

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 21, 2021
Part of

	)		Public Record
Consolidated Rail Corporation – Abandonment	)	Docket No. AB 167	
Exemption – In Hudson County, NJ	)	(Sub-No. 1189X)	
	)		
CSX Transportation, Inc.—Discontinuance of	)	Docket No. AB 55	
Service Exemption – In Hudson County, NJ	)	(Sub-No. 686X)	
	)		
Norfolk Southern Railway Company –	)	Docket No. AB 290	
Discontinuance of Service Exemption – In	)	(Sub-No. 306X)	
Hudson County, NJ	)		
	)		

OPENING ARGUMENT AND EVIDENCE OF THE LLCs

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OPENING ARGUMENT AND EVIDENCE OF THE LLCs

The LLCs¹ submit the following opening argument and evidence in response to the decision of the Surface Transportation Board (“STB” or “Board”) served in the above-captioned proceedings on May 19, 2021 (“Decision”).

**I.
SUMMARY**

The Board’s May 19 Decision invited argument and evidence on the applicability of Section 110(k) of the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306113, with respect to the notice of exemption for Consolidated Rail Corporation (“Conrail”) to abandon, and for CSX Transportation, Inc. and Norfolk

¹ The LLCs consist of 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC.

Southern Railway Company to discontinue service over, an approximately 1.36 mile portion of a rail line known as the Harsimus Branch, located in Jersey City, New Jersey (“City” or “Jersey City”). The eastern portion of the Harsimus Branch includes six segments with stone embankments. Rail service was discontinued at least thirty years ago.

The LLCs are the owners of much of the underlying property on which the rail line is situated. As more fully explained herein, the pertinent facts demonstrate that Section 110(k) of NHPA is entirely inapplicable to this proceeding. Furthermore, even in the unlikely event that Section 110(k) could somehow be determined to be applicable, no anticipatory demolition of covered historic properties in violation of Section 110(k) has occurred by any reasonable, recognized, and objective measure of review.

The central fact is that no part of the Embankment is listed as eligible for the National Register of Historic Places (“National Register”) and subject to Section 106 of the NHPA has ever been demolished in any way since the LLCs purchased the property fifteen years ago. In addition, Conrail has previously demonstrated that it did not engage in anticipatory demolition before or after the sale to the LLC’s either intentionally or purposely, or with any intent to evade Section 106 review.

When the Board’s declaratory order proceedings on the Harsimus Branch began in Docket No. 34818 in January 2006, Conrail and the LLCs both committed to the Board that they would not alter any Embankment structures during the proceedings.

They have not done so over the subsequent fifteen years and to date, and the LLCs will not do so during the remaining pendency of this proceeding, including the resolution of the Section 106 process.

Further, Conrail, the LLCs, and other participating parties have cooperatively engaged in what is the most comprehensive, thorough, and protracted Section 106 review ever undertaken by the STB, and likely its predecessor, the Interstate Commerce Commission (“ICC”), in full compliance with NHPA and the Board’s rules.

In addition, for the past five years the LLCs have continued to work closely with Jersey City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and the Rails to Trails Conservancy (collectively “City Parties”), the Albanese Development Corporation (“Albanese”) (the contract purchaser and developer), and Conrail in exhaustive efforts to develop a visionary mitigation plan. That plan envisages preservation, open spaces, and a linear park and trail of unsurpassed excellence that far exceeds the usual conditions for Section 106 NHPA mitigation and what is achievable under the Board’s limited jurisdiction.

While the LLCs remain hopeful that settlement can be achieved, they remain concerned about the true intentions of the City Parties, especially inasmuch as the violations they assert, and self-serving remedies they seek, are wholly unwarranted and inappropriate, and have no basis in Section 106 or Section 110(k). This proceeding has languished for over a decade, effectively seizing and preventing the productive use of

property no longer needed for common carrier railroad transportation purposes. The administrative delay has also deprived the public of the substantial benefits (including a beautiful, elevated park) that will be achieved through preservation and responsible redevelopment of an area that suffers from urban blight.

The need for closure is acute here, where the line has been out of service for decades, the Section 106 review has been so exhaustive, and delay means a continuation of deterioration and blight of the Embankment. The LLCs respectfully request the Board's assistance in promptly addressing the Section 110(k) issue and proceeding to complete its Section 106 review and issuing a final decision expeditiously. Prompt resolution of Section 110(k) is also the best way to help encourage final settlement prior to a final decision, although such settlement is by no means assured.

II. IDENTITY AND INTEREST OF THE LLCs

The LLCs are limited liability companies that acquired via quitclaim deeds in July 2005 a portion of the 1.36-mile property underlying what is referred to as the Harsimus Branch, the Harsimus Branch Embankment, the Sixth Street Embankment, the Embankment, or other variants. After the LLCs made their purchase in good faith, and after an 18-month declaratory order proceeding culminating in a decision served August 8, 2007 in Docket No. 34818, followed by six years of appeals and court proceedings, it was later stipulated by the parties that the property was encumbered by a common carrier

rail line requiring Board abandonment authority. The line had not provided service for over a decade when the LLCs acquired the property.

The LLCs have been actively and cooperatively participating in these abandonment and discontinuance of service proceedings for this longstanding out of service line since the Board lifted its stay in this proceeding over six years ago on August 11, 2014, and the Office of Environmental Assessment (“OEA”) recommenced its review under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* and the NHPA, 54 U.S.C. §§ 300101 *et seq.* As such, the LLCs have a strong interest in this proceeding and in having the Section 110(k) issue fully and finally resolved as soon as possible.

III. BACKGROUND

A. General Factual Background

Constructed over a century ago, the Harsimus Branch has been out of service for nearly three decades, since 1992 and possibly earlier. As confirmed in the Cultural Resources Identification Report that the OEA issued in the above-captioned proceeding on May 5, 2017 (“CRI Report”), the eastern terminus of the line that once served downtown Jersey City’s heavy industry and even car floats used to deliver freight and livestock to New York City, has been completely redeveloped into a high density,

urban commercial retail, office, and residential area, with the full encouragement and participation of the City, starting long before 1992. *Id.* at ii.

The Harsimus Branch encompasses the six elevated parcels constructed of masonry retaining walls and earthen fill between Brunswick Street and Marin Boulevard (Milepost 0.36 to 0.88) (“Embankment”). Conrail retains the fee interest in the western part of the Branch from Milepost 0.00 to 0.18. The LLCs acquired the middle part of the Branch between Milepost 0.18 and 0.88, subdivided into eight parcels, six of them comprising the Embankment. The fee interest in the easternmost part of the Branch is controlled by several different entities.

The rail structures and plate girder bridges on and connecting the separate sections of the Embankment were removed at the request and urging of Jersey City in the mid-1990s. *Id.* There is no vestige of the eastern terminus of the Embankment, which “has been completely transformed by modern urban renewal and development of retail, residential, and hotel properties.” *Id.*

The OEA prepared the following helpful map depicting the line to be abandoned and the six embankments:

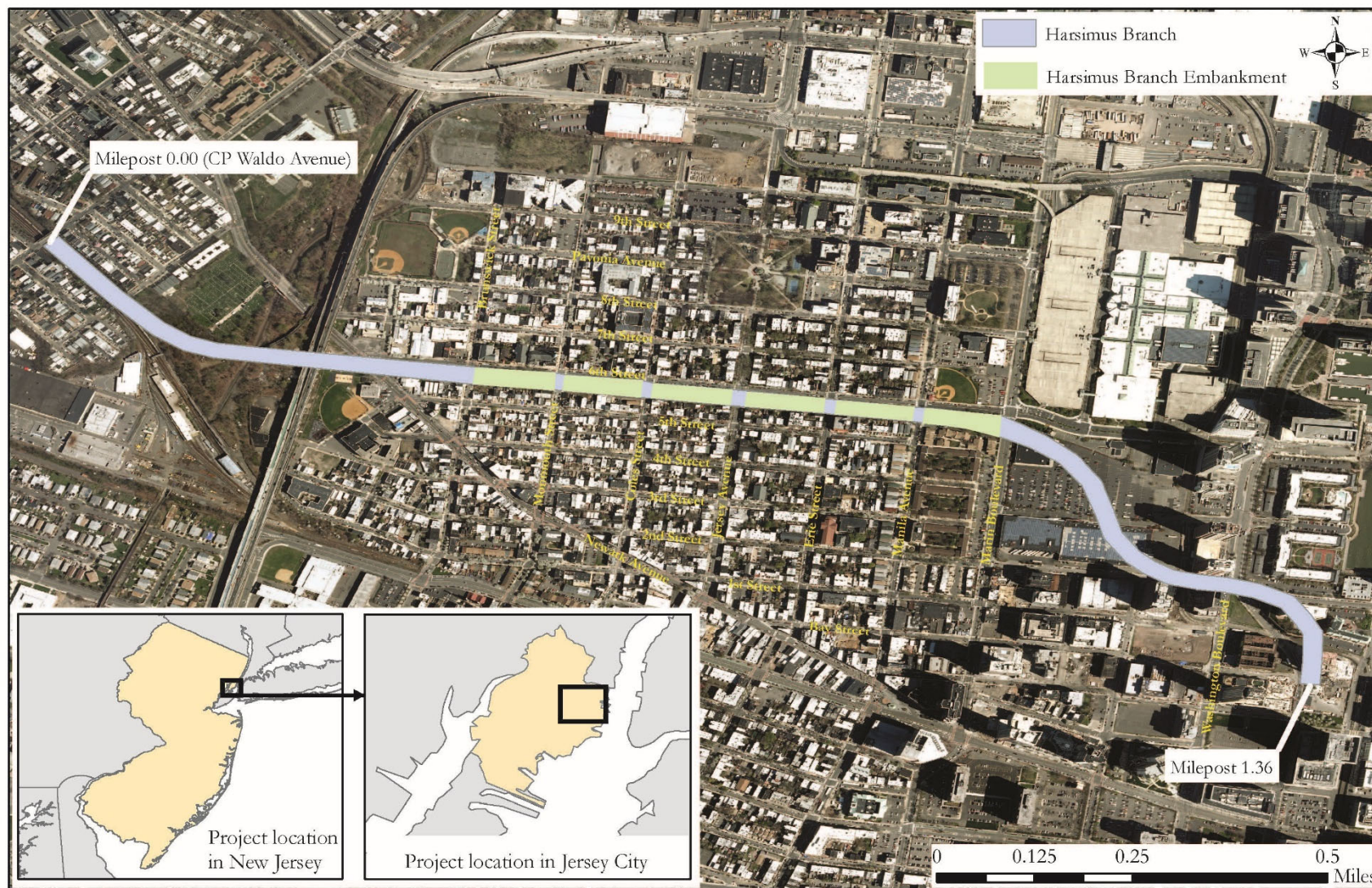


Figure 1.1: Project Location

In the past, starting in 1984, and continuing into the late 1990s, Jersey City considered purchasing and redeveloping the Embankment, and proposed a plan to demolish the Embankment, remove all the fill, and construct at-grade housing. Conrail Reply, Verified Statement of Conrail Witness Robert W. Ryan, FD 34818 (filed Apr. 24, 2006) at 11-14. In 1998, the City declared the Embankment as an area in need of redevelopment, and began the process of adopting a redevelopment plan calling for the demolition of the Embankment. Despite Conrail's willingness and attempts to sell the property to Jersey City, the sale to the City and its redevelopment agency never occurred, and, after offering the property to all bidders for an extended period of time, it was not until 2005 that Conrail sold the property to the LLCs. The City adopted a historic preservation ordinance when it learned of the sale.

1. The Covered Historic Properties

In assessing allegations of a Section 110(k) violation, it is essential to understand exactly what properties and structures are "historic properties," as defined by the NHPA, i.e., either actually listed or eligible for listing in the National Register, and thus possibly subject to Section 110(k) applicability. The timeline reveals that the Harsimus Branch and the Embankment were not historic properties when the bridges and structures were removed at the City's direction.

To put this matter in further context, and to ensure that the Board has a fuller understanding of the City's changed position on the historic significance of the Harsimus Branch and the Embankment, in the mid-1980s, the Jersey City Department of

Housing and Development, Division of Urban Research and Design, contracted with Mary B. Dierickx, a well-known historic preservation consultant, to conduct a comprehensive cultural resources survey of properties and districts in the City eligible for the National Register. The Phase 2 survey of Ward E, in which the Embankment is located, entailed a visual inspection and research of over 300 individual sites and districts declared potentially eligible for the National Register. The historical importance, age, rarity, design, and integrity of sites were examined using the National Register Criteria for Evaluation in determining the significance of the structures and districts. Neither the Embankment nor any railway bridges, trestles, stanchions, track, or structures were included (or even mentioned) in the comprehensive survey of sites declared eligible for the National Register. *See* CRI Report at IX-25, *Phase 2 Survey of Ward E, Jersey City List of Props. & Dists. Eligible for the Nat'l Register* (1986).

In May 2000, the Planning Board of the City of Jersey City adopted a comprehensive Master Plan entitled “The City of Jersey City Master Plan” that included a Historic Preservation Plan Element, at Chapter IX (*see* CRI Report at App. Q). That Master Plan remains in place today (as amended). The Historic Preservation Element of the Master Plan incorporates the criteria for designation of historic resources utilized in the National Register, references the previously designated historic resources and numerous historically significant resources throughout the City, and recommends the designation of additional properties as landmarks.

The Phase 2 survey of Ward E is incorporated into the Historic Preservation Plan Element of the Master Plan, which states that “[n]o other resources are planned for local designation by the Commission at this time.” The Embankment is not included in the resources to be designated or in the properties with historic significance listed in the Master Plan, or in the additional properties with historic significance listed as priorities in Appendix A of the Master Plan.²

Simply put, based on comprehensive study and evaluation over a period of years using the criteria for designation of historic resources utilized in the National Register and studied by a noted preservation consultant, the City of Jersey City had *never* formally recognized the Embankment as having any historic significance until the sale to the LLCs. It was not until 1999 that the Embankment Coalition nominated the Embankment portion of the Harsimus Branch to the National Register. CRI Report at App. M. Jersey City strongly opposed the listing with professional assistance, and Conrail refused the listing, resulting in the six parcels comprising the Embankment, and only those parcels, to be declared eligible for the National Register. *Id.*

The May 2017 CRI Report describes the Embankment, but not the PRR Harsimus Branch Right-of-Way, as a recommended contributing resource to the Harsimus Cove Historic District and a discontinuous key contributing resource to the

² Also, the listing of the Hamilton Park and Harsimus Cove historic districts in the National and State Registers does not mention the Embankment as having any historic significance.

National Register-eligible Pennsylvania Railroad (“PRR”) (New York to Philadelphia) Historic District that ends at “the end of the existing stone abutment on the west side of Brunswick Street at Christopher Columbus Drive (formerly Railroad Avenue) (Saunders 2009). CRI Report at 5-4, 3-61.³

As noted, *supra*, the LLCs own eight parcels, six of which comprise the Embankment. The other two properties are at-grade, and still include some deteriorating concrete stanchions that once supported elevated railway trestles. Also, as further noted, *supra*, the structures and plate girder bridges on and connecting the sections of the Embankment were removed years earlier, as the City requested and urged and were therefore not historic properties. None of the railway trestles, stanchions, track, signals, or other facilities that once stood were themselves declared eligible for the National Register, and were removed well before any portions of the properties were declared eligible for the National Register

2. The Current Status of the Embankment

The Embankment as it now stands continues to deteriorate and constitutes and contributes to blight in the surrounding area. *Id.* at 3-60-61 (referencing Louis Berger & Associates, Inc., *Historic Res. Evaluation of the Sixth St. R.R. Embankment Study prepared for Jersey City* (1999)). The 2015 Survey by the authors of the CRI

³ The LLCs understand that the Embankment Coalition may have subsequently nominated parts or all the Harsimus Branch Right-of-Way to be declared eligible for the National Register.

Report describes the physical condition of the Harsimus Branch Right-of-Way, including the six stone-lined Embankment segments, as “Poor” and the remaining historic fabric as “Low.” *Id.* at 7-265. It concludes that the Harsimus Branch right-of-way lacks historic significance and physical integrity, rendering it ineligible individually to meet the criteria for listing in the National Register, and recommends that the Embankment be eligible for listing in the National Register only as “a discontinuous key contributing resource” to the Pennsylvania Railroad (New York to Philadelphia) Historic District. *Id.* at 7-284.

In February 2021, the City Council of the City of Jersey City passed Resolution 21-124 authorizing the Jersey City Planning Board to conduct a preliminary investigation of the area and make recommendations pursuant to N.J.S.A. 40A:12A-1 for redeveloping the entire Harsimus Branch.

B. The LLCs’ Preservation and Redevelopment Plans

Notwithstanding the existing poor physical condition and relatively low remaining historic fabric of the Embankment, the LLCs and its contract purchaser, Albanese, remain committed to redeveloping the property in a responsible manner that *preserves* the vast majority of the Embankment. However, the ongoing and protracted Board proceedings and delays have substantially hindered their ability to move forward to implement a visionary plan and places these preservation efforts in substantial jeopardy.

The parcels are zoned within a R-1, one- and two-family residential district, except for the Manila Avenue block, which is zoned R-2, multi-family attached housing,

and the easternmost Marin Boulevard parcel, which is zoned within a R-4 medium density general residential district. CRI Report at 1-9. It should be noted that presently the easternmost block of the existing Embankment was deemed blighted and became subject to a redevelopment plan, known as the Luis Munoz Marin Boulevard Redevelopment Plan, amended and updated in 2012 and 2014, at a point in time when another potential settlement of the dispute between the parties was in the offing. Ultimately, that prior settlement collapsed, and the dispute continued unabated. Various concepts and proposals in recent years have been presented, culminating in plans that would retain five of the existing Embankment structures to create an elevated park, in exchange for being allowed to develop higher-density mixed use residential buildings on the east end of the Embankment on Marin Boulevard, near other high-density development (known as Newport), and consistent with the general intent of the Luis Munoz Marin Boulevard Redevelopment Plan but requiring further amendment and supplementation.

The most recent proposal has been put together in close consultation with all interested local, state, and federal parties and groups. The plan includes *100% Preservation* of five of the existing stone walls; donation *of five of the six* Embankment blocks to the City, to be zoned for public park, trail, and potential light rail/trolley use; and remediation and landscaping of the top portion of the Manila embankment block as a public park and pedestrian space, with walking paths and interconnections via pedestrian bridges. A summary of the proposal to preserve the Embankment provided to OEA is

included as **Attachment 1**. A copy of the presentation that Albanese, together with its Architect (Pelli Clarke Pelli Architects) and Landscape Architect (Hargreaves Associates), made to OEA and the New Jersey Historic Preservation Office (“NJ SHPO”) in January 2020 is included as **Attachment 2**.

Major portions of the proposal have been tentatively agreed to in lengthy settlement discussions with the City Parties. The plan has also been disclosed to and discussed with the Advisory Council on Historic Preservation (“ACHP”), NJ SHPO, and OEA. However, final agreement on a settlement plan is by no means assured, especially as it potentially involves additional Conrail property being sought by the City that does not involve historic property.

C. NHPA Section 106 Review to Date

The NHPA Section 106 review and consultation process commenced in 2008, when Conrail filed its request for abandonment authority. Step 1 of the four-step Section 106 review process, defining and documenting the area of potential effects (“APE”), was conducted by OEA in 2008 and 2009. In consultation with the ACHP and the NJ SHPO, OEA issued a report delineating the APE on March 23, 2009.

Step 2 of the Section 106 review, identifying historic properties within the APE, was delayed following the Board’s April 2010 stay until the Board lifted the stay in its decision served August 11, 2014, which also granted the LLCs request to intervene. After the Board’s decision, Conrail submitted a Supplemental Environmental and Historic Report, and the Board, after meeting further with interested consulting parties,

including the ACHP and the NJ SHPO, resumed its Section 106 review. Step 2 involved an extensive study conducted over a four-year period. As part of that study, and after receiving comments from ACHP and the NJ SHPO, OEA issued its 653-page CRI Report on May 5, 2017. Following comment on the CRI Report, OEA issued a 302-page CRI Report Addendum on October 16, 2018, addressing comments and listing all the historic properties listed in or eligible for listing in the National Register located within the APE of the proposed abandonment, that concluded the Step 2 identification phase of the Section 106 process.

Step 3 of the Section 106 review, assessment of adverse effects, took over a year to process. Following further consultation and study, on March 29, 2019, OEA issued a 148-page Cultural Resources Effects Assessment Report, documenting the potential impacts of the abandonment on historic properties (“CRE Report”). Following receipt of additional comments, OEA issued a 67-page *Cultural Resources Effects Assessment Report Addendum* on November 12, 2019, which concluded Step 3 of the Section 106 review.

OEA initiated Step 4 of the Section 106 review, resolution of adverse effects, in November 2019. As part of its review, OEA prepared a draft MOA, to address proposed mitigation, presented and discussed the matter with ACHP, NJ NSHPO, and consulting parties in an online meeting on October 27, 2020, and received comments on the draft MOA through November 14, 2020.

As part of its Section 106 review and consultation process, OEA has held multiple meetings with consulting parties, including ACHP and the NJ SHPO, in Jersey City (2016), Washington, DC (2016), Washington, DC (2019), Trenton, NJ (2019), and virtual/online (2020).

OEA has not yet completed and executed a final MOA to date. As the Board noted in its May 19 Decision, the ACHP had previously agreed that the final MOA and Section 106 review process could be completed without delay or prejudice because the Board would make its Section 110(k) determination before deciding whether or not to grant line abandonment authority, thus assuring that the final Section 110(k) determination would not be rendered moot. *Id.* at 2. However, ACHP changed its mind and recently requested that the Board address alleged violations of Section 110(k) before completing the Section 106 process, resulting in the Board's issuance of its May 19, 2021 Decision.

D. Governing Timeline for Historic Review

In *Implementation of Environmental Laws*, 7 I.C.C.2d 807 (1991) ("*Environmental Laws*"), the ICC determined that "[t]o expedite the historic review process, we will continue to set reasonable time limits for our consultation with SHPOs and the Advisory Council in individual cases." *Id.* at 827. It also determined:

Both the plain language of § 10904 and its legislative history make clear that Congress intended for railroads to be able to dispose of their property expeditiously, and by a date certain. Therefore, in the future any delaying conditions that we impose under NHPA in rail abandonment cases will not

extend beyond the 330-day statutory time period for abandonment proceedings, unless modified or earlier removed.

Id.

To put it mildly, those time limits have not been observed in this proceeding. Almost seven years have passed since the Board's August 11, 2014 decision that vacated its prior stay in this proceeding and reinitiated historic and environmental review, even though a substantial portion of the review was completed prior to August 2014. This period is well over seven times the amount of time allowed for completion of NHPA review under the Board's governing rules in the most extreme circumstances, and over forty times the sixty days that NHPA review normally requires.

The LLCs are unaware of any other abandonment proceeding before the STB, nor the ICC before it, that has undergone such a thorough and exhaustive review under Section 106. The LLCs are also unaware of any other railroad abandonment proceeding before the Board or the ICC where the environmental or historic review process in an abandonment proceeding has taken even remotely close to this long to complete.

Abandonment, particularly for a very short line of railroad that has been out of service for nearly three decades (rail service last occurred in 1992) and is wholly unsuitable for continuing freight rail service, is supposed to be an expedited process. The Board's rules at 49 C.F.R. § 1152.26, provide for a 110-day time frame to process and approve abandonment applications, (with consummation subject to completion of any

environmental, historic preservation, and other review or conditions), and the Board has adopted general procedures to expedite the handling of abandonment exemption proceedings. *E.g., id.* at §§ 1121.4, 1152.60. For a variety of reasons, no such expedition has been achieved here.

The extensive delay is especially perplexing here given that the Board's authority for historical review in an abandonment proceeding is limited to the disruptive consequences of removing the track and related structures only by the common carrier, and does not properly extend to the activities of others or their property. *E.g., Iowa So. R.R. – Exemption – Abandonment*, 5 I.C.C.2d 496, 501 (1989), *aff'd sub nom. Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990). The Board's limited authority coincides with the Board's limited statutory jurisdiction over railroads and their property – its jurisdiction does not extend to non-railroad properties.

Furthermore, the Board cannot, as part of its approval and conditioning authority, impose a restrictive covenant or other nonconsensual obligation beyond documentation:

Where historic property is involved, our ability to protect it is very limited. . . . [W]e can impose historic preservation conditions only to the extent the particular property is owned by the applicant carrier Moreover, even where the property is subject to our conditioning authority, we do not have the power to force a railroad to sell (or donate) its property, or impose a restrictive covenant upon the deed, as a condition to obtaining abandonment . . . authority. Nor can we deny [agency] approval of a transaction solely on the ground that it would adversely affect historic resources. Thus, as a practical matter, documentation

of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of nonconsensual mitigation available to us.

Environmental Laws, 7 I.C.C.2d at 828-29 (footnotes omitted). The ICC stressed that “our *conditioning* power is limited to requiring appropriate documentation of historic railroad property.” *Id.* at 830 (original emphasis).

Again, freight service ended on the Harsimus Branch in 1992 or earlier, and, at the request of Jersey City, rail infrastructure was removed in the mid-1990s, before any historic protection was sought. While there is no longer any track, roadbed, or bridges for Conrail or anyone else to salvage on the Harsimus Branch that could possibly impact historic resources, OEA is, in this case, taking into consideration the potential effects of reasonably foreseeable post-abandonment changes to the rail right-of-way that could occur if abandonment authority is granted. In doing so, OEA is considering adjacent areas that could experience changes to the visual landscape as a result of the removal or alteration of historic architectural railroad resources.

The above observations of jurisdictional and extreme proceeding delays are not intended as criticism of the exhaustive and thorough work performed by OEA and the several project managers in its Section 106 review to date. The OEA painstakingly complied with and exceeded all applicable NHPA requirements, but we wish to remind the Board that: (1) there is an overwhelming need for this protracted proceeding, including the Section 106 review process, to be completed promptly; and (2) the need for closure is especially acute here, where the Section 106 review has been so exhaustive,

and the line has been out of service for decades. Only the Embankment is in place with no rail infrastructure remaining, and thus, delay means a continuation of deterioration and blight. Further, the protracted delay in completing the review conflicts with the National Transportation Policy to minimize the need for federal regulatory control over the rail transportation system, reduce regulatory barriers to exit from the industry, and to require fair and expeditious handling and resolution of all proceedings brought to the Board decisions. 49 U.S.C. §§ 10101(2), (7) & (15).

In contrast, redevelopment of the Embankment has the potential to make a substantial contribution to Jersey City in a manner that respects and literally builds upon the past and serves the diverse interests of the surrounding community. The LLCs and Albanese have worked in good faith with Jersey City and others for many years to realize that vision. Further delay means a continuation of the deterioration in the condition of the Embankment, which started before the abandonment exemption proceeding commenced, and does no one any good. The protracted administrative delay is contrary to the public interest, especially as the line has been out of service for almost three decades and is no longer needed for common carrier service, and has effectively blocked the property from being used for any purpose.

IV. ARGUMENT

A. Section 110(k) Does Not Apply to Conrail's Abandonment Exemption Petition

The Board's historic review responsibilities under Section 106 of NHPA require it to "take into account the effect" of licensing decisions, including rail line abandonment decisions, on properties included in, or eligible for inclusion in, the National Register, and to afford the ACHP a reasonable opportunity to comment. 49 C.F.R. § 1105.8(a). Where Section 106 applies, the Board, through OEA, must consult with the relevant State Historic Preservation Officers, as well as other interested parties, to identify historic properties, determine if they will be adversely affected, and, if so, consider appropriate mitigation. *Environmental Laws*, 7 I.C.C.2d at 822.

While the STB has determined that the reach of Section 106 extends to rail line abandonments, it has never determined the reach of Section 110(k). Section 110(k) of the NHPA provides that an "agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section 306108 of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant." 54 U.S.C. § 306113.

The reach of Section 110(k) is narrower than that of Section 106. Section 106 applies to “undertakings” (36 C.F.R. pt. 800), which the Board has construed applies to abandonment approvals. Section 110(k) applies to a “grant [of] a loan, loan guarantee, permit, license, or other assistance to an applicant.” However, a petition for abandonment authority is not a permit or license, and the courts have construed agency “assistance” to require “agency ‘assistance’ to approving the expenditure of funds.” *Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989); *accord Brewery Dist. Soc’y v. FHWA*, 996 F. Supp. 750, 755 (S.D. Ohio 1998).

This interpretation that Section 110(k) is a prohibition against the granting of permits or grants or other financial assistance is consistent with the governing ACHP rules at 36 C.F.R. § 800.9(c). Those rules address the need for agency consultation with ACHP on potential mitigation only where the agency determines that Section 110(k) is applicable, and the agency is considering whether “circumstances may justify granting the assistance.” In such instances, “the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of that adverse effects.” Further, the agency official, after receiving the ACHP’s opinion, “shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.” *Id.* at § 800.9(c)(2)(ii).

Through its abandonment petition, Conrail is not seeking any loan, loan guarantee, a permit, or license, and it is not seeking any grant or financial assistance or expenditure of funds that could potentially trigger the applicability of Section 110(k). Simply put, the act of approving an abandonment exemption petition does not trigger application of Section 110(k). Accordingly, Section 110(k) simply does not apply in this instance.

B. Even If It Applies, There Has Been No Section 110(k) Violation

While the LLCs believe that Section 110(k) does not apply to Conrail's abandonment exemption petition, in the event that the Board finds that it is applicable (which it should not), there would still be no factual basis for showing that there has been a Section 110(k) violation.

In its recent letter of June 15, 2021 to OEA ("ACHP June 15 Letter"), the ACHP suggests guidance on the standard for determining "the applicability of Section 110(k)." By "applicability" ACHP actually appears to refer to the standard to be applied in determining whether there is a violation of Section 110(k), and not the issue of whether Section 110(k) is applicable to an abandonment exemption petition, addressed in the immediately preceding subsection (an issue that ACHP does not address in its June 15 Letter). The ACHP suggests the following substantive standard for determining a Section 110(k) violation:

the STB should carefully review the timeline of the applicant's actions and consider whether: (1) an intentional significant adverse effect to a historic property occurred as a

result of the applicant's actions, and (2) in carrying out that action, there is evidence of the applicant's intent to avoid a Section 106 review. Note that "significant adverse effect" is a higher threshold than the standard "adverse effect" provided for in 36 CFR § 800.5. However, this does not mean that a property must be completely demolished or destroyed. The effects must alter, directly or indirectly, one or more of the characteristics of the historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would significantly diminish its integrity. In looking to the intent of the applicant's actions, the Secretary of the Interior's Standards and Guidelines for Federal Agency Preservation Programs pursuant to the NHPA state that Section 110(k) is applicable where 'an historic property is destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of [S]ection 106 review.'

Id. at 1.

As further addressed, *infra*, under the first prong of the Section 110(k) review standard suggested by ACHP, on a close review of the applicable timeline of Conrail's pertinent actions with respect to the Harsimus Branch, there is *no* evidence of record reflecting *any* actions of Conrail (or the LLCs) on a **historic property** since the Embankment and the Harsimus line were not historic properties when the bridges and rail infrastructure were removed. Prominent preservation consultants did not consider the Embankment or the Harsimus line eligible for listing on the National Register. No historic property underlying the Harsimus Branch has been destroyed, irreparably harmed, altered, or effected in any way by Conrail or the LLCs. As such, there can simply be no "significant adverse effects" that destroy or irreparably harm a historic property or that "alter, directly or indirectly, one or more of the characteristics of the

historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would significantly diminish its integrity.”

And as further addressed, *infra*, under the second prong of ACHP’s suggested Section 110(k) standard, Conrail has in no way avoided a Section 106 review, let alone “with the express purpose of circumventing or preordaining the outcome of [S]ection 106 review.” In fact, long before the parties’ stipulation that the Harsimus Branch is a common carrier rail line requiring STB abandonment approval, and *seven years prior to the litigation over the matter being finally resolved* (in September 2013), Conrail filed its abandonment exemption petition (in January, 2006), and has complied and cooperated with every aspect of the STB’s extensive Section 106 review process conducted over the past decade.

In multiple cumulative and repetitive filings with OEA, the City Parties have repeatedly asserted that Conrail violated Section 110(k), but those assertions have largely been very generalized and devoid of any reasoned analysis under the governing standards. Conrail has fully addressed and refuted these baseless claims in a number of responsive submissions in FD 34818 and these proceedings. At the risk of duplication, the Embankment and the Harsimus line were not historic properties when the removal of rail infrastructure occurred. ACHP requests the Board to identify the timeline. The timeline clearly establishes that the Embankment and the line were not historic properties when the City required Conrail to remove the bridges. It was long after the rail

infrastructure was removed that the Embankment, without the rail infrastructure, was declared eligible for listing.

Most recently, the City Parties filed with OEA and ACHP a 75-page unsolicited submission on the subject that recycle many of their rejected claims. Letter from City Parties to OEA (Mar. 15, 2021) (Comment ID EL-30372). The LLCs address below the principal Section 110(k) arguments that the City Parties have raised in the past. The LLCs reserve the right to further address these and any other claims that the City Parties and any other party may raise in their opening evidence and argument.

1. OEA Correctly Determined That There Is No 110(k) Violation with Respect to Bridge and Track

The City Parties have claimed that Conrail engaged in anticipatory demolition within the meaning of Section 110(k) by removing bridges and track from the Embankment properties between 1994 and 1997 without STB approval. *E.g.*, Letter from City Parties to OEA (Mar. 28, 2008) (Comment ID EI 7065), at 13; However, OEA reviewed the evidence and determined that there has been no violation of the NHPA Section 110(k) anticipatory demolition prohibition because there was no intent by Conrail to harm historic resources, let alone that Conrail had, “with intent to avoid” Section 106 requirements, “intentionally significantly adversely affected a historic property to which the grant would relate” under 54 U.S.C. § 306113. “Parties . . . have not demonstrated any intent on Conrail’s part to harm historic sites or structures. It was the City itself, starting in 1984, that asked Conrail to make available for redevelopment underutilized

railroad property and trackage, and specifically urged Conrail to remove the Embankment.” Environmental Assessment (STB served Mar. 23, 2009) (“EA”), at 14.

Additionally, no track or bridge structures on the Harsimus Branch were ever determined to be eligible for listing in the National Register, and thus possibly subject to NHPA protection. In fact, at the time the Embankment was nominated, no associated railroad bridges, tracks, ties, signaling, or switches existed. One of the City Parties, the Pennsylvania Railroad Embankment Preservation Coalition, fully admitted this reality when it nominated the Embankment for inclusion in 1999:

All tracks and ties have been removed from all segments of the embankment, as have any vestiges of signaling, switching or watering systems. . . . All plate girder bridges have very recently been removed, chain link fencing has been attached to the coping at north-south cross-streets.

CRI Report at App. M, Sec. 7, pg. 5. The 1999 nomination for listing in the National Register was thus limited to the six separate sections of the Embankment, described as “six segments, each approximately 400 feet long and 100 feet wide.” CRI Report at App. M, Sec. 7, pg. 1.

At the time the bridges and other track infrastructure were removed, there was no indication that any portion of the Embankment had historic significance or was eligible for listing on the National Register. To the contrary, as explained, *supra*, in-depth studies of historic resources in the City did not mention the Embankment as having any historic significance or eligibility, and the City itself planned for demolition of the Embankment.

The LLCs also understand that one or more allegations may have been made in the past that, shortly after purchase, the LLC's may have sought to remove deteriorating stanchions on the at-grade parcels. However, as further explained, *supra*, even if that had happened, which has not been verified, none of the remaining stanchions on the at-grade parcels were determined to have historic significance or designated as eligible for listing on the National Register at the time, and were not historic properties protected by the NHPA. Also, there is no evidence of any citations made under the historic protections of City Code Chapter 345, Land Development Ordinance § 345-30A. Section 110(k) is inapplicable.

In fact, faced with these facts, the City Parties at one point completely recanted their previous assertion that Conrail had improperly removed railroad structures in violation of Section 110(k), asserting the following statement against interest:

All the evidence on which SEA relies in the 1980's or 1990's is irrelevant. Prior to 2000, no structure on this part of the Harsimus Embankment had been determined to be eligible for the National Register. As a result, City and RTC are not protesting anticipatory demolition of bridges or rail at that time. (Indeed, there is nothing that indicates any of the removed structures which SEA mentions were in fact eligible for National Register listing in the first place.)

City Parties Apr. 9, 2009 filing on the EA at 22. The City Parties should not be heard to repeat yet again claims that they originally made, and then correctly disavowed, regarding the removal of track structures and bridges, which was done at the behest of the

City. To present such claims yet again would indicate a lack of candor as well as a proclivity to proceed in an irresponsible and specious manner.

2. The LLCs' Applications for Local Permits Do Not Constitute a Section 110(k) Violation

The City Parties have asserted that the LLCs' applications for Certificates of Appropriateness filed with the Jersey City Preservation Commission in 2007, and Conrail's joinder and consent to application for relief, constitute anticipatory demolition. *See, e.g.*, letter from City Parties to OEA (Feb. 29, 2016) (Comment ID EI 21354); letter from City Parties to OEA (Dec. 9, 2016) (Comment ID EI-25676), at 2 ("The developer, with Conrail concurrence, applied to demolish the Embankment."). However, the mere filing of such applications, made in full compliance with Jersey City Land Development Ordinance requirements, cannot possibly constitute an anticipatory demolition of historic properties under Section 110(k). The City Parties also fail to note that the LLCs proposed several alternatives for redevelopment of the Embankment, similar to those presented by the current contract purchaser. One of the alternatives proposed one single-family house on an Embankment block with minimal modification to the walls, but was still met with denial.

The six sections of the Embankment are designated as a Jersey City Municipal Landmark. CRI Report at 1-5, 5-4. A petition for local landmark designation of the Embankment was filed and approved by Jersey City in 2006, amending City Code Chapter 345, Land Development Ordinance § 345-30, and designating the Embankment

as “historic” and subject to protection under the Ordinance. CRI Report App. R.⁴ Under the Ordinance, a property owner seeking to develop, construct, alter, or rehabilitate a Landmark, must first secure a Certificate of No Effect, a Certificate of Appropriateness, or appropriate waiver, before work commences. Adherence to these regulations is required for any future use or development of the Embankment pursuant to Chapter 345, Article 30, Section G. CRI Report App. R; *see also id.* at App. Q.

Neither the LLCs nor, to the best of the LLCs’ knowledge, Conrail, have been cited for or otherwise found in violation of any Jersey City Land Development Ordinance requirements with respect to the Embankment, including the historic preservation portions of the Ordinance. Even the City Parties have not alleged such violations. Additionally, all of the local permitting processes are contingent on Conrail’s obtaining the necessary STB abandonment authority. *See* letter from Conrail to OEA

⁴ The history of the ordinance is as follows: On January 8, 2003, the City Council introduced Ordinance 03-010, which designated the Embankment as a historic landmark, and adopted it on first reading. On January 22, 2003, the City Council adopted Ordinance 03-010 designating Block 212, Lot A; Block 247, Lot 50A; Block 280, Lot 50A; Block 317.5, Lot 50A; Block 354.1, Lot 50A; and Block 389.1, Lot A, as a local landmark subject to the historic preservation provisions of the Land Development Ordinance of the City of Jersey City. The City did not adopt a resolution nor did it record in its minutes the reasons for deviating from the Historic Preservation Element of the Master Plan.

The validity of the 2003 ordinance was challenged. Prior to a judicial ruling on the validity of Ordinance No. 03-010, on or about January 11, 2006, the City Council, in an attempt to rectify the procedural and substantive errors in Ordinance No. 03-010, again designated the Embankment as a historic site by the adoption of Ordinance No. 05-176.

(Apr. 28, 2008). Conrail and the LLCs have pledged not to disturb the Embankment and will not disturb the Embankment at any time during the STB abandonment review proceeding, including its Section 106 review, and they have not done so.

In any event, demolition and development of the Embankment cannot take place until compliance with municipal landmark restrictions that the City has placed on the Embankment properties are approved at the local level, and additional land use plans and local permitting are secured, depending on the final plans and proposals approved by the City. The City Parties speculate on an impossible future event that is directly contrary to the protracted agreements tentatively reached and abandoned by the City Parties after Conrail withdrew from negotiations. The City controls the destiny of the Embankment and its preservation according to the Albanese plan does more for preservation than could be achieved through Section 106 and Section 110(k).

Unfortunately, the ACHP's recent turn-around on its prior agreement that the final MOA and Section 106 review process could be completed without delay or prejudice, with the ultimate Section 110(k) determination made by the Board at the same time as its decision to grant line abandonment authority, has resulted in further unwarranted administrative delay, and that potentially places a robust preservation settlement agreement in substantial jeopardy. One must question why the ACHP would favor this counter-productive approach, that ultimately reflects poorly on the integrity of the historic review processes, and preservation itself.

3. Conrail's Sale of the Underlying Property to the LLCs Does Not Constitute a Section 110(k) Violation

The City Parties have argued repeatedly that the sale of some of the property underlying the Harsimus Branch to the LLCs in 2005 somehow constitutes “anticipatory demolition” within the meaning of Section 110(k), allegedly because Conrail and the LLCs purposely attempted to avoid STB abandonment review, which would constitute an “undertaking” triggering the Section 106 review process. However, the LLCs strongly believed they were purchasing property free and clear, unencumbered by a common carrier rail line, and it was not until after the closing that there was any suggestion that the line might actually constitute a common carrier line, for which abandonment would require Board approval.

The Board's declaratory order decision served August 8, 2007 in Docket No. 34818, considered Conrail's belief that the Harsimus Branch was ancillary spur track acquired out of the Penn Central Transportation Company bankruptcy and through the Final System Plan of the United States Railway Association in 1976, and thus excepted from STB entry and exit regulation under 49 U.S.C. 10906. The Board's decision found that the track actually constituted a common carrier line and required appropriate abandonment authority. Two years later, the D.C. Circuit determined that the Board lacked jurisdiction to determine the status of the line under the 3R Act, which authorized the Special Court, and later the United States District Court for the District of Columbia, to interpret orders conveying properties of bankrupt carriers to Conrail, and vacated the

Board's August 8, 2007 decision. *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009). Ultimately, the LLCs and the City of Jersey City entered a joint stipulation that the Harsimus Branch constituted a common carrier line requiring abandonment authority, which was granted by the District Court. *City of Jersey City, et al. v. Consolidated Rail Corp. et al.*, 968 F. Supp. 2d 302, 307-08 (D.D.C. Sept. 30, 2013).

As Conrail has previously and correctly noted, the effect of this stipulation and decision of the Special Court is that: (1) Conrail has a constructive regulatory easement over the Embankment until it obtains the necessary abandonment authority, and (2) abandonment authority is required in order for Conrail to abandon the Harsimus Branch. Of course, Conrail had already voluntarily started the abandonment review process, through its 2009 notice of exemption, and before that, submitting environmental and historic reports in March 2008. Conrail thus initiated the Section 106 review process even before the Special Court's decision. No party has pointed to any credible evidence that Conrail or the LLCs have taken any action to engage in any "anticipatory demolition" within the meaning of Section 110(k), let alone with the intent to evade Section 106 review, during this regulatory review period. The City Parties demanded abandonment authority, and that is exactly what Conrail is seeking in this proceeding.

There has been no "illegal sale" to the LLCs, the sale of the underlying Embankment property has not deprived the City Parties of any historic preservation remedies that they would have had before the Board if Conrail still owned the properties, and the City parties have not identified any such deprivation. Property conveyances are a

matter of state law, and railroads have never been required to possess a fee interest in property underlying a freight rail right of way in order to meet their common carrier obligation. *E.g., Georgia Great S. Div., S. Carolina E.R. Co., Inc. – Abandonment & Discontinuance Exemption – Between Albany & Dawson, in Terrell, Lee, & Dougherty Cntys. Ga.*, AB-389 (Sub-No. 1X), at 6 (STB served Apr. 16, 1999). (“The agency has long found that it is consistent with the common carrier obligation of a railroad for the carrier to sell the underlying assets of rail line while retaining an easement that is sufficient for carrying out rail operations.”) While Conrail did not retain an express easement over the Harsimus Branch properties it sold, it remains a common carrier of the line, and as referenced, the Special Court’s decision is that Conrail retains a constructive regulatory easement over the Embankment until it obtains the necessary abandonment authority.

In the absence of any evidence that Conrail violated Section 110(k), the City Parties still desperately assert that Conrail’s sale of the Embankment to the LLCs as spur track constituted a fraud on the Board with an intent and purpose to evade Section 106 review procedures. However, there is no evidence of such specific fraudulent intent. In fact, while the LLCs themselves have understandably expressed in the past their strong dissatisfaction with Conrail, including assertions that Conrail potentially misled it on the sale, such claims have not been upheld. As Conrail has informed the Board in its February 23, 2021 letter, the Superior Court of New Jersey, following a full trial involving the title company complaint against Conrail, rendered a decision issued on

August 31, 2017, that rejected the claim that Conrail acted fraudulently. The Superior Court found instead that:

Chicago Title has not proven by clear and convincing evidence that the statement, that it characterizes as a representation, was anything other than a reasoned and informed opinion as to the belief that the parcel was a spur track Despite the arguments advanced by Chicago Title that there was nefarious purpose in making these statements with the knowledge of their falsity, the record simply does not support this conclusion.

212 Marin Boulevard v. Chi. Title Ins. Co., No. HUD-L-5801-09, at 21 (N.J. Super. Ct. Aug. 31, 2017).

The facts show that Conrail and the LLCs both believed the property being purchased contained excepted spur track and did not require abandonment authority. Once it was determined that the line was a common carrier line requiring STB abandonment authorization, Conrail promptly sought appropriate abandonment authority, in full compliance with Section 106. At no time since the property was sold to the LLCs fifteen years ago, has there been any anticipatory demolition of the Harsimus Branch in violation of Section 110(k), and Conrail has fully complied with all Section 106 review requirements over the period.

C. The Self-Serving Remedies Sought by the City Parties Are Unjustified and Highly Inappropriate

In its June 15 Letter, ACHP suggests that “if the STB makes the decision that Section 110(k) is not applicable to this undertaking, then the STB should notify the ACHP, applicant, SHPO, and the consulting parties of this decision, and resume the

appropriate point in the Section 106 review process.” For the reasons set forth herein, the Board should find that Section 110(k) is inapplicable to this abandonment exemption proceeding, and even if it is, there has been no Section 110(k) violation. OEA should then move to notify ACHP, the NJ SHPO, and consulting parties of the Board’s decision, and swiftly move to complete the Section 106 review process as it attempted to do in November 2019.

Even if the Board somehow finds some evidence of a Section 110(k) violation, which it should not for all of the reasons stated above, the remedies for violation, especially here where there is no evidence of any actual demolition of historic properties, are straightforward, and in fact have already been accomplished, and will continue to be accomplished. Conrail should be required to participate in, and complete the Section 106 review, and not be permitted to demolish or alter the Embankment pending completion of that review and compliance with any and all STB abandonment decision conditions affecting historic preservation. However, any such requirements and mitigation have already been achieved in full, especially since: (i) no actual demolition of any historic property has taken place; (ii) Conrail has already pledged not to demolish any historic properties during the pendency of the Board’s abandonment review process, as have the LLCs; (iii) Conrail has cooperated and fully participated in all steps of the Section 106 review process; and (iv) the Board will require Conrail to comply with any appropriate conditions on abandonment approval, including historic preservation conditions, if it seeks to consummate the Harsimus Branch abandonment. Also, even

after abandonment consummation, the LLCs will still be required to obtain appropriate local development permits from the City, as explained above.

Nonetheless, the City Parties insist that two conditions on abandonment approval are necessary to remedy any Section 110(k) violation that may be found: (1) “voiding the deeds” from Conrail to the LLCs, and (2) “grant[ing] a public use condition barring Conrail from disposing of the property for other than public use for 180 days following the effectiveness of the abandonment.” City Parties Follow-up to October 27 Virtual Hearing on STB OEA’s proposed Section 106 MOA (Oct. 29, 2020). Neither request is justifiable or even lawful.

First, the STB has no authority to “void deeds” for parcels properly and legally conveyed 15 years ago. Also, the City Parties have provided no authority for such a request because there is none. The LLCs have already recognized that the common carrier obligation continues to exist, which is the reason that abandonment exemption is still being pursued. The reconveyance that the City Parties seek would clearly violate the Fifth Amendment by taking property from entities over which the STB has no jurisdiction. *E.g., Rail Abandonments – Use of Rights-of-Way as Trails (49 CFR Parts 1105 & 1152)*, 2 I.C.C.2d 591, 596-97 (1986) (“A railroad right-of-way has been found to constitute property under the Fifth Amendment and, therefore, is entitled to protection.”).

Additionally, there is nothing that would be accomplished by voiding the deeds and reconveying the property back to Conrail to prevent demolition of the

Embankment. As explained, the LLCs have already pledged that they will never engage in their development plans until abandonment of the Harsimus Branch is authorized by the STB and development is authorized by City agencies. As further explained, any development permits the LLCs (or the actual developer) may seek, including certificates of appropriateness and demolition permits, remain conditional until such time as all needed authority has been obtained, including proper federal rail line abandonment authority. Protection of the Embankment from anticipatory demolition is already ensured.

Second, the public use condition sought by the City Parties has absolutely no connection to anticipatory demolition of historic properties under Section 110(k). Under 49 U.S.C. § 10905 and the Board's implementing rules at 49 C.F.R. § 1152.28, the Board has authority to delay abandonment consummation for a period of not more than 180 days to allow the properties to be offered for sale for public purposes. However, public use conditions are completely *voluntary*, and the Board has no right to require a railroad to entertain any proposals from public entities during that period. *E.g., Georgia Sw. Div., S.C. Cent. R.R. – Abandonment Exemption*, AB-385 (Sub-No. 1X) 1996 WL 39972, *3-4, (STB served Feb. 2, 1996) ("This agency has consistently held that, under 49 U.S.C. 10906, we cannot compel a carrier to sell a line for public purposes."). Additionally, requests for a public use condition must be filed promptly, no more than 45 days after the exemption application is filed. No such timely request was ever made in this proceeding

by the City Parties or any other party, so their belated request is untimely, made over a decade too late.

Furthermore, the property Conrail owns only constitutes, as previously explained, a right-of-way easement for common carrier rail operations, and not the underlying fee. In any event, such a public use condition would in no way ensure compliance with Section 106, or Section 110(k), and would in no way require Conrail to sell its right-of-way easement to the City Parties. In the end, this component of the City Parties' demands simply appears to be a further delay tactic or, alternatively, a thinly veiled, baseless attempt by the City Parties to somehow force the sale of the Embankment to them at a fire sale price, with no historic preservation protections, perhaps to enable them to seize the property following rail line abandonment.

Also, there would be nothing stopping the City from turning around and selling the property at a profit to a new developer. One can readily see why the City would prefer to obtain the property at the same price paid by the LLCs in 1995, rather than seeking to take the properties by eminent domain at market rates for a legitimate public purpose, consistent with the Fifth Amendment, as extended to the states and local governments by the Fourteenth Amendment. The LLCs respectfully suggest that the Board should refrain from effectuating such an unlawful and unjust result.

Finally, ACHP suggests in its June 15 letter (at 2) that if the Board finds a violation, "but believes that the circumstances do justify granting the abandonment request, then the STB should notify the ACHP and provide documentation specifying the

circumstance under which the adverse effects to historic properties occurred, the degree of damage to the integrity of the historic property(ies), and any views obtained from the applicant, the State Historic Preservation Officer (SHPO), and any other consulting parties.” ACHP suggests that the Board should deny the abandonment if it determines that a Section 110(k) violation occurred, but only if “the circumstances do not merit proceeding with the application.” Unfortunately, ACHP is thus proposing to prolong the further deterioration of the Embankment and to destroy an invaluable preservation plan.

For the reasons addressed above, no “damage to the integrity of the historic property(ies)” under Section 110(k) has occurred. Also, even in the unlikely event the Board did somehow find such damage, it has no authority to simply deny the application based on a Section 110(k) violation. ACHP fails to provide any authority for such a result, which makes no sense, and does not advance historic preservation goals or the public interest in any way.

If the Board denies Conrail’s exemption petition, it has no authority to force Conrail to continue common carrier rail line service in the absence of a showing of a bona fide need for such service. As such, there is nothing in the statute preventing Conrail from turning around and immediately filing a new abandonment petition, and starting the whole review regulatory process anew, further preventing the productive use of property. In such a case, OEA would potentially need to repeat the same entire Section 106 review process, without any purpose, which would not be in the public

interest, would not advance historic preservation goals, and would be a tremendous waste and perversion of administrative and public resources.

V. CONCLUSION

There is no credible evidence that any anticipatory demolition of the Harsimus Branch in violation of Section 110(k) has occurred by any reasonable, recognized, and objective measure of review. The City Parties' assertions to the contrary are unsupported and largely spurious. Their allegations do not even come close to establishing any elements of a violation, and their proposed remedies are wholly unsupported and unjustified. The Board should promptly rule that Section 110(k) has not been violated, proceed expeditiously to terminate the Section 106 consultation and issue a final decision to allow this long-delayed exemption proceeding to be concluded. The Board, with the able assistance of OEA, has stopped, looked and listened as carefully and

thoroughly as humanly possible. The time has come to end this counterproductive interference with the Board's jurisdiction.

Respectfully submitted,

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Robert D. Rosenberg
Katherine F. Waring
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Washington, D.C. 20036

Dated June 18, 2021

Attorneys for LLCs

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of June, 2021, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/
Katherine F. Waring

ATTACHMENT 1



Preservation of the Embankment Blocks

For the avoidance of any potential miscommunication, misunderstanding or misinformation regarding the intended preservation of the Embankment Blocks, the below bullet points are intended to clearly detail a block-by-block summary of the Project as proposed by The Albanese Development Corp. (“Developer”) in direct concert with The City of Jersey City (“City”) and the Embankment Preservation Coalition (“Embankment Coalition”). Furthermore, all of the below redevelopment and preservation components will be memorialized in a Jersey City Zoning Ordinance through a Redevelopment Plan and Redevelopment Agreement.

For the purposes of this memo, we are only focusing on Blocks 1 – 6, which are the only Embankment Blocks that are elevated above the street level with stone walls. For an aerial map identifying Blocks 1 – 6, please see Exhibit A herein.

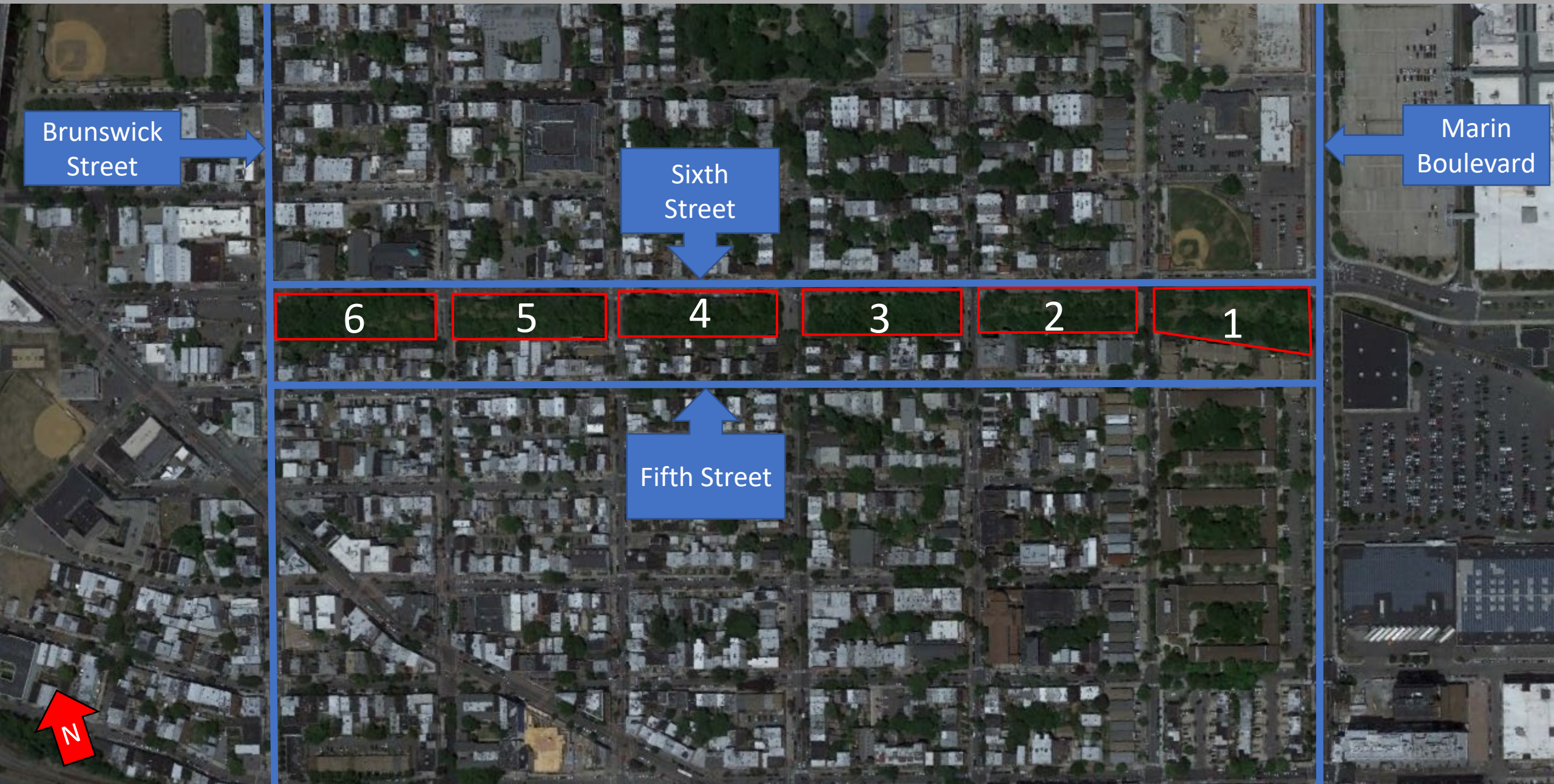
- **Blocks 2, 3, 4, 5, 6.**
 - 100% Preservation of existing stone walls.
 - NO demolition of existing stone walls.
 - Will be donated fee-simple to the City.
 - Will be zoned only for public park, trail, and potential light rail/trolley use.
 - Will most likely be held in a Conservation Trust.
 - The top portion of these Blocks will be remediated and landscaped into a public park with walking paths and interconnected by pedestrian bridges.
- **Block 1.**
 - Developer will own Block 1 fee simple, and will construct 875 market-rate residential units with parking.
 - Developer will grant 30’ wide easement on the northern portion of the block to the City for a public park, trail, and potential light rail / trolley.
 - Currently, the stone walls are intact on the western portion of the block and either never existed or have eroded toward the center and eastern portion of the block.
 - Developer will preserve the stone walls on the western side of the block, including a wrap around portion on the north and south side. The western preservation will allow for a building service entrance.
 - Other stones from the eastern and center portion of the Block will be saved to be re-used in other portions of the Project.

- **Developer Contribution.**

- The Developer will design, construct, and privately fund the following as part of the Project:
 - Remediate and fully construct and landscape the public park and trail on all of Block 2, totaling approximately 40,000 sf.
 - Design and construct a public, pedestrian bridge connecting Block 2 and Block 1.
 - Design and construct the entire 30' public right of way on the northern portion of Block 1.
 - This northern portion on Block 1 will include:
 - pedestrian walking paths,
 - potential to add light rail / trolley,
 - full landscaping and benches,
 - grand staircase with access for bicycles,
 - 2 ADA public bathrooms, and
 - 1 ADA elevator with access from the street level to the Embankment Park level.
 - Developer will also commit to cleaning, stocking, repairing and maintaining the two public bathrooms.

Dated: January 2021

Exhibit A

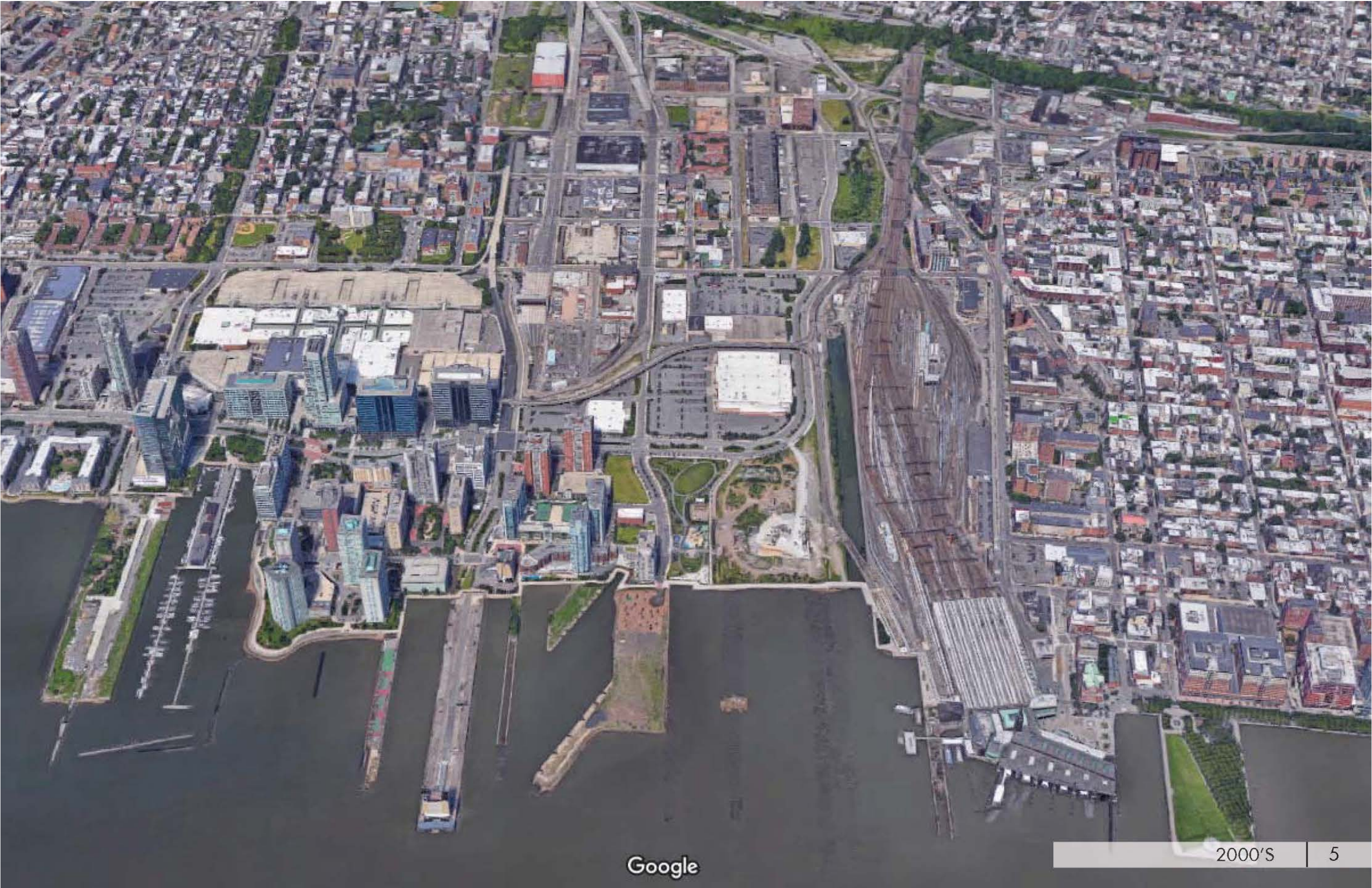


ATTACHMENT 2

SIXTH STREET EMBANKMENT
JERSEY CITY



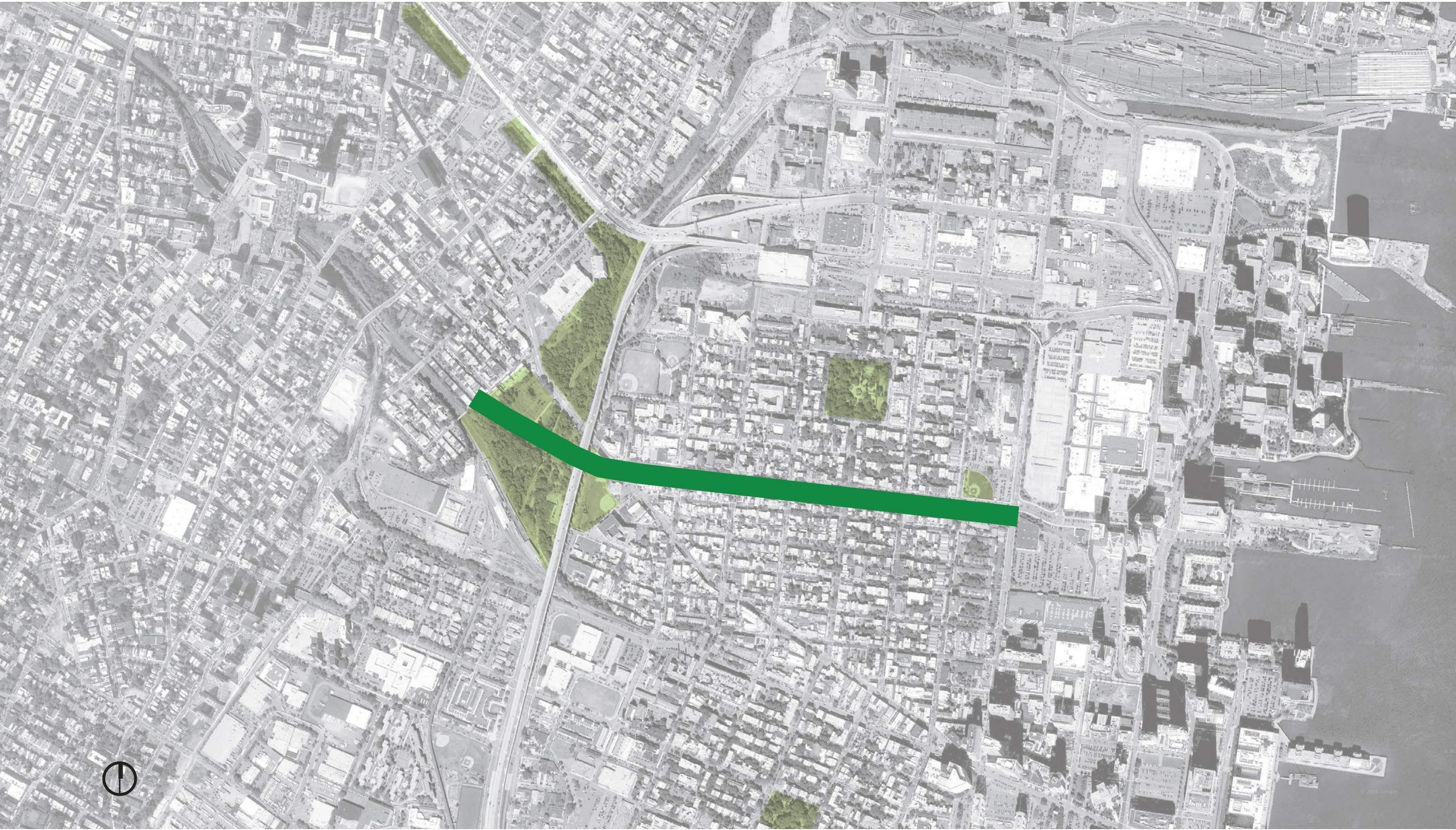






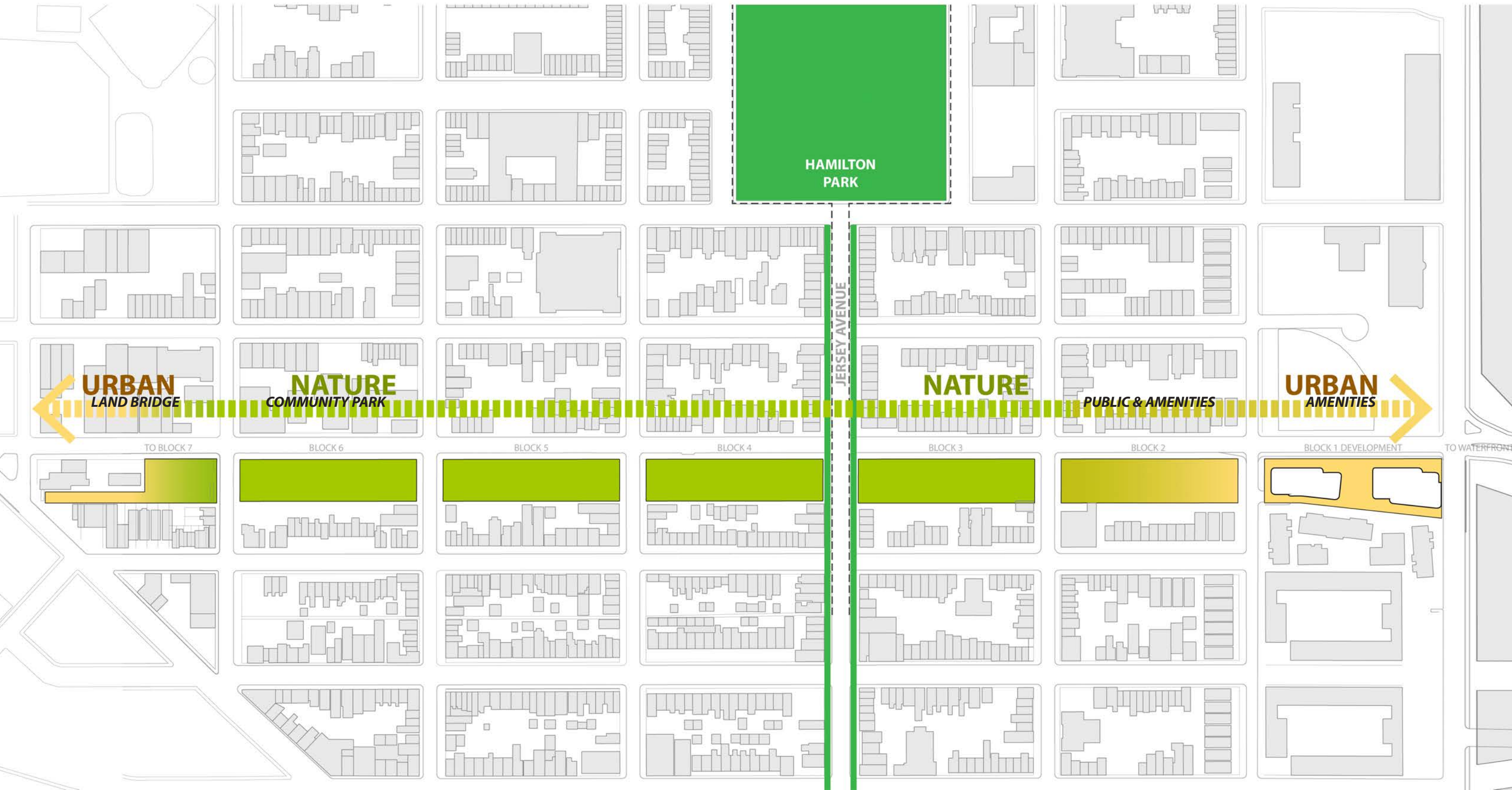
1990 | 3



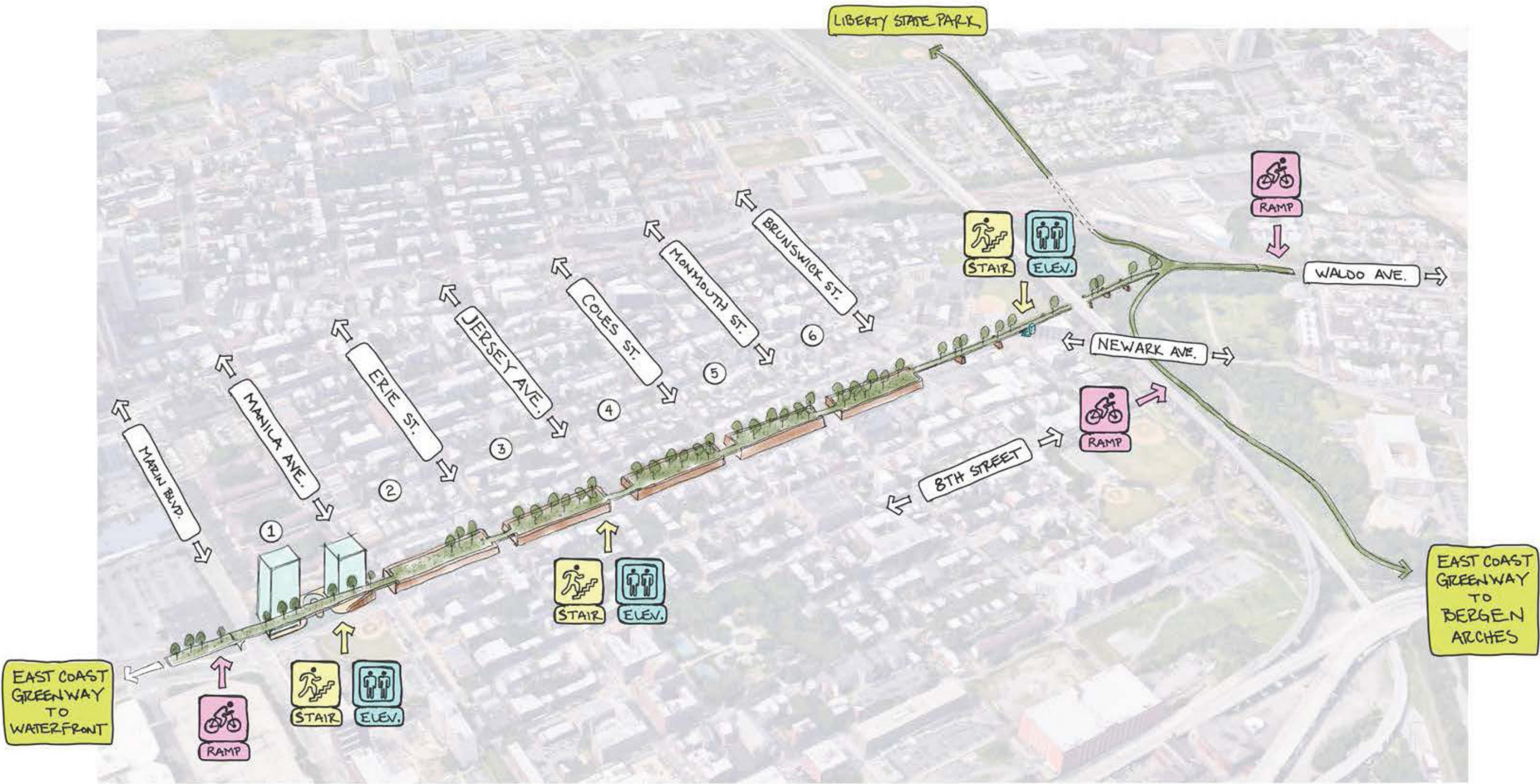






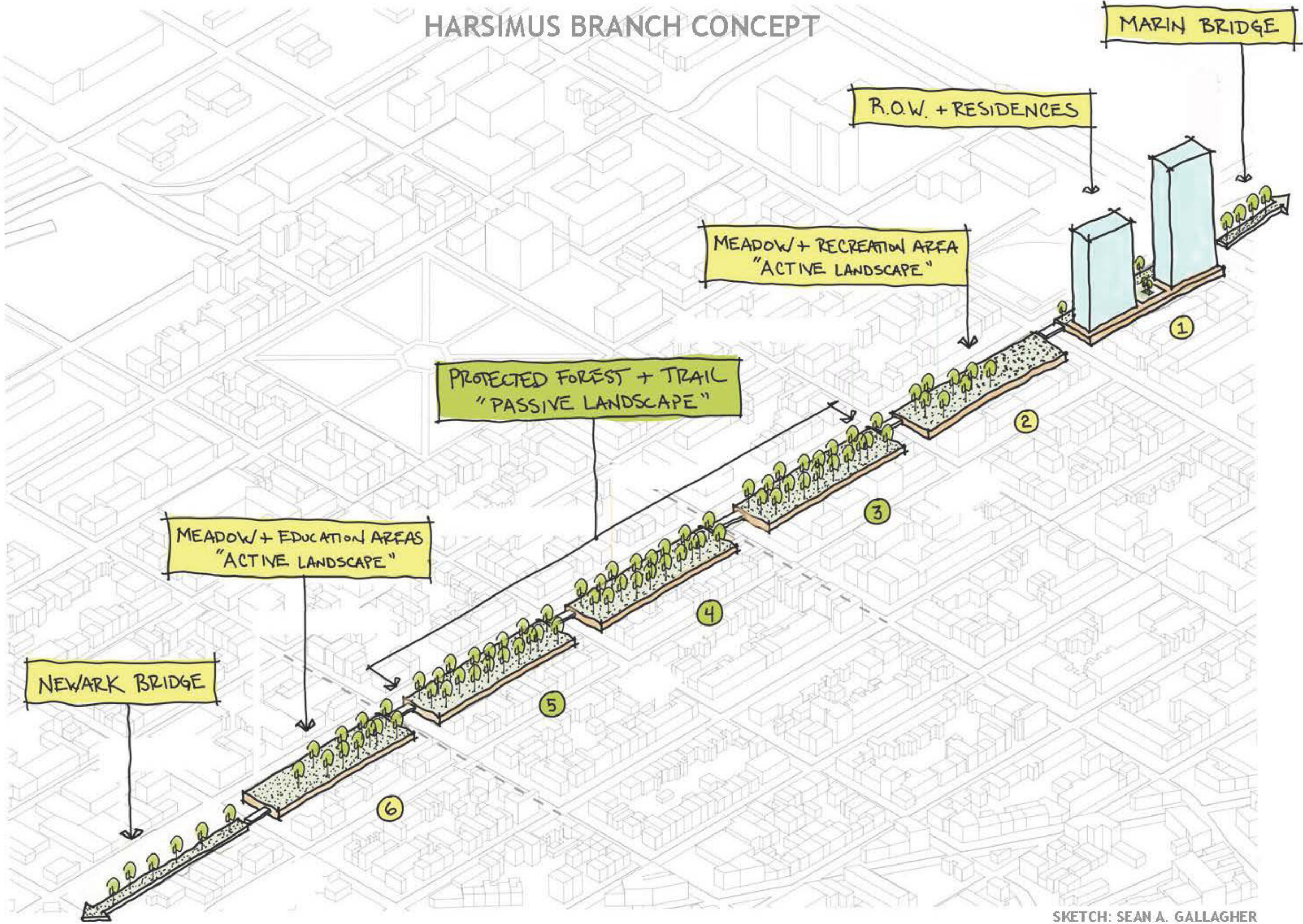


HARSIMUS BRANCH CONNECTIVITY



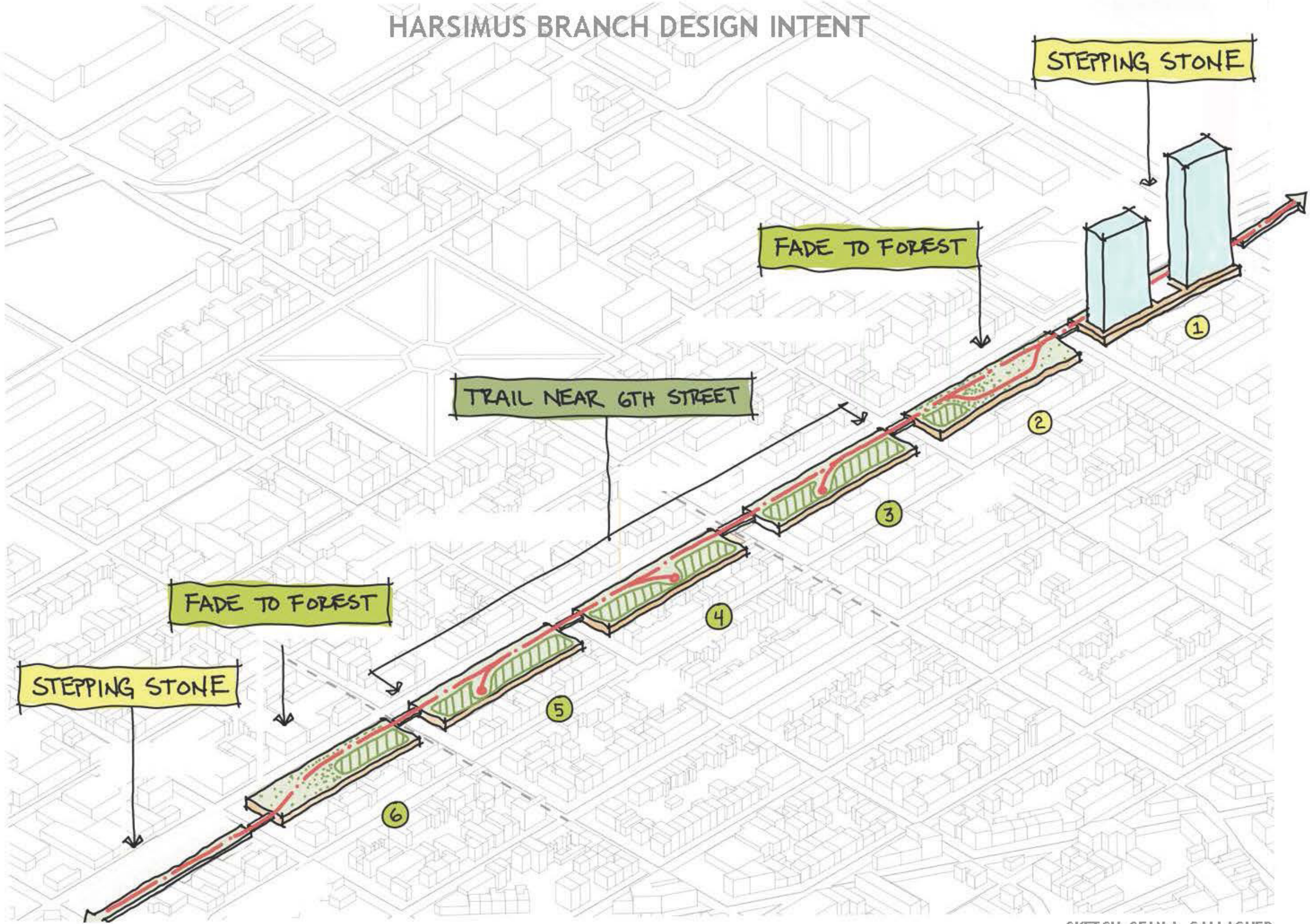
SKETCH: SEAN A. GALLAGHER

HARSIMUS BRANCH CONCEPT



SKETCH: SEAN A. GALLAGHER

HARSIMUS BRANCH DESIGN INTENT



SKETCH: SEAN A. GALLAGHER

LAND BRIDGE

"STEPPING STONE LANDSCAPE"

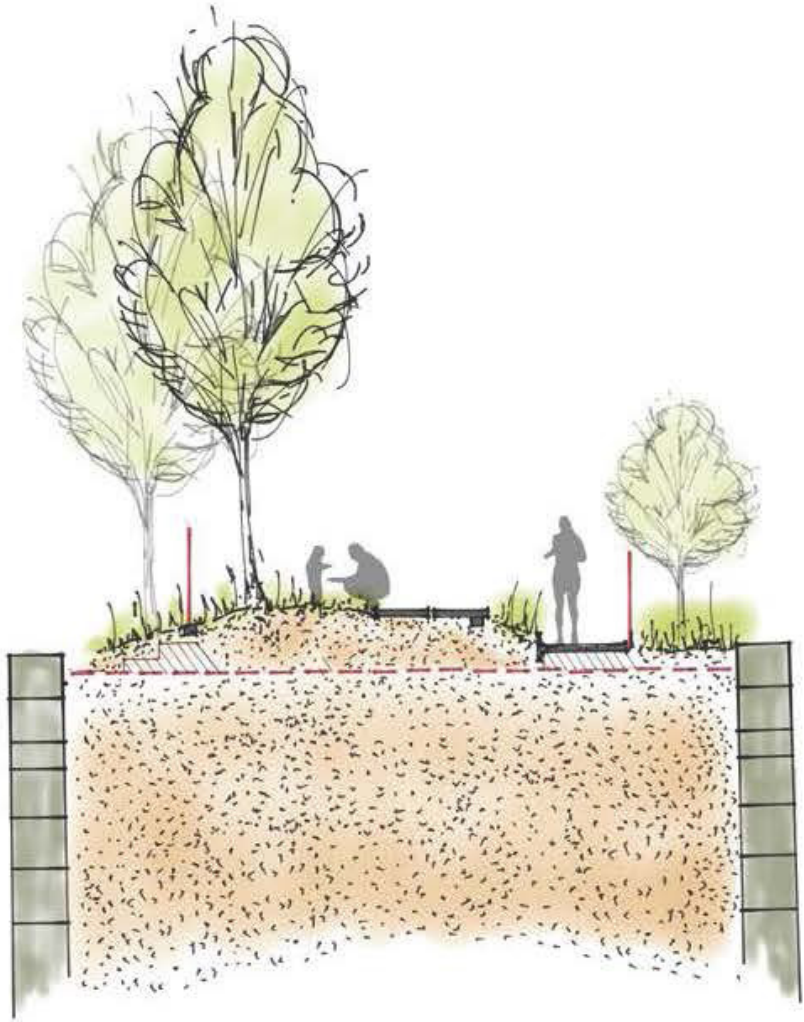


BLOCKS 1 & 7

- 1. RESERVE & RESTORE HISTORIC STANCHIONS
- 2. CONSTRUCT BRIDGE STRUCTURE
- 3. CONSTRUCT ACTIVE & PASSIVE LANDSCAPE
- 4. CREATE STEPPING STONE HABITAT

MEADOW

"ACTIVE LANDSCAPE"

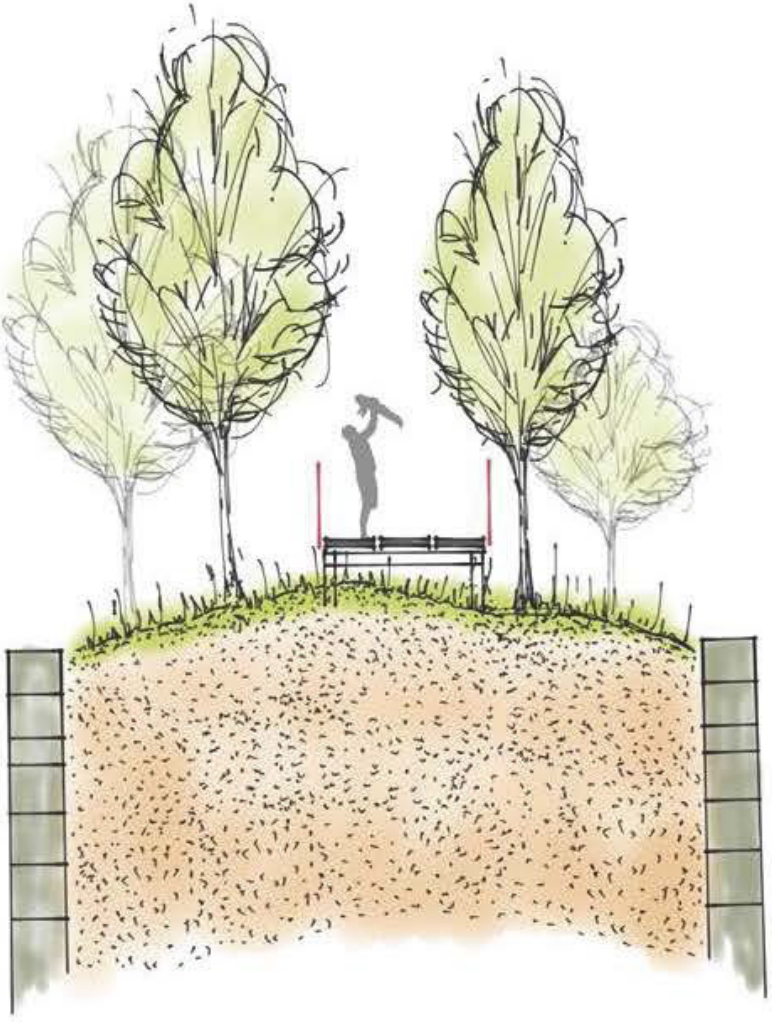


BLOCK 2 & 6

- 1. PRESERVE & RESTORE HISTORIC WALLS
- 2. ADD RESIDENTIAL GRADE SOIL CAP
- 3. CONSTRUCT ACTIVE LANDSCAPE
- 4. CREATE STEPPING STONE HABITAT

FOREST

"PASSIVE LANDSCAPE"



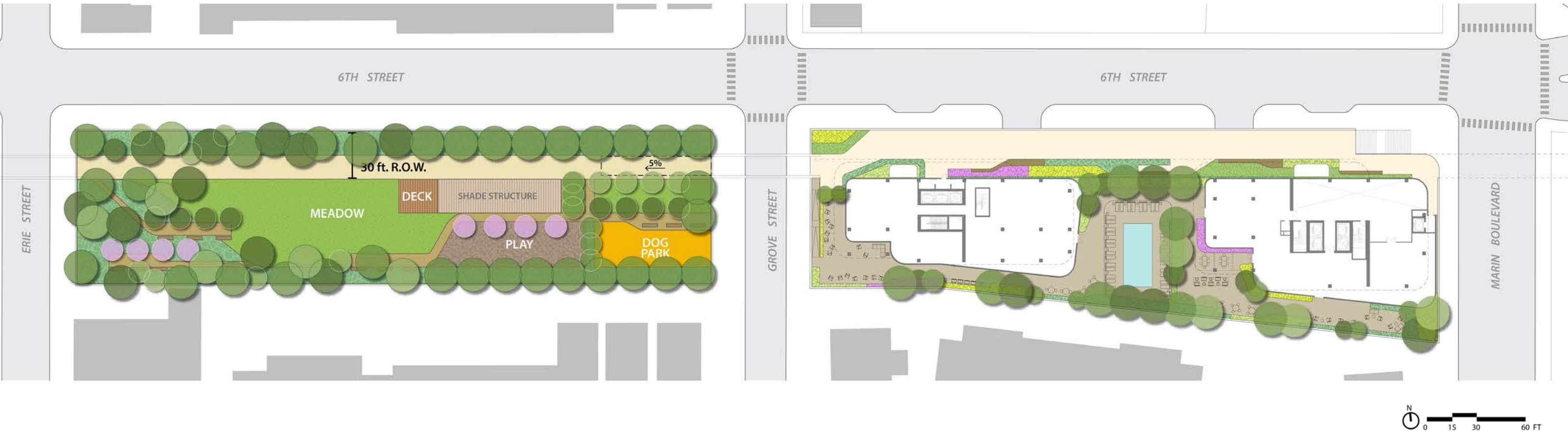
BLOCKS 3, 4, & 5

- 1. PRESERVE & RESTORE HISTORIC WALLS
- 2. CONSERVE ORIGINAL FOREST
- 3. CONSTRUCT "LIGHT TOUCH" TRAIL
- 4. STUDY URBAN FOREST ECOSYSTEM

SKETCH: SEAN A. GALLAGHER

BLOCK 1 & 2
RAILS SCHEME

DRAFT – FOR DISCUSSION PURPOSES ONLY

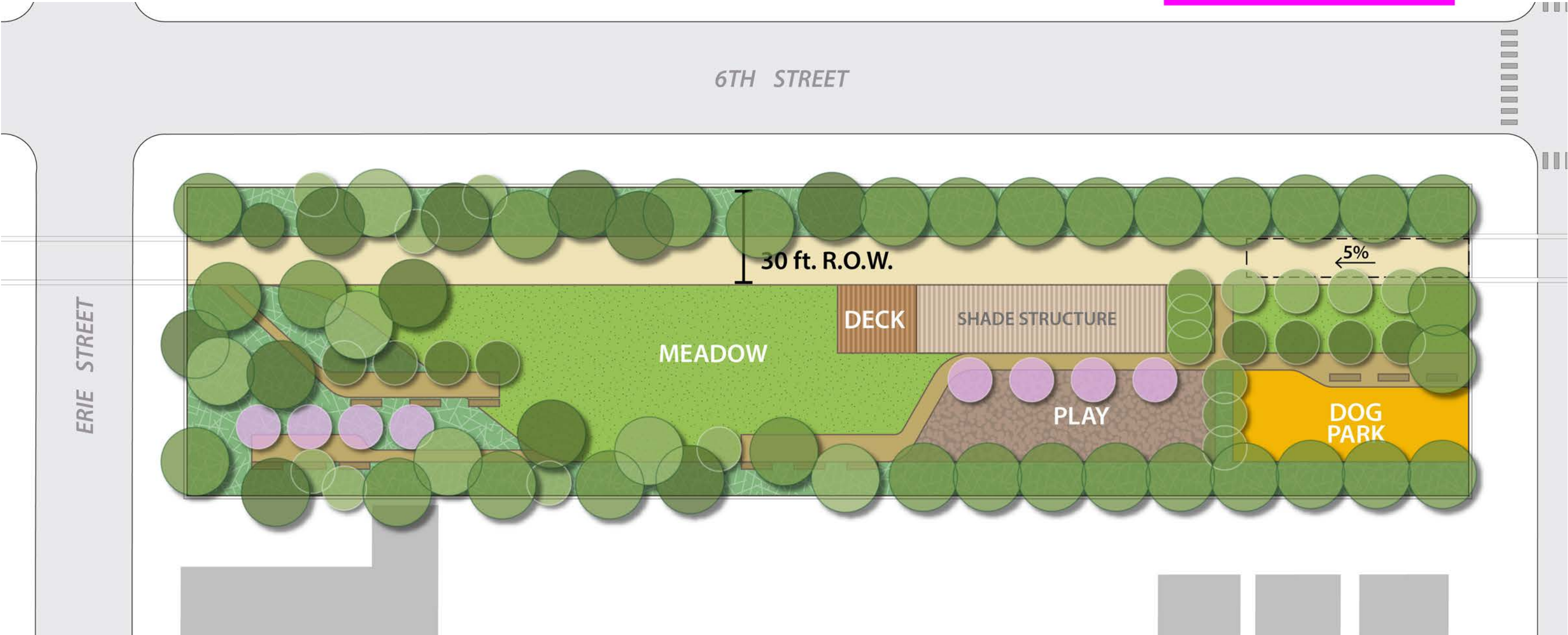
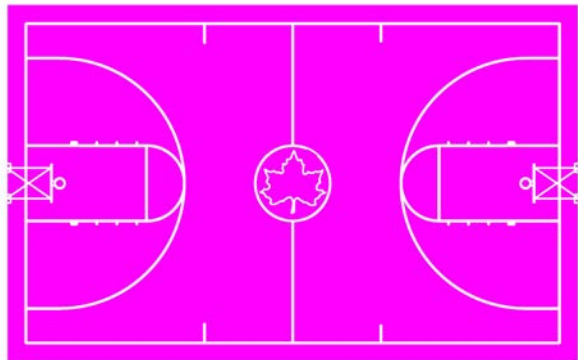


BLOCK 2 - RAILS

LAWN AREA **6100 SQ. FT.**
600 people
(10 SQ.FT. PER PERSON - MOVABLE CHAIRS IN ROWS)
300 people
(20 SQ.FT. PER PERSON - PICNIC BLANKETS, LAWN CHAIRS WITH COMFORTABLE PERSONAL SPACE)

DRAFT – FOR DISCUSSION PURPOSES ONLY

BASKETBALL COURT FOR REF





VIEW FROM WEST

HargreavesJones | Pelli Clarke Pelli Architects



VIEW FROM EAST

HargreavesJones | Pelli Clarke Pelli Architects

BLOCK 1 - RAILS

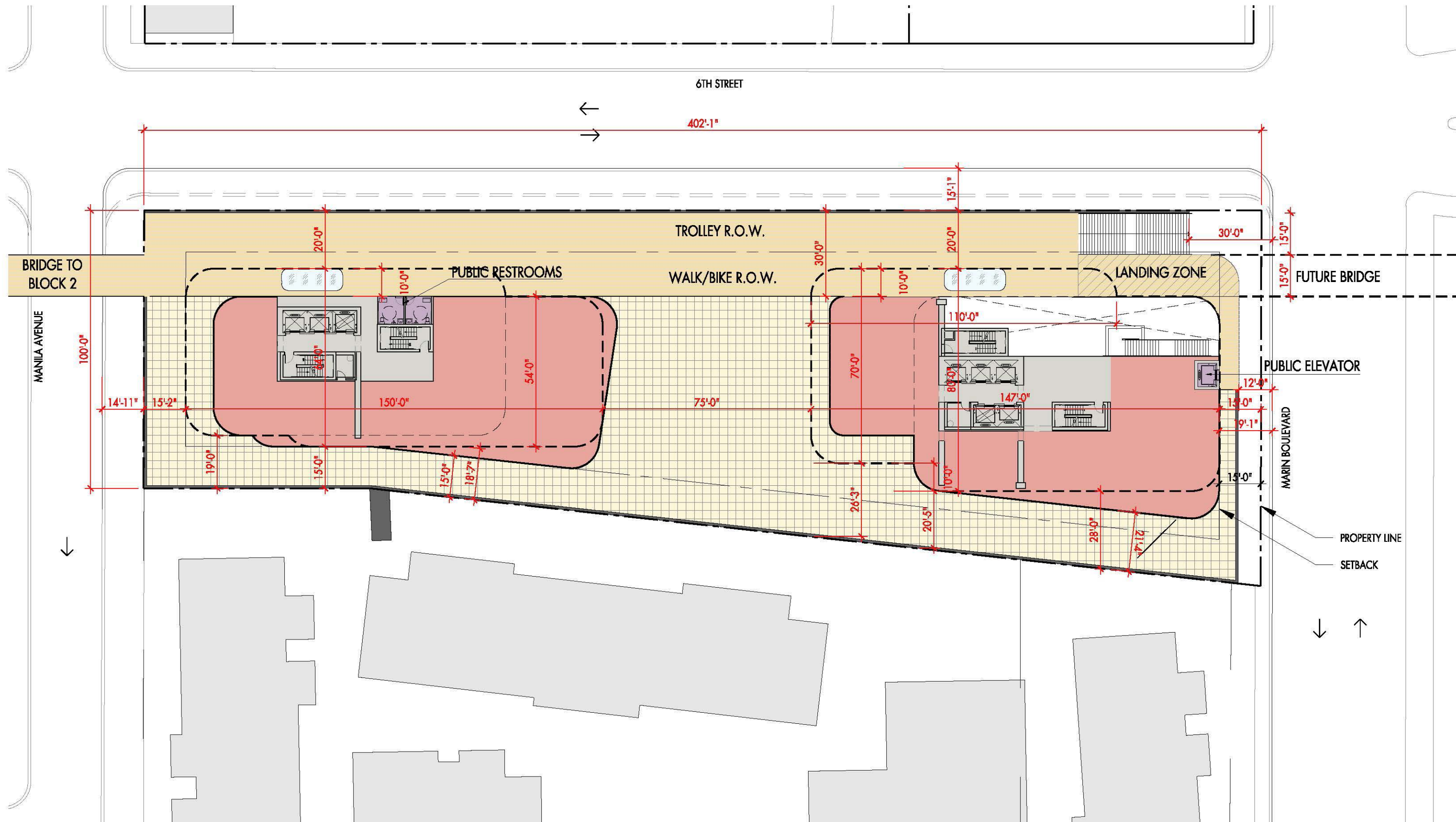
DRAFT – FOR DISCUSSION PURPOSES ONLY

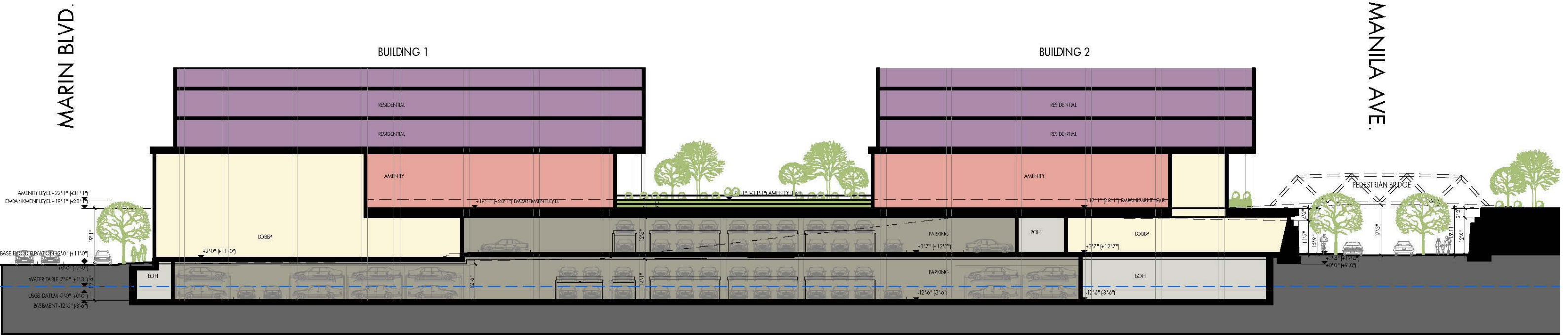




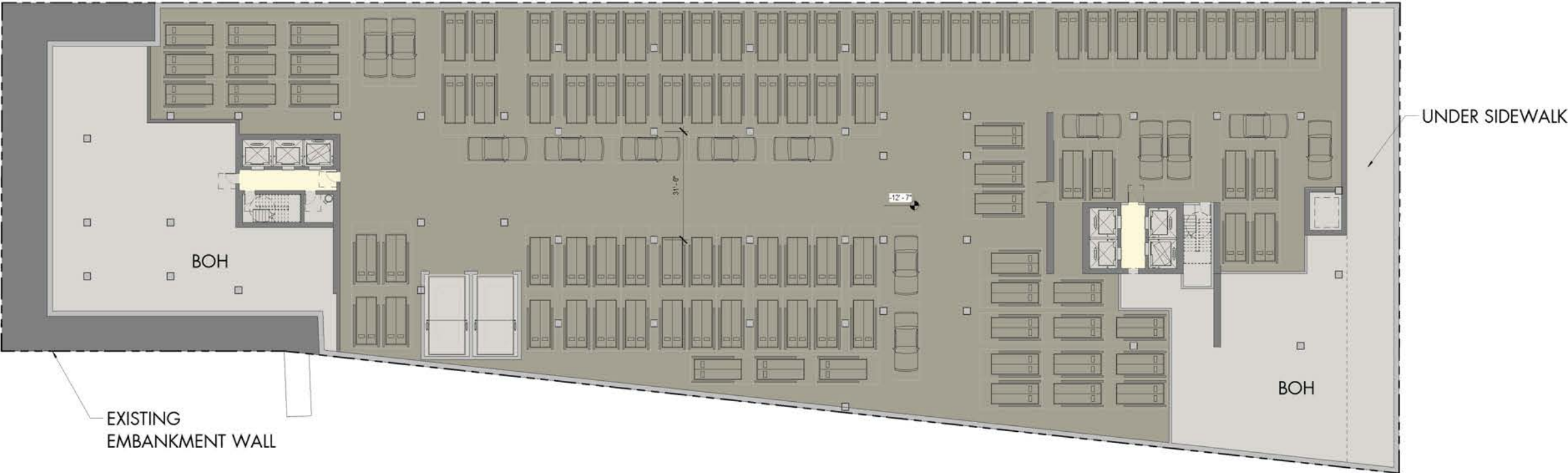
VIEW AT PROMENADE

HargreavesJones | Pelli Clarke Pelli Architects





BLOCK 1 SECTION



FLOOR PLAN
BASEMENT

PARKING:

GROUND FLOOR	
8 ADA SPACES	
106 SPACES	
BASEMENT:	
212 SPACES	
TOTAL:	
326 SPACES	



FLOOR PLAN
GROUND LEVEL

PARKING:

GROUND FLOOR
8 ADA SPACES
106 SPACES

BASEMENT:
212 SPACES

TOTAL:
326 SPACES



FLOOR PLAN
EMBANKMENT LEVEL



