well-considered written comments of nationally and internationally known experts on lead poisoning and lead dust control in failing to find that LL 38 would, or even might, have an adverse environmental health effect.

While respondents argue that the Negative Declaration was a “policy decision” which they apparently believe Court has no authority to question, Res. Br. at 14-15, they ignore the fact that SEQRA and its underlying regulations set out specific procedural steps that respondents must follow in making that decision. In particular, the Negative Declaration’s “environmental assessment” form and narrative failed to “contain enough information to describe the proposed action,” in violation of 6 N.Y.C.R.R. § 617.2(m), by failing to disclose and describe how LL 38 would weaken existing safeguards for children against exposure to toxic lead paint dust and other lead paint hazards. It also failed to “contain enough information to describe . . . its purpose and its potential impacts on the environment,” 6 N.Y.C.R.R. § 617.2(m), by failing to thoroughly analyze and take a hard look at the areas of environmental concern. Where, as in this

case, the respondents failed entirely to identify a series of potential adverse environmental health effects of LL 38 and further failed to analyze those effects at all, the Court cannot find compliance with SEQRA.

In Ginsburg, supra, the court overturned the town board's negative declaration despite the fact that it had received extensive data and analysis from the public, a planning board, and two committees and had held five meetings to discuss the matter because, it found, "[T]here exists little support, if any, in the minutes of the Town Board meeting or in the Town Board's negative declaration to indicate what it specifically considered in reaching its determination of nonsignificance.... Moreover, the reasons set out for its determination are merely conclusory." 150 Misc. 2d at 31.[9] The same is true in this case and respondents do not deny it.

The Court has the authority to review the Negative Declaration to determine whether it failed to analyze thoroughly the potential adverse effects of the proposed action, particularly the specific areas of environmental concern specifically identified by SEQRA and its underlying regulations. Such a review will clearly show that the respondents failed to analyze thoroughly and take a hard look at, for example:

- Whether LL 38 might cause "the creation of a hazard to human health," as required by 6 N.Y.C.R.R. § 617.7(c)(1)(vii), or to "human health or safety," as required by CEQR, 43 R.C.N.Y. § 6-06(a)(7), despite expert testimony that it would cause such a hazard;
- The impact of LL 38 on hazardous materials; it even failed to follow the City's own CEQR Technical Manual guidelines by not analyzing the potential for LL 38 to increase pathways of exposure to toxic lead paint and dust;[10]

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9. Respondents assertion that the Council could have discussed the Negative Declaration at the full Council meeting on June 30 does not remedy the fact that it didn't (and, in any event, would not have cured its reliance on the flawed Negative Declaration which facially failed to meet SEQRA's requirements). The transcripts clearly show that no Council member at the June 30 full City Council meeting raised the question of what the Council's duties were under SEQRA, and no Council member stated that LL 38 would have absolutely no adverse environmental effect.

10. The City's CEQR technical manual (Ex. 86), which applies to, inter alia, "Generic actions... including "regulatory changes, local legislation, and changes to the City Code," id. at 2-1, states that "the potential for significant impacts from hazardous materials can occur when 1) hazardous materials exist on a site, and b) an action would increase pathways to their exposure ..." Id. at 3J2. The Manual goes on to discuss this in more detail:

> Is there the potential for human exposure to contaminants? This includes future on- site

(continued...)

- The adverse effect of LL 38 on existing community or neighborhood character, as required by 6 N.Y.C.R.R. § 617.7(c)(1)(v), despite testimony on the socio-economic impacts of childhood lead poisoning, especially on low-income and minority neighborhoods;
- The significance of LL 38's adverse environmental effects in connection with "the number of people affected," as required by 6 N.Y.C.R.R. § 617.7(e)(3) (vii), even though LL 38 – for no stated scientific reason – eliminates six-year-old children from the laws protection;
- Reasonably related long-term, short-term, direct, indirect and cumulative impacts in making its determination of non-significance, as required by 6 N.Y.C.R.R. § 617.7(c)(2).
- The significant "public controversy related to potential adverse impacts" from LL 38. See, Full Environmental Assessment Form (EAF) and Short EAF provided in 6 N.Y.C.R.R. § 617.

See Pet ¶¶ 151, 187. Moreover, as noted in Pet. ¶¶ 190-198, respondents also

- Failed to set forth the reasons supporting the determination of nonsignificance in written form, "containing a reasoned elaboration and providing reference to any supporting documentation." as required by 6 N.Y.C.R.R. § 617(g)(2)(iv) and 43 R.C.N.Y. § 6-07(b)(v); and
- Failed to provide reference to supporting documents for its findings which the public (or Council members) could review, as required by 6 N.Y.C.R.R. § 617(g)(2)(iv) and 43 R.C.N.Y. § 6-07(b)(v).

As stated above, the threshold under SEQRA for finding an environmental effect is low – lower than that under the federal National Environmental Policy Act. The Council cannot, as lead agency under SEQRA, issue a negative declaration on a proposed local law if any potential adverse environmental effect may occur. Despite respondents' claims to the contrary (Res. Br. at 26), the record as a whole does not contain sufficient evidence to support the Negative Declaration and EAF's conclusion that LL 38 will not have any significant adverse impacts on the environment because no reasonable person could examine the record in this case and not recognize that an adverse environmental effect may occur as a result of

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10. (...continued)

> occupants.
>
> ...
>
> Future occupants of the site may be exposed to on-site hazardous materials. For example, children at a residential site may ... ingest lead-laden particles [from] a building's interior....

Id.. at 3J10 (emphasis added).

implementation of LL 38's weakened lead paint clean-up standards, weakened enforcement provisions and weakened requirements for landlords.

Finally, the City Council does not have technical expertise in the area of lead poisoning to which the Court must defer. Even its reliance on the Mayor's Commissioner of Health should have been questionable at the time because of the City Administration's obvious conflict of interest as owner of a large amount of low income housing and because of Dr. Rosen's warning that lead poisoning experts within the Department did not support weakening of the Health Code safety standards.[11] The Health Commissioner's affidavit asserts (at ¶ 21) that his conclusion was based upon review of the legislation with his staff.

Dr. Rosen's warning, in fact, has now been vindicated. The person within the Department of Health most knowledgeable on the subject of lead poisoning prevention when LL 38 was enacted, was Dr. Susan Klitzman, at that time the Assistant Health Commissioner for Environmental Risk Assessment and Communication, who testified at the Housing Committee hearing on June 21, 1999, as the person who "oversee[s] the Department of Health's Lead Poisoning Prevention Program Chachère. Ex. 77, at 129**;** see also Chachère Rep. Aff., Ex. 115, at 1. Just last week, however, Dr. Klitzman (who subsequently resigned her position in August, 1999 and is now a professor of Environmental and Occupational Health Sciences at Hunter College), offered testimony that contradicts many of respondents' assertions in support of the Negative Declaration. In testimony to the Board of Health on November 5, 1999, she said:

> [T]he "exclusive interim controls" outlined in Local Law 38 and its related rules ... are less protective of health than the provisions of the current health code Section 173.14 in at least 2 key respects.
>
> First, they do not require that the person performing the work receive any training, licensing or certification in lead safety.
>
> Second, they do not require that after lead-based paint hazards are correct and the work are is cleaned, four dust wipe sample be collected by an independent third party, and that clearance levels be met before the areas is cleared for re-occupancy by young children.
>
> [There are]... dangers of lead-containing dust to young children which can result when work that disturbs lead-based paint is conducted in an unsafe manner, by untrained personnel, without proper cleaning and monitoring. You can't tell how much lead dust is present from a visual inspection. ...[T]hese dangers can be minimized when trained workers follow safety procedures, when post- clean up clearance dust testing is performed by an independent third

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11. Dr. John Rosen, in testimony on LL 38, had warned that the experts on lead poisoning within the Department were in opposition to its approach. See Letter to DoH Comm. Cohen, June 14, 199 (Ex. 15, p. 3), submitted with Dr. Rosen's testimony at June 21, 1999 Housing Committed hearing.

party and when clearance standards are employed.

> No scientific evidence has been presented to indicate that the safety measures which have been deleted [by LL 38] are unnecessary from a public health perspective. This remains a concern among many in the public health community.

Ex. 115 at 2-3. (emphasis in original).

D. SEQRA Does Not Allow Any Approximation or Substitute for its Mandatory Requirements.

As much as respondents 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, respondents have repeatedly hailed their public hearings, and consultations with interested groups, Res. Br. at 22. et seq., as a substitute for the procedural requirements of SEQRA for a full environmental analysis.

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[12]), 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 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.

Yet that is precisely what respondents 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 of "years of debate." Res. Br. at 22.[13] This approach has been long ago rejected by the courts. For example, in Desmond-Americana v. Jorling, 153 A.D.2d at 11, the court noted that "while it is true that [the agency] may have

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12. 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).

13. Of course, the specific provisions of LL 38 were not subject to "years of debate," 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.

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. The State Legislature did not exempt the City Council from the strict procedural and substantive requirements of SEQRA.

The cases respondents cite in support of their argument on this issue, Sutton Area Community v. Board of Estimate, 78 N.Y.2d 945 (1991); Coalition for Responsible Dev. in Goldens Bridge v. Town of Lewisboro, 221 A.D.2d 626 (2d Dep't 1995); and Kelsky v. Town of Lewisboro Planning Board, 215 A.D.2d 483 (2d Dep't 1995) are clearly inapposite, as all three involved judicial review of agency action following the preparation of an EIS. See Sutton Area Community v. Board of Estimate, 165 A.D.2d 456, 458 (1st Dep't 1991) (noting issuance of Final EIS); Coalition for Responsible Dev. in Goldens Bridge v. Town of Lewisboro, 221 A.D.2d at 626 ("[T]he respondent adequately identified and addressed the environmental concerns raised in the Draft [EIS], giving 'due consideration to pertinent environmental factors.'" (citation omitted)); Kelsky v. Town of Lewisboro Planning Board, 215 A.D.2d at 484 (same). In fact, these cases demonstrate that SEQRA's elaborate framework (through the preparation of the EIS) ensures that decision makers will be fully informed about and will give due consideration to all the relevant areas of environmental concern. **14**

In Williamsburg, the reliance on ad hoc, patchwork, "ersatz EIS" procedures was roundly rejected. Even if an approximation, equivalent, or substitute for the SEQRA procedures could suffice, the process here could not. It completely failed to recognize the uncertainties of LL 38's approach, let alone describe how the many choices embodied in that proposal were explored and analyzed, or any rational basis for making and rejecting specific and various choices. No combination of ad hoc devices can substitute for

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14. Respondents' repeated citations to Save the Audubon Coalition v. City of New York , 180 AD.2d 348 (1st Dep't 1992) fail for the same reasons, since that case concerned the adequacy of a completed final EIS - an entirely different issue.

the specific procedures of SEQRA and CEQR regarding the making of a determination of significance or the preparation of an EIS. As the cases clearly hold, CEQR and SEQRA require the earliest possible review of the environmental impacts.

SEQRA and CEQR and all the courts' decisions on the subject resoundingly reject the notion that local municipal legislative bodies deliberations can serve as a substitute for the requirements of SEQRA in making environmental policy. The courts have repeatedly held that "literal compliance with SEQRA's procedural requirements for integrating environmental considerations into the decision-making process is mandated." Horn v. IBM, 110 A.D.2d 87, 92 (2d Dep't 1985), app. den., 67 N.Y.2d 602 (1986). Accord, Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 603 (2d Dep't 1988), app. den. 72 N.Y.2d 807 (1988); Inland Vale Farm Co. v. Stergianopoulous, 104 A.D.2d 395, 396 (2d Dep't 1984), aff'd, 65 N.Y.2d 718 (1985) ("substantial compliance will not suffice").

Rye Town/King Civic Ass'n, 82 A.D.2d 474, 481 (1981), app. dism., 56 N.Y.2d 985 (1982), articulated the rationale for this policy.

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

More recently, West Branch Conservation v. Planning Bd., 177 A.D.2d 917, 918 (3d Dep't 1991), expanded this reasoning.

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

(citations omitted). In sum, "[S]ubstantial 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 v. Town of Oyster Bay, 88 A.D.2d 484, 491 (2d Dep't 1982); see also, e.g., Desmond-Americana, 153 A.D.2d 4, app. den., 75 N.Y.2d 709; Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Industrial

Development Agency, 212 A.D.2d 958, 959 (4th Dep't 1995), app. den.85 N.Y.2d 812 (1995) ; Martin v. Koppelman, 124 A.D.2d 24, 27 (2d Dep't 1987), Williamsburg, 223 A.D.2d at 73-74, and cases cited therein.

III. RESPONDENTS WERE REQUIRED TO PREPARE AN EIS BECAUSE LL 38 OBVIOUSLY "MAY" RESULT IN AT LEAST ONE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECT.

Having failed to make a convincing argument that the Negative Declaration is facially adequate by identifying the relevant areas of environmental concern and fully analyzing them, respondents have invited the court to review the record as a whole to supplant this failure. As discussed supra, this cannot serve to cure respondents' failure to comply with the strict requirements of SEQRA. But even if the court were to do so, it is obvious on this record that respondents' assertion that LL 38 would have only beneficial impacts is insupportable.

First, as noted in the Petition (¶¶ 6, 96, 117) and in petitioner's initial brief (at 10), every independent expert who testified or offered written submissions stated that LL 38 will have adverse environmental impacts. The City was unable to come forward with a single outside medical, environmental, or public health expert to testify to the contrary, and even now apparently is unable to do so. See Reply Aff. of Dr. John Rosen.

Petitioners identified numerous aspects of LL 38 that easily may (and indeed, will) have significant adverse impacts. Respondents fail to explain them away, and in many instances, fail to even address them. Given respondents' assertion that LL 38 does not require an EIS if it only has beneficial impacts, respondents' negative declaration must fail.

For example, respondents fail to explain how LL 38's deletion of friction surfaces from the definition of "lead hazards" will be "only beneficial," given 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.

Nor do respondents explain how removing all protections for six year olds from the current law is "only beneficial" to the many thousands of six year old children living in dwellings with lead paint. See

Rosen Aff. ¶ 19 (stating that his clinic has seen hundreds of lead poisoned six-year-olds over the past quarter century). Incredibly, the Health Commissioner justifies such a change merely because it will "harmonize local law with federal" law (Cohen Aff. ¶ 36). Yet, as noted above in the above prior paragraph, respondents apparently chose not to "harmonize with federal law" with respect to its far broader definition of lead hazards. See, 42 USC. § 4851b. Respondents offer no explanation of the basis upon which they essentially "cherry picked" those portions of federal law they chose to "harmonize" with.

Nor do respondents ever explain why LL 38 removed the requirement in Admin. Code § 27-2126 that HPD must respond within 18 days to a DoH order to abate lead paint in a 1- or 2- family home where an owner fails to do so, much less how the removal of such mandatory timeframes can possibly be considered "beneficial" to lead poisoned children who have the misfortune of residing in such homes. This is all the more curious, since in other areas of their brief, respondents claim that the addition of mandatory time frames for other HPD action is beneficial. The only explanation respondents now offer -- that DoH still retains authority to request HPD to remove such violations -- completely sidesteps the issue, and ignore the fact that HPD will no longer be required to respond to such orders by a date certain. As noted in petitioners' initial brief (at 7), such was the status quo ante before the enactment of the additional requirements of § 27-2126 (as LL 50 in 1972) (ex. 98).

Nor do respondents offer any explanation why the substitution of "interim controls" -- using untrained, uncertified workers -- for large aspects of the Health Code safety procedures can be considered "only beneficial." Respondents' assertion that the "interim controls" are beneficial because they impose new requirements on owners is misleading and incorrect. First of all, under the current law, not only did the current § 173.14 safety standards apply to all lead abatements ordered by DoH and HPD; they were also supposed to apply to all lead hazard removals. NYCCELP II, slip op. (Sup. Ct. N.Y. Co. July 6, 1989) (Ex. 101); Order (Sup. Ct. N.Y. Co. Aug. 2, 1990) (Ex. 102), aff'd, 170 A.D.2d 419 (1st Dep't 1991), NYCCELP VII, 173 Misc.2d 235 (Sup. Ct. N.Y. Co. 1997), Order (Aug. 1, 1997) (Ex. 107), aff'd, 248 A.D.2d 120 (1st Dep't 1998). Moreover, only a year ago, DoH proposed rules that would have modified § 173.14 to make this extended coverage explicit, in accordance with the forgoing NYCCELP orders. See City Record Oct. 15, 1998, 3544-46 (Res. Ex. N) (proposed § 173.14(a)(1)(cc)). In any event, as noted

above, Dr. Klitzman (head of respondents' lead poisoning prevention program when LL 38 was enacted), has now demolished respondents' arguments, stating in no uncertain terms that "the ‹exclusive interim controls' outlined in LL 38 and its related rules .. are less protective of health than the provisions of § 173.14...." Ex. 115. Indeed, in testimony before the Housing Committee, Health Commissioner Cohen stated that

> 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. (Res. Ex. S)

The City also fails to explain why it is "only beneficial" to eliminate the existing continuing duty of a landlord to inspect an apartment as needed for lead paint hazards. Under LL 1 and Juarez v. Wavecrest, 88 N.Y.2d 628, 647 (1996), landlords' obligations to remedy lead hazards were continuous, and not limited to when landlords' received notice of a lead hazard. See also Valdez v. Sherman Estates, Inc., 224 A.D.2d 240, 241 (1st Dep't 1996) (Rejecting argument that landlords had no duty under LL 1 to inspect unless given notice; "The plain effect of [LL 1] ... is to the contrary, and the entire remedial scheme would be meaningless if a landlord could suffer a lead condition in its building until given "notice" of the condition..."); Lane v. Ruiz, N.Y.L.J., May 29, 1996, p. 29 col. 3 (Sup. Ct. Queens Co.) ("A landlord is required to take action to remedy a lead condition prior to receiving any 'notice' of the condition ..."). LL 38 drastically changes this mandate: owners are only required to inspect once a year, unless given notice of a hazard.

Respondents do not even attempt to demonstrate why it is "only beneficial" to remove all landlord obligations and City enforcement responsibilities for buildings constructed after January 1, 1960, even though children become lead poisoned in such dwellings. See Woolfalk v. New York City Housing Authority, Index No. 112405/93 slip op. (S. Ct. N.Y. Co. May 12, 1998)(Goodman, J.) (Ex. 114), aff'd, _ A.D.2d _, 692 N.Y.S.2d 386 (1st Dep't 1999); NYCCELP II, slip op. at 13 (Ex. 101), aff'd, 170 A.D.2d

419 (1st Dep't 1991) (City "should not ... rely on the naive presumption that no lead based paints were ever utilized in violation of the law in post-1960 buildings.").

Respondents do not demonstrate why the lengthy time frames they chose for enforcing the removal of lead paint in LL 38 are "only beneficial." Indeed, respondents misleadingly assert that LL 38 broke new ground by requiring time limits for HPD inspections and enforcement. Yet the City had been ordered long ago in NYCCELP VI, dec. (Sup. Ct. N.Y. Co. Dec. 14, 1995) (Ex. 105), Order (May 1, 1996) (Ex. 106), aff'd as modified, 245 A.D.2d 49 (1st Dep't 1997), to set time limits for enforcing LL 1, and indeed, had proposed regulations that set time frames for HPD inspections and enforcement, including intervention when landlords failed to do so -- with significantly stricter time limits than in LL 38. Proposed rule, October 9, 1998 (Res. Ex. M). Respondents fail to show why the lengthy time frames in LL 38 are "only beneficial" in comparison to a range of far shorter time frames that might have been selected, or in what manner it was determined that these time frames are sufficient to prevent young children from becoming lead poisoned.

Finally, respondents incorrectly claim that LL 1 did not regulate lead dust. They fail to recognize the obvious: if all of the lead paint is removed or covered and the strict clean-up and dust clearance tests (under Health Code 173.14) are complied with to ensure that the apartment is safe, the lead dust problem has been entirely -- and permanently -- eliminated. At a minimum, respondents do not demonstrate why it would be "only beneficial" to allow surfaces that generate lead dust (such as friction and impact surfaces) to remain unabated, as compared to the current LL 1 (which did not permit such conditions).

While any one of these adverse environmental impacts, standing alone, would be sufficient to mandate an EIS, the totality of them makes the need for an EIS overwhelming. And respondents' actions to discourage public participation, denial of the City Comptroller's offer to analyze the bill's impact, and failure to address specific concerns raised by the public evidences a lack of objectivity that makes the need for a court order to prepare an EIS -- with its specific legal requirements for full public participation and response to public comments -- even more compelling.

IV. THE CITY FAILED TO COMPLY WITH SEQRA'S PROCEDURAL REQUIREMENTS

Respondents do not contest that they failed to carry out some of the most basic procedural requirements of SEQRA. Individually and taken together, these violations indicate a serious abrogation of the responsibilities of a lead agency under SEQRA. Among others, the Council violated SEQRA's procedural requirements to:

- Make the determination of significance "as early as possible in the design or formulation of the action," 6 N.Y.C.R.R. § 617.6(b)(1)(I) and ECL § 8-0109(4).
- Make the determination of significance itself, as required by 6 N.Y.C.R.R. § 617.6(a)(1) and 617.7(a) and (b). This elected body improperly delegated the task to staff and even failed to reconsider its staff's conclusion in view of the testimony it received.[15]
- Make "every reasonable effort to involve . . . the public in the SEQR process," 6 N.Y.C.R.R. § 617.3(d), by failing give timely notice of the proposed Negative Declaration and by providing unreasonably short notice even for the hearings on LL 38.
- Make "every reasonable effort to keep involved and interested agencies informed during the environmental review process and to facilitate their participation in such process," CEQR, 62 R.C.N.Y. § 5-06(a), by denying the Comptroller's request for time to provide a financial analysis of LL 38.

As indicated in Petitioners' initial brief, all of these failures mandate nullification as well. Inland Vale Co. v. Stergianopoulos, 65 N.Y.2d at 720; Williamsburg Around the Bridge Block Ass'n, 223 A.D.2d at 68, 73-74.

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15. Moreover, the Council as a whole did not answer all the questions contained in the EAF as required by regulations for an unlisted action, See, 6 N.Y.C.R.R. § 617.6(a) and 617.7(a)(2); Gernatt Asphalt, 87 N.Y.2d at 689, so the failure to undertake the required analysis under SEQRA in the Negative Declaration would render any such discussion legally meritless.

CONCLUSION

For the above reasons, the Petition should be granted; respondents' approval of LL 38 declared invalid, null, and void for having been based on an inadequate and unlawful negative declaration; and respondents immediately enjoined from proceeding with the implementation of LL 38 and permanently enjoined from re-enacting LL # 38 without the preparation of an EIS.

Dated: New York, New York
November 10, 1999

Respectfully submitted

/s/ *Matthew J. Chachere*

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