ZACHARY W. CARTER
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007-2601

SUSAN E. AMRON
Chief, Environmental Law Division
(212) 356-2070
FAX: (212) 356-2069
samron@law.nyc.gov

February 28, 2017

VIA NYSCEF AND HAND DELIVERY

Hon. Lucy Billings
Supreme Court of the State of New York
New York County
71 Thomas Street, Room 203
New York, New York 10013

Re: *Brooklyn Heights Association, Inc. v. Brooklyn Bridge Park Corporation et al.*,
Index No.: 155641/2016

Dear Justice Billings:

On behalf of all of the Respondents in the above-referenced matter, we write in response to Petitioner's unsolicited letter of February 10, 2017, which purports to inform the Court of "new data released last month by the New York City Department of Finance ("DOF")." Petitioner's letter is an unauthorized "sur-reply" that is inadmissible, irrelevant, and factually incorrect. More importantly, to the extent it is considered, nothing in Petitioner's letter contradicts Brooklyn Bridge Park Corporation's ("BBP") rational and reasonable determination that the Pier 6 development is needed to ensure Brooklyn Bridge Park's ("Park") financial future.[1]

Petitioner's letter relates entirely to "tentative" property valuations released seven months after the administrative determinations challenged herein, and which are undeniably outside the record of this Article 78 proceeding. This Court's review of BBP's June 6, 2016 lease authorizations for the Pier 6 development "is confined to the facts and record adduced before the agency" at that time, *Chandler v. Rhea*, 103 A.D.3d 427, 427 (1st Dep't 2013) (citation omitted), "not facts and issues raised by petitioner after the fact." *Dokyi v. N.Y.S. Banking Dep't*, 2009 N.Y. Misc. LEXIS 6240 (Sup. Ct. N.Y. County Oct. 9, 2009). Under controlling precedent, Petitioner cannot second-guess BBP's determinations based upon subsequent events, and its undisguised attempt to do so should not be considered. *See id.* ("The court is bound to review the record as

[1] In its letter, Petitioner once again inaccurately describes the Pier 6 development and the other development parcels as "within Brooklyn Bridge Park." The repetition of that canard does not make it any truer. *See Brooklyn Bridge Park Defense Fund v. N.Y.S. Urban Dev. Corp.*, 14 Misc.3d 515 (Sup. Ct. Kings County 2006), *aff'd* 50 A.D.3d 1029 (2d Dep't 2008) (holding that the development parcels are not and were not intended to be dedicated as public parkland).

known to respondents at the time the questioned action was taken …"); *Rizzo v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 16 A.D.3d 72, 78 (1st Dep't 2005), *aff'd*, 6 N.Y.3d 104 (2005) ("[T]he admission of subsequent events which occurred after the final agency order would defeat finality and could subject an otherwise final order to endless recurring review.").[2]

Even if they were *subject* to review, DOF's recent valuations have no bearing on the need for the Pier 6 development to fund the preventative maintenance of BBP's marine infrastructure. Petitioner alleges these tentative valuations will increase the PILOT payments that BBP will receive from its development sites over the next 50-plus years. BBP, however, needs approximately $95 million immediately to arrest and prevent the deterioration of the piles that support approximately 30% of the Park, as advised by BBP's marine engineering experts. *See* Corrected Affidavit of David Lowin, sworn to September 20, 2016 ("Lowin Aff.") (NYSCEF Doc. No. 287) ¶¶ 12, 15, 81; Affidavit of Kirk Riden, sworn to September 15, 2016 (NYSCEF Doc. No. 103) ¶¶ 29-39. It is the up-front payment from the Pier 6 development leases, and not the annual PILOT payments, that will enable BBP to pursue this recommended course of maintenance. Therefore, Petitioner's conclusory assertion that the new valuations will result in $300 million of additional PILOT revenues (a gross, undiscounted sum that does not account for when revenues are actually required by the Park) does not diminish the immediate need for the Pier 6 development.

In addition to being outside the record and irrelevant, the values that Petitioner ascribes to DOF are also erroneous. As a "graphic illustration" of its argument, Petitioner asserts that the Pier 1 development "was just valued by the DOF at $230 per square foot." In a February 27, 2017 letter to BBP that is attached hereto, DOF clarifies that it actually valued the Pier 1 development at $178.43 per square foot.[3] Not only does this mean that Petitioner's recommended appraiser, Max Rosin, overestimated the Pier 1 development valuation by approximately 20%, but Petitioner's selective presentation of DOF's tentative valuations conceals that fact that Mr. Rosen also overestimated the One John Street valuation by 103% (compared to BBP's 5% overestimate) and the Empire Stores valuation by 92% (compared to BBP's 11% underestimate). DOF's tentative valuations for both Pier 1 and John Street are also affected by the pending status of construction; both buildings were valued for Fiscal Year ("FY") 2018 as 90% complete, and neither figure provides a reliable indication of the properties' future valuations, which will be determined using a different methodology that DOF applies to income-generating properties

Petitioner notes that the combined market valuation of all of BBP's development parcels is "about $376 million." That figure is immaterial, and the conclusions that Petitioner attempts to draw from it are deliberately misleading. First, there is no direct correlation between market value and BBP's PILOT revenues. In addition to glossing over the significant variations among the

[2] Petitioner's assertion that the DOF valuations are subject to judicial notice does not change the fact that they postdate the administrative determinations at issue, and therefore cannot be used as a basis to challenge them. *See, e.g., Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000) ("[F]or a court to consider evidentiary submissions as to circumstances after the [agency] made its determination would violate [a] fundamental tenet of CPLR article 78 review …"); *Berardi v. New York*, 16 A.D.2d 248, 250 (1st Dep't 1962) (declining to consider post-decisional documents notwithstanding potential for judicial notice).

[3] In miscalculating that figure, Petitioner appears to have taken the total value for both the residential and commercial components of the Pier 1 development and divided it by solely the floor area of the residential component, improperly excluding more than 100,000 square feet of commercial floor area. Even if only the residential portion of the Pier 1 development were considered, the development would be valued at approximately $200/sf.

development sites, the aggregate market valuation cited by Petitioner does not account for exemptions, abatements, caps, changing tax rates, and other factors that are used to determine BBP's PILOT payments. *See* Lowin Aff. ¶ 48. Second, DOF's tentative valuations do not reflect the final market values for the upcoming fiscal year (they are subject to revision before they are finalized in June), much less predict future valuations and PILOT payments over the 50-year span of BBP's financial model. *See Id.* ¶ 49; Supplemental Affidavit of David Lowin, sworn to November 7, 2016 ("Supp. Lowin Aff.") (NYSCEF Doc. No. 364) ¶ 21. Finally, Petitioner's claim that DOF's tentative valuations are closer to Mr. Rosin's estimates than to BBP's inappropriately equates the impacts of overestimating and underestimating BBP's potential revenues. BBP's revenue projections are deliberately conservative because it is required to ensure that the Park remains financially self-sustaining at all times, and revenue shortfalls from the use of Mr. Rosin's estimates would increase the risk of the Park's insolvency.

In short, there are multiple reasons to reject Petitioner's letter and the extra-record material referenced therein. In the event that DOF's recent valuations are considered, however, they merely reinforce the dynamic nature of real estate valuations and the need for BBP's prudent financial stewardship. Between June 2016's final FY 2017 figures and January 2017's tentative FY 2018 figures, the valuation of One Brooklyn Bridge Park increased by approximately 10%, and the valuation of One John Street decreased by more than 20%. This unpredictability is also revealed in Max Rosin's FY 2018 projections, which range from 103% too high (John Street) to 5% too low (One Brooklyn Bridge Park). Such volatility is unavoidable; despite Petitioner's persistent demands to wait for additional data, the most that any year's valuations can provide is a snapshot of the highly variable real estate market at a particular time.

In projecting its long-term needs and revenues, BBP's mandate is not to foretell DOF's precise valuations in each and every year, a Delphic undertaking that is neither realistic nor required. Instead, BBP's financial model incorporates reasonably cautious assumptions based upon the available information, intended to safeguard against market fluctuations and ensure that BBP will be able to cover the Park's expenses even in its leanest years. *See* Supp. Lowin Aff. ¶ 16. In reviewing Petitioner's challenge to BBP's decisions, Article 78 requires reasonableness, not prescience. *See Procaccino v. Stewart,* 32 A.D.2d 486, 489 (1st Dep't 1969), *aff'd, 25 N.Y.2d 301* (1969) (a reviewing court is "not to second-guess the wisdom of what an administrative agency has done, nor to reform the procedures and methods used by that agency," but rather to determine whether an agency has acted rationally based on the record before it). The approval of the Pier 6 development satisfies that standard, and Petitioner's improper invocation of DOF's subsequent, non-final valuations does nothing to change that.

Respectfully submitted,

Susan E. Amron

David Paget

Richard Leland

c: Richard F. Ziegler
Counsel for Petitioner