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

In the matter of the application of

BROOKLYN HEIGHTS ASSOCIATION, INC.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, and BROOKLYN BRIDGE PARK CORPORATION d/b/a BROOKLYN BRIDGE PARK,

Respondents,

-and-

RAL DEVELOPMENT SERVICES LLC, OLIVER'S REAL ESTATE GROUP LLC d/b/a OLIVER'S REALTY GROUP, LANDING A ASSOCIATES LLC, AND LANDING B ASSOCIATES LLC,

Interested Party-Respondents.

Index No.: 155641/2016
(Billings, J.)

MEMORANDUM OF LAW OF PETITIONER BROOKLYN HEIGHTS ASSOCIATION, INC. IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION PROHIBITING RESPONDENTS AND INTERESTED PARTY-RESPONDENTS FROM INITIATING CONSTRUCTION AT PIER 6 PENDING THE COURT'S DECISION ON THE MERITS OF THE AMENDED PETITION

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Petitioner the Brooklyn Heights Association, Inc. (the "BHA") respectfully submits this Memorandum of Law in support of its motion pursuant to N.Y. C.P.L.R. §§ 6301, 6311 and 6312 for a Temporary Restraining Order ("TRO") and/or Preliminary Injunction prohibiting Respondents and the Interested Party-Respondents (together "Respondents") from initiating construction at Pier 6 pending the Court's decision on the merits of the Amended Petition and for the Court to set, at most, a nominal bond.[1]

SUMMARY OF ARGUMENT

Notwithstanding the imminent completion of this Article 78 proceeding, which will likely be ready for the Court's consideration of a decision on the merits once the July 18, 2017 argument has taken place, Respondents have notified the BHA (pursuant to a 2016 stipulation filed with the Court requiring such notice) that they intend to start construction of the Pier 6 towers on July 19, 2017. Respondents' unnecessary attempt either to coerce the Court to make an instant decision in this matter, or to make it more difficult for Petitioner to undo the construction activity they will have completed when the Court's decision is rendered, should not be countenanced.

As shown in the accompanying affidavit of Todd Castilow, construction is expected to commence with at least two months of pile-driving activity in which the developers hammer more than 400 100-foot steel beams 90 feet into the ground to reach bedrock at both Parcels A and B. That activity will generate unbearable noise for neighbors and Park visitors alike; it threatens essentially to shut down the playgrounds and park areas at Pier 6 and adjacent sections of the Park during the height of the summer visitor season.

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the BHA's Memoranda of Law in support of its Petition (July 7, 2016, Dkt. No. 3), Corrected Reply (Oct. 26, 2016, Dkt. No. 338) and Supplemental Reply (Nov. 14, 2016, Dkt. No. 366).

The BHA seeks a TRO to preserve the status quo while the Court renders its decision on the merits of the Amended Petition, or, if appropriate, the BHA seeks a preliminary injunction. For the reasons discussed below, the BHA is likely to succeed on at least one of its nine causes of action, there is plainly irreparable harm, and the balance of equities is in the BHA's favor.

THE PROCEEDINGS TO DATE

A. The Record.

The BHA filed its Verified Petition on July 7, 2016, asserting nine causes of action challenging the BBPC Board of Directors' final action on June 7, 2016, approving 93-year leases with real-estate developers RAL Development Services LLC and Oliver's Realty Group for Parcels A and B at the Park's Pier 6. The record created from the filing of the Petition and accompanying papers on July 7, 2016, through the filing of Petitioner's supplemental reply brief on November 14, 2016, which includes the submission of 15 fact affidavits by Respondents and 10 reply affidavits by Petitioner, is described at pages 5 through 7 of Petitioner's reply brief and page 2 of Petitioner's supplemental reply brief.[2]

For this motion Petitioner relies upon the record created with respect to the Petition and Amended Petition including the affidavits and affirmations submitted by Petitioner, upon the

[2] Thereafter, on February 10, 2017, the BHA wrote to inform the Court of new data released by the New York City Department of Finance ("DOF") that bore directly on the First Cause of Action in the BHA's Amended Petition. The new DOF valuations were about 30% higher than the values assumed in BBPC's financial model for all existing BBPC real estate developments in the aggregate.

On February 28, 2017, the Petitioner wrote to inform the Court of a pertinent decision of the Appellate Division, First Department, under Article 78: *Prometheus Realty Corp. v. New York City Water Board* (No. 653003/16).

On February 28, 2017, Respondents, collectively, filed a letter with the Court in response to the February 10 letter concerning the DOF valuations. Petitioners wrote the Court on March 7, 2017, to respond to arguments raised by Respondents' February 28 letter. Finally, on March 9, 2017, Respondents filed a letter with the Court addressing the *Prometheus Realty* case.

Affirmation of Matthew Wilkins, dated June 30, 2017, submitted with this motion, which attaches the notification Petitioner received from the Interested Party-Respondents that they intend to start construction at Pier 6 on July 19, 2017, and upon the Affidavit of Todd Castilow, dated June 23, 2017 (the "Castilow Affidavit"), which describes the irreparable harm that will be caused by the start of construction at Pier 6. For the Court's convenience, excerpts of exhibits already in the record that are relied upon in this brief, such as the General Project Plan and Final Environmental Impact Statement, are submitted as Addenda to this brief.

B. Court Hearings.

The Court has held four separate hearings on the merits in this matter on April 12, 18 and 26, and June 7, 2017. Another and likely final hearing on the merits has been scheduled for July 18, 2017. Because the Court is already familiar with the pleadings and the factual record, this Memorandum of Law does not reiterate the pertinent facts.

ARGUMENT

I. The BHA Is Entitled To A Temporary Restraining Order And/Or A Preliminary Injunction Barring Construction At Pier 6 While The Court Considers Its Ruling On The Fully Argued Amended Petition.

A. A TRO Or A Preliminary Injunction Is Required Because The Imminent Start Of Construction On July 19, One Day After The Final Argument Date While The Court Is Considering Its Ruling On The Amended Petition, Disrupts The Status Quo And Imposes Irreparable Harm.

The BHA seeks a TRO barring Respondents from permitting, and the Interested Party-Respondents from initiating, construction activities at Parcels A and B at Pier 6 during the period the Court considers its ruling on the fully argued motion.

The CPLR provides that "if, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without

notice." N.Y. C.P.L.R. § 6313(a). Accordingly, the key questions in determining whether a temporary restraining order is warranted are whether the movant's potential injury is *immediate* and *irreparable*.

Respondents notified the BHA on June 28, 2017 that they intend to commence construction on Parcels A and B on July 19, 2017, just one day following the July 18 final argument date. There can be no doubt that the threatened harm to the BHA is immediate while the Court considers its ruling on the Amended Petition.

The BHA — and the neighborhood — will suffer two distinct categories of irreparable harm in the absence of a TRO: the first is the palpably adverse impact of construction on the Park, park visitors and the neighborhood; the second is the purely legal consequence that the status quo will be altered and the balance of equities test for injunctive relief will become harder for a petitioner to satisfy.

As to the first category of harm, construction projects of tall buildings necessarily start with massive foundation activities, including pile driving, that will create tremendous noise, dust, disruption and other environmental harm. The neighborhood should not be subjected to those adverse consequences — which will likely make the nearby sections of the Park unusable during the peak summer usage period due to the unbearable noise created by at least two months of pile-driving activity — when the proceedings in this Court appear likely to be completed imminently at the July 18 argument session and while the Court will presumably be considering its ruling on the Amended Petition. The Park and neighborhood should not be subjected to construction while the Court is considering the merits of the BHA's Amended Petition, which shows that the proposed construction is unlawful on multiple different grounds.

The pile-driving activity at Parcels A and B will be unusually loud and unusually prolonged: the accompanying affidavit of Todd Castilow, a resident of One Brooklyn Bridge Park (whose apartment does *not* face the construction sites) and the Treasurer of the building's Board of Directors, describes that because Pier 6 is so close to the East River its soil is sandy and the developer has filed plans calling for piles to be driven 90 feet into bedrock. The 30-story tower will require 291 piles, while the lower tower will need 123. Mr. Castilow personally measured the decibel level of the driving of the four test piles that the contractor installed at Parcel A over a two-to-three day period in May 2017 — a form of "pre-construction" testing activity that did not trigger the issuance of the required three-week notice of the start of construction — and the noise reached over 100 dB on the street near the site. It will sound as if a particularly noisy subway train is taking 20-30 minutes to pass by, or a very loud rock concert is being held in 20-30 minute spurts from 7am – 4pm. Steve Claridge, *How Loud is Too Loud: Decibel levels of common sounds*, Hearing Aid Know (June 30, 2017), https://www.hearingaidknow.com/how-loud-is-too-loud-decibel-levels-of-common-sounds (listing the decibel level of a nightclub at 97 dB, and the permissible exposure time for 100 dB as 15 minutes). The activity is expected to continue at least two months, with the maximum noise levels occurring for 20-30 minutes during every 90-minute period during the 7am – 4pm work day. Castilow Aff. ¶¶ 3-6.

In addition to the highly intrusive noise from the pile-driving, the construction process will inevitably impose additional hardships on the Park and the neighborhood, including significant traffic issues caused by the diversion of buses, trucks and cars onto a portion of the Park's loop road adjacent to an intensely used pedestrian area as a result of the closing of a different portion of that road for the contractor's use as a construction equipment and material staging area. Castilow Aff. ¶ 7. None of these consequences will be required if this Court annuls BBPC's

decisions as the Amended Petition requests, and all of them will be far reduced if BBPC is permitted to construct only a single or smaller building. As a result, starting construction now of the challenged project imposes irreparable harm.

Separately, construction will alter the status quo as a legal matter. *See Kew Forest Neighborhood Ass'n, Inc. v. Lieberman*, 284 A.D.2d 377, 378 (2d Dep't 2001) (affirming trial court's grant of a preliminary injunction to prevent further construction of a partially constructed building alleged to violate a restrictive covenant). In cases involving challenged construction, there is typically a threat of irreparable harm if construction is allowed to proceed because, as a practical matter, it is costly to tear down a partially or completely built development, and that can become a factor in the decision to grant permanent injunctive relief.

This Court has held in another construction case that there was a threat of immediate and irreparable harm where some demolition had already occurred and was set to continue before a decision on the merits could be reached. *See Allison v. N.Y.C. Landmarks Preservation Comm'n*, 35 Misc. 3d 500 (Sup. Ct. N.Y. Cty. 2011) (granting a TRO and ultimately a preliminary injunction where petitioners sought to enjoin the demolition and remodeling of a landmark). As this Court recognized in *Allison*, "[t]he progression of demolition or construction well may affect the practicality of injunctive relief possible and the balance of hardships that warrants such relief." 35 Misc. 3d at 515. *See generally Save Gansevoort, LLC v. City of New York*, No. 158482/16, 2017 WL 1133457, at *1 (Sup. Ct. N.Y. Cty. Mar. 27, 2017) (granting a TRO pending hearing on a preliminary injunction where petitioner sought to enjoin construction that would alter two landmarks).

B. The BHA Is Entitled To A Preliminary Injunction Following The July 18 Argument Until Entry Of Judgment On The Merits Because The BHA Is Likely To Succeed On The Merits Of At Least One Of Its Causes of Action.

Based on the record and briefing to date, and, as is more fully explained below, the BHA also satisfies the two additional criteria (in addition to irreparable harm) for preliminary injunctive relief: (1) a probability of success on the merits of at least one, if not all, of its nine causes of action; (2) the balance of the equities favors the BHA. *See Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *Casita, L.P. v. MapleWood Equity Partners (Offshore) Ltd.*, 43 A.D.3d. 260, 260 (1st Dep't 2007).

The BHA's Amended Petition asserts nine causes of action challenging the BBPC Board's Final Action on June 7, 2016. Each is supported by facts shown in the exhibits and affidavits in the record, and by applicable legal authority. For Respondents to avoid annulment of the Board's final actions, they would need to defeat each and every one of those well-grounded claims. Respondents cannot do so.

1. Respondents Violated The General Project Plan With Respect To Both Site A And Site B By Rejecting The Existence Of Any Financial Need Requirement For The Development Parcels (First And Second Causes Of Action).

Respondents' actions are plainly "affected by an error of law" under Article 7803(3): with respect to Site B at Pier 6 (the 15-story rental building that is not intended to generate revenue for the Park), they violated the GPP's fundamental restriction that the development parcels at the Park Project, including those at Pier 6, can be used only for projects that generate revenue that is needed to fund the Park's maintenance and operations and enable it to be financially self-sustaining. With respect to Site A (the 30-story luxury condo tower), they violated the GPP's related commitment that any revenue-generating project must be limited to the extent necessary for the Park's financial needs.

Respondents boldly contend that the GPP contains neither of those financial need restrictions on development parcels, and claim instead that they can use one of the development parcels for a non-revenue-generating purpose, and they can develop the other parcel to its "maximum build-out" if they wish, regardless of whether or not revenues from that full development are necessary to pay for Park costs. Gov't Resp'ts' Opp. Br. at 22, 35-36; Gov't Resp'ts' Sur-Opp. Br. at 28, 51-55. In other words, Respondents claim that the GPP authorizes it to use the five development parcels in the Park Project for purposes other than the financial support of the Park. Yet the GPP is clear that the five development parcels it carefully identifies are to be developed solely to satisfy the fundamental principle expressly stated in the GPP that the Park Project must be financially self-sustaining.

Respondents' position that they can use a development parcel — Site B at Pier 6 — for a wholly non-remunerative purpose is a shocking legal position that flies in the face of the GPP and its associated legal documents. This error of law necessarily taints the BBPC Board's decision to develop both Sites A and B and by itself is sufficient to compel the annulment of the Board's June 7, 2016 final actions for both sites.

This Court must review the GPP as a cohesive and integrated whole. The New York Court of Appeals recently instructed that a "fundamental rule[] of statutory interpretation" is that "a statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other." *Avella v. City of New York*, No. 54, slip op. at 9, 2017 WL 2427307, at *6 (N.Y. Jun. 6, 2017) (quoting *N.Y. Cty. Lawyers' Assn. v. Bloomberg*, 19 N.Y.3d 712, 721 (2012)). Reading the GPP as a whole leaves no room for doubt that the authorized purpose of the development parcels, including the two sites that constitute the development parcel at Pier 6, is to generate revenue needed to support the Park and enable BBPC to satisfy its

obligation under the GPP to be financially self-sustaining with respect to its annual operations and maintenance expenses.

Thus, the GPP is explicit that any authorized development will be the "limited amount of development *essential to the park's creation*, including retail, restaurant, residential, and hotel space." Wolf Aff., Ex. 7 at 44th page (Jan. 18, 2006 Letter of Resolution at 1, incorporated into GPP at Wolf Aff., Ex. 7 at 29th page) (emphasis added). The GPP repeatedly states that:

- "The cost of operations, maintenance and upkeep would be paid out of the revenues received from appropriate commercial activities and residential projects located within the Project." *Id.* at 3.

- "[A]ppropriate commercial revenue producing activities would be located within the Project to support its' [sic] annual maintenance and operations." *Id.* at 4.

- "[T]he park must be self-sufficient. The funds to support park operations and maintenance must flow from revenue-generating park components. These features will be limited to a small area of parkland . . . ." *Id.* at 44th page.

In view of these statements in the GPP, Respondents' claim that they can use one of the small number of development parcels set aside in the GPP for purposes that are *not* "essential to the park's creation," and that do *not* pay "the cost of operations, maintenance and upkeep," and are *not* "revenue producing activities" or "revenue-generating" reflects their willful refusal to abide by the law that necessarily constrains their decisions.[3]

Moreover, the GPP not only requires that the development parcels be used for revenue-generating purposes that will support the Park's financial needs, but also instructs that the area for the Park itself should be maximized and the area of the development parcels should be minimized.

[3] The GPP is the source of Respondents' authority to develop and operate the Park Project and its restrictions are legally binding on them, akin to zoning requirements. The GPP itself provides that "zoning shall be overridden" and "pursuant to this override, the Project would be developed and constructed in accordance with the Project description set forth in the General Project Plan and the uses allowed in the General Project Plan would be allowed." Wolf Ex. 7 at 14.

The analysis that underlay the identification of the size and volume of the various development parcels in the GPP "consisted of determining *how much development was necessary to support the Project*." *Id.* at 4 (emphasis added). The GPP states: "To the maximum extent practicable, site the proposed developments so there is a maximum amount of park provided to the public at each entrances," *id.* at 8, and "development parcels may not constitute more than 20 percent of the Project. As currently proposed, development parcels make up approximately 10 percent of the Project's area . . . ." *Id.* at 11. Finally, the GPP states point-blank that the "building envelopes" set aside at Pier 6 and other locations "represent the maximum build-out within the Project, with the intention being to build only what is necessary to support annual maintenance and operations." Wolf Aff., Ex. 7 at 12.[4]

The GPP's commitment to include development only to the extent necessary to make the Park self-sustaining was not an accident. It was included and clarified to secure the community's support for the GPP during the environmental review of the proposed GPP in 2005. BHA Reply Br. at 9-13; Squadron Reply Aff. ¶ 4; Stanton Reply Aff. ¶¶ 2-3; Sloane Reply Aff. ¶¶ 12-16, 19. Tellingly, the community uniformly opposed the size of the Pier 6 development since it was first proposed in 2005. The neighborhood's elected officials continue to oppose a 30-story luxury condo tower at Pier 6 today, including U.S. Representative Nydia Velázquez, Public Advocate Letitia James, State Senator Daniel Squadron, Assemblymember Jo Anne Simon, and the two local

[4] A fuller set of excerpts from the GPP, and from the FEIS, SEQRA Findings, ESD's and BBPDC's briefs in the 2006-07 litigation, Wolf Aff., Exs. 9 & 10, and BBPC's request to ESD to modify the GPP to do away with the financial need requirement, appears as Addendum 1 to this brief. Petitioner provided Addendum 1 during the oral argument held by the Court on June 7, 2017; everything in Addendum 1 is already in the record.

City Councilmembers, Steve Levin and Brad Lander.[5] Am. Pet. ¶¶ 20-22; Wolf Aff., Ex. 1 at 23-34 (2005 FEIS Chapter 24 at 24-23 (cmt. 41), 24-34 (cmt. 80), 24-45 (cmt. 117)); Koteen Reply Aff. ¶¶ 2, 18 (opposition to Pier 6 development from BBPC's CAC); Breedlove Reply Aff. ¶¶ 5-6 (opposition to Pier 6 development from Cobble Hill Association). Even then-Councilmember Bill de Blasio objected to the scope of the Pier 6 residential towers when they were first proposed in the GPP in 2005. Wolf Aff., Ex. 1 (FEIS Comments) at Response 117 at 24-25.

The GPP necessarily also embodies the written commitments that Respondents ESD and BBPDC made in the FEIS that they issued in conjunction with their adoption of the GPP. An entire chapter of the FEIS, issued in December 2005, consists of ESD's and BBPDC's joint responses to these and other concerns voiced by the public on the draft EIS. Wolf Aff., Ex. 1.

The GPP expressly refers to the FEIS. Wolf Aff., Ex. 7 at 15. As a result, ESD's statements in the FEIS explaining the GPP are incorporated in the GPP or, at a minimum, the GPP must be interpreted in conjunction with the commitments that Respondents set out in the FEIS, since that document was required to be prepared as part of the process pursuant to which the GPP was lawfully adopted. *See generally This is Me, Inc. v. Taylor*, 157 F.3d 139, 143 (2d Cir. 1998) (interpreting New York law to require that "all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, even though they were executed on different dates and were not all between the same parties"); *BWA Corp. v. Alltrans Express U.S.A., Inc.*, 112 A.D.2d 850, 852 (1st Dep't 1985) (finding that "[w]here several instruments constitute part of the same transaction, they must be interpreted together" (citing *Nau*

[5] Wolf Aff., Ex. 37 at 41:25-53:15, 54:12-57:3, 71:4-74:19, 75:4-79:4, 108:19-115:22; Squadron Reply Aff. ¶ 5 and Ex. A; Letter from Public Advocate Letitia James, et al. to ESD and BBPDC, Aug. 25, 2015, https://thebha.org/issue/pier-6-brooklyn-bridge-park (under the heading "August 2015"). *See* BHA Reply Br. at 18 n.13.

v. Vulcan Rail & Constr. Co., 286 N.Y. 188, 197 (1941) (finding that three contracts that were executed at substantially the same time and related to the same subject matter were essentially contemporaneous agreements and must be read together))).

In responding to the public comments critical of the proposed thirty-story tower at Pier 6, ESD and BBPDC consistently committed to building only the amount of development needed to support the Park's maintenance and operations:

- "*[O]nly the development needed to support the park, as determined by the RFP process, would be developed.*" Wolf Aff. Ex. 1 (FEIS comments) Response 80 at 24-34 (emphasis added).

- "*The EIS analyzes the maximum development envelope deemed necessary to support maintenance and operations of the park. If it is determined during the RFP process that less development is needed to support the park's maintenance and operations, then less development will be incorporated into the final park plan.*" FEIS Response 79 at 24-34 (emphasis added).

- "*[A]s described above, if it is determined during the RFP process that less development is needed to support the park's maintenance and operations, then less development will be built.*" FEIS Response 116 at 24-45 (emphasis added).

- "*The proposed development program sets out a maximum envelope for development. If it is determined during the RFP process that less development is needed to support the park's maintenance and operations, then less development will be built.*" Responding to the following comment from the BHA, then-Councilmember *de Blasio* and others: "*Effort should be made to decrease the height of the residential buildings . . . . The Pier 6 buildings are too tall. The Pier 6 buildings should be decreased in height to 20 stories. This can be done within budget constraints with other ways to achieve the necessary revenue. They must fit into the neighborhood context and be in scale with surrounding buildings.*" FEIS Response 117 at 24-45 (emphases added).

The SEQRA Findings — also explicitly referenced in the GPP at page 15 — adopted by ESD when it issued the FEIS similarly state that a key objective of Park development was to "create the smallest program that could prudently support . . . the park," and that "development

should maximize parkland while minimizing building footprints." Wolf Aff., Ex. 8 at 13-14 (emphasis added). The SEQRA Findings further said that the actual level of development "may be smaller [than that proposed in the GPP], if market conditions permit it, because the value of land and other factors may well be different from those assumed in this analysis." *Id.* at 16.

In short, Respondents' commitments to the community in the FEIS and Findings, incorporated into the GPP, leave no room for doubt that the GPP permits construction at any of the development parcels only (1) for the fundamental purpose of funding the Park's needs, and (2) to the extent necessary to achieve that fundamental purpose so that, at the point at which any Parcel is considered for development, the GPP requires the BBPC to scale back from the maximum allowable development plans if they are not financially necessary for the Park's needs.

But BBPC flouted the GPP from the outset of its planning of new real estate construction at Pier 6 by expressly requiring in the RFP it issued in 2014 that the Parcel B site should be devoted to an affordable housing tower that would not serve the Park's financial needs. Wolf Aff., Ex. 18 (RFP) at 3. Thus, instead of using the RFP process to identify the least intrusive development that would achieve the Park's financial requirements as the GPP required it to do, BBPC used the RFP process to achieve objectives that the GPP does not permit. BBPC was free to ask ESD to modify the GPP to authorize it to use its last undeveloped development parcel for a laudable but non-remunerative purpose (and it did just that, without success, as discussed below) but it could not lawfully take it upon itself to simply disregard the constraints the GPP imposes upon it.

The New York Court of Appeals recently reiterated the importance of holding government agencies to the scope of their legal authority. In *Avella* (cited *supra* p. 8), the Court of Appeals sustained an Article 78 petition and annulled New York City's plan to address the blighted Willets Point section of Queens, near the former Shea Stadium. The Court found that only the state

legislature, not the City, had the authority to permit development of that area. In finding the City's action unlawful, the Court plainly "acknowledge[d] that the remediation of Willets Point is a laudable goal" that advocates report "would immensely benefit the people of New York City, by transforming the area into a new, vibrant community, and that the present plan might be the only means to accomplish that transformation." *Avella*, slip op. at 18, 2017 WL 2427307, at *10. But in a critical statement that applies here, the Court held that "[t]hose contentions, however, have no place in our consideration of whether the legislature granted authorization for the development of Willets West on land held in the public trust." *Id.* at 18-19. So too here, where only the ESD has the authority to modify the GPP to permit the use of development parcels "without regard to Project finances," in the phrasing of the modification of the GPP that BBPC proposed to ESD but failed to obtain. Wolf Aff., Ex. 36 at 2.

In their bold argument that the GPP permits BBPC to devote its final development parcel to a non-financial purpose, Respondents fail to review the GPP as a whole or to address the numerous provisions quoted above. Equally important, they completely disregard their ironclad commitments to the community in the FEIS quoted above. Instead, they point solely to the fact that one of the GPP's pertinent provisions is framed as an "intention" to build no more than is necessary, and they argue that the word "intention" in that single statement somehow makes the entire GPP (and FEIS commitments) merely aspirational and non-binding. Gov't Resp'ts' Opp. Br. at 35-36. But Respondents cannot rely on the word "intention" to bulldoze away the entire structure and meaning of the GPP: the "development parcels" set aside in the GPP are indisputably to be devoted to development that enables the BBPC to be financially self-sustaining; they must be "limited" to the extent "essential" to fund the Park; and they should be the "smallest" amount possible so as to "maximize" parkland.

Moreover, articulating this aspect of the GPP as an "intention" does not support Respondents' claim that an "intention" is somehow not binding. The second "P" in GPP stands for "Plan," and describing its "intention" with respect to future construction simply expresses that the "plan" for such construction is to minimize it to the extent financially possible. There is nothing non-binding about a commitment to reduce the scope of development if, at the time the development is being seriously considered, circumstances allow the Park to be financially viable with lesser or no development.[6]

Respondents' interpretation of the GPP would also need to be rejected even if the Court were persuaded that the word "intention" somehow makes the GPP as a whole ambiguous. In that case, Respondents' clear admissions about the meaning of the GPP during litigation challenging the GPP in 2006 and 2007 are plainly admissible to show the GPP's intended meaning.[7] Respondents used the word "committed" — not "intention" — when they informed both the Kings County Supreme Court and the Second Department, in defending the GPP in litigation in 2006, that they had "*committed to building the minimum development necessary to cover the park's maintenance and operations needs*." Wolf Aff., Ex. 10 at 8; Ex. 9 at 11 (emphasis added). Respondents' new argument in this case that they made no such commitment is unbecoming, to

[6] Respondents distort the BHA's position by suggesting that the BHA's interpretation of the GPP would require BBPC "to maximize the revenue generated per square foot of building space" and therefore preclude any consideration of aesthetics in the design of the revenue-producing developments or the inclusion of even *de minimis* non-revenue generating spaces, such as public bathrooms. Gov't Resp'ts' Opp. Br. at 36. Respondents contend that the BHA's prior support for some public amenities at development parcels undermines its present position, *id.* at 36-39, but that argument is downright silly, for the reasons explained in the BHA's Reply Brief at pages 21-23 & n.17 and the BHA's Supplemental Reply Brief at pages 4-6 & nn.4-5.

[7] *Waverly Corp. v. City of New York*, 48 A.D.3d 261, 265 (1st Dep't 2008) (finding that, if the contract were ambiguous, the parties' conduct following execution could supply evidence of the contract's meaning).

say the least. Their attempt to create a loophole in the GPP that they can exploit to renege on their clear commitment must not be permitted.

Finally, BBPC also acknowledged that the GPP as now written permits it to develop only as much as is necessary to pay for Park operations and maintenance when in 2015 it requested — unsuccessfully — that ESD modify the GPP to authorize BBPC to develop Pier 6 "without regard to Project finances." Wolf Aff., Ex. 36 at 3. As the text of the proposed modification made clear, this new authority would, among other things, allow BBPC to "determine the number and affordability of residential units in each building" at Pier 6. *Id.* Notwithstanding self-serving claims to the contrary made by Respondents in the course of this litigation, the primary goal of the requested modification was to obtain authorization to include affordable housing units at Parcel B because that authority is lacking under the terms of the GPP. At a public hearing on the requested modification, then-BBPC Chair Alicia Glen admitted just this, telling the public that "this . . . discussion . . . [is] about . . . affordable housing at this site. That's all this is about." Wolf Aff., Ex. 37 at 33:5-8. When ESD declined to modify the GPP, BBPC simply chose to pretend that it had never made the commitments it had made, and that it could ignore the GPP in approving the development of both Sites A and B at Pier 6. The Court of Appeals' recent decision in *Avella* squarely rejects BBPC's disregard of its legal authority.

In sum, Respondents' current litigation position that the GPP contains no financial need requirement flatly conflicts with the text and structure of the GPP and the FEIS it incorporates, as well as Respondents' express commitment to both courts and the community to limit development at the Park. By rejecting the existence of any such financial need constraint on its legal authority to sell the Pier 6 development parcels to private real estate developers for the next ninety-three

years, the BBPC Board's final actions at both sites A and B are necessarily infected by a clear "error of law" under N.Y. C.P.L.R. § 7803(3) and must be annulled on that basis alone.

2. BBPC's Purported Showing Of Financial Need For The Thirty-Story Luxury Condo Tower Is Irrational (First Cause Of Action).

Respondents acknowledge that no fiscal purpose is served by the fifteen-story tower it has authorized at Site B.[8] Consequently, the error of law described above is dipositive of Petitioner's claim with respect to Site B. As to Site A, however, Respondents purport to show they satisfy the financial need test that they claim is non-existent. Even if such a showing could in theory overcome that fundamental legal error, BBPC's showing of financial need for development at Parcel A is inadequate and the Board's Final Action must be annulled as irrational, arbitrary and capricious. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts," *Prometheus Realty Corp. v. N.Y.C. Water Bd.*, 147 A.D.3d 519, 531 (1st Dep't 2017), for example, where the agency "relied upon assumptions about certain facts that are both contradicting and unrealistic," *Council of Trade Waste Ass'ns v. City of New York*, 179 A.D.2d 413, 413 (1st Dep't 1992).

a) BBPC's Decision Is Irrational And Self-Contradictory.

The First Department's recent decision in *Prometheus Realty* amply demonstrates that Respondents' factual allegations make their decision irrational under Article 78. In *Prometheus Realty*, the First Department annulled the New York City Water Board's decision to raise water

[8] Purdy Reply Aff., Ex. G at 34-35 (statement of BBPC Board Audit & Finance Committee member Stephen Merkel at the June 7, 2016 BBPC Board meeting that "the development of Parcel B may well be in the best interest of the corporation but doesn't necessarily fit into the category of pure fiscal needs"). Notably, the Site B residential tower is financially independent of the Site A condominium tower, Gov't Resp'ts' Opp. Br. at 35 n.5 (acknowledging that the forty luxury units at Site B "are required to support the affordable housing" in that tower and that the Parcel A condo tower "does not cross-subsidize the affordable housing on Parcel B").

rates for three classes of its customers to meet an anticipated budget shortfall while, at the same time, issuing a special, one-time $183 credit to each of a third class of customers. In April 2016, the Water Board had decided to set a 2.1 percent rate increase for all three classes to cover a potential cash shortfall. *Prometheus Realty*, 147 A.D.3d at 521. Later that month, the City of New York announced a decision to forgo a $122-million annual rental payment owed by the Water Board in fiscal year 2017. *Id.* The Water Board went ahead with the rate increase anyway, but used the unexpected windfall of $122 million to issue a credit to only one of its classes of customers. *Id.*

The First Department found that the Water Board's self-contradictory decision lacked a rational basis. The court emphasized that the Water Board, just like BBPC, is required to be financially self-sustaining and determined that it was irrational for the Water Board to balance its fiscal year 2017 budget by raising rates, while simultaneously issuing a credit to certain customers. *Id.* at 523-24. The court also rejected the Water Board's claim that the 2.1 percent rate increase was necessary in any event to cover future budget gaps. In dismissing that argument, the First Department observed that, even if the cash shortfall would persist, "the Water Board [did] not explain how its five year projections still have validity when they were made before the City announced its intention to forgo rent for the next five years." *Id.* at 524.

BBPC's irrational decision to develop Parcels A and B is directly analogous for both reasons. Like the Water Board's decision in *Prometheus Realty* to give away credits to some customers while raising rates for others, the decision to construct a massive luxury condo tower at Pier 6 to serve a purported financial need while simultaneously deciding to lock up the Park

project's last possible development parcel (Parcel B) for a non-remunerative purpose[9] makes no financial sense. BBPC's argument for its decision is also irrational: it claims that it needed to make conservative, prudent forecasts of its present and future financial need because the real estate market is volatile and DOF is unpredictable in its valuations,[10] yet it then relied on its admittedly unreliable forecasts to sell off Parcel B, its last development parcel, for development that will yield no revenue instead of holding onto it in case its forecasts prove unduly optimistic in the future. Reply Br. at 39-40; Watts Reply Aff. ¶ 9; Gov't Resp'ts' Opp. Br. at 31-33. In short, both the decision and the rationale reflect precisely the sort of illogic that the *Prometheus Realty* court rejected as irrational.

Additionally, like the Water Board in *Prometheus*, BBPC knowingly relied on unreliable data to underlie its decision without rational justification. When valuing its other developments, BBPC intentionally relied on its own estimates of DOF's future valuations rather than wait for actual DOF valuations that would be available beginning in January 2017 and that might demonstrate a lack of financial need for the high-rise tower at Pier 6.[11] Reply Br. at 32; Lowin Supp. Aff. ¶¶ 56-88. BBPC's decision to alter the face of the Park permanently with two towers, rather than wait a year for more reliable valuation data, was unreasonable, particularly since

[9] That the non-remunerative building serves a salutary public policy does not distinguish *Prometheus Realty*, where the credit to small home-owners also served a laudable goal. *See Avella*, slip op. at 18, 2017 WL 2427307, at *10.

[10] Lowin Aff. ¶¶ 96-97 ("[T]he Park's revenues are based on an unpredictable and volatile real estate market that is subject to erratic ups and downs . . . . That is why the financial model relies on appropriately cautious assumptions to minimize future risk to the Park and the community."); Gov't Resp'ts' Opp. Br. at 22 ("BBP's projections are based on reasonably conservative assumptions that minimize risk and account for an unpredictable and volatile real estate market.").

[11] Respondents now attempt to exclude the actual DOF data from the record, since it exposes the irrationality of their refusal to wait for the valuations. *See* Resp'ts' February 28, 2017 Letter to the Court at 1.

BBPC's estimated valuations, as discussed below, were inaccurate. And, to be clear, there was no need for the Board to act immediately to authorize development at Pier 6. As BBPC management acknowledged at the June 7, 2016 meeting, its preferred preventative maintenance on the piers supporting the Park could begin at any point "in the next couple of years." Purdy Aff., Ex. G at 22-23; Am. Pet. ¶ 120.

b) BBPC's Decision Is Irrational Because It Has Not Approved A Preventative Maintenance Plan And Because It Has Not Meaningfully Considered Borrowing To Fund Such A Plan.

Separately, it is irrational for BBPC to approve the sale of a crown jewel asset now to fund a massive new expenditure (on preventative pier maintenance) when its Board of Directors must approve any such expenditure and has never done so. BHA Reply Br. at 26-29; Witty Aff. ¶ 19 (confirming that the BBPC Board has not voted on a preventative maintenance contract). Nor is it persuasive for BBPC to argue that its Board will approve that expenditure when it is asked to do so in the future: fundamental principles of responsible corporate governance do not permit the sale of a crown jewel to fund an expense that the Board has not approved, even in principle. And at least one Board member cast doubt on approving that maintenance plan at the very meeting at which the Pier 6 development was approved. Purdy Reply Aff., Ex. G at 40 (comments by City Councilmember / BBPC Board member Stephen Levin).

Moreover, even if the near-term massive expense for the newly proposed preventative maintenance plan were accepted as a given, the record demonstrates no serious consideration of borrowing by BBPC to address that short-term need for cash. Respondents point to a cursory letter received from the City's Office of Management and Budget, stating that BBPC itself could not borrow to fund pier maintenance at the Park. However, ESD or BBPDC could issue bonds to fund this expenditure, as the BHA has repeatedly proposed. Stein Supp. Aff., Ex. 35 at 1 (letter from

the office of State Comptroller Thomas DiNapoli stating that "it appears the BBPDC may issue bonds in furtherance of its corporate purposes"); Squadron Reply Aff. ¶ 9 (reporting that both the New York City Comptroller and State Comptroller provided information suggesting that BBPC and BBPDC "may have the ability to issue bonds to fund capital projects"); Watts Aff. ¶ 10 ("The New York State Urban Development Corporation, which established the Park and its General Project Plan, is authorized by state statute to issue bonds and frequently does so."). The BHA has submitted compelling evidence showing that BBPC has never given any meaningful consideration to borrowing, making its decision to solve its purported cash-flow mismatch by selling off its last major asset irrational. Watts Aff. at ¶¶ 10, 11.

c) BBPC's Decision Is Irrational Because It Relied On Material Misinformation.

The BBPC Board's decision to approve development at Pier 6 also relied on material misinformation about BBPC's financial needs. BBPC management exaggerated the organization's financial need for the Pier 6 development by underestimating the revenue to be expected from other Park developments by at least $285 million. BHA Reply Br. at 31; Qiao Reply Aff. ¶ 14. Lowin has admitted that his calculation was based on data errors that caused BBPC to underreport revenues by $64 million. Lowin Aff. ¶ 90; Lowin Supp. Aff. ¶ 9. BHA Reply Br. at 31-32; Qiao Reply Aff. ¶¶ 6-8.

BBPC's calculation about its future revenues from non-Pier 6 developments relied upon three additional irrational assumptions. *First*, BBPC assumed that the newly constructed Pierhouse will be valued like One Brooklyn Bridge Park, which is a warehouse converted into residential property, rather than like similar brand-new luxury construction in the neighborhood. This caused BBPC to underestimate its future revenues from Pierhouse by $102 million. BHA Supp. Reply Br. at 10-12; Qiao Aff. ¶ 14. *Second*, BBPC's estimate failed to apply the appropriate

DOF methodology when calculating the Empire Stores vacancy rate, causing it to underestimate future revenues from Empire Stores by $81 million.[12] BHA Reply Br. at 33-36; Qiao Aff. ¶ 14. *Third*, BBPC calculations anticipated that DOF would value One John Street at only $134 per square foot; however, partial DOF valuation data that was available prior to the BBPC Board's final vote in June 2016 (and that was not brought to the Board's attention) reflected that the likely revenue from One John Street would be $32 million higher. BHA Reply Br. at 32-33. BBPC's miscalculations are material. As amply demonstrated by the Qiao affidavit, which corrects for these errors and irrational assumptions in BBPC's calculations, a much smaller building at Parcel A could satisfy BBPC's purported immediate cash need.

3. Changed Circumstances Since 2005 Require An SEIS (Sixth, Seventh, And Eighth Causes Of Action).

Although the SEQRA regulations grant the lead agency discretion as to whether to issue an SEIS when environmental impacts were "inadequately addressed" in the FEIS, 6 N.Y.C.R.R. § 617.9(a)(7) (stating that an agency "may" require an SEIS), the New York Court of Appeals has made clear that an agency's decision not to prepare an SEIS is subject to judicial review under the SEQRA "hard look" standard. *Riverkeeper, Inc. v. Planning Bd.*, 9 N.Y.3d 219, 231-32 (2007). When an agency decides not to issue an SEIS, as was done here, the court must assess "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." *Id.* (quoting *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)) (internal quotation marks omitted); *accord Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, 94 A.D.3d 508, 511 (1st Dep't

[12] If the Court's decision could turn on which of these assumptions is correct, the BHA requests the opportunity to examine Mr. Lowin about them.

2012) (ordering ESD to issue an SEIS because its decision not to do so was unsupportable under "hard look" analysis).

Here, there is no factual dispute about the changes in circumstances. There are unquestionably newly-available alternatives to the Pier 6 project that were never considered, and there is no dispute that dramatic overcrowding of the local elementary schools has arisen since the 2005 FEIS and has never been studied. As a result, Respondents' position is affected by the three separate errors of law discussed below, any one of which establishes that it necessarily failed to take the required "hard look" when it chose not to prepare a SEIS.

a) ESD Remains The Lead Agency But Has Not Made Any SEIS Determination (Eighth Cause Of Action).

At the outset, the choice not to proceed with an SEIS was made by the wrong agency. Although the public was not told about it at the time, Respondents now claim that BBPC took over from ESD as the "lead agency" to comply with SEQRA requirements for the Park Project as of the day before the June 7, 2016 BBPC Board meeting. Gov't Resp'ts' Br. at 60-61; Stein Aff., Ex. 23. Such a change in lead agency status violates the GPP. The GPP — as amended in mid-2010 expressly for the purpose of reflecting the then-recent creation of BBPC and the transfer to BBPC of all operational responsibilities of the Park Project — specifies that, "[f]or any future Project actions requiring environmental review, ESDC will continue to serve as the lead agency." Wolf Aff., Ex. 7 at 31. ESD has, therefore, at all times remained the lead agency and was not permitted to delegate to BBPC the decision whether to undertake an SEIS in connection with the Pier 6 development. *Coca-Cola Bottling Co. of N.Y. v. Bd. of Estimate of N.Y.*, 72 N.Y.2d 674, 679-83 (1988) (finding that a lead agency may not delegate the final determination as to whether a project will have a significant environmental impact). As a result, the required lead agency plainly has

not taken the "hard look" at the need for an SEIS, as mandated by SEQRA. BHA Reply Br. at 53-55. The BBPC Board's Final Actions must be annulled on this ground alone.

b) An SEIS Must Be Prepared To Address Changed Circumstances (Sixth And Seventh Causes Of Action).

BBPC misapplied SEQRA in two ways: by failing to (1) recognize that changes in available alternatives may necessitate an SEIS and (2) address the severe increase in school overcrowding since the FEIS was prepared over a decade ago.

Respondents do not contest that eleven years passed after the FEIS was issued before the Board's action on Pier 6, and the vast and unanticipated improvement in BBPC's finances makes possible several alternatives to massive residential construction at Pier 6 that may not have been possible when the FEIS was issued in 2005. Those newly available alternatives include deferral of any development at Pier 6 until actual DOF valuations are available; development of a smaller building at Pier 6; applying the new pier preventative maintenance approach over time instead of all at once; and funding any justifiable near-term capital expenditures through borrowing against future revenues. BHA Reply Br. at 43-44 & n.29; BHA Br. at 26-27.

Respondents — in defiance of the SEQRA regulation's "change in circumstances" language and common sense — argue that, as a matter of law, the emergence of newly feasible alternatives never warrants an SEIS, and that only a change in the environmental impact of the project can trigger an SEIS. Gov't Resp'ts' Br. at 53. Respondents are incorrect. Their position does not comport with the language of SEQRA's regulatory framework, which authorizes an SEIS if the FEIS "inadequately addressed" the project's environmental impacts in light of changed circumstances. 6 N.Y.C.R.R. § 617.9(a)(7)(i). Consideration of feasible alternatives is fundamental to any "adequate" environmental review under SEQRA, as is shown in the BHA's prior briefing; the BHA has also shown that nothing in SEQRA, its enabling regulations, or the

case law dictates that changes in available alternatives are insufficient to warrant the preparation of an SEIS. *See, e.g.*, BHA Reply Br. at 43-48; BHA Br. at 24-27. And the hypothetical circumstances the BHA has posited — in which a planned toxic, polluting power plant is proposed to be built a decade after its FEIS, and new technology in the interim would enable a far cleaner plant to be built at no greater cost — illustrates that the availability of alternatives must be sufficient to warrant an SEIS, while Respondents claim no SEIS would be required in that circumstance because the toxic pollution itself would not have changed. Pet. Op. Br. at 26; BHA Reply Br. at 46-47.

Separately, Respondents admit that the Pier 6 development will exacerbate existing overcrowding in elementary schools, which have already been forced to eliminate Pre-K programs for lack of space and are expected (by Respondents) to be at 135-percent capacity when the Pier 6 developments open in two years, without taking account of the nearly 100 additional students Respondents project will be created by the Pier 6 buildings. Yet Respondents argue as a matter of law that such overcrowding, which was never anticipated or studied in the FEIS, *see* Wolf Aff., Ex. 54 at 4-6 to 4-7; BHA Reply Br. at 49-53, does not warrant an SEIS because it will not increase the existing school utilization by at least 5 percent. Gov't Resp'ts' Opp. Br. at 55; Gov't Resp'ts' Sur-Opp. Br. at 83. Respondents' argument relies on a misreading of the City's *CEQR Technical Manual*. As the BHA has shown in its prior briefing, Respondents are not bound by the advisory guidance in the *Technical Manual* and, in any event, the *Technical Manual*'s 5-percent-increase test does not apply to an already overcrowded school district. BHA Reply Br. at 50-51. Respondents' misapplication of the *Technical Manual*'s 5-percent-increase standard is another "error of law" that compels annulment of its Final Action.

Even if BBPC's reading of the *Technical Manual* were correct, the entirety of Park development (without impermissible segmenting) increases crowding at Sub-District 2 elementary schools by more than 5 percent. BHA Reply Br. at 51-53. Since it is undisputed that the true impact of residential development at the Park was never accurately considered, BBPC cannot exclude non-Pier 6 developments at the Park when applying the standard for triggering an SEIS set forth in the City's *Technical Manual*. Considering the entirety of Park development, the *Technical Manual* dictates that an SEIS to address school utilization is necessary.

For these reasons, an SEIS is required to address the impact of development at Pier 6.

4. BBPC Violated Its Procedures In Approving Contracts With Developers Who Did Not Comply With City Procurement Rules (Fourth Cause Of Action).

When establishing the selection criteria for Pier 6 development proposals, BBPC made the submission of a Doing Business Database form a mandatory pre-requisite for BBPC even to consider, much less select, a developer's proposal. Wolf Aff., Ex. 18 at 23. Once it established these necessary bid requirements and defined its selection process, BBPC was not free to ignore the process it set forth. *See, e.g., Cave-of-the-Winds Scenic Tours, Inc. v. Niagara Frontier State Park & Recreation Comm'n*, 64 A.D.2d 818, 819 (4th Dep't 1978) (annulling commission's award of license to bidder who failed to comply with all application requirements set forth by the commission).[13]

[13] *See also Frick v. Bahou*, 56 N.Y.2d 777, 778 (1982) (reversing civil service examination grading for violation of lawful procedure where it was done "in contravention of the respondent commission's own rules and regulations"); *Gutierrez v. Rhea*, 105 A.D.3d 481, 485 (1st Dep't 2013) (annulling New York City Housing Authority decision to preclude tenant's residency because, among other things, the agency's determination violated a number of its internal procedural rules).

Respondents do not contest that BBPC failed to follow its established selection procedure, and concede that Oliver's Realty and its principal have never submitted this required form. Myer Aff. ¶ 35.[14] Having acknowledged that a violation occurred, Respondents instead argue that the BHA lacks standing to obtain relief based on BBPC's admitted "violation of lawful procedure," N.Y. C.P.L.R. § 7803(3). They also claim that the BHA's claim is time barred.

Respondents' standing argument construes the discretionary doctrine of standing so narrowly as to render it "insuperable." *See Allison v. N.Y.C. Landmarks Preservation Comm'n*, 35 Misc. 3d 500, 506 (Sup. Ct. N.Y. Cty. 2011) (citing *Save the Pine Bush, Inc. v. Common Council of Albany*, 13 N.Y.3d 297 (2009)). The Court of Appeals has clearly expressed that standing must not be applied in a "heavy handed" manner that precludes judicial review. *Ass'n for a Better Long Is., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014) (internal quotation marks omitted). Respondents' highly restrictive view of standing would limit standing to challenge the selection of RAL and Oliver's in violation of BBPC's established RFP procedure solely to competing bidders, ironically limiting standing to enforce BBPC's invocation of the City's anti-corruption "pay to play" law to the pay-to-players! *See* Gov't Resp'ts' Opp. Br. at 65; Gov't Resp'ts' Sur-Opp. Br. at 102.

Moreover, a statute can confer standing even without a direct economic interest; the question is whether the claimant's interests, whether or not economic, fall within the zone of interest that the statute seeks to protect. *Allison*, 35 Misc. 3d 500, 507-08 (finding that, independent of any economic interest in the building, the petitioner fell within the zone of interest expressly contemplated by the Landmark Preservation Law). Here, the pertinent statute is the

[14] RAL claims that it submitted the form, but RAL did not appear in the Doing Business Database, which logs entities and individuals who have submitted Doing Business Data forms to the City, until March 2016. Factor Aff. ¶ 5.

Urban Development Corporation Act ("UDCA"), the authority for the creation of the Park Project, the GPP, and the development of Pier 6. The BHA's claim falls squarely within the zone of interest protected by the UDCA, which expressly contemplates that community groups like the BHA will have a voice in urban development authorized by the act, such as the Park Project. N.Y. Unconsol. Law § 6266(1). For the reasons set forth in the BHA's prior briefing, the BHA's unquestioned standing to challenge the BBPC Board's Final Action under Article 78 on other grounds necessarily includes standing to challenge procedural violations that led to the final approval. BHA Reply Br. at 58-59; BHA Supp. Reply at 24-26. If the BHA were denied standing, BBPC's decision to flout its established procedure would go unchecked. *See, e.g., Montgomery v. Metro. Transp. Auth.*, 2009 WL 4843782, 25 Misc. 3d 1241(A), at *4 (Sup. Ct. N.Y. Cty. 2009) (cautioning against restrictive standing analysis that would prevent review of "a clear violation of . . . appraisal and bidding provisions").[15]

5. BBPC Violated BBPC And CAC Bylaws By Failing To Disclose Information To The CAC (Fifth Cause Of Action).

BBPC's developer selection process omitted key steps designed to ensure that the CAC, the community's official representative in that process, could provide meaningful consultation and advice. The BHA, through its authority as a member of the CAC, may enforce the CAC's rights.[16] The CAC bylaws require BBPC to provide the CAC with "information on a timely basis on major aspects of its policies and operations affecting Brooklyn Bridge Park to enable the [CAC] to

[15] The BHA's claim that BBPC violated its selection procedures is also timely because, as required by Article 78, it was brought within four months of BBPC making a final selection of developers for Pier 6. BHA Reply Br. at 61-66; BHA Supp. Reply Br. at 26 n.14.

[16] Respondents argue that the BHA lacks standing to enforce the CAC's rights as it is neither a president nor treasurer of the CAC. However, because the CAC has neither a president nor a treasurer, it can only act through its members. Thus, as a member of the CAC, the BHA was aggrieved and has standing to assert its Fifth Cause of Action. Supp. Br. at 27. The Chairman of the CAC, Lucy Koteen, submitted an affidavit in support of the Amended Petition.

properly fulfill its advisory role to the Corporation." Am. Pet. ¶ 290; Wolf Aff., Ex. 3 at 1. BBPC withheld from the CAC material information regarding development at Pier 6, preventing the CAC from performing its advisory function. Prior to the June 7 BBPC Board vote, BBPC did not disclose to the CAC any information about the actual proposed Pier 6 development or that the Parcel B building height had increased. Koteen Aff. ¶¶ 22-24; Am. Pet. ¶¶ 25, 291. BBPC also repeatedly refused the CAC's request for BBPC's financial model. Koteen Aff. ¶¶ 28-32, 37. These failures by BBPC warrant annulment. *Frick*, 56 N.Y.2d at 778; *Gutierrez*, 105 A.D.3d at 485.[17]

C. The Balancing Of The Equities Weighs In Petitioner's Favor.

The harm Petitioner will suffer should construction commence is greater than the harm Respondents would suffer if construction is postponed pending this Court's decision on the merits. The harm to Petitioner here is described above and in the Castilow Affidavit. It is clear that the burdens of two months' of pile-driving on the neighborhood and Park visitors is real and irreparable, particularly during the summertime peak usage period; in addition, the legal standard would become more difficult for Petitioner to obtain injunctive relief even if its claims are meritorious. Such harm outweighs whatever speculative economic injury the developers may claim to incur from a delay.[18] *See Sachellaridou v. Pasent Realty Co.*, 104 A.D.2d 764, 766 (1st

[17] BHA relies on its prior briefing to support its Third Cause of Action concerning the violation of the height limit for the tower at Site B.

[18] Moreover, Respondents themselves are partly responsible for the time it has taken for this litigation to reach this point: the BHA promptly filed its Petition and supporting papers thirty days after the challenged action, but Respondents requested a seven-week adjournment of their time to answer. Moreover, although BHA alerted Respondents well before they answered that the BHA would raise the lead agency issue that Respondents disclosed for the first time three weeks after the BHA filed its Petition, Respondents chose not to address that issue in their answering papers and once the BHA amended the Petition solely to add lead agency point, Respondents took another four weeks to submit new answering papers, adding forty new pages to their opposition

Dep't 1984) (granting plaintiff's motion for a preliminary injunction to enjoin defendant from evicting her when the only harm to defendant was "merely a delay in selling the shares to the apartment at a presumably greater 'outsider' price if they were to prevail upon the action").

D. The Court Should Exercise Its Discretion To Require At Most A Nominal Undertaking.

If the Court grants Petitioner's motion for a TRO or preliminary injunction, it should exercise its discretion to require at most a nominal undertaking from Petitioner, pursuant to CPLR § 6312(b), as the BHA is a not-for-profit community organization that lacks the means to post a bond and its Article 78 challenge serves a public purpose.

New York courts have considered the financial ability of the moving party to pay as well as the public purpose served by the moving party's legal position. *See, e.g.*, *Daytop Village v. Consolidated Edison Co. of New York*, 61 A.D.2d 933, 934 (1st Dep't 1978) ($1,000 undertaking); *Raritan Baykeeper, Inc. v. City of New York*, No. 31145/06, 42 Misc. 3d 1208(A) (Sup. Ct. Kings Cty. Dec. 20, 2013) ($1,000 bond); *Broadway Triangle Cmty. Coal v. Bloomberg*, 35 Misc. 3d 167, 177 (Sup. Ct. N.Y. Cty. Dec. 23, 2011) ($5,000); *Wuertz v. Cowne*, 65 A.D.2d 528 (1st Dep't 1978) ($100 for individual plaintiff); *McDonald v. N. Shore Yacht Sales, Inc.*, 134 Misc. 2d 910, 917–18 (Sup. Ct. Nassau Cty. Jan 28, 1987) (no bond in view of public purpose). *See also A. Sherman Lumber Co. v. Kildare Club*, 186 A.D. 852, 855 (App. Div. 3d Dep't 1919) (public purpose pertinent).

CONCLUSION

For any and all of the foregoing reasons, this Court should grant Petitioner's motion for a temporary restraining order and/or for a preliminary injunction prohibiting construction of the Pier

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brief. As a result they cannot be heard to complain about the modest delay now needed to preserve the status quo.

6 development while this Court determines the merits of the Amended Petition, and set at most a nominal bond.

Dated: New York, New York
June 30, 2017

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