



CITY PLANNING COMMISSION

September 9, 2009 /Calendar No. 16

C 090432 ZSM

IN THE MATTER OF an application submitted by W2005/Hines West Fifty-Third Realty, LLC pursuant to Sections 197-c and 201 of the New York City Charter for the grant of special permits pursuant to the following sections of the Zoning Resolution:

1. Section 74-711 - to allow the distribution of the total allowable floor area without regard to zoning district boundaries, to modify the height and setback regulations of Sections 81-90 (SPECIAL REGULATIONS FOR PRESERVATION SUBDISTRICT) and 33-432 (In other Commercial Districts), to modify the requirements of Sections 81-45 (Pedestrian Circulation Spaces) and 37-50 (Requirements for Pedestrian Circulation Space), and rear yard regulations of Section 23-532 (Required Rear Yard Equivalent); and
2. Section 81-277 - to modify the height and setback requirements of Section 81-27 (Alternative Height and Setback Regulations – Daylight Evaluation);

to facilitate the development of an 85-story mixed use building on property located at 53 West 53rd Street (Block 1269, Lots 5, 6, 7, 8, 9, 11, 12, 13, 14, 20, 30, 58, 66, 69, and 165), in C6-6, C5-P, C5-2.5 and C5-3 Districts, within the Special Midtown District (partially within the Preservation and Fifth Avenue Subdistricts) Borough of Manhattan, Community District 5.

This application for a special permit was filed by W2005/Hines West Fifty-Third Realty, LLC, on May 12th, 2009 to facilitate the construction of an 85-story mixed-use building with a maximum height of approximately 1,250 feet containing approximately 658,306 square feet of floor area with residential, hotel, and museum uses.

RELATED ACTION

In addition to the application for a special permit which is the subject of this report (C 090432 ZSM), implementation of the proposed development also requires action by the City Planning Commission (CPC) on the following application which is considered concurrently with this application:

C 090431 ZSM: A special permit pursuant to Sections 81-212 & 74-79 (Transfer of Development Rights from Landmark Sites) to facilitate the transfer of

approximately 136,000 square feet of unused development rights from the landmarked University Club to the project site.

BACKGROUND

The project site (Block 1269, Lots 5, 6, 7, 8, 66, 69, 165, and a portion of Lot 58) is located on a through block site between West 53rd Street and West 54th Street and between Fifth and Sixth Avenues. The site is currently vacant. It is located on a zoning lot that also includes the existing Museum of Modern Art complex (Block 1269, Lots 11, 12, 13, 14, 20, and 58), St. Thomas Church (Block 1269, Lot 30), the American Folk Art Museum (Block 1269, Lot 9), and the Museum Tower condominium (Block 1269, Lot 14 and condominium parcels above Lot 14). St. Thomas Church is a landmark and the applicant is seeking a special permit pursuant to Section 74-711 and 81-277 to allow for a zoning lot containing a landmark to waive bulk regulations. Directly across the street from the zoning lot is the University Club, also a designated landmark, located at 1 West 54th Street (Block 1270, Lot 34), on the northwest corner of 5th Avenue and West 54th Street. The University Club has approximately 148,295 square feet of excess floor area available for transfer pursuant to Section 74-79. 136,000 square feet is proposed to be transferred for use on the development site as part of the related action (C 090432 ZSM).

Existing Zoning and Context

The project zoning lot is located in four separate zoning districts: the portion of the zoning lot within 150 feet of Sixth Avenue is in a C6-6 district; the portion within 150 feet of Fifth Avenue is in a C5-3 district and the Fifth Avenue Subdistrict; the northern half of the midblock portion of the zoning lot is in a C5-P district and the Preservation Subdistrict; and the southern half of the midblock portion is in a C5-2.5 district. The entire zoning lot is also within the Special Midtown District.

In a C6-6 zoning district, the basic maximum permitted floor area ratio for residential use is 10.0, which may be increased to 12.0 through the provision of residential recreation space, and the basic maximum FAR for commercial use, community facility use and combined commercial, community facility and residential uses is 15.0. There is no limit

on the amount of development rights that may be transferred from a landmark site to a C6-6 zone within the Special Midtown District. C5-3 zoning districts in the Midtown Special District permit the same floor area ratios as C6-6 zoning districts and C5-2.5 zoning districts permit a basic maximum FAR of 12.0 for commercial, community facility and residential uses, although residential uses are limited to 10.0 FAR unless residential recreation space is provided. C5-P zones permit a maximum FAR of 8.0 for all uses.

The University Club is directly across the street from the project zoning lot and is located on a zoning lot that is split between a C5-3 within 150 feet of Fifth Avenue with the remainder of the lot in the C5-P zoning district. For purposes of transferring development rights pursuant to Section 74-79 of the Zoning Resolution, Section 81-211 of the Special Midtown District permits a maximum FAR of 16.0 in C5-3 districts and 8.0 in C5-P districts.

The site is located in the Midtown central business district, which contains a mix of low and high-rise buildings. Although the predominant land use is commercial office buildings, there are also residential, retail, hotel, and institutional community facility uses in the vicinity. Along the north side of West 54th Street, the Preservation Subdistrict contains mostly townhouses and mid-rise apartment buildings, some of which are New York City landmarks, including the Rockefeller Apartments at 17 West 54th Street and the townhouses at 13 and 15 West 54th Street.

Commercial office buildings, including Rockefeller Center, line both Fifth and Sixth Avenues to the south. A 40-story office building sits immediately adjacent to the development site, at 1330 Avenue of the Americas, and several hotels are also located nearby on Sixth Avenue. The Fifth Avenue Subdistrict of the Special Midtown District requires retail uses along Fifth Avenue, and is among the busiest retail districts in New York City.

Zoning Lot

The zoning lot is located on the block bounded by West 53rd Street and West 54th Streets and Sixth and Fifth Avenues. It has 100 feet of frontage on Fifth Avenue, 680 feet of frontage on West 54th Street, and 822 feet of frontage on West 53rd Street. The lot area of the zoning lot is 150,860 square feet.

The development site is a 19,615-square-foot, through-block parcel located at the western end of the zoning lot, with approximately 108 feet of frontage on West 54th Street and 88 feet of frontage on West 53rd Street. The remainder of the zoning lot is improved with the existing MoMA complex, American Folk Art Museum, St. Thomas Church, and the Museum Tower condominium. No changes are proposed to these buildings as a part of this application.

Prior Actions

The site was the subject of a series of discretionary approvals and rezonings in 1977, 1989, and 2000, and minor modifications to these prior approvals in 2007.

1977 MoMA Expansion/Museum Tower

An expansion of the museum's facilities, together with the development of the 42-story residential Museum Tower pursuant to a CPC special permit and a Board of Standards and Appeals variance approved in 1977. The 1977 approvals included a special permit C 770261 ZSM pursuant to Section 74-72 to modify height and setback regulations in connection with the Museum Tower and a certification pursuant to Section 26-07 to allow modification of the street tree planting requirement.

1989 American Folk Art Museum (AFAM)

In 1988 AFAM submitted an application (C 880703 ZMM) to rezone its property (Block 1269, Lots 7, 8, and 9) and the entire southern half of its midblock of Block 1269, from C5-2 and C5-P to C5-2.5. The CPC limited the rezoning to the 75 foot by 100 foot parcel owned by AFAM, and required the execution of a restrictive declaration, affecting Lots 5 through 9, to impose certain urban design restrictions on the site. The restrictive declaration also required that any building developed on the property contain a "first-class museum" on its lower floors, including the ground floor.

2000 MoMA

MoMA applied in 2000 for several zoning approvals to facilitate the expansion of its museum complex. Applications C 000651 ZSM, C 000649 ZMM, and N 000650 ZRM were each approved by the CPC and the City Council for the following zoning actions:

- 1) The rezoning of a portion of the midblock of the southern side of Block 1269 (north side of West 53rd Street) from a C5-P zoning district to a C5-2.5 zoning district, a 12 FAR zone that was already mapped on AFAM's property as well as in the midblocks to the south;
- 2) Zoning text amendments to (a) the Special Midtown district to modify the district map to reflect the elimination of the rezoned area from the Preservation Subdistrict and (b) Section 81-066 (Special Permit Modification of Section 81-40 and Section 77-00) to allow certain bulk modifications in the Special Midtown District by special permit;
- 3) A special permit pursuant to the proposed Section 81-066 to allow the transfer of bulk across a district boundary, from the C5-P district in the north of the site to the C5-2.5 district in the south, and the waiver of a portion of a required rear yard; and
- 4) An authorization pursuant to Section 81-90 to modify street wall requirements.

The special permit allowed 153,339 square feet of floor area from the C5-P zoning district to be transferred to the C5-2.5 zoning district. The southern half of the property was rezoned from C5-P (8.0 FAR) to C5-2.5 (12.0 FAR) but as part of this rezoning 86,080 square feet of the available floor area was not utilized in the development, and was "retired" pursuant to a restrictive declaration dated October 18, 2000 that prohibited this floor area from being used on MoMA's property or on any zoning lot that includes MoMA's property. The restrictive declaration also required MoMA to maintain a through-block lobby through the new museum building. There are no changes to these requirements as a part of this application.

2007 Minor Modifications

In 2007 MoMA sought a minor modification of its 2000 special permit and the restrictive declaration, pursuant to application M 000651(A) ZSM and M 880703(A) ZMM, respectively, to facilitate the development of a 6-story, infill structure fronting on West 54th Street, at the western end of MoMA's zoning lot, on Lot 165 and a portion of Lot 58. The CPC approved these applications on March 26, 2007.

The Proposed Building

As certified, the building would be 1,250 feet tall and would contain approximately 658,306 square feet of floor area, including approximately 51,949 square feet of floor area on the second through fifth floors for use as gallery and exhibition space for MoMA, approximately 147,945 square feet of hotel floor area on floors 8-17, and approximately 458,412 square feet of residential floor area on floors 19-81. The proposed building would reach a height of 1250 feet and would contain no more than 300 residential units and 167 hotel rooms. The residential use will have its entrance on West 54th Street, while the hotel would utilize a block-through lobby on the ground floor, which will also provide access to a cellar-level hotel restaurant.

The museum space in the new building will expand and connect internally to MoMA's existing gallery space in a new wing of galleries to be located on the second, fourth, and fifth floors of the building. There is no proposed additional street-level entrance to these galleries. The new second floor will have the same double height space as in the Museum's current galleries; there will be no third floor.

The proposed building would utilize floor area from two landmarks: approximately 136,000 square feet are requested for transfer from the University Club, pursuant to the related special permit (C 090431 ZSM), and approximately 275,000 square feet are requested for transfer from the St. Thomas Church portion of the zoning lot.

The design of the building consists of a series of asymmetrical spires rising into sharp, needle-like shapes inspired by Hugh Ferriss' sketches from the 1920s of the zoning

regulations. The clear glass of the building façades would be marked on the exterior by an irregular diagrid structure composed of aluminium panels mounted on glass and has been described as an attempt to reflect the structure of the curtain wall. The building is massed so as to concentrate the bulk on West 53rd, away from the portions of the zoning lot in the C5-P district.

REQUESTED ACTIONS

To facilitate the proposed project, the following actions are required:

1. Special Permit to modify bulk regulations for a zoning lot containing a landmark building pursuant to Sections 81-277 and 74-711 (C 090432 ZSM).

As required by Section 74-711 St. Thomas Church has proposed restoration work and a program of continuing maintenance. This continuing maintenance program was approved by the Landmarks Preservation Commission (LPC) at a meeting on May 13, 2008. The restoration work was approved by the LPC under Report MOU 09-4761, dated October 22, 2008 and Certificate of No Effect 09-4310, dated October 6, 2008, which determined that the restoration work and the continuing maintenance program contribute to a preservation purpose.

The work consists primarily of the restoration of the Church's stained glass windows. Additional work includes roof repairs, drain repairs, restoration of glass windows at the Parish House, replacement of wood windows, and replacement of paving and stairs at the rear courtyard. Under the continuing maintenance program, St. Thomas Church or its successor in interest shall engage a preservation architect, engineer or other qualified person to perform an inspection of St. Thomas Church every five years. The preservation architect, engineer or other qualified person shall submit a report on each periodic inspection to the owner and the LPC outlining the existing conditions of St. Thomas Church and detailing the work that should be performed in order to maintain St. Thomas Church in a sound first-class condition. The owner or its successor in interest shall perform the repairs and rehabilitation detailed in the report. Prior to exercise of the

special permit, St. Thomas Church shall execute and record a restrictive declaration ensuring that the work is performed.

The Landmarks Preservation Commission also found that the proposed bulk waiver will have no effect on the relationship between the proposed building and St. Thomas Church because of the distance between the proposed building and the landmark.

The applicant is proposing to modify the following bulk regulations in connection with this 74-711 special permit:

Distribution of floor area without regard to district boundaries. The development site is located in C5-2.5, C5-P, and C6-6 zoning districts, while St. Thomas Church is located partially in a C5-3 zoning district and partially in a C5-2.5 zoning district. Because the C5-3, C5-2.5, and C6-6 zoning districts are all R10 equivalent districts, which have the same allowable FAR for residential uses, most of the available St. Thomas Church development rights may be utilized anywhere on the development site on an as-of-right basis. However there are 52,429 square feet of development rights available from the C5-3 portion of the St. Thomas Church site that may only be used for commercial or community facility uses, and their use in another zoning district requires a special permit. In addition, the proposed special permit will also allow the transfer of approximately 68,240 square feet of floor area from the C5-P portion of the zoning lot to the portions of the zoning lot located in the higher density C5-2.5 zoning districts.

Height and Setback. In the C6-6 and C5-2.5 zoning districts the proposed building does not comply with Special Midtown District's height and setback requirements of Section 81-27 (Alternative Height and Setback Regulations - Daylight Evaluation). The C5-P district has a separate set of height and setback requirements in Section 81-90 and the applicant is also seeking a waiver of these provisions. Under the Special Midtown District, there are two alternatives for determining height and setback compliance for a zoning lot: Section 81-26 Daylight Compensation and Section 81-27 Daylight Evaluation. An applicant may choose either methodology to evaluate height and setback

compliance. Where a waiver of height and setback is being requested through a Section 74-711 special permit the findings of Section 81-266 or Section 81-277 need to be made in addition to the required findings of Section 74-711. The proposed building has been evaluated under the Daylight Evaluation requirement of Section 81-27. The building fails to achieve the minimum 66 score on W. 53rd and W. 54th streets were it scores 38.53 and 61.23 respectively. The building achieves an overall score of 46.07, less than the 75 that is required to comply with the requirements of 81-27. The applicant is seeking these waivers on the basis that a complying building would result in floor plates that are too narrow on the top floors to be functional and that the building therefore needs to penetrate the height & setback envelope in order to create larger and more functional floor plates.

Pedestrian circulation space. 2,962 square feet of pedestrian circulation space is required in accordance with Section 37-50. A total of 1,837 square feet of pedestrian circulation space is proposed including 437 square feet in the proposed building and 1,400 square feet in the existing MoMA building. The recessed entry areas provided in the proposed building also do not conform to the dimensional requirements of Section 37-50. The recessed area on West 54th Street has a depth of 7 feet, which is less than the minimum depth of 10 feet required pursuant to Section 37-50. The entry areas also have a slightly lower height than the minimum required height of 15 feet. The applicant has stated that this lower height at the ground floor results from the need to construct the second floor of the proposed building which will connect with the existing MoMA building, at a level that corresponds to the second floor of the existing MoMA building.

Rear yard equivalent. The proposed building will encroach into the rear yard equivalent on West 54th Street required pursuant to Section 23-533. Under Section 23-533 on a through lot a 60 foot rear yard equivalent needs to be provided at an elevation of the lowest residential floor on the zoning lot, which occurs in the Museum Tower at a height of 177 feet. The waiver of the rear yard equivalent requirement is being sought in order to provide for a deeper and more functional floor plate.

2. Special Permit to allow the transfer of floor area from a landmark site pursuant to Sections 81-212 and 74-79 (C 090431 ZSM)

Section 74-79 of the Zoning Resolution allows the CPC to permit development rights to be transferred to adjacent lots from lots occupied by landmark buildings or other structures and permits the maximum permitted floor area on adjacent lots to be increased on the basis of the transfer of development rights. For the purposes of Section 74-79, the term “adjacent lot” means a lot that is contiguous to the lot occupied by the landmark building or other structure or one that is across a street and opposite to the lot occupied by the landmark building or other structure. The project zoning lot is an “adjacent lot” with respect to the University Club zoning lot. Pursuant to Section 81-211 there is no limit on the amount of floor area that may be transferred to the portion of a zoning lot within the C6-6 zoning district. There is a total of approximately 148,295 square feet of excess floor area available for transfer pursuant to Section 74-79. 136,000 square feet is proposed to be transferred for use on the development site as part of the related action (C 090431 ZSM).

In connection with the Section 74-79 special permit application, the University Club has proposed restoration work and a program of continuing maintenance for the University Club. This program of continuing maintenance was approved by the Landmarks Preservation Commission at a meeting on May 13, 2008. The work approved by the Landmarks Preservation Commission is outlined in a MOU 09-5602, dated November 28, 2008 and Certificate of No Effect 09-5601, dated November 28, 2008. The work includes the replacement of the entryway transom frame at the West 54th Street entrance, repair of sidewalks vaults, restoration or replacement of windows at the annex building, and roof repairs at the annex and main building.

Under the continuing maintenance program, the University Club’s owner or its successor in interest shall engage a preservation architect, engineer or other qualified person to perform an inspection of the University Club every five years, and to submit a report to the owner and the Landmarks Preservation Commission outlining the existing conditions

of the University Club and detailing the work that should be performed in order to maintain the University Club in a sound first-class condition. The owner or its successor in interest shall perform the repairs and rehabilitation detailed in the report. Prior to exercise of the special permit, the University Club shall execute and record a restrictive declaration ensuring that the work is performed.

The Landmarks Preservation Commission also found that the transfer of floor area will have no effect on the relationship between the proposed building and the University Club, due to the distance between the development site and the landmark.

ENVIRONMENTAL REVIEW

This application (C 090432 ZSM), in conjunction with the application for the related actions (C 090431 ZSM) was reviewed pursuant to the New York State Environmental Quality Review Act (SEQRA), and the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 et. seq. and the City Environmental Quality Review (CEQR) Rules of Procedure of 1991 and Executive Order No. 91 of 1977. The designated CEQR number is 09DCP004M. The lead is the City Planning Commission.

A Positive Declaration was issued on October 16, 2008, and distributed, published and filed. Together with the Positive Declaration, a Draft Scope of Work for the Draft Environmental Impact Statement (DEIS) was issued on October 16, 2008. A public scoping meeting was held on the DEIS on November 18, 2008. A Final Scope of Work, reflecting the comments made during the scoping, was issued on May 18th, 2009.

The applicant prepared a DEIS and a Notice of Completion for the DEIS was issued on May 18, 2009. On July 22nd, 2009, a public hearing was held on the DEIS pursuant to SEQRA and other relevant statutes. A Final Environmental Impact Statement (FEIS) was completed and a Notice of Completion for the FEIS was issued on August 28, 2009. The FEIS identified a significant adverse shadow impact that would affect the stained glass

windows of the Fifth Avenue Presbyterian Church. The FEIS considered possible mitigation measures but determined that none of these measures were practical or feasible.

A Technical Memorandum was issued on September 4th, 2009 which describes and analyzes the modifications to the Proposed Actions, adopted herein. The Technical Memorandum concludes that the modifications would not result in any new or different significant adverse environmental impacts not already identified in the FEIS.

UNIFORM LAND USE REVIEW PROCEDURE

This application (C 090432 ZSM) along with the application for the related action (C 090431 ZSM), was certified as complete by the Department of City Planning on May 18th, 2009, and was duly referred to Manhattan Community Board 5 and the Manhattan Borough President, in accordance with Title 62 of the Rules of the City of New York, Section 2-02(b).

Community Board Public Hearing

Community Board 5 held a public hearing on this and the related application (C 090431 ZSM) and on June 11, 2009, the Board passed a resolution by a vote of 30 in favor, 9 opposed, 1 abstaining, with 1 present adopted a resolution disapproving the application.

Community Board 5's resolution stated:

Although the Board is not concerned with the various waivers as to district boundaries, height, setback, rear-yard and pedestrian circulation space because these waivers would help to enhance the beauty and the practicality of the proposed building, the Board is concerned that the proposed tower is simply too large for it site; and

WHEREAS, Although the benefits of new maintenance plans for the University Club and St. Thomas Church, an important new architectural addition to the City and more public gallery space at MoMA would not be insignificant, the Board finds that the transfer of development rights would unduly increase the bulk of the proposed building such that the benefits are outweighed by the burdens associated with such a tall new building on this midblock site...

Borough President Recommendation

This application (C 090432 ZSM) and the related application (C 090431 ZSM) were considered by the Borough President, who issued a recommendation conditionally approving the applications on July 17th, 2009 subject to the conditions that the applicant :

1. Explore methods to encourage visitor arrival at non-peak hours and adjusting opening hours or waiting areas to accommodate more visitors in the MoMA complex;
2. Engage with neighbors, the community board, and the Midtown North Police Precinct on traffic-related issues; and
3. Dedicate staff to monitor deliveries and implement strategies to minimize traffic and pedestrian conflicts, truck and bus idling, and other quality of life impacts;
4. Enter into a restrictive declaration with the City that limits hotel rooms, dwelling units, and total commercial space, and requires that the building be substantially in accordance with renderings in the ULURP application;
5. Provide hotel entrances on West 53rd Street and West 54th Street, with the hotel lobby open to the public;
6. Work as part of a construction task force to address and respond to certain construction impacts and issues, and maintain a single point of contact during construction; and
7. Explore with Fifth Avenue Presbyterian Church and LPC methods to implement mitigations for shadow impacts.

City Planning Commission Public Hearing

On July 1, 2009 (Supplemental Calendar No. 2) the City Planning Commission scheduled July 22nd, 2009, for a public hearing on this application (C 090432 ZSM). The hearing was duly held on July 22nd, 2009 (Calendar No. 26), in conjunction with the hearing on the related application (C 090431 ZSM). There were 19 speakers in favor of the applications and 26 speakers in opposition.

Those speaking in favor of the applications included the applicant's attorney, project architect, project consultants, as well as representatives of the MoMA, the University

Club and St. Thomas Church. The Director of Land Use for the Borough President also spoke in favor of the application as did a representative of the Real Estate Board of New York a representative of the American Institute of Architects, and a number of volunteers at the Museum of Modern Art. Written testimony in support of the proposed project was also received from the Fifth Avenue Presbyterian Church as well as the Skyscraper Museum.

Those speaking in opposition included the Assembly Member from the 75th District and representatives of the Councilmember from the 4th District, Community Board 5, New York Hotel and Motel Trades Council, the West 54th & West 55th Block Association, and the Coalition for Responsible Midtown Development. .

The representative from MoMA highlighted the museum's commitment to adding a piece of exceptional architecture on this site, as well as its need for additional gallery space and its continuing efforts to work with the affected community. The applicant's attorney described the proposed project and the actions required and explained the reasons for the proposed bulk modifications.

The project architect described the design rationale for the building. He explained that the building was an expression of the existing zoning on the site and that the building was inspired by early drawings of the 1916 zoning regulations. He further explained that the building was top was intended to slowly disappear as the building rises through a change in the material.

The environmental consultants for the applicant explained the traffic patterns, loading scheme, and shadow impact on the 5th Avenue Presbyterian Church. They stated that although the EIS analyzed a building with 300 apartments and 167 hotel rooms, the building when constructed was likely to contain far fewer units and would therefore generate fewer pick-up and drop-off as well as fewer delivers than stated in the DEIS.

The Director of Land Use for the Manhattan Borough President reiterated the Borough President's recommendation and the commitments made by the applicant. The representative

The representatives from St. Thomas Church explained the stained glass restoration program that would be funded through the proceeds from the sale of air rights to the applicant. The representative from the University Club also detailed the work being done as part of the restoration program.

A number of MoMA volunteers also spoke on behalf of the project and described the importance of additional gallery space in order for MoMA to display additional works from its collection.

The representative for the Councilmember from the 4th District stated his agreement with the concerns outlined in Community Board 5's resolution and emphasized that a building of this size in this location was inappropriate. The representative from the Community Board stated that although the design was an exciting one, the building does not belong in this midblock context as well as underscoring MoMA's lack of responsiveness on operational issues, including loading.

Members of the West 54th & West 55th Street block associations raised concerns about the impact the project would have on the surrounding community, particularly with regard to traffic, construction, shadows, and access to light and air. The members of the block association also expressed concerns about the appropriateness of a building this size on a midblock and the benefit of the preservation of landmarks which are already in good condition. They expressed further concern about the lack of a more detailed river to river traffic analysis and the failure of the DEIS to properly analyze the impacts to the Black Rock building – 51 West 52nd - between West 52nd Street and West 53rd on Sixth Avenue. Some speakers on behalf of the block association also stated a need for a drive thru loading dock with an entrance on West 54th Street and an exit on West 53rd Street. They further argued that MoMA and the applicant should increase the transparency from

the existing MoMA sculpture garden from West 54th Street. The block association's representative also spoke about the relatively low scale of the blocks to the north of the development site in comparison with the proposed project and argued that the applicant fails to meet the special permit findings.

The representative from the Coalition for Responsible Midtown Development commented further on the light and air impact to the residents on West 54th Street and the inconsistency between the intent of the C5-P zoning district and the proposed project.

CONSIDERATION

The Commission believes that the special permit (C 090432 ZSM), as modified, in conjunction with the related application for a special permit (C 090431 ZSM), as modified, is appropriate.

The Commission notes that the proposed design of the building is exemplary, and that the building - its tapered, sculpted form, unique diagrid structure and curtain wall, and overall design ingenuity - would be a strong addition to the City and its architecture. The Commission also notes that this building will help fund the maintenance of two landmarks – the University Club & St. Thomas Church – in addition to providing MoMA with expanded gallery space to display more of its permanent collection.

The Commission recognizes that as the building rises it pulls back dramatically from West 53rd Street and West 54th Streets and at its top floors has a floor plate of approximately 2,889 square feet – equivalent to approximately 15% of the total lot area. The Commission believes that the tapering design with a decreasing floor plate as the building rises requires the minimum amount of height and setback waiver in order to achieve a functional design.

As certified, the building would rise to a height 1250 feet, the same height as the Empire State Building below its antenna. The Commission believes that the applicant has not made a convincing argument that the design of the tower's top (the uppermost 200 feet of

the building) merits being in the zone of the Empire State Building's iconic spire, making the building the second tallest building in New York City. This part of the building would have the greatest impact on the City's skyline and the Commission notes that it appears less attention has been paid to this portion of the building when compared to the rest of the structure. In particular, the Commission is not satisfied with the attempts at incorporating mechanical equipment into the tower top, which results in a tower top with highly visible mechanical equipment. Therefore, as a condition of its approval and to minimize adverse effects on the character of the surrounding area the Commission is modifying the application to reduce the height of the building to 1,050 feet.

The Commission has also considered the particular development site on which the proposed building would be constructed. The Commission notes that proposed building is located on a midblock, through lot, fronting on both West 53rd Street and West 54th streets. The Commission further notes that the proposed building is adjacent to an approximately 500 foot tall office building, the Museum of Modern Art (MOMA), and the Museum Tower condominium. The Commission believes modifying the building height to 1,050 feet is also appropriate in consideration of both the building's relationship to the Midtown Manhattan skyline and the area surrounding the development site. The Commission notes that this reduced height is approximately what could be built as-of-right under existing zoning. .

The Commission notes that the proposed building, at its modified height, would still be a tall and significant structure, and that the important design features that contribute to its architectural success, and which minimize its adverse effects on the surrounding area and enhance the character of the proposed development, will be maintained. Such design features are attached in Exhibit B. The reduction in height will be achieved in a way that maintains the overall integrity of the design, massing and building proportions. For this building to be constructed the applicant must return for certification by the Chair of the Commission that the final architectural design complies with the specific requirements of the approved special permit and restrictive declaration.

The Commission recognizes that, as a result of the modified height, the overall floor area in the building will be reduced such that the actual amount of floor area transferred or distributed will likely be less than the full amount requested. Similarly, the building, as modified, will likely not require the full extent of the waivers granted in this special permit.

Transfer of Development Rights from Landmark

The Commission recognizes that the University Club is a significant Midtown landmark and that the program for continuing maintenance and restoration work required as part of this application is important to ensure its future preservation. The Commission also recognizes that the transfer of development rights from the landmark zoning lot to the project zoning will have the effect of moving floor area away from the landmark building and ensuring its prominence on the corner of West 54th Street and Fifth Avenue. The Commission also recognizes that West 53rd Street has emerged as an important architectural corridor in Midtown with buildings designed by Philip Johnson, Mies van der Rohe, Gordon Bunshaft, Philip Goodwin and Edward Durell Stone, Yoshio Taniguchi, César Pelli, and Eero Saarinen among others and the Commission believes that the proposed building will be an important addition in this architectural context.

The Commission notes that an as-of-right building could be constructed with approximately the same height as the proposed building, as modified. The Commission further notes that although the proposed building is on a mid-block site and the zoning districts for the site include C6-6 (15.0 FAR) and C5-2.5 (12.0 FAR) two of the highest density districts in Manhattan.

The Commission further notes that as a part of the MoMA rezoning approved in 2000, 86,080 square feet of the available floor area was not utilized in the development, and was “retired” pursuant to a restrictive declaration dated October 18, 2000 that prohibited this floor area from being used on MoMA’s property or on any zoning lot that includes MoMA’s property.

The Commission recognizes that the FEIS analyzed a building with 300 apartments and 167 hotel units and that the applicant has committed to constructing no more this number.

Bulk Modifications pursuant to 74-711

The Commission believes the requested bulk modifications pursuant to Section 74-711 are appropriate. The Commission notes that this application would facilitate restoration work and a plan and program of continuing maintenance for St. Thomas Church, located on the far eastern portion of the subject zoning lot, on Fifth Avenue.

The Commission notes that the transfer of floor area across district boundaries would allow commercial floor area located on the eastern part of the zoning lot to be utilized on the far western portion of the zoning lot, approximately 500 feet away from the landmark building. The Commission notes that by moving floor area a significant distance away from the landmark building, St. Thomas Church would continue to hold a dominant position on the corner of West 53rd Street and Fifth Avenue. The Commission also notes that the requested action would permit the transfer of approximately 68,000 square feet of floor area out of the C5-P district which has an FAR of 8.0 to portions of the site located in the higher density C6-6 (15.0 FAR) and C5-2.5 (12.0 FAR). The Commission recognizes that this project continues the trend on the block begun with the Museum Tower and the MoMA expansion in 2000 of shifting bulk to West 53rd Street and away from the C5-P zone on West 54th Street.

The Commission believes the modifications to required pedestrian circulation space are appropriate. The Commission recognizes that due to the relatively small development site and the mix of uses proposed on the ground floor of the building - including residential, hotel, and restaurant lobbies, and MoMA back of house uses – providing the required amount of pedestrian circulation is impractical. The Commission notes that in order for MoMA's existing second floor space to connect seamlessly to the second floor of the proposed building, the clear heights of provided pedestrian circulation spaces will be slightly lower than required and that the unique architectural expression of the

proposed building's structure will require modifications of pedestrian circulation space dimensional requirements.

The Commission notes that the project site is part of a larger through lot in which the rear yard equivalent is located along West 54th Street, to a depth of 60 feet. The Commission notes that although a rear yard is required on the north side of the building above 177 feet, due to the presence of residential uses at that height on another portion of the zoning lot, residential uses in the proposed project would only be located above the height of approximately 250 feet. The Commission further notes that residential uses in the proposed project are located approximately 100 feet from the other residential uses on the zoning lot and that the proposed modification will have minimal adverse affects on access to light and air.

The Commission believes that the requested height and setback waivers are appropriate, and are the minimum necessary to achieve a feasible building design. The Commission notes the proposed building form has been based substantially on height and setback regulations of the Special Midtown District, including the more restrictive zoning envelope required by the C5-P zoning district. The Commission notes that requested waivers in the C5-P district have been minimized to the greatest extent feasible and are necessary due to the irregularly shaped development site, the need for more usable and efficient floor plates, and the difficulty of constructing a single tower form at the confluence of zoning districts with distinct height and setback regulations. The Commission notes that the area of encroachment in the C5-P decreases as the building rises and is relatively small portion of the total building floor area.

The Commission recognizes that concerns were raised about the operation of MoMA's facilities with respect to its activities on West 54th Street. The Commission notes that in its letter to the CPC dated August 20, 2009, the applicant has agreed to supplement its existing obligations under the Traffic Management Plan, which was adopted by the CPC in 2000 in connection with the approval of MoMA's expansion plans at that time. The Commission expects that MoMA will vigorously adhere to the terms of its commitments,

continue to seek for new ways to manage its operations in a way that minimizes conflicts with users of public space, and work with its neighbors to implement strategies to address quality of life concerns. The Commission notes that the increase in floor area proposed in the new building is not expected to increase the attendance level of the museum.

The Commission notes that a significant adverse shadow impact was identified in the FEIS on the Fifth Avenue Presbyterian Church on the June 21st analysis day. The Commission further notes that possible mitigation measures were considered in the FEIS but it determined that none of these measures were practical or feasible.

The Commission further notes that the applicant has agreed to participate in a construction committee to address community concerns during the construction of the proposed building. This commitment shall be set forth in the restrictive declaration that shall be executed and recorded as a condition of exercising the special permit and was outlined in a letter dated August 20th, 2009 to the CPC.

FINDINGS

The City Planning Commission hereby makes the following findings pursuant to Section 74-711(b) of the Zoning Resolution;

1. That such bulk modifications shall have minimal adverse effects on the structures or open space in the vicinity in terms of scale, location and access to light and air;
2. Not applicable

The Commission hereby makes the following findings pursuant to Section 81-277 (b) (Special permit for height and setback modifications) of the Zoning Resolution;

1. That the requested departure from the alternate height and setback regulations is the minimum amount necessary to achieve a feasible building design;

2. That the disadvantages to the surrounding area resulting from reduced light and air access will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole; and
3. That where the landmark is located on the zoning lot proposed for development or on a lot contiguous thereto or directly across a street therefrom, the modification of the alternate height and setback regulations will adequately protect the setting for the landmark.

RESOLUTION

RESOLVED, that having considered the Final Environmental Impact Statement (FEIS), for which a Notice of Completion ratified herein was issued on August 28th, 2009, with respect to this application (CEQR No. 09DCP004M), together with the Technical Memorandum, dated September 4th, 2009, the City Planning Commission finds that the requirements of the New York State Environmental Quality Review Act and Regulations have been met and that

1. Consistent with social, economic, and other essential considerations, from among the reasonable alternatives thereto, the action is one which minimizes or avoids adverse environmental impacts to the maximum extent practicable; and
2. Due consideration has been given to the avoidance or minimization to the maximum extent practicable of adverse environmental impacts, but that no practicable measures were identified for mitigation of the shadow impact with respect to Fifth Avenue Presbyterian Church.

RESOLVED, by the City Planning Commission, pursuant to Sections 197-c and 200 of the New York City Charter, that based on the environmental determination, and the consideration and findings described in this report, the application of W2005/Hines West Fifty-Third Realty, LLC pursuant to Sections 197-c and 201 of the New York City

Charter for the grant of a special permit pursuant to the following sections of the Zoning Resolution:

1. Section 74-711 - to allow the distribution of the total allowable floor area without regard to zoning district boundaries, to modify the height and setback regulations of Sections 81-90 (SPECIAL REGULATIONS FOR PRESERVATION SUBDISTRICT) and 33-432 (In other Commercial Districts), to modify the requirements of Sections 81-45 (Pedestrian Circulation Spaces) and 37-50 (Requirements for Pedestrian Circulation Space), and rear yard regulations of Section 23-532 (Required Rear Yard Equivalent); and
2. Section 81-277 - to modify the height and setback requirements of Section 81-27 (Alternative Height and Setback Regulations – Daylight Evaluation);

to facilitate the development of a mixed use building on property located at 53 West 53rd Street (Block 1269, Lots 5, 6, 7, 8, 9, 11, 12, 13, 14, 20, 30, 58, 66, 69, and 165), in C6-6, C5-P, C5-2.5 and C5-3 Districts, within the Special Midtown District (partially within the Preservation and Fifth Avenue Subdistricts) Borough of Manhattan, Community District 5, is approved subject to the following conditions:

1. The property that is the subject of this application (C 090432 ZSM) shall be developed in accordance with:
 - (a) Plans prepared by SLCE Architects filed with this application (“Certification Plans”), modified as necessary to reflect a reduction of building height to a height of no more than 1050 feet, and to be consistent in all respects with the Modification Notes annexed hereto as Exhibit A, which plans are incorporated in this resolution, as follows:

<u>Drawing No.</u>	<u>Title</u>	<u>Last Date Revised</u>
Z-3	Zoning Calculations	May 11, 2009
Z-4	Site Plan/Roof Plan	May 26, 2009

Z-5	Floor Area Analysis	May 11, 2009
Z-6	Zoning Floor Area Schedule	May 11, 2009
Z-7	Pedestrian Circulation & Tree Requirement	May 11, 2009
Z-8	Rear Yard & Rear Yard Equivalents	May 11, 2009
Z-9	Rear Yard & Rear Yard Equivalents	May 26, 2009
Z-10	Roof Plan – Height and Setback	May 26, 2009
Z-11	Zoning Roof Plan and Viewpoints	May 26, 2009
Z-12	Sec 81-27 Analysis Plan and Section Angles	May 26, 2009
Z-13	Sec 81-27 Analysis Plan and Section Angles	May 26, 2009
Z-14	Sec 81-27 Analysis Plan and Section Angles	May 26, 2009
Z-15	Sec 81-27 Analysis Plan and Section	May 26, 2009
Z-16	Sec 81-27 Analysis Plan and Section	May 26, 2009
Z-17	Sec 81-27 Analysis Plan and Section	May 26, 2009
Z-18	Height and Setback – Sections	May 11, 2009
Z-19	Area of Encroachment C5-P	May 11, 2009
Z-20	Area of Encroachment C5-P – Axonometric	May 11, 2009

and ;

- (b) Supplemental plans (hereinafter “Supplemental Plans”), on file with the Technical Review Division of the Department of City Planning, annexed hereto as Exhibit B and incorporated into this resolution

Z-21	Building Views	September 9, 2009
Z-25	North and East Building Elevations	September 9, 2009
Z-26	South and West Building Elevations	September 9, 2009
Z-27	Top of Building Partial Elevations	September 9, 2009
Z-28	Height at Intersection- Point and Slope Angles	September 9, 2009

2. The Department of Buildings shall not issue any Permit for the Subject Development unless and until the Chair has certified that the Department has

received a single set of consolidated and revised plans which conform in all respects to the provisions of Section 1 of this resolution .

3. Such development shall conform to all applicable provisions of the Zoning Resolution, except for the modifications specifically granted in this resolution, as shown on the plans listed above and in the single set of consolidated and revised plans certified pursuant to Section 2 of this resolution. All zoning computations are subject to verification and approval by the New York City Department of Buildings.
4. Such development shall conform to all applicable laws and regulations relating to its construction, operation and maintenance.
5. All leases, subleases, or other agreements for use or occupancy of space at the subject property shall give actual notice of this special permit to the lessee, sublessee or occupant.
6. Upon the failure of any party having any right, title or interest in the property that is the subject of this application, or the failure of any heir, successor, assign, or legal representative of such party, to observe any of the covenants, restrictions, agreements, terms or conditions of this resolution and the related restrictive declaration whose provisions shall constitute conditions of the special permit hereby granted, the City Planning Commission may, without the consent of any other party, revoke any portion of or all of said special permit. Such power of revocation shall be in addition to and not limited to any other powers of the City Planning Commission, or of any other agency of government, or any private person or entity. Any such failure as stated above, or any alteration in the development that is the subject of this application that departs from any of the conditions listed above, is grounds for the City Planning Commission or the City Council, as applicable, to disapprove any application for modification,

cancellation or amendment of the special permit hereby granted or of the related restrictive declaration.

7. Neither the City of New York nor its employees or agents shall have any liability for money damages by reason of the city's or such employee's or agent's failure to act in accordance with the provisions of this special permit.
8. In the event the property that is the subject of the application is developed as, sold as, or converted to condominium units, a homeowners' association, or cooperative ownership, a copy of this resolution and the restrictive declaration described below and any subsequent modifications to such documents shall be provided to the Attorney General of the State of New York at the time of application for any such condominium, homeowners' or cooperative offering plan and, if the Attorney General so directs, shall be incorporated in full in any offering documents relating to the property.
9. Development pursuant to this resolution shall be allowed only after the restrictive declaration and Transfer Instrument and Notice of Restrictions pursuant to Section 74-793, attached hereto as Exhibit C, with such administrative changes as are acceptable to Counsel to the City Planning Commission, has been executed and recorded by W2005/Hines West Fifty-Third Realty in the Office of the City Register of the City of New York, County of New York. Such restrictive declaration shall be deemed incorporated herein as a condition of this resolution.
10. Development pursuant to this resolution shall be allowed only after the restrictive declarations, attached hereto as Exhibit D, with such administrative changes as are acceptable to Counsel to the City Planning Commission, have been executed and recorded by St. Thomas Church and the University Club in the Office of the City Register of the City of New York, County of New York. Such restrictive declarations shall be deemed incorporated herein as a condition of this resolution.

The above resolution (C 090432 ZSM), duly adopted by the City Planning Commission on September 9th, 2009 (Calendar No. 16), is filed with the Office of the Speaker, City Council, and the Borough President, in accordance with the requirements of Section 197-d of the New York City Charter.

AMANDA M. BURDEN, FAICP, Chair
KENNETH J. KNUCKLES, Esq., Vice Chairman
ANGELA M. BATTAGLIA, RAYANN BESSER,
BETTY CHEN, MARIA M. DEL TORO, RICHARD W. EADDY,
NATHAN LEVENTHAL, KAREN A. PHILLIPS, Commissioners

IRWIN G. CANTOR, P.E., Commissioner, Recused
ANNA HAYES LEVIN, Commissioner Abstaining

EXHIBIT A

EXHIBIT A
MODIFICATION NOTES

September 9th, 2009

1. Height & Overall Building Form

The height of the building shall be limited to a maximum of 1,050 feet, including all permitted obstructions. The form of the building shall be in accordance with the Approved Plans and the Supplemental Plans, as set forth in the Special Permit Resolution, as determined by the Chair pursuant to the procedure set forth in the Restrictive Declaration, and subject to the “Limitations” set forth below.

For purposes of the above, the term “in accordance” shall mean that the “Key Architectural and Design Features” enumerated below, and also as defined under the Restrictive Declaration, are fully reflected and incorporated in the building design, subject only to deviations as are consistent with the scale and relative proportions of such Key Architectural and Design Features as shown in the Approved Plans and Supplemental Plans.

The “Key Architectural and Design Features” are as follows:

- Sloped planes which are in number, relative location, orientation, and proportion to the overall building form as shown in Supplemental Plans Z-21, Z-25, Z-26, Z-28.
- A tower top with three distinct asymmetrical peaks, with each peak of varying height and shape, tapering to a narrow edge at the top. The tallest peak shall contain a vertex with an interior angle no greater than 27 degrees. The foregoing shall be in accordance with Supplemental Plan Z-27.
- A “Diagrid”, defined as an asymmetrical, non-orthogonal web pattern, including nodes with radial spokes. The Diagrid shall extend from the top of the building to the sidewalk, and shall be expressed in metal elements projecting beyond the exterior of the building over a curtain wall. The foregoing shall be in accordance with Supplemental Plans Z-21, Z-25 and Z-26
- Exterior walls constructed with a combination of non-mirrored insulated glass and painted aluminum elements.

Limitations shall include:

- No increase or change in location in areas of encroachment approved pursuant to ZR section 74-711 as shown on Approved Plans Z-8, Z-9, Z-18, and Z-20.
- No reduction to the Daylight Evaluation Score approved pursuant to ZR section 81- 27 and shown on Approved Plans Z-11, Z-12, Z-13, Z-14, Z-15, Z-16, and Z-17

2. Interior Structural Elements

- The interior structural elements shall, to the extent feasible, reflect the asymmetrical Diagrid defined above.

EXHIBIT A
MODIFICATION NOTES

- The interior structural elements, to the extent feasible, shall be perceptible from the 53rd Street sidewalk through transparent surfaces.
- The interior structural elements located within publicly-accessible areas of the ground floor and sub-grade levels shall be visible from within such spaces, including, without limitation public entrances and restaurants located therein.

EXHIBIT B

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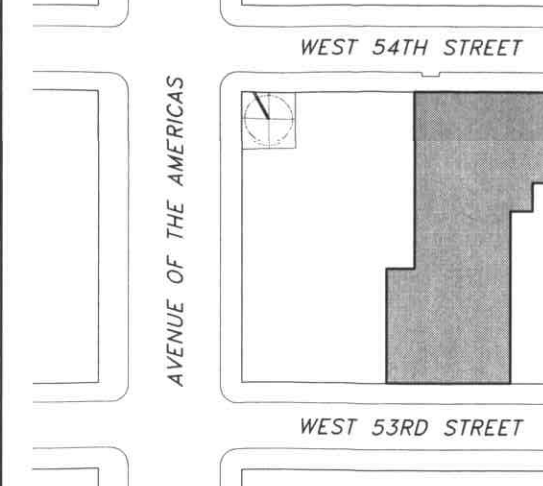
MECHANICAL ENGINEER:
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No.	Date	Revisions
09-09-09		CPC FINAL SUBMITTAL
05-11-09		CPC SUBMITTAL
01-21-09		REVISION
11-31-08		REVISION
06-25-08		2ND DRAFT
05-15-08		
04-02-08		
01-15-08		SD SET

SCALE:

KEY PLAN:

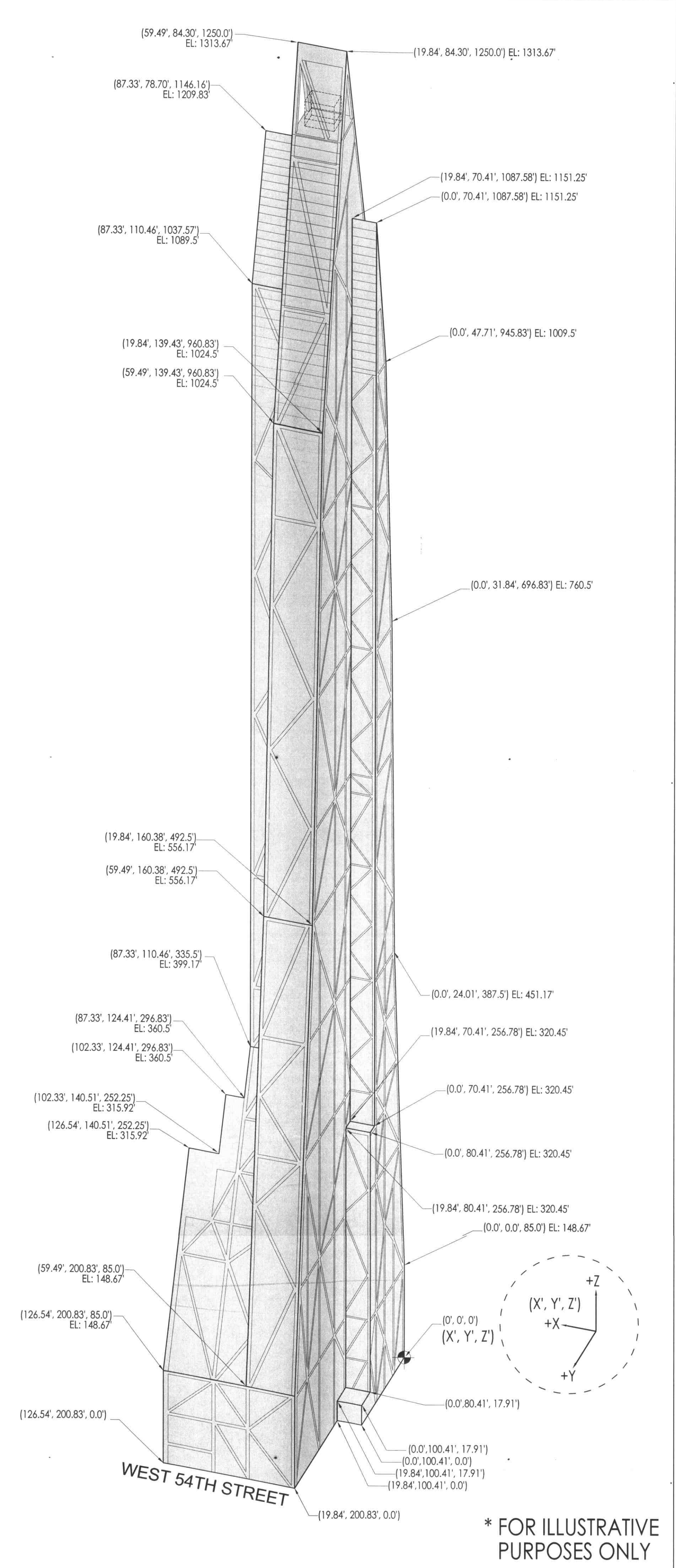


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53 WEST 53RD STREET
New York, NY

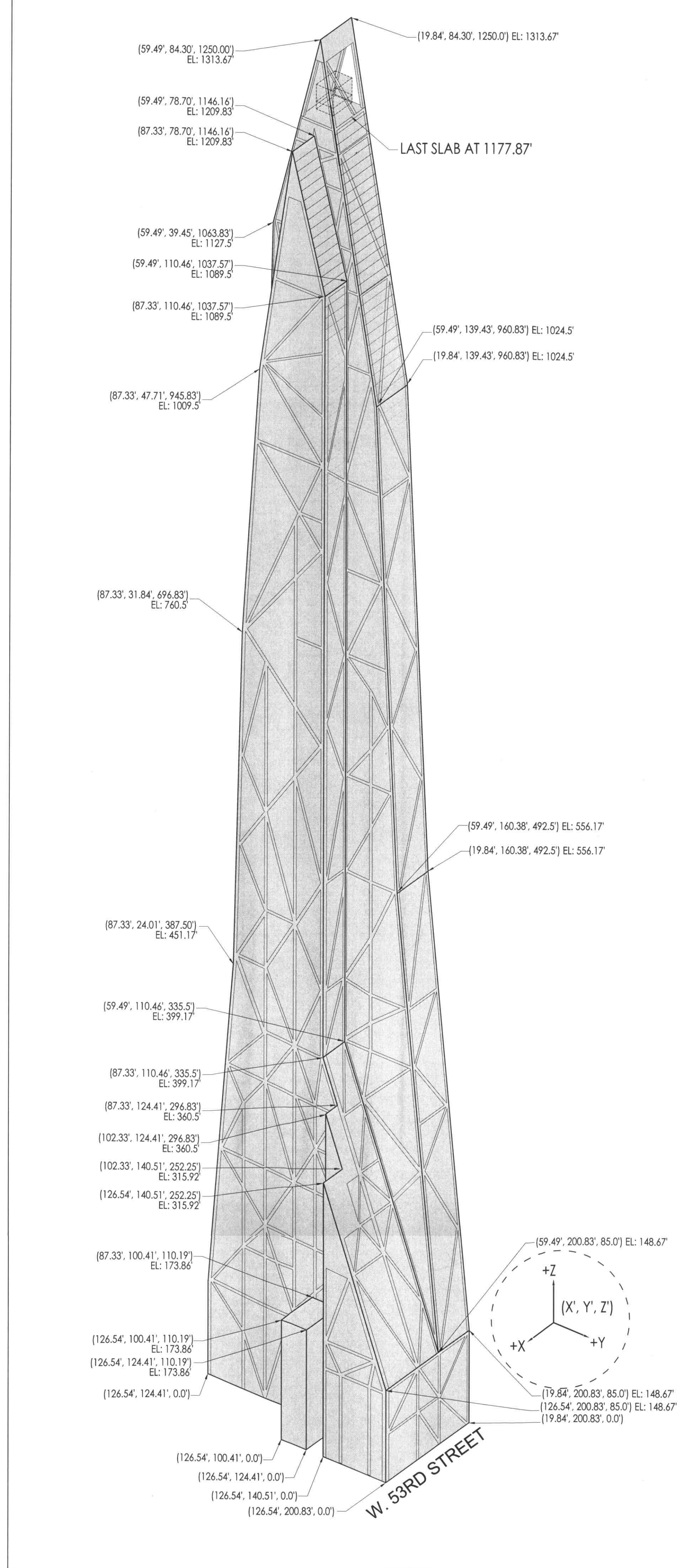
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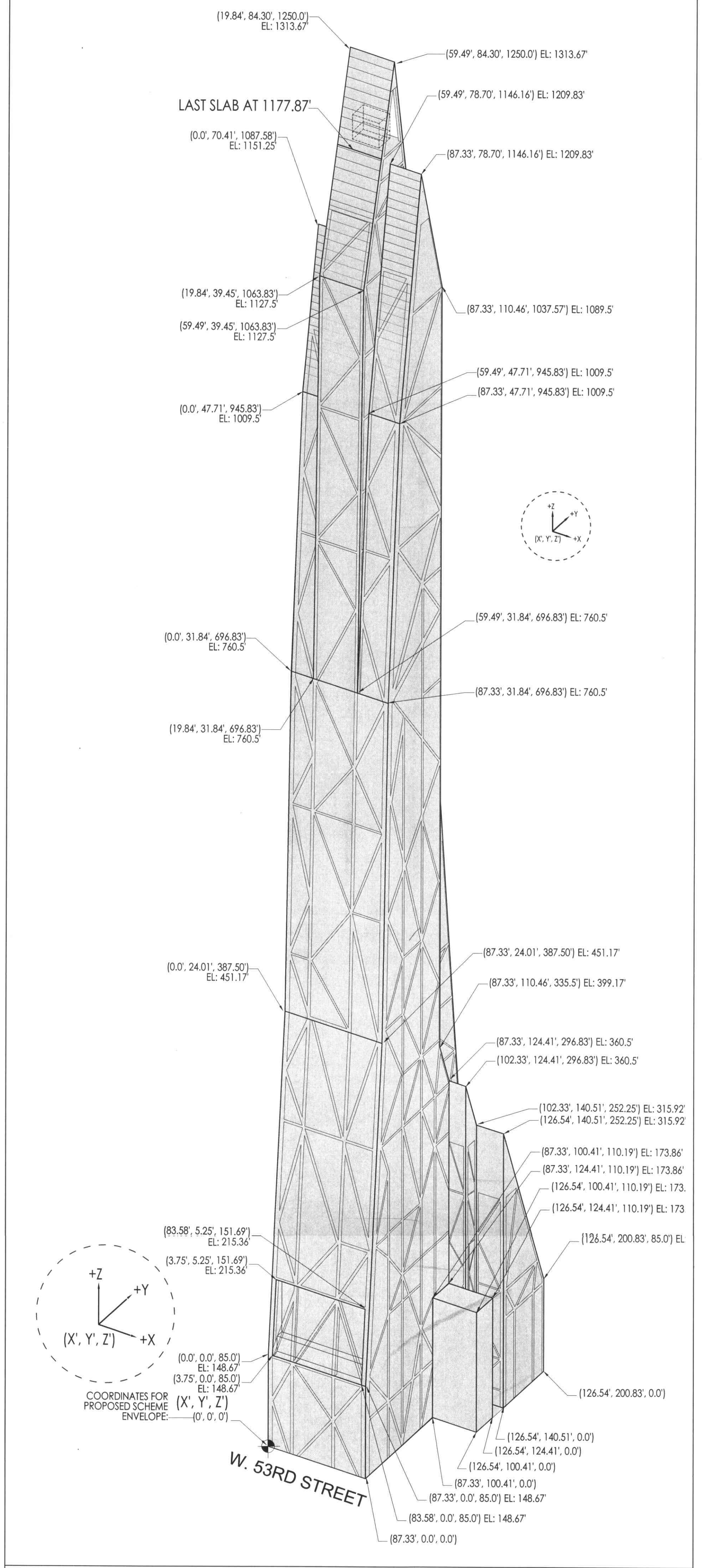
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DWG NO.:	Z-21



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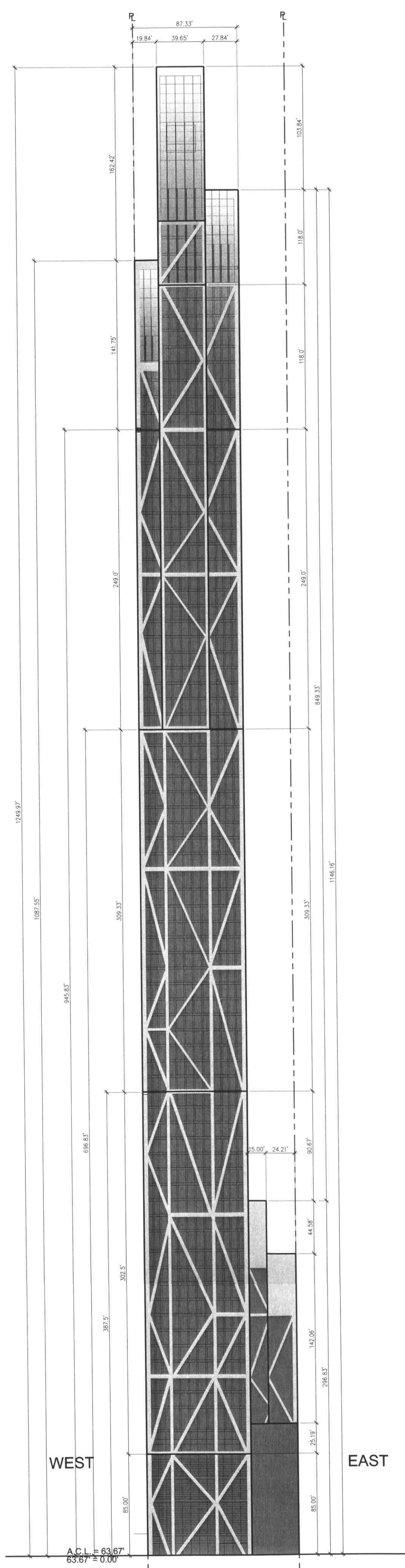
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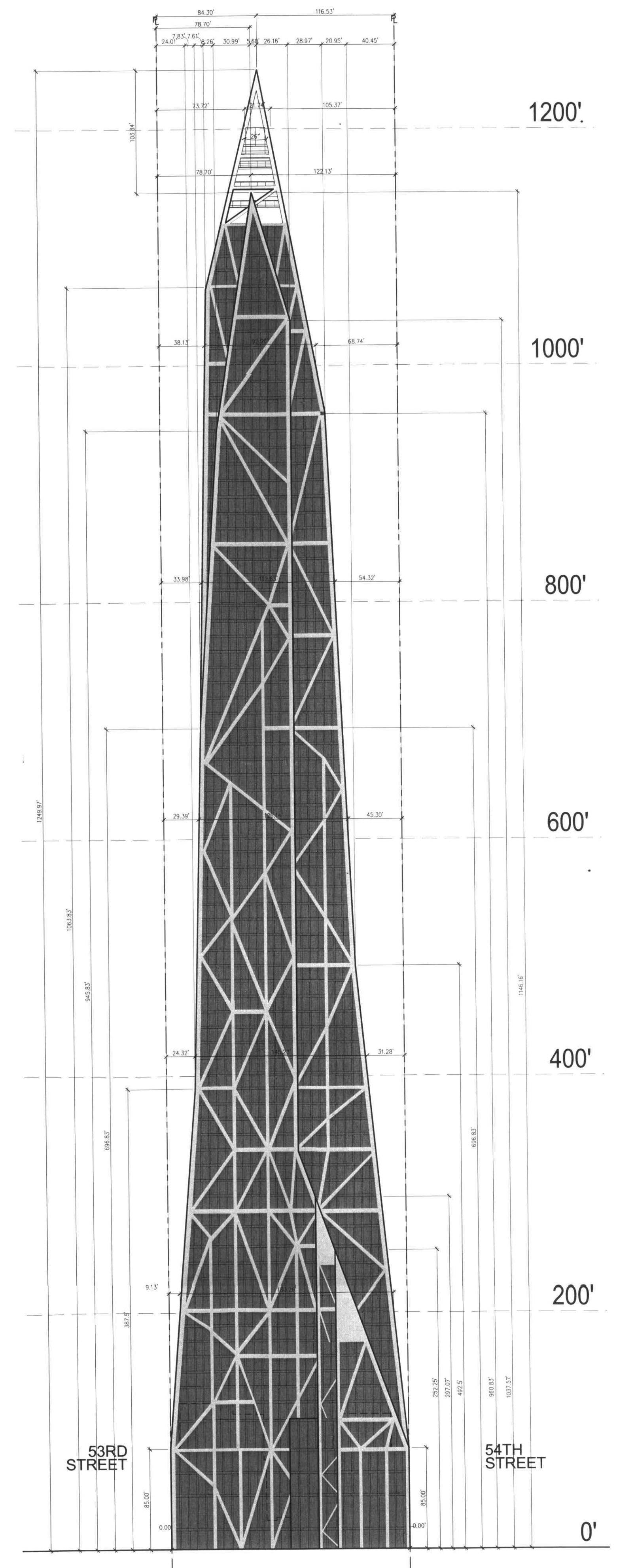
01 VIEW FROM WEST 53RD STREET- SOUTH EAST
SCALE: N.T.S.

* FOR ILLUSTRATIVE PURPOSES ONLY

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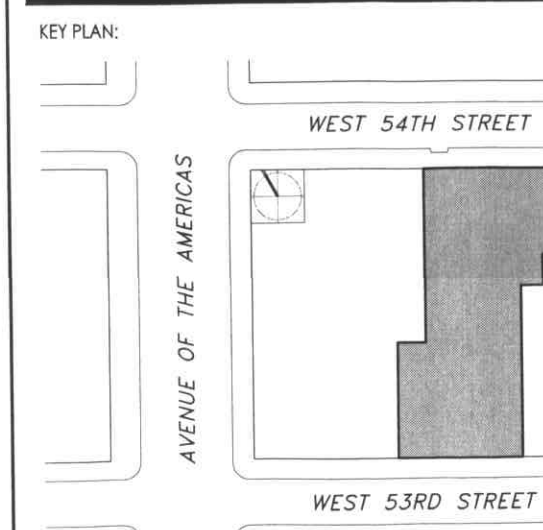
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SCALE: 1/84" = 1'-0"

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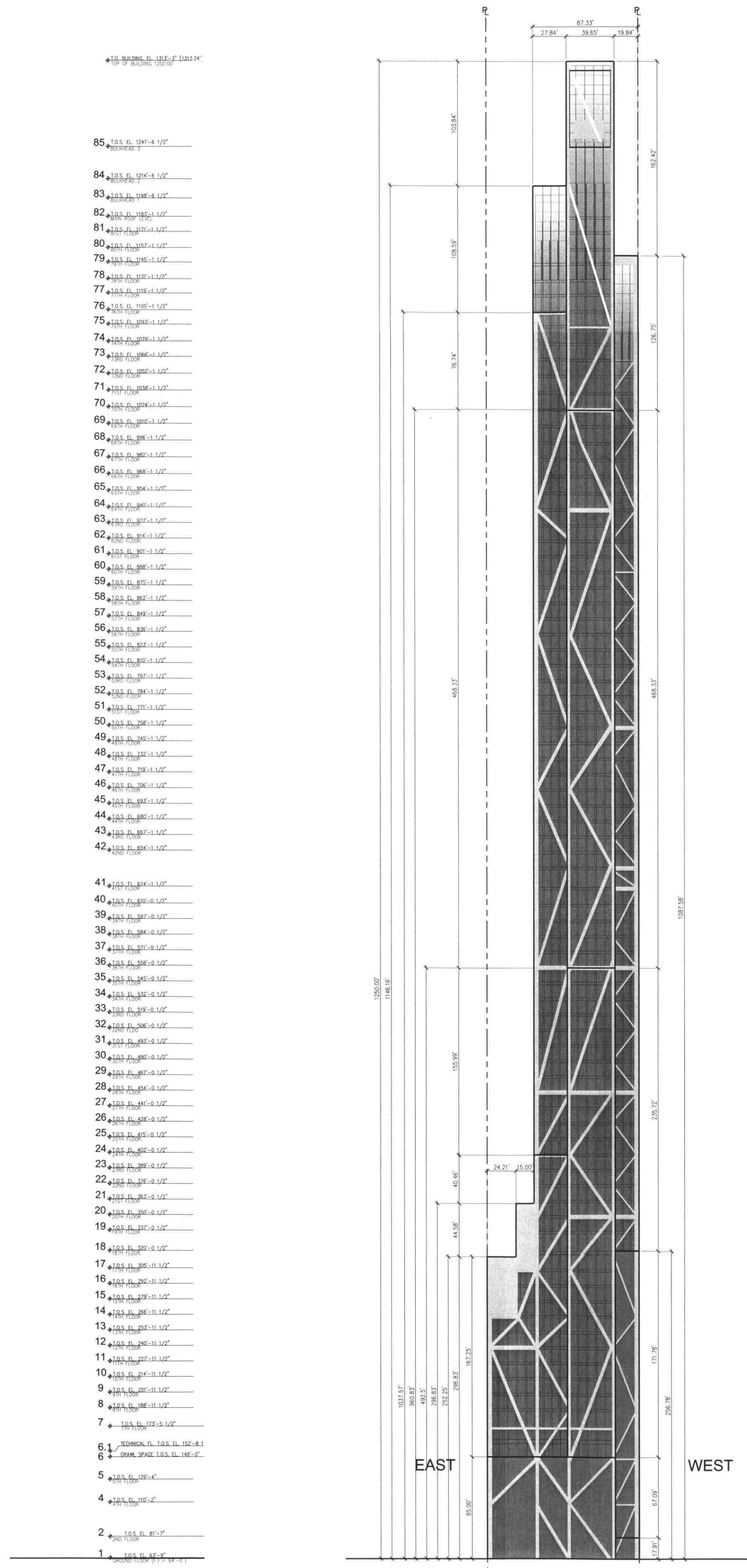
No.	Date	Revision
01	09-09-09	CPC FINAL SUBMITTAL
02	08-10-09	ADDITIONAL DRAWING TO CPC REQUEST



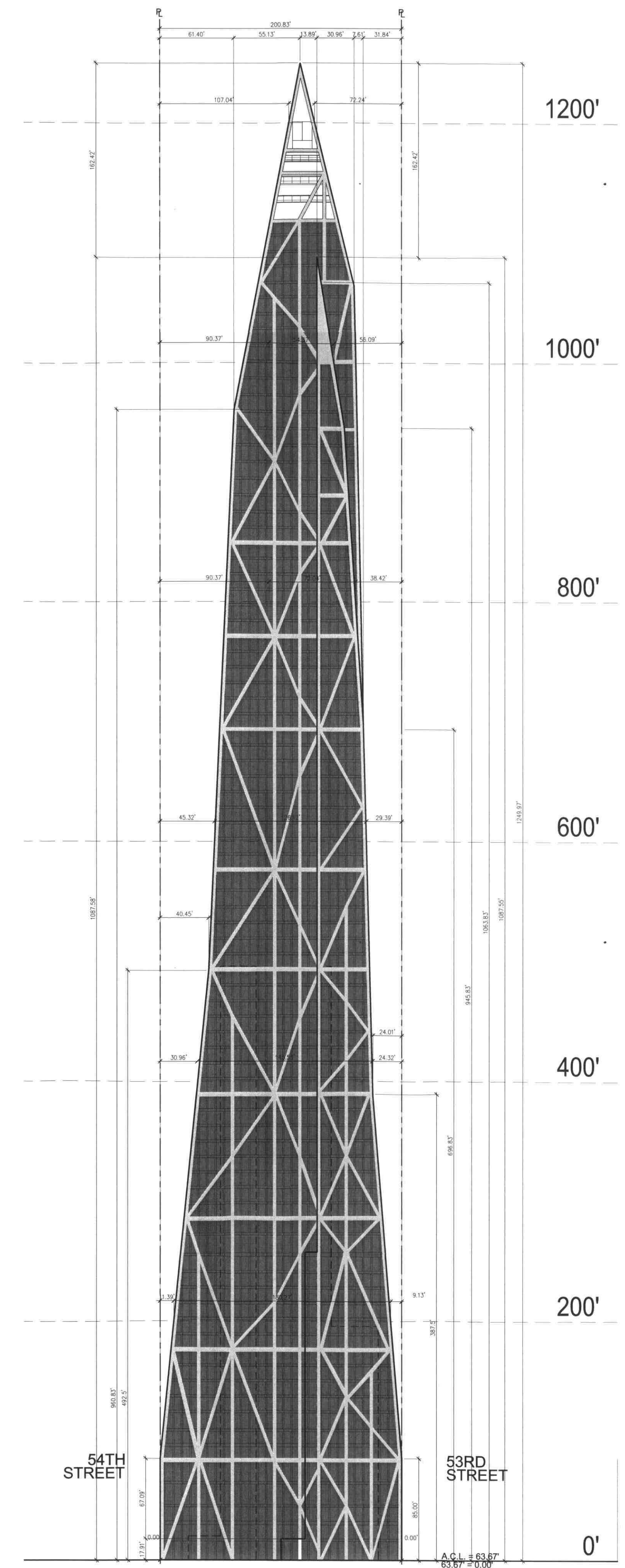
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53 WEST 53RD STREET
 New York, NY

TITLE:
NORTH AND EAST BUILDING ELEVATIONS

SCALE: AS NOTED
 DATE: 2007-07
 PROJECT NO: 2007-07
 FILE NO: CDS/SH/W/LLURP
 DRAWN BY:
 CHECKED BY:
 DWG NO: **7-25**



01 SOUTH ELEVATION
SCALE: 1/64" = 1'-0"



02 WEST ELEVATION
SCALE: 1/64" = 1'-0"

SPONSOR:

ARCHITECT OF RECORD:
SLCEArchitects
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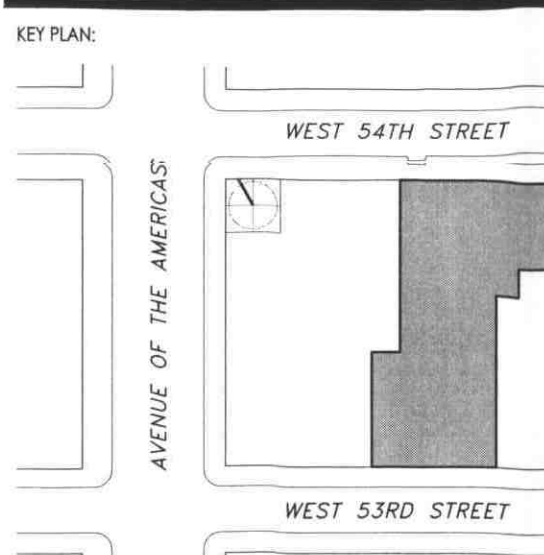
STRUCTURAL ENGINEER:
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No.	Date	Revision
09-09-09	CPC FINAL SUBMITTAL	
08-10-09	ADDITIONAL DRAWING TO CPC REQUEST	

SCALE:



PROJECT:
53 WEST 53RD STREET
New York, NY

TITLE:
SOUTH AND WEST
BUILDING ELEVATIONS

SEAL & SIGNATURE: _____ DATE: _____ AS NOTED

SCALE: AS NOTED

PROJECT No: 2007-47

FILE No: CDS33WVLLURP

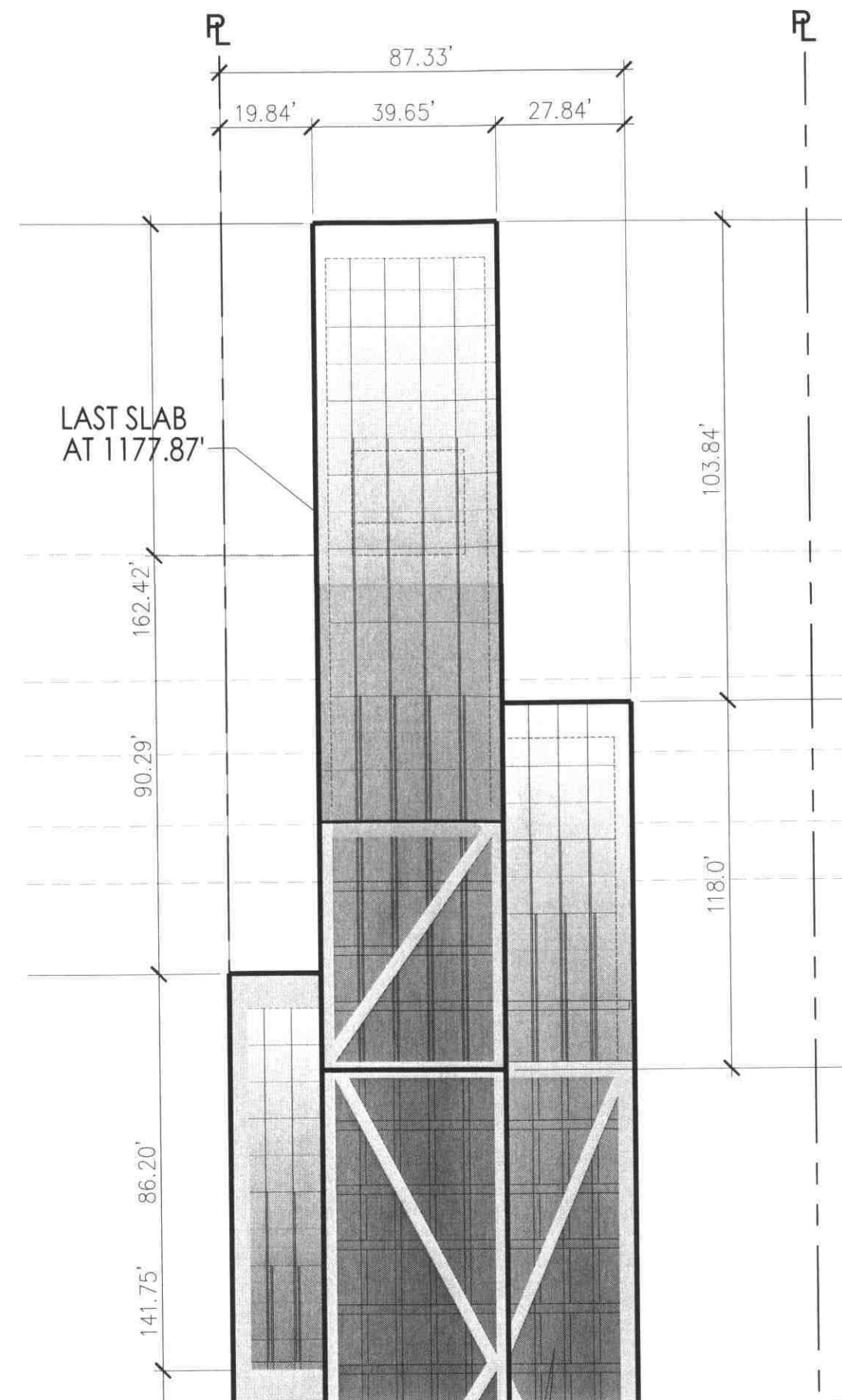
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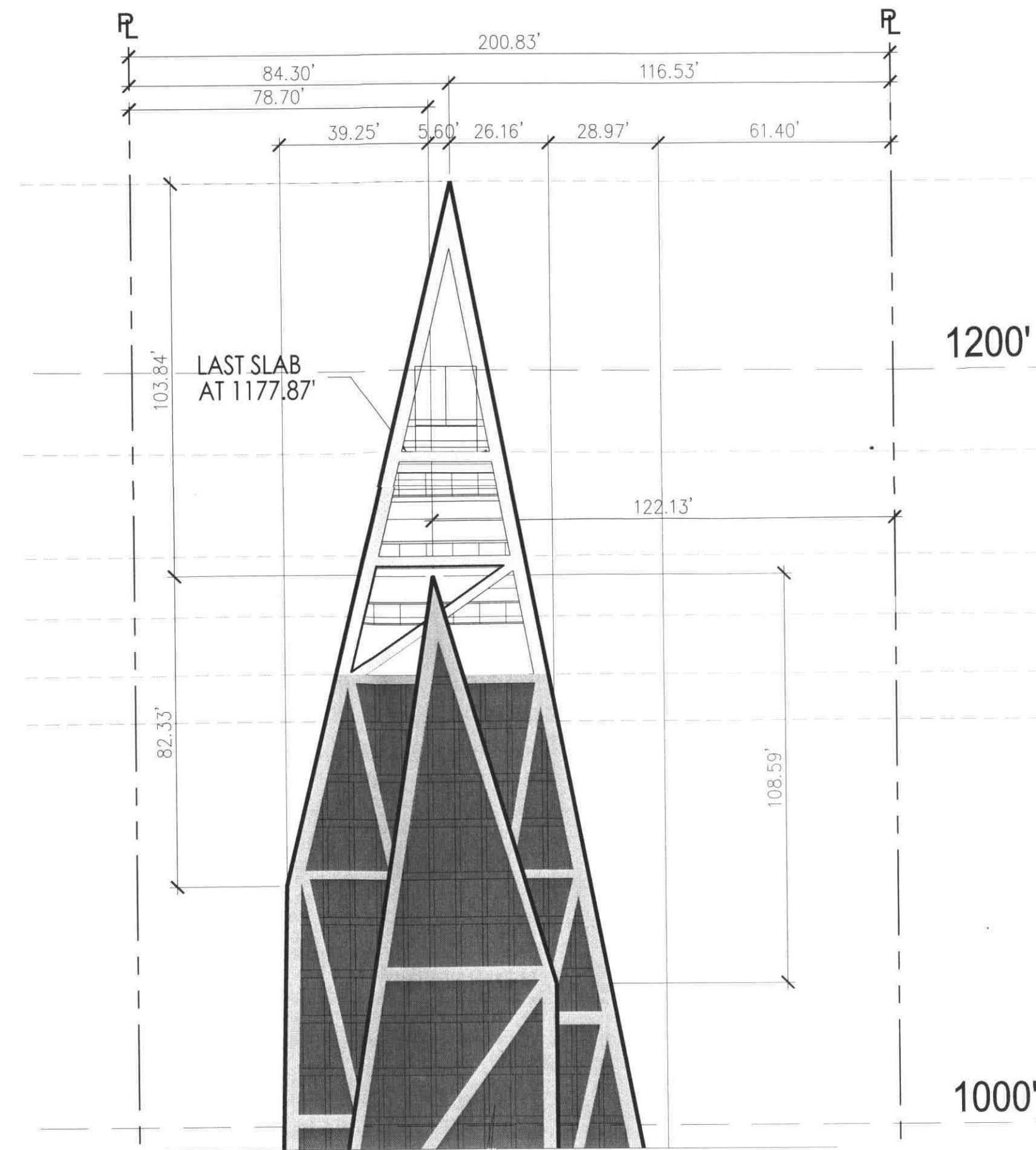
DWG No: _____

Z-26

- ↕ T.O. BUILDING EL. 1313'-3" [1313.24']
TOP OF BUILDING 1250.00'
- 85 ↕ T.O.S. EL. 1241'-6 1/2"
BULKHEAD 3
- 84 ↕ T.O.S. EL. 1214'-6 1/2"
BULKHEAD 2
- 83 ↕ T.O.S. EL. 1198'-6 1/2"
BULKHEAD 1
- 82 ↕ T.O.S. EL. 1183'-1 1/2"
MAIN ROOF LEVEL
- 81 ↕ T.O.S. EL. 1171'-1 1/2"
81ST FLOOR
- 80 ↕ T.O.S. EL. 1157'-1 1/2"
80TH FLOOR
- 79 ↕ T.O.S. EL. 1145'-1 1/2"
79TH FLOOR
- 78 ↕ T.O.S. EL. 1131'-1 1/2"
78TH FLOOR
- 77 ↕ T.O.S. EL. 1119'-1 1/2"
77TH FLOOR
- 76 ↕ T.O.S. EL. 1105'-1 1/2"
76TH FLOOR
- 75 ↕ T.O.S. EL. 1093'-1 1/2"
75TH FLOOR
- 74 ↕ T.O.S. EL. 1079'-1 1/2"
74TH FLOOR
- 73 ↕ T.O.S. EL. 1066'-1 1/2"
73RD FLOOR

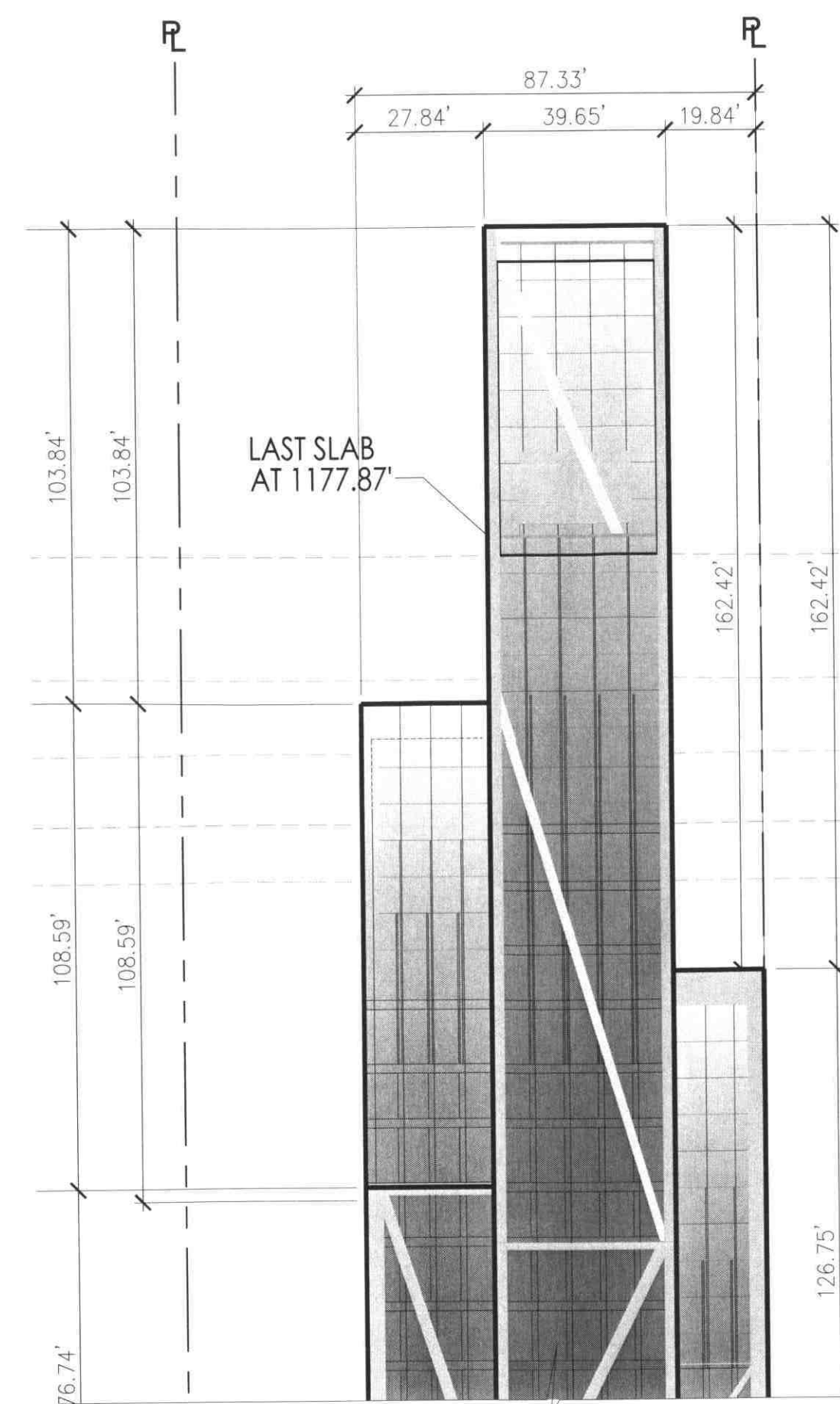


01 PARTIAL SOUTH ELEVATION
SCALE: 1/32" = 1'-0"

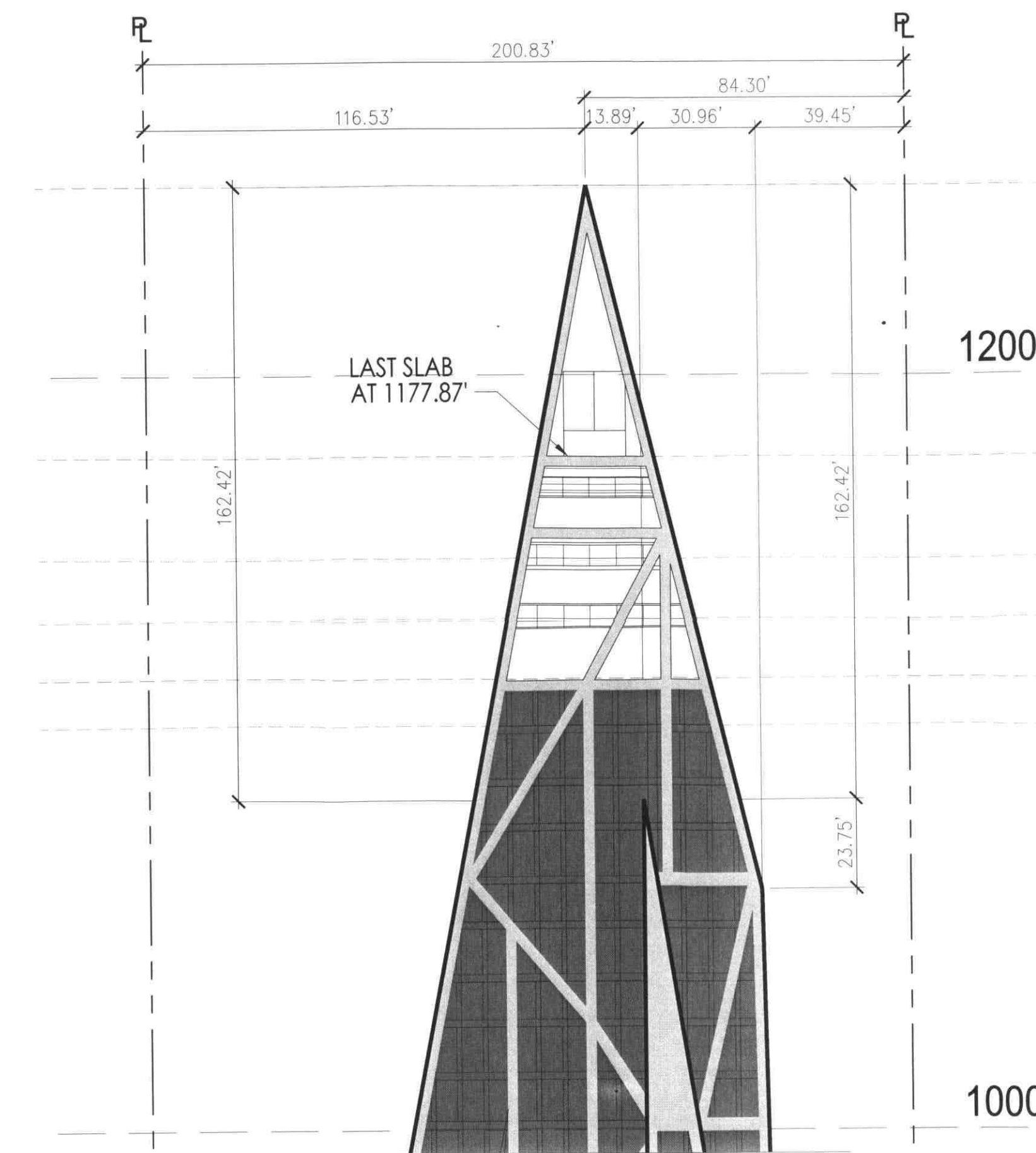


02 PARTIAL EAST ELEVATION
SCALE: 1/32" = 1'-0"

- ↕ T.O. BUILDING EL. 1313'-3" [1313.24']
TOP OF BUILDING 1250.00'
- 85 ↕ T.O.S. EL. 1241'-6 1/2"
BULKHEAD 3
- 84 ↕ T.O.S. EL. 1214'-6 1/2"
BULKHEAD 2
- 83 ↕ T.O.S. EL. 1198'-6 1/2"
BULKHEAD 1
- 82 ↕ T.O.S. EL. 1183'-1 1/2"
MAIN ROOF LEVEL
- 81 ↕ T.O.S. EL. 1171'-1 1/2"
81ST FLOOR
- 80 ↕ T.O.S. EL. 1157'-1 1/2"
80TH FLOOR
- 79 ↕ T.O.S. EL. 1145'-1 1/2"
79TH FLOOR
- 78 ↕ T.O.S. EL. 1131'-1 1/2"
78TH FLOOR
- 77 ↕ T.O.S. EL. 1119'-1 1/2"
77TH FLOOR
- 76 ↕ T.O.S. EL. 1105'-1 1/2"
76TH FLOOR
- 75 ↕ T.O.S. EL. 1093'-1 1/2"
75TH FLOOR
- 74 ↕ T.O.S. EL. 1079'-1 1/2"
74TH FLOOR
- 73 ↕ T.O.S. EL. 1066'-1 1/2"
73RD FLOOR



03 PARTIAL NORTH ELEVATION
SCALE: 1/32" = 1'-0"



04 PARTIAL WEST ELEVATION
SCALE: 1/32" = 1'-0"

SPONSOR:

ARCHITECT OF RECORD:

SLCEArchitects
641 BROADWAY
NEW YORK, NY 10003
TEL: (33) 1 49 23 83 83
FAX: 212 979 8387

DESIGN ARCHITECT:

AJN ATELIERS JEAN NOUVEL
10 cité d'Angoulême
75011 Paris FRANCE
TEL: (33) 1 49 23 83 83
FAX: (33) 1 43 14 81 10

STRUCTURAL ENGINEER:

WSP CANTOR SEINUK
228 EAST 45TH STREET, 3RD FLOOR
NEW YORK, NY 10017-3303
TEL: (212) 687-9888
FAX: (646) 487-5501

MECHANICAL ENGINEER:

FK Flock + Kurtz
475 Fifth Avenue
New York, NY 10017
Tel: (212) 533-9600
Fax: (212) 689-7489

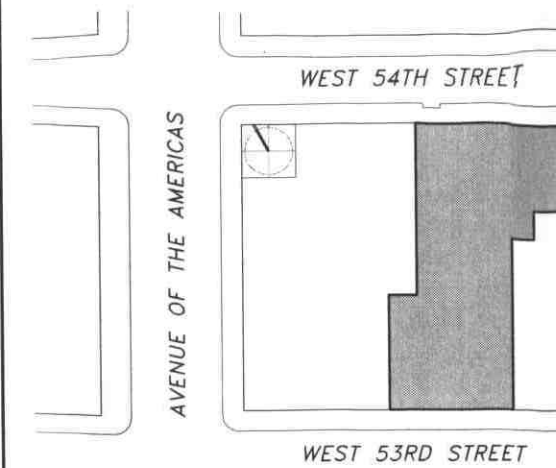
EXTERIOR WALL CONSULTANT:

ISRAEL BERGER & ASSOCIATES, INC.
232 MADISON AVENUE
NEW YORK, NY 10016
TEL: (212) 689-5389
FAX: (212) 687-6449

No.	Date	Revision
09-09-09		CPC FINAL SUBMITTAL
08-10-09		ADDITIONAL DRAWING TO CPC REQUEST

SCALE:

KEY PLAN:



PROJECT:

53 WEST 53RD STREET
New York, NY

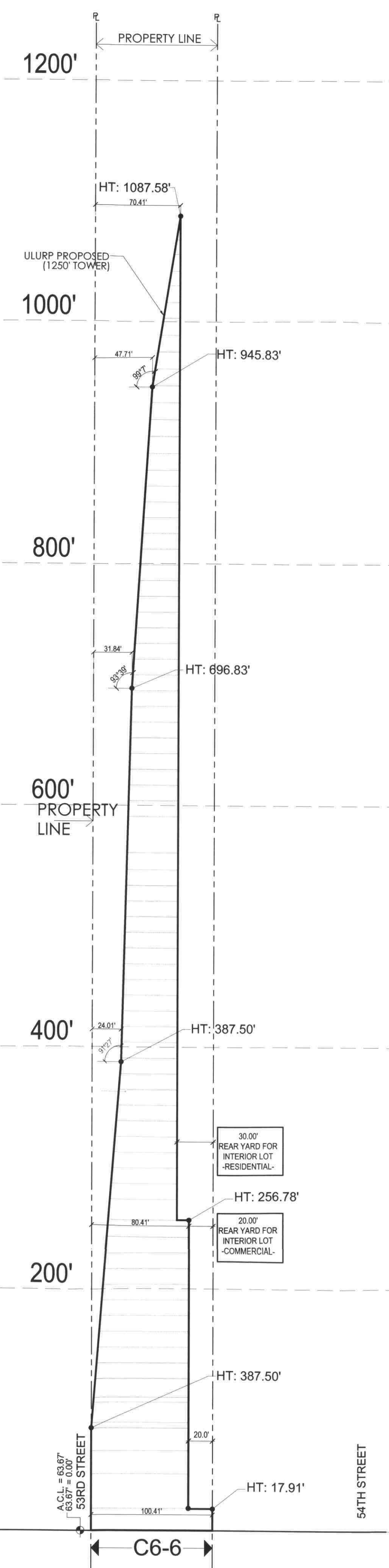
TITLE:

TOP OF BUILDING
PARTIAL ELEVATIONS

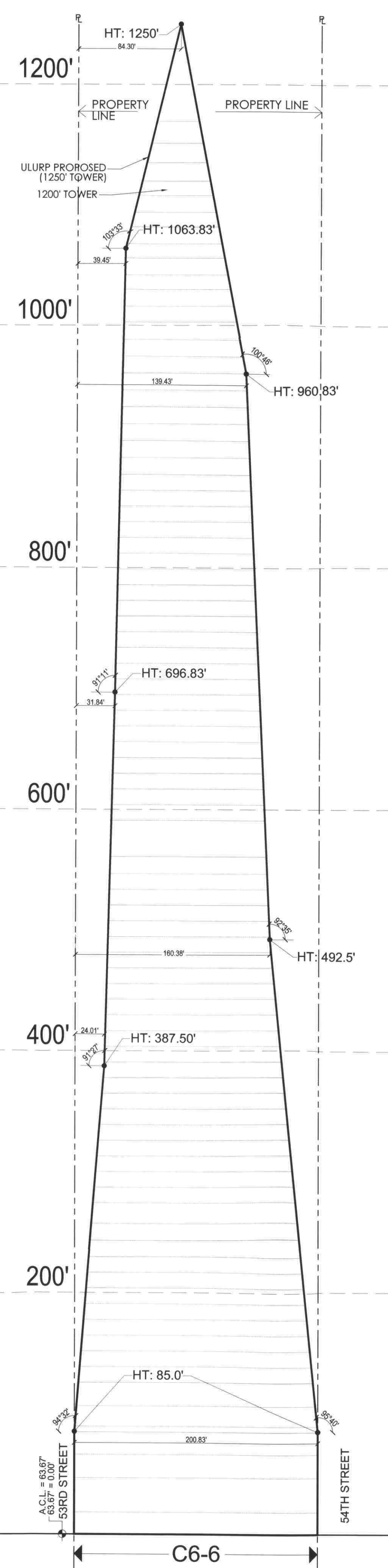
SEAL & SIGNATURE:

SCALE: AS NOTED
DATE: 2007-07
PROJECT NO: 2007-07
FILE NO: CDSWALU00P
DRAWN BY:
CHECKED BY:
DWG NO:

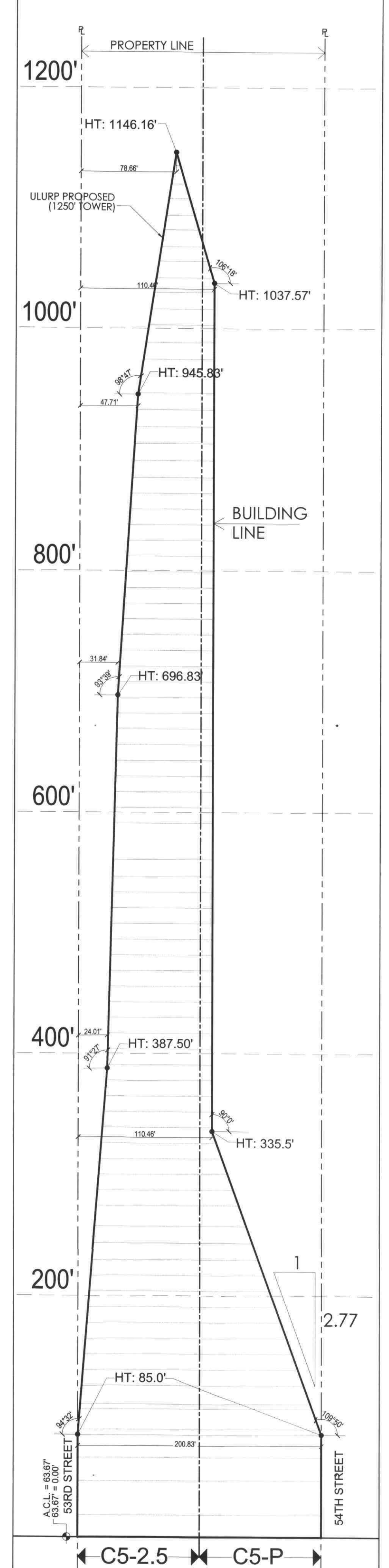
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SECTION AA'

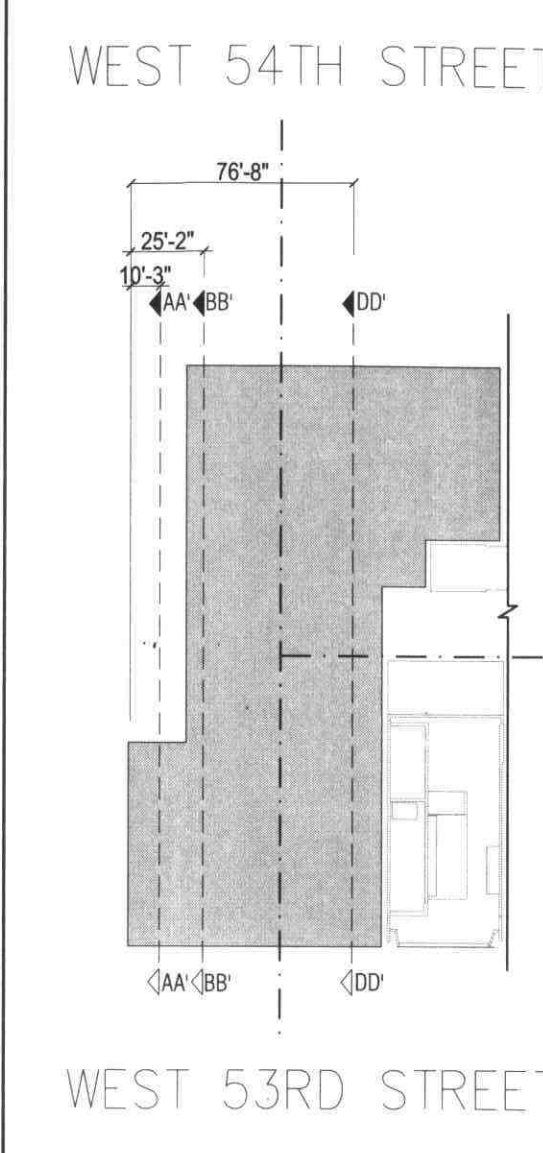


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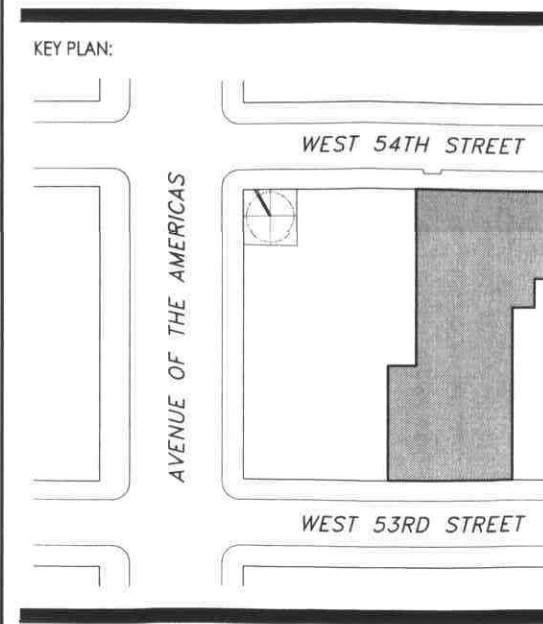


SECTION DD'

SPONSOR:
 ARCHITECT OF RECORD:
SLCE Architects
 84 BROADWAY
 NEW YORK, NY 10003
 TEL: 212-979-8400
 FAX: 212-979-8387
 DESIGN ARCHITECT:
 A.J.N. ATELIERS JEAN NOUVEL
 10 rue d'Angoulême
 75001 PARIS, FRANCE
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 FAX: (33) 1 43 14 81 10
 STRUCTURAL ENGINEER:
 WSP CANTOR SEINUK
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 TEL: (212) 687-9888
 FAX: (646) 487-5301
 MECHANICAL ENGINEER:
FK Flock + Kurtz
 475 Fifth Avenue
 New York, NY 10017
 Tel: (212) 532-7620
 Fax: (212) 689-7489
 EXTERIOR WALL CONSULTANT:
 ISRAEL BERGER & ASSOCIATES, INC.
 232 MADISON AVENUE
 NEW YORK, NY 10016
 TEL: (212) 689-5389
 FAX: (212) 689-6449



08-19-09 RESPONSE TO CPC REQUEST
 No: Date: Revision:
 SCALE:
 0 50 100 FT



PROJECT:
 53 WEST 53RD STREET
 New York, NY
 TITLE:
 HEIGHT AT INFLECTION
 -POINT AND SLOPE ANGLES

SEAL & SIGNATURE: AS NOTED
 DATE: 2007-12
 PROJECT NO: C05-SWDD
 FILE NO: C05-SWDD
 DRAWN BY:
 CHECKED BY:
 DWG NO:
Z-28

EXHIBIT C

**TRANSFER OF DEVELOPMENT RIGHTS AND NOTICE
OF RESTRICTIONS PURSUANT TO SECTION 74-793
OF THE ZONING RESOLUTION OF THE CITY OF NEW YORK**

NOTICE, made as of this __ day of ____, 200_, by and between THE UNIVERSITY CLUB, a New York not-for-profit corporation, having an address 1 West 54th Street, New York, New York 10019 (“Transferor”), and 2005/HINES WEST FIFTY-THIRD REALTY, LLC (“Developer”), a Delaware limited liability company, having an address c/o Hines Interests Limited Partnership, 885 Third Avenue, New York, New York 10022, THE MUSEUM OF MODERN ART, a corporation organized and existing pursuant to the New York Education Law, having an address at 11 West 53rd Street, New York, New York 10019 (“MoMA”), THE TRUST FOR CULTURAL RESOURCES OF THE CITY OF NEW YORK, a corporate government agency and a public benefit corporation constituting a political subdivision of the State of New York organized pursuant to the New York State Cultural Resources Act, having an address at c/o the New York City Economic Development Corporation, 110 William Street, New York, New York 10038 (the “Trust”), ST. THOMAS CHURCH IN THE CITY AND COUNTY OF NEW YORK, a New York religious corporation, having an address at 678 Fifth Avenue, New York, New York 10019 (“St. Thomas”), and THE AMERICAN FOLK ART MUSEUM, a New York education corporation chartered by the Regents of The University of the State of New York, having an address at 49 East 52nd Street, New York, New York 10022 (“AFAM”) (Developer, MoMA, the Trust, St. Thomas, and AFAM, collectively, “Transferee”).

W I T N E S S E T H:

WHEREAS:

Transferor is the owner in fee simple of certain real property located in the Borough of Manhattan, City, County and State of New York, with the buildings and improvements thereon, in the City of New York, designated as Block 1270, Lot 34 on the Tax Map of the City of New York and more particularly described in Exhibit A attached hereto and made a part hereof (said real property being hereinafter called, the “Transferor Lot”) and the owner of unused excess floor area and other development rights appurtenant to the Transferor’s Lot;

Transferor’s Lot is improved with a building which has been designated by the New York City Landmarks Preservation Commission (“LPC”), pursuant to Section 25-303(a)(1) of the New York City Administrative Code as a “landmark” (the “Landmark Building”);

The Transferor Lot is a "zoning lot occupied by a landmark building or other structure" for purposes of Section 74-79 of the Zoning Resolution of the City of New York (hereinafter, the "Zoning Resolution");

Developer is the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, designated as Block 1269, Lots 5, 6, 7, 8, 66, and 69 on the Tax Map of the City of New York and by the street address 53 West 53rd Street, and is more particularly described on Exhibit B attached hereto (the “Developer Premises”); and

MoMA is the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, designated as Block 1269, Lots 11, 12, 13, 20, and 165 on the Tax Map of the City of New York, and the lessee from the Trust of certain real property located in the Borough of Manhattan, City, County and State of New York, designated as Block 1269, Lots 14 and 58 on the Tax Map of the City of New York (the "Trust Premises"), all of which property is designated by the street address 11 West 53rd Street, and is more particularly described on Exhibit C attached hereto (collectively, the "MoMA Premises"); and

St. Thomas is the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, designated as Block 1269, Lot 30 on the Tax Map of the City of New York and by the street address 678 Fifth Avenue, and is more particularly described on Exhibit D attached hereto (the "St. Thomas Premises"); and

AFAM is the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, designated as Block 1269, Lot 9 on the Tax Map of the City of New York and by the street address 45-47 West 53rd Street, and is more particularly described on Exhibit E attached hereto (the "AFAM Premises," and together with the Developer Premises, the MoMA Premises, and the St. Thomas Premises, the "Transferee Lot");

The Transferee Lot is an "adjacent lot", as defined in Section 74-79 of the Zoning Resolution, with respect to the Transferor Lot;

The "floor area", as defined in Section 12-10 of the Zoning Resolution, allowable for the development of the Transferor's Lot exceeds the floor area utilized by the Landmark Building (and does so by approximately 136,000 square feet);

Pursuant to the provisions of Section 74-79 and 81-212 of the Zoning Resolution, the City Planning Commission of New York City (hereinafter, the "CPC") approved on the 9th day of September, 2009 (Calendar No. 15) the transfer of a maximum of 136,000 square feet of unused excess floor area and the development rights appurtenant thereto (hereinafter collectively, the "Development Rights") from the Transferor Lot to the Transferee Lot pursuant to the provisions of Section 74-79 of the Zoning Resolution (the "Special Permit Approval"), and the City Council of the City of New York approved such action taken by CPC by Resolution No. _____, dated _____ 2009;

Developer desires to receive from Transferor, and Transferor desires to transfer to Developer, the Development Rights for use on the Transferee Lot.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, it is hereby agreed as follows:

Transferor hereby assigns, transfers and sets over to Transferee the Development Rights solely for the use and benefit in perpetuity of the Transferee's Lot.

Transferor covenants that, in compliance with Section 13 of the Lien Law, it will receive the consideration paid by Transferee for such rights as a trust fund and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for

any other purposes. At the request and expense of Developer, Transferor covenants that it will execute or procure any further necessary assurances of its rights to make the transfer, provided that such assurances shall not impose any obligations or liabilities upon Transferor other than as provided herein and further provided that Developer shall reimburse Transferor for its reasonable costs and expenses incurred in connection therewith.

Notice is hereby given that this transfer (a) irrevocably restricts the available floor area on the Transferor's Lot by reducing it and any appurtenant development rights by 136,000 square feet of floor area and (b) benefits the Transferee's Lot by irrevocably increasing the available floor area, and any appurtenant development rights by 136,000 square feet of floor area.

Transferor covenants that at no time shall any building, buildings or improvements be situated on Transferor's Lot which would have a floor area in excess of that permitted on Transferor's Lot, as reduced by this transfer. In the event that the landmark designation of the Landmark Building is removed or the Landmark Building is altered or destroyed and the Transferor Lot is redeveloped, the floor area on the Transferor Lot shall not be greater than the amount of floor area permitted thereon by the Zoning Resolution as reduced by the Development Rights. Notwithstanding the foregoing, in the event of an amendment to the Zoning Resolution which effectively reduces the floor area permitted on the Transferor Lot, all buildings and improvements situated on the Transferor Lot at the time of such amendment may be continued irrespective of their existing floor area, but shall not be enlarged or otherwise modified so as to result in floor area in excess of the amount permitted on the Transferor Lot at such time or, if the existing floor area is already in excess of the amount permitted on the Transferor Lot at such time, increase the degree of such excess.

Transferor represents and warrants that (a) it has the requisite power and legal authority to execute and deliver this Transfer of Development Rights and Notice of Restrictions and all related documents, (b) that this Transfer of Development Rights and Notice of Restrictions and all related documents have been duly authorized by all necessary action on the part of Transferor, and (c) the execution and delivery of this Transfer of Development Rights and Notice of Restrictions and all related documents do not and will not (i) conflict with or violate any law, rule, judgment, regulation, order, writ, injunction or decree issued as to such party by any court or governmental or quasi-governmental entity with jurisdiction over such party, including the United States of America, the State of New York or any political subdivision of either of the foregoing, or any decision or ruling of any arbitrator to which Transferor is a party or by which Transferor is bound or affected, and (ii) conflict with or result in a breach of or constitute a default under any of the terms, conditions or provisions of any agreement or instrument to which Transferor is a party or by which Transferor is bound or any order or decree applicable to such party, or result in the creation or imposition of any lien on any of its assets or property which would adversely affect the ability of Transferor to perform its obligations under this Transfer of Development Rights and Notice of Restrictions and such related documents.

This Transfer of Development Rights and Notice of Restrictions shall be recorded by Transferor against the Transferor Lot and by Developer against the Transferee Lot in the Conveyance Section of the Borough Office of the City Register of the City of New York, New

York County and certified copies submitted to the CPC in accordance with the provisions of Section 74-793 of the Zoning Resolution.

Transferor covenants to execute and deliver from time to time, upon request by, and at the expense of, Developer or its successor in interest, such instruments as are necessary to confirm that the property interest hereby transferred is the Development Rights only, and does not include fee ownership of land or other ownership interests which would subject Transferee, or its successor in interest to liability for real estate taxes, water and sewer charges, or other similar governmental or public utility charges applicable to the Transferor Lot.

This instrument may be executed in counterparts, all of which, when taken together, shall constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, Transferor and Transferee, have each hereunto set their hands this ____ day of _____, 2009.

TRANSFEROR:

THE UNIVERSITY CLUB

By: _____
Name: _____
Title: _____

TRANSFEEE:

**W2005/HINES WEST FIFTY-THIRD
REALTY, LLC**

By: _____
Name: _____
Title: _____

THE MUSEUM OF MODERN ART

By: _____
Name: _____
Title: _____

**THE TRUST FOR CULTURAL
RESOURCES OF THE CITY OF NEW
YORK**

By: _____
Name: _____
Title: _____

**SAINT THOMAS CHURCH IN THE CITY
AND COUNTY OF NEW YORK**

By: _____
Name: _____
Title: _____

THE AMERICAN FOLK ART MUSEUM

By: _____
Name: _____
Title: _____

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

On the ____ day of _____ in the year 20__ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

EXHIBIT A

Metes and Bounds Description of Transferor's Lot

EXHIBIT B

Metes and Bounds Description of Developer Premises

EXHIBIT C

Metes and Bounds Description of MoMA Premises

EXHIBIT D

Metes and Bounds Description of Trust Premises

EXHIBIT E

Metes and Bounds Description of St. Thomas Premises

EXHIBIT F

Metes and Bounds Description of AFAM Premises

DECLARATION

DECLARATION made as of the ____ day of _____, 2009, by W2005/Hines West Fifty-Third Realty, LLC, a Delaware limited liability company, having an address at c/o Hines Interests Limited Partnership, 885 Third Avenue, New York, New York 10022 (“Developer Declarant”), The Museum of Modern Art, a corporation organized and existing pursuant to the New York Education Law, having an address at 11 West 53rd Street, New York, New York 10019 (“MoMA Declarant”), The Trust for Cultural Resources of The City of New York, a corporate government agency and a public benefit corporation constituting a political subdivision of the State of New York organized pursuant to Article 20 of the Arts and Cultural Affairs Law of the State of New York (New York State Cultural Resources Act) and Article 21 of the Arts and Cultural Affairs Law of the State of New York (Trust for Cultural Resources of the City of New York), having an address at c/o the New York City Economic Development Corporation, 110 William Street, New York, New York 10038 (the “Trust Declarant”), St. Thomas Church in the City and County of New York, a New York religious corporation, having an address at 678 Fifth Avenue, New York, New York 10019 (“St. Thomas Declarant”), and the American Folk Art Museum, a New York education corporation chartered by the Regents of The University of the State of New York, having an address at 49 East 52nd Street, New York, New York 10022 (“AFAM Declarant”). Developer Declarant, MoMA Declarant, Trust Declarant, St. Thomas Declarant and AFAM Declarant are referred to herein collectively as “Declarants.”

W I T N E S S E T H:

WHEREAS, Developer Declarant is the owner above the level of a defined horizontal plane (the “Developer Premises”), and MoMA Declarant is the owner below the level of a defined horizontal plane (the “MoMA Development Premises”), of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lots 5, 6, 7, 8, 66, and 69 on the Tax Map of the City of New York (the “Tax Map”) and by the street address 53 West 53rd Street, and are each more particularly described on Exhibit A attached hereto (the Developer Premises, the MoMA Development Premises, and the portion of the MoMA Premises (as hereinafter defined) designated as Block 1269, Lot 165 on the Tax Map (“Lot 165”) and a portion of Block 1269, Lot 58 on the Tax Map are hereinafter referred to collectively as the “Development Site”); and

WHEREAS, MoMA Declarant is also (1) the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lots 11, 12, 13, and 20 on the Tax Map, and (2) the lessee from Trust Declarant of the Trust Premises (as hereinafter defined), all of which property is designated by the street address 11 West 53rd Street, and is more particularly described on Exhibit B attached hereto (collectively, all those properties and together with Lot 165, the “MoMA Premises”); and

WHEREAS, Trust Declarant is the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as (1) Block 1269, Lot 14 (the “1979 Trust Premises”) on the Tax Map of the City of New York (the “Tax Map”), which 1979 Trust Premises are leased to MoMA Declarant pursuant to that certain lease dated as of December 20, 1979 (the “1979 Trust Lease”), a memorandum of which 1979 Trust Lease, dated as of December 20, 1979, was recorded in the Office of the Register of the County

of New York (the “Register’s Office”) on December 24, 1979 at Reel 507, Page 743, pursuant to which 1979 Trust Lease MoMA Declarant has certain rights to acquire the 1979 Trust Premises, and (2) Block 1269, Lot 58 (the “1996 Trust Premises” and, together with the 1979 Trust Premises, the “Trust Premises”) on the Tax Map, which 1996 Trust Premises are leased to MoMA Declarant pursuant to that certain lease dated as of November 19, 1996, between Trust Declarant and Modern and Contemporary Art Support Corp. (the “1996 Trust Lease” and, together with the 1979 Trust Lease, the “Trust Leases”), which was recorded in the Register’s Office on December 13, 1996 at Reel 2402, Page 1546, which 1996 Trust Lease was (A) assigned to MoMA Declarant pursuant to Assignment and Assumption of Lease dated as of June 7, 2001 and extended pursuant to Notice of Exercise of Extension Option, dated as of June 9, 2001, (B) amended and partially terminated by First Amendment and Partial Termination of Agreement of Lease dated as of May 3, 2007, and (C) with respect to which an Amended Memorandum of Lease dated as of May 3, 2007 was recorded in the Register’s Office on June 11, 2007 at CRFN 2007000301454, pursuant to which 1996 Trust Lease MoMA Declarant has certain rights to acquire the 1996 Trust Premises; and

WHEREAS, St. Thomas Declarant is the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lot 30 on the Tax Map and by the street address 678 Fifth Avenue, and is more particularly described on Exhibit C attached hereto (the “St. Thomas Premises”); and

WHEREAS, the AFAM Declarant is the owner of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lot 9 on the Tax Map and by the street address 45-47 West 53rd Street, and is more particularly described on Exhibit D attached hereto (the “AFAM Premises”); and

WHEREAS, the Board of Managers of Museum Tower Condominium (“Museum Tower Condominium”) is the agent for the owners of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lots 1001-1274 on the Tax Map and by the street address 15 West 53rd Street, and is more particularly described on Exhibit E attached hereto (the “Museum Tower Premises”); and

WHEREAS, the Development Site, the MoMA Premises, the St. Thomas Premises, the AFAM Premises, and the Museum Tower Premises have been merged into a single zoning lot (the “Subject Zoning Lot”); and

WHEREAS, _____ (“Title Company”), in a certificate set forth in Exhibit F annexed hereto and made a part hereof, has certified to the City that as of _____, 2009, Developer Declarant, MoMA Declarant, Trust Declarant, AFAM Declarant, St. Thomas Declarant, Museum Tower Condominium, and _____ are the only parties-in-interest (“Parties-in-Interest”), as that term is defined in Section 12-10 of the Zoning Resolution of the City of New York (the “Zoning Resolution”), in the Subject Zoning Lot; and

WHEREAS, the consent of all necessary Parties-in-Interest to this Declaration has been obtained; and

WHEREAS, Developer Declarant represents and warrants that the Parties-in-Interest with respect to the Subject Zoning Lot listed in Exhibit F are the only known Parties-in-Interest in the Subject Zoning Lot as of the date hereof; and

WHEREAS, the MoMA Premises is subject to a restrictive declaration dated as of October 18, 2000, and recorded in the Register’s Office on December 29, 2000 at Reel 3214, Page 2336 in connection with land use applications C 000649 ZMM (Cal. No. 23), C 000651 ZSM (Cal. No. 24), and N 000650 ZRM (Cal. No. 25), approved by the City Planning

Commission (the “CPC”) on October 18, 2000 and later adopted by the City Council on December 19, 2000; and

WHEREAS, the special permit approved in 2000 pursuant to land use application C 000651 ZSM was modified pursuant to Application M 000651(A) ZSM, approved by the CPC on March 26, 2007; and

WHEREAS, the AFAM Premises and Lots 5, 6, 7, and 8 within the Development Site are subject to a restrictive declaration dated as of December 1, 1989 and recorded in the Register’s Office on January 17, 1990 at Reel 1658, Page 1336, in connection with land use application C 880703 ZMM (Cal. No. 2), approved by the CPC on November 20, 1989 and by the Board of Estimate on January 11, 1990, which restrictive declaration was later amended pursuant to land use application M 880703(A) ZMM, which application was approved by the CPC on March 26, 2007, and a modification of the 1989 restrictive declaration, dated as of March 22, 2007, affecting Lots 5, 6, 7, and 8 within the Development Site, was recorded on April 4, 2007 at CRFN 2007000173593 (as amended, the “AFAM Declaration”); and

WHEREAS, Developer Declarant proposed to develop a new building at 1,250 feet in height with up to 82 occupiable stories, with residential, hotel, and museum uses, including 51,949 square feet of museum uses, on the Development Site (the “Proposed Development”),

WHEREAS, Developer Declarant filed with the Department of City Planning plans prepared by SLCE Architects (the “Certified Plans”) which plans reflected the Proposed Development at a height of 1,250 feet;

WHEREAS, CPC modified the Proposed Development by reducing its height to a maximum height of 1,050 feet and required that plans for the Proposed Development be prepared consistent with the Certified Plans, modified as necessary to reflect a reduction of building

height to a height of no more than 1,050 feet, and consistent in all respects with the modification notes annexed to its resolution for C090432ZSM (“Modification Notes”); and

WHEREAS, CPC also annexed supplemental plans to its resolution (the “Supplemental Plans”), and required that the plans for the Proposed Development be prepared to be consistent therewith and with the Modification Notes; and

WHEREAS, CPC further required that a single set of consolidated and revised plans be certified by the Chairperson pursuant to Section 2 of such resolution, as consistent with the Certified Plans and Supplemental Plans, as required to be modified to reflect the reduced building height of 1,050 feet and to be consistent with the Modification Notes; and

WHEREAS, Declarant has submitted a single set of consolidated and revised plans which have been certified by the Chairperson pursuant to Section 2 of such resolution which plans are annexed hereto as Exhibit G (“Plans”); and

WHEREAS, Zoning Resolution Section 74-79 provides that the CPC may permit development rights to be transferred to adjacent lots from lots occupied by landmark buildings or other structures; and

WHEREAS, the Subject Zoning Lot is an “adjacent lot”, as defined in Section 74-79 of the Zoning Resolution, with respect to certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1270, Lot 34 on the Tax Map and by the street address 1 West 54th Street (the “University Club Premises”), in that it is across the street and opposite to the University Club Premises; and

WHEREAS, the University Club Premises is improved with a 10-story building (the “University Club Building”), which pursuant to the provisions of Section 3020 of the New York City Charter and Title 25, Chapter 3 of the Administrative Code of the City of New York (the

“Landmark Preservation Law”), has been designated by the New York City Landmarks Preservation Commission (the “LPC”) as a designated landmark because of its special character or historical or aesthetic interest or value; and

WHEREAS, Zoning Resolution Section 74-711 provides that the CPC may permit, on zoning lots containing a landmark designated by the LPC, the modification of use and bulk regulations, except floor area ratio regulations; and

WHEREAS, the Subject Zoning Lot includes the St. Thomas Premises, which contain a church and parish house (the “St. Thomas Building”), which has been designated by the LPC pursuant to the Landmarks Preservation Law as a designated landmark because of its special character or historical or aesthetic interest or value; and

WHEREAS, pursuant to Application No. C 090432 ZSM and Application No. C 090431 ZSM dated May 12, 2009 (collectively, the “Application”), Developer Declarant applied to the CPC for (1) a special permit pursuant to Sections 74-79 and 81-212 of the Zoning Resolution to permit, in connection with the Proposed Development, 136,000 square feet of unused development rights to be transferred from the University Club Premises to the Subject Zoning Lot, and (2) a special permit pursuant to Sections 74-711 and 81-277 of the Zoning Resolution to permit, in connection with the Proposed Development, (a) the distribution of floor area on the Subject Zoning Lot without regard to zoning district boundaries, and (b) the modification of (i) Zoning Resolution Sections 81-27 (Alternative Height and Setback Regulations - Daylight Evaluation) and 81-90 (SPECIAL REGULATIONS FOR PRESERVATION SUBDISTRICT), (ii) Zoning Resolution Section 81-45 (Pedestrian Circulation Space) and 37-07 (Requirements for Pedestrian Circulation Space), and (iii) Zoning Resolution Section 23-533 (Rear Yard Equivalent) (collectively, the “Special Permit”); and

WHEREAS, consistent with the requirements of Section 74-79 of the Zoning Resolution, the University Club, the owner of the University Club Premises, has (1) proposed to perform certain restoration work on the University Club Building, as described in the University Club CNE (as hereinafter defined), (2) agreed to establish a program for continuing maintenance that will result in preservation of the University Club Building, and (3) executed a restrictive declaration, dated of even date herewith (the “University Club Maintenance Declaration”), to be recorded against the University Club Premises, to ensure the performance of the restoration work and the program for continuing maintenance; and

WHEREAS, consistent with the requirements of Section 74-711 of the Zoning Resolution, the St. Thomas Declarant has proposed to perform certain restoration work on the St. Thomas Building, as described in the St. Thomas CNE (as hereinafter defined), and has agreed to establish a program for continuing maintenance that will result in preservation of the St. Thomas Building, and has executed a restrictive declaration, dated of even date herewith (the “St. Thomas Maintenance Declaration”), to be recorded against the St. Thomas Premises, to ensure the performance of the restoration work and the program for continuing maintenance; and

WHEREAS, the LPC issued Certificate of No Effect 09-5601 (LPC 09-4999), dated November 28, 2008 (the “University Club CNE”), for the restoration work on the University Club Building proposed by the University Club (such restoration work, as described in the University Club CNE, the “University Club Landmark Work”); and

WHEREAS, the LPC issued Certificate of No Effect 09-4310 (LPC 09-3670), dated October 6, 2008 (the “St. Thomas CNE”), for the restoration work on the St. Thomas Building proposed by the St. Thomas Declarant (such restoration work, as described in the St. Thomas CNE, the “St. Thomas Landmark Work”); and

WHEREAS, the LPC, at the public meeting on May 13, 2008, voted to issue a report to the CPC as requested in connection with the Application, and subsequently issued report MOU 09-5601, dated November 28, 2008, with regard to the University Club Building (the “University Club LPC Report”) and report MOU 09-4761, dated October 22, 2008, with regard to the St. Thomas Building (the “St. Thomas LPC Report”). Copies of the University Club LPC Report and University Club CNE are annexed hereto as Exhibit I. Copies of the St. Thomas LPC Report and the St. Thomas CNE are annexed hereto as Exhibit J;

WHEREAS, Developer Declarant desires to restrict the manner in which the Developer Premises may be developed, restored, and operated, to the extent set forth in this Declaration; and

WHEREAS, MoMA Declarant desires to restrict the manner in which the MoMA Development Premises and the MoMA Premises may be developed, restored, and operated, to the extent set forth in this Declaration; and

WHEREAS, Trust Declarant desires to restrict the manner in which the Trust Premises may be developed, restored, and operated, to the extent set forth in this Declaration; and

WHEREAS, St. Thomas Declarant desires to restrict the manner in which the St. Thomas Premises may be developed, restored, and operated, to the extent set forth in this Declaration; and

WHEREAS, AFAM Declarant desires to restrict the manner in which the AFAM Premises may be developed, restored, and operated, to the extent set forth in this Declaration; and

NOW, THEREFORE, Developer Declarant, MoMA Declarant, Trust Declarant, St. Thomas Declarant, and AFAM Declarant do hereby declare and agree that the Subject Zoning

Lot shall be held, sold, transferred, conveyed and occupied subject to the following restrictions, covenants, obligations, easements, and agreements, all of which are for the purpose of protecting the Subject Zoning Lot, which shall inure to the benefit of the City of New York, and which shall run with the Subject Zoning Lot and bind Developer Declarant, MoMA Declarant, Trust Declarant, St. Thomas Declarant, AFAM Declarant, Museum Tower Condominium, and their respective heirs, successors and assigns, so long as they have a right, title or interest in the Subject Zoning Lot or any part thereof. References in this Declaration to agencies or instrumentalities of the City shall be deemed to include agencies or instrumentalities succeeding to the jurisdiction thereof.

PROPOSED DEVELOPMENT AND USE OF SUBJECT ZONING LOT

1. (a) If Developer Declarant proceeds to develop the Development Site in accordance with the Special Permit, Developer Declarant covenants and declares that Development Site shall be developed in accordance with the Plans attached hereto as Exhibit G, which have been certified by the Chairperson of CPC pursuant to Section 2 of the resolution for C 090432 ZSM, and which are made a part hereof, as follows:

<u>DRAWING NUMBER</u>	<u>TITLE</u>	<u>DATE</u>
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(b) The requirements of Section 1 of the AFAM Declaration as to the “street wall” of a building, as applicable to the Development Site, are hereby superceded by the requirements of the Special Permit and of this Declaration, as are the requirements pertaining to hazardous materials.

(c) The requirements of Section 2 of the AFAM Declaration as to the location of “Museum Space” (as defined in the AFAM Declaration) in a new building located on the Development Site shall be deemed to be satisfied by the Proposed Building built in accordance with the Special Permit, the Plans, and this Declaration. There shall be no less than 50,000 square feet of “floor area” (as used in this Declaration, “floor area” shall have the meaning ascribed to it in Section 12-10 of the Zoning Resolution) of Museum Space located in the Proposed Building, in accordance with the Plans, for a period of twenty-five (25) years from the date of initial occupancy of the Museum Space.

(d) There shall be no more than 167 hotel units and 300 residential units located in any building on the Development Site. No office use shall be permitted.

2. No application for grading, excavation, foundation, alteration, building or other permit respecting the Development Site which permits soil disturbance for the Proposed Development shall be submitted to or accepted from the Department of Buildings (the “Buildings Department”) by Developer Declarant until the Department of Environmental Protection (“DEP”) has issued to the Buildings Department, as applicable, either a Notice to

Proceed as set forth in Paragraph 2(a), a Notice of Satisfaction as set forth in Paragraph 2(b) or a Final Notice of Satisfaction as set forth in Paragraph 2(c). Developer Declarant shall submit a copy of the Notice to Proceed, Notice of Satisfaction or Final Notice of Satisfaction to the Buildings Department at the time of filing of any application set forth in this Paragraph 2. No application for a temporary or permanent Certificate of Occupancy for the Proposed Development shall be submitted to or accepted from the Buildings Department by the Developer Declarant until DEP has issued to the Buildings Department, as applicable, either a Notice to Proceed as set forth in Paragraph 2(a), a Notice of Satisfaction as set forth in Paragraph 2(b) or a Final Notice of Satisfaction as set forth in Paragraph 2(c). Developer Declarant shall submit a copy of the Notice to Proceed, Notice of Satisfaction or Final Notice of Satisfaction to the Buildings Department at the time of filing of any application set forth in this Paragraph 2. Any submittals necessary under this Declaration from Developer Declarant to DEP shall be addressed to the Deputy Commissioner of the Bureau of Environmental Planning and Assessment of DEP, or such person as authorized by the Deputy Commissioner of DEP. The provisions of this Section 2 of this Declaration may be amended or modified by Developer Declarant only with the approval of DEP and DCP or the agencies succeeding to their jurisdictions and no other approval or consent shall be required from any other public body, private person or legal entity of any kind.

(a) Notice to Proceed - DEP shall issue a Notice to Proceed for the Proposed Building after it determines that: (i) the project specific Remedial Action Plan and Construction Health and Safety Plan have been approved by DEP and (ii) the permit(s) respecting the Development Site that permit grading, excavation, foundation, alteration, building or other permit respecting the Development Site which permits soil disturbance or

construction of the superstructure for the Proposed Development are necessary to further the implementation of the DEP approved Remedial Action Plan.

(b) Notice of Satisfaction - DEP shall issue a Notice of Satisfaction for the Proposed Building after the project specific Remedial Action Plan has been prepared and accepted by DEP and DEP has determined in writing that such Remedial Action Plan has been completed to the satisfaction of DEP.

(c) Final Notice of Satisfaction - DEP shall issue a Final Notice of Satisfaction for the Proposed Building after the project specific Remedial Action Plan has been prepared and accepted by DEP and DEP has set forth in writing, that such Remedial Action Plan has been completed to the satisfaction of DEP and all potential hazardous materials have been removed or remediated and no further hazardous remediation is required on the Development Site as determined by DEP.

3. Pursuant to the Special Permit, Developer Declarant has applied to the CPC to transfer unused development rights from the University Club Premises to the Subject Zoning Lot by means of a Transfer of Development Rights and Notice of Restrictions in the form annexed hereto as Exhibit J. A total of 136,000 square feet of development rights may be transferred from the Landmark Premises Zoning Lot.

4. MoMA Declarant, Trust Declarant, Museum Tower Condominium, St. Thomas Declarant, and AFAM Declarant may use or develop the Subject Zoning Lot, other than the Development Site, in any manner permitted by the Zoning Resolution and not inconsistent with the Special Permit or any other prior governmental approvals.

5. Declarant shall participate in a consultation process, as described below, if the Borough President for the Borough of Manhattan (the “Borough President”) shall hereafter elect to conduct such process. If a CRCP Committee (the “Committee”) is hereafter established by the Borough President, it shall consist of members appointed by the Borough President and the local Councilmembers. The Declarant shall designate an individual as a liaison (“Liaison”) to the Committee before the commencement of any construction work at the site. Upon request of the Committee, during the course of construction at the Development Site, the Liaison shall address the questions and concerns of the Committee about construction related issues, including but not limited to: scope of work covered by permit, street closures, hours of construction work, work hour variances, noise control, particulate/dust control, types of construction equipment to be used, cleanliness of work site, and protections for the public including pedestrians, nearby residents and surrounding buildings (“Construction Issues”). The Liaison and the Declarant shall, in good faith, work with the Committee and others, if necessary, to address Construction Issues and to resolve them, as appropriate, promptly. Declarant’s obligations hereunder shall expire when PCOs for all the floor area at the Development Site have been issued.

6. The “University Club Landmark Work” shall include that work described in the University Club CNE, the University Club LPC Report, and the University Club Maintenance Declaration, including, but not be limited to, window repair, certain roofing repair, and the addition of flashing and pointing, to bring the University Club Building to a sound, first-class condition. The issuance of the Special Permit is premised on, inter alia, the performance of the University Club Landmark Work in substantial conformity with the University Club CNE, the University Club LPC Report, the University Club Maintenance Declaration, and the requirements thereof.

7. The “St. Thomas Landmark Work” shall include that work described in the St. Thomas CNE, the St. Thomas LPC Report, and the St. Thomas Maintenance Declaration. Pursuant to the St. Thomas Maintenance Declaration, the “Phase I St. Thomas Landmark Work” shall include those portions of the St. Thomas Landmark Work consisting of the restoration of Windows C10 to C18 of the St. Thomas Building, repair of masonry surrounding Windows C10 to C18, repair of the damaged stonework on the façade of the Parish House portion of the St. Thomas Building, identified repairs to the roof, repairs to the roof drains, and removal of louvers and replacement with stone matching the surrounding material. Pursuant to the St. Thomas Maintenance Declaration, the “Phase II St. Thomas Landmark Work” shall include the portion of the St. Thomas Landmark Work consisting of restoration of Windows C1 to C9, T1 to T5, A1 to A6, W1 to W3, and the Rose Window of the St. Thomas Building, restoration of the leaded glass windows in the Parish House, repair of the wooden window and surrounding lintels of the first floor window of the parish house portion of the St. Thomas Building, courtyard paving replacement, and courtyard stair replacement, to, together with the Phase I St. Thomas Landmark Work, bring the St. Thomas Building to a sound, first-class condition. The issuance of the Special Permit is premised on, inter alia, the performance of the St. Thomas Landmark Work in substantial conformity with the St. Thomas CNE, the St. Thomas LPC Report, the St. Thomas Maintenance Declaration, and the requirements thereof.

8. “Landmark Owner” shall mean either the University Club or St. Thomas Church Declarant, as applicable.

9. (a) Developer Declarant shall give written notice to the Chairperson of the LPC seven (7) days prior to applying to the New York City Department of Buildings (the “Buildings Department”) for a temporary certificate of occupancy (“TCO”) or permanent

certificate of occupancy (“PCO”) either for floors _____ through _____ in the Proposed Development (the “University Club Reserved Space”), which floors contain a total of approximately 136,000 square feet of floor area, which is equal to the amount of floor area permitted to be transferred from the University Club Premises to the Subject Zoning Lot pursuant to the Special Permit. Developer Declarant shall give written notice to the Chairperson of the LPC seven (7) days prior to applying to the Buildings Department for a TCO or PCO either for floors _____ through _____ in the Proposed Development (the “St. Thomas Reserved Space,” and together with the University Club Reserved Space, the “Reserved Space”), which floors contain a total of approximately 116,271 square feet of floor area, which is equal to the amount of floor area permitted to be distributed on the Subject Zoning Lot without regard to zoning district boundaries pursuant to the Special Permit. No TCO or PCO for the University Club Reserved Space shall be granted by the Buildings Department or accepted by Developer Declarant until the Chairperson of the LPC shall have given written notice to the Buildings Department that the University Club Landmark Work has been satisfactorily completed by the University Club. No TCO or PCO for the St. Thomas Reserved Space shall be granted by the Buildings Department or accepted by Developer Declarant until the Chairperson of the LPC shall have given written notice to the Buildings Department that (a) the Phase I St. Thomas Landmark Work has been satisfactorily completed by St. Thomas Declarant, and (b) St. Thomas Declarant has submitted to the LPC (i) a satisfactory estimate of costs for the Phase II St. Thomas Landmark Work, and (ii) an executed escrow agreement, pursuant to which it has placed in escrow funds equal to 150 percent of the estimated cost of the Phase II St. Thomas Landmark Work (the “Phase II St. Thomas Landmark Work Conditions”). Developer Declarant may redesignate the location of the University Club Reserved Space and the St. Thomas Reserved

Space within the Proposed Development by written notice to the Chairperson of the CPC, and such redesignation shall become effective when the Chairperson of the CPC so notifies the Building Department in writing, provided, that any such redesignation of the University Club Reserved Space or the St. Thomas Reserved Space may not include partial floors.

(b) Notwithstanding the foregoing conditions on the issuance of TCOs and PCOs for the Reserved Space, a TCO or PCO for the Reserved Space may be granted by the Buildings Department and accepted by Developer Declarant if the Chairperson of the LPC has certified in writing, as provided in Section 7(a) hereof, that (a) a Force Majeure (as defined in Section 8 hereof) has occurred and (b) by reason of such Force Majeure, the Chairperson of the LPC has no objection to the issuance of such TCO or PCO. The Chairperson of the LPC shall issue said notice in the exercise of his or her reasonable judgment and reasonably promptly after a Landmark Owner has made written request to the Chairperson of the LPC and has provided documentation to support such request, and the Chairperson of the LPC shall in all events endeavor to issue such written notice to the Buildings Department, or inform such Landmark Owner in writing of the reason for not issuing said notice, within fourteen (14) calendar days after such Landmark Owner has requested such written notice. Upon receipt of the written notice from the Chairperson of the LPC that (i) the University Club Landmark Work has been satisfactorily completed or (ii) the Chairperson of the LPC has certified that a Force Majeure has occurred and that, by reason of such Force Majeure, the Chairperson of the LPC has no objection to the issuance of a TCO or PCO for the University Club Reserved Space, the Buildings Department may grant, and Developer Declarant may accept, a TCO or PCO for the University Club Reserved Space. Upon receipt of the written notice from the Chairperson of the LPC that (i) the Phase I St. Thomas Landmark Work has been satisfactorily completed and the Phase II St.

Thomas Landmark Work Conditions have been satisfied or (ii) the Chairperson of the LPC has certified that a Force Majeure has occurred and that, by reason of such Force Majeure, the Chairperson of the LPC has no objection to the issuance of a TCO or PCO for the St. Thomas Reserved Space, the Buildings Department may grant, and Developer Declarant may accept, a TCO or PCO for the St. Thomas Reserved Space. In the event that the Buildings Department shall grant to Developer Declarant, or Developer Declarant shall accept, a TCO or PCO in violation of the terms of this Declaration, Developer Declarant shall at the request of the Chairperson of the LPC immediately relinquish and forfeit such TCO or PCO. Notwithstanding anything to the contrary contained herein, the Chairperson of the LPC shall declare that the University Club Landmark Work and the Phase I St. Thomas Landmark Work have been satisfactorily completed notwithstanding that minor and insubstantial details of construction or mechanical adjustment remain to be performed.

(c) In the event that either Landmark Owner reasonably believes that the full performance of its obligations to complete the University Club Landmark Work or the Phase I St. Thomas Landmark Work, as applicable, or to satisfy the Phase II St. Thomas Landmark Work Conditions has been delayed as a result of a Force Majeure, such Landmark Owner shall so notify the Chairperson of the LPC as soon as such Landmark Owner learns of such circumstances. The written notice of such Landmark Owner shall include a description of the condition or event, its cause (if known to the Landmark Owner), its probable duration, and in the reasonable judgment of the Landmark Owner, the impact it is reasonably anticipated to have on the completion of the University Club Landmark Work, the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions, as the case may be. The Chairperson of the LPC shall, within fourteen (14) calendar days of its receipt of the

written notice of a Landmark Owner, (A) certify in writing that a Force Majeure has occurred, including a determination of the expected duration of such delay (the “Delay Notice”), and grant Developer Declarant appropriate relief for such delay, including certifying in writing to the Buildings Department that the Chairperson of the LPC has no objection to the issuance of a TCO or PCO for the Reserved Space, or (B) notify such Landmark Owner that it does not reasonably believe a Force Majeure has occurred. With respect to any claim that a Force Majeure has delayed a Landmark Owner’s performance or completion of the University Club Landmark Work, the Phase I St. Thomas Landmark Work, and/or satisfaction of the Phase II St. Thomas Landmark Work Conditions, as applicable, the LPC may require that such Landmark Owner post a bond or other security in a form and amount acceptable to the Chairperson of the LPC in order to ensure that the University Club Landmark Work or the Phase I St. Thomas Landmark Work is completed and/or that the Phase II St. Thomas Landmark Work Conditions are satisfied, as the case may be. Such alternative security could include, without limitation, alternative or additional conditions on the issuance of a PCO or TCO for the Reserved Space. Any delay caused as the result of a Force Majeure shall be deemed to continue only as long as such Landmark Owner shall be using reasonable efforts to minimize the effects thereof. Upon cessation of the events causing such delay, the applicable Landmark Owner shall promptly recommence the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions, as the case may be.

(d) Notwithstanding anything else to the contrary contained herein, this Declaration shall not be deemed to prohibit or restrict (i) Developer Declarant from applying for or receiving a “core and shell” TCO for the Reserved Space (which would not permit occupancy in the Reserved Space) or from entering into agreements affecting all or any portions of the

Proposed Development prior to completion of the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions, (ii) Developer Declarant and/or MoMA Declarant from applying for or receiving a TCO or PCO for any portion of the Proposed Development other than the Reserved Space prior to completion of the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions (iii) any of Developer Declarant, MoMA Declarant, Trust Declarant, Museum Tower Condominium, St. Thomas Declarant, or AFAM Declarant from obtaining permits from the Buildings Department to perform work in any improvements located on its premises within the Subject Zoning Lot prior to the completion of the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions, or from entering into agreements affecting all or any portion of the space in the improvements on its premises within on the Subject Zoning Lot prior to completion of the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions, or (iv) either Landmark Owner from obtaining permits from the Buildings Department to perform work in the University Club Building or the St. Thomas Building, as applicable, prior to the completion of the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions, or from entering into agreements affecting all or any portions of the space in the University Club Building or the St. Thomas Building, as applicable, prior to completion of the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions.

10. "Force Majeure" shall mean: strike, lockout or labor dispute(s); inability to obtain materials or reasonable substitutes on schedule, unless due to any act or failure to act by a Landmark Owner; acts of God; unforeseen governmental restrictions, regulations, omissions or controls; enemy or hostile government actions; civil commotion, insurrection, revolution or sabotage; fire or other casualty; inclement weather of such a nature as to make performance or completion of the University Club Landmark Work or the Phase I St. Thomas Landmark Work and/or the satisfaction of the Phase II St. Thomas Landmark Work Conditions not feasible unless due to any act or failure to act by a Landmark Owner; any damage to the University Club Building of such a nature as to make completion of the University Club Landmark Work not feasible; any damage to the St. Thomas Building of such a nature as to make completion of the Phase I St. Thomas Landmark Work and/or satisfaction of the Phase II St. Thomas Landmark Work Conditions not feasible; a taking of the University Club Premises or the St. Thomas Premises, or a portion thereof, by condemnation or eminent domain; failure of a public utility to provide power, heat or light; unusual delay in transportation; material delays by the City, State or United States Government, or any agency or instrumentality thereof, in the performance of any work or processing or approval of any applications required in order to permit the University Club to complete the University Club Landmark Work, unless due to any act or failure to act by the University Club, or to permit St. Thomas Church to complete the Phase I St. Thomas Landmark Work and/or satisfy the Phase II St. Thomas Landmark Work Conditions, unless due to any act or failure to act by St. Thomas Declarant; denial to a Landmark Owner by any owner of an enforceable interest in adjoining real property, including any private fee owner or ground lessee of adjoining real property, or any agency of the City or State having an enforceable interest in adjoining real property, including sidewalk or streets, of a right to access to such

adjoining real property, if such access is required to accomplish the obligations of such Landmark Owner to complete the University Club Landmark Work, the Phase I St. Thomas Landmark Work and/or satisfy the Phase II St. Thomas Landmark Work Conditions, as applicable; the pendency of a litigation not initiated by a Landmark Owner or similar proceeding which suspends or materially and adversely affects the ability of such Landmark Owner to complete the University Club Landmark Work, the Phase I St. Thomas Landmark Work and/or satisfy the Phase II St. Thomas Landmark Work Conditions; or other conditions similar in character to the foregoing which are beyond the control of the applicable Landmark Owner. No event shall constitute a Force Majeure unless the applicable Landmark Owner complies with the procedures set forth in Section 7 hereof. For purposes of Sections 8 and 9, "Landmark Owner" shall be deemed to include both Landmark Owners and Developer Declarant, and Developer Declarant shall have the right to act on behalf of either Landmark Owner in the event of Force Majeure.

EFFECT AND ENFORCEMENT

11. This Declaration shall become effective upon execution and recordation pursuant to the requirements of the resolutions and paragraph 12 hereof, which, pursuant to Section 9 of the resolution for C 090432 ZSM, is a prerequisite to exercise of the Special Permit.

12. Developer Declarant shall file and record at its sole cost and expense this Declaration in the Register's Office, indexing it against the Subject Zoning Lot, immediately after the Chairperson of CPC has issued a certification pursuant to Section 2 of the resolution for C 090432 ZSM. Developer Declarant shall promptly deliver to the CPC duplicate executed originals, and following recordation, true copies of this Declaration as recorded, as certified by the Register. If Developer Declarant fails to so record this Declaration, the City may record this

Declaration, at the sole cost and expense of Developer Declarant, who shall promptly pay to the City such costs together with fees for purchase of a reasonable number of certified copies of the recorded Declaration.

13. Declarants acknowledge that the City is an interested party to this Declaration, and consent to enforcement by the City, administratively or at law or equity, of the restrictions, covenants, easements, obligations and agreements contained herein. No person other than Declarants, the CPC or the City shall have any right to enforce the provisions of this Declaration. Declarants also acknowledge that the remedies set forth in this Declaration are not exclusive, and that the City and any agency thereof may pursue other remedies not specifically set forth herein including, but not limited to, the seeking of a mandatory injunction compelling a Declarant, its heirs, successors or assigns, to comply with any provision, whether major or minor, of this Declaration applicable to such Declarant.

14. (a) Before any agency, department, commission or other subdivision of the City of New York institutes any proceeding or proceedings to enforce the terms or conditions of this Declaration because of any violation hereof, it shall give each of the Declarants forty-five (45) days written notice of such alleged violation, during which period each Declarant shall have the opportunity to effect a cure of such alleged violation. If any of the Declarants commences to effect a cure during such forty-five (45) day period and proceeds diligently towards the effectuation of such cure, the aforesaid forty-five (45) day period shall be extended for so long as any of the Declarants continues to proceed diligently with the effectuation of such cure. The right to notice and cure provided in this subsection shall apply equally to all parties with a fee interest in the Subject Zoning Lot, or any part thereof, including ground lessees, provided the CPC has received notice by said parties in accordance with Section 26 hereof.

(b) If any Declarant fails to observe any of the terms or conditions of this Declaration applicable to such Declarant, and none of the Declarants cures such violation within the applicable grace period provided in Section 14(a) hereof, then prior to the institution by any agency or department of the City of any action, proceeding, or proceedings against any Declarant in connection with such failure, a mortgagee who has given written notice of its name and address to the CPC shall be given thirty (30) days written notice of such alleged violation, during which period such mortgagee shall have the opportunity to effect a cure of such alleged violation. If such mortgagee commences to effect a cure during such thirty (30) day period and proceeds diligently towards the effectuation of such cure, the aforesaid thirty (30) day period shall be extended for so long as such mortgagee continues to proceed diligently with the effectuation of such cure.

(c) If after due notice as set forth in this Section 14, none of the Declarants (or any mortgagee who has given written notice of its name and address to the CPC) cures such alleged violations, the City may exercise any and all of its rights, including those delineated in this Section and may disapprove any amendment, modification, or cancellation of this Declaration on the sole grounds that Declarants are in default of any material obligation under this Declaration.

15. Declarants acknowledge that the restrictions, covenants, easements, obligations and agreements in this Declaration, which are an integral part of the Special Permit, will protect the value and desirability of the Subject Zoning Lot as well as benefit the City of New York and all property owners within a one-half mile radius of the Subject Zoning Lot. Those restrictions, covenants, easements, obligations and agreements shall be covenants running

with the land, and shall bind Declarants and their respective successors, legal representatives, and assigns.

16. Developer Declarant, with respect to the Developer Premises and the Museum Tower Premises portions of the Subject Zoning Lot, MoMA Declarant, with respect to the MoMA Development Premises and the MoMA Premises portions of the Subject Zoning Lot, St. Thomas Declarant, with respect to the St. Thomas Premises portion of the Subject Zoning Lot, and AFAM, with respect to the AFAM Premises portion of the Subject Zoning Lot, each represents and warrants, solely in reliance on the parties-in-interest certificate annexed hereto as Exhibit F and other title examinations that such party has received from a title company in respect of the applicable property, that there are no enforceable restrictions of record on the use of the Subject Zoning Lot, nor any present or presently existing future estate or interests in the Subject Zoning Lot, nor any lien, obligation, enforceable covenant, limitation or encumbrance of any kind, the requirements of which have not been waived or subordinated, which prevents or precludes, directly or indirectly, presently or potentially, the imposition on the Subject Zoning Lot of the restrictions, covenants, easements and obligations of this Declaration. MoMA Declarant hereby subordinates its interest in the Trust Premises pursuant to the Trust Leases to this Declaration, and, in accordance with the Trust Leases, requests Trust Declarant to enter into this Declaration.

17. This Declaration shall be governed by and construed in accordance with the laws of the State of New York.

18. In the event that any provision of this Declaration shall be deemed, decreed, adjudged or determined to be invalid or unlawful by a court of competent jurisdiction and the judgment of such court shall be upheld on final appeal, or the time for further review of

such judgment on appeal or by other proceeding has lapsed, such provision shall be severable, and the remainder of this Declaration shall continue to be of full force and effect.

19. Declarants covenant to include a copy of this Declaration as part of any application submitted to the CPC, Buildings Department, Board of Standards and Appeals (“BSA”), New York State Attorney General (in the event of a proposed conversion of the Proposed Development) or any agency succeeding to their respective jurisdictions. The restrictions and obligations contained herein are a condition of any permit or Certificate of Occupancy to be issued by the Buildings Department, and Developer Declarant with respect to the Development Site, MoMA Declarant with respect to the MoMA Premises, St. Thomas Declarant with respect to the St. Thomas Premises, and AFAM Declarant with respect to the AFAM Premises, will take all reasonable steps to ensure that any such permit or Certificate of Occupancy includes a reference to this Declaration. Failure to carry out an obligation of this Declaration beyond any applicable grace period shall constitute sufficient cause for the Commissioner of the Buildings Department to revoke any building permit issued pursuant to the Special Permit or to apply to the BSA or to a court of competent jurisdiction for revocation of a Certificate of Occupancy or any permit issued by the Buildings Department.

20. (a) Each Declarant shall be liable in the performance of any term, provision or covenant in this Declaration applicable to it. Notwithstanding anything to the contrary contained in this Declaration, the City and any other party or person relying on this Declaration shall look solely to the fee estate and interest of (i) any then-existing Declarant in the Development Site; (ii) the then-existing MoMA Declarant in the MoMA Premises; (iii) the then-existing Trust Declarant in the Trust Premises; (iv) the then-existing St. Thomas Declarant in the St. Thomas Premises; (v) the then-existing AFAM Declarant in the AFAM Premises; or (vi) the

Museum Tower Condominium in the Museum Tower Premises, on an in rem basis only, for the enforcement of any remedy based upon any breach by such Declarant under this Declaration, and no other property of a Declarant or its principals, disclosed or undisclosed, direct or indirect partners, shareholders, directors, officers, members, managers or employees shall be subject to levy, execution or other enforcement procedure for the satisfaction of the remedies of the City under or with respect to this Declaration, and no such party shall have any personal liability under this Declaration. Notwithstanding the foregoing, nothing herein shall be deemed to preclude, qualify, limit or prevent any of the City's governmental rights, powers or remedies, including, without limitation, with respect to the satisfaction of the remedies of the City, under any laws, statutes, codes or ordinances.

(b) The restrictions, covenants and agreements of each Declarant set forth in this Declaration shall be binding upon such Declarant and Museum Tower Condominium and any successors-in-interest thereto only for the period during which such party is the holder of a fee interest in or is a party-in-interest of the Subject Zoning Lot and only to the extent of such fee interest or the interest rendering such party a party-in-interest. At such time as any of Developer Declarant, MoMA Declarant, Trust Declarant, St. Thomas Declarant, AFAM Declarant, or Museum Tower Condominium has no further fee interest in the Subject Zoning Lot and is no longer a party-in-interest of the Subject Zoning Lot, such party's obligations and liability with respect to this Declaration shall wholly cease and terminate from and after the conveyance of such party's interest and such party's successors-in-interest in the Subject Zoning Lot by acceptance of such conveyance automatically shall be deemed to assume such party's obligations and liabilities hereunder to the extent of such successor-in-interest's interest.

21. Developer Declarant with respect to the Development Site, MoMA Declarant with respect to the MoMA Premises, St. Thomas Declarant with respect to the St. Thomas Premises, and AFAM Declarant with respect to the AFAM Premises, shall cause every individual, business organization or other entity that between the date hereof and the date of recordation of this Declaration becomes a Party-in-Interest to the Subject Zoning Lot, to execute this Declaration or to consent to the Declaration and waive its right to execution. Any mortgage or other lien encumbering all or any portion of the Subject Zoning Lot after the recording date of this Declaration shall be subject hereto.

22. Nothing contained herein shall be construed as requiring the consent of the CPC, the City, any agency thereof or any other person or entity to any sale, transfer, conveyance, mortgage, pledge, lease or assignment of any interest in or any encumbrance on or affecting all or any portion of the Subject Zoning Lot.

23. If the Special Permit is at any time declared invalid or is otherwise voided by final judgment of any court of competent jurisdiction from which no appeal can be taken or for which no appeal has been taken within the applicable statutory period provided for such appeal, then, upon entry of said judgment or the expiration of the applicable statutory period for such entry, as the case may be, this Declaration shall be automatically canceled without further action by Declarants and shall be of no further force or effect and the CPC shall, if requested by any Declarant, provide such Declarant with a letter in recordable form stating that the Declaration has been so canceled and is of no further force and effect.

AMENDMENTS, MODIFICATIONS AND CANCELLATIONS

24. Except as provided in Sections 2, 14, and 23 above, this Declaration may be amended or canceled only upon application by a Declarant, each with the consent of the other,

and only with the express written approval of the CPC and of the New York City Council, but only in the event that the City Council reviewed the Special Permit pursuant to Section 197-d, and no other approval or consent shall be required from any public body, private person or legal entity of any kind; provided, however, that no such approval shall be required in the case of any cancellation pursuant to Section 14 or 23.

25. Notwithstanding the provisions of Sections 11 and 23, in the event that Developer Declarant does not undertake the Proposed Development pursuant to the Special Permit, Developer Declarant may surrender the Special Permit to the CPC and Developer Declarant and the other Declarants may proceed with any use or development of the Subject Zoning Lot permitted by the Zoning Resolution as if such Special Permit had not been granted. This Declaration shall be rendered null and void upon recordation of an instrument executed by each Declarant discharging it of record, with copies to LPC and CPC, the recordation of which instrument shall constitute a waiver of the right to use the Subject Zoning Lot pursuant to the Special Permit.

26. Notwithstanding the provisions of Section 23, the Chairperson of the CPC may, by express written consent, administratively approve modifications to the Declaration that the CPC has determined to be minor. Such minor modifications shall not be deemed amendments requiring the approval of the CPC, the City Council or any other agency or department of the City of New York.

27. Any modification, amendment or cancellation of this Declaration, except pursuant to Section 11 or 23, shall be executed and recorded in the same manner as this Declaration. Following any modification, amendment or cancellation, each Declarant shall immediately record such modification, amendment, or cancellation against its Premises, and

Developer Declarant shall provide one executed and certified true copy thereof to the CPC, and upon failure to so record, permit its recording by the CPC at the cost and expense of Developer Declarant.

MISCELLANEOUS

28. All notices, demands, requests, consents, waivers, approvals and other communications which may be or are permitted, desirable or required to be given, served or deemed to have been given or sent hereunder shall be in writing and shall be sent, (a) if intended for Developer Declarant, to W2005/Hines West Fifty-Third Realty, LLC, c/o Hines Interests Limited Partnership, 885 Third Avenue, New York, New York 10022, with copies to Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Samuel H. Lindenbaum, Esq., and Proskauer Rose LLP, 1585 Broadway, New York, New York 10036, Attn: Ronald D. Sernau, Esq. (b) if intended for MoMA Declarant, to The Museum of Modern Art, 11 West 53rd Street, New York, New York 10019, Attn: General Counsel, with a copy to Chief Operating Officer (c) if intended for Trust Declarant, to The Trust for Cultural Resources of the City of New York, c/o the New York City Economic Development Corporation, 110 William Street, New York, New York 10038, with a copy to The Trust for Cultural Resources of The City of New York, c/o Butzel Long, 380 Madison Avenue, 22nd Floor, New York, New York 10017, Attn: Donald H. Elliott, Esq. (d) if intended for St. Thomas Declarant, to St. Thomas Church in the City and County of New York, 678 Fifth Avenue, New York, New York 10019, with a copy to _____ (e) if intended for AFAM Declarant, to _____, with a copy to _____ (f) if intended for the Museum Tower Condominium, to _____, with a copy to _____ (g) if intended for the CPC, to the CPC at 22 Reade Street, New York, New York 10007 (or then-official address),

Attn: Chairperson, (h) if intended for the LPC, to the LPC at One Centre Street, Municipal Building, New York, New York 10007 (or then-official address), Attn: Chairperson and (i) if intended for the City Council, to the City Council at the Office of the Speaker, City Council, City Hall, New York, New York 10007. Each Declarant, Museum Tower Condominium, or their representatives, by notice given as provided in this Section, may change any address for the purposes of this Declaration. Each notice, demand, request, consent, approval or other communication shall be either sent by registered or certified mail, postage prepaid, or delivered by hand, and shall be deemed sufficiently given, served or sent for all purposes hereunder five (5) business days after it shall be mailed, or, if delivered by hand, when actually received.

29. Provided that any Declarant is found by a court of competent jurisdiction to have been in default in the performance of its respective obligations under this Declaration after having received written notice of such default and opportunity to cure as provided above, and such finding is upheld on final appeal, or the time for further review of such finding on appeal or by other proceeding has lapsed, subject to the terms hereof, such Declarant (a) shall indemnify and hold harmless the City from and against all of its reasonable legal and administrative expenses arising out of or in connection with the City's enforcement of such obligations under this Declaration, and (b) shall indemnify and hold harmless each of the other Declarants against any such expenses owed to the City as a result of the indemnifying Declarant's default.

30. This Declaration may be executed in one or more counterparts, each of which when so executed and delivered shall be deemed an original, but all of which taken together shall be construed as and shall constitute but one and the same instrument.

IN WITNESS WHEREOF, Developer Declarant, MoMA Declarant, Trust

Declarant, St. Thomas Declarant, and AFAM Declarant have executed this Declaration as of the date set forth above.

W2005 / HINES WEST FIFTY-THIRD REALTY,
LLC

By: _____
Name:
Title:

MUSEUM OF MODERN ART

By: _____
Name:
Title:

THE TRUST FOR CULTURAL RESOURCES OF
THE CITY OF NEW YORK

By: _____
Name:
Title:

ST. THOMAS CHURCH

By: _____
Name:
Title:

AMERICAN FOLK ART MUSEUM

By: _____
Name:

Title:

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

On the ____ day of _____ in the year 20__ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

SCHEDULE OF EXHIBITS

<u>Exhibit A</u>	Metes and Bounds of Development Site
<u>Exhibit B</u>	Metes and Bounds of MoMA Premises
<u>Exhibit C</u>	Metes and Bounds of St. Thomas Premises
<u>Exhibit D</u>	Metes and Bounds of AFAM Premises
<u>Exhibit E</u>	Museum Tower Premises
<u>Exhibit F</u>	Certificate as to Parties in Interest
<u>Exhibit G</u>	Plans
<u>Exhibit H</u>	University Club CNE and LPC Report
<u>Exhibit I</u>	St. Thomas CNE and LPC Report
<u>Exhibit J</u>	Transfer of Development Rights and Notice of Restrictions

EXHIBIT D

1 WEST 54TH STREET
(The University Club)

DECLARATION

Dated: _____, 200__

Location: Block 1270, Lot 34
New York County, New York

Record & Return to:

Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036
Attn: Samuel H. Lindenbaum, Esq.

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SCHEDULE OF EXHIBITS

DECLARATION made as of the ____ day of _____, 200__ by THE UNIVERSITY CLUB, INC., a New York not-for-profit corporation having an address 1 West 54th Street, New York, New York, 10019 (“Landmark Owner”).

W I T N E S S E T H:

WHEREAS, Landmark Owner is the owner in fee simple of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1270, Lot 34 on the Tax Map of the City of New York and by the street address 1 West 54th Street, and is more particularly described on Exhibit A attached hereto (the “Landmark Premises”) and on which is located a 10-story building (the “Designated Structure”); and

WHEREAS, pursuant to the provisions of Section 3020 of the New York City Charter and Title 25, Chapter 3 of the Administrative Code of the City of New York (the “Landmark Preservation Law”), the Landmarks Preservation Commission (the “LPC”) has designated the Designated Structure as a designated landmark because of its special character or historical or aesthetic interest or value; and

WHEREAS, _____ (“Title Company”) has certified as of _____, 200__, that Landmark Owner and _____ are the sole parties in interest (“Parties in Interest”) to the Landmark Premises, a copy of which certification is attached hereto as Exhibit B; and

WHEREAS, _____ has executed an instrument waiving its right to execute, and subordinating the lien of its interest in the Subject Premises to, this Declaration, a copy of which instrument is attached as Exhibit C hereto; and

WHEREAS, as of the date hereof, Title Company has determined there has been no change in the certification attached as Exhibit B, and Landmark Owner represents and warrants that the

Parties in Interest listed in Exhibit B are the only known Parties in Interest in the Landmark Premises as of the date hereof; and

WHEREAS, W2005/Hines West Fifty-Third Realty, LLC ("Developer") and the Museum of Modern Art are the fee owners of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lots 5, 6, 7, 8, 66, and 69 on the Tax Map of the City of New York and by the street address 53 West 53rd Street (the "Developer Premises"), on which Developer proposes to develop a new 83-story mixed use (residential, commercial, and community facility) building (the "Proposed Development"); and

WHEREAS, the Developer Premises, certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lot 30 on the Tax Map of the City of New York and by the street address 678 Fifth Avenue, and the property designated as Block 1269, Lots 11, 12, 13, 14, 20, 58, and 165 on the Tax Map of the City of New York and by the street address 21-43 West 53rd Street and 26-42 West 54th Street, constitute a single zoning lot (the "Developer Premises Zoning Lot"); and

WHEREAS, the Developer Premises Zoning Lot constitutes an "adjacent lot", as defined in Section 74-79 of the Zoning Resolution, with respect to the Landmark Premises Zoning Lot in that it is across the street and opposite to the Landmark Premises Zoning Lot; and

WHEREAS, Zoning Resolution Section 74-79 provides that the City Planning Commission (the "CPC") may permit development rights to be transferred to adjacent lots from lots occupied by landmark buildings or other structures and may permit the maximum permitted floor area on such adjacent lot to be increased on the basis of such transfer of development rights; and

WHEREAS, consistent with the requirements of Section 74-79 of the Zoning Resolution, Landmark Owner has proposed to perform certain restoration work on the Designated Structure, as

described in the CNE (as hereinafter defined), and has agreed to establish a program for continuing maintenance that will result in preservation of the Designated Structure; and

WHEREAS, pursuant to Application No. C090431ZSM (the “Application”), Developer and Landmark Owner applied to the City Planning Commission of the City of New York (the “CPC”) for a special permit pursuant to Section 74-79 of the Zoning Resolution (the “Special Permit”) to permit 136,000 square feet of unused development rights to be transferred from the Landmark Premises Zoning Lot to the Developer Premises Zoning Lot, in connection with the Proposed Development, and to permit the maximum permitted floor area on the Developer Premises Zoning Lot to be increased on the basis of such transfer of development rights; and

WHEREAS, at a public hearing held on April 8, 2008, Developer and Landmark Owner requested that the LPC issue a report to the CPC in connection with the Application; and

WHEREAS, the LPC, at the public meeting held on May 13, 2008, voted to issue the report to the CPC as requested in connection with the Application, and subsequently issued report MOU 09-5602, dated November 28, , 2008 (the "LPC Report"); and

WHEREAS, the LPC issued Certificate of No Effect 09-5601, dated November 28, 2008 (the “CNE”), for the restoration work on the Designated Structure proposed by Landmark Owner (such restoration work, as described in the CNE, the "Landmark Work"). Copies of the LPC Report and the CNE are annexed hereto as Exhibit D; and

WHEREAS, Section 74-791 requires, inter alia, that a program has been established for continuing maintenance (the “Continuing Maintenance Program”) that will result in preservation of the Designated Structure by Landmark Owner; and

WHEREAS, Landmark Owner has agreed to place five percent of the proceeds received from the sale to the Developer of approximately 136,000 square feet of unused development rights into a dedicated fund to be used to maintain the Designated Structure as required under this declaration; and

WHEREAS, Landmark Owner has agreed to certain obligations and restrictions contained in this Declaration for the protection, preservation, repair and maintenance of the Designated Structure; and

WHEREAS, Landmark Owner desires to restrict the manner in which the Landmark Premises may be developed, restored, and operated in order to assure the protection, preservation, repair and maintenance of the Designated Structure; and

WHEREAS, Landmark Owner represents and warrants that, to the best of its knowledge and belief, there are no restrictions, liens, obligations, covenants, easements, limitations or encumbrances of any kind, the requirements of which have not been waived or subordinated, which would prevent or preclude, presently or potentially, the imposition of the restrictions, covenants, obligations, easements and agreements of this Declaration.

NOW, THEREFORE, Landmark Owner does hereby declare and agree that the Landmark Premises shall be held, sold, transferred, conveyed and occupied subject to the following restrictions, covenants, obligations, easements, and agreements, all of which are for the purpose of protecting the Landmark Premises, which shall inure to the benefit of the City of New York, and which shall run with the Landmark Premises and bind Landmark Owner and its heirs, successors and assigns so long as they have a right, title or interest in the Landmark Premises or any part thereof.

ARTICLE I

DEFINITIONS

The following words, when used in this Declaration, shall have the following meanings:

- 1.1 “Application” shall mean the application to the City Planning Commission for the Special Permit.
- 1.2 “Buildings Department” shall mean the New York City Department of Buildings, or any successor to the jurisdiction thereof.
- 1.3 “Chairperson of the CPC” shall mean the Chairperson of the City Planning Commission of the City of New York or any successor to the jurisdiction thereof.
- 1.4 “Chairperson of the LPC” shall mean the Chairperson of the Landmarks Preservation Commission of the City of New York or any successor to the jurisdiction thereof.
- 1.5 “City” shall mean the City of New York.
- 1.6 “City Council” shall mean the New York City Council or any successor to the jurisdiction thereof.
- 1.7 “CPC” shall mean the New York City Planning Commission, or any successor to the jurisdiction thereof.
- 1.8 “DCP” shall mean the New York City Department of City Planning or any successor to the jurisdiction thereof.
- 1.9 “Designated Structure” shall mean the 10-story University Club building located on the Landmark Premises.
- 1.10 “Effective Date” is defined in Section 4.1(a) hereof.
- 1.11 “Force Majeure” shall mean: strike, lockout or labor dispute(s); inability to obtain materials or reasonable substitutes therefore unless due to any act or failure to act by Landmark

Owner; acts of God; unforeseen governmental restrictions, regulations, omissions or controls; enemy or hostile government actions; civil commotion, insurrection, revolution or sabotage; fire or other casualty; inclement weather of such a nature as to make performance or completion of the Landmark Work not feasible; any damage to the Landmark Premises of such a nature as to make completion of the Landmark Work not feasible; a taking of the Landmark Premises, or a portion thereof, by condemnation or eminent domain; failure of a public utility to provide power, heat or light; unusual delay in transportation; material delays by the City, State or United States Government, or any agency or instrumentality thereof, in the performance of any work or processing or approval of any applications required in order to permit Landmark Owner to carry out its obligations pursuant to this Declaration; denial to Landmark Owner by any owner of an enforceable interest in adjoining real property, including any private fee owner or ground lessee of adjoining real property, or any agency of the City or State having an enforceable interest in adjoining real property, including sidewalk or streets, of a right to access such adjoining real property, if such access is required to accomplish the obligations of the Landmark Owner pursuant to this Declaration; the pendency of a litigation or similar proceeding not initiated by Landmark Owner, which suspends or materially and adversely affects the ability of the Landmark Owner to accomplish the obligations of the Landmark Owner pursuant to this Declaration; or other conditions similar in character to the foregoing which are beyond the control of Landmark Owner. No event shall constitute a Force Majeure unless Landmark Owner complies with the procedures set forth in Sections 2.3 and 6.2 hereof.

1.12 “Landmark Owner” shall mean the named Landmark Owner and the heirs, successors and assigns of the named Landmark Owner including, without limitation, any owner of a condominium unit within the Designated Structure, except that Landmark Owner shall not be

deemed to include (i) a mortgagee of all or any portion of the Landmark Premises until it succeeds to the interest or obligation of Landmark Owner by purchase, assignment, foreclosure or otherwise, or (ii) a tenant of the Landmark Premises, unless such tenant holds a lease to all or substantially all of the Landmark Premises.

1.13 “Landmark Work” is defined in Section 2.1 hereof.

1.14 “LPC” shall mean the Landmarks Preservation Commission of New York City or any successor to the jurisdiction thereof.

1.15 “Mortgagee” shall mean (a) the institutional first mortgagee of all or substantially all of the Landmark Premises listed in Exhibit B or (b) the first mortgagee of a condominium unit within the Designated Structure.

1.16 “Party(ies) in Interest” shall mean any party-in-interest listed in Exhibit B and any other party-in-interest to the Landmark Premises who has given written notice of its name and address to the CPC and the LPC.

1.17 “PCO” is defined in Section 2.2 hereof.

1.18 “Special Permit” is defined in the Whereas clauses set forth above.

1.19 “Special Permit Space” shall mean floors [X] through [X] in the Proposed Development. Notwithstanding the foregoing, no space shall be deemed Special Permit Space if it is permitted as of right within the Proposed Development by the terms of the Zoning Resolution then in effect.

1.20 “TCO” is defined in Section 2.2 hereof.

1.21 “Zoning Resolution” shall mean the Zoning Resolution of the City of New York.

ARTICLE II

DEVELOPMENT, PRESERVATION, REPAIR AND MAINTENANCE OF THE DESIGNATED STRUCTURE

2.1 Landmark Work. The "Landmark Work" shall consist of the work described in the CNE, performed as necessary to restore the Designated Structure to a sound, first-class condition. The issuance of the Special Permit is premised on, inter alia, the performance of the Landmark Work in conformity with the CNE, the LPC Report, and the requirements thereof.

2.2 Certificate of Occupancy. Written notice that the Developer is seeking a temporary certificate of occupancy ("TCO") or a permanent certificate of occupancy ("PCO") for the Special Permit Space shall be provided to the LPC seven days prior to the Developer applying for a TCO or PCO, as applicable. Subject to Section 2.2(b) hereof, no TCO or PCO for the Special Permit Space shall be granted by the Buildings Department or accepted by Developer until the Chairperson of the LPC shall have given written notice to the Buildings Department that the Landmark Work has been satisfactorily completed by Landmark Owner. The Chairperson of the LPC shall issue said notice reasonably promptly after Landmark Owner has made written request to the Chairperson of the LPC and has provided documentation to support such request, and the Chairperson of the LPC shall in all events issue such written notice to the Buildings Department, or inform Landmark Owner in writing of the reason for not issuing said notice, within fourteen (14) calendar days after Landmark Owner has requested such written notice. Upon receipt of the written notice from the Chairperson of the LPC that the Landmark Work has been satisfactorily completed, the Buildings Department may grant, and Developer may accept, a TCO or PCO, as applicable, for all or part of the Special Permit Space. Notwithstanding anything to the contrary contained herein, the Chairperson of the LPC shall

declare that the Landmark Work has been satisfactorily completed notwithstanding that minor and insubstantial details of construction or mechanical adjustment remain to be performed.

(a) Landmark Owner shall permit inspection of the Designated Structure by the Chairperson of the LPC and representatives designated by the Chairperson of the LPC, at reasonable times and upon provision of reasonable notice to Landmark Owner, in connection with the notice described in Section 2.2 hereof.

(b) (i) Upon application by Landmark Owner, notwithstanding anything contained in any other provision of this Declaration, the Chairperson of the LPC, in the exercise of his or her reasonable judgment, may certify that the performance or completion of the Landmark Work has been delayed due to a Force Majeure as provided in subsection (ii) below.

(ii) In the event that Landmark Owner reasonably believes that Landmark Owner's full performance of its obligations to complete the Landmark Work has been delayed as a result of a Force Majeure, Landmark Owner shall so notify the Chairperson of the LPC as soon as Landmark Owner learns of such circumstances. The written notice of Landmark Owner shall include a description of the condition or event, its cause (if known to Landmark Owner), its probable duration, and in the reasonable judgment of Landmark Owner, the impact it is reasonably anticipated to have on the completion of the Landmark Work. The Chairperson of the LPC shall, within fourteen (14) calendar days of its receipt of the written notice of Landmark Owner, (A) certify in writing that a Force Majeure has occurred, including a determination of the expected duration of such delay (the "Delay Notice"), and grant Developer appropriate relief for such delay, including certifying in writing to the Buildings Department that the Chairperson of the LPC has no objection to the issuance of a TCO or PCO, as applicable, for all or part of the Special Permit Space, or (B) notify Landmark Owner that it does not reasonably believe a Force Majeure has occurred. With

respect to any claim that a Force Majeure has delayed the Landmark Owner's performance or completion of the Landmark Work, the LPC may require that Landmark Owner post a bond or other security in a form and amount acceptable to the Chairperson of the LPC in order to ensure that the Landmark Work is completed. Such alternative security could include, without limitation, alternative or additional conditions on the issuance of any PCO or TCO for the Special Permit Space. Any delay caused as the result of a Force Majeure shall be deemed to continue only as long as the Landmark Owner shall be using reasonable efforts to minimize the effects thereof. Upon cessation of the events causing such delay, the Landmark Owner shall promptly recommence the Landmark Work.

(c) Notwithstanding anything else to the contrary contained herein, this Declaration shall not be deemed to prohibit or restrict (i) Developer or the owner of any other portion of the Developer Premises Zoning Lot from applying for or receiving a "core and shell" TCO or a TCO or PCO for any floor area in the Proposed Development or on the Developer Premises Zoning Lot which is not Special Permit Space or from entering into agreements affecting all or any portions of the Proposed Development, including the Special Permit Space, or the Developer Premises Zoning Lot prior to completion of the Landmark Work, or (ii) Landmark Owner or the owner of any other portion of the Landmark Premises Zoning Lot from obtaining permits or building notices from the Buildings Department to perform work, including tenant work, in the Designated Structure or on the Landmark Premises Zoning Lot prior to the completion of the Landmark Work, or from entering into agreements affecting all or any portions of the Designated Structure or the Landmark Premises Zoning Lot prior to completion of the Landmark Work.

2.3 Preservation, Repair and Maintenance. Landmark Owner hereby covenants and agrees to preserve, repair and maintain the Designated Structure in sound first-class condition, at its

own cost and expense, in accordance with this Declaration, the CNE, the LPC Report, and the Landmarks Preservation Law. It is understood that certain obligations and duties set forth in this Declaration are above and beyond the requirements of the Landmarks Preservation Law and do not in any way diminish Landmark Owner's obligation and responsibility to comply with all provisions of the Landmarks Preservation Law.

2.4 Continuing Maintenance Program. Landmark Owner shall comply with the obligations and restrictions of the continuing maintenance program (the "Continuing Maintenance Program") as set forth below. Landmark Owner has agreed to place five percent of the proceeds received from the sale to the Developer of approximately 136,000 square feet of unused development rights into a dedicated fund. This fund shall only be used for meeting the continuing maintenance obligations required under this declaration in that the funds shall be used for physical repairs to the exterior of the Designated Structure as required to maintain the landmark in a sound, first-class condition. Interest accrued on the monies in the fund shall be placed into the fund.

(a) Periodic Inspections. Landmark Owner shall establish and carry out a cyclical inspection and maintenance program for the Designated Structure which shall include, without limitation, the following:

(i) At Landmark Owner's expense, an inspection (the "Periodic Inspection") shall be made every five years. The first Periodic Inspection shall be made on or within two months of the fifth anniversary of the issuance by the LPC of the Notice of Compliance pursuant to the LPC Report, and, thereafter, Periodic Inspections shall be made every five years on or within two months of the anniversary of the date of such initial or subsequent inspection. In the event that Developer has accepted a TCO or PCO for all or part of the Special Permit Space without Landmark Owner having first received the Notice of Compliance, the first periodic inspection shall be made on or

within two months of the fifth anniversary date of the issuance of such TCO or PCO. The Periodic Inspection shall be done by a preservation architect, engineer or other qualified person knowledgeable about the preservation of historic structures (the “Preservation Architect”) selected by Landmark Owner from a list prepared by Landmark Owner and approved by the Chairperson of the LPC as to their credentials, which approval shall not be unreasonably withheld or delayed. Landmark Owner shall update such listing upon the request of the Chairperson of the LPC. In addition, Landmark Owner may periodically supplement the list of Preservation Architects, subject to the reasonable approval of the Chairperson of the LPC as to their credentials. The Preservation Architect shall make a thorough inspection of the exterior of the Designated Structure and those portions of the interior, which, if not properly maintained, could affect the condition of the exterior, including, but not limited to interior systems such as heating, plumbing and air conditioning. The Periodic Inspection shall include (but not be limited to) the following portions of the exterior: **Structure** including: roof spandrel beams, envelope columns and upper spandrel beams, outrigger supports, sidewalk spandrel beams and Main Entrance stair support beams, and window lintels, **Masonry** including: brick, marble, limestone, granite, terra cotta, Guastavino tile vaulting, and stucco, **Balcony Rails** including the 7th and 4th floor cast and extruded bronze ornamental balcony rails and 3rd floor extruded bronze balcony rails, **Roofing** including: the membrane roofing, sheet metal flashing, gutters and downspouts, and roof accessories, **Windows, Doors, Flagpoles** and **Canopies**.

(ii) The Preservation Architect shall, at the expense of Landmark Owner, submit a report on each Periodic Inspection (the “Periodic Report”) to Landmark Owner and the LPC within 45 days after each Periodic Inspection. The Periodic Report shall outline the existing conditions of the Designated Structure and detail the work which should be performed in order to maintain the

Designated Structure, including all architectural features and elements, in a sound first-class condition, including but not limited to: **Structure** including: roof spandrel beams, envelope columns and upper spandrel beams, outrigger supports, sidewalk spandrel beams and Main Entrance stair support beams, and window lintels, **Masonry** including: brick, marble, limestone, granite, terra cotta, Guastavino tile vaulting, and stucco, **Balcony Rails** including the 7th and 4th floor cast and extruded bronze ornamental balcony rails and 3rd floor extruded bronze balcony rails, **Roofing** including: the membrane roofing, sheet metal flashing, gutters and downspouts, and roof accessories, **Windows, Doors, Flagpoles and Canopies**.

(iii) Submission of Local Law 10 & 11 Facade Inspection Report. If the Designated Structure is subject to the Facade Inspection Report requirements of Title 1 RCNY §32-03 et seq., a copy of any such Facade Inspection Report which is submitted to the New York City Department of Buildings, shall also be provided at the same time to the Landmarks Preservation Commission. In the event that the building is found to be unsafe pursuant to such inspection, the Landmark Owner shall notify the Landmarks Preservation Commission simultaneously with the Department of Buildings, pursuant to Title 1 RCNY §32-03(b)(2)(vii).

(iv) Except as set forth below, Landmark Owner shall perform all work which a Periodic Report, Facade Inspection Report or Emergency Incident Report (as defined below) identifies as necessary to maintain the Designated Structure, including architectural features and elements, in sound first-class condition. No work shall be performed except pursuant to a permit from the LPC if a permit is required under the Landmarks Preservation Law. If the LPC determines that a specific item of work or method of work as set forth in a Periodic Report, Facade Inspection Report or Emergency Incident Report would be inappropriate or inadequate, the determination of the LPC shall control and Landmark Owner need not and shall not have such specific item performed.

Landmark Owner shall have the right to contest in a hearing before the LPC any work called for in a Periodic Report or Emergency Incident Report. Landmark Owner's obligation to perform such contested work or to perform it by a method acceptable to the LPC shall be stayed pending a decision in any such proceeding at the LPC. Landmark Owner shall proceed with all work that is uncontested during the stay pursuant to a permit.

(v) Unless Landmark Owner has notified the LPC in writing that it contests any work as set forth in the preceding subsection, Landmark Owner shall apply for all necessary permits or certificates from the LPC within 45 days of receiving the completed report from the Preservation Architect. Landmark Owner shall use its best efforts to assure that all repairs, rehabilitation, repointing, and restoration work detailed in the Periodic Report or Emergency Incident Report shall be completed at the earliest possible date, but no later than within nine months of the date of issue of the certificate or permit from the LPC, or, if no such certificate or permit is required, within nine months of the date of the Periodic Report or Emergency Incident Report. If for reasons beyond Landmark Owner's control, as determined by the Chairperson of the LPC, in the exercise of his or her reasonable judgment, such work cannot be completed within nine months, Landmark Owner shall apply to the LPC for an extension of time within which to complete such work. Such extensions shall be for a stated additional period of time to be related to the period of delay and shall not be unreasonably withheld.

(b) Emergency Protection Program. Landmark Owner shall establish and be prepared to carry out an emergency protection program for the Designated Structure which shall include at the minimum, the following:

(i) If a fire, the elements or any other cause whatsoever damages or destroys the Designated Structure or any part thereof (the "Emergency Incident"), Landmark Owner shall use all

reasonable means to save, protect and preserve the Designated Structure at the time of and following the Emergency Incident, including, but not limited to, acting with an approval from the Chairperson of the LPC or his or her designated representatives to stabilize and prevent further damage to or deterioration of the structure, and to secure the Landmark Premises from unauthorized access.

Landmark Owner shall not remove from the Landmark Premises any debris consisting of exterior features of the Designated Structure without an approval from the Chairperson of the LPC or his or her designated representative. Unless necessitated as a safety precaution as ordered by the Departments of Buildings, Health, Fire or Police, or as an action taken in response to a life-threatening situation, the Landmark Owner shall not remove any other debris or otherwise clear the Landmark Premises without the approval of the LPC or its Chairperson.

(ii) Landmark Owner shall give immediate written notice of such Emergency Incident to the LPC. Landmark Owner shall also give timely notice to the LPC of the time or times when the New York City Departments of Buildings, Health and Fire will inspect the Landmark Premises following the Emergency Incident, in order that the LPC may have a representative present during such inspections.

(iii) Within sixty days of such Emergency Incident, a Preservation Architect shall, at the expense of Landmark Owner, make a thorough inspection of the Designated Structure and submit a report (an "Emergency Incident Report") to Landmark Owner and to the LPC outlining the condition of the structure, assessing the extent of damage, and recommending (A) work, if any, which must be undertaken immediately, upon receipt of proper permits, in order to stabilize and prevent further damage to the Designated Structure, and (B) work that should be performed to repair and restore the Designated Structure to a sound, first-class condition or, alternatively to (A) and (B),

that Landmark Owner make an application to the LPC for permission to demolish the remaining portions of the Designated Structure.

(iv) With regard to the work to be performed pursuant to subsection (iii)(A), Landmark Owner shall immediately upon receipt of the Emergency Incident Report request and vigorously pursue all necessary permits and upon their issuance, shall undertake all such work with alacrity. If no permits are required, work shall be undertaken as soon as possible after receipt of the Emergency Incident Report.

(v) With regard to the work to be performed pursuant to subsection (iii)(B), within ninety days of receiving the report of the Preservation Architect, Landmark Owner shall apply for all necessary permits and certificates from the LPC to repair and restore or to demolish. No work on the exterior of the Designated Structure, and no work on the interior of the Designated Structure which would affect the exterior or which would require the issuance of a permit from the Department of Buildings shall be performed except pursuant to a permit from the LPC. If the LPC determines that a recommendation to demolish or to perform a specific item of work or method of work set forth in the report would be inappropriate, using the criteria set forth in the Landmarks Preservation Law, the determination of the LPC shall control and the Landmark Owner shall not have such specific work performed or be entitled to have the Designated Structure demolished unless Landmark Owner is obligated to perform such work or demolish the structure in accordance with an "Immediate Emergency Declaration" issued by the Department of Buildings. All repair, restoration, rehabilitation, repointing, and other work provided for in a certificate or permit shall be completed within nine months of the date of issue of such certificate or permit by the LPC. If such work cannot be completed within nine months for reasons beyond Landmark Owner's control, as determined by the Chairperson of the LPC in the exercise of his or her reasonable judgment, Landmark Owner shall

apply in writing to the LPC for an extension of time within which to complete such work. Such extensions shall be for a stated additional period of time that is related to the period of the delay and shall not be unreasonably withheld.

(c) Access to Designated Structure. Landmark Owner agrees to provide access to the Designated Structure to the LPC and its designated representatives at reasonable times and upon reasonable written notice, except in cases of emergency, in which event the LPC or its representatives shall have access, if feasible, immediately and without notice, in order to insure that the preservation, repair and maintenance of the Designated Structure is carried out in accordance with this Declaration.

(d) Failure to Perform. In the event that the preservation, repair, or maintenance of the Designated Structure is not performed in accordance with the provisions of this Article, the LPC shall give written notice of such failure to perform to the Landmark Owner. Subject to the provisions of Section 4.4 hereof, in the event that Landmark Owner, its successors or assigns, fails after sixty days from receipt of written notice from the LPC to perform or shall commence to perform but fail diligently to prosecute to completion any such repair and/or maintenance, or any obligations of Landmark Owner set forth in this Declaration, the City of New York may perform all of the necessary work at the sole cost and expense of the Landmark Owner and shall have the right to enter onto the Landmark Premises and to charge said Landmark Owner for all the actual cost of such work, together with actual administrative and legal fees incurred in the collection thereof. The City's actual costs hereunder shall include, but not be limited to, payments by the City of New York to any lawyers, consultants, contractors, painters, engineers, architects and skilled artisans required to be hired to perform or supervise such work. To the extent such actual costs are expended by the City of New York, the LPC shall have a lien on the Landmark Premises as if a lien had been filed,

perfected and enforced for materials and labor under Article 2 of the Lien Law of the State of New York. Notwithstanding the foregoing, in the event that the Designated Structure is converted to a condominium, Landmark Owner's right to notice and cure provided in this subsection shall apply only to the condominium board and to any owner of space occupied by commercial uses in the Designated Structure; provided that the LPC has received notice by said parties in accordance with Section 6.2.

ARTICLE III

CONDOMINIUM BOARD

3.1 General. In the event that the Designated Structure is converted to a condominium in accordance with Article 9B of the New York State Real Property Law ("RPL"), the condominium board ("Board") shall have the responsibility to carry out all of Landmark Owner's obligations and the authority to exercise all of Landmark Owner's rights under this Declaration and upon such assumption, The University Club, Inc. shall be released from its liability hereunder.

The following provisions of this Article 3 shall be operative only in the event that the Board is formed as described in this Section 3.1.

3.2 Board. The Board shall require that each owner of a condominium unit (the "Unit Owner") appoint the Board as his Attorney-in-Fact with respect to modification, amendment, or cancellation of the Declaration.

3.3 Condominium Declaration. Every deed conveying title to, or a partial interest in, the Landmark Premises and every lease of all or substantially all of the Landmark Premises shall contain a recital that the grantee is bound by the terms of the Condominium Declaration and By-laws which shall incorporate an obligation by the Board to comply with the provisions of Article 3 of this Declaration.

ARTICLE IV

EFFECT AND ENFORCEMENT

4.1 Effective Date.

(a) This Declaration shall have no force and effect unless and until the date of final approval of the Special Permit by the CPC and, if applicable, the City Council, pursuant to Sections 197-c and 197-d of the New York City Charter (the “Effective Date”). The Declaration shall become immediately effective upon the Effective Date. If, before the Effective Date, Developer requests or causes the application for the Special Permit to be withdrawn or abandoned, or if final action has been taken having the effect of denying the Special Permit, then, upon notice to CPC and LPC, this Declaration shall not become effective, shall be automatically canceled and shall be of no force and effect.

(b) If the Special Permit is at any time declared invalid or is otherwise voided by final judgment of any court of competent jurisdiction from which no appeal can be taken or for which no appeal has been taken within the applicable statutory period provided for such appeal, then, upon entry of said judgment or the expiration of the applicable statutory period for such entry, as the case may be, this Declaration shall be automatically canceled without further action by Landmark Owner and shall be of no further force or effect and the CPC shall, if requested by Landmark Owner, provide Landmark Owner with a letter in recordable form stating that the Declaration has been so canceled and is of no further force and effect.

4.2 Filing and Recordation. Landmark Owner shall file and record at its sole cost and expense this Declaration in the Register’s Office, indexing it against the Landmark Premises, immediately upon the Effective Date. Landmark Owner shall promptly deliver to the CPC and the LPC duplicate executed originals, promptly following the Effective Date and, following recordation,

a true copy of this Declaration as recorded, as certified by the Register. If Landmark Owner fails to so record this Declaration, the City may record this Declaration, at the sole cost and expense of Landmark Owner, who shall promptly pay to the City such costs together with fees for purchase of a reasonable number of certified copies of the recorded Declaration.

4.3 Additional Remedies. Landmark Owner acknowledges that the City is an interested party to this Declaration, and consents to enforcement by the City, administratively or at law or equity, of the restrictions, covenants, easements, obligations and agreements contained herein. No person other than Landmark Owner, the LPC or the City shall have any right to enforce the provisions of this Declaration. Landmark Owner also acknowledges that the remedies set forth in this Declaration are not exclusive, and that the City and any agency thereof may pursue other remedies not specifically set forth herein including, but not limited to, the seeking of a mandatory injunction compelling Landmark Owner, its heirs, successors or assigns, to comply with any provision, whether major or minor, of this Declaration.

4.4 Notice and Cure.

(a) Before any agency, department, commission or other subdivision of the City of New York institutes any proceeding or proceedings to enforce the terms or conditions of this Declaration because of any violation hereof, it shall give Landmark Owner forty-five (45) days written notice of such alleged violation, during which period Landmark Owner shall have the opportunity to effect a cure of such alleged violation. If Landmark Owner commences to effect a cure during such forty-five (45) day period and proceeds diligently towards the effectuation of such cure, the aforesaid forty-five (45) day period shall be extended for so long as Landmark Owner continues to proceed diligently with the effectuation of such cure. In the event that title to the Landmark Premises, or any part thereof, shall become vested in more than one party, the right to

notice and cure provided in this subsection shall apply equally to all parties with a fee interest in the Landmark Premises, or any part thereof, including ground lessees; provided the LPC has received notice by said parties in accordance with Section 6.2. Notwithstanding the foregoing, in the event that the Designated Structure is or is converted to a condominium or cooperative, the right to notice and cure provided in this subsection shall apply only to the condominium or cooperative board and to any owner of space occupied by commercial uses in the Designated Structure; provided that the LPC has received notice by said parties in accordance with Section 6.2.

(b) If Landmark Owner fails to observe any of the terms or conditions of this Declaration, and the Landmark Owner fails to cure such violation within the applicable grace period provided in subsection 4.4 of this Declaration, then prior to the institution by any agency or department of the City of any action, proceeding, or proceedings against Landmark Owner in connection with such failure, a Mortgagee who has given written notice of its name and address to the CPC and the LPC shall be given thirty (30) days written notice of such alleged violation, during which period such Mortgagee shall have the opportunity to effect a cure of such alleged violation. If such Mortgagee commences to effect a cure during such thirty (30) day period and proceeds diligently towards the effectuation of such cure, the aforesaid thirty (30) day period shall be extended for so long as such Mortgagee continues to proceed diligently with the effectuation of such cure.

(c) If after due notice as set forth in this Section 4.4, Landmark Owner and the Mortgagee fail to cure such alleged violations, the City may exercise any and all of its rights, including those delineated in this Section and may disapprove any amendment, modification, or cancellation of this Declaration on the sole grounds that Landmark Owner is in default of any material obligation under this Declaration.

4.5 Acknowledgment of Covenants. Landmark Owner acknowledges that the restrictions, covenants, easements, obligations and agreements in this Declaration, which are an integral part of the Special Permit, will protect the value and desirability of the Landmark Premises as well as benefit the City of New York and all property owners within a one-half mile radius of the Landmark Premises. Those restrictions, covenants, easements, obligations and agreements shall be covenants running with the land, and shall bind Landmark Owner and its successors, legal representatives, and assigns.

4.6 No Other Enforceable Restrictions. Landmark Owner represents and warrants that there are no enforceable restrictions of record on the use of the Landmark Premises or the Designated Structure, nor any present or presently existing future estate or interests in the Landmark Premises or the Designated Structure, nor any lien, obligation, enforceable covenant, limitation or encumbrance of any kind, the requirements of which have not been waived or subordinated, which precludes, directly or indirectly, imposition on the Landmark Premises of the restrictions, covenants, easements and obligations of this Declaration.

4.7 Governance. This Declaration shall be governed by and construed in accordance with the laws of the State of New York.

4.8 Severability. In the event that any provision of this Declaration shall be deemed, decreed, adjudged or determined to be invalid or unlawful by a court of competent jurisdiction and the judgment of such court shall be upheld on final appeal, or the time for further review of such judgment on appeal or by other proceeding has lapsed, such provision shall be severable, and the remainder of this Declaration shall continue to be of full force and effect.

4.9 Applicability to Other City Agencies. Landmark Owner covenants to include a copy of this Declaration as part of any application submitted to the LPC, CPC, Buildings Department,

Board of Standards and Appeals (“BSA”), New York State Attorney General (in the event of a proposed conversion of the Designated Structure to condominium ownership) or any agency succeeding to their respective jurisdictions. The restrictions and obligations contained herein are a condition of any permit or Certificate of Occupancy to be issued by the Buildings Department and Landmark Owner will take all reasonable steps to ensure that they are so listed. Failure to carry out such obligation beyond any applicable grace period shall constitute sufficient cause for the Commissioner of the Buildings Department to revoke any building permit issued pursuant to the Special Permit or to apply to the BSA or to a court of competent jurisdiction for revocation of the Certificate of Occupancy or any permit issued by the Buildings Department.

4.10 Limitation of Liability.

(a) Landmark Owner shall be liable in the performance of any term, provision or covenant in this Declaration, subject to the following sentences and subject to Section 4.12 below. Notwithstanding anything to the contrary contained in this Declaration, the City and any other party or person relying on the Declaration will look solely to the fee estate and interest of Landmark Owner in the Landmark Premises, on an in rem basis only, for the collection of any money judgment recovered against Landmark Owner, and no other property of Landmark Owner shall be subject to levy, execution or other enforcement procedure for the satisfaction of the remedies of the City or any other person or entity with respect to this Declaration, and Landmark Owner shall have no personal liability under this Declaration. The liability of any Unit Owner under this Declaration shall be limited to the amount of such Unit Owner’s prorated share, based on such Unit Owner’s interest in the common elements of the Condominium, of the costs of compliance with this Declaration. Notwithstanding the foregoing, nothing herein shall be deemed to preclude, qualify, limit or prevent

any of the City's governmental rights, powers or remedies, including, without limitation, with respect to the satisfaction of the remedies of the City, under any laws, statutes, codes or ordinances.

(b) The restrictions, covenants and agreements set forth in this Declaration shall be binding upon Landmark Owner and/or any successors-in-interest thereto only for the period during which such party is the holder of a fee interest in or is a party-in-interest of the Landmark Premises and only to the extent of such fee interest or the interest rendering such party a party-in-interest. At such time as Landmark Owner or any successor-in-interest thereto has no further fee interest in the Landmark Premises and is no longer a party-in-interest of the Landmark Premises, such party's obligations and liability with respect to this Declaration shall wholly cease and terminate from and after the conveyance of such party's interest and such party's successor-in-interest in the Landmark Premises by acceptance of such conveyance automatically shall be deemed to assume such party's obligations and liabilities hereunder to the extent of such successor-in-interest's interest.

4.11 Subordination. Landmark Owner shall cause every individual, business organization or other entity that between the date hereof and the date of recordation of this Declaration becomes a Party in Interest to the Landmark Premises, to execute this Declaration or to subordinate such interest to the Declaration and waive its right to execution. Any mortgage or other lien encumbering the Landmark Premises after the recording date of this Declaration shall be subject and subordinate hereto.

4.12 Right to Convey. Nothing contained herein shall be construed as requiring the consent of the CPC, the LPC, the City, any agency thereof or any other person or entity to any sale, transfer, conveyance, mortgage, lease or assignment of any interest in the Landmark Premises or the Designated Structure.

ARTICLE V

AMENDMENTS, MODIFICATIONS AND CANCELLATIONS

5.1 Amendment or Cancellation. Except as provided in Section 4.1 above, this Declaration may be amended or canceled only upon application of Developer and Landmark Owner and only with the express written approval of the CPC and of the City Council, but only in the event that the City Council reviewed the Special Permit pursuant to Section 197-d, and no other approval or consent shall be required from any public body, private person or legal entity of any kind; provided, however, that no such approval shall be required in the case of any cancellation pursuant to Section 5.4.

5.2 Minor Modification. The Chairperson of the LPC and the Chairperson of the CPC may, by express written consent, administratively approve modifications to the Declaration that the CPC has determined to be minor. Such minor modifications shall not be deemed amendments requiring the approval of the CPC, the LPC, the City Council or any other agency or department of the City of New York.

5.3 Recording and Filing. Any modification, amendment or cancellation of this Declaration, except pursuant to Section 5.4, shall be executed and recorded in the same manner as this Declaration. Following any modification, amendment or cancellation, Landmark Owner shall immediately record it and provide one executed and certified true copy thereof to each of the CPC and the LPC and upon failure to so record, permit its recording by the CPC or the LPC at the cost and expense of Landmark Owner.

5.4 Surrender or Nullification. Notwithstanding the provisions of Section 4.1(a) and 4.1(b), in the event that Developer does not use the Developer Premises pursuant to the Special Permit, Developer may surrender the Special Permit to the CPC and proceed with any use or

development of the Developer Premises permitted by the Zoning Resolution as if such Special Permit had not been granted. This Declaration shall be rendered null and void upon recordation of an instrument filed by Landmark Owner discharging it of record, with copies to LPC and CPC, the recordation of which instrument shall constitute a waiver of the right to use the Developer Premises pursuant to the Special Permit.

ARTICLE VI

MISCELLANEOUS

6.1 Exhibits. Any and all exhibits, appendices, or attachments referred to herein are hereby incorporated fully and made an integral part of this Declaration by reference.

6.2 Notices. All notices, demands, requests, consents, waivers, approvals and other communications which may be or are permitted, desirable or required to be given, served or deemed to have been given or sent hereunder shall be in writing and shall be sent, (a) if intended for Landmark Owner, to The University Club, Inc., 1 West 54th Street, New York, New York, 10019, (b) if intended for Developer, to W2005/Heins West Fifty-Third Realty, LLC, c/o Hines Interests Limited Partnership, 885 Third Avenue, New York, New York 10022, Attn: Thomas Craig, Jr. with a copy to Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Samuel H. Lindenbaum, Esq., (c) if intended for the CPC, to the CPC at 22 Reade Street, New York, New York 10007 (or then-official address), Attn: Chairperson, (d) if intended for the LPC, to the LPC at One Centre Street, Municipal Building, New York, New York 10007 (or then-official address), Attn: Chairperson and (e) if intended for the City Council, to the City Council at the Office of the Speaker, City Council, City Hall, New York, New York 10007. Landmark Owner or its representatives, by notice given as provided in this Section 6.2, may change any address for the purposes of this Declaration. Each notice, demand, request, consent, approval or

other communication shall be either sent by registered or certified mail, postage prepaid, or delivered by hand, and shall be deemed sufficiently given, served or sent for all purposes hereunder five (5) business days after it shall be mailed, or, if delivered by hand, when actually received.

6.3 Indemnification. Provided that Landmark Owner is found by a court of competent jurisdiction to have been in default in the performance of its obligations under this Declaration after having received written notice of such default and opportunity to cure as provided above, and such finding is upheld on final appeal, or the time for further review of such finding on appeal or by other proceeding has lapsed, Landmark Owner shall indemnify and hold harmless the City from and against all of its reasonable legal and administrative expenses arising out of or in connection with the City's enforcement of Landmark Owner's obligations under this Declaration.

IN WITNESS WHEREOF, Landmark Owner has executed this Declaration as of the day and year first above written.

THE UNIVERSITY CLUB, INC.

By: _____
Name:
Title:

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ____ day of _____ in the year 20__ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

SCHEDULE OF EXHIBITS

<u>Exhibit A</u>	Metes and Bounds of Landmark Premises
<u>Exhibit B</u>	Certificate as to Parties Interest
<u>Exhibit C</u>	Waivers
<u>Exhibit D</u>	LPC Report and Certificate of No Effect

EXHIBIT A

Metes and Bounds of Landmark Premises

The subject tract of land is known as Tax Lot Number(s) 34 in Block(s) 1270 as shown on the Tax Map of the City of New York, New York County and more particularly described as follows:

ALL that certain lot piece or parcel of land, situate lying and being in the Borough of Manhattan, of the City of New York in the County and State of New York, bounded and described as follows:

BEGINNING at the corner formed by the intersection of the northerly side of West 54th Street and the westerly side of 5th Avenue;

RUNNING THENCE northerly along the westerly side of 5th Avenue, 100.5 feet to a point lying 100.5 feet southerly from the corner formed by the intersection of the southerly side of West 55th Street and the westerly side of 5th Avenue.

THENCE westerly at right angles to the preceding course, 125 feet to a point;

THENCE northerly 100.5 feet to a point;

THENCE westerly 52 feet to a point;

THENCE southerly parallel with 5th Avenue 100.5 feet to a point;

THENCE easterly 2 feet to a point;

THENCE southerly parallel with 5th Avenue, 100.5 feet to a point;

THENCE easterly along the northerly side of West 54th Street, 175 feet to the point or place of BEGINNING.

EXHIBIT B

Certificate as to Parties in Interest

EXHIBIT C

Waivers

EXHIBIT D

LPC Report and Certificate of No Effect

678 Fifth Avenue
(Saint Thomas Church)

DECLARATION

Dated: _____, 200__

Location: Block 1269, Lot 30
New York County, New York

Record & Return to:

Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036
Attn: Samuel H. Lindenbaum, Esq.

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DECLARATION made as of the ____ day of _____, 200__ by SAINT THOMAS CHURCH IN THE CITY AND COUNTY OF NEW YORK, a New York religious corporation having an address 678 Fifth Avenue, New York, New York, 10019 (“Declarant”).

W I T N E S S E T H:

WHEREAS, Declarant is the owner in fee simple of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lot 30 on the Tax Map of the City of New York and by the street address 678 Fifth Avenue, and is more particularly described on Exhibit A attached hereto (the “Landmark Premises”) and on which is located the Saint Thomas Church and Parish House (the “Designated Structure”); and

WHEREAS, pursuant to the provisions of Section 3020 of the New York City Charter and Title 25, Chapter 3 of the Administrative Code of the City of New York (the “Landmark Preservation Law”), the Landmarks Preservation Commission (the “LPC”) has designated the Designated Structure as a designated landmark because of its special character or historical or aesthetic interest or value; and

WHEREAS, _____ (“Title Company”) has certified as of _____, 200__, that Declarant, W2005/Hines West Fifty-Third Realty, LLC (“Developer”), Museum of Modern Art (“MoMA”), and _____ are the sole parties-in-interest (“Parties in Interest”), as that term is defined in the zoning lot definition in Section 12-10 of the Zoning Resolution of the City of New York, to the Landmark Premises, a copy of which certification is attached hereto as Exhibit B; and

WHEREAS, _____ has executed an instrument waiving its right to execute, and subordinating the lien of its interest in the Subject Premises to, this Declaration, a copy of which instrument is attached as Exhibit C hereto; and

WHEREAS, the sole Parties in Interest to the Landmark Premises have therefore either executed this Declaration or waived their right to do so; and

WHEREAS, as of the date hereof, Title Company has determined there has been no change in the certification attached as Exhibit B, and Declarant represents and warrants that the Parties in Interest listed in Exhibit B are the only known Parties in Interest in the Landmark Premises as of the date hereof; and

WHEREAS, Developer and MoMA are the fee owners of certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lots 5, 6, 7, 8, 66, and 69 on the Tax Map of the City of New York and by the street address 53 West 53rd Street (the “Developer Premises”), on which Developer proposes to develop a new 83-story mixed use (residential, commercial, and community facility) building (the “Proposed Development”); and

WHEREAS, the Developer Premises, the Landmark Premises, and that certain real property located in the Borough of Manhattan, City, County and State of New York, which property is designated as Block 1269, Lots 11, 12, 13, 14, 20, 58, and 165 on the Tax Map of the City of New York and by the street address 21-43 West 53rd Street and 26-42 West 54th Street, constitute a single “zoning lot”, as defined in Section 12-10 of the Zoning Resolution, (the "Combined Zoning Lot"); and

WHEREAS, Zoning Resolution Section 74-711 provides that the City Planning Commission (the “CPC”) may permit modification of use and bulk regulations, except for floor area ratio regulations, applicable to zoning lots containing a Landmark building; and

WHEREAS, pursuant to Application Nos. 090431ZSM and 090432ZSM (the “Application”), Developer and Declarant applied to the City Planning Commission of the City of New York (the

“CPC”) for a special permit pursuant to Section 74-711 of the Zoning Resolution (the “Special Permit”), in connection with the Proposed Development to modify (i) Zoning Resolution Section 77-02 (Zoning lots not existing prior to effective date or amendment of resolution) to permit approximately 275,000 square feet of unused development rights from the Landmark Premises (the “Development Rights”) to be utilized without regard to district boundaries; (ii) Sections 81-90 (Special regulations for preservation subdistrict) and 33-432 (In other commercial districts) to permit a modification of the height and setback regulations applicable in the C5-P zoning district; (iii) Sections 81-45 (Pedestrian circulation space) and 37-50 (Requirements for pedestrian circulation space); and (iv) Section 23-533 (Required rear yard equivalents); and

WHEREAS, consistent with the requirements of Section 74-711 of the Zoning Resolution, Declarant has proposed to perform certain restoration work on the Designated Structure, as described in the CNE (as hereinafter defined), and has agreed to establish a program for continuing maintenance that will result in preservation of the Designated Structure; and

WHEREAS, Section 74-711(a)(1) requires, inter alia, that a program has been established for continuing maintenance (the “Continuing Maintenance Program”) that will result in preservation of the Designated Structure by Declarant; and

WHEREAS, the LPC, at the public meeting held on May 13, 2008, voted to issue the report to the CPC as requested in connection with the Application, and subsequently issued report MOU 09-4761, dated October 22, 2008 (the "LPC Report"); and

WHEREAS, the LPC issued Certificate of No Effect 08-2475, dated August 23, 2007 and Certificate of No Effect 09-4310, dated October 6, 2008 (collectively, the “CNE”), for the restoration work on the Designated Structure proposed by Declarant (such restoration work, as

described in the CNE, the "Landmark Work"). Copies of the LPC Report and the CNE are annexed hereto as Exhibit D; and

WHEREAS, Declarant has agreed to certain obligations and restrictions contained in this Declaration for the protection, preservation, repair and maintenance of the Designated Structure; and

WHEREAS, Declarant desires to restrict the manner in which the Landmark Premises may be developed, restored, and operated in order to assure the protection, preservation, repair and maintenance of the Designated Structure; and

WHEREAS, Declarant represents and warrants that there are no restrictions, liens, obligations, covenants, easements, limitations or encumbrances of any kind, the requirements of which have not been waived or subordinated, which would prevent or preclude, presently or potentially, the imposition of the restrictions, covenants, obligations, easements and agreements of this Declaration;

NOW, THEREFORE, Declarant does hereby declare and agree that the Landmark Premises shall be held, sold, transferred, conveyed and occupied subject to the following restrictions, covenants, obligations, easements, and agreements, all of which are for the purpose of protecting the Landmark Premises, which shall inure to the benefit of the City of New York, and which shall run with the Landmark Premises and bind Declarant and its heirs, successors and assigns so long as they have a right, title or interest in the Landmark Premises or any part thereof.

ARTICLE I

DEFINITIONS

The following words, when used in this Declaration, shall have the following meanings:

1.1 "Application" shall mean the application to the City Planning Commission for the Special Permit.

1.2 “Buildings Department” shall mean the New York City Department of Buildings, or any successor to the jurisdiction thereof.

1.3 “Chairperson of the CPC” shall mean the Chairperson of the City Planning Commission of the City of New York or any successor to the jurisdiction thereof.

1.4 “Chairperson of the LPC” shall mean the Chairperson of the Landmarks Preservation Commission of the City of New York or any successor to the jurisdiction thereof.

1.5 “City” shall mean the City of New York.

1.6 “City Council” shall mean the New York City Council or any successor to the jurisdiction thereof.

1.7 “CPC” shall mean the New York City Planning Commission, or any successor to the jurisdiction thereof.

1.8 “DCP” shall mean the New York City Department of City Planning or any successor to the jurisdiction thereof.

1.9 “Designated Structure” is defined in the first Whereas Clause set forth above.

1.10 “Development Rights” is defined in the tenth Whereas Clause set forth above.

1.11 “Effective Date” is defined in Section 4.1(a) hereof.

1.12 “Escrow Agreement” is defined in Section 2.2 hereof.

1.13 “Force Majeure” shall mean: strike, lockout or labor dispute(s); inability to obtain materials or reasonable substitutes therefore; acts of God; unforeseen governmental restrictions, regulations, omissions or controls; enemy or hostile government actions; civil commotion, insurrection, revolution or sabotage; fire or other casualty; inclement weather of such a nature as to make performance or completion of the Landmark Work not feasible unless due to any act or failure to act by Declarant; any damage to the Landmark Premises of such a nature as to make completion

of the Landmark Work not feasible; a taking of the Landmark Premises, or a portion thereof, by condemnation or eminent domain; failure of a public utility to provide power, heat or light; unusual delay in transportation; material delays by the City, State or United States Government, or any agency or instrumentality thereof, in the performance of any work or processing or approval of any applications required in order to permit Declarant to carry out its obligations pursuant to this Declaration unless due to any act or failure to act by Declarant; denial to Declarant by any owner of an enforceable interest in adjoining real property, including any private fee owner or ground lessee of adjoining real property, or any agency of the City or State having an enforceable interest in adjoining real property, including sidewalk or streets, of a right to access to such adjoining real property, if such access is required to accomplish the obligations of the Declarant pursuant to this Declaration; the pendency of a litigation not initiated by Declarant or similar proceeding which suspends or materially and adversely affects the ability of the Declarant to accomplish the obligations of the Declarant pursuant to this Declaration; or other conditions similar in character to the foregoing which are beyond the control of Declarant. No event shall constitute a Force Majeure unless Declarant complies with the procedures set forth in Sections 2.2 and 6.2 hereof.

1.14 “Declarant” shall mean the named Declarant and the heirs, successors and assigns of the named Declarant including, without limitation, any owner of a condominium unit within the Designated Structure, except that Declarant shall not be deemed to include (i) a mortgagee of all or any portion of the Landmark Premises unless and until it succeeds to the interest or obligation of Declarant by purchase, assignment, foreclosure or otherwise, or (ii) a tenant of the Landmark Premises, unless such tenant holds a lease to all or substantially all of the Landmark Premises.

1.15 “Landmark Work” is defined in Section 2.1 hereof.

1.16 “LPC” shall mean the Landmarks Preservation Commission of New York City or any successor to the jurisdiction thereof.

1.17 “Mortgagee” shall mean (a) any institutional mortgagee of all or substantially all of the Landmark Premises listed in Exhibit B or (b) the first mortgagee of a condominium unit within the Designated Structure.

1.18 “Party(ies) in Interest” shall mean any party-in-interest listed in Exhibit B and any other party-in-interest to the Landmark Premises who has given written notice of its name and address to the CPC and the LPC.

1.19 “PCO” is defined in Section 2.2 hereof.

1.20 "Phase I Landmark Work" is defined in Section 2.1 hereof.

1.21 "Phase II Landmark Work" is defined in Section 2.1 hereof.

1.22 "Phase II Landmark Work Conditions" is the Developer’s execution of an escrow agreement and placement in escrow of funds equal to 110 percent of the estimated cost of the Phase II Landmark Work remaining to be completed at the time the escrow is established, as described in Section 2.1 hereof.

1.23 “Special Permit” is defined in the tenth Whereas clause set forth above.

1.24 “Special Permit Space” shall mean floors **[X] through [X]** in the Proposed Development. Notwithstanding the foregoing, no space shall be deemed Special Permit Space if it is permitted as of right within the Developer Premises by the terms of the Zoning Resolution then in effect.

1.25 “TCO” is defined in Section 2.3 hereof.

1.26 “Zoning Resolution” shall mean the Zoning Resolution of the City of New York.

ARTICLE II

DEVELOPMENT, PRESERVATION, REPAIR AND MAINTENANCE OF THE DESIGNATED STRUCTURE

2.1 Landmark Work. The "Landmark Work" shall be comprised of restoration of the stained glass windows in the Designated Structure (including improvement to the surrounding masonry), restoration of leaded glass windows in the Parish House, replacement of deteriorated window wood in the first floor window of the Parish House facing the courtyard and repair of corroded lintels, repair of courtyard paving and stairs, identified roof repairs and repair to damaged stonework on the Parish House facade to bring the Designated Structure to a sound, first-class condition. The "Phase I Landmark Work" shall include the portion of the Landmark Work consisting of: (a) restoration of Windows C10 to C18 of the Designated Structure; (b) repair of masonry surrounding Windows C10 to C18; (c) repair of the damaged stonework on the Parish House façade; (d) identified repairs to the roof, (e) repairs to the roof drains; and (f) removal of louvers and replacement with stone matching the surrounding material. The "Phase II Landmark Work" shall include the portion of the Landmark Work consisting of: (a) restoration of Windows C1 to C9, T1 to T5, A1 to A6, W1 to W3, and the Rose Window of the Designated Structure; (b) restoration of the leaded glass windows in the Parish House; (c) repair of the wooden window and surrounding lintels of the first floor Parish House window; (d) Courtyard paving replacement; and (e) Courtyard stair replacement. Declarant shall also investigate the feasibility of installation of central air conditioning to eventually replace in-window air conditioning units in a manner consistent with the historic integrity of the interior of the building. The issuance of the Special Permit is premised on, inter alia, the agreement by Declarant to the performance of the Landmark Work in conformity with the CNE, the LPC Report and the requirements thereof.

2.2 Certificate of Occupancy. (a) Written notice that the Developer is seeking a temporary certificate of occupancy ("TCO") or a permanent certificate of occupancy ("PCO") for the Special Permit Space shall be provided to the LPC seven (7) days prior to the Developer applying for a TCO or PCO, as applicable. Subject to Section 2.2(b) hereof, no TCO or PCO for the Special Permit Space shall be granted by the Buildings Department or accepted by Developer until the Chairperson of the LPC shall have given written notice to the Buildings Department that (a) the Phase I Landmark Work has been satisfactorily completed by Declarant, and (b) the Declarant has submitted to the LPC (i) a satisfactory estimate of costs for the Phase II Landmark Work, and (ii) an executed escrow agreement, in the form attached hereto as Exhibit E (the "Escrow Agreement"), pursuant to which it has placed in escrow (the "Landmark Work Escrow") funds equal to One Hundred Ten Percent (110%) of the estimated cost of the Phase II Landmark Work remaining to be completed at the time the escrow fund is established (the "Phase II Landmark Work Conditions"). Declarant shall be entitled to draw down on the funds in the Landmark Work Escrow, upon demonstration to the reasonable satisfaction of the Chairperson of LPC that Declarant has incurred costs in furtherance of the Phase II Landmark Work, on a not less than monthly basis in order to reimburse Declarant for costs incurred by Declarant in undertaking the Phase II Landmark Work.

(b) The Chairperson of the LPC shall issue said notice reasonably promptly after Declarant has made written request to the Chairperson of the LPC and has provided documentation to support such request, and the Chairperson of the LPC shall in all events endeavor to issue such written notice to the Buildings Department, or inform Declarant in writing of the reason for not issuing said notice, within fourteen (14) calendar days after Declarant has requested such written notice. Upon receipt of the written notice from the Chairperson of the LPC that the conditions set forth in (a) and (b) above have been satisfied,

the Buildings Department may grant, and Developer may accept, a TCO or PCO, as applicable, for all or part of the Special Permit Space. Notwithstanding anything to the contrary contained herein, the Chairperson of the LPC shall declare that the Phase I Landmark Work has been satisfactorily completed notwithstanding that minor and insubstantial details of construction or mechanical adjustment remain to be performed.

(c) Declarant shall permit inspection of the Designated Structure by the Chairperson of the LPC and representatives designated by the Chairperson of the LPC upon reasonable notice and at reasonable times in connection with the notice described in Section 2.2 hereof.

(d) (i) Upon application by Declarant, notwithstanding anything contained in any other provision of this Declaration, the Chairperson of the LPC, in the exercise of his or her reasonable judgment, may certify that the performance or completion of the Phase I Landmark Work or satisfaction of the Phase II Landmark Work Conditions has been delayed due to a Force Majeure as provided in subsection (ii) below.

(ii) In the event that Declarant reasonably believes that Declarant's full performance of its obligations to complete the Phase I Landmark Work or satisfy the Phase II Landmark Work Conditions has been delayed as a result of a Force Majeure, Declarant shall so notify the Chairperson of the LPC as soon as Declarant learns of such circumstances. The written notice of Declarant shall include a description of the condition or event, its cause (if known to Declarant), its probable duration, and in the reasonable judgment of Declarant, the impact it is reasonably anticipated to have on the completion of the Phase I Landmark Work or satisfaction of the Phase II Landmark Work Conditions. The Chairperson of the LPC shall, within fourteen (14) calendar days of its receipt of the written notice of Declarant, (A) certify in writing that a Force Majeure has occurred, including a determination of the expected duration of such delay (the "Delay

Notice”), and grant Developer appropriate relief for such delay, including certifying in writing to the Buildings Department that the Chairperson of the LPC has no objection to the issuance of a TCO or PCO, as applicable, for all or part of the Special Permit Space, or (B) notify Declarant that it does not reasonably believe a Force Majeure has occurred. Any delay caused as the result of a Force Majeure shall be deemed to continue only as long as the Declarant shall be using reasonable efforts to minimize the effects thereof. Upon cessation of the events causing such delay, the Declarant shall promptly recommence the Phase I Landmark Work and/or proceed with its satisfaction of the Phase II Landmark Work Conditions, as applicable.

(e) Notwithstanding anything else to the contrary contained herein, this Declaration shall not be deemed to prohibit or restrict (i) Developer or the owner of any other portion of the Combined Zoning Lot from applying for or receiving a "core and shell" TCO or a TCO or PCO for any floor area in the Proposed Development or on the Developer Premises which is not Special Permit Space or from entering into agreements affecting all or any portions of the Proposed Development, including the Special Permit Space, or the Combined Zoning Lot prior to completion of the Phase I Landmark Work or satisfaction of the Phase II Landmark Work Conditions, or (ii) Declarant or the owner of any other portion of the Landmark Premises from seeking, applying for or obtaining permits or building notices or other authorizations or approvals from the Buildings Department or any other governmental agency to perform work, including tenant work, in the Designated Structure or on the Landmark Premises, or permit other use of or the transfer of additional development rights, prior to the completion of the Phase I Landmark Work or satisfaction of the Phase II Landmark Work Conditions, or from entering into agreements affecting all or any portions of the Designated Structure or the Landmark Premises prior to completion of the Phase I Landmark Work or satisfaction of the Phase II Landmark Work Conditions.

(f) Following Declarant's execution and delivery of the Escrow Agreement, as set forth in Section 2.2 above, Declarant shall continue to proceed with the Phase II Landmark Work in accordance with the CNE and the Specifications in connection therewith with all due diligence until the completion thereof.

2.3 Preservation, Repair and Maintenance. Declarant hereby covenants and agrees to preserve, repair and maintain the Designated Structure in sound first-class condition, at its own cost and expense, in accordance with this Declaration, the CNE, the LPC Report and the Landmarks Preservation Law. It is understood that certain obligations and duties set forth in this Declaration are above and beyond the requirements of the Landmarks Preservation Law and do not in any way diminish Declarant's obligation and responsibility to comply with all provisions of the Landmarks Preservation Law.

2.4 Continuing Maintenance Program. Declarant shall comply with the obligations and restrictions of the continuing maintenance program (the "Continuing Maintenance Program") as set forth below:

(a) Periodic Inspections. Declarant shall establish and carry out a cyclical inspection and maintenance program for the Designated Structure which shall include, without limitation, the following:

(i) At Declarant's expense, an inspection (the "Periodic Inspection") shall be made every five years. The first Periodic Inspection shall be made on or within two months of the fifth anniversary of the issuance by the LPC of the Notice of Compliance pursuant to the LPC Report, and, thereafter, Periodic Inspections shall be made every five years on or within two months of the anniversary of the date of such initial or subsequent inspection. In the event that Developer has accepted a TCO or PCO for all or part of the Special Permit Space without Declarant having first

received the Notice of Compliance, the first periodic inspection shall be made on or within two months of the fifth anniversary date of the issuance of such TCO or PCO. The Periodic Inspection shall be done by a preservation architect, engineer or other qualified person knowledgeable about the preservation of historic structures (the "Preservation Architect") selected by Declarant from a list prepared by Declarant and approved by the Chairperson of the LPC as to their credentials, which approval shall not be unreasonably withheld or delayed, and which list in the first instance shall include Beyer Blinder Belle, Architects and Planners LLP, and Higgins and Quasebarth LLP. Declarant shall update such listing upon the request of the Chairperson of the LPC if the Chairperson of the LPC reasonably determines that any party on the approved list no longer possesses the credentials to serve as preservation architect. In addition, Declarant may periodically supplement the list of Preservation Architects, subject to the reasonable approval of the Chairperson of the LPC as to their credentials. The Preservation Architect shall make a thorough inspection of the exterior of the Designated Structure and shall also make a thorough inspection of the portions of the interior of Designated Structure whose integrity may affect the exterior of the Designated Structure. The Periodic Inspection shall include (but not be limited to) the following portions of the exterior: exterior stone work; roof; bell towers, entry portal, stained glass and leaded windows, including frames, sashes and surrounding materials; courtyard paving; and stonework details.

(ii) The Preservation Architect shall, at the expense of Declarant, submit a report on each Periodic Inspection (the "Periodic Report") to Declarant and the LPC within 45 days after each Periodic Inspection. The Periodic Report shall outline the existing conditions of the Designated Structure and detail the work which should be performed in order to maintain the Designated Structure, including all architectural features and elements, in a sound first-class condition, including but not limited to: exterior stone work; roof; bell towers, entry portal, stained glass and leaded

windows, including frames, sashes and surrounding materials; courtyard paving; and stonework details.

(iii) Submission of Local Law 10 & 11 Facade Inspection Report. If the Designated Structure is subject to the Facade Inspection Report requirements of Title 1 RCNY §32-03 et seq., a copy of any such Facade Inspection Report which is submitted to the New York City Department of Buildings, shall also be provided at the same time to the Landmarks Preservation Commission. In the event that the building is found to be unsafe pursuant to such inspection, the Declarant shall notify the Landmarks Preservation Commission simultaneously with the Department of Buildings, pursuant to Title 1 RCNY §32-03(b)(2)(vii).

(iv) Except as set forth below, Declarant shall perform all work which a Periodic Report, Facade Inspection Report or Emergency Incident Report (as defined below) identifies as necessary to maintain the Designated Structure, including architectural features and elements, in sound first-class condition. No work shall be performed except pursuant to a permit from the LPC if a permit is required under the Landmarks Preservation Law. If the LPC determines that a specific item of work or method of work as set forth in a Periodic Report, Facade Inspection Report or Emergency Incident Report would be inappropriate or inadequate, the determination of the LPC shall control and Declarant need not and shall not have such specific item performed. Declarant shall have the right to contest in a hearing before the LPC any work called for in a Periodic Report or Emergency Incident Report. Declarant's obligation to perform such contested work or to perform it by a method acceptable to the LPC shall be stayed pending a decision in any such proceeding at the LPC. Declarant shall proceed with all work that is uncontested during the stay pursuant to a permit.

(v) Unless Declarant has notified the LPC in writing that it contests any work as set forth in the preceding subsection, Declarant shall apply for all necessary permits or certificates

from the LPC within 45 days of delivery of the completed report to the Chairperson of LPC, unless the work to be performed is of a nature or complexity that more time is reasonably required to accurately prepare such applications, in which case such applications shall be made in a prompt and timely manner as may be reasonable under the particular circumstances. Declarant shall use its best efforts to assure that all repairs, rehabilitation, and restoration work detailed in the Periodic Report or Emergency Incident Report shall be completed at the earliest possible date, but no later than within nine months of the date of issue of the certificate or permit from the LPC, or, if no such certificate or permit is required, within nine months of the date of the Periodic Report or Emergency Incident Report. If for reasons beyond Declarant's control or due to the nature of the repair work, as determined by the Chairperson of the LPC, in the exercise of his or her reasonable judgment, such work cannot be completed within nine months, Declarant shall apply to the LPC for an extension of time within which to complete such work. Such extensions shall be for a stated additional period of time to be related to the period of delay or nature of the required work and shall not be unreasonably withheld.

(vi) Promptly upon the conveyance of the Development rights from Declarant, Declarant shall deliver an amount equal to five percent (5%) of the purchase price received by Declarant for the Development Rights into an escrow account to assure the ongoing maintenance of the Designated Structure as contemplated under this Declaration (the "Maintenance Escrow"). Declarant shall be entitled to draw down on the funds in the Maintenance Escrow from time to time upon demonstration to the reasonable satisfaction of the Chairperson of LPC that the funds are to be used to undertake work identified as necessary in a Periodic Report.

(b) Emergency Protection Program. Declarant shall establish and be prepared to carry out an emergency protection program for the Designated Structure which shall include at the minimum, the following:

(i) If a fire, the elements or any other cause whatsoever damages or destroys the Designated Structure or any part thereof (the “Emergency Incident”), Declarant shall use all reasonable means to save, protect and preserve the Designated Structure at the time of and following the Emergency Incident, including, but not limited to, acting with an approval from the Chairperson of the LPC or his or her designated representatives to stabilize and prevent further damage to or deterioration of the structure, and to secure the Landmark Premises from unauthorized access. Unless necessitated as a safety precaution as ordered by the Departments of Buildings, Health, Fire or Police, or as an action taken in response to a life-threatening situation, the Declarant shall not remove any debris consisting of exterior features or otherwise clear the Landmark Premises without the approval of the LPC or its Chairperson.

(ii) Declarant shall give immediate written notice of such Emergency Incident to the LPC. Declarant shall also give timely notice to the LPC of the time or times when the New York City Departments of Buildings, Health and Fire will inspect the Landmark Premises following the Emergency Incident, in order that the LPC may have a representative present during such inspections if Declarant is made aware of or receives notice of the timing of such inspections..

(iii) Within sixty (60) days of such Emergency Incident, a Preservation Architect shall, at the expense of Declarant, make a thorough inspection of the Designated Structure and submit a report (an “Emergency Incident Report”) to Declarant and to the LPC outlining the condition of the structure, assessing the extent of damage, and recommending (A) work, if any, which must be undertaken immediately, upon receipt of proper permits, in order to stabilize and

prevent further damage to the Designated Structure, and (B) work that should be performed to repair and restore the Designated Structure to a sound, first-class condition or, alternatively to (A) and (B), that Declarant make an application to the LPC for permission to demolish the remaining portions of the Designated Structure.

(iv) With regard to the work to be performed pursuant to subsection (iii)(A), Declarant shall immediately upon receipt of the Emergency Incident Report request and vigorously pursue all necessary permits and upon their issuance, shall undertake all such work with alacrity. If no permits are required, work shall be undertaken as soon as possible after receipt of the Emergency Incident Report.

(v) With regard to the work to be performed pursuant to subsection (iii)(B), within ninety days of receiving the report of the Preservation Architect, Declarant shall apply for all necessary permits and certificates from the LPC to repair and restore or to demolish. No work on the exterior of the Designated Structure, and no work on the interior of the Designated Structure which would affect the exterior or which would require the issuance of a permit from the Department of Buildings shall be performed except pursuant to a permit from the LPC. If the LPC determines that a recommendation to demolish or to perform a specific item of work or method of work set forth in the report would be inappropriate, using the criteria set forth in the Landmarks Preservation Law, the determination of the LPC shall control and the Declarant shall not have such specific work performed or be entitled to have the Designated Structure demolished unless Declarant is obligated to perform such work or demolish the structure in accordance with an “Immediate Emergency Declaration” issued by the Department of Buildings. All repair, restoration, rehabilitation, and other work provided for in a certificate or permit shall be completed within nine months of the date of issue of such certificate or permit by the LPC. If such work cannot be

completed within nine months for reasons beyond Declarant's control or due to the nature of the work to be performed, as determined by the Chairperson of the LPC in the exercise of his or her reasonable judgment, Declarant shall apply in writing to the LPC for an extension of time within which to complete such work. Such extensions shall be for a stated additional period of time that is related to the period of the delay and shall not be unreasonably withheld.

(c) Access to Designated Structure. Declarant agrees to provide access to the Designated Structure to the LPC and its designated representatives at reasonable times and upon reasonable written notice, except in cases of emergency, in which event the LPC or its representatives shall have access, if feasible, immediately and without notice, in order to insure that the preservation, repair and maintenance of the Designated Structure is carried out in accordance with this Declaration.

(d) Failure to Perform. In the event that the preservation, repair, or maintenance of the Designated Structure is not performed in accordance with the provisions of this Article, the LPC shall give written notice of such failure to perform to the Declarant. Subject to the provisions of Section 4.4 hereof, in the event that Declarant, its successors or assigns, fails after sixty days from receipt of written notice from the LPC to perform or shall commence to perform but fail diligently to prosecute to completion any such repair and/or maintenance, or any obligations of Declarant set forth in this Declaration, the City of New York may perform all of the necessary work at the sole cost and expense of the Declarant and shall have the right to enter onto the Landmark Premises and to charge said Declarant for all the actual cost of such work, together with actual administrative and legal fees incurred in the collection thereof. The City's actual costs hereunder shall include, but not be limited to, payments by the City of New York to any lawyers, consultants, contractors, painters, engineers, architects and skilled artisans required to be hired to perform or supervise such work. To

the extent such actual costs are expended by the City of New York, the LPC shall have a lien on the Landmark Premises as if a lien had been filed, perfected and enforced for materials and labor under Article 2 of the Lien Law of the State of New York. Notwithstanding the foregoing, in the event that the Designated Structure is converted to a condominium, Declarant's right to notice and cure provided in this subsection shall apply only to the condominium board and to any owner of space occupied by commercial uses in the Designated Structure; provided that the LPC has received notice by said parties in accordance with Section 6.2.

ARTICLE III

CONDOMINIUM BOARD

3.1 General. In the event that the Designated Structure is converted to a condominium in accordance with Article 9B of the New York State Real Property Law ("RPL"), the condominium board ("Board") shall have the responsibility to carry out all of Declarant's obligations and the authority to exercise all of Declarant's rights under this Declaration and upon such assumption, Saint Thomas Church in the City and County of New York shall be released from its liability hereunder.

The following provisions of this Article 3 shall be operative only in the event that the Board is formed as described in this Section 3.1.

3.2 Board. The Board shall require that each owner of a condominium unit (the "Unit Owner") appoint the Board as his Attorney-in-Fact with respect to modification, amendment, or cancellation of the Declaration.

3.3 Condominium Declaration. Every deed conveying title to, or a partial interest in, the Landmark Premises and every lease of all or substantially all of the Landmark Premises shall contain a recital that the grantee is bound by the terms of the Condominium Declaration and By-laws which shall incorporate an obligation by the Board to comply with the provisions of Article 3 of this Declaration.

ARTICLE IV

EFFECT AND ENFORCEMENT

4.1 Effective Date.

(a) This Declaration shall have no force and effect unless and until the date of final approval of the Special Permit by the CPC and pursuant to Sections 197-c and 197-d of the New York City Charter (the “Effective Date”). The Declaration shall become immediately effective upon the Effective Date. If, before the Effective Date, Developer requests or causes the application for the Special Permit to be withdrawn or abandoned, or if final action has been taken having the effect of denying the Special Permit, then, upon notice to CPC and LPC, this Declaration shall not become effective, shall be automatically canceled and shall be of no force and effect.

(b) If the Special Permit is at any time declared invalid or is otherwise voided by final judgment of any court of competent jurisdiction from which no appeal can be taken or for which no appeal has been taken within the applicable statutory period provided for such appeal, then, upon entry of said judgment or the expiration of the applicable statutory period for such entry, as the case may be, this Declaration shall be automatically canceled without further action by Declarant and shall be of no further force or effect and the CPC shall, if requested by Declarant, provide Declarant with a letter in recordable form stating that the Declaration has been so canceled and is of no further force and effect.

4.2 Filing and Recordation. Declarant shall file and record at its sole cost and expense this Declaration in the Register’s Office, indexing it against the Landmark Premises, immediately upon the Effective Date. Declarant shall promptly deliver to the CPC and the LPC duplicate executed originals, promptly following the Effective Date and, following recordation, a true copy of this Declaration as recorded, as certified by the Register. If Declarant fails to so record this Declaration,

the City may record this Declaration, at the sole cost and expense of Declarant, who shall promptly pay to the City such costs together with fees for purchase of a reasonable number of certified copies of the recorded Declaration.

4.3 Additional Remedies. Declarant acknowledges that the City is an interested party to this Declaration, and consents to enforcement by the City, administratively or at law or equity, of the restrictions, covenants, easements, obligations and agreements contained herein. No person other than Declarant, the LPC or the City shall have any right to enforce the provisions of this Declaration. Declarant also acknowledges that the remedies set forth in this Declaration are not exclusive, and that the City and any agency thereof may pursue other remedies not specifically set forth herein including, but not limited to, the seeking of a mandatory injunction compelling Declarant, its heirs, successors or assigns, to comply with any provision, whether major or minor, of this Declaration.

4.4 Notice and Cure.

(a) Before any agency, department, commission or other subdivision of the City of New York institutes any proceeding or proceedings to enforce the terms or conditions of this Declaration because of any violation hereof, it shall give Declarant forty-five (45) days written notice of such alleged violation, during which period Declarant shall have the opportunity to effect a cure of such alleged violation. If Declarant commences to effect a cure during such forty-five (45) day period and proceeds diligently towards the effectuation of such cure, the aforesaid forty-five (45) day period shall be extended for so long as Declarant continues to proceed diligently with the effectuation of such cure. In the event that title to the Landmark Premises, or any part thereof, shall become vested in more than one party, the right to notice and cure provided in this subsection shall apply equally to all parties with a fee interest in the Landmark Premises, or any part thereof, including ground lessees; provided the LPC has received notice by said parties in accordance with

Section 6.2. Notwithstanding the foregoing, in the event that the Designated Structure is or is converted to a condominium or cooperative, the right to notice and cure provided in this subsection shall apply only to the condominium or cooperative board and to any owner of space occupied by commercial uses in the Designated Structure; provided that the LPC has received notice by said parties in accordance with Section 6.2.

(b) If Declarant fails to observe any of the terms or conditions of this Declaration, and the Declarant fails to cure such violation within the applicable grace period provided in subsection 4.4 of this Declaration, then prior to the institution by any agency or department of the City of any action, proceeding, or proceedings against Declarant in connection with such failure, a Mortgagee who has given written notice of its name and address to the CPC and the LPC shall be given thirty (30) days written notice of such alleged violation, during which period such Mortgagee shall have the opportunity to effect a cure of such alleged violation. If such Mortgagee commences to effect a cure during such thirty (30) day period and proceeds diligently towards the effectuation of such cure, the aforesaid thirty (30) day period shall be extended for so long as such Mortgagee continues to proceed diligently with the effectuation of such cure.

(c) If after due notice as set forth in this Section 4.4, Declarant and the Mortgagee fail to cure such alleged violations, the City may exercise any and all of its rights, including those delineated in this Section and may disapprove any amendment, modification, or cancellation of this Declaration on the sole grounds that Declarant is in default of any material obligation under this Declaration.

4.5 Acknowledgment of Covenants. Declarant acknowledges that the restrictions, covenants, easements, obligations and agreements in this Declaration, which are an integral part of the Special Permit, will protect the value and desirability of the Landmark Premises as well as benefit the City

of New York and all property owners within a one-half mile radius of the Landmark Premises. Those restrictions, covenants, easements, obligations and agreements shall be covenants running with the land, and shall bind Declarant and its successors, legal representatives, and assigns. Notwithstanding the foregoing, only the City shall have the right to enforce the provisions of this Declaration.

4.6 No Other Enforceable Restrictions. Declarant represents and warrants that there are no enforceable restrictions of record on the use of the Landmark Premises or the Designated Structure, nor any present or presently existing future estate or interests in the Landmark Premises or the Designated Structure, nor any lien, obligation, enforceable covenant, limitation or encumbrance of any kind, the requirements of which have not been waived or subordinated, which precludes, directly or indirectly, imposition on the Landmark Premises of the restrictions, covenants, easements and obligations of this Declaration.

4.7 Governance. This Declaration shall be governed by and construed in accordance with the laws of the State of New York.

4.8 Severability. In the event that any provision of this Declaration shall be deemed, decreed, adjudged or determined to be invalid or unlawful by a court of competent jurisdiction and the judgment of such court shall be upheld on final appeal, or the time for further review of such judgment on appeal or by other proceeding has lapsed, such provision shall be severable, and the remainder of this Declaration shall continue to be of full force and effect.

4.9 Applicability to Other City Agencies. Declarant covenants to include a copy of this Declaration as part of any application submitted to the LPC, CPC, Buildings Department, Board of Standards and Appeals (“BSA”), New York State Attorney General (in the event of a proposed conversion of the Designated Structure to condominium ownership) or any agency succeeding to

their respective jurisdictions. The restrictions and obligations contained herein are a condition of any permit or Certificate of Occupancy to be issued by the Buildings Department and Declarant will take all reasonable steps to ensure that they are so listed. Failure to carry out such obligation beyond any applicable grace period shall constitute sufficient cause for the Commissioner of the Buildings Department to revoke any building permit issued pursuant to the Special Permit or to apply to the BSA or to a court of competent jurisdiction for revocation of the Certificate of Occupancy or any permit issued by the Buildings Department.

4.10 Limitation of Liability.

(a) Declarant shall be liable in the performance of any term, provision or covenant in this Declaration, subject to the following sentences and subject to Section 4.12 below.

Notwithstanding anything to the contrary contained in this Declaration, the City will look solely to the fee estate and interest of Declarant in the Landmark Premises, on an in rem basis only, for the collection of any money judgment recovered against Declarant, and no other property of Declarant shall be subject to levy, execution or other enforcement procedure for the satisfaction of the remedies of the City or any other person or entity with respect to this Declaration, and Declarant shall have no personal liability under this Declaration. The liability of any Unit Owner under this Declaration shall be limited to the amount of such Unit Owner's prorated share, based on such Unit Owner's interest in the common elements of the Condominium, of the costs of compliance with this Declaration. For the purposes of this Section 4.10, "Declarant" shall mean "Declarant" as defined in Article I hereof, as well as any principals, disclosed or undisclosed, partners, affiliates, officers, employees, shareholders or directors of Declarant. Notwithstanding the foregoing, nothing herein shall be deemed to preclude, qualify, limit or prevent any of the City's governmental rights, powers

or remedies, including, without limitation, with respect to the satisfaction of the remedies of the City, under any laws, statutes, codes or ordinances.

(b) The restrictions, covenants and agreements set forth in this Declaration shall be binding upon Declarant and/or any successors-in-interest thereto only for the period during which such party is the holder of a fee interest in or is a party-in-interest of the Landmark Premises and only to the extent of such fee interest or the interest rendering such party a party-in-interest. At such time as Declarant or any successor-in-interest thereto has no further fee interest in the Landmark Premises and is no longer a party-in-interest of the Landmark Premises, such party's obligations and liability with respect to this Declaration shall wholly cease and terminate from and after the conveyance of such party's interest and such party's successor-in-interest in the Landmark Premises by acceptance of such conveyance automatically shall be deemed to assume such party's obligations and liabilities hereunder to the extent of such successor-in-interest's interest.

4.11 Subordination. Declarant shall cause every individual, business organization or other entity that between the date hereof and the date of recordation of this Declaration becomes a Party in Interest to the Landmark Premises, to execute this Declaration or to subordinate such interest to the Declaration and waive its right to execution. Any mortgage or other lien encumbering the Landmark Premises after the recording date of this Declaration shall be subject and subordinate hereto.

4.12 Right to Convey. Nothing contained herein shall be construed as requiring the consent of the CPC, the LPC, the City, any agency thereof or any other person or entity to any sale, transfer, conveyance, mortgage, lease or assignment of any interest in the Landmark Premises or the Designated Structure.

ARTICLE V

AMENDMENTS, MODIFICATIONS AND CANCELLATIONS

5.1 Amendment or Cancellation. Except as provided in Section 4.1 above, this Declaration may be amended or canceled only upon application of Developer and Declarant and only with the express written approval of the CPC and of the City Council, but only in the event that the City Council reviewed the Special Permit pursuant to Section 197-d, and no other approval or consent shall be required from any public body, private person or legal entity of any kind; provided, however, that no such approval shall be required in the case of any cancellation pursuant to Section 5.4.

5.2 Minor Modification. The Chairperson of the LPC and the Chairperson of the CPC may, by express written consent, administratively approve modifications to the Declaration that the CPC has determined to be minor. Such minor modifications shall not be deemed amendments requiring the approval of the CPC, the LPC, the City Council or any other agency or department of the City of New York.

5.3 Recording and Filing. Any modification, amendment or cancellation of this Declaration, except pursuant to Section 5.4, shall be executed and recorded in the same manner as this Declaration. Following any modification, amendment or cancellation, Declarant shall immediately record it and provide one executed and certified true copy thereof to each of the CPC and the LPC and upon failure to so record, permit its recording by the CPC or the LPC at the cost and expense of Declarant.

5.4 Surrender or Nullification. Notwithstanding the provisions of Section 4.1(a) and 4.1(b), in the event that Developer does not use the Developer Premises pursuant to the Special Permit, Developer may surrender the Special Permit to the CPC and proceed with any use or development of

the Developer Premises permitted by the Zoning Resolution as if such Special Permit had not been granted. In the event that the Special Permit has been surrendered as set forth in the preceding sentence or has lapsed in accordance with the terms of the Zoning Resolution, or in the event that the Development Rights are not acquired by Developer, this Declaration shall be rendered null and void upon recordation of an instrument filed by Declarant discharging it of record, with copies to LPC and CPC, the recordation of which instrument shall constitute a waiver of the right to use the Developer Premises pursuant to the Special Permit.

ARTICLE VI

MISCELLANEOUS

6.1 Exhibits. Any and all exhibits, appendices, or attachments referred to herein are hereby incorporated fully and made an integral part of this Declaration by reference.

6.2 Notices. All notices, demands, requests, consents, waivers, approvals and other communications which may be or are permitted, desirable or required to be given, served or deemed to have been given or sent hereunder shall be in writing and shall be sent: (a) if intended for Declarant, to Saint Thomas Church in the City and County of New York, 678 Fifth Avenue, New York, New York 10019, Attn: Barbara Pettus, with a copy to Fried Frank Harris Shriver & Jacobson LLP, One New York Plaza, New York, New York 10004, Attn: Melanie Meyers, Esq.; (b) if intended for Developer, to W2005/Hines West Fifty-Third Realty, LLC, c/o Hines Interests Limited Partnership, 855 Third Avenue, New York, New York 10022, Attn: Thomas Craig, Jr., with a copy to Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Samuel H. Lindenbaum, Esq.; (c) if intended for the CPC, to the CPC at 22 Reade Street, New York, New York 10007 (or then-official address), Attn: Chairperson; (d) if intended for the LPC, to the LPC at One Centre Street, Municipal Building, New York, New York 10007 (or

then-official address), Attn: Chairperson; and (e) if intended for the City Council, to the City Council at the Office of the Speaker, City Council, City Hall, New York, New York 10007.

Declarant or its representatives, by notice given as provided in this Section 6.2, may change any address for the purposes of this Declaration. Each notice, demand, request, consent, approval or other communication shall be either sent by registered or certified mail, postage prepaid, or delivered by hand, and shall be deemed sufficiently given, served or sent for all purposes hereunder five (5) business days after it shall be mailed, or, if delivered by hand, when actually received.

6.3 Indemnification. Provided that Declarant is found by a court of competent jurisdiction to have been in default in the performance of its obligations under this Declaration after having received written notice of such default and opportunity to cure as provided above, and such finding is upheld on final appeal, or the time for further review of such finding on appeal or by other proceeding has lapsed, Declarant shall indemnify and hold harmless the City from and against all of its reasonable legal and administrative expenses arising out of or in connection with the City's enforcement of Declarant's obligations under this Declaration.

IN WITNESS WHEREOF, Declarant has executed this Declaration as of the day and year first above written.

SAINT THOMAS CHURCH
IN THE CITY AND COUNTY OF NEW YORK

By: _____

Name:

Title:

