

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

----- X
:
In the Matter of :
:
DEVELOP DON'T DESTROY (BROOKLYN), :
INC., et al., :
:
Petitioners-Plaintiffs-Appellants, :
:
For a Judgment Pursuant to Article 78 of the CPLR :
and Declaratory Judgment :
:
- against - :
:
URBAN DEVELOPMENT CORPORATION :
d/b/a EMPIRE STATE DEVELOPMENT :
CORPORATION, et al., :
:
Respondents-Defendants-Respondents. :
:
----- X

New York County
Index No. 104597/07

**AFFIDAVIT IN OPPOSITION
TO APPLICATION FOR A STAY**

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

ROBERT P. SANNA, R.A. being sworn, states:

1. I am a Registered Architect licensed by the State of New York, and Executive Vice President and Director of Construction Design and Development of respondent-defendant-respondent Forest City Rather Companies, LLC ("FCRC"). I have over 25 years of experience in real estate development and construction. I make this affidavit in opposition to an application by petitioners-plaintiffs-appellants ("petitioners") for a stay of construction work at the site of the Atlantic Yards Civic and Land Use Project (the "Project") pending their appeal

from the decision, order and judgment of the Supreme Court, New York County (Joan A. Madden, J.), dated January 11, 2008, which dismissed the Article 78 petition in this case.

2. The purpose of this affidavit is to describe the actual construction work that already has been done and is being done at the Project site, and that is about to start, and to demonstrate that this work is critical. The work has been carefully orchestrated in a complex and interrelated schedule. Therefore, a delay of just one step in the complicated sequence of work would have a ripple effect on the Project's schedule and cause enormous delay to the important public benefits that the Project is intended to achieve, and also would cause the demobilization (*i.e.*, the sending home) of nearly 100 construction workers, and significant financial injury to the Project's sponsors.

3. The Project's site consists of approximately 22 acres in Brooklyn. The site is roughly bounded by Atlantic Avenue to the north, Flatbush and Fourth Avenues to the west, Dean Street to the south and Vanderbilt Avenue to the east. A map of the Project site is attached to this affidavit as Exhibit A, and a map of the completed Project is attached to this affidavit as Exhibit B. Approximately eight acres of the site are owned by the Metropolitan Transit Authority (the "MTA") and consist of an open (*i.e.*, uncovered) trench, below the grade of the surrounding streets and blocks, that the MTA operates as its Vanderbilt Yard. The Long Island Railroad ("LIRR") uses this yard for the storage and servicing of train cars that are employed in its passenger service. As part of the Project, and in addition to other significant mass transit improvements, FCRC will remediate environmental contamination at the Vanderbilt Yard as part of the construction of a reconfigured MTA/LIRR facility at the site to replace the existing one. In addition, a platform eventually will be constructed over the rail yard. Significant parts of the Project will be built on that platform, which will close the enormous

trench that now separates the blocks to the north of the rail yard from those to the south of the yard.

4. Under the General Project Plan for the Project that received final approval from Empire State Development Corporation (“ESDC”) in December 2006 and was sustained by Justice Madden, the Project is to be built in two phases. Phase I includes the reconstruction of the Vanderbilt Yard, transit improvements, infrastructure upgrades, environmental remediation, and construction of the arena and the immediately surrounding buildings. Furthermore, in order to remediate the environmental contamination at the existing rail yard, dismantle the existing yard and build a new facility without disruption to LIRR operations, FCRC now is building a replacement rail yard in the southern half of the MTA’s property to allow the MTA and the LIRR to continue their mass transit operations while the existing rail yard is demolished and replaced.

5. The arena is the building that is scheduled to be completed first. Because the arena will be constructed, in part, above the westernmost portion of the rail yard, construction of the arena itself (as opposed to preparatory work) cannot commence until the replacement rail yard has been built and the existing yard has been vacated and can be dismantled.

6. Much of the Phase I work that is currently in progress is being undertaken to allow construction of the arena to commence as soon as possible, and is intended to allow the arena to be completed in time for the Nets to relocate there in 2010. The work is proceeding in accordance with an intricate schedule, with work in progress now on vacant properties that are owned by FCRC affiliates, the MTA and the City of New York, and work on properties that are owned or occupied by other parties deferred until ESDC actually uses its powers of eminent domain to acquire title to and possession of those properties.

7. There are three major scopes of work by FCRC that currently are underway at the Project site: (1) the abatement of asbestos and demolition of vacant buildings at the Project site; (2) the first phase of the relocation of utility services; and (3) the construction of the replacement rail yard for the LIRR. As part of the construction of the replacement yard, the demolition of the Carlton Avenue bridge – *i.e.*, the block of Carlton Avenue between Atlantic Avenue and Pacific Street, which is actually a bridge over the existing rail yard – also is about to begin. Further explanation of the foregoing work follows. In addition, a color-coded image of the Project site that depicts the locations of this work is annexed to this affidavit as Exhibit C.

8. In connection with the ongoing work that is underway at the Project site, several different construction crews, totaling nearly 100 construction workers, are active at the site on a daily basis. A court order that halts work at the Project site would require that all or nearly all of these workers be sent home, without pay in at least some cases, during the cessation of activity.

A. The Ongoing Work

9. Abatement and demolition work. In 2006, prior to the Project's approval by ESDC, FCRC demolished six vacant buildings that it had acquired in the Project site. These demolitions were conducted pursuant to emergency approvals that were issued to FCRC by ESDC on the ground that the buildings were so structurally unsound that they posed an immediate danger to public safety. ESDC's determination to allow these demolitions to proceed on an emergency basis was challenged by some of the present petitioners, but was sustained by this Court. Develop Don't Destroy Brooklyn v. Empire State Develop. Corp., 31 A.D.3d 144 (1st Dep't 2006), lv. to app. denied, 8 N.Y.3d 802 (2007).

10. In February 2007, after ESDC's final approval of the Project, FCRC began asbestos abatement and demolition work at vacant buildings that it owns within the Project site. All of the abatement and demolition work is being conducted subject to periodic inspections by the New York City Department of Buildings ("DOB"), in compliance with all applicable legal requirements, and also in accordance with additional protocols established by DOB in April 2007.

11. Prior to demolition of buildings, it is necessary to identify and remove asbestos and any other hazardous materials such as above-ground storage tanks, lead-based paint and PCB-containing fluorescent light ballasts. Asbestos abatement – *i.e.*, the proper identification, isolation, removal and disposal of any asbestos or asbestos-containing materials – must be done by specially licensed abatement contractors with licensed personnel wearing appropriate protective gear. Prior to the commencement of the actual abatement work, the abatement contractor must file appropriate submissions with the City's Department of Environmental Protection ("DEP") and, if the amount of asbestos to be abated exceeds certain thresholds, with the New York State Department of Labor and the U.S. Environmental Protection Agency. Once the abatement work has been completed, air-monitoring tests are performed, after which certifications that the building is free from asbestos are filed with DOB as part of the process of obtaining a demolition permit from DOB. The necessary submissions to DOB also include certifications that all utilities have been disconnected, plans showing the measures that will be taken to protect adjoining properties, and proof that adjoining property owners have been notified of the demolition. In addition, DOB's BEST Squad conducts a pre-demolition inspection of the premises. Once the necessary filings and the inspection have been successfully completed, a demolition permit is issued by DOB.

12. As of today, FCRC has demolished 25 vacant buildings on the Project site. Another eight vacant buildings are being demolished now or are scheduled to be demolished in the near future. I understand that, at the commencement of this litigation in April 2007, petitioners applied to Justice Madden for a temporary restraining order and preliminary injunction that would halt this demolition work during the pendency of this litigation, that Justice Madden denied the requested TRO and held the motion for a preliminary injunction under submission while she considered petitioners' Article 78 petition, and that petitioners never applied to this Court for a temporary restraining order after Justice Madden denied their application for such emergency relief.

13. Utility work. In order to effectuate the Project, it is necessary to remove the utilities that now are under the location where the arena will be built, and to re-route these utilities around the arena block and connect the new utilities to the existing network to allow continuous water and sewer service. All of the work relating to the replacement or relocation of water and sewer lines is being conducted by FCRC's contractors in accordance with DEP standards, and subject to DEP review.

14. FCRC began the first of three phases of upgraded water and sewer installations on the Project site in November 2007. Work on the new sewer and water lines started on Dean Street at its intersection with Flatbush Avenue, and is continuing along Dean Street to 6th Avenue, and along 6th Avenue from Dean Street to Pacific Street. This work must be completed before construction of the arena building can begin. Although this work has entailed the opening of street beds along Dean Street and 6th Avenue within the Project site and concomitant inconvenience to residents of the adjoining buildings and pedestrians and vehicles that use those streets, FCRC and ESDC have taken steps to notify the community and reduce,

where possible, the inconvenience caused by this work. Petitioners have not previously sought judicial intervention to halt this work notwithstanding its commencement two months ago.

15. Construction of the replacement rail yard. As discussed above, the Project requires the reconfiguration and reconstruction of the Vanderbilt Yard. Ultimately, a platform will be constructed over the rail yard. This platform will provide a base for six of the new buildings that are to be constructed during Phase II of the Project.

16. The arena will be located on blocks 1118, 1119 and 1127. Currently, the Vanderbilt rail yard is partially located on block 1119. Therefore, in order to construct the arena, the railroad tracks on block 1119 must be removed. Furthermore, in order to allow the LIRR to continue to service its trains, a replacement rail yard must be constructed on the southern halves of blocks 1120 and 1121 before the LIRR can cease its operations on block 1119.

17. Construction of the replacement rail yard – an essential component of the construction sequencing for the Project – commenced in February 2007, and has been underway continuously since then. Existing tracks and other structures have been removed from blocks 1120 and 1121. Underground storage tanks associated with a former gas station on block 1121 also have been removed. Currently, excavation support piles and foundation piles for a temporary train trestle are being drilled on block 1121. Excavation to the depth of the replacement yard, with lagging and bracing to support adjoining property, is in progress on block 1121. Foundations are being poured for a temporary access ramp to the yard on block 1120. Foundation piles also have been drilled, and trenches are being dug and conduit is being installed, for the future cable bridge that will cross the Vanderbilt Yard on block 1120.

18. I understand that, when petitioners applied to Justice Madden in April 2007 for a temporary restraining order and preliminary injunction against construction work at

the site, they were persuaded by the MTA that interference with the work on the replacement rail yard would lead to disruptions in mass transit operations, and that petitioners therefore excluded work on the replacement rail yard from the scope of the injunctive relief that they requested from the motion court.

B. Demolition of the Carlton Avenue Bridge

19. It is essential to the construction of the replacement rail yard that the Carlton Avenue bridge be demolished, because the bridge's abutments and piers – *i.e.*, crucial parts of its structural elements – physically interfere with the location of the new tracks. This bridge is a one-block-long structure that traverses the Vanderbilt Yard from north to south, separates block 1120 from 1121, and connects Atlantic Avenue to Pacific Street. Furthermore, as the bridge is on the critical path in the construction schedule for the replacement yard, delay in the bridge's demolition would cause delay in all elements of the replacement yard construction that cannot proceed until the bridge has been demolished, and therefore would cause significant delay in the completion of the replacement yard.

20. On January 2, 2008, in accordance with commitments that FCRC had made to the New York City Department of Transportation (“DOT”), FCRC made a public announcement of the closure of the Carlton Avenue bridge, to take place on January 16, 2008, to allow demolition of the bridge to commence and construction of the replacement yard to continue. A copy of this notice is attached hereto as Exhibit D. On the same day, FCRC's counsel advised petitioners' counsel of the scheduled closure date. On January 14, 2008, FCRC announced that the bridge's closure had been postponed for one week, until January 23, 2008, to allow work in the area of the detour route to be completed. On the same day, FCRC's counsel advised petitioners' counsel of this change.

21. The demolition and reconstruction of the bridge will occur in a complicated sequence of events that is to take place in stages. During the first stage, while the LIRR continues to operate on its existing tracks on block 1119, the replacement yard will continue to be constructed on blocks 1120 and 1121, as discussed above. As also discussed above, the Carlton Avenue bridge's southern supports would interfere with the new tracks that will be part of the replacement rail yard. Therefore, to make room for the replacement yard's tracks and allow trains to enter the replacement yard, the southern half of the bridge must be demolished.

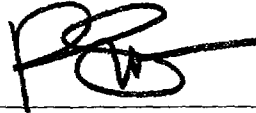
22. After the southern half of the bridge has been demolished, the replacement yard's new tracks have been installed and the replacement yard has been completed, the LIRR will be able to relocate its operations to the replacement yard, which will be in the southern half of the existing MTA site. Next, as part of the improvements to the Vanderbilt Yard the northern half of the Carlton Avenue bridge will be demolished, and the entire Carlton Avenue bridge will be reconstructed and then reopened. Once all of this work has been completed, the platform will be constructed over the rail yard.

23. The closure and demolition of the Carlton Avenue bridge therefore is an integral component of a complicated sequence of work that must proceed sequentially, and must be completed in order to construct the temporary rail yard, relocate the LIRR's operations to the replacement rail yard (and out of block 1119), and begin construction of the arena on block 1119.

C. Conclusion

24. All of the construction work described in this affidavit is critical to the Project's timely completion. A stay of the work by this Court would prevent FCRC from continuing any of the work that is underway or soon to be commenced, would lead to the

demobilization of nearly 100 construction workers, would delay the realization of the substantial public benefits that the Project is intended to achieve, and also would subject FCRC and its affiliates to significant financial injury.



Robert P. Sanna, R.A.

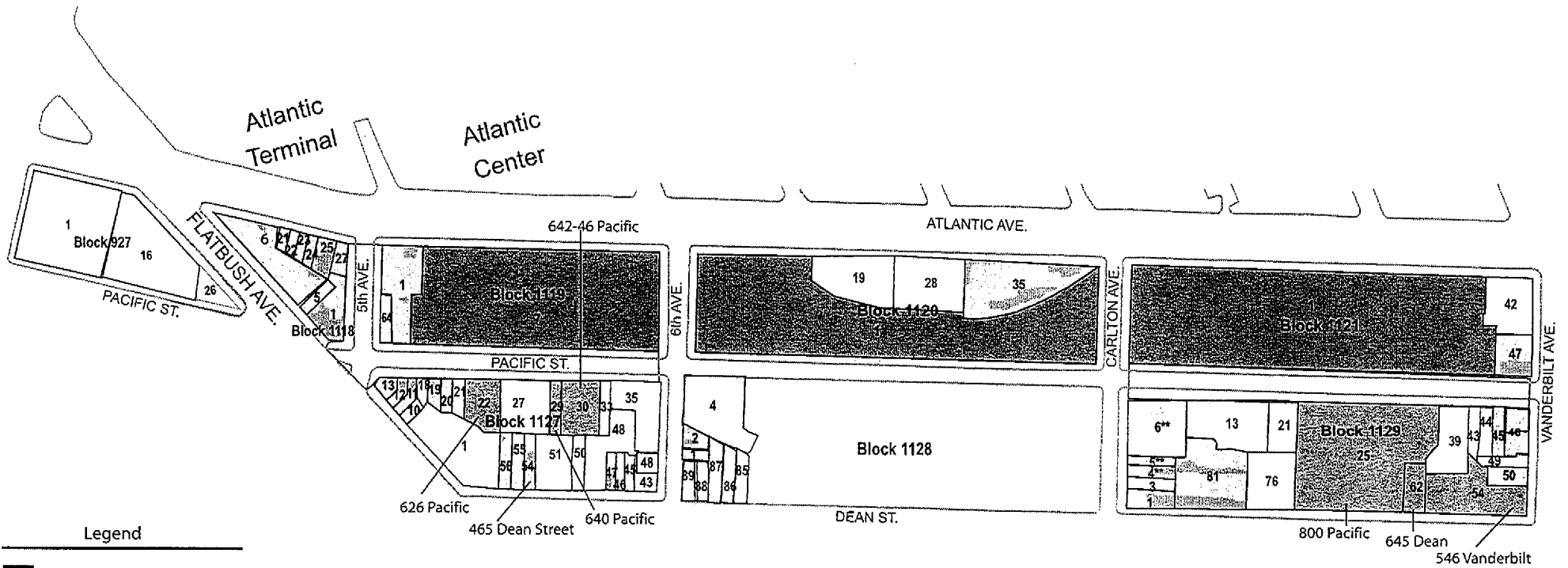
Sworn to before me this
17th day of January, 2008.

ALISON VACCARO
Notary Public, State of New York
No. 01VA506683
Qualified in Queens County
Commission Expires Sept 30, 2010

Alison Vaccaro

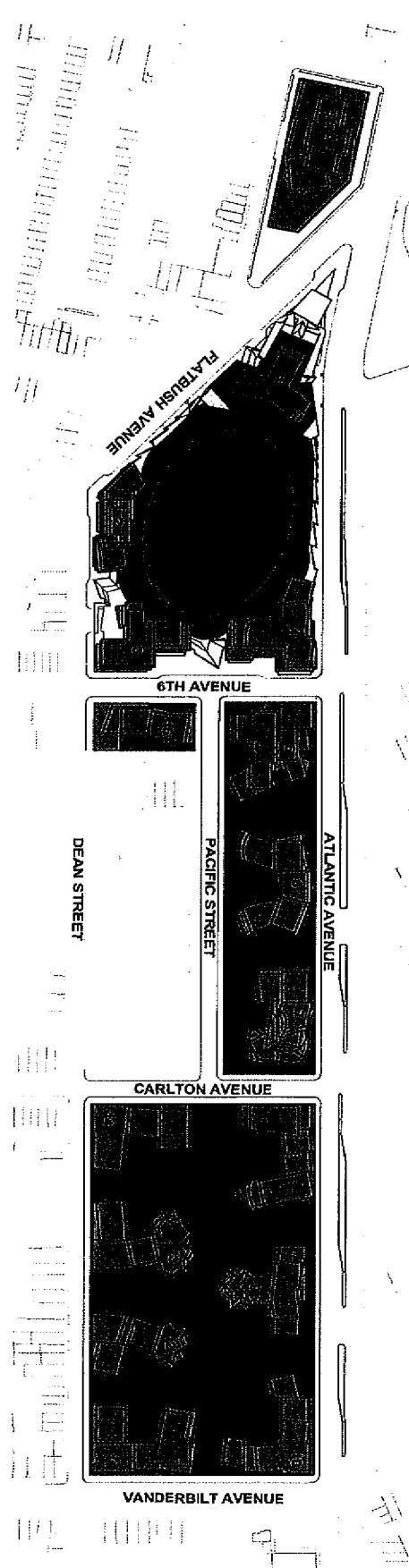
Exhibit A

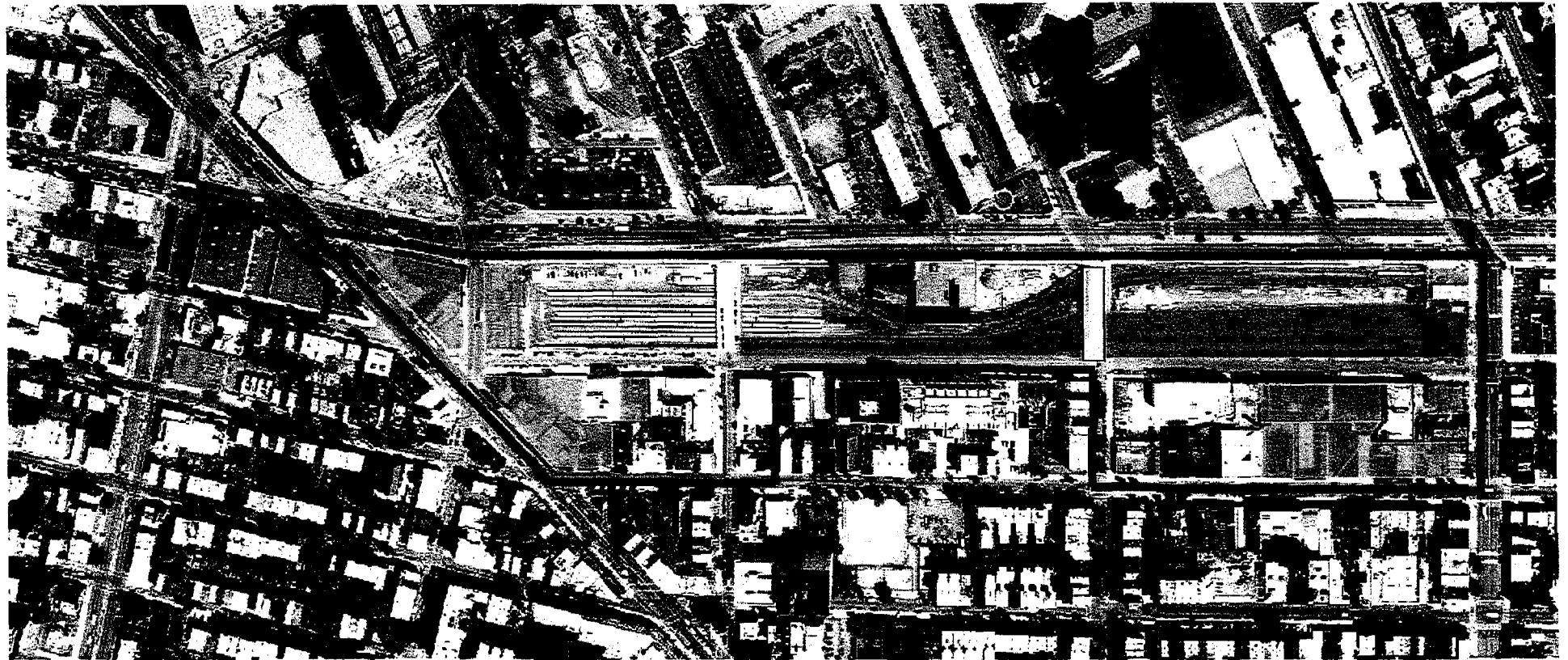
Atlantic Yards Demolition Status



January 14, 2008

Exhibit B





 Demo & Abatement

 Carlton Ave Bridge

 Rail Yard Construction


 Water & Sewer Work

Exhibit D

COMMUNITY NOTICE

Closure and Reconstruction of the Carlton Avenue Bridge

Beginning January 16, 2008

Beginning approximately January 16, 2008, the Carlton Avenue Bridge, located between Atlantic Avenue and Pacific Street in Brooklyn, will be closed. The one-way bridge is being closed to accommodate upgrading the Long Island Rail Road's Vanderbilt Yard under the bridge, and also to construct a new bridge as part of the Atlantic Yards project. For the duration of this work, northbound traffic will be rerouted either west along Pacific Street to Sixth Avenue, which will become two-way to accommodate this detour, or east along Pacific Street to Vanderbilt Avenue.

Advisory signs will be posted in advance of the closure and detour signs will be posted during the work. Traffic agents will be assigned to facilitate the flow of traffic.

Please see the detour map below.

Questions relating to this project may be addressed to:

Atlantic Yards Community Liaison Office
(866) 923-5315
communityliaison@atlanticyards.com

Empire State Development Corporation
Office of the Atlantic Yards Ombudsman
(212) 803-3233
atlanticyards@empire.state.ny.us

DIAL 311 Government Services & Information for NYC

