

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

---

In the Matter of the Application of	:	X
	:	Index No. 114631/09
	:	IAS Part 57
DEVELOP DON'T DESTROY (BROOKLYN), INC., et al.,	:	Justice Marcy S. Friedman
	:	
Petitioners,	:	
	:	
For a Judgment Pursuant to Article 78 of the CPLR	:	
	:	
– against –	:	
	:	
EMPIRE STATE DEVELOPMENT CORPORATION	:	
and FOREST CITY RATNER COMPANIES, LLC,	:	
	:	
Respondents.	:	
-----	:	
In the Matter of the Application of	:	Index No. 116323/09
	:	IAS Part 57
PROSPECT HEIGHTS NEIGHBORHOOD	:	Justice Marcy S. Friedman
DEVELOPMENT COUNCIL, INC., et al.,	:	
	:	
Petitioners,	:	<b>AFFIRMATION OF</b>
	:	<b>PHILIP E. KARMEL</b>
For a Judgment Pursuant to Article 78 of the CPLR	:	<b>IN OPPOSITION TO</b>
	:	<b>THE SUPPLEMENTAL</b>
– against –	:	<b>PETITIONS AND THE</b>
	:	<b>MOTION TO ENJOIN</b>
EMPIRE STATE DEVELOPMENT CORPORATION	:	<b>CONSTRUCTION</b>
and FOREST CITY RATNER COMPANIES, LLC,	:	
	:	
Respondents.	:	

---

PHILIP E. KARMEL, an attorney admitted to the practice of law in the State of New York, hereby affirms and declares under the penalty of perjury:

1. I am a member of Bryan Cave LLP, attorneys in these proceedings for respondent New York State Urban Development Corporation doing business as

Empire State Development Corporation (“ESDC”). I am fully familiar with the facts and circumstances set forth herein. I respectfully submit this affirmation in opposition to the supplemental petitions and the most recent motion to enjoin construction of the Atlantic Yards Project.

2. Annexed as Exhibit 1 hereto is a true and correct copy of this Court’s decision, order and judgment issued on March 10, 2010 dismissing these proceedings.

3. Annexed as Exhibit 2 hereto is a true and correct copy of this Court’s decision and order issued on November 9, 2010 granting petitioners’ motions to reargue and renew to the extent of remanding “to ESDC for findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10 year build-out for the Project, and on whether a Supplemental Environmental Impact Statement is required or warranted.”

4. Annexed as Exhibit 3 hereto is a true and correct copy of this Court’s order issued on November 8, 2010 precluding consideration of press accounts of out-of-court statements in these proceedings. ESDC continues to object to consideration of such statements on the grounds of hearsay, unreliability, the potential for selective bias of the journalist writing the story and because the documents are unauthenticated and outside the administrative record and, in some cases, they post-date the administrative determinations purportedly challenged in these proceedings.

5. Annexed as Exhibit 4 hereto is the affidavit of Peter Davidson, the Executive Director of ESDC, which was previously submitted to the Court in December

2010, in opposition to the then pending motion to enjoin the Project. An injunction would harm the public and be contrary to the public interest for the reasons explained in Mr. Davidson's affidavit.

6. Annexed as Exhibit 5 hereto is a true and correct copy of the most recent 2-week construction update detailing the construction work taking place at the Project site. To keep the public informed of the progress of the Project, ESDC has been posting these updates on its web site since 2007.

7. Annexed as Exhibit 6 is the affidavit of Ricardo G. DePaoli authenticating recent photographs of the Project site. As evident in these photographs, an injunction freezing the status quo at the Project site would not benefit the community, as it would leave a half-completed Arena and subway entrance and vacant and derelict buildings in place at the site indefinitely. It would also prevent the work required to build a new Carlton Avenue bridge spanning the rail yard.

WHEREFORE, for the reasons stated in ESDC's Answer and Memorandum of Law, ESDC respectfully requests that these proceedings be dismissed, the motion for an injunction be denied and ESDC be granted such further and additional relief as the Court may deem just and equitable.

Dated: New York, New York  
February 18, 2011

  
PHILIP E. KARMEL



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

DEVELOP DON'T DESTROY (BROOKLYN),  
INC., et al.,

*Petitioners,*

Index No.: 114631/09

DECISION/ORDER

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

- against -

EMPIRE STATE DEVELOPMENT CORPORA-  
TION and FOREST CITY RATNER  
COMPANIES, LLC,

*Respondents.*

\_\_\_\_\_ x

PROSPECT HEIGHTS NEIGHBORHOOD  
DEVELOPMENT COUNCIL, INC., et al.,

*Petitioners,*

Index No.: 116323/09

DECISION/ORDER

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

- against -

EMPIRE STATE DEVELOPMENT CORPORA-  
TION and FOREST CITY RATNER  
COMPANIES, LLC,

*Respondents.*

\_\_\_\_\_ x

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
4000).

In these Article 78 proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc.

(DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenge the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of a modified general project plan (MGPP) for the Atlantic Yards Project in Brooklyn, which is to be constructed by respondent Forest City Ratner Companies (FCRC). The Atlantic Yards Project is a massive, publicly subsidized, mixed-use development project, extending eastward over 22 acres from the junction of Atlantic and Flatbush Avenues. The Project is to be built in two phases: Phase I will include an 18,000 seat sports arena that is intended to serve as the new home of the New Jersey Nets, a professional basketball team, and construction of a new rail yard on the site of a rail yard that is owned by the Metropolitan Transportation Authority (MTA). The Project also calls for 16 high rise buildings that will contain commercial space as well as between 5,325 and 6,430 residential units, of which 2,250 will be affordable to low, moderate, and middle income persons. Four to five of these buildings in the vicinity of the arena are proposed for Phase I, with the remainder to be constructed in Phase II.

ESDC approved the first plan for the Atlantic Yards Project on July 18, 2006 and first modified the plan on December 8, 2006. The Project has been the subject of extensive litigation. The court refers to prior opinions for a detailed discussion of the scope of the Project and of petitioners' challenges to the prior regulatory findings and approvals. (See e.g. Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312 [1st Dept 2009] [DDDB I], lv denied 13 NY3d 713, rearg denied 2010 WL 520599 [2010] [holding, among other things, that the Project qualified as a Land Use Improvement Project pursuant to the Urban Development Corporation Act, based on ESDC's findings of blight at the site, and rejecting petitioners' challenges to

ESDC's environmental review under the State Environmental Quality Review Act]; Matter of Goldstein v New York State Urban Dev. Corp., 13 NY3d 511 [2009], rearg denied 2010 NY Slip Op 63486 [2010] [upholding the use of the eminent domain power under the State Constitution for takings of private property to be used for the Project]; Goldstein v Pataki, 516 F3d 50 [2d Cir 2008], cert denied 128 S Ct 2964 [same under the U.S. Constitution].)

On June 23, 2009, ESDC adopted a Modified General Project Plan (Record at 4684 et seq.) which ESDC affirmed by resolution on September 17, 2009 (Record at 7236). In the present proceedings, petitioners challenge ESDC's September 17, 2009 resolution on two main grounds: First, they argue that ESDC violated the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 et seq.) by not preparing a Supplemental Environmental Impact Statement (SEIS) as a result of changes to the Project. Second, they argue that ESDC violated the New York Urban Development Corporation Act (UDCA) (L 1968, ch 174, § 1, as amended) (McKinney's Uncons Laws of NY § 6260[c]) by not assuring that a plan is in place to alleviate the blight that ESDC previously found to exist at the Project site.

Petitioners' challenge, in turn, rests on the MTA's renegotiation in June 2009 of its agreement with FCRC to sell FCRC the air rights to the rail yards that the MTA currently owns.<sup>1</sup> It is undisputed that these air rights are necessary to develop six of the eleven buildings that are to be constructed in Phase II. Under the agreement between the MTA and FCRC that was in effect at the time of ESDC's 2006 approval of the Project plan, FCRC was required to pay \$100 million to the MTA, at the inception of the Project, for the air rights and related real property

---

<sup>1</sup> The 2009 MGPP abandons the design for the arena facade by prominent architect Frank Gehry, which was described in the FEIS, and replaces it with "a more traditional design." (Technical Memorandum at 4 [Record at 4749].) This design change is not the subject of challenge in the DDDB proceeding and is mentioned only in passing in the PHND proceeding.

interests necessary to construct the arena as well as six Phase II buildings to be located above the rail yard platform. Under the 2009 MGPP, FCRC will pay the sum of \$20 million for acquisition of the property interests necessary for the development of the arena block, will provide the MTA with an \$86 million letter of credit to secure the obligation to build the upgraded rail yard, and will pay the balance of the \$100 million on an installment schedule. (See Memo. of Marisa Lago to ESDC Board of Directors, dated June 23, 2009, at 4 [Record at 4678] [June 23, 2009 Memo].) According to the MTA's summary of the renegotiated agreement, the remaining \$80 million, discounted to present value, will be paid in installments of \$2 million each in the years 2012 through 2015, and installments of \$11 million per year for 15 years beginning in 2016. MTA will convey the parcel necessary for construction of the arena at the closing for the \$20 million purchase price, while the air rights parcel will "be conveyed only after substantial completion of the new permanent rail yard and only upon payment in full of the price of a development parcel." (MTA Staff Summary, dated June 22, 2009, at 2-3 [Record at 4667-4668].) The air rights parcel consists of six development sites, and the installment payments for the air rights parcel are "allocated proportionally to each Development Parcel." (MTA Staff Summary, Attachment at 2 [Record at 4671].) A Development Parcel is "conveyable (to ESDC or FCR) only upon payment to MTA of the full Development Parcel Purchase Price." (Id.)

Based on the renegotiated MTA agreement, petitioners argue that FCRC does not have the financial incentive to complete the project in a timely manner, that it has until 2030 to complete acquisition of the air rights necessary for construction of six of the Phase II buildings, and that it could "abandon" the project completely. (See DDDDB Memo. of Law in Support at 14-



15 [DDDB Memo.].) Petitioners also claim that ESDC ignored the MTA agreement and its impact on the expected time frame for the project (*id.* at 10) and improperly used a 10 year build-out for the project, with a 2019 completion date. (*id.* at 12-13.) Respondents deny that ESDC staff did not make the ESDC Board aware of the MTA agreement. (ESDC Memo. of Law in Opp. to DDDB Pet. at 22.) They also counter that there is no inconsistency between the renegotiated MTA agreement and the 2009 MGPP, that the dates for FCRC's acquisition of the air rights necessary for construction are "outside dates," and that the Phase II buildings will be constructed on a parcel-by-parcel basis. (*id.* at 18-20.) Respondents emphasize that a separate agreement between ESDC and FCRC will require FCRC to use "commercially reasonable efforts" to complete the entire Project by 2019. (*id.* at 22.)

Petitioner DDDB's argument that ESDC violated the UDCA by not assuring that a plan is in place to eliminate blight reduces, in effect, to the argument that the 2009 MGPP is not a "plan" because it lacks guarantees that the Project will be completed. Governing legal authority does not support this contention. (See generally *Neville v Koch*, 79 NY2d 416 [1992].) Authority is similarly lacking for petitioner PHND's claim that ESDC unlawfully delegated control to FCRC over the schedule for the Project. The court is also unpersuaded by petitioners' contention that the development agreement with FCRC illegally conditions the development of affordable housing on the availability of public subsidies. The remainder of this opinion accordingly addresses petitioners' SEQRA claim.

The standard for SEQRA review of an ESDC determination is well settled. The regulations which implement SEQRA provide: "The lead agency [here, ESDC] may require a supplemental EIS, limited to the specific significant adverse environmental impacts not

addressed or inadequately addressed in the EIS that arise from: [a] changes proposed for the project; or [b] newly discovered information; or [c] a change in circumstances related to the project." (6 NYCRR 617.9[a][7][i][a]-[c].) A lead agency's determination whether to require an SEIS is "discretionary." (Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 231 [2007].) The court's review is limited to whether the lead agency "took the requisite hard look at project and regulatory changes that arose after the filing of a SEQRA findings statement, and made a reasoned elaboration that [an SEIS] was not necessary to address those changes." (*Id.* at 228-229, 231-232, citing Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986].) As the Court of Appeals has emphasized: The courts may not "second-guess" agency decision making. "[A]ccordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The lead agency [in this case, ESDC] . . . has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts. . . . While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives." (Riverkeeper, Inc., 9 NY3d at 232 [internal quotation marks, citations, and brackets omitted].)

Applying this limited or deferential standard of review, the court must deny petitioners' challenge to ESDC's determination not to require an SEIS. Contrary to petitioners' contention, ESDC did not ignore the renegotiated MTA agreement. There is no question that ESDC knew that the MTA agreement extended FCRC's time to acquire the air rights needed for development of the six Phase II sites. Each agency was aware of the other's proceedings. It appears that the

MTA's own approval of its agreement with FCRC was conditioned on ESDC's approval of the 2009 MGPP. (See MTA Staff Summary, Recommendation at 3 [Record at 4668].) ESDC staff noted the existence of the MTA agreement in the memoranda that were submitted to the ESDC Board prior to its June 23, 2009 adoption of the MGPP and its September 17, 2009 resolution affirming the MGPP and determining that an SEIS was not "warranted" in connection with the modified plan. The June 23, 2009 Memorandum categorized the "MTA Site Acquisition" as a "major change" to the 2006 plan. It noted that the air rights for the development of the non-arena stages of the Project would be acquired by FCRC on an installment schedule and that "[t]he conveyance of MTA air rights is essential for the development of the [railway] platform and improvements thereon." (June 23, 2009 Memo. at 3-4 [Record at 4677-4678].) The September 17, 2009 Memorandum included, among its description of the changes to the 2006 plan, "a phased acquisition of the MTA air rights necessary to complete development of the Project site." (Memo. of Dennis Mullen to ESDC Board of Directors at 2 [Record at 7022].)

In connection with its initial review and approval of the MGPP in June 2009, ESDC worked with consultants to prepare a Technical Memorandum, dated June 2009 (Record at 4744 et seq.), which was used to determine whether an SEIS was necessary. As set forth in both the June 23, 2009 Memorandum and the Technical Memorandum, the purpose of the Technical Memorandum was to assess whether the proposed modifications to the 2006 plan, design development, changes to the Project schedule, changes in background conditions and analysis methodologies since the FEIS [Final Environmental Impact Statement], and the potential for delay due to prolonged adverse economic conditions would result in "any new or substantially different significant adverse impacts than those addressed in the FEIS" that was prepared in

connection with ESDC's approval of the 2006 plan. (See June 23, 2009 Memo. at 6 [Record at 4680]; Technical Memorandum at 9 [Record at 4759].) The Technical Memorandum discussed each of these changes, and concluded that the changes "would not, considered either individually or together, result in any significant adverse environmental impacts not previously addressed in the FEIS." (Technical Memorandum at 55 [Record at 4808].)

The Technical Memorandum and the ESDC staff memoranda recommending approval of the 2009 MGPP without an SEIS, assumed a 10 year build-out for the Project with an expected completion date of 2019. The FEIS had also used a 10 year build-out, with an expected completion date of 2016. In extending the FEIS build-out for three years from 2016 to 2019, the Technical Memorandum stated: "The anticipated year of completion for Phase I of the project has been extended from 2010 to 2014 due to delays in the commencement of construction on the arena block. The anticipated date of the full build-out of the project -- Phase II -- has been extended from 2016 to 2019 for the same reason." (Technical Memorandum at 5-6 [Record at 4752, 4755].) The Technical Memorandum also undertook an analysis of the potential for a delayed build-out based on "prolonged adverse economic conditions," and recognized that such conditions could cause delays of some of the buildings on the arena block and on Phase II sites. It concluded that the delay would not result in significant adverse environmental impacts that had not previously been considered in the FEIS. (Technical Memorandum at 55, 63 [Record at 4808, 4816].) The Technical Memorandum analyzed environmental impacts on traffic and parking as well as transit and pedestrian conditions over an additional five year period until 2024. While it did not provide a specific number of years for its analysis of other environmental impacts, including delays in the development of open space and extensions of time during which above

ground parking lots would remain in existence, it anticipated that the Phase II buildings would be constructed on a parcel-by-parcel basis and that, as each of the buildings was completed, these impacts would be lessened or eliminated. (See *id.* at 58, 62 [Record at 4811, 4815].)

ESDC's staff's September 17, 2009 Memorandum concluded that the Project remained "viable" and that the Project schedule was "achievable based on existing and projected economic conditions" and on the report of KPMG, a real estate consulting firm that ESDC retained to perform an analysis of whether, taking into account the severe recession, the market can absorb the residential units called for by the Project over the 10 year period. (See Sept. 17, 2009 Memo. at 5 [Record at 7025].) KPMG concluded that FCRC's residential absorption rate estimates were supported by current market data for condominiums and were "not unreasonable" for market rate rental units, and that, given the need for low income housing in New York City, low income units would be absorbed as soon as they were brought onto the market. (KPMG Analysis, dated Aug. 31, 2009, at 38, 36 [Record at 7117, 7115].)

As petitioners acknowledge, public comments were made about the potential delays that the MTA agreement would cause and the 2030 date for FCRC to complete the acquisition of all of the air rights necessary to complete the construction of the Phase II buildings. (See Summary of Comments and Responses, dated Sept. 2009, esp. Comments 10, 13, 14, 16, 24-31 [Record at 7030 *et seq.*]. See Testimony of Daniel Goldstein at Sept. 17, 2009 ESDC Board Meeting [Record at 7179-7180].) In responding to the public's questions about the feasibility of completing the Project by 2019, ESDC's staff stated that the assumption of the 10 year schedule in the Technical Memorandum was reasonable because 1) FCRC has made a substantial investment to date in acquisition costs and has an incentive to recognize a return on its

investment as soon as possible; and 2) it is reasonable to expect that the market will absorb the units called for by the Project. (Comment 10 [Record at 7036].) ESDC's staff also noted that "[t]he Project documentation will obligate the developer to complete the entire Project in accordance with the MGPP." (Comment 26 [Record at 7043].) This reference was to a provision in the 2009 MGPP which states that "[t]he Project documentation to be negotiated between ESDC and the Project Sponsor [FCRC] will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule [for Phase I construction] and to complete the entire Project by 2019. The failure to commence construction of each building would result in, inter alia, monetary penalties being imposed on the Project Sponsors." (2009 MGPP [Record at 4692-4693].) In addition, ESDC's staff summarized a number of public comments about the environmental impacts that would occur – e.g., on open space, air quality, and traffic – as a result of prolonged delays in completing the Project, and noted requests from the public that an SEIS be prepared to study such impacts. ESDC's staff responded that it "anticipated that the full build-out of the Project would be completed by 2019." (Comment 29 [Record at 7044]. See e.g. Comments 30, 37, 39 [Record at 7044, 7047-7048].) The response also noted that the Technical Memorandum had considered the potential for delay of the build-out due to prolonged adverse economic conditions. (See e.g. Comments 25, 27 [Record at 7042-7043].)

The ESDC Board's September 17, 2009 Resolution did not contain any independent analysis of the MGPP, and stated that the Board had "considered the Technical Memorandum, the comments received during the public comment period for the Modified General Project Plan and the view of the Corporation's staff that the preparation of a Supplemental Environmental

Impact Statement would not provide information useful to the determination whether to affirm the Modified General Project Plan.” (Resolution [Record at 7236].)

Petitioners’ challenge in these proceedings focuses on the ESDC’s continuing use of the assumption of a 10 year build-out, or 2019 completion date for the Project, in the face of the MTA agreement under which FCRC is not required to acquire all of the air rights needed to complete the construction of six of the Phase II buildings until 2030. ESDC contends that it has a rational basis for its use of the 10 year build-out and its consequent finding that adverse environmental impacts were adequately addressed in the FEIS that had also used a 10 year build-out. ESDC grounds the rationality of its determination in the opinion of its consultant that the market can absorb the planned units over a 10 year build-out; its intent to obtain a commitment from FCRC to use commercially reasonable efforts to complete the Project in 10 years; and FCRC’s financial incentive to do so – all factors that were articulated and relied on by ESDC in the documents discussed above. (See ESDC Memo. of Law in Opp. to DDDDB Pet. at 22-27.)

Under the limited standard for SEQRA review, the court is constrained to hold that ESDC’s elaboration of its reasons for using the 10 year build-out and for not requiring an SEIS was not irrational as a matter of law. ESDC’s continuing use of the 10 year build-out was supported – albeit, in this court’s opinion, only minimally – by the factors articulated by ESDC. ESDC did not, for reasons that are unexplained to this date, expressly state, in the documentation prepared in connection with its review of the 2009 plan, that the MTA agreement permitted FCRC to defer acquisition until 2030 of air rights necessary to complete construction of various buildings called for in Phase II of the Project. Contrary to petitioners’ contention, however, the documentation of ESDC’s review unquestionably demonstrates, as found above, that ESDC

categorized the MTA agreement as a "major change" to the Project (June 23, 2009 Memo. at 3-4 [Record at 4677-4678]), and was aware of the MTA installment through 2030. ESDC determined, however, to continue to use the 10 year build-out, based on its intent to require FCRC to commit to use commercially reasonable efforts to build-out the Project within 10 years, and based on its real estate consultant's opinion that, notwithstanding the economic downturn, the market could reasonably be expected to absorb the units over the 10 year period. In analyzing the environmental impacts of the delayed Project, ESDC also assumed that Phase II buildings would be constructed on a parcel-by-parcel basis, with attendant mitigating effects on the environmental impacts.

ESDC's assumptions were consistent with the MTA agreement. In approving the agreement, the MTA noted that changes in the acquisition of the air rights were made due to the tightening of financial and credit markets, and "[i]n recognition of the impact that the financial and real estate downturn has had upon the economics of the original FCR proposal." (MTA Staff Summary at 2 [Record 4667].) Although the MTA agreement permits FCRC to acquire the development rights for construction of the arena up front, and to defer until 2030 acquisition of air rights necessary to complete construction of certain Phase II buildings, the MTA agreement also permits FCRC to acquire the necessary air rights for these Phase II buildings on a parcel-by-parcel basis. (See MTA Staff Summary Attachment at 2 [Record at 4671].) Thus, the MTA agreement is not inconsistent with the development scenario posited by ESDC in which the Project would proceed incrementally within the 10 year period rather than stall until all of the air rights were acquired in 2030.

Significantly, petitioners do not make any showing, or indeed, even claim that it is not



financially feasible for FCRC to acquire the Phase II parcels on an incremental basis. Petitioners also do not submit any financial analysis to show that ESDC lacked a rational basis for its finding that FCRC has the financial incentive, based on the investment it has made in the Project to date, to acquire the Phase II sites on a parcel-by-parcel basis. Under these circumstances, petitioners do not demonstrate that ESDC lacked a rational basis for its intent to require FCRC to make a separate commitment, notwithstanding the MTA agreement, to use commercially reasonable efforts to complete the Project within 10 years.<sup>2</sup>

SEORA review of the financial feasibility of a Project may be appropriate where there is a showing that the financial feasibility is a "sham." (See Matter of Tudor City Assn., Inc. v City of New York, 225 AD2d 367 [1<sup>st</sup> Dept 1996]; Matter of Nixbot Realty Assocs. v New York State Urban Dev. Corp., 193 AD2d 381 [1<sup>st</sup> Dept 1993], lv denied 82 NY2d 659.) Here, petitioners stop far short of leveling the serious charge that FCRC's financial ability to construct the Project is a sham. At most, petitioners submit a report from their real estate consultant, Joshua Kahr, opining generally that the Project is not financially feasible within the 10 year period. However, petitioners' expert's opinion is highly qualified and does not question the feasibility of FCRC's acquisition of the air rights for the Phase II buildings on a parcel-by-parcel basis.<sup>3</sup> In any event,

<sup>2</sup> Documentation of this commitment was not in existence at the time of ESDC's June 23, 2009 approval of, and September 17, 2009 resolution affirming, the 2009 MGPP. To the extent that petitioners now claim that the documentation that was subsequently negotiated does not provide adequate guarantees that the Project will be built within the 10 year period, that issue is not before this court. Under long settled authority, a court reviewing an agency's determination is confined to the facts and record adduced before the agency. (See generally Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000].)

<sup>3</sup> The Kahr report summarizes its conclusion as follows: "Based on our analysis, we do not feel that the project is financially feasible within a ten year development period. We feel that it is much more likely that the development will take 20 or more years to complete." The report summarizes the bases for this conclusion as follows:

"- The current state of the capital markets will make it extremely difficult to obtain financing for a project of this size within the next 36 months.

in a SEQRA review, it is not the province of the court to resolve disagreements between petitioners' and ESDC's experts. (See Matter of Fisher v Giuliani, 280 AD2d 13, 19-20 [1<sup>st</sup> Dept 2001].)

ESDC's use of the 10 year build-out meets the minimal threshold for rationality of a build year articulated in DDDBI. In DDDBI, petitioner argued that the 10 year build-out in the FEIS and the 2006 plan was intentionally underestimated and skewed the FEIS' findings as to the environmental impacts of the Project. The Appellate Division of this Department explained the standard for judicial review of the rationality of the build year as follows: "[T]he ultimate accuracy of the estimates [of the build-out periods] is neither within our competence to judge nor dispositive of the issue properly before us, which is simply whether the lead agency's selection of build-dates based on its independent review of the extensive construction scheduling data obtained from the project contractor may be deemed irrational or arbitrary and capricious. . . . The build dates having been rationally selected, there can be no viable legal claim that the EIS was vitiated simply by their use." (DDDBI, 59 AD3d at 318.) In reviewing the 2009 MGPP, ESDC did not take the position, nor could it have reasonably done so given the changes to the

- The projected residential market rate rental and condominium prices that the developer relied on when they originally underwrote the deal are substantially above the current market. . .
- The demand for housing units is most likely not sufficient to support a project of this scale over the next ten years.
- The developer recently restructured its original agreement with the MTA to enable it to exit the purchase of the Phase II properties for a minimal or no breakup fee depending on timing. Based on the timing of the payments, we believe that the developer is concerned about its ability to complete the project within the stated 10 year frame."

(Kahr Report, dated Aug. 31, 2009 [Ex. D to Baker Aff. In Support of DDDB Pet.].)

As this summary shows, although the report cites the difficulty in obtaining financing as a basis for the conclusion that the 10 year build-out is not financially feasible, the report projects such difficulty only over a 36 month period. The report also cites the MTA agreement as evidence of FCRC's concern about its ability to complete the project within the 40 years, but does not engage in any analysis of the FCRC's ability to acquire Phase II air rights on an incremental basis.

2006 plan, that it was required only to look at construction scheduling data to determine the continuing feasibility of the 10 year build-out. Rather, it looked at additional factors including, as discussed above, the report of its real estate expert and its expectation that the buildings would be completed on a parcel-by-parcel basis. For the reasons also discussed above, these bases for ESDC's use of the 10 year build-out may not be deemed irrational under the governing legal standard.

In conducting a SEQRA review, a court is precluded from making substantive judgments on the evidence or "evaluat[ing] de novo the data presented to the agency." (*Akpan v Koch*, 75 NY2d 561, 571 1990.) This court may not make any independent findings of fact or any independent determination on the impact of the changes in the plan for the Project and therefore may not, and does not, make its own evaluation of the effect of the MTA agreement on the build-out of the Project, the likelihood of the potential for delay as a result of the agreement, or the need for an SEIS; its role is restricted to determining whether ESDC had a rational basis for its determination.

While the court cannot find that ESDC lacked any rational basis for its use of the 10 year build-out for the Project, the court cannot ignore the deplorable lack of transparency that characterized ESDC's review of the 2009 MGPP. Although the MTA agreement was identified as a major change in ESDC's staff's June 23, 2009 and September 17, 2009 memoranda, these memoranda did not contain any explicit discussion of the impact of the installment schedule on the build-out of the Project. Neither ESDC's Technical Memorandum nor its Summary and Responses to the public comments mentioned the MTA agreement by name. The MTA agreement was the elephant in the room. Although ESDC articulated reasons for its continued use of

the 10 year build-out that are marginally sufficient to survive judicial scrutiny under the limited SEQRA standard of review, ESDC's consideration of the modification of the plan lacked the candor that the public was entitled to expect, particularly in light of the scale of the Project and its impact on the community.

This court is not the first to criticize the process by which ESDC has made environmental findings for the Atlantic Yards Project. In DDDBI, Justice Catterson concurred with the majority, based on his finding that ESDC had sufficient evidence of blight, but only "by the barest minimum," to satisfy the limited review standard. (59 AD3d 333.) However, he sharply criticized the "less than admirable sleight of hand" with which ESDC's blight study had been prepared (id. at 331), as well as ESDC's rush through the review process (id. at 327-328), and concluded by "deplor[ing] the destruction of the neighborhood in this fashion." (id. at 333.) The Court of Appeals upheld the use of the power of eminent domain to take property for the Project, but observed that "[i]t is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight." While reiterating that the remedy must come from the legislature, the Court noted that "[i]t may be that the bar has now been set too low -- that what will now pass as 'blight' . . . should not be permitted to constitute a predicate for the invasion of property rights." (Goldstein, 13 NY3d at 526.)

Here, too, it is quite possible, as petitioners have done, to dispute ESDC's assumption of a 10 year build-out for the Project, to disapprove its failure to address more directly the impact of the MTA agreement on the completion of the Project, and to disagree strongly with ESDC's decision, as a quasi-public agency, to permit construction to proceed on the arena without greater certainty that the surrounding Brooklyn neighborhoods will not be subjected to the

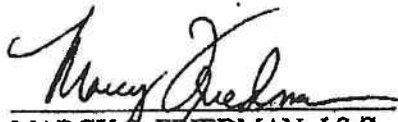
deleterious, if not blighting, effects of significantly prolonged construction. As of the date petitioners filed this current environmental challenge, however, the Project was already well underway: The Appellate Division of this Department had affirmed ESDC's 2006 approval of the Project plan, and the Court of Appeals has recently declined to review the case. During this litigation, ESDC has expended or approved disbursements of \$75 million of the \$100 million State-appropriated monies for the Project, and has received \$85 million of \$100 million that the City has committed to the Project. (Sept. 17, 2009 Memo. at 4 [Record at 7024].) FCRC has expended over \$350 million in acquiring properties for the Project and in demolishing over 30 vacant buildings on the site. FCRC has also already performed extensive work on the infrastructure of the Project (e.g., relocation of sewers and utilities) and on construction of a temporary rail yard. At this late juncture, petitioners' redress is a matter for the political will, and not for this court which is constrained, under the limited standard for SEQRA review, to reject petitioners' challenge.

It is accordingly hereby ORDERED that the petitions of Develop Don't Destroy (Brooklyn), Inc. and of Prospect Heights Neighborhood Development Council, Inc. are denied; and it is further

ORDERED that petitioner Develop Don't Destroy (Brooklyn), Inc.'s motion for a preliminary injunction is denied.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York  
March 10, 2010

  
MARCY S. FRIEDMAN, J.S.C.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419B).**

deleterious, if not blighting, effects of significantly prolonged construction. As of the date petitioners filed this current environmental challenge, however, the Project was already well underway: The Appellate Division of this Department had affirmed ESDC's 2006 approval of the Project plan, and the Court of Appeals has recently declined to review the case. During this litigation, ESDC has expended or approved disbursements of \$75 million of the \$100 million State-appropriated monies for the Project, and has received \$85 million of \$100 million that the City has committed to the Project. (Sept. 17, 2009 Memo. at 4 [Record at 7024].) FCRC has expended over \$350 million in acquiring properties for the Project and in demolishing over 30 vacant buildings on the site. FCRC has also already performed extensive work on the infrastructure of the Project (e.g., relocation of sewers and utilities) and on construction of a temporary rail yard. At this late juncture, petitioners' redress is a matter for the political will, and not for this court which is constrained, under the limited standard for SEQRA review, to reject petitioners' challenge.

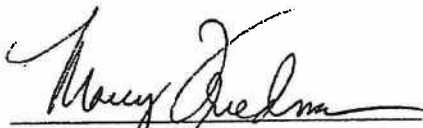
It is accordingly hereby ORDERED that the petitions of Develop Don't Destroy (Brooklyn), Inc. and of Prospect Heights Neighborhood Development Council, Inc. are denied; and it is further

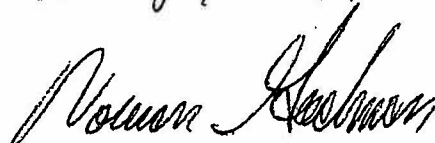
ORDERED that petitioner Develop Don't Destroy (Brooklyn), Inc.'s motion for a preliminary injunction is denied.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York  
March 10, 2010.

**FILED**  
MAR 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

  
MARCY G. FRIEDMAN, J.S.C.

  
CLERK



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

---

DEVELOP DON'T DESTROY (BROOKLYN),  
INC., et al.,

*Petitioners,*

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

- against -

EMPIRE STATE DEVELOPMENT  
CORPORATION and FOREST CITY RATNER  
COMPANIES, LLC,

*Respondents.*

Index No.: 114631/09

DECISION/ORDER

**FILED**  
NOV 10 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

---

PROSPECT HEIGHTS NEIGHBORHOOD  
DEVELOPMENT COUNCIL, INC., et al.,

*Petitioners,*

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

- against -

EMPIRE STATE DEVELOPMENT  
CORPORATION and FOREST CITY RATNER  
COMPANIES, LLC,

*Respondents.*

Index No.: 116323/09

DECISION/ORDER

---

x



In these Article 78 proceedings, petitioner Develop Don't Destroy (Brooklyn), Inc. (DDDB) and petitioners Prospect Heights Neighborhood Development Council, Inc. and others (collectively PHND) challenged the affirmance, on September 17, 2009, by respondent New York State Urban Development Corp., doing business as the Empire State Development Corp. (ESDC), of a modified general project plan (2009 MGPP) for the Atlantic Yards Project in Brooklyn, to be constructed by respondent Forest City Ratner Companies (FCRC). By decision dated March 10, 2010 (prior decision), this court denied the petitions. Petitioners now move for leave to reargue and renew the petitions.

On these motions, petitioners argue that the court erred in rejecting petitioners' claim that ESDC violated the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 et seq.) by approving the 2009 MGPP without preparing a Supplemental Environmental Impact Statement (SEIS) as a result of changes to the Project. Petitioners also argue that the court erred in rejecting petitioners' claim that ESDC violated the Urban Development Corporation Act (UDCA) by finding that the Project is a plan within the meaning of § 6260(c). Petitioners' motions are based on the terms of a master Development Agreement, entered into between ESDC and FCRC on December 23, 2009 (fn 1) which, according to petitioners, shows that the Project will be built-out over a 25 year period, not the 10 year period that ESDC assumed in reviewing the 2009 MGPP.

#### The Prior Decision

The court refers to the prior decision for a detailed discussion of the parties' claims in these proceedings. In brief, petitioners' challenge rested primarily on the renegotiation in June 2009 by the Metropolitan Transit Authority (MTA) of its agreement with FCRC to sell FCRC air

rights necessary for development of 6 of the 11 residential buildings to be constructed in Phase II of the Project. In particular, petitioners cited MTA's agreement to permit FCRC to acquire the air rights over a 15 year period extending until 2030, rather than to require FCRC to purchase all of the air rights at the inception of the Project, as had been the case when the original Project Plan was approved in 2006. Petitioners argued that ESDC ignored the impact of the renegotiated MTA agreement on the time frame for construction, and improperly continued to use the 10 year build-out for the Project that had been used in the Final Environmental Impact Statement (FEIS) prepared in connection with the original Plan.

The prior decision set forth the court's reasons for rejecting petitioners' UDCA claim. The court is not persuaded that it misapprehended applicable facts or law governing this claim. The remainder of this opinion will accordingly address petitioners' SEQRA claim.

In the prior decision, the court found that ESDC based its use of a 10 year build-out on three main factors: the opinion of its consultant that the market can absorb the planned units over a 10 year period; ESDC's intent to obtain a commitment from FCRC to use commercially reasonable efforts to complete the Project in 10 years; and FCRC's financial incentive to do so. (Prior Decision at 11.) The decision reasoned that, under the limited standard for SEQRA review, the court was "constrained to hold that ESDC's elaboration of its reasons for using the 10 year build-out and for not requiring an SEIS was not irrational as a matter of law. ESDC's continuing use of the 10 year build-out was supported – albeit, . . . only minimally – by the factors articulated by ESDC." (*Id.*)

Evidence of the Terms of the Development Agreement in the Prior Papers and in the Reargument Motions

At the time the petitions and ESDC's opposition papers were filed, ESDC had not yet entered into a formal agreement with FCRC for development of the Project. However, in arguing that the renegotiated MTA agreement did not extend the build-out until 2030, ESDC emphasized that the MTA agreement would be subject to a set of development agreements, to be entered into between ESDC and FCRC, in which FCRC would be contractually committed to implementing the 2009 MGPP, and would be required to use commercially reasonable efforts to complete the Project within 10 years, by 2019. (See e.g. ESDC Memo. In Opp. To DDDDB Pet. at 22.) (fn 2) ESDC supported this claim with a citation to the MGPP as well as to a summary of the Development Agreement. (*Id.*, citing AR 4692, 7070.) (fn 3) The MGPP provision that ESDC cited stated in full: "The Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019. The failure to commence construction of each building would result in, *inter alia*, monetary penalties being imposed upon the Project Sponsors." (MGPP [AR 4692-4693].) The summary of the Development Agreement that ESDC cited was a one-page document that described the "Development Obligation" as: "To construct the project described in the Modified General Project Plan," including enumerated improvements. (AR 7070.) (fn 4)

It is undisputed that at the time ESDC approved the 2009 MGPP, the above MGPP provision and summary were the sole documents in the record before ESDC that summarized the terms of the Development Agreement. (June 29, 2010 Transcript of Oral Argument of Reargument Motions [Reargument Tr.] at 34.) As of the time ESDC filed its opposition papers to the petitions, the Development Agreement was in the process of being negotiated. (ESDC

Answer to DDDDB Pet., Fact Statement ¶ 39.) However, ESDC cited no evidence of any terms of the Development Agreement other than the above MGPP provision and summary. Rather, in discussing the terms of the Development Agreement in its papers in opposition to the petitions, ESDC repeatedly cited only the MGPP provision and summary. (fn 5) By the time the oral argument of the petitions was held on January 19, 2010, the Development Agreement had been executed. However, ESDC continued to represent that the terms of the Development Agreement were those contained in the MGPP provision and summary. (See e.g. Jan. 19, 2010 Tr. at 44-46, 51, 81.)

On the reargument motions, ESDC for the first time acknowledged the existence in the Development Agreement of a 25 year outside date for substantial completion of Phase II of the Project. The reargument motions also mark the first time ESDC admitted that, at the time of its review of the 2009 MGPP, ESDC knew of the 25 year outside date and “anticipated” its inclusion in the Development Agreement. (Reargument Tr. at 35-36.) (fn 6)

Prior to these reargument motions, the above MGPP provision and summary were also the sole documents containing the terms of the Development Agreement that were furnished to this court. In seeking leave to renew, petitioners offer the full master Development Agreement. This Agreement distinguishes between construction of the Arena and Phase I buildings on the Arena block, and construction of Phase II buildings which constitute 11 of the 16 residential hi-rise buildings to be constructed on the Project site. The former are required to be substantially completed within or reasonably soon after the 10 year build date, and are the subject of heavy penalties in the event of delays. The latter are required to be substantially completed in 25 years or by 2035, and are apparently the subject of less stringent penalties in the event of failure to

meet that deadline.

Development Agreement

As the issue before this court is the impact of the Development Agreement on ESDC's determination to use the 10 year build-out and to approve the 2009 MGPP without requiring an SEIS, the detailed provisions of the Development Agreement regarding scheduling of the construction must be reviewed: The Agreement provides for commencement and construction of the Arena well within the 10 year period. (§ 8.4; Appendix A [requiring the Arena to be the first or second building for which construction is commenced, and requiring the substantial completion of the Arena by the Outside Arena Substantial Completion Date, defined as the sixth anniversary of the Project Effective Date or by 2016].) (fn 7) It also provides for commencement of the Phase I buildings on the Arena Block well within the 10 year period (§ 8.6[d] [providing, subject to certain exceptions, for commencement of Phase I buildings within 3 to 10 years of the Project Effective Date or from 2013 to 2020]), and for substantial completion of the Phase I buildings within a 12 year period. (§8.6 [providing for substantial completion of the Phase I construction within 12 years of the Project Effective Date or by 2022, subject to Unavoidable Delays].) (fn 8) The Agreement defines as Events of Default failure to commence or substantially complete the Arena within the preceding deadlines (§ 17.1[b], [d]) and failure to commence or substantially complete the Phase I construction within such deadlines. (§ 17.1[i], [I].) Upon the occurrence of these Events of Default, FCRC is required to pay substantial liquidated damages (Schedule 3 liquidated damages). For the Arena, these damages are set at \$75 million for failure to timely commence construction. (Schedule 3 at 1.) They may amount to as much as \$341 million for failure to meet the outside substantial completion deadline,

depending on the length of the default. (Id. at 2-3.) For Phase I, the damages for failure to timely commence construction may reach \$5 million per building per year. (Id. at 4-5.) The damages for failure to meet the outside substantial completion date are based on a formula that takes into account the length of the default and the Phase I square footage that has been completed. The Phase I damages shown in the example range from \$586,000 per year to \$5.5 million. (See § 17.2[a][ii]; Schedule 3 at 8-10.)

In contrast, the Development Agreement does not provide for dates for commencement of Phase II construction other than for commencement of the platform which is needed to support the construction of certain Phase II buildings. The commencement of the platform is not required until the 15<sup>th</sup> anniversary of the Project Effective Date or 2025 (§ 8.5.) While failure to commence construction of the platform is defined as an Event of Default (§17.1[g]), the significant Schedule 3 liquidated damages are not a remedy for such default. (§ 17.2[a][ii].) The Development Agreement requires Phase II Construction to be substantially complete, subject to Unavoidable Delays, by the Outside Phase II Substantial Completion Date, which is defined as 25 years following the Project Effective Date or 2035. (§ 8.7.) Failure to substantially complete the Phase II construction is defined as an Event of Default (§ 17.1[m]), but is not a basis for the payment of Schedule 3 liquidated damages. (§ 17.2[a][ii].) Rather, the remedy for such default is ESDC's option to terminate the applicable Project Lease for any portion of the Project site on which construction of improvements has not commenced. (§ 17.2[a][vi].)

The Development Agreement contains the following provision requiring FCRC to use commercially reasonable efforts to complete the project by December 31, 2019: “[The FCRC developer entities] agree to use commercially reasonable effort to cause the Substantial

Completion of the Project to occur by December 31, 2019 (but in no event later than the Outside Phase II Substantial Completion Date [defined in § 8.7 as 25 years following the Project Effective Date], in each case as extended on a day-for-day basis for any Unavoidable Delays.” (§ 2.2.) The Development Agreement provides that the Article VIII deadlines for the performance of Phase I and II work shall not “modify, limit or otherwise impair” FCRC’s obligations under the preceding provision. (§ 8.1[d].) However, the remedies provided for failure to use commercially reasonable efforts to complete the Project by 2019 are uncertain or appear to be significantly less stringent than the remedies provided for FCRC’s failure to meet the deadlines for Phase I work.

The Development Agreement provides that in the event of FCRC’s failure to use commercially reasonable efforts, ESDC may resort to remedies available through litigation – i.e., “any and all remedies available to ESDC at law or in equity under or in connection with this Agreement,” including specific performance and damages. (§ 17.2[d].) If ESDC were to claim a breach of the commercially reasonable efforts provision, a mixed issue of fact and law would be presented. While courts are adept at interpreting legal standards, determination of this issue would be complicated by the absence of settled authority. There is a substantial body of case law, under UCC 9-627, interpreting the term commercially reasonable manner in connection with dispositions of collateral. (See e.g. Bankers Trust Co. v J.V. Dowler & Co., 47 NY2d 128 [1979].) However, this authority is not factually relevant to the construction context. The parties have not cited, and the court’s research has not located, case law articulating standards for awarding damages or equitable relief for failure to use commercially reasonable efforts to meet construction deadlines. (Cf. 330 Hudson Owner, LLC v The Rector, Church-Wardens &

Vestrymen of Trinity Church, 2009 NY Slip Op 51018[U], 23 Misc 3d 1131[A] [Sup Ct, New York County].)

The Development Agreement also does not define the failure to use commercially reasonable efforts as an Event of Default for which Schedule 3 liquidated damages are available. (§ 17.2[a][ii].) It does appear that such failure would qualify as an Event of Default for which a notice to cure is required under a catch-all provision for not otherwise specified defaults. (§ 17.1 [r].) For these unspecified defaults, the Development Agreement provides for liquidated damages in the amount of \$10,000 per day until the defaults are cured, or the reduced amount of \$1,000 per day if, in ESDC's "reasonable determination," the default would not have a material adverse effect on the value or use of the Project site, or result in a condition hazardous to human health, or put the Project site in danger of being forfeited, or subject ESDC to criminal or civil liability or penalties. (§ 17.2[a][x].) (fn 9) These damages are significantly lower than the Schedule 3 damages available for other specified Events of Default. In addition, imposition of these damages would require a predicate finding, subject to the legal uncertainties discussed above, that the commercially reasonable efforts provision had been breached.

#### Discussion

As close reading of the Development Agreement shows, the Agreement plainly contemplates an outside build date of 25 years for completion of the 11 Phase II buildings which constitute the substantial majority of the residential buildings at the Project. It provides detailed timetables, firm commencement dates for the Arena and Phase I work, no commencement dates (other than for the platform) for the Phase II residential construction, and apparently far stricter penalties for failure to meet the deadlines for the Arena and Phase I work than for failure to meet



the 2035 outside deadline for substantial completion of the Phase II buildings or for failure to use commercially reasonable efforts to complete the Project by 2019.

In its papers in opposition to the Article 78 petitions, ESDC repeatedly cited, as the basis for its continuing use of the 10 year build-out, the MGPP provision stating ESDC's intent to require FCRC to use commercially reasonable efforts to complete the Project by 2019, and the summary of the Development Agreement (AR 7070). Neither of these documents gave any indication that the Development Agreement would include a 25 year substantial completion date for the Phase II construction. While ESDC's papers acknowledged that there were mandatory commencement dates for construction of the first few buildings on the Arena Block, the papers did not discuss the absence of any deadlines for commencement of the Phase II buildings, were completely silent as to the 2035 outside date, and contained no discussion of the disparate penalties provided for failure to meet the deadlines for Phase I and II construction. ESDC's papers left the inaccurate impression that the commercially reasonable efforts provision was the focus of the Development Agreement, whereas the Agreement in fact contained numerous far more detailed construction deadlines for the Project which cannot be ignored in addressing the rationality of the build-date.

In opposing the petitions, ESDC argued that the master closing documents could not have been included in the record because they did not exist at the time of ESDC's approval of the 20009 MGPP. (Jan. 19, 2010 Tr. at 67.) Significantly, although the Development Agreement had been executed as of the date the petitions were heard, ESDC did not then claim that it was unaware, at the time of the approval, that the Development Agreement would provide the 2035 outside completion date for Phase II rather than a 2019 completion date for the entire Project.

Rather, at the oral argument, ESDC continued to represent that the terms of the Development Agreement were described in the summary (AR 7070) that was in the record before ESDC at the time of the approval. (Jan. 19, 2010 Tr. at 45.) ESDC went so far as to state that this document “summarizes many of the salient elements of the general project plan.” (*Id.*) This summary, of course, said nothing about the 2035 outside substantial completion date for the Phase II construction, and merely stated that FCRC was obligated to construct the Project in accord with the MGPP which, in turn, contained the provision that FCRC would be required to use commercially reasonable efforts to complete the Project by 2019.

As noted above, on the reargument motions, ESDC acknowledged for the first time that it was aware, when it reviewed the 2009 MGPP, that a provision for a 2035 substantial completion date for the Phase II construction would be included in the Development Agreement that was to be negotiated. (Reargument Tr. at 35-36.) However, ESDC never discussed this provision in its review of the MGPP, and ESDC never disclosed the provision to this court in these Article 78 proceedings for review of ESDC’s determination.

ESDC had an obligation to furnish the court in these Article 78 proceedings with a complete and accurate record of the proceedings before ESDC. (See generally 7804[e]; Bellman v McGuire, 140 AD2d 262, 265 [1<sup>st</sup> Dept 1988] [holding that “CPLR 7804[e] requires the respondent in an Article 78 proceeding to submit a complete record of all evidentiary facts.” [emphasis in original].) It is axiomatic that ESDC also had an obligation to accurately summarize the bases for its determination in the proceedings before this court. Thus, once the Development Agreement was executed, ESDC had an obligation to bring it to the attention of this court in order to correct the totally incomplete representations, made in the summary of the

Development Agreement and in ESDC's papers in opposition to the Article 78 petitions, as to the terms that were included in Development Agreement regarding the imposition and enforcement of deadlines for completion of the Project. Given ESDC's failure to do so, leave to reargue and renew is warranted. (See Bellman, 140 AD2d at 265.)

In granting reargument and renewal, the court rejects ESDC's contention that consideration of the Development Agreement would violate the well-settled tenet of Article 78 review that the court is bound by the facts and record before the agency. (See generally Matter of Featherstone v. Franco, 95 NY2d 550, 554 [2000].) Nor would consideration of the Development Agreement violate the precept that updating of the information to be considered by the agency is "rarely warrant[ed]," given the interest in the finality of administrative proceedings. (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 425 [1986].) The Development Agreement is not accepted to show changed circumstances since ESDC's determination or to supplement the record that was before ESDC. Rather, although the Development Agreement was executed after ESDC's determination, ESDC repeatedly stated that it relied on its terms in approving the MGPP. In fact, at the oral argument of the petitions, ESDC represented that the Development Agreement was the "main thing" ESDC was relying on to get the Project built in conformance with the plan. (Jan. 19, 2010 Tr. at 45-47.) The Development Agreement is therefore accepted to correct ESDC's incomplete representations concerning the Agreement's terms regarding construction deadlines and their enforcement. Put another way, the Development Agreement is needed to enable the court to undertake meaningful review of ESDC's representation that its use of the 10 year build-out in assessing environmental impacts of the MGPP was reasonable, based on its intent to require FCRC to make a contractual

commitment to use commercially reasonable efforts to complete the Project by 2019. (fn 10)

The court also rejects ESDC's contention that reargument and renewal is unnecessary because the 25 year outside date for completion of the Project is "nothing new," and that the documents that were in the record before ESDC – in particular, the summary of Project leases showing 25 year terms (see AR 7068-70) – gave notice of the 25 year outside date. (ESDC Memo. In Opp. To Reargument Motions at 21.) ESDC took a completely contrary position in opposing the petitions. It dismissed petitioners' reliance on the 25 year term leases to show that the Project would take 25 years to build, stating: "[A] sunset provision establishing the date on which the relationship between the developer and ESDC would come to an end with respect to a specific development parcel, whether or not a Project building has been successfully constructed on that parcel, sheds no light on the schedule for construction anticipated by the parties. [¶] Outer 'drop dead' dates do not supersede FCRC's contractual obligation to use commercially reasonable efforts to develop the Project by 2019." (ESDC Memo. In Opp. To PHND Pet. at 35 [internal citations omitted].)

To the extent that ESDC argues that reargument and renewal is unnecessary because ESDC has already taken a hard look at the impacts of delays in the construction of the Project, this contention is also unavailing. For this argument, ESDC relies on the Technical Memorandum (AR 4744 et seq.), prepared at the time of ESDC's review of the 2009 MGPP, in which ESDC concluded that an extended schedule would not result in significant impacts not identified in the FEIS, and that preparation of an SEIS was not needed. (ESDC Memo. In Opp. To PHND Pet. at 39.) While the Technical Memorandum reached this conclusion (AR 4808), it treated the change in the Project schedule as a change from 2016 to 2019. It assumed a 10 year

build-out, stating: "The anticipated year of completion for Phase I of the project has been extended from 2010 to 2014 due to delays in the commencement of construction on the arena block. The anticipated date of the full build-out of the project – Phase II – has been extended from 2016 to 2019 for the same reason." (AR 4752, 4755.) While the Technical Memorandum also undertook an analysis of the potential for delayed build-out, it did so on the basis of the potential for "prolonged adverse economic conditions" (*id.* at 4808), and not on the basis of a change in the Project schedule to provide for construction beyond 2019, much less over a 25 year period, as to which the Technical Memorandum was silent. Moreover, in considering delays due to economic conditions, the Technical Memorandum analyzed environmental impacts on traffic and parking, as well as transit and pedestrian conditions, over a five year period beyond 2019 or until 2024, not an additional 16 year period to 2035. (*Id.* at 4812-4815.) It did not provide a specific number of years for its analysis of other environmental impacts, including delays in the development of open space, extensions of time during which above ground parking lots would remain in existence, impacts on neighborhood character, and effects of prolonged construction. With respect to all impacts, the Technical Memorandum concluded that a delay in the build-out due to prolonged adverse economic conditions "would not result in any significant adverse environmental impacts that were not addressed in the FEIS." (*Id.* at 4816.)

ESDC now suggests that the construction impacts of a 10 year build-out would be the same or even more severe than the construction impacts of a 25 year build-out because, if construction were delayed, "the intensity of the construction would be greatly reduced." (ESDC Memo. In Opp. To Reargument Motions at 14-15. See also FCRC Memo. In Opp. To Reargument Motions at 11.) However, the Technical Memorandum did not compare the

environmental impacts of intense construction over a 10 year period with the impacts of ongoing construction over a 25 year period. It did not address, and the record thus lacks any expert opinion or analysis of, the impact of a potential 25 year delay in completion of the Project.

#### Conclusion

ESDC argues, and the court agrees, that SEQRA does not require guarantees that a Project will be completed by the build date or exactitude in the agency's selection of a build date. However, ESDC itself acknowledges that "ESDC had the responsibility to determine whether the proposed schedule was reasonable for purposes of conducting the requisite assessment of environmental impacts." (ESDC Memo. In Opp. To Reargument Motions at 5.) As the Appellate Division held in a prior litigation involving the Atlantic Yards Project, a mere inaccuracy in the build date will not invalidate the basic data used in the agency's environmental assessment. (See Develop Don't Destroy [Brooklyn] v Urban Dev. Corp., 59 AD3d 312, 318 [1st Dept 2009] [DDDB I], lv denied 13 NY3d 713, rearg denied 14 NY3d 748 [2010]. See also Committee to Preserve Brighton Beach v Council of City of New York, 214 AD2d 335 [1st Dept 1995], lv denied 87 NY2d 802.) As the Court also held, ESDC's choice of the build year is not immune to judicial review. Rather, it is subject to review under the arbitrary and capricious or rational basis standard that is applicable to judicial scrutiny of any agency action in an Article 78 proceeding. (DDDB I at 318.)

Under this standard, as applied to a SEQRA determination in particular, the court's review "is limited to whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." (Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 231-232 [2007] [citing

Matter of Jackson, 67 NY2d at 417.) “[T]he courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives.” (Riverkeeper, Inc., 9 NY3d at 232 [internal quotation marks, citations, and brackets omitted].) However, judicial review must be “meaningful.” (Id. at 232.) It is the court’s responsibility to “ensure that, in light of the circumstances of a particular case, the agency has given due consideration to the pertinent environmental factors.” (Akpan v Koch, 75 NY2d 561, 571 [1990].)

In the prior decision, this court criticized ESDC’s lack of transparency and its failure even to mention the MTA agreement by name, but found, based on its review of the record, that ESDC was aware that the MTA agreement had made a “major change” in the Project, and had articulated reasons for its continued use of the 10 year build-out that were marginally sufficient to survive scrutiny under the limited standard for judicial review of a SEQRA determination. (Prior Decision at 15-16.) Now, in what appears to be yet another failure of transparency on ESDC’s part in reviewing the 2009 MGPP, ESDC never directly acknowledged or addressed the impact of the Development Agreement on the build-out; and, in these Article 78 proceedings, ESDC never brought to the court’s attention the extended construction schedule that the Development Agreement contemplates.

The Development Agreement has cast a completely different light on the Project build date. Its 25 year outside substantial completion date for Phase II and its disparate enforcement provisions for failure to meet Phase I and II deadlines, read together with the renegotiated MTA Agreement giving FCRC until 2030 to complete acquisition of the air rights necessary to construct 6 of the 11 Phase II buildings, raise a substantial question as to whether ESDC’s

continuing use of the 10 year build-out has a rational basis.

In the prior decision, this court accepted ESDC's claim that because the MTA agreement permitted FCRC to acquire the air rights on a parcel-by-parcel basis, it was not inconsistent with the development scenario posited by ESDC, in which the Project would proceed incrementally within the 10 year build date rather than stall until the 2030 outside date for acquisition of the air rights. (Prior Decision at 12.) This rationale for continuing use of the 10 year build date was, in turn, dependent on ESDC's assertion that it would require a contractual commitment from FCRC to use commercially reasonable efforts to complete the Project by 2019. (See fn 2, *supra*.) As such, it is also called into question by the Development Agreement that was actually negotiated.

The court makes no finding, at this juncture, as to the rationality of the 10 year build-out. Its reading of the Development Agreement was undertaken not for the purpose of making a final determination as to the proper construction of the Agreement but for the purpose of determining whether the provisions of the Agreement have relevance to the rationality of ESDC's decision to continue to use the 10 year build date. The court has concluded that these provisions unquestionably must be addressed. Under the limited standard for SEQRA review, it is for ESDC to do so in the first instance. Where, as here, an agency action involves a specific project, "environmental effects that can reasonably be anticipated must be considered." (*Matter of Neville v Koch*, 79 NY2d 416, 427 [1992] [emphasis in original].) If ESDC concludes, in the face of the Development Agreement and the renegotiated MTA agreement, that a 10 year build-out continues to be reasonable, and that it need not examine environmental impacts of construction over a 25 year period on neighborhood character, air quality, noise, and traffic, among other issues, then it must expressly make such findings and provide a detailed, reasoned

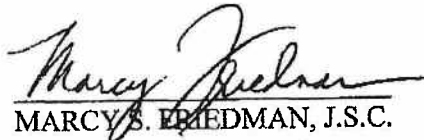


basis for the findings.

In sum, the court holds that ESDC did not provide a "reasoned elaboration" for its determination not to require an SEIS, based on its wholesale failure to address the impact of the complete terms of the Development Agreement and of the renegotiated MTA agreement on the build-out of the Project. The matter should accordingly be remanded to ESDC for additional findings on this issue. (fn 11)

It is accordingly hereby ORDERED that the motions of petitioners DDDDB and PHND are granted to the following extent: Leave to reargue and renew is granted, and the proceedings are remanded to ESDC for findings on the impact of the Development Agreement and of the renegotiated MTA agreement on its continued use of a 10 year build-out for the Project, and on whether a Supplemental Environmental Impact Statement is required or warranted.

Dated: New York, New York  
November 9, 2010

  
MARCY S. FRIEDMAN, J.S.C.

**FILED**  
NOV 10 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Footnotes

## Footnotes

fn 1 While the copy of the Development Agreement that is annexed to the petitions is undated, ESDC's counsel confirmed at the oral argument of the petitions that it was executed on December 23, 2009. (Jan. 19, 2010 Tr. Of Oral Argument Of Petitions [Jan. 19, 2010 Tr.] at 46.)

fn 2 ESDC also argued that the MTA agreement set outside deadlines for FCRC to acquire the air rights needed to construct 6 of the Phase II buildings, but that FCRC had the option to purchase the air rights on a parcel-by-parcel basis. ESDC further argued that it expected that FCRC would exercise the option because it would be obligated to use commercially reasonable efforts to complete the Project within the 10 year deadline. (Jan. 19, 2010 Tr. at 51.)

fn 3 AR refers to the record before ESDC in connection with its approval of the 2009 MGPP.

fn 4 The enumerated improvements are improvements of 4,470,000 gross square feet, exclusive of the Arena; no less than 2,250 units of affordable housing, subject to the availability of subsidies; a completed Arena for basketball and other events; at least 8 acres of open space; a completed Urban Room; a completed upgraded railyard; a completed subway entrance; and a completed Carlton Avenue Bridge.

fn 5 Thus, for example, ESDC represented: "With respect to schedule, the MGPP describes the anticipated timetable (AR 4687), and establishes mandatory commencement dates for construction of the first few buildings on the Arena Block (AR 4692); it then dictates that 'the Project documentation to be negotiated between ESDC and the Project Sponsor is to require the Project Sponsors to use commercially reasonable efforts to . . . complete the entire Project by 2019.' (Id.)" (ESDC Memo. In Opp. To DDDDB Pet. at 17.) AR 4687 is also a citation to a portion of the MGPP stating that the "[t]he build-out of the Project is likely to occur in two phases," with Phase I anticipated to completed by 2014 and Phase II by 2019. AR 4692 refers to a portion of the MGPP which states that the Arena is expected to open in 2011-2012, sets forth dates for commencement of construction on three other Phase I non-Arena buildings, and contains the much-referenced statement: "The Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019."

Another statement typical of ESDC's representations as to the terms of the Development Agreement is as follows: "Petitioners' errors in describing the purpose and effect of the MTA term sheet are compounded by the fact that they look only to the transaction with MTA to discern FCRC's obligations. What they apparently fail to apprehend . . . is that there will be an entirely separate set of agreements between FCRC and ESDC, and that under those agreements FCRC will be contractually committed to implementing the 2009 MGPP. (Fact Statement ¶ 39.) Among other things, FCRC will be required to use 'commercially reasonable efforts' to complete the Arena and certain Phase I buildings in accordance with a specified schedule, and to bring the

Project to completion by 2019, with sanctions imposed for any failure to do so. (Fact Statement ¶ 39; AR 4692, 7070.)” (ESDC Memo. In Opp. To DDDDB Pet. at 22.) The Fact Statement is contained in ESDC’s Answer to the Petition. Paragraph 39 refers to the commercially reasonable efforts provision of the MGPP (AR 4692); to AR 7067-7069 which is a description of the Project Leases; and to AR 7070 which is the summary of the Development Agreement referred to in the text above.

Other substantially similar representations as to the terms of the Development Agreement are made in ESDC’s Memorandum In Opposition To DDDDB Petition at 40, and in ESDC’s Memorandum In Opposition To PHND’s Petition at 34 and 57.

fn 6 At the oral argument of the reargument motions, ESDC stated that the 25 year terms of the Project leases “match[ed] up with what was actually in the development agreement, which is that there was the outside date [of] 25 years from project effective date. . . . So what we have in the development agreement is really from a contractual standpoint, that which was anticipated. There is a schedule. There is a commercially reasonable efforts provision. And then there is the outside dates that is kind of a drop-dead date, no matter what you have to complete by that date.” (Rearg. Tr. at 35-36.)

As discussed in the text (*infra* at 12-13), this argument is contrary to the position taken by ESDC at the time the petitions were first heard.

fn 7 It is undisputed that the Project Effective Date, based on which the Development Agreement imposes deadlines, is May 12, 2010. (ESDC Letter to Court, dated July 2, 2010.)

fn 8 Unavoidable Delays, as defined in the Development Agreement (Appendix A) include typical force majeure conditions and litigation which delays construction, but not inability to obtain financing.

fn 9 ESDC argued that the liquidated damages provision set forth in § 17.2(a)(x) would apply to failure to complete the Phase II construction work by the 25 year outside date, but only if FCRC was not using commercially reasonable efforts to complete the Project within 10 years. As stated at the oral argument:

“If the reason why phase two was not progressing was that Forest City had walked away from the project or failed to use adequate efforts to complete the project, then that would be a breach of the covenant to use commercially reasonable efforts to complete the entire project within a ten-year period. And that would implicate the penalties set forth in x. [§17.2[a][x]]. However, if Forest City was using commercially reasonable efforts to proceed with the project on a ten-year schedule and notwithstanding its use of commercially reasonable efforts it was falling behind the ten-year schedule, then that would not be subject to the penalties set forth in x because there would be no breach of the commercial reasonable efforts covenant.” (Reargument Tr. at 31.)

fn 10 The court notes that petitioners, not ESDC, brought the Development Agreement to this court’s attention after submission but before decision of the Article 78 petitions. The court

rejected the proffer based on its misapprehension that petitioners were raising a new argument, not before ESDC at the time of its approval of the MGPP, that the Development Agreement that was subsequently negotiated did not provide adequate guarantees that the Project would be built within the 10 year period. (See Prior Decision at 13, n 2.) As held above, the Development Agreement is not received on that issue but in order to correct the incomplete record furnished to this court as to the terms regarding deadlines that would be included in the Development Agreement and, hence, the reasonableness of ESDC's use of a 10 year build-out in approving the MGPP.

fn 11 This decision should not be construed as staying construction of the Project. Petitioners' prior challenges to the original Plan and in condemnation proceedings have not been successful. Thus, as of the date of the prior decision, substantial public and private expenditures had already been made and the Project was already well underway. (Prior Decision at 17.) While petitioners seek a stay in the event of a favorable decision on the reargument motions, they have not moved for reargument or renewal of their prior motion for a stay. The record is not factually developed on the current state of the construction. Nor have the parties addressed the legal issues regarding the propriety of a stay at this stage of the construction. Any decision on a stay would therefore not be proper on this record. The court notes, moreover, that while the DDDDB petitioners oppose continued work on the arena (DDDB Reply Aff., ¶ 23), the PHND petitioners represent that their greatest concern is over the disruptions that would occur during extended construction of Phase II, and appear to acknowledge that the Arena could be permitted to proceed. As they also note, the Phase II work is not scheduled to begin for years. (PHND Reply Aff., ¶ 15.)



ORDERS

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

PRESENT: MARCY S. FRIEDMAN  
Justice

PART 57

Develop Don't Destroy (Brooklyn) v. Empire State Dev. Corp. INDEX NO. 114631/09

MOTION DATE \_\_\_\_\_

Prospect Heights Neighborhood Dev. Council v. Empire St. Development, Corp. MOTION SEQ. NO. 116323/09  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

By letter dated October 6, 2010, petitioners request that this court consider, in connection with determination of their motions for reargument and renewal of the petitions, a news article reporting on statements allegedly made by Bruce Ratner at a press conference. Consideration of this press account of out-of-court statements would not be proper. The application is accordingly denied.

Dated: 11/8/10

  
MARCY S. FRIEDMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE



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

---

In the Matter of the Application of : X  
: Index No. 114631/09  
DEVELOP DON'T DESTROY (BROOKLYN), INC., et : IAS Part 57  
al., : Justice Marcy S. Friedman  
: :  
Petitioners. : :  
: :  
For a Judgment Pursuant to Article 78 of the CPLR : :  
: :  
- against - : :  
: :  
EMPIRE STATE DEVELOPMENT CORPORATION : :  
and FOREST CITY RATNER COMPANIES, LLC, : :  
: :  
Respondents. : :  
----- : :  
In the Matter of the Application of : Index No. 116323/09  
: IAS Part 57  
: Justice Marcy S. Friedman  
PROSPECT HEIGHTS NEIGHBORHOOD : :  
DEVELOPMENT COUNCIL, INC., et al., : :  
: :  
Petitioners. : **AFFIDAVIT OF**  
: **PETER DAVIDSON**  
: **IN OPPOSITION TO**  
For a Judgment Pursuant to Article 78 of the CPLR : **THE MOTION FOR AN**  
: **INJUNCTION**  
: :  
- against - : :  
: :  
EMPIRE STATE DEVELOPMENT CORPORATION : :  
and FOREST CITY RATNER COMPANIES, LLC, : :  
: :  
Respondents. : :  
----- X

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

PETER DAVIDSON, being duly sworn, deposes and says:



1. I am the Executive Director of the Empire State Development Corporation ("ESDC"). During the course of my duties at ESDC I have become familiar with the facts and circumstances surrounding the public benefits of the Atlantic Yards Land Use Improvement and Civic Project (the "Project") and the progress that has been made over the last few years to make the Project a reality. I submit this affidavit to assist the Court in understanding the harm that would result to the public if construction of the Project were to be stopped. The statements made in this affidavit are based on my personal knowledge and ESDC's records.

2. ESDC has determined that the Project has significant social, environmental, civic and economic benefits, including, among other things, the elimination of long-standing blight at the Project site; a new 18,000 seat Arena that will bring a major professional sports team to Brooklyn and provide a venue for other recreational, cultural, educational and civic events; thousands of new housing units, including 2,250 affordable units; eight acres of publicly accessible open space; a new subway entrance; and an improved Long Island Rail Road ("LIRR") rail yard adjacent to Atlantic Terminal. The Project will occupy an approximately 22-acre area (the "Site") encompassing all or portions of eight blocks in the vicinity of the intersection of Flatbush and Atlantic Avenues.

3. To date, the State and City of New York have invested nearly a quarter of a billion dollars in the Project. Approximately \$100 million in State monies have been targeted to infrastructure improvements in and around the Project site, in order to support the construction of the Arena and to construct the LIRR rail yard, pursuant to

appropriations of the New York State Legislature. The City has contributed more than \$131 million towards infrastructure costs and the costs of property acquisition.

4. A significant portion of the Site is now in public ownership. The Metropolitan Transportation Authority ("MTA") continues to hold title to the portions of the Site that comprise the LIRR rail yard on Blocks 1120 and 1121, and ESDC has completed the acquisition of all property on four City blocks (Blocks 1118, 1119, 1127 and 1129) and three other lots (Lot 35 on Block 1120 and Lots 47 and 42 on Block 1121) as well as certain adjoining street segments through the exercise of eminent domain. ESDC has acquired these properties for the sole and express purpose of implementing the Project.

5. For contractual purposes, the 17-building development has been divided into two phases. In Phase I, construction of which is now well underway, the Arena and four other buildings are to be constructed on three blocks at the western end of the Project site (the "Arena Block"), with a fifth building planned for a parcel across Flatbush Avenue from the Arena Block. Phase I also includes (among other things) construction of a new subway station entrance on the Arena Block, construction of the new LIRR rail yard, and construction of permanent and interim parking lots for the Arena.

6. A key element of Phase I of the Project is the Arena. Affiliates of Forest City Ratner Companies (collectively, "FCRC"), the designated private developer, have made arrangements for the Nets, a professional basketball franchise, to relocate to this new facility at beginning of the National Basketball Association's 2012 season.

This will be a landmark event in the history of Brooklyn, marking the return of a major league professional sports team to borough after a 50 year hiatus. The arena will not only serve as a new home for the Nets, but will also provide a venue for other entertainment and cultural events including community gatherings, collegiate competitions, and graduations. To accommodate the relocation of the Nets for the 2012 season, the Arena and associated parking facilities must be completed in less than two years.

7. The final environmental impact statement ("FEIS") for the Project provided an estimate of the economic benefits that would accrue to the State and City of New York during the period that the Arena is under construction. Among those benefits are thousands of construction and other jobs – more than 9,200 direct and indirect person years of employment in the State, and millions of tax dollars – amounting to approximately \$71.6 million in additional public revenues. See FEIS, Table 4-27.

8. An intensive effort is now ongoing in order to meet the tight timetable for completion of the Arena. Construction workers are currently on the Site working to build the facility, and those workers are making substantial progress towards achieving this goal. Previously existing structures on the Arena Block have been demolished, utilities have been relocated, much of the excavation within the footprint of the Arena has been completed, the Arena foundation is being laid, the steel shell of the Arena is being erected, and storm water management systems, underground plumbing, and underground electrical systems are being installed.

9. Block 1129 plays a key role in the effort to open the Arena by the 2012 NBA season. All of the buildings previously standing on that block have been

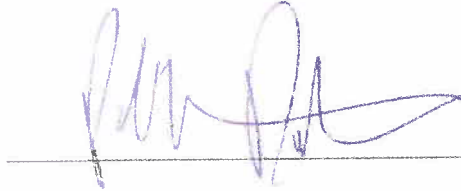
acquired and most of these buildings have been removed. As the Arena nears completion, the area will be converted to an interim parking area that is essential to the successful opening of the facility, and to construction staging areas for the construction of the rail yard.

10. Significant infrastructure work under the streets surrounding the site also has been accomplished. A new water trunk main, along with associated distribution mains, is under construction along Atlantic Avenue between Flatbush and 6<sup>th</sup> Avenues. The trunk main will serve not only the Project, but the surrounding area as well.

11. Other Phase I components currently under construction also will be of tangible benefit to the public. FCRC has completed a temporary rail yard for LIRR, and is advancing design of the construction of the permanent rail yard envisioned by the Project. Environmental remediation of contaminated soils within and around the facility is proceeding, and the Carlton Avenue Bridge, along with associated piers, has been demolished, to be rebuilt after additional progress is made on the LIRR yard. Moreover, excavation is ongoing and physical improvements are being made in connection with the construction of a new subway entrance on the Arena Block for New York City Transit.

12. A stay of construction or demolition activities on the Site would deny to the State and the City the benefits that will be derived from the nearly one-quarter billion dollar public investment made in the Project. Properties currently in public ownership would sit idle; a large number of workers now gainfully employed on the Project site would be laid off from their jobs; and the employment opportunities expected for thousands of other workers would be placed in jeopardy. At the same time,

the current flow of tax revenues from ongoing construction activities would disappear  
and millions of anticipated dollars in additional tax revenues would be put at risk.  
Moreover, the schedule for completing the Arena in time to bring professional sports  
back to Brooklyn in 2012 would be thrown into disarray.



Sworn to before me this  
9<sup>th</sup> day of December, 2010.

  
Notary Public

309



# Empire State Development

## ATLANTIC YARDS CONSTRUCTION UPDATE Weeks of February 14, 2011 through February 27, 2011

In an effort to keep the Atlantic Yards Community aware of upcoming construction activities, ESD and Forest City Ratner provide the following outline of anticipated upcoming construction activities.

Please note: the scope and nature of activities are subject to change based upon field conditions. In addition, during the utility work water shut offs may be required; these shut downs are done under the oversight of DEP and property owners will be given advance notice. All work has been approved by appropriate City and State agencies where required.

If you have any questions please feel free to contact our project Ombudsperson, Forrest Taylor, at: 212-803-3233 or [AtlanticYards@empire.state.ny.us](mailto:AtlanticYards@empire.state.ny.us)

Weeks covering February 14, 2011 through February 27, 2011

### Long Island Rail Road/Vanderbilt Yard/ Carlton Avenue Bridge

- Structural Test Pile lateral load tests will be performed on piles previously drilled within the rail yard continues and is expected to be completed during this reporting period.
- Work related to the demolition of the Carlton Ave Bridge and the associated piers located in the north side of the existing LIRR yard located within blocks 1120 & 1121 is complete. Removal of the concrete footings and piers is complete. Removal of the old north abutment by saw-cutting and hoe ram will continue during this period.
- Construction of the AO1-2 concrete vault and transformer pad along with the associated electrical duct banks has been completed. The area will be turned over to LIRR for their installation of the substation equipment. Forest City is not involved with that work.
- Posillico/Tully JV will mobilize to the site during this period. Posillico/Tully JV will install their site trailers on Block 1129. They will also start site clearing and grubbing and perform test pits within blocks 1120 & 1121.
- Tracks Unlimited will be on site during this period to remove the remaining north lead track and the tracks within the car shop located on block 1121.
- Posillico/Tully to install Construction fence along Vanderbilt Ave on Lot 42 to prepare for the drilling of soldier piles. This work can not start until the demolition of the north east gas station is completed.
- Posillico/Tully to start work to raise the grade at the bump area located in Block 1120 to prepare for drilling of north side piles. Mobilization drill rigs and associated equipment and drilling of piles on the north side of the yard adjacent to the bump will commence during this work period.

- Underground storage tanks at Block 1121 Lot 42 have been temporarily closed and safeguarded by purging tank vapors with nitrogen and capping all applicable tank appurtenances according to Fire
- Empire State Development Corporation  
633 Third Avenue New York New York 10017 Tel 212 803 3100  
Web Site: [www.empire.state.ny.us](http://www.empire.state.ny.us)

Department Regulations. This work was completed in connection with upcoming above-grade demolition at Block 1121 Lot 42.

- Posillico/Tully is expected to commence demolition work in the car shop to prepare for underpinning of the south wall of the LIRR Tunnel

#### Environmental Remediation

- Soil that has been classified as clean, contaminated or hazardous will be removed from the site as part of the excavation activities and brought to appropriate disposal locations.
- Where excavation and soil moving activities occur in areas of known Volatile Organic Compounds (VOC's) (BL 1119, lot 1 & 64, BL 1118, lot 1 and BL 1127, lot 1) VOC monitoring will be performed as required in the Community Air Monitoring Plan ("CAMP") and VOC Best Monitoring Practices documents.
- CAMP monitoring is continuing on all areas of soil disturbance per the project plan, including excavation, grading and demolition.
- Work related to the post-injection performance monitoring sampling at Block 1119 Lot 1 and Block 1118 Lot 1 has been completed. The first round of in-situ chemical oxidation injections at Block 1127 Lot 1 has also been completed. Additional remediation performance monitoring sampling may be completed on Block 1127 Lot 1 during this period. All work was completed as a remedial action under jurisdiction of New York State Department of Environmental Conservation (DEC).

#### Infrastructure

- A new water trunk main will be installed along Atlantic between Flatbush and 6<sup>th</sup> Avenue and associated distribution mains will be installed in the Flatbush/Atlantic Avenue intersection, and approximately 200 feet south in Flatbush toward Pacific Street. Work related to the original scope of an exploratory trench across Flatbush near Atlantic, and test pits along Atlantic Avenue to 6<sup>th</sup> Avenue, including additional pits requested by DEP have been completed. Recently, the DEP requested additional test trenching in Flatbush. This work was completed as well
- Work on the new trunk water main will commence this period on the south side of Atlantic Avenue across from the Ft Green intersection and will continue eastward for the next 5 months. A section west of the Ft Green intersection will be installed in May 2011 when Transit Connection activities allow. All work will be performed behind MPT.
- The MPT along Atlantic Avenue will be modified near the 6<sup>th</sup> Avenue intersection during the next 2-week period.
- During the course of utility installation work, the contractor may encounter unforeseen contaminants, underground storage tanks or other structures. In the event that this happens and where appropriate, notification will be given to the DEC, VOC monitoring will be continuously performed, and remediation steps will be implemented.



- The Utility contractor and its subcontractors will be conducting inspections, videotaping and cleaning of the new sewers in Atlantic and Flatbush as part of the sign off requirements for the DEP. Work will continue over the next two week period.
- The DEP, with its own forces, will be repairing a sewer line in the bed of Atlantic Avenue west of 6<sup>th</sup> Avenue. This work was not reported in the last two week look ahead because it was not foreseen at that time. Work will begin this period and may extend into the two week period.

### Demolition

- Applications have been submitted to the Department of Buildings for 808 Pacific and 514 Vanderbilt Avenue and are in the review process. Demolition will begin when permits are received.
- Underground storage tanks at Block 1121 Lot 42 have been closed in accordance with Fire Department Regulations. This work was conducted in connection with and prior to upcoming above-grade demolition at Block 1121 Lot 42.
- Abatement is complete at 768 Pacific Street and 603 Dean Street during this reporting period. Roofing abatement was delayed due to snow cover.
- Subject to the receipt of necessary permits, demolition of the former gasoline station at the corner of Vanderbilt Ave and Atlantic Ave, block 1121, lot 42 and the former warehouse at 808 Pacific Street, may commence during this period.

### Arena

- Waterproofing and backfilling along the outside of the arena Atlantic Avenue foundation wall will resume, subject to weather conditions, during this reporting period.
- Steel deliveries and steel erection will continue throughout this reporting period.
- Installation of SOE along the southern portion of the arena building, continuing down Dean continues during this period; additional rakers and sheeting is required in this area, as well as revisions to some existing SOE to accommodate placement of sewer pipe along Flatbush Avenue Within this same area, excavation will continue within the footprint of the arena (block 1127). During this period drilling for soldier piles, lagging and tiebacks will continue east of the Dean Street and Flatbush Avenue intersection.
- Mass excavation within the southeast quadrant of the site will continue during this reporting period.
- Work related to the SOE installation and related excavation within the southeast and southwest quadrants of the arena block, paralleling Dean Street, will continue during this reporting period.
- The excavation and SOE lagging and tiebacks installation for the ConEd vault on Dean Street will continue this period.
- VOC monitoring as required by the CAMP, as well as use of enhanced personal protective equipment (PPE) in some instances, will continue during SOE installation and excavation work on Block 1127

Lot 1. A concrete slab of approximately 2'-4 inches ("cap") has been placed at grade within the area where VOC releases have been elevated to allow work to continue with minimal enhanced PPE and to limit as much emissions as possible at this location. It is likely that the enhanced PPE requirement will be terminated during the reporting period.

- Installation of footings along Flatbush Avenue in Block. 1127 continuing towards the intersection of Dean Street and Flatbush Avenue continues.
- The application of waterproofing to the foundation walls from the 6<sup>th</sup> Avenue at Pacific Street starting north and then west down Atlantic Avenue will continue during this reporting period, as weather allows. Backfilling at these locations will follow the waterproofing and is expected to continue during this reporting period.
- Waterproofing of the west side storm retention tank exterior, followed by backfilling, is expected to continue, as weather allows, during this period.
- Layout/installation related to the underground plumbing will continue within the northeast quadrant (near Atlantic Avenue & 6<sup>th</sup> Avenue portion of the site) and will proceed west down Atlantic Avenue during this reporting period. Underground plumbing will continue within the Block 1127 area in controlled access zones beneath the structural steel erection as needed this period.
- The removal of the retaining wall along the north side of the former Pacific Street and the creation of a new access ramp into the site from Pacific Street will continue this period. The retention wall removal procedure has been reviewed and approved by DOB.
- The excavation for a new, temporary bowl access ramp that opens into Dean Street near intersection with Flatbush will continue during this reporting period. A site access gate to be located at the intersection of Dean Street and 6<sup>th</sup> Avenue, with curb cut at Dean Street, may be installed during this reporting period. The ramp that was previously reported to go in this area is no longer contemplated.
- Underground electrical installation will continue as needed during this reporting period. This work is taking place within Block 1119 and Block 1127 where the concrete foundations and footings are being poured and beneath the structural steel erection within control access zones
- Work, formwork and rebar placement, related to the installation of the perimeter wall at the east end (6<sup>th</sup> Avenue) will be discontinued during this reporting period and resume following the demolition of the east end of the Pacific Avenue retaining wall and placement of the access ramp.
- The maintenance of the site to accommodate steel erection will continue during this period. Steel erection sequences 203-6-and 307-308 and 408 for lift #2 & #3 @ lower suites to upper concourse elevation) are continuing. Steel deck placement will continue in sequences 304-305 this period. Preparation for concrete slab on deck placement in sequence 106 is projected to start this reporting period, including the first deliveries of the reinforcing steel. These deliveries are projected to be off loaded from inside the Atlantic Avenue MPT lane.
- The excavation and concrete footing placement for a long term but temporary visual mock-up of the weathered steel façade panels is expected to begin this period in the northwest parking lot of Lot 1129 (752 Pacific Street). The mock-up panel delivery and placement of the footing is expected to be completed in during the reporting periods covering March 7<sup>th</sup> through March 25<sup>th</sup>.

- Preparation of the lay down and storage area to the east section of 752 Pacific Ave., Lot 1129 is expected to start this reporting period, following completion of adjacent demolition activity.
- During the course of the excavation work, the contractor may encounter unforeseen contaminants, underground storage tanks or other structures. In the event that this happens and where appropriate, notification will be given to DEC, VOC monitoring will be continuously performed while excavating these materials and remediation steps will be implemented.
- Coordination activity, including excavation to assist with the installation of the infrastructure piping at Flatbush Avenue and Dean Street will continue during this period.

Weekend work will be scheduled no later than close of business on the preceding Thursday, where makeup work due to weather or other delays makes it necessary.

- Atlantic Yards is participating in the City's Urban Canvas program which is managed by the City's Department of Buildings; as such a decorative covering has been installed on a portion of the construction fence facing Atlantic Avenue (approximately 200 feet in length); it is one of four sanctioned designs selected by the City. To find out more information about the program go to the following website: [www.nyc.gov/urbancanvas](http://www.nyc.gov/urbancanvas)

#### NYC Transit Improvements

- Cross bracing has commenced and excavation is substantially complete. Smaller bracing is currently in progress at the existing structure at the tip of the intersection. Vibration and Tilt sensors have been installed and are being monitored per NYCT requirements.
- Work related to the excavation of test holes at various points within the project footprint will continue during this period as well.
- Classification of soil will be completed for proper disposal, as selective excavation continues. The soil testing work has been completed, except for one area for which access is not yet available. All soil has tested as "non-hazardous".
- Demolition of the TA structures continues. IRT and BMT Tunnel inspections have taken place and repair work will be implemented during scheduled NYCT track outages during evenings and weekends. IRT Track Outages are now scheduled for the weekends of February 5<sup>th</sup> and 19<sup>th</sup>. BMT Track Outages are now scheduled for March 5<sup>th</sup>, 12<sup>th</sup> and April 19<sup>th</sup>. Additional GO's for both the IRT and BMT will be evaluated as the work progresses. Minor repair and cleanup work will occur on selective evenings under scheduled NYCT flagging protection.
- Permits have been secured for the portions of the street immediately adjacent to the "Tip" of the project area (at the corner of Flatbush and Atlantic). Concrete plank/decking in the roadway is now complete, with the exception of one small area on Atlantic Ave. Custom concrete plank is being fabricated and will be placed at night under DOT permits during this period. This work being done to allow the Fare Control Area excavation & demolition to continue below the street. Traffic will be restored every morning according to DOT stipulations.
- Concrete sealer slab and waterproofing have commenced and will follow at the main transit entrance where the staircase/elevator/escalator is located.

- Minor mechanical, electrical and plumbing work within the subway station below ground is underway to accommodate new station configuration.
- MPT @ Flatbush Ave - Maintenance of the MPT has been suspended due to the recent snow storms experienced over the last month. At this time the MPT is still in place but the lane changes are not being performed until the weather condition permit. We have advised the DOT that once the weather permits; the MPT will be restored and maintained.

#### Anticipated Night Time & Weekend Work

During this reporting period the following work will be performed either at night or during the weekend as noted. All work will be done pursuant to approved permits:

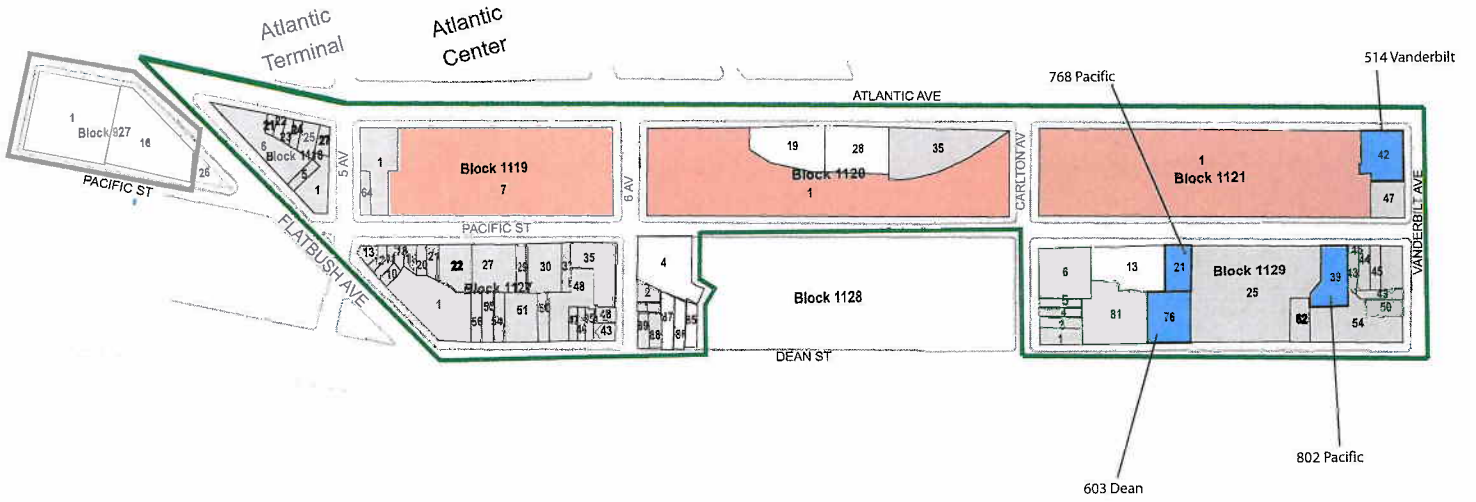
- Arena Site:
  - Weekend work will be scheduled no later than close of business on the preceding Thursday, February 19th and/or February 26th, where make-up work due to weather or other delays makes it necessary.
- NYC Transit Improvements:
  - Temporary concrete decking, as noted above, will be installed along Atlantic Avenue and will be performed at night per DOT requirements. Traffic will be restored every morning according to DOT stipulations.
  - Work related to demolition of BMT structure may be conducted on Saturdays, February 19<sup>th</sup> and/or February 26<sup>th</sup> during this reporting period. All such work will take place within the site.
- Infrastructure:
  - Work related to additional test trenching in Flatbush will be performed at night during this reporting period, weather permitting.
  - Work performed by DEP related to emergency repairs of a sewer in Atlantic will be performed at night during this reporting period, weather permitting.
- Demolition:
  - None anticipated at this time.
- Block 1129 – staging arena:
  - Contractors conducting night work may have cause to enter and exit this area as it serves as a staging and material/equipment storage area.

During the course of work conditions may be encountered at the site which may warrant the need for night and/or weekend work. Work will be done pursuant to approved permits. The above listing is not meant to be an exhaustive list.

Community Liaison Office (CLO)

Persons seeking access should do so from Carlton Avenue. Both the CLO phone line (866-923-5315) email ([communityliaison@atlanticyards.com](mailto:communityliaison@atlanticyards.com)) are operational and community residents are encouraged to use both when making inquiries about the project.

# Atlantic Yards Demolition Status

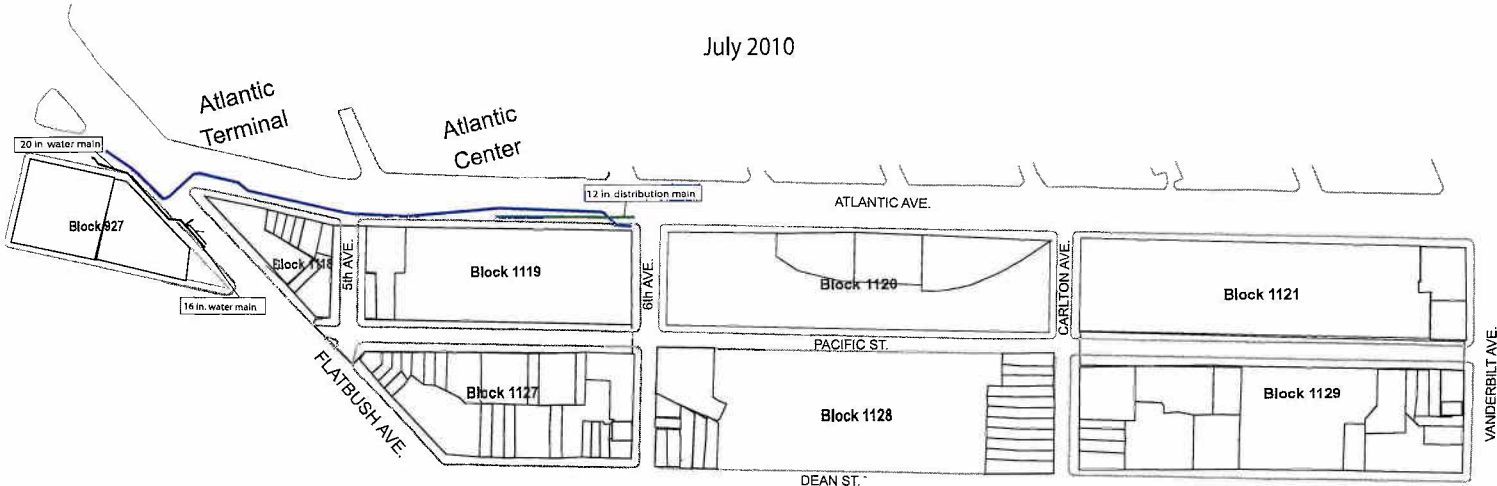


- vacant lot
- Abatement or Demolition Underway/ Filings in Progress
- LIRR Yard

as of February 1, 2011

# Location of Water Main Work

July 2010



- 36"/48" trunk water main
- 12", 16", & 20" water main & 12" Distribution Main





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

---

In the Matter of the Application of : Index No. 114631/09  
: IAS Part 57  
DEVELOP DON'T DESTROY (BROOKLYN), INC., et : Justice Marcy S. Friedman  
al., :  
: Petitioners, :  
: For a Judgment Pursuant to Article 78 of the CPLR :  
: - against - :  
EMPIRE STATE DEVELOPMENT CORPORATION :  
and FOREST CITY RATNER COMPANIES, LLC, :  
Respondents. :  
----- :

In the Matter of the Application of : Index No. 116323/09  
: IAS Part 57  
PROSPECT HEIGHTS NEIGHBORHOOD : Justice Marcy S. Friedman  
DEVELOPMENT COUNCIL, INC., et al., :  
: **AFFIDAVIT OF**  
Petitioners, : **RICARDO G. DEPAOLI**  
: **AUTHENTICATING**  
For a Judgment Pursuant to Article 78 of the Civil : **PHOTOGRAPHS OF**  
Practice Law and Rules : **THE ATLANTIC YARDS**  
: **PROJECT SITE TAKEN**  
- against - : **ON FEBRUARY 8, 2011**  
: EMPIRE STATE DEVELOPMENT CORPORATION :  
and FOREST CITY RATNER COMPANIES, LLC, :  
Respondents. :  
----- :

---

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

RICARDO G. DEPAOLI, being duly sworn, deposes and says:

1. I am a Superintendent at STV Construction, Inc. ("STV"), a professional firm offering construction management services. Empire State Development Corporation ("ESDC") has retained STV to be its owner's representative with respect to the construction of the Atlantic Yards Project (the "Project") in Brooklyn, New York. I submit this affidavit to authenticate photographs taken of the Project site on February 8, 2011. The statements made in this affidavit are based on my personal knowledge.

2. I am STV's field superintendent with respect to its engagement on behalf of ESDC described above. My office address is 225 Park Avenue South in Manhattan. As STV's field superintendent for this engagement, I am on the Project site on a daily basis and am generally familiar with the construction work taking place there.

3. Annexed hereto as Exhibit 1 is a site map of the entire Project site showing the approximate locations from which photographs were taken on February 8, 2011. Annexed hereto as Exhibit 2 is a map of just one portion of the Project site, Block 1129, showing the approximate locations from which other photographs were taken on February 8, 2011. The letters on the two maps (A, B, C, etc.) correspond to the letters on the photographs annexed hereto as Exhibits A through V. The arrows on the site maps show the approximate direction at which the camera was pointed from the location at which each photograph was taken.

4. On February 8, 2011, I took the photographs annexed hereto as Exhibits A through V. These photographs were taken as part of STV's responsibilities to ESDC as its owner's representative. The photographs are true and correct depictions of the Project site at the time they were taken on February 8, 2011.

5. As indicated on the site map, photographs A, B, C, D and E show the site of the ongoing construction of the Arena and the adjacent subway entrance. I was unable to include this entire area in a single photograph from the place these photographs were taken (the roof of the shopping mall on Atlantic Avenue across from the Arena site), but the five photographs together show the different areas of the three blocks on which the Arena and the adjacent subway entrance are being constructed. As these photographs indicate, all buildings on the three Arena blocks have been demolished, and the Arena and subway entrance are actively under construction.

6. Photograph F was taken on Pacific Street between Sixth Avenue and Carlton Avenue, looking west towards the construction on the Arena Block.

7. Photograph G shows portions of Blocks 1120 and 1121 where Phase 2a of the construction of the new rail yard for the Long Island Rail Road is taking place.

8. As further indicated on the site map, photographs H, I, J, K, L, M, N, O, P, Q, R, S and T depict different areas of Block 1129.

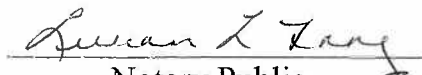
9. As of February 8, 2011, there were four buildings on Block 1129. The other buildings on Block 1129 have been demolished.

10. Photograph H was taken from the roof of the building on Lot 13 on Block 1129. Because it was taken from that vantage point, it shows the largest area of Block 1129.

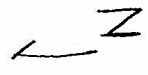
11. Photographs U and V show the blue construction wall along Vanderbilt Avenue on Block 1121. Behind the construction wall on Lot 42 is a vacant former gasoline station.

  
RICARDO G. DEPAOLI

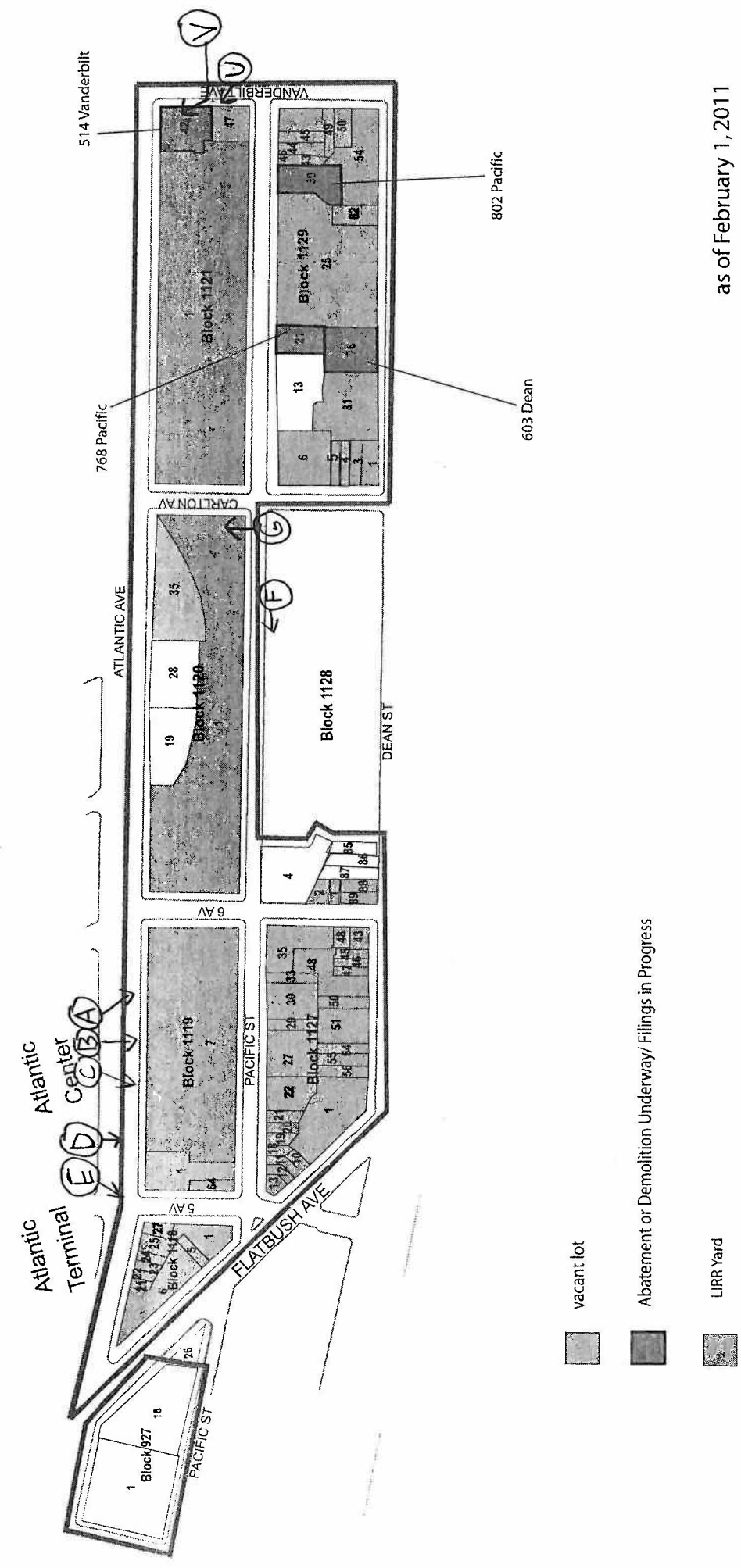
Sworn to before me this  
16<sup>th</sup> day of February, 2011.

  
Notary Public



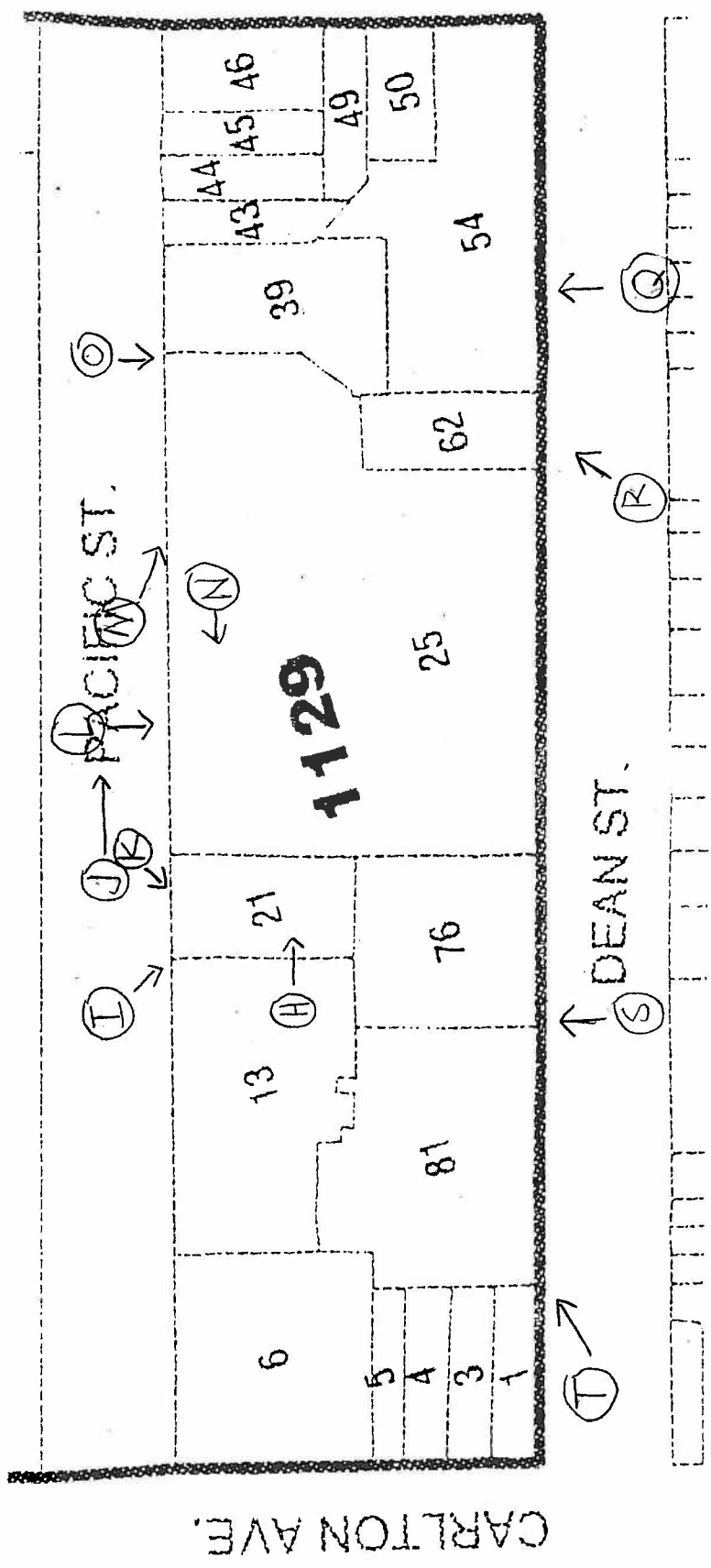


# Atlantic Yards Demolition Status



as of February 1, 2011

EXHIBIT 1





02/08/2011 11:58

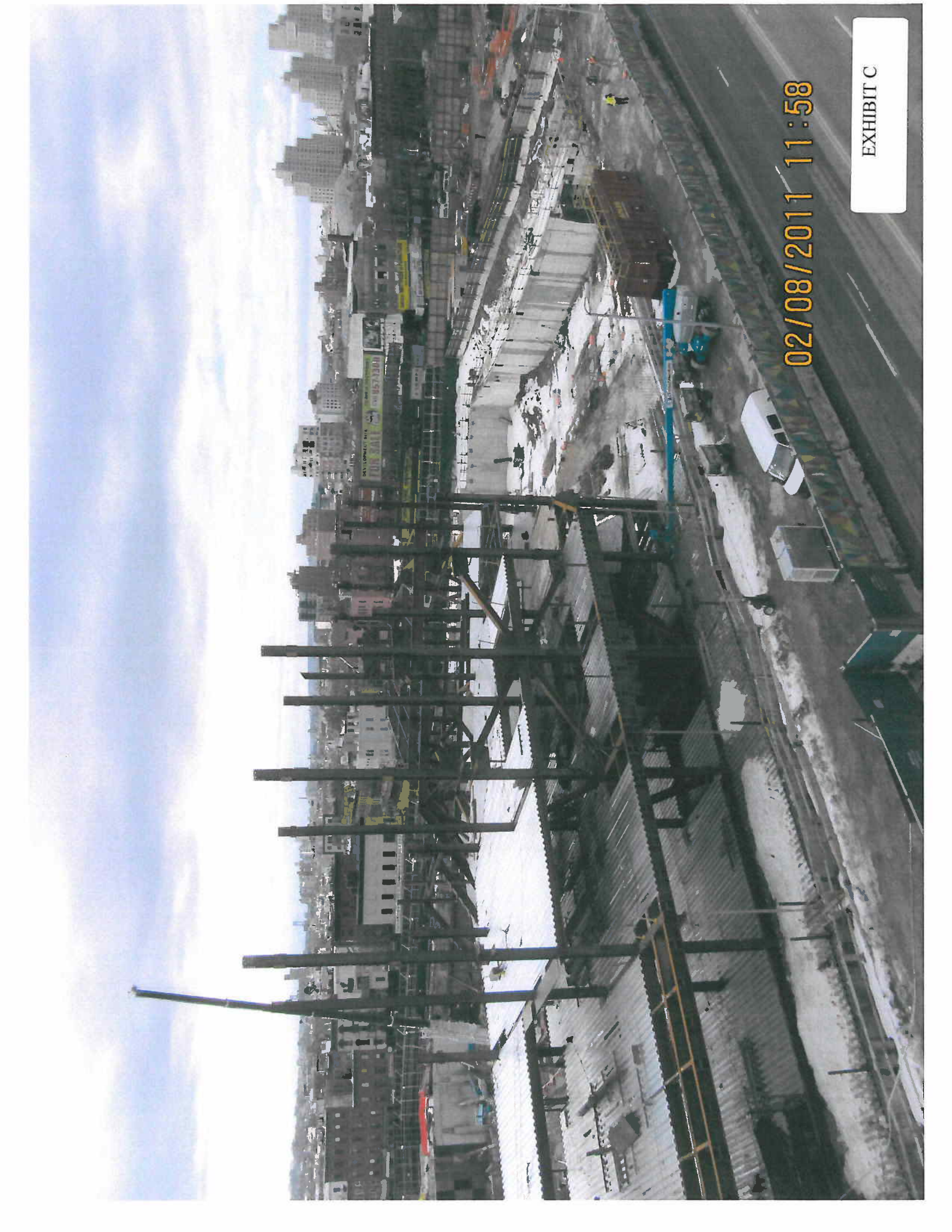
EXHIBIT A



02/08/2011 11:58

EXHIBIT B





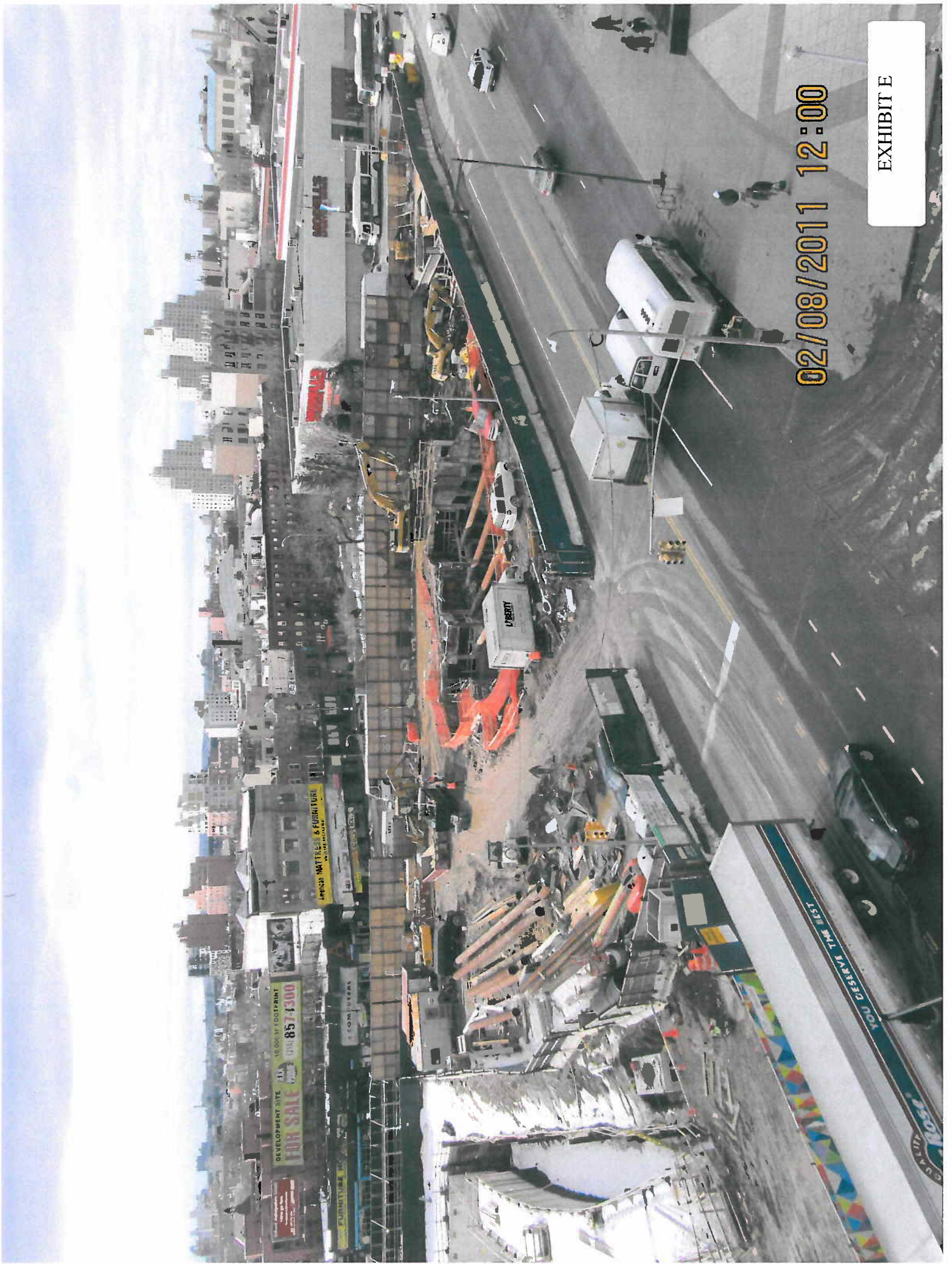
02/08/2011 11:58

EXHIBIT C



02/08/2011 12:00

EXHIBIT D



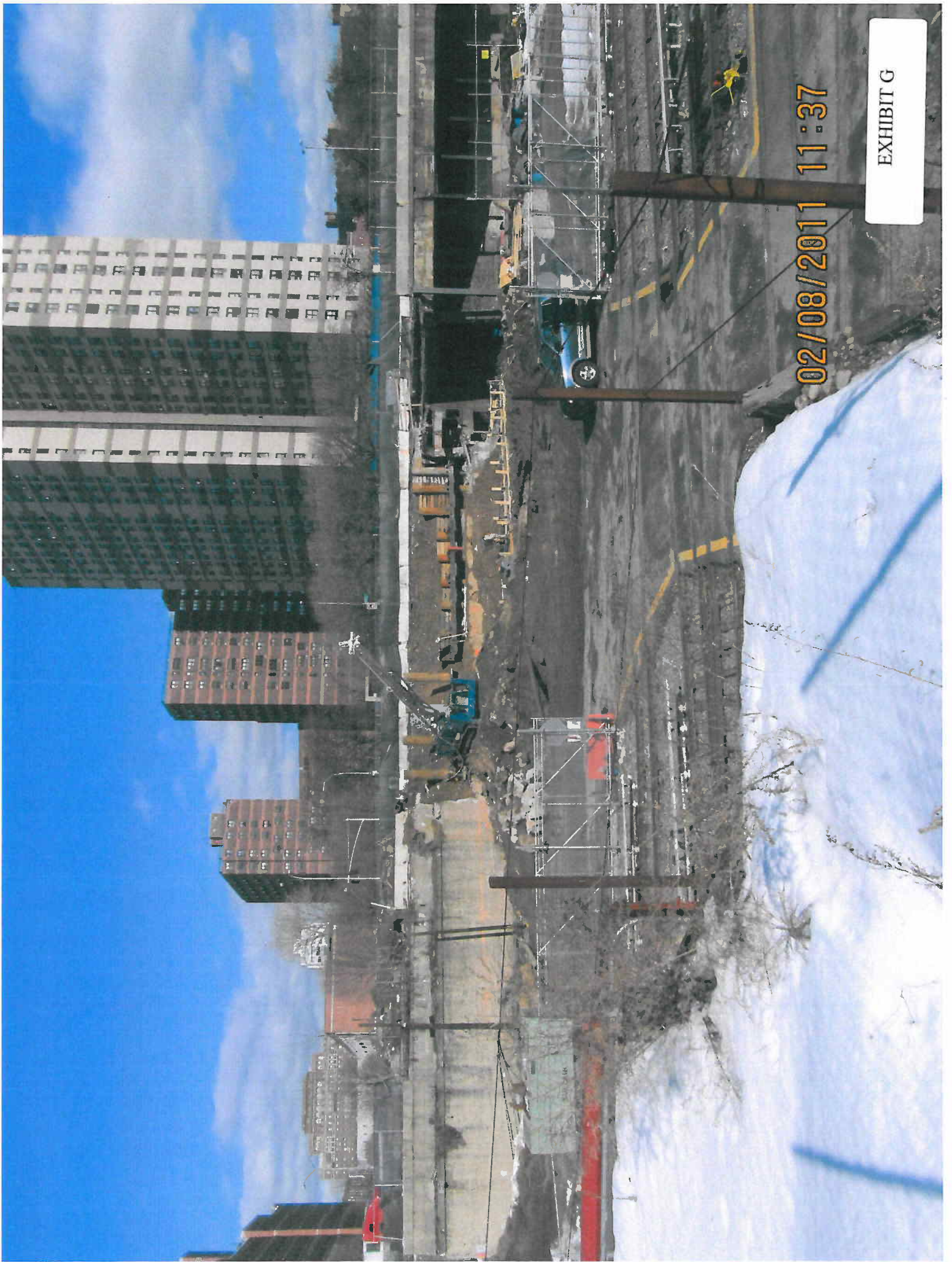
02/08/2011 12:00

EXHIBIT E



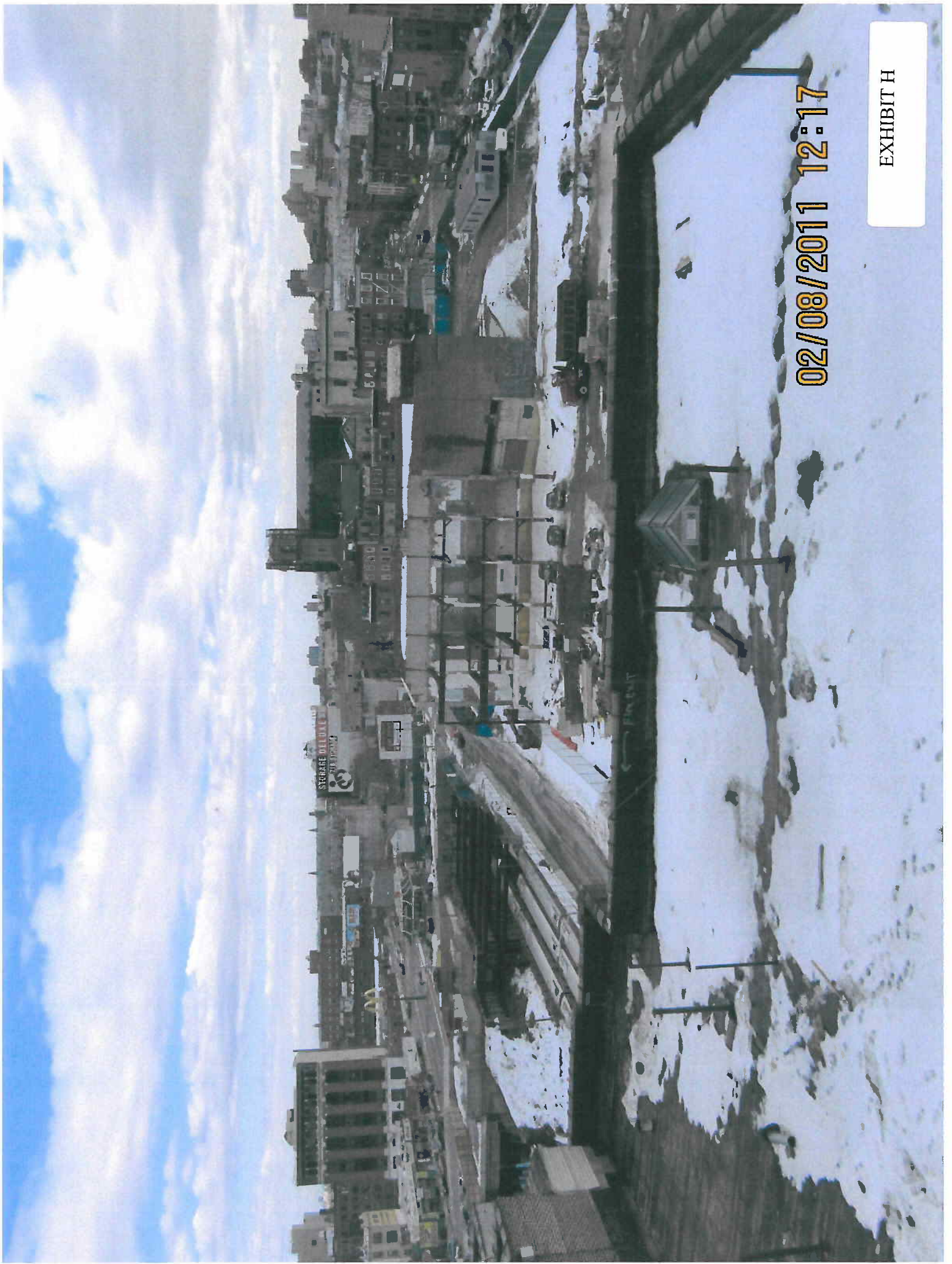
02/08/2011 11:39

EXHIBIT F



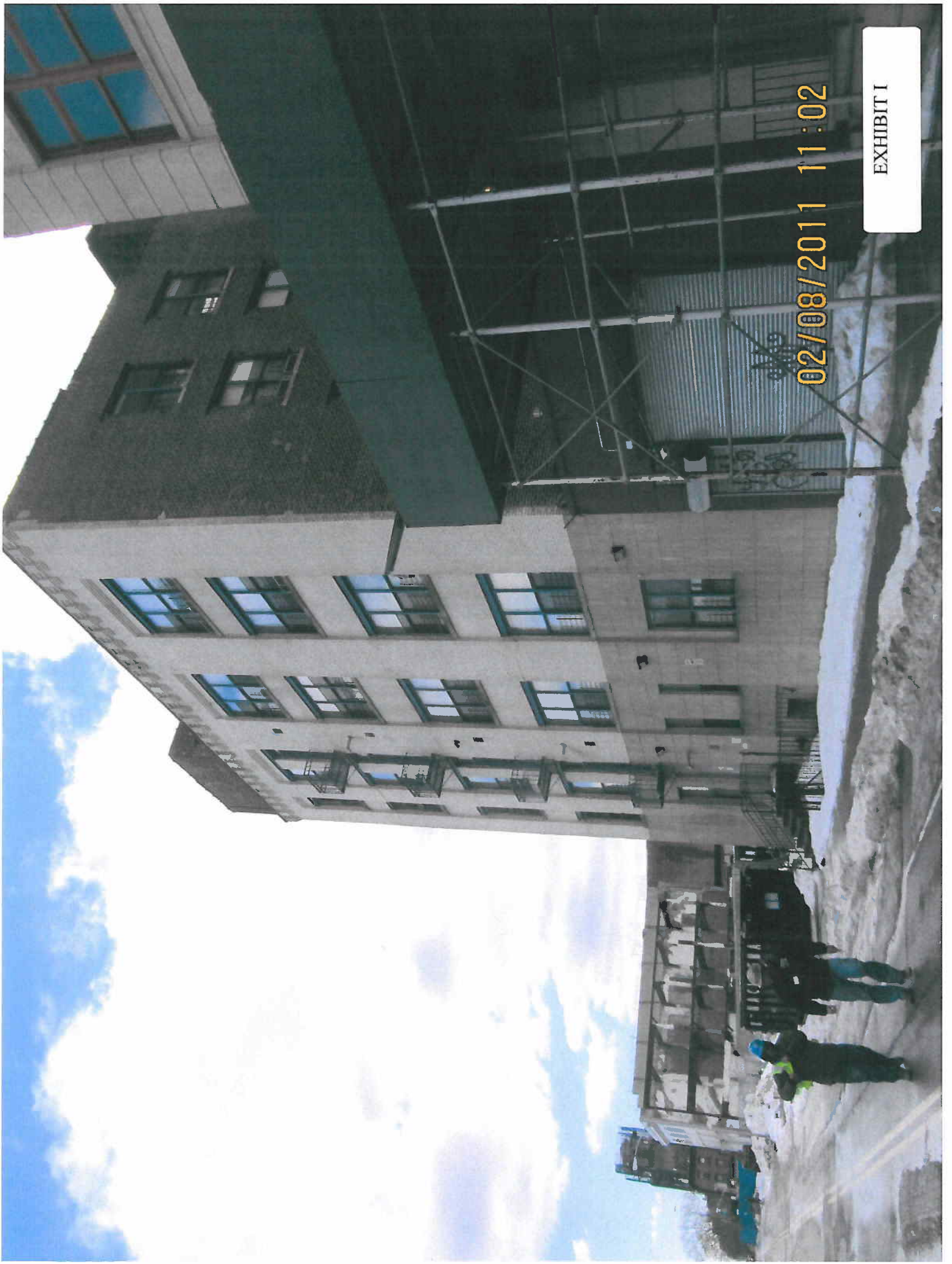
02/08/2011 11:37

EXHIBIT G



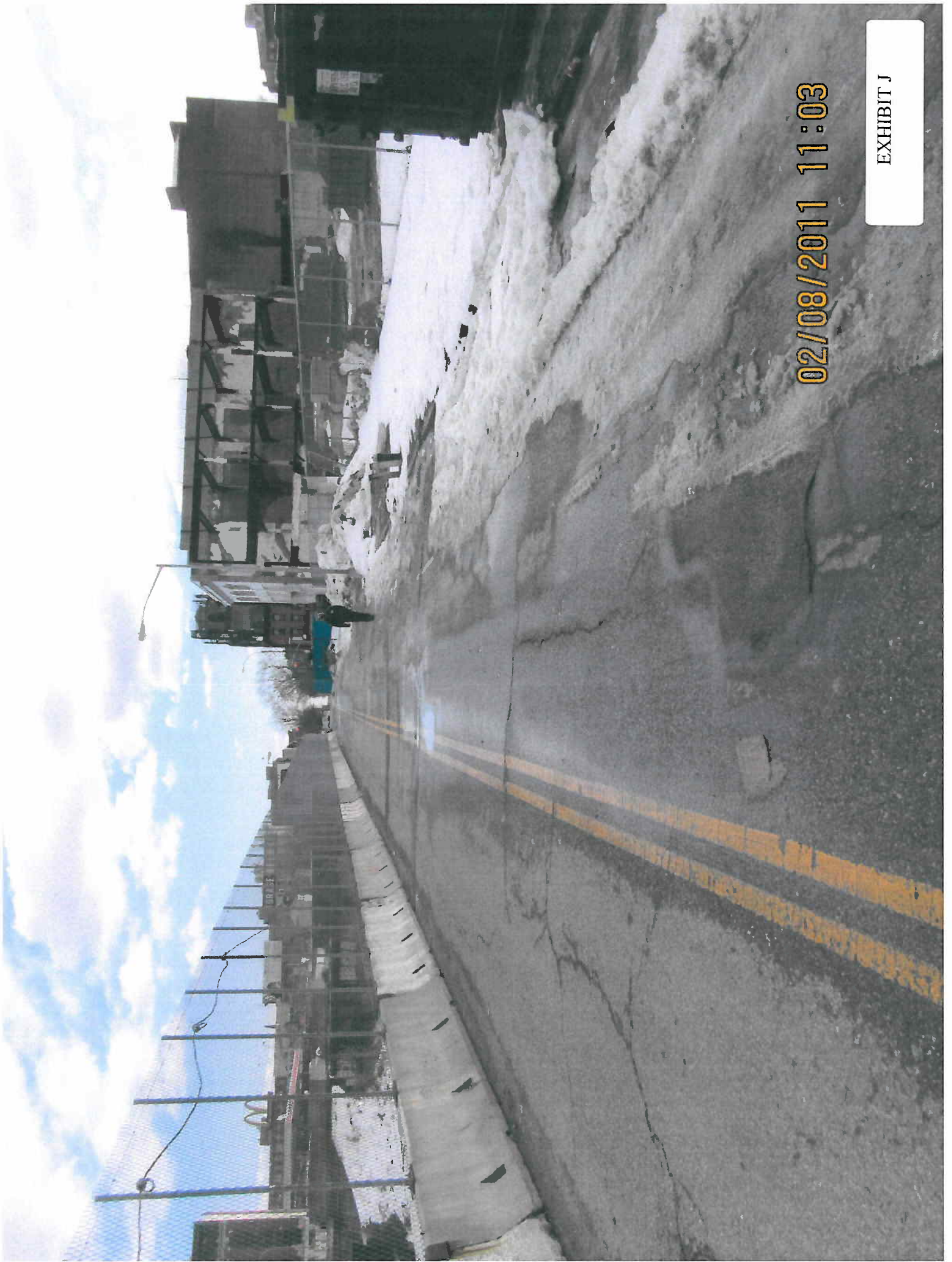
02/08/2011 12:17

EXHIBIT H



02/08/2011 11:02

EXHIBIT I



02/08/2011 11:03

EXHIBIT J





02/08/2011 11:04

EXHIBIT K



02/08/2011 11:07

EXHIBIT L



02/08/2011 11:08

EXHIBIT M



02/08/2011 11:09

EXHIBIT N

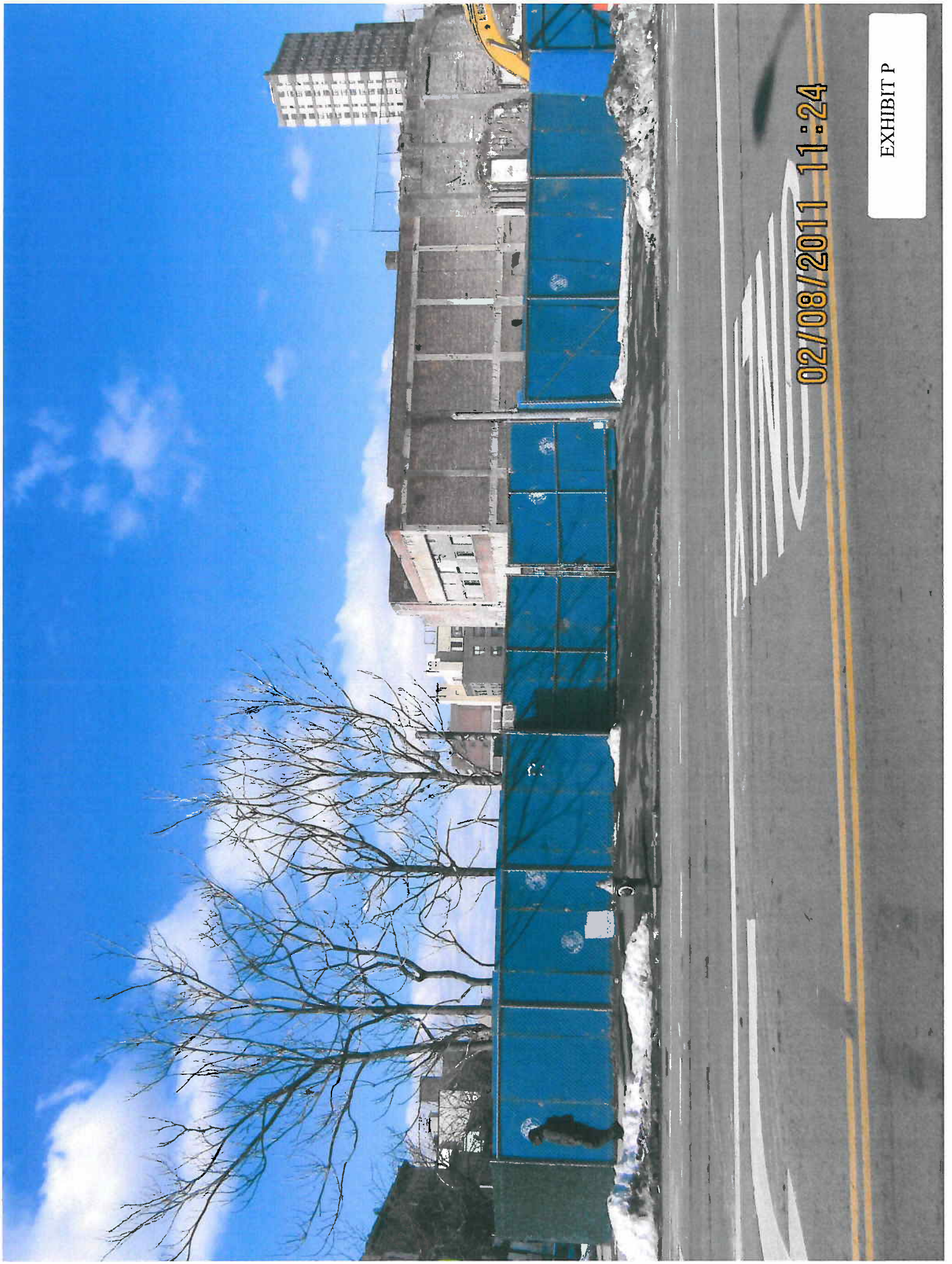


**A. RUSSO WRECKING**  
**EQUIPMENT RENTALS**

02/08/2011 11:11

EXHIBIT O

NO STANDING  
MACHINE



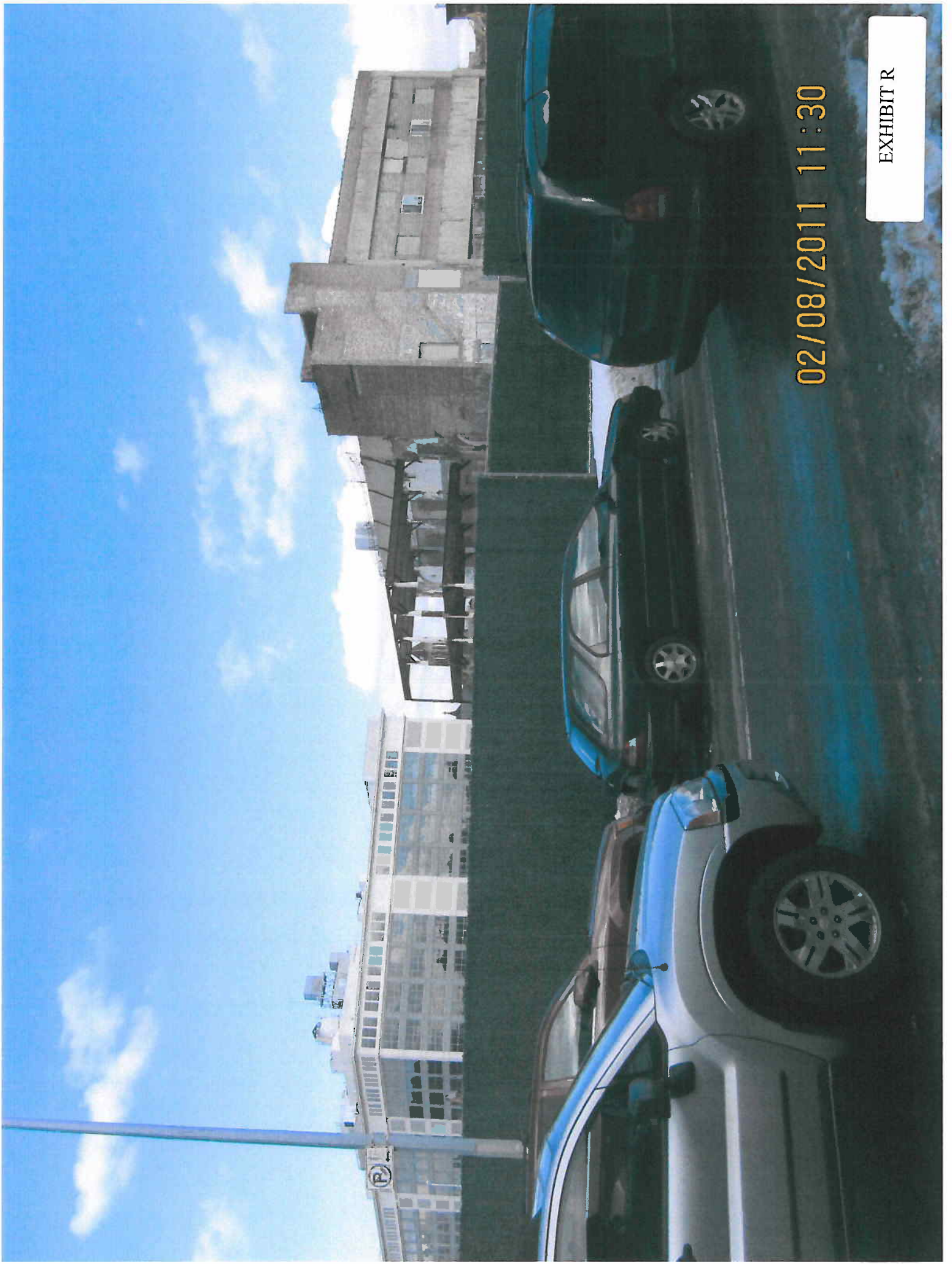
02/08/2011 11:24

EXHIBIT P



02/08/2011 11:29

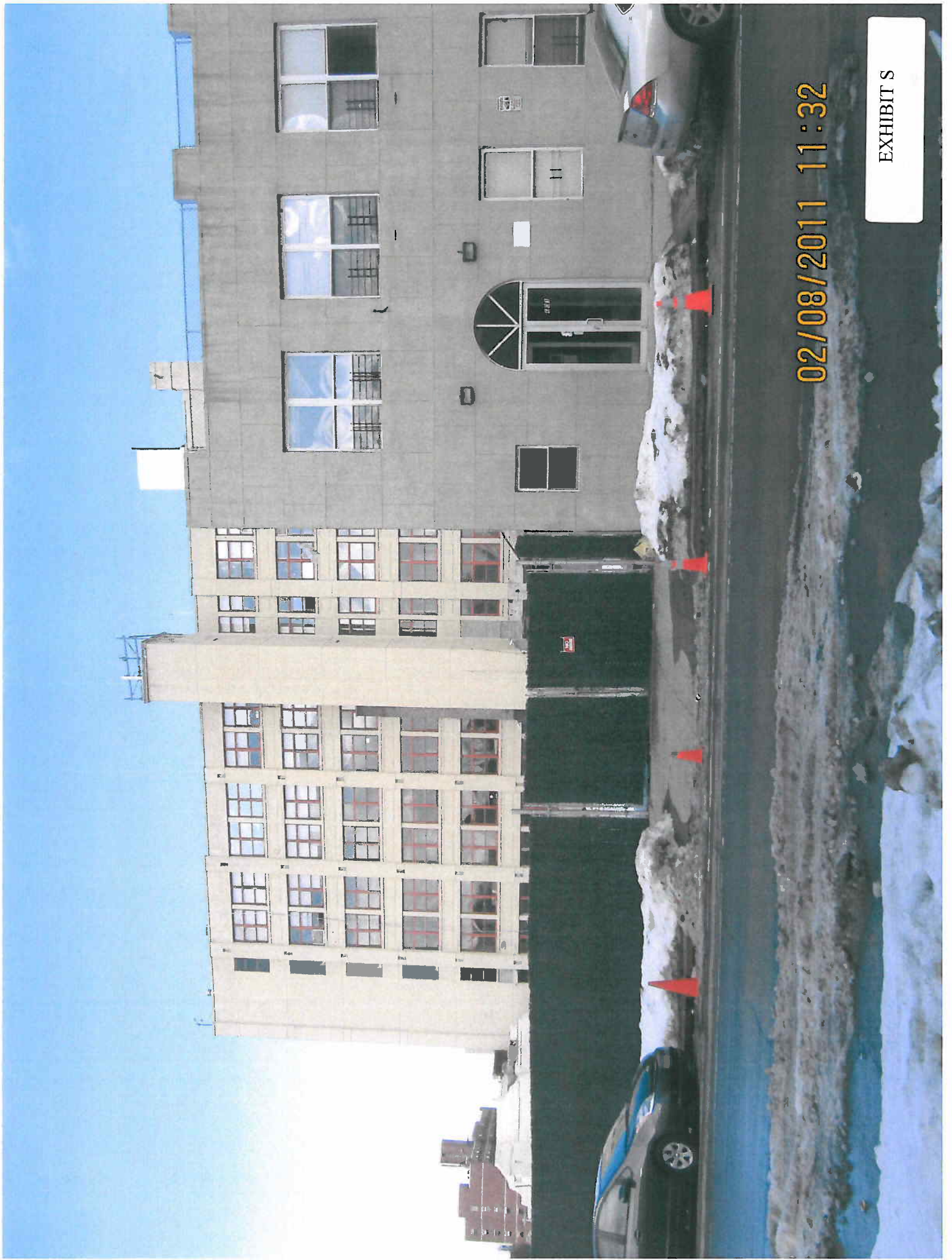
EXHIBIT Q



02/08/2011 11:30

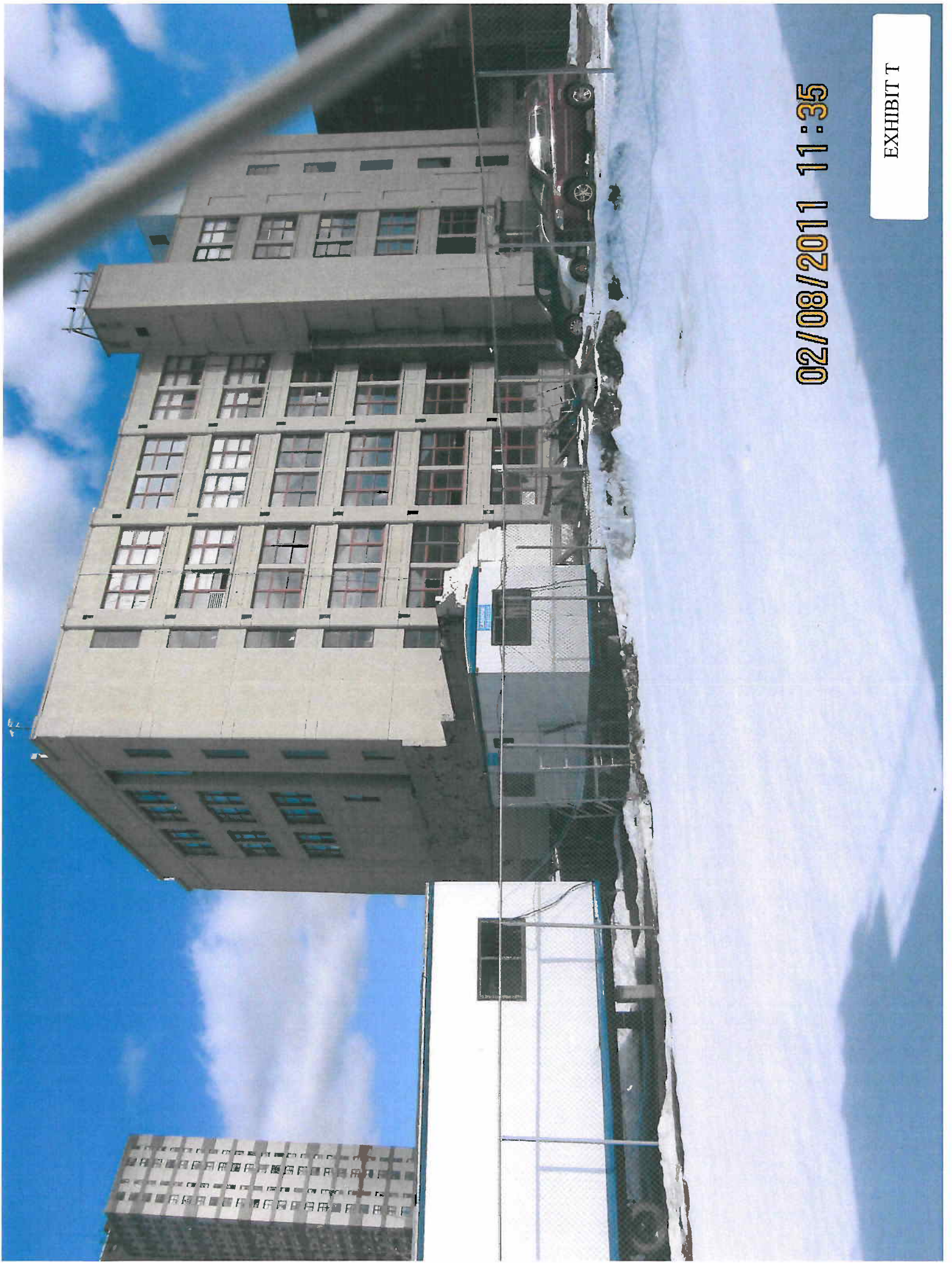
EXHIBIT R





02/08/2011 11:32

EXHIBIT S



02/08/2011 11:35

EXHIBIT T



TO ARRIVE ON-SITE, REPORT TO THE CONDITIONS AT THE SITE, CALL 311  
FOR MORE INFORMATION, VISIT  
WWW.NYC.GOV/311

TO ARRIVE ON-SITE, REPORT TO THE CONDITIONS AT THE SITE, CALL 311  
FOR MORE INFORMATION, VISIT  
WWW.NYC.GOV/311

**SIDEWALK CLOSED**  
SEE THE OFFICE FOR MORE

02/08/2011 11:17

EXHIBIT U



02/08/2011 11:20

EXHIBIT V

STICK  
PROSOL  
ELEGIR SU MATERIA