

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC

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August 30, 2023

HAND DELIVERED

Stefanie Casella, Planner II
Portsmouth Zoning Board of Adjustment
City Hall
1 Junkins Avenue
Portsmouth, NH 03801

Re: Zoning Relief
Applicant/Owner: Marcella Hoekstra
Property: 35 Whipple Court
Tax Map 260, Lot 98
Single Residence B Zone

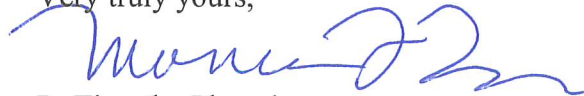
Dear Ms. Casella & Zoning Board Members:

On behalf of Applicant, Marcella Hoekstra enclosed please find the following:

- See Viewpoint Land Use Application uploaded today.
- Owner's Authorization
- 07/26/23 Memorandum in Support of Variance

We look forward to presenting this Application to the Zoning Board of Adjustment at its September 19, meeting.

Very truly yours,



R. Timothy Phoenix
Monica F. Kieser

Encl.

cc: Marcella Hoekstra

DANIEL C. HOEFLE
R. TIMOTHY PHOENIX
LAWRENCE B. GORMLEY
STEPHEN H. ROBERTS

R. PETER TAYLOR
KEVIN M. BAUM
GREGORY D. ROBBINS
MONICA F. KIESER

JACOB J.B. MARVELLEY
DUNCAN A. EDGAR
STEPHANIE J. JOHNSON

OF COUNSEL:
SAMUEL R. REID
JOHN AHLGREN

Monica Kieser

From: Marcella Hoekstra - Heirloom Pictures <marcella@heirloompictures.com>
Sent: Monday, May 24, 2021 7:20 PM
To: Monica Kieser
Subject: Authorization email.

I authorize Hoefle, Phoenix, Gormley & Roberts, PLLC to execute all applications before Portsmouth Land Use Boards and to take any and all actions necessary throughout the application and permitting process related to my property at 35 Whipple Court (Tax Map 260, Lot 98) including but not limited to attendance and presentation at public hearings.

Marcella Hoekstra

MEMORANDUM

TO: Portsmouth Zoning Board of Adjustment (“ZBA”)
FROM: Monica F. Kieser, Esquire
Stephanie J. Johnson, Esquire
DATE: August 30, 2023
RE: Marcella Hoekstra
Project Location: 35 Whipple Court
Tax Map 260/Lot 98
SRB Zone

Dear Chair Eldredge and Zoning Board Members:

On behalf of Marcella Hoekstra (“Hoekstra”), we are pleased to submit this memorandum and attached exhibits in support of Zoning Relief to be considered by the Zoning Board of Adjustment (“ZBA”) at its September 19, 2023 meeting.

I. EXHIBITS

- A. Plot Plan & Dimensions.
 - Existing Conditions
 - Setbacks & Parking
 - Zoomed-in Setbacks
- B. ADU Plan.
 - Floor Plan
 - Elevations with height
- C. Site Photographs.
- D. Tax Map 260.

II. PROPERTY/PROJECT

35 Whipple Court is an 8,324 s.f. lot in Pannaway Manner which contains a modest 1,543 s.f. one story single family home (1,143 s.f. living area) and 615 s.f. garage/shed outbuilding (the “Property”) (**Exhibits A, C**). The home dates back to 1940. In 1968, a 22 ft. by 18 ft. one car garage was approved with a 10 ft. right side yard and a 17 ft. rear yard. Because the accessory structure on the lot is larger than 22 ft. by 18 ft., and closer to both lots lines than what was previously approved, Hoekstra seeks an equitable waiver, or in the alternative, a variance to permit the structure that has existed on the lot – likely for decades. In addition, Hoekstra intends to convert a portion of the existing garage/shed outbuilding to a one bedroom, one bathroom Accessory Dwelling Unit (“ADU”) (the “Project”). No expansion of the structure will occur and the ADU will be served by municipal water and sewer. Relief from the Portsmouth Zoning Ordinance (“PZO”) is nonetheless required because the outbuilding is within the right side and rear yard setbacks and will be converted to an ADU.

III. RELIEF REQUIRED

After conferring with the City Planning Department staff, it has been determined that the following is required:

<u>PZO Requirement</u>	<u>Existing</u>	<u>Proposed</u>
<u>PZO §10.520/Table §10.521 & §10.814.131</u> <u>SRB Dimensional Standards</u> <u>15,000 s.f. lot area/dwelling unit</u>	8,324 s.f. existing lot with single family home.	Single-family home and ADU
<u>PZO §10.520/Table §10.521:</u> <u>SRB Dimensional Standards¹</u> <u>10' Side Yard</u>	Accessory structure 8.5' (right)	1-BR ADU 8.5' (right)
<u>PZO §10.520/Table §10.521:</u> <u>SRB Dimensional Standards²</u> <u>30' Rear Yard</u>	Accessory structure 8.16'/8.83	1-BR ADU 8.16'/8.83
<u>PZO §10.1112.311 – Parking</u> <u>2.3 spaces (1.3 spaces + 1 ADU)</u>	1 indoor space, 2 in driveway	2 driveway spaces.

Given the long-standing existence of the accessory structure, we request an equitable waiver. If the Board does not see fit to grant an equitable waiver for the existing garage, in the alternative, we request a variance. In addition, Staff have opined that a variance is nonetheless required to permit conversion of a portion of the existing garage to an ADU.

IV. EQUITABLE WAIVER

Given the long standing existence of the accessory structure, we pursuant to RSA 674:33-a, I:

When a lot or other division of land, or structure thereupon, is discovered to be in violation of the physical layout or dimensional requirement imposed by the zoning ordinance... the zoning board of adjustment shall, upon application by and with the burden of proof upon

¹ See also PZO§10.573 An accessory building or structure more than 10 feet in height or more than 100 square feet in area shall be set back from any lot line at least the height of the building or the applicable yard requirement, whichever is less. The existing outbuilding is 10.91' at its highest point, so the applicable side yard requirement is 10 ft.

² Pursuant to PZO §10.573, the applicable rear yard setback for the accessory structure is 30 ft. because the accessory structure is taller than 10 ft. and occupies an area greater than 100 s.f.

the property owner, grant an equitable waiver from the requirement, if and only if the Board makes all of the following findings:

- (a) that the violation was not noticed or discovered by any owner former owner or his agent or representative or municipal official until after a structure in violation had been substantially completed... .

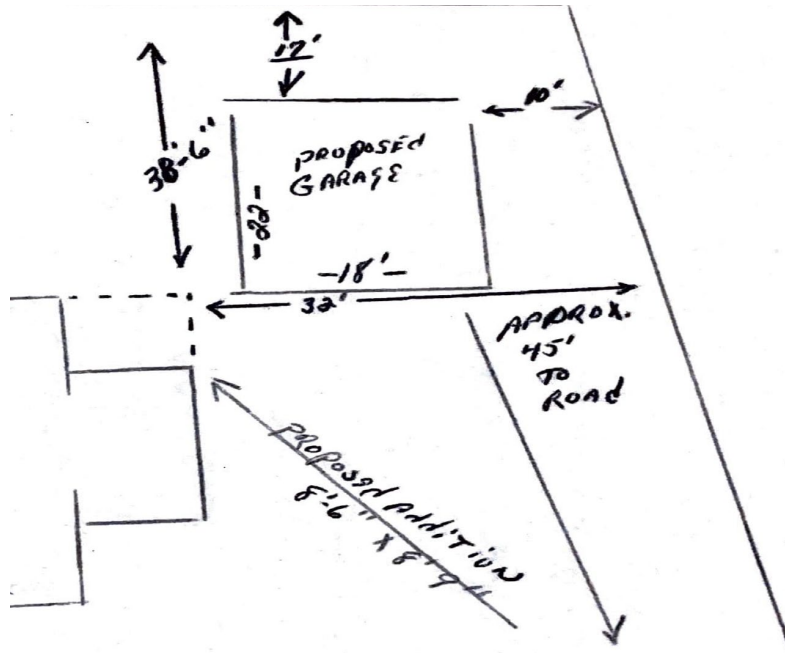
Response – The accessory structure on the Property was constructed in 1968 after the then-owner obtained a variance from the ZBA to permit an 18 ft. x 22 ft. garage. The existing accessory structure is larger (615 s.f.) and closer (8.5 ft.) to the right side lot line than previously approved (10 ft.). The extended portion has a roof lower than the garage, and its separate space utilized as a shed. Given the lack of subsequent permits and the 2014 listing photo and description (“Large garage with separate room and plenty of storage and room for all the toys.”), it appears that the shed area (in red below) has been present since the garage was constructed.



<https://www.redfin.com/NH/Portsmouth/35-Whipple-Ct-03801/home/87964994>

- (b) that the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation or bad faith on the part of any owner, owner’s agent or representative, but was instead caused by either a good-faith error in measurement or calculation made by an owner or owner’s agent, or by an error in or misinterpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.

Response - Hoekstra did not realize that the presence of the attached shed area was not permitted, or violated the PZO, as the shed area has been present since she purchased the Property in 2014. The drawings submitted to the ZBA in 1968 evidently misjudged the angle of the right side lot line (Compare below to Exhibit A).



Note that RSA 674:33-a, II, provides that, “[I]n lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.” Undersigned Counsel has reviewed the building, planning, and zoning files and finds no record of any enforcement action of any kind related to 35 Whipple Court.

(c) that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of such property;

Response – The longer garage with shed area is not noticeable from the front of the Property, and the garage conforms to the appearance of homes in the surrounding neighborhood. Landscaping and a fence screen the garage from the right side and rear abutting lots. The structure has clearly existed for more than 10 years. Thus, the existence of the accessory structure in the right and rear yard setbacks does not present a nuisance, a diminishment of the value of other properties, nor an adverse effect to present or future use of neighboring properties.

(d) that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, cost of correction so far outweighs any public benefit to be gained that it would be inequitable to require the violation to be corrected.

Response – Given the long existing nature of the garage, its minimal encroachment on the right side over what was approved, and the screening between it and the abutting properties, it would be an unnecessary and extreme expense to remove the nonconforming parts of the accessory structure. The garage with shed extension has existed for decades, is not noticeable to the public, and does not negatively impact surrounding properties. The cost of correction clearly outweighs any public benefit to be gained from a correction, thus it is inequitable to require.

V. 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 a variance is not contrary to the public interest and is 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 a variance “would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives”. Id. “Mere conflict with the zoning ordinance is not enough”. Id.

The purpose of the Portsmouth Zoning Ordinance as set forth in PZO §10.121 is “to promote the health, safety and the general welfare of Portsmouth and its region in accordance with the City of Portsmouth Master Plan... [by] regulating”:

1. The use of land, buildings and structures for business, industrial, residential and other purposes – The Project repurposes an existing, underutilized, accessory building to provide a modest ADU.
2. The intensity of land use, including lot sizes, building coverage, building height and bulk, yards and open space – The lot is nonconforming as to lot size, coverage and side yard. Accordingly, no increase in footprint is proposed. Instead, the Project utilizes the existing structure.
3. The design of facilities for vehicular access, circulation, parking and loading – Given the small home and ADU, the two proposed parking spaces on the lot are sufficient.
4. The impacts on properties of outdoor lighting, noise, vibration, stormwater runoff and flooding – The structure exists now. The interior renovation and addition of a single modest dwelling unit in it will not negatively affect abutting properties compared to existing conditions.
5. The preservation and enhancement of the visual environment – The Project will renovate the existing structure on the Property improving its appearance and value while retaining existing air, light, and space.

6. The preservation of historic districts, and buildings and structures of historic or architectural interest – The Property is not located in the Historic District; however, the Project will preserve the existing accessory structure.
7. The protection of natural resources, including groundwater, surface water, wetlands, wildlife habitat and air quality – The area is intensely developed and in close proximity to Interstate 95, repurposing the existing accessory building in place has no impact compared to existing conditions.

Additionally, PZO §10.814.11 states as follows:

The purpose of this section is to provide for additional dwelling units within single-family neighborhoods in order to: increase the supply of smaller, more affordable housing units with less need for more municipal infrastructure or further land development; contribute to local housing needs; and provide opportunities for adapted reuse of existing accessory structures. The standards in this section are intended to integrate more housing options into the community with minimal impact on the surrounding neighborhood.

The Project, which repurposes an existing accessory structure and provides a modest housing unit, clearly fulfills the purposes of the Ordinance.

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 examine 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)

Here a modest one-story home and garage exist on a lot that is slightly more than half the required lot size of the SRB Zone; upward expansion is prohibitively expensive. The garage has existed within the side and rear yard setbacks for decades, no physical expansion of the structure is proposed, and municipal water and sewer are available. Like the existing home, the proposed 353 s.f. ADU is very modest, intended in the short run for an aging parent. Given the very small size of the home and ADU, two parking spaces are sufficient. Accordingly, allowing the existing accessory structure to remain and converting part of it into a modest ADU will neither “alter the essential character of the locality nor threaten the public health, safety or welfare.”

3. Substantial justice will be done by granting the variance.

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, L.L.C., 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. Hoekstra is constitutionally entitled to the use of the Property as she sees fit; including retention of a long-existing accessory structure in a nonconforming location and conversion of a portion of it to a modest ADU.

“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 Supreme Court has held that zoning ordinances must be reasonable, not arbitrary and must rest upon some ground of difference having fair and substantial relation to the object of the regulation. Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727, 731 (2001); Chesterfield at 69.

Because the existing home is quite small, the accessory structure has existed in its present location for decades, and a modest ADU is proposed in a portion of it, there is no benefit to the public from denying the variances. In comparison, Hoekstra will suffer great harm if she is unable to add an ADU to her property. Clearly, there is no benefit to public outweighing the hardship to the applicant if the variances are denied. Accordingly, substantial justice is done by granting the variances.

4. Granting the variance will not diminish surrounding property values.

The lot has existed since Pannaway Manor was first developed with the home dating back to approximately 1940. The accessory structure was constructed after a 1968 variance, though

due to an error on the part of the then-owner, the as-built location did not conform to the approval. The accessory structure has existed for decades as it sits and will not be expanded. The Project proposes a modest ADU in keeping the very small existing home. The driveway provides sufficient parking for two cars, which is adequate to support the occupants and municipal water and sewer will serve the ADU. Under these circumstances, it is clear that granting a variance to allow conversion of the garage into an ADU will not diminish surrounding property values.

5. Denial of the variances results in an unnecessary hardship.

a. Special conditions distinguish the property/project from others in the area.

At 8,324 s.f., the Property is just over half the size of the required lot size for the SRB Zone, yet already developed with a modest home and garage which will not be expanded. The existing lot lines are angled toward each other resulting in 45 ft. of frontage, less than half of the rear lot line. These circumstances combine to create special conditions and make it impossible for a proposed ADU to conform with the lot size and lot size per dwelling unit requirements of a single family home lot in the SRB. The configuration of the lot and angled lot lines makes it difficult to place structures on the lot in a manner that conforms to the side yard requirements. Were the existing home and garage constructed today, relief would be required, therefore even conversion of the existing garage into an ADU no expansion requires identical relief.

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 lot area, lot size per dwelling unit, yard requirements exist to prevent overcrowding of land or people, and to maintain air, light, space for abutters as well as and separation for stormwater treatment. Parking requirements exist to ensure streets are free from excess parked cars and traffic is not impeded. The existing accessory structure has existed in its current location for decades without complaint. It is screened by fences and plantings. No physical expansion is proposed so the Project has no effect on existing yard setbacks. The Project proposes a very small ADU serving a modest home. Given the size of both units, the two parking spaces provided will adequately serve the Property. Accordingly, there is no reason to apply the strict dimensional requirements of the zoning ordinance.

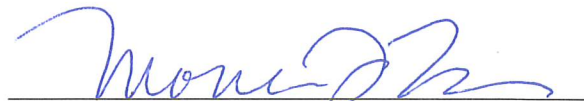
c. The proposed use is reasonable.

If the use is permitted, it is deemed reasonable. Vigeant v. Hudson, 151 N.H. 747 (2005). A permitted residential use is proposed. An existing accessory structure repurposed to accommodate a modest ADU serving a small home is reasonable and fulfills the purpose of the Ordinance. For all these reasons, the proposed use is reasonable, and denial results in an unnecessary hardship.

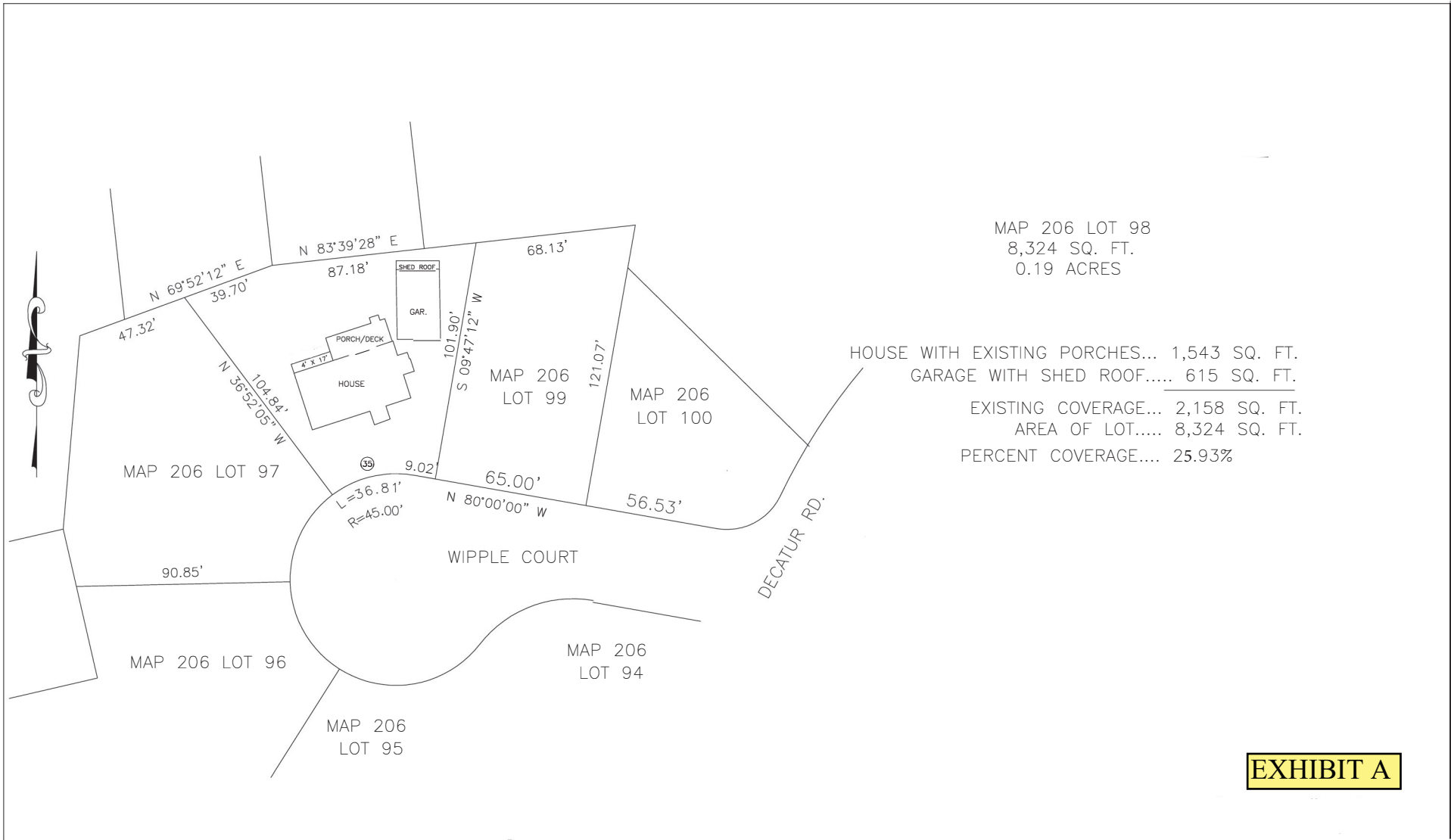
VI. CONCLUSION

For all of the reasons stated, Hoekstra respectfully requests that the Portsmouth Zoning Board of Adjustment grant the submitted variance and equitable waiver requests.

Respectfully submitted,
Marcella Hoekstra



By: Monica F. Kieser
Stephanie J. Johnson



MAP 206 LOT 98
 8,324 SQ. FT.
 0.19 ACRES

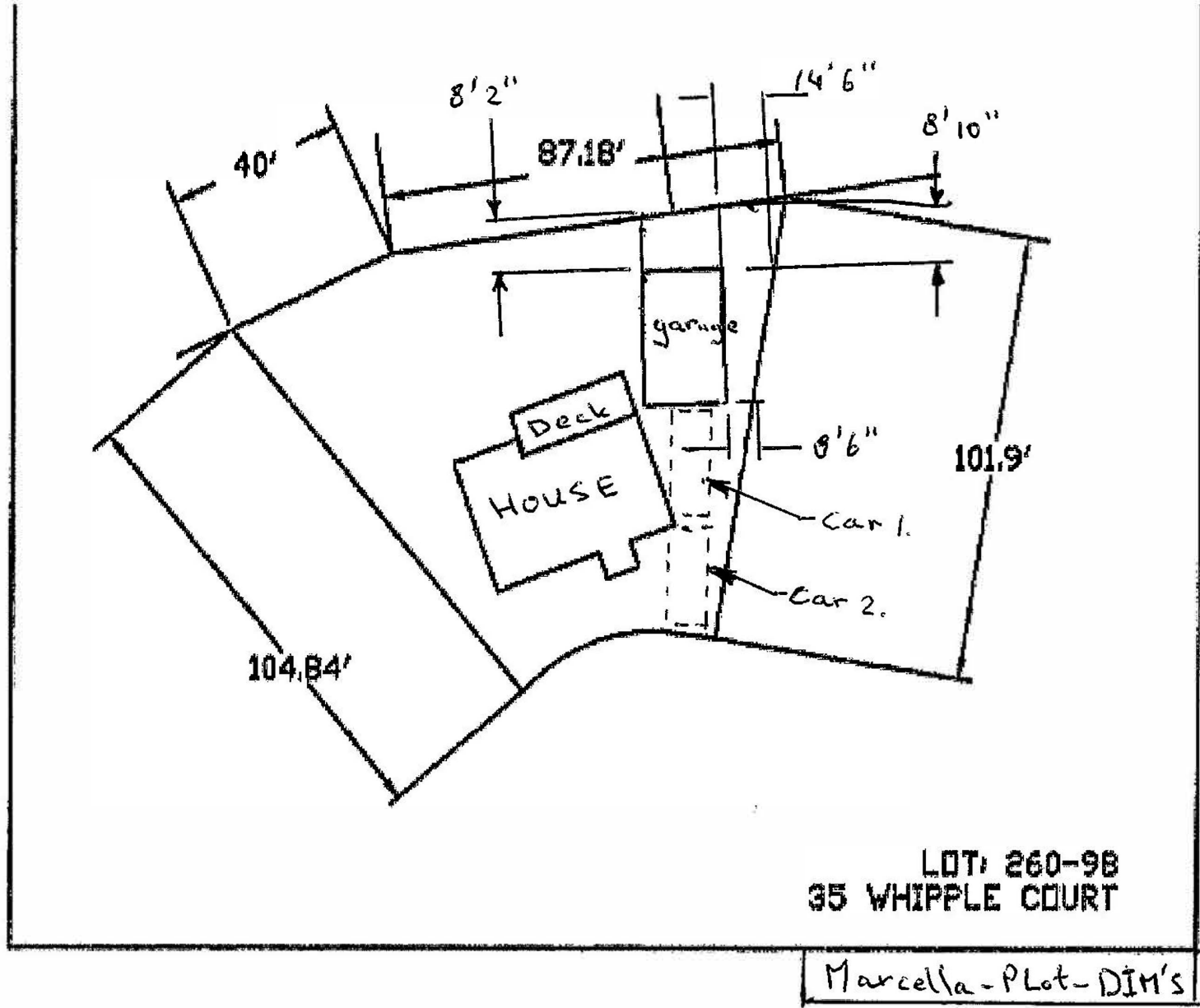
HOUSE WITH EXISTING PORCHES... 1,543 SQ. FT.
 GARAGE WITH SHED ROOF..... 615 SQ. FT.
 EXISTING COVERAGE... 2,158 SQ. FT.
 AREA OF LOT..... 8,324 SQ. FT.
 PERCENT COVERAGE.... 25.93%

EXHIBIT A

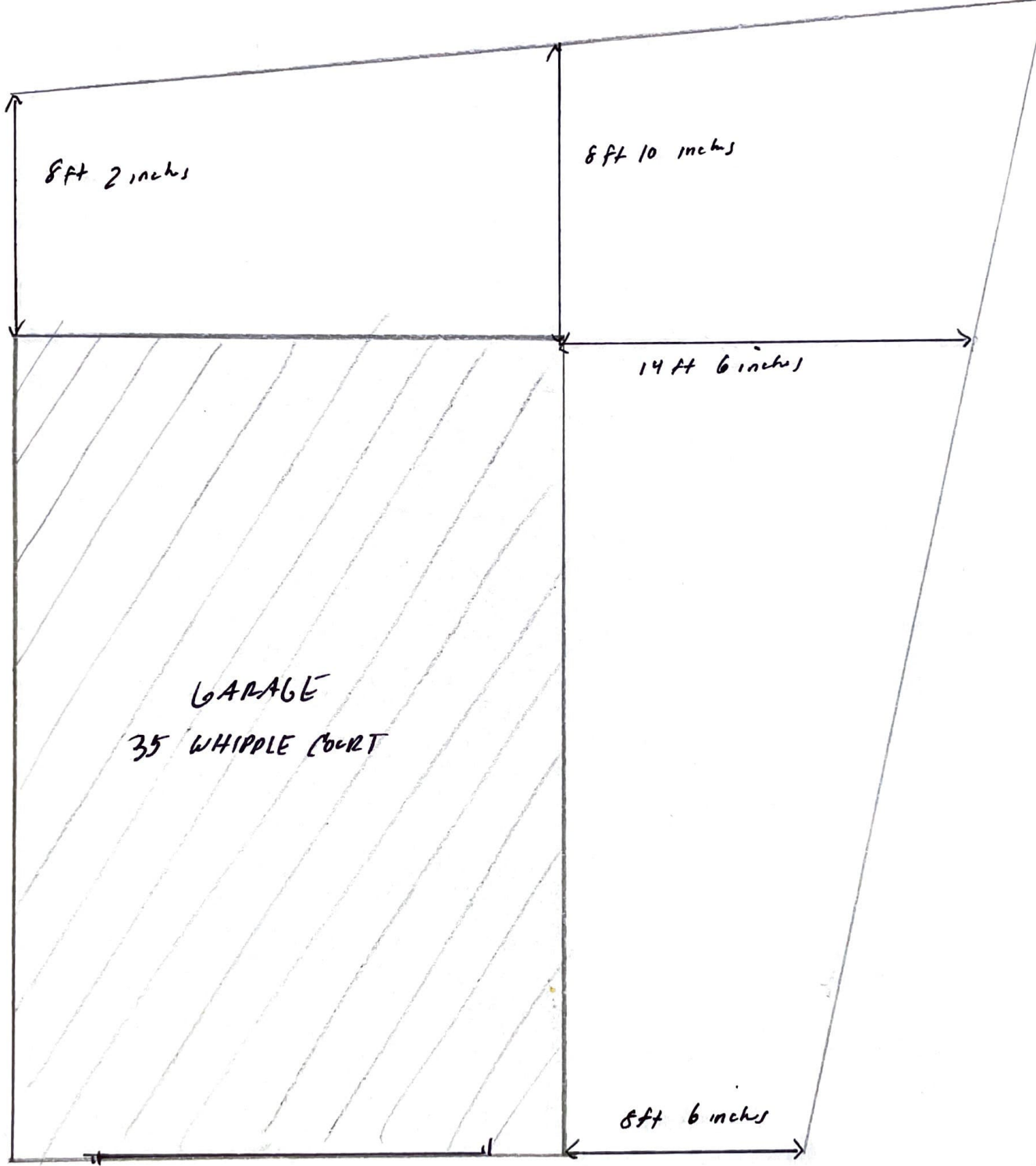
REV.	DATE	NOTE	INT.

Legend	
● Iron Pipe/Steel Pin Fnd	----- Boundary
⊙ Iron Rod Set	----- Bldg Setbacks
⊙ Iron Rod Fnd	----- Edge of Tar
■ Granite/Concrete Bnd Fnd	----- Culvert
⊙ Drill Hole Set	----- Stonewall
⊙ Drill Hole Fnd	----- Wetland Flagging
⊙ Utility Pole	----- Wetland Setback

TAX MAP 260 LOT 98
 35 WHIPPLE COURT
 PORTSMOUTH, NH
 SCALE: 1" = 20'



Existing and proposed dimensions from existing garage to side and rear lot lines & illustration of parking placement.



GARAGE
35 WHIPPLE COURT

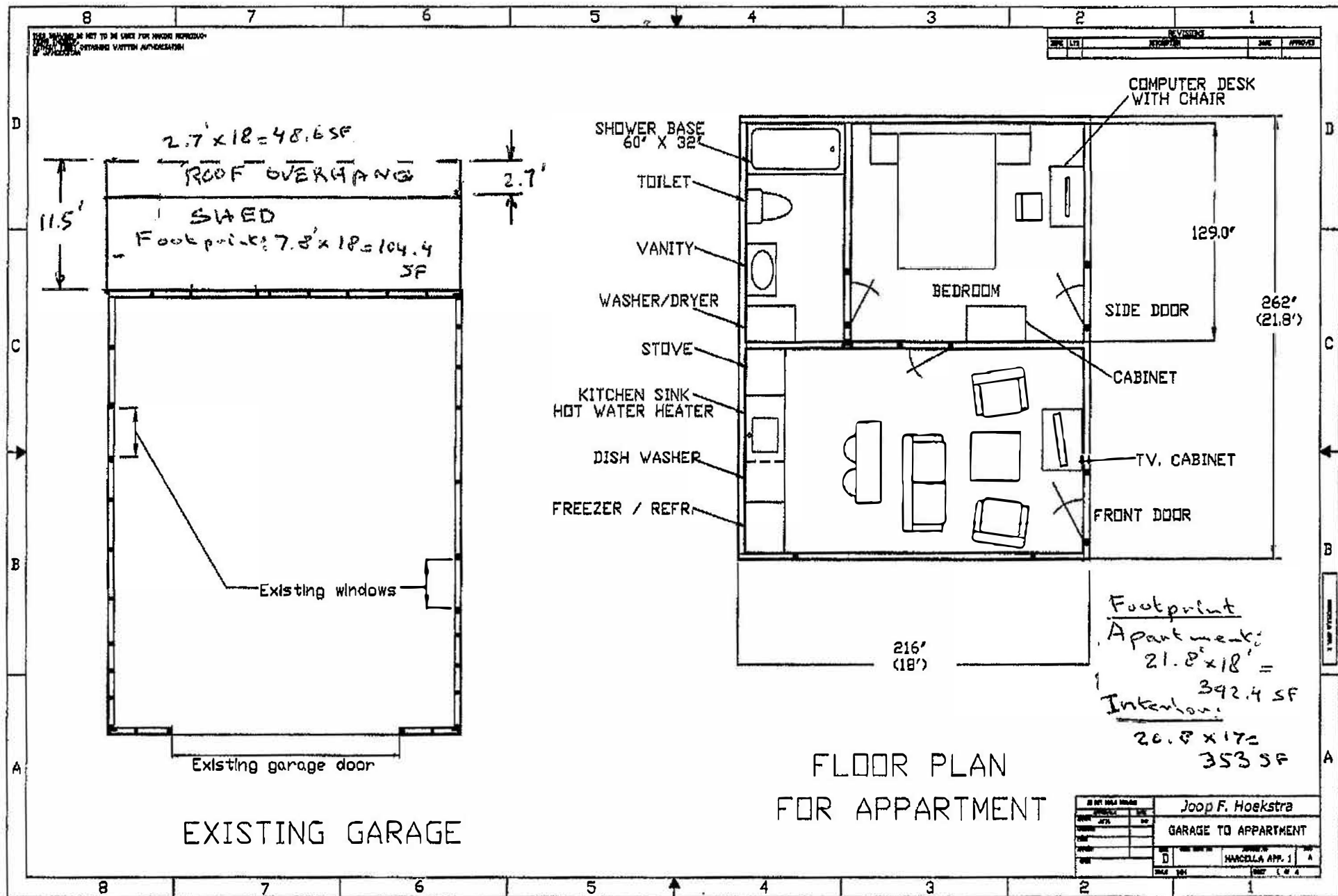
8 ft 2 inches

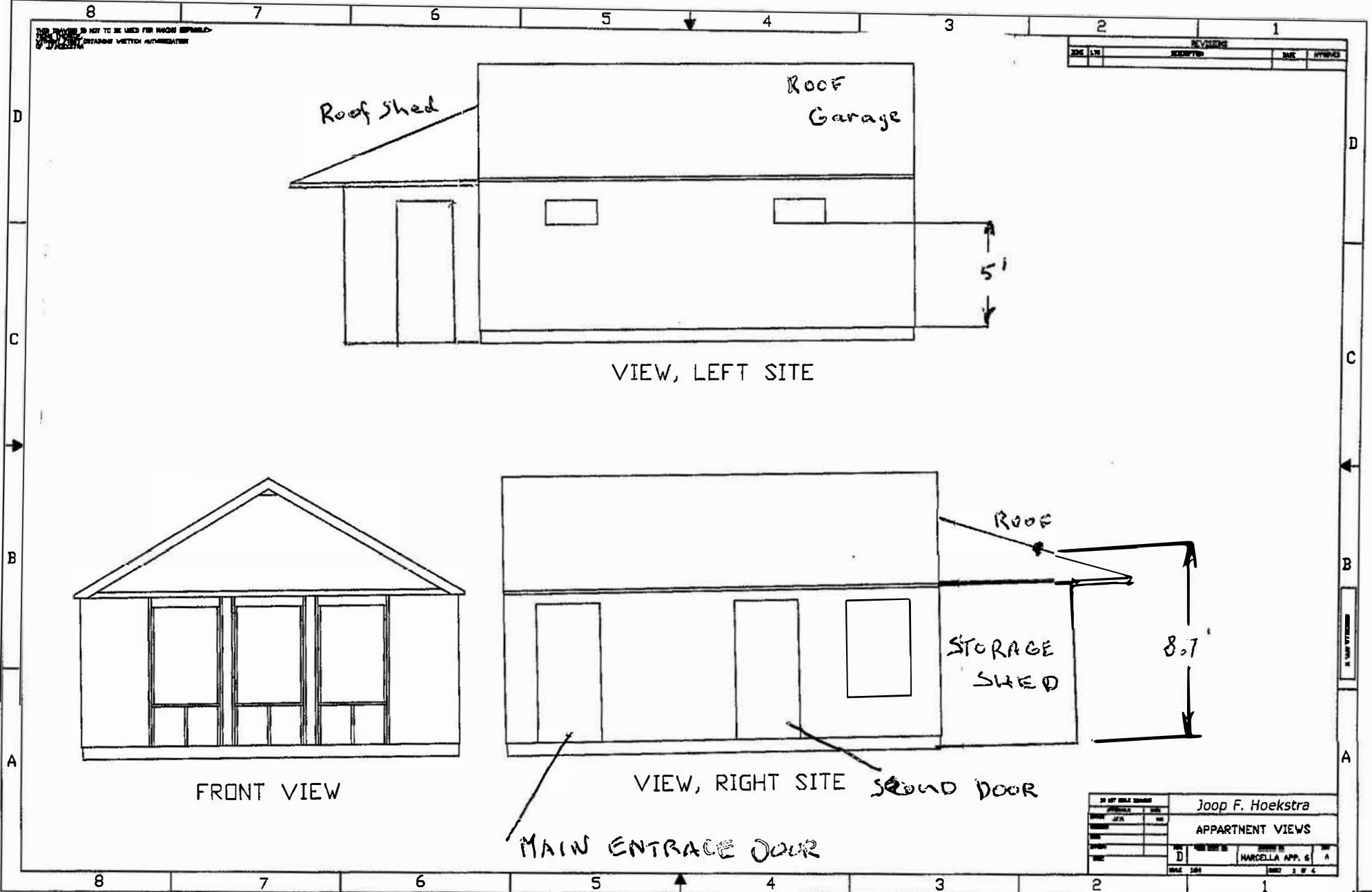
8 ft 10 inches

14 ft 6 inches

8 ft 6 inches

Zoomed in existing and proposed dimensions from garage to side and rear lot lines



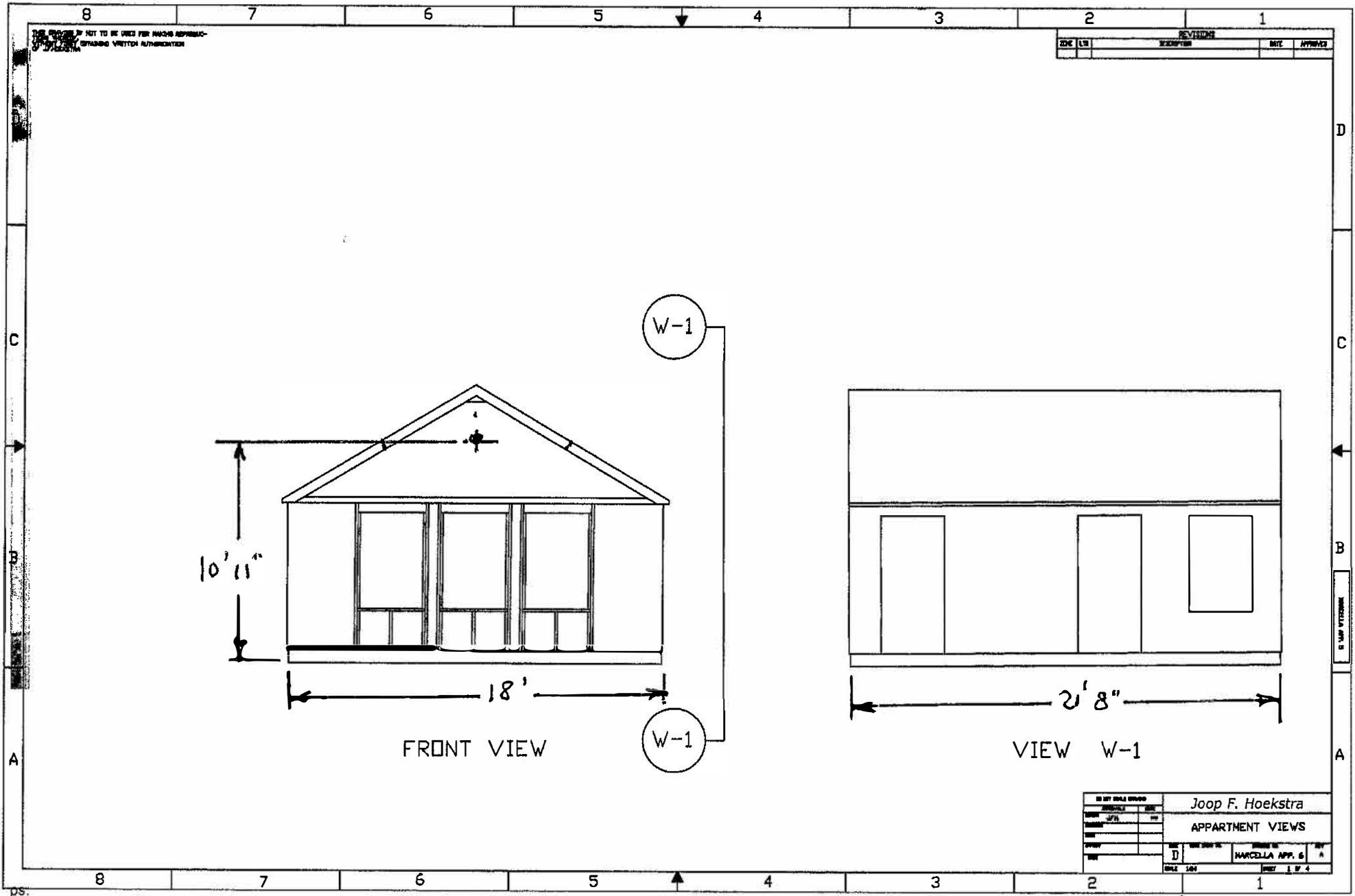


THIS DRAWING IS NOT TO BE USED FOR ANY OTHER PURPOSES WITHOUT THE WRITTEN AUTHORIZATION OF THE ARCHITECT

REVISIONS			
NO.	DATE	DESCRIPTION	BY

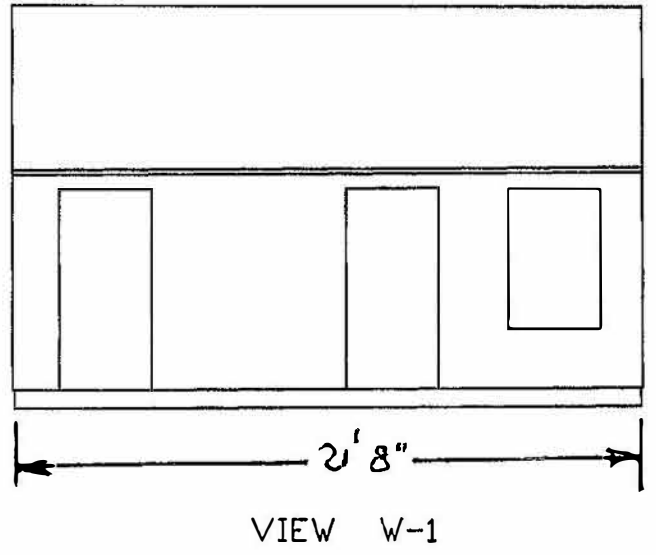
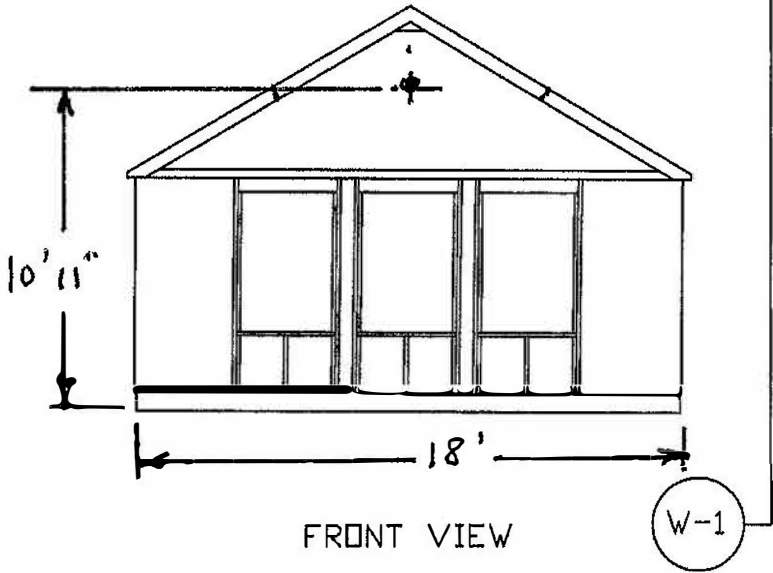
JOOP F. HOEKSTRA		Joop F. Hoekstra	
ARCHITECT		APPARTMENT VIEWS	
NO.	DATE	PROJECT NO.	
D		MARCELLA APP. 6	A
SCALE	1/8" = 1'-0"	SHEET	1 OF 4

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THIS DRAWING IS NOT TO BE USED FOR ANY OTHER PURPOSES WITHOUT THE WRITTEN AUTHORIZATION OF THE ARCHITECT.

REVISED		DATE	APPROVAL
NO.	DESCRIPTION		



JOOP F. HOEKSTRA		Joop F. Hoekstra	
ARCHITECT		ARCHITECT	
APARTMENT VIEWS			
DATE	NO.	DATE	NO.
D		MARCELLA APP. 6	
SHEET 1 OF 4			

Google Maps 35 Whipple Ct

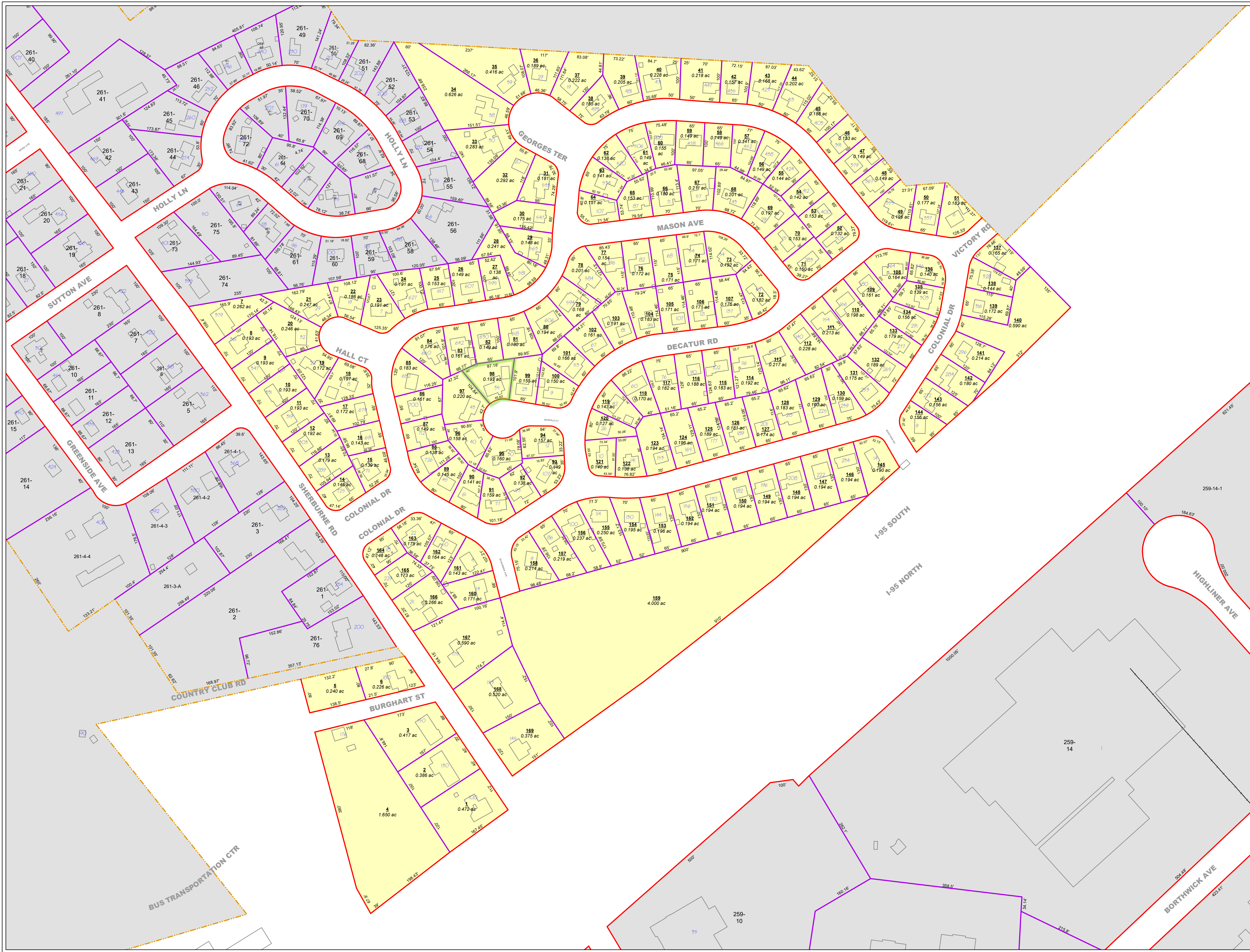


Imagery ©2021 Google, Imagery ©2021 Maine GeoLibrary, U.S. Geological Survey, Map data ©2021 20 ft

EXHIBIT C

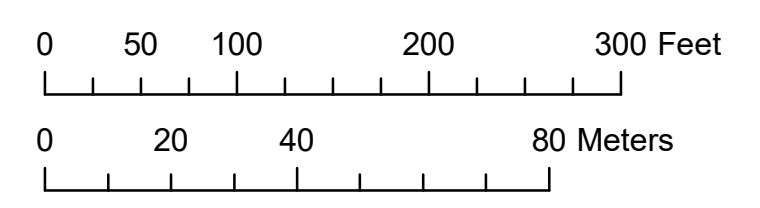




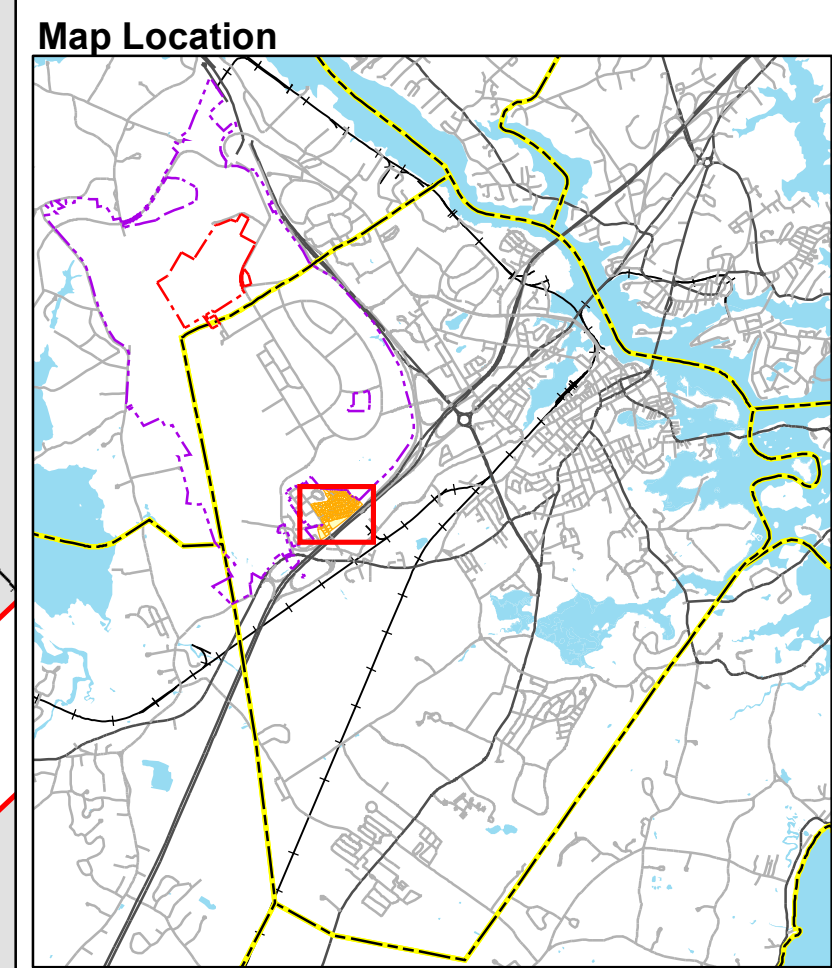
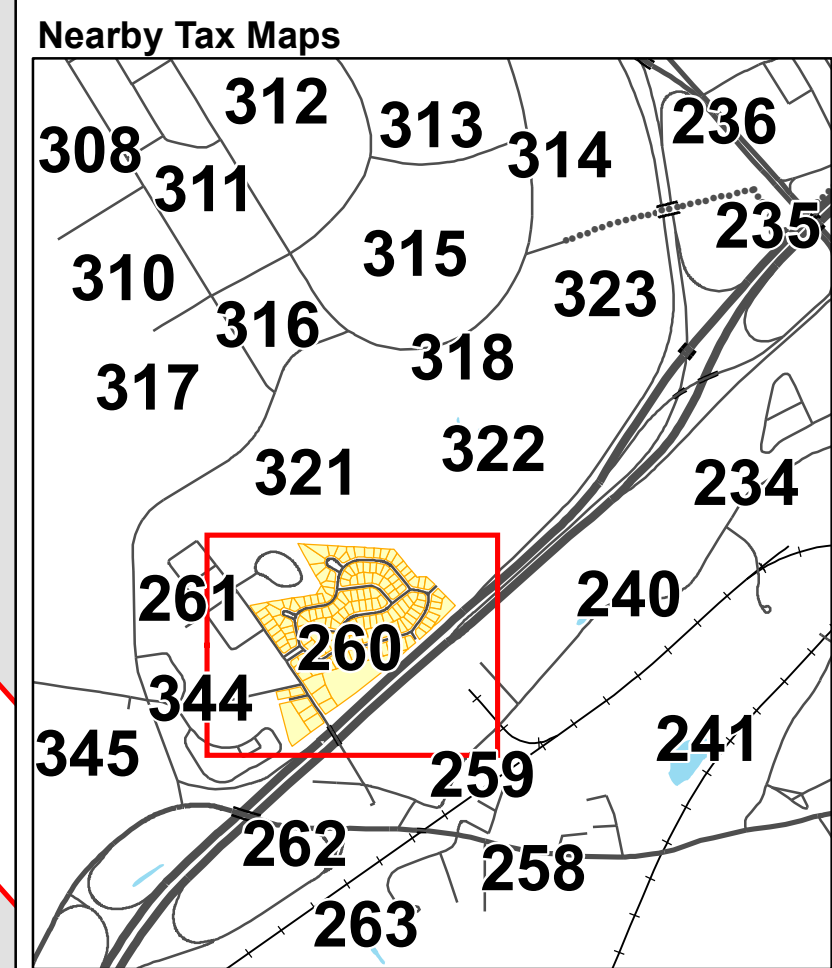


- Partial Legend**
 See the cover sheet for the complete legend.
- 7-5A** Lot or lot-unit number
 - 2.56 ac Parcel area in acres (ac) or square feet (sf)
 - 25 Address number
 - 233-137 Parcel number from a neighboring map
 - 68' Parcel line dimension
 - SIMS AVE Street name
 - Parcel/Parcel boundary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

EXHIBIT D



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.



Portsmouth, New Hampshire
 2022
Tax Map 260