

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

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

Petitioners-Plaintiffs,

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

-against-

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

Respondents-Defendants.

Index No.
120911/99

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

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
<u>STATEMENT OF THE CASE</u>	4
A. The Environmental Hazards of Lead Paint in New York City	4
B. Legal Framework	8
1. SEQRA	8
2. New York City's Current Legal Framework to Prevent Environmental Hazards Related to Lead Paint	10
a. Health Code § 173.13	10
b. Administrative Code § 27-2126 (Local Law # 50)	10
c. Administrative Code § 27-2013(h) (Local Law # 1)	11
d. Health Code § 173.14 - The Safety Standards	11
e. The Related <u>NYCCELP v. Giuliani</u> litigation	12
C. FACTS	14
1. The Enactment of Local Law # 38 of 1999	14
2. Local Law # 38's Changes to the Existing Legal Protections of Children From Environmental Exposure to Toxic Lead	17
a. Significantly Weakened Definition of Lead Hazards and Significant Limitation on Landlords' Inspection Duties	17
b. Depriving Six Year Olds of Protection Against Lead Paint ¹⁸	18
c. Significantly Reduced Safety Measures for Controlling and Removing Toxic Lead Dust and Chips	18
d. Significantly Prolonged Time Frames for Correction and Enforcement	20
e. Elimination of Important Deadlines for Protection of Lead Poisoned Children in 1- or 2-Family Dwellings	21
<u>ARGUMENT</u>	22
I. THE COURT SHOULD ANNUL LOCAL LAW # 38 BECAUSE THE CITY COUNCIL'S NEGATIVE DECLARATION FAILED TO TAKE A "HARD LOOK" AT THE ENVIRONMENTAL IMPACT	22
A. The Negative Declaration Failed to Identify Relevant Areas of Environmental Concern.	23
1. LL # 38's Weakened Definition and Controls of Lead Hazards, in Particular its Deregulation of Lead Dust, Will Have a Significant Adverse Impact on the Environment.	24
2. The Elimination of All Lead Poisoning Preventative Measures for the Entire Class of Six Year Old Children In New York City Will Have A Significant Adverse Impact on the Environment	28

3.	The Evisceration of the Safety Standards for Work That Disturbs or Removes Lead Paint Will Increase Lead Dust Exposures of Vulnerable Children and Pregnant Women and Thus Will Have A Significant Adverse Impact On The Environment.	28
4.	The Enlarged Times For Correction and Enforcement of Lead Paint Hazard Violations Will Adversely Affect Public Health By Significantly Increasing the Probability That Vulnerable Children Will Be Poisoned	32
5.	The Elimination of Any Enforceable Deadlines for Correction of Lead Hazards in the Homes of Already Lead-Poisoned Children in 1- or 2-family Dwellings Will Result in Further Adverse Environmental Impacts.	33
6.	The Failure to Identify the Above Relevant Areas of Environmental Concern Mandates Nullification	34
B.	The Council Failed to Take a "Hard Look" at the Likely Adverse Effects of the Implementation of Local Law # 38.	35
C.	The City Council Failed to Make a Reasoned Elaboration in Support of its Determination to Issue a Negative Declaration.	38
D.	The City Council's Determination of Environmental Non-Significance of Local Law # 38 Warrants Close Judicial Scrutiny Because of the Council's (and City's) Position as Initiator of the Action, the City's Dual Role as Regulator and Landlord, and the Council's Lack of Medical and Technical Expertise.	41
II.	BECAUSE LOCAL LAW # 38 MAY -- AND INDEED, WILL -- HAVE A SIGNIFICANT ADVERSE IMPACT ON THE ENVIRONMENT, AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED BY LAW.	42
III.	IN ADDITION, THE COURT SHOULD NULLIFY THE NEGATIVE DECLARATION DUE TO THE CITY COUNCIL'S EXTENSIVE PROCEDURAL VIOLATIONS OF SEQRA.	45
A.	The Council Failed to Determine as Early as Possible Whether an EIS Needed to Be Prepared	46
B.	The Council Failed to Conduct the Environmental Assessment Analysis Required to Determine the Significance of the Action.	47
C.	The Council's Fast-Tracking of the Legislative Process and its Concerted Obstruction of Public, Intra-Council, and Intra-Agency Debate Violated SEQRA and CEQR, Which Require a Participatory and Informed Decision-Making Process.	48
IV.	PRELIMINARY INJUNCTIVE RELIEF IS REQUIRED	50
	CONCLUSION	52

PRELIMINARY STATEMENT

Petitioners-plaintiffs seek a permanent injunction, prohibiting implementation of Local Law ("LL") # 38 of 1999 before it takes effect on November 12, 1999, on the grounds that it was adopted by the City Council and approved by the Mayor in total disregard of the State Environmental Quality Review Act ("SEQRA"). N.Y. Environmental Conservation Law ("ECL") § 8-0101 et seq.

SEQRA makes certain that state and municipal agencies (which include both the City Council and Mayor) consider and minimize every potential environmental impact that may arise from a proposed action. To achieve this goal, SEQRA requires advance preparation of a detailed "environmental impact statement" ("EIS") for any action which even "may" have a single significant adverse effect on the environment, including creating a hazard to human health.

The evidence established in the accompanying Petition overwhelmingly demonstrates that LL # 38 not only may, but indeed, will, have significant and substantial adverse environmental effects, putting children at greater risk of lead poisoning. Moreover, in the view of many lead poisoning prevention experts, LL # 38 will increase lead poisoning of New York City's children, especially among children of color residing in the City's poorest neighborhoods. Nevertheless, the respondent City Council failed to carry out the most basic procedural steps required under SEQRA to consider the potential adverse environmental effects of LL # 38.

While under SEQRA, the existence of even a single adverse impact is sufficient to trigger a full EIS, the petition identifies many adverse environmental impacts that will arise from LL # 38's implementation. To list just five:

! Lead contaminated dust is recognized as the single greatest source of toxic lead exposure for young children. While the City's existing legal framework treats it as an immediate hazard, LL # 38 eliminates almost all future regulation of lead dust and the housing conditions that create it.

! Data compiled by DoH reveal that 9% of children identified with a blood lead level of 20 micrograms per deciliter are older than 6 years of age. While lead poisoning prevention under the existing Housing Maintenance Code applies to all children up to age 7, LL # 38 eliminates all lead poisoning prevention requirements under the Code for children between the ages of 6 and 7.

! Studies overwhelmingly show that carefully followed safety measures during lead paint removal and repair work, to control and remove toxic lead dust and chips from the environment, are effective in reducing children's blood lead levels and the dust lead levels in their homes. On the other hand, when this work is done without proper controls, it results in environmental hazards, and lead dust and blood lead levels often increase, sometimes dramatically. While the existing Housing Maintenance Code and Health Code require all lead paint activities to comply with detailed safety measures issued by the Board of Health, LL # 38 exempts almost all such work from the Health Code's safety standards, unless a child is already poisoned.

! When lead paint hazards exist in the dwelling of a young child, exposure can occur immediately and no recognized safe period exists for delay in correcting the hazards. While the existing Housing Maintenance Code requires correction of a lead paint violation within 24 hours, unless extended by the Department of Housing Preservation and Development ("HPD") for good cause, LL # 38 increases this time to 21 (and possibly 66) days. The new law also will authorize as much as half a year to transpire after a tenant's complaint before the City must assure the violation's correction.

! When the owner of a 1- or 2-family dwelling does not comply with a Department of Health ("DoH") order to correct because a child is lead poisoned, current law requires DOH, within 16 days, to direct HPD to execute the order instead, and HPD must execute this request within 18 days. LL # 38 will delete both of the foregoing time frames, and imposes no enforceable time frames at all.

In short, the record before this Court will unquestionably establishes that LL # 38 weakens significant provisions of New York City's existing comprehensive legal framework for the protection of children from environmental exposure to toxic lead. Nevertheless, the respondents ignored these obvious adverse environmental effects.

Instead, the City Council and the Mayor engaged in a sham process to evade SEQRA's requirements through the device of issuing a "Negative Declaration." While SEQRA allows an agency to dispense with an EIS for actions having truly minimal potential adverse environmental effects, the law still compels the preparation and issuance of a negative declaration, which (1) identifies the relevant areas of environmental concern, (2) takes a "hard look" at them, and (3) makes a reasoned elaboration of the basis for the determination. Respondents failed to comply with this substantive requirement.

For example, far from taking a "hard look" at the many obvious changes in the way New York City will address lead paint hazards under LL # 38, the Negative Declaration ignores them all entirely. The document even omits to identify "public health" as a possible area of environmental concern (while solemnly reciting that LL # 38 will not affect, *inter alia*, neighborhood character, vehicular or pedestrian traffic patterns, and New York City's archeological resources). Furthermore, its statements are entirely conclusory, without a single reference to expert opinion or to supporting documentation. Because of respondents' unwillingness to pay even lip service to SEQRA's procedural and substantive requirements for the minimal contents of negative declarations, the Court must rule that the Negative Declaration adopted by the Council is unlawful and that the enactment of LL # 38 is a legal nullity.

Finally, SEQRA imposes not only substantive requirements for the minimal contents of negative declarations but also minimal procedural standards designed to insure a thoughtful and deliberate process when issuing negative declarations. Chief among these is the requirement that the agency declare whether an EIS is needed as early as possible in the formulation of the proposed action. This insures that

environmental concerns become an integral part of the agency's decisionmaking. Here, ludicrously enough, the Negative Declaration made its first public appearance and was adopted by the Council's Housing and Buildings Committee on the same day that the Committee voted to adopt LL # 38 and six days before passage of the local law by the full Council. Neither the public nor the involved agencies participated in the negative declaration process. This gross violation of SEQRA procedures alone warrants the relief sought in this petition.

STATEMENT OF THE CASE

B. The Environmental Hazards of Lead Paint in New York City

Lead is a highly toxic metal which, when absorbed into the human body, produces a range of adverse health effects, particularly in children. These effects include nervous system disorders, delays in neurological and physical development, cognitive and behavioral changes, and hypertension, most of which are irreversible. Williamsburg Around the Bridge Block Ass'n v. Giuliani, 167 Misc.2d 980, 984 (Sup. Ct. N.Y. Co. 1995), aff'd, 223 A.D.2d 64 (1st Dep't 1996). The federal Centers for Disease Control and Prevention ("CDC") regards lead poisoning as "the most common and societally devastating environmental disease of young children." CDC, Strategic Plan for the Elimination of Childhood Lead Poisoning (Feb. 1991) at xi. See E. Mauss Aff.¹ ¶ 12; see also Landrigan Aff. ¶ 15. Ingestion of lead particles by pregnant women also causes damage to the developing fetus. See Rosen Aff. ¶ 11.

1. References to the various affidavits and affirmations submitted in support of the Petition will be made herein thus: Landrigan Aff. (Affirmation of Philip Landrigan, M.D.), Lanphear Aff. (Affidavit of Bruce P. Lanphear, M.D.), I. Mauss Aff. (Affidavit of Irving Mauss, M.D.), Needleman Aff. (Affidavit of Herbert Needleman, M.D.), Rosen Aff. (Affidavit of John F. Rosen, M.D.), Gilbert Aff. (Affidavit of Charles Gilbert, Ph.D.), E. Mauss Aff. (Affidavit of Evelyn Mauss, Sc.D.), Newman Aff. (Affidavit of David Newman, M.S.), Olmsted Aff. (Affidavit of Edward Olmsted, C.I.H.). References to the exhibits submitted with the Affirmation of Matthew J. Chachère, Esq. as given as "Ex. ##."

Children are at risk of lead poisoning, particularly from birth until at least age seven, because their normal hand-to-mouth activity causes frequent ingestion of lead particles. In addition, in their early developmental stages, children's brains and nervous systems are particularly vulnerable. Environmental factors cause older children to be at risk as well. Rosen Aff. ¶¶ 5, 9, 19; Needleman Aff. ¶ 7; see also E. Mauss Aff. ¶¶ 6-12; see U.S. Pub. Health Serv., Agency for Toxic Substances and Disease Registry (ATSDR), The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress (1988) (ATSDR Report) at 1, 10, III-12, IV-7; CDC, Preventing Lead Poisoning in Young Children (1991) ("CDC Statement") at 7-12.

Lead poisoning causes permanent, irreversible brain damage, interfering with a child's cognitive and intellectual abilities. E. Mauss Aff. ¶ 10-12 and Ex. A thereto; Rosen Aff. ¶ 8; Ex. 12 (Letter of Dr. Sergio Piomelli). Lead poisoning is associated with reduced intelligence, a shortened attention span and behavioral disorders, including a propensity to violence. See Needleman Aff. ¶¶ 8, 9; Landrigan Aff. ¶ 15 and Ex. A thereto; I. Mauss Aff. ¶ 79. Children who are lead poisoned are very likely to suffer learning disabilities and often require special education. See Ex. 78 (Tr., June 24, 1999, at 149 (testimony of M. Bodden and comment of Chairperson Spigner)).

As scientific understanding of lead's toxic effects has grown, adverse effects have been found at lower and lower blood levels, and by 1991 the CDC lowered its level of concern from 25 micrograms per deciliter of blood ("g/dL") to a level of 10 : g/dL.² The New York City Health Code also defines lead poisoning as 10 : g/dL or higher. 24 R.C.N.Y. § 11.03. Childhood lead poisoning has long been known as the "silent epidemic," Garcia v. Freeland Realty, Inc., 63 Misc.2d 937, 940 (Civ. Ct. N.Y. Co. 1970), as its symptoms can be subtle, thus often eluding diagnosis. 64 F.R. 50141 (1999). Even lead exposure

2. The level was lowered from 60 : g/dL in 1969 to 40 : g/dL in 1970, 30 : g/dL in 1978, 25 : g/dL in 1985, and 10 : g/dL in 1991.

well below 10 : g/dL is directly related to cognitive and neurobehavioral deficits. See Rosen Afd. ¶ 8; Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 66 (a blood lead level "as low as two [: g/dL] in children under seven years old lowers IQ, stunts growth and causes behavioral disorders"). No blood-lead threshold is too low to be disassociated from the adverse effects on IQ, cognitive functioning, maturational development, and academic skills necessary for success in school. E. Mauss Aff. ¶ 6 and Ex. A thereto; Rosen Aff. ¶ 8.; Ex. 77 (Tr., June 21, 1999 at 304-08 (testimony of Dr. E. Mauss)). These deficits in intellectual performance are considered irreversible, and thus this environmental disease has significant adverse socio-economic impacts. For example, the loss of 4 to 6 IQ points that results among a given population from even low level exposure increases by 80% the number of children falling into the borderline function IQ range. CDC Statement at 10.

Lead paint is the greatest source of lead exposure to young children. CDC Statement at 12; Rosen Aff. ¶ 5. For much of this century lead paint was used on interior surfaces. As one court acknowledged, "[t]he danger that lead-based paint presents to human health and safety, especially with regard to children, is today virtually beyond debate." City of New York v. Lead Industries Ass'n, Inc., 190 A.D.2d 173, 176 (1st Dep't 1993); see also Gilbert Aff. ¶ 10, Rosen Aff. ¶ 9.

Ingestion of lead-contaminated house dust is children's primary route of environmental exposure. Lanphear Aff. ¶¶ 5-6, Gilbert Aff. ¶ 11. Lead dust can be inhaled or swallowed when present on contaminated surfaces, such as children's toys, hands, and food, and is generated not only from peeling or chalking lead paint on aging or damaged structures, Rosen Aff. ¶ 5-7, but also from normal abrasion of even intact painted surfaces, such as window and door frames. CDC Statement at 18; Rosen Aff. ¶ 6. The paint particles either fall off from deterioration or abrasion or are released during repairs. Lead dust is so toxic to children that the federal Department of Housing and Urban Development ("HUD") has recently lowered its safety standards to only 40 micrograms (millionth's of a gram) per square foot of

floor area (: g/ft²), 64 F.R. 50140, 50181 (1999), an amount that is less than half the mass of a single particle of coffee sweetener. Ex. 77. (Tr. of June 21, 1999, at 218 (testimony of Nick Farr, Executive Director of the National Center for Lead Safe Housing)).

Despite a broad federal ban on lead paint in 1977 (allowing only a few exemptions), it remains pervasive; the vast majority of painted structures constructed before 1980 contain lead paint. See 16 C.F.R. pt. 1303; CDC Statement at 18. "[Lead] paint continues to cover the walls of two out of three City dwellings." Juarez v. Wavecrest Mgt. Team Ltd., 88 N.Y.2d 628, 641 (1996) (citation omitted). The City estimates that some 78% of the city's 2,980,762 housing units are pre-1960,³ and that 2,000,000 housing units contain lead paint (of which half are occupied by low or moderate income families). Ex. 113 (HPD and DoH, Request for Grant Assistance Lead-Based Paint Hazard Control (to HUD), July 31, 1997, at 18.) Children under 6 years of age reside in an estimated 323,000 of these units. Low income families occupy an estimated 174,000 of these units -- in presumably the most deteriorated housing conditions. Id. at 19.

By the City's own estimates, there are at least 30,000 children in New York City currently lead poisoned, using the Health Code and CDC definition of 10 : g/dL. Id. at 19; Ex. 77 (Tr. June 21, 1999, at 209 (Testimony of Dr. Rosen)).⁴

3. NYC DoH, "A Non-Competitive Continuation Application for NYC DoH Provision of 1997-1998 State and Community-Based Childhood Lead Poisoning Prevention Program & Surveillance of Blood Levels in Children - #H64/CCH205097-08" (Grant application to CDC) 3/24/97, at 32. (Ex. 112)

4. See also New York City Public Advocate, Lead & Kids: Why are 30,000 NYC Children Contaminated?, February 2, 1998, at 3 (Ex. 64). These reports indicate as well that at least 81% of the highly lead poisoned New York City children are known to be African-American, Latino, or Asian/Pacific. In some minority and low income areas of City, up to 30% of one and two year old children are lead poisoned.

C. Legal Framework

1. SEQRA

The New York State Legislature enacted SEQRA in 1975 in order to "inject environmental considerations directly into governmental decision making." Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988) (citations omitted). As described by the Court of Appeals,

SEQRA makes environmental protection a concern of every agency (ECL 8-0103 [8]; 6 N.Y.C.R.R. 617.1 [b]). In proposing action, an agency must give consideration not only to social and economic factors, but also to protection and enhancement of the environment (ECL 8-0103 [7]; see, 6 N.Y.C.R.R. 617.1 [d]).

Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 414-15 (1986).

SEQRA attempts to achieve this goal through the mechanism of the EIS, a document which must be prepared by any state or municipal agency contemplating action "which may have a significant effect on the environment." ECL § 8-8109(2) (emphasis added). The EIS must provide "detailed information about the effect which a proposed action is likely to have on the environment, ... list ways in which any adverse effects of such an action might be minimized, and ... suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action." Id. Detailed requirements for the specific contents of any EIS are contained both in the statute and in implementing regulations. See generally ECL §§ 8-0101 - 8-0103 and 6 N.Y.C.R.R. Part 617, as well as in the N.Y.C. City Environmental Quality Review ("CEQR"), codified at 43 R.C.N.Y. §§ 6-01 et seq.

The first step in the SEQRA process is for the agency contemplating a project, activity, or rule-making to make an initial "determination of significance" regarding whether or not the proposed action will have a significant environmental effect, requiring preparation of an EIS. ECL § 8-0109(4); 6 N.Y.C.R.R. § 617.6(b)(1)(i). The determination results in either a "positive declaration" or a "negative

declaration." 6 N.Y.C.R.R. §§ 617.7, 617.12. This determination must be made "[a]s early as possible in the formulation of a proposal for an action." ECL § 8-0109(4)

SEQRA's implementing regulations require that the significance of "unlisted" actions must be made by comparing the impacts which may be reasonably expected to result from the proposed action" with criteria set out in the regulations. 6 N.Y.C.R.R. § 617.4(a)(1); see also §§ 617.7 (a)-(c) (setting out specific steps in this analysis); § 617.7(c)(1) (defining criteria as "indicators of significant adverse impacts on the environment"). Among the applicable criteria is "the creation of a hazard to human health." 6 N.Y.C.R.R. § 617.7 (c)(1)(vii); see also Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 70 (identifying this criterion as relevant to an increased risk of lead poisoning). The initial determination of significance also requires that agencies "consider reasonably related long-term, short-term, direct, indirect and cumulative impacts," 6 N.Y.C.R.R. § 617.7(c)(2), and assess the significance of a likely consequence in light of its setting, probability of occurrence, duration, irreversibility, geographic scope, magnitude and number of persons affected. Id. § 617.7(c)(3).

If there is a "positive declaration," the agency prepares or causes to be prepared a draft EIS for the purpose of informing the public and other government agencies about the proposed action and of soliciting comments to assist the agency in its own decision making. ECL § 8-0109(4); 6 N.Y.C.R.R. § 617.9(a). The agency then holds a public hearing on the draft EIS. 43 R.C.N.Y. § 6-10(c). The agency then issues the final EIS which must include a complete and detailed analysis of the proposed action, its short and long-term environmental effects, the alternatives considered, and mitigation measures proposed to minimize the impact of any adverse environmental effects that cannot be avoided should the proposal be implemented. ECL § 8-0109(2); 6 N.Y.C.R.R. § 617.9.

2. New York City's Current Legal Framework to Prevent Environmental Hazards Related to Lead Paint

The New York Court of Appeals has declared that "childhood lead-paint poisoning may be the most significant environmental disease in New York City." Juarez v. Wavecrest Mgt. Team Ltd., 88 N.Y.2d at 641 (emphasis added, citation omitted). Currently, four City laws are designed to operate in combination to prevent this environmental disease. N.Y.C. Admin. Code §§ 27-2013(h), 27-2126; 24 R.C.N.Y. §§ 173.13, 173.14. Two City agencies, HPD and DoH, are charged with the duty to enforce and obey these laws working in cooperation as each of the laws directs.

a. Health Code § 173.13

Health Code § 173.13 (Ex. 92) represents New York City's first effort to respond to childhood lead poisoning. As originally promulgated in 1959, the use of lead paint was banned on the interior surfaces of dwellings in New York City effective January 1, 1960. A subsequent January 15, 1970, amendment added a mandate, 24 R.C.N.Y. § 173.13(d)(2), that where a child's lead poisoning has already occurred and DoH receives a report that a child has a blood lead level ("BPb") at or above a specified measurement, DoH is required to inspect and order the owner immediately to remove or permanently cover all lead paint in the dwelling. If the owner fails to correct the hazard within 5 days after service of a DoH order, DoH must request HPD to correct the lead paint conditions. Id.

b. Administrative Code § 27-2126 (Local Law # 50)

LL # 50 of 1972 (Ex. 98), codified at Administrative Code (Housing Maintenance Code) § 27-2126 (Ex. 96), added the requirement that whenever a dwelling owner fails to comply with a DoH order to correct a lead violation, DoH must, within 16 days of the receipt of the complaint or the inspection (whichever occurs first), certify the condition to HPD for correction, and HPD must complete the

correction within 18 days thereafter. Thus, when read in conjunction with Health Code § 173.13, these two provisions require the City to assure the correction of lead paint violations in the home of any lead-poisoned child within New York City (including non-multiple dwellings) within a total of 34 days after learning of the lead poisoning.

c. Administrative Code § 27-2013(h) (Local Law # 1)

LL # 1 of 1982 (Ex. 97), codified at Administrative Code (Housing Maintenance Code) § 27-2013(h) (Ex. 94), requires the owner of any multiple dwelling inhabited by a child under age 7 to eliminate all lead paint on specified interior surfaces "in a manner approved by the department." The owner must comply within 24 hours because the very existence of lead paint in a multiple dwelling inhabited by a child under 7 is a class C "immediately hazardous" violation. Admin. Code §§ 27-2013(h)(3), 27-2115(c)(3) (Ex. 95). Unlike the prior laws (Health Code § 173.13 and Admin. Code § 27-2126), § 27-2013(h) does not require a child's poisoning to trigger the duty to abate lead paint nor a City inspection. Landlords are under a duty to abate the condition whenever and wherever lead paint exists, and whether or not the City has cited the violation. Admin. Code § 27-2013(h)(1); Juarez, 88 N.Y.2d at 647; Valdez v. Sherman Estates, Inc., 224 A.D.2d 240, 241 (1st Dep't 1996). The measure is thus preventive, designed to abate a major health hazard before irreversible damage to children occurs.

d. Health Code § 173.14 - The Safety Standards

The Health Code, at 24 R.C.N.Y. § 173.14 (Ex. 91), contains safety standards for work on lead-based paint, promulgated November 16, 1993, as a result of various orders in a pending class action entitled New York City Coalition to End Lead Poisoning v. Giuliani (herein "NYCCELP"), N.Y. County Index No. 42780/85, discussed infra. These standards were based upon guidelines promulgated by HUD

and incorporate current national trends regarding safety measures during such work, which, if improperly carried out, can exacerbate the risk of lead poisoning because of the dispersal of lead dust.

e. The Related NYCCELP v. Giuliani litigation

The NYCCELP v. Giuliani class action, commenced nearly 15 years ago (as NYCCELP v. Koch) seeking, inter alia, proper enforcement of the aforementioned statutes and regulations by the City, has resulted in numerous decisions and orders, some of which are summarized below and which bear directly on the events at issue in the instant action.

In NYCCELP I, 138 Misc.2d 188 (Sup. Ct. N.Y. Co. 1987), aff'd, 139 A.D.2d 404 (1st Dep't 1988), lv. to app. den., 1988 N.Y. App. Div. LEXIS 8081 (1st Dep't 1988), the court, denying the City's motion to dismiss, declared there was "ample evidence that municipal defendants do not adequately carry out their duties under [§ 2013(h) and § 173.13]," 138 Misc.2d at 193, and "[a]lthough the method of enforcement may be discretionary, enforcement is not." Id. at 191-92. Subsequently, in NYCCELP II, slip op. (Sup. Ct. N.Y. Co. July 6, 1989) (Ex. 101); Order (Sup. Ct. N.Y. Co. Aug. 2, 1990) (Ex. 102), aff'd, 170 A.D.2d 419 (1st Dep't 1991), lv. to app. den., 1991 N.Y. App. Div. LEXIS 8028 (1st Dep't 1991), the City's interpretation of Admin. Code § 27-2013(h) -- as limiting its inspection and enforcement duties regarding lead paint solely to peeling painted surfaces, and solely to pre-1960 buildings -- was declared contrary to the plain meaning of the statute, and the City was ordered to enact appropriate regulations to enforce LL # 1 in line with this decision. The City was also ordered to enact safety standards for the abatement of lead hazards and regulations providing for the relocation of children and pregnant women during abatements.

In NYCCELP III, slip op. (Sup. Ct. N.Y. Co. May 4, 1993) (Ex. 103), Order (Sup. Ct. N.Y. Co. Mar. 30, 1994) (Ex. 104), appeal withdrawn, Stip. (Feb. 24, 1995), the City was held in civil contempt

for failing to enact any of the regulations ordered in NYCCELP II, and ordered to pay a continuing fine equal to the ongoing rent of one of the plaintiffs until such regulations were adopted. Two years later, the City had still not complied. The Court observed:

The record contains convincing proof of the deleterious health consequences of the exposure of children to lead from peeling paint. The City Council recognized this danger and enacted a comprehensive statute that places mandatory duties on several municipal agencies. Those agencies have failed to fulfill that mandate in numerous respects in direct violation of a lawful order of the Supreme Court.

NYCCELP IV, 216 A.D.2d 219, 220 (1st Dep't 1995).

In NYCCELP VI, dec. (Sup. Ct. N.Y. Co. Dec. 14, 1995) (Ex. 105), Order (May 1, 1996) (Ex. 106), aff'd as modified and lv. to app. den., 245 A.D.2d 49, 50-51 (1st Dep't 1997), civil contempt was once again found (and class certification granted) because the City has still failed to enact the regulations required by NYCCELP II regarding timely inspection and enforcement of all lead paint (not just peeling paint) and the relocation of children and pregnant women during lead hazard repairs.

In NYCCELP VII, 173 Misc.2d 235 (Sup. Ct. N.Y. Co. 1997), Order (Aug. 1, 1997) (Ex. 107), aff'd, 248 A.D.2d 120 (1st Dep't 1998), leave to app. den., 1998 N.Y.App. Div. LEXIS 8108 (June 25, 1998), the City was yet again held in contempt because, among other things, the safety procedures' (Health Code § 173.14) applicability was improperly limited to only cited violations (rather than all lead hazards as required by NYCCELP II), still failed to provide for relocation of children and pregnant women during lead abatements (as required by NYCCELP II), and because the City sought to weaken provisions of Health Code § 173.13(d) to limit inspections, in the case of already lead poisoned children, to only peeling lead paint.

On October 9, 1998 (City Record p. 3505) and October 15, 1998 (City Record p. 3544), respectively, the City issued proposed revisions of HPD's regulations (28 R.C.N.Y. §§ 11-01 et seq.) and

Health Code §§ 173.13 and 173.14, for the stated purpose of complying with the various NYCCELP orders.

At a December 16, 1998, hearing of the Council's Housing and Buildings Committee, City Health Commissioner Neal Cohen and HPD Commissioner Richard Roberts stated that the proposed regulations were intended to go into effect in the beginning of 1999, and urged the Council to revise LL # 1 before then to avoid having to fully enforce the existing law.

D. FACTS

1. The Enactment of Local Law # 38 of 1999

Beginning in January of 1999, the parties in NYCCELP v. Giuliani, reacting to the HPD and DoH Commissioners' call to the Council to quickly revise LL # 1, entered into a series of stays of that litigation “to assist the legislative process to proceed calmly and expeditiously.” See Pet. ¶¶ 72, 75, 80.

At some point prior to April 13, 1999, the City Council leadership determined to enact substantial revisions to Local Law # 1. The proposed action was substantially formulated in April and informally circulated in various draft forms during the month of May (or earlier), as set out in detail in the Petition, ¶¶ 76-90.

Subsequently, on various occasions leading experts in the field of childhood lead poisoning and other health professionals called upon the Council to provide them, and the public at large, an opportunity for thorough, open review of any proposed new legislation on lead paint. Pet. ¶¶ 79, 95; I. Mauss Aff. Ex. A. In fact, however, the Council leadership fast-tracked the legislation and kept advocates and interested parties in the dark about the timing and manner of the legislative process. See, e.g. Pet. ¶ 82; see also Pet. ¶¶ 76-90; 94. Ex. 28 at 1-2.

On the afternoon of Friday, June 18, 1999, an unnumbered bill (Ex. 67) was released by the City Council leadership and scheduled for a public hearing on the next business day (Monday, June 21) before the Council's Housing and Buildings Committee, chaired by Council member and Deputy Speaker Archie Spigner, who was listed as the sole sponsor of the bill. Pet. ¶¶ 89, 91.

Several experts in childhood lead poisoning and lead dust control issues were able to appear at the June 21, 1999, hearing (although given less than half a business day's notice of the hearing and draft legislation) and testified against the proposed local law, urging that it would lead to the poisoning of more children by exposure to toxic lead dust and lead paint chips. Ex. 77 (Tr. at 303-08 (testimony of Dr. E. Mauss)); id. at 292-94 (testimony of Dr. Rosen). The written submissions of numerous other public health experts on lead poisoning were also submitted. Exs. 26-30 (and subexhibits contained therein). Not one independent medical doctor or health expert testified in favor of the proposed local law at the June 21 hearing, or subsequently. In addition, various public officials raised concerns about the adverse human health impacts of the proposal, including the City Comptroller, Alan G. Hevesi, Ex. 35; Ex. 77 (Tr. June 21, 1999 at 189-95), and the Health Commissioner, id. at 130, 140.

The June 21 hearing concluded after 8 ½ hours at approximately 7:20 p.m, and at 8:45 p.m. a new draft of the bill was released (Ex. 73-a), with minor changes from the prior draft. Pet ¶¶ 100-03 On the afternoon of June 23, 1999, several petitioners learned that a hearing was to be held the next day on this revised draft. Pet ¶ 109.

On June 24, 1999, the Housing and Buildings Committee held a second hearing for the purpose of discussing the still unnumbered revised proposal. Ex. 78 (Tr. June 24, 1999 at 4). Numerous speakers testified against the revised proposal's failure to adequately protect children, including Manhattan Borough President C. Virginia Fields, id. 68-72, Deputy City Comptroller Steven Newman, id. at 72-81, and Megan Charlop, director of Montefiore Medical Center's Lead Safe House. Id. 86-96. Near the end

of the hearing, a "Notice of Negative Declaration," with a supporting "Environmental Assessment Statement," (herein, collectively, the "Negative Declaration," Ex. 1) was distributed to the Committee members. The Negative Declaration, dated June 24, 1999 and signed by Terzah Nasser, Legislative Attorney, Counsel to the Committee, asserted that the proposed local law would have no significant effect on the environment and declared that no EIS was required. The Negative Declaration was approved without discussion by the Committee, as Resolution # 883. (Ex. 2); see infra at 35. Shortly thereafter, the Committee voted in favor of the proposed legislation. Ex. 78 (Tr. June 24, 1999, at 238-50).

Numerous public health and medical experts, advocacy organizations, public officials, and others wrote to the Council members urging them not to approve the new law because it would weaken the protections for children from exposure to toxic lead. Pet ¶ 131, see also id. ¶¶ 115, 128; Exs. 43-57. Nevertheless, on June 30, 1999, the City Council approved the bill, now designated as "Preconsidered Int. No. 582." The Negative Declaration was approved at the same time, with no discussion of its findings, its reasoning, or its legal impact. Ex. 79 (Tr. June 30, 1999, at 237-74).

The respondent Mayor held a public hearing on the proposed law on Thursday, July 15, 1999. Ex. 84. Dr. Philip Landrigan, Dr. John Rosen and Dr. Evelyn Mauss testified the new law would cause exposure of children to toxic lead dust and lead paint hazards, and the Mayor was presented with a set of documents that included copies of the letters from numerous other medical and technical experts who opposed the bill for the same reasons. Exs. 59-64. Immediately after the close of the public testimony, and without reading any of the written material submitted at the hearing, the Mayor signed the proposed measure into law, as LL # 38.

2. Local Law # 38's Changes to the Existing Legal Protections of Children From Environmental Exposure to Toxic Lead

LL # 38 completely overhauled New York City's statutory and regulatory framework for preventing environmental exposure to lead. Some of the more significant changes are described below.⁵

a. Significantly Weakened Definition of Lead Hazards and Significant Limitation on Landlords' Inspection Duties

Current law, Admin. Code § 27-2013(h), defines lead paint violations and lead paint hazards as "[t]he existence of paint or other similar surface-coating material ... [over a defined level of lead content] ... in the interior walls, ceilings, doors, window sills or moldings in any dwelling unit in a multiple dwelling in which a child or children six (6) years of age and under reside." Thus, all lead paint --in whatever condition, on any interior surface -- is hazardous and a violation. NYCCELP II, slip op. at 12, 14 n.1, 19 (Ex. 101), aff'd, 170 A.D.2d 419; NYCCELP VII, 173 Misc.2d at 239, aff'd, 248 A.D.2d 120, 669 N.Y.S.2d 552. Moreover, the Court of Appeals in Juarez, 88 N.Y.2d at 647, held that § 27-2013(h) imposes constructive notice to owners of such hazards, thus creating a continuing duty for landlords to inspect their property as often as needed to assure their safety from lead hazards.

Under LL # 38, in contrast, only peeling lead paint or lead paint on a deteriorated subsurface is considered to be a lead hazard and a violation. LL # 38 § 5 (proposed §§ 27-2056.1(a)(2), 27-2056.5(a)). All intact lead paint -- even on friction surfaces (such as window and door frames) and impact surfaces (such as moldings), which normally generate toxic lead dust, or chewable surfaces (such as window sills that a teething child could mouth) -- is no longer included as a hazard. Nor is lead dust itself denominated as a lead hazard, despite the fact that it is known to be the primary route of exposure

5. A more detailed comparison table setting forth in further detail the changes imposed by LL # 38 is annexed to this Memorandum as Attachment A.

of children to lead. And landlords' inspection requirements are limited to a single inspection once a year. LL # 38 § 5 (proposed § 27-2056.3(d)).

b. Depriving Six Year Olds of Protection Against Lead Paint

Current law, § 27-2013(h), extends its preventative measures to children up to their seventh birthday. The new law removes all preventative measures for six-year-old children. LL # 38 § 5 (proposed §§ 27-2056.1(a)(2), 2056.3(a), 2056.4(a), 2056.7(a)).

c. Significantly Reduced Safety Measures for Controlling and Removing Toxic Lead Dust and Chips

The Health Code, 24 R.C.N.Y. § 173.14, provides a rigorous set of safety standards that must be followed for all work on lead paint. Under NYCCELP II, Order at 8 (Ex. 102), and NYCCELP VII, Order at 3 (Ex. 107), these procedures are to be followed for all work on lead paint hazards, regardless of whether a violation has been cited by a City agency.

LL # 38 creates a scheme whereby work performed by landlords to correct defined "lead paint hazards" (which, as noted supra, are far more limited than under current law), either before a violation has been issued, LL # 38 § 5 (proposed § 27-2056.2(a)), or during the first 21 days (and possibly 66 days) after a violation has been placed, LL # 38 §§ 5 (proposed § 27-2056.5(b)) & 6 (amending § 27-2115(l)(1)), can be performed under what LL # 38 denominates as "interim controls," which are far less stringent than Health Code § 173.14. Only work performed after the expiration of landlord's time to repair pursuant to a notice of violation would be subject to the full Health Code safety standards.

The differences between § 173.14 and LL # 38's "interim controls" are significant, including:⁶

6. A comparison table setting forth in further detail these differences, including citations to the relevant subsections of the respective laws, is annexed to this Memorandum as Attachment B.

<u>Provision</u>	<u>Health Code § 173.14</u>	<u>LL # 38's "Interim Controls"</u>
Filing with City	Required to file notice with City so that City is alerted to work in progress and can inspect as needed	Not required
Licensing and Training of workers	Required, including forthcoming federal certification requirements	Not required
Record keeping	Detailed records, kept for 7 years	Less detailed, only 3 years
Warning signs	Required	Not required
Furniture	Required to remove movable furniture from entire area	Not required
Plastic barriers	Specific detailed requirements on thickness and layers, taping, etc.	Not specified
Sealing of forced air ducts	Required	Not required
Sealing of windows and doorways	Required	Not required
Daily clean-up	Specific prohibitions on access to contaminated materials and areas, sealing and disposal of debris	No such provisions
Final cleanup	Requires 1 hour wait for dust to settle; specific requirements for misting debris and sealing it; and HEPA vacuuming of all surfaces, including furniture and carpets, then a detergent wash of all surfaces, then a 2nd HEPA vacuuming.	Not required; no specific requirements for misting debris and sealing it; and allows just one HEPA vacuuming <u>or</u> one detergent wash.
Final inspection	By an independent 3d party; who must wait 1 hour before inspecting for dust to settle.	Inspection can be done by one who is not independent; and no waiting period.

Clearance dust testing	4 dust wipe samples -- from window well, window sill, floor, and from adjacent room (for tracking) -- and must meet dust levels set in accordance with federal law, before family is allowed to re-enter work area.	No dust wipe samples required for work on walls or ceilings -- and not required at all if no violation placed. Only required if work done on doors or moldings or near windows in response to violation, and no sample required outside work area. No requirement to meet health standard <u>before</u> family allowed to reenter.
Disclosure of dust test results to tenant	Required	Not required

Furthermore, the "interim controls" do not provide for the removal of children and pregnant women from the apartment while the work is being done, if needed.

d. Significantly Prolonged Time Frames for Correction and Enforcement

Current law, §§ 27-2013(h) and 27-2115(c), requires lead paint to be corrected within 24 hours, as a Class "C" immediately hazardous violation. LL # 38 will allow landlords 21 days after service of a notice of violation to correct it, which can be extended to a total of 66 days.⁷ LL # 38 §§ 5 (proposed § 27-2056.5(a)) and 6 (amending § 27-2115(l)(1)).

Under the new law, the landlord will then be given 5 days to mail certification of the violation's correction. LL # 38 § 6 (amending § 27-2115(l)(2)). HPD will then have 30 days to reinspect the work, and, if the work has not been done, a further 30 days after that to mail a notice of invalid certification,

7. The notice of violation itself may take a month to be issued after the tenant first complains, since HPD will have 10 days (15 in the heating season) to inspect in response to the complaint (proposed § 27-2056.7(a)), and 20 days thereafter to issue the violation notice. LL # 38 § 6 (amending 27-2115(l)(1)).

then, finally, some 60 further days to step in and correct the violation itself. LL # 38 § 6 (amending § 27-2115(l)(3) & (4)). Taking all these time frames together, the new law thus provides that a total of as much as 226 days may elapse from a tenant's first complaint before the violation is corrected. See Pet. ¶ 63.

e. Elimination of Important Deadlines for Protection of Lead Poisoned Children in 1- or 2-Family Dwellings

As noted supra at page 10, current law, Admin. Code § 27-2126, together with Health Code § 173.13(d)(2), creates a legal scheme whereby in any dwelling where DoH has placed a violation due to a child's lead poisoning and the landlord has failed to correct within 5 days, DoH must refer the matter to HPD within 16 days and HPD must intervene and correct the violation within 18 days of such referral. LL # 38, at § 7, amends § 27-2126(b) to limit these provisions to multiple dwellings (i.e. buildings with 3 or more units (Admin. Code § 27-2004(a)(7)), thus removing lead poisoned children in 1- or 2-family dwellings from the protections of the existing law.

ARGUMENT

I. THE COURT SHOULD ANNUL LOCAL LAW # 38 BECAUSE THE CITY COUNCIL'S NEGATIVE DECLARATION FAILED TO TAKE A "HARD LOOK" AT THE ENVIRONMENTAL IMPACT.

"SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making... ." Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d at 679 (citations omitted). To review agencies' SEQRA actions, courts "first, [examine] the agency procedures to determine whether they were lawful," Jackson v. New York State Urban Development Corp., 67 N.Y.2d at 417; see also Kahn v. Pasnik, 90 N.Y.2d 569, 574 (1997) (setting out standard of review), and more specifically whether the procedures complied "strict[ly]" with SEQRA and its regulations. Merson v. McNally, 90 N.Y.2d 742, 750 (1997) (emphasis added).

To assess the adequacy of a negative declaration, courts apply the test articulated in H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222 (4th Dep't 1979). The test demands of the negative declaration that it (1) identify the relevant areas of environmental concern, (2) take a "hard look" at them, and (3) make a "reasoned elaboration" of the basis for the determination to dispense with an EIS. Id., 69 A.D.2d at 232; see also Jackson v. New York State Urban Dev. Corp., 110 A.D. 2d 304, 307-08 (1st Dep't 1986), aff'd 67 N.Y. 2d 400, 417; Kahn v. Pasnik, 90 N.Y.2d at 574; Merson v. McNally, 90 N.Y.2d at 752; Gernatt Asphalt Products v. Town of Sardinia, 87 N.Y.2d 668, 688 (1996); Giuliani v. Hevesi, 228 A.D.2d 348, 352-53 (1st Dep't 1996), aff'd as modified, 90 N.Y.2d 27 (1997) (City "failed to take the requisite hard look at areas of environmental concern" regarding sale of water system from City of New York to New York City Water Board). A properly issued negative declaration requires that the agency have "made a thorough investigation of the problems involved and reasonably exercised its discretion," Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 530 (1989) (citations omitted); see

also Desmond-Americana v. Jorling, 153 A.D.2d 4, 12-13 (3d Dep't 1989), lv. to app. den., 75 N.Y.2d 709 (1990) (agencies must perform "a thorough and meaningful review and analysis of any potential environmental impacts").

The Court must annul the Negative Declaration (and thus LL # 38) for the simple reason that compliance with the procedural and substantive requirements of SEQRA for making a "determination of significance" plainly cannot be found within the four corners of the Negative Declaration. The Negative Declaration in the instant matter, on its face, fails all three elements of the H.O.M.E.S. test. The reviewer will look in vain in this Negative Declaration for the identification of relevant areas of environmental concern, a "hard look" at those areas, and a reasoned elaboration for the basis of the agency's determination. More importantly, the fatally flawed Negative Declaration reflects the process by which the City Council issued it -- one wherein it completely abrogated its substantive and procedural duties under SEQRA.

A. The Negative Declaration Failed to Identify Relevant Areas of Environmental Concern.

Far from identifying the relevant areas of environmental concern, the Negative Declaration quite literally and remarkably fails to mention them -- any of them. That is, the Negative Declaration fails to mention that LL # 38 in effect ends most regulation of lead dust and the conditions which create it; fails to mention that LL # 38 eliminates protection against lead poisoning for 6 year olds; fails to mention that LL # 38 permits landlords in most situations to ignore Health Code safety standards for abatement work; fails to mention that LL # 38 allows "immediately hazardous" lead paint violations to remain uncorrected for as long as 6 months; and fails to mention that LL # 38 eliminates enforceable time frames for correction of hazards in 1- or 2-family dwellings occupied by lead-poisoned children. All of these are significant areas of environmental concern.

1. LL # 38's Weakened Definition and Controls of Lead Hazards, in Particular its Deregulation of Lead Dust, Will Have a Significant Adverse Impact on the Environment.

Under the current "lead free" law (LL # 1), since no lead paint is permitted in a young child's home -- in any condition -- no interior sources are allowed to remain that could generate lead dust. However, in a "lead safe" scheme, such as LL # 38, which permits some amount of lead paint to remain in a dwelling with young children, the risk of a child's lead poisoning from lead dust a fortiori is higher than if no lead paint is present at all. Thus, policy determinations regarding, among other things, 1) which surfaces are allowed to be covered with lead paint, 2) which specific conditions must be monitored and maintained, 3) at what intervals, and 4) by whom, necessarily implicates nuanced, carefully considered environmental and public health judgments based on medical and technical expertise. See Landrigan Aff. at ¶ 9 (on the complexity of issues regarding change from "lead free" to "lead safe" policy); Ex. 77 (Tr. June 21, 1999, at 229 (Don Ryan testifying to same)).

For example, while LL # 1, coupled with the jurisprudence in Juarez, created a continuing obligation for landlords to ensure no lead hazards are present, LL # 38 limits landlords' responsibilities to a single, annual inspection, and only for peeling paint -- no matter what the general condition of the building. The Negative Declaration cites no research or testimony to indicate that this massive reduction of landlord's obligations will be sufficient to protect children's health, nor was there any expert testimony that it would be. In very well-maintained buildings, a single annual inspection might be sufficient, but in others, once every 6 months, or even much more often, may be needed. Gilbert Aff. ¶ 16.

The federal Residential Lead-Based Paint Hazard Reduction Act defines lead hazards as including "any condition that causes exposure to lead from lead-contaminated dust, ... lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in

adverse human health effects." 42 U.S.C. § 4851b(15). While under current law, LL # 1, all of those five conditions were included in the ban on lead paint in any multiple dwelling inhabited by a child under the age of 7, see supra page 11, LL # 38 includes only one condition -- deteriorated lead paint, to the exclusion of all others. The new statute thus effectively deregulates as a "hazard" lead dust and the conditions that cause it, such as lead paint on impact and friction surfaces. These changes constitute a potential public health disaster for New York City children under 7 years of age. See Landrigan Aff., ¶¶ 13-14 and Ex.A thereto; Ex. 15; Ex. 77 (Tr. June 21, 1999 at 133-40); id. (Tr. June 21, 1999 at 292-94 (Dr. Rosen's testimony that "friction surfaces must be ... abated to control the ... lead dust problem")),⁸ and Rosen Aff. ¶¶ 6, 17 (noting that defining lead hazards as only peeling paint inevitably fails to regulate many conditions which produce lead dust and poison children).

Many other experts agree that some lead painted surfaces should always be considered hazardous, whether or not the paint is intact, because of their tendency to generate lead dust through friction or abrasion (such as window and door frames), from frequent impact (such as baseboards), or because teething infants can chew them (such as window sills). Lanphear Aff. ¶¶ 6-7; Gilbert Aff. ¶ 17. This was succinctly explained in testimony by former City Health Commissioner Margaret Hamburg in 1996 against a prior City Council proposal that would have eliminated the statutory requirement to correct lead paint on all friction and impact surfaces:

[W]hen ... lead-painted surfaces rub against each other, paint chips and dust are created that can then contaminate floors and other surfaces. Unless all the lead-based paint is removed or covered, over time the constant movement and rubbing will probably cause the hazard to recur.

8. Dr. Rosen also stressed that leading clinicians, scientists, and lead toxicologists had "expressed their dismay in writing" concerning LL # 38. Id. at 293, including Dr. Paul Mushak (Ex. 9), Dr. Herbert Needleman (Ex. 10), Dr. Sergio Piomelli (Ex. 12), and Dr. Joseph Graziano (Ex. 46-b).

Ex. 26-a (Testimony of Margaret Hamburg, M.D., Commissioner, DoH (N.Y.C. Council Apr. 29, 1996)). HPD Commissioner Roberts also acknowledged that lead dust from friction spaces presents a hazard. Ex. 77 (Tr., June 21, 1999 at 53 (conceding that lead dust "could be" an issue)); Rosen Aff. ¶ 6.

Yet not only does LL # 38 omit these conditions as "hazards," it omits lead dust itself as a defined hazard, despite the fact that respondents' own housing and public health officials have convincingly depicted the dangers to which lead dust exposes the youngest children. The current City Health Commissioner, Dr. Cohen, in testimony before the Council's Housing and Buildings Committee on June 21, 1999, declared:

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

Ex. 77 (Tr. June 21, 1999 at 123). He then went on to urge that lead dust be defined as a hazard:

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

Id. at 173.

Other City officials roundly criticized LL # 38's de-regulation of toxic lead dust. City Comptroller Alan G. Hevesi warned that "[t]he bill only defines peeling paint as a hazard, but lead dust poses the greatest hazard to young children." Id. at 189. Manhattan Borough President C. Virginia Fields also condemned LL # 38's de-regulation of lead dust, stating that the bill "ignores what scientific evidence [has] demonstrated to be the primary source of lead poisoning, lead dust." Ex. 78 (Tr., June 24, 1999 at 70).

Many housing advocates and other lead-paint poisoning specialists also stressed that it was environmentally unsafe to omit coverage of lead dust hazards from legislation. See, e.g., Ex. 77 (Tr., June 21, 1999, at 219 (Nick Farr, Executive Director of the National Center for Lead Safe Housing, discussing his concern about the threat of lead dust)); id. at 230 (Don Ryan, Alliance to End Childhood Lead

Poisoning, stating that recent scientific research has demonstrated that lead dust constitutes the “pathway of exposure” and must be “control[led], contain[ed], and clean[ed] up”); id. at 252 (Don Ryan stating that LL # 38 “ignores the hazards of lead dust”); id. at 366 (Maureen Silverman, member of NYCCELP and housing resource coordinator for petitioner Sinergia, explaining that “[l]andlords must ... address dust from lead-based paint, if they are to prevent children from becoming lead poisoned”); Ex. 78 (Tr., June 24, 1999, at 151-52 (Judith Goldiner, Legal Aid Society, noting the Society's opposition to LL # 38 due, in part, to the exclusion of lead dust from the definition of hazards)).

Many other experts in the field, unable to attend the hearings on less than a full business day's notice, nonetheless alerted the Council to LL # 38's failure to address the lead dust issue. Dr. Bruce P. Lanphear, author of numerous peer-reviewed studies on lead dust, noted that the bill "fails to recognize that lead-contaminated house dust is the primary pathway for leaded paint to be ingested by young children." Ex. 6; see also, Lanphear Aff. ¶¶ 6-7; Gilbert Aff. ¶ 17. Dr. Paul Mushak, a toxicologist and environmental health scientist and author of the 1988 Report to Congress on the Nature and Extent of Lead Poisoning in Children,⁹ speaking at a press conference on June 28, 1999, at City Hall, called the failure to address lead dust a "critical flaw" and stated that an increase in new lead poisoning cases as a result was "predictable." Ex. 9.

In Williamsburg Around the Bridge Block Ass'n v. Giuliani, the First Department held that the release of lead dust from the City's bridges involved a toxic material and that policymaking concerning lead dust implicated SEQRA and required an EIS. 223 A.D.2d at 71-72, 74. Here, all of the evidence provided at the hearings and presented in support of this Petition is even more compelling, because young

9. Dr. Mushak also serves as an expert witness for the City in the pending case of City of New York v. Lead Industries Association, N.Y. Co. Index. No. 14365/89. He raised similar concerns in a June 10, 1999 letter to Health Commissioner Cohen on which Speaker Vallone was copied. Ex. 9

children live in the environment that will become hazardous and/or remain hazardous under LL # 38. The failure of the Negative Declaration to identify LL # 38's deregulation of a hazardous material, toxic lead dust, and the conditions that generate it, as matters of environmental concern and analyze them thoroughly renders it invalid and insufficient on its face.

2. The Elimination of All Lead Poisoning Preventative Measures for the Entire Class of Six Year Old Children In New York City Will Have A Significant Adverse Impact on the Environment

LL # 38 eliminates environmental protection for roughly one-seventh of the children covered under current law, i.e., children between the ages of 6 and 7. Proponents of LL # 38 offered no explanation for this change, which obviously "may" have an adverse impact on the health of six year olds, despite information provided to the Council that six year old children are vulnerable to the harmful effects of lead poisoning. See E. Mauss Aff. ¶ 9 and Att. A; Ex. 111 at 47; see also Rosen Aff. ¶ 19 (stating that his clinic has seen hundreds of lead poisoned six year olds over the past quarter century). No evidence adduced before the City Council in any way contradicts this information. The Negative Declaration contains not a shred of support or analysis for eliminating environmental lead poisoning prevention measures for six-year-olds or even any discussion of why it was done. See Pet. ¶¶ 152, 183.

3. The Evisceration of the Safety Standards for Work That Disturbs or Removes Lead Paint Will Increase Lead Dust Exposures of Vulnerable Children and Pregnant Women and Thus Will Have A Significant Adverse Impact On The Environment.

LL # 38 exempts all lead paint repair activities from the detailed safety requirements imposed by the Board of Health in 1993, except work performed after a landlord has failed to respond within 21 days (and possibly extended to 66 days) after receiving a formal notice of violation from HPD. See supra at 18. This exemption from the Health Code standards creates -- and was intended by LL # 38's sponsors

to create -- a powerful "incentive" for landlords to remove lead hazards quickly by relieving the landlord of the bother and expense of using careful safety protocols. Instead, the landlord who acts quickly need only adhere to a much-weakened set of "interim controls." Ex. 78 (Tr. June 24, 1999 at 9); LL # 38 § 5 (proposed §§ 27-2056.2(a), 27-2056.5(b))

This is another key provision of LL # 38 which has been denounced as a grave threat to public health, not only by the bill's opponents, but by the respondent's own public health officials. Thus in 1996, when a bill with a similar provision was under consideration by the City Council, then Health Commissioner Hamburg implored the Council not to enact it:

Our first concern is that the safety procedures required when an owner repairs peeling paint voluntarily ... are not adequate. Unfortunately, the risk to young children is actually increased by work that disturbs lead-based paint if it is done without appropriate safety precautions. The safety procedures required in the Committee's proposal do not require adequate containment of work areas nor do they require clearance testing after work is completed to ensure that lead dust was cleaned up. Furthermore, the bill only requires full safety measures when an owner fails to voluntarily make the repair within 30 days. To reduce safety requirements solely on the voluntary and rapid response of an owner, with no risk assessment, is not logical.

Ex. 26-a (emphasis added).

Three years later, at the first Council Housing and Buildings Committee hearing on the bill which became LL # 38, Dr. Hamburg's successor, Dr. Cohen, expressed similar concern about the hazards created by inadequate work practices, noting that:

[e]ven when performed with care by highly trained professionals, repairing peeling paint will often unfortunately still leave dust hazards behind. And because lead dust can be invisible to the naked eye, clearance tests ... are important to confirm that the work has already been done safely.... In my view, clearance dust testing provides the best quality control check that [exists]."

Ex. 77 (Tr., June 21, 1999, at 124 (emphasis added)); see also id. at 164 (Commissioner Cohen advocating clearance dust testing); id. at 133 (Commissioner Cohen stating that "even with the best

trained" lead abatement workers "there remains a risk of lead dust that can be invisible to the eye."). And two days later, in a letter to Council Housing and Buildings Committee Chair Spigner, Dr. Cohen proclaimed: "The dust wipe test is the single best way to ensure than an area has been thoroughly cleaned and is safe." Ex. 78 (Tr. June 24, 1999 at 10).

Yet as noted previously, LL # 38 does not require, in the vast majority of cases, either trained professionals nor clearance dust tests. The failure to do so will undoubtedly increase the number of instances where homes of young children and pregnant women are left with hazardous lead dust. As HUD declared recently:

[Numerous] studies demonstrate that without clearance testing and without adequate dust-lead standards, children's blood lead levels may worsen as a result of lead-based paint hazard control work in housing. Therefore, HUD has provided for clearance testing when lead hazard control work is done in housing covered by this rule.

HUD, Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance; Final Rule

64 F.R. 50140, 50180 (1999) (emphasis added); see also Landrigan Aff. and Ex. A thereto; Gilbert Aff. ¶¶ 39-51; Lanphear Aff. ¶¶ 8-12; Olmsted Aff. ¶ 12-15; Newman Aff. ¶ 12; Ex. 77 (Tr. June 21, 1999 at 431-32 (test. of Joel Shufro, Executive Dir. of N.Y. Committee for Occupational Safety and Health)).

Other aspects of the weakened safety procedures permitted in the so-called "interim controls" may significantly increase the incidence of lead poisoning among children whose homes are undergoing repair work on lead paint. For example, the existing Health Code provisions for abatement areas greater than six square feet require landlords to seal off the area and cover the entire floor and all openings with two layers of six-mil polyethylene sheeting. 24 R.C.N.Y. § 173.14(e)(2)(bb)(iv). LL # 38 would eliminate this requirement, merely requiring an unspecified covering of "the floor adjacent to the work area" with "polyethylene, plastic or equivalent sheeting" of any thickness. See § 27-2056.5(b)(2). Plastic

that is too thin can easily be torn by work shoes, ladders and equipment. See Gilbert Aff. ¶ 28; Olmsted Aff. ¶ 6; see also Newman Aff. ¶ 9.

The existing Health Code provisions require that furniture and other objects in the work area as well be covered with two layers of six-mil polyethylene sheeting. The sheeting must be taped together with waterproof tape and taped to the floor “to form a continuous barrier to the penetration of dust.” 24 R.C.N.Y. § 173.14(e)(2)(aa)(ii). LL # 38 only requires that the furniture and other objects be covered with some kind of polyethylene, plastic or similar sheeting. Thus, implementation of LL # 38 would eliminate the specific requirement of a continuous, sealed barrier against toxic lead dust. See LL # 38 § 5 (§§ 27-2056.2(2)(ii) & 27-2056.5(2)(ii)). For example, eliminating the requirement of taping with waterproof tape means that the barrier can easily be breached during misting and washing operations. Landrigan Aff. ¶ 13(b); Olmsted Aff. ¶ 8, Gilbert Aff. ¶ 29; Newman Aff. ¶ 10. The Health Code also requires measures to control the diffusions of lead dust through ventilation systems, 24 R.C.N.Y. § 173.14(e)(2)(aa)(iv), which are absent in the "interim controls" in LL # 38. Olmsted Aff. ¶ 11; Gilbert Aff. ¶ 30.

The elimination of all of these careful lead dust control measures will greatly increase the risks that children will be exposed to lead contamination. Landrigan Aff. ¶ 14; I. Mauss Aff. ¶ 8; Needleman Aff. ¶ 5; Olmsted Aff. ¶ 20; Newman Aff. ¶ 8; Gilbert Aff. ¶ 32; Lanphear Aff. ¶ 8. The record clearly shows that the Council ignored the warnings of lead poisoning experts and housing advocates regarding LL # 38's weakened safety measures. See, e.g., Ex. 77 (Tr., June 21, 1999 at 216, 219 (Farr test.); id. at 230-32 (D. Ryan test.); id., at 367 (Silverman test.); id., at 432 (Shufro test.)). These concerns persisted despite the bill's minor revision after the June 21, 1999 hearing. See, e.g., Ex. 78 (Tr. June 24, 1999, at 55 (comments of Council member Linares), id. at 214-25 (comments of Council member Michels); id. at 135-36 (test. of J. Laurie for petitioner Met Council); id. at 154-55 (test. by A. Goldberg

for petitioner NYPIRG)); Ex. 79 (Tr., June 30, 1999, at 112 (comments of Council member Michels); id. at 130-32 (comments by Council member Eldridge)). The failure of the Negative Declaration to identify these issues as matters of environmental concern and analyze them thoroughly renders it invalid and insufficient on its face.

4. The Enlarged Times For Correction and Enforcement of Lead Paint Hazard Violations Will Adversely Affect Public Health By Significantly Increasing the Probability That Vulnerable Children Will Be Poisoned

Even for the few remaining situations where LL # 38 considers lead paint to be a "hazard," LL # 38 will permit as much as half a year to transpire before the condition is corrected. The Negative Declaration fails to consider that in the life of a young child, a half year is enormous, and far more than enough time for the "hazard" to result in the poisoning and irreparable injury of that child. Rosen Aff. ¶ 9. For this reason, many public health and lead poisoning specialists, advocates, and public officials repeatedly criticized the unreasonably long time frames in LL # 38 because of the increased risks for children from prolonged exposure to conditions that even LL # 38 defines as "lead hazards." Health Commissioner Cohen stressed the critical importance of a quick response to remove lead hazards:

There is no question that from a public health perspective the quicker the better. There is no scientific data ... that I can give to you that would say if we get to it within six days, 15 days, 20 days, we will see different outcomes. There is no question, though, that we encourage there to be a rapid response -- we encourage our sister agency, HPD, to be able to address and use its resources as they can to shorten the time frames once these violations have been cited to carry out reinspections, so that we minimize any opportunity that children would have to have continuing exposure to lead.

Ex. 77 (Tr., June 21, 1999, at 140). Likewise, HPD Commissioner Roberts conceded that the longer lead hazards exist the greater the exposure of children to danger. Id. at 56-58. He also admitted that HPD could take action much more quickly, stating that it generally responds to Class C immediately hazardous conditions within 24 to 72 hours. See Ex. 77 (Tr., June 21, 1999 at 29-31, 57-63).

Similarly, several Council members expressed grave concern about LL # 38's proposed time frames and whether they were adequate to protect children, see, e.g., Ex. 78 (Tr., June 24, 1999 at 127 (Council member DiBrienza stating his belief that LL # 38's time frames are insufficient to protect children)); Ex. 79 (Tr., June 30, 1999, at 165-66 (Council member Michels decrying the timeframes for abatement, which total up to 226 days, as unreasonably excessive and likely to result in poisoned children)), as did concerned advocates. See, e.g., Ex. 78 (Tr. June 24, 1999 at 136, 145, 152); see also I. Mauss Aff. ¶ 8; Needleman Aff. ¶ 5. Despite these many warnings, the Negative Declaration failed to identify the potential environmental impact of these relaxed time frames as matters of environmental concern and analyze them thoroughly, rendering it invalid and insufficient on its face. See Pet. ¶¶ 165-68. This omission reflects the Council's total abrogation of its statutory duties under SEQRA.

5. The Elimination of Any Enforceable Deadlines for Correction of Lead Hazards in the Homes of Already Lead-Poisoned Children in 1- or 2-family Dwellings Will Result in Further Adverse Environmental Impacts.

While the current laws failed to provide lead poisoning preventative measures for children in 1- or 2-family dwellings, at least they provided measures for abating lead paint in those dwellings once resident children became lead poisoned, to prevent further injury. As noted supra at p. 21, LL # 38 eliminates the existing 34-day timeframe mandating City intervention to remove lead hazards if the landlord fails to do so; instead, it provides no timeframe at all.

During the City Council hearings, several persons expressed concern that this change would leave a whole subpopulation of children vulnerable to lead poisoning. See, e.g., Ex. 78 (Tr., June 24, 1999, at 120 (Council member Linares stating "for the record" his concern that LL # 38 failed to protect children in 1- and 2-family homes from further exposure to lead hazards); id. at 86-87 (Megan Charlop, Director of the Lead Poisoning Prevention Project in Montefiore Medical Center, asserting that LL # 38 will

increase the number of children living in 1- and 2-family homes that will be exposed to lead hazards)), see also Rosen Aff. ¶ 20 (noting that about 35% of a random sample of 3,000 children treated at his program at Montefiore live in 1- or 2-family homes). Allowing lead hazards to remain in these dwellings, potentially forever, will have profound public health and environmental impacts. See Pet. ¶ 172; see also Rosen Aff. ¶ 12 (explaining the medical necessity that after treatment a lead poisoned child be discharged only to an environmentally safe home).

Because the Negative Declaration failed to identify these matters and environmental concerns and to analyze them thoroughly, it is invalid and insufficient on its face.

6. The Failure to Identify the Above Relevant Areas of Environmental Concern Mandates Nullification

The Council's failure in the Negative Declaration to even identify the above-noted relevant (and obvious) areas of environmental concern¹⁰ -- almost all of which public officials and environmental and medical experts emphasized as likely to result in adverse health impacts -- violates the letter and spirit of SEQRA and requires nullification of the Negative Declaration. Incredibly, the Negative Declaration failed to make any mention at all of the effect of the local law on human health.

10. The above list is certainly not exhaustive. For example LL # 1 required HPD to place violations for lead paint in dwellings of any age. NYCCELP II, slip op. at 12-13 (ex. 101). The Negative Declaration failed to disclose and identify as an environmental concern that LL # 38 eliminates all HPD enforcement for lead paint hazards in dwellings constructed after January 1, 1960, leaving young children living in such dwellings exposed to environmental lead hazards. See Woolfalk v. New York City Housing Authority, Index No. 112405/93 slip op. (S. Ct. N.Y. Co. May 12, 1998)(Goodman, J.) (Ex. 114), aff'd, __ A.D.2d __, 629 N.Y.S.2d 386 (1st Dep't 1999), leave to app. den., slip op. (1st Dep't, Sept. 28, 1999) (LL # 1 applicable where lead paint found in lead poisoned child's home, a New York City Housing Authority building constructed in 1973). See Pet ¶ 171.

In Chinese Staff and Workers Association v. City of New York, 68 N.Y.2d 359, 368-69 (1986) the Court of Appeals held that the City's failure to identify the environmental impact of a relevant area of environmental concern (*i.e.*, the potential long-term displacement of residents and businesses) rendered its issuance of a conditional negative declaration improper and required nullifying the special permit. Similarly, in Village of Westbury v. Department of Transportation, the Court of Appeals determined that the agency's failure to identify the cumulative effect on the environment of a proposed reconstruction in conjunction with another related highway project also violated SEQRA. 75 N.Y.2d 62, 69 (1989). The Court of Appeals went on to affirm the annulment of the negative declaration. Id. at 74; see also Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 604 (2d Dept' 1988), lv to app. den., 72 N.Y.2d 807 (1988) (reversing negative declaration and ordering EIS due to agency's failure to consider relevant areas of environmental concern, which area residents identified at public hearing); Kravetz v. Plenge, 102 Misc.2d 622, 631-32 (Sup. Ct. Monroe Co. 1979) (reversing the agency's determination of a negative declaration because of its failure to identify and consider a relevant area of environmental concern).

B. The Council Failed to Take a "Hard Look" at the Likely Adverse Effects of the Implementation of Local Law # 38.

Since the Negative Declaration fails to identify the relevant areas of environmental concern, as discussed in the prior section, the document ipso facto failed to provide a thorough analysis of them, *i.e.* a "hard look." Moreover, the Council cynically and cavalierly ignored experts' testimony regarding LL # 38's broad panoply of likely adverse impacts. "Like the proverbial ostrich, respondents have incredibly put out of sight and mind a clear environmental problem." H.O.M.E.S. v. N.Y.S. Urban Dev. Corp. 69 A.D.2d at 231.

By June 24, at least twenty-two medical professionals had warned the City Council of the likely

adverse health impacts -- especially on children of color living in poor communities -- that these changes would create. I. Mauss Aff., Ex. A; Rosen Aff.; E. Mauss Aff., Ex. A; Exs. 5, 6, 8-12, 14-19, 25.¹¹ Similarly, public officials and Council members, including Council member Michels (the author of LL # 1 of 1982), raised many of the same concerns. See, e.g., Ex. 77 (Tr., June 21, 1999 at 89-95 (Test. of Comptroller Hevesi); id. at 239-40 (colloquy between Council member Linares and N. Farr)); Ex. 78 (Tr., June 24, 1999 at 66-67 (comments of Council member Freed); id. at 69-72 (test. of Manhattan Borough President C. Virginia Fields); id. at 77-81 (test. of Dep. Comptroller Newman); id. at 210-28 (comments of Council member Michels)). Even the City's top public health official noted the critical importance of lead dust, safe work standards such as clearance tests, and adequate time frames. See supra pp. 29, 32. Moreover, the City Council failed even to question the impact of removing six year old children from the law's current protections. Neither the Negative Declaration nor the briefing report to the Council (supplied to the Office of Environmental Coordination as the sole supporting document to the Negative Declaration) mention any of this testimony or correspondence. See Ex. 4, at 11-16. Nonetheless, the Negative Declaration merely stated in a conclusory fashion that LL # 38 would not have a socioeconomic impact nor an impact on hazardous materials. See Ex. 1-a, at 14.

In similar circumstances, courts routinely nullify negative declarations either because (as here) the agencies never identified concerns in the first place, Chinese Staff and Workers Assoc. v. City of New York, 68 N.Y.2d at 368; Village of Westbury v. Department of Transp., 75 N.Y.2d at 69; Kravetz v. Plenge, 102 Misc.2d at 631, or because (also as here) they mistakenly discounted or wilfully disregarded concerns raised by retained consultants, internal officials, or external critics. See, e.g., Kahn v. Pasnik, 90 N.Y.2d at 573-74 (board disregarded potential adverse environmental impacts that an environmental

11. No medical professional testified that these changes would not create adverse environmental health impacts.

consultant identified); Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d 718, 720 (1985) (board disregarded potential adverse environmental impacts that the board itself identified); Golten Marine Co., Inc. v. New York State Dep't of Env'tl. Conservation, 193 A.D.2d 742, 742-43 (2d Dep't 1993) (agency failed to examine relevant areas of environmental concern expressly contained in the implementing regulations); West Branch Conservation Assoc., Inc. v. Town of Ramapo, 177 A.D.2d 917, 919 (3d Dep't 1991) (planning board failed to take a hard look at an environmental concern raised by advocate during a public hearing); Desmond-Americana v. Jorling, 153 A.D.2d at 11-12 (agency failed to take a hard look at relevant areas of environmental concern despite repeated and persistent warnings by agency critics of adverse environmental effects); H.O.M.E.S. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d at 227, 232, 234-35 (agency disregarded potential adverse environmental impacts that, among others, external critics identified); see also: Kanaley v. Brennan, 119 Misc.2d 1003, 1008-11 (Sup. Ct., Onondaga Co. 1983), aff'd, 120 A.D.2d 979 (4th Dep't 1986) (agency failed to take a "hard look" at relevant areas of environmental concern); Meschi v. New York State Dep't of Env'tl. Conservation, 114 Misc.2d 877, 879 (Sup. Ct., Albany Co. 1982) (same); Center Square Ass'n, Inc. v. Corning, 105 Misc.2d 6, 12 (Sup. Ct., Albany Co. 1980) (same); Kravetz v. Plenge, 102 Misc.2d at 631-32 (same).

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

CHAIRPERSON SPIGNER: Okay, let's move on now to the negative declaration, which is a part of the procedure I am told we must comply with. . . . Let me turn to Terzah Nasser, Counsel for the Committee.

MS. NASSAR: Okay, the next vote will be on a resolution . . . [on] which we will shortly have a vote, [that] local law [38] . . . will not have a significant adverse impact on the environment. There are copies of the negative declaration available for members who wish to review it. Actually, it has been on your desks. Thank you.

CHAIRPERSON SPIGNER: As has been described, a roll call now on the negative declaration, which was explained to you by counsel. Roll call, please.

Ex. 78 (Tr. June 24, 1999, at 237-38). The full Council never discussed it at all. In contrast, courts look to a thorough examination by the government agency in making a determination of significance. See Gernatt Asphalt Prod. v. Town of Sardina, 87 N.Y.2d at 689 ("The record reveals that at a work session of the full Town Board, it reviewed and answered all of the questions posed on the Full Environmental Assessment Form."). A negative declaration was annulled where the Town Board (like the City Council in the instant matter) essentially rubber stamped an Environmental Assessment Form without discussion and without making any attempt to independently assess the conclusions contained therein. Phelps v. Town Bd. of Town of Alabama, 174 Misc.2d 889, 895 (Sup. Ct. Genesee Co. 1997).

Similar to the cases discussed above, the record in this case shows that the City Council -- as a body and in committee -- failed to take a hard look at the environmental concerns raised in the uncontroverted, independent testimony of over a dozen medical and scientific experts and community advocates over the course of two public hearings. See Exs. 77, 78. Notably, not even a single medical or toxicology expert testified in support of LL # 38, id., and proponents of LL # 38 failed to introduce into the record even one study or report to support the provisions contained in the new law. Id.

C. The City Council Failed to Make a Reasoned Elaboration in Support of its Determination to Issue a Negative Declaration.

Having failed to identify or take a hard look at the relevant areas of environmental concern, it follows inexorably that the respondents also must have failed to make a "reasoned elaboration" of their bases for determining that those concerns did not require an EIS. Kravetz v. Plenge, 102 Misc.2d at 631.¹²

12. SEQRA's regulations require an agency to review an environmental assessment form as a precursor to setting forth its reasoned elaboration. 6 N.Y.C.R.R. § 617.7(b)(2)-(4). The form "must contain enough information to describe the proposed action, its location, its purpose and its (continued...)

In addition to its failure to cite, let alone discuss, major environmental concerns (e.g., lead dust deregulation, extended time frames, weakened safety standards), the Negative Declaration manages to get wrong the few substantive points that were inadvertently allowed to creep into the narrative: For instance, the Negative Declaration repeatedly and erroneously touts as an accomplishment that LL # 38 "establishes a new prohibition on the dry scraping and dry sanding of lead-based paint." In fact, the law has prohibited this for well over five years. Compare Ex. 1-d, at 3-4, with existing 24 R.C.N.Y. § 173.14(d)(2)(bb) (Ex. 91); see Pet. ¶ 161.

Second, the Negative Declaration failed to address at all any of the concerns raised by witnesses before the Council regarding the local law's potential to cause "the creation of a hazard to human health," as required by 6 N.Y.C.R.R. § 617.7(c)(i)(vii), or to "human health and safety," as required by CEQR, 43 R.C.N.Y. § 6-06 (a)(7); see Ex. 85. Other than noting in passing that lead poisoning in children leads to permanent damage, see Ex. 1-c at 2, § 1.1., the Negative Declaration does not allude to health again -- although a local law to prevent lead paint poisoning by its very nature implicates public health concerns.

Third, the "environmental assessment and determination" contained in Part III of the Council's Negative Declaration reaches conclusions that directly contradict testimonial evidence in the record. The form states that LL # 38 will not have a significant effect on the environment with respect to "[h]azardous materials" or "[s]ocioeconomic impacts/displacement." See Ex. 1-c, at 14. However, witness after witness before the Council testified that LL # 38 would likely result in increased lead paint (particularly lead dust) hazards and adverse environmental impacts involving socioeconomic

12. (...continued)
potential impacts on the environment. Id. § 617.2(m) (emphasis added). Additionally, model forms may be modified by the agency "provided the scope of the modified form is as comprehensive as the model." Id.

ramifications. See Rosen Aff. ¶ 9; Needleman Aff. ¶ 5; Exs. 15, 24, 26, 27, 29, 63, 67; Ex. 77 (Tr. June 21, 1999, at 123, 208-11, 433); Ex. 78 (Tr. June 24, 1999, at 133); Pet ¶ 5-6.

Fourth, the model short environmental assessment form for unlisted actions contains the following substantive question, which the City's Negative Declaration omits: "Is there, or is there likely to be, controversy related to potential adverse environmental impacts?" See 6 N.Y.C.R.R. § 617.20 Pt. II.E.

The record shows that LL # 38 engendered tremendous controversy among public health experts, doctors, and other advocates, see, e.g., Exs. 5 - 40, and such controversy was reflected in numerous articles and editorials in the newsmedia. Ex. 58.

This is not what SEQRA means by "reasoned elaboration." See e.g., West Branch Conservation Ass'n, Inc. v. Town of Ramapo, 177 A.D.2d at 919 (planning board violated SEQRA, in part, because "[t]he record [was] devoid of any reasoned elaboration" relating to the relevant area of environmental concern); Fernandez v. Planning Bd. of Village of Pomona, 122 A.D.2d 139, 141 (2d Dep't 1986) ("merely voted that a negative declaration should be issued" and "failed to set forth `a reasoned elaboration for the basis of its declaration"); Fisher v. Giuliani, N.Y.L.J., July 1, 1999, p.31 col. 1 (Sup. Ct. N.Y. Co.) (reversing New York City Council's negative declaration, in part, due to its failure to give a "reasoned elaboration" for its determination); Phelps v. Town Bd. of Town of Alabama, 174 Misc.2d at 898 (conclusory statements by Town Board, without factual basis, insufficient "reasoned elaboration"); Kravetz v. Plenge, 102 Misc.2d at 631-32 (reversing agency's determination, in part, because of its "failure to give a reasoned elaboration of the findings"). Likewise, in this instance, the Court should nullify the City Council's Negative Declaration for its failure to contain a "reasoned elaboration" for its determination.

D. The City Council's Determination of Environmental Non-Significance of Local Law # 38 Warrants Close Judicial Scrutiny Because of the Council's (and City's) Position as Initiator of the Action, the City's Dual Role as Regulator and Landlord, and the Council's Lack of Medical and Technical Expertise.

Courts evaluate agencies' decision-making on a case-by-case basis as they "must ensure that, in light of the circumstances of a particular case, the agency [gave] due consideration to pertinent environmental factors." Akpan v. Koch, 75 N.Y.2d 561, 571 (1990) (emphasis added). Where an agency both issues a negative declaration and serves as well as the sponsor of the action presents a circumstance warranting close review of the SEQRA action. For example, the court in Rochester Gas & Electric Corporation v. New York State Environmental Facilities Corporation noted in a SEQRA context that when:

[an agency] is charged with the duty to evaluate the impact of [an action], it cannot be overlooked that in th[at] instance, the [agency] is actually evaluating [its] own action. When evaluating one's own actions, the allegation of non-objectivity may always be raised, therefore justifying the scrutiny of such determination.

No. 810-8897, slip op. at 7 (Sup. Ct. Cayuga Co., Sept. 9, 1981) (copy annexed as Attachment C).

The case at bar presents an especially acute instance of agency non-objectivity due to the City's unique and conflicting role as both enforcer of its housing code and landlord to approximately 22,000 units. See Ex. 77 (Tr. June 21, 1999 at 34-37 (colloquy between City Council member Guillermo Linares and HPD Commissioner Roberts)). Thus, LL # 38 would set (lowered) landlord standards of care that the City itself would bear responsibility to meet. Unlike many SEQRA circumstances, the case at bar also involved decision-making with extraordinarily far-reaching, irreparable environmental and public health ramifications by an agency without the commensurably required expertise. Thus, the Council's position as initiator of the action, the City's dual and conflicting role as self-regulated landlord, as well as the City

Council's lack of particular expertise in environmental public health, call for close judicial scrutiny of the Council's determination of environmental non-significance.

II. BECAUSE LOCAL LAW # 38 MAY -- AND INDEED, WILL -- HAVE A SIGNIFICANT ADVERSE IMPACT ON THE ENVIRONMENT, AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED BY LAW.

“The heart of SEQRA is the [EIS] process.” Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d at 415. An EIS must be prepared for any proposed action “which may have a significant effect on the environment.” ECL § 8-0109(2) (emphasis added). To require an EIS, it is enough “that the action may include the potential for at least one significant adverse environmental impact.” 6 N.Y.C.R.R. § 617.7(a)(1) (emphases added). The New York courts have consistently described this standard as presenting a “relatively low” threshold. Chemical Specialties Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 397 (1995); Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d at 364-65; Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d at 603; Save the Pine Bush, Inc. v. Planning Board of the City of Albany, 96 A.D.2d 986, 987 (3d Dep't 1983), lv. to app. den. 61 N.Y.2d 668 (1983); H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d at 232.

As discussed supra in Pt. I.A, the evidence accompanying the Petition and supporting affidavits overwhelmingly proves that LL # 38 not only may, but indeed will, significantly and substantially increase poisoning of New York City's children from lead in the environment, thereby creating a serious public health hazard. SEQRA specifically covers “the creation of a hazard to public health.” 6 N.Y.C.R.R. § 671.7(c)(1)(vii), and environmental impacts on human health. 6 N.Y.C.R.R. § 617.2(1) Where, as here, a proposed action may have significant adverse impacts on the environment, an EIS is required, and the failure to prepare such an EIS mandates the annulment of Local Law # 38.

Where agencies have ignored the potential for adverse environmental impacts in their decision making, the courts have not hesitated to nullify negative declarations and order the preparation of an EIS. See, e.g., Kahn v. Pasnik, 90 N.Y.2d at 573-74 (annulling agency action and remanding for the preparation of a supplemental EIS); Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 719 (annulling agency action and remitting the matter to agency for the preparation of an EIS); Omni Partners v. City of Nassau, 237 A.D.2d 440 (2d Dept. 1997) (holding that lower court should have ordered EIS); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 74-75 (annulling "Protocol" for lead paint removal on N.Y. City bridges and enjoining the action until preparation of an EIS); West Branch Conservation Ass'n, Inc. v. Planning Bd. of Town of Clarkstown, 207 A.D.2d 837, 841 (2d Dept. 1994), mot. for lv. to app. dis'm, 84 N.Y.2d 1019 (1995) (agency should have prepared an EIS); Schultz v. New York State Dep't of Env'tl. Conservation, 200 A.D.2d 793, 794-95 (3d Dep't 1994), lv. to app. den. 83 N.Y.2d 758 (1998) (nullifying agency's regulations and enjoining their enforcement until preparation of an EIS); Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d at 604 (annulling agency determination and remitting matter to agency to prepare an EIS); Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany, 96 A.D.2d at 986, 988 (affirming lower court judgment which, in part, enjoined future agency action until an EIS completed); Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 482 (2d Dept. 1981), appeal dis'm, 56 N.Y.2d 985 (1982) (concluding as a matter of law and based on the record that an EIS is required); Tri-County Taxpayers Ass'n. v. Town Bd. of Queensbury, 79 A.D.2d 337, 339 (3d Dep't 1981), app. dis'm, 54 N.Y.2d 755 (1981) (concluding that "EIS should have been prepared" and ordering agency to comply with SEQRA before proceeding further). Because the record demonstrates that LL # 38 unquestionably may have adverse environmental effects, and yet no EIS was prepared, LL # 38 must be annulled and this Court should order the City Council to prepare an EIS before the local law is reenacted.

Such relief is particularly appropriate here. The very purpose of SEQRA is to

insure[] that agency decision-makers -- enlightened by public comment where appropriate -- will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.

Jackson v. N.Y.S. Urban Development Corp., 67 N.Y.2d at 414-15; see also Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 73 ("key element in the environmental review process is the public review and comments of the [Draft EIS]...." to draw "on the reservoir of public information and expertise which SEQRA intends to tap" (citations omitted). The record of the Council's debate here illustrates why SEQRA and the EIS process can be so vitally important.

To cite only one example involving the critical issue of lead dust, no City official or public health or medical expert offered evidence into the record that LL # 38's deregulation of lead dust was either desirable or at least benign with respect to its public health impacts. Indeed, the prime (and sole) sponsor of LL # 38, Housing Committee Chair Spigner, urged the deregulation of lead dust controls not on the grounds that lead dust was no longer a significant public health hazard, but rather, because the degree of danger to children from lead-dust had not been (in his opinion) adequately studied and was unknown. At the conclusion of the debate and immediately prior to Council's final vote, Mr. Spigner stated that there was "a great deal of confusion ... as to what and how to control and measure lead dust" and that lead dust was "very insidious." Ex. 79 (Tr. June 30, 1999 at 232). He then concluded:

I don't know how you keep a room or an environment dust, lead dust ... free. So that is an issue that we have yet to talk about.

Id. at 232-33.¹³

13. Such a deferral of consideration of a critical environmental issue also violates SEQRA. Penfield Panorama Area Community, Inc. v. Town of Penfield, 253 A.D.2d 342, 349-50 (4th (continued...))

On this record, the contention that lead-dust deregulation is an idea of such overwhelming merit that its public health implications need not be formally assessed is simply and completely fatuous. The debate was not between experts who felt that the potential adverse effects of lead dust deregulation should be assessed and experts who feel that deregulation was totally benign and need not be studied. It was, instead, between experts who already believed that de-regulation will inevitably poison more children and those non-experts who, like Council Member Spigner, merely professed not to know if more children will be poisoned or not. The prime sponsor of LL # 38's candid admission of a lack of understanding of lead dust issues -- at the end of debate on legislation of overwhelming public health significance -- underscores precisely why SEQRA requires environmental impact statements.

III. IN ADDITION, THE COURT SHOULD NULLIFY THE NEGATIVE DECLARATION DUE TO THE CITY COUNCIL'S EXTENSIVE PROCEDURAL VIOLATIONS OF SEQRA.

The Court of Appeals has declared that SEQRA must be effectuated through "strict compliance with the review procedures outlined in the environmental laws and regulations." Merson v. McNally, 90 N.Y.2d at 750 (emphasis added); see also King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d 341, 347 (1996) ("Strict, not substantial, compliance is required"); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 73-74 (same); Golten Marine Co. v. New York State Dep't of Env'tl. Conservation, 193 A.D.2d at 743 (same); Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d at 603 (same); Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d at 481 (same). SEQRA's "elaborate procedural framework," which requires agencies "to consider the environmental ramifications of their actions '[a]s early as possible' and 'to the fullest extent possible,'" ensures that environmental concerns

13. (...continued)

Dep't 1999) ("[B]y deferring resolution of the hazardous waste remediation issue, the Planning Board failed to take the requisite hard look at an area of environmental concern.")

become an integral part of agencies' decision-making processes. King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d at 347 (citations omitted). This applies with special force to those portions of SEQRA and its implementing regulations that detail the requirements for determining whether a proposed action may have a significant effect on the environment. See, e.g., ECL §§ 8-0109(2) & (4); 6 N.Y.C.R.R. § 617.6(a)(1).

Failure to strictly comply with these procedural requirements, like failure to abide by the substantive requirements for the contents of negative declarations, is grounds for nullifying agency action. See, e.g., Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 720 (agency's failure to "follow procedures" warranted, *inter alia*, annulment of the negative declaration); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 68, 73-74 (nullifying lead paint abatement "Protocol" due to N.Y. City's failure to comply with SEQRA procedural requirements); Iorio v. Town of Mount Pleasant, 131 Misc.2d 395, 402 (Sup. Ct. Westchester Co. 1986) (nullifying negative declaration due to agency's failure to comply with SEQRA procedure for issuing an environmental assessment form).

A. The Council Failed to Determine as Early as Possible Whether an EIS Needed to Be Prepared

SEQRA requires agencies to "make an initial determination whether an environmental impact statement need be prepared for the action" "[a]s early as possible in the formulation of a proposal for an action." ECL § 8-0109 (4) (emphasis added); see also 6 N.Y.C.R.R. § 617.6(a)(1). The regulations specify the steps involved in this process, including "determin[ing] whether the action is subject to SEQRA;" "determin[ing] whether the action may involve one or more other agencies;" and "mak[ing] a preliminary classification of an action as Type I or Unlisted." 6 N.Y.C.R.R. § 617.6(a)(1)(i), (iii), (iv).

City Council members and staff began work on revising New York City's lead poisoning prevention laws many months prior to LL # 38's final enactment on June 30, 1999, probably as early as

January 1999, or even before. The basic proposals had been conceptualized by mid-April, 1999, and developed into legislative text by May 3, or May 28, if not much earlier. See Pet. ¶¶ 72, 74, 76-78, 81, 89-92. The Council's failure to address SEQRA concerns at the earliest dates and its issuance and approval of the negative declaration at the very end of its law-making process, *i.e.*, on June 24, 1999, the date on which LL # 38 was finally approved by the Housing and Buildings Committee and six days before the Council's final vote, flies in the face of SEQRA's express statutory and regulatory requirements. This violation of SEQRA alone warrants nullification of the resulting local law. See Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 720 (annulling negative declaration, in part, due to agency's failure "to follow procedures requiring it to `make an initial determination [of environmental significance] as early as possible'" (citation omitted)).

B. The Council Failed to Conduct the Environmental Assessment Analysis Required to Determine the Significance of the Action.

The illegality of the timing of the City Council's issuance of its Negative Declaration was compounded by the Council's failure -- as a body -- to deliberate thoroughly and meaningfully over the substantive contents of the Negative Declaration. Council staff delivered the proposed Negative Declaration, with an already completed environmental assessment form,¹⁴ to the Housing and Buildings Committee members on June 24, 1999, while the hearings were already underway -- indeed, when they

14. SEQRA's implementing regulations mandate that:

For Unlisted actions, the short [environmental assessment form] ... *must* be used to determine the significance of such actions.

6 N.Y.C.R.R. § 617.6(a)(3) (emphasis added). Moreover, CEQR outlines the environmental analysis necessary for a meaningful completion of an environmental assessment form. 43 R.C.N.Y. § 6-02(5) ("Environmental analysis' means the lead agencies' evaluation of the short and long term, primary and secondary environmental effects of an action, with particular attention to the same areas of environmental impacts as would be contained in an [EIS].")

were nearing their conclusion. Pet. ¶ 120. The Committee Chair offered no explanation of the document or its findings, reasoning, or legal impact, and held no discussion. Ex. 78 (Tr., June 24, 1999 at 237-38); Pet ¶¶ 113, 123-24.

Thus, at the time the Committee voted to approve the Negative Declaration (containing the already-completed environmental assessment form), the Committee as a whole never discussed the documents explicitly, let alone undertook the "environmental analysis" required by SEQRA and CEQR to complete the form. See 6 N.Y.C.R.R. § 617.7(b)(2) (stating that agencies making a determination of significance regarding an unlisted action must "review the [environmental assessment form]"). There was no revision of the Negative Declaration after the June 24th hearing to reflect the concerns raised in public testimony at that hearing, and no discussion at all of the Negative Declaration at the full City Council meeting on June 30. See Pet. ¶ 143-44.

The Council's failure to complete the environmental assessment form and conduct the environmental analysis that it requires constitutes a procedural violation and yet another ground for nullifying LL # 38. See Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d at 720.

C. The Council's Fast-Tracking of the Legislative Process and its Concerted Obstruction of Public, Intra-Council, and Intra-Agency Debate Violated SEQRA and CEQR, Which Require a Participatory and Informed Decision-Making Process.

SEQRA mandates that agencies "make every reasonable effort to involve ... the public in the SEQRA process." 6 N.Y.C.R.R. § 617.3(d). CEQR also requires appropriate participation of interested parties in the environmental review process. 62 R.C.N.Y. § 5-06(a) ("The lead agency ... shall make every reasonable effort to keep involved and interested agencies informed during the environmental review process and to facilitate their participation in such process."); see also Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d at 682 ("[T]he lead agency under SEQRA is likely to be nonexpert in

environmental matters, and will often need to draw on others[;] [t]he statute and regulations not only provide for this, but strongly encourage it." (citations omitted)). The purpose of an EIS, which follows a positive determination of significant environmental impacts of an action, ECL § 8-0109(2), is to act as an "environmental `alarm bell'" to alert public officials to environmental shifts before those changes reach "`ecological points of no return.'" Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 71 (citations omitted). A "'key element in the environmental review process is the public review and comments'... so as to draw `on the reservoir of public information and expertise which SEQRA intends to tap.'" Id. at 73 (emphasis added) (citations omitted).

In assessing agency conduct under SEQRA, the courts are attentive to agencies' efforts to make the environmental review process a broadly participatory and informed one. See, e.g., Merson v. McNally, 90 N.Y.2d at 753 ("The environmental review process was ... [meant to be] an open process that also involves other interested agencies and the public."); King v. Saratoga Co. Bd. Of Supervisors, 89 N.Y.2d at 349 ("Procedurally, respondents ... took substantial steps to involve interested members of the public.") ("At each stage, respondents sought and considered other points of view and itself evaluated the environmental consequences of the proposed landfill."); Coalition Against Lincoln West v. City of New York, 86 N.Y.2d 123, 132 (1995) ("[A]n application cannot be deemed `complete' until all potential negative environmental impacts have been identified and are, thus, brought to the attention of all interested parties for meaningful review and comment."). Conversely, courts disfavor agencies' exclusion of the public and other interested agencies in making the initial determination of significance. See, e.g., Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 74 ("The respondents ... have not ... complied with the public comment mandates of SEQRA ... and, in fact, only allowed limited public participation and scrutiny."); Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d at

603-04 ("[T]here is no indication that the DEP took any steps prior to issuing its negative declaration to involve interested members of the public in the SEQRA process.").

Here, the process by which the City Council adopted its Negative Declaration could not have been less open or more inimical to the spirit of public participation. The City Council leadership assiduously dampened debate and discouraged input from the medical, scientific, and advocate communities, see generally Pet. ¶¶ 74-94; Landrigan Aff. ¶ 8; E. Mauss Aff. § 4; Needleman Aff. ¶¶ 2-4; Rosen Aff. ¶ 16, and even from the City Comptroller, an interested agency that specifically requested an opportunity to provide analysis to the Council but was denied that request. See Ex. 78 (Tr., June 24, 1999, at 73-74, 130); Ex. 41, at 1; Pet. ¶ 146. Moreover, the Council leadership and staff deliberately and repeatedly kept advocates and the public in the dark about the substance of the bill and the legislative process in formulating and passing the bill. Pet. ¶¶ 74-94. The Council delayed releasing the proposed negative declaration until near the end of the Housing Committee's June 24 hearing, thus denying the public a reasonable opportunity for a prior review of its contents. Pet. ¶ 122. This conduct constitutes another abrogation of SEQRA's and CEQR's procedural requirements and further supports nullifying LL # 38. See, e.g., Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 74 (declining agency's failure to allow public participation and scrutiny); Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d at 603-04 (same).

The Council's violations of SEQRA's strict procedural requirements rendered the negative declaration improper and thus require the nullification of LL # 38.

IV. PRELIMINARY INJUNCTIVE RELIEF IS REQUIRED

The court should preliminarily enjoin the implementation of LL # 38 pending the determination of this proceeding.

An application for preliminary injunctive relief should be granted where (1) the movant is likely to succeed ultimately on the merits, (2) the movant will suffer irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities favors the injunction. NYCCELP II, slip op. at 7 (Ex. 101) (citing Gambar Enterprises Inc. v. Kelly Services Inc., 69 A.D.2d 297 (4th Dep't 1979)); Weissman v. Kubasek, 112 A.D.2d 1086 (2d Dep't 1985); Albini v. Solork Assocs, 37 A.D.2d 835 (2d Dep't 1971). All these elements are amply present here.

There is little question that petitioners will succeed on the merits of their claims. See Williamsburg v. Giuliani, 223 A.D.2d at 74 (enjoining Protocol on lead paint removal for failure to prepare EIS because 6 N.Y.C.R.R. § 617.3(a) provides that no "agency involved in an action shall ... approve the action until it has complied with ... SEQRA[A]").

Moreover, in Williamsburg, the First Department analyzed the other two elements of injunctive relief and found them amply present as well. Speaking to the danger of childhood lead poisoning from the release of lead dust, the Court stated "there can be no doubt in the face of overwhelming medical evidence that the ingestion of lead leads to irreversible and serious medical problems." Id. at 74, see also NYCCELP VI, 245 A.D.2d at 52 ("Plaintiffs make a compelling case that this is a serious health hazard requiring immediate action"). And the balance of equities clearly favors petitioners who would be affected by the increased exposure to uncontrolled toxic lead dust were LL # 38 not enjoined, whereas such an injunction will merely require the respondents to maintain the status quo and obey the law: Local Law # 1 (Admin. Code § 27-2013(h), the unamended Local Law # 50 (Admin. Code § 27-2126), and the full applicability of the safety standards in Health Code § 173.14, pursuant to the orders in the pending NYCCELP v. Giuliani action, as well as SEQRA and CEQR. See Williamsburg; 223 A.D.2d at 74-75 (balance of equities favored petitioners where City violated SEQRA and CEQR).

CONCLUSION

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

Dated: New York, New York
October 13, 1999

Respectfully submitted

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ATTACHMENT A

TABLE OF CHANGES IN THE NEW YORK CITY LAWS RELATED TO LEAD PAINT

	UNDER CURRENT LAW	UNDER LOCAL LAW 38
DEFINITION OF LEAD PAINT HAZARD	<p>Broader definition:</p> <ul style="list-style-type: none"> - The existence of lead paint -- in any condition (which encompasses peeling paint, intact lead paint, conditions that generate lead dust such as intact lead paint on friction or impact surfaces, and chewable surfaces) - in any multiple dwelling - rebuttable presumption of lead paint if peeling in a pre-1960 buidling, without need for testing - defined at 0.7 mg/cm² or 0.5% by weight <p>N.Y.C. Admin. Code § 27-2013(h)(1) (Local Law # 1)</p>	<p>The definition of “lead-based paint hazard” is</p> <ul style="list-style-type: none"> - limited to peeling paint only and omits non-peeling paint conditions that generate lead dust such as friction surfaces: - in any multiple dwelling - rebuttable presumption of lead paint, defined as 1.0 mg/cm² Admin Code § 27-2056.1(2). <p>-While lead paint is still a "hazard" in a post-1960 building, and thus technically a "violation," HPD has no obligation to inspect post-1960 buildings. § 27-2056.7</p>
AGES OF CHILDREN COVERED	<p>Applies to children under age 7</p> <p>Admin. Code § 27-2013(h)(1)</p>	<p>Applies to children under the age 6</p> <p>§ 27-2056.1(2)</p>
TIMEFRAMES FOR ENFORCEMENT OF CORRECTIONS OF VIOLATIONS	<p>24 hours:</p> <p>Lead paint hazards constitute a class C immediately hazardous violation, Admin. Code § 27-2013(h)(3), and must be corrected by the date specified in a notice of violations, which is twenty-four hours. <u>Id.</u> § 27-2115(c)(1).</p>	<p>176 to 226 days from complaint to correction:</p> <p>After a tenant complains, HPD will have 10 days (15 in heat season) to respond, § 27-2056.7(1), then 20 days to issue a violation. § 27-2115(l)(1). The owner will have 21 days to correct (extendable to 60 days). <u>Id.</u> The owner will have 5 days to mail a certification, § 27-2115(l)(2), after which HPD will have 30 days to reinspect, and (if the certification is false) HPD will have a further 30 days to mail a notice of invalidity. <u>Id.</u> § 27-2115(l)(3). After that, HPD will have yet another 60 days to correct the violation. <u>Id.</u> These time frames total 176 days (<i>i.e.</i>, 1/2 a year) at a minimum and 226 days at a maximum.</p>

	UNDER CURRENT LAW	UNDER LOCAL LAW 38
SAFETY STANDARDS FOR WORK PRACTICES	Detailed safety standards set out in the Health Code in 24 R.C.N.Y. § 173.14. See Table II for a comparison of work safety standards between the two laws.	Creates a two-tiered enforcement scheme whereby weaker safety provisions apply to abatement work conducted before a violation is placed or within 21 days (possibly 66 days) after service of a violation: During this period, owners may follow more lax lead abatement protocols -- termed "interim controls" -- in LL # 38. Owners who fail to correct within twenty-one days of a violation will be required to comply with the latter. § 27-2056.5(d).
LANDLORDS' DUTY TO MAINTAIN APARTMENTS SAFE OF LEAD PAINT HAZARDS	Continuing duty on the part of landlords to inspect and ensure that apartments are free of lead paint hazards. Because the very existence of lead paint is an immediately hazardous violation that must be corrected within 24 hours, see Admin. Code § 27-2013(h)(3), the statute places a continuing legal duty on landlords to eliminate <u>all</u> lead paint on specified interior surfaces, "in a manner approved by" the City. <u>Juarez v. Wavecrest Mgt.</u> , 88 N.Y.2d 628, 642, 647 (1996).	Landlords' duty to maintain premises safe of lead paint hazards dramatically curtailed so that landlords sole obligations are: ! to correct violations identified during annual <u>visual</u> inspections for peeling paint, which inspections landlords need conduct only if they have notice that a young child resides in the premises. (Admin. Code §§ 27-2056.3(d) & (e)). ! to correct violations during other times of the year only if the tenant gives the landlord written notice or the landlord has "actual" notice of the peeling paint. Admin. Code § 27-2056.3(f(4)). Landlords will not be required to: ! give a written copy of the visual inspection results to the tenant, so the tenant may not know that the landlord failed to observe (or record) a peeling paint condition. §§ 27-2056.3(d), (e), (g)). ! inspect at all unless tenant returns a form indicating that there are children in the dwelling, or unless landlord knows child lives there ! inspect in post-1960 buildings

	UNDER CURRENT LAW	UNDER LOCAL LAW 38
<p>CORRECTION OF HEALTH CODE VIOLATIONS FOR LEAD POISONED CHILDREN IN ONE- AND TWO-FAMILY HOMES</p>	<p>Mechanism in place to ensure HPD corrects lead hazard violations in one- and two-family homes where an already-poisoned child resides and where the landlord has failed to do so:</p> <p>Where landlords fail to correct lead paint hazards in one- and two-family homes where an already-poisoned children reside, DoH must certify such matters to HPD within 16 days of receipt of the complaint or inspection, which triggers HPD’s duty to require correction of the hazard within 18 days after certification. <u>See</u> N.Y.C. Admin. Code § 27-2126(b) (“If the owner fails to comply with an order of [DoH] to correct the violation, the department shall certify such conditions to [HPD].”)</p>	<p>Eliminates mechanism to ensure that HPD corrects lead hazard violations in one- and two-family homes where an already-poisoned child resides and where the landlord has failed to do so:</p> <p><u>See</u> LL # 38, § 7, (modifying § 27-2126(b)) (stating “if the owner of a <u>multiple dwelling</u> fails to comply with an order of [DoH] to correct lead-paint hazards, [DoH] shall certify such conditions to [HPD]”). Thus, mandatory time frames no longer apply to 1- and 2- family dwellings</p>

ATTACHMENT B
TABLE OF CHANGES IN SAFETY STANDARDS FOR LEAD PAINT REPAIRS

	UNDER CURRENT LAW Health Code, 24 R.C.N.Y. § 173.14	UNDER LOCAL LAW 38 Admin. Code §§ 27-2056.2, 27-2056.5
FILING	<p>Detailed filing requirement for any abatement work conducted:</p> <p>! Between 24 and 96 hours prior to beginning abatement work, the owner or deleader-contractor must file with HPD or DEP a notice, containing detailed information related to the project, of commencement of the abatement. §§ 173.14(c)(1)(aa), (bb).</p> <p>! Purpose is to alert agencies, so that HPD or DEP may inspect work practices. § 173.14(c)(1)(cc).</p> <p>! Warning sign ("Lead Hazard - do not enter") to be post outside abatement area, in English and Spanish, with agency phone numbers to call if complaints. § 173.14(e)(2)(aa)(i)</p>	<p>Omits filing requirement, warnings.</p>
LICENSING AND TRAINING	<p>Licensing and training requirement of deleader-contractor:</p> <p>"No person shall perform an abatement who has not complied with all federal, state and other applicable law requiring training, licensing, certification, or other authorization to carry on the activities specified in this section." § 173.14(c)(2).</p>	<p>Omits licensing and training requirement.</p>
RECORD-KEEPING	<p>Detailed record-keeping requirements:</p> <p>! The owner and deleader-contractor must keep a record for every lead-based paint abatement performed, including name and address of contractor; location and description of the project; location of lead-based paint abated; summary of abatement methods used. § 173.14(c)(3)(aa).</p> <p>! The owner and deleader-contractor shall maintain all records and environmental results, including dust clearance testing results. <u>Id.</u> § 173.14(c)(3)(bb).</p> <p>! The owner and deleader-contractor must maintain such records for <u>seven years</u> after the date of the completion of the abatement. <u>Id.</u> § 173.14(c)(3)(cc).</p>	<p>Contains record-keeping requirement that does not specify what information must be contained in the records and for a significantly less period of time:</p> <p>"[T]he owner shall maintain or transfer to subsequent owners records of any work performed pursuant to this section. Such records shall be maintained for three years"</p> <p>Admin. Code §§ 27-2056.2(a)(12); 27-2056.5(b)(13).</p>

	UNDER CURRENT LAW Health Code, 24 R.C.N.Y. § 173.14	UNDER LOCAL LAW 38 Admin. Code §§ 27-2056.2, 27-2056.5
PROHIBITED PAINT REMOVAL METHODS	<p>Contains comprehensive list of prohibited paint removal methods:</p> <p>“The following methods of paint removal shall be prohibited: grinding or sanding without HEPA exhaust, heat gun operating above 1100 degrees Fahrenheit, open flame gas fired torch, dry scraping, uncontained hydro-blasting, dry abrasive blasting, chemical strippers containing methylene chloride or any other substances which are known or suspected human carcinogens”</p> <p>§ 173.14(d)(2)(bb).</p>	<p>Only prohibits dry scraping and sanding:</p> <p>“The dry scraping or dry sanding of lead-based paint or paint of unknown lead content in any dwelling unit is hereby declared to constitute a public nuisance and a condition dangerous to life and health.”</p> <p>Admin. Code § 17-181.</p>
ENCLOSURE AND ENCAPSULATION	<p>Contains detailed regulations related to enclosure and encapsulation:</p> <p>! For example, requires that enclosures of walls be done with sheet rock, panelling or other materials permitted by DoH; that window sills and other chewable surfaces be enclosed with wood, metal, rigid vinyl, or other materials permitted by DoH; that all seams be tightly sealed; and that surfaces be sealed with a primer and two coats of non-lead based paint. <u>See, e.g.</u>, § 173.14(d)(3).</p> <p>! Among other provisions, encapsulation may not be done until ordered or authorized by DoH or HPD. <u>See, e.g.</u>, § 173.14(d)(4).</p>	<p>Omits regulations dictating manner of enclosure or encapsulation.</p>

	<p align="center">UNDER CURRENT LAW Health Code, 24 R.C.N.Y. § 173.14</p>	<p align="center">UNDER LOCAL LAW 38 Admin. Code §§ 27-2056.2, 27-2056.5</p>
<p>WORK AREA PREPARATION</p>	<p>Contains detailed requirements for abatement area preparation when wet scraping, repainting, encapsulating, or enclosing surfaces.</p> <p>If under 6 ft² feet per room, includes:</p> <ul style="list-style-type: none"> ! specific information contained in warning signs that must be posted; ! that all movable objects (such as furniture, etc.) shall be HEPA- vacuumed or washed, then moved out of abatement area or otherwise covered with 2 layers of six-mil disposable polyethylene sheeting before abatement begins, and such sheeting shall be taped with waterproof tape to the floors or bottom of walls or baseboards in order to form continuous barrier to the penetration of dust; ! that before and during abatement floor adjacent to area abated will be covered with 2 layers of disposable polyethylene sheeting of at least six-mil thickness, which shall be taped with waterproof tape to floors and extend 6 inches up walls and baseboards to form a continuous barrier to the penetration of dust; ! that forced-air systems within the room where abatement is to occur shall be turned off and covered with two layers of six-mil polyethylene sheeting and waterproof tape; and ! violations or conditions that may cause paint to peel, such as water leaks, shall be corrected as part of the abatement. <p>§ 173.14(e)(2)(aa).</p> <p>If greater than 6 ft² per room:</p> <p>Most of the requirements cited above, plus</p> <ul style="list-style-type: none"> ! the entire floor must be covered with 2 layers of 6 mil poly ! access must be restricted and that doorways and windows be sealed. <p>§ 173.14(e)(2)(bb).</p>	<p>Contains weaker requirements related to the preparation of abatement areas:</p> <p>“[P]repare the work area by either (i) covering all moveable objects in and adjacent to the work area and covering the floor adjacent to the work area with polyethylene, plastic or equivalent sheeting or (ii) removing all moveable objects in and adjacent to the work are and HEPA-vacuuming all such objects prior to removing such object and covering the floor with polyethylene, plastic or equivalent sheeting.”</p> <p>Admin. Code §§ 27-2056.2(a)(2); 27-2056.5(b)(3).</p> <p>Local Law 38 does not:</p> <ul style="list-style-type: none"> ! distinguish between small and large areas to be abated; ! does not specify the thickness or number of the sheeting and permits plastic or “equivalent sheeting” to be used; ! does not require waterproof tape or a "continuous barrier" ! does not specify that other violations that produce peeling paint such as water leaks be corrected; and ! does not require doors and windows to be sealed off ! does not require the sealing off of forced-air systems ! does not require removing movable objects such as furniture, etc. ! does not require restricting occupants' access

	<p align="center">UNDER CURRENT LAW Health Code, 24 R.C.N.Y. § 173.14</p>	<p align="center">UNDER LOCAL LAW 38 Admin. Code §§ 27-2056.2, 27-2056.5</p>
<p>DAILY CLEAN-UP</p>	<p>Contains detailed requirements for daily clean-up procedures, including:</p> <ul style="list-style-type: none"> ! prohibiting polyethylene sheeting, drop cloths and other potentially hazardous materials to be accessible outside abatement area; ! disposal of large debris by wrapping it in six-mil polyethylene, sealing it with waterproof tape, and removing it to a trash storage area; ! disposal of small debris by HEPA vacuuming or wet sweeping it and removing it in double four-mil or single six-mil plastic bags, which shall be sealed and stored; ! visually examining area adjacent to and to the exterior of the abatement area to ensure that no lead debris has escaped. <p>See, e.g., § 173.14(e)(4)(aa).</p>	<p>Contains weaker daily clean-up provisions:</p> <p>“[T]horoughly wet-mop <u>or</u> HEPA-vacuum the work area and conduct a visual examination at the end of each workday to ensure that no peeling paint, paint chips, dust or other work-related debris have been released from such area.”</p> <p>Admin. Code §§ 27-2056.2(a)(7); 27-2056.5(b)(7).</p>

	<p align="center">UNDER CURRENT LAW Health Code, 24 R.C.N.Y. § 173.14</p>	<p align="center">UNDER LOCAL LAW 38 Admin. Code §§ 27-2056.2, 27-2056.5</p>
<p>FINAL CLEAN-UP</p>	<p>Contains detailed requirements related to final clean-up procedures, including:</p> <ul style="list-style-type: none"> ! final clean-up may commence no sooner than one hour after abatement activities have ceased; ! removal of polyethylene sheeting shall be preceded by misting, placed in double four-mil or single six-mil plastic bags, and then sealing it and disposing of it; ! all surfaces in abatement area shall be HEPA vacuumed, beginning with ceilings and proceeding down the walls to the floors and including <u>furniture</u> and <u>carpets</u>; ! all surfaces in the abatement area shall be washed down with a detergent solution, beginning with ceilings and proceeding down the walls to the floors; ! all surfaces exposed to lead dust generated by the abatement process shall be HEPA vacuumed again, starting with ceilings and proceeding down the walls to the floors, including carpets and furniture; ! inspect all surfaces to ensure that they have been abated and that all visible dust and debris has been removed. <p><u>See, e.g.</u>, § 173.14(e)(4)(bb).</p>	<p>Contains far less stringent requirements related to final clean-up:</p> <ul style="list-style-type: none"> ! "HEPA-vacuum all affected surfaces and the floors in the work area <u>or</u> wash area with a detergent prior to repainting to remove any dust that may have accumulated and provide for the disposal of any peeling paint or materials that may contain peeling paint, paint chips, dust and other work-related debris in accordance with all applicable laws, rules and regulations." §§ 27-2056.2(a)(5); 27-2056.5(b)(5). ! "[U]pon the completion of the work, provide that any remaining polyethylene, plastic or equivalent sheeting, drop cloths or other materials be removed in a safe manner, and all surfaces exposed to peeling paint, paint chips, dust or other work-related debris during the course of work shall be HEPA-vacuumed <u>or</u> detergent washed beginning with ceilings, then down the walls and across the floors." §§ 27-2056.2(a)(9); 27-2056.5(b)(9) ! no misting required before removing plastic sheeting, no requirements for sealing debris ! no requirement to wait at least one hour before final clean-up for dust to settle ! no requirement of using lead-specific detergent

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<p>FINAL INSPECTION</p>	<p>Contains stringent requirements regarding final inspection:</p> <ul style="list-style-type: none"> ! after final clean-up (and repainting if necessary), an independent third party who is familiar with and experienced in lead based paint abatement will conduct a final inspection; ! the inspection can occur no sooner than at least one hour after the final clean-up; ! the final inspection shall entail a visual inspection and surface dust testing pursuant to protocols approved by DoH; ! 3 wipe samples must be taken (one from a window well, one from a window sill, and one from the floor) and a 4th wipe sample must be collected and tested from the floor in a room or area adjacent to the abatement area. <p>§ 173.14(e)(4)(cc).</p> <p>The clearance tests must pass set levels or else the clean-up and testing process must be repeated. § 173.14(e)(4)(dd).</p> <p>Clearance test results must be provided to tenants upon request. <u>Id.</u></p>	<p>No requirement that final inspections be conducted by an independent third party.</p> <p>No requirement that dust test results pass minimum levels for clearance and that clean-up and retesting recur.</p> <p>Requires “surface dust tests” <u>only where landlords correct a violation.</u> However, the law does not require such tests for abatement work conducted on walls and ceilings -- only for abatement work conducted on an interior wood trim, door or window.</p> <p>Even where dust tests required: in some cases only 1 wipe test, in others, only 3 wipe tests (omits test outside of abatement area to check on the containment)</p> <p>No waiting period required for dust to settle before testing</p> <p>No requirement that dust test results be provided to tenants upon request. § 27-2056.5(b)(12).</p>

ATTACHMENT C

Rochester Gas & Elec. Corp v. New York State
Envtl. Facilities Corp., No. 810-8897, slip op.
(Sup. Ct. Cayuga Co., Sept. 9, 1981)

[Intentionally Omitted]