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April 29, 2020

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

Re: Salema Realty Trust/Application for Variance
199 Constitution Avenue, Tax Map 283, Lot 16-303

Dear Chair Rheame and Board Members:

Enclosed please find supporting information for the variance application submitted via the City's online permitting system. The Applicant proposes to construct a residential multifamily dwelling with more than eight (8) dwelling units in the Industrial Zone on the property located at 199 Constitution Avenue.

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

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC

Justin L. Pasay
JLP/sac
Enclosures

cc: Salema Realty Trust
Denise Poulos, Esq.
John Chagnon, Ambit Engineering

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VARIANCE APPLICATION FOR
SALEMA REALITY TRUST (the “Applicant”)

VARIANCE FROM ZONING ORDINANCE ARTICLE 4, SECTION 10.440 TO ALLOW A MULTIFAMILY DWELLING WITH MORE THAN EIGHT (8) DWELLING UNITS RESIDENTIAL USE AT PROPERTY LOCATED AT 199 CONSTITUTION AVENUE, FURTHER IDENTIFIED AS CITY ASSESSOR MAP 285, LOT 16-303, LOCATED WITHIN THE INDUSTRIAL ZONING DISTRICT (the “Property”), WHERE RESIDENTIAL USES ARE NOT PERMITTED.

A. Introduction

The Property is 370,120 SF in size, currently has 121,439 SF +/- of existing impervious area, which is 32.8% of the Property, and is located within the Industrial Zoning District, where residential uses are prohibited. As depicted in the enclosed aerial photo of existing conditions (*see Enclosure 1*), the Property is located to the west of Lafayette Road and the Walmart property which is identified as City Assessor Map 285, Lot 16-2 (“Walmart” or the “Walmart Property”) and has deeded access via Constitution Avenue and Lafayette Road. The Walmart Property immediately to the east of the Property, and the majority of properties on either side of Lafayette Road, are located within the Gateway Neighborhood Mixed Use Corridor Zoning District (“G1 District”), where multifamily dwellings with more than eight (8) dwelling units are permitted by right.

The Property has been submitted to a condominium form of ownership and is currently improved by two industrial buildings and corresponding site improvements, each building being a condominium unit pursuant to the Constitution Avenue Condominium Declaration recorded at Book 3203, Page 0272 of the Rockingham County Registry of Deeds, and are owned by the Applicant. *See also* Enclosure 1. The existing condominium units contain various commercial spaces which are leased from the Applicant by local businesses. The development, described below, which is the subject of this application, is proposed to take place on the southern undeveloped vacant land at the southern end of the Property, as depicted in Enclosure 1 (the “Development Area”), which is currently wooded.

In 2017, the Applicant designed and the Planning Board approved an industrial building to be sited in the Development Area, as depicted in the approved site plan included herewith as **Enclosure 2** (the “Industrial Development”). The Industrial Development contemplated a 12,800 SF building to accommodate up to four (4) tenants, with corresponding site improvements, and would have added 64,075 SF +/- of impervious area to the Property. Prior to the Applicant proceeding to construct the approved project, however, it was determined that the expense for doing so, particularly for constructing the approved stormwater drainage infrastructure by virtue of the amount of new impervious surface area, was cost-prohibitive, and the Applicant abandoned the project.

The Applicant now proposes to develop a four (4) story apartment building comprised of 46-70¹ one and two-bedroom units that will be offered by Applicant for rent, with corresponding

¹ The proposed number of units will be refined through the planning review process.

site improvements (the “Residential Development”), which will comply in all respects, save for the prohibition on residential uses, with the requirements of the Industrial Zoning District. A rendering of the proposed apartment building, produced by CJ Architects, is included herewith as **Enclosure 3**. The proposed Residential Development will both justify the expense of developing the Development Area of the Property, and also contribute housing stock to the greater Portsmouth area that will directly align with the Portsmouth 2025 Master Plan (the “Master Plan”) goals of encouraging walkable mixed-use development along existing commercial corridors, developing housing that will accommodate changing demographics and accommodate the housing needs of low and moderate income residents.²

The preliminary design for the proposed Residential Development, which is depicted in **Enclosure 4**, a Variance Application Site Plan produced by Ambit Engineering, Inc., is intentionally similar to the Industrial Development that was previously approved for the Property. Like the Industrial Development, access to the Residential Development will be based on existing easements over the Walmart Property which will, in conjunction with the proposed new driveway, create a direct connection to Lafayette Road, with secondary egress to Constitution Avenue. *See* Enclosure 4. As depicted in Enclosure 4, the proposed new driveway follows the southwesterly Property line and then arcs to the north to a split which allows access on either side, and around, the proposed apartment building. This design creates an area where drainage will be captured and detained on the site. As a result, there will be no increase runoff to the surrounding properties. This same method was employed in the previously approved design for the Industrial Development.

Though the Property has more proposed parking than the Industrial Development to accommodate the residential use³, the proposed Residential Development will require 8,861 SF *less* impervious area than the Industrial Development design, and will translate into a total impervious surface area for the Property of 176,653 SF +/-, or 47.7%, where 50.4% impervious area would have resulted from the Industrial Development. *See* Enclosure 2. Most other site design elements, such as the placement of trash disposal and the utility connections, will be similar to the previous design, which was of course the product of the TAC and Planning Board approval process, which provides a high degree of confidence that the Residential Development design is sound. Of course, should the requested variance be granted by the Board of Adjustment, this proposal will again have to go through the planning review and approval process.

Because the proposed Residential Development would not be inconsistent with the essential character of the surrounding area, will not compromise the public health in any way, will provide substantial justice, will not compromise the property values of surrounding properties, and because there is no rational connection between the intent of the City’s Zoning Ordinance and its application to the Property under the unique circumstances of this case, we respectfully request that this variance be granted.

² *See* Master Plan, Introduction, Theme 3, Goal 1.2, Goal 3.1, Goal 3.2.

³ *See* **Enclosure 5**, Ambit Engineering, Inc.’s Parking Calculations worksheet.

B. Variance Criteria

Pursuant to Article 2, Section 10.233 of the Zoning Ordinance, and RSA 674:33, to obtain a variance in New Hampshire, an applicant must show that: (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed; (3) substantial justice is done; (4) the values of surrounding properties are not diminished; and (5) literal enforcement of the provisions of the ordinance would result in an unnecessary hardship, where said term means that, owing to special conditions of the property that distinguish it from other properties in the area: no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and the Proposed use is a reasonable one; or if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it. *See* RSA 674:33, I (b).

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

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

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

The general purpose of the City’s Zoning Ordinance and of its Table of Uses is to “promote the health, safety, and the general welfare of Portsmouth and its region in accordance with the City of Portsmouth Master Plan.” Zoning Ordinance, §10.121. The Residential Development proposal which is the subject of this application advances these purposes because it advances the goals articulated within the Master Plan for the underlying area. For starters, the Applicant’s apartment building will be sited immediately adjacent to the G1 District, the purpose of which is “to facilitate a broad range of housing types together with compatible commercial, fabrication, and civic uses in a high-quality pedestrian environment with moderate to high density.” Zoning Ordinance, §10.410. Further, this area of the City along the Lafayette Road commercial corridor, is specifically envisioned to one day embody the current planning efforts in the West End of the City to create a more walkable and vibrant mixed-use area. *See* Master Plan, Goal 1.2 (“This type of

transformation is also envisioned for Portsmouth's outlying commercial corridors over time"). Moreover, the Applicant envisions that his apartment building will serve low to moderate income people, to include those in younger demographics, which will provide access to the City to such demographics, and will advance other specifically identified goals articulated in the Master Plan. See Master Plan, Goals 3.1 and 3.2 ("Adapt Housing Stock to Accommodate Changing Demographics" and "Accommodate the Housing Needs of Low and Moderate Income Residents", respectively).⁴ Suffice to say, the proposed Residential Development will advance the general and specific goals of the Zoning Ordinance and the Master Plan. It also satisfies the standard of review, outlined above, that the Board of Adjustment must use in determining whether the requested variance will be contrary to the public interest and whether the spirit of the Ordinance is observed, which is whether the proposed Residential Development will alter the essential character of the neighborhood or threaten the public health, safety or welfare. The Residential Development will do neither.

First, the Residential Development will not alter the essential character of the neighborhood. Though the Property is bound to the east by the Walmart Property, it is bound to the north by a large unimproved parcel located at 2300 Lafayette Road (Assessor Map 273, Lot 5), and to the west by property located at 275 Constitution Avenue (Assessor Map 285, Lot 16-4) which is, at its southern end closest to the Development Area, unimproved and wooded. To the south, the Property is abutted initially by industrial/commercial development along Heritage Avenue, but immediately thereafter by residential development like Patriot Park Apartments off of Freedom Circle, and the residential properties along Suzanne Drive, Simonds Road and Wallis Road. Accordingly, the proposed Residential Development will not, as a matter of fact, alter the essential character of the neighborhood. Rather, the proposal will be consistent with the general area and will advance, as discussed above, the express goals and intentions for the area articulated within the Master Plan.

The proposed Residential Development will also not threaten the public health, safety, or welfare. On the contrary, this proposal will provide housing options for low to moderate income people and families, will not have an adverse environmental impact on the surrounding property and will advance the goals of the Master Plan which, by definition, will further the public interest.

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

2. The spirit of the Ordinance is observed.

As referenced in Section 1, above, the requested variance observes the purposes articulated in the Zoning Ordinance, the specific goals articulated in the Master Plan, and New Hampshire jurisprudence regarding the "public interest" prong of the variance criteria because the proposed Residential Development will not alter the essential character of the neighborhood

⁴ See Master Plan, Goal 3.1, 3.2, Action # 3.2.2 ("Promote the development of mixed-income multifamily housing in appropriate locations . . .").

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

3. Substantial justice is done.

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

In this case, the public does not stand to gain anything from denying the Applicant’s variance request. On the contrary, the public will benefit greatly from the Residential Development which will provide housing stock for low and moderate income people and families, provide housing which is accessible to the necessities of life, and potentially work too, by foot or other public transportation, expand access to the City, and advance the goals of the Master Plan. On the other hand, the Applicant will benefit significantly from the grant of the variance as it will be able to develop the Property in a manner that will provide a reasonable return on investment, which is not otherwise possible as discussed above and below, and maximize its use of the Property.

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

4. The proposal will not diminish surrounding property values.

Given the location of the Property and the Development Area, the surrounding properties and the uses thereof, as discussed above, and the nature and design of the Residential Development, none of the surrounding properties will suffer any diminution in value as a result of granting this variance. Accordingly, the Applicant respectfully requests that the Board of Adjustment find that the requested variance will not diminish surrounding property values.

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

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

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

- (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
- (ii) The Proposed use is a reasonable one.

or,

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The “special conditions” of the Property for purposes of this variance criterion include the location of the Development Area vis-à-vis surrounding properties, the Property’s location adjacent to the G1 District, it’s unique ability to accommodate the proposed Residential Development and fulfill the general and express intentions of the Zoning Ordinance and Master Plan with mixed-use like development, and its inability to accommodate a permitted industrial use by virtue of the exorbitant stormwater drainage and other infrastructure costs associated with same as evidenced through the Applicant’s experience with the Industrial Development proposal. More specifically, the location of the Development Area in close proximity to the forested areas of surrounding industrially zoned property and Natural Resource Protection Area zoned property beyond that, as well as surrounding commercial and other residential uses, make it an ideal location for a residential development.

Through consideration of these special circumstances, there is no fair and substantial relationship between the general public purposes and intent of the Zoning Ordinance to promote the health, safety, and the general welfare of Portsmouth and its region in accordance with the City of Portsmouth Master Plan⁵, and its application to the Property in this case, because strictly enforcing the same will not advance those public purposes. On the contrary, the Property is burdened by the inability to develop the Development Area in an economically practical way which presents an ideal opportunity to develop the same in accordance with the purpose of the G1 District which it abuts, all in furtherance of the express goals of the Master Plan as discussed above. Accordingly, the proposed Residential Development actually advances the purpose of the Zoning Ordinance.

The Applicant respectfully reminds the Board of Adjustment that the mere fact that the Applicant is seeking a variance from the express provisions of the Zoning Ordinance is not a valid reason for denying the variance. See Malachy Glen Associates, Inc. v. Town of Chichester, 155

⁵ See Zoning Ordinance, §10.121.

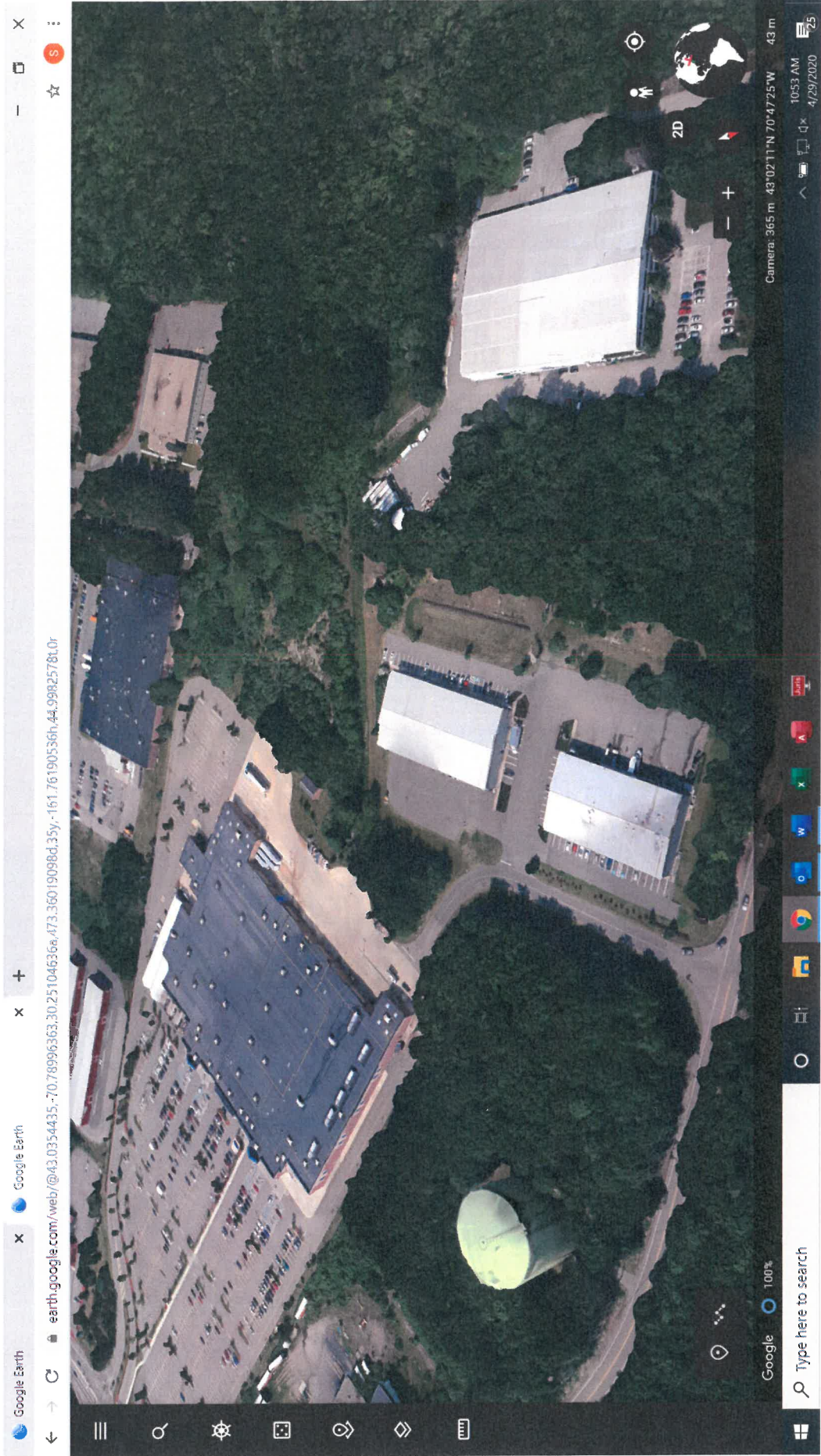
N.H. 102, 107 (2007); *see also* Harborside Associates, 162 N.H. at 2011 (“mere conflict with the terms of the ordinance is insufficient”).

Finally, the proposed Residential Development will be appropriately sited amidst surrounding forested land, commercial uses, and residential uses, and will further the objectives of the Master Plan, and is therefore reasonable under the circumstances. *See* Vigeant v. Town of Hudson, 151 N.H. 747, 752 - 53 (2005); and Malachy Glen, 155 N.H. at 107; *see also* Harborside at 518-519 (applicant did not need to show signs were “necessary” rather only had to show signs were a “reasonable use”). Accordingly, the Applicant respectfully asserts that its application complies with the standard for Option A of the unnecessary hardship criterion and the Board of Adjustment should so find.

The Applicant also submits, however, that it satisfies Option B of the unnecessary hardship criterion because based on the special conditions of the Property described above, the Property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the Development Area. More specifically, the Development Area on the Property is ideally situated for the proposed Residential Development and cannot, as described above, accommodate a permitted industrial use.

C. Conclusion

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

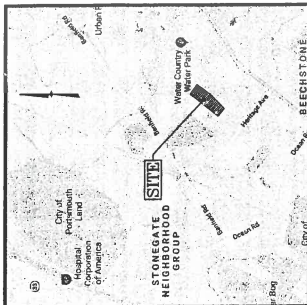


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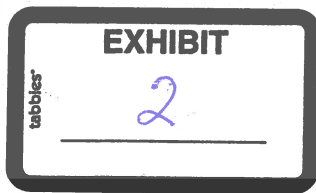
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EXHIBIT

2018 Plan



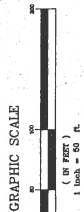
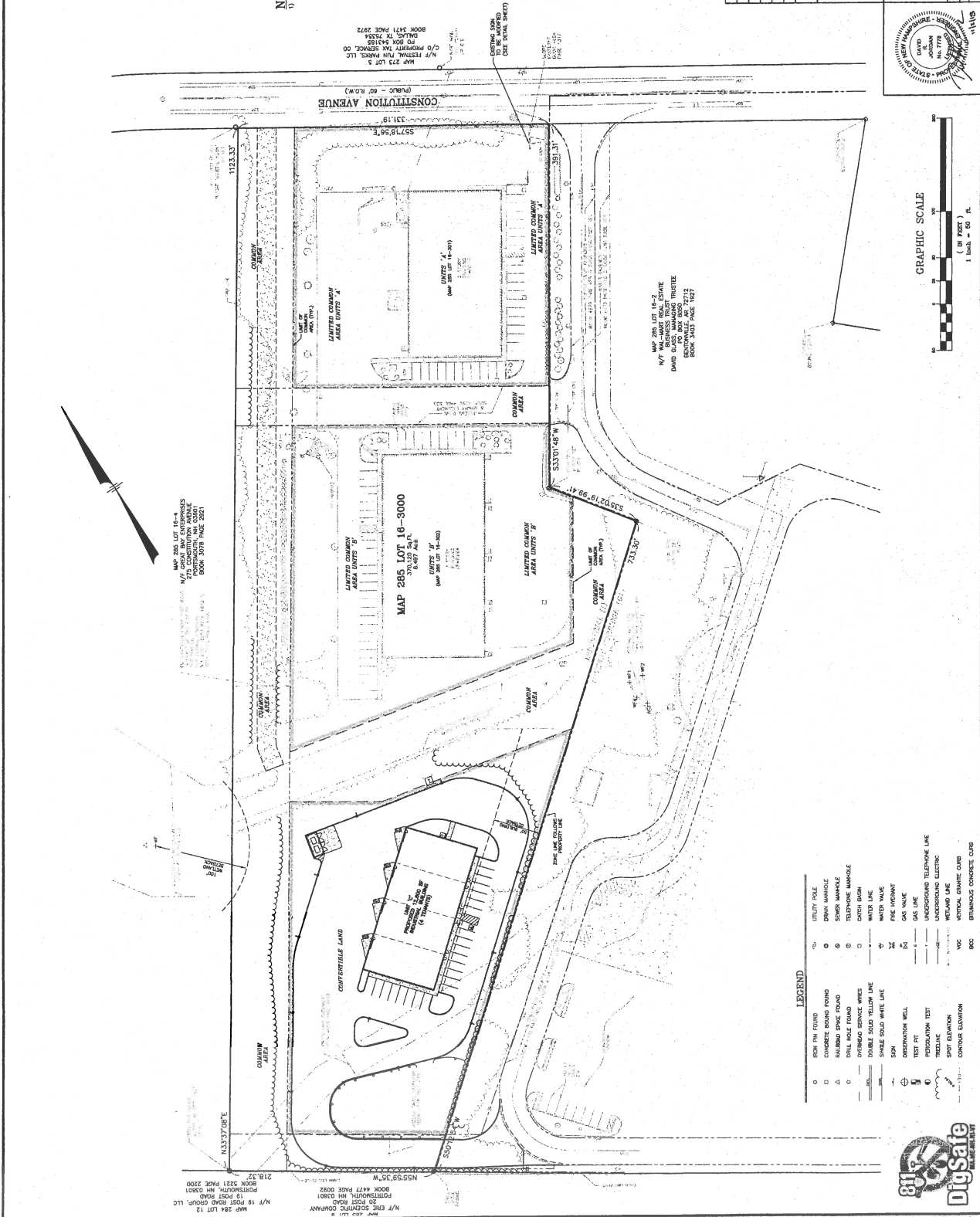
NOTES:
 1) REFER TO SET PLAN FOR ADDITIONAL NOTES AND GENERAL INFORMATION.



NO.	REVISIONS	DESCRIPTION	BY	DATE
3	REVISIONS PER AOT COMMENTS			CMT 10/23/18
2	REVISIONS PER TAC MEETING			CMT 8/7/18
1	REVISIONS PER TAC WORKSHOP			CMT 7/13/18

SITE OVERVIEW PLAN

ASSESSORS MAP 285 LOT 16-3000
 PORTSMOUTH, NH 03801
 PREPARED FOR:
SALEMA REALTY TRUST
 10000 SALEM ROAD
 PORTSMOUTH, NH 03801



LEGEND

○	IRON PIN FOUND	○	UTILITY POLE
□	CONCRETE FOUND	○	DRAIN MANHOLE
△	RAILROAD SPIKE FOUND	○	SERIES MANHOLE
○	DRILL HOLE FOUND	○	TELEPHONE MANHOLE
○	WOOD SERVICE PIPES	○	WATER MAIN
○	DOUBLE SOLID WHITE LINE	○	WATER VALVE
○	SINGLE SOLID WHITE LINE	○	FIRE HYDRANT
○	SOON	○	GAS VALVE
○	OBSTRUCTION WELL	○	GAS LINE
○	TEST PIT	○	UNDERGROUND TELEPHONE LINE
○	PERCUSSION TEST	○	UNDERGROUND ELECTRIC
○	TREELINE	○	WETLAND LINE
○	SPOT ELEVATION	○	VERTICAL CURVE CURS
○	CONTOUR ELEVATION	○	BRUSHWOOD CONCRETE CURS



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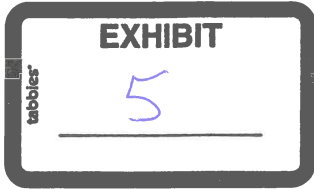
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CONSTITUTION AVENUE
PORTSMOUTH, NEW HAMPSHIRE



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EXHIBIT
3



Salema Realty - Constitution Avenue Housing Project
 Lower Unit Count Scenario

Residential Parking Space Calculation			
Apartment Categories By Sq. Ft.	Parking Spaces Required	#Units	Parking Spaces Required
< 500	0.5	3	2
500 to 750	1	6	6
Over 750	1.3	34	44
Visitor Parking = 43/5 =			9
Totals		43	61

Parking Spaces

Salema Realty - Constitution Avenue Housing Project
 Larger Unit Count Scenario

Residential Parking Space Calculation			
Apartment Categories By Sq. Ft.	Parking Spaces Required	#Units	Parking Spaces Required
< 500	0.5	36	18
500 to 750	1	10	10
Over 750	1.3	24	31
Visitor Parking = 70/5 =			14
Totals		70	73

Parking Spaces