THE CONTEXTUAL REZONING OF SUNSET PARK, BROOKLYN, AND THE DECISION IN CHINESE STAFF & WORKERS’ ASSOCIATION V. BURDEN: THE BASIC PRINCIPLES GOVERNING LIMITED JUDICIAL REVIEW OF ENVIRONMENTAL CHALLENGES IN NEW YORK ENDURE

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I. INTRODUCTION

Just over twenty-five years after its decision in Chinese Staff & Workers Association v. City of New York (“Chinese Staff I”), the New York State Court of Appeals had occasion to consider another environmental challenge by the same group, to the 2009 contextual rezoning of Sunset Park, Brooklyn, in Chinese Staff & Workers’ Association v. Burden (“Chinese Staff II”). The two cases ended in different results, but they were unified by the same underlying principles of environmental review.

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The author would like to thank Leonard Koerner, the Chief Assistant Corporation Counsel and the Chief of the Appeals Division, who supervised Chinese Staff II, and Pamela Seider Dolgow, Senior Counsel in the Appeals Division, who litigated Chinese Staff I, for their valuable input and assistance, as well as her Chinese Staff II colleagues in the Environmental Law Division, Carrie Noteboom and Haley Stein, and also David Karnovsky, Counsel for the New York City Department of City Planning, and Wesley O'Brien, Counsel for the Mayor's Office of Environmental Coordination. Finally, she would also like to thank her daughter Tasha for the many ways in which she has helped her mother rise to the challenge of staying an effective appellate litigator while performing her most important role as a mother.

This article will review the background of the litigation and the\textit{Chinese Staff II} decision, why the result differed from \textit{Chinese Staff I}, and why certain belated novel issues and twists interjected into the \textit{Chinese Staff II} Court of Appeals litigation necessarily failed. The primary issue presented in both cases was whether the lead agency had comported with state and city environmental laws—\textit{i.e.}, the State Environmental Quality Review Act (“SEQRA”), ECL sections 8-0101 \textit{et seq.}, and its city counterpart, City Environmental Quality Review Rules of the City of New York (“CEQR”), 62 RCNY sections 5-01 \textit{et seq.}—as to the respective actions at issue, a luxury high rise development on a vacant lot in Chinatown, Manhattan (\textit{Chinese Staff I}), and a rezoning of a 128-block area of Sunset Park, Brooklyn (\textit{Chinese Staff II}).\footnote{\textit{Chinese Staff I}, 19 N.Y.3d at 923, 973 N.E.2d at 1279, 950 N.Y.S.2d at 505; \textit{Chinese Staff II}, 68 N.Y.2d at 362–63, 502 N.E.2d at 177–78, 509 N.Y.S.2d at 500–01} The eventual focus by the petitioners in both cases was the factor of alleged secondary displacement, as part of the analysis of the potential socioeconomic impacts and effect on neighborhood character.\footnote{\textit{Chinese Staff I}, 68 N.Y.2d at 363, 502 N.E.2d at 178, 509 N.Y.S.2d at 501; Petitioners-Appellants’ Brief at 30–32, \textit{Chinese Staff II}, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (No. 111575/09) [hereinafter Petitioners-Appellants’ Brief].} Below, we first examine the 2009 contextual rezoning and litigation in \textit{Chinese Staff II}, leading to the trial court and appellate division decisions.\footnote{See \textit{Chinese Staff I}, 68 N.Y.2d at 363, 502 N.E.2d at 178, 509 N.Y.S.2d at 501; Petitioners-Appellants’ Brief at 30–32, \textit{Chinese Staff II}, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (No. 111575/09) [hereinafter Petitioners-Appellants’ Brief].} Thereafter, we briefly examine the earlier \textit{Chinese Staff I} decision.\footnote{See discussion \textit{infra} Parts II–V.} Finally, we review the Court of Appeals’ \textit{Chinese Staff II} decision, including its implicit rejection of several novel challenges, and the reasons why the \textit{Chinese Staff II} unanimous affirmance followed from the Court of Appeals’ jurisprudence over the last quarter century after its reversal in \textit{Chinese Staff I}.\footnote{See discussion \textit{infra} Part VI.} In 2009, the New York City Council\footnote{This article focuses on the key points raised by the petitioners and their \textit{amici} in the New York Court of Appeals. See discussion \textit{infra} Parts F.1–3. Other aspects of the case—including the Rezoning’s Inclusionary Housing program feature, and details of the specific changes in the commercial and residential Rezoning—were developed at length in the appellate briefs, but a detailed examination is beyond the scope of this article.} approved changes to the City

\textbf{II. BACKGROUND OF THE CHINESE STAFF II LITIGATION: THE 2009 CONTEXTUAL REZONING OF SUNSET PARK, BROOKLYN}

In 2009, the New York City Council\footnote{The City Council is New York City’s legislative body. \textit{N.Y. CITY CHARTER} § 21 (2009), available at http://www.nyc.gov/html/charter/downloads/pdf/citycharter2009.pdf. There are fifty-one elected members; one from each council district. Id. § 22. \textit{About the City Council},} approved changes to the City...
of New York’s zoning map\(^9\) to rezone a 128-block area of the Sunset Park neighborhood in Brooklyn, which is predominantly residential, with some commercial corridors along Fourth, Fifth, Seventh, and Eighth Avenues (hereinafter referred to as “the Rezoning”).\(^{10}\) The Rezoning was a contextual zoning plan that was developed through a participatory public process in close consultation with Brooklyn Community Board 7,\(^{11}\) and other community participants, following a thorough study by the New York City Department of City Planning (“DCP”).\(^{12}\)

The Rezoning plan addressed two pressing needs identified by the community: protection of the existing low- and mid-rise built character of the area and creation of incentives for much-needed affordable housing.\(^{13}\) Those needs were addressed by: (1) applying contextual zoning districts and appropriate commercial overlay districts to ensure that new development was consistent with the neighborhoods’ building patterns; and (2) applying the City’s Inclusionary Housing Program to create opportunities and incentives for affordable housing along Fourth and Seventh Avenues, which are areas that have good access to public

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\(^{9}\) See Affidavit of Purnima Kapur in Support of the City’s Answer and in Opposition to the Amended Petition at A205, *Chinese Staff II*, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (No. 111575/09) [hereinafter Kapur Affidavit]. The New York City Zoning Resolution (“ZR”) consists of both narrative text and zoning maps which divide the geographic areas of the City into major classifications of the type of area, e.g., residential, commercial, or manufacturing, and the accompanying permissible uses and other height and bulk limitations as indicated by a number. See generally *Zoning Text*, N.Y. DEPARTMENT CITY PLANNING, http://www.nyc.gov/html/dcp/html/zone/zh_abouttext.shtml (last visited Mar. 21, 2013) (providing an overview and introduction to the Zoning Resolution along with a link to the online version).

\(^{10}\) Petitioners-Appellants’ Brief, *supra* note 4, at 4–7.

\(^{11}\) Kapur Affidavit, *supra* note 9, at A205. In the City of New York, there are fifty-nine Community Boards, which are established pursuant to the New York City Charter. N.Y. CITY CHARTER §§ 2800–01. They have an advisory role and must be consulted on the placement of most municipal facilities in the community. *Id.* Applications for a change in or variance from the zoning resolution must come before the Board for review, and the Board’s position is considered in the final determination. *See, e.g.*, Cmty. Bd. 7 of Manhattan v. Schaffer, 84 N.Y.2d 148, 152, 639 N.E.2d 1, 2, 615 N.Y.S.2d 644, 645 (1994) (charging the community board with studying proposed land use changes in the district and making recommendations).

\(^{12}\) Under the New York City Charter, the DCP is responsible for, among other things, advising and assisting the Mayor, Borough Presidents, and the City Council “[w]ith regard to the physical planning and public improvement aspects of all matters related to the development of the city.” N.Y. CITY CHARTER § 191(b)(1). DCP also provides staff assistance to the City Planning Commission (“CPC”), a thirteen-person body with members appointed by the Mayor, each Borough President, and the Public Advocate, that is responsible for planning, relating to the orderly growth, improvement, and future development of the city. *Id.* §§ 191(b)(2), 192(a), (d).

\(^{13}\) Kapur Affidavit, *supra* note 9, at A205–06.
transportation and could support increased development.\textsuperscript{14}

Contextual zoning is a planning tool that has been employed in the City and elsewhere in order to meet the needs of addressing outmoded zoning which no longer fits the existing land uses.\textsuperscript{15} A contextual zoning or rezoning “ensures development of buildings with densities and forms that are consistent with existing land uses through the mapping of ‘contextual districts,’ which regulate total floor area, building height, and streetwall height and alignment.”\textsuperscript{16}

The concept of contextual rezonings has been utilized throughout New York City,\textsuperscript{17} and the country,\textsuperscript{18} in recent years. Such rezonings

\textsuperscript{14} Id.; see Environmental Assessment Statement at A485, Chinese Staff II, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (No. 111575/09) [hereinafter EAS]. The relevant facts surrounding the Rezoning were detailed in documents in the Record on Appeal in Chinese Staff II, especially the Environmental Assessment Statement, see EAS, supra, at A467–58, and in two affidavits submitted by the City respondents in the motion court: (1) by Purnima Kapur, Director of DCP’s Brooklyn Office, see Kapur Affidavit, supra note 9, at A201–19, and (2) by Robert Dobruskin, Director of DCP’s Environmental Assessment and Review Division, see Affidavit of Robert Dobruskin in Support of the City’s Answer and in Opposition to the Petition at A220–62, Chinese Staff II, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012) (No. 111575/09) [hereinafter Dobruskin Affidavit].

\textsuperscript{15} See generally PLANNING CTRL., MUN. ART SOC’Y OF N.Y., ZONING GUIDE 10 (2004), available at http://myciti.mas.org/docs/citi_zoning_guide_8_04.pdf (“Contextual zoning is zoning that regulates the height and bulk of new buildings, their setback from the street line, and their width along the street frontage, to conform with the character of the neighborhood.”).

\textsuperscript{16} Kapur Affidavit, supra note 9, at A209.

\textsuperscript{17} As described on DCP’s website:

Since 1989, R3, R4 and R5 districts with an A, B, D, X or 1 suffix have been created or revised as contextual districts to prevent the out-of-scale development that can blur distinctions among resident districts and alter the character of the city’s traditional low-rise neighborhoods. The regulations for these new and revised districts aim to preserve neighborhood scale by reflecting bulk distinctions, building configurations and established lot sizes of many residential neighborhoods.

A maximum height limit is established for every building in an R3, R4 and R5 district, including the traditional low-rise rowhouse districts (R4B and R5B). The familiar roof line of districts characterized by pitched roofs (R2X, R3, R4-1 and R4A) is encouraged by establishing a maximum perimeter wall height, above which pitched roofs or setbacks are required.


\textsuperscript{18} For example, in August 2012, the City of Philadelphia streamlined its zoning code and expressly incorporated principles of contextual zoning. The New Code: Big Changes for Zoning in Philadelphia, JDSUPRA (Aug. 17, 2012), http://www.jdsupra.com/legalnews/the-
respond to “community concerns about new construction that differs dramatically from the prevailing built character of the neighborhood, but which is allowed by the existing, often out-of-date zoning.” Contextual rezonings “creat[e] predictability in the height and bulk of new buildings” through height limits and other regulations.

In this case, the contextual rezoning involved approximately “128 blocks of the Sunset Park neighborhood in Brooklyn Community District 7 . . . generally bounded by Third Avenue, 28th Street, 63rd Street, and 8th Avenue.” Sunset Park is a “predominantly residential neighborhood,” and “[m]ost blocks in the area consist of three- and four-story row houses and apartment buildings, mostly on the side streets, while some buildings rise to five or six stories and are predominantly located along the avenues.” These buildings “often include ground floor commercial uses” when “located along the commercial corridors of Fourth, Fifth, Seventh and Eighth Avenues.” Additionally, “[t]here are also small areas of detached and semi-detached housing on the southwest corner of the rezoning area” and “[c]ommunity facilities such as schools and churches are common.”

The history of the Sunset Park neighborhood reveals a wealth of diverse residents and waves of immigrants over time, including Irish, Polish, Norwegian, Finnish, and Italian, to, more recently, Latino/Hispanic and Asian, as well as Muslim. According to one source, about half of Sunset Park’s one hundred thousand residents are Hispanic, including Dominicans, Ecuadorians, Nicaraguans, Puerto Ricans, and Mexicans. Additionally, the Asian population,
“including many from Canton, China and Hong Kong, as well as Malaysia and other nations, represent over two-fifths of Sunset Park’s community . . . [with a] thriving ‘Chinatown’ . . . located on Eighth Avenue in Sunset Park.”

In the years prior to 2009:

Sunset Park’s unique, low-rise neighborhood character had been increasingly threatened with development pressures that would have resulted in construction of buildings that were out of scale with the neighborhood character . . . .

Although the proposed developments were inconsistent with Sunset Park’s neighborhood character, they were permitted under the area’s then-existing zoning laws.

Such laws included outdated zoning districts that had been in place over a majority of the area since the current New York City Zoning Resolution was adopted in 1961:

In particular, the original 1961 zoning districts did not place street wall (the portion of a building facing the street) or overall building height limits on development, allowing construction of tall, slender buildings surrounded by open space . . . .
By mapping contextual zoning districts, in the majority of the rezoned area, the Rezoning resulted in a “downzoning”—that is, the rezoning of a tract of land to a lesser density with a lower floor area ratio (“FAR”), meaning less development is allowed in those areas under the Rezoning than was allowed under the old zoning. Prior to the Rezoning, the entire area was zoned R6 except for a small portion of Fifth Avenue that was zoned with a commercial C4-3 district; under the Rezoning, over sixty-five percent of the area was rezoned from R6 to R6B (which decreased maximum permitted residential density by eighteen percent). Thus, because one of the main goals of the Rezoning was to eliminate the possibility of out-of-scale building in the area, the Rezoning eliminated the previously available Height Factor option and placed height and bulk limits on buildings, replacing the R6 district with R6A, R6B, and R7A zoning districts.

In addition, as part of the contextual zoning, two limited areas along Fourth and Seventh Avenues were rezoned to R7A, which provided a modest increase in allowable residential density (an upzoning), but also removed the previous incentive to develop to even greater densities in buildings with community facilities. Most of the potential increases in residential density along Fourth and Seventh Avenues are only available through application of an Inclusionary Housing Program bonus, which allows developers to utilize the increased density by providing permanently affordable

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31 FAR is a means of determining the total zoning floor area permitted to be built on a zoning lot: “[e]ach zoning district has an FAR control which, when multiplied by the lot area of the zoning lot, produces the maximum amount of floor area allowable in a building on the zoning lot.” See N.Y.C. DEPT CITY PLANNING, ZONING HANDBOOK 105–06 (2011) [hereinafter 2011 ZONING HANDBOOK]. For example, if a lot of 50 feet by 100 feet (a 5000 square foot lot) has an FAR of 5, then 5 FAR x 5000 square feet, or 25,000 square feet of zoning floor area, can be constructed on that lot. The higher the FAR, the greater the bulk allowed. See id. at 106.

32 EAS, supra note 14, at A478 fig.2, A480 fig.3; Kapur Affidavit, supra note 9, at A207.

33 In relevant part, the prior R6 zoning provided developers with a non-contextual option for building construction known as the “Height Factor” option, which did not impose height limits and encourages development of tall buildings surrounded by large amounts of open space. Therefore, it allowed for development that was out-of-scale with Sunset Park’s prevailing low- and mid-rise neighborhood character. See Kapur Affidavit, supra note 9, at A209. Additionally, as described on DCP’s website, in the 1980s, a Quality Housing Program was created to promote high-quality housing harmonious with its neighbors and constituted a response to concerns that “height factor” buildings were often out-of-scale with the surrounding neighborhood. All of the Quality Housing Program rules and regulations are mandatory in contextual R6 through R10 districts, and, since the 1980s, hundreds of areas throughout the city have been rezoned as contextual districts. See Zoning Districts, N.Y.C. DEPARTMENT CITY PLANNING, http://www.nyc.gov/html/dcp/html/zone/zh_resdistricts.shtml (last visited Mar. 21, 2013).

34 See EAS, supra note 14, at A483–84; Kapur Affidavit, supra note 9, at A209.
housing as a condition of the new development.³⁵

Finally, the Rezoning also adjusted the boundaries of the commercial zoning overlay zoning districts in Sunset Park in order to conform the commercial zoning to preexisting uses and better reflect the existing commercial character of the rezoned blocks.³⁶ In order to preclude encroachment of commercial uses on the residential side streets, the size of the commercial overlay districts were reduced from one hundred fifty feet in depth under the old zoning to one hundred feet under the new zoning.³⁷

III. THE SEQRA/CEQR ENVIRONMENTAL REVIEW RESULTING IN A NEGATIVE DECLARATION WITH RESPECT TO THE REZONING

Because the New York City Department of City Planning (“DCP”), acting on behalf of the City Planning Commission (“CPC”), as the lead agency for environmental review purposes, determined that the Rezoning, which involved a change in allowable use for over twenty-five acres, qualified as a Type I action,³⁸ it prepared a thorough

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³⁵ According to the 2008 New York City Housing and Vacancy Survey, the City housing supply shortage warrants a “housing emergency.” The City thus established a voluntary Inclusionary Housing Program to spur the provision of affordable housing. See Inclusionary Housing, N.Y.C. DEPARTMENT OF CITY PLANNING, http://nyc.gov/html/dcp/html/inclusionary_housing/index.shtml (last visited Mar. 21, 2013). Consistent with other recent rezonings throughout the City, the Sunset Park Rezoning made a floor area bonus available for developments in specified areas if they provided affordable housing, while also requiring that such developments comply with the height and setback regulations of the underlying contextual district. Kapur Affidavit, supra note 9, at A211. For this Rezoning, Fourth and Seventh Avenues were identified as areas appropriate to permit modest increases in residential density because those wide streets provide good transit access and are appropriate for the larger apartment buildings that may be built with the Inclusionary Housing Program. See id. at A209–11; EAS, supra note 14, at A483–84. See generally Kalima Rose et al., Increasing Housing Opportunity in New York City: The Case for Inclusionary Zoning 6, 9 (2004), available at http://prattcenter.net/sites/default/files/users/pdf/Inclusionary%20Zoning%20Full%20Report.pdf (arguing that inclusionary zoning, which “set[s] aside affordable units in new housing developments,” will allow benefits of the proposed planning changes to be “fairly shared” among residents in the relevant communities).

³⁶ See Kapur Affidavit, supra note 9, at A212. Commercial overlay districts are C1 or C2 districts usually mapped within residential neighborhoods to serve local retail needs. See 2011 ZONING HANDBOOK, supra note 31, at 102.

³⁷ See Kapur Affidavit, supra note 9, at A212.

³⁸ See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(b)(2)(i) (2013). A Type I action “carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS.” Id. § 617.4(a)(1); N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2013); see also N.Y.C., N.Y., RULES & REGULATIONS, tit. 62, § 5-01 (2013) (providing how to determine a “lead agency”). However, an EIS is not necessary where the lead agency establishes that the action is not likely to result in significant environmental impacts, or that any adverse environmental impacts will not be significant. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(b)(3)(ii); N.Y.C., N.Y., RULES, tit. 62, § 6-15(a) (2013).
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Environmental Assessment Statement (“EAS”)\textsuperscript{39} to identify and consider the areas in which the proposed zoning changes might create significant environmental impacts.\textsuperscript{40} In so doing, it utilized guidelines set forth in the City’s CEQR Technical Manual.\textsuperscript{41}

Based on the analysis contained in the EAS,\textsuperscript{42} which was issued on April 17, 2009, DCP determined that the Rezoning did not have the potential to result in significant adverse impacts on the environment and, therefore issued a negative declaration, because preparation of a more in-depth Environmental Impact Statement (“EIS”) was not necessary.\textsuperscript{43}

As part of the analysis in evaluating the potential impacts that might occur as a result of the Rezoning, DCP developed a “reasonable worst-case development scenario” (“RWCDS”), set forth in the EAS.\textsuperscript{44} The term RWCDS is “used to describe the projection of the amount and type of development,” which is calculated for both “the ‘future with action condition’ and the ‘future without action

\textsuperscript{39} N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(a) (2013); N.Y.C., N.Y., RULES, tit. 62, §§ 5-04(c)(3), 5-05, 6-02 (2013).
\textsuperscript{40} COMP. CODES R. & REGS. tit. 6, § 617.6(a).

\textsuperscript{42} Part I of the EAS, titled “Project Description” discussed the project’s background, existing zoning, proposed zoning changes, the Inclusionary Housing Program, the purpose of and need for the proposed action, proposed development and likely effects, site descriptions and potential development sites, with and without action conditions, and potential development sites. EAS, supra note 14, at A476. Part II of the EAS, titled “Potential Impacts of the Proposed Actions,” discussed potential impacts, or explained why a further discussion of such impacts was unnecessary, for the categories of land use, zoning, and public policy, socioeconomic conditions, community facilities and services, open space, shadows, historic resources, urban design/visual resources, neighborhood character, natural resources, hazardous materials, waterfront revitalization program, infrastructure, solid waste and sanitation services, energy, traffic and parking, transit and pedestrians, air quality, noise, and construction impacts, the range of factors that may be subject to analyses depending on the project, as set forth in Chapter Three of the 2001 CEQR Technical Manual. See id. at A502.

\textsuperscript{43} See N.Y.C., N.Y., RULES, tit. 62, § 6-07(b)(1) (2013); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.2(y), 617.7(a)(2), 617.7(b) (2013).
\textsuperscript{44} EAS, supra note 13, at A485.
condition,” i.e., projected future development both with and without the Rezoning.”45 The increment between the future no-action condition and the future with action condition represents the actual measurable effect of a proposed action.46 Because SEQRA is concerned with the potential impacts that may be attributable to a proposed action, the EAS focused its analysis on the potential impacts of this incremental development.47

Thus, the EAS explained that “[g]enerally, for area-wide rezonings that create a . . . range of development opportunities, new development [is] . . . expected to occur on selected, rather than . . . all, sites within a rezoning area.”48 Accordingly, in estimating the RWCDS, DCP used reasonable build-out assumptions49 and the methodologies set forth in the 2001 CEQR Technical Manual, which identified “the amount and location of projected and potential development.”50

Based on this evaluation of sites suitable for new construction, DCP identified eight lots that met the criteria for inclusion as “projected” development sites, which were considered more likely to be developed within the ten-year analysis period because they are larger sites built to a low density and many also have large surface parking areas.51 Using the build out assumptions described in the EAS, for the future “No-Action” alternative—i.e., the future

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45 Dobruskin Affidavit, supra note 14, at A255, ¶ 9.
47 See EAS, supra note 14, at A485.
48 See id.
49 See infra text accompanying notes 157–62.
50 See Dobruskin Affidavit, supra note 14, at A225–26. These included examining known development proposals, current market demands, past development trends and criteria for determining “soft sites,” i.e., sites where development can reasonably be expected to occur. See 2001 CEQR Technical Manual, supra note 41, at 2-6; EAS, supra note 14, at A486. In addition to those criteria, DCP also considered the specific characteristics of the Rezoning area and its development trends to exclude buildings from the development scenario that were, in DCP’s expert opinion, unlikely to be redeveloped as a result of the Rezoning. These sites included:

the sites of schools (public and private) and churches; [b]uildings with six or more residential units [which] are likely to be rent-stabilized and difficult to legally demolish due to tenant relocation requirements; [l]ots for which there [were] known developments already under construction; [and] [i]ndividual landmark buildings or buildings located within a historic district.

EAS, supra note 14, at A486; Dobruskin Affidavit, supra note 14, at A227.
51 See EAS, supra note 14, at A486, A487 fig.4.
development which would occur without the Rezoning—DCP predicted that, without the Rezoning, the eight projected development sites would be developed with 236 housing units and 82,885 square feet of non-residential space. For the future With-Action alternative— i.e., the future conditions with the Rezoning—DCP predicted that a total of 311 new dwelling units and 65,431 square feet of non-residential space could be expected to be developed on the 8 projected development sites. Up to sixty-four of those 311 dwelling units could be expected to be built as affordable housing.

Thus, comparing the expected future development both with and without the Rezoning, DCP found that the Rezoning was expected to result in a net increase of seventy-five total residential units (311 vs. 236), up to sixty-four of which would be affordable, and a net decrease of 17,454 square feet of non-residential space, as compared to the future without the Rezoning.

Following its examination of all the relevant factors, DCP issued a Negative Declaration on April 20, 2009, which explained DCP’s determination of no significant impact on the environment from the Rezoning. After compliance with City’s the Uniform Land Use Review Procedure (“ULURP”), the CPC proposed the relevant zoning map and text amendments. Following referral and public hearings, on May 20, 2009, Community Board 7 voted overwhelmingly (thirty-four for, zero against, one abstention) to approve the application, with certain conditions, as did the Brooklyn Borough President.

After public hearings before the CPC, the City Council’s Subcommittee on Zoning and Franchises, and the City Council’s

52 EAS, supra note 14, at A488; Dobruskin Affidavit, supra note 14, at A228–29.
53 EAS, supra note 14, at A488; Dobruskin Affidavit, supra note 14, at A229.
54 EAS, supra note 14, at A489; Dobruskin Affidavit, supra note 14, at A229.
55 Dobruskin Affidavit, supra note 14, at A229.
56 Kapur Affidavit, supra note 9, at A218.
57 The City’s ULURP procedures are set forth in the New York City Charter. N.Y. CITY CHARTER §§ 197-c, 197-d (2009).
59 See Community Board Public Hearing at A676, Chinese Staff II, 19 N.Y.3d 922, 973 N.E. 1277, 950 N.Y.S.2d 503 (No. 11575/09); Kapur Affidavit, supra note 9, at A216. In New York City, the Borough President appoints the members of community boards for two-year terms, reviews and makes recommendations on ULURP applications, maintains planning and budget offices, administers training to community board members and serves as chairperson of the Borough Board and Borough Service Cabinet. See N.Y. CITY CHARTER §§ 81–85.
Land Use Committee, the New York City Council approved the CPC’s Resolutions, with subsequent referral to the Mayor.

IV. THE ARTICLE 78 PROCEEDING CHALLENGING THE ENVIRONMENTAL REVIEW

In August of 2009, petitioners commenced an Article 78 proceeding, in which they alleged that respondents failed to take a “hard look” at various environmental impacts of the zoning changes and thus violated SEQRA/CEQR. Among other things, they specifically contended that the Rezoning would “allow[] more opportunities for market-rate development—thereby increasing rental prices and accelerating displacement of low-income tenants.” As relief, they sought an order nullifying the EAS and ordering the City to prepare an EIS.

Petitioners submitted a supporting affidavit from Dr. Tom Angotti, Professor of Urban Affairs and Planning at Hunter College. Therein, he disagreed with the methodologies employed by DCP in the EAS. He contended that DCP’s analysis of the development potential was inadequate, including inadequate consideration of the potential impact on socioeconomic conditions and neighborhood character. Among other alleged deficiencies, he pointed to the failure to consider lots smaller than five thousand square feet as targets for development and he also claimed that there were many missed development targets that met the five

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62 Petitioners-Appellants’ Brief, supra note 4, at 12.
63 Verified Petition at ¶¶ 37–39, Chinese Staff II, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012) [hereinafter Chinese Staff II Verified Petition]. The named petitioners were the Chinese Staff & Workers’ Association, the Church of God of Brooklyn, Fourth Avenue United Methodist Church, Iglesia Cristiana Luz Del Mundo, Inc., Iglesia Pentecostal Fuente Divina, Iglesia Pentecostal de Jesucristo fe Triunfante, Hugo Paniagua, and Johnny Trelles. See Petitioners-Appellants’ Brief, supra note 4. The named respondents were Amanda M. Burden, as Director of the DCP, DCP, the New York City Department of Buildings, and the New York City Council. Id.
64 Chinese Staff II Verified Petition, supra note 63, at ¶ 22.
65 Id. at ¶ 1.
67 Id. at A102.
68 Id.
thousand square foot criteria.\(^{69}\)

The affirmation of respondents' attorney sought dismissal,\(^{70}\) and submitted the entire administrative record, which consisted of twenty-seven exhibits,\(^{71}\) including the EAS, and affidavits from Purnima Kapur, the Director of DCP's Brooklyn Office, and from Robert Dobruskin, DCP's Director of the Environmental Assessment and Review Division.\(^{72}\) Respondents detailed how, rather than creating a major upzoning to facilitate new development, the Rezoning preserved the neighborhood character of Sunset Park by imposing contextual zoning districts that regulate building heights and setbacks and reduce the development potential of property in the vast majority of the Rezoning area.\(^{73}\) At the same time, the Rezoning recognized the need for affordable housing in the neighborhood by applying the City's Inclusionary Housing Program to two Avenue corridors that could support an associated modest increase in allowable development.\(^{74}\)

Furthermore, the City respondents demonstrated how, using accepted planning methodologies largely set forth in the 2001 CEQR Technical Manual, DCP carefully and thoroughly evaluated the potential development associated with the Rezoning and properly determined that it was not of a size or character that could be expected to result in significant adverse impacts to the environment, including upon socioeconomic conditions and neighborhood character.\(^{75}\) In particular, the affidavit of the Director of DCP's Environmental Assessment and Review Division, Robert Dobruskin, explained the analyses and assumptions set forth in the EAS in response to the specific critiques of the petitioners that had been raised in litigation,\(^{76}\) and did not simply provide post hoc

\(^{69}\) Id.


\(^{71}\) Id. at ¶¶ 6–32.


\(^{73}\) See Kapur Affidavit, supra note 9, at A225–26.

\(^{74}\) Id. at A225.

\(^{75}\) See id. at A254–61.

\(^{76}\) See id. at A254. For example, petitioners' primary example of the alleged problem with the RWCDs concerned the City's soft site analysis, contending that the EAS was required to include a detailed explanation of why DCP did not consider lots under 5000 square feet to be "developable sites." Angotti Affidavit, supra note 66, at A106. However, as explained in the Dobruskin Affidavit, DCP chose this size threshold based on the agency's extensive experience and institutional knowledge regarding development trends in New York City and
explanations, as petitioners contended.\textsuperscript{77}

V. THE TRIAL COURT AND APPELLATE DIVISION OPINIONS IN CHINESE STAFF II

In an opinion dated April 9, 2010, and entered May 14, 2010, Justice Michael D. Stallman of the Supreme Court, New York County, thoroughly reviewed the administrative record with respect to the Rezoning and the accompanying environmental review.\textsuperscript{78} The court found that the environmental review was legally sufficient, finding that:

[T]he EAS and supporting documentation, including affidavits by those intimately involved in the project, have adequately demonstrated that DCP identified the relevant areas of environmental concern, took a hard look at them, and made a reasonable elaboration of the basis for the negative declaration. Thus, to grant the petition, the court would be impermissibly weighing the desirability of the proposed action, resolving disagreements among experts, and substituting its judgment for that of the agency.\textsuperscript{79}

The court also found that respondents’ explanations of the analysis in the EAS, including the calculation of the number of developable sites, was reasonable and recognized that it was not the role of the court to resolve disagreements among experts or to substitute its judgment for that of the agency.\textsuperscript{80}

In a comprehensive opinion authored by Justice Richard T. Andrias,\textsuperscript{81} on September 8, 2011, the Appellate Division, First
Department, affirmed Judge Stallman’s order in a split three-two decision. The appellate division held that:

[T]he 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.

The appellate division also found “that Supreme Court did not err when it considered DCP’s submissions in opposition, which elaborated on the analysis set forth in the EAS.”

Applying the limited standard of review of the agency’s determination, the appellate division found that:

DCP’s determination that the [R]e zoning will have no significant adverse effect on the environment is the product of an adequate environmental review . . . . 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.

Additionally, the appellate division carefully reviewed and rejected each of petitioners’ specific challenges, including petitioners’ argument that DCP ignored the areas of socioeconomic impacts and neighborhood character, a position agreed with by the dissent.

In response to the dissent, the appellate division recognized that “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.” The appellate division then held that:

[T]he EAS rationally concluded that no direct residential displacement is expected as a result of the [R]e zoning

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82 See Chinese Staff 1st Dep’t, 88 A.D.3d at 426, 932 N.Y.S.2d at 1.
83 Id. at 428, 932 N.Y.S.2d at 2.
84 Id. at 428, 932 N.Y.S.2d at 2–3.
85 Id. at 429–30, 932 N.Y.S.2d at 3 (citations omitted).
86 Id. at 434, 932 N.Y.S.2d at 7.
87 Id.
because there are no specific development sites with residences or any specific development projects associated with the [R]ezoning, and that the [R]ezoning 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 (citation omitted). DCP also noted that the [R]ezoning would create new incentives for affordable housing under the City’s Inclusionary Housing Program, through modest increases in allowable residential density along two targeted corridors on Fourth and Seventh Avenues.88

Accordingly, the appellate division held that “the EAS rationally concluded that the zoning changes were not likely to result in significant impacts.”89

The dissenting opinion would have annulled DCP’s determination.90 The dissent opined that “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.”91 While purporting to recognize the limited standard of review and requisite deference to agency expert technical assessments, the dissent criticized what it characterized as “restrictive” exclusions (despite the standard use of screening methodologies in environmental review),92 and also characterized the submissions of the DCP affidavits, which provided responses to the litigation challenges, as the “first attempts at providing a reasoned elaboration.”93

Based on the two-justice dissenting opinion, petitioners took an appeal as of right to the New York State Court of Appeals.94

VI. A BRIEF REVIEW OF THE CHINESE STAFF I DECISION AND THE COURT OF APPEALS’ SUBSEQUENT JURISPRUDENCE

Before turning to the details of the arguments in the Court of Appeals in Chinese Staff II, a brief review of the Chinese Staff I
decision sheds light on the primary challenges raised in Chinese Staff II. As a precursor, in May 1986, in Jackson v. New York State Urban Development Corp., the Court of Appeals rendered a seminal decision upholding the environmental review done for the redevelopment of Times Square against a SEQRA challenge. Noting that SEQRA itself “contain[ed] no provision regarding judicial review,” it held that the Court “must be guided by standards applicable to administrative proceedings generally,” under CPLR section 7803(3). Thus, after determining if agency procedures were lawful, the court adopted the standard of reviewing the record to “determine whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination (citations omitted).”

About six months later, in Chinese Staff I, the Court of Appeals considered the adequacy of environmental review “of the proposed construction of . . . a high-rise luxury condominium, on a vacant lot in the Chinatown section of [Manhattan].” Upon review of the statutory CEQR definition of “physical condition[,]” which included socioeconomic conditions and neighborhood character, the court held that because the environmental analysis did not address these distinct elements, it had to be invalidated. In particular, the court held that, under CEQR, “the potential displacement of local residents and businesses is an effect on population patterns and neighborhood character which must be considered in determining whether the requirement for an EIS is triggered.”

Four years following Chinese Staff I, the Court of Appeals rendered a key decision in Akpan v. Koch, which rejected a challenge to the urban renewal project for the Atlantic Terminal

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96 Id. at 411, 494 N.E.2d at 432, 503 N.Y.S.2d at 301.
97 Id. at 416, 494 N.E.2d at 435, 503 N.Y.S.2d at 304.
98 Id. at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305.
100 The court stated that existing patterns of population concentration, distribution or growth and existing community or neighborhood character are physical conditions such that . . . [CEQR] require[s] an agency to consider the potential long-term secondary displacement of residents and businesses in determining whether a proposed project may have a significant effect on the environment.
Id. at 368, 502 N.E.2d at 181, 509 N.Y.S.2d at 504.
101 Id. at 359–67, 502 N.E.2d at 180, 509 N.Y.S.2d at 503.
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Project.\textsuperscript{103} Later decisions, often involving specific subsidiary issues, included \textit{Neville v. Koch} (1992), \textit{Spitzer v. Farrell} (2003), \textit{Riverkeeper, Inc. v. Planning Board of Southeast} (2007), and \textit{Save the Pine Bush, Inc. v. Common Council of the City of Albany} (2009).\textsuperscript{104}

As the above case law makes clear, the Court of Appeals has largely upheld the environmental reviews as comporting with applicable law and involving reasonable exercises of the agency’s discretion.\textsuperscript{105} While a comprehensive review of these cases is beyond the scope of this article, the cases uniformly recognized the guiding principle that a judicial review of an agency’s SEQRA/CEQR administrative determination, including a negative declaration, is strictly limited.\textsuperscript{106} A court may only review 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.”\textsuperscript{107} In assessing an agency’s compliance with the substantive mandates of SEQRA, the relevant question is whether the agency identified the relevant areas of environmental concern, took a “hard look” at these areas, and made a “reasoned elaboration” of the basis for its determination.\textsuperscript{108}

In \textit{Spitzer v. Farrell}, the court held that “a ‘negative declaration is

\textsuperscript{103} Id. at 565–66, 554 N.E.2d at 54, 555 N.Y.S. at 17.


\textsuperscript{106} See, e.g., \textit{Akpan}, 75 N.Y.2d at 570, 554 N.E.2d at 57, 555 N.Y.S.2d at 20 (discussing the purpose of SEQRA).


\textsuperscript{108} \textit{Jackson}, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305 (citation omitted); \textit{Akpan}, 75 N.Y.2d at 571, 554 N.E.2d at 57, 555 N.Y.S.2d at 20.
properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion.”

Accordingly, the court upheld the New York City Department of Sanitation’s negative declaration for a municipal waste disposal plan, despite petitioners’ various disagreements with the City’s reasoned analysis of the potential for air quality impacts. As summarized in *Spitzer v. Farrell*:

Under SEQRA, an agency is required to prepare an environmental impact statement (EIS) if it determines that a proposed action “may have a significant effect on the environment.” If the agency determines that the environmental impact is not significant, it issues a “negative declaration.”

In making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects. Although the threshold triggering an EIS is relatively low, a “negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion.” Thus, a court’s review of that determination is limited to “whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration of the basis for its determination.’”

The Court of Appeals has also consistently recognized that an agency’s compliance with SEQRA is governed by the rule of reason and not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency’s responsibility. Thus, agencies thus have “considerable

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109 *Spitzer*, 100 N.Y.2d at 190, 791 N.E.2d at 397, 761 N.Y.S.2d at 140 (citation omitted).

latitude in evaluating environmental effects and choosing among alternatives.\textsuperscript{112} The extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals.\textsuperscript{113}

Finally, while judicial review must be genuine, the courts may not review \textit{de novo} the data presented to the agency, for it is not their role 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.\textsuperscript{114} Nothing "requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice."\textsuperscript{115}

\section*{VII. The Primary Issues Framed in the Court of Appeals}

Before examining the primary issues raised in the \textit{Chinese Staff II} appeal in the Court of Appeals, a little procedural background is useful. Initially, the case followed a normal briefing schedule, with petitioners filing their brief on November 21, 2011,\textsuperscript{116} followed by the City respondents’ brief on January 12, 2012,\textsuperscript{117} and petitioners’ reply brief on January 27, 2012.\textsuperscript{118} After this full briefing, however, in February 2012, the Natural Resources Defense Council ("NRDC") and three college professors\textsuperscript{119} filed a motion to participate and

\textsuperscript{112} \textit{Jackson}, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305 (citations omitted).

\textsuperscript{113} \textit{Akpan}, 75 N.Y.2d at 570, 554 N.E.2d at 57, 555 N.Y.S.2d 20 (citation omitted).

\textsuperscript{114} \textit{Id.; see also} Riverkeeper, Inc. v. Planning Bd. of Se., 9 N.Y.3d 219, 232, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007) (explaining that courts may not substitute their judgment for an agency's judgment); Merson v. McNally, 90 N.Y.2d 742, 752, 688 N.E.2d 479, 484, 665 N.Y.S.2d 605, 610 (1997) (explaining that courts may not substitute their judgment for an agency's judgment).


\textsuperscript{116} Petitioners-Appellants' Brief, supra note 4, at 1.

\textsuperscript{117} Brief for the City, \textit{Chinese Staff II}, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012) (No. 111575/09) [hereinafter Brief for the City].


\textsuperscript{119} According to its website, the "NRDC is the nation’s most effective environmental action group, combining the grassroots power of 1.3 million members and online activists with the
proposed brief as *amici* in support of petitioners. Subsequently, the court granted the motion and accepted the proposed brief as filed on March 22, 2012.

While such a filing after full briefing can occur if the *amici* motion is returnable in the court term prior to the scheduled term for argument, it triggers the possibility of another brief by the responsive party. Although not every case will warrant such a responsive brief, in this case, the City respondents chose to file one and did so in early April 2012. Oral argument followed on May 30, 2012.

With respect to the primary legal issues, in their lead brief, petitioners categorically contended that respondents “disregarded the possibility that the [R]ezoning would cause displacement and disruption in Sunset Park.” Petitioners also argued that the EAS “took no look” at the impact of the Rezoning on socioeconomic conditions and neighborhood character, heavily relying on *Chinese Staff I*. Subsequently, the *amici’s* primary claim was that “DCP...”

courtroom clout and expertise of more than 350 lawyers, scientists and other professionals.” *About, Nat’l Resources Def. Council*, http://www.nrdc.org/about/ (last visited Mar. 21, 2013). The three professors were: Peter Marcuse, Professor of Urban Planning; Andrew Scherer, Adjunct Professor; and Elliot Sclar, Professor of Urban Planning. All three professors work in the School of Architecture, Planning and Preservation at Columbia University. *Brief for Chinese Staff & Workers Association as Amici Curiae Supporting Petitioners, Chinese Staff and Workers’ Ass’n v. Burden,* 18 N.Y.3d 935; 967 N.E.2d 684; 944 N.Y.S.2d 460 (No. 111575/09) [hereinafter *Chinese Staff Amici Curiae Brief*].


123 In considering whether to file a responsive brief to an *amicus/amici* brief, several factors may be of relevance, including responding to the introduction of different or new legal arguments that may rest on material outside the record, such as treatises, law reviews, newspaper and other articles. Title 22, section 500.23(a), expressly restricts *amici* from presenting issues not raised before the courts below and requires that the motion for *amicus* relief demonstrate that: (i) the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency; (ii) the *amicus* could identify law or arguments that might otherwise escape the Court’s consideration; or (iii) the proposed *amicus curiae* brief otherwise would be of assistance to the Court. *Id.* § 500.23(a)(4). Given this wide range of factors, generally, the court is amenable to participation by *amicus* and does not seek to unduly restrict them. In a similar fashion, the Appeals Division of the Office of the Corporation Counsel frequently does not oppose timely *amicus* participation, as in this case, where the office consented to the *amicus* motion. A full development of legal issues obviously is a laudable goal.


125 *Petitioners-Appellants’ Brief, supra* note 4, at 3.

126 *Id.* at 30–33, 35, 37–39, 41–43 (emphasis added).
failed to identify or analyze the Rezoning’s potential to accelerate the displacement of lower-income residents and the small businesses that serve the community” and thus violated “SEQRA’s clear commands” and the decision in Chinese Staff I.\footnote{127} They specifically contended that the environmental review overlooked displacement of two populations, the Asian and Hispanic populations.\footnote{128}

However, unlike Chinese Staff I, the EAS in Chinese Staff II expressly addressed the impact of displacement with respect to socioeconomic conditions and neighborhood character, but the EAS found that the impact was minimal such that there was no significant adverse impact.\footnote{129}

In particular, the EAS had included an assessment of the potential socioeconomic impacts of the Rezoning, which was conducted in accordance with the methodologies set forth in the 2001 CEQR Technical Manual, and DCP used an initial screening method to determine whether a more detailed socioeconomic analysis was warranted.\footnote{130} Following a detailed review and analysis, the EAS thus concluded:

The proposed action would not exceed any of the initial thresholds cited in the CEQR Technical Manual. The proposed action is expected to induce a net increase[] of

\footnote{127} Chinese Staff Amici Curiae Brief, supra note 119, at 1, 2. In the amici’s motion in support of their participation, they noted that Mitchell Bernard, Esq., one of the authors of the brief, had “argued in [the Court of Appeals] in 1986 the Chinese Staff & Workers’ Assn decision that informs this appeal.” See Notice of Motion for Leave to File Amici Curiae Brief at 3, Chinese Staff II, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (No. 124).


\footnote{129} 2001 CEQR Technical Manual, supra note 41, at 3B-1, 3B-4; Dobruskin Affidavit, supra note 14, at A250. The “Socioeconomic Conditions” section of the 2001 CEQR Technical Manual is generally concerned with determining whether an action may “directly or indirectly change population, housing stock, or economic activities in an area” to an extent that it would result in a change to land use and population patterns or community character that qualifies as a significant adverse impact. 2001 CEQR Technical Manual, supra note 41, at 3B-1. Accordingly, in the assessment of potential changes in socioeconomic conditions caused by a proposed action, the 2001 CEQR Technical Manual outlined five technical analyses: direct and indirect residential displacement, direct and indirect business displacement, and adverse effects on specific industries. See id. at 3B-4 to 3B-7. If population directly displaced from a neighborhood is considered large enough to change the socioeconomic character of the area, then such displacement could be considered an impact under CEQR. Dobruskin Affidavit, supra note 14, at A251. If, however, the action falls below specified levels set forth in the Manual, no further examination of potential socioeconomic changes is needed to conclude that there will be no potentially significant adverse socioeconomic impacts as a result of the proposed action. See 2001 CEQR Technical Manual, supra note 41, at 3B-2.
seventy-five (75) new residential dwelling units, 18,980 square feet of commercial development and a decrease in community facility square footage which is below the CEQR Technical Manual threshold of 200 residential units and 200,000 square feet of commercial development. Therefore, the proposed action would not result in significant adverse impacts on socioeconomic conditions, and no further assessment is warranted.\textsuperscript{131}

Since none of the screening thresholds were exceeded, DCP reasonably concluded that the Rezoning would not be expected to result in any potentially significant impacts to socioeconomic conditions.

Correspondingly, the City respondents contended that, with respect to neighborhood character,\textsuperscript{132} the EAS reasonably concluded that the Rezoning was expected to complement the scale and density of the existing neighborhood and to support the existing neighborhood character because the Rezoning: (1) applied contextual zoning districts to regulate building height and bulk, (2) conformed the commercial zoning to reflect the preexisting commercial uses in the neighborhood, and (3) reduced allowable densities over the majority of the rezoned area.\textsuperscript{133} Incorporating relevant sections of the EAS, DCP specifically concluded, \textit{inter alia}, that the Rezoning was “compatible with and supportive of [existing]...
land use trends”;

would not result in new construction that would substantially differ from existing uses, density, scale or bulk [present in the neighborhood], and it would not alter existing block forms, street patterns, setbacks, streetscape elements or street hierarchy”;

and did not have the potential to result in significant socioeconomic condition impacts.

In light of the above, although petitioners and the amici had first urged that DCP did not even address the socioeconomic impacts, they ultimately framed their attack somewhat differently—i.e., attacking the use of screening thresholds in environmental analysis of displacement, and arguing, in essence, that the lead agency could not rely on its reasonable planning expert methodologies.

Below, we examine three specific targeted arguments in the Court of Appeals, which petitioners contended violated Chinese Staff I and warranted annulling the negative declaration. First, we briefly examine petitioners’ novel argument that the City’s CEQR Technical Manual, which provides guidance on methodologies used in environmental review, was “promulgated” outside its authority. We then review the core argument that the socioeconomic analysis was infirm because it utilized screening thresholds for displacement, the sole argument joined in by the amici. Finally, we discuss petitioners’ arguments that the affidavits submitted by the City respondents somehow constituted “post hoc” rationalizations.

A. The Use of the City’s CEQR Technical Manual in Environmental Review

Petitioners’ threshold argument, raised only in the Court of Appeals, was that the CEQR Technical Manual was a City
regulation “impermissib[ly] . . . promulgat[ed]” without authority.\textsuperscript{139} However, as respondents detailed in their brief, pursuant to SEQRA and CEQR, which “serve to incorporate the consideration of potentially significant environmental factors into governmental planning, review and decision-making, . . . agencies may adopt their own procedures to implement SEQRA.”\textsuperscript{140}

In particular, pursuant to the authority set forth in Title 6, section 617.14(b) of the N.Y.C.R.R.,\textsuperscript{141} and Executive Order 91,\textsuperscript{142} and following the Court of Appeals’ invalidation of co-lead agency designations,\textsuperscript{143} the \textit{CEQR Technical Manual} was developed as part of the Mayor’s Office of Environmental Coordination (“MOEC”)’s mandate to assist agencies, project sponsors, the public, and other participants in the procedures and substance of the CEQR process, including developing technical guidance and methodologies for environmental review.\textsuperscript{144} The \textit{CEQR Technical Manual} is thus a rule, such as avoiding unfairness to the other party, giving deference to the lower courts, encouraging the proper administration of justice by demanding an end to litigation, and requiring the parties and trial courts to focus the issues before they reach this Court. Bingham v. N.Y.C. Transit Auth., 99 N.Y.2d 355, 359, 786 N.E.2d 28, 30–31, 756 N.Y.S.2d 129, 131–32 (2003). Cf. Telaro v. Telaro, 25 N.Y.2d 433, 439, 255 N.E.2d 158, 160, 306 N.Y.S.2d 920, 924 (1969) (new point will not be considered if it might have been avoided or countered “by factual showings or legal countersteps” had it been raised below). However, where the issue is one of law, the Court of Appeals may consider the issue. Id. at 438–39, 255 N.E.2d at 924.

\textsuperscript{139} See Petitioners-Appellants’ Brief, supra note 4, at 33–39.
\textsuperscript{140} Brief for the City, supra note 117, at 22 (citing N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 2013); N.Y. COMP. R. & REGS. tit. 6, § 617.1(c) (2013)).
\textsuperscript{141} Under Title 6, section 617.14(b), “[i]ndividual agency procedures to implement SEQR must be no less protective of environmental values, public participation and agency and judicial review than the procedures contained in this Part.” N.Y. COMP. R. & REGS. tit. 6, § 617.14(b) (2013).
\textsuperscript{142} “In 1989, amendments to the New York City Charter, adopted by referendum, established the [Mayor’s] Office of Environmental Coordination (OEC) and authorized the City Planning Commission (CPC) to establish procedures for the conduct of environmental review by city agencies where such review is required by law.” CEQR TECHNICAL MANUAL, at 1–2 (2012).
\textsuperscript{144} The first version of the \textit{CEQR Technical Manual} was written in 1993 under a consultant contract managed by . . . [DCP] and [the Department of Environmental Protection (“DEP”)] with guidance from the Mayor’s Office of Environmental Coordination (“MOEC”). In 2001, [the Manual] was thoroughly reviewed and updated by the City’s technical agencies under the supervision of the . . . [MOEC]. 2001 CEQR Technical Manual, supra note 41, at Foreword. The 2009 environmental review in this case was conducted pursuant to the 2001 Manual, as informed by updated planning practices. See Chinese Staff II, 19 N.Y.3d 922, 923, 973 N.E.2d 1277, 1279, 950 N.Y.S.2d 503, 505 (2012). Subsequently, the \textit{CEQR Technical Manual} has been updated several times, following extensive and comprehensive technical review by the City’s technical agencies and coordinated by MOEC. The most recent 2012 version, available online, states: “The updated
citywide guidance document of the CEQR process, developed with input from experts in environmental review issues across various disciplines and City agencies, which is tailored to address the unique environmental review issues and potential impacts associated with actions undertaken within the City.\footnote{See 2 Michael B. Gerrard et al., Environmental Impact Review in New York § 8A.04(1), (3). Notably, the amici agreed that the CEQR Technical Manual is a citywide guidance document, Chinese Staff Amici Curiae Brief, supra note 119, at 18, and not an improperly promulgated rule or regulation, as contended by petitioners, Petitioners-Appellants' Brief, supra note 4, at 19, 34.}{145}

\textbf{B. The Use of a Screening Threshold in Analyzing Socioeconomic Conditions}

Petitioners and their amici vigorously challenged the use of a screening threshold in analyzing potential adverse impact on socioeconomic conditions, including displacement, as “allow[ing] [the] agency to excuse itself from thoroughly analyzing [the] adverse impacts,”\footnote{See Petitioners-Appellants' Brief, supra note 4, at 33–39.}{146} despite the fact that use of screening thresholds are a common planning methodology.\footnote{Brief for the City, supra note 117, at 22.}{147} The amici also argued that the potential for significant impacts could not be determined based on using screening threshold analyses and the guidance provided in the \textit{CEQR Technical Manual}.

\footnote{Chinese Staff Amici Curiae Brief, supra note 119, at 17–20.}{148}

However, the City respondents demonstrated that the screening methodology utilized by DCP in conducting a socioeconomic impact analysis properly and reasonably identified the level below which no significant environmental impacts were reasonably expected to occur.\footnote{See 2 Gerrard et al., supra note 146, § 8A.04(1), (3), (4)(a).}{149} In this regard, thresholds reflect the best judgment of City experts and provide guidelines so as to avoid inconsistent or arbitrary treatment by the various City agencies and provide information to other interested entities and the public.

In relevant part, SEQRA requires that agencies determine whether an action has “the potential [to cause] . . . significant adverse environmental impact[s].”\footnote{N.Y. COMP. R. & REGS. tit. 6, § 617.7(a)(1) (2012).}{150} In order to assist agencies in making this determination, the \textit{CEQR Technical Manual} provides

screening thresholds, or a series of questions, that can be used to assess whether an action is likely to have a significant adverse impact on various aspects of the environment. These screening thresholds do not purport to establish a line between projects with impacts and those without. Rather, the thresholds seek to identify incremental effects of a proposed action below which it can be generally presumed that there would not be significant impacts on particular aspects of the environment; for levels of increment attributable to the proposed action that are above the thresholds, a more detailed analysis is recommended to determine the potential for significant adverse impacts.

Furthermore, the use of screening thresholds comports with other jurisdictions’ use of threshold screening in environmental reviews, as well as federal entities, such as the Surface

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152 Additionally, in defending the negative declaration in Spitzer v. Farrell, the City respondents submitted an affidavit from Angela Licata Misiakiewicz, the Deputy Director of the Office of Environmental Planning and Assessment for the City’s DEP, dated 3/20/2000, which explained:

SEQRA and CEQR technical analyses seek to apply a similar basic approach. In CEQR, one attempts to apply screening models that are designed to overpredict potential impacts before turning to more detailed, more precise analytical methods. This is standard environmental review practice done for many different types of potential impacts, such as noise, traffic, air, etc.


Furthermore:

CEQR screening methods guide agencies through a series of steps with an ascending level of detail, aimed at permitting the agency to determine whether the potential for significant impact can be ruled out or if more detailed analysis is necessary. If at any point the potential for a significant impact can be ruled out, then the analysis is considered sufficient and complete at that point.

Id. at 675–76.

Transportation Board’s environmental review process.\textsuperscript{154} In utilizing a screening threshold methodology in this case with respect to socioeconomic conditions, DCP first determined that no direct residential displacement was expected as a result of development or re-development, “because there are no specific development projects associated with the Rezoning and . . . no projected development sites with residences.”\textsuperscript{155} With respect to indirect or secondary displacement, DCP reasonably found that the number of new residents and new commercial development generated by development projected to occur under the Rezoning would be so far below the threshold level for which City experts have determined that there is the potential for significant adverse socioeconomic impact to occur, that it was reasonable to rely on these thresholds to conclude that there would be no significant adverse socioeconomic impacts resulting from the Rezoning.\textsuperscript{156}

In particular, as reviewed in the City respondents’ brief and as described in the Dobruskin Affidavit, DCP used reasonable build-out assumptions and \textit{CEQR Technical Manual} methodologies that identified the amount and location of projected and potential development to estimate the RWCDS and produce a reasonable conservative estimate of future growth consistent with prevailing development trends in Sunset Park and the City in general.\textsuperscript{157} The RWCDS was then examined, based on \textit{CEQR Technical Manual} methodologies, to determine whether the amount of future growth under the Rezoning relative to the amount of growth that would otherwise occur absent the Rezoning had the potential to result in socioeconomic impacts, including secondary displacement.\textsuperscript{158}


\textsuperscript{155} Dobruskin Affidavit, supra note 14, at A251–52; see EAS, supra note 14, at A508–09.

\textsuperscript{156} EAS, supra note 14, at A508–09.

\textsuperscript{157} Dobruskin Affidavit, supra note 14, at A224–27.

\textsuperscript{158} See id. The critical measure in environmental review is the increment of change due to the action itself, \textit{i.e.}, here the Rezoning, \textit{independent of} any change that will or is occurring due to market forces or other background conditions already in existence. Environmental review focuses on the incremental changes between what new or different development could reasonably be expected from the changes in the proposed zoning, as compared to the development reasonably expected to occur in the future under the current zoning. The fact that development might occur in the neighborhood subsequent to the Rezoning, which was allowed under the prior zoning, is not relevant to impact analysis for SEQRA/CEQR purposes; put simply, this is because that development would occur even without the proposed action. See generally Respondent’s Brief, supra note 117, at 21–23 (explaining the EAS’ CEQR
DCP identified potential and projected development sites and, by individually analyzing each of these sites, determined that the Rezoning was likely to result in a net increase of 75 new residential units and 18,980 square feet of commercial development.\textsuperscript{[159]} Given the guidance set forth in the \textit{2001 CEQR Technical Manual} 3B-2 that, "[r]esidential development of 200 units or less or commercial development of 200,000 square feet or less would typically not result in significant socioeconomic impacts," the projected increases in residential units and commercial development expected to result from the Rezoning was well below these levels.\textsuperscript{[160]} Therefore, DCP determined that the Rezoning would be unlikely to result in significant adverse impacts on the socioeconomic conditions of the area.\textsuperscript{[161]} Having undertaken a reasonable analysis to consider the potential impacts and reach this determination, nothing in SEQRA would then require DCP to undertake a more elaborate analysis of the socioeconomic conditions.\textsuperscript{[162]}

Additionally, respondents emphasized that "the resulting population increase attributable to the Rezoning would be less than 250 new residents, or less than one percent of existing residents."\textsuperscript{[163]} Further, "[o]n the basis of this small increment, consistent with the guidance in the \textit{Manual}," and the rule of reason under SEQRA, DCP had thus "reasonably concluded that the Rezoning would not be expected to result in any potentially significant impacts to the socioeconomic conditions" of the area.\textsuperscript{[164]} Finally, the EAS also detailed that the mixed market rate and inclusionary development\textsuperscript{[165]} that resulted from the few "upzoning" changes in

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\textsuperscript{[159]} EAS, \textit{supra} note 14, at A508–09.
\textsuperscript{[161]} EAS, \textit{supra} note 14, at A508.
\textsuperscript{[163]} Dobruskin Affidavit, \textit{supra} note 14, at A252.
\textsuperscript{[164]} Id.
\textsuperscript{[165]} Petitioners had attacked the lower courts’ discussions of the Inclusionary Housing Program as somehow allowing a sidestepping of the issue of whether Respondents took a hard look at the issue of socioeconomic adverse impacts. Petitioners-Appellants’ Brief, \textit{supra} note 4, at 40–41. However, both courts properly recognized that, in exchange for developing affordable housing—one goal of the Rezoning—there could be small increases in FAR available should developers decide to participate but that they would also have to comply with the height and setback regulations of the underlying contextual district. See \textit{Chinese Staff 1st Dep’t}, A.D.3d 425, 432–433, 932 N.Y.S.2d 1, 5–6 (1st Dep’t 2011), \textit{aff’d}, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012); \textit{Chinese Staff Sup. Ct.}, 2010 WL 1852948, at *6 (Sup. Ct. N.Y. County Apr. 9, 2010), \textit{aff’d}, 88 A.D.3d 425, 932 N.Y.S.2d 1 (App. Div. 1st Dep’t 2011), \textit{aff’d}, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012).
allowable density in the R7A district applied on Fourth and Seventh was not expected to introduce a new population that resulted in significant socioeconomic changes to the area.\textsuperscript{166}

In nonetheless attacking the use of any screening methodology for socioeconomic analysis, in effect, the \textit{amici} argued that every EAS analysis of the potential for socioeconomic issues must be prepared at an EIS level of detail.\textsuperscript{167} They thereby ignored the distinction between an EAS, which includes preliminary analysis for the purpose of identifying the potential for impacts, and the detailed analysis of the nature and extent of impacts required in an EIS.\textsuperscript{168}

Finally, the \textit{amici}'s further argument that DCP erroneously focused on buildings rather than people\textsuperscript{169} was also unavailing.\textsuperscript{170} In response, the City respondents argued that DCP, informed by the \textit{CEQR Technical Manual} guidance, properly recognized that secondary displacement occurs by reason of rent pressure on lower income tenants who lack the protection of rent regulation arising from the introduction of significant numbers of new residents with higher incomes into the neighborhood within new development facilitated by the Rezoning.\textsuperscript{171} Analysis of the potential for secondary displacement necessarily requires identification of the amount and type of development projected to occur under the Rezoning, pursuant to the RWCDS, because it is only on the basis of this projection that the potential numbers of new residents can be estimated.\textsuperscript{172} Further, the population vulnerable to secondary displacement is not defined by race or ethnicity, but rather by low-income status and residence in units that are not protected by rent regulations.\textsuperscript{173}

\textbf{C. Allegedly Improper Post Hoc Rationalizations}

Petitioners’ closing argument was that the “elaboration provided by the City in response to litigation was insufficient under

\textsuperscript{166} See EAS, \textit{supra} note 14, at 10.
\textsuperscript{167} See Chinese Staff \textit{Amici Curiae} Brief, \textit{supra} note 119, at 11–13.
\textsuperscript{168} See Brief for the City, \textit{supra} note 117, at 35–39.
\textsuperscript{169} See Chinese Staff \textit{Amici Curiae} Brief, \textit{supra} note 119, at 17–18.
\textsuperscript{171} Brief for the City, \textit{supra} note 117, at 52–59.
\textsuperscript{172} See Dobruskin Affidavit, \textit{supra} note 14, at 31–35, 39–41.
\textsuperscript{173} For a more in-depth explanation, see \textit{id.}, where Robert Dobruskin, the Director of DCP’s Environmental Assessment and Review Division, detailed the reasons for the methodology used to analyze the potential for effects on lower income minority populations and not on any one specific ethnic group.
SEQRA.” In essence, that amounted to a claim that the EAS failed to explain in sufficient detail all of the underlying assumptions routinely relied upon by city planning experts in conducting environmental reviews of zoning changes. Under petitioners’ view, DCP would have had to explain each and every assumption utilized on the basis of its institutional expert city planning experience and judgment, in anticipation of the subsequent methodological critiques made by petitioners.

In response, respondents urged that, pursuant to ample case law from the Court of Appeals, the EAS reflected that the lead agency “identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination,” and that there was no requirement of “a detailed explanation of all underlying assumptions relied upon by City planning experts.” “This is, indeed, why courts defer to an administrative agency’s expertise in conducting an environmental review.”

As respondents also urged, the Appellate Division, First Department, directly rejected petitioners’ argument, holding, in relevant part:

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.’ To be “thorough,” an investigation need not entail ‘every conceivable environmental impact, mitigating measure or alternative.’ It is neither arbitrary [nor] capricious nor a violation of environmental laws for a lead agency ‘to ignore speculative environmental consequences which might arise.’ 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.

| 174 | Petitioners-Appellants’ Brief, supra note 4, at 43. |
| 175 | See id. at 45 (alleging that it was arbitrary for City planners to assume that sites under 5000 square feet are rarely built to the full allowable FAR, despite the City's evidence and experience to the contrary). |
| 176 | See id. |
| 177 | Brief for the City, supra note 117, at 63. |
| 178 | See id. (citations omitted). |
| 179 | Chinese Staff 1st Dep’t, 88 A.D.3d 425, 433, 932 N.Y.S.2d 1, 6 (App. Div. 1st Dept. 2011) |
In sum, the methodology used by DCP was transparent, satisfying SEQRA’s requirements; upon criticism of that methodology by petitioners, DCP had further explained the basis of the methodology to rebut the unfounded assertions of petitioners’ expert.180

VIII. **Chinese Staff II: The Court of Appeals’ Opinion**

On June 27, 2012, the New York State Court of Appeals issued a unanimous memorandum opinion affirming the appellate division’s order.181 Upon thorough review of the record, the Court of Appeals rejected all of petitioners’ and their amici’s arguments, including the specific ones discussed above, and reiterated the well-established principles of limited judicial review of SEQRA/CEQR challenges, finding that the City respondents comported with such principles in this case.182

In ruling in the City’s favor, the Court of Appeals first reviewed the well-settled principles of environmental review.183 Thus, it held that “[a]n agency’s initial determination under . . . SEQRA and CEQR is whether an EIS [environmental impact statement] is required, which in turn depends on whether an action may or will not have a significant effect on the environment.”184 The court recognized that “[i]n making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects.”185 Further, “[w]here an agency determines that an EIS is not required, it will issue a ‘negative declaration.’”186 The court continued: “Although the threshold triggering an EIS is relatively low, a

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180 Chinese Staff 1st Dep’t, 88 A.D.3d at 432–33, 932 N.Y.S.2d at 5.
182 Id.
183 Id.
184 Id. at 923, 973 N.E.2d at 1279, 950 N.Y.S.2d at 505 (internal quotation marks omitted).
185 Id. at 924, 973 N.E.2d at 1279, 950 N.Y.S.2d at 505 (internal quotation marks omitted) (quoting Chinese Staff I, 68 N.Y.2d at 364, 502 N.E.2d 176, 178, 509 N.Y.S.2d 499, 501–02 (1986); Greenberg v. City of N.Y., No. 0100760/2007, 2007 WL 4397739, at *14 (Sup. Ct. New York 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.”)), aff’d, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012).
negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion.”187

Once again, moreover, the Court of Appeals recognized the limited standard of judicial review, stating:

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. In assessing an agency’s compliance with the substantive mandates of the statute, the courts must review the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.188

Applying this standard in Chinese Staff II, the Court of Appeals held:

[T]he DCP neither abused its discretion nor was arbitrary or capricious when it issued a negative declaration determining that the proposed Rezoning in this case would have no significant adverse effect on the environment. In its EAS, 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.189

IX. CONCLUSION: WHAT DO WE LEARN FROM CHINESE STAFF II?

Contrary to petitioners’ and the amici’s claims, in the end, Chinese Staff II was completely different than Chinese Staff I. Most importantly, a socioeconomic analysis was conducted in accordance with the methodologies set forth by expert City Planning officials and other experts, with guidance from the CEQR Technical Manual.190 The review complied with applicable statutes and case

187 Chinese Staff II, 19 N.Y.3d at 924, 973 N.E.2d at 1279, 950 N.Y.S.2d at 505 (other citations omitted) (internal quotation marks omitted) (citing Farrell, 100 N.Y.2d at 190, 791 N.E.2d at 397, 761 N.Y.S.2d at 140).


189 Chinese Staff II, 19 N.Y.3d at 924, 973 N.E.2d at 1280, 950 N.Y.S.2d at 506.

law, including the agency’s considered use and application of a RWCDS, a methodology used that has been repeatedly upheld by New York courts. 191

Ultimately, therefore, petitioners and the amici merely disagreed with the methodology of this analysis, but that was legally insufficient. Indeed, while SEQRA/CEQR mandates that a hard look be taken, it does not direct that a specific conclusion be drawn—just that it be rational. 192

In sum, while petitioners and their amici disagreed with the scope of the environmental review and may disagree with the public policy decision to enact the contextual Rezoning, they did not show that DCP’s determination of no significant adverse impacts was arbitrary or capricious or that DCP failed to take the requisite “hard look” at the potential impacts of the Rezoning. Rather, the Court of Appeals, as had both earlier reviewing courts, held that DCP met its obligation to identify the relevant areas of environmental concern, take a hard look at them, and make a reasoned elaboration of the basis for the negative declaration. 193

Significantly, moreover, the court did not weigh the desirability of the proposed action or delve into second-guessing how expert municipal planners utilize professional methodologies. 194

In the end, the 2012 Chinese Staff II opinion carries forward the controlling principles of Jackson, Akpan, and Spitzer—and even Chinese Staff I—with the Court of Appeals unanimously finding that the environmental review under SEQRA/CEQR was sufficient by applying well-established standards of limited judicial review. 195

While the litigation path to get to that result was a bit longer and more winding than it might have been, the clear principles of limited judicial review endure. 196

191 See id.
192 See Jackson, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305 (stating that the court is authorized only to assure that the statutory mandates have been obeyed and not licensed “to second-guess the agency’s choice”); Akpan v. Koch, 152 A.D.2d 113, 118, 547 N.Y.S.2d 852, 855 (App. Div. 4th Dep’t 1989) (“[M]ere disagreement with the plan promulgated does not make [the agency’s] action arbitrary, capricious, unsupported by substantial evidence or irrational.”), aff’d, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990).
193 Chinese Staff II, 19 N.Y.3d at 924, 973 N.E.2d at 1280, 950 N.Y.S.2d at 506.
194 Id.
195 Id.
196 An interesting side note is revealing. As is common in environmental challenges, the litigation occurred over several years, i.e., from the initial challenge in the spring of 2009 until the final decision in June 2012. During this period, the Rezoning was in place because petitioners did not obtain preliminary injunctive relief. In the Court of Appeals, the amici brief cited, inter alia, 2011 and 2012 newspaper articles to support their argument that the
analysis of socioeconomic conditions and neighborhood character was inadequate. Such information, outside the record, see N.Y. C.P.L.R. 5526 (McKinney 2013), did not relate to the adequacy of the environmental review when it occurred and therefore the City respondents did not address that information in its April 2012 responsive brief.

However, a close review of the cited news articles actually bears out the EAS’s analysis of a de minimis or minimal residential and commercial displacement, as one would likely expect would result from a contextual rezoning which actually resulted in a down-zoning of over 65% of the area. For example, the amici brief admitted that, well over two years after the Rezoning had been in full effect, the neighborhood is “now home to more Chinese residents than Manhattan’s Chinatown,” given job opportunities and “affordable housing.” Chinese Staff Amici Curiae Brief, supra note 119, at 6 (citing Daniel Beekman, The Changing Chinatowns: Move Over Manhattan, Sunset Park Now Home to Most Chinese in NYC, N.Y. DAILY NEWS (Aug. 5, 2011), http://www.nydailynews.com/changing-chinatowns-move-manhattan-sunset-park-home-chinese-nyc-article-1.948028). So too, the cited 2011 New York Times article describes “thriving retail strips on Fifth and Eighth Avenues, with Fifth dominated by Latin American businesses and restaurants and Eighth at the heart of Brooklyn’s version of Chinatown.” Jake Mooney, A Low-Slung District with a Very High Perch, N.Y. TIMES (Dec. 23, 2011), http://www.nytimes.com/2011/12/25/realestate/sunset-park-brooklyn-living-in-low-slung-but-with-a-high-perch.html?_r=1&n. The same article further noted that “[h]ousing remains relatively inexpensive,” that one common thread that the prevalent housing stock all have in common is that they are low to the ground, and that “[a]lmost all of the neighborhood has been rezoned with the intention of keeping them that way.” Id.

On a personal note, this author and her daughter have been fortunate enough to have a close friend and esteemed legal colleague, Fay Leoussis, with a home in Sunset Park, where we have visited and stayed from our home in Battery Park City, most recently in connection with our evacuations for Hurricane Irene and Hurricane Sandy. We have felt lucky to explore and enjoy this incredibly diverse, historic, and family-friendly neighborhood.