Public Advocate for the City of New York

THE HIGH COST OF LEASING SCHOOLS:

The Loophole in the Public Authorities Law

A REPORT BY PUBLIC ADVOCATE BETSY GOTBAUM

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EXECUTIVE SUMMARY

Building new schools offers the possibility of a better learning and work environment for students and teachers, respectively. In addition to relieving overcrowding, the creation of new school buildings usually provides facilities that are cleaner and safer than those built in the past. Over the last decade, however, the School Construction Authority (SCA) has made questionable decisions regarding the location of some new schools located on leased property.

The SCA has a record of opening schools in manufacturing zones, in former factories, and on soil known to be polluted with toxic industrial chemicals. Just north of the Mott Haven section of the Bronx, the SCA is building a campus of four new schools on polluted property owned by the city. In this instance, the Public Authorities Law (PAL) of New York State required the SCA to make the site plans public and to seek approval from the City Council. The community found the plans for cleaning the toxic soil to be insufficient and has been working with the city since December 2006 to develop an appropriate remediation and long-term maintenance plan.

This report deals not with cases like the Mott Haven Campus but rather with ones like the Soundview Campus, a school created in an existing building *leased* by the SCA. Environmental tests have shown that the Soundview Campus is, like the Mott Haven Campus, polluted from prior industrial uses. In the case of the Soundview Campus, however, the SCA was not required to share its plans with the community or the City Council because of a loophole in the PAL. The courts have interpreted the law as requiring community notification and City Council oversight only for additions to existing school buildings or new construction, not for existing buildings leased by the SCA. Because of these court decisions, the City Council has not had the opportunity to review site plans for the Soundview Campus and at least three other school sites across the city.

The report also identifies schools in leased buildings that, while not proven to pose a risk of toxic exposure for occupants, are housed in buildings previously used for industrial purposes and located in areas zoned for manufacturing uses. Schools sited on similar properties have, in the past, required environmental remediation to ensure their safety. The SCA's ongoing practice of leasing such buildings for new schools indicates a need for Council oversight and public environmental review for schools created in leased existing buildings.

According to the SCA and the Department of Education (DOE), all of the currently open schools discussed in this report have been subject to the appropriate environmental remediation and testing to prove they are safe for students and teachers. The intention of this report is simply to show that, because of the loophole in the PAL, the SCA has chosen a number of sites for new schools without conducting an environmental assessment that meets the requirements of the State Environmental Quality Review Act (SEQRA) or submitting to meaningful public review.

Closing the loophole in the PAL is necessary to ensure that, in all cases, parents have access to information about schools created in their communities and the opportunity to give their input on the SCA's environmental clean up and maintenance plans for schools that require them. Closing the loophole would also give the City Council an important role in ensuring that the SCA and DOE give the concerns of parents and communities proper consideration.

In the last legislative session, the New York State Assembly passed a bill that would close the leasing loophole in the Public Authorities Law. It is the recommendation of the Office of the Public Advocate that the State Senate pass Bill 7127, which amends the Public Authorities Law to include the leasing of any building or property, and send the legislation to the governor for his signature. Until the law is amended, the Public Advocate calls on the SCA to broaden its interpretation of the law by following the requirements of the PAL and participating in the State Environmental Quality Review process whenever it creates a new school facility in a leased existing building. Finally, the Public Advocate recommends that the DOE put systems in place to provide parents with all the facts about the history and current conditions of their children's school buildings.

INTRODUCTION

In the fall of 2006, nearly half of all high school students in the city were assigned to school buildings exceeding capacity. The same was true for nearly 25 percent of elementary school students and almost 15 percent of middle school students.[1] To help alleviate these conditions, the School Construction Authority (SCA) has provided for 63,000 additional seats in its five-year capital plan.[2] The SCA will create this additional capacity not only by constructing new buildings but also by constructing additions to existing schools, reconfiguring underutilized schools, and leasing space in privately owned buildings.

There is concern among parents, advocates, and environmental experts, however, that the SCA has created, and is planning to create, schools on sites that were polluted from previous industrial uses. The Mott Haven Campus in the Bronx was formerly a rail yard and is contaminated with a variety of pollutants, including toxic gasoline additives, coal tar, and dry cleaning chemicals. The building housing P.S. 65 in Queens was used for many years as an airplane parts factory and sits above groundwater contaminated with a chemical called trichloroethylene.

The Office of the Public Advocate has not taken a position on whether the SCA should ever convert a formerly industrial site into a school; however, if the SCA is to continue the practice, it must take every necessary step to ensure the safety of those sites in order to protect the health of students, teachers, and others who will spend their days in these buildings. This report focuses on a city practice in need of greater oversight: the leasing of existing buildings for use as educational facilities.

BACKGROUND

The School Construction Authority

The state created the SCA under the New York State Public Authorities Law (PAL) as a public benefit corporation in 1988. According to the law, the SCA has the power and duty to "design, construct, reconstruct, improve, rehabilitate, maintain, furnish, repair, equip, and otherwise provide for educational facilities" for the city Department of Education (DOE). The law also states that, after a school is sited, the SCA must "convey title to any such facilities to the city for use as educational facilities" by the DOE.[3]

Oversight requirements

The PAL states that SCA plans for the construction of new schools or building additions are subject to the State Environmental Quality Review Act (SEQRA).[4] SEQRA, established by Article Eight of the Environmental Conservation Law (ECL), states that all agencies must prepare an environmental impact statement (EIS) for any action they

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[1] New York City Mayor's Office of Operations, *Mayor's Management Report*, 2007.
[2] School Construction Authority, 2005-2009 Dept. of Education 5-Year Capital Plan, November 2007 Proposed Amendment.
[3] PAL §1727(1).
[4] PAL §1730(1).

propose that may have a significant effect on the environment. The PAL clearly states that the SCA is not exempt from this law.[5] Courts have held that SEQRA requires the lead agency, in this case the SCA, to take a "hard look"[6] at environmental conditions and impacts, and how those impacts will be mitigated. SEQRA provides an opportunity for the public to participate in the environmental review. The SCA must make the EIS publicly available and take into consideration comments from the public. Finally, SEQRA gives people the right to challenge an insufficient environmental review in the courts.[7]

In addition to subjecting new construction and school building additions to SEQRA, the PAL stipulates that the local school board,[8] community board, and the New York City Council be provided with a copy of the site plan. This is an important opportunity for community members and local elected officials to become aware of all proposed land uses. The PAL also provides a check on the city's executive branch by giving the City Council the power to disapprove the plan within 20 days of submission with a two-thirds majority vote.[9] This oversight has resulted in more thorough testing and remediation at new school construction sites in the past.[10]

Leasing loophole

The amount of oversight required by the PAL suggests that the intention of the law is not only to ensure that communities and their elected representatives are informed about plans for potential new school sites but also to provide them with a meaningful opportunity to provide input and potentially influence decisions made about the site. There is, however, a loophole in the PAL that allows the SCA to forgo this process in cases in which it chooses to lease existing facilities.

In its discussion of community participation and Council approval requirements, the law states that these requirements are triggered by the "commencing of new construction or building additions of an educational facility, or the acquisition of real property or any interest therein for such purpose."[11] In *Park South-Tenants Corp. v. Board of Education*

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[5] PAL §1730 states that the actions of the SCA are exempt from land use review and other requirements "*except for the provisions of article eight of the environmental conservation law.*" NY Environmental Conservation Law §8-0109(2) states: "All agencies shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on *any* action they propose or approve which may have a significant effect on the environment." [all emphasis added]

[6] The term "hard look" has become a judicial standard in cases involving challenges to environmental reviews. See *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986).

[7] NYCRR §617.9 (a) (3).

[8] Local school boards have been replaced with Community Education Councils, though this change in the education law is not reflected in the PAL

[9] If the Council or the Mayor disapproves the site plan the SCA may revise and resubmit it or remove it from the capital plan.

[10] Both the Mott Haven and Gateway schools are new construction sites owned by the city. Because of the requirements of the PAL, the community and City Council have been able to play a stronger role in calling for adequate testing and remediation at these sites than in cases in which SCA has leased existing buildings.

[11] PAL §1731(1).

of the City of New York,[12] the Appellate Division affirmed a New York State Supreme Court decision that interpreted this to mean that only the acquisition of real property for the purpose of new construction or building additions is subject to the requirements of the PAL. In *Park South*, the SCA sought to lease a building previously used as office space. The plaintiffs requested a court order to stop students from occupying the building. They argued that the SCA was required to produce an EIS, submit site plans to the local community and school boards, and give the City Council the opportunity to approve or disapprove the project, pursuant to the PAL. The Appellate Division held that the city's leasing program was not subject to the community participation and political approval processes codified in the PAL, stating, "As the renovation of the premises is *neither new construction nor an addition to an education facility*, Public Authorities Law §1731 requirements for notice, public hearings, and the filing of a site plan are inapplicable herein."[13] Notably, the Appellate Division only addressed the public notice and Council review portion of the law, not the SEQRA requirement. The lower court, on the other hand, addressed both the Council review and SEQRA requirements in its decision, stating that an EIS was not required in this particular case.

The SCA now uses the *Park South* decision not only as legal justification for its decision not to give communities notice of plans to lease existing education facilities and for forgoing Council oversight but also for avoiding the requirements of SEQRA. The SCA has indicated that it has its own internal process for the environmental review of existing leased buildings;[14] that process, however, is not codified nor can it be found in any written policy of which this office is aware.

The SCA purports to follow the two-phase standard for environmental site assessments that has been incorporated into the Environmental Protection Agency (EPA) guidelines on environmental due diligence.[15] The first phase of this standard involves a documentary review to find information about prior site uses. If this research raises the possibility that the site may have been contaminated at some point, a second phase of review tests physical conditions on the site, measuring levels of toxicity in the groundwater, air, and soil. Because this process is not subject to external review, however, the public cannot be certain that the SCA follows it in every case.[16]

When it is applied, this two-phase standard for environmental assessment can be a sufficient way for the SCA to discover possible contamination at potential school sites. The SCA is not required, however, to disclose the results to the public, as it must for new

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[12] 208 A.D.2d 394 (1994).
[13] Id.
[14] The November 2007 proposed amendment to the Department of Education's Five-Year Capital Plan states that "the SCA has developed stringent environmental protocols…which meet or exceed industry standards [and] have been created to address the sensitive considerations surrounding remediation of environmental issues at existing and new school sites." p.33.
[15] Letter of support for legislation from DOE to State Senator Padavan, www.frankpadavan.com/press_archive_story.asp?id=17473: see also ASTM Standards E1527-05 and E1903-97(2002); and 40 CFR Part 312.
[16] For examples in which SCA conducted environmental review but did not follow public notification procedures mandated by SEQRA and the PAL, see pp. 6, 7, and 8 of this report.

construction. Nor does this process address the sufficiency of any proposed cleanup, an essential component in ensuring the safety of the site. The SCA is at liberty to move forward with plans to lease an existing building that its review has shown to be contaminated and to develop a remediation plan without consulting the community or City Council. The New York State Department of Environment Conservation (DEC) does have oversight of proposed cleanup plans and the implementation of those plans, but in the past independent environmental experts have deemed cleanup plans approved by DEC at both existing leased sites and new school sites to be insufficient. Examples include the Mott Haven and Soundview Educational Campus sites in the Bronx and the Gateway site in Queens.[17] In the case of Mott Haven and Gateway, both of which are new construction projects, cleanup plans have been strengthened as a result of SEQRA-mandated public review and City Council review.[18]

HISTORY OF THE LOOPHOLE

The leasing loophole first came under scrutiny in the 1990's when the SCA leased existing buildings for P.S. 141 in Manhattan and P.S. 65 in Queens that were later found to have environmental problems.[19] Despite the past experiences with P.S. 141 and P.S. 65, the SCA has continued the practice of leasing facilities for schools on sites with former industrial uses, then forgoing the SEQRA process and/or City Council oversight.

Soundview Educational Campus

In 2004, the SCA leased property for the Soundview Educational Campus in the Bronx. Until just a few years prior, the site was home to the Loral Electronics Company, a military contractor that generated tons of toxic waste including lead and industrial solvents, including TCE.[20] (See Appendix B for a discussion of toxins mentioned in this report.) When the SCA gained control of the site, it conducted an environmental assessment and developed a remediation plan without public notification. The local community did not learn of the SCA plan to open a school there until after construction began.[21] Residents of the nearby Lafayette Houses worried about the possibility of exposure to toxins during construction formed a group called the Concerned Residents Organization (CRO).

In response to requests from the CRO, the SCA agreed to fund an independent review of the environmental assessment and remediation plan. The resulting report written by an independent consultant states that SCA excavated "an upper layer of soil and placed a barrier . . . above the contaminated soils found on-site that exceeds New York State Cleanup Criteria."[22] At different locations on the site this barrier consists of either clean

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[17] Siegel, L. and Strauss, P., *Independent Review of the Cleanup of the Mott Haven Schools Complex*, January 24, 2007; Allegiance Resources Corporation/ ARC Engineering & Construction, P.C., *Independent Review of Environmental Investigation and Cleanup of Soundview Education Complex-Former Loral Site*, May 4, 2005;.Letter to SCA from Dr. James M. Cervino, Department of Biology, Pace University.
[18] *See Footnote* 10.
[19] See Appendix A for discussion of P.S. 141 and P.S. 65.
[20] Gonzalez, J., "BX HS Site Toxic Bonanza," October 4, 2005.
[21] "Bronx School Fails Toxin Test," *Daily News*, June 24, 2005.
[22] Allegiance Resources Corporation/ ARC Engineering & Construction, P.C., *Independent Review of*

soil, concrete, or asphalt. Because some contamination was left in the soil, albeit beneath this protective barrier, the consultant recommended that the SCA develop a long-term maintenance and monitoring program and take public comments into consideration before implementation.

The SCA did incorporate some of the CRO's comments into its resulting site monitoring plan. However, the CRO and the independent consultants working with them believe that the site monitoring plan developed by the SCA does not include enough specific strategies for carrying out this plan in the long term. For example, the plan does not include the requirement that costs associated with the maintenance and monitoring program be included as a specific item in the SCA's budget or a process for allowing community members to report comments and complaints about any breach in the protective barrier.[23] Closing the loophole in the PAL would give the City Council power to approve or disapprove the site plan for projects like Soundview, which in turn would give the SCA greater incentive to work with community groups like the CRO earlier in the process when leasing existing buildings for use a school in the future.

Information Technology High School

The Information Technology High School (Info Tech) in Long Island City, Queens is located in a former metal plating factory leased by the SCA. The SCA conducted air quality tests at Info Tech on September 5, 2007. After a mid-September news report on toxic contamination in schools mentioned the presence of PCE, TCE, and lead at Info Tech, the SCA released its air quality data, which showed the site was not unsafe.

An independent consultant noted, however, that those tests conducted on September 5, 2007 used an inappropriate threshold that could not adequately measure potential hazards, prompting a second round of tests in late September, which revealed that the site was indeed safe.[24] [25] The fact remains that many parents were not even aware that there may have been cause for concern until after the news report aired. An independent review of Info Tech, commissioned by New York Lawyers for the Public Interest on behalf of concerned members of the community, calls the remediation strategy put in place by DOE, DEC, and SCA "robust." But the report goes on to recommend additional monitoring of air quality in the school and greater efforts to involve parents and the

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Environmental Investigation and Cleanup of Soundview Education Complex-Former Loral Site, May 4, 2005

[23] Letter from The Concerned Residents Organization to the School Construction Authority, re: Comments on the maintenance and monitoring program for the Soundview Educational Campus, 1440 Story Avenue, Bronx, NY 10473, November 21, 2005.

[24] Email correspondence, L. Siegel of the Center for Public Environmental Oversight to David Palmer at New York Lawyers for the Public Interest, September 7, 2007.

[25] According to the United Federation of Teachers, "the significant problem at Info Tech was related to the building owner shutting down the ground water treatment system for a number of months without notifying the Department of Education, the community, and the NYSDEC . . . The sampling done by SCA in September . . . was done because the SCA needed to quickly assess the air over the weekend. There are more sensitive methods and these were scheduled by SCA, but the sensitive sampling could not be completed in the time needed." Memo from United Federation of Teachers to the Office of the Public Advocate, March 12, 2008.

community in future decisions regarding the remediation and monitoring of the site.[26] The DEC recently drafted and released a new draft Site Management Plan for the Info Tech site in an apparent acknowledgement of the need for better oversight.[27]

THE FUTURE OF THE LEASING LOOPHOLE

Using publicly available information about site ownership, land use regulations, and environmental hazards, this report identifies the following schools in existing leased buildings listed in the SCA five-year capital plan, which, although not known to be unsafe, are—like Soundview and Infotech—housed in buildings previously used for industrial purposes and located in areas zoned for manufacturing uses.

P.S. 78 / Robert F. Wagner Jr. School

The Robert F. Wagner Jr. School in Hunters Point, Queens is housed in leased space in the Queens West development. Many parcels in this development participate in the state Brownfield Cleanup Program.[28] In 2006, the DEC issued a "certificate of completion" indicating that cleanup is complete on at least one part of the development area. Several other parts, however, are still undergoing remediation according to the DEC Remedial Site Database.[29] Former industrial uses at Queens West have left the ground contaminated with toxins such as lead, benzene, and arsenic. There have been no complaints about the environmental safety of the school, but given past problems with schools on previously industrial sites, the SCA should have completed an environmental impact statement pursuant to SEQRA, and the City Council should have had an opportunity to review and then vote on the plan for the school before it opened.[30] To ensure that the SCA follows this process in the future, the loophole in the PAL must be closed.

Bathgate High School Complex

In 2006 the Bathgate High School Complex opened on leased property in the Bronx that was formerly the site of a packaging plant.[31] The former use of the site is not, in itself, cause for concern, but the site is located within the Bathgate Industrial Park, created by the Port Authority and the city Economic Development Corporation to attract light industrial businesses. Like the school at Queens West, the Bathgate School has not been shown to pose a threat to the health of children, but because it was created in an existing

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[26] Siegel, L., and Strauss, P,. "Info Tech: Environmental Concerns; A Summary of Environmental Concerns Regarding Contamination at Information Technology High School (Q502)," October 15, 2007.

[27] *Draft Site Management Plan for Information Technology High School*, prepared by Leggette, Brashears, & Graham, Inc., December 2007.

[28] Participants in the Brownfield Cleanup Program agree to remediate contamination on their site in exchange for tax credits and a release of liability

[29] New York State Department of Environmental Conservation, Remedial Site Database, Site Codes C241049, C241087, C241095, C241096.

[30] Although the SCA did present its site plan for P.S. 78 to the Community Board, it appears that certain procedures pursuant to SEQRA and PAL were not followed. A search of the City Council database returned no resolutions regarding the site. A search of the DEC website returned no public notices of environmental review of the site posted by the SCA.

[31] New York City Department of Finance, Automated City Register Information System.

leased building, members of the local Community Board and the City Council did not have an opportunity to review the facts for themselves before the school opened.[32]

Art and Leather High School
The Art and Leather High School building, now under construction in Queens, is also located in an area zoned for manufacturing. This school initially attracted media attention because of its close proximity to a polluted industrial site where lead was discovered;[33] the building itself may or may not be contaminated from chemicals spilled during its years as a leather tannery. The SCA did conduct an environmental assessment for this property.[34] The assessment led the SCA to determine that the proposed facility "will not have a significant adverse environmental impact provided specific conditions are met." These conditions include preserving the historic building, testing the area for archeological remains, and adjusting traffic signals in the area.[35] None of the conditions mentioned in the negative declaration addresses concerns of site toxicity. In this case, the SCA chose to follow SEQRA procedures and assess the site, but because it leased an existing building, the City Council did not get a chance to review and vote on the plans.[36]

RISK POSED BY THE LOOPHOLE

Extensive testing has proven that both the Soundview Educational Campus in the Bronx and Information Technology High School in Queens are safe for students and school staff. At one time, however, both were exposed to potential environmental hazards, and the two schools share characteristics that made them susceptible to such exposure. Both are located in manufacturing zones and both of the sites where these schools are located previously had industrial uses. Therefore, there is a need for oversight of the SCA's leasing program.

Although not shown to be toxic, the Robert F. Wagner Jr. School at Queens West, the Bathgate High School Complex, and the Art and Leather High School now under construction in Queens also share one or more of these characteristics. Robert F. Wagner Jr. and the Bathgate High School Complex are on leased sites in manufacturing zones. The Art and Leather High School is not only located in a manufacturing zone but is also in a building previously used by an industry known for its use of noxious chemicals.

The SCA has plans to lease sites for 12 more schools in the next two years.[37] If the SCA were to build a new school or undertake a building addition to create one of these proposed schools, it would be subject to the PAL and to the SEQRA process, allowing adequate opportunity for public involvement. Because these proposed schools will be in

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[32] As with P.S. 78/Robert Wagner Jr. School, a search of the City Council database returned no resolutions regarding the site.
[33] Hirshon, N., "Critics say Elmhurst School Site Too Toxic," *Daily News*, October 30, 2007.
[34] Lead agencies use environmental assessments to decide whether to proceed with an EIS. If the assessment results in a negative or conditioned negative declaration, an EIS is not required.
[35] Conditioned Negative Declaration notice, DEC Environmental Notice Board. November 1, 2006.
[36] A search of the City Council database returned no resolutions regarding the site.
[37] These schools are proposed in the DOE five-year Capital Plan, but sites have not yet been identified.

existing leased facilities, however, the SCA argues that it is not subject to these safeguards.

CLOSING THE LOOPHOLE

Assembly Bill 8838 closes the leasing loophole by amending the language of §1731 and §1732 to specifically reference the "leasing of any building" or property. This legislation would ensure that every new school construction project and school building addition—regardless of whether the SCA constructs a new building or leases an existing one—is subject to SEQRA; that the local CEC and community board receive a copy of the site plan; and that the City Council has the power to approve or disapprove the plan within 20 days of submission with a two-thirds majority vote. Bill A.8838 passed unanimously in the Assembly during the 2007 legislative session.[38]

During a special session in July 2007, the State Senate passed a different bill, Senate Bill 6393, which amends the PAL but does not adequately address the loophole. Instead S.6393 amends §1730 of the PAL to specifically require the two-phase environmental review "prior to entering into a new lease for an education facility." This provision would codify the procedures the SCA has indicated it currently follows. While this bill is positive in that it attempts to legislate environmental review procedures for leased facilities, it is problematic in that it creates a less stringent review process for leased facilities than that used for new construction. The bill does not provide for community notice of plans to lease existing facilities or require City Council oversight. Further, the public process outlined in S.6393, proposed in lieu of SEQRA, would be left to community education councils (CEC) to conduct.[39] CECs are local advisory groups with limited financial resources and power and are made up of parents and community members, not environmental experts. The CECs would likely have neither the authority nor the funds to make changes to cleanup plans based on public comments. By requiring CECs, and not the SCA, to hold hearings and approve work plans, S.6393 could shield the SCA from any legal responsibility for insufficient environmental review. On April 28, 2008, State Senator John D. Sabini announced the introduction of Senate Bill 7127. The bill is the same as A.8838, leaving §1731 unchanged except for additional language

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[38] The New York City Council also unanimously passed a resolution in support of the state legislation this past summer (Res. 836). The following organizations are in support of the A.8838: Asian American Legal Defense and Education Fund, Bronx Committee for Toxic Free Schools, Bronx Health REACH, Center for Health, Environment & Justice , Chinese Progressive Association, Class Size Matters, Concerned Residents Organization, Environmental Advocates of New York, Environmental Defense, Healthy Schools Network, Hillcrest Citizens for Neighborhood Preservation, Hillcrest Estates Civic Association, Institute for Health and the Environment at SUNY Albany, Institute for Urban Family Health, Make the Road by Walking, Natural Resources Defense Council, New York City Environmental Justice Alliance, New York Immigration Coalition, New York Lawyers for the Public Interest, New York League of Conservation Voters, New York Public Interest Research Group, Northwest Bronx Community & Clergy Coalition, Nos Quedamos/We Stay, Puerto Rican Legal Defense and Education Fund, Sierra Club, Sustainable South Bronx, WE ACT for Environmental Justice, United Federation of Teachers, United Puerto Rican Organization of Sunset Park, and Wellness in the Schools.

[39] Local school boards have been replaced with Community Education Councils, though this change in the education law is not reflected in the PAL.

specifying that the PAL also applies to the leasing of any building or property.

RECOMMENDATIONS

Amend the PAL to require public notice and Council oversight for leased properties
The best way to ensure that the SCA is doing the right thing for New York's children is to amend the law to require the same level of oversight whether it leases an existing facility or builds a new one. This means the SCA would have to provide plans for new schools on all sites it leases or purchases to the City Planning Commission and the relevant Community Education Council and Community Board. The SCA would also have to attend a Community Board hearing on any plans to lease or construct facilities for new schools. Finally, whether the SCA engages in new construction or leases an existing facility, the City Council would have an opportunity to review the site plan and approve or disapprove it. Assembly Bill 8838 amends the PAL to require the above actions. The State Senate should pass Senate Bill 7127 in order to close the PAL leasing loophole.[40] The Bloomberg administration should withdraw its opposition to A.8838.[41]

Subject SCA leasing of existing facilities to SEQRA
The PAL states that the SCA is not exempt from Article Eight of the Environmental Conservation Law, which, in establishing SEQRA, requires all agencies to prepare an EIS for any action they propose that may have a significant effect on the environment. Whether the SCA leases an existing facility or constructs a new building, it should follow the rules of SEQRA. This should include preparation of an EIS in all instances in which a school is to be sited on a contaminated property. In addition to providing another forum for public participation, preparing an EIS will ensure that the SCA takes a "hard look" at potential environmental impacts and how those impacts will be mitigated when reviewing a potential leased site, as mandated by the courts.

Provide more environmental information about schools
Parents have a right to have all of the facts pertaining to their child's school presented to them. The DOE should create a public repository available on-line that lists all schools on contaminated properties—especially those it leases because these sites currently are not subject to any public review. Any environmental data for each site, as well as any cleanup plans and site monitoring and maintenance plans for each site, should accompany the list of schools.

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[40] This report focuses mainly on a loophole pertaining to the distinction between new construction of schools and the leasing of existing facilities for use as schools. However, an additional possibility exists: that the SCA may purchase an existing facility for use as a school rather than lease it. Currently, the PAL requirements are triggered by the "commencing of new construction or building additions of an educational facility, or the acquisition of real property or any interest therein for such purpose [of *new construction or building addition*]." The possibility that the City may purchase an existing facility for use as a school is not addressed. A.8838 would, as written, preserve this additional loophole. Thus, as an added safeguard, if possible, A.8838 should be amended to trigger requirements provided for in the PAL in cases in which the city seeks to purchase existing facilities for use as schools. If an amendment to A.8838 were drafted, it should also include a clarification that Community Education Councils have replaced local school boards.

[41] "City ensures strict standards for every new school project: Op/Ed by Deputy Mayor Dennis Walcott," *Daily News*, 25 Sept 2007.

The state should pass legislation requiring the SCA and DOE to conduct air testing inside any school at the request of parents or school staff where evidence exists that would lead a reasonable person to believe that the presence of contamination poses a health risk. Any entity designing such a law or regulation must carefully consider the meaning of the "reasonableness" threshold that might trigger this requirement—a parent or DOE employee's right to know must be within reason so as not to waste resources.

Provide communities with means for independent review

In the case of Info Tech, Soundview, and other sites, having an outside consultant review the city's environmental testing results and remediation plans has gone a long way towards reassuring parents and ensuring that remediation plans are thorough and effective. This kind of review is relatively inexpensive, but the city has shown a reluctance to fund it in the past.[42] The Public Authorities Law should include a provision for Technical Assistance Grants (TAG) for communities. TAGs are already available to provide communities with funds to "obtain independent technical assistance in interpreting environmental and health information generated and/or evaluated under the State Superfund Program or Brownfield Cleanup Program about an eligible site."[43] Giving communities the means to have the city's environmental tests and remediation plans reviewed by an outside consultant is a small price to pay to reinforce the message that the city is committed to maintaining a healthy and safe school environment for all children.

[42] In November 2007, the Bronx Borough President on behalf of the community, requested $11,000 from the city to fund an independent review of the site monitoring plan for the Mott Haven schools campus. The total cost of remediation at that site is $30 million. Lombardi, F., "Parents press PS 156 for environmental review funds," *Daily News*, November 13, 2007.

[43] DER-14/ Technical Assistance Grants Guidebook, New York State Dept of Environmental Conservation, DEC Program Policy, March 27, 2006; see also NYS ECL §27-1316 and §27-1417.

APPENDIX A: DISCUSSION OF P.S. 141 AND P.S. 65

P.S. 141

P.S. 141, was a school sited in a former dry cleaning plant at the far eastern end of 141st Street in Manhattan. Community School District Five (CSD 5) originally intended to use the site for its students to ease overcrowding. Upon learning about the history of the building, however, the district Superintendent and Board President chose to reject the site and renovation plans were halted. Less than a year later, CSD 6 requested to use the site to ease overcrowding in *its* schools. In the spring of 1995, Community Board 10, in which the building is located, issued a resolution demanding that the then Board of Education reject the site because of, among other factors, its "present and past toxic chemical use."[44]

The resolution went unheeded, and the SCA signed a 4.5-million-dollar, 15-year lease and spent an additional five million dollars in construction funds to turn the dry cleaning plant into a school building. During the two-year construction and environmental remediation, the property owner installed a soil vapor extraction system.[45] In September 1997, before adequate environmental testing was complete, the DOE opened the school. Tests conducted a week after the school opened revealed perchloroethylene levels in the air exceeding state guidelines, in some rooms by more than double the acceptable levels. The school, shut down by the BOE in the first week of October, never reopened. Students returned to the overcrowded schools they had left the previous year, and at least five million dollars was wasted.[46]

P.S. 65

In the fall of 1996, P.S. 65 opened in Ozone Park, Queens in a former airplane parts factory leased by the SCA. The opening was delayed for a week because testing by the SCA revealed that groundwater 35 feet below the site was contaminated with trichloroethylene (TCE). The then BOE, in consultation with various state and city health and environment officials, opened the school after finding that the contamination was too far underground to pose a threat to students.

The issue of toxicity at P.S. 65 resurfaced in 2002 when a nearby site known to be the source of the TCE contamination was identified by DEC as a Class 2 hazardous waste disposal site and school officials notified parents that new tests would be conducted in the school building. Although a BOE spokesperson said that all of the test results were negative, a soil vapor extraction system was installed out of what BOE called an "abundance of caution."[47] The DOE and the DEC claim that the site has always been

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[44] Steinberg, J., "Toxic Lease: A special report; How a Laundry in Harlem Became a Tainted School," *The New York Times*, October 11, 1997.

[45] According to the Center for Public Environmental Oversight (www.cpeo.org/techtree/ttdescript/soileve.htm), "Soil vapor extraction uses vacuum pressure to remove volatile and some semi-volatile contaminants from the soil. The gas leaving the soil may be treated or destroyed."

[46] Steinberg, Jacques. "School in Harlem Shut Indefinitely Because of Fumes," *The New York Times*, October 7, 1997.

[47] Sheridan, D. and Calderone, J., "PS 65 Opens Up After Toxics Scare," *Daily News*, September 11, 1996; see also Gendar, A., "Queens School Gets Clean Bill of Health," *Daily News*, August 24, 2002.

safe. Nonetheless, parents were alarmed that their children spent years in the building without the most protective remedial measures.[48] Had the lease for the P.S. 65 building been subject to the PAL, it is possible that the vapor extraction system could have been in place six years earlier.

[48] Bode, N., "Basement Classes at PS 65 Worry Parents," *Daily News*, October 2, 2003.

APPENDIX B: DISCUSSION OF TOXINS MENTIONED IN THE REPORT

There are several reasons why children are more vulnerable than adults to regular exposure to even low levels of toxins. Their developing bodies are more susceptible to damage from chemical exposure. Polluted air has a greater effect on children because they breathe in more air per pound of body weight than adults. Young children are more likely to be exposed to toxins in soil when they play on the ground outside or put their hands in their mouths. Finally, early exposure to carcinogenic toxins gives diseases more time to develop over a lifetime.[49]

Perchloroethylene (PCE)

PCE, sometimes called "perc," is a chemical used in the dry cleaning process. Exposure to high concentrations of PCE can cause dizziness, headaches, sleepiness, and in extreme cases, death. The U.S. Department of Health and Human Services (DHHS) has determined that PCE "may reasonably be anticipated to be a carcinogen." [50]

Trichloroethylene (TCE)

TCE is used as an industrial solvent. According to DHHS, "breathing high levels of [TCE] may cause nervous system effects, liver and lung damage, abnormal heartbeat, coma, and possibly death." The EPA reports that "a recent analysis of available epidemiological studies reports trichloroethylene [TCE] exposure to be associated with several types of cancers in humans, especially kidney, liver, cervix, and lymphatic system. The Agency is currently reassessing the cancer classification of trichloroethylene." [51]

Lead

Lead poisoning affects the nervous system, kidneys, and reproductive system. Lead also affects behavior, causing attention deficit, impulsivity, and learning disabilities. According to DHHS, the "effects of lead are the same whether it enters the body through breathing or swallowing." Children are especially vulnerable to lead poisoning and even at low levels of exposure, "lead can effect a child's mental and physical growth." [52]

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[49] Fischbach, S., Gibbs, L., and Gonzalez, S., "School Location Matters: Preventing School-Siting Disasters," *Journal of Poverty Law and Policy*, pp 14-15, May-June 2005.

[50] U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, *Tetrachloroethylene ToxFAQS Fact Sheet*, September 1997.

[51] Federal Environmental Protection Agency (www.epa.gov/ttn/atw/hlthef/tri-ethy.html); U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, *Tricholoroethylene ToxFAQS Fact Sheet*, July 2003.

[52] Schettler, T., Stein, J., Reich, F., Valenti, M., and Wallinga, D.. *In Harm's Way: Toxic Threats to Child Development*, Greater Boston Physicians for Social Responsibility, p. 94, May 2000; Lead ToxFAQS Fact Sheet, Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, August 2007.