

MEMORANDUM

TO: Portsmouth Zoning Board of Adjustment (“ZBA”)
FROM: Kevin M. Baum, Esquire
DATE: May 27, 2020
Re: Applicant: Salvation Army
Owner: RKW Investment Properties LLC
Property: 115 Heritage Avenue
Tax Map 285, Lot 5-1
Industrial (“I”) Zoning District

Dear Chairman Rheaume and Zoning Board Members:

On behalf of the Salvation Army, we are pleased to submit this Memorandum and exhibits in support a Variance to permit Place of Assembly use on the above-referenced property (the “Property”). The variance is necessary for the Salvation Army to provide temporary services at the Property while it looks for a permanent new home.

I. Exhibits

1. Building Plan.
2. Office Floor Plan – showing leased premises.
3. Tax Assessor’s Card – Tax Map 285, Lot 5-1.
4. City GIS Map – showing the property and surrounding area.
5. Site Photographs.

II. Relief Requested

The Salvation Army respectfully requests the following variance from the Portsmouth Zoning Ordinance (“PZO”):

Section 10.440.3.10 (Table of Uses) – to allow the use of the Property as a Place of Assembly.

III. Overview of Request and Property

On February 19, 2020, this Board granted the Salvation Army a Special Exception to allow Place of Assembly use at 2222 Lafayette Road to replace its longstanding Middle Street facility. The Middle Street building had become a burden to the organization due to its age and size, and has since been sold. Unfortunately, the Salvation Army’s purchase of the 2222 Lafayette Road property did not occur, and the organization continues to look for a long-term

home. In the interim, the organization is leasing the subject Property as a temporary location for its local operations.

The Property is an approximately 2.74 acre parcel with an existing ±25,376 square foot industrial/warehouse building (the “Building”) and associated parking located at 115 Heritage Avenue in the Industrial (I) Zoning District. **Exhibit 1** (Building Plan); **Exhibit 3** (Tax Card). The Salvation Army is leasing approximately 3,000 square feet of space within the Building (**Exhibit 2**), which it has been for office use, permitted by right in the Industrial District. Additional uses are currently limited due to COVID-19 related restrictions. However, as restrictions lift, the Salvation Army hopes to increase the use of the space to provide a full range of its organizational services.

Proposed operations at the Property will mirror those of the Middle Street facility and those proposed for 2222 Lafayette Road, for which approval was recently granted. Specifically, the Salvation Army will provide weekly church services, youth and adult programming and associated religious/community services. The organization will also provide daily breakfasts and dinners via its food truck, with which it is currently providing prepared foods from the City’s designated State Street location on a temporary basis.¹ There will be no overnight facilities or services offered at the Property.

Parking is available on the Property, with approximately 15 unlined and undesignated spaces on each side of the Building (±30 total) and additional space to the rear of the lot if needed. However, most of the organization’s patrons do not currently use (or own) cars to access services. They access the Property primarily via the Coast bus service or are picked up by Salvation Army staff members. The Property is located within walking distance of the Coast Bus route, with the closest stop located on Lafayette Road. **Exhibit 4**. Services and other events typically bring maximum of ±35-40 patrons and not more than ±10-12 cars. Thus, there is more than enough parking available at the Property.

The Property meets the Salvation Army’s needs while it seeks a more permanent home. No changes to the Building or parking area are proposed or needed to allow the organization to provide services. However, because the Property is located within the Industrial District, a variance is required to expand its utilization beyond minimal office use so that the Salvation

¹ See Portsmouth Herald, May 5, 2020 article available at <https://www.seacoastonline.com/news/20200505/salvation-army-rolls-out-food-truck-for-those-in-need-in-portsmouth>

Army can provide the full range of organizational services permitted under Place of Assembly use.

Other nearby places of assembly exist, including the Portsmouth Believers Church located at 235 Heritage Avenue, less than one-half mile up the road and also in the Industrial District, Calvary Baptist Church on Ocean Road and United Pentecostal Church on Banfield Road. Accordingly, the Salvation Army respectfully requests this Board grant a variance to allow the Salvation Army to operate as a Place of Assembly on the Property, consistent with other nearby church uses.

IV. VARIANCE REQUIREMENTS

1. The variances will not be contrary to the public interest.
2. The spirit of the ordinance is observed.

The first step in the ZBA's analysis is to determine whether granting a variance is not contrary to the public interest and is consistent with the spirit and intent of the ordinance, considered together pursuant to *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007) and its progeny. Upon examination, it must be determined whether granting a variance "would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." *Id.* "Mere conflict with the zoning ordinance is not enough." *Id.*

The purpose of the Portsmouth Zoning Ordinance as set forth in PZO §10.121 is "to promote the health, safety and the general welfare of Portsmouth and its region in accordance with the City of Portsmouth Master Plan... [by] regulating":

1. The use of land, buildings and structures for business, industrial, residential and other purposes – Office use is already permitted within the I District and on the Property as is secondary education use. The Salvation Army seeks to also provide small religious services, youth and other educational programming and similar Place of Assembly use within the existing Building. Use of the food truck on the Property is consistent with similar, commercial, food services typically provided to industrial facilities. Thus, the proposed use is consistent with the use of land within the area.
2. The intensity of land use, including lot sizes, building coverage, building height and bulk, yards and open space – No changes to the Building or parking area are proposed.

3. The design of facilities for vehicular access, circulation, parking and loading – No changes to the parking area is proposed. Given the long-existing layout, availability of ±30 (undesignated) spaces available and limited parking needs of the Salvation Army’s patrons, parking layout and vehicle circulation are fully adequate for the use.

4. The impacts on properties of outdoor lighting, noise, vibration, stormwater runoff and flooding – No impacts will be created by the variance. All use will be within the Building with the exception of the food truck offering prepared meals at limited times.

5. The preservation and enhancement of the visual environment – No impact. No changes to the Building or Property are proposed.

6. The preservation of historic districts, and buildings and structures of historic or architectural interest – Not applicable.

7. The protection of natural resources, including groundwater, surface water, wetlands, wildlife habitat and air quality – No changes to the Building or Property are proposed. No wetlands or water bodies are identified on or adjacent to the Property (per City GIS mapping).

Based upon the foregoing, none of the variances “in a marked degree conflict with the ordinance such that they violate the ordinance’s basic zoning objectives.” *Malachy Glen, supra*, which also held:

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. . . . Another approach to [determine] whether granting the variance violates basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare. (emphasis added)

The Salvation Army proposes no physical changes to the Property. It only seeks to expand the use of the Property beyond office and secondary educational use, which are both permitted, to include other Place of Assembly uses such as small religious services, youth educational programs, meal service (via its food truck) and similar uses. Other Places of Assembly exist nearby, including the Portsmouth Believers Church located a short distance up Heritage Road. **Exhibit 5**. Accordingly, granting each requested variance will neither “alter the essential character of the locality,” nor “threaten the public health, safety or welfare.”

3. Granting the variance will not diminish surrounding property values.

The requested variance simply permits the Salvation Army to use the Property for the full range of its organizational services rather than the limited office and secondary educational uses currently permitted. Most of the use will be entirely within the Building and out of sight of surrounding properties. The only proposed exterior use is to provide meals via the food truck, a service typically provided by third party commercial food trucks to employees on other industrial properties. Thus, from the outside, the use of the Property will be unseen or indistinguishable from others in the area. The location of the Property within an industrial area and availability of ample off-street parking further mitigates any potential impacts to surrounding properties. In light of these factors, granting the requested variance will not diminish surrounding property values.

4. Denial of the variances results in an unnecessary hardship.

a. Special conditions distinguish the property/project from others in the area.

The Property includes an existing industrial/warehouse Building that is currently being used by the Salvation Army for office use. The Property's location on Heritage Avenue, away from residential neighborhoods but in close proximity to the Coast Bus route, makes it an ideal location for a broader range of use by the Salvation Army to provide its organizational services. Additionally, other, similar, Places of Assembly already exists in the area. *Walker v. City of Manchester*, 107 N.H. 382, 386 (1966) (hardship may be found where similar nonconforming uses exist within the neighborhood and the proposed use will have no adverse effect on the neighborhood.) These factors clearly combine to create special conditions.

b. No fair and substantial relationship exists between the general public purposes of the ordinance and its specific application in this instance.

The PZO does not articulate a reason why Place of Assembly use is prohibited in the Industrial Zone. Presumably, it is to avoid bringing large numbers of congregants to the area for religious services, which could potentially conflict with nearby industrial activities. However, no such issue is present here. The Salvation Army's use of the Property will include office and adult educational uses (both already permitted) and limited other educational programs and small religious services. Services and other events typically bring maximum of ±35-40 patrons and not

more than ±10-12 cars. There is little risk of conflict with surrounding uses. Moreover, a similar use already exists just up the road at the Portsmouth Believers Church located at 235 Heritage Avenue, for which we are aware of no issues with other nearby properties. For all these reasons, there is no fair and substantial relationship between the general public purposes of these provisions of the PZO and their specific application to the Property.

c. The proposed use is reasonable.

For all the reasons previously stated, the proposed Place of Assembly use is reasonable. It simply expands the Salvation Army's use of the Property to include the full range of its organizational services. The location, size and layout of the lot are appropriate and further support the proposed use. Finally, other similar Places of Assembly exist nearby without any known issues.

5. Substantial justice will be done by granting the variance.

If "there is no benefit to the public that would outweigh the hardship to the applicant" this factor is satisfied. *Harborside Associates, L.P. v. Parade Residence Hotel, L.L.C.*, 162 N.H. 508 (2011). That is, "any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice." *Malachy Glen, supra* at 109. Granting the variance allows the Salvation Army to continue to provide the full range of its services, which are all the more important in the current economic circumstances. Thus, granting the variance provides a significant benefit to the public. Conversely, denial deprives the Salvation Army the full use of the Property and the public of a fuller range of religious/charitable services. There is no benefit to the public that outweighs the harm to the owner if the requested variance is not granted. Denial would result in significant harm to the Applicant and the public.

V. CONCLUSION

For all the reasons stated, the Salvation Army respectfully requests that the Portsmouth Zoning Board of Adjustment grant the submitted variance request to permit the use of the Property as a Place of Assembly.

Respectfully submitted,

THE SALVATION ARMY

By: 

Kevin M. Baum, Esquire
Hoefle, Phoenix, Gormley & Roberts, PLLC
127 Parrott Avenue
Portsmouth, NH 03801
(603) 436-0666

EXHIBIT B



BUILDING PLAN

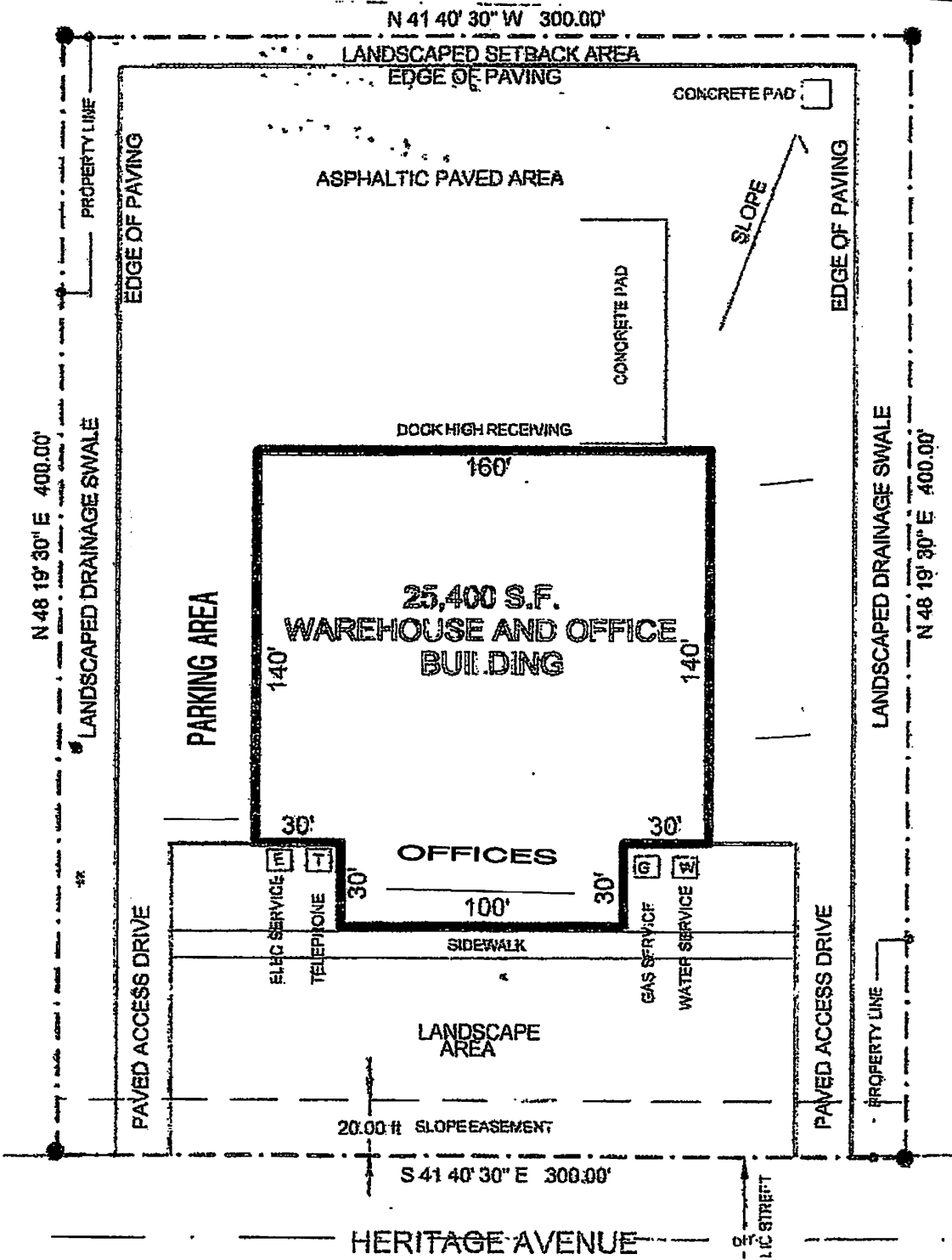
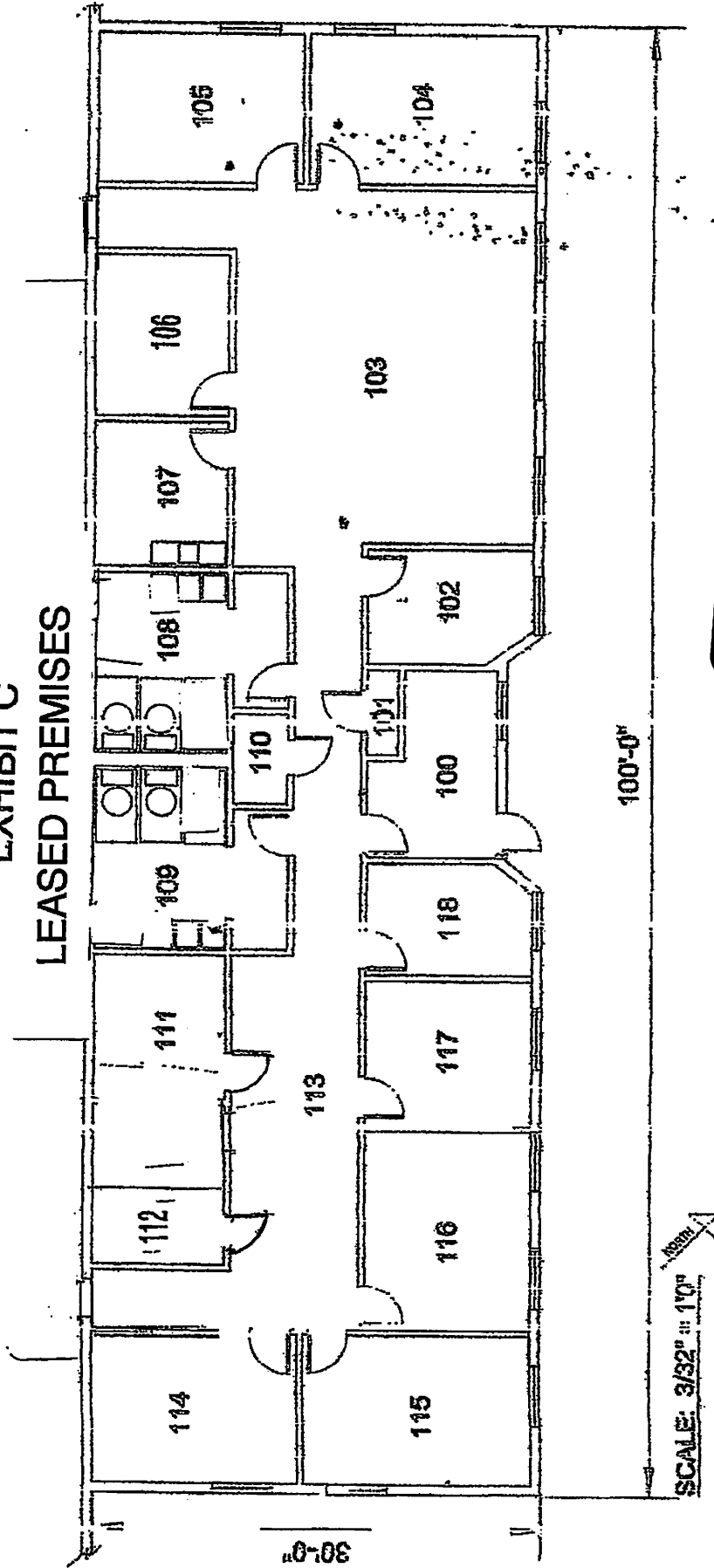


EXHIBIT C
LEASED PREMISES



OFFICE FLOOR PLAN
WAREHOUSE & OFFICE BUILDING
115 HERITAGE AVENUE
PORTSMOUTH, N.H.

FIKW INVESTMENT PROPERTIES, LLC

P.O. BOX 341 RYE BEACH N.H. 03071

TEL: 603-773-5015

e-mail: whs@fiqw.com

115 HERITAGE AVE**Location** 115 HERITAGE AVE**Mblu** 0285/ 0005/ 0001/ /**Acct#** 35948**Owner** RKW INVESTMENT
PROPERTIES LLC**PBN****Assessment** \$1,767,400**Appraisal** \$1,767,400**PID** 35948**Building Count** 1**Current Value**

Appraisal			
Valuation Year	Improvements	Land	Total
2019	\$1,191,900	\$575,500	\$1,767,400
Assessment			
Valuation Year	Improvements	Land	Total
2019	\$1,191,900	\$575,500	\$1,767,400

Owner of Record**Owner** RKW INVESTMENT PROPERTIES LLC**Sale Price** \$850,000**Co-Owner****Certificate****Address** PO BOX 341
RYE BEACH, NH 03871**Book & Page** 3490/0745**Sale Date** 07/14/2000**Instrument** 0**Ownership History**

Ownership History					
Owner	Sale Price	Certificate	Book & Page	Instrument	Sale Date
RKW INVESTMENT PROPERTIES LLC	\$850,000		3490/0745	0	07/14/2000

Building Information**Building 1 : Section 1**

Year Built: 1985
Living Area: 25,376
Replacement Cost: \$1,606,902

Building Percent Good: 70

Replacement Cost

Less Depreciation: \$1,124,800

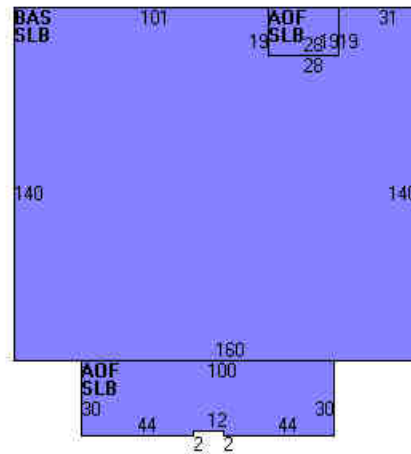
Building Attributes	
Field	Description
STYLE	Office/Warehs
MODEL	Industrial
Grade	C
Stories:	1
Occupancy	1
Exterior Wall 1	Concr/Cinder
Exterior Wall 2	
Roof Structure	Flat
Roof Cover	T & Grvl/Rubbr
Interior Wall 1	Drywall/Sheet
Interior Wall 2	
Interior Floor 1	Carpet
Interior Floor 2	
Heating Fuel	Gas
Heating Type	None
AC Type	None
Bldg Use	IND WHSES
Total Rooms	
Total Bedrms	
Total Baths	
Kitchen Grd	
1st Floor Use:	
Heat/AC	HEAT/AC PKGS
Frame Type	STEEL
Baths/Plumbing	AVERAGE
Ceiling/Wall	CEIL & MIN WL
Rooms/Prtns	AVERAGE
Wall Height	18
% Comn Wall	

Building Photo



(<http://images.vgsi.com/photos2/PortsmouthNHPhotos/\00\01\14\64.JPG>)

Building Layout



(http://images.vgsi.com/photos2/PortsmouthNHPhotos//Sketches/35948_3)

Building Sub-Areas (sq ft)			Legend
Code	Description	Gross Area	Living Area
BAS	First Floor	21,880	21,880
AOF	Office	3,496	3,496
		25,376	25,376

Extra Features

Extra Features				Legend
Code	Description	Size	Value	Bldg #
SPR1	SPRINKLERS-WET	25376 S.F.	\$29,300	1
LDL1	LOAD LEVELERS	4 UNITS	\$10,900	1
A/C	AIR CONDITION	3508 S.F.	\$6,500	1

Land**Land Use**

Use Code 4010
Description IND WHSES
Zone I
Neighborhood 301
Alt Land Appr No
Category

Land Line Valuation

Size (Acres) 2.74
Frontage
Depth
Assessed Value \$575,500
Appraised Value \$575,500

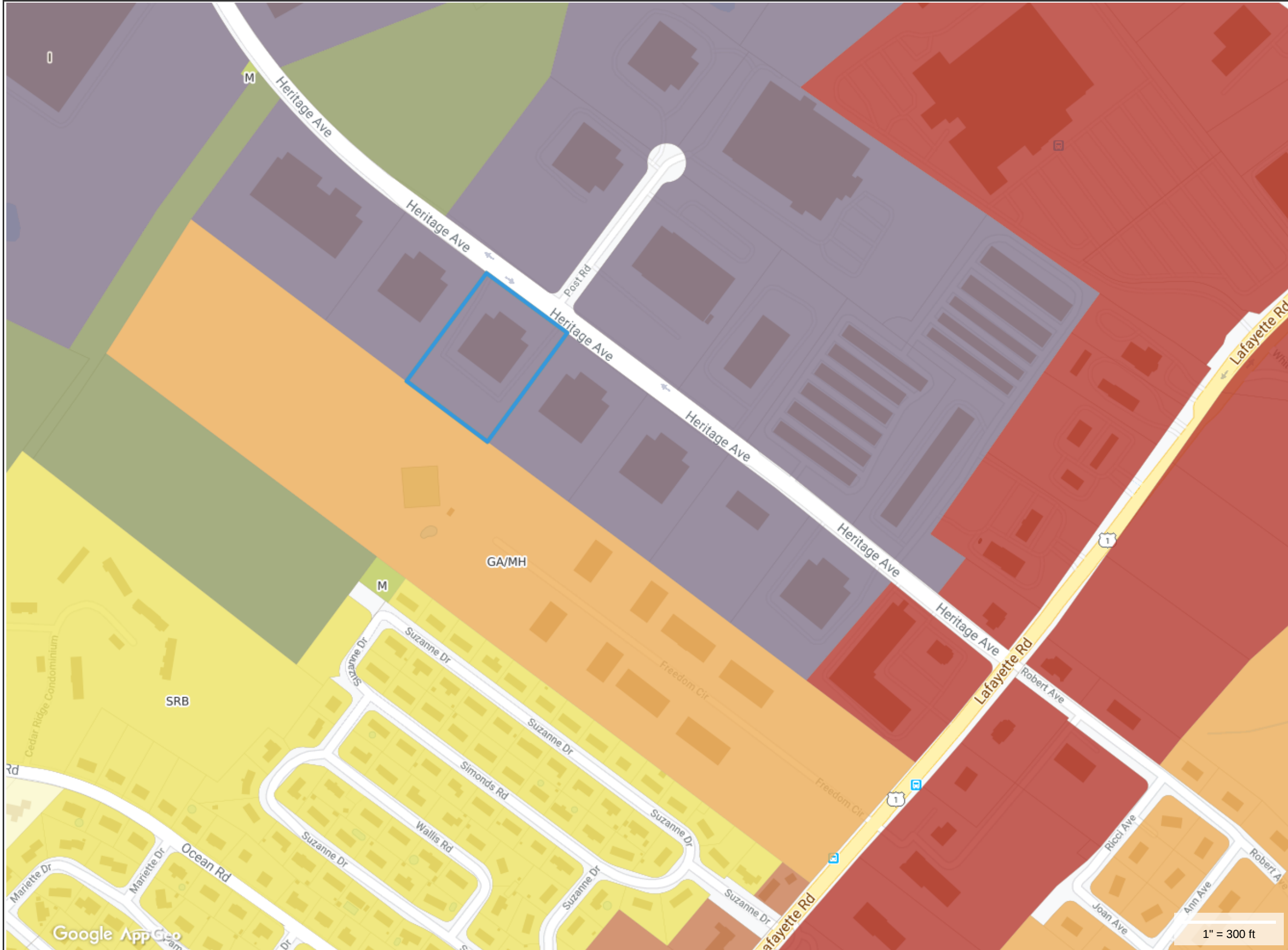
Outbuildings

Outbuildings						<u>Legend</u>
Code	Description	Sub Code	Sub Description	Size	Value	Bldg #
FN2	FENCE-5' CHAIN			1100 L.F.	\$7,300	1
PAV1	PAVING-ASPHALT			15000 S.F.	\$13,100	1

Valuation History

Appraisal			
Valuation Year	Improvements	Land	Total
2018	\$948,700	\$532,700	\$1,481,400
2017	\$948,700	\$532,700	\$1,481,400
2016	\$912,300	\$450,800	\$1,363,100

Assessment			
Valuation Year	Improvements	Land	Total
2018	\$948,700	\$532,700	\$1,481,400
2017	\$948,700	\$532,700	\$1,481,400
2016	\$912,300	\$450,800	\$1,363,100



Property Information
Property ID 0285-0008-0000
Location 175 HERITAGE AVE
Owner ARTISAN REALTY ASSOCIATES LLC



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

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

Geometry updated 4/1/2019
 Data updated 7/17/2019

Exhibit 4

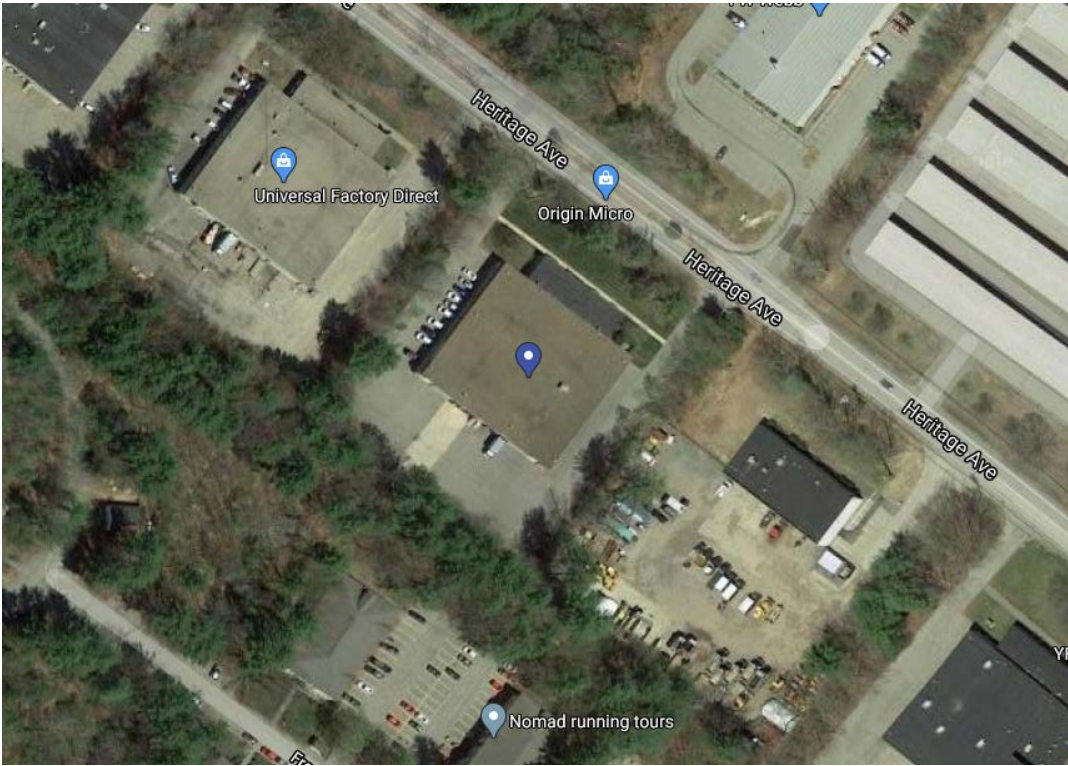
Map Theme Legends

Zoning

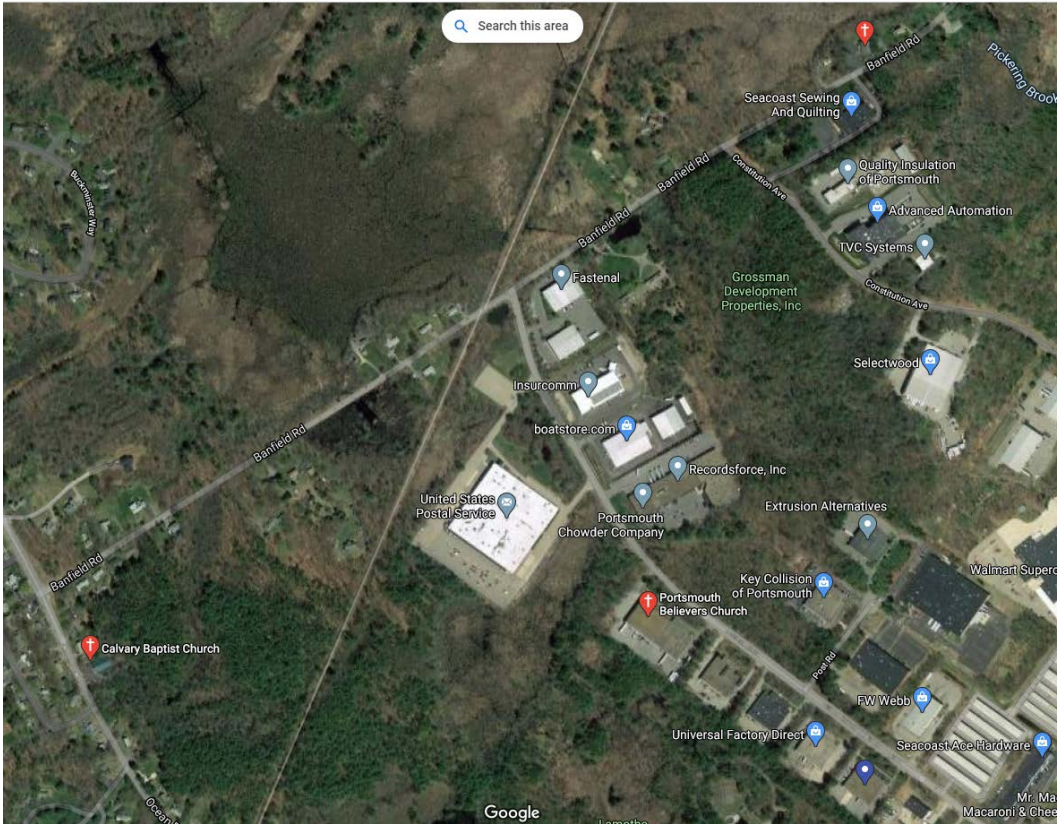
- Residential Districts**
 - R Rural
 - SRA Single Residence A
 - SRB Single Residence B
 - GRA General Residence A
 - GRB General Residence B
 - GRC General Residence C
 - GA/MH Garden Apartment/Mobile Home Park
- Mixed Residential Districts**
 - MRO Mixed Residential Office
 - MRB Mixed Residential Business
 - G1 Gateway Corridor
 - G2 Gateway Center
- Business Districts**
 - GB General Business
 - B Business
 - WB Waterfront Business
- Industrial Districts**
 - OR Office Research
 - I Industrial
 - WI Waterfront Industrial
- Airport Districts**
 - AIR Airport
 - AI Airport Industrial
 - PI Pease Industrial
 - ABC Airport Business Commercial
- Conservation Districts**
 - M Municipal
 - NRP Natural Resource Protection
- Character Districts**
 - CD5 Character District 5
 - CD4 Character District 4
 - CD4W Character District 4-B
 - CD4-L1 Character District 4-L1
 - CD4-L2 Character District 4-L2
- Civic District**
 - Civic District
- Municipal District**
 - Municipal District
- Overlay Districts**
 - OLOD Osprey Landing Overlay District
 - Downtown Overlay District
 - Historic District

City of Portsmouth

**Exhibit 5
Site Photographs**



Aerial View of Property



Aerial View of Property showing nearby places of assembly

**Exhibit 5
Site Photographs**



View of Property from the front (northeast)



**Exhibit 5
Site Photographs**



View from Property from the side (north)



View from Property from the side (south)

**Exhibit 5
Site Photographs**



View from Property from the side (southwest)



Salvation Army Food Truck