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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART: 2

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

Petitioners-Plaintiffs,

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

-against-

PETER VALLONE, as Speaker of the New York City
Council, et al.,

Respondents-Defendants.

-----X
Index No. 120911/99 80 Centre Street
ORAL ARGUMENT New York, N.Y.
November 15, 1999

B E F O R E:

HONORABLE LOUIS B. YORK,
Justice

A P P E A R A N C E S:

NEW YORK PUBLIC INTEREST RESEARCH GROUP
Self-represented as Petitioner-Plaintiff
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BY: ANDREW GOLDSTEIN, ESQ.

NORTHERN MANHATTAN IMPROVEMENT CORP.
LEGAL SERVICES
For all other Petitioners-Plaintiffs
76 Wadsworth Avenue
New York, N.Y. 10033
BY: MATTHEW J. CHACHERE, ESQ.

ALAN F. BOWIN, CSR, RMR, CRR

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2 (Appearances continued:)

3

4

NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL
Attorneys for the Respondents-Defendants
100 Church Street
New York, N.Y. 10007
BY: MARK W. MUSCHENHEIM, ESQ.
and DANIEL RICHMOND, ESQ.

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ALAN F. BOWIN, CSR, RMR, CRR
Official Court Reporter

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* * *

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MR. MUSCHENHEIM: Your Honor,

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the threshold issue before your Honor

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is whether it was appropriate for

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the petitioners to designate this

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proceeding as related to the 1985

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action dealing with enforcement of

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Local Law 1 of 1982. These two cases

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are not related and petitioners'

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designation is an inappropriate attempt

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to forum shop. Consequently, this

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proceeding should be returned to the

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Clerk's Office for random reassignment.

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This proceeding challenges the

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legislative branch's enactment of Local

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Law 38 under the State Environmental Quality Review Act. The parties' papers are focused solely on whether the SEQRA mandates were followed in the legislative process of enacting Local Law 38 in June of this year.

In contrast, the 1985 class action challenges the executive branch's enforcement of Local Law 1 of 1982. Indeed, that action has focused almost exclusively on Local Law 1. SEQRA has never been an issue in the 1985 action. And as to this proceeding, enforcement by the executive branch of Local Law 1, or any other law, for that matter, is not at issue.

The justifications for having related cases heard before the same judge, conservation of judicial resources and the avoidance of inconsistent rulings, are simply not present here. Judicial resources will not be conserved; these two cases involve two completely different areas

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of law and two different local laws.
Nor are inconsistent rulings a threat.
Defendants' motion, in the '85 action,
to vacate the Local Law 1 orders should
prevail; and even if there is any
question as to the ultimate success,
the defendants have indicated that we
are willing to withdraw that motion,
which eliminates any perceived threat
of inconsistent rulings.

THE COURT: Explain that.

You're willing to withdraw the
motion to dismiss the other -- the
class action suit that's still pending?
Is that what you're saying?

MR. MUSCHENHEIM: We are willing
to -- we will withdraw the motion to
vacate the order based on Local Law 1
in the 1985 action.

THE COURT: I don't follow you.
You will move to vacate my orders?

MR. MUSCHENHEIM: In the 1985
action, we had moved, as a result of
your order that the parties had to do

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2 something by, I believe, the middle of
3 September -- we had proposed to vacate
4 orders based on Local Law 1 as a result
5 of the enactment of Local Law 38.

6 THE COURT: Oh, okay.

7 MR. MUSCHENHEIM: We are willing
8 to withdraw that motion and --

9 THE COURT: In other words, Local
10 Law 1 still applies and I can hold the
11 commissioner in contempt?

12 MR. MUSCHENHEIM: Local Law 1 is
13 applicable at this stage. I think that
14 the parties are willing -- I think the
15 parties -- I think the petitioners have
16 indicated that they were willing to
17 enter into a stay pending the
18 resolution of the Local Law 38
19 proceeding and --

20 THE COURT: So what you're really
21 willing to do is to consent to a stay
22 in lieu of your motion to dismiss.
23 Isn't that what you're saying?

24 MR. MUSCHENHEIM: We are willing
25 to -- right -- to hold off moving on

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2 the Local Law 1 orders at this stage,
3 which is exactly what the petitioners
4 had suggested in their cross-motion and
5 in their opposition to our motion in
6 the 1985 action.

7 THE COURT: That reminds me, I
8 forgot to tell you that I know that you
9 submitted an affidavit in -- at least,
10 an affidavit in opposition to the
11 motion to disqualify me from this case.
12 The reason I know that is because I got
13 a courtesy copy of the reply affidavit,
14 and I've read the reply affidavit but
15 I've never seen your affidavit in
16 opposition.

17 MR. CHACHERE: Your Honor, I
18 hand-delivered a copy of that here.

19 THE COURT: I couldn't find it.

20 MR. CHACHERE: And I just
21 handed -- I handed up another copy,
22 as well.

23 THE COURT: Okay. I just want
24 you to know that I'm conducting this
25 proceeding right now, or this hearing,

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2 without having read your answer.

3 MR. CHACHERE: Okay.

4 THE COURT: Which may pose some
5 problems for me to immediately make a
6 decision, which I had wanted to do.

7 MR. CHACHERE: Okay. Well, it's
8 not that long. As I said, I've just
9 handed it up.

10 THE COURT: I think I figured it
11 out based on the comments in the reply
12 affirmation. I mean, it was clear to
13 me from the -- I think it was clear to
14 me from the reply affirmation what you
15 had argued. But I still think, maybe
16 I should read it before I do anything,
17 and maybe, if we don't stay here for
18 more than an hour or so, before I do
19 anything, I could read your affidavit.

20 Okay. I just wanted to make that
21 clear.

22 MR. MUSCHENHEIM: Just to
23 summarize, I mean, the cases that
24 I've cited in my moving papers, none
25 of those cases support petitioners'

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designation as related to the 1985
action. In those cases, there was a
single dispute over the same building
or over the same personal injury or
over the same employment relationship.
Here, there are two different
situations: there's Local Law 1 of 1982
and Local Law 38 of 1999. They're two
completely different animals, so to
say.

So we would respectfully request
that the -- that their designation --
I mean, that you send this case back
to the Clerk's Office for random
reassignment.

THE COURT: Let me ask you, is
there any case law, at least in this
state -- not in the First Department --
where a statute aimed at what is
perceived as problems in health care is
subject to -- and I know I'm touching
on the merits but I really want to know
this -- is subject to SEQRA?

I mean, I found it unusual and

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2 I had some SEQRA cases. Generally,
3 it's got to do with congestion in the
4 streets, or too much electromagnetic --
5 electromagnetic exposure in the
6 environment to people who are living
7 near certain lines that are being set
8 up, or things like that.

9 I'm not familiar with any
10 legislation, or any case law, rather,
11 that talks about SEQRA's relationship
12 to health-care legislation, and I was
13 just wondering whether there is such
14 case law on that.

15 MR. RICHMOND: Your Honor, I'm not
16 aware of any case law on that direct
17 point.

18 MR. GOLDBERG: Your Honor, maybe
19 I can explain. My name is Andrew
20 Goldberg. I'm an attorney with NYPIRG
21 and I represent the NYPIRG petitioners.

22 First of all, in this case, the
23 issue of whether or not SEQRA applies
24 to the circumstances was not raised by
25 the City in their answering papers.

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2 While your Honor refers to this
3 as health legislation, it also is
4 really environmental. The entire
5 statute is about the work practices,
6 or a good part of it is about the work
7 practices, disturbing of a toxic
8 substance in the apartments.

9 The other thing I think that's
10 important to keep in mind, your Honor,
11 is that there was -- I think it is the
12 Chinatown case, says that -- and the
13 Court of Appeals has said a number of
14 times, that not only is the Court to
15 enforce the provisions of SEQRA, but
16 the additional requirements and gloss
17 that local law may give to it. In New
18 York City we have SEQRA/CEQR.

19 THE COURT: CEQR, with a C.

20 MR. GOLDBERG: In this case, the
21 action that's under discussion here was
22 a resolution by the legislative body of
23 the City of New York, the City Council.
24 So the City Council, as the legislative
25 body of the City of New York, has said

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2 that SEQRA -- at least, New York City
3 CEQR -- applies to this circumstance.
4 So I don't really believe that it's an
5 issue.

6 THE COURT: They passed a
7 resolution saying that it had no impact
8 on the environment; right?

9 MR. GOLDBERG: Well, they have
10 passed a resolution saying that CEQR
11 applies and -- New York City CEQR,
12 because they passed a resolution of
13 negative impact.

14 THE COURT: I understand that.

15 But in the next breath, they said
16 that since it has no substantial
17 impact --

18 MR. GOLDBERG: They attempted
19 to act under CEQR. The City Council,
20 as the legislative body, is saying,
21 at least City CEQR environmental
22 law applies, and then we have a
23 determination under City law.

24 But I think your Honor's question
25 is a threshold question, and I think,

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2 in light of the action of the City
3 Council, it's really not an issue in
4 this case.

5 I also understand that there are
6 cases -- I can't cite them for you,
7 your Honor, but if you'd like us to
8 brief the issue, we can -- where SEQRA
9 has been applied to pesticide use, both
10 inside apartments and outdoors, as well
11 as other circumstances. So I don't
12 think that this is an entirely unique
13 case.

14 THE COURT: You mean to
15 legislation regulating pesticides?

16 MR. GOLDBERG: Yes, and we can
17 brief that issue if your Honor wishes.

18 But I think the City Council's
19 actions really settled the question in
20 New York City as to whether SEQRA and
21 CEQR apply to this action, because the
22 legislative body has said it does.

23 THE COURT: Okay. I don't know
24 that we need to discuss this any
25 further. I think the question really

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2 before us, in the first -- at first
3 blush, is whether or not I'm going to
4 continue to preside in this case.

5 MR. MUSCHENHEIM: I think that's
6 correct, your Honor. I think -- I
7 mean, we would ask that everything --
8 that this case be held in abeyance
9 until you have made that decision.

10 MR. CHACHERE: May I be heard,
11 your Honor?

12 THE COURT: Sure, especially since
13 I haven't read your affidavit.

14 MR. CHACHERE: Yeah, which does
15 put me at somewhat of a disadvantage.
16 You know, I'm not sure what went on.
17 I did -- as I said, I came here and did
18 deliver a hand copy, as well as brought
19 up --

20 THE COURT: I'm sure you did, but
21 we couldn't find it.

22 MR. CHACHERE: -- the original
23 here today, so it's in the papers I
24 just handed up and it's about eight
25 pages, so it wouldn't take long to

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2 peruse it.

3 But let me just mention a few
4 things. First of all, the request for
5 judicial intervention, the RJI form,
6 on its face, requires the attorney
7 signing that document, under penalty of
8 perjury, to disclose any related cases,
9 and I was the attorney who signed that
10 document. I think that I was under
11 an absolute obligation to disclose the
12 very close relationship between these
13 two cases; and, in fact, if I didn't,
14 I think that would be a highly
15 questionable act.

16 Secondly, the Operating Statements
17 of Justice Crane, which is in the
18 respondents' papers, also indicates
19 that the disclosure of related cases is
20 required.

21 Now, there is a case that we
22 discussed at considerable length in our
23 answering papers and the City's motion,
24 called the Morfesis versus Wilk case,
25 and it's a First Department case and

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2 it was a three-two decision. And
3 interestingly enough, that was the case
4 where the City was on the opposite side
5 of this question.

6 The City had brought a case which,
7 to my mind, at least, was far less
8 related to the initial case. One had
9 to do with a bank foreclosure action
10 that was going with respect to a second
11 piece of property -- to a particular
12 piece of property and, about a year
13 later, the City commenced an action
14 having to do with code violations in
15 that property and asked to have it
16 assigned as a related case.

17 And one of the parties challenged
18 that and brought it up to the Appellate
19 Division, and the First Department said
20 that absent an abuse of discretion, the
21 concept of permitting a court to -- the
22 judge who has the arguably related case
23 to determine if they're truly related
24 is a sound one. It permits the person
25 most familiar with the already-pending

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2 case to make a determination whether
3 the new case is related.

4 And what's interesting is what the
5 dissent did. They, kind of, clarified
6 exactly what the considerations are and
7 they said that, in essence, there are
8 two important principles here that
9 underlie why we have the related-case
10 designation: one is for reasons of
11 judicial economy and, secondly,
12 for the avoidance of inconsistent
13 determinations. And even the dissent
14 in the Morfesis case, you know,
15 recognized these as far more important
16 than random selection.

17 THE COURT: Well, which of those
18 criteria --

19 MR. CHACHERE: Both.

20 THE COURT: -- of the two
21 criteria?

22 MR. CHACHERE: Both. And let me
23 address each one in turn.

24 With respect to judicial economy,
25 first, I will say that our answer to

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the City's motion to have this case reassigned was due prior to when the City's answer came in in the case-in-chief, so we were somewhat limited in what our response was; and now that we've seen their answer, it, in fact, emphatically demonstrates that these cases are related for purposes of judicial economy.

The City's entire argument, as we read it in their answer here, is that Local Law 38 was passed precisely because, in the City's view, it has only beneficial impacts when compared to Local Law 1, as interpreted by this Court, by your Honor, and as affirmed by the First Department. And that's the gist of their arguments. They have put the interpretation of Local Law 1 by this Court as the main reason they have enacted Local Law 38.

They go on for great length in their papers about this. Their answer attaches all the various orders in the

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NYCCELP versus Giuliani case, various stipulations in the NYCCELP versus Giuliani case. That is the main part of their argument. So to say that these cases are not related, that they don't involve the same subject matter, I think, is a little bit of a stretch.

With respect to the City's arguments that there are different legal issues here, I don't find that persuasive. There are a lot of different legal issues in NYCCELP versus Giuliani besides Local Law 1, like Local Law 50, the Medicaid issue.

So we think this only further supports our contention that there is no one in a better position to hear this case than your Honor, for the purposes of judicial economy.

Now, let me go to the question of inconsistent decisions. I don't recall, offhand, when the conference was, the last case conference we had in NYCCELP versus Giuliani. I believe

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2 it was around September the 4th, but
3 my recollection is that your Honor
4 directed that, if any motions were
5 going to be made, they had to be made
6 by the 22nd of September or the case
7 with be marked off the calendar.

8 Now, what the City says is that
9 they were forced to make a move to
10 dismiss the orders; otherwise, they
11 would waive them. Now they're turning
12 around and saying, "We're willing to
13 withdraw those," which I find -- you
14 know, if they were forced to make those
15 motions then, why are they willing to
16 withdraw them?

17 Well, apparently, the reason
18 they're willing to withdraw them is
19 that they want to retroactively try to
20 dissolve any relatedness between these
21 two cases, which I don't think changes
22 the fact that at the time that we
23 filed the RJI, there was clearly a
24 relationship between these cases.

25 So, in any event, on the 22nd

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of September, the City made a motion, in NYCCELP versus Giuliani, premised entirely upon Local Law 1, to vacate all the orders and the class certification in that action. Thus, they put the validity of Local Law 38 squarely at issue in the NYCCELP versus Giuliani class action.

And, in any event, on the same day that we filed the instant case here, the NYCCELP versus Vallone case, we cross-moved in NYCCELP versus Giuliani, in response to the City's motion to dismiss, for precisely the same relief we're seeking in this case; i.e., a declaration by this Court, by your Honor, that Local Law 38 is invalid, as a matter of law.

Thus, in either case, the issue, we believe, of Local Law 38's validity is squarely before this Court, and if NYCCELP versus Vallone is referred to another justice, then this Court is still going to be facing the same issue

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2 in NYCCELP versus Giuliani. The City's
3 motion in that case cannot be resolved,
4 I believe, without an understanding of
5 whether, in fact, Local Law 38 is
6 valid.

7 Now, with respect to the City's
8 related offer, now, apparently
9 realizing the error of their ways,
10 they're willing to withdraw this motion
11 that they said was essential purely to
12 avoid a relatedness question. We are
13 not willing to withdraw our cross-
14 motion on that case and we would ask
15 that that go forward.

16 So, in conclusion, I -- you
17 know, I think I've set out more of my
18 arguments in my answering papers here,
19 but I think it's time for us to move
20 forward to the merits of NYCCELP versus
21 Vallone.

22 THE COURT: Well, let me just
23 ask this question: This argument that
24 you've just made about the relationship
25 between the two statutes, that even

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2 if I send this case off to another
3 justice, I still have the question of
4 whether or not this law is valid, is
5 that raised in your answering papers?

6 MR. CHACHERE: Yes; we cross-moved
7 for that -- a determination of that in
8 NYCCELP versus Giuliani. We did that
9 the same day we commenced this case.

10 THE COURT: But it's not in these
11 papers (indicating), so I have to go to
12 NYCCELP versus Giuliani.

13 MR. CHACHERE: No, they're in our
14 papers in NYCCELP versus Giuliani. We
15 made precisely the same arguments there
16 as we made in NYCCELP versus Vallone.
17 Both cases have to do with the validity
18 of Local Law 38.

19 But, again, it's the City's
20 argument in NYCCELP versus Giuliani
21 that Local Law 38 invalidates all of
22 this Court's orders. It's directly
23 in front of the Court here. And
24 conversely, in NYCCELP versus Vallone,
25 they're turning around and saying, "We

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2 passed Local Law 38 precisely because
3 of the Court's orders in NYCCELP versus
4 Giuliani."

5 And yet, they're saying --
6 and their words are -- we engaged in
7 blatant forum shopping by designating
8 on the RJI, as we were required to do,
9 that there was a relationship between
10 these cases, so much that they're
11 willing to withdraw their motion, which
12 they said they were required to do or
13 they would waive it, purely for the
14 purposes of, apparently, sending this
15 case to another justice.

16 MR. MUSCHENHEIM: Your Honor, if
17 I may respond, there are a variety of
18 points. One is, the Morfesis case
19 merely states that the operating --
20 merely states what the Operating
21 Statement codifies, which is that
22 judicial economy and avoidance of
23 inconsistent determinations is the
24 reason why we have cases related. It
25 says nothing more than that simple

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2 principle.

3 There are -- in terms of the Local
4 Law 1 action from -- the 1985 action,
5 as Mr. Chachere says, there are a
6 variety of other issues in that case,
7 we don't necessarily concede that.
8 There is no dispute that Local Law 1
9 had been front and center in that
10 lawsuit, and even if there were a
11 variety of issues in that lawsuit,
12 SEQRA is not one of them.

13 THE COURT: I know, but if I
14 decide that SEQRA -- first of all, if
15 I decide -- I know I'm getting into
16 the merits again but I don't see how
17 it can be avoided -- if I decide that
18 they haven't satisfied SEQRA, the great
19 bulk of cases, I think, doesn't require
20 dismissal of the case; it requires
21 staying of the action until SEQRA is
22 satisfied.

23 Isn't that right?

24 MR. CHACHERE: I'm sorry; require
25 dismissal of which case?

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2 THE COURT: Of the current case.

3 MR. CHACHERE: Of NYCCELP versus
4 Giuliani.

5 THE COURT: Of Local Law No. 38.

6 Isn't this Local Law No. 38?

7 MR. CHACHERE: Yeah, okay.

8 THE COURT: Now, you've said,
9 SEQRA applies and you've made a strong
10 argument by citing that the City has
11 already invoked it -- the City Council
12 has already invoked it.

13 Now, suppose I agree with you
14 and I say SEQRA applies? That doesn't
15 mean that this case is dismissed. If
16 I decide that SEQRA applies and you
17 need an environmental impact statement,
18 I don't dismiss this case; I stay its
19 enforcement until there's an
20 environmental impact statement.

21 Is that not true?

22 MR. CHACHERE: You stay
23 enforcement of which case, your Honor,
24 of the --

25 THE COURT: The Local Law 38.

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2 MR. CHACHERE: Of NYCCELP versus
3 Vallone or NYCCELP versus Giuliani?

4 THE COURT: Of the NYCCELP versus
5 Vallone.

6 MR. CHACHERE: No.

7 THE COURT: You think I dismiss
8 it.

9 MR. CHACHERE: It's not dismissed.
10 If you declare that Local Law 38
11 requires an environmental impact
12 statement, it's an Article 78
13 proceeding. That's the end of the
14 proceeding. Then the City is required
15 to do that.

16 That's what happened in the
17 Williamsburg versus Giuliani case, the
18 case about the sandblasting of lead
19 paint off bridges. That was the
20 ultimate determination.

21 THE COURT: Well, it doesn't --
22 okay, it's an Article 78 proceeding,
23 but it doesn't invalidate Local Law 38.

24 MR. CHACHERE: Yes, it does.

25 THE COURT: It stays it.

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2 MR. CHACHERE: No, it invalidates
3 it. If it was wrongly enacted and it
4 was enacted in violation of the law, it
5 is invalid. That's what the cases --
6 that's what the cases indicate. It
7 can't be retroactively repaired by
8 doing an EIS after the fact.

9 MR. RICHMOND: Your Honor, I
10 disagree, and again I think this is
11 getting to the merits, but I think
12 there is a variety of injunctive relief
13 that a court hearing the case on
14 Local Law 38 could carve out. One, I
15 imagine, would be -- as your Honor has
16 stated, would be to stay it or even
17 allow Local Law 38 to proceed.

18 THE COURT: Well, I don't think
19 that any court would allow it to
20 proceed in the absence of a required
21 antecedent act, but I'm not sure that
22 the court would be required to dismiss
23 it, either.

24 MR. RICHMOND: Thank you, your
25 Honor.

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2 MR. MUSCHENHEIM: Your Honor,
3 just two other issues in response
4 to Mr. Chachere's comments earlier
5 about the relatedness, or lack of
6 relatedness.

7 THE COURT: Well, what I'm
8 persuaded by so far is the argument
9 about the possibility of inconsistent
10 decisions.

11 MR. MUSCHENHEIM: Your Honor, that
12 is not a threat, since we have -- are
13 withdrawing our motion.

14 And we were not forced to make
15 our motion. We made our motion in the
16 middle of September because, had we not
17 done so, you would have marked -- you
18 had indicated that you would mark the
19 case off the calendar; you would mark
20 the 1985 action off of the calendar.
21 To avoid that from happening, we made
22 our motion.

23 We are willing to withdraw that
24 motion, and that dispenses with any
25 threat of inconsistent verdicts.

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2 And Mr. Chachere had indicated, in
3 his cross-motion, that he was willing
4 to hold his cross-motion, as well as
5 our motion, in the 1985 action, in
6 abeyance pending the decision on the
7 Local Law 38.

8 THE COURT: But if you withdraw
9 at this point, I'm not so sure he's
10 willing to stay the course with regard
11 to that position.

12 Are you?

13 MR. CHACHERE: No, we're not. No,
14 we're not, your Honor.

15 MR. MUSCHENHEIM: Your Honor, he
16 had previously --

17 THE COURT: It really complicates
18 the situation.

19 MR. CHACHERE: Your Honor --

20 MR. MUSCHENHEIM: They had
21 indicated previously that they were
22 willing to. I mean, I think --

23 THE COURT: I mean, yes, but
24 nothing happened.

25 I mean, you know, do I now say

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2 to him: "You have to do it because you
3 said, at one point, you wanted to do
4 it? Now that the situation is changed,
5 I'm going to hold you to your word"?
6 I don't think the Appellate Division
7 would uphold me on that.

8 He made it under a certain set
9 of circumstances. Those circumstances
10 have changed drastically, and I don't
11 think, since it didn't happen and he
12 didn't do it, that I can tell him,
13 "You have to do it now."

14 MR. MUSCHENHEIM: He was willing
15 to hold his -- I'm sorry. He was
16 willing to hold his motion in abeyance.

17 THE COURT: But he's not willing
18 to do that now.

19 MR. CHACHERE: Your Honor, may I
20 read from the City's reply papers here?
21 Footnote to page 4: "Before the City
22 knew that Local Law 38 was being
23 challenged, the City was required to
24 move in the 1985 action or essentially
25 waive its right to relief."

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2 Now they're saying that that's not
3 true, but that's what he said last week
4 when he put his reply papers in, that
5 he would waive his relief. And now he
6 said no, it's just because it was being
7 marked off calendar.

8 MR. MUSCHENHEIM: Your Honor, the
9 first sentence of that footnote clearly
10 states what the situation was.

11 MR. CHACHERE: Well, that's his
12 words, not mine.

13 THE COURT: All right, let's get
14 into the merits now.

15 MR. MUSCHENHEIM: Your Honor, we
16 object to going forward with the merits
17 on this issue at this time. We would
18 like a decision on the issue of the
19 related-case issue.

20 THE COURT: Well, here's the
21 thing: You know, I don't see any reason
22 to waste time on this. If I decide
23 against you, then I'm going to have to
24 call you back for another argument.
25 If I decide for you, then we've only

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2 wasted maybe a half an hour here in
3 arguing the merits. I think that the
4 balance of equities falls decidedly in
5 favor of having the argument.

6 MR. MUSCHENHEIM: Your Honor, we
7 object to going forward --

8 THE COURT: What is wrong with
9 having the argument? What --

10 MR. MUSCHENHEIM: Because --

11 THE COURT: It doesn't influence
12 me one way or the other, but it does
13 allow me to make a more expeditious
14 decision.

15 MR. MUSCHENHEIM: I think we
16 would like to --

17 I mean, if there is a decision
18 against us on the related-case
19 designation, we would go to the
20 administrative judge and raise that
21 issue, which is permitted under the
22 Operating Statement. And we think
23 that the proper course is to go through
24 that procedure, as opposed to possibly
25 having argument now, only to re -- only

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2 to have to go through that process
3 one more time, if either you or the
4 administrative judge believes that
5 this case was improperly designated as
6 related to the 1985 action.

7 MR. CHACHERE: Well, your Honor,
8 I think that the First Department's
9 decision in Morfesis says that only
10 the Appellate Division has appellate
11 authority over orders that you make on
12 a motion. I'm unaware that Justice
13 Crane has become an intermediate
14 appellate authority on motions that
15 have been briefed and submitted to this
16 Court.

17 THE COURT: I think he has some
18 residual authority; not to rule on the
19 merits, of course --

20 MR. CHACHERE: Right.

21 THE COURT: -- but to rule --

22 I mean, he can assign cases to
23 judges and unassign them.

24 MR. CHACHERE: Right.

25 MR. MUSCHENHEIM: Your Honor --

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2 THE COURT: So I don't have any
3 problem with that. You know, I don't
4 think he can reverse me on any issue.

5 MR. CHACHERE: Right.

6 THE COURT: But he certainly can
7 either give me a case or take a case
8 away. That's one of his functions.

9 MR. CHACHERE: Right.

10 And I think, your Honor, that -- I
11 think you've correctly noted that the
12 judicial economy is, in fact, served by
13 proceeding with this case right here
14 and now. They're clearly related. The
15 relatedness between these cases and the
16 relatedness of the merits, in fact, to
17 the City's own motion for sending this
18 case elsewhere are -- demonstrate that
19 judicial economy is served by going
20 forward.

21 THE COURT: Well, I think I see
22 counsel's problem, though. What he's
23 concerned with is, if I decide that I
24 have -- that I'm not going to recuse
25 myself and then I go in and decide the

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2 merits in the same decision, we now
3 have a procedural quandary, because
4 could Judge Crane -- I think, in that
5 instance, it would be very difficult
6 for him to say that I shouldn't have
7 had the case.

8 And he would also be hard pressed,
9 and, probably, the Appellate Division,
10 after all is said and done and there's
11 a decision in the case and everything
12 else, and he has to face the question:
13 "Well, aren't you appealing only
14 because you don't like the Judge's
15 decision now? You wouldn't be
16 appealing if he decided in your favor."

17 So maybe we should pay some
18 attention to his problem here.

19 You know, there's something I
20 could do to satisfy what I think is
21 your concern and that is, I could
22 decide -- hear everything, decide the
23 disqualification issue first and, ten
24 days later, if I haven't been stayed
25 by the Appellate Division in any way,

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2 decide the merits.

3 MR. MUSCHENHEIM: I think, your
4 Honor, that we would prefer to go
5 forward only with this issue of the
6 relatedness.

7 THE COURT: You're not prepared
8 on the -- I'm wrong? That's not the
9 reason --

10 MR. MUSCHENHEIM: We are prepared
11 to move forward on that argument --

12 THE COURT: But what's wrong with
13 the procedure that I've set up?

14 MR. MUSCHENHEIM: I think it's
15 a -- we'll have to -- we may have to go
16 through this whole process twice, and
17 that's a waste of everyone's time.

18 THE COURT: Well, we may have
19 to go through it twice with one judge
20 when we could have done it once, also.
21 That's a possibility also. I mean, how
22 can you weigh -- you can't decide which
23 is which.

24 And, since we're all here and
25 everybody's primed and we have a very

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2 attentive audience who want to hear the
3 arguments of both sides, I think that
4 there's no problem in going forward.

5 And I promise you, I won't make a
6 decision on the merits until ten days
7 after I release my decision on whether
8 I'm disqualified or not.

9 MR. MUSCHENHEIM: Your Honor, we
10 object to the procedure going forward.

11 THE COURT: All right, objection
12 is noted.

13 Only because I'm not persuaded
14 that there's any good reason not to
15 have the argument now.

16 MR. MUSCHENHEIM: I think we
17 will -- we are spinning our wheels, if
18 we have to go through this argument now
19 and then have to --

20 If either you or Justice Crane
21 decides that these two cases are
22 not related, we will then have to go
23 through this whole process all over
24 again --

25 THE COURT: Well --

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2 MR. MUSCHENHEIM: -- and counsel
3 is primed now, but I'm sure they can
4 get re-primed.

5 THE COURT: Why does he have to?
6 My point is --

7 MR. MUSCHENHEIM: Because --

8 THE COURT: My point is, if I
9 decide that I have the jurisdiction,
10 then why would I have to call everybody
11 back and decide to argue it all over
12 again?

13 MR. MUSCHENHEIM: Because, even
14 if you decide that you have the case,
15 we are entitled, under the Operating
16 Statement, on page 2, which clearly
17 states that any further review that
18 is required of the relatedness issue
19 occurs before the administrative judge.

20 THE COURT: Okay, I'll give you 20
21 days, then, before I decide the merits.
22 You'll have a chance to go to -- if I
23 decide against you, and I wouldn't be
24 so certain, because my mind is not made
25 up at this point.

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2 MR. MUSCHENHEIM: We appreciate
3 that.

4 THE COURT: Really.

5 MR. MUSCHENHEIM: We appreciate
6 that.

7 THE COURT: But if you want to
8 go to Judge Crane and, if you're not
9 satisfied with Judge Crane, you want
10 to go to the Appellate Division, I'll
11 stay -- I won't rule on the merits for
12 20 days after my decision.

13 Now, does that satisfy your
14 concerns?

15 MR. MUSCHENHEIM: I think, your
16 Honor, that we -- our position really
17 is that we would like to have this
18 issue of the relatedness decided first.

19 THE COURT: Okay, your objection
20 is noted.

21 Mr. Chachere --

22 Which of you wants to argue?

23 MR. CHACHERE: Mr. Goldberg.

24 MR. GOLDBERG: The petitioner.

25 Since your Honor has presided over

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1
2 the NYCCELP versus Giuliani lawsuit for
3 several years, I know I don't need to
4 elaborate on the effects of lead paint
5 and lead poisoning. Suffice it to say
6 that the SEQRA action we're talking
7 about, that your Honor knows and
8 understands very well, the repair,
9 the removal, the cleanup of lead paint
10 and lead-contaminated dust in the
11 apartments and homes occupied by
12 children, is a serious health
13 environmental problem. Lead is a toxic
14 substance; it can cause brain damage
15 and other serious consequences to the
16 normal and healthy functioning of a
17 child's mind and body.

18 Petitioners challenge the validity
19 of Local Law 38 on the grounds that the
20 City Council failed to comply with the
21 substantive and procedural requirements
22 of the State Environmental Quality
23 Review Act, SEQRA.

24 The first step in the SEQRA
25 process is for the agency contemplating

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an action to make an initial determination of significance regarding whether or not the proposed action will have a significant environmental effect -- excuse me -- may have a significant environmental effect, requiring the preparation of an environmental impact statement.

In this proceeding, the first prong of petitioners' argument is that the Council's Negative Declaration was inadequate on its face, having failed to identify all relevant areas of environmental concern, thus rendering moot the subsequent steps of a harder look and written, reasoned analysis.

Since this argument is a facial analysis, your Honor, of the Negative Declaration, I ask your Honor to look at page 14 of the Negative Declaration where the Council was required to state its environmental assessment and determination.

Does your Honor have a --

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2 I think that's Exhibit 1.

3 MR. CHACHERE: It's Exhibit 1.

4 THE COURT: I think I have

5 everything.

6 MR. GOLDBERG: I have an extra
7 copy here, your Honor (handing).

8 THE COURT: I think it would be
9 easier if you give me that.

10 MR. GOLDBERG: At page 14,
11 your Honor, is where the Council
12 is required to state the conclusion
13 of an environmental assessment and
14 determination. Subsection 1 says:
15 "For each of the impact categories
16 below, consider whether the action
17 may have a significant effect on the
18 environment with respect to the impact
19 category. If it may, answer 'Yes.'"

20 Well, in the Negative Declaration
21 it says -- for "Air Quality" it says:
22 "No." Incredibly, it says: "No";
23 that the action of repairing, removing
24 and cleaning up lead paint and
25 lead-contaminated dust in the

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2 apartments and homes occupied by
3 children will not have an impact --
4 may not have an adverse impact on air
5 quality.

6 And the same thing for hazardous
7 materials. Lead is a toxic substance,
8 and again the Council answered "No."

9 In subdivision 2, the second
10 paragraph, it says: "Are there any
11 aspects of the action relevant to the
12 determination whether the action may
13 have a significant effect on the
14 environment, such as combined or
15 cumulative impacts?"

16 This was a last chance for the
17 Council, your Honor -- for them to
18 consider whether it may have an adverse
19 impact; whether removing, disturbing
20 lead in an apartment may have an
21 adverse environmental impact, and
22 again, incredibly, the Council says
23 "No" in the face -- in the
24 environmental -- in the Negative
25 Declaration.

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2 In fact, your Honor knows very
3 well, having presided over the NYCCELP
4 versus Giuliani lawsuit, the action of
5 repairing, removing and cleaning lead
6 paint or lead dust will have a
7 significant impact.

8 Local Law 38 also imposes many
9 other impacts in addition to just
10 removing the lead paint. All of these
11 adverse impacts are identified in the
12 petition at Paragraphs 149 through 198.
13 In this proceeding, however, in our
14 brief, the petitioners have focused on
15 just five.

16 First, Local Law 38 significantly
17 weakens the definition of lead hazards.

18 Lead-contaminated dust is
19 recognized as the single greatest
20 source of toxic lead exposure in young
21 children. In New York City apartments,
22 its source comes from lead paint that
23 is peeling, deteriorated, abraded or
24 impacted. Less common, but not unheard
25 of, exposure comes when a child chews

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2 on a mouthable surface.

3 Lead paint, whether peeling or
4 intact, is a potential environmental
5 hazard, and under current law, all of
6 these potential hazards are recognized;
7 under Local Law 1, all of these
8 potential hazards are recognized.
9 Local Law 38 now says that only peeling
10 and deteriorated lead paint is a
11 hazard.

12 Under SEQRA, the City Council was
13 compelled to identify in the Negative
14 Declaration this change in the law and
15 its associated environmental impact,
16 but it did not.

17 Second, under current law,
18 lead-poisoning prevention extends to
19 children up to their seventh birthday.
20 The new law removes all preventive
21 measures for six-year-old children.

22 Children above the age of six are
23 lead-poisoned, a fact respondents do
24 not dispute. DOH data shows that nine
25 percent of children identified with a

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2 blood lead level of 20 micrograms per
3 deciliter are older than six years of
4 age.

5 In fact, Paula Prester, one of the
6 original 1985 plaintiffs in the NYCCELP
7 versus Koch lawsuit -- that's the way
8 I refer it to, your Honor, because I
9 represented the plaintiffs when it was
10 NYCCELP versus Koch -- was nine years
11 old when she was lead-poisoned. Over
12 the course of a year, she was
13 hospitalized several times for lead
14 poisoning and was eventually placed
15 in foster care because her parents did
16 not provide her with alternative, safe
17 housing.

18 Again, under SEQRA, the City
19 Council was compelled to identify in
20 the Negative Declaration this change
21 in the law and its associated
22 environmental impacts, but it did not.

23 Third, the City Council, under
24 the rubric of "interim controls," has
25 lessened and weakened the procedures

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2 landlords must use for the repair and
3 removal of lead paint.

4 The current procedures under the
5 Health Code section 173.14 and their
6 application to lead-paint repair and
7 removal is compelled by Local Law 1.
8 The changes under Local Law 38 are
9 controversial and they're significant.
10 Among the most important of the
11 changes is the elimination of lead-dust
12 clearance testing under most, if not
13 all, circumstances.

14 The testimony by expert witnesses
15 and the written submissions to the City
16 Council, as well as scientific studies,
17 overwhelmingly show that carefully
18 followed safety measures during lead-
19 paint removal and repair work to
20 control and remove toxic lead dust
21 and chips from the environment are
22 effective in reducing children's blood
23 lead levels and dust lead levels in
24 their homes.

25 On the other hand, when work

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2 is done without proper controls, it
3 results in environmental hazards, and
4 lead dust and blood lead levels often
5 increase, sometimes dramatically.

6 In the scientific literature, your
7 Honor, these principles apply to intact
8 and peeling paint with equal results.

9 Furthermore, we know of no
10 scientific evidence or expert opinion
11 to support respondents' claim that the
12 interim controls are safer or at least
13 as safe as existing law. If such
14 evidence or opinion exists, it should
15 have been set forth in the Negative
16 Declaration (indicating), and it's not
17 there.

18 Again, under SEQRA, the City
19 Council was compelled to identify this
20 negative impact from the change in the
21 law, and they have not.

22 Fourth, when lead-paint hazards
23 exist in the dwelling of a young child,
24 exposure can occur immediately and no
25 recognized safe period exists for the

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2 delay in correcting the hazards.

3 Under existing law, correction
4 of the lead-paint violation must occur
5 within 24 hours unless the time is
6 extended by the Department of Housing
7 Preservation and Development, HPD, for
8 good cause under HPD's regulations.
9 Local Law increases this -- Local Law
10 38 increases this time to 21 and,
11 possibly, 66 days.

12 Whether, on balance, this is
13 a good idea or a bad one, adverse
14 environmental consequences of the
15 change in the law exist; and again,
16 under SEQRA, the City Council was
17 compelled to identify in the Negative
18 Declaration this change in the law and
19 its associated environmental impact,
20 and it did not.

21 Fifth, when an owner of a one-
22 or two-family dwelling does not comply
23 with a Department of Health order
24 to correct because a child is lead-
25 poisoned, current law requires DOH,

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within 16 days, to direct HPD to execute that order and HPD must execute it within 18 additional days. Local Law 38 will remove this time frame and imposes no new time frame in its place.

Obviously, there are consequences when a law that set forth a mandatory obligation for the City of New York is changed to a discretionary one, particularly when the budget of an agency is set.

Moreover, the respondents do not explain why removing a date certain may not have an adverse environmental impact.

Obviously, again, this was an impact that should have been identified by the Council under SEQRA, and it was not.

In summary, to the substantive defects with the Negative Declaration, petitioners argue that the Negative Declaration is inadequate on its face,

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2 in part because it fails to identify
3 and analyze obvious and relevant areas
4 of environmental concern.

5 Despite the large record in front
6 of your Honor, the Court's review must
7 begin with a careful inspection of the
8 Negative Declaration, which fails to
9 address numerous significant areas of
10 environmental concerns within the four
11 corners of this document (indicating).

12 While the Council has ignored
13 entirely the substantive requirements
14 of SEQRA in the preparation of the
15 Negative Declaration by failing to
16 identify adverse impacts, they've
17 also ignored SEQRA's procedural
18 requirements.

19 One requirement of SEQRA is that
20 a determination of significance must
21 be made as early as possible in the
22 formulation of the proposal for an
23 action. In this proceeding,
24 respondents began the SEQRA process at
25 the very last moment, rather than as

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2 early as possible. Indeed, respondents
3 fully acknowledged that they were
4 seriously looking at the changes in
5 the legislation at least since October
6 of 1998; they say so in their answer,
7 at Paragraphs 218 to 229. And, when
8 they got to work preparing the Negative
9 Declaration, which is attached as
10 Exhibit 1, the only references I
11 can find to the preparation are at
12 Paragraphs 249, 250 and 252.

13 I'd just like to read these to
14 your Honor. In Paragraph 249, the City
15 says, about the preparation -- 249
16 says: "In accordance with the... City
17 Charter... and the Rules of the
18 Council..., a notice dated June 23rd...
19 also indicated that the City Council
20 Committee on Housing and Buildings
21 would hold another hearing on June
22 24th...

23 "The June 23rd notice" -- at
24 Paragraph 250 it says: "The June 23rd
25 notice also indicated that at the June

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24th hearing the Committee would consider a proposed resolution -- Preconsidered Resolution 883... -- that the proposed lead paint legislation would not have 'a significant adverse impact on the environment.'"

Then in Paragraph 252 they say:

"The Preconsidered Resolution 883... and the remaining documents in the Negative Declaration, the Notice of Negative Declaration..., the Notice of Lead Agency Designation..., and the Environmental Assessment Statement... and two attachments... and the Description of Action and Assessment... were made available to Council Members at the beginning of the June 24th Committee hearing, and were made available to the public during the June 24th hearing."

In other words, what they say about the SEQRA process in the preparation of the Negative Declaration is that on the Wednesday before the

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2 Thursday of the hearing, a notice was
3 given that on Thursday they would
4 consider the Negative Declaration.

5 The Negative Declaration is dated
6 Thursday, June 24th, which is the day
7 of the hearing. And the Negative
8 Declaration was not submitted to the
9 committee members for review until the
10 hearing had begun and the public --
11 until the beginning -- until the
12 hearing had commenced.

13 Furthermore, at the hearing, your
14 Honor, the committee disposed of the
15 Negative Declaration without any review
16 and consideration.

17 And I would like to direct your
18 Honor to Exhibit 78 of the petition,
19 which is the transcript of the June
20 24th hearing, at page 237, line 17:
21 Chairperson Spigner says:

22 "Okay, let's move on now to the
23 negative declaration, which is a part
24 of the procedure I am told we must
25 comply with. You have had on your

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2 desk or in front of you a notice of
3 negative declaration. Let me turn to
4 Terzah [sic] Nasser, Counsel for the
5 Committee.

6 "Ms. Nasser: Okay, the next
7 vote will be on a resolution. It
8 is actually preconsidered reso --
9 resolution determining that the
10 enactment of our preconsidered intro,
11 which we will shortly have a vote, a
12 local law to amend the Administrative
13 Code of the City of New York in
14 relation to childhood lead-poisoning
15 prevention and to repeal subdivision H
16 of section 27-0213 of such code will
17 not have a significant adverse impact
18 on the environment.

19 "There are copies of the negative
20 declaration available for members who
21 wish to review it. Actually, it has
22 been on your desks.

23 "Thank you.

24 "Chairperson Spigner: As has
25 been described, a roll call now on

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2 the negative declaration, which was
3 explained to you by counsel. Roll
4 call, please."

5 The Clerk: "Spigner.

6 "Chairperson Spigner: Aye."

7 Sixty-five seconds, your Honor.
8 That's how long the City Council
9 committee spent in its review of this
10 resolution.

11 Now, turning to the second prong
12 of petitioners' argument, I'll touch
13 on this one very briefly because it's
14 implicit in what I've said already:

15 Not only was the City required
16 to put its analysis in the Negative
17 Declaration, but it was also required
18 to provide a reasoned explanation for
19 its conclusions. Since none of this
20 is found there (indicating) -- and had
21 the Council identified a single adverse
22 impact, under the rules, the SEQRA
23 rules and the CEQR rules and the City's
24 own forms, that would have triggered
25 the requirement to do a full

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2 environmental statement.

3 As in Williamsburg Around
4 the Bridge Block Association versus
5 Giuliani, a case I will talk about
6 at greater length in a few moments,
7 the Appellate Division said that a
8 procedure for the repair and removal of
9 lead paint on the Williamsburg Bridge
10 obviously required the preparation of
11 an environmental impact statement.

12 The Appellate Division explained
13 that it appears that young children are
14 more sensitive to lead exposure. This
15 is something your Honor knows very well
16 from your prior decisions.

17 And I won't continue to read.

18 The Court also explained that --
19 they said: "In the matter at bar, there
20 is no dispute that the work performed
21 by the City on the Williamsburg Bridge,
22 which resulted in the emission of a
23 cloud of fine, hazardous lead dust over
24 densely populated areas composed of
25 schools, open-air markets, parks,

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2 homes and playgrounds, falls within
3 the ambit of a significant effect on
4 the environment so as to trigger the
5 provisions of CEQR," the New York City
6 CEQR.

7 If lead-contaminated dust which is
8 dispersed outside the home constitutes,
9 in the words of the Appellate Division,
10 "... a significant effect on the
11 environment so as to trigger the
12 provisions of CEQR," then, of course,
13 the dispersion of a hazardous lead
14 dust inside the home, where you have
15 children and pregnant women present
16 while the work is in progress, must
17 also constitute a significant effect
18 on the environment.

19 In light of the Appellate Division
20 decision against the City of New York
21 in the Williamsburg case, I anticipated
22 reading Corporation Counsel's
23 explanation as to how the circumstances
24 may differ. It's not there; they say
25 absolutely nothing.

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2 In summary, the Negative
3 Declaration is defective on its face
4 and the circumstances warrant this
5 Court not only to void the Negative
6 Declaration, but also to order
7 respondents to prepare an EIS before
8 enacting new legislation.

9 Now turning to respondents'
10 arguments, they are, in fact, I
11 believe, just making one argument.
12 To quote them: "Local Law 38 replaces
13 the dangerous mandate to abate intact
14 lead paint with a lead-safe approach."

15 This assertion is wrong for
16 numerous reasons, and I'll give you
17 just two. Abating peeling lead paint
18 oftentimes can be more hazardous than
19 abating intact paint on sound surfaces.
20 You can abate a large surface like a
21 wall or ceiling by covering it with
22 thin sheetrock without generating
23 any significant lead dust. You can
24 encapsulate a lead-painted windowsill
25 with a vinyl cap, again without

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2 generating lead dust.

3 On the other hand, when you scrape
4 a large wall surface that has loose
5 paint on deteriorated plaster, large
6 amounts of lead dust may be generated.

7 The science and the truth about
8 lead- paint removal, as we know it, is
9 that you never know for sure whether
10 lead dust -- whether a lead-dust hazard
11 is created, irrespective of the
12 condition of the paint, peeling or
13 intact. That's why every recognized
14 expert who has testified about Local
15 Law 38 has said that lead-dust
16 clearance testing always must be a
17 requirement of the law. It's now the
18 requirement under Local Law 1; it's not
19 a requirement under Local Law 38.

20 Respondents also make no effort to
21 support the claim, the so-called "lead-
22 safe approach" is more protective of
23 the environment than the laws it will
24 replace. They do not because they
25 simply cannot. Instead, the record

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2 your Honor has supports -- supporting
3 the petition, including the affidavits
4 from Drs. Landrigan, Lanphear, Irving
5 Mauss; Drs. Needleman, Rosen, Gilbert;
6 Dr. Evelyn Mauss, Dr. Newman, and
7 Olmsted, all explain why respondents
8 are wrong, backed up by the science.

9 And in addition, something else
10 that just occurred a few days ago is
11 attached as Exhibit 115 to the reply
12 affirmation. It includes the testimony
13 of Dr. Susan Klitzman, who until
14 recently was in charge of DOH's
15 lead program, and she says that you
16 cannot -- that you must have trained
17 workers to do lead abatement and you
18 must have clearance testing. And that
19 was her testimony before the Department
20 of Health last Friday.

21 Next, I will address the law and
22 the cases that supports petitioners'
23 positions. To begin, according to the
24 Court of Appeals in Coca-Cola Bottling
25 Company versus the Board of Estimate,

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2 the State Legislature enacted SEQRA in
3 1975 in order to inject environmental
4 considerations directly into government
5 decision-making. SEQRA achieves this
6 goal through the mechanism of an
7 environmental impact statement.

8 After SEQRA's enactment, the
9 Court of Appeals has instructed on many
10 occasions that it's not the role of the
11 courts to weigh the desirability of any
12 action but to ensure that the agency
13 itself has satisfied SEQRA, both
14 substantively and procedurally.

15 In the Chinese Staff and Workers
16 Association versus the City of New
17 York, the Court of Appeals invalidated
18 a negative declaration and declared
19 null and void a special building
20 program to construct a high-rise
21 building in Chinatown because the
22 Board of Estimate had failed to
23 consider all adverse environmental
24 impacts, as required by SEQRA.

25 Although there is much case law

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cited in petitioners' memorandum and reply memorandum, petitioners maintain that the recent Appellate Division decision in the Williamsburg Bridge case is dispositive of the present case. In fact, the situation in this proceeding is virtually indistinguishable from the situation in the Williamsburg, where the Appellate Division directed the City to produce an environmental impact statement.

In Williamsburg, after complaints arose concerning unsafe practices in removal of lead paint from the Williamsburg Bridge, the City promulgated a protocol to improve the control of lead dust during their removal of lead paint from the bridge's steel structure. In other words, the City had produced a protocol to control lead dust where none had existed before.

Respondents here argue that a negative declaration was appropriate

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2 because, overall, there was a
3 beneficial impact; but, if a case more
4 clearly represents this beneficial-
5 impact-alone analysis asserted by
6 respondents here, that case is the
7 Williamsburg Bridge case, because the
8 challenged protocol established control
9 procedures where none had existed
10 before. Thus, under respondents'
11 theory in this proceeding, the
12 Appellate Division should have ruled
13 in the City's favor, but it did not.

14 Instead, the court in Williamsburg
15 invalidated this process and required
16 the preparation of an environmental
17 impact statement. Calling the City's
18 process in that case "ersatz," the
19 First Department recognized that the
20 City could not substitute alternative
21 procedure for the strict and detailed
22 procedures established by the
23 Legislature under SEQRA, and in
24 that respect, the Court of Appeals
25 has ruled many times about strict

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2 compliance with SEQRA's procedural
3 and substantive requirements.

4 Irrespective of whether the
5 protocol would have a beneficial
6 effect, the Appellate Division focused
7 on the undisputed fact that work
8 performed on the Williamsburg Bridge
9 falls within the ambit of the
10 significant effect on the environment,
11 so as to trigger the provisions of
12 SEQRA.

13 In the present case, there could
14 be no dispute that the work performed
15 in occupied apartments to remove or
16 repair lead paint will also have a
17 significant effect on the environment.
18 There is lead paint in New York City
19 apartments. New York City has the
20 highest concentration of old
21 apartments.

22 There's no conflict -- there's no
23 conflict, in fact, between the records
24 submitted by the petitioners and the
25 records submitted by the respondents

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2 on this point: that the presence of
3 lead paint in New York City apartments,
4 its repairs and its removals, create a
5 potential adverse environmental impact
6 for apartment residents, particularly
7 children and pregnant women.

8 The Williamsburg case is referred
9 to numerous times in petitioners'
10 memorandum of law but it's not
11 mentioned even once in respondents'
12 answering memorandum. Perhaps
13 respondents' omission is, in fact, an
14 acknowledgment that Williamsburg Around
15 the Bridge Block Association is the
16 case they cannot distinguish.

17 Finally, the cases respondents
18 cite on beneficial impacts do not stand
19 for the legal propositions respondents
20 are advancing. Rather, in each
21 instance, the courts, under the
22 H.O.M.E.S. analysis, based their
23 holding on whether the governmental
24 actors fully complied with SEQRA's
25 substantive and procedural mandates in

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issuing negative declarations.

For example, respondents inappropriately rely on Gernatt Asphalt Products versus the Town of Sardinia. There the Court said that the record reflects, the town board identified the relevant areas of environmental concern as related to the proposed action, took the requisite hard look and, in its negative declaration, set forth in writing a reasoned elaboration and basis for its determination.

In the present case, respondents do not even make the claim that they identified all concerns, then took a hard look, and then set forth their reasoned elaboration of their determination. Remember, the committee did not receive the Negative Declaration until the hearing began. Counsel to the committee had to tell them it was on their desks because they probably didn't even know it was there, and the committee disposed of the

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2 matter in just 65 seconds.

3 Similarly, respondents' reliance
4 on Save the Audubon Coalition versus
5 the City of New York is also misplaced.
6 In Save the Audubon, the Appellate
7 Division upheld a negative declaration
8 that supported a zoning resolution
9 because, as the court emphasized over
10 and over, the resolution would require
11 a full EIS to support every application
12 for a permit under the resolution.
13 This is a beneficial impact that SEQRA
14 could not be -- of SEQRA that would not
15 be in dispute, because it codified that
16 every permit would have to address
17 adverse environmental impacts with an
18 EIS to be considered.

19 What possible analogy is there
20 to Local Law 38? Local Law 38 does
21 not require the landlords to justify
22 that they are using safe work practices
23 before commencing work. Instead, Local
24 Law 38 just gives them the green light
25 to use the unsafe work practices that

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2 the expert witnesses have said are
3 likely to increase the incidence of
4 lead poisoning in the City of New York.

5 Thank you, your Honor.

6 MR. RICHMOND: Good afternoon,
7 your Honor. My name is Daniel
8 Richmond. I'm with the New York City
9 Law Department.

10 Your Honor, this past summer, the
11 New York City Council passed by a vote
12 of 36 to 15, and the Mayor then signed
13 into law, Local Law 38 of the year
14 1999. Local Law 38 eliminates a
15 dangerous mandate to abate intact
16 lead paint and replaces it with a
17 comprehensive framework for preventing
18 and correcting lead-paint hazards.

19 THE COURT: What's the "dangerous
20 mandate"?

21 MR. RICHMOND: Your Honor,
22 numerous people -- and I would urge
23 your Honor to look at the hearings
24 before the Department of Health and HPD
25 when those regulations were going into

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2 effect, and also at the testimony that
3 was presented to the City Council on
4 December 16th, 1998.

5 The problem is, when you -- intact
6 lead paint, the consensus is, is not a
7 hazard. The hazard becomes when you
8 disturb it and you create dust. It's
9 the dust that they are -- you know,
10 that -- it would not be a problem in
11 intact paint but becomes one once you
12 start disturbing it needlessly.

13 THE COURT: I know, but what
14 about when intact lead paint ages and
15 deteriorates?

16 MR. RICHMOND: Your Honor, the
17 thinking is, and again, the current
18 consensus on lead, how to keep things
19 safe, is to keep -- to keep the lead
20 safe is that if it's in good repair, if
21 it's intact, you keep it intact and you
22 monitor it.

23 And that's what Local Law 38 does;
24 it requires landlords, when they get
25 notice -- when they find out that a kid

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2 under six lives in their apartment, to
3 inspect it annually. It requires them
4 every year to send out a notice to ask
5 people living in multiple dwellings, in
6 buildings built before 1960, whether a
7 child under six lives there. If they
8 find out that -- if, after performing
9 their annual inspection, they
10 find a hazard -- this is without
11 a violation -- they need to go in
12 there and correct it, using the safe
13 practices that are outlined in Local
14 Law 38.

15 THE COURT: What happens if
16 they don't go in? What happens if the
17 landlords -- when landlords don't go
18 in? What happens then?

19 MR. RICHMOND: If the landlord
20 doesn't go --

21 You mean, they've sent out a
22 notice --

23 THE COURT: Well, I don't think
24 we can assume there's going to be 100
25 percent obedience to the statute.

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2 There are some landlords, at least, who
3 deviate.

4 MR. RICHMOND: In that case, I
5 mean, the tenant can make a complaint
6 to HPD. HPD is required under the law
7 to inspect within a certain mandated
8 time frame, to reinspect to make sure
9 that it's corrected. If it's not
10 corrected, in an unprecedented mandate,
11 HPD must actually do the repairs to
12 correct the violations. Ultimately, as
13 a result, no lead-paint violations will
14 be left unrepaired in New York City.

15 This case, your Honor, which
16 petitioners cast as a SEQRA challenge,
17 is really a misguided --

18 THE COURT: Has HPD put together
19 the resources now to implement that
20 requirement, to do the repairs?

21 MR. RICHMOND: Your Honor,
22 I would have to check with my client
23 about that. I know that they have --
24 they've already held a hearing and have
25 implemented final rules that will go --

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2 that --

3 As your Honor may know, Local Law
4 38 has gone into effect last Friday and
5 is now being enforced, and the rules
6 that DOH implemented pursuant to the
7 process where they had the hearing last
8 month also went into effect on Friday.

9 Your Honor, this case, which
10 petitioners cast as a SEQRA challenge,
11 is really a misguided and wholly
12 inappropriate effort to misuse state
13 and City environmental law to subvert
14 the legislative process. The instant
15 petitioners, disappointed advocates for
16 a different piece of legislation, are
17 using SEQRA as a platform to re-present
18 and reargue their case for this other
19 legislation. In doing so, petitioners
20 are asking the Court to exceed its
21 limited role under SEQRA so that they
22 can have a second bite at the lawmaking
23 apple.

24 The record, however, shows that
25 SEQRA was satisfied both procedurally

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and substantively here. The Negative Declaration and the Environmental Assessment Statement were lawful and rational in all respects.

It is well settled that SEQRA affords decision makers broad latitude in evaluating potential environmental impacts and choosing among alternatives. And, in particular, municipalities enjoy considerable discretion under SEQRA in their determinations as to substantive environmental matters. Nothing in SEQRA requires municipalities to reach particular results or permits courts to second-guess their choices.

It is well settled that courts cannot substitute their judgment for that of the decision makers. Rather, it is well settled that the Court's role here is supervisory only.

Accordingly -- under SEQRA, a court is limited to reviewing whether a determination was made in violation

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2 of lawful procedure, was affected by
3 an error in law or was arbitrary and
4 capricious or an abuse of discretion.

5 Accordingly, the sole issue is
6 whether the City's lawmakers lawfully
7 and rationally determined that there
8 would be no significant adverse
9 environmental impacts from eliminating
10 a dangerous mandate to abate intact
11 lead paint and replacing it with
12 comprehensive legislation to prevent
13 and correct lead hazards that places
14 multiple duties and responsibilities
15 on multiple-dwelling owners and on
16 City agencies.

17 To give some background, as you
18 know, your Honor, under Local Law 1,
19 the City -- Local Law 1 required the
20 abatement of all lead paint, regardless
21 of its condition.

22 Respectfully, your Honor, Local
23 Law 1 of the year 1982, as judicially
24 interpreted, was poised to create
25 environmental havoc. As the City

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Council repeatedly heard, by causing the abatement of intact lead paint, Local Law 1, as judicially interpreted, would actually endanger the health of children by creating lead-dust hazards where previously none had existed. By causing the generation of lead dust by requiring the disturbance of intact lead paint, Local Law 1, ironically, would cause childhood lead poisoning to increase dramatically in the City.

As Health Commissioner Neal Cohen testified before the City Council, implementing the court's interpretation of Local Law 1 of 1982 will have exactly the opposite effect of what the law originally intended. Rather than eliminating the lead-paint hazards, new lead-paint hazards will be created and, in the words of one prominent environmental consulting firm, "will create a new wave of childhood lead-poisoning cases that would dwarf the current case load."

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2 THE COURT: All this from applying
3 SEQRA?

4 MR. RICHMOND: I'm sorry?

5 THE COURT: I said, all this from
6 applying SEQRA?

7 MR. RICHMOND: I'm sorry, your
8 Honor?

9 THE COURT: Well, we are talking
10 about whether or not SEQRA has been
11 followed here?

12 MR. RICHMOND: Yes, your Honor,
13 and the sole issue is whether or not
14 it was rational and lawful for the --
15 whether the City Council lawfully and
16 rationally determined that replacing
17 this mandate with a comprehensive
18 scheme violated SEQRA; whether that
19 was arbitrary and capricious. And I
20 think it's necessary for the Court to
21 understand what the background is with
22 Local Law 1 and also what happened --
23 what Local Law 38 puts in its place.

24 Thank you, your Honor.

25 Local Law 1 also threatened to

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2 deplete the City's stock of affordable
3 housing. For example, HPD Commissioner
4 Roberts testified before the City
5 Council that "It is truly ironic
6 that the proposed rules [which would
7 implement Local Law 1 as judicially
8 interpreted] may severely
9 exacerbate" --

10 THE COURT: Brackets? I don't
11 understand. You're making an oral
12 presentation here.

13 MR. RICHMOND: Okay. Well, I'm
14 just trying --

15 THE COURT: Is this coming out of
16 the encyclopedia or something?

17 MR. RICHMOND: It should be.

18 "It is truly ironic that the
19 proposed rules" -- and just by way
20 of explanation, these proposed rules
21 were implemented by HPD to implement
22 the court's interpretation of Local
23 Law 1, and continuing with Commissioner
24 Roberts -- "may severely exacerbate
25 the lack of affordable housing in

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2 the City, without achieving the goal of
3 protecting the safety of children."

4 THE COURT: We did all of that?

5 MR. RICHMOND: Well, I would point
6 out, your Honor, as the NYCCELP Court,
7 repeatedly expressed doubts about Local
8 Law 1. Indeed, your Honor, in December
9 1995, transcript pages 14 through 15,
10 stated that "The City has amassed an
11 impressive display of authority tending
12 to show that the statute that Judge
13 DeGrasse based his order on may not
14 be the most practical, economical and
15 expedient way of eradicating poisoning
16 of children from lead-based paint
17 and costs to the City are quite
18 substantial. Nevertheless, while
19 the statute is in force, it is the
20 clear mandate of the law, which this
21 Court is bound to follow, along with
22 Judge DeGrasse's order."

23 Skipping ahead, your Honor, as
24 I've already mentioned to you, these
25 proposed rules were the subject of CAPA

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2 hearings before DOH and before HPD,
3 which I would urge your Honor to read.

4 More importantly, however, on
5 December 16, 1998, the City Council
6 Committee on Housing and Buildings held
7 a hearing --

8 THE COURT: Now you're going too
9 fast even for me.

10 MR. RICHMOND: On December 16th,
11 1998, the City Council Committee on
12 Housing and Buildings held a hearing
13 on these proposed regulations.
14 HPD Commissioner Roberts and DOH
15 Commissioner Dr. Cohen spoke at length
16 about the dire situation that was
17 unfolding as both agencies promulgated
18 regulations to implement Local Law 1's
19 judicial interpretation and stressed
20 the need for legislative change.

21 Your Honor, as, ultimately,
22 Councilman Michels, who was the author
23 of Local Law 1 of 1982, said, "Everyone
24 agreed that Local Law 1 needed to be
25 revised and updated, especially to make

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2 sure that intact lead paint is not
3 removed from walls and ceilings because
4 they cause dust when you remove it."

5 Local Law 38 repeals --

6 THE COURT: I don't think,
7 given the fact that his was the first
8 signature on that petition I got when
9 the City Council asked me to hold off
10 on the motion -- I guess it was the
11 motion to dismiss -- it didn't sound
12 to me -- especially in his oral
13 presentation at that time -- well,
14 he made some statements -- that he
15 supports this law, either.

16 MR. RICHMOND: I think that's what
17 this case is about; that they support
18 alternative legislation which they
19 were -- and that's what I think this
20 case is exactly about.

21 Your Honor agrees, I think,
22 that Local Law 1 was unworkable, was
23 dangerous, and the question is: What
24 do we replace it with?

25 They have alternative legislation

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2 that they prefer.

3 Local Law 38 repeals Local Law 1
4 and replaces it with a comprehensive
5 framework for preventing and correcting
6 lead-paint hazards. It imposes
7 explicit duties on, and requires
8 specific actions from, multiple-
9 dwelling owners and City agencies.

10 Under Local Law 38, owners are
11 required to correct lead-paint hazards
12 using safe work practices to control
13 the dispersal of dust and debris that
14 may contain lead and to perform ongoing
15 monitoring and maintenance of painted
16 surfaces.

17 I would also point out that
18 they're requiring, on vacancy of
19 multiple dwellings built before 1960,
20 inspections to make sure that they're
21 lead-safe; and, as I said before,
22 they have the duty to ask, in multiple
23 dwellings, if children under six are
24 residing there.

25 THE COURT: Here's the problem I'm

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2 seeing here: You keep comparing Local
3 Law 1 with Local Law 38 -- I lost my
4 train of thought -- but my job is not
5 to find out whether Local Law 38 is
6 better or worse than Local Law 1.
7 I think we're going off on a tangent
8 when we do that. The issue is whether
9 or not SEQRA was followed in the
10 promulgation of Local Law 38 of 1999.
11 Right? Or '98?

12 MR. GOLDBERG: 1999.

13 THE COURT: 1999.

14 So these comparisons, I think,
15 are beside the point, it seems to me.
16 Unless you're saying that, if I decide
17 that SEQRA wasn't followed, then Local
18 Law 1 goes into effect, and therefore,
19 don't apply SEQRA because then you'll
20 have a bad statute.

21 I don't think that's the issue
22 that I'm faced with. I think the issue
23 I'm faced with is: Was SEQRA followed,
24 or not, in passing Local Law 38? I
25 shouldn't be concerned with Local Law

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2 1 in determining whether or not SEQRA
3 was followed --

4 MR. RICHMOND: I think --

5 THE COURT: -- or applies.

6 MR. RICHMOND: Well, your Honor,
7 I think it's important to understand
8 the circumstances that led to the
9 passage of Local Law 38.

10 THE COURT: Well, you're trying
11 to make me feel guilty, I think, if I
12 say that Local Law 1 -- SEQRA doesn't
13 apply.

14 MR. RICHMOND: That's not my
15 intention, your Honor. My intention --

16 THE COURT: -- or SEQRA applies,
17 rather.

18 MR. RICHMOND: No, your Honor.
19 As I pointed out, I see that the Court
20 has repeatedly expressed doubts,
21 itself, about Local Law 1.

22 You're correct, your Honor; the
23 sole issue before this Court is whether
24 the City's lawmakers lawfully and
25 rationally determined that there was

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2 no significant adverse impact from
3 repealing that and replacing it with
4 the comprehensive legislation to
5 prevent that.

6 Not every action subject to SEQRA
7 review must undergo an environmental
8 analysis in the form of an
9 environmental impact statement.
10 If an agency determines, after
11 the preparation of the initial
12 environmental assessment statement,
13 that no significant adverse effects
14 are likely to result from the action,
15 it may elect to issue a negative
16 declaration, obviating the need for
17 further environmental review.

18 As the Court of Appeals has held,
19 in determining whether an action will
20 have a significant adverse impact,
21 the question of significance
22 is ultimately a policy decision.
23 Accordingly, a negative declaration is
24 a policy determination that significant
25 adverse environmental impacts will not

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result from an action subject to SEQRA review. Here, the determination that Local Law 38 will not have significant adverse impacts on the environment was a rational, lawful and well-informed policy decision.

Your Honor, it is well settled that decision makers' responsibilities under SEQRA must be viewed in the light of the rule of reason; and not every conceivable environmental impact, mitigating measure or alternative need be addressed in order to meet the agency's responsibilities. Rather, the degree of detail and the reasonableness of an agency's action will depend largely on the circumstances surrounding the proposed action.

Pursuant to the rule of reason governing SEQRA jurisprudence, the Negative Declaration and Environmental Impact Statement here were appropriately focused. For example, the Negative Declaration focused --

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2 And I think this is why it's
3 important to get back to Local Law 1,
4 your Honor, the context in which it was
5 promulgated.

6 The City Council and the Mayor of
7 New York concur that the goal of Local
8 Law 1, which was to eliminate hazardous
9 housing conditions before a child
10 becomes lead-poisoned, is --

11 THE COURT: You talk faster than I
12 think.

13 MR. RICHMOND: -- is not best
14 served by the removal of intact paint
15 containing lead, which Local Law 1
16 has been interpreted by the courts to
17 require.

18 The Negative Declaration and EAS,
19 Environmental Assessment Statement,
20 reasoned that the proposed
21 legislation's comprehensive lead-safe
22 framework offered a rational approach
23 to potential lead hazards, since "the
24 best way to prevent poisoning from
25 paint containing lead is to ensure

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2 that such paint is kept in good repair,
3 or, if it is peeling or located on a
4 deteriorated subsurface, that it is
5 repaired using safe work practices."

6 The Negative Declaration and
7 Environmental Assessment Statement
8 also took a hard look at the proposed
9 legislation's potential impact with
10 respect to generation, storage or
11 disturbance of hazardous materials.
12 They focused on the safe work practices
13 set forth in the proposed legislation,
14 noting that they would mandate the
15 repair of lead-based paint hazards or
16 violations using certain corrective
17 procedures referred to in the bill as
18 "interim controls." As the Negative
19 Declaration and Environmental
20 Assessment Statement reasoned with
21 respect to the interim controls in the
22 proposed legislation:

23 "The purpose of these interim
24 controls or measures is to keep intact
25 and in good condition paint that is

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presumed to contain lead, while limiting the dispersal of such paint, paint chips or other work-related debris through the use of plastic sheeting, wet scraping, and either HEPA vacuuming or washing surfaces. These interim controls are also intended to minimize the amount of work-related dust, which may contain lead, that remains in the dwelling unit after the work is completed."

They reasonably determined that the interim controls set forth in the bill are designed to reduce the spread of hazardous or potentially hazardous materials.

The Negative Declaration and Environmental Assessment Statement also identified and took hard looks at other relevant areas of concern. For example, they assessed the proposed legislation's socioeconomic impacts and assessed various aspects of the proposed legislation. For example,

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2 they considered the new prohibition
3 on dry scraping and dry sanding lead
4 paint in the proposed legislation and
5 reasoned that this measure "should
6 help to reduce the influx of dust
7 and air pollutants, particularly in
8 neighborhoods where such conditions
9 are most prevalent due to poor housing
10 conditions."

11 Their analysis here also
12 considered the mandates on City
13 agencies imposed by Local Law 38.
14 For example, it considered the
15 Department of Health's obligation under
16 the proposed legislation to develop an
17 informational pamphlet describing the
18 dangers of lead paint; the Department
19 of Health's duties under the new
20 legislation with respect to arranging
21 for blood lead screening for children
22 who require it, but whose parent or
23 guardian cannot obtain it because the
24 child is not insured or covered for
25 such screening; and HPD's duty to

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2 correct lead-hazard violations when
3 owners do not.

4 As a result of its assessment of
5 these and other measures under the
6 legislation, the Negative Declaration
7 and Environmental Assessment Statement
8 had a rational basis for reasoning that
9 the proposed legislation should improve
10 the maintenance of the housing stock in
11 the City.

12 The Negative Declaration and
13 Environmental Assessment Statement also
14 took a hard look at the law's impact
15 with regard to solid waste.

16 I'll skip ahead, your Honor.

17 The Negative Declaration and
18 Environmental Assessment Statement
19 also reviewed and assessed Local Law 38
20 with respect to a comprehensive list
21 of areas of environmental concern and
22 declared that the proposed legislation
23 would have no significant adverse
24 impact with respect to these areas.

25 In view of the dangers posed

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2 by Local Law 1 as interpreted by
3 the courts and the clear benefits
4 of replacing it with comprehensive
5 measures to prevent and correct lead
6 hazards, the Negative Declaration and
7 Environmental Assessment Statement
8 could rationally determine that Local
9 Law 38 would have no significant
10 adverse environmental effects with
11 respect to categories including:
12 neighborhood character, socioeconomic
13 impacts and displacement, community
14 facilities, open space, historic
15 and archeological resources,
16 transportation, air quality,
17 infrastructure and energy, natural
18 resources, waterfront revitalization,
19 hazardous materials, noise, and solid
20 waste.

21 The Negative Declaration and
22 Environmental Assessment Statement's
23 assessments of no significant adverse
24 environmental impacts were supported by
25 ample evidence before the City Council,

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2 and I think I've touched upon some of
3 them for the Court, and it's very well
4 set out in the brief.

5 Moreover, in addition to the
6 facial validity of the Negative Dec.
7 and the Environmental Assessment
8 Statement, the record as a whole also
9 shows that the requisite "hard look"
10 was taken. Where the record as a whole
11 shows that a legislative body was fully
12 informed of all relevant environmental
13 issues and considered them before
14 taking action, the hard-look standard
15 is met.

16 In Sutton Area Community versus
17 Board of Estimate, after a final
18 environmental impact statement was
19 released, it was revealed that it was
20 totally incorrect about a significant
21 issue: sewage waste disposal.

22 Just three days before the lead
23 agency held a hearing and adopted
24 resolutions relevant to the project,
25 the City issued a notice of correction

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2 indicating the change. At the Board of
3 Estimate hearing, public officials,
4 community residents and other
5 interested individuals, including the
6 Sutton Area petitioners' counsel and
7 their consultants, offered testimony.
8 Board members questioned the speakers
9 at length about a host of topics
10 relating to the proposed project's
11 environmental impacts. The Court
12 of Appeals held that the hard-look
13 standard had been met in Sutton Area
14 because "the record, viewed as a whole,
15 reveals that the Board was fully
16 informed of all pertinent environmental
17 issues."

18 Your Honor, the City's lead paint
19 policy had been discussed among the
20 City's lawmakers for years prior to
21 the passage of Local Law 38 and with
22 particular intensity in the months
23 leading up to its passage.

24 On December 16th, 1998, the
25 Council Committee on Housing and

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Buildings held a hearing on regulations that HPD and DOH were promulgating in compliance with the NYCCELP court orders.

On June 21st, 1999, the Council Committee on Housing and Buildings heard testimony from the HPD Commissioner Roberts and DOH Commissioner Cohen on the proposed legislation which, as later amended, would become Local Law 38 and discussed it with them. In addition, a variety of organizational representatives and other interested members of the community also spoke.

On June 24th, the Committee on Housing and Buildings again convened, this time to discuss the legislation which had been amended subsequent to and in consideration of testimony at the June 21st Council hearing. Again interested members of the public and a variety of organizational representatives appeared.

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2 On June 30th, the Council
3 debated the merits of both the Negative
4 Declaration and the Environmental
5 Assessment Statement and the proposed
6 legislation. After a lengthy and
7 vigorous debate, both the Negative
8 Declaration and the Environmental
9 Assessment Statement and the proposed
10 legislation were adopted by a vote of
11 36 to 16.

12 On July 15th, the Mayor signed the
13 legislation into law.

14 The record as a whole shows, your
15 Honor, that petitioners' challenge here
16 is a rehash of arguments they raised
17 before the City's lawmakers and that
18 were considered by them prior to
19 passage of Local Law 38. Like
20 petitioners in Sutton Area, the
21 instant petitioners, as they themselves
22 concede, are making the same arguments
23 here as they made repeatedly at Council
24 hearings, in written testimony, and
25 even a press conference.

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2 THE COURT: You know, counsel,
3 you're taking up an inordinate amount
4 of time on this --

5 MR. RICHMOND: Sorry, your Honor.

6 THE COURT: -- and, I think, on
7 things that are extraneous, really, to
8 what I have to do here.

9 MR. RICHMOND: Well, your Honor --

10 THE COURT: You're not reading
11 your brief, are you?

12 MR. RICHMOND: No, your Honor.

13 Your Honor, a closer look, I
14 believe, shows that the petitioners'
15 arguments here are thinly veiled
16 arguments for another lead-paint bill,
17 which the City's lawmakers did not
18 enact, and I think they mischaracterize
19 Local Law 38 and incorrectly lionize
20 Local Law 1 in making these arguments.

21 And I'll just go over the
22 comments he made today, the particular
23 challenges they said.

24 For example, they said that Local
25 Law 38 weakens the definition of lead-

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2 paint hazards by not encompassing dust.
3 However, your Honor, Local Law 31 did
4 not define lead dust as a hazard --

5 THE COURT: Local Law 1.

6 MR. RICHMOND: -- did not define
7 lead dust as a hazard.

8 In fact, the irony is that by
9 mandating the abatement of intact lead
10 paint, it was going to cause dust to
11 be dispersed. Local Law 38 removes
12 that requirement and puts into place
13 numerous measures that will control the
14 dispersal of dust, which were discussed
15 in the Negative Declaration and
16 Environmental Assessment Statement.

17 The other point I think they
18 raised today is about six-year-olds;
19 that there's a move from -- in Local
20 Law 38, that the threshold now is
21 six years old. As we pointed out
22 in our reply, your Honor, this is in
23 harmony with the state and federal
24 environmental law, and I believe this
25 again is another issue that was raised

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2 for purposes of this challenge. And I
3 note that the bill that petitioners, I
4 believe, support also would make it
5 six; that this is just the consensus
6 that the primary children that are
7 covered, that are at risk, are one
8 and two, because they're at risk of
9 ingesting lead paint.

10 They also, today -- petitioners'
11 counsel said that there was a weakened
12 definition -- weakened safety measures,
13 but I think it's kind of comparing
14 apples and oranges to compare the full
15 abatement requirement of Local Law 31
16 [sic] with the interim controls that
17 are required under Local Law 38, and
18 that Local Law 38 puts in place safety
19 measures that are appropriate to the
20 scope of work that is mandated under
21 it.

22 With respect to DOH orders, they
23 allege -- they state that it's removed
24 with regard to one- and two-family
25 homes. The fact is, Local Law 38 first

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establishes -- it says specifically, nothing in it affects the Board of Health's ability to act with respect to any dwelling unit where a child with elevated blood lead level lives, and moreover, Local Law 38 does not affect the Commissioner of Health's power to deal with nuisances.

And in regard to the procedural arguments that I believe they raised today, "as early as possible," your Honor, I believe it's well settled that for legislative enactments, this standard only means that possible significant activities with environmental impacts must be considered before enactment.

And their argument with reference to the June 24th hearing -- they say there was only a brief discussion -- ignores the fact that the Negative Declaration was before the entire Council for several days prior to the June 30th vote, and at the June 30th

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2 vote it was coupled with legislation
3 that would become Local Law 38; and
4 accordingly, according to counsel,
5 both measures were before the entire
6 Council throughout the entire debate.

7 I would also point out, with
8 regard to, I think, certain statements
9 that referenced someone who used
10 to work at -- some statements made
11 regarding the Board of Health CAPA
12 hearing for new regulations, those were
13 with regard to Board of Health matters.
14 It was not in regard to Local Law 38;
15 it was a Board of Health hearing.

16 Your Honor, the record shows
17 that the Negative Declaration and
18 Environmental Assessment Statement were
19 lawful and rational in all respects in
20 determining that there would be no
21 significant adverse environmental
22 impacts from replacing a dangerous
23 mandate to abate intact lead paint with
24 comprehensive legislation to prevent
25 and correct lead-paint hazards.

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2 Thank you.

3 THE COURT: Any reply?

4 MR. GOLDBERG: Yes. I'll be very
5 brief.

6 THE COURT: Very briefly.

7 MR. GOLDBERG: Yes. I'll just
8 touch on a couple of points.

9 First of all, with respect to
10 children between the ages of six and
11 seven, counsel says that the intent
12 here was simply to harmonize the City's
13 law with federal law. But that doesn't
14 get -- that still doesn't say that we
15 don't have to go through the SEQRA
16 process to -- because, in a sense,
17 they're conceding that there is an
18 adverse impact. And the purpose of
19 the SEQRA process is to look at that
20 adverse impact, give it a hard look,
21 attempt to mitigate the circumstances,
22 show that there are other processes
23 that they may be putting into place
24 that will mitigate that circumstance,
25 and to write in the Negative

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2 Declaration a reasoned analysis.

3 The other thing is, is that they
4 are using federal law like a Chinese
5 menu; they want to pick a little from
6 Column A and a little from Column B.

7 Well, let's go to the question of
8 intact lead paint. Federal law that --
9 HUD regulations, EPA regulations, all
10 recognize, in their definition of a
11 lead-based paint hazard, that intact
12 lead paint can be a hazard. And intact
13 lead paint, and they are very specific
14 in the HUD guidelines --

15 THE COURT: Don't they say it
16 should be encapsulated?

17 MR. GOLDBERG: Yes. They're very
18 clear that intact --

19 THE COURT: In lieu of removing
20 it, encapsulate it and then it doesn't
21 get out.

22 MR. GOLDBERG: Excuse me. But,
23 your Honor -- you're absolutely right,
24 and that's something else that I think
25 is a misstatement by the City. Local

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2 Law 1 didn't require the removal of
3 all lead paint; it required either its
4 removal or safe covering, and safe
5 covering of intact lead-painted
6 surfaces on windows, where lead dust
7 is generated, door frames. These are
8 recognized hazards and Local Law 38
9 eliminates them from the definition
10 of a lead hazard, and if there's a
11 rationale for doing it, it should have
12 been stated in the Negative Declaration
13 (indicating).

14 But we can't get past the Negative
15 Declaration. For hazardous materials,
16 where it asks the question, "May it
17 have a significant impact"; that if
18 we're going to ignore lead dust that's
19 generated by friction of windows, is
20 there a possibility that that will
21 constitute an adverse environmental
22 impact? The answer is, obviously, yes
23 and that answer would have compelled an
24 EIS.

25 Another thing is, it may come --

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2 it must have come as a real shock to
3 you to hear the City say that HPD's
4 mandatory obligation to repair lead
5 paint if the landlord won't do it is
6 an unprecedented accomplishment of this
7 legislation. Well, I'm probably -- me
8 and a couple of the City officials back
9 here (indicating) are probably the only
10 ones who have been involved in this
11 since 1985. Well, that's what Justice
12 Wilk said; that's what Justice DeGrasse
13 said; Justice Tolub, I don't think he
14 ever had to rule on that; and then the
15 case came to you, and your Honor ruled
16 on that several times.

17 In terms of a rational process,
18 look (indicating), 65 seconds to listen
19 to the counsel tell the Council members
20 that the Negative Declaration is on
21 your desk if you want to look at it,
22 and then starting the vote, is not a
23 rational process.

24 They have conceded, in their
25 discussion of intact lead paint, to

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2 confirm for your Honor, that lead dust
3 is a hazard. And the literature and
4 the expert witnesses have come and
5 testified and have explained what the
6 state of science is; that lead paint,
7 whether it's peeling or intact, is a
8 hazard. If you remove it improperly or
9 if it is intact and generating dust,
10 it's a hazard and it must be dealt
11 with.

12 And when you get done with it, you
13 must do a clearance test, because you
14 could hire the best guys in the world
15 or the worst guys in the world, and you
16 know what? You don't know whether
17 you've cleaned the place properly
18 unless you do a clearance test.

19 And counsel (indicating) doesn't
20 want to talk about that. He just wants
21 to talk about the conclusions; not the
22 SEQRA process.

23 THE COURT: Okay, thank you.

24 MR. CHACHERE: Your Honor, may I
25 just make one brief point, too?

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2 Just getting back to the first
3 motion before us, I think you have now
4 heard the City's counsel repeatedly
5 argue about the need for Local Law 38
6 arising specifically from this Court's
7 orders in NYCCELP versus Giuliani and
8 what they saw as a dangerous mandate
9 proceeding from that case. I think
10 it establishes, beyond the slightest
11 doubt, the integral relation of these
12 two cases and why they need to be heard
13 by the same court.

14 Thank you.

15 MR. RICHMOND: First, the former
16 point --

17 THE COURT: I'll give you two
18 minutes. If you want to speak. I
19 thought you stood up because you wanted
20 to speak.

21 MR. RICHMOND: I did, your Honor.
22 I will be very brief.

23 THE COURT: You've spoken a lot,
24 so two minutes, I think, is only fair
25 to everybody else, including me.

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2 (Mr. Muschenheim stood instead.)

3 MR. MUSCHENHEIM: Your Honor, in
4 terms of the point that Mr. Chachere
5 just raised, just because Local Law 38
6 was enacted in response, in a certain
7 sense, to Local Law 1 does not mean
8 that they are related for purposes of
9 the "related" designation under the
10 Operating Statement.

11 The baseline that we are talking
12 about is something that is presented
13 in our papers and is what the state
14 of the law was before Local Law 38.
15 That's presented in our papers and any
16 judge can sort that out in looking at
17 those papers. There's no magic to what
18 happened before in Local Law 1 and that
19 it's necessarily related to this case.

20 THE COURT: I don't think it is
21 with respect to Local --

22 Well, I think what you say may be
23 true, but you've spent an extraordinary
24 amount of time comparing the two cases,
25 to the extent that I interrupted

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counsel and said his comparisons are basically, I think, extraneous, because we're only deciding whether or not -- I thought, when we were arguing the motion on the merits -- whether or not SEQRA applies and whether you need to have an environmental impact statement, and the response I get is a comparison between the two laws. And I really don't understand that, when you're saying there's no relationship between the two statutes, why you're doing this. But you did it, and it's going to influence me.

Okay, thank you very much.

Decision reserved.

There are things I haven't read yet that I have to read.

* * *

CERTIFIED to be a true and accurate transcript of the proceedings.

ALAN F. BOWIN, CSR, RMR, CRR
Official Court Reporter

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