SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 8, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Freedman, Román, JJ.

4668 Jeffrey Serbin, Index 603783/09
Plaintiff-Appellant,

-against-

Rodman Principal Investments, LLC, et al.,
Defendants-Respondents.

_____

Steptoe & Johnson, LLP, Washington, DC (Jeffrey M. Theodore, of the bars of the State of Maryland and the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Wilk Auslander LLP, New York (Natalie Shkolnik of counsel), for respondents.

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Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 22, 2010, dismissing the complaint, unanimously affirmed, without costs.

The parties' separation agreement bars the very claims that plaintiff asserts in this action arising from his withdrawal from defendant Aceras Partners, LLC (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 76 AD3d 310 [2010], *affd* __ NY3d __, 2011 NY Slip Op 04720 [2011]; *see also Global Mins. & Metals Corp. v Holme*, 35 AD3d 93 [2006], *lv denied* 8 NY3d 804

[2007]). Because the release is clear and unambiguous, plaintiff may not endeavor to vary its terms or to create an ambiguity by resorting to extrinsic evidence (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). Nor is the release invalid for lack of consideration (*see* General Obligations Law § 15-303).

The agreement, "by its terms, extinguishes liability on any and all claims arising in connection with [plaintiff's withdrawal from Aceras] [and therefore] is deemed to encompass claims of fraud relating to [that] matter[], even if the release does not specifically refer to fraud and was not granted in settlement of an actually asserted fraud claim" (*Centro*, 76 AD3d at 318-319). In any event, defendant Liatos's representation that plaintiff's economic interest as set forth in the separation agreement was equivalent to a 10% interest in Huxley, a "Portfolio Company" from the proceeds of sale of which plaintiff had the right to receive distributions, was not false at the time of the agreement. Nor was it inaccurate for Liatos to represent that plaintiff's interest was the same as the interest held by the other members of Aceras at the time and would remain so until his withdrawal from Aceras. To the extent plaintiff alleges that Liatos informed him that his interest in Huxley would forever remain 10% of the proceeds from the sale thereof, his reliance on

such a representation was unreasonable. The separation agreement does not set forth plaintiff's interest in Huxley in terms of his membership interest; it expresses his interest as equivalent to 400,000 shares of Huxley. In addition, the Aceras operating agreement provides that a withdrawing member ceases to retain an interest based on his membership percentage and retains only a certain economic interest in the portfolio companies owned prior to his withdrawal.

We reject plaintiff's argument that the separation agreement should be interpreted to give him a 10% interest in the proceeds from the sale of Huxley so that it accords with his interpretation of the operating agreement. Even assuming that his interpretation of the operating agreement is correct, or that the operating agreement is ambiguous, the separation agreement is not ambiguous. It thus effectively modifies the operating agreement by defining plaintiff's interest as the value of 400,000 shares of Huxley, rather than a percentage of the proceeds from the sale of Huxley based on his membership interest (*see Reiss v Financial Performance Corp.*, 97 NY2d 195 [2001]).

We have considered plaintiff's remaining arguments, including his minority shareholder dilution claim, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3760 Arie Genger, Index 104249/07
Plaintiff-Appellant,

-against-

Sagi Genger,
Defendant-Respondent.

_____

Leon Friedman, New York, for appellant.

McLaughlin & Stern, LLP, New York (Steven J. Hyman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 14, 2009, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion with respect to the first, second, fourth, and fifth causes of action, and otherwise affirmed, with costs. Pursuant to CPLR 1001, plaintiff is directed to join Dalia Genger as a defendant by serving her with a summons and all pleadings.

Plaintiff Arie Genger (Arie) was the defendant in a divorce action commenced by his wife, Dalia Genger (Dalia). In connection with that action, Arie and Dalia entered into a written stipulation of settlement, in which they agreed that their son, defendant Sagi Genger (Sagi), was to be appointed attorney-in-fact under a power of attorney, with the power to allocate certain marital assets so as to effect an equal

distribution of those assets. Relying on the power of attorney, Sagi instructed that ownership of certain instruments under which he was indebted to Arie -- four promissory notes and a stock purchase agreement -- be transferred to Dalia. When Arie failed to comply with Sagi's instructions, Dalia filed a motion to hold him in contempt. Arie cross-moved for removal of Sagi as attorney-in-fact, on the ground, among others, that Sagi had engaged in self-dealing by unilaterally reallocating ownership of the notes and stock purchase agreement to Dalia.

The court presiding over the divorce action granted Arie's cross motion to have Sagi removed as attorney-in-fact, concluding that Sagi had "an irreconcilable conflict of interest that prevent[ed] him from properly exercising his fiduciary duties to [Arie]." The court also directed that the parties arbitrate, among other issues, the dispute over the notes and the stock purchase agreement. After a 14-day hearing, the arbitrator rendered a final arbitration award that, while making findings as to certain other issues, disavowed jurisdiction over claims concerning the notes and the stock purchase agreement.

Arie subsequently commenced the instant action, which seeks a money judgment against Sagi on the notes and the stock purchase agreement. Supreme Court granted Sagi's pre-answer motion to dismiss the complaint. We now modify as indicated.

Initially, we find that Arie's purported lack of standing to sue on the notes or the stock purchase agreement does not form a proper basis for the motion to dismiss. The motion court erred in finding that the instruments had been transferred to Dalia and that Arie therefore lacked standing to sustain the action. The record presents substantial factual issues concerning the notes' ownership. By memorandum dated November 25, 2006, Sagi issued instructions that the notes were to be transferred to correct an imbalance in the distribution of marital assets, and instructed the parties to "execute document(s) specifically recognizing the ownership of each asset allocated to the other . . ." However, the record does not show definitively that the transfer was effected. Indeed, in her affidavit submitted in support of Sagi's motion to dismiss, Dalia states that Arie "refused to comply with the [i]nstructions."

Further, the court presiding over the divorce action, on Arie's motion, removed Sagi as attorney-in-fact because of a conflict of interest, specifically mentioning Sagi's transfer of the notes and the stock purchase agreement. Sagi asserts that, although he was removed as attorney-in-fact, the court did not set aside his instructions. Arie, however, apparently failed to comply with the instructions' direction to execute documents specifically recognizing Dalia's ownership in the notes and stock

purchase agreement. The record thus leaves open the question of whether the transfer of ownership ever took place. Sagi's assertion that two of the notes' maturity dates were modified so that those notes are not yet due similarly begs the question, especially with respect to whether Sagi properly discharged his fiduciary duties to Arie.[1]

In light of the foregoing, a question exists as to the ownership of the notes and the stock purchase agreement, and this question is not definitively resolved by the documentary evidence on which Sagi relies. In granting Sagi's motion to dismiss, the court improperly assumed the answer to the very question raised by the complaint -- namely, whether the ownership of the disputed instruments actually changed (*see Gutierrez v Bernard*, 27 AD3d 377, 378 [2006]). This issue cannot be resolved at the pleading stage (*see Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 383 [2008]).

Moreover, even apart from the uncertainty regarding the occurrence of the transfer, the documents underlying the complaint raise the question of whether Sagi actually had the power to transfer the notes or the stock purchase agreement to Dalia. The power of attorney, read in conjunction with the

[1]In any event, one of the modifications stated that the note came due on July 10, 2010.

stipulation pursuant to which the power of attorney was executed, gave Sagi the power to dispose of those assets that were listed on the schedule attached to the power of attorney; however, neither the notes nor the stock purchase agreement was listed on the schedule. Further, while the stipulation states that Sagi had the power to sell assets and distribute the proceeds from the sale, it nowhere states that he had the power to transfer or assign assets from one party to the other. The documentary evidence, far from establishing Sagi's authority to effect the transfers in question, raises an issue as to the existence of such authority that cannot be resolved on a motion to dismiss pursuant to CPLR 3211(a).

As to the contention that the complaint should be dismissed on the basis of a prior arbitration and award, the arbitrator rendered no award concerning the notes and the stock purchase agreement. Therefore, the arbitration has no preclusive effect on those issues. Preclusive effect will not be given to a prior decision if the particular issue was not "actually litigated, squarely addressed[,] and specifically decided" (*Ross v Medical Liab. Mut. Ins. Co.*, 75 NY2d 825 [1990]). Here, the award recites that the arbitrator disavowed jurisdiction over issues regarding the notes, specifically declining to render any award

regarding that issue (*see Papapietro v Pollack & Kotler*, 9 AD3d 419, 419-420 [2004]; *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:21). The arbitrator also rendered no award regarding the stock purchase agreement and disavowed jurisdiction over that issue. Therefore, the issues regarding the notes and the stock purchase agreement were not determined in the prior arbitration proceeding, and the doctrine of arbitration and award does not bar Arie's action against Sagi (*Crespo v 160 W. End Ave. Owners Corp.*, 253 AD2d 28, 33 [1999]; *see also Matter of Solow Bldg. Co. [Morgan Guar. Trust Co. of N.Y.]*, 294 AD2d 224 [2002], *lv denied* 98 NY2d 611 [2002]).[2]

We further find that, with one exception, the causes of action pleaded in the complaint are legally sufficient. The complaint's allegations that Sagi executed promissory notes and a stock purchase agreement obligating him to make certain payments to Arie, and that Sagi failed to make payment on these

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[2]We observe that the arbitrator's disavowal of jurisdiction left Arie without any effective arbitration remedy with respect to the notes and the stock purchase agreement. An arbitral award cannot be attacked on the ground that an arbitrator refused to consider, or failed to appreciate, particular evidence or arguments (*see Solow Bldg. Co., LLC v Morgan Guar. Trust Co. of N.Y.*, 6 AD3d 356 [2004], *lv denied* 3 NY3d 605 [2004], *cert denied* 543 US 1148 [2005]; *see also Wabst v Scoppetta*, 56 AD3d 399 [2008]). What is more, the notes and the stock purchase agreement do not contain arbitration clauses.

instruments when due, despite Arie's demands, are sufficient to state the first, second, fourth and fifth causes of action. However, the documentary evidence establishes a defense to the third cause of action, which is based on the note dated April 6, 2004, for $1,000. The note of April 6, 2004 is unsigned, and thus fails to meet the requirements for an enforceable promissory note (*see* Uniform Commercial Code § 3-104[a]). Nothing in the record suggests that a signed copy of this note exists.

Finally, Dalia should have been joined as a party to this action, because her rights, if any, in the subject instruments might be inequitably affected by a judgment (*see* CPLR 1001[a]). Furthermore, Sagi could well be placed in the position of being obligated to both his parents separately for the same debts. However, the complaint need not be dismissed on this basis (*see Leeward Isles Resorts, Ltd. v Hickox*, 61 AD3d 622 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3997-
3997A In re Perry Bellamy, Index 401463/98
Petitioner-Respondent,

-against-

The New York City Police Department,
Respondent-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for appellant.

Perry Bellamy, respondent pro se.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered July 31, 2009, to the extent appealed from as limited by the briefs, granting the petition brought pursuant to the Freedom of Information Law to compel respondent to disclose police reports containing the names and statements of witnesses who did not testify at petitioner's trial, and order, same court and Justice, entered November 18, 2009, which, inter alia, denied respondent's motion to renew, unanimously reversed, on the law and the facts, without costs, and the petition denied.

In 1986, petitioner was convicted of the murder of a New York City Parole Officer. Petitioner made inculpatory statements to the police, in which he admitted to being present during the planning of the murder and to luring the victim to the scene. During the federal narcotics prosecution of other participants in

the murder scheme, these individuals asserted that petitioner had not been involved. Petitioner's FOIL request for unredacted versions of documents he has received previously is part of his effort to obtain a new trial.

Public Officers Law § 87(2)(f) permits an agency to deny access to records, that, if disclosed, would endanger the life or safety of any person. The agency in question need only demonstrate "a possibility of endanger[ment]" in order to invoke this exemption (*see Matter of Connolly v New York Guard*, 175 AD2d 372, 373 [1996]; *see also Matter of Rodriguez v Johnson*, 66 AD3d 536 [2009]). "[A]ccess to government records does not depend on the purpose for which the records are sought" (*Matter of Bellamy v New York City Police Dept.*, 59 AD3d 353, 355 [2009]).

Respondent met its burden of establishing that the documents at issue fall within an exemption from disclosure as provided in Public Officers Law § 87(2). The documents here reflect the identities of certain persons who spoke with police during the course of an investigation into this gang-related homicide ordered from prison. Because these individuals never became testifying witnesses, neither respondent, nor anyone else, would know about them otherwise. It is therefore possible that the lives of persons who spoke with police could be endangered from the release of identifying information. After learning the

names, all one would need is an Internet connection to determine where they live and work. Moreover, insofar as the documents mention individuals who did not provide information relied upon during the investigation, that information is exempt from FOIL under the privacy exemption (*see* Public Officers Law § 87[2][b]; *Matter of De Oliveira v Wagner*, 274 AD2d 904 [2000]).

Accordingly, based on the facts and circumstances, we deny petitioner's FOIL request seeking unredacted versions of the documents (*see Matter of Rodriguez*, 66 AD3d 536 [2009] [DA properly withheld, pursuant to the public interest privilege, statements of two witnesses who spoke with law enforcement personnel]).

The decision and order of this Court entered herein on January 4, 2011, is hereby recalled and vacated (*see* M-624 [decided simultaneously herewith]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4026 TPR Investment Associates, Inc., et al., Plaintiffs-Appellants, Index 603509/07 601803/08

-against-

William Fischer, et al., Defendants-Respondents.

Yankwitt & McGuire, LLP, White Plains (Harold F. McGuire, Jr. of counsel), for appellants.

Snow Becker Krauss P.C., New York (Ronald S. Herzog of counsel), for William Fischer and Raines & Fischer, respondents.

Leon Friedman, New York, for Arie Genger, respondent.

Cooley LLP, New York (Alan Levine of counsel), for Edward Klimerman and Sonnenschein Nath & Rosenthal LLP, respondents.

Goldberg Segalla, LLP, White Plains (William T. O'Connell of counsel), for William S. Dowd, respondent.

Levitt & Kaizer, New York (Richard W. Levitt of counsel), for Lerner Manor Trusteeships Ltd. and Gilad Sharon, respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 10, 2009, which, insofar as appealed from as limited by the briefs, granted defendants' motions to dismiss the causes of action arising from the "Bogalusa Affair" and the Canadian real estate venture, unanimously affirmed, with costs.

Plaintiff Dalia Genger's causes of action with respect to the transfer of certain shares of stock in nonparty Trans-Resources, Inc. (TRI) are barred by the award issued in the

arbitration proceeding commenced pursuant to the stipulation of settlement in the divorce action between Dalia and defendant Arie Genger (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). In the arbitration proceeding, Dalia claimed that, because of the undervaluing of TRI, she was not properly compensated for her marital interest in the TRI shares that were transferred to Arie. Her present claim, that she was defrauded out of her marital interest in the TRI shares that she and Arie had agreed to gift to their children's trusts, thus involves marital property; moreover, it flows from the same transactions and occurrences that were considered in the arbitration proceeding. Dalia's failure to raise the present claim in that proceeding precludes her from raising it in this action. Plaintiffs TPR Investment Properties, Inc., control of which passed to Dalia pursuant to the stipulation, and D&K Limited Partnership, of which she was a general partner, are in privity with Dalia and are therefore also precluded (*see Matter of Shea*, 309 NY 605, 617 [1956]; *Ultracashmere House v Kenston Warehousing Corp.*, 166 AD2d 386, 387 [1990], *lv dismissed in part, denied in part* 78 NY2d 984 [1991]).

Plaintiffs concede that their causes of action with respect to the Canadian real estate venture may not be asserted on behalf of Dalia, because her claim to a marital interest in the venture

was rejected in the arbitration proceeding. In fact, the arbitrator rejected her claim on the ground that plaintiff AG Properties Company, which owned the venture, was in turn owned 50% by defendant Gilad Sharon and 50% by the Gengers' children. In other words, TPR had no ownership interest in the real estate venture. Since the present causes of action with respect to the real estate venture are premised upon the same documents and other evidence that were submitted in support of Dalia's claim in the arbitration proceeding, TPR, which is in privity with Dalia, may not raise them in this action.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4033 Chelise Navarro, Index 25776/04
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

The Department of Education
of the City of New York,
Defendant-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

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Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered May 15, 2009, which denied defendant Department of Education's motion for judgment notwithstanding the verdict or a new trial, unanimously reversed, on the law, without costs, the motion for judgment notwithstanding the verdict granted, and the complaint dismissed. The Clerk is directed to enter judgment dismissing the complaint as against said defendant.

During an elective high school softball class, plaintiff, then 16 years old, hit ground balls to a fielder as a warmup exercise. A student named Johanny approached plaintiff and asked if she could hit a few balls. Plaintiff handed the bat to Johanny and told her, consistent with the teacher's instructions

for practice drills, that she should not take full swings. Upon being handed the bat, however, Johanny immediately threw the ball in the air and took a full swing before plaintiff had time to get out of the way. As a result, the bat hit plaintiff on the cheek, causing injury.

Plaintiff subsequently commenced this personal injury action, which, after a jury trial, resulted in a verdict in her favor against defendant Department of Education. Defendant appeals from the denial of its motion for judgment notwithstanding the verdict or a new trial. We reverse and grant the motion for judgment notwithstanding the verdict.

Because the record establishes that plaintiff assumed the risk that resulted in her injury, defendant is entitled to judgment as a matter of law (*see* CPLR 4404[a]). A participant in an athletic activity is deemed to have assumed "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). In this regard, it is well established that "'the danger associated with people swinging bats . . . while warming up for the game' is inherent in the game of baseball" (*Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 248 [2008], *affd* 10 NY3d 889 [2008], quoting *Napoli v Mount Alvernia, Inc.*, 239 AD2d 325, 326 [1997];

see also Marlowe v Rush-Henrietta Cent. School Dist., 167 AD2d 820 [1990], *affd* 78 NY2d 1096 [1991] [baseball player assumed risk of bat being thrown]). This principle has equal application to softball. Given that the risk of being hit by a practice swing of a bat has been held to be assumed even by a spectator "claim[ing] lacunae in her knowledge and experience of the game" (*Roberts*, 51 AD2d at 248) and by a child (*Napoli*, 239 AD2d at 326), that risk was necessarily assumed by plaintiff, an experienced softball player who admittedly knew the risks inherent in the sport (*see Kennedy v Rockville Ctr. Union Free School Dist.*, 186 AD2d 110, 111 [1992]). The record is devoid of evidence that plaintiff's injury resulted from any "unassumed, concealed or unreasonably increased risks" (*Benitez v New York Bd. of Educ.*, 73 NY2d 650, 658 [1989]) from which she should have been protected by her teacher. Inasmuch as plaintiff assumed the risk that resulted in her injury, "[r]ecovery may not . . . be had on a theory of negligent supervision" (*Roberts*, 51 AD3d at 251).

We note that the verdict cannot be sustained on a theory of negligent supervision for an additional and independent reason. Plaintiff testified that only three to five seconds elapsed between her giving the bat to Johanny and the bat's striking her face. "'Where an accident occurs in so short a span of time that

even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the [defendant school district] is warranted'" (*Esponda v City of New York*, 62 AD3d 458, 460 [2009], quoting *Convey v City of Rye School Dist.*, 271 AD2d 154, 160 [2000]). Schools "are not 'insurers of safety' and cannot be held liable 'for every thoughtless or careless act by which one pupil may injure another'" (*Lizardo v Board of Educ. of the City of New York*, 77 AD3d 437, 438 [2010], quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4525 Lorraine Graves, Index 301467/08
Plaintiff-Respondent,

-against-

L&N Car Service, et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Michael D. Hassin, Rockville Centre (Randall A. Sorscher of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 19, 2010, which, upon reargument, denied defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

This is an action seeking damages for "serious injury" within the meaning of Insurance Law § 5102(d) allegedly resulting from a motor vehicle accident. In support of their motion for summary judgment, defendants submitted affirmations of a radiologist, Dr. Jessica Berkowitz, attesting that she examined MRIs of plaintiff's cervical spine, lumbar spine and right shoulder, and found no evidence of a causal relationship between

plaintiff's injuries and the subject accident. Rather, for reasons Dr. Berkowitz explained with particularity in her affirmations, the injuries appeared to result from chronic and degenerative conditions and were not the type of injuries that are caused by trauma. The radiology reports submitted by plaintiff, by contrast, said nothing about the etiology of the injuries, and the report of plaintiff's chiropractor contained only a conclusory assertion that there was a causal connection between the injuries and the accident. On this record, defendants established a prima facie case for dismissal of the complaint insofar as based on an alleged permanent, consequential and significant serious injury, and plaintiff failed to meet her burden to come forward with competent medical evidence specifically refuting the claimed lack of causal connection to the accident (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]; *Charley v Goss*, 54 AD3d 569, 571-572 [2008], *affd* 12 NY3d 750 [2009]). Moreover, plaintiff's admissions in her bill of particulars and deposition testimony that she missed only three weeks of work as a result of the accident established as a matter of law that she did not suffer a serious injury within the meaning of the 90/180-day prong of Insurance Law § 5102(d).

Accordingly, defendants' summary judgment motion should have been granted.

All concur except Moskowitz, J. who dissents in part in a memorandum as follows:

MOSKOWITZ, J. (dissenting in part)

I agree with the majority that plaintiff has not raised an issue of fact with respect to her 90/180-day claim. However, I disagree with the dismissal of the complaint under the permanent, consequential and significant limitation categories of serious injury under Insurance Law § 5102(d).

While defendants' experts concluded that plaintiff had normal range of motion in her shoulder and cervical and lumbar spine, plaintiff raised an issue of fact through the affidavit of her chiropractor, Dr. Rosenfeld, who first examined plaintiff a week after the accident and again in October 2009. Specifically, Dr. Rosenfeld opined that plaintiff did not have normal range of motion and had "sustained a permanent disability as a result of the bulging and herniated discs in her cervical spine and lumbar spine." He concluded that "based upon this patient[']s history, treatment, physical examination, range of motion testing, and review of the MRI and EMG test results," these injuries "are the direct result of the automobile accident of July 23, 2007."

Moreover, Dr. Shapiro, a radiologist, attested to MRI studies (upon which Dr. Rosenfeld relied) that revealed, inter alia, "focal disc bulge at C4-5[,] right paracentral herniation at C5-6," "right foraminal herniation at L3-4, [and] loss of signal and central herniation at L4-5 with extension of disc into

the neural foramen bilaterally." Accordingly, this case involves contested issues of fact inappropriate for summary adjudication (*see de La Cruz v Hernandez*, 84 AD3d 652 [2011]; *see also Linton v Nawaz*, 62 AD3d 434, 440-441 [2009], *affd* 14 NY3d 821 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Román, JJ.

5290 The People of the State of New York, Ind. 7219/92
Respondent,

-against-

Sheldon Parker,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about March 23, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings consistent herewith.

Defendant is eligible for resentencing under the 2009 Drug Law Reform Act (L 2009, ch 56), even though he was released on parole from custody on his drug conviction, but reincarcerated for a parole violation (*see People v Paulin*, __ NY3d __, 2011 NY Slip Op 05544 [2011]). Accordingly, we remand the matter to Supreme Court for further consideration of his application.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5376 The People of the State of New York, Respondent, Ind. 1468/02

-against-

Carlton Spivey, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about August 6, 2010, which denied, on the ground of ineligibility, defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings.

Defendant was released on parole shortly after he filed his resentencing motion.

Defendant is eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56), even though he was released on

parole from custody on his drug conviction, but reincarcerated for a parole violation (*see People v Paulin*, __ NY3d __, 2011 NY Slip Op 05544 [2011]). Accordingly, we remand the matter to Supreme Court for further consideration of his application.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5473 The People of the State of New York, Respondent, Ind. 9039/96

-against-

Robert Miles, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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Order, Supreme Court, Supreme Court, New York County (A. Kirke Bartley, J.), entered February 26, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings consistent herewith.

Defendant is eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56), even though he was released on parole from custody on his drug conviction, but reincarcerated for a parole violation (*see People v Paulin*, __ NY3d __, 2011 NY

Slip Op 05544 [2011]). Accordingly, we remand the matter to Supreme Court for further consideration of his application.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

4479 In re Chinese Staff and Workers' Association, et al., Petitioners-Appellants, Index 111575/09

-against-

Amanda M. Burden, as Director of the New York City Department of City Planning, et al., Respondents-Respondents.

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John C. Gray, South Brooklyn Legal Services, Brooklyn (Rachel Hannaford of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered May 14, 2010, affirmed, without costs.

Opinion by Andrias, J.P. All concur except Moskowitz and Abdus-Salaam, JJ. who dissent in an Opinion by Abdus-Salaam, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
James M. Catterson
Karla Moskowitz
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

4479
Index 111575/09

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In re Chinese Staff and Workers' Association, et al.,
Petitioners-Appellants,

-against-

Amanda M. Burden, as Director of the New York City Department of City Planning, et al.,
Respondents-Respondents.
_____x

Petitioners appeal from an order and judgment (one paper) of the Supreme Court, New York County (Michael D. Stallman, J.), entered May 14, 2010, inter alia denying the petition to annul respondent Department of City Planning's determination that the proposed rezoning of Sunset Park would not have a significant environmental impact, and dismissing the proceeding brought pursuant to CPLR article 78.

John C. Gray, South Brooklyn Legal Services, Brooklyn (Rachel Hannaford and Jennifer Levy of counsel), and Asian American Legal Defense and Education Fund, New York (Bethany Y. Li of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella, Leonard Koerner, Carrie Noteboom and Haley Stein of counsel), for respondents.

ANDRIAS, J.P.

The issue before us is whether the Department of City Planning (DCP) conducted an adequate environmental review of the proposed rezoning of an approximately 128-block area in Sunset Park, Brooklyn, bounded generally by Third Avenue, 28th Street, 63rd Street and Eighth Avenue. The rezoning was approved by the City Council on September 30, 2009 and was intended to preserve the existing neighborhood character and scale by placing height limits throughout, create opportunities and incentives for affordable housing through "inclusionary" zoning, and support local retail corridors, while at the same time protecting the residential character of nearby side streets, by applying contextual zoning districts and mapping commercial overlays (commercial districts within residential areas).

DCP, as lead agency, prepared an Environmental Assessment Statement (EAS) and issued a negative declaration, i.e. a determination that the rezoning would have no significant effects on the environment that would require a more detailed Environmental Impact Statement (EIS). Petitioners seek to annul the negative declaration on the ground that DCP's environmental review did not comport with the requirements of the New York State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 *et seq.*; 6 NYCRR § 617.1 *et seq.*) and

the City Environmental Quality Review (CEQR) rules (43 RCNY 6-01 *et seq.*; 62 RCNY 5-01 *et seq.*). Petitioners maintain that DCP based its development scenario on faulty assumptions that underestimate the opportunities for market-rate development, failed to adequately analyze the impact of the commercial zoning changes in existing residential and commercial districts, which will result in new types of businesses, and failed to adequately analyze CEQR technical areas such as neighborhood character and socioeconomic impacts. Petitioners also contend that DCP's submissions in opposition to the petition should not have been considered because they improperly supplement the EAS.

We find that the EAS, standing on its own, has a rational basis and that DCP's issuance of the negative declaration was a proper exercise of discretion. The EAS identified the relevant areas of environmental concern, made a thorough investigation of those areas, and provided a reasoned elaboration of the basis for its determination. We also find that Supreme Court did not err when it considered DCP's submissions in opposition, which elaborated on the analysis set forth in the EAS.

The study area was predominantly zoned R6 with C1 and C2 overlays on blocks along retail corridors, and a C4-3 district located on a portion of Fifth Avenue. The proposed rezoning mapped R4-1, R4A, R6B, R6A, R7A, and C4-3A contextual zoning

districts in the study area, with existing C1-3, Cl-4 overlays replaced by C2-4 overlays, and new C2-4 overlays mapped on Fourth Avenue and below 45th Street on Seventh Avenue. All commercial overlays were scaled back from 150-foot depths to 100 feet. The proposed zoning text amendment modified Section 23-922 of the NYC Zoning Resolution to allow an Inclusionary Housing Program bonus for development providing affordable housing in the proposed R7A districts within the rezoning area.

Since the proposed action was in the "Type I" category, it "carrie[d] with it the presumption that it [was] likely to have a significant adverse impact on the environment" (6 NYCRR 617.4[a][1]). To overcome this presumption, DCP, in a properly completed EAS, was obligated to identify the potential adverse environmental impacts, take a "hard look" at them, and "[make] a reasoned elaboration of the basis for its determination" that there would be no adverse impacts (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986] [internal quotation marks and citations omitted]; *Matter of Friends of Port Chester Parks v Logan*, 305 AD2d 676 [2003]).

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious

or an abuse of discretion'" (*Akpan v Koch*, 75 NY2d 561, 570 [1990]; CPLR 7803[3]). The reviewing court must employ reasonableness and common sense, tailoring the intensity of the "hard look" to the complexity of the environmental problems actually existing in the project under consideration (*see Matter of Town of Henrietta v Department of Envtl. Conservation of State of N.Y.*, 76 AD2d 215, 224 [1980]). It is not the role of the court to weigh the desirability of the proposed action or to choose among alternatives, resolve disagreements among experts, or to substitute its judgment for that of the agency (*Matter of Merson v McNally*, 90 NY2d 742, 752 [1997]).

Measured against this standard of review, we find that DCP's determination that the rezoning will have no significant adverse effect on the environment is the product of an adequate environmental review. The rezoning was developed thorough a participatory public process, in close consultation with Brooklyn Community Board 7, following a thorough study by city planning officials. In accordance with accepted methodology, as set forth in the 2001 CEQR Technical Manual (the Manual), DCP considered both a "reasonable worst-case scenario" in a future "no-action" condition, as compared to a future "with-action" condition over a 10-year period, and the environmental review categories

identified in the Manual (*see Matter of Neville v Koch*, 79 NY2d 416, 427 [1992]; *Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 4-5 [2006]; *Matter of Fisher v Giuliani*, 280 AD2d 13, 18 [2001]; 62 RCNY 6-07[a][1] ["In making their determination, the lead agencies shall employ the Environmental Assessment Form, apply the criteria contained in § 6-06 and consider the lists of actions contained in § 6-15 of this chapter"]).

Specifically, the EAS identified a "total of 8 projected development sites and 18 potential development sites [] in the study area" and found, based on the assumptions employed, that 236 housing units and 82,885 square feet of non-residential space could be expected to be developed under the current zoning on the eight projected development sites, as compared to 311 dwelling units and 65,431 square feet of non-residential space under the rezoning, a net increase of 75 dwelling units and 18,980 square feet of commercial space. Additionally, approximately 64 of the 75 net incremental units would be affordable, developed pursuant to the Inclusionary Housing Program's floor area ratio (FAR)

bonus.[1]

The EAS then analyzed the potential for adverse impacts in the following areas: land use, zoning and public policy, socioeconomic conditions, community facilities and services, open space, shadows, historic resources, urban design and visual resources, neighborhood character, natural resources, hazardous materials, compliance with the City's waterfront revitalization program, infrastructure, solid waste and sanitation services, energy, traffic and parking, transit and pedestrians, air quality, noise, construction impacts, and public health. Because the EAS found that there would be an incremental increase of only 75 dwelling units, which is below the 200-unit threshold set forth in the Manual (Chapter 3, 3B-2 of the Manual), it did not conduct any further assessment of socioeconomic conditions and concluded that the small increase in dwelling units would not result in any potentially significant impacts to the socioeconomic conditions of the area. In making these projections, the EAS employed certain assumptions as to where new

[1]"FAR is comprised of total floor area within the building divided by the total area of the lot containing the building. Since residential areas have lower FAR, more lot is required to build larger buildings . . . One way to control the size of a building is to limit its overall volume through FAR limits" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 105 [1997] [citations and internal quotation marks omitted]).

development could reasonably be expected to occur. Recognizing that "generally, for area-wide rezonings that create a range of development opportunities, new development can be expected to occur on selected, rather than on all, sites within a rezoning area," the EAS considered lots of 5,000 square feet or more and excluded sites of schools and churches, buildings with six or more residential units, lots for which there were known developments under construction, and individual landmark buildings or buildings located within a historic district, which were deemed "very unlikely to be redeveloped as a result of the proposed rezoning."

In support of these assumptions, the EAS considered current and past development trends, noting that "[a]pproximately 500 units have been constructed or received building permits in the past five years within the rezoning area. Many of these units are within buildings developed under the R6 Quality Housing program and are generally appropriately-scaled and represent continuing investment in this area. However, a few out-of-scale one-hundred foot tall tower developments have been proposed throughout the neighborhood that are inconsistent with the low-rise, rowhouse neighborhood character. Some of these projects have been redesigned in response to community concern, but a few out-of-scale eight and nine-story buildings have been

built throughout the neighborhood."

The EAS explained that "[t]he projected development sites [were] considered more likely to be developed within the ten-year analysis period (Build Year 2019) because they [were] larger sites built to a low density. Many sites also [had] large surface parking areas. The potential development sites were less likely to be developed within a ten-year period because they [were] not assembled into single ownership, [were] smaller sites, [were] located mid-block and thus [were] more difficult to develop, or [were] located close to entrances and exits to the Brooklyn Queens Expressway and [were] likely to remain in auto-oriented use."

The EAS further explained that "the sites of schools (public and private) and churches that met the development site criteria were built to less than half the permitted FAR under the current zoning designation" and that "it [was] extremely unlikely that the increment of additional FAR permitted under the proposed zoning would induce redevelopment or expansion of these substantial community structures." As to buildings with six or more residential units, the EAS explained that they "[were] likely to be rent-stabilized and difficult to legally demolish due to tenant relocation requirements."

It cannot be said that these assumptions are not rationally based.

> "[W]hile any single developer will seek to develop its property to capacity should it choose to build, that does not mean, when dealing with the rezoning of a wider geographic area, that the entire area will be developed to full capacity. Development to full capacity will obviously not occur, because market forces act as a constraint. This being so, it was rational for the City to conclude that a full build-out of the Theater Subdistrict was constrained by economic forces" (*Matter of Fisher v Giuliani*, 280 AD2d 13, 21-22 [2001]).

Relying on the affidavit of their expert, petitioners contend that the exclusion of lots under 5,000 square feet is irrational because most lots in the rezoning area are less than 2,500 square feet, and instances of new development are occurring on lots of less than 5,000 square feet under the existing zoning. Petitioners contend that if the smaller lots were considered, it would add 89 sites and 142,200 square feet of residential space, totaling 142 residential units, which would raise the total number of new units above the 200 threshold needed for socioeconomic analysis. Petitioners also contend that buildings with six or more residential units were irrationally excluded, that there are nine such sites that, if redeveloped, would add 10,623 square feet of residential space, equivalent to 10 residential units, and that the EAS left out 25 sites of greater than 5,000 square feet, which would result in 114 residences.

These critiques were rebutted by the affidavits of DCP, which further demonstrated that DCP's assumptions were reasonable. DCP's submissions rationally explain that the EAS excluded lots under 5,000 square feet because buildings on those lots are rarely able to take advantage of the full allowable FAR due to Building Code requirements that make new construction financially unfeasible. This opinion is based on a review of New Building and AI Alterations permits issued by DOB since 1998, which showed that on lots of less than 5,000 square feet, 39 of the 46 lots permitted for new construction or major renovation either did not maximize potential development rights or used a mixed-use building density regulation that is no longer available. DCP further explained that the 89 additional sites claimed by petitioners include four double-counted lots, 10 places of worship, and lots located on 5th Avenue, which was rezoned from R6 to R6A, which does not create an increase in allowable building density.

As to buildings with six or more residential units built after 1974, DCP's submissions reinforced the point that these were excluded because they are generally subject to DHCR rent regulation rules and therefore difficult to demolish legally. As to petitioners' claim that the EAS ignored the impact of the area churches' ability to sell their air rights and property, DCP

explained that the amount of unused floor area available to churches decreases under the rezoning, as does a property owner's ability to use development rights derived from church properties.

The dissent believes that DCP's submissions should not have been considered because they improperly supplement the EAS. However, in reviewing the issuance of a negative declaration, a court is obliged to decide whether the agency "made a thorough investigation of the problems involved and reasonably exercised [its] discretion" (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 364 [1986]). To be "thorough," an investigation need not entail "every conceivable environmental impact, mitigating measure or alternative" (*Matter of Neville*, 79 NY2d at 425; *see also Matter of Hells Kitchen Neighborhood Assn. v City of New York*, 81 AD3d 460 [2011], *lv denied*, 16 NY3d 712 [2011]). It is neither arbitrary and capricious nor a violation of environmental laws for a lead agency "to ignore speculative environmental consequences which might arise" (*see Real Estate Bd. of N.Y. v City of New York*, 157 AD2d 361, 364, [1990] [internal quotation marks and citations omitted]). Since the EAS, standing on its own, complied with SEQRA and CEQR, DCP could rely on the supplemental affidavits to explain the analyses and assumptions set forth in the EAS in response to the specific critiques petitioners raised in this proceeding (*see Greenberg v*

City of New York, 2007 NY Misc LEXIS 8579, 18-19 [Sup Ct, NY County, 2007] ["(W)hile the (EAS) must stand on its own, it would be fundamentally unfair if the lead agency could not address factual assertions made by the petitioners and their experts regarding the proposed action in the context of a legal challenge to an EAS."]).

Petitioners also argue that DCP failed to take a hard look at the impact of the commercial zoning changes. The dissent agrees, stating that although the rezoning includes commercial overlays that will permit new businesses, the EAS's discussion of the impact of these changes is conclusory and lacks analysis. However, the EAS explained that the C4-3A zoning district and C2-4 overlay district would conform existing commercial uses and reinforce the commercial nature of the existing corridors. Notably, the blocks rezoned from C4-3 to C4-3A will now have a height limit where none existed before, and the rezoning creates a 10-block section of Fifth Avenue with C4-3A zoning, all of which had previously had a different type of commercial zoning. In addition, the change in zoning from C1-3 to C4-3A will allow for residential uses on the second floors of mixed-use buildings designed for such residential use, since they will now be uses that conform to the zoning. DCP further explained that the C2-4 commercial overlay district extends 100 feet from the avenues, as

opposed to the 150 feet overlay that existed under the prior zoning, thereby reducing the extent of the overlay and providing protection to residential side streets from encroaching commercial development. Based on these observations, the EAS rationally concluded that the zoning changes were not likely to result in significant impacts.

Petitioners also argue that DCP ignored CEQR technical areas such as socioeconomic impacts and neighborhood character. The dissent agrees, finding that although the plan permits "upzoning" (an increase in FAR) for 33 blocks on Third, Fourth and Seventh Avenues, which petitioners claim makes the buildings more attractive for development, there is no analysis of the environmental impact of the change on the socioeconomic conditions or neighborhood character.

However, once the EAS projected an increase of only 75 units, it was not arbitrary or capricious for DCP to conclude that the rezoning would not have any adverse socioeconomic impacts. In any event, the EAS explains that the purpose of the rezoning was "to preserve neighborhood character while allowing for medium density residential growth which conforms to the existing scale and built form of the neighbourhood [sic]" and that the proposed zoning map and text amendments will: "[1] Protect existing row house scale and character on side streets

with contextual zoning districts and appropriate location and depth of commercial overlays; [2] Reinforce the avenues as corridors for mixed retail/residential use; [3] Provide opportunities for housing and development, where appropriate, at a height and scale that is in keeping with the existing context; and [4] Provide incentives for affordable housing with new development." Further, the EAS rationally concluded that no direct residential displacement is expected as a result of the rezoning because there are no specific development sites with residences or any specific development projects associated with the rezoning, and that the rezoning does not permit a new housing type in the area. Rather, it imposes height limits that are in line with the existing size of buildings in the neighborhood (*see Real Estate Bd.*, 157 AD2d at 365). DCP also noted that the rezoning would create new incentives for affordable housing under the City's Inclusionart Housing Program, through modest increases in allowable residential density along two targeted corridors on Fourth and Seventh Avenues.

Further, as set forth in the EAS, the Manual defines neighborhood character as an amalgam of the various elements that give a neighborhood its distinct personality, including land use, urban design, visual resources, historic resources, socioeconomics, traffic and noise. The EAS analyzes these

elements thoroughly. Based on these analyses, in the section related to Neighborhood Character, the EAS rationally concluded that the rezoning would not result in: (1) development that would conflict with existing uses; (2) substantially different building bulk form, size, scale, street patterns, setbacks, streetscape elements or street hierarchy; (3) changes to natural features or a substantial change to a visual feature; (4) substantial changes to historic resources; (5) significant socioeconomic impact; and (6) substantial changes to traffic. Accordingly, the EAS rationally concluded that the rezoning would not have a significant adverse effect on the environment because it was decreasing, rather than increasing, the potential for development by imposing building height limits that did not previously exist.

While the dissent accepts petitioners' argument that Supreme Court based its decision on a mistaken belief that the Inclusionary Housing Program was mandatory, a review of the order and judgment on appeal demonstrates that the court understood that the program provided a developer with a FAR bonus in exchange for providing affordable housing, and that the program was optional. Further, a reading of the entire decision makes clear that the court was not permitting respondents to avoid their SEQRA obligations because they included a voluntary affordable housing program in the project.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Michael D. Stallman, J.), entered May 14, 2010, inter alia, denying the petition to annul respondent Department of City Planning's determination that the proposed rezoning of Sunset Park would not have a significant environmental impact, and dismissing the proceeding brought pursuant to CPLR article 78, should be affirmed, without costs.

All concur except Moskowitz and Abdus-Salaam, JJ. who dissent in an Opinion by Abdus-Salaam, J.

ABDUS-SALAAM, J. (dissenting)

I do not agree with the majority that DCP complied with SEQRA and CEQR. Accordingly, I respectfully dissent, and would annul the determination.

This proceeding challenges the adequacy of the environmental review undertaken by DCP in connection with the rezoning of more than 25 acres in Sunset Park, Brooklyn, and DCP's determination that the plan, which includes the rezoning of 33 blocks from residential to commercial use, would not have a significant environmental impact. Petitioners are the Chinese Staff and Workers' Association, an organization dedicated to improving the lives of low-income members of the Chinese community with offices in Sunset Park, five churches with congregants in Sunset Park, and two residents of the neighborhood.

The rezoning project was required to undergo environmental review pursuant to the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 *et seq*; 6 NYCRR 617.1 *et seq*.) and its City counterpart, the City Environmental Quality Review (CEQR) rules (62 RCNY 5-01 *et seq*.). In accordance with SEQRA/CEQR procedures, DCP, acting on behalf of the City Planning Commission (CPC), was designated as the lead agency and was responsible for determining whether an

Environmental Impact Statement (EIS) was required (6 NYCRR 617.2[u]).

DCP determined that this rezoning should be categorized as a "Type I" action because it involved changes in allowable uses affecting 25 or more acres of the zoning district (6 NYCRR 617.4[b][2]). Projects classified as Type I are presumed likely to result in adverse environmental impacts and may require the preparation of an EIS (6 NYCRR 617.4[a]). However, "while Type I projects are presumed to require an EIS, an EIS is not required when . . ., following the preparation of a comprehensive environmental assessment statement (EAS), the lead agency establishes that the project is not likely to result in significant environmental impacts or that any adverse environmental impacts will not be significant" (*Matter of Hells Kitchen Neighborhood Assn. v City of New York*, 81 AD3d 460, 461-462 [2011], *lv denied* 16 NY3d 712 [2011]; 6 NYCRR 617.7[a][2]).

Here, "although the threshold triggering an EIS is relatively low" (*Matter of Spitzer v Farrell*, 100 NY2d 185, 190 [2003]), DCP declined to prepare an EIS based on the negative declaration made in the EAS. In reviewing this determination, this Court is limited to considering whether DCP "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for [its]

determination" (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 364 [1986] [internal quotation marks and citations omitted]). While respondents argue that petitioners do not understand the "true nature and effect" of the rezoning, which is intended to have no negative environmental impact and to bring non-conforming uses into conformity, the "nature" of the rezoning and the intentions of the lead agency are not determinative in assessing whether the agency complied with SEQRA.

DCP failed to take the requisite "hard look" at the potential impact of the rezoning on the businesses and residents of Sunset Park and to provide a "reasoned elaboration" of the basis for its negative declaration. For example, the challenged rezoning changed the permissible use from residential to commercial for 33 blocks on Third, Fourth and Seventh Avenues. It permits some upzoning (an increase in the floor area ratio [FAR] of the space permitted to be developed) of the avenues. Petitioners point out that this upzoning means that lots that were once unattractive to developers because they contained buildings using most of the allowable FAR are now attractive because the space that can be developed is larger. The rezoning also includes commercial overlays (commercial districts within residential areas) on the avenues. Seventh Avenue, which is currently zoned residential and does not have any commercial

overlay would have a C2-4 overlay. As petitioners observe, while there are many nonconforming uses along Seventh Avenue, most of these uses are small local retail services such as grocery stores and restaurants; the C2-4 commercial overlay will allow for larger businesses and national chains. The EAS noted that this overlay will permit new businesses, but did not explore or elaborate upon the new businesses that might be established, or analyze the effect of bringing these new businesses to Seventh Avenue.

C2-4 commercial overlays are proposed to replace existing C1-3 and C2-3 overlays on Third, Fourth, Fifth, Sixth and Seventh Avenues. The change from C1 to C2 zoning allows for substantially different kinds of business to locate on the avenue, such as a moving storage facility, auto rental and other services with markets beyond the local neighborhood. In addition, several blocks along Fifth Avenue are currently zoned C4-3; the proposed rezoning would change that designation to C4-3A and expand that district by four blocks. Those four blocks are currently zoned residential with a C1-3 overlay that permits local retail; C4-3 will permit businesses serving regional markets.

The EAS's discussion of the effect of the impact of these commercial zoning changes is conclusory and lacks both analysis

of data and any explanation as to the absence of analysis. The EAS merely states:

> "The new overlays mapped on Avenues where none currently exist would bring legal, pre-existing non-conforming commercial uses into conformance and lessen their parking requirements. These changes are unlikely to induce new commercial development and no development sites were identified in these areas.
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> "Some overlays were mapped where the uses are predominantly non-commercial today in order to define a specific Avenue as a commercial corridor."

"Conclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information[,] will not suffice as a reasoned elaboration for [DCP's] determination of environmental significance or nonsignificance" (*Matter of Tonery v Planning Bd. of Town of Hamlin*, 256 AD2d 1097, 1098 [1998] [internal quotation marks and citation omitted]). There is no discussion of the current commercial development, the number of nonconforming commercial businesses, any comparison between the portion of rezoning meant to conform existing non-conforming uses with the portion meant to encourage new commercial development, or the impact of defining certain avenues as commercial corridors. Strikingly, there is no analysis of the environmental impact that rezoning 33 blocks from residential use to commercial use might have on socioeconomic

conditions or neighborhood character.

Similarly, DCP's consideration of the rezoning's impact upon residential units does not constitute a "hard look." The EAS does not undertake a comprehensive survey of all lots susceptible to development -- rather, DCP predicts a development scenario by applying several restrictive criteria to eliminate from consideration, for example, certain lots that, individually or assembled, have an area of under 5,000 square feet. DCP also eliminates from consideration buildings with six or more residential units, reasoning that "[t]hese buildings are likely to be rent-stabilized and difficult to legally demolish due to tenant relocation requirements." Using its restrictive criteria and limited analysis, DCP identified 8 lots that were likely to be developed and 19 that had the potential for redevelopment. After calculating that these lots, if developed, would yield an increase of 75 residential units, DCP then applied what it termed the "threshold" of 200 units or less that is identified in the CEQR Technical Manual, and concluded that based on this threshold, there was no need to analyze the potential socioeconomic effect of the plan or its impact on neighborhood

character.[1]

Petitioners submitted to Supreme Court an expert's affidavit explaining that due to DCP's particularly restrictive exclusion of lots less than 5,000 square feet, the EAS had failed to include in its analysis 89 lots that could be developed, although development trends in Sunset Park showed development occurring on lots of typical size, which is less than 2,500 square feet. In assessing this expert opinion, the court was persuaded by the post hoc explanation provided by the Director of the Environmental Assessment and Review Division of DCP that development on those smaller lots is financially unfeasible.

While as Supreme Court correctly noted, it is not the role of the courts to resolve disagreements between experts, the problem with the court's analysis is that the explanation given by DCP's expert as to this and other matters raised by petitioners was not included in the EAS, but instead was supplied in response to this lawsuit. It is the EAS that must include a reasoned elaboration of the basis for the negative declaration

[1]Petitioners point out that although the 2001 CEQR Technical Manual(TM)that applies here notes that, in small to moderate size projects, residential development of 200 units or less would "typically not result in significant socioeconomic impacts" (CEQR TM 3B-2), this is not described as a threshold. In contrast, the revised 2010 manual refers to this and other factors as thresholds (http://www.nyc.gov/html/oec/html/ceqr/2001ceqrtm.shtml).

(*see Matter of Bauer v County of Tompkins*, 57 AD3d 1151, 1153 [2008]).

> "*Before* issuing a declaration of nonsignificance, the lead agency must take a hard look at the relevant areas of environmental concern. If such is not done, 'there is a danger that the subsequent finding, made after the [environmental assessment form] is reviewed, would merely be a "rubber stamp" or afterthought' (*Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 371)" (*Matter of Tonery*, 256 AD2d at 1098 [emphasis added].
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> "SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making . . . [and] is not mere exhortation" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 679 [1988]).

I disagree with the majority's conclusion that the EAS, standing on its own without benefit of the supplemental submissions, complies with SEQRA and that the supplemental affidavits submitted by DCP merely serve to rebut specific charges by petitioners in this proceeding. Although (as Supreme Court noted) the EAS consists of 49 pages that discuss the various required considerations, such as land use, neighborhood character, and socioeconomic impact (or explain why a discussion is not necessary), the EAS essentially merely lists the criteria; it does not set forth a reasoned elaboration of DCP's determinations and fundamental assumptions. Thus, the

supplemental materials provided in response to this lawsuit do not elaborate on the EAS; they are the first attempts at providing a reasoned elaboration. This does not meet the mandates of SEQRA, which, according to well established precedent, requires the agency to analyze a proposed action, and then set forth its analysis, in the EAS.

Finally, Supreme Court recognized that petitioners had asserted that the rezoning will serve as an incentive to redevelopment and will change the residential area of three-to four-story buildings into six-story buildings, as well as to displace low-income and minority residents of Sunset Park. In addressing this assertion and the explanation in the EAS that the Inclusionary Housing Program will come into play, the court concluded that "[m]aking the creation of affordable housing (through the Inclusory [*sic*] Housing Program) a condition of new development militates in favor of a finding that the presumption [that an EIS was required] has been overcome." However, this conclusion was based on the erroneous premise that affordable housing is required in the rezoning plan. The Inclusionary Housing Program is voluntary, not mandatory. Respondents do not maintain otherwise. In fact, the EAS speaks of an Inclusionary Housing bonus that creates incentives for, but does not require, the development and preservation of affordable housing. While

the majority concludes that the court understood that the program was optional, the court's characterization of the Inclusionary Housing Program as "a condition" of new development suggests otherwise.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2011

CLERK