DURBIN LAW

Derek R. Durbin, Esq.
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derek@durbinlawoffices.com

BY: VIEWPOINT & HAND DELIVERY

November 21, 2022

City of Portsmouth
Attn: Peter Stith, Planner
Zoning Board of Adjustment
1 Junkins Avenue
Portsmouth, NH 03801

RE: Variance Application of Nissley LLC
915 Sagamore Avenue, Tax Map 223, Lot 31

Dear Peter,

Enclosed for submission to the ZBA for its December 20th meeting, please find the following materials relative to the proposed improvements for property located at 915 Sagamore Avenue.

1) Landowner Letter of Authorization;
2) Narrative to Variance Application;
3) Site Plan;
4) Wetlands Comparison Plan;
5) Floor Plans and Elevations;
6) Tax Map;
7) Photographs of the Property.

A copy of the application submission is being delivered to the Planning Department. Should you have any questions or concerns regarding the enclosed application materials, do not hesitate to contact me at your convenience.

Sincerely,

Derek R. Durbin, Esq.

LANDOWNER LETTER OF AUTHORIZATION

Nissley LLC, record owner of property located at 915 Sagamore Avenue, Portsmouth, NH 03801, Tax Map 223, Lot 31 (the "Property"), hereby authorizes **Durbin Law Offices, PLLC** to file any building, zoning, planning or other municipal permit applications with the City of Portsmouth for said Property and to appear before its land use boards. This Letter of Authorization shall be valid until expressly revoked in writing.

November 14, 2022

Sign Name

GINGRICH, DAY

Print Name (Member, Duly Authorized)

VARIANCE APPLICATION
NARRATIVE

915 Sagamore Avenue
Tax 223, Lot 31
Portsmouth, NH 03801

Nissley LLC
(Owner / Applicant)

Introduction

Nissley LLC is the owner of property located at 915 Sagamore Avenue, identified on Portsmouth Tax Map 223 as Lot 31 (the "Property"). The Property is located in the Waterfront Business ("WB") Zoning District. The Property is 1.02 acres in size and has approximately 270' of street frontage on Sagamore Avenue. It is also accessed via a 25' wide unpaved right-of-way (ROW) off of Sagamore Avenue, thus it has two access points and parking areas. As a result of the recent improvements to Sagamore Avenue, the Property is now served by municipal water and sewer.

The Property has a significant grade drop from Sagamore Avenue from east to west and from north to south towards Sagamore Creek. The Property contains wetlands along the western boundary, of which an area of approximately 3,603 square feet has been disturbed. A vast majority of the Property is within the regulated buffer. The southern portion of the Property that drops down to Sagamore Creek contains ledge and is wooded with a mixture of deciduous and evergreen trees.

There is a two (2) floor building on the Property that previously served as the business location for Portsmouth Scuba and retains its branding on the front. There is a mooring and/or machine shop business located on the first floor of the building which is accessed in the rear from the dirt/gravel parking area off of the 25' ROW. The second floor of the building contains some type of forestry-related commercial business which is accessed from the front paved parking area directly off of Sagamore Avenue.

There are inoperable vehicles, equipment, lobster traps and debris scattered throughout the Property. The Property as a whole has been neglected and is an "eyesore" in its current condition.

As shown on the map attached as Exhibit A, the Property is zoned WB but is surrounded by a mixture of residential and commercial uses and zoning districts. To the north, east and west, many of the properties are zoned for residential uses. To the south, many of the properties are zoned for business or municipal (public) uses. The mixtures of uses and zoning districts that the Property is surrounded by is reflective of the character of the area which cannot be defined by one particular use.

Proposed Improvements

The Applicant is proposing a three-story mixed-use building on the Property. The building would contain office space on all three floors and twelve residential units of equal dimension (780 sf) in total (4 on each floor). Each residential unit would contain one bedroom and a bathroom. The majority of off-street parking spaces would be located under or to the rear of the proposed building. There would be two ADA compliant parking spaces for the front of the building accessed by Sagamore Avenue. As part of the proposed improvement of the Property, the junk vehicles, equipment and debris will be removed. The approximately 3,602 square foot area of disturbed wetlands would also be restored.

The exact use of the office space has yet to be determined, but it is anticipated that the Applicant will locate his business operations in at least a portion of the space. The combination of residential units and office space in one building lends itself naturally to a future live-work environment. While the Property is "waterfront" per se and has a decent amount of legal frontage on "Sagamore Creek", the water is essentially inaccessible due to the topography of the land. It is anticipated that the southern, forested quadrant of the Property will remain much as it is seen now.

If the variance request being sought by the Applicant is approved, he will also need site plan and conditional use permit approvals from the Planning Board. The improvements proposed for the Property will undergo review and scrutiny from the Conservation Commission in addition to the Planning Board. The Applicant will also need DES approvals for impacts within the wetland and shoreland buffers. The plans for the Property remain conceptual given the various hurdles the Applicant must overcome to develop the land but provide a realistic vision of how the Property would be built upon and utilized in the future.

Variance Criteria

Granting the variances will not be contrary to the public interest and will observe the spirit of the Ordinance.

In the case of *Chester Rod & Gun Club, Inc. v. Town of Chester*, the Court noted that since the provisions of all ordinances represent a declaration of public interest, any variance will, in some measure, be contrary to the ordinance, but to be contrary to the public interest or injurious to public rights of others, "the variance must 'unduly, and in a marked degree' conflict with the ordinance such that it violates the ordinance's 'basic zoning objectives." 152 N.H. 577. The Court observed that "[t]here are two methods of ascertaining whether granting a variance would violate an ordinance's basic zoning objectives: (1) examining whether granting the variance would alter the essential character of the neighborhood or, in the alternative; and (2) examining whether granting the variance would threaten the public health, safety, or welfare." 152 N.H. 577.

The Property is located within a very small pocket of properties zoned WB. The properties within this area are predominantly used for residential purposes. The properties in the adjacent zoning districts are used for a combination of residential and business-related purposes. The Property directly across Sagamore Creek is used for professional office space (Seacoast Mental Health). There is not one particular use that defines the area; however, it can be fairly said that it consists of a mixture of office, business, and residential uses. In the case of *Belanger v. Nashua*, the NH Supreme Court opined: "[w]hile we recognize the desired interrelationship between the establishment of a plan for community development and zoning, we believe that municipalities must also have their zoning ordinances reflect the current character of neighborhoods." 121 N.H. 389 (1981).

It can be fairly argued that the Property and those that immediately surround it are improperly zoned given the mixture of surrounding residential and non-marine business uses. There are very few marine-related uses in the area. The use that is proposed for the Property is consistent with the uses being made of surrounding properties. The size of the residential units and their location will make them inherently affordable to rent in the context of the Portsmouth market. The combination of office space and apartments within the same building lends itself to a future live-work environment. It is in the public's interest to see that more housing opportunities are created within the City of Portsmouth, particularly those that are more affordable in nature. Opportunities such as this in Portsmouth remain scarce.

The topography of the Property and its location makes it inconducive to permitted waterfront business uses. Sagamore Creek is essentially inaccessible from the upland portion of the Property. Without easy access to Sagamore Creek, and the ability to dock boats on the Property, it has limited "waterfront" value. The limited amount of usable upland area also limits the potential marine-related uses that could be made of the Property. Even if the Property could be easily used for a marine-related purpose, that does not mean that it would be compatible to the surrounding area, which is predominantly residential with some business uses mixed in.

The overall conditions of the Property will be improved and the proposed use will be consistent with the character of the area. Access and parking on the Property will be improved beyond what exists and will allow for safe ingress and egress for emergency vehicles. For the foregoing reasons, granting the variance will not alter the essential character of the neighborhood or threaten public health, safety or welfare.

Substantial justice will be done by granting the variance relief.

Any loss to the individual that is not outweighed by a gain to the general public is an injustice. *New Hampshire Office of State Planning, The Board of Adjustment in New Hampshire, A Handbook for Local Officials* (1997); *Malachy Glen Assocs., Inc. v. Town of Chichester,* 155 N.H. 102 (2007).

Because of how it is presently zoned, there are limited uses that can be made of the Property. Most of the uses that are permitted for the Property under the Ordinance are not feasible given its challenging topography and its inaccessibility to Sagamore Creek. Granting the variance relief sought would allow the owner to make reasonable use of the land at little to no cost to the public. In the present case, the equitable balancing test for determining whether substantial justice is done weighs in favor of the Applicant.

The values of surrounding properties will not be diminished by granting the variance.

The Property is an eyesore in its existing condition. Any improvement and clean-up of the Property should only increase surrounding property values not diminish them. The building concept for the Property is tastefully designed and would be an aesthetic improvement over what exists.

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

The Property has several special conditions that distinguish it from surrounding properties, most notably its topography and location. The Property is "waterfront" by definition and land use designation, but not in reality. The reality is that Sagamore Creek cannot be easily accessed from the Property. To access Sagamore Creek, you have to descend a steep hill comprised primarily of trees and ledge. If the tide is low, you would then have to cross a mudflat to reach the water. This severely restricts what permitted uses can be made of the Property since it is located in the WB Zoning District. The Property itself is quite large when considered in the context of the surrounding area but is almost entirely encumbered by wetland buffers which further restricts what uses can be made of it. The Property is also located in an area that consists primarily of residential and business related uses, including office space. For these reasons, there is no fair and substantial relationship between the general purposes of the Ordinance and its application to the Property.

Finally, the proposed use is reasonable. As stated above, the use is consistent and compatible with the uses of surrounding properties.

Conclusion

In conclusion, the Applicant submits that it has demonstrated that its application meets the five (5) criteria for granting the variance requested. Accordingly, it respectfully requests the Board's approval.

Respectfully Submitted,

Dated: November 21, 2022

Nissley LLC

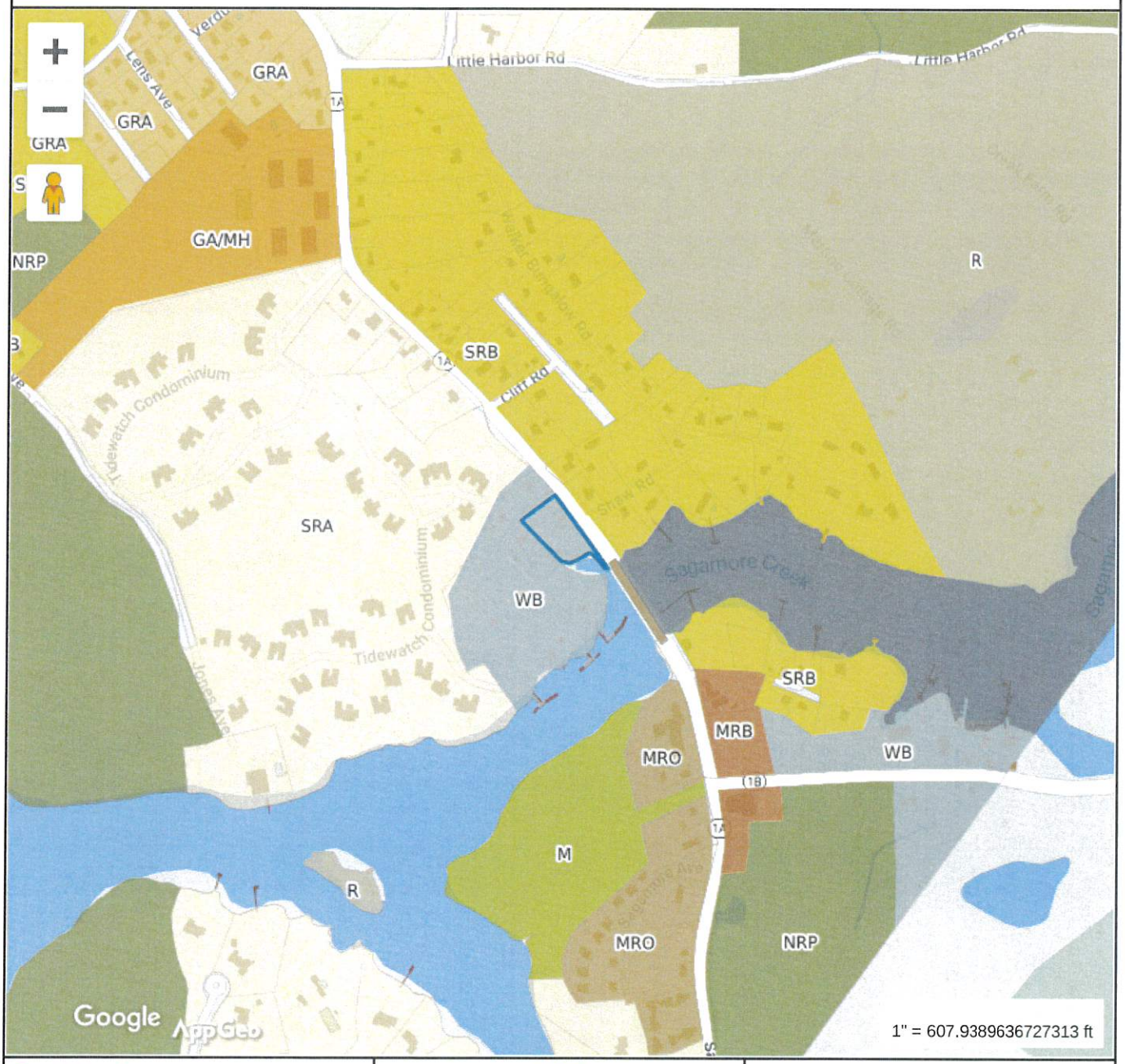
By and Through,
Durbin Law Offices PLLC

By: Derek R. Durbin, Esq.
144 Washington Street
Portsmouth, NH 03801
(603)-287-4764
derek@durbinlawoffices.com

Exhibit A

City of Portsmouth, NH

November 20, 2022



Property Information

Property ID	0223-0031-0000
Location	915 SAGAMORE AVE
Owner	NISSLEY LLC

MAP FOR REFERENCE ONLY
NOT A LEGAL DOCUMENT

City of Portsmouth, NH makes no claims and no warranties, expressed or implied, concerning the validity or accuracy of the GIS data presented on this map.

Geometry updated 09/21/2022
Data updated 3/9/2022

Print map scale is approximate. Critical layout or measurement activities should not be done using this resource.

Map Theme Legends

Zoning

City of Portsmouth

WETLANDS NOTE:

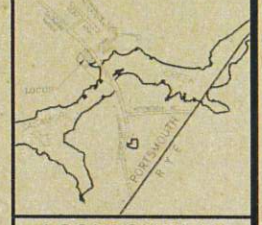
WETLANDS DEPICTED ON THIS PLAN WERE DELINEATED ON SEPTEMBER 27, 2022 BY JASON R. AUBE, CWS #313.
THE WETLANDS WERE DELINEATED ACCORDING TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL (JANUARY 1987) AND THE REGIONAL SUPPLEMENT TO THE U.S. CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: NORTHCENTRAL AND NORTHEAST REGION, VERSION 2.0 (JANUARY 2012).

SHORELAND NOTE:

THE HIGHEST OBSERVABLE TIDE LINE (HOTL) DEPICTED ON THIS PLAN WAS DETERMINED ON SEPTEMBER 27, 2022, BY COASTAL PROFESSIONAL, JASON R. AUBE. THE HOTL WAS DETERMINED IN ACCORDANCE WITH THE NHDES WETLANDS BUREAU ADMINISTRATIVE RULES, UNDER ENV-WT 802.23, HIGHEST OBSERVABLE TIDE LINE MEANS A LINE DEFINING THE FARTHEST LANDWARD LIMIT OF TIDAL FLOW, NOT INCLUDING STORM EVENTS, THAT CAN BE RECOGNIZED BY INDICATORS SUCH AS THE PRESENCE OF A STRAND LINE OF FLOTSAM AND DEBRIS, THE LANDWARD MARGIN OF SALT- TOLERANT VEGETATION, OR A PHYSICAL BARRIER THAT BLOCKS INLAND FLOW OF THE TIDE.

PLAN REFERENCES:

1. "PROPOSED ADDITION PORTSMOUTH SCUBA 915 SAGAMORE AVENUE PORTSMOUTH, N.H." BY AMIST ENGINEERING, INC. DATED FEBRUARY 2002, WITH REVISIONS. (PLAN NOT RECORDED).



NOTES:

1. THE PARCEL IS LOCATED IN THE WATERFRONT BUSINESS (WB) ZONING DISTRICT.
2. THE PARCEL IS SHOWN ON THE CITY OF ASSESSOR'S MAP 223 AS LOT 31.
3. THE PARCEL IS LOCATED IN ZONES AE (EL8) & ZONE X, PER NAVD88, AS SHOWN ON NATIONAL FLOOD INSURANCE PROGRAM (NFIP), FLOOD INSURANCE RATE MAPS (FIRM) ROCKINGHAM COUNTY, NEW HAMPSHIRE, PANELS 227F & 256F, OF 651, MAP NUMBER 33015C0651F, WITH AN EFFECTIVE DATE OF JANUARY 29, 2021.
4. DIMENSIONAL REQUIREMENTS:

	REQUIRED
MINIMUM LOT DIMENSIONS:	
LOT AREA:	20,000 S.F.
LOT AREA PER DWELLING UNIT:	NR
CONTINUOUS STREET FRONTAGE:	100'
DEPTH:	100'
MINIMUM YARD DIMENSIONS:	
FRONT:	30'
SIDE:	20'
REAR:	20'
MAXIMUM STRUCTURE DIMENSIONS:	
BUILDING HEIGHT:	35'
ROOF APPURTENANCE HEIGHT:	10'
BUILDING COVERAGE:	30%
FLOOR AREA RATIO:	NR
MINIMUM OPEN SPACE:	20%

5. PARKING CALCULATIONS:
   OFFICE: 1/350 SF (8,000 SF) = 23 SPACES

   MULTI-FAMILY:
   0.5 SP./UNIT (<500 SF UNITS)(0 UNIT) = 0 SPACES
   1.0 SP./UNIT (500 SF TO 750 SF UNITS)(2 UNITS) = 2 SPACES
   1.3 SP./UNIT (>750 SF UNITS)(10 UNITS) = 13 SPACES
   PLUS 1.0 SP./5 UNITS (VISITORS) (5 UNITS) = 3 SPACES
   TOTAL OF 18 SPACES

   DAYTIME SHARED PARKING:
   OFFICE AT 100% = 23 SPACES
   MULTI-FAMILY AT 50% = 11 SPACES

   REQUIRED: 34 SPACES

   PROPOSED: 34 SPACES
6. OWNER OF RECORD:
   MAP 223 LOT 31:
   NISSLEY, LLC
   513 MARCY STREET
   PORTSMOUTH, NH 03801
   RCRD BK.4067 PG.2212
7. PARCEL AREA:
   MAP 223 LOT 31:
   1.22 ACRES (PER PLAN REFERENCE 1).
8. THE INTENT OF THIS PLAN IS TO SHOW THE APPROXIMATE LOCATION OF TAX MAP 223 LOT 31. THE APPROXIMATE LOCATION OF TAX MAP 223 LOT 31 AS DEPICTED ON THIS PLAN HAS BEEN COMPILED FROM RECORDED AND UNRECORDED SOURCES AND SOME FIELD EVIDENCE. IT IS NOT THE RESULT OF A COMPLETE BOUNDARY SURVEY AND IT IS NOT AN ATTEMPT TO DEFINE THE EXTENT OF OWNERSHIP OR DEFINE THE LIMITS OF TITLE.

TAX MAP 223 LOT 31
CONCEPTUAL SITE PLAN
PORTSMOUTH SCUBA
915 SAGAMORE AVENUE
PORTSMOUTH, NEW HAMPSHIRE
COUNTY OF ROCKINGHAM
OWNED BY
NISSLEY, LLC

SCALE: 1" = 20' (22x34)
1" = 40' (11x17)
NOVEMBER 08, 2022

This plan is for conceptual purposes only. It is not necessarily the result of a complete on-site survey, nor is it intended for construction uses. Locations of boundaries and wetlands are approximate and not necessarily correct or accurate. Compliance with current regulations must be verified.

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All Construction Drawings, Elevations, R.I.P. 02870

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This plan is not effective unless signed by a duly authorized officer of Thomas F. Moran, Inc.

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THIS PLAN IS A PRELIMINARY CONCEPTUAL DESIGN FOR SITE LOCATION FEASIBILITY AND DISCUSSION PURPOSES ONLY. ADDITIONAL PERMITS, WAIVERS, AND VARIANCE MAY BE REQUIRED UPON FURTHER DESIGN, REVIEW, AND COORDINATION WITH THE TOWN.

Graphic Scale in Feet

REV.	DATE	DESCRIPTION	BY	CK

TFM
Seacoast Division
Civil Engineers
Structural Engineers
Traffic Engineers
Land Surveyors
Landscape Architects
Scientists
170 Commerce Way, Suite 102
Portsmouth, NH 03801
Phone (603) 431-2222
Fax (603) 431-0910
www.tfmoran.com

JOB	47092-30	CAD	WP	FILE	SHEET
		CK	DWG	CADFILE	SITE MARGIN

Nov 10, 2022 - 11:12am
P:\47xx\47092-30\Engr\47092-30 - Sagamore Ave - Portsmouth\47092-30 - Barnsley - 915 Sagamore Ave\Design\Concepts\47092-30 Wetland with Concept 2022-11-08.dwg

WETLANDS NOTE:

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THE WETLANDS WERE DELINEATED ACCORDING TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL (JANUARY 1987) AND THE REGIONAL SUPPLEMENT TO THE U.S. CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: NORTHCENTRAL AND NORTHEAST REGION, VERSION 2.0 (JANUARY 2012).

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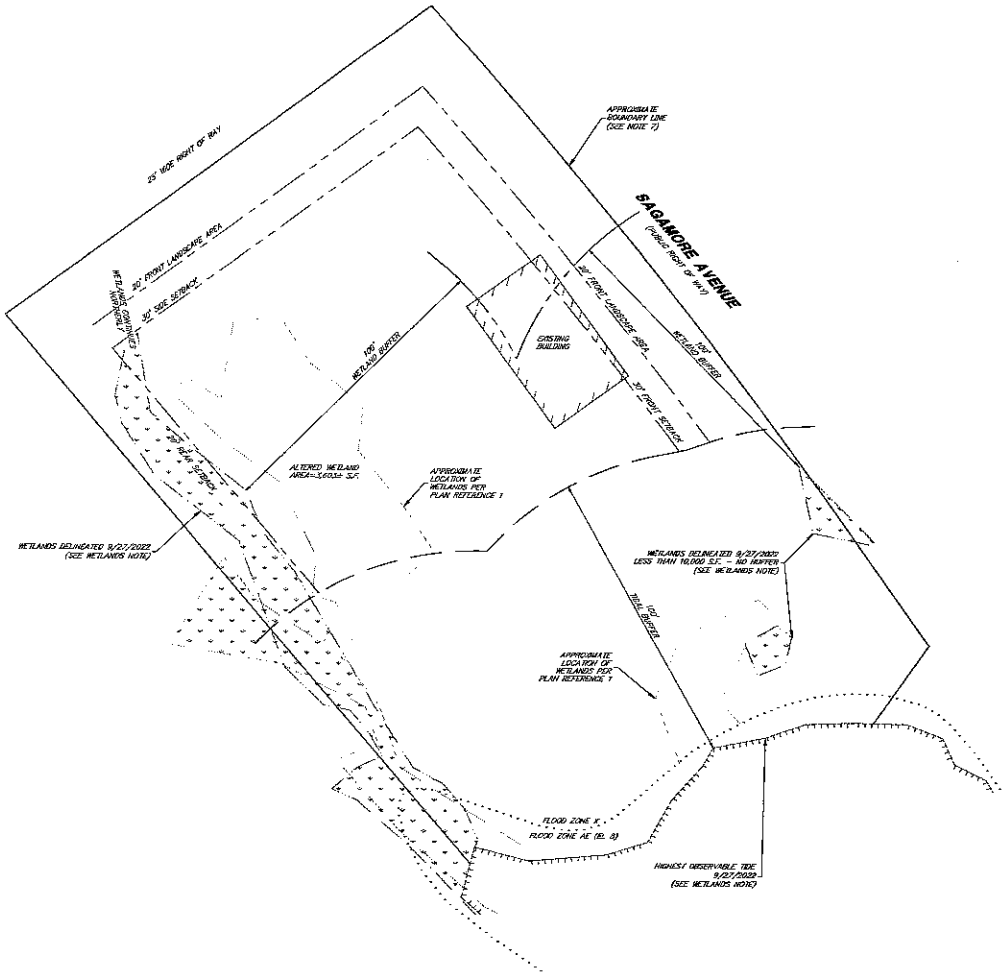

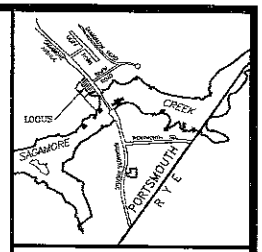

LOCATION PLAN

NOTES:

1. THE PARCEL IS LOCATED IN THE WATERFRONT BUSINESS (WB) ZONING DISTRICT.
2. THE PARCEL IS SHOWN ON THE CITY OF ASSESSOR'S MAP 223 AS LOT 31.
3. THE PARCEL IS LOCATED IN ZONES AE (EL8) & ZONE X, PER NAVD88, AS SHOWN ON NATIONAL FLOOD INSURANCE PROGRAM (NFIP), FLOOD INSURANCE RATE MAPS (FIRM) ROCKINGHAM COUNTY, NEW HAMPSHIRE, PANELS 270F & 286F OF 626, MAP NUMBER 33015C0, WITH AN EFFECTIVE DATE OF JANUARY 29, 2021.
4. DIMENSIONAL REQUIREMENTS:

	REQUIRED:
MINIMUM LOT DIMENSIONS:	
LOT AREA:	20,000 S.F.
LOT AREA PER DWELLING UNIT:	NR
CONTINUOUS STREET FRONTAGE	100'
DEPTH:	100'
MINIMUM YARD DIMENSIONS:	
FRONT:	30'
SIDE:	30'
REAR:	20'
MAXIMUM STRUCTURE DIMENSIONS:	
BUILDING HEIGHT:	42'
ROOF APPURTENANCE HEIGHT:	10'
BUILDING COVERAGE:	30%
FLOOR AREA RATIO:	NR
MINIMUM OPEN SPACE:	20%

5. OWNER OF RECORD:
MAP 223 LOT 31:
NISSLEY, LLC
513 MARCY STREET
PORTSMOUTH, NH 03801
RCRD BK 6091 PG 2312
6. PARCEL AREA:
MAP 223 LOT 31:
1.62 ACRES (PER PLAN REFERENCE 1).
7. THE INTENT OF THIS PLAN IS TO SHOW THE APPROXIMATE LOCATION OF TAX MAP 223 LOT 31. THE APPROXIMATE LOCATION OF TAX MAP 223 LOT 31 AS DEPICTED ON THIS PLAN HAS BEEN COMPILED FROM RECORDED AND UNRECORDED SOURCES AND SOME FIELD EVIDENCE. IT IS NOT THE RESULT OF A COMPLETE BOUNDARY SURVEY AND IT IS NOT AN ATTEMPT TO DEFINE THE EXTENT OF OWNERSHIP OR DEFINE THE LIMITS OF TITLE.
8. THE PURPOSE OF THIS PLAN IS TO SHOW THE APPROXIMATE BOUNDARY LINES, LIMITED SITE CONDITIONS, AND A COMPARISON OF THE WETLANDS PER PLAN REFERENCE ONE AND THE WETLANDS DELINEATED ON SEPTEMBER 27, 2022 ON MAP 223 LOT 31.
9. FIELD SURVEY COMPLETED BY TCE & RJB IN OCTOBER, 2022 USING A LEICA TS-16, A TOPCON RIPER-V AND CARLSON DATA COLLECTION SOFTWARE.
10. HORIZONTAL DATUM IS NAD83 (2011) PER NETWORK RTK GPS OBSERVATIONS.
11. EASEMENTS, RIGHTS, AND RESTRICTIONS SHOWN OR IDENTIFIED ARE THOSE WHICH WERE FOUND DURING RESEARCH PERFORMED AT THE ROCKINGHAM COUNTY REGISTRY OF DEEDS. OTHER RIGHTS, EASEMENTS, OR RESTRICTIONS MAY EXIST WHICH A TITLE EXAMINATION OF SUBJECT PARCEL(S) WOULD DETERMINE.
12. THE LOCATION OF ANY UNDERGROUND UTILITY INFORMATION SHOWN ON THIS PLAN IS APPROXIMATE. TFMORAN, INC. MAKES NO CLAIM TO THE ACCURACY OR COMPLETENESS OF UNDERGROUND UTILITIES SHOWN. PRIOR TO ANY EXCAVATION ON SITE THE CONTRACTOR SHALL CONTACT DIG SAFE.

PLAN REFERENCES:

1. "PROPOSED ADDITION PORTSMOUTH SCUBA 915 SAGAMORE AVENUE PORTSMOUTH, N.H." BY AMBIT ENGINEERING, INC. DATED FEBRUARY 2002, WITH REVISIONS. (PLAN NOT RECORDED).

TAX MAP 223 LOT 31
WETLANDS COMPARISON PLAN
PORTSMOUTH SCUBA
915 SAGAMORE AVENUE
PORTSMOUTH, NEW HAMPSHIRE
COUNTY OF ROCKINGHAM
OWNED BY
NISSLEY, LLC

SCALE: 1" = 20' (22x34)
1" = 40' (11x17)
OCTOBER 19, 2022

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This plan is not effective unless signed by a duly authorized officer of TFMoran, Inc.

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Graphic Scale In Feet: 20 10 0 20

REV	DATE	DESCRIPTION	DR	CK

Seacoast Division
TFM
Civil Engineers
Structural Engineers
Traffic Engineers
Land Surveyors
Landscape Architects
Scientists
170 Commerce Way, Suite 102
Portsmouth, NH 03801
Phone (603) 431-2222
Fax (603) 431-0910
www.tfmoran.com

FILE	47092-30	DR	MP	Fb	593
		CK	RJB	CADFILE	SEE MYLAR

Oct 20, 2022 - 11:09am
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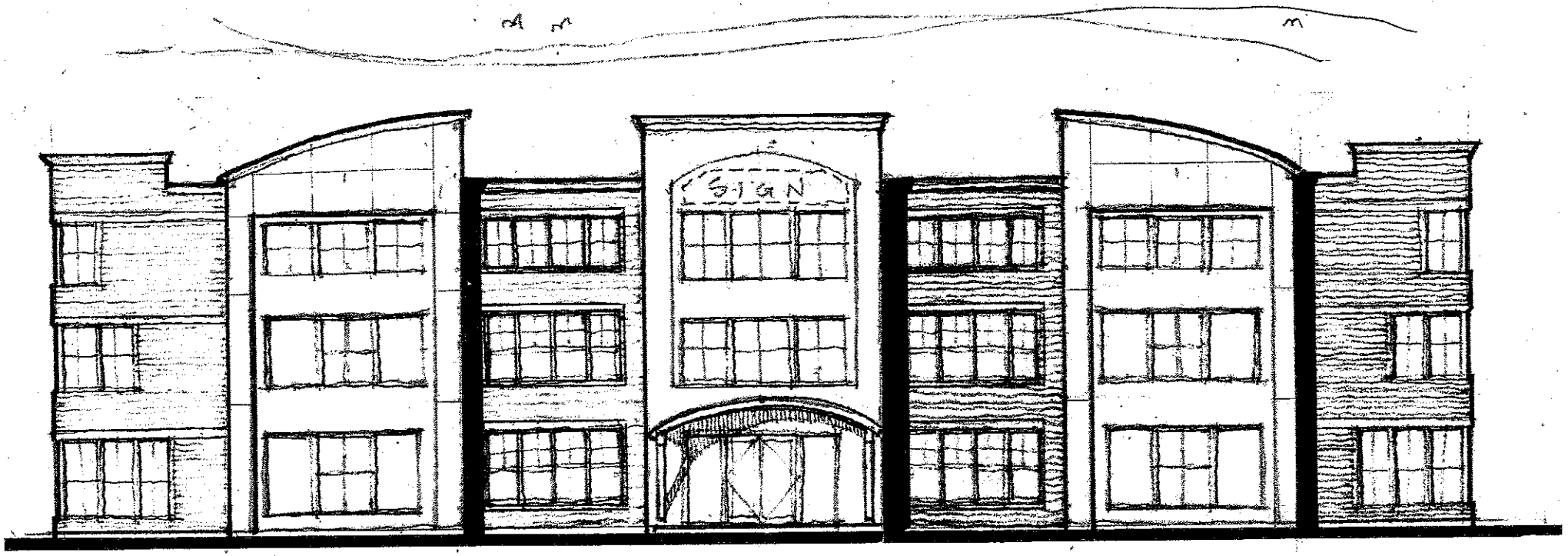


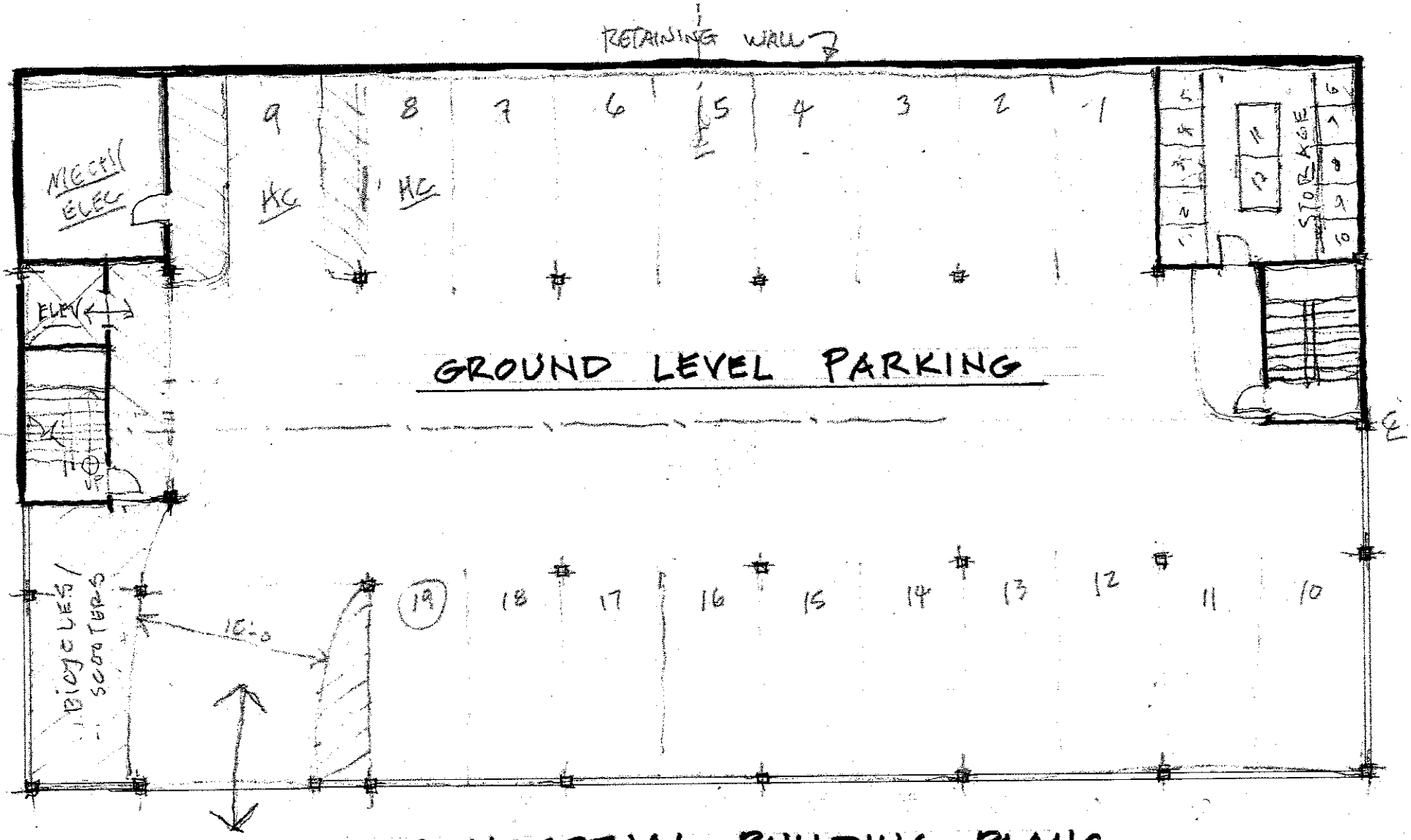
SAGAMORE AVENUE ELEVATION

CONCEPTUAL BUILDING PLANS

915 SAGAMORE AVENUE

OWNER: NISSLEY LLC

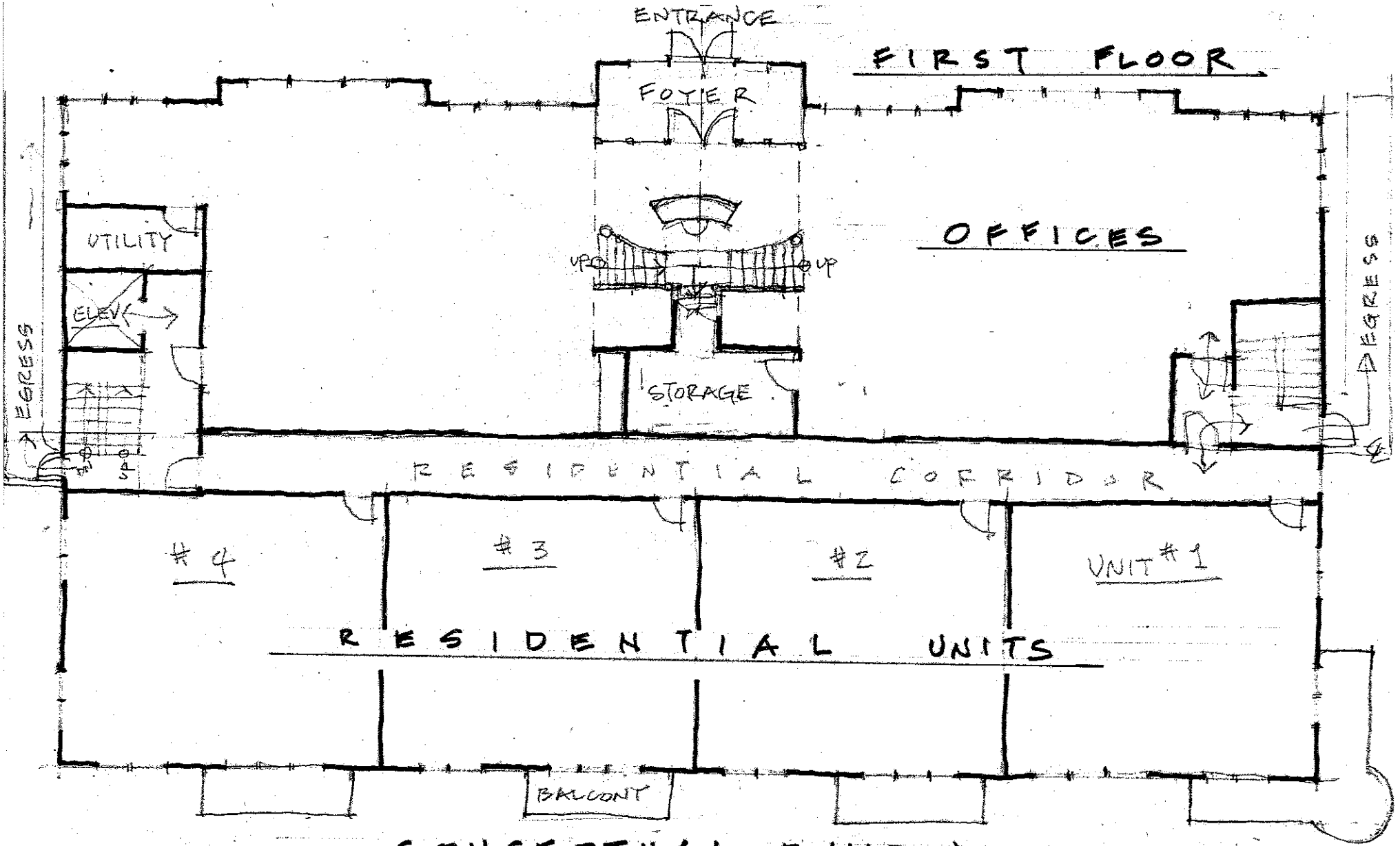
DATE: 17 NOV. 2022



CONCEPTUAL BUILDING PLANS

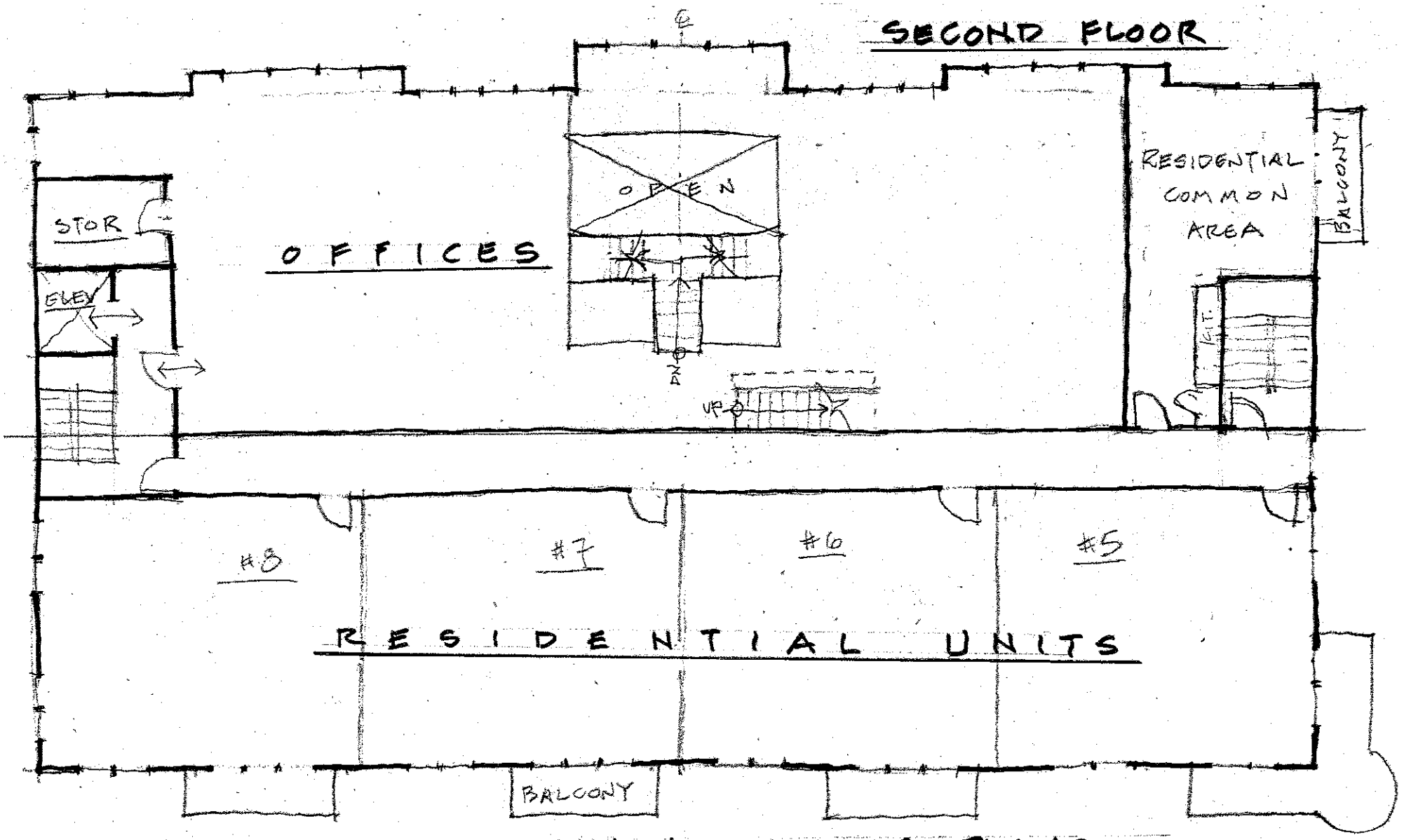
915 SAGAMORE AVENUE

OWNER: NISSLEY LLC 17 NOV 2022



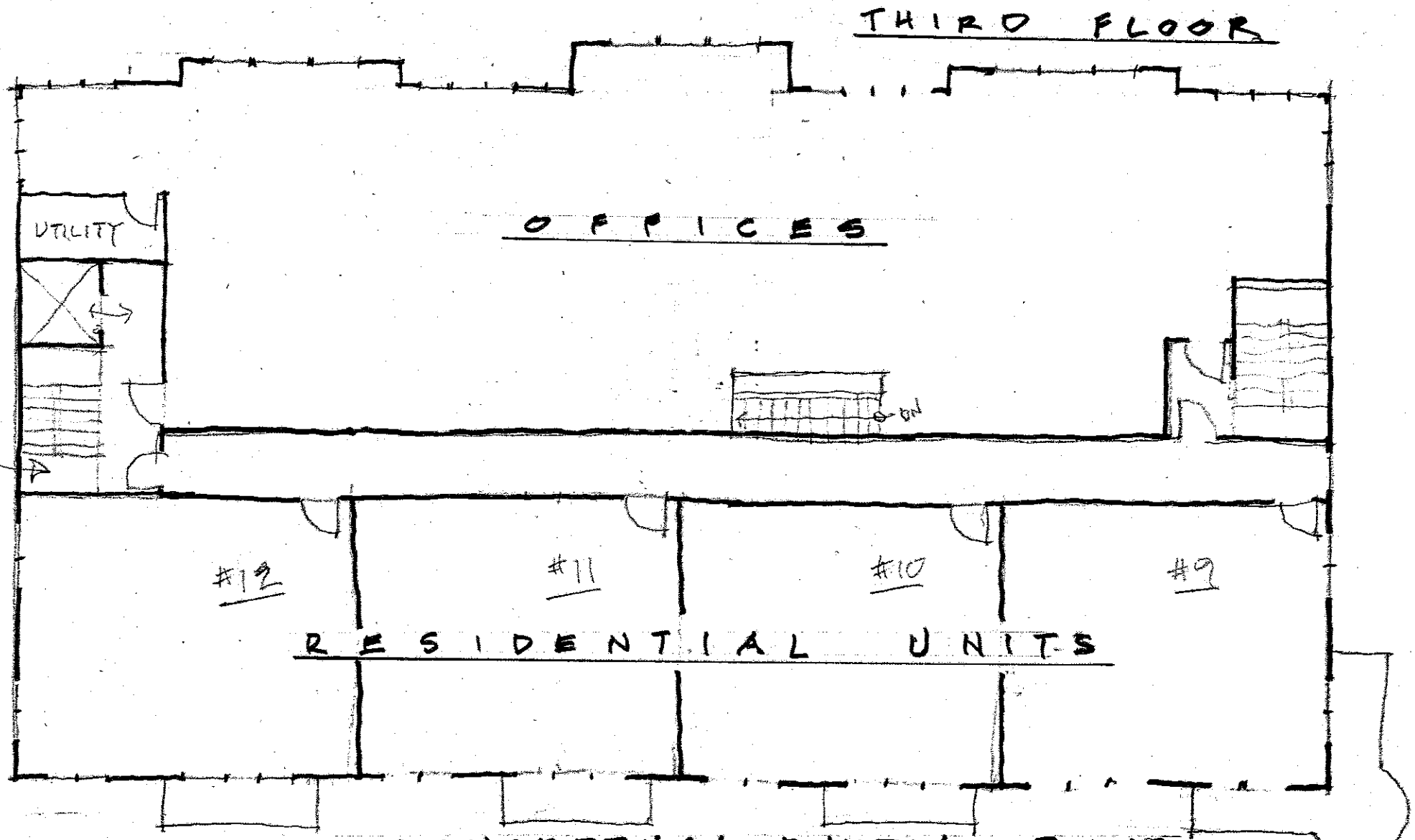
CONCEPTUAL BUILDING PLANS

915 SAGAMORE AVE 17 NOV. 2022



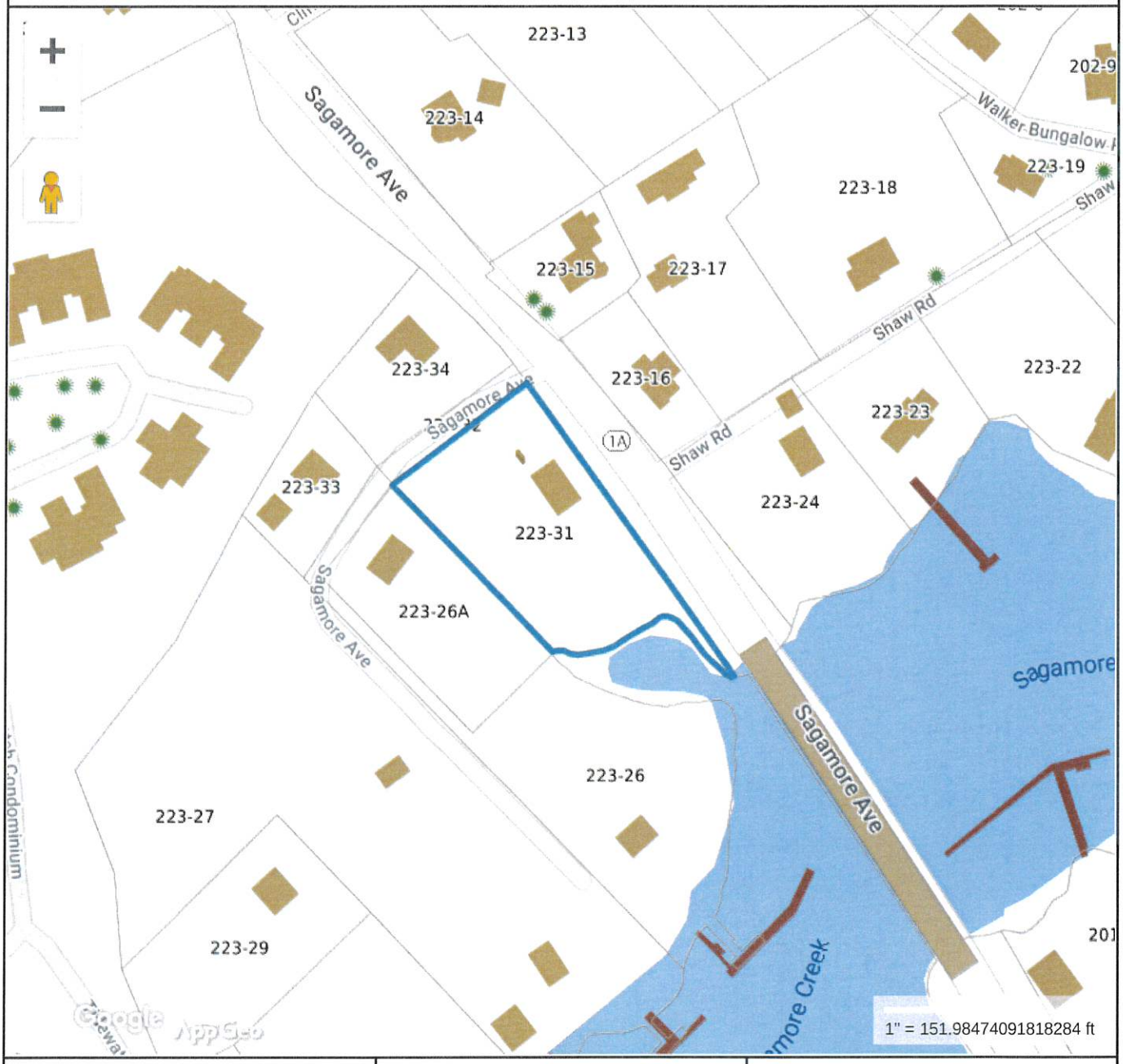
CONCEPTUAL BUILDING PLANS

915 SAGAMORE AVE 17 NOV 2022



CONCEPTUAL BUILDING PLANS

915 SAGAMORE AVE 17 NOV 2022



Property Information

Property ID	0223-0031-0000
Location	915 SAGAMORE AVE
Owner	NISSLEY LLC

MAP FOR REFERENCE ONLY
NOT A LEGAL DOCUMENT

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Geometry updated 09/21/2022
Data updated 3/9/2022

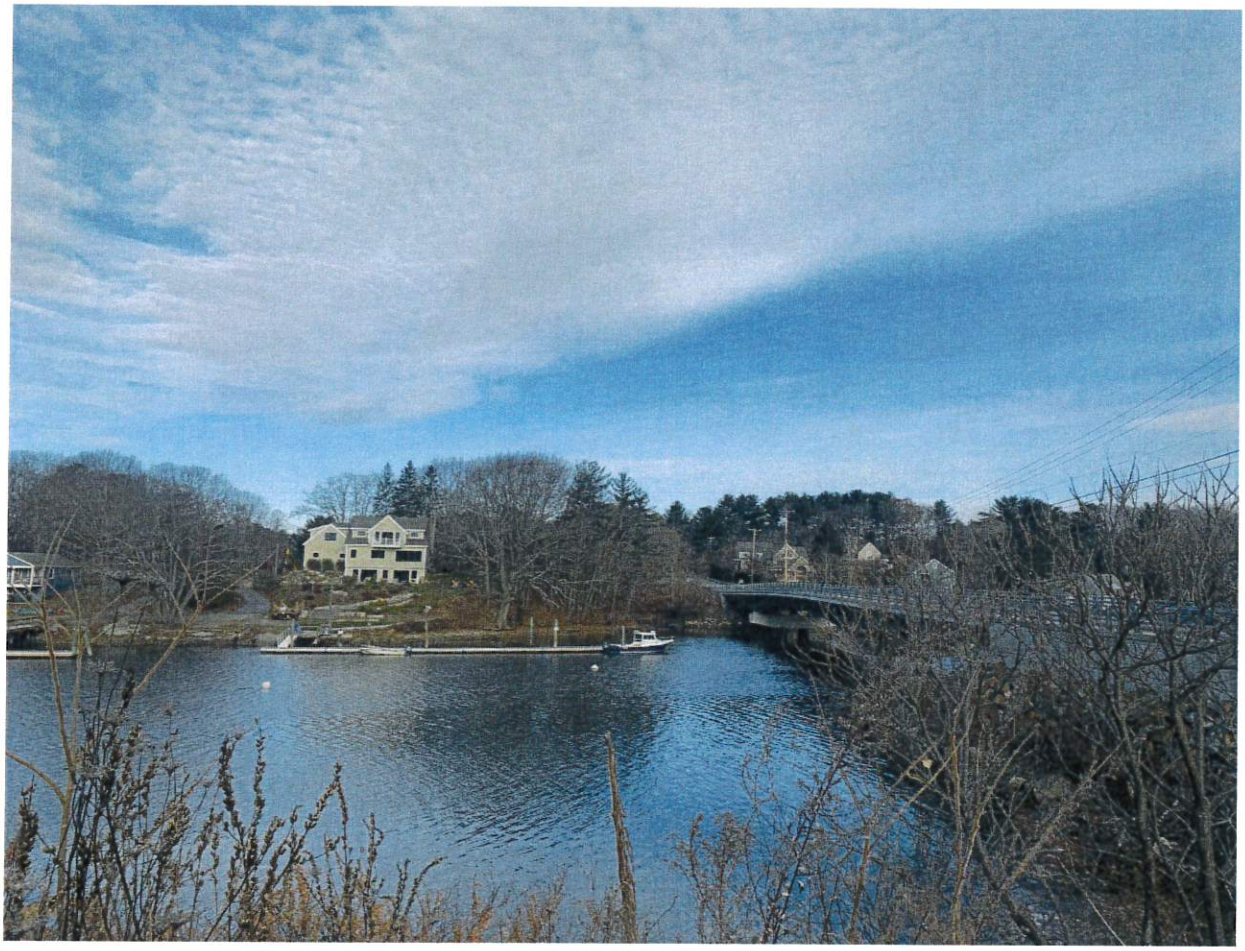
Print map scale is approximate. Critical layout or measurement activities should not be done using this resource.

Front Elevation View

Rear Elevation View

Right Elevation View

Right Elevation View



Left Elevation View (Across Water)

View from Sagamore Road