

February 5, 2021

301592

Via electronic filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
February 5, 2021
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Public Record

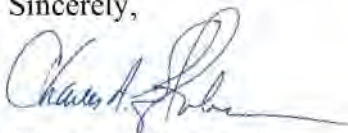
Re: *Verified Petition of New York City Economic Development Corporation on Behalf
of the City of New York for a Declaratory Order* - STB Docket No. FD 36467

Dear Ms. Brown:

I please find attached the New York City Economic Development Corporation's ("NYCEDC") Verified Petition for Declaratory Order. I have also arranged for payment of the \$1,400 filing fee through the link provided on the Board's website.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Charles A. Spitulnik
Counsel for New York City Economic Development
Corporation

FILED
February 5, 2021
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
February 5, 2021
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36467

**VERIFIED PETITION OF
NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
ON BEHALF OF
THE CITY OF NEW YORK
FOR A DECLARATORY ORDER**

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document should be addressed to:

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Counsel for the New York City Economic
Development Corporation

Dated: February 5, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36467

**VERIFIED PETITION OF
NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
ON BEHALF OF
THE CITY OF NEW YORK
FOR A DECLARATORY ORDER**

New York City Economic Development Corporation (“NYCEDC”), acting on behalf of the City of New York (“the City”), hereby petitions this Board for a declaratory order pursuant to 49 U.S.C. § 1321 and 5 U.S.C. § 554(e), confirming that certain rail facilities owned by the City of New York, and managed by NYCEDC pursuant to an annual contract with the City, have been abandoned. NYCEDC submits that the property and facilities that are the subject of this Petition are within the scope of 49 U.S.C. §10906 and therefore not subject to the Board’s authority to approve abandonment. NYCEDC submits further that although this Board has no authority to issue an order approving abandonment of the facilities, it may issue the order requested here that confirms that the property and facilities have been abandoned and are no longer subject to this Board’s jurisdiction.

INTRODUCTION AND STATEMENT OF FACTS

The City owns a rail facility on the Brooklyn waterfront known as the 51st Street Yard, as well as the line of railroad along 1st Avenue in Brooklyn that connected that Yard to shippers along the line. The facilities at issue here have a long history of service to the maritime and rail shipping communities on the New York waterfront. For the purposes of this proceeding, however, the facts related to the current proceeding begin with the application by one of the prior owners of the

property – the New York Dock Railway Company (“NYD”) – to abandon all of its operations along the Brooklyn Waterfront. In its 1983 application to the Interstate Commerce Commission (“ICC”) to abandon the property that is the subject of this proceeding, NYD stated: “The track operated by NYD is primarily switching track in its terminals with minimal main line operations not exceeding one and one-half miles.” ICC Docket No. AB 219 (Sub-No.1), *In the Matter for New York Dock Ry. – Abandonment – Entire Line, Kings County, NY*, section (c)(2) at 7 (filed May 2, 1983) (“NYD 1983 Application”).

As an alternative to that abandonment, the New York Cross Harbor Terminal Corp. (“NYCH”) later secured authority from the ICC to acquire the property for which NYD had sought abandonment authority, ICC FD No. 30183, *NY Cross Harbor Terminal RR Corp. – Exemption for Operation and Issuance of Securities* (Service Date July 15, 1983). Upon receipt of that approval, NYCH began to operate the facilities and lines in Brooklyn as well as the cross-harbor float operation and the accompanying facilities at Greenville Yard in Jersey City, NJ.

Following a series of disagreements with the owners of New York Cross Harbor Railroad (“NYCH”), a successor to the NY Cross Harbor Terminal RR Corp., the City later sought to have NYCH’s rights to operate on the Brooklyn properties terminated. Following an initially successful attempt to secure adverse abandonment authority, *see* STB Docket AB-No. 596, *NYC Econ. Dev. Corp. - - Adverse Abandonment - - N. Y. Cross Harbor R.R. in Brooklyn, N.Y.* (Service Date May 12, 2003), the United States Court of Appeals for the D.C. Circuit subsequently overturned that decision. *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004). The City did not pursue those efforts further. *See* STB Docket AB-No. 596, *NYC Econ. Dev. Corp. - - Adverse Abandonment - - N. Y. Cross Harbor R.R. in Brooklyn, N.Y.* (Service Date December 15, 2004).

Later, as a result of transactions described as “intracorporate family transactions” the STB acknowledged the transfer of all of NYCH’s operating assets to the New York New Jersey Railroad, LLC (“NYNJ”). See STB F.D. No. 34813, *N.Y. N.J. Rail LLC and N. Y. Cross Harbor R.R. Terminal Corp.—Corporate Family Transaction Exemption* (Service Date July 27, 2006). NYNJ continues to operate some of the facilities in Brooklyn, including portions of the line along 1st Avenue and the 65th Street Railyard that were part of the assets covered by the transaction described in F.D. No. 34813.

However, NYNJ has long since stopped operating on much of the tracks and facilities in the 51st Street Yard. In the aerial imagery map attached to this Verified Petition as **Attachment A**, the highlighted areas identify premises that are owned by the City, including the land, lands under water, the terminal buildings and piers located outside of the former 51st Street Yard comprising the Bush Terminal Property (the “Bush Terminal Property”) and portions of the 51st Street Yard that are no longer used for rail purposes (the “Disused 51 St Railyard” as identified on **Attachment A**). **Attachment A** also delineates the portion of the 51st Street Yard which continues to be used by NYNJ for rail purposes (the “Operating Yard”, as identified on **Attachment A** and more specifically described as the “51st Street Rail Yard” in the survey included as **Attachment B**). The switching tracks outside of the Operating Yard that were previously part of the 51st Street Yard have been removed and paved over in order to use that area for parking automobiles. Similarly, NYNJ no longer uses the round house that is outside of the northern boundary of the Operating Yard (located within the area identified as the Disused 51 St Railyard in **Attachment A**). The tracks that remain in the Operating Yard, which NYNJ uses for car storage and transload operations, and the tracks along 1st Avenue are not addressed by NYCEDC’s Petition.

However, the City now plans to undertake development of property outside of the Operating Yard, including portions of Bush Terminal Property and the former 51st Street Yard, specifically the areas identified as the Disused 51 St Railyard in **Attachment A**. Because that property and the facilities located on this property have previously been used by a rail carrier providing common carrier service in interstate commerce and have therefore been subject to the jurisdiction of this Board, NYCEDC is submitting this Petition to confirm that, as a result of the actions of the NYNJ and the City that constitute a *de facto* abandonment of rail service, the Board no longer has jurisdiction over the property and facilities identified in the highlighted areas on **Attachment A** as the Bush Terminal Property and the Disused 51 St Railyard. For further clarification, the Operating Yard indicated in the parcel maps provided in **Attachment B** will remain available for NYNJ to use in its continued rail operations.

ARGUMENT

I. THIS BOARD HAS THE AUTHORITY TO DETERMINE THAT THE TRACKS AND FACILITIES THAT ARE THE SUBJECT OF THIS PETITION HAVE BEEN ABANDONED.

Under the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. §§ 10101 *et seq.*, the Surface Transportation Board (the “Board”) has “exclusive jurisdiction over the abandonment of tracks, including wholly intrastate spur and side tracks.” *Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003). However, the “Board does not have authority . . . over [the] construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks,”¹ 49 U.S.C.

¹ There is no statutory definition for the listed categories of excepted tracks and the legislative history does not “reveal a clear Congressional intent regarding the meaning of the [] terms.” *Oakland Global Rail Enter. —Pet. for Declaratory Order*, FD 36168, slip op. at 8 (STB Served

§ 10906, often referred to as “excepted” tracks because they are “statutorily excepted from the entry and exit licensing requirements of 49 U.S.C. §§ 10901-10905, as well as the sales and acquisition licensing requirements of 49 U.S.C. §§ 11321 *et seq.*” *Pinelawn Cemetery—Pet. for Declaratory Order*, FD 35468, slip op. at 6 (STB served Apr. 21, 2015).

Despite the Board’s lack of authority over certain transactions relating to excepted track—i.e. excepted track “can be added or removed from the system without a license from the Board,” *id.*—the Board maintains its jurisdiction over the lines as part of the national rail system. See *United Transp. Union-Ill. Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) (“§ 10906 exception states that the Board ‘does not have authority’ over ‘construction, acquisition, operation, abandonment, or discontinuance of spur . . . track,’ but this does not mean that the Board lacks jurisdiction over such transactions.”); *Cedarapids, Inc.*, 265 F. Supp. 2d at 1013 (same).

In order to determine whether a rail line is excepted under § 10906, the Board evaluates the facts on a case-by-case basis and “analyzes the track’s intended use, physical characteristics, and relationship to the rail system.” *Oakland Global Rail Enter.—Petition for Declaratory Order*, FD 36168, slip op. at 8 (STB Served Mar. 15, 2019) (citing *Tri-City R.R.—Pet. for Declaratory Order*, FD 36037, slip op. at 4 (STB served June 1, 2017)); cf. *Allied Industrial Development Corp.—Pet. for Declaratory Order*, FD 35477, slip. op. at 6 n.14 (STB Served Sept. 17, 2015) (“Section 10906 ancillary tracks are not necessarily abandoned when a carrier’s property right is extinguished.” (citing *Pinelawn Cemetery*, slip op. at 11)).

With respect to the “intended use” factor, the Board considers: (1) “whether the track will be used for certain ancillary operations (e.g., switching, loading, and unloading);” (2) “whether it

Mar. 15, 2019) (citing *Bhd. of Locomotive Eng’rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996); *N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Order*, FD 34429, slip op. at 5 (STB served July 15, 2004)).

serves more than one shipper”; (3) “whether the shipper is located at the end of the track”; (4) “whether there are stations on the track”; (5) “whether there is regularly scheduled service”; (6) “who owns and maintains the track”; and (7) “the volume of traffic moving over the track.” *Oakland Global Rail Enter.*, slip op. at 8. The Board considers the “physical characteristics” including: (1) the “length of the track”; (2) “whether it is stub-ended”; and (3) “whether the track was constructed with light-weight rail.” *Id.* The final factor the Board evaluates is the “relationship to the rail system,” including “whether the track was built to penetrate new markets or territory.” *Id.* The Board does not require evidence addressing every factor listed above, but balances the evidence presented and makes its determination based on “the overall legal status of the track.” *Id.*; see also *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, FD 32760, slip op. at 15 (STB served Jan. 31, 2018) (same).

To evaluate whether an abandonment of a § 10906 track has occurred, the “key consideration” for the Board is “whether or not the carrier has continued to exhibit a fixed and continuing intent to hold out to provide common carrier rail service to the public.” *Pinelawn Cemetery*, slip op. at 10. As with the inquiry as to whether a rail segment qualifies as excepted track under § 10906, the Board considers the totality of the circumstances and not “a single act, or failure to act” in determining whether a rail carrier intended to *abandon* its excepted track. *Id.* at 11. In order for the Board to “remove its jurisdiction” over excepted track, the rail carrier “would need to demonstrate that the [track] is no longer needed for the interstate rail system.” *Id.*

II. THE TRACKS AND FACILITIES THAT ARE THE SUBJECT OF THIS PETITION ARE “EXCEPTED TRACK” AND HAVE BEEN ABANDONED.

The tracks and facilities that are the subject of this Petition fall squarely within the category of excepted track. Now, the actions of both NYNJ, as the entity that had the authority to operate over the tracks and facilities in the former 51st Street Yard, and the City, as owner of those tracks

and facilities at issue here, including the former tracks and facilities outside of the former 51st Street Yard within the Bush Terminal Property , confirm that they have been abandoned (with the exception of the tracks and facilities within the Operating Yard, which continue to be used by NYNJ).

First, the statement about the tracks and the roundhouse by a previous owner constitute the best evidence of their “intended use” (see, *Oakland Global Rail Enter.*, slip op. at 8). The NYD abandonment application confirms that the vast majority of the tracks in its terminals (of which the 51st Street Yard was one) were “primarily switching tracks”. NYD 1983 Application, at 7. Examining the multi-factor test outlined in *Oakland Global Rail Enter.*, the layout of the location of the facilities, as shown on **Attachment B**, confirms that “the track will be used for certain ancillary operations (e.g., switching, loading, and unloading)” and that the roundhouse would have been used, of course, for rolling stock repairs; that there were no “stations on the track” since they were all included within one yard facility-c; and that the yard tracks were clearly stub-ended. *Oakland Global Rail Enter.*, slip op. at 8. While certain tracks, such as the track along 1st Avenue and the track that led to the now-defunct float bridge may have been “built to penetrate new markets or territory”, the self-contained nature of the facilities at issue here confirms that they were used for the limited purpose of moving traffic around in a yard to make up or break up trains that were arriving in or departing from the Brooklyn waterfront facilities.

The next inquiry, following confirmation that the track and facilities fall within the “excepted” categories in Section 10906, is whether an abandonment has occurred. The “key consideration” for the Board is “whether or not the carrier has continued to exhibit a fixed and continuing intent to hold out to provide common carrier rail service to the public.” *Pinelawn Cemetery*, slip op. at 10. Here, on the tracks and facilities at issue, the answer is clear – NYNJ

has no intent to provide common carrier rail service. The letter from NYNJ that is attached confirms the absence of intent to use the roundhouse and the tracks that surround it. *See **Attachment C***.

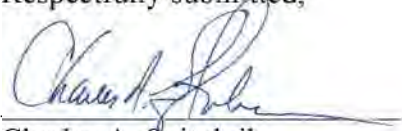
With respect to the yard tracks, **Attachment A** confirms that the tracks in the area labeled as the Disused 51 St Railyard have been removed. In fact, as seen in that map, some of the property formerly occupied by tracks has been paved over and is now used for parking by the industrial facilities located adjacent to that portion of the property. NYNJ continues to hold itself out as the provider of common carrier service on a portion of the property that is part of the 51st Street Yard (i.e. the Operating Yard), along with the tracks along 1st Avenue that lead into that yard. However, it does not – indeed, it cannot -- use those portions where the track has been removed. The conclusion that both the former roundhouse and the tracks previously located on the now-paved over portion of the 51st Street Yard have been abandoned is both supported by the photo/map that in **Attachment A** and by the statement of the NYNJ provided in **Attachment C**. The abandonment of these tracks and associated facilities do not affect the NYNJ’s existing rail operations for the remainder of the 51st Street Yard and 1st Avenue tracks or impact its common carrier obligation with respect to these lines. *See **Attachment A** and **Attachment B***.

CONCLUSION

In view of all of the foregoing, NYCEDC hereby respectfully requests this Board to issue a declaratory order confirming that the former tracks and the roundhouse at the 51st Street Yard and the former track located on the Bush Terminal Property fall within the parameters of Section 10906 “excepted track” and confirming that the track has been abandoned and is no longer subject to this Board’s jurisdiction.

Dated: February 5, 2021

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

Charles A. Spitulnik

Allison I. Fultz

Christian L. Alexander

Kaplan Kirsch & Rockwell LLP

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calexander@kaplankirsch.com

Counsel for the New York City Economic
Development Corporation

VERIFICATION

VERIFICATION AND CERTIFICATION

I, Yolande Schüler, Executive Vice President, New York City Economic Development Corporation, verify under penalty of perjury that the facts recited in the foregoing Verified Petition for Declaratory Order are true and correct. Further, I certify that I have personal knowledge of the facts stated therein and that I am authorized to verify these facts stated herein.


Yolande Schüler (Feb 5, 2021 15:33 EST)

Yolande Schüler
Executive Vice President

Subscribed and sworn to
before me this 5th day of
February, 2021.



Notary Public

My commission expires: 11/12/2021

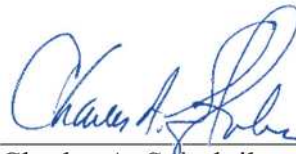
Carlos A. Guerra
Notary Public, State of New York
No. 01GU6292830
Qualified in New York County
Commission Expires 11/12/2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Verified Petition of the New York City Economic Development Corporation on Behalf of the City of New York for a Declaratory Order to be served upon the following individuals via first class mail, postage prepaid, and e-mail:

Donald B. Hutton
Managing Director
New York New Jersey Rail, LLC
26 Colony Road
Jersey City, New Jersey 07305
Email: dhutton@nynjr.com

Michael Farbiarz, Esq.
General Counsel
Port Authority of New York New Jersey
Office of General Counsel
4 World Trade Center – 23rd Floor
150 Greenwich Street
New York, NY 10007
Email: mfarbiarz@panynj.gov



Charles A. Spitulnik
Counsel New York City Economic
Development Corporation

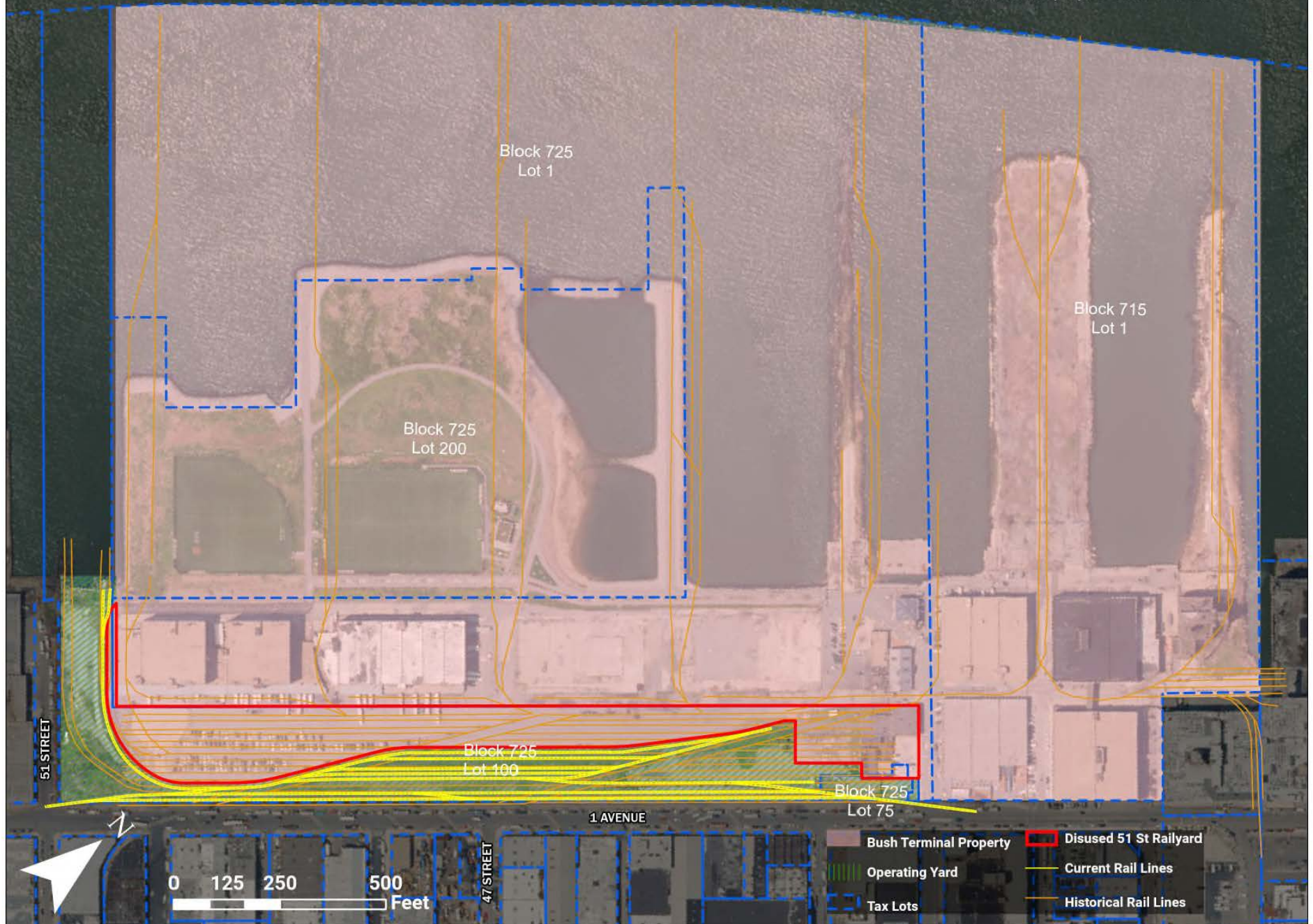
Dated: February 5, 2020

ATTACHMENT A

Aerial Map of Bush Terminal

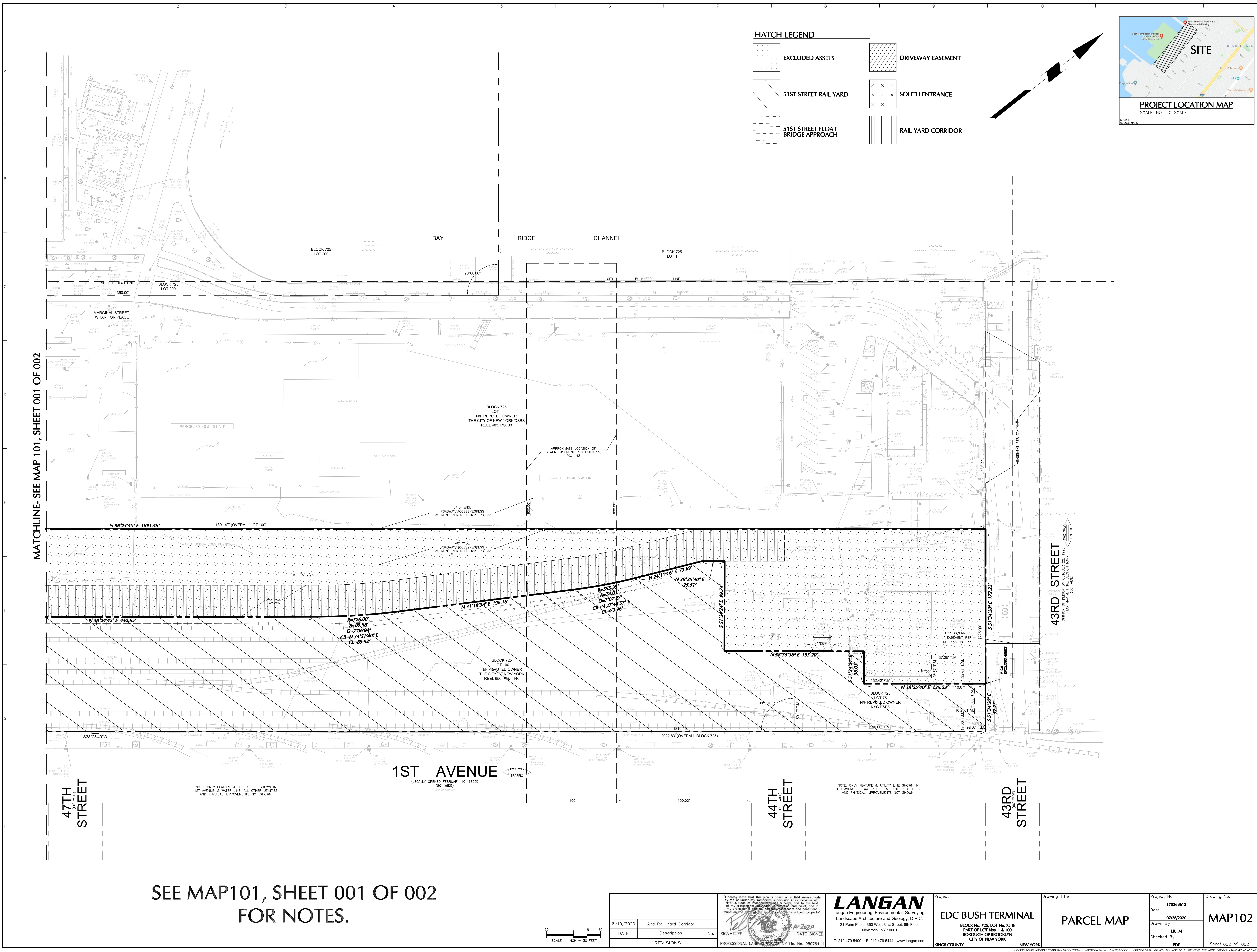
Attachment A

For illustrative purposes. NYC EDC | MGIS 2020



ATTACHMENT B

Parcel Map of 51st Street Yard



MATCHLINE- SEE MAP 101, SHEET 001 OF 002

SEE MAP101, SHEET 001 OF 002
FOR NOTES.



8/10/2020	Add Rail Yard Corridor	1
DATE	Description	No.
REVISIONS		

PROFESSIONAL LAND SURVEYOR
STATE OF NEW YORK
No. 050784-1

LANGAN
Langan Engineering, Environmental, Surveying,
Landscape Architecture and Geology, D.P.C.
21 Penn Plaza, 360 West 31st Street, 8th Floor
New York, NY 10001
T: 212.479.5400 F: 212.479.5444 www.langan.com

Project
EDC BUSH TERMINAL
BLOCK No. 725, LOT No. 75 &
PART OF LOT No. 1 & 100
BOROUGH OF BROOKLYN
CITY OF NEW YORK

Drawing Title
PARCEL MAP

Project No. 170368612	Drawing No. MAP102
Date 07/28/2020	Sheet 002 of 002
Drawn By LB, JM	
Checked By PDF	

ATTACHMENT C

NYNJ Railroad Letter of Support

January 28, 2021

Department of Small Business Services
of The City of New York
110 William Street, 7th Floor
New York, NY 10038
Attn: Mr. Andrew Schwartz
Deputy Commissioner for Legal & Regulatory Affairs

New York City Economic Development Corporation
110 William Street, 4th Floor
New York, NY 10038
Attn: Ms. Julie Stein
Senior Vice President

Dear Mr. Schwartz and Ms. Stein:

Reference is made to an Operating Agreement, dated as of October 25, 2010, by and among The Port Authority of New York and New Jersey (the "Port Authority"), its affiliate New York New Jersey Rail, LLC ("NYNJR") and New York City Economic Development Corporation ("NYCEDC") (as amended, the "Operating Agreement").

NYNJR acknowledges that NYCEDC intends to seek an order from the Surface Transportation Board (the "Board") for a declaratory order pursuant to 49 U.S.C. § 1321 and 5 U.S.C. § 554(e), confirming that certain rail facilities on the Brooklyn waterfront located within the 51st Street Rail Yard, delineated on the attached maps as "Disused 51st Street Railyard" on Attachment A and "Excluded Assets" on Attachments B-1 and B-2 (the "Abandoned Area"), owned by the City of New York, managed by NYCEDC and operated by NYNJR pursuant to the Operating Agreement, have been abandoned and removal of property will not adversely affect NYNJR operations. NYNJR acknowledges that the Abandoned Area has not been used by NYNJR for many years and is not needed for NYNJR railroad operations.

Nothing contained herein, shall be deemed to be or construed as a waiver or modification of any of the terms of the Operating Agreement, all of which remain in full force and effect until such time as the Operating Agreement is modified by NYCEDC, the Port Authority and NYNJR in accordance with this letter and on terms mutually acceptable to all such parties.

New York New Jersey Rail, LLC

By: The Port Authority of New York
and New Jersey, Sole Member

By: Richard Cotton
Name: Richard Cotton
Title: Executive Director

Attachment A

For illustrative purposes. NYC EDC | MGIS 2020

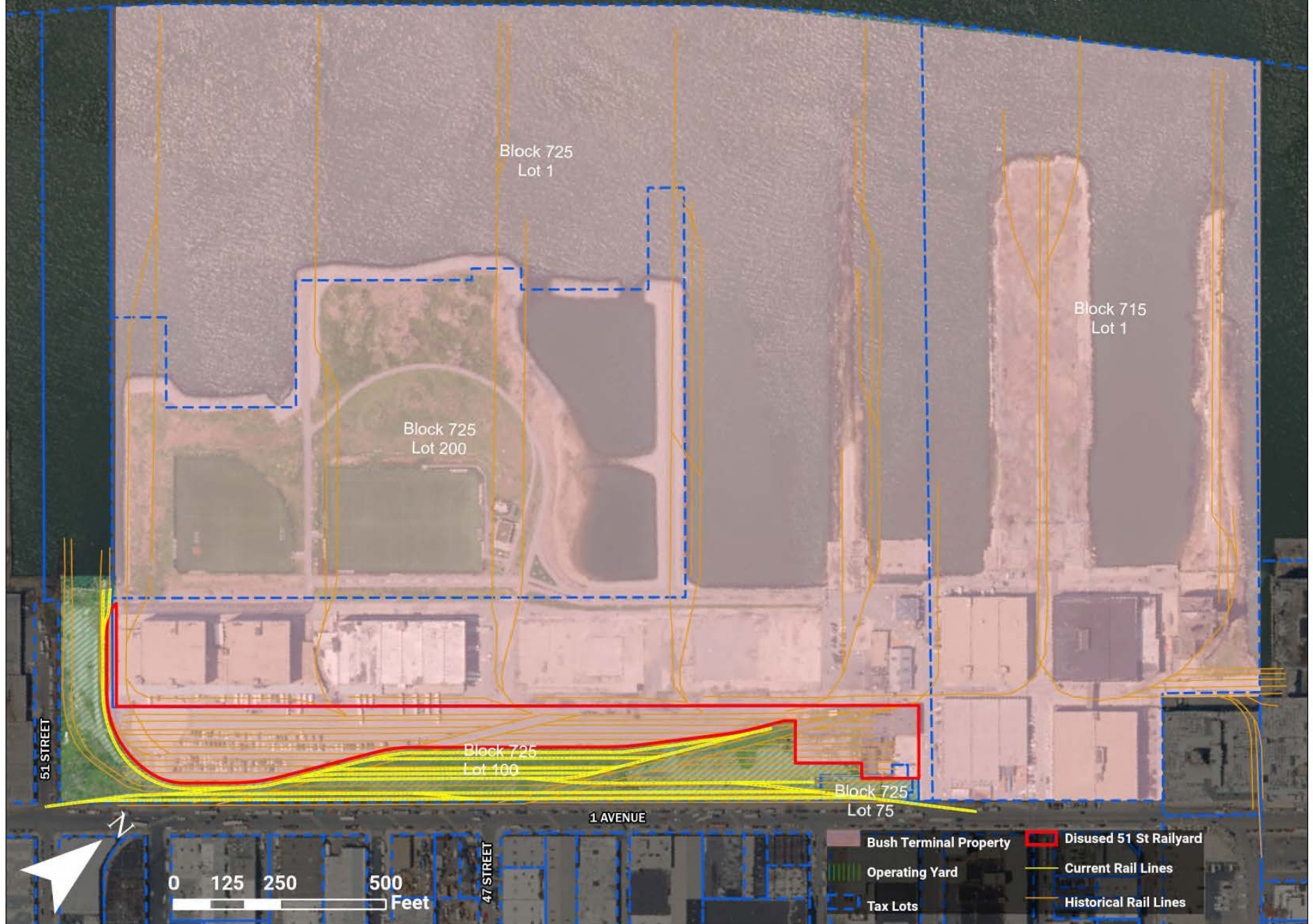


Exhibit B-2

