

APPENDIX A
DRAFT PROGRAMMATIC AGREEMENT

Programmatic Agreement Between the New York State Historic Preservation Officer and the Lower Manhattan Development Corporation Regarding the East River Waterfront Esplanade and Piers Project

Agreement, dated _____, 2006, between the New York State Historic Preservation Officer (“SHPO”) and the Lower Manhattan Development Corporation (“LMDC”) as the recipient of community development block grant assistance from the U.S. Department of Housing and Urban Development (“HUD”) (“Agreement”).

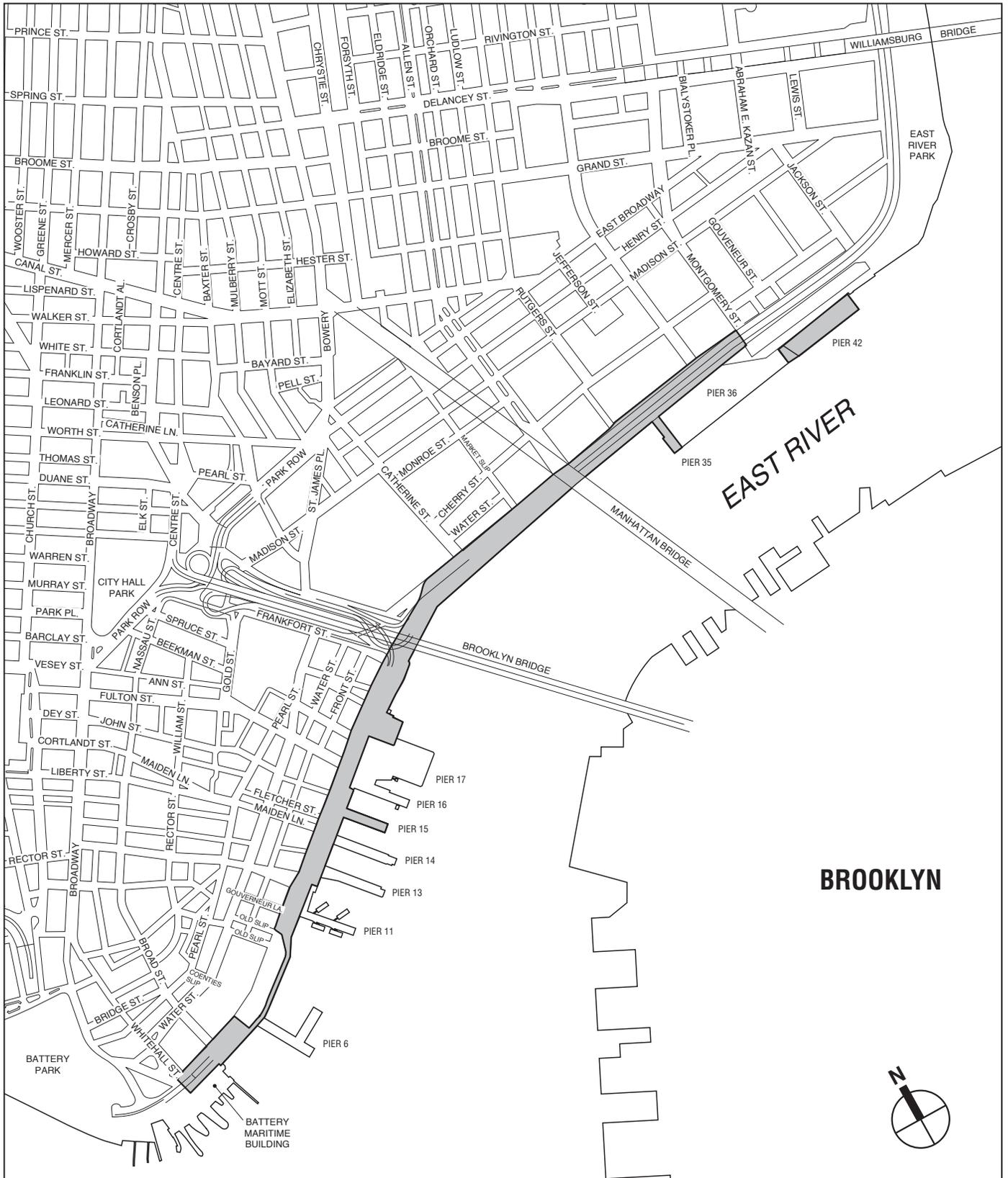
WHEREAS, LMDC, SHPO and the City of New York (“City”)¹ are working cooperatively to implement a number of independent projects in Lower Manhattan which include improvements to Fulton Street, Burling Slip, Peck Slip and other roadways as well as the East River Waterfront Esplanade and Piers Project (“Esplanade Project”), (collectively the “Improvements Projects”); and

WHEREAS, LMDC, SHPO and the City are working together to conduct all necessary reviews for the Improvement Projects pursuant to Section 106 of the National Historic Preservation Act (“Section 106”) and other applicable laws; and

WHEREAS, LMDC is responsible for planning and conducting the environmental and historic reviews for the proposed Esplanade Project, which will improve areas along the East River in Lower Manhattan as shown in the project area map attached to this Agreement as Exhibit A² (“Project Site”); and

¹ The City, as the recipient of funds from LMDC, will carry out the Esplanade Project through an agreement with the New York City Economic Development Corporation (“EDC”). The “City” has therefore been referenced in various provisions of this Agreement. Various City agencies may also be involved in the planning and implementation of the Esplanade Project including the New York City Department of City Planning, the New York City Department of Transportation and the New York City Department of Parks and Recreation. Where relevant, including for consideration of architectural and archeological matters, the City may choose to carry out its role in this Agreement and consultation through the Landmarks Preservation Commission (“LPC”). Both the EDC and LPC will therefore receive courtesy copies of notices as provided in section 13 of this Agreement.

² This attachment is also Figure 1-1 from the environmental impact statement.



Project Site



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WHEREAS, the reviews for the Esplanade Project pursuant to the National Environmental Policy Act (“NEPA”) and Section 106 are being coordinated through the preparation of an environmental impact statement (EIS) that addresses effects on historic properties; and

WHEREAS, the effects of the Esplanade Project on historic properties cannot be fully determined prior to the conclusion of the coordinated NEPA and Section 106 review; and

WHEREAS, the Project Site includes portions of the New York City South Street Seaport Landmark District and the State and National Register-listed South Street Seaport Historic District (“Historic Districts”); and

WHEREAS, historic properties within or near the Project Site have been identified in the EIS; and

WHEREAS, the Project Site includes areas where archeological resources may be located, as identified in the EIS; and

WHEREAS, several additional improvements are being analyzed in the EIS for the Esplanade Project, although they are not being funded by LMDC, including the creation of a plaza in front of the Battery Maritime Building (“BMB”), a New York City Landmark listed on the State and National Registers; and

WHEREAS, the SHPO and the City of New York (“City”) serve as consulting parties in the Section 106 process and pursuant to this Agreement; and

WHEREAS, the Advisory Council on Historic Preservation (“ACHP”) will be invited to participate in the Section 106 process pursuant to this Agreement;

NOW, THEREFORE, the signatories to this Agreement hereby agree that the Esplanade Project shall be implemented in accordance with the following stipulations of this Agreement entered into pursuant to 36 CFR § 800.14(b) in order to take into account the effect of the Esplanade Project on historic properties.

Stipulations

1. Description of the Project and Project Site. The Project Site includes the waterfront, the upland area adjacent to and under the elevated FDR highway and South Street extending from Whitehall Ferry Terminal and Peter Minuit Plaza on the south to East River Park on the north.

The Esplanade Project includes a Program Zone under the FDR Drive for pavilions and temporary outdoor activities; a Recreation Zone along the edge of the water with seating, play spaces, and plantings; and a uniform bikeway/walkway along South Street. The Esplanade Project analyzed in the EIS includes improvements to Piers 15, 35, 36, and 42, as well as the New Market Building pier, though this Project does not provide funding by LMDC for construction of the plaza in front of the BMB, the replacement for the New Market Building and the urban beach on Pier 42, which are dependent on additional funding that is currently being sought by the City of New York.

2. Definitions.

a. The term “historic properties” shall have the meaning provided by 36 CFR § 800.16(1). Where relevant, historic properties that consist of archeological resources are separately addressed by this Agreement. LMDC may also consider, where appropriate, City-designated landmarks, properties calendared for consideration by the

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Landmarks Preservation Commission (“LPC”) or properties defined by the LPC as eligible for New York City Landmark designation.

b. Effect is defined by 36 CFR § 800.16(i) as “alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.”

c. Adverse effects are evaluated pursuant to the “criteria of adverse effect” as described by 36 CFR § 800.5(a)(1).

3. Consultation Regarding Historic Properties Within the Historic Districts and the Historic Bulkhead. Planning, design and construction of the Esplanade Project shall be undertaken in the manner set forth in this Agreement.

a. Designs for the following project elements shall be subject to review pursuant this section: (i) the rebuilt Pier 15; (ii) the design of the Program Zone and Recreation Zone within the Historic Districts, including any cladding for the FDR and any pavilions constructed within the Historic Districts; and (iii) the design of the Esplanade Project on or around the historic, granite portions of the East River Bulkhead.

b. The review and consultation provided in Section 3 of this Agreement shall be undertaken when designs for the project elements listed in paragraph 3(a) are at preliminary (35%) and pre-final (75%) completion stages. SHPO may also elect, at the time that written comments on the pre-final designs are submitted, to review substantially final designs for the Esplanade Project. Consultation may be undertaken sequentially as designs for individual project elements substantially progress.

c. In consultation with SHPO and the City, LMDC will determine if there are any adverse effects on historic properties listed or determined eligible for listing on the

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State and National Registers of Historic Places, on the Historic Districts, or—where appropriate—on City-designated landmarks, properties calendared for consideration by LPC, or properties defined by the LPC as eligible for New York City Landmark designation. These will be evaluated in light of those characteristics which make the historic properties significant. All final findings will be accompanied by documentation consistent with 36 CFR § 800.11.

d. Finding of No Effect.

If, after consultation with SHPO and the City, LMDC determines that there will be no effect to a historic property, this finding will be documented and copies will be provided to SHPO for review. Any objections by SHPO shall be provided to LMDC in writing within 30 days.

e. Finding of No Adverse Effect.

If, after consultation with SHPO and the City, LMDC determines that there will be no adverse effect to a historic property, this finding will be documented and copies will be provided to SHPO for review. Should SHPO object in writing within 30 days, LMDC can (i) accept a finding of adverse effect; (2) consult with SHPO and the City to resolve the objection; or (iii) consult with SHPO and the City, and involve ACHP, pursuant to 36 CFR § 800.5(c) and (d).

f. Finding of Adverse Effect. If, after consultation with SHPO and the City, LMDC determines that there will be an adverse effect to a historic property, SHPO and LMDC will develop a treatment plan.

i. Plan for the Treatment of Adverse Effects. If adverse effects to historic properties are identified, SHPO, the City and LMDC will consider, depending on

the nature of the effect and the significance of the historic property, mitigation measures including, but not limited to, the following: modifications to designs; use of noise attenuation; landscaping to minimize visual impact; monitoring of seismic impacts with modifications to construction techniques if seismic impacts are detected; traffic controls and improvements; use of construction materials and design features that will improve visual compatibility with historic properties; documentation of existing historic properties.

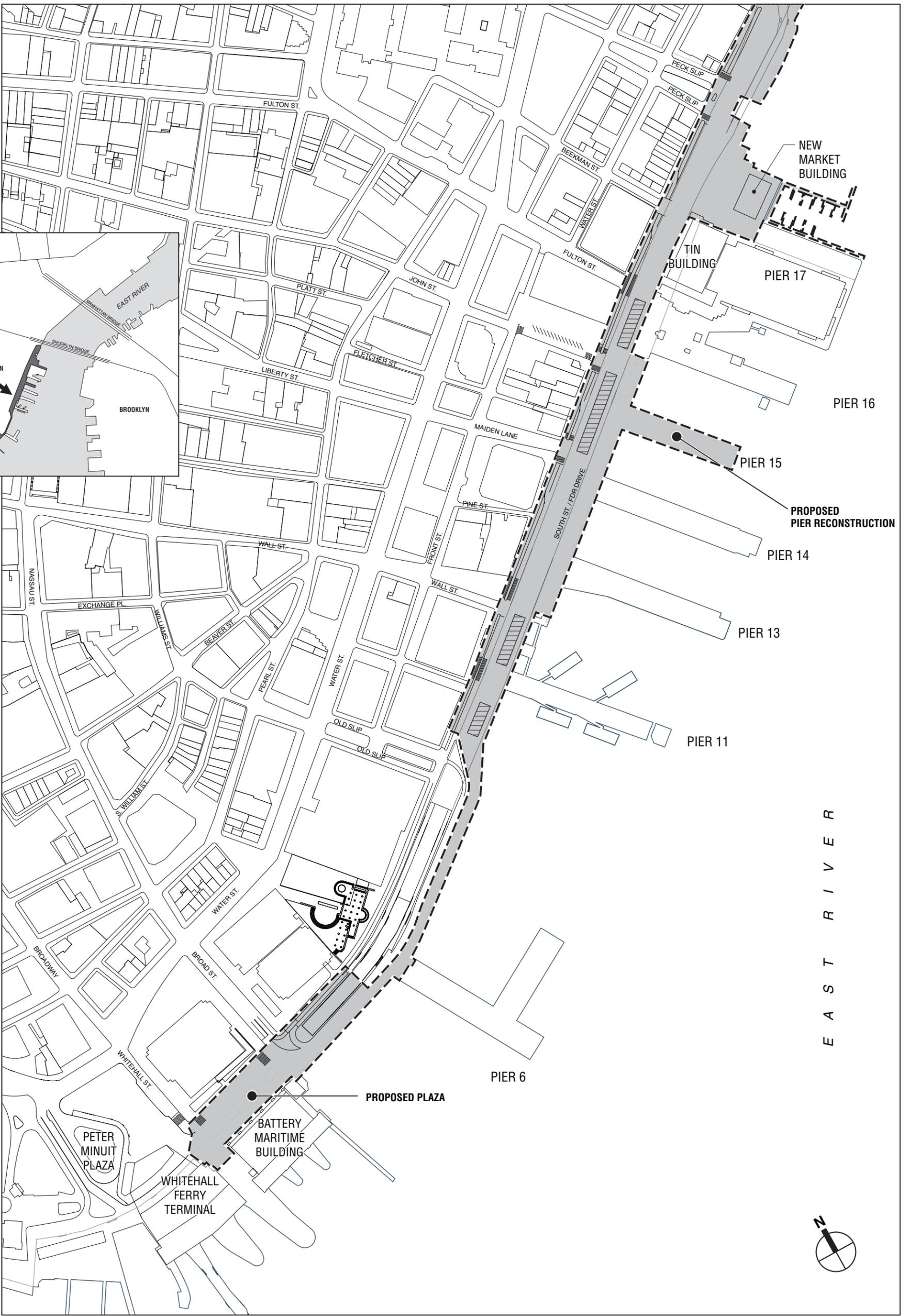
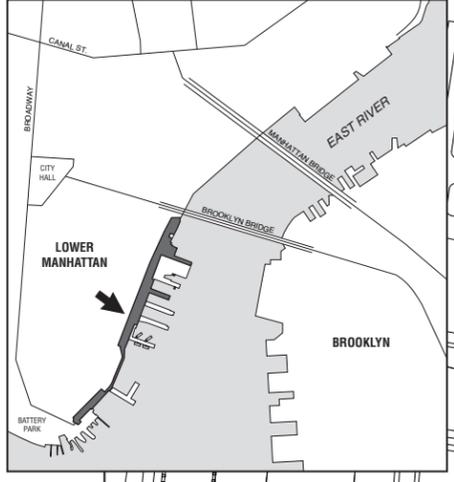
- ii. Documentation. The Treatment of Adverse Effects will be documented consistent with 36 CFR 800.11.
- iii. Failure to Agree. If SHPO and LMDC are unable to agree on a treatment plan to resolve adverse effects to historic properties, LMDC will complete the steps provided for in 36 CFR § 800.7 (governing failure to resolve adverse effects).

4. Archeological Resources.

a. The EIS has identified an area of potential effects for archaeological resources (“Archeology APE”). A map of the Archeology APE is attached to this Agreement as Exhibit B. The process that will be followed in conducting further research to determine the potential for archaeological resources to be affected by the Esplanade Project is described below.

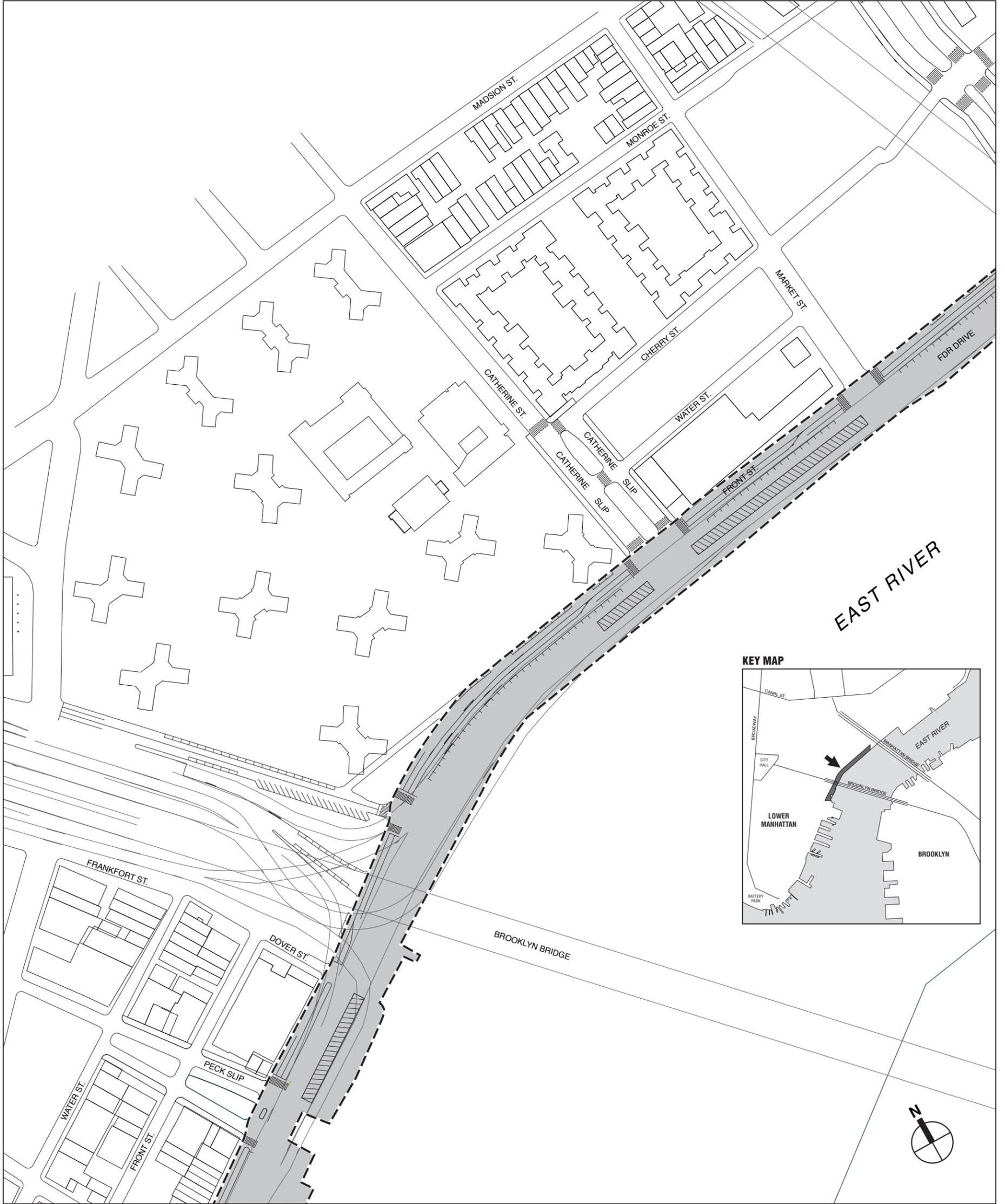
b. Prior to the start of construction for the Esplanade Project, LMDC and the City will cooperate in the preparation of a “Phase 1A” study that will examine the potential for archaeological resources to be present in the Archeology APE. The Phase 1A study will consider the entire Archeology APE, with the exception of two areas

KEY MAP

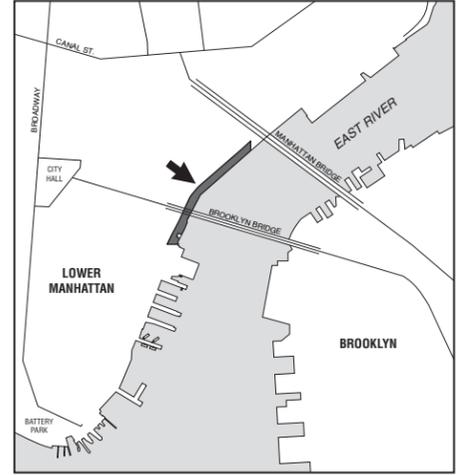


-  Project Site
-  Potential Locations of Pavilions
-  Archaeological Resources APE

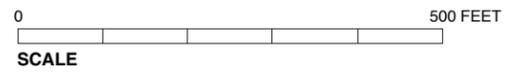
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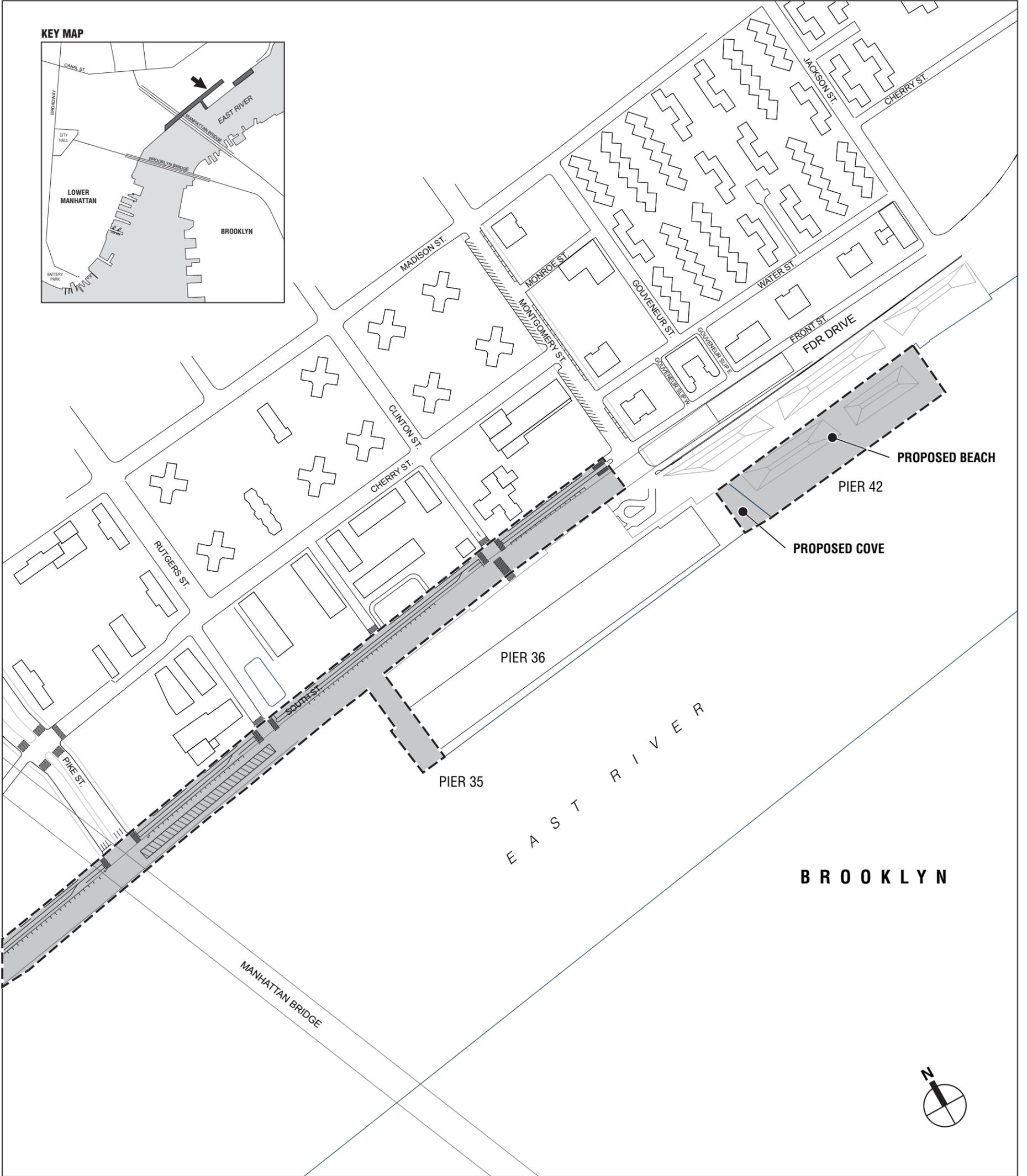


KEY MAP



- Project Site
- Potential Locations of Pavilions
- Archaeological Resources APE





-  Project Site
-  Potential Locations of Pavilions
-  Archaeological Resources APE

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which would experience minimal disturbance (less than two feet in depth) for the Esplanade Project. These two areas are: the esplanade area that is outside of the pavilions and South Street north of the Brooklyn Bridge. The Phase 1A study will be submitted to SHPO for review and approval. SHPO shall have 30 days to submit comments or recommendations to LMDC and the City with respect to the adequacy of the Phase 1A study. The completed Phase 1A study will include graphics illustrating the areas of potential archaeological sensitivity that exist within the Archaeological APE.

c. Subsequent to the review of the Phase 1A by SHPO, LMDC and the City will cooperate in the preparation of a protocol (“Archaeology Monitoring and Testing Protocol”) to define which portions of the Archaeology APE would be monitored during construction or would undergo Phase 1B field testing prior to construction, depending on the nature of the potential resources identified in the Phase 1 A and the extent of construction that would take place in specific locations. The protocol will include an assessment of the feasibility and utility of monitoring versus field testing for all potentially sensitive archaeological areas that would be affected by the Esplanade Project. The protocol will also outline the proposed methodology for the monitoring or field testing. SHPO shall have 30 days to submit comments or recommendations to LMDC and the City with respect to the adequacy of the Archaeological Monitoring and Testing Protocol.

d. To the extent that LMDC and SHPO agree that the construction of the Esplanade Project will result in adverse effects to archaeological resources, LMDC and the City will prepare a mitigation plan for such resources. SHPO shall have 30 days to provide LMDC and the City written comments on the plan. To the extent that LMDC

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and SHPO disagree on adverse effects, the process set forth in Section 16 of this Agreement will be followed.

e. LMDC and the City will cooperate in the preparation of an Unanticipated Discoveries Plan for archaeological resources. SHPO shall have 30 days to submit comments and recommendations to LMDC and the City with respect to the adequacy of the Unanticipated Discoveries Plan. In the event that unanticipated archaeological deposits or features are encountered during construction of the Esplanade Project and adverse effects on those resources will result, LMDC and the City will immediately implement the procedure of the Unanticipated Discoveries Plan. All parties recognize that stopping construction may have extraordinary costs. They will therefore make every effort to implement the approved Unanticipated Discoveries Plan expeditiously in circumstances requiring its use.

5. Battery Maritime Building Plaza.

Although it will not be funded as part of the Esplanade Project, the construction of a new BMB pedestrian plaza is being analyzed in the EIS for the Esplanade Project. The City is seeking additional funding for it, and, if funding is obtained, the BMB Plaza would be built along with the Esplanade Project. The design for the plaza is not expected to have a significant effect on any historic properties or the BMB. When a pre-final (75%) design is prepared, LMDC and the City will consult with SHPO and provide 30 days for SHPO to submit written comments. SHPO may elect to review the final design at that time and, if it does, will have 30 days to submit written comments on it.

6. New Market Building and Pier.

(a) When a pre-final (75%) design for improvements to the New Market Building pier is prepared, LMDC and the City will consult with SHPO and provide 30 days for SHPO to submit written comments. SHPO may elect to review the final design at that time and, if it does, will have 30 days to submit written comments on it.

(b) The funding and development of a design for the replacement of the New Market Building are not part of the Esplanade Project. The building is expected to be developed at a later date. To the extent that federal or state funding or approvals are involved, conformance with the National Historic Preservation Act or State Historic Preservation Act will be undertaken as appropriate. In all cases, LMDC or the City will provide SHPO with 30 days to provide written comments on the pre-final (75%) design. SHPO may elect to review the final design at that time and, if it does, will have 30 days to submit written comments on it.

7. Brooklyn Bridge and Manhattan Bridge.

The EIS for the Esplanade Project concluded that there are no locations where construction will occur within 90 feet of the Brooklyn Bridge and Manhattan Bridge anchorages. As design plans evolve, if any project elements will require construction within these 90-foot areas, LMDC and the City will develop a construction protection plan for any work occurring within that distance and SHPO will have 15 days to provide written comments on it.

8. Public Participation.

a. NEPA/Section 106 Review and Development of Agreement. The draft, final and executed copies of this Agreement shall be made available for public comment

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as appropriate during the environmental review process. This Agreement may be made available in the draft EIS, final EIS or NEPA record of decision as appropriate. Notice of the execution of this Agreement following the completion of the FEIS will be published in a newspaper of general circulation and/or the Environmental Notice Bulletin and a copy of the final executed Agreement will be made available online at www.renewnyc.com and upon request.

b. Designs. When final designs as described in Sections 3, 5 and 6 are completed they will be made available on LMDC's website and upon request.

c. Findings. LMDC will make final findings of no effect, findings of no adverse effect and findings of adverse effect pursuant to Section 3, with supporting documentation, available to the public on its website and upon request at the time that final findings are provided to SHPO. If a finding of adverse effect is made, any final documentation of the "Treatment of Adverse Effects" prepared pursuant to Section 3 will be made available on LMDC's website and upon request.

d. Archaeology. The final mitigation plan for adverse effects on archaeological resources, if any, and the final Unanticipated Discoveries Plan, both described in Section 4 above, will be made available on LMDC's website and upon request.

e. Public Comments. If LMDC receives a timely and substantive written public objection regarding treatment of historic properties or compliance with the terms of this Agreement, LMDC shall forward the objection to SHPO. If SHPO and LMDC agree that they should consult regarding the objection, such consultation shall be

undertaken with the City. Within 30 days of the completion of consultation, LMDC shall provide a written response to the person making the objection.

9. Termination of Agreement.

Any party to this Agreement may terminate it by providing 30 days' notice to the other parties provided that the parties consult during the period prior to termination to seek agreement or amendments or other actions that would avoid termination and to clarify the procedure for future review or any outstanding activities subject to this Agreement. In addition, other parties may elect to continue their roles under this Agreement without the participation of the terminating party. In the event of termination of this Agreement, LMDC shall either execute a new programmatic agreement pursuant to 36 CFR § 800.14(b) or request and consider comments from the ACHP consistent with 36 CFR § 800.7.

10. Duration of the Agreement.

This Agreement shall remain in force for ten years following its execution unless the parties to it agree otherwise. Alternatively, this Agreement shall expire when the actions that are the subject of it have been performed in accordance with the terms of this Agreement.

11. Amendments to the Agreement.

Amendments to this Agreement shall be effective only when in writing and upon the written approval of all parties to this Agreement. The amended agreement shall be made available to the public on LMDC's website and upon request.

12. Coordination with Other Federal Reviews.

In the event that LMDC or a federal agency applies for additional federal funds for the Esplanade Project, the federal funding agency may satisfy its Section 106 responsibilities by agreeing in writing to the terms of this Agreement and notifying SHPO and ACHP accordingly.

13. Notices.

All notices, including for the initiation of comment periods, required by this Agreement shall be provided as follows:

SHPO

Ruth Pierpoint
Office of Parks Recreation and Historic Preservation
Peebles Island
219 Delaware Avenue
Waterford, NY 12188

LMDC

Lower Manhattan Development Corporation
1 Liberty Plaza, 20th Floor
New York, NY 10006
Attention: General Counsel

with copies to:

New York City Economic Development Corporation
c/o William Kelley
110 William Street, 3rd Floor
New York, NY 10038
United States of America

Gina Santucci
Environmental Review Coordinator
New York City Landmarks Preservation Commission
1 Centre Street, 9th Fl.
New York, NY 10007

14. Successors.

This Agreement shall be binding on and inure to the benefit of the parties' respective successors and assigns.

15. Enforcement.

Only parties to this Agreement shall have the authority to enforce its terms.

16. Dispute Resolution.

Any disputes pertaining to Section 3 of this Agreement, "Consultation Regarding Historic Properties Within the Historic Districts and the Historic Bulkhead," shall be addressed as specified therein. In the event that SHPO concludes that LMDC has failed to carry out its obligations under any other section of this Agreement, the SHPO shall so advise LMDC and request it to consider taking appropriate measures to remedy such failure. If, after considering the SHPO's views, LMDC determines that no such measures are warranted or appropriate, LMDC shall advise the ACHP, which shall have 15 days to consider that matter and submit its recommendations, if any, to LMDC and SHPO for further consideration. The failure of the ACHP to comment within that time period shall constitute concurrence with LMDC's views on the disputed matter.

17. Monitoring and Reporting.

During the Esplanade Project, LMDC, or the City at LMDC's request, shall submit semi-annual status reports to SHPO to summarize measures it has taken, if any, to comply with the terms of this Agreement. Reports shall be submitted until the project is complete.

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18. Execution.

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall together constitute one instrument.

Facsimile signatures shall be treated as originals.

EXECUTION AND IMPLEMENTATION of this Agreement evidence LMDC's compliance with Section 106 of the National Historic Preservation Act with respect to the project improvements addressed herein.

NEW YORK STATE HISTORIC PRESERVATION OFFICER

By: _____
Title: _____

LOWER MANHATTAN DEVELOPMENT CORPORATION

By: _____
Title: _____