

**REGULAR MEETING\***  
**BOARD OF ADJUSTMENT**  
**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**  
**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**  
**PORTSMOUTH, NEW HAMPSHIRE**

*Members of the public also have the option to join the meeting over Zoom  
(See below for more details)\**

**7:00 P.M.**

**May 2, 2023**

**AGENDA**

**I. OLD BUSINESS** (*Continued from April 18, 2023*)

- A. REQUEST TO POSTPONE** The request of **Jared J Saulnier (Owner)**, for property located at **4 Sylvester Street** whereas relief is needed to subdivide one lot into two lots which requires the following: Proposed Lot 1: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 9,645 square feet where 15,000 is required for each; b) 80 feet of lot depth where 100 feet is required; and c) a 9 foot right side yard where 10 feet is required. Proposed Lot 2: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling unit of 6,421 square feet where 15,000 is required for each; b) 40 feet of street frontage where 100 feet is required; and c) 80 feet of lot depth where 100 feet is required. Said property is located on Assessor Map 232 Lot 36 and lies within the Single Residence B (SRB) District. **REQUEST TO POSTPONE (LU-23-27)**
- B. POSTPONED TO MAY 16 2023** The request of **Cynthia Austin Smith and Peter (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two-family and construct a single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 5,000 square feet where 7,500 square feet is required for each; b) 53% building coverage where 25% is the maximum allowed; c) a 4.5 foot rear yard where 20' is required; d) a 0.5 foot side yard where 10 feet is required; e) a 0 foot front yard where 11 feet is allowed under Section 10.516.10; and f) a 9.5 foot secondary front yard where 13 feet is allowed under Section 10.516.10. 2) A Variance from Section 10.515.14 to allow a 1.5 foot setback for a mechanical unit where 10 feet is required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. **POSTPONED TO MAY 16 2023 (LU-23-28)**

## II. NEW BUSINESS

- A.** Petition of **729-733 Middle Street Condominium Association, Nicole M. Bodoh and Craig Crowell**, for Appeal of an Administrative Decision not to present to the Board of Adjustment the Motion for Rehearing of Variance Application of **David Sinclair and Nicole Giusto** for property located at **765 Middle Street** due to an untimely request. Said property is shown on Assessor Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts.
- B.** The request of **Peter G Morin Trust, Peter G Morin Trustee (Owner)**, for property located at **170 Mechanic Street** whereas relief is needed to install a generator which requires the following: 1) Variance from Section 10.515.14 to allow a) 4 foot rear yard where 10' is required and 5.5 foot rear yard where 10 feet is required; 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 102 Lot 7 and lies within the General Residence B (GRB) and Historic District. (LU-23-35)
- C.** The request of **RTM Trust, Ryan T Mullen and Heidi E K Trustees (Owners)**, for property located at **253 Odiorne Point Road** whereas relief is needed to construct a deck extension which requires a Variance from Section 10.521 to allow a 30 foot rear yard where 40 feet is required. Said property is located on Assessor Map 224 Lot 10-19 and lies within the Single Residence A (SRA) District. (LU-23-36)
- D.** The request of **Cherie A Holmes and Yvonne P Goldsberry (Owners)**, for property located at **45 Richmond Street** whereas relief is needed to construct a greenhouse which requires the following: 1) Variance from Section 10.521 to allow a 5.5 foot rear yard where 15 feet is required; 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 108 Lot 18 and lies within the Mixed Residential Office (MRO) and Historic District. (LU-20-249)
- E.** The request of **45 Rockingham St LLC (Owner)**, for property located at **45 Rockingham Street** whereas relief is needed to construct a front porch and rear addition which requires the following: 1) Variance from Section 10.521 to allow a) .5 foot front yard where 5 feet is require, b) 1.5 foot side yard where 10 feet is required, c) 41% building coverage where 35% is allowed; 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 144 Lot 6 and lies within the General Residence C (GRC) District. (LU-23-41)

- F.** The request of **Bucephalus LLC (Owner)**, for property located at **650 Maplewood Avenue** whereas relief is needed to remove the outdoor fenced storage area and construct a 48 foot by 25.5 foot addition to the rear of the existing structure which requires a Variance from Section 10.592.20 to allow the expansion of space used for motorcycle sales located adjacent to a Residential district where 200 feet is required. Said property is located on Assessor Map 220 Lot 88 and lies within the Business (B) District. (LU-21-111)
- G.** The request of **Cate Street Development LLC (Owner)**, for property located at **360 US Route 1 BYP** whereas relief is needed to install a sign on the northern façade of the building which requires a Variance from Section 10.1271 to allow a sign to be installed on a façade not facing the street or with a public entrance; 2) Variance from Section 10.1242 to allow more than one parapet sign above the ground floor per facade. Said property is located on Assessor Map 172 Lot 1 and lies within the Gateway Corridor (G1) District. (LU-23-44)

### **III. OTHER BUSINESS**

### **IV. ADJOURNMENT**

*\*Members of the public also have the option to join this meeting over Zoom, a unique meeting ID and password will be provided once you register. To register, click on the link below or copy and paste this into your web browser:*

[https://us06web.zoom.us/webinar/register/WN\\_G\\_J7IIhnT3SD\\_UNB2i41XA](https://us06web.zoom.us/webinar/register/WN_G_J7IIhnT3SD_UNB2i41XA)



City of Portsmouth  
Planning Department  
1 Junkins Ave, 3<sup>rd</sup> Floor  
Portsmouth, NH  
(603)610-7216

## MEMORANDUM

TO: Zoning Board of Adjustment  
FROM: Stefanie Casella, Planner  
DATE: April 26, 2023  
RE: Zoning Board of Adjustment May 2, 2023

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The agenda items listed below can be found in the following analysis prepared by City Staff:

### II. Old Business

- G. 4 Sylvester Street
- H. 9 Kent Street

### III. New Business

- A. Appeal of Administrative Decision by Nicole Bodoh and Craig Crowell
- B. 170 Mechanic Street
- C. 253 Odiorne Point Road
- D. 45 Richmond Street
- E. 45 Rockingham Street
- F. 650 Maplewood Avenue
- G. 360 US Route 1 Bypass

## II. OLD BUSINESS

- G. The request of **Jared J Saulnier (Owner)**, for property located at **4 Sylvester Street** whereas relief is needed to subdivide one lot into two lots which requires the following: Proposed Lot 1: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 9,645 square feet where 15,000 is required for each; b) 80 feet of lot depth where 100 feet is required; and c) a 9 foot right side yard where 10 feet is required. Proposed Lot 2: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling unit of 6,421 square feet where 15,000 is required for each; b) 40 feet of street frontage where 100 feet is required; and c) 80 feet of lot depth where 100 feet is required. Said property is located on Assessor Map 232 Lot 36 and lies within the Single Residence B (SRB) District. (LU-23-27)

### Planning Department Comments

The applicant has requested to postpone the hearing of this request to the May 16 meeting.

## II. OLD BUSINESS

- H. **REQUEST TO POSTPONE** The request of **Cynthia Austin Smith and Peter (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two-family and construct a single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 5,000 square feet where 7,500 square feet is required for each; b) 53% building coverage where 25% is the maximum allowed; c) a 4.5 foot rear yard where 20' is required; d) a 0.5 foot side yard where 10 feet is required; e) a 0 foot front yard where 11 feet is allowed under Section 10.516.10; and f) a 9.5 foot secondary front yard where 13 feet is allowed under Section 10.516.10. 2) A Variance from Section 10.515.14 to allow a 1.5 foot setback for a mechanical unit where 10 feet is required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. **REQUEST TO POSTPONE** (LU-23-28)

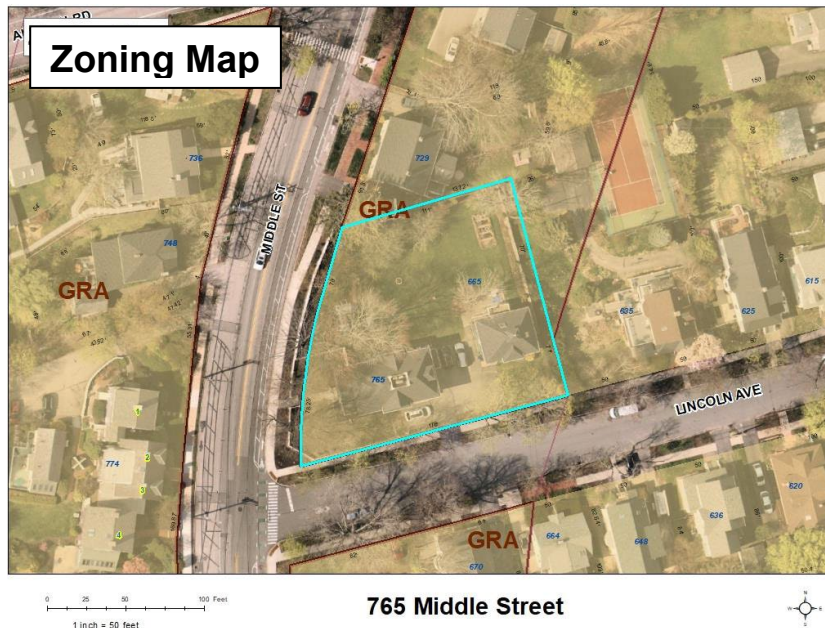
### Planning Department Comments

The applicant has requested to postpone the hearing of this request to the May 16 meeting.

### III. NEW BUSINESS

- A. Petition of **729-733 Middle Street Condominium Association, Nicole M. Bodoh and Craig Crowell**, for Appeal of an Administrative Decision not to present to the Board of Adjustment the Motion for Rehearing of Variance Application of **David Sinclair and Nicole Giusto** for property located at **765 Middle Street** due to an untimely request. Said property is shown on Assessor Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts.

#### Neighborhood Context



**Planning Department Comments**

The appellant is appealing a determination of the Planning Director that the appeal of the case was untimely given the standards set forth in section 10.234.20 of the Zoning Ordinance (provided below).

***10.234.20** Appeals from decisions or orders of the Code Official may be made by any person within 30 days after the date on which the written decision was actually filed.*

Letter of decision is included in the appellants submitted materials as well as a memo from Planning Director Peter Britz



March 14, 2023

NICOLE M. BODOH  
T 603.695.8546  
F 603-669-8547  
NBODOH@DEVINEMILLIMET.COM

**VIA EMAIL AND HAND DELIVERY**

Zoning Board of Adjustment (the "Board")  
City of Portsmouth  
Planning Department  
1 Junkins Avenue  
Portsmouth, NH 03801  
planning@cityofportsmouth.com

Peter Britz  
Director of Planning and Sustainability  
City of Portsmouth  
Planning Department  
1 Junkins Avenue  
Portsmouth, NH 03801  
plbritz@cityofportsmouth.com

**Re: Appeal of Decision of an Administrative Official Pursuant to RSA 676:5**

Appellants: 729-733 Middle Street Condominium Association, Nicole M. Bodoh, and Craig Crowell, abutters at Portsmouth Tax Map 148-36.

Decision: Decision of the Director of Planning and Sustainability not to present to the Board the Motion for Rehearing of Variance Application of David Sinclair & Nicole Giusto (the "Applicants") for the property at 765 Middle Street, Tax Map 148-37, Portsmouth, NH 03801 to allow construction of a new detached garage with dwelling unit above (the "Application").

Greetings Board Members:

The purpose of this correspondence is to appeal the decision of Peter Britz, as the Director of Planning and Sustainability of the City of Portsmouth (the "Planning Director") rendered on February 16, 2023, and to provide notice thereof as required under RSA 676:5. A copy of the decision not to present to the Board the Appellants' Motion for Rehearing is included herewith as Exhibit A (the "Decision"). The Planning Director acted unreasonably and improperly in issuing the Decision, which contains errors of fact and law as set forth in greater detail below. **The Appellants provide this notice of appeal to exhaust their administrative remedies before pursuing relief from a court of competent jurisdiction (to the extent required by law), and hereby reserve each and every right and remedy available to the Appellants under applicable laws.**

Zoning Board of Adjustment, City of Portsmouth  
March 14, 2023  
Page 2

Appellants are aware that the Motion for Rehearing filed on January 17, 2023, a copy of which is attached hereto as Exhibit B (the "Motion"), was filed more than thirty (30) days after the decision by the Board of Adjustment to grant the variances requested in the Application. However, as described in the Motion:

- The Appellants did not receive notice of the Application or Board meeting held on October 18, 2022, as required by New Hampshire law; and
- It is well settled law that notice is a pre-requisite to the Board having jurisdiction to hear or decide a variance request. RSA 676:7; Hussey v. Barrington, 135 N.H. 227 (1992).

The above grounds, among others, are described in further detail in the attached Motion. On behalf of the Appellants, I thank you for your consideration of our appeal of the Decision and our request for a rehearing of the Application. The Appellants respectfully request that you render your decision and grant the Motion as required by RSA 677:2. Thank you.

Very truly yours,



Nicole M. Bodoh, Esq.

cc: Christopher Swiniarski, Esq.

Enclosures

# EXHIBIT A



## CITY OF PORTSMOUTH

Planning Department  
1 Junkins Avenue  
Portsmouth, New Hampshire  
03801  
(603) 610-7216

February 16, 2023

Attorney Christopher Swiniarski  
Devine, Millimet & Branch  
111 Amherst Street  
Manchester, NH 03105

RE: Motion for Rehearing – Variance Application for property at 765 Middle Street, Tax Map 148-37,  
Portsmouth, NH 03801

Dear Attorney Swiniarski:

The City of Portsmouth is in receipt of your communication regarding the request for rehearing of the Board of Adjustment decision for the project at 765 Middle Street. After discussion with the City Legal department and in accordance with New Hampshire RSA 677:2, your motion submitted on Tuesday, January 17, 2023 will not be presented to Board of Adjustment as the proper procedure requires a motion for rehearing within thirty (30) days of the Board of Adjustment decision. The appeal deadline for the decision made on Tuesday, October 18, 2022 was Thursday, November 17, 2022. Therefore your request was untimely.

This decision may be appealed up to thirty (30) days after the issue date of this letter. Please contact the Planning Department for more details about the appeals process.

Sincerely,

Peter Britz, Director of Planning and Sustainability

CC: Susan G. Morell, City Attorney  
R. Timothy Phoenix, Attorney to David A. Sinclair and Nicole J. Giusto

# EXHIBIT B



CHRISTOPHER A. SWINIARSKI  
Admitted in NH and MA

Devine, Millimet & Branch  
111 Amherst Street  
Manchester, NH 03105

Direct Dial: 603.695-8709  
[cswiniarski@devinemillimet.com](mailto:cswiniarski@devinemillimet.com)

January 17, 2022

VIA HAND DELIVERY AND  
BY EMAIL TO [PLANNING@CITYOFPORTSMOUTH.COM](mailto:PLANNING@CITYOFPORTSMOUTH.COM)

Zoning Board of Adjustment (the "Board")  
City of Portsmouth  
Planning Department  
1 Junkins Avenue  
Portsmouth, New Hampshire 03801

**RE: Motion for Rehearing – Variance Application (the "Application") of David Sinclair & Nicole Giusto (the "Applicants") for property at 765 Middle Street, Tax Map 148-37, Portsmouth, NH 03801 (the "Property")**

Greetings Board Members:

The purpose of this correspondence is for 729-733 Middle Street Condominium Association, Nicole M. Bodoh and Craig Crowell, owners of property at Portsmouth Tax Map 148-36 and direct abutters to the Property (collectively, the "Appellants") to move for a rehearing by the Board of its decision rendered on October 18, 2022 with respect to the above-referenced Application. Pursuant to RSA 677:2, the Board has authority to grant this motion for rehearing in order to correct errors prior to any party appealing the Board's decision to the Superior Court. Rochester City Council v. Rochester Zoning Board of Adjustment. 171 N.H. 271, 278. (2018).

### Introduction

The Appellants are the owners of Tax Map 148-36 and the two (2) condominium units it comprises, and are direct abutters to the Property. The Applicants filed the Application to allow construction of a new detached garage with dwelling unit above which requires the following variances: 1) a variance from Section 10.513 of the Portsmouth Zoning Ordinance (the “Ordinance”) to allow three (3) principal dwellings on a lot where only one (1) is allowed per lot; (2) a variance from Section 10.521 to allow a lot area per dwelling of 5,376 square feet where 7,500 is required and (3) a variance from Section 10.521 to allow a 10 foot rear yard setback where 20 feet is required. The Property is shown on the Assessor’s Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts.

At its October 18, 2022 meeting, the Board made findings relative to the five (5) criteria for Variance set forth in RSA 674:33 I. (2), which findings are attached hereto as Exhibit A (the “Decision”). The Appellants hereby move for a rehearing on the Decision and allege that the Board made factual and legal errors in issuing the Decision as particularly set forth below.

As a final introductory note, the Appellants are of course aware that this motion for rehearing is filed more than thirty (30) days after the Decision.

However, as described in greater detail below, the Appellants never received notice of the Application as required by New Hampshire law. It is well settled law that notice is a pre-requisite to the Board having jurisdiction to hear or decide the variance request, as detailed further below. This motion for rehearing is therefore timely and proper since the Board did not have proper jurisdiction over the Application at the time of the Decision.

### **Grounds for Rehearing**

**I. Due Process Violations of RSA 676:7. None of the Appellants received notice by verified mail as required under RSA 676:7.**

RSA 676:7 provides: *“Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows: (a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by verified mail, as defined in RSA 21:53, stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal.”* [emphasis supplied]

Verified mail, as defined in RSA 21:53 means *“any method of mailing that is offered by the United States Postal Service or any other carrier, and which*

*provides evidence of mailing*”. ***None of the Appellants received notice by verified mail*** as required under RSA 676:7.

A. Abutter Nicole M. Bodoh did not Receive Notice of the ZBA Meeting.

Nicole Bodoh, the owner of 733 Middle Street, did not receive any notice of the Zoning Board of Adjustment hearing on October 18, 2022 (“ZBA Meeting”) and as a result did not attend the meeting and was unable to express her vigorous objection to the planned project.

As further evidence that proves the faulty notice procedures by the USPS that ultimately led to Ms. Bodoh not receiving notice of the ZBA Meeting, later, in December 2022, Ms. Bodoh received notice by unverified mail of the Historic District Commission Work Session (“HDC Meeting”) held on December 14, 2022. That notice was simply left in her mailbox, though the City sent that notice by certified mail in the same manner as it sent notice of the ZBA Meeting. It was at this HDC Meeting that Ms. Bodoh first became aware that the Decision had been rendered. Following the December 14, 2022 meeting, Ms. Bodoh again received notice by unverified mail of the Technical Advisory Committee meeting on January 3, 2023 (the “TAC Meeting”), which she attended. Again, the notice of the TAC Meeting was simply left in her mailbox, though the City sent that notice by certified mail as well, just like the ZBA Meeting.

It is true that the failure of notice to Ms. Bodoh for both the HDC Meeting and the TAC Meeting are not dispositive for this Motion for Rehearing. However, those failures evidence a course of conduct on the part of the USPS that supports the fact that Ms. Bodoh never received notice of the ZBA Meeting. The City of Portsmouth sent notices of all of the meetings to Nicole Bodoh by USPS Certified Mail. However the United States Postal Service did not deliver the certified mail in accordance with U.S. Postal Service regulations which provide that “the USPS maintains a record of delivery (*which includes the recipient’s signature*).” [emphasis supplied] United States Postal Service Domestic Mail Manual 500 – 3.1.1. See attached Exhibit B.

The record of delivery provided by the Post Office does not include Ms. Bodoh’s signature. The tracking and signature records for the notices sent to Ms. Bodoh of the ZBA Meeting, the HDC Meeting and the TAC Meeting are attached hereto as Exhibits C-1, C-2, and C-3. A specimen of Ms. Bodoh’s signature is attached hereto as Exhibit C-4. It is immediately apparent when comparing the records of the notices to Ms. Bodoh’s specimen signature that she did not sign the certified mail receipt upon delivery, as required under the Postal Regulations and State law. Further details are found in Ms. Bodoh’s affidavit, attached as Exhibit D. These facts make it plainly clear that Ms. Bodoh never received notice of the ZBA Meeting as required by New Hampshire law.



B. Abutter Craig S. Crowell did not Receive Notice of the ZBA Meeting in accordance with US Postal Regulations or State Law.

Similarly, Craig S. Crowell, the owner of 729 Middle Street, did not receive notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting in accordance with the Postal Regulations or State law. The notices for the ZBA Meeting and TAC Meeting were sent to Mr. Crowell's former address at 37 Allen Farm Road, Greenland NH 03840 and then forwarded on through automatic mail forwarding to his address at 729 Middle Street. The notice for the HDC Meeting has to date not been delivered, according to the US Postal Service's records. Again, while the notices for the HDC Meeting and TAC Meeting are not dispositive for this Motion for Rehearing, those failures evidence a course of conduct on the part of the USPS which evidences the fact that Mr. Crowell never received notice of the ZBA Meeting. The HDC Notice and TAC Notice were sent by the City in the same manner as the ZBA Notice.

It is unknown why the notices for the ZBA Meeting, HDC Meeting and the TAC Meeting were addressed to Mr. Crowell's former address in Greenland, NH. Mr. Crowell purchased his home at 729 Middle Street on May 16, 2022 and moved in a few days later. He provided his current and correct address of 729 Middle Street to the City of Portsmouth when he registered his vehicle with the City of Portsmouth and the State of New Hampshire on September 19, 2022. He also updated his New Hampshire driver's license on June 15, 2022 with his 729

Middle Street address. Further, Mr. Crowell is registered to vote in the City of Portsmouth. Mr. Crowell has never provided his Greenland, NH address to the City of Portsmouth for any purpose. See attached Affidavit of Craig S. Crowell, Exhibit E.

According to the tracking records for the notices sent to Mr. Crowell, the notice of the ZBA Meeting was “delivered to an individual at the address at 12:07 pm on October 12, 2022 in Portsmouth, NH 03801”. See Exhibit F-1. That record is plainly false. The notice of the ZBA Meeting was originally sent to Mr. Crowell’s former Greenland, NH address; it only arrived in Portsmouth via automatic mail forwarding to the 729 Middle Street address, not by any individual delivery.

As in the case with notice to Ms. Bodoh above, the record for the notice of the HDC Meeting to Mr. Crowell tells a similar tale. The official USPS record states that the item is “awaiting a delivery scan” and that “the delivery status of your item has not been updated as of December 6, 2022, 12:35 am. We apologize that it may arrive later than expected”. See Exhibit F-2. To date this notice has not been delivered, even though the USPS reports that it was expected back on December 6, 2022. Again, while the faulty HDC Meeting Notice is not dispositive in this matter, it demonstrates the USPS’s course of conduct that proves the ultimate unreliability of the USPS as a means of providing actual notice. The USPS did not provide the in-hand, signed-for notice that they assure senders is provided for by certified mail.

Similarly again, Mr. Crowell did not receive notice of the TAC Meeting in conformity with US Postal Regulations and State Law. Tracking information available on the Post Office's website indicates that the notice was "delivered to front desk, reception or mailroom" at 11:13 am on January 3, 2023. See Exhibit F-3. There is no front desk, reception or mailroom at Mr. Crowell's former address in Greenland, NH or at his current address at 729 Middle Street. See Mr. Crowell's Affidavit attached hereto as Exhibit E at paragraph 9. Even if Mr. Crowell had received this notice, January 3, 2023 was the date the TAC Meeting was held and therefore the requirement of delivery at least 5 days prior to the meeting was not met (in addition to not meeting the signature requirement under U.S. Postal regulations for certified mail).

The supposed "record of delivery" for the notices does not bear Mr. Crowell's signature. The signature records for the ZBA Meeting and the TAC Meeting are included in Exhibits F-1 and F-3. The US Postal Service does not have any record for Mr. Crowell's signature for delivery of the HDC Meeting notice. A specimen of Mr. Crowell's signature is attached hereto as Exhibit F-4. When comparing Mr. Crowell's specimen signature to the signatures on record with the U.S. Postal Service, it is immediately apparent that those signatures are not the signature of Mr. Crowell.

C. 729-733 Middle Street Condominiums did not Receive Notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting.

In addition, the Applicants, on the site plans in their Application identified the owner of the Appellants' property as "729-733 Middle Street Condominiums" rather than Craig C. Crowell and Nicole M. Bodoh, as individuals, who were not mentioned anywhere in the Application. In spite of the Applicant's emphasis on the ownership of the Appellants' property by a condominium association, no notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting was ever sent to 729-733 Middle Street Condominiums, according to the City's records.

The definition of "Abutter" in the New Hampshire Revised Statutes Annotated indicates that, under State law, notice should have been sent and addressed to an officer of 729-733 Middle Street Condominiums.

*RSA 672:3 states: "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use Board. [...] For purposes of receipt of notification by a municipality of a local land use Board hearing, in the case of an abutting property being under a condominium or other collective*

*form of ownership, the term abutter means the officers of the collective or association, as defined in [RSA 356-B:3, XXIII.](#)” [emphasis supplied]*

RSA 356-B:3, XXIII provides that “*Officer*” means any member of the Board of directors or official of the unit owners’ association.

Because the Applicants specifically identified 729-733 Middle Street Condominiums as an abutter, and because the New Hampshire statutes provides specific notice provisions relative to condominiums, notices of the ZBA Meeting, HDC Meeting and TAC Meeting should have been sent and addressed to “Officer” or “Official” of the 729-733 Middle Street Condominiums. The Applicants did not send any such notice by verified mail or otherwise for any of the Meetings in connection with the Application. It is not necessary to identify any particular individual as an officer when sending notices to a condominium association. All that is required to meet the New Hampshire statutory requirement is to send the notice to an “Official” or an “Officer”.

None of the three Appellants received the notice under RSA 676:7. That notice is a necessary pre-requisite to the Board’s jurisdiction to hear the Application. Hussey v. Barrington, 135 N.H. 227 (1992). ***When that notice is lacking or deficient, the variance purportedly granted by the Board “is void from the very date on which it was issued.”*** Id. at 232.

As a matter of law, *all* of the Appellants had to receive notice of the Application in compliance with New Hampshire law not less than 5 days before the date fixed for the hearing of the Application by “verified mail”. Since that did not happen, the Board had no jurisdiction to hear or grant the Applicants’ requested variances. The only remedy is for the Board to issue new notices that are received by the Appellants and all other abutters and conduct a re-hearing giving the Applicant adequate notice and opportunity to comment as required by RSA 676:7.

**II. The Applicant Provided Incomplete, Insufficient and Inaccurate Information to the Board.**

The information submitted by the Applicants to the City of Portsmouth with their Application is incomplete, insufficient and inaccurate. The photo renderings of Ms. Bodoh’s property at 733 Middle Street, which is adjacent to the proposed project, are either absent or presented in a misleading fashion, with the presumed intention of concealing the proximity of the proposed project to 733 Middle Street and the fact that the front of 733 Middle St. faces the location of the project.

Although small portions of the home at 733 Middle Street were included with the photo renderings supplied by the Applicant, not included in the application were any photo renderings including the entire front of 729-733

Middle Street, which is shown on Exhibit G-1 attached hereto. The applicants did not include a photo of the entire house presumably in order to mislead the Board into thinking that the 729-733 Middle Street Condominiums consists of apartment-style condominiums. To the contrary, this historic property was originally built as a duplex in 1820. The right side of the house that is 733 Middle Street represents one of the earliest examples still in existence in this country of what today is known as an “in-law suite.” It does not conform at all to what is commonly understood as a “condominium”. It is more similar to an attached, single-family, early Victorian residence.

Comparisons of the photo renderings submitted by the Applicants to photos of the actual locations are attached hereto as Exhibits G-2 through G-4. The photo rendering to the left on Exhibit G-2 when compared to the actual photo of the location to the right, shows that the Applicants used digital photography editing to delete the front of 733 Middle Street from the photo, substituting in its place artificial greenery. The photo rendering to the left on Exhibit G-3, when compared to the actual photo on the right, shows the magnitude of the additional density this project will create. In addition, the photo rendering depicts the project as set back further from 733 Middle Street than its actual location based upon the site plans that were submitted. The plans indicate that the Applicant’s proposed deck and garden room will extend to the intersection of the gate on Ms. Bodoh’s property and the fence between the two properties as shown on Exhibit G-4 attached hereto. This will completely block Ms. Bodoh’s dining room

windows that are facing the proposed project. Contrary to the presentation on the photo rendering on Exhibit G-3, direct sunlight will be blocked from Ms. Bodoh's dining room windows. The proposed project is located as close to the property line at 733 Middle Street as possible without violating the ten foot (10') setback. This means that the deck and garden room of the proposed project will be located **less than fifteen feet (15')** from Ms. Bodoh's dining room windows at 733 Middle Street. The 733 Middle Street lot is a permitted nonconforming lot, as the property was built long before zoning ordinances came into existence. The actual property line for 733 Middle Street (which does not conform to the fence) is just a few feet from the house in the vicinity adjacent to the proposed project. This is wholly new information that the Board did not have, as a result of Applicant's misleading materials.

The third comparison on Exhibit G-5 again demonstrates that the Applicants apparently attempted to mislead the Board as to the proximity of the proposed project to 733 Middle Street, and the fact that the front of 733 Middle Street will be blocked by the proposed project. It appears that the Applicant purposely added a tree to the plans and photo rendering on Exhibit G-5 (next to the mud room of 765 Middle Street) in order to disguise the manner in which the proposed project blocks the front of 733 Middle Street. This state of facts is, once again, additional new information that the Board did not have as a result of Applicant's misleading materials.



**III. The Board was unreasonable and unlawful in making its purported findings as to the first and second variance criteria RSA 674:33 I. (2) (A) and (B). Granting the variance would be contrary to the public interest, and would not observe the spirit of the Ordinance.**

The New Hampshire Supreme Court has noted that a determination of whether the spirit of the Ordinance is observed is largely similar to determining whether the variance is contrary to the public interest. Chester Rod & Gun Club v. Town of Chester, 152 NH 577 (2005). It is well settled that a variance will be contrary to the public interest and will not observe the spirit of the Ordinance if it conflicts with or violates the ordinance's basic zoning objectives. Id. at 581 (2005).

In the case at hand, the Board unreasonably and unlawfully found that granting the variances sought in the Application would not be contrary to the public interest or violate the Ordinance's basic zoning objectives. In its written Decision attached hereto as Exhibit A, the Board stated "*since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project.*" [emphasis supplied] It is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the test set forth in Chester Rod & Gun Club. Further, the Appellants at 729 and 733 Middle Street *do* have

something to say about the proposed project, but because they did not receive notice of the ZBA Meeting in conformity with State law and US Postal requirements, they did not have an opportunity to be heard at the ZBA Meeting to inform the Board of the specific, numerous impacts this project would have on abutting properties that directly conflict with the specific zoning objectives set forth in Section 10.121 of the Ordinance. The fact that the Board grounded its purported findings upon the absence of the Appellants indicates that it could not reasonably make the findings it purported to make if the Appellants had received the notice required under applicable law.

**IV. The Board was unreasonable and unlawful in making its purported findings as to the third variance criteria under RSA 674:33 I. (2) (C). Substantial justice *would not* be done.**

The guiding rule on determining substantial justice is weighing the loss to the applicant versus the gain to the general public. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 515 (2011). The Appellants have carefully reviewed the video recording of the ZBA Meeting on October 18, 2022. There, Tim Phoenix, the attorney for the Applicants, discussed the primary reason the proposed project will be located in close proximity (less than fifteen feet (15')) to 733 Middle Street. He stated that creating a “courtyard effect” is “the primary reason we are asking for setback relief.” If there is in fact such a

“courtyard effect” created by this project, it will be enjoyed solely by the Applicants. Based upon the site plans submitted to the Board, neither the tenants of the newly built residence, nor the owner of 733 Middle Street will have views of the courtyard.

To the contrary, as shown in the Application, the majority of the windows of the new residence have been situated so that they do not face the Applicants’ residence, presumably in order to maintain the Applicants’ privacy. To that end, the majority of the windows of the new residence are directly opposite 733 Middle Streets’ windows, so that the occupants of both dwellings will have forced views into each other’s homes. The Applicants may be able to maintain their privacy by designing the project this way, but they do so by destroying any meaningful semblance of privacy for their tenants and the owner of 733 Middle Street. The impact on Ms. Bodoh’s quality of life will be substantial due to this complete lack of privacy. Thus, granting the variances results in a substantial injustice. It is unreasonable and unlawful for the Board to dismiss the uncontroverted facts of the case that clearly demonstrate a tremendous benefit to the Appellants in continuing to require compliance with the Ordinance. The Applicants’ three (3) requested variances from the Ordinance only serve singularly to allow the Applicants to squeeze every last pecuniary drop from what would be a fourth single family residence on one (1) lot, where only one (1) principal dwelling is lawfully allowed by the Ordinance. There is no reasonable

or lawful way, on the facts in this case, that the Board can find this criteria of RSA 674:33 I. (2) (C) to have been met.

**V. The Board was unreasonable and unlawful in making its purported findings as to the fourth variance criteria RSA 674:33 I. (2) (D). The values of the surrounding properties would so obviously be diminished.**

The Board unreasonably and unlawfully found that granting the variances sought in the Application would not negatively impact the values of surrounding properties, specifically the property of the Appellants. Specifically, the Board found that *“the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.”* [emphasis supplied] As stated above, it is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the criteria for determining whether or not the values of surrounding properties would be diminished. Had the Appellants received notice of the ZBA Meeting in conformity with State law and US Postal requirements, they would have informed the Board at the ZBA Meeting that the proposed project would significantly and obviously diminish the values of the homes at 729 and 733 Middle Street. The Board’s findings state as much, relying solely on the Appellants’ absence in making their determination.

Further, the letter attached hereto as Exhibit H from Jeffrey Mountjoy, the realtor who assisted with the sale of 733 Middle Street to Ms. Bodoh, explains in detail how the values of both residences will be adversely impacted by the overall size of the project, the lack of privacy and increased noise and traffic level that will result from its construction, and the blocking of several windows of 733 Middle Street by a distance of less than fifteen feet (15'). These factors will obviously make the property at 733 Middle Street significantly less valuable to prospective buyers, as stated in Mr. Mountjoy's letter. Further, if this project is constructed, there will be a complete loss of air, light and space available to Ms. Bodoh at 733 Middle Street. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably affect the value of 729 Middle Street.

Mr. Mountjoy notes in his letter to the Board a unique feature of the home at 733 Middle Street. The tall dining room windows and window seat are in particular an attractive feature of the home to prospective buyers. If the project is built, the view from the dining room windows will be completely blocked by the Applicants' deck and garden room that will be situated less than fifteen feet (15') away. As such, it is unlawful and unreasonable for the Board to have concluded that the criteria set forth in RSA 674:33 I. (2) (D) were satisfied by the Applicant.

**VI. The Board was unreasonable and unlawful in making its purported findings as to the fifth variance criteria under RSA 674:33 I. (2) (E). Literal enforcement of the provisions of the Ordinance would not result in an unnecessary (or any) hardship to the Applicant.**

The fifth prong of the variance criteria requires the Board to determine whether an unnecessary hardship results from literal enforcement of the Ordinance. RSA 674:33, I (2) (E)(b)(1) provides that:

“Unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area: (A) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (B) the proposed use is a reasonable one.

If these criteria are not established, an unnecessary hardship will be deemed to exist “if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.” In the case at hand, the Board did not find the Property of the Applicants to be unique such that it is distinguished from other properties in the area.

Further, the Board cannot find that the Property could not reasonably be used. According to the Applicant, based upon the zoning history of 765 Middle

Street, two (2) lots were “forcibly combined into one lot and if that hadn’t been done, there would be no issue with adding a dwelling unit in that spot.” However, this reference to the involuntary merger of two (2) lots ignores the fact that variances relative to the reasonable use of the property had already previously been granted to the Applicants. The Property is currently in use for two (2) primary dwelling units consisting of three (3) residences (two (2) of which already generate rental income) where the Ordinance allows for only **one (1) primary dwelling unit**. The Property does currently enjoy a use well in excess of that which is reasonable under the Ordinance, a use that far exceeds the rest of the neighborhood which generally adheres to the one (1) house per lot scheme of the Ordinance. There is simply no possible way to state that the Property cannot be used in strict conformance with the Ordinance without causing an “unnecessary hardship” to the Applicants; the Property is already currently enjoying a windfall income from its current rental use despite the spirit of the Ordinance.

The hardship reason given by Tim Phoenix on behalf of the Applicants at the ZBA Meeting is “this lot is larger than most, so that suggests you should be able to do more with it.” Not being able to “do more” with your property is not a hardship. This conjured hardship cannot be construed in any way to satisfy the criteria of RSA 674:33, I (2) (E). As stated above, RSA 674:33, I (2) (E), requires the Applicants to conclusively demonstrate that they have an “unnecessary

hardship” resulting from a condition of their Property, not that they have a hardship because they could make more money with the variances.

### Summary

The notice to abutters required by RSA 676:7 is a prerequisite to the Board having jurisdiction to hear any variance request. That notice is a two-step process, requiring (1) the City to transmit the notice, and (2) the United States Postal Service to deliver that notice in-hand to a resident and obtain his or her signature. In the present case, the United States Postal Service clearly failed to complete the notice required by RSA 676:7. Because of this failure, the Board inadvertently and mistakenly relied upon the absence of abutters to indicate the Appellants’ acquiescence and approval of the Application. The Board’s written findings of fact clearly indicate this mistaken reliance, which renders the Board’s Decision unreasonable and unlawful as a matter of law.

For the reasons discussed above, the Appellants respectfully requests that the Board

- (1) grant this motion to rehear the Application;
- (2) provide notice to all Abutters, including the Appellants as required by RSA 676:7;
- (3) Review additional facts and information regarding the Application submitted herein; and



(4) deny the Applicant's requested variances in the Application.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to be 'CS', written over a light blue horizontal line.

Christopher Swiniarski, Attorney for Appellants

# CITY OF PORTSMOUTH



Planning Department  
1 Junkins Avenue  
Portsmouth, New  
Hampshire 03801  
(603) 610-7216

## ZONING BOARD OF ADJUSTMENT

October 24, 2022

David Sinclair & Nicole Giusto  
765 Middle Street  
Portsmouth, New Hampshire 03801

**RE: Board of Adjustment request for property located at 765 Middle Street (LU-22-196)**

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, October 18, 2022**, considered your application for the construction of a new detached garage with dwelling unit above which requires the following: 1) A Variance from Section 10.513 to allow 3 principal dwellings on a lot where only 1 is allowed per lot. 2) Variances from Section 10.521 to allow a) a lot area per dwelling of 5,376 square feet where 7,500 is required per dwelling unit; and b) a 10 foot rear yard where 20 feet is required. Said property is shown on Assessor Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts. As a result of said consideration, the Board voted to **grant** the request as presented with the enclosed Findings of Fact and stipulation below:

1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,



Jim Lee, Vice Chairman of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

Eric Weinrieb, Altus Engineering, Inc.

R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, PLLC

# Findings of Fact | Variance

## City of Portsmouth Zoning Board of Adjustment

Date: October 18, 2022

Property Address: 765 Middle Street

Application #: LU-22-196

Decision: **Grant with stipulations**

### Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, I now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of the all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.	<b>Yes</b>	The proposed building was a beautiful structure on a beautiful lot and would be a nice property in that location. It would not be detrimental to the public good. Since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project. It resonated with the intention of the zone in terms of density of housing.
10.233.22 Granting the variance would observe the spirit of the Ordinance.	<b>Yes</b>	
10.233.23 Granting the variance would do substantial justice.	<b>Yes</b>	There would not be any loss to the public by allowing this to proceed and the loss to the applicant would not be outweighed by any potential loss to the public.
10.233.24 Granting the variance would not diminish the values of surrounding properties.	<b>Yes</b>	There were a lot of abutters who said they were comfortable with the project and the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.

<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(a)The property has special Conditions that distinguish it from other properties in the area. AND (b)Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one. OR Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.</p>	<p><b>Yes</b></p>	<p>The special condition of the property was that it was forcibly combined into one lot and if that hadn't been done, there would be no issue with adding a dwelling unit in that spot.</p>
--	-------------------	---

<p><b>Stipulations</b></p>
<p>1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.</p>
<p>2.</p>
<p>3.</p>
<p>4.</p>

## **Exhibit B**

### **3.1 Basic Standards**

#### **3.1.1 Description**

Certified Mail is subject to the basic standards in [1.0](#); see [1.4](#) for eligibility. Certified Mail provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made. Customers can retrieve the delivery status as provided in [1.8](#). Certified Mail is dispatched and handled in transit as ordinary mail. Except for Priority Mail pieces with included insurance, no insurance coverage is provided when purchasing Certified Mail. USPS maintains a record of delivery (which includes the recipient's signature). Customers may obtain a delivery record by purchasing a return receipt ([6.0](#)) at the time of mailing. Customers may direct delivery of Certified Mail only to the addressee (or addressee's authorized agent) using Certified Mail Restricted Delivery ([3.2.2](#)); or to an adult using Certified Mail Adult Signature Required or Certified Mail Adult Signature Restricted Delivery when meeting the applicable standards for Adult Signature under [8.1.3](#).

Tracking Number:

Remove X

## 70220410000138687245

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Add to Informed Delivery (<https://informedelivery.usps.com/>)

### Latest Update

Your item was delivered to an individual at the address at 12:08 pm on October 8, 2022 in PORTSMOUTH, NH 03801.

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Feedback

#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801  
October 8, 2022, 12:08 pm

#### Out for Delivery

PORTSMOUTH, NH 03801  
October 8, 2022, 6:55 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801  
October 8, 2022, 6:44 am

#### Departed USPS Facility

MANCHESTER, NH 03103  
October 7, 2022, 3:00 pm

#### Arrived at USPS Facility

MANCHESTER, NH 03103  
October 6, 2022, 7:03 pm



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January 09, 2023

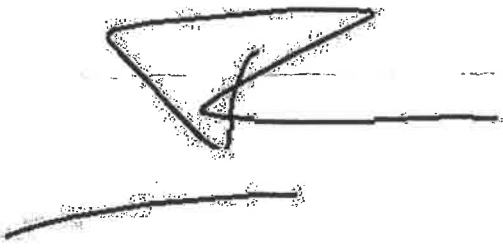

## USPS Tracking Intranet

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Tracking Number: 7022.0410 0001 3888 7245

This item was delivered on 10/08/2022 at 12:08:00

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### Latest Update

Your item was delivered to an individual at the address at 12:02 pm on December 1, 2022 in PORTSMOUTH, NH 03801.

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#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801

December 1, 2022, 12:02 pm

#### Out for Delivery

PORTSMOUTH, NH 03801

December 1, 2022, 6:52 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801

December 1, 2022, 6:41 am

#### Departed USPS Facility

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

#### Arrived at USPS Facility

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm



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January 10, 2023

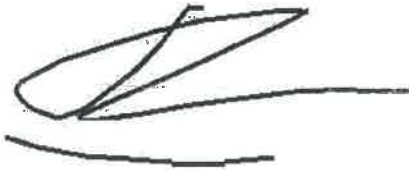
## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 2410 0002 7036 5760

This item was delivered on 12/01/2022 at 12:02:00

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<p>Signature</p> <p>Deliv</p> <p>Tracki</p> <p>This it</p>	
<p>Address</p>	<p><b>733 MIDDLE ST</b> <b>PORTSMOUTH, NH 03801</b></p>

Enter up to 35 items separated by commas.

Select Search Type:

Quick Search

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Tracking Number:

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Feedback

#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801

December 24, 2022, 11:58 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801

December 24, 2022, 8:00 am

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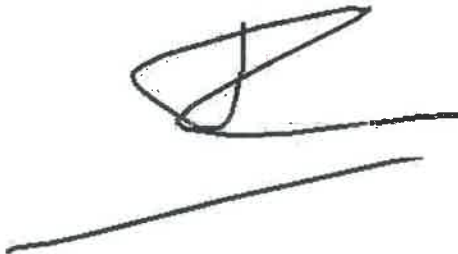

## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 2410 0002 7036 6682

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<p>Address</p>	

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Exhibit C-4

Signature of Nicole M. Bodoh:

*Nicole M. Bodoh*

Exhibit D

Affidavit of Nicole M. Bodoh

I, Nicole M. Bodoh, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 733 Middle Street, Portsmouth, N.H. That property is a condominium of “729-733 Middle Street Condominiums.”
2. I purchased this property on or about July 23, 2018 and have lived there since as my primary residence.
3. I am an attorney in good standing licensed to practice law in Pennsylvania since December 15, 2005, New Hampshire since April 9, 2013, Massachusetts since April 9, 2013 and Vermont since May 7, 2014. I have never been the subject of complaint concerning my conduct as an attorney or the subject of any judicial investigation or sanctions. I take my responsibility as an officer of the court to act truthfully with the utmost seriousness.
4. I never received any Notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (“ZBA”) on the Application submitted by David Sinclair and Nicole Giusto.
5. It was not until I was at a meeting of the Portsmouth Historic District Commission (“HDC”) on December 14, 2022 that I learned that the Applicants had already been granted their requested variances at the October 18, 2022 ZBA meeting.
6. The only notice I received of the December 14, 2022 HDC meeting was a letter from the City of Portsmouth, bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.

7. The only notice I received of the January 3, 2023 Site Plan Review Technical Advisory Committee meeting was a letter from the City of Portsmouth bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.
8. I am the only individual residing at 733 Middle Street, Portsmouth, NH.
9. In investigating why I never received the required certified mail Notice of the ZBA hearing which is required to be given to me in hand and signed for, I have determined the following.
  - a) As shown on Exhibit C-2 to the Motion for Rehearing, the tracking information from the US Postal Service for the HDC Meeting indicates the notice was “delivered to an individual” at the address at 12:02 p.m. on December 1, 2022. This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On December 1, 2022 I was at a business luncheon with my colleague, Katherine Battles at the River House at 53 Bow Street, Portsmouth, NH. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-2 and C-4 to the Motion for Rehearing.
  - b) As shown on Exhibit C-3 to the Motion for Rehearing, the tracking information from the US Postal Service for the TAC Meeting indicates “delivered to an individual” at the address at 11:58 am on December 24, 2022.” This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On Saturday December 24, 2022, between the hours of 11:00 am and approximately 2:00 pm I was running errands at multiple locations in the City of Portsmouth in preparation for the holiday weekend which included picking up food orders at Ceres Bakery and

Saunder's Fish Market. I missed a call from Cassandra LaRae-Perez at 1:54 as I was driving home. I returned her call at 2:39 p.m. after I returned home. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-3 and C-4 to the Motion for Rehearing.

- c) As shown on Exhibit C-1 to the Motion for Rehearing, the records of the US Postal Service of the notice of the ZBA meeting indicate that the notice was "left with individual at the address at 12:08 pm on October 8, 2022." I do not have a record of where I was at 12:08 pm on October 8, 2022 however my calendar indicates that my at-home piano lesson ordinarily between 10:00 and 10:30 am was cancelled due to a conflict on the part of my instructor, Kathy Fink, and that I sent an email to a client from my work email account at 10:26 am that day. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-1 and C-4 to the Motion for Rehearing.

Dated: January 17, 2023

  
\_\_\_\_\_  
Nicole M. Bodoh, Esq.

STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 17<sup>th</sup> day of January, 2023.

  
\_\_\_\_\_  
Notary Public/Justice of the Peace

My Commission Expires: \_\_\_\_\_



Exhibit E

Affidavit of Craig S. Crowell

I, Craig S. Crowell, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 729 Middle Street, Portsmouth, NH. That property is a condominium of "729-733 Middle Street Condominiums."
2. I purchased this property on or about May 16, 2022 and have lived there ever since as my primary residence.
3. I registered my vehicle under my current address at 729 Middle Street, Portsmouth, NH with the City of Portsmouth and the State of New Hampshire on September 19, 2022.
4. I updated my New Hampshire driver's license with my current address at 729 Middle Street, Portsmouth, NH on June 15, 2022.
5. I am registered to vote in the City of Portsmouth.
6. I have never provided my former address in Greenland, NH address to the City of Portsmouth for any purpose.
7. The notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (the "ZBA") on the Application submitted by David Sinclair and Nicole Giusto was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.
8. The notice of the January 3, 2023 hearing held by the Site Plan Review Technical Advisory Committee was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.

9. There is no front desk, reception or mailroom at my former address at 37 Allen Farm Road, Greenland, NH or at my current address at 729 Middle Street, Portsmouth, NH.
10. I did not sign any certified mail receipt for the notice of the October 18, 2022 hearing held by the ZBA. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.
11. I did not sign any certified mail receipt for the notice of the Technical Advisory Committee Meeting held on January 3, 2023. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.


Dated: January 16, 2023

  
Craig S. Crowell

STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 16<sup>th</sup> day of January, 2023.



  
Notary Public/Justice of the Peace

My Commission Expires: July 12, 2027

Tracking Number:

Remove X

## 70220410000138687238

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### Latest Update

Your item was delivered to an individual at the address at 12:07 pm on October 12, 2022 in PORTSMOUTH, NH 03801.

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#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801  
October 12, 2022, 12:07 pm

#### Out for Delivery

PORTSMOUTH, NH 03801  
October 12, 2022, 6:10 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801  
October 12, 2022, 5:03 am

#### Departed USPS Facility

MANCHESTER, NH 03103  
October 11, 2022, 2:26 pm

#### Arrived at USPS Facility

MANCHESTER, NH 03103  
October 11, 2022, 11:19 am

#### In Transit to Next Facility

October 10, 2022

**Arrived at USPS Regional Facility**

SHREWSBURY MA DISTRIBUTION CENTER

October 9, 2022, 12:17 pm

**Departed USPS Facility**

MANCHESTER, NH 03103

October 7, 2022, 3:00 pm

**Arrived at USPS Facility**

MANCHESTER, NH 03103

October 6, 2022, 7:03 pm

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---

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**FAQs**



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Accounts

January 12, 2023



## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 0410 0001 3868 7238

This item was delivered on 10/12/2022 at 12:07:00

[< Return to Tracking Number View](#)

Signature:	
Deliver	Signature
Track	07
Print	Delivery
<a href="#">&lt; Return to Tracking Number View</a>	Signature
Address	
Deliver	Signature
Track	07

Enter up to 35 items separated by commas.

Select Search Type:

Quick Search

Submit

Product Tracking & Reporting, All Rights Reserved

Version: 23.1.1.0.72

*Craig Crowell*

Tracking Number:

Remove X

## 70222410000270365777

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### Latest Update

The delivery status of your item has not been updated as of December 6, 2022, 12:35 am. We apologize that it may arrive later than expected.

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#### Alert

##### Awaiting Delivery Scan

December 6, 2022, 12:35 am

##### Out for Delivery

PORTSMOUTH, NH 03801  
December 5, 2022, 6:35 am

##### Arrived at Post Office

PORTSMOUTH, NH 03801  
December 5, 2022, 6:24 am

##### Departed USPS Facility

MANCHESTER, NH 03103  
December 4, 2022, 3:29 pm

##### Arrived at USPS Facility

MANCHESTER, NH 03103  
December 4, 2022, 8:09 am

##### Arrived at USPS Regional Facility

Feedback

SHREWSBURY MA DISTRIBUTION CENTER

December 3, 2022, 9:42 am

**In Transit to Next Facility**

December 2, 2022

**Departed USPS Facility**

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

**Arrived at USPS Facility**

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm

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**Text & Email Updates**



**USPS Tracking Plus®**



**Product Information**



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Tracking Number:

Remove X

## 70222410000270366675

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### Latest Update

Your item was delivered to the front desk, reception area, or mail room at 11:13 am on January 3, 2023 in PORTSMOUTH, NH 03801.

Get More Out of USPS Tracking:

USPS Tracking Plus<sup>®</sup>

Feedback

#### Delivered

Delivered, Front Desk/Reception/Mail Room

PORTSMOUTH, NH 03801

January 3, 2023, 11:13 am

#### Redelivery Scheduled for Next Business Day

PORTSMOUTH, NH 03801

December 31, 2022, 7:16 am

#### Out for Delivery

PORTSMOUTH, NH 03801

December 31, 2022, 6:27 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801

December 31, 2022, 6:16 am

#### Departed USPS Facility

MANCHESTER, NH 03103

December 30, 2022, 3:12 pm

#### Arrived at USPS Facility



MANCHESTER, NH 03103  
December 30, 2022, 11:20 am

**Arrived at USPS Regional Facility**  
SHREWSBURY MA DISTRIBUTION CENTER  
December 29, 2022, 1:39 pm

**Forwarded**  
PORTSMOUTH, NH  
December 24, 2022, 9:53 am

**Forwarded**  
PORTSMOUTH, NH  
December 24, 2022, 9:47 am

**Arrived at Post Office**  
PORTSMOUTH, NH 03801  
December 24, 2022, 8:00 am

**Hide Tracking History**

**Text & Email Updates**



**USPS Tracking Plus®**



**Product Information**



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**FAQs**



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January 12, 2023

## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 2410 0002 7036 6675

This item was delivered on 01/03/2023 at 11:13:00

[< Return to Tracking Number View](#)

Pro	Tr. of	
Signature	kin. in	
Deliv	ign. in	
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< Retu	king. N	
Pro	Tr. of	
Address		
Deliv	ign. in	

Enter up to 35 items separated by commas.

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Quick Search

Submit

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Version: 23.1.1.0.72

Exhibit F-4

Signature of Craig S. Crowell:

A handwritten signature in black ink, reading "Craig S. Crowell". The signature is written in a cursive style with a large initial "C" and a distinct "S" in the middle.

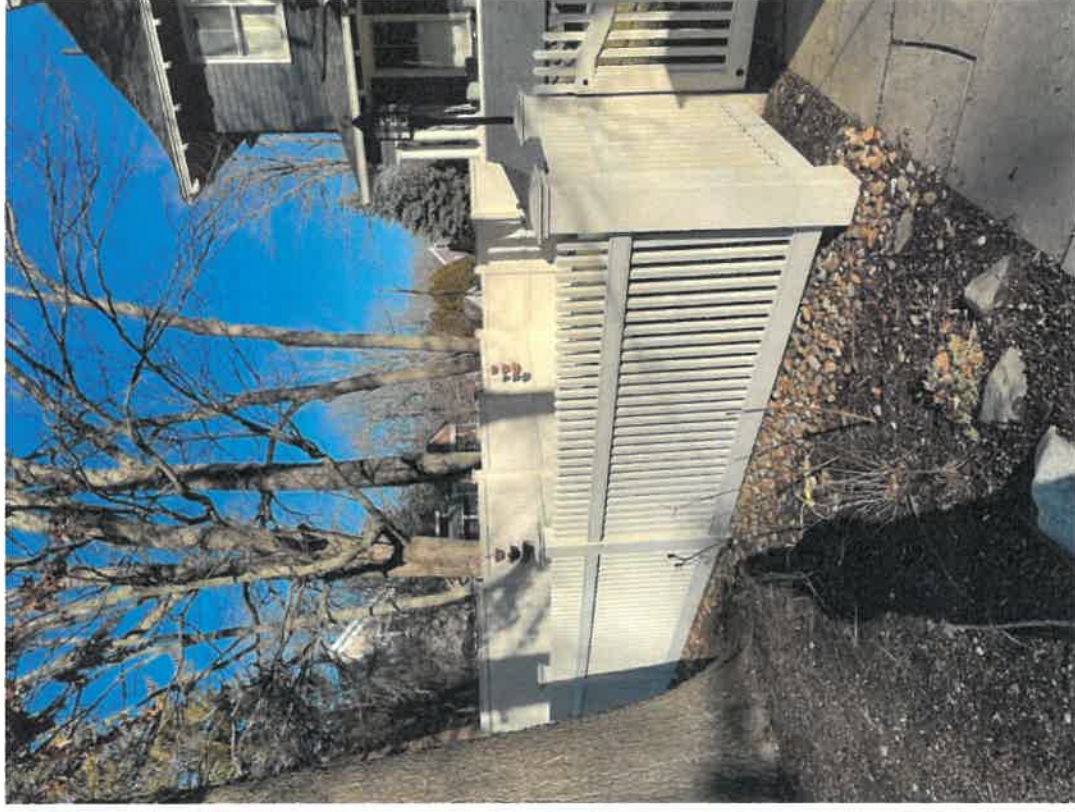
Exhibit G-1



729-733 Middle Street Condominiums



Rendering submitted by David Sinclair & Nicole Giusto  
(765 Middle Street)



Actual Photo of 765 Middle Street  
with 733 Middle Street to the left of the Property

**Exhibit G-3**



**Rendering submitted by David Sinclair & Nicole Giusto  
(733 Middle Street)**



**Actual photo of 733 Middle Street**

**SITE NOTES**

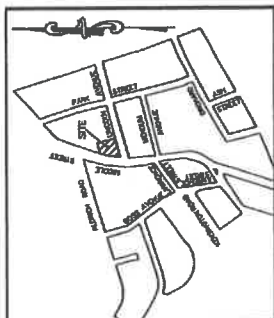
1. DESIGN INTENT - THIS PLAN SET IS INTENDED TO PERMIT A CONSTRUCTION OF A RESTAURANT USE.
2. APPROXIMATE LOT AREA: 21,504 SF
3. ZONE: CRA
4. ON OCTOBER 18, 2022, THE ZONING BOARD OF ADJUSTMENT APPROVED THE FOLLOWING VARIANCES:
  - a. VARIANCE TO PERMIT CONSTRUCTION OF A LOT WHERE ONLY ONE UNIT IS ALLOWED.
  - b. VARIANCE TO ALLOW A LOT AREA OF 21,504 SF WHERE 7,500 SF IS REQUIRED.
  - c. VARIANCE TO PERMIT DWELLING UNIT AND A UNIT WITH MORE THAN ONE UNIT.
5. PARKING REQUIREMENTS:
  - a. RESIDENTIAL 1.3 SPACE PER DWELLING UNIT CRA OVER 700 SF
  - b. DWELLING UNITS
    - 3.2 SPACES REQUIRED
    - 7 SPACES PROVIDED
6. CREATE WETLANDS BUFFER ANALYSIS - NO WETLANDS ON THE PROPERTY OR WITHIN 75-FOOT OF THE SITE.
7. AREA OF DISTURBANCE UNDER ALIAS OF ORDINANCE UNDER EPA RULES PHASE I CONSTRUCTION. SPECIAL PERMIT NOT REQUIRED.
8. NOTES SHALL BE STAMPED AT THE EDGE OF PARCELS BY AREAS SHOWN HEREON, AND/OR TYPED OFF SITE AS APPROPRIATE.
9. PROHIBIT WAREHOUSES - RESIDENTIAL USE - STRIPPING NOT PERMITTED.
10. ALL CONSTRUCTION SHALL MEET THE DESIGN STANDARDS OF THE CITY OF PORTSMOUTH, NH. THE MORE STRINGENT SPECIFICATION SHALL GOVERN.
11. CLEAN AND GRAY WETLAND PAZES OF EXISTING PARCELS AT SHARPE LINES WITH 75-FOOT IMMEDIATELY PRIOR TO PLACING NEW WETLANDS CONVEYOR.
12. ALL BIDDERS AND FEES SHALL BE PAID/POSTED PRIOR TO RETURNING CONSTRUCTION.
13. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
14. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION. ALL DIMENSIONS AND TOPOGRAPHY SHALL BE INDICATED BY THE ARCHITECT AND ENGINEER FOR VERIFICATION.
15. BUILDING AREA SHOWN IS BASED ON FOOTPRINT MEASURED TO THE EDGE OF PARCELS AND/OR CURBS. ACTUAL INTERIOR SPACE WILL VARY.
16. NO CHANGES TO THE UNIVERSITY WITHIN THE CITY RIGHT-OF-WAY IS PERMITTED.

**ZONING SUMMARY**

ZONE: CRA (GENERAL RESIDENCE A)  
EXISTING LOT AREA: 0.49 ACRES

DIMENSIONAL REQUIREMENTS	EXISTING	REQUIRED
MIN. LOT AREA:	21,504 S.F.	7,500 S.F.
MIN. LOT AREA PER DWELLING UNIT:	2,150 S.F.	7,500 S.F.
MIN. STREET FRONTAGE:	158' (MIDDLE ST.)	100'
MIN. LOT DEPTH:	111' ±	70'
FRONT SETBACK:	28.1' ± (EX.) (MIDDLE ST.)	15'
SIDE SETBACK:	18.5' ± (EX.) (LINCOLN ST.)	10'
REAR SETBACK:	14.0' (REAR)	20'
MAX HEIGHT:	45' (EX.)	35'
MAX BUILDING COVERAGE:	12.75% (INCL. DECK)	30%
MIN. OPEN SPACE:	70.0%	30%

\* FRONT SETBACK IS FROM BOTH STREET ADDRESS STREET AND ACCESS STREET

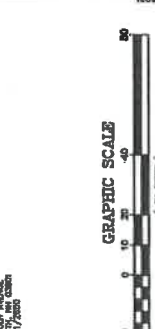
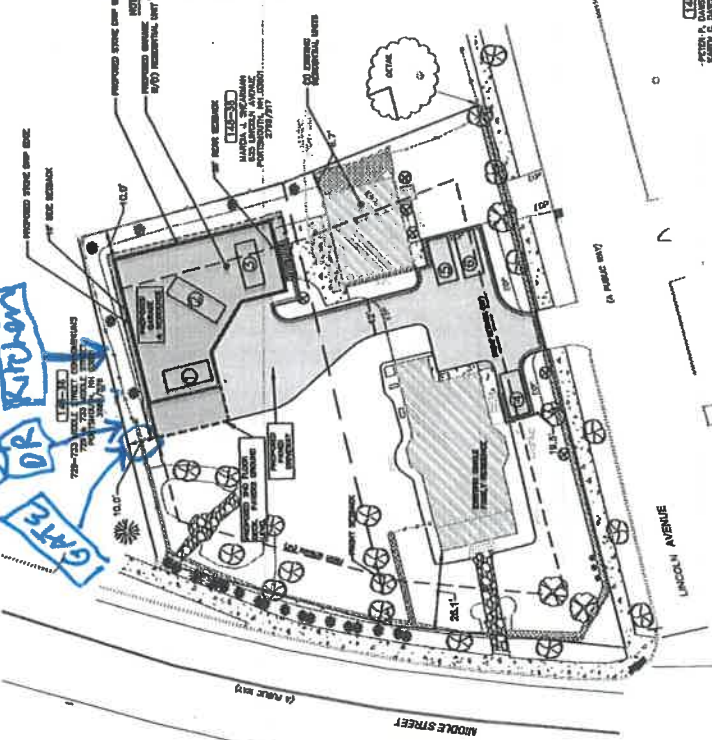


LOCUS  
NOT TO SCALE

APPROVED BY THE PORTSMOUTH PLANNING BOARD

CHAIRMAN	DATE

1. THE RELATIVE ERROR OF CLASSING THIS LOT AS 1 UNIT IS 1.0%.
2. THE LOCATION OF ALL WETLANDS UNDER FEDERAL AND STATE REGULATIONS IS SHOWN ON THIS PLAN SET.
3. THE LOCATION OF ALL WETLANDS UNDER FEDERAL AND STATE REGULATIONS IS SHOWN ON THIS PLAN SET.
4. THE LOCATION OF ALL WETLANDS UNDER FEDERAL AND STATE REGULATIONS IS SHOWN ON THIS PLAN SET.
5. THE LOCATION OF ALL WETLANDS UNDER FEDERAL AND STATE REGULATIONS IS SHOWN ON THIS PLAN SET.



**ALTUS ENGINEERS, INC.**  
 1000 W. 10th Street  
 Portsmouth, NH 03801  
 TEL: 603.433.1234  
 WWW.ALTUS-ENG.COM

NOT FOR CONSTRUCTION  
 ISSUED DATE: NOVEMBER 1, 2022  
 TAC WORK SESSION  
 ISSUE DATE: NOVEMBER 1, 2022  
 NO. DESCRIPTION: BY DATE  
 0 RETN. SUBMISSION: DFW 11/19/22

DOWN BY: \_\_\_\_\_  
 APPROVED BY: \_\_\_\_\_  
 DRAWING FILE: 508-210559  
 SCALE: (27'-2.54') 1" = 20'  
 (11'-31.17") 1" = 40'

DESIGNER/ARCHITECT:  
 NICOLE J. CRISTO &  
 DAVID A. SINCLAIR  
 705 MIDDLE STREET  
 PORTSMOUTH, NH 03801  
 TAX MAP 148 PARCEL 37

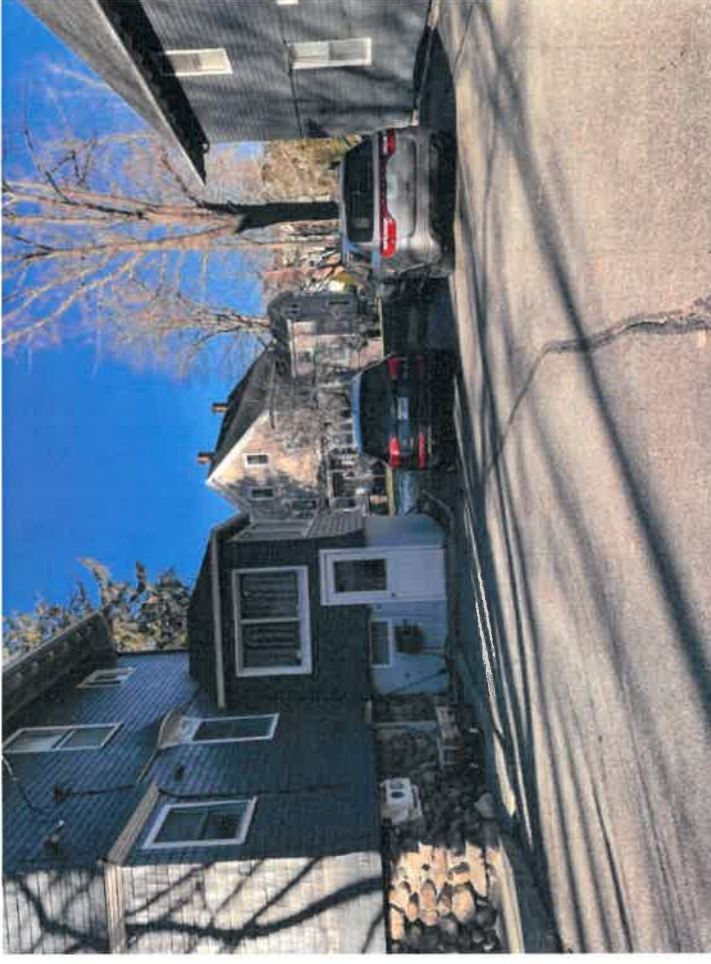
PROJECT:  
**RESIDENTIAL DEVELOPMENT EXPANSION**  
 - TAX MAP 148, LOT 37  
 705 MIDDLE STREET  
 PORTSMOUTH, NH  
 TITLE:

PRELIMINARY OVERALL SITE PLAN  
 SHEET NUMBER: **C-1**

**Exhibit G-5**



**Rendering submitted by David Sinclair & Nicole Giusto  
(765 Middle Street)**



**Actual Photo of 765 Middle Street  
with the front of 733 Middle Street in the background**



Exhibit H

Zoning Board of Adjustment  
City of Portsmouth  
Planning Department  
1 Junkins Avenue  
Portsmouth, New Hampshire 03801

January 11, 2023

Re: Proposed Project at 765 Middle Street and Impact on Property Values at 733 and 729 Middle Street

Dear Madam or Sir:

I am the realtor who originally sold the property at 733 Middle Street to Nicole Bodoh, and as such I am very familiar with its value. Based upon my review of the project plans submitted by the applicant at 765 Middle Street, I can confirm that there will be a significant diminution in the value of 733 Middle Street based upon the overall size of the structure and the lack of privacy resulting from its proximity to the home at 733 Middle Street. In addition, the fact that the front of 733 Middle Street will face the proposed garage with residence, and that this structure would completely block several of 733 Middle Street's windows, including, but not limited to, the house's feature dining room windows, I can confirm the proposed structure will adversely affect the value of the home owned by Ms. Bodoh.


The plans submitted by the applicant at 765 Middle Street indicate that the proposed garage with residence would be located less than 15 feet from the windows of 733 Middle Street. Because the house was built long before contemporary zoning ordinances, 733 Middle Street sits on a permitted, non-conforming lot where the property line is just within a few feet from the side of the house.

The tenants of this new building would have forced, direct views into Ms. Bodoh's dining room, kitchen, bedroom and bathroom windows. Conversely, Ms. Bodoh's view of the outside world from her dining room would be limited to the proposed deck and garden room wall, and her views from most of her other windows would be limited to the siding and windows of this proposed structure. The additional traffic and noise resulting from the tenancy at this new structure will also make Ms. Bodoh's home significantly less valuable to prospective buyers.

Although not as immediate as the impact on 733 Middle Street, the value of the property located at 729 Middle Street (the other side of the duplex), owned by Craig Crowell, will also be negatively affected by the proposed structure. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably impact 729 Middle Street. If, after the project is built, 733 Middle Street is sold before 729 Middle Street, that sale price will be a comparable price for potential buyers of 729 Middle Street.

Thank you for your attention to this matter.

Sincerely,

DocuSigned by:  
  
247D3160331149D...  
Jeff Mountjoy

Aland Realty





# CITY OF PORTSMOUTH

Community Development Department  
(603) 610-7281

Planning Department  
(603) 610-7216

April 26, 2023

City of Portsmouth  
Board of Adjustment

Dear Chair Eldridge and Members of the Board of Adjustment:

On March 14, 2023 the Planning Department received a letter requesting an appeal of an Administrative Official by the abutters from 729-733 Middle Street. The administrative decision made by the Director of Planning and Sustainability was to withhold the Motion for Rehearing of the application for 765 Middle Street reviewed and decided by the BoA at their October 18, 2022 meeting. The reason the request for rehearing was withheld is that it was untimely. The rehearing request was received on January 17, 2023 when the appeal deadline was November 17, 2022.

In their letter, the abutters from 729-733 Middle Street state that while the request did not meet the required deadline for a rehearing, they had not been notified as abutters of the hearing before the Board of Adjustment. In fact, the Planning and Sustainability Department had notified the abutters at 729-733 Middle Street by certified mail as shown on the copy of the Certified mail receipt shown as Attachment 1. You will see on the Certified mail receipt that Craig Crowell from 729 Middle Street had a notice mailed to his address as listed in the assessing records and Nicole Bodoh also had a notice mailed to her at her listed address.

In an appeal of an administrative official, the BoA may make any decision the Administrative Official had the power to make. Therefore, the BoA may either determine the request for rehearing should be placed on the next BoA agenda or that it should not be placed on any BoA agenda because the request was untimely. If the BoA grants this appeal, the result would be that the Request for Rehearing would be placed on the next BoA meeting agenda. If the BoA denies this appeal, the abutters may appeal that decision to the Superior Court or the Housing Appeals Board.

Sincerely,

Peter Britz  
Director of Planning and Sustainability



# Attachment 1

Firm Mailing Book For Accountable Mail

V1712

Name and Address of Sender

Planning Department  
City of Portsmouth  
1 Junkins Avenue  
Portsmouth, NH 03801

Check type of mail or service

- Adult Signature Required
- Adult Signature Restricted Delivery
- Certified Mail
- Certified Mail Restricted Delivery
- Collect on Delivery (COD)
- Insured Mail
- Priority Mail
- Priority Mail Express
- Registered Mail
- Return Receipt for Merchandise
- Signature Confirmation
- Signature Confirmation Restricted Delivery

Affix Stamp Here  
(for additional copies of this receipt).  
Postmark with Date of Receipt.

D: \$59.41  
I: \$26.79  
PH: \$102.84  
**\$189.04**

USPS Tracking/Article Number

Addressee (Name, Street, City, State, & ZIP Code™)

Postage	(Extra Scales)	Handling Charge	Actual Value if Restricted	Insured Value	Due Amount	ASR Fee	ASRD Fee	RD Fee	RR Fee	SC Fee	SCRD Fee	SH Fee
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1.	SINCLAIR DAVID A GIUSTO NICOLE J 765 MIDDLE ST PORTSMOUTH, NH 03801 7022 0410 0001 3868 7177	SHAFFER ELTON L RAIS PAULA M 748 MIDDLE STREET PORTSMOUTH, NH 03801 7022 7221	JORGENSEN FAMILY TRUST JORGENSEN NATHAN H & KRISTIE L TRUSTEES 774 MIDDLE ST UNIT 1 PORTSMOUTH, NH 03801 7022 7276									
2.	DAWSON PETER P REVOC TRUST (1/2 INT) DAWSON KAREN G REVOC TRUST (1/2 INT) 648 LINCOLN AVE PORTSMOUTH, NH 03801 7022 7184	CROWELL CRAIG S 37 ALLEN FARM RD GREENLAND, NH 03840 7022 7238	MAGUIRE BRIAN T MAGUIRE MELISSA J 774 MIDDLE ST #3 PORTSMOUTH, NH 03801 7022 7283									
3.	GRAHAM ROBERT M REVOC TRUST GRAHAM KAREN J REVOC TRUST 664 LINCOLN AVE PORTSMOUTH, NH 03801 7022 7191	BODOH NICOLE M 733 MIDDLE ST #2 PORTSMOUTH, NH 03801 7022 7245	PYOTT ALISON L PYOTT CHRISTOPHER J 774 MIDDLE ST #4 PORTSMOUTH, NH 03801 7022 7290									
4.	THIBEAULT JOEL ANN 670 LINCOLN AVE PORTSMOUTH, NH 03801 7022 7207	SHEARMAN MARCIA J REV TRUST SHEARMAN JOHN M REV TRUST 635 LINCOLN AVE PORTSMOUTH, NH 03801 7022 7252										
5.	VESSLES COREY T & SHELLEY A 795 MIDDLE ST PORTSMOUTH, NH 03801 7022 7214	SIMONOFF STACEY CARLA 774 MIDDLE ST #2 PORTSMOUTH, NH 03801 7022 7269										

Total Number of Pieces Listed by Sender

Total Number of Pieces Received at Post Office

Postmaster, Per (Name of receiving employee)

Stamp  
Completed In Ink

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The Postal Service allows mailers to use privately printed or computer-generated firm sheets that contain the same information and that are nearly identical to the USPS-provided PS Form 3877, *Firm Mailing Book For Accountable Mail*. For the locations where you are presenting your mailings, the local postmaster or manager of Business Mail Entry provides approval of the form in writing. On the mailer's approved form, you may omit columns that are not applicable to the extra service requested. For additional information, see DMM 503.1.10.

Mailers must retain their original written approvals by the postmaster or manager of Business Mail Entry, as evidence that their privately prepared facsimile of PS Form 3877 was approved by the Postal Service. The Postal Service does not retain documentation of the facsimile approval. Mailers using privately printed forms must periodically verify them against the USPS-provided versions, make routine updates, and obtain approval of the updated facsimile form.

When using an approved, privately prepared form, a mailer who wants the form sheets postmarked by the Postal Service must present the books with the articles to be mailed at a Post Office. The sheets of the books become the mailer's only receipt; the Postal Service does not retain a copy.

For Registered Mail and COD, the mailer submits the forms in duplicate and receives one copy as the mailer's receipt after the USPS employee accepting the mailing has verified the entries.

For Certificates of Mailing with domestic or international mailings, the mailer must use either PS Form 3665, *Certificate of Mailing - Firm*, or PS Form 3817, *Certificate of Mailing*. For Certificates of Bulk Mailing, the mailer must use either PS Form 3606-D, *Certificate of Bulk Mailing - Domestic*, or PS Form 3606, *Certificate of Bulk Mailing - International*.

765 Middle Street  
Page 1 of 1  
LU-22-196  
BOA: 10/18/2022

Tracking Number:

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#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801

October 12, 2022, 12:07 pm

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**USPS Tracking Plus<sup>®</sup>**



**Product Information**



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Feedback

### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801

October 8, 2022, 12:08 pm

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[Text & Email Updates](#)



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January 17, 2022

VIA HAND DELIVERY AND  
BY EMAIL TO [PLANNING@CITYOFPORTSMOUTH.COM](mailto:PLANNING@CITYOFPORTSMOUTH.COM)

Zoning Board of Adjustment (the "Board")  
City of Portsmouth  
Planning Department  
1 Junkins Avenue  
Portsmouth, New Hampshire 03801

**RE: Motion for Rehearing** – Variance Application (the "Application") of David Sinclair & Nicole Giusto (the "Applicants") for property at 765 Middle Street, Tax Map 148-37, Portsmouth, NH 03801 (the "Property")

Greetings Board Members:

The purpose of this correspondence is for 729-733 Middle Street Condominium Association, Nicole M. Bodoh and Craig Crowell, owners of property at Portsmouth Tax Map 148-36 and direct abutters to the Property (collectively, the "Appellants") to move for a rehearing by the Board of its decision rendered on October 18, 2022 with respect to the above-referenced Application. Pursuant to RSA 677:2, the Board has authority to grant this motion for rehearing in order to correct errors prior to any party appealing the Board's decision to the Superior Court. Rochester City Council v. Rochester Zoning Board of Adjustment. 171 N.H. 271, 278. (2018).

## **Introduction**

The Appellants are the owners of Tax Map 148-36 and the two (2) condominium units it comprises, and are direct abutters to the Property. The Applicants filed the Application to allow construction of a new detached garage with dwelling unit above which requires the following variances: 1) a variance from Section 10.513 of the Portsmouth Zoning Ordinance (the “Ordinance”) to allow three (3) principal dwellings on a lot where only one (1) is allowed per lot; (2) a variance from Section 10.521 to allow a lot area per dwelling of 5,376 square feet where 7,500 is required and (3) a variance from Section 10.521 to allow a 10 foot rear yard setback where 20 feet is required. The Property is shown on the Assessor’s Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts.

At its October 18, 2022 meeting, the Board made findings relative to the five (5) criteria for Variance set forth in RSA 674:33 I. (2), which findings are attached hereto as Exhibit A (the “Decision”). The Appellants hereby move for a rehearing on the Decision and allege that the Board made factual and legal errors in issuing the Decision as particularly set forth below.

As a final introductory note, the Appellants are of course aware that this motion for rehearing is filed more than thirty (30) days after the Decision.

However, as described in greater detail below, the Appellants never received notice of the Application as required by New Hampshire law. It is well settled law that notice is a pre-requisite to the Board having jurisdiction to hear or decide the variance request, as detailed further below. This motion for rehearing is therefore timely and proper since the Board did not have proper jurisdiction over the Application at the time of the Decision.

### **Grounds for Rehearing**

**I. Due Process Violations of RSA 676:7. None of the Appellants received notice by verified mail as required under RSA 676:7.**

RSA 676:7 provides: *“Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows: (a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by verified mail, as defined in RSA 21:53, stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal.”* [emphasis supplied]

Verified mail, as defined in RSA 21:53 means *“any method of mailing that is offered by the United States Postal Service or any other carrier, and which*

*provides evidence of mailing*". ***None of the Appellants received notice by verified mail*** as required under RSA 676:7.

A. Abutter Nicole M. Bodoh did not Receive Notice of the ZBA Meeting.

Nicole Bodoh, the owner of 733 Middle Street, did not receive any notice of the Zoning Board of Adjustment hearing on October 18, 2022 ("ZBA Meeting") and as a result did not attend the meeting and was unable to express her vigorous objection to the planned project.

As further evidence that proves the faulty notice procedures by the USPS that ultimately led to Ms. Bodoh not receiving notice of the ZBA Meeting, later, in December 2022, Ms. Bodoh received notice by unverified mail of the Historic District Commission Work Session ("HDC Meeting") held on December 14, 2022. That notice was simply left in her mailbox, though the City sent that notice by certified mail in the same manner as it sent notice of the ZBA Meeting. It was at this HDC Meeting that Ms. Bodoh first became aware that the Decision had been rendered. Following the December 14, 2022 meeting, Ms. Bodoh again received notice by unverified mail of the Technical Advisory Committee meeting on January 3, 2023 (the "TAC Meeting"), which she attended. Again, the notice of the TAC Meeting was simply left in her mailbox, though the City sent that notice by certified mail as well, just like the ZBA Meeting.

It is true that the failure of notice to Ms. Bodoh for both the HDC Meeting and the TAC Meeting are not dispositive for this Motion for Rehearing. However, those failures evidence a course of conduct on the part of the USPS that supports the fact that Ms. Bodoh never received notice of the ZBA Meeting. The City of Portsmouth sent notices of all of the meetings to Nicole Bodoh by USPS Certified Mail. However the United States Postal Service did not deliver the certified mail in accordance with U.S. Postal Service regulations which provide that “the USPS maintains a record of delivery (*which includes the recipient’s signature*).” [emphasis supplied] United States Postal Service Domestic Mail Manual 500 – 3.1.1. See attached Exhibit B.

The record of delivery provided by the Post Office does not include Ms. Bodoh’s signature. The tracking and signature records for the notices sent to Ms. Bodoh of the ZBA Meeting, the HDC Meeting and the TAC Meeting are attached hereto as Exhibits C-1, C-2, and C-3. A specimen of Ms. Bodoh’s signature is attached hereto as Exhibit C-4. It is immediately apparent when comparing the records of the notices to Ms. Bodoh’s specimen signature that she did not sign the certified mail receipt upon delivery, as required under the Postal Regulations and State law. Further details are found in Ms. Bodoh’s affidavit, attached as Exhibit D. These facts make it plainly clear that Ms. Bodoh never received notice of the ZBA Meeting as required by New Hampshire law.

B. Abutter Craig S. Crowell did not Receive Notice of the ZBA Meeting in accordance with US Postal Regulations or State Law.

Similarly, Craig S. Crowell, the owner of 729 Middle Street, did not receive notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting in accordance with the Postal Regulations or State law. The notices for the ZBA Meeting and TAC Meeting were sent to Mr. Crowell's former address at 37 Allen Farm Road, Greenland NH 03840 and then forwarded on through automatic mail forwarding to his address at 729 Middle Street. The notice for the HDC Meeting has to date not been delivered, according to the US Postal Service's records. Again, while the notices for the HDC Meeting and TAC Meeting are not dispositive for this Motion for Rehearing, those failures evidence a course of conduct on the part of the USPS which evidences the fact that Mr. Crowell never received notice of the ZBA Meeting. The HDC Notice and TAC Notice were sent by the City in the same manner as the ZBA Notice.

It is unknown why the notices for the ZBA Meeting, HDC Meeting and the TAC Meeting were addressed to Mr. Crowell's former address in Greenland, NH. Mr. Crowell purchased his home at 729 Middle Street on May 16, 2022 and moved in a few days later. He provided his current and correct address of 729 Middle Street to the City of Portsmouth when he registered his vehicle with the City of Portsmouth and the State of New Hampshire on September 19, 2022. He also updated his New Hampshire driver's license on June 15, 2022 with his 729

Middle Street address. Further, Mr. Crowell is registered to vote in the City of Portsmouth. Mr. Crowell has never provided his Greenland, NH address to the City of Portsmouth for any purpose. See attached Affidavit of Craig S. Crowell, Exhibit E.

According to the tracking records for the notices sent to Mr. Crowell, the notice of the ZBA Meeting was “delivered to an individual at the address at 12:07 pm on October 12, 2022 in Portsmouth, NH 03801”. See Exhibit F-1. That record is plainly false. The notice of the ZBA Meeting was originally sent to Mr. Crowell’s former Greenland, NH address; it only arrived in Portsmouth via automatic mail forwarding to the 729 Middle Street address, not by any individual delivery.

As in the case with notice to Ms. Bodoh above, the record for the notice of the HDC Meeting to Mr. Crowell tells a similar tale. The official USPS record states that the item is “awaiting a delivery scan” and that “the delivery status of your item has not been updated as of December 6, 2022, 12:35 am. We apologize that it may arrive later than expected”. See Exhibit F-2. To date this notice has not been delivered, even though the USPS reports that it was expected back on December 6, 2022. Again, while the faulty HDC Meeting Notice is not dispositive in this matter, it demonstrates the USPS’s course of conduct that proves the ultimate unreliability of the USPS as a means of providing actual notice. The USPS did not provide the in-hand, signed-for notice that they assure senders is provided for by certified mail.



Similarly again, Mr. Crowell did not receive notice of the TAC Meeting in conformity with US Postal Regulations and State Law. Tracking information available on the Post Office's website indicates that the notice was "delivered to front desk, reception or mailroom" at 11:13 am on January 3, 2023. See Exhibit F-3. There is no front desk, reception or mailroom at Mr. Crowell's former address in Greenland, NH or at his current address at 729 Middle Street. See Mr. Crowell's Affidavit attached hereto as Exhibit E at paragraph 9. Even if Mr. Crowell had received this notice, January 3, 2023 was the date the TAC Meeting was held and therefore the requirement of delivery at least 5 days prior to the meeting was not met (in addition to not meeting the signature requirement under U.S. Postal regulations for certified mail).

The supposed "record of delivery" for the notices does not bear Mr. Crowell's signature. The signature records for the ZBA Meeting and the TAC Meeting are included in Exhibits F-1 and F-3. The US Postal Service does not have any record for Mr. Crowell's signature for delivery of the HDC Meeting notice. A specimen of Mr. Crowell's signature is attached hereto as Exhibit F-4. When comparing Mr. Crowell's specimen signature to the signatures on record with the U.S. Postal Service, it is immediately apparent that those signatures are not the signature of Mr. Crowell.

C. 729-733 Middle Street Condominiums did not Receive Notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting.

In addition, the Applicants, on the site plans in their Application identified the owner of the Appellants' property as "729-733 Middle Street Condominiums" rather than Craig C. Crowell and Nicole M. Bodoh, as individuals, who were not mentioned anywhere in the Application. In spite of the Applicant's emphasis on the ownership of the Appellants' property by a condominium association, no notice of the ZBA Meeting, the HDC Meeting or the TAC Meeting was ever sent to 729-733 Middle Street Condominiums, according to the City's records.

The definition of "Abutter" in the New Hampshire Revised Statutes Annotated indicates that, under State law, notice should have been sent and addressed to an officer of 729-733 Middle Street Condominiums.

*RSA 672:3 states: "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use Board. [...] For purposes of receipt of notification by a municipality of a local land use Board hearing, in the case of an abutting property being under a condominium or other collective*

*form of ownership, the term abutter means the officers of the collective or association, as defined in [RSA 356-B:3, XXIII.](#)” [emphasis supplied]*

RSA 356-B:3, XXIII provides that “*Officer*” means any member of the Board of directors or official of the unit owners’ association.

Because the Applicants specifically identified 729-733 Middle Street Condominiums as an abutter, and because the New Hampshire statutes provides specific notice provisions relative to condominiums, notices of the ZBA Meeting, HDC Meeting and TAC Meeting should have been sent and addressed to “Officer” or “Official” of the 729-733 Middle Street Condominiums. The Applicants did not send any such notice by verified mail or otherwise for any of the Meetings in connection with the Application. It is not necessary to identify any particular individual as an officer when sending notices to a condominium association. All that is required to meet the New Hampshire statutory requirement is to send the notice to an “Official” or an “Officer”.

None of the three Appellants received the notice under RSA 676:7. That notice is a necessary pre-requisite to the Board’s jurisdiction to hear the Application. Hussey v. Barrington, 135 N.H. 227 (1992). *When that notice is lacking or deficient, the variance purportedly granted by the Board “is void from the very date on which it was issued.”* Id. at 232.

As a matter of law, *all* of the Appellants had to receive notice of the Application in compliance with New Hampshire law not less than 5 days before the date fixed for the hearing of the Application by “verified mail”. Since that did not happen, the Board had no jurisdiction to hear or grant the Applicants’ requested variances. The only remedy is for the Board to issue new notices that are received by the Appellants and all other abutters and conduct a re-hearing giving the Applicant adequate notice and opportunity to comment as required by RSA 676:7.

**II. The Applicant Provided Incomplete, Insufficient and Inaccurate Information to the Board.**

The information submitted by the Applicants to the City of Portsmouth with their Application is incomplete, insufficient and inaccurate. The photo renderings of Ms. Bodoh’s property at 733 Middle Street, which is adjacent to the proposed project, are either absent or presented in a misleading fashion, with the presumed intention of concealing the proximity of the proposed project to 733 Middle Street and the fact that the front of 733 Middle St. faces the location of the project.

Although small portions of the home at 733 Middle Street were included with the photo renderings supplied by the Applicant, not included in the application were any photo renderings including the entire front of 729-733

Middle Street, which is shown on Exhibit G-1 attached hereto. The applicants did not include a photo of the entire house presumably in order to mislead the Board into thinking that the 729-733 Middle Street Condominiums consists of apartment-style condominiums. To the contrary, this historic property was originally built as a duplex in 1820. The right side of the house that is 733 Middle Street represents one of the earliest examples still in existence in this country of what today is known as an “in-law suite.” It does not conform at all to what is commonly understood as a “condominium”. It is more similar to an attached, single-family, early Victorian residence.

Comparisons of the photo renderings submitted by the Applicants to photos of the actual locations are attached hereto as Exhibits G-2 through G-4. The photo rendering to the left on Exhibit G-2 when compared to the actual photo of the location to the right, shows that the Applicants used digital photography editing to delete the front of 733 Middle Street from the photo, substituting in its place artificial greenery. The photo rendering to the left on Exhibit G-3, when compared to the actual photo on the right, shows the magnitude of the additional density this project will create. In addition, the photo rendering depicts the project as set back further from 733 Middle Street than its actual location based upon the site plans that were submitted. The plans indicate that the Applicant’s proposed deck and garden room will extend to the intersection of the gate on Ms. Bodoh’s property and the fence between the two properties as shown on Exhibit G-4 attached hereto. This will completely block Ms. Bodoh’s dining room

windows that are facing the proposed project. Contrary to the presentation on the photo rendering on Exhibit G-3, direct sunlight will be blocked from Ms. Bodoh's dining room windows. The proposed project is located as close to the property line at 733 Middle Street as possible without violating the ten foot (10') setback. This means that the deck and garden room of the proposed project will be located **less than fifteen feet (15')** from Ms. Bodoh's dining room windows at 733 Middle Street. The 733 Middle Street lot is a permitted nonconforming lot, as the property was built long before zoning ordinances came into existence. The actual property line for 733 Middle Street (which does not conform to the fence) is just a few feet from the house in the vicinity adjacent to the proposed project. This is wholly new information that the Board did not have, as a result of Applicant's misleading materials.

The third comparison on Exhibit G-5 again demonstrates that the Applicants apparently attempted to mislead the Board as to the proximity of the proposed project to 733 Middle Street, and the fact that the front of 733 Middle Street will be blocked by the proposed project. It appears that the Applicant purposely added a tree to the plans and photo rendering on Exhibit G-5 (next to the mud room of 765 Middle Street) in order to disguise the manner in which the proposed project blocks the front of 733 Middle Street. This state of facts is, once again, additional new information that the Board did not have as a result of Applicant's misleading materials.

**III. The Board was unreasonable and unlawful in making its purported findings as to the first and second variance criteria RSA 674:33 I. (2) (A) and (B). Granting the variance would be contrary to the public interest, and would not observe the spirit of the Ordinance.**

The New Hampshire Supreme Court has noted that a determination of whether the spirit of the Ordinance is observed is largely similar to determining whether the variance is contrary to the public interest. Chester Rod & Gun Club v. Town of Chester, 152 NH 577 (2005). It is well settled that a variance will be contrary to the public interest and will not observe the spirit of the Ordinance if it conflicts with or violates the ordinance's basic zoning objectives. Id. at 581 (2005).

In the case at hand, the Board unreasonably and unlawfully found that granting the variances sought in the Application would not be contrary to the public interest or violate the Ordinance's basic zoning objectives. In its written Decision attached hereto as Exhibit A, the Board stated "*since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project.*" [emphasis supplied] It is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the test set forth in Chester Rod & Gun Club. Further, the Appellants at 729 and 733 Middle Street *do* have

something to say about the proposed project, but because they did not receive notice of the ZBA Meeting in conformity with State law and US Postal requirements, they did not have an opportunity to be heard at the ZBA Meeting to inform the Board of the specific, numerous impacts this project would have on abutting properties that directly conflict with the specific zoning objectives set forth in Section 10.121 of the Ordinance. The fact that the Board grounded its purported findings upon the absence of the Appellants indicates that it could not reasonably make the findings it purported to make if the Appellants had received the notice required under applicable law.

**IV. The Board was unreasonable and unlawful in making its purported findings as to the third variance criteria under RSA 674:33 I. (2)(C). Substantial justice *would not* be done.**

The guiding rule on determining substantial justice is weighing the loss to the applicant versus the gain to the general public. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 515 (2011). The Appellants have carefully reviewed the video recording of the ZBA Meeting on October 18, 2022. There, Tim Phoenix, the attorney for the Applicants, discussed the primary reason the proposed project will be located in close proximity (less than fifteen feet (15')) to 733 Middle Street. He stated that creating a “courtyard effect” is “the primary reason we are asking for setback relief.” If there is in fact such a



“courtyard effect” created by this project, it will be enjoyed solely by the Applicants. Based upon the site plans submitted to the Board, neither the tenants of the newly built residence, nor the owner of 733 Middle Street will have views of the courtyard.

To the contrary, as shown in the Application, the majority of the windows of the new residence have been situated so that they do not face the Applicants’ residence, presumably in order to maintain the Applicants’ privacy. To that end, the majority of the windows of the new residence are directly opposite 733 Middle Streets’ windows, so that the occupants of both dwellings will have forced views into each other’s homes. The Applicants may be able to maintain their privacy by designing the project this way, but they do so by destroying any meaningful semblance of privacy for their tenants and the owner of 733 Middle Street. The impact on Ms. Bodoh’s quality of life will be substantial due to this complete lack of privacy. Thus, granting the variances results in a substantial injustice. It is unreasonable and unlawful for the Board to dismiss the uncontroverted facts of the case that clearly demonstrate a tremendous benefit to the Appellants in continuing to require compliance with the Ordinance. The Applicants’ three (3) requested variances from the Ordinance only serve singularly to allow the Applicants to squeeze every last pecuniary drop from what would be a fourth single family residence on one (1) lot, where only one (1) principal dwelling is lawfully allowed by the Ordinance. There is no reasonable

or lawful way, on the facts in this case, that the Board can find this criteria of RSA 674:33 I. (2) (C) to have been met.

**V. The Board was unreasonable and unlawful in making its purported findings as to the fourth variance criteria RSA 674:33 I. (2) (D). The values of the surrounding properties would so obviously be diminished.**

The Board unreasonably and unlawfully found that granting the variances sought in the Application would not negatively impact the values of surrounding properties, specifically the property of the Appellants. Specifically, the Board found that *“the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.”* [emphasis supplied] As stated above, it is neither reasonable nor legal for the Board to make its findings of fact based on the presence or absence of any parties, nor does such a cursory analysis satisfy the criteria for determining whether or not the values of surrounding properties would be diminished. Had the Appellants received notice of the ZBA Meeting in conformity with State law and US Postal requirements, they would have informed the Board at the ZBA Meeting that the proposed project would significantly and obviously diminish the values of the homes at 729 and 733 Middle Street. The Board’s findings state as much, relying solely on the Appellants’ absence in making their determination.

Further, the letter attached hereto as Exhibit H from Jeffrey Mountjoy, the realtor who assisted with the sale of 733 Middle Street to Ms. Bodoh, explains in detail how the values of both residences will be adversely impacted by the overall size of the project, the lack of privacy and increased noise and traffic level that will result from its construction, and the blocking of several windows of 733 Middle Street by a distance of less than fifteen feet (15'). These factors will obviously make the property at 733 Middle Street significantly less valuable to prospective buyers, as stated in Mr. Mountjoy's letter. Further, if this project is constructed, there will be a complete loss of air, light and space available to Ms. Bodoh at 733 Middle Street. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably affect the value of 729 Middle Street.

Mr. Mountjoy notes in his letter to the Board a unique feature of the home at 733 Middle Street. The tall dining room windows and window seat are in particular an attractive feature of the home to prospective buyers. If the project is built, the view from the dining room windows will be completely blocked by the Applicants' deck and garden room that will be situated less than fifteen feet (15') away. As such, it is unlawful and unreasonable for the Board to have concluded that the criteria set forth in RSA 674:33 I. (2) (D) were satisfied by the Applicant.

**VI. The Board was unreasonable and unlawful in making its purported findings as to the fifth variance criteria under RSA 674:33 I. (2) (E). Literal enforcement of the provisions of the Ordinance would not result in an unnecessary (or any) hardship to the Applicant.**

The fifth prong of the variance criteria requires the Board to determine whether an unnecessary hardship results from literal enforcement of the Ordinance. RSA 674:33, I (2) (E)(b)(1) provides that:

“Unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area: (A) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (B) the proposed use is a reasonable one.

If these criteria are not established, an unnecessary hardship will be deemed to exist “if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.” In the case at hand, the Board did not find the Property of the Applicants to be unique such that it is distinguished from other properties in the area.

Further, the Board cannot find that the Property could not reasonably be used. According to the Applicant, based upon the zoning history of 765 Middle

Street, two (2) lots were “forcibly combined into one lot and if that hadn’t been done, there would be no issue with adding a dwelling unit in that spot.” However, this reference to the involuntary merger of two (2) lots ignores the fact that variances relative to the reasonable use of the property had already previously been granted to the Applicants. The Property is currently in use for two (2) primary dwelling units consisting of three (3) residences (two (2) of which already generate rental income) where the Ordinance allows for only **one (1) primary dwelling unit**. The Property does currently enjoy a use well in excess of that which is reasonable under the Ordinance, a use that far exceeds the rest of the neighborhood which generally adheres to the one (1) house per lot scheme of the Ordinance. There is simply no possible way to state that the Property cannot be used in strict conformance with the Ordinance without causing an “unnecessary hardship” to the Applicants; the Property is already currently enjoying a windfall income from its current rental use despite the spirit of the Ordinance.

The hardship reason given by Tim Phoenix on behalf of the Applicants at the ZBA Meeting is “this lot is larger than most, so that suggests you should be able to do more with it.” Not being able to “do more” with your property is not a hardship. This conjured hardship cannot be construed in any way to satisfy the criteria of RSA 674:33, I (2) (E). As stated above, RSA 674:33, I (2) (E), requires the Applicants to conclusively demonstrate that they have an “unnecessary

hardship” resulting from a condition of their Property, not that they have a hardship because they could make more money with the variances.

### Summary

The notice to abutters required by RSA 676:7 is a prerequisite to the Board having jurisdiction to hear any variance request. That notice is a two-step process, requiring (1) the City to transmit the notice, and (2) the United States Postal Service to deliver that notice in-hand to a resident and obtain his or her signature. In the present case, the United States Postal Service clearly failed to complete the notice required by RSA 676:7. Because of this failure, the Board inadvertently and mistakenly relied upon the absence of abutters to indicate the Appellants’ acquiescence and approval of the Application. The Board’s written findings of fact clearly indicate this mistaken reliance, which renders the Board’s Decision unreasonable and unlawful as a matter of law.

For the reasons discussed above, the Appellants respectfully requests that the Board

- (1) grant this motion to rehear the Application;
- (2) provide notice to all Abutters, including the Appellants as required by RSA 676:7;
- (3) Review additional facts and information regarding the Application submitted herein; and

(4) deny the Applicant's requested variances in the Application.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to be 'CS', written in a cursive style.

Christopher Swiniarski, Attorney for Appellants

# CITY OF PORTSMOUTH



Planning Department  
1 Junkins Avenue  
Portsmouth, New  
Hampshire 03801  
(603) 610-7216

## ZONING BOARD OF ADJUSTMENT

October 24, 2022

David Sinclair & Nicole Giusto  
765 Middle Street  
Portsmouth, New Hampshire 03801

**RE: Board of Adjustment request for property located at 765 Middle Street (LU-22-196)**

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, October 18, 2022**, considered your application for the construction of a new detached garage with dwelling unit above which requires the following: 1) A Variance from Section 10.513 to allow 3 principal dwellings on a lot where only 1 is allowed per lot. 2) Variances from Section 10.521 to allow a) a lot area per dwelling of 5,376 square feet where 7,500 is required per dwelling unit; and b) a 10 foot rear yard where 20 feet is required. Said property is shown on Assessor Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts. As a result of said consideration, the Board voted to **grant** the request as presented with the enclosed Findings of Fact and stipulation below:

1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,



Jim Lee, Vice Chairman of the Zoning Board of Adjustment



cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

Eric Weinrieb, Altus Engineering, Inc.

R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, PLLC

# Findings of Fact | Variance

## City of Portsmouth Zoning Board of Adjustment

Date: October 18, 2022

Property Address: 765 Middle Street

Application #: LU-22-196

Decision: **Grant with stipulations**

### Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, I now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of the all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.	<b>Yes</b>	The proposed building was a beautiful structure on a beautiful lot and would be a nice property in that location. It would not be detrimental to the public good. Since the residents of 733 Middle Street didn't have anything to say, because they would have the most impact from the proximity to the lot line, it is presumed that they don't object to the project. It resonated with the intention of the zone in terms of density of housing.
10.233.22 Granting the variance would observe the spirit of the Ordinance.	<b>Yes</b>	
10.233.23 Granting the variance would do substantial justice.	<b>Yes</b>	There would not be any loss to the public by allowing this to proceed and the loss to the applicant would not be outweighed by any potential loss to the public.
10.233.24 Granting the variance would not diminish the values of surrounding properties.	<b>Yes</b>	There were a lot of abutters who said they were comfortable with the project and the one abutter that would be most impacted remained silent, so presumably had no objection regarding the impact on the value of their property.

<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(a)The property has special Conditions that distinguish it from other properties in the area. AND (b)Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one. OR Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.</p>	<p><b>Yes</b></p>	<p>The special condition of the property was that it was forcibly combined into one lot and if that hadn't been done, there would be no issue with adding a dwelling unit in that spot.</p>
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<b>Stipulations</b>
<p>1. The design and location of the garage may change based on Planning Board and Historic District Commission review and approval.</p>
<p>2.</p>
<p>3.</p>
<p>4.</p>

## **Exhibit B**

### **3.1 Basic Standards**

#### **3.1.1 Description**

Certified Mail is subject to the basic standards in [1.0](#); see [1.4](#) for eligibility. Certified Mail provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made. Customers can retrieve the delivery status as provided in [1.8](#). Certified Mail is dispatched and handled in transit as ordinary mail. Except for Priority Mail pieces with included insurance, no insurance coverage is provided when purchasing Certified Mail. USPS maintains a record of delivery (which includes the recipient's signature). Customers may obtain a delivery record by purchasing a return receipt ([6.0](#)) at the time of mailing. Customers may direct delivery of Certified Mail only to the addressee (or addressee's authorized agent) using Certified Mail Restricted Delivery ([3.2.2](#)); or to an adult using Certified Mail Adult Signature Required or Certified Mail Adult Signature Restricted Delivery when meeting the applicable standards for Adult Signature under [8.1.3](#).

Tracking Number:

Remove X

## 70220410000138687245

Copy

Add to Informed Delivery (<https://informedelivery.usps.com/>)

### Latest Update

Your item was delivered to an individual at the address at 12:08 pm on October 8, 2022 in PORTSMOUTH, NH 03801.

Get More Out of USPS Tracking:

USPS Tracking Plus<sup>®</sup>

#### Delivered

Delivered, Left with Individual

PORTSMOUTH, NH 03801  
October 8, 2022, 12:08 pm

#### Out for Delivery

PORTSMOUTH, NH 03801  
October 8, 2022, 6:55 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801  
October 8, 2022, 6:44 am

#### Departed USPS Facility

MANCHESTER, NH 03103  
October 7, 2022, 3:00 pm

#### Arrived at USPS Facility

MANCHESTER, NH 03103  
October 6, 2022, 7:03 pm

Feedback



# Product Tracking & Reporting

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Accounts

January 09, 2023

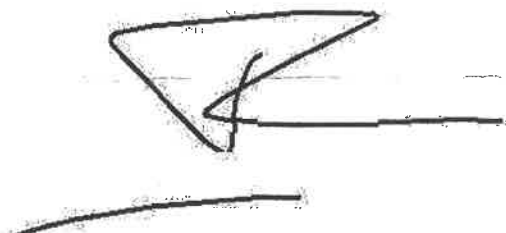

## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 0410 0001 3868 7245

This item was delivered on 10/08/2022 at 12:08:00

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Address	

Enter up to 35 items separated by commas.

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Version: 23.1.1.0.72

Tracking Number:

Remove X

## 70222410000270365760

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Your item was delivered to an individual at the address at 12:02 pm on December 1, 2022 in PORTSMOUTH, NH 03801.

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#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801

December 1, 2022, 12:02 pm

#### Out for Delivery

PORTSMOUTH, NH 03801

December 1, 2022, 6:52 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801

December 1, 2022, 6:41 am

#### Departed USPS Facility

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

#### Arrived at USPS Facility

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm

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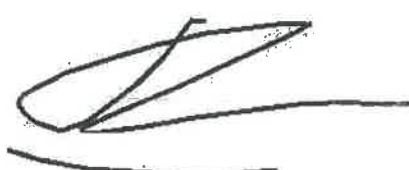
## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: **7022 2410 0002 7036 5760**

This item was delivered on **12/01/2022** at **12:02:00**

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<b>Signature</b>	
<b>Del</b>	gna
<b>Trackl</b>	or: 702 2
<b>Address</b>	<p><b>733 MIDDLE ST</b>  <b>PORTSMOUTH, NH 03801</b></p>

Enter up to 35 items separated by commas.

Select Search Type:

Quick Search

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Version: 23.1.1.0.72



Tracking Number:

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## 70222410000270366682

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### Latest Update

Your item was delivered to an individual at the address at 11:58 am on December 24, 2022 in PORTSMOUTH, NH 03801.

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#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801

December 24, 2022, 11:58 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801

December 24, 2022, 8:00 am

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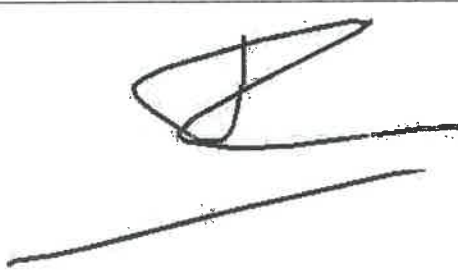
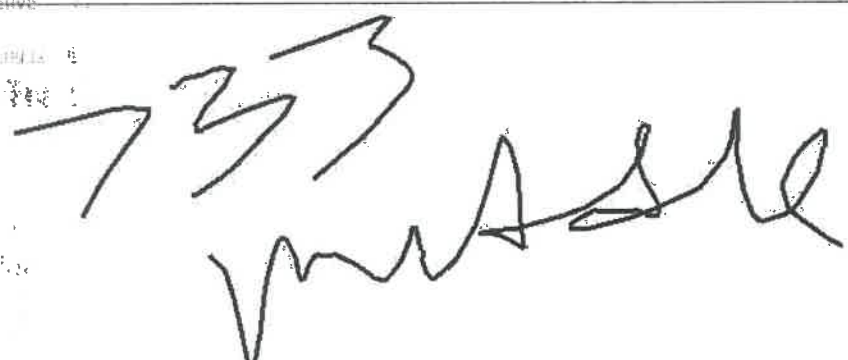
## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 2410 0002 7036 6682

This item was delivered on 12/24/2022 at 11:58:00

[< Return to Tracking Number View](#)

<p>Signature</p>	
<p>Address</p>	

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Version: 23.1.1.0.72

Signature of Nicole M. Bodoh:

*Nicole M. Bodoh*

Exhibit D

Affidavit of Nicole M. Bodoh

I, Nicole M. Bodoh, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 733 Middle Street, Portsmouth, N.H. That property is a condominium of “729-733 Middle Street Condominiums.”
2. I purchased this property on or about July 23, 2018 and have lived there since as my primary residence.
3. I am an attorney in good standing licensed to practice law in Pennsylvania since December 15, 2005, New Hampshire since April 9, 2013, Massachusetts since April 9, 2013 and Vermont since May 7, 2014. I have never been the subject of complaint concerning my conduct as an attorney or the subject of any judicial investigation or sanctions. I take my responsibility as an officer of the court to act truthfully with the utmost seriousness.
4. I never received any Notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (“ZBA”) on the Application submitted by David Sinclair and Nicole Giusto.
5. It was not until I was at a meeting of the Portsmouth Historic District Commission (“HDC”) on December 14, 2022 that I learned that the Applicants had already been granted their requested variances at the October 18, 2022 ZBA meeting.
6. The only notice I received of the December 14, 2022 HDC meeting was a letter from the City of Portsmouth, bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.

7. The only notice I received of the January 3, 2023 Site Plan Review Technical Advisory Committee meeting was a letter from the City of Portsmouth bearing a certified mail designation that was placed along with all my other regular mail in my mailbox.
8. I am the only individual residing at 733 Middle Street, Portsmouth, NH.
9. In investigating why I never received the required certified mail Notice of the ZBA hearing which is required to be given to me in hand and signed for, I have determined the following.
  - a) As shown on Exhibit C-2 to the Motion for Rehearing, the tracking information from the US Postal Service for the HDC Meeting indicates the notice was “delivered to an individual” at the address at 12:02 p.m. on December 1, 2022. This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On December 1, 2022 I was at a business luncheon with my colleague, Katherine Battles at the River House at 53 Bow Street, Portsmouth, NH. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-2 and C-4 to the Motion for Rehearing.
  - b) As shown on Exhibit C-3 to the Motion for Rehearing, the tracking information from the US Postal Service for the TAC Meeting indicates “delivered to an individual” at the address at 11:58 am on December 24, 2022.” This record is false. The notice was simply left in my mailbox along with all of my other regular mail. On Saturday December 24, 2022, between the hours of 11:00 am and approximately 2:00 pm I was running errands at multiple locations in the City of Portsmouth in preparation for the holiday weekend which included picking up food orders at Ceres Bakery and

Saunders's Fish Market. I missed a call from Cassandra LaRae-Perez at 1:54 as I was driving home. I returned her call at 2:39 p.m. after I returned home. Thus, I was not at home when the notice was delivered. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-3 and C-4 to the Motion for Rehearing.


c) As shown on Exhibit C-1 to the Motion for Rehearing, the records of the US Postal Service of the notice of the ZBA meeting indicate that the notice was "left with individual at the address at 12:08 pm on October 8, 2022." I do not have a record of where I was at 12:08 pm on October 8, 2022 however my calendar indicates that my at-home piano lesson ordinarily between 10:00 and 10:30 am was cancelled due to a conflict on the part of my instructor, Kathy Fink, and that I sent an email to a client from my work email account at 10:26 am that day. My purported signature or initials on the US Postal Service receipt is false. See Exhibits C-1 and C-4 to the Motion for Rehearing.

Dated: January 17, 2023

  
\_\_\_\_\_  
Nicole M. Bodoh, Esq.

STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 17<sup>th</sup> day of January, 2023.

  
\_\_\_\_\_  
Notary Public/Justice of the Peace  
My Commission Expires: \_\_\_\_\_

JULIE A. McLEAN  
Notary Public - New Hampshire  
My Commission Expires February 3, 2026  
  
JULIE A. McLEAN  
Notary Public - New Hampshire  
My Commission Expires February 3, 2026

Exhibit E


Affidavit of Craig S. Crowell

I, Craig S. Crowell, being over the age of eighteen and first being duly sworn, do hereby depose and say:

1. I am the owner of real property at 729 Middle Street, Portsmouth, NH. That property is a condominium of "729-733 Middle Street Condominiums."
2. I purchased this property on or about May 16, 2022 and have lived there ever since as my primary residence.
3. I registered my vehicle under my current address at 729 Middle Street, Portsmouth, NH with the City of Portsmouth and the State of New Hampshire on September 19, 2022.
4. I updated my New Hampshire driver's license with my current address at 729 Middle Street, Portsmouth, NH on June 15, 2022.
5. I am registered to vote in the City of Portsmouth.
6. I have never provided my former address in Greenland, NH address to the City of Portsmouth for any purpose.
7. The notice of the October 18, 2022 hearing held by the Portsmouth Zoning Board of Adjustment (the "ZBA") on the Application submitted by David Sinclair and Nicole Giusto was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.
8. The notice of the January 3, 2023 hearing held by the Site Plan Review Technical Advisory Committee was sent to my former address in Greenland, New Hampshire and then forwarded to my current address at 729 Middle Street, Portsmouth, New Hampshire through automatic mail forwarding.

9. There is no front desk, reception or mailroom at my former address at 37 Allen Farm Road, Greenland, NH or at my current address at 729 Middle Street, Portsmouth, NH.
10. I did not sign any certified mail receipt for the notice of the October 18, 2022 hearing held by the ZBA. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.
11. I did not sign any certified mail receipt for the notice of the Technical Advisory Committee Meeting held on January 3, 2023. My purported signature or initials on the postal service receipt is false. See Exhibits F-1 through F-4 to the Motion.

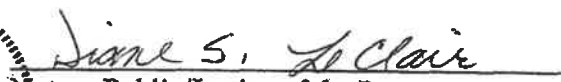
Dated: January 16, 2023

  
Craig S. Crowell

STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

Subscribed and sworn to before me this 16<sup>th</sup> day of January, 2023.



  
Notary Public/Justice of the Peace  
My Commission Expires: July 12, 2027



Tracking Number:

## 70220410000138687238

Remove X

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### Latest Update

Your item was delivered to an individual at the address at 12:07 pm on October 12, 2022 in PORTSMOUTH, NH 03801.

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#### Delivered

**Delivered, Left with Individual**

PORTSMOUTH, NH 03801  
October 12, 2022, 12:07 pm

#### Out for Delivery

PORTSMOUTH, NH 03801  
October 12, 2022, 6:10 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801  
October 12, 2022, 5:03 am

#### Departed USPS Facility

MANCHESTER, NH 03103  
October 11, 2022, 2:26 pm

#### Arrived at USPS Facility

MANCHESTER, NH 03103  
October 11, 2022, 11:19 am

#### In Transit to Next Facility

Feedback

October 10, 2022

**Arrived at USPS Regional Facility**

SHREWSBURY MA DISTRIBUTION CENTER

October 9, 2022, 12:17 pm

**Departed USPS Facility**

MANCHESTER, NH 03103

October 7, 2022, 3:00 pm

**Arrived at USPS Facility**

MANCHESTER, NH 03103

October 6, 2022, 7:03 pm

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## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 0410 0001 3868 7238

This item was delivered on 10/12/2022 at 12:07:00

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*Craig Crowell*

Tracking Number:

Remove X

## 70222410000270365777

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### Latest Update

The delivery status of your item has not been updated as of December 6, 2022, 12:35 am. We apologize that it may arrive later than expected.

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#### Alert

##### Awaiting Delivery Scan

December 6, 2022, 12:35 am

##### Out for Delivery

PORTSMOUTH, NH 03801

December 5, 2022, 6:35 am

##### Arrived at Post Office

PORTSMOUTH, NH 03801

December 5, 2022, 6:24 am

##### Departed USPS Facility

MANCHESTER, NH 03103

December 4, 2022, 3:29 pm

##### Arrived at USPS Facility

MANCHESTER, NH 03103

December 4, 2022, 8:09 am

##### Arrived at USPS Regional Facility

SHREWSBURY MA DISTRIBUTION CENTER

December 3, 2022, 9:42 am

**In Transit to Next Facility**

December 2, 2022

**Departed USPS Facility**

MANCHESTER, NH 03103

November 30, 2022, 4:51 pm

**Arrived at USPS Facility**

MANCHESTER, NH 03103

November 29, 2022, 9:24 pm

**Hide Tracking History**

**Text & Email Updates**



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Tracking Number:

Remove X

## 70222410000270366675

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Add to Informed Delivery (<https://informedelivery.usps.com/>)

### Latest Update

Your item was delivered to the front desk, reception area, or mail room at 11:13 am on January 3, 2023 in PORTSMOUTH, NH 03801.

#### Get More Out of USPS Tracking:

**USPS Tracking Plus®**

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#### Delivered

**Delivered, Front Desk/Reception/Mail Room**

PORTSMOUTH, NH 03801  
January 3, 2023, 11:13 am

#### Redelivery Scheduled for Next Business Day

PORTSMOUTH, NH 03801  
December 31, 2022, 7:16 am

#### Out for Delivery

PORTSMOUTH, NH 03801  
December 31, 2022, 6:27 am

#### Arrived at Post Office

PORTSMOUTH, NH 03801  
December 31, 2022, 6:16 am

#### Departed USPS Facility

MANCHESTER, NH 03103  
December 30, 2022, 3:12 pm

#### Arrived at USPS Facility

MANCHESTER, NH 03103  
December 30, 2022, 11:20 am

**Arrived at USPS Regional Facility**

SHREWSBURY MA DISTRIBUTION CENTER  
December 29, 2022, 1:39 pm

**Forwarded**

PORTSMOUTH, NH  
December 24, 2022, 9:53 am

**Forwarded**

PORTSMOUTH, NH  
December 24, 2022, 9:47 am

**Arrived at Post Office**

PORTSMOUTH, NH 03801  
December 24, 2022, 8:00 am

**Hide Tracking History**

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**Text & Email Updates**



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**USPS Tracking Plus®**



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**Product Information**



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Track Another Package

Enter tracking or barcode numbers

## Need More Help?

Contact USPS Tracking support for further assistance.

**FAQs**



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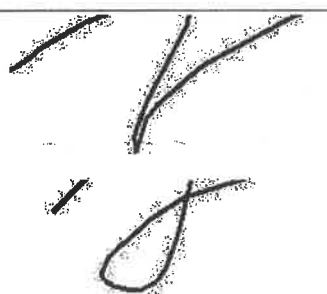

## USPS Tracking Intranet

### Delivery Signature and Address

Tracking Number: 7022 2410 0002 7036 6675

This item was delivered on 01/03/2023 at 11:13:00

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Signature	
Address	

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Exhibit F-4

Signature of Craig S. Crowell:

A handwritten signature in black ink, reading "Craig S. Crowell". The signature is written in a cursive style with a large initial "C" and a distinct "S" before the last name.

Exhibit G-1

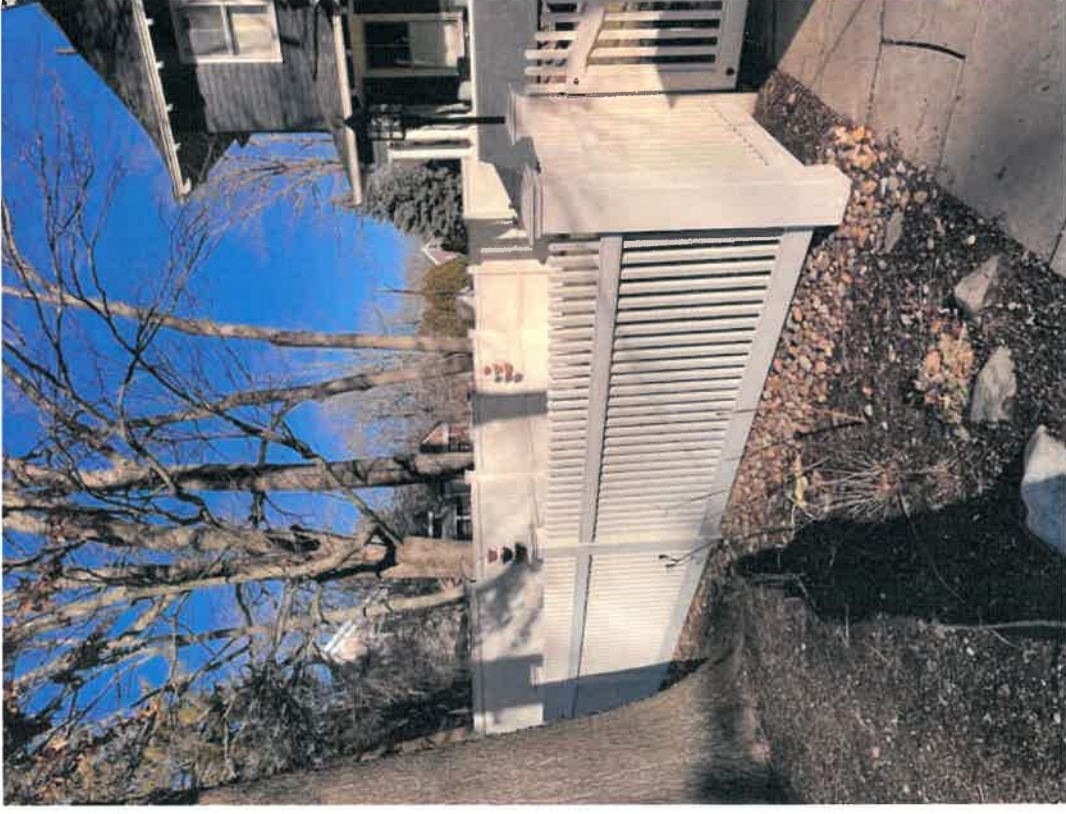


729-733 Middle Street Condominiums

Exhibit G-2



Rendering submitted by David Sinclair & Nicole Giusto  
(765 Middle Street)



Actual Photo of 765 Middle Street  
with 733 Middle Street to the left of the Property



Rendering submitted by David Sinclair & Nicole Giusto  
(733 Middle Street)



Actual photo of 733 Middle Street



**Exhibit G-5**



**Rendering submitted by David Sinclair & Nicole Giusto  
(765 Middle Street)**



**Actual Photo of 765 Middle Street  
with the front of 733 Middle Street in the background**

Exhibit H

Zoning Board of Adjustment  
City of Portsmouth  
Planning Department  
1 Junkins Avenue  
Portsmouth, New Hampshire 03801

January 11, 2023

Re: Proposed Project at 765 Middle Street and Impact on Property Values at 733 and 729 Middle Street

Dear Madam or Sir:

I am the realtor who originally sold the property at 733 Middle Street to Nicole Bodoh, and as such I am very familiar with its value. Based upon my review of the project plans submitted by the applicant at 765 Middle Street, I can confirm that there will be a significant diminution in the value of 733 Middle Street based upon the overall size of the structure and the lack of privacy resulting from its proximity to the home at 733 Middle Street. In addition, the fact that the front of 733 Middle Street will face the proposed garage with residence, and that this structure would completely block several of 733 Middle Street's windows, including, but not limited to, the house's feature dining room windows, I can confirm the proposed structure will adversely affect the value of the home owned by Ms. Bodoh.

The plans submitted by the applicant at 765 Middle Street indicate that the proposed garage with residence would be located less than 15 feet from the windows of 733 Middle Street. Because the house was built long before contemporary zoning ordinances, 733 Middle Street sits on a permitted, non-conforming lot where the property line is just within a few feet from the side of the house.

The tenants of this new building would have forced, direct views into Ms. Bodoh's dining room, kitchen, bedroom and bathroom windows. Conversely, Ms. Bodoh's view of the outside world from her dining room would be limited to the proposed deck and garden room wall, and her views from most of her other windows would be limited to the siding and windows of this proposed structure. The additional traffic and noise resulting from the tenancy at this new structure will also make Ms. Bodoh's home significantly less valuable to prospective buyers.

Although not as immediate as the impact on 733 Middle Street, the value of the property located at 729 Middle Street (the other side of the duplex), owned by Craig Crowell, will also be negatively affected by the proposed structure. Because 729 Middle Street is a comparable property to 733 Middle Street, any decrease in the value of 733 Middle Street will inevitably impact 729 Middle Street. If, after the project is built, 733 Middle Street is sold before 729 Middle Street, that sale price will be a comparable price for potential buyers of 729 Middle Street.

Thank you for your attention to this matter.

Sincerely,

DocuSigned by:  
  
247D3160331149D...

Jeff Mountjoy

Aland Realty

# HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC

ATTORNEYS AT LAW

127 Parrott Avenue | Portsmouth, NH, 03801  
Telephone: 603.436.0666 | Facsimile: 603.431.0879 | www.hpgrlaw.com

April 18, 2023

## HAND DELIVERED

Stefanie Casella, Senior Planner  
Peter Stith, Principal Planner  
Portsmouth City Hall  
1 Junkins Avenue  
Portsmouth, NH 03801

Re: Nicole Giusto, David Sinclair Owners/ Applicants  
Project location: 765 Middle St., Tax Map 148, Lot 37  
General Residence A (GRA) Zone

Dear Ms. Casella, Mr. Stith & Zoning Board Members:

On behalf of Nicole Giusto and David Sinclair, enclosed please find an Objection to Administrative Appeal for consideration by the Zoning Board of Adjustment on April 25, 2023.

Very truly yours,



R. Timothy Phoenix  
Monica F. Kieser

Enclosure

cc: Nicole Guisto & David Sinclair  
Eric Weinrieb, Altus Engineering  
Jennifer Ramsey, Somma Studios  
Robbi Woodburn, Woodburn & Company  
Christopher Swiniarski, Esq.

---

DANIEL C. HOEFLE	R. PETER TAYLOR	GREGORY D. ROBBINS	STEPHANIE J. JOHNSON
R. TIMOTHY PHOENIX	ALEC L. MCEACHERN	PETER V. DOYLE	OF COUNSEL:
LAWRENCE B. GORMLEY	KEVIN M. BAUM	MONICA F. KIESER	SAMUEL R. REID
STEPHEN H. ROBERTS	JACOB J.B. MARVELLEY	DUNCAN A. EDGAR	JOHN AHLGREN



**PORTSMOUTH ZONING BOARD OF ADJUSTMENT**  
**DAVID SINCLAIR & NICOLE GIUSTO, OWNERS/APPLICANTS**  
**765 Middle Road, Tax Map 148, Lot 37**  
**Case #LU-22-196**

**OBJECTION TO ADMINISTRATIVE APPEAL**

NOW COME, David Sinclair & Nicole Giusto (“Sinclair”), by and through their attorneys, Hoefle, Phoenix, Gormley & Roberts, PLLC, and respectfully request that the Portsmouth Zoning Board of Adjustment deny the Administrative Appeal filed by Nicole Bodoh and Craig Crowell (“Petitioners”) with respect to the October 18, 2022 decision of the Portsmouth Zoning Board of Adjustment (“ZBA”) granting Sinclair’s variances from the Portsmouth Zoning Ordinance (“PZO” or the “Ordinance”) to permit the following at 765 Middle Street (the “Property”): three principal dwellings on a lot; lot area of 5,376 s.f./unit where 7,500/unit is required; and a 10 ft. rear yard setback where 20 ft. is required.

**I. EXHIBITS<sup>1</sup>**

- A. Abutter Support Letters.
- B. Correspondence between Sinclair and Bodoh

**II. STANDARD OF REVIEW**

Pursuant to RSA 676:5, I, “[a]ppeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved...by any decision of the administrative officer.” In hearing appeals of administrative decisions, a zoning board has “all the powers of the administrative official from whom the appeal is taken” but not more. RSA 674:33, II; 15 Loughlin, New Hampshire Practice, Land Use Planning and Zoning §22.02, at 351. A “decision of the administrative officer” includes any decision made by an official or board involving the construction, interpretation, or application of the terms of a zoning ordinance. RSA 676:5, III.

**III. INTRODUCTION**

Petitioners’ Request for Rehearing was untimely and was properly denied by Peter Britz, thus their Administrative Appeal is without merit and must be denied. Abutters were duly noticed in accordance with RSA 672:3 which, in conjunction with RSA 21:53, requires

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<sup>1</sup> Sinclair’s initial submission is on file and available at:  
[https://files.cityofportsmouth.com/files/planning/apps/MiddleSt\\_765/MiddleSt\\_765\\_boa\\_10182022.pdf](https://files.cityofportsmouth.com/files/planning/apps/MiddleSt_765/MiddleSt_765_boa_10182022.pdf)

verification of *mailing*, not verification of *receipt* by the addressee. Each Petitioners was sent a notice at the addresses on file with the Portsmouth City Assessor's Office. Furthermore, on more than one occasion as early as May 2022, Sinclair approached Ms. Bodoh to discuss the Project, so Ms. Bodoh had actual notice of their intentions well before the October 18, 2022 ZBA hearing on the matter. Assuming *arguendo*, that Ms. Bodoh did not receive notice of the variances until December 14, 2022, her January 17, 2023 was still not filed within 30 days. Accordingly, her appeal is untimely and must be denied.

#### IV. RESPONSE TO PETIONER'S CLAIMS

- A. The Administrative Appeal must be denied where Petitioners received their statutory notification in compliance with RSA 672:3 and RSA 21:53.

The plain language of RSA 676:7 requires public notice as follows:

- I. Prior to exercising its appeals powers, the board of adjustment shall hold a public hearing. Notice of the public hearing shall be given as follows:
  - (a) The appellant and every abutter and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by *verified mail, as defined in RSA 21:53*, stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal. The board shall hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony and all nonabutters who can demonstrate that they are affected directly by the proposal under consideration. The board may hear such other persons as it deems appropriate.
  - (b) A public notice of the hearing shall be placed in a newspaper of general circulation in the area not less than 5 days before the date fixed for the hearing of the appeal.  
*(emphasis added)*

Verified Mail is a term of art defined by RSA 21:53 as "any method of mailing that is offered by the United States Postal Service or any other carrier, and which provides *evidence of mailing*." Additionally, in the case of Condominium Ownership, an abutter for purposes of notification by a municipality means the officer of the association, defined as any member of the board of directors or official of the unit owners' association. RSA 672:3, 356-B:3, XXIII. Thus, notification to every member of an association is not required by the statute.

Interpretation of a statute begins with its plain language of the statute. Words and phrases are given their common meanings and the plain language of the ordinance controls absent an ambiguity in need of resolution. Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743, 754 (2017) (citing Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 494 (2007)). “The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.” Garand v. Town of Exeter, 159 N.H. 136, 141, 977 A.2d 540 (2009) (quotation omitted). Principals of statutory interpretation avoid construction of a statute or ordinance in a manner that results in an absurd result that the legislative body could not have intended. See Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019); Hogan v. Pat’s Peak Skiing, LLC, 168 N.H. 71, 75 (2015).

In arguing that they have failed to receive notice and pointing to the alleged false signature, Petitioners erroneously look beyond the plain language of the statute, which merely requires evidence of *mailing*. Looking to its common meaning, the Webster’s definition of mailing is “the act of sending by mail.” Webster’s Third New International Dictionary, Merriam-Webster, 1993. Evidence of mailing is established by the documentation provided by the City. Notably, past versions of the statute required the certified mail Petitioners seek, but in 2017, the term “certified mail” was replaced with the term “verified mail” which lacks any requirement of a return receipt. See The Board of Adjustment in New Hampshire: A Handbook for Local Officials, NH Department of Business and Economic Affairs, p. III-5. As a result of this amendment, guidance to municipal officials now recommends sending notification by certified mail, *without return receipt requested*. NH Land Use Meeting Mechanics, 2021 Webinar, p.2, NH Office of Strategic Initiatives (emphasis added). Vesting of jurisdiction to grant the requested relief occurred in accordance with RSA 676:7 and 21:53 when the City initiated the notice not less than 5 days before the ZBA meeting. Notably the RSA 676:7 states, “such notice shall be given not less than five days...” it does not require receipt of said notice five days before the meeting. The City complied with its obligation under RSA 676:7, RSA 21:53, RSA 672:3 and 356-B:3, XXIII 356. Accordingly, Petitioners Administrative Appeal is entirely without merit and must be denied.

B. Ms. Bodoh had ample knowledge of the Project.

Beginning in May of 2022, Sinclair made every effort to meet with each of his 10

abutters to the Project, including Ms. Bodoh (Mr. Crowell did not yet reside at 729 Middle Street). These efforts are demonstrated by Exhibit 10 to his original submission: seven abutter letters of support ranging in dates from May through September. These and additional letters received since the ZBA decision are attached. **(Exhibit A)**. Sinclair first attempted to speak with Ms. Bodoh in early May. She was too busy with a handyman to speak with him, but said she did not oppose the Project, as long as it was not “here”, gesturing toward the northwest corner of the Property where a curb cut exists at Middle Street. A week later, Sinclair tried again, hoping to show her the site plan, Ms. Bodoh again stated she was “too busy”. They did, however, exchange phone numbers, so that Ms. Bodoh could reach out at her convenience. **(Exhibit B)**. However, she failed to contact him until December 4, 2022, at which point she reiterated that she did not oppose the Project as long as it did not block her windows; only then did she request plans, which were timely sent with receipt confirmed by Ms. Bodoh. **(Id)**.

We note that the final plans submitted to the ZBA garage that complies with the side yard setback to the Bodoh lot line. The garage was located further back on the lot, requiring rear yard relief, which satisfying Ms. Bodoh’s preference that the garage not be sited in the northwest corner. Contrary to statements in the appeal, Ms. Bodoh was clearly aware of the Project well before receipt of the HDC Notice. **(Id)**. Assuming *arguendo* that she received notice on December 4, 2022, or even December 14, 2022, she still failed to take any timely action to review the matter and failed to file an appeal within 30 days of the date she claims she learned relief was granted. Under these circumstances, it is clear that the Request for Rehearing was untimely filed and Britz correctly declined to docket it.

It is not clear from Mr. Crowell’s affidavit when he received notice, only that he received notice forwarded from his Greenland address. It is reasonable to infer that he received notice of the ZBA meeting well before Ms. Bodoh attended the Historic District Commission meeting on December 14, 2022, yet he neither investigated the matter nor timely appealed the decision of the ZBA, waiting until January 17, 2023, well after he was notified about the Project. Notably, Sinclair is not responsible for providing addresses to the City Planning Department, which relies on the City Assessor records for address information. The tax card and tax bill related to Crowell’s property both list his Greenland address, which was likely on paperwork provided to the Assessor by the closing agent used when he purchased the property.

In summary, contrary to Petitioners' argument, as a matter of law, the official of the 729-733 Middle Street Condominium Association is entitled to notification by verified mail, which requires evidence of mailing only. Said notice shall be given (not received) not less than 5 days before the ZBA meeting. RSA 676:7, 672:3, 356-B:3, XXIII. As this obligation was met by sending mail through USPS tracking enabled mail well before October 18, 2022, Petitioners received the notification to which they are entitled. Even if we take the latest possible date Petitioners learned of the Project, December 4<sup>th</sup> or 14<sup>th</sup>, their Appeal was untimely submitted on January 17, 2023. Accordingly, Peter Britz did not err in and Petitioners Administrative Appeal must be denied.

C. The merits of Petitioners Request for Rehearing should not be addressed unless and until the ZBA grants Petitioners Administrative Appeal.

While we reject Petitioners claims that the ZBA erred in finding that the Sinclair Project met all five variance criteria, their substantive claims of error are not before the ZBA unless their Administrative Appeal is granted. Petitioners appeal the decision of Peter Britz rejecting as untimely, their request for rehearing of the ZBA's October 18, 2022 decision. The sole issue is whether Mr. Britz properly interpreted the Portsmouth Zoning Ordinance, specifically PZO §10.635.30, which requires notification to abutters in accordance with State Law. As Mr. Britz is not empowered to consider any of Petitioners claims regarding the merits of Petitioners' arguments regarding the five variance criteria, the ZBA also may not, at this time, address the merits of Petitioners' claims regarding the variance criteria, unless and until it determines that Mr. Britz improperly interpreted the Ordinance. We reserve the right to submit an objection to Petitioners' Request for Rehearing should the ZBA grant Petitioners' Administrative Appeal.

V. CONCLUSION

In summary, Petitioners are unable to demonstrate that Peter Britz erred determining their Request for Rehearing was untimely. Accordingly, the Administrative Appeal must be denied.

Respectfully submitted,

**David Sinclair & Nicole Giusto**

By their attorneys

Hoefle, Phoenix, Gormley & Roberts, PLLC



R. Timothy Phoenix

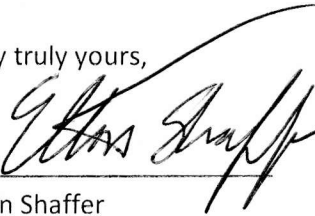
Monica F. Kieser

May 27th, 2022

To Whom it May Concern:

We Elton Shaffer and Paula Rais, own a property at 748 Middle St, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Elton Shaffer



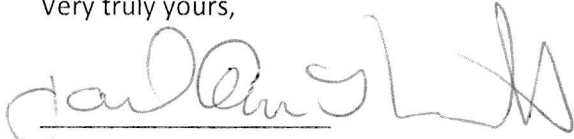
Paula Rais

September 9th, 2022

To Whom it May Concern:

I Joel Ann Thibeault, own a property at 670 Lincoln Ave, Portsmouth, New Hampshire. I am abutter to/ neighbor of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that I have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Joel Ann Thibeault', written over a horizontal line.

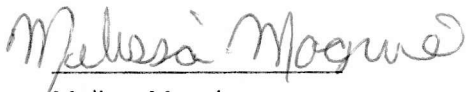
Joel Ann Thibeault

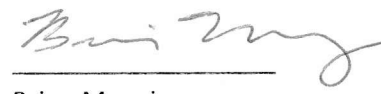
September 8th, 2022

To Whom it May Concern:

We Melissa & Brian Maguire, own a property at 774 Middle St #3, Portsmouth, New Hampshire. I am abutter to/ neighbor of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that I have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,

  
Melissa Maguire

  
Brian Maguire

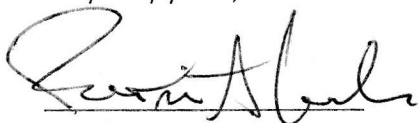


September 9th, 2022

To Whom it May Concern:

We Patricia and Charles Corlin, own a property at 736 Middle St, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Patricia Corlin



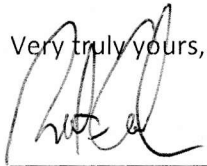
Charles Corlin

September 8th, 2022

To Whom it May Concern:

We Robert Graham and Karen Graham, own a property at 664 Lincoln Avenue, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Robert Graham



Karen Graham

Sept 8th, 2022

To Whom it May Concern:

We Peter Dawson and Karen Dawson, own a property at 648 Lincoln Ave, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



Peter Dawson



Karen Dawson

---

**Follow up re variance 765 Middle Street**

---

**Kristie Jorgensen** <knejorg@gmail.com>  
cc: sleddiver@gmail.com  
cc: "Nathan H. Jorgensen" <nhjorgensen@mac.com>

Tue, Sep 20, 2022 at 10:22 AM

Dear David and Nicole,

We received your packet in our mailbox last week after returning from our trip traveling abroad. It was addressed to a "Carla" but we are the current owners across the street, located at 774 Middle Street, Unit 1, Portsmouth, NH.

My apologies for a delayed response but I am still ill with a Covid infection from our trip back home. I hope we are not too late in offering our support for your variance request. I just wanted to let you know that we, as abutters to the subject property at 765 Middle Street, Portsmouth, NH support your variance request and feel that it will be a very pleasant addition to the neighborhood. It does not impact parking or impact abutting structures and conforms nicely with the area and for the historic district.

Please feel free to reach out to us in the near future if you need further support in any way. As abutters and good neighbors, we are here to help.

All the best to you and your plans.

Kristie and Nathan Jorgensen  
774 Middle Street, Unit 1  
Portsmouth, NH 03801  
Kristie's Cell: 603-767-7182  
Email: knejorg@gmail.com

**KRISTIE JORGENSEN**

Vice President, Associate Broker, Realtor  
Licensed in ME & NH

**Legacy Properties Sotheby's International Realty**

141 Maine Street, Brunswick, ME 04011

cc 603-767-7182 | ME 207-200-5082

kjorgensen@legacysir.com

MyProfile | LegacySIR | SothebysRealty

January 9th, 2023

To Whom it May Concern:

We Shelley Vessels and Corey Vessels, own a property at <sup>795 Middle St</sup>~~635 Lincoln Ave~~, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,

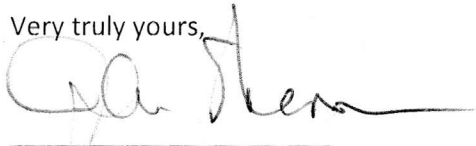
  
Corey & Shelly Vessels

January 9th, 2023

To Whom it May Concern:

We Marcia ~~Shearman~~<sup>Shearman</sup> and John ~~Shearman~~<sup>Shearman</sup>, own a property at 635 Lincoln Ave, Portsmouth, New Hampshire. We are abutters to/ neighbors of David Sinclair and Nicole Giusto at 765 Middle Street, Portsmouth, NH. David and Nicole have provided me with their garage/dwelling project for which they are seeking relief from the Portsmouth zoning board of adjustment and Portsmouth Historic District Commission. This is to provide notice that we have no objection to the project. We support the granting of any and all variances or other relief required.

Very truly yours,



---

John & Marcia Shearman

<  Nicole Neighbor ▾



Friday, May 27, 2022

Hi David 17:35

17:37 Got it.  
David & Nicole Sinclair

Sunday, December 4, 2022

Hi David and Nicole , it's Nicole at 733 Middle Street. I received the abutter notice from the town in regards to the garage and the hearing on 12/14. As I mentioned I am not opposed to the garage so long as it is not blocking my windows. could you please email me the plans so I can see where the ga

View all >

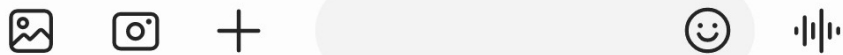
11:23

Monday, December 5, 2022

19:27 Nicole, let me know that you received the plan via email when convenient.  
Thanks!

I received it --thank you! I'll take a look

19:57



 **Nicole Neighbor**

11:23, Dec 4

Hi David and Nicole , it's Nicole at 733 Middle Street. I received the abutter notice from the town in regards to the garage and the hearing on 12/14. As I mentioned I am not opposed to the garage so long as it is not blocking my windows. could you please email me the plans so I can see where the garage will be located. My email is [nmb3000@hotmail.com](mailto:nmb3000@hotmail.com). Thanks!



Copy text



Share



More







David Sinclair <sleddiver@gmail.com>

---

## Garage

1 message

---

**David Sinclair** <sleddiver@gmail.com>  
To: nmb3000@hotmail.com

Mon, Dec 5, 2022 at 10:00 AM

Hi Nicole, I received your text last night. Attached is what has been submitted to the City.

David Sinclair

---

### 4 attachments



**765 Middle St rendering 3.jpg**  
2043K



**765 Middle St, Lincoln Ave rendering 2.jpg**  
1321K

 **Site plan Altus.pdf**  
551K

 **2022-09-23 765 Middle Landscape Plan.pdf**  
1140K

### III. NEW BUSINESS

- B. The request of **Peter G Morin Trust, Peter G Morin Trustee (Owner)**, for property located at **170 Mechanic Street** whereas relief is needed to install a generator which requires the following: 1) Variance from Section 10.515.14 to allow a) 4 foot rear yard where 10' is required and 5.5 foot rear yard where 10 feet is required; 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 102 Lot 7 and lies within the General Residence B (GRB) and Historic District. (LU-23-35)

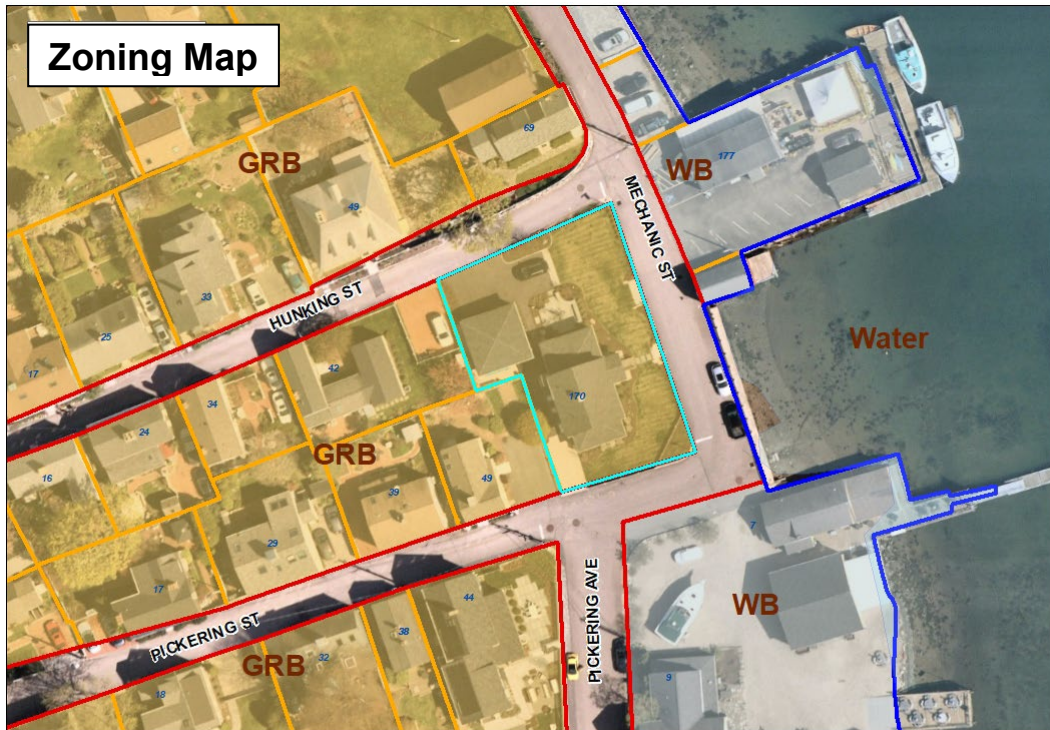
#### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use</u>	Single family	Install New Generator	Primarily residential
<u>Lot area (sq. ft.):</u>	8,680	8,680	5,000 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	8,680	8,680	5,000 min.
<u>Lot depth (ft.):</u>	>80	>80	60 min.
<u>Street Frontage (ft.):</u>	>260	>260	80 min.
<u>Mechanic St Front Yard (Primary)(ft.):</u>	19	19	5 min.
<u>Hunking St Front Yard (ft.):</u>	22 (Garage)	22 (Garage)	5 min.
<u>Pickering St Front Yard (ft)</u>	17 (House)	17 (House)	5
<u>Left Yard (ft.):</u>	8 (Garage)	<b>4 (Generator)</b>	10 min
<u>Rear Yard (ft.):</u>	5 (Garage)	<b>5.5 (Generator)</b>	25 min.
<u>Height (ft.):</u>	<35	<35	35 max.
<u>Building Coverage (%):</u>	22	22	30 max.
<u>Open Space Coverage (%):</u>	>35	>35	25 min.
<u>Parking:</u>	2	2	2
<u>Estimated Age of Structure:</u>	2003	<b>Variance request(s) shown in red.</b>	

#### Other Permits/Approvals Required

- Historic District Approval
- Building Permit

### Neighborhood Context



0 20 40 60 Feet  
1 inch = 43.9 feet

**170 Mechanic Street**



## Previous Board of Adjustment Actions

*(As 170 Mechanic Street)*

January 16, 1996 – The Board **granted** a variance for a 2' x 5' mud room with an 8' rear yard where 25' was required.

March 18, 2003 – The Board **granted** a variance for a 3' x 5' one-story addition with an 8' rear yard where 25' was required.

May 17, 2005 – The Board **denied** a request to allow a room and bath to be used for a Bed and Breakfast in a single-family dwelling where the use was not allowed and to allow a travel aisle less than 24' where 24' was required.

May 21, 2019 – Relief from Zoning Ordinance including:

A Variance from Section 10.573.20 to allow a 5'± rear yard where 14' is required.

A Variance from Section 10.521 to allow a rear yard of 7.9'± for an addition and 9'± for a bulkhead where 25' is required for each.

A Variance from Section 10.571 to allow an accessory structure to be closer to a street than the principal building.

A Variance from Section 10.321 to allow a nonconforming structure or building be expanded, reconstructed, or enlarged without conforming to the requirements of the ordinance.

The Board voted to **grant** the petition as presented and advertised.

*(As 49 Pickering Street)*

August 16, 1994 – The Board **granted** variances for the demolition of a shed and part of a dwelling and construction of a 398 s.f. two story rear addition with a 6' left yard and a 4'6" right yard, 10' required for each; a 19'3" rear yard where 25' was required; and maintaining the existing 30.4% building coverage after the demolition and construction.

April 25, 1995 – The Board **granted** a variance to allow a decayed structure to be rebuilt in the same location and configuration as the existing structure.

*(As 49 Pickering Street and 170 Mechanic Street)*

May 22, 2018 – The Board **granted** a variance in connection with a lot line revision to allow a 7.9' rear yard where 25' is required.

## Planning Department Comments

The applicant is proposing the installation of an emergency generator on the back side of the garage. This is an irregular shaped lot with three sides of street frontage and an additional boundary line that is parallel to Pickering Street and Hunking St. The zoning table has been labeled according to the street each boundary line fronts on, with the left side boundary line referring to the section that runs parallel to Hunking and Pickering Street

## Review Criteria

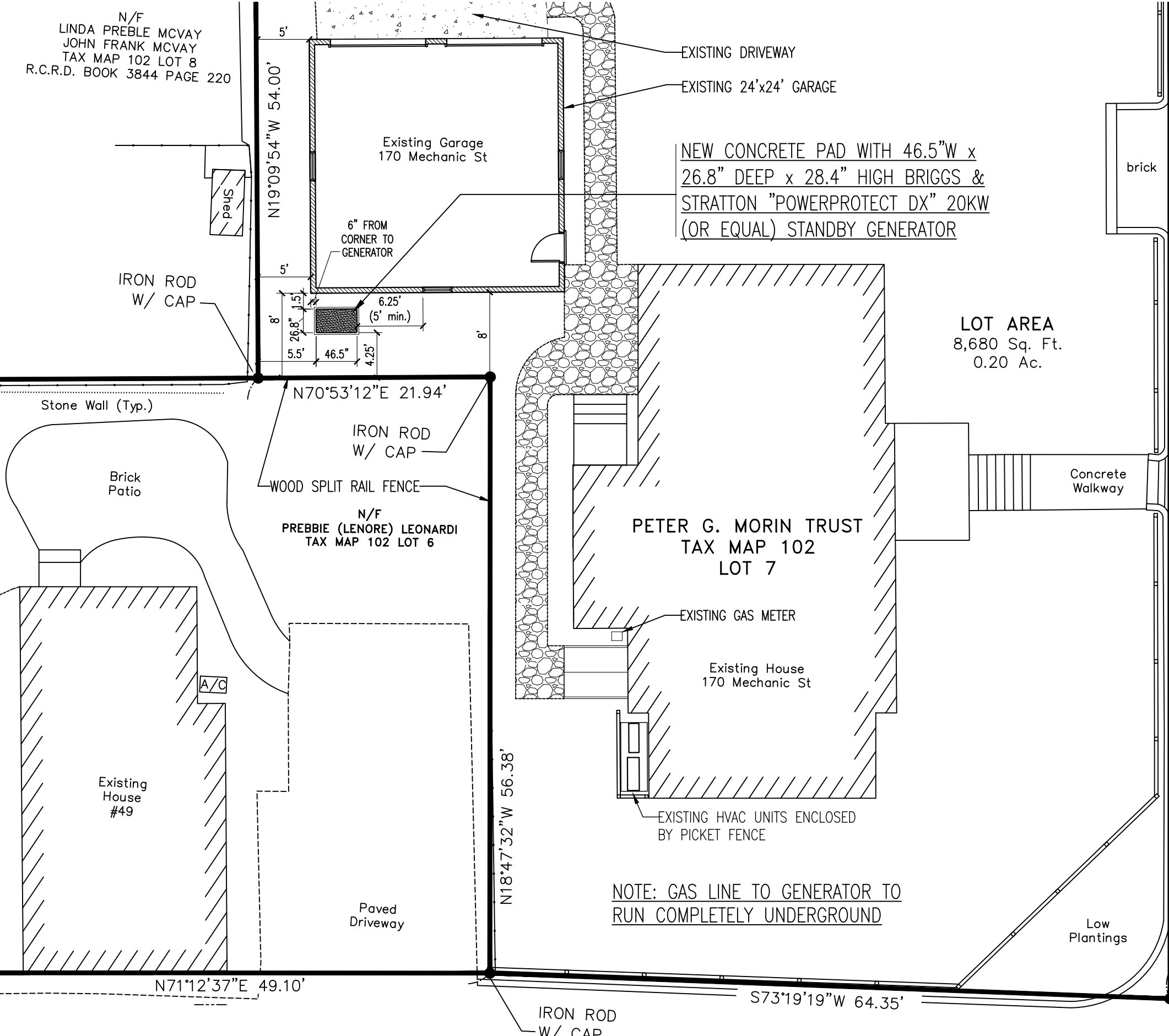
This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*  
**AND**
  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*  
**OR**  
*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

### **10.235 Certain Representations Deemed Conditions**

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

N/F  
LINDA PREBLE MCVAY  
JOHN FRANK MCVAY  
TAX MAP 102 LOT 8  
R.C.R.D. BOOK 3844 PAGE 220

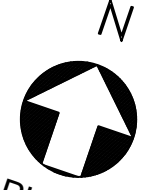


LOT AREA  
8,680 Sq. Ft.  
0.20 Ac.

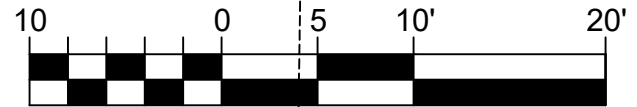
NOTE: GAS LINE TO GENERATOR TO RUN COMPLETELY UNDERGROUND

MECHANIC STREET

PICKERING STREET



GRAPHIC SCALE



S18°50'05"E 120.15'

Concrete Retaining Wall (Typ.)

IRON ROD W/ CAP #829 SET FLUSH  
N: 210476.1  
E: 1229284.3  
NH-SPC

Water Gate Valve (Typ.)

PETER MORIN  
170 MECHANIC STREET  
PORTSMOUTH, NH 03801

ARILDA DESIGN  
densch@comcast.net / www.arilda.com  
9 Adams Lane, Unit 2  
Kittery, Maine 03904  
207-604-6848

Revisions:

BOA Meeting April 18, 2023  
New Generator & Pad  
Detail - Site Plan

date: 3-16-2023

scale: 1" = 10'-0"

S1



VIEW FROM REAR DECK OF HOME



VIEW FROM REAR CORNER OF HOME



VIEW FROM PICKERING STREET

BOA Meeting April 18, 2023

**PETER MORIN**  
 Generator & Pad - 170 MECHANIC ST  
 PORTSMOUTH, NH 03801

ARILDA DESIGN  
 densch@comcast.net / www.arilda.com  
 9 Adams Lane, Unit 2  
 Kittery, Maine 03904  
 207-604-6848

**New Generator & Pad  
 Site Photographs**

date: 3-16-2023

NO SCALE

**A1**

**Zoning Ordinance Criteria to be met, as per City Ordinance 10.233.20:**

**10.233.21 The Variance will not be contrary to the public interest:**

The proposed generator is placed behind the Garage to be the least visible and bothersome to the neighbors and the neighborhood in general. All immediate abutters have signed a letter of support for this variance request. (The property owner will bring a copy of this letter to the meeting and file a paper copy with the City.) Therefore, the variance will not be contrary to the public interest.

**10.233.22 The spirit of the Ordinance will be observed:**

The property at 170 Mechanic Street is very unusual. It has 3 spacious Front Yard areas, no designated Right Side Yard, and very little space in its Rear Yard area. If a variance is granted to accommodate for this unusual situation and with respect for the abutters the spirit of the Ordinance will be observed.

**10.233.23 Substantial justice will be done:**

The property owners want to place their generator behind the garage and behind a fence where it will disrupt their neighbors and the general neighborhood as little as possible on this unusual lot, with abutter approval. Substantial justice will be done for the owners and the neighborhood if this variance is granted.

**10.233.24 The values of surrounding properties will not be diminished:**

Because the proposed generator is well hidden it will not diminish the surrounding property values.

**10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship:**

The proposed generator constitutes a reasonable addition to this Single Family home. Power outages in the winter are not uncommon and present a risk for pipes to freeze and other loss of property. This home has all of its available yard space on it's 3 Fronts, but those areas are no place for a generator. If it were placed in the middle of the Right Side Yard where plenty of space is available out of the setbacks it would be unsightly. So, a literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship to the neighborhood, surrounding businesses that welcome tourists, and the property owners.

BOA Meeting April 18, 2023

PETER MORIN  
Generator & Pad at 170 MECHANIC ST  
PORTSMOUTH, NH 03801

ARILDA DESIGN  
densch@comcast.net / www.arilda.com  
9 Adams Lane, Unit 2  
Kittery, Maine 03904  
207-604-6848

New Generator & Pad  
Variance Criteria

date: 3-16-2023

NO SCALE

A2



To whom it may concern,

I, Peter Morin property owner of 170 Mechanic Street Portsmouth, NH hereby give permission for Arilda Densch of Arilda Design to be the primary point of contact for the application and the project at 170 Mechanic St.



Sincerely,  
Peter Morin  
170 Mechanic Street  
Portsmouth, NH 03801

BOA Meeting April 18, 2023

date: 3-16-2023

NO SCALE

**A3**

ARILDA DESIGN  
densch@comcast.net / www.arilda.com  
9 Adams Lane, Unit 2  
Kittery, Maine 03904  
207-604-6848

**New Generator & Pad  
Letter of Authorization**

**PETER MORIN**  
Generator & Pad at 170 MECHANIC ST  
PORTSMOUTH, NH 03801

### III. NEW BUSINESS

- C. The request of **RTM Trust, Ryan T Mullen and Heidi E K Trustees (Owners)**, for property located at **253 Odiorne Point Road** whereas relief is needed to construct a deck extension which requires a Variance from Section 10.521 to allow a 30 foot rear yard where 40 feet is required. Said property is located on Assessor Map 224 Lot 10-19 and lies within the Single Residence A (SRA) District. (LU-23-36)

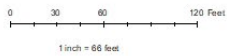
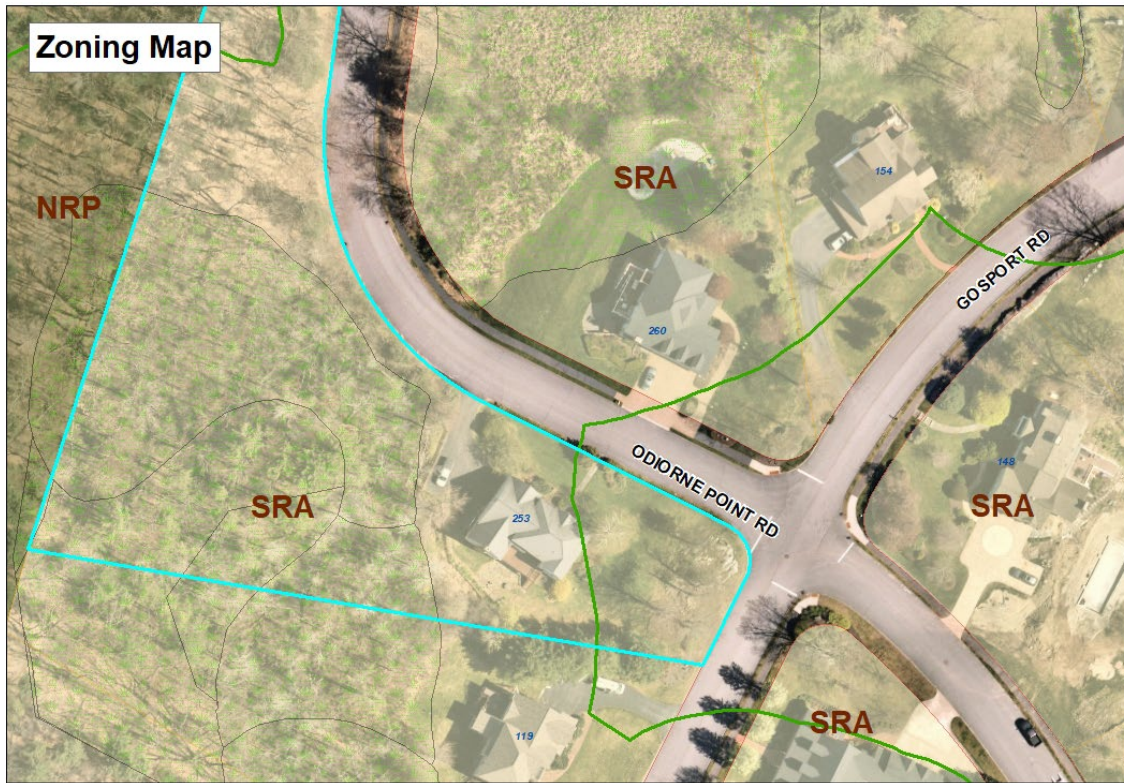
#### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single Unit Residential	Deck Expansion	Single Residential Uses
<u>Lot area (sq. ft.):</u>	87,300	87,300	43,650 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	87,300	87,300	43,650 min.
<u>Frontage (ft.):</u>	>400	>400	150 min.
<u>Lot depth (ft.):</u>	100	100	200 min.
<u>Primary Front Yard (ft.):</u>	30	30	30 max.
<u>Secondary Front Yard (ft.):</u>	90	82	30 min.
<u>Right Yard (ft.):</u>	>250	>250	20 min.
<u>Rear Yard (ft.):</u>	30	<b>30</b>	40 min.
<u>Height (ft.):</u>	<35	<35	35 max.
<u>Building Coverage (%):</u>	3	3.3	10 max.
<u>Open Space Coverage (%):</u>	>50	>50	50 min.
<u>Parking</u>	2	2	2
<u>Estimated Age of Structure:</u>	2000	Variance request(s) shown in red.	

#### Other Permits/Approvals Required

- Building Permit
- Wetland Conditional Use Permit – Conservation Commission and Planning Board

### Neighborhood Context



**253 Odiorne Point Road**



## Previous Board of Adjustment Actions

February 28, 2023 – The Board voted to **grant** the request as presented and advertised for the installation of a mechanical unit which requires the following:

- 1) Variance from Section 10.515.14 to allow the mechanical unit to be located closer to a street than the principal structure.

## Planning Department Comments

Applicant is requesting to remove the existing deck stairs, extend the deck, and construct new stairs. This project requires relief from Section 10.521 as the new portion of the deck and the new stairs, as proposed, will be located within the 40 foot rear yard.

This project does not require relief from Section 10.321 as the portion of the existing deck that is to remain is currently conforming.

## Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

  - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

## 10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### PROJECT NARRATIVE:

**Introduction:** The residential property and single-family structure located at 253 Odiorne Point Road in Portsmouth, New Hampshire was constructed in the year 2000 and most recently purchased in November of 2022. Per the City of Portsmouth's MapGeo mapping program view (see Exhibit #1 below), approximately ninety-five percent (95%) of the existing structure, the entire existing patio, the entire existing deck, and the entire existing deck stairway are within the one hundred (100) foot wetland buffer, which is the area located between the light green lines in Exhibit #1 below. Unfortunately, the unique location and positioning of the structure, the lack of effective drainage infrastructure, and the improper grading around the structure subjected the property to significant natural environmental stress in the form of excessive rainwater collection, which resulted in damage to the existing flagstone patio on grade, damage to the adjacent existing siding of the home, and damage to the piers of the existing deck and the existing deck stairway.

### Exhibit #1, City of Portsmouth MapGeo Satellite View of 253 Odiorne Point Road



**Objective & Requested Approvals:** With the general objective of protecting the existing structure and property from additional rainwater damage; the property owner respectfully requests the following two (2) approvals prior to initiating alterations in the form of repairs and improvements to the hardscape, the landscape, and the structure.

1. A Wetland Conditional Use Permit from the Planning Board to satisfy the City of Portsmouth Zoning Ordinance Section 10.241.22, which requires conditional use approval to complete alterations in a wetland or wetland buffer (Article 10, Section 10.1010 – Wetlands Protection).
2. A setback variance from the Zoning Board of Adjustment to allow for the following:
  1. The ninety (90) degree movement of the existing deck stairway that is currently located approximately thirty (30) feet from the property line and within the forty (40) foot setback, but which terminates in the patio area that is prone to rain water collection and situated adjacent to the wetland. The proposed deck stairway will be removed from the patio area and re-directed toward a side yard and away from wetland where it will terminate approximately thirty (30) feet from the property line.
  2. An approximate eighty-eight (88) square foot extension of the existing deck to support the ninety (90) degree movement of the existing deck stairway. The deck extension will be directed away from the wetland and it will terminate approximately thirty-five (35) feet from the property line, but within the forty (40) foot setback.

# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### Exhibit #2

### Photographs of Rainwater Collection



**Rainwater Collection Areas**

**Rainwater Damaged Siding at Grade**

**Rainwater Damaged Patio/Deck/Stairway**



**Photographs of Same Area From Opposite Direction**

**Snow Melt Water Collection**  
**After 03/14/2023 Snow Storm**

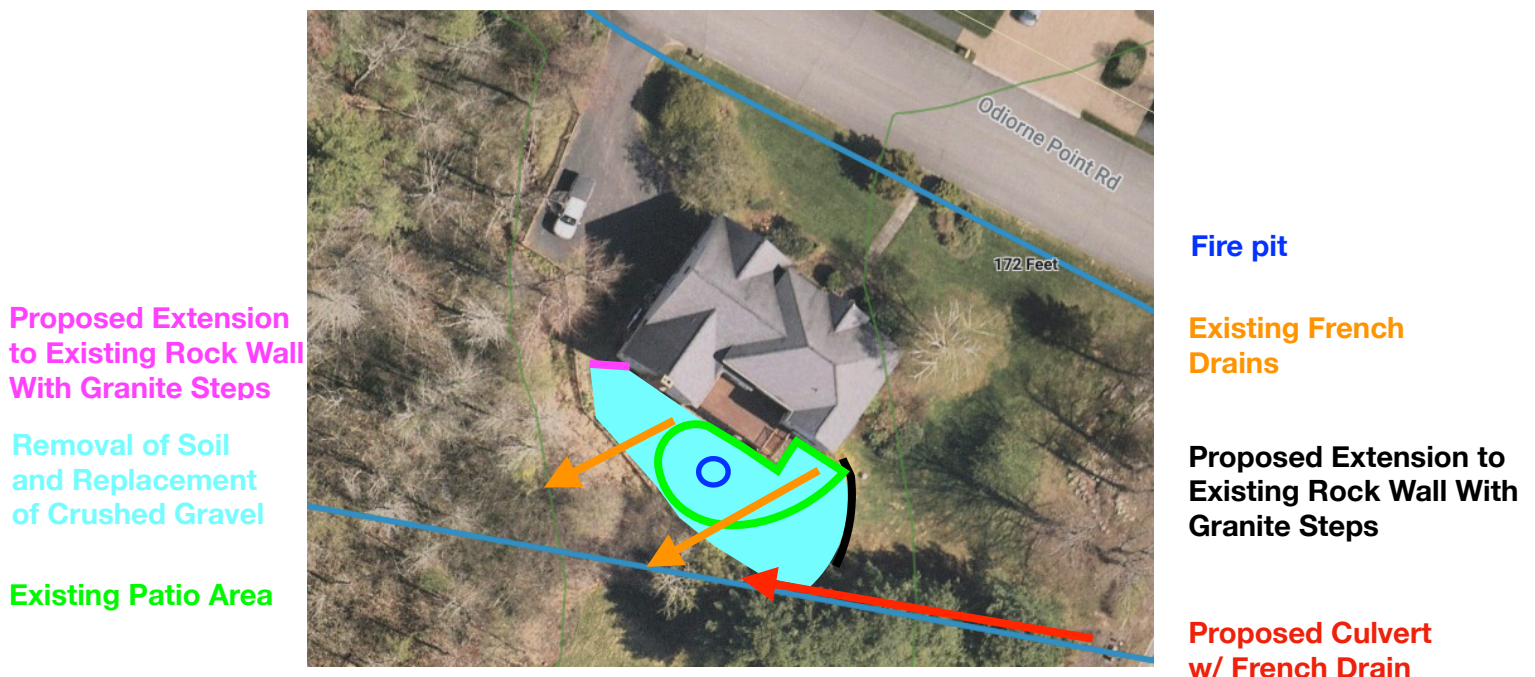
# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### Proposed Hardscape Alterations:

1. Extend an existing ten (10) foot long and four (4) foot high rock wall, which starts on the southeast corner of the residence to approximate twenty-five (25) feet in length and sloping downward to grade with the objective of diverting rainwater away from the residence and toward the wetland to avoid additional water damage to the structure and the hardscape. Construct granite steps in the extended rock wall to allow for pedestrian access between the lawn and patio areas. See the black line in Exhibit #3 below for the location of the proposed extended rock wall with integrated granite steps.
2. Extend an existing four (4) foot long rock wall on the southwest corner of the residence to approximately ten (10) feet in length with the objective of diverting the rainwater away from the residence and toward the wetland to avoid additional damage to the structure and to the hardscape. Construct granite steps in the rock wall to allow for pedestrian access between the driveway and the patio areas. See the pink line in Exhibit #3 below for the location of the proposed extended rock wall with integrated granite steps.
3. Remove the water damaged flagstone patio (see the green line in Exhibit #3) and twelve (12) to eighteen (18) inches of clay infused soil from the area under and surrounding the patio (see the light blue shaded area in Exhibit #3) and place the clay infused soil to the southeast side of the property and behind the extended twenty-five (25) foot long rock wall described above and identified below in Exhibit #3 as a black line. To ensure the existing French drains (identified by the orange lines below) are operable, the clay infused soil in the light blue shaded area will be replaced with a permeable crushed gravel base and permeable interlocking concrete patio pavers will be installed within the confines of the existing patio area, which is identified in green in Exhibit #3 below. A gas fire pit will be constructed and centered within the existing existing patio area. The fire pit will be approximately five (5) feet in diameter and will be constructed of blocks that match the pavers. A concrete slab will be poured under the deck to support a freestanding spa/hot tub. The concrete slab will not be noticeable, it will be surrounded by pavers, and it will measure approximately ten (10) feet by ten (10) feet.
4. Install a French drain gravel lined culvert along the southeast edge of the property where a natural culvert currently exists, but which does not effectively manage rainwater runoff. The objective of installing the French drain gravel lined culvert will be to effectively collect rainwater and divert that rainwater away from the residence and toward the wetland on the southwest portion of the property. An additional photograph of the location of natural culvert is included in the proposed landscape alterations section as Exhibit #6.

### Exhibit #3, Proposed Hardscape Alterations



# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### Proposed Structure Alterations:

1. **Replace the existing deck support piers:** The existing deck support piers were undersized and damaged by rainwater. It's proposed the deck support piers be correctly sized and replaced.
2. **Move the existing deck stairway ninety (90) degrees:** The existing deck stairway currently terminates in the patio area that is adjacent to the wetland and prone to rainwater collection, which resulted in damage to the existing deck stairway. Additionally, the existing deck stairway terminates approximately thirty (30) feet from the property line and within the forty (40) foot setback. It's proposed the existing deck stairway be moved ninety (90) degrees away from the patio area and adjacent wetland and be positioned to terminate in the side yard approximately thirty (30) feet from the property line, but within the forty (40) foot setback. Please refer to Exhibit #4 for the locations of the existing and proposed deck stairway.
3. **Extend the existing deck to accommodate the movement of the existing deck stairway:** To accommodate the ninety (90) degree movement of the existing stairway and to prevent the obstruction of the walkout basement doorway (see Exhibit #5), it's proposed the the existing deck be extended along the southeast side of the structure by approximately eighty-eight (88) feet. The deck extension will be directed away from the wetland and it will terminate approximately thirty-five (35) feet from the property line, but within the forty (40) foot setback. Please refer to Exhibit #4 for the locations of the existing deck and proposed deck extension.

**Exhibit #4, Proposed Structure Alterations**



**Exhibit #5, Walkout Basement Doorway**





# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### Proposed Landscaping Alterations

1. Install permeable landscape fabric over the permeable crushed gravel base (described in item #3 of the proposed proposed hardscape alterations) within the light blue shaded area of Exhibit #3. Install topsoil over the landscape fabric, and then install sod to match the surrounding areas of grass.
2. Spread and sculpt the relocated clay infused soil (identified below in Exhibit #6 with the blue lines and described in item #3 of the proposed proposed hardscape alterations) away from the residence and toward the proposed French drain gravel lined culvert identified below in Exhibit #6 with a red line and as described in item #4 of the proposed proposed hardscape alterations.

**Exhibit #6**



3. Remove the invasive species of phragmites reeds identified by the yellow ovals in Exhibits #7 and #8 and located on the southwest side of the the residence by hand as suggested by the City of Portsmouth Planning Department. Replace the invasive species of phragmites reeds with winterberry, a species of red colored holly native to eastern North America and suggested by the City of Portsmouth Planning Department.

**Exhibit #7**

**Exhibit #8**



# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### Evaluation of Five (5) "Analysis Criteria"

1. 10.233.21: Approval of a wetland conditional use permit and a setback variance will not be contrary to the public interest
  - Justification: The property owner believes an approved wetland conditional use permit and setback variance would allow the property owner to complete alterations in the form of improvements to the hardscape, the landscape, and the structure with the general objective of protecting the existing structure and property from additional rainwater collection and damage. The proposed alterations will not be contrary to the public interest because the location of the proposed improvements are in the backyard of the residence, which is not easily visible from publicly accessible locations or the surrounding properties due to the topography of the property and the location of the structure. Furthermore, the proposed alterations will occur in the wetland buffer (not the wetland) and those proposed alterations will actually improve rainwater management as the rainwater travels from the side yards, through wetland buffer zone, and to the wetland without being diverted to public land, the surrounding properties, or collecting in the patio area of the residence and causing unsightly damage to the structure. Additionally, the property owner proposes removing an invasive species of phragmites reeds and replacing those phragmites reeds with winterberry, a species of red colored holly native to eastern North America, which will be inline with the public interest.
2. 10.233.22: The spirit of the Ordinance will be observed
  - Justification: An approved conditional use permit and setback variance would satisfy a reasonable social and moral consensus the property owner is respecting the both the importance of setbacks and the protection of wetland because the property owner is not proposing a decrease in the setback that currently exists, the property owner is simply proposing moving structures away from the wetland, and the property owner is not changing how the space in the wetland buffer will be utilized.
3. 10.233.23: Substantial justice will be done
  - Justification: An approved conditional use permit and setback variance would will allow the property owner to protect the existing structure and property from additional rainwater damage, while protecting the wetland and enjoying full use of the property thereby satisfying a standard of fairness and allowing for a substantial justice to be done.
4. 10.233.24: The values of surrounding properties will not be diminished
  - Justification: An approved conditional use permit and setback variance will not diminish the values of the surrounding properties because the proposed alterations will allow the property owner to repair the damaged exterior desk and stairway, replace a damaged patio area, improve rainwater management, and remove an invasive species of phragmites reeds and replace those phragmites reeds with winterberry, a species of red colored holly native to eastern North America. The property owner believes the proposed alterations will improve the values of surrounding properties.
5. 10.233.25: Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.
  - Justification: If the provisions of the Zoning Ordinance were literally enforced, the property owner would be unable repair, improve, and protect the existing structure and property from additional rainwater damage. Consequently, the property owner would be unable to enjoy full use of the property and structure, and the property owner would be routinely burdened with expensive rainwater damage repairs which would result in unnecessary physical and financial hardship.

# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### Specific Information Requested for Conditional Use Permit

1. Description of site and proposed construction:
  - Description of Site: The residential property and single-family structure located at 253 Odiorne Point Road in Portsmouth, New Hampshire was constructed in the year 2000 and most recently purchased in November of 2022. Per the City of Portsmouth's MapGeo mapping program view (see Exhibit #1), approximately ninety-five percent (95%) of the existing structure, the entire existing patio, the entire existing deck, and the entire existing deck stairway are within the one hundred (100) foot wetland buffer, which is the area located between the light green lines in Exhibit #1. Unfortunately, the unique location and positioning of the structure, the lack of effective drainage infrastructure, and the improper grading around the structure subjected the property to natural environmental stress that caused significant rainwater collection and which resulted in damage to the existing flagstone patio on grade, damage to the adjacent existing siding of the home, and damage to the piers of the existing deck and the existing deck stairway.
  - Proposed Construction: With the general objective of protecting the existing structure and property from additional rainwater damage; the property owner respectfully requests approval to improve the hardscape by extending two (2) existing rock walls, replacing the current damaged patio, and improving a stormwater drainage culvert. Additionally, the property owner proposes structural repairs and an extension to an existing exterior deck and a re-direction of the deck stairway. Lastly, the property owner proposes landscape improvements to improve rainwater drainage management and to remove an invasive species of phragmites reeds located in the wetland buffer and replacing those phragmites reeds with winterberry, a species of red colored holly native to eastern North America.
2. Total area of inland wetland or vernal pool (both on and off the parcel):
  - On Parcel Inland Wetland Area: Approximately one (1) acre
  - Off Parcel Inland Wetland Area: Unknown
3. Impacted Jurisdictional Area:
  - Inland Wetland Buffer
4. Distance of proposed structure or activity to the edge of wetland:
  - Minimum Distance: Approximately 20 feet
  - Maximum Distance: Approximately 155 feet
5. Total wetland area and/or wetland buffer area on the lot:
  - Wetland Area: Approximately one (1) acre
  - Wetland Buffer: Approximately 31,556 square feet
6. Total wetland area and/or wetland buffer area to be disturbed on the lot:
  - Wetland Area: No wetland areas will be disturbed
  - Wetland Buffer: Approximately 2,500 square feet will be disturbed
7. Project Representative: Ryan T. Mullen, (619) 865-3660 - rtmullen75@gmail.com

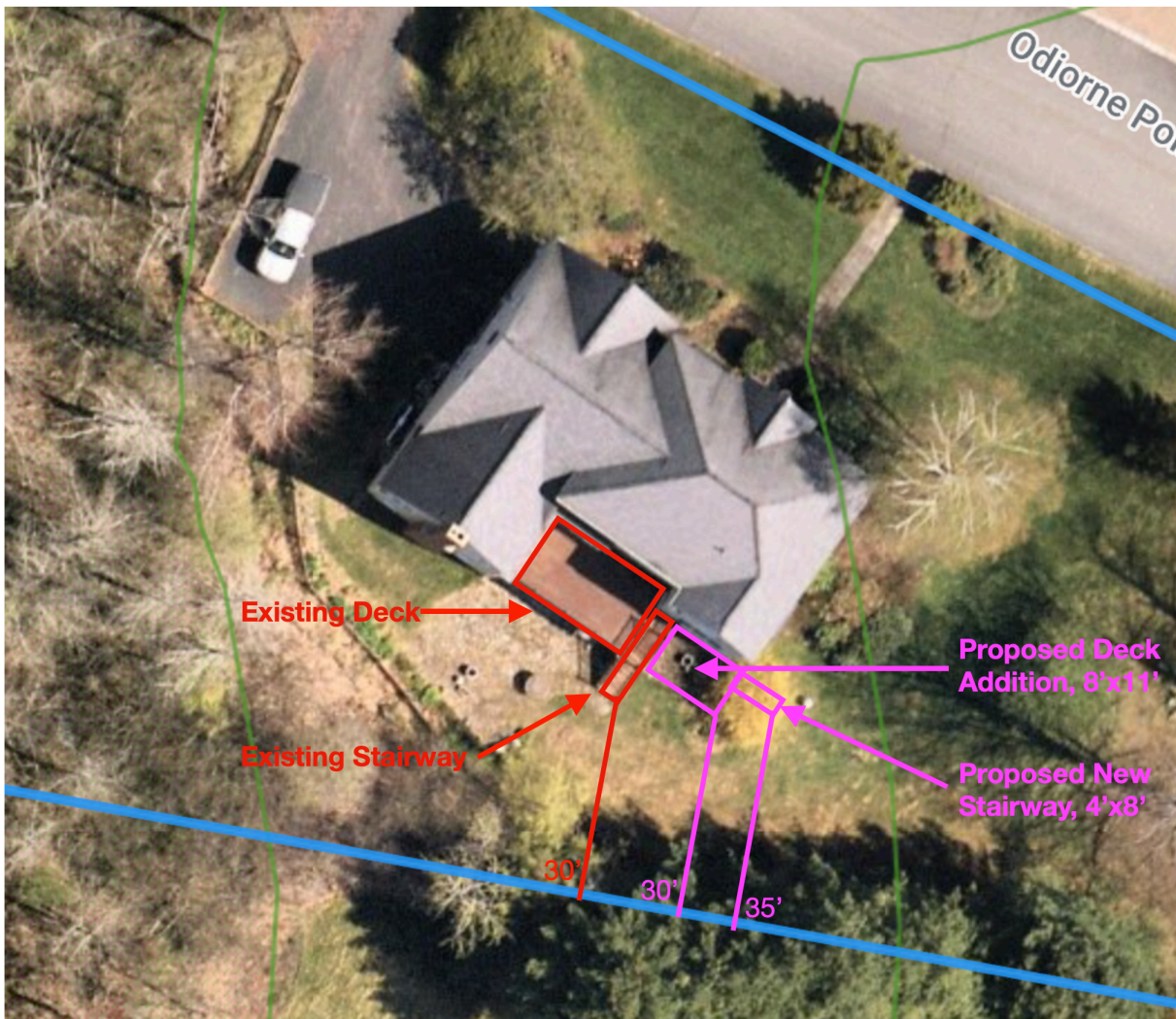
# City of Portsmouth Land Use Application

## 253 Odiorne Point Road, Portsmouth, N.H.

### Structure - Visual Aid and Measurements Attachment

#### Proposed Structure Details

- 1. Move the existing deck stairway ninety (90) degrees:** The existing deck stairway currently terminates in the patio area that is adjacent to the wetland and prone to rainwater collection, which resulted in damage to the existing deck stairway. Additionally, the existing deck stairway terminates approximately thirty (30) feet from the property line and within the forty (40) foot setback. It's proposed the existing deck stairway be moved ninety (90) degrees away from the patio area and adjacent wetland and be positioned to terminate in the side yard approximately thirty (30) from the property line, but within the forty (40) foot setback.
- 2. Extend the existing deck to accommodate the movement of the existing deck stairway:** To accommodate the ninety (90) degree movement of the existing stairway and to prevent the obstruction of the walkout basement doorway, it's proposed the the existing deck be extended along the southeast side of the structure by approximately eighty-eight (88) feet. The deck extension will be directed away from the wetland and it will terminate approximately thirty-five (35) feet from the property line, but within the forty (40) foot setback.



### III. NEW BUSINESS

- D. The request of **Cherie A Holmes and Yvonne P Goldsberry (Owners)**, for property located at **45 Richmond Street** whereas relief is needed to construct a greenhouse which requires the following: 1) Variance from Section 10.521 to allow a 5.5 foot rear yard where 15 feet is required; 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 108 Lot 18 and lies within the Mixed Residential Office (MRO) and Historic District. (LU-20-249

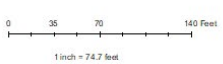
#### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single Unit Residential	Build a green house	Mixed Use
<u>Lot area (sq. ft.):</u>	5,417	5,417	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	5,417	5,417	7,500 min.
<u>Frontage (ft.):</u>	64	64	80 min.
<u>Lot depth (ft.):</u>	84	84	100 min.
<u>Front Yard (ft.):</u>	0	0	5 max.
<u>Left Yard (ft.):</u>	10.6	10.6	10 min.
<u>Right Yard (ft.):</u>	4.4	4.4	10 min.
<u>Rear Yard (ft.):</u>	4.5 (previously approved)	<b>5.4 (Green House Extension)</b>	15 min.
<u>Height (ft.):</u>	<35	<35	40 max.
<u>Building Coverage (%):</u>	25.4%	33.4	40 max.
<u>Open Space Coverage (%):</u>	52.2	59.2	25 min.
<u>Parking</u>	2	2	2
<u>Estimated Age of Structure:</u>	1860	<b>Variance request(s) shown in red.</b>	

#### Other Permits/Approvals Required

- Building Permit

### Neighborhood Context



**45 Richmond Street**



## Previous Board of Adjustment Actions

November 24, 1964 –The Board **granted** the petition to erect a garage 24' x 20', five (5') feet back from line and two (2') feet from sideline.

January 19, 2021 – Relief is needed from the Zoning Ordinance to remove existing garage and rear addition and construct new garage and 2-story addition which requires the following:

- 1) Variances from Section 10.521 to allow:
  - a) a 0.5 foot front yard where 5 feet is required;
  - b) a 4.5 foot rear yard where 15 feet is required;
  - c) a 4 foot right side yard where 10 feet is required.
- 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended.

The Board voted to **grant** the request with the following stipulation: 1) The rear yard setback shall be 5 feet.

## Planning Department Comments

The applicant was previously before the Board for a larger project that encompassed the greenhouse in January of 2021. Upon refinement of the plan it was discovered that the greenhouse would be longer than what was approved in the original variance granted by the BOA in 2021. The applicant is now before the Board to obtain the needed relief for the change in design.

Staff acknowledges there is a small error in the advertised request. The request advertises a 5.5 foot rear yard where the applicant has requested 5.4 feet. Should the Board approve the variance as presented, staff recommend the following condition:

- 1) The Board approves the variance with a 5 foot +/- rear yard.

## Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The "unnecessary hardship" test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

  - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

## 10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.



45 Richmond St  
Map 108 Lot 18

**Change to the size of Greenhouse within the Rear Yard Setback**

**To permit the following:**

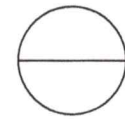
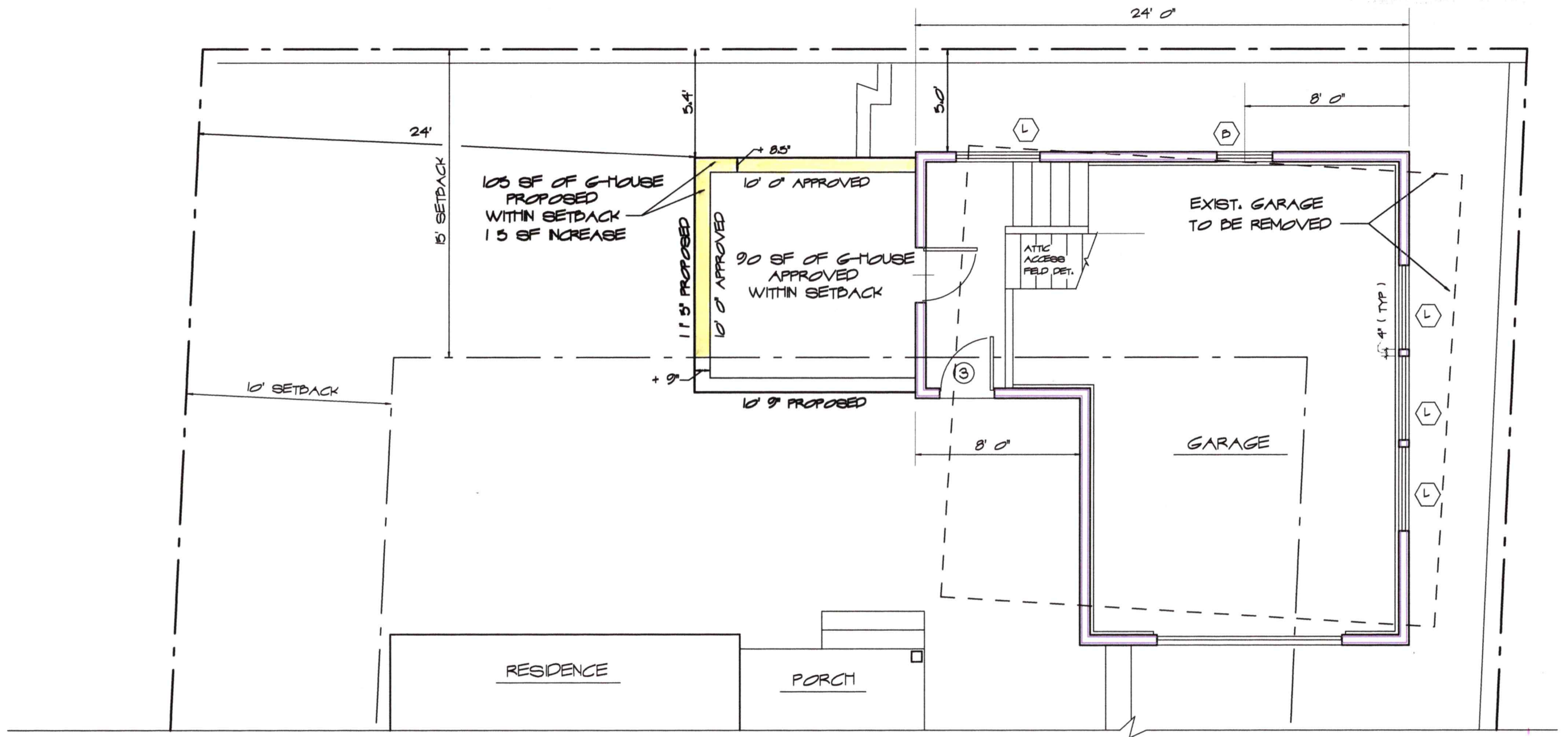
1. An increase of 15sf within the Rear Yard Setback, for the Greenhouse

**The undersigned agrees that the following circumstances exist.....**

1. A Greenhouse (10' x 10") was previously approved within the rear yard setback, Jan. 21st 2021. There was a stipulation that both the Garage & Attached Greenhouse will have a minimum rear setback of 5ft. The Proposed Greenhouse has a 5.4' setback.
2. Working with the Greenhouse Supplier, we found that the standard glass size at 30" determines the overall size. The closest standard size is 11' 3" x 10' 6", with the foundation needing to be 11' 5" x 10' 9". This adds 15sf within the rear yard setback. The added 9" of length still leaves a 24ft Left Side Setback.

**Criteria for the Variance:**

1. The Variance is not contrary to the public interest in that this small increase within the Rear Setback will not visually change the view from the street and will not adversely affect abutting properties.
2. The Variance is consistent with the spirit of the ordinance as noted above.
3. Substantial justice will be done, as this minor increase will allow use of LOW-E Solar Ban glazing, which would be extremely costly if custom sized and will increase the energy efficiency of the Greenhouse without adversely affecting abutting properties.
4. This Variance will not diminish the value of surrounding properties.
5. The special condition of this property is the non-conformity of the Existing Garage and the smaller Proposed Garage needs to be in a similar location and has increased both the Rear & Right Side Setbacks.



**REVISED GREENHOUSE PLAN**

SCALE : 3/16" = 1'-0"

NOTE: GREENHOUSE SIZE HAS CHANGED FROM 10' X 10',  
 TO CONFORM TO MANUFACTURES STANDARD SIZING, 11' 3" X 10' 6" ( 118 SF )  
 FROST WALL & SLAB DIMESIONS INCREASE TO, 11' 5" X 10' 9" ( 123 SF )  
 SLAB DIMENSIONS USED TO CALCULATE AREA WITHIN THE REAR SETBACK

<b>GREENHOUSE</b> ANNE WHITNEY ARCHITECT GLDSBERRY HOLMES RESIDENCE 45 RICHMOND STREET PORTSMOUTH, NH	801 Islington St, Suite 32 Portsmouth NH 03801 603-502-4387 archwhit@aol.com	Project: 2008 Revisions:	Date: 3/27/23
	Project: 2008 Date: 3/27/23		



**AMBIT ENGINEERING, INC.**  
 Civil Engineers & Land Surveyors  
 300 Griffin Road - Unit 3  
 Portsmouth, N.H. 03801-7114  
 Tel (603) 430-9282  
 Fax (603) 436-2315

NORTH  
 NAD83(2011)  
 GRID  
 NH SPC

**NOTES:**

- 1) PARCEL IS SHOWN ON THE CITY OF PORTSMOUTH ASSESSOR'S MAP 108 AS LOT 18.
- 2) OWNERS OF RECORD:  
 CHERIE A. HOLMES & YVONNE GOLDSBERRY  
 1087 COUNTY ROAD  
 WALPOLE, NH 03608  
 5957/665  
 R.C.R.D. PLAN #522
- 3) PARCEL IS NOT IN A SPECIAL FLOOD HAZARD AREA AS SHOWN ON FIRM PANEL 33015C0259E. EFFECTIVE DATE MAY 17, 2005.
- 4) EXISTING LOT AREA:  
 5,417 S.F.  
 0.1244 ACRES
- 5) PARCEL IS LOCATED IN THE MIXED OFFICE RESEARCH (MRO) ZONING DISTRICT.
- 6) DIMENSIONAL REQUIREMENTS:  
 MIN. LOT AREA: 7,500 S.F.  
 FRONTAGE: 100 FEET  
 DEPTH: 80 FEET  
 SETBACKS: FRONT 5 FEET  
 SIDE 10 FEET  
 REAR 15 FEET  
 MAXIMUM STRUCTURE HEIGHT: 40 FEET  
 MAXIMUM STRUCTURE COVERAGE: 40%  
 MINIMUM OPEN SPACE: 25%
- 7) THE PURPOSE OF THIS PLAN IS TO SHOW PROPOSED CONSTRUCTION AND VARIANCES REQUIRED ON ASSESSOR'S MAP 108 LOT 18 IN THE CITY OF PORTSMOUTH.
- 8) BUILDING/SITE PLANS BASED ON ARCHITECTURAL DESIGN BY ANNE WHITNEY ARCHITECT, UPDATED 1/25/23

**HOLMES & GOLDSBERRY RESIDENCE**  
 45 RICHMOND STREET  
 PORTSMOUTH, N.H.

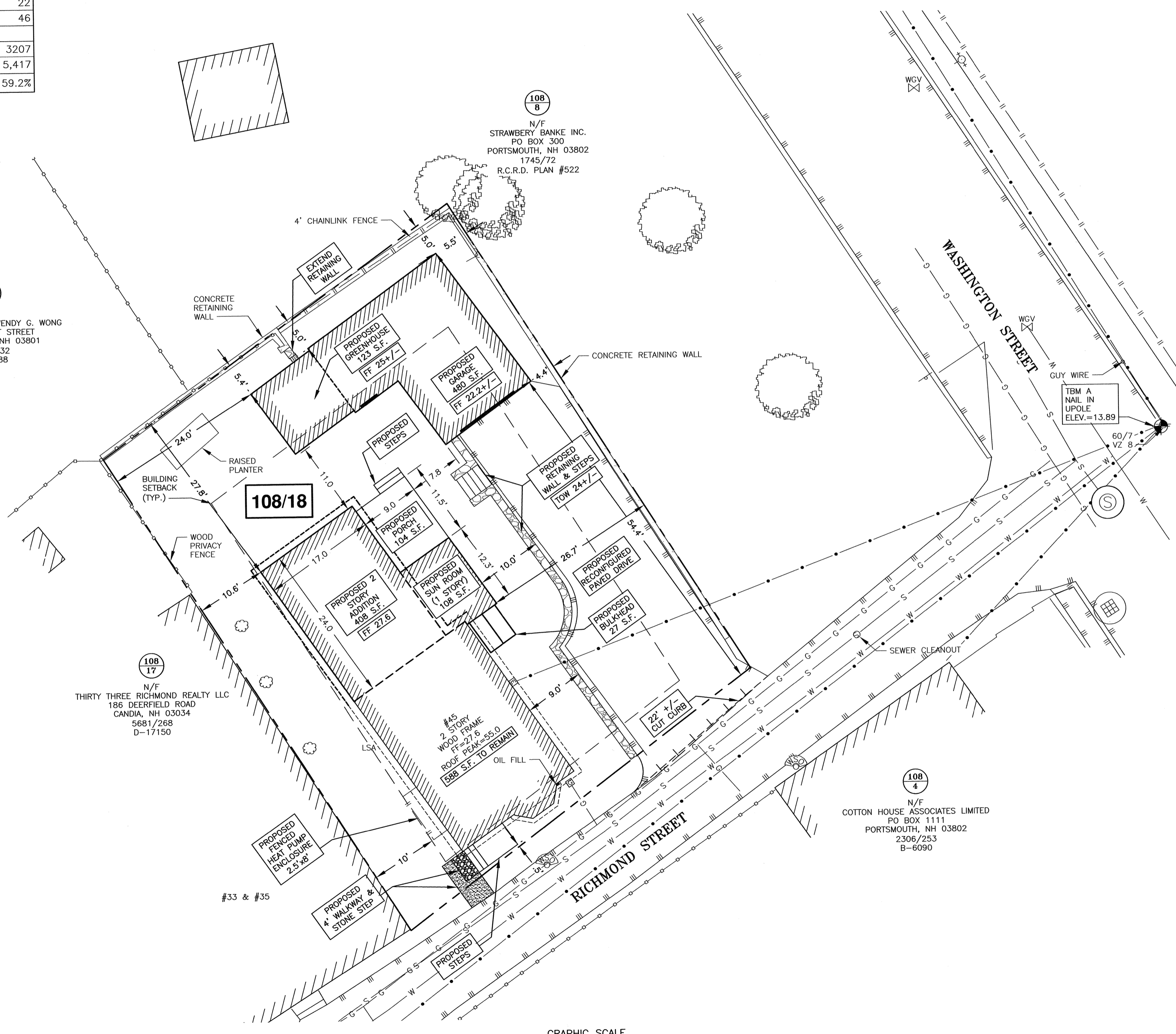
NO.	DESCRIPTION	DATE
2	REVISE BUILDING	2/16/23
1	ISSUED FOR APPROVAL	12/8/20
0	ISSUED FOR COMMENT	11/23/20

REVISIONS	

SCALE 1"=10' NOVEMBER 2020

**SITE PLAN** **C3**

IMPERVIOUS SURFACE AREAS (TO PROPERTY LINE)		
STRUCTURE	PRE-CONSTRUCTION IMPERVIOUS (S.F.)	POST-CONSTRUCTION IMPERVIOUS (S.F.)
MAIN STRUCTURE & PORCHES	839	1,208
GARAGE & GREENHOUSE	539	603
BULKHEAD	0	26
CONCRETE WALK	97	0
PAVED DRIVEWAY	982	1099
RETAINING WALLS	165	203
WALKWAY	144	22
STEPS	61	46
TOTAL	2827	3207
LOT SIZE	5,417	5,417
% LOT COVERAGE	52.2%	59.2%

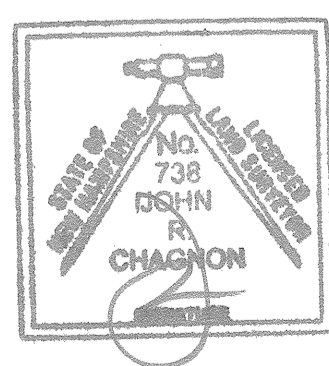


108/15  
 N/F  
 ALAN W. WONG & WENDY G. WONG  
 179 PLEASANT STREET  
 PORTSMOUTH, NH 03801  
 5863/532  
 D-33388

108/17  
 N/F  
 THIRTY THREE RICHMOND REALTY LLC  
 186 DEERFIELD ROAD  
 CANDIA, NH 03034  
 5681/268  
 D-17150

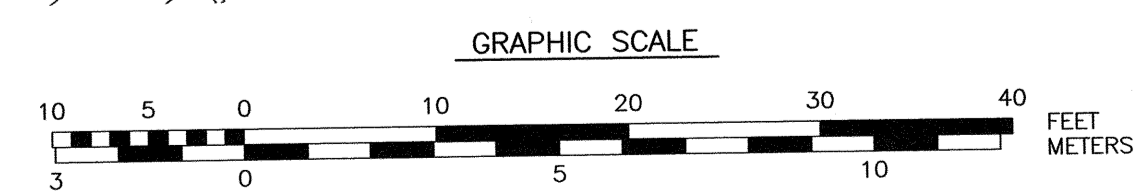
108/8  
 N/F  
 STRAWBERRY BANKE INC.  
 PO BOX 300  
 PORTSMOUTH, NH 03802  
 1745/72  
 R.C.R.D. PLAN #522

108/4  
 N/F  
 COTTON HOUSE ASSOCIATES LIMITED  
 PO BOX 1111  
 PORTSMOUTH, NH 03802  
 2306/253  
 B-6090



"I CERTIFY THAT THIS PLAN WAS PREPARED UNDER MY DIRECT SUPERVISION, THAT IT IS THE RESULT OF A FIELD SURVEY BY THIS OFFICE AND HAS AN ACCURACY OF THE CLOSED TRAVERSE THAT EXCEEDS THE PRECISION OF 1:15,000."

*John R. Chagnon* 2-16-23  
 JOHN R. CHAGNON, LLS #738 DATE



J:\CADD\110513\110513.dwg 11/23/2020 10:58:15 AM J:\CADD\110513\110513.dwg 11/23/2020 10:58:15 AM

REVISIONS AND APPROVAL			
REV	DESCRIPTION	DATE	APPROVED

COMPOSITE SECTIONS					
STRUCTURAL MAIN BAR		2x4x1/8" TUBE		2x4x1/8" W/MAIN BAR	
COMPOSITE SECTION PROPERTIES		COMPOSITE SECTION PROPERTIES		COMPOSITE SECTION PROPERTIES	
$A = 5.92 \text{ IN}^2$	$A = 14.28 \text{ IN}^2$	$A = 5.92 \text{ IN}^2$	$A = 14.28 \text{ IN}^2$	$A = 5.92 \text{ IN}^2$	$A = 14.28 \text{ IN}^2$
$X\text{-AXIS} = 1.304 \text{ IN}$	$X\text{-AXIS} = 1.304 \text{ IN}$	$X\text{-AXIS} = 1.304 \text{ IN}$	$X\text{-AXIS} = 1.304 \text{ IN}$	$X\text{-AXIS} = 1.304 \text{ IN}$	$X\text{-AXIS} = 1.304 \text{ IN}$
$Y\text{-AXIS} = 1.486 \text{ IN}$	$Y\text{-AXIS} = 1.486 \text{ IN}$	$Y\text{-AXIS} = 1.486 \text{ IN}$	$Y\text{-AXIS} = 1.486 \text{ IN}$	$Y\text{-AXIS} = 1.486 \text{ IN}$	$Y\text{-AXIS} = 1.486 \text{ IN}$
$I_x = 2.99 \text{ IN}^4$	$I_x = 3.72 \text{ IN}^4$	$I_x = 2.99 \text{ IN}^4$	$I_x = 3.72 \text{ IN}^4$	$I_x = 2.99 \text{ IN}^4$	$I_x = 3.72 \text{ IN}^4$
$I_y = 1.75 \text{ IN}^4$	$I_y = 1.68 \text{ IN}^4$	$I_y = 2.2 \text{ IN}^4$	$I_y = 2.2 \text{ IN}^4$	$I_y = 2.2 \text{ IN}^4$	$I_y = 2.2 \text{ IN}^4$

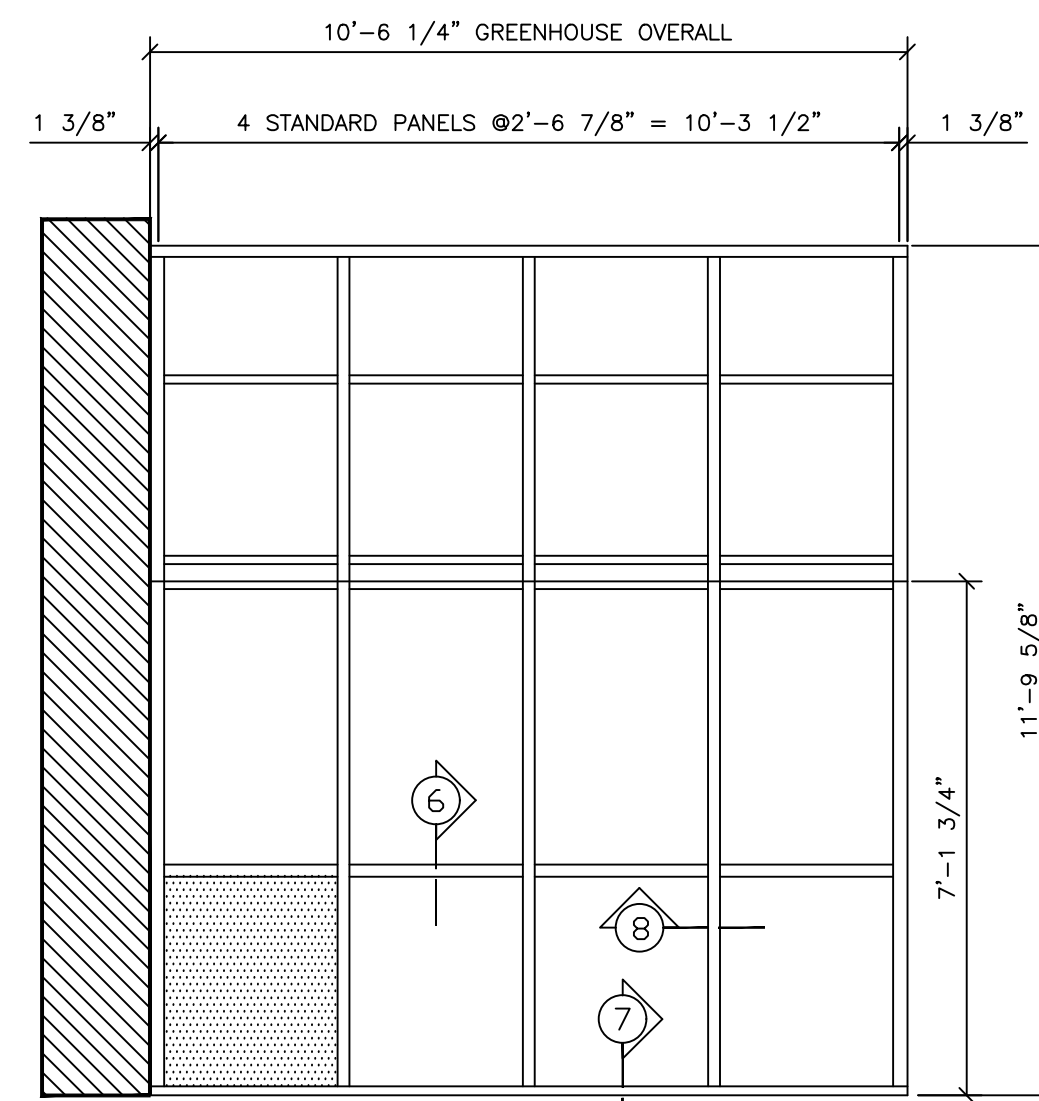
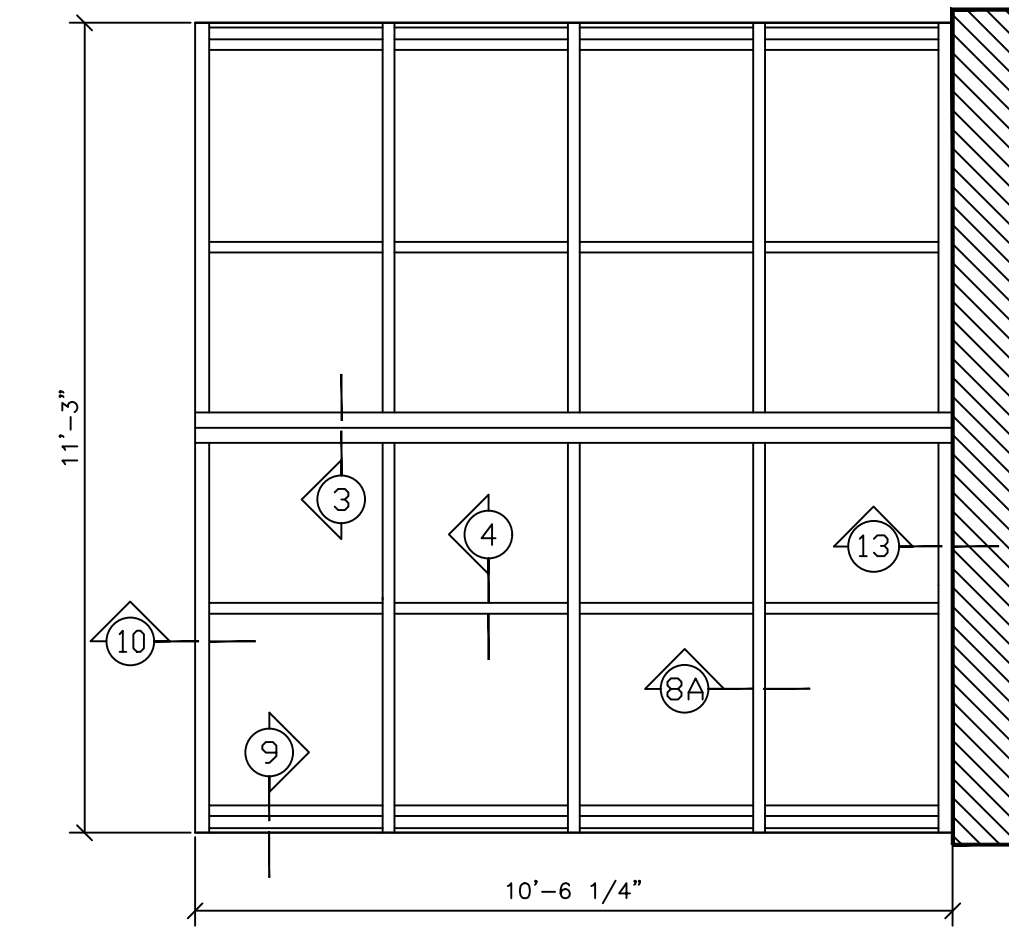
DESIGN LOADS TO MEET OR EXCEED LOCAL CODE:  
 SNOW LOAD = 70 PSF  
 DEAD LOAD = 7 PSF  
 WIND LOAD = 125MPH, EXP. "B"  
 CONCENTRATED LOAD = 100 LB. MID-SPAN  
 MAX. DEFLECTION = L/175  
 AIR INFILTRATION PER SQUARE FOOT  
 =0.02cfm/sqft (25mph)

**ANCHOR SCHEDULE**

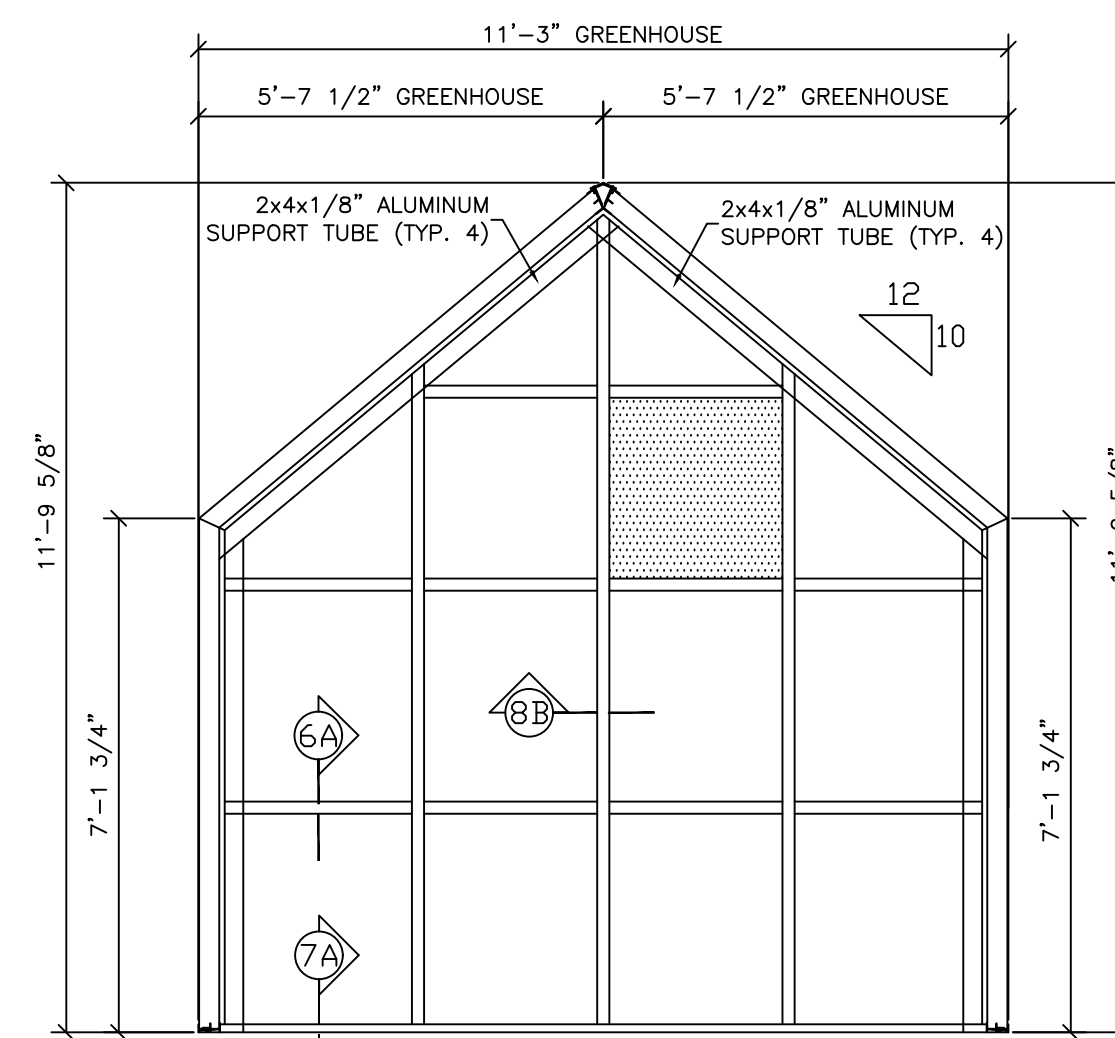
ANCHORS INTO DOUBLE WOOD PLATE, MIN 3" EMBEDMENT:  
 SIMPSON 1/4" X 3 1/2" SDS SCREWS MODEL SDS25312  
 HEAD MEMBER: 1 @ 12" O.C. MAX SPACING [QTY 22]  
 MAIN RAFTER: 2 @ EACH INTERNAL CLIP [QTY 14]

ANCHORS INTO 3000 PSI CONCRETE, MIN 2 1/2" EMBEDMENT:  
 TAPCON HEX HEAD 1/4" X 3 1/4" RED HEAD  
 ANCHORS MODEL HW4-314  
 FRONT SILLS: 1 @ 24" O.C. MAX SPACING [QTY 7]  
 LEFT AND RIGHT SILLS: 1 @ 24" O.C. MAX SPACING [QTY 14]

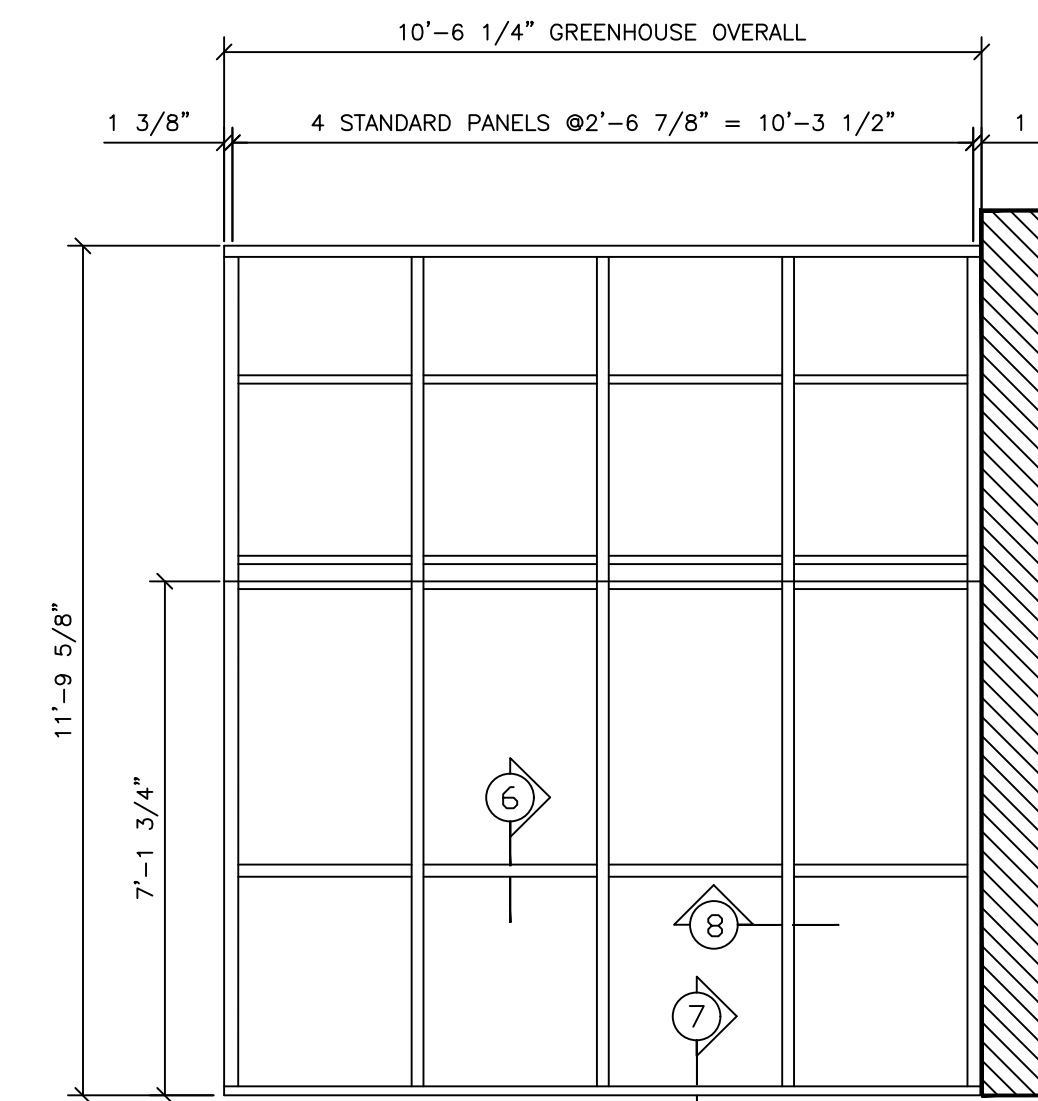
**PLAN VIEW**



LEFT SIDE ELEVATION



GABLE ELEVATION



RIGHT SIDE ELEVATION

**\*\*APPROVAL NOTE\*\***

BASED ON OUR INTERPRETATION OF THE PROJECT PLANS AND THE SPECIFICATIONS WHICH HAVE BEEN MADE AVAILABLE TO US, WE HAVE PREPARED THESE SHOP DRAWINGS TO ILLUSTRATE OUR UNDERSTANDING OF WHAT HAS BEEN ORDERED, AND WHAT WE INTEND TO FURNISH.

- BEFORE WE CAN ACTIVATE THIS ORDER FOR PRODUCTION, WE NEED THE APPROVAL OF:
- (1) THE ARCHITECT DESIGNER OF THE PROJECT, INDICATING THAT THESE DRAWINGS COMPLY WITH THE PLANS AND SATISFY ALL RELATED DESIGN SPECIFICATIONS, AND
  - (2) THE CONTRACTOR OR SUCH OTHER PERSON RESPONSIBLE FOR THE SITE PREPARATION, INDICATING THAT WE CAN PROCEED TO MANUFACTURE THE MATERIALS RELYING ON THEIR ASSURANCE THAT THE SITE HAS BEEN OR WILL BE PREPARED IN ACCORDANCE WITH ALL DIMENSIONS CONTAINED IN THESE SHOP DRAWINGS.

PLEASE TAKE THIS APPROVAL PROCESS SERIOUSLY, AND REVIEW CAREFULLY FOR ACCURACY AND NOTE ANY EXCEPTION, OMISSIONS, AND OR CHANGES REQUIRED. ONCE THESE DRAWINGS HAVE BEEN APPROVED, THEY WILL SERVE AS THE BASIS FOR MANUFACTURING AND THE RESULTING FULFILLMENT OF OUR CONTRACTUAL OBLIGATIONS.

UNDERSTOOD AND APPROVED:	(2) AS TO SITE PREPARATION:	CHECK ONE OF THE FOLLOWING:
(1) AS TO DESIGN SPECIFICATIONS:	_____	<input type="checkbox"/> APPROVED w/NO CHANGES
_____	_____	<input type="checkbox"/> APPROVED AS NOTED
_____	_____	<input type="checkbox"/> REVISE & RESUBMIT
DATE: _____	DATE: _____	

**CUSTOM / SIERRA  
MODEL #CES-SL12B**

- 4 - STANDARD PANELS (B-TO-B)
- 1 - FULL GABLE END (B-TO-B)
- 2 - PANEL BOARD

**GREENHOUSE SPECIFICATIONS**

ROOF GLASS [BETTER]: MC LOW-E TEMPERED SAFETY OVER CLEAR TEMPERED SAFETY (7/8" O.A. THICKNESS)

WALL GLASS [BETTER]: MC LOW-E TEMPERED SAFETY OVER CLEAR TEMPERED SAFETY (7/8" O.A. THICKNESS)

FINISH: FRAME FINISH TO BE WHITE BAKED-ON ENAMEL

GASKETS: GLAZING GASKETS TO BE E.P.D.M. RUBBER

FLASHING: BY INSTALLER

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NOTE:  
 THE INSTRUCTION MANUAL CONTAINS GENERAL GUIDELINES FOR INSTALLATION OF A FLORIAN GREENHOUSE UNIT. IT IS BASED ON A STANDARD, OUT-OF-THE-BOOK GREENHOUSE BEING INSTALLED ON A PREPARED SITE. FOR PROPER INSTALLATION, THIS MANUAL MUST BE USED IN CONJUNCTION WITH THE CUSTOMER-APPROVED DRAWINGS (CONTAINING SPECIFIC DETAILS) AND THE INCLUDED GREENHOUSE PACKING LIST WITH ATTACHED GLASS/METAL LAYOUT SHEETS.  
 FLORIAN SOLAR PRODUCTS, L.L.C. ASSUMES NO RESPONSIBILITY FOR ANY INSTALLATION OR SITE PREPARATION, OR FOR ANY DISCREPANCIES BETWEEN THE CUSTOMER-APPROVED BLUEPRINTS AND THE INSTALLATION SITE. ANY SITE ADJUSTMENTS FOR THE GREENHOUSE TO FIT PROPERLY MUST BE MADE BEFORE INSTALLATION IS STARTED. PLEASE CHECK WITH LOCAL BUILDING CODES FOR REQUIREMENTS OF WALL CONSTRUCTION, HEADERS, ANCHORS, ETC.  
 DURING INSTALLATION, SEALANT (NOT PROVIDED) MUST BE APPLIED AT ALL EXPOSED MATERIAL JOINTS INCLUDING, BUT NOT LIMITED TO, SILL ANCHOR HOLES, SILL UNDERSIDE AND ENDS, SILL AND HEAD MEMBER SPLICE JOINTS, DOOR HEADERS, BACK-TO-BACK RIDGES, ALL FLAT CAP/GLAZING JUNCTIONS, HORIZONTAL-TO-VERTICAL METAL JUNCTIONS, AND RUBBER JOINTS. RECOMMENDED SEALANT IS ONE-PART URETHANE OR SILICONE (GRADE 795 OR BETTER) CAULK.  
 ONCE INSTALLATION IS COMPLETED, AND ALL SEALANT HAS PROPERLY DRIED (SEE SEALANT MFG'S RECOMMENDATIONS), THE ENTIRE GREENHOUSE MUST BE WATER TESTED WITH A HOSE AND NOZZLE. THE WATER SHOULD BE AIMED TO SIMULATE MODERATE-TO-HEAVY RAINS, AND SHOULD BE TESTED FROM THE BOTTOM OF THE GREENHOUSE UP TOWARDS THE TOP. IF THERE IS ANY WATER INFILTRATION, THE TEST CAN BE STOPPED, THE AREA REPAIRED, AND, AFTER THE SEALANT HAS PROPERLY DRIED, THE TESTING RESUMED.  
 FOR INSTALLATION ASSISTANCE PLEASE CALL (678) 482-8811  
 FOR QUESTIONS REGARDING MISSING/DAMAGED MATERIALS, PLEASE CALL YOUR SALESMAN.

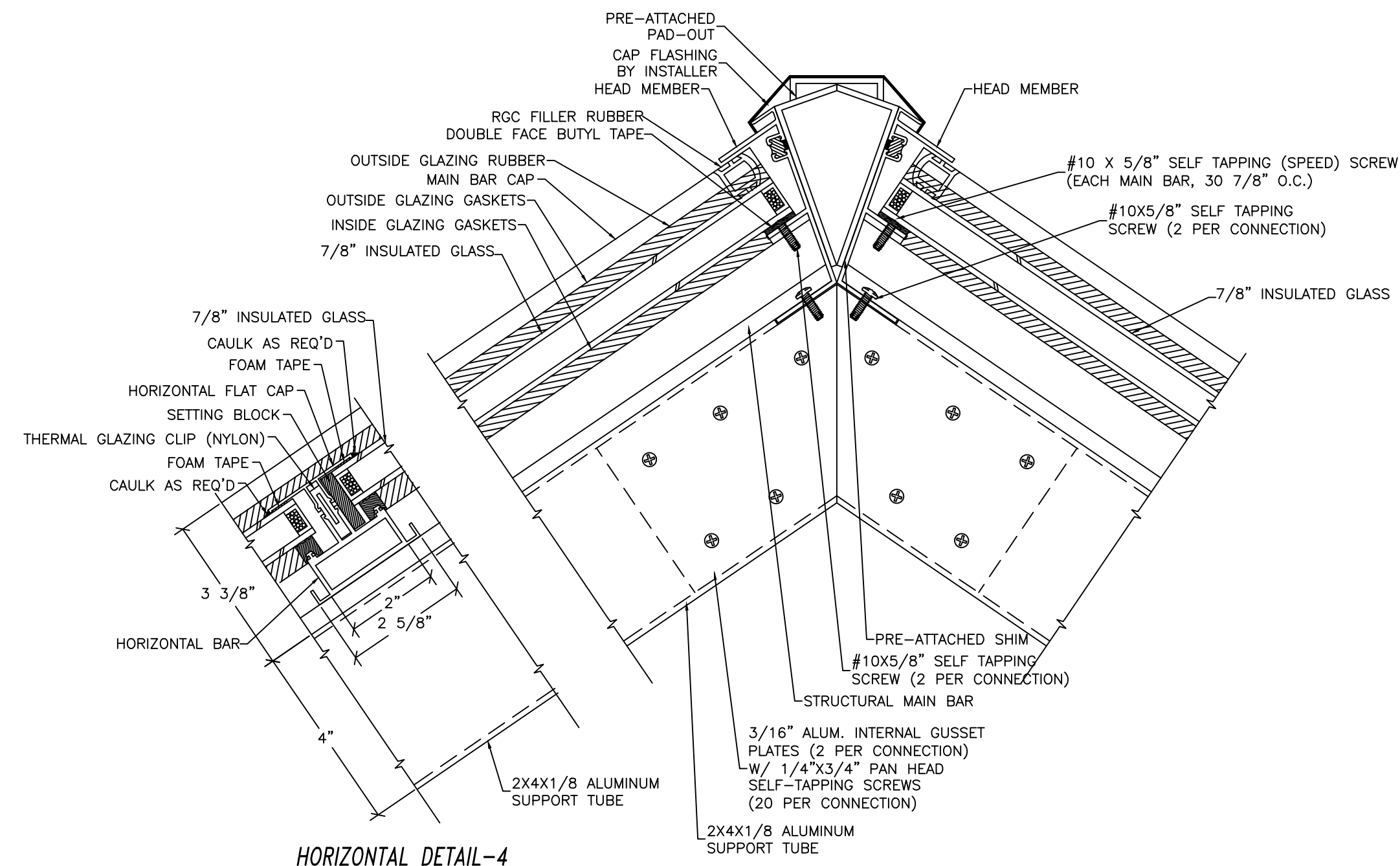


549 AVIATION BLVD.  
 GEORGETOWN, S.C.  
 29440  
 TEL. (800) 356-7426  
 FAX (843) 520-4605

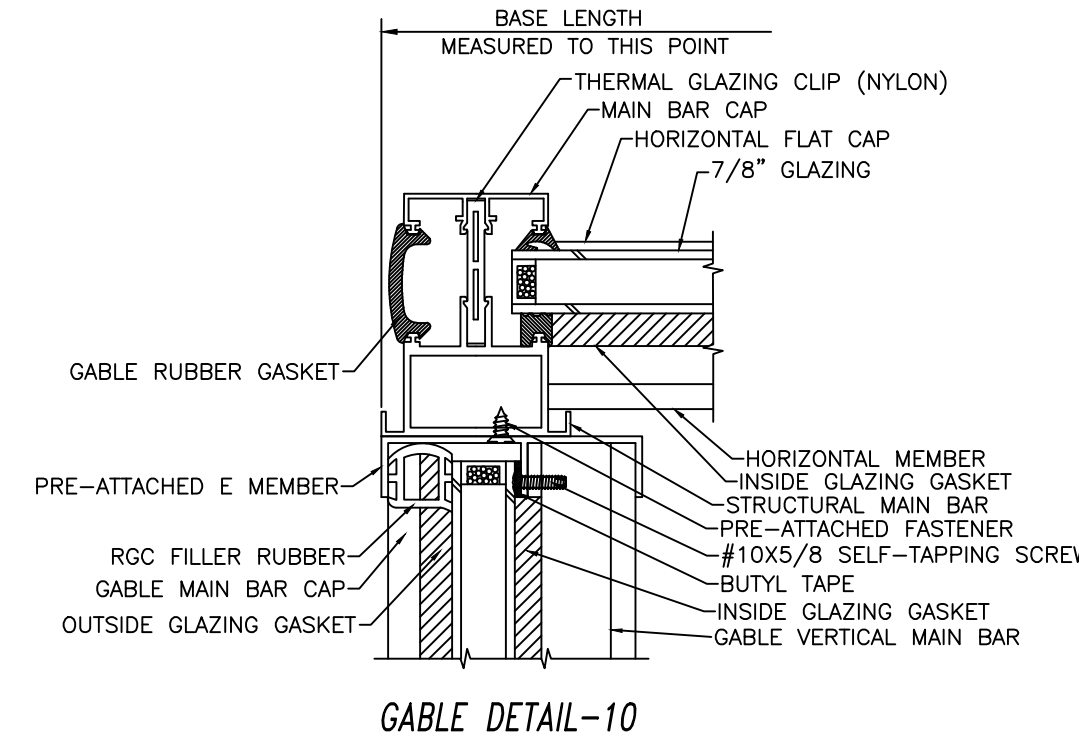
DRAWN/CHK'D: DM	CUSTOMER: ARCADIA GLASSHOUSE 354 N. LAKE ST MADISON, OH 44057	END USER: WHITNEY RESIDENCE MADISON, OH 44057
ISSUED: 2/15/23		
CODE IDENT NO 16549-5994	SCALE: 3/8" = 1'-0"	SHEET 1 OF 2
DWG NO DM-5994		

REVISIONS AND APPROVAL			
REV	DESCRIPTION	DATE	APPROVED

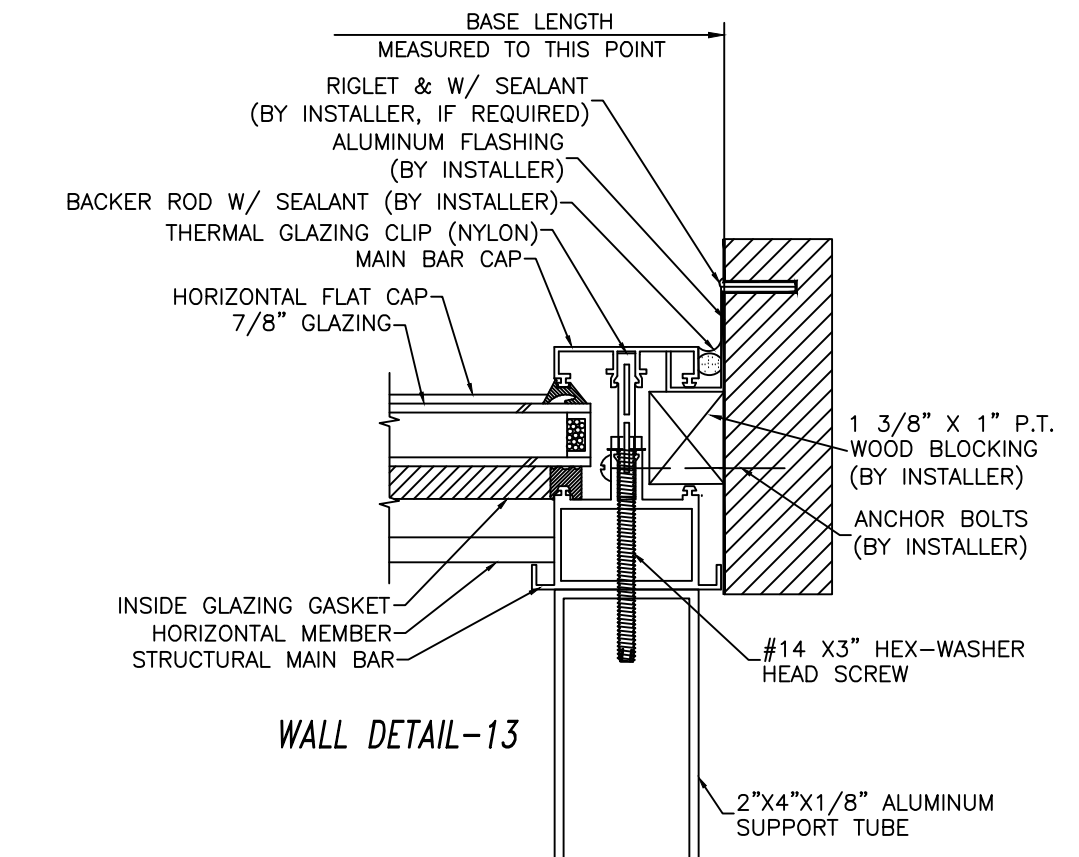
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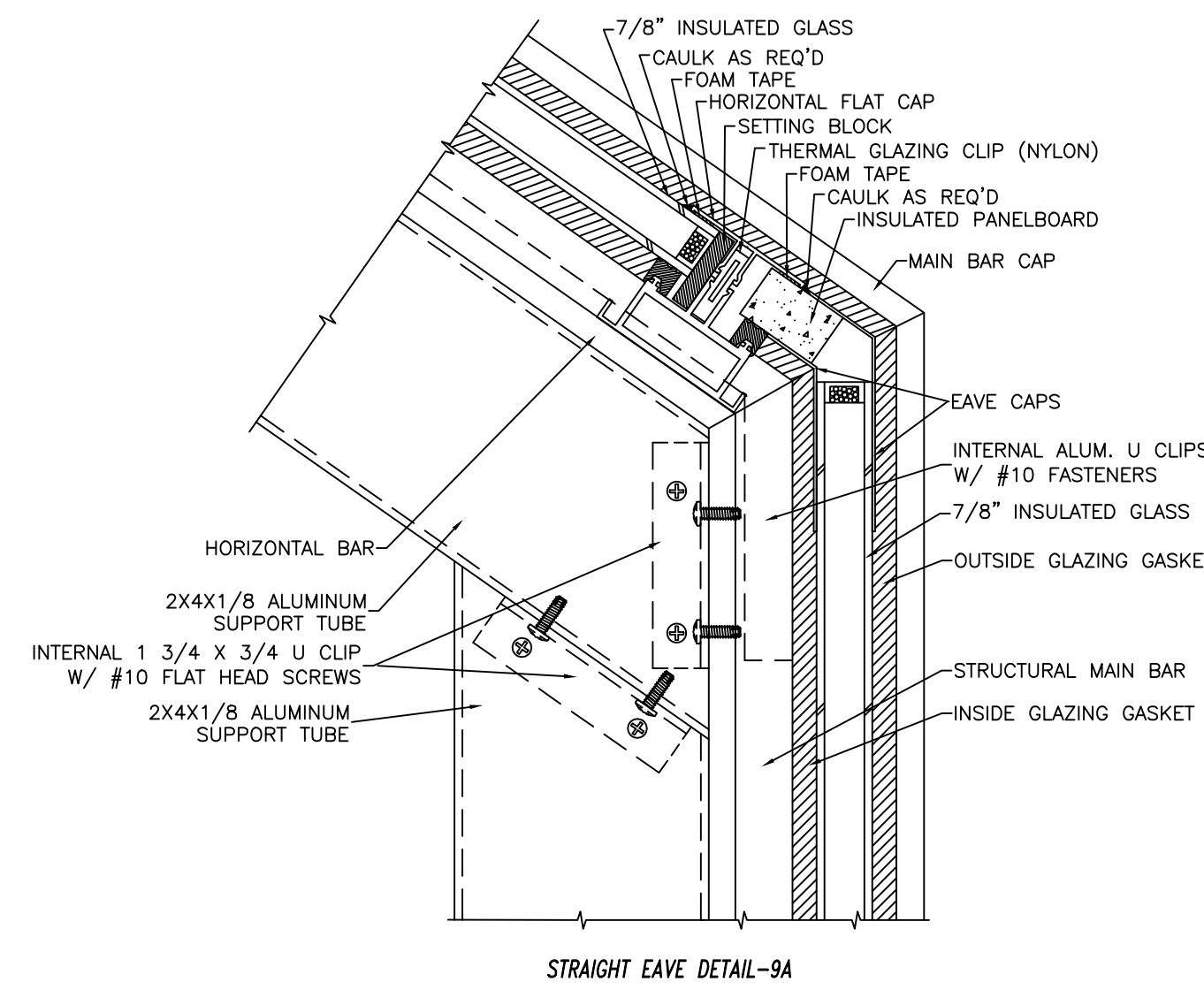
**HORIZONTAL DETAIL-4**



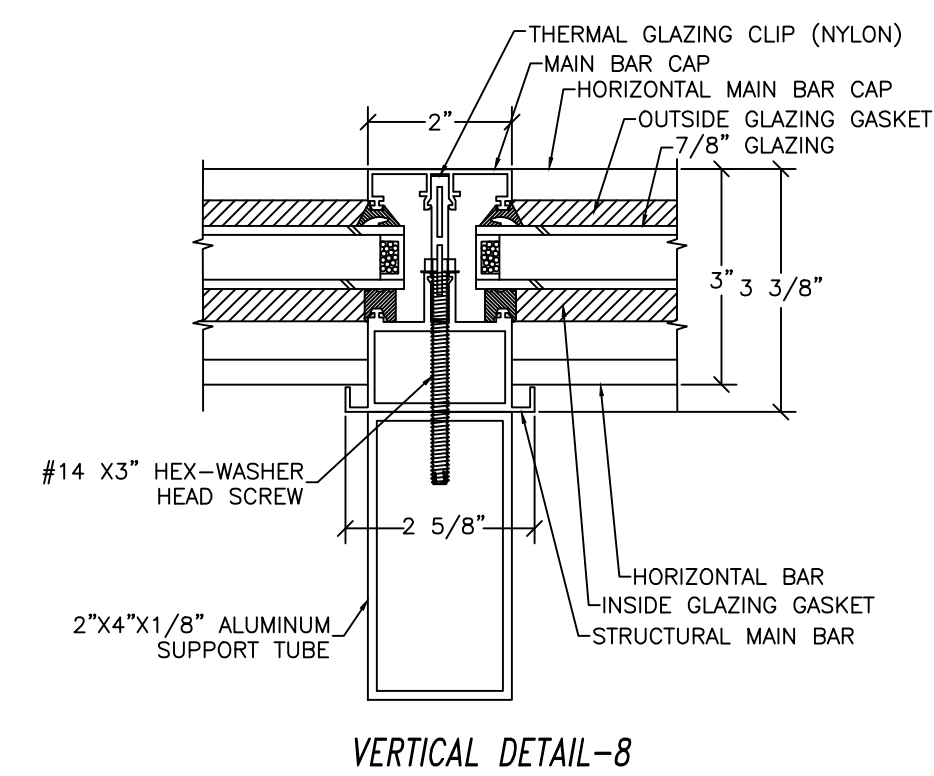
**GABLE DETAIL-10**



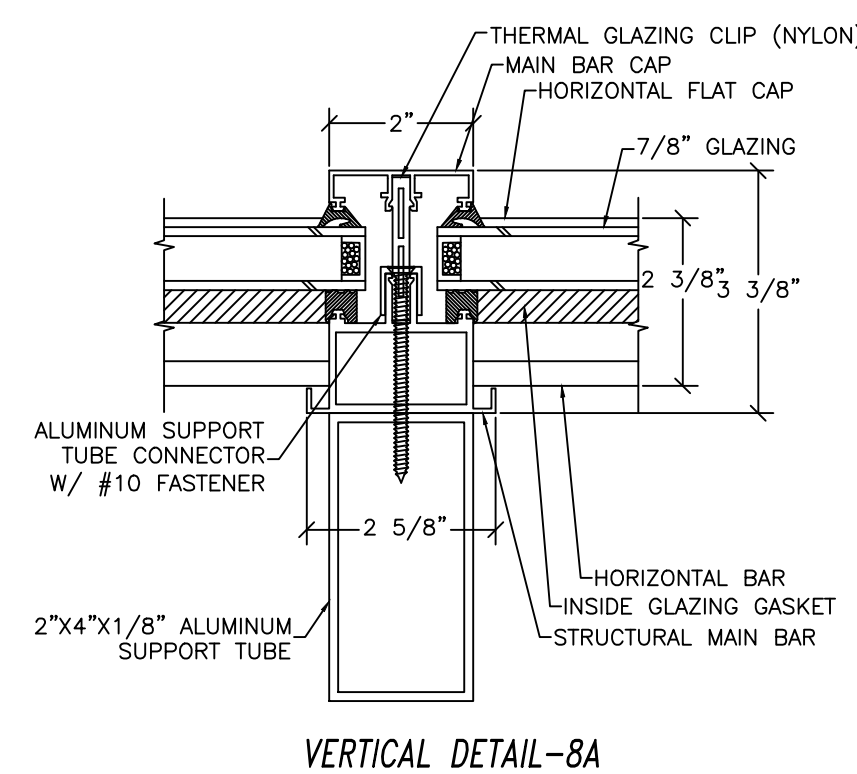
**WALL DETAIL-13**



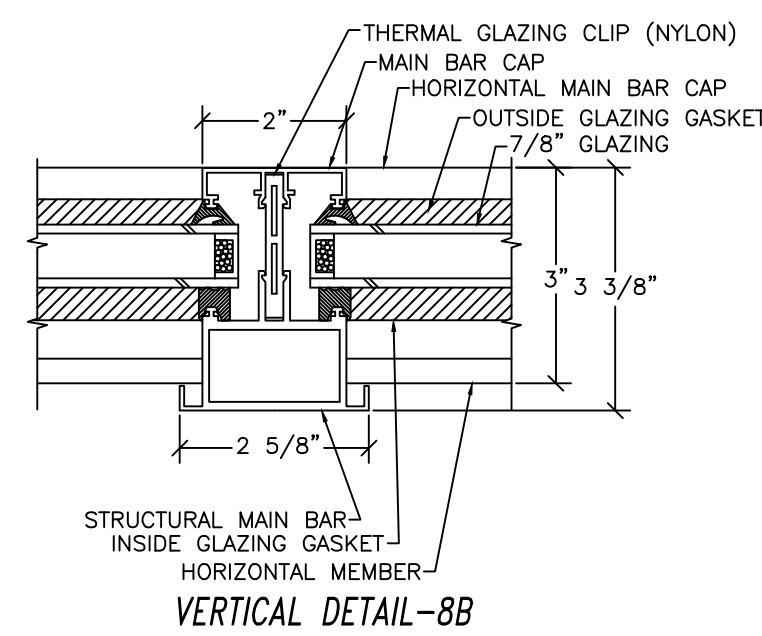
**STRAIGHT EAVE DETAIL-9A**



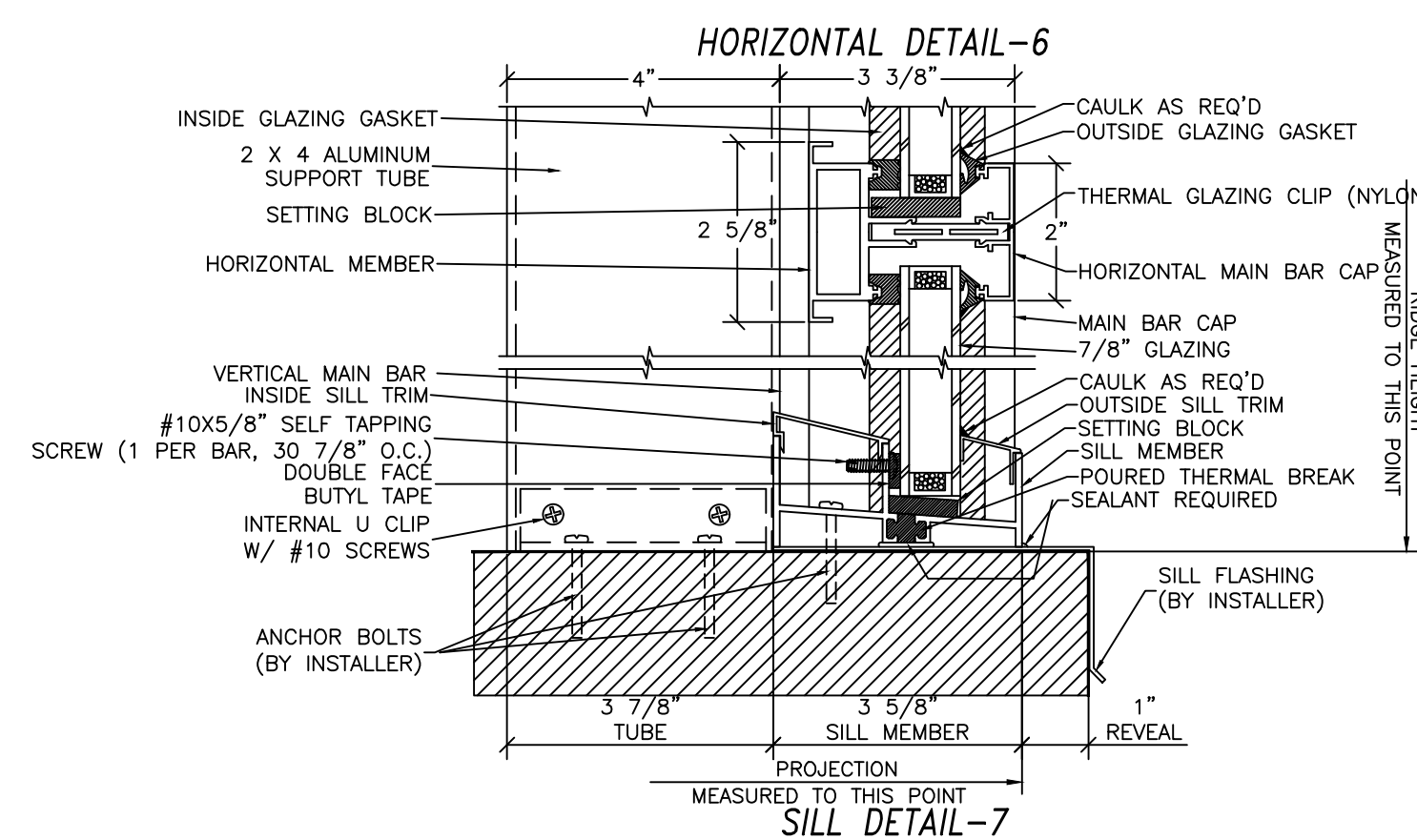
**VERTICAL DETAIL-8**



**VERTICAL DETAIL-8A**

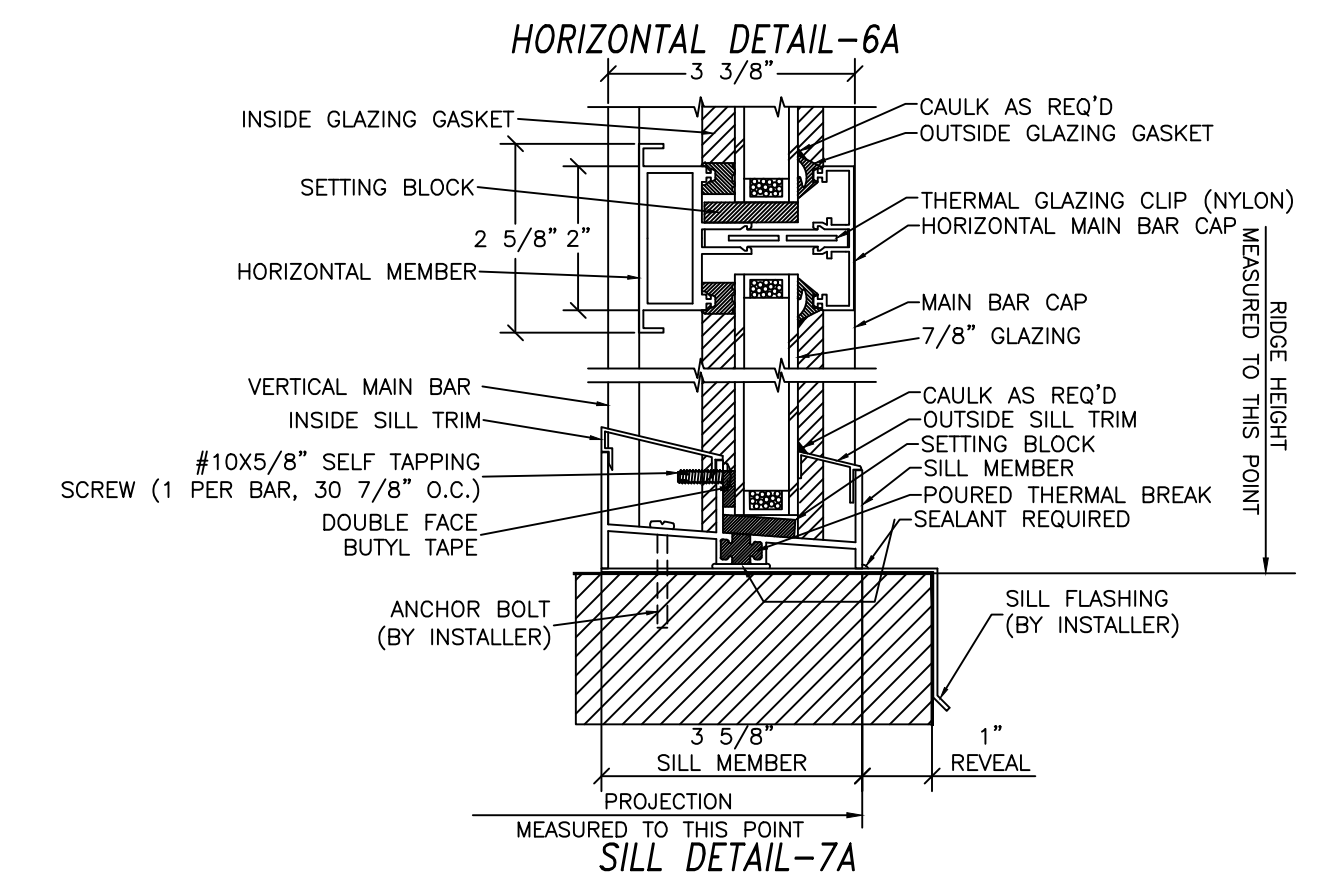


**VERTICAL DETAIL-8B**



**HORIZONTAL DETAIL-6**

**SILL DETAIL-7**



**HORIZONTAL DETAIL-6A**

**SILL DETAIL-7A**

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		549 AVIATION BLVD. GEORGETOWN, S.C. 29440 TEL. (800) 356-7426 FAX (843) 520-4605	
		IMPROVE YOUR OUTLOOK	
DRAWN/CHK'D: DM ISSUED: 2/15/23	CUSTOMER: <b>ARCADIA GLASSHOUSE</b> 354 N. LAKE ST MADISON, OH 44057	END USER: <b>WHITNEY RESIDENCE</b> MADISON, OH 44057	SCALE: 3/8" = 1'-0"
CODE IDENT NO 16549-5994 DWG NO DM-5994	SHEET 2 OF 2		SHEET 2 OF 2

### III. NEW BUSINESS

- E. The request of **45 Rockingham St LLC (Owner)**, for property located at **45 Rockingham Street** whereas relief is needed to construct a front porch and rear addition which requires the following: 1) Variance from Section 10.521 to allow a) .5 foot front yard where 5 feet is required, b) 1.5 foot side yard where 10 feet is required, c) 41% building coverage where 35% is allowed; 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 144 Lot 6 and lies within the General Residence C (GRC) District. (LU-23-41)

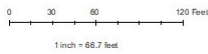
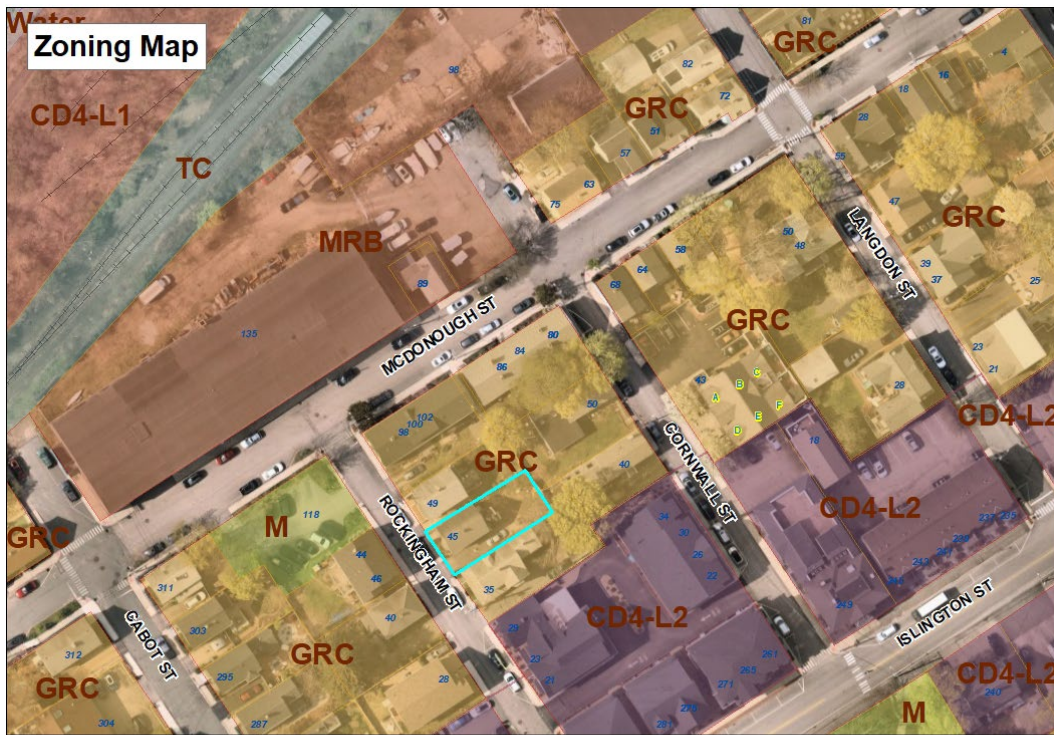
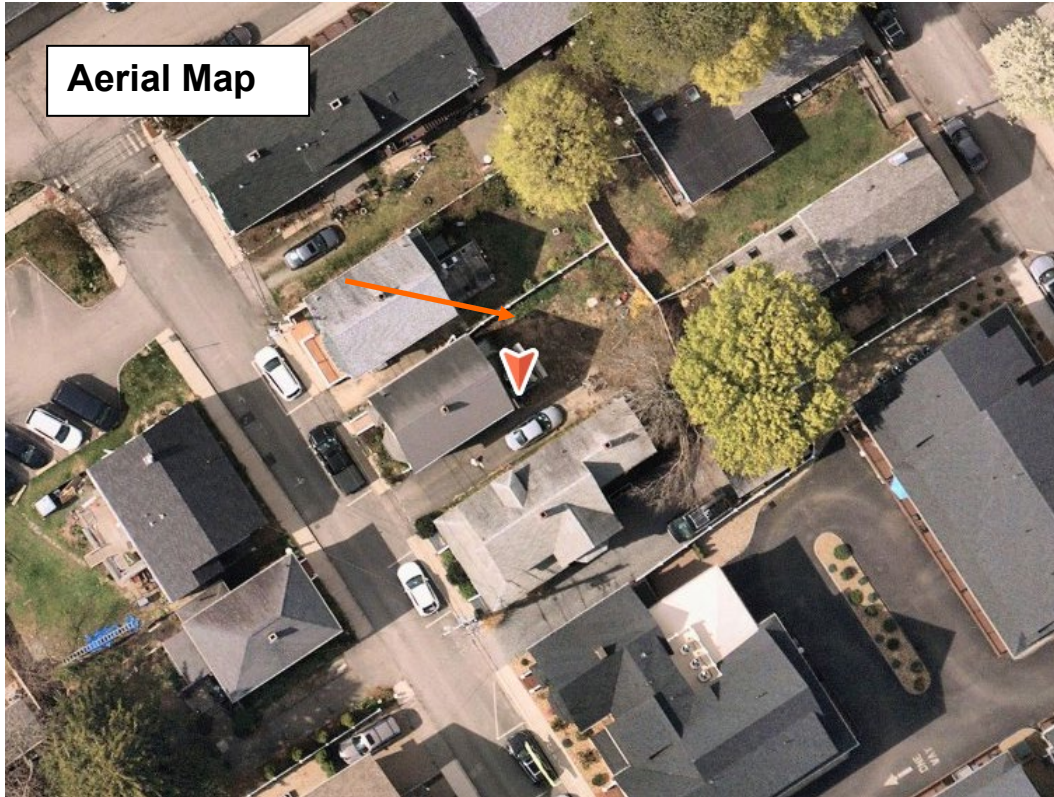
#### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single Unit Residential	Construct front porch and rear addition	Single Residential Uses
<u>Lot area (sq. ft.):</u>	2,809	2,809	3,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	2,809	2,809	3,500 min.
<u>Frontage (ft.):</u>	35	35	70 min.
<u>Lot depth (ft.):</u>	80.5	80.5	50 min.
<u>Primary Front Yard (ft.):</u>	1	.5	0 (with front yard max. averaging)
<u>Left Yard (ft.):</u>	1.5	<b>1.5</b>	10 min.
<u>Right Yard (ft.):</u>	10.5	10	10 min.
<u>Rear Yard (ft.):</u>	46.5	20	20 min.
<u>Height (ft.):</u>	25.5	29.5	35 max.
<u>Building Coverage (%):</u>	22	<b>41</b>	35 max.
<u>Open Space Coverage (%):</u>	41	30	20 min.
<u>Parking</u>	2	2	2
<u>Estimated Age of Structure:</u>	1890	<b>Variance request(s) shown in red.</b>	

#### Other Permits/Approvals Required

- Building Permit

### Neighborhood Context



**45 Rockingham Street**



## Previous Board of Adjustment Actions

No previous BOA history found.

## Planning Department Comments

The applicant is proposing to construct a front porch and construct an addition in the rear of the property. The front yard averaging calculation as found in Section 10.516.10 of the Zoning Ordinance, and provided below, was used to determine the front yard requirement is 0 feet. Please note that the project as advertised requests relief for the front yard but in fact variance 1. A. is not needed.

### **10.516.10 Front Yard Exception for Existing Alignments**

*If existing principal buildings on the same side of the same street, in the same zoning district, and within 200 feet of a lot are located closer to the street than the minimum required front yard specified in this Article, the required front yard for the principal building on such lot shall be the average of the existing alignments of all such principal buildings, rounded to the nearest foot. For the purpose of this provision, buildings on the subject lot shall not be included in the average of existing alignments.*

Should the Board grant the requests, staff recommends the below condition, or similar, be included in the approval.

1. The Board recognizes the advertised request for front yard relief is not needed. Per Section 10.516.10 of the Zoning Ordinance, the required front yard setback is 0 feet.

## Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The "unnecessary hardship" test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

  - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

## 10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings,



structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

## MEMORANDUM

**TO:** Portsmouth Zoning Board of Adjustment (“ZBA”)  
**FROM:** Kevin Baum, Esquire  
**DATE:** March 27, 2023  
**Re:** 45 Rockingham St., LLC, Owner/Applicant  
Property Location: 45 Rockingham Street  
Tax Map 144, Lot 6  
General Residence C (“GRC”)

Dear Chair Eldridge and Zoning Board Members:

On behalf of 45 Rockingham St., LLC, Owner/Applicant (the “Applicant”), we are pleased to submit this memorandum and attached exhibits in support of zoning relief to allow a front porch and rear addition be added onto the existing home at 45 Rockingham Street, to be considered by the Portsmouth Zoning Board of Adjustment (“ZBA”) at its April 18, 2023 meeting.

### I. EXHIBITS

- A. Site and Architectural Plan Set – by McHenry Architecture
- Existing Conditions Survey by Doucet Survey LLC (Sheet 1)
  - Existing Site Photographs (Sheet A1)
  - Setback Calculations (Sheet A2)
  - Architectural Site Plans (Sheet A3)
  - Floor Plans (Sheets A4-5)
  - Architectural Elevations (Sheets A6-7)
  - Architectural Rendering (Sheet A8)
- B. Photographs of Surrounding Area
- C. Tax Map 144

### II. PROPERTY/PROJECT

The subject property is a 2,811 s.f. lot located at 45 Rockingham Street in the General Residence C Zoning District (the “Property”). Exhibit A (Cover). It is currently developed with a ±1,192 s.f., 2-story, 2-bedroom single-family home with an attic on the third level which was built in approximately 1890. The existing front stairs encroach over the front property line onto the Rockingham Street sidewalk. The residential structure itself is only 1.5’ from the left side lot line. Exhibit A (Sheet 1). The Applicant proposes to remove the existing front stairs and replace them with a covered porch and stairs, improving over existing conditions by bringing the front entrance of the Property within the lot line, adding an addition to the rear of the property, and

adding dormers to the left and right side of the home. Exhibit A (Sheet A3). The proposed leftside (northern) dormer, located within the side setback will not include any windows to preserve privacy for the neighboring property and in accordance with building code. Exhibit A (Sheet A7).

Despite the existing non-conforming nature of the Property and other homes in the neighborhood, the proposal largely complies with the dimensional requirements of the Portsmouth Zoning Ordinance (“PZO”), including all height restrictions, minimum open space requirements, and front,<sup>1</sup> right (south) and rear setbacks. However, as the left (north) side of the existing building is within the 10’ side setback and the structure will increase both vertically and towards the street within this setback via the new dormer and front porch (although all improvements remain within the existing 1.5’ setback), relief is required. Additionally, the proposed addition and pergola increase the Building coverage to 41%, also requiring relief.

### III. RELIEF REQUIRED

- PZO §10.321 Expansion of nonconforming structure – to permit the addition of a dormer and front porch within the pre-existing non-conforming left side setback.
- PZO §10.521 Left Side Setback – to the extent relief beyond PZO §10.321 is deemed necessary, the Applicant requests side setback relief to allow for the dormer and porch within the left side setback where 10’ is required, 1.5’ exists and 1.5’ will remain.
- PZO §10.521 Building Coverage – to permit the construction of any approximately 327 s.f. (footprint) addition and pergola where 35% building coverage is required, 22% exist and 41% is proposed.

### IV. VARIANCE REQUIREMENTS

1. The variances will not be contrary to the public interest.
2. The spirit of the ordinance is observed.

The first step in the ZBA’s analysis is to determine whether granting the variances are not contrary to the public interest and are consistent with the spirit and intent of the ordinance, considered together pursuant to Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007) and its progeny. Upon examination, it must be determined whether granting the variances “would unduly and to a marked degree conflict with the ordinance such that it violates

---

<sup>1</sup> PZO Section 10.516.10 allows for setbacks to be determined by applying the average of other lots within 200’ of a property and along the same street. Based on other nearby properties having no setbacks (or in some instances encroaching on the sidewalk), the required setback for the Property is 0’. See Exhibit A (Sheet A2) for calculations.

the ordinance's basic zoning objectives." Id. "Mere conflict with the zoning ordinance is not enough." Id.

The intent of the GRC Zone is to "provide areas for single-family, two-family and multifamily dwellings, with appropriate accessory uses, at moderate to high densities (ranging from approximately 5 to 12 dwelling units per acre), together with appropriate accessory uses and limited services." PZO §10.410. The Property, like many in the neighborhood, contains a home which does not comply with all setback requirements. Exhibit B; Exhibit C. The proposed do not increase encroachment into any of the setbacks over existing conditions, and reduce the encroachment of the front entrance by bringing the front entrance within the front lot line. Front, rear and right side setbacks are met, as are height and open space requirements. As such, granting the requested variances will not conflict with the basic zoning objectives of the PZO.

In considering whether variances "in a marked degree conflict with the ordinance such that they violate the ordinance's basic zoning objectives," Malachy Glen, supra, also held:

One way to ascertain whether granting the variance would violate basic zoning objectives is to determine whether it would alter the essential character of the locality... . Another approach to [determine] whether granting the variance violates basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare. (emphasis added)

There are numerous other properties in the immediate area that encroach on front, side, and/or rear setbacks. Exhibit A (Sheet A1); Exhibit B. The proposed dormer is no closer to the left side lot line than existing conditions. The proposed porch retains the existing distance from the side lot line and removes the sidewalk encroachment. Given the number of buildings in the area encroaching on the sidewalk and within front, side, and/or rear setbacks, the proposal is in keeping with the surrounding area. The proposal allows for an updated, more livable residence consistent with other nearby homes. Thus, granting the variances neither alters the essential character of the locality nor threatens the public health, safety, or welfare.

### **3. Granting the variances will not diminish surrounding property values.**

The proposal adds interior living space and improves aesthetics, while conforming with the architectural character of the surrounding area and maximum height restrictions. The use of the structure and its impacts will match existing conditions. There are many properties fronting Rockingham Street, Cornwall Street, Islington Street, and Cabot Street whose buildings are

within front, side, and/or rear setbacks. The proposal also removes the existing sidewalk encroachment. These improvements result in a significant improvement to the Property, and therefore, its value and of other nearby properties. Accordingly, the variances will not diminish surrounding property values.

**4. Denial of the variances results in an unnecessary hardship.**

- a. Special conditions distinguish the property from others in the area.

The Property was built in 1890 and is situated on a rectangular lot that is approximately 35' wide and 80' long, leaving insufficient space for a single-family home that complies with modern-day setback requirements. Almost half the width of the existing home is located within the left side setback, and the existing home is 10'5" from the right side lot line. These facts drive the location of the proposed changes, combining to create special conditions.

- b. No fair and substantial relationship exists between the general public purposes of the ordinance and its specific application in this instance.

The purpose of setback requirements is to prevent overcrowding and overburdening of land, improve sightlines for pedestrians and motorists, ensure adequate light and air circulation, and provide sufficient area for stormwater treatment. All proposed changes either comply with setback requirements (rear addition), are within the footprint of the existing home (dormers) or improve over existing conditions (front entry). Ample open space – 10% more than required – is preserved without over building the lot in relation to others in the area. Aesthetics are improved. Accordingly, there is no fair and substantial relationship between the purposes of the ordinance and its application in this instance.

- c. The proposed use is reasonable.

If the use is permitted, it is deemed reasonable. Vigeant v. Hudson, 151 N.H. 747 (2005). Residential use is permitted in the GRC Zone. The use will remain that of a single-family home. Although the addition slightly decreases open space, the resulting open space is still 10% higher than the Ordinance requires and is consistent with other homes in the area. Despite the expansion, the proposal makes use of the current structure's footprint, with the exception of a small portion of the front porch, which removes an existing sidewalk encroachment.

**5. Substantial justice will be done by granting the variances.**

If "there is no benefit to the public that would outweigh the hardship to the applicant" this factor is satisfied. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508

(2011). That is, “any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice.” Malachy Glen, supra at 109.


“The right to use and enjoy one's property is a fundamental right protected by both the State and Federal Constitutions.” N.H. CONST. pt. I, arts. 2, 12; U.S. CONST. amends. V, XIV; Town of Chesterfield v. Brooks, 126 N.H. 64 (1985) at 68. Part I, Article 12 of the New Hampshire Constitution provides in part that “no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.” Thus, our State Constitutional protections limit the police power of the State and its municipalities in their regulation of the use of property. L. Grossman & Sons, Inc. v. Town of Gilford, 118 N.H. 480, 482 (1978). “Property” in the constitutional sense has been interpreted to mean not the tangible property itself, but rather the right to possess, use, enjoy and dispose of it. Burrows v. City of Keene, 121 N.H. 590, 597 (1981) (emphasis added).

The proposal is quite modest, retaining the existing use while improving aesthetics and livability while complying with open space and improving the front yard setback over existing conditions. Access to air and light is maintained, so there is no harm to the public in granting the variance. Conversely, the Applicant will be greatly harmed by denial of the variances because it will be unable to create additional living space or reasonably renovate this residence. Denial will also harm the public by retaining the existing sidewalk encroachment. Without question, substantial justice will be done by granting the variance.

## VI. CONCLUSION

For all of the reasons stated, the Applicant respectfully requests that the Portsmouth Zoning Board of Adjustment grant the requested variance.

Respectfully submitted,  
**45 Rockingham, LLC**

  
By: Kevin Baum  
Stephanie Johnson  
Hoefle, Phoenix, Gormley & Roberts, PLLC  
127 Parrott Avenue  
Portsmouth, New Hampshire 03801

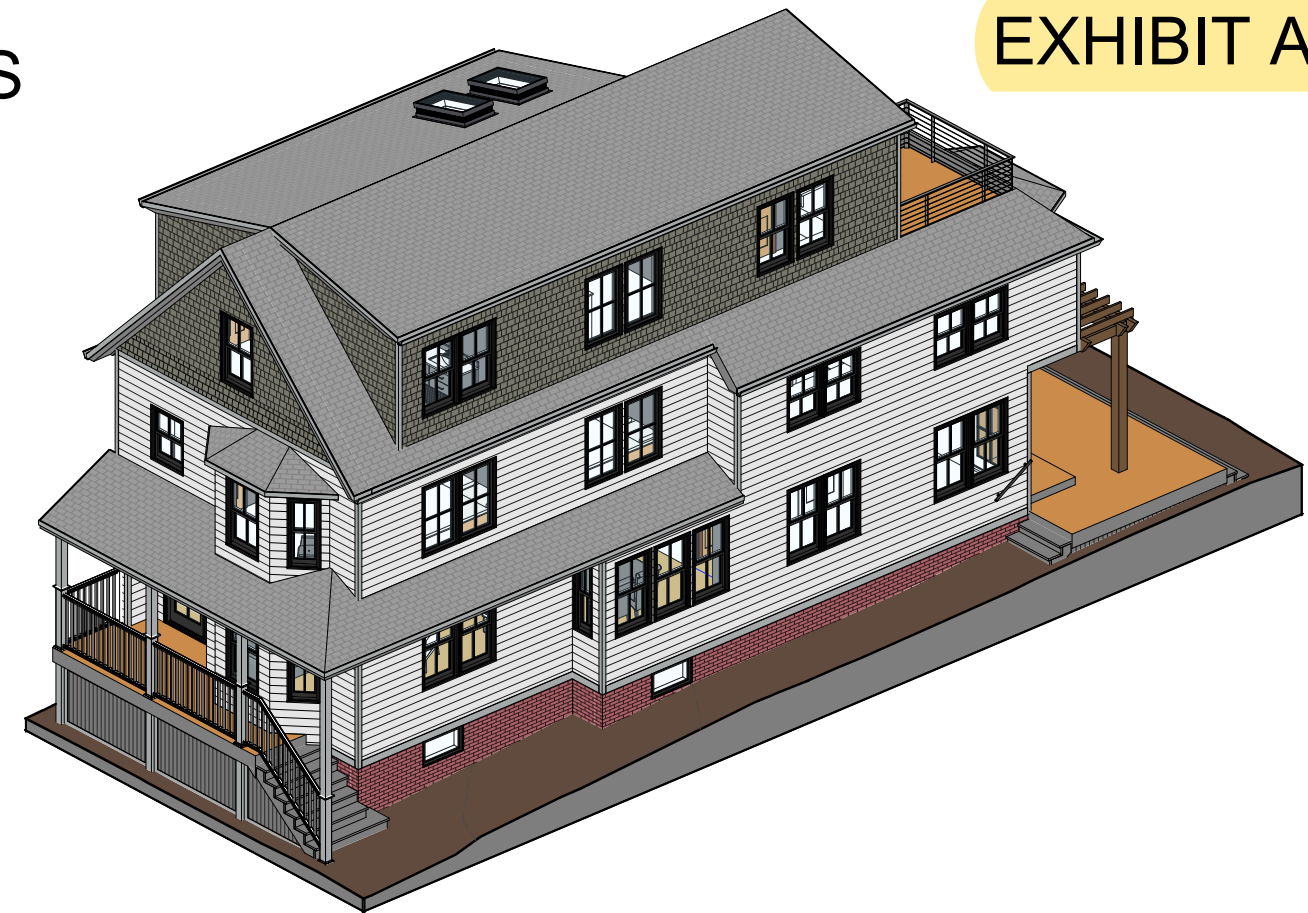
# 45 ROCKINGHAM STREET ADDITION AND RENOVATIONS

EXHIBIT A

ZONING BOARD OF ADJUSTMENT - APRIL 2023, PORTSMOUTH, NEW HAMPSHIRE

GENERAL PROJECT DESCRIPTION:

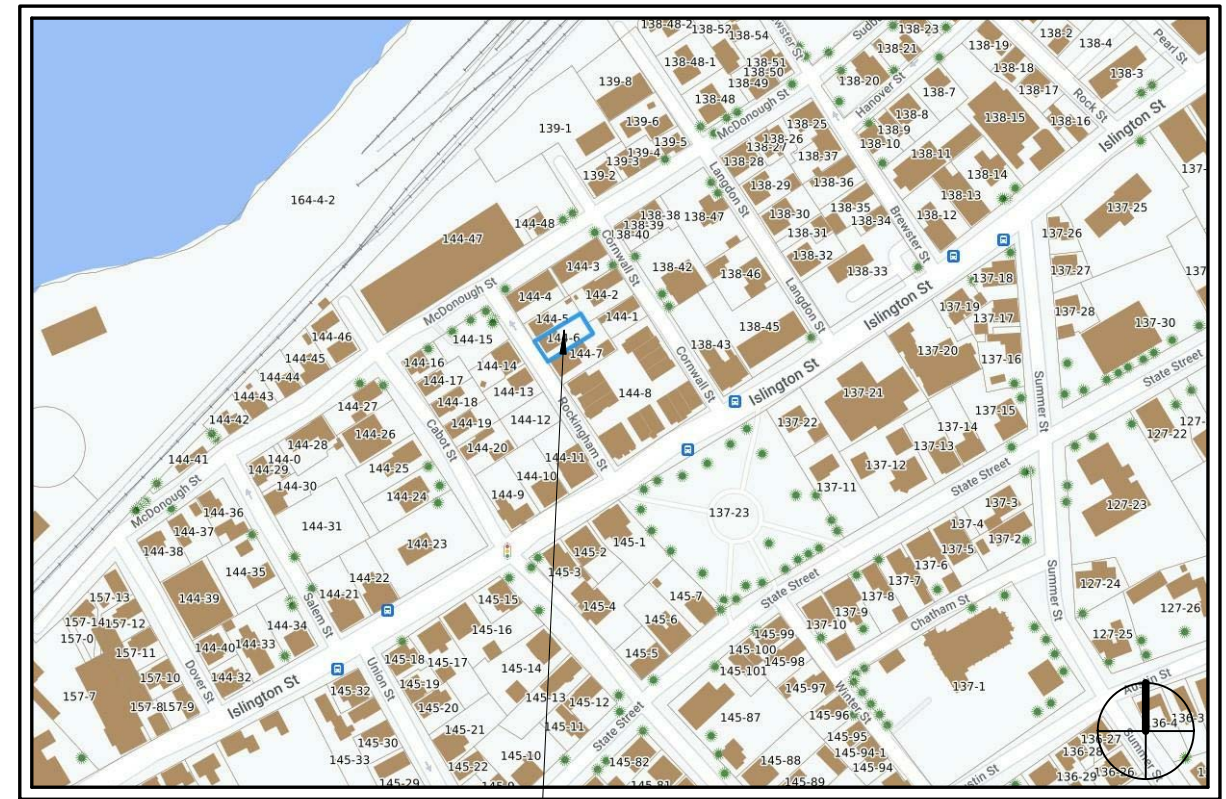
- FULL INTERIOR RENOVATION OF EXISTING SINGLE FAMILY DWELLING.
- REMOVAL OF FRONT STAIRS, REAR DECK AND STAIRS, BULKHEAD, AND PORTIONS OF REAR EXTERIOR WALL AND EXISTING ROOF.
- REAR ADDITION ABIDES BY ALL REQUIRED YARD SETBACKS.
- FRONT COVERED PORCH AND STAIRS ADDITION ASKING FOR RELIEF WITHIN LEFT YARD YARD SETBACKS.
- ADDITION OF DORMER ASKING FOR RELIEF WITHIN LEFT YARD SETBACK, MAXIMUM BUILDING HEIGHT TO REMAIN.



SHEET LIST	
Sheet Number	Sheet Name
C	COVER
C2	EXISTING CONDITION SURVEY
A1	EXISTING PHOTOGRAPHS
A2	SETBACK CALCULATIONS
A3	ARCHITECTURAL SITE PLANS
A4	FLOOR PLANS
A5	FLOOR PLANS
A6	ELEVATIONS
A7	ELEVATIONS
A8	RENDERING

45 ROCKINGHAM STREET DIMENSIONAL CRITERIA			
GENERAL RESIDENCE DISTRICT C			
	REQUIRED	EXISTING	PROPOSED
BUILDING FOOTPRINT		620 SF	947 SF
GROSS BUILDING		1,192 SF	2,560 SF
BUILDING COVERAGE	35%	22%	41%
RIGHT SIDE YARD SETBACK	10' - 0"	10' - 5" +/-	10' - 1" +/-
LEFT SIDE YARD SETBACK	10' - 0"	1' - 6" +/-	1' - 6" +/-
REAR YARD SETBACK	20' - 0"	46' - 9" +/-	20' - 0"
FRONT YARD SETBACK (SEE A2 FOR CALCULATIONS)	0' - 0"	1' - 1 3/4" +/-	0' - 6 3/4" +/-
LOT SIZE	3,500 SF	2,809 SF	2,809 SF
LOT AREA PER DWELLING UNIT	3,500 SF	2,809 SF	2,809 SF
LOT FRONTAGE	70' - 0"	35' - 0" +/-	35' - 0" +/-
LOT DEPTH	50' - 0"	80' - 6" +/-	80' - 6" +/-
BUILDING HEIGHT (SLOPED)	35' - 0"	25' - 6" +/-	29' - 8" +/-
OPEN SPACE (MIN)	20%	41%	30%

BLUE INDICATES EXISTING NON-CONFORMITY  
RED INDICATED VARIANCE REQUEST



45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801

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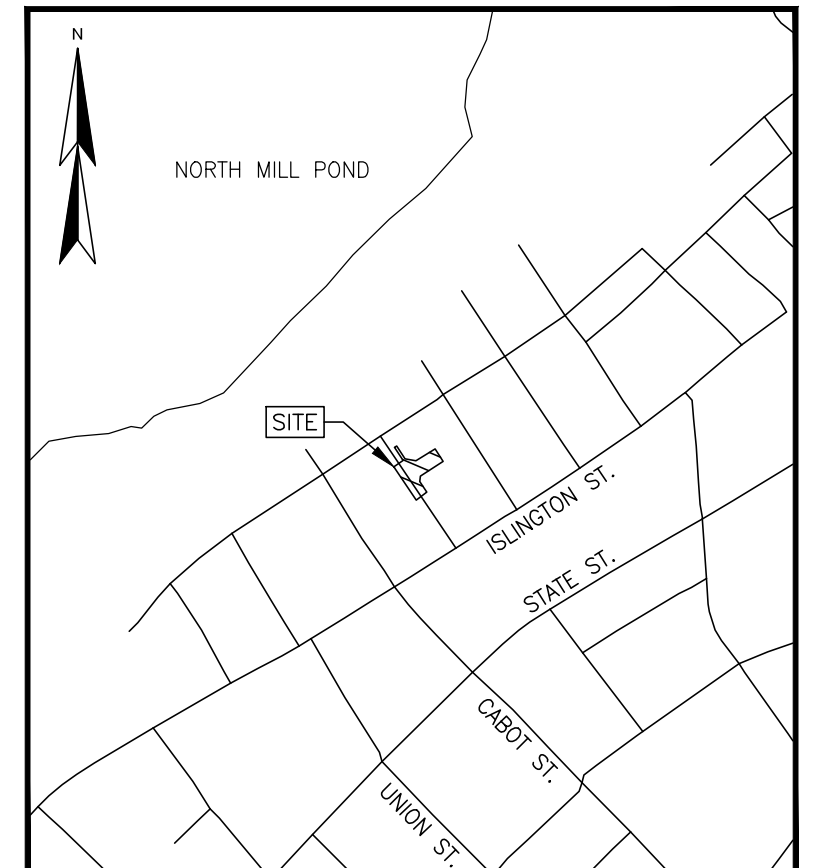
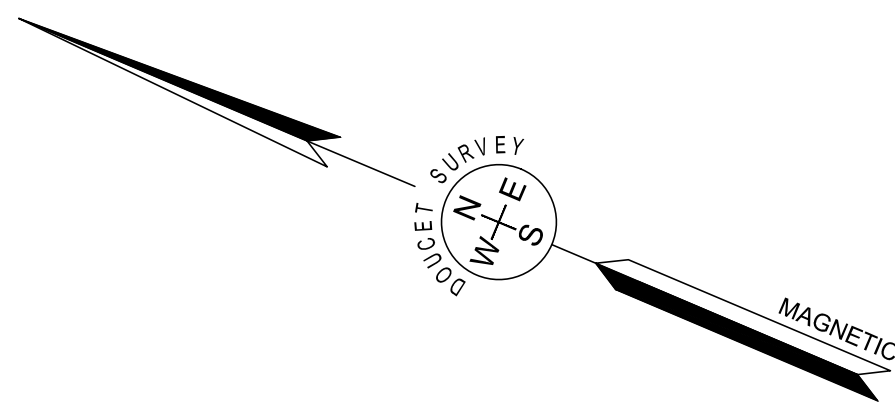
**ADDITION AND RENOVATION**  
45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801

**COVER**  
ZONING BOARD OF ADJUSTMENT

**McHENRY ARCHITECTURE**  
4 Market Street  
Portsmouth, New Hampshire

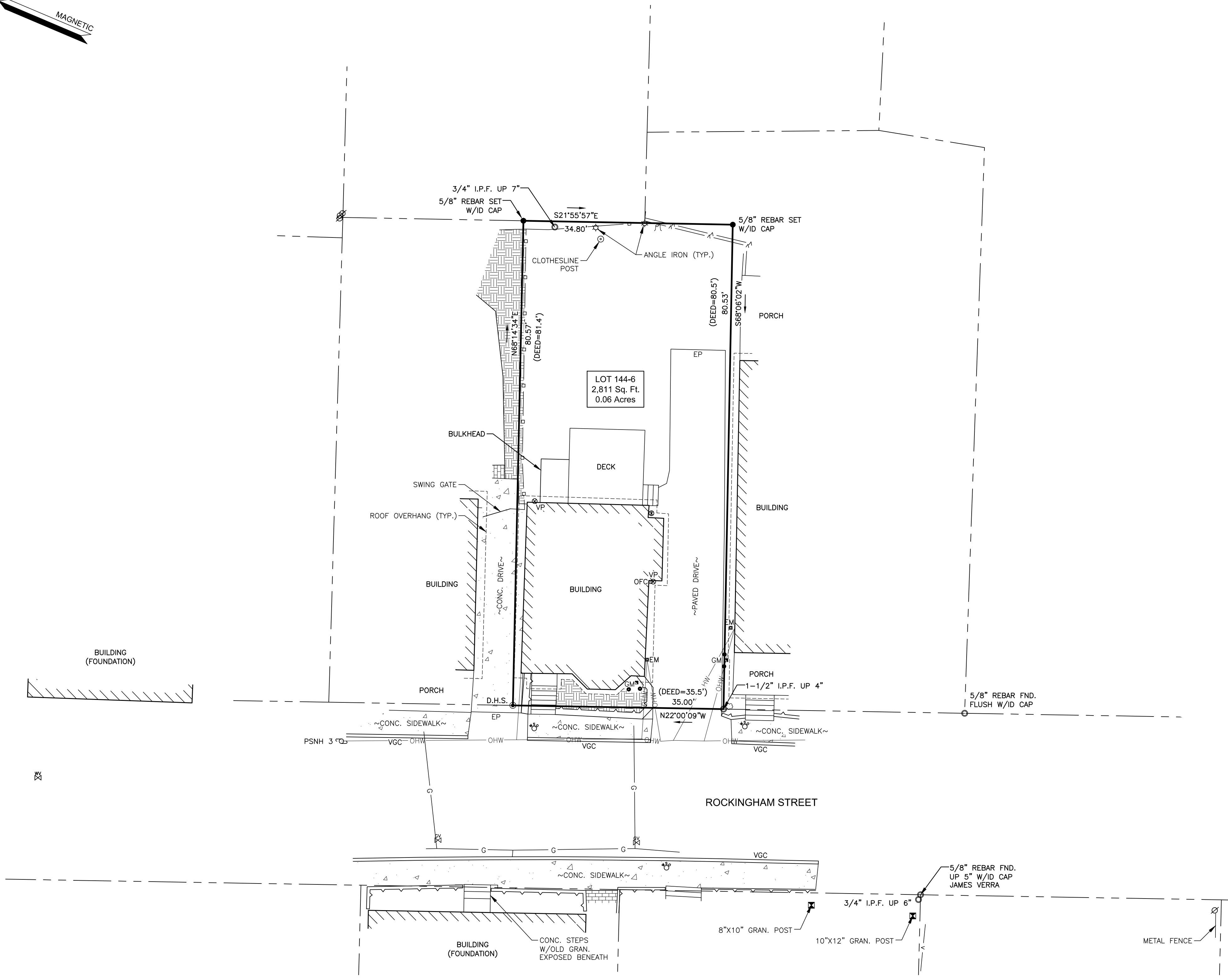
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03/14/2023  
McHA: RD / MG  
NOT TO SCALE  
**Locus**



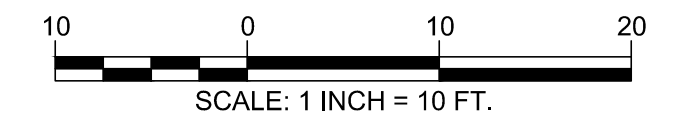
LOCATION MAP (n.t.s.)

- LEGEND**
- PROPERTY LINE
  - - - APPROXIMATE ABUTTER LINE
  - ▬ RETAINING WALL
  - ▬ WOODEN STOCKADE FENCE
  - ▬ VINYL STOCKADE FENCE
  - OHW — OVERHEAD WIRE
  - G — GAS LINE
  - ▬ CONCRETE
  - ▬ LANDSCAPED AREA
  - ▬ BRICK
  - PIPE/ROD FOUND
  - DRILL HOLE SET (D.H.S.)
  - 5/8" REBAR W/ID CAP SET
  - FENCE POST
  - ANGLE IRON
  - UTILITY POLE
  - SEWER MANHOLE
  - WATER GATE VALVE
  - WATER SHUTOFF VALVE
  - GAS GATE VALVE
  - GM GAS METER
  - EM FAUCET
  - EM ELECTRIC METER
  - VP VENT PIPE
  - BOLLARD
  - BUSH
  - TREE STUMP
  - CONC. CONCRETE
  - EP EDGE OF PAVEMENT
  - GRAN. GRANITE
  - I.P.F. IRON PIPE FOUND
  - OFC OIL FILL CAP
  - TYP. TYPICAL
  - VGC VERTICAL GRANITE CURB



- NOTES:**
- REFERENCE: TAX MAP 144, LOT 6  
45 ROCKINGHAM STREET  
PORTSMOUTH, NH
  - FIELD SURVEY PERFORMED BY P.C.L. & J.R.P. (DOUCET SURVEY) ON OCTOBER 20, 2022 USING A TRIMBLE S6 TOTAL STATION WITH A TRIMBLE TS3C3 DATA COLLECTOR. TRAVERSE ADJUSTMENT BASED ON LEAST SQUARE ANALYSIS.
  - THE INTENT OF THIS PLAN IS TO SHOW THE LOCATION OF BOUNDARIES IN ACCORDANCE WITH AND IN RELATION TO THE CURRENT LEGAL DESCRIPTION, AND IS NOT AN ATTEMPT TO DEFINE UNWRITTEN RIGHTS, DETERMINE THE EXTENT OF OWNERSHIP, OR DEFINE THE LIMITS OF TITLE.
  - HORIZONTAL DATUM BASED ON MAGNETIC OBSERVATION IN OCTOBER 2022.
  - UNDERGROUND UTILITIES SHOWN HEREON ARE BASED ON OBSERVED PHYSICAL EVIDENCE AND PAINT MARKS FOUND ON-SITE. ALL UNDERGROUND UTILITIES (ELECTRIC, GAS, TEL, WATER, SEWER DRAIN SERVICES) ARE SHOWN IN SCHEMATIC FASHION, THEIR LOCATIONS ARE NOT PRECISE OR NECESSARILY ACCURATE. NO WORK WHATSOEVER SHALL BE UNDERTAKEN USING THIS PLAN TO LOCATE THE ABOVE SERVICES. CONSULT WITH THE PROPER AUTHORITIES CONCERNED WITH THE SUBJECT SERVICE LOCATIONS FOR INFORMATION REGARDING SUCH. CALL DIG-SAFE AT 1-888-DIG-SAFE.
  - PER NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES BOARD OF LICENSURE FOR LAND SURVEYORS, LAN 503.08(A): "MONUMENTS SHALL BE SET SO THAT UPON COMPLETION OF THE BOUNDARY SURVEY, EACH CORNER OF THE PROPERTY WILL BE PHYSICALLY MONUMENTED". AT THIS TIME, DOUCET SURVEY HAS NOT BEEN CONTRACTED TO SET ANY MONUMENTATION.

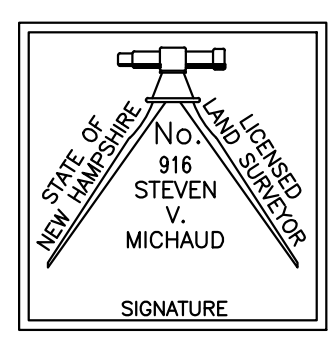
- REFERENCE PLANS:**
- "PLAN OF THE ROCK FIELD IN THE TOWN OF PORTSMOUTH" DATED 1815 BY BENJAMIN ACKERMAN, R.C.R.D. PLAN 00562.
  - "AS-BUILT CONDOMINIUM SITE PLAN, 275 ISLINGTON STREET" DATED 3/16/2018 BY JONES & BEACH ENGINEERS, INC., R.C.R.D. PLAN D-40708.
  - SURVEY WORKSHEET OF 50 CORNWALL STREET BY TF MORAN.



**BOUNDARY SKETCH  
FOR  
STILETTO CONSTRUCTION  
OF  
TAX MAP 144 LOT 6  
45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE**

NO.	DATE	DESCRIPTION	BY

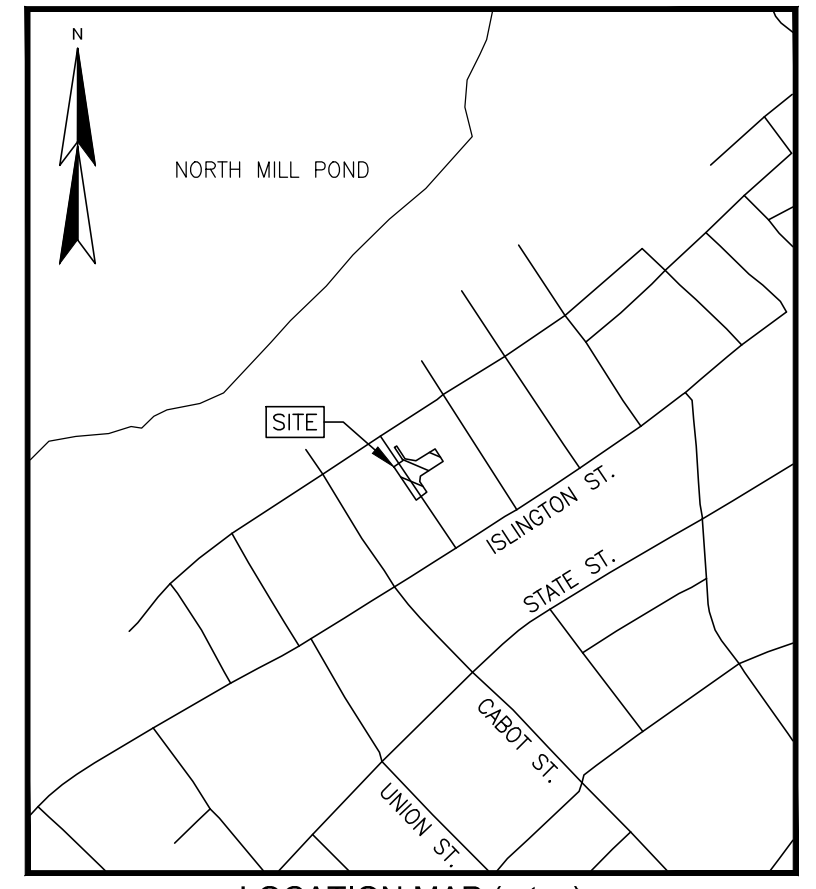
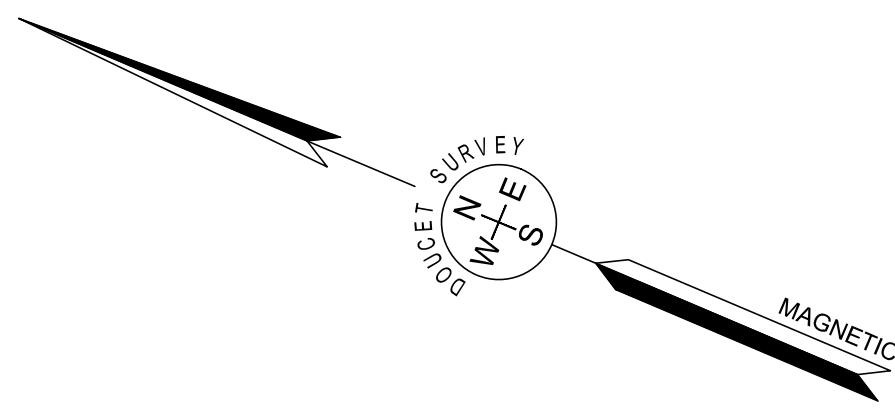
DRAWN BY: J.R.P.	DATE: JANUARY 30, 2023
CHECKED BY: S.V.M.	DRAWING NO. 7695A
JOB NO. 7695	SHEET 1 OF 1



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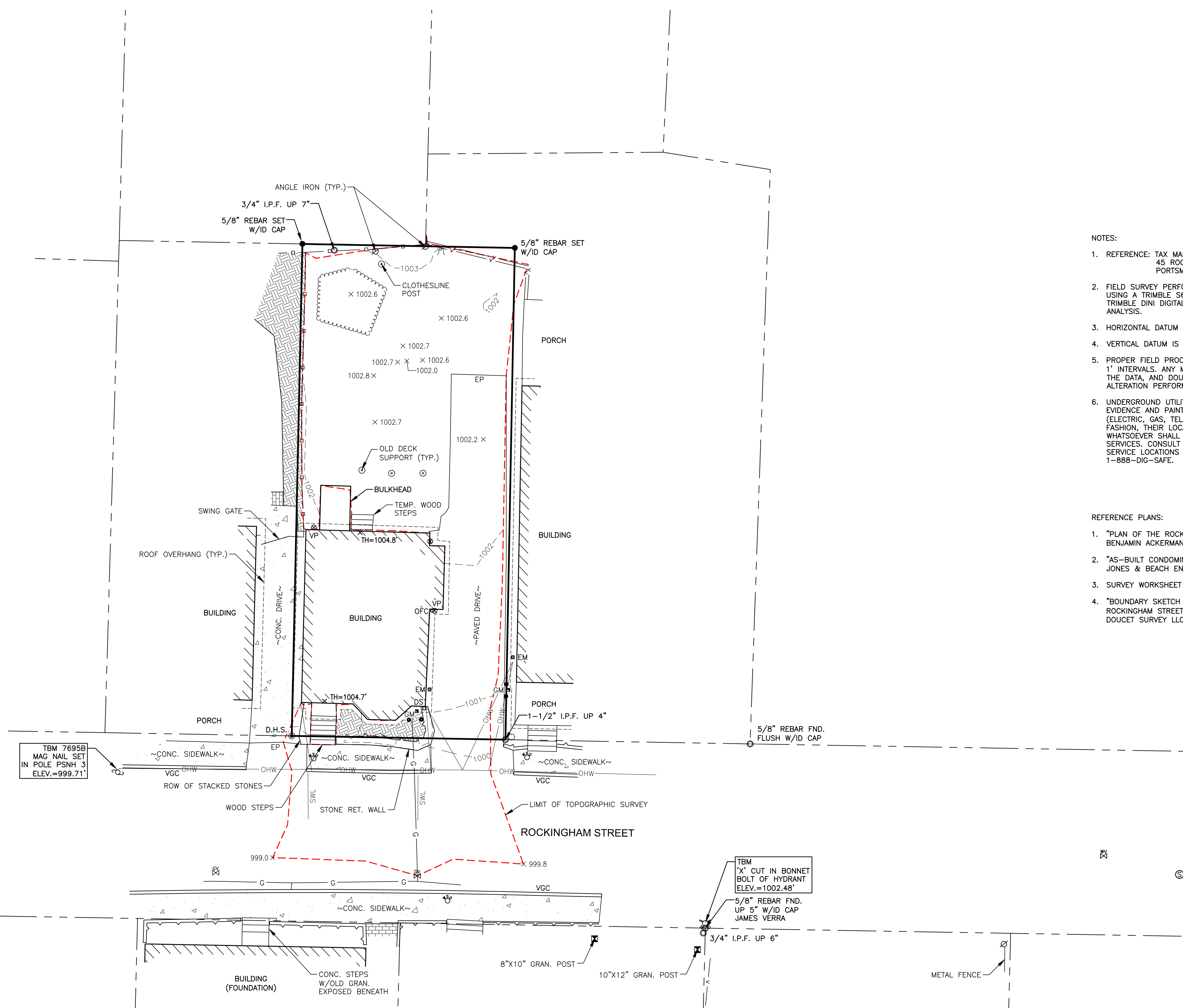
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 PLOT BY: JRM  
 PLOT SCALE: 1"=10'  
 PLOT SHEET: 1 OF 1  
 PLOT SIZE: 11x17"





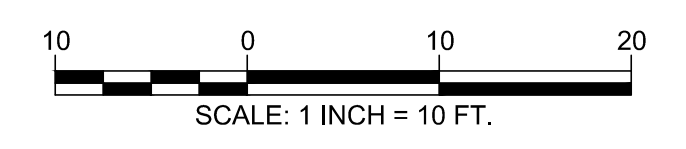
LOCATION MAP (n.t.s.)

- LEGEND**
- PROPERTY LINE
  - - - APPROXIMATE ABUTTER LINE
  - 100 — MAJOR CONTOUR LINE
  - 98 — MINOR CONTOUR LINE
  - RETAINING WALL
  - v — WOODEN STOCKADE FENCE
  - — VINYL STOCKADE FENCE
  - OHW — OVERHEAD WIRE
  - G — GAS LINE
  - SHRUB LINE
  - CONCRETE
  - LANDSCAPED AREA
  - BRICK
  - — PIPE/ROD FOUND
  - — 5/8" REBAR SET
  - ⊙ — DRILL HOLE SET (D.H.S.)
  - ⊠ — ANGLE IRON
  - ⊕ — UTILITY POLE
  - ⊙ — SEWER MANHOLE
  - ⊕ — WATER GATE VALVE
  - ⊕ — WATER SHUTOFF VALVE
  - ⊕ — FAUCET
  - ⊕ — GAS GATE VALVE
  - ⊕ — GAS METER
  - ⊕ — ELECTRIC METER
  - ⊕ — VENT PIPE
  - — BOLLARD
  - — DOWNSPOUT
  - ⊕ — BUSH
  - ⊕ — TREE STUMP
  - CONC. — CONCRETE
  - EP — EDGE OF PAVEMENT
  - GRAN. — GRANITE
  - I.P.F. — IRON PIPE FOUND
  - OFC — OIL FILL CAP
  - SWL — SINGLE WHITE LINE
  - TYP. — TYPICAL
  - VGC — VERTICAL GRANITE CURB



- NOTES:**
- REFERENCE: TAX MAP 144, LOT 6, 45 ROCKINGHAM STREET PORTSMOUTH, NH
  - FIELD SURVEY PERFORMED BY DOUCET SURVEY ON OCTOBER 2022 & JANUARY 2023 USING A TRIMBLE S6 TOTAL STATION WITH A TRIMBLE TSC3 DATA COLLECTOR AND A TRIMBLE DINI DIGITAL AUTO LEVEL. TRAVERSE ADJUSTMENT BASED ON LEAST SQUARE ANALYSIS.
  - HORIZONTAL DATUM BASED ON MAGNETIC OBSERVATION IN OCTOBER 2022.
  - VERTICAL DATUM IS ASSUMED.
  - PROPER FIELD PROCEDURES WERE FOLLOWED IN ORDER TO GENERATE CONTOURS AT 1' INTERVALS. ANY MODIFICATION OF THIS INTERVAL WILL DIMINISH THE INTEGRITY OF THE DATA, AND DOUCET SURVEY WILL NOT BE RESPONSIBLE FOR ANY SUCH ALTERATION PERFORMED BY THE USER.
  - UNDERGROUND UTILITIES SHOWN HEREON ARE BASED ON OBSERVED PHYSICAL EVIDENCE AND PAINT MARKS FOUND ON-SITE. ALL UNDERGROUND UTILITIES (ELECTRIC, GAS, TEL, WATER, SEWER DRAIN SERVICES) ARE SHOWN IN SCHEMATIC FASHION. THEIR LOCATIONS ARE NOT PRECISE OR NECESSARILY ACCURATE. NO WORK WHATSOEVER SHALL BE UNDERTAKEN USING THIS PLAN TO LOCATE THE ABOVE SERVICES. CONSULT WITH THE PROPER AUTHORITIES CONCERNED WITH THE SUBJECT SERVICE LOCATIONS FOR INFORMATION REGARDING SUCH. CALL DIG-SAFE AT 1-888-DIG-SAFE.

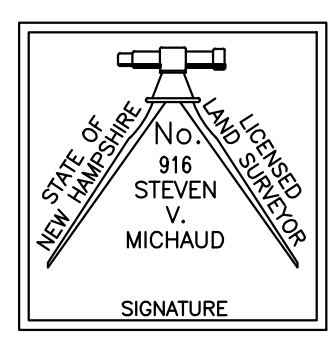
- REFERENCE PLANS:**
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  - "AS-BUILT CONDOMINIUM SITE PLAN, 275 ISLINGTON STREET" DATED 3/16/2018 BY JONES & BEACH ENGINEERS, INC., R.C.R.D. PLAN D-40708.
  - SURVEY WORKSHEET OF 50 CORNWALL STREET BY TF MORAN.
  - "BOUNDARY SKETCH FOR STILETTO CONSTRUCTION OF TAX MAP 144 LOT 6 45 ROCKINGHAM STREET PORTSMOUTH, NEW HAMPSHIRE" DATED JANUARY 20, 2023 BY DOUCET SURVEY LLC.



**TOPOGRAPHY PLAN**  
FOR  
**STILETTO CONSTRUCTION**  
OF  
**TAX MAP 144 LOT 6**  
**45 ROCKINGHAM STREET**  
**PORTSMOUTH, NEW HAMPSHIRE**

NO.	DATE	DESCRIPTION	BY

DRAWN BY:	J.R.P.	DATE:	FEBRUARY, 2023
CHECKED BY:	S.V.M.	DRAWING NO.	7695B
JOB NO.	7695	SHEET	1 OF 1



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# ADDITION AND RENOVATION

45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801

# EXISTING PHOTOGRAPHS

ZONING BOARD OF ADJUSTMENT

McHENRY ARCHITECTURE

4 Market Street  
Portsmouth, New Hampshire

A1

03/14/2023  
McHA: RD / MG  
NOT TO SCALE



98 McDONOUGH STREET:  
FRONT YARD SETBACK : 0' - 0"

49 ROCKINGHAM STREET:  
FRONT YARD SETBACK : 0' - 0"

45 ROCKINGHAM STREET:

35 ROCKINGHAM STREET:  
FRONT YARD SETBACK : 1' - 0"

CONDO LOT 144-8 (291 ISLINGTON STREET):  
FRONT YARD SETBACK : 0' - 0"

PER GENERAL RESIDENCE DISTRICT C THE FRONT YARD SETBACK SHALL BE 5'-0". PORTSMOUTH ZONING ORDINANCE SECTION 10.516.10 ALLOWS FOR THE AVERAGE OF THE LOTS ALONG THE SAME STREET WITHIN 200' TO BE AVERAGED TO PROVIDE AN AVERAGE SETBACK. THE CALCULATIONS ARE BELOW.

AVERAGE FRONT YARD SETBACK ALONG ROCKINGHAM STREET (EXCLUDES 45 ROCKINGHAM):

$$0' - 0" + 0' - 0" + 1' - 0" + 0' - 0" = 1' - 0"$$

$$1' - 0" / 4 \text{ PROPERTIES} = 0' - 3"$$

0' - 3" ROUNDED TO NEAREST FOOT PER SECTION 10.516.10 = **0' - 0" FRONT YARD SETBACK**

NOTE: ALL PROPERTIES WERE MEASURED FROM PROPERTY FACE OF SIDEWALK TO THE FACE OF A STRUCTURE 18" ABOVE GRADE DEFINED IN THE PORTSMOUTH ZONING ORDINANCE 10.516.10



291 ISLINGTON STREET



35 ROCKINGHAM STREET



49 ROCKINGHAM STREET



98 McDONOUGH STREET

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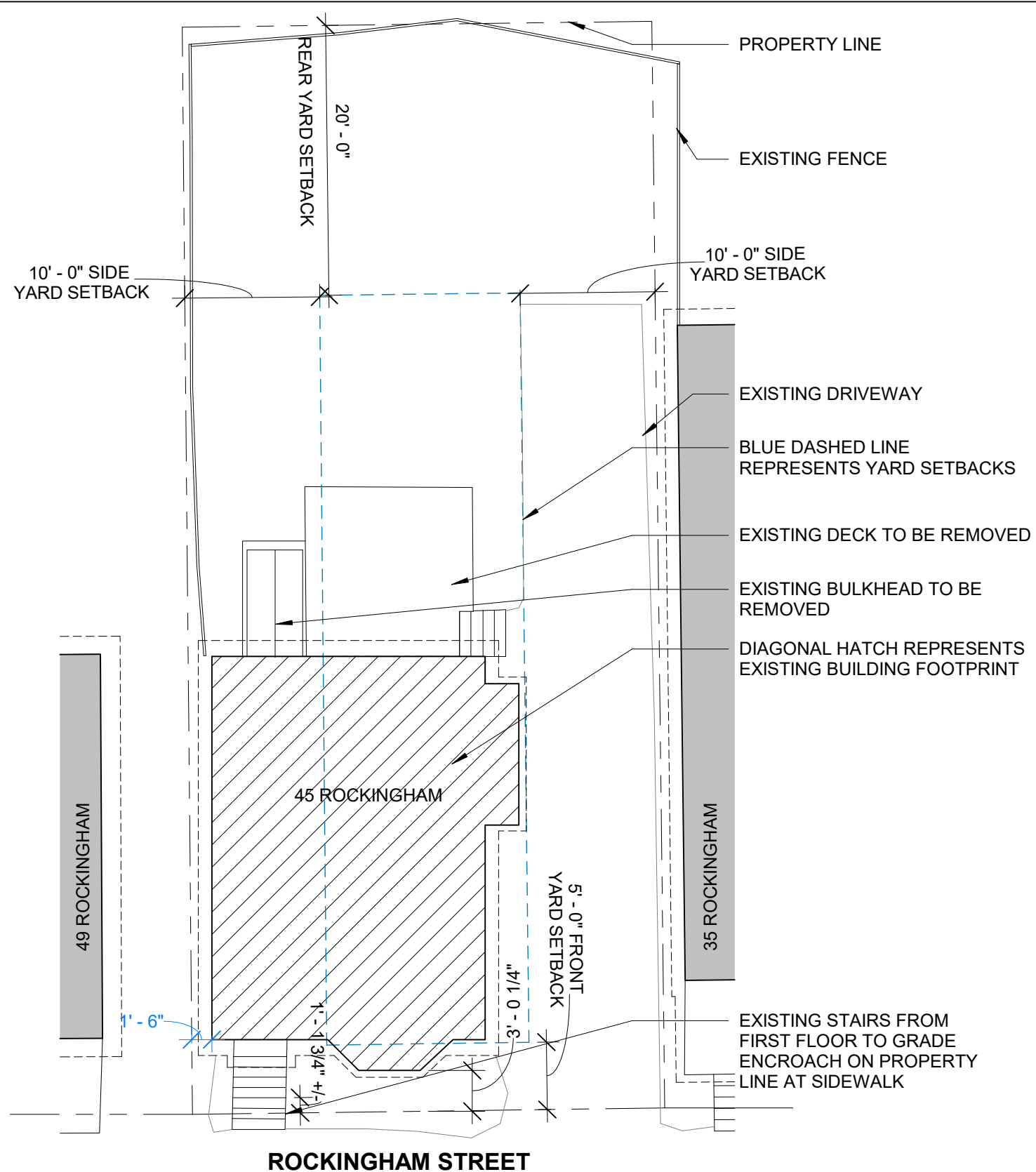
**ADDITION AND RENOVATION**  
45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801

**SETBACK CALCULATIONS**  
ZONING BOARD OF ADJUSTMENT

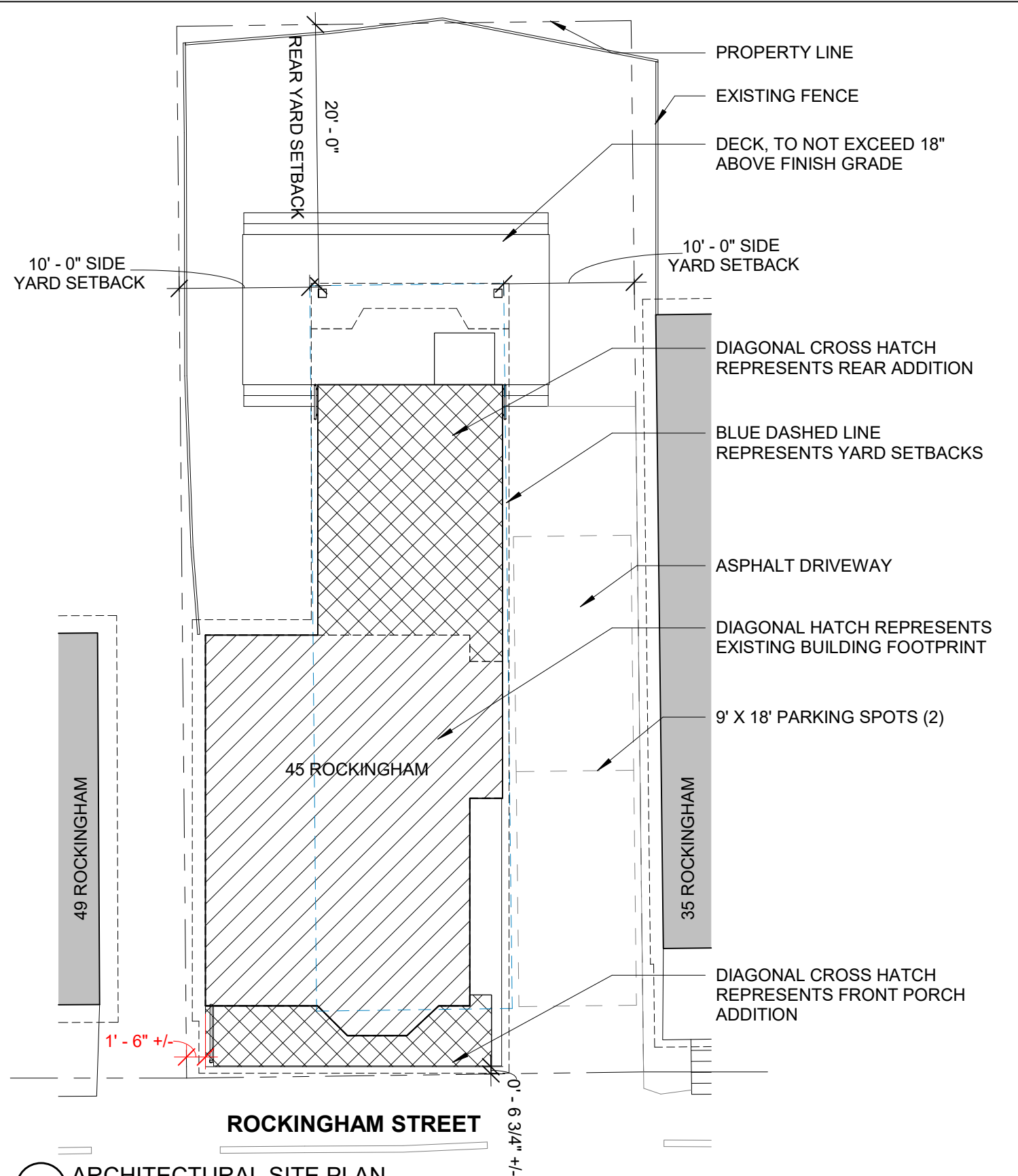
**McHENRY ARCHITECTURE**  
4 Market Street  
Portsmouth, New Hampshire

**A2**

03/14/2023  
McHA: RD / MG  
**NOT TO SCALE**



1 EXISTING ARCHITECTURAL SITE PLAN  
1" = 10'-0"



2 ARCHITECTURAL SITE PLAN  
1" = 10'-0"

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**ADDITION AND RENOVATION**

45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801



**ARCHITECTURAL SITE PLANS**

ZONING BOARD OF ADJUSTMENT

**McHENRY ARCHITECTURE**

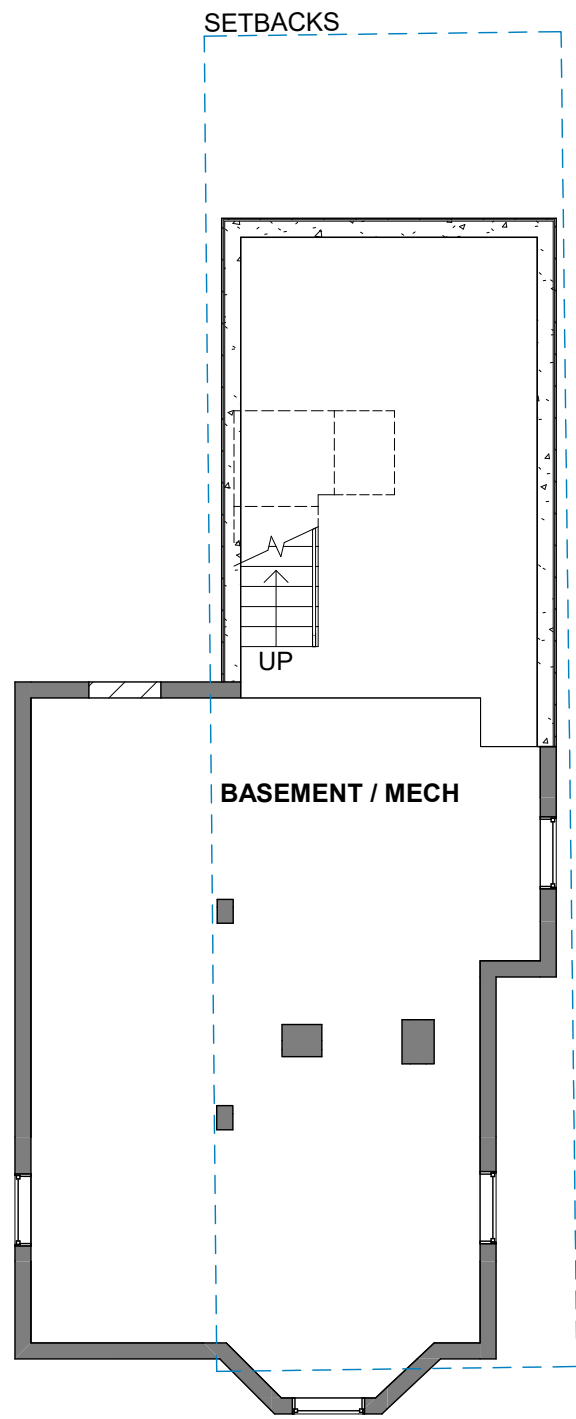
4 Market Street  
Portsmouth, New Hampshire

**A3**

03/14/2023

McHA: RD / MG

Scale: 1" = 10'-0"



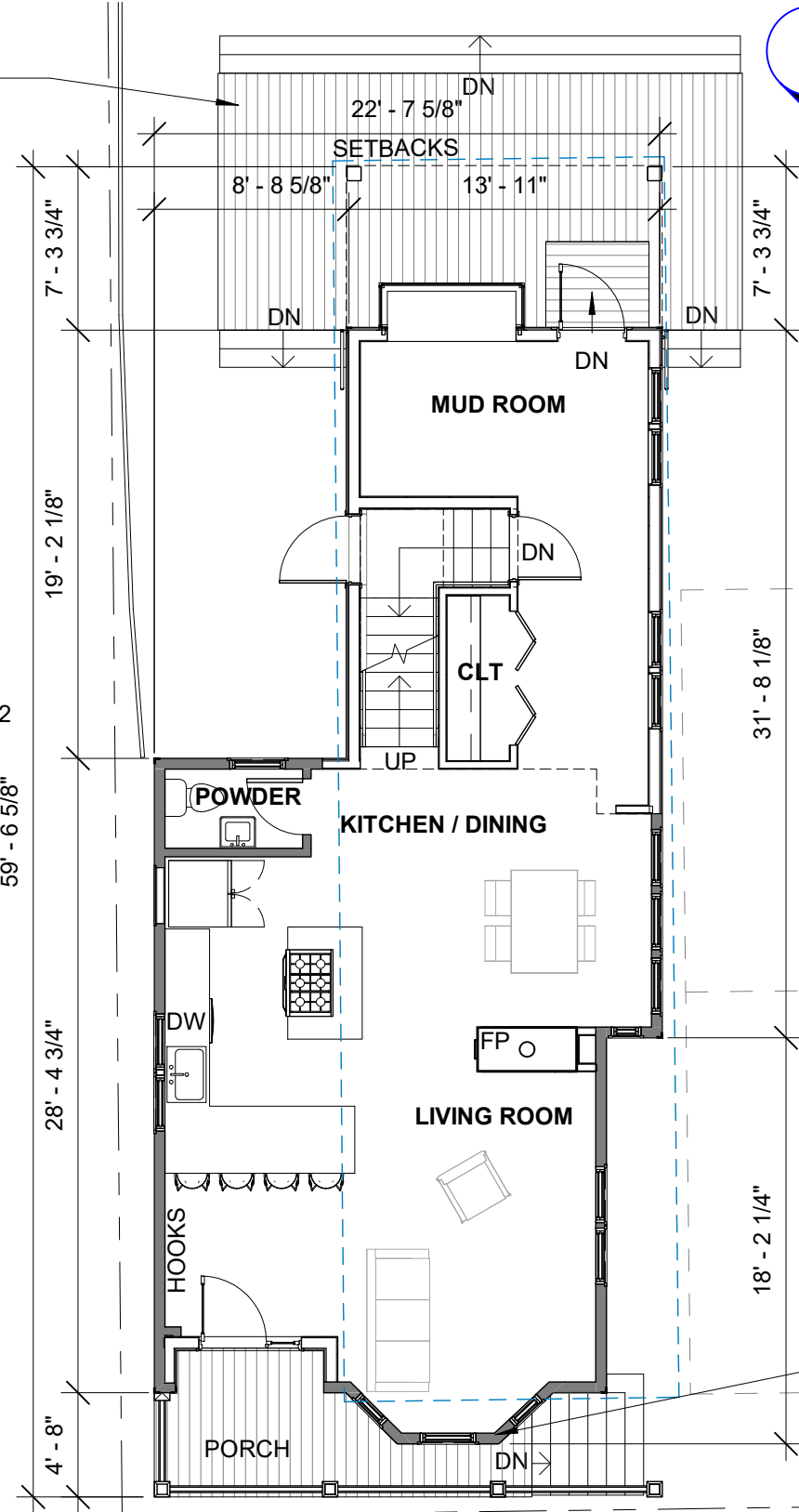
A7 2

A7 1

1 **BASEMENT**  
1/8" = 1'-0"

A6 1

DECK TO BE LESS THAN 18" TALL



A7 2

A7 1

2 **FIRST FLOOR PLAN**  
1/8" = 1'-0"

A6 1

9' X 18' PARKING SPOTS (2)

A6 2

EXISTING FIRST FLOOR BAY WINDOW MAY BE REMOVED, TBD

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**ADDITION AND RENOVATION**

45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801



**FLOOR PLANS**

ZONING BOARD OF ADJUSTMENT

**McHENRY ARCHITECTURE**

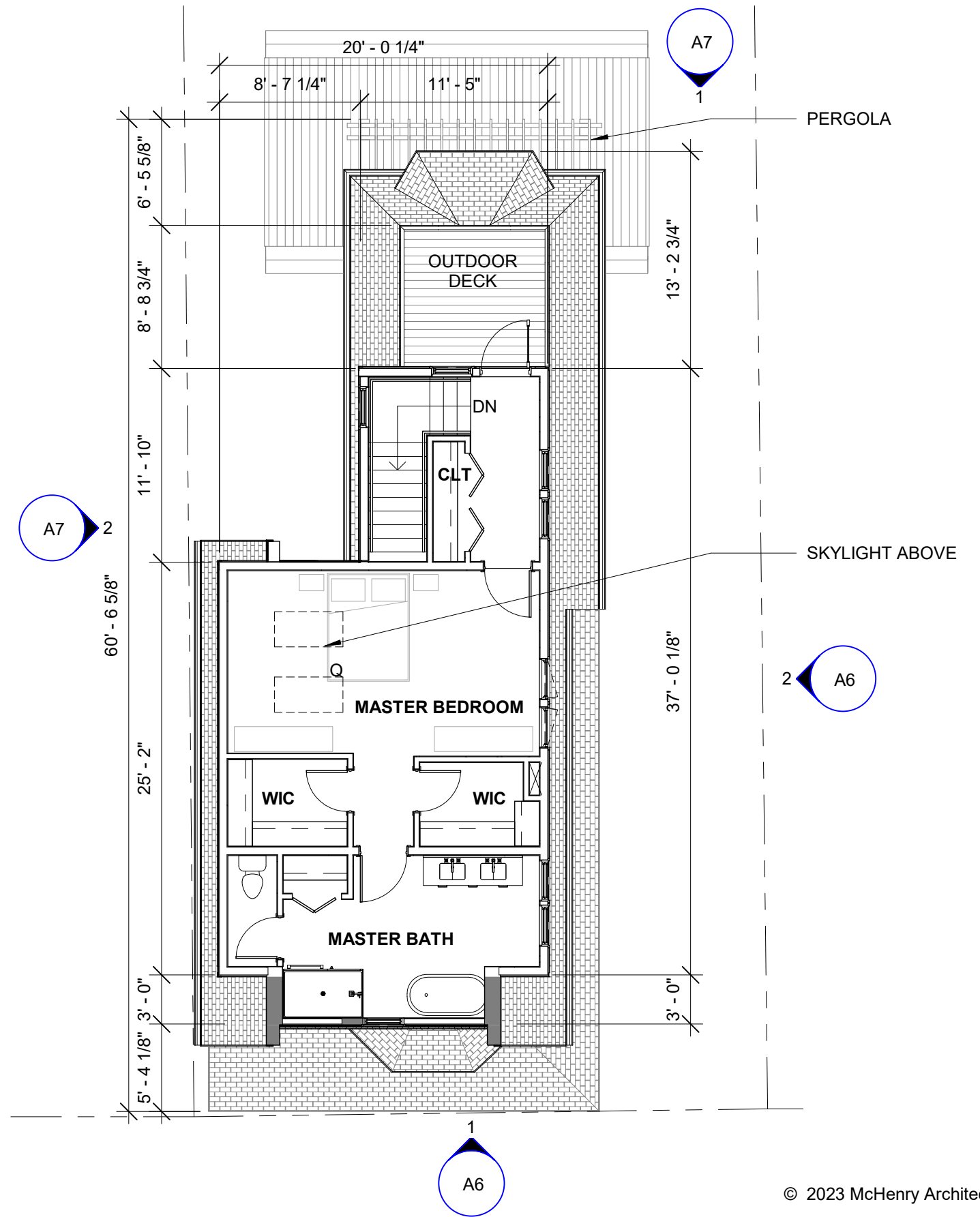
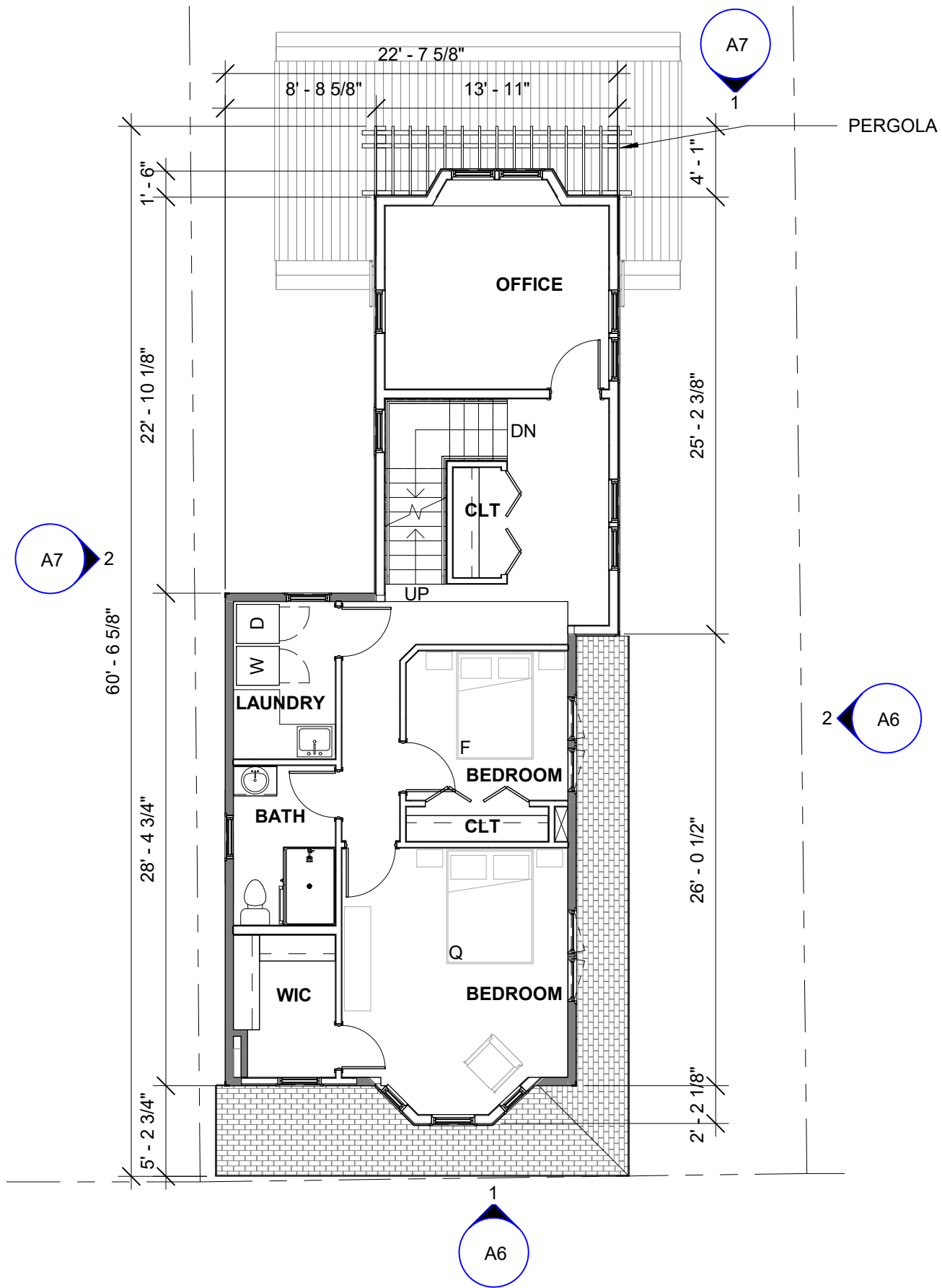
4 Market Street  
Portsmouth, New Hampshire

**A4**

03/14/2023

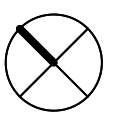
McHA: RD / MG

Scale: 1/8" = 1'-0"



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**ADDITION AND RENOVATION**  
 45 ROCKINGHAM STREET  
 PORTSMOUTH, NEW HAMPSHIRE 03801



**FLOOR PLANS**  
 ZONING BOARD OF ADJUSTMENT

**McHENRY ARCHITECTURE**  
 4 Market Street  
 Portsmouth, New Hampshire

**A5**

03/14/2023  
 McHA: RD / MG  
 Scale: 1/8" = 1'-0"



1 WEST ELEVATION  
1/8" = 1'-0"

2 SOUTH ELEVATION  
1/8" = 1'-0"

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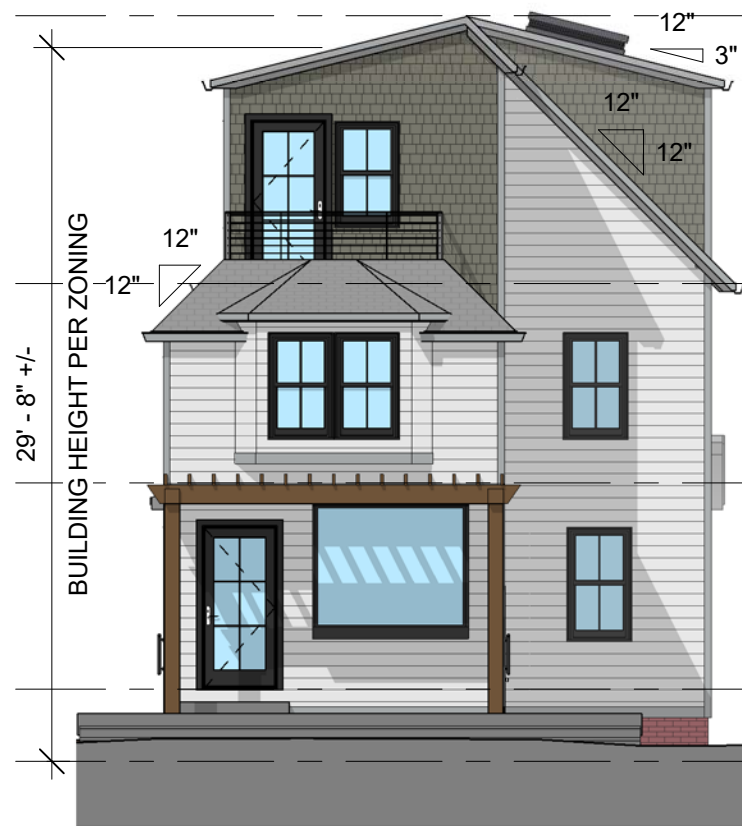
**ADDITION AND RENOVATION**  
45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801

**ELEVATIONS**  
ZONING BOARD OF ADJUSTMENT

**McHENRY ARCHITECTURE**  
4 Market Street  
Portsmouth, New Hampshire

**A6**

03/14/2023  
McHA: RD / MG  
Scale: 1/8" = 1'-0"



1 EAST ELEVATION  
1/8" = 1'-0"



2 NORTH ELEVATION  
1/8" = 1'-0"

- TOP OF ROOF 128' - 0 1/4"
- WINDOW LOCATIONS AND SIZE ARE TBD
- THIRD FLOOR 116' - 10 1/2"
- SECOND FLOOR 108' - 7"
- FIRST FLOOR 100' - 0"
- AVERAGE GRADE 97' - 0"

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**ADDITION AND RENOVATION**  
45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801

**ELEVATIONS**  
ZONING BOARD OF ADJUSTMENT

**McHENRY ARCHITECTURE**  
4 Market Street  
Portsmouth, New Hampshire

**A7**

03/14/2023  
McHA: RD / MG  
Scale: 1/8" = 1'-0"





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# ADDITION AND RENOVATION

45 ROCKINGHAM STREET  
PORTSMOUTH, NEW HAMPSHIRE 03801

# RENDERING

ZONING BOARD OF ADJUSTMENT

McHENRY ARCHITECTURE

4 Market Street  
Portsmouth, New Hampshire

A8

03/14/2023  
McHA: RD / MG  
NOT TO SCALE

**Exhibit B  
Site Photographs**



**Aerial photograph of Property and surrounding area**



**View down Rockingham Street from the South**

**Exhibit B  
Site Photographs**



**View of Property from the Southwest**

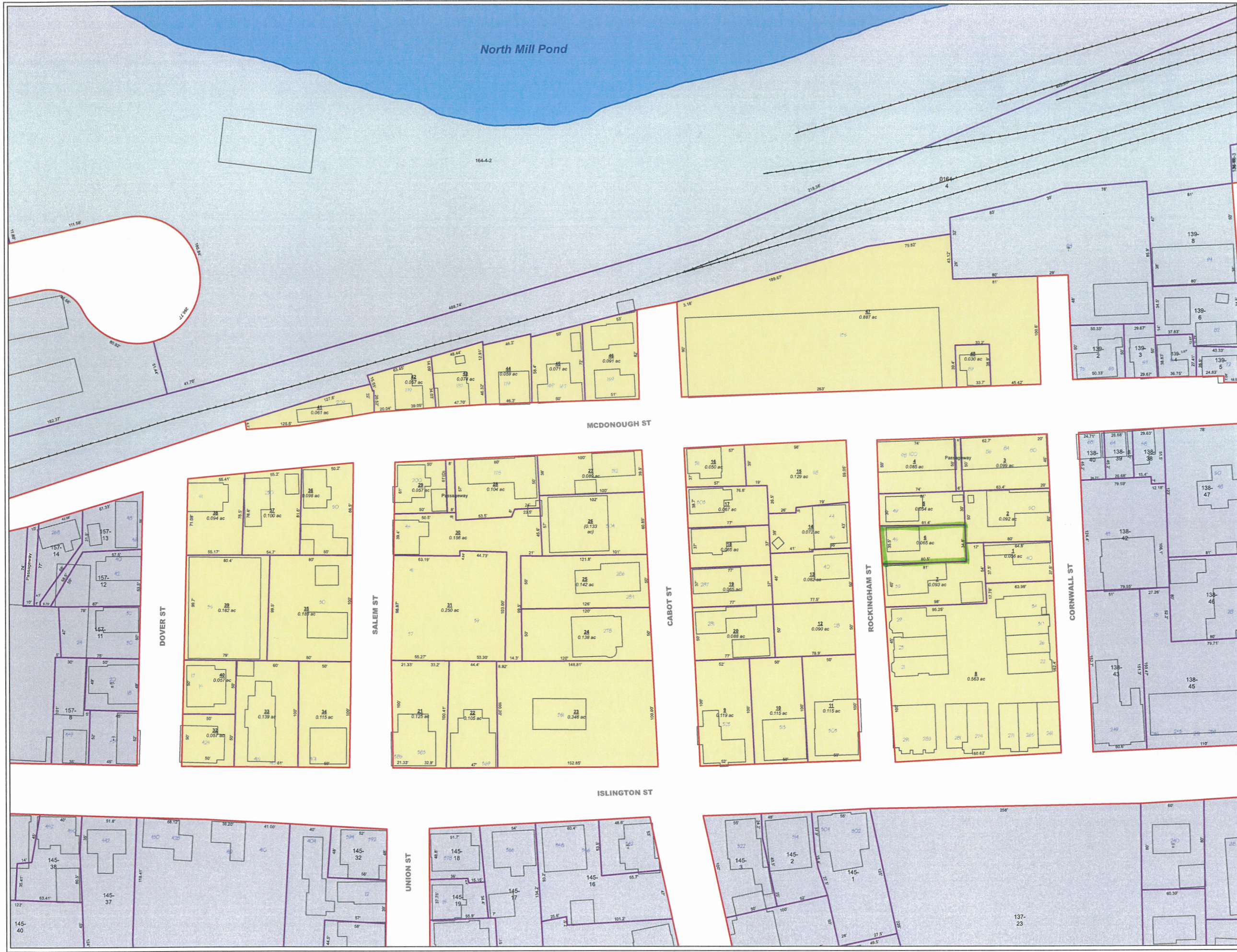


**View of Property from the Northwest**

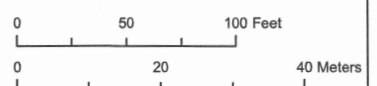
**Exhibit B  
Site Photographs**



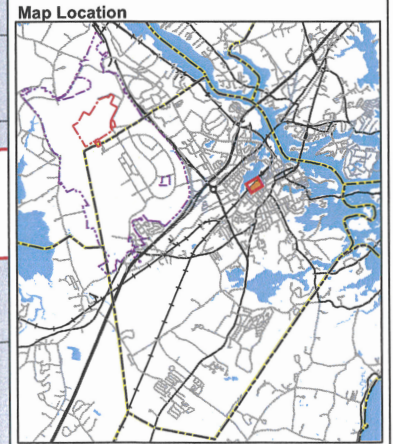
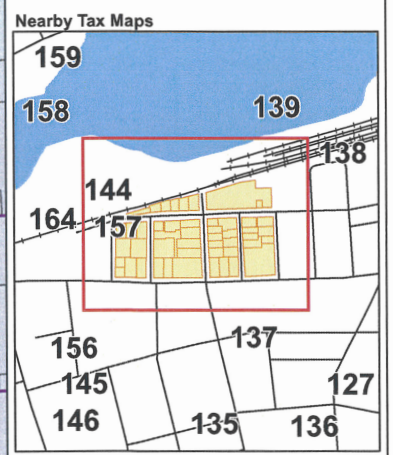
**View of Property from the Northwest (up Rockingham Street)**



- Partial Legend**  
See the cover sheet for the complete legend.
- 7-5A** Lot or lot-unit number
  - 2.56 ac Parcel area in acres (ac) or square feet (sf)
  - 25 Address number
  - 233-137 Parcel number from a neighboring map
  - 98' Parcel line dimension
  - SIMS AVE Street name
  - Parcel/Parcel boundary
  - Parcel/ROW boundary
  - Water boundary
  - Structure (1994 data)
  - Parcel covered by this map
  - Parcel from a neighboring map (see other map for current status)



*This map is for assessment purposes only. It is not intended for legal description or conveyance. Parcels are mapped as of April 1. Building footprints are 2006 data and may not represent current structures. Streets appearing on this map may be paper (unbuilt) streets. Lot numbers take precedence over address numbers. Address numbers shown on this map may not represent posted or legal addresses.*



**III. NEW BUSINESS**

F. The request of **Bucephalus LLC (Owner)**, for property located at **650 Maplewood Avenue** whereas relief is needed to remove the outdoor fenced storage area and construct a 48 foot by 25.5 foot addition to the rear of the existing structure which requires a Variance from Section 10.592.20 to allow the expansion of space used for motorcycle sales located adjacent to a Residential district where 200 feet is required. Said property is located on Assessor Map 220 Lot 88 and lies within the Business (B) District. (LU-21-111)

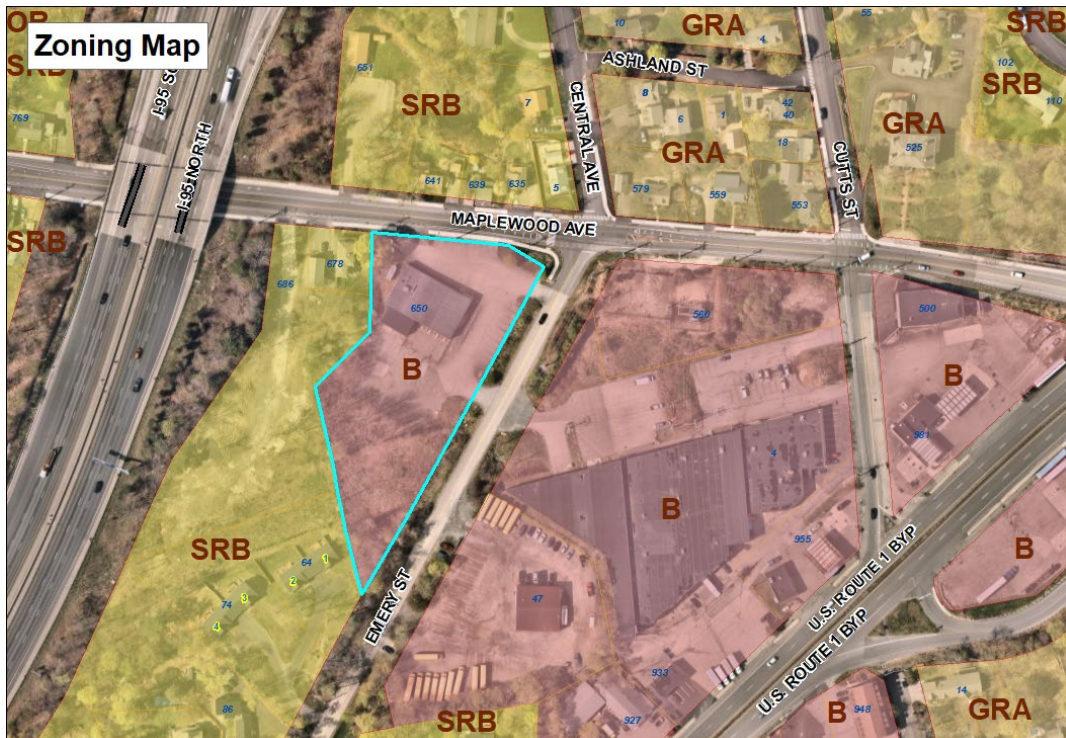
**Existing & Proposed Conditions**

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single Unit Retail	Construct addition onto rear of building	Mix of commercial, retail, and residential Uses
<u>Lot area (sq. ft.):</u>	75,078	75,078	20,000 min.
<u>Use Setback from Right of Way (ft.):</u>	<40	<40	40 min.
<u>Use Setback from Residential District (ft)</u>	0	<b>0</b>	200 min
<u>Lot depth (ft.):</u>	>80	>80	80 min.
<u>Primary Front Yard (ft.):</u>	>30	>30	20 max.
<u>Secondary Front Yard (ft.):</u>	>50	>50	15 min.
<u>Right Yard (ft.):</u>	15	15	15 min.
<u>Rear Yard (ft.):</u>	>100	>100	15 min.
<u>Height (ft.):</u>	<50	<50	50 max.
<u>Building Coverage (%):</u>	10	11.4%	35 max.
<u>Open Space Coverage (%):</u>	>33	>33	15 min.
<u>Parking</u>	26	26	15 (1 Space/ 600 sf GFA)
<u>Estimated Age of Structure:</u>	1970	<b>Variance request(s) shown in red.</b>	

**Other Permits/Approvals Required**

- Building Permit
- Site Plan Review – TAC and Planning Board

### Neighborhood Context



650 Maplewood Avenue

## Previous Board of Adjustment Actions

June 22, 2021 – The Board voted to **postpone** the application for a change of use to allow motorcycle sales which requiring the below to the July 20, 2021, BOA meeting:

- 1) A Special Exception from Section 10.440, Use #11.10 to allow the sales, renting or leasing of motorcycles where the use is permitted by Special Exception.
- 2) A Variance from Section 10.592.20 to allow the proposed use to be located adjacent to a Residential district where 200 feet is required.
- 3) A Variance from Section 10.843.21 to allow areas for parking, outdoor storage and outdoor display of vehicles or equipment to be setback less than 40 feet from the street right-of-way where 40 feet is required.

July 20, 2021 – the Board voted to **grant** the above request with the following stipulation:

- 1) No test drives shall occur outside of the property itself.

## Planning Department Comments

The applicant is requesting relief to construct an addition on to the rear of the property and this increases the retail space. The approvals from July of 2021 are still active but the expansion requires further relief as it is within 200 feet of a residential district and was not included in the original approval. The applicant has included their submission from 2021 in the application materials.

## Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

  - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

## 10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.







**Bosen & Associates**  
ATTORNEYS AT LAW

March 28, 2023

Phyllis Eldridge, Chair  
Zoning Board of Adjustment  
City of Portsmouth  
1 Junkins Avenue  
Portsmouth, NH 03801

**John K. Bosen**  
Admitted in NH & MA

**Christopher P. Mulligan**  
Admitted in NH & ME

**Molly C. Ferrara**  
Admitted in NH & ME

**Bernard W. Pelech**  
1949-2021

**Austin Mikolaities**  
Admitted in NH

***RE: 650 Maplewood Avenue, Tax Map 220, Lot 88***

Dear Chair Eldridge:

This office represents the interests of Motorbikes Plus, LLC. In July of 2021, this board granted a special exception to permit the sale, renting or leasing of motorcycles at the above-referenced property, along with associated variances for motor vehicle sales within 200 feet of a residential district (10.592.20) and for parking, outdoor storage and displays within the 40 foot setback (10.843.21). A condition of approval is that no test drives are to occur outside the property itself. The Board's Notice of Decision dated July 26, 2021 is submitted herewith.

In connection with the applicant's build-out of the property for this approved use, we have determined that it would be advantageous to remove the outdoor fenced storage area used by the prior tenant and replace it with an addition to the building. The addition is 48' x 25'5" and is sited next to the existing room identified as a "Stock Room" on the plans submitted herewith. The existing building's roofline is unique and the addition will tie into it.

Because the original application represented that there would be no significant exterior changes to the building, the planning department has determined that the expansion of the building within 200 feet of the residential zone requires identical relief as was previously obtained from section 10.592.20. It is the applicant's belief that, for the reasons set forth in the original application, a copy of which is submitted herewith, such relief is appropriate. It should also be noted that the residential properties most affected by the proposed addition, those on Maplewood Avenue, will experience little if

any visual impact from the addition, as it is sited entirely behind the existing structure. Furthermore, the addition is aesthetically more appealing than the fenced storage area that it is replacing.

Accordingly, we respectfully request that the variance request be approved. Thank you for your consideration.

Very truly yours,

*Chris Mulligan*  
Christopher P. Mulligan

CPM/

Enclosures



# CITY OF PORTSMOUTH

Planning Department  
1 Junkins Avenue  
Portsmouth, New  
Hampshire 03801  
(603) 610-7216

## ZONING BOARD OF ADJUSTMENT

July 26, 2021

Bucephalus LLC  
1 Haven Ct  
Portsmouth, NH 03801

**RE: Board of Adjustment request for property located at 650 Maplewood Avenue**

Dear Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **July 20, 2021**, considered your application for a change of use to allow motorcycle sales which requires the following: 1) A Special Exception from Section 10.440, Use #11.10 to allow the sales, renting or leasing of motorcycles where the use is permitted by Special Exception. 2) A Variance from Section 10.592.20 to allow the proposed use to be located adjacent to a Residential district where 200 feet is required. 3) A Variance from Section 10.843.21 to allow areas for parking, outdoor storage and outdoor display of vehicles or equipment to be setback less than 40 feet from the street right-of-way where 40 feet is required. Said property is shown on Assessor Map 220 Lot 88 and lies within the Business (B) District. As a result of said consideration, the Board voted to **grant** the request with the following **stipulation**:

1) No test drives shall occur outside of the property itself.

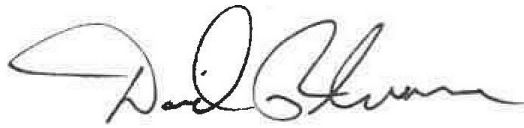
The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,



David Rheume, Chairman of the Zoning Board of Adjustment

cc: Robert Marsilia, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

John K. Bosen, Esquire

Christopher Mulligan

# PROJECT RENDERINGS

STATE OF NEW HAMPSHIRE - CITY OF PORTSMOUTH

ENTRY PERSPECTIVE:



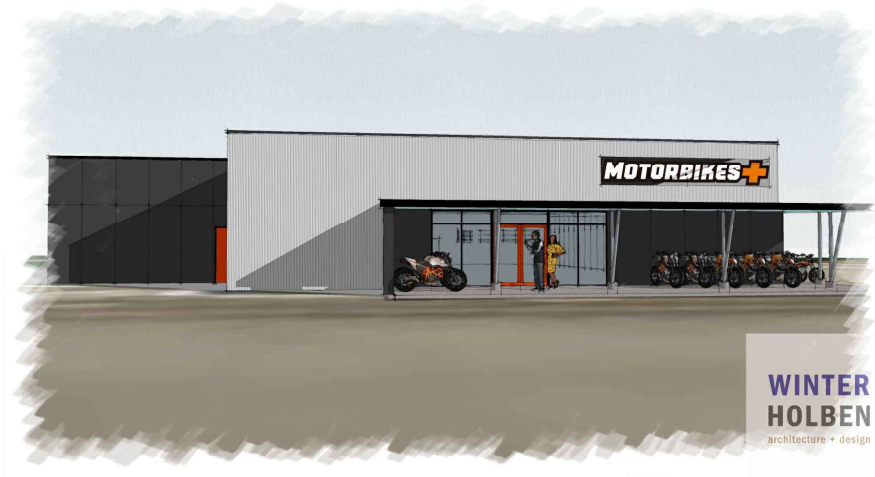
**WINTER  
HOLBEN**  
architecture + design

ENTRY PERSPECTIVE:



**WINTER  
HOLBEN**  
architecture + design

EMERY ELEVATION:



**WINTER  
HOLBEN**  
architecture + design

MAPLEWOOD ELEVATION:



**WINTER  
HOLBEN**  
architecture + design

MOTORBIKES PLUS

650 Maplewood Avenue  
Portsmouth, New Hampshire 03801

PROJECT:  
KIT

**WINTER  
HOLBEN**  
architecture + design

7 WALLINGFORD SQ  
UNIT 209-9  
KITTELY, MAINE 03904  
207.994.3104

REVISIONS:

PROJECT NAME: MOTORBIKES PLUS

650 MAPLEWOOD AVENUE  
PORTSMOUTH, NH 03801

PROJECT NO.: 21111

DRAWN BY: DS / RW

APPROVED BY: BH

ISSUE DATE: 2022/11/17

DRAWING NAME: ---

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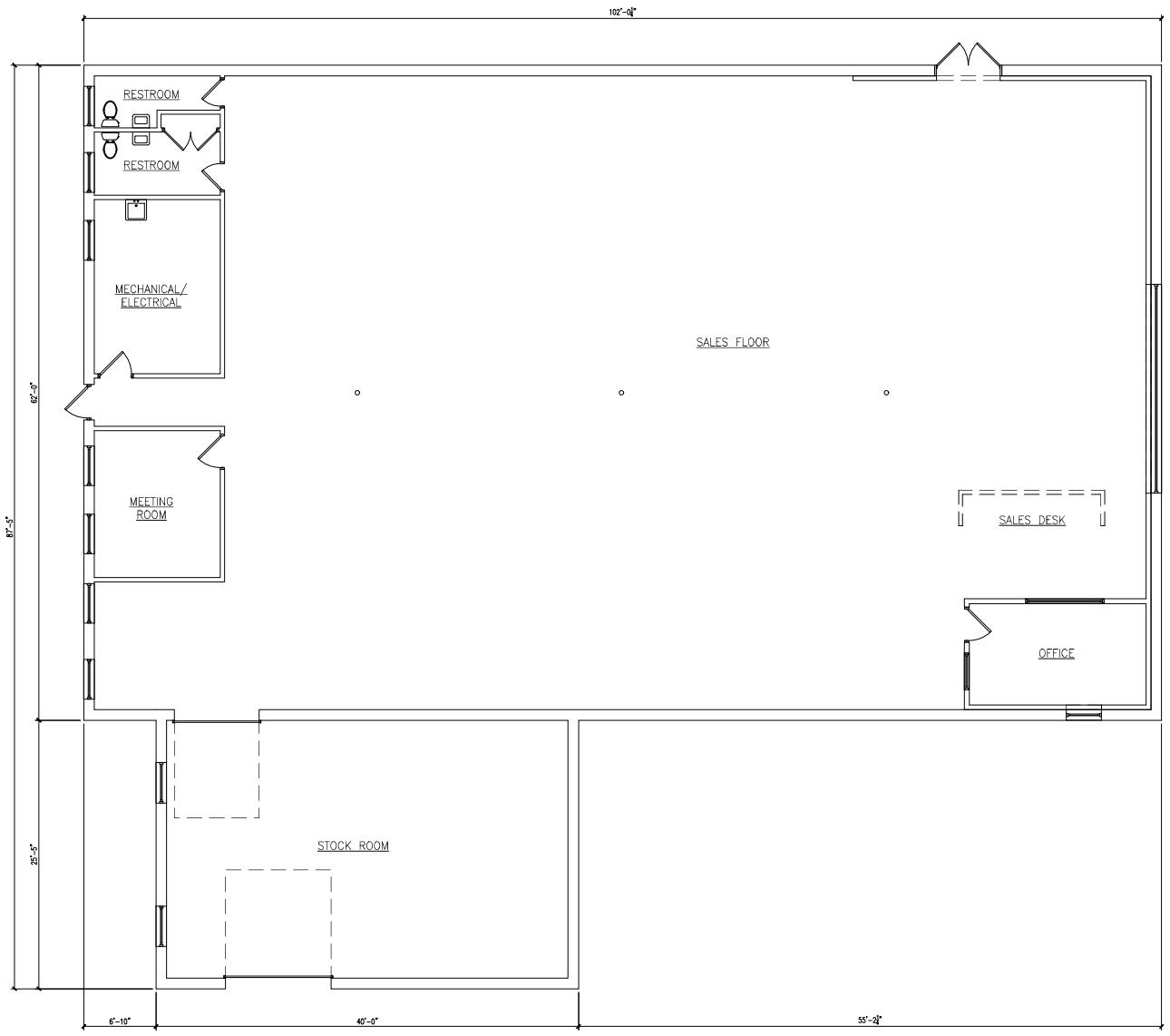
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SCALE: N.T.S.

DRAWINGS NO. ---

**T1.3**

SHEET NO. SHEET 3 OF 13



**EXISTING FLOOR PLAN**  
SCALE: 3/16"=1'-0"

EX1.1



**MOTORBIKES PLUS**

650 Maplewood Avenue  
Portsmouth, New Hampshire 03801

PROJECT

NOY

**WINTER  
HOLBEN**  
architecture + design

7 WALLINGFORD SQ UNIT 209-B  
KITTERY, MAINE 03804  
207.994.3104

REVISED

PROJECT NAME  
MOTORBIKES PLUS  
650 MAPLEWOOD AVENUE  
PORTSMOUTH, NH 03801  
PROJECT NO. 21111  
DRAWN BY DS / RW  
APPROVED BY BH  
ISSUE DATE 2022/11/17  
DRAWING NAME  
**EXISTING FLOOR PLAN**

SCALE: 3/16" = 1'-0"  
DRAWING NO.

**EX1.1**

MOTORBIKES PLUS

650 Maplewood Avenue  
Portsmouth, New Hampshire 03801

PROJECT

NO.

WINTER  
HOLBEN

architecture + design

7 WALLINGFORD SQ  
UNIT 209-B  
KITTERY, MAINE 03804  
207.994.3104

REVISE

PROJECT NAME

MOTORBIKES PLUS  
650 MAPLEWOOD AVENUE  
PORTSMOUTH, NH 03801

PROJECT NO.

21111

DRAWN BY

DS / RW

APPROVED BY

BH

ISSUE DATE

2022/11/17

DRAWING NAME

EXISTING EXTERIOR ELEVATIONS

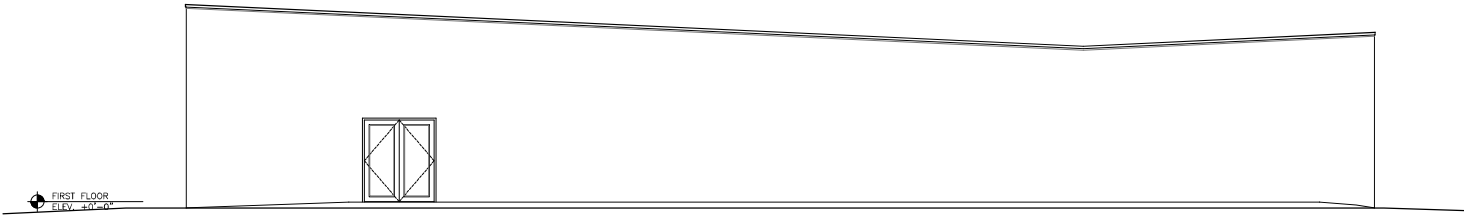
SCALE

3/16" = 1'-0"

DRAWING NO.

EX2.1

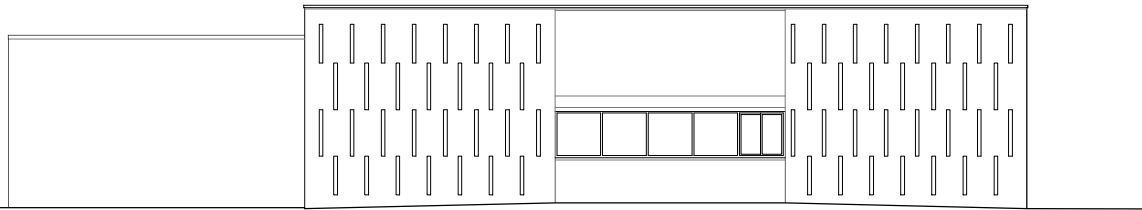
SHEET NO. 5 OF 13



FIRST FLOOR  
ELEV. +0'-0"

EXISTING NORTH ELEVATION  
SCALE: 3/16"=1'-0"

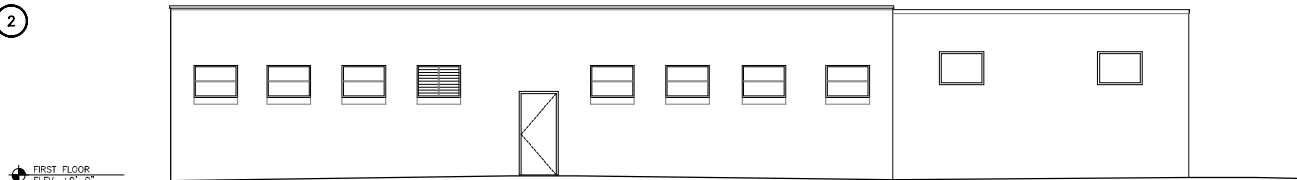
EX2.1 1



FIRST FLOOR  
ELEV. +0'-0"

EXISTING EAST ELEVATION  
SCALE: 3/16"=1'-0"

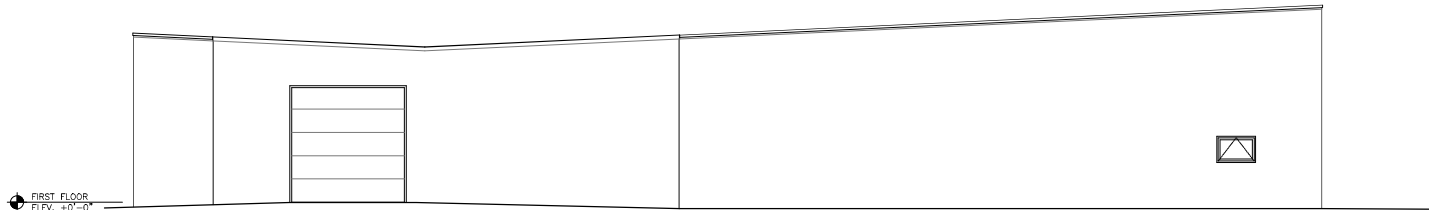
EX2.1 2



FIRST FLOOR  
ELEV. +0'-0"

EXISTING WEST ELEVATION  
SCALE: 3/16"=1'-0"

EX2.1 3



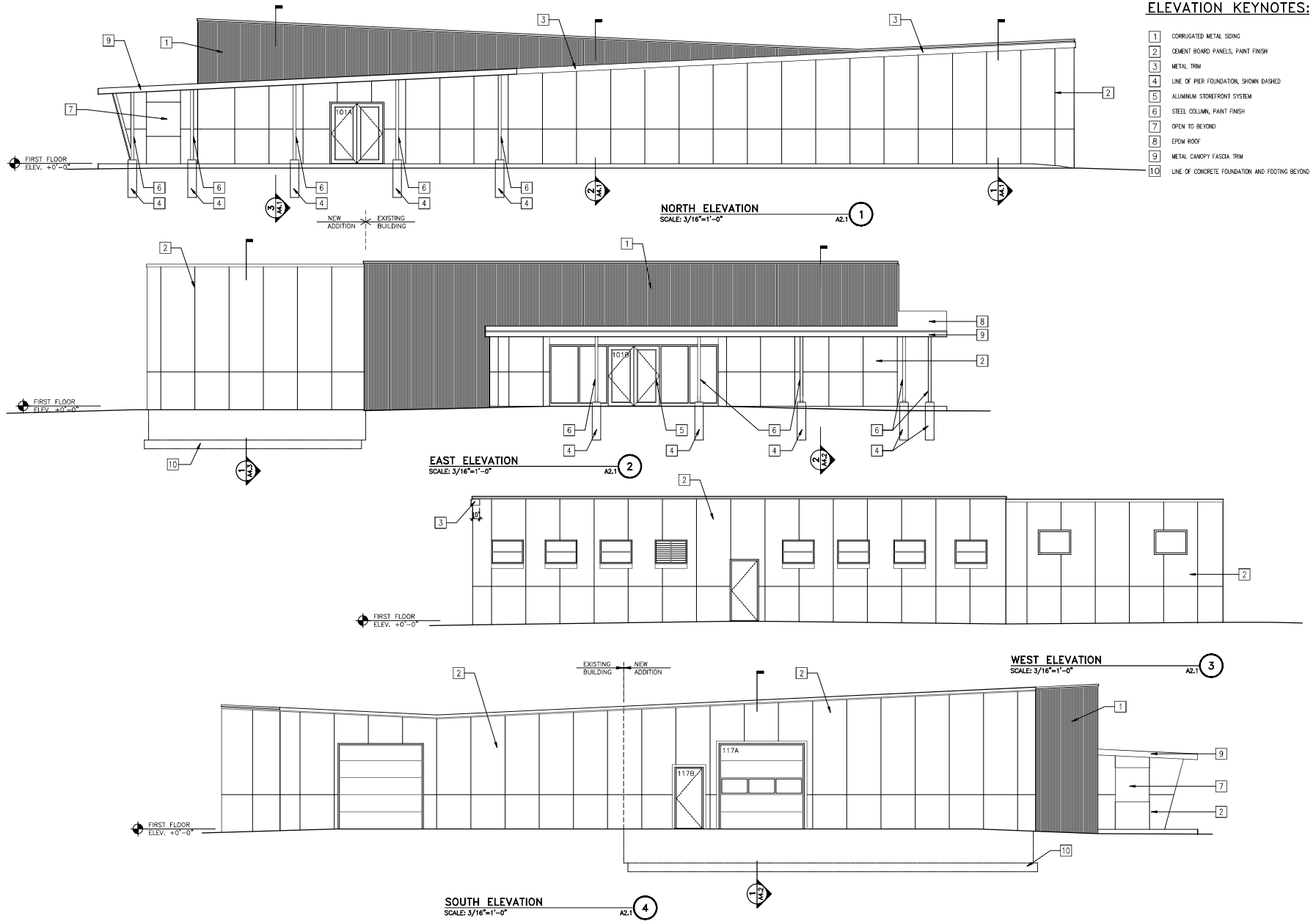
FIRST FLOOR  
ELEV. +0'-0"

EXISTING SOUTH ELEVATION  
SCALE: 3/16"=1'-0"

EX2.1 4







**ELEVATION KEYNOTES:**

- 1 CORRUGATED METAL SIDING
- 2 CEMENT BOARD PANELS, PAINT FINISH
- 3 METAL TRIM
- 4 LINE OF PIER FOUNDATION, SHOWN DASHED
- 5 ALUMINUM STOREFRONT SYSTEM
- 6 STEEL COLUMN, PAINT FINISH
- 7 OPEN TO BEYOND
- 8 EPDM ROOF
- 9 METAL CANDY FASIA TRIM
- 10 LINE OF CONCRETE FOUNDATION AND FOOTING BEYOND

**MOTORBIKES PLUS**  
 650 Maplewood Avenue  
 Portsmouth, New Hampshire 03801

PROJECT:  
 UNIT:

**WINTER HOLBEN**  
 architecture + design

7 WALLINGFORD SQ UNIT 209-9  
 KITTERY, MAINE 03804  
 207.994.3104

REVISED:

PROJECT NAME:  
 MOTORBIKES PLUS  
 650 MAPLEWOOD AVENUE  
 PORTSMOUTH, NH 03801

PROJECT NO.: 21111  
 DRAWN BY: DS / RW  
 APPROVED BY: BH  
 ISSUE DATE: 2022/11/17  
 DRAWING NAME:

**PROPOSED EXTERIOR ELEVATIONS**

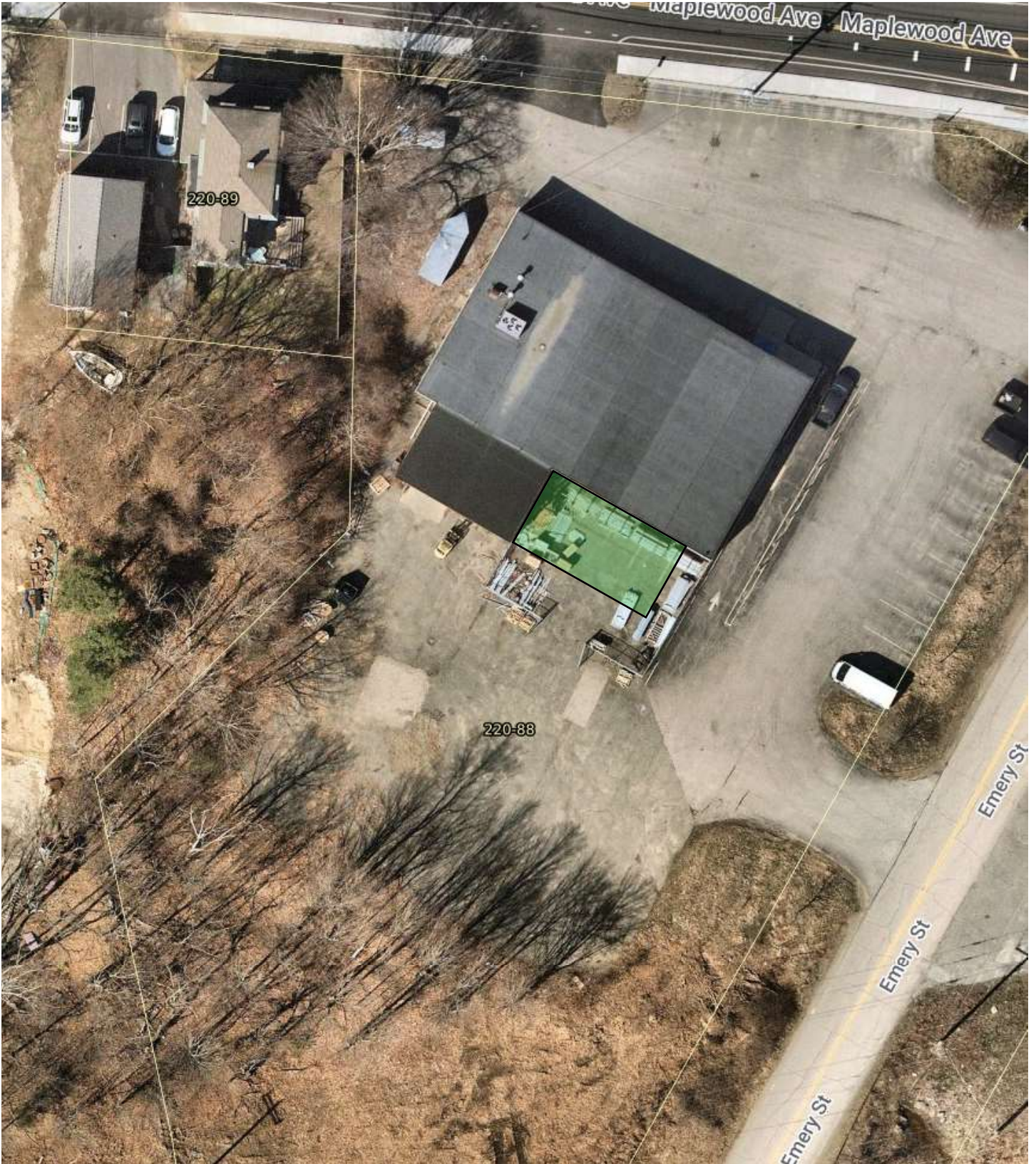
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 DRAWING NO.:

**A2.1**

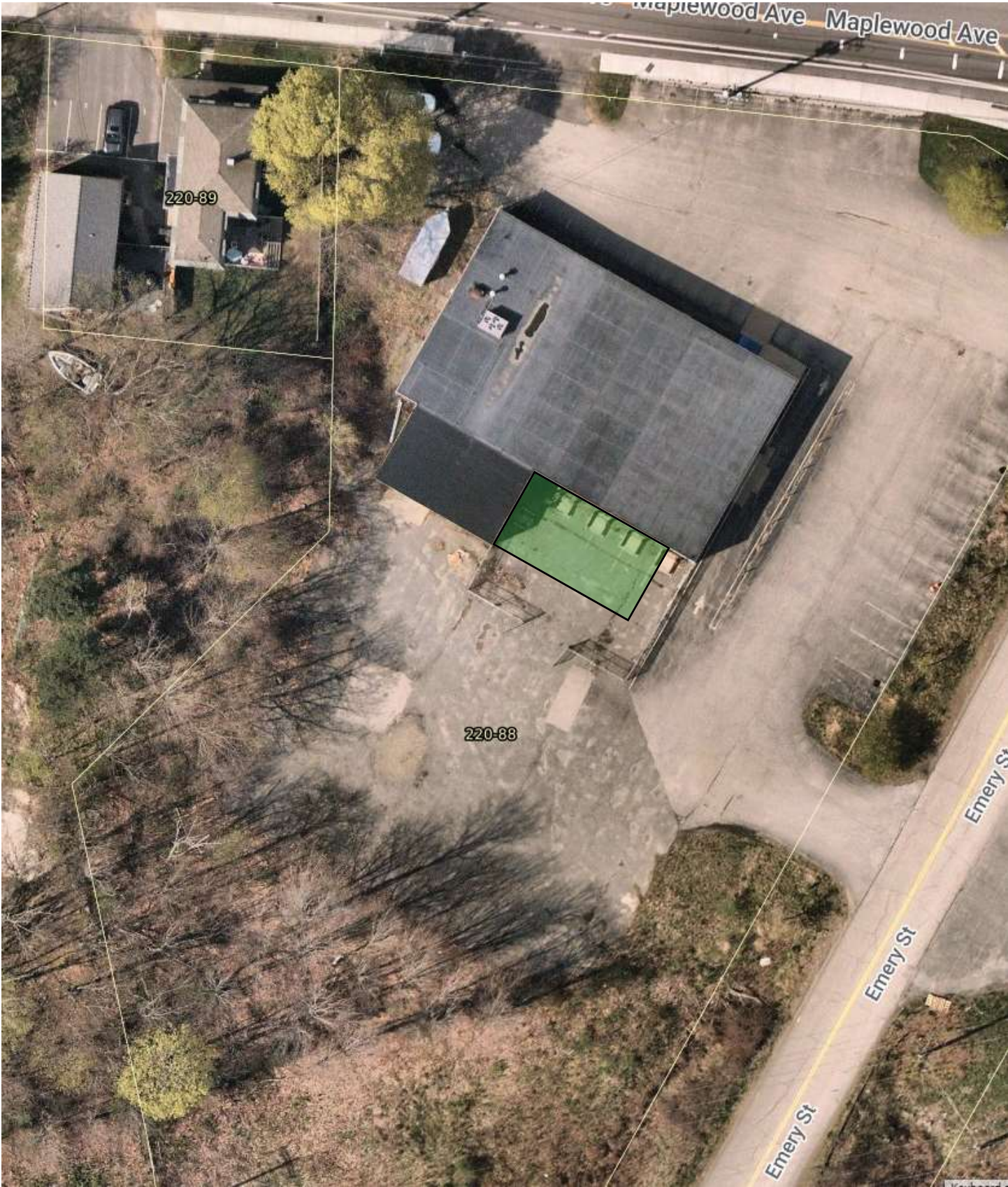
# Portsmouth 2020 Aerial



# Portsmouth 2021 Aerial



Portsmouth 2022 Aerial



**APPLICATION OF MOTORBIKES PLUS, LLC**  
**650 MAPLEWOOD AVENUE**  
**Map 220, Lot 88**

**APPLICANT'S NARRATIVE**

**A. The Project.**

The Applicant, Motorbikes Plus, LLC, is under contract to acquire the property located at 650 Maplewood Avenue, 1.72 acre lot and the site of an approximately 7325 square feet warehouse facility currently housing the Rexall Electrical industrial/warehouse/retail and office use. The property is at the northeastern corner of Maplewood Avenue and Emery Street. According to City tax records, the existing building dates to 1970. The Applicant seeks to relocate its existing retail sales operation from 3 Cate Street, where it has operated since 2001, to this location. The Applicant will be making minimal exterior changes to the building and property, beyond usual and customary changes to signage and landscaping.

The property is an irregularly shaped lot and the building is oriented such that it is parallel to Emery Street and at sharp angle to Maplewood. In the immediate vicinity are a bus depot, commercial uses on the Rte. 1 By-Pass, an electrical transformer station, the Oddfellows lodge, and residential uses. One abutter has been approved for a place of religious assembly. The proposal is not incompatible with these uses.

The proposed sale of motorcycles does not produce excessive noise, and the property is not in any event a "quiet" site given its proximity to the By-Pass, I-95 and the nearby commercial uses. The Applicant will, at most, store only limited product or equipment outdoors overnight and is open to the public during normal business hours (9am -5pm) from Tuesday through Friday, and from 9am to 3pm on Saturdays. The business is closed Sundays and Mondays.

The products applicant offers for sale are primarily specialized, and, as such, the business does not generate an excessive amount of retail traffic.

The property is in the Business (B) zoning district, the purpose of which is "[t]o provide for a mix of retail, commercial and residential uses in areas of the City where a mix of such uses is desirable." §10.410.

Motor vehicle sales are permitted in the B zone by special exception. §10.440.11.10. It should be noted, however, that the applicant's business is very different than what is typically considered "motor vehicle" related. Sales and repair of motorcycles are only a portion of its business. Most items fall into other categories, like helmets, apparel, parts, accessories and even bicycles. The majority of the use would be permitted on the property.

Because this site abuts residential districts to the west and the south and across Maplewood Avenue, relief from §10.592.20 is required as the proposed use,<sup>1</sup> motor vehicle sales, is within 200 feet of such residential districts.

The applicant does not plan to make any significant changes to the exterior of the building and intends to retain and utilize the parking areas as they currently exist. The current parking is in places within forty feet of the Maplewood Avenue and Emery Street rights of way. Accordingly, for this use, relief from §10.843.21 is also necessary<sup>2</sup>.

### **B. The Special Exception.**

The Applicant believes the proposal easily meets the criteria for the necessary special exception. Those criteria are set forth in the ordinance at §10.232.20.

First, the use proposed here, “motor vehicle sales,” is permitted within this district by special exception, see §10.440 Table of Uses, no. 11.10. §10.232.10.

Second, the proposed use will pose no hazard to the public or adjacent properties on account of potential fire, explosion or release of toxic materials. §10.232.22. No explosives, toxic materials or unusual accelerants will be stored on site. Any motor vehicle fluids will be disposed of properly by the Applicant privately in accordance with accepted practices. This has never presented any issue for the Applicant at its Cate Street location.

Third, there will be no detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighborhoods or business and industrial districts on account of the location or scale of buildings and other structures, parking areas, accessways, odor, smoke, gas, dust, or other pollutant, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other materials. §10.232.23. Commercial use has existed on this site for at least fifty years. There will be, at most, limited overnight outside storage of product or equipment on site. The existing use by Rexall includes permanent outdoor storage of equipment and supplies (which will be discontinued by the applicant), which has had no discernible effect on property values in the vicinity. Ambient noise from the traffic on the By-Pass and I-95 mitigates any minor noise impact this use will produce.

The building already exists and no new construction or site disturbance is contemplated.

Fourth, there will be no creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity. §10.232.23. The existing use is comprised of industrial/warehouse/retail and office use. The applicant’s operation is geared towards a

---

<sup>1</sup> “Use” is defined in the ordinance to include “[a]ny purpose for which a lot, building or other structure or a tract of land may be designated, arranged, intended, maintained or occupied; or any activity, occupation, business or operation carried on or intended to be carried on in a building or other structure or on a tract of land.” This would presumably include the parking areas, which the applicant does not intend to alter at this time.

<sup>2</sup> The applicant has not commissioned an as-built survey of the lot, so the exact location of the parking areas from the rights of way is not known, but it is assumed relief is necessary.

specialized clientele and does not generate significant traffic. The property currently has 28 designated/marked parking spots, which is more than sufficient for this proposed use. The Cate Street operation, for example, has only 11 spaces.

Fifth, there will be no excessive demand on municipal services, including, but not limited to, water, sewer, waste disposal, police and fire protection and schools. §10.232.24. None of these services will be implicated by this proposal.

Finally, the project will result in no significant increase of stormwater runoff onto adjacent property or streets. §10.232.25. There will be no change to the existing building footprint or impervious surfaces.

### **C. The Variances.**

The Applicant submits that the proposal meets the criteria for granting the requested variances.

**Granting the requested variance will not be contrary to the spirit and intent of the ordinance nor will it be contrary to the public interest.** The “public interest” and “spirit and intent” requirements are considered together pursuant to Malachy Glen Associates v. Chichester, 152 NH 102 (2007). The test for whether or not granting a variance would be contrary to the public interest or contrary to the spirit and intent of the ordinance is whether or not the variance being granted would substantially alter the characteristics of the neighborhood or threaten the health, safety and welfare of the public.

The proposed use fits in well with the mix of commercial, religious and other assembly and residential uses characteristic of this neighborhood. The existing structure and lot will not be altered in any material way. The health, safety and welfare of the public will not be threatened in any fashion if the proposed use is within 200 feet of the abutting residential zones or if the forty foot parking setback is not maintained.

**Substantial justice would be done by granting the variance.** Whether or not substantial justice will be done by granting a variance requires the Board to conduct a balancing test. If the hardship upon the owner/applicant outweighs any benefit to the general public in denying the variance, then substantial justice would be done by granting the variance. It is substantially just to allow a property owner the reasonable use of his or her property.

In this case, there is no benefit to the public in denying the variances that is not outweighed by the hardship upon the owner. The required 200 foot separation cannot be maintained without moving the building and substantially altering the parking areas. The forty foot parking/motor vehicle storage setback requirement is unnecessary to protect any abutting properties. The properties across Emery Street consist of a PSNH facility and an entirely commercial facility. At least one of the residential properties across Maplewood Avenue is oriented away from this property, and Maplewood itself provides a natural separation from other properties.



Accordingly, the loss to the applicant clearly outweighs any gain to the public if the applicant were required to conform to the ordinance.

**The values of surrounding properties will not be diminished by granting the variance.** The proposal will modernize and update a very modest commercial building and will spruce up the site. Deliveries and the noise associated with them will likely decrease. The abutting residential zone to the west is separated from the proposed use by heavy vegetation and a six foot privacy fence. The residential zone to the south is separated from the use by a utility corridor and heavy vegetation. The residential zone to the north is separated from the use by Maplewood Avenue. The values of surrounding properties will not be negatively affected in any way.

**There are special conditions associated with the property which prevent the proper enjoyment of the property under the strict terms of the zoning ordinance and thus constitute unnecessary hardship.** The property is an irregularly shaped corner lot with an existing built environment that is very easily adapted to the proposed use for the sale of motorcycles. The existing building is sited so that it is parallel to Emery Street but at an odd angle to Maplewood. Compliance with the ordinance would require, at a minimum, the relocation of the building on the property and the substantial removal and re-configuration of the parking. Pulling the parking area to 40 feet from the rights of way would impede the safe flow of traffic through the site given its irregular shape and the orientation of the building on the site.

**The use is a reasonable use.** The proposal is permitted by special exception in this zone and is not inconsistent with the intent of the Business zone or the existing mix of commercial, religious and general assembly and residential uses in the area.

**There is no fair and substantial relationship between the purpose of the ordinance as it is applied to this particular property.** All of the variance relief here requested is driven by the applicant's desire to reuse the property as it is currently configured. The purpose of the 200 foot from residential zones is to assure residential uses are adequately protected from the potentially deleterious effect of having a busy and very highly visible motor vehicle showroom in close proximity. The purpose of the forty foot parking setback from the public right of way is to blunt the adverse aesthetic affect a large automobile parking lot is presumed to have on the motoring public. None of these purposes are frustrated by this proposal for this site given that heavy vegetation, a privacy fence, a utility corridor and Maplewood Avenue all separate the proposed use from the abutting residential zones. As noted above, compliance with these requirements would mean moving the building and re-configuring the parking lot, which is an unnecessary hardship in this circumstance.

Accordingly, the relief requested here would not in any way frustrate the purpose of the ordinance and there is no fair and substantial relationship between the purpose of these requirements and their application to this property.

**D. Conclusion.**

For the foregoing reasons, the applicant respectfully requests the Board grant the special exception and variances as requested and advertised.

Respectfully submitted,

Dated: May 25, 2021

By: */s/ John K. Bosen*  
John K. Bosen, Esquire

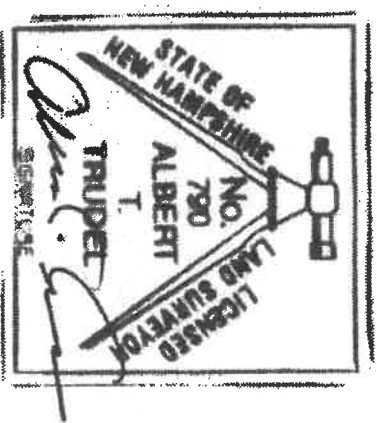
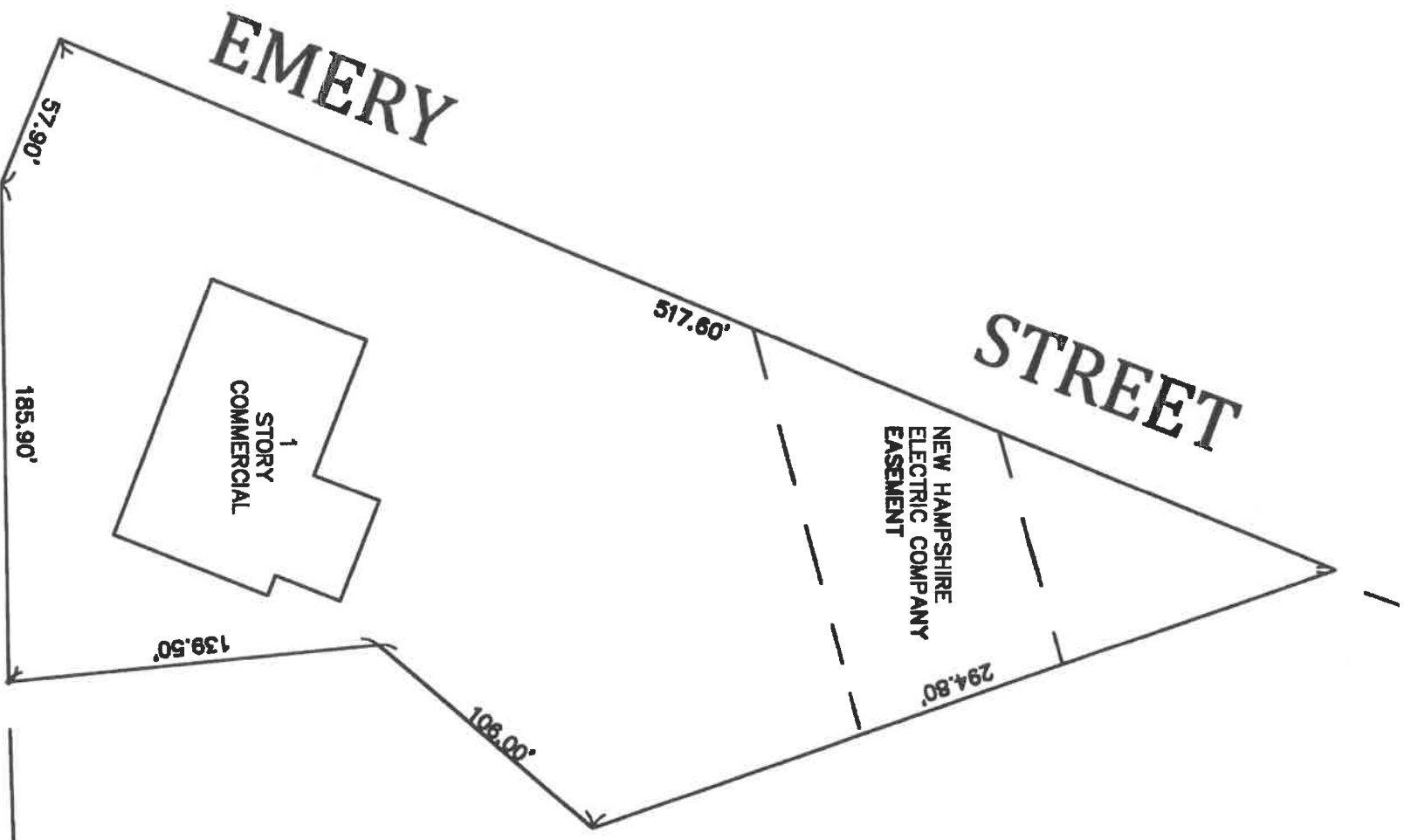
# MORTGAGE PLOT PLAN

S.E.C. & ASSOCIATES 2, INC.  
PHONE 978-469-1985

MORTGAGOR: JAMES KENNY  
ADDRESS OF PRINCIPLE BUILDING: 650 MAPLEWOOD AVE. PORTSMOUTH, NH

DEED REF. BK. 2909 PG.977  
PLAN REF. 02976  
DATE OF INSPECTION: APRIL 20, 2020  
SCALE 1" = 80'

EMERY STREET  
MAPLEWOOD AVENUE



certification to:  
This Mortgage Plot Plan was prepared specifically for mortgage purposes only and it is not intended or represented to be a property line or land survey. This plan is not to be used to establish any of the property lines for any purpose. No responsibility is extended to the land owner or occupant. This is a tape survey based on the location of survey markers of others. This plan is not to be used for building permits or any such use.

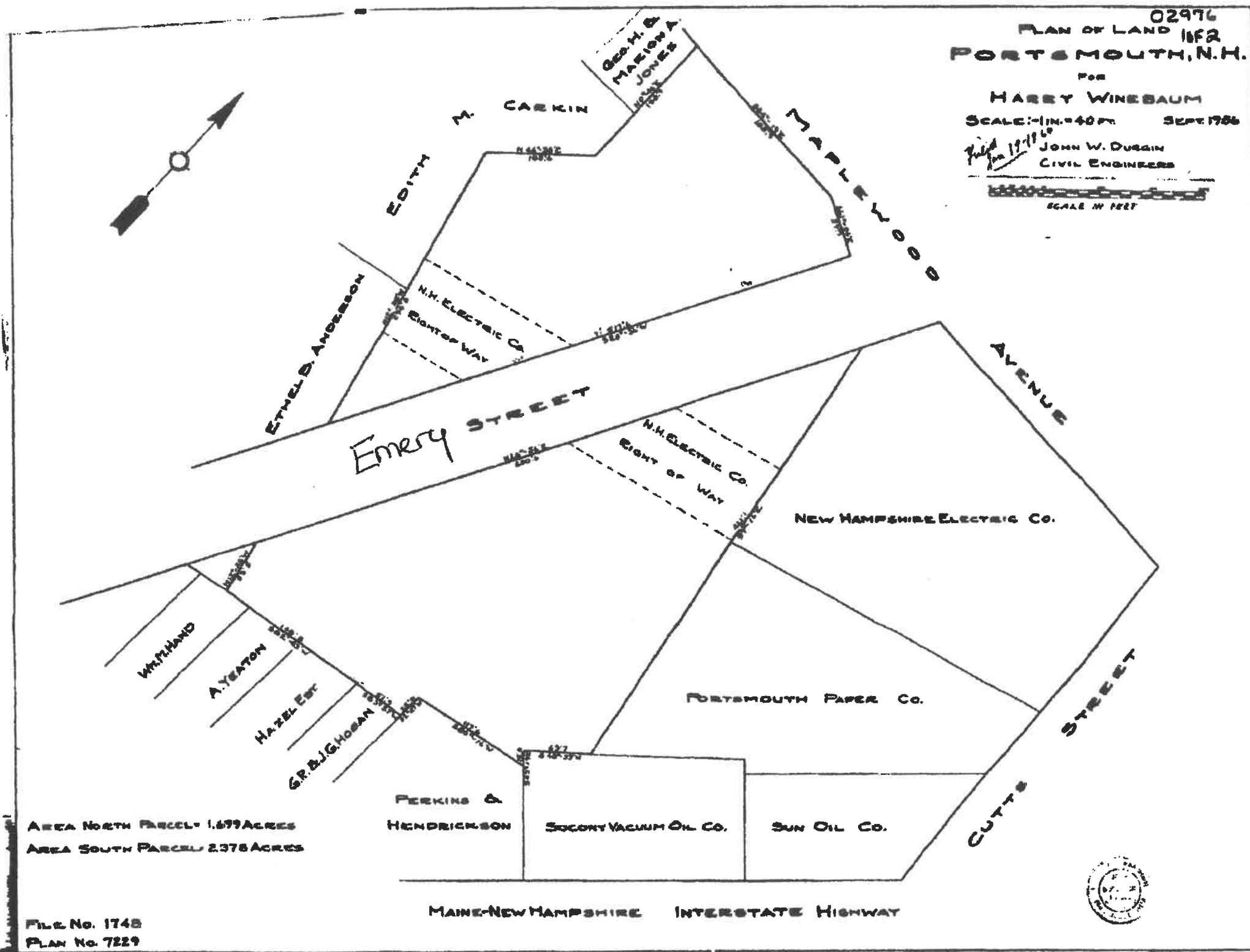
The approximate location of the principle structure/s conform with the horizontal building setback requirements in effect when constructed.  
The principle structure on this plan is not located within a special flood hazard area as scaled from FRM Map # 33015C-0259 E  
Date: 5/17/2005

Prepared for: CASASSA LAW OFFICE File No.

Job No. 20258

02976  
PLAN OF LAND 1162  
PORTSMOUTH, N.H.

FOR  
HARRY WINEBAUM  
SCALE: 1/4" = 40 FT. SEPT 1986  
JOHN W. DUGGIN  
CIVIL ENGINEERS

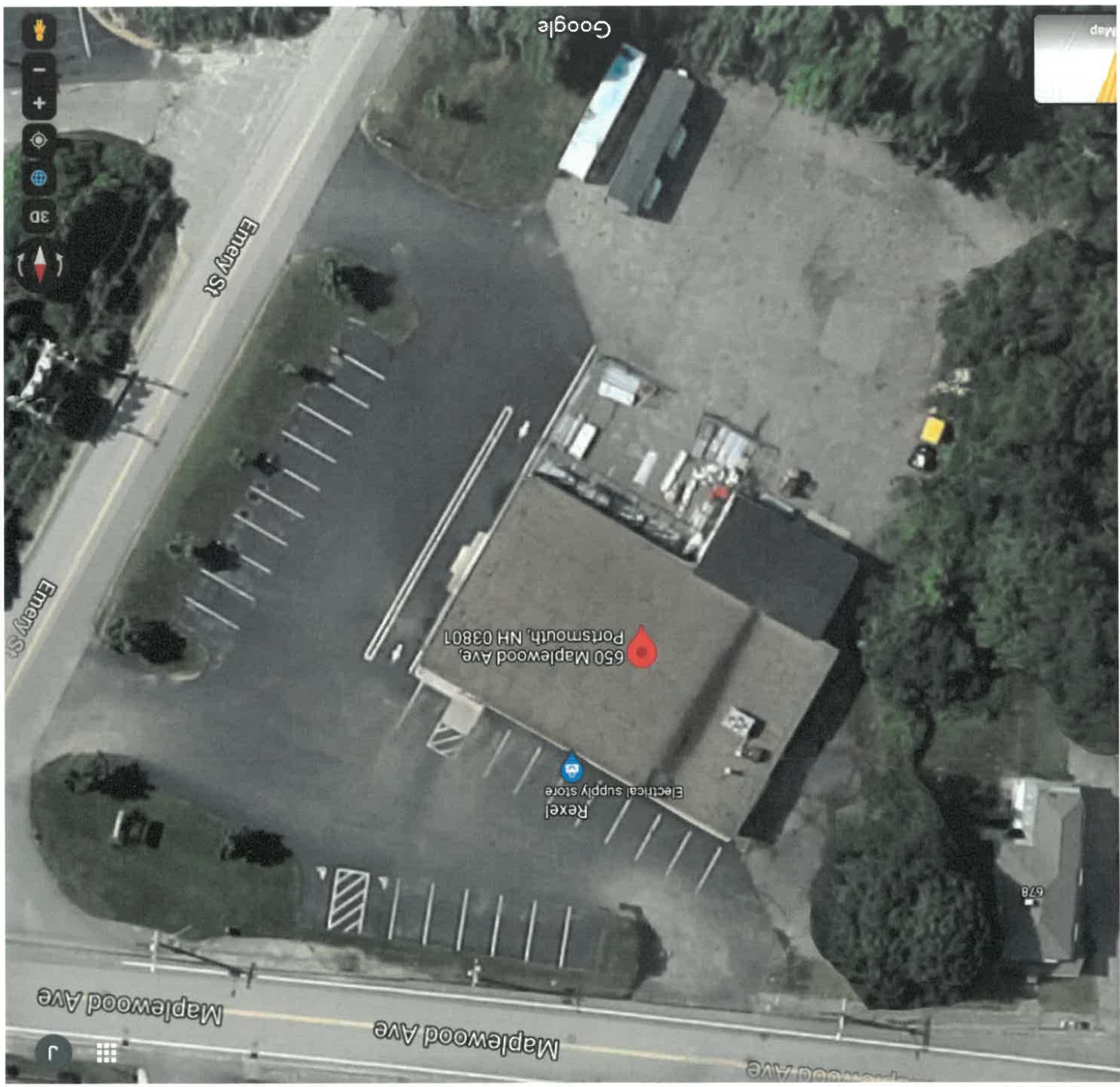


AREA NORTH PARCEL: 1.679 ACRES  
AREA SOUTH PARCEL: 2.376 ACRES

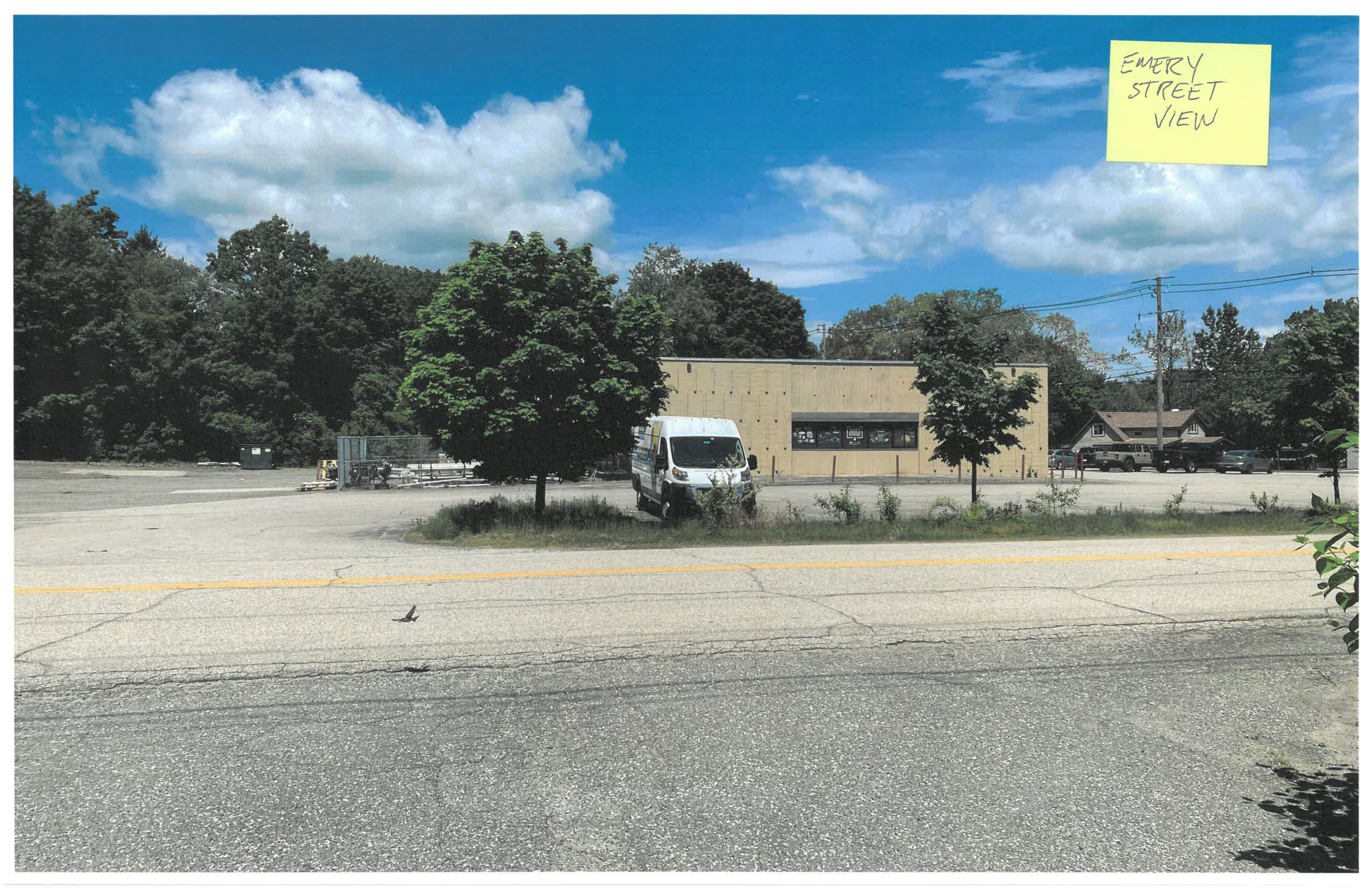
FILE No. 1748  
PLAN No. 7229



Plan 02976 Requested by C from RET7PC at Rockingham on 3/1/2020



EMERY  
STREET  
VIEW



MAPLEWOOD  
AVENUE  
VIEW

rexel



**III. NEW BUSINESS**

**G.** The request of **Cate Street Development LLC (Owner)**, for property located at **360 US Route 1 BYP** whereas relief is needed to install a sign on the northern façade of the building which requires a Variance from Section 10.1271 to allow a sign to be installed on a façade not facing the street or with a public entrance; 2) Variance from Section 10.1242 to allow more than one parapet sign above the ground floor per facade. Said property is located on Assessor Map 172 Lot 1 and lies within the Gateway Corridor (G1) District. (LU-23-44)

**Existing & Proposed Conditions**

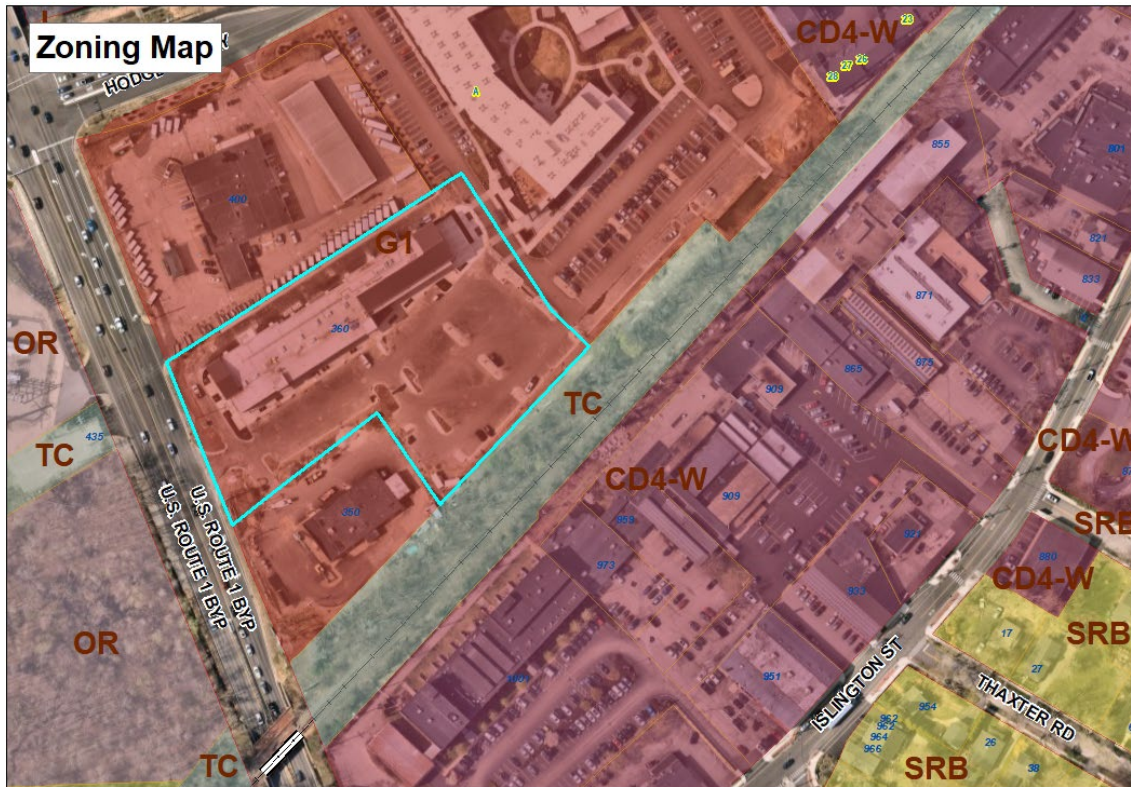
	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Commercial	Add "Headquarters" Signage	Mixed Uses
<u>Aggregate Sign Area (sq. ft.):</u>		166.6	201 max.
<u>Parapet Signs Above ground floor (sq. ft.):</u>	0	1	1 max.
<u>Signs on façade not facing a street or w/ a public entrance (ft.):</u>	0	<b>1</b>	0 min.
<u>Estimated Age of Structure:</u>	2021	<b>Variance request(s) shown in red.</b>	

**Other Permits/Approvals Required**

- Building Permit



### Neighborhood Context



0 65 130 260 Feet  
1 inch = 133.3 feet

**360 US Rt. 1 Bypass**



## Previous Board of Adjustment Actions

September 10, 1985 – The Board **granted** the following special exception with stipulations:

Article II, Section 10-207(8) to allow heavy equipment and heavy vehicle distribution and sales in the southerly half of an existing one-story structure.

Stipulations:

- 1) A \$15,000 bond be posted to ensure that the parking are be paved and lined in accordance with the plan filed with the Planning Department; and
- 2) No parking be allowed beyond the parking spaces as delineated on the plan in front of the W.T.A. Bingo building and the Route 1 By-Pass.

August 22, 1989 – The Board **denied** the following variance:

Article IX Section 10-906 to allow the erection of a 4' by 13' free-standing sign with 0' setback for the front property line in a zone where free-standing signs shall have a minimum of 35' front setback

September 12, 1989 – Request to rehear the August 22, 1989 request was considered and **denied**.

October 3, 1989 – The Board **granted** the following variance:

- Article III, Section 10-302 to allow the construction of a 16' by 22' canopy 30' from the left of the lot line where 50' is required

November 14, 1989 – The Boards **granted** the following variance:

- Article IX, Section 10-906 to permit the erection of a 52 s.f. free standing sign with an 8' front yard where a 35' front yard is required.

April 19, 1994 - The Board **granted** the following variances:

- Article II, Section 10-207 to convert 1920 s.f. of space formerly occupied by a catering service to Bingo Hall usage for a total of 8,870 s.f. for the bingo hall; and
- Article IV, Section 10-401(5) to allow the expansion of a nonconforming use of a structure where no increase in the extent of a nonconforming use of a structure may be made without Board approval.

April 18, 1995 – The Board **granted** the following special exception and stipulation:

- Article II, Section 10-207(11) for the erection of a 40' by 120' tent to the rear of the building for three days, May3, 1995 to May 5, 1995 for the purpose of a fundraising event for hunger relief where temporary structures may be allowed by special exception provided a bond is posted to insure their removal.

Stipulation

- 1) \$100.00 bond be posted to the City to ensure the removal of the tent.

## Planning Department Comments

The applicant is proposing to add a sign to the northern facing façade of their building. This sign requires relief as the northern facing façade does not front on a public street or have a public entrance to the proposed use.

## Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*

2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

### **10.235 Certain Representations Deemed Conditions**

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

**APPLICATION OF CONVENIENT MD, LLC**  
**360 US Route One By-Pass Portsmouth, Tax Map 172, Lot 001**

**APPLICANT'S NARRATIVE**

I. **THE PROPERTY:**

The applicant, Convenient MD, LLC, is in the process of fitting up space at 360 US Route One By-Pass in the West End Yards complex for its corporate headquarters. In connection therewith, the applicant seeks approval for several wall signs on the building. The applicant is leasing a portion of the first and the entire second floor of the building, a total of 32,602 square feet.

The West End Yards development consists of three buildings on an approximately nine acres. The development covers a large, relatively narrow area that moves east away from the By-Pass, and surrounds the U-Haul facility on the By-Pass to the south of Hodgdon Way. The property actually has two points of access from the By-Pass, only one of which is accessible from the northbound travel lane. Due to these factors, and given the multiple uses on the site, which is encouraged in this zone, effective signage is very important to the success of the development.

The property is within the G-1 Gateway Corridor District and Sign District 5. The building itself is 325 feet long and houses multiple tenants. It has 75 feet of frontage on the By-Pass, however, the applicant's primary public entrance is on the southern side of the building, not facing the right of way. The applicant proposes to install two "logo" tower signs (25.9 square feet each) and a canopy "marquee" sign (18.5 square feet) on this southern façade. It also proposes to install a "headquarters" sign (122.2 square feet) on the northern façade.

None of the proposed wall mounted signs exceeds 200 square feet, and thus all comply with section 10.1251.20. The applicant's establishment will only occupy a portion of the ground floor of the building, with building frontage, as calculated pursuant to section 10.1290, of 134 feet. Per section 10.1251.10, the applicant would be entitled to aggregate sign area of 201 square feet per, so no relief from this section is necessary. Relief from 10.1271.30 is required, however, as the proposed "headquarters" sign is proposed on the northern façade of the building, where there is no public entrance.

The proposed signage on the northern façade, where there is no public entrance, is critical because it will allow southbound traffic to easily identify the building prior to reaching the signalized intersection at Hodgdon Way, which is the last place such traffic can enter the complex without having to make a U-turn at Greenleaf Avenue.

**CRITERIA:**

The applicant believes the within Application meets the criteria necessary for the Board to grant the requested variances.

**Granting the requested variance will not be contrary to the spirit and intent of the ordinance nor will it be contrary to the public interest.** The “public interest” and “spirit and intent” requirements are considered together pursuant to Malachy Glen Associates v. Chichester, 152 NH 102 (2007). The test for whether or not granting a variance would be contrary to the public interest or contrary to the spirit and intent of the ordinance is whether or not the variance being granted would substantially alter the characteristics of the neighborhood or threaten the health, safety and welfare of the public.

In this case, were the variances to be granted, there would be no change in the essential characteristics of the neighborhood, nor would any public health, safety or welfare be threatened. This building is a fully approved and permitted commercial facility and is within the Gateway zone where the applicant’s use is permitted by right. It is bounded on both sides by existing retail and commercial operations.

The health, safety and welfare of the public will not be threatened, nor will the essential characteristics of the neighborhood change in any way by virtue of the size of the signs here proposed. In fact, the competing signage at the U-Haul facility arguably cuts in favor of more prominent signage for this site to properly direct visitors to the location. There is a fully signalized intersection at the main Hodgdon Way entry, which is the last point at which southbound traffic on the By Pass may make a left turn onto the property without making a U-turn further south. Accordingly, prominent signage is appropriate for this location.

**Substantial justice would be done by granting the variance.** Whether or not substantial justice will be done by granting a variance requires the Board to conduct a balancing test. If the hardship upon the owner/applicant outweighs any benefit to the general public in denying the variance, then substantial justice would be done by granting the variance. It is substantially just to allow a property owner the reasonable use of his or her property. Here, there are significant challenges to the site that make enhanced visibility necessary and desirable. The building is relatively long and narrow and obscured from the right of way by the U-Haul facility. Prominent signage is necessary in order to secure and maintain visibility and effective and reasonable sight lines. The signs are tastefully designed and in no way promote the visual clutter the City’s sign ordinance is meant to protect against.

It would be an injustice to the applicant to deny the variances here requested.

**The values of surrounding properties will not be diminished by granting the variance.** The surrounding properties and those in the vicinity will not be negatively affected in any way by this relief. The proposed signs will enhance the visibility of this

establishment, which will decrease potential negative impacts on neighboring properties. Directing motorists off the By-Pass to this establishment requires more prominent signage than the ordinance contemplates.

**There are special conditions associated with the property which prevent the proper enjoyment of the property under the strict terms of the zoning ordinance and thus constitute unnecessary hardship.** The property for which relief is sought is unique. It is a large, irregularly shaped lot with frontage in two separate places on the By-Pass and on Hodgdon Way. It completely surrounds and is partially obscured by the U-Haul facility, which is a very visually busy site. The property is bounded on the north and south by existing commercial uses. There is a fully signalized intersection at the main entry, which is the last point at which southbound traffic on the By Pass may make a left turn onto the property without making a U-turn further south. Accordingly, prominent signage is appropriate for this location.

These are special conditions of the property which counsel for more prominent signage in order to secure and maintain effective and reasonable sight lines.

**The use is a reasonable use.** The uses proposed are permitted within this district and are compatible with the surrounding retail and commercial enterprises and residential uses.

**There is no fair and substantial relationship between the purpose of the ordinance as it is applied to this particular property.** The purpose of the sign ordinance is to maintain and enhance the character of the city's commercial districts and to protect the public from hazardous and distracting displays. Section 10.1211. None of the proposed new signs do anything to distract from the character of this district and there is nothing hazardous or distracting about them. There is no fair and substantial relationship between these purposes and their application to this property.

## **II. Conclusion.**

For the foregoing reasons, the applicant respectfully requests the Board grant the variances as requested and advertised.

Respectfully submitted,

Dated: March 29, 2023

By: John K. Bosen  
John K. Bosen, Esquire

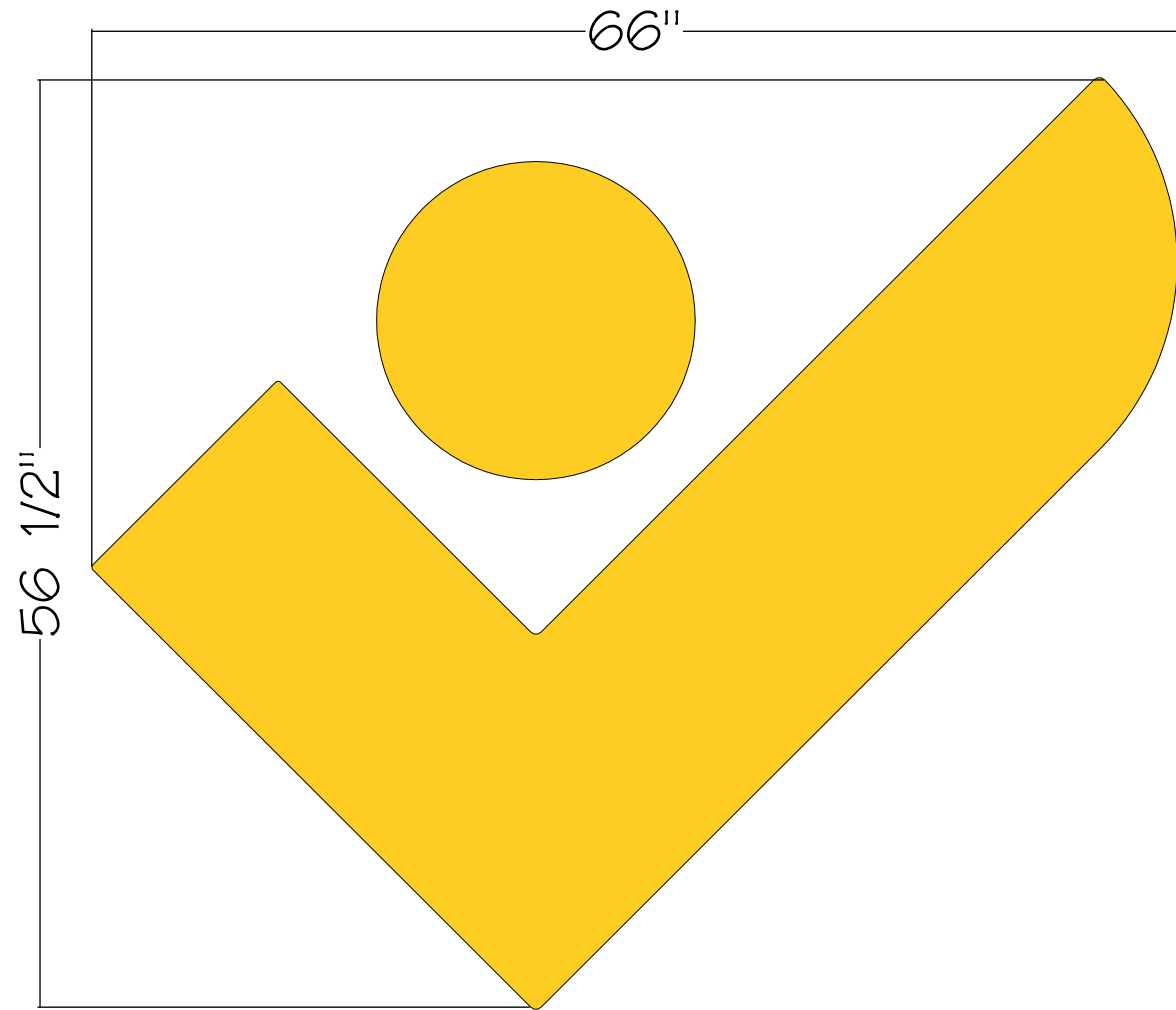



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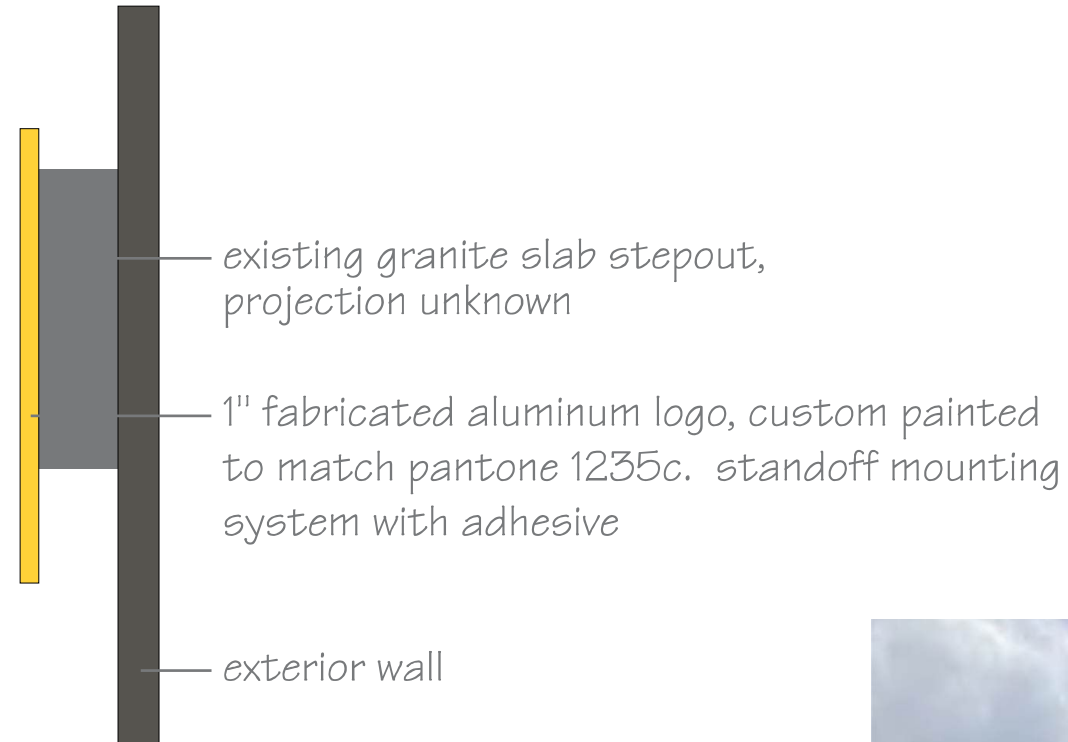
## Portsmouth, NH

### SIGNAGE PLAN

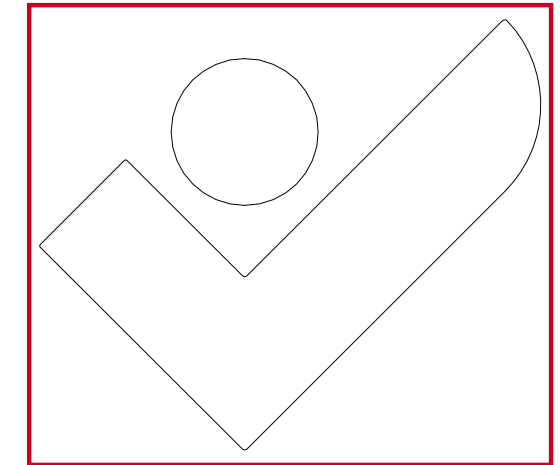
PAGE	TYPE	ELEVATION
01	EXT-WALL SIGNS	SOUTH - TOWERS
02	EXT-WALL SIGN	SOUTH - AWNING/CANOPY
03	EXT-WALL SIGN	NORTH ELEVATION



Side Profile



Sign Area Calculation



Sign is 25.9 sq.ft

Quantity [2]

Design, furnish and install (2) fabricated logo signs., on the exterior building wall on the South elevation (towers.) Sign will either be externally illuminated (downlights) or non-illuminated signs. Colors meet CMD branding standards.

- 1" aluminum fabricated logos
- painted to match Pantone 1235c



DATE: 1-5-23	JOB NAME: Convenient MD - West End Yards - Exterior Sign Package
REP: Jason	JOB LOCATION: 428 Route 1 Bypass, Portsmouth, NH
CONTACT: Dave / Ryan	Signature: _____
AUTHORIZED SIGNATURE REQUIRED TO BEGIN PRODUCTION	

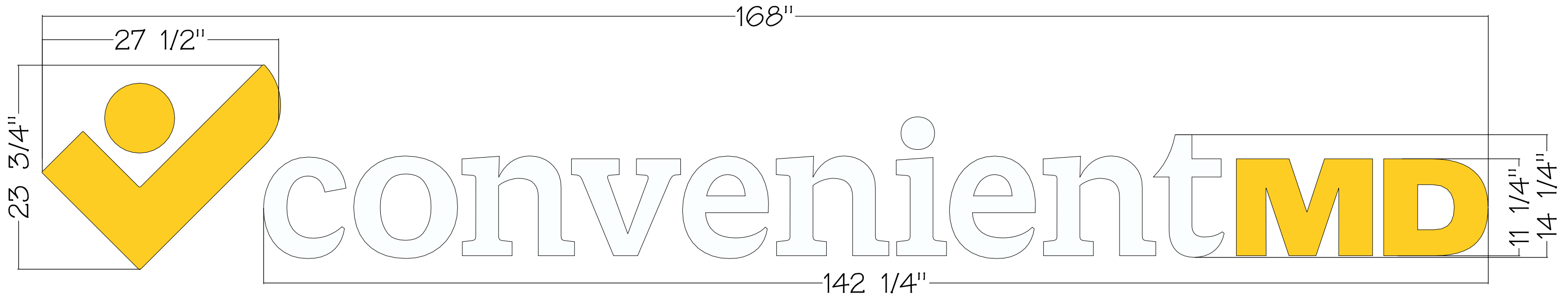


225 East Industrial Park Dr. Manchester, NH 03109  
 603-622-5067 FAX 603-624-6188

CHANNEL LETTERS SPECIFICATIONS

- SIGN FACE: 3/16" Acrylic, White
- TRIMCAP: 1" Trimcap, Black
- RETURNS: 040 Aluminum, Matte Black
- LIGHTING: Hanley LED Lighting, White
- COLOR: Printed to Match Pantone 1235c





**Quantity [1]**

Design, furnish and install (1) LED illuminated channel letter set, flush mounted to exterior building wall on the North elevation (rear of building facing U-Haul.) Colors meet CMD branding standards.

- standard 5" LED, lit channel letters
- plotter cut translucent vinyl graphics
- signs are UL listed under Sousa Signs, LLC

Night Rendering



Sign Area Calculation  
Sign totals 18.5 sq.ft



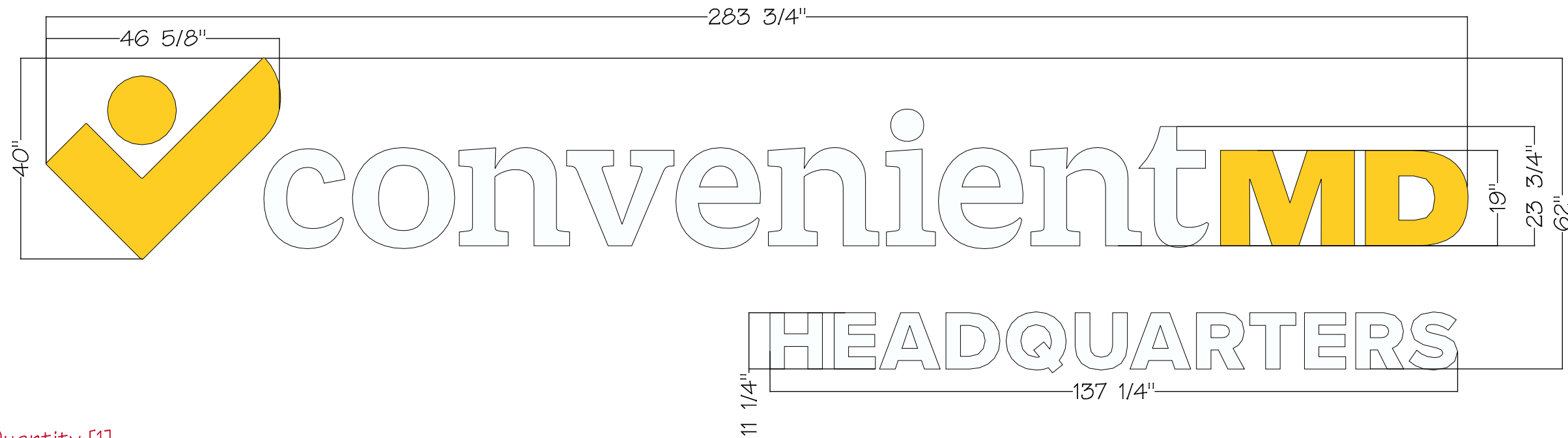
DATE: 1-5-23	JOB NAME: Convenient MD - West End Yards - Exterior Sign Package
REP: Jason	JOB LOCATION: 428 Route 1 Bypass, Portsmouth, NH
CONTACT: Dave / Ryan	Signature: _____
AUTHORIZED SIGNATURE REQUIRED TO BEGIN PRODUCTION	



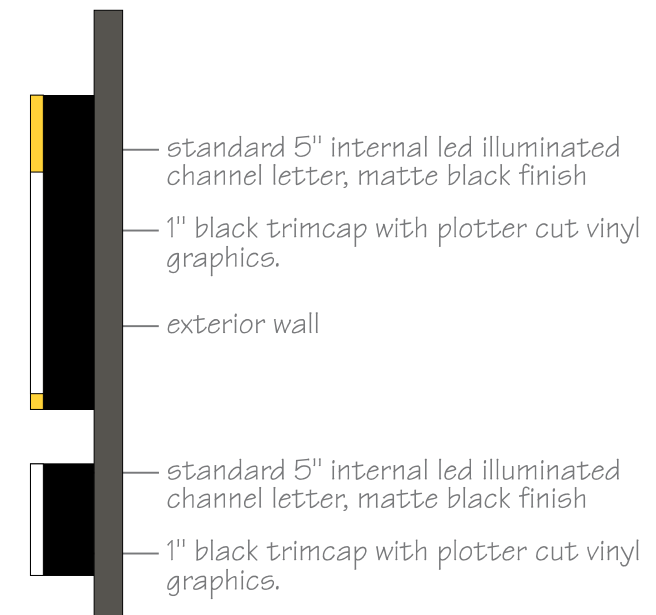
225 East Industrial Park Dr. Manchester, NH 03109  
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- standard 5" LED, lit channel letters
- plotter cut translucent vinyl graphics
- signs are UL listed under Sousa Signs, LLC



Placement Rendering ONLY (not to scale)



Night Rendering



Sign Area Calculation



Sign is 122.2 sq.ft

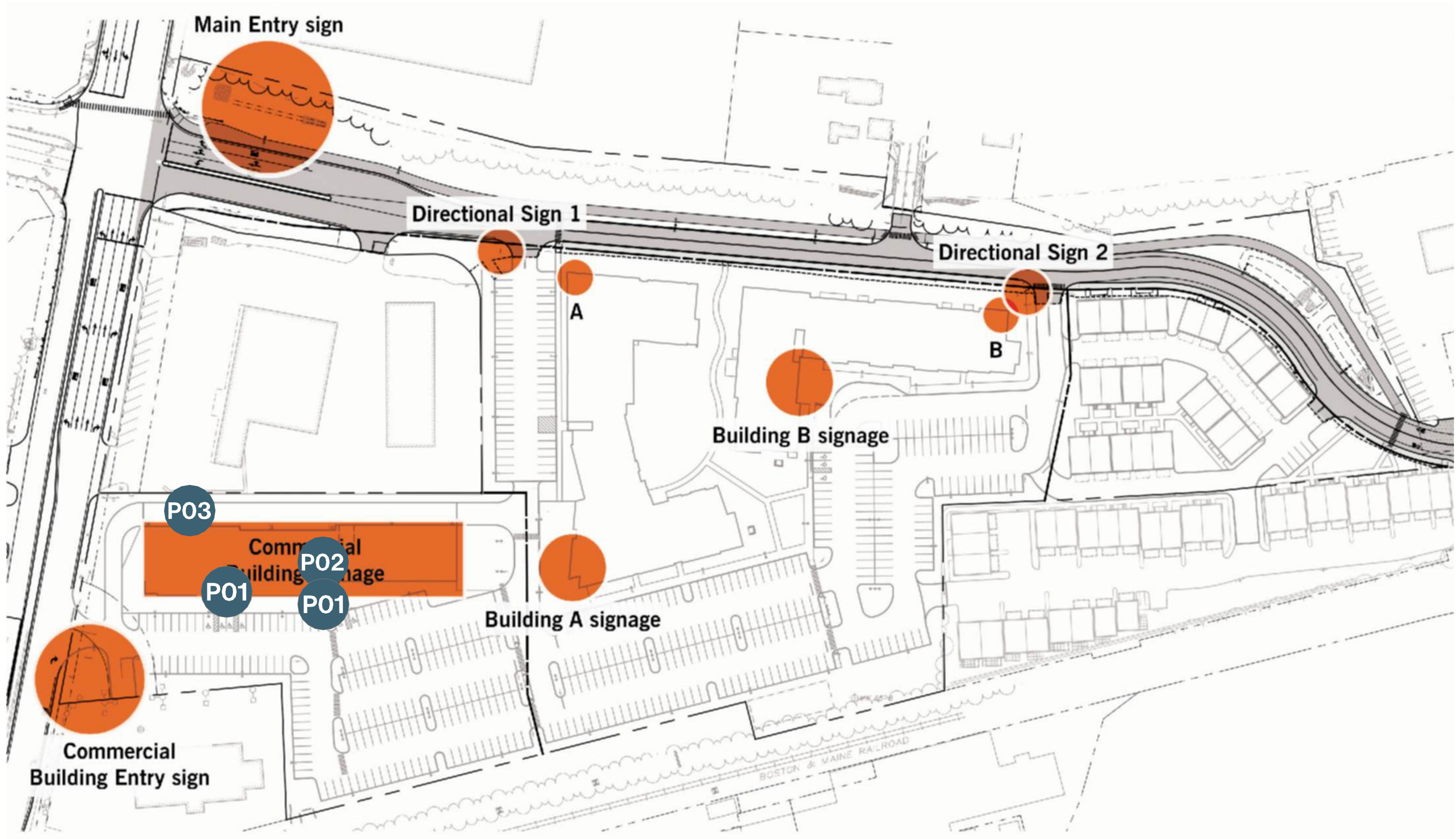
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REP: Jason	JOB LOCATION: 428 Route 1 Bypass, Portsmouth, NH
CONTACT: Dave / Ryan	Signature: _____
AUTHORIZED SIGNATURE REQUIRED TO BEGIN PRODUCTION	



225 East Industrial Park Dr. Manchester, NH 03109  
603-622-5067 FAX 603-624-6188

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<b>DATE:</b> 1-5-23	<b>JOB NAME:</b> Convenient MD - West End Yards - Exterior Sign Package
<b>REP:</b> Jason	<b>JOB LOCATION:</b> 428 Route 1 Bypass, Portsmouth, NH
<b>CONTACT:</b> Dave / Ryan	<b>Signature:</b>
<b>AUTHORIZED SIGNATURE REQUIRED TO BEGIN PRODUCTION</b>	

  
 225 East Industrial Park Dr. Manchester, NH 03109  
**603-622-5067 FAX 603-624-6188**

PANEL SPECIFICATIONS	
<span style="display: inline-block; width: 10px; height: 10px; background-color: orange; border: 1px solid black;"></span>	SIGN PANEL: Material TBD
<span style="display: inline-block; width: 10px; height: 10px; background-color: blue; border: 1px solid black;"></span>	COLOR: Blue Color, TBD
<span style="display: inline-block; width: 10px; height: 10px; background-color: yellow; border: 1px solid black;"></span>	COLOR: Sun Yellow Color, TBD

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HARRIMAN

AUBURN BOSTON PORTLAND PORTSMOUTH

WEST END YARDS  
COMMERCIAL BUILDING

PORTSMOUTH, NEW HAMPSHIRE

Harriman Project No. 20377

Proj. Team



GENERAL NOTES

1. SEE DRAWING A101 FOR HARRIMAN TYPES.
2. SPECIFICATIONS LOCATING FINISH PARTITIONS ARE TO FACE OF GFW OR CMU UNLESS NOTED OTHERWISE.
3. SEE DRAWING A801 FOR DOOR SCHEDULE.
4. SEE DRAWING A801 FOR ROOM FINISH SCHEDULE.

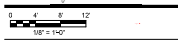
SYMBOLS LEGEND

- - - 1HR RATED WALL ASSEMBLY UL GAW
- - - 2HR RATED ELEVATOR SHAFT ASSEMBLY UL GAW
- - - 1HR RATED SHAFT WALL ASSEMBLY UL GAW

CONFORMANCE SET

JUNE 28, 2021

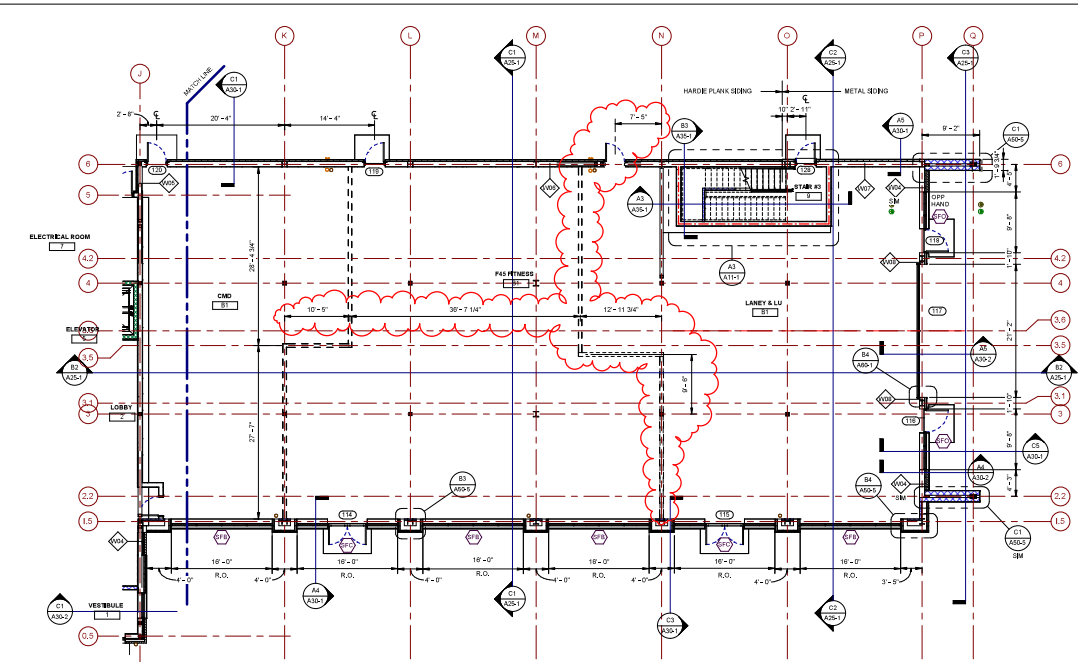
Rev. No.	Revised Description
05-16-2022	AS14
02-24-2022	REVIEW TO AS14
02-24-2022	REVIEW TO AS14
02-24-2022	PROPOSAL REQUEST 10
03-24-2022	REVIEW TO PROPOSAL REQUEST 10
05-04-2022	AS16



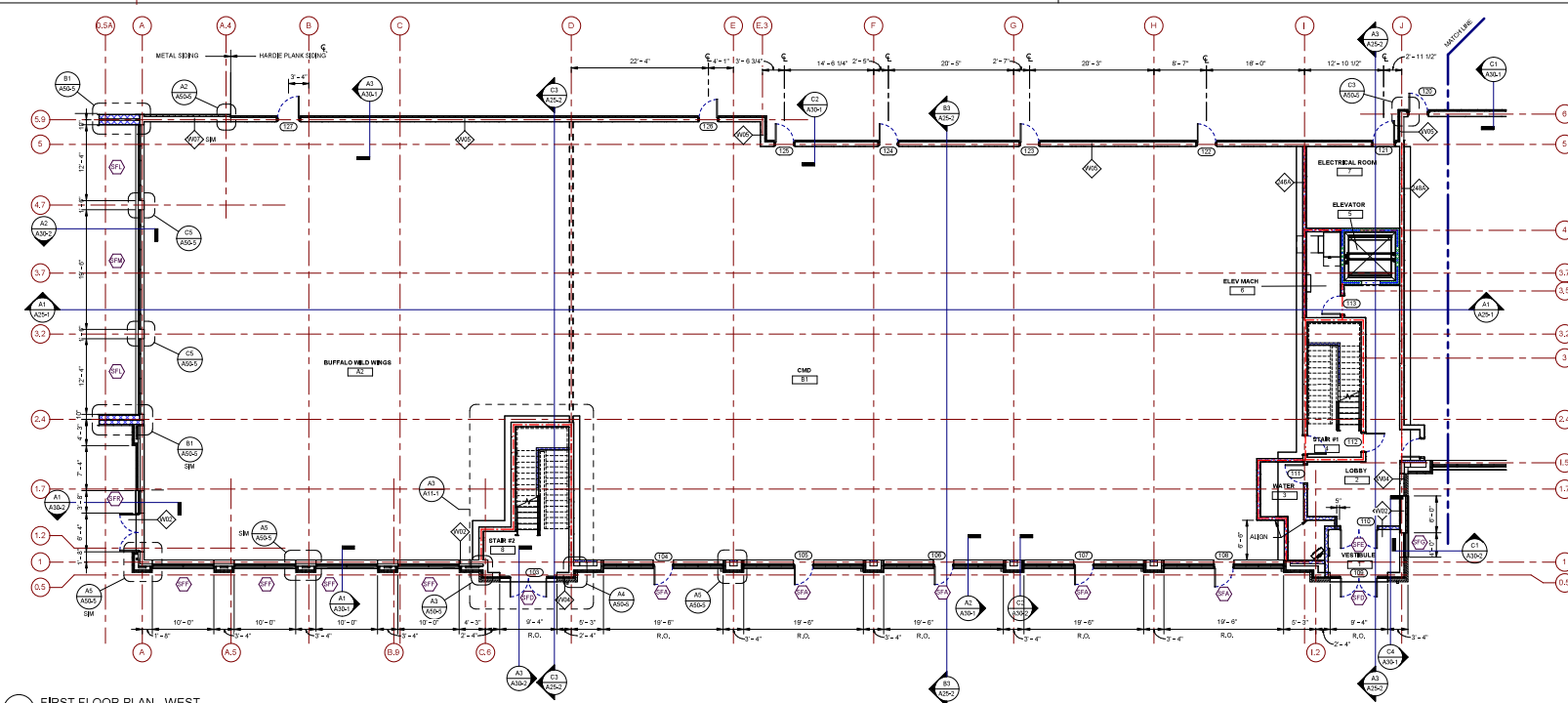
PA/RE: MJB  
Drawn by: DNE

FIRST FLOOR PLAN

A10-1



B1 FIRST FLOOR PLAN - EAST  
SCALE: 1/8" = 1'-0"



A1 FIRST FLOOR PLAN - WEST  
SCALE: 1/8" = 1'-0"



Southern facade



Northern facade