

Moore-Love, Karla

From: Reynolds, Allison J. (Perkins Coie) <AReynolds@perkinscoie.com>
Sent: Tuesday, February 20, 2018 3:16 PM
To: Moore-Love, Karla
Cc: Patrick Gilligan; Tim Wybenga; Bonnie Chiu; Pfeiffer, Steven L. (Perkins Coie)
Subject: Public Testimony Regarding Council Item 177 (Fremont Place Apartments)
Attachments: Opposition to Appeal of Design Review Approval LU 16-278621 DZM GW.pdf

Hi Karla,

Please find attached testimony on Council Item 177 for tomorrow's Agenda.

Thank you,

Allison

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February 20, 2018

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Portland City Council
1221 SW 4th Avenue, Room 130
Portland, OR 97204
Attention: Council Clerk

**Re: Opposition to Appeal of Design Review Approval LU 16-278621 DZM GW,
Fremont Place Apartments, City Council Agenda Item 177**

Dear Mayor Wheeler and Members of the City Council:

This office represents Lincoln Property Company ("Lincoln"), owner of the property at 1650 NW Naito Parkway (the "Property" or "site") and proponent of the project approved as LU 16-278621 DZM GW (the "Decision"), commonly known as the Fremont Place Apartments (the "Project").

The Property is zoned for density and height and is an important development site along the Central Reach of the Willamette. The Project is the result of almost a year and a half of formal design efforts to find the right building for this important site, including a Design Advice Request and four hearings before the Design Commission (the "Commission"). Lincoln also met with the Pearl District Neighborhood Association ("PDNA") numerous times throughout the design process. Lincoln started with an elegant design that preserved views of the Fremont Bridge and provided activation of the waterfront. After each meeting and hearing, Lincoln made design changes to further preserve views, add and enhance the more than 10,000 square foot public plaza, activate the greenway, add restaurant space, and further refine the design of the Project. A better building for this site was the result of these efforts.

The Project was approved by the Commission and appealed by the PDNA. Below, our letter addresses legal questions raised by PDNA's Appeal. For the reasons discussed below, the Decision is legally correct and does not violate the City Code. We appreciate your consideration of these important issues.

The Project Meets the Applicable Design Guidelines and Preserves Views of the Fremont Bridge

As explained in length in the Decision, the Project, as modified, meet the applicable design guidelines. The Project design evolved through meeting with the Commission and Project neighbors to better meet these guidelines than the original design. One key aspect of the design

was to preserve views of the Fremont Bridge from Fields Park. The site's 100-foot height limit and allowable FAR would have allowed a low, wide design, without any modifications, that significantly obscured views of the bridge from Fields Park. Although this view is not formally protected and heights on the Property are not required to provide or account for this view, Lincoln understood that preserving the view was important to Project neighbors. Therefore, Lincoln sought modifications to place density in the tower portion of the Project, allowing the podium to drop to five stories and best preserve this view.

The Decision Correctly Calculates the Site's Allowed Floor Area Ratio

PDNA argues that under Portland City Code ("PCC" or "Code") Section 33.930.025, the 25-foot greenway easement and 60-foot wide public open space connection are "dedications" of public or private rights of way and should be deducted from the site area prior to calculating the site's floor area ratio ("FAR"), resulting in a smaller floor area limit for the site. PDNA is incorrect.

The Code Section PDNA relies upon to make this argument, PCC 33.930.025, is not part of the regulations that govern the City's consideration of the Project. The Project's land use review application was submitted on November 28, 2016. Pursuant to PCC 33.700.080, the Code regulations in effect on this date govern the Project. PCC 33.930.025 was added to the Code on March 31, 2017 and does not exist in the regulations governing the Project.¹

Under the Code governing the Project, a site's floor area ratio is "the amount of floor area in relation to the amount of site area, expressed in square feet." Under this metric, the allowed amount of floor area that can be built on a site is directly related to the site size. A "site" is defined as an ownership.² An "ownership" is "one or more contiguous lots that are owned by the same person, partnership, association, or corporation." A lot is a "legally defined piece of land other than a tract that is the result of a land division. This definition includes the State definition of both lot, (result of subdividing), and parcel, (result of partitioning)." Easement areas, such as the greenway trail and the public access area on the Property, do not transfer ownership of a lot, and merely allow another party (here, the public) to use an owner's land for a specific purpose (here, public access). Under the Code, an easement does not reduce the area of the site for purposes of calculating the site's FAR.

The Locker Room and Associated FAR Bonus are Allowed

The Project includes a 380-square foot locker room and a bicycle storage area. PDNA questions the utility of these facilities in a residential building where each unit will have a single bicycle

¹ See City Council Ordinance 188259.

² Exceptions to the definition of a site as an ownership also exist in the Code but do not apply to this situation.

storage space. PDNA also alleges that the locker room is included only to generate bonus FAR and urges the City to use its discretion to deny the locker room FAR bonus.

The Project's 275 units and 6,000 square feet of retail/restaurant space require 415 long-term bicycle parking spaces. 275 of these are included in the residential units. The remainder of these spaces are included in the bicycle storage area. Lincoln included the locker room and additional bicycle storage above the maximum requirement to accommodate and encourage bicycle use by employees of the apartment management team as well as employees of the retail and restaurant spaces in the mixed-use Project. In Lincoln's experience, residents in bike-friendly areas like Portland are often interested in additional bicycle storage outside of units to accommodate more than one bicycle user per unit. Biking in Portland's often rainy weather also makes a locker room for storing and changing out of bike gear desirable to residents.

Under the Code that applies to the Project, the locker room bonus provides bonus FAR for buildings in the CX and EX zones that provide locker rooms with certain facilities and extra bicycle storage. This bonus is intended to encourage bicycle use and applies to all building types (including mixed use buildings like the Project) in the listed zones.

The FAR generated by the locker room bonus is not discretionary. Section 33.510.210.C of the Code is clear that when the bonus elements are included in a development, bonus FAR is generated. The Commission and this Council do not have discretion to prevent a project from earning the locker room bonus FAR if the project meets the Code requirements. PDNA is correct, however, that the use of FAR entitlements on the Property (including any bonus or base FAR) is subject to approval of the building's design through the design review process. For reasons discussed in the Decision, the Commission found that the Project meets the applicable design guidelines.

The Project Complies with the Parking Regulations

PDNA concludes that the Project only includes retail and restaurant space to circumvent the maximum parking standards and allow the Project to include more parking for residential users. PDNA appears to misunderstand Lincoln's proposal and does not provide any evidence or explanation for this confusing statement. The Project includes 300 fewer spaces than the maximum parking allowance for residential use, and 9 spaces for retail and restaurant use (for which unlimited spaces are allowed). As required by the Code, the Project will mark spaces for retail and restaurant customers and prohibit resident use of these spaces during times required by the Code.

The Project proposes 275 residential units and 140 parking spaces for residential use, at a ratio of 0.51 spaces per unit. Under PCC 33.510.265.E (Parking regulations for the River District Sectors 1 and 2), 1.7 parking spaces per residential unit are allowed. This maximum ratio would

allow 467 spaces for residential use in the Project. The proposed amount of residential parking is less than this maximum amount. The Project also proposes 9 spaces for use by retail and restaurant customers. Unlimited parking for retail sales and service (“RSS”) uses (including retail and restaurant) is allowed at the site (PCC 33.510.265.A.4), but this parking must be accessory to the RSS use on weekdays from 7:00AM until 6:00 PM. These 9 spaces will be marked for the RSS uses and will not be available for resident parking during the restricted time.

In total, 149 parking spaces are proposed for the mixed-use building. This amount is considerably less than the maximum allowance for residential spaces (467 spaces) or for retail spaces (unlimited).

A 200-foot Block Pattern is Not Required for the Project

PDNA argues that the Project fails to meet design guidelines and greenway design guidelines because the Project does not follow the City’s typical 200-foot grid pattern. PDNA also argues that the building will set a precedent for other adjacent sites to forgo 200-foot blocks. None of the guidelines that apply to this Project require it to follow the 200-foot grid pattern. Instead the River District and greenway guidelines require pedestrian linkage and access, which this Project achieves.

As described in the Decision, the Project site is larger than a typical 200-foot block, as is somewhat common for river parcels south of the Fremont Bridge and true of the surrounding development. The Project provides a 60-foot wide public plaza and greenway access that leads from NW Naito to the greenway trail in conjunction with a 180-foot wide building. The Project originally considered two narrow public access paths on each side of the building, but the Design Commission determined that the single larger plaza accessway would better activate the River and greenway and was the preferred design for the Property.

Future development on adjacent sites will be governed by the regulations for those sites at the time of development. Development of the Project will not prevent adjacent properties from providing access to the river or pedestrian connections.

Modifications Are Appropriate for the Project

PDNA argues that the modifications approved for the Project should instead be processed as adjustments and subjected to the “more rigorous” adjustment process.

Under PCC 33.825.040, the Commission may consider modifications to “site-related development standards” that will allow a project to better meet applicable design guidelines. These include changes to the height, setbacks, and building façade standards, among others. Adjustments are required for a change to use-related standards, such as the size of limited uses,

number of units, or intensity of use. All modifications approved for the Project are to site-related development standards.

Because of the Type III design review process required for the Project, either an adjustment or modification for this Project would be handled through the same Type III process by the Commission. Therefore, the adjustment process should not be considered more “rigorous” as PDNA argues. The modifications sought are subject to the same level of scrutiny and opportunity for public comment as an adjustment would be. The changes approved for this Project are site-related and specific to the design of the building and its ability to meet the guidelines. For these reasons, the modification process is the appropriate avenue for these changes.

Modifications Approved for the Project Achieve a Better Design

PDNA objects to the modifications approved for the Project, arguing that a building with such a large number of modifications inherently cannot meet the Code’s approval standards, that modifications are not required to be considered or approved by the Commission, and that the modifications approved for the Project violate the Code, either individually or through “stacking of modifications.”

Modifications to the Code development standards are allowed through the Design Review process if the decision maker (here, the Commission) finds that the modification will allow the Project to better meet the design guidelines than a design that did not include a modification, and if “on balance” the proposal will be consistent with the purpose of the standard being modified. As discussed at length in the Decision, the Commission found that the modifications approved for the building allowed the Project to better meet the applicable design guidelines and were consistent with the purposes of the Code standards.

The Number of Modifications Approved is Common for North Pearl and South Waterfront Projects

The number of modifications approved for this Project is slightly higher than for many developments in the City, but the Project is by no means an outlier. Four of the seven modifications are to standards that do not impact the building height, massing or placement on the site. These modifications (1, 2, 6 and 7) are to allow rooftop mechanical equipment

screening³ to cover a larger roof area and be set closer to the roof edge,⁴ to allow bicycle parking spaces to be 8 inches narrower than the Code requirements, to allow landscaping with low plants instead of trees along the Naito frontage, and to allow 3 feet less landscaping coverage along one side of the Project driveway. As stated in the Decision and throughout the hearing discussions, modifications to these standards are frequently considered and approved by the Commission. The Decision describes how these modifications allow the Project to better meet the design guidelines and are consistent with the purposes of these development standards.

Three modifications are proposed that directly impact building height, massing, and placement on the site. These modifications are to the specific standards for the North Pearl Subarea. For buildings in this subarea that were approved after these criteria were added to the Code, modifications to these standards are common. In part, this is because the standards are quite specific, and limit height, size of floor plates, façade length, and the angle at which the building steps back from the greenway. The only area of the City with similarly specific and prescriptive standards is the South Waterfront Subarea, and, predictably, developments in that area have been approved with similar modifications.⁵

Modifications not Prohibited by the Code Must be Considered by the Commission

Unless specifically prohibited, modifications to any development standard can be granted if they allow the Project to better meet the design guidelines and are consistent with the purpose of the standard. The North Pearl Subarea regulations specifically contemplate that modifications may be warranted and establish upper limits on these modifications. For instance, Section 33.510.205.H.2.c allows height to be modified, but caps the height modification option at 175 feet. These limits ensure that even with modifications, the resulting building will meet the

³ The height standards for the property's EX base zone allow height up to 65 feet. Under PCC 33.700.070, because of the Property's location within the CCPD, the Property's base and bonus plan district heights of 100-175 feet override the EX base zone standard. However, in instances where the plan district rules do not conflict with the base EX zone regulations, the EX zone rules govern development. The EX base zone allows mechanical equipment screening that meets certain, modifiable criteria, to project an additional 10 feet in height above a building's allowed height. The CCPD rules do not conflict with or otherwise regulate additional height for mechanical equipment, so the EX base zone rules control. The lack of CCPD regulation of this standard appears to be intentional, as the similar regulations for the South Waterfront Height Opportunity Area do place specific restrictions on additional height to accommodate mechanical equipment. See PCC Section 33.510.205.G.2. Therefore, the Project's additional height for mechanical areas is allowed, with the approved modification for percentage of roof area and placement upon the roof.

⁴ Modification 1 allows the screened mechanical area to cover 73% of the Tower's roof surface and to be set back 5 and ten feet from the Tower's roof edge along the Naito frontage as shown on Exhibit 1.

⁵ See LU 07-127030 DZM; LU 06-109715 DZM, AD; LU 05-108039 DZM, GW; LU 13-139762 DZM, AD; LU 16-134889 DZM; LU 14-152721 DZM, GW.

purpose of these area-specific regulations. In all instances, the modifications approved for this Project are within the allowed modification range.

PDNA alleges that modifications are not required to be considered by the Design Commission. In fact, the Commission is required to consider all modifications requested by an applicant that are not prohibited by the Code. All of the modifications approved for this Project are allowed under the Code, and were required to be considered by the Commission. PDNA correctly points out that the Commission was not required to approve any of the modifications. We agree. However, the Commission carefully considered each modification request and granted modifications for the Project after finding that these modifications allowed the Project to better meet the design guidelines and were consistent with the purposes of the Code standards.

Modifications Approved for the Project Do Not Violate the Code

PDNA assigns error to the Design Commission's approval of modifications individually and modifications that "stack upon" one another.

The Commission made findings regarding how each modification allows the Project to better meet the design guidelines and is consistent with the purpose of the modified standards. In challenging most of the modifications, PDNA disagrees with the Commission's interpretation of the guidelines and purposes of the modified regulations. Beyond this disagreement, PDNA does not provide evidence to support its contention that the Commission's decision violates the Code.

PDNA also mischaracterizes the change made by modification 5, which it claims allows the Project to protrude into and eliminate the greenway setback. In fact, the Project provides a larger setback from the greenway than required. The Project's façade along the greenway is composed of a 5-story building podium (approximately 2/3 of the façade length⁶) and a single-story podium (approximately 1/3 of the greenway façade⁷). The building angles horizontally away from the greenway to the north, and provides larger setbacks on the north elevation, as shown on the attached Exhibit 2. The 5-story podium is, at its closest point, set back an additional three feet, 4 inches from the general 25-foot greenway setback. The one-story podium is set back even further from the greenway, an additional 18 feet, 6 inches from the 25-foot greenway setback at its closest point.

Modification 5 does not allow the building to intrude into the 25-foot greenway setback. Instead, it modifies the North Pearl Subarea waterfront standards, which apply only to portions of the building over 35-feet in height. These standards require areas taller than 35 feet to step back from the greenway at a 45-degree angle (one foot back for every one foot in height over 35 feet). To allow for a thinner tower and shorter podium that provides an elegant design while preserving

⁶ The 5-story podium is 120'-8" long along the greenway.

⁷ The single-story podium is 55'-4" long along the greenway.

views of the Fremont Bridge, a modification to this setback height standard was needed. As shown on Exhibit 2, the five-story podium is 19 feet, 3 inches taller than the Code allowance at its closest point to the 25-foot greenway.⁸ The closest point of the tower, which is set more than 90 feet back from the 25-foot greenway, is 63 feet, 6 inches taller than the allowed standard.⁹ The Commission found that this orientation allowed the Project to better meet the design guidelines and was consistent with the purpose of the setback angle standard.

Finally, the Code does not prohibit “stacking” of modifications, and in fact directly contemplates this in the North Pearl Subarea. For a height modification up to 175 feet discussed above, façade length is limited. However, façade length can also be modified, up 150 feet. The Code contemplates that both modifications may be appropriate in order to allow a building to better meet the design guidelines, as the Commission found was necessary for this Project.

The North Pearl Plan Is Not An Approval Criterion for the Project

PCC Section 33.510.205.H contains the height opportunity area regulations for the North Pearl Subarea. The purpose statement for these regulations states: “In the North Pearl Subarea, additional building height may be appropriate to support the goals of the North Pearl Plan.” It goes on to enumerate the various goals and purposes of the regulations that should be considered when allowing additional height. The Commission considered these factors when approving additional height for the Project.

PDNA argues that the mention of the “North Pearl Plan” in this purpose statement directly incorporates the City’s 2008 North Pearl District Plan and that consistency with this planning document becomes an approval criterion for the Project. PDNA is incorrect. The North Pearl District Plan is a summary of planning goals and initiatives for the North Pearl area developed in 2008. The City incorporated some of the objectives of this Plan into the zoning Code, but did not incorporate the Plan itself or make the Plan an approval criterion. This is evident by the inclusion of some, but not all, of the Plan goals as part of the Code’s purpose statement for the height opportunity area. Furthermore, the Oregon Court of Appeals has found that when a local zoning Code makes general reference to a planning document but does not directly incorporate

⁸ Due to the horizontal angle of the building as it faces the greenway, the building intersects the Code prescribed angle at different elevations show on Exhibit 2. The North corner of the 5-story podium, which is set 7’-9” back from the 25-foot greenway, is 14’-9” taller than allowed. The South corner of the 5-story height podium, which is set 3’-4” back from the 25-foot greenway, is 19’-3” taller than allowed.

⁹ Due to the horizontal angle of the building as it faces the greenway, the building intersects the Code prescribed angle at different elevations show on Exhibit 2. The North corner of the tower, which is set 92’-6” back from the 25-foot greenway, is 58’-11” taller than the allowed standard. The South corner of the tower, which is set 90’-4” back from the 25-foot greenway, is 63’-6” feet taller than the allowed standard.

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specific plan provisions, the planning document as a whole cannot be considered an approval criterion. See *Paterson v. City of Bend*, 201 Or App 344 (2005).

Conclusion

The Project evolved through a lengthy design process and conversations with Project neighbors, and involved numerous design changes to better meet the design guidelines and provide public benefits to the neighborhood. For the reasons discussed above, the Commission's decision complies with the Code regulations that govern the Project. We urge the City Council to support this important Project and deny PDNA's appeal.

Very truly yours,



Allison J. Reynolds

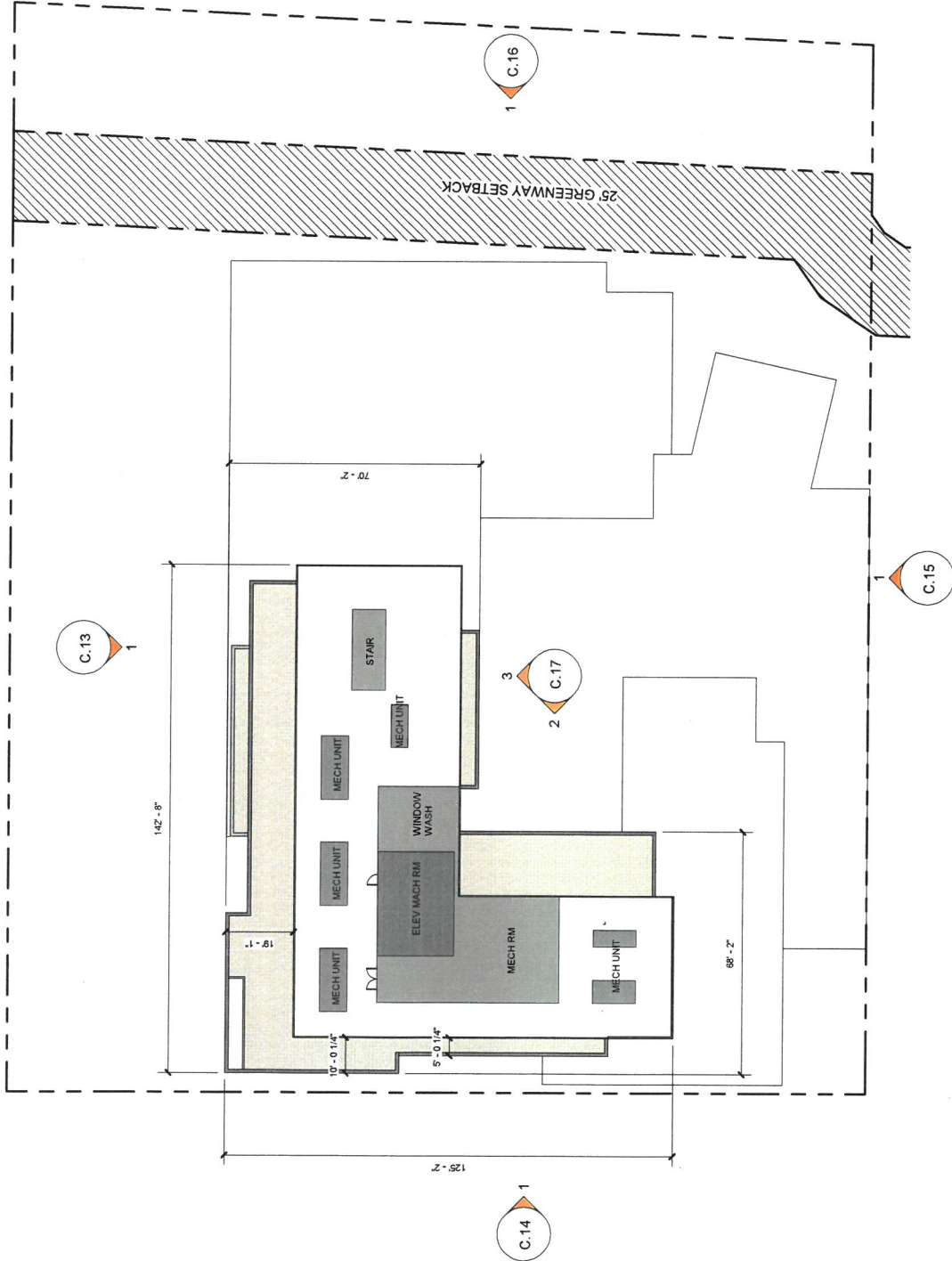


Stephen L. Pfeiffer

Exhibits 1-2

cc: Patrick Gilligan, Lincoln Property Company

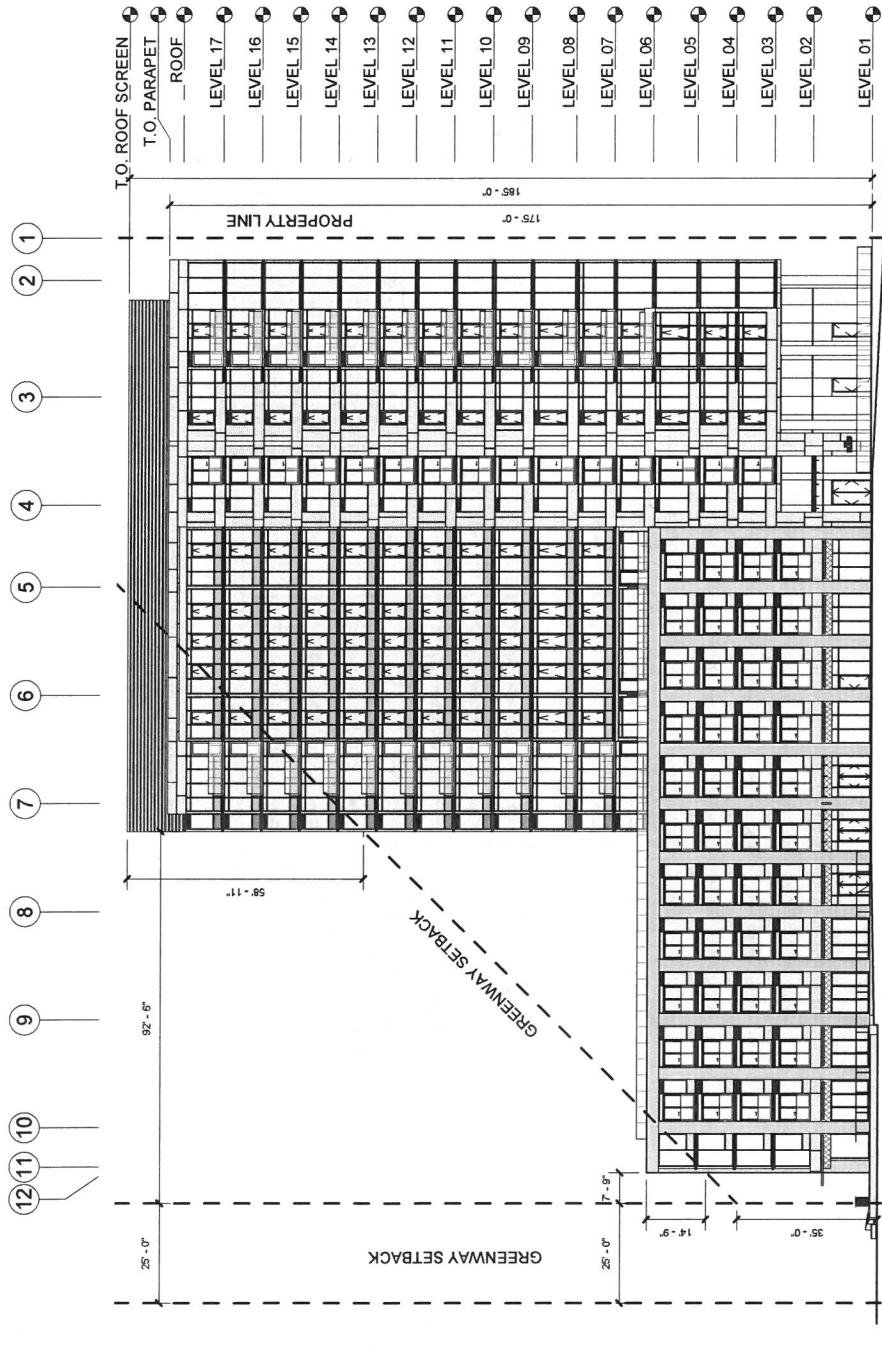
EXHIBIT 1



C.12 ROOF PLAN



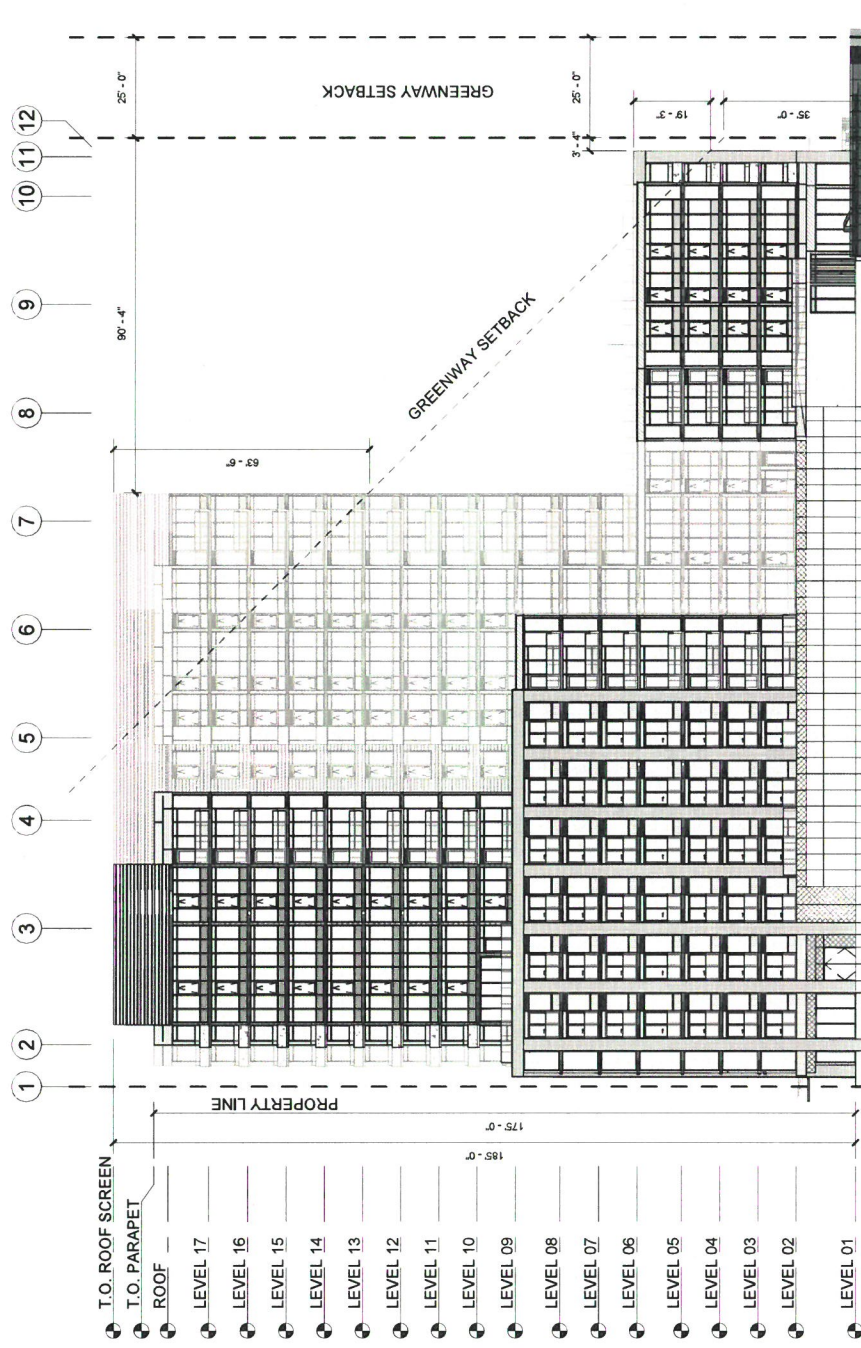
EXHIBIT 2



1 NORTH ELEVATION
1" = 30'-0"



C.18 BUILDING ELEVATIONS - NORTH



1 SOUTH ELEVATION
1" = 30'-0"

