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

In the Matter of the Application of NEW YORK CITY COALITION TO END LEAD POISONING, INC; NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.; NEW YORK STATE TENANTS & NEIGHBORS COALITION, INC.; MET COUNCIL, INC.; SINERGIA, INC.; ALIANZA DOMINICANA, INC.; CITY PROJECT, INC.; EAST NEW YORK UNITED FRONT, by its Chairperson, CHARLES BARRON; EL PUENTE OF WILLIAMSBURG, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, INC.; MAKE THE ROAD BY WALKING, INC.; NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE, INC.; SOUTH BRONX COALITION FOR CLEAN AIR, INC.; QUEENS LEAGUE OF UNITED TENANTS, INC.; INOCENCIA NOLASCO, GRECIA MARIA VASQUEZ, and her minor child, KATHERINE FIGUEREO by her next friend and mother, GRECIA MARIA VASQUEZ; CATHERINE RODRIGUEZ, and her minor children, DESTINY ALONSO, BIANCA RODRIGUEZ, and JOANNE MARRERO, by their best friend and mother, CATHERINE RODRIGUEZ; ANA GOMEZ, and her minor children, CHRISTIAN GOMEZ and STEPHANIE GOMEZ, by their next friend and mother, ANA GOMEZ; MARIA CELIA NOLASCO and her minor grandchildren JUSTIN AGRAMONTE and JUAN NOLASCO, JR., by their next friend and guardian, MARIA CELIA NOLASCO; and DAVID M. MONAHAN and JULIE MONAHAN, and their minor child IRIS EVE MONAHAN, by her next friends and parents, DAVID M. MONAHAN and JULIE MONAHAN,

Petitioners-Plaintiffs-Respondents

for a Judgment pursuant to Article 78 and § 3001 of the CPLR,

-against-

PETER VALLONE, as Speaker of the New York City Council; THE NEW YORK CITY COUNCIL; RUDOLPH GIULIANI, as Mayor of the City of New York; and the CITY OF NEW YORK,

Respondents-Defendants-Appellants.

New York County Clerk's Index No. 120911/99

MEMORANDUM OF LAW IN OPPOSITION TO APPELLANTS' MOTION FOR A STAY OF THE JUDGMENT BELOW AND IN SUPPORT OF PETITIONERS' CROSS-MOTION TO VACATE AUTOMATIC STAY, IF NECESSARY

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March 29, 2001

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INTRODUCTION

Petitioners-Plaintiffs-Respondents (hereinafter "Petitioners") respectfully submit this memorandum of law in opposition to Respondents-Defendants-Appellants' (herein "Appellants") motion for an Order declaring a C.P.L.R. § 5519(a) automatic stay to be in effect or for a discretionary stay pursuant to C.P.L.R. § 5519(c) of the Order and Judgment (hereinafter "Judgment") of the Supreme Court, New York County, entered on February 22, 2001. (Exhibit 121 to the March 29, 2001, Affirmation of Theodora Galacatos, filed herewith) (herein "Galacatos Aff.")[1]

The Judgment from which the appeal is taken nullified the Negative Declaration for New York City's Local Law 38 of 1999 (hereinafter "LL 38"). The New York City Council passed LL 38 on June 30, 1999, and the Mayor of the City of New York signed the legislation into law on July 15, 1999. The Judgment also nullified LL 38 in its entirety.

Petitioners urge this Court to deny appellants' motion. No automatic stay of enforcement exists pursuant to CPLR § 5519(a)(1) under the circumstances presented here, because the Judgment

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1. To avoid any confusion with the 115 numbered exhibits submitted by petitioners in the proceedings below, petitioners have commenced the enumeration of additional exhibits submitted in opposition to appellants' motion and in support of the instant cross-motion at number 116. For the convenience of the Court, the papers submitted by petitioners below are provided as appendices herewith in four volumes, as follows:

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

References to the affidavits and affirmations submitted in support of the Petition will be made herein thus: Landrigan Aff. (Affirmation of Philip Landrigan, M.D.), Lanphear Aff. (Affidavit of Bruce P. Lanphear, M.D.), I. Mauss Aff. (Affidavit of Irving Mauss, M.D.), Needleman Aff. (Affidavit of Herbert Needleman, M.D.), Rosen Aff. (Affidavit of John F. Rosen, M.D.), Gilbert Aff. (Affidavit of Charles Gilbert, Ph.D.), E. Mauss Aff. (Affidavit of Evelyn Mauss, Sc.D.), Newman Aff. (Affidavit of David Newman, M.S.), Olmsted Aff. (Affidavit of Edward Olmsted, C.I.H.), Rosen Reply Aff. (Reply Affidavit of John F. Rosen, M.D.)

is fully self-executing and requires no further enforcement in this action, and, for the same reasons, a discretionary stay is equally unavailable under CPLR § 5519(c).[2] Even assuming, arguendo, that CPLR § 5519(c) were available, however, a balancing of equitable factors would militate strongly against such a stay, as the law should favor compliance with environmental review laws and the protection of children from the increased risk of lead poisoning over the possible inconvenience to appellants and landlords, especially since appellants are highly unlikely to prevail on appeal. Those same equities militate for the vacatur pursuant to CPLR § 5519(c) of any automatic stay, if such stay exists.

The Parties

The petitioners in this case include organizations and individuals. The organizational petitioners are city-wide and neighborhood-based non-profit organizations, unincorporated associations, and coalitions seeking to prevent child lead poisoning in New York City, as well as city-wide and state-wide tenant organizations. Their members include parents who either have lead poisoned children or are concerned about their children's risk of lead poisoning. Individual petitioners — all of whom reside in New York City — are parents of young children residing in multiple and non-multiple dwellings built before 1960. Several petitioners reside in premises with

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2. Appellants' counsel explains in the first paragraph of his affirmation that appellants seek an order

> 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 . . . or . . . granting a stay pursuant to CPLR 5519(c) of all proceedings to enforce the declaratory judgment . . . . 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.

Muschenheim Aff. at ¶ 1. Petitioners would concur with the latter two sentences, but maintain that as there are no further proceedings needed to enforce the declaratory judgment in this action, appellants' entire motion is moot.

a documented presence of lead paint; one petitioner has grandchildren who reside with her who have elevated blood lead levels.

Appellants are Peter Vallone, as Speaker of the New York City Council; the New York City Council ("City Council" or "Council"); Rudolph Giuliani, as Mayor of the City of New York; and the City of New York.

The Underlying Petition

On October 14, 1999, petitioners commenced the instant combined declaratory judgment action and Article 78 proceeding by show cause Order,[3] challenging appellants' enactment of Local Law 38 on the ground that appellants violated the State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq. SEQRA requires that governmental agencies such as the City Council consider and minimize every potential environmental impact that may arise from a proposed action. To achieve this, SEQRA requires advance preparation of a detailed "environmental impact statement" ("EIS") for any action which "may" have even a single significant adverse effect on the environment, including creating a hazard to human health. See, e.g., ECL §§ 8-0109 (2), (4); 6 N.Y.C.R.R. §§ 617.7(a)(1-2), 617.7 (c)(1)(vii).

Petitioners averred that LL 38 would have significant, substantial adverse environmental effects, putting children at greater risk of lead poisoning. Petitioners asserted that the Council, nonetheless, failed to meet SEQRA's most basic procedural and substantive requirements and to consider the potential adverse environmental effects of LL 38. The existence of even a single adverse impact triggers a full EIS, see, e.g., Chemical Specialties Mfrs. Ass'n v. Jorling, 85 N.Y.2d

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3. The October 14, 1999, Show Cause Order and the October 12, 1999, Verified Petition and Memorandum of Law in Support thereof are in Volume I of the appendices submitted herewith.

382, 397 (1995) ("an [EIS] is triggered by a relatively low threshold" (citation omitted)); Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 364 (1986) (same).

Petitioners identified many adverse environmental impacts that would arise from LL 38 but were not evaluated by appellants pursuant to SEQRA.[4] To list just five:

! Experts recognize lead contaminated dust as the single greatest source of toxic lead exposure for young children.[5] While New York City's legal framework previously treated it as an immediate hazard, LL 38 eliminated almost all regulation of lead dust and the housing conditions that create it. These changes constitute a potential public health disaster for New York City children under 7 years of age.[6]

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4. Two tables, comparing side-by-side the then-existing laws and regulations with Local Law 38, were annexed as Attachments A and B to the Memorandum of Law in Support of the Petition, see Volume I of the appendices submitted herewith.

5. See, e.g., Lanphear Aff. ¶¶ 5-7, Gilbert Aff. ¶ 11, 17, Rosen Aff. ¶ 5-7. Lead dust is so toxic to children that the federal Department of Housing and Urban Development ("HUD") has recently lowered its safety standards to only 40 micrograms (millionth's of a gram) per square foot of floor area ($\mu g/ft^2$), 64 F.R. 50140, 50181 (1999), an amount that is less than half the mass of a single particle of coffee sweetener. Ex. 77 (Tr. of Council's Housing and Buildings Committee on June 21, 1999), at 218 (testimony of Nick Farr, Executive Director of the National Center for Lead Safe Housing), at 303-08 (testimony of Dr. E. Mauss), at 292-94 (testimony of Dr. Rosen). Even appellants' Health Commissioner acknowledged in testimony that:

> We know now that lead-contaminated dust is the predominant source of lead poisoning, and most likely the best predictor of children's risk.

Id. at 123.

6. Pet. ¶¶ 3, 16-19, 57, 81, 93, 103, 115, 138, 150-60, 169, 174-81, 191-93, 199, see Landrigan Aff., ¶¶ 13-14 and Ex.A thereto; Ex. 15; Ex. 77 (Tr. June 21, 1999 at 133-40); id. (Tr. June 21, 1999 at 292-94 (Dr. Rosen's testimony that "friction surfaces must be ... abated to control the ... lead dust problem")), and Rosen Aff. ¶¶ 6, 17 (noting that defining lead hazards as only peeling paint inevitably fails to regulate many conditions which produce lead dust and poison children).

Most recently, a study by the United State Department of Housing and Urban Development ("HUD") found that one out of three homes with lead based paint in good condition nonetheless have hazardous levels of lead dust. HUD, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, Peer Review Draft, January 12, 2001, at 5-15 (continued...)

! Data compiled by the New York City Department of Health ("DoH") reveal that 9% of children identified with a blood lead level of 20 micrograms per deciliter are older than six years of age. Ex. 111 at 47. Lead poisoning prevention laws under pre-LL 38 regulations applied to all children up to age seven. LL 38, however, eliminated all lead poisoning prevention requirements for children between the ages of six and seven.[7]

! Studies overwhelmingly show that carefully followed safety measures during lead paint removal and repair work to control and remove toxic lead dust and chips from the environment effectively reduce children's blood lead levels and dust lead levels in homes. On the other hand, conducting such work without proper controls results in environmental hazards, and lead dust and blood lead levels often increase, sometimes dramatically. Pre-LL 38 regulations required all lead paint repair and abatement activities to comply with detailed safety measures issued by the Board of Health. New York City Coalition to End Lead Poisoning v. Giuliani, 173 Misc. 2d 235, 239-40 (S. Ct. N.Y. Co. 1997), aff'd, 248 A.D.2d 120 (1st Dep't 1998) ("NYCCELP VII"). By contrast, LL 38 exempted almost all such work from these safety standards, unless a child was already poisoned or unless the landlord had delayed repairs for an extended period of time.[8]

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6. (...continued)
(available online at www.hud.gov/lea/Vol1finalreport.pdf). Yet under LL 38, landlords (who need not have any training in lead hazard inspection or control) need only to visually inspect for peeling paint once a year, ignoring dust-generating friction sources such as lead paint coated window frames.

7. Pet. ¶¶ 3, 18-19, 65, 81, 152, 183, 199; see E. Mauss Aff. ¶ 9 and Att. A; see also Rosen Aff. ¶ 19 (stating that his clinic has seen hundreds of lead poisoned six year olds over the past quarter century). See also, Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64, 66 (1st Dep't 1996) (blood lead levels "as low as two [µg/dL] in children under seven years old lowers IQ, stunts growth and causes behavioral problems") (emphasis added).

8. See Pet. at ¶¶ 153-161; Landrigan Aff. ¶ 14; I. Mauss Aff. ¶ 8; Needleman Aff. ¶ 5; Lanphear Aff. ¶¶ 8-12, Gilbert Aff. ¶¶ 26-51; Newman Aff. ¶¶ 8-12; Olmsted Aff. ¶¶ 5-15, 20; Ex. (continued...)

! When lead paint hazards exist in the dwelling of a young child, exposure can occur immediately and no recognized safe period exists for delay in correcting the hazards. Pre-LL 38 law required correction of lead paint violations within 24 hours, unless extended by the Department of Housing Preservation and Development ("HPD") for good cause. Without explanation, LL 38 increased this time to at least 21 days, and in some cases up to 66 days. LL 38 also authorized as much as half a year to transpire after a tenant's complaint before the City had to assure the violation's correction.[9]

! When the owner of a 1- or 2-family dwelling did not comply with a DoH order to correct because a child was lead poisoned, pre-LL 38 law required DoH, within 16 days, to direct HPD to execute the order instead, and HPD had to execute this request within 18 days. LL 38 deleted this required time frame, and failed to impose any enforceable time frame whatsoever. Allowing lead hazards to remain in these dwellings, potentially forever, will have profound public health and environmental impacts.[10]

Despite universally vehement objections from renowned medical and environmental experts, (see, e.g., Pet. ¶¶ 93-97, 114-115, 127, 128, 131-32, 139-40, and exhibits cited therein) appellants

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8. (...continued)
73-a; Ex. 77, at 431-32; Ex. 78, at 180-85; Ex. 91.

9. See Pet. ¶¶ 165-68, 195-97; I. Mauss Aff. ¶ 8; Needleman Aff. ¶ 5; Rosen Aff. ¶ 9; Landrigan Aff.; Gilbert Aff.; Olmsted Aff.; and Exs. 24, 26, 27, and 29.

10. See Pet. ¶¶ 19, 172, 176, 182; Ex. 78 (Tr., June 24, 1999, at 120 (Councilmember Linares stating "for the record" his concern that LL 38 failed to protect children in 1- and 2-family homes from further exposure to lead hazards); id. at 86-87 (Director of the Lead Poisoning Prevention Project in Montefiore Medical Center, asserting that LL 38 will increase the number of children living in 1- and 2-family homes that will be exposed to lead hazards)); see also Rosen Aff. ¶ 20 (noting that about 35% of a random sample of 3,000 children treated at his program at Montefiore live in 1- or 2-family homes) and ¶ 12 (explaining the medical necessity that after treatment a lead poisoned child be discharged only to an environmentally safe home).

ignored obvious adverse environmental effects and, instead, issued a Negative Declaration (stating that LL 38 would result in "no significant adverse impact on the quality of the environment"). (Ex. 1) The record, however, established conclusively that LL 38 weakened significant provisions of the pre-existing comprehensive legal framework for protecting children from environmental lead exposure.

While SEQRA allows an agency to dispense with an EIS for actions having truly minimal potential adverse environmental effects, ECL § 8-0109(2), the law still compels the preparation and issuance of a negative declaration that (1) identifies the relevant areas of environmental concern, (2) takes a "hard look" at them, and (3) makes a reasoned elaboration of the basis for the determination. Kahn v. Pasnik, 90 N.Y.2d 569, 574 (1997) (citations omitted); Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986). Appellants failed to comply with this substantive requirement. For example, far from taking a "hard look" at the many obvious changes in the way New York City would address lead paint hazards under LL 38, the Negative Declaration (Ex.1) quite literally failed to mention them. The document even omitted to identify "public health" as a possible area of environmental concern. It expressed not one word of opinion on the desirability of the five changes identified in pages 4 to 6 of this memorandum. Id. Furthermore, its conclusory statements failed to contain a single reference to expert opinion or to supporting documentation.

Finally, SEQRA also imposes minimal procedural standards designed to insure a thoughtful and deliberate process when issuing negative declarations. Chief among these requirements is that agencies must declare whether an EIS is needed as early as possible in the formulation of a proposed action to insure that environmental concerns become an integral part of decisionmaking. ECL § 8-0109 (4); 6 N.Y.C.R.R. § 617.6 (b)(1)(i). In this case, the Council's Housing Committee released

and adopted the Negative Declaration on the same day the Committee voted to adopt LL 38 and six days before the law's passage by the full Council. Ex. 78 (Tr. June 24, 1999, at 237-38).[11] Neither the public nor involved agencies participated in the negative declaration process. Pet. at ¶¶ 120-125. Petitioners asserted that the Council's gross violations of SEQRA procedures alone warranted nullification of the Negative Declaration and of LL 38. Pet. at ¶¶ 142-47.

The Proceedings and Decision Below

The underlying proceeding was fully briefed and argued below before Justice Louis York on November 15, 1999.[12] On October 11, 2000, the court below issued a written decision (Galacatos Aff. Ex. 122) (herein "Slip op."). The court's decision concluded that "[t]he Council's environmental review of [LL 38] [was] in sharp contrast" to that required by SEQRA, being "mostly perfunctory, only occasionally rising to the level of cursory, with the operative word being alacrity rather than analysis." Slip op. at 11.

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11. The sum total of the discussion by the Council's Housing and Building Committee on the Negative Declaration consisted of the following:

> CHAIRPERSON SPIGNER: Okay, let's move on now to the negative declaration, which is a part of the procedure I am told we must comply with. . . . Let me turn to Terzah Nasser, Counsel for the Committee.
>
> MS. NASSAR: Okay, the next vote will be on a resolution . . . [on] which we will shortly have a vote, [that] local law [38] . . . will not have a significant adverse impact on the environment. There are copies of the negative declaration available for members who wish to review it. Actually, it has been on your desks. Thank you.
>
> CHAIRPERSON SPIGNER: As has been described, a roll call now on the negative declaration, which was explained to you by counsel. Roll call, please.

Ex. 78 (Tr. June 24, 1999, at 237-38).

12. The transcript of the oral argument is annexed as Exhibit 130 to the Galacatos Affidavit. The petitioners' initial and reply briefs are in Volume 1 of the appendices submitted herewith.

As the lower court correctly stated,

> "In reviewing an agency's SEQRA determination, the standard of review is whether the determination was arbitrary and capricious or an abuse of discretion." Cathedral Church of Saint John the Divine v. Dormitory Auth., 224 A.D.2 95, 100 (3d Dep't 1996) (citations omitted), leave denied, 89 N.Y.2d 802 (1996). "[T]he role of the courts is not to weigh the desirability of any action or to choose among alternatives, but to review the agency procedures, to determine whether they were lawful, and 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." Coalition for Responsible Planning v. Koch, 148 A.D.2d 230, 233 (1st Dep't 1989) (citation omitted)), leave denied, 75 N.Y.2d 704 (1990)).

Slip op. at 15. The court emphasized that lead poisoning falls squarely within SEQRA's purview and stated that "[t]here can be no doubt that this potential danger to children . . . constitutes the 'hazard to human health' contemplated by both SEQRA and CEQR." Id. at 5 (citations omitted). The court further reasoned that the key question before it (and before the Council) was whether LL 38 wrought changes that "may increase the likelihood of lead being introduced into the bodies of children living in affected housing units, thereby creating a possible hazard to the health of those children." Id. at 5-6.

The court found that LL 38 "altered" "core provisions" of the preexisting statutory and regulatory scheme for protecting children against lead poisoning, id. at 7, and that "[f]or purposes of the issues before the court, . . . on their face these changes could pose . . . a hazard [to human health]." Id. at 8 (emphasis added). The court pointed, in particular, to "[t]he fact that [LL 38] lower[ed] the age of children to be protected and raise[d] the lead content required to deem paint lead-based, without any explanation for such change, [as] enough to raise questions that must be answered." Id.

Given LL 38's extensive changes to the statutory and regulatory scheme for lead poisoning prevention, the court found that "the record does not indicate that the Council gave [the necessary]

reasoned consideration to the environmental concerns raised at the public hearings or even through its own discussion of the proposed legislation." Id. at 17.[13] The court went on to state that:

> Indeed, the transcript of the Council's June 30 session clearly shows that almost all concerns raised by councilmembers were answered with "we know the legislation is not perfect, but we can address any problems with it as they come up." As recently noted by another justice of this state's Supreme Court, "[b]y issuing a negative declaration on the basis that these issues would be worked out in the future, the [Council] abdicated its decision making authority." "Clearly [the Council] failed to take a 'hard look' at the problems and adverse potential effects. . . . Not only did it fail to analyze the . . . problems entailed, but it vaguely recognized their existence and relied upon general assurances that after the problems developed the . . . City . . . would adequately mitigate them by some unspecified appropriate action. . . . It is inconceivable that the Legislature envisioned or intended that its EIS requirement could be avoided by an . . . agency which . . . declined to recognize egregious environment problems. In Alice-in-Wonderland manner, [appellants] separated and put aside the realities of the . . . problems."

Id. at 17-18 (citations omitted). Citing Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64, 74 (1st Dep't 1996), the court added that this Court's jurisprudence already holds an EIS to be necessary before approval of lead-based paint removal procedures. Id. at 18.

The Issuance of the Judgment Below

On January 3, 2001, the court below issued its Judgment, entered February 22, 2001, (Galacatos Aff. Ex. 121) nullifying the Negative Declaration and LL 38. Petitioners served the Judgment with Notice of Entry on appellants on February 23, 2001. (Galacatos Aff. Ex. 121) On

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13. Indeed, the prime (and sole) sponsor of LL 38, Housing Committee Chair Archie Spigner, urged the deregulation of lead dust controls not on the grounds that lead dust was no longer a significant public health hazard, but rather, because the degree of danger to children from lead-dust had not been (in his opinion) adequately studied and was unknown. At the conclusion of the debate and immediately prior to Council's final vote, Mr. Spigner stated that there was "a great deal of confusion ... as to what and how to control and measure lead dust" and that lead dust was "very insidious." Ex. 79 at 232.

He then concluded: "I don't know how you keep a room or an environment dust, lead dust ... free. So that is an issue that we have yet to talk about." Id. at 232-33 (emphasis added).

March 1, 2001, appellants served a notice of appeal. (Galacatos Aff. Ex. 123).

The Circumstances Surrounding Appellants' Motion

At a status conference before Justice York on October 27, 2000, (subsequent to the decision but prior to the issuance of the Judgment) the parties discussed whether CPLR § 5519(a)(1) applied in this instance. Petitioners asserted that no stay was available, under the authority of recent case law such as Pokoik v. Department of Health Servs., 220 A.D.2d 13, 15 (2d Dep't 1996), and at Justice York's request provided copies of this Court's unpublished decisions in Medical Society of the State of New York v. Levin (1st Dep't, July 17, 2000) (Galacatos Aff., Ex.127) and Cosentino v. Dowling / McCain v. Giuliani / Lamboy v. Hammons (1st Dep't, February 29, 2000) (Galacatos Aff., Ex. 128), as well as copies of briefs submitted by both sides in Medical Society. Copies were supplied to appellants as well.

When petitioners served the notice of entry of the judgment, they enclosed a cover letter reiterating the position that CPLR § 5519(a)(1) does not provide for an automatic stay under these circumstances, but nonetheless expressed a willingness to explore with appellants any interim proposals concerning the stay issue or other settlement. (Galacatos Aff. Ex. 124) In an ensuing exchange of letters and phone calls between February 23, and March 9, 2001, (Galacatos Aff. Ex. 124) petitioners made a specific proposal to appellants;

> that, while an appeal was pending, plaintiffs would agree to a stay of City inspection and enforcement of intact lead paint violations in non-lead-poisoned children's homes, provided the City agreed to enforce all other aspects of the regulations it proposed in late 1998 to carry out enforcement in accordance with the Supreme Court's and Appellate Division's prior directives [in NYCCELP v. Giuliani] . . . . specifically . . . § 11-05(b)(2) of those regulations. . . . plaintiffs' understanding [is] that they would thus be staying those enforcement obligations that the City felt were the most onerous.

March 6, 2001, letter from Matthew J. Chachère (petitioners' counsel) to Mark W. Muschenheim

(appellants' counsel) (Galacatos Aff. Ex. 124).[14]

Appellants, however, refused to even discuss this proposal unless petitioners first stipulated that LL 38 — even though illegally enacted, and declared invalid by the court below — remain in effect. Instead, on March 12, 2001, appellants brought the subject motion.

ARGUMENT

II. THE AUTOMATIC STAY PROVISION OF C.P.L.R. § 5519(a)(1) IS INAPPLICABLE TO THE JUDGMENT BELOW THAT NULLIFIED THE CITY COUNCIL'S NEGATIVE DECLARATION AND LOCAL LAW 38.

"CPLR 5519(a), by its express terms, only provides a stay of proceedings to enforce the judgment or order appealed from," Pokoik v. Department of Health Servs., 220 A.D.2d 13, 14 (2d Dep't 1996) (emphasis in original), and is thus wholly inapplicable to the instant situation. The Judgment's decretal paragraphs consisted entirely of the following:

> ORDERED that the petition is granted, and it is further
>
> ORDERED and ADJUDGED that the Negative Declaration for the proposed local law now known as Local Law 38 of 1999, which was passed on June 30, 1999, by the City Council of the City of New York as "Preconsidered Int. No. 582" and signed into law by the Mayor of the City of New York on July 15, 1999, is hereby declared null and void, and it is further
>
> ORDERED and ADJUDGED that Local Law 38 of 1999 is hereby declared null and void.

Judgment, at 3. As there remains nothing further for petitioners to enforce in this case, there is likewise nothing to be stayed.

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14. A copy of the proposed HPD regulations for implementing Local Law 1, published in the City Record, October 9, 1998, at 3505-3506, is Exhibit 125 to the Galacatos Affidavit.

A. CPLR § 5519(a)(1) Does Not Apply to a Self-Executing Judgment, Which Takes Effect Immediately and Requires No Enforcement.

CPLR § 5519(a)(1) states that when a governmental entity appeals a decision, order or judgment, the mere

> [s]ervice upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal.

(Emphasis added.)

Published Second Department decisions contain perhaps the most detailed recent explications of stays under CPLR § 5519. In Pokoik v. Department of Health Services, a leading case on stays, the court noted the two types of judgments and orders that exist: "those that are immediately executed upon the promulgation of the judgment or order, and those that direct the performance of some act in the future and are thus executory, requiring voluntary or compelled compliance to cause them to become executed." 220 A.D.2d at 14. The court explained that "the scope of the automatic stay of CPLR § 5519(a) is restricted to the executory directions of the judgment or order appealed from which command a person to do an act. . . .". Id., at 15. By contrast,

> [t]hose provisions of the judgment or order appealed from which are self-executing upon its promulgation . . . are not undone. That is to say, an appeal by the State, a political subdivision thereof, or their officers or agencies does not suspend the operation of the order or judgment and restore the case to the status which existed before it was issued. A motion decided by an order does not become undecided and the declaratory provisions of a judgment are not undeclared when a governmental party serves a notice of appeal therefrom.

Id. at 15 (emphasis added) (citations omitted). While appellants would seem to treat the lawfully entered declaratory judgment below as a mere advisory opinion, not binding until it is ratified by this Court,

> [i]t is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal.

Da Sivla v. Musso, 76 N.Y.2d 436, 440 (1990).

Thus, in Pokoik, the Court held that an order granting partial summary judgment was "self-executing" and not subject to § 5519(a)(1), while orders directing defendants to submit memoranda of law and documents were "executory" and subject to the automatic stay. Id. at 17; see also Pickerell v. Town of Huntington, 219 A.D.2d 24, 25 (2d Dep't 1996) ("Since the provisions of the instant order . . . were self-executing, and were effective upon the promulgation of the order, they were not subject to the automatic stay provisions of CPLR § 5519(a)(1)."); State of New York v. Town of Haverstraw, 219 A.D.2d 64, 65 (2d Dep't 1996) ("[T]he service of a notice of appeal by the State . . . has the effect of automatically staying all proceedings to enforce executory directives in the order or judgment appealed from[;] [and] [e]xecutory directives are those which direct the performance of a future act."); Schwartz v. New York City Housing Auth., 219 A.D.2d 47, 48 (2d Dep't 1996) (stating that statutory stays under CPLR § 5519(a) pertain to enforcement proceedings only).

Because self-executory orders do not entitle governmental parties to automatic statutory stays, the Second Department has held that motions to vacate purported stays in such cases were ultimately unnecessary. See Executive Towers at Lido v. City of Long Beach, N.Y.L.J., Jan. 25, 2000, at 29 (2d Dep't) (declaring that no automatic stay of a trial had been obtained and denying non-governmental party's motion to vacate purported stay as academic).

The Third and Fourth Departments have long followed the Pokoik reasoning. See, e.g., Ulster Home Care, Inc. v. Vacco, 255 A.D.2d 73, 78 (3d Dep't 1999) ("[N]o automatic stay is available by appealing . . . from an order or judgment which prohibits certain conduct." (citations omitted));

Walker v. Delaware & Hudson R.R. Co., 120 A.D.2d 919, 919-20 (3d Dep't 1986) (deeming motion to vacate automatic stay of trial pending appeal of summary judgment "unnecessary" as the trial was "not a proceeding to enforce the order appealed from"); White v. City of Jamestown, 242 A.D.2d 979, 980 (4th Dep't 1997) (§ 5519(a)(1) "stays only proceedings to enforce an order" and it was irrelevant that an order as incident to other relief directed parties to proceed to trial because the "trial is not a proceeding to enforce an order"); Young v. State of New York, 213 A.D.2d 1084, 1084 (4th Dep't 1995) (dismissing motion to vacate automatic stay as unnecessary as "CPLR 5519(a)(1) stays only proceedings to enforce the order on appeal, not all proceedings"); Rotondo v. Reeves, 192 A.D.2d 1086, 1086 (4th Dep't 1993), mot. for lv. to app. dis'm, 82 N.Y.2d 706 (1993) (plaintiffs entitled to default judgment when defendants failed to interpose answer while appealing denial of motion to dismiss because serving an answer "did not involve a proceeding to enforce the order that determined [such] motion"); Baker v. Board of Educ., 152 A.D.2d 1014, 1014 (4th Dep't 1989) ("Neither a discretionary stay nor an automatic stay under CPLR 5519 stays all proceedings in the action; it stays only proceedings to enforce the order or judgment appealed from." (citations omitted)); Spillman v. City of Rochester, 132 A.D.2d 1008, 1008-09 (4th Dep't 1987) (dismissing as "unnecessary" motion to vacate automatic stay pending appeal of denial of motion to dismiss because appeal did not stay order's effect); Burlaka v. Greece Cent. Sch. Dist., 167 Misc. 2d 281 (Sup. Ct. Monroe Co. 1996) (stay prevents enforcement of judgment but not a determination of damages); see also Hicks v. Schoetz, 261 A.D.2d 944, 945 (4th Dep't 1999) (enforcement of prior judgment, "which was executory, not prohibitory," automatically stayed by governmental party's notice of appeal).

Although this Court has yet to publish any decisions specifically stating accord with the foregoing declared policy of the other three Departments, in at least two recent unpublished motion

determinations this Court has also restricted the reach CPLR § 5519(a)(1) to enforcement proceedings only. For example, in Medical Society of New York v. Levin (hereinafter Medical Society), Slip op., M-3843 and M-4057 (decided on July 17, 2000), petitioners sought to vacate a stay asserted by governmental appellants pursuant to CPLR § 5519(a)(1) regarding an order nullifying state regulations. This Court deemed the motion "unnecessary" and denied appellants' cross-motion for a discretionary stay of the order. Id. Similarly, petitioners in Cosentino v. Dowling, Slip op., M-8119 and M-381 (decided on February 29, 2000), also sought to vacate the governmental appellants' asserted automatic stay. This Court held that "to the extent that it seeks to vacate the City's purported automatic stay, the motion is denied as unnecessary, the provisions of CPLR 5519(a)(1) being inapplicable to the present matters." Id. at 2; see also "Today's News Update," N.Y.L.J., Mar. 2, 2000, at 1 (describing decision) (Galacatos Aff., Ex. 128). These recent unpublished decisions are thus in accord with the positions of the Second, Third, and Fourth Departments.

While a twenty year old First Department decision construing CPLR § 5519(a) appears to conflict with the more recent rulings in the other departments of the Appellate Division, see Eastern Paralyzed Veterans Association v. Metropolitan Transportation Authority, 79 A.D.2d 516, 516 (1st Dep't 1980), app. dism. 52 N.Y.2d 895 (1981) (holding that appeal from order denying motion to dismiss stayed governmental defendant's duty to interpose an answer), a 1992 First Department decision, on a different set of facts, found that the stay was not automatic even in the case of a mandatory order if the agency voluntarily complied and it thus never became necessary for the petitioner to seek enforcement. Raes Pharmacy, Inc. v. Perales, 181 A.D.2d 58 (First Dep't 1992). Similarly, the Cosentino and Medical Society decisions indicate that this Court no longer adheres to the conflicting position set forth in the early Eastern case with respect to self-executing orders and

judgments involving no mandates.[15]

Moreover, since Pokoik, and prior to Medical Society and Cosentino, numerous trial courts within the First Department have also adopted Pokoik's statutory interpretation. See, e.g., Lopez v. New York City Hous. Auth., 178 Misc.2d 719, 720-22 (Civ. Ct. N.Y. Co., 1998) (expressly adopting the Second, Third, and Fourth Department view and holding that a trial on damages is not an enforcement proceeding and hence not subject to an automatic stay under CPLR § 5519(a)(1)); Elzee Constr., Inc. v. New York City Hous. Auth., N.Y.L.J., July 29, 1999, at 21 (Sup. Ct. N.Y. Co.) (appeal of a denial of summary judgment does not automatically stay the trial, as "[t]he plain language of the statute makes it clear that not all proceedings in the action are stayed; only `proceedings to enforce the judgment or order'" (citation omitted)); Estate of Sol Goldman, N.Y.L.J., Nov. 14, 1997, at 26 (Surr. Ct. N.Y. Co.) (expressly citing and adopting Pokoik and noting that CPLR § 5519(a)(1) "is restricted to executory directions of the judgment or order appealed from"); but see Silver v. Pataki, N.Y.L.J., Mar. 23, 1999 (Sup. Ct. N.Y. Co.) (characterizing the Pokoik reasoning adopted by the Second, Third, and Fourth Departments as the preferable interpretation of

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15. Appellants' citations to Community School Board 9 v. Crew, 24 A.D.2d 8, 11 (1st Dep't 1996), and T.D. v. New York State Office of Mental Health, 228 A.D.2d 95, 102 (1st Dep't 1996), as well as Colonial Arms Apartments v. Village of Mount Kisco, 64 N.Y.2d 984 (1985) offer no support. All three are reports of decisions on the appeals themselves, rather than on stay motions, and merely mention in passing the existence of § 5519(a)(1) stays in the context of reporting the procedural history, without any elaboration on the question before this Court as to the applicability of § 5519(a)(1). Moreover, the precise wording of the lower courts' orders in those cases is not set out, rendering analysis of their injunctive-versus-declaratory aspects speculative. Indeed, in T.D., it appears that the order at issue contained mandamus injunctive relief ("It was further ordered therein that the `Commissioner of Health must advise plaintiffs at least five days prior to the effective date of any promulgated regulations" concerning human subject research). 228 A.D.2d at 102.

In contrast, appellants' motion fails to even mention — much less distinguish — the recent leading cases on this issue, such as Pokoik, Schwartz, and Haverstraw, even though (as discussed above at page 11) these cases have been repeatedly brought to appellants' attention.

§ 5519 but nevertheless feeling "constrained" to follow Eastern).[16]

First Department determinations such as Raes Pharmacy, Cosentino and Medical Society and the overwhelmingly uniform case law of the Second, Third, and Fourth Departments highlight that the express, unambiguous language of CPLR § 5519(a)(1) can be correctly interpreted in only one way: automatic stays apply only to enforcement of executory directives; they do not apply at all to self-executing judgments.

B. The Trial Court's Judgment Nullifying the City Council's Negative Declaration and LL 38 Does Not Involve Any Directives, Is Self-Executing, and Thus Is Not Subject to CPLR § 5519(a)(1).

As noted above, CPLR § 5519(a)(1) expressly restricts automatic stays to executory directives, Pokoik, 220 A.D.2d at 14, which "are those [orders] which direct the performance of a future act." State of New York v. Town of Haverstraw, 219 A.D.2d at 65. On the other hand, self-executing orders (such as prohibitory injunctions or declaratory judgments) are "immediately executed upon the promulgation of the judgment or order," Pokoik, 220 A.D.2d at 14, and "need no enforcement procedure to compel inaction on the part of the person or entity restrained." Haverstraw, 219 A.D.2d at 65. Under the express terms of CPLR § 5519(a)(1), automatic stays do not apply to

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16. The decision in Silver — issued prior to this Court's unpublished determinations of the motions in Medical Society and Cosentino — noted:

> In an article on this subject, Newman and Ahmuty, "Automatic Stays for Government Bodies and Officials," N.Y.L.J., Nov. 2, 1994, the authors, noting the conflicting decisions, state that they spoke to Catherine O'Hagan, the Clerk of the First Department, and that she "authorized us to report that the court's current interpretation of CPLR § 5519(a)(1) is in accord with that of the Fourth Department in Rotondo v. Reeves, supra," However, I have not located any decision in the First Department that in any way modified its holding in Eastern. . . . While I believe that the decisions of the other judicial departments on this issue represent the preferable interpretation of § 5519, I am nevertheless constrained by the decision in Eastern.

Undoubtedly, a published opinion by this Court expressly clarifying the rule in this Department would be useful in removing the ambiguities expressed in Silver and perhaps eliminate the need for the motion practice reflected in the instant matter.

self-executing orders that require no enforcement. See Pokoik, 220 A.D.2d at 14.

Moreover, actions that are "a natural consequence" of, rather than actually "directed by," a court's decision, order or judgment are also not automatically stayed pursuant to CPLR § 5519(a)(1). Schwartz v. New York City Hous. Auth., 219 A.D.2d at 48; see also Pokoik, 220 A.D.2d at 15 ("[T]he scope of the automatic stay of CPLR 5519(a) is restricted to the executory directions of the judgment . . . appealed from which command a person to do an act, and . . . the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief."). Indeed, stays apply only to the executory orders specifically and directly appealed from and do not extend to other previously issued, extant, unappealed orders in the case. NYCCELP VII, 248 A.D.2d at 120-21.

The First Department cases of Cosentino and Medical Society, discussed supra, involved self-executing orders that required no enforcement in order to go into effect. For example, a temporary restraining order in the Cosentino case, which this Court ruled was not stayed under CPLR §5519(a)(1), addressed a city "implementation plan" that interpreted and carried out a set of State regulations. See Galacatos Aff., Ex. 128; 18 N.Y.C.R.R. § 352.35. In Medical Society, the lower court's judgment nullified a State regulation and prohibited its implementation. Galacatos Aff., Ex. 127.

Likewise, in the instant case, the lower court's Judgment nullified the City Council's Negative Declaration and LL 38. (See Galacatos Aff., Ex. 121.) Such a judgment carries an immediate substantive impact and renders the Negative Declaration and LL 38 invalid. It is complete in and of itself, and petitioners need not act to "enforce" the Judgment or effectuate the invalidity of the Negative Declaration or LL 38. Thus, the automatic stay provision of CPLR § 5519(a)(1) does not apply.

III. APPELLANTS' MOTION FOR A DISCRETIONARY STAY OF THE JUDGMENT BELOW IS WITHOUT MERIT AND SHOULD BE DENIED.

A. CPLR § 5519(c) is Wholly Unavailable to Stay a Judgment that is Self-Executing and Requires No Enforcement

Since appellants are not entitled to an automatic stay under CPLR § 5519(a)(1) for the reasons set forth above, they likewise have no legal basis to proceed under the discretionary stay provisions of CPLR § 5519(c). The latter provides only that the court

> may stay all proceedings to enforce the judgement or order appealed from pending an appeal . . . in a case not provided for in subdivision (a) . . . or may grant a limited stay. . .

(emphasis added). Thus, the same analysis applies: is there anything further to enforce in the judgment appealed from? Since there is not, appellants fare no better under this subdivision. Indeed, as the Second Department has recognized,

> The scope of the stay authorized by subdivision (c) is thus coextensive with the stay authorized by subdivision (a), namely, a stay of enforcement proceedings only, not a stay of acts or proceedings other than those commanded by the order or judgment appealed from.

Schwartz v. New York City Housing Auth., 219 A.D.2d at 48 (emphasis added). The court there concluded that the New York City Housing Authority was not entitled to a stay under the authority of either subdivisions (a) or (c) of § 5519 to a trial that flowed as a natural consequence of an order denying summary judgment, since the order itself "did not contain a directive that the case proceed to trial." Id.

B. Even If, Arguendo, Appellants' Motion Was Procedurally Valid, Appellants Have Not Met Their Burden of Demonstrating "Extraordinary Circumstances" for Obtaining a Stay

Appellants' motion is premised solely upon CPLR 5519(a)(1) and (c). See appellant's March 12, 2001, Notice of Motion.[17] Since — as demonstrated above in Points I and II.A — neither of these provisions are available, this Court need go no further and should deny the motion, as appellants have offered no other grounds. See CPLR § 2214(a) ("notice of motion shall specify ... the relief demanded and the grounds therefor" (emphasis added); Goldstein v. Haberman, 183 A.D.2d 807 (2d Dep't 1992) (reversible error for court to grant motion to dismiss complaint on grounds other than those stated in notice of motion by relying on notice's general prayer for relief); McLearn v. Cowen & Co., 60 N.Y.2d 686, 689 (1983) (court erred in relying on grounds other than those expressly stated in notice of motion, as "that this ground must be deemed to have been embraced in the prayer for `other and further relief' is unavailing"); Villator v. Talt, 269 A.D.2d 390, 391 (2d Dep't 2000) (same).

Even assuming, arguendo, that this Court could go beyond appellants' asserted grounds and seek some other mechanism to achieve appellants' purpose, however, the only imaginable basis petitioners are aware of would be by the invocation of the "inherent powers" doctrine. However, while Pokoik v. Department of Health Service recognized that an "appellant may apply to this Court, in extraordinary circumstances, to exercise its inherent power to suspend the operation of the declaratory judgment itself pending the appeal," 220 A.D.2d at 16 (emphasis added), appellants have neither made such an application in their motion nor presented such "extraordinary circumstances."

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17. See, also, footnote 2, page 2, supra.

Yet even if this Court were to review the instant situation under a traditional balancing of equities (to say nothing of the "extraordinary circumstances" standard), appellants' motion must fail.[18]

1. Appellants are Highly Unlikely to Prevail on Appeal, as the Court Below Correctly Nullified the City Council's Negative Declaration and LL 38.

As appellants' admit, to obtain a stay even under § CPLR 5519(c), the appellant must show that their appeal has a reasonable likelihood of success on appeal. Herbert v. City of New York, 126 A.D.2d 404, 407 (1st Dep't 1987); In re Terrance K., 135 A.D.2d 857 (2d Dept 1987); 4 N.Y. Jur. 2d Appellate Review § 455. In the instant case, the lower court made well-reasoned, carefully documented determinations on the very points that support the denial of a stay in this matter.

The trial court determined that the City Council failed to give "reasoned consideration to the environmental concerns raised at the public hearings or even through its own discussion of the proposed legislation" as required by SEQRA and CEQR. Slip op. at 17. The court concluded that "[f]or purposes of the issues before the court, it suffices that on their face [the changes wrought by LL 38] could pose . . . a hazard [to human health]," id. at 8 — exactly the kinds of hazard to human

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18. The courts of late appear to invoke the "inherent powers" doctrine quite sparingly, especially where the legislature has provided a specific statutory framework for a matter of civil procedure, as it has here with respect to stays pending appeal.

Thus, in Matter of Mennella v. Lopez Torres, 91 N.Y.2d 474 (1998) the court ruled that where the legislature had spoken by creating certain procedural mechanisms with respect to judgments, "[r]egrettably ... the trial court was without authority to fill" a perceived gap in that scheme "by fashioning its own remedy...." Id., 91 N.Y.2d at 481 (Ciparick, J., concurring); see, also, Lang v. Pataki, 271 A.D.2d 375, 376 (1st Dep't 2000) ("Under the New York Constitution, article VI, § 30, the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature, and the court's discretion to adjust their procedures in areas involving the `"inherent nature of the judicial function"' may not be exercised `in a manner that conflicts with existing legislative command.'" (citations omitted)).

health that result in irreparable harm to petitioners and other New York City children under the age of seven. The court, after thoughtful consideration and analysis of the facts of this case, granted the petition. Id. at 18. Indeed, the court summed up by explaining that in Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64, the First Department found that

> the main hazard which . . . [was] necessary to address through an EIS was . . . lead dust . . . . In the wake of such ruling, this court cannot now tell the Appellate Division that a regulatory scheme for lead paint abatement which does not even include lead dust in the definition of a hazard was adequately reviewed by the Council.

Id. Given the trial court's extensive reliance on this Court's holding in Williamsburg, remarkably appellants' motion fails to even mention — much less distinguish — Williamsburg; appellants apparently cannot overcome the compelling authority of that decision.

This Court is not asked to determine the merits of LL 38 itself; petitioners argue primarily that the Negative Declaration is inadequate on its face. Appellants 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, a 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, omitting, for example, the entire subject of lead-contaminated dust as an adverse environmental impact.[19] As the Court of Appeals stated in Akpan v. Koch,

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19. Appellants cannot cure the facial omissions in the Negative Declaration by their attempts 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). For the same reason, appellants' 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 (continued...)

> 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) (citation omitted). A review of the Negative Declaration (as well as the record as a whole) amply demonstrates that appellants' actions were arbitrary and capricious and an abuse of discretion and in violation of the law, because in enacting sweeping legislation that overhauled the existing comprehensive program for preventing childhood lead poisoning appellants failed to identify — let alone give due consideration to — LL 38's potential adverse environmental effects.[20]

Appellants attempt to claim they gave the due deliberation necessary to pass muster with SEQRA's "hard look" requirement by stressing "[t]he voluminous transcripts of this and several other

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19. (...continued)
abatement program. In any event, that testimony was not part of the Negative Declaration.

Indeed, if appellants are now asserting that the December 1998 hearing should now be considered part of LL 38's legislative history, then appellants are admitting their violation of SEQRA's mandate that agencies declare whether an EIS is needed as early as possible in the formulation of a proposed action to insure that environmental concerns become an integral part of decisionmaking. ECL § 8-0109 (4); 6 N.Y.C.R.R. § 617.6 (b)(1)(i).

20. Appellants' motion papers repeat their flawed attempt below to convince the court that LL 38 is “better” than the pre-exisiting law and that therefore SEQRA review could be dispensed with. If that theory were viable, however, this Court would have ruled differently in the Williamsburg case, since there, as well, the City was ostensibly promulgating regulations to control lead hazards. Yet in Williamsburg this Court rejected that approach, relying instead on the undisputed fact that the activities in question fell within the ambit of a possible significant effect on the environment and thus triggered SEQRA review. Even assuming some positive aspects in LL 38 does not redeem its fundamental illegality; at bottom, appellants cannot escape their wholesale noncompliance with SEQRA in evaluating the ways that LL 38 weakened existing environmental protections.

hearings, as well as numerous other documents," which "are part of the record below"[21] and "stand[] nearly a foot high," id. n.8, and that they heard "widely divergent" opinions. Id., ¶ 49. Appellants chose to ignore the virtual unanimity of opinion among the experts in the fields of public health, industrial hygiene, environmental medicine, toxicology, pediatrics, and relevant disciplines, that the omission of measures such as control of lead dust, clearance dust testing, timely intervention, and many of the other flaws identified in Local Law 38 put children at greater risk of lead poisoning. While at least twenty-two medical professionals warned the Council of LL 38's likely adverse health impacts, LL 38's proponents were unable to find a single credentialed expert to support their approach.

The instant case presents an extreme example of a decisionmaker turning both a deaf ear and a blind eye to overwhelmingly critical expert opinion and deafening expert opposition to a proposed action. In far less drastic circumstances where decisionmakers deliberately ignored environmental concerns and failed to give them their due regard, courts have uniformly nullified negative declarations. See, e.g., Kahn v. Pasnik, 90 N.Y.2d at 574 ("the Board did not take a hard look at the relevant areas of environmental concern before issuing the negative declaration" because negative

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21. While appellants assert, without foundation, that the court's decision was "based on an incomplete review of the record as a whole" (Muschenheim Aff. at ¶ 45), the decision below indicates that the court's review was searching and extensive. See, e.g., Slip op. at 17-18 (discussing review of the proceedings in the Council).

Oddly, appellants argue that in reviewing whether an agency took the requisite "hard look," "court 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." Muschenheim Aff. ¶ 47 (emphasis in original). Appellants further argue that "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." Id. (emphasis in original)

Other than the documents submitted to the City Council and the transcripts of City Council hearings that dealt directly with the proposal to enact LL 38 — all of which the record below contains and which the court below carefully considered — plaintiffs cannot imagine what else comprises the "record in its entirety."

declaration issued "[w]ithout waiting for the information identified as necessary by it own consultants"); Schulz v. New York State Dep't of Envtl. Conservation, 200 A.D.2d 793, 794-96 (3d Dep't 1994) (negative declaration nullified where Commission ignored anticipated impacts that had been "drawn to [its] attention"); Golten Marine Co. v. New York State Dep't of Envtl. Conservation, 193 A.D.2d 742, 742-43 (2d Dep't 1993) (negative declaration nullified where agency "declined to review" pertinent areas of environmental concern); H.O.M.E.S. v. New York State Urban Dev't Corp., 69 A.D.2d 222, 232 (4th Dep't 1979)(nullifying negative declaration due to agency's failure to "analyze" concerns, which existence it "vaguely recognized").

A municipal statutory scheme promulgated in such open conflict with SEQRA's requirements simply cannot be sustained. The lower court's well-considered conclusion is unlikely to be reversed by this Court upon the final determination of this appeal.

2. Children Thoughout New York City Will Be Left at Increased Risk of Lead Paint Poisoning and Thus Suffer Irreparable Harm — and SEQRA's Purposes Will Be Severely Compromised — If a Stay Is Granted.

Granting a stay will result in irreparable harm to some children's health and would be contrary to public policy requiring environmental review prior to taking action.

This Court has repeatedly and consistently held that lead paint causes grievous and terrible, irreparable and lifelong harm to children. New York City Coalition to End Lead Poisoning v. Koch, 138 Misc. 2d 188, 189 (Sup. Ct. N.Y. Co. 1987), aff'd, 139 A.D.2d 404 (1st Dep't 1988) ("NYCCELP I") ; New York City Coalition to End Lead Poisoning v. Koch, N.Y.L.J., July 21, 1989, at 18 (Sup. Ct. N.Y. Co.), (Ex.101), aff'd, 170 A.D.2d 419 (1st Dep't 1991), ("NYCCELP II"); New York City Coalition to End Lead Poisoning v. Koch, 216 A.D.2d 219, 220 (1st Dep't 1995) ("NYCCELP IV"); Juarez v. Wavecrest Management Team, 212 A.D.2d 38, 40 (1st Dep't 1995),

modified on other grounds, 88 N.Y.2d 628 (1996); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 66; City of New York v. Lead Indus., 190 A.D.2d 173, 176 (1st Dep't 1993).

The court below as well, citing Juarez v. Wavecrest Management Team, 88 N.Y.2d at 640-41, emphasized the "potential danger to children" that lead paint poisoning poses, slip op. at 5, and quoted at length from this Court's decision in Williamsburg:

> "It is well documented and beyond dispute that lead is a highly toxic metal which, when introduced into the human body, produces a wide range of adverse health effects, especially with regard to children and developing fetuses. . . . [T]hese consequences include: nervous and reproductive system disorders; delays in neurological and physical development; cognitive and behavioral changes; and hypertension. Most of these physical maladies are irreversible."
>
> "Further, it appears that young children are more sensitive to lead exposure than adults, particularly their brain and nervous systems, which are especially vulnerable in their developmental stages. Lead exposure as low as two micrograms per deciliter in children under seven years old lowers IQ, stunts growth and causes behavioral disorders."

slip op. at 5 (quoting Williamsburg Around the Block Ass'n v. Giuliani, 223 A.D.2d at 66).

"`[C]hildhood lead paint poisoning may be the most significant environmental disease in New York City.'" Juarez v. Wavecrest Management Team, 88 N.Y.2d at 641 (citation omitted), especially as "[lead] paint continues to cover the walls of two out of three City dwellings." Id. Appellants themselves estimate some 78% of the city's 2,980,762 housing units are pre-1960,[22] and that 2,000,000 housing units contain lead paint (of which half are occupied by low or moderate

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22. NYC DoH, "A Non-Competitive Continuation Application for NYC DoH Provision of 1997-1998 State and Community-Based Childhood Lead Poisoning Prevention Program & Surveillance of Blood Levels in Children - #H64/CCH205097-08" (Grant application to CDC) March 24, 1997, at 32. (Ex. 112)

income families).[23] Children under 6 years of age reside in an estimated 323,000 of these units, of which low income families occupy an estimated 174,000 — in presumably the most deteriorated housing conditions. Id. at 19.

Not long ago the appellant City itself estimated that some 30,000 children under six years old in New York City have blood lead levels at or above the definition of lead poisoning under City and federal guidelines. (HPD and DoH, Request for Grant Assistance Lead-Based Paint Hazard Control (to HUD), July 31, 1997, at 19). (Ex.113) Thus, "there ha[ve] been significant injuries being suffered by a substantial portion of the population of this City under seven years of age. . . ." New York City Coalition to End Lead Poisoning v. Giuliani, dec. at 3 (Sup. Ct. N.Y. Co. Dec. 14, 1995) (Ex. 105), aff'd., 245 A.D.2d 49 (1st Dep't 1997)("NYCCELP VI").

The court below found that the changes wrought by LL 38 "on their face" pose a hazard by lowering the age of children protected by the statute (from seven to six) and by raising the lead content in the definition of lead-based paint — without any discussion or explanation in the record for their rationale. Slip op. at 8. Unquestionably, permitting LL 38's relaxation of lead paint controls in residential premises will cause irreparable harm by increasing the risk of lead paint poisoning for some children — particularly indigent children living in substandard housing. See, e.g., Landrigan Aff.; Lanphear Aff.; I. Mauss Aff.; Needleman Aff.; Rosen Aff and Rosen Reply Aff.; Gilbert Aff.; E. Mauss Aff.; Newman Aff.; Olmsted Aff.

While changes to the preexisting law weakened some protection measures, another serious problem is LL 38's failure to address other significant causes of lead poisoning, in particular

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23. HPD and DoH, Request for Grant Assistance Lead-Based Paint Hazard Control (to HUD), July 31, 1997, at 18. (Ex. 113)

exposure from lead contaminated dust. Even appellants' Health Commissioner testified to the Council that lead dust should be defined as a hazard:

> In my view we cannot ignore the dangers of lead contaminated dust, and dust should be incorporated into the bill in the language of what constitutes lead-based paint hazards.

Ex. 77 (Tr. June 21, 1999) at 173. Unfortunately, the drafters of LL 38 failed to heed the Commissioner's advice.[24]

The March 26, 2001, affidavit of Mary Gearhart, the mother of a one-year-old child (submitted herewith), illustrates the consequences of this problem all too well. Although lead dust has been detected in her apartment (Gearhart Aff. ¶ 7) at a level some 40 times higher than that defined as a hazard by the federal Environmental Protection Agency (see 40 CFR 745 § 745.65(b) (defining lead hazard as 40 $\mu g/ft^2$), see, also, footnote 5, page 4, supra), under LL 38 she has no legal remedies with respect to her landlord or the City's code enforcement agencies unless and until her child becomes lead poisoned. Nor does LL 38 provide any requirements for relocation of young children and pregnant women during unsafe and hazardous lead-dust creating activities, as trial court

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24. Indeed, subsequent to the commencement of the petition below, Dr. Susan Klitzman, professor of Environmental and Occupational Health Sciences at Hunter College, testified to the Board of Health on November 5, 1999, that

> [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 ...
>
> ...
>
> 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).

Dr. Klitzman's testimony was particularly noteworthy because she was the City's Assistant Health Commissioner for Environmental Risk Assessment and Communication when LL 38 was enacted and testified in that capacity at the Housing Committee hearing on June 21, 1999, as the person who "oversee[s] the Department of Health's Lead Poisoning Prevention Program." Ex. 77, at 129.

decisions affirmed by this Court in NYCCELP II, NYCCELP VI, and NYCCELP VII repeatedly ordered. As a result, Ms. Gearhart and her child have had to find safe shelter elsewhere. Gearhart Aff. ¶ 8.

Allowing untrained personnel to disturb or remove lead paint presents another significant potential cause of childhood lead poisoning. The experts who addressed this issue, both before the City Council and in this proceeding, have advocated for training and approval requirements, noting that the absence thereof leaves children at significant risk of irreparable harm.[25]

Appellants' motion papers do not respond at all to these concerns, nor to the other areas of adverse environmental impacts arising from LL 38 (discussed supra at pages 4 to 6) that experts and others identified in the record before the City Council and in the proceedings and decision below.[26]

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25. Indeed, recently the federal Environmental Protection Agency ("EPA") contacted appellants and opined that LL 38 "falls short of the protection that children deserve and need," noting that

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

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

26. The affidavits appellants submit here from various landlord lobby organizations have no response to these issues, either.

Indeed, a recent article in a real estate trade publication noted that affiant Nicholas LaPorte, Jr., executive director of the Associated Builders and Owners of Greater New York, was "part of a negotiating team that worked on provisions of" LL 38 and that "the industry supported [LL 38] in part, because it shifted some of the burden on tenants to inform owners of lead paint hazards." Natalie Kieth, ABO Watches Paint Appeal, Real Estate Weekly, November 8, 2000, at 1 (Galacatos Aff. Ex.129).

Real estate lobbyists' apparent special entrée to the legislative drafting process in this case was a poor substitute for the open policy-making process SEQRA contemplates and requires. While the non-party real estate interests may bemoan their perceived inconvenience at being required to assure safe housing, they can point to no support in the record below that can excuse appellants failure to comply with SEQRA.

A proper SEQRA review, completed before LL 38 was enacted, would have identified and analyzed these numerous potential adverse impacts. The State Legislature went to considerable lengths to mandate that the SEQRA review take place before, not after, the contemplated action. Tri-County Taxpayers Ass'n v. Town Bd. of Queensbury, 55 N.Y.2d 41, 46-47 (1982); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 71 ("purpose of an EIS is to act as an environmental `alarm bell' ... to alert public officials to environmental shifts before those changes reach `ecological points of no return.'" (citations omitted)). As one Councilmember noted during Committee hearings shortly before the vote on the negative declaration:

> [M]any of the questions that we are posing about the implications of protecting our children and their health in the City of New York, according to this law, need to be answered, and quite frankly, the letter that was received and read into the record today by the Commissioner of Health is not enough. We need answers to questions about life and death of our children.

Ex. 78. (Tr. of June 24, 1999, at 56-57 (statement of Councilmember Guillermo Linares).

An order by this Court staying the Judgment below would permit major environmental legislation that has never gone through proper SEQRA review to continue in effect, thus defeating the entire purpose of SEQRA.

3. Appellants Will Not Suffer Significant Harm by Complying with Pre-LL 38 Statutes and Regulations Pursuant to the Lower Court's Judgment Pending Appeal.

Appellants will not be harmed by the Judgment striking down LL 38. The absence of LL 38 does not create an enforcement vacuum; instead, it revives prior law.[27] See, e.g., slip op. at 3 ("All

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27. Local Law 1 of 1982 (Ex. 97) ("LL 1," codified at N.Y.C. Admin. Code § 27-2013(h) (Ex. 94.)). LL 38 (at § 7) also deleted certain provisions in Local Law 50 of 1972 (Ex. 96) ("LL 50", codified at N.Y.C. Admin. Code § 27-2126 (Ex. 96)), thereby eliminating mandated time frames for appellants' removal of lead hazards in non-multiple dwellings where children are already lead poisoned.

parties agree that if petitioners prevail in the instant proceeding and [LL] 38 is struck down, Local Law 1 would again become the applicable law.").

Appellants are intimately familiar with LL 1, as it governed New York City's lead paint poisoning prevention efforts for nearly eighteen years since 1982; LL 38 has been in effect only for little over a year. With modest effort, appellants can make programmatic and operational adjustments to the LL 1 regime.[28] Indeed, over the past decade appellants have been repeatedly ordered by this Court to enforce this very law. NYCCELP II, 170 A.D.2d 419 (1st Dep't 1991) (affirming on opinion below, N.Y.L.J., July 21, 1989, at 18 (Sup. Ct. N.Y. Co.)(Ex.101)); NYCCELP IV, 216 A.D.2d 219 (1st Dep't 1995); NYCCELP VI, 245 A.D.2d 49 (1st Dep't 1997); NYCCELP VII, 248 A.D.2d 120 (1st Dep't 1998).[29] And appellant City Council need not wait out the appeal before commencing the process of enacting a new law if it so chooses, doing so in compliance with SEQRA.

Appellants' alarmist attempts to predict harms from enforcement of pre-existing law are wholly unconvincing. First, appellants offer a rehash of the same arguments that this Court in NYCCELP VII rejected years ago. Id., 248 A.D.2d 120 (finding City's arguments "to be without

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28. Appellants knew from the outset that any major change in the City's lead poisoning prevention laws would be subject to SEQRA review, and can hardly have doubted that their purported compliance with SEQRA's requirements was little more than a sham. They have thus far enjoyed the benefits of circumventing SEQRA for over a year. Extending those benefits for additional months will send the worst possible signal to decisionmakers, encouraging them to present the courts with faits accompli, which the courts will be reluctant to change.

Moreover, appellants can hardly assert being blindsided by the Judgment herein. Petitioners commenced the instant proceeding a month before LL 38 went into effect, and the case was promptly briefed, argued, and submitted within a month (the decisions' delay was no doubt due in part to appellants' two separate, groundless motions to remove the Justice assigned to the case). Appellants knew the outcome by October 13, 2000, and knew by the October 27, 2000, status conference (supra, page 11) of petitioners' position that no automatic stay applied.

29. As noted supra at page 12 footnote 14, the City has already drafted regulations for implementing Local Law 1 (Ex. 125).

merit"), affirming 173 Misc. 2d at 239-40. As set forth in the March 27, 2001, affidavit of Dr. Martin Rutstein (submitted herewith), no technological reason exists why the City cannot resume testing at the more stringent 0.7 mg/cm² standard for lead in paint with current equipment, as the City was ordered to do in NYCCELP VII.[30] And as explained in the March 20, 2001, affidavit of Dr. Evelyn A. Mauss (submitted herewith), Dr. Jessica Leighton's attempt to offer epidemiological inferences to prop up the weaker provisions of LL 38 is scientifically insupportable and indeed conflicts with Dr. Leighton's recent published assertions. See Exhibit 119.

Neither do appellants explain, for example, why the resumption of lead inspections in the homes of six-year-old children (as required under the prior laws) would create undue and impractical burdens, nor why this Court should prevent the reimposition of a date certain for the removal of lead hazards where children have been lead poisoned in non-multiple dwellings. Instead, appellants' motion papers appear to place great emphasis on the administrative burdens of having to re-orient its inspectors to the more stringent time-frames in the pre-existing laws. It bears noting again that

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30. Dr. Leighton also complains that to require the Health Department to do complete inspections of all surfaces in the homes where children are already lead poisoned — as this Court in NYCCELP VII previously required — imposes undue burdens because it adds hours to the task. This issue was fully briefed in NYCCELP VII; plaintiffs there submitted affidavits concerning incidents where the Health Department had merely inspected only surfaces where the paint was presently peeling, resulting in the repeated repoisonings of children when other surfaces subsequently deteriorated. Obviously, any landlord who is so careless as to poison a child should hardly be presumed to be capable of keeping lead painted surfaces in good repair in the future. These concerns are just as significant today. See, e.g., "Jury Awards $6 million in Lead Case," N.Y.L.J. March 27, 2001, at 1, col. 3 (noting repeat poisonings after Albany health department ordered incomplete lead abatements).

in the related NYCCELP v. Koch/Giuliani action the City was mandated since 1990 to do precisely that, and repeatedly cited for contempt for not doing so.[31]

Now that the City agencies have at long last begun to train their staff to do more thorough inspections (as they were likewise repeatedly directed to in NYCCELP v. Koch/Giuliani), appellants assert that the mere administrative inconvenience of reorienting line inspectors to more stringent and comprehensive inspections and enforcement outweighs the benefits of protecting young children from exposure to known lead hazards such a lead dust. Indeed, as shown by Ms. Gearhart's affidavit and exhibits 117 and 118 concerning a City inspection in her home just this month, HPD's apparent inability to inspect even for presumed lead paint violations under the less stringent LL 38 regime, if anything, militates for more vigorous training and enforcement, not less.

Appellants' most contrived arguments are based entirely on one premise — that unless a stay is granted the City will be required by the pre-exisiting orders in the NYCCELP v. Giuliani case (repeatedly affirmed by this Court) to enforce the removal of all lead paint, intact or not. This argument fails for two reasons. First, LL 1 did not require the removal of all lead paint. It required

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31. See, 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 III, slip op. (Sup. Ct. N.Y. Co. May 4, 1993) (Ex. 103), Order March 30, 1994, (Ex.104), appeal. withdrawn by stipulation (Feb. 24, 1995); NYCCELP IV, 216 A.D.2d 219 (1st Dep't 1995); NYCCELP VI, decision (Sup. Ct. N.Y. Co. Dec. 14, 1995)(Ex. 105), Order (May 1, 1996), aff'd as modified, 245 A.D.2d 49 (1st Dep't 1997); NYCCELP VII, 173 Misc. 2d 235 (S. Ct. N.Y. Co. 1997), aff'd, 248 A.D.2d 120 (1st Dep't 1998).

As the trial court noted in NYCCELP VII, "Patience may be a virtue, but from Genesis to the fulfillment of the Apocalypse, or the coming of the Messiah, is too long a period of time to have to wait for an administrative agency to comply with its duty to enforce the law ...." id, 173 Misc. 2d at 236; see, also, Transcript of Proceedings (Ex. 130) at 104-06.

its removal or safe covering. See Ex. 94 (§ 27-2013(h)(1))[32] Secondly, conveniently undisclosed in the City's motion papers is the fact that petitioners offered unconditionally to stay that aspect of the Local Law 1 regulations pending the resolution of the instant appeal. See March 6, 2001, letter from petitioners' counsel to appellants' counsel (Galacatos Aff. Ex. 124), as discussed supra at page 11.

Thus, it appears that appellants' argument is based entirely on a self-created crisis. Having refused, without explanation, this unconditional offer, appellants disingenuously now come to this Court proclaiming this to be the key reason why they should be granted extraordinary relief.

The equities clearly favor protecting children's health from the irreparable and devastating effects of lead paint poisoning over the administrative and operational inconveniences appellants claim they face in enforcing prior court mandates.

IV. IN THE ALTERNATIVE, IF AN AUTOMATIC STAY DOES EXIST, SUCH STAY SHOULD BE VACATED.

If this Court concludes — notwithstanding the completely self-executory nature of the Judgment below — that the automatic stay provisions of CPLR § 5519(a)(1) are nonetheless applicable to the facts of this case, petitioners respectfully urge that this Court vacate such stay

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32. Appellants persist in this mischaracterization. Yet as petitioners' counsel pointed out in oral argument below,

> Local Law 1 didn't require the removal of all lead paint; it required either its removal or safe covering, and safe covering of intact lead-painted surfaces on windows, where lead dust is generated, door frames. These are recognized hazards and Local Law 38 eliminates them from the definition of a lead hazard, and if there's a rationale for doing it, it should have been stated in the Negative Declaration.

Transcript of Proceedings (November 15,1999) at 104-05; see, also, footnote 6, page 4, supra.

pursuant to § CPLR 5519(c), as a balancing of the equities clearly weighs in favor of such vacatur. As set forth in Part II-B above, failure to vacate any stay of the Judgment below will result in irreparable harm to children's health, while an order to vacate any such stay will not harm appellants. Moreover, an order to vacate any such stay should be granted because appellants are highly unlikely to prevail on appeal. See, e.g., Leiman v. 310 West 56th Street Corp., 270 A.D.2d 211, 211 (1st Dep't 2000) (affirming grant of preliminary injunction as plaintiff sufficiently demonstrated a likelihood of success on the merits, irreparable injury, and a balancing of the equities in her favor); DeLury v. City of New York, 48 A.D.2d at 405 (setting out standard for setting aside stay and granting preliminary injunction).

CONCLUSION

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

Dated: New York, New York
March 29, 2001

Respectfully Submitted,

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