



CITY OF KIRKLAND

Planning and Community Development Department
123 Fifth Avenue, Kirkland, WA 98033 425.587-3225
www.ci.kirkland.wa.us

MEMORANDUM

To: David Ramsay, City Manager

From: Janice Soloff, AICP, Senior Planner
Eric R. Shields, AICP, Planning Director

Date: July 23, 2008

Subject: CONTINUATION OF BANK OF AMERICA/MERRILL GARDENS APPEAL OF DRB
DECISION, CASE NO. APL08-00001, FILE DRC07-00006

RECOMMENDATION

Staff recommends that City Council continue deliberation on the appeal of the Design Review Board's decision on the Bank of America/Merrill Gardens mixed use project at 101 Kirkland Avenue. At the July 1, 2008 meeting City Council continued the appeal proceedings to August 5, 2008 in order to allow time for the appellant CiViK to ask questions of the applicant SRM Development's modified design for the project.

Enclosed for City Council consideration is correspondence received since the July 1, 2008 meeting including questions from the appellant CiViK related to the modified design and responses to those questions from SRM Development.

Additionally, staff has enclosed Findings and Conclusions with minor revisions to: 1) reflect the additional open record proceedings which have been held since the original Findings were drafted; and 2) correct Zoning Code citations.

BACKGROUND DISCUSSION

On June 30, 2008, SRM Development submitted modifications to the project design aimed at responding to concerns expressed by the Council regarding the original disapproved design. The modified plans were distributed to City Council and all parties via email. On behalf of CiViK, Mr. Aramburu in his letter of June 27, 2008 objected to SRM's plan to submit revisions to the design of the project.

SRM Development presented the modified project design to City Council at the July 1, 2008 meeting. CiViK requested additional time to review the proposed modifications and to ask SRM Development questions. City Council requested the applicant provide information about how the modified proposal complies with parking requirements, to show comparison of setbacks and step

backs between the previous and new proposal, and expected traffic impacts of relocating the drive thru.

As directed by City Council, Economic Development Manager Ellen Miller Wolfe facilitated a process and timeline for the exchange of information between CiViK and SRM Development (see Attachment 1). Both CiViK and SRM had some clarifying questions regarding the process and timeline (see Attachments 2, 3, 4). On July 11, 2008, CiViK submitted questions to SRM Development related to the modified proposal (see Attachment 5). SRM responded to the questions on July 18, 2008 (see Attachment6).

Summary of appeal meetings to date:

- January 31, 2008 CiViK filed an appeal of the Design Review Board's decision on the Bank of America/Merrill Gardens project.
- On April 15 the City Council heard the open record appeal of the Design Review Board's decision granting design review approval to the Bank of America/Merrill Gardens mixed use project. The appeal hearing was continued to May 6, 2008.
- On May 6, 2008, the City Council passed a motion to reverse the Design Review Board decision and directed staff to return to the May 20th meeting with a resolution setting forth findings and conclusions that supported the motion that 1) the development is not designed for superior retail and therefore does not warrant the additional height for a fifth story; and 2) the project does not meet the requirements of a two story building along Lake Street So.
- At the May 20, 2008 meeting the Council decided to consider alternative designs that were consistent with the above conclusions before making a final decision on the appeal and moved to table the resolution along with the findings and conclusions until June 3.
- On June 3, 2008, City Council discussed a draft of R-4707 and made edits to staff's proposed Exhibit A, Findings and Conclusions. The Applicant requested direction from the Council on what is required to satisfy the Lake Street So. height restriction and superior retail space criteria so that the applicant could modify its proposal to meet the Council's intent. City Council agreed to continue the meeting until July 1, 2008, in order for the applicant and appellant to meet to discuss possible modifications to the development. The City received notice from SRM Development and CiViK that the two parties met but were unable to reach agreement on proposed revisions.

For background information from the last meeting please refer to the Council packet materials available on the City's website at:

http://www.ci.kirkland.wa.us/_shared/assets/9a_PublicHearings9072.pdf

Attachments:

1. Ellen Miller Wolfe letter of July 3, 2008 to appellant's and applicant's attorneys regarding process for exchanging questions/responses on modified development proposal
2. Bea Nahon of CiViK email of July 7, 2008 with questions on process
3. Molly Lawrence for SRM, letter of July 9, 2008 discussing above process
4. Bea Nahon of CiViK email of July 11, 2008 discussing process
5. Bea Nahon of CiViK email of July 11, 2008 with list of questions for SRM
6. Molly Lawrence for SRM letter of July 18, 2008 responding to CiViK questions
7. Bea Nahon of CiViK email of July 23, 2008 with additional questions for SRM
8. Bea Nahon of CiViK attachment to July 23, 2008 (questions regarding rooftop appurtenances)
9. Molly Lawrence for SRM letter of July 25, 2008 responding to CiViK questions
10. Bea Nahon of CiViK email of July 25, 2008 responding to SRM response
11. Robin Jenkinson letter of July 2, 2008 to Richard Aramburu
12. Richard Aramburu for CiViK letter of July 7, 2008 to Robin Jenkinson
13. Robin Jenkinson letter of July 8, 2008 to Richard Aramburu
14. Molly Lawrence for SRM letter of July 25, 2008 with objections

Additional Attachments:

The following documents have previously been provided to the Council as part of the Bank of America/Merrill Gardens appeal, but due to time constraints were either placed on the dais and/or provided electronically:

- A. May 16, 2008 letter from Richard Aramburu to City Council
- B. May 19, 2008 letter from Richard Aramburu to Mayor and City Council, with enclosure
- C. May 28, 2008 letter from Molly Lawrence to City Council, with enclosures
- D. May 29, 2008 letter from Richard Aramburu to Robin Jenkinson
- E. June 3, 2008 letter from Molly Lawrence to Robin Jenkinson
- F. June 10, 2008 letter from Richard Aramburu to Robin Jenkinson
- G. June 16, 2008 letter from Robin Jenkinson to Richard Aramburu, with enclosure
- H. June 24, 2008 letter from Richard Aramburu to Robin Jenkinson
- I. June 27, 2008 letter from Richard Aramburu to Robin Jenkinson
- J. June 30, 2008 letter from Robin Jenkinson to Richard Aramburu
- K. June 30, 2008 letter from Molly Lawrence to City Council, with enclosures

cc: Applicant: Andy Loos, SRM Development
 Molly Lawrence, legal counsel for SRM Development
 Appellant: J. Richard Aramburu, legal counsel for CiViK
 Bea Nahon, CiViK
 File DRC07-00006 (APL08-00001)



July 3, 2008

J. Richard Aramburu
Aramburu & Eustis, LLP
720 Third Avenue, Suite 2112
Seattle, WA 98104-1860

Molly A. Lawrence
GordonDerr
2025 First Avenue, Suite 500
Seattle, WA 98121-3140

Re: Bank of America/Merrill Gardens
Appeal of Design Review Board
File No. APL08-00001

Dear Counsel:

At the July 1, 2008 meeting, City Council continued the public hearing on the appeal of the Bank of America/Merrill Gardens project to the August 5, 2008 City Council meeting in order to allow the appellant additional time to review the applicant's modified proposal and to ask questions of the applicant. The recommended schedule that follows provides a timeframe for this information exchange and also allows sufficient time for the City distribution of City Council packets. I recommend that the parties follow the following process and schedule outlined below:

- July 11 CiViK submits questions in writing to the applicant; or to City staff to provide to the applicant if that is preferable
- July 18 SRM Development responds back in writing to CiViK's questions
- July 23 CiViK responds in writing to SRM Development information if there are outstanding issues or further clarifications needed
- July 25 Deadline for responses by SRM and CiViK in order to be included in City Council packet for August 5th meeting

To insure that all parties and the City Council are informed about the progress of this exchange, please submit questions and responses in writing to all parties and copy them to City staff.

In addition to the questions CiViK may have, City staff is requesting that the applicant also provide responses to questions and requests for additional information from the July 1, 2008 City Council meeting, and also from preliminary staff review of the modified proposal. They are as follows:



1. Submit an updated parking study that explains how the modified proposal of adding retail space and eliminating at-grade parking stalls will comply with the City's parking requirements and/or the approved parking modification.
2. Update the traffic impact analysis to address the traffic circulation and design of the relocated drive-through.
 - a. What is the best circulation route for the drive-thru? Westbound or eastbound?
 - b. Will there be changes to turns onto Lake Street?
 - c. Verify if there is adequate queuing for cars.
 - d. Evaluate if there is adequate existing radius without encroaching into the eastbound lane or if there will be a conflict with left turn out of the parking garage.
3. Respond to the City Council concern regarding the elimination of the second retail space along Lake Street (shown as the café space). This additional retail space on Lake Street was a strong point with the Design Review Board (DRB) as well.
4. Show pedestrian crossings of the drive-through exits and entrances in the alley as having textured or color surface materials.

As a reminder, all items for the Council packet must be in electronic formats including PowerPoint or other presentations. Please let me know if the proposed process and timeline works for both parties.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ellen Miller-Wolfe".

Ellen Miller-Wolfe
Economic Development Manager

cc: Kirkland City Council
Dave Ramsay, City Manager
Bea Nahon, CiViK
Andy Loos, SRM Development
Robin Jenkinson, City Attorney
Eric Shields, Planning Director
Janice Soloff, Senior Planner
Cheri Aldred, Deputy City Clerk

Janice Soloff

From: Bea L. Nahon CPA [Bea.Nahon@nahoncpa.com]
Sent: Monday, July 07, 2008 11:08 AM
To: Ellen Miller-Wolfe; rick@aramburu-eustis.com; mlawrence@GordonDerr.com
Cc: andy@srmdevelopment.com; David Ramsay; Eric Shields; Janice Soloff; Cheri Aldred; Robin Jenkinson
Subject: RE: Follow up to July 1 Kirkland City Council Meeting

Ellen,

Thank you for your memo of July 3 regarding your recommendations for the process and schedule. In general, this appears to be a workable arrangement, however, some concerns and/or questions have been identified.

1. The proposed time between July 23 (Step 3) and July 25 (Step 4) is not adequate for either party to respond or prepare. Since the Council packet is typically prepared on the preceding Wednesday, it seems as though Tuesday July 28 is a more workable date for the 4th step.
2. As noted in our telephone discussion on Thursday, it will be very useful to have the applicant's responses to the City's questions (as listed in your memo). We are requesting that those responses be provided by July 18 as well, so that if there are follow-up questions, those can be identified.
3. Noting that the City itself may have follow-up questions and analysis once the City's four questions are responded to, we ask that a copy of any City correspondence (e.g. Traffic, Public Works, etc.) be provided to us immediately (i.e. upon generation)
4. As noted in our telephone conversation on Thursday, we are assuming that each set of correspondences (questions, answers, followup, response thereto) will be in the City Council's packet so that the Council can see and consider the materials.
5. While the deadline for submitting data for the packet may be July 28, CiViK still has the right as appellant, to ask questions of the applicant's witnesses at the August 5 City Council meeting, and to comment and present rebuttal before the hearing is concluded and the Council returns to deliberations. The memo is silent in this regard, and so we are stating this for the record as part of this process.
6. The documents that are exchanged in each of these correspondences are to be limited to questions and answers relating to the proposal (which may include supporting documents as appropriate to answer the questions.) However, none of these submissions should include legal arguments, as that is not what the Council has asked for.

Please note that Mr. Aramburu will be on vacation for part of this coming month and will not have access to e-mail during that time. Therefore, it is important that any documents (from the City or from the applicant) be transmitted with copies to me so that they can be addressed on a timely basis.

Also, please note that I have copied this to all of the parties on the initial e-mail other than the City Council. It would not be appropriate for me to send a copy of this e-mail to them, so I ask that you or Robin provide this information to them.

Thank you for your assistance. Please advise as soon as possible if there are any other modifications or clarifications to the schedule or process.

Sincerely,

Bea Nahon

7/22/2008

From: Ellen Miller-Wolfe [mailto:emwolfe@ci.kirkland.wa.us]
Sent: Thursday, July 03, 2008 4:04 PM
To: rick@aramburu-eustis.com; mlawrence@GordonDerr.com
Cc: Bea L. Nahon CPA; andy@srmdevelopment.com; City Council; David Ramsay; Eric Shields; Janice Soloff; Cheri Aldred; Robin Jenkinson
Subject: Follow up to July 1 Kirkland City Council Meeting

As promised, please find attached a recommended process for preparing for the August 5, 2008 City Council meeting and continuation of the Bank of America appeal hearing. Enclosed are suggested steps and a timeline. Please let me know if the process suits or whether there are any remaining questions or concerns. Happy holiday, e



July 9, 2008

Ellen Miller-Wolfe
Economic Development Manager
City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033

Re: Merrill Gardens/BOA
Appeal of Design Review Board Decision
File No. APL08-00001

Dear Ellen:

Thank you for your letter of July 3, 2008. As SRM Development has explained throughout the design review and appeal processes for its Merrill Gardens/BOA Project at 101 Kirkland Avenue, SRM is eager to have the City identify a design that it will approve for this site consistent with the City's adopted standards. Toward that end, SRM is willing to answer questions from the Appellant CiViK, as well as City Staff and Council members, regarding any design modifications offered as part of the effort to identify an approvable design.

SRM representatives have reviewed your proposed schedule for exchanging questions and answers. In general, we agree that it looks workable. We do, however, share CiViK's concern that a July 25th deadline for materials in advance of the August 5th hearing is unnecessarily condensed. Instead, we would support CiViK's request that the deadline for submitting materials for the August 5th hearing be extended to July 29th or 30th.

With regard to CiViK's other comments contained in Bea Nahon's email dated July 7, 2008, we will attempt to provide responses to City Staff's questions contained in your letter by July 18th, subject to the caveat that we cannot control our transportation/parking consultant's schedule/availability. Further, we do not object to comments 3 and 4 provided that all materials are provided concurrently to both parties. With regard to comment 5, we anticipate that CiViK will present rebuttal at the August 5, 2008 hearing, but would strongly advocate that because the Council has provided CiViK an unprecedented opportunity to submit written questions outside of the standard hearing process, any further questions of SRM at the hearing be brief and limited only to topics/issues identified in advance through their written questions. Our purpose is not to limit CiViK's ability to ask questions, but rather to ensure that the August 5th hearing is as efficient as possible with the goal of reaching a final decision on an approvable design. Finally, we cannot agree with Ms. Nahon's request in comment 6 that SRM's answers to CiViK's questions contain no legal arguments. Because the Council made no request for the parties to exchange written questions/answers, but instead assented to CiViK's request that it be permitted

to submit written questions to SRM, it is a mischaracterization to assert that the Council requested only facts. In any case, because the key questions at issue have been and remain how the Project design conforms to the adopted criteria for approval, we anticipate that it will be necessary to some degree to include legal analysis in our responses.

Finally, it is worth stating that this letter is not intended as SRM's response to the events at the July 1, 2008 hearing or the subsequent correspondence between counsel for CiViK, Richard Aramburu, and the City Attorney, Robin Jenkinson. We intend to respond separately to those events.

Very truly yours,



Molly A. Lawrence

MAL:mal

cc: Andy Loos
Rick Aramburu, CiViK

From: Bea L. Nahon CPA [mailto:Bea.Nahon@nahoncpa.com]
Sent: Friday, July 11, 2008 9:11 AM
To: mlawrence@GordonDerr.com
Cc: Rick Aramburu; andy@srmdevelopment.com; Ellen Miller-Wolfe
Subject: Merrill Gardens/BOA - Letter faxed from Molly Lawrence this morning

[Ellen - Please be aware that this is being sent to a limited distribution list, consistent with the list that the referenced fax was sent to. I will rely on you to forward to others in the broader distribution list, including the City Council, if and as appropriate. Thank you!]

Dear Molly,

We've received a copy of your letter of July 9 and it is good to note that there are many points of process which we agree on. The questions, due from CiViK today, are in the final stage of subcommittee review and should be transmitted by mid-day today.

Some points of clarification to respond to your July 9 letter:

First, we do hope that further questions of SRM that will take place at the hearing on August 5 will be brief. We appreciate that the City has provided us with the opportunity to pose questions and receive answers in advance of that date. This interim process will be helpful, we think, for the parties and will also enable the Council to see the information in their packet prior to August 5. However, we cannot be limited "only to topics/issues identified in advance through their written questions." It is reasonable to expect that when the last set of materials is provided by SRM, there will likely be follow-up questions which emanate from those materials. In addition, there may be additional questions which are prompted by information, if any, which is presented that evening.

Also, with regard to whether or not legal arguments would be included in the interim materials, I asked Ellen to look into this, and the direction that I've received is that until the Council meets, we can't know what their preference is (i.e. as to what it wants to see or not see in this regard.) Of course, by that time, the interim period will have elapsed and so we must use our best judgment in making the determination. We think that it will simplify and enhance the process for the Council if the interim materials are focused on fact-finding. If you believe that is not reasonable to limit the materials in that fashion, and if you anticipate that it will be necessary to include legal analysis in your responses, then please advise and our materials will be presented similarly. We are prepared to keep this interim part of the process limited to fact-finding. Please advise at your earliest opportunity and not later than July 18 when the responses to the 1st set of questions are transmitted to us.

One other procedural question that has come up, is the issue of whether Council members and staff may be posing questions during the interim period. This was alluded to in a reply from Councilmember Greenway and possibly in the first paragraph of your July 9 letter (although you may have been referring solely to the August 5 meeting). If the Council and staff wish to pose questions between now and August 5, that is fine with us, provided that all correspondence to and from Council and to and from Staff are sent simultaneously to all parties. Please let us know your thoughts. Also please note that as of this writing, we have not received a copy of any questions from Councilmembers or Staff, so if you have received any, please let us know and please forward a copy to me.

As a closing item, we received your fax of July 9, which was forwarded to us by Rick Aramburu. However, please take note that he will be traveling and away from e-mail or fax connections and so it is essential that all correspondence includes me, on behalf of CiViK, as a copied recipient. My e-mail address is bea.nahon@nahoncpa.com, my work number is (425) 828-4747 and my direct fax number is (425) 696-0032.

Thank you,
Bea

Questionnaire re: Bank of America/Merrill Gardens
Appeal of Design Review Board
File No. APL08-00001

Submitted by: Citizens for a Vibrant Kirkland (CiViK)
Submitted to: SRM Development LLC
Copies to: J. Richard Aramburu (Counsel for CiViK)
Molly Lawrence (Counsel for SRM)
City of Kirkland staff: Robin Jenkinson, Ellen Miller Wolfe, David
Ramsay, Eric Shields, Janice Soloff; Cheri Aldred, Kathi Anderson

Date submitted: July 11, 2008
Response date: July 18, 2008

Note: As appellant, we are not sending this directly to the City Council. It needs to be provided to them, however, as part of the total package for the continued hearing on August 5, 2008. Thank you for your assistance.

As indicated to the City Council prior to the July 1 meeting, our recommendation was that the revised proposal should have been evaluated by the Design Review Board (DRB). Among the reasons for that request, was so that public input would be included as part of the process. Accordingly, we have invited the public to contribute questions, which have been incorporated along with ours.

Also, as noted in recent correspondence, Mr. Aramburu will be on vacation for part of this month and not able to access his e-mail. Accordingly, please include Bea Nahon (for CiViK) in the cc list of all replies and followup so that your information is received promptly. Her contact information is at the end of this memo. Thank you!

Thank you in advance for your attention to the attached, and we look forward to your responses.

The questions are on the attached pages, as follows:

1. Bank of America
2. Drive-Thru
3. Parking and traffic
4. Plans and documents
5. Setbacks and stepbacks
6. Retail spaces
7. Residential units
8. Exterior design
9. Questions posed by the City of Kirkland

July 11, 2008, CiViK to SRM

1. Bank of America

- a. How many square feet (gross floor area) will the bank occupy?
- b. Please indicate specifically which space the bank will occupy and which space the Café will occupy.
- c. Please provide a copy of the Purchase and Sale Agreement between Bank of America and SRM Development LLC (or RDMSRMK 101 LLC) or their affiliates, as well as any addendums, amendments, etc.
- d. How many lineal feet of frontage will the Bank have (i) on Lake Street and (ii) on Kirkland Avenue?
 - i. For item d, please provide (A) the amounts based on plans with the Café on Lake Street and (B) without the Café on Lake Street.
 - ii. Please also indicate the number of lineal feet of frontage the Bank would have had on Lake Street and on Kirkland Avenue in the proposal as initially approved by the DRB
- e. Please describe the Bank's signage (design and locations)

July 11, 2008, CiVIK to SRM

2. Drive-Thru

- a. Will the drive-thru be designed to be staffed by a bank employee or will it be a drive-up ATM?

- b. Please provide line-of-sight information which considers visual ability for a vehicle entering and exiting the drive-through as it relates to other vehicles which are simultaneously entering and exiting:
 - i. The garage for this property
 - ii. The McLeod garage
 - iii. Loading docks of both properties

- c. As vehicles (A) enter the drive-thru from the alley and (B) return to the alley from the drive-thru, will right-turns and left-turns be permitted, or will turns be restricted?

- d. If an eastbound drive-through is being considered (as suggested by the City as a possible alternative) please provide answers to items b & c with that configuration

July 11, 2008, CiViK to SRM

3. Parking and traffic

- a. Indicate the total number of parking spaces and the supporting calculation as required to comply with the Kirkland Zoning Code (such as was provided previously by the report from Thang Nguyen).

- b. Of the total number of spaces, indicate the number of spaces which will be reserved at any point of the day for the use by the following (if the reserved parking spaces will be available to the general public during part of the day, indicate which spaces and which hours):
 - i. Bank of America
 - ii. The other spaces indicated as Retail or Café
 - iii. Residents of Merrill Gardens
 - iv. Guests of Merrill Gardens
 - v. Merrill Gardens operations

- c. On July 1, you indicated that the Bank will have 40 restricted parking spaces. Previous documents indicated that the Bank needed 16 spaces, which was consistent with 1 space for every 350 square feet. Please explain why the Bank has this increased requirement (i.e. 40 spaces instead of 16 spaces).

- d. Will any of the parking spaces be owned by the Bank or by any other user? If so, please indicate the number of spaces and which spaces will be directly owned and by whom.

- e. When traffic exits the alley onto Lake Street, will vehicles be restricted to a right-turn only, or will left-turns be permitted?

July 11, 2008, CiViK to SRM

4. Plans and documents

- a. Please provide the following documents that would be comparable to those submitted to the Design Review Board:
 - i. "Project data" – a grid, comparable to Page 24 of Attachment 4 from your presentation at the January 3, 2008 DRB meeting, which shows the square footage for each floor, by type of use, unit distribution, parking calculations, etc. For reference, please see CiViK Exhibit 132, or Page 24 of http://www.ci.kirkland.wa.us/_shared/assets/Bank_of_America_DRB_Attachment_47609.pdf
 - ii. Similarly, plans for each floor such as were included as Pages 25 through 31, inclusive, of the same document from the January 3, 2008 meeting, including the same type of information as was included there (e.g. square footage, unit type, etc.) This was also presented, from the original submittal, as CiViK exhibit 131.

July 11, 2008, CiViK to SRM

5. Setbacks and setbacks

- a. Please provide the amounts of setbacks from the property line for each floor:
 - i. On the Lake Street side of the property

 - ii. On the Kirkland Avenue side of the property

- b. Similarly as to item (a), please provide the amounts of setbacks from floor to floor on the Lake Street and Kirkland Avenue sides of the property.

July 11, 2008, CiViK to SRM

6. Retail spaces

- a. Please provide the square footage, not including any load, of each retail space.

- b. Please indicate which of the retail spaces you would be willing to record with a binding covenant for retail and/or café use (i.e. that could not be otherwise converted to Bank, Merrill Gardens' operations or common area, or non-retail). For any spaces that you are willing to covenant for retail and/or café use, indicate the number of years that you would be willing to have the binding covenant(s) run.

July 11, 2008, CiViK to SRM

7. Residential Units

- a. How many residential units are included in the revised plan and how many total bedrooms?

- b. Will these units be rental apartments or condominiums?

- c. We note that the impact fees were paid to the City based on the rate for "Senior Housing"
 - i. What is the minimum age requirement for residency in this project?

 - ii. Will there be a covenant for the Senior Housing use?

July 11, 2008, CiViK to SRM

8. Exterior design

- a. In the plan as initially approved, the Café space on Lake Street was an elevated one-story structure to improve the visual appeal of the building on Lake Street. As submitted now, the space (either as café or bank at the street level) is two stories. Can the one-story Café' feature be reinstated?

- b. Please provide the plans for the rooftop appurtenances, including location and height. If any variances will be required, please describe in detail as to the amount and nature of the variance, the reason for the variance, the placement, and the additional height.

July 11, 2008, CiVIK to SRM

9. Questions posed by the City of Kirkland

Please respond to the questions which have been posed thus far by the City's staff (see correspondence from Ellen Miller Wolfe or other City staff), which are incorporated herein by reference.

Thank you in advance for your responses to these requests. If you need clarification of any of these questions, please contact Bea Nahon at bea.nahon@nahoncpa.com. Also, please note her direct fax number at 425-696-0032.



July 18, 2008

Ms. Ellen Miller-Wolfe
Economic Development Manager
City of Kirkland
123 5th Avenue
Kirkland, WA 98033

Re: Response to Questions from CiViK
Merrill Gardens/BOA
Appeal of Design Review Board Decision
File No. APL08-00001

Dear Ms. Wolfe:

Enclosed please find SRM Development's responses to the questions submitted by the Appellants' CiViK on July 11, 2008. As context and background for our responses, we are including this cover letter summarizing our proposed modifications to the Merrill Gardens/BOA Project design. Since the July 1, 2008 Council meeting, and in response to comments from Council members during that meeting, SRM has further revised its modified design as follows:

- SRM has restored the Café to the south corner of Lake Street. The Café is the same size and configuration as originally approved by the DRB.
- SRM has restored the drive through to its original location. The drive-through is the same size and configuration as originally approved by the DRB.
- By restoring these two design elements, the ground floor of the Project remains the same as the ground floor design originally approved by the DRB. The amount of parking provided remain unchanged from the original DRB approval.
- As explained during the July 1, 2008, Council meeting, SRM has revised the Project to increase the step backs between the 2nd and 3rd, 3rd and 4th, and 4th and 5th stories.
- In response to the comments during the July 1, 2008 Council meeting, SRM has further increased the setbacks and step backs for the 5th story. Under the proposed modified design, the 5th story setback ranges from a minimum of 99'7" to a maximum of 119'1"

measured from the property line (or 107'4" to 126'8" from the curb), and 5th story step back from the 4th story ranges from a minimum of 70'11" to a maximum of 74'2".

As modified, SRM has conceptualized the Project as two independent buildings. As the Council has discussed, the subject property is approximately 300 feet deep and consequently, it should be considered as multiple separate buildings. (This is the case on the north side of Kirkland Avenue.) SRM is proposing to construct only a total of 4 stories over the western building, which contains the bank, drive through and café on the ground floor; and to construct 5 stories over only the eastern building, which contains all superior retail spaces on the ground floor. See attached Exhibit 4. As a result, no 5th story will be located over any portion of the building containing spaces that the Council has indicated may not qualify as superior retail spaces (i.e., the bank use and the drive through).

As part of this concept, SRM has maintained the public plaza and all of the superior retail space design elements on the western building. In other words, we have continued to provide the necessary design elements to qualify for a 5th story over the western building, but have eliminated the 5th story over that building. Further, SRM has also maintained all superior retail design elements within the eastern building.

We are hopeful that this letter will help both CiViK and the Council understand the modified Project design as currently proposed. Please let us know if you, any other member of City Staff, or the City Council have questions about the modified Project design or any other related matter.

Very truly yours,



Molly A. Lawrence

MAL:mal

Enclosure

cc: Bea Nahon, CiViK
Rick Aramburu, Counsel for CiViK
Andy Loos, SRM
Jim Rivard, SRM
Robin Jenkinson, City Attorney

Questionnaire re: Bank of America/Merrill Gardens
Appeal of Design Review Board
File No. APL08-00001

Submitted by: Citizens for a Vibrant Kirkland (CiViK)
Submitted to: SRM Development LLC
Copies to: J. Richard Aramburu (Counsel for CiViK)
Molly Lawrence (Counsel for SRM)
City of Kirkland staff: Robin Jenkinson, Ellen Miller Wolfe, David
Ramsay, Eric Shields, Janice Soloff; Cheri Aldred, Kathi Anderson

Date submitted: July 11, 2008

Responses from SRM submitted: July 18, 2008

The questions are on the attached pages, as follows:

1. Bank of America
2. Drive-Thru
3. Parking and traffic
4. Plans and documents
5. Setbacks and stepbacks
6. Retail spaces
7. Residential units
8. Exterior design
9. Questions posed by the City of Kirkland

July 11, 2008, CiViK to SRM

July 18, 2008 Responses from SRM to CiViK

1. Bank of America

- a. How many square feet (gross floor area) will the bank occupy?

5,700 SF

- b. Please indicate specifically which space the bank will occupy and which space the Café will occupy.

Café – Retail Space 1

Bank – Retail Space 2

- c. Please provide a copy of the Purchase and Sale Agreement between Bank of America and SRM Development LLC (or RDMSRMK 101 LLC) or their affiliates, as well as any addendums, amendments, etc.

The contract between Bank of America (BOA) and SRM is proprietary and not subject to discovery through this appeal process. In any case, all components of the Purchase and Sale Agreement relevant to the design of the proposed Merrill Gardens/BOA Project have been integrated into the Project design.

- d. How many lineal feet of frontage will the Bank have (i) on Lake Street and (ii) on Kirkland Avenue?

Following the July 1, 2008, Council meeting, and in response to comments from Council during that meeting, SRM has returned to the original ground floor design (as approved by the DRB). SRM is not proposing any modification to the lineal feet of frontage for any of the retail spaces on either Lake Street or Kirkland Avenue.

- i. For item d, please provide (A) the amounts based on plans with the Café on Lake Street and (B) without the Café on Lake Street.

Lake Street

Retail Space 1/Café – 44'-6"

Retail Space 2/Bank – 42'-6"

Kirkland Avenue

Retail Space 1/Café – none

Retail Space 2/Bank – 79'-0"

Retail Space 3 – 74'-0"

Retail Space 4 – 70'-2"

- ii. Please also indicate the number of lineal feet of frontage the Bank would have had on Lake Street and on Kirkland Avenue in the proposal as initially approved by the DRB

Following the July 1, 2008, Council meeting, and in response to comments from Council during that meeting, SRM has returned to the original ground floor design (as approved by the DRB).

- e. Please describe the Bank's signage (design and locations)

There is currently no design for the signage. SRM anticipates that BOA will apply for permits for signage as part of its tenant improvement permits. That application will be subject to applicable City codes in effect at that time.

July 11, 2008, CiViK to SRM
July 18, 2008 Responses from SRM to CiViK

2. Drive-Thru

- a. Will the drive-thru be designed to be staffed by a bank employee or will it be a drive-up ATM?

This question is not relevant to the City's review criteria. Nevertheless, SRM understands that the drive-through will be a drive-up ATM.

- b. Please provide line-of-sight information which considers visual ability for a vehicle entering and exiting the drive-through as it relates to other vehicles which are simultaneously entering and exiting:
- i. The garage for this property
 - ii. The McLeod garage
 - iii. Loading docks of both properties

Not applicable. Following the July 1, 2008, Council meeting, and in response to comments from Council during that meeting, SRM has returned to the original ground floor design (as approved by the DRB). Thus, SRM has restored the drive through to the original location/design. All information regarding line-of-site for the original design was previously provided as part of the design review process.

- c. As vehicles (A) enter the drive-thru from the alley and (B) return to the alley from the drive-thru, will right-turns and left-turns be permitted, or will turns be restricted?

Not applicable, see 2b above.

If an eastbound drive-through is being considered (as suggested by the City as a possible alternative) please provide answers to items b & c with that configuration

Not applicable, see 2b above.

July 11, 2008, CiViK to SRM
July 18, 2008 Responses from SRM to CiViK

3. Parking and traffic

- a. Indicate the total number of parking spaces and the supporting calculation as required to comply with the Kirkland Zoning Code (such as was provided previously by the report from Thang Nguyen).

Applying the formula from the previously approved Parking Modification, the Project as modified would be required to provide the following number of parking stalls:

Residential:

**One stall per bedroom plus 0.15 stalls per bedroom for guests is required. As modified, the Project includes 72 residential units with a total of 77 bedrooms, thus 89 stalls are required ($77 + (77 \times 0.15)$).
Total Residential Spaces: 89**

Retail:

**Bank of America: 5,700 SF; one stall per 350 SF equals 16 required stalls ($5,700 \div 350$);
Café' Space: 872 SF; one stall per 125 SF equals 7 required stalls ($872 \div 125$);
Other Retail Space: 5,387 SF; one stall per 350 SF equals 15 required stalls ($5,387 \div 350$);
Total Retail Spaces: 38 (consistent with February 11, 2008 memo from Thang Nguyen for the retail space)**

Subtotal: 127

**Less 3 spaces offset through a prior LID payment
Total Required Parking: 124**

In fact, the Project will provide 134 parking spaces per the approved Parking Modification. Thus, the Project will provide 10 more spaces than would be required if the City were to apply the standards used in the Parking Modification to the Project as modified.

- b. Of the total number of spaces, indicate the number of spaces which will be reserved at any point of the day for the use by the following (if the reserved parking spaces will be available to the general public during part of the day, indicate which spaces and which hours):
- i. Bank of America
 - ii. The other spaces indicated as Retail or Café
 - iii. Residents of Merrill Gardens

- iv. Guests of Merrill Gardens
- v. Merrill Gardens operations

This question is not relevant to the City's review criteria. As explained above, the Project meets the City's code criteria/requirements for number of parking stalls for the Project.

- c. On July 1, you indicated that the Bank will have 40 restricted parking spaces. Previous documents indicated that the Bank needed 16 spaces, which was consistent with 1 space for every 350 square feet. Please explain why the Bank has this increased requirement (i.e. 40 spaces instead of 16 spaces).

There has been no change. In any case, this question is not relevant to the City's review criteria. As explained above, the Project meets the City's code criteria/requirements for number of parking stalls for the Project.

- d. Will any of the parking spaces be owned by the Bank or by any other user? If so, please indicate the number of spaces and which spaces will be directly owned and by whom.

Following completion of the Project, the Bank will purchase the area identified as Retail Space 2 as a condominium unit. The remainder of the building, including all parking, will be owned by SRM.

- e. When traffic exits the alley onto Lake Street, will vehicles be restricted to a right-turn only, or will left-turns be permitted?

City of Kirkland department of Public Works has designated this as non-restricted turning.

July 11, 2008, CiViK to SRM
July 18, 2008 Responses from SRM to CiViK

4. Plans and documents

- a. Please provide the following documents that would be comparable to those submitted to the Design Review Board:
- i. "Project data" – a grid, comparable to Page 24 of Attachment 4 from your presentation at the January 3, 2008 DRB meeting, which shows the square footage for each floor, by type of use, unit distribution, parking calculations, etc. For reference, please see CiViK Exhibit 132, or Page 24 of [http://www.ci.kirkland.wa.us/_shared/assets/Bank of America DRB Attachment 47609.pdf](http://www.ci.kirkland.wa.us/_shared/assets/Bank_of_America_DRB_Attachment_47609.pdf)
 - ii. Similarly, plans for each floor such as were included as Pages 25 through 31, inclusive, of the same document from the January 3, 2008 meeting, including the same type of information as was included there (e.g. square footage, unit type, etc.) This was also presented, from the original submittal, as CiViK exhibit 131.

See Exhibit 1 (attached)

See Exhibit 2 (attached)

July 11, 2008, CiViK to SRM

July 18, 2008 Responses from SRM to CiViK

5. Setbacks and stepbacks

- a. Please provide the amounts of setbacks from the property line for each floor:
- i. On the Lake Street side of the property

See Exhibit 3 (attached)

- ii. On the Kirkland Avenue side of the property

See Exhibit 3 (attached)

- b. Similarly as to item (a), please provide the amounts of stepbacks from floor to floor on the Lake Street and Kirkland Avenue sides of the property.

See Exhibit 3 (attached)

July 11, 2008, CiViK to SRM
July 18, 2008 Responses from SRM to CiViK

6. Retail spaces

- a. Please provide the square footage, not including any load, of each retail space.

Retail 1 – 872 SF

Retail 2 – 5,700 SF

Retail 3 – 2,205 SF

Retail 4 – 3,182 SF

- b. Please indicate which of the retail spaces you would be willing to record with a binding covenant for retail and/or café use (i.e. that could not be otherwise converted to Bank, Merrill Gardens' operations or common area, or non-retail). For any spaces that you are willing to covenant for retail and/or café use, indicate the number of years that you would be willing to have the binding covenant(s) run.

SRM does not believe that it necessary or appropriate to impose covenants on the property as part of this project approval. Please see Section 8 of SRM's April 3, 2008 letter to Council regarding the subject appeal.

July 11, 2008, CiViK to SRM
July 18, 2008 Responses from SRM to CiViK

7. Residential Units

- a. How many residential units are included in the revised plan and how many total bedrooms?

72 Units, 77 Bedrooms

- b. Will these units be rental apartments or condominiums?

They will be permitted as rental units.

- c. We note that the impact fees were paid to the City based on the rate for "Senior Housing"

- i. What is the minimum age requirement for residency in this project?

62 years of age.

- ii. Will there be a covenant for the Senior Housing use?

No, the Project has been reviewed as a "multi-family" project not subject to any particular age restrictions. If in the future SRM were to change the Project to a different use category, SRM would be responsible for paying any additional fees due at that time.

July 11, 2008, CiViK to SRM

July 18, 2008 Responses from SRM to CiViK

8. Exterior design

- a. In the plan as initially approved, the Café space on Lake Street was an elevated one-story structure to improve the visual appeal of the building on Lake Street. As submitted now, the space (either as café or bank at the street level) is two stories. Can the one-story Café feature be reinstated?

No. The current two-story façade along Lake Street is consistent with the City Code, the approved McLeod proposal and direction from the Council. Additionally, it replaces area lost on the 3rd and 4th floors as part of providing greater 3rd and 4th floor step backs, as well as area lost to the dedicated plaza area at the corner of Kirkland Avenue and Lake Street.

- b. Please provide the plans for the rooftop appurtenances, including location and height. If any variances will be required, please describe in detail as to the amount and nature of the variance, the reason for the variance, the placement, and the additional height.

No change to the rooftop appurtenance plan. Please refer to the materials submitted to the DRB.

July 11, 2008, CiViK to SRM
July 18, 2008 Responses from SRM to CiViK

9. Questions posed by the City of Kirkland

Please respond to the questions which have been posed thus far by the City's staff (see correspondence from Ellen Miller Wolfe or other City staff), which are incorporated herein by reference.

Not applicable. Questions from City staff related to the modified drive-through location and its impact. Following the July 1, 2008, Council meeting, and in response to comments from Council during that meeting, SRM has returned to the original ground floor design (as approved by the DRB).

Thank you in advance for your responses to these requests. If you need clarification of any of these questions, please contact Bea Nahon at bea.nahon@nahoncpa.com. Also, please note her direct fax number at 425-696-0032.

EXHIBIT #1

REVISED PROJECT DATA

DATE: 7/18/2008

- 1.1 Location: 101 Kirkland Ave
- 1.2 Site Area: 28,390 SF
- 1.3 Zone: CBD 1B
- 1.5 Proposed Use: Mixed-Use
- 1.6 Type of Construction per IBC:

Residential Bldg: Type 5
 Parking/ Comm: Type 1

1.7 Occupancy Classification per IBC:

Business B
 Residential R-2
 Parking Garage S-2

1.8 Apt. Building Floor Areas (gross):

APT.s	PARKING	RETAIL	RESIDENTIAL	LOBBY/ COMMON/	M & E	CIRCULATION	TOTAL
P2	8,820					466	9,286
P1	23,843			157	417	775	25,192
C1	10,607	8,687		157	956	1100	21,507
C2		3,182		1,094	779	851	5,906
L2			13,490	800		2460	16,750
L3			15,300		50	1970	17,320
L4			14,805		50	1965	16,820
L5			8,535			1695	10,230
Subtotal	43,270	11,869	52,130	2,208	2,252	11,282	123,011*

	Studio +	1BR	2BR	total
L2	3	16	0	19
L3	4	16	1	21
L4	4	14	2	20
L5		10	2	12
	11	56	5	72

*difference in square footage from 1/3/08 data reflects increased square footage for additional parking on new level P2, and decreased square footage from lost residential area on levels L2-L5

2.0 Parking Requirements: (calculated consistent with standards of approved parking modification; see Memo from Thang Nguyen, City of Kirkland Transportation Engineer dated December 26, 2007)

Residential Parking:

1 per bedroom 77 stalls
 15% for guest stalls 12 stalls
89 residential stalls required

Commercial Parking:

restaurant - 1/125 7 stalls required
 retail - 1/350 31 stalls required
total comm. 38

Total Required Parking:

89 + 38 127 stalls required, however the Applicant paid \$15,077.53 into the LID for parking mitigation giving the property a credit of 3 stalls

127 - 3 = **124 stalls**

Actual Total Parking Provided (per approved parking modification):

level	Large	Comp	BF	Total
P2		28		28
P1	22	52	0	74
C1	12	17	3	32
Totals	34	97	3	134

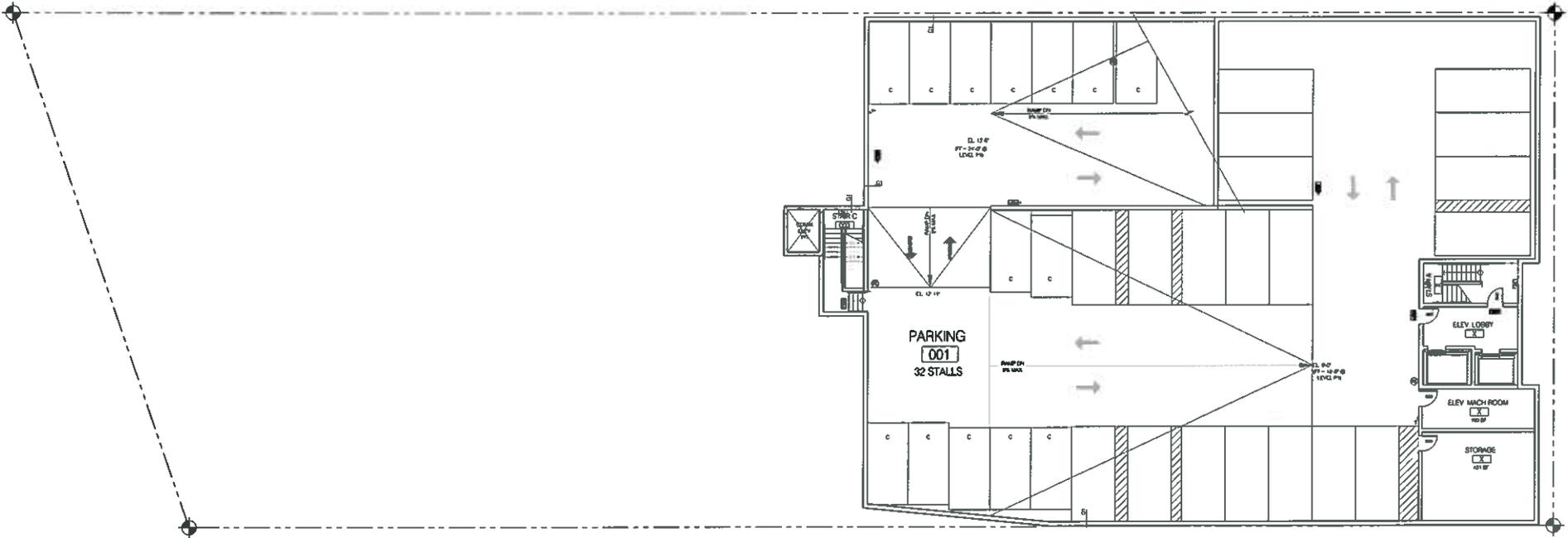
Unit Distribution

Unit Type	%	GSF	# of Units
St.+	15%		11
1/1	78%		56
2/2	7%		5
Total Res. Units			72

Average Unit Size

Res	# of Units	Avg. GSF
52,130	72	724

Allowable height: 55'



***PARKING LEVEL ADDED TO PROVIDE 134 STALLS PER APPROVED PARKING MODIFICATION (ORIGINAL 1/3/08 PLAN ONLY PROVIDED 109 STALLS)**

EXHIBIT #2
101 KIRKLAND AVENUE
 7/18/08



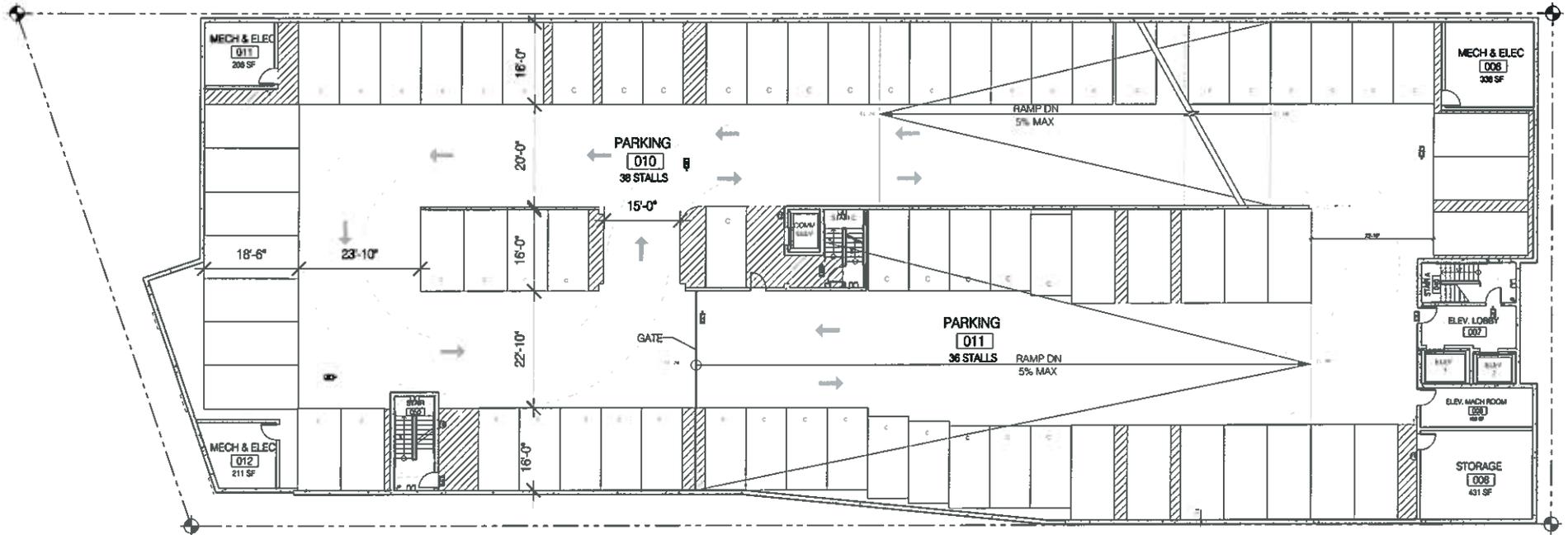


EXHIBIT #2
 101 KIRKLAND AVENUE
 7/18/08

PLAN: LEVEL P1

SCALE: 1/20" = 1'-0"



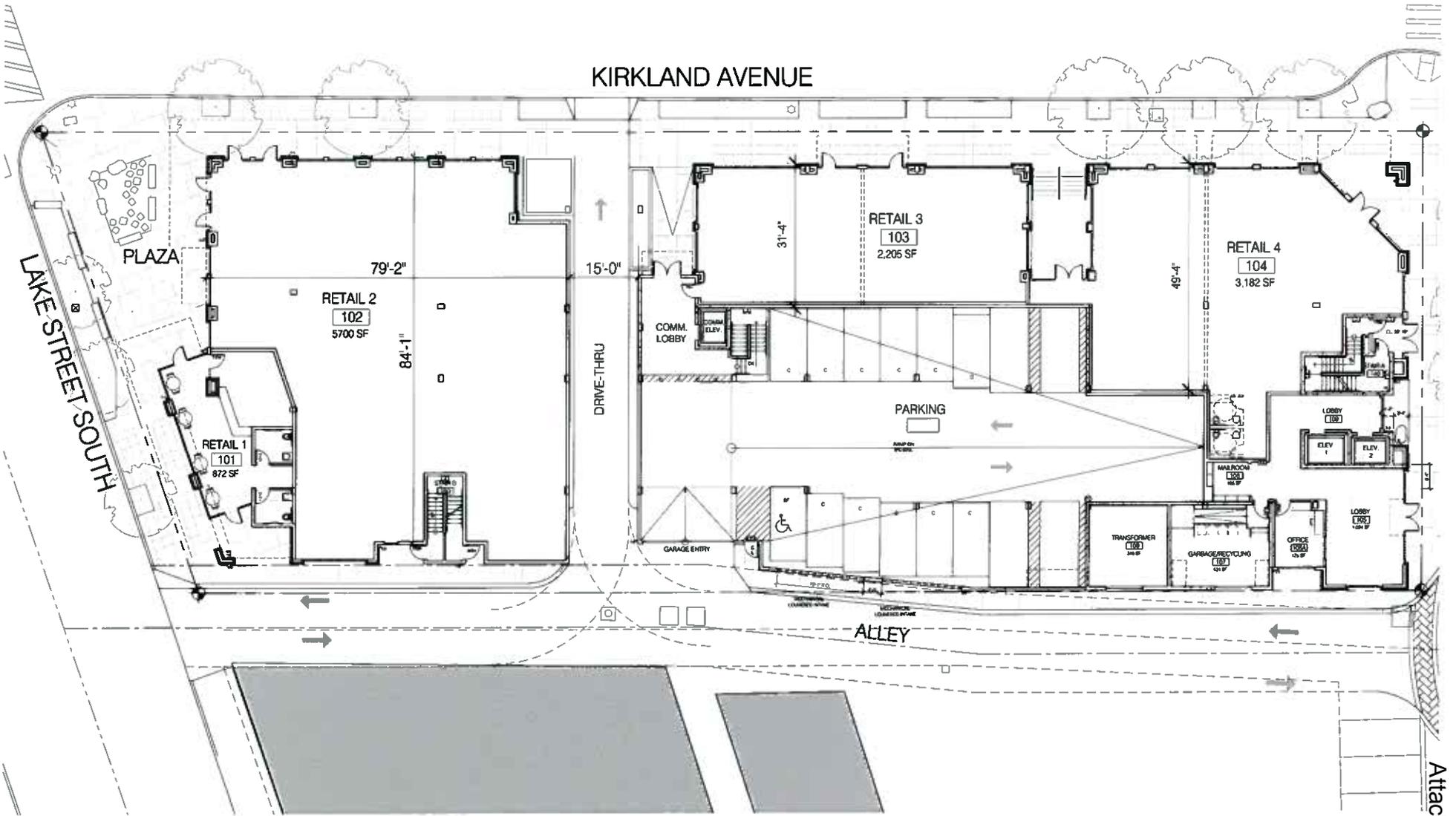


EXHIBIT #2
101 KIRKLAND AVENUE
 7/18/08

PLAN: LEVEL C1 & C2

SCALE: 1/20" = 1'-0"



KIRKLAND AVENUE

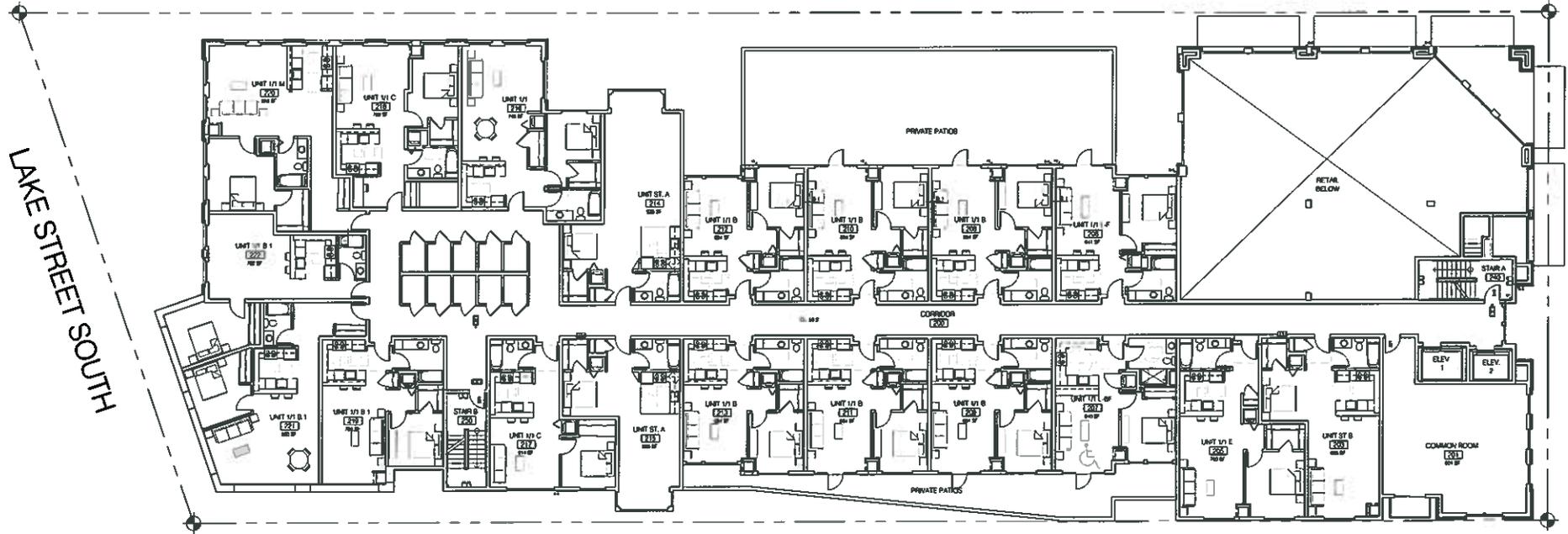
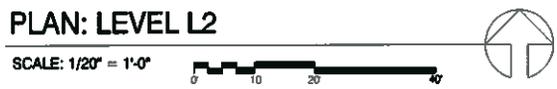


EXHIBIT #2
101 KIRKLAND AVENUE
7/18/08



KIRKLAND AVENUE

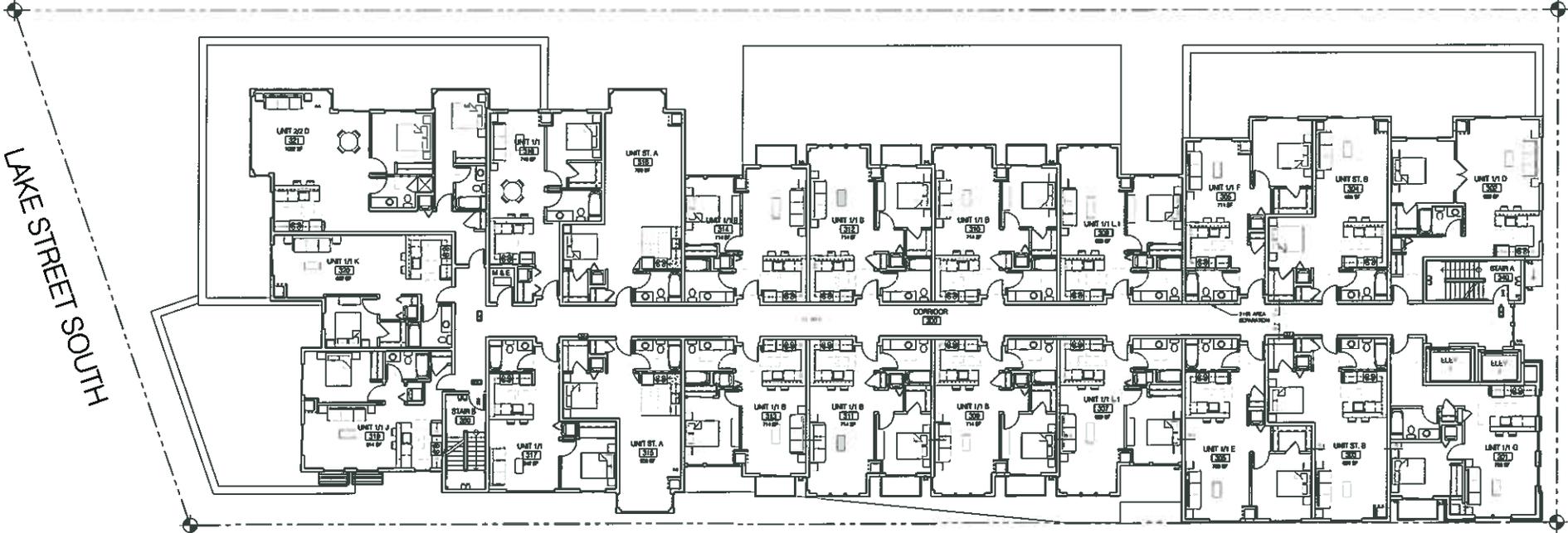


EXHIBIT #2
101 KIRKLAND AVENUE
 7/18/08

PLAN: LEVEL L3

SCALE: 1/20" = 1'-0"



KIRKLAND AVENUE

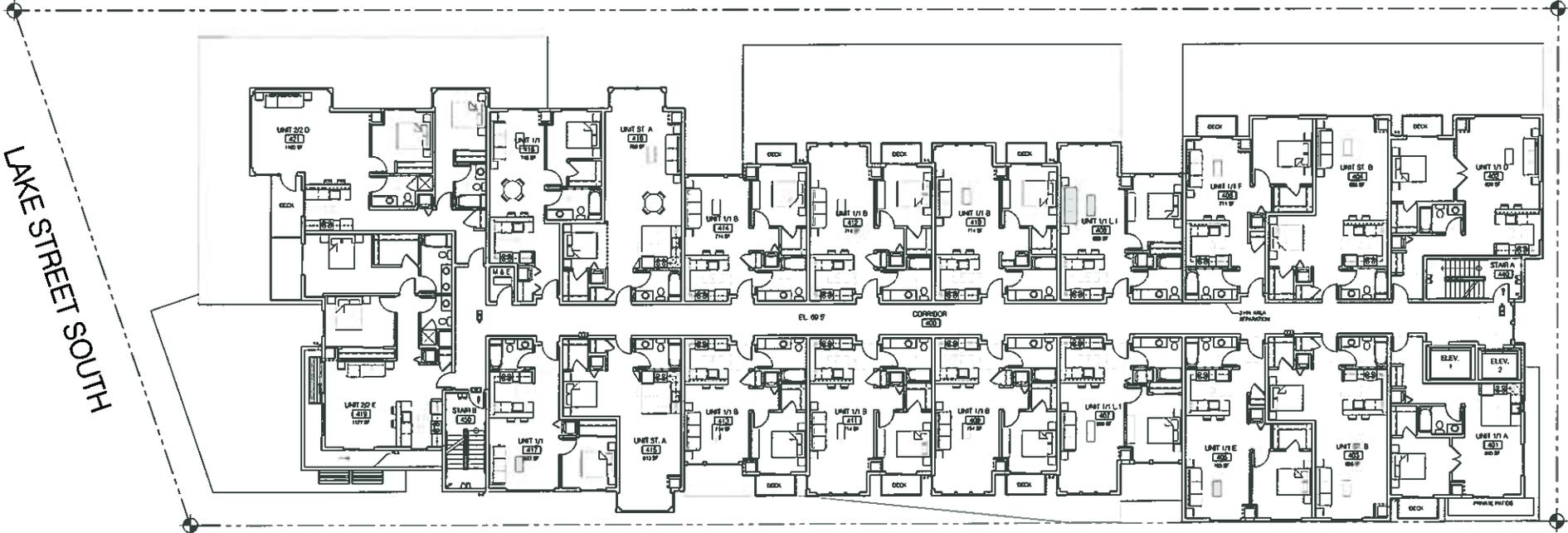


EXHIBIT #2
 101 KIRKLAND AVENUE
 7/18/08

PLAN: LEVEL L4

SCALE: 1/20" = 1'-0"



KIRKLAND AVENUE

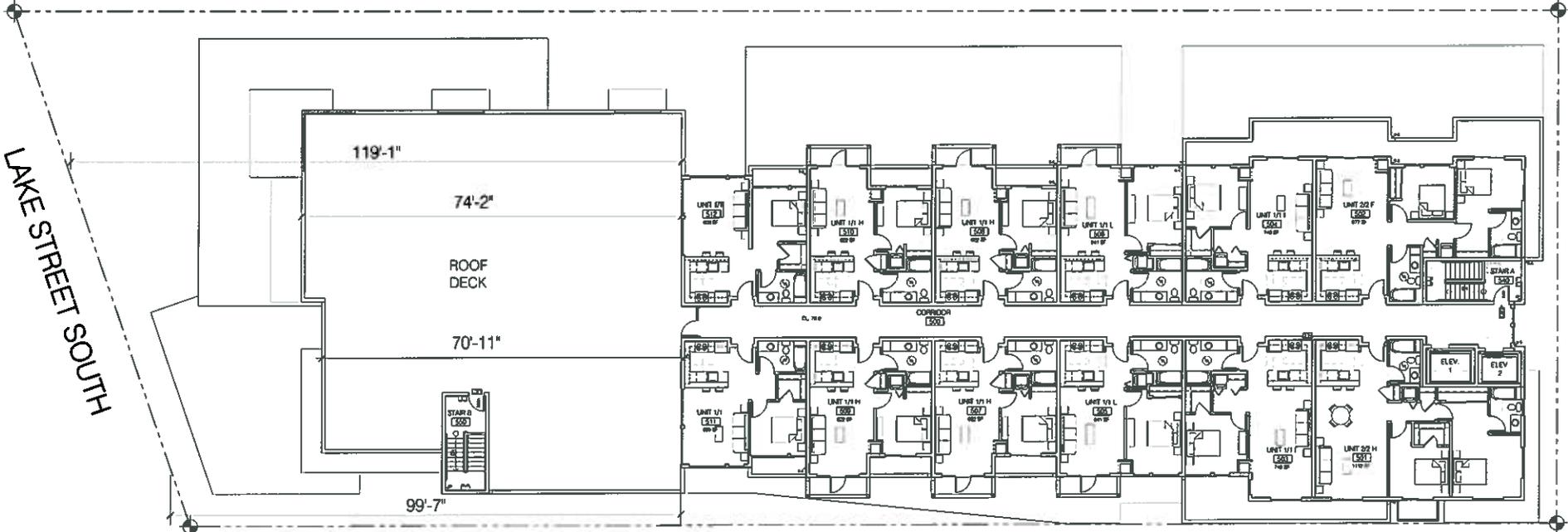


EXHIBIT #2
101 KIRKLAND AVENUE
7/18/08

PLAN: LEVEL L5

SCALE: 1/20" = 1'-0"



EXHIBIT #3

7/18/2008

101 Kirkland Ave.
Setback/Step Back Chart

SETBACKS : the distance from the property line or the curb edge to the face of the building at any given level

STEP BACKS : the distance between the building edge below to the face of a wall above

LAKE STREET FAÇADE

Distance from curb edge to property line: 7'-9"

	Minimum setback from prop line	Maximum setback from prop line	Minimum setback from curb edge	Maximum setback from curb edge	Minimum step back	Maximum stepback
Level 1 & 2	6'-6"	34'-1"	14'-3"	41'-10"	N/A	N/A
Level 3	25'-11"	40'-8"	33'-8"	48'-5"	10'-0"	26'-10"
Level 4	30'-5"	40'-8"	38'-2"	48'-5"	4'-0"	6'-0"
Level 5	99'-7"	119'-1"	107'-4"	126'-10"	70'-11"	74'-2"

KIRKLAND AVENUE FAÇADE

Distance from curb edge to property line: 7'-9"

	Minimum setback from prop line	Maximum setback from prop line	Minimum setback from curb edge	Maximum setback from curb edge	Minimum step back	Maximum stepback
Level 1	5'-3"	6'-10"	13'-0"	14'-7"	N/A	N/A
Level 2	5'-3"	30'-0"	13'-0"	37'-9"	0	23'-2" center bldg
Level 3	15'-1"	30'-0"	22'-10"	37'-9"	10'-0" west bldg	18'-0" east bldg
Level 4	15'-1"	30'-0"	22'-10"	37'-9"	0	0
Level 5	28'-6"	34'-0"	36'-3"	41'-9"	4'-0" center bldg	7'-8" east bldg

EXHIBIT #4

7.18.08



Attachment 6

Follow-up questions

Questionnaire re: Bank of America/Merrill Gardens
Appeal of Design Review Board
File No. APL08-00001

Submitted by: Citizens for a Vibrant Kirkland (CiViK)
Submitted to: SRM Development LLC
Copies to: J. Richard Aramburu (Counsel for CiViK)
Molly Lawrence (Counsel for SRM)
City of Kirkland staff: Robin Jenkinson, Ellen Miller Wolfe, David
Ramsay, Eric Shields, Janice Soloff; Cheri Aldred, Kathi Anderson

Date submitted: July 23, 2008
Response date: See below

Note: As appellant, we are not sending this directly to the City Council. It needs to be provided to them, however, as part of the total package for the continued hearing on August 5, 2008. Thank you for your assistance.

The attached follow-up questions are being submitted in accordance with the procedures recommended by the City for this interim period between the July 1 and August 5 Council meetings.

As with the initial set of questions submitted on July 11, we have invited the public to contribute questions so that the public could be included as part of the process. Their questions have been incorporated along with ours.

With regard to the response date, our understanding is that the response will be submitted so that it arrives in time to be included in the City Council's packet and that we will receive a copy at the same time as transmitted to the City.

Finally, note that Mr. Aramburu is on vacation and is not able to access his e-mail. Accordingly, please include Bea Nahon (for CiViK) in the cc list of all replies and followup so that your information is received promptly. Her contact information has been provided previously.

Thank you in advance for your attention to the attached and we look forward to your responses.

The questions are on the attached pages, as follows:

1. Parking
2. Rooftop appurtenances
3. Roof deck

July 23, 2008, CiViK to SRM

1. Parking and traffic

These 2 questions were posed in our July 11 submission, but the applicant did not respond. We are asking for the courtesy of complete responses to these questions so as to better understand the functionality of the parking for the project as it relates to the various occupants and uses.

- a. Of the total number of spaces (134, as per the July 18 response), indicate the number of spaces which will be reserved or restricted at any point of the day for the use by the following (if the reserved parking spaces will be available to the general public during part of the day, indicate which spaces and which hours):
 - i. Bank of America
 - ii. The other spaces indicated as Retail or Café
 - iii. Residents of Merrill Gardens
 - iv. Guests of Merrill Gardens
 - v. Merrill Gardens operations

- b. On July 1, you indicated that the Bank will have 40 restricted parking spaces. Previous documents indicated that the Bank needed 16 spaces, which was consistent with 1 space for every 350 square feet. Please explain why the Bank has this increased requirement (i.e. 40 spaces instead of 16 spaces).

July 23, 2008, CiViK to SRM

2. Rooftop Appurtenances

- a. Please provide the plans for the rooftop appurtenances, including location and height. If any variances will be required, please describe in detail as to the amount and nature of the variance, the reason for the variance, the placement, and the additional height.

This question was included in the July 11 submission. The response was that there was no change to the rooftop appurtenance plan and we were asked to refer to the materials submitted to the DRB.

We contacted Planning and we were referred to Slide 28 of the November 2007 DRB packet. We also located information in Slide 10 of the January 2008 DRB packet. However, these slides have a limited amount of summarized data and are not responsive to the question as posed.

Due to the variances which were allowed by the Planning Department and installed by the developer on the adjoining Merrill Gardens property without required notice to the adjacent property owners, there is concern about this current proposal. Please refer to attached correspondence dated June 12, 2008. To prevent this from re-occurring and to provide assurance that appurtenances will be at or below the 4-foot and 10% limitations, the courtesy of responding to this question will be appreciated. If a full plan is not feasible at this time, at least please advise if variances to the height and percentages will be requested.

July 23, 2008, CiViK to SRM

3. Rooftop Deck

Referring to the responses provided on July 18:

- a. The plans for the fifth story (Exhibit 3, L5) and the drawing in Exhibit 4, indicate a stairway structure on the south side of the fifth-story rooftop deck, in the section of the project over the bank's space. Please provide the dimensions for this structure (height, depth, width).

- b. The rooftop deck will require a secure perimeter for the safety of its users. Referring to the drawing in Exhibit 4, as well as to prior drawings submitted to the DRB, it appears that this will be accomplished with a partial wall on the 5th story on the west, south and north sides of the project. Please confirm, or advise if some other design is intended.

Please also indicate the height of the partial wall (or guard rail, etc.)



June 12, 2008

Mr. Al Wilson
108 Second Ave So #301
Kirkland WA 98033

Dear Mr. Wilson,

Re: Merrill Gardens Rooftop Appurtenances at 201 Kirkland Avenue, BLD07-00152

This letter is in response to your email of June 3, 2008 regarding your concerns about the height and massiveness of the rooftop appurtenance screening for the Merrill Gardens project under construction at 201 Kirkland Avenue. I hope this clarifies the decision making process that went into the review and approval of the rooftop screening.

Kirkland Zoning Code Section 115.120 establishes that rooftop appurtenances may exceed the applicable height limitation by a maximum of four feet if the area of all appurtenances and screening does not exceed 10% of the total area of the building footprint. Modifications to allow taller screening or size of area may be approved by the Planning Official if certain criteria are met and noticing to adjacent property owners is given to allow for comment before making a decision.

During the Design Review process the Design Review Board (DRB) reviewed proposed plans for 4' tall screening surrounding the rooftop mechanical units. As a result of public comments expressed to the DRB, concerning the close proximity of the Merrill Gardens building to the Kirkland Central and Portsmouth buildings, a condition of approval of the DRB decision required an acoustical study of the noise levels of the proposed air conditioning vents and other exhaust ventilation systems.

During building permit review an acoustical study (SSA report dated 2/16/07) was submitted and noted that a few of the units would exceed the City of Kirkland nighttime noise limit. The study recommended that the noise mitigation measures be incorporated into the units such as noise barriers installed 2 feet above the top of the particular units, additional thickness in the materials, 2 inch thick duct liner and a silencer.

Based on the recommendations of the acoustical study I approved a modification to allow the additional 2 foot high screening above the applicable units. I acknowledge that I missed a step in the process by not first noticing the property owners and allowing for comment before making my decision. I don't think this would have changed the results; however, I apologize for the oversight.

In response to your email, I contacted the architects to see if there was anything that could be done to lower or reduce the amount of screening and still meet the recommendations of the acoustical study. The architect responded that no there wasn't and that they had made considerable expense in installing the screening as approved.

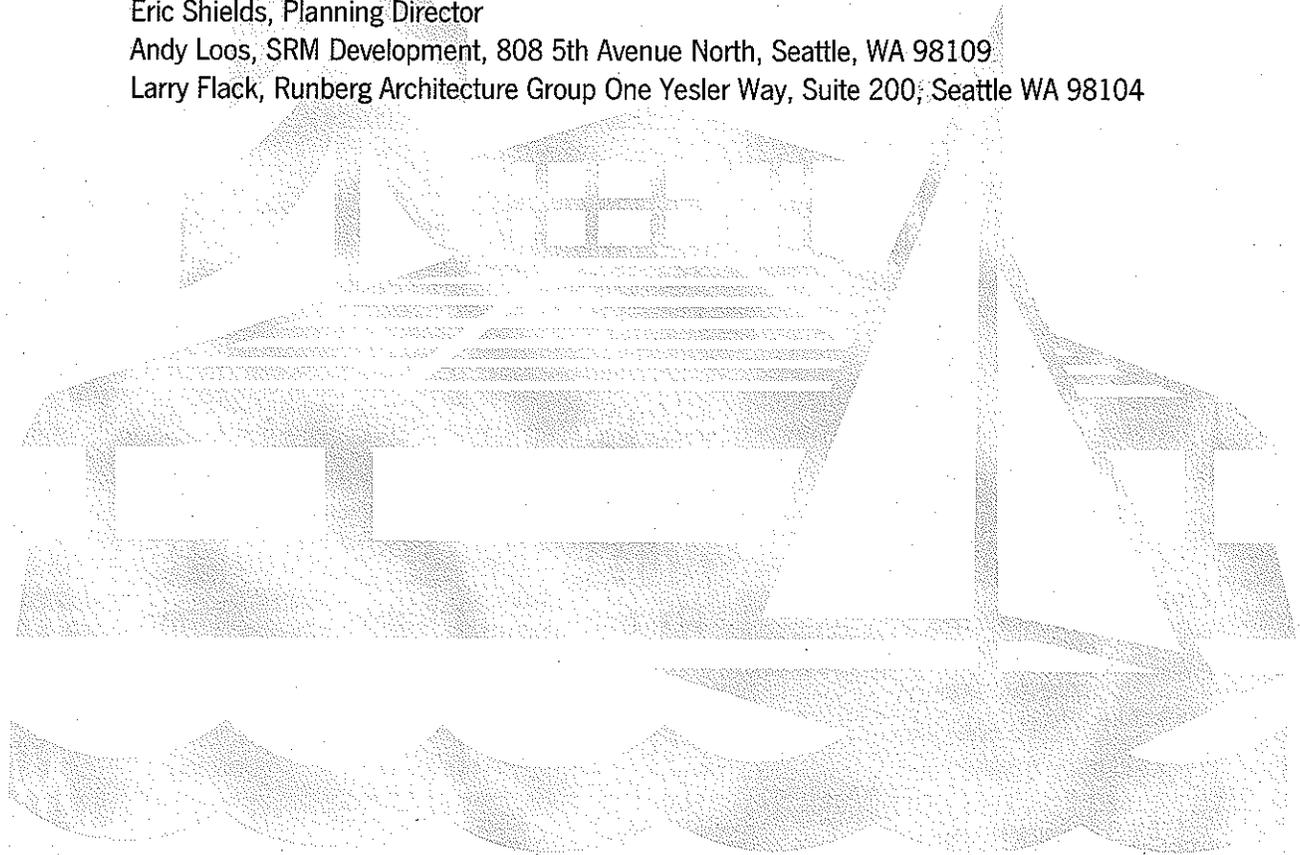
Thank you for bringing this to our attention. In the future, the department will make an extra effort to advise architects to anticipate the size and quantity of mechanical units early on in the design of their projects. We will also assure that proper notice is given when increased height for mechanical units is requested. If you have additional questions about this matter, please feel free to contact me at 425-587-3257 or jsoloff@ci.kirkland.wa.us.

Sincerely,
PLANNING AND COMMUNITY DEVELOPMENT



Janice Soloff, AICP
Senior Planner

Cc: Mayor Jim Lauinger
Dave Ramsay, City Manager
Eric Shields, Planning Director
Andy Loos, SRM Development, 808 5th Avenue North, Seattle, WA 98109
Larry Flack, Runberg Architecture Group One Yesler Way, Suite 200, Seattle WA 98104



July 25, 2008

Ms. Ellen Miller-Wolfe
Economic Development Manager
City of Kirkland
123 5th Avenue
Kirkland, WA 98033

Re: Response to Additional Questions from CiViK
Merrill Gardens/BOA
Appeal of Design Review Board Decision
File No. APL08-00001

Dear Ms. Wolfe:

Enclosed please find SRM Development's response to the supplemental questions submitted by CiViK on July 23, 2008. In addition to these responses, SRM is enclosing additional renderings of the final *modified* design for the Merrill Gardens/BOA Project at 101 Kirkland Avenue. To reiterate, the final *modified* design includes the following components:

- SRM restored the Café to the south corner of Lake Street. The Café is the same size and configuration as originally approved by the DRB.
- SRM restored the drive through to its original location. The drive-through is the same size and configuration as originally approved by the DRB, and includes all of the safety related features required by the DRB.
- By restoring these two design elements, the ground floor of the Project remains the same as the ground floor design originally approved by the DRB. The amount of parking provided remains unchanged from the original DRB approval.
- As explained during the July 1, 2008, Council meeting, SRM revised the Project to increase the step backs between the 2nd and 3rd, 3rd and 4th, and 4th and 5th stories. *See Exhibit 3 for a complete listing of the setbacks and step backs from Lake Street and Kirkland Avenue.*
- In response to the comments during the July 1, 2008 Council meeting, SRM further increased the setbacks and step backs for the 5th story. Under the proposed modified design, the 5th story setback ranges from a minimum of 99'7" to a maximum of 119'1"

measured from the property line (or 107'4" to 126'8" from the curb), and 5th story step back from the 4th story ranges from a minimum of 70'11" to a maximum of 74'2". See *Exhibit 3 for a complete listing of the setbacks and step backs from Lake Street and Kirkland Avenue.*

As we explained in our July 18, 2008, letter, SRM has conceptualized the final modified Project as two independent buildings. As the Council has discussed, the subject property is approximately 300 feet deep and consequently, it should be considered as multiple separate buildings. (This is the case on the north side of Kirkland Avenue.) SRM is proposing to construct only a total of 4 stories over the western building, which contains the bank, drive through and café on the ground floor; and to construct 5 stories over only the eastern building, which contains all superior retail spaces on the ground floor. See *Corrected Exhibit 4*. As a result, no 5th story will be located over any portion of the building containing spaces that the Council has indicated may not qualify as superior retail spaces (i.e., the bank use and the drive through).

As part of this concept, SRM has maintained the public plaza and all of the superior retail space design elements on the western building. In other words, we have continued to provide the necessary design elements to qualify for a 5th story over the western building, but have eliminated the 5th story over that building. Further, SRM has also maintained all superior retail design elements within the eastern building. As depicted by the enclosed renderings, the final Project design as modified will have significantly less visual impact than the neighboring McLeod project, which the Council approved July 15, 2008. See *Exhibit 5*.

We are hopeful that these materials, together with the plan view drawings submitted July 18, 2008, make clear SRM's final proposed modified Project design. Please let us know if anyone at the City has clarifying questions before the August 5, 2008, Council Meeting.

Finally, as we have stated before, SRM is eager to have the Council identify a project design that it will approve for the subject site. During the July 1, 2008, Council Meeting, a motion was made to remand this Project to the Design Review Board (DRB). That motion failed. SRM objects to any further proposal to remand the Project back to the DRB. There is no question under the Kirkland Zoning Code that the Council has the authority to consider and approve a modified Project design. By comparison, the Code does not provide the Council the option to remand this matter to the DRB. KZC 142.40(11)(b). Equally important, absent complete direction from the Council, a remand would be inefficient and unfair. At this point, neither SRM, nor the DRB, yet knows what the Council believes is an approvable design for this site. Thus, SRM reiterates its request that the Council render a final decision regarding the proposed Project as modified. We believe that the proposed Project as modified meets all applicable criteria and, therefore, request that the Council approve this final design.

Thank you very much for your consideration. We look forward to the August 5, 2008, Council Meeting.

Very truly yours,



Molly A. Lawrence

MAL:mal

Enclosures

cc: Bea Nahon, CiViK
Rick Aramburu, Counsel for CiViK
Andy Loos, SRM
Jim Rivard, SRM
Robin Jenkinson, City Attorney

Follow-up questions

Questionnaire re: Bank of America/Merrill Gardens
Appeal of Design Review Board
File No. APL08-00001

Submitted by: Citizens for a Vibrant Kirkland (CiViK)
Submitted to: SRM Development LLC
Copies to: J. Richard Aramburu (Counsel for CiViK)
Molly Lawrence (Counsel for SRM)
City of Kirkland staff: Robin Jenkinson, Ellen Miller Wolfe, David
Ramsay, Eric Shields, Janice Soloff, Cheri Aldred, Kathi Anderson

Date submitted: July 23, 2008
Response date: **July 25, 2008**

Note: As appellant, we are not sending this directly to the City Council. It needs to be provided to them, however, as part of the total package for the continued hearing on August 5, 2008. Thank you for your assistance.

The attached follow-up questions are being submitted in accordance with the procedures recommended by the City for this interim period between the July 1 and August 5 Council meetings.

As with the initial set of questions submitted on July 11, we have invited the public to contribute questions so that the public could be included as part of the process. Their questions have been incorporated along with ours.

With regard to the response date, our understanding is that the response will be submitted so that it arrives in time to be included in the City Council's packet and that we will receive a copy at the same time as transmitted to the City.

Finally, note that Mr. Aramburu is on vacation and is not able to access his e-mail. Accordingly, please include Bea Nahon (for CiViK) in the cc list of all replies and followup so that your information is received promptly. Her contact information has been provided previously.

Thank you in advance for your attention to the attached and we look forward to your responses.

The questions are on the attached pages, as follows:

1. Parking
2. Rooftop appurtenances
3. Roof deck

July 23, 2008, CiViK to SRM
July 25, 2008, SRM's Responses

1. Parking and traffic

These 2 questions were posed in our July 11 submission, but the applicant did not respond. We are asking for the courtesy of complete responses to these questions so as to better understand the functionality of the parking for the project as it relates to the various occupants and uses.

- a. Of the total number of spaces (134, as per the July 18 response), indicate the number of spaces which will be reserved or restricted at any point of the day for the use by the following (if the reserved parking spaces will be available to the general public during part of the day, indicate which spaces and which hours):
 - i. Bank of America
 - ii. The other spaces indicated as Retail or Café
 - iii. Residents of Merrill Gardens
 - iv. Guests of Merrill Gardens
 - v. Merrill Gardens operations

SRM repeats its objection to this question. This question is not relevant to the City's review of SRM's design and consequently we decline to respond. Our intent is not to be evasive. Rather, throughout this process CiViK has attempted to create and apply new, unadopted review criteria. The Kirkland Zoning Code does not include any criteria related to reserved or restricted parking. As a result, this question is not relevant to the City's review.

In any case, as noted in SRM's July 18, 2008, responses to CiViK's questions, the number of parking spaces provided as part of the modified Project exceeds the number of parking spaces required applying the standards used in the parking modification. Specifically, SRM is providing 134 spaces for the Project. Applying the standards used in the parking modification, the modified Project would be required to provide only 124 spaces.

- b. On July 1, you indicated that the Bank will have 40 restricted parking spaces. Previous documents indicated that the Bank needed 16 spaces, which was consistent with 1 space for every 350 square feet. Please explain why the Bank has this increased requirement (i.e. 40 spaces instead of 16 spaces).

SRM repeats its prior answer. There has been no change. In any case, this question is not relevant to the City's review criteria. As explained in SRM's July 18, 2008, responses, the Project complies the City's parking requirements for the Project.

July 23, 2008, CiViK to SRM
July 25, 2008, SRM's Responses

2. Rooftop Appurtenances

- a. Please provide the plans for the rooftop appurtenances, including location and height. If any variances will be required, please describe in detail as to the amount and nature of the variance, the reason for the variance, the placement, and the additional height.

This question was included in the July 11 submission. The response was that there was no change to the rooftop appurtenance plan and we were asked to refer to the materials submitted to the DRB.

We contacted Planning and we were referred to Slide 28 of the November 2007 DRB packet. We also located information in Slide 10 of the January 2008 DRB packet. However, these slides have a limited amount of summarized data and are not responsive to the question as posed.

Due to the variances which were allowed by the Planning Department and installed by the developer on the adjoining Merrill Gardens property without required notice to the adjacent property owners, there is concern about this current proposal. Please refer to attached correspondence dated June 12, 2008. To prevent this from re-occurring and to provide assurance that appurtenances will be at or below the 4-foot and 10% limitations, the courtesy of responding to this question will be appreciated. If a full plan is not feasible at this time, at least please advise if variances to the height and percentages will be requested.

SRM was required to show the general location and screening of rooftop mechanical equipment as part of the DRB process. The final design for the mechanical systems, however, has not yet been determined. (The design of the mechanical equipment is usually completed 3-4 months from now in the process.) No variances have been requested or are anticipated at this time.

Further, SRM requests that the June 12, 2008, letter from the City, referenced above and attached to CiViK's July 23, 2008 submittal, be excluded from the Council packet and record for this proceeding. The City's June 12, 2008, letter concerns a different project and raises a new issue that has never before been raised by the Appellants in this appeal. Per KZC 142.40(7), the scope of this appeal is limited to the issues raised in CiViK's January 31, 2008, appeal letter. That appeal letter contains no references or comments regarding rooftop appurtenances. Consequently, the Appellants are barred from attempting to raise this issue at this late date. The City's June 12, 2008, letter appears to be submitted at this time solely to confuse the Council and further delay this proceeding.

In any case, as explained in the City's June 12, 2008, letter, the modification request for the rooftop appurtenances on the 201 Kirkland Avenue project resulted from a requirement imposed through the design review process for that project. Furthermore, the developer followed the required procedures in requesting approval for that modification.

July 23, 2008, CiViK to SRM
July 25, 2008, SRM's Responses

3. Rooftop Deck

Referring to the responses provided on July 18:

- a. The plans for the fifth story (Exhibit 3, L5) and the drawing in Exhibit 4, indicate a stairway structure on the south side of the fifth-story rooftop deck, in the section of the project over the bank's space. Please provide the dimensions for this structure (height, depth, width).

This has been designed as an open stair. The walls around the stairs are 3' above the roof and the stairs are 9'-2" wide and 16'-2" long. We have enclosed a corrected Exhibit 4 to clarify this.

- b. The rooftop deck will require a secure perimeter for the safety of its users. Referring to the drawing in Exhibit 4, as well as to prior drawings submitted to the DRB, it appears that this will be accomplished with a partial wall on the 5th story on the west, south and north sides of the project. Please confirm, or advise if some other design is intended.

Please also indicate the height of the partial wall (or guard rail, etc.)

That is correct. The average parapet height permitted by the Kirkland Zoning Code is 24", and the building code requires a secure perimeter of 42". The rooftop deck will be surrounded by a combination of open rail and parapet walls as allowed per Code. Open guardrails with no parapet are 42", and the parapets are 36" with a single 6" top rail mounted to the top to meet the code required 42". Overall, the average height of the parapet walls are 2' consistent with the Kirkland Zoning Code.

EXHIBIT #3

7/18/2008

101 Kirkland Ave.
Setback/Step Back Chart

SETBACKS : the distance from the property line or the curb edge to the face of the building at any given level

STEP BACKS : the distance between the building edge below to the face of a wall above

LAKE STREET FAÇADE

Distance from curb edge to property line: 7'-9"

	Minimum setback from prop line	Maximum setback from prop line	Minimum setback from curb edge	Maximum setback from curb edge	Minimum step back	Maximum stepback
Level 1 & 2	6'-6"	34'-1"	14'-3"	41'-10"	N/A	N/A
Level 3	25'-11"	40'-8"	33'-8"	48'-5"	10'-0"	26'-10"
Level 4	30'-5"	40'-8"	38'-2"	48'-5"	4'-0"	6'-0"
Level 5	99'-7"	119'-1"	107'-4"	126'-10"	70'-11"	74'-2"

KIRKLAND AVENUE FAÇADE

Distance from curb edge to property line: 7'-9"

	Minimum setback from prop line	Maximum setback from prop line	Minimum setback from curb edge	Maximum setback from curb edge	Minimum step back	Maximum stepback
Level 1	5'-3"	6'-10"	13'-0"	14'-7"	N/A	N/A
Level 2	5'-3"	30'-0"	13'-0"	37'-9"	0	23'-2" center bldg
Level 3	15'-1"	30'-0"	22'-10"	37'-9"	10'-0" west bldg	18'-0" east bldg
Level 4	15'-1"	30'-0"	22'-10"	37'-9"	0	0
Level 5	28'-6"	34'-0"	36'-3"	41'-9"	4'-0" center bldg	7'-8" east bldg

corrected EXHIBIT #4

7.25.08





NORTH ELEVATION

EXHIBIT #5
101 KIRKLAND AVENUE
FINAL RENDITION OF MODIFIED DESIGN
7.25.08



WEST ELEVATION

EXHIBIT #5
101 KIRKLAND AVENUE
FINAL RENDITION OF MODIFIED DESIGN
7.25.08



SOUTH ELEVATION

EXHIBIT #5
101 KIRKLAND AVENUE
FINAL RENDITION OF MODIFIED DESIGN
7.25.08



EXHIBIT #5
101 KIRKLAND AVENUE
FINAL RENDITION OF MODIFIED DESIGN
7.25.08

AERIAL VIEW
LOOKING SOUTHEAST



EXHIBIT #5
101 KIRKLAND AVENUE
FINAL RENDITION OF MODIFIED DESIGN
7.25.08

AERIAL VIEW
LOOKING SOUTHWEST



EXHIBIT #5
101 KIRKLAND AVENUE
FINAL RENDITION OF MODIFIED DESIGN
7.25.08

AERIAL VIEW
LOOKING NORTHEAST



EXHIBIT #5
101 KIRKLAND AVENUE
FINAL RENDITION OF MODIFIED DESIGN
7.25.08

AERIAL VIEW
WEST ELEVATION

From: Citizens Vibrant Kirkland [mailto:civik_org@hotmail.com]
Sent: Friday, July 25, 2008 5:25 PM
To: Robin Jenkinson; Ellen Miller-Wolfe; Kathi Anderson
Subject: For the Council Packet for the August 5, 2008 City Council Meeting

Following on to a conversation held moments ago with Ellen Miller Wolfe, I have been advised that today is the cutoff for including anything in the packet. While that is not wholly consistent with recent conversations, we are satisfied that with respect to the Q&A pertaining to the potential modified proposal, today's cutoff is acceptable to us.

However, Ms. Lawrence sent in an additional document relating to the events of the July 1 meeting, and my understanding after conversation with Ellen, is that the City will be enforcing a deadline of today with respect to any response to that, as well.

Our attorney is out of town and will not return until after the more customary packet deadline of Wednesday AM. And my office e-mail is unable to connect to the City's for the time being, because of a recent virus which our office computer system experienced. Accordingly, I am using the CiViK e-mail address to send this.

My most immediate concern is to address the "anonymous memo" which Ms. Lawrence has chosen to attach. It is irrelevant and inflammatory, and as a result of first, the City's mis-handling of the memo itself, and now, Ms. Lawrence's attachment of it to her letter, it will now reside forever on the City's website, as part of the online Council agenda packet. Ellen has told me that there is nothing which that can be done about this, which I respectfully disagree with.

My request is one of the following:

- Exclude the letter from Molly Lawrence regarding the July 1 meeting, from the August 5 online Council agenda packet
- Include the letter from Molly Lawrence, but redact the attached anonymous letter
- Include both items, but also include this letter and the item below as well, in the online Council agenda packet for August 5. The letter below was sent out to our supporters on June 9, shortly before the Kirkland Reporter article regarding the anonymous memo. I have removed just one paragraph, which related to fundraising.

I would take more time for a more complete response, but based on what I've heard from Ellen, there is no other choice in order to accomplish the immediate curing of this particular issue.

This should be about a zoning issue, not about mudslinging and potential defamation. Please remember that what goes into the online packet will live forever on Google.

Thank you.

Respectfully submitted,

Bea Nahon for CiViK

Begin pasted material - remember, this was originally written on June 9.

From: civik_org@hotmail.com
To: civik_org@hotmail.com
Subject: Recent News Regarding B of A Appeal
Date: Mon, 9 Jun 2008 21:13:48 -0700

The purpose of this e-mail is to make you aware of events which have taken place over the past week. These events are of great concern to us, and we trust they will be to you, as well. These events include a threat made to a City Council member, and an anonymous letter received by the City containing false allegations and threats to the City.

The matter remains quasi-judicial until the findings are finalized and entered by the City Council. Please do not contact any member of the City Council regarding this matter.

On May 6, the Kirkland City Council voted in support of our appeal of the Bank of America proposal on the corner of Lake Street & Kirkland Avenue. The majority of the Council indicated their agreement with our two greatest concerns, as follows (as quoted from the minutes of the May 6 meeting):

"Motion to direct staff to return to the next regular City Council meeting with a resolution setting forth the findings and conclusions that the development does not contain superior retail that warrants additional height, bulk, mass of the development, nor does it present/meet the requirements of a two story building along Lake Street; to deny the decision of the Kirkland Design Review Board Decision in the matter of the Bank of America/Merrill Gardens Mixed Use Project."

Since May 6, the Council has had two meetings, during which they have discussed the content and text of the findings and conclusions. At their most recent meeting (June 3) they reviewed a staff-prepared draft of the findings, and then continued the matter until their July 1 meeting so as to allow time for the applicant to potentially modify their design and to allow time for possible discussions between the parties.

That is the status of the appeal itself. However, it is the other events that have brought us to send this e-mail message to you.

Threat to a Council member – As this is a quasi-judicial matter, the Council members are asked at the beginning of each session to disclose any communications that they may have had with the parties or others supporting or opposing the appeal. At that point of the June 3 City Council meeting, Council member Tom Hodgson (who had voted in favor of the appeal) stated that he was disappointed to report that a "prominent member of the Kirkland business community" threatened him to change his vote.

We are startled and appalled by this. For anyone to threaten a Council member or any other party to this matter is a chilling reflection of just how much is at stake for some with respect to downtown development.

Anonymous letter – the next evening, late on June 4, a reporter from the Kirkland Reporter told us that he had a copy of an anonymous letter that the City Attorney had received (on May 21) regarding city council campaign involvement by Board members of CiViK and challenging the participation of some Council members in the appeal. We requested and obtained a copy of the letter from the City on the following day.

This letter is yet another indication of how desperate someone is with respect to the appeal outcome. As this letter is anonymous, we cannot determine what the motivation is. However, this much we do know:

- The letter is grossly inaccurate. Nearly all of the statements made in the letter are false, which is particularly infuriating because most of the statements could have – and should have – been fact-checked against the data on the Public Disclosure Commission (PDC) website.
- The letter is incomplete. The letter alleges campaign involvement with regard to the Council members that voted to support the appeal. However, the letter omits any mention of the campaign support that was sought by and provided to Council members who voted against the appeal.
- The letter is irrelevant. Even if 100% of the statements were correct, they would still not be relevant to this matter. The laws of the State of Washington provide rules as to what constitutes violations of the law in these matters, and campaign activities are among the list of items which are specifically exempt. The purpose of this exemption is so that quasi-judicial matters can be heard before elected councils – without this exemption, many aggrieved parties would find themselves without a council to appeal to, or would be reticent to participate in the political process for fear of not having a means of redress should a future concern arise. Additionally, campaign contributions and organizing committees are in no way secret as they are already a matter of public record through PDC filings and information distributed during the campaigns.
- The letter is anonymous. As an anonymous letter, this document should not be receiving attention. Ironically, part of the letter questions CiViK's transparency - a contradictory comment to be contained in an anonymous letter!

As you consider the last bullet point, you must then wonder why we are even alerting you to an anonymous letter. There are two reasons – one, because we suspect that it was this letter which led Councilmember Hodgson and Mayor Lauinger to include statements on June 3 identifying members of their campaign teams, but also, because the Kirkland Reporter has chosen to cover this letter in its reporting of the appeal. We have seen the online edition, and are awaiting the paper edition on Wednesday to see if they will run the same article or a variation thereof.

We are surprised by the Kirkland Reporter's decision to provide coverage of – and a quotation from – the anonymous letter. The newspaper's own policy requires Letters to the Editor to include a name, address and phone number for verification. Had this letter been submitted as a Letter to the Editor, it would have been rejected. Yet, the content of this letter has now been elevated from status as a letter, to status as part of an article.

It has been our experience that the Kirkland Reporter takes pride in reporting activities accurately, stating that "The Reporter values fairness and accuracy." However, by describing the letter as "outlining the relationships between CiViK and Council members" without doing any fact-checking as to the content of the letter, the Reporter has violated its own policy. Had they spent the requisite time to corroborate the letter, they would have learned that the letter did not outline the relationships, instead it fabricated and exaggerated them.

We should also point out that the same article, in describing the McLeod appeal, describes the 12 appellants in that matter as having "10 of whom live in the Portsmouth Condominiums" and "the two other appellants listed are CiViK volunteers." The phrasing and framing might lead one to believe that CiViK had appointed 2 volunteers to serve as part of the McLeod appeal group – however, that is untrue.

We will be following up with the Kirkland Reporter sometime over the coming weeks to discuss our disappointment with this coverage by our local newspaper and more important, in the hopes of establishing better communications going forward.

What can you do?

- Please plan to attend next 2 City Council meetings at 7:30PM on June 17 and on July 1. While the appeal by CiViK is not expected to be on the agenda again until July 1, it is possible that something could occur on June 17 as a result of these most recent events.

Thank you for your support, and thank you for caring about the future of Kirkland and its downtown. It is essential that our dedication to downtown and our determination to allow development to occur within the guidelines and vision of the City's Comprehensive Plan will be stronger than the desperation that is driving these most recent events.

On behalf of CiViK,

Bea Nahon and Jim McElwee

With Windows Live for mobile, your contacts travel with you. [Connect on the go.](#)



July 2, 2008

J. Richard Aramburu
Aramburu & Eustis LLP
Attorneys at Law
720 Third Avenue, Suite 2112
Seattle, WA 98104

Re: Bank of America Project

Dear Mr. Aramburu:

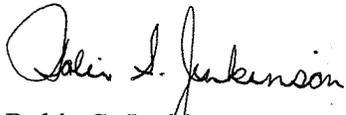
At the Council Meeting last night, the Kirkland City Council discussed whether the City should waive its attorney-client privilege with respect to the confidential memo ("Memo") prepared for the City Council by the City Attorney's Office. As you are aware, four of the seven Councilmembers at the meeting clearly stated that they oppose waiver of the attorney-client privilege. Nevertheless, Councilmember Hodgson provided you with a copy of the Memo, after indicating that he would individually waive the attorney-client privilege.

As you have previously acknowledged, the waiver of the attorney-client privilege is the decision of the client, not the attorney. In this case, the client is the City of Kirkland, a municipal corporation. With respect to corporate entities, the decision of whether to waive the attorney-client privilege must necessarily be taken by individuals empowered to act on its behalf. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348-49, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). At a minimum, an effective waiver of the attorney-client privilege would have required the assent of a majority of the Kirkland City Council. You yourself acknowledged this in your specific and direct request to the Council as a whole that it make the Memo available to you and your clients.

Mr. Hodgson's waiver of the City's attorney-client privilege was unilateral, unauthorized and not an effective waiver. It was clear at the time Mr. Hodgson provided you with the Memo that his attempted waiver was opposed by a majority of the Kirkland City Council. Accordingly, the City requests that you do the following: (1) return the Memo that Mr. Hodgson provided you last night to me; (2) destroy any electronic or paper copies of the Memo that you have made in the meantime; and (3) disclose the identity of anyone to whom

you have provided copies of the Memo. I would appreciate it if you can confirm that you have taken these steps by the end of day tomorrow.

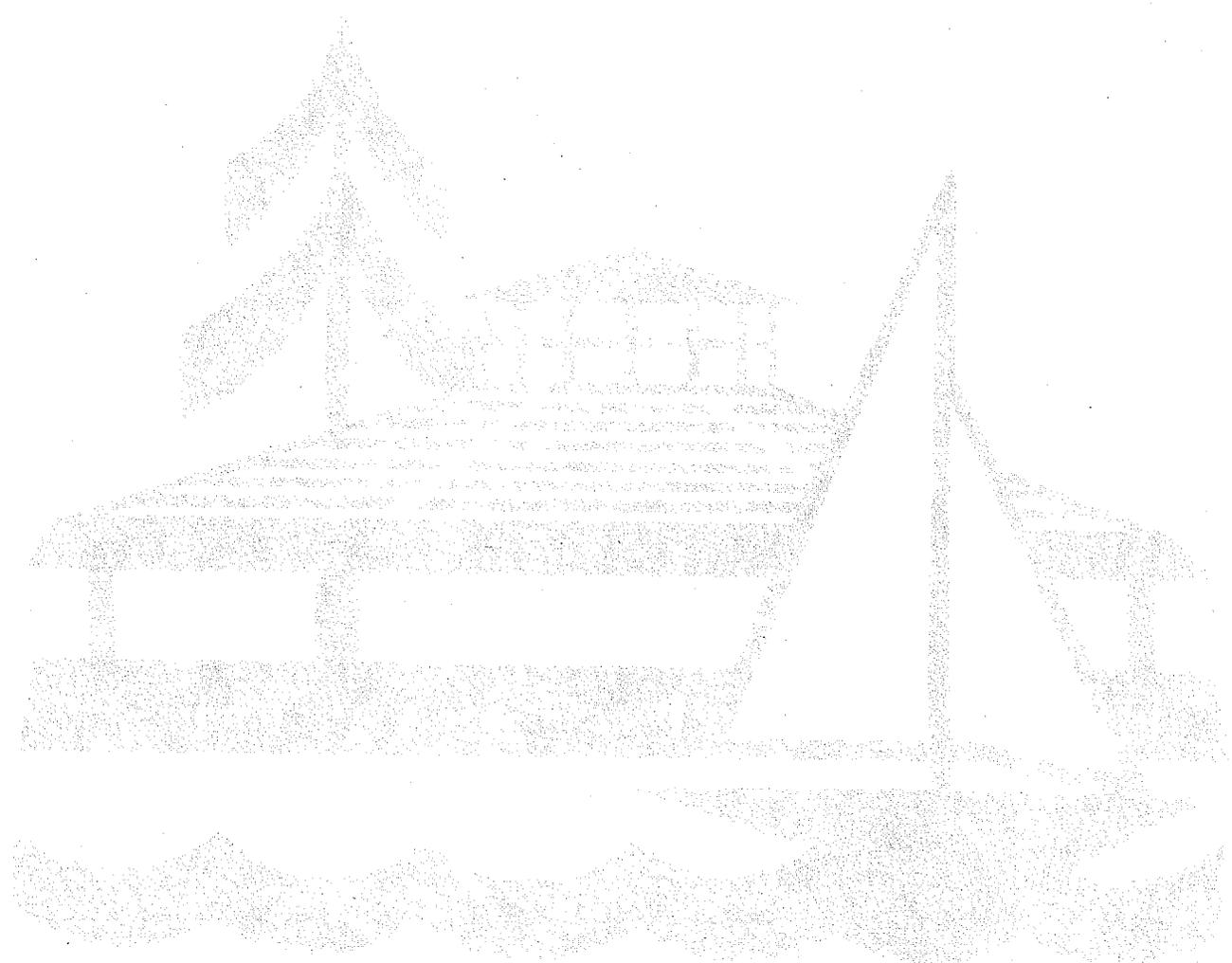
Sincerely,



Robin S. Jenkinson
City Attorney

Enclosure

cc: City Council
Dave Ramsay, City Manager



J. RICHARD ARAMBURU
JEFFREY M. EUSTIS
 Attorneys at Law
 Suite 2112, Pacific Building
 720 Third Avenue
 Seattle Washington 98104
 Telephone: (206) 625-9515
 Fax: (206) 682-1376

FAX COVER SHEET
DO NOT "REPLY" TO THIS EMAIL ADDRESS!

To: Robin Jenkinson, Kirkland City Attorney

FAX NO.: (425) 587-3025
 Email: Rjenkinson@ci.kirkland.wa.us

CC: Molly Lawrence
 Fax No.: 206-626-0675
 Email: mlawrence@gordonderr.com

From: J. Richard Aramburu
 Date: July 7, 2008
 Client/Matter: Appeal of SRM application

DOCUMENTS	NUMBER OF PAGES*
Letter re memo	2

COMMENTS:
 Original will follow by messenger.

DO NOT REPLY TO THIS EMAIL ADDRESS!

If you received this message via email and wish to reply, please reply by fax to (206) 682-1376 or be certain your e-mail response is to one of the following addresses:

rick@aramburu-eustis.com | eustis@aramburu-eustis.com
pat@aramburu-eustis.com | kathy@aramburu-eustis.com | carol@aramburu-eustis.com

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the authorized employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone.

* NOT COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 206-625-9515.

ARAMBURU & EUSTIS LLP**Attorneys at Law**

720 Third Avenue, Suite 2112
Seattle, Washington 98104
(206) 625-9515
Fax: (206) 682-1376

July 7, 2008

Robin Jenkinson
City Attorney
City of Kirkland
123 Fifth Avenue
Kirkland WA 98033

Dear Robin:

I have received your letter dated July 2, 2008, which I did not see until the next day, July 3. As I communicated to you via e-mail on July 3, my schedule on that day did not permit me to respond and I committed to responding to you on Monday, as I am now doing.

I do not agree with the points that you have raised with respect to privileged communications. However, to focus this matter on the merits, CiViK responds to your three requests as follows:

1. My client has asked that we return the memo to Mr. Hodgson, as he was the one who provided it to us. It is being sent via legal messenger to his office address.
2. Regarding your request to destroy any electronic or paper copies of the memo, I have done so as has the one other recipient (see item 3).
3. You have asked me to disclose the identity of anyone to whom I have provided copies of the Memo. I requested the same of you in my letter of June 24 ("identification of all persons who received a copy of the items identified and the date such copy was provided") and in your response of June 30, you declined to provide this information. That stated, I will respond to your question and inform you that a copy of the memo was provided to my client on July 2. The recipient was only one person, Bea Nahon. Ms. Nahon affirms that she has not provided a copy of the memo to anyone by any means, and further, Ms. Nahon affirms that she has also destroyed any electronic or paper copies of the memo.

We now ask that you also provide the same courtesy and respond to my inquiry of June 24 and identify all persons who have been provided with a copy of this memo or information regarding its substance. This request also extends to David Ramsay or

July 7, 2008
Page 2

other staff members as well as any other recipients who have been provided with the memo via electronic or paper means or have been made privy to the contents of the memo. Please also inform us whether the substance of the memo was discussed in executive session and if so when.

We repeat our objections to your submission of this memo to the Council. We should have been informed that the memo was given to the Council, provided with the opportunity to review and comment upon it and to rebut it at the time it was presented to the Council. As also noted to you previously, there is no reason for secrecy. This memo constituted a private ex parte communication between you and the Council, which is contrary to the City ordinance (KZC 142.40) and the rules for this appeal hearing. You, Molly Lawrence and I discussed the process for the appeal, and we all agreed as to the submissions that would be delivered to the Council and there was no mention of ex parte communications from you. This agreed process was appropriate in the context of the Ordinance and its rules for Appeals of Design Review Board Decisions.

Any memo regarding "litigation risks" is inappropriate when prepared and submitted to the Council before any testimony or evidence is presented and without opportunity for parties to rebut its content. CiViK still has not had an opportunity to rebut the contents of your memo. This goes to the heart of the matter, namely for the parties to have a fair and unbiased hearing, decided on the merits of the case and the evidence presented, and not diverted or influenced by unfounded fears or one-sided argument. Further, all of the Council's deliberations must be conducted in open air with testimony and evidence that is available for all to see, in accordance with the rules for a quasi-judicial, open-record hearing. Under Washington law, there is no claim for damages where an applicant buys property, as here, in the middle of an ongoing, highly contested legal matter; any risk is reflected in the purchase price and the city is not the guarantor of land speculation. Further, there is no Washington caselaw that assesses damages where an applicant voluntarily seeks to gain bonus development rights through a discretionary procedure such as here (request for a fifth floor).

While I have returned the documents to Mr. Hodgson and all copies have been destroyed, I am not waiving the right to re-request this document and my objections to its use continue as stated above.

Sincerely yours,

ARAMBURU & EUSTIS LLP



J. Richard Aramburu

JRA:cc

cc: Molly Lawrence
CIVIK



July 8, 2008

J. Richard Aramburu
Aramburu & Eustis LLP
Attorneys at Law
720 Third Avenue, Suite 2112
Seattle, WA 98104

Re: Bank of America Project

Dear Rick:

I write in reply to your letter to me dated July 8, 2008. Thank you for agreeing to return the attorney-client privileged memo prepared for the City Council by the City Attorney's Office.

You have asked that I provide you with information about the executive session discussion which I declined to do in my letters of June 16 and June 30, because the discussion was subject to the attorney-client privilege. You also asked who was provided with the attorney-client privileged memo. The memo was provided to the City Council, City Manager, Planning Director, and recently, outside counsel for the City.

Contrary to your assertion that all of the Council's deliberations must be conducted in public, the Open Public Meetings Act, Chapter 42.30 RCW, does not apply to: "[t]hat portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group;" RCW 42.30.140(2). While the City Council has not chosen to do so, it could legally deliberate outside of public view.

Sincerely,

A handwritten signature in black ink that reads "Robin S. Jenkinson".

Robin S. Jenkinson
City Attorney

cc: City Council
Dave Ramsay, City Manager
Molly A. Lawrence



July 25, 2008

Ms. Robin Jenkinson
City Attorney
City of Kirkland
123 5th Avenue
Kirkland, WA 98033

Re: Merrill Gardens/BOA
Appeal of Design Review Board Decision
File No. APL08-00001

Dear Ms. Jenkinson:

I am writing to register SRM Development's concerns and objections regarding the events at the July 1, 2008, Council Meeting. The events of that meeting were unusual and indeed unprecedented in my ten years as a land use attorney in the region. As SRM has stated throughout this appeal, we remain committed to identifying an approvable design for the subject property through the current process. Prior to proceeding to the August 5, 2008, Council Meeting, however, we believe that it is appropriate to document our objection to the events of July 1, 2008.

1. *Disqualification and Recusal of Councilmember Hodgson.*

SRM requests that Councilmember Hodgson be disqualified and abstain from any further participation in the City's consideration of the Merrill Gardens/BOA Project or this appeal. During the June 3, 2008, Council meeting, Councilmember Hodgson disclosed for the first time his prior relationship with key members of CiViK. At that time, SRM accepted Councilmember Hodgson's assertion that he could remain impartial and unbiased in his consideration of this appeal. His behavior during the July 1, 2008, Council meeting, however, demonstrated that he is not operating in an objective and unbiased manner.

During the July 1, 2008, hearing, Councilmember Hodgson repeatedly stated that he believed this appeal process had been unfair to the Appellants. He first stated: "My problem here is that I think the process here has been unfair to the appellant throughout." A few minutes later, he again reiterated that he believed the entire process had been "extremely unfair" to CiViK. He did not, however, explain in what way he believed the process had been unfair. Despite objections from four other Council Members, Councilmember Hodgson thereafter

handed to Richard Aramburu, legal counsel for CiViK, one or more attorney-client privileged City memorandum regarding the subject appeal.

Based on his remarks and actions, SRM believes that Councilmember Hodgson has not been impartial or objective in this proceeding. *See e.g., Chrobuck v. Snohomish Cty*, 78 Wn.2d 858, 870, 480 P.2d 489 (1971) (“the unfortunate combination of circumstances . . . and the cumulative impact thereof inescapably cast an aura of improper influences, partiality and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness. . . .”). His relationship with CiViK and his apparent belief that the proceeding has been biased has unquestionably colored his judgment with regard to this matter. Consequently, he should be prohibited from participating further in this appeal *in any manner*; he should be prohibited both from voting and from participating in any further discussions or deliberations regarding this matter. *See e.g., Buell v. City of Bremerton*, 80 Wn.2d 518, 525, 495 P.2d 1358 (1972) (participation by a potentially affected planning commissioner tainted the entire proceeding); *Hayden v. City of Port Townsend*, 28 Wn.App. 192, 197, 622 P.2d 1291 (1981).

Moreover, we do not believe that this is an appearance of fairness objection that can be cured through a disclosure pursuant to RCW 42.36.060. Not only does Councilmember Hodgson *appear* to be biased and partial, but it seems that his opinions regarding this proceeding have actually colored his ability to treat the two parties equally and objectively. RCW 42.36.110; *see e.g., Smith v. Behr Process Corp.*, 113 Wn.App. 306, 340, 54 P.3d 665 (2002), (due process requires disqualification of a decision maker whose impartiality may reasonably be questioned). As noted above, SRM would very much like to this proceeding to result in a final decision not subject to challenge on procedural grounds. Further participation by Councilmember Hodgson in any manner risks rendering any resulting decision void.

2. Due Process Violation.

SRM would also like to object on the record to the City providing materials to CiViK regarding this appeal that it has refused to provide to SRM. As noted above, immediately after declaring this appeal process unfair to CiViK, Councilmember Hodgson handed to CiViK’s legal counsel copies of one or more memorandum related to the City’s legal analysis of the subject appeal without also providing copies to SRM. SRM acknowledges that these memoranda may be subject to the attorney-client privilege, and that Councilmember Hodgson’s unilateral actions to disclose those attorney-client communications may not have been an effective waiver of the privilege. But the fact remains that CiViK has been provided access to materials relevant to this appeal proceeding that have been denied to SRM. This is a due process violation.

The City’s request that CiViK return the memoranda does not cure this due process problem. CiViK’s legal counsel and at least one member of CiViK reviewed the memoranda before returning them to Councilmember Hodgson. SRM does not wish to belabor the point, but it is the unavoidable conclusion that CiViK has been provided an unfair advantage in these proceedings. The only way to fully remedy this unfairness is to provide SRM with an equal opportunity to review the memoranda provided to CiViK.

3. Disclosure of "Anonymous Memo."

We have enclosed with this letter a copy of the anonymous memorandum that sparked Councilmember Hodgson's behavior during the July 1, 2008, Council meeting. SRM Representative, Andy Loos, received a copy of this anonymous memorandum in an unmarked envelope on May 22, 2008. SRM had absolutely no part in the creation or dissemination of this memorandum. We did not give it much weight, and now, as then, SRM chooses not to object to the participation of Mayor Lauinger, Councilmember Hodgson or Councilmember Greenway on its basis. Further, we fundamentally disagree with CiViK's objections to the City's handling of this memorandum. Nevertheless, we believe that it should be included in the record for these proceedings to address any perceived appearance of fairness concerns.

Please contact me if you have any questions or comments regarding this letter. Also, to the extent possible, please let both parties know in advance of August 5, 2008, whether Councilmember Hodgson intends to participate regarding this matter at the August 5, 2008, Council meeting.

Very truly yours,



Molly A. Lawrence

MAL:mal

cc: Andy Loos, SRM
Rick Aramburu, Counsel for CiViK
Bea Nahon, CiViK

Staff note: Anonymous letter enclosure is not included in Council packet

ARAMBURU & EUSTIS, LLP**Attorneys at Law**

720 Third Avenue, Suite 2112
Seattle, Washington 98104
(206) 625-9515 Fax: (206) 682-1376

May 16, 2008

Kirkland City Council
123 Fifth Avenue
Kirkland, WA 98033

Re: 101 Kirkland Avenue SRM Proposal

Dear Council Members:

As you are aware, this office represents CiViK in this appeal of the Design Review Board decision regarding the SRM/101 Kirkland Avenue proposal.

We have received by mail a letter from the lawyer for SRM regarding this project and requesting Council action. This letter should not be considered or reviewed by the Council for the reasons set forth below.

As councilmembers will recall, the Council closed the hearing portion of this appeal in the late evening of May 6, 2008. The Council then began deliberations leading to the introduction and adoption of motions which resolved this appeal. The Council requested staff to prepare findings and conclusions for presentation at the next (May 20) council meeting.

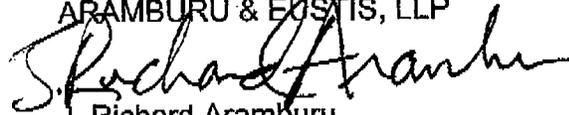
As the Council has closed the hearing, there is no further opportunity for additional presentations. Further, the hearing rules as agreed by the parties do not allow further submission after the close of the hearing, especially following council motions. Indeed, at the earlier hearing the submissions of materials by the parties was specifically restricted by the Mayor as presiding officer. Accordingly, the Council should disregard this letter and strike it from the record.

This letter is clearly an attempt to delay or prevent the Council's entry of its decision. Further, it asks the Council to review an alternative design proposal without the benefit of public input, as this matter remains quasi-judicial. This is not in the best interests of the City, the Council and the citizens. If the applicant has an alternate proposal, the City of Kirkland has process to accommodate this. The decision should be entered as decided by the City Council on May 6, 2008, and the applicant can, if it chooses, promptly submit an alternate proposal to the City.

Though the letter is clearly out of order, if the Council does decide to accept and review this letter, then CiViK requests an opportunity to respond to the positions taken by SRM.

Thank you in advance for your consideration of our position.

Sincerely yours,
ARAMBURU & EUSTIS, LLP



J. Richard Aramburu

JRA/km

cc: Client
Robin S. Jenkinson
Molly A. Lawrence

ARAMBURU & EUSTIS LLP
ATTORNEYS AT LAW
720 THIRD AVENUE, SUITE 2112
SEATTLE, WASHINGTON 98104
(206) 625-9515 • FAX (206) 682-1376

May 19, 2008

The Honorable James Lauinger, Mayor
The Honorable Joan McBride, Deputy Mayor
Ms. Robin Jenkinson, Kirkland City Attorney
Members of the Kirkland City Council
123 Fifth Avenue
Kirkland, WA 98033

Re: May 20, 2008 Agenda Item 9a, Continuation of Public Hearing re
Appeal Case APL08-0001, Resolution R-4707, Bank of America
Appeal

Dear Mayor Lauinger, Deputy Mayor McBride, Ms. Jenkinson and
Members of the Kirkland City Council:

This office represents Citizens for a Vibrant Kirkland ("CIVIK"). On Thursday May 15, 2008, we received the Memorandum of Robin Jenkinson, City Attorney, together with the proposed language for Resolution R-4707, the proposed Findings, Conclusions and Decision in the above-referenced matter.

We recognize that the record is now officially closed and that further arguments or submissions would not be appropriate from either party. Honoring that direction, the sole purpose of this letter is to bring to the Council's attention significant errors in the Resolution and attached Exhibit A as proposed for their approval and signature. We ask for the Council's due consideration and correction of each of these errors prior to executing the resolution and we thank the Council for their attention to these matters.

To assist the Council in its review, CIVIK has prepared a transcript of the deliberation portion of the Council meeting on May 6, commencing when the Mayor closed the hearing and ending at adjournment. That transcript is attached hereto.

May 19, 2008

Page 2

If the errors were limited to scriveners' errors, a simple memo or an e-mail to City Attorney might have sufficed. However, we are alarmed to find that this document includes findings which were neither introduced nor deliberated by the Council, along with omissions of findings and deliberations which are material to the motion that was passed by the Council on May 6.

The two items of most serious concern in the draft findings are the following:

1) **"Superior Retail."** As drafted, the implication of Resolution R-4707, Exhibit A, Section IV is that the mere removal of the drive-through, and that alone, would allow the project to achieve the criteria for superior retail. Section IV has completely ignored the Council's discussion about the design of the total space as a bank, which was also essential to its decision.

2) **"Two Stories on Lake Street."** As drafted, Exhibit A, Section 5.6 and related following sections, provide that a total setback of just 20 feet on the 3rd story and on the 4th story, would create a two-story building on Lake Street. Moreover, the staff memo presents a new criteria (two times the height of the second story) which was never mentioned by the Council (or in the DRB's Notice of Decision) during its deliberations. This is not consistent with the Council's deliberations nor with the motion that was passed by the Council.

As noted in the City Attorney's memo of May 14, the staff were tasked to "faithfully capture the rationale for the Council's decision based upon its review of the Council's deliberation." This is an appropriate charge to the staff. It is imperative that this document reflect the Council's deliberations completely and accurately. The findings need to thoroughly cite to the evidence that supports the Council's decision. We are extremely concerned about the content of the draft resolution and supporting exhibit and ask that the Council consider each of these points and correct the findings accordingly.

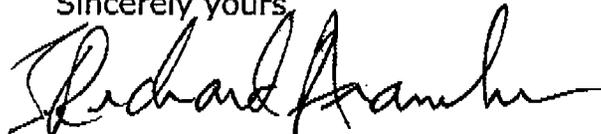
May 19, 2008
Page 3

We apologize for not having this letter and related documents delivered to you sooner, however, the timetable was not within our control. On May 7, 2008, this office sent an e-mail to the City Attorney indicating that we would appreciate receiving a copy of the draft findings in advance of the upcoming May 20 Council meeting. On May 8, we were notified that we would receive the findings when they were provided to the City Council on Thursday, May 15. Upon receiving the documents on May 15 and noting various errors, we proceeded to prepare the attached verbatim transcript of the Council's deliberations to provide certainty not only as to our recollection of the hearing, but also to provide supporting documentation for the City Council's reference. That transcript was completed today.

Please further note that this letter is in addition to our letter dated May 15, 2008, which was transmitted to the City Council in response to the letter from Molly Lawrence of Gordon Derr dated May 13, 2008 and received by our office on May 14. We assume that the Council has received our May 15 letter and is aware of the objections that we have raised to the applicant's submittal of supplemental materials subsequent to the close of the hearing.

Thank you in advance for your consideration of these matters.

Sincerely yours



J. Richard Aramburu

JRA/py

cc: Molly Lawrence
Robin Jenkinson
CIVIK

Enclosure: Verbatim Transcript of Council's Deliberations, May 6, 2008

Resolution R-4707 and Exhibit A
May 20, 2008

Errors in Resolution Draft

Resolution R-4707

The second "whereas" includes a reference to December 17, 2007 which is an incorrect month and year. The correct date should be January 17, 2008. Please also see item 2 under Procedural Findings, below.

I. PROCEDURAL FINDINGS

1. The Findings should recite the actual motion that was passed by the Council.

This could be done as an insertion in Section I, Procedural Findings, as the next to last item. *Please see Verbatim Transcript, Page 52, top of page, motion by Councilmember Asher.*

Suggested insertion as follows:

1.8 The City Council's motion reversed the Design Review Board's decision, denying the application, and directed staff to return to the next regular City Council meeting with a resolution setting forth findings and conclusions that: 1) the development does not contain superior retail that warrants the additional height, bulk, and mass of the project; and 2) the project does not present/meet the requirements of a two-story building along Lake Street South. *May 6 proceedings.*

The existing Section 1.8 would be renumbered as Section 1.9.

2. Incorrect date.

As currently drafted, item 1.2 reads:

1.2 On December 17, 2007, the Kirkland Design Review Board issued its decision granting design review approval to the Bank of America project. *Design Review Board Decision.*

The DRB's final meeting and approval occurred on January 7, 2008 and the Notice of Decision was dated January 17, 2008.

Suggested correction as follows:

1.2 On January 7, 2008 the Kirkland Design Review Board voted to approve the project subject to conditions and issued its decision dated January 17, 2008 granting design review approval to the Bank of America project. *Design Review Board Decision.*

II. APPEAL FINDINGS

1. Reference to KZC 50.12.030 in Section 3.1 should be deleted.

As currently drafted, the provision reads:

3.1 The Central Business District (CBD) 1 zone permits two to five stories for attached or stacked dwelling units. *CBD 1 Use Zone Chart; KZC 50.12.030; KZC 50.12.080.*

KZC 50.12.030 is the provision for hotels and motels, which is not relevant to this case.

Suggested correction as follows:

3.1 The Central Business District (CBD) 1 zone permits a maximum height of structure of two to five stories above each abutting right of way for attached or stacked dwelling units. *CBD 1 Use Zone Chart KZC 50.12.080.*

2. As drafted, Exhibit A properly notes in Section 3.5 that “Buildings should be limited to two stories along all of Lake Street South to reflect the scale of development in Design District 2.” However, in 3.6 the reference to the scale of development in Design District 2 is not entirely correct.

As currently drafted, the provision reads:

3.6 The scale of development in Design District 2 is buildings of two to three stories or lower. *Downtown Plan, page XV.D-12, Design District 2.*

However, the height limit in Design District 2 ranges from a maximum of one to three stories with the three-story potential permitted only south of 2nd Avenue South, which is a full block south of the subject property. That is, the scale of development in Design District 2 is buildings of two stories or lower from Central Way to Second Avenue South .

Suggested correction as follows:

3.6 The scale of development of buildings in Design District 2 is a maximum height of one to three stories. The scale of development in Design District 2 across from the subject property is a maximum height of two stories. *Downtown Plan, page XV.D-12, Design District 2.*

3. As drafted, Section 3.8 omits the Downtown Plan from the list of documents which include requirements for the design of retail space. The Downtown Plan should be added to this list.

As currently drafted, the provision reads:

3.8 The requirements for the design of retail space are established in the Zoning Code regulations for CBD 1, Design Regulations of KZC Chapter 92, and the Design Guidelines for Pedestrian Oriented District Standards.

Suggested correction as follows:

3.8 The requirements for the design of retail space are established in the Zoning Code regulations for CBD 1, Design Regulations of KZC Chapter 92, the Downtown Plan, and the Design Guidelines for Pedestrian Oriented District Standards.

4. As drafted, Section 3.11 only provides partial information about the proposed setbacks in the proposal. It provides information about the setback from the street, but not about the setback from the 2nd story itself.

As currently drafted, the provision reads:

3.11 Along Lake Street South stories above the second story are proposed to be set back between 14'3" and 34'8" feet from the street. *Exhibit 201, Final Setbacks Levels 3-4.*

This section should be expanded to provide the measurements of the setbacks from the 2nd to the 3rd story, and should also note that there is no additional setback from the 3rd to the 4th story.

Suggested correction as follows:

3.11 Along Lake Street South stories above the second story are proposed to be set back between 15'4" and 32'3" feet from the street. The amount of setback along Lake Street South from the 2nd to the 3rd story is proposed to be between 14'3", 25'1" and 34'8". There is no setback proposed from the 3rd to the 4th story. *Exhibit 201, Final Setbacks Levels 2 and Levels 3-4.*

5. Section 3.13 has added text which was not a part of the DRB Decision document.

The words which were added are "making the bank the largest retail tenant in the building." Those additional words serve to bestow unearned retail status to the bank.

This section should be changed to reflect the actual text of the DRB Decision document – which also sets forth the sizes of the other proposed retail spaces.

As currently drafted, the provision reads:

3.13 The four proposed retail spaces range in size from approximately 880 square feet for a café to approximately 5,720 square feet for the bank, making the bank the largest retail tenant in the building. *Design Review board Decision, 111.A, Retail Size, page 2.*

Suggested correction as follows:

3.13 The four proposed retail spaces range in size from approximately 880 square feet for a café to 2,365 SF and 2,450 SF for spaces along Kirkland Avenue and approximately 5,720 square feet for the bank. *Design Review board Decision, 111.A, Retail Size, page 2.*

6. The document should include a reference to the desired mix of retail establishments that is elaborated in the Downtown Plan.

Suggested insertion of new section, possibly between what is currently items 3.20 and 3.21:

Restaurants, delicatessens, and specialty shops, including fine apparel, gift shops, art galleries, import shops, and the like constitute the use mix and image contemplated in the Vision for Downtown. These uses provide visual interest and stimulate foot traffic and thereby provide opportunities for leisure time strolling along Downtown walkways for Kirklanders and visitors alike. *Downtown Plan, Page XV, D-4.*

7. One criteria of the Downtown Plan discussed by the Council, specific to Design District 1B, is not mentioned.

The following provision should be added (possibly between items 3.4 and 3.5), and the section renumbered accordingly.

Suggested addition as follows:

South of Kirkland Avenue, building forms should step up from the north and west with the tallest portions at the base of the hillside to help moderate the mass of large buildings on top of the bluff. *Downtown Plan, Page XV.D-10*

III. CONCLUSIONS AS TO SUPERIOR RETAIL SPACE

As drafted, this section properly includes references to the drive-through and those provisions should remain.

However, the section has omitted most of the Council's expressed reasons for denying the additional height for the "superior retail" bonus. The Council considered the entire body of evidence (e.g. the testimony by retail expert Stephen Stephanou along with his letter of rebuttal, the various exhibits presented by CiViK, as well as the testimony of CiViK's representatives) in reaching its decision.

The omission of this part of the deliberation implies that solely by removing the drive-through, the proposal would meet the superior retail criteria, which is not consistent with the deliberations of the City Council as expressed in the transcript.

In reaching its decision, the Council deliberated and considered that the space was designed to be a bank. These factors were part and parcel of their decision. By example, please refer to the following comments:

Jessica Greenway Pages 24-25, Page 32, Pages 44-45
Mayor Lauinger Pages 28-29
Tom Hodgson Page 22, Page 29, Page 46

In order to effect these changes, the following revisions and additions are suggested:

1. Change existing Section 4.4 to delete the concluding phrase "and the proposed building does not warrant the additional height, bulk and mass of a fifth story." This phrase denotes a conclusion to the entire section, and so this phrase needs to be moved to what will become the conclusion of the section.
2. Add new Sections 4.5, 4.6, 4.7 and 4.8 as follows:

4.5 The guidelines for superior retail provide expectations for "superior" retail space which include consideration of the physical features as well as how the retail space will fit into/contribute to the downtown. The latter requirements include supporting other retail by virtue of its tenants, pedestrian connections/linkages, etc. and that the space attracts desired tenant types (local serving retail, anchor tenant space, etc.) A bank does not satisfy this criteria. *Planning Department Guidelines, CiViK Exhibit 109, Testimony of Stephen Stephanou.*

4.6 The architect was instructed to design the bank's space to function as a bank, including its size, its drive-through, and other design configuration. Moreover, this space occupies the prominent corner and the largest portion of the ground floor of the proposed building. Moreover, whereas the bank sold the property in December 2007, it has also entered into a binding contract to repurchase its unit. The terms of the agreement support the conclusion that the space will be used as a bank for the indefinite future. *SRM Exhibit 201; Testimony of Chad Lorentz; Short Form Purchase Agreement; Special Warranty Deed*

4.7 While a bank is an approved use in CBD1, a bank is not a preferred retail use, consistent with the use mix and image contemplated in the Vision for Downtown Kirkland, nor does it strengthen the retail fabric in the core area.

4.8 For each of the reasons noted in this section, and with consideration of the exhibits and expert testimony provided, the Council determined that the space, which is designed for a bank, fails to achieve the objectives and requirements of superior retail space. Accordingly, the proposed building does not warrant the additional height, bulk and mass of a fifth story.

IV. CONCLUSIONS AS TO HEIGHT ON LAKE STREET SOUTH

1. Section 5.2 contains a typographical error, with the last sentence referring to Design District 2 rather than 1. The reference to Design District 2 in the first sentence is correct.

As drafted, the provision reads:

5.2 The Downtown Plan states that “buildings *should* be limited to two stories along all of Lake Street South to reflect the scale of development in Design District 2.” The term “should” is directive and not mandatory, but the Board failed to give meaning and effect to the fact that the Downtown Plan uses different and stronger language in describing height along Lake Street than it does when describing height in other locations. For example, the next sentence of the Plan, which refers to buildings on other streets in Design District 2, says that the height of these buildings should only be limited “along street frontages”.

This section should be corrected so that the last sentence states Design District 1 rather than Design District 2.

2. Section 5.3 should not contain reference to “Exceptional Circumstances.” This section, as drafted, is specific to Lake Street South and states that if an applicant proves “exceptional circumstances” then additional height above 2 stories is permissible. The concept of “exceptional circumstances” is not in the zoning code or the Downtown Plan. Further, “exceptional circumstances” were not discussed in the transcript.

As drafted, this section reads:

5.3 The Downtown Plan thus says that “buildings” that are “along” Lake Street South should be limited to two stories, and by using the word “should” the Plan requires an applicant who wishes to include a third or fourth floor to demonstrate that exceptional circumstances justify such additional height. No such demonstration has been made in the record before the Council.

This section needs to be deleted entirely.

2. Section 5.5 and 5.7 incorrectly quote the Downtown Plan and should be deleted.

As drafted, these sections read:

5.5 The reference in the Downtown Plan to breaking “large buildings into the appearance of multiple smaller buildings” also demonstrates that a limitation on the number of stories along the street does not have to apply to the entire building. *Downtown Plan, page XV.D-10, page.*

5.7 Two-story portions of buildings should be treated as distinct building elements to reflect the scale of Design District 2 consistent with the Downtown Plan reference to breaking “large buildings into the appearance of multiple smaller buildings.”

The quoted text begins in the middle of a sentence. The entire sentence, as stated in the Downtown Plan, reads:

East of Main Street, development should combine modulations in building heights with modulations of facade widths to break large buildings into the appearance of multiple smaller buildings.

(Emphasis supplied.) Since the SRM proposal is west, not east, of Main Street this section does not apply.

Sections 5.5 and 5.7 should be deleted in their entirety.

3. Section 5.6 creates a measuring stick for setbacks not found in the Downtown Plan nor in any of the Council's deliberations. It should be deleted entirely from this document.

As drafted, the section reads:

5.6 Upper stories must be sufficiently set back from Lake Street South to minimize their visibility from the west side of Lake Street South. In general, for each story above the second story, the setback should be twice the height of the story that is being set back. Thusly, a pedestrian on the east side of Lake Street South will perceive a two-story scale of buildings in Design District 2. Similarly, a pedestrian on the west side of Lake Street South would perceive a two-story scale of buildings on the east side of Lake Street South within Design District 1B.

(Emphasis supplied.) We have absolutely no idea where this formula ("twice the height of the story that is being set back") came from. The verbatim transcript does not mention such a criterion. If the staff is trying to propose a solution to the two-story building question – which, by the way, will impact not only this proposal but others in the future – this is neither the time nor the venue to accomplish this.

This section is inappropriate and without source from these proceedings and must be deleted in its entirety.

4. The conclusion of this section needs to include reference to the setbacks not only from Lake Street, but also from the 2nd story to the 3rd story. The text should reflect the Downtown Plan and the overall sense of the majority of the Council in stating the conclusion.

As drafted, the section reads:

5.8 The Bank of America project does not present as or meet the requirements of a two-story building along Lake Street South because the third floor, and the fourth floor in particular, are not set back from Lake Street South far enough to comply with the Downtown Plan.

Suggested correction as follows:

5.8 The Bank of America project does not present as or meet the requirements of a two-story building limitation along Lake Street South because the third and fourth floors are not set back from the second floor, nor from Lake Street South, far enough to comply with the Downtown Plan. Further, the proposal has not demonstrated compliance with all of the provisions of the Downtown Plan so as to mitigate the scale and mass of the proposed third and fourth floors.



CITY OF KIRKLAND

Planning and Community Development Department

123 Fifth Avenue, Kirkland, WA 98033 425.587.3225

www.ci.kirkland.wa.us

MEMORANDUM

Date: May 12, 2008

To: Interested Parties Who Have Submitted Oral or Written Comments on the Nakhjiri Private Amendment Request

From: Joan Lieberman-Brill, AICP, Senior Planner

Subject: Nakhjiri Private Amendment Request – Outcome of City Council Reconsideration (File ZON07-00010)

Kirkland City Council adopted Resolution 4699 on May 6, 2008 stating their intent to adopt the Nakhjiri private amendment request to amend the Comprehensive Plan and Zoning Map later this year. The change to the property located at 138 5th Avenue, containing the American Legion Hall building, will be from low density residential single family RS 5.0 zoning to high density residential Planned Area 7A zoning. Council directed the effective date to implement the request be delayed until 2009 to provide at least two years from the adoption date of the Norkirk Neighborhood Plan update, which was on December 12, 2006, and to provide time for the Heritage Society or another interested party to work on saving the American Legion building. The final ordinance will set the effective date as May 6, 2009, one year from the date of the adopted resolution.

The City Council will take final action on the proposal as part of the entire package of 2007 - 2008 comprehensive plan amendments later this year. .

Please feel free to contact me at 425-587-3254 or email me at jbrill@ci.kirkland.wa.us with questions or comments.

Thank you.

DECLARATION

I am over the age of eighteen years and competent to testify.

The preceding transcript of the council deliberations portion of the Kirkland City Council hearing conducted on May 6, 2008, was prepared by me from a recording downloaded from the city website. Assistance with proofreading and speaker identification was provided by Rachel Nahon.

DATED this 19th day of May, 2008.

Carol Cohoe
Carol Cohoe

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE CITY COUNCIL
FOR THE
CITY OF KIRKLAND

In re appeal of a Decision of the Design
Review Board of a proposed development at
101 Kirkland Avenue

Permit No. DRC07-00006

VERBATIM TRANSCRIPT OF COUNCIL
DELIBERATIONS, MAY 6, 2008

Citizens for a Vibrant Kirkland ("CiViK")

Appellant,

SRM Development,

Project Applicant.

The following transcript contains only the portion of the hearing during which the Council deliberations occurred. The time period covered is May 6, 2008 from approximately 10:53 p.m. to approximately 12:40 a.m. (May 7, 2008). In a .wmv file of 7 Hours 9 Minutes 54 Seconds, this portion begins during Hour 5, Minute 23.

MAYOR: I am now going to close this portion of the hearing and council will begin its deliberations. I might add to that that we're here to discuss the issues, if any, where they believe the Design Review Board erred - made a mistake - so I don't know if we need to discuss each issue or just the issues where you feel that there was an error. Anybody want to lead off? Or I can still continue to ramble while you think.

1 GREENWAY: Well, I'd like to ask a question, I guess of the city attorney. I'm confused about
2 how we are or if we are supposed to consider the comments that have been received about the
3 project because both the applicant and the appellant referenced public comment. There was
4 some talk about public support or public dissatisfaction and, and then there was also some
5 statements in the material but we're not supposed to consider that, so, so do we consider it and if
6 so, how?
7

8 ROBIN JENKINSON: I guess starting where the Mayor left off, the review standard that
9 you apply – and I'll just reiterate it because I think it's helpful – is that unless substantial relevant
10 information is presented which was not considered by the Design Review Board, the decision of
11 the Design Review Board shall be accorded substantial weight. The decision of the Design
12 Review Board may be reversed or modified if after considering all of the evidence in light of the
13 design regulations, design guidelines and comprehensive plan, the Council determines that a
14 mistake has been made.
15

16 So to your question, you do have evidence before you about people's opinions of this
17 project, people who support it and people who don't. I don't think that helps you evaluate
18 whether the design guidelines, comprehensive plans and regulations have been met. But you can,
19 you have that evidence before you, there's nothing that says you cannot consider it. I think
20 community sentiment - and I think you have briefing from both of the parties about this - in a
21 case such as this I don't think it does get that much weight. We're not talking about a rezone
22 here; we're talking about analyzing a project against Design Review standards.
23

24 ARAMBURU: May I?

25 MAYOR: I don't know. City attorney, we have Mr. Aramburu with a hand up and I think I've
26 closed the hearing. I don't know process-wise where to go with this.

1 ARAMBURU: I want to address Ms. Greenway's question.

2 MAYOR: But city attorney.

3 UNIDENTIFIED: Let him talk to the city attorney.

4 JENKINSON: I think for the Mayor at this juncture you can conduct the hearing and you - I was
5 asked a question by the councilmember, I responded to the best of my ability. I don't think you
6 need to have countervailing arguments or responses.

7
8 MAYOR: Right, and I don't know where to stop that once it starts, that's the only problem.
9 I'm not legally trained as a lawyer or as a judge and it's uncomfortable so I would seek not to
10 allow continued comment from either the applicant or the appellant.

11 ARAMBURU: My purpose was only to try to answer Ms. Greenway's question.

12 MAYOR: I understand that and that's much appreciated, thank you. All right, Tom, and then
13 I have Dave.

14
15 TOM HODGSON: Okay, I've got a short list of questions that will help me decide whether or
16 not the Design Review Board has made any errors along the way here, and I'd like to take them
17 one at a time. I don't know if -

18 MAYOR: And these are questions that are in your mind, right? That you're asking -

19 HODGSON: Yeah, I mean, the answer to these questions will help me decide whether or not a
20 mistake was made and I think that's what we're here to do, right? That's only way we're going
21 to change the outcome. I'd like to start with the question of whether or not this project meets the
22 requirement for two stories on Lake Street. Is that all right?

23
24 UNIDENTIFIED FEMALE: Mm-hmm [affirmative].

25 MAYOR: Yes.

26

1 HODGSON: Okay. The key words for me are "should be"; should be two stories on Lake
2 Street, which means that anything else should not be, with the exception I suppose of - well, with
3 some exception but my understanding of that is that that should, that's the understanding, that it
4 should be two stories and that the building form should be two stories, not a façade. That's my
5 understanding so I'm just going to kick it off right there.

6
7 MAYOR: Thank you. David?

8 DAVID ASHER: I've asked everyone that I thought could contribute that same question and
9 I, I have a, my - I was here when this was adopted, my understanding of when I voted for it was
10 that we would have two stories along Lake Street and that was a requirement, a two story
11 building along Lake Street. I still can't find the two story building along Lake Street. To be able
12 to put this together, we have to have a two story building along Lake Street as I see in the
13 comprehensive plan that it says, "and we can go up to five stories if we've got superior retail."
14 Whether that has to be in the two story building along Lake Street, I don't know. Whether it can
15 be in some of the other retail space, that's - I haven't figured that piece of it. But whether it could
16 be only one piece of retail, superior retail, and superior retail as I think I've come to see how we
17 are interpreting it is we are interpreting it as size from the way we have historically, the
18 precedents that we have set, rather than use, and I still can't figure out where the two story
19 building along Lake Street that is required in the comprehensive plan. I don't know where that
20 exists.
21

22
23 MAYOR: Thank you. Mary Alyce.

24 MARY-ALYCE BURLEIGH: Thank you. Yeah, I think it's instructive always to, when
25 you're looking at definitions, and I know I remember in earlier life talking about shall, should
26 and what they mean and all that

1 MAYOR: (Inaudible).

2 BURLEIGH: And I'm interested in two cases, actually, the Garrett case and the *State versus*
3 *Reier* where it talks about should is permissible and expresses desire or request whereas shall is
4 clearly unambiguous and creates imperative. In other words, should is a directive term that is a,
5 perhaps a desire, but shall is a mandatory term, and let - pardon?

6 ASHER: (Inaudible).

7 BURLEIGH: I found this, this is in -

8 MAYOR: In their, their, the staff...

9 BURLEIGH: Document from staff.

10 UNIDENTIFIED: Okay.

11 BURLEIGH: And I think, so to me, if you're talking about shall or should, should is not a
12 directive term by legal interpretation. I think beside the point, however, it's persuasive to me at
13 least and I can obviously - but that along the east side of Lake Street - I think there's no question
14 that the west side of Lake Street is two stories. I think that on the other side of the street there is a
15 given exceptions to that and I think that if you are - it even talks about stories above the second
16 floor should be stepped back from the street and towards the hillside, again should, and it's got
17 all kinds of comments about how you (inaudible) exceptions to the two stories and it would seem
18 to me if the intent was only to have two stories on both sides, why didn't they include that side of
19 the street in the same as the west side? They didn't. They separated that so the west side is in a
20 different zone from the east side, right? And to me that indicates a difference in treatment. If
21 you'd wanted it to be two stories you would have put the whole shooting match in the same zone.
22 They're put in different zones because it was intended to deal with them differently and I think
23 deal with them differently because it was identified as a prime opportunity site, was to say we
24
25
26

1 want to take this underutilized site and we want to develop it into something significant and if
2 people meet the requirements that are set forward with the setbacks and all that that you could in
3 fact go above the two stories. In fact, you could go to four and a fifth if you had residential. So it
4 seems persuasive to me that this idea of this two stories on the east side is in fact, it would not be
5 consistent with the downtown plan as it was intended.

6
7 MAYOR: Thank you. Joan.

8 JOAN McBRIDE: Mr. Mayor, I'm actually ready to just render my decision. The reason why
9 perhaps these are instructive debates but given the sheer amount of material, the huge amount of
10 testimony, I'm feeling very ready to go forward. I feel odd about having a debate. Maybe that's of
11 interest to everyone but um...and maybe there's an interest to go point by point by point but
12 having reviewed all of the information I think I'm getting ready to go forward with -

13
14 MAYOR: Do you want to continue this, with this or do you want to wait until you hear
15 more?

16 McBRIDE: Well, I'm...it doesn't matter. I'm just wondering if the Council wants to go
17 through each particular issue.

18 UNIDENTIFIED MALE: I do.

19 MAYOR: I think that's probably going to be the case.

20 McBRIDE: Okay.

21
22 MAYOR: And there's not a lot of issues here.

23 McBRIDE: Okay. Well, if we're then starting with the two to four stories then let me just
24 weigh in on the issue. You know what I, I have to come at this about what would I do if I
25 wanted, well, when we come together and we put together policies and a comprehensive plan
26 and our guidelines, what we're really striving for is for people to have predictability. We want

1 neighbors to have predictability and we want the people who are going to purchase and develop
2 or whatever to have predictability and so for me it's hard for me to get past the map on page
3 15.D-11 that shows 1B that clearly says that two to four stories are allowed given discretionary
4 approval for those over two stories so I don't know what to do about that kind of information
5 because that's the kind of information folks would see.

6
7 MAYOR: Why don't you just hold there then.

8 McBRIDE: Well, it - one other thing.

9 MAYOR: Yeah?

10 McBRIDE: Because on the previous page it also talks about 1B and it talks about this being a
11 site that we want to have incentives for for redevelopment because these larger sites have more
12 flexibility to accommodate additional site, and that's directly about those 1B areas. So that causes
13 me pause.

14
15 MAYOR: Tom and then Bob and then Jessica.

16 HODGSON: I just want to address Mary-Alyce's point about should versus shall, which is very
17 good because if something should be done that leaves an opening for the alternative but is the
18 alternative in the spirit of the downtown plan? If we're directing that something should be done,
19 if you don't do that are you acting in the spirit and intent of the downtown plan?

20 MAYOR: And is the word discretionary usable here? Should is discretionary? I'd add that
21 because that - yes?

22
23 ASHER: That's for another situation where you have other provisions to provide height
24 when you have (inaudible).

25 MAYOR: But this, I believe this does. With discretion.

26 ASHER: Yes, in the 1B zone, yeah.

1 MAYOR: Right.

2 ASHER: Or pieces of it.

3 MAYOR: Bob.

4 BOB STERNOFF: I think this is the perfect time after what Tom just said and it's the spirit.
5 There's about, as I count there's four of us in the room who were in those meetings back in those
6 days that can talk about intent. Only four of us, I looked throughout the whole room here: Mr.
7 Ramsay, Eric Shields, Jeremy McMahan, myself - oh, Mr. Vadino I think was there too back
8 then. The intent, and I'll come right out and say I was one of the people when the heights came
9 out that voted against the heights at that time because I was concerned much about what's been
10 talked about tonight. But I was also convinced at the time that the intent was to do a couple
11 things. One was to encourage the redevelopment in our downtown that hadn't happened. To have
12 things come here that wouldn't come here without some type of incentive. I think it's unfortunate
13 there isn't a definition of superior retail and we can argue all day long whether a bank is or isn't,
14 whether it brings people, doesn't bring people, you can line people up on either side, I don't care.
15 I know when I go down there there's people in and out of that bank and I'm going to propose that
16 they're probably spending money. Yeah, they're driving on our streets but you know, they're also
17 spending money because they're taking cash in, putting cash out.

18
19
20 But the intent, what was really there at the time was how do you maintain the feel, how
21 do you, how do you incentivize that. So when we looked at setbacks, yeah, we can be critical and
22 we can say gee, you know, it's one-and-a-half percent or whatever it is and I'll buy that but the
23 key component for me is what do you see from the street? What do you really see? When you
24 walk down there my concern at the time was is it going to be pedestrian friendly? Are you going
25 to feel like you're next to a three story, four story building or are you going to feel like you're
26

1 next to a two story building? And that was the intent of what, of what was, what came out of, of
2 this whole process, plus the invent of the Design Review Board to go deal with issues like this
3 and you know, frankly, you know, that's what the intent was, was to try and modulate, to try and
4 not have up and down buildings and all of my, people in this room, I built the first building in the
5 city that tiered back. At that time you couldn't do it, you had to go straight up and down and I
6 fought very hard with the previous council what, 24 years ago to go do it. So we've come a long
7 way and I think that to, that yes should to me implies yeah, you should if you can, but in this case
8 where you've got a property that is so deep that in order to go do it, you know, I think that the
9 design review board was tasked with you know, can you do it, if not how do you moderate it,
10 how do you modulate the buildings and does it end up giving you really what you want which is
11 again the intent and the intent was a feel, so.

12
13 MAYOR: Thank you, Bob. Jessica.

14
15 GREENWAY: The requirement for two stories on Lake Street is a very important
16 requirement in my mind and in reading the comprehensive plan and like Bob I have a long
17 history of downtown issues, a 20 year history, and building heights have been the main area of
18 discussion, contention and the comprehensive plan is the result of that. It is definitely not the
19 result of the work of four or five people in this room, it's the result of the work of an entire
20 community. It was approved by the Council. The community has a right to rely on it. For me the
21 key is chapter 50.10 of the Kirkland Zoning Code states that building exceeding two stories on
22 Lake Street in the CBD1 zone must demonstrate compliance with the design regulation of
23 chapter 92 and this, these are the key words, and all provisions contained in the downtown plan.
24 To me that is the essence, that is the core of the appeal and what I will be making my decision
25
26

1 on, is does the evidence show that this application has complied with all provisions contained in
2 the downtown plan and should be awarded three, four or five stories.

3 MAYOR: Thank you. When we talk about the building being only at two floors the
4 discretionary part that I understood that I feel that is important on it is the setbacks and I believe
5 we've used the word significant setbacks from the street, and that would be incentive to go
6 beyond two floors, correct?
7

8 UNIDENTIFIED MALE: Mm-hmm [affirmative].

9 MAYOR: And that kind of relieves the word should because you can or you can't, that's
10 going to be the determination and so I would think what we need to be also putting into our
11 equation to think about is what do we mean by significant setbacks? Did we see significant
12 setbacks this evening on Lake Street? To be able to first, without even talking about the fifth
13 floor, does this building warrant, does this design warrant the third and the fourth floor? David.
14

15 ASHER: I think clearly it's been demonstrated that it's set back because in the
16 comprehensive plan on page 15.D-10 it says that stories above the second story are set back, set
17 back significantly from the street. Now here's where I, the issue that I have that I think I'm
18 climbing aboard with you. It says, it goes on to say, and the building form is stepped back at the
19 third and fourth stories to mitigate the additional building mass and the project provides superior
20 retail space at the street level. So I think setback we have because the setbacks from the street -
21

22 MAYOR: Right.

23 ASHER: Are in fact material. It's the step back. The step back does not say that it has to be
24 significant, however, it says that the purpose of the step back is to mitigate the additional
25 building mass.

26 MAYOR: Right.

1 ASHER: And that becomes a judgmental factor.

2 MAYOR: Yeah.

3 ASHER: To what is material to be able to mitigate.

4 MAYOR: And that's why I was asking about the incremental amount.

5 ASHER: Yeah.

6 MAYOR: From the second to the third floor because I think that's the important thing. I

7 understand from the street and looking at it from the street can sound significant.

8

9 ASHER: Right.

10 MAYOR: But when you look at the building will you see the four story building or will you

11 see two stories and there, there's an equation on this, decide by the width of your streets as far as

12 looking across, what you should see and this one you see the four stories, you don't see just the

13 two stories. Mary-Alyce.

14

15 BURLEIGH: Well, I think it also depends on where you are. I think, for example, if we can use

16 Marina Heights as an example.

17 UNIDENTIFIED MALE: Please.

18 BURLEIGH: Well, it's there.

19 UNIDENTIFIED MALE: Yeah.

20 BURLEIGH: As is Portsmouth. What we find is when you're walking along the street, along Lake

21 Street on the east side, as you're walking -

22

23 UNIDENTIFIED: Yeah.

24 BURLEIGH: - Past the building and to me that's where you get the impression of is it a two or

25 three story building. Now if you're looking across the street you could have - unless you had just

26 a tiny little bit you would always see the second or third story because I mean, that's just by the

1 nature of perspective. So it seems to me that where you get the impression of whether it's two
2 stories or whatever is was you walk down the street past that building. For example, one thing I
3 notice when you go to Bellevue is most of their buildings have zero setback. It's just straight up
4 from the sidewalk edge and so as you're walking along that you get this idea of this one straight
5 wall and I would suggest to you that it doesn't take much in the way of setbacks, particularly fro
6 the street to give you the impression that it is a two story building and to me when you're talking
7 about the fact that, you know, on a building like this I, you know, evidently when we, in our
8 areas - correct me if I'm wrong - we're allowed 100 percent coverage of the lot. That's not the
9 case in this particular one and as I remember the testimony level two would only cover 68
10 percent and the total building is 75 percent and when you get to the fifth story you're down to 46
11 percent. Seems to me that that reflects a significant in my mind setbacks. I mean, if we don't, we
12 don't put down exactly what we mean by significant and that is in the eye of the beholder and we
13 selected a Design Review Board with expertise in design and to, with the expertise to be able to
14 determine these things. Did they, can we point out that they made an error in their consideration
15 of what significant setbacks is? I'm not prepared to do that because again, I think it's a
16 perspective as you walk past the building and the setback is sufficient so you're not looking at
17 just a straight wall and I think that's the case here. You're not.

20 McBRIDE: (Inaudible).

21 MAYOR: Joan.

22
23 McBRIDE: I'd have to agree with Mary-Alyce on those setbacks. Lacking a definition of what
24 is significant setback, at least by using the percentage we've got something that is measurable but
25 if we don't have a definition of what is significant setbacks then we do have to, you know, punt
26 to the design professionals.

1 MAYOR: Thank you. You could still measure the footage, the incremental footage is
2 measurable. There's nothing that's not measurable.

3 McBRIDE: I know, but we haven't decided what is significant or not so lacking is two feet
4 equals moderate, four feet equals significant, we haven't determined that so it's, it's a judgment
5 call but what we do have is the percentage of coverage of those stories and that is mathematically
6 significant.
7

8 MAYOR: All right. I have Jessica and then Dave.

9 GREENWAY:I just want to mention, we're talking a lot about setbacks and step backs and I
10 think it is a judgment call as to if the setbacks and the step backs are significant enough to
11 accomplish the intent of the comprehensive plan but I would also point out that the downtown
12 plan requires modulation of building heights, modulation of façade widths to break large
13 buildings into the appearance of multiple smaller buildings and that buildings over two story in
14 height should generally reduce the building mass above the second story. So there is a reason for
15 the, these rules, including the setbacks, and it is to break up the mass so that a large building, the
16 mass, the bulk, the mass and height of a large building is mitigated.
17

18 McBRIDE: Question to Jessica, would you say that the proposal has done that?

19 GREENWAY:I would say -

20 McBRIDE: In other words, the three -

21 GREENWAY:I would say that it has not done that. I think a valiant attempt was made but I, in
22 my opinion the applicant's own renderings prove to me that this is, this is a large, massive
23 building. It looks like a large, massive building and that the modulation, the setbacks and the step
24 backs don't go far enough to accomplish what I believe the goal of the downtown plan is.
25

26 MAYOR: Thank you. Dave and then Tom.

1 UNIDENTIFIED FEMALE: Jim.

2 ASHER: My issues are with the west end of this I think exclusively. I think the rest of the
3 building to me is a gee whiz, thank you all the people that have contributed to it, really great job
4 and I, I don't have, I don't think I have anything to say and one of these days I'll look at that
5 board that came by but that doesn't have anything to do with the appeal. The west end of this
6 building is where I have the issue. The west end of this building, I'm still looking for the two
7 story building on the west end. I'm still, I'm questioning, given the presentations this evening,
8 whether the step backs are sufficient to mitigate. However, if we get a two story building along
9 Lake Street I think the set or the step backs will be enough to do that. I just need to see a two
10 story building along Lake Street.
11

12 MAYOR: Tom?

13 HODGSON: So question for you, Dave, how deep is a building on Lake Street in your mind?
14

15 ASHER: That's a wonderful question.

16 HODGSON: So is the retail space to have 39 feet, is that?

17 ASHER: I think the -

18 HODGSON: We've got that codified.

19 ASHER: - Question asked earlier was that retail space to be superior has to be more than 30
20 feet, is that what it was? I've got it somewhere.
21

22 MAYOR: We had dealt with that over the years. Eric, you can probably help us with that.

23 ASHER: Greater than 30 feet and greater than 13 feet (inaudible).

24 MAYOR: We had to have a depth of 30 feet or maybe it was 20 feet. We debated this to
25 great length in the city in terms of the, the intrusion of non-retailers.

26 SHIELDS: Yeah, the code establishes a minimum depth of 30 feet.

1 MAYOR: Thirty feet.

2 SHIELDS: So -

3 MAYOR: And selling a product I believe we called it.

4 SHIELDS: Retail use.

5 MAYOR: Yeah.

6

7 ASHER: So to me, and again, but this goes back to the other question, do all the retail
8 spaces have to be superior retail, and I think not, but how much of it needs to be superior retail? I
9 don't know, I haven't come to that conclusion, however I'm still looking for a two story building
10 along Lake Street that is 30 feet or if it's superior or more.

11 MAYOR: Okay, well you, you can't, you're coming down in a good place because you
12 excluded the superior retail. Why don't we just kind of set superior retail - we seem to have we've
13 done that, so we'll come back to that so then we'll try and wrap around one of these issues. Tom?
14

15 HODGSON: So my question for you then, Dave, was do you require a depth of 30 plus feet on
16 the ground floor to be defined as superior retail, and that would mean that the, that would
17 represent a building and all the height above that would also be two stories for the depth that
18 we're talking about.

19 ASHER: I think whatever retail is along, whatever the size of the building is along Lake
20 Street, it's two stories.

21 HODGSON: Okay.

22

23 ASHER: For the entire -

24 HODGSON: But then if we're talking about -

25 ASHER: For the entire depth -

26 HODGSON: Superior retail then (inaudible) 30 feet.

1 ASHER: Now, then whether - no, you're talking more than 30 feet.
2 HODGSON: There, oh -
3 ASHER: And that's ill defined, 30 feet one inch on.
4 HODGSON: Okay.
5 ASHER: Whether that particular space on the corner has to be greater than 30 feet I don't
6 know.
7
8 BURLEIGH: Excuse me, can you describe something for me, Dave? We're talking about the
9 interior of the building being 30 feet from a door to a back wall, correct?
10 ASHER: That's the depth of the -
11 BURLEIGH: Right.
12 ASHER: (Inaudible) so.
13 BURLEIGH: So are you suggesting that this is not the case on this retail space?
14 ASHER: Oh no, it is.
15 BURLEIGH: It is? So it is -
16 ASHER: It is on the retail space -
17 BURLEIGH: Right.
18 ASHER: However, that is not a building. That is part of right now a huge single mass that
19 is more than two stories when you go back that the, that (inaudible).
20
21 MAYOR: Let's go back to the person that had the floor. Tom.
22 HODGSON: So I'll try to wrap up this thought here. Okay, Dave, if the first floor was brought
23 out to the allowed maximum setback there would be roughly a 35 foot setback from the face of
24 the first floor to the face of the third, from second to the third.
25
26 ASHER: I would say greater than 30 feet.

1 HODGSON: Okay.

2 ASHER: Whatever that would be.

3 HODGSON: So, but they chose to hold back the corner of the property on the first floor which
4 gives the impression that there's less of a setback from the first to second so if we were to give
5 that back to them there's be much greater appearance of a building on Lake Street that is two
6 stories, am I right? Okay, so what I'm trying to do is quantify what qualifies for a building on
7 Lake Street because I tend to agree that it should feel like a two story building on Lake Street
8 and so how much of a step back do we need and you have to calculate in that corner that they
9 gave away too.

10

11 ASHER: That's setback, not step back.

12 HODGSON: Right, but they could have built, they could have built out to the, you know, a lot
13 closer to the street.

14

15 ASHER: You're right.

16 HODGSON: So that was a choice.

17 ASHER: Mm-hmm.

18 HODGSON: I think we have to give them that as part of -

19 BURLEIGH: As from the street.

20 HODGSON: Right, yeah.

21 ASHER: As counting that as building?

22 HODGSON: Well -

23 ASHER: Count the sidewalk as building?

24 HODGSON: I think that counts as superior pedestrian environment actually.

25

26 UNIDENTIFIED FEMALE: (Inaudible).

1 HODGSON: So I'm trying to get a little closure on this so that - does the, does what's been
2 done here qualify as the impression and living up to the spirit of the two story desire?

3 MAYOR: Good question. All right, then we have Joan, Mary-Alyce and Jessica.

4 McBRIDE: Just back to the setbacks and step backs, we have previously seen a couple of
5 buildings come through using the superior retail and I know that when the Heathman was built I
6 didn't see a lot of step backs and yet you know, that went through the process and it feels okay
7 but I don't see what I would call significant step backs but the Design Review did and we didn't
8 see a problem with that and they are far less than what we're seeing in this building so I'm a little
9 bit concerned about what our history is and then trying to kind of remake and I'm also concerned
10 about talking about, 'cause basically this is about design elements so I'm a little bit concerned. I
11 can really only judge this on our zoning code, our guidelines and our comprehensive plan. I can't
12 decide what significant means, I can't decide what is the proper step back. That's a design issue
13 and if that's not in our code, bad us, we're going to have to go back and do that at some point but
14 right now I can only deal with what's in front of us and our history of what we have approved.

17 MAYOR: Thank you. Mary-Alyce.

18 BURLEIGH: Yeah, I think Joan's hit on this in the sense that you know, our job here is to apply
19 the law to the facts and what we're seeing here is that if it says setbacks from the street we get
20 into Tom's point about, you know, you could have set back the upper story further if you, but you
21 gave up some because you wanted to create this good pedestrian feel and so it seems to me that
22 the intent of what we're trying to do here has been met because we've asked for a pedestrian feel
23 and, and keep in mind when we're talking about retail we're talking about the space and there's
24 been a lot of chat tonight about whether or not a bank is an appropriate one but I think we can
25 find from code that it does meet the definition of retail but I think -
26

1 MAYOR: We'll come back to that.

2 BURLEIGH: We'll come back to that but I think, but the point is that I'm trying to make is that
3 it seems to me that in the modulation and all the rest that we have in this building to reduce mass
4 and with the choices that were made with the encouragement of the, I think properly of the
5 Design Review Board to make sure that this building did appear as you walk beside it to be a two
6 story building. I think they've met that test.

7
8 MAYOR: All right, thank you. And Jessica.

9 GREENWAY: I end up having, again I agree with Joan. I'm going to make, render my decision
10 based on the comprehensive plan and the downtown plan and the evidence that was presented in
11 this hearing and I sound like a broken record but for me it really comes down to does the design
12 demonstrate compliance with all provisions contained in the downtown plan and I end up having
13 issue with first of all, a, in my, you know, a core requirement is that buildings along Lake Street
14 should be two stories. If they're going to be taller than two stories they have to demonstrate
15 compliance with all provisions contained in the downtown plan and I have two problems with
16 this application and one is should it have been granted a third and fourth story because were the
17 setbacks, step backs, modulation, was it enough to really mitigate the scale and the mass of the
18 building, and should it have been given a fifth story because of superior retail, and I intend to
19 use, as the comprehensive plan does, use as a criteria for saying whether or not it is superior
20 retail. The comprehensive plan clearly states that use is a criteria for judging superior retail.
21 Now, we don't always know the use but in this case we do know the use of almost half of the
22 retail space and I intend to use that in rendering my decision.

23
24
25 MAYOR: All right, thank you. You're kind of headed already to superior retail. Bob?
26

1 STERNOFF: I'm not going to touch superior retail yet but I'm am going to touch that I think
2 that the, that you could have a two story building that comes right to the curb and I don't want
3 that and I think Design Review doesn't want that and I think their task was to take a look at what
4 was there and to, and to really say okay, you know, within the guidelines - and Jessica's clearly
5 pointed these out and Dave's talked about you know, when is, what is two stories? At what point
6 do you go to two stories? I would argue that Design Review reviewed this with the intent that
7 what are you looking at. That's what they do, they look at modulations and they look at those
8 things and they make that determination, their determination based on what they see. What is the
9 perception? As I said earlier, I think what they perceived was pedestrian friendly, which is the
10 number one, you know really the number one thing, is it going to be pedestrian friendly, and I
11 think that they looked at it that way and I think that cutting the corner off as they did to create a
12 pedestrian friendly thing you know, definitely changed the way the building looks. Did it make
13 it, make it skinnier in a corner or two? Sure did. But when you walk by, when I walk by am I
14 going to see a two story building or am I going to see a three story building? When I'm walking
15 on that side of the street I'm going to propose I'm going to see a two story building, you know?
16 So.

17
18
19 MAYOR: Thank you, Bob. We're back to Tom. Who else had their hand up on this? Maybe
20 we ought to kind of then go to superior retail.

21 UNIDENTIFIED FEMALE: Uh-huh [affirmative].

22
23 MAYOR: I think we're getting kind of the feel of setbacks here.

24 UNIDENTIFIED FEMALE: Okay.

25 HODGSON: Yeah, okay, so after the discussion I think that this falls within the discretion of
26 the Design Review Board's authority and I would not be ready to say that they made an error on

1 the issue of whether or not this building qualifies as a two story building or façade on Lake Street
2 so I don't think, for me I don't think an error was made on this issue.

3 McBRIDE: I would concur with that.

4 BURLEIGH: So would I.

5 STERNOFF: Concur.

6 MAYOR: All right, now let's move along.

7 GREENWAY: We're not, we're not rendering our opinions yet, are we?

8 McBRIDE: Not yet, we're just agreeing.

9 STERNOFF: Well, we just did. We kinda did.

10 BURLEIGH: Well, on one issue not (inaudible).

11 GREENWAY: If we're rendering our opinion then I want to render my opinion.

12 MAYOR: You did.

13 UNIDENTIFIED FEMALE: You did.

14 MAYOR: Earlier. I've got it down. You know?

15 BURLEIGH: Are we ready to move onto retail space?

16 MAYOR: Okay, let's talk a little bit about superior retail. Who wants to start off talking
17 about superior retail?

18 BURLEIGH: Oh heck, I'll jump in.

19 MAYOR: Go ahead.

20 BURLEIGH: I think it's pretty obvious that we're really talking about space here, not use and I
21 mean, it says space and to do otherwise I think is a bit odd because space changes. I don't know
22 how many times I've been in a town where what previously had been a bank building was now a
23 thriving retail, whether it be selling women's clothes or whatever it might be. Uses change and
24
25
26

1 we've all talked about, we've heard a lot of talk in the previous meeting about how the banking
2 business is changing. I would suggest to you that retail is changing.

3 UNIDENTIFIED MALE: That's right.

4 BURLEIGH: We have a bookstore in town that's going to be moving to a smaller space, they're
5 going to build up their Internet business because more people are shopping on line and you
6 know, when we talk about one of the reasons we've gone to streamlined sales tax and all that
7 business is because of the incredible growth in online shopping and so I think all retail, banking,
8 whatever it could be, is all changing and we will see spaces' use changing consistently and so
9 what we need and what the problem we have in a large part of downtown is that we have
10 outdated, poorly designed spaces in a lot of the older buildings in town, which means that they're
11 not effective as good retail and so I think we have to look at space, not the use, because that's
12 ever-changing. I mean, good heavens, look at some of all the changes we've seen in the uses of
13 some of our buildings downtown and I don't think bank buildings are exempt from that. The uses
14 are continually changing so what, how can you determine whether or not a building should be
15 built on the basis of a current use? It's the space that they're going to be able to put to use over
16 the years because we would hope this building's going to be there for a good long time and
17 you're certainly not going to tear it down because you're going to change the use of the space
18 unless it were something dramatic like turning it into an auto dealer or something. So I think we
19 have to look at the space part of this as a way to evaluate it.

20 UNIDENTIFIED FEMALE: Yeah.

21 MAYOR: All right, Tom and then Joan.

22 HODGSON: Okay.

23 MAYOR: And then Jessica.

1 HODGSON: I'm going to restrict my comments to the issue of space, not use. I think it's clear
2 that that is the language that is in our comp plan but saying that, to me this space has been very
3 clearly and specifically designed to be a bank. It's got a drive-through, it's got doors and window
4 alignments that support that use, and we've got a tenant lined up. Maybe it's not going to actually
5 be that but I think we're pretty sure that it will be the same bank. After 2037 when this bank goes
6 away, maybe, will that space be used for something else? It's designed to be a bank. My guess is
7 that another bank would like to use that great corner space so I'm thinking here that yes, it could
8 be used for another retail use but in my mind it's not likely because everything I heard was that
9 the architect was instructed to build out to a certain size for a bank use for a drive through for a
10 bank use, doors and window configurations for security for a bank use, and I think that's the,
11 that's going to be the design of that space indefinitely.

12
13
14 MAYOR: Thank you, Tom. Joan and then Jessica.

15 STERNOFF: Jim.

16 MAYOR: And then Bob.

17 McBRIDE: Yeah, I believe also that this conversation should be about space as opposed to
18 use because I think if we were going, if we were thinking about use we wouldn't ask the Design
19 Review to review that. We might ask Ellen Miller Wolfe, someone who is knowledgeable about
20 retail uses. We didn't ask Ellen to review that, we asked Design Review to design beautiful
21 storefronts and beautiful retail spaces. I'm not so concerned about the bank. I agree with CiViK,
22 a bank is not typically a good use of beautiful retail space and I think this is going to be or if this
23 goes through I think it will be a beautiful retail space, and I'm not too worried about what the
24 future is because mainly the drive through that goes between the two buildings that would be
25 maybe an issue for the future but anything that resembles an alley to me, because I'm I believe in
26

1 a grid system that includes alleys at all times, I'm a big fan of alleys, I don't think that would ever
2 be a bad thing to have should a bank go away in use.

3 I'm also, believe that the other three retail spaces are well designed, they're deep, I
4 appreciate the eyes on the street, the giant window treatments, so I'm very comfortable with the
5 retail space that has been designed and I think that the Design Review Board used the authority
6 that we gave them to help the developer design space that would meet our needs for a pedestrian
7 friendly, eyes on the street, good retail space.
8

9 Do we need to revisit this? I think from some of the neighbors and citizens' concerns
10 we're going to have to come back to this because it, there's obviously a problem, but for this
11 issue, for what we have before us, because we have to go by the guidelines, by the precedent, this
12 is not your ordinary meeting. This is not legislative. We don't get to do what we most want
13 tonight. We have to only go by guidelines, by what is written, by what has been approved in the
14 past. Tonight is not the night we get to just do what we want.
15

16 MAYOR: Okay, Jessica, Bob and Tom.

17 GREENWAY: I believe that the Design Review Board did make a mistake in granting superior
18 retail designation to this application. I call your attention to the guidelines. The guidelines give
19 us "A," what is the basic expectation, the basic retail expectation without the height bonus? "B"
20 is, what is the expectation for superior retail space? It talks about two items, physical features
21 and how does the retail fit into or contribute to downtown, which says, does it support other
22 retail by virtue of its tenants, pedestrian connections, linkages, et cetera; is it space that attracts
23 desired tenant types, local serving retail anchor tenant space? Because we know that almost half
24 of this retail space is designed for a bank, going to be used by a bank because our guidelines, in
25 defining superior retail, not only allow us but in my opinion require us to consider use when we
26

1 know the use. I don't think that this qualifies as superior retail space. Retail, yes. Our code, I may
2 not agree with it but our code clearly says that banks fall into the category of retail. What we're
3 talking about here is should a fifth story be granted because it provides superior retail and in my
4 opinion the answer to that question is no.

5 MAYOR: Thank you. Bob, then Tom.

6
7 STERNOFF: Yeah, I agree with CiViK that banking is probably not my first choice and I agree
8 with their experts, the expert lady who said yeah, banks like this are going out. I agree, and I
9 expect that's going to happen because more and more of us are going to electronic banking so
10 what their needs going to be for X amount of years, for 5,000 plus feet, you know, 55, 5,700,
11 whatever the heck it is, I don't think is going to be very long lived. I think one could argue that it
12 does provide a service to our retailers. I see retailers in there all the time when I bank. I bank
13 there, I see people in there, I deposit my company's checks in there and so do other companies.
14 How much longer we're going to be dealing with those things who the heck knows, probably not
15 very much longer. I think it is a space issue and I think that was, that was - once again I get back
16 to the intent of when we were talking back in '99 and 2000 about this stuff at the, at the DAT in
17 those days, but it was about space that the argument really had to do with space and about what
18 spaces were not available, why weren't businesses successful here, and so I think it does come
19 down to that is really the question for the DRB and I can't fault them on this. I, you know, I don't
20 think we're into the business of picking uses and I think that's a very dangerous slippery slope.
21 Not my first choice but I can't fault the DRB on this one.

22
23
24 MAYOR: Thank you, Bob. Tom.

25 HODGSON: Good comments, Bob. I'm not ready to, to condemn the use because it actually
26 might change to another use someday. I mean, I think there's always that possibility and we're

1 not supposed to be discussing this based on use so I won't but the thing that I'm concerned about
2 now is that this project was evaluated based on this particular use even though we're not talking
3 about use and the part that disturbs me is that in order to satisfy the parking requirement, 16
4 stalls from the retail bank space use are to be used after hours to meet the parking requirement
5 for the upper floors, so if and when this space ever is converted to another retail space, a shoe
6 store or a clothing store, they will be deficient in parking requirement and I think that's an error
7 in the -
8

9 UNIDENTIFIED FEMALE: They'll have to make it up.

10 HODGSON: Well, I think then it's not superior retail space if you don't have adequate parking
11 and that's an error.

12 MAYOR: I'll weigh in here. When I, when you look at some of the original proposals in the
13 book here of what we were expecting, why are we considering the retail aspects of the downtown
14 plan? Office uses are prohibited unless they have intervening retail frontage, we know that. The
15 intent of the provision is to create a vibrant, active core by prohibiting non-retail uses. I'm not
16 saying that would be a bank but this is key, "that do not stimulate the same level of pedestrian
17 interest and activity." The proposal is to tighten the requirements for ground floor retail and I
18 think that's what we were seeking to do -
19

20 UNIDENTIFIED MALE: (Inaudible).

21 MAYOR: I was on the DAT too, Bob, I was just kind of quiet.

22 STERNOFF: Okay.

23 MAYOR: And I remember us talking about -

24 STERNOFF: We saw you there I guess, a couple times.
25
26

1 MAYOR: We talked about space because we don't have the footprints for attracting a lot of
2 different types of stores in downtown Kirkland. I probably said as a retailer there isn't anything
3 down there that I probably want to go occupy because I would be a new construction kind of a
4 guy but there's people who would want to provide themselves with some kind of a retail
5 opportunity in an older funky business and bring a different type of a retail activity to the street
6 so I think use, it's hard not to get use back into the conversation. If you want to provide activity
7 on the street the - Gibbs even said, in an earlier memo Gibbs even said that most retailers in his
8 assessment of our downtown were closed on Sundays and closed at night, six o'clock. Most of
9 the retail. And I don't know, they're still doing it. Well, what does a bank do? It's not open on
10 Sundays, limited on Saturdays and closed at night so you automatically limit, as he says, you
11 limit your sales potential and I think sales potential is all what it's all about in downtown
12 Kirkland.
13

14
15 One other thing. I don't think I remember what it was.

16 BURLEIGH: Jim, can I comment while you?

17 MAYOR: In a minute - well, go ahead while I'm thinking, that'd be fine.

18 BURLEIGH: Okay. Well, I think, it seems to me that when we're talking about this space in
19 time we make a point well, it's designed as a bank but you know, it would seem to me if as we
20 propose banking goes away, and I don't think it will because one of things I've heard people say
21 is you know, I'm really upset that services seem to be going. I moved downtown so I could have
22 services as well as retail and I find that I can't find a doctor downtown anymore because they're
23 all moved up to say, Evergreen, they can't find a space. And it seems to me that banks play an
24 essential role in any community, that's why you go into any downtown you find banks because
25 people go there because they need to. I go to the bank, need to deposit checks and things of that
26

1 sort and you may go to get a loan, all kinds of reasons to go to a bank and I think if a bank usage
2 went away and somebody would, you could come in and remodel the space, I mean, we've
3 certainly seen a vast amount of that go on where you could remodel the frontage and stick a door
4 in and you could divide the space up differently.

5 UNIDENTIFIED MALE: (Inaudible).

6
7 BURLEIGH: I think we just also need to remember that we also have three other, as Joan
8 pointed out, we have three other retail spaces there which I think are going to be a real benefit to
9 the community. Right now we have a bank, so that's what we got.

10 MAYOR: Okay.

11 BURLEIGH: And so I - and the bank has owned the property and so it seems to me that it's the
12 space and can the space be adapted to superior retail use, I think so and I think this is the basis on
13 which we need to judge it.

14
15 MAYOR: Well, you're right that the bank could come there, that's fine and that would be if
16 there was a mistake and an error in the process, it was right from the get go of the applicant and
17 to a degree staff saying this is going to be a bank and that's what it's going to be, it's not going to
18 be anything else, and they pushed for a straw vote and very, very early in the decision and I think
19 Mr. Loos went home thinking that this was kind of a done deal. He bought the property right
20 after that, after that meeting, so if there was a mistake it was, we kind of, rather than grow into
21 the decision making, we already made a decision, we're trying to push it and twist it like a square
22 peg into the round hole. This doesn't fit but we're going to figure out how to make it fit. Now
23 there's a whole hierarchy of different types of retail. How would be, you be feeling if this was
24 going to be a McDonald's on that corner? Well I don't think we would feel that this is really too
25 good. Is that superior or not? Well, we're saying that we can't determine if something is superior
26

1 or not. I would say a McDonald's probably wouldn't be, even though it's got a lot of energy and a
2 lot of people driving and probably far more people than you'll see in your bank will be seen in
3 McDonald's, they'll be eating there. Is that what we want? And the idea is no. I'm not saying you
4 can't have the bank there, the bank is fine. You can have a bank if that's the deal. But you can't
5 have a fifth floor as a result of it. That's all.

6 UNIDENTIFIED FEMALE: Jim.

7 MAYOR: That's the, that's the code.

8 UNIDENTIFIED: Yeah.

9 MAYOR: All right, now I'm going to stop there and go back to Tom and I know Joan's got
10 her hand up.

11 HODGSON: So I'll try to follow on to that. I think we all agree that a bank is not necessarily
12 our definition of superior retail. I don't think it's what we had in mind when we were talking
13 about the spirit of the downtown plan and revitalizing retail in the downtown. I think, you know,
14 I think we can get there.

15 UNIDENTIFIED: (Inaudible).

16 HODGSON: Well, we can talk about that but assuming that the space might be used in the
17 future for something other than a bank use, there's still a basic design problem, that it's not well
18 designed for superior retail use. It's designed to be a bank and when you do go to convert it you
19 have to deal with the drive-through, you have to deal with the doors that may or may not be
20 optimal for certain types of retail and you have to deal with the parking deficiency. That's not
21 superior.

22 MAYOR: Thank you. Joan.

23 ERIC SHIELDS: Excuse me, Mayor?

1 McBRIDE: Just um -

2 SHIELDS: I'm sorry, but I think we want to probably clarify a little bit on the parking. There
3 may be a misunderstanding about that.

4 McBRIDE: Okay, and then come back to me, sir?

5 MAYOR: Yes.

6 JANICE SOLOFF: So as part of the parking modification, the 16 parking stalls allocated for
7 the bank use, it states here that it should be for visitor parking between 7:00 p.m. and 6:00 a.m.,
8 so if the bank, if that tenant space changes to another use, those 16 stalls would still be allocated
9 for visitor parking, any type of visitor parking, in the evening hours.

10 MAYOR: Okay. Go ahead Tom. That wasn't code.

11 HODGSON: But wouldn't that -

12 UNIDENTIFIED: But that was not a -

13 HODGSON: Wouldn't that short change the residential parking requirement?

14 SOLOFF: No, that's in addition to the visitor parking for the residential.

15 SHIELDS: I think, Tom, it was just to make efficient use of those spaces when they're not
16 being used by the tenant.

17 MAYOR: You want me to come back to you?

18 HODGSON: Okay. Something's not right.

19 MAYOR: Joan, and then we're going to come back.

20 McBRIDE: I think what we're dealing with here, though, is that when some of these plans and
21 these guidelines were written they actually anticipated that there would be a bank there. In fact
22 there's a special provision for a drive-through use there.

23 UNIDENTIFIED FEMALE: Mm-hmm.

24

25

26

1 McBRIDE: And I think CiViK makes a great point, is a drive-through a pedestrian friendly?
2 Absolutely not. Drive-through is not pedestrian friendly but the plan not only, it anticipates that
3 there will be a bank there and it anticipates that there will be a drive-through. I mean it's, what
4 did it go back to, 1995 or something, 1990 when the plan was made for a, when there was an
5 anticipation of the drive-through, how old was that? Nineteen....
6

7 MAYOR: Well, let's not debate that. Can we move on?

8 McBRIDE: Well...well, we can debate everything else.

9 MAYOR: Well, memories.

10 McBRIDE: What I'm concerned about is when we start identifying tenants we get into a
11 dangerous, dangerous place, especially I think with these kind of opportunity sites. At some
12 point when this was written the Council thought that it was so important to have this as a
13 redevelopment site they actually made a provision for a drive-through there and that's what we
14 see today, so because it's in our guidelines, because it's allowed to have a bank there and because
15 it's allowed to have a drive-through, because it's in the guidelines I can't find fault. Do I like it?
16 No. But I can't find fault.
17

18 MAYOR: Okay. Bob?

19 STERNOFF: Yeah, when I said earlier bank is not my first choice I did not say it's not superior
20 retail, you know, whatever that is. What I did say was that it does provide the services and that it
21 does support retail. My first choice? No. McDonald's? No, you wouldn't see it there. Not on my
22 tenure hopefully but what is there is a bank today. It's an accepted use, it's already there, and I
23 think that, that I do believe and I'll say it again, that banks, as was mentioned by the expert
24 witness, yeah the banks are getting smaller and I think even at some point B of A will decide
25 they have too much space there and yes, you'll still have a place to go deposit checks but it's
26

1 going to be much smaller and your services, you know, will be on line and I think that the next
2 generation will be used to using cash machines and things and that we're not used to quite yet.

3 MAYOR: All right. Jessica and then we'll come back to Tom.

4 GREENWAY: So I find the discussion interesting because council members seem to be
5 arguing about whether or not a bank can be there. Clearly a bank can be there but what we're
6 trying to decide is does a bank, does this space and this use on the 100 percent corner in
7 downtown Kirkland qualify for superior retail. That is the decision. Not about whether it's
8 allowed, not about whether it's good or bad, but whether it qualifies as superior retail. Again, I
9 keep going back to the guidelines, the guidelines for superior retail say, how does the retail fit
10 into, contribute to downtown, does it support other retail by virtue of its tenants. The retail expert
11 told us, he answered the question that I asked, that what retail looks for is to cluster with other
12 retail so that it provides a draw. We know that a group of galleries means that each gallery will
13 be more successful. A group of restaurants means that each restaurant will be more successful
14 because the group will be a draw, so the bank is clearly allowed, that is not the issue. The issue
15 is, does it qualify? Does this application qualify for superior retail? In my opinion, based on the
16 guidelines, it does not.

17 MAYOR: Okay. I've got Tom, Dave and Mary-Alyce and then let's see if we get kind of an
18 indication here.

19 HODGSON: So I'd like to ask a question of Eric Shields, planning director. Was there any
20 accommodation for reduced parking because of the residential use? Any at all? What is the
21 residential use requirement in that zone?

22 SHIELDS: The answer is yes, there was reduced parking for residential, not for the senior
23 residential, though. The ratio that was used was the same ratio that has been used for other
24

1 residential projects in the downtown which I think is one per bedroom? One stall per bedroom.

2 So it is not the code required parking, it is through a modification provision in the code and that
3 has been used consistently by other retail, other mixed use projects with residential in the
4 downtown (inaudible).

5 HODGSON: Okay, so the parking that is provided is consistent with any multi-family project?

6 SHIELDS: Well, essentially, again to be real clear, it is not the code required parking in the
7 use listing in the plan. It is a modification but it's a modification which is consistent with other,
8 virtually all –

9 HODGSON: But is it a modification for less or more parking?

10 SHIELDS: Yes, for less.

11 HODGSON: Okay, so the parking requirement has been reduced and in order to – and I read
12 this in the packet someplace –

13 ASHER: Early on.

14 HODGSON: Yeah, that part of the mitigation for that reduced parking allowance, since there's
15 no covenant that will keep this in senior use forever, that 16 stalls would be made available after
16 hours. Is that correct?

17 UNIDENTIFIED MALE: He withdrew that.

18 SHIELDS: No, in the sense that -

19 HODGSON: You just said that from 7:00 p.m. to 7:00 a.m. that visitor parking would be taken
20 from –

21 SHIELDS: That is a requirement but it is not in compensation for the senior use.

22 Modification had nothing to do with the senior use, it was simply the usual residential
23 requirement that has been allowed through modifications in the downtown. The requirement for
24
25
26

1 the visitor use of the 16 stalls I'm understanding was intended to simply make use, shared use of
2 parking so that there is the availability that there's not that parking is not taken off the
3 availability when the bank or any other tenant that's in that space is not using it.

4 HODGSON: Okay, so you're telling me that there would be no parking shortage if another
5 retail use other than a bank were to use this space?

6 SHIELDS: That's correct.

7 ASHER: Well, not necessarily.

8 MAYOR: We'll come back to that.

9 HODGSON: Dave – okay.

10 MAYOR: If someone else wants to chew on that. Let me ask Eric a question. Eric, why did
11 we write on CBD1 to exclude banking and related financial services? Why'd we do that?
12

13 SHIELDS: Well, I'd have to go look at that.

14 MAYOR: Zoning code.

15 SHIELDS: Yeah, I think it was trying – yeah, do you have that handy? Hang on a second. Let
16 me take a look at that.
17

18 So I'm being told that that occurred at the time that the drive-through grandfathering was
19 put in for banks, which was sometime after the strategic plan was adopted.

20 ASHER: 2004.

21 SHIELDS: What?

22 ASHER: 2004 I think.

23 SHIELDS: That would make sense, 2004. And so I think that was intended to distinguish
24 banking from the use listing above, which is the retail establishment.
25
26

1 MAYOR: Well we seem to be overlooking that in our discussions, no one has come back to
2 that. I just kind of wanted to double check it and lay it back out on the table because if we're
3 talking about what the plan says, what the zoning says, that's what it says, okay? Excludes banks
4 and related financial services. All right, Dave and then Mary-Alyce.

5 BURLEIGH: I'm not quite sure what you meant by that.

6 MAYOR: Uh, you're not Dave!

7 BURLEIGH: Okay.

8 MAYOR: It was Dave and then Mary-Alyce.

9 ASHER: I'd like the planning director to respond to what you just said. I think, you've
10 made a point and what – how did we arrive at this inconsistency?

11 SHIELDS: The – well, I'm not sure I fully understand but if I understand the question is why
12 are banks listed separately from other retail uses? That's a common practice in the code that,
13 where there's a use that has a special regulation attached to it, in this case the drive-through for
14 example, it is separated out and listed separately. It still falls within the definition, if you look at
15 the definitions, of a retail use.

16 ASHER: Okay.

17 SHIELDS: But it is not – it is handled through a separate regulation. Car dealers are handled
18 that way in other zones and that sort of thing.

19 ASHER: All right.

20 McBRIDE: But it is allowed in 1B?

21 SHIELDS: Yes.

22 ASHER: The, you said a moment ago that the parking is not to code, is that the term you
23 used?

1 SHIELDS: The residential portion received a modification from the code-required parking.

2 ASHER: And they received a modification why? (Inaudible).

3 SHIELDS: Basically they - under the code a modification is allowed. They have to
4 demonstrate that they have adequate parking for the use. And so a parking study was performed.
5 It's reviewed by Thang over here in the Public Works department who does do an analysis of
6 whether or not the parking is adequate. If it's adequate then we allow a modification.
7

8 ASHER: So are we essentially changing our code or are we saying that the code is sort of
9 our baseline and then you do a parking study and the results from that becomes then the
10 definitive for that particular -

11 SHIELDS: Yeah, it's more the latter.

12 ASHER: Okay. All right. The basic question I had about the retail, if we don't talk about
13 the corner retail space, let's say we talk about the other two retail spaces.
14

15 McBRIDE: Three.

16 ASHER: The other two retail spaces along Kirkland Avenue. They are greater than 30 feet
17 in depth. I'm not sure about the height. Do they meet the height so - do those in and of
18 themselves qualify sufficiently for superior retail to provide the additional story? If those were
19 the only two retail spaces in this development, would they in and of themselves qualify for the,
20 providing the additional story with housing and superior retail?
21

22 SHIELDS: Are you asking me that question?

23 ASHER: Yeah.

24 SHIELDS: The code does not get into that level of detail. It provides a list of criteria and a
25 body -
26

1 ASHER: So any one space could be deeper than 30 feet and we've met the requirement of
2 superior retail?

3 SHIELDS: I don't think that the criteria are intended to say all you have to do is meet one of
4 these or another. It's taken as a whole and the Design Review Board makes a judgment as to
5 whether or not, on the whole, the project meets the criteria for superior retail. So this isn't a
6 checklist sort of things where you can just say if they do this, they got it, they don't do that they
7 don't have it. Otherwise I don't think we'd be here debating this issue. It was really a matter of
8 judgment as to what, whether or not overall it's superior retail.
9

10 ASHER: Okay.

11 MAYOR: Mary-Alyce.

12 BURLEIGH: Yeah, I just wanted to talk a little bit about the criteria that Jessica's referred to
13 and it seems to me that just as we wouldn't want downtown to have all restaurants or all retail
14 shops selling goods we provide for also services to be in our downtown and I think that's rightly
15 so. I don't think we'd want to -- and so when we talk about being compatible or being helpful to
16 the other businesses in the area certainly I think you could argue that having a bank there
17 certainly is helpful. You don't have to get in a car and drive someplace to go deposit your
18 receipts and so I think that there is a place in every downtown to have services available as a
19 compliment to retail and I think that's to me is persuasive.
20

21 MAYOR: Yeah, I can't disagree. So banks are allowed in downtown. They could be allowed
22 on this corner. Even though, although, I don't know, I think I heard two different opinions
23 floating around, Eric, on the dais here. It says CBD1 excludes banking and related financial
24 services, then I think I heard someone says the 1B allows them, and then you said yes. Is that
25 right?
26

1 SHIELDS: Yeah, if you look at the code, right below that retail listing that says “excluding
2 banks” is the listing of banks, so it’s really intended to say that that use listing is not the bank
3 listing, is not the use listing for banks.

4 MAYOR: It says banks, excluding banking and related financial services. I think that’s kind
5 of clear.

6 McBRIDE: But then –

7 SHIELDS: But then we go down to the next use listing and it has banks and financial
8 services.

9 MAYOR: Ah.

10 SHIELDS: In the code. And so ...

11 UNIDENTIFIED: Here you go.

12 SHIELDS: Well.

13 MAYOR: But anyway! (Laughter) Wow that’s, we’ve got it on one page, go back to the
14 next page, maybe I’ve got to go to the third page!

15 UNIDENTIFIED MALE: (Inaudible) all that he said.

16 MAYOR: You can have a bank there, that’s fine –

17 UNIDENTIFIED MALE: (Inaudible).

18 MAYOR: But the bank doesn’t qualify as performing superior to our retail.

19 STERNOFF: Sounds like another study session to me.

20 ASHER: It’s not defined.

21 MAYOR: Needs and defined so therefore the fifth floor doesn’t fly.

22 McBRIDE: Well, I disagree.

23 MAYOR: Tom. I know, we’re going to disagree on this.

1 HODGSON: So Eric, I have to go back to you on this parking issue. You said that the reduction
2 was based on the use and it was, there was a precedent in the area. I think you're talking about
3 Merrill Gardens as the reduction in parking in that, in that zone?

4 SHIELDS: I'm talking about every other residential project that I can think of in the last 15
5 years.

6 HODGSON: Okay, that were not designated as senior housing?

7 SHIELDS: Yes, correct.

8 HODGSON: Okay.

9 SHIELDS: (Inaudible).

10 HODGSON: Then why bother allocating 16 parking spaces from the retail space to visitor
11 parking? Why bother? What's the point?

12 SHIELDS: Simply to make more efficient use of those in an area where we know there is a
13 high parking demand.

14 HODGSON: Visiting parking for the residential use or visiting in general?

15 SHIELDS: Visiting in general I suppose.

16 UNIDENTIFIED FEMALE: (Inaudible).

17 SHIELDS: Right. Yeah.

18 HODGSON: So anybody can go in there and park for free?

19 SHIELDS: I don't think we specify the target of the parking, I don't think that's regulated.

20 HODGSON: But it would be generally available parking and not dedicated to any, any use of
21 the building, residential or retail?

22 ASHER: Not restricted from the public.

23 HODGSON: Okay. Okay.

1 MAYOR: Now, I'm out of names here. Where are we, folks? If I try to find the gut feel here
2 it sounds like for setbacks we are kind of a 4-to-3 split between yes and no and on superior retail
3 I'm seeing it the opposite, 3-to-4.

4 BURLEIGH: But I think the issue is where we come at the end of the day and what we're
5 voting on.

6 MAYOR: Yeah, that's, I'm trying to get us there.

7 BURLEIGH: Well we don't -

8 MAYOR: So that's kind of where we are. Do we want to recap that in an end of the day?

9 ASHER: I'd like to recap one piece of the setback-slash-stepback discussion that we had. It
10 sort of, Tom sort of brought it to a head when he indicated that the setback from the street could
11 be a surrogate for the façade, the front of the building to the back of the building, and in fact if
12 you look on - let's see, let's take something that we got recently - the handout where it showed
13 the setbacks and stepbacks from floor to floor. We received that here this evening. Yeah, just
14 hand that right here. If you took and said okay, superior retail has to be 30 feet one inch or
15 further, then at the corner that's achieved. If you go back to a distance further to the south, it's
16 not achieved in either the mid-point or the further south point at the southern corner.

17 UNIDENTIFIED: Right.

18 ASHER: So taking and saying a surrogate for a two story building can be achieved by
19 stepping back from or setting back from the property line I think should be consistent along the
20 façade of that end of the building, so I would say that you could do it and it's probably an
21 innovative approach to do that, but it needs to be 30 feet of the whole façade, the western façade
22 of the building along Lake Street.
23
24
25
26

1 HODGSON: Yeah, except the point that I was making there is that they didn't use the full
2 footprint on the first floor so I'm sort of offering an offset on the second floor setback because
3 they didn't utilize the full –

4 UNIDENTIFIED FEMALE: (Inaudible) possible.

5 HODGSON: Footprint on the first floor. That's the, you know, allowance I'm thinking of there.
6 So if you were to put back the full floor plate on the first floor and then take off what you're
7 looking for, it'd be in the ballpark, I think.

8 ASHER: It wouldn't be on the southern half of the façade.

9 UNIDENTIFIED: (Inaudible)?

10 HODGSON: Well, no, I'm saying if you were to gain it back on the first but remove it on the
11 second floor, I'm sorry, on the third, then it'd be a wash more or less.

12 MAYOR: Okay.

13 HODGSON: And you'd get your depth is what I'm saying.

14 STERNOFF: Okay.

15 MAYOR: All right, Bob and Joan.

16 STERNOFF: All right, I agree with Tom, I'll yield.

17 MAYOR: That was it?

18 STERNOFF: Yeah.

19 MAYOR: Oh.

20 STERNOFF: I agree with Tom on that.

21 McBRIDE: Mr. Mayor, I'm concerned about the lateness of the evening. Now, I'm semi-
22 retired so I can be here for the long haul but you know, we are supposed to be using the
23 evidence, you know, in light of our regulations, design guidelines, comprehensive plan, et cetera,
24
25
26

1 so while these debates I think are really helpful and might lead us to some legislative issues
2 down the line I -- do we have a notion of how we might come to?

3 MAYOR: We just have to have someone make a motion.

4 HODGSON: Well, can I just -- yeah, I think we're close. I mean, I'm getting near the end of my
5 short list here. I think we're at the point of deciding whether we think this designed use is --
6 meets the definition of superior retail - space rather, not use but space. I don't, I think I've got
7 my answers about parking cleared up so I don't think a mistake was made there but does the
8 space as it's designed qualify to be considered superior retail? That's the question.

10 McBRIDE: Okay, I have a few questions.

11 MAYOR: Let's see now, I had Jessica and then Joan, back to Joan.

12 BURLEIGH: Bob's up too.

13 MAYOR: And Bob.

14
15 GREENWAY: Well, I would just like to say that I think it's appropriate, it would be appropriate
16 for us to go through and each of us state our ruling or rendering of our opinion based on the
17 evidence.

18 MAYOR: Between the two as a combination?

19 McBRIDE: All of them.

20 MAYOR: Or individually.

21 GREENWAY: You know, I have an opinion.

22 MAYOR: Okay.

23 GREENWAY: That's based on some --

24 MAYOR: We could do that.

25
26 GREENWAY: Different factors of the hearings.

1 MAYOR: Well we may come back to start that.

2 GREENWAY: And I assume that everybody does, so I think that's, at some point, that, to me that

3 -

4 MAYOR: Are you ready to render yours right now?

5 GREENWAY: I'm ready if the rest of the council is ready.

6

7 BURLEIGH: I want to make sure Tom's ready.

8 GREENWAY: I'm, I'm -

9 HODGSON: Well...

10 MAYOR: Well, we can still have the discussion -

11 HODGSON: I would like to finish the discussion on superior retail.

12

13 MAYOR: All right.

14 HODGSON: I'm, you know, I'd -

15 GREENWAY: Just at some point that's what I think should happen.

16 HODGSON: Yeah, and I've got one more that I wanted to toss out before we wrap up, if I

17 could.

18 MAYOR: Well, superior retail, what else do we need to talk about, Tom?

19 HODGSON: I, do we have -

20 ASHER: Twelve-oh-five.

21 HODGSON: Does it or doesn't it. Yeah, I think we're there. I mean, unless somebody else

22 wants to discuss a little bit more about (inaudible).

23

24 MAYOR: That's why I was taking kind of sort of a gut feel and it sounds like we're saying

25 it doesn't.

26

1 STERNOFF: Well, hold on a second. I haven't (inaudible) to say. I think short of something in
2 our code that says what it is, first of all, and second how much it has to be. I think that's a big
3 issue and I think that is a judgment call that we turned over to the DRB and I would argue.
4 That's, you know, you can't legislate that at this point.

5 McBRIDE: Mr. Mayor?

6 MAYOR: Yes, Joan?

7
8 McBRIDE: I believe that, that the code anticipated that there would be a bank on this site and
9 I believe that a project that was delivered to and worked with the DRB to come up with a
10 superior retail space for that bank. Much, much better that we see today, much smaller with a
11 more - better defined alley that may or may not be used that way in the future. I also think that
12 we're seeing superior retail space in three other areas of that development so altogether I see four
13 superior retail spaces and here I'm only talking about the design of the spaces, the superior
14 materials, the glazing, and that's where I'm at.

15
16 MAYOR: All right, Bob? You were done.

17 STERNOFF: Mm-hmm.

18 MAYOR: Okay.

19 GREENWAY: All right, I'll go next.

20 MAYOR: Jessica, go ahead.

21 GREENWAY: Or, is it my turn?

22 MAYOR: Yes.

23
24 GREENWAY: As an elected official it's my responsibility to make sure that applications comply
25 with the provisions of the comprehensive plan and the comprehensive plan clearly states that if
26 an application in this area is going to be allowed more than two stories one of the things it has to

1 provide is superior retail. I do not believe this application provides superior retail. I sound like a
2 broken record, but again, it must comply with all provisions of the downtown plan. These
3 guidelines clearly allow us to use use as a criteria for defining superior retail and a bank by no
4 stretch of the imagination can qualify as superior retail. We're allowed to, one of the guidelines
5 specifically says "tenants." Will it contribute to downtown, does it support other retail by virtue
6 of its tenant-pedestrian connections and linkages? A bank is clearly allowed. That is not the
7 issue. The issue is, does almost half of this new retail space qualify as superior retail and I don't
8 believe that it does, and the fact that a drive-through is going to be part of the retail use in my
9 opinion proves that it is not superior. Is it allowed? Yes, it's allowed. That's not the issue. The
10 issue is, does it qualify as superior retail and in my opinion based on the evidence, based on my
11 reading of the comprehensive plan, based on my interpretation of these guidelines - which I think
12 are very clear - this does not qualify as superior retail.
13

14
15 MAYOR: Mary-Alyce.

16 BURLEIGH: Well, that's, I'll say it again, I think that when we're talking about is it a use that
17 is helpful to other, the other retail in the area, I think yes it is if we're talking about this use. A
18 bank is important to retail. They have to have a bank to provide the services that they provide.
19 The fact that there's a drive-through I think is just inherent and, and what the code says and I
20 think the design review, to say that the Design Review Board erred in this point I think is a
21 stretch. I mean, I may not, it's a, I may not agree with them that, in their, I may not agree with
22 the code and how the language is stated but certainly in terms, in terms of what it says in terms
23 of requirements, that it complements and abets the retail environment, I think it does and I don't
24 believe that the Design Review Board erred in this area.
25

26 MAYOR: All right. Who's in queue here?

1 HODGSON: (Inaudible).

2 MAYOR: I don't have a queue.

3 HODGSON: Okay. Yeah, I think the space was designed for a specific function that is not
4 superior retail.

5 MAYOR: Okay. Where we going, folks?

6

7 McBRIDE: Mr. Mayor?

8 MAYOR: Yes? You want to venture a -

9 McBRIDE: Well, I'm just wondering if you have four votes that -

10 BURLEIGH: We need a motion.

11 McBRIDE: Say this is not superior retail, that may be enough, that may be what is needed to
12 stop this discussion.

13

14 MAYOR: Well, yes, I think we do - city attorney. I don't want to fracture this so we're just
15 voting on different specific things because we're supposed to be voting and coming around a
16 general topic or general consensus that we are denying or we are accepting or we are modifying.

17 ASHER: We have to come to findings and conclusions.

18 MAYOR: Yeah, findings and conclusions but then, but then staff will bring back as we
19 continue this, the findings and conclusions.

20

21 ASHER: Well, you've got to give them something -

22 MAYOR: But we need to have something that we are telling between the three areas of
23 accepting, denying or modifying. Is that correct?

24 ASHER: Mm-hmm.

25 JENKINSON: Yes.

26 ASHER: Mm-hmm.

1 MAYOR: Okay. So that's kind of where we are of the plan, not just a piece here and a piece
2 there. I thought our discussions, we did it by piece but I think we're at the point now of
3 accepting, denying or modifying.

4 ASHER: Question.

5 MAYOR: David and then Mary-Alyce.

6 ASHER: Question of the planning director. If superior retail is not determined to be in as
7 part of this development, what are the things that change from what the current proposal is?
8

9 SHIELDS: Janice maybe will help me. The thing that I recall being of great discussion as part
10 of the DRB decision was the additional space, public space in front of the retail space, that that
11 was an integral part of the retail, so the plaza, the wider sidewalks were a key element, I believe,
12 in the Design Review Board's –

13 ASHER: If the Council comes to a finding that superior retail is not inherent in the current
14 proposal and there are no provisions that are attached to superior retail, are there height changes,
15 are there bulk and mass changes, what changes are about what's allowable on this particular
16 piece of property?
17

18 SHIELDS: I think it –

19 ASHER: If it doesn't qualify as superior retail.

20 SHIELDS: Well, it depends on what basis you're making a judgment, I suppose, but in
21 general, and yeah one of the things that comes to my mind is a project that could come back that
22 was just like this project in every other way could go to within ten feet of the curblin so rather
23 than –
24

25 ASHER: Still five stories?

26 SHIELDS: No, still, five, no, that's, superior retail is a pre-requisite for the fifth story, so.

1 ASHER: That's what I was asking.

2 BURLEIGH: (Inaudible) before and what would be significant.

3 MAYOR: And we would look at the setbacks.

4 ASHER: Oh, I'd imagine the setbacks would change.

5 MAYOR: All right, so that is our, those are our options, affirm, reverse, modify.

6 BURLEIGH: Mothball.

7 MAYOR: Mary-Alyce?

9 BURLEIGH: I'd like to make a motion that we affirm the recommendation of the Design
10 Review Board.

11 MAYOR: All those –

12 STERNOFF: I'll second

13 ASHER: Well, you've got to get a second.

14 STERNOFF: I'll second.

15 MAYOR: Oh, I'm sorry.

17 STERNOFF: Get it on the floor, I'll second.

18 MAYOR: All right, so in second by Bob, motion is made by Councilmember Burleigh. So
19 all in favor say aye.

20 VARIOUS: Aye.

21 MAYOR: Opposed?

22 VARIOUS: No.

24 MAYOR: And that was a 4-to-3 denial of that motion. Do we have another motion?
25
26

1 McBRIDE: Mr. Mayor, thank you for trying to help this along but I - you know I didn't get a
2 chance to speak to the motion and I would have like to have had a chance. But maybe - I don't
3 think people under - I - this is such a difficult decision that we have before us tonight.

4 UNIDENTIFIED: (Inaudible). Pardon me.

5 McBRIDE: The only thing that we really have and the only thing that we honored to uphold
6 when we an oath of office is our guidelines, our comprehensive plan, our zoning code, so
7 whichever way we come down on this I just think it's really important that people know how
8 important we take this decision.

10 MAYOR: I -

11 McBRIDE: It's not a laughing matter, it's not something we do flippantly. But we really
12 believe that developers for private property have a right to come in and have a predictable set of
13 rules and we struggle with that tonight, so.

14 MAYOR: And might I say the Design Review Board struggled mightily with it also and I
15 don't think there's anybody sitting in the room that's not struggling with it or is not taking it
16 seriously. Tom?

17 HODGSON: And that's - I want to talk about that. I think that we didn't talk about my fourth
18 item on my short list and that is the discretion of the Design Review Board. During all of our
19 discussion here and testimony we were looking at facts in the comp plan, facts here, facts there
20 and trying to go back to what was written, and the discretion of the Design Review Board to
21 decide on things like what's right for the intent and spirit of the downtown was pretty much
22 pushed aside. If that's the way we want to do this then we don't need the Design Review Board.
23 We can have administrative approval of these things, which to me is what looks like what
24 happened. I'm hearing and through this whole process from the very start it looked like a five
25
26

1 story project that came in and we were going to find a way to make it fit, not from the ground up
2 but from the fifth floor down and that's what's bothering me about this and I think we have a
3 further discussion about the function of our Design Review Board.

4 MAYOR: Thank you, Tom well said. Jessica and then Joan.

5 GREENWAY: Other councilmembers have said it very well. This is very, very difficult to be up
6 here sitting in judgment of this. It's incredibly difficult for me to sit up here and vote to reverse a
7 recommendation of the Design Review Board because I respect and appreciate the work and the
8 commitment and the professionalism of the Design Review Board and in fact of all of our citizen
9 volunteers on all of our boards and commissions. It's also very difficult for me to change the
10 design, reverse the Design Review Board recommendation because I really, really like and
11 respect Mr. Loos, the developer. However, as an elected official I am charged with carrying out
12 and upholding the provisions of our comprehensive plan and that's what I had to base my
13 decision on and I believe that the Design Review Board erred in two ways. One was in granting
14 the third and fourth stories, because I do not believe the setbacks, the step backs, the modulation
15 did enough to change the appearance of the bulk and mass of the building. This is a very large
16 building and it looks like a very large building, and as you heard me say over and over tonight I
17 do not think that this application qualifies for superior retail.

18
19
20 One of the things that really got my attention was in the first part of this hearing on April
21 15th the testimony of the chair of the Design Review Board, Jeff Bates, said that the Design
22 Review Board interpreted the intent of the comprehensive plan to provide greater density by
23 allowing greater height. I don't think that is what the Design Review Board is charged with. The
24 Design Review Board is not charged with interpreting the comprehensive plan. The
25 comprehensive plan is not up for interpretation. It's very clear. There are a few details that are
26

1 not specific and do require some interpretation, so again, this was a very difficult decision but
2 one that I was compelled to make based on the evidence presented in this hearing.

3 DAVID RAMSAY: Mr. Mayor?

4 MAYOR: Yes.

5 RAMSAY: Staff's assignment now is to bring back to you findings from the council based on
6 your deliberations tonight. So, so far I've heard one finding, namely, not superior retail, so I need
7 to, we need to understand if there are other findings and conclusions the council's reached on
8 which to base this order.
9

10 MAYOR: And then do we need to have a vote to

11 UNIDENTIFIED: Yep.

12 MAYOR: Deny, 'cause we've basically turned down a vote to confirm.

13 ASHER: I'll give you a proposal in a minute if you'd like.

14 MAYOR: Okay. Mary-Alyce is next and then Dave.

15
16 BURLEIGH: Well, everybody's said about how difficult this is. We've had a lot of information
17 to go through and there's a lot of legal ramifications of any decision that we make and we take it
18 very seriously and I think it's been said that there are certain aspects of this that are open to
19 interpretation and good minds can agree to differ on what these interpretations are. We appoint a
20 Design Review Board made up of experts and it's unlike a lot of our boards and commissions
21 because we insist they be people with design expertise, landscape architects, architects, folks like
22 that so that they can best interpret our intent and we give them that charge because we know that
23 to do this sort of development is as much art as science and you know, what is considered to be a
24 piece of art in one person's eye is a piece of junk in another person's eye and we find that also in
25 building design so good minds can differ on this. That's why we hire, quote unquote, at zero pay
26

1 these people to work hard and come up with a design recommendation for us. This is not the
2 permit process, this is the design process, and it seems to me we have to give great credence to
3 the opinions of our Design Review Board and so I think this is going to be something we're
4 going to have to deal with in the future.

5 MAYOR: Thank you, Mary-Alyce. Dave and then Bob.

6 ASHER: I think the next stop for this development is superior court and given that I think
7 that the findings of the council need to be clear and include all of the misgivings that we have
8 and I would propose that we direct staff to return at the next regular city council meeting with a
9 resolution setting forth the findings and conclusions that the development does not contain
10 superior retail that warrants additional height, bulk, mass of the development nor does it present,
11 meet the requirements of a two story building along Lake Street, and I add that second provision
12 to make sure that we enjoin both aspects of that in any kind of a final appeal.

13 MAYOR: And what you might want to do is put that together in a motion of denial.

14 ASHER: That's, yeah, that was what I was doing.

15 MAYOR: Okay, so –

16 ASHER: That was what I was proposing.

17 MAYOR: Moved and seconded by councilmember Asher. All those -

18 ASHER: Councilmember Hodgson.

19 HODGSON: Hodgson.

20 MAYOR: Excuse me, Hodgson. Asher's over here. All those in favor?

21 VARIOUS: Aye.

22 MAYOR: Opposed.

23 VARIOUS: No.

1 MAYOR: Okay, 4-to-3 with Burleigh and McBride –

2 STERNOFF: Three. Gang of three. Gang of three.

3 STERNOFF: Mr. Mayor, if I may. I just want to, this is for our boards and commissions
4 mainly. I for one really rely on the expertise of our boards and commissions and I want to make
5 sure that those that are watching, those that hear about this understand that there are differing
6 opinions on the council. I for one appreciate everything that's done. Certainly on a volunteer
7 basis by these people. We select you by your qualifications and sometimes as I've known in my
8 past on boards and commissions you don't get listened to. I will also posit to the council, part of
9 the problem we have here is we have so many boards and commissions and about to maybe
10 create another one that we don't have time to even talk to and not on a regular basis and certainly
11 not on a frequent basis and I think maybe that's where some of the disconnect comes in and I
12 caution the council before we create any more that we take a look at what we've got and try and
13 get this cleaned up because this to me is not acceptable in any way.

16 MAYOR: I think that's a valid opinion, Bob, thank you. Any further council comments?

17 Well, to both the appellant, applicant, staff, to the citizens that showed up faithfully and stayed
18 with us until 12:37, I thank you for your patience with this council, for your interest and your
19 faith.

20 JENKINSON: Mayor?

22 MAYOR: (Inaudible).

23 JENKINSON: Could you continue the hearing until the 20th so that –

24 MAYOR: Yes, this hearing will be continued until the next meeting of May the 20th where
25 we will have the entry of the findings and conclusions. That concludes the matter of this agenda
26 this evening. Thank you.

1 ASHER: You going to adjourn?

2 MAYOR: We are adjourned.

3 [END RECORDING]

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26



May 28, 2008

Kirkland City Council
123 First Avenue
Kirkland, WA 98033

Re: Comments and Suggested Revision regarding Proposed
Findings and Conclusions
Appeal Case No. APL08-00001; DRC 07-00006

Dear Council Members:

Thank you for providing SRM Development with the opportunity to comment on the staff's proposed Findings and Conclusions prepared regarding the above-referenced appeal, and to respond to revisions proposed by the Appellants CiViK. The attached memorandum sets forth SRM's comments and suggested revisions in a format similar to that employed by CiViK. As you will see, SRM's comments include several questions aimed at illuminating and clarifying the Council's collective rationale with the goal of preparing and presenting a modified proposal acceptable to the majority of the Council. SRM very much appreciated the comments of several Council members during the May 20th meeting that we are close to an approvable building. SRM would like to reach that approvable design through the current process.

Consistent with staff's approach, SRM also concluded from the May 6th deliberations that the Council's preliminary decision was based on two primary issues: (1) whether the proposed BOA/Merrill Gardens project as approved by the DRB complies with the height restrictions applicable to Lake Street South; and (2) whether the proposed BOA/Merrill Gardens project satisfied the "superior retail spaces" criteria qualifying the project for a fifth story. Although a majority of the Council directed staff to prepare findings and conclusions on these two issues, SRM did not hear a consensus amongst the Council members regarding your reasoning on each issue. Absent clarification by the Council, SRM, and other owners of property in the CBD-1 zone, are left to guess at the Council's intent and the meaning, as interpreted by Council, of the provision of the Downtown Plan and Kirkland Zoning Code that dictate the development potential of their properties.

As part of its comments on the Findings and Conclusions, SRM has proposed modifying the Council's decision from a reversal of the DRB's approval of the BOA/Merrill Gardens project to an approval of the project as modified. As the Council acknowledged during its May 20th meeting, you have authority to consider modifications under the Kirkland Code. KZC 142.40(11)(b)(3). To facilitate this discussion, SRM has included revised renderings of the project showing increased setbacks between the second and third stories and between the fourth and fifth stories along Lake Street South. We believe that this revised design should resolve any

outstanding questions or concerns regarding the building's compliance with the Lake Street height restrictions. We offer this design as an alternative for your review and approval as a modified design.

With regard to the "superior retail space" criteria, SRM lacks adequate direction from the Council to prepare similar revised drawings for the project. However, we believe that we can address one of the key concerns and misconceptions regarding the corner space – that it was designed as a bank. We have prepared a drawing showing how the corner space as currently designed could also be utilized as a restaurant. As explained in greater detail in the attachment, the corner space was never "designed as a bank." Instead, it was designed as an approximately 5,700 square foot retail space consistent with the joint DRB/staff created criteria for evaluating "superior retail spaces." It could be utilized by any number of different types of retail uses. If the majority of the Council continues to believe that this space does not meet its interpretation of the "superior retail space" criteria, SRM requests clarification from the Council regarding what is necessary for this space to meet the criteria, and an opportunity to revise the project to better conform to that direction. Absent such clear direction, SRM is left to guess at the Council's meaning.

Thank you again for your consideration. We look forward to the Council's continuing discussion regarding this matter at the June 3, 2008, meeting. We will be available at that time to respond to any questions or comments from the Council and to discuss any modification to the proposal that might enable the Council to approve the project as modified.

Very truly yours,



Molly A. Lawrence

MAL:mal

cc: Robin Jenkinson, Kirkland City Attorney
Andy Loos, SRM Development
Richard Aramburu, CiViK

SRM Development's Comments and Suggested Revisions regarding Draft Resolution R-4707, including responses to revisions proposed by CiViK.
May 28, 2008

Text of Resolution R-4707:

Introductory paragraph: If the Council moves forward with its preliminary decision to reverse the DRB's approval of the BOA/Merrill Gardens project, no change. If, however, the Council reviews alternative designs and consequently approves a modified design for the BOA/Merrill Gardens project, the following revisions would be appropriate:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND
ADOPTING FINDINGS AND CONCLUSIONS AND MODIFYING THE DECISION
OF THE DESIGN REVIEW BOARD GRANTING DESIGN REVIEW APPROVAL TO
THE BANK OF AMERICA/MERRILL GARDENS MIXED USE PROJECT AT 101
KIRKLAND AVENUE. (FILE NO.: DRC 07-0006; APPEAL CASE NO.: APL08-
0001).

2nd "whereas" paragraph: Accept revision proposed by CiViK.

4th "whereas" paragraph: Modify to include reference to the May 20, 2008, and June 3, 2008, Council meetings.

WHEREAS, on April 15, 2008, May 6, 2008, May 20, 2008, and June 3, 2008, the City Council considered the appeal in an open record proceeding; and

5th "whereas" paragraph: If the Council moves forward with its preliminary decision to reverse the DRB's approval of the BOA/Merrill Gardens project, no change. If, however, the Council reviews alternative designs and consequently approves a modified design for the BOA/Merrill Gardens project, the following revisions would be appropriate:

WHEREAS, at the conclusion of the hearing on June 3, 2008, the City Council voted to approve the Bank of America project as modified; and

Section 1: If the Council moves forward with its preliminary decision to reverse the DRB's approval of the BOA/Merrill Gardens project, no change. If, however, the Council reviews alternative designs and consequently approves a modified design for the BOA/Merrill Gardens project, the following revisions would be appropriate:

In support of the decision modifying the Design Review Board's decision granting design review approval to the Bank of America project, the City Council hereby adopts the

Findings, Conclusions, and Decision attached hereto as Exhibit "A" and by this reference incorporated herein.

Revised Exhibit A to Draft Resolution R-4707

I. Procedural Findings

Paragraph 1.4: Modify to add reference to the May 20, 2008, and June 3, 2008, Council meetings.

On April 15, 2008, May 6, 2008, May 20, 2008, and June 3, 2008, the Kirkland City Council considered the appeal in an open record proceeding. *April 15, 2008, May 6, 2008, May 20, 2008, and June 3, 2008, Proceedings.*

Paragraph 1.7: With regard to the second sentence, modify to make clear that the entire record from the DRB proceedings is part of the record for this appeal. With regard to the fourth sentence, if the Council moves forward with its preliminary decision to reverse the DRB's approval of the BOA/Merrill Gardens project, no change. If, however, the Council reviews alternative designs and consequently approves a modified design for the BOA/Merrill Gardens project, the following revisions would be appropriate:

The City Council heard testimony from the Department of Planning and Community Development ("Planning") staff, the Chair of the Design Review Board, testimony and oral argument from members of the Appellant and representatives of the Applicant, and asked questions of the witnesses. The Council had before it the following documents: (a) the decision of the Design Review Board with attachments including Planning staff memoranda, applicant submittals and public comment letters to the Design Review Board; (b) the Planning staff report to the City Council with attachments including the entire record before the Design Review Board; and (c) the written submissions of the parties, including briefing and exhibits. After hearing the presentation and oral arguments of the parties, the City Council deliberated and reached a decision on the appeal. By a vote of ___ to ___, the City Council modified the Design Review Board's decision granting design review approval to the Bank of America project. *April 15, May 6, May 20, and June 3, 2008, Proceedings.*

Paragraph 1.8: Reject CiViK's proposed revision. Although CiViK accurately captures the language of Councilmember Asher's motion, CiViK inaccurately asserts that that motion "reversed the Design Review Board's decision." The City Council has not to date taken final action on this appeal. Councilmember Asher's motion directed staff to return with proposed findings and conclusions. Those findings and conclusions, and not the prior motion, will become the Council's final decision on this appeal. CiViK's proposed revision unnecessarily confuses the matter.

II. Standard of Review

No proposed changes to Section II, Standard of Review.

III. Findings Regarding Appeal

Paragraph 3.1: The language proposed by both staff and CiViK is flawed. Between the two, staff's proposed language is more accurate. CiViK's proposed language, by comparison, is confusing and appears to be missing one or more letters or words. If the Council wishes to modify the staff's proposed finding, SRM would recommend the following, which most accurately reflects the language in the KZC:

The Central Business District (CBD) 1 zone permits structures containing attached or stacked dwelling units to heights between two and five stories above each abutting right-of-way. *CBD 1 Use Zone Chart; KZC 50.12.030; KZC 50.12.080.*

Paragraph 3.4: Modify to more fully and accurately capture the criteria of the Downtown Plan.

The Downtown Plan provides that the maximum building height in Design District should be between two and five stories with no minimum setback from property lines and requires that stories above the second story should be setback from the street. *Downtown Plan, page XV.D-10.*

Paragraph 3.7: No objection to either staff's proposed language or CiViK's proposed revision.

Paragraph 3.9: Accept staff's language as proposed. Reject CiViK's proposed additional language. CiViK has failed to identify any provisions in the Downtown Plan that specify the design requirements for retail space. SRM is similarly unaware of any provisions of the Downtown Plan that specify the design requirements for retail spaces. Absent such provisions, the proposed addition is inappropriate and inaccurate.

Paragraph 3.11: Staff's proposed language could be misinterpreted as implying that the BOA/Merrill Gardens project is five stories over the entire site. It also overly simplifies the DRB's decision language regarding approval of the fifth story. SRM proposes the following revision to more accurately reflect the project design:

The Bank of America proposal ranges in height from one to five stories. *Exhibit 201.*

Paragraph 3.12: *No objection to the staff's proposed language. If the Council chooses to consider CiViK's proposed revisions, we would request clarifications as follows:*

Along Lake Street South, the first and second stories are setback from the street between 14'-0" and 40'-2", the third and fourth stories are setback from the street between 22'-0" and 42'-6", and the fifth story is setback from the street between 46'-9" and 74'-11". The stepbacks between the first and second stories and the third story range between 6'-0" and 22'-4", the stepbacks between the first and second stories and the fifth story range between 34'-4" and 46'-0", and the stepbacks between the fourth and fifth stories ranges between 23'-4" and 36'-0". *Exhibit 201.*

Notably, these dimensions would need to be revised if the Council considers and approves a modified design.

Paragraph 3.14: *No objection to CiViK's proposed modification.*

Paragraph 3.16: *Delete entire paragraph. This paragraph is not factually accurate. It further does not reflect the consensus of the Council members who support reversing the DRB's approval of the BOA/Merrill Gardens project.*

Testimony of SRM's architect, Chad Lorentz, indicated that the project was not "designed as a bank." We apologize if there was any confusion about this and would encourage the Council to review Mr. Lorentz's testimony and cross-examination.¹ As Mr. Lorentz testified, SRM gave him an approximate square footage for the corner "bank" space and further told him to design an adjoining drive through. Other than that, he received no direction to design the interior or exterior space as a bank or any other particular type of retail tenant. He also had no knowledge of the operations or functions that would be located in the space. Instead, he sought to design the space consistent with the DRB's and staff's "superior retail space" criteria. The design of the doors, windows, facades, etc., were all generated to meet the "superior retail space" criteria, and were not related in any way to the anticipated tenant. Moreover, the inclusion of a drive through does not indicate that the space was "designed for a bank." Any number of other retail uses, including drug stores, coffee shops and restaurants, regularly include drive throughs.

Further, the DRB proceedings regarding the project evidence that the space was not "designed for a bank." The configuration of the corner space changed repeatedly throughout the design review process. SRM made no effort during those proceedings to design the corner space to accommodate any particular functions or anticipated needs of a bank tenant.

¹ As the Council may recall, during the April 15, 2008, Council meeting, Mayor Lauinger instructed the parties that they could not question their own witnesses to clarify testimony given on cross-exam. This may explain the confusion. But an objective review of Mr. Lorentz's testimony evidences that he was not asked to design the corner space in any particular way in order to accommodate a bank tenant – or any other particular retail tenant.

Moreover, as was discussed extensively during the Council's deliberations on May 6, 2008, there is no question that the corner space could be used by any number of other tenant types in the future. See the attached drawing demonstrating how this space could easily be adapted to accommodate a restaurant.

Finally, the transcript from the Council's May 6, 2008, deliberation document that only one Councilmember asserted that the space was "designed as a bank." See Hodgson, Transcript pp. 23, 29, 46. Consequently, this paragraph does not reflect the consensus of the Council members who support reversing the DRB's approval of the BOA/Merrill Gardens project.

CiViK's proposed additional Paragraph 3.22: Reject proposed additional paragraph. None of the proposed additional language contains relevant review criteria for this appeal. Further, none of the Council members suggested including this language in their findings and conclusions. Inclusion of this language improperly elevates one sentence, which is not even a review criterion, from the Downtown Plan above other policy provisions in the Plan. If the Council proposes to accept CiViK's additional language, it would similarly be appropriate to include the following from the Downtown Plan:

The portions of Design District 1 designated as 1B in Figure C-5 provide the best opportunities for new development that could contribute to the pedestrian fabric of the Downtown. Much of the existing development in these areas consists of older auto-oriented uses defined by surface parking lots and poor pedestrian orientation. To provide incentive for redevelopment and because these larger sites have more flexibility to accommodate additional height, a mix of two to four stories in height is appropriate.

IV. Conclusions as to Superior Retail Space

SRM concurs with CiViK's concern that this section as proposed by staff does not accurately reflect the consensus of the Council Members who support reversing the DRB's decision approving the BOA/Merrill Gardens project. Based on the transcript of the Council's May 6, 2008, deliberations, four different positions were articulated by the Council members regarding the "superior retail space" criteria.

- Council Members Bride, Burleigh, and Sternoff all concluded that the corner "bank" space met the City's criteria for superior retail space.
- Mayor Lauinger and Councilmember Greenway concluded that a bank could not constitute "superior retail" and, therefore, the project did not meet the superior retail space criteria.
- Councilmember Hodgson concluded that the corner space was designed as a bank and therefore could not qualify as superior retail space.
- Councilmember Asher did not express a clear position regarding why the project did not meet the superior retail space criteria.

SRM requests clear direction from the Council regarding: (1) why the project as approved by the DRB does not meet the superior retail space criteria; and (2) what changes are needed to the corner space to meet the “superior retail space” criteria.

At this point in the deliberations, SRM is left guessing at the Council’s intent and interpretation of the Downtown Plan criteria. Once the Council has fully articulated its direction regarding what is needed to meet the “superior retail space” criteria, corresponding findings and conclusions should be drafted. SRM also requests the opportunity at that point to offer a modified proposal that conforms to the Council’s interpretation and direction before the Council enters its final decision regarding this appeal.

With regard to the specific language of the proposed conclusions paragraphs, SRM suggests the following:

Paragraph 4.1: As proposed, this paragraph does not accurately reflect the consensus of the Council members who support reversing the DRB’s approval of the BOA/Merrill Gardens project. This paragraph should be revised in response to clear direction from the Council regarding why the majority of the Council did not believe the project as designed met the superior retail space criteria.

Paragraphs 4.3 and 4.4: SRM objects to the inclusion of the portion of Paragraph 4.3 which begins “A drive-through facility, moreover, is not consistent with superior retail space in the CBD-1, as explained in the Downtown Plan, page XV.D-6 . . . “ through the end of the paragraph. SRM further objects to the inclusion of Paragraph 4.4. Based on the transcript of the Council’s May 6, 2008, deliberations, only one of seven Council members referred to the drive-through as an indication that the project did not meet the “superior retail space” criteria. Consequently, these conclusions do not reflect the consensus of the Council members who support reversing the DRB’s approval of the BOA/Merrill Gardens project.

CiViK’s proposed Paragraphs 4.5 through 4.8: SRM objects to the inclusion of any or all of these proposed paragraphs. These paragraphs restate CiViK’s positions, rather than the consensus of the Council Members who support reversing the DRB’s approval of the BOA/Merrill Gardens project.

With regard to proposed paragraph 4.5, again, this paragraph reflects the position of one or possibly two of the Council members, but does not reflect the consensus position of the Council members who support reversing the DRB’s approvals of the BOA/Merrill Gardens project.

Further, the DRB believes that the superior retail space criteria concerns the design of the space, and not to the use of the space. As Jeff Bates from the DRB explained, the DRB did not intend, and has not applied, any of the superior retail spaces criteria, which were created jointly by staff and the DRB, as referring to or considering use. Even the “does it support other retail by virtue of its tenants, pedestrian connections/linkages, etc.” criterion is a method for

evaluating space, not use. This is easily understood if one considers that different spaces may be designed for different tenant types, but without a specific tenant in mind. This is exemplified by the café space in the proposed building – it could be a coffee shop, a sandwich shop, or an ice cream parlor (to name a few). By comparison, a 5,700 square foot corner space could be utilized by any number of different retail tenant types, and is not limited in any way by its design to a bank use.

With regard to proposed paragraph 4.6, this paragraph does not accurately reflect the testimony of SRM's architect, Chad Lorentz, or other evidence presented. The first sentence is wholly inaccurate. As explained above, SRM gave Mr. Lorentz an approximate square footage and told him to design an adjoining drive through. He was not provided any other details regarding the bank, its functions, or design needs or preferences. Again, we would encourage the Council to review Mr. Lorentz's testimony to avoid any confusion about this.

Further, the second sentence mischaracterizes the project. Also, the fourth sentence involves speculation. Even if accurate, it is irrelevant if the Council's decision is based on the design of the space, and not the use. This proposed paragraph should be rejected in its entirety. Alternatively, if the Council intends to incorporate any portion of this paragraph into its findings and conclusions, SRM proposes the following:

The space at the corner of Lake Street and Kirkland Avenue occupies the most prominent corner and is the largest retail space in the project.

With regard to CiViK's proposed paragraph 4.7, this paragraph is a blatant attempt by CiViK to insert its position into the Council's findings and conclusions. It does not reflect the consensus of the Council members who support reversing the DRB's approval of the BOA/Merrill Gardens project. It should be rejected in its entirety.

For the reasons explained above, CiViK's proposed paragraph 4.8 should also be rejected in its entirety.

V. Conclusions as to the Height on Lake Street

In general, SRM shares CiViK's concern that the staff's original proposed conclusions (dated May 14, 2008) regarding the Lake Street height restrictions do not accurately reflect the consensus of the Council members who support reversing the DRB's approval of the BOA/Merrill Gardens project. SRM was similarly unable to discern from the Council's deliberations a precise mathematical formula regarding the setbacks required above the second story to satisfy the Lake Street height restrictions.

Indeed, SRM was confused by the Council's vote on the height restriction issue. Approximately half way through the Council's May 6, 2008, deliberations, Mayor Lauinger took a "straw vote." At that time four of the seven Council members expressed their positions that the BOA/Merrill Gardens project as approved by the DRB satisfied the Lake Street height restriction. Subsequently, during the final vote on Councilmember Asher's motion directing staff to prepare findings reversing the DRB's decision, one Council member, who had previously

in the deliberations expressly concluded that the project met the Lake Street height restrictions, reversed his vote on this issue without explanation. Consequently, while SRM agrees with staff's interpretation that the entire project need not be limited to 2 stories, SRM remains unsure of what degree of stepback above the second story is necessary to satisfy the Lake Street height restrictions. SRM requests clear direction from the Council regarding exactly what is required to meet the Lake Street height restrictions. In an effort to advance the dialogue regarding this issue, SRM has enclosed proposed modified renderings of the project showing additional stepbacks at the third and fifth stories. If acceptable, SRM requests that the Council approve this design as modified.

With regard to the specific language of the proposed conclusions paragraphs, we would suggest the following:

Paragraph 5.2: Approximately two-thirds of the paragraph should be deleted beginning on the third line at the words "but the Design Review Board..." through the end of the paragraph. Although this language reflects the arguments articulated by CiViK in this appeal, none of the Council members referred to the different phrasing in the Downtown Plan as the basis for their conclusion that the BOA/Merrill Gardens project did not meet the Lake Street height restrictions.

Paragraph 5.3: SRM appreciates the staff's effort to revise this paragraph since the original draft findings and conclusions (dated May 14, 2008). SRM believes that the current version more accurately reflects the consensus of the Council members who support reversing the DRB's approval of the BOA/Merrill Gardens project. SRM proposes the following additions/revisions to further clarify the Council's interpretation of the Lake Street height restrictions:

The Downtown Plan does not, however, require that an entire building located along Lake Street South be limited to two stories, regardless of the depth of the building, because the purpose of this limitation is to "reflect the scale of the development in Design District 2." Under the Downtown Plan, it is intended that buildings abutting Lake Street South should create the impression, from the perspective of a pedestrian walking next to these buildings, of being a maximum of two stories in height.

Paragraph 5.4: As proposed by CiViK, this paragraph perhaps partially captures the consensus of the Council members who support reversing the DRB's approval of the BOA/Merrill Gardens project, but it is ambiguous and subject to misinterpretation. SRM proposes the following revisions:

The Bank of America project as approved by the DRB is not consistent with the Council's interpretation of the height limitation on Lake Street South, as articulated in paragraph 5.3 above, because the third and fourth floors are not setback from the second floor, nor from Lake Street South, far enough. *[Delete the remainder of the paragraph and insert guidance regarding how large the stepback must be to meet the Council's interpretation of the Lake Street height restriction.]*

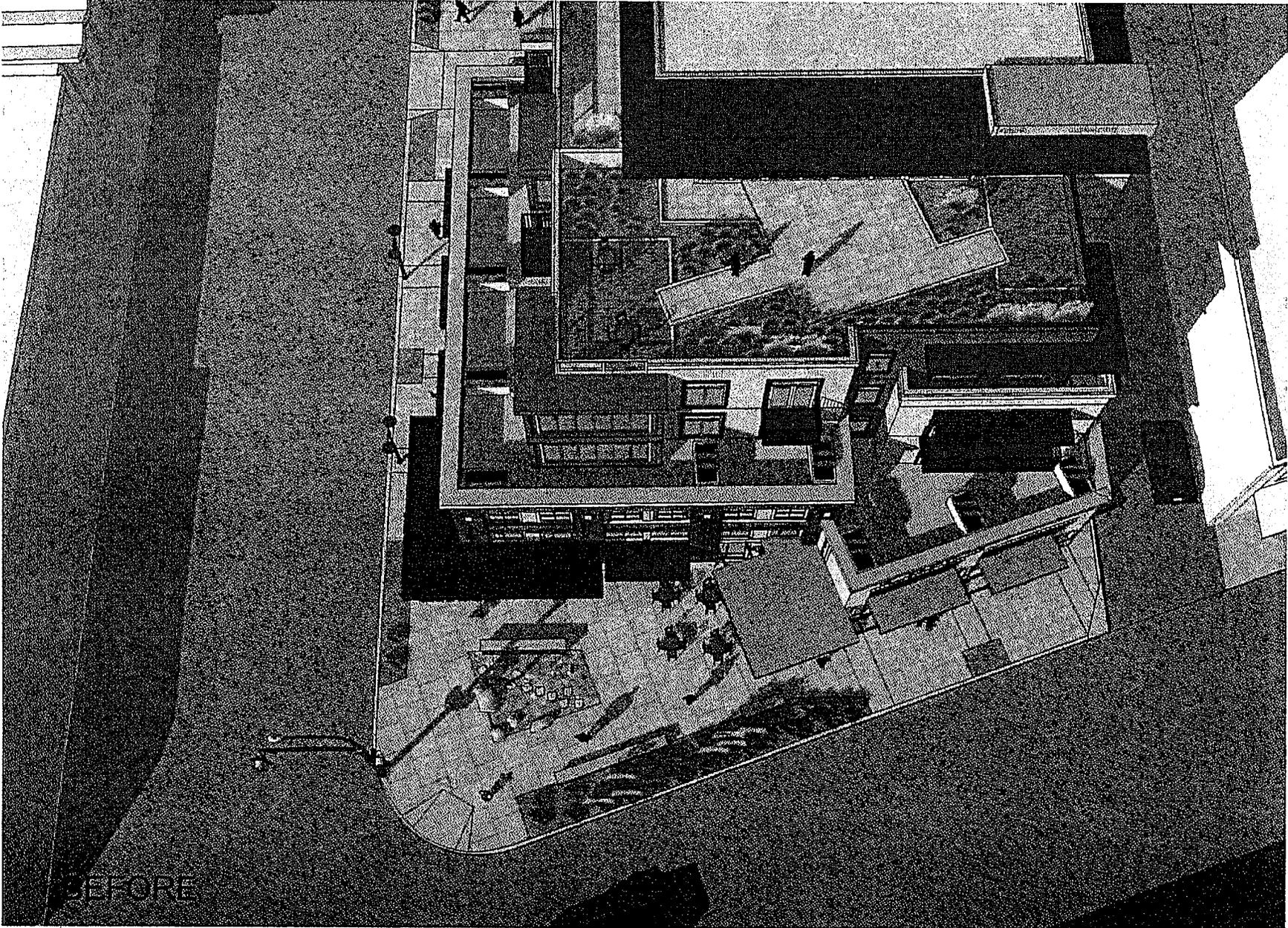
Further, if the Council reviews SRM's alternative project design and agrees that it conforms to the majority of the Council's interpretation of the Lake Street height restrictions, SRM would propose appending the following at the end of the paragraph or adding a new Paragraph 5.5 as follows:

During the appeal process, however, SRM offered an alternative design that the majority of the Council members agree conforms to the Council's interpretation of the height restrictions on Lake Street South.

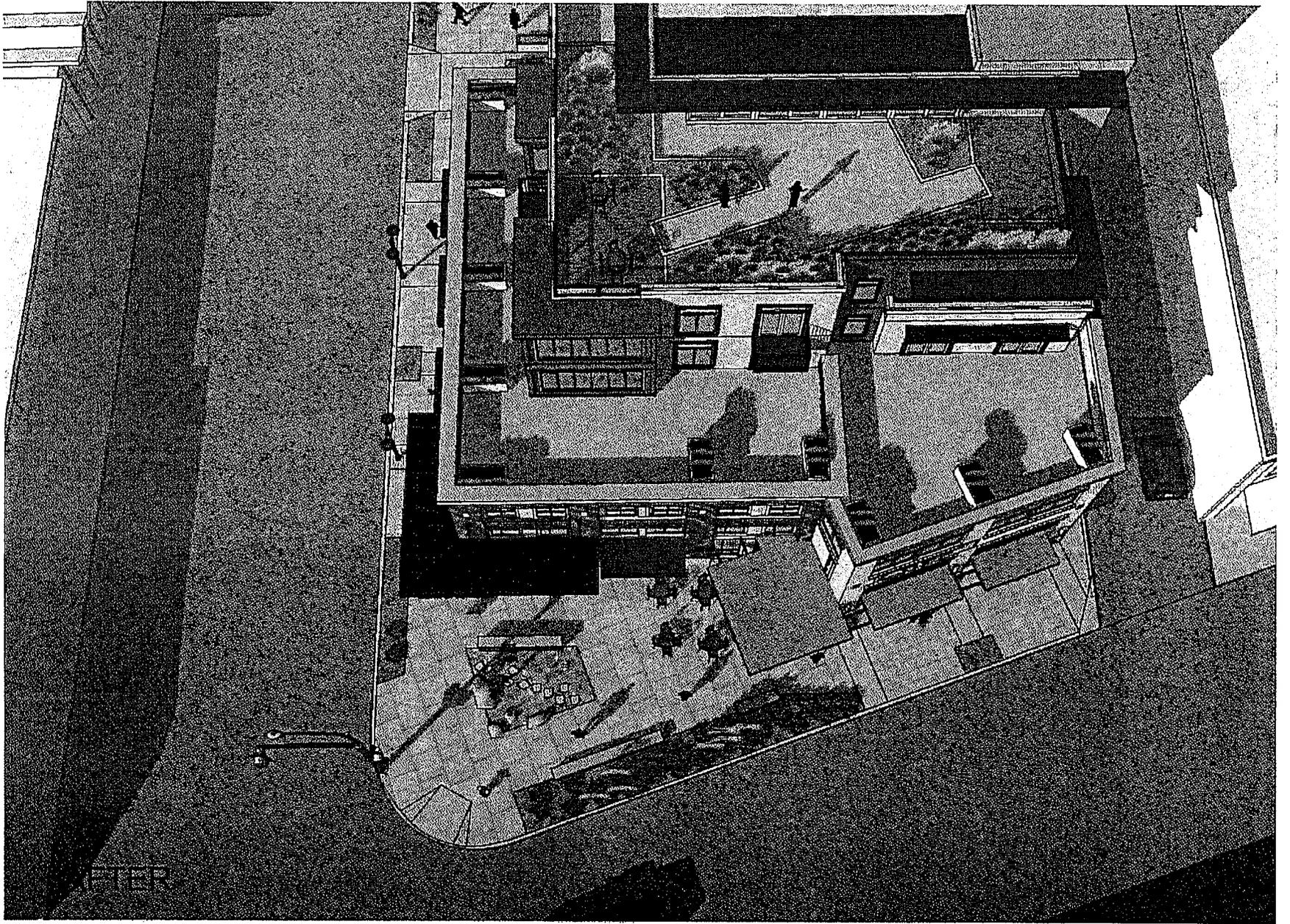
VI. Decision

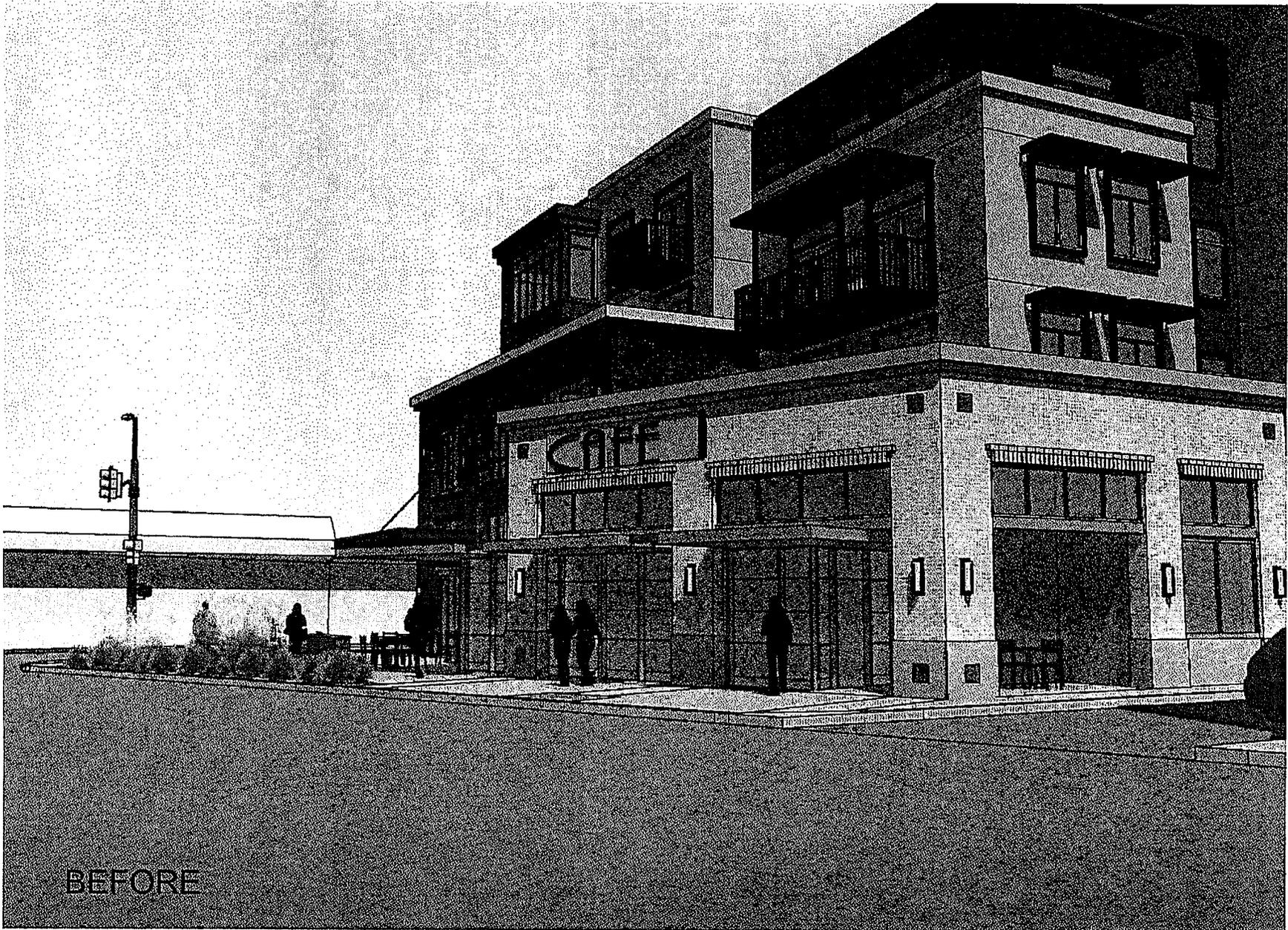
If the Council moves forward with its preliminary decision to reverse the DRB's approval of the BOA/Merrill Gardens project, no change. If, however, the Council reviews alternative designs and consequently approves a modified design for the BOA/Merrill Gardens project, the following revisions would be appropriate:

For the reasons set forth in the foregoing Findings and Conclusions, the decision of the Design Review Board is hereby MODIFIED. The approved design for the Bank of America project, as modified by the City Council, is attached hereto as Exhibit A.I.

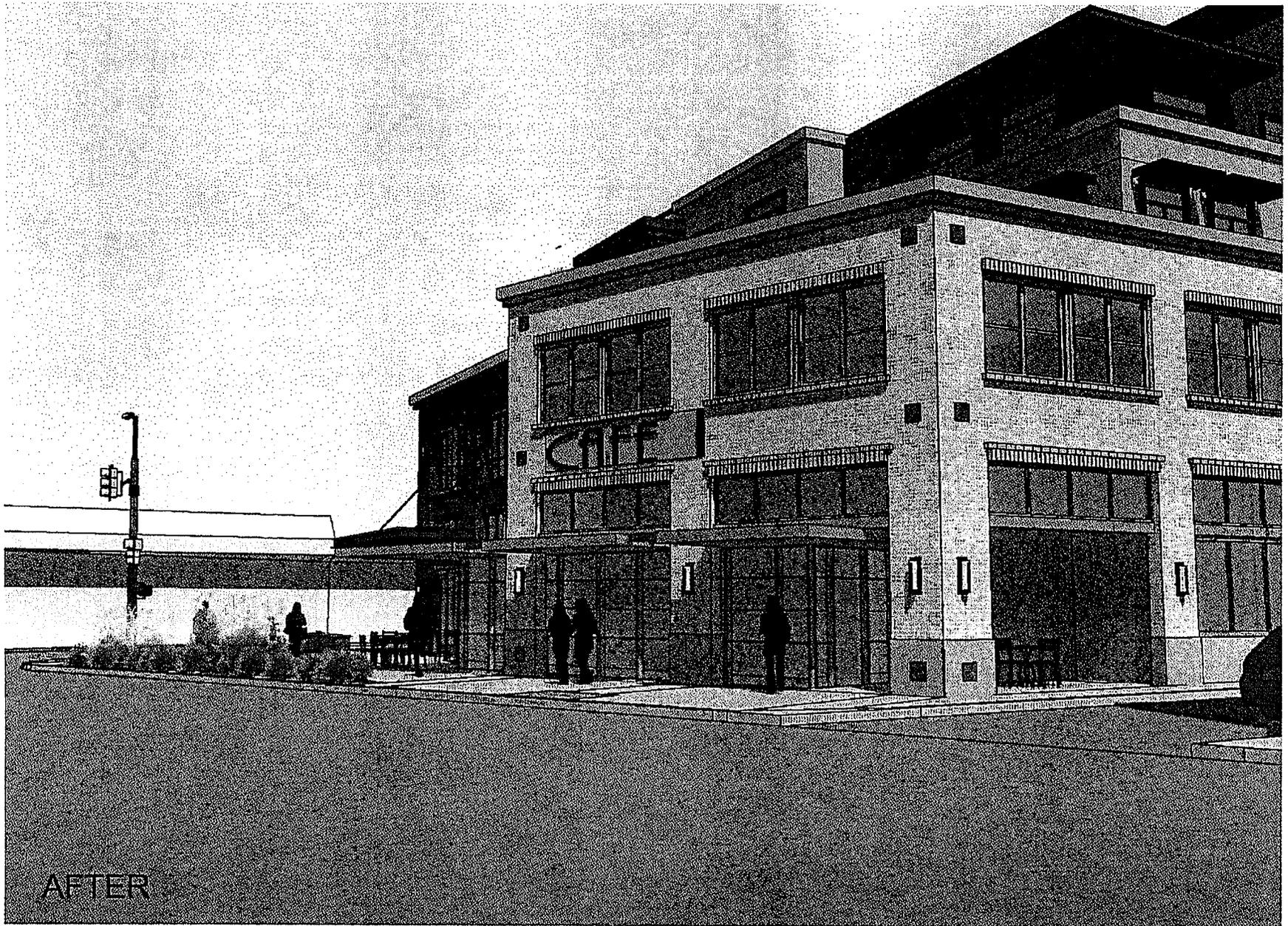


BEFORE

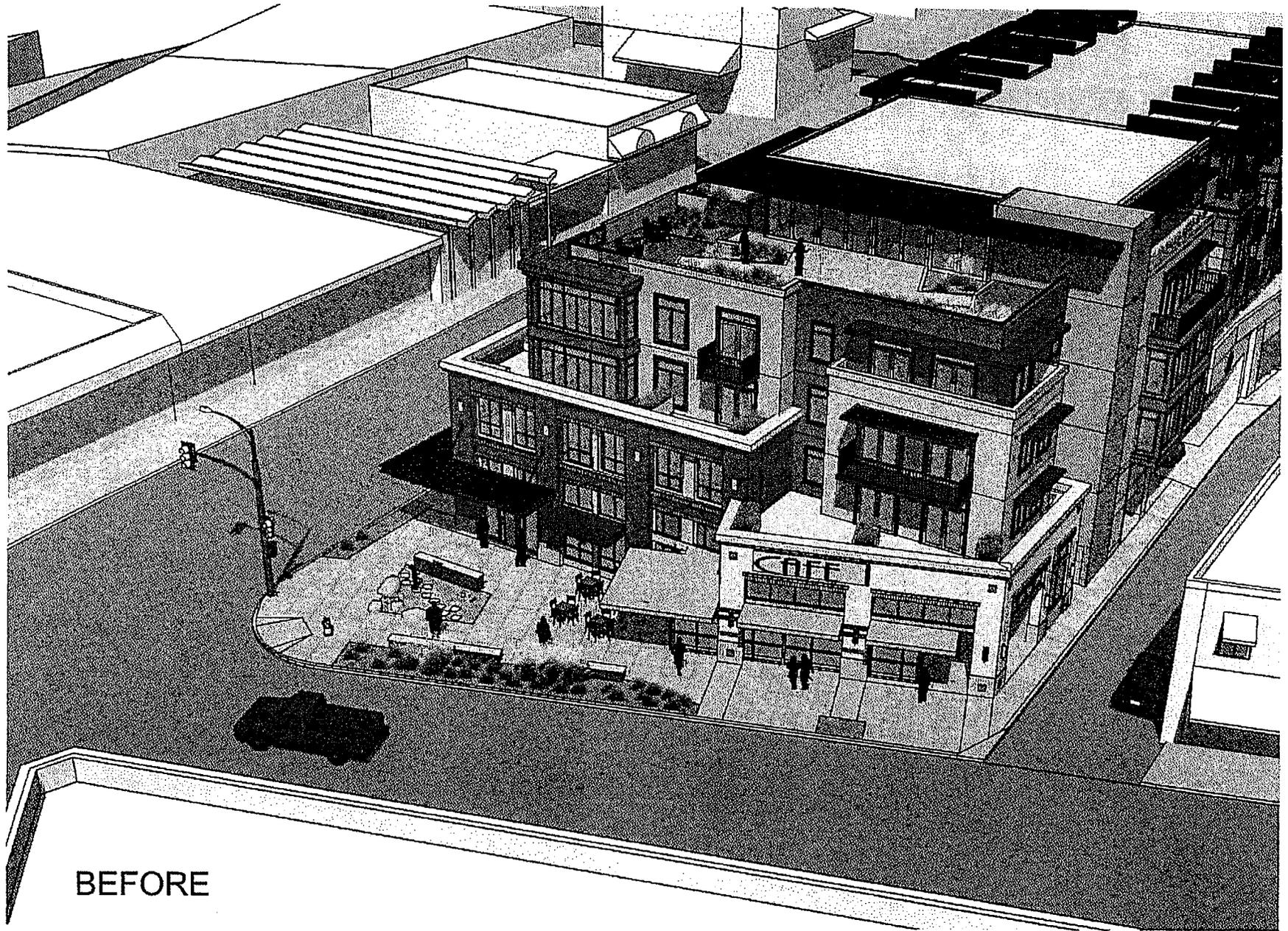




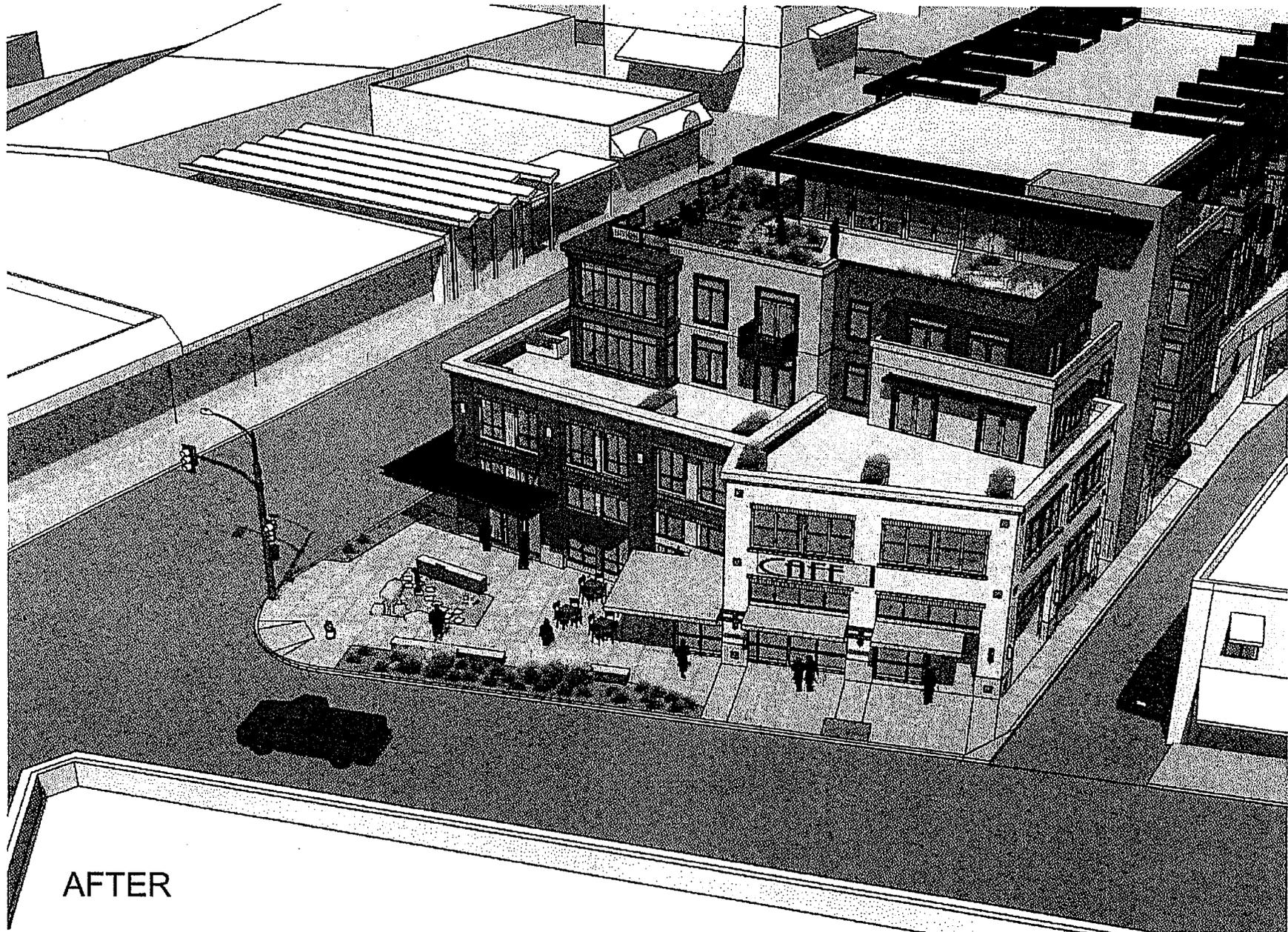
BEFORE



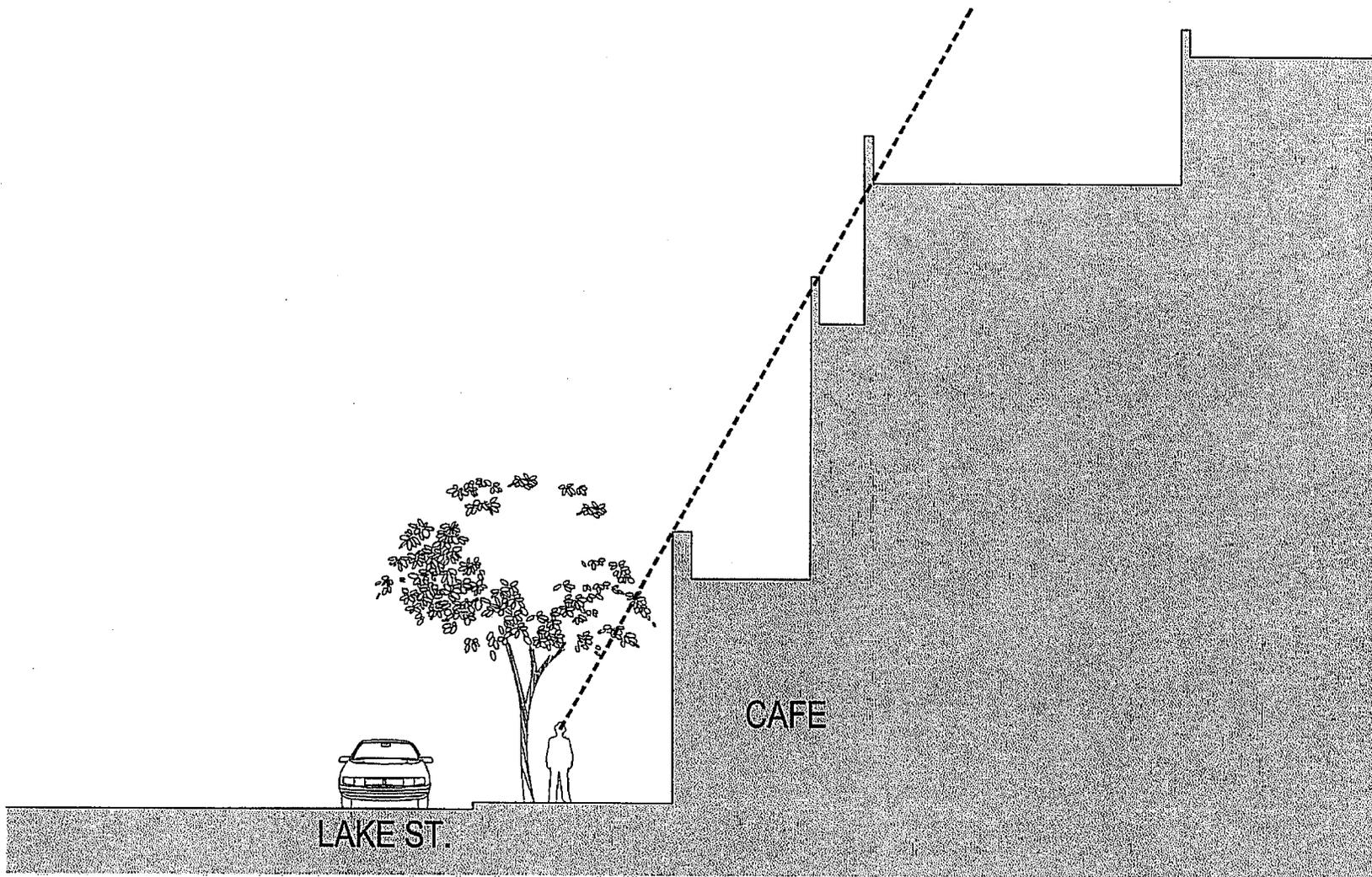
AFTER



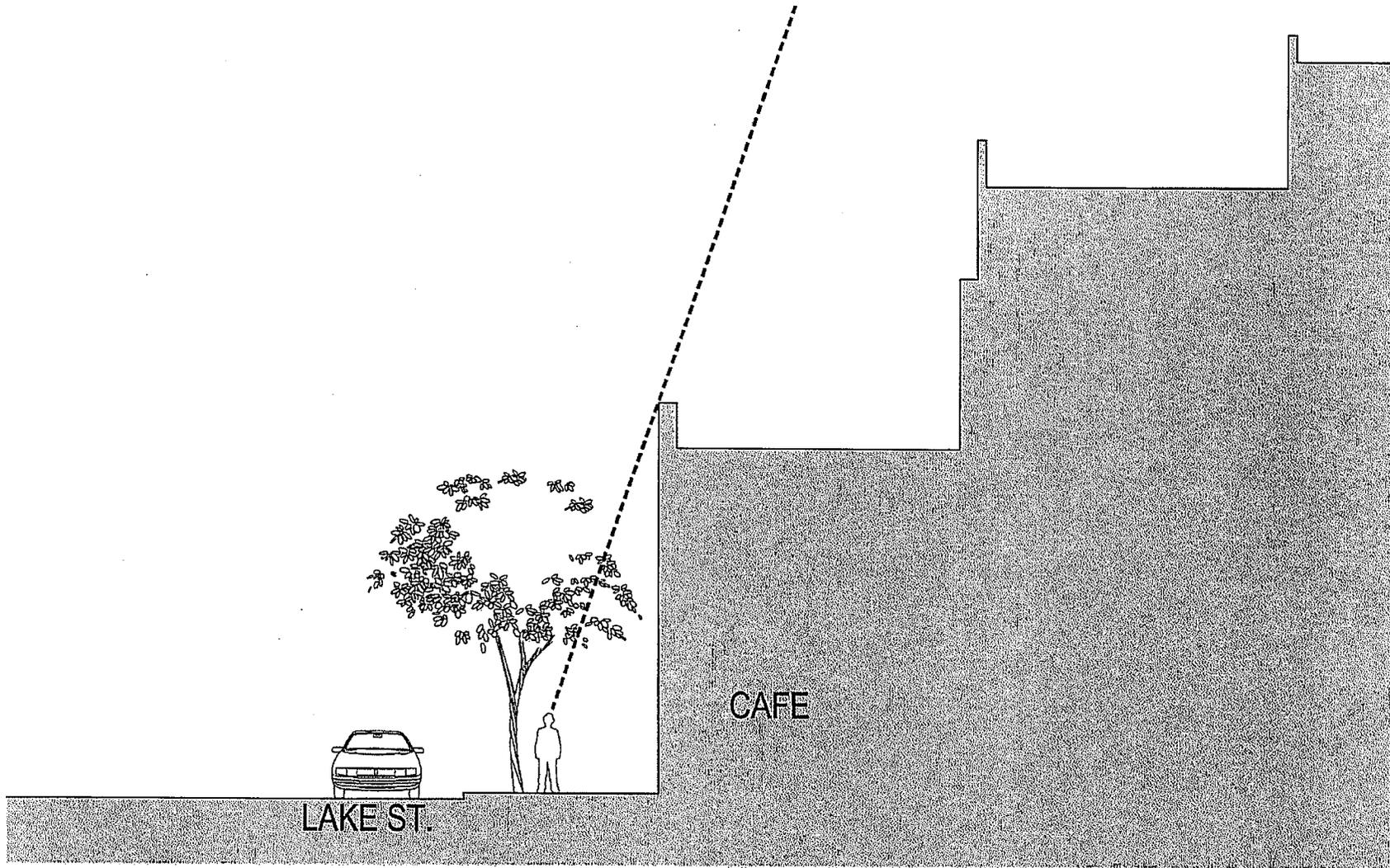
BEFORE



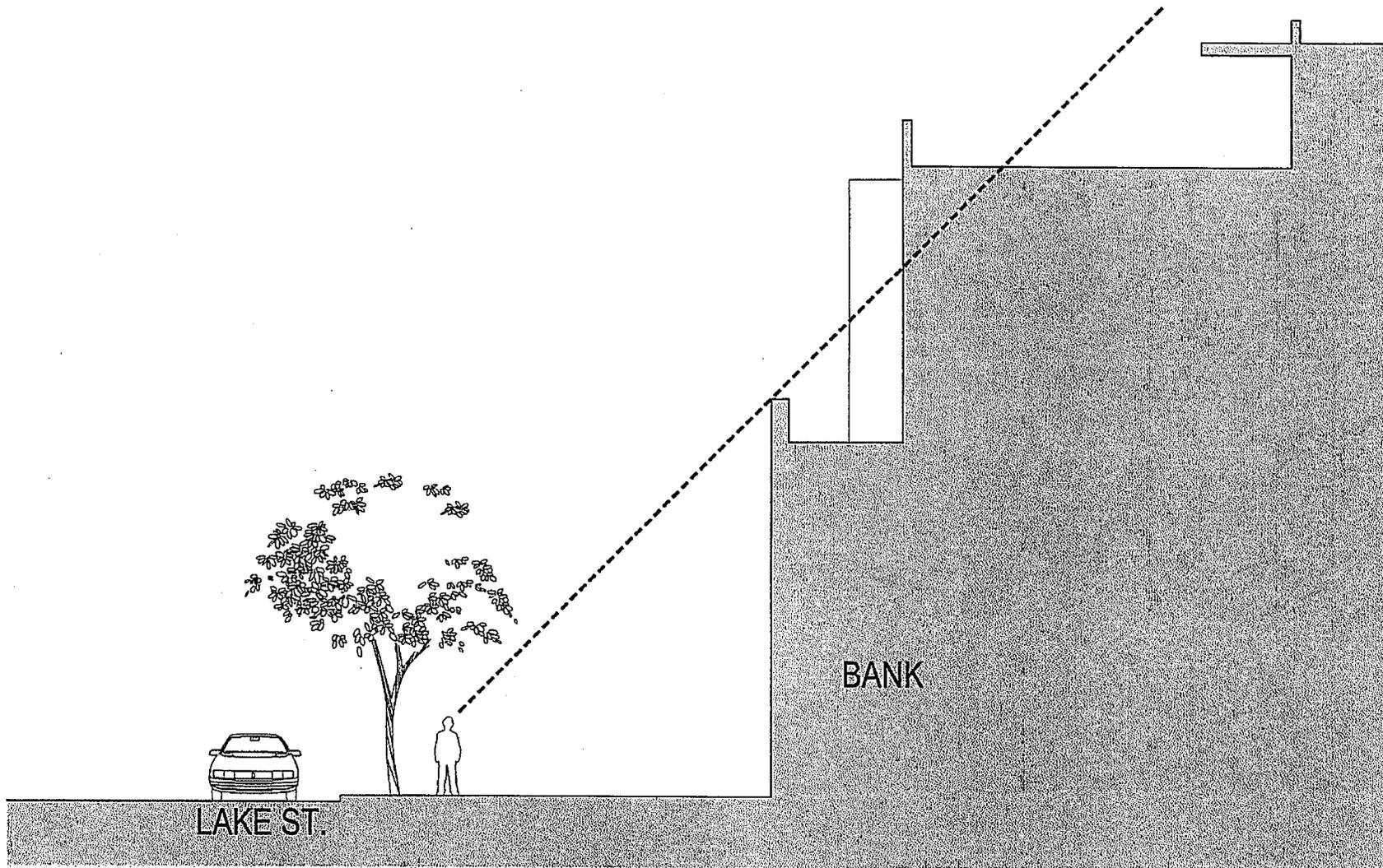
AFTER



CAFE - PREVIOUS



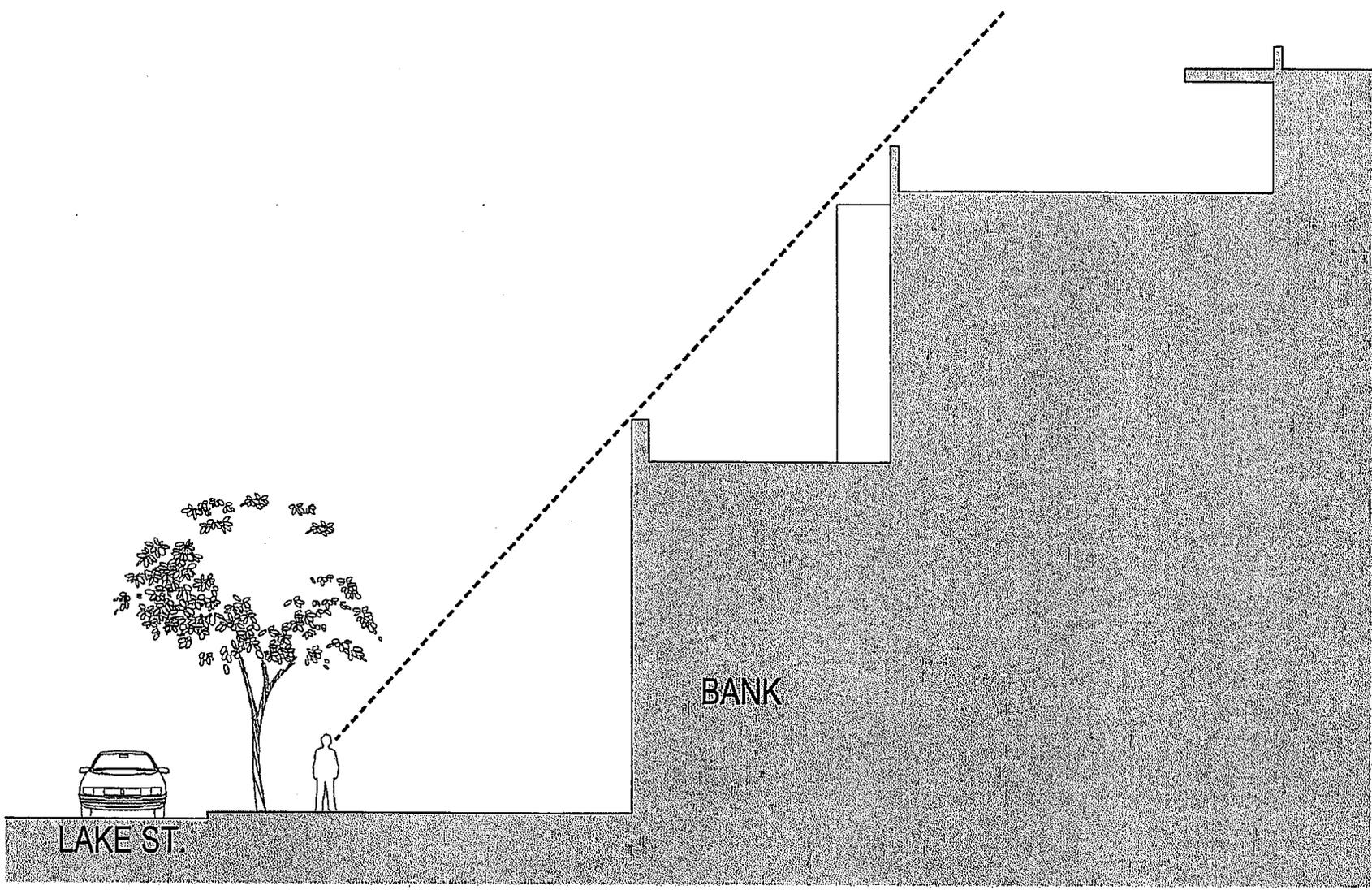
CAFE - REVISED



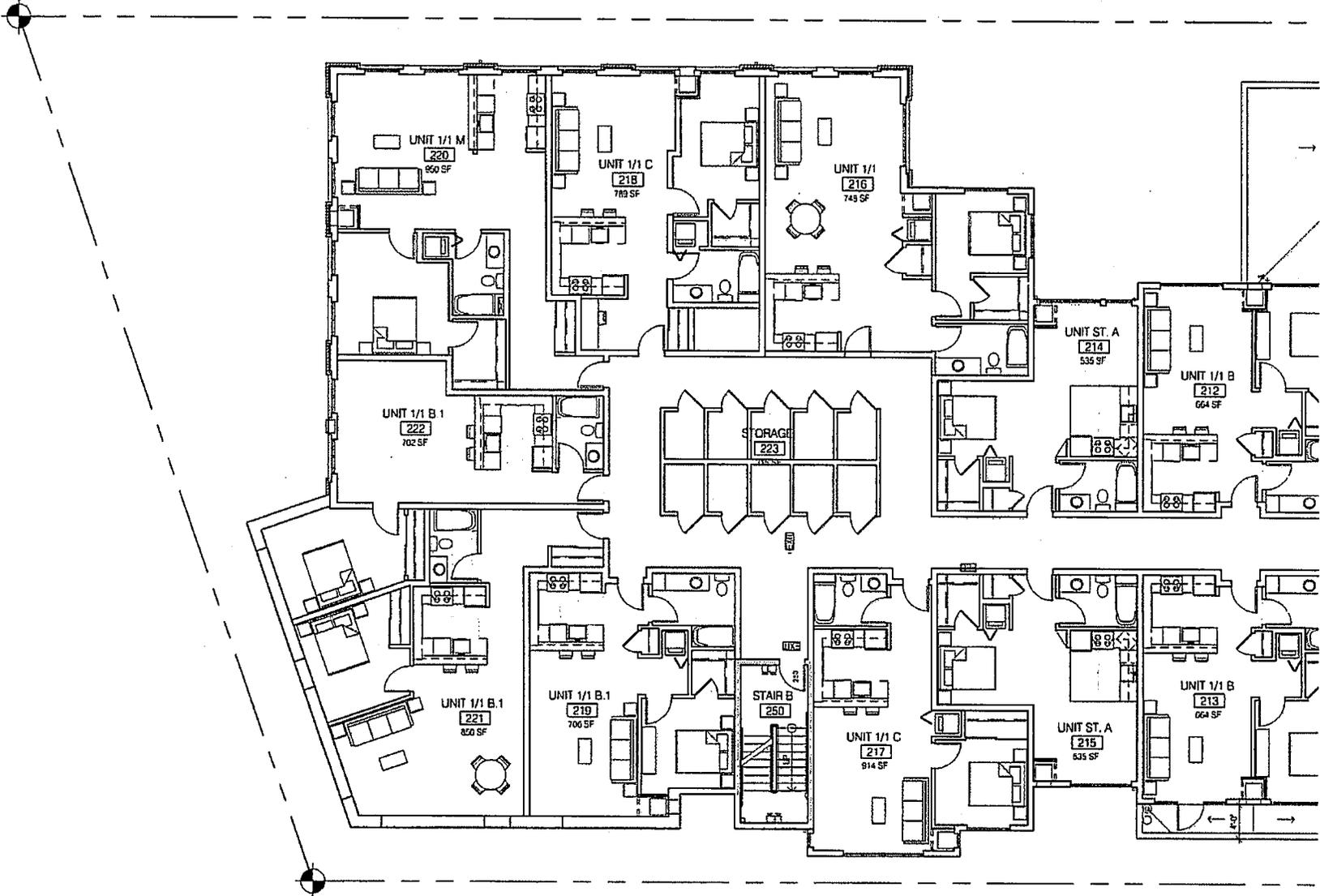
LAKE ST.

BANK

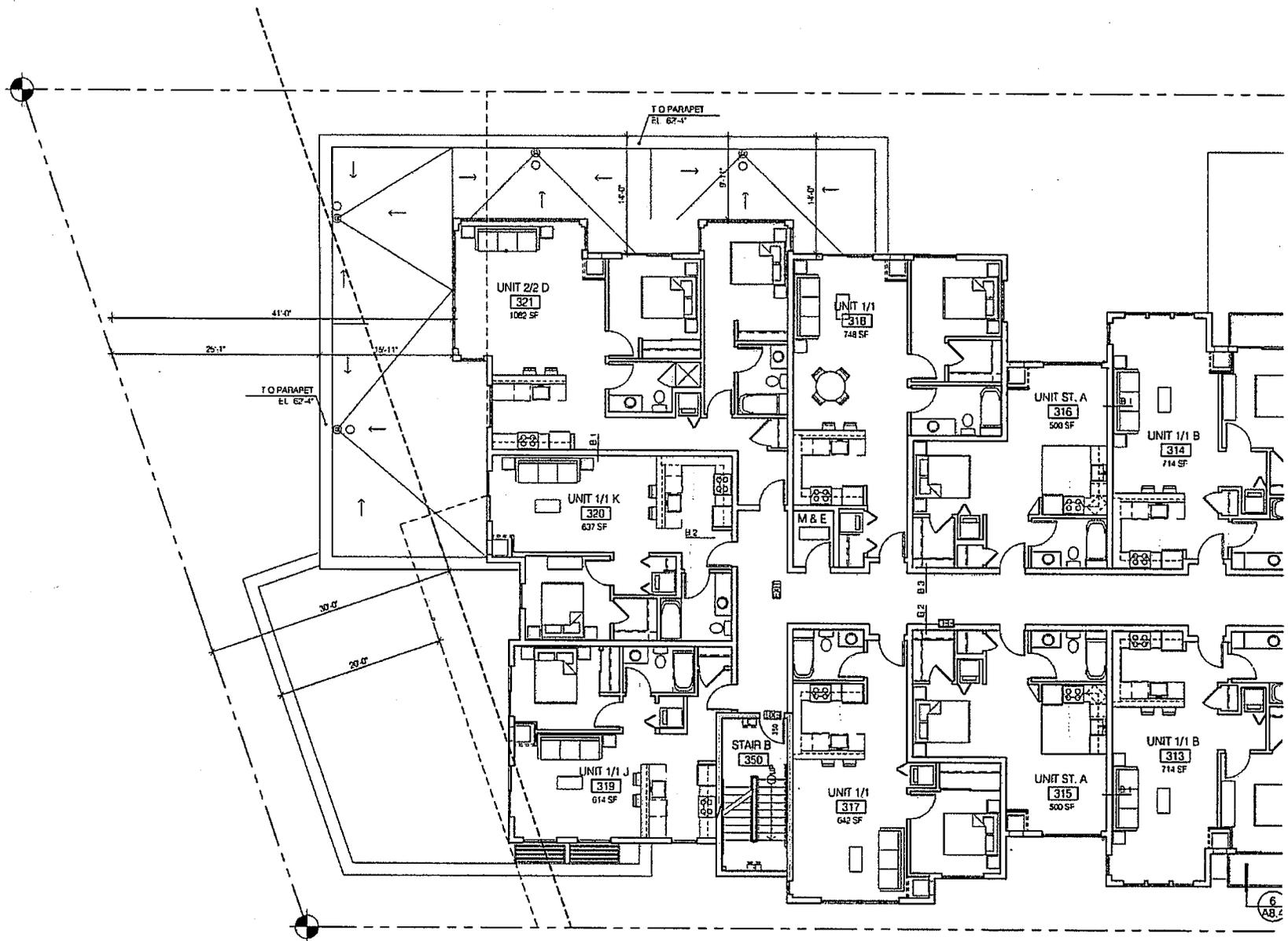
BANK - PREVIOUS



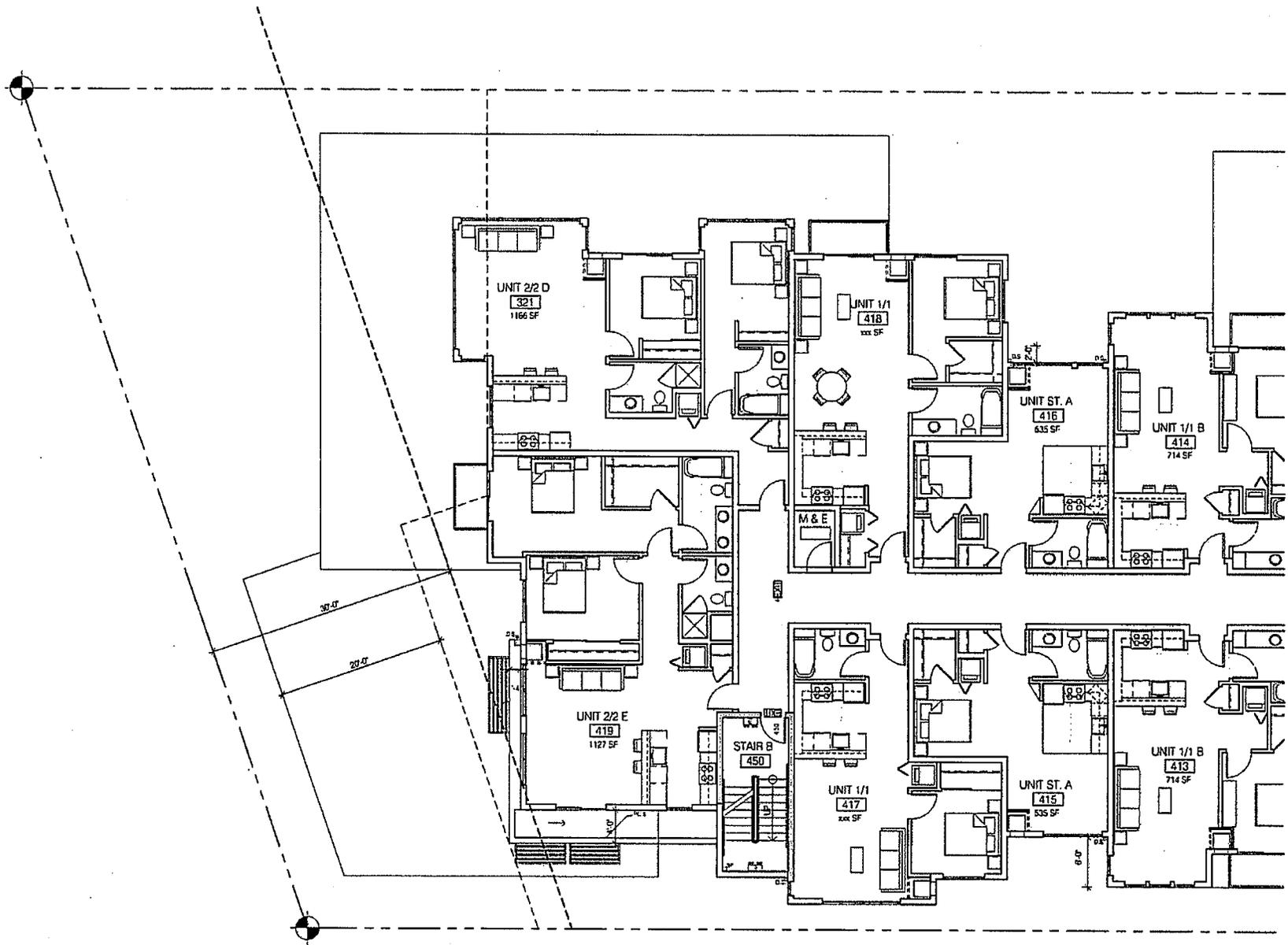
BANK - REVISED



LEVEL L2 - REVISED



LEVEL L3 - REVISED



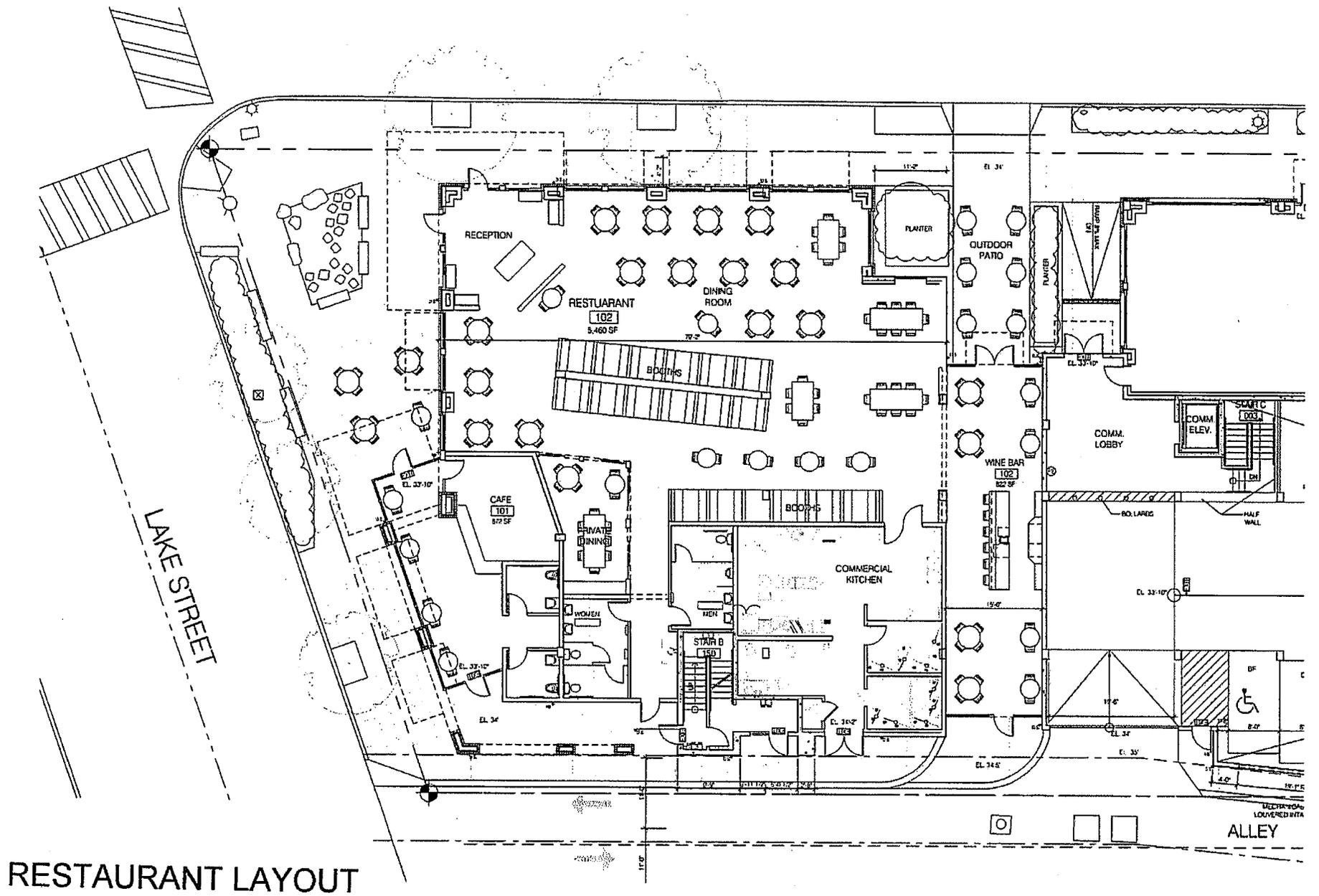
LEVEL L4 - REVISED



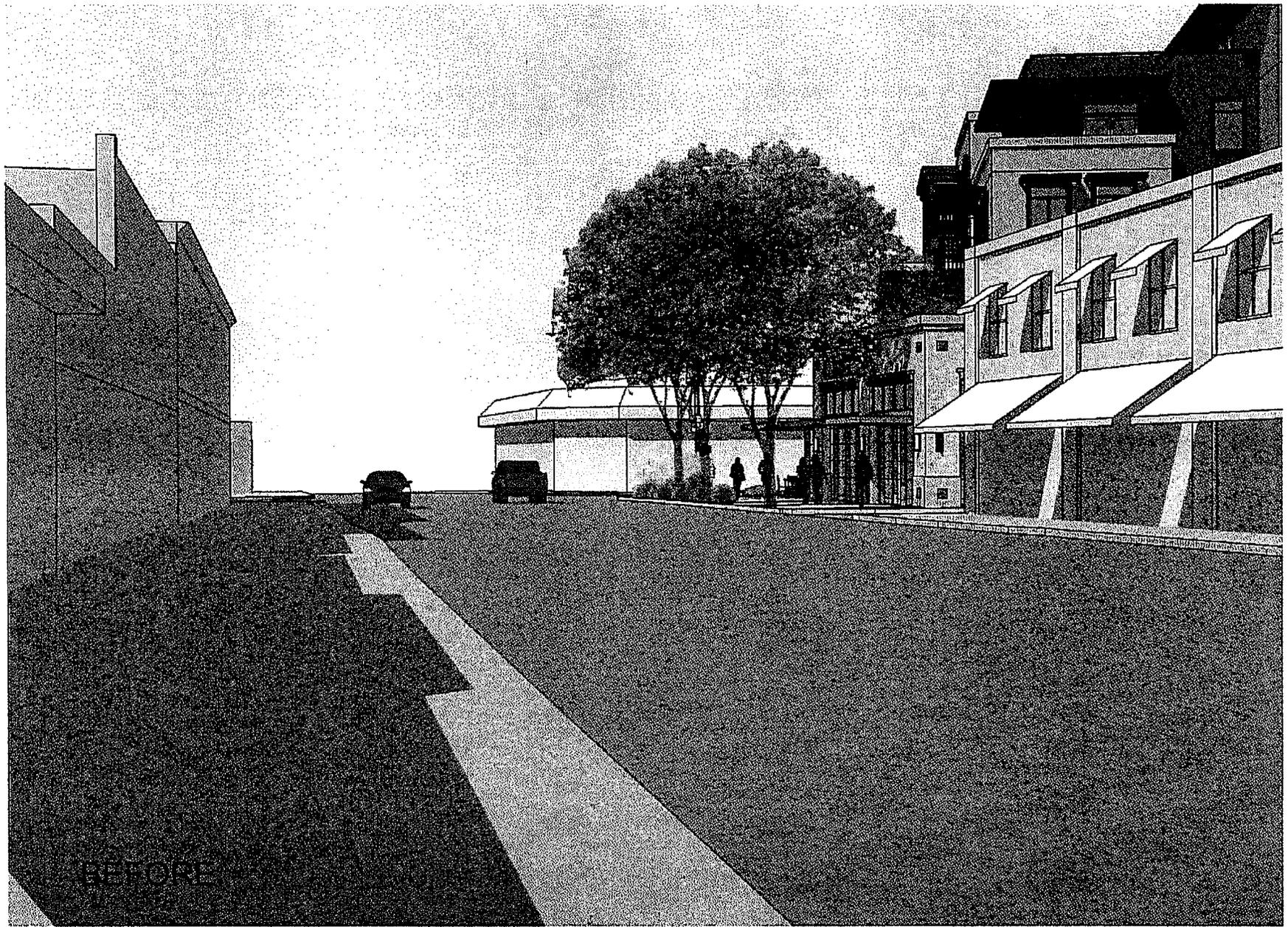
BEFORE

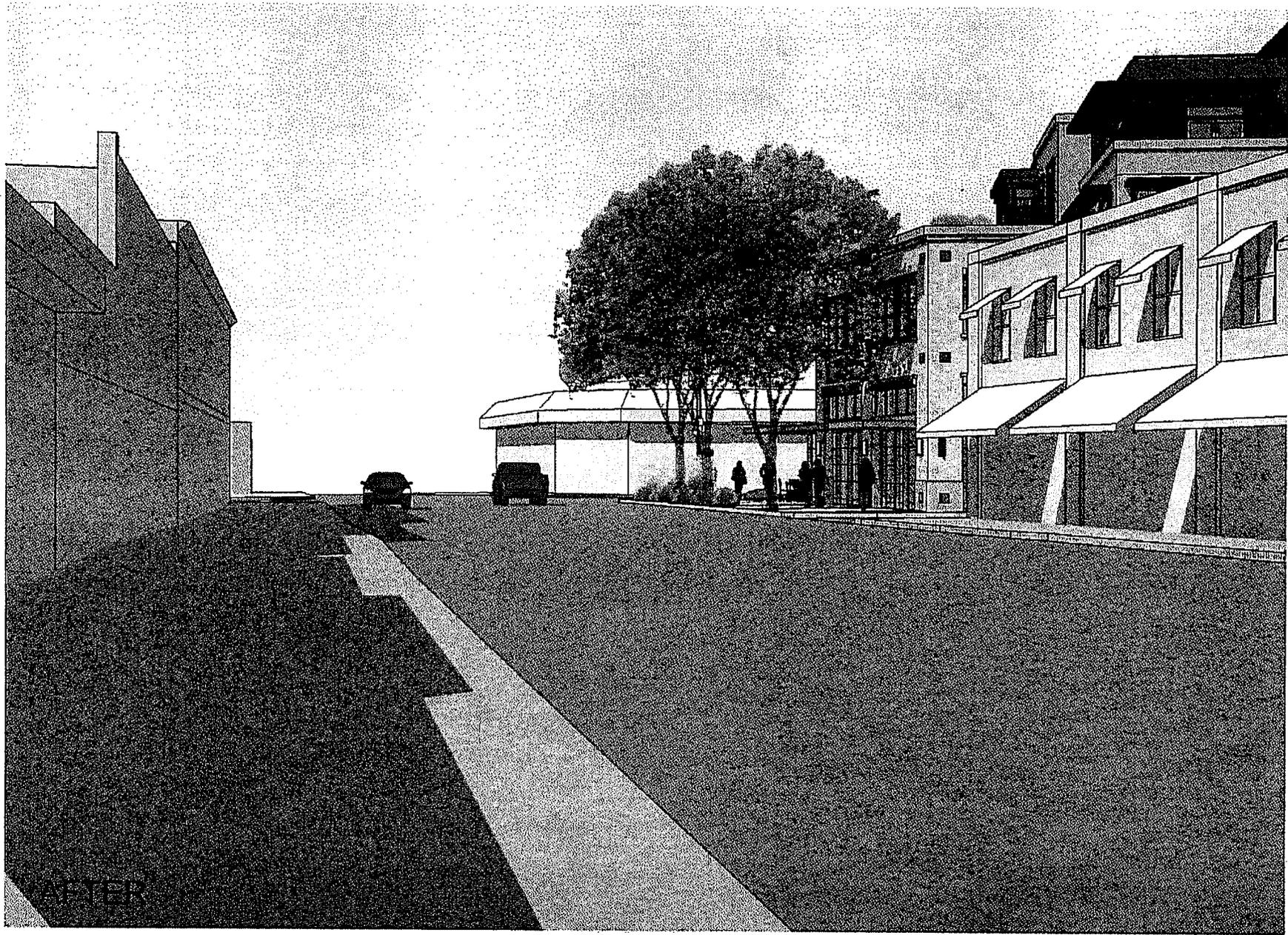


AFTER



RESTAURANT LAYOUT





AFTER

ARAMBURU & EUSTIS LLP**Attorneys at Law**

720 Third Avenue, Suite 2112

Seattle, Washington 98104

(206) 625-9515

Fax: (206) 682-1376

May 29, 2008

Robin Jenkinson
City Attorney
City of Kirkland
123 Fifth Avenue
Kirkland WA 98033

VIA Email: rjenkinson@ci.kirkland.wa.us

Re: Appeal of SRM Proposal by CiViK,
Appeal Case No. APL08-000011 DRC 07-00006

Dear Robin:

I am writing today on behalf of CiViK, the appellant in the above referenced appeal, to object to portions of the 28-page "Comments and Suggested Revisions Regarding Proposed Findings and Conclusions" submitted by attorneys for the applicant SRM to the Council on May 28, 2008.

At its May 6, 2008 meeting, the Council voted to reverse the decision of the Design Review Board. Following that oral decision, the City Attorney was asked to prepare Findings and Conclusions reflecting that decision. She did prepare such materials and provided them to the parties on May 14, 2008. Concerned that the Findings did not reflect the Council's actual intentions in reversing the DRB, CiViK provided comments to the council on May 19, 2008. At the May 20, 2008 meeting the council was to make a decision on the text of findings and conclusions to enter for its reversal decision. However, the council tabled the resolution.

At the meeting on May 20, counsel for SRM requested the opportunity to comment on the findings and respond to the CiViK comments. Citing fairness concerns, the City Council determined that SRM would be permitted to comment on the Findings and Conclusions. The draft minutes for this meeting that reflect the Council's direction state:

"Following the motion to table Resolution R-4707, Council indicated that the only further testimony that would be accepted for consideration would be a response from the Applicant to the Appellant's interim submittals."

May 29, 2008
Page 2

Further, the Council decided that CiViK, though the appellant, and ordinarily entitled to the last word in quasi-judicial proceedings, would not be given the opportunity to respond to SRM's materials.

SRM has gone well beyond the limited authority given by Council in its May 28 submission. It does so in two regards: a) it essentially asks the Council to reconsider its decision and approve SRM's proposal, and b) it provides additional information not a part of the record, which is now closed.

On the first point, SRM's cover letter states:

As part of its comments on the Findings and Conclusions, SRM has proposed *modifying the Council's decision from a reversal of the DRB's approval of the BOA/Merrill Gardens project to an approval of the project as modified.*

(Underline in original, italics supplied). Thus SRM essentially asks the Council, under the guise of comments on the Findings and Conclusions, to reconsider their decision and enter a whole new decision. This is clearly beyond what the council authorized. CiViK objects to this portion of SRM's comments and asks that they be stricken from the record.

On the second point, SRM, in blatant disregard of the Council's limited authority to comment on the findings, has attached new evidence and testimony. As the SRM's cover letter states:

To facilitate this discussion, SRM has included revised renderings of the project showing increased setbacks between the second and third floors and between the fourth and fifth stories along Lake Street South.

(Emphasis supplied). This is wholly new evidence completely beyond the limited dispensation of the council to allow SRM to comment on the findings to be entered from the Council's reversal of the DRB decision.

In addition, SRM provides further new evidence and argument in the form of a drawing with a restaurant layout where the bank was in SRM's original submissions.¹ Once again this is new information. This constitutes a request for the City Council to reconsider its decision about the bank space, not appropriate in comments on findings and conclusions regarding the reversal of the DRB decision. Moreover, this suggestion

¹ SRM had unlimited opportunity to present alternate designs during the evidentiary portion of the hearing, but declined to do so.

May 29, 2008
Page 3

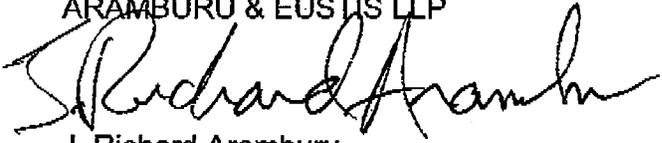
is entirely inappropriate for a space where the known owner and user is the Bank of America.

CiViK objects to the additional arguments, drawings and any references to them and asks that they be stricken from the record.

While we recognize the Council's directive to not provide additional materials, we cannot keep silent about this abuse of the Council's limited allowance. We ask that the Council strike from the record SRM's unpermitted submissions.

Sincerely yours,

ARAMBURU & EUSTIS LLP



J. Richard Aramburu

JRA:cc

cc: Client
Molly Lawrence (mlawrence@gordonderr.com)



June 3, 2008

Robin Jenkinson
Kirkland City Attorney
123 Fifth Ave.
Kirkland, WA 98033

Re: Appeal of Merrill Gardens/BOA Project
Appeal Case No. APL08-00001; DRC 07-00006

Dear Ms. Jenkinson:

We are in receipt of Mr. Aramburu's letter dated May 30, 2008. SRM Development objects to CiViK's letter. In approving SRM's request to submit comments on the proposed findings and conclusions, including rebuttal to CiViK's suggested revisions thereto, the Council explicitly instructed CiViK that it was not authorized to submit a response to SRM's comments. Despite that clear direction, CiViK nevertheless submitted its May 30th letter responding to SRM's comments on the proposed findings and conclusions. This was inappropriate and unauthorized. SRM merely sought the same opportunity to comment that CiViK assumed in its May 19, 2008, submission to the Council. It would be unfair for the Council to accept comments from one party while refusing to accept them from the other.

What is more important, however, is that the majority of the City Council members have indicated that they would like to identify an approvable project for the subject site. There is no question that the Council has the authority to consider modified designs during the current proceeding. This is an open record hearing, not a closed record appeal. KZC 142.40.11(b) provides: "The hearing body or officer shall adopt findings and conclusions and either: (1) affirm the decision being appealed; or (2) reverse the decision being appealed; or (3) *modify the decision being appealed.*" (Emphasis added.). Moreover, the Council has final decision-making authority in this matter, and has clearly indicated that it has an independent vision from the DRB for Downtown. In such a case, a return to the DRB would be an expensive and inefficient use of both public and private resources.

SRM seeks direction from the Council regarding not only what it will not approve, but what it will approve. SRM's comments regarding the proposed findings and conclusions are aimed at clarifying the Council's decision and identifying the modification(s) necessary to reach an approvable project. Absent such design direction from Council, the property will remain as-is for the foreseeable future. That result would defeat the purpose of the Downtown Plan.

Robin Jenkinson
Kirkland City Attorney

- 2 -

June 3, 2008

SRM apologizes for interjecting this letter at this point, but could not remain quiet while CiViK attempted to mischaracterize and silence SRM's efforts to clarify the Council's reasoning and to identify an approvable project. Thank you for your consideration.

Very truly yours,



Molly A. Lawrence

MAL:mal

cc: Richard Aramburu, Counsel for CiViK
Andy Loos, SRM Development

ARAMBURU & EUSTIS LLP**Attorneys at Law**

720 Third Avenue, Suite 2112

Seattle, Washington 98104

(206) 625-9515 Fax: (206) 682-1376

June 10, 2008

Ms. Robin Jenkinson
Kirkland City Attorney
123 Fifth Avenue
Kirkland, WA 98033

Re: SRM Proposal

Dear Ms. Jenkinson:

As you know, this office continues to represent CIVIK in the quasi-judicial appeal concerning the SRM proposal.

Following the Tuesday, June 3, 2008 City Council meeting at which CIVIK's appeal was again discussed, Jim McElwee of CIVIK, learned from Kendall Watson of the *Kirkland Reporter* that you had received an anonymous letter from a project proponent of the SRM proposal. He asked the City Clerk about the letter and received a copy by e-mail.

Jim learned from the City Clerk that you received this letter back on May 21, 2008. Despite the fact that the letter made specific reference to "CIVIK's appeal on the Bank of America project" you never sent this letter to us.

The letter is an obvious attempt by a SRM project proponent to influence the City Council to change its mind about its prior decision. It does so by resorting to threats such as: "This could cost the City of Kirkland big bucks." Who would receive these "big bucks" is not stated, but it must refer to SRM, the project proponent.

As an anonymous communication related to a pending quasi-judicial

June 10, 2008

Page 2

matter, it should have been either ignored or destroyed.¹ Incredibly, we understand you delivered this letter to the City Council without prior notice to, or delivery of, the communication to me or any member of CIVIK. What were you thinking; why were you distributing ex parte communications to the Council in a secretive manner? Since when are anonymous communications by a project proponent, concerning a quasi-judicial matter, containing threats, delivered to Council members at all?²

Given the comments made by councilmembers at the opening of the meeting on June 3, and the protracted length of the Executive Session (as well as the previously unscheduled Executive Session topic referenced by the Mayor of "potential litigation"), it appears that the scurrilous letter may also have been discussed at the Executive Session scheduled for that meeting. Please confirm whether this is true or not. As well, we want to know who made the decision to treat the matters as confidential; was it you, the city manager or one or more councilmembers? If this matter was discussed during the executive session, please indicate what you consider to be the statutory basis for treating this letter as confidential. We believe there is no basis to treat an anonymous communication from a project proponent as confidential or the basis for an executive session. Further, in a quasi-judicial matter ex parte communications are prohibited, and if received, must be disclosed publicly and on the record under RCW 42.36.060.

We also ask that you disclose and make available to us any other communications by any person, including you and other staff of the City of Kirkland, that were submitted to the council outside the current record concerning, in any manner, the SRM proposal or CIVIK's appeal thereof. By example only, the City Clerk has indicated that a memo was provided by you to Council Member Burleigh on April 15, 2008.

¹ Not even the *Seattle Times* will publish anonymous letters.

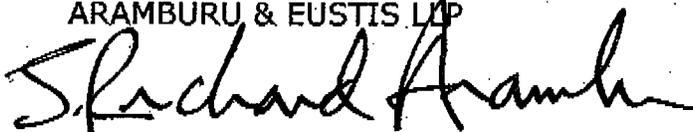
² As an experienced city attorney, you are aware the content of the communication regarding campaign activities was spurious as a) even expressions of opinion about a project during political campaigns cannot be considered violations of appearance of fairness doctrine (RCW 42.36.040); and b) properly disclosed campaign contributions are not the basis for any appearance of fairness challenges (RCW 42.36.050).

June 10, 2008
Page 3

Frankly, I have not seen such an egregious violation of the appearance of fairness doctrine in many years. The communication, and particularly the manner in which it was hidden from the public and CiViK, and given to the council and subsequently to Mr. Watson, who is not even a party to the proceeding, shakes the faith that citizens have in the fairness of appeal and public hearings in the City of Kirkland. Further, the online edition of the *Kirkland Reporter*, and presumably their upcoming print edition, has cited and quoted this memo as though it is factual and relevant when in truth, it is neither. The City's handling of this anonymous letter has lent it unmerited credibility, causing unwarranted embarrassment and potential harm to the reputation of my client, to citizens of your City, and to members of the Kirkland City Council.

We request your prompt attention and response to the questions and requests made in this communication. Once we have these responses, CiViK will consider what further actions to take with regard to these circumstances.

ARAMBURU & EUSTIS LLP



J. Richard Aramburu

JRA/py



June 16, 2008

J. Richard Aramburu
Aramburu & Eustis LLP
Attorneys at Law
720 Third Avenue, Suite 2112
Seattle, WA 98104

Re: Bank of America Project

Dear Mr. Aramburu:

I write in reply to your letter to me dated June 10, 2008.

I disagree with your characterization of the anonymous document as either an ex parte communication or a communication by a project proponent. The document's anonymous author does not offer information or express opinions about the application that is currently pending before the City Council regarding a proposed new development at 101 Kirkland Avenue. Instead, the document's author makes allegations regarding circumstances that are alleged to have existed in 2005, and then asserts, in effect, that these alleged circumstances give rise to a violation of the appearance of fairness doctrine that could be grounds for a legal challenge to the fairness of the City Council's decision.

The applicable statute, RCW 42.36.060, states that:

During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte communications with opponents or proponents with respect to the proposal which is the subject of the proceeding unless that person:

- (1) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and
- (2) Provides that a public announcement of the communication and of the parties' rights to rebut the substance of the communication shall be made at

each hearing where action is considered or taken on the subject to which the communication related. . . .

In this case, the document at issue is not a communication "with respect to the proposal" that is pending before the Council, but instead an allegation of a violation of the appearance of fairness doctrine based upon relationships that allegedly existed in 2005 between members of your client's Board and certain members of the City Council, during the Council Members campaigns for office and years before the land use decision at issue was pending before the City.

I am unaware of any authority, either in Chapter 42.36 RCW or in caselaw, which says that an allegation of a violation of the appearance of fairness doctrine is itself a violation of the doctrine that cannot be communicated to the persons about whom the allegations are made. It was appropriate for Council Members to be advised of the allegations questioning their ability to be fair, and the document, once it was submitted to the City, became a public document that was and is available to any member of the public who requests a copy, including Mr. Watson.

Two of the Council Members named in the document determined that it was appropriate to respond to the allegations regarding their ability to be fair, and these Council Members did so at the start of the resumed hearing on June 3rd.

Since they were not responding to ex parte communications with respect to the proposal, but to allegations that the alleged existence of certain relationships in 2005 affected their ability to be fair, there was no need for the parties to be given an opportunity to "rebut the substance" of the allegations in the document, as provided in RCW 42.36.060(2). If you nonetheless would like to request such an opportunity, you may do so in response to this letter or at the July 1st Council meeting.

As to the Council's executive session, that was held, as announced, pursuant to RCW 42.30.110(1)(i):

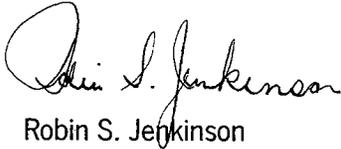
- (i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

The discussion in the executive session was subject to the attorney-client privilege, so I am not at liberty to answer your questions about what was discussed. You also requested "communications by any person, including [me] and other staff of the City of Kirkland, that were submitted to the council outside the current record" I provided the Council with an attorney-client privileged memorandum dated April 9, 2008, concerning litigation risks. Similarly, the memo to which you refer, from me to Council Member Burleigh, provided legal advice in response to a request for such advice and it is therefore subject to the attorney-client privilege as well. I also provided the Council with your letter dated June 10, 2008. The only other document of which I am aware that might be

Letter to J. Richard Aramburu
June 16, 2008
page 3

responsive to your request is a memo dated May 28, 2008, from Mayor Lauinger to the other Council Members about the next procedural steps in their deliberations. I have enclosed a copy for your convenience.

Sincerely,



Robin S. Jenkinson
City Attorney

Enclosure

cc: City Council
Dave Ramsay, City Manager
Molly Lawrence



CITY OF KIRKLAND

123 Fifth Avenue, Kirkland, WA 98033 425.587.3000

www.ci.kirkland.wa.us

MEMORANDUM

To: City Council

From: Mayor Jim Lauinger

Date: May 28, 2008

Subject: Proposed Outline for Bank of America Hearings/June 3 and June 17, 2008

I believe that there may have been confusion after our last City Council Meeting as to what was left to do and what we should be prepared to do with the Bank of America matter. I have asked that the City Attorney review these remarks, edit and pass them along to the Council.

As the next meeting on June 3rd is also the start of the McLeod Appeal, we should set a time, maybe 9:00 p.m., to wrap up the Bank of America portion of that meeting. We could then take a break before opening the McLeod hearing. I will make this suggestion at the beginning of the meeting.

The first order of business for the Bank of America matter is to begin discussion of our findings and conclusions. If the Council is willing to review alternative designs that are consistent with the oral decision from our May 6th hearing, formulation of the findings and conclusions should provide the Applicant with the necessary direction. I suggest that we each come prepared to formulate the findings and conclusions from our comments at the May 6th hearing. We must keep to the record.

Once the Council has agreed upon proposed findings and conclusions, then the process would be to have the Applicant submit the alternative design to the City, with a copy to the Appellant. The hearing then would be reopened at our next meeting on June 17th. If the Applicant and the Appellant can agree that the alternative design is acceptable to them both, then that design can be presented to the Council for the Council to confirm that is consistent with the findings and conclusions. If the Applicant and the Appellant cannot agree, then the Applicant will present its alternative design to the Council. The Applicant and staff would have the opportunity to respond to the alternative design and make presentations to the Council as to whether the alternative design is consistent with the Zoning Code, Downtown Plan, the Council's oral decision, and with the proposed findings and conclusions.

Then City Council would have the remaining task of: 1) approving a modification to the DRB decision; or 2) reversing the DRB decision, or 3) modifying in part and reversing in the part the DRB decision. This would be accomplished by passing a resolution adopting findings, conclusions, and decision.

If the City Council is unwilling to review alternative designs, we would proceed immediately to the passage of a resolution adopting findings, conclusions, decision reversing the DRB decision.

If you have any questions I would ask you to speak directly with our City Attorney.

Thank you.

ARAMBURU & EUSTIS LLP**Attorneys at Law**

720 Third Avenue, Suite 2112

Seattle, Washington 98104

(206) 625-9515

Fax: (206) 682-1376

June 24, 2008

Robin Jenkinson
City Attorney
City of Kirkland
123 Fifth Avenue
Kirkland WA 98033

Dear Ms. Jenkinson:

Thank you for your June 16 reply to my letter of June 10 regarding the Bank of America project. I must say I have strong disagreement with your characterization of the pertinent documents and events.

Initially, I am amazed that you would give an anonymous letter any credence of any kind, particularly when it was part of an on-going quasi-judicial matter.

You begin by denying that the anonymous letter received by you on May 21 had anything to do with the pending Bank of America appeal. This is incorrect. The letter was a blatant attempt to convince the city council to change its vote on the CiViK appeal. The very first sentence of the letter discusses council action "ruling on CiViK's appeal of the Bank of America project. . . ." The reference to the vote to uphold the CiViK appeal that "could cost the City of Kirkland big bucks" is a threat from a project proponent to intimidate the Council into changing the Council decision just made.

Even if it was an allegation of a violation of the appearance of fairness, it was obviously out of order for several reasons. First, the council had closed the record, specifically prohibiting CiViK from providing additional information. However, you chose to treat this scurrilous letter - not even sent to the Council - as a part of the council deliberation and even considering the same in executive session. Second, even if this objection was made by the applicant it was far too late. No party is permitted to raise objections to sitting councilmembers after their vote, based on alleged events that you even admit occurred in 2005, if at all. Such a practice allows project proponents to withhold objections so as to not risk the adverse consequences of a personal appearance of

June 24, 2008
Page 2

fairness challenge before the decision, and only raise such issues after they know the Councilmember's vote.

In any event, there was no basis upon which to consider this matter in executive session as was apparently done. You have not answered my question as to the basis upon which this matter was considered secretly by the Council. Lacking any justification for an executive session on this matter, we believe the Council's consideration of this letter secretly is a clear violation of the open public meetings laws.

You have also refused to provide us with memoranda provided by you to the Council on April 9 and April 16 on the basis of attorney-client privilege. Apparently, these memoranda address the merits of CIVIK's appeal and discuss, by your own admission, "litigation risks." Since there was no pending or threatened litigation, we cannot understand what "litigation risks" existed. The courts will not accept suits by anonymous persons. It is indeed offensive to us that such subject matter was provided to the Council on April 9, six days before the first evidentiary hearing on CIVIK's appeal. How could litigation risks be discussed when the Council had not yet heard the evidence?

These private, ex parte communications are completely contrary to the City ordinance and the rules for this appeal hearing. This appeal had three parties, CIVIK as appellant, SRM as the applicant and the City providing staff comments. Indeed before the hearing, the staff provided a memorandum to the Council (dated March 27) addressing the issues on appeal, which included its interpretation of various city ordinances and rules. This was a part of the agreed hearing procedure that was set forth in your March 6 letter to the parties. There was nothing that contemplated or authorized private, secret memoranda from staff to the Council and you never disclosed to us that you would provide off the record memoranda to the Council. Obviously, we have not seen whatever was said in your April 9 and 16 memoranda and have no chance to determine if rebuttal is warranted and if so, to rebut the substance thereof. Further, what is the reason for secrecy? Your legal opinions could have been integrated into the hearing process with full opportunity for review and debate. These ex parte communications were contrary to the hearing rules. Since there is no basis for the non-disclosure of these documents, we believe their continued non-disclosure violates the public records statute.

You continue to assert attorney-client privilege, but as you know this privilege is not the attorney's, but the client's. Have you consulted with the Council and have they decided to assert the attorney-client privilege? If so, please inform us. For that matter, even if privilege had existed at any time, Councilmember Burleigh's public citation of matters from this memo would make the document(s) subject to public disclosure under RCW 42.56.280.

June 24, 2008
Page 3

In summary, we request the following to be provided to this office:

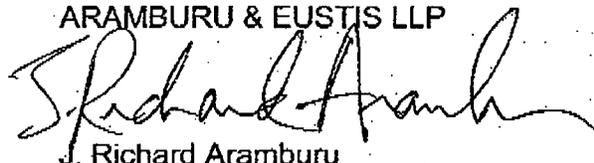
1. A full and complete disclosure on the record of the content of the executive session held by the Council on June 3 to the extent relating to the anonymous letter delivered to you on May 21.
2. The April 9 and 16 memoranda that you provided to the Council together with the opportunity to respond to the same at our own choosing.
3. A copy of any other document prepared by you or any other member of the City staff, which provides advice or commentary to staff, the Design Review Board (DRB), the City Council, and/or to the applicant or their representatives, regarding this proposal and/or this appeal, for any purpose whatsoever, from September 1, 2007 to the present that was not included in the online packet for a DRB meeting or City Council meeting.
4. Identification of all persons who received a copy of any of the items identified above and the date such copy was provided.
5. Identification of outside counsel, if any, which you have consulted with, either with respect to the project, the appeal, the anonymous memo, or any other matter which bears on the like.

I trust that you will respond to the requests of this memo promptly and fully. It is not typical for me to have to place what must seem to be a wide-ranging and open ended document request in a matter such as this, however, the recent series of events and the handling thereof make this request necessary in order to protect the interests of my client.

Frankly, neither CIViK nor I relish the continued correspondence on this subject. CIViK would prefer that the anonymous message and the various memoranda did not exist; indeed, none of this was the idea of CIViK and was not written by them. All these documents have done is create more time, trouble and expense for us and for the Council. CIViK will not, however, sit patiently by while unauthorized materials are received and covert internal memos are created and secret meetings are held.

Sincerely yours,

ARAMBURU & EUSTIS LLP



J. Richard Aramburu

JRA:cc

cc: CIViK
Molly A. Lawrence

ARAMBURU & EUSTIS LLP

Attorneys at Law

720 Third Avenue, Suite 2112

Seattle, Washington 98104

(206) 625-9515 Fax: (206) 682-1376

June 27, 2008

Kirkland City Council
c/o Ms. Robin Jenkinson, City Attorney
123 Fifth Avenue
Kirkland, WA 98033

Re: APL08-0001 Bank of America/Merrill Gardens proposal

As you are aware, this office continues to represent Citizens for a Vibrant Kirkland (CIViK) in the quasi-judicial appeal concerning the above-referenced SRM proposal.

The City Council has closed the record to new information or testimony on this matter. Accordingly, we must object to SRM's planned submission of an alternative design to the City Council and your consideration of it, intended to be provided to the City Council on Monday, June 30.

Specifically, we refer to Council agenda item 11.b for its upcoming July 1 meeting. The June 19 memorandum (found in the Council's packet for the July 1 meeting) from Janice Soloff and Eric Shields to David Ramsay, states "Staff was informed that the applicant intends to propose a revised design to the Council and will submit plans on Monday June 30. Staff will forward materials to Council members immediately upon receipt" and "[i]n a telephone conversation, the applicant indicated his intention to propose an alternative design to the City Council. Plans are expected to be submitted on Monday June 30 and will be forwarded to the Council prior to the meeting."

We object to this proposed submission and its consideration by the City Council for the following reasons:

1. The record is closed to additional testimony and/or argument by the parties, and the alternative design and plans would constitute exactly that. No Council action has been taken to reopen the record and no motion to reconsider the ruling has been made.
2. We have attached a copy of a verbatim transcript from the Council's meeting on June 3, 2008.¹ The Council's discussions contemplated the possibility of viewing a revised plan that both parties might be able to agree on, but did not at any point in its conversation contemplate viewing a plan that solely the applicant's.
3. The staff memo (in the Council's packet) itself is out of order. Kirkland Zoning Code 142.40(6) states that "[o]nly the persons who filed the appeal, the applicant, and the chair (or designee) of the Design Review Board may participate in the appeal." The only opportunity for Planning staff to participate in the appeal is provided in KZC 142.40(8) whereby the Planning Official is directed to prepare a staff report which may be presented orally. That report has been presented, and the opportunity for planning staff's direct participation has concluded absent further requests from the Council.

We have noted continued occurrences where the applicant or its counsel has approached your Planning staff, who will then interject the applicant's comments into the Council's deliberation. With regard to the memo in question, the applicant has told your Planning staff of their intention to submit new plans, and once again is using your Planning staff as a means to communicate new information to you. At this point in the process, the staff's sole role should be to provide answers to the Council's questions, upon their specific inquiry.

4. The staff memo is clairvoyant. The memo is dated June 19, which is four days before the parties' last meeting. This

¹ The verbatim transcript was prepared by the City for the parties' use for their recent meetings.

June 27, 2008
Page 3

memo says it was to be forwarded to me and to CIViK, but never was; we learned of it only through the on-line Council packet. Apparently your staff knew in advance what was going to take place, and most important, that the applicant had full intention of submitting new plans to the Council irrespective of what might take place in the meetings between the parties.

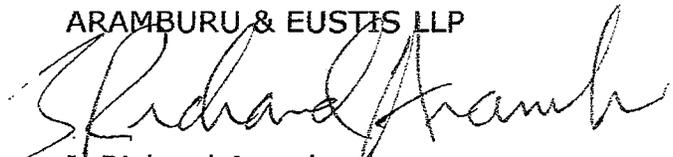
We ask that the Council enact Resolution 4707 as it has been drafted and enter the findings and conclusions as attached to the draft resolution. The Council has already reviewed and considered these findings and conclusions, and the time has come to conclude the quasi-judicial process and enter the decision. Immediately thereafter, the applicant is free to submit its new proposal to the Design Review Board that fits within the Zoning Code and the Comprehensive Plan, benefitted by the guidance that is contained in your findings and conclusions.

To do otherwise - for the Council to accept the materials for a new proposal and consider the same - places the Council in exactly the role it has said it does not want to do, namely to function as the DRB and to design from the dais. Moreover, the presentation and rebuttal will only continue to extend this matter out further and further, causing additional costs for the parties and taking the Council's valuable time.

Please forward this correspondence to the Council immediately, so that they may consider it contemporaneously with their agenda packet which they received yesterday.

Thank you for your consideration.

ARAMBURU & EUSTIS LLP



J. Richard Aramburu

JRA:cc
cc: Molly Lawrence
CIViK



June 30, 2008

J. Richard Aramburu
Aramburu & Eustis LLP
720 Third Avenue, Suite 2112
Seattle, WA 98104

Re: Bank of America Project

Dear Mr. Aramburu:

I write in reply to your letter dated June 24, 2008, which I received on June 26th when I returned from vacation.

Once again I do not agree with your letter's characterization of the facts, nor with its assertions regarding the law that is applicable to the facts. I also do not agree with some of your characterizations of what I said in my June 16, 2008, letter to you. For example, I did not say that the anonymous document had nothing to do with the pending appeal, only that it made allegations regarding circumstances alleged to exist in 2005 rather than assertions regarding the issues currently before the Council.

To the extent that your letter simply expresses your disagreement with what I said in my June 16th letter, I will not repeat myself here.

An allegation of a violation of the appearance of fairness doctrine can be made at any time prior to the issuance of a decision. RCW 42.36.080. The Council has not yet issued its final decision, and therefore it is appropriate for the members of the Council to be apprised of allegations regarding their ability to be fair.

My June 16th letter explains the basis for the Council's executive session. If you wish to ask the Council to vote to waive the attorney-client privilege, you should make that request to the Council.

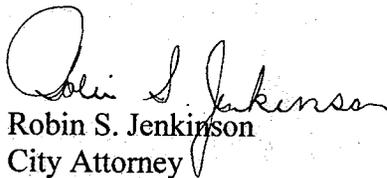
The legal memoranda that I wrote on April 9, 2008, and April 16, 2008, are subject to the attorney-client privilege, and there is nothing inappropriate in the Council receiving legal advice from its attorney regarding issues raised by a pending quasi-judicial appeal, any more than it is inappropriate for members of the Court of Appeals to review legal memoranda prepared by their law clerks regarding pending judicial appeals. I also disagree that RCW 42.56.280 applies to these memoranda: that statute applies to certain

“preliminary drafts, notes, recommendations, and intra-agency memorandums”, not to documents that are subject to attorney-client privilege.

In specific response to items 1-5 on page three of your letter:

1. I decline to provide you with information regarding the executive session on June 3, 2008, for the reasons discussed above and in my June 16th letter.
2. I decline to provide you with copies of my April 9th and June 16th memoranda, for the reasons discussed above.
3. I am not aware of any other documents that are responsive to this request. I forwarded your prior, similar request to Planning staff, and the only responsive document that staff and I are aware of is the memo dated May 28, 2008, from Mayor Lauinger to the City Council. I provided you with a copy of this document with my June 16th letter.
4. This item requests information, not documents, and the Public Records Act applies to documents. Mayor Lauinger's May 28th memo was addressed to the City Council, and it may have been read by City staff, but I am aware of no documents that answer your question.
5. Your item number five also requests information, not documents, and the Public Records Act applies only to documents. I will nonetheless respond by informing you that the City has engaged Foster Pepper, PLLC, and that I have consulted with Dick Settle and Pat Schneider regarding certain issues identified in your request.

Sincerely,


Robin S. Jenkinson
City Attorney

cc: City Council
Dave Ramsay, City Manager
Molly A. Lawrence



June 30, 2008

Kirkland City Council
c/o Robin Jenkinson, City Attorney
123 Fifth Ave.
Kirkland, WA 98033

Re: Appeal of Merrill Gardens/BOA Project
Appeal Case No. APL08-00001; DRC 07-00006

Dear Council Members:

Thank you on behalf of SRM Development for agreeing to consider design modifications for the Merrill Gardens/BOA Project at 101 Kirkland Avenue. The attached materials represent the Project design as modified. Each of the proposed modifications is aimed at responding to concerns expressed by the Council regarding the original, disapproved design. We request that the Council approve the Project as shown in the attached materials.

As the Council is aware, you have clear authority pursuant to KZC 142.40.11(b) to consider modified designs as part of this appeal process. Moreover, a majority of the Council indicated during your prior discussions of the Merrill Gardens/BOA Project appeal that you would like to identify an approvable design.

The materials included with this letter are:

- A series of slides depicting and explaining the proposed design modifications to be presented during the July 1, 2008 Council meeting;
- A one page summary of the modifications made to the Project in response to the Council's comments/concerns;
- A listing of the retail uses currently occupying the superior retail spaces in each of the three project previously granted an additional story in downtown Kirkland; and
- Proposed revisions and additions to the Resolution, Findings, Conclusions and Decisions for the Merrill Gardens/BOA Project reflecting the modified Project design.

Again, SRM Development thanks each of you for your efforts regarding this Project and consideration of the appeal. We believe that we have listened carefully to each of the concerns raised by the Council and modified the Project to respond to those concerns. As modified, the Project meets each of the City's criteria for approval. We, therefore, request that the Council approve the Merrill Gardens/BOA Project as modified.

Very truly yours,



Molly A. Lawrence

MAL:mal

Enclosures

cc: Richard Aramburu, Counsel for CiViK
Andy Loos, SRM Development

**101 KIRKLAND
DESIGN
MODIFICATION**

**COUNCIL AGREED TO CONSIDER
ALTERNATIVE DESIGN OPTIONS**

**THE COUNCIL REVERSED THE DRB'S
APPROVAL OF THE ORIGINAL DESIGN BASED
ON TWO PRINCIPLE ISSUES:**

- APPARENT BUILDING HEIGHT ALONG LAKE ST.
- CRITERIA FOR FIFTH STORY

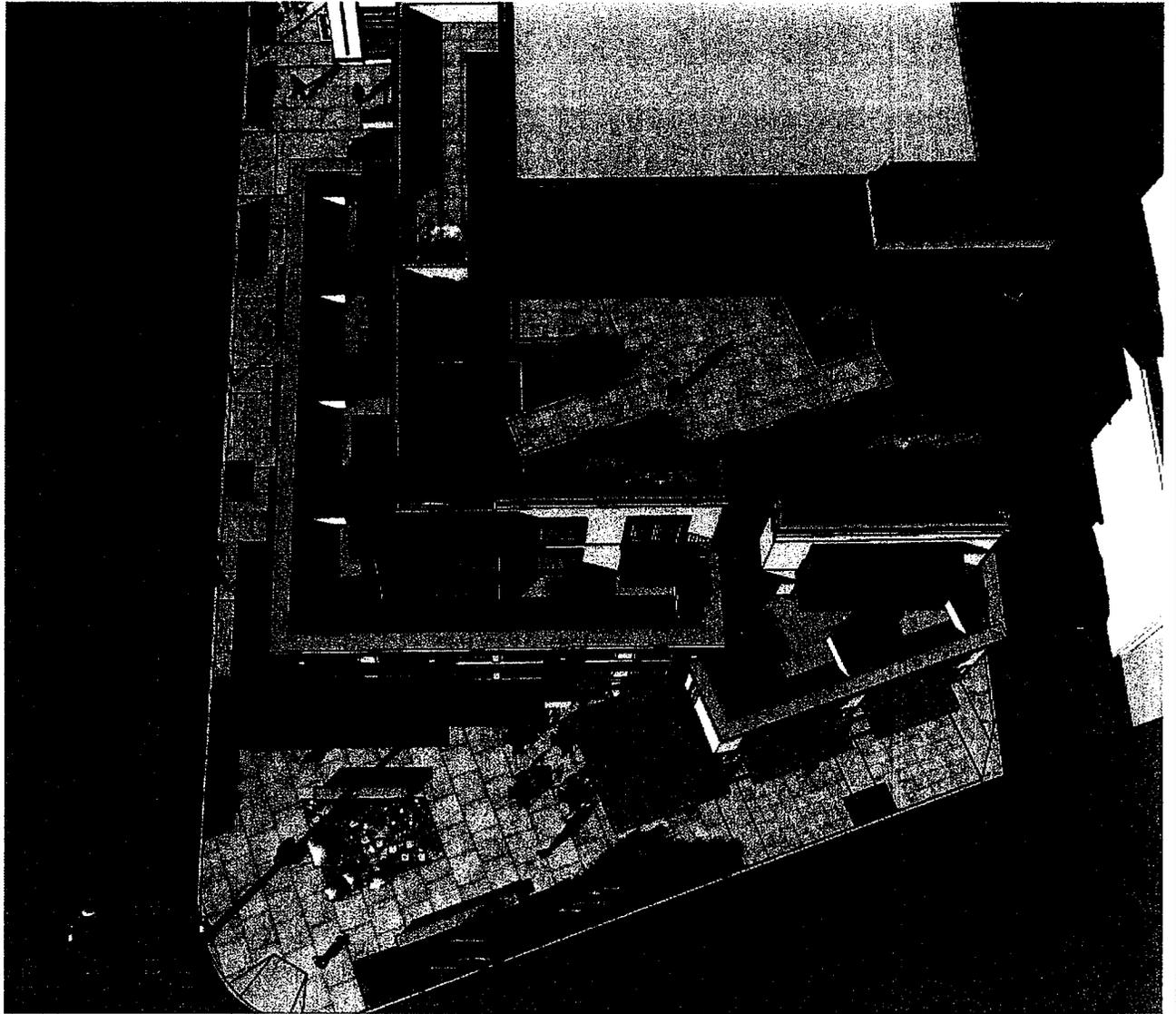
CRITERIA FOR FIFTH STORY:

- “At least 3 of the upper stories are residential”;
- “The total height is not more than one foot taller than the height that would result from an office project with three stories of office over ground floor residential”;
- “Stories above the second story are set back significantly from the street”;
- “The building form is stepped back at the third, fourth, and fifth stories to mitigate the additional building mass”; and
- “The project provides superior retail space at the street level.”

DEFINITIONS

SETBACKS: The distance between the curb-line of the street to the face of a building at any given level.

STEP BACKS: The distance between the building edge below to the face of a wall above.



BRUNBERG
group

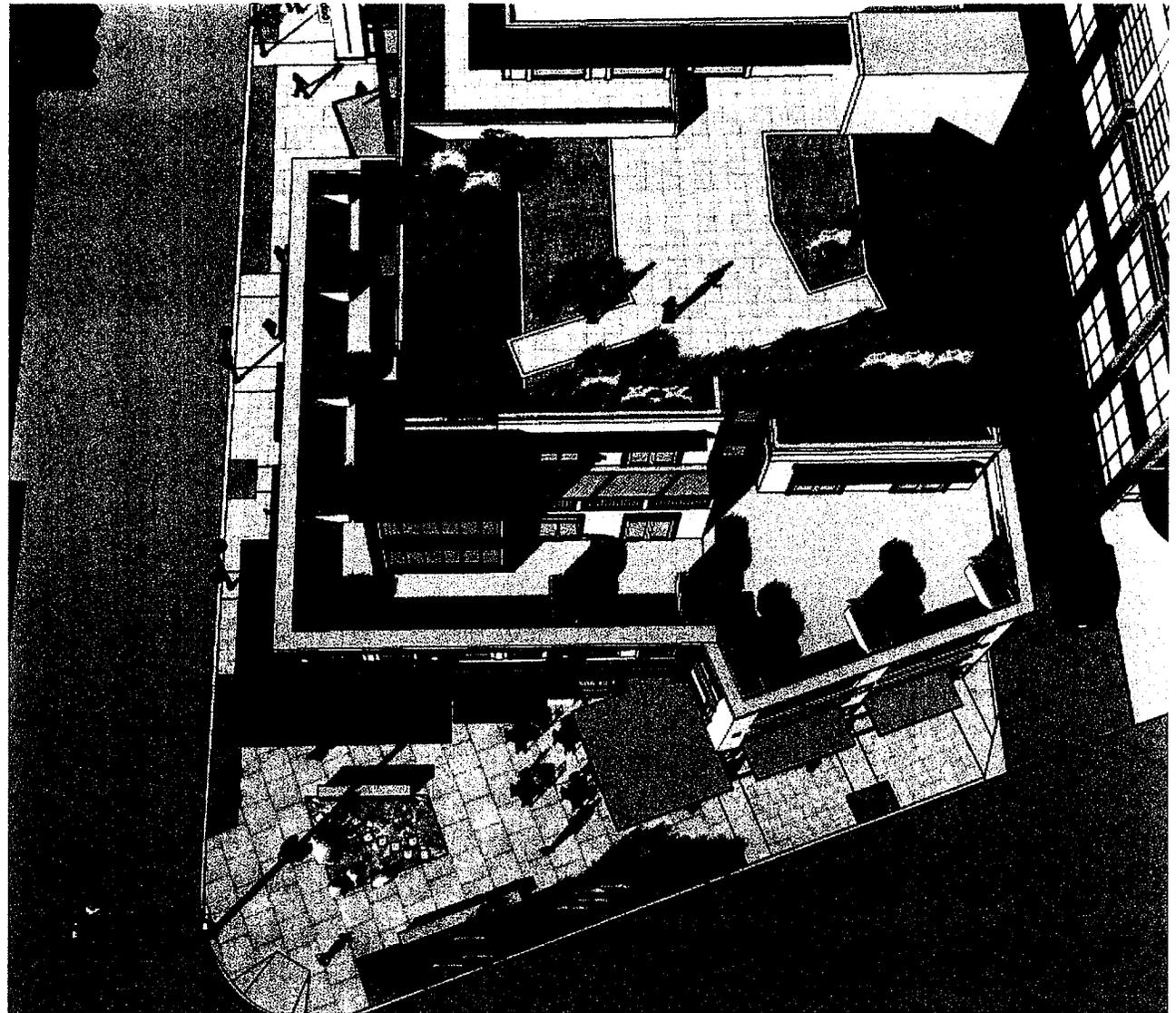

MERRILL GARDENS


SHONS
KIPARD
W. GUN GIL
DEVELOPMENT, LLC

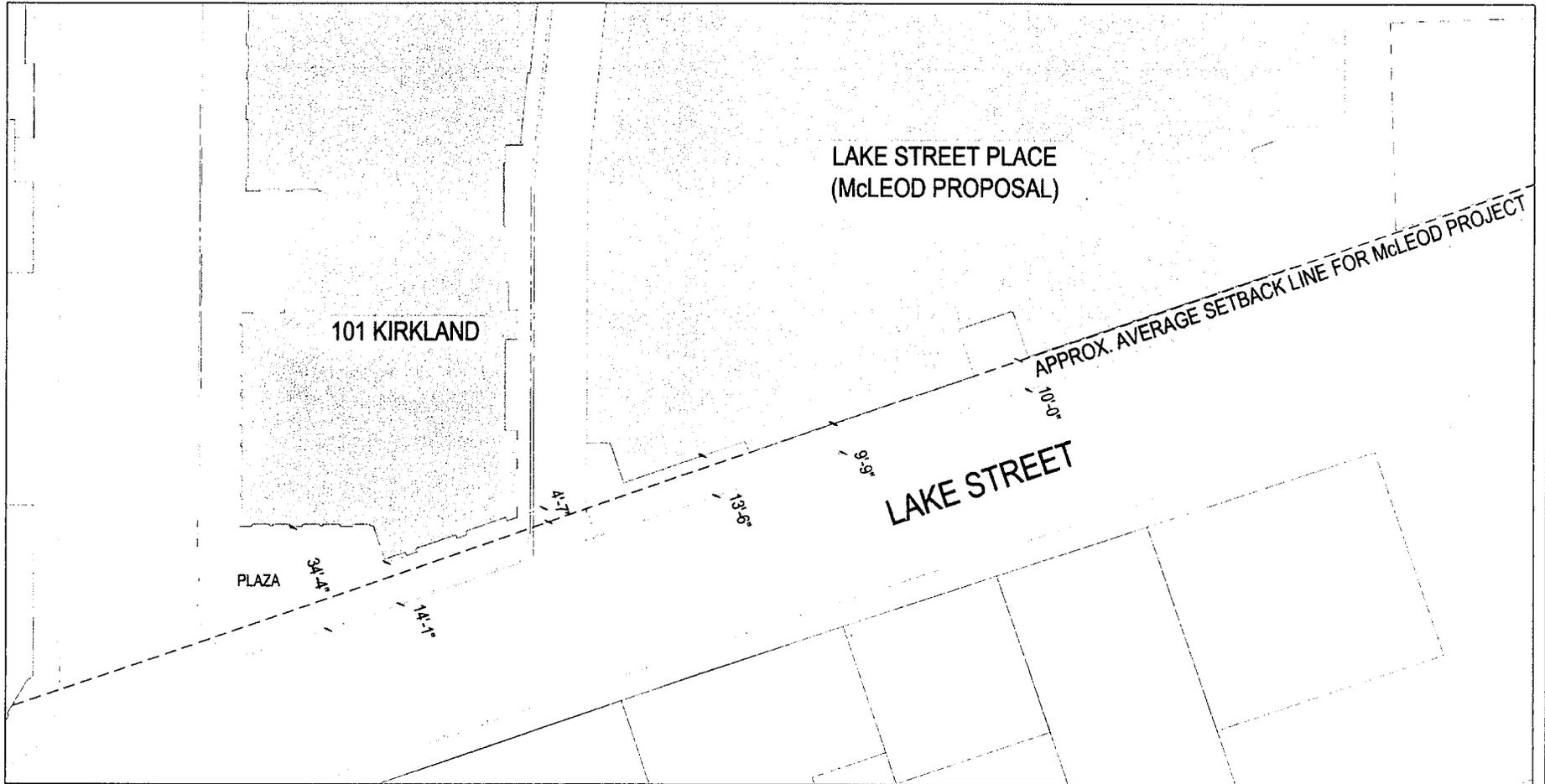
101 Kirkland Avenue
Architectural Development
July 2008

SUMMARY OF MODIFICATIONS IN RESPONSE TO HEIGHT AND SETBACK/STEP BACK ISSUES

- Added 2nd story to southwest corner to create a continuous 2-story appearance along Lake Street
- Stepped back 3rd story an additional 4'-10' from the 2nd story (10' to 22' step back, 32' to 46' setback)
- Stepped back portions of the 4th floor an additional 4'-6' from portions of the 3rd Story (10' to 32' step back, 36' to 46' setback)
- Stepped back the 5th floor an additional 22' from the 4th floor so that 5th floor does not begin until the eastern edge of the bank space (44' step back, 67' to 95' setback)
- Retained plaza as in original design



COMPARISON OF SETBACKS AND STEP BACKS WITH McLEOD PROPOSAL



LEVEL 1 & 2

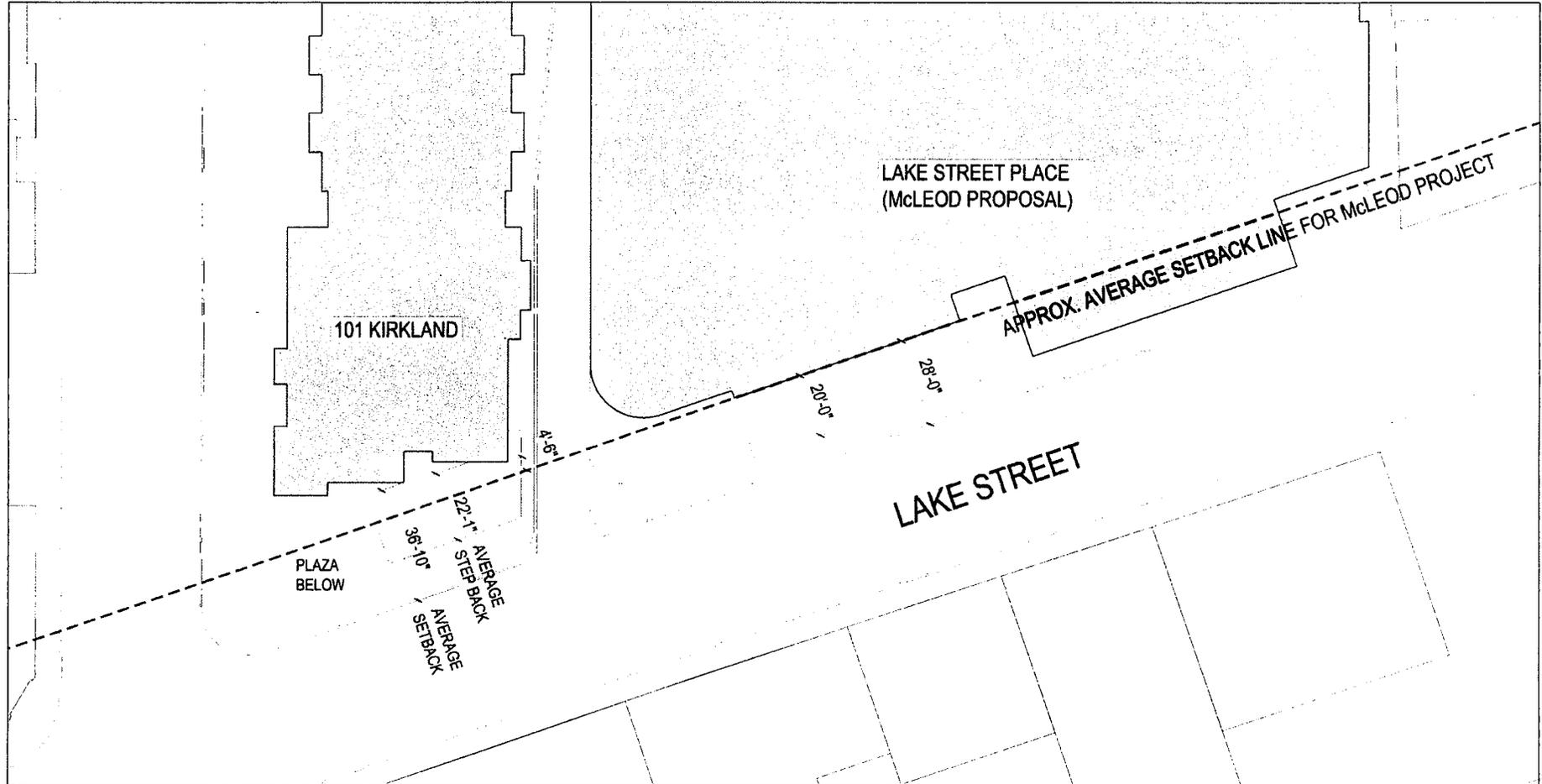
Average of 40% more sidewalk width than McLeod



MODIFIED

101 Kirkland Avenue
Mixed Use Development
July 11, 2008

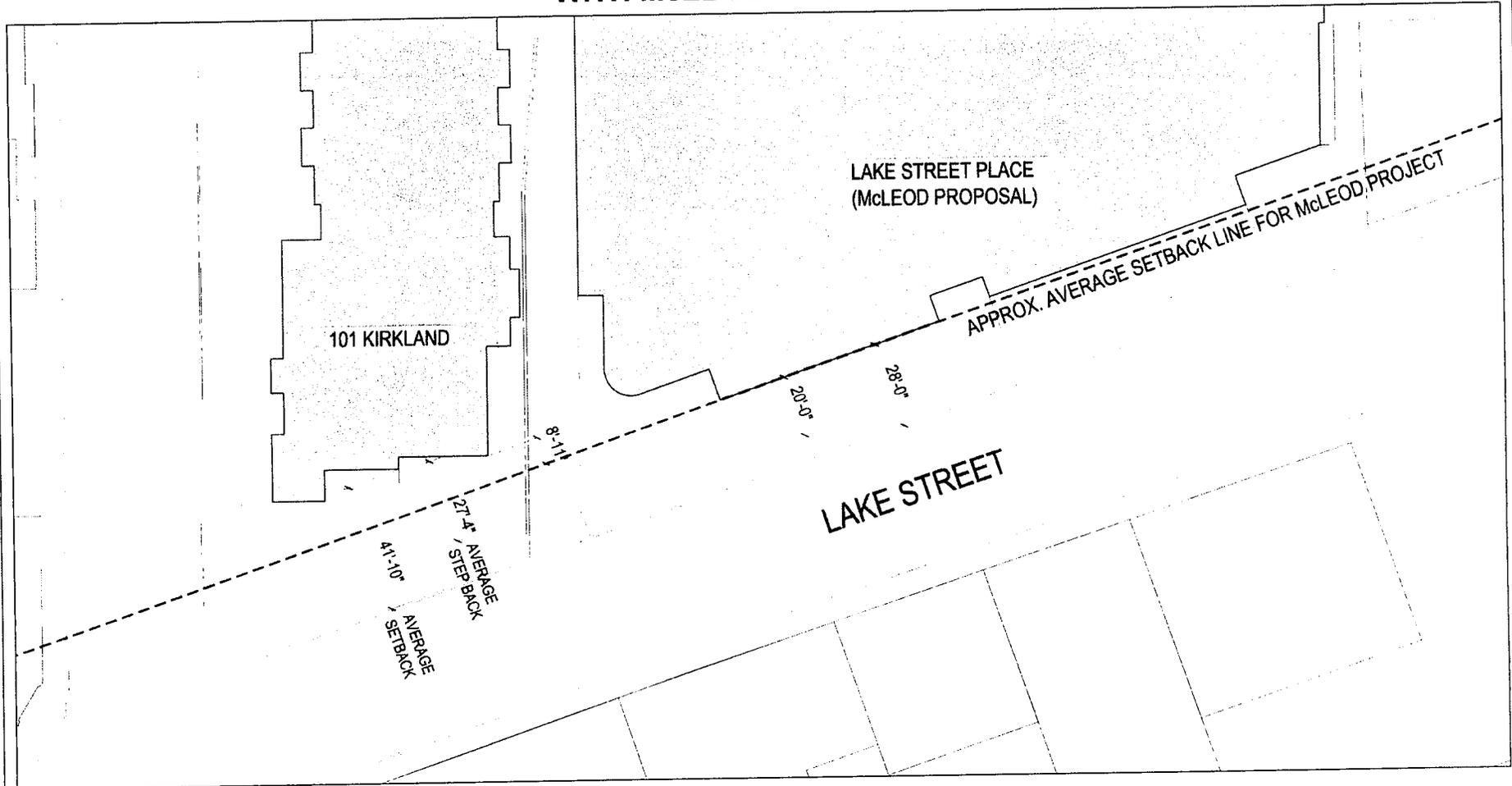
COMPARISON OF SETBACKS AND STEP BACKS WITH McLEOD PROPOSAL



LEVEL 3

32% greater average setback than McLeod

COMPARISON OF SETBACKS AND STEP BACKS WITH McLEOD PROPOSAL



LEVEL 4

50% greater average setback than McLeod

McLEOD
group

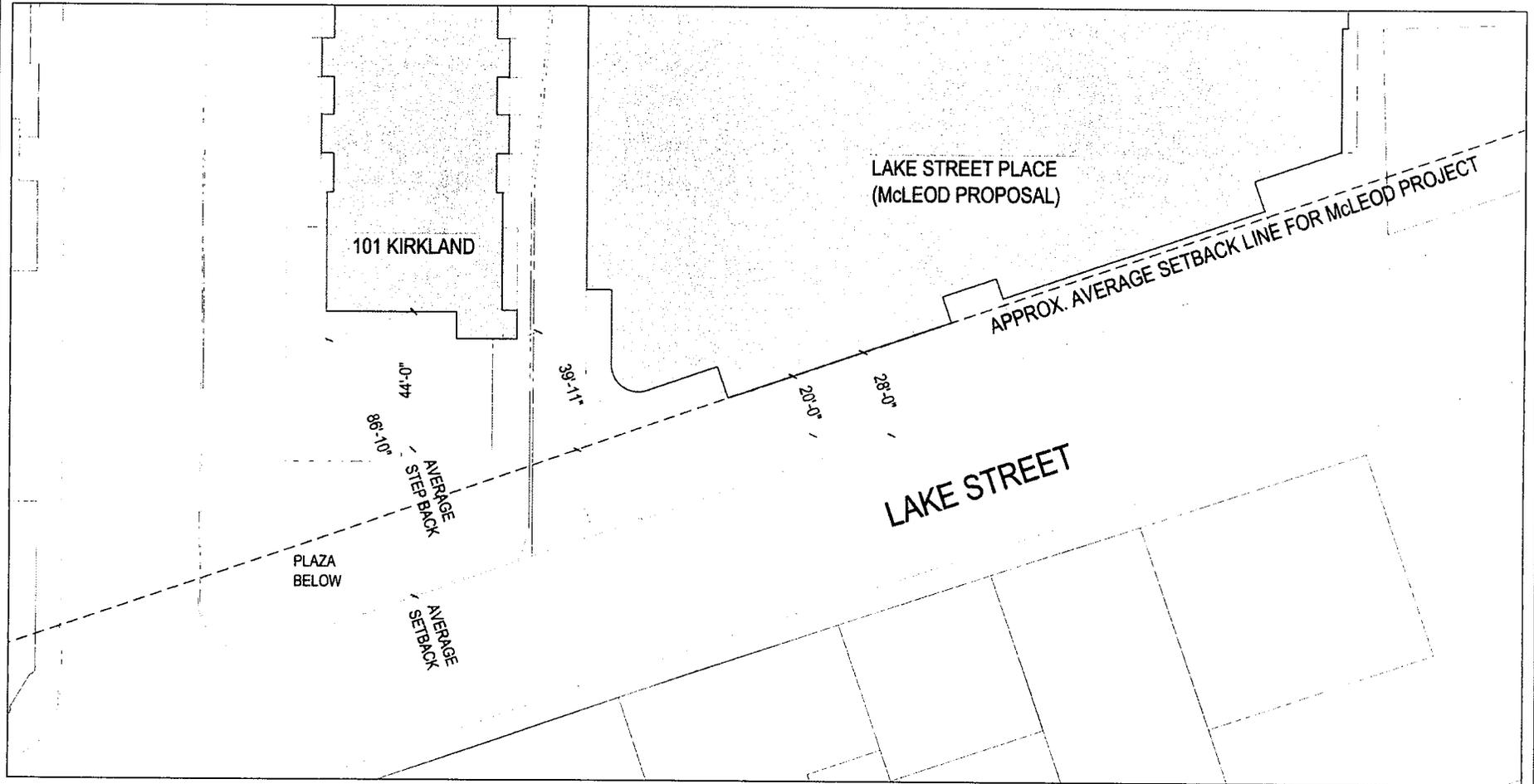
MERRILL GARDENS

SRM
STONE HAVEN
DEVELOPMENT LLC

RECEIVED

101 Kirkland Avenue
Mixed Use Development
July 11, 2008

COMPARISON OF SETBACKS AND STEP BACKS WITH McLEOD PROPOSAL



LEVEL 5

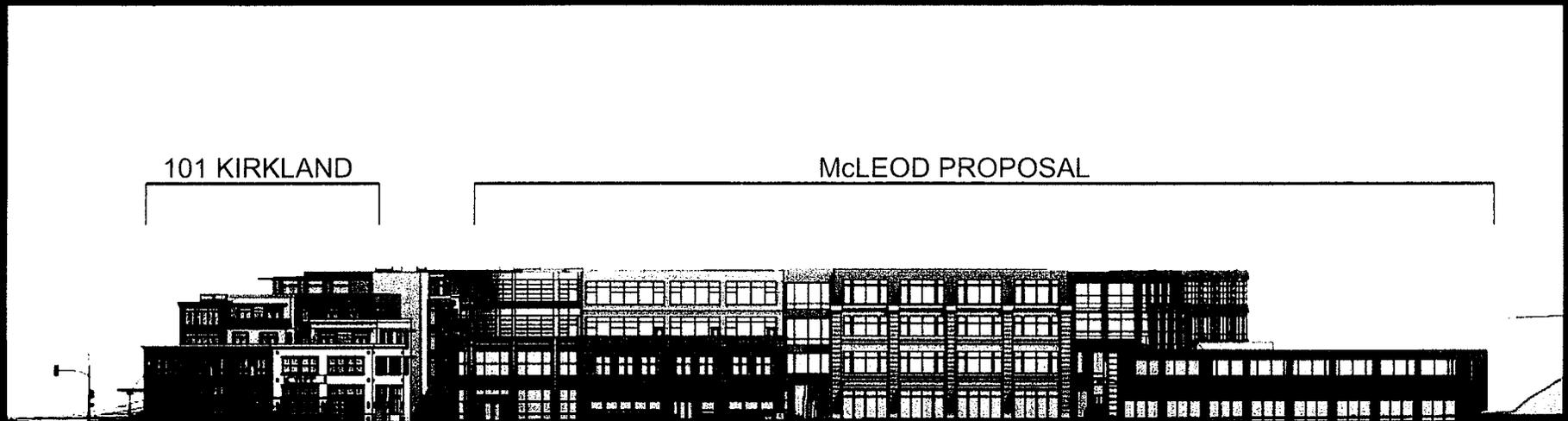
- Bank of America/Merrill Gardens only 1 foot taller than McLeod
- 210% greater setback than McLeod (compared to McLeod's 4th story)



101 Kirkland Avenue
 Mixed-Use Development
 July 2008

MODIFIED DESIGN MEETS THE SETBACK AND STEP BACK CRITERIA FOR 5TH FLOOR:

- SETBACKS ARE 32% TO 210% GREATER THAN THE ADJACENT McLEOD PROJECT ON LAKE STREET.
- BUILDING STEPS BACK AT EACH OF THE 3RD, 4TH, AND 5TH STORIES. STEP BACKS RANGE IN DEPTH BETWEEN 10' AND 44' FEET.



AERIAL VIEW – 101 KIRKLAND & McLEOD PROPOSAL



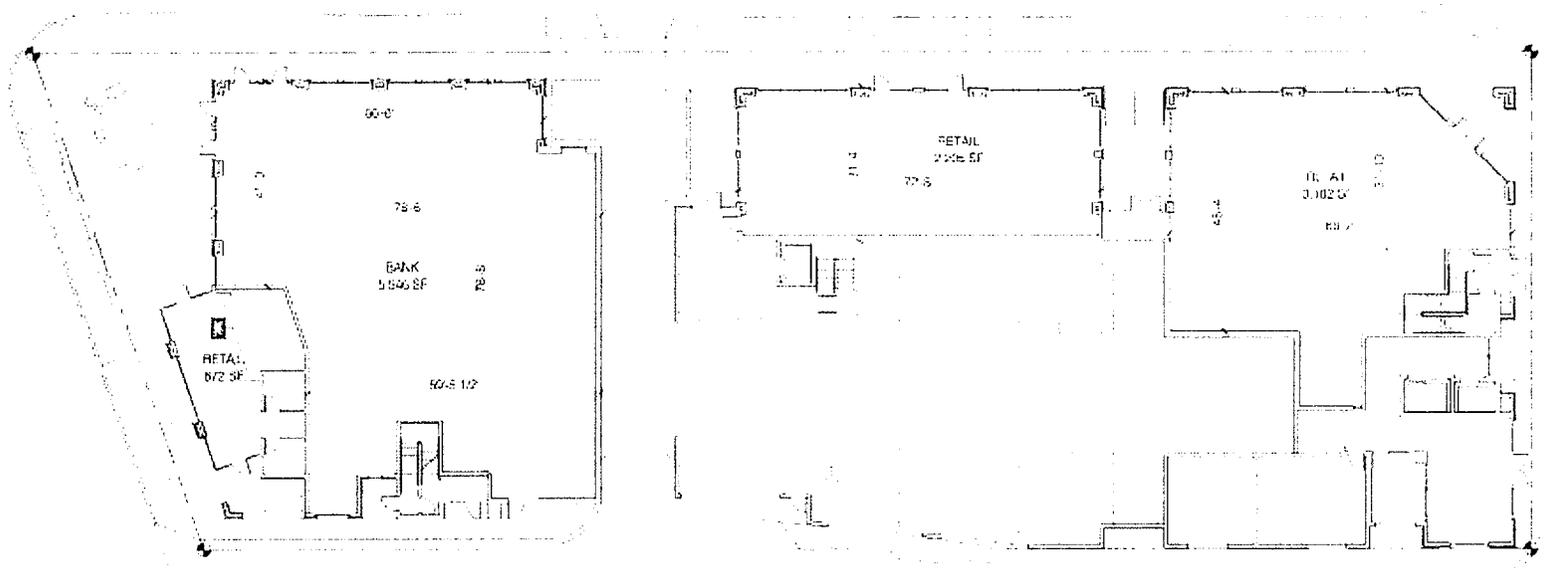
HUSBERG
group


MERRILL GARDENS

STONE
HAWARD
M. GONZALEZ
DEVELOPMENT, LLC

101 Kirkland Avenue
Meredith Development
July 11, 2012

**SUPERIOR
RETAIL**



LEVEL 1 PLAN - ORIGINAL

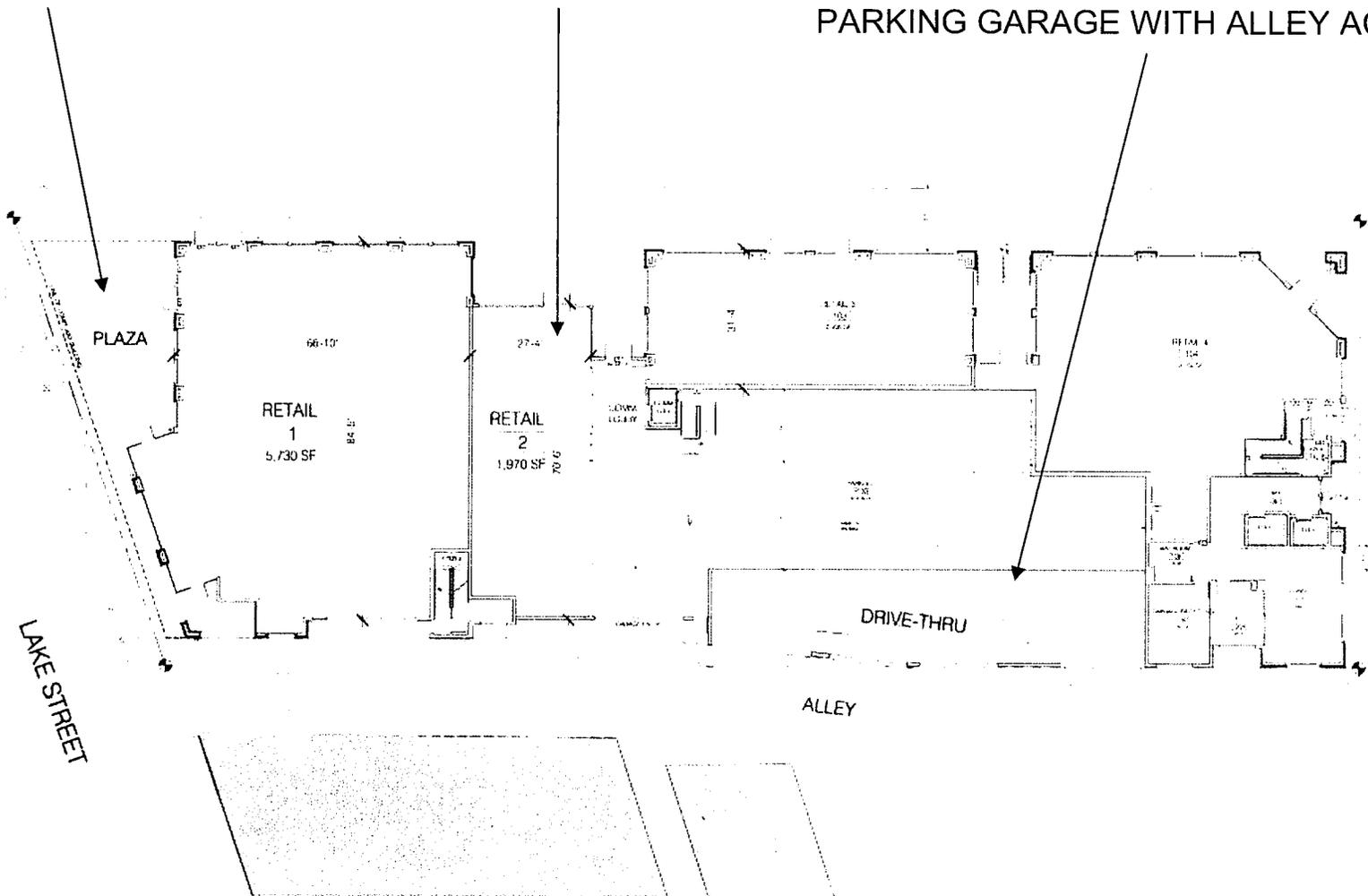


101 Kirkland Avenue
 Merril Gardens Development
 01107-2000

RETAINED PLAZA

ADDED RETAIL SPACE

RELOCATED THE DRIVE-THRU IN THE PARKING GARAGE WITH ALLEY ACCESS



LEVEL 1 PLAN - MODIFIED

RSB GROUP

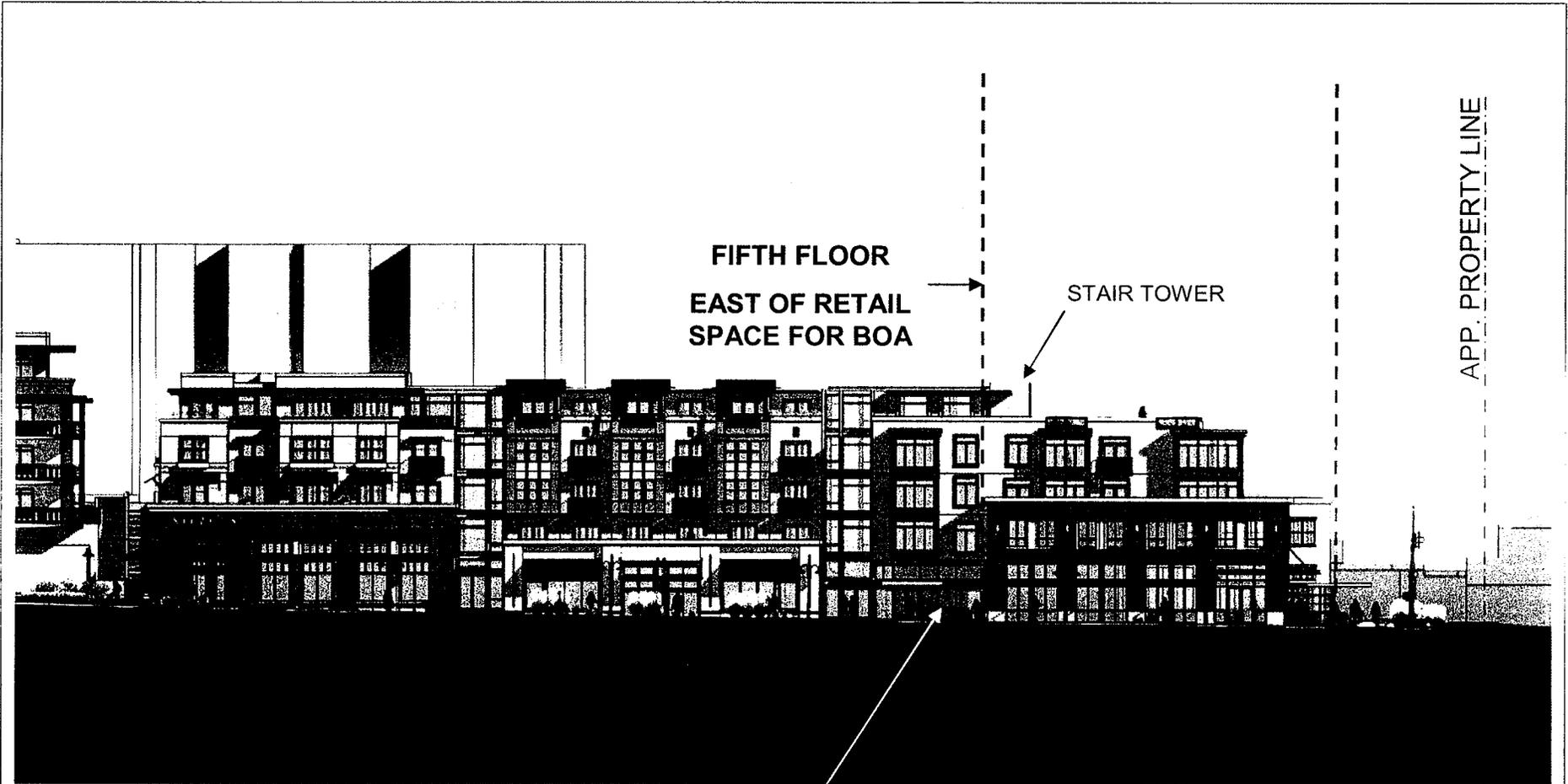
MERRILL GARDENS

SRM DEVELOPMENT LLC

MODIFIED

101 Kirkland Avenue
Mixed-Use Development

July 2008



FIFTH FLOOR
EAST OF RETAIL
SPACE FOR BOA

STAIR TOWER

APP. PROPERTY LINE

SUBSTITUTED ADDITIONAL
RETAIL IN PLACE OF DRIVE-
THRU

RETAIL SPACE
FOR BOA



MODIFIED

101 Kirkland Avenue
Mixed Use Development
July 11, 2008

← RETAIL SPACE FOR BOA

← EDGE OF 4TH STORY

BEGINNING OF 5TH STORY

92'-11"

48'-0"

44'-0"

74'-1"

PRIVATE PATIOS

UNIT 1/1 G
514
1223 SF

UNIT 1/1 H
512
822 SF

UNIT 1/1 G
519
1223 SF

UNIT 1/1 H
511
822 SF

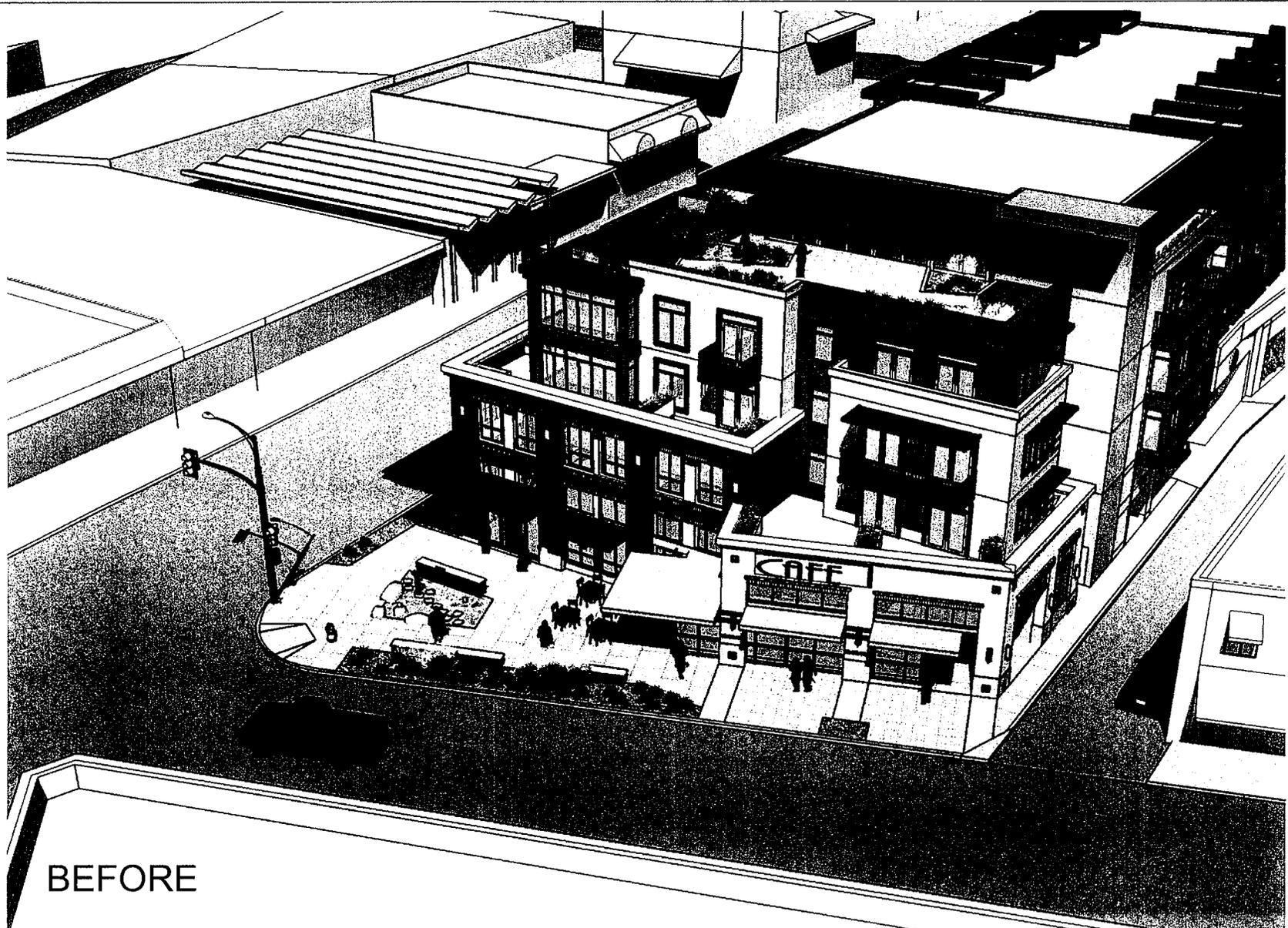
STAIR B
550

LEVEL 5 - MODIFIED



MODIFIED

101 Kirkland Avenue
Mixed-Use Development
July 1, 2008



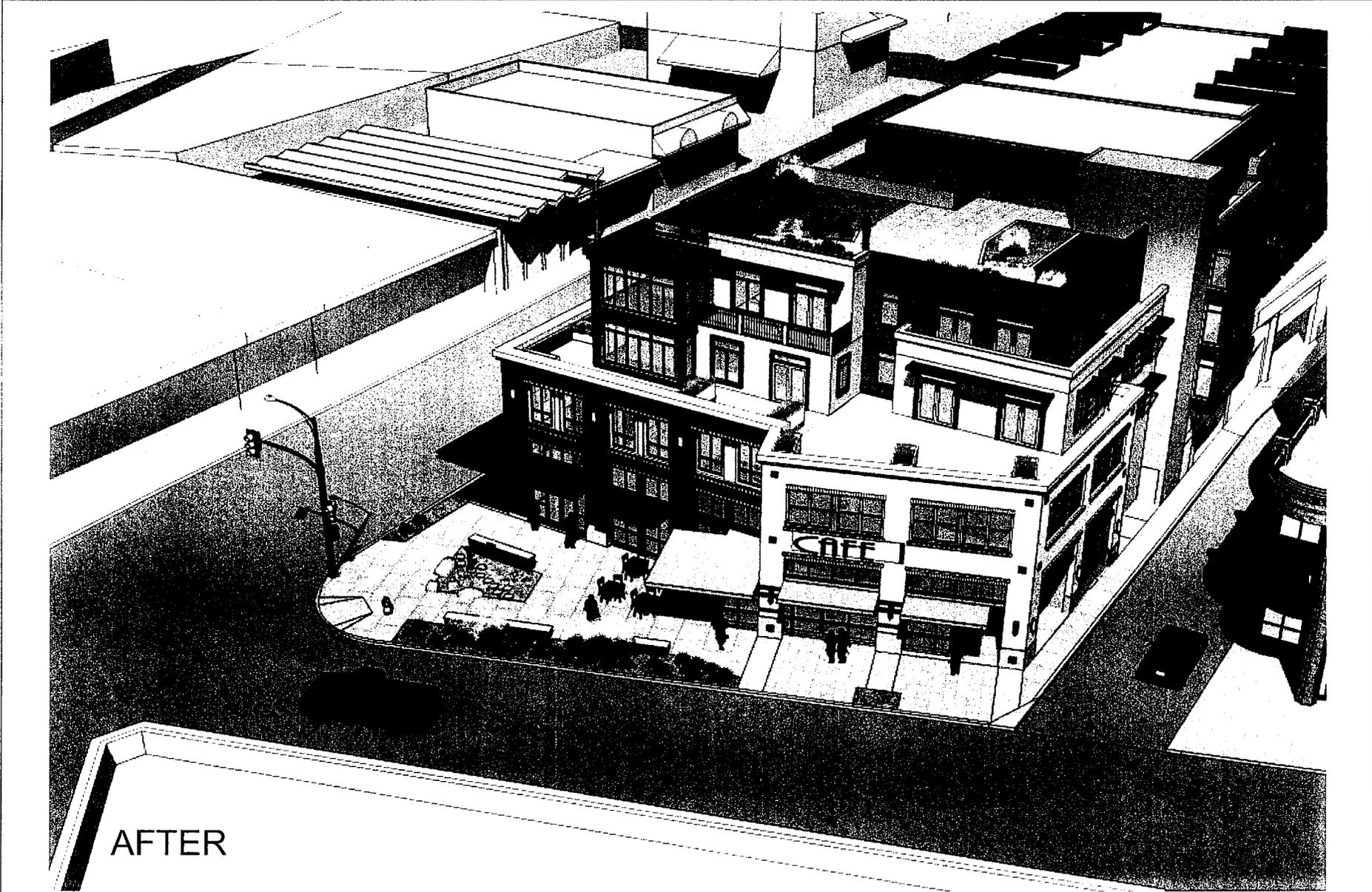
BEFORE

RUBINBERG
group

MERRILL GARDENS

STONE
MARTIN
SMITH
MERRILL
DEVELOPMENT, LLC

101 Kendall Avenue
Mixed Use Development
July 11, 2008



AFTER

BRUNBERG
group


MERRILL GARDENS


SHERIDAN
ROBERTSON
MERRILL
GARDEN
DEVELOPMENT, LLC

101 Kirkland Avenue
Mixed Use Development
July 1, 2008

Modified exterior to mitigate the concern that the space was “designed as a bank.”



RUBINBERG GROUP

MERRILL GARDENS

SRM STONE
HWARD
M GAN GIL
DEVELOPMENT, LLC

MODIFIED

101 Kirkland Avenue
Mixed Use Development

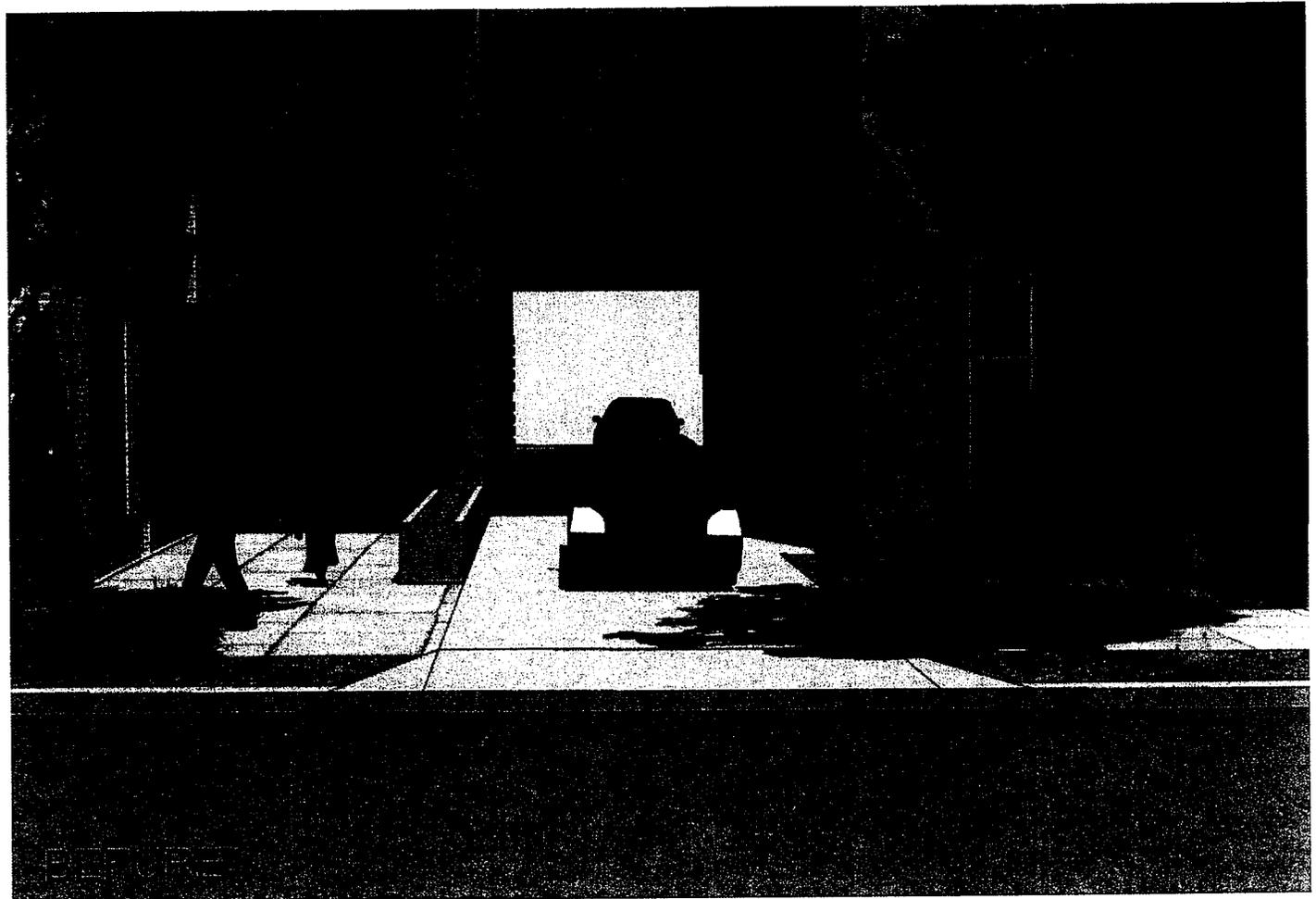
July 2008

Summary of Modifications

- Changed storefront window fenestrations
- Changed corner door treatment
- Changed corner canopy from metal to fabric
- Could change the color of the brick if necessary
- *Anything else necessary?*



Relocated Drive-thru



1000 Standard Avenue
Merrill Gardens
July 2003

Summary of Modifications

- Drive-thru was moved inside building with access off the alley
- An additional retail space has been added at previous drive-through location



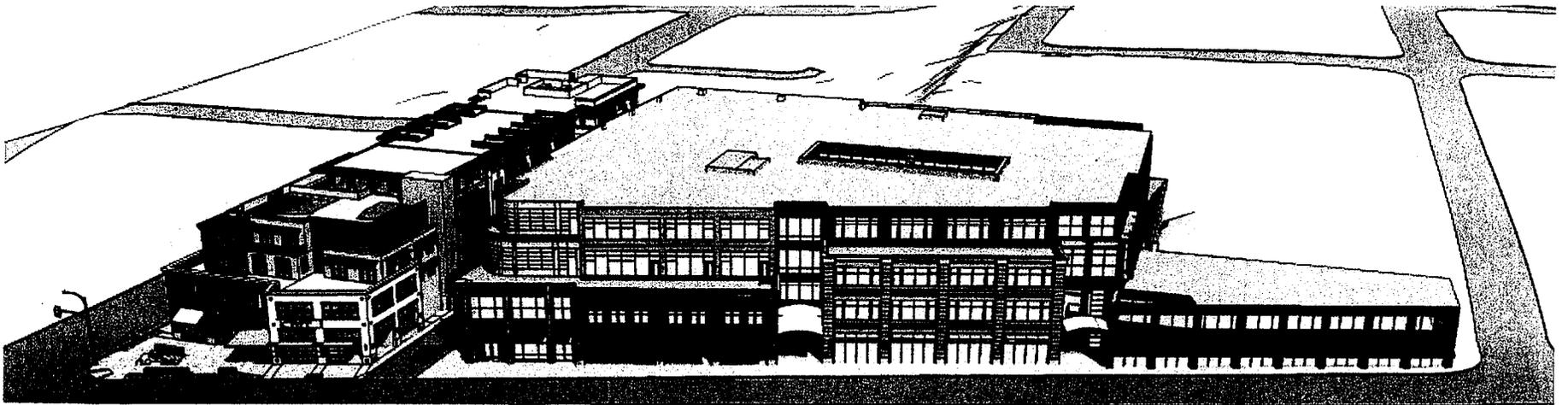
REISBERG
group


MERRILL GARDENS

 STONE
BLVD
DEVELOPMENT, LLC

MODIFIED

101 Kirkland Avenue
Mixed Use Development
© 2011



West Elevation of Lake Street South



NOTIFIED

101 Kirkland Avenue
Mixed Use Development
July 1, 2008

Merrill Gardens/BOA Project

July 1, 2008

Summary of Modifications to Project Design:

- Retained plaza
- Added 2nd story to the southwest corner to create a continuous 2 story appearance on Lake Street
- Stepped back the 3rd story an additional 4'-10' from the 2nd story (*10' to 22' step back, 32'-1" and 46'-5" setback from Lake Street*)
- Stepped back portions of the 4th floor an additional 4' to 6' from portions of the 3rd story (*10' to 32' step back, 36'-7" and 46'-5" setback from Lake Street*)
- Stepped back the 5th floor an additional 22' from the 4th floor so that the 5th floor does not begin until the eastern edge of the bank space (*44' step back, 67'-8" and 95'-9" setback from Lake Street*)
- Relocated drive-thru to the alley
- Created an additional retail space along Kirkland Avenue in place of the drive through
- Changed the doors, awnings and windows on the exterior of the Kirkland Avenue/Lake Street corner retail space to mitigate concerns that the space was "designed as a bank"

Merrill Gardens/BOA Project

July 1, 2008

Prior Superior Retail Space Project Approvals:

- (1) Kirkland Hotel/Heathman Hotel
Uses at street level:
 - Hotel lobby
 - Hotel rooms
 - Spa
 - Restaurant

- (2) Kirkland Central Condo
Uses at street level:
 - Washington Mutual Bank (corner space)
 - Yoga Studio
 - Shnoo Yogurt
 - Elle Salon and Boutique
 - French Bakery and Espresso
 - Terra Bite

- (3) 201 Kirkland Avenue/SRM Merrill Gardens I
Uses at street level not yet known. Building under construction.

**SRM'S PROPOSED REVISIONS TO THE RESOLUTION AND
FINDINGS/CONCLUSIONS BASED ON MODIFIED DESIGN**

July 1, 2008

Supplement to Resolution R-4707:

Insert new paragraphs following paragraph ending "review approval of the Bank of America project":

WHEREAS, at SRM Development's request, the City Council authorized SRM Development to submit proposed modifications to the design of the Bank of America project;

WHEREAS, on July 1, 2008, SRM Development presented a modified project design that responded to and alleviated the concerns of the majority of the Council members;

WHEREAS, at the conclusion of the July 1, 2008, hearing, the City Council voted to approve the Bank of America project *as modified*.

Supplement to the Findings, Conclusions, and Decision on Appeal:

Section I, Procedural Findings:

New Paragraph 1.9: At the May 20, 2008, hearing, SRM Development requested the opportunity to submit modifications to the Bank of America project design in an effort to respond to the concerns expressed by the Council regarding the original, disapproved design;

New Paragraph 1.10: SRM Development returned at the July 1, 2008, meeting with a modified proposal for the design of the Bank of America project. Following SRM's presentation, the Council deliberated regarding the modified proposal and voted to approve the Bank of America project as modified.

Existing paragraph 1.9 is renumbered as Paragraph 1.11.

Section III, Findings Regarding Appeal:

New Paragraph 3.24: As modified by SRM Development's July 1, 2008 submittal, the first and second stories of the Bank of America/Merrill Gardens project are proposed to be setback 14'-1" and 40'-2" from Lake Street. As modified, the third story is proposed to be setback between 32'-1" and 46'-5" from Lake Street. As modified, the fourth story is proposed to be setback between 36'-7" and 46'-5" from Lake Street. As modified, the fifth story is proposed to be setback between 67'-8" and 95'-9" feet from Lake Street.

New Paragraph 3.25: As modified by SRM Development's July 1, 2008 submittal, the drive through facility is located within the building with both the entrance and exit located along the alley. As modified, the drive through no longer exits onto Kirkland Avenue.

New Paragraph 3.26: As modified by SRM Development's July 1, 2008 submittal, the several retail spaces range in size between approximately 1,970 square feet and 5,730 square feet.

New Paragraph 3.27: As modified on July 1, 2008, the Bank of America/Merrill Gardens project has been modified to mitigate concerns that the space on the corner of Kirkland Avenue and Lake Street was "designed as a bank." As modified, this retail space could be used by any number of different retail use tenants.

Section IV, Conclusions as to Superior Retail:

New Paragraph 4.6: Through its July 1, 2008 submittal, SRM Development mitigated the effect of the drive through on the Bank of America/Merrill Gardens project by relocating the drive through so that it is accessed exclusively from the alley, and reconfigured the area utilized as the drive through in the original design as an additional superior retail space. As a result of these modifications, the City Council concluded that the Bank of America/Merrill Garden's project as modified satisfied the criteria for superior retail space.

Alternate Paragraph 4.6: Through its July 1, 2008 submittal, SRM Development effectively divided the Bank of America/Merrill Gardens project into two components. SRM setback the fifth story of the project from Lake Street between 67'-8" and 95'-9" such that no portion of the fifth story was located above the retail space proposed for use by Bank of America. In so doing, SRM sought to divide the project into two "buildings": the western "building" containing the Bank of America retail space which is limited to four stories; and the eastern "building" which contains several superior retail spaces and is granted a fifth story. In addition, SRM Development mitigated the effect of the drive through on the Bank of America/Merrill Gardens project by relocating the drive through so that it is accessed exclusively from the alley, and reconfigured the area utilized as the drive through in the original design as an additional superior retail space. As a result of these modifications, the City Council concluded that the Bank of America/Merrill Garden's project as modified satisfied the criteria for superior retail space.

Section V, Conclusions as to Height on Lake Street:

New Paragraph 5.7: As modified on July 1, 2008, the Bank of America/Merrill Gardens project provides significant setbacks and step backs from Lake Street to meet the requirements of the two-story building limitation along Lake Street. Further, as modified on July 1, 2008, the Bank of America/Merrill Gardens project provides sufficient setbacks and step backs to mitigate the scale and mass of the proposed third, fourth and fifth stories.

Section VI, Decision:

Add the following: The modified design for the Bank of America/Merrill Gardens project as presented by SRM Development on July 1, 2008, is APPROVED.

RESOLUTION R-4707

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND ADOPTING FINDINGS AND CONCLUSIONS AND REVERSING THE DECISION OF THE DESIGN REVIEW BOARD GRANTING DESIGN REVIEW APPROVAL TO THE BANK OF AMERICA/MERRILL GARDENS MIXED USE PROJECT AT 101 KIRKLAND AVENUE. (FILE NO.: DRC 07-0006; APPEAL CASE NO.: APL08-0001)

WHEREAS, the applicant, SRM Development LLC, applied for design review approval of the Bank of America/Merrill Gardens five-story mixed use project ("Bank of America project") located at 101 Kirkland Avenue; and

WHEREAS, on January 17, 2008, the Kirkland Design Review Board issued its decision granting design review approval to the Bank of America project; and

WHEREAS, the appellant, Citizens for a Vibrant Kirkland, a Washington non-profit corporation, timely filed an appeal of the Design Review Board's decision; and

WHEREAS, on April 15 and May 6, May 20, June 3, and July 1 2008, the Kirkland City Council heard the appeal in an open record proceeding; and

WHEREAS, at the conclusion of the May 6, 2008, portion of the hearing, the City Council voted to reverse the Design Review Board's decision granting design review approval to the Bank of America project; and

WHEREAS, Kirkland Zoning Code 142.40.11.b requires that the City Council adopt findings and conclusions.

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. In support of the decision reversing the Design Review Board's decision granting design review approval to the Bank of America project, the City Council hereby adopts the Findings, Conclusions, and Decision attached hereto as Exhibit "A" and by this reference incorporated herein.

Section 2. The City shall distribute the Council's decision by mail to the appellant and the applicant.

Passed by majority vote of the Kirkland City Council in open meeting this ____ day of _____, 2008.

Signed in authentication thereof this ____ day of _____, 2008.

MAYOR

Attest:

City Clerk

EXHIBIT A (Staff)
Revised for August 5, 2008 meeting

BEFORE THE KIRKLAND CITY COUNCIL

APPEAL OF THE DESIGN REVIEW)	APPEAL CASE NO.: APL08-00001
BOARD DECISION ON THE BANK)	
OF AMERICA/MERRILL GARDENS)	CITY COUNCIL’S FINDINGS
MIXED USE PROJECT AT 101)	CONCLUSIONS, AND DECISION
KIRKLAND AVENUE)	ON THE APPEAL
FILE NO.: DRC07-00006)	
<hr/>		

I. PROCEDURAL FINDINGS

1.1 The Applicant, SRM Development, LLC (“Applicant”) applied for design review approval of the Bank of America/Merrill Gardens five-story mixed use project (“Bank of America project”) at 101 Kirkland Avenue.

1.2 On January 7, 2008, the Kirkland Design Review Board voted to approve the project subject to conditions and issued its decision dated January 17, 2008, granting design review approval to the Bank of America project. *Design Review Board Decision*.

1.3 Citizens for a Vibrant Kirkland (CiViK) (“Appellant”), a Washington non-profit corporation, timely filed an appeal of the Design Review Board’s Decision. *Letter from J. Richard Aramburu dated January 31, 2008*.

1.4 On April 15, May 6, May 20, June 3, and July 1, 2008, the Kirkland City Council heard the appeal in an open record proceeding. *April 15, May 6, May 20, June 3, and July 1, 2008, Proceedings*.

1.5 Appellant was represented by J. Richard Aramburu of Aramburu and Eustis, LLP at the City Council’s open record proceeding. Applicant was represented by Molly Lawrence of GordonDerr.

1.6 The City Council Members made appearance of fairness disclosures at the outset of the proceedings and no objections were raised by the parties to the participation of any member. Mayor James Lauinger presided over the appeal proceedings. *April 15, May 6, May 20, June 3, and July 1, 2008, Proceedings*.

1.7 The City Council heard testimony from the Department of Planning and Community Development (“Planning”) staff, the Chair of the Design Review Board, testimony and oral argument from members of the Appellant and representatives of the Applicant, and asked questions of the witnesses. The City Council had before it the

following documents: (a) the decision of the Design Review Board with attachments including Planning staff memoranda, applicant submittals and public comment letters to the Design Review Board; (b) the Planning staff report to the City Council with attachments; and (c) the written submissions by the parties, including briefing and exhibits. After hearing the presentations and oral arguments of the parties, the City Council deliberated and reached a decision on the appeal. By a vote of four-to-three, the City Council reversed the Design Review Board's decision granting design review approval to the Bank of America project. *April 15 and May 6, 2008, Proceedings.*

1.8 The City Council's motion reversed the Design Review Board's decision, denying the application, and directed staff to return to the next regular City Council meeting with a resolution setting forth findings and conclusions that: 1) the development does not contain superior retail that warrants the additional height, bulk, and mass of the project; and 2) the project does not present/meet the requirements of a two-story building along Lake Street South. *May 6, 2008, Proceedings.*

1.9 Any Conclusion set forth below that is deemed a Finding of Fact is hereby adopted as such.

II. STANDARD OF REVIEW

2.1 The Kirkland City Council has jurisdiction over the appeal pursuant to Kirkland Zoning Code (KZC) 142.40.1.ab. The appeal was timely filed. Under KZC 142.40.11.a, "[u]nless substantial relevant information is presented which was not considered by the Design Review Board," the City Council is required to accord the decision of the Design Review Board "substantial weight."

2.2 The decision of the Design Review Board "may be reversed or modified if, after considering all of the evidence in light of the design regulations, design guidelines, and Comprehensive Plan" the City Council "determines that a mistake has been made." *KZC 142.40.11.a.*

III. FINDINGS REGARDING APPEAL

3.1 The Central Business District (CBD) 1 zone permits a maximum height of structure of two to five stories above each abutting right of way for attached or stacked dwelling units. *CBD 1 Use Zone Chart KZC 50.12.080.*

3.2 Buildings exceeding two stories in CBD 1 must demonstrate compliance with the design regulations of Chapter 92 KZC and all provisions contained in the Downtown Plan. *KZC 50.10.*

3.3 The Downtown Plan provides guidance concerning the allowed building height in the eight height and design districts within Downtown Kirkland. *Downtown Plan, pages XV.D-9 to XV.D-15.*

3.4 The Downtown Plan provides that the maximum building height in Design District 1 should be between two and five stories with no minimum setback from property lines and requires that stories above the second story should be set back. *Downtown Plan, pages XV.D-10.*

3.5 South of Kirkland Avenue, building forms should step up from the north and west with the tallest portions at the base of the hillside to help moderate the mass of large buildings on top of the bluff. *Downtown Plan, Page XV.D-10.*

3.6 With respect to building heights along Lake Street South, the Downtown Plan, XV.D-10, provides, in pertinent part:

Buildings should be limited to two stories along all of Lake Street South to reflect the scale of development in Design District 2.

3.7 The scale of development of buildings in Design District 2 is a maximum height of one to three stories. *Downtown Plan, page XV.D-12, Design District 2.* The scale of development in Design District 2 across from the subject property is a maximum height of two stories.

3.8 The Downtown Plan, page XV.D-10, provides a fifth story may be considered by the Design Review Board for a building within Design District 1B where:

at least three of the upper stories are residential, the total height is not more than one foot taller than the height that would result from an office project with three stories of office over ground floor retail, stories above the second story are set back significantly from the street and the building form is stepped back at the third, fourth, and fifth stories to mitigate the additional building mass, and the project provides superior retail space at the street level . . .

3.9 The requirements for the design of retail space are established in the Zoning Code regulations for CBD 1, Design Regulations of KZC Chapter 92, the Downtown Plan, and the Design Guidelines for Pedestrian Oriented **Business Districts Standards**.

3.10 The Bank of America project is located within the CBD 1 Zone of the Zoning Code and Design District 1B of the Downtown Plan. *Downtown Plan, page XV.D-10, Figure C-5.*

3.11 The Bank of America proposal is for a five story building. *Design Review Board Decision, III.A., DRB Conclusions, page 8.*

3.12 Along Lake Street South the second story is proposed to be set back between 14'3" and 32'3" feet from the street. The third and fourth stories are proposed to be set back between 14'3" and 34'8" feet from the street. There is no setback proposed from the 3rd to the 4th story. *Exhibit 201, Final Setbacks Levels 3-4.*

3.13 The bank would occupy the northwest corner of the site and a drive through banking facility would be located within the building, so that automobiles enter on the alley and leave the building on Kirkland Avenue. *Design Review Board Decision, Summary of Decision, page 1.*

3.14 The four proposed retail spaces range in size from approximately 880 square feet for a café to 2,365 SF and 2,450 SF for spaces along Kirkland Avenue and approximately 5,720 square feet for the bank. *Design Review Board Decision, 111.A, Retail Size, page 2.*

3.15 Banking and related financial institutions are an allowed use in the CBD 1 zone, but a drive-through bank is allowed in this location only because a drive-through bank presently exists on the site. *KZC 50.12.025.*

3.16 The bank space has very clearly and specifically been designed for a bank tenant.

3.17 The bank is proposed for the portion of the building at the corner of Kirkland Avenue and Lake Street South, one of the most prominent corners in the CBD.

3.18 The Design Review Board is authorized to determine compliance of buildings in CBD 1 with these provisions, subject to appeal to the City Council. *Downtown Plan, XV.D-10; ~~KZC 50.12.030~~; KZC 50.12.080; ~~KZC 50.12.100~~; KZC 142.40.*

3.19 In issuing its decision on the Bank of America project, the Design Review Board determined that the term "superior retail space" applies to the physical characteristics of the retail space and not the use. *Design Review Board Decision, III.A., Superior Retail, page 8.*

3.20 The Design Review Board concluded that the Bank of America project provided superior retail space at the street level. *Design Review Board Decision, III.A., DRB Conclusions, page 8.*

3.21 Restaurants, delicatessens, and specialty shops, including fine apparel, gift shops, art galleries, import shops, and the like constitute the use mix and image contemplated in the Vision for Downtown. These uses provide visual interest and stimulate foot traffic and thereby provide opportunities for leisure time strolling along Downtown walkways for Kirklanders and visitors alike. *Downtown Plan, Page XV, D-4.*

3.22 KCZ 50.12.080, Special Regulation 1 requires that retail uses occupying the street level floor of a building fronting on Lake Street South have a minimum depth of 30 feet.

3.23 The Design Review Board further concluded that the stories above the second story of the Bank of America project are set back significantly from the street, the building form is stepped back at the third, fourth, and fifth stories to mitigate building mass, and approved the fifth story. *Design Review Board, III, DRB Conclusions, page 8.*

IV. CONCLUSIONS AS TO SUPERIOR RETAIL SPACE

4.1 After according substantial weight to the decision of the Design Review Board, the City Council is left with the definite and firm conviction that the Design Review Board committed a mistake with regard to its conclusion that the proposed drive-through bank provides superior retail space at street level, and the Design Review Board's decision on this issue is clearly erroneous.

4.2 In order for the Design Review Board to consider a fifth story, all of the six criteria set forth in the Downtown Plan must be met.

4.3 The Design Review Board correctly noted that banks are listed in the Use Zone Chart as permitted uses in the CBD 1. However, drive-through facilities for banks are permitted only if they have existed since before January 1, 2004. A drive-through facility, moreover, is not consistent with superior retail space in the CBD 1, as explained in the Downtown Plan, page XV.D-6:

The desired pedestrian character and vitality of the core area requires the relatively intensive use of land and continuous compact retail frontage. Therefore, automobile drive-through facilities should be prohibited. Similarly, office uses should not be allowed to locate on the ground level. These uses generally lack visual interest, generate little foot traffic, and diminish prime ground floor opportunities for the retail uses that are crucial to the ambiance and economic success of the core area.

The attractiveness of the core area for pedestrian activity should be maintained and enhanced. . . .

4.4 While a drive-through facility in the proposed new building is permitted because it is a use that has existed since before January 1, 2004, a drive-through facility is not consistent with a superior retail space in the CBD 1, and the proposed building does not warrant the additional height, bulk and mass of a fifth story.

4.5 For each of the reasons noted in this section, and with consideration of the exhibits and expert testimony provided, the City Council determined that the space,

which is designed for a bank, fails to achieve the objectives and requirements of superior retail space. Accordingly, the proposed building does not warrant the additional height, bulk and mass of a fifth story.

V. CONCLUSIONS AS TO HEIGHT ON LAKE STREET SOUTH

5.1 After according substantial weight to the decision of the Design Review Board, the City Council is left with the definite and firm conviction that the Design Review Board committed a mistake with regard to its interpretation and application of the provisions of the Downtown Plan regarding height along Lake Street South.

5.2 The Downtown Plan states that “buildings *should* be limited to two stories along all of Lake Street South to reflect the scale of development in Design District 2.” The term “should” is directive and not mandatory, but the Design Review Board failed to give meaning and effect to the fact that the Downtown Plan uses different and stronger language in describing height along Lake Street than it does when describing height in other locations. For example, the next sentence of the Plan, which refers to buildings on other streets in Design District 1, says that the height of these buildings should only be limited “along street frontages.”

5.3 The Downtown Plan thus says that “buildings” that are “along” Lake Street South should be limited to two stories, and by using the word “should” the Plan requires an applicant who wishes to include a third or fourth floor to demonstrate that exceptional circumstances justify such additional height. No such demonstration has been made in the record before the City Council.

5.4 The Downtown Plan does not, however, require that an entire building located along Lake Street South be limited to two stories, regardless of the depth of the building, because the purpose of this limitation is to “reflect the scale of development in Design District 2.” Under the Downtown Plan, it is intended that buildings abutting Lake Street South should create the impression, from a pedestrian’s perspective, of being a maximum of two stories in height.

5.5 Upper stories must be sufficiently set back from Lake Street South to minimize their visibility.

5.6 The Bank of America project does not present as or meet the requirements of a two-story building limitation along Lake Street South because the third and fourth floors are not stepped back from the second floor, nor from Lake Street South, far enough to comply with the Downtown Plan. Further, the proposal has not demonstrated compliance with all of the provisions of the Downtown Plan so as to mitigate the scale and mass of the proposed third and fourth floors.

VI. DECISION

For the reasons set forth in the foregoing Findings and Conclusions, the decision of the Design Review Board is hereby REVERSED.

Decision adopted by the Kirkland City Council _____, 2008.

MAYOR