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**Also admitted in MA*

BY: HAND DELIVERY & VIEWPOINT

June 26, 2019

City of Portsmouth
Zoning Board of Adjustment
Attn: David Rheume, Chairman
1 Junkins Avenue
Portsmouth, NH 03801

**RE: Variance Application of Bacman Enterprises, Inc.
140 Edmond Avenue, Tax Map 220, Lot 81**

Dear Chairman Rheume,

Our Office represents Bacman Enterprises Inc., owner of the property located at 140 Edmond Avenue. Enclosed, please find twelve (12) copies of Bacman Enterprises, Inc.'s zoning application and related materials to be considered at the Board's July meeting. The following are included in the package:

- 1) Landowner Letter of Authorization;
- 2) Narrative to Variance Application;
- 3) ZBA Site Plan;
- 4) Floor Plans;
- 5) Tax Map Image of Property;
- 6) Photographs of Property; and
- 7) \$150.00 filing fee.

Should you have any questions or concerns, regarding the enclosed application materials, do not hesitate to contact me at your convenience. Thank you for your time and consideration of the foregoing application.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Derek R. Durbin', with a large, stylized flourish at the end.

Derek R. Durbin, Esq.

LETTER OF AUTHORIZATION

Bacman Enterprises Inc., the owner of real property located at 140 Edmond Avenue, Portsmouth, New Hampshire 03801, identified on Tax Map 220, as Lot 81 (the "Property"), hereby authorizes Durbin Law Offices PLLC to act as his agent and representative in connection with the filing of any building, zoning, planning or other municipal permit applications with the City of Portsmouth for the Property. Said Letter of Authorization shall be valid until expressly revoked in writing.

Bacman Enterprises Inc.



Printed Name: Paul Bacon, President

Duly Authorized

6-25-2019
Date

**CITY OF PORTSMOUTH
ZONING BOARD OF ADJUSTMENT
APPLICATION NARRATIVE**

Bacman Enterprises Inc.
(Owner/Applicant)
Tax Map 220, Lot 81
140 Edmond Avenue
Portsmouth, NH 03801

INTRODUCTORY STATEMENT

Bacman Enterprises Inc. is the owner of property located at 140 Edmond Avenue, Portsmouth, New Hampshire 03801, identified on Tax Map 220, as Lot 81 (the "Property"). The Property is in Portsmouth's Single Residence B ("SRB") Zoning District. It consists of approximately 0.53 acres of land with a ranch-style building that contains two (2) residential units on the ground floor and a chiropractic office on the lower level which is below grade. The chiropractic business is owned by Paul Bacon, the principal and owner of Bacman Enterprises, Inc. He has operated his chiropractic business on the Property since 1978.

The two (2) residential units on the Property pre-date current zoning and are considered lawfully non-conforming. A special exception was granted in 1978 for a 300 (+/-) square foot chiropractic office on the lower level of the building. Mr. Bacon's chiropractic office use of the lower level of the building expanded as his business grew. Over the decade or so after he purchased the Property, the chiropractic office expanded into the entire lower level of the building, which contains a gross floor area of approximately 2,300 sf. The expansion of use occurred absent any relief being applied for or granted by the Zoning Board of Adjustment. When Mr. Bacon approached the City in attempt to purchase land that it owned adjacent to the Property in the early 2000s, the City became aware of the expanded use of the lower level and notified Mr. Bacon of the need for zoning relief. Mr. Bacon subsequently applied for and obtained the necessary zoning relief in 2005. In addition, he obtained a Conditional Use Permit from the Planning Board for the creation of additional parking within the wetland buffer.

2005 ZBA APPROVAL

On May 17, 2005, the Board granted the zoning approvals necessary for Mr. Bacon to make legal use of the entire 2,300 sf. lower level of the building subject to the following conditions:

- 1) That an Engineered site plan, including parking spaces conforming in size and location, as depicted on the plan submitted and approved with this petition, be provided;
- 2) That the property must meet current codes as referenced in the staff memorandum to the Board.

Mr. Bacon complied with the first stipulation of approval by supplying the Planning Department with an engineered site plan. However, due to unforeseen financial hardship, Mr. Bacon was unable to comply with the other stipulation imposed by the Board. The Applicant's zoning approval ultimately lapsed in 2007.

CURRENT PROPOSAL

The current application is substantively identical to the prior application granted by the Board in 2005 and would have the same legal effect. Mr. Bacon seeks an approval to allow his chiropractic business to legally occupy the entire 2,300 sf. lower level of the building.

It is important to note that the parking requirements of the Ordinance have changed since the Applicant's original approval in 2005. In 2005, the City required fifteen (15) parking spaces for the combined use of the Property. The City now only requires thirteen (13) spaces. Three (3) of the parking spaces are required for the residential units and ten (10) spaces for the chiropractic office (1 per 250 sf. of GFA). The Applicant has nine (9) parking spaces available on-site. Pursuant to Section 10.1112.14 of the Ordinance, the Applicant intends to apply for a Conditional Use Permit from the Planning Board for the three (3) spaces that it cannot provide on-site. This avenue for relief was not available to the Applicant in 2005. At that time, the Applicant was required to either comply with the Ordinance or seek a variance from it.

Even if the Variance Application is approved, Mr. Bacon will have several additional hurdles to clear. Most notably, it is likely that the City will require that the 2,300 sf. lower level comply with *current* building code for commercial spaces of this nature. The use of the Property will be subject to Site Plan review from the Planning Board and will need a Conditional Use Permit for the three (3) parking spaces cannot be provided on-site.

SUMMARY OF VARIANCE RELIEF

The Applicant seeks the following variances from the Zoning Ordinance:

Section 10.333: To allow a non-conforming use to be extended into other parts of the building.

Section 10.1113.20: To allow off-street parking spaces to be located in the required front yard setback or between a principal building and the street.

Section 10.1114.32: To allow vehicles to enter and leave a parking area by backing out into a public street.

VARIANCE CRITERIA

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

In the case of *Chester Rod & Gun Club, Inc. v. Town of Chester*, the Court observed that the requirements that a variance not be "contrary to the public interest" or "injure the public rights of others" are coextensive and are related to the requirement that the variance be consistent with the spirit of the ordinance. 152 N.H. 577 (2005). The Court noted that since the provisions of all ordinances represent a declaration of public interest, any variance will, in some measure, be contrary to the ordinance, but to be contrary to the public interest or injurious to public rights of others, "the variance must 'unduly, and in a marked degree' conflict with the ordinance such that it violates the ordinance's 'basic zoning objectives.'" Id. "Mere conflict with the terms of the zoning ordinance is insufficient to constitute a violation of the ordinance's basic zoning objectives." *Harborside Assoc v. Parade Residence Hotel*, 162 N.H. 508, 514 (2011). "There are two methods of ascertaining whether granting a variance would violate an ordinance's basic zoning objectives: (1) examining whether granting the variance would alter the essential character of the neighborhood or, in the alternative; and (2) examining whether granting the variance would threaten the public health, safety, or welfare." Id.

The entire 2,300 sf. lower level of the building has been used as a chiropractic office for more than thirty (30) years. In the earlier years of the business, and when Mr. Bacon received his approvals in 2005, the chiropractic office served a much higher volume of patients. Today, Mr. Bacon's practice serves an average of thirty (30) patients per day. In addition, Mr. Bacon has three (3) employees that regularly work at his office. The office is closed on Thursdays and the weekends from 9am – 6pm.

The chiropractic office has not changed the character of the neighborhood nor has it been injurious to surrounding property owners or the general public. To the contrary, it has provided a public benefit by offering medical services to residents of the City. The building has retained a residential appearance. There is sufficient on-site parking on the Property to accommodate the residential units and medical office. As shown on the Applicant's Site Plan, there are three (3) dedicated parking spaces associated with the residential use of the Property. The other six (6) existing parking spaces are for the chiropractic office. On a normal day, there is excess parking availability on the Property.

Substantial justice will be done by granting the variance relief.

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

There would be a significant hardship to the Applicant of having to remove the chiropractic business from the Property or reducing it to the original 300 square feet approved by the Board in 1978. The chiropractic business provides a valuable medical service to the public that many

surrounding residents take advantage of. There would be no gain to the benefit to the public in denying the variances. To the contrary, there would likely be a detriment to the public. The hardship to the Applicant in denying the variances outweighs any speculative public benefit.

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

The values of surrounding properties have diminished over the past three (3) or more decades since Mr. Bacon expanded his chiropractic practice into the remainder of the 2,300 sf. lower level of the building. To the contrary, surrounding property values have increased significantly. Mr. Bacon is not proposing any physical modifications to the Property. The building on the Property has a residential appearance. The use and physical appearance of the building would remain the same. Therefore, it is fair to conclude that surrounding property values would not be diminished by the approval of the variances.

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

The Subject Property has special conditions that make it distinguishable from surrounding properties. Owing to these special conditions, there is no fair and substantial relationship between the general purposes of the Ordinance provision(s) and their application to the Property.

The Property is uniquely situated in comparison with other properties in the surrounding area. The abutter to the front (North) and left (East) of the Property is the City of Portsmouth. The Property is bounded by I-95 to the rear (South). The Property to the North which is owned by the City contains a very large utility easement that could never be built upon. The Property owned by the City to the East consists of wetlands and cannot be developed. The abutting property to the West is owned by the Moultons. By agreement, the Moultons share a driveway with the Mr. Bacon and have a good neighborly relationship with Mr. Bacon. Despite being situated in the SRB Zoning District, only one abutting property is used for residential purposes. Given the unique circumstances presented, there is no fair and substantial relationship between the general purposes of the Ordinance provisions and their strict application to this Property.

On a historical note, the building was actually moved by the Army Corps of Engineers during its construction of I-95 and placed in its current location. It was previously located where I-95 is presently constructed.

The proposed use is reasonable.

The two-family residential use of the Property was established prior to enactment of current zoning. The medical office use of the Property was established in 1978 when the Board granted a variance to allow 300 square feet of the building to be used for this purpose. The expansion of that use into the remainder of the building, which occurred in the decade or so after 1978, does not affect the reasonableness of the use when considered in the context of the Property's location. In addition, the Applicant has not received any complaints about the use of the Property from residents of the City. It does not appear that the City has any record of any complaints either. This

is evidence that the use of the Property is reasonable and does not interfere with the quiet enjoyment of surrounding properties. Mr. Bacon has also made improvements to the Property that have been beneficial to the City and surrounding property owners. Accordingly, the proposed use of the Property is reasonable.

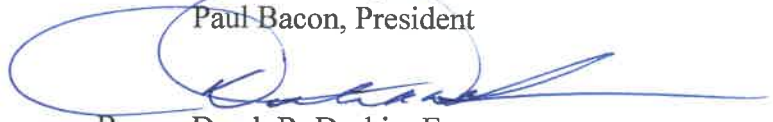
CONCLUSION

In conclusion, the Applicant has demonstrated that its proposed use of the Property meets the five (5) criteria for granting each of the variances requested. Accordingly, the Applicant respectfully requests that the Board approve the Variance Application as presented.

Respectfully Submitted,

Dated: June 26, 2019

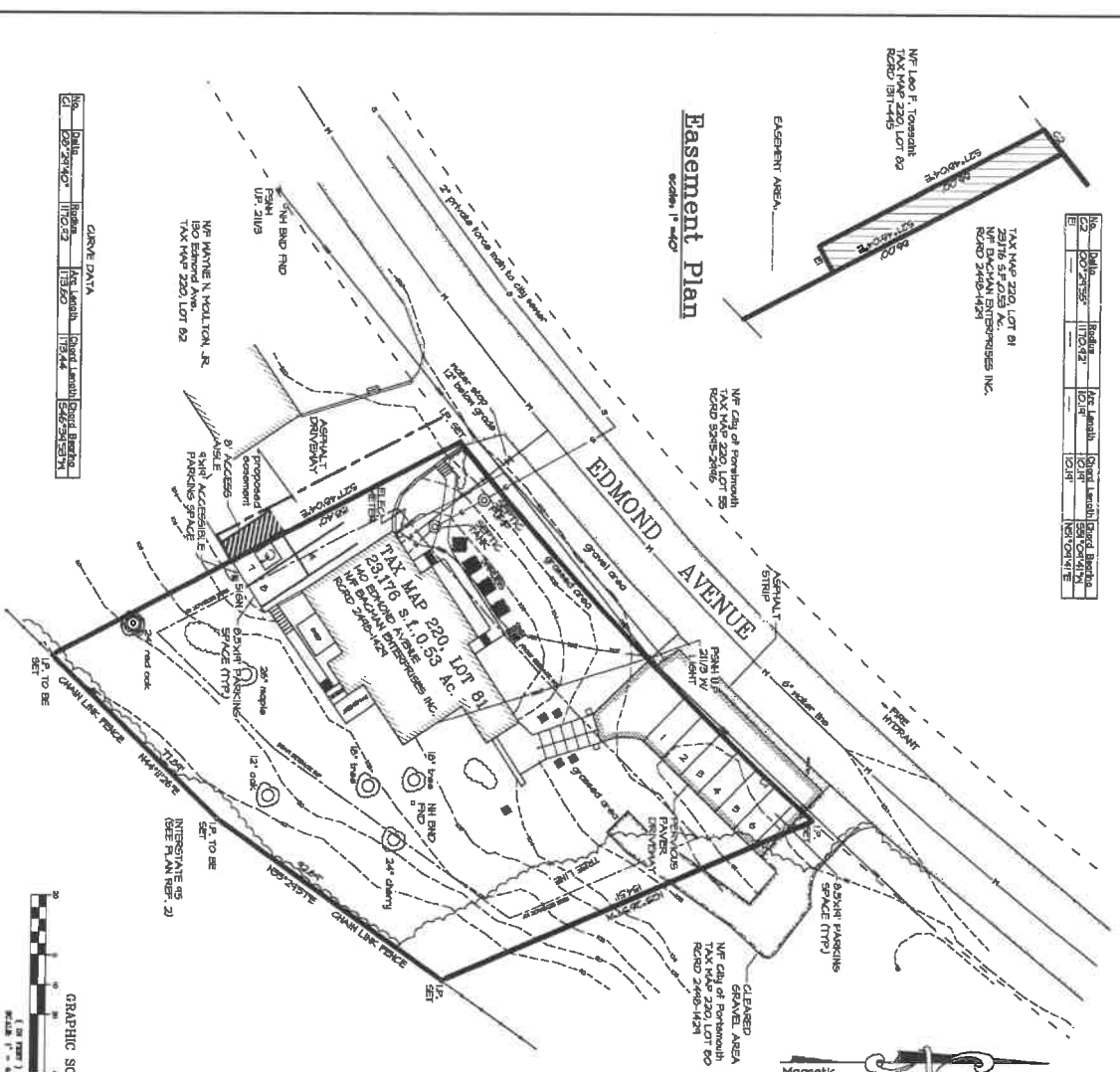
Bacman Enterprises Inc.
Paul Bacon, President



By: Derek R. Durbin, Esq.
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No.	Date	By	For	Sheet No.	Total Sheets
1	02/27/97	RMS	Final Design	1	1

Easement Plan

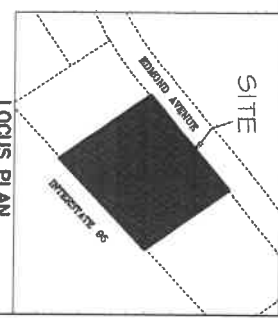


NOTES

- OWNER OF RECORD, BACMAN ENTERPRISES, INC. TAX MAP 220, LOT 81 140 EDMOND AVE PORTSMOUTH, NH 02801 RCD# 2449-1421 AREA, 23116 S.F., 0.53 AC
- PARCEL IS IN SINGLE RESIDENCE B (SRB). MIN. LOT AREA PER DWELLING UNIT.....15000 SF MIN. LOT FRONTAGE.....100 FT MIN. LOT DEPTH.....100 FT SETBACKS..... FRONT..... 30 FT SIDE..... 10 FT REAR..... 30 FT MAXIMUM BUILDING HEIGHT..... 30 FT SLOPED ROOF..... 30 FT MAXIMUM BUILDING COVERAGE..... 20% MINIMUM OPEN SPACE..... 40%
- SEWER, WATER, & GAS LINE LOCATIONS ARE APPROXIMATE & BASED ON FIELD MEASUREMENTS & CITY DATA INFORMATION. THE BUILDING IS SUPPLIED WITH WATER MAIN FROM THE STREET. THE EXACT LOCATION OF THE SIDE OF THE BUILDING, THE EXACT LOCATION OF THIS CONDUIT IS UNKNOWN.
- EXISTING ON-SITE SURFACES:
 HOLDSERVED..... 2808 SF
 CONCRETE WALKWAYS..... 506 SF
 CONCRETE DRIVEWAY..... 294 SF
 PAVED DRIVEWAY AREAS..... 1732 SF
 GRAVEL DRIVEWAY..... 216 SF
 TOTAL PAVED AREAS..... 6720 SF
 TOTAL INTERIORS AREA..... 6720 SF
- OPEN SPACE
 23116 - 6720 / 23116 = 11.28%
 BUILDING COVERAGE
 2112 / 23116 = 11.78%
- PARKING SPACES:
 2300'-6" SF MEDICAL SPACE - 1720 5-F, 10 SPACES
 2 APARTMENTS - 150 DWELLING..... 3 SPACES
 TOTAL REQUIRED SPACES..... 13 SPACES
 PROVIDED SPACES..... 9 SPACES
 HANDICAP SPACE REQUIREMENT: 1 PER 25.1 SPACE

REFERENCE PLANS

- CONSOLIDATION PLAN OF L&I FOR BACMAN ENTERPRISES, INC. 140-142 EDMOND AVENUE COUNTY OF ROCKINGHAM PORTSMOUTH, NH 02801 ARCHITECT: RICHARD F. HILLIER AND ASSOCIATES, RCD# C-19442
- HIGHWAY LAYOUT PLAN, PLAN OF PORTSMOUTH, NH-1 (B) 14-2027-A, SHEETS 12 AND 13 DATED 5/24/87 BY NEW HAMPSHIRE TRANSPORTATION, RCD# D-22281, RCD# C-19442



LEGEND

- S— SEWER LINE
- W— WATER LINE
- O— OVERHEAD UTILITIES
- O— OVERHEAD TELEPHONE & CABLE
- T— TREE LINE
- E— UNDERGROUND ELECTRIC



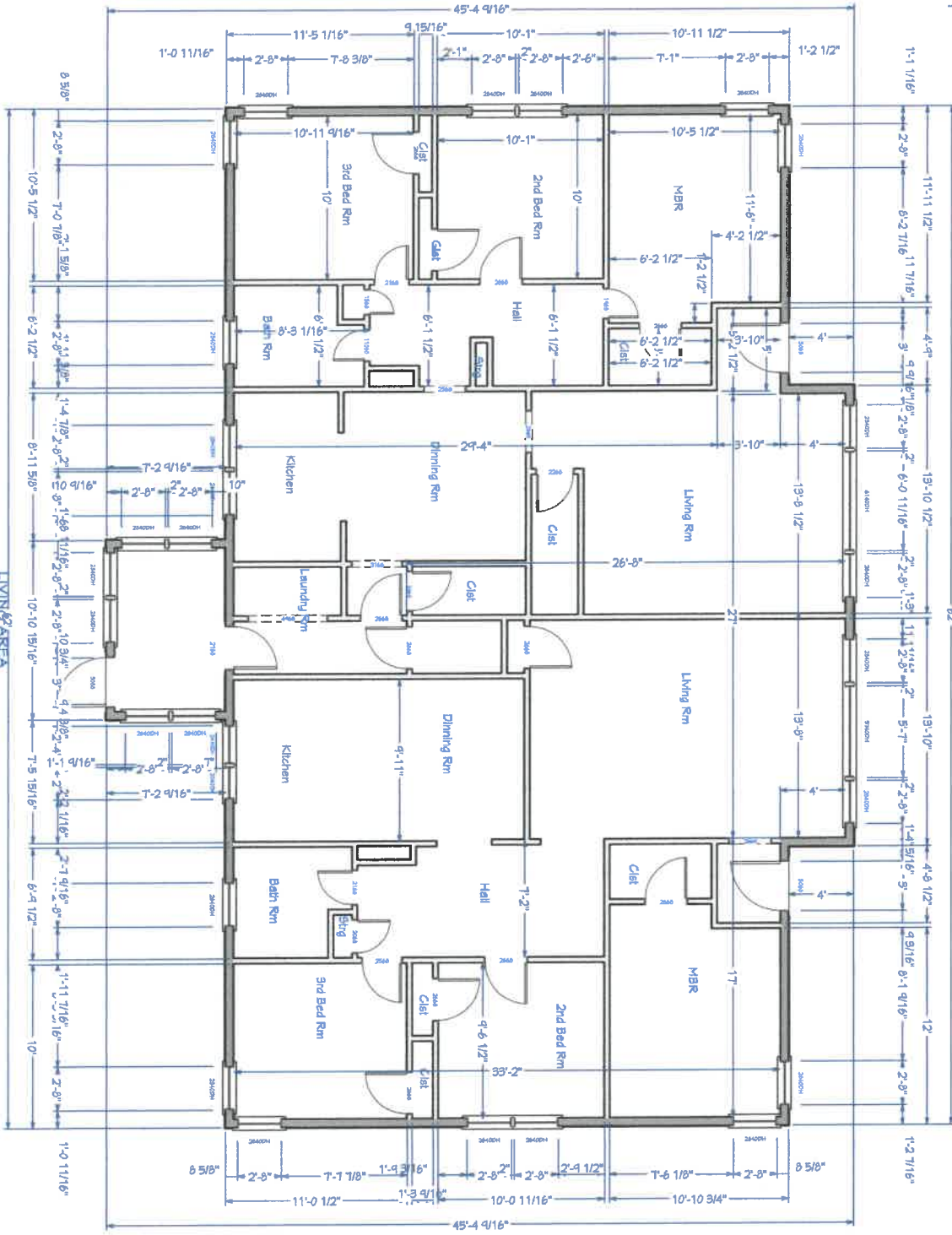
ZBA SITE PLAN
 BACMAN ENTERPRISES, INC.
 PORTSMOUTH, NH 02801
 TAX MAP 220, LOT 81

NO.	DATE	BY	FOR	SHEET NO.	TOTAL SHEETS
1	02/27/97	RMS	Final Design	1	1

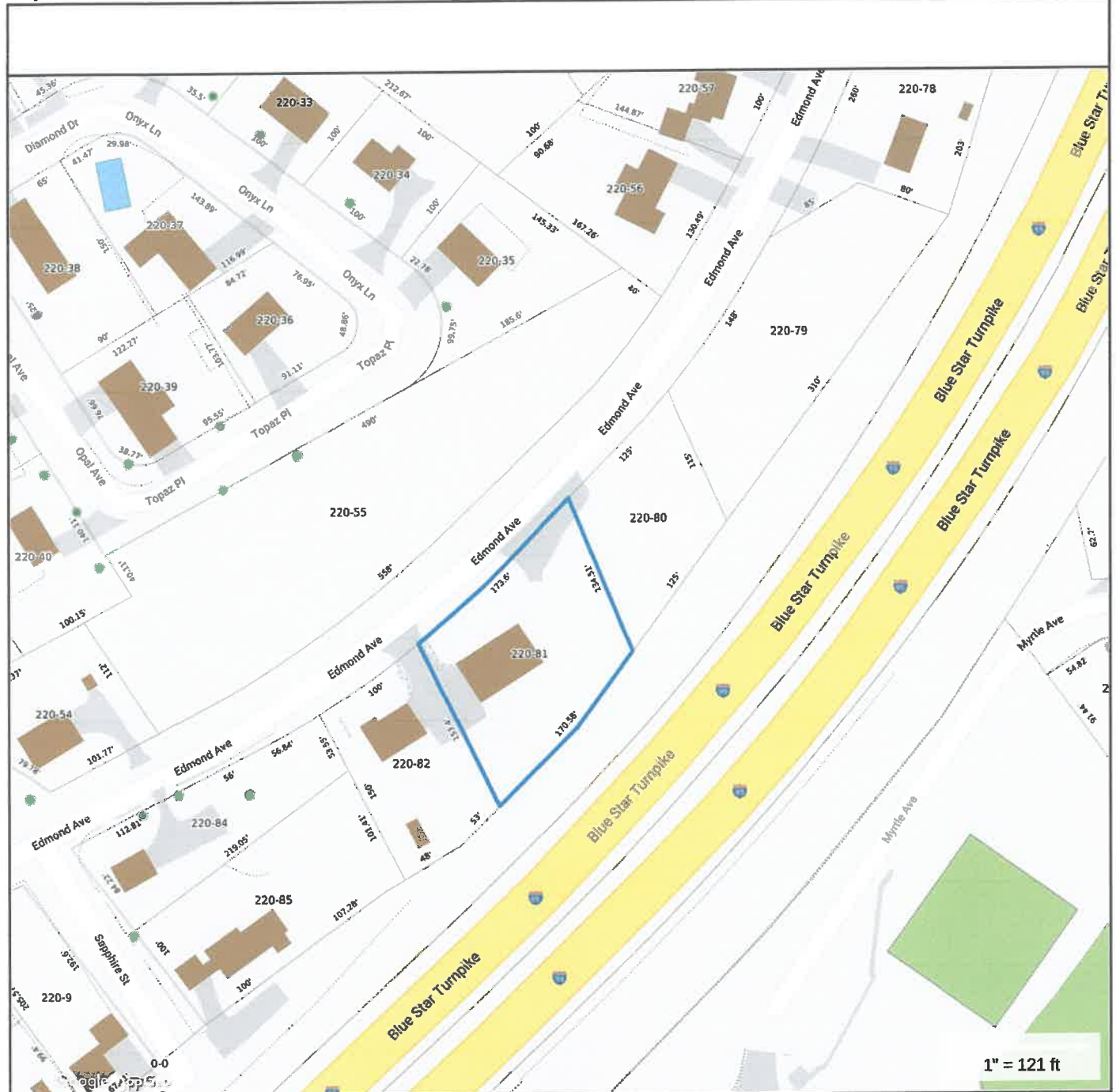
ROSS ENGINEERING
 Civil/Structural Engineering
 10043
 10043
 PORTSMOUTH, NH 02801

DATE: 02/27/97
 TIME: 10:00 AM
 DRAWN BY: JRM
 CHECKED BY: JRM
 SCALE: AS SHOWN
 PROJECT: ZBA SITE PLAN
 SHEET: 1 OF 1

Scale: 1/4" = 1'



LIVING AREA
2309 SQ FT



Property Information

Property ID 0220-0081-0000
Location 140 EDMOND AVE
Owner BACMAN ENTERPRISES INC



**MAP FOR REFERENCE ONLY
NOT A LEGAL DOCUMENT**

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

Geometry updated 11/30/2018
Data updated 11/19/2018



Photo of Right Side of Property from Edmond Avenue



Photo of Front of Property from Edmond Avenue



Photo of Property from Edmond Avenue



Photo of Property Edmond Avenue



Photo of Left Side of Property from Edmond Avenue



Photo of City Land with Utility Easement across Street fro 140 Edmond Avenue

Durbin Law Offices PLLC

Operating Account
P.O. Box 1222
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603-287-4764

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06/26/2019

PAY TO THE
ORDER OF

City of Portsmouth

\$
**150.00

DOLLARS

One hundred fifty and 00/100*****

City of Portsmouth

Durbin Law Offices PLLC

MEMO

Bacon Variance Application Filing Fee

⑈002120⑈ ⑆011400071⑆ 9243456161⑈

Security features. Details on back.

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06/26/2019

City of Portsmouth

150.00

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150.00

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