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Documents: [VERIZON WIRELESS LTR RE ZONINGDETERMINATION PROCESS-0201201_1.PDF](#)

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3.XI. E-Mail Comment

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CITY OF PORTLAND, MAINE

ZONING BOARD OF APPEALS

Kent Avery, Chair
Donna Katsiaficas, Secretary
Chip Gavin
William Getz
Eric Larsson

APPEAL AGENDA

The Board of Appeals will hold a Public Hearing on Thursday, February 4, 2016, 6:30 p.m., City Council Chambers, City Hall, 389 Congress Street, Portland, Maine, to hear the following appeals:

1. Old Business:

A. Interpretation Appeal:

50 Industrial Way, Allagash Brewing Company, lessee, Tax Map 326, Block B, Lot 008, I-M Industrial Zone: The applicant is challenging the Zoning Administrator's determination in a letter dated November 3, 2015 that selling pre-packaged food is not an incidental accessory use to a brewery and therefore cannot be allowed under the zoning ordinance (section 14-247). A motion to continue the appeal until the next meeting was requested by the Planning and Urban Development Department at the January 21, 2016 meeting and was granted by the board. Representing the appeal is Gordon R. Smith, Esq. and Jill Perry from Allagash Brewing.

B. Conditional Use Appeal:

1877 Congress St, Verizon Wireless, buyer, Tax Map 217, Block A, Lot 010, R-2 Residential Zone: The applicant is seeking a Conditional Use Appeal under section 14-78(c)(1) to construct a thirty foot by fifty five foot telephone equipment shelter and pad-mounted generator, transformer, and HVAC unit. The shelter and associated equipment will be accessed by a new twelve foot wide gravel driveway and parking area. A motion to continue the appeal until the next meeting was requested by the applicant at the January 21, 2016 meeting and was granted by the board. Representing the appeal is the buyer and Kelly B. Boden, Esq.

2. Adjournment

Verrill Dana^{LLP}

Attorneys at Law

GORDON R. SMITH
COUNSEL
gsmith@verrilldana.com
Direct: 207-253-4926

ONE PORTLAND SQUARE
PORTLAND, MAINE 04112-0586
207-774-4000 • FAX 207-774-7499
www.verrilldana.com

November 25, 2015

Portland Board of Appeals
City Hall Inspections Office, Room 315
389 Congress St
Portland, ME 04101

**Re: Interpretation Appeal;
Provision of Pre-Packaged Food at Allagash Brewery Tasting Room**

Dear Members of the Board,

Allagash Brewing Company is appealing the zoning administrator's determination that provision of a small amount of pre-packaged food at the company's existing tasting room does not constitute an incidental accessory use to the company's brewery.

The Allagash brewery and tasting room are located within the city's I-M Moderate Impact Industrial Zone. Breweries are an explicitly permitted use within the I-M Zone. See § 14-247(a). "Incidental accessory uses" are also explicitly permitted. See § 14-247(s). As recently as 2013, the city has affirmed the facility's approved uses as brewery and warehouse with accessory tasting room and accessory retail sales of beer, clothing and other items associated with the brewery. Certificate of Occupancy attached as Exhibit A.

Allagash recently approached the city for permission to provide a small selection of pre-packaged snacks to the customers that visit the Allagash tasting room. The snacks would be located in a single shelving unit the size of a vending machine and would be available to customers on the honor system, with an unmanned box to hold payments. The city denied the proposal on the basis that it was outside the scope of the approved existing tasting room and retail accessory uses.

On the contrary, the proposed provision of a limited selection of pre-packaged food, the functional equivalent of a vending machine, is entirely consistent with the operation of the brewery's tasting room and retail sales and should be permitted.

First, the scope and intensity of the proposed packaged food service are completely subordinate to the existing tasting room and retail sales. The tasting room and retail area are housed in a 70' x 28' space with copious counter and table seating to accommodate the thousands of customers who visit the brewery every year. In addition, an even larger outdoor patio space is available to visitors in the warmer months. The proposed packaged food area is a single shelved cabinet with an approximately 4' x 2' footprint located in an unused alcove in the

tasting room. See photographs attached as Exhibit B; construction drawings attached as Exhibit C; and plot plan attached as Exhibit D.

Second, the availability of food is directly related and beneficial to the existing tasting room accessory use. This is not an attempt by Allagash to expand its commercial operation. Allagash is proposing to offer food primarily for the purpose of providing its existing tasting room visitors the opportunity to temper the potential effects of alcohol during a day of sampling beer. At Allagash and at other tasting rooms, food trucks will often, but not always, park outside to provide visitors with something to eat. Allagash proposes to have the snacks on hand so that food is available at all times. Visitors drive to and from the Allagash tasting room and the tasting rooms of other breweries. It is common sense for a tasting room to have some type of sustenance on hand for patrons who want it. In fact, state law requires bars to make food available for this very reason. See 28-A M.R.S.A. § 1065 (requiring bars to offer food at all times that liquor is for sale). The city's determination that limited food service is not encompassed within or related to the tasting room is directly at odds with the policy behind this state requirement.

Third, it is common practice for brewery and distillery tasting rooms to offer snacks or some kind of limited food service. A tour of tasting rooms in Portland indicates that snacks are frequently made available as part of the tasting room or retail sales operations. Accordingly, the city's determination is inconsistent with the reality of commonly accepted industry practices.

Fourth, the food service that Allagash is proposing is essentially a low-tech vending machine. A small assortment of snacks will be available in an unattended cabinet with five shelves and a box to accept payment made on the honor system. The only place that the Portland Land Use Ordinance mentions vending machines is as an example of concessions permitted in an airline terminal within the Airport Business Zone. See § 14-197.1(b)(2). Yet vending machines are found in commercial establishments throughout Portland. As such, it is not clear that installation of a vending machine, the functional equivalent of what Allagash is proposing, is even regulated within the I-M Zone. If the city were to enforce its interpretation of the Allagash proposal uniformly, it would have to remove all vending machines from the array of commercial, institutional and recreational facilities within the I-M Zone, an area that encompasses much of the Riverside Street corridor, Presumpscot Street, Canco Road and Outer Congress.

Finally, even if the pre-packaged snack service proposed by Allagash did not fit within the scope of the approved accessory tasting room and retail sales operation, it would be permitted under the I-M Zone's Performance Based Uses provision. See § 14-248. This provision permits uses that are either expressly prohibited or not expressly permitted as long as the use is consistent with the purpose of the I-M Zone, does not negatively impact the environment or property values, and does not create "significant hazards to the health or safety of neighboring residents." Id. It is difficult to imagine how the availability of a limited selection of snacks at the existing tasting room would create any impacts at all. In fact, as discussed above, the provision of food is expected to have a positive effect on the health and safety of the neighborhood.

For the foregoing reasons, we respectfully request that the Board find that, pursuant to section 14-247 of the Portland Land Use Ordinance, the provision of pre-packaged food as described above is within the scope of the existing Allagash tasting room, which is a permitted incidental accessory use to the Allagash brewery. In the alternative, we respectfully request that

November 25, 2015

Page 3

the Board find that the provision of pre-packaged food as described above is permitted as a performance based use under section 14-248 of the Portland Land Use Ordinance.

Thank you for your time and attention to this matter. I look forward to answering any questions at your next available meeting.

Sincerely,

A handwritten signature in blue ink, appearing to be "Gordon R. Smith", written over the printed name.

Gordon R. Smith



Jeff Levine, AICP, Director
Planning & Urban Development Department

Ann Machado
Zoning Administrator

CITY OF PORTLAND ZONING BOARD OF APPEALS**Interpretation Appeal Application****Applicant Information:**

NAME

Allagash Brewing Co.

BUSINESS NAME

50 Industrial Way

BUSINESS ADDRESS

878-5385 jperry@allagash.com

BUSINESS TELEPHONE & E-MAIL

Deeds & Lease Agreement

APPLICANT'S RIGHT/TITLE/INTEREST

I-M

CURRENT ZONING DESIGNATION

EXISTING USE OF THE PROPERTY:

Brewery and warehouse with accessory tasting room and retail sales**Subject Property Information:**50 Industrial Way

PROPERTY ADDRESS

326 B009001

CHART/BLOCK/LOT (CBL)

PROPERTY OWNER (If Different)

ADDRESS (If Different)

PHONE # AND E-MAIL

DISPUTED PROVISIONS FROM SEC 14- 247

ORDER, DECISION, DETERMINATION OR INTERPRETATION UNDER DISPUTE:

November 3, 2015 determination that "selling food is not an 'incidental accessory use' to a brewery" and denial of proposal to have pre-packaged food available to tasting room visitors.

TYPE OF RELIEF REQUESTED

Determination that availability of pre-packaged food in tasting room fits within
scope of tasting room accessory use.

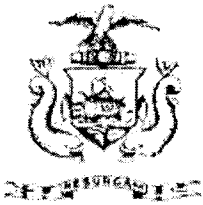
NOTE: If site plan approval is required, attach preliminary or final site plan.

The undersigned hereby makes application for a conditional use permit as described above, and certifies that the information herein is true and correct to the best of his OR her knowledge and belief.

SIGNATURE OF APPLICANT

DATE

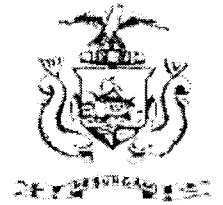
EXHIBIT A



Certificate of Occupancy

CITY OF PORTLAND, MAINE

Department of Planning and Urban Development
Building Inspections Division



Location: 50 Industrial Way

CBL: 326 B009001

Issued To: 50 Industrial Way Llc

Issued Date: 07/09/2013

This is to certify that the building, premises, or part thereof, at the above location, built-altered-changed as to use under Building Permit No. 201248397 has had a final inspection, has been found to conform substantially to the requirements of the Building Code and the Land Use Code of the City of Portland, and is hereby approved for occupancy or use, limited or otherwise, as indicated below.

PORTION OF BUILDING OR PREMISES

ENTIRE

APPROVED OCCUPANCY

USE GROUP F-2/B/M

TYPE 2B

BREWERY/WAREHOUSE/ACCESSORY

TASTING & SALES

MUBEC '09

LIMITING CONDITIONS: NONE

Approved: _____

Inspector

Inspection Division Director

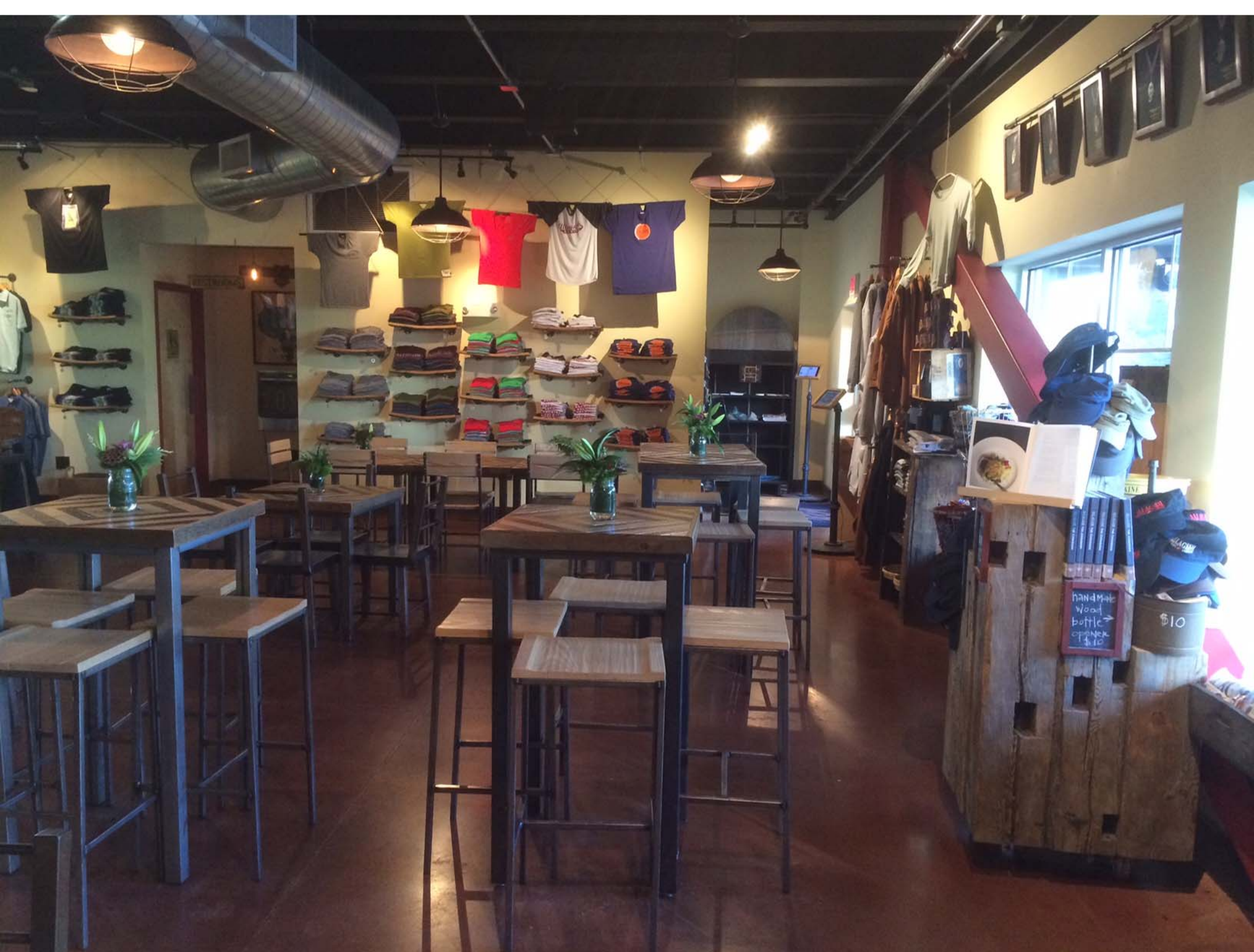
Notice: This certificate identifies the legal use of the building or premises, and ought to be transferred from owner to owner upon the sale of the property.

EXHIBIT B



TODAY'S TASTING
• White ... 5M
• Tiramisu ... 7M
• INTERLUDE 10
• NANCY 34

OUTDOOR
OPEN SIMPLY
125



COLD BEER



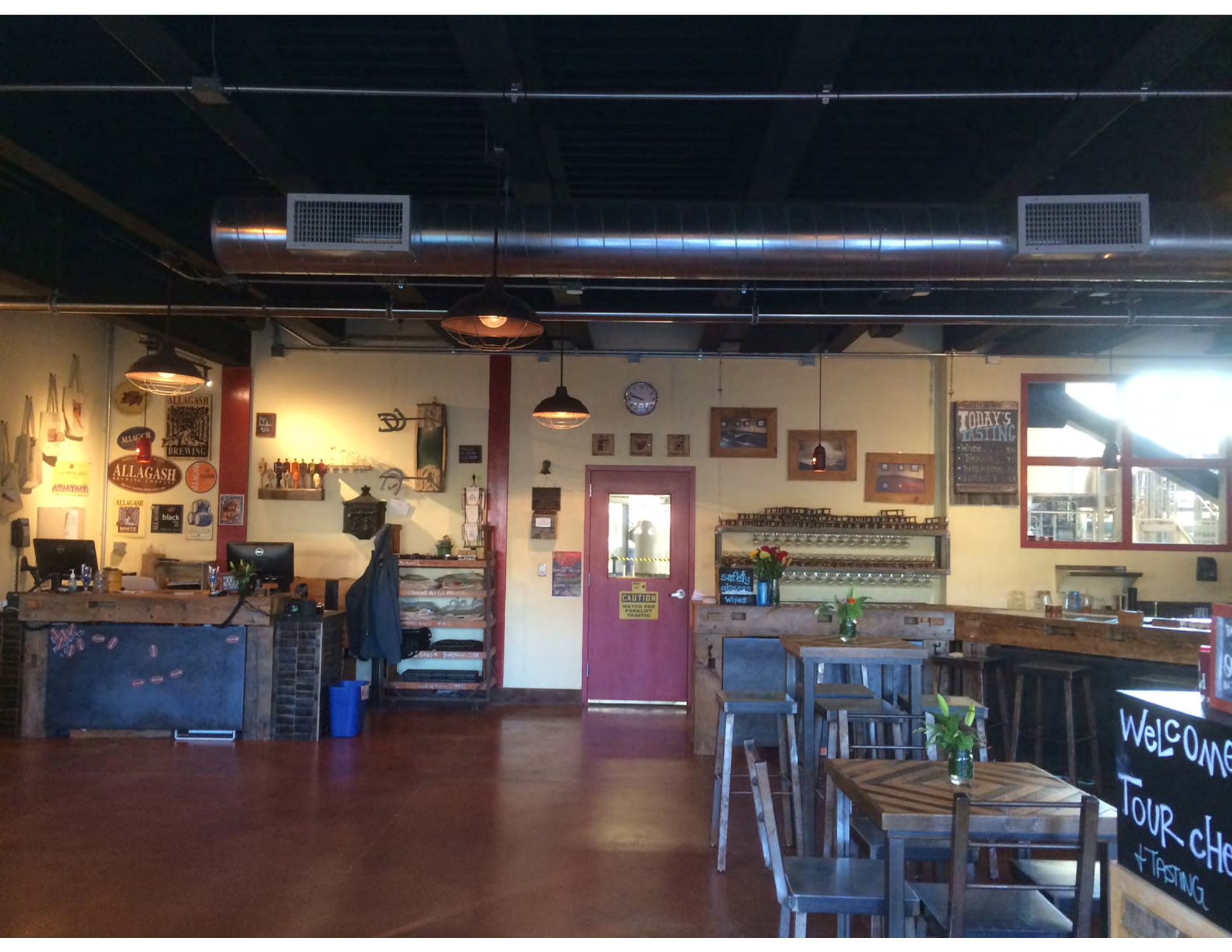










EXHIBIT C

NEW ADDITION FOR ALLAGASH BREWING COMPANY

50 INDUSTRIAL WAY

PORTLAND, MAINE

ISSUED FOR CONSTRUCTION

ABBREVIATIONS				GENERAL NOTES				MATERIALS				SYMBOLS				DRAWING INDEX										
ATP ALUM OR AL AMP	ABOVE FINISH FLOOR ALUMINUM ACOUSTICAL WALL PANEL	HO HD WD HBR HFW HMT HORIZ HT	HANDICAP HARDWOOD HEADER HARDWARE HOLLOW METAL HORIZONTAL HEIGHT	S SAT SC SD SDSD SECT SECT SECT	SOUTH SUSPENDED ACOUSTICAL TILE GRILING SHOWER CURTAIN SCAFF DISPERISOR SCHEDULE SECTION SUSPENDED GYPSUM BOARD CEILING	SHIT SH1 SH2 SHD SPO SQA SSS STD STL STRUT STV SV	SHEET SEALAR SANITARY NAPKIN DISPOSAL SPEIFICATIONS SQUARE SYNTHETIC SPORTS SURFACE STANDARD STEEL STRUCTURAL STRAIGHT VINYL DASH SHEET VINYL	CONCRETE	CONCRETE MASONRY UNIT	BRICK	GRAVEL	SOIL	STUD PARTITION (NEW)	STEEL	WOOD FRAMING	WOOD BLOCKING	PLYWOOD	GYPSEUM BOARD	SUSPENDED ACOUSTICAL TILE	BATT INSULATION	RIGID INSULATION	FINISH WOOD	ONE HOUR RATED PARTITION	TWO HOUR RATED PARTITION	EXISTING PARTITION (SCREENED)	NEW PARTITION
BT BOT BOS BRK	STIMULOUS BENCH MARK BOTCH BOARDS BRICK	D F INSUL INT	INSIDE DIAMETER INSIDE FACE INCHES INSULATION INTERIOR	SHIT SH1 SH2 SHD SPO SQA SSS STD STL STRUT STV SV	SHEET SEALAR SANITARY NAPKIN DISPOSAL SPEIFICATIONS SQUARE SYNTHETIC SPORTS SURFACE STANDARD STEEL STRUCTURAL STRAIGHT VINYL DASH SHEET VINYL	SHIT SH1 SH2 SHD SPO SQA SSS STD STL STRUT STV SV	SHEET SEALAR SANITARY NAPKIN DISPOSAL SPEIFICATIONS SQUARE SYNTHETIC SPORTS SURFACE STANDARD STEEL STRUCTURAL STRAIGHT VINYL DASH SHEET VINYL	CONCRETE	CONCRETE MASONRY UNIT	BRICK	GRAVEL	SOIL	STUD PARTITION (NEW)	STEEL	WOOD FRAMING	WOOD BLOCKING	PLYWOOD	GYPSEUM BOARD	SUSPENDED ACOUSTICAL TILE	BATT INSULATION	RIGID INSULATION	FINISH WOOD	ONE HOUR RATED PARTITION	TWO HOUR RATED PARTITION	EXISTING PARTITION (SCREENED)	NEW PARTITION
C CAB																										

ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105
(207) 871-5900
(207) 871-9508

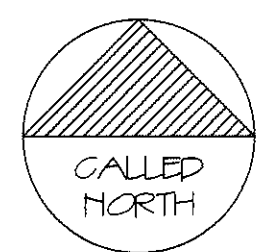
COVER SHEET

SCALE AS NOTED
DATE 10 SEPT. 12
DRAWN BY SAM/MPH
JOB NO. 120701
DRAWING NO. A0.0

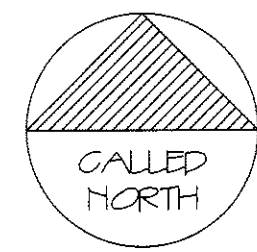
REVISIONS
11/1/12
SUPERCEDES
PREVIOUS ISSUES

NEW ADDITION FOR
ALLAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

ARCHITECT
MICHAEL F. HAYS
No. 1724
STATE OF MAINE

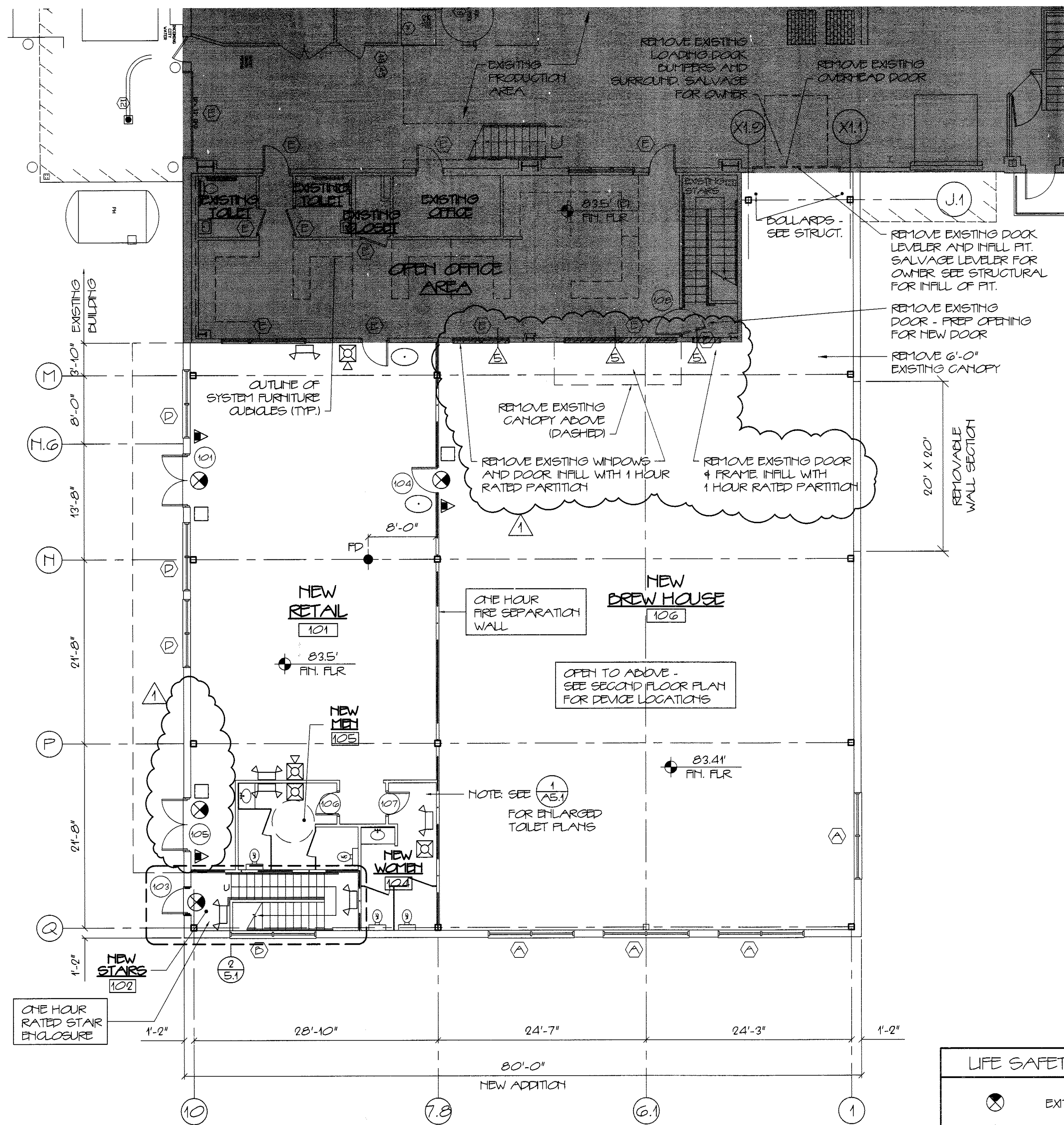


	EXISTING BUILDING - 16,900 S.F.
	NEW ADDITION - 5,900 S.F.
	TOTAL AREA = 22,800 S.F.



	EXISTING BUILDING	-	3,656 S.F.
	NEW ADDITION	-	2,400 S.F.
TOTAL AREA		=	6,056 S.F.

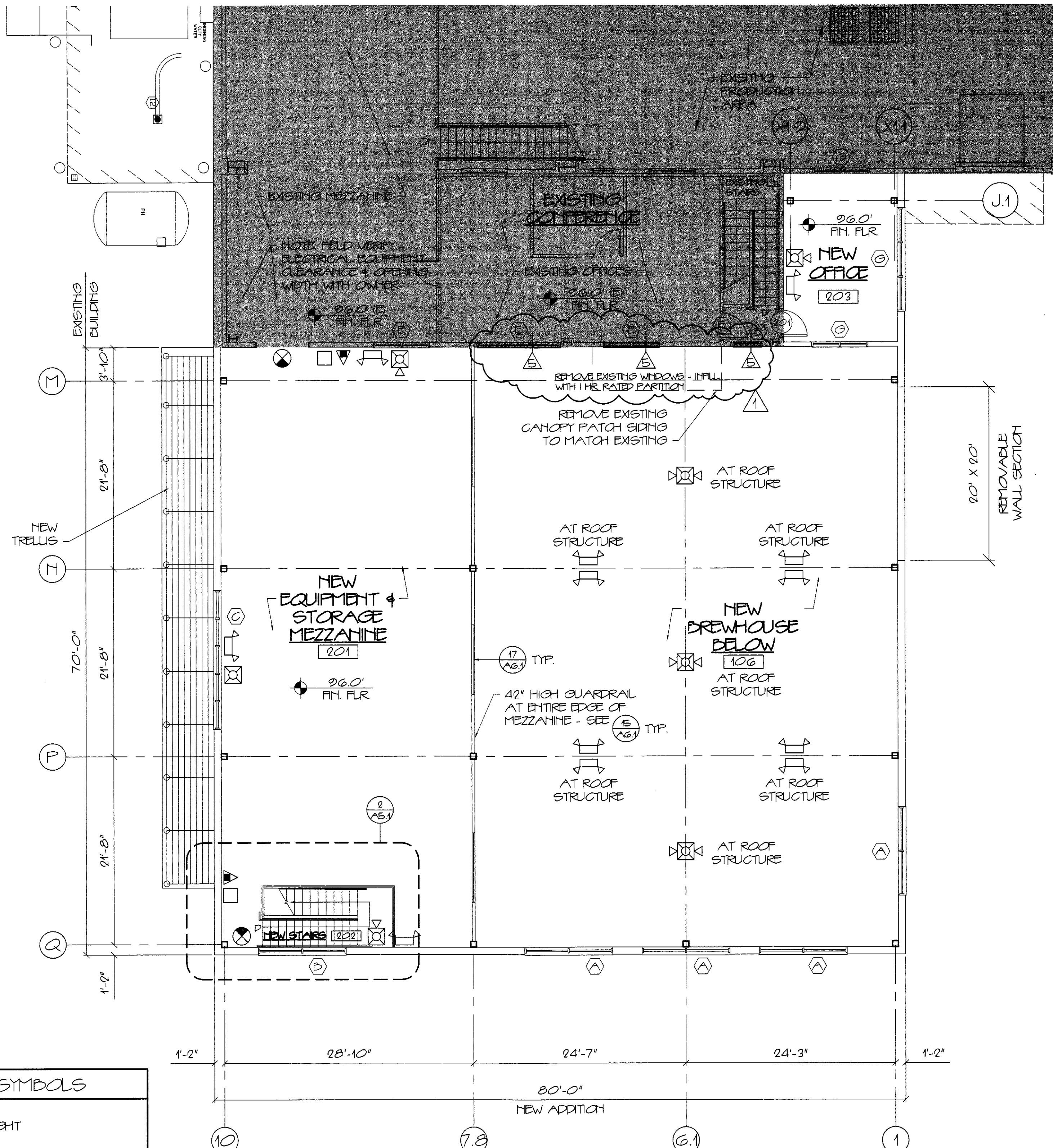
GRAN T	HA Y S	ARCHITECTURE INTERIOR DESIGN P.O. BOX 6179 FALMOUTH, MAINE 04105 TELEPHONE (207) 871-5900 FACSIMILE (207) 871-9308	NEW ADDITION FOR ALLAGASH BREWING CO. 50 INDUSTRIAL WAY FORTLAND, MAINE	ASSOCIATE	DATE 10 SEPT. 12 DRAWN BY SAM/MTM JOB NO. 120701 DRAWING NO. A1.1
SCALE 1/16" = 1'-0"		REVISIONS △ 11/1/12 SUPERCEDES PREVIOUS ISSUES		LICENSED ARCHITECT MICHAEL F. HAYS No. 1724 STATE OF MAINE	
DRAWING TITLE		JOB TITLE		DATE	



1 FIRST FLOOR NEW ADDITION CODE COMPLIANCE PLANS
SCALE: 1/8" = 1'-0"

NOTE: FIELD VERIFY EXISTING EXTERIOR WALL IS CONSTRUCTED WITH 1 HR. RATING (S/3" FIRE CODE SHEETROCK/DEMIGLASS)

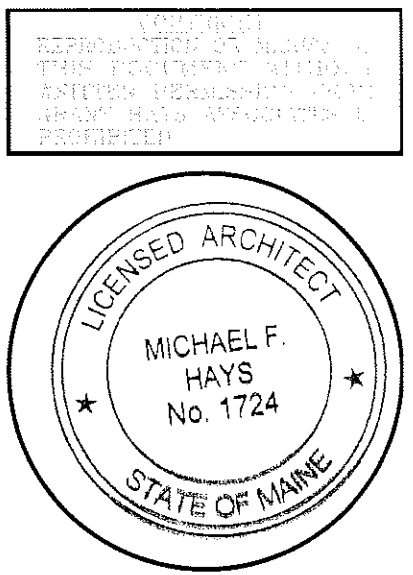
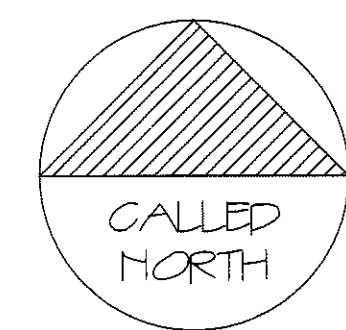
LIFE SAFETY SYMBOLS	
	EXIT LIGHT
	FIRE EXTINGUISHER
	FIRE ALARM PULL STATION
	FIRE ALARM PANEL
	EMERGENCY LIGHT
	FIRE ALARM HORN/STROBE UNIT
	FIRE ALARM STROBE UNIT
	SMOKE DETECTOR
	SMOKE DETECTOR W/ AUDIBLE ALARM
	"NOT AN EXIT" SIGN
	KNOX BOX
	1 HR RATED PARTITION
	2 HR RATED PARTITION



2 SECOND FLOOR NEW ADDITION CODE COMPLIANCE PLAN
SCALE: 1/8" = 1'-0"

FIRE SUPPRESSION & LIFE SAFETY SYSTEM NOTES:

- THE ENTIRE BUILDING HAS AN EXISTING NFPA 13 FIRE SUPPRESSION SPRINKLER SYSTEM. THE EXISTING SPRINKLER SYSTEM SHALL BE MODIFIED BY A CERTIFIED SPRINKLER CONTRACTOR FOR THE PROPOSED PLANS AND SHALL BE REVIEWED AND APPROVED BY THE STATE AND LOCAL AUTHORITY HAVING JURISDICTION. THE CONTRACTOR SHALL BEAR SOLE RESPONSIBILITY FOR THE DESIGN AND INSTALLATION OF THE MODIFIED SYSTEM FOR OCCUPANCY.
- UPGRADE THE EXISTING FIRE ALARM SYSTEM AS REQUIRED FOR COMPLIANCE WITH NFPA 101 LIFE SAFETY CODE. COORDINATE WITH SPRINKLER SYSTEM MODIFICATION. VERIFY LOCATION OF ALARM & NOTIFICATION PANELS WITH THE AUTHORITY HAVING JURISDICTION.



REVISIONS
11/1/12
SUPERSEDES PREVIOUS ISSUES

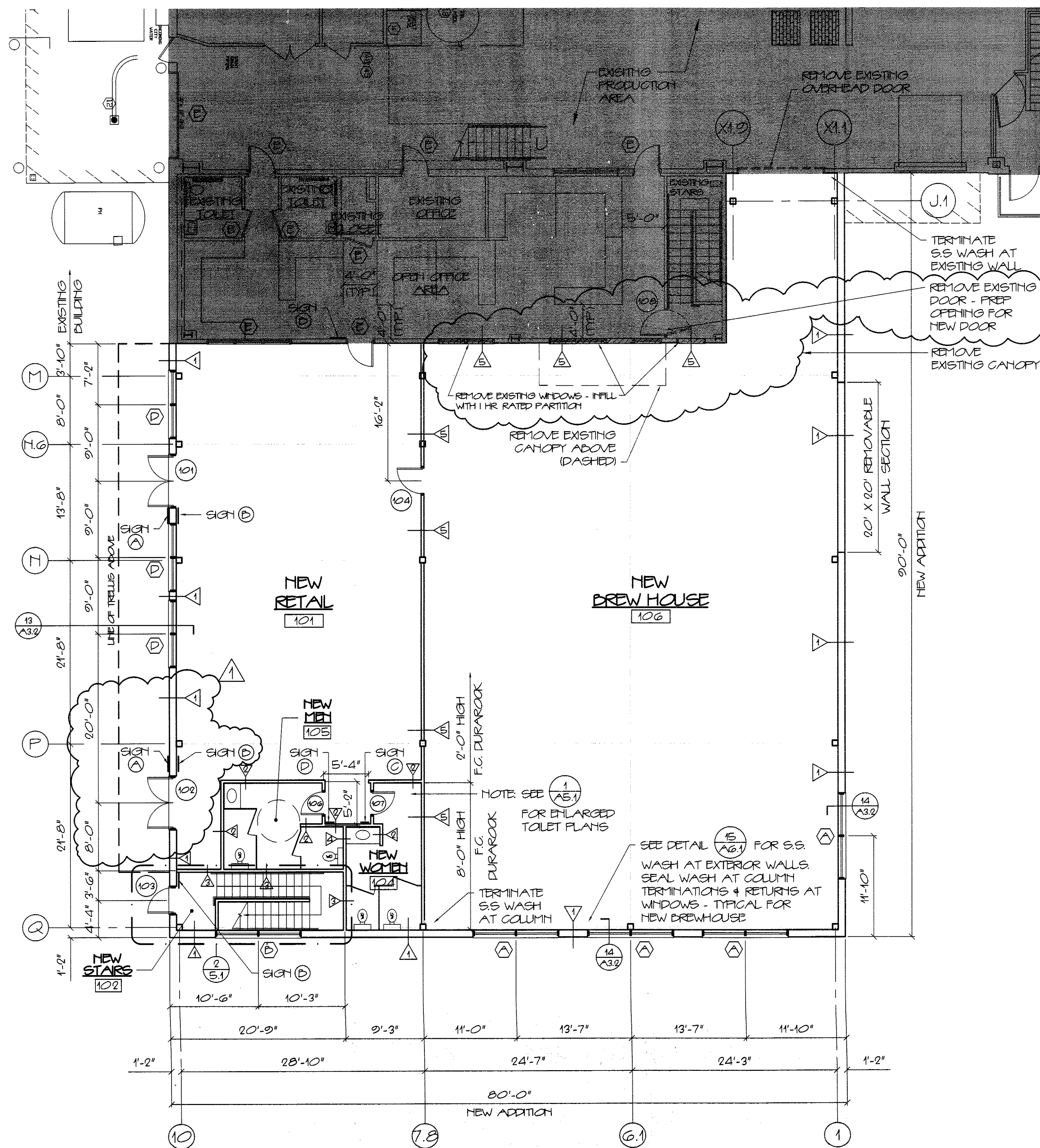
NEW ADDITION FOR
ALLAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105
(207) 871-5900 (207) 871-8308

ENLARGED ADDITION
CODE COMPLIANCE
PLANS

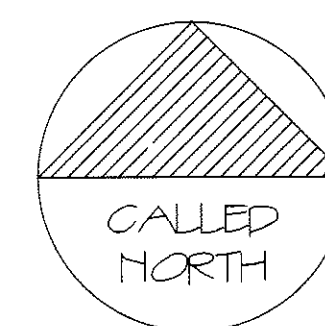
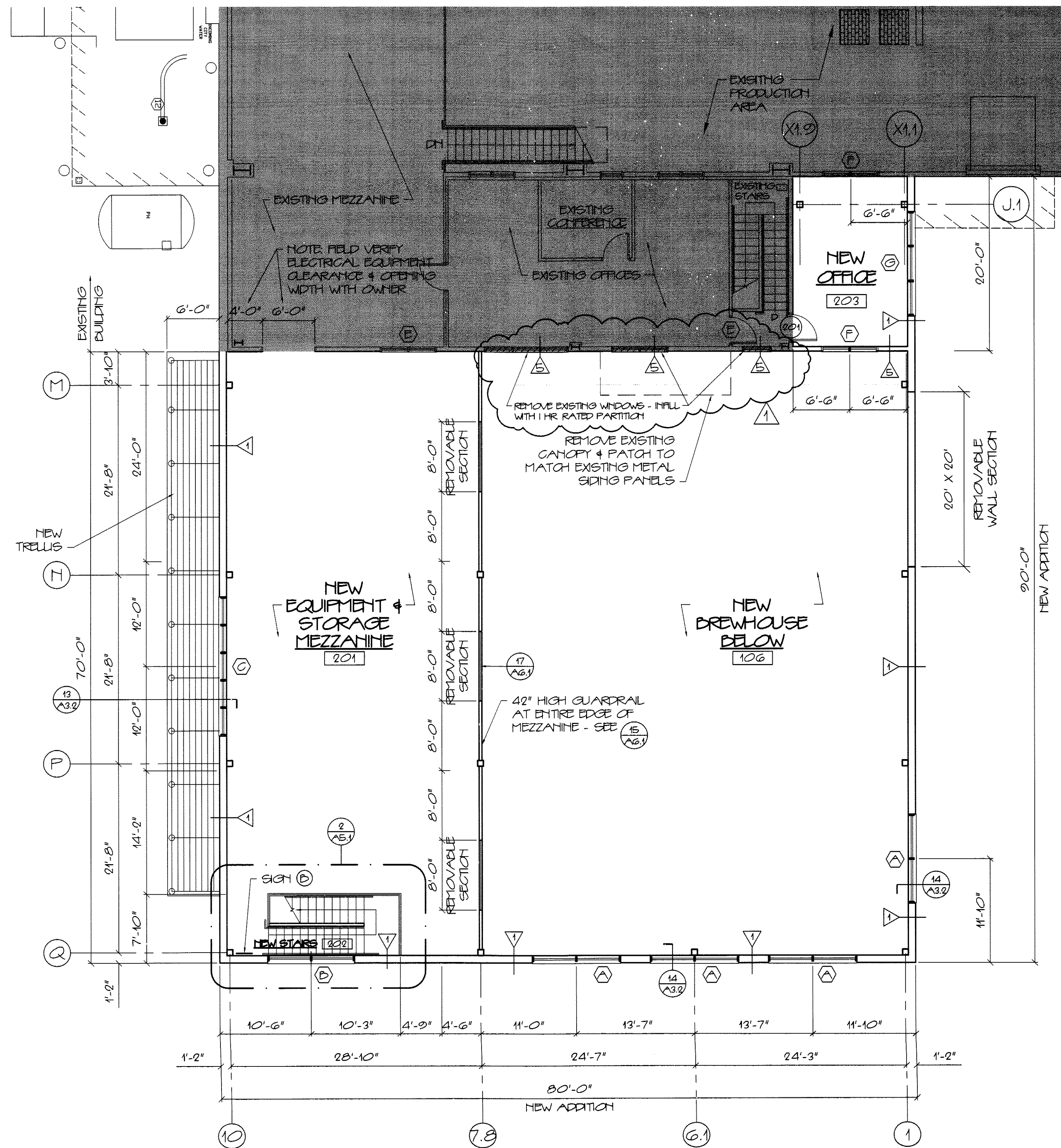
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JOB NO. 120701

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A1.3

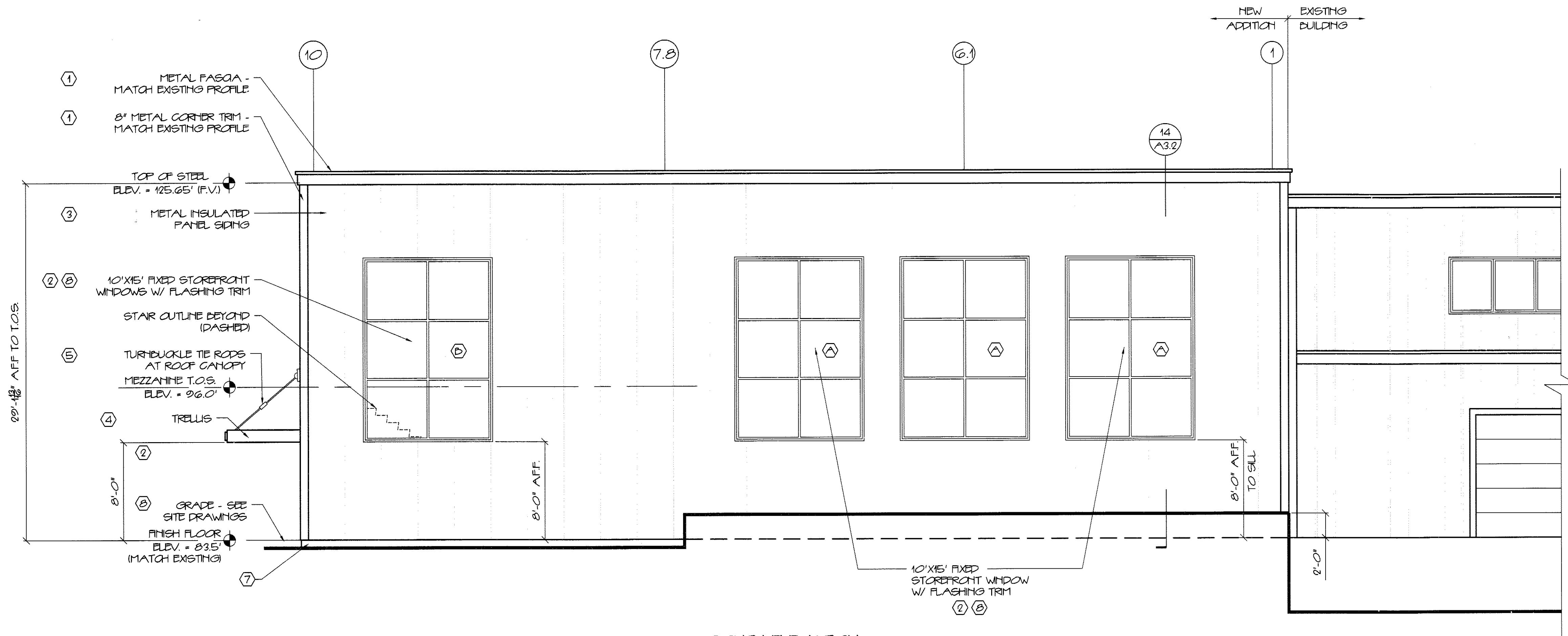


PARTITION TYPES	
TAG	DETAIL
	
	
	
	
	

SIGNAGE TYPES	
TAG	DETAIL
(A)	
(B)	
(C)	
(D)	



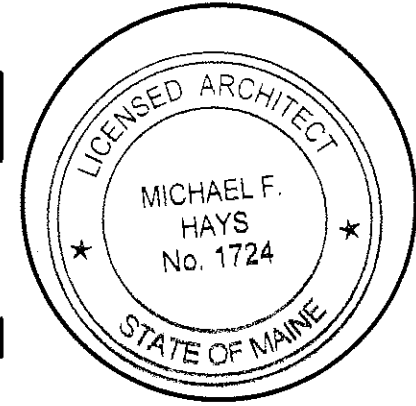
GRANT	HAYS	ASSOCIATES	ESTABLISHED
ENLARGED ADDITION PLANS		ARCHITECTURE INTERIOR DESIGN P.O. BOX 6179 FALMOUTH, MAINE 04105 TELEPHONE (207) 871-5900 FACSIMILE (207) 871-9308	
SCALE AS NOTED		REVISIONS 1 11/1/12 SUPERCEDES PREVIOUS ISSUES	
DATE 10 SEPT. 12		NEW ADDITION FOR ALLAGASH BREWING CO. 50 INDUSTRIAL WAY PORTLAND, MAINE	
DRAWN BY SAM/MFH			
JOB NO. 120701			
DRAWING NO.		A1.4	



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

COLOR SCHEDULE	
TAG	COLOR
①	LIGHT BRONZE
②	MILL ALUMINUM
③	LIGHT STONE
④	"RUSTED" STEEL
⑤	"GALVANIZED" STEEL & ROUGH TIMBER
⑥	MILL ALUMINUM
⑦	CONCRETE
⑧	LIGHT BRONZE
⑨	BLUE
⑩	(RESERVED)

THIS DRAWING IS THE PROPERTY OF
HAYSON ARCHITECTURE
IT IS TO BE USED ONLY FOR THE PROJECT
AND SITE SPECIFICALLY IDENTIFIED
HEREIN.



REVISIONS

NEW ADDITION FOR
ALLAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

JOB TITLE

ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105

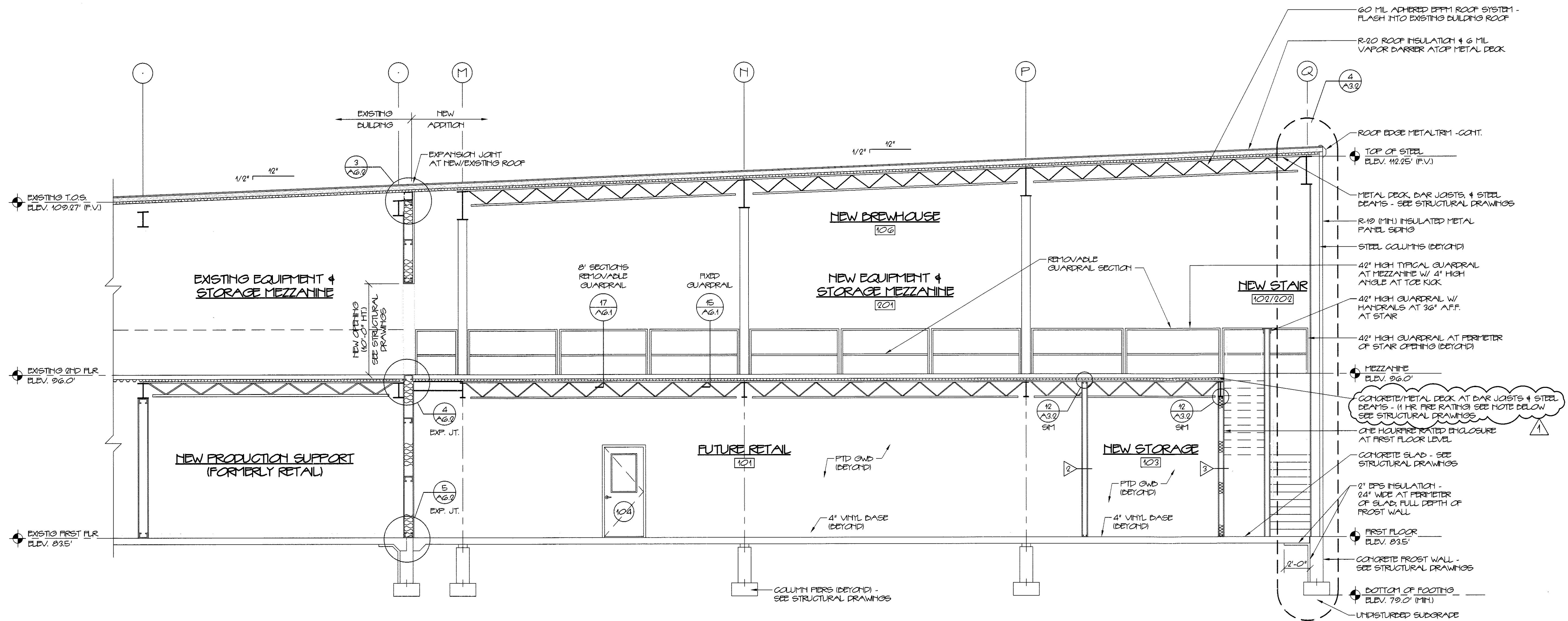
TEL: (207) 871-5900
FAX: (207) 871-9908

ADDITION
EXTERIOR
ELEVATIONS

DRAWING TITLE

SCALE	AS NOTED
DATE	10 SEPT. 12
DRAWN BY	SAM/MPH
JOB NO.	120701

DRAWING NO.
A2.2



TYPICAL NEW ADDITION BUILDING SECTION
SCALE: 1/4" = 1'-0"

NOTE: NEW MEZZANINE FLOOR CONSTRUCTION CONSISTS OF STRUCTURAL METAL DECKING, MINIMUM 1/2" CONCRETE TOPPING WITH WELDED WIRE MESH REINFORCING PER UL DESIGN NO. D064 - 1 HOUR ASSEMBLY RATING

STATE OF MAINE
LICENSED ARCHITECT
MICHAEL F. HAYS
NO. 1724

REVISIONS
1 11/1/12
SUPERCEDES
PREVIOUS ISSUES

NEW ADDITION FOR
ALLAGASH BREWING CO.
50 INDUSTRIAL WAY
PORTLAND, MAINE

ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105

ADDITION
BUILDING SECTIONS

SCALE 1/4" = 1'-0"

DATE 10 SEPT. 12

DRAWN BY SAM/MPH

JOB NO. 120701

DRAWING NO.

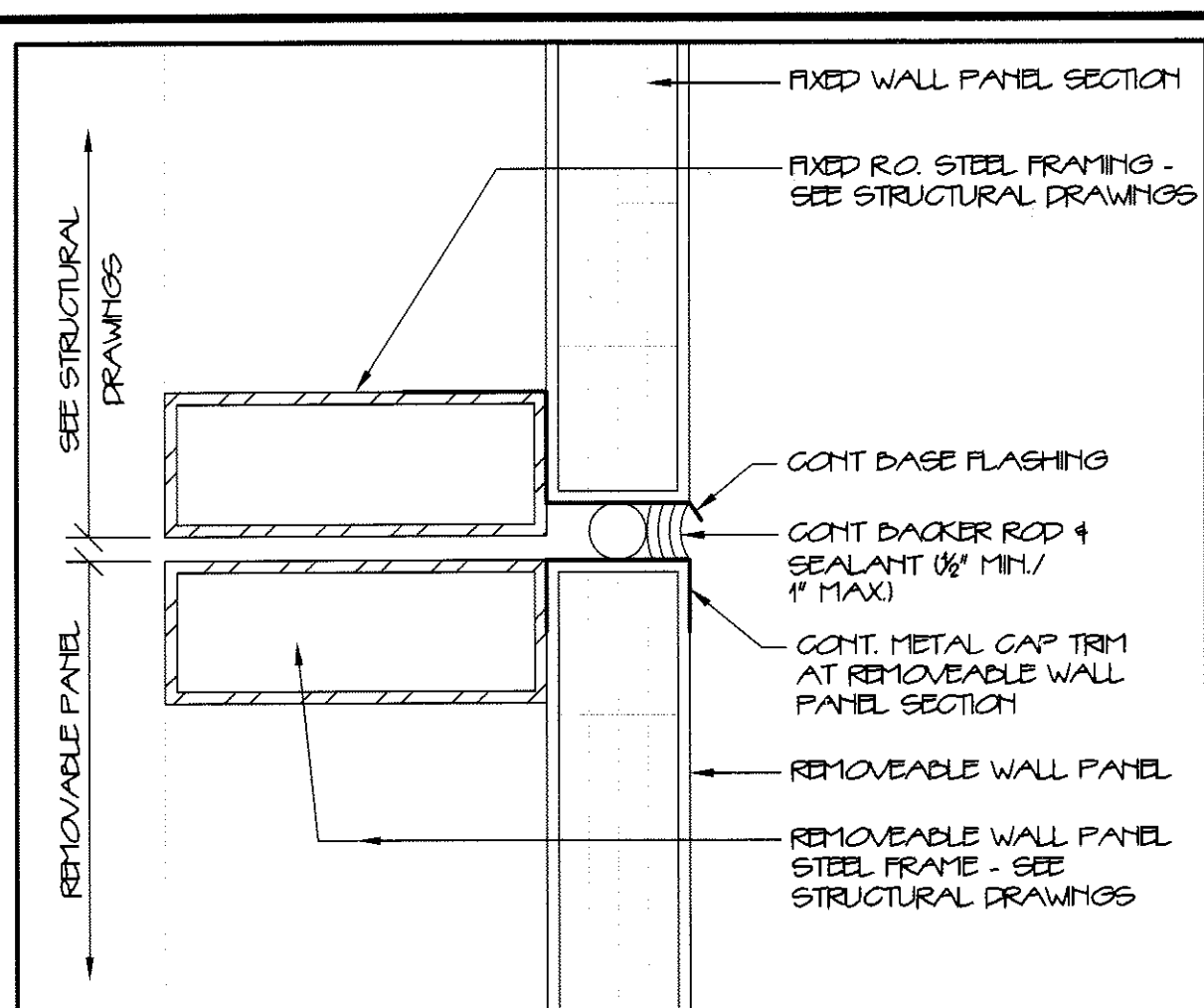
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JOB TITLE

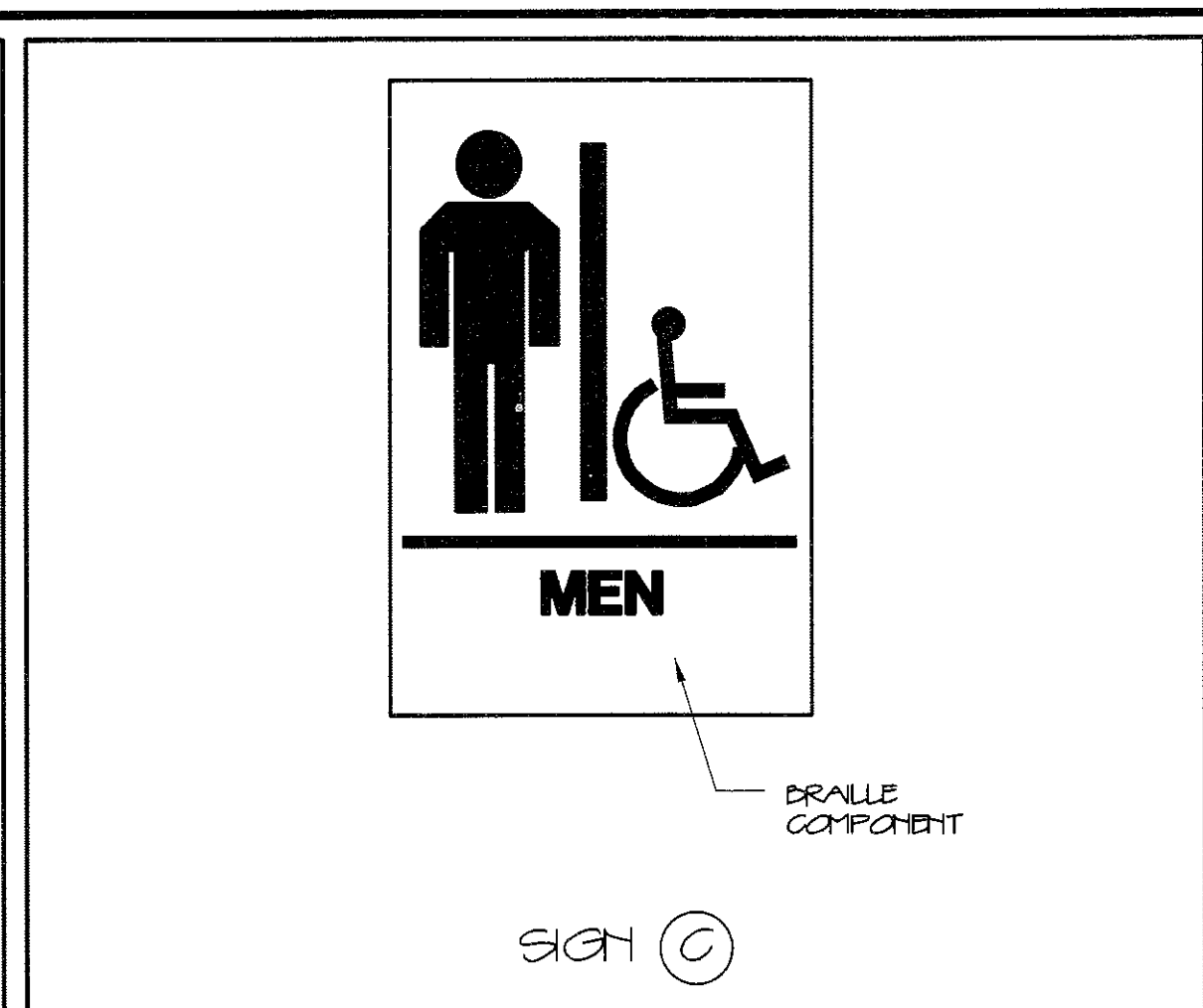
(207) 871-9306

(207) 871-5800

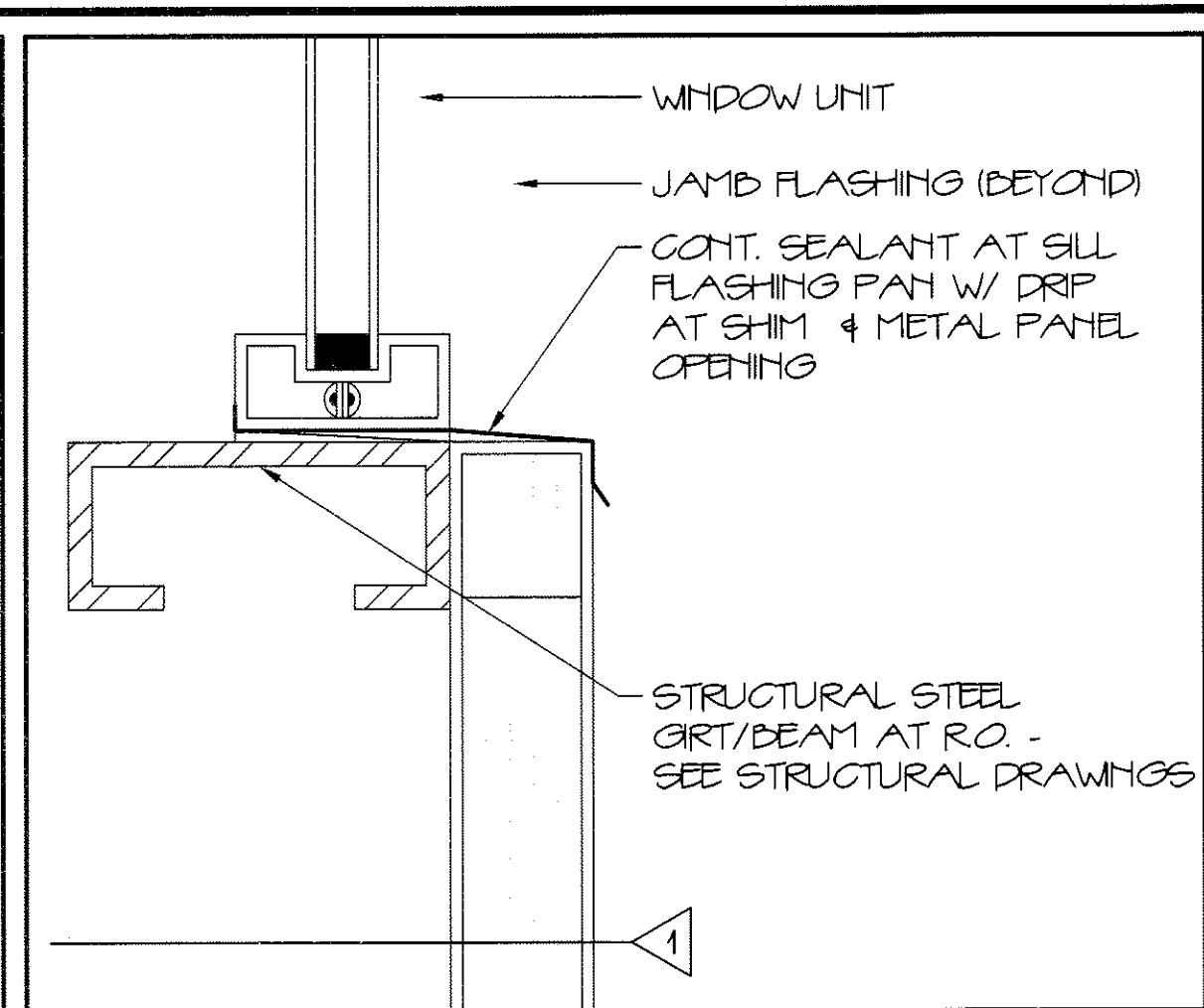
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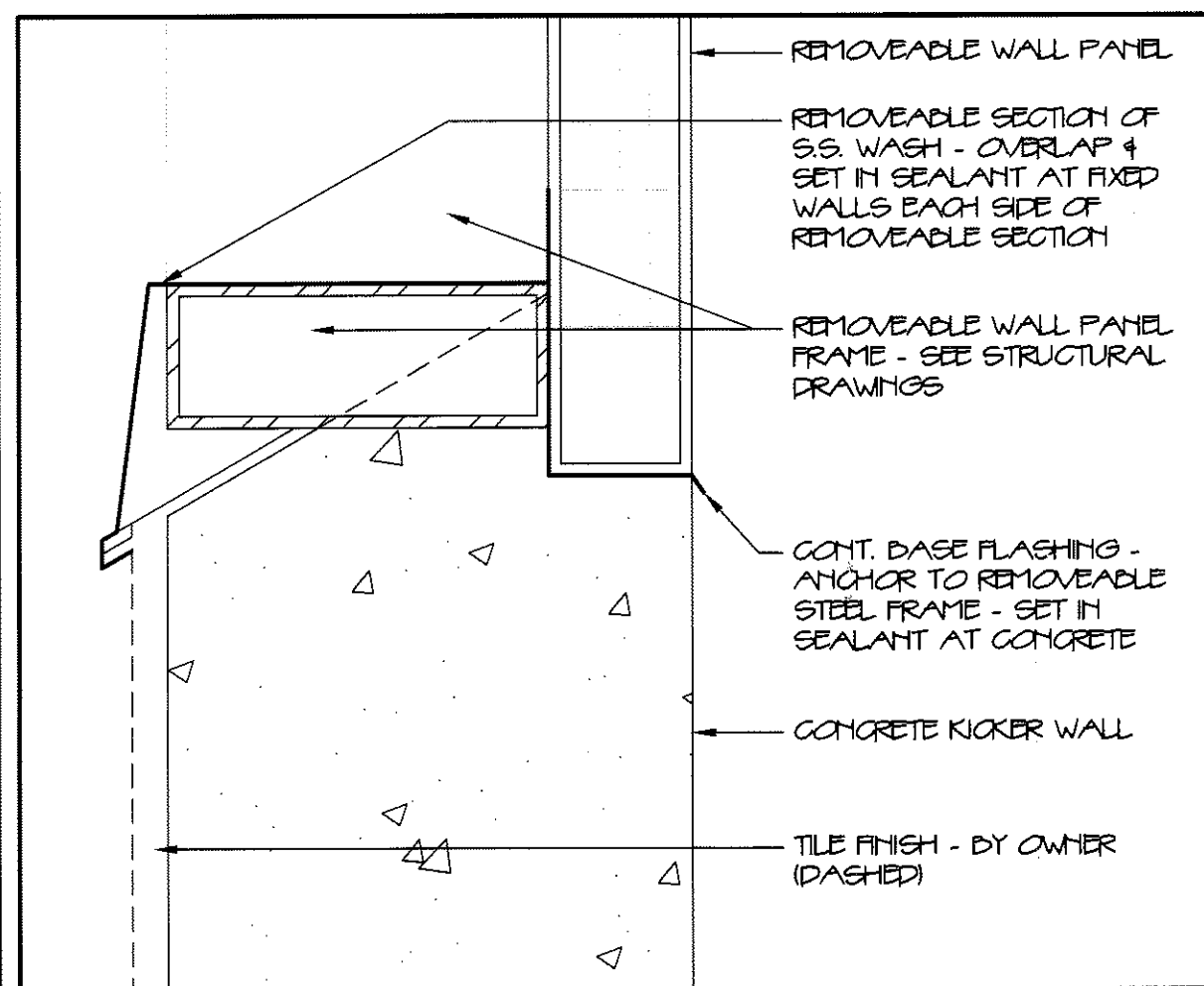
1 REMOVABLE WALL AT HEAD (JAMB SILL) 3'-1'-0"



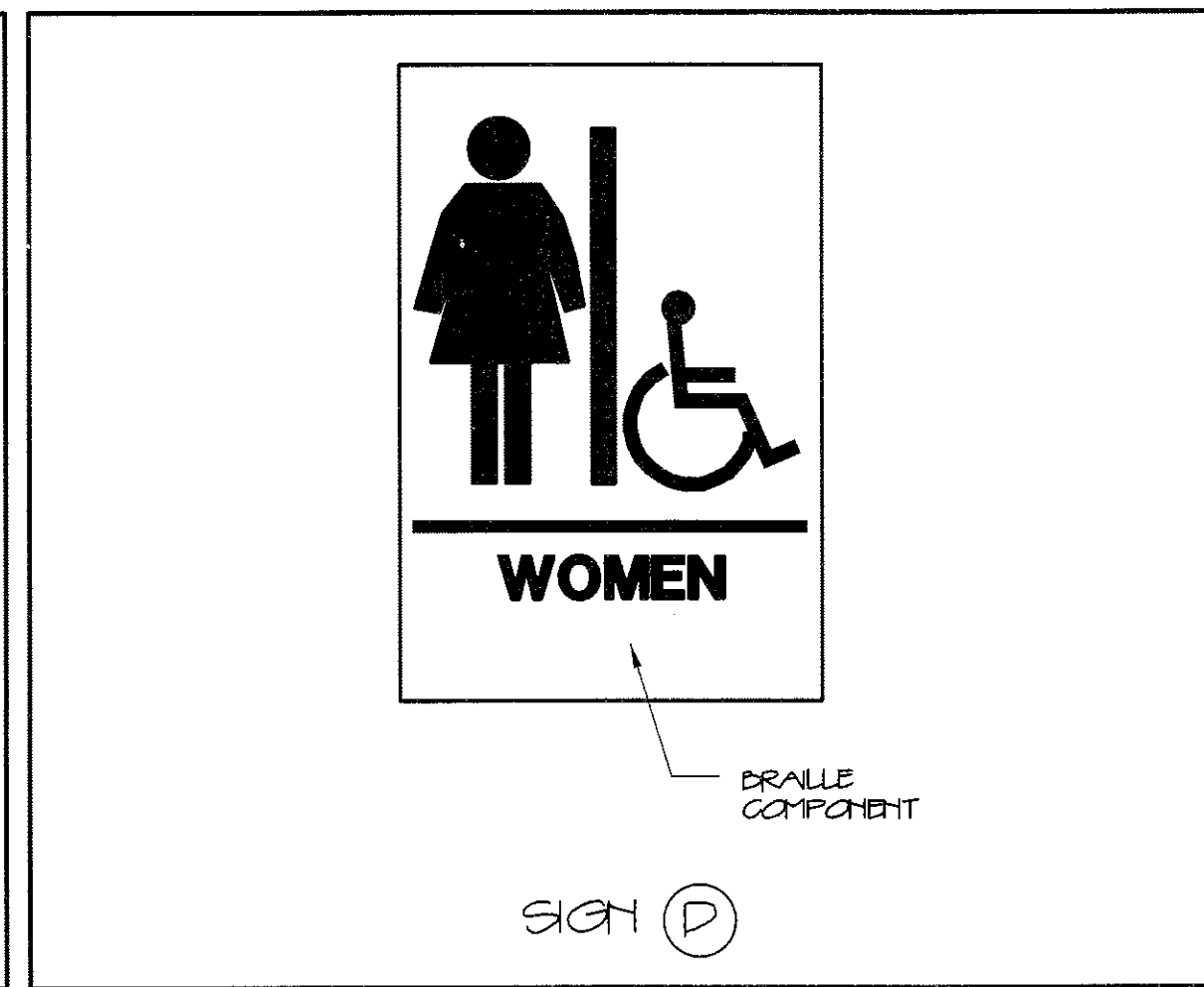
5 ACCESSIBLE MEN'S TOILET SIGN N.T.S.



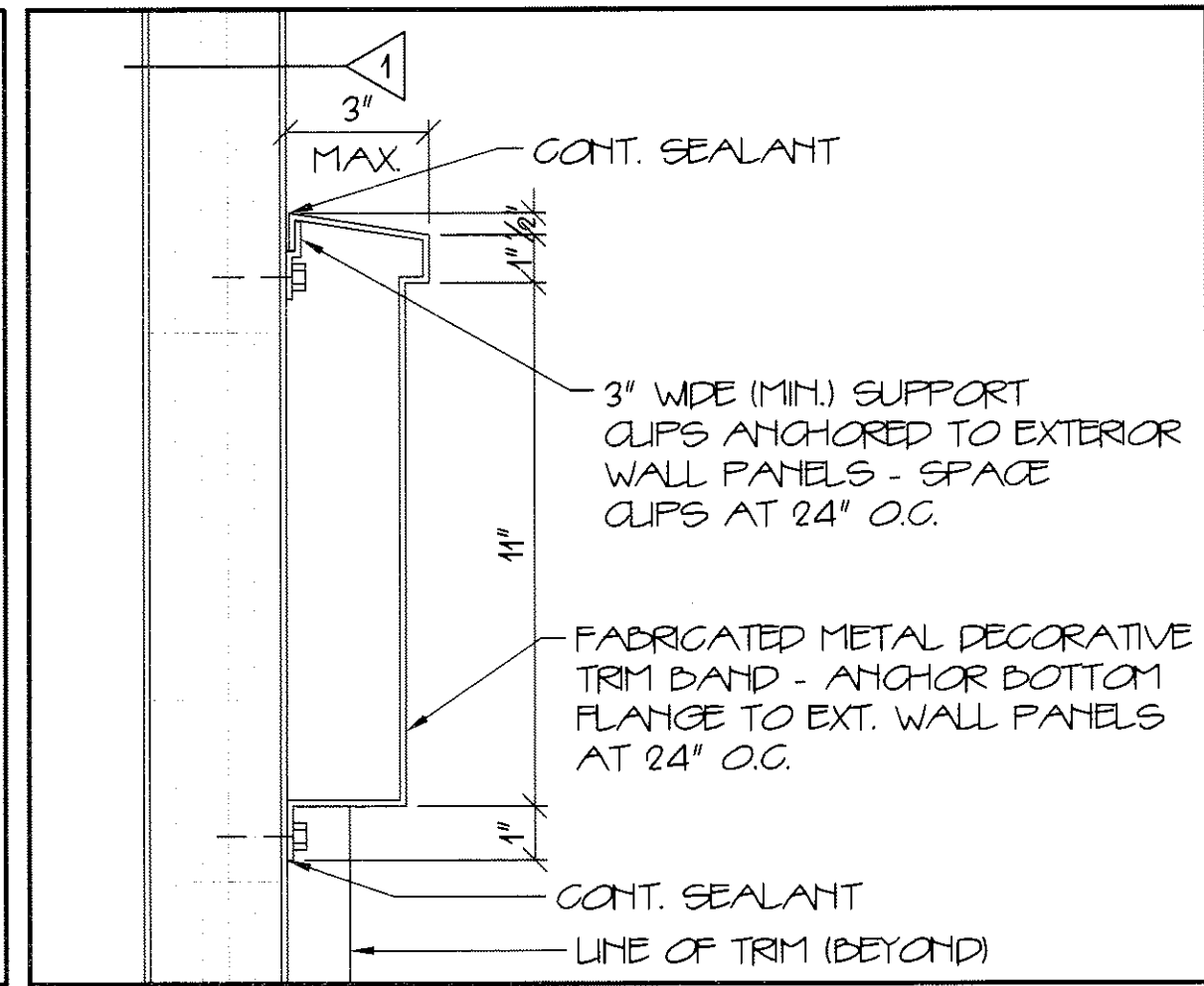
9 EXT. WINDOW SILL DETAIL 3'-1'-0"



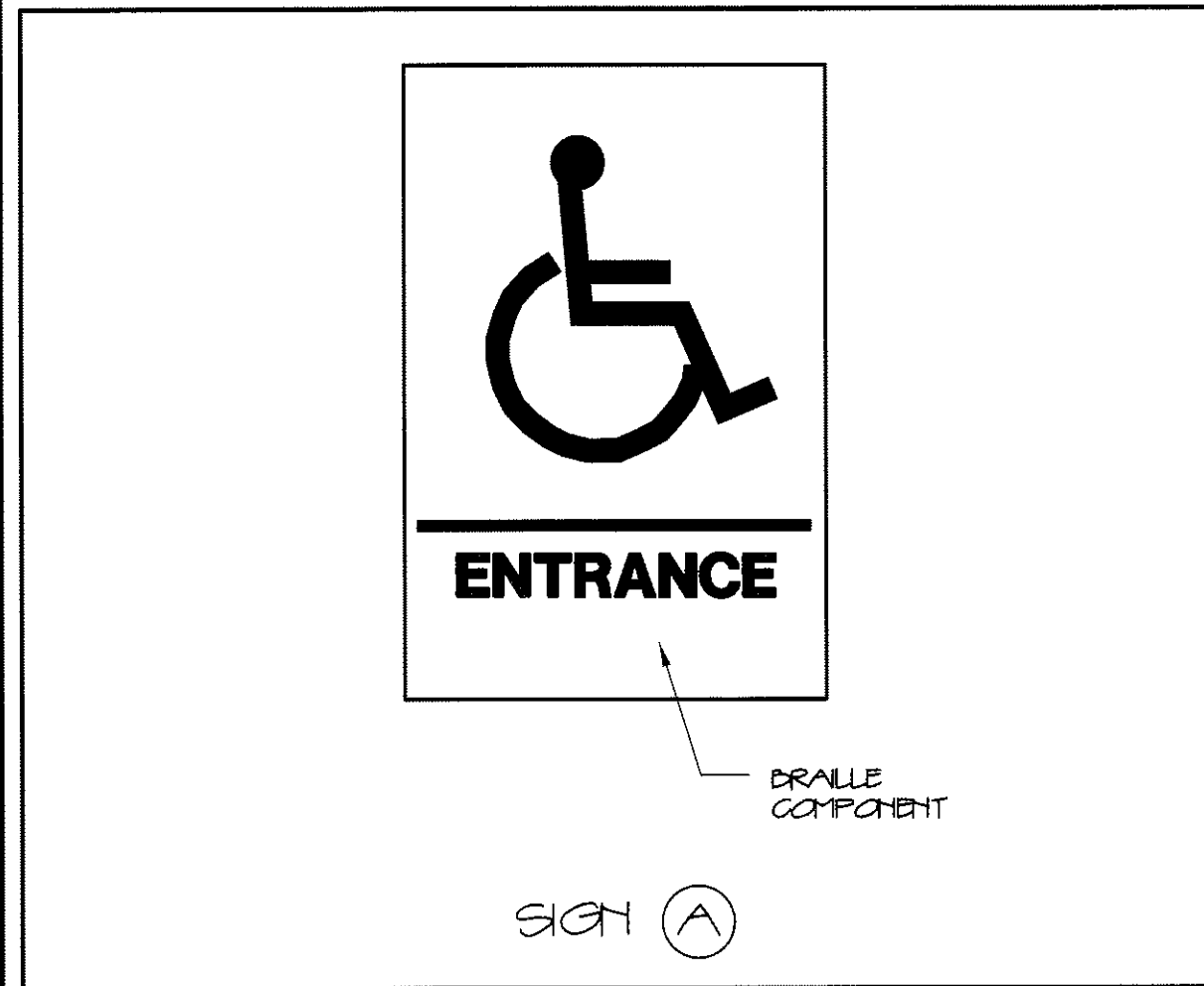
2 REMOVABLE WALL AT SILL 3'-1'-0"



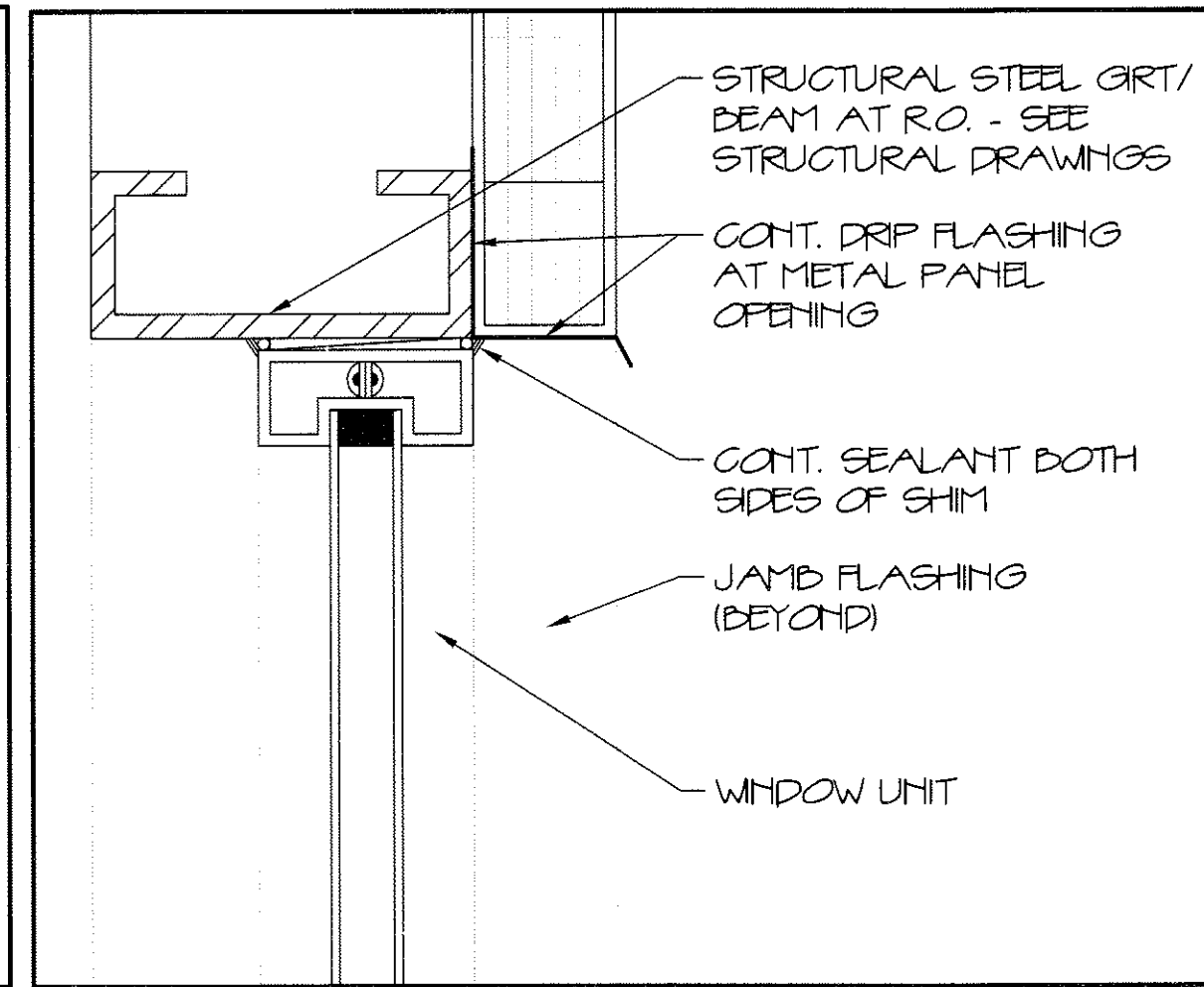
6 ACCESSIBLE WOMEN'S TOILET SIGN N.T.S.



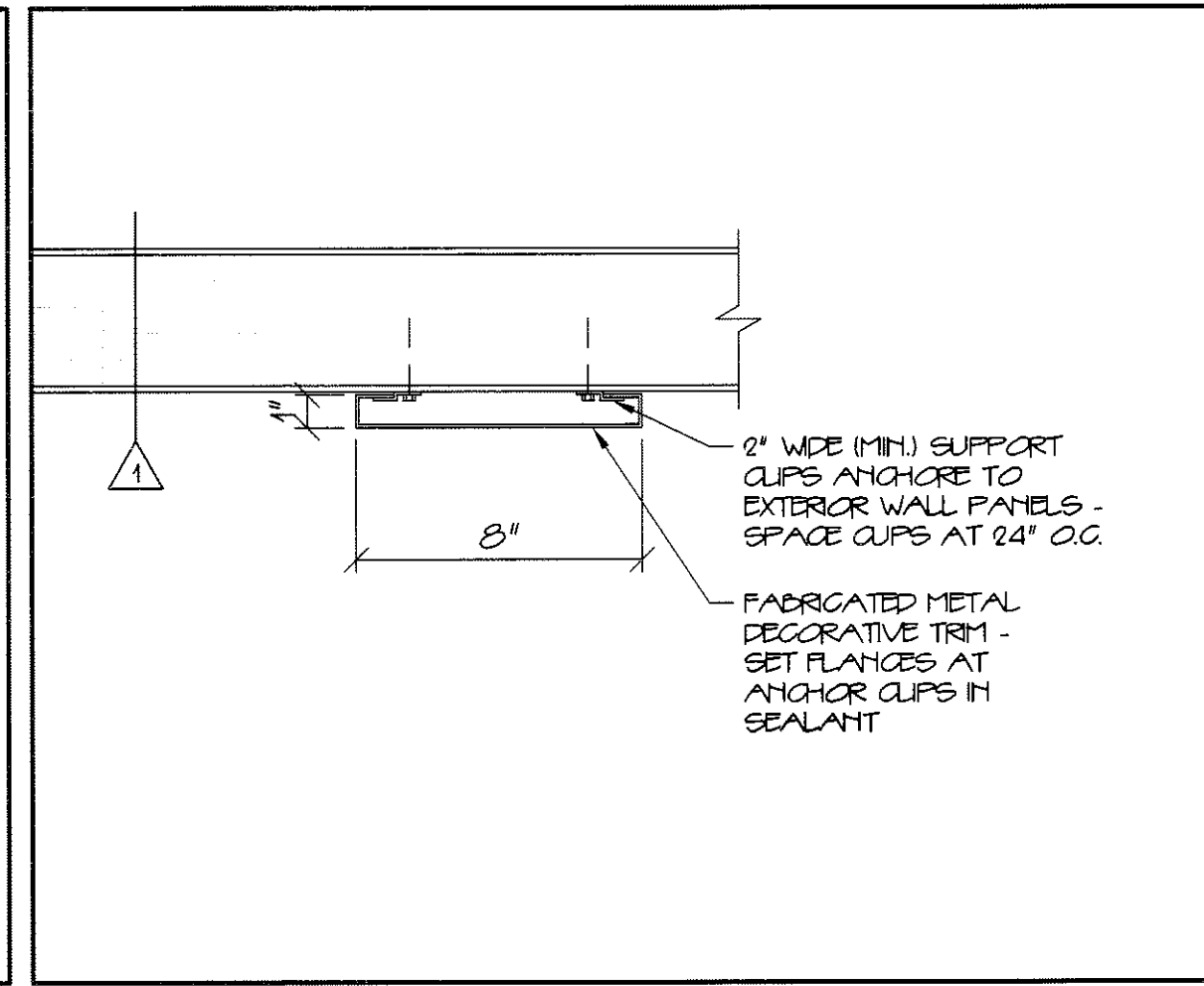
10 DECORATIVE HORIZONTAL BAND 3'-1'-0"



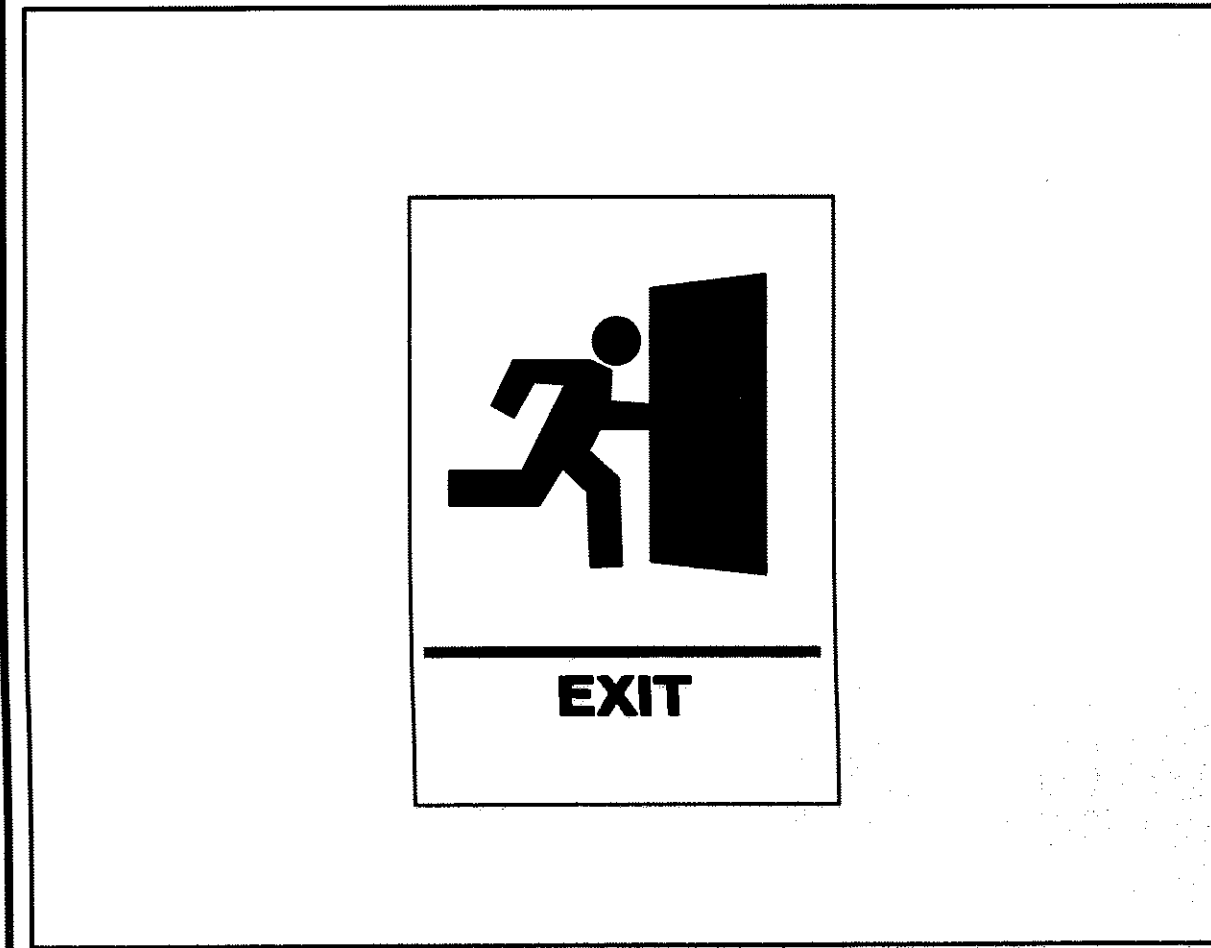
3 ACCESSIBLE ENTRANCE SIGN N.T.S.



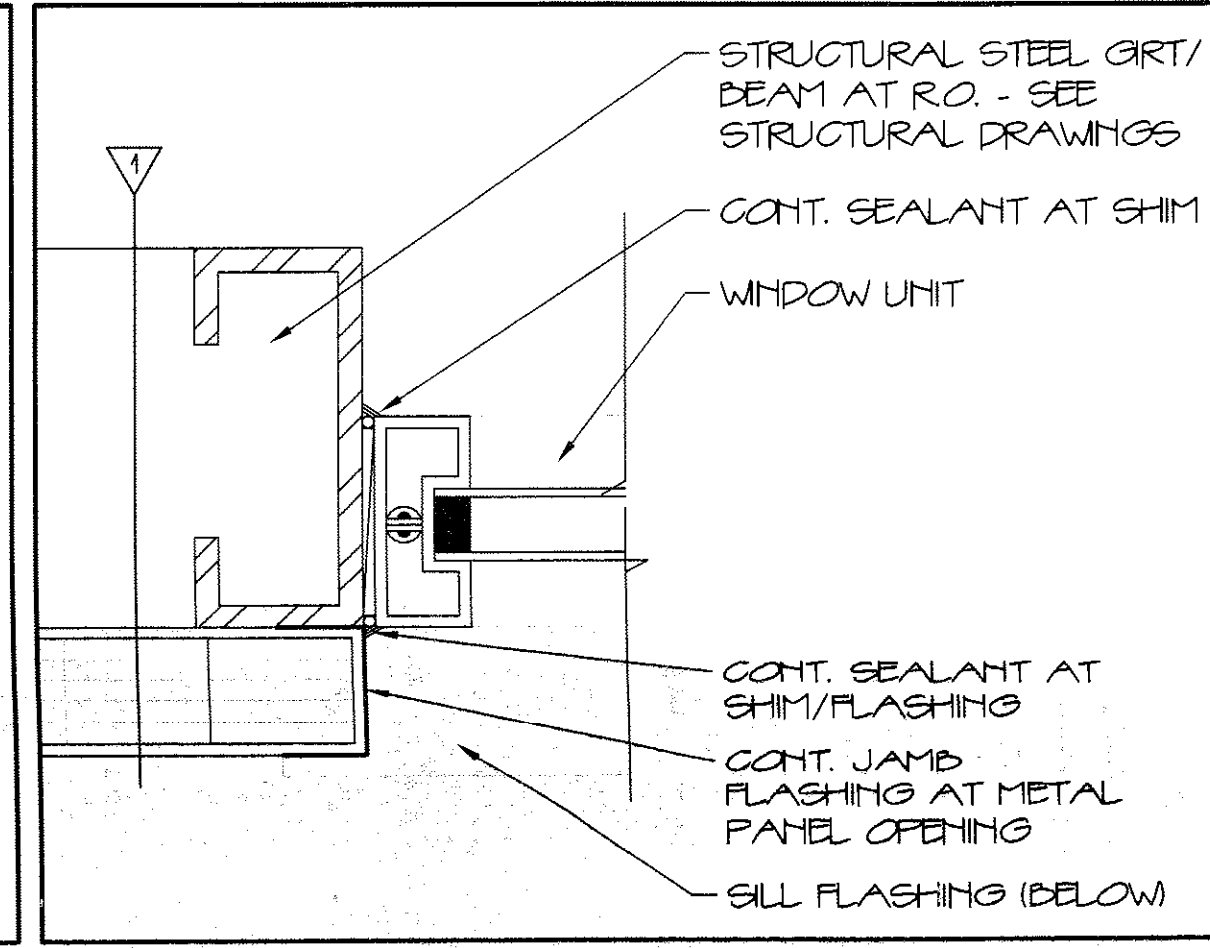
7 EXT. WINDOW HEAD DETAIL 3'-1'-0"



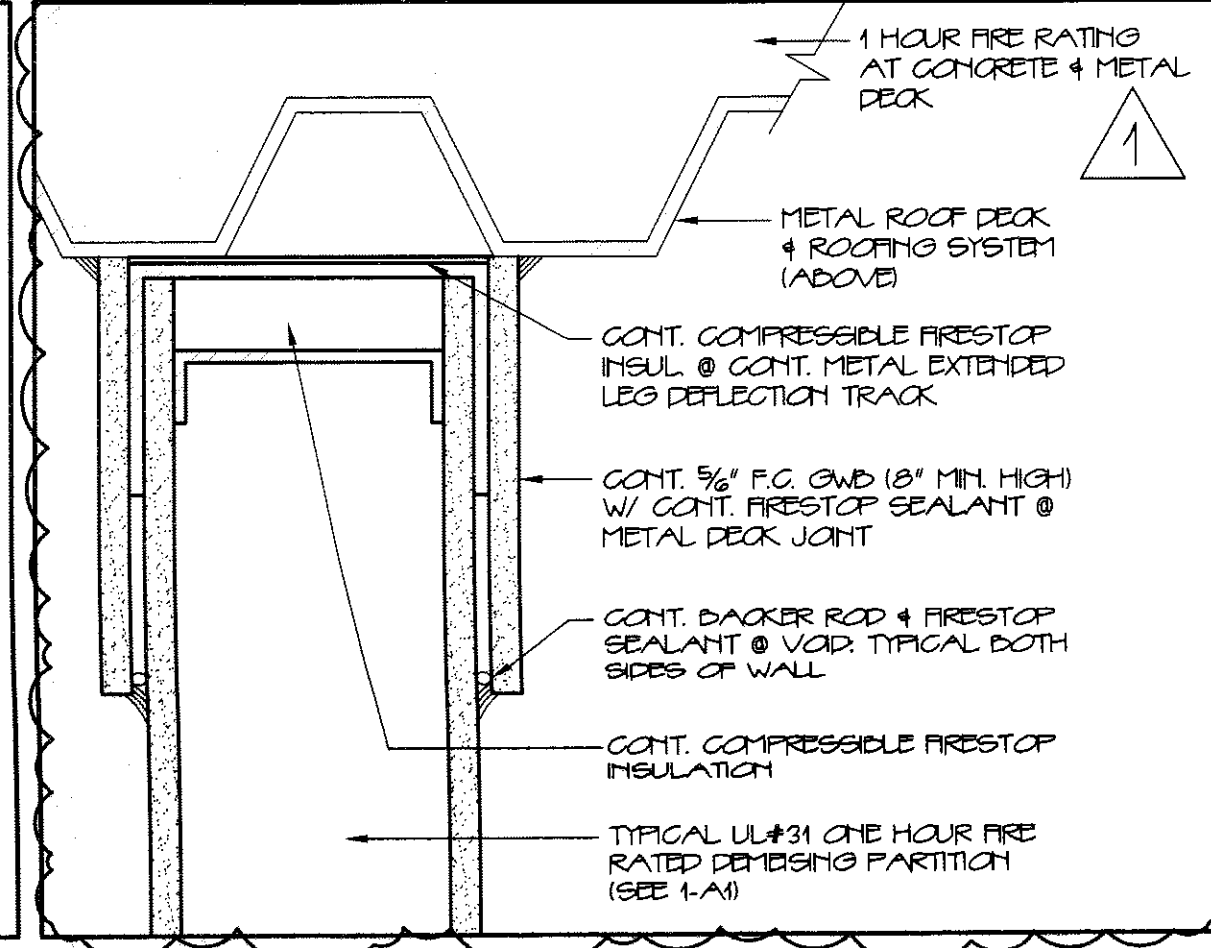
11 DECORATIVE VERTICAL TRIM 3'-1'-0"



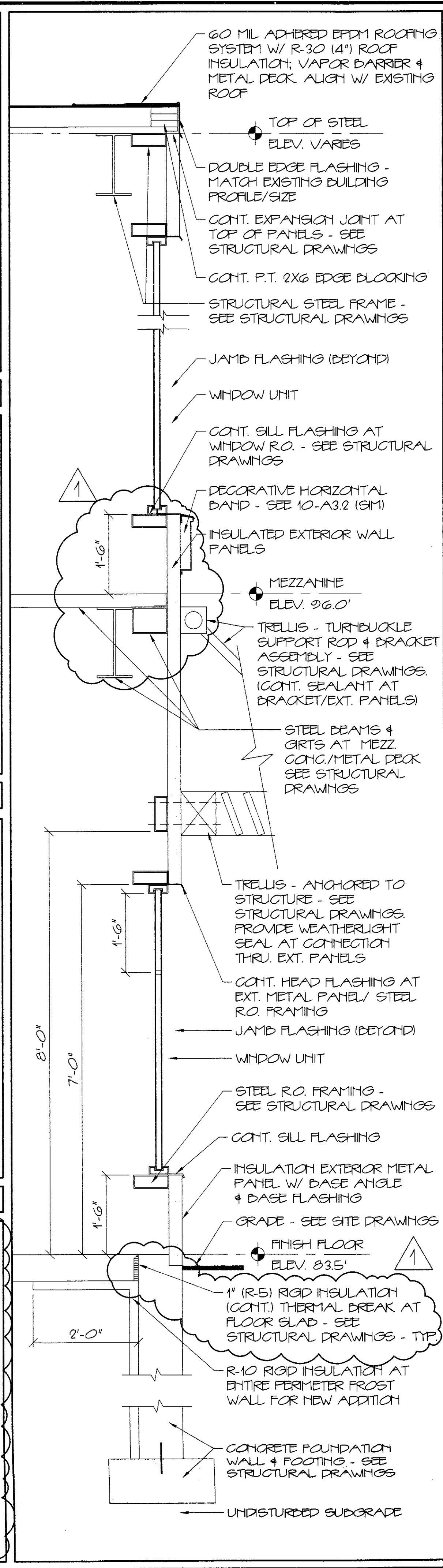
4 EXIT SIGN N.T.S.



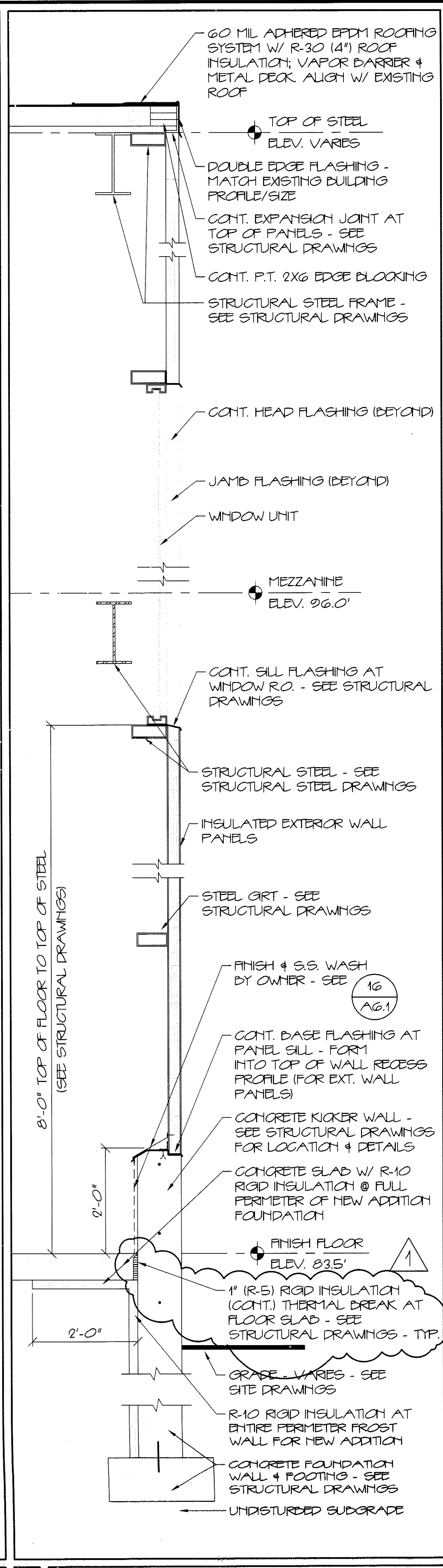
12 TYPICAL 1 HR RATED DEFLECTION TRACK 3'-1'-0"



13 TYPICAL EXTERIOR WALL SECTION - WEST 3'-1'-0"



14 TYPICAL EXTERIOR WALL SECTION - WEST 3'-1'-0"



15 TYPICAL EXTERIOR WALL SECTION - EAST 3'-1'-0"

REVISIONS

11/1/12 SUPERSEDES PREVIOUS ISSUES

NEW ADDITION FOR
ALLAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105
(207) 871-5900

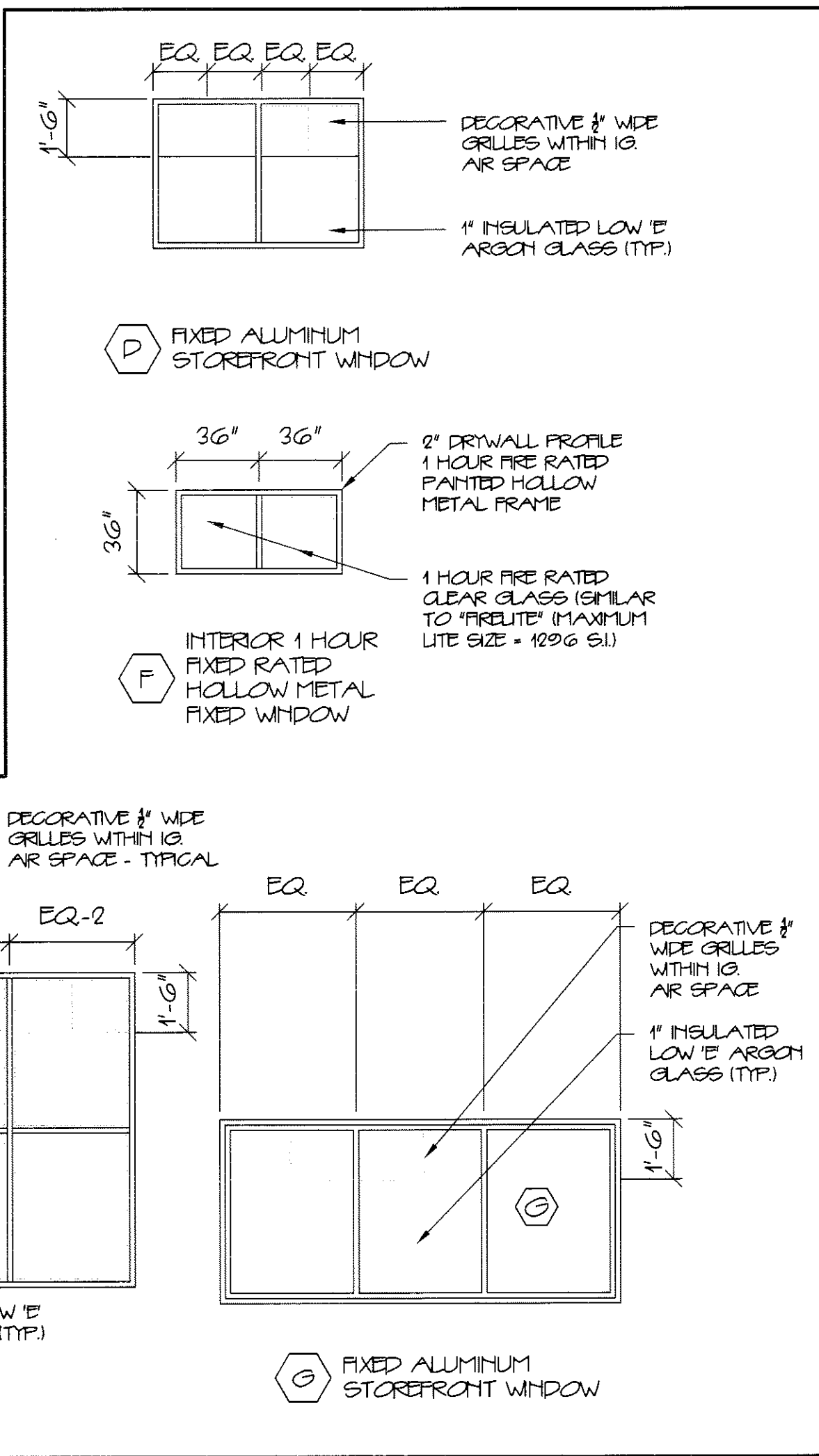
SCALE 1/4" = 1'-0"

DATE 10 SEPT. 12

DRAWN BY SAM/MPH

JOB NO. 120701

DRAWING NO. A3.2

[illegible]

DOOR SCHEDULE

REVISIONS

AL	ALUMINUM	T	TEMPERED
E	EXISTING	TH	THERMAL INSULATED
EMG	ELECTRO MAGNETIC HOLD OPERATOR	V	VENEER
GL	GLASS	W	WIRE
HM	HOLLOW METAL	WD	WOOD
INSUL	INSULATED	W/I	WITH
SS	STAINLESS STEEL		

DOORS										FRAMES					THRESHOLDS		
NO.	TYPE	SIZE (W X H)	THK	INSUL	HW#	FR	GLASS		REMARKS	TYPE	FR	DETAILS		MATERIAL	DETAILS		
							TYPE	SIZE				HEAD	JAMB		SILL	FIN	
101	A	6070 PR	1 3/4"	YES	HW-1	NO	T/TH	FULL		A	NO	T-BREAK	4-A4.1	5-A5.1	ALUM	6-A4.1	-
102	A	6070 PR	1 3/4"	YES	HW-1	NO	T/TH	FULL		A	NO	T-BREAK	4-A4.1	5-A5.1	ALUM	6-A4.1	-
103	A	3070	1 3/4"	YES	HW-2	NO	NTH	FULL		B	NO	T-BREAK	4-A4.1	5-A5.1	ALUM	6-A4.1	-
104	D	3070	1 3/4"	NO	HW-3	1 HR	24X30			C	1 HR	DW	4-A4.1	4-A4.1	ALUM	2-A4.1	-
105	G	3070	1 3/4"	NO	HW-4	NO	NONE	NONE	NOT USED	G	NO	DW	4-A4.1	4-A4.1	NONE	-	GGNG
106	C	3070	1 3/4"	NO	HW-5	NO	NONE	NONE		C	NO	DW	4-A4.1	4-A4.1	NONE	-	GGNG
107	C	3070	1 3/4"	NO	HW-5	NO	NONE	NONE		C	NO	DW	4-A4.1	4-A4.1	NONE	-	GGNG
108	C	3070	1 3/4"	NO	EXIST'G	1 HR	NONE	NONE	* REUSE @ REMOVED DOOR	C	1 HR	DW	4-A4.1	4-A4.1	NONE	-	GGNG
201	C	3070	1 3/4"	NO	HW-6	1 HR	NONE	NONE		C	1 HR	DW	4-A4.1	4-A4.1	ALUM	2-A4.1	-

HW-1 EXTERIOR PAIR DOORS

- 6 BUTTS
- 2 CLOSERS
- 1 EXIT DEVICES WITH EXTERIOR PULLS & CONCEALED RODS
- 1 THRESHOLD
- 2 DOOR BOTTOMS
- 1 WEATHERSTRIPPING JAMB/HEAD SET

HW-2 EXTERIOR SINGLE DOOR

- 3 BUTTS
- 1 CLOSERS
- 1 EXIT DEVICES WITH EXTERIOR PULL
- 1 THRESHOLD
- 1 DOOR BOTTOM
- 1 WEATHERSTRIPPING JAMB/HEAD SET

HW-3 INTERIOR SINGLE RATED DOOR

- 3 BUTTS
- 1 CLOSERS
- 1 EXIT DEVICES WITH FULL
- 1 THRESHOLD
- 1 DOOR BOTTOM
- 1 WEATHERSTRIPPING JAMB/HEAD SET

HW-4 INTERIOR SINGLE DOOR

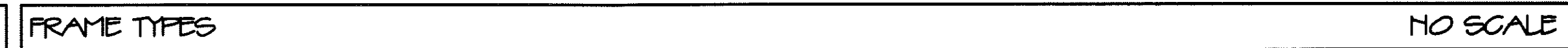
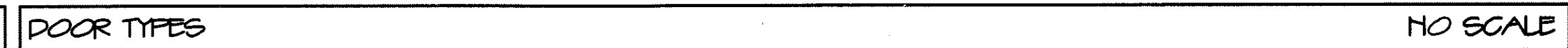
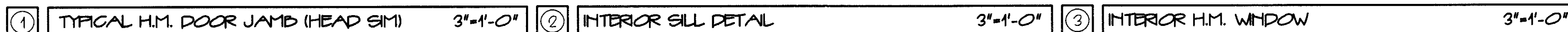
- 3 BUTTS
- 1 LEVER/LOCKSET - STORE ROOM FUNCTION
- 2 FRAME SILENCERS

HW-5 INTERIOR SINGLE DOOR

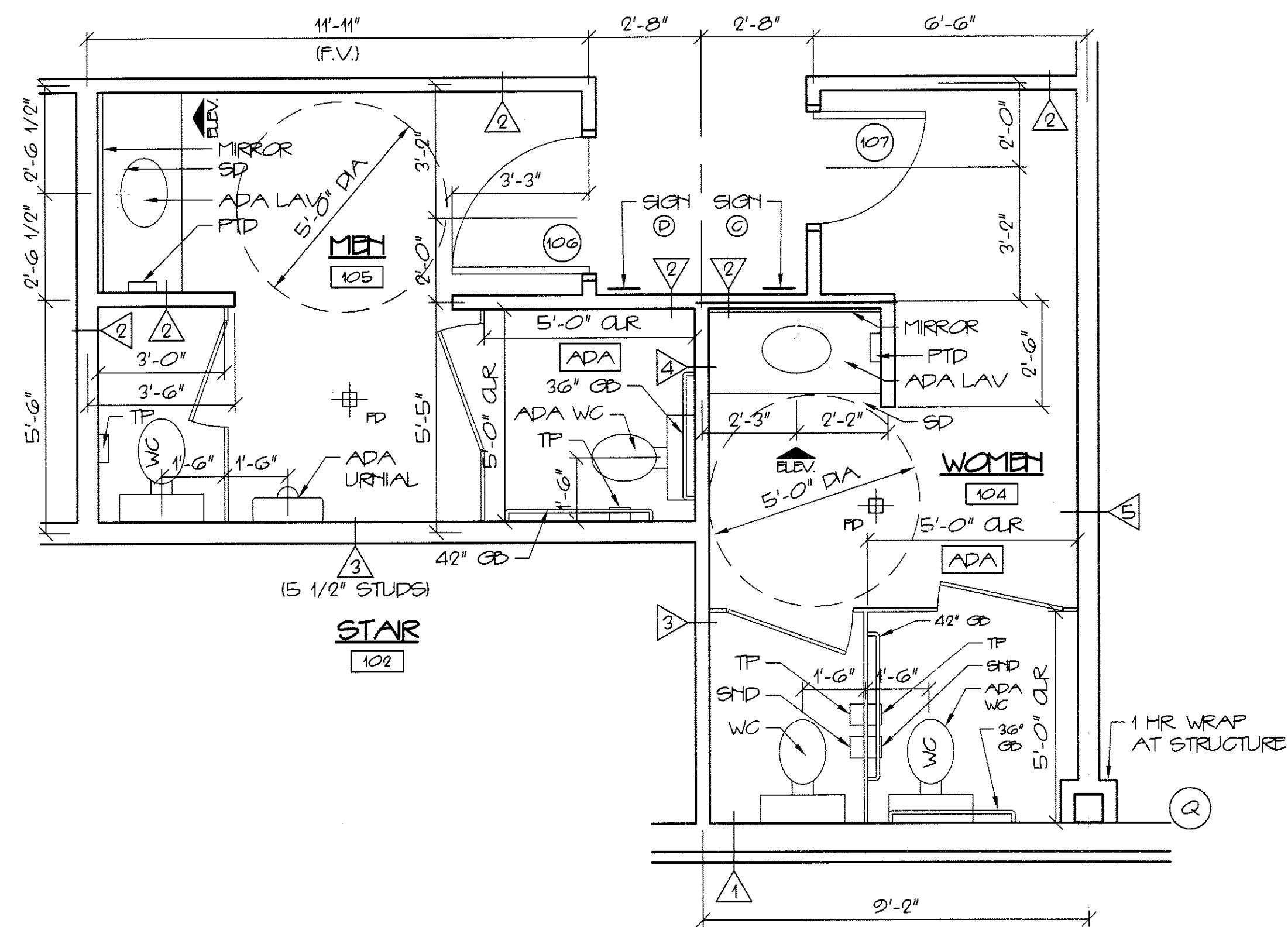
- 3 BUTTS
- 1 CLOSERS
- 1 PUSH PLATE WITH FULL
- 2 FRAME SILENCERS

HW-6 INTERIOR SINGLE RATED DOOR

- 3 BUTTS
- 1 CLOSERS
- 1 LEVER LATCHSET - OFFICE FUNCTION
- 2 FRAME SILENCERS

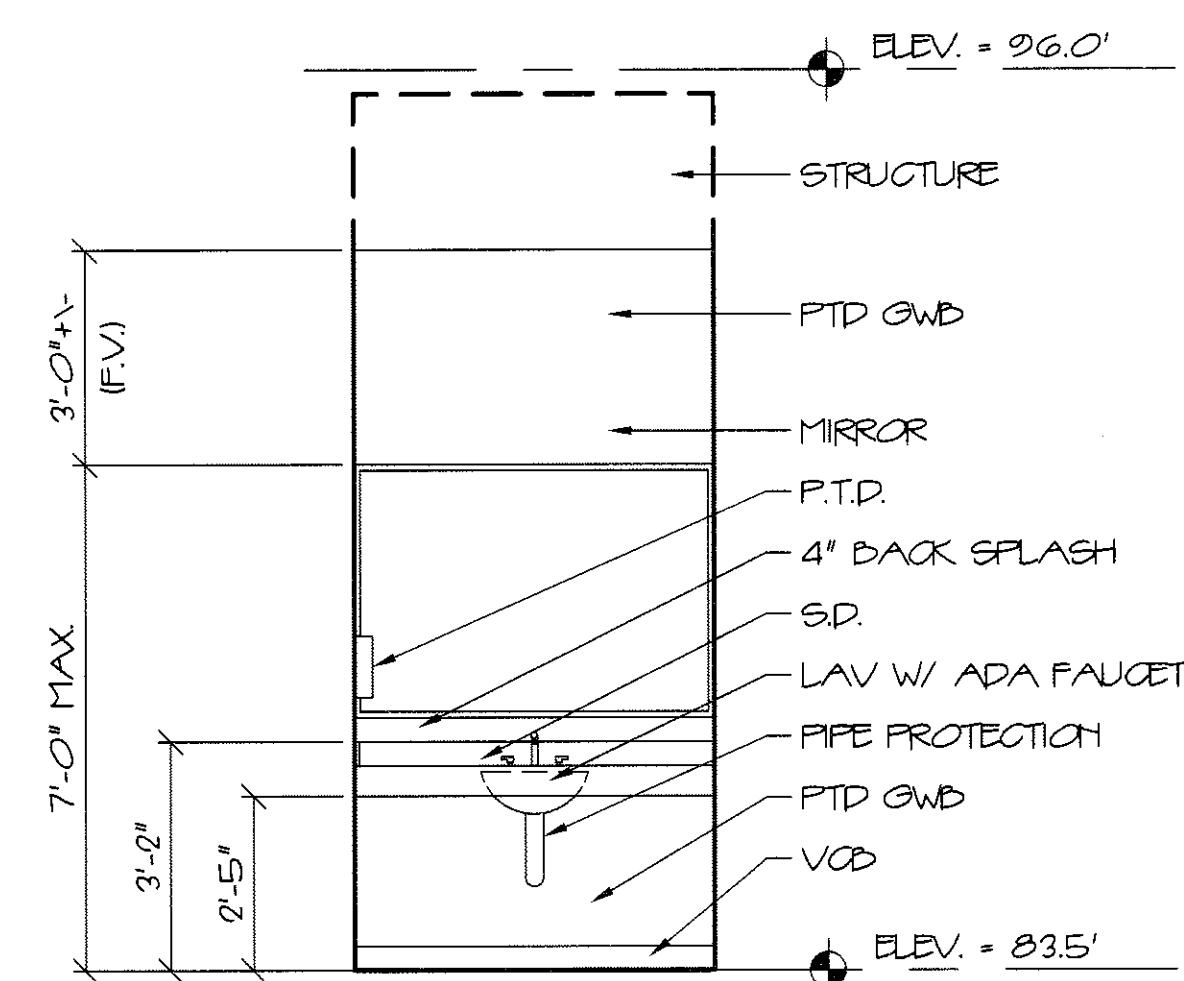


GRANT	DOORS & WINDOWS	DRAWING TITLE
SCALE AS NOTED		
DATE 10 SEPT. 12		
DRAWN BY SAM/MPH		
JOB NO. 120701		
DRAWING NO. A4.1		

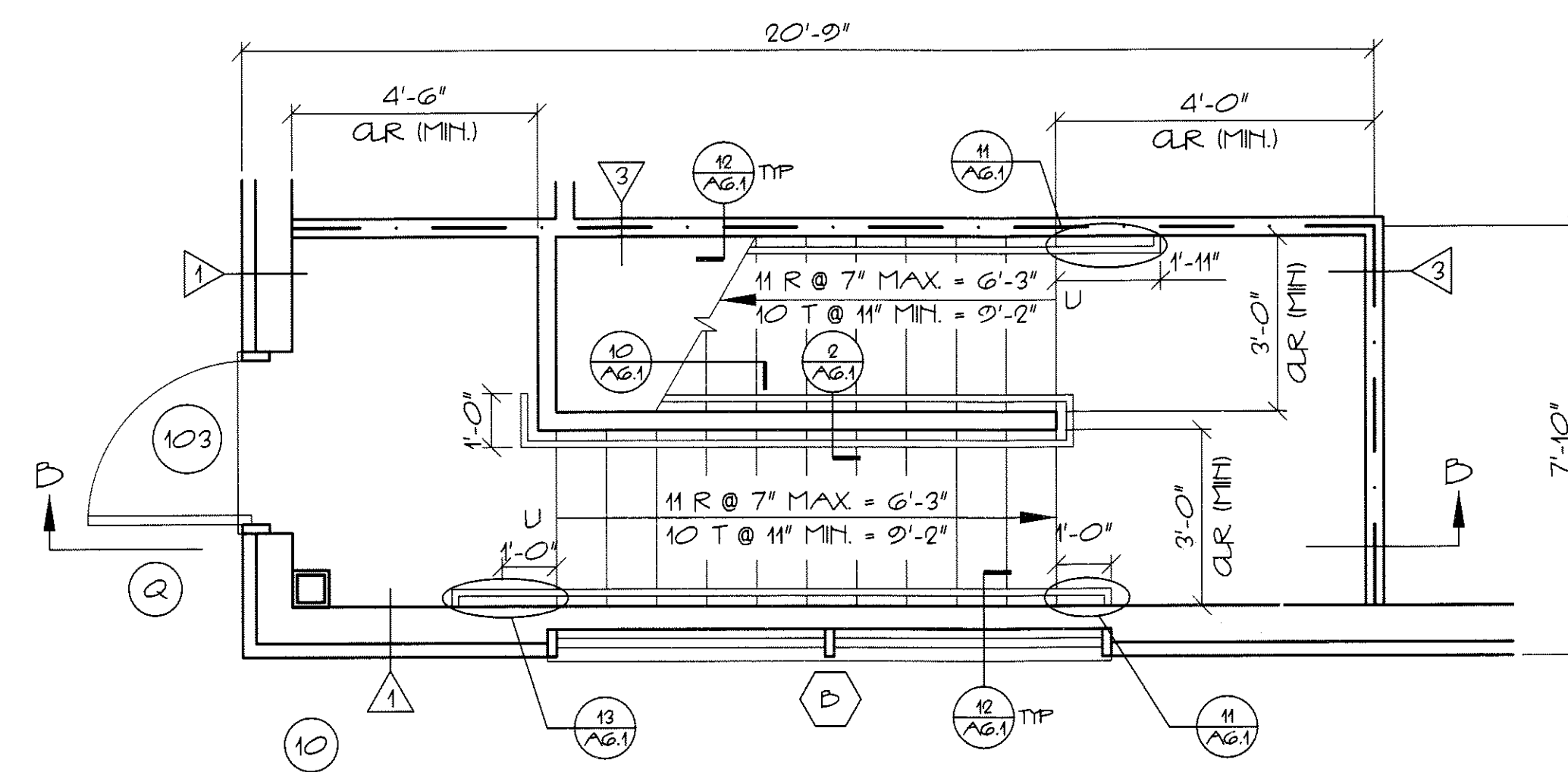


FLOOR PLAN AT MEN/WOMEN
3/8" = 1'-0"

NOTE: SEE SHEET A7.1 FOR ACCESSIBILITY MOUNTING HEIGHTS & CLEARANCE CRITERIA.

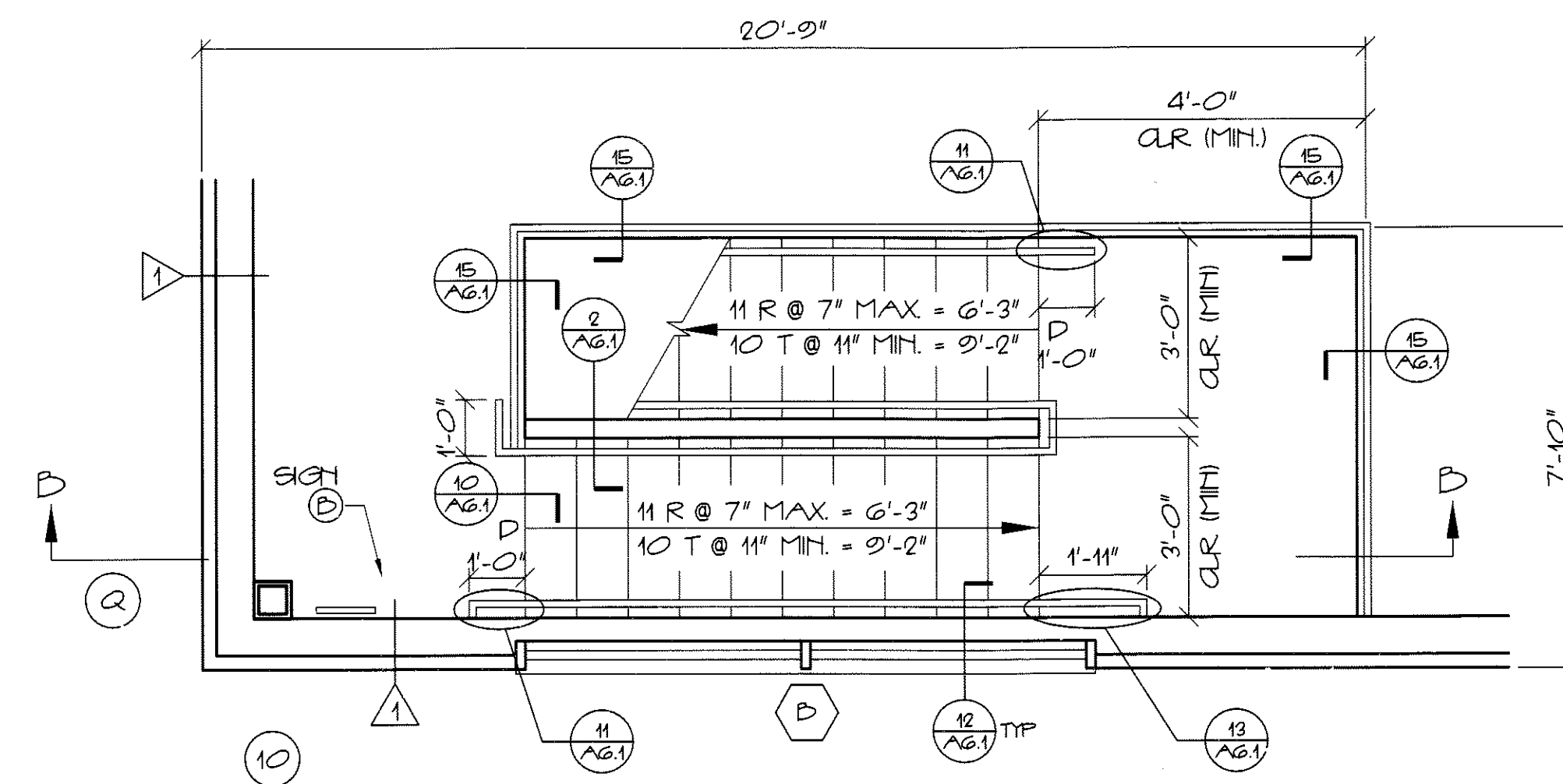


ADA LAVATORY ELEVATION
3/8" = 1'-0"

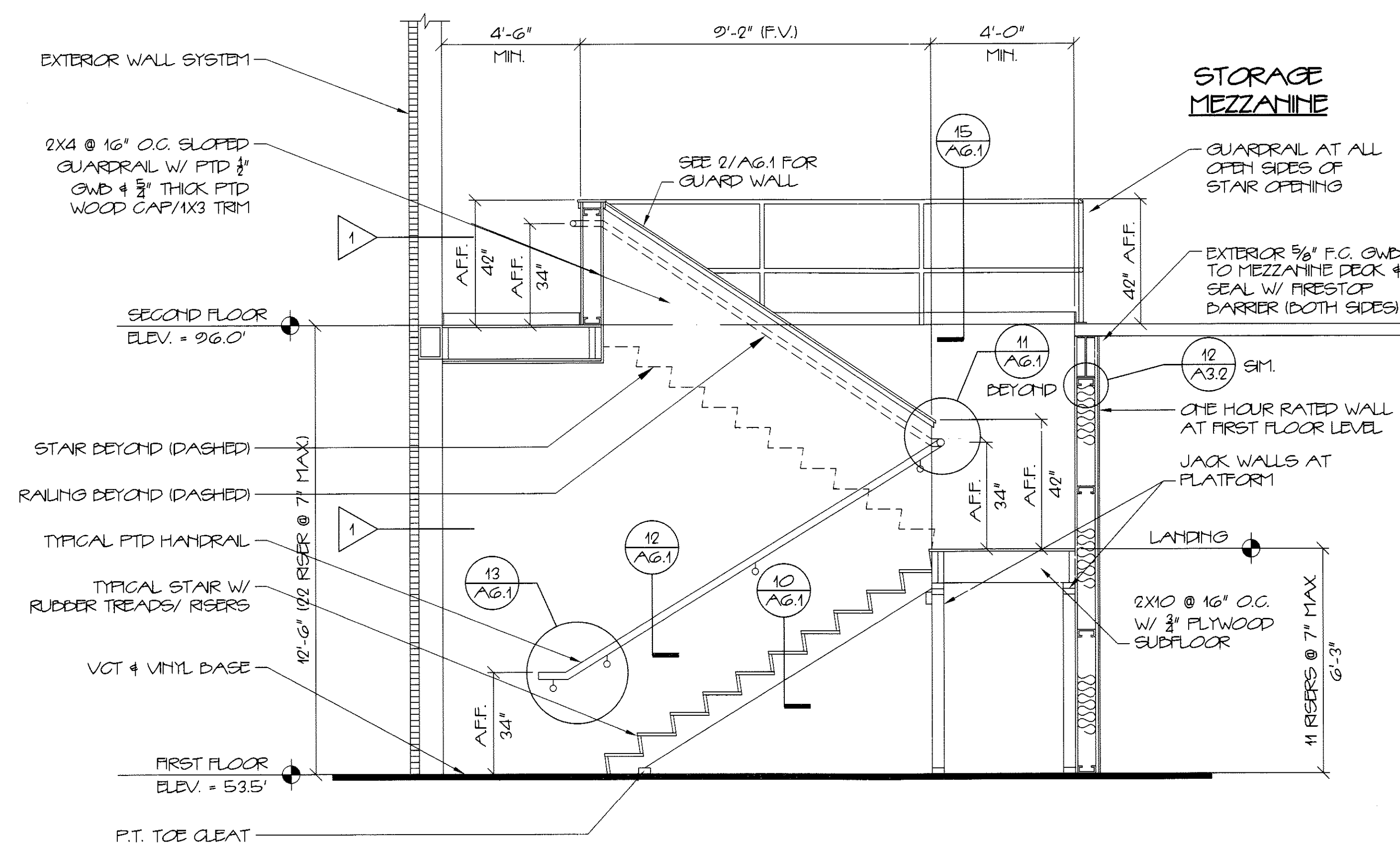


FIRST FLOOR PLAN - STAIR 102

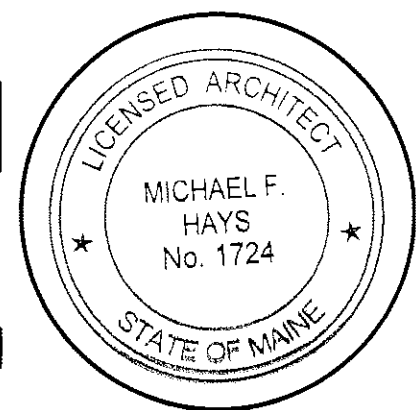
(1 HOUR RATED)
3/8" = 1'-0"

$$3/8^v = 1 - C$$


SECOND FLOOR PLAN - STAR 202

$$3/8^v = 1 - 0^v$$


STAIR SECTION B-B

$$3/8'' = 1'-0''$$


REVISIONS

NEW ADDITION FOR
ALLAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

JOB TITLE

ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105

celephone (207) 871-5900

WET CORE &
STARS

DRAWING TITLE

SCALE AS NOTED

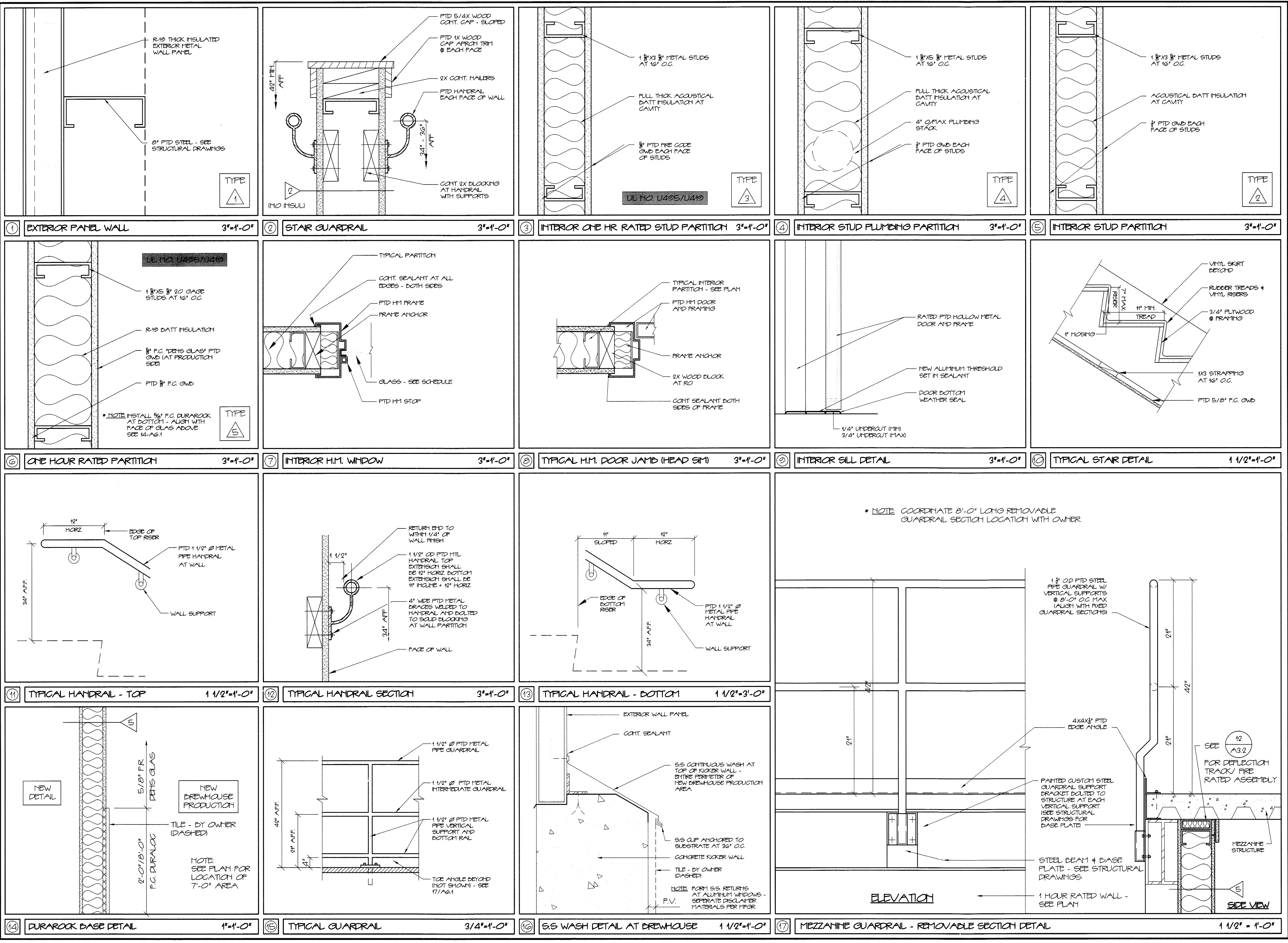
DATE 10 SEPT. 12

DRAWN BY SAM/MFH

JOB NO. 120701

DRAWING NO.

A5.1



ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105
(207) 871-5900
(207) 871-9308

NEW ADDITION FOR
ALAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

REVISIONS

SCALE AS NOTED
DATE 10 SEPT. 12
DRAWN BY MPH/SAM
JOB NO. 120701
DRAWING NO. A6.1

DETAILS

DRAWING TITLE

REGISTERED ARCHITECT
MICHAEL F. HAYS
No. 1724
STATE OF MAINE

REVISIONS

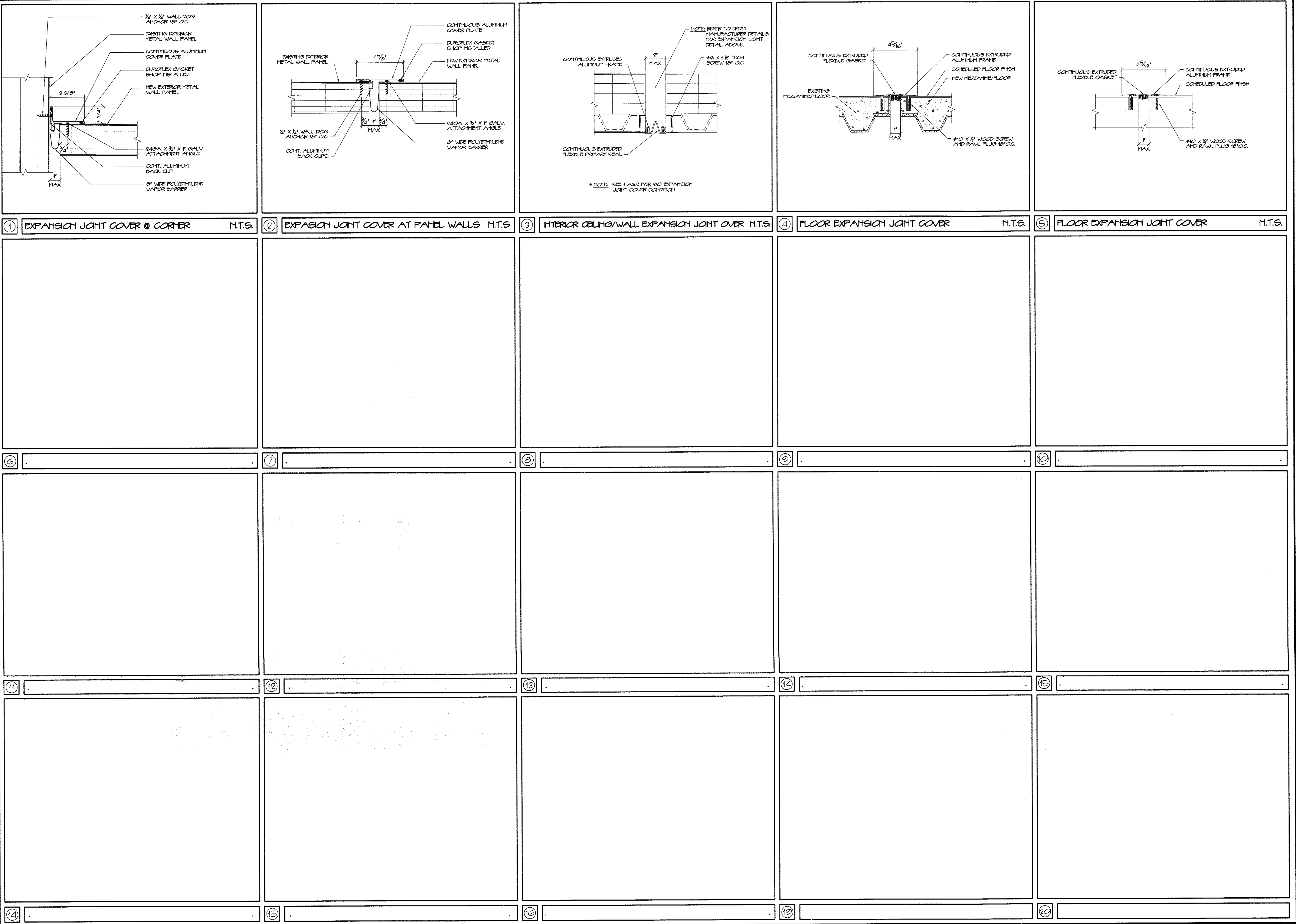
NEW ADDITION FOR
ALAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

REVISIONS

SCALE AS NOTED
DATE 10 SEPT. 12
DRAWN BY MPH/SAM
JOB NO. 120701
DRAWING NO. A6.1

DETAILS

DRAWING TITLE



STATE OF MAINE
LICENSED ARCHITECT
MICHAEL F. HAYS
No. 1724

REVISIONS

NEW ADDITION FOR
ALLAGASH BREWING CO.
50 INDUSTRIAL WAY PORTLAND, MAINE

JOB TITLE

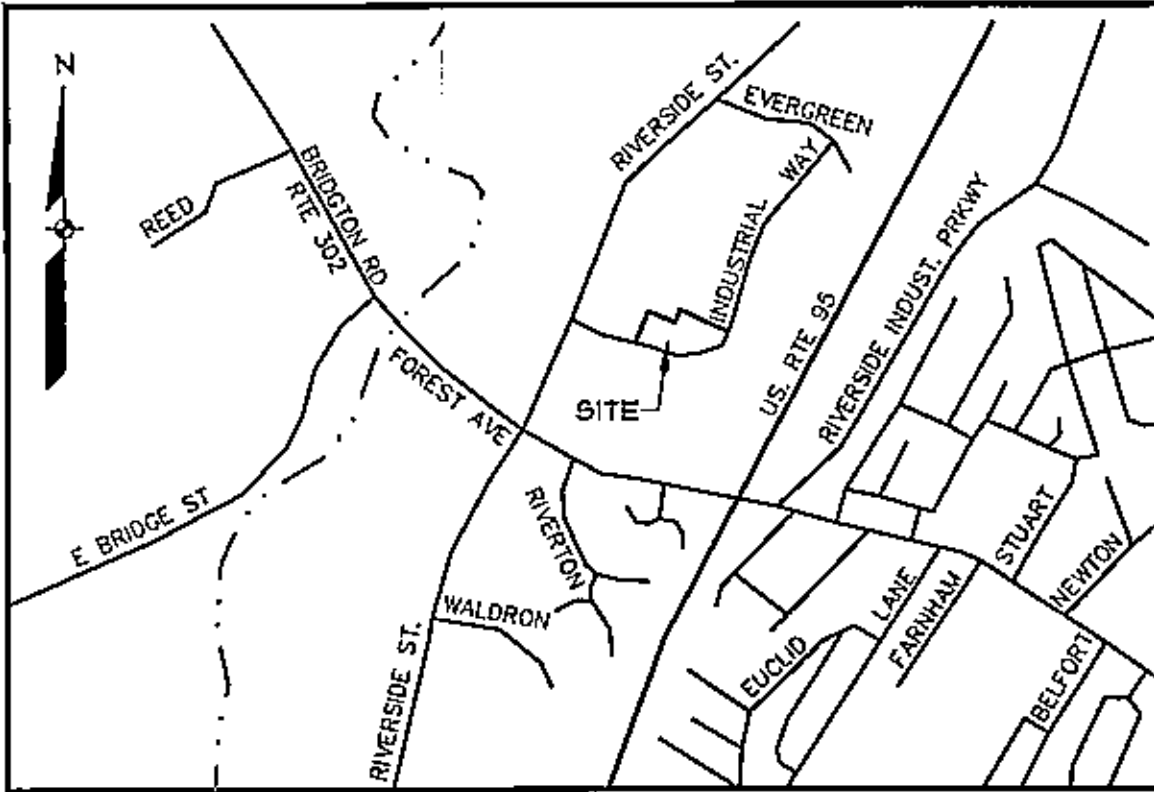
ARCHITECTURE
INTERIOR DESIGN
P.O. BOX 6179 FALMOUTH, MAINE 04105
(207) 871-5900

DETAILS

SCALE AS NOTED
DATE 10 SEPT. 12
DRAWN BY MFH/SAM
JOB NO. 120701
DRAWING NO. A6.2

DRAWING TITLE

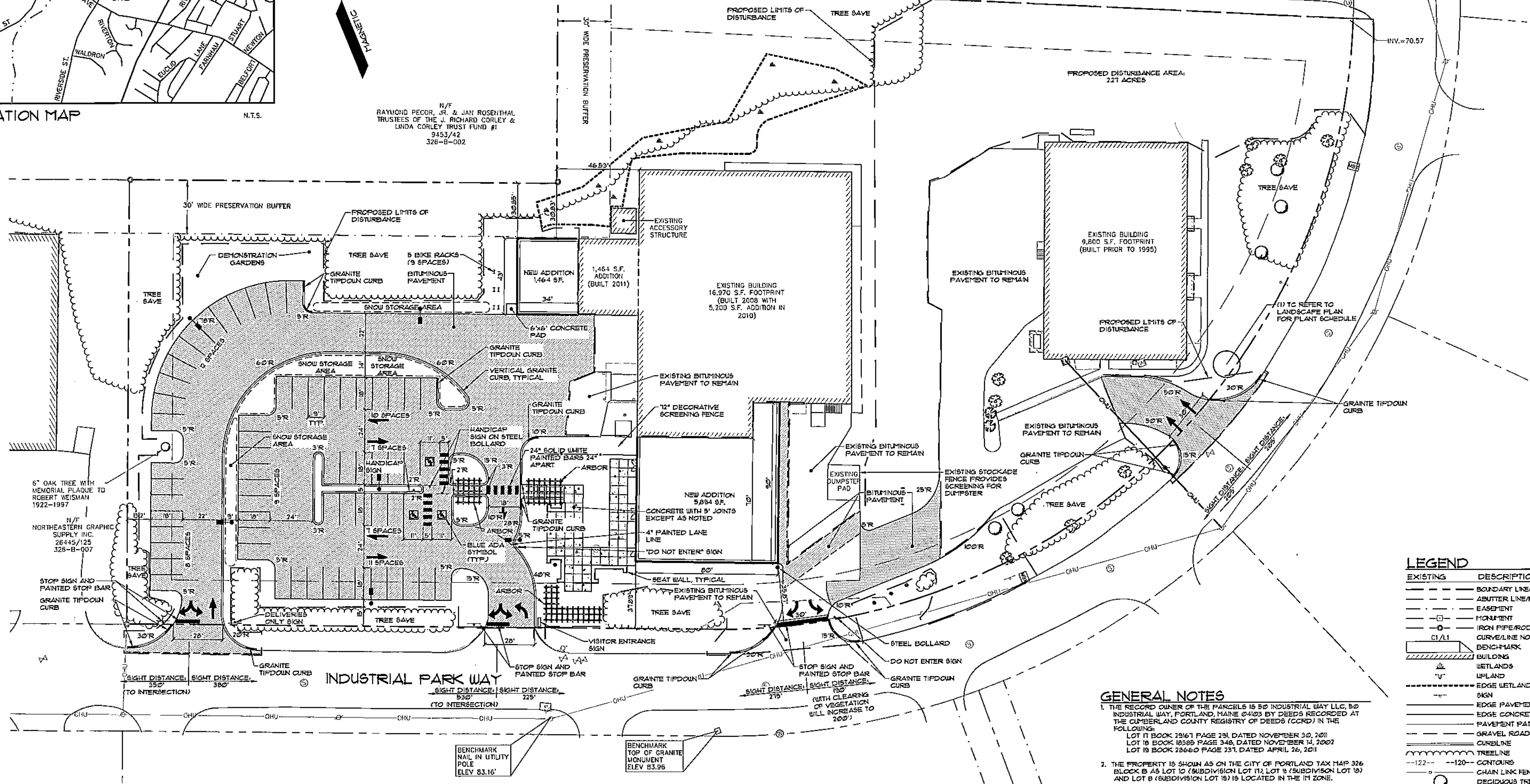
EXHIBIT D



LOCATION MAP

N.T.S.

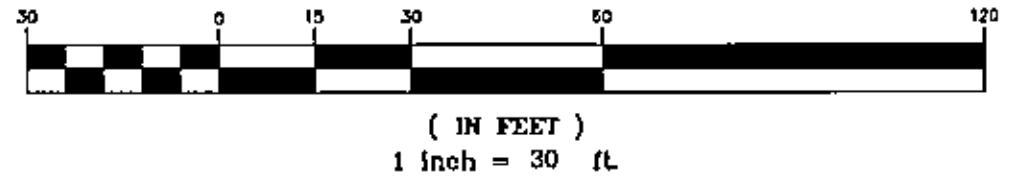
N/F
RAYMOND PECOR, JR. & JAN ROSENTHAL
TRUSTEES OF THE J. RICHARD CORLEY &
LINDA CORLEY TRUST FUND #1
9453/42
326-B-002



PARKING SUMMARY

50 INDUSTRIAL WAY			
RETAIL	3,230 SF	SPACE/100 SF (OVER 2,000 SF)	6 SPACES
OFFICE	1,130 SF	SPACE/100 SF	4 SPACES
PRODUCTION	22,550 SF	SPACE/100 SF	23 SPACES
100 INDUSTRIAL WAY	9,800 SF	SPACE/100 SF	10 SPACES
WAREHOUSE			
TOTAL REQUIRED			43 SPACES
TOTAL PROVIDED			64 SPACES

GRAPHIC SCALE

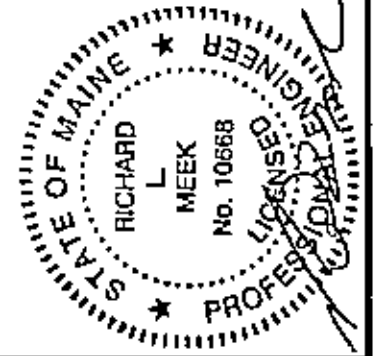


GENERAL NOTES

- THE RECORD OWNER OF THE PARCELS IS 50 INDUSTRIAL WAY LLC, 50 INDUSTRIAL WAY, PORTLAND, MAINE 04103 BY DEEDS RECORDED AT THE CUMBERLAND COUNTY REGISTRY OF DEEDS (CORD) IN THE FOLLOWING:
LOT 11 BOOK 29161 PAGE 291, DATED NOVEMBER 30, 2011
LOT 18 BOOK 18385 PAGE 348, DATED NOVEMBER 14, 2002
LOT 19 BOOK 28660 PAGE 231, DATED APRIL 26, 2011
- THE PROPERTY IS SHOWN AS ON THE CITY OF PORTLAND TAX MAP 326 BLOCK B AS LOT 10 (SUBDIVISION LOT 11), LOT 9 (SUBDIVISION LOT 18) AND LOT 8 (SUBDIVISION LOT 19) IS LOCATED IN THE 1H ZONE.
- SPACE AND BULK CRITERIA FOR THE 1H ZONE ARE AS FOLLOWS:
MIN. LOT SIZE NONE
MAX. IMPERVIOUS RATIO 15%
MAX. BUILDING HEIGHT 35 FEET
MIN. SIDE YARD 25 FEET
MIN. REAR YARD 25 FEET
MIN. FRONT YARD 1 FT./FT. OF BLDG. HEIGHT
MIN. STREET FRONTAGE 6.0 FEET
PAVEMENT SETBACK 10 FEET
- TOTAL AREA OF PARCELS ARE AS FOLLOWS:
LOT 11 1/2-58,320 SQUARE FEET
LOT 18 1/2-13,073 SQUARE FEET
LOT 19 1/2-59,385 SQUARE FEET
- BOUNDARY AND TOPOGRAPHIC INFORMATION SHOWN HEREON IS BASED UPON BOUNDARY, TOPOGRAPHIC AND AS-BUILT SURVEYS PERFORMED BY SEBAGO TECHNIQS, INC. FROM 2002 THROUGH 2011.
- PLAN REFERENCES:
A. RECORDING PLAT OF THE TURNPIKE INDUSTRIAL PARK, BY LAND USE CONSULTANTS, DATED MARCH 28, 1986 AND LAST REVISED SEPTEMBER 9, 1986, BEING RECORDED IN THE CORD IN PLAN BOOK 1ST PAGE 61.
B. SITE PLAN SET OF PLANS OF LOT 18, TURNPIKE INDUSTRIAL PARK FOR ALL AGASH BREWING, BY SEBAGO TECHNIQS, INC. (PROJECT 050571).
- PLAN ORIENTATION IS GRID NORTH, MAINE STATE PLANE COORDINATE SYSTEM, WEST ZONE 1802-NAD83. ELEVATIONS DEPICTED HEREON ARE NAVD83, BASED ON DUAL FREQUENCY GPS OBSERVATIONS.
- UTILITY INFORMATION DEPICTED HEREON IS COMPILED USING PHYSICAL EVIDENCE LOCATED IN THE FIELD. UTILITIES DEPICTED HEREON MAY NOT NECESSARILY REPRESENT ALL EXISTING UTILITIES. CONTRACTORS NEED TO CONTACT DIG-SAFE SYSTEMS, INC. (1-800-DIG-SAFE) AND FIELD VERIFY EXISTING UTILITIES PRIOR TO CONSTRUCTION AND/OR EXCAVATION.

LEGEND

EXISTING	DESCRIPTION	PROPOSED
---	BOUNDARY LINE/ROLL	---
---	ADJUTER LINE/ROLL	---
---	EASEMENT	---
---	MONUMENT	---
---	IRON PIPE/ROD	---
---	CURVE/LINE NO.	---
---	BENCHMARK	---
---	BUILDING	---
---	WETLANDS	---
---	UPLAND	---
---	EDGE WETLAND	---
---	SIGN	---
---	EDGE PAVEMENT	---
---	EDGE CONCRETE	---
---	PAVEMENT PAINT	---
---	GRAVEL ROAD	---
---	CURBLINE	---
---	TREELINE	---
---	CONTOURS	---
---	CHAIN LINK FENCE	---
---	DECIDUOUS TREE	---
---	CONIFEROUS TREE	---
---	BOLLARD	---
---	GAS	---
---	GAS GATE VALVE	---
---	GAS PETER	---
---	WATER	---
---	WATER GATE VALVE	---
---	WATER SHUT OFF	---
---	HYDRANT	---
---	WATER MANHOLE	---
---	SEWER	---
---	SEWER MH	---
---	STORM DRAIN	---
---	UNDERDRAIN	---
---	CATCH BASIN	---
---	DRAINAGE PH	---
---	CULVERT	---
---	OVERHEAD UTILITY	---
---	UNDERGROUND UTILITY	---
---	TRANSFORMER PAD	---
---	LIGHT POLE/WALL	---
---	UTILITY POLE	---
---	GUY	---
---	RIPRAP	---



C	RLM	09/08/12	REVISED PER CONDITIONS OF APPROVAL
B	RLM	08/10/12	REVISED PER CITY REVIEW COMMENTS
A	RLM	07/08/12	PRELIMINARY SITE PLAN SUBMISSION TO CITY
REV.	BY:	DATE:	STATUS:
THIS PLAN SHALL NOT BE USED FOR ANY OTHER PROJECT WITHOUT PERMISSION FROM SEBAGO TECHNIQS, INC. ANY ALTERATIONS AUTHORIZED OR OTHERWISE SHALL BE AT THE USER'S SOLE RISK AND WITHOUT LIABILITY TO SEBAGO TECHNIQS, INC.			

SEBAGO TECHNIQS
75 John Roberts Rd., Suite 1A
South Portland, ME 04106
Tel: 207-280-5100

SITE PLAN
OF:
ALLAGASH BREWING COMPANY
INDUSTRIAL WAY
PORTLAND, MAINE
FOR:
50 INDUSTRIAL WAY, LLC
50 INDUSTRIAL WAY
PORTLAND, MAINE 04103

EXHIBIT E

QUITCLAIM DEED WITH COVENANT

NORTHEASTERN GRAPHIC SUPPLY, INC., a Maine corporation, for consideration paid, grants to 50 INDUSTRIAL WAY LLC, a Maine limited liability company with an address of 100 Industrial Way, Portland, Maine, 04103, with Quitclaim Covenant, the following described real property:

A certain lot or parcel of land, with any buildings and improvements thereon, situated in on the northerly side of Industrial Way, so-called, in the City of Portland, County of Cumberland and State of Maine, bounded and described as follows:

Lot 18 as shown on a Plan entitled Turnpike Industrial Park-Riverside Street, Portland Maine, Recording Plat, made for Portland Venture Partners, 100 Silver Street, Portland, Maine, by Land Use Consultants, dated March 25, 1986, revised through September 9, 1986 and recorded in the Cumberland County Registry of Deeds, in Plan Book 157, Page 61 ("the Subdivision Plan"), to which Subdivision Plan reference is hereby made for a more particular description.

Meaning and intending to convey and hereby conveying the same premises as conveyed to Northeastern Graphic Supply by deed of Alfred H. Milliken, Jr., et als, dated June 2, 1988 and recorded in the Cumberland County Registry of Deeds in Book 8317, Page 51.

Together with an easement to benefit the above described Lot 18, over the parcel of land described hereinafter (the "Easement Area") for ingress and egress by foot and by vehicle, together with the right to construct, improve, maintain, repair, grade, excavate, fill and pave a driveway within the Easement Area for access to Lot 18, and together with the right to install within the Easement Area, both above and below ground, utility services to include, without limitation, facilities necessary or convenient for the transmission of electricity, gas, telephone communications, cable television, computer communications, sewerage and water.

The Easement Area is a fifty (50) foot wide parcel of land, being a portion of Lot 19 as shown on the Subdivision Plan, bound and described as follows:

Beginning on the northerly side of Industrial Park Way, also known as Industrial Way, at the southwesterly corner of Lot 18 as shown on the Subdivision Plan, said point also being the most southerly corner of Lot 19 as shown on the Subdivision Plan;

Thence N 29° 52' 15" E along the westerly sideline of Lot 18 and the easterly sideline of Lot 19 a distance of 90.00 feet;

MAINE REAL ESTATE TAX PAID

No. Received
 Recorded Register of Deeds
 Nov 15, 2002 10:01:56A
 Cumberland County
 Cumberland County, Maine

Thence N 60° 03' 55" W through land of Northeastern Graphic Supply, Inc., being Lot 19 as aforesaid, a distance of 50.00 feet;

Thence S 29° 52' 15" W through land of Northeastern Graphic Supply, Inc., being Lot 19 as aforesaid, a distance of 90.00 feet to the northerly sideline of Industrial Way;

Thence S 60° 03' 55" E along the northerly sideline of Industrial Way a distance of 50.00 feet to the point of beginning.

The Easement Area consists of approximately 4,500 square feet.

The Grantor herein reserves for itself, its successors and assigns, the right to use the Easement Area in common with the Grantee for all purposes, including but not limited to, ingress and egress by foot and vehicle and the right to install and/or connect to all utilities located within the Easement Area, all of which reserved rights shall benefit the Grantor's adjoining property.

IN WITNESS WHEREOF, Northeastern Graphic Supply, Inc. has caused this instrument to be executed by Brian Kroot, its president this 14th day of November, 2002.

WITNESS

NORTHEASTERN GRAPHIC
 SUPPLY, INC.

Catherine E. Decker

By: [Signature]

Brian Kroot

Its: President

State of Maine

County of Cumberland

November 14, 2002

Personally appeared before me the above named Brian Kroot, president of Northeastern Graphic Supply, Inc. and acknowledged the foregoing instrument to be his/her free act and deed in said capacity and the free act and deed of Northeastern Graphic Supply, Inc.

Catherine E. Decker
 Notary Public/Attorney at Law

Print Name CATHERINE E. DECKER

My Commission Expires N/A

QUITCLAIM DEED
With Covenant

THAT, 100 INDUSTRIAL WAY, LLC, a Maine Limited Liability Company with an office in Portland, County of Cumberland, State of Maine (Grantor) in consideration of one dollar and other valuable consideration paid by 50 INDUSTRIAL WAY LLC, a Maine Limited Liability Company with an office in Portland, County of Cumberland, State of Maine whose mailing address is 50 Industrial Way, Portland, Maine 04103 (Grantee), the receipt whereof Grantor does hereby acknowledge, does hereby remise, release, bargain, sell and convey and forever quitclaim unto the said 50 Industrial Way LLC, its successors and assigns forever, the following described real estate:

A certain lot or parcel of land, together with the buildings and improvements thereon, situated on the northerly side of Industrial Way, so-called, in the City of Portland, County of Cumberland and State of Maine, and described as follows:

Lot 17 as shown on a Plan of Turnpike Industrial Park made for Portland Venture Partners by Land Use Consultants (Jeffrey H. McAllister, Registered Land Surveyor No. 1263), dated March 25, 1986 and recorded September 17, 1986 in the Cumberland County Registry of Deeds in Plan Book 157, page 61, to which Plan reference is hereby made for a more particular description.

Being the same premises conveyed to the Grantor herein by deed from Bruce E. Milliken dated August 29, 2006 and recorded in the Cumberland County Registry of Deeds in Book 24314, Page 237.

TO HAVE AND TO HOLD the same, together with all the privileges and appurtenances thereunto belonging to the said 50 Industrial Way LLC, its successors and assigns forever.

AND Grantor does covenant with the said Grantee, its successors and assigns, that Grantor shall and will warrant and defend the premises to the said Grantee, its successors and assigns forever, against the lawful claims and demands of all persons claiming by, through or under Grantor.

IN WITNESS WHEREOF, Peter Colesworthy, Manager of 100 Industrial Way, LLC have hereunto set my hand and seal in my said capacity this 30th day of November, 2011.

Witness

100 INDUSTRIAL WAY, LLC

By: Peter Colesworthy
Peter Colesworthy, Its Manager

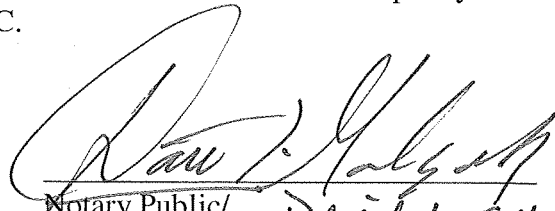
MAINE REAL ESTATE TAX PAID

State of Maine
Cumberland, ss.

November 30, 2011

Personally appeared Peter Colesworthy, Manager of 100 Industrial Way, LLC and acknowledged the foregoing instrument to be his free act and deed in his said capacity and the free act and deed of said 100 Industrial Way, LLC.

Before me,


Notary Public/
Attorney at Law *David L. Galtay Jr.*
Bar # 003643

Received
Recorded Register of Deeds
Dec 01, 2011 11:31:38A
Cumberland County
Pamela E. Lovley

COMMERCIAL LEASE AGREEMENT

This Lease is entered into this 1st Day of November, 2010, by and between 50 INDUSTRIAL WAY LLC, a Maine limited liability company of Portland, Maine, having a mailing address of 50 Industrial Way, Portland Maine 04103 (the "Landlord"), and ALLAGASH BREWING COMPANY, a Maine corporation having a place of business in Portland, Maine and a mailing address of 50 Industrial Way, Portland Maine 04102 (the "Tenant").

WITNESSETH:

ARTICLE I. PREMISES In consideration of the rent and covenants herein reserved and contained on the part of the parties to be paid, performed, and observed, the Landlord does hereby lease unto the Tenant, and the Tenant does hereby take and hire from the Landlord, upon and subject to the terms and provisions of this Lease, the property located at or near 50 Industrial Way in the City of Portland, County of Cumberland and State of Maine, and being more particularly described and set forth on Exhibit A attached hereto (the "Premises").

ARTICLE II. TERM: OPTION TO RENEW. (a) To have and to hold the Premises for a term of five (5) years beginning on November 1, 2010 (the "commencement date") and ending on October 31, 2015 at 11:59 p.m. (the "initial term").

(b) The Landlord hereby grants and gives to the Tenant the privilege of three (3) successive extensions of this Lease at the Tenant's election, for periods of five (5) years each, commencing upon the termination of the initial term or extension term, as applicable, of this Lease. The Tenant shall exercise its election to extend by notifying the Landlord in writing at least one hundred eighty (180) days in advance of the commencement date of the applicable extension term period (the "extension term"). The five-year extension term periods shall be subject to the same terms and conditions as the initial term hereof (all references in this Lease to the "term" shall mean the initial term and/or the extension term, as applicable). Except that the rent shall be adjusted in the manner set forth in Article III of this Lease. No holding over as a tenant-at-will shall be construed by either of the parties as an exercise and/or acknowledgement of the holding under the extension term period (or waiver of written notice thereof) unless and except the actual exercise of such extension thereafter be acknowledged in writing by the Tenant.

ARTICLE III. RENT. (a) The Tenant covenants and agrees to pay to the Landlord at the address of the Landlord set forth hereinabove or at such other place as the Landlord may by notice in writing from time to time direct, annual rent in the amount of Two Hundred Forty-Seven Thousand, Two Hundred Dollars (\$247,200.00), payable in 12 equal monthly installments of Twenty Thousand, Six Hundred Dollars Per Month (\$20,600.00), payable in advance without demand, offset or deduction, on the first day of each and every calendar month during the initial term of this Lease and prorated for the fraction of any month, except that on the first rent day, the Tenant shall also pay rent at said rate for any portion of the preceding calendar month included

in the term of this Lease. In the event the Tenant elects to extend the term pursuant to Article II (b) above, the Tenant shall pay base rent as aforesaid at an annual rate equal to the then current market rate agreed to by the Landlord and the Tenant but in no event less than the base rent for the last year of the previous five (5) year term. Subject to the foregoing, in the event the Landlord and the Tenant do not agree to the annual rent for the applicable extension term at least one hundred twenty (120) days prior to commencement of such extension term, then the annual amount of base rent shall be equal to the annual base rent in effect during the previous five (5) year period increased by the rate of inflation for the preceding sixty (60) month period beginning with the commencement date, as measured by the CPI. The "CPI" means the Consumer Price Index for All Urban Consumers (1982-84=100) for Boston, Massachusetts, All Items as issued by the Bureau of Labor Statistics of the United States Department of Labor.

(b) It is the intent of this Lease that the base rent be absolutely net to the Landlord and that the Tenant pay all costs and expenses associated with the Premises, of whatever kind or nature, during the term of this Lease, including, without limitation, all taxes, assessments and utilities relating to the Premises. The Tenant agrees that interest shall accrue on any overdue rent and other charges payable by the Tenant to the Landlord under this Lease at the rate of eighteen percent (18%) per annum.

ARTICLE IV. CONDITION OF PREMISES. The Tenant acknowledges that it has inspected the Premises prior to its occupation thereof, is satisfied with their condition and accepts them in "as is" condition. The Landlord shall have no obligation to perform any improvements to the Premises during the term of this Lease.

ARTICLE VI. ALTERATIONS, ADDITIONS, AND IMPROVEMENTS. The Tenant shall make no alterations, additions or improvements in or to the Premises without the Landlord's prior written consent except for brewery and warehouse fit-up in connection with the normal business operations associated with the use described in Article V above.

ARTICLE VII. TENANT'S FIXTURES. All operating equipment and trade fixtures installed by the Tenant in the Premises shall be, and remain, the property of the Tenant and may be removed at any time during or at the expiration of the term of this Lease; provided, however, that the Tenant shall, at or before the expiration of the term of this Lease, remove said operating equipment and trade fixtures and in the case of damage by reason of such removal, restore the Premises to substantially the same order and condition as existed at the beginning of the term of this Lease; and provided further that all plumbing, electrical, wiring, water, sewer, heating, ventilating, and air conditioning equipment and systems, and other permanent improvements, whether or not installed by the Tenant, shall be and remain the property of the Landlord and may not be removed by the Tenant.

ARTICLE VIII. TAXES, UTILITIES. (a) The Tenant shall during the term hereof pay to the Landlord, as an additional charge, all of the real estate taxes imposed or levied against the Premises for each tax year or portion thereof during the term of this Lease. The payment for each tax year or portion thereof shall be made to the Landlord within ten (10) days after the tenant shall have received from the Landlord a copy of the Landlord's tax bill. Upon receipt of such payment, the Landlord shall pay the taxes due to the taxing authority if they have not

already been paid. The expression "real estate taxes" used herein shall mean all ad valorem taxes imposed or assessed by any public authority having jurisdiction, which upon assessment or upon failure of payment become a lien upon the Premises (including personal property), and shall include betterment assessments assessed upon the Premises during the term, but shall exclude all income taxes, excess profits taxes, franchise taxes, and estate, succession, and inheritance taxes.

The Tenant shall also pay one hundred percent (100%) of all taxes upon its signs, equipment and other personal property in or upon the Premises. Real estate taxes imposed or levied against the Premises for the tax years which include the commencement date or termination date of the term of this Lease. Shall be apportioned pro rata between the Landlord and the Tenant on the basis of the portions of such tax years occurring after the commencement date or prior to the termination date of the term of this Lease. The Landlord agrees that the Tenant shall have the right to contest the amount or legality of any real estate or other ad valorem or personal property taxes, or other taxes or charges which the Tenant is obligated to pay and make application for the reduction thereof, or of any assessment upon which the same may be based, and the Landlord agrees at the request of the Tenant to execute or join in the execution of any instruments or documents necessary in connection with such contests or application, all at the Tenant's expense.

(b) The Tenant shall pay all costs and expenses for gas, electricity, heat, oil, and other fuels or utilities, including water and/or sewer charges, and all other utilities furnished to or used in connection with the Premises for any purposes whatsoever during the term of this Lease, promptly as each thereof shall become due and payable.

(c) The Tenant's obligation to pay real estate taxes accrued during the term and to pay for all utilities used at the Premises during the term shall survive the expiration or termination of this Lease.

ARTICLE IX. REPAIRS AND MAINTENANCE. The Tenant shall, at its own cost and expense, keep and maintain the entire Premises, including the equipment and the buildings and improvements situated thereon, in good order, condition and repair throughout the term of this Lease. Without limiting the foregoing, the Tenant shall keep such buildings weather-tight, shall maintain in good order and condition and repair the walls, structural frame, foundation, roofing, downspouts and gutters thereof, the storm waterlines, plumbing, sewage, heating, electrical, gas and air conditioning or any other utility or drainage systems within or servicing the Premises or the buildings thereon and any paved areas, equipment, sprinkler systems, exterior lights or signs on the Premises (including snow and ice removal in a timely manner), and shall make all necessary repairs, alterations, and improvements whether ordinary, extraordinary, foreseen or unforeseen, including any which may be required by any laws, ordinances, orders or regulations or any public authority having jurisdiction over the Premises or the Tenant's use and occupation thereof, including, without limitation, those relating to the accessibility and usability of the accommodations, facilities and services located on the Premises and in the buildings thereon, and including, without limitation, any repair, alteration or improvement required after the commencement date. Before making any structural or nonstructural alterations, additions or improvements to the Premises or the buildings thereon, including any required by this article IX, the Tenant shall obtain the prior written consent of the Landlord based on detailed plans and

specifications to be submitted to the Landlord for approval; provided however that the Tenant may, from time to time at its expense, redecorate the Premises with obtaining such consent. All renovations, alterations, additions and improvements shall be done in a good and workmanlike manner. The Landlord shall have no maintenance or repair obligations for the Premises during the term of this Lease, including without limitation any obligation to maintain or repair the walls, structural frame, foundation, roof, plumbing, sewage, heating, electrical, or other utility or drainage systems or to make any capital expenditures whatsoever.

ARTICLE X. SUBLETTING AND ASSIGNMENT. The Tenant shall not assign this Lease, nor sublet the Premises in whole or in part, without the prior written consent of the Landlord and shall not permit the Tenant's interest in this Lease to be bested in any other party by operation of law or otherwise. Notwithstanding any assignment of this Lease or subletting of the Premises, the Tenant shall remain directly and primarily liable under this Lease.

ARTICLE XI. INSURANCE; DAMAGE AND DESTRUCTION. (a) During the term of this Lease, the Tenant, at its sole cost and expense shall keep the buildings and improvements upon the Premises (including the equipment and the personal property) insured against loss or damage by fire or any of the other casualties under a so-called "all risk" policy in an amount at least equal to the replacement cost thereof, exclusive of excavation, foundations, and floorings and with demolition cost and additional cost of construction endorsements. The Tenant shall, upon request of the Landlord, deposit with the Landlord certificates of such insurance on or before the commencement date, and such policies shall name the Landlord as additional insured. Each policy of such insurance shall name as the insured thereunder the Landlord and the Tenant, and all such certificates shall require the respective insurers to give thirty (30) days prior written notice to the Landlord prior to any cancellation or reduction of coverage. All insurance proceeds recovered on account of any destruction or damage to the buildings and improvements upon the Premises shall be paid to the Landlord and shall thereafter, subject to the escrow procedure described below, be disbursed to the Tenant by the Landlord to be applied to the cost of repair and restoration of the Premises as provided in this article XI; provided, however that in the event that this Lease shall be terminated by reason of any fire or casualty, the insurance proceeds shall be retained by the Landlord. If this Lease shall not be terminated following any casualty and if the insurance proceeds shall be less than Twenty-Five Thousand Dollars (\$25,000.00), the same shall be paid over to the Tenant to be applied to repair and restoration as aforesaid, provided that if such insurance proceeds shall be in excess of said amount, the same shall be held by the Landlord and disbursed to the Tenant as the work of repair and restoration progresses, upon certificates of the architect or engineer supervising such work that the disbursements then sought, plus all prior disbursements, do not exceed the costs of such work completed to the date of such certificate and the balance is sufficient to pay for the estimated cost of completing such work. The Tenant further agrees at all times during the term of this Lease, at its sole cost and expense, to carry and pay for rental value insurance (covering loss or damage by fire with extended coverage) in an amount equal to at least the base rent value for one (1) year, plus, for one (1) year, the reasonably estimated real estate taxes, assessments, and other charges attributable to the Premises. The policy shall be written in favor of the Landlord and the Tenant, as their interest may appear, but with loss payable to the Landlord. The original policy shall be delivered to the landlord, and not later than ten (10) days prior to its expiration, the Tenant shall deliver renewal

policies together with due proof of payment of premiums thereon. In the event of damage or destruction of the Premises by as risk comprehended within the policy, the proceeds of the rental value insurance paid to the Landlord shall be held by the Landlord as security for the payment of the rental, additional charges, and other charges due for the period of time for which the loss was paid.

(b) In the event the whole or any part of the buildings and improvements upon the Premises shall be destroyed or damaged by fire or other casualty after the date of execution hereof to the extent the restoration of the premises and the buildings and improvements thereon to substantially the condition in which they were immediately prior to such destruction and damage is not possible, as reasonably estimated, within ninety (90) days following such destruction or damage, then this Lease may be terminated and ended at the election of either the Landlord or the Tenant (and in the case of termination by the Tenant, provided that notice in writing of such election shall be sent to the Landlord within thirty (30) days after such destruction or damage as aforesaid). Upon termination as aforesaid, this Lease and the term hereof shall cease and come to an end; provided however that the Tenant shall be permitted a reasonable period of time thereafter to remove its property. If such destruction or damage to the Premises is such that neither the Landlord nor the Tenant shall have the right to terminate this Lease, or in the event that having such right, neither shall elect to terminate this Agreement as aforesaid within the time provided, the Tenant shall proceed to repair and restore the Premises and the buildings and improvement thereon to substantially their condition prior to such damage or destruction.

(c) The Landlord and the Tenant each releases the other and the trustees, directors, officers, employees and representatives of the other, from any liability or responsibility (to the other or anyone claiming through or under them by subrogation or otherwise) for any damage caused by fire or other insured casualty to the extent of any insurance recovery even if such fire or casualty shall have been caused by the fault or negligence of the other party or anyone for whom the other party is responsible, provided that if the releaser shall carry insurance upon its property, this release shall be in force and effect only with respect to damage occurring during such time as the releaser's policies of fire and casualty insurance shall contain a clause to the effect that said release shall not affect said policies or the right of the releaser to recover thereunder. The Landlord and the Tenant each agrees that its fire and casualty insurance policies shall include such a clause so long as the same is obtainable and is includable at nominal or no extra cost. If extra cost is chargeable therefore, each party shall advise the other thereof and of the amount of the extra cost and the other party, at its election, may pay the same but shall not be obligated to do so.

ARTICLE XII. INDEMNITY AND PUBLIC LIABILITY INSURANCE. (a) The Tenant shall, from and after the date of execution of this Lease, defend, indemnify and hold harmless the Landlord (together with affiliates and officers, directors, managers, members, employees and agents of the Landlord and its affiliates) from and against all loss, liability, damages, claims, proceedings, costs (including costs of defense and attorneys' and professionals' fees incurred in defense or incurred in enforcement of this indemnity), expenses, demands, suits, and causes of action (all of the foregoing collectively referred to as "Liabilities") arising out of damage to any property or death or injury to any person sustained on the Premises, or arising

(directly or indirectly) out of or in connection with the possession, use, occupation or control of the Premises, and from and against all Liabilities arising out of damage to any property or death or injury to any person anywhere occasioned, or claimed to have been occasioned, by any act, neglect or default of, or work performed by, the Tenant, its agents, employees, licensees or contractors. In claims against any person or entity indemnified under this Article by an employee of the Tenant, its licensee or contractor, anyone directly or indirectly employed by them, or attributable for whose acts they may be liable, the indemnification obligation under this Article shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Tenant or its licensee or contractor under workers' or workmen's compensation acts, disability benefit acts or other employees benefit acts, and solely for purposes of this indemnity the Tenant hereby waives any immunity or any such limitation provided by any such act. This Article shall survive the expiration or termination of this Lease.

(b) In addition to the foregoing indemnity, the Tenant shall maintain with respect to the Premises public liability insurance having a combined single limit coverage of not less than Three Million Dollars (\$3,000,000.00) for injury to, or death of, one or more persons in a single accident of occurrence, and property damage insurance in an amount not less than One Million Dollars (\$1,000,000.00) in companies qualified to do business in the State of Maine under a policy or policies insuring the Landlord, the Tenant and any designee of the Landlord against injury to persons or damage to property as herein provided, all of said policies to be written on an occurrence basis, and to contain a clause to the effect that such policies and the coverage evidenced thereby shall be primary with respect to any policies carried by the Landlord, and that any coverage carried by the Landlord shall be excess insurance. In no event shall the limits of said policies be considered as limiting the liability of the Tenant under this Lease.

(c) The Tenant shall, upon request of the Landlord, deposit with the Landlord, certificates of such insurance at or prior to the commencement of the term of this Lease, and thereafter within ten (10) days prior to the expiration of such policies. Such policies shall, to the extent obtainable, provide that the policies may not be cancelled without at least ten (10) days prior written notice to each insured.

ARTICLE XIII. INSPECTION OF PREMISES. The Landlord and its agents and representatives shall have the right to enter into or upon the Premises or any part thereof at all reasonable hours for the purpose of examining the same or performing work permitted to be performed by the Landlord by the terms hereof, or for the purpose of showing said Premises to prospective purchasers, mortgagees or lessees, provided such entry shall not unreasonably interrupt the business of the Tenant or cause damage to the Tenant's property.

ARTICLE XIV. SUBORDINATION. The Tenant shall, at the request of the Landlord, subordinate this Lease to the lie of any present or future mortgage or mortgages upon the Premises or any property of which the Premises are a part irrespective of the time of execution or the time of recording any such mortgage or mortgages, and the Tenant agrees, at the request of the Landlord, to execute and documents which may be requested by a prospective mortgagee acknowledging such subordination; provided, however, that any such documents shall provide that in the event such mortgagee shall foreclose its mortgage or otherwise succeed to the interest of the Landlord in the Premises, such mortgagee shall recognize this Lease and the Tenant's right

hereunder, subject to the provisions of this Lease concerning the Tenant's defaults, and the Tenant shall recognize and attorn to such holder, its successors and assigns, as the Landlord hereunder.

ARTICLE XV. SIGNS. The Tenant shall not place, install or maintain any sign, symbol, advertisement of similar device, visible to public view from outside the Premises without first obtaining the Landlord's approval as to the size, location, design and appearance thereof. Any sign erected by the Tenant shall be created at the Tenant's expense and in conformity with applicable laws and ordinances.

ARTICLE XVI. TENANT'S COVENANTS. The Tenant covenants and agrees as follows: (a) to pay when due the said rent at the times and in the manner aforesaid, together with interest at the rate of eighteen percent (18%) per annum on any installment of rent which is more than five (5) days overdue; (b) to procure any licenses and permits required for any use made of the Premises by the Tenant; (c) to store all trash and garbage in appropriate containers; (d) not to make any use of the Premises which is improper, offensive or contrary to any law or ordinance, nor to permit any act or thing to be done on the Premises which shall constitute a nuisance or which may make void or void able any insurance on the Premises; (e) to comply, at the Tenant's cost and expense, with all present or future laws, codes, ordinances, rules and regulations of any governmental body or agency having jurisdiction over the Premises or the Tenant's use thereof; (f) to promptly pay when due the entire cost of any work to the Premises undertaken by the Tenant so that the Premises shall at all time be free of liens for labor and materials, to do all of such work in a good and workmanlike manner, employing material of good quality and complying with all applicable building codes and other governmental requirements; and to defend the Landlord and save the Landlord harmless and indemnified from injury, loss, liability, claims or damage to any person or property occasioned by or arising out of such work; (g) not to burn any trash on or near the Premises or to cause any offensive odors to be emitted from the Premises; (h) not to permit or cause to be used on the Premises any device such as a Public Address System or any excessively bright lights which change, flash or flicker, or any similar devices, the effect of which shall be visible or audible from outside the Premises; and (i) to pay all costs and expenses incurred by the Landlord in enforcing the provisions of this Lease in the event of any breach or default by the Tenant, including reasonable attorneys' fees.

ARTICLE XVII. DEFAULT. This Lease is made on the condition that if the Tenant shall fail to pay any installment of rent within ten (10) days after the same shall be due and payable, or if the Tenant shall neglect or fail to perform or observe any of the terms, provisions, conditions, and covenants herein contained, and on the Tenant's part to be performed, or observed for a period of thirty (30) days after the Landlord shall have given the Tenant notice of such neglect or failure, or if a receiver, guardian, conservator, trustee in bankruptcy or similar officer shall be appointed by a court of competent jurisdiction to take charge of all or any part of the Tenant's property, which appointment is not stayed or terminated within sixty (60) days, or if the Tenant commits any act of bankruptcy, or if a petition is filed by the Tenant under any bankruptcy or insolvency law, and the same shall not be dismissed within sixty (60) days from the date upon which it is filed, then, and in any of said cases, the Landlord lawfully may immediately, or at any time thereafter, and without demand or notice or the necessity of compliance with any statute in any manner relating to the summary process, enter upon the

Premises and repossess the same and expel the Tenant and those claiming through or under the Tenant and remove its effects, forcibly if necessary, without being deemed guilty of any manner of trespass and without prejudice to any rights or remedies which might otherwise be used for arrears of rent or previous breach of covenant, and upon such entry, all rights of the Tenant under this Lease shall terminate; and the Tenant covenants that in case of such termination, the Tenant shall forthwith pay to the Landlord, as damages, a sum equal to the amount by which the discounted present value of the rent for the term of this Lease exceeds the fair rental value of the Premises for the remainder of the term of this Lease, and, in addition thereto, will, during the remainder of the term of this Lease, pay to the Landlord on the last day of each calendar month the difference, if any, between the rental which would have been due for such month had there been no such termination and the sum of the then future value of the amount being received by the Landlord as rent from occupants of the Premises, if any, and the applicable pr-rated amount of the damages previously paid to the Landlord. The Tenant shall also remain liable for all unpaid rent accrued prior to the date of termination.

The Tenant shall also pay to the landlord such reasonable expenses as the Landlord may incur in connection with re-letting, including but not by way of limitation, legal expenses, attorneys' fees, brokerage and advertising costs, and expenses for keeping the Premises in good order or for preparing same for re-letting.

No remedy herein or otherwise conferred upon or reserved to the Landlord or the Tenant shall be considered exclusive of any other remedy, but the same shall be distinct, separate, and cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity, and every power and remedy given by this Lease may be exercised from time to time as often as occasion may arise or as may be deemed expedient. No delay or omission of the Landlord or the Tenant to exercise any right or power arising from any default on the part of the Tenant or the Landlord, as the case may be, shall impair any such right or power, or shall be construed to be a waiver of any such default by the Tenant hereunder, shall not constitute a waiver of such default. No termination of this Lease, prior to the normal ending thereof, by lapse of time or otherwise, shall affect the Landlord's right to collect rent for the period prior to the termination thereof.

ARTICLE XVIII. WAIVERS. The receipt of rent by the Landlord, with knowledge of any breach of this Lease by the Tenant or of any default on the part of the Tenant in the observance or performance of any of the terms, covenants or conditions of this Lease, shall not be deemed to be a waiver of any provisions of this Lease. Failure of either party to complain of any act or omission on the part of the other party no matter how long the same may continue shall not be deemed to be a waiver by said party of any of its rights hereunder. No waiver by either party at any time, express or implies, of any breach of any provision of this Lease shall be deemed a waiver of a breach of any other provision of this Lease or a consent to any subsequent breach of the same or any other provision. If any action by the Tenant shall require the consent or approval of the Landlord, the Landlord's consent to, or approval of, such action on any one occasion shall not be deemed a consent to or approval of said action on any subsequent occasion or a consent to or approval of any other action on the same or any subsequent occasion.

ARTICLE XIX. NOTICES. All notices and other communications authorized or required hereunder shall be in writing and shall be deemed given when mailed by certified mail, return receipt requested, with postage prepaid, addressed to the party for whom it is intended at the address set forth above, or at such other address or addresses as either party may hereafter designate by notice to the other.

ARTICLE XX. INVALIDITY OF PARTICULAR PROVISIONS. If any term or provision of this Lease or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and be in force to the fullest extent permitted by law.

ARTICLE XXI. PARTIES. Any pronoun used herein shall be read in the singular or plural number and in such gender as the context may require. Except as otherwise provided in this Lease, the terms and provisions of this Lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors, and assigns, respectively of the Landlord and the Tenant. The word "Landlord" as used herein shall mean only the owner for the time being of the Landlord's interest in this Lease and such owner and each succeeding owner shall be liable hereunder only during the period of its respective ownership. It is agreed that the Landlord hereunder, or any person having a beneficial interest in the Premises, shall not be personally liable under this Agreement in any way whatsoever to the Tenant beyond its or their interest in the Premises, and the Tenant shall be entitled to look only to the Premises, including any insurance proceeds there from, for collection of any judgment for money damages against Landlord. Furthermore, if the Landlord or any successor in interest of the Landlord shall be a mortgagee in possession, or an individual, joint venture, trust, tenancy in common, corporation, limited liability company or partnership, general or limited, it is specifically understood and agreed that there shall be absolutely no personal liability on the part of such mortgagee in possession, or such individual or on the part of the stockholders of such corporation or the members of such partnership, joint venture or limited liability company or the beneficiaries of such trust with respect to any of the terms, covenants and conditions of this Lease, and the Tenant shall look solely to the equity of the Landlord, or such successor in interest in the estate of the Landlord in the Premises, including insurance proceeds, for the satisfaction of each and every remedy of the Tenant in the event of any breach by the Landlord, or by such successor in interest, of any of the terms, covenants and conditions of this Lease to be performed by the Landlord; such exculpation of personal liability to be absolute and without any exception whatsoever. The foregoing shall not prohibit the Tenant from bringing any action for specific performance or for injunctive relief.

ARTICLE XXII. SELF-HELP. If the Tenant shall default in the performance of observance of any agreement, condition or other provision in this Lease contained on its part to be performed or observed, and shall not cure such default within fifteen (15) days after notice in writing from the Landlord specifying the default (or shall not within said period commence to cure such default and thereafter prosecute the curing of such default to completion with due diligence), the Landlord may, at its option, without waiving any claims for breach of agreement, at any time thereafter cure such default for the account of the Tenant and the Tenant shall

reimburse the Landlord for any amount paid and any expense or contractual liability so incurred, and any amounts due hereunder from the Tenant shall be deemed additional rent due and payable with the next installment of rent; provided, however, that the Landlord may cure any such default as aforesaid prior to the expiration of said waiting period, but after notice to the Tenant, if it is necessary to protect the Premises if its interest therein, or to prevent injury or damage to persons or property.

ARTICLE XXIII. FORCE MAJEURE. In any case where either party hereto is required to do any act (except for the payment of rent or other sums by the Tenant), the time for the performance thereof shall be extended by a period equal to any delay caused by or resulting from an act of God, war, civil commotion, fire or other casualty, labor difficulties, shortages of energy, labor, materials or equipment, government regulations, or delays caused by either party to the other whether such time be designated by a fixed date, a fixed time, or a "reasonable time".

ARTICLE XXIV. EMINENT DOMAIN. (a) If the entire Premises is taken by any public authority under the power of eminent domain or taken in any manner for any public or quasi-public use or conveyed in lieu of such taking, or in any portion of the Premises is so taken or conveyed so as to render the Premises permanently unusable by the Tenant for the purposes intended, then the term of this Lease shall cease as of the day possession shall be taken by such public authority or the date of the conveyance, and the rent and other sums payable hereunder shall be duly apportioned as of the date of such taking or conveyance. All damages awarded for the value of the Premises shall belong to and be the property of the Landlord; provided, however, that the Tenant shall be entitled to any portion of the award attributable to any capital improvements, additions, modification or replacements constructed or installed by the Tenant at the Tenant's cost.

(b) If only a portion of the Premises is taken by any public authority under power of eminent domain or taken in any manner for any public or quasi-public use or conveyed in lieu thereof and this Lease is not terminated pursuant to article XXIV, paragraph (a), this Lease shall continue in full force and effect and the Landlord shall make an equitable adjustment of the rent payable by the Tenant.

ARTICLE XXV. HOLDING OVER. In the event that the Tenant shall continue in occupancy of the Premises after the expiration of the term of this Lease, such occupancy shall not be deemed to extend or renew the term of this Lease, but, at the option of the Landlord, such occupancy shall continue as a tenancy at will from month to month upon the covenants, provisions, and conditions herein contained and at twice the rental in effect during the term of this Lease, prorated and payable for the period of such occupancy. This Article shall not be construed as giving the Tenant any right to hold over after the expiration of the term of this Lease.

ARTICLE XXVI. EXONERATION OF LANDLORD. The Tenant agrees that the Landlord shall not be liable to the Tenant of anyone claiming under the Tenant for any damage to property or injury (including death to any person on or near the Premises that has been occasioned by or through (i) the failure of the water supply or of any other utility servicing the premises; (ii) the action, whether direct or indirect, of the elements; (iii) malicious mischief or

vandalism; or (iv) any other cause whatsoever unless the same shall be caused by or result from the affirmative acts or gross negligence of the Landlord.

ARTICLE XXVII. CAPTIONS. The captions are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope of this Lease nor the intent of any provision hereof.

ARTICLE XXVIII. LANDLORD'S RIGHT TO SELL. The Landlord shall have the right to sell, assign, transfer or otherwise alienate its interest in the Premises. Upon such sale, assignment, transfer or alienation, the new owner shall succeed to all of the Landlord's obligations hereunder. In exchange for such new owner's written assumption of this Lease, the Tenant shall be bound to the new owner to the same extent as it was bound to the Landlord. At such time, upon written assumption of this Lease by the new owner, the Landlord hereunder shall be entirely freed and relieved of any obligation or responsibility under this Lease first arising after the date of such assumption.

ARTICLE XXIX. LEASE NOT TO BE RECORDED. The Landlord and the Tenant agree that this Lease shall not be recorded. Upon execution of this Lease, the Landlord shall execute and deliver to the Tenant a Memorandum of Lease in recordable form, which may be recorded by the Tenant at the Tenant's expense.

ARTICLE XXX. QUIET ENJOYMENT. Upon payment by the Tenant of the rent and other sums reserved in this Lease and provided to be paid by the Tenant and upon the observance and performance by the Tenant of all of the covenants, agreements, terms and conditions of this Lease on the Tenant's part to be observed and performed, the Tenant shall peaceably and quietly hold and enjoy the Premises for the term of this Lease without hindrance or interruption.

ARTICLE XXXI. NO BROKERS. The Landlord and the Tenant agree that no brokers have been involved in this Lease, and each agrees to hold and indemnify the other harmless from and against any losses, damages, costs or expenses that either party may suffer as a result of claims made or suits brought by any broker in connection with this Lease and the transactions contemplated hereby, the obligated party hereunder to be the party whose conduct gives rise to such claim.

ARTICLE XXXIII. HAZARDOUS MATERIALS. (a) Without limiting the requirements contained elsewhere in this Lease, the Tenant shall, from and after the commencement date, with respect to any Hazardous Materials affecting the Premises (i) identify and handle all Hazardous Materials on, from or affecting the Premises in accordance with all applicable federal, state and local laws, regulations, rules, ordinances and policies and in accordance with the orders and directives of all federal, state and local governmental authorities, and (ii) defend, indemnify and hold harmless the Landlord and its affiliates, and the employees, agents, officers and directors of any of them, from and against any and all claims, demands, penalties, fines, liabilities, settlements, damages, costs or expenses (including, without limitation, attorneys' and consultants' fees, investigation and laboratory fees, court costs and litigation expenses) of whatever kind or nature, known or unknown, contingent or otherwise, arising out of or in any way related to (1) the presence, disposal, release or threatened release of any Hazardous

Materials which are on, from, or affecting the Premises; (2) any personal injury (including wrongful death) or property damage (real or personal) arising out of or related to Hazardous Materials on, from or affecting the Premises; (e) any lawsuit brought or threatened, settlement reached or government order relating to Hazardous Materials on, from or affecting the Premises, and/or (4) any violation of laws, orders, regulations, requirements or demands of government authorities, or any policies or requirements of the Landlord which are based upon or in any way related to Hazardous Materials on, from or affecting the Premises.

(b) For purposes of this Lease, the term "Hazardous Materials" includes, without limit, any flammables, explosives, radioactive materials, hazardous materials, hazardous waste, hazardous or toxic substances, oil or petroleum products, asbestos or related materials, including as the same are defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. § 9601, et seq.), the Hazardous Materials Transportation Act, as amended (19 U.S.C. § 1801, et seq.), the Resource Conservation and Recover Act, as amended (42 U.S.C. § et seq.), applicable state statutes, and in the regulations adopted and publications promulgated pursuant thereto. In addition to the foregoing, the Tenant shall provide the Landlord with copies of any notices, correspondence, warnings, guidance or other written materials received from any governmental authority or other person or entity in connection with Hazardous Materials and the Premises and shall give the Landlord written notice of its discovery or release of any Hazardous Materials on, upon, under, from or into the Premises. The foregoing provisions shall be in addition to any other obligations and liabilities the Tenant may have under this Lease, at common law or otherwise and shall survive the termination or expiration of this Lease.

(c) The Tenant acknowledges that the Landlord requires the Premises to be and remain in compliance with applicable environmental laws, regulations, rules, ordinances and policies and that the Landlord has a direct interest in such matters and, therefore, without limiting the Tenant's obligations under this Article or otherwise, or the Landlord's rights of self-help under this Lease or otherwise, the Tenant agrees that the Landlord may, but shall be under no obligation to, undertake some or all of the matters referred to in the foregoing paragraph (a) on behalf of the Tenant, upon giving the Tenant written notice, and thereupon the Tenant shall have no further right undertake such matters itself but shall continue to be liable to the Landlord pursuant to the Tenant's indemnity.

ARTICLE XXXIV. GOVERNING LAW. This Lease and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State of Maine.

ARTICLE XXXV. TENANT'S AUTHORITY. The Tenant warrants and represents that the Tenant has the legal power and authority to lease the Premises, and that the execution and delivery of, and the performance of all obligations under this Lease and any financing or other documents executed at the time of the execution of this Lease by the Tenant, have been duly authorized by all necessary action of the Tenant and do not and will not require any consent or approval or any person and do not and will not result in a breach of, or constitute a default under, and indenture, loan or credit agreement, mortgage, deed of trust, or other agreement to which the Tenant is a party or by which Tenant may be bound.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed as of the day and year first above mentioned.

WITNESS:

ALLAGASH BREWING COMPANY

Elin MacShegog-Jarbes G. Robert Tod, Jr.
G. Robert Tod, Jr.
It's President

"Tenant"

WITNESS:

50 INDUSTRIAL WAY LLC

Elin MacShegog-Jarbes G. Robert Tod, Jr.
G. Robert Tod, Jr.
It's Manager

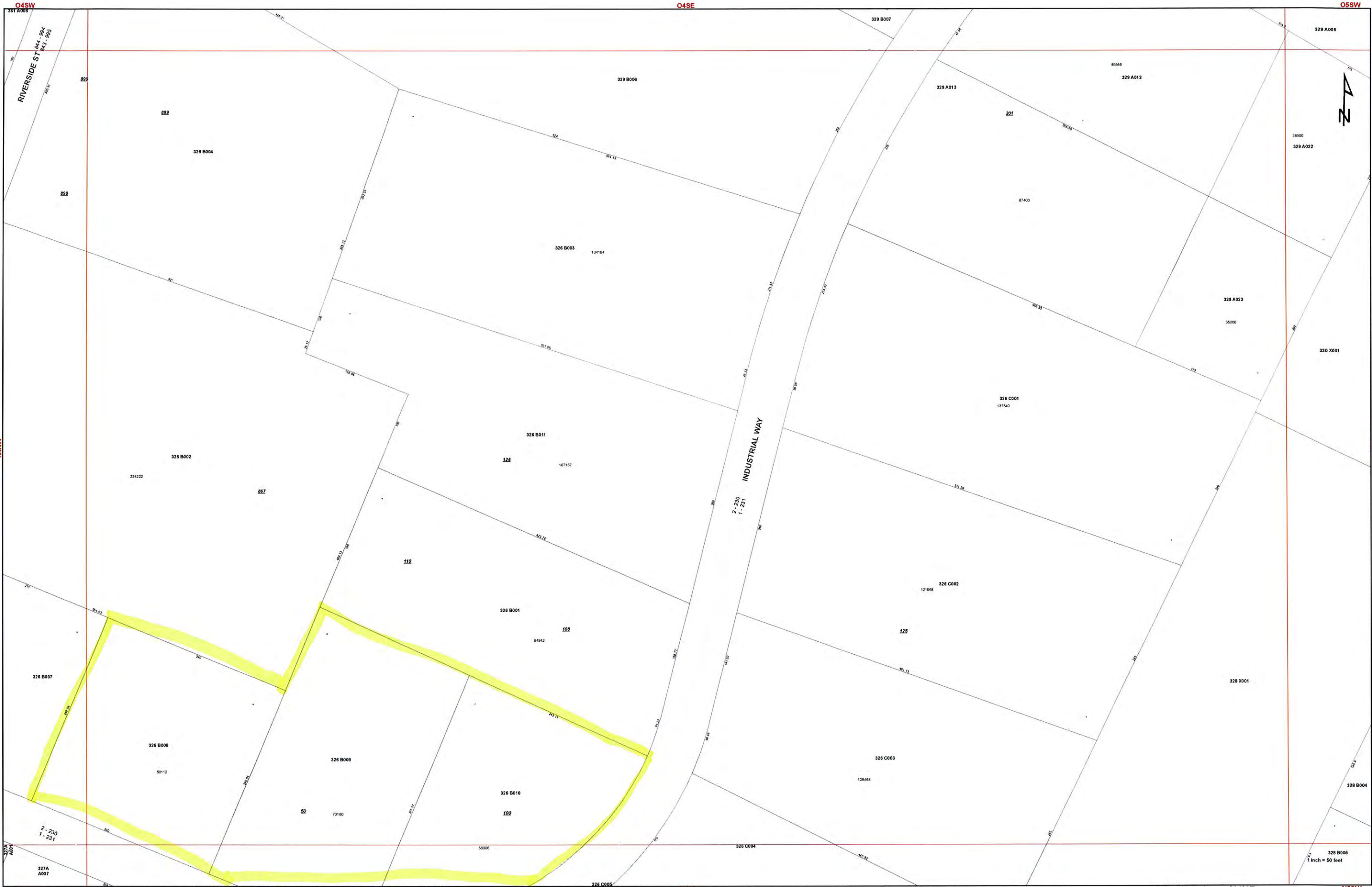
"Landlord"

Three certain lots or parcels of land, with any buildings and improvements thereon, situated on the northerly side of Industrial Way, so-called, in the City of Portland, County of Cumberland and State of Maine, bounded and described as follows:

Lot 17, Lot 18 and Lot 19 as shown on a Plan entitled Turnpike Industrial Park-Riverside Street, Portland, Maine, Recording Plat, made for Portland Venture Partners, 100 Silver Street, Portland, Maine, by Land Use Consultants, dated March 25, 1986, revised through September 9, 1986 and recorded in the Cumberland County Registry of Deeds, in Plan Book 157, Page 61 ("the Subdivision Plan"), to which Subdivision Plan reference is hereby made for a more particular description.

Received
Recorded Register of Deeds
Sep 25, 2012 12:37:31P
Cumberland County
Pamela E. Lovley

EXHIBIT F



Verrill Dana^{LLP}

Attorneys at Law

KELLY B. BODEN
PARTNER
kboden@verrilldana.com
Direct: 207-253-4472

ONE PORTLAND SQUARE
PORTLAND, MAINE 04112-0586
207-774-4000 • FAX 207-774-7499
www.verrilldana.com

October 21, 2015

Via Hand Delivery

City of Portland Zoning Board of Appeals
389 Congress St., Room 315
Portland, ME 04101

Re: Conditional Use Application
Proposed Verizon Wireless Facility

Dear Zoning Board of Appeals:

Enclosed please find eleven (11) copies of a Conditional Use Appeal Application for a proposed Verizon Wireless' wireless telecommunications facility at 1877 Congress Street, Portland, Maine. Also, enclosed is the requisite filing fee of \$100.00.

PROJECT DESCRIPTION

Verizon Wireless proposes to place a 1,650 square foot equipment shelter at the proposed site to house cellular equipment. Additionally, Verizon Wireless proposes to place an external generator on a 5 x 10 concrete pad immediately outside of the equipment shelter. Verizon Wireless proposes to screen the generator with arborvitae. An HVAC unit placed on an 8 x 8 concrete pad will also be located outside of the equipment shelter and screened by arborvitae. The equipment shelter will be accessed by a new 12-foot wide gravel driveway. A single parking area is proposed as well. All of the above project components are shown in detail on the Site Plan attached as Exhibit 2.

STANDARDS FOR CONDITIONAL USE

- a. The volume and type of vehicle traffic to be generated, hours of operation, expanse of pavement, and the number of parking spaces required are not substantially greater than would normally occur at surrounding uses or other allowable uses in the same zone; and

RESPONSE: The proposed Facility will result in approximately one vehicle trip per month, on average, by a Verizon Wireless technician. Accordingly, the construction of the facility will not result in any adverse parking or traffic impacts.

- b. The proposed use will not create unsanitary or harmful conditions by reason of noise, glare, dust, sewage disposal, emissions to the air, odor, lighting, or litter; and

RESPONSE: The proposed Facility will not create unsanitary or harmful conditions. The only noise associated with operation of the Facility is the weekly cycling of the back-up generator. In addition, the proposed Facility will not require water supply or sewage disposal, nor will it produce any wastewater. There will be no emissions to the air, odor, or litter. The only exterior lighting associated with the Facility is a small, down-directional, motion-activated light over the door of the equipment shelter.

- c. The design and operation of the proposed use, including but not limited to landscaping, screening, sign, loading, deliveries, trash or waste generation, arrangement of structures, and materials storage will not have a substantially greater effect/impact on surrounding properties than those associated with surrounding uses or other allowable uses in the zone.

RESPONSE: The proposed Facility has been designed to fit into the existing landscape of the site. The equipment shelter has been designed with an architectural shingle roof and residential clapboard siding to fit in with the surrounding neighborhood. There will be no signs, loading, deliveries, trash, waste generation, or materials stored at the facility.

We respectfully request that the Zoning Board of Appeals consider this request at its next regularly scheduled meeting. Please do not hesitate to contact the project manager, Matt Burke (at 508-930-0974), or me should you have any questions.

Thank you and I look forward to hearing from you.

Very truly yours,



Kelly B. Boden

KBB/prf

Enclosures

cc: Matt Burke, Tower Resource Management, Inc.

TABLE OF CONTENTS

1. Conditional Use Appeal Application Form
2. Site Plan
3. Tax Map
4. Purchase & Sale Contract
5. Existing Photos of the Site

EXHIBIT 1

Portland, Maine



Yes. Life's good here.

Jeff Levine, AICP, Director
Planning & Urban Development Department

Ann Machado
Zoning Administrator

CITY OF PORTLAND ZONING BOARD OF APPEALS
Conditional Use Appeal Application

Applicant Information:

Verizon Wireless
NAME

Verizon Wireless d/b/a Portland Cellular
BUSINESS NAME Partnership

118 Flanders Road, Westborough, MA 01581
BUSINESS ADDRESS

(207) 253-4472 kboden@verrilldana.com
BUSINESS TELEPHONE & E-MAIL

Purchase and Sale Contract
APPLICANT'S RIGHT/TITLE/INTEREST

R2
CURRENT ZONING DESIGNATION

EXISTING USE OF THE PROPERTY:
Undeveloped

TYPE OF CONDITIONAL USE PROPOSED:

Utility substation/telephone electronic equipment enclosures

Subject Property Information:

1877 Congress St., Portland, ME 04101
PROPERTY ADDRESS

217-A-10 & 217 A010001
CHART/BLOCK/LOT (CBL)

St. Albans Corp.
PROPERTY OWNER (If Different)

1897 Congress Street, Portland, ME 04102
ADDRESS (If Different)

PHONE # AND E-MAIL

CONDITIONAL USE AUTHORIZED BY
SECTION 14- 78(c)(1)

STANDARDS: Upon a showing that a proposed use is a conditional use under this article, a conditional use permit shall be granted unless the Board determines that:

1. The volume and type of vehicle traffic to be generated, hours of operation, expanse of pavement, and the number of parking spaces required are not substantially greater than would normally occur at surrounding uses or other allowable uses in the same zone; and
2. The proposed use will not create unsanitary or harmful conditions by reason of noise, glare, dust, sewage disposal, emissions to the air, odor, lighting, or litter; and
3. The design and operation of the proposed use, including but not limited to landscaping, screening, signs, loading deliveries, trash or waste generation, arrangement of structures, and materials storage will not have a substantially greater effect/impact on surrounding properties than those associated with surrounding uses of other allowable uses in the zone.

NOTE: If site plan approval is required, attach preliminary or final site plan.

The undersigned hereby makes application for a conditional use permit as described above, and certifies that the information herein is true and correct to the best of his OR her knowledge and belief.

Kelly Boden (agent for Verizon)
SIGNATURE OF APPLICANT

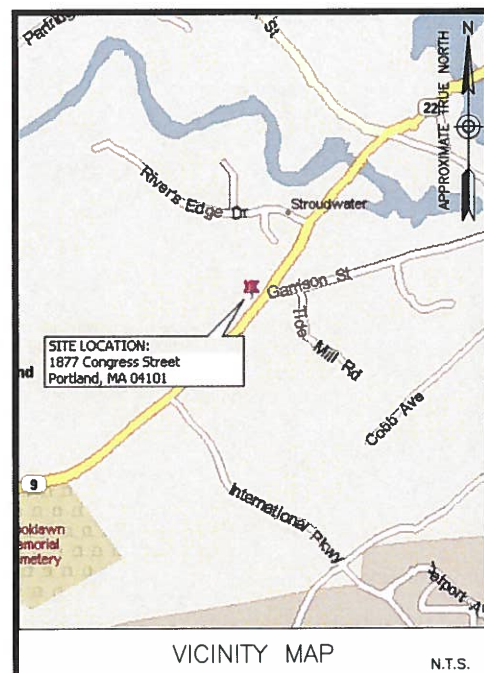
10/20/15
DATE

389 Congress Street * Portland Maine 04101-3509 * Phone: (207) 874-8703 * Fax: (207) 874-8716
<http://www.portlandmaine.gov/planning/buildinsp.asp> * E-Mail: buildinginspections@portlandmaine.gov

EXHIBIT 2



PORTLAND, ME HEAD END
1877 CONGRESS STREET
PORTLAND, ME 04101



DIRECTIONS FROM WESTBOROUGH, MA:

TAKE 1-495 N. CONTINUE ONTO EXIT 60 (SIGNS FOR ROUTE 286/BEACHES/SALISBURY). MERGE ONTO 1-95 N. KEEP LEFT AT THE FORK TO STAY ON 1-95 N. KEEP LEFT AT THE FORK TO STAY ON 1-95 N. TAKE EXIT 46 TOWARD W-22 WEAVER/JETPORT/CONGRESS ST. TURN RIGHT ONTO THE S.W. WAY. USE THE LEFT LANE TO TURN LEFT AT EXIT 15T. CROSS STREET ONTO JOHNSON RD. CONTINUE STRAIGHT TO STAY ON JOHNSON RD. USE THE RIGHT 2 LANES TO MERGE ONTO CONGRESS ST. SITE WILL BE ON THE LEFT.

ENGINEER
DEWBERRY ENGINEERS INC.
280 SUMMER ST.
10TH FLOOR
BOSTON, MA 02210

PHONE # (617) 531-0813
FAX # (617) 695-3310

CONTACT: DAMIAN SCHMALZ

CONSTRUCTION
VERIZON WIRELESS
400 FRIBERG PARKWAY
WESTBOROUGH, MA 01581-3956
PHONE # (508) 330-3335
FAX # (508) 330-3405

CONSULTANT TEAM

SITE NAME:
PORTLAND, ME HEAD END

PROPERTY OWNER:
PORTLAND / ST ALBANS CORP
1897 CONGRESS ST
PORTLAND ME 04102

APPLICANT:
PORTLAND CELLULAR PARTNERSHIP D/B/A
VERIZON WIRELESS
118 FLANDERS ROAD
WESTBORO, MA 01581

ELECTRIC UTILITY:
CENTRAL MAINE POWER (800) 565-3181

TELEPHONE UTILITY:
VERIZON (800) 837-4966

PARCEL ID:
217-A-10

HORIZONTAL DATUM:
NORTH AMERICAN DATUM OF 1983 (NAVD88)

CENTER OF BUILDING*:
LATITUDE: 43° 39' 18.99" N
LONGITUDE: 70° 19' 02.60" W
*PER HANDHELD GPS

PROJECT SUMMARY

SITE ADDRESS:
1877 CONGRESS ST.
PORTLAND, ME 04101

ZONING DISTRICT:
R-2 RESIDENTIAL DISTRICT 2

PROJECT DIRECTORY

THE PROJECT WILL CONSIST OF INSTALLING A NEW 1,500 S.F. HEAD END FACILITY WITH ASSOCIATED PARKING AREA. UTILITIES TO COME FROM EXISTING SOURCES AT STREET.

PROJECT DESCRIPTION

THIS DOCUMENT WAS DEVELOPED TO REFLECT A SPECIFIC SITE AND ITS SITE CONDITIONS AND IS NOT TO BE USED FOR ANOTHER SITE OR WHEN OTHER CONDITIONS PERTAIN. REUSE OF THIS DOCUMENT IS AT THE SOLE RISK OF THE USER.

A.D.A. COMPLIANCE:
FACILITY IS UNMANNED AND NOT FOR HUMAN HABITATION.

[illegible]

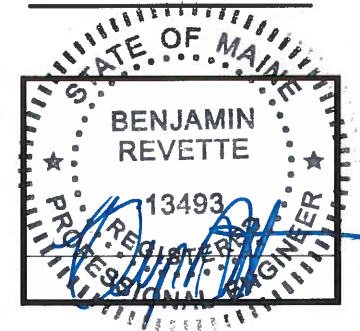
VERIZON WIRELESS
400 FRIBERG PARKWAY
WESTBOROUGH, MA 01581-3956

**PORTLAND, ME
HEAD END**

ZONING DRAWINGS		
2	10/20/15	FOR SUBMITTAL
1	10/19/15	FOR SUBMITTAL
0	10/16/15	FOR SUBMITTAL
A	10/02/15	FOR COMMENT



Dewberry Engineers Inc.
280 SUMMER STREET
10TH FLOOR
BOSTON, MA 02210
PHONE: 617.695.3400
FAX: 617.695.3310



DRAWN BY: SK

REVIEWED BY:	DAS
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CHECKED BY:	MFT
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PROJECT NUMBER:	50002925
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JOB NUMBER:	50070909
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SITE ADDRESS:

1877 CONGRESS STREET
PORTLAND, ME 04101

SHEET TITLE

TITLE SHEET

SHEET NUMBER

T-1

1. FIELD SURVEY DATE: SEPTEMBER 18, 2015
2. VERTICAL DATUM: NORTH AMERICAN VERTICAL DATUM OF 1988.
3. HORIZONTAL DATUM: NORTH AMERICAN DATUM OF 1983 (NAD83) GEOID 09.
4. CENTER OF PROPOSED LEASE AREA:
LAT 43° 39' 18.99" N
LON 70° 19' 02.60" W
5. OWNER: PORTLAND / ST ALBANS CORP
1897 CONGRESS ST
PORTLAND ME 04102
6. SITE NAME: PORTLAND, ME HEAD END
7. SITE NUMBER: N/A
8. SITE ADDRESS: 1877 CONGRESS ST.
PORTLAND, ME 04101
9. ABUTTERS INFORMATION TAKEN FROM TOWN TAX DATA
10. JURISDICTION: CITY OF PORTLAND, ME
11. TAX ID: MAP 217 LOT A-10
12. DEED REFERENCE: BK 29756 PL 145
13. PLAT REFERENCE: UNRECORDED PLAN BY LAND SERVICES
INC. DATED 1/08/13
14. GRID NORTH BASED ON GPS
15. ELEVATIONS AND COORDINATES FROM GPS LOCATIONS.
16. ALL UNDERGROUND UTILITY INFORMATION PRESENTED
HEREON WAS DETERMINED FROM THE BEST AVAILABLE EVIDENCE
AND PLANS OF RECORD. ALL UNDERGROUND UTILITIES
SHOULD BE LOCATED IN THE FIELD PRIOR TO
COMMENCEMENT OF ALL SITE WORK.
CALL DIGSAFE 1(800) 322-4844 A MINIMUM OF 72
HOURS PRIOR TO PLANNED ACTIVITY.
17. ACCORDING TO FEDERAL EMERGENCY MANAGEMENT
AGENCY MAPS, THE PROPOSED TOWER ON THIS
PROPERTY IS LOCATED IN AN AREA DESIGNATED
AS ZONE X. NOT WITHIN THE 100 YEAR FLOOD BOUNDARY.
COMMUNITY PANEL NO. 2300510012C, DATED 12/8/1998
18. PROPERTY LINE INFORMATION IS COMPILED FROM
DEEDS AND PLANS OF RECORD AND IS NOT THE
RESULT OF A FULL BOUNDARY SURVEY.
19. BEARING SYSTEM OF THIS PLAN IS BASED ON GRID
NORTH.

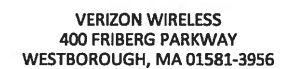
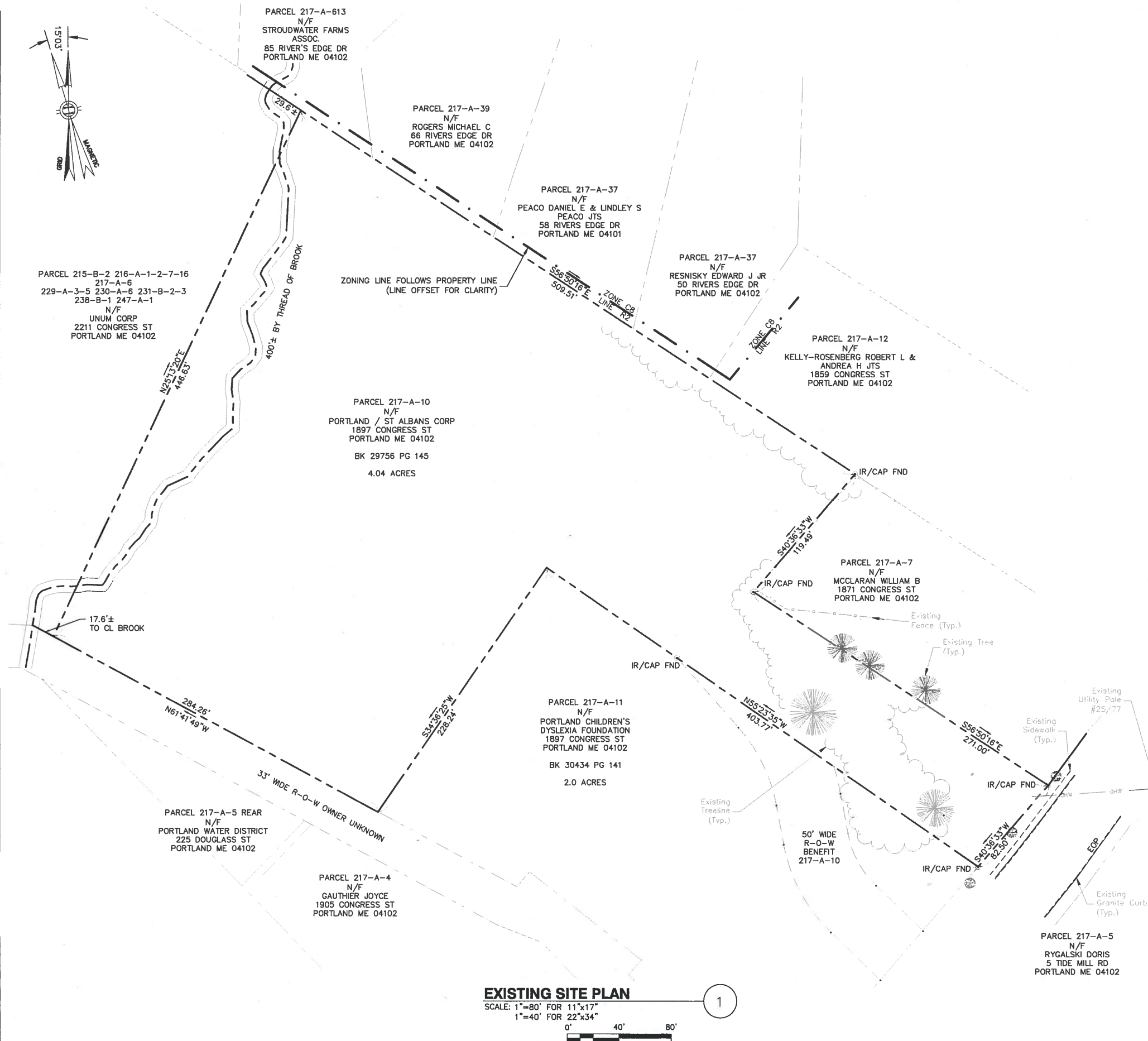
I HEREBY CERTIFY THAT THE LATITUDE, LONGITUDE AND ELEVATIONS PRESENTED HEREON MEET THE REQUIREMENTS OF THE FAA WITH THE FOLLOWING ACCURACIES:

± THREE (3) FEET VERTICALLY
± FIFTEEN (15) FEET HORIZONTALLY

DATE _____

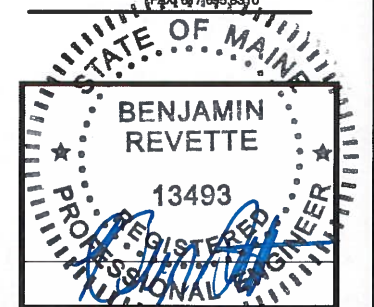
DISTRICT: R2 -- RESIDENTIAL ZONE	
	REQUIRED
MIN. AREA:	10,000 s.f.
MAX HEIGHT:	35 FEET
MIN. FRONTAGE:	50 FEET
MIN. DEPTH:	N/A
MIN. FRONT YARD DEPTH:	25 FEET
MIN. SIDE YARD DEPTH:	12 FEET (1 STORY)
MIN. REAR YARD DEPTH:	25 FEET
MAX LOT COVERAGE:	20%
MIN. IMPERVIOUS SURFACE:	N/A
MIN. OPEN SPACE:	N/A

Locus Property Line
 Existing Property Line
 Existing Contours
 Zoning Line



ZONING DRAWINGS

2	10/20/15	FOR SUBMITTAL
1	10/19/15	FOR SUBMITTAL
0	10/16/15	FOR SUBMITTAL
A	10/02/15	FOR COMMENT



DRAWN BY: SK

REVIEWED BY:	DAS
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CHECKED BY:	MFT
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PROJECT NUMBER:	50002925
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JOB NUMBER: 50070909

SITE ADDRESS:

1877 CONGRESS STREET
PORTLAND, ME 04101

SHEET TITLE

EXISTING SITE PLAN

SHEET NUMBER

$$Z-1$$

GENERAL NOTES

1. FIELD SURVEY DATE: SEPTEMBER 18, 2015
2. VERTICAL DATUM: NORTH AMERICAN VERTICAL DATUM OF 1988.
3. HORIZONTAL DATUM: NORTH AMERICAN DATUM OF 1983 (NAD83) GEOID 09.
4. CENTER OF PROPOSED LEASE AREA:
LAT TBD
LON TBD
GROUND EL= TBD
5. OWNER: PORTLAND / ST ALBANS CORP
1897 CONGRESS ST
PORTLAND ME 04102
6. SITE NAME: PORTLAND, ME HEAD END
7. SITE NUMBER: N/A
8. SITE ADDRESS: 1877 CONGRESS ST.
PORTLAND, ME 04101
9. ABUTTERS INFORMATION TAKEN FROM TOWN TAX DATA
10. JURISDICTION: CITY OF PORTLAND, ME
11. TAX ID: MAP 217 LOT A-10
12. DEED REFERENCE: BK 29756 PG 145
13. PLAT REFERENCE: UNRECORDED PLAN BY LAND SERVICES INC. DATED 1/08/13
14. GRID NORTH BASED ON GPS
15. ELEVATIONS AND COORDINATES FROM GPS LOCATIONS.
16. ALL UNDERGROUND UTILITY INFORMATION PRESENTED HEREON WAS DETERMINED FROM SURFACE EVIDENCE AND PLANS OF RECORD. ALL UNDERGROUND UTILITIES SHOULD BE LOCATED IN THE FIELD PRIOR TO COMMENCEMENT OF ALL SITE WORK. CALL DIGSAFE 1(800) 322-4844 A MINIMUM OF 72 HOURS PRIOR TO PLANNED ACTIVITY.
17. ACCORDING TO FEDERAL EMERGENCY MANAGEMENT AGENCY MAPS, THE PROPOSED TOWER ON THIS PROPERTY IS LOCATED IN AN AREA DESIGNATED AS ZONE X. NOT WITHIN THE 100 YEAR FLOOD BOUNDARY. COMMUNITY PANEL NO. 2300510012C, DATED 12/6/1998
18. PROPERTY LINE INFORMATION IS COMPILED FROM DEEDS AND PLANS OF RECORD AND IS NOT THE RESULT OF A FULL BOUNDARY SURVEY.
19. BEARING SYSTEM OF THIS PLAN IS BASED ON GRID NORTH.

FAA CERTIFICATION

I HEREBY CERTIFY THAT THE LATITUDE, LONGITUDE AND ELEVATIONS PRESENTED HEREON MEET THE REQUIREMENTS OF THE FAA WITH THE FOLLOWING ACCURACIES:

± THREE (3) FEET VERTICALLY
± FIFTEEN (15) FEET HORIZONTALLY

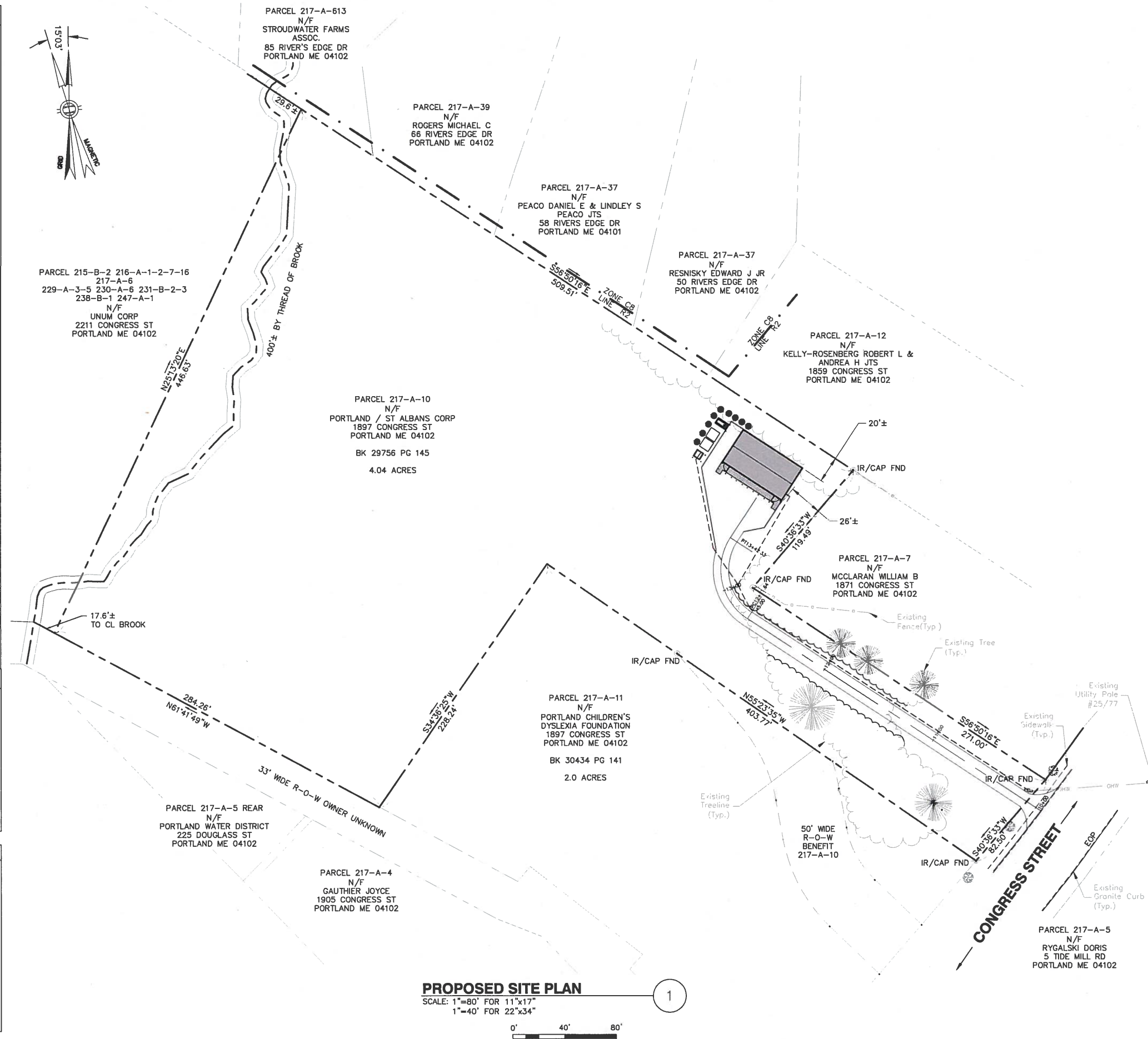
DATE

ZONING INFORMATION

DISTRICT:	R2 - RESIDENTIAL ZONE
REQUIRED	
MIN. AREA:	10,000 s.f.
MAX HEIGHT:	35 FEET
MIN. FRONTAGE:	50 FEET
MIN. DEPTH:	N/A
MIN. FRONT YARD DEPTH:	25 FEET
MIN. SIDE YARD DEPTH:	12 FEET (1 STORY)
MIN. REAR YARD DEPTH:	25 FEET
MAX LOT COVERAGE:	20%
MIN. IMPERVIOUS SURFACE:	N/A
MIN. OPEN SPACE:	N/A

LEGEND

---	LOCUS PROPERTY LINE
- - -	Existing Property Line
---	Existing Road
---	PROPOSED ROAD
---	PROPOSED ROAD CENTERLINE
---	Existing Contour
---	PROPOSED CONTOUR
---	PROPOSED EDGE OF CLEARING
---	Existing Treeline
---	Existing Overhead Utilities



verizon
WIRELESS

VERIZON WIRELESS
400 FRIBERG PARKWAY
WESTBOROUGH, MA 01581-3956

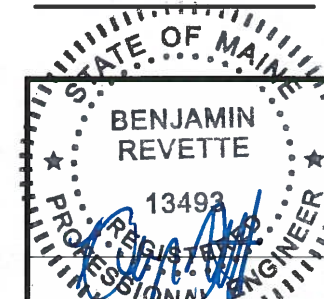
**PORTLAND, ME
HEAD END**

ZONING DRAWINGS

2	10/20/15	FOR SUBMITTAL
1	10/19/15	FOR SUBMITTAL
0	10/16/15	FOR SUBMITTAL
A	10/02/15	FOR COMMENT

Dewberry

Dewberry Engineers Inc.
280 SUMMER STREET
10TH FLOOR
BOSTON, MA 02210
PHONE: 617.865.3400
FAX: 617.865.3310



DRAWN BY: SK

REVIEWED BY: DAS

CHECKED BY: MFT

PROJECT NUMBER: 50002925

JOB NUMBER: 50070909

SITE ADDRESS:

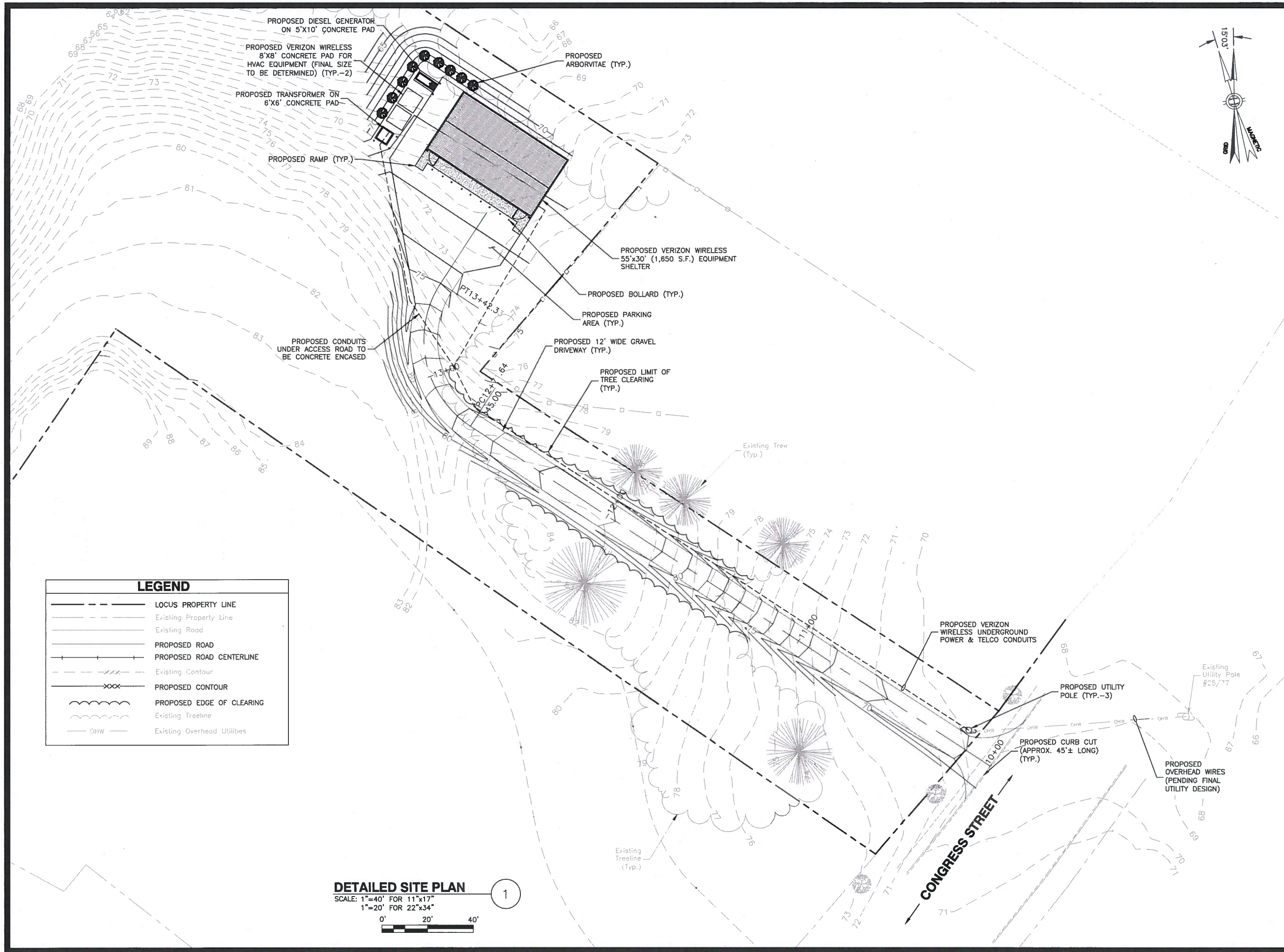
1877 CONGRESS STREET
PORTLAND, ME 04101

SHEET TITLE

PROPOSED SITE PLAN

SHEET NUMBER

Z-2



VERIZON WIRELESS
400 FRIBERG PARKWAY
WESTBOROUGH, MA 01581-3956

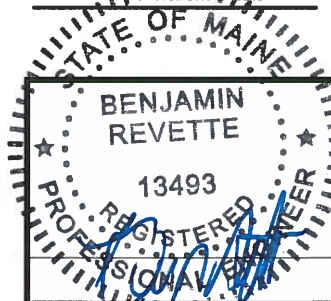
PORTLAND, ME HEAD END

ZONING DRAWINGS

2	10/20/15	FOR SUBMITTAL
1	10/19/15	FOR SUBMITTAL
0	10/16/15	FOR SUBMITTAL
A	10/02/15	FOR COMMENT



Dewberry Engineers Inc.
280 SUMMER STREET
10TH FLOOR
BOSTON, MA 02210
PHONE: 617.865.3400
FAX: 617.865.6310



DRAWN BY:	SK
REVIEWED BY:	DAS
CHECKED BY:	MFT
PROJECT NUMBER:	50002925
JOB NUMBER:	50070909
SITE ADDRESS:	

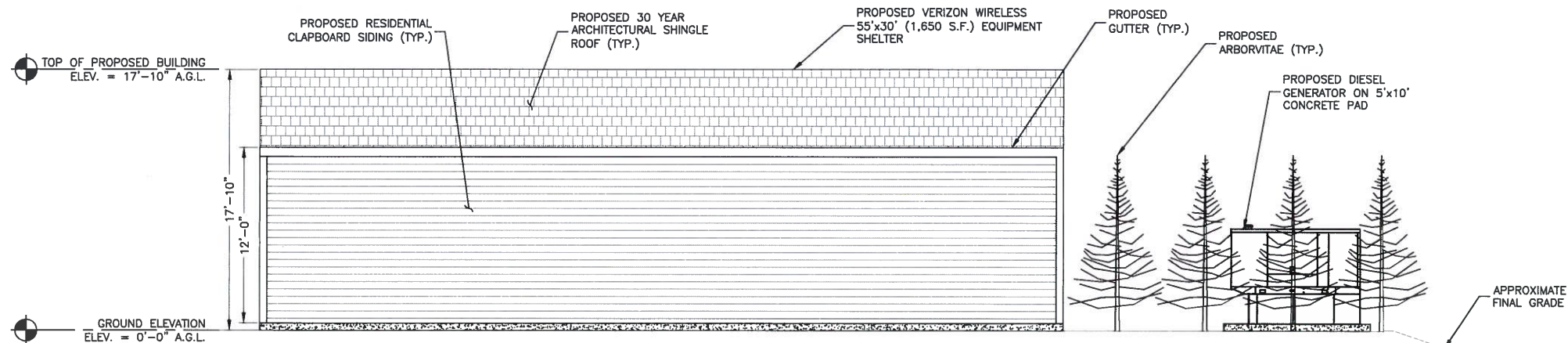
1877 CONGRESS STREET
PORTLAND, ME 04101

SHEET TITLE

DETAILED SITE PLAN

SHEET NUMBER

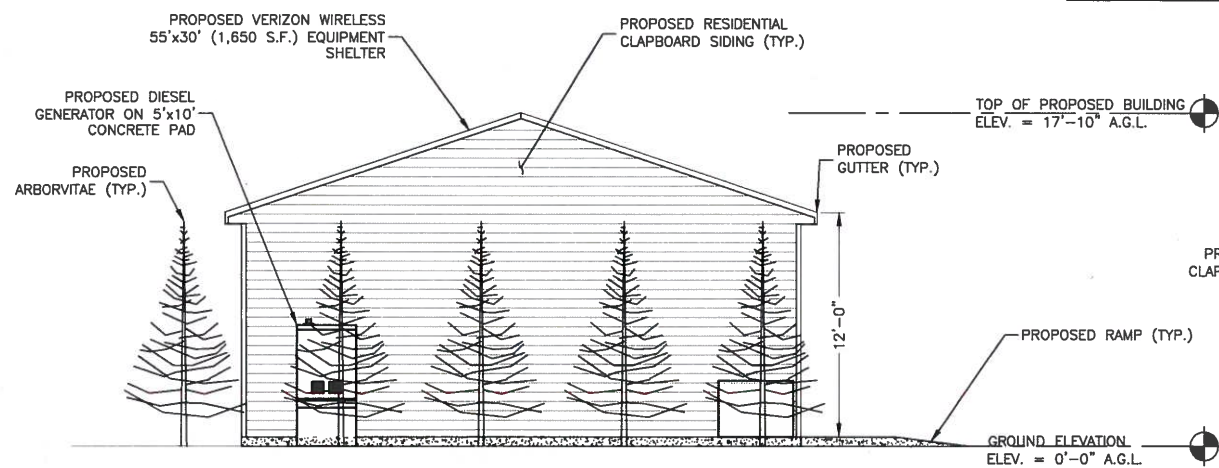
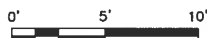
Z-3



SHELTER ELEVATION (NORTH)

SCALE: 1"=10' FOR 11"x17"
1"=5' FOR 22"x34"

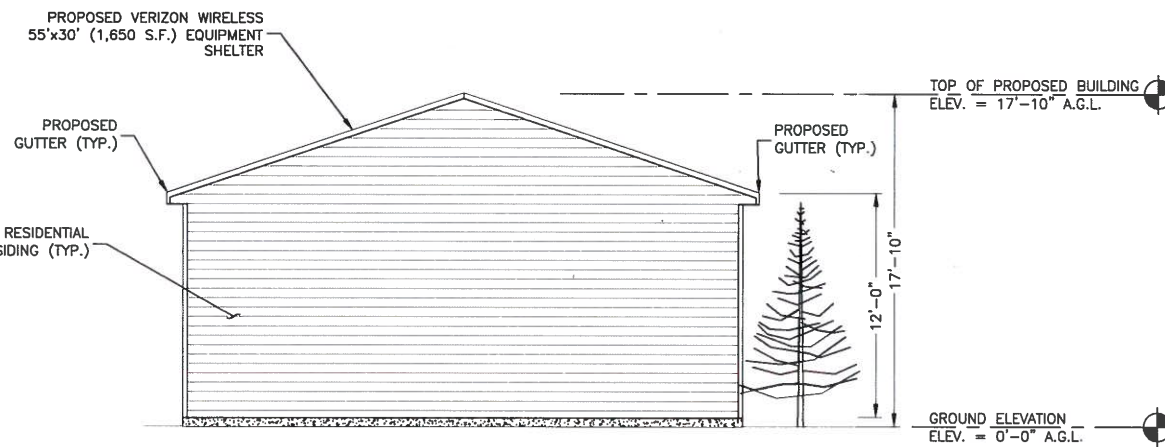
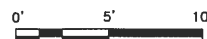
2



SHELTER ELEVATION (WEST)

SCALE: 1"=10' FOR 11"x17"
1"=5' FOR 22"x34"

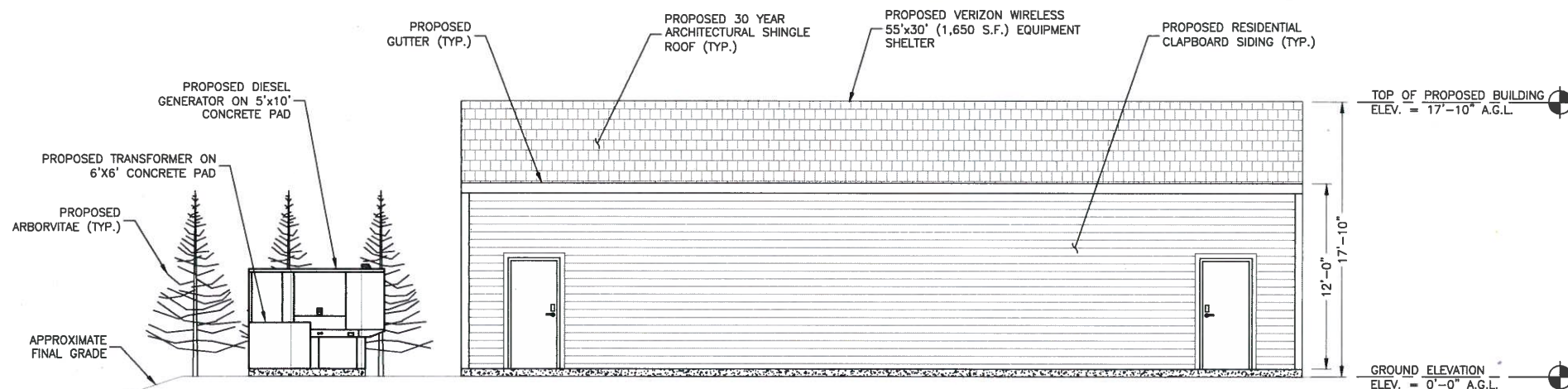
2



SHELTER ELEVATION (EAST)

SCALE: 1"=10' FOR 11"x17"
1"=5' FOR 22"x34"

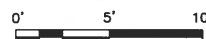
4



SHELTER ELEVATION (SOUTH)

SCALE: 1"=10' FOR 11"x17"
1"=5' FOR 22"x34"

3



verizon
WIRELESS

VERIZON WIRELESS
400 FRIBERG PARKWAY
WESTBOROUGH, MA 01581-3956

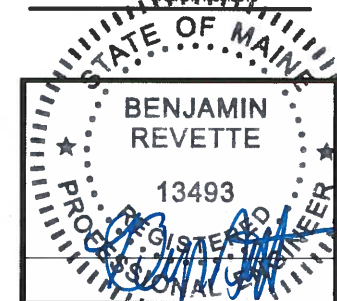
**PORTLAND, ME
HEAD END**

ZONING DRAWINGS

2	10/20/15	FOR SUBMITTAL
1	10/19/15	FOR SUBMITTAL
0	10/16/15	FOR SUBMITTAL
A	10/02/15	FOR COMMENT

Dewberry

Dewberry Engineers Inc.
280 SUMMER STREET
10TH FLOOR
BOSTON, MA 02210
PHONE: 617.885.3400
FAX: 617.885.3810



DRAWN BY: SK

REVIEWED BY: DAS

CHECKED BY: MFT

PROJECT NUMBER: 50002925

JOB NUMBER: 50070909

SITE ADDRESS:

1877 CONGRESS STREET
PORTLAND, ME 04101

SHEET TITLE

ELEVATIONS

SHEET NUMBER

Z-4

EXHIBIT 3

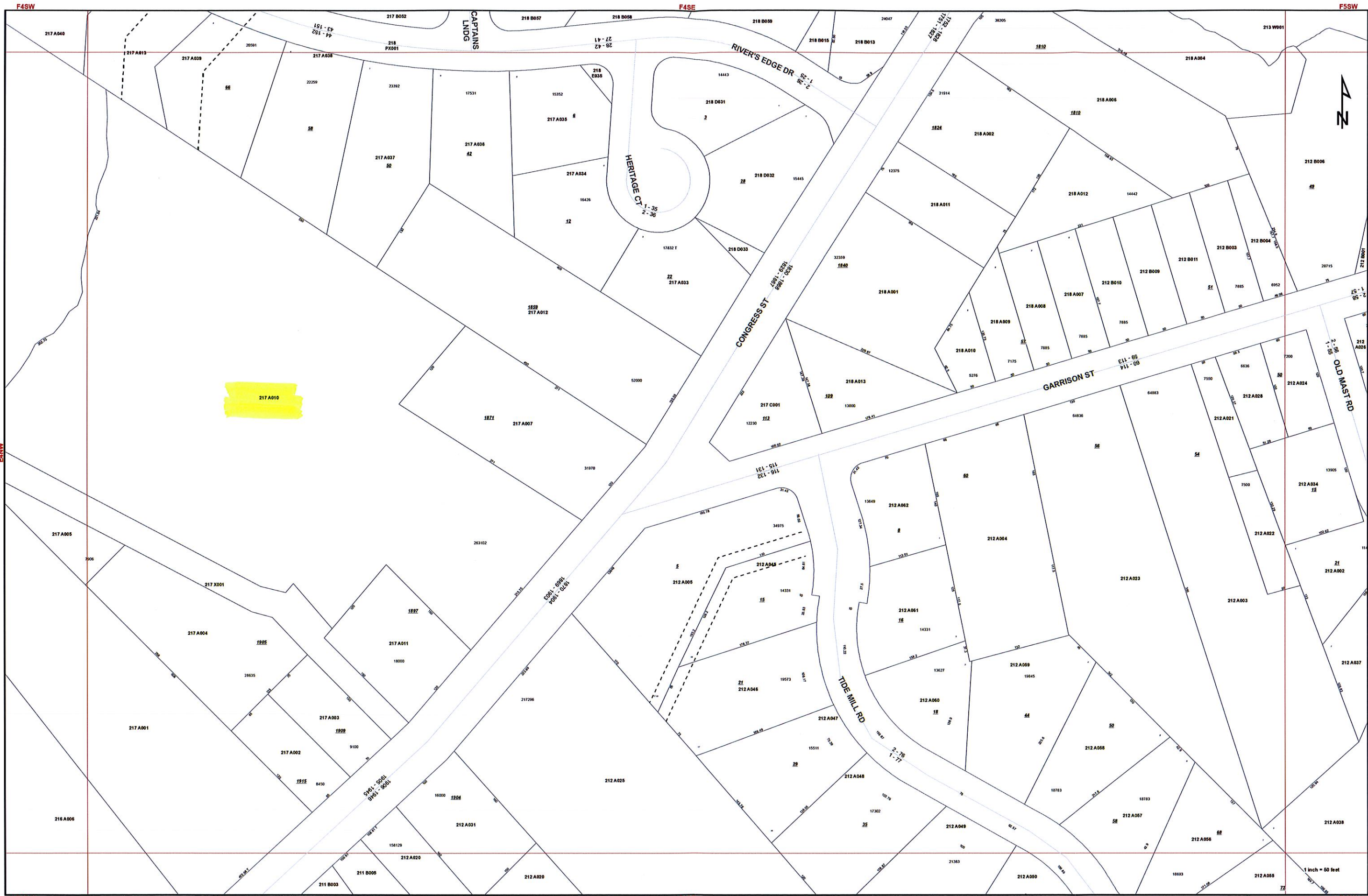


EXHIBIT 4

CONTRACT FOR SALE OF REAL PROPERTY

This Agreement being made this 15th of July, 2015, between PORTLAND/ST. ALBANS, CORP, a Maine corporation ("Seller"), with a mailing address of 1897 Congress Street, Portland, Maine 04102 and PORTLAND CELLULAR PARTNERSHIP, a Maine general partnership d/b/a Verizon Wireless, One Verizon Way, Mail Stop 4AW100, Basking Ridge, New Jersey 07920 (telephone number 866-862-4404) ("Purchaser").

1. Contract for Sale: Seller agrees to sell and Purchaser agrees to buy a certain lot or parcel of land, with any improvements thereon, located at 1877 Congress Street, Cumberland County, State of Maine and more particularly described in Exhibit "A" attached hereto, consisting of approximately 4.04 acres of land, together with all rights, easements and appurtenances benefitting and belonging thereto (the "Premises").

2. Purchase Price and Deposit: The total purchase price for the Premises (the "Purchase Price" shall be _____ subject to proration of taxes and other charges as hereinafter stated, to be paid as follows:

(i) _____ (the "Deposit") shall be delivered in escrow to Seller's real estate agent, Demetria Chadbourne, within five (5) business days after expiration of the Due Diligence Period referred to in Section 12 below; and

(ii) The balance of the Purchase Price shall be paid to Seller at closing by certified check, cashier's check or federal wire transfer, and the Deposit shall be released to Seller from escrow at the time of closing, as provided hereinafter.

3. Title Conveyed: Seller shall convey to Purchaser good clear marketable title in fee simple, insurable at regular rates of title insurance, and free and clear of all tenancies, mortgages, liens, encroachments and encumbrances whatsoever, including restrictions and easements of record that would prevent Purchaser's use of the premises as a communications facility (all or any of which shall be known as a "defect" or "defects"). Purchaser may, in its sole discretion, waive any such defect. Purchaser shall pay the cost of title insurance, including the cost of title examination. If the title to all or part of the Premises is defective or unmarketable, or if any part of the Premises is subject to one or more defects, Seller shall have a reasonable time, not to exceed 30 days after written notice thereof, within which to remedy any such defect, or to obtain title insurance against the same. It is understood that this Agreement and the obligations of Purchaser hereunder shall be conditioned upon Seller's removing all defects as set forth in the Section. If Seller fails to remove said defects within the period provided herein, Purchaser may (a) cure any such matter and deduct the cost thereof from the Purchase Price at closing, or (b) elect to close notwithstanding any such matter, or (c) terminate this Agreement in which case Seller shall refund all payments made by Purchaser hereunder.

4. Deed and Closing: Closing shall take place in the offices of the Purchaser's counsel on a mutually convenient date within thirty (30) business days after satisfaction or expiration of the Zoning Contingency set forth in Section 10 below. The purchase and sale contemplated herein

shall be closed by Purchaser paying to Seller the amount set forth in Section 2, and by Seller executing and delivering to Purchaser a warranty deed conveying title to the Premises in the manner required by Section 3. Seller agrees that the description in the deed to be delivered at closing shall, at the option of Purchaser, utilize a description determined by Purchaser's survey of the Premises. The date of such payment and delivery shall be referred to herein as "the Closing Date". At the time of closing, the Seller shall also provide (1) an owner's affidavit regarding parties in possession and indemnities regarding mechanics' liens sufficient for Purchaser's title insurance company to delete exceptions for such matters from Purchaser's title insurance policy, (2) such evidence of Seller's existence and authority as Purchaser or its title insurance company shall reasonably request, (3) a withholding exemption certificate pursuant to §1445 of the Internal Revenue Code of 1954, as amended, (4) an underground tank notice pursuant to 38 M.R.S. A. § 563(6), and (5) and such other documents as are customarily and reasonably required in order to convey and record title to the Premises.

5. Possession of the Premises: Full possession of the Premises free of all tenants shall be delivered to Purchaser on the Closing Date, with any improvements on the Premises to be in the same condition as they are now, reasonable use and wear excepted.

6. Environmental: Seller warrants that during the period of Seller's ownership of the Premises, the Premises have not been and shall not be used for the storage, generation, discharge or disposal of any hazardous waste, substance or material or other toxic chemical pollutant (including without limitation underground petroleum storage tanks) or otherwise in violation of environmental laws, regulations, guidelines, standards, or policies. Seller further warrants that, to the best of Seller's knowledge, the Premises were not used for any such purposes prior to the time Seller acquired title to the Premises. Use of the Premises for any of such purposes, or the presence of any hazardous or toxic materials, substances or wastes upon or under the Premises, at any time prior to closing, including prior to Seller's acquisition of title to the Premises, shall constitute a title defect, rendering the title unmarketable under the provisions hereinabove. Seller shall defend, indemnify and hold harmless Purchaser, its employees, agents, officers and directors, from and against any and all claims, demands, penalties, fines, liabilities, settlements, damages, costs or expenses, including without limitation, attorney and consultant fees, investigation, cleanup and removal costs, arising out of any breach of the foregoing representations and warranties.

7. Prorations: All rents, real estate and personal property taxes and assessments, sewer and water charges, charges for fuel, service and supply contracts, utilities and the like shall be prorated as of the day of closing. Each party shall pay its share of transfer taxes as provided by law. Assessments, either general or special, for improvements made prior to closing, whether matured or unmatured, shall be paid by Seller. Seller represents and warrants that it has no notice or knowledge of any special assessments having been made or levied against the Premises and to Seller's knowledge there are no public improvements which have been planned, commenced or completed which would result in a special assessment against the Premises. Seller further represents and warrants that Premises is not under any classification for tax purposes resulting in the payment of penalties, charges or other amounts upon the change of use or development thereof. Any inaccuracy in the foregoing representations and warranties shall be deemed a title defect rendering the title unmarketable as aforesaid.

8. Right of Assignment: Purchaser may assign its rights, duties and obligations under this Agreement to Purchaser's principal or subsidiaries, affiliates or subsidiaries of its principal or to any entity which acquires all or substantially all of Purchaser's assets in the market defined by the Federal Communications Commission in which the Property is located by reason of a merger, acquisition or other business reorganization. Said assignment shall be effective upon notice to Seller in the manner provided below. Any other assignment shall require the written consent of Seller, such consent not to be unreasonably withheld.

9. Subdivision Status: Seller represents and warrants to Purchaser that the conveyance of the Premises to Purchaser shall not constitute a subdivision and will not require subdivision approval by the City of Portland.

10. Zoning Contingency: This Agreement is expressly made contingent upon the Purchaser obtaining all governmental variances, zoning changes, permits and approvals needed to permit the Purchaser's use of the premises as a communications facility "Approvals". The term "Approvals" shall include all easements, agreements and other prerequisites which shall be necessary to extend utilities to the Premises. The Seller hereby authorizes Purchaser, in the Seller's name if necessary, and at the Purchaser's expense to apply for and secure from any governmental authority or private party such Approvals as the Purchaser desires. Seller shall reasonably cooperate with Purchaser to assist in obtaining the Approvals, including executing documents reasonably necessary to petition the appropriate public body for zoning relief required for Purchaser's intended purposes. All such activities are to be at the expense of Purchaser. Purchaser shall not be deemed to have "obtained" the Approvals unless (i) all Approvals are final and non-appealable, and not subject to any appeal, and (ii) the Approvals do not contain conditions or requirements unacceptable to Purchaser in its sole discretion. Purchaser shall notify Seller in writing when the Approvals have been obtained. In the event the Approvals have not been obtained on or before the date which is ninety (90) days after the date of execution of this Agreement, or if Purchaser prior to that date determines that the Approvals cannot be obtained in a timely manner, then Purchaser shall have the right to terminate this Agreement by written notice to Seller. If Purchaser timely exercises its right to terminate for any condition contained in this Section, this Agreement shall terminate, the Deposit shall be returned to Purchaser, and neither party shall have any further obligations hereunder except for any obligations expressly designated hereunder to survive the termination of this Agreement. If Purchaser shall be diligently pursuing any Approval at the expiration of the aforesaid ninety (90) day period, Purchaser may by notice to the Seller extend such period for a reasonable period of time (not to exceed one hundred twenty (120) days) in order that the Purchaser may receive a final decision thereon (and notwithstanding such extension Purchaser shall continue to have all of its rights set forth in this Section). Purchaser agrees to make good faith efforts to obtain the Approvals, but in no event shall Purchaser be required to appeal any denial or other negative determination with respect to any Approval.

11. Condemnation, Damage or Destruction: Until the delivery of the deed from Seller to Purchaser, the risk of loss or damage to the Premises by fire or condemnation shall be on Seller. If all or any part of the Premises are condemned, damaged or destroyed prior to the Closing Date, Purchaser shall have the option of terminating this Agreement. In the event of such termination, Seller shall repay all sums theretofore paid by Purchaser.

12. Entry for Inspection; Due Diligence Period: Purchaser is authorized at its expense to enter the Premises and make such inspection, surveys, sub-surface boring tests, environmental assessments, appraisals and other activities of a similar nature as Purchaser shall deem appropriate, so long as Purchaser shall not unreasonably interfere with Seller's use of the Premises. Purchaser will repair any damage caused by these operations. Purchaser shall have a period of ninety (90) days from the date of this Agreement within which to terminate the Agreement by written notice to Seller if Purchaser is not satisfied in its sole discretion with the results of any such inspections, tests, appraisals or surveys.

13. Default: If Purchaser fails to consummate this transaction for any reason constituting a default on the part of the Purchaser, Seller may, as its sole remedy, retain the Deposit as liquidated damages, and this Agreement shall be canceled. The parties agree that actual damages are impossible to determine and agree, after negotiation, that the foregoing liquidated damages are the parties' best estimate of actual damages that would be incurred.

14. Brokers: Each party represents and warrants that Demetria Chadbourne is the only real estate broker involved in this transaction and Seller shall be responsible for the commission to be paid. Each party agrees to hold and indemnify the other harmless from and against any losses, damages, costs or expenses (including attorneys' fees) that either party may suffer as a result of claims made or suits brought by any other broker in connection with this transaction, the obligated party hereunder to be the party whose conduct gives rise to such claim.

15. Successors and Assigns: The terms, covenants and provisions of this Agreement shall extend to and be binding upon the respective executors, administrators, heirs, successors and assigns of Seller and Purchaser.

16. Governing Law: This Contract for Sale of Real Property and the performance thereof shall be governed, interpreted, construed, and regulated by the laws of the State of Maine.

17. Notices: All notices hereunder must be in writing and shall be deemed validly given if sent by certified mail, return receipt requested or by commercial courier, provided the courier's regular business is delivery service and provided further that it guarantees delivery to the addressee by the end of the next business day following the courier's receipt from the sender, addressed as follows (or any other address that the Party to be notified may have designated to the sender by like notice):

Seller: Portland/St. Albans, Corp
1897 Congress Street
Portland, Maine 04102

Purchaser: Portland Cellular Partnership
d/b/a Verizon Wireless
180 Washington Valley Road
Bedminster, New Jersey 07921
Attention: Network Real Estate



With a copy to: Raymond A. Pelletier, Esq.
Verrill Dana, LLP
One Portland Square, 9th Floor
P.O. Box 586
Portland, Maine 04112-0586

Notice shall be effective upon actual receipt or refusal as shown on the receipt obtained pursuant to the foregoing.

18. Miscellaneous: The submission of this Agreement for examination is intended for negotiation and discussion purposes only, and this Agreement shall become effective only upon the execution and delivery by Seller and Purchaser. This document and the exhibits attached hereto constitute the entire agreement of the parties and no oral or implied agreements or representations will be binding upon the parties hereto. The provisions of the Agreement relating to indemnification from one party to the other party shall survive any termination or expiration of this Agreement. Additionally, any provisions of this Agreement which require performance subsequent to the termination or expiration of this Agreement shall also survive such termination or expiration.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their respective seals the day and year first above written.

SELLER:

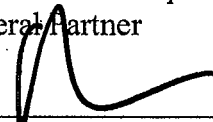
PORTLAND/ST. ALBANS, CORP

By: 
Print Name: Kenneth A Caldwell
Its: PRESIDENT

PURCHASER:

PORTLAND CELLULAR PARTNERSHIP,
d/b/a VERIZON WIRELESS

By Cellco Partnership
Its General Partner

By: 
David R. Heverling
Area Vice President Network

71515

EXHIBIT A

(Description of Property)

That certain parcel of land approximately 4.04 acres in size, situated at 1877 Congress Street, Portland, Maine, identified as tax parcel 217-A-10 and depicted on Exhibit A-1 attached hereto. For source of title see Warranty Deed dated July 16, 2012, recorded in the Cumberland County Registry of Deeds in Book 29756, Page 145.

EXHIBIT A-1

(Depiction of Premises)

A handwritten signature or set of initials, possibly "JH", written in black ink in the bottom right corner of the page.

EXHIBIT 5









Ann Machado - RE: Statement from Stroudwater Village Association regarding Verizon Wireless Conditional Use Application, 1877 Congress Street, Portland

From: Bret Yarrison <byarrison@gmail.com>
To: <amachado@portlandmaine.gov>
Date: 12/3/2015 1:58 PM
Subject: RE: Statement from Stroudwater Village Association regarding Verizon Wireless Conditional Use Application, 1877 Congress Street, Portland
CC: <edsuslovic@portlandmaine.gov>

Ann,

I'd like to second the motion from the SVA with regards to the Verizon Wireless Conditional Use Application on/of 1877 Congress Street.

We have a lot of zoning and development changes going on in our area and I'd like to see things slow down and allow the residents to review these requests.

Thank you,

Bret Yarrison - 35 Penrith Rd.

Ann Machado - Verizon sale

From: raeleneg <raeleneg@maine.rr.com>
To: <amachado@portlandmaine.gov>
Date: 12/4/2015 6:30 AM
Subject: Verizon sale
CC: Charlton Smith <charltonsmith@mac.com>, Charlton Smith <charltonsmith@me...>

Hi,

Sorry but I saw this late.

I am against this Verizon site abutting our neighborhood. I told Carl Smith it would be like a plane taking off. Almost. Not good.

Two of the 5 people who abutt this site have their homes on the market as we speak. This will de-value their properties significantly.

Surely Verizon can find another non-residential site? This is VERY bad for our neighborhood, Anne.

Raelene Gardner & Bill Bartholomew
22 Heritage Court
775-0375

Sent from my U.S. Cellular® Smartphone

Ann Machado

From: bill bartholomew <bartholomewbill@yahoo.com>
To: "amachado@portlandmaine.gov" <amachado@portlandmaine.gov>
Date: 12/4/2015 10:02 AM

Dear Mrs. Machado,

Rivers Edge Development. I think it is a mistake to allow a Generator station to abut the assoc. land as it will produce unwanted noise and noxious fumes. Let them go elsewhere.

Bill Bartholomew
22 Heritage Court

Ann Machado - Verizon equipment building adjacent to River Edge Drive

From: Phil Haskell <pjhaskell@aol.com>
To: <amachado@portlandmaine.gov>
Date: 12/6/2015 8:49 PM
Subject: Verizon equipment building adjacent to River Edge Drive

I agree with the SFHA position. Philip J. Haskell-16 Captains Landing, Portland Maine

Ann Machado - Objection to the Verizon equipment facility adjacent to Rivers Edge Drive

From: Amelia Hassler <ameliahassler@gmail.com>
To: <amachado@portlandmaine.gov>
Date: 12/6/2015 9:44 PM
Subject: Objection to the Verizon equipment facility adjacent to Rivers Edge Drive

Hi Ann,

My name is Amelia Hassler and I purchased a home at 93 River's Edge Drive a little over a year ago. I'm writing with great concern about the proposed zoning change for the Verizon equipment facility. I wanted to formally express my opposition to the possibility of allowing Verizon to build a large commercial facility in such close proximity to our residential neighborhood.

When I bought into this neighborhood just over a year ago, I carefully researched the zoning of the directly adjacent areas, specifically looking for whether or not the residential / natural woodland surroundings would remain intact (hence the property value and aesthetic of the neighborhood would remain intact). Unlike some of my neighbors who bought 10 or more years ago, I paid top dollar for my property... and I'm deeply concerned that the looming presence of such a large industrial commercial facility so close to our own residential properties will significantly reduce the property values, causing me to lose money on such large personal investment.

This is such a special quiet beautiful neighborhood of Portland that has a unique protected feel to it, and I'm greatly saddened and worried that this proposed equipment facility will have an adverse impact for all of us who live here. The idea of a big 'for profit' company swooping in and being able to change the rules, and in doing so disrupt the quality and value of our personal properties, is deeply upsetting.

I've had nothing but positive experiences in the past with your zoning board and the city of Portland in general... so I appeal to you to please not allow commercial use of this land... to not allow big businesses like Verizon to intrude on the protected residential neighborhoods of Portland (where the impact to the individual is deeply felt).

Thank you for your time and your understanding.

Sincerely,

Amelia Hassler
93 Rivers Edge Drive

Ann Machado - Verizon Wireless Conditional Use Application - 1877 Congress Street

From: Dan Peaco <dpeaco@daymarkea.com>
To: "amachado@portlandmaine.gov" <amachado@portlandmaine.gov>
Date: 12/10/2015 8:27 AM
Subject: Verizon Wireless Conditional Use Application - 1877 Congress Street
CC: "edsuslovic@portlandmaine.gov" <edsuslovic@portlandmaine.gov>, "estrimli..."

Ann Machado,

My wife Lindley and I are homeowners in the Stroudwater Farms development. We have recently become aware of the October 21, 2015 Conditional Use Application submitted by Verizon Wireless to the Zoning Board of Appeals. I understand this application was on the agenda of a recent meeting of the Board and is pending a decision at an upcoming meeting. The proposed facility is on a lot at 1877 Congress Street.

We are one of four property owners in Stroudwater farms that directly abut the 4 acre property that is the location for the proposed Verizon Wireless facility. Our lot is identified in the depiction of the premises included in Attachment 1-A of the Application.

It is my understanding that you have already received some comments from Michael Rodgers (our neighbor and also a direct abutter to the property) and that Gerard Kiladjian (also a direct abutter) attended the recent Board meeting. Ed Resnisky is the fourth direct abutter in our development.

At this point, we are still learning about the proposed plan. We are interested in being included in any communications or notices that the Zoning Board of Appeals issues with respect to this matter. We are also concerned and interested in receiving the feedback on the questions that have been raised by Michael Rodgers and others thus far. I also understand that other homeowners in the Stroudwater Farms have raised concerns to your attention, as well.

We will be seeking additional information in the coming days and will offer our further comments and concerns once we have a better understanding of the proposal.

Thank you,

Daniel E. Peaco

58 River's Edge Drive
PORTLAND, ME 04102

HOME: (207) 773-2449
CELL: (617) 283-8163
dpeaco@maine.rr.com

Ann Machado - Concerns relating to Verizon's October 20, 2015, Conditional Use Appeal Application for 1877 Congress Street, Portland

From: Michael Rogers <michael.rogers66@gmail.com>
To: <amachado@portlandmaine.gov>, <edsuslovic@portlandmaine.gov>, <estrimlin...>
Date: 12/8/2015 11:11 AM
Subject: Concerns relating to Verizon's October 20, 2015, Conditional Use Appeal Application for 1877 Congress Street, Portland

Dear Portland Zoning Board of Appeals:

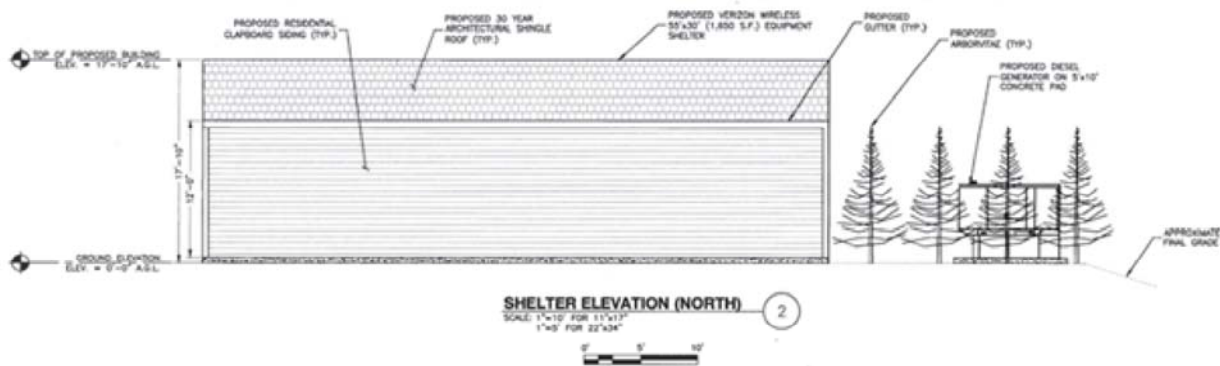
I am an abutter to 1877 Congress Street, Portland, Maine. I live at 66 River's Edge Drive (Lot 9) in the Stroudwater Farm subdivision. I have the following concerns relating to Verizon's Conditional Use Appeal application dated October 20, 2015.

1) The following is the last of Portland's three standards for a Conditional Use:

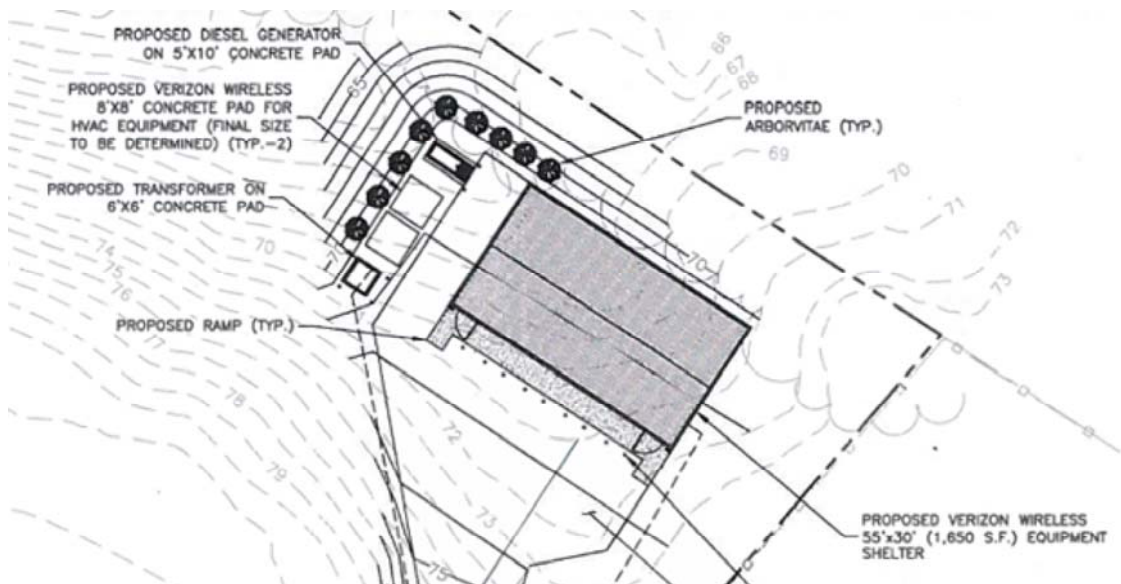
- c. The design and operation of the proposed use, including but not limited to landscaping, screening, sign, loading, deliveries, trash or waste generation, arrangement of structures, and materials storage will not have a substantially greater effect/impact on surrounding properties than those associated with surrounding uses or other allowable uses in the zone.

RESPONSE: The proposed Facility has been designed to fit into the existing landscape of the site. The equipment shelter has been designed with an architectural shingle roof and residential clapboard siding to fit in with the surrounding neighborhood. There will be no signs, loading, deliveries, trash, waste generation, or materials stored at the facility.

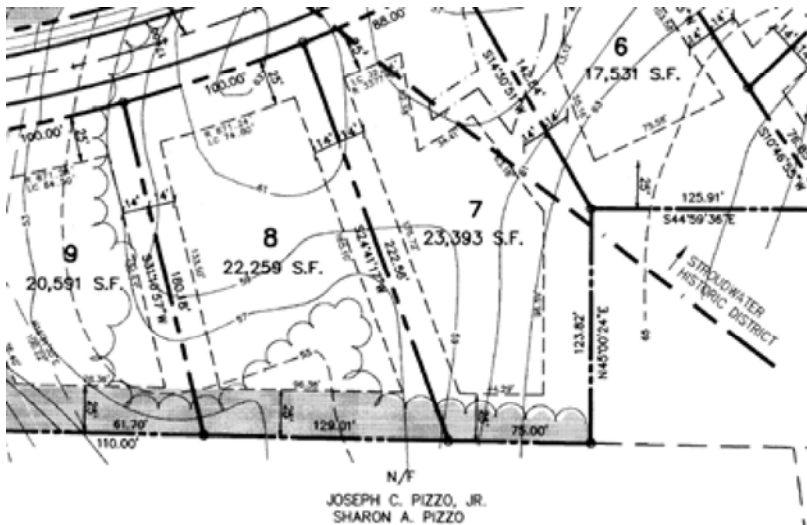
The Facility plans show a final elevation just below 18' above grade.



As planned, the center of the grade for the Facility would be 71' above grade. Adding the building's 18' elevation, depicts the center of the Facility would rise about 89' above sea level.



Consider the grade levels of the abutting neighbors (proposed location is in the lower right corner of this plan - N/F Pizzo):



The following are the average grades of the abutting lots in comparison to the Facility's highest point:

Lot 6 63' Facility is 29% higher

Lot 7 60' Facility is 33% higher

Lot 8 59' Facility is 34% higher

Lot 9 55' Facility is 38% higher

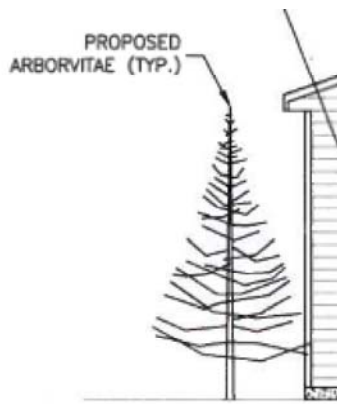
Lots 6 and 7 are most adversely affected given their close proximity. Is it necessary for the building to be so tall? Could the building be partially constructed below grade to lessen its height and thereby better "fit in to the surrounding neighborhood" as quoted from the application?

Given its plan, how can the Facility truly "fit in to the existing landscape of the site"?

Rather than fitting in, it would dominate the site. Its flora is slow growing and nowhere near 18' in height in unison. The statement, "fit in to the existing landscape of the site", is a non-sequitur.

2) The application indicates arborvitae will be planted, yet did not submit a landscaping plan.

The following is all I gleaned from the application.



Wouldn't it be reasonable to at least proffer the following?

types of arbovitae (ideally, there should be a mix, as there are five species of which two are indigenous to North America)

Number of trees

Location of said trees (optimally they would be staggered)

Planting distance between trees

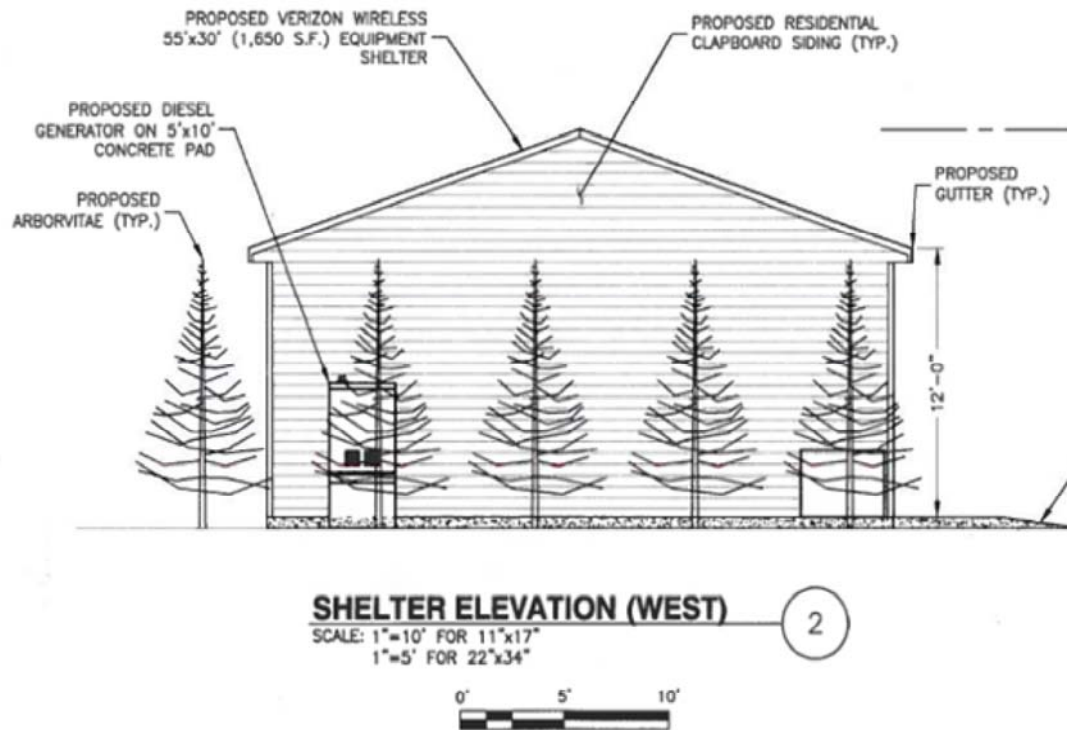
Grade level of trees

Height of trees upon planting

How much of the Facility's north and west side will be obscured with the trees

Tony Muench is a local landscape architect and an expert on designing a landscaping plan to meet the needs of all stakeholders. I highly recommend Tony.

3) Why is the diesel generator planned for the west side of the Facility?



I would think Verizon would want to be a good neighbor and keep the generator away from its immediate neighbors. This plan fails that.

Are there any specifications for the decibel level of the generator?

The elevations should clearly state the clapboard siding would be vinyl.

Why are gutters needed? Properly insulated buildings don't need gutters. Storm water can easily be collected below grade with perimeter drainage and directed a designated area. Further, gutters require constant maintenance.

4) Verizon wants to acquire 4 acres yet seeks to shoehorn the Facility in one small corner of the property closest to its Stroudwater Farm neighbors and another Congress Street abutter.



Is there a reason for its location? Is this the optimal location given the lower grade of the site so as to be less conspicuous? The center of the 4-acre lot appears to be at least 15' higher so the proposed site may be the best spot, but I do not have sufficient data to form an opinion.

) What plans does Verizon have for the remaining land not planned currently for development?

ould Verizon consider setting adding the undeveloped land to remain deeded “forever wild”? Perhaps the land could be donated to Portland Trails and used for passive recreation. Speaking only for myself, I believe it would allay the concerns of many of my neighbors if Verizon set aside the remaining land as “green space” and not propagate additional commercial buildings.

do not want to replicate what occurred on nearby Cobb Avenue in Stroudwater when a rental car facility was approved and constructed in 2012.



After three years, the 6' stockade fence and immature and sparsely planted arborvitae offer no meaningful blocking of the commercial enterprise abutting the residential zone.

7) Have you considered designing the Facility to appear like an old barn?

The present design of the Facility is not inspiring. The planned vinyl sided warehouse offers NO architectural appeal in one of Portland's oldest neighborhoods. Instead of the monolithic plastic building with no break (windows) in its design, perhaps a clapboard (or shingle) building shaped and

stained like an old barn would be more appropriate, visually pleasing and more fitting for the lot, given it is just outside the Stroudwater Historic District.

I am a real estate agent and have also designed and built single-family homes and commercial buildings. I am a native of Stroudwater, trustee of the Stroudwater Village Association (SVA) and resident of Stroudwater Farm. My letter does not represent the position of anyone but me.

Residents are naturally concerned for the further erosion of the character of residential life here in Stroudwater.

Notice of Verizon's intentions occurred so quickly around the holidays it has made it difficult for my fellow Stroudwater residents to properly evaluate the application.

If Verizon truly wants to be a "good neighbor", then I recommend Verizon reach out to the SVA and convene a neighborhood meeting inviting Stroudwater residents and Portland Trails. Verizon would present their proposed plan and listen to the concerns of Stroudwater residents and hopefully reach an agreement meeting the needs of all stakeholders prior to the Portland Zoning Board consider their presently incomplete application for conditional use appeal approval.

Thank you.

Regards,

Michael Rogers, MBA, Realtor

Ann Machado - Zoning change outer Congress St

From: raeleneg <raeleneg@maine.rr.com>
To: <amachado@portlandmaine.gov>
Date: 12/8/2015 5:58 AM
Subject: Zoning change outer Congress St
CC: Charlton Smith <charltonsmith@me.com>

Hi Ann,

It just occurred to me that there is commercial zoning less than a mile from the Elks Club and from the Masonic building, just past Unum.

Why are these projects not looking into that as an option? Lot less hassle. Of course it's more money but that's because it's zoned commercial.

Also if these projects go thru, we are setting a precedent for the rest of the Stroudwater area in the future.

These are not isolated incidents. Zoning is zoning.

Also, Ann, the Verizon Issue involves wetlands. They may have to build closer to Congress St than they told us.

Thank you.

Raelene Gardner
Rivers Edge

Sent from my U.S. Cellular® Smartphone

Ann Machado - Proposed re-zoning of Congress Street

From: "Galardo, Barbara (Portland, ME)" <bgalardo@fairpoint.com>
To: "amachado@portlandmaine.gov" <amachado@portlandmaine.gov>
Date: 12/7/2015 4:36 PM
Subject: Proposed re-zoning of Congress Street

Ann,

I understand that a zoning request has been made to accommodate a storage unit for Verizon on outer Congress Street and that the position of the Verizon building may affect the property values of the residential homes on River's Edge Drive. Please postpone the approval of the request until the homeowners on River's Edge can determine if there is any negative affect of the re-zoning request.

Thank you

Barbara Galardo
88 River's Edge Dr.
Portland, ME 04102

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Ann Machado - Rebuttal: Verizon 1877 Congress St Generator Proposal

From: "Raelene Gardner" <raeleneg@maine.rr.com>
To: <amachado@portlandmaine.gov>
Date: 12/4/2015 4:11 PM
Subject: Rebuttal: Verizon 1877 Congress St Generator Proposal
CC: <stroudwatervillageassociation@gmail.com>, "Charlton Smith" <charltons...>

Hi again, Ann,

I sent you an email against this proposal on Dec3.

Again, I think this project will devalue all the homes that abut the proposed Verizon generator site.

That generator will be like a plane taking off.

We all know what a small generator sounds like;

I can only imagine the noise a generator of that size will produce.

This will adversely affect property values in the ten's of thousands, I'm afraid.

I wouldn't buy a house next to one . . .

May I recommend that any evaluation, review or consideration of this project include an onsite visit to an existing Verizon generator?

I would like for an SVA and/or River's Edge member to be in attendance.

where are other sites located in Maine?

Surely this generator does not need to be in the midst of a residential area?

Once it is built, it will be too late . . .

Thank you,

Raelene Gardner

(207) 775-0375 h

(207) 408-1626 c

<mailto:raeleneg@maine.rr.com>

Ann Machado - Fwd: Re: Zoning change outer Congress St

From: raeleneg <raeleneg@maine.rr.com>
To: Charlton Smith <charltonsmith@mac.com>, Ann Machado <AMACHADO@portlandma...
Date: 12/10/2015 4:32 PM
Subject: Fwd: Re: Zoning change outer Congress St
CC: BILL'S <bartholomewbill@yahoo.com>, <lpeaco@maine.rr.com>

Sent from my U.S. Cellular® Smartphone

----- Original message -----

From: raeleneg
 Date: 12/10/2015 3:27 PM (GMT-05:00)
 To: Ann Machado
 Cc: Charlton Smith , Charlton Smith , "dkoloski@mba2002.hbs.edu" , lizfreeman@maine.rr.com, Robert & Susan Close , lpeaco@maine.rr.com
 Subject: Re: Zoning change outer Congress St

Thank you Ann.

Also, please add the rest of my concerns:

1. My biggest concern is the negative effect on our property values. Our neighborhood values have held steady. This will impact the abutting properties significantly. I would not pay \$400,000 for a house that had that in the back yard. Would you?
 2. The noise is a major factor. We need to visit an existing site to know the real impact and decibel level.
 3. there are wetlands on that property, where the proposed footprint is. It seems unrealistic they would build on wetlands.
 4. Carcinogenic Fumes from the generator.
- How can you prevent that from a diesel generator?

Sent from my U.S. Cellular® Smartphone

Ann Machado - Re: Objection to the Verizon equipment facility adjacent to Rivers Edge Drive

From: Amelia Hassler <ameliahassler@gmail.com>
To: Ann Machado <AMACHADO@portlandmaine.gov>
Date: 12/10/2015 7:28 PM
Subject: Re: Objection to the Verizon equipment facility adjacent to Rivers Edge Drive

Hi Ann,

Thanks so much for your response. There has been a lot of research and dialogue in the neighborhood since I sent you my email. And as I learn more about the proposed placement of the building on the site map (closest proximity to the neighborhood and highest most visible elevation possible) it leaves me with even greater concerns about how big and imposing a presence it will have (not just for the direct abutters but for all of us). Truly a terrible eye sore in a beautiful natural space. I'm deeply distressed.

Thanks again for your response!

Amelia

Sent from my iPhone

On Dec 10, 2015, at 2:39 PM, Ann Machado <AMACHADO@portlandmaine.gov> wrote:

Amelia -

I have passed your email on to the applicant, Verizon so they can address your concerns at the next meeting. The Board will also be receiving your email before the meeting. When we know the date of the next meeting, we will notify you. This email has also become part of the permanent record of the appeal.

Ann Machado

Ann Machado
 Zoning Administrator
 Planning & Urban Development
 Portland, Maine
 (207) 874-8709

>>> Amelia Hassler <ameliahassler@gmail.com> 12/6/2015 9:44 PM >>>

Hi Ann,

My name is Amelia Hassler and I purchased a home at 93 River's Edge Drive a little over a year ago. I'm writing with great concern about the proposed zoning change for the Verizon equipment facility. I wanted to formally express my opposition to the possibility of allowing Verizon to build a large commercial facility in such close proximity to our residential

neighborhood.

When I bought into this neighborhood just over a year ago, I carefully researched the zoning of the directly adjacent areas, specifically looking for whether or not the residential / natural woodland surroundings would remain intact (hence the property value and aesthetic of the neighborhood would remain intact). Unlike some of my neighbors who bought 10 or more years ago, I paid top dollar for my property... and I'm deeply concerned that the looming presence of such a large industrial commercial facility so close to our own residential properties will significantly reduce the property values, causing me to lose money on such large personal investment.

This is such a special quiet beautiful neighborhood of Portland that has a unique protected feel to it, and I'm greatly saddened and worried that this proposed equipment facility will have an adverse impact for all of us who live here. The idea of a big 'for profit' company swooping in and being able to change the rules, and in doing so disrupt the quality and value of our personal properties, is deeply upsetting.

I've had nothing but positive experiences in the past with your zoning board and the city of Portland in general... so I appeal to you to please not allow commercial use of this land... to not allow big businesses like Verizon to intrude on the protected residential neighborhoods of Portland (where the impact to the individual is deeply felt).

Thank you for your time and your understanding.

Sincerely,

Amelia Hassler
93 Rivers Edge Drive

Ann Machado - Concerns RE: Verizon's October 20, 2015, Conditional Use Appeal Application for 1877 Congress Street, Portland

From: "Raelene Gardner" <raeleneg@maine.rr.com>
To: <amachado@portlandmaine.gov>, <edsuslovic@portlandmaine.gov>, <estrimlin...
Date: 12/20/2015 9:16 AM
Subject: Concerns RE: Verizon's October 20, 2015, Conditional Use Appeal Application for 1877 Congress Street, Portland
CC: "'Charlton Smith'" <charltonsmith@mac.com>, <stroudwatervillageassociati...

Hi again Ann,

I sent you the email below on Dec10 and never received a confirmation from you.

I did receive a confirmation for a previous email re: concerns about the Verizon zoning appeal on Congress St.

Not sure why you would not receive this one or if I am only allowed one "concern" letter.

Please add the rest of my concerns below:

1. My biggest concern is the negative effect on our property values.

Our neighborhood values have held steady. This will impact the abutting properties significantly.

I would not pay \$400,000 for a house that had that in the back yard. Would you?

2. The noise is a major factor. We need to visit an existing site to know the real impact and decibel level.

3. there are wetlands on that property, where the proposed footprint is. It seems unrealistic they could build on wetlands.

4. Carcinogenic Fumes from the generator.

Thank you,

Raelene Gardner

(207) 775-0375 h

(207) 408-1626 c

<mailto:raeleneg@maine.rr.com>

Ann Machado - RE: Date for ZBA meeting for Verizon equipment shelter

From: "Galardo, Barbara (Portland, ME)" <bgalardo@fairpoint.com>
To: AMACHADO@portlandmaine.gov
Date: 12/28/2015 8:12 AM
Subject: RE: Date for ZBA meeting for Verizon equipment shelter

Unless someone can provide another definition of "Utility" per the City or State, Verizon is not a Utility Provider. Therefore, they cannot build a "substation". Please see the definition of a Public Utility and a Telephone Utility per the Maine Statutes that govern telecommunications below. Verizon sold its "public utility" to FairPoint, Inc. in March 2008. (Lots of Folks still refer to FairPoint as Verizon). In addition to the rules cited below, the Maine Public Utility Commission website does not show Verizon as a Maine Telephone Utility.

Title 35-A: PUBLIC UTILITIES Part 1 Chapter 1

§102. Definitions

13. Public utility. "Public utility" includes every gas utility, natural gas pipeline utility, transmission and distribution utility, telephone utility, water utility and ferry, as those terms are defined in this section, and each of those utilities is declared to be a public utility. "Public utility" does not include the operation of a radio paging service, as that term is defined in this section, or mobile telecommunications services unless only one entity or an affiliated interest of that entity, as defined in section 707, subsection 1, paragraph A, exclusively controls the use of the radio frequency spectrum assigned by the Federal Communications Commission to provide mobile service to the service area. "Public utility" includes a smart grid coordinator as defined in section 3143, subsection 1, paragraph B.

19. Telephone utility. "Telephone utility" includes every person, its lessees, trustees, receivers or trustees appointed by any court, that provides telephone service for compensation inside this State. "Telephone utility" also includes a dark fiber provider. "Telephone utility" does not include any person or entity that is excluded from the definition of "public utility" as defined in subsection 13, subject to the provisions of subsection 13, paragraphs A to C.

Barbara Galardo

From: Ann Machado [mailto:AMACHADO@portlandmaine.gov]
Sent: Monday, December 21, 2015 8:36 AM
To: pjhaskell@aol.com; dpeaco@daymarkea.com; Galardo, Barbara (Portland, ME); amelaihassler@gmail.com; byarrison@gmail.com; michael.rogers66@gmail.com; Stroudwater Village Association Board of Trustees; bartholomewbill@yahoo.com
Subject: Date for ZBA meeting for Verizon equipment shelter

I just wanted to let you know that Verizon is planning to come back before the Zoning Board of Appeals on Thursday, January 21, 2016.

Ann Machado

Ann Machado
Zoning Administrator
Planning & Urban Development
Portland, Maine
(207) 874-8709

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Ann Machado - Statement from Stroudwater Village Association regarding Verizon Wireless Conditional Use Application, 1877 Congress Street, Portland

From: Stroudwater Village Association Board of Trustees
<stroudwatervillageassociation@gmail.com>
To: <amachado@portlandmaine.gov>
Date: 12/3/2015 12:26 PM
Subject: Statement from Stroudwater Village Association regarding Verizon Wireless Conditional Use Application, 1877 Congress Street, Portland
CC: Edward Suslovic <edsuslovic@portlandmaine.gov>

Hello Ann, the SVA may not be able to send a representative in person tonight, so please read this statement into the record from the SVA.

Thank you!

-Dan Koloski, SVA President

TO: Ann Machado on behalf of Zoning Board of Appeals, City of Portland

CC: Councilor Ed Suslovic

FROM: Stroudwater Village Association

RE: Statement from Stroudwater Village Association regarding Verizon Wireless Conditional Use Application, 1877 Congress Street, Portland

DATE: 12/3/2015

The SVA requests that the vote on the Verizon Wireless Conditional Use Application, 1877 Congress Street, Portland be tabled until at least January 2015 so that our residents have time to evaluate the proposal, both on its own and in the context of other proposed nearby activity in the neighborhood.

It's important to note that the SVA did not receive any notice of this meeting, but was in fact alerted to it by watchful residents only on Monday November 30. As such, we have not had time to adequately collect feedback from residents.

Questions specific to the proposal that we would like to discuss with the applicant include:

- * Proximity of the building to residences in the River's Edge neighborhood.
- * Expected amount of noise and light from the generator facility (related to the previous point)
- * Ensuring the rest of the parcel remains green space and/or residential development, and that this is not a prelude to a zoning conversion request or cell tower proposal

In terms of the larger context, as the Zoning office is aware, the neighborhood is currently involved in an active discussion about the proposed re-zoning of the nearby Elks Club property from residential R-2 to commercial O-P. We have repeatedly requested that the city work with us to think about the bigger picture for the neighborhood before making these kinds of changes, especially in light of the housing shortage in Portland (although not a zoning conversion, this proposal would also remove potential housing stock from the inventory). As such, we would like to make sure that this specific proposal is evaluated in the context of the other discussions happening in the neighborhood.

The bottom line is that this proposal would benefit from some more time to evaluate, and so **the SVA requests that the vote on the Verizon Wireless Conditional Use Application, 1877 Congress Street, Portland be tabled until at least January 2015 so that our residents have time to evaluate the proposal, both on its own and in the context of other proposed nearby activity in the neighborhood.**

Thank you for your consideration.

The Stroudwater Village Association is a Maine Non-Profit corporation. All residents of Stroudwater are members and invited to participate in all of our activities.

Find us on the web at <http://www.stroudwatervillage.org> and
<http://www.livinginportland.org/stroudwater.htm>

Find us on Facebook at <https://www.facebook.com/StroudwaterVillageAssociation>

Verrill Dana^{LLP}

Attorneys at Law

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207-774-4000 • FAX 207-774-7499
www.verrilldana.com

January 4, 2016

Via Hand Delivery

City of Portland Zoning Board of Appeals
c/o Ann Machado
389 Congress St., Room 315
Portland, ME 04101

Re: Conditional Use Application—Supplemental Information
Proposed Verizon Wireless Facility

Dear Zoning Board of Appeals:

Enclosed please find eleven (11) copies of additional information requested by the Zoning Board of Appeals during the December 3, 2015 meeting. Specifically, the Board requested Verizon Wireless to submit information regarding the sound output from the proposed diesel generator and visual simulations of the proposed project.

Generator

Enclosed please find spec sheets estimating sound output from the generator proposed here. The estimated sound output from a diesel generator is 77 dBA at a distance of 23 feet (using the proposed Level 2 Sound Enclosure described herein), which is the property line. The projected sound output is 64 dBA at 100 feet.¹ Please note that the sound estimates are based on a generator located on a 100 foot concrete pad. Here, the generator will be on a significantly smaller pad with intervening vegetation, which will further reduce the sound at the property line and beyond.

The Board also asked for some comparative sound information. Below are some common examples:

Dishwasher: 50 dBA
Air Conditioner: 60 dBA
Vacuum cleaner: 75 dBA
Garbage Disposal: 80 dBA
Lawn Mower: 90 dBA

¹ The sound levels reflected in the attached specs are projected for a gas generator. A 3 dBA upward adjustment is appropriate for the proposed diesel generator and it has been included in the numbers presented here.

January 4, 2016

Page 2

Emergency Vehicle Siren: 115 dBA

Jet engine at takeoff: 140 dBA

Visual Assessment

Enclosed are visual simulations depicting the proposed generator building and access drive. In addition, the consultant included photographs from River's Edge drive and Heritage Court showing the approximate location of the building from those locations.

We respectfully request that the Zoning Board of Appeals consider this additional information and the entirety of Verizon's application at its January 21, 2016 meeting. Please do not hesitate to contact the project manager, Matt Burke (at 508-930-0974), or me should you have any questions.

Thank you.

Very truly yours,



Kelly B. Boden

KBB/mtt

Enclosures

cc: Matt Burke, Tower Resource Management, Inc.

SD135 SD150

Liquid Cooled Diesel Engine Generator Sets

Standby Power Rating

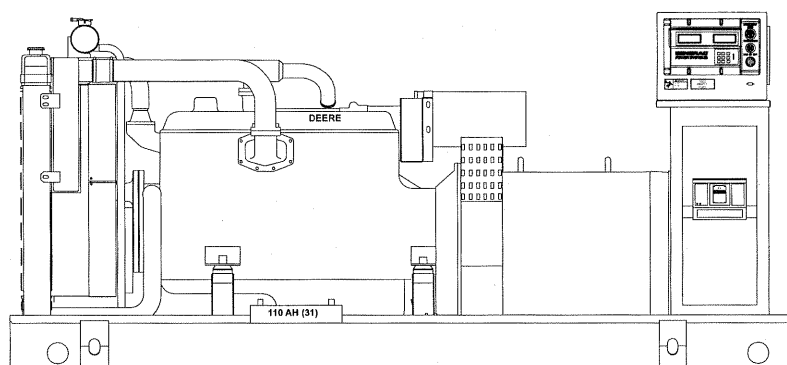
135KW 60Hz

150KW 60 Hz

Prime Power Rating

120KW 60 Hz

135KW 60 Hz



Power Matched

GENERAC 6.8 DTA ENGINE

Turbo-Charged, Aftercooled

EPA Tier III Compliant

FEATURES

■ **INNOVATIVE DESIGN & PROTOTYPE TESTING** are key components of GENERAC'S success in "IMPROVING POWER BY DESIGN." But it doesn't stop there. Total commitment to component testing, reliability testing, environmental testing, destruction and life testing, plus testing to applicable CSA, NEMA, EGSA, and other standards, allows you to choose GENERAC POWER SYSTEMS with the confidence that these systems will provide superior performance.

■ **TEST CRITERIA:**

- ✓ PROTOTYPE TESTED
- ✓ SYSTEM TORSIONAL TESTED
- ✓ ELECTRO-MAGNETIC INTERFERENCE
- ✓ NEMA MG1 EVALUATION
- ✓ MOTOR STARTING ABILITY
- ✓ SHORT CIRCUIT TESTING
- ✓ UL 2200 COMPLIANCE AVAILABLE

■ **MICROPROCESSOR CONTROLLED VOLTAGE AND FREQUENCY REGULATION.** Digital microprocessor control of engine and generator functions and protective systems integrated

into a single controller for unparalleled performance and reliability. LCD display of all engine and generator functions and remote monitoring via GenLink® software.

■ **SINGLE SOURCE SERVICE RESPONSE** from Generac's dealer network provides parts and service know-how for the entire unit, from the engine to the smallest electronic component. You are never on your own when you own a GENERAC POWER SYSTEM.

■ **ECONOMICAL DIESEL POWER.** Low cost operation due to modern diesel engine technology. Better fuel utilization plus lower cost per gallon provide real savings.

■ **LONGER ENGINE LIFE.** Generac heavy-duty diesels provide long and reliable operating life.

■ **GENERAC TRANSFER SWITCHES AND ACCESSORIES.** Long life and reliability is synonymous with GENERAC POWER SYSTEMS. One reason for this confidence is that the GENERAC product line includes its own transfer systems, accessories, and controls for total system compatibility.

GENERAC®

APPLICATION & ENGINEERING DATA

SD135/SD150

GENERATOR SPECIFICATIONS

TYPE Four-pole, revolving field
ROTOR INSULATION Class H
STATOR INSULATION Class H
TOTAL HARMONIC DISTORTION <3.0%
TELEPHONE INFLUENCE FACTOR (TIF) <50
ALTERNATOR Self-ventilated and drip-proof
BEARINGS (PRE-LUBED & SEALED) 2
COUPLING Flexible Disc
LOAD CAPACITY (STANDBY) 100%

NOTE: Emergency loading in compliance with NFPA 99, NFPA 110. Generator rating and performance in accordance with ISO8528-5, BS5514, SAE J1349, ISO3046 and DIN6271 standards.

EXCITATION SYSTEM

PERMANENT MAGNET PILOT EXCITER Eighteen-pole exciter ✓
Magnetically coupled DC current ✓
Mounted outboard of main bearing ✓
REGULATION H100 Controller Digital ✓
3 Phase Sensing, $\pm 1\%$ regulation ✓

GENERATOR FEATURES

- ☐ Revolving field heavy duty generator
- ☐ Directly connected to the engine
- ☐ Operating temperature rise 120 °C above a 40 °C ambient
- ☐ Insulation is Class H rated at 150 °C rise
- ☐ All prototype models have passed three phase short circuit testing

CONTROL PANEL FEATURES

- ☐ TWO FOUR LINE LCD DISPLAYS READ:
 - Voltage (all phases)
 - Power factor
 - kVAR
 - Engine speed
 - Run hours
 - Fault history
 - Coolant temperature
 - Low oil pressure shutdown
 - Overvoltage
 - Low coolant level
 - Not in auto position (flashing light)
 - ATS selection
 - Current (all phases)
 - kW
 - Transfer switch status
 - Low fuel pressure
 - Service reminders
 - Oil pressure
 - Time and date
 - High coolant temperature shutdown
 - Overspeed
 - Low coolant level
 - Exercise speed
- ☐ INTERNAL FUNCTIONS:
 - FT function for alternator protection from line to neutral and line to line short circuits
 - Emergency stop
 - Programmable auto crank function
 - 2 wire start for any transfer switch
 - Communicates with the Generac HTS transfer switch
 - Built-in 7 day exerciser
 - Adjustable engine speed at exerciser
 - RS232 port for GenLink® control
 - RS485 port remote communication
 - Canbus addressable
 - Governor controller and voltage regulator are built into the master control board
 - Temperature range -40 °C to 70 °C

ENGINE SPECIFICATIONS

MAKE DEERE
MODEL See Exhaust Emission Sheet
ENGINE FAMILY First digit is Cert. Yr. (i.e. 7, 8, 9) _JDXL06.8104
CYLINDERS 6 in-line
DISPLACEMENT 6.8 Liters (415 cu. in.)
BORE 106 mm (4.19 in.)
STROKE 127 mm (5.0 in.)
COMPRESSION RATIO 17.0:1
INTAKE AIR Turbocharged, Aftercooled
NUMBER OF MAIN BEARINGS 7
CONNECTING RODS 6-Carbon Steel
CYLINDER HEAD Cast Iron with Overhead Valve
PISTONS 6-Heat Resistant Aluminum Alloy
CRANKSHAFT Case Hardened, Die Forged, Carbon Steel

VALVE TRAIN

LIFTER TYPE Solid
INTAKE VALVE MATERIAL Special Heat Resistant Steel
EXHAUST VALVE MATERIAL Special Heat Resistant Steel
HARDENED VALVE SEATS Replaceable
VALVES PER CYLINDER 2

ENGINE GOVERNOR

☐ ELECTRONIC Standard
FREQUENCY REGULATION, NO-LOAD TO FULL LOAD ... Isochronous
STEADY STATE REGULATION $\pm 0.25\%$

LUBRICATION SYSTEM

TYPE OF OIL PUMP Forced Feed Lubrication w/ Oil Pump
OIL FILTER Full Flow, Cartridge
CRANKCASE CAPACITY 22.7 Liters (6.0 U.S. gallons)

COOLING SYSTEM

TYPE OF SYSTEM Pressurized, closed recovery
WATER PUMP Pre-lubed, Self-Sealing
TYPE OF FAN Pusher
NUMBER OF FAN BLADES 7
DIAMETER OF FAN 650 mm (26.0 in.)
COOLANT HEATER 120V, 1800 W

FUEL SYSTEM

FUEL #2D Fuel (Min Cetane #40)
(Fuel should conform to ASTM Spec.)
FUEL FILTER 10 Micron
FUEL INJECTION PUMP ZEXEL
FUEL PUMP Mechanical
INJECTORS Multi-hole, nozzle type
ENGINE TYPE Direct injection
FUEL LINE (Supply) 9.53 mm (0.375 in.)
FUEL RETURN LINE 9.53 mm (0.375 in.)

ELECTRICAL SYSTEM

BATTERY CHARGE ALTERNATOR 45 Amps at 24 V
STARTER MOTOR 24 V
RECOMMENDED BATTERY 2-12V, 31
GROUND POLARITY Negative



SD135/SD150

OPERATING DATA

	STANDBY				PRIME			
	SD135		SD150		SD135		SD150	
GENERATOR OUTPUT VOLTAGE/KW-60Hz	kW	Rated AMP	kW	Rated AMP	kW	Rated AMP	kW	Rated AMP
120/240V, 1-phase, 1.0 pf	135	563	150	625	120	500	135	563
120/208V, 3-phase, 0.8 pf	135	468	150	520	120	416	135	468
120/240V, 3-phase, 0.8 pf	135	406	150	451	120	361	135	406
277/480V, 3-phase, 0.8 pf	135	203	150	226	120	180	135	203
600V, 3-phase, 0.8 pf	135	162	150	180	120	144	135	162
NOTE: Consult your Generac dealer for additional voltages.								
MOTOR STARTING								
Maximum KVA with 35% instantaneous voltage dip	208/240V	400/480V	208/240V	400/480V	208/240V	400/480V	208/240V	400/480V
with standard alternator; 60 Hz	348	464	348	464	348	464	348	464
with optional alternator; 60 Hz	490	653	490	653	490	653	490	653
FUEL								
Fuel consumption—60 Hz	25%	50%	75%	100%	25%	50%	75%	100%
Load kW @ %	33.75	67.5	101.25	135	37.5	75	112.5	150
gal./hr.	2.87	5.45	7.95	9.89	3.11	5.89	8.60	10.83
Liters/Hr.	10.85	20.61	30.11	37.43	11.75	22.30	32.55	40.99
COOLING								
Coolant capacity System - lit. (US gal.)	42.4 (11.2)		42.4 (11.2)		42.4 (11.2)		42.4 (11.2)	
Engine - lit. (US gal.)	13.0 (3.4)		13.0 (3.4)		13.0 (3.4)		13.0 (3.4)	
Radiator - lit. (US gal.)	29.4 (7.8)		29.4 (7.8)		29.4 (7.8)		29.4 (7.8)	
Coolant flow/min. 60 Hz - lit. (US gal.)	265 (70)		265 (70)		265 (70)		265 (70)	
Heat rejection to coolant BTU/hr.	263,000		293,000		211,200		234,000	
Inlet air 60 Hz - m ³ /min. (cfm)	259 (9,128)		259 (9,128)		259 (9,128)		259 (9,128)	
Max. operating air temp onto radiator °C (°F)	60 (140)		60 (140)		60 (140)		60 (140)	
*see note								
Max. operating ambient temp °C (°F)	50 (122)		50 (122)		50 (122)		50 (122)	
*see note								
Max. external pressure drop on rad in. H ₂ O	0.5		0.5		0.5		0.5	
COMBUSTION AIR REQUIREMENTS								
Flow at rated power 60 Hz - m ³ /min. (cfm)	12.5 (442.0)		14.5 (512.3)		10.0 (353.6)		11.7 (414.8)	
EXHAUST								
Exhaust flow at rated output 60 Hz - m ³ /min. (cfm)	36.8 (1301)		42.7 (1508)		28.6 (1009)		33.5 (1184)	
Max recommended back pressure Kpa (Hg)	5.1 (1.5)		5.1 (1.5)		5.1 (1.5)		5.1 (1.5)	
Exhaust temp at rated output °C (°F)	460 (860)		476 (890)		435 (815)		446 (835)	
Exhaust outlet size mm (in)	127 (5.0)		127 (5.0)		127 (5.0)		127 (5.0)	
ENGINE								
Rated RPM 60 Hz	1800		1800		1800		1800	
HP (@ rated kW) 60 Hz	208		229		165		183	
Piston speed (mean) 60 Hz - m/sec. (ft./min.)	7.6 (1500)		7.6 (1500)		7.6 (1500)		7.6 (1500)	
BMEP 60 Hz - psi	249		221		177		200	
DERATION FACTORS								
Temperature								
2.4% for every 10°C above - °C	40		40		40		40	
4.1% for every 10°F above - °F	104		104		104		104	
Altitude								
0.8% for every 100 m above - m	1525		1066		1525		1066	
2.6% for every 1000 ft. above - ft.	5000		3500		5000		3500	

* Note: Values given are maximum temperatures to which power adjustments can be applied. Consult your Generac Power Systems representative if operating conditions exceed these maximums.

STANDARD ENGINE & SAFETY FEATURES

SD135/SD150

- High Coolant Temperature Automatic Shutdown
- Low Coolant Level Automatic Shutdown
- Low Oil Pressure Automatic Shutdown
- Overspeed Automatic Shutdown (Solid-state)
- Crank Limiter (Solid-state)
- Oil Drain Extension
- Radiator Drain Extension
- Factory-Installed Cool Flow Radiator
- Closed Coolant Recovery System
- UV/Ozone Resistant Hoses
- Rubber-Booted Engine Electrical Connections
- Secondary Fuel Filter
- Fuel Lockoff Solenoid

- Stainless Steel Flexible Exhaust Connection
- Battery Charge Alternator
- Battery Cables
- Battery Tray
- Vibration Isolation of Unit to Mounting Base
- 24 Volt, Solenoid-activated Starter Motor
- Air Cleaner
- Fan Guard
- Control Console
- Coolant Heater
- Isochronous Governor
- Radiator Duct Adapter

OPTIONS

■ OPTIONAL COOLING SYSTEM ACCESSORIES

- Coolant Heater 208/240VAC

■ OPTIONAL FUEL ACCESSORIES

- Flexible Fuel Lines
- UL Listed Fuel Tanks
- Base Tank Fuel Alarms
- Primary Fuel Filter

■ OPTIONAL EXHAUST ACCESSORIES

- Critical Exhaust Silencer (Standard on enclosed gensets)

■ OPTIONAL ELECTRICAL ACCESSORIES

- Battery, 12 Volt, 135 A.H., 4D (2 req'd)
- Battery, 12 Volt, 225 A.H., 8D (2 req'd)
- 2A Battery Charger
- 10A Dual Rate Battery Charger
- Battery Heater

■ OPTIONAL ALTERNATOR ACCESSORIES

- Alternator Upsizing
- Alternator Strip Heater
- Alternator Tropicalization
- Voltage Changeover Switch
- Main Line Circuit Breaker

■ CONTROL CONSOLE OPTIONS

- Digital Controller H-100 (Bulletin 0172110SBY)

■ ADDITIONAL OPTIONAL EQUIPMENT

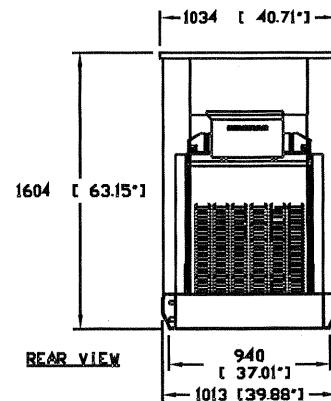
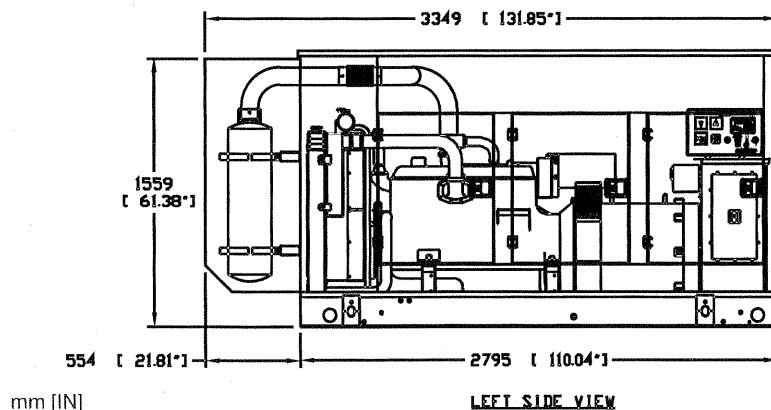
- Automatic Transfer Switch
- 3 Light Remote Annunciator
- 5 Light Remote Annunciator
- 20 Light Remote Annunciator
- Remote Relay Panels
- Unit Vibration Isolators
- Oil Make-Up System
- Oil Heater
- 5 Year Warranties
- Export Boxing
- GenLink® Communications Software

■ OPTIONAL ENCLOSURES

- Weather Protective
- Sound Attenuated
- Aluminum and Stainless Steel
- Enclosed Muffler

Distributed by:

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GENERAC

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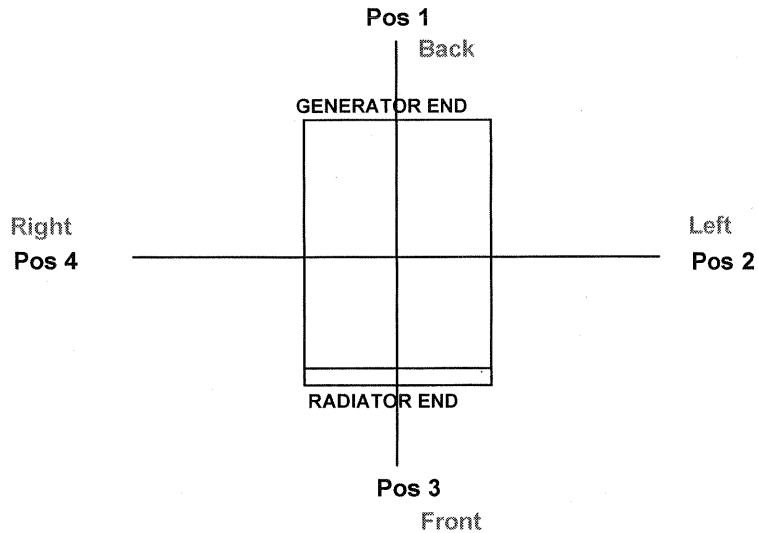
GENERAC[®]

POWER SYSTEMS, INC.

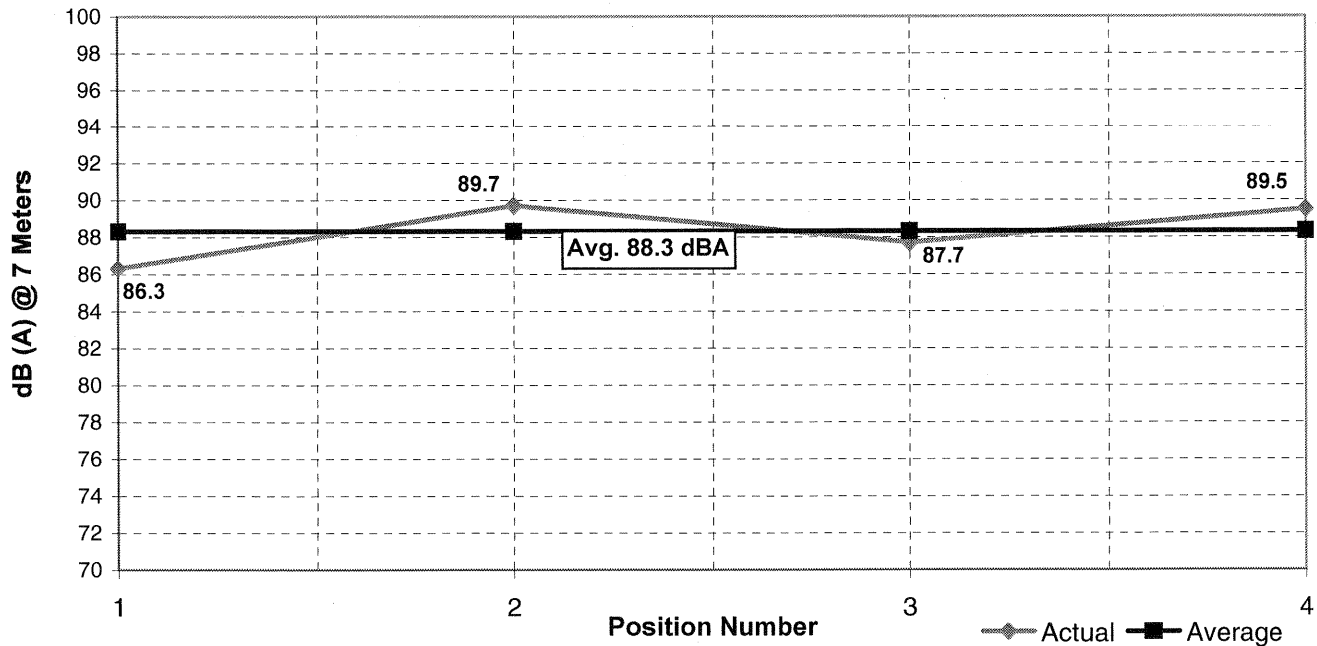
Sound Test Results

Genset: SD150 6.8L John Deere

Enclosure: Open Set (No Enclosure)



Measured Sound Levels - 60 Hz



Notes:

1. All positions 23 ft (7M) from side faces of generator set.
2. Generator operating at full load.
3. Test conducted on a 100 foot diameter asphalt surface.

GENERAC®

POWER SYSTEMS, INC.

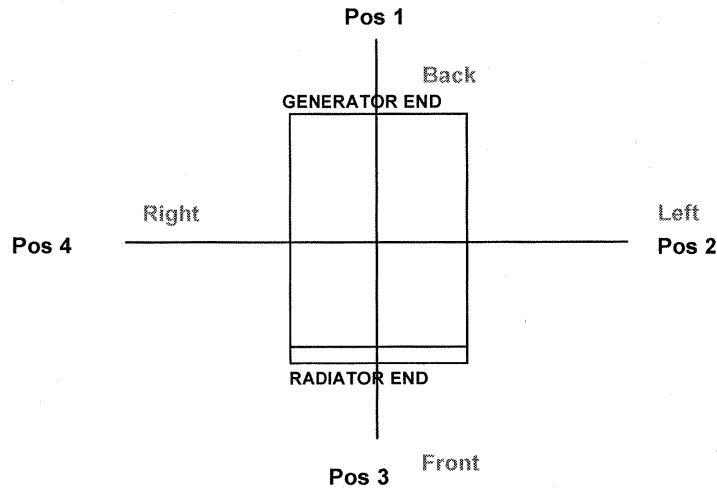
Sound Test Results

Genset:

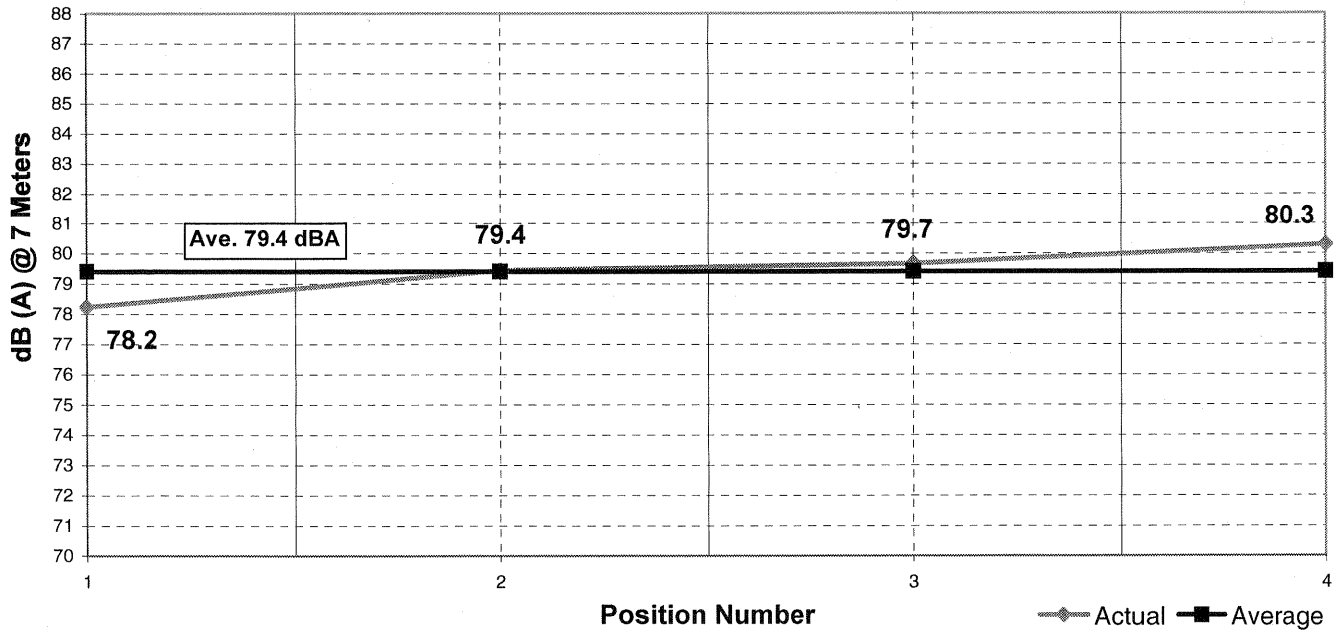
6.8L John Deere 150 kW

Enclosure:

Sound Attenuated Enclosure



Measured Sound Levels - 60 Hz



Notes:

1. All positions 23 ft (7M) from side faces of generator set.
2. Generator operating at full load.
3. Test conducted on a 100 foot diameter asphalt surface.

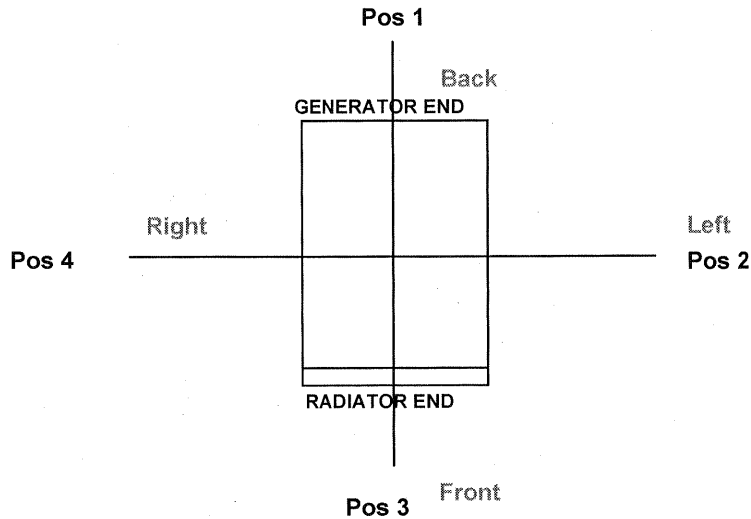
GENERAC[®]

POWER SYSTEMS, INC.

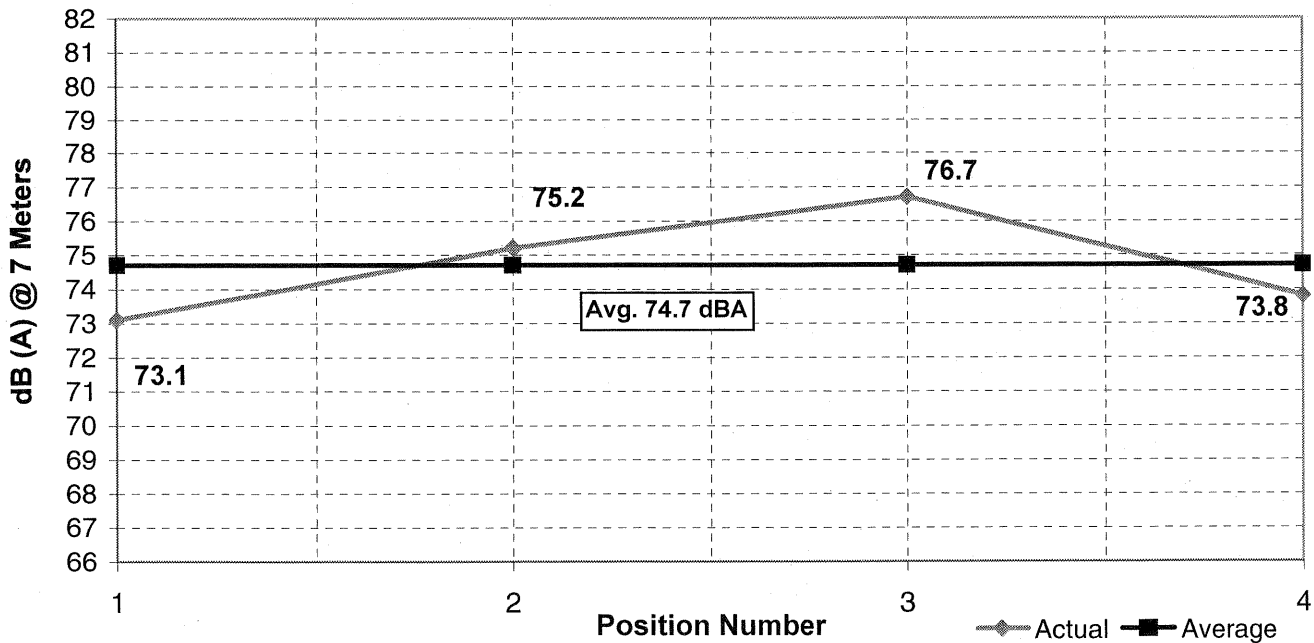
Sound Test Results

Genset: 6.8L John Deere 150 kW

Enclosure: Sound Attenuated Level 2A



Measured Sound Levels - 60 Hz



Notes:

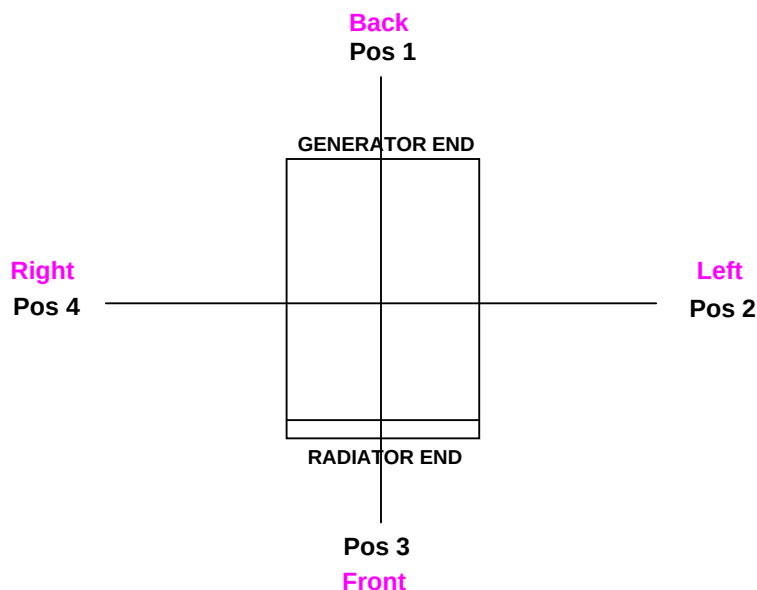
1. All positions 23 ft (7M) from side faces of generator set.
2. Generator operating at full load.
3. Test conducted on a 100 foot diameter asphalt surface.



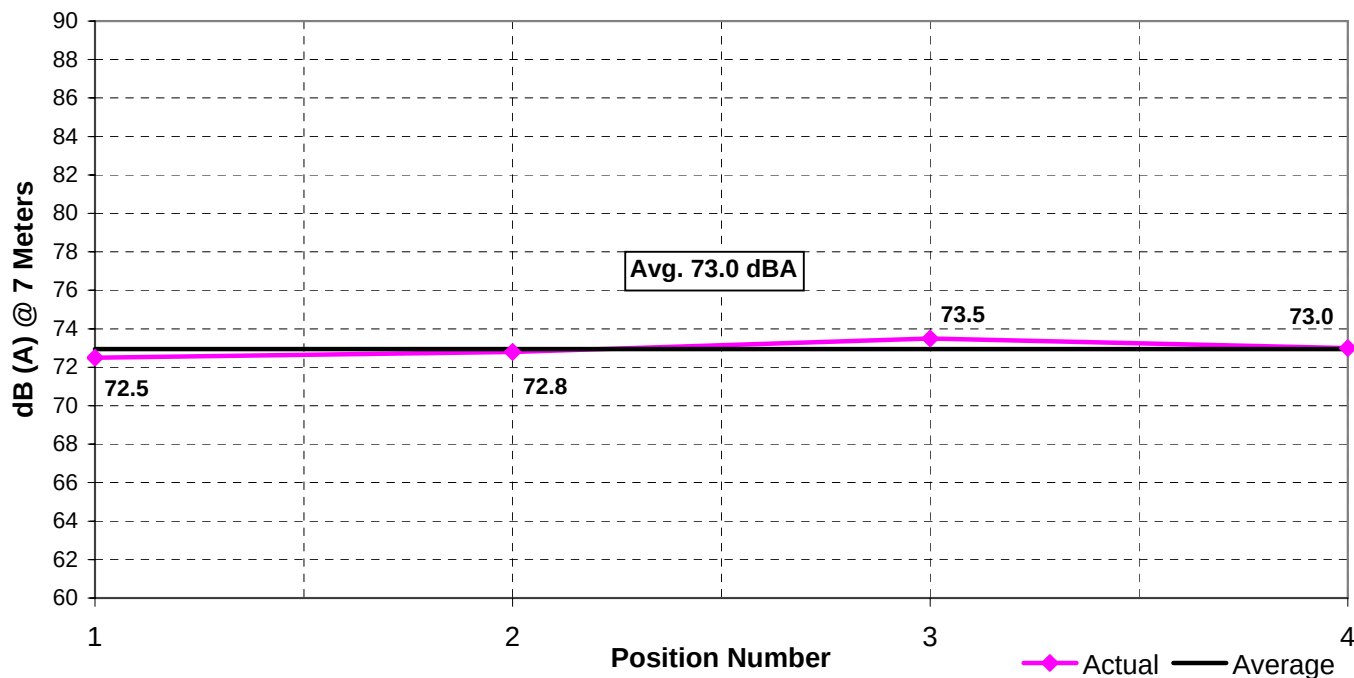
Sound Test Results

Genset: SD150 6.7L Iveco

Enclosure: Sound Attenuated, Level 2



Measured Sound Levels - 60 Hz



Notes:

1. All positions 23 ft (7M) from side faces of generator set.
2. Generator operating at full load.
3. Test conducted on a 100 foot diameter asphalt surface.
4. Non-enclosed sets do not include exhaust sound during testing.



Prepared For:

Verizon Wireless and Dewberry

Site Name:

Portland, ME ~ Head End

Site Address:

**1877 Congress Street
Portland, ME 04101**

Prepared By:

Caron & Associates Design

Benjamin E. Caron

301 Concord Street

Haverhill, MA 01830

(978) 360-3671

ben@cadsim.com

General Information:

The references for these simulations consisted of 18' tall poles placed at the proposed roof ridge ends at each end of the building. A 55' long rope was strung between the Ridge Poles and 5' wide by 9' long orange plastic sheets were hung from that rope to create a visual approximation of the ridgeline of the building. It is important to note that due to the existing terrain on site, the northwest ridge pole was 4.6 feet lower than the southeast ridge pole. The proposed building is shown at the correct finished grade elevation.

For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

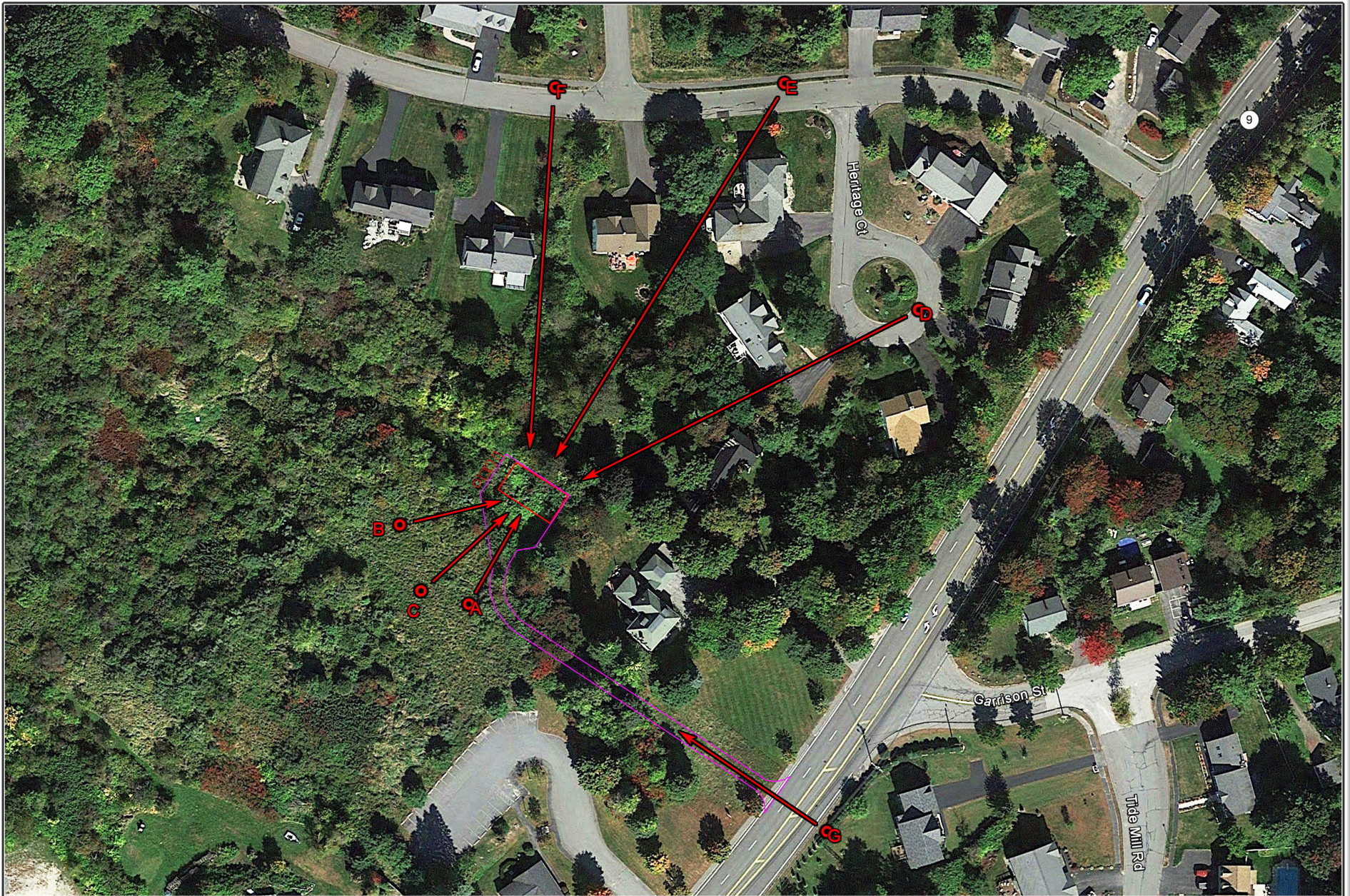
Based upon Rev2 Submittal Dwgs
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)
Photographic Renderings

Created By: Ben Caron & Mike Barreiros

CAD Caron & Associates Design

(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

Photo Location Map

Created By: Ben Caron & Mike Barreiros
CAD Caron & Associates Design
(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

Photo Location A ~ 35mm ~ 102' +/- (0.02mi) Away
From on Site

Created By: Ben Caron & Mike Barreiros

 Caron & Associates Design

(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg's
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

Photo Location A ~ 35mm ~ 102' +/- (0.02mi) Away
From on Site

Created By: Ben Caron & Mike Barreiros

CAD Caron & Associates Design

(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg's
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

Photo Location B ~ 35mm ~ 90'+/- (0.02mi) Away
From on Site

Created By: Ben Caron & Mike Barreiros

CAD Caron & Associates Design

(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg's
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

**Photo Location B ~ 35mm ~ 90'+/- (0.02mi) Away
From on Site**

Created By: Ben Caron & Mike Barreiros
 **Caron & Associates Design**
(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

Photo Location C ~ 35mm ~ 110' +/- (0.02mi) Away
From on Site

Created By: Ben Caron & Mike Barreiros

CAD Caron & Associates Design

(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

Photo Location C ~ 35mm ~ 110' +/- (0.02mi) Away
From on Site

Created By: Ben Caron & Mike Barreiros
CAD Caron & Associates Design
(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg's
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

**Photo Location E ~ 85mm ~ 412' +/- (0.08mi) Away
From Near Intersection of River's Edge Drive and Heritage Court**

Created By: Ben Caron & Mike Barreiros
CARON & ASSOCIATES DESIGN
(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg's
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

Photo Location F ~ 85mm ~ 334' +/- (0.06mi) Away
From Across the street from 50 River's Edge Drive

Created By: Ben Caron & Mike Barreiros

CAD Caron & Associates Design

(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg's
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

**Photo Location G ~ 35mm ~ 54' +/- (0.01mi) Away
From Across Route 9 From Proposed Entrance**

Created By: Ben Caron & Mike Barreiros

CAD Caron & Associates Design

(978) 360-3671 info@cadsim.com



For visual reference only. Actual visibility is dependent upon weather conditions, season, sunlight, and viewer location.

Based upon Rev2 Submittal Dwg's
by Dewberry dated: 10/20/2015

Portland, ME ~ Head End ~ (12/28/2015)

**Photo Location G ~ 35mm ~ 54' +/- (0.01mi) Away
From Across Route 9 From Proposed Entrance**

Created By: Ben Caron & Mike Barreiros

CAD Caron & Associates Design

(978) 360-3671 info@cadsim.com

David P. Silk, Esq.
dsilk@curtisthaxter.com

January 14, 2016

Sent via email to: amachado@portlandmaine.gov

City of Portland, Zoning Board of Appeals
c/o Ann Machado, Zoning Specialist,
City of Portland
Portland City Hall, Room 315
389 Congress Street
Portland, ME 04101

RE: Conditional Use Application, Verizon Wireless, 1877 Congress Street

Dear Chair Avery and Board Members:

I represent Charlton and Mary Smith, residents at 85 River's Edge in Portland. The Smiths reside in the River's Edge residential development. Their home is located in close proximity to the 1877 Congress Street property which is where Verizon Wireless seeks approval to install a 1,650 s.f. "Head End" telecommunications facility. The engineering plans Verizon Wireless submitted with its October 21, 2015 application calls the proposed structure a "Head End" facility. If the proposed Head End facility is permitted to be located at 1877 Congress Street, the Smiths will suffer a particularized injury as they will hear the proposed external industrial sized generator to be located on a 5' by 10' concrete pad and operated every single week. They will also see the proposed 55' by 30' building with a height of almost 18' housing a commercial use. This will result in a substantial diminution in value of the Smith property, along with other properties at River's Edge. Mr. Smith appeared and spoke at the Board's initial December 3, 2015 meeting on this matter.

Verizon Wireless has not provided any detail whatsoever about what will occur in the proposed 1,650 s.f. Head End facility. The applicant's October 21, 2015 cover letter submitted with the Conditional Use Application, on the first page, introductory paragraph, refers to the proposed building as a "wireless telecommunications facility." Later in the same cover letter, under "Project Description", the Head End building is described as an "equipment shelter." On the actual one page conditional use application form, as the type of conditional use proposed, Verizon Wireless states: "Utility substation/telephone electronic equipment enclosure."

As explained more fully below, Verizon Wireless is a telecommunications company that operates a wireless and fiber broadband network.¹ Verizon Wireless is not a public utility. Under the Land Use Code, only a public utility can obtain a conditional use permit to locate a “utility substation” in the R-2 residential zone. 1877 Congress Street is located entirely in the R-2 residential zone. While it is not entirely clear yet what will occur in the facility, any activity that occurs will be a commercial use because Verizon Wireless is not a public utility. Like AT&T, Sprint, and US Cellular, Verizon Wireless is a telecommunications company. What Verizon Wireless proposes, a telecommunications facility, is an expressly permitted use in the B-6 and B-7 zones and listed in those zones as a commercial use. *See* Sections 14-269 and 14-295 of the Land Use Code. Commercial uses, such as telecommunications facilities, are not however allowed in the R-2 residential zone, either as permitted or conditional uses.² Therefore the Board must deny Verizon Wireless’ conditional use application.

By its application, Verizon Wireless states that its proposed telecommunications facility constitutes a utility substation. Utility substations are conditional uses in the R-2 residential zone. Section 14-78.c.1 provides:

Utility substations, including sewage and water pumping stations and standpipes, electric power substations, transformer stations, telephone electronic equipment enclosures, and other similar structures, provided that such uses are suitably screened and landscaped so as to ensure compatibility with the surrounding neighborhood.³

For the Board to approve Verizon Wireless application to install the proposed Head End facility, the Board must first find that Verizon Wireless is a utility. This is so for two reasons.

First, section 14-78.c.1 permits in the R-2 residential zone “utility substations” as a conditional use, subject to suitable screening and landscaping. The general term “utility substation” is followed by specific examples plainly describing different types of public utility owned or operated substations, based on whether the utility is a sewer, water, electric or telephone utility. *See Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 17 (If an ordinance is unambiguous, plain meaning will govern.). The example given as a typical substation for a telephone utility, telephone electronic equipment enclosure, is what Verizon Wireless seeks a permit for. But Verizon Wireless is not a telephone utility.

¹ <http://www.verizon.com/about/our-company/verizon-glance>

² The purpose of the R-2 residential zone is to “provide for low-density residential development characterized by single-family homes on individual lots...”. Section 14-76.

³ Any applicant seeking conditional use approval for a utility substation to be located in the R-2 zone must also meet the standards in section 14-474. *See* section 14-78.

The Land Use Code definition of “utility substation” reinforces the requirement that to qualify as a “utility substation,” any such substation, whether it be a sewer or water pumping station, electric power substation, telephone equipment enclosure, or similar structure, must be “*owned or operated by a public utility.*” See section 14-47 for definition. So for Verizon Wireless to have standing to seek to obtain a conditional use permit for its proposed Head End facility, what Verizon Wireless also calls a “telecommunications facility”, it must first show it is a public utility. Verizon cannot make this showing because it is not a public utility.

While the term “utility” is not defined, its common definition is “public utility.”⁴ Verizon Wireless is a non-regulated facilities based wireless service provider doing business in the State of Maine. It competes with businesses such as AT&T, Sprint and US Cellular, all of which offer wireless services in the City. Verizon Wireless has not presented any information to the Board showing that it is a public utility in Maine. The information available shows that it is not.

In Maine, a “public utility” is defined by statute as follows:

“Public utility” includes every gas utility, natural gas pipeline utility, transmission and distribution utility, telephone utility, water utility and ferry, as those terms are defined in this section, and each of those utilities is declared to be a public utility. “Public utility” *does not include* the operation of a radio paging service, as that term is defined in this section, *or mobile telecommunications services...*”

35-A M.R.S. §102(13) (emphasis added).⁵

Verizon Wireless is a provider of wireless, or more specifically, “mobile telecommunications services,” and therefore, by definition, is decidedly not a “public utility.” This conclusion should be determinative as to Verizon Wireless’ status in Maine, and should end the inquiry on whether Verizon Wireless may receive the benefits associated with public utility status under the Land Use Code. By contrast, for example, FairPoint is a “public utility” under the statutory definition because it is a “telephone utility.”

A “telephone utility” is defined in the statute to include every person, its lessees, trustees, receivers or trustees appointed by any court, that provides telephone service for compensation

⁴ http://www.oxforddictionaries.com/us/definition/american_english/utility

⁵ The same statute defines a “Mobile telecommunications services” as a provider of telecommunications services licensed by the Federal Communications Commission for mobile use.” 35-A M.R.S. § 102(9-A). It cannot be disputed that Verizon Wireless provides telecommunications services licensed by the FCC for mobile use. For the record, Verizon Wireless is also not a mobile telecommunications service provider who has exclusive control over the radio frequency spectrum assigned by the FCC to provide mobile service to the service area. There is no evidence that Verizon Wireless possesses monopoly control over the radio frequency spectrum in its service area, which evidently includes most if not all of Maine. 35-A M.R.S. §102(13).

inside this State” excluding those entities that are excluded from the definition of “public utility,” such as a provider of mobile telecommunications services. 35-A M.R.S. §102(19). It goes without further explanation that, as a provider of mobile telecommunications services, Verizon Wireless is not a “telephone utility.”

Verizon Wireless does not hold itself as a public utility, whether in its website, advertising literature, or before the Maine Public Utilities Commission (the “Commission”), which regulates Maine public utilities under Title 35-A of the Maine Revised Statutes. Verizon Wireless is content to avoid the label “public utility” perhaps for reasons that benefit the Verizon Wireless. Because Verizon Wireless is not a “public utility” and provides wireless service the company is not currently required to seek Commission approval to provide service in Maine and is excluded from the regulation of its rates and terms of customer service and other matters which apply to public utilities in Maine. *See, e.g.,* 35-A M.R.S. § 2101 (requiring a public utility seeking to serve in a municipality to obtain a certificate of need); 35-A M.R.S. § 301(fundamental requirement imposed on public utilities under Maine law requires the utility to provide services safely and at just and reasonable rates, subject to Commission review and approval). As a non-public telecommunications provider, Verizon Wireless avoids a multitude of other Maine utility regulatory requirements regarding its services, ownership and operations.

Telephone public utilities have universal service obligations that guarantee affordable phone service to all and are subject to other rules that promote competition and consumer choice. In exchange, telephone public utilities, in common with other public utilities, are granted certain kinds of legal immunity, easements over private property and public rights of way, pole attachment rights, access to the phone number system, and the right to take property. A utility’s obligation to serve the public within a defined service territory coupled with the right to take property is why utility substations are conditional uses in all of the City’s residential zones. Without the ability to locate substation facilities in residential zones, a utility, whether it is water, sewer, gas, electric, or telephone, would be unable to meet its legal obligations to serve those living within its service territory. And as is readily observable in Portland, utility substations in residential zones in Portland are much smaller than the Verizon Wireless proposed 55’ by 30’ Head End building with a height of almost 18’.

Verizon Wireless is a wholly owned subsidiary of Verizon Communications.⁶ Board members will recall that in 2009, Verizon Communications wholly owned subsidiary, Verizon New England, Inc., sold to FairPoint Communications, Inc. its local exchange and long distance business operation in Maine.⁷ At that time Verizon New England, Inc. obtained Commission approval for the discontinuance of its “regulated telephone utility service” in Maine. *See In Re Verizon New England Inc. d/b/a Verizon Maine*, Amended Stipulation dated Dec. 21, 2007 filed

⁶ http://verizon.api.edgar-online.com/EFX_dll/EdgarPro.dll?FetchFilingHTML1?SessionID=W_C5e7_Q9z9amEN&ID=10506387

⁷ https://www.verizon.com/about/sites/default/files/Verizon_Corporate_History.pdf

in MPUC Docket No. 2007-67. That is, Verizon Communications sold its regulated telephone “public utility” business to FairPoint. Having discontinued its telephone public utility service in Maine, Verizon Communications, through its wholly owned subsidiary Verizon Wireless, cannot claim to be a public utility telephone company and call its proposed Head End telecommunications facility a “utility substation.” Verizon Wireless would need Commission approval before it could gain status as a telephone utility. There are no records of the Commission showing that such approval has been obtained.

Also, the services provided by Verizon Wireless are dissimilar to services considered utility services in Maine. The Commission has explained in the past that the “basic regulatory framework in Maine, as in most jurisdictions, is that utilities have an obligation to serve customers in defined service territories at rates that are regulated; in return, competition within utility service territories is restricted.” *Central Maine Power Company, Boralex Investigation*, Docket No. 2000-653 (April 6, 2001). “This policy is embodied in 35-A M.R.S.A. §2102, which requires Commission authority before a second utility can provide service in the territory of an existing utility.” *Id.* (referencing the Law Court’s interpretation of a public utility in *Dickinson v. Maine Public Service Co.*, 223 A.2d 435, 438-439 (Me. 1966)). By contrast, unlike FairPoint, Verizon Wireless has no obligation to serve in any particular defined area and is not the server of last resort. Unlike FairPoint, Verizon Wireless’ charges are not subject to review and approval. Verizon Wireless is not subject to the requirement that its rates be just and reasonable. Verizon Wireless does not provide monopoly services at regulated rates; rather, the company operates as one of many providers of mobile telecommunications providers (US Cellular, Sprint, AT&T, among others) in a competitive, unregulated environment.

As confirmation of the fact that Verizon Wireless is not a utility in Maine, it is not listed on the Commission’s website as a telephone utility. *See* <http://www.maine.gov/mpuc/telecom/telcos1.htm> (listing of telephone utilities authorized to do business in Maine, and other non-utility communications carriers providing telephone service as eligible telecommunications carries; *Verizon Wireless is not listed as either a telephone utility or as a providing telephone service as an eligible telecommunications carrier*).

In sum, for the proposed Head End telecommunications facility to be eligible under the R-2 residential zone conditional use standard for a “utility substation”, it must be owned or operated by a telephone public utility. Since Verizon Wireless is not telephone public utility in Maine, it lacks any basis to seek a conditional use permit to install a utility substation in the R-2 residential zone.

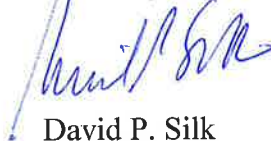
As noted above, both in the B-6 and B-7 zones, “telecommunication facilities” are permitted uses in those zones. *See* Section 14-269.a.13 295.a.15 (listing under permitted “commercial” uses, “telecommunication and broadcast and receiving facilities”) and Section 14-295.a.15 (same). The fact that “telecommunication facilities” are listed under “commercial” uses in the B-6 and B-7 zone reinforces the point that Verizon Wireless’ proposal cannot be approved

since commercial uses are prohibited in the R-2 residential zone. The applicant's cover letter to the Board, dated October 21, 2015, first page, first paragraph, makes clear that what Verizon Wireless seeks to build is a "telecommunications facility." It states: "Enclosed please find ... Application for a *proposed Verizon Wireless' wireless telecommunications facility* at 1877 Congress Street..." (emphasis added). Verizon Wireless therefore should look to locate its Head End facility in the B-6 or B-7 zones.

In sum, because Verizon Wireless is not a public utility, its proposed Head End telecommunications facility is prohibited in the R-2 residential zone. The Board should deny Verizon Wireless' permit application without reaching the merits of whether Verizon Wireless has met the specific conditional use standards set forth in section 14-474 of the Land Use Code. My clients reserve all rights on this later issue and reserve the right to provide additional material to the Board on whether Verizon Wireless' proposal complies with the conditional use standards and/or section 14-78.c.1.

Thank you for your consideration of this letter.

Sincerely,



David P. Silk

DPS/ml

Ann Machado - Statement from the Stroudwater Village Association regarding the proposed re-zoning of 1945 Congress Street (Elks Club Property) and proposed conditional use of 1877 Congress Street (back lot of Masons' property)

From: Stroudwater Village Association Board of Trustees
<stroudwatervillageassociation@gmail.com>
To: Ann Machado <amachado@portlandmaine.gov>
Date: 1/20/2016 1:10 PM
Subject: Statement from the Stroudwater Village Association regarding the proposed re-zoning of 1945 Congress Street (Elks Club Property) and proposed conditional use of 1877 Congress Street (back lot of Masons' property)

Dear Ms. Machado,

This is Dan Koloski, Stroudwater Village Association (SVA) President, writing. The SVA asks that you consider the following statement in advance of your deliberations regarding the Verizon Wireless Conditional Use proposal tomorrow evening. Note this statement also references the City Council vote on the nearby 1945 Congress Street parcel that takes place today 1/20, which is very closely related to this same issue. The SVA is requesting that both proposals be tabled or rejected at this point.

Thank you for your consideration.

-Dan Koloski, SVA President

STATEMENT from the Stroudwater Village Association regarding the proposed re-zoning of 1945 Congress Street (Elks Club Property) and proposed conditional use of 1877 Congress Street (back lot of Masons' property), January 2016.
stroudwatervillageassociation@gmail.com

This statement should be considered in addition to our prior letters to the Planning Board, Zoning Board of Appeals and City Council from January, May, July, September, October and December 2015.

The Stroudwater Village Association is grateful that the Council and Planning office have elected to begin a broader conversation about land use in the Stroudwater area, beginning January 2016. What we all need now is sufficient time for that discussion to take place.

As we have expressed throughout this process, the Stroudwater Village Association remains opposed to one-off changes of use for individual parcels in the neighborhood area, until such a comprehensive visioning process for the area is completed.

The SVA was very interested to read the memorandum entitled "1945 Congress Street Zone Change Application Supplemental Information" from Jeff Levine, Director of Planning to the Council, dated 1/8/2016 (tab 6, pp. 62-76 in the full 1/20/2016 Council agenda packet), especially the white paper entitled "Outer Congress Street Land Use" that begins on pp 72. Mr. Levine's analysis is thoughtful and represents a great first step that could lead to a broader, generally-understood vision for the area.

Stroudwater residents will, we are sure, be willing and excited to help be a productive part of that larger discussion. And in fact the SVA has several existing upcoming forums, such as our annual Pancake Breakfast in February and Annual Meeting in May, in which we would be delighted to host conversations on this subject. SVA members would also be happy to participate in other forums.

Unfortunately, our challenge this week remains that there are currently two meaningful decisions before the City that represent a de facto implementation of a vision, before we have all collectively had a chance to discuss such a vision in the first place. The first is Northland's 1945 Congress Street re-zoning proposal application (before the City Council on 1/20), and the second is Verizon Wireless' 1877 Congress Street Conditional Use application (before the Zoning Board of Appeals on 1/21). As everyone is aware, both of these specific proposals are already controversial in isolation, but are especially so when considered together and in advance of the discussion we reference above.

Neither decision is a time-sensitive issue from the City's perspective, nor is either decision the result of advocacy from existing residents. As such, these decisions should be at a minimum tabled, or the applications should be rejected at this time.

As we have expressed throughout this process, the Stroudwater Village Association remains opposed to one-off changes of use for individual parcels in the neighborhood area, until a comprehensive visioning process for the area is completed.

The Stroudwater Village Association is a Maine Non-Profit corporation. All residents of Stroudwater are members and invited to participate in all of our activities.

Find us on the web at <http://www.stroudwatervillage.org> and
<http://www.livinginportland.org/stroudwater.htm>

Find us on Facebook at <https://www.facebook.com/StroudwaterVillageAssociation>

Verrill Dana^{LLP}

Attorneys at Law

KELLY B. BODEN
PARTNER
kboden@verrilldana.com
Direct: 207-253-4472

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www.verrilldana.com

January 20, 2016

Via Electronic Mail

City of Portland
Zoning Board of Appeals
Portland City Hall, Room 315
389 Congress Street
Portland, Maine 04101

Re: Conditional Use Application, Verizon Wireless 1877 Congress Street

Dear Chair Avery and Members of the Zoning Board of Appeals:

I am writing on behalf of Verizon Wireless, the current applicant seeking a conditional use approval to construct an equipment shelter, external generator and HVAC units on a parcel of land located at 1877 Congress Street in Portland, Maine (the "Property"). By way of procedural background, the application was submitted on October 21, 2015 and first heard by the Zoning Board of Appeals ("Board") during its December 3, 2015 meeting. Supplemental information requested by the Board was submitted on January 4, 2016. On January 14, 2016, Attorney Silk submitted a challenge to the conditional use determination of utility substation as applied to Verizon Wireless. The objection was submitted on behalf of two non-abutting residents of the River's Edge neighborhood in Portland.

The City has determined that Verizon Wireless' proposed facility is a "utility substation." The Portland Land Use Code (the "Land Use Code" or the "Code") lists Utility Substations as a conditional use within the R-2 Zone. Based on the plain language of the City's Code, and reading this term in a manner consistent with the overall statutory scheme, this interpretation is correct. Further, this interpretation is not new, and has been applied to other permitted facilities. Finally, Attorney Silk's proposed interpretation leads to absurd results, and would likely render the Code in violation of federal law.

I. THE CITY HAS PROPERLY DETERMINED THAT VERIZON WIRELESS' FACILITY IS A "UTILITY SUBSTATION."

The starting point for the interpretation of any statute or ordinance is the language of the statute itself. *Hutchinson v. Cary Plantation*, 2000 ME 129, ¶10, 755 A.2d 494, 497; *Murphy v. Bd. of Envtl. Prot.*, 615 A.2d 255, 258 (Me. 1992). Unless defined, words used in an ordinance must be given their plain, common and ordinary meaning. *Hutchinson*, 2000 ME 129, ¶10, 755 A.2d at 497; *Town of Orono v. LaPointe*, 1997 ME 185, ¶11, 698 A.2d 1059, 1062; *Apex Custom*

Lease Corp. v. State Tax Assessor, 677 A.2d 530, 533 (Me. 1996). Further, terms must be interpreted in a manner that is harmonious with the overall statutory scheme and does not lead to absurd results. *See Town of Arundel v. Swain*, 374 A.2d 317, 321 (Me. 1977).

The term “utility substation” is defined in the R-2 Zone to include,

...sewage and water pumping stations and standpipes, electric power substations, transformer stations, telephone electronic equipment enclosures, and other similar structures, provided that such uses are suitably screened and landscaped so as to ensure compatibility with the surrounding neighborhood.

Code Sec. 14-78(c)(1).

Verizon has proposed a structure that will house and enclose telephone electronic equipment associated with its wireless communications network.¹ Thus, based on the plain language of the Code, Verizon Wireless has proposed a “telephone electronic equipment enclosure,” which is a “utility substation.”

Attorney Silk does not dispute that Verizon Wireless has proposed a “telephone electronic equipment enclosure.” Instead, he claims that this facility is not a “utility substation” because in another section of the Code the term “utility substation” is defined as those structures operated by a “public utility” and Attorney Silk argues that Verizon Wireless is not a “public utility” regulated by the Maine Public Utility Commission. Although Attorney Silk is correct that Verizon Wireless is not regulated by the Maine PUC, this fact is irrelevant to the City’s interpretation of its Land Use Code for several reasons.²

First, although the term “public utility” is defined in Title 35-A of Maine’s Revised statutes, it is not defined in the Land Use Code. As such, the term must be given its plain, common and ordinary meaning. *Apex Custom Lease Corp.*, 677 A.2d at 533. The commonly accepted meaning of “public utility” is a business providing necessary services to the general public. *See* Utility, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “public utility”) (“A company that provides necessary services to the public, such as telephone lines and service, electricity, and water.”) Services provided by public utilities are necessary for the safety, economic vitality, and general functioning of society, such as water, electricity, telephone communication, natural gas, sewage, transportation, and other everyday necessities. Where “telephone communication” once implied hard-wired cables, the commonly accepted meaning now includes wireless telephones. Indeed, many residents rely on wireless phones as the

¹ Verizon’s structure will have no antennae and it neither emits nor receives any wireless signals.

² Attorney Silk ignores the fact that the term “utility substation” in Division 3 (R-2) does not include the phrase “public utility.” Thus, based on the plain language of the Code, utility substations in the R-2 Zone are not limited to those owned by a public utility. More importantly, however, and as discussed below, even if the phrase “public utility” is read in to the text in Division 3, Attorney Silk’s interpretation is incorrect.

exclusive source of “telephone communication” within their homes. A wireless signal, just like electricity, sewage, and transportation, has become indispensable to the general functioning of today’s society, and has thus come to be understood as a “public utility” in the ordinary or commonly accepted meaning of the term.³

Second, this interpretation of “utility substation” is appropriate because such services are necessary everywhere in the City of Portland, and so they must be allowed in a broad area of the City. Attorney Silk argues that Verizon Wireless’ building should be characterized as a “telecommunication facility,” which facilities are only allowed in the B6 and B7 Zones. These zoning districts, however, only encompass about 10% of the area of the City of Portland.⁴ This figure is significant because Attorney Silk’s interpretation of the Land Use Code would, in effect, exclude wireless telecommunications equipment from over 90 percent of the City of Portland. This interpretation would lead to absurd results, with wireless telecommunications companies being banned from providing adequate wireless service within the City.⁵

Third, the Land Use Code’s interpretation of “public utility” is not unique. Verizon Wireless recently permitted a similar structure in the Town of Wells, as a “Public Utility Facility.” Such facilities are defined in the Wells ordinance as “[a] building or structure necessary for the furnishing of publicly regulated utility services primarily within the Town of Wells...such as, but not limited to switching stations, relay stations, treatment facilities and pumping stations.” Arguably Wells’ definition, with the language “regulated utility services,” is narrower than the City’s term “utility substations.” Regardless, as wireless facilities must be permitted in broad areas of any municipality, the Town of Wells has interpreted its ordinance to include facilities such as the one proposed by Verizon Wireless.

In summary, given the clear legal standard provided by the Law Court, “public utility” must be given its commonly accepted meaning under the Land Use Code. Prudent policy design

³ The term “public utility” has been defined in Title 35-A to determine when the PUC may or may not exercise jurisdiction over a particular entity and how that entity will be regulated if jurisdiction is found. 35-A M.R.S.A. § 101. This provision has nothing to do with zoning or land use and a determination regarding the scope of the Maine PUC’s jurisdiction is not relevant to the discussion of whether a particular land use is permitted in the City’s R-2 Zone. Further, Attorney Silk is selective in his citation to other statutory provisions, ignoring zoning and land use laws and regulations that define “public utility” more broadly, to include entities that are not regulated by the Maine PUC. *See, e.g.*, 06-96 CMR Ch. 1000, § 16(5)(G) (Shoreland Zoning Regulations in reference to the installation of a public utility service: “A public utility, water district, sanitary district or any utility company of any kind...”); 30-A M.R.S.A. § 4406(3) (defining utility installation as “[a] public utility, water district, sanitary district or any utility company of any kind...”).

⁴ Zone B-6 is a narrow strip of land, less than a half of a mile long and no more than a tenth of a mile wide, tucked into the northeastern corner of the Portland peninsula. *See* Portland Zoning Map. B-7 is an area roughly a half a mile square with Marginal Way running through its center. *Id.*

⁵ Nor does the term “telecommunications facility” fit Verizon’s proposed development, as this term clearly contemplates a facility that receives and emits wireless signals. As noted above, this structure will do neither.

and precedent from other jurisdictions also supports this conclusion. Verizon satisfies the commonly accepted meaning of public utility and thus satisfies the definition of “utility substation” within the R-2 Zone. Verizon’s structure is precisely an enclosure of telephone electronic equipment and is, therefore, a lawfully permitted conditional use within the R-2 Zone.

II. IF THE CITY ADOPTED ATTORNEY SILK’S INTERPRETATION OF THE LAND USE CODE, THE CITY’S CODE WOULD BE IN VIOLATION OF FEDERAL LAW.

The Federal Telecommunications Act of 1996 states in relevant part, that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -- shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C.A. § 332(a)(7)(B)(i) and (II).

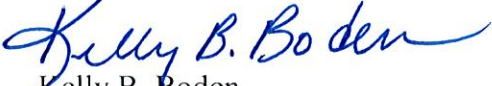
As noted above, Attorney Silk argues that Verizon has proposed a “telecommunication facility,” not a utility substation and, therefore, this facility is not permitted except in the B-6 and B-7 Zones. Such an interpretation would prohibit wireless companies from installing equipment in nearly every area of the City, except those small zones. The effect of such an interpretation would be that the City’s Code would “prohibit or have the effect of prohibiting the provision of personal wireless services” within the City and would, therefore, violate the Telecommunications Act. *See Davis v. SBA Towers II, LLC*, 2009 ME 82, ¶3, 979 A.2d 86, 90 (“no ordinance may prohibit, or effectively prohibit” telecommunications facilities or the providing of telecommunication services). Local ordinances should not be interpreted in a manner that would render them unlawful or unconstitutional.

Nor is it necessary to do so. It is clear that the City of Portland has issued permits for numerous wireless facilities outside the B-6 and B-7 Zones. Just recently, in October of last year, the Board of Appeals issued a conditional use permit for a Verizon Wireless facility consisting of a 100 foot tall flagpole tower and related equipment located at the Grace Baptist Church on 476 Summit Street, Portland, Maine. The Grace Baptist Church is located in the R-2 Zone and the facility was permitted as a “utility substation.” Not only would Attorney Silk’s interpretation violate federal law, but it contradicts the City’s practice of regulating and permitting these important facilities.

In conclusion, for the foregoing reasons, we contend that the City’s characterization of the proposed Verizon Wireless facility as a “utility substation,” as that term is defined and used in the City’s Land Use Code is proper—and the only proper—interpretation.

Thank you and we look forward to continuing our discussion of this project with the Board.

Very truly yours,


Kelly B. Boden

cc: David Silk, Esq.

From: Charlton Smith, President of the Stroudwater Farms Homeowners Association
To: The Portland Zoning Board of Appeals
Re: Conditional Use Application of Verizon Wireless dated October 21, 2015
Dated: February 1, 2016

Verizon Wireless has applied to the Zoning Board of Appeals for approval of a conditional use appeal to allow Verizon Wireless to construct a 1650 square foot equipment building with a large external diesel generator and other external equipment at 1877 Congress St.

The description of the proposed facility as being located at 1877 Congress St. is misleading because that address only describes the location of the entrance road or driveway that leads to the facility. The facility itself is located several hundred feet from Congress St. adjacent to the Stroudwater Farms residential subdivision known as River's Edge and the Stroudwater Historic District and two historic homes located at 1859 and 1871 Congress St. Please refer to the aerial photo with a portion of the plan for the proposed facility superimposed on the aerial photo in Appendix A.

The proposed facility would be close to and clearly visible from several houses in the River's Edge subdivision as well as from portions of River's Edge Drive and it would also be close to and clearly visible from the houses at 1859 and 1871 Congress St. It would have a substantial adverse impact on both the residential character and market value of the houses that will look directly at the facility and to a lesser but still significant extent on all the other properties in River's Edge.

The Stroudwater Farms Homeowners Association through its Board of Directors is working in conjunction with the owners of the homes in River's Edge that would be most directly impacted by the proposed facility to oppose the granting of this appeal. We have been advised by the owners of the adjacent properties on Congress St. that they are strongly opposed to having a substantial commercial facility constructed immediately behind their homes. It is also our understanding that the Stroudwater Village Association opposes the construction of this facility that would be bordered on two sides by the Stroudwater Historic District.

Legal issues relating to the requested conditional use by Verizon Wireless:

Attorney David Silk has submitted a legal opinion to the Board that makes very clear that Verizon Wireless is not entitled to the rights and powers over private property that are afforded to regulated public utilities. Verizon Wireless is a purely commercial company competing with numerous other wireless communications companies. To allow Verizon Wireless to take advantage of ordinances intended to enable companies that are legally obligated to provide service in areas that are not profitable in return for the advantages of having monopoly power would be a serious injustice to our neighborhood. Verizon Wireless is seeking the benefits of a monopoly without its burdens.

Recently the Board approved a conditional use appeal for Verizon Wireless at a church property in a residential zone, but it is our understanding that no one challenged Verizon Wireless's assertion that it was a public utility. Further, the installation of an antenna designed to look like a flagpole and a small shed in a Portland church complex is not even remotely similar to the impact and scale of a 30 x 55 foot, 18-foot-high commercial building with an external industrial generator placed immediately adjacent to numerous residential properties. It would be a grave injustice for the Board to use this flagpole case as a precedent in our case.

The proposed Verizon Wireless facility is not an essential service to the community.

Verizon Wireless has not offered any evidence that the proposed facility will provide an essential service to the immediate community or the Portland area, nor have they provided us with a detailed written description of the functions or business purpose of the equipment that is to be housed in the proposed building. In Portland it is beyond dispute there is ample cellular service available through Verizon Wireless, US Cellular, ATT and/or Sprint. There are no gaps in coverage in our neighborhood or in the City. We have been told only that the facility will allow Verizon Wireless to compete better in the market place and gain more customers. We conclude that this is not an essential service for the community but simply a commercial advantage for a competitive supplier of cellular phone service.

Verizon Wireless has not offered any evidence that the proposed facility must be located at this location or at any location that is not currently zoned for similar commercial purposes. We have only been told verbally that this location meets the company's own criteria for a good location, with a key aspect being proximity to cables currently existing on Congress St. When pressed Verizon Wireless did not indicate that there are no other suitable locations for the facility but rather that it is a site that best met their own business criteria.

We have no reason to believe that this facility provides any essential service to the community and must conclude that this location simply provides a commercial advantage to Verizon Wireless over its competitors in the Portland area. Our neighborhood should not be asked to accommodate this facility (and others like it) without a clear demonstration that this is actually an essential service that cannot be accomplished at a properly zoned location. A renewed request for additional information that would better serve the Board and our neighborhood in making a determination of the essential nature of this facility is attached as Appendix B.

Our attempts to work with Verizon Wireless:

At our request a meeting was held near the site of the proposed facility on Saturday January 16th at which approximately ten residents of River's Edge met with a representative of Tower Resources Management, Inc., the company responsible for

construction of the proposed facility, to discuss our concerns about the impact of the building and its equipment on the residential character of our neighborhood.

There was considerable give and take in the discussion and Verizon Wireless requested a list of our proposed changes to the construction plans that would be necessary to provide a natural visual barrier so that the residents of River's Edge would not have to look at the proposed commercial building and its associated equipment. We have submitted such a list to Verizon Wireless, including other items relating to the building and its equipment, which is attached to this memo as Appendix C.

We raised several other issues at the January 16th meeting that are not directly related to the construction process but are of crucial importance to us that have not yet been adequately addressed by Verizon Wireless.

Most important of these issues is our concern that once a substantial commercial facility has been constructed on this property the possibilities for residential use for the balance of the approximately four acres will be greatly diminished if not eliminated entirely. At a time when Portland is attempting to deal with a housing shortage this should not be allowed to happen. Our concern is not only the prospect of having to see and hear a large commercial facility immediately next to our residential community. We are also very concerned with the impact on our property values of having a major corporation owning approximately four acres of undeveloped land immediately adjacent to us on which a conditional use for a commercial building has already been approved.

We recognize that any further commercial development on the property by Verizon Wireless or others would be subject to the same residential zoning that Verizon Wireless presently seeks a conditional use to avoid. However, common sense dictates the conclusion that once a substantial commercial use has been approved by this Board and built on the property there will over time be considerable pressure to extend such commercial uses on the property or to rezone all of it to commercial. The conditional use being requested at this time could be the turning point in an irreversible process of commercialization immediately adjacent to both the Stroudwater Historic District and a 29-lot residential subdivision that is otherwise completely free of any commercial elements.

While Verizon Wireless denies any present plans for future commercial use for this land footnote #17 on the plans for the currently proposed facility submitted to the Board with its application for the conditional use refers to a tower planned for the premises and the name of the construction company for the current proposed project is Tower Resources Management, Inc. Though Verizon Wireless maintains that it has no plans for a future tower, the explicit reference to a planned tower in the plans and the fact that its contractor's name begins with "Tower" make it difficult for the residents of River's Edge not to be concerned about being faced with a tower proposal for this land in the future.

Based on the verbal assurances of Verizon Wireless that it has no plans for further commercial development of this land we proposed as part of our offer to accept the Verizon Wireless building (subject to the visual screening and other provisions described

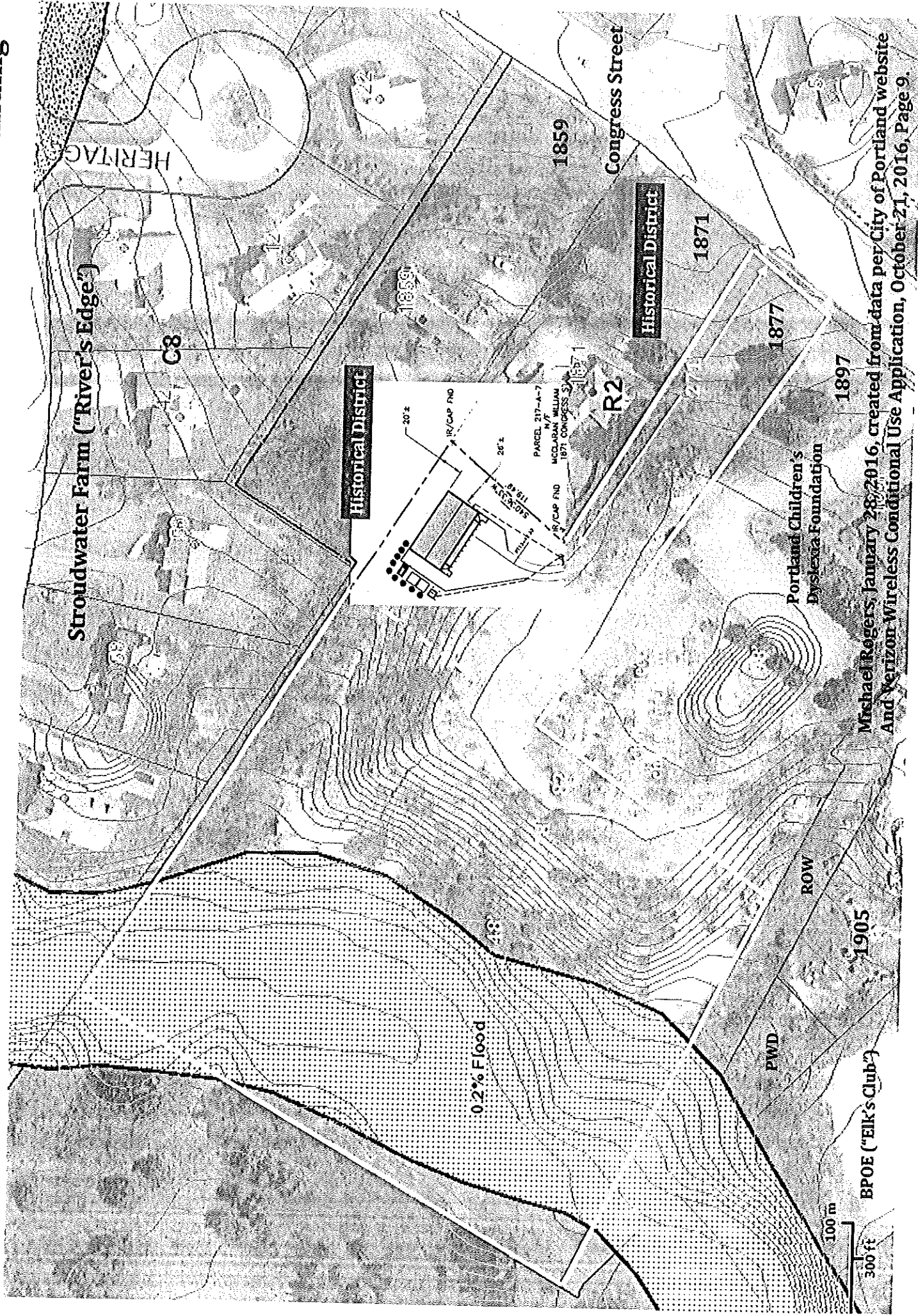
in Appendix B) that Verizon Wireless through various ways formally agree that the remaining unused land will never be used for commercial development. Unfortunately no such agreement has been made.

We also have requested substantially more information about the nature of the equipment and electronic activity planned for the proposed building that we have not yet received. We were given some very general information at the January 16th meeting -- that the facility will house radio equipment to power antennas -- but not enough detail for us to make an informed assessment of our own as to whether the operation would have any deleterious effects on our homes, such as interference with our existing cable, phone or television service. As indicated above the information that we have requested appears in Appendix B.

We are pleased that Verizon Wireless has requested the list of our requests for modifications and additions to the proposed building and landscaping, but we are disappointed that Verizon Wireless has failed to address our concerns about the future commercial development of the remaining property and our requests for more detailed and comprehensive information about what will take place in the proposed building and its possible impact on us.

Until all the matters outlined in this memo have been satisfactorily addressed the Board of Directors of Stroudwater Farms Homeowners Association remains opposed to the pending conditional use appeal.

1877 Congress Street, Portland - Proposed Verizon Wireless Commercial Building



APPENDIX B

1. The Conditional Use Application (CUA) indicates that Verizon Wireless (VW) proposes “a wireless telecommunications facility” consisting of “a 1,650 square foot equipment shelter” accompanied by “an external generator on a 5 x 10 concrete pad”. The CUA indicates the type of Conditional Use proposed to be “utility substation/telephone electronic equipment”. The CUA provides site plots to indicate the proposed location of the building and the generator, which includes a designation of the facility as a “Head End” (undefined) facility. The site plan (CUA Sheets Z-1 and Z-2, note 17) refers to a tower to be located on the property.
 - i. At the meeting on January 16th, VW representatives indicated that the plan will not include a tower or any other facilities outside of the proposed building for sending or receiving data. Please provide written confirmation that VW agrees as a condition of the application to preclude any such facilities and limit the mode of data communications to or from the facility to underground cables.
 - ii. Please provide a full description of the telephone electronic equipment to be contained in the facility. Please confirm that VW agrees to preclude uses of the facility for any purpose other than for containing telephone equipment.
 - iii. Please provide a full description of a Head End facility as the term is used in reference to the proposed facility.
 - iv. In the January 16th meeting, we understood the VW representatives description of the facility would be used in association with a new wireless phone service option using technology currently not in service in the Portland area. Please provide a written description of the new wireless phone service that will be provided with the implementation of this facility.
2. The CUA does not provide any information on the nature of the equipment and the potential for interference with radio, television, telephone, or other electronic devices employed in abutting residential properties. Please confirm that VW represents that operation of the facility will cause no electronic interference with any such devices used in the neighborhood.
3. The Photo Simulations package includes a proposed view (page 13 of 13) of the proposed driveway access and utility service drop. This was discussed at the January 16 meeting with VW representatives.
 - i. Please describe the power and cable facilities that will cross Congress Street and verify that all utility cables will proceed underground to the facility from Congress Street.
 - ii. Please explain the basis for an overhead crossing of Congress Street vs. underground.
 - iii. Please describe any off-site utility facilities required other than those necessary to cross Congress Street.

APPENDIX C

To: Verizon Wireless
From: Charlton Smith
January 25, 2016

Verizon Wireless has requested a list of requested changes to the existing plans for an equipment facility proposed by Verizon Wireless to be built on land adjacent to River's Edge subdivision. In providing this list Charlton and Mary Smith acting on their own behalf and on behalf of members of Stroudwater Farms Homeowners Association are not waiving their right to oppose this project if they are unable to settle other matters with Verizon Wireless not included in this list of issues relating specifically to the construction of the building.

1. The proposed building should be moved 15 feet further from River's Edge in order to provide space to add two staggered rows of 12 foot high White Pines and Norway Spruce trees 8 feet apart on both the side and end of the building visible from River's Edge. Due to the extreme variability in quality of trees suitable for transplanting the trees should come from O'Donnell's Nursery in Gorham, Maine and be planted by a contractor approved by O'Donnell's Nursery. Being 12 feet high at the time of planting the trees will soon grow higher than the 18-foot roof peak. We were advised by O'Donnell's Nursery against using larger trees because if the trees are more than 12 feet in height transplanting is not as successful. Verizon Wireless would be responsible for making sure that these trees are properly cared for until they are fully established.
2. Verizon Wireless will not cut any of the mature trees on its own land in the entire area behind River's Edge unless cutting them is essential to the construction of the proposed building. The larger trees have been marked with yellow "caution tape" but all trees of any size located near River's Edge that do not need to be cut to construct the building will be left standing.
3. The diesel generator and all other exterior equipment related to the proposed facility presently shown on the plans will be relocated to the side of the building furthest from River's Edge to minimize its impact on the River's Edge neighborhood. The generator will not exceed 150 KW and will be inside a Level 2 enclosure. There will be no external antennas, satellite dishes, towers or any similar kinds of equipment used in connection with the building.
4. Because the building will not be occupied and will be visited by a representative of Verizon Wireless only once a week, the building will include security devices that will enable Verizon to remotely monitor and detect any improper activity that may occur at the building that could adversely impact the residents of the River's Edge neighborhood.

We look forward to an opportunity to resolve the matters listed above, as well as other matters not directly relating to the construction of the proposed building, with representatives of Verizon Wireless prior to the February 4th Zoning Board meeting. For this purpose we would be happy to provide Verizon Wireless with a list of questions and issues that are not related to the construction of the building but which are pertinent to our concerns relating to the overall operation of the proposed facility. These additional questions and issues should be addressed prior to the February 4th Zoning Board of Appeals meeting.

Verrill Dana^{LLP}

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February 1, 2016

Via Electronic Mail

City of Portland
Zoning Board of Appeals
Portland City Hall, Room 315
389 Congress Street
Portland, Maine 04101

Adam Lee, Corporation Counsel
City of Portland
Portland City Hall
389 Congress Street
Portland, Maine 04101

**Re: Verizon Wireless Proposed Facility
Parcel 217-A-10
Process for Zoning Determination**

Dear Members of the Portland Zoning Board of Appeals and Attorney Lee:

On January 14, 2016, Attorney David Silk filed comments on behalf of one of the abutters to the above referenced project, objecting to the City's prior determination, made in October of 2015, that Verizon Wireless' proposed development constitutes a "utility substation" as that term is used in the City's zoning ordinance. On January 20, 2016 I filed a response to the substantive arguments made in Attorney Silk's letter.

The following is Verizon Wireless' position regarding the October 2015 zoning determination and what process, if any, exists for Attorney Silk to seek review of that determination. In summary, and for the reasons set forth below, the Building Authority's determination that Verizon Wireless' proposed development is a "utility substation" is a final decision that is no longer subject to review by the Board of Appeals. In the event Attorney Silk seeks review of this determination, such a review must now be filed in the Maine courts.

1. Under Maine Law City Staff, Not the Board of Appeals, is Authorized to Make Zoning Determinations.

"The authority to make a zoning determination must be expressly granted by statute or ordinance." *See Ray v. Town of Camden*, 533 A.2d 912, 914 (Me. 1987). Sections 14-56 and 14-461 of the City Code expressly state that the Building Authority is authorized and is charged with enforcement of the City's land use ordinance. In contrast, the City Code states that the Board of Appeals has appellate jurisdiction to "decide appeals from, and review orders, decisions, determinations or interpretations made by the building authority." City Code §14-471(a).

The City's code is consistent with state law, which provides that boards of appeals have jurisdiction to "hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance." 30-A M.R.S.A. § 4353(1), (2). The Maine Supreme Court has interpreted Section 4353 to provide boards of appeals with only appellate jurisdiction over determinations of whether a proposed land use fits within a particular zoning designation. *Noyes v. City of Bangor*, 540 A.2d 1110, 1111-12 (Me. 1988); *Oeste v. Town of Camden*, 534 A.2d 683, 684 (Me. 1987). The Maine Municipal Association concurs, advising municipalities that initial determinations about whether a proposed development is properly characterized under the zoning ordinance are made by municipal staff (either code enforcement officers or, in the case of Portland, the Building Authority). MMA Code Enforcement Officer Manual p. 37 (2002 Rev. Ed.).

In early 2015, Verizon Wireless sought confirmation regarding how the City characterized the proposed project. By email dated January 13, 2015, the Zoning Administration staff determined that Verizon's project met the definition of "utility substation," and indicated that a conditional use permit was required by the Board of Appeals.¹ Based on this zoning determination, Verizon Wireless filed a conditional use permit application with the Board of Appeals on October 21, 2015.²

2. Board of Appeals' Jurisdiction is Limited to Appellate Review of Staff Zoning Determinations.

Given the language in Title 30-A, the City Code, and, as noted in the *Oeste* and *Noyes* cases, the Portland Board of Appeals does not have primary jurisdiction to make zoning determinations. The Board's role in the current proceeding is to review and decide a conditional use permit application. This is the same role that the Camden planning board had in *Oeste*—it is acting as a permitting authority, not as an appellate body.

The jurisdiction of the Portland Board of Appeals must be expressly identified in the Code. *See Stucki v. Plavin*, 291 A.2d 508, 510 (Me. 1972). Division 28 of the City Code outlines this jurisdiction, and although the Board has the authority to hear appeals of zoning determinations made by City staff, it does not have primary jurisdiction to make such determinations. *See Oeste*, 534 A.2d at 684.

Nor is there any provision in the City's conditional use procedures or standards that grants the Board jurisdiction to make the threshold decision of whether a particular land use does, or does not, meet a particular zoning designation. *See City Code* § 14-474. In fact, applications for conditional use permits are filed with the Building Authority, not the Board of

¹ The "Building Authority" includes the Director of Planning and Urban Development and the Department of Planning and Urban Development. City Code § 2-17(h)(1). This includes the Zoning Administration staff that made the zoning determination in this proceeding.

² Although the City Code provides that any person may seek a formal zoning determination from the Building Authority, such a formal determination is not required, and does not occur with most permit applications. *See City Code* § 14-465.

Appeals, and the “standards” considered by the Board do not concern the underlying zoning determination.³ *Id.* §14-474(b)(1), (c)(2).

Given this, the Portland Board of Appeals does not have primary jurisdiction to make the zoning determination of whether Verizon Wireless’ proposed facility is a “utility substation.” This determination was made, in accordance with Section 14-56 and 14-461 of the Code, by the Building Authority, prior to Verizon Wireless’ submission of its conditional use application last October.⁴

3. Further Review of the City’s October, 2015 Zoning Determination Must be Sought in an Appeal to the Maine Superior Court.

The City Code provides that any appeal of any decision of the Building Authority,

...shall be taken within thirty (30) days of the action complained of by filing with the building authority a notice of appeal specifying the grounds thereof. A payment of a nonrefundable filing fee, as established from time to time by the city council to cover administrative costs and costs of hearing, shall accompany notice of appeal. The building authority shall forthwith transmit to the board of appeals all of the papers constituting the record upon which the action appealed from was taken.

City Code § 14-472(b)(1).

The zoning determination in this proceeding was made on or about January 13, 2015. Verizon Wireless filed its application for a conditional use permit on October 21, 2015. The City

³ This interpretation of the Code is reflected on the City’s webpage and description of the Zoning Administration function of city staff, stating that “all building permit reviews start with a zoning determination. Zoning determines if a certain type of use can be undertaken at the proposed location, how much land is required for that use, how high a building can be, how much parking is required, and many other factors related to land development.” <http://me-portland.civicplus.com/Directory.aspx?DID=22>. As noted in the description of Zoning Administration and the City Code, appeals of such zoning determinations may be filed with the Board of Appeals, subject to certain requirements.

⁴ It has been suggested that the Board of Appeals has both appellate jurisdiction to hear appeals of zoning determinations and the authority to make a threshold determination within the context of a conditional use application. Given that the City Code expressly delegates this authority to the Building Authority it cannot also be held by the Board, absent a specific grant in the Code. Further, the City has taken the position previously that, with regard to the Portland Planning Board, the language in the site plan review provision, which allegedly gives the Planning Board the right to confirm compliance with all provisions in the Code, including the zoning designations, does not permit such “threshold” decisions to be made in a site plan review proceeding. See *Ciccomancini v. City of Portland*, 2009 WL 1106417 (Me. Super. Mar. 2, 2009) (attached). In this case the City made it clear that zoning determinations are made by the Zoning Administrator (in that case Ms. Schmuckal) and that there is no concurrent jurisdiction by the board processing the permit application.

sent abutters within 500 feet of the subject property notice of the filing approximately two weeks prior to the Board of Appeals meeting on December 3, 2015. Both Attorney Silk's client, and another abutter that has filed comments on the zoning designation, Ms. Galardo, received written notice of the filing of the application.

Even if we assume that the 30-day period began to run as of the date these abutters received actual notice of the filing of the application (which under Maine law is not the commencement of the 30-day period), no appeal of the Zoning Administrator's determination was filed with the Board within 30 days of such notice. Even if the City were to consider Ms. Galardo's December 28, 2015 email or Attorney Silk's January 14, 2016 letter to constitute an "appeal" of the zoning determination, neither of these comments were submitted to the City within this 30-day period. There is no provision in the City Code that permits the filing of appeals beyond this time period.

Finally, although under certain circumstances a Superior Court judge may permit a municipal board of appeals to consider a late appeal for "good cause," a party must first obtain a court order to that effect. *See Brackett v. Town of Rangeley*, 2003 ME 109, ¶ 17, 831 A.2d 422, 428 (the application of the good cause exception is a decision to be made judicially, not by municipal boards, "to prevent local arbitrariness"). As the City Code does not authorize the Board of Appeals to hear late appeals, the Board cannot do so absent a court order.

Thank you for your consideration of these comments.

Very truly yours,



Kelly B. Boden

KBB/mtt
Enclosure

2009 WL 1106417 (Me.Super.) (Trial Order)
Superior Court of Maine.
Cumberland County

Nicolino CICCOMANCINI and Patricia Ciccomancini, Plaintiff / Petitioners,
v.
CITY OF PORTLAND and Casco Bay Ventures, LLC, Defendants / Respondents.

No. AP-07-061.
March 2, 2009.

Decision and Order on Defendant's Motion to Dismiss (M.R.Civ.P. 80B)

Thomas E. Delahanty II, Justice Superior Court.

This matter comes before the court on the Motion to Dismiss by respondent City of Portland (the City). The case is a Rule 80B appeal arising from a decision of the City of Portland Planning Board (PPB) granting a building permit to Casco Bay Ventures, LLC (CBV), the owner of property abutting petitioners' property in the Eastern Promenade section of Portland.

I. BACKGROUND AND PROCEDURAL HISTORY

The petitioners, Nicolino Ciccomancini and Patricia Ciccomancini (Ciccomancini), own a multi-unit apartment building located in the Eastern Promenade area of Portland. On the adjacent lot, located at the corner of Wilson Street and the Eastern Promenade, CBV owns a multi-family apartment building. The CBV apartment building is a nonconforming structure under the City of Portland Land Use Code (the Ordinance) with insufficient set-back distances on the northwesterly and northeasterly sides. The building is grandfathered as a nonconforming structure because it was constructed in 1903 before the adoption of the Ordinance. For this reason, the CBV needed authorization from the City to make any alterations, modifications, or additions to the building.

CBV applied for subdivision and site plan approval for its property on July 16, 2007. CBV's proposed plan would result in a total of nine units in the finished structure. Before the plan was presented to the PPB for its review, the Zoning Administrator, Marge Schmuckal (Schmuckal), reviewed the project to determine zoning compliance. On September 4, 2007, the Ciccomancinis submitted a letter to the City Planner and the PPB objecting to CBV's application on multiple grounds.¹ The letter was passed on to Schmuckal, who then disapproved the site plan, agreeing with the Ciccomancinis on one of their raised objections, but not the others.² On September 26, Schmuckal wrote the Ciccomancinis, informing them that she was not approving CBV's site plan because it contained insufficient square footage to support the proposed nine units. Schmuckal also informed them that she did not agree with the Ciccomancinis' other objections and that they had a right to appeal her decision to the Zoning Board of Appeals (ZBA) within 30 days. The Ciccomancinis did not appeal the decision at that time.

On October 9, 2007, CBV amended its plan to reduce the number of proposed units from nine to seven thereby bringing it into conformance with section 14-388 of the Ordinance. Schmuckal thereafter determined the project to be in compliance with the City's zoning requirements. The Ciccomancinis received notice that a PPB workshop was scheduled and again wrote to the City Planner registering their objections to the new site plan. The City's counsel took the position that the issue was foreclosed for failure to appeal the September 26, 2007 determination.

On January 22, 2008, the project was presented to the PPB for its review under subdivision and site plan standards. The Ciccomancinis were represented by counsel at the public hearing and argued that PPB should revise Schmuckal's zoning

determinations. The Ciccomancinis raised two objections to CBV's new plan: they made their previously raised argument that the plan did not comply with section 14-382(d) because the changes proposed would not be made within the space occupied by the existing shell of the building, and they posed a new argument that the proposal did not comply with open space requirements provided in section 14-526 of the Ordinance.

The City's attorney advised the PPB that it lacked the authority to make zoning decisions and declined to revise Schmuckal's zoning determinations. Subsequently, the PPB determined that CBV's project now complied with the subdivision and site plan ordinance and approved the project with conditions. One condition required Schmuckal to confirm that the project met the open space requirements of the Zoning Ordinance, as this was a new concern raised by the Ciccomancinis through written correspondence with the PPB and testimony at the public hearing. Thereafter, the Ciccomancinis submitted a letter to Schmuckal dated February 1, 2008, with information supporting their conclusion that the project did not meet the open space requirement.

On February 5, 2008, Schmuckal decided that the open space requirement was satisfied and communicated her determination to the PPB. Schmuckal provided written notice to the Ciccomancinis in a letter dated February 5, 2008, again informing them of their right to appeal to the ZBA within 30 days. The PPB issued a written decision approving the site plan on February 12, 2008. The Ciccomancinis did not appeal Schmuckal's decision (the decision made by the Building Authority) to the ZBA. Instead the Ciccomancinis appealed the PPB's major site plan review and approval of the CBV project to this court.

II. DISCUSSION

A. Failure to Appeal to the ZB

The ZBA “shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless *only* a direct appeal to Superior Court has been provided by municipal ordinance. 30-A M.R.S. § 4353(1) (emphasis added).³ The Portland Ordinance expressly provides for direct appeals from the PPB to the Superior Court, stating that “[w]hen the Planning Board has finally approved or disapproved a site plan, any person aggrieved or the city may appeal the decision of [sic] the Superior Court, pursuant to Rule 80B” § 14-527(b). Although the Ordinance provides for appeals from the PPB to Superior Court, it does not provide that this is the *only* way to appeal a zoning ordinance determination as required by 30-A M.R.S. § 4353(1). Instead, the Ordinance expressly provides that zoning determinations decided by the Building Authority, and only approved by the PPB, are appealable to the ZBA. § 14-471.

The Ordinance designates the Building Authority as “responsible for enforcing” the relevant zoning ordinance. § 14-461. The Zoning Administrator (the Administrator), an official within the Building Authority, makes decisions regarding zoning enforcement. Section 14-471 of the Ordinance specifically authorizes the ZBA with jurisdiction and the authority to hear and decide appeals taken from the Building Authority.⁴

After the Administrator makes all relevant zoning determinations, the PPB reviews all of the site plan decisions, including the initial determinations of zoning issues. The Ordinance states that the PPB shall not approve a major site plan unless it meets certain criteria. § 14-526(a). One such requirement mandates that the applicant must submit all required information and the PPB must find that the development complies with all applicable provisions of the Ordinance. § 14-526(a)(17).⁵ Section 14-30(f) of the Ordinance defines the PPB's authority to decide zoning issues, providing the PPB with the authority to review and provide recommendations to City Council on applications for zoning changes.⁶

The Maine Legislature has provided local administrative bodies with compartmentalized authority over land use activities, but roles can at times overlap and boundaries can become blurred. Although the ZBA has primary jurisdiction over zoning issues, the Law Court has recognized that 30-A M.R.S. § 4353 does not expressly preclude other local bodies from all matters concerning a municipality's zoning ordinance. *Perkins v. Town of Ogunquit*, 1998 ME 42, ¶ 9, 709 A.2d 106, 108. Planning boards are precluded from enforcing zoning matters that the Legislature has expressly placed within the ZBA's jurisdiction. For example,

the Law Court found that a planning board's modification of a binding zoning requirement is a variance that must be committed to the discretion of a ZBA due to the express language of 30-A M.R.S. § 4353(2)(C). *Id.* An ordinance "shall not circumvent the Legislature's express and implicitly exclusive grant of variance-granting authority to ZBAs." *Id.* ¶ 9, 709 A.2d at 108-09.

The Law Court has held that the authority to make a zoning determination must be expressly granted by statute or ordinance. *Oeste v. Town of Camden*, 534 A.2d 683, 684 (Me. 1987). In *Oeste*, the Court found that the planning board did not have authority to act, stating that it was "readily apparent from the structure of the ordinance and the statutes that only the Code Enforcement Officer and the Zoning Board of Appeals are authorized to make zoning determinations." *Id.* While the Court acknowledged that the planning board determines whether a proposal is in conformance with ordinances, and development and land use plans, it went on to state that "[w]hen confronted with a disputed zoning question ... the Planning Board is not authorized to make the zoning determination." *Id.* The Law Court came to a similar conclusion in *Noyes v. Bangor*, reasoning that the planning board "could not have made that determination, implicitly or otherwise" because the zoning ordinance "vests the code enforcement officer and not the Board with the authority to decide" zoning issues. 540 A.2d 1110, 1111-12 (Me. 1988).

The Ciccomancinis argue that the Court's broad language in *Oeste* suggesting that planning boards are prohibited from having zoning authority is contrary to holdings in subsequent Law Court cases. In support of this contention, the petitioners list cases that actually predate the *Oeste* decision in 1987: *Fletcher v. Feeney*, 400 A.2d 1084 (Me. 1979) *Cushing v. Smith*, 457 A.2d 816, 819-20 (Me. 1983); and *Lakes Envtl. Ass'n v. Town of Naples*, 486 A.2d 91, 95 (Me. 1984). These cases not only precede *Oeste*, but they also fail to expressly address whether or not planning boards have the authority to make zoning determinations.⁷

In this case, the Ciccomancinis argue that the PPB has been granted the authority to review compliance with the zoning ordinance in the context of a site plan review. They contend that § 14-526(a)(17) provides the PPB with the authority over a number of zoning determinations. It is the Ciccomancinis' contention that the Building Authority is the body charged with making initial and only preliminary determinations on zoning, and the PPB that is to review those determinations and issue a final decision. The petitioners assert that the ZBA does not have exclusive jurisdiction because the Ordinance provides for direct appeal of PPB's site review decisions to superior court.

The City argues that the Ciccomancinis have failed to exhaust their administrative remedies. The City points out that the Ciccomancinis had two opportunities to appeal Schmuckal's zoning decision to the ZBA and they failed to do so on both occasions. The City further argues that the PPB does not have the authority to decide zoning matters and that zoning matters are decided by the Building Authority and should therefore be appealed to the ZBA. The City further argues that even if the Ordinance grants the PPB with the authority to determine zoning issues, such an action should be found null and void and of no consequence because the Legislature has granted the Building Authority and the ZBA with exclusive authority over zoning matters.

According to the record, the planning board site review did ensure that all necessary information had been gathered from CBV and opened the floor up to those who objected to the project's approval. The Ciccomancinis raised their concerns about compliance with the zoning Ordinance and the PPB passed on the site plan with the condition that Schmuckal follow up on the open space issue and make a final determination. The record reflects the fact that the PPB declined to make the zoning determination, reasoning that it was not within its purview to second guess or revisit zoning decisions. The PPB made clear that the Administrator determines zoning issues, thereby making appeal to the ZBA the appropriate course of action for the Ciccomancinis.

Understandably, the Ciccomancinis did not appeal Schmuckal's 2007 decision on CBV's initial proposal because they were not "aggrieved" by the decision; Schmuckal denied CBV's first proposal based on one of the Ciccomancinis' raised objections. It is less clear, however, why the Ciccomancinis chose not to appeal when Schmuckal wrote to them again on February 5, 2008, after making the final determination that the zoning requirements were met. Schmuckal informed the Ciccomancinis of their right to appeal her decision to the ZBA and they failed to exercise that right. The PPB expressly stated that it did not have the authority to decide zoning issues.

The Ordinance provides the PPB with the authority to provide recommendations, not determinations, as to zoning matters. Even if the Ordinance grants the PPB with the authority to make zoning determinations, this authority should not circumvent authority that the Legislature has expressly and implicitly granted to ZBA. The Ordinance does allow for the appeal of PPB review decisions to the Superior Court, however, this is not the appropriate course of action regarding zoning determinations made by the Housing Authority. Although the PPB does review the overall site plan, zoning determinations are outside of its authority and it is therefore the final decision of the Housing Authority that should be appealed to the ZBA.

B. Remand of the Case to the ZBA

The Ciccomancinis never appealed to the ZBA and have missed their opportunity to do so. The Law Court has held that when a court "finds special circumstances which would result in a flagrant miscarriage of justice," the time for filing an appeal may be extended "within a narrowly extended range." *Keating v. Zoning Board of Appeals of Saco*, 325 A.2d 521, 524 (Me. 1974). The judicial exception for good cause does not apply here because the Ciccomancinis had ample opportunity to appeal to the ZBA and chose not to do so. The City informed the petitioners that this was a zoning issue that was outside of the PPB's authority, yet the Ciccomancinis chose to appeal from the PPB's site plan review, rather than the Building Authority's determination that they were actually disputing.

III. DECISION AND ORDER

The clerk will make the following entries as the Decision and Order of the court:

A. The Motion to Dismiss by the City of Portland is granted for failure of the petitioners to exhaust their administrative remedies.

B. Judgment is entered for the City of Portland and Casco Bay Ventures, LLC.

C. No costs are awarded.

SO ORDERED.

Dated: March 2, 2009

<<signature>>

Thomas E. Delahanty II

Justice, Superior Court

Footnotes

- 1 The Ciccomancinis made two primary objections to the site plan at that time: (1) that the plan did not comply with section 14-382(d) of the Ordinance because the changes proposed would not be made within the space occupied by the existing shell of the building; and (2) that the plan did not comply with section 14-388 of the Ordinance because the square footage would be insufficient to support the nine units proposed.
- 2 Schmuckal agreed that the 9-Unit Plan contained insufficient square footage to support nine units under § 14-388 of the Ordinance.
- 3 The relevant provisions of 30-A M.R.S. state:
§ 4353. Zoning Adjustment
Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section.

1. Jurisdiction; procedure. The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance

2. Powers. In deciding any appeal, the board may:

B. Approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance except that, if the municipality has authorized the planning board, agency or office to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and

C. Grant a variance in strict compliance with subsection 4.

4 Section 14-471. Jurisdiction and authority:

(a) Subject to the provisions of section 14-472, to hear and decide appeals from, and review orders, decisions, determinations or interpretations made by the building authority

5 The precise language of § 14-526(a)(17) of the Code is as follows:

(a) *Requirements for approval.* The Planning Board or planning authority shall not approve a site plan unless it meets the following criteria:

....

(17) The applicant has submitted all information required by this article and the development complies with all applicable provisions of this Code. § 14-526(a)(17)....

6 Section 14-30. Jurisdiction and authority.

In addition to the jurisdiction conferred on it by other provisions of state law and the ordinances of the city and in accordance therewith, the planning board shall have the following jurisdiction and authority:

(a) To prepare and recommend a comprehensive plan to the city council, shall be known as the "Land Development Plan of the City of Portland";

(b) To prepare and recommend to the city council changes in and amendments to the land development plan;

(c) To aid and assist the city council and departments and agencies of the city in implementing general plans and in planning, developing and completing specific projects;

(d) To hear, review and approve, conditionally approve or disapprove major site plans;

(e) To hear, review and approve or deny applications for subdivision approval;

(f) To hear, review and offer its recommendations to the city council on applications for zoning changes and amendments to, or revisions of, the zoning ordinance, and to initiate recommendations for zoning changes and amendments to, or revisions of, the zoning ordinance

7 There are subsequent cases that indicate that planning boards do have limited zoning authority. *Perkins v. Town of Ogunquit*, 1998 ME 42, ¶ 9, 709 A.2d 106, 108 (noting that the planning board had the authority to issue "special exception and conditional use permits" as long as the waiver did not, in effect, grant a variance); *York v. Town of Ogunquit*, 2001 ME 53, ¶ 10, 769 A.2d 172, 176-77 (finding that the Planning Board did have the authority to waive strict application of Subdivision Standards in certain circumstances). These cases, however, do not contradict the Court's holding in *Oeste*.

David P. Silk, Esq.

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February 3, 2016

Sent via email to: amachado@portlandmaine.gov

City of Portland, Zoning Board of Appeals
c/o Ann Machado, Zoning Specialist
City of Portland
Portland City Hall, Room 315
389 Congress Street
Portland, ME 04101

**RE: Conditional Use Application, Verizon Wireless, 1877 Congress Street
Jurisdiction of the Portland Zoning Board of Appeals**

Dear Board Members and Attorney Lee:

On Monday, February 1, 2016, Attorney Kelly Boden submitted a letter outlining Verizon Wireless' position regarding the authority of the Portland Zoning Board of Appeals (the "Board") to make a conditional use determination on Verizon Wireless' proposed "Head End" facility.¹ That letter contains a number of misstatements that require correction in advance of the February 4, 2016 hearing.

To start, in the opening paragraph of her letter, Attorney Boden states that the abutters "object[] to the City's prior determination, made in October of 2015, that Verizon Wireless' proposed development constitutes a 'utility substation.'" That is not true. The abutters are not objecting to a *prior determination* because there has been no prior determination that the proposed head end facility is a utility substation. Instead the abutting landowners have argued simply that the "Board should deny Verizon Wireless' permit application." See Letter dated January 14, 2016 from David Silk at 6. As set forth in more detail below, the grant or denial of a conditional use permit *is* the initial determination on conditional use and such a determination is

¹ Section 27 of the City Code is titled "Broadband Telecommunications Network." It allows for the City to grant cable franchises pursuant to a franchise agreement. Section 27-2 includes a definition section. In that section "Head End" is defined as "the land, electronic processing equipment, antenna, tower, building and other appurtenances normally associated with and located at the starting point of a broadband telecommunications network." "Network facilities" are defined to include the head end.

within the sole province of the Board. No prior determination has been made as to whether or not the proposed head end facility is a utility substation that qualifies for a conditional use.

Attorney Boden's remaining misstatements concerning the procedural history of this case and her misunderstanding of the authority and procedures set forth in Portland's Land Use Code are addressed in more detail below.

1. The Land Use Code Gives The Board Of Appeals Primary
And Exclusive Jurisdiction Over Conditional Use Determinations

Verizon Wireless cites Maine case law for the proposition that "[t]he authority to make a zoning determination must be expressly granted by statute or ordinance." *Ray v. Town of Camden*, 533 A.2d 912, 914 (Me. 1987). That much is true. What Verizon Wireless neglects to note, however, is that Portland's Land Use Code expressly grants that authority to the Board.² Section 14-471 states:

The board of appeals shall have the following jurisdiction and authority:

...
(c) Subject to the provisions of section 14-474, to hear and grant or deny applications for conditional uses, as specified in this article.

Pursuant to the plain language of the Land Use Code, the Board has primary jurisdiction and authority to hear and decide conditional use applications. Therefore, the Board has the authority to decide, in the first instance, whether to grant or deny Verizon Wireless' conditional use permit application. *See Desfosses v. City of Saco*, 2015 ME 151, ¶ 8 ("If the meaning of the statute or ordinance is clear, we need not look beyond the words themselves to interpret the provision according to that plain meaning.").

Verizon Wireless confuses the Board's primary authority over conditional use applications with the Board's appellate authority over other matters. Verizon Wireless misleadingly quotes only subsection 14-471(a), pursuant to which the Board has appellate jurisdiction to "decide appeals from, and review orders, decisions, determinations or interpretations made by the building authority." That subsection is plainly inapplicable here because, by subsection 14-471(c) quoted above, only the Board has authority to decide conditional use applications.

Despite the express language of Section 14-471(c) to the contrary, Verizon Wireless suggests that the Board does not have "both appellate jurisdiction to hear appeals of zoning determinations and the authority to make a threshold determination within the context of a

² Relevant sections of the Land Use Code are reproduced and attached as Exhibit A.

conditional use application.”³ The Board clearly does. In fact, the Maine Supreme Judicial Court has explicitly recognized that a zoning board of appeals acts within its original jurisdiction when it considers an application for a special permit, such as a conditional use permit. In *Silsky v. Allen’s Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985), the Law Court considered whether the zoning board of appeals “was acting in an appellate or original jurisdiction capacity in considering [an] application for a special exception.” *Id.* at 1294. It first explained that “[z]oning enabling acts and zoning ordinances usually do not characterize the jurisdiction of a board of adjustment as original or appellate, and such acts and ordinances must be inspected to determine the nature of the board’s jurisdiction with regard to the various types of relief.” *Id.* The Law Court reasoned that “[w]here the zoning ordinance provides that certain uses may be maintained only upon issuance of a special permit by the board, the board has original jurisdiction with regard to the issuance or denial of the permit.” *Id.* It concluded that the board had authority to consider an application for a special exception without a written appeal because “the Board was acting in its original jurisdiction, and not in its appellate role acting upon a decision of the building inspector.” *Id.* at 1295. *See also Cushing v. Smith*, 457 A.2d 816, 819 (Me. 1983) (recognizing that under what is now codified at 30-A M.R.S. § 4253(2)(B), the statute permits a municipality to authorize a zoning board of appeals to grant conditional use permits “in strict compliance with the ordinance”).

Here, the plain language of Section 14-471(c) gives the Board primary jurisdiction and the authority to hear and decide conditional use applications. Therefore, the only way that Verizon Wireless would be permitted to install its head end telecommunications facility in the proposed residential area is if the Board determines that the facility qualifies for a conditional use permit. Neither the Zoning Administration staff nor any other City building authority has the power to make that determination.

Other sections of the Land Use Code support the conclusion that the authority to grant or deny conditional use permits rests with the Board. Section 14-474 governs the procedure for issuance of conditional use permits. Like Section 14-471(c), Section 14-474 (a) again grants the Board – and only the Board – the authority to grant or deny conditional use permits. Subsection (a) provides:

“*Authority.* The board of appeals may, subject to the procedures, standards and limitations set out in this section, approve the issuance of a conditional use permit authorizing development of conditional uses.”

³ The case Verizon Wireless cites in support of its position, *Ciccomancini v. City of Portland*, 2009 WL 1106417 (Me. Super. Mar. 2, 2009), is inapposite as that case does not involve a conditional use application. For an example of a case in which the Law Court upheld a threshold determination on conditional use made by a zoning board of appeals, see *Wells v. Portland Yacht Club*, 2001 ME 20 (holding that the board of zoning appeals did not err as a matter of law in determining in the first instance that the proposed use constituted a “private club,” a permitted conditional use under the town ordinance).

Subsection (b) of Section 14-474 then outlines the procedure to be followed when applying for a conditional use permit. The application and application fee are to be submitted to the building authority, 14-474(b)(1), but then “[a] public hearing shall be set, advertised and conducted by the board of appeals.” 14-474(b)(2) (*emphasis added*). The building authority’s power over conditional use permits thus begins and ends with the collection of the application. By contrast, subsection 14-474(b)(3) provides the actions that may be taken by the Board:

Action by the board of appeals. Within thirty (30) days following the close of the public hearing, the board of appeals shall render its decision, in a manner and form specified by article VI of this chapter, granting the application for a conditional use permit, granting it subject to conditions as specified in subsection (d), or denying it. The failure of the board to act within thirty (30) days shall be deemed an approval of the conditional use permit, unless such time period is mutually extended in writing by the applicant and the board. Within five (5) days of such decision or the expiration of such period, the secretary shall mail notice of such decision or failure to act to the applicant and, if a permit is authorized, shall issue such permit, listing therein any and all conditions imposed by the board of appeals.

There is nothing in Section 14-474 (or elsewhere in the Land Use Code) that allows the building authority to make any initial determination pertaining to conditional use. Indeed, all that the building authority is expressly authorized to do is accept the conditional use permit applications, which are then turned over to the Board to act upon. The Land Use Code thus vests the original authority to make conditional use determinations in the Board and no other entity.⁴

Verizon Wireless’ own actions up until now comport with this. Verizon Wireless applied for a conditional use permit on October 21, 2015 by submitting an application to the Board and asking that the Board “consider this request at its next regularly scheduled meeting.” See Verizon Wireless’ Conditional Use Application dated October 21, 2015. The application form itself includes the standards set forth in 14-474(c)(2) that the Board applies in making its conditional use determination. *Id.* (“Upon a showing that a proposed use is a conditional use under this article, a conditional use permit shall be granted unless the Board determines”) That standard places the burden of proof on Verizon Wireless to show that its proposed use qualifies as a conditional use. With its application to the Board, Verizon Wireless makes no

⁴ This primary authority of the Board over conditional uses is reinforced in other sections of the Land Use Code. For example, Section 14-78 provides that a temporary wind anemometer is permitted as a conditional use provided that certain standards are met, including constructing the tower according to a licensed engineer’s plans, “which shall be provided to the Board of Appeals with the application” and providing an engineer’s safety report, “to the Board of Appeals with their application for conditional use.” Section 14-78(c)(4)(b)-(d). See also Section 14-88(a)(1); 14-118(a)(2); 14-128(a)(1); 14-137(a)(2) (“The board of appeals may impose conditions upon a conditional use permit”). These provisions further support the conclusion that the Board is tasked with evaluating initial applications for conditional use, not solely appeals as Verizon Wireless maintains.

mention of the “zoning determination” that it now claims had been made by the building authority on January 13, 2015.

2. The Proposed Head End Facility Is Not A Utility Substation

In order to issue a conditional use permit, the Board must determine if the proposed use is permitted in the zone where it is proposed to be located. Section 14-474(c) contains the conditions that must be met for a conditional use: “A conditional use permit may be issued for any use denominated as a conditional use in the regulations applicable to the zone in which it is proposed to be located.” 14-474(c). In this case, that means that the Board must first determine whether the proposed use, Verizon Wireless’ “Head End” building, is “denominated as a conditional use in the regulations applicable to the [R-2] zone in which it is proposed to be located.” Put another way, Verizon Wireless has the burden to show that the proposed head end building, also called a “telecommunications facility” by Verizon Wireless, is a “utility substation” in the R-2 zone. If Verizon Wireless cannot meet its burden, then the Board must deny Verizon Wireless’ application.⁵

As set forth in my January 14, 2016 letter, because it is undisputed that Verizon Wireless is not a public utility, its proposed telecommunications facility is *not* a utility substation but a telecommunications facility. Telecommunications facilities are not listed as conditional uses in the R-2 zone. Verizon Wireless has not suggested otherwise.

Even though it concedes it is not a public utility, Verizon Wireless argues that its proposed telecommunications facility is a “utility substation” and therefore does fall within permitted conditional uses for an R-2 zone. Verizon Wireless argues that it satisfies the definition of a utility substation because it meets “the commonly accepted meaning of public utility.” See Letter dated January 20, 2016 from Attorney Boden at 4. But in its January 20, 2016 letter, Verizon Wireless conspicuously omits the portion of the *Black’s Law* definition that supports the conclusion that it is not a public utility:

1. A company that provides necessary services to the public, such as telephone lines and service, electricity, and water. *Most utilities operate as monopolies, but are subject to governmental regulation.*
2. A person, corporation, or other association that carries on an enterprise for the accommodation of the public, the members of which are entitled as a matter of right to use its facilities.

⁵ If the Board does conclude that the proposed facility qualifies as a utility substation, which it should not, then the Board goes on to consider the standards listed in subsection (c) that the facility must meet before issuance of the conditional use permit. The abutting landowners continue to reserve the right to later address whether Verizon Wireless’ proposal complies with these standards.

Black's Law Dictionary 1582 (8th ed. 2004) (*emphasis added*). Further, other definitions of “public utility” support the abutters’ interpretation. For example, *The American Heritage Dictionary* defines public utility as “[a] private business organization, subject to governmental regulation, that provides an essential commodity or service to the public.” *The American Heritage College Dictionary* 1106 (3d ed. 1997).

The treatise *American Law of Zoning* provides a more robust definition. It states that a “public utility” means “a private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain and be subject to such governmental regulation as fixing of rates, and standards of service.” 2 Anderson, *American Law of Zoning* § 12.32, at 568-569 (3d ed.). According to this treatise, characteristics of a public utility include:

- (1) the essential nature of the services offered which must be taken into account when regulations seek to limit expansion of facilities which provide the services,
- (2) “operat[ion] under a franchise, subject to some measure of public regulation,” and
- (3) logistical problems, such as the fact that “[t]he product of the utility must be piped, wired, or otherwise served to each user . . . [,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery.”

Id. at 569.

Verizon Wireless, as a mobile telecommunications company, does not meet these definitions of “public utility.” It does not operate as a monopoly. Indeed, it has multiple direct competitors for its business in Portland such as AT&T, T-Mobile, Sprint and US Cellular. Nor does Verizon Wireless provide “an essential commodity or service to the public” or “enjoy certain privileges such as eminent domain.” It is one of many companies in Maine that offers, at unregulated prices, mobile devices and mobile telecommunications services, neither of which is essential to the public interest. Applying any of the above definitions, Verizon Wireless is not a public utility.

3. The City’s Ordinance Does Not Violate The Federal Telecommunications Act

Contrary to Verizon Wireless’ assertion, a finding that the proposed telecommunications facility is not a utility substation under the Land Use Code will not violate the Federal Telecommunications Act of 1996 (the “Telecom Act”). The Telecom Act expressly preserves local zoning authority. 47 U.S.C. § 332(c)(7)(A) (“Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”) A zoning ordinance may violate the Telecom Act if it

prohibits or has “the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II). Courts have held that to prove this violation of the Telecom Act, the wireless carrier must demonstrate that (1) preventing the construction of the proposed facility results in a significant gap in service and (2) that the carrier’s proposal is the least intrusive means of filling that gap. *See Omnipoint Commc’ns Enters., L.P. v. Newtown Twp.*, 219 F.3d 240, 244 (3d Cir.), *cert. denied*, 531 U.S. 985 (2000). Verizon Wireless has failed to demonstrate that it meets this standard. Indeed, it cannot make such a showing because, with at least four other wireless carriers operating in southern Maine, there is no evidence of any significant gap in wireless coverage in Portland.⁶

Further, while Verizon Wireless acknowledges that telecommunications facilities are permitted uses in the B-6 and B-7 zones, it overlooks that such facilities are very likely permitted in the I-L zone as a low-impact industrial use and in the I-M zone under the performance-based uses. Section 14-248.

4. Verizon Wireless’ Incorrect Reading Of The Land Use Code Is Unconstitutional

Although the plain language of the Land Use Code clearly authorizes the Board – and only the Board – to hear applications for conditional use, Verizon urges the Board to find that a utility substation determination was made on January 13, 2015 and that the abutters’ time to appeal that decision has expired. Such a conclusion is not only contrary to the express provisions of the Land Use Code as explained above, but would result in depriving the abutting landowners of their due process rights to notice and a fair hearing.

Courts strive to “interpret all provisions in a manner that avoids any danger of unconstitutionality.” *Desfosses v. City of Saco*, 2015 ME 151, ¶ 8. The Law Court recently noted that an abutting landowner to a proposed project has a protected property interest and “a right to the notice and opportunity to be heard in all proceedings related to that interest that are the hallmarks of due process.” *Id.* ¶ 20 n.12 (*citing Duffy v. Town of Berwick*, 2013 ME 105, ¶ 15 (“Both an applicant and members of the public who oppose a project are entitled under the Due Process Clause of the United States and Maine Constitutions to a fair and unbiased hearing.”)).⁷

⁶ Even if there were a significant gap, of which Verizon Wireless has made no such showing, Verizon Wireless must also prove that its proposal is the least intrusive means of remedying the gap. Verizon Wireless has failed to show why siting its proposed facility in this residential zone, rather than a commercially zoned area, is the least intrusive method.

⁷ In *Desfosses*, a car dealership requested and obtained approval from the city planner for a “minor change” to its site plan, that would allow the dealership to install a twelve-foot retaining wall and fence along its and abutter Desfosses’s common boundary. Desfosses was given no notice of the proposed amendment to the approved site plan or the city planner’s approval of that amendment. The Law Court held that Desfosses was entitled to notice.

If Verizon Wireless' version of events and interpretation of the Land Use Code were followed, the abutters here would be impermissibly deprived of notice and the opportunity to be heard on the proposed Verizon Wireless head end facility:

- The abutters had no notice in January 2015 that a "utility substation" determination had been made via an email exchanged between Verizon Wireless and City staff.
- The abutters had no opportunity to be heard prior to the January 2015 determination being made.
- There was no notice in the application for a conditional use permit that Verizon Wireless filed that suggested that a determination already had been made.
- The postcard sent to the abutters after Verizon Wireless filed its application for a conditional use permit did not contain any notice that a determination already had been made.
- The abutters had no opportunity to be heard prior to the December 3, 2015 meeting.
- There was no mention at the December 3, 2015 meeting that a determination already had been made on the "utility substation" issue.

My clients and others, such as direct abutters, have a constitutional right to notice and the opportunity to be heard in all proceedings concerning the proposed facility adjacent to their properties. Moreover, conditional use permits can only be issued "in strict compliance with the ordinance." 30-A M.R.S. § 4353 (2)(B). Nowhere in the Land Use Code does Verizon Wireless cite to any provision that describes any procedure by which (1) via email and without notice to abutters and area property owners the Zoning Administrator can make a legal determination on whether a proposed use qualifies as a conditional use and (2) any such determination is deemed binding on abutters, area property owners, and this Board if the determination is not appealed within thirty days. While such a process would greatly aid Verizon Wireless in its pursuit of locating commercial telecommunications facilities in residential zones where they are prohibited, it would make a mockery of landowners' rights to due process and notice.⁸

⁸ Verizon Wireless concedes it never filed for a zoning determination in the manner provided for in Section 14-465. Even if it had, absent notice, for the reasons discussed above, any determination made through that process would not be binding on impacted property owners. Compare Section 14-391 which sets forth the process for the Zoning Administrator to make a determination as to the number of nonconforming legal dwelling units in a structure. On receipt of a completed application, the Zoning Administrator is required to give notice to abutters as well as property owners located within 300 feet of the structure. Section 14-391(d). If after notice any objection is made, then the Zoning Administrator lacks any authority to make any determination and the applicant must proceed to this Board for conditional use approval. Section 14-391(d).

City of Portland, Counsel
City of Portland, ZBA
Page 9
February 3, 2016

For the foregoing reasons and for the reasons set forth in my January 14, 2016 letter, the Board has the authority to grant or deny Verizon Wireless' application for a conditional use permit. The Board should deny the application because Verizon Wireless is not a public utility and its proposed head end telecommunications facility is prohibited in the R-2 residential zone.

Thank you for your consideration.

Sincerely,



David P. Silk

DPS/ml

Enclosures

cc: Kelly B. Boden, Esq. (w/encl.)

Exhibit A

Sec. 14-471. Jurisdiction and authority.

The board of appeals shall have the following jurisdiction and authority:

(a) Subject to the provisions of section 14-472, to hear and decide appeals from, and review orders, decisions, determinations or interpretations made by the building authority;

(b) Subject to the provisions of section 14-473, to hear and grant or deny applications for variances from the terms of this article;

(c) Subject to the provisions of section 14-474, to hear and grant or deny applications for conditional uses, as specified in this article;

(d) To initiate changes and amendments to this article.

(Code 1968, § 602.24.A; Ord. No. 437-74, 7-1-74; Ord. No. 354-85, § 5, 1-7-85)

Sec. 14-472. Appeals.

(a) *Authority.* The board of appeals shall hear and decide appeals from and review orders, decisions, determinations or interpretations or the failure to act of the building authority.

(b) *Procedure:*

1. *Notice of appeal.* An appeal may be taken to the board of appeals by any person affected by a decision of the building authority. Such appeal shall be taken within thirty (30) days of the action complained of by filing with the building authority a notice of appeal specifying the grounds thereof. A payment of a nonrefundable filing fee, as established from time to time by the city council to cover administrative costs and costs of hearing, shall accompany notice of appeal. The building authority shall forthwith transmit to the board of appeals all of the papers constituting the record upon which the action appealed from was taken.

2. *Public hearing.* A public hearing shall be set, advertised and conducted by the board of appeals in accordance with article VI of this chapter.

3. *Action by the board of appeals.* Within thirty (30) days

***Editor's note**—Ord. No. 93-88, adopted July 19, 1988, amended § 14-473 by adding subsection (f) to read as herein set out. See also the editor's note to Art. III of this chapter for additional provisions relative to Ord. No. 93-88.

Sec. 14-474. Conditional uses.

(a) *Authority.* The board of appeals may, subject to the procedures, standards and limitations set out in this section, approve the issuance of a conditional use permit authorizing development of conditional uses listed in this article.

(b) *Procedure:*

1. *Application.* Applications for conditional use permits shall be submitted to the building authority. A nonrefundable application fee, as established from time to time by the city council to cover administrative costs and costs of a hearing, shall accompany each application. The application shall be in such form and shall contain such information and documentation as shall be prescribed from time to time by the building authority but shall in all instances contain at least the following information and documentation:
 - a. The applicant's name and address and his or her interest in the subject property;
 - b. The owner's name and address if different than the applicant;
 - c. The address, or chart, block and lot number as shown in the records of the office of the assessor of the subject property;
 - d. The zoning classification and present use of the subject property;
 - e. The particular provision of this article authorizing the proposed conditional use;
 - f. A general description of the proposed conditional use;
 - g. Where site plan approval is required by article V of this chapter, a preliminary or final site plan

as defined by article V of this chapter.

2. *Public hearing.* A public hearing shall be set, advertised and conducted by the board of appeals in accordance with article VI of this chapter.
3. *Action by the board of appeals.* Within thirty (30) days following the close of the public hearing, the board of appeals shall render its decision, in a manner and form specified by article VI of this chapter, granting the application for a conditional use permit, granting it subject to conditions as specified in subsection (d), or denying it. The failure of the board to act within thirty (30) days shall be deemed an approval of the conditional use permit, unless such time period is mutually extended in writing by the applicant and the board. Within five (5) days of such decision or the expiration of such period, the secretary shall mail notice of such decision or failure to act to the applicant and, if a permit is authorized, shall issue such permit, listing therein any and all conditions imposed by the board of appeals.

(c) *Conditions for conditional uses:*

1. *Authorized uses.* A conditional use permit may be issued for any use denominated as a conditional use in the regulations applicable to the zone in which it is proposed to be located.
2. *Standards.* The Board shall, after review of required materials, authorize issuance of a conditional use permit, upon a showing that the proposed use, at the size and intensity contemplated at the proposed location, will not have substantially greater negative impacts than would normally occur from surrounding uses or other allowable uses in the same zoning district. The Board shall find that this standard is satisfied if it finds that:
 - a. The volume and type of vehicle traffic to be generated, hours of operation, expanse of pavement, and the number of parking spaces required are not substantially greater than would normally occur at surrounding uses or other allowable uses in the same zone; and
 - b. The proposed use will not create unsanitary or

harmful conditions by reason of noise, glare, dust, sewage disposal, emissions to the air, odor, lighting, or litter; and

- c. The design and operation of the proposed use, including but not limited to landscaping, screening, signs, loading, deliveries, trash or waste generation, arrangement of structures, and materials storage will not have a substantially greater effect/impact on surrounding properties than those associated with surrounding uses or other allowable uses in the zone.

(d) *Conditions on conditional use permits.* The board of appeals may impose such reasonable conditions upon the premises benefited by a conditional use as may be necessary to prevent or minimize adverse effects therefrom upon other property in the neighborhood. Such conditions shall be expressly set forth in the resolution authorizing the conditional use permit and in the permit. Violation of such conditions shall be a violation of this article.

(e) *Effect of issuance of a conditional use permit.* The issuance of a conditional use permit shall not authorize the establishment or extension of any use nor the development, construction, reconstruction, alteration or moving of any building or structure, but shall merely authorize the preparation, filing and processing of applications for any permits or approvals which may be required by the codes and ordinances of the city, including but not limited to a building permit, a certificate of occupancy, subdivision approval and site plan approval.

(f) *Limitations on conditional use permits.* No conditional use permit shall be valid for a period longer than six (6) months from the date of issue, or such other time as may be fixed at the time granted not to exceed two (2) years, unless the conditional use has been commenced or is issued and construction is actually begun within that period and is thereafter diligently pursued to completion; provided, however, that one (1) or more extensions of said time may be granted if the facts constituting the basis of the decision have not materially changed, and the two-year period is not exceeded thereby. A conditional use permit shall be deemed to authorize only the particular use for which it was issued and such permit shall automatically expire and cease to be of any force or effect if such use shall for any reason be discontinued for a period of twelve (12) consecutive months or more.

(g) *Appeals from board decisions.* Appeals from any decision of the board of appeals or, where applicable, the Planning Board respecting a conditional use permit shall be to superior court.

(Code 1968, § 602.24.D; Ord. No. 437-74, 7-1-74; Ord. No. 407-83, 2-2-83; Ord. No. 467-83, § 2, 4-20-83; Ord. No. 237-83, 10-17-83; Ord. No. 222-13/14, 5-5-2014)

Sec. 14-475. Reserved.

***Editor's note**—Section 7 of Ord. No. 354-85, adopted Jan. 7, 1985, repealed § 14-475, relative to nonconforming uses, which derived from Code 1968, § 602.24.E, and Ord. No. 437-74, adopted July 1, 1974.

Sec. 14-476. Successive applications.

Whenever any application, appeal or other request filed pursuant to this article has been finally denied on its merits, a second application, appeal or other request seeking essentially the same relief, whether or not in the same form or on the same theory, shall not be brought within one (1) year of such denial unless, in the opinion of the officer or board before which it is brought, substantial new evidence is available or a mistake of law or fact significantly affected the prior denial.

(Code 1968, § 602.24.F; Ord. No. 437-74, 7-1-74)

Sec. 14-477. Violations.

In addition to any other remedies available, the board of appeals after notice and hearing may revoke any variance or other relief granted under this article when the provisions of this article or the conditions under which the relief was granted have not been complied with.

(Code 1968, § 602.24.G; Ord. No. 437-74, 7-1-74)

Sec. 14-478. - 14-482. Reserved.

***Editor's Note**—Pursuant to Council Order 280-09/10 passed on 7/19/10 Division 29 (Preservation and Replacement of Housing Units) was repealed in its entirety and replaced with a new Division 29 (Housing Preservation and Replacement).

DIVISION 29. HOUSING PRESERVATION AND REPLACEMENT

Exhibit B

771 A.2d 371
Supreme Judicial Court of Maine.

Lloyd WELLS et al.
v.
PORTLAND YACHT CLUB et al.

Docket No. Cum-00-381.
|
Submitted on Briefs: Dec. 20, 2000.
|
Decided: Jan. 30, 2001.

Landowners sought review of zoning board of appeals' approval of yacht club's conditional use request for construction of building for boat storage and use by junior sailing program. The Superior Court, Cumberland County, Warren, J., affirmed. Landowners appealed. The Supreme Judicial Court, [Dana](#), J., held that: (1) landowners had standing to appeal; (2) landowners waived their claim that sufficiently similar request had been rejected within previous year; (3) club and its junior sailing program were permitted conditional uses; and (4) record supported approval of conditional use request.

Affirmed.

West Headnotes (10)

[1] **Zoning and Planning**

🔑 **Permits, certificates, and approvals**

Landowners had standing to appeal zoning board of appeals' approval of yacht club's conditional use request for construction of building for boat storage and use by junior sailing program; minutes of board meeting indicated that landowners, described as abutters or residents of road on which building was to be constructed, voiced their concerns for traffic, noise and aesthetics.

[5 Cases that cite this headnote](#)

[2] **Zoning and Planning**

🔑 **Right of Review; Standing**

To appeal a decision of the zoning board of appeals, a party must (1) have appeared before the board of appeals; and (2) be able to demonstrate a particularized injury as a result of the board's action.

[4 Cases that cite this headnote](#)

[3] **Zoning and Planning**

🔑 **Preservation before board or officer of grounds of review**

Landowners who opposed conditional use request for construction of building waived their claim that zoning board of appeals' approval of conditional use request violated zoning ordinance that prohibited board from considering second appeal of similar nature within one year from date of denial of first appeal; that issue was not sufficiently "raised" to board, despite letters and comments that generally stated that concerns raised by landowners at hearing for applicant's first conditional use request continued to exist.

[3 Cases that cite this headnote](#)

[4] **Administrative Law and Procedure**

🔑 **Preservation of Questions Before Administrative Agency**

Generally, a party in an administrative proceeding must raise any objections it has before the agency for the issue to be preserved for appeal.

[Cases that cite this headnote](#)

[5] **Administrative Law and Procedure**

🔑 **Preservation of Questions Before Administrative Agency**

A party in an administrative proceeding must raise any objection to the agency to ensure that the agency, and not the court, has the first opportunity to pass upon the claims of the parties.

[Cases that cite this headnote](#)

[6] **Administrative Law and Procedure**

🔑 Preservation of Questions Before
Administrative Agency

An issue is considered raised and preserved for appeal in an administrative proceeding if there is sufficient basis in the record to alert the court and any opposing party to the existence of that issue.

[5 Cases that cite this headnote](#)

[7] **Zoning and Planning**

🔑 Clubs, fraternities, and sororities

Zoning ordinance providing that private clubs were permitted conditional use in residential district allowed private yacht club to operate junior sailing program that charged tuition and allowed public to participate; language of ordinance did not limit use of “private club” to those who paid fees or dues, and junior sailing program taught boating skills to children, which was integral part of predominant goal of club, which was to promote and facilitate boating.

[Cases that cite this headnote](#)

[8] **Zoning and Planning**

🔑 Water-related uses and regulations

Record supported zoning board of appeals' approval of yacht club's conditional use request for construction of building for boat storage and use by junior sailing program; communications in meeting between board, club, and landowners who opposed conditional use request, and conditions that board placed on approval, supported board's implicit finding that club satisfied requirements for receiving conditional use approval.

[Cases that cite this headnote](#)

[9] **Zoning and Planning**

🔑 Evidence and fact questions

The applicant for a conditional use permit is responsible for demonstrating to the zoning board of appeals that each of the prerequisites is satisfied.

[Cases that cite this headnote](#)

[10] **Administrative Law and Procedure**

🔑 Further or corrected findings, remand for

If an agency's findings of fact are insufficient to apprise the Supreme Judicial Court of the basis of the agency's decision and whether it is supported by substantial evidence, the Court will usually remand to the agency for further findings of fact; in some cases, however, the subsidiary facts may be obvious or easily inferred from the record and the general factual findings, and a remand would be unnecessary.

[5 Cases that cite this headnote](#)

Attorneys and Law Firms

*372 [S. James Levis Jr.](#), Esq., [Levis & Hull](#), P.A., Biddeford, for plaintiffs.

[Gary D. Vogel](#), Esq., [Aaron P. Burns](#), Esq., Lambert, Coffin, Rudman & Hochman, Portland, (for PYC), [Amy K. Tchao](#), Esq., Drummond Woodsum & MacMahon, Portland, (for Town of Falmouth), for defendants.

Panel: [WATHEN](#), C.J., and [CLIFFORD](#), [RUDMAN](#), [DANA](#), [SAUFLEY](#), [ALEXANDER](#), and [CALKINS](#), JJ.

Opinion

[DANA](#), J.

[¶ 1] Lloyd Wells, Ellen Wells, Zbigniew J. Kurlanski, Dee Kurlanski, Joseph Kilbride, Kathleen Kilbride, Roswell Y. Furman and Jennifer Furman (hereinafter Wells) appeal from a judgment entered in the Superior Court (Cumberland County, *Warren, J.*) affirming the Falmouth Zoning Board of Appeals' approval of the Portland Yacht Club's conditional use request for the construction of a building for boat storage and use by the junior sailing program. Wells contends that the Board erred in approving the conditional use request because a sufficiently similar request had been rejected within one year; the junior sailing program is an impermissible conditional use; the grant enlarged a nonconforming use; the request was not supported by substantial evidence; and the grant violated shoreland zoning. We affirm the judgment.

I. FACTS AND PROCEDURE

[¶ 2] The Club property is located in a residential district at the end of Old Powerhouse Road, and the Club operates the junior sailing program to teach children of both members and nonmembers to sail. On April 29, 1998, the Board denied the Club's request for conditional use approval "to construct a new building to house the junior program and store small boats at Old Powerhouse Rd." On March 1, 1999, the Club filed a conditional use request for the "construction of a building as part of the existing Portland Yacht Club, that measures 30' x 40' to store small boats nine months a year and use as classrooms during the summer for the Junior Sailing *373 Program." The Club's conditional use request was discussed at a Board meeting, and the public participated through oral and written comments. On March 30, 1999, the Board approved the Club's conditional use request with conditions.¹

[¶ 3] Wells filed an appeal pursuant to M.R. Civ. P. 80B in the Superior Court. The court upheld the Board's conditional use approval, finding that: the ordinance banning resubmission of a conditional use request within one year was not violated;² the Club's use is a permitted conditional use; and the remaining arguments could not be sustained on the record. This appeal followed.

II. STANDING

[1] [2] [¶ 4] The Club contends that Wells does not have standing. To appeal a decision of the Board, "a party must (1) have appeared before the board of appeals; and (2) be able to demonstrate a particularized injury as a result of the board's action." *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 6, 746 A.2d 368, 371 (quotations and citation omitted). The minutes of the Board meeting indicate that the appellants, described as abutters or residents of Old Powerhouse Road, voiced their concerns for traffic, noise and aesthetics. Thus, the appellants have standing to bring this appeal. *See id.* ¶¶ 6-7, 746 A.2d at 371 (finding "[t]he threshold requirement for an abutter to have standing is minimal" because a party appealing as an abutter "need only allege a potential for particularized injury to satisfy the standing requirement") (quotations and citation omitted).

III. TIMING REQUIREMENT

[3] [4] [5] [6] [¶ 5] Wells contends that the approval of the conditional use request violates section 8.8(I), which prohibits the Board from considering a second appeal of a similar nature within one year from the date of the denial of the first appeal. FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 8.8(I). "Generally, a party in an administrative proceeding must raise any objections it has before the agency for the issue to be preserved for appeal." *Berry v. Bd. of Trustees, Me. State Ret. Sys.*, 663 A.2d 14, 18 (Me.1995). A party must raise any objection to the agency "to ensure that the agency, and not the court, has the first opportunity to pass upon the claims of the parties." *Oliver v. City of Rockland*, 1998 ME 88, ¶ 7, 710 A.2d 905, 907. An issue is considered raised and preserved for appeal "if there is sufficient basis in the record to alert the court and any opposing party to the existence of that issue." *Farley v. Town of Washburn*, 1997 ME 218, ¶ 5, 704 A.2d 347, 349.

[¶ 6] Wells contends that the issue was raised to the Board through letters and comments that generally state that the concerns raised by Wells at the hearing for the Club's first conditional use request continue to exist. These letters and comments were not sufficient to alert the Board and the Club to the existence of the issue that the Club's conditional use request violated the timing requirement; therefore, the issue cannot be raised here.

*374 IV. CONDITIONAL USE

[7] [¶ 7] Wells contends that the Board erred in allowing an impermissible conditional use in a residential district because, while the Club is a "private club," a permitted conditional use, the junior sailing program is not. A "private club" is defined in the ordinance as: "A group of people organized for a common purpose to pursue common goals, interests or activities, such as social or recreational, and usually characterized by certain membership qualifications, payment of fees or dues, and a constitution and bylaws." FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 2.116. "[A]ny use not specifically allowed as either a permitted use or a conditional use is specifically prohibited." *Id.* § 1.5.

[¶ 8] "Whether a proposed use falls within the terms of a zoning ordinance is a question of law." *Underwood v. City of Presque Isle*, 1998 ME 166, ¶ 9, 715 A.2d 148, 151.

“The language at issue must be construed reasonably and with regard to both the ordinance's specific object and its general structure.” *Lewis v. Town of Rockport*, 1998 ME 144, ¶ 11, 712 A.2d 1047, 1049 (quotations and citation omitted). “Moreover, we construe a statute to avoid absurd, illogical, or inconsistent results.” *Wright v. Town of Kennebunkport*, 1998 ME 184, ¶ 5, 715 A.2d 162, 164.

[¶ 9] The language of the ordinance is not so narrow that it excludes a private club from operating a program that charges tuition and allows the public to participate. See FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 2.116. The definition of “private club” does not include any limitation regarding public access or participation; instead, the definition characterizes a “private club” as a “group of people.” See *id.* The ordinance also states that a “private club” is “usually characterized by certain membership qualifications, payment of fees or dues.” *Id.* This language does not limit the use of a “private club” to those who pay fees or dues, and it does not prevent a private club from charging other fees, such as tuition. See *id.* Furthermore, the junior sailing program teaches boating skills to children, an integral part of the predominant goal of the Club, which is to promote and facilitate boating. See *Underwood*, 1998 ME 166, ¶ 11, 715 A.2d at 151-52. Therefore, the Board did not err as a matter of law in approving the conditional use request. Because we agree that the Club and its junior sailing program are permitted conditional uses, we need not consider Wells's contention that the conditional use approval enlarged a nonconforming use.

V. SUFFICIENCY OF THE EVIDENCE

[8] [9] [10] [¶ 10] Wells contends that the Club failed to satisfy the requirements of section 8.3(c), (d), (e) and (h).³ “The applicant *375 is responsible for demonstrating to the board that each of the statutory prerequisites is satisfied.” *Forester v. City of Westbrook*, 604 A.2d 31, 32 (Me.1992).

Footnotes

1 The conditions specified in the approval are:

1. No landscaping within [a specified nonappealing abutter's] property right of way.
2. The number of students in the sailing program shall be limited to 60 per session.
3. Activities at the proposed building are to cease by 8:00 PM.

2 The Superior Court also determined that this issue was arguably waived “by the plaintiffs below, but given the record here the court does not need to rely upon waiver”

Recently we stated that if an agency's findings of fact are insufficient to apprise us of the basis of the agency's decision and whether it is supported by substantial evidence, we should usually remand to the agency for further findings of fact. *Christian Fellowship and Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶¶ 10, 14, 769 A.2d 834. In some cases, however, “the subsidiary facts may be obvious or easily inferred from the record and the general factual findings, and a remand would be unnecessary.” *Id.* ¶ 19, 769 A.2d at 840.

[¶ 11] The record reflects that the Board questioned the Club about the requirements in section 8.3, and the minutes of the meeting state that a Board member “reviewed the conditional use standards[,] finding that the applicant satisfied those standards if conditions were placed on an approval.” We find that the communications in the meeting between the Board, the Club, and the appellants and the conditions the Board placed on approval support the Board's implicit finding that the Club satisfied the requirements for receiving conditional use approval. See *id.*; see also *Forester*, 604 A.2d at 33 (stating that “[i]f there is sufficient evidence on the record, the Board's decision will be deemed supported by implicit findings”).

VI. SHORELAND ZONING

[¶ 12] Wells also contends that by granting the conditional use request, the Board violated various shoreland zoning provisions. We find that Wells failed to preserve this issue for appeal.

The entry is:

Judgment affirmed.

All Citations

771 A.2d 371, 2001 ME 20

- 3** The Club was denied the initial conditional use request for failure "to satisfy section 8.3 c, d & e." Section 8.3 states in pertinent part:

Conditional uses may be granted by the Board of Appeals after considering the characteristics and location of the proposed use and of other properties in the surrounding neighborhood, provided that the petitioner shall submit to the Board statements in writing, which may be accompanied by diagrams or photographs which shall become part of the record of the such petitions, demonstrating that the proposed use:

c. will not have a significant detrimental effect on the use and peaceful enjoyment of abutting property as a result of noise, vibrations, fumes, odor, dust, light or glare;

d. will not have a significant adverse effect on adjacent or nearby property values;

e. will not result in significant hazards to pedestrian or vehicular traffic or significant traffic congestion;

h. will be served adequately by, but will not overburden, existing public services and facilities, including fire protection services, sanitary sewers, roads, water and storm drainage systems.

FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 8.3.

Exhibit C

501 A.2d 1290
Supreme Judicial Court of Maine.

Myrle C. SILSBY, et al.
v.
ALLEN'S BLUEBERRY FREEZER, INC., et al.

Argued May 8, 1985.

|
Decided Dec. 9, 1985.

Action was filed challenging a decision of a zoning board of appeals to grant a special exception that would allow a corporation to build an expansion to its blueberry processing plant. The Superior Court, Hancock County, affirmed. Appeal was taken. The Supreme Judicial Court, Violette, J., held that: (1) the board was acting within its original jurisdiction in granting the special exception and, therefore, the corporation was not required to take an appeal from the building inspector's denial of the application; (2) the board did not abuse its discretion in determining that a substantial change in circumstances had occurred after a prior denial of the corporation's application; and (3) the evidence sustained the granting of the special exception.

Judgment affirmed.

West Headnotes (3)

[1] Zoning and Planning

 Proceedings for Variances and Exceptions

Zoning board of appeals was acting in its original jurisdiction, and not in its appellate role acting upon decision of building inspector, when board considered corporation's application for special exception that would allow corporation to expand its blueberry processing plant and, therefore, board had authority to consider application without requisite of written appeal from building inspector's decision. 30 M.R.S.A. § 4963, subd. 2, par. B.

[Cases that cite this headnote](#)

[2] Zoning and Planning

 Successive applications

Zoning board of appeals did not abuse its discretion in determining that there was substantial change in circumstances after prior denial of special exception that would allow corporation to expand its blueberry processing plant where there was substantial change in application with respect to off-street parking and loading requirement of special exception, even if there was no finding as to any substantial changes on objectionable odors.

[7 Cases that cite this headnote](#)

[3] Zoning and Planning

 Business, commercial, and industrial uses in general

Substantial evidence supported decision of zoning board of appeals to grant special exception that would allow corporation to expand its blueberry processing plant, even if there was conflicting evidence on whether proposed expansion would emit additional objectionable odors.

[Cases that cite this headnote](#)

Attorneys and Law Firms

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Bernard Staples (orally), Bar Harbor, for City of Ellsworth.

Peter Roy, Ellsworth, Paul L. Rudman, Dawn M. Pelletier (orally), George F. Terry, IV, Bangor, for Allen's Blueberry Freezer, Inc.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, VIOLETTE, WATHEN, and SCOLNIK, JJ.

Opinion

VIOLETTE, Justice.

Plaintiffs Myrle C. Silsby and William S. Silsby, Sr. (Silsbys) appeal from a judgment of the Superior Court, Hancock County, affirming the grant of a special exception by the Ellsworth Zoning Board of Appeals (Board) to Allen's Blueberry Freezer, Inc. (Allen's) that would allow Allen's to build an expansion to its blueberry processing plant.

Silsby contends, *inter alia*, that (1) the Board was without jurisdiction to consider the application for a special exception, (2) the grant of the special exception was erroneous because Allen's had failed to prove changed circumstances since denial of the previous application, and (3) the Board's findings were not supported by substantial evidence. We affirm the judgment of the Superior Court.

I.

Allen's is located in a Commercial and Institutional (C-I) Zone in the City of Ellsworth and is shown on the city's tax maps as Lot 101 of Map 35. This property is adjacent to the appellants' residential property that is located in an Urban Residential (R-1) Zone and shown as Lot 103 of Map 35. In December of 1982, Allen's acquired Lot 102 of Map 35 that also abuts the Silsby property. On December 19, 1983, Lot 102 was rezoned from R-1 to C-1.

On December 20, 1983, Allen's applied to the City of Ellsworth for a building permit to add an extension to its existing blueberry processing plant. This extension would expand the present size of the building onto Lot 102 to allow the installation of an additional blueberry processing and quick freezing line, including freezing units to provide freezing capacity for the new line. The application was denied by the building inspector as requiring a special exception. The Board scheduled a public hearing for January 26, 1984 to consider the request but remanded the application to the building inspector for further information. On January 27, 1984, Allen's filed a second application for a building permit, which was again denied by the building inspector for the same reason given in the first application; whereupon Allen's filed a written appeal to the Board.

The Board held a public hearing on the application on February 9, 1984, then the hearing was tabled to February 23. The *1292 record before us does not include a transcript of the proceedings on February 9. While we can deduce from the record of the proceedings on February 23 and March 16 that both sides presented evidence on the subjects of objectionable odors and the adequacy of off-street parking and loading space, we cannot ascertain the exact nature of that evidence. The Board resumed the public hearing on February 23, 1984, with four of the five members present. After denying Silsby's request to reopen the hearing for further evidence, the Board made no findings of fact but proceeded to vote on the application. The Board first voted two for, and two against, a

motion to deny the application for a special exception on the ground that Allen's had failed to satisfy both the objectionable odors and adequate parking and loading space conditions of the zoning ordinance. A subsequent motion to grant the special exception on the basis that both conditions of the ordinance had been satisfied again resulted in the same two votes for and two votes against. The Board was thereupon informed by its counsel that, because the ordinance required the concurring vote of at least three members for approval of the application, the vote constituted a denial.

On February 28, 1984, Allen's filed another application with the building inspector for the same building permit, along with four documents identified as (1) Salsbury survey dated January 26, 1984; (2) Site Plan for Allen's Blueberry Freezer, dated January 24, 1984 and revised January 27, 1984; (3) Site Plan-Williams Lot, dated February 28, 1984; and (4) Site Plan-Giles Lot, dated February 28, 1984. Allen's proposed to use the Williams and Giles Lots for off-street employee parking. On March 1, 1984, the building inspector refused to grant the permit, noting the matter had to go to the board of appeals for a special exception. The building inspector then transferred the application and accompanying documents to the Board. On March 12, 1984, Allen's submitted an option for purchase of the Giles property. The Board scheduled and held a public hearing on the application on March 16, 1984. At the outset, Silsbys made several procedural objections to the holding of the hearing, two of which we consider. They argued the Board was without jurisdiction to hold the hearing because Allen's had not filed a written appeal from the building inspector's denial of the application, as required by the zoning ordinance. They also argued the application did not demonstrate that any substantial change of conditions materially affecting the merits of the application had occurred since the Board's denial of the prior application. The Board decided it had authority to hold the hearing, and, acknowledging that Allen's had to show a substantial change, deferred ruling on this objection until later on in the hearing. The hearing continued with the presentation of evidence on the special exception conditions of objectionable odors and adequacy of off-street parking and loading space.¹ The Board decided during the hearing that with the submission of the proposed acquisition and plan of the Giles property and the drawings of the Williams property, Allen's application demonstrated a significant change of conditions since the last application. Following the closing of evidence and argument the Board, by a three to two vote, conditionally approved Allen's application for a special exception to build an addition to its freezing plant, finding that the addition would not

emit objectionable odors, that adequate loading areas were provided, and that off-street parking would be satisfied with imposition of certain conditions, namely, acquisition of *1293 the Giles lot and removal of the buildings or obstructions on the lot, that parking be delineated and drawings so showing be presented to the building inspector for his approval, and that the lot be designated for Allen's employees only. On March 23, 1984, the Board gave Allen's written notice of its decision. Silsby thereupon filed an 80B complaint, M.R.Civ.P., in Superior Court, Hancock County, seeking review of the Board's decision.

II.

When, as here, the Superior Court acts as an intermediate appellate court reviewing the action of the Board of Appeals, we examine directly the record before the Board without deference to the decision of the Superior Court. *Kittery Water District v. Town of York*, 489 A.2d 1091, 1093 (Me.1985); *Lakes Environmental Ass'n. v. Town of Naples*, 486 A.2d 91, 94 (Me.1984). Our review is confined to ascertaining whether there was an abuse of discretion, error of law, or findings of fact not supported by substantial evidence in the record. *Id.*

[1] Appellant contends that the Board was without jurisdiction to hear the request for a special exception because Allen's had not filed a written appeal from the building inspector's refusal to grant the permit. When Silsby raised this objection, the chairman responded that it had been the general practice, when a request for a special exception was made, to have the building inspector refuse the request because a special exception was required and he would then pass the application on to the Board, which would act on the application. It appears the Board did not adhere to a uniform practice and heard such applications in the aforescribed manner as well as upon written appeal. It was the Board counsel's opinion that, under the city's Zoning Ordinance, the Board had the authority to hear and grant an application for a special exception without the requirement of a formal notice of appeal because the Board was then not acting in an appellate role but, rather, was exercising its original jurisdiction as the only body authorized to consider a request for a special exception. He added that the building inspector had no authority over a use classified as a special exception other than to refer the matter to the Board. He distinguished this authority from that when the Board acted in its true appellate capacity.

While a literal reading of the pertinent enabling statutes, the zoning ordinance and the Board's rules and regulations appears to support appellants' position, our analysis of the issue leads us to agree with the Board's conclusion. 30 M.R.S.A. § 2411 (1978) permits a municipality to establish a board of appeals and provides for its organization, procedures and jurisdiction. Under 30 M.R.S.A. § 2151(4)(C)(5) (1978), a municipality may enact an ordinance regulating the construction of new buildings and additions and alterations of existing buildings and an appeal in writing may be taken from an order of the building inspector refusing to grant a permit therefor to a board of appeals established in accordance with section 2411. 30 M.R.S.A. § 4963 (1978 & Supp.1984-85) provides in pertinent part:

§ 4963. Zoning adjustment

1. Establishment. A board of appeals is established in any municipality which adopts a zoning ordinance. The board of appeals shall hear appeals from actions or failure to act of the official or board charged with the enforcement of the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance. Such board of appeals shall be governed by section 2411, except that section 2411, subsection 2 shall not apply to boards existing on September 23, 1971.

2. Powers. In deciding any appeal:

- A. The board may interpret the provisions of the ordinance which are called into question;
- B. The board may approve the issuance of a special permit or conditional *1294 use permit in strict compliance with the ordinance;
- C. The board may grant a variance in strict compliance with subsection 3.

Article VII, section 1, of the Ellsworth Zoning Ordinance establishes a Board of Appeals, and Section 7 of Article VII defines the powers and duties of the Board as follows in pertinent part:

A. Administrative Review-To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by the Building Inspector in the enforcement of this ordinance.

B. Special Exceptions-To hear and decide special exceptions upon which the Board is required to act under the terms of this ordinance. An exception may be granted

only for a use which is specifically listed in this ordinance as a permitted exception in the zone in which the exception is requested. In granting an exception, the Board may prescribe appropriate conditions or safeguards.

C. Variance—To authorize upon appeal in specific cases such variance from the terms of this ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this ordinance would result in unnecessary hardship....

Section 3 of Article VII states that an appeal from any decision of the building inspector to the Board shall be taken by filing a written notice of appeal specifying the grounds thereof. Section II(A) & (B) of the Board's Rules and Regulations comport with Art VII, sec. 3 of the Ordinance.

Notwithstanding that the aforementioned pertinent enabling statutes, provisions of the zoning ordinances and of the Board's rules and regulations all speak of an appeal to the Board, we perceive the issue to be whether the Board was acting in an appellate or original jurisdiction capacity in considering the application for a special exception. Zoning enabling acts and zoning ordinances usually do not characterize the jurisdiction of a board of adjustment as original or appellate, and such acts and ordinances must be inspected to determine the nature of the board's jurisdiction with regard to the various types of relief. 82 Am.Jur.2d, *Zoning and Planning*, § 297 at 855 (1976).² The jurisdiction vested in a board of adjustment to hear and decide appeals from the orders, decision, or determination by an administrative official is clearly appellate, but the board's jurisdiction with regard to a special permit may be either appellate or original in nature. *Id.*³ Where the zoning ordinance provides that certain uses may be maintained only upon the issuance of a special permit by the board, the board has original jurisdiction with regard to the issuance or denial of the permit. *Id.*

In *Cushing v. Smith*, 457 A.2d 816, 819 (Me.1983), this Court said that “30 M.R.S.A. § 4963(2)(B) permits a municipality to authorize either the zoning board of appeals or a planning board, agency or office to grant a special permit in the first instance.” We further said that “[W]here, as in the instant case, the municipality has authorized the planning board to make the initial determination regarding a special exception permit, then the planning board is “the office charged with the enforcement of the zoning ordinance” as contemplated by 30 M.R.S.A. § 4963(1) with respect to

the granting of special exceptions.” *Id.* See *Thornton v. Lothridge*, 447 A.2d 473, 476 (Me.1982) (a town's zoning board of appeals had authority under section 4963(2)(B) to make initial determination whether applicant qualified for exception.) The Ellsworth Zoning Ordinance, Art. VII, sec. 7(B), which comports with 30 M.R.S.A. § 4963(2) (B), authorizes the Board to grant *1295 special exception permits in the first instance. We are led to conclude that the Board was acting in its original jurisdiction, and not in its appellate role acting upon a decision of the building inspector, in its consideration of Allen's application for a special exception. It therefore had authority to consider the application without the requisite of a written appeal. A use by exception is a particular type of use, differing substantially from a use by variance, as we said in *Stucki v. Plavin*, 291 A.2d 508, 511 (Me.1972):

A special exception use differs from a variance in that a variance is authority extended to a landowner to use his property in a manner prohibited by the ordinance (absent such variance) while a special exception allows him to put his property to a use which the ordinance expressly permits.

Our determination of this issue in no way excuses either the applicant nor the Board from compliance with every provision of the zoning ordinance. In this respect, proper public notice was given of the Board's special meeting on March 16, 1984, and the business to be taken at that meeting. Appellants were fully apprised of the relief sought in the application and were given full opportunity to present their case. We find no error of law by the Board in hearing this application.

III.

[2] Appellants also claim the Board committed error in holding the hearing and granting the special exception because Allen's had failed to show changed circumstances since denial of the previous application. We determine that the vote of the Board on February 23, 1984, was a denial of the pending application. It is clear that the Ordinance required the concurring vote of 3 members of the Board in favor of the application.⁴ Because of the clear language of the Ordinance, we are not required to determine the consequences of a tie vote.

The Ellsworth Zoning Ordinance has no provision dealing with reapplication following the denial of a special exception by the Board. We have previously stated, in the case of a reapplication for a variance, that even in the absence of an express provision in a zoning ordinance, the general rule is that a board of zoning appeals or a board of adjustment may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions had occurred or other considerations materially affecting the merits of the subject matter had intervened between the first application and the subsequent application. *Driscoll v. Gheewalla*, 441 A.2d 1023, 1027 (Me.1982) (citations omitted). We can discern no reason why this rule should not apply also to special exceptions.

The Board found that inclusion of the Williams lot plan, the Giles lot plan and the option to acquire the Giles lot constituted a "significant change" in conditions between the February 28 application and the prior application. The Silsbys agree there was a substantial change in the application with respect to the off-street parking and loading requirement of the special exception, but argue that Allen's was also required to show a substantial change on the objectionable odor requirement. The Board made no finding as to any substantial changes on objectionable odors. While the Board denied the prior application, we have no specific findings by the Board whether Allen's failed to comply with either or both requirements of the special exception. In the absence of such findings, we are of the *1296 opinion that the Board's finding that a substantial change in circumstances had occurred was within the Board's discretion. This determination by the Board will be disturbed only if its discretion is abused. *Driscoll*, 441 A.2d 1027.

III.

[3] Contrary to appellants' argument, we conclude that the Board's decision is supported by substantial evidence on the entire record. *Brak v. Town of Georgetown*, 436 A.2d 894, 898. The Board found five loading spaces existed where four was required. With respect to off-street parking, it found the Williams lot inadequate but determined the Giles lot would provide more than the essential number of parking spaces and conditioned its approval of the application upon Allen's acquisition of that property for employee parking space. The Board found the proposed addition would not emit additional objectionable odors. While evidence on this requirement of the special exception was conflicting, we cannot say, upon examination of the record, the Board could not reasonably have found this requirement was met. See *Driscoll*, 441 A.2d 1026.

We do not consider it necessary to address other issues raised in the appeal.

The entry is:

Judgment affirmed.

All concurring.

All Citations

501 A.2d 1290

Footnotes

- 1 Art. X, Sec. (4)(B)(18) of the Ellsworth Zoning Ordinance, Commercial and Institutional "C-1" Zone provides:
Board of Appeal may permit as special exceptions:
(18) Food processing and freezing, but excluding slaughterhouses and chicken processing plants provided that:
a. Proposed activity will not emit objectionable odors
b. Adequate off-street parking and loading area is provided.
- 2 Am.Jur.2d uses the term "board of adjustment" as a generic one to indicate board of adjustment, board of review or board of appeal.
- 3 Am.Jur.2d uses the term "special permit" as a generic one to denote special permit, special exception, conditional use permit, or special use permit.
- 4 Art. VII, sec. 6 of the Zoning Ordinance provides:
The concurring vote of 3 members of the Board shall be necessary to reverse any order, requirement, decision, or determination of the Building Inspector, or to decide in favor of the applicant of any matter on which it is required to

pass under this ordinance, or to affect any variation in the application of this ordinance. The failure of the Board to issue a written notice of its decision, directed to the applicants, within thirty (30) days of filing of the appeal constitutes a denial of the appeal.

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Ann Machado - STATEMENT from the Stroudwater Village Association regarding the Verizon Wireless' proposed conditional use of 1877 Congress Street (back lot of Masons' property), January 2016

From: Stroudwater Village Association Board of Trustees
<stroudwatervillageassociation@gmail.com>
To: Ann Machado <amachado@portlandmaine.gov>
Date: 2/4/2016 12:13 PM
Subject: STATEMENT from the Stroudwater Village Association regarding the Verizon Wireless' proposed conditional use of 1877 Congress Street (back lot of Masons' property), January 2016
CC: Michael Rogers <michael.rogers66@gmail.com>

Hello Ann, please add this to the record for tonight's ZBA hearing. SVA Trustee Michael Rogers (copied) will be in attendance tonight. Thank you.

-Dan

STATEMENT from the Stroudwater Village Association regarding the Verizon Wireless' proposed conditional use of 1877 Congress Street (back lot of Masons' property), January 2016. stroudwatervillageassociation@gmail.com

This statement should be considered in addition to our prior letters to the Zoning Board of Appeals and City Council from December 2015 and January 2016.

The Stroudwater Village Association (SVA) is opposed to Verizon Wireless' proposed conditional use appeal of 1877 Congress Street, and requests the Zoning Board of Appeals deny the application at this time.

As we have done in similar matters, the SVA emphasizes the importance of placing individual zoning change (or conditional use) applications in larger context of the neighborhood as a whole, and we encourage city staff to do the same.

The SVA has heard from many residents that are deeply uncomfortable with the development being proposed, which would place an outsized, incongruous structure right next to existing homes and abutting the Stroudwater Historic District. Area residents (reference January and February letters from Silk, Smith and others) have voiced a variety of legal, environmental and compatibility reasons to deny this application, each of which has merits on a standalone basis, but combined make it obvious this proposal is the wrong choice for this location. Furthermore, there has been no evidence provided that the downsides of this proposal referenced above and in other letters are counterbalanced by a compelling need for this specific proposal.

As such, the Stroudwater Village Association (SVA) is opposed to Verizon Wireless' proposed conditional use appeal of 1877 Congress Street, and requests the Zoning Board of Appeals deny the application at this time.

The Stroudwater Village Association is a Maine Non-Profit corporation. All residents of Stroudwater are members and invited to participate in all of our activities.

Find us on the web at <http://www.stroudwatervillage.org> and
<http://www.livinginportland.org/stroudwater.htm>

Find us on Facebook at <https://www.facebook.com/StroudwaterVillageAssociation>