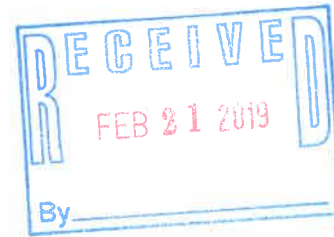


# KEANE & MACDONALD

A PROFESSIONAL CORPORATION • ATTORNEYS AT LAW



February 20, 2019

***HAND DELIVERED***

David Rheume, Chair  
Board of Adjustment  
Portsmouth Planning Department  
1 Junkins Ave, 3<sup>rd</sup> Floor  
Portsmouth, NH 03801

RE: Applicant: Happy Dreams, LLC/ Resport L.L.C. c/o Ocean Properties, LTD  
Property: One International Drive, Portsmouth, NH, 03801  
Portsmouth Tax Map 303, Lot 2  
Zone: Airport Business Commercial Zone – City of Portsmouth  
Business/Commercial District – Pease International Tradeport

Dear Mr. Chairman & Board of Adjustment Members:

On behalf of Happy Dreams, LLC, Resport L.L.C. (the “Applicant”), enclosed please find the original and eleven (11) copies of this letter, along with the following documents in support of the enclosed Variance Application (the “Application”) respectfully submitted for consideration by the Board of Adjustment (“BOA”) at its March 19, 2019 meeting:

**I. Exhibits**

1. Variance Application;
2. Tax Map 303;
3. Site Plan with Floor Plan;
4. Portsmouth Planning Board’s Recommendation of Site Plan Approval;
5. As Built Foundation Plan;
6. Photos of Existing Conditions;
7. Building Plan of Proposed Addition;
8. Interior Floor Plan of Expansion of Existing Structure;
9. PDA Setback Variance Plan by TMS Architects; and
10. *Condominium Site Plan for Resport, L.L.C., R.C.R.D. Plan D- 28652.*

Also enclosed is an Abutters lists on mailing labels, together with a check in the amount of \$300.00 for the Application fee.

## **II. History/Project**

The Applicant's lot consists of 435,637 sq. ft (10.0008 acres; the "Parcel"), and is located at One International Drive in the Business/Commercial district of the Pease International Tradeport (which is referred to in the City of Portsmouth Zoning Ordinance as the Airport Business Commercial Zone). Presently, there is a ninety room Residence Inn by Marriot (the "Hotel") located on a portion of the Parcel. On the *Condominium Site Plan for Resort, L.L.C., One International Drive*, by Millette, Sprague & Colwell, Inc., Dated December 14, 2000, and recorded in the Rockingham County Registry of Deeds as Plan D- 28652 (the "Site Plan"), an area labeled "FUTURE ADDITION" was identified as "Convertible Land 'A'".

In January 2018, the Applicant requested site plan approval from the Portsmouth Planning Department for the construction of a 7,130 +/- s.f., 3 story addition to the Hotel (the "Expansion") which provided for 36 rooms and a 29 space reserve parking area (the "Expansion Site Plan"). On January 18, 2018, the Portsmouth Planning Board voted to recommend approval of the Site Plan. Following the Board's approval, the Applicant secured a foundation permit and constructed the foundation for the 36-room addition.

Upon completing the foundation, an "as-built" foundation plan was prepared which revealed that the foundation veered into the fifty-foot set-back by less than 12 inches at its greatest encroachment. While the rear wall of the foundation was built in a line that represented a continuation of the prior rear wall of the foundation, likely due to an inadvertent error in measurement, the rear wall of the foundation, and as constructed the rear wall of the Expansion, slightly encroached in the setback buffer.

Accordingly, the Applicant is filing this application for relief from the strict application of the setback requirements of the Pease Development Authority ("PDA") Zoning Ordinance (the "Ordinance") in order to continue construction of the Expansion.

## **III. Relief Requested**

The Applicant is requesting a variance from the fifty (50) foot rear yard setback required by Part 304.04(e) of the Ordinance. The Applicant is seeking relief from the fifty (50) foot setback requirement due to the encroachment of the Hotel building into the rear set back buffer.

It is important to note that relief for the Applicant would qualify for consideration as an equitable waiver of a dimensional requirement under RSA: 674:33-a, but the PDA has not yet incorporated this statutory remedy into the Ordinance. RSA 674:33-a, provides that when a lot, or structure thereupon, is discovered to be in violation of a dimensional requirement imposed by a zoning ordinance, the zoning board of adjustment shall grant an equitable waiver from the requirement, if the board makes the following four findings:

(a) That the violation was not noticed or discovered until after a structure in violation had been substantially completed;



(b) That the violation was caused by either a good faith error in measurement or calculation made by an owner or owner's agent;

(c) That the dimensional violation does not constitute a public or private nuisance, diminish the value of other property in the area, interfere with or adversely affect any present or permissible future uses of any such property; and

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

The Applicant's situation appears to satisfy the equitable waiver requirements, including that the violation was not discovered until after the foundation was built and that the issue was caused by a good faith error in measurement. The additional requirements are supported by the information set forth in this letter. However, since this remedy is not available, the Applicant respectfully submits that its request is supported, and should be granted, based on the following information.

#### **IV. Variance Requirements**

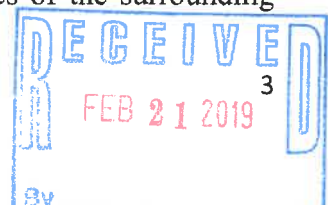
Under Part 317.01(c) of the Ordinance "a variance shall not be approved or recommended for approval unless it is in harmony with the general purpose and intent of [the Ordinance's] regulations and meets the following criteria: (1) no adverse effect or diminution in values of surrounding properties would be suffered; (2) granting the variance would be of benefit to the public interest; (3) denial of the variance would result in unnecessary hardships to the person seeking it; (4) granting the variance would be substantial justice and (5) the proposed used would not be contrary to the spirit of [the] zoning rule."

The Applicant respectfully submits that the following criteria are satisfied and requests that the BOA grant the Applicant's request for relief.

##### **Criteria 1**

##### **No Adverse Effect or Diminution in Values of Surrounding Properties Would Be Suffered**

No adverse effect or diminution of value of surrounding properties would be suffered because the minor encroachment will not have a significant effect on the Parcel's layout, overall aesthetics, surrounding greenspace or proximity to buildings or improvements on abutting lots. Relative to its closest abutting improvement, the parking lot of Cisco Brewery, there is significant green space and trees which will remain as a buffer between the Parcel and the Cisco Brewery and its parking area. The Applicant submits that the slight encroachment will not impact the value of the Cisco Brewery, or its other abutters, the nearest being Paddy's American Green (which is more distant and separated by a wooded area from the Parcel), those located in 2 International Drive, Sig Sauer, and others which are located a distance from the Hotel and across at least one roadway. In short, allowing this variance will have no adverse impact on the values of the surrounding



properties, and may increase their value by having corporate accommodations in close proximity to their businesses.

For the above reasons, granting the variance would not diminish the value of surrounding properties.

**Criteria 2 & Criteria 5**  
**Granting the Variance Would Be of Benefit to the Public Interest &**  
**The Proposed Use is Not Contrary to the Spirit of the Ordinance**

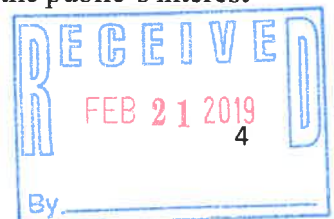
The requirements of the second and fifth criteria are commonly considered together. (*See, Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 105, (2007)). To be contrary to the spirit of the ordinance a variance “must unduly and to a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” *Id.* “Mere conflict with the zoning ordinance is not enough.” *Id.* The two ways to ascertain whether granting a variance would violate the basic zoning objectives are to: (1) examine whether the variance would alter the essential character of the neighborhood; and (2) examine whether granting the variance would threaten the health, safety or welfare of the public. (*Id., See also, Harborside Associates, L.P. v. Parade Residence North, LLC*, 162, N.H. 508, 589 (2011)).

Granting the variance would not alter the essential character of the neighborhood because as discussed above the encroachment is minor and, to the naked eye, will not have any visible effect on the overall appearance of the Parcel. The Expansion will be constructed in a manner similar to the existing Hotel, and as approved in January 2018 by the Planning Board, so the appearance will be consistent, thus not changing the character of the current building and its relationship with surrounding buildings.

Additionally, granting the variance would in no way threaten the health, safety or welfare of the public. As mentioned above, the significant green space will remain, and the small encroachment will have no effect on the health, safety or welfare of the public, in fact the public will not likely take notice of the encroachment. Finally, being at the rear of the Hotel, the public is not likely to interact at all with that area of the setback in which the encroachment exists.

Further, the variance is consistent with the Ordinance’s basic objectives, which are found in Chapter 301 and include to “promote the public health, safety and general welfare... conserve the value of property within the jurisdiction of the PDA ... encourage the appropriate and wise use of land and promote high quality economic development.” As discussed above, the variance will not threaten the public’s safety or have a negative effect on abutting property values. The Expansion will provide quality accommodations for visitors and those with assignments serving local businesses, which supports the goal of promoting the wise use of land and high quality economic development.

For the reasons set forth above, granting the variance would serve both the public’s interest and the spirit of the Ordinance.



### Criteria 3

#### Denial of the Variance Would Result in Unnecessary Hardship to the Applicant

The Ordinance does not define “unnecessary hardship”, but RSA 674:33, I (b) provides insight because it contains two definitions of “unnecessary hardship”. Under the first definition, an “unnecessary hardship 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”.

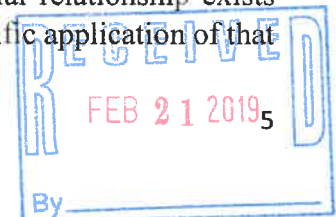
Typically, if an applicant is unable to satisfy the first definition of unnecessary hardship, then it may still obtain a variance if it satisfies the second definition. (*See, Harborside Associates, L.P. v. Parade Residence Hotel, L.L.C.*, 162 N.H. 508 (2011)). Under the second definition, “an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguishes it from other properties in the area, the property cannot be used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.”

The Applicant submits that the requirements of the first definition are satisfied. There are many special conditions of the Parcel that distinguish it from other properties in the area, including that the Parcel:

- (1) abuts only commercial lots;
- (2) has green space, roadways and driveways as a buffer from the abutting lots;
- (3) has a parking lot as the closest improvement on an abutting lot;
- (4) now includes a foundation constructed in good faith, at significant cost;
- (5) now has a minor encroachment into the rear set back buffer of less than one foot; and
- (6) the Parcel is located within the PDA jurisdiction so relief under RSA: 674:33-a, which appears to be designed to address the Applicant’s situation, is unavailable to it.

In this case, there is no fair and substantial relationship that exists between the general public purposes of the Ordinance provision and the specific application of that provision to the Parcel. Typically, a setback requirement ensures that the spacing between building is sufficient and consistent for purposes that can include safety, neighborhood continuity, green space and similar goals. In this matter, none of those purposes are adversely impacted if the variance is granted due to items 1-3 and 5 above. Chapter 301 of the Ordinance also values light, air, and open space, all of which are not affected by the minor encroachment, as the building size as approved by the Planning Board has not changed, only its placement with the variance, if granted, will be slightly closer to the rear property line.

In light of the above, the Applicant submits that the first definition of hardship is satisfied because owing to special conditions of the property, 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. Further the Planning Board has approved the Expansion, which indicates that the proposed use of the Expansion is a reasonable one.

In the event that the second definition is to be considered, then the Applicant submits that the second definition is also satisfied. For the reasons stated above, the proposed use is a reasonable use, and strict conformity with the Ordinance, given that the foundation has already been constructed at significant expense, would be a costly and inequitable result, particularly in light of the fact that the slight encroachment does not occur without an unintentional error in measurement and the Applicant's construction was in good faith belief that there was no encroachment.

In light of the above, the Applicant submits that the hardship criteria have been satisfied and in further support of that is the Planning Board's approval of the Expansion.

**Criteria 4**  
**Granting the Variance Would be Substantial Justice**

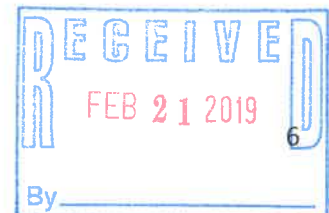
Granting the variance would be substantial justice because there is no benefit to the public gained from denying the variance, but the Applicant would suffer substantial hardship if the variance is denied.

This element of the analysis is commonly founded on the following inquiry: "any loss to the individual that is not outweighed by a gain to the general public is an injustice." (Harborside Associates, L.P., supra at 590). If "there is no benefit to the public that would outweigh the hardship to the applicant" this factor is satisfied. (Harborside Associates, L.P., supra at 508). 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).

There is no benefit to the public from denying the variance. The Expansion allows for the development of the Parcel in a reasonable manner that is consistent with the intent of the Applicant in the Site Plan, and the current use of the Parcel. The current use of the Parcel benefits the abutting properties and community.

Granting the variance increases the public's gain, while denying provides no gain to the public. Further, denying the variance will cause harm to the Applicant because it will result in a hardship of significant proportions. Denial of the variance will result in the destruction of the foundation and re-creation of a new foundation approximately one-foot further away from the rear property line, a result that imposes a huge hardship on the Applicant with zero perceivable gain to the public.

Due to the reasons stated above, granting this variance would not cause any harm to the general public that outweighs the loss to the Applicant if the variance is not granted.




V. **Conclusion**

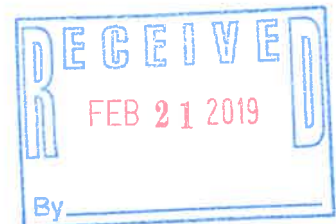
For all the reasons herein stated, the Applicant respectfully request that the BOA the Applicant's variance from Part 304.04(e) of the Ordinance and the fifty (50) foot rear yard setback requirement set forth therein.

We look forward to presenting this application to the BOA on March 19, 2019.

Respectfully submitted,

Happy Dreams, LLC

  
By: Thomas M. Keane, Esq., Attorney  
For Happy Dreams, LLC



Pease Development Authority  
 55 International Drive, Portsmouth, NH 03801, (603) 433-6088



**Request for Appeal/Variance Application**

<b>For PDA Use Only:</b>			
Date Submitted: _____	Municipal Review: _____	Fee: _____	
Application Complete: _____	Date Forwarded: _____	Paid: _____	Check #: _____

<b>Action Requested (please check one):</b>	Appeal from Administrative Decision: <input type="checkbox"/>	Variance: <input checked="" type="checkbox"/>
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**Applicant Information**

Applicant: Happy Dreams, LLC & Resport, L.L.C, c/o Ocean Properites, LTD		Contact Name: Thomas Keane
Address: One International Drive, Portsmouth, New Hampshire 03801		Description of Property: Existing Hotel with a 7,130 s.f. 3-story building expansion which will include 36 additional rooms and a 29 space reserve parking area to be constructed in the future.
Business Phone: 603-559-2100		Frontage: 133.61 feet
Mobile Phone:		Left Side: 162 feet
Fax:		Right Side: 380 feet
Zone(s) Location: ABC/ Airport Buisness Commerical	Lot #: 0303-0002-0001	Rear: 49 feet
Assessors Plan #: Map 303 Lot 2	Lot Area: 43,5637 square feet	
Existing Use: Hotel	Proposed Use: Hotel with Expansion(additonal 36 rooms)	

**Request for Appeal from Administrative Decision:**

**Variance:**

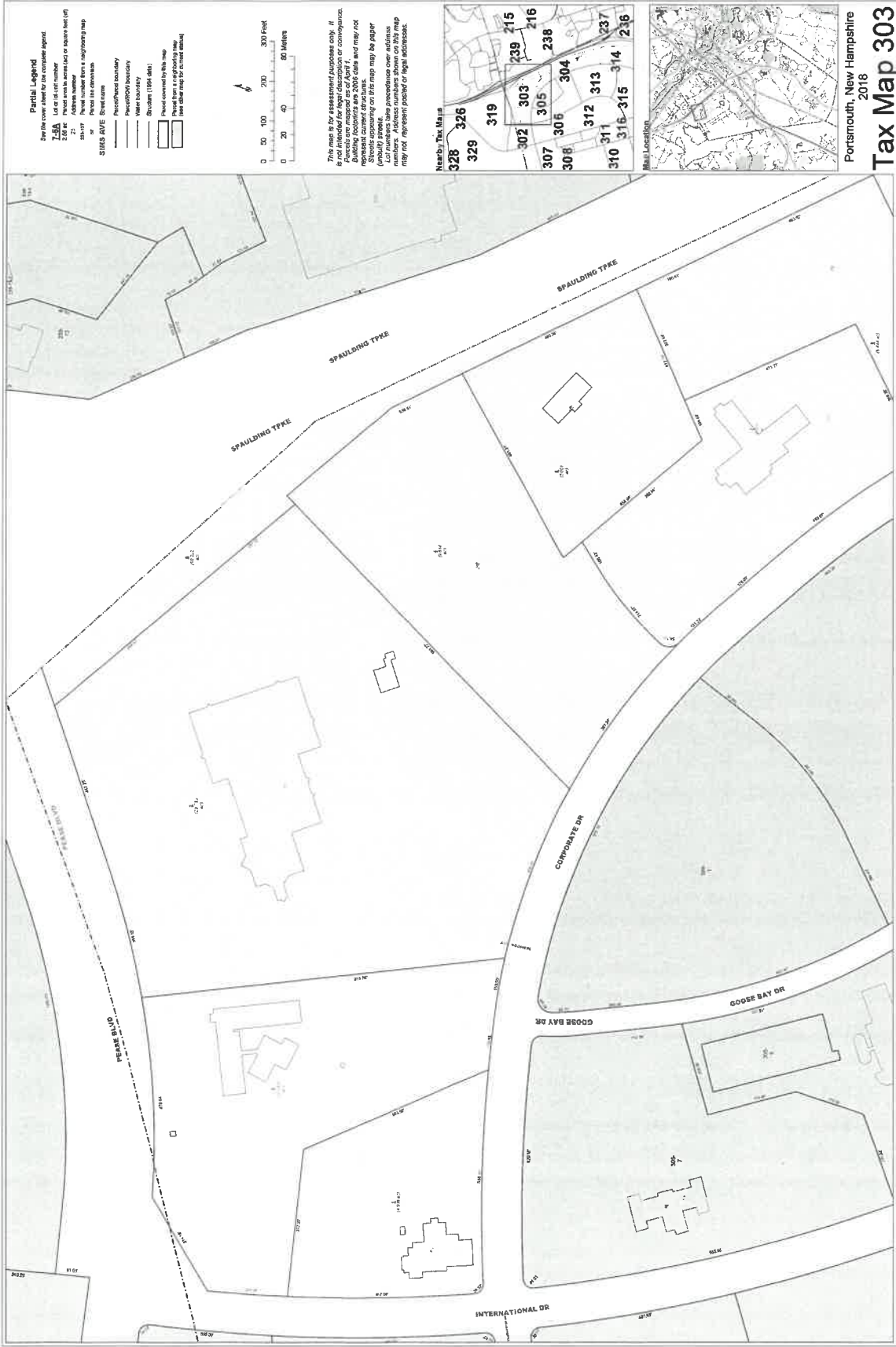
Applicable Rule/Regulation/Code Provision: _____
Applicable Zoning Regulation: _____
Interpretation Claimed:
Administrative Decision from which appeal is sought:

Zoning Regulation(s) from which Variance is Sought: 304.04(e)- minium rear yard setback of 50 feet.
Reason(s) Why Variance Should Be Granted Including Circumstances Which Constitute Unnecessary Hardship: See Attached Letter

Please attach any required site plans or drawings to this application with a fee of \$ ~~300.00~~ All forms must be completely filled out and signed by the applicant or their agent before they will be accepted. Additional sheets may be attached if required. Completed forms must be returned to the PDA for a hearing by the PDA Zoning Adjustment and Appeals Committee or referral to the appropriate municipality. The applicant or their agent is required to attend the Public Hearing for the Appeal/Variance. If you have any questions, please contact the PDA Engineering Department at 603-427-2836.

I hereby certify under the penalties of perjury that the foregoing information and accompanying plans, documents, and supporting data are true and complete to the best of my knowledge.		
02/20/2019		Thomas M. Keane
Date	Signature of Applicant	Printed Name



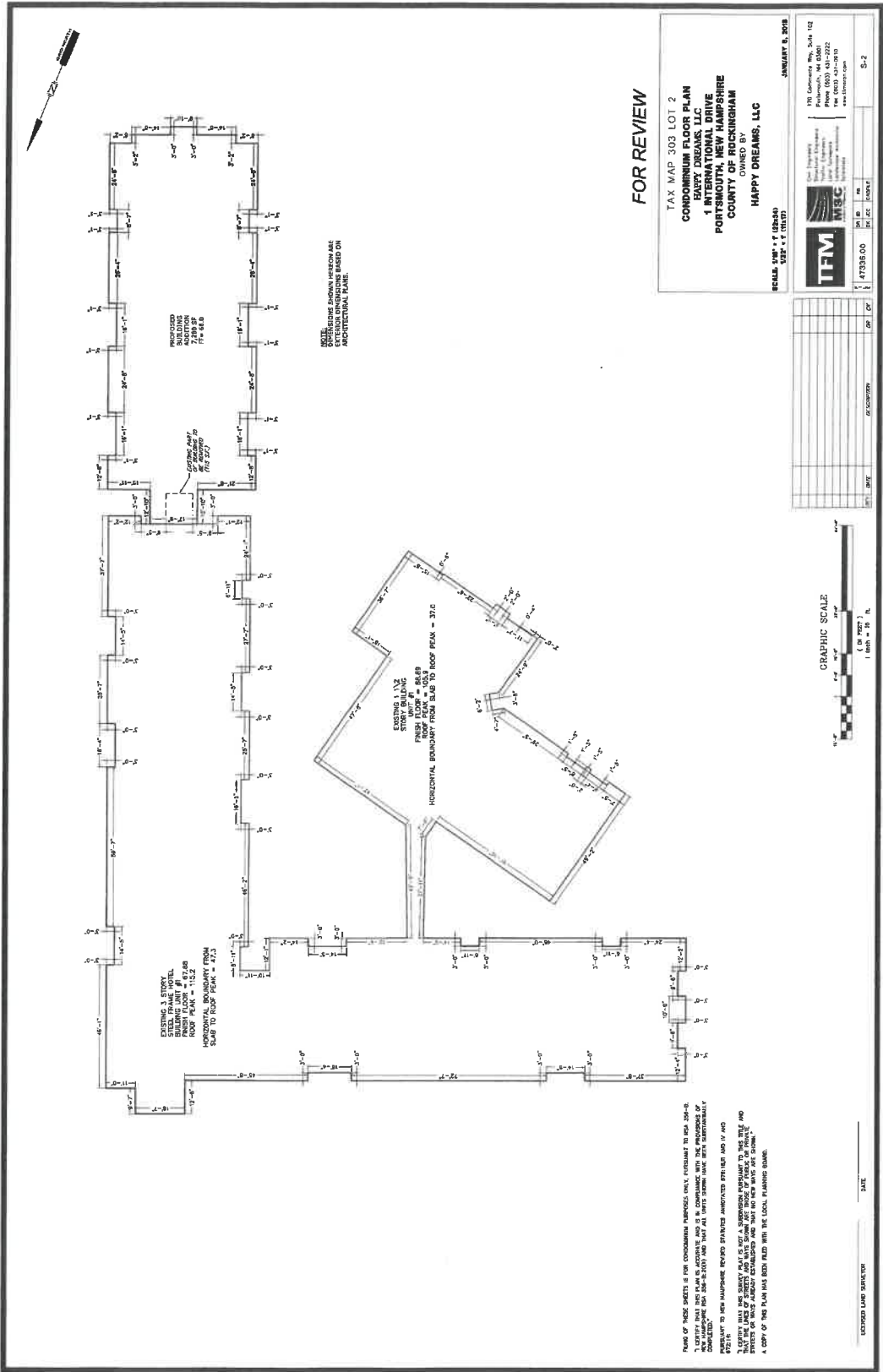


Portsmouth, New Hampshire  
 2018  
**Tax Map 303**

**RECEIVED**  
 FEB 21 2019  
 BY \_\_\_\_\_



RECEIVED  
 FEB 21 2019  
 By \_\_\_\_\_



NOTE: THIS PLAN IS FOR INFORMATION ONLY. EXTENDED CONDITIONS SHALL BE ON ARCHITECTURAL PLAN.

FOR REVIEW

TAX MAP 303 LOT 2  
 CONDOMINIUM FLOOR PLAN  
 HAPPY DREAMS, LLC  
 1 INTERNATIONAL DRIVE  
 PORTSMOUTH HAMPSHIRE  
 COUNTY OF ROCKINGHAM  
 OWNED BY  
 HAPPY DREAMS, LLC

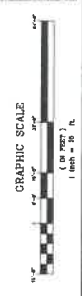
SCALE: 1/8" = 1'-0"  
 SHEET: 1 OF 1

DATE: JANUARY 8, 2018

170 Commerce Way, Suite 102  
 Portsmouth, NH 03801  
 Tel: 603.431-1200  
 Fax: 603.431-1810  
 www.tfm.com

Civil Engineering  
 Surveying  
 Planning  
 Architecture  
 Interior Design  
 Landscape Architecture  
 Environmental Engineering  
 Mechanical Engineering  
 Electrical Engineering  
 Structural Engineering  
 Transportation Engineering  
 Water Resources Engineering

SHEET NO. 1  
 PROJECT NO. 147338.00  
 DATE: 1/8/18



PLANS OF THESE SHEETS IS FOR CONDOMINIUM PURPOSES ONLY. PURSUANT TO RSA 364-B:10, ANY UNIT THIS PLAN IS SUBMITTED AND IS TO BE CONSIDERED WITH THE PROVISIONS OF RSA 364-B:10 AND 364-B:11. THIS PLAN IS NOT TO BE USED FOR ANY OTHER PURPOSES, INCLUDING BUT NOT LIMITED TO, THE DESIGN OF STRUCTURES, UTILITIES, OR OTHER SERVICES. THE DESIGNER ASSUMES NO LIABILITY FOR ANY ERRORS OR OMISSIONS IN THIS PLAN. A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD.

EXTENDED LAND DIVISION \_\_\_\_\_ DATE \_\_\_\_\_



# CITY OF PORTSMOUTH

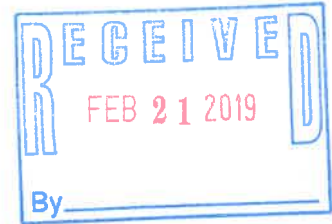
Community Development Department  
(603) 610-7281

Planning Department  
(603) 610-7216

## PLANNING DEPARTMENT

January 23, 2017

Barry Kimball  
Ocean Properties  
1000 Market Street, Suite 300  
Portsmouth, NH 03801



**RE: Site Review Application for Property Located at 1 International Drive**

Dear Mr. Kimball:

The Planning Board, at its regularly scheduled meeting of January 18, 2018, considered your Site Review application for the construction of a 7,130  $\pm$  s.f., 3-story building expansion to the Residence Inn which will include 36 additional rooms and a 29 space reserve parking area to be constructed in the future, with related paving, lighting, utilities, landscaping, drainage and associated site improvements. As a result of said consideration, the Board voted as follows:

- A. Voted to determine that the application is complete according to the Site Plan Review Regulations and to accept the application for consideration.
- B. Voted to **recommend** Site Plan approval as presented.

Three complete sets of revised Site Plans must be provided to the Planning Department, along with a pdf version.

The building/construction plans must be reviewed and approved by the Inspection Department prior to a Building Permit being issued.

The minutes and audio recording of this meeting are available through the Planning Department.

Very truly yours,

Juliet T.H. Walker, Planning Director  
for Dexter Legg, Chairman of the Planning Board  
JTHW:jms

cc: Robert Marsilia, Building Inspector  
Rosann Maurice-Lentz, City Assessor  
Patrick Crimmins, P. E., Tighe & Bond



# Google Maps



Imagery ©2019 Google, Map data ©2019 Google 50 ft

RECEIVED  
FEB 21 2019  
By \_\_\_\_\_



















# PDA Setback Variance

