



CELEBRATING OVER 30 YEARS OF SERVICE TO OUR CLIENTS

ROBERT D. CIANDELLA
LIZABETH M. MACDONALD
JOHN J. RATIGAN
DENISE A. POULOS
ROBERT M. DEROSIER
CHRISTOPHER L. BOLDT
SHARON CUDDY SOMERS
DOUGLAS M. MANSFIELD
KATHERINE B. MILLER
CHRISTOPHER T. HILSON
HEIDI J. BARRETT-KITCHEN
JUSTIN L. PASAY
ERIC A. MAHER
BRENDAN A. O'DONNELL
ELAINA L. HOEPPNER

RETIRED
MICHAEL J. DONAHUE
CHARLES F. TUCKER
NICHOLAS R. AESCHLIMAN

April 29, 2020

David Rheume, Chair
Zoning Board of Adjustment
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Re: Borthwick Forest, LLC/Application for Variance
100 Eileen Dondero Road, Tax Map 241, Lot 25

Dear Chair Rheume and Board Members:

Enclosed please find supporting information for the variance application submitted via the City's online permitting system. The Applicant proposes to install a sign within the 20' front line setback on the property located at 100 Eileen Dondero Road.

We respectfully request that this matter be placed on the Board's May 19, 2020 agenda. In the meantime, if you have any questions do not hesitate to contact me.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC

Justin L. Pasay
JLP/sac
Enclosures

cc: Borthwick Forest, LLC
Patrick Crimmins, Tighe & Bond

S:\BF-BQ\Borthwick Forest, LLC\2020 Sign Variance\Submittal Materials\2020 04 29 zba letter.docx

DONAHUE, TUCKER & CIANDELLA, PLLC
16 Acadia Lane, P.O. Box 630, Exeter, NH 03833
111 Maplewood Avenue, Suite D, Portsmouth, NH 03801
Towle House, Unit 2, 164 NH Route 25, Meredith, NH 03253
83 Clinton Street, Concord, NH 03301

VARIANCE APPLICATION FOR
BORTHWICK FOREST, LLC (the “Applicant”)

VARIANCE FROM ZONING ORDINANCE ARTICLE 12, SECTION 10.1253.10 TO ALLOW A MONUMENT SIGN 3.6 FEET FROM THE FRONT LOT LINE WHERE 20 FEET IS REQUIRED IN SIGN DISTRICT 4, AT PROPERTY LOCATED AT 100 EILEEN DONDERO ROAD (shown as Islington Street on the City Assessing Cards), FURTHER IDENTIFIED AS CITY ASSESSOR MAP 241, LOT 25 (the “Property”)

A. Introduction:

The Applicant proposes to construct a monument sign at the Property that is 3.6’ from the front lot line where 20’ is required pursuant to §10.1253.10 of the Zoning Ordinance. The Property is located in the Office Research Zoning District (the “OR District”), where office buildings and appropriate signage are permitted by right, and Sign District 4. The Property has 41.56 acres of lot area.

The Property has been approved by the City for a medical office building which is under construction. As permitted, the City required that the Applicant construct a multi-use path along the roadway, which is called Eileen Dondero Road. The roadway would normally be centered within the right of way but because of the multi-use path, Eileen Dondero Road has been located further east within the right of way. The unique configuration causes a large portion of the driveway accessing the new building (approximately 20’) to be constructed within the right of way. If the Applicant were to construct the proposed sign 20’ from the lot line, as required by the ordinance, it would be located approximately 40’ from Eileen Dondero Road and would be difficult to see in light of the site conditions as described below. The proposed sign is an 8’ x 4’-8” monument sign which is depicted in **Enclosure 1**, which enclosure also includes a rendering of the sign and the building under construction.

The proposed location of the new sign is depicted in **Enclosure 2**, which is an overall site plan for the new building, and **Enclosure 3**, which is a monument sign location exhibit. We note that Enclosure 3 depicts both the applicable 20’ sign setback in black, from which relief is sought, as well as the 20’ sign setback line where it would exist if there was no multi-use path along the Eileen Dondero Road, which is depicted in red. Variance relief would still be required were there no multi-use path but the proposed sign would be far closer to compliance with the 20’ setback requirement. Eileen Dondero Road is long, measuring 1000’ from Borthwick Ave to the cul-de-sac and benefited from a waiver for cul-de-sac length from the Planning Board. After an initial crest in the roadway off Borthwick Ave, Eileen Dondero Road slopes down and curves towards the new building. The west side of the road and multi-use path has a large berm which obstructs the sightline to the new building where signage is proposed, as depicted in the photograph contained in **Enclosure 4**.

Because the proposed sign location would not be inconsistent with the essential character of the surrounding area, will not compromise the public health in any way, will provide substantial justice, will not compromise the property values of surrounding properties, and because there is no rational connection between the intent of the City’s Sign Ordinance and its application to the

Property under the unique circumstances of this case, we respectfully request that this variance be granted.

B. Variance Criteria

Pursuant to Article 2, Section 10.233 of the Zoning Ordinance, and RSA 674:33, to obtain a variance in New Hampshire, an applicant must show that: (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed; (3) substantial justice is done; (4) the values of surrounding properties are not diminished; and (5) literal enforcement of the provisions of the ordinance would result in an unnecessary hardship, where said term means that, owing to special conditions of the property that distinguish it from other properties in the area: 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 the Proposed use is a reasonable one; or 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. *See* RSA 674:33, I (b).

The Applicant asserts that the proposed sign location meets each of the variance criteria as described in greater detail below.

1. The variance will not be contrary to the public interest.

The New Hampshire Supreme Court has indicated that the requirement that a variance not be “contrary to the public interest” is coextensive and related to the requirement that a variance be consistent with the spirit of the ordinance. *See* Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580 (2005); Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-06 (2007); and Farrar v. City of Keene, 158 N.H. 684, 691 (2009). A variance is contrary to the public interest only if it “unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance’s basic zoning objectives.” Chester Rod & Gun Club, 152 N.H. at 581; Farrar, 158 N.H. at 691. *See also* Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011) (“[m]ere conflict with the terms of the ordinance is insufficient.”) Moreover, these cases instruct boards of adjustment to make the determination as to whether a variance application “unduly” conflicts with the zoning objectives of the ordinance “to a marked degree” by analyzing whether granting the variance would “alter the essential character of the neighborhood” or “threaten the public health, safety or welfare” and to make that determination by examining, where possible, the language of the Zoning Ordinance.

The purpose of the City’s Sign Ordinance is to “maintain and enhance the character of the city’s commercial districts and residential neighborhoods and to protect the public from hazardous and distracting displays.” Zoning Ordinance, §10.1211. This express purpose of the Sign Ordinance is substantially similar to the standard of review, outlined above, that the Board of Adjustment must use in determining whether the requested variance will be contrary to the public interest and whether the spirit of the Ordinance is observed, which is whether the proposed sign will alter the essential character of the neighborhood or threaten the public health, safety or welfare. The new sign will do neither.

First, the proposed sign will not alter the essential character of the neighborhood. The proposed new office building is the only office building currently being developed off Eileen Dondero Road. Moreover, due to the multi-use path, the proposed new sign will appear substantially similar to other monument signs located on adjacent properties which identify medical uses to include the Jackson Gray building located at 330 Borthwick Ave and further identified as City Assessor Map 240, Lot 2(2) (the “Jackson Gray Property”), and Portsmouth Regional Hospital located at 333 Borthwick Ave and further identified as City Assessor Map 240, Lot 2(1) (“PRH”), both of which are in the OR District and Sign District 4. More specifically, **Enclosure 5** depicts the east and west monument signs at the Jackson Gray Property as well as the main monument sign at PRH. As shown in Enclosure 5, the Jackson Gray monument signs are located in very close proximity to the paved area of Borthwick Ave and they are not located behind a multi-use path or sidewalk. Similarly, while the PRH property does have a sidewalk along the front lot line, its sign is not located behind the same. Through consideration of Enclosures 1 – 5, it is clear that the proposed new sign will not alter the essential character of the neighborhood. If anything, the new sign will appear in greater conformity with the Sign Ordinance, by virtue of its proposed placement, than the aforementioned adjacent properties.

The proposed new sign will also not threaten the public health, safety, or welfare. As explained above, the monument signs identifying the Jackson Gray Property and PRH appear substantially similar to the sign proposed by the Applicant, and they are not buffered from Borthwick Ave by a multi-use path the way the proposed sign will be buffered from Eileen Dondero Road. Moreover, Eileen Dondero Road has far less traffic than Borthwick Ave. To summarize, granting the requested variance will not threaten the public health, safety or welfare.

As the proposed sign meets the express intent of the Sign Ordinance as well as New Hampshire jurisprudence, because it will not alter the essential character of the neighborhood nor threaten the public health, safety or welfare, it would be reasonable and appropriate for the Board of Adjustment to conclude that granting the variance will not be contrary to the public interest.

2. The spirit of the Ordinance is observed.

As referenced in Section 1, above, the requested variance observes the letter and spirit of the Sign Ordinance and New Hampshire jurisprudence regarding the “public interest” prong of the variance criteria because the proposed sign will not alter the essential character of the neighborhood and will not threaten the public health, safety, or welfare. As the New Hampshire Supreme Court has indicated in both Chester Rod & Gun Club and in Malachy Glen, the requirement that the variance not be “contrary to the public interest” is coextensive and is related to the requirement that the variance be consistent with the spirit of the ordinance. *See Chester Rod & Gun Club*, 152 N.H. at 580. A variance is contrary to the spirit of the ordinance only if it “unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance’s basic zoning objectives.” *Chester Rod & Gun Club*, 152 N.H. at 581; *Farrar*, 158 N.H. at 691. As discussed above, the requested variance is consistent with the spirit of the Sign Ordinance because of the reasons stated in Section 1. Similarly, for the reasons stated above, the Applicant respectfully asserts that granting the variance would not “alter the essential character of the neighborhood” or “threaten the public health, safety or welfare”. Accordingly, the Board of Adjustment should determine that the requested variance will observe the spirit of the Zoning

Ordinance.

3. Substantial justice is done.

As noted in Malachy Glen, *supra*, “perhaps the only guiding rule [on this factor] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.” Malachy Glen, *supra*, citing 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 24.11, at 308 (2000) (quoting New Hampshire Office of State Planning, The Board of Adjustment in New Hampshire, A Handbook for Local Officials (1997)). In short, there must be some gain to the general public from denying the variance that outweighs the loss to the Applicant from its denial.

In this case, the public does not stand to gain anything from denying the variance request. On the contrary, the public will benefit greatly from the multi-use path along Eileen Dondero Road and as proposed, the new sign will appear consistent with other adjacent properties in the area. Further, the proposed sign poses no threat to the public health, safety, or welfare. On the other hand, the Applicant will benefit significantly from the grant of the variance as the Property will benefit from signage that is logically sited in a manner to identify the new building.

As there is no gain to the general public from denying the variance that outweighs the loss to the Applicant from its denial, granting the requested variance will accomplish substantial justice.

4. The proposal will not diminish surrounding property values.

Given the location of the Property and the proposed sign, the size, nature and locations of the surrounding parcels, and the existing monument signs on the Jackson Gray and PRH properties, none of the surrounding properties will suffer any diminution in value as a result of granting this variance. Accordingly, the Applicant respectfully requests that the Board of Adjustment find that the requested variance will not diminish surrounding property values.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

As set forth in the provisions of RSA 674:33, I, there are two options by which the Board of Adjustment can find that an unnecessary hardship exists:

(A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (i) 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
- (ii) The Proposed use is a reasonable one.

or,

(B) If the criteria in subparagraph (A) 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.

The “special conditions” of the Property for purposes of this variance criterion include its large size, its insulation and isolation from other surrounding properties and the length of Eileen Dondero Road, the large berm to the east of Eileen Dondero Road which obstructs the sightline to the sign area of the new building, and the multi-use path along the front lot line. As depicted in Enclosures 1 – 4 and noted above, the proposed sign is located behind the multi-use path. Importantly, the Jackson Gray Property has no such multi-use path or sidewalk, and while the PRH property does have a sidewalk along the front lot line, its sign, depicted in Enclosure 5, is not located behind the same.

In Harborside Assocs. v. Parade Residence Hotel, the New Hampshire Supreme Court upheld the Portsmouth Board of Adjustment’s finding that the physical improvements on a property, in that case the size of a building when compared to other buildings in the area within the context of sign variance request, could be considered “special circumstances.” Affirming the analysis of the Board of Adjustment, the Supreme Court stated:

The [Respondent] is not attempting to meet the ‘special conditions’ test by showing that its *signs* would be unique in their settings, but that its *property* – the hotel and conference center – has unique characteristics that make the signs themselves a reasonable use of the property.

Harborside, 162 N.H. at 518 (emphasis added). Cf Farrar, 158, N.H. 689 (where variance sought to convert large, historical single use residence to mixed use of two residence and office space, size of residence was relevant to determining whether property was unique in its environment).

Here, like the size of the building in Harborside, and the size of the residence in Farrar, the Property’s physical improvements, to specifically include the existence of the multi-use path, make the proposed sign reasonable under the circumstances, especially when considered against similar monument signs on abutting property. Moreover, as noted above, the Property is large and is insulated and isolated from buildings and uses on surrounding properties, the new medical office building is the only proposed building to be accessed off of Eileen Dondero Road at this time, which road is a considerable length from Borthwick Ave, and there is a large berm on the eastern side of Eileen Dondero Road which obstructs the sightline to the sign area for the new building. Under the circumstances, the Applicant and the public will benefit greatly by a sign that is placed in a manner that will readily identify the new building so to avoid confusion.

Through consideration of these special circumstances, and the discussion above regarding the nature of the proposed sign, the character of the Property, and the nature and character of the surrounding area to include other monument signs, there is no fair and substantial relationship between the general public purposes of the Sign Ordinance, which is, as indicated above, to “maintain and enhance the character of the city’s commercial districts and residential neighborhoods and to protect the public from hazardous and distracting displays”, and its application to the Property in this case, because strictly enforcing the same, will not advance those public purposes. The proposed sign does not compromise the character of the city’s commercial

districts and does not create a hazard or distracting display. On the contrary, the proposed sign is tasteful and conservative and is substantially similar to other monument signs in the area. As result, the proposed sign actually advances the express purpose of the Sign Ordinance.

The Applicant respectfully reminds the Board of Adjustment that the mere fact that the Applicant is seeking a variance from the express provisions of the Zoning Ordinance is not a valid reason for denying the variance. *See Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102, 107 (2007); *see also Harborside Associates*, 162 N.H. at 2011 (“mere conflict with the terms of the ordinance is insufficient”).

Finally, the proposed sign will be appropriately sited away from Eileen Dondero Road and the multi-use path, will appropriately identify the Property, and is substantially similar to other monument signs identifying medical office/building uses on abutting properties which are also in the OR District and Sign District 4. As such, the proposed new sign is reasonable under the circumstances. *See Vigeant v. Town of Hudson*, 151 N.H. 747, 752 - 53 (2005); and *Malachy Glen*, 155 N.H. at 107; *see also Harborside* at 518-519 (applicant did not need to show signs were “necessary” rather only had to show signs were a “reasonable use”).

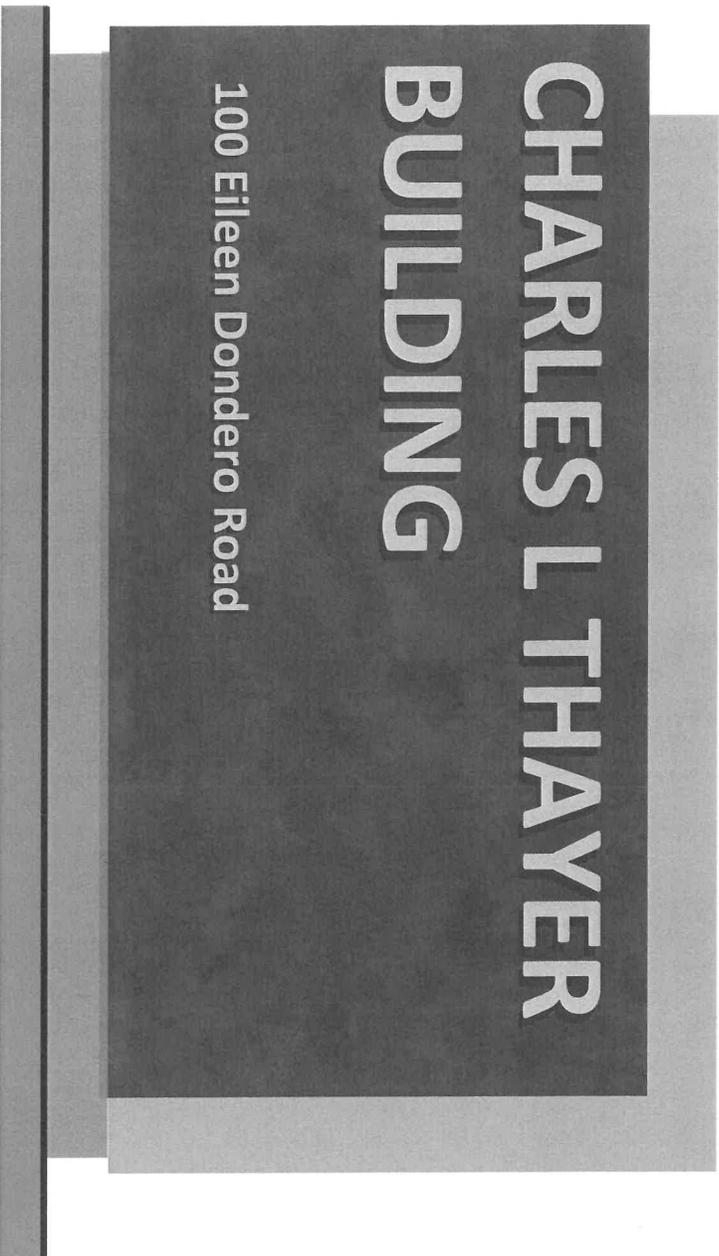
Accordingly, the Applicant respectfully asserts that its application complies with the standard for Option A of the unnecessary hardship criterion and the Board of Adjustment should so find.

C. Conclusion

The Applicant respectfully submits that all five criteria for the variance as requested have been met such that its Variance Application should be granted.

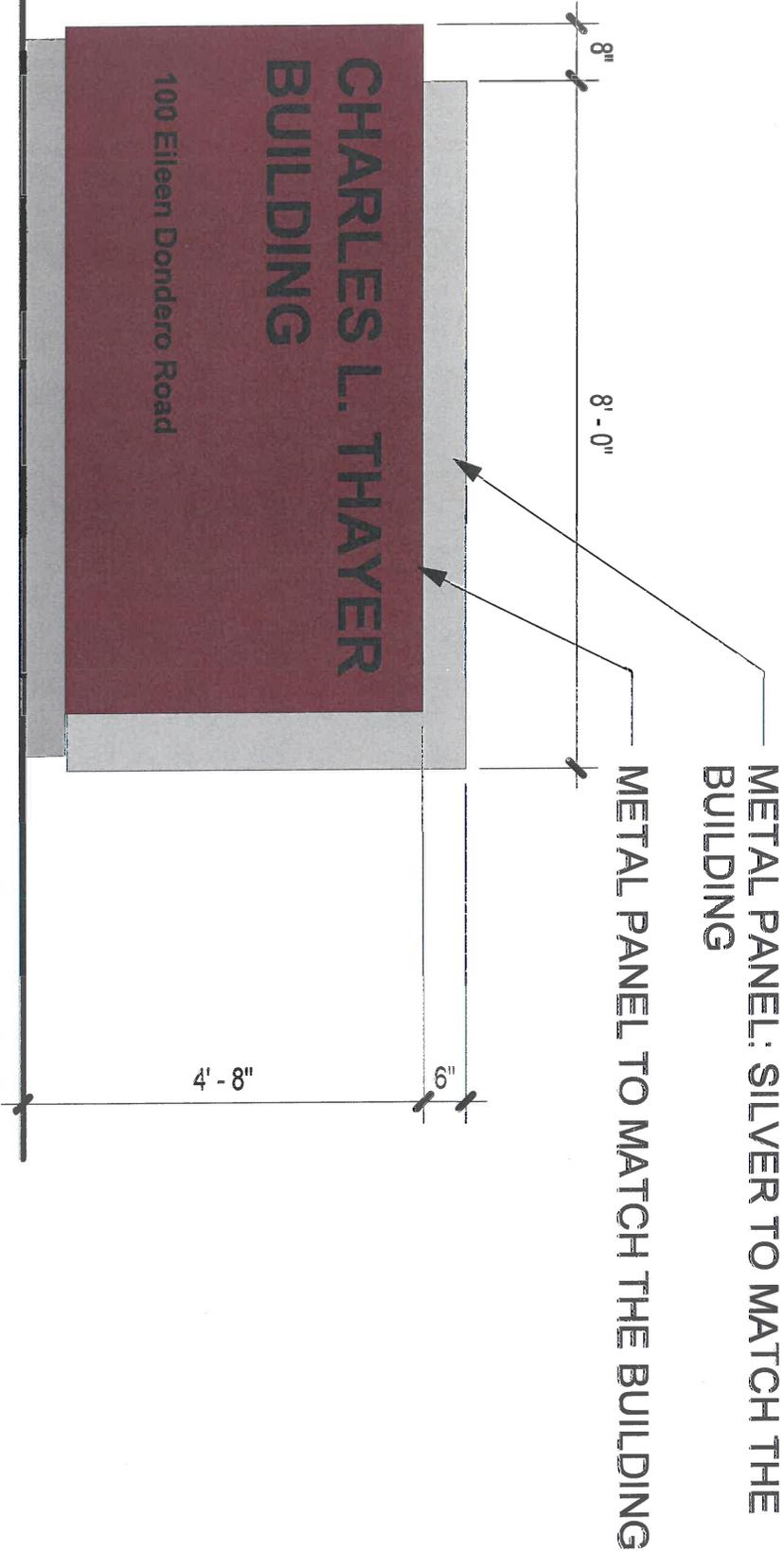


BUILDING SIGNAGE



BUILDING SIGNAGE

SIGN MATERIALS: METAL PANELS TO MATCH BUILDING METAL PANELS



BUILDING SIGNAGE

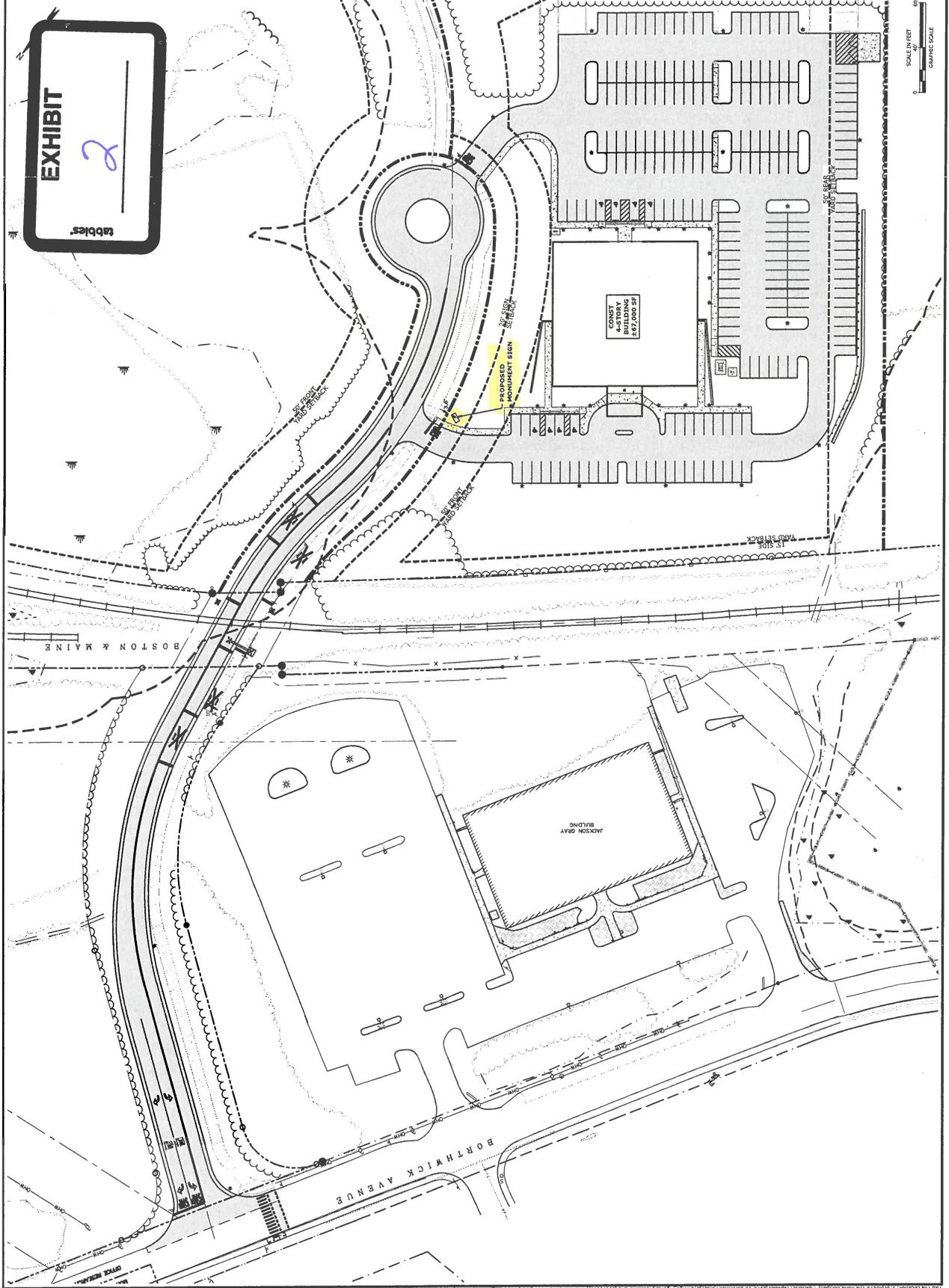
SIGN MATERIALS: METAL PANELS TO MATCH BUILDING METAL PANELS

**Proposed
Subdivision Road
& Office Building
Development**

Borthwick Forest, LLC
Portsmouth,
New Hampshire

MARK	DATE	DESCRIPTION
PROJECT NO.		NO2012-13
DATE		02/20/20
FILE		NO2012-13_02/20/20
DRAWN BY:		CHL
CHECKED:		PMC
APPROVED:		ELM

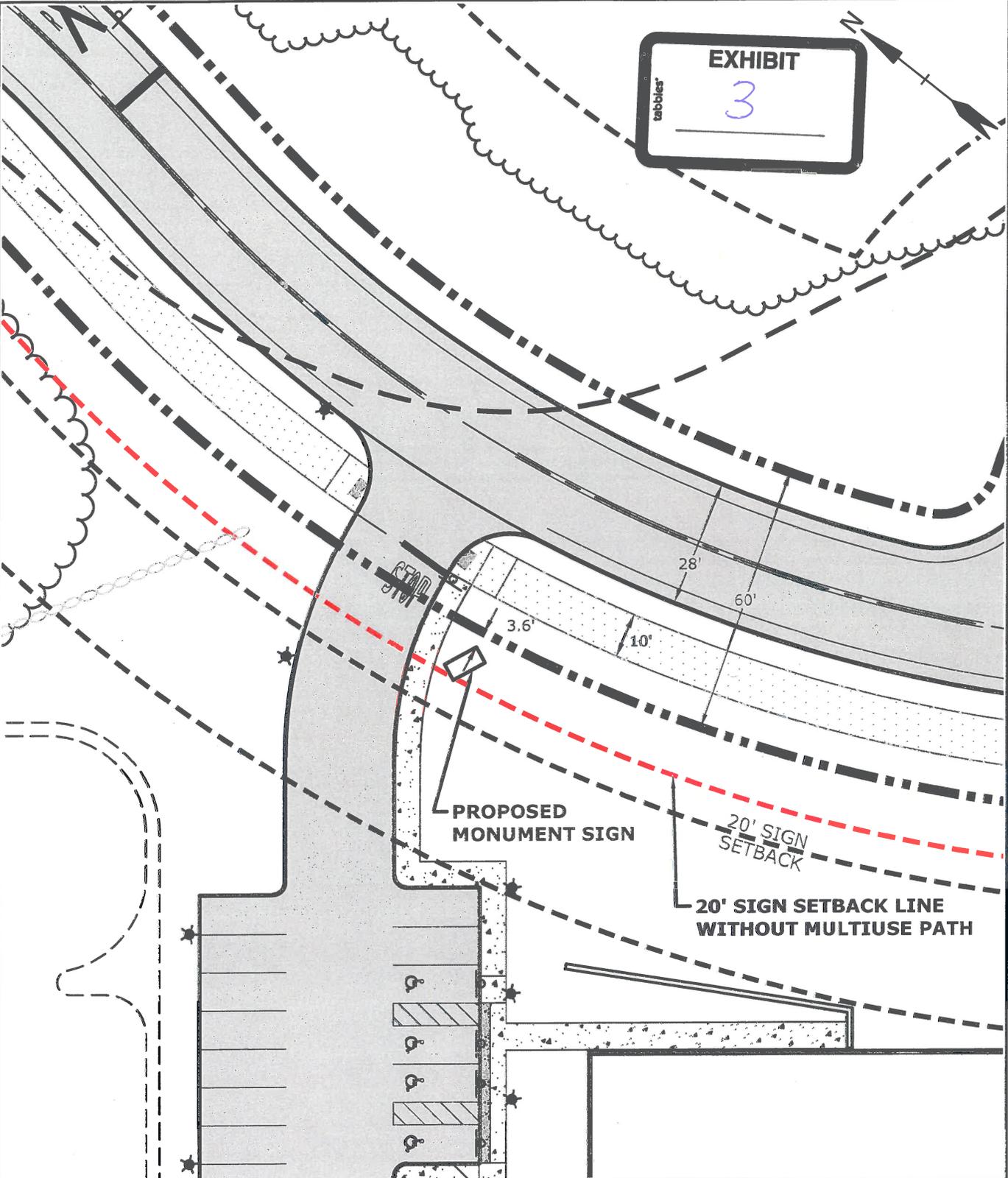
MONUMENT SIGN LOCATION
EXHIBIT
SCALE: AS SHOWN
1 OF 1



labbles
EXHIBIT 2

SCALE IN FEET
0 50 100
GRAPHIC SCALE

tabbler
EXHIBIT
 3



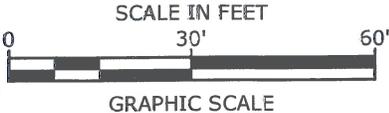
PROPOSED MONUMENT SIGN

20' SIGN SETBACK

20' SIGN SETBACK LINE WITHOUT MULTIUSE PATH

**PROPOSED SUBDIVISION ROAD & OFFICE BUILDING DEVELOPMENT
 PORTSMOUTH, NEW HAMPSHIRE**

**MONUMENT SIGN LOCATION
 EXHIBIT**



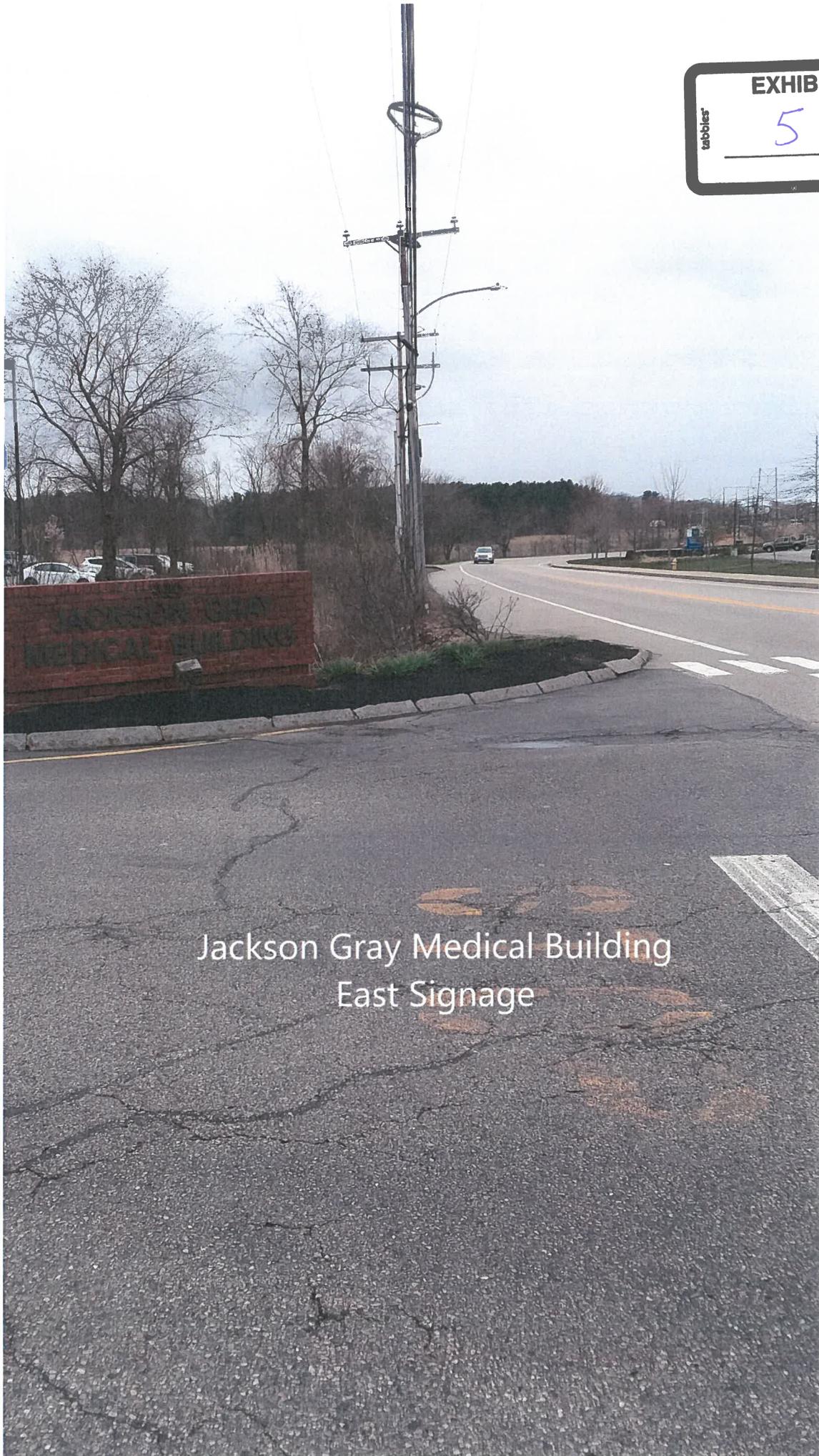
DATE:	6/14/2018
FILE:	K0076-13_DSGM.DWG
DRAWN BY:	CML
CHECKED:	PMC
APPROVED:	BLM

Tighe & Bond
 Engineers | Environmental Specialists

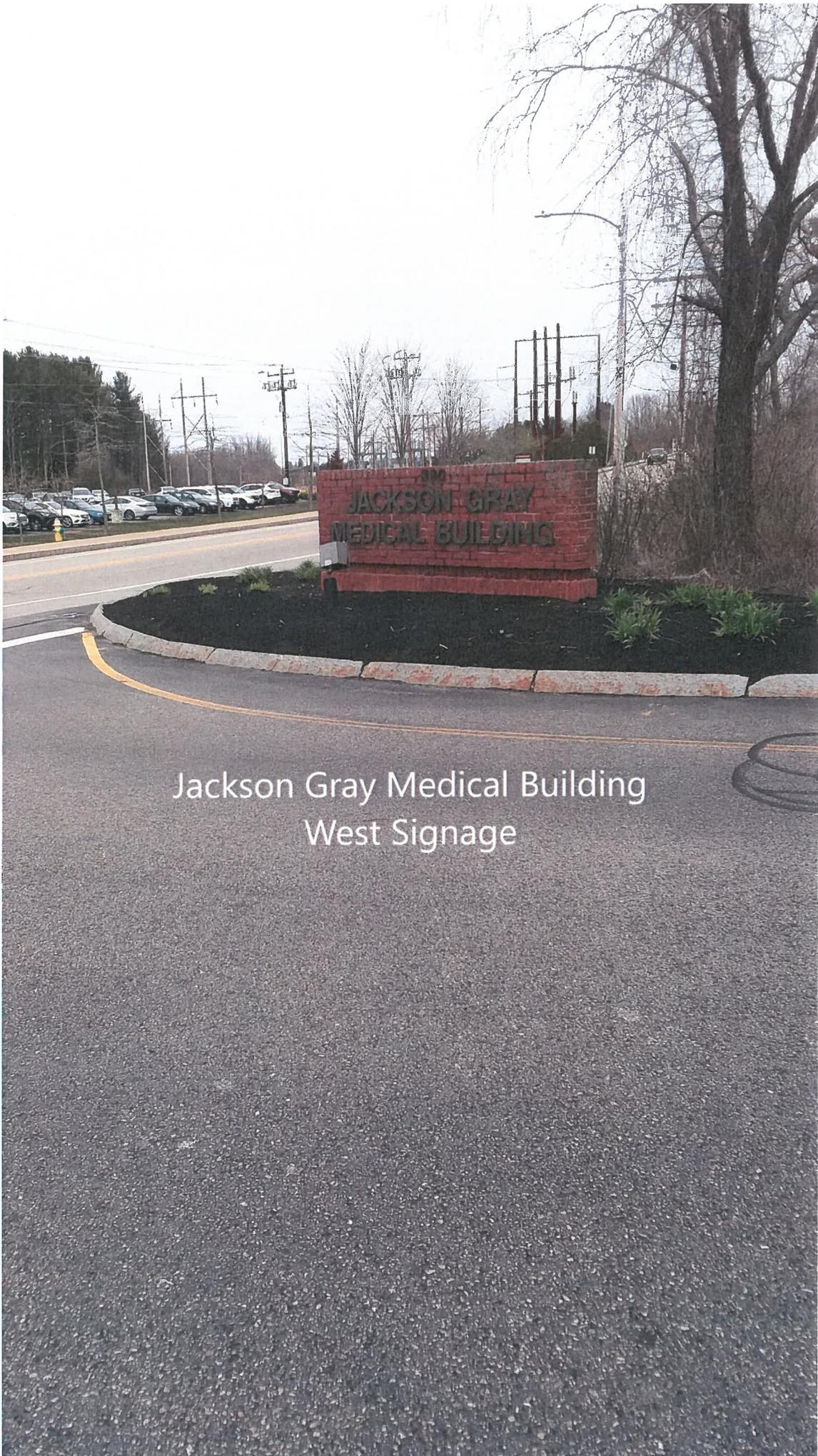
Last Save Date: April 1, 2020 10:35 AM By: CML
 Plot Date: Wednesday, April 01, 2020 Plotted By: Craig M. Lunton
 T&B File Location: J:\K0076 The Kane Company - General Proposals\0076-13 Berthwick Forest\Drawings_Figures\AuteCAD\Xref\K0076-13_DSGM.DWG Layout Tab: Sign Ex

EXHIBIT
4





Jackson Gray Medical Building
East Signage



Jackson Gray Medical Building
West Signage



Portsmouth
Regional
Hospital

- ↑ **EMERGENCY**
- Main Entrance
 - Registration
 - Medical Office Building

*Parking For Official Hospital Business Only.
Violators Will Be Towed At Owners Expense.*

333 Borthwick Avenue

STOP

Portsmouth Hospital Sign