SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of the Application of
NEW YORK CITY COALITION TO END LEAD POISONING, INC., et al.,

Plaintiffs-Respondents,

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, et al.,

Defendants-Appellants.

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AFFIRMATION OF MARK MUSCHENHEIM IN SUPPORT OF DEFENDANTS' MOTION

New York County Index No. 120911/99

MARK W. MUSCHENHEIM, an attorney admitted to practice in the courts of this State, affirms the following to be true, upon information and belief, under penalty of perjury:

1. I am an Assistant Corporation Counsel in the office of Michael D. Hess, Corporation Counsel of the City of New York ("City"), attorney for defendants in this matter. I am familiar with the facts stated herein based upon personal knowledge and upon conversations with City employees. I submit this affirmation in support of defendants' motion for an order (1) declaring that there is in effect an automatic statutory stay pursuant to CPLR 5519(a)(1) such that all proceedings to enforce the declaratory judgment appealed from are stayed pending determination of this appeal, or (2) in the alternative to such a declaration, granting a stay pursuant to CPLR 5519(c) of all proceedings to enforce the declaratory judgment pending the determination of this appeal. While the instant motion is pending, plaintiffs have agreed to refrain from initiating any proceeding to enforce the declaratory judgment appealed from. Consequently, there is no need for any interim relief while this motion is pending.

INTRODUCTION

2. Local Law 38 of 1999 (codified primarily at NYC Administrative Code § 27-2056.1 et seq.) is a comprehensive framework for preventing and correcting lead paint hazards. Ex.[1] A (Local Law 38). See also Shultz Aff. ¶¶ 15-21.[2] Nearly a year after it came into effect, the Supreme Court, New York County (York, J.), ruled that defendants did not comply with the State Environmental Quality Review Act ("SEQRA") when they adopted Local Law 38, and in a judgment entered February 22, 2001, declared Local Law 38 null and void. Exs. B & C (10/11/00 Decision & 2/22/01 Judgment). Since Local Law 38 was signed into law in July 1999, however, its precise requirements relating to lead paint hazards have become a well-known and firmly established regulatory framework in the City's housing community. See Shultz Aff. ¶¶ 3 & 6; Strasburg Aff. ¶¶ 5, 6, 11, 12, & 14; Margulies Aff. ¶¶ 5 & 6; Spinola Aff. ¶¶ 6 - 9; LaPorte Aff. ¶¶ 7 & 8. Absent a stay, the actual effect of the judgment will be to force the City to change (perhaps only temporarily) this regulatory framework. Yet, as this Court stated, the "automatic stay provided to [] agencies by CPLR 5519(a) ... is intended to preserve the status quo pending appeal." Matter of Raes Pharmacy, Inc. v. Perales, 181 A.D.2d 58, 64 (1st Dept. 1992). This motion merely seeks to maintain the status quo -- Local Law 38 -- during the appeal process.

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[1] Exhibits that are designated "Ex. _" are attached hereto.

[2] Accompanying this affirmation are the following: the affirmation of Harold M. Shultz, Special Counsel at the City's Department of Housing Preservation and Development, dated March 12, 2001 ("Shultz Aff."); the affidavit of Jessica Leighton, Ph.D., Assistant Commissioner of Environmental Risk Assessment and Communication at the City's Department of Health, dated March 12, 2001 ("Leighton Aff."); the affidavit of Joseph Strasburg, president of the Rent Stabilization Association of NYC, Inc., dated March 12, 2001 ("Strasburg Aff."); the affidavit of Nick LaPorte, executive director of the Associated Builders and Owners of Greater New York, dated March 12, 2001 ("LaPorte Aff."); the affidavit of Dan Margulies, executive director of Community Housing Improvement Program, Inc., dated March 12, 2001 ("Margulies Aff."); and the affidavit of Steven Spinola, president of the Real Estate Board of New York, dated March 12, 2001 ("Spinola Aff.").

3. Since July 1999, the City's Department of Housing Preservation and Development ("HPD") has expended significant resources first creating and implementing procedures, and then enforcing Local Law 38. See Shultz Aff. ¶¶ 3 - 5, 15 - 22, 25, 28, 32 & 35. Indeed, HPD has issued nearly 20,000 lead paint violations pursuant to Local Law 38. And since some private multiple dwelling owners failed to timely or properly correct some of these violations, pursuant to its Local Law 38 obligations, HPD has completed over 1,300 lead paint jobs that have corrected thousands of these lead paint violations. See Shultz Aff. ¶ 3.

4. Private landlord organizations have also expended significant resources educating their members about their new obligations under Local Law 38. For example, in the summer of 1999 one of these organizations, the Rent Stabilization Association ("RSA"), devoted an entire edition of its bi-monthly newsletter to Local Law 38, including a summary of the law, and a step-by-step instruction guide on how to correct lead paint hazards in accordance with Local Law 38. See Strasburg Aff. ¶ 11 & Exhibit B attached thereto. In addition, in November 1999 the RSA held a seminar that comprehensively addressed mandates under Local Law 38 and HPD's implementing regulations; this seminar was attended by over 400 New York City landlords. Id. at ¶ 12 & Ex. C attached thereto. RSA also maintains a telephone support line that regularly responds to calls seeking guidance from landlords on their obligations under Local Law 38. Id. at ¶ 15.

5. Most importantly, these efforts have succeeded in, among other things, significantly reducing the incidence of childhood lead poisoning in New York City. Specifically, in 2000 there was a 24 percent decrease from 1999 in the number of children with elevated blood lead levels of 20 mcg/dL or greater in New York City. This decrease is even more remarkable

since during the same time period the number of children tested for elevated blood lead level increased by 7.5 percent. See Leighton Aff. ¶ 5.

6. If the Judgment below is not stayed, Local Law 38's comprehensive framework for addressing lead paint hazards will be replaced by Local Law 1 of 1982,[3] including its antiquated mandate that all intact lead paint -- which is not hazardous -- must be completely abated immediately. With no drama intended, the resurrection of Local Law 1 (which was never fully enforced because of ongoing litigation) would be a public health and housing disaster[4] that would likely lead to a significant increase in childhood lead poisoning.

7. Indeed, even those who opposed Local Law 38 argued forcefully that Local Law 1 would be a disaster. As the court below noted, it "is apparently the general consensus, shared by petitioners, that since the enactment of Local Law 1 experts have made a philosophical U-turn and removal of intact lead-based paint is now considered to have more detrimental consequences than its non-removal." Ex. B (10/11/00 Decision at 6 (emphasis added)).

8. The Local Law 1 mandate to abate intact lead paint will undoubtedly lead to an increase in lead poisoning cases. Owners who receive lead paint violations from either the Department of Health ("DOH") or HPD requiring the abatement of intact lead paint will face costs that could easily reach $15,000 to $20,000 per apartment unit. Owners who are able to incur such bills will often be unable to abate intact lead paint and correct the lead hazards in a timely manner since currently there is a severe shortage of EPA licensed lead abatement

[3] Local Law 1 was formerly codified at NYC Administrative Code § 27-2013(h).

[4] There are approximately three million housing units in New York City; approximately two-thirds of these units are estimated to contain lead paint. See Shultz Aff. ¶ 6, n.3.

contractors. Moreover, DOH and HPD's experience has been that some owners will simply be unable to pay such bills. And others will be unwilling to incur such bills, and will attempt to correct the lead paint violations in a less expensive (albeit unlawful) manner by using unskilled contractors, thereby further increasing the potential for lead exposure. Under any of these scenarios, it is very probable that real lead paint hazards (involving deteriorated paint in units where children reside) will not be corrected in a timely and safe manner. And young children -- the very population intended to be protected by Local Law 1-- will suffer the most from this failure. See Leighton Aff. ¶ 9; Shultz Aff. ¶¶ 10 - 11.

9. In addition to the adverse health consequences that will be caused if a stay is not granted, there will be confusion among City agency staff, private landlords and tenants as they are forced to immediately adjust to a completely different regulatory structure. For example, HPD has issued thousands of lead paint violations predicated on Local Law 38. Some of these violations have not yet been corrected, and are the subject of litigation in housing court. Absent a stay, tenants and HPD in its enforcement actions will be hard-pressed to insist that these violations be corrected since they would have been issued pursuant to an inoperative law.[5] And those who will suffer most from the failure to correct these violations are young children. See Shultz Aff. ¶ 7.

10. The burden on the agencies of enforcing Local Law 1 will also be enormous. The time for HPD and DOH inspections of lead paint hazards would increase dramatically, since all intact paint surfaces would have to be tested initially with an XRF analyzer, and if negative, by a paint chip analysis to determine if such surfaces contained lead

[5] Indeed, based on the trial court's decision in this action, since October 2000 Housing Court judges have postponed cases commenced by HPD's Housing Litigation Division that allege that an owner falsely certified correction of a Local Law 38 lead paint violation.

paint. If owners did not correct these lead paint violations, HPD would either have to initiate a court proceeding to force the owner to do so, or would undertake such abatement jobs itself. HPD estimates that the cost of these jobs could easily run in the millions of dollars. See Shultz Aff. ¶¶ 8, 23, 26 - 27, 29 - 31, 33 - 34 & 36; Leighton Aff. ¶ 10.

11. The burden described above is not theoretical. Specifically, in the fall of 1998 DOH was forced to implement Local Law 1's mandate to inspect for and order the abatement of intact lead paint when responding to a report of a child with an elevated lead level. During that time, the time required for DOH inspections more than doubled, from an average of three hours to an average of seven hours per apartment unit. And one inspection lasted fifteen hours. Not surprisingly, this added burden was a severe strain on the DOH staff, as well as on the families who lived in these apartment units. Indeed, in at least one instance DOH staff was physically threatened while carrying out an inspection. See Leighton Aff. ¶ 10.

12. The burden on HPD of complying with Local Law 1 as a property owner of more than 13,000 apartment units would also be enormous. HPD, like any private owner, would be required to abate all lead paint, intact or peeling. It is estimated that the number of lead abatement jobs that HPD would have to undertake would increase significantly, at an additional cost that could quickly run in the millions of dollars. See Shultz Aff. ¶¶ 38 - 39.

13. The burden on private multiple dwelling owners to comply with Local Law 1 would similarly be enormous. Owners would have to be immediately educated both that Local Law 38 was no longer operative, and about the substantially different obligations under Local Law 1. This is no simple task, as indicated by the extensive efforts undertaken by landlord organizations to educate their members about Local Law 38. Indeed, confusion would be the norm; the RSA already has received numerous calls from its members about the status of Local

Law 38. See Strasburg Aff. ¶ 9. In addition, any owner that received a lead paint violation would be required to abate such violation within twenty-four hours, and would face lead abatement bills that, as noted above, could easily reach $15,000 to $20,000 per apartment. And as noted supra ¶ 8, owners that could afford such would likely be unable to abate intact lead paint and correct lead hazards in a timely manner because of a severe shortage of EPA licensed contractors. Both HPD and private owners would also have to pay for the relocation of tenants when extensive intact lead paint abatements are performed.

14. Finally, if defendants here ultimately prevail on appeal, Local Law 38 will come back into force. At that point there would be massive further confusion among both private multiple dwelling owners and tenants as they try to determine their rights and responsibilities under a lead paint regime that has repeatedly changed. For instance, many would be confused as to their rights and responsibilities pertaining to violations issued during this interim Local Law 1 period, as well as to the status of violations previously issued under Local Law 38. Both HPD and DOH would also have to change course yet again to begin enforcing Local Law 38. These repeated changes would place significant burdens on the agencies as they once again have to change their procedures and retrain their staff. The chaos that would result as the lead paint laws are repeatedly changed would not be conducive to the principal goal of any of the parties here: protecting children from lead paint hazards.

FACTUAL BACKGROUND

15. For more than a decade before the enactment of Local Law 38, there was an ongoing debate about appropriate legislation to prevent childhood lead paint poisoning. This debate resulted, in large part, from court rulings interpreting Local Law 1 to require the abatement of intact lead paint.[6] As the court below recognized, however, the consensus throughout the country was that intact lead paint did not pose a hazard, and should not be disturbed.[7] See Ex. B (10/11/00 Decision at 6). See also Leighton Aff. ¶ 8 & n.3.

16. The debate on appropriate legislation intensified in September 1998, when the City was served with notices of entry of various orders that required full implementation of Local Law 1 as interpreted by the courts. DOH and HPD, under threat of criminal and civil contempt against various City officials, including their Commissioners, promulgated regulations that mandated, among other things, that intact lead paint be abated.

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[6] Even the court in the Local Law 1 litigation expressed doubts about Local Law 1. See NYCCELP v. Giuliani, transcript at 14-15 (Sup. Ct. N.Y. Co. Dec. 14, 1995) (Ex. D) ("The City has amassed an impressive display of authority tending to show that the statute that Judge DeGrasse based his order on may not be the most practical, economical and expedient way of eradicating poisoning of children from lead-based paint and costs to the City are quite substantial. Nevertheless, while the statute is in force, it is the clear mandate of the law, which this Court is bound to follow, along with Judge DeGrasse's order, which this court is duty-bound to follow as the law of the case.").

[7] The City Council also heard testimony that the abatement of intact lead paint would actually endanger the health of children by creating lead dust hazards where none previously existed. See, e.g., Ex. E (Testimony of Vincent Collucio, Dr.PH., Vice President, ATC Associates Inc., at 2) ("The scientific literature clearly shows that intact lead paint is not a hazard but it can become hazardous in the course of renovation and improper abatements. We are well aware of the creation of dust lead hazards during the removal of non-hazardous, intact lead paint, especially when this work is performed in the City's occupied multi-family dwellings"). In addition, the City Council heard testimony that the mandate to abate intact lead paint would have a detrimental effect on the City's affordable housing stock. See, e.g., Ex. F (Testimony of former HPD Commissioner Richard Roberts, at 8) ("It is truly ironic that the proposed rules [mandating abatement of intact lead paint] may severely exacerbate the lack of affordable housing in the City, without achieving the goal of protecting the safety of children.").

17. On December 16, 1998, the City Council Committee on Housing and Buildings held a hearing on these regulations. Former HPD Commissioner Roberts and DOH Commissioner Dr. Cohen testified at length about the dire situation that was unfolding as the agencies prepared to implement Local Law 1's mandates, and also stressed the need for legislative change. See Exs. F & G.[8] In addition, many other experts on public health and housing testified and/or submitted written testimony on the dire effects if Local Law 1 was fully implemented.

18. Beginning in January 1999, the City and the plaintiffs in the Local Law 1 litigation entered into a series of "so ordered" stays of the court's orders, thereby postponing implementation of Local Law 1's requirement, among other things, to abate intact lead paint. Consequently, Local Law 1 as interpreted by the courts was never fully enforced. The final order staying implementation expired on June 30, 1999.

19. On June 21 and 24, 1999, the City Council's Committee on Housing and Buildings held hearings on proposed lead paint legislation. The hearings lasted more than twelve hours, and a broad spectrum of individuals and organization representatives testified or provided written comments on the proposed legislation, including the former HPD Commissioner and DOH Commissioner, as well as representatives of the real estate industry, researchers, attorneys and members of the public concerned about lead poisoning. By the close of the June 24 hearing, twenty-two of the fifty-one City Council Members had participated in at least one of the hearings.

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[8] The voluminous transcripts of this and several other hearings, as well as numerous other documents, are part of the record below, and can be provided to the Court. A stack of these transcripts and documents stands nearly a foot high.

20. On June 30, 1999, the full City Council debated the merits of the proposed legislation, and then voted 36 to 15 to adopt the proposed legislation, and the proposed resolution pertaining to the environmental effect (as described in the SEQRA Negative Declaration) of the legislation. On July 15, 1999, Mayor Giuliani held a public hearing on the adopted legislation, and after due consideration of the record signed the legislation into law, making it Local Law 38.

21. After Local Law 38 was signed into law, HPD engaged in an agency-wide effort to redesign and, where necessary, create new procedures to enforce and comply with Local Law 38. The effort included drafting and enacting new regulations to implement Local Law 38, and incorporating the Local Law 38 mandates into the design of a new computer system. The agency also developed new operational procedures for a host of divisions involved in enforcing Local Law 38 mandates, and then trained staff accordingly. See Shultz Aff. ¶¶ 4, 15 - 22, 25, 28, 32 & 35.

22. Private multiple dwelling owners were also required to learn about and then implement Local Law 38 requirements into their daily operations. Through newsletters, conferences and meetings, the various private landlord associations educated their members on the new Local Law 38 obligations. See Strasburg Aff. ¶¶ 5, 11 & 12; Margulies Aff. ¶¶ 5 & 6; Spinola Aff. ¶¶ 6 - 8; LaPorte Aff. ¶ 7.

23. Less than a month before Local Law 38 was to take effect, the plaintiffs commenced the instant action by Order to Show Cause. On November 12, 1999, the City began implementing and enforcing Local Law 38. Three days later, the court below heard oral argument, and reserved decision.

24. In a decision dated October 11, 2000, the court below granted plaintiffs' application seeking nullification of Local Law 38. Until this decision, no court ruling had been issued that effected the City's implementation and enforcement of Local Law 38.

25. Plaintiffs' core contention was that prior to passing Local Law 38 the City Council should have prepared an Environmental Impact Statement ("EIS") rather than issuing a "negative declaration" stating that the law would have "no significant adverse impact on the quality of the environment." Ex. B (Decision at 9). While the court declined to rule on whether an EIS should have been prepared, the court found that the City Council did not give adequate consideration to potential environmental impacts prior to issuing its negative declaration. Id. at 11, 17-18.

26. The court noted that SEQRA, ECL § 8-0109[2], permitted an agency to issue a negative declaration in place of a full-fledged EIS, but that prior to issuance an agency "must identify the relevant areas of environmental concern, take a hard look at them, and make a reasoned elaboration of the basis for its declaration." Id. at 9. The court, however, held that in its details, the process required for taking a "hard look" prior to issuing a negative declaration is essentially the same as the process required for drafting, hearing comment on, and issuing an EIS. Id. at 10. The court also failed to specifically address the negative declaration itself and never made a determination as to whether it constituted a "reasoned elaboration" of the basis for the City Council's decision.

27. The court also acknowledged that the City Council had "a full discussion of the many issues involved," and that it was evident from the record that "each Council Member, whether voting for or against the legislation, voted for what he or she thought would be in the best interests of the City's children." Id. at 2. Yet the court subsequently found that the

City Council's consideration of potential environmental effects was "mostly perfunctory, rarely rising to the level of cursory." Id at 11. In arriving at this judgment, the court focused chiefly on the chronology and substance of public hearings. Id at 11-15. The court did not address the documentary evidence presented to the City Council. The court also cited as an infirmity of the procedure the fact that the City Council did not fully answer all of the environmental concerns "raised at the public hearings," id at 17, despite the fact that it is not *all* concerns raised *at public hearings* but all "relevant" concerns which an agency must consider. Rather than merely analyzing the relevant issue of whether the City Council, in the end, did in fact give due consideration to potential environmental effects, the court decision repeatedly editorialized on a non-relevant issue: its own doubts about City Council Members' inner motivations for supporting Local Law 38. Id at 1, 11, 12, 14.

28. On January 3, 2001, Justice York signed plaintiffs' proposed judgment. The judgment provides in pertinent part: "Ordered and Adjudged, that Local Law 38 of 1999 is hereby declared null and void." Ex. C at 3. Nearly two months later, on February 22, 2001, the judgment was entered. The following day plaintiffs served notice of entry, and on March 1, 2001, defendants served their notice of appeal. See Ex. K.

ARGUMENT

I. Defendants Have a CPLR 5519(a)(1) Statutory Stay Pending Appeal.

29. The City's timely appeal from the judgment invoked the automatic statutory stay provision of CPLR 5519(a), which provides, in relevant part:

> Service upon the adverse party of a notice of appeal . . . stays all proceedings to enforce the judgment or order appealed from pending the appeal . . . where:
>
> 1. the appellant . . . is . . . any political subdivision of the state[.]

30. The salutary purpose of CPLR 5519(a)(1) is "to stabilize the effect of an adverse determination to a political subdivision of the State, pending an appeal." Grant v. Metropolitan Transit Authority, 96 Misc. 2d 683, 686 (Sup. Ct., New York Co., 1978). The statute "expresses a public policy designed to protect a 'political subdivision of the state.'" DeLury v. City of New York, 48 A.D.2d 405 (1st Dept. 1975).

31. The declaratory judgment under review does not contain any provisions for injunctive relief, either mandatory or prohibitory. See Ex. C at 3. It contains no direct, coercive elements. Consequently, the City seeks a declaration that the automatic stay contained in CPLR 5519(a)(1) is effective to stay "all proceedings to enforce the judgment or order appealed from pending the appeal . . .", that is, a statutory automatic stay of any enforcement, by contempt, mandamus or otherwise, of the declarations of law contained in the judgment appealed from. The declaratory judgment is itself not coercive in nature and cannot be read as a prohibitory or mandatory injunction. Klostermann v. Cuomo, 61 N.Y.2d 525, 538 (1984). Recognition of a statutory stay of a declaratory judgment is both logical and necessary. We do not seek to undo the prudential effect of the declaration of rights contained in the judgment appealed from, but rather to prevent implementation of the declaration by other judicial

proceedings pending appeal so that Local Law 38 remains in force pending determination of this appeal.

32. Even if analyzed as if the judgment were directly coercive in notice, the statutory stay should be deemed to apply. Although the judgment contains no coercive elements, it does have the practical effect of changing the status quo by invalidating Local Law 38, which is a fully implemented, complex regulatory scheme in effect for the past sixteen months. The purpose of § 5519(a)(1) is to preserve the status quo when a governmental entity takes an appeal. Here, the status quo, by any measure of reality, is full implementation of Local Law 38. The declaration of invalidity of Local Law 38 and the consequent return to implementation of the significantly different requirements of Local Law 1 would effect a major change in the status quo of the rights and obligations pertaining to lead paint hazards. For this reason, the situation is akin to many mandatory orders that coerce governmental entities to change its activities and alter the status quo. Such cases have always been held subject to the automatic stay.

33. Cases where so-called prohibitory injunctions have been implicitly held to be exempt from the statutory stay involve situations where the injunction seeks to maintain the status quo, as in implementation of new programs or regulations and the effectuation of the automatic stay would actually allow the government to countermand the order appealed from and change the status quo. Thus, in Consentino v. Dowling, motion M-8119, decided February 29, 2000, the Court did not recognize a statutory stay where implementation of the new "back-end" regulations would have radically changed the existing homeless program. Significantly, the "back-end" regulations were never implemented prior to the City's appeal in that matter. By comparison, the instant declaratory judgment would effect a very significant change in an ongoing enforcement program.

34. The same analysis applies to this Court's rejection of a statutory stay in Matter of Medical Society of the State of New York v. Levin, motion M-3843, decided July 17, 2000. There, the new state regulations took effect in February 1, 2000 and petitioners presented an order to Show Cause on February 4, 2000, which was argued on February 7. The final judgment was signed on June 9, 2000 (Pet. Mem. in Support of Motion, at 18). The new regulations were never effectively implemented in the brief time period they were effective and could not have been inserted into a substantial number of new insurance policies. Thus, the Court was maintaining the status quo by rejecting existence of a statutory stay (Pet. Mem., at 19).

35. This Court has apparently also recognized this distinction between an order that alters or continues the status quo in Community School Board 9 v. Crew, 224 A.D.2d 8, 11 (1st Dept. 1996). There this Court refused to vacate the statutory stay that arose when the Chancellor appealed from a judgment of the Supreme Court that had reinstated suspended Community Board members. The suspensions under review took effect prior to commencement of the Article 78 proceeding. Thus the Supreme Court order changed the status quo by invalidating the suspensions and the statutory stay was held to apply.

36. This Court should follow its existing practice of recognizing the statutory stay in cases where declarations of invalidity of regulations or statutes are involved. See T.D. v. New York State Office of Mental Health, 228 A.D.2d 95, 102 (1st Dept. 1996) (recognizing but vacating statutory stay in case where judgment appealed from declared existing regulations invalid where regulations had been in effect for several years prior to judgment).

37. Indeed, the Court of Appeals has seemingly recognized the validity of the § 5519(a)(1) stay on an appeal to it from an order of the Appellate Division which declared invalid a village resolution declaring a housing emergency. Specifically, the Court stated that the

village resolution freezing rentals in the affected units remained in force pending the appeal to the Court of Appeals. Colonial Arms Apartments v. Mt. Kisco, 64 N.Y.2d 948, 949 (1985).

38. In City of New York v. State of New York, 1995 N.Y.App.Div.Lexis 10128 (1st Dept. Oct. 3, 1995), M-5149, this Court stated that "the statutory stay invoked by appellants [the State] is declared to be in full force and effect." The statutory stay allowed the State to enforce an amendment to the New York City Criminal Court Act that had been preliminarily enjoined by the order of the Supreme Court.

II. Assuming Arguendo that a Statutory Stay is Not in Effect, Defendants are Entitled to CPLR 5519(c) Stay Pending Appeal.

39. In moving for a stay under CPLR 5519(c), defendants have the burden of establishing a meritorious appeal, harm in the event a stay is denied, and no likely prejudice to the non-moving party if the stay is granted. Defendants here conclusively establish all three factors.

A. The Defendants have a Meritorious Appeal.

40. It is well settled under SEQRA that when an agency contemplates an action which, in its opinion, "may have a significant effect upon the environment," it must issue an EIS. N.Y. E.C.L. § 8-0109 [2]; Matter of Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 415 (1986). However, if an agency finds that the contemplated action is not likely to have an adverse impact upon the environment, it may instead issue a "negative declaration" to that effect, obviating the need to conduct a full environmental study and issue an EIS. 6 N.Y.C.R.R. § 617.2(h), § 617.7 (d), (e), (f); Jackson, 67 N.Y.2d at 430; Matter of Har Enterprises v. Brookhaven, 74 N.Y.2d 524, 528 (1989); Chinese Staff & Workers Assoc. v. City of New York, 68 N.Y.2d 359, 362, 364 (1986). A court reviewing the issuance of a negative declaration is to be guided by the limited standards applicable to administrative proceedings

generally: "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." C.P.L.R. §7803 [3]; Jackson, 67 N.Y.2d at 416; Fisher v. Giuliani, 2001 N.Y. App. Div. LEXIS 632, *12-13 (1st Dept. 2001); Aldrich v Pattison, 107 A.D.2d 258, 267 (2nd Dept. 1985). Specifically, a court must "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." Jackson, 67 N.Y.2d at 417; Matter of Kahn v. Pasnik, 90 N.Y.2d 569, 574 (1997); Apkan v. Koch, 75 N.Y.2d 561, 570 (1990); Fisher, supra at *12-13.

41. For two reasons, the court below was incorrect in finding that the "hard look" standard was not met when the City Council adopted the Local Law 38 Negative Declaration. First, it erroneously ruled that when taking a "hard look" prior to issuing a negative declaration the City Council must follow the more elaborate and onerous procedures for preparing an EIS; as a consequence the court found that the City Council's "hard look" was inadequate, and it also failed to address the negative declaration itself. Second, the Court failed to view the record in its entirety as per the normal practice of reviewing courts under SEQRA; instead it improperly limited its inquiry to a narrow portion of the record and gave undue weight to the length and substance of public hearings.

42. In its ruling, the court below purports to lay out the procedures that an agency must follow prior to issuing a negative declaration:

> In fact, the Court of Appeals has enunciated the details of a process which satisfies SEQRA's "hard look" requirement. "Pursuant to the statutory procedure, a draft EIS (DEIS) is prepared and, after a comment period and any public hearings deemed necessary by the agency, is reevaluated to determine in what way, if any, the EIS should be revised or supplemented so as to adequately address issues

> raised by the comments. . . . The agency then files a final EIS (FEIS) and after a final comment period and any appropriate hearings, the agency must make express findings that SEQRA's requirements have been met. . .

Ex. B (Decision at 10-11). This is a misstatement of the law. What the court below has quoted is in fact the procedure for preparing an EIS, not a negative declaration. The quoted procedure must be followed "*once an agency decides that an EIS is required.*" Jackson, 67 N.Y.2d at 415 (emphasis added.) But what is at issue here is the appropriate procedure for deciding whether an EIS is necessary *in the first instance*. When making *this* decision, an agency need not draw up a DEIS, as asserted by the court below; rather, it must "identif[y] the relevant areas of environmental concern" and take a "hard look" at them such that it has a reasoned basis for its decision to issue a negative declaration instead of an EIS.[9] Jackson, 67 N.Y.2d at 417; Kahn, 90 N.Y.2d at 574; Apkan, 75 N.Y.2d at 570; Har Enterprises, 74 N.Y.2d at 530. Further, the case quoted by the court below, Apkan, 75 N.Y.2d at 569, did not even involve a negative declaration. And in no case involving the issuance of a negative declaration is it suggested that an agency must follow these more onerous EIS procedures in order to satisfy the "hard look" requirement.

43. Having thus misframed the issue, the court below concludes that "[t]he Council's environmental review of Local Law 38 is in sharp contrast to this process." Ex. B (Decision at 11). Indeed it is in sharp contrast, as one might well expect. It is hardly surprising that the court below, having misstated the law, finds a "sharp contrast" between the procedures

[9] The lower court's interpretation would, of course, effectively require an EIS for every contemplated action which could conceivably have a significant environmental impact, thus eliminating an agency's well-settled authority under SEQRA to issue a negative declaration when it lawfully concludes that such adverse impact is unlikely.

actually followed by the City Council and the more onerous procedures that the court (incorrectly) believes to be required.

44. More fundamentally, the court below never specifically addressed the Local Law 38 Negative Declaration itself, and never made a determination as to whether it constituted a "reasoned elaboration" of the basis for the City Council's decision. The Court of Appeals requires the court to make this determination. Jackson, 67 N.Y.2d at 417. Had the court done so, it would have learned that the Negative Declaration focused its analysis on the most significant environmental impact of the proposed legislation, avoiding the looming public health and housing crisis posed by implementation of Local Law 1. Moreover, the Negative Declaration also took a hard look at Local Law 38's potential impact on the generation of hazardous materials, on socio-economic factors, on the generation of solid waste, and a host of other mandated areas of environmental concern.

45. Based on an incomplete review of the record as a whole, the court below also erred in its finding that the City Council did not take a "hard look" at the relevant areas of environmental concern. The court correctly states that judicial review is limited to whether the City Council's determination was arbitrary and capricious or an abuse of discretion, and specifically, "whether the respondents identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for their determination." Jackson, 67 N.Y.2d at 416-417; Kahn, 90 N.Y.2d at 574; Apkan, 75 N.Y.2d at 570; Har Enterprises, 74 N.Y.2d at 530; Aldrich, 107 A.D.2d at 267. But in conducting its own review, the court failed to look at the entire record as a whole, improperly limiting the scope of its inquiry and placing undue emphasis on the substance of public hearings and the public comment process.

46. In determining whether the City Council gave a "hard look" to potential environmental impacts of Local Law 38, the court below focused chiefly on the public hearing and comment process in the final days before passage. It found, based largely on a review of the chronology of these final public hearings and transcripts of same, that the City Council failed to take a "hard look." The Court says, for example:

> In the immediately following discussion of the bill itself, several councilmembers identified specific health hazards that would be created by the proposed law [citations omitted]. These were not addressed beyond general assurances by Council leadership that the legislation at hand was but a starting place and any resulting health hazards or implementation problems would be addressed if and when they developed.

Ex. B (Decision at 14-15). Such an analysis is not persuasive. The limited court review under the "hard look" standard does not require that every objection be answered or that no Council Member be dissatisfied with the proposed action. See Neville v. Koch, 79 N.Y.2d 416, 425 (1992) (an "agency's responsibility under SEQRA must be viewed in light of a 'rule of reason'; not every conceivable environmental impact, mitigating measure or alternative need be addressed in order to meet the agency's responsibility"). The crucial question for a reviewing court is whether the agency gave due consideration to the relevant areas of environmental concern. See Jackson, 67 N.Y.2d at 417; Kahn, 90 N.Y.2d at 574; Apkan, 75 N.Y.2d at 570; Fisher, supra at *12-13.

47. In answering this question courts look not just to the public hearing and comment process in the final days before an agency acts, but to the *record in its entirety* to determine whether there is evidence to indicate that the agency was in fact fully informed. See, e.g., Society of the Plastics Industry v. Suffolk, 77 N.Y.2d 761 (1991); Boyles v. Town Board of Bethlehem, 718 N.Y.S.2d 430, 433 (3rd Dept. 2000); Matter of Save Easton Environment v.

Marsh, 234 A.D.2d 616, 618-619 (3rd Dept. 1996); Matter of Balsam Lake Anglers Club v. Dep't of Environmental Conservation, 199 A.D.2d 852, 855 (3rd Dept. 1993); Horn v. County of Westchester, 106 A.D.2d 612, 614 (2nd Dept. 1984). In short, it is not sufficient that the court below did not find adequate deliberation *in the substance of the Council's hearings.* The Court must look to the record as a whole.

48. And the record below amply demonstrates that due consideration was given.[10] Local Law 38 was the subject of extended public discussion. Voluminous documentary evidence was received and considered by the City Council. Multiple hearings were held, in which numerous witnesses on various sides of the issue were heard. As the Court of Appeals has noted, review of an agency's SEQRA determination is "tempered" by a "rule of reason," whereby "'[n]ot every conceivable environmental impact, mitigating measure or alternative must be identified and addressed'" by the agency before SEQRA is satisfied. Jackson, 67 N.Y.2d at 417.[11]

49. It is true that the opinions expressed at the hearings were widely divergent. But a divergence of expert opinion is not dispositive of the "hard look" issue. See, e.g., Matter of Cohalan v. Carey, 88 A.D.2d 77, 80 (2nd Dept. 1982). A reviewing court looks only to see that the agency gave due consideration to the relevant issues such that it had a reasoned basis for its action. And here the record as a whole establishes that City Council properly addressed the relevant environmental concerns raised. Hearing from a variety of experts is itself indicative of the requisite "hard look," and has been recognized as such. See id (approval of agency action by

[10] As noted supra note 8, there is nearly a foot high stack of the documentary evidence and transcripts pertaining to the adoption of Local Law 38.

[11] In Jackson, the Court of Appeals was referring to review of an EIS, which of course involves a more detailed and comprehensive study of potential impacts than does a negative declaration.

Commissioner of Mental Health "implicitly denotes" that due consideration was given to "environmental" effect upon psychiatric patients, where Commissioner is charged with safeguarding the well-being of such patients).

50. The court below also noted that some speakers at the hearings were answered with assurances that further regulations promulgated after the passage of the law would address their concerns. This, again, does not demonstrate that the City Council failed to give due consideration to relevant environmental concerns. Moreover, acknowledging the City Council could revisit this issue merely indicates -- as the failed policies of Local Law 1 conclusively show -- that the lead paint poisoning prevention field is not static, and that in the future statutory mandates might change as knowledge of the most effective methods to address lead paint hazards change. Nor should the Court's apparent belief that the public hearing process was too brief be dispositive of the "hard look" issue. While it is undisputed that public comment, testimony, and discussion can be an integral part of the deliberative process, and that the substance of hearings may be evidence of such deliberation, it is nowhere indicated in the caselaw that a shortened hearings process, in and of itself, is evidence of a failure to take a "hard look." See, e.g., Society of the Plastics Industry, 77 N.Y.2d at 761; Boyles, 718 N.Y.S.2d at 433; Matter of Save Easton Environment, 234 A.D.2d at 618-619; Matter of Balsam Lake, 199 A.D.2d at 855; Horn, 106 A.D.2d at 614.

51. In short, on *limited* review under SEQRA, Jackson, 67 N.Y.2d at 417, Kahn, 90 N.Y.2d at 574, a court cannot properly say on this record that the City Council did not have a reasoned basis for passing Local Law 38. Voluminous documentary evidence was received; multiple hearings were held; expert testimony was heard; concerns were raised and answered. The court below may *prefer* that the process had been even more elaborate and

extended, but it can hardly say, on limited SEQRA review, that the Council's action was irrational

B. Young Children, Defendants and Private Owners will Suffer Irreparable Harm if the Stay is Denied, while Plaintiffs will not be Prejudiced if the Stay is Granted.

52. As set forth above and in extensive detail in the accompanying affidavits, numerous individuals and entities will suffer irreparable harm if the trial court's judgment is not stayed pending appeal. Most importantly, the recent significant reduction in the incidence of childhood lead poisoning will be reversed. If Local Law 1 is fully implemented, non-hazardous intact lead paint will have to be abated at an enormous per apartment cost. Such a mandate will most likely increase lead hazards. Moreover, it is very probable that real lead paint hazards will not be corrected in a timely and safe manner, to the detriment of young children.

53. In addition to the harm caused to young children if a stay is not granted, the harm to the agencies charged with enforcing Local Law 1 will be significant. The time required to inspect for lead paint will increase dramatically, since all intact surfaces will have to be tested, with a resulting significant strain on agency staff. Moreover, if private landlords fail to correct intact lead paint violations, HPD would have to ultimately do so; the cost of these jobs could quickly run in the millions of dollars. And the harm to HPD in its capacity as owner of 13,000 apartment units, and to private landlords of multiple dwellings will be enormous. Both HPD and these landlords will be faced with astronomical per apartment abatement costs. Finally, confusion as to the rights and responsibilities of those dealing with lead paint hazards will be the order of the day as questions are raised as to the viability of violations issued under Local Law 38. Moreover, this confusion will only get worse if the defendants ultimately prevail on appeal, and Local Law 38 is resurrected.

54. In stark contrast to the irreparable harm caused to young children, defendants, and others in New York City, plaintiffs will suffer no prejudice if a stay is granted. Indeed, plaintiffs' acts show that they did little to prevent any "prejudice" to their rights by doing little to prevent Local Law 38 from coming into effect. Although plaintiffs knew on July 15, 1999 that Local Law 38 would come into effect four months later, they waited for three months before commencing this action. Moreover, when plaintiffs finally commenced this action, they did not seek a temporary restraining order preventing Local Law 38 from coming into effect.

55. For these reasons and those discussed in the accompanying affirmations and affidavits, it is respectfully requested that this Court declare that there is in effect an automatic statutory stay pursuant to CPLR 5519(a)(1) such that all proceedings to enforce the declaratory judgment appealed from are stayed pending determination of this appeal, or in the alternative to such a declaration, granting a stay pursuant to CPLR 5519(c) of such proceedings to enforce the declaratory judgment pending the determination of this appeal.

Dated: March 12, 2001
New York, New York

MARK MUSCHENHEIM