



CITY OF KIRKLAND

City Attorney's Office

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MEMORANDUM

To: David Ramsay, City Manager

From: Robin S. Jenkinson, City Attorney

Date: May 26, 2008

Subject: Bank of America Appeal/Findings and Conclusions

QUASI-JUDICIAL

BACKGROUND DISCUSSION

The applicant, SRM Development LLC, ("Applicant") applied for design review approval of the Bank of America/Merrill Gardens five-story mixed use project at 101 Kirkland Avenue (Bank of America project). On January 17, 2007, the Design Review Board issued its decision granting design review approval to the Bank of America project. Citizens for a Vibrant Kirkland (CiViK) ("Appellant") timely filed an appeal. On April 15 and May 6, 2008, the City Council heard the appeal in open record hearings. At the conclusion of the hearing on May 6, 2008, the City Council passed a motion to reverse the Design Review Board 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. At the May 20, 2008, Council Meeting, the City Council discussed the Applicant's written request that the City Council consider alternative project designs before making a final decision on the appeal from the Design Review Board. Following City Council discussion, a motion was made and adopted to table Resolution R-4707 to the next regular City Council Meeting.

Submitted for the Council's consideration are the following documents:

A resolution adopting Findings and Conclusion;
Findings and Conclusions prepared by staff;
Findings and Conclusions prepared by the appellant; and
Applicant's response to staff/appellant's Findings and Conclusions.

Please let me know if you have any questions.

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, 2008, the Kirkland City Council heard the appeal in an open record proceeding; and

WHEREAS, at the conclusion of the hearing on May 6, 2008, 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)

BEFORE THE KIRKLAND CITY COUNCIL

APPEAL OF THE DESIGN REVIEW) BOARD DECISION ON THE BANK) OF AMERICA/MERRILL GARDENS) MIXED USE PROJECT AT 101) KIRKLAND AVENUE) FILE NO.: DRC07-00006) <hr style="width: 100%;"/>	APPEAL CASE NO.: APL08-00001 CITY COUNCIL’S FINDINGS CONCLUSIONS, AND DECISION ON THE APPEAL
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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 and May 6, 2008, the Kirkland City Council heard the appeal in an open record proceeding. *April 15 and May 6, 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 and May 6, 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.a. 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 District 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, and the Design Review Board's decision is clearly erroneous in this regard.

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 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.

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

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.*

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property lines and requires that stories above the second story should be set back. *Downtown Plan, pages XV.D-10.*

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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 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.*

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.*

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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.*

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3.21 KCZ 50.12.080, Special Regulation I requires that retail uses occupying the street level floor of a building fronting on Lake Street South have a minimum depth of 30 feet.

3.22 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.*

3.23 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.*

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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.

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 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, and the Design Review Board's decision is clearly erroneous in this regard.

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 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.

5.4 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.

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

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.

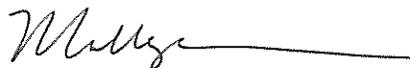
As part of its comments on the Findings and Conclusions, SRM has proposed modifying the Council's decision from a reversal of the DRB's approval of the BOA/Merrill Gardens project to an approval of the project as modified. As the Council acknowledged during its May 20th meeting, you have authority to 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

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cc: Robin Jenkinson, Kirkland City Attorney
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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 stepbacks 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:

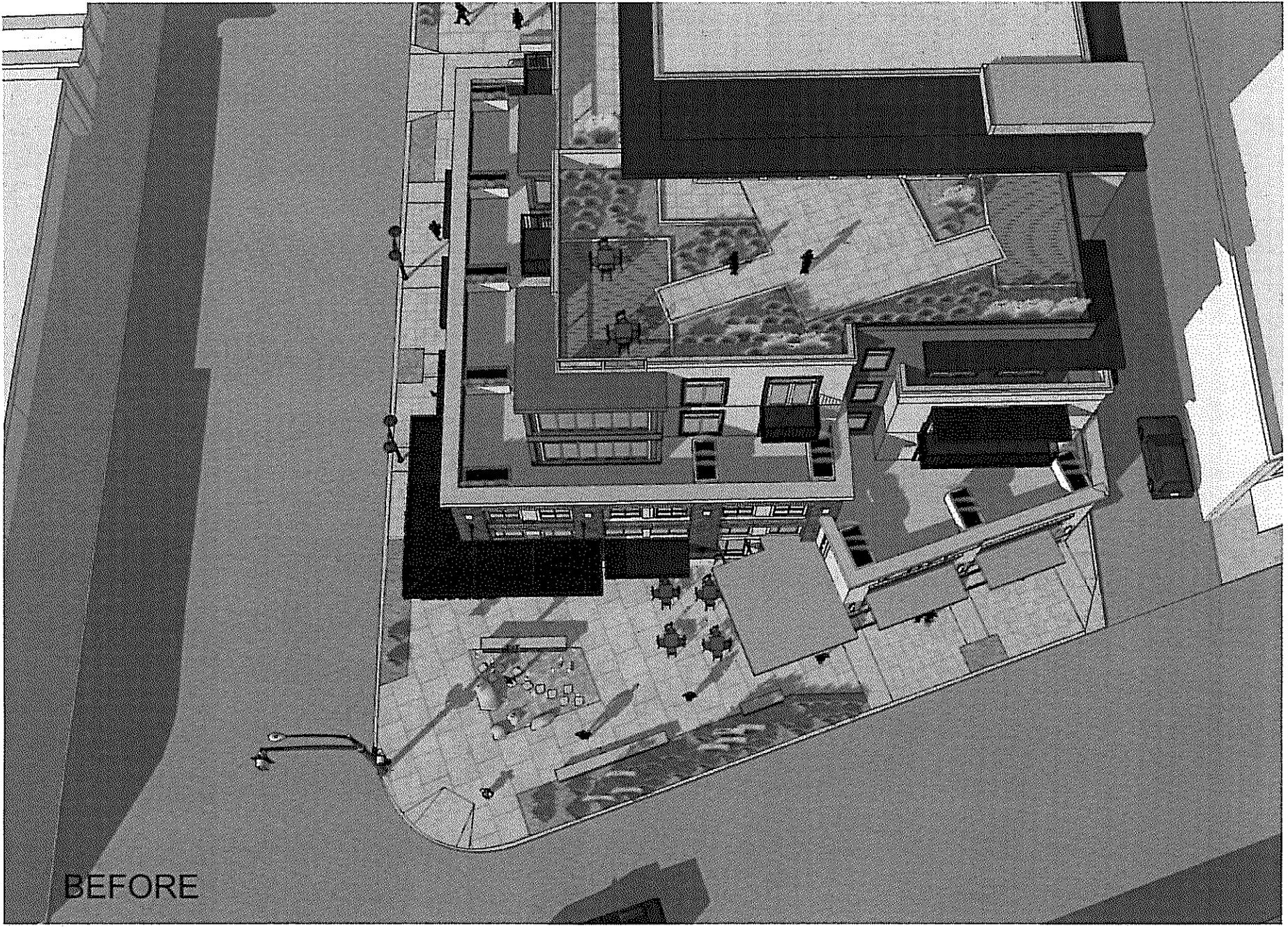
For the reasons set forth in the foregoing Findings and Conclusions, the decision of the Design Review Board is hereby MODIFIED. The approved design for the Bank of America project, as modified by the City Council, is attached hereto as Exhibit A.I.



BEFORE



AFTER



BEFORE



AFTER



BEFORE



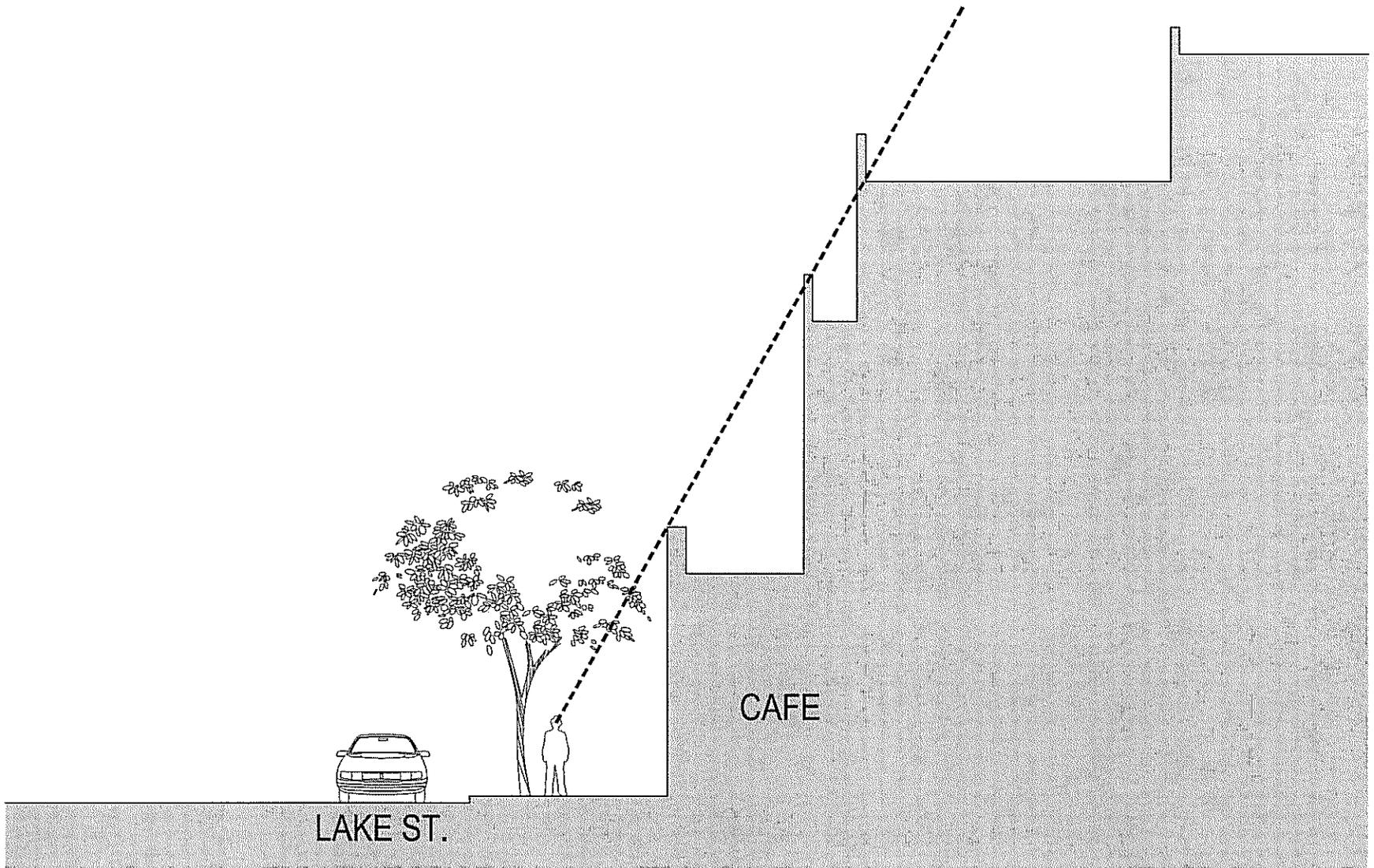
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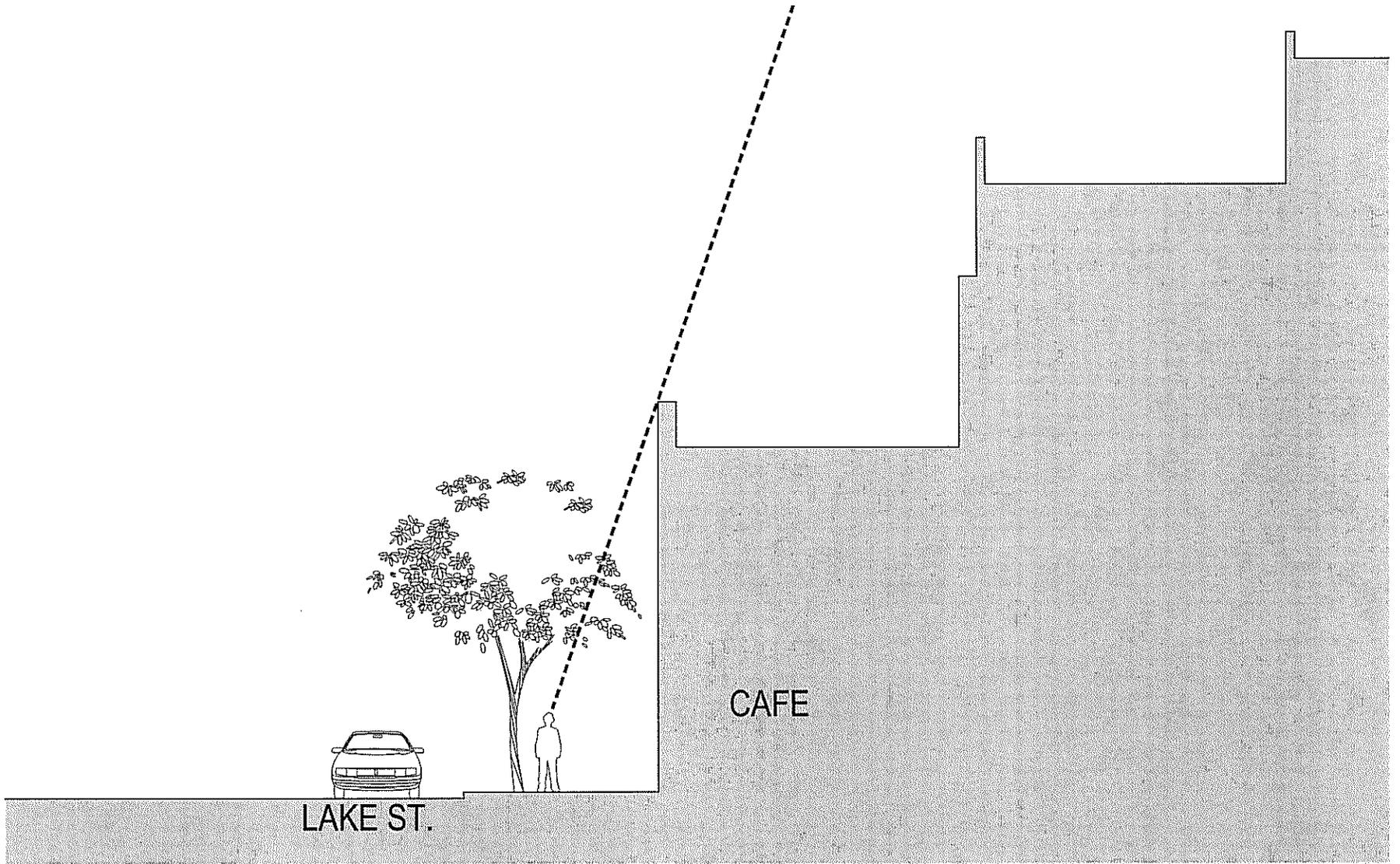
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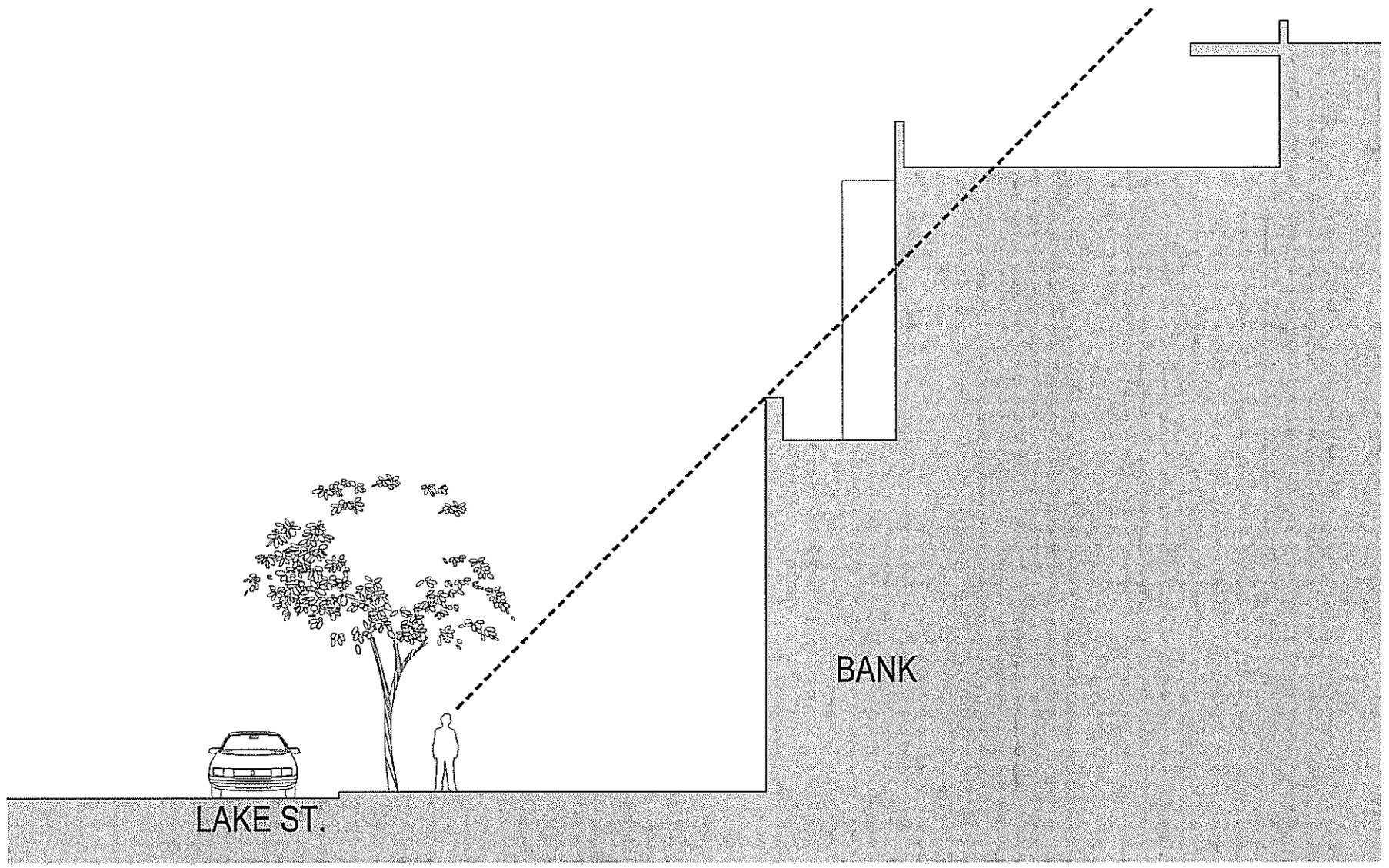
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CAFE - PREVIOUS



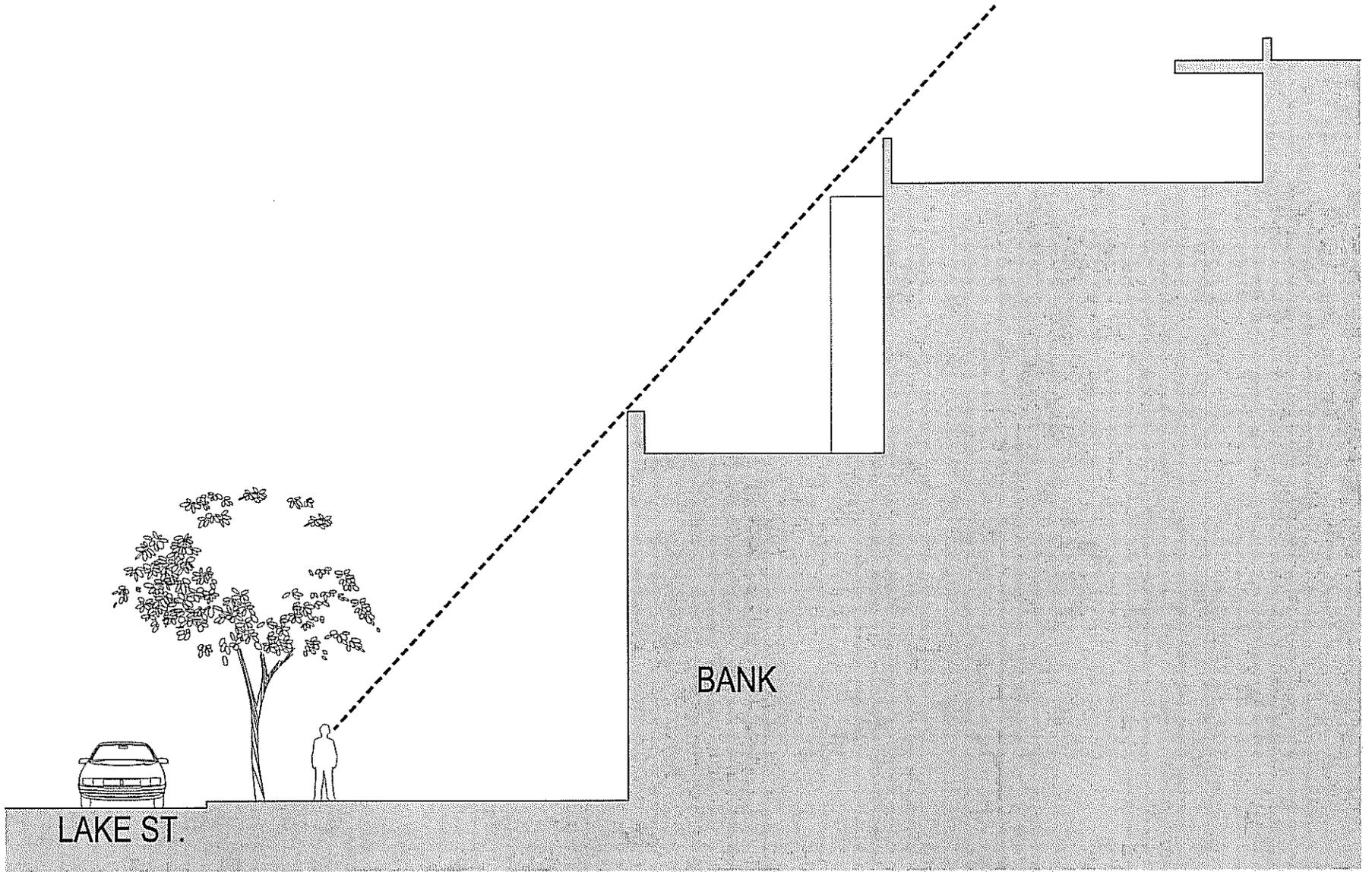
CAFE - REVISED



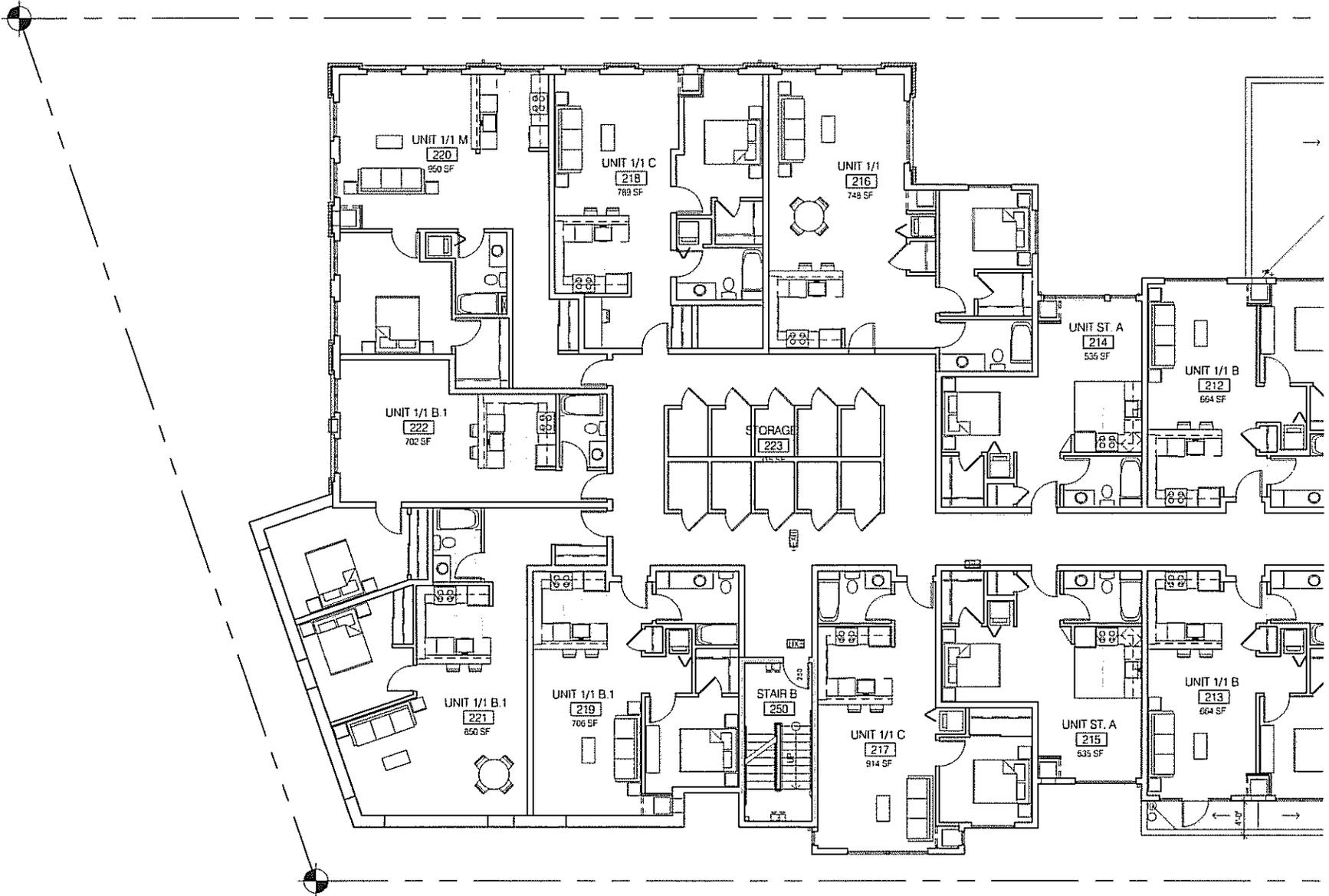
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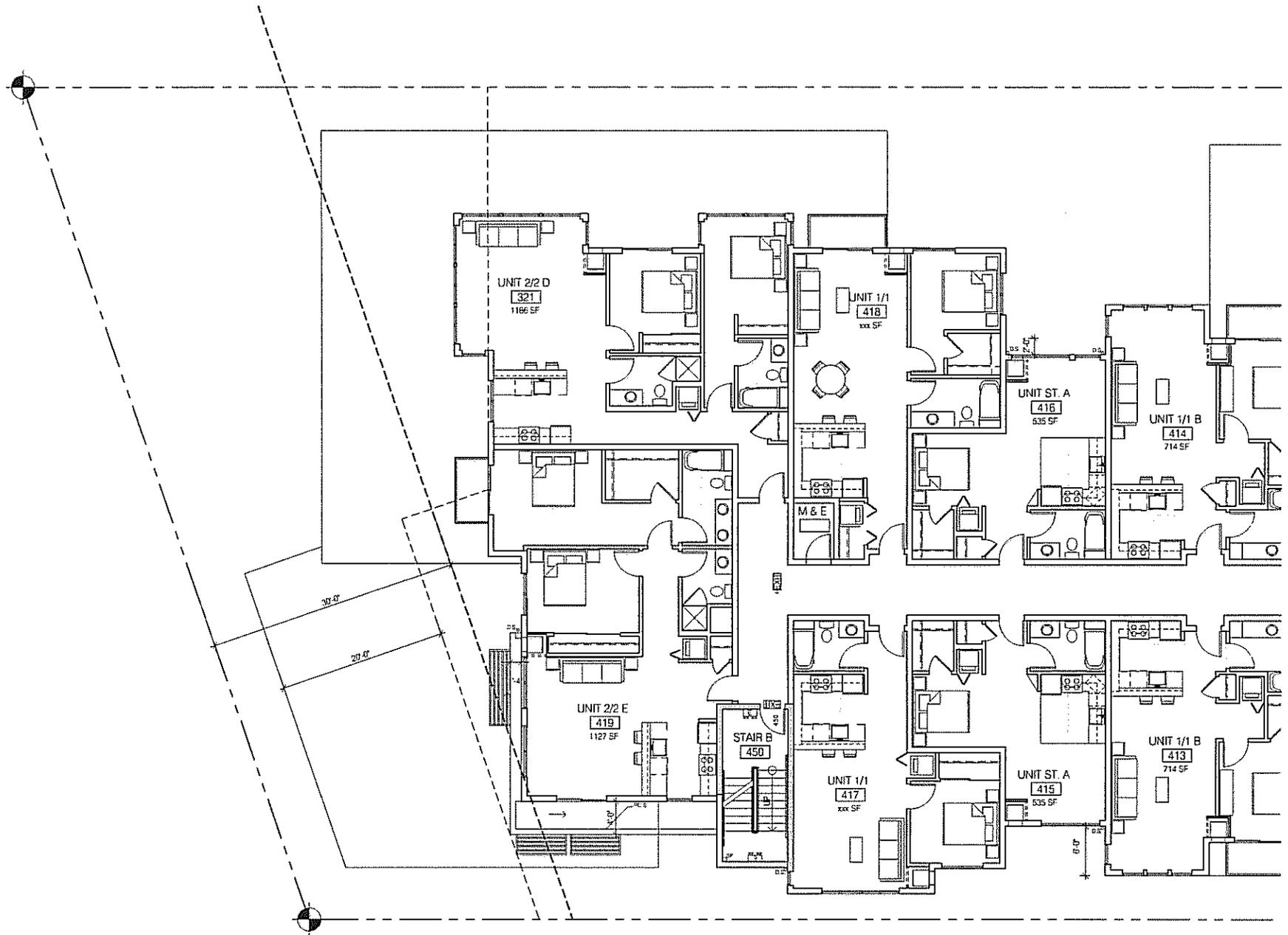
BANK - PREVIOUS



BANK - REVISED



LEVEL L2 - REVISED



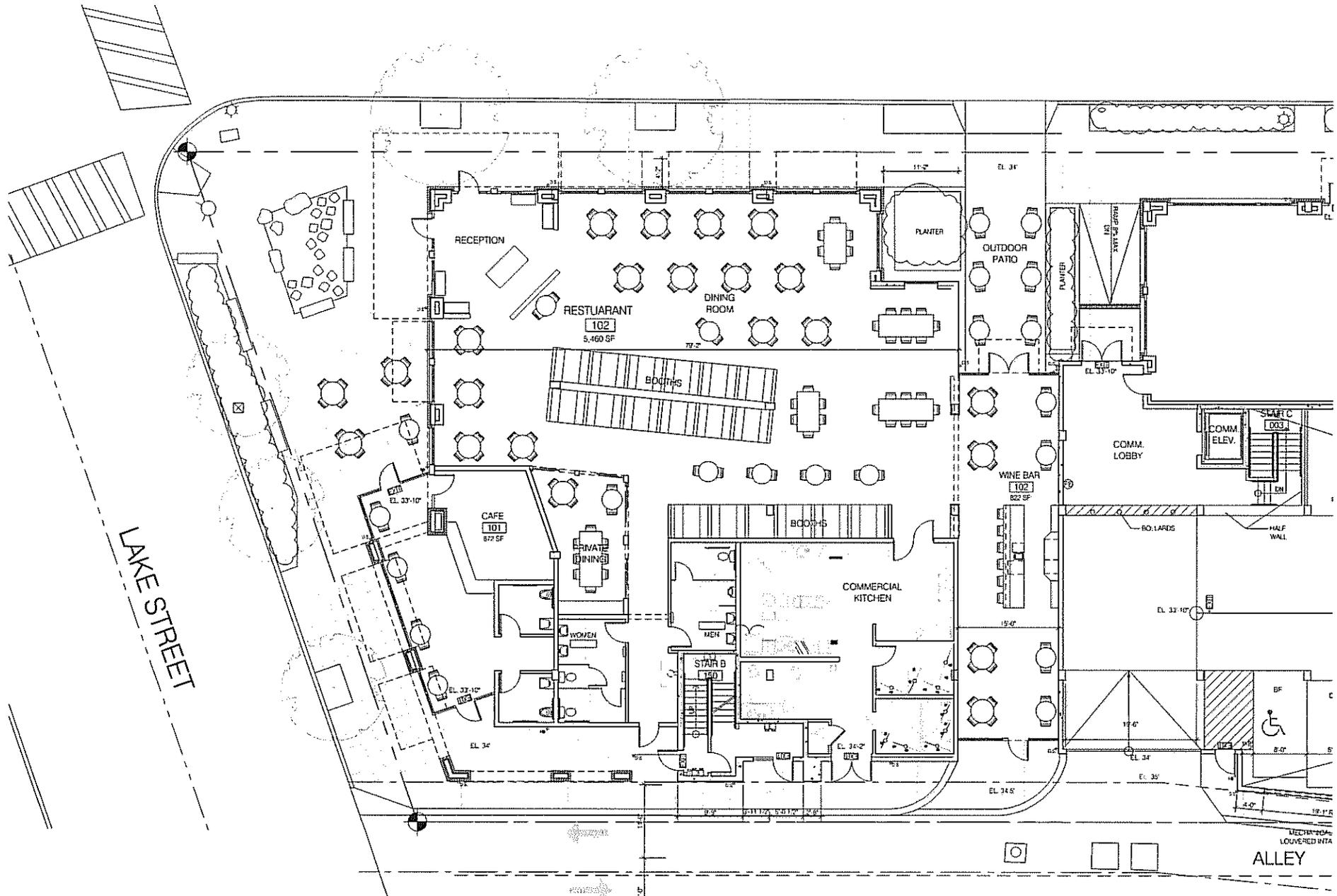
LEVEL L4 - REVISED



BEFORE



AFTER



RESTAURANT LAYOUT