RESTRICTIVE DECLARATION

NEW YORK COUNTY

BLOCK 1284, LOT 21

RECORD AND RETURN TO:

Fried Frank Harris Shriver & Jacobson LLP

One New York Plaza

New York, New York 10004

Attention: Melanie Meyers, Esq.

Matter double struck out is old, deleted by the City Council;

Matter double-underlined is new, added by the City Council.

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RESTRICTIVE DECLARATION

**THIS RESTRICTIVE DECLARATION** (“**Declaration**”), made as of the \_\_\_ day of \_\_\_\_\_\_\_\_\_, 202\_, by 415 MADISON AVENUE LLC, a Delaware limited liability company having an address at c/o Rudin Management Co. Inc., 345 Park Avenue, New York, New York 10154 (“**Declarant**”).

**W I T N E S S E T H:**

1. Declarant is the fee owner of certain real property located in the Borough of Manhattan, City and State of New York, designated on the Tax Map of the City of New York as Lot 21 of Block 1284 (the “**Subject Property**”), which is more particularly described in **Exhibit A** attached hereto;
2. The Chair of the New York City Planning Commission (the “**Chair**”) previously approved the following zoning certifications: (a) a certification pursuant to Section 81-643(a) of the Zoning Resolution for retaining non-complying floor area in the existing commercial building on the Subject Property (N 210004 ZCM); (b) a certification pursuant to Section 81-643(b) of the Zoning Resolution allowing for the reconstruction of 40,909 square feet of non-complying floor area in a new commercial development on the Subject Property (N 210220 ZCM); and (c) a certification pursuant to Section 81-642 to enable the transfer of 36,139.4 square feet of development rights from the zoning lot occupied by St. Bartholomew’s Church and Community House (Block 1305, Lot 1) to the Subject Property (N 210219 ZCM) (collectively, the “**Certifications**”);
3. Declarant filed applications with the New York City Department of City Planning (“**DCP**”) for approval by the New York City Planning Commission (the “**Commission**”) of: (a) a special permit pursuant to Section 81-645 of the Zoning Resolution for an increase in the maximum floor area ratio for the provision of a public concourse (C 210453 ZSM) (the “**Public Concourse Special Permit**”); and (b) a special permit pursuant to Section 81-685 of the Zoning Resolution to modify street wall, height and setback, and mandatory district plan elements regulations (C 210454 ZSM) (collectively, the “**Special Permits**”);
4. Declarant intends to develop the Subject Property pursuant to the Special Permits and Certifications with a new building utilizing up to 287,180 square feet of zoning floor area, containing a mix of office and retail uses (the “**Proposed** **Building**”) as set forth in the Building Drawings (defined below);
5. The Proposed Building would utilize up to 35,022 square feet of zoning floor area pursuant to the Public Concourse Special Permit (the “**Bonus Floor Area**”);
6. Section 81-645 of the Zoning Resolution requires applicants for the Public Concourse Special Permit to execute an agreement setting forth the obligations of the owner to construct, maintain, and provide public access to the public concourse;
7. The Commission conducted an environmental review of the Special Permits as lead agency pursuant to City Environmental Quality Review, Executive Order No. 91 of 1977, as amended, and the regulations promulgated thereunder at 62 RCNY § 5-01 et seq. and the State Environmental Quality Review Act, New York State Environmental Conservation Law § 8-0101 et seq. and the regulations promulgated thereunder at 6 NYCRR Part 617, and published an Environmental Assessment Statement dated July 23, 2021 (the “**EAS**”) and issued a Negative Declaration on July 26, 2021;
8. To ensure that the development of the Subject Property pursuant to the Special Permits is consistent with the analysis in the EAS and incorporates certain project components related to the environment (“**PCREs**”) that were material to the analysis in the EAS, Declarant desires to restrict the manner in which the Subject Property may be developed, redeveloped, maintained, and operated now and in the future;
9. Pursuant to the certificate annexed hereto as **Exhibit B** (the “**Certification of Parties-in-Interest**”), [TITLE COMPANY] has certified that as of [DATE] Declarant and [OTHERS] are the sole Parties-in-Interest (defined below) to the Subject Property; and
10. All Parties-in-Interest have either executed this Declaration or waived their rights to execute this Declaration by written instrument, which instrument is intended to be recorded simultaneously with this Declaration.

**NOW, THEREFORE,** Declarant does hereby declare and agree that the Subject Property shall be held, sold, transferred, conveyed, and occupied subject to the restrictions, covenants, obligations, easements, and agreements of this Declaration, which shall run with the Subject Property and which shall be binding on Declarant and its successors and assigns.

# CERTAIN DEFINITIONS

## **Definitions**

**.** For purposes of this Declaration, the following terms shall have the following meanings:

“**Alternative Environmental Measures**” shall have the meaning set forth in Section 4.03(a).

“**As-of-Right Building**” shall mean any building that can be developed and constructed on the Subject Property without utilizing the Special Permits.

“**Bonus Floor Area**” shall have the meaning set forth in the Recitals.

“**Building Drawings**” shall have the meaning set forth in Section 2.02.

“**Building Permit**” shall mean shall mean a work permit issued by DOB under a “New Building” application authorizing the construction of above-grade portions of the Proposed Building.

“**Business Days**” means any day other than a Saturday, Sunday, or other day on which banks in the State of New York are not open for business.

“**Certification of Parties-in-Interest**” shall have the meaning set forth in the Recitals.

“**Certifications**” shall have the meaning set forth in the Recitals.

“**Chair**” shall have the meaning set forth in the Recitals.

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

“**City Council**” shall mean the New York City Council.

“**Commission**” shall have the meaning set forth in the Recitals.

“**Completion Notice**” shall have the meaning set forth in Section 5.01.

“**Completion Security**” shall have the meaning set forth in Section 7.04(b).

“**DCP**” shall have the meaning set forth in the Recitals.

“**Declarant**” shall have the meaning set forth in the Preamble.

“**Declaration**” shall have the meaning set forth in the Preamble.

“**Default Notice**” shall have the meaning set forth in Section 7.01(a).

“**Delay Notice**” shall have the meaning set forth in Section 7.04(a).

“**DOB**” shall mean the New York City Department of Buildings.

“**EAS**” shall have the meaning set forth in the Recitals.

“**Elimination or Modification of EAS Obligation**” shall have the meaning set forth in Section 4.03(b).

“**Final Approval**” shall mean approval or approval with modifications of the Special Permits by the City Council, unless the City Council disapproves the decision of the Commission and the Mayor of the City of New York (the “**Mayor**”) files a written disapproval of the City Council’s action pursuant to New York City Charter Section 197‑d(e), and the City Council does not override the Mayor’s disapproval, in which event “Final Approval” shall mean the Mayor’s written disapproval of the City Council’s action pursuant to such New York City Charter Section 197‑d(e). Notwithstanding anything to the contrary contained in this Declaration, Final Approval shall not be deemed to have occurred for any purpose of this Declaration if the final action taken pursuant to New York City Charter Section 197-d is disapproval of the Special Permits.

“**Final Completion**” or “**Finally Complete**” shall mean the completion of all relevant items of work, including any so-called “punch-list” items, which remain to be completed upon Substantial Completion.

“**Final Completion Determination**” shall mean a determination by the Chair that the Public Concourse is Finally Complete.

“**Mortgage**” shall mean a mortgage given as security for a loan in respect of all or any portion of the Subject Property.

“**Mortgagee**” shall mean the holder of a Mortgage.

“**MTA**” shall mean the Metropolitan Transportation Authority, New York City Transit, or any successor to its jurisdiction.

“**Named Mortgagee**”shall have the meaning set forth in Section 8.01(d).

“**Notice**” shall have the meaning set forth in Section 8.01(a).

“**Party-in-Interest**” and, in the plural, “**Parties-in-Interest**” shall have the meaning set forth in subdivision (d) of the definition of the term “zoning lot” in Section 12-10 of the Zoning Resolution.

“**PCO**” shall mean a Permanent Certificate of Occupancy issued by DOB.

“**PCREs**” shall have the meaning set forth in the Recitals.

“**Proposed Building**” shall have the meaning set forth in the Recitals.

“**Public Concourse**” shall have the meaning set forth in Section 2.03.

“**Public Concourse Drawings**” shall have the meaning set forth in Section 2.03.

“**Public Concourse Special Permit**” shall have the meaning set forth in the Recitals.

“**Special Permit Election**” shall have the meaning set forth in Section 2.01.

“**Special Permits**” shall have the meaning set forth in the Recitals.

“**Subject Property**” shall have the meaning set forth in the Recitals.

“**Substantial Completion**”or “**Substantially Complete**”shall mean that the Public Concourse has been constructed substantially in accordance with the Public Concourse Drawings and may be usable by the public. The Public Concourse may be deemed Substantially Complete notwithstanding that (a) minor or insubstantial items of construction, decoration, or mechanical adjustment remain to be performed or (b) if applicable, Declarant has not completed any planting or vegetation or tasks that must occur seasonally.

“**Substantial Completion Determination**” shall mean a determination by the Chair that the Public Concourse is Substantially Complete.

“**TCO**”shall mean a Temporary Certificate of Occupancy issued by DOB.

“**Uncontrollable Circumstances**” shall include the following elements: strike(s) or labor dispute(s); inability to obtain labor, equipment, supplies, or materials, or reasonable substitutes therefor, in the open market; acts of God; governmental restrictions, regulations, omissions, or controls; enemy or hostile government actions, war, hostilities, terrorism, explosion, invasion; civil commotion, riot, mob violence, malicious mischief, insurrection, revolution, or sabotage; a lockout; a flood, earthquake, or fire; an epidemic or quarantine restriction; inclement weather or field conditions of such a nature as to make performance or completion of the Public Concourse not feasible; a taking of the Subject Property, or a portion thereof, by condemnation or eminent domain; failure of a public utility to provide power, heat, or light; unusual delay in transportation; governmental actions with respect to construction projects in the vicinity of the Public Concourse that directly delay performance or completion of the Public Concourse; the pendency of litigation not initiated by Declarant or similar proceeding which results in an injunction or restraining order or similar relief prohibiting or otherwise delaying the commencement or continuation of the obligations of Declarant pursuant to this Declaration, provided such litigation or proceeding was not instituted, financed or supported by Declarant or any of its affiliates; or other conditions similar in character to the foregoing which are beyond the control of Declarant. In addition, “Uncontrollable Circumstances” shall also include (i) material delays by the City, State or United States government, or any agency or instrumentality thereof, the MTA, or any utility company, in the performance of any work or processing or approval of any applications, or comment on architectural and engineering plans within a reasonable time period following receipt of such plans, unless due to any act or failure to act by Declarant; and (ii) denial to Declarant by any owner, ground lessee or franchisee 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 or any utility company having an enforceable interest in adjoining real property, including sidewalk or streets, of a right to access to such adjoining real property. No event shall constitute Uncontrollable Circumstances unless (i) the event is not due to an act or failure to act of Declarant, and (ii) Declarant complies with the procedures set forth in Section 7.04, and (iii) the Chair or the Deputy Mayor has certified the existence of Uncontrollable Circumstances or the Chair has failed to respond in accordance with the provisions of Section 7.04(a).

“**Zero Occupancy TCO**” shall mean a TCO for the core and shell of the Proposed Building or portions thereof. A Zero Occupancy TCO shall not include any certificate of occupancy that permits occupancy of the Proposed Building or portions thereof for office, retail, hotel, or other tenant uses.

“**Zoning Resolution**” shall mean the Zoning Resolution of the City of New York, effective December 15, 1961, as amended from time to time.

# DEVELOPMENT OF THE SUBJECT PROPERTY

## **Special Permit Election**

. The provisions of this ARTICLE II shall apply to the development of the Subject Property upon Declarant’s acceptance of a DOB foundation permit that includes a DOB zoning approval for the Proposed Building (the “**Special Permit Election**”).

## **Proposed Building**

. If the Declarant makes the Special Permit Election, the Proposed Building shall be constructed substantially in accordance with the locations, dimensions, and specifications indicated on the following drawings, annexed hereto as **Exhibit C** (collectively, the “**Building Drawings**”):

|  |  |  |
| --- | --- | --- |
| **Drawing Number** | **Title** | **Last Revision Date** |
| Z-01 | Zoning Analysis | 07/26/2021 |
| Z-02 | Zoning Lot Site Plan | 07/26/2021 |
| Z-04 | Zoning Diagram Waiver Plan | 07/26/2021 |
| Z-05 | Zoning Building Sections | 07/26/2021 |
| Z-06 | Zoning Building Sections | 07/26/2021 |
| Z-11 | Daylight Evaluation Analysis | 07/26/2021 |
| Z-12 | Daylight Evaluation Analysis - East 48th Street | 07/26/2021 |
| Z-13 | Daylight Evaluation Analysis - Madison Avenue | 07/26/2021 |

## **Bonused Improvements**

. As a requirement for utilizing Bonus Floor Area, Declarant shall construct, at its sole cost and expense a public concourse (the “**Public Concourse**”) substantially as shown on the following plans, annexed hereto as **Exhibit D** the “**Public Concourse Drawings**”):

|  |  |  |
| --- | --- | --- |
| **Drawing Number** | **Title** | **Last Revision Date** |
| L-100 | Concourse - Layout Plan | 07/26/2021 02/10/2022 |
| L-101 | Concourse - Seating and Amenities Plan | 07/26/2021 02/10/2022 |
| L-200 | Concourse - Materials, Paving & Grading Plan | 07/26/2021 |
| L-301 | Concourse - Lighting Plan | 07/13/2021 |
| L-302 | Concourse - Photometric Plan | 07/13/2021 |
| L-500 | Concourse Elevations | 07/26/2021 |
| L-501 | Concourse Sections | 07/26/2021 |
| L-600 | Typical Details | 07/26/2021 |
| L-601 | Exterior Bench/Planter Plans and Details | 07/26/2021 |
| L-700 | Signage | 07/26/2021 |

## 

## **As-of-Right Building**. Declarant shall have the right to develop an As-of-Right Building without adherence to the Building Drawings or Public Concourse Drawings. At any time prior to the issuance of a TCO for the Proposed Building, Declarant may forfeit the Special Permits and terminate this Declaration in accordance with Section 6.02(c).

## 

# PUBLIC Concourse

## **Maintenance**

.Declarant or its designee shall be responsible for the maintenance of the Public Concourse for the life of the Proposed Building.

## **Hours of Operation**

. The Public Concourse shall be open to the public 24 hours a day, 7 days a week.

## **Public Concourse Closures**. Notwithstanding the foregoing, Declarant may close the Public Concourse to the public and use such space (i) for private functions \_\_ (\_\_) times per calendar year and (ii) for local community or not-for-profit functions or events without expense to such community or not-for-profit organizations except for the actual costs of such function to Declarant \_\_ (\_\_) times per calendar year, for a total of \_\_ (\_\_) such closures per year, each time for not more than a \_\_ (\_\_)-hour period commencing at \_\_\_\_\_, provided that (x) Declarant shall provide written notice to the Department of City Planning, Attention: General Counsel at least seven (7) days prior to such closing, indicating the date, time, and duration of such closing and indicating whether such closing is for a private function or for a community or not-for-profit function or event, (y) for each such closing Declarant shall, for the seven (7) days immediately preceding the closing, post a sign at the Public Concourse, giving notice of such closing; and (z) the Public Concourse shall be restored to its approved condition as shown on the Public Concourse Drawings by \_\_ a.m. of the day following any closure pursuant to this Section 3.03.

# PROJECT COMPONENTS RELATING TO THE ENVIRONMENT

## **Project Components Related to the Environment**

. If the Declarant makes the Special Permit Election, Declarant shall implement the following PCREs:

### **Construction Air Emissions Reduction Measures**.

#### All diesel-powered non-road construction equipment with a power rating of 50 horsepower or greater shall meet at least the Tier 3 emissions standard to the extent practicable. All diesel-powered engines rated less than 50 horsepower shall meet at least the Tier 2 emissions standard to the extent practicable.

#### Non-road diesel engines with a power rating of 50 horsepower or greater and controlled truck fleets (i.e., truck fleets under long-term contract with the Declarant), including but not limited to concrete mixing and pumping trucks, shall utilize the best available technology for reducing diesel particulate matter emissions.

### **Construction Noise Reduction Measures**.

#### The use of certain types of construction equipment may not exceed the noise emission limits set forth in **Exhibit E**.

#### Concrete operations including pumps and trucks shall occur along East 48th Street without a direct line of site to the west-facing windows at 423 Madison Avenue.

#### Along Madison Avenue, the site-perimeter noise barrier shall be 12 feet tall and shall connect with no gaps to the bottom of a sidewalk bridge, leaving no line of site to the upper floors of 423 Madison Avenue. Where logistics allow, truck deliveries shall take place behind the noise barriers.

#### To allow for the maintenance of a closed-window condition, Declarant shall offer one window air-conditioner unit per living room and bedroom to residences in 423 Madison Avenue that do not have one at the time of construction.

## **Uncontrollable Circumstances Involving a PCRE**

## .Notwithstanding any provision of this Declaration to the contrary, if (a) Declarant is unable to perform a PCRE set forth in this ARTICLE IV by reason of the occurrence of Uncontrollable Circumstances and (b) the failure to implement the PCRE during the period of Uncontrollable Circumstances, or the implementation of an alternative measure proposed by Declarant, would not result in any new or different significant environmental impact not addressed in the EAS, then Declarant shall not be required to perform such obligation.

## **Innovation and Alternatives; Modifications Based on Further Assessments.**

### **Innovation and Alternatives**. In complying with any obligation set forth in this ARTICLE IV, Declarant may, at its election, implement innovations, technologies, or alternatives now or hereafter available, including replacing any equipment, technology, material, operating system, or other measure previously located on the Subject Property or used within the Proposed Building, provided that Declarant demonstrates to the satisfaction of DCP that such alternative measures would result in equal or better methods of achieving the relevant obligation than those set forth in this Declaration (such measures, “**Alternative Environmental Measures**”), in each case subject to approval by DCP.

### **Modifications Based on Further Assessments**. In the event that Declarant believes, in good faith, based on changed conditions, that an obligation under this ARTICLE IV should not apply or could be modified without diminishment of the environmental standards which would be achieved by implementation of the obligation, it shall set forth the basis for such belief in an analysis submitted to DCP. In the event that, based upon review of such analysis, DCP determines that the relevant PCRE should not apply or could be modified without diminishment of the environmental standards which would be achieved by implementation of the obligation, Declarant may eliminate or modify the PCRE consistent with the DCP determination (“**Elimination or Modification of EAS Obligation**”).

### **Notice**. If Declarant implements any Alternative Environmental Measures or an Elimination or Modification of EAS Obligation, a notice of such change may be recorded in the Office of the City Register against the Subject Property in lieu of modification to this Declaration.

# CERTIFICATES OF OCCUPANCY

## **Completion Notice**

. Declarant shall submit a notice to the Chair (a “**Completion Notice**”) certifying that the Public Concourse is Substantially Complete (or in the case of a PCO, Finally Complete). Within ten (10) Business Days following receipt of a Completion Notice, the Chair shall (i) issue a Substantial Completion Determination or Final Completion Determination, as applicable, or (ii) notify Declarant in writing that the Public Concourse is not Substantially Complete or Finally Complete, as applicable, and set forth with specificity the reasons therefor. If the Chair issues an objection in accordance with clause (ii) above, Declarant and the Chair shall meet within five (5) Business Days of the issuance of such notice to review the claimed omission or failure and develop any measures required to respond to such claim. Declarant shall take all steps necessary to remedy such omission or failure, including providing additional information in writing as may be reasonably requested by the Chair to verify whether the Public Concourse is Substantially Complete or Finally Complete, as applicable. Notwithstanding the foregoing, in the event that the Chair has failed to (x) respond in writing to Declarant within ten (10) Business Days of receipt of the Completion Notice; (y) meet with Declarant within five (5) Business Days of the issuance of any written notice in (ii) above; or (z) respond in writing to Declarant within ten (10) Business Days of receipt of any additional materials reasonably requested by the Chair to verify whether the Public Concourse is Substantially Complete or Finally Complete, as applicable, then the Chair shall be deemed to have issued the Substantial Completion Determination or Final Completion Determination, as applicable, and Declarant shall be entitled to accept the TCO or PCO, as applicable.

## **Temporary Certificate of Occupancy**

. Declarant shall not accept a TCO for any portion of the Proposed Building that would utilize the Bonus Floor Area until the Chair has issued or has been deemed to have issued a Substantial Completion Determination in accordance with Section 5.01. Notwithstanding the foregoing, Declarant may apply for and accept a Zero Occupancy TCO prior to the Substantial Completion of the Public Concourse.

## **Permanent Certificates of Occupancy**

. Declarant shall not accept a PCO for any portion of the Proposed Building that would utilize the Bonus Floor Area until the Chair has issued or has been deemed to have issued a Final Completion Determination in accordance with Section 5.01.

# EFFECTIVE DATE; AMENDMENT AND CANCELLATION

## **Effective Date**

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### **Effective Date**. This Declaration and the provisions and covenants hereof shall become effective upon its recordation, but Declarant’s obligations hereunder shall be postponed until the latest to occur of the following dates: (i) the date on which the right to seek judicial review of the Special Permits has expired; (ii) the date on which the time to appeal from an order of any court of competent jurisdiction upholding or affirming the Special Permits has expired; and (iii) the date on which a final order upholding or affirming the Special Permits is entered pursuant to a decision by a court of competent jurisdiction from which no appeal can be taken. Notwithstanding the foregoing, if the Special Permit Election occurs prior to the latest to occur of the dates set forth in (A) above, Declarant’s obligations hereunder shall commence on the date of the Special Permit Election.

### **Recordation**. Promptly, and no later than ten (10) days after the Final Approval of the Special Permits, Declarant shall file and record this Declaration and any related waivers executed by Mortgagees or other Parties‑in‑Interest that are required to be recorded, in the Office of the City Register, indexing them against the Subject Property. Declarant shall deliver to the Commission a copy of all such documents as recorded promptly upon receipt of such documents from the Office of the City Register. If Declarant fails to so record such documents within ten (10) days after the Final Approval of the Special Permits, then the City may record duplicate originals of such documents. However, all fees paid or payable for the purpose of recording such documents, whether undertaken by Declarant or by the City, shall be borne by Declarant.

## **Amendment and Cancellation**

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### **Amendment and Cancellation**. Except as otherwise provided in Section 4.03, Section 6.02(b), or Section 6.02(c), this Declaration may be amended or cancelled only upon application by Declarant and subject to the express written approval of the Commission or an agency succeeding to the Commission’s jurisdiction. No other approval or consent shall be required for such amendment or cancellation from any public body, private person, or legal entity of any kind, including, without limitation, any other present Party‑in‑Interest or future Party‑in‑Interest who is not a successor of Declarant. Any amendment of this Declaration pursuant to this Section 6.02(a) shall be executed and recorded in the same manner as provided in Section 6.01(b).

### **Amendment by the Chair**. Notwithstanding anything to the contrary contained in Section 6.02(a), any change to this Declaration proposed by Declarant that the Chair deems to be a minor modification of this Declaration may by express written consent be approved administratively by the Chair and no other approval or consent shall be required from any public body, private person or legal entity of any kind, including, without limitation, any present or future Party-in-Interest. Such minor modifications shall not be deemed amendments requiring the approval of the Commission. In the event that a minor modification results in a modification of the Building Drawings or the Public Concourse Drawings, a notice indicating such modification shall be recorded in the Office of the City Register, in lieu of a modification of this Declaration.

### **Cancellation**.

#### Notwithstanding anything to the contrary contained in this Declaration, if any Final Approval is declared invalid or otherwise voided by a 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 appeal, this Declaration shall be cancelled and shall be of no further force or effect and an instrument discharging it may be recorded.

#### Notwithstanding anything to the contrary contained in this Declaration, this Declaration shall automatically and without any further public or private action be canceled, and the restrictions, covenants, obligations, liens and agreements hereof shall be of no further force and effect if, prior to the issuance by DOB of a TCO for the Proposed Building, Declarant delivers to the Chairperson and records with the City Register’s Office, a document duly executed and acknowledged in which the Declarant (x) forfeits the Special Permits and surrenders its right to use the Bonus Floor Area or develop the Proposed Building in accordance with the Special Permits and (y) discharges this Declaration of record.

#### Prior to the recordation of an instrument discharging this Declaration, Declarant shall notify the Chair of Declarant’s intent to cancel and terminate this Declaration and request the Chair’s approval, which approval shall be limited to insuring that such cancellation and termination is in proper form. The Chair shall respond to such notice and request within thirty (30) days of receipt by the Chair of such notice, and shall at Declarant’s request execute an instrument in recordable form consenting to the discharge of Declarant’s obligations hereunder. The failure of the Chair to respond within such thirty (30) day period shall be deemed an approval by the Chair of the cancellation of the Declaration. Upon recordation of such instrument, Declarant shall provide a copy thereof to the Commission.

# COMPLIANCE; DEFAULTS; REMEDIES

## **Default**

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### The City shall give written notice (each, a “**Default Notice**”) of any alleged breach of the provisions of this Declaration to Declarant. Upon receipt of a Default Notice, Declarant shall effect a cure within forty-five (45) Business Days thereof. Alternatively, if the violation is not capable of cure within such forty-five (45) Business Day period, Declarant shall promptly initiate and diligently pursue any steps required to cure such breach and, if Declarant thereafter proceeds diligently toward the effectuation of such cure, the aforesaid forty-five (45) Business Day period shall be deemed extended for so long as Declarant continues to proceed diligently with the effectuation of such cure. Declarant shall have the right, in its sole discretion, to determine the manner in which a breach of this Declaration will be cured, provided such cure is in compliance with this Declaration. The forty-five (45) Business Day period for curing any breach of this Declaration by Declarant (as such may be extended in accordance with this Section 7.01) shall be subject to further extension for Uncontrollable Circumstances, provided that Declarant shall have taken the steps required by Section 7.04.

### The City retains all remedies at law and in equity and via administrative enforcement to enforce this Declaration.

### The City retains the right to resolve any dispute regarding the provisions of this Declaration by an alternate dispute resolution acceptable to Declarant, before resorting to litigation or administrative enforcement.

### In the case of an alleged breach of, or other dispute regarding the provisions of, this Declaration, both Declarant and the City may (but shall not be obligated to) agree that the same shall be resolved by arbitration in a manner to be agreed upon.

### A Named Mortgagee shall have the right to cure a breach on behalf of Declarant within the applicable notice and cure period provided in this ARTICLE VII.

## **Enforcement of Declaration**

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### The obligations of Declarant under this Declaration shall be enforceable solely by the City. No person or entity other than the City shall be entitled to enforce, or assert any claim arising out of or in connection with, this Declaration. This Declaration shall not create any enforceable interest or right in any person or entity other than the City.

### Notwithstanding anything to the contrary contained in this Declaration, the City will look solely to the fee interest of Declarant in the Subject Property, 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. For the purposes of this Section 7.02(b), “Declarant” shall include any principals, disclosed or undisclosed, partners, affiliates, officers, employees, shareholders or directors of Declarant.

### The restrictions, covenants, and agreements set forth in this Declaration shall be binding upon Declarant 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 Property 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 Subject Property or portion thereof, and is no longer a Party-in-Interest of the Subject Property, or portion thereof, such party’s obligations and liability with respect to this Declaration shall wholly cease and terminate as to the portion conveyed from and after the conveyance of such party’s interest. Such party’s successor-in-interest in the Subject Property, or portion thereof, 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.

### 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.

## **Certain Remedies**

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### Declarant hereby agrees that failure to comply with conditions or restrictions in this Declaration shall constitute a violation of the Zoning Resolution, and such failure to comply may constitute the basis for denial or revocation of Building Permit(s) or certificate(s) of occupancy.

### In any application for an amendment or modification of this Declaration, Declarant shall verify that it has complied with each of the material conditions of the Declaration applicable at the time of such application.

### In the event that Declarant has not complied with the material conditions of this Declaration, such non-compliance may constitute grounds for the Commission to disapprove any application for amendment or modification of the Declaration.

### For purposes of this Section 7.03, Declarant shall not be deemed to have failed to comply under any of paragraphs (a), (b), or (c) unless and until Declarant or a Named Mortgagee, as the case may be, has failed to remedy or cure the event or occurrence which is the basis of any allegation of a failure to comply in accordance with the procedure as set forth in Section 7.01 of this Declaration with respect to alleged default(s), including all applicable notice and cure periods afforded Declarant and Named Mortgagee(s) therein.

## **Uncontrollable Circumstances**

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### In the event that, as the result of Uncontrollable Circumstances, Declarant is or believes it will be unable to perform or complete any obligation required to be performed hereunder prior to accepting a Building Permit, TCO, or PCO for Bonus Floor Area, Declarant shall promptly after it has actual knowledge of such Uncontrollable Circumstances so notify the Chair in writing (such notice, the “**Delay Notice**”). Any Delay Notice shall include a description of the Uncontrollable Circumstances and, if known to Declarant, their cause and estimated impact on performance of the obligation in question. The Chair shall thereafter determine whether the Uncontrollable Circumstances exist and, upon written notice to Declarant no later than ten (10) days of receipt of the Delay Notice, certify whether the Uncontrollable Circumstances exist. If the Chair certifies that Uncontrollable Circumstances exist, the Chair shall, either concurrently with such certification or no later than ten (10) days thereafter, grant Declarant appropriate relief, including notifying DOB that a Building Permit, TCO, or PCO for the Bonus Floor Area, or a portion thereof (as applicable) may be issued. If the Chair certifies that Uncontrollable Circumstances do not exist, the Chair shall set forth with specificity in the certification the reasons therefor. Declarant and DCP shall meet within five (5) Business Days of the issuance of any written notice certifying that Uncontrollable Circumstances do not exist to review the basis for such determination. Declarant shall take all steps necessary to respond, including providing additional information in writing as may be reasonably requested by the Chair to determine whether Uncontrollable Circumstances exist. Notwithstanding the foregoing, in the event that the Chair has failed to (x) respond in writing to Declarant within ten (10) days of receipt of the Delay Notice; (y) cause DCP to meet with Declarant within five (5) Business Days of the issuance of any written notice certifying that Uncontrollable Circumstances do not exist; or (z) respond in writing to Declarant within ten (10) Business Days of receipt of any additional materials reasonably requested by the Chair to determine whether Uncontrollable Circumstances exist, then the Chair shall be deemed to have made a finding of Uncontrollable Circumstances. In the event that the Chair certifies that Uncontrollable Circumstances do not exist after a meeting between Declarant and DCP as provided above, Declarant may appeal the Chair’s determination to the Deputy Mayor having oversight over the Department of City Planning by providing such Deputy Mayor with written notice thereof within ten (10) days of such meeting. The determination of such Deputy Mayor, following consultation with Declarant and DCP, shall be final.

### Any delay caused as the result of Uncontrollable Circumstances shall be deemed to continue only as long as the Uncontrollable Circumstances continue. Upon cessation of the Uncontrollable Circumstance causing such delay, Declarant shall promptly recommence the work or implement the measure needed to complete the obligation, in accordance with any applicable directive of the Chair, unless an alternative is specified and agreed to by the Chair. As a further condition to granting relief as aforesaid, the Chair may also require that Declarant post security acceptable to the Chair (the “**Completion Security**”), in a form reasonably acceptable to the Chair and naming the City as beneficiary, to secure Declarant’s obligation to complete the obligation upon cessation of the Uncontrollable Circumstances, provided that no Completion Security shall be required to the extent that Declarant has previously provided a completion guaranty acceptable to the City of New York with respect to the Public Concourse. If Declarant fails to resume performance of such work upon cessation of the Uncontrollable Circumstances, such failure shall be deemed an alleged breach of this Declaration subject to the provisions of Section 7.01; if Declarant fails to cure the breach in accordance with such Section 7.01, then the City may undertake the performance of such work. Upon completion of the obligation, whether by Declarant or the City, the City shall promptly return the Completion Security to Declarant.

## **Representation**

. Declarant hereby represents and warrants that (a) there is no restriction of record on the development, enlargement, or use of the Subject Property, nor any present or presently existing estate or interest in the Subject Property, nor any existing lien, obligation, covenant, easement, limitation, or encumbrance of any kind that shall preclude the enforcement of the obligations and restrictions as set forth herein; and (b) the Parties-in-Interest listed in the Certification of Party-in-Interest are the only known Parties-in-Interest to the Subject Property as of the date hereof.

# MISCELLANEOUS

## **Notices**

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### All notices, demands, requests, consents, approvals, or other communications (each of which is hereinafter referred to as “**Notice**”), which may be or are permitted, desirable, or required to be given, served, or sent hereunder shall be effective only if in writing and (i) mailed to the party for which it is intended by certified or registered mail, return receipt requested, (ii) sent via nationally recognized overnight courier service, or (iii) personally delivered, addressed as follows:

If to Declarant:

415 Madison Avenue LLC

c/o Rudin Management Co. Inc.

345 Park Avenue

New York, New York 10154

Attention: [Nick Martin and Andrew Migdon]

with a copy to:

Fried, Frank, Harris, Shriver & Jacobson LLP

One New York Plaza

New York, New York 10004

Attention: Melanie Meyers, Esq.

If to the City:

New York City Department of City Planning

120 Broadway, 31st Floor

New York, New York 10271

Attention: General Counsel

### Any recipient of Notice may from time to time by Notice designate a new or additional related entity or person or address for receipt of Notices.

### Notice shall be deemed given five (5) days after mailing, two (2) Business Days after sending by nationally recognized overnight courier service, or upon personal delivery after receipt, except that a Notice providing for change of Notice name or address shall only be effective upon receipt.

### A copy of all Notices to Declarant shall be simultaneously given to any mortgagee or ground lessor of all or a portion of the Subject Property of which the City has been given Notice (any such mortgagee or lessor, a “**Named Mortgagee**”).

### In the event that there is more than one Declarant at any time, any Notice from the City or the Commission shall be provided to all Declarants of whom the Commission has notice.

## **Certificates**

. The City will at any time and from time to time upon not less than fifteen (15) days’ prior notice by Declarant or a Named Mortgagee execute, acknowledge and deliver to Declarant or such Named Mortgagee, as the case may be, a statement in writing certifying (a) that this Declaration is unmodified and in full force and effect (or if there have been modifications or supplements that the same is in full force and effect, as modified or supplemented, and stating the modifications and supplements), (b) whether or not to the best knowledge of the signer of such certificate Declarant is in default in the performance of any obligation contained in this Declaration, and, if so, specifying each such default of which the signer may have knowledge, and (c) as to such further matters as Declarant or such Named Mortgagee may reasonably request.

## **Successors of Declarant**

. References in this Declaration to “Declarant” shall be deemed to include any successor to or assign of Declarant. Notwithstanding anything to the contrary contained in this Declaration, no holder of a mortgage or other lien in the Subject Property shall be deemed to be a Declarant for any purpose, unless and until such holder obtains either a fee interest in the Subject Property or any portion thereof or a lessee’s estate in a ground lease of all or substantially all the Subject Property, and provided further that the holder of any such mortgage or lien shall not be liable for any obligations of Declarant as the “Declarant” hereunder unless such holder commences to develop the Subject Property in accordance or has acquired its interest from a party who has done so.

## **Parties‑in‑Interest**

. Declarant shall cause any individual, business organization, or other entity which, between the date hereof and the effective and recording date and time of this Declaration, becomes a Party‑in‑Interest in the Subject Property or portion thereof to subordinate its interest in the Subject Property to this Declaration. Any and all mortgages or other liens encumbering the Subject Property after the recording date of this Declaration shall be subject and subordinate hereto. Notwithstanding anything to the contrary contained in this Declaration, if a portion of the Subject Property is held in condominium ownership, the board of managers of the condominium association shall be deemed to be the sole Party‑in‑Interest with respect to the premises held in condominium ownership, and the owner of any unit in such condominium, the holder of a lien encumbering any such condominium unit, and the holder of any other occupancy or other interest in such condominium unit shall not be deemed to be a Party‑in‑Interest.

## **Governing Law**

. This Declaration shall be governed and construed by the laws of the State of New York, without regard to principles of conflicts of law.

## **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, such provision shall be severed and the remainder of this Declaration shall continue to be of full force and effect.

## **Applications**

.Declarant shall include a copy of this Declaration as part of any application pertaining to the Subject Property submitted to DOB or any other interested governmental agency or department having jurisdiction over the Subject Property.

## **Incorporation by Reference**

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

[Signature Appears on Following Page]

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

**415 madison Avenue LLC**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name:

Title:

ACKNOWLEDGMENT

State of New York }

} ss.

County of New York }

On the \_\_ day of \_\_\_\_\_\_\_\_\_\_\_, in the year 202\_ before me, the undersigned, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

SCHEDULE OF EXHIBITS

**EXHIBIT A** Metes and Bounds Description of the Subject Property

**EXHIBIT B** Certification of Parties-in-Interest

**EXHIBIT C** Building Drawings

**EXHIBIT D** Public Concourse Drawings

**EXHIBIT E** Construction Noise Emission Limits

**EXHIBIT A**

Metes and Bounds Description of the Subject Property

**EXHIBIT B**

**Certification of Parties-in-Interest**

[Attached]

**EXHIBIT C**

**Building Drawings**

[Attached]

**EXHIBIT D**

**Public Concourse Drawings**

[Attached]

**EXHIBIT E**

**Construction Noise Emissions Limits**

|  |  |  |
| --- | --- | --- |
| Construction Equipment Noise Emission Levels (dBA) | | |
| Equipment List | NYCDEP Lmax Noise Level Limit  at 50 feet1 | Project-Specific Lmax Noise Level Limit at 50 feet |
| Backhoe / Loader | 80 |  |
| Bar Bender | 80 |  |
| Compressor | 80 | 70 |
| Concrete Finisher | 672 |  |
| Concrete Pump | 82 |  |
| Concrete Mixer Truck | 85 |  |
| Concrete Vibrator | 80 | 70 |
| Cranes (Mobile) | 85 | 75 |
| Cranes (Tower) | 85 | 75 |
| Drill Rig3 | 85 |  |
| Dump Truck | 84 |  |
| Excavator | 85 |  |
| Generator | 82 | 72 |
| Hoist | N/A | 75 |
| Hydraulic Break Ram | 90 |  |
| Jack Hammer | 85 |  |
| **Source:**  1 *Rules for Citywide Construction Noise Mitigation*, Chapter 28, DEP, 2007.  **2** Manufacturer’s Specifications or previously approved Noise Certification,  **3** The Proposed Development would use drilled piles, which is a substantially quieter method (i.e., approximately 10 dBA quieter) than impact pile driving. | | |