

BY: VIEWPOINT & HAND DELIVERY

December 26, 2022

City of Portsmouth
Attn: Peter Stith, Planner
Zoning Board of Adjustment
1 Junkins Avenue
Portsmouth, NH 03801

**RE: Variance Application of Lucky Thirteen Properties LLC
147 Congress Street, Tax Map 126, Lot 4**

Dear Peter,

Our Office represents Lucky Thirteen Properties LLC, owner of the property located at 147 Congress Street, Portsmouth. Enclosed for submission to the ZBA for its January meeting, please find the following materials relative to the proposed improvements for 147 Congress Street.

- 1) Landowner Letter of Authorization;
- 2) Narrative to Variance Application (photos included as Exhibit D);
- 3) Site Plan and Open Space Plan;
- 4) Floor Plans and Elevations;

A copy of the application submission is being delivered to the Planning Department. Should you have any questions or concerns regarding the enclosed application materials, do not hesitate to contact me at your convenience.

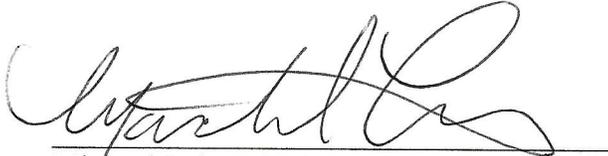
Sincerely,



Derek R. Durbin, Esq.

LANDOWNER LETTER OF AUTHORIZATION

Lucky Thirteen Properties LLC, record owner of property located at 147 Congress Street, Portsmouth, NH 03801, Tax Map 126, Lot 4 (the "Property"), hereby authorizes **Durbin Law Offices, PLLC** to file any zoning, planning or other municipal permit applications with the City of Portsmouth for said Property and to appear before its land use boards. This Letter of Authorization shall be valid until expressly revoked in writing.



Michael Labrie, Duly Authorized

December 19, 2022

**CITY OF PORTSMOUTH
ZONING APPLICATION NARRATIVE**

Lucky Thirteen Properties LLC
(Owner/Applicant)
Tax Map 126, Lot 4
147 Congress Street
Portsmouth, NH 03801

The Property

The Property at 147 Congress Street, Portsmouth (the “Property”) is located in the Character District 5 (CD5) Zoning District and Downtown Overlay District (“DOD”). **Exhibit A.** The Property has a land area of approximately 6,245 square feet. It contains a 2-story commercial building with a finished basement level. The building was originally constructed in the year 1950 per the City’s assessing records. The building consists of vacant space on the first floor. The bottom floor serves primarily as storage space but has some office space for the employees at Jimmy’s Jazz Club. Until recently, the Portsmouth Health Food Store occupied the first floor. The second floor consists of four (4) office spaces, one of which is presently occupied by a yoga studio.

As you will see by looking at the Tax Map attached as **Exhibit B**, the Property is a long, narrow, corner lot which puts it at a disadvantage for retail, restaurant, and similar uses. The purpose of the DOD is “to promote the economic vitality of the downtown by ensuring continuity of pedestrian-oriented business **uses** along **streets**.” When translated into the layperson’s vernacular, the DOD is intended to encourage retail, restaurant and like business uses on the ground floors of downtown buildings. The existing long, narrow building on the Property may be perfectly suitable for commercial office space, but the resulting floor plan is generally incompatible with retail and restaurant-related uses given the lack of window frontage (storefront) along the sidewalk and street. Given the high tax assessments attributed to the downtown properties, maximizing the amount of retail and restaurant related space on the ground floors of buildings is critically important since this type of space commands the highest rents.

The current owner of the Property, Lucky Thirteen Properties LLC (Michael Labrie, Member), would like to repurpose, renovate and add onto the Maplewood Avenue side of the building following the departure of the Portsmouth Health Food Store. Given the lack of available land area, in order to accomplish this goal, Mr. Labrie needs to utilize the landscaped sliver of land that runs between the sidewalk and building along Maplewood Avenue. This will allow him to take advantage of the long, narrow configuration of the building and its frontage on both Maplewood Avenue and Congress Street. As it stands now, the westerly side of the building along Maplewood Avenue consists of a relatively monolithic white brick wall. The building itself is from the Urban Renewal period and has a Cold War Era appearance. The proposed renovations will result in a more attractive, code-compliant building that will activate the sidewall along Maplewood Avenue. Mr. Labrie will be repurposing an existing building to improve its function and appearance, which will benefit the public, as opposed to tearing it down and building something much larger in its place.

The landscaping that would be removed and infilled with the proposed addition consists of a mixture of vegetation, including some zebra grass, flowering plants and smaller shrubbery. The utility meters are also located on this side of the building within the landscaped area. Objectively speaking, the landscaping serves very little purpose and is not overly attractive in its current state. Moreover, its location immediately between the building and sidewalk means that it tends to collect debris and trash and is difficult to maintain.

Summary of Zoning Relief

In order to construct the proposed addition, Mr. Labrie needs a variance from Section Figure 10.5A41.10D of the Ordinance to allow for 2.3% open space where 5% is the minimum required.

Variance Criteria

Granting the variances will not be contrary to the spirit and intent of the Zoning Ordinance or the public interest.

In the case of *Chester Rod & Gun Club, Inc. v. Town of Chester*, 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.* The Court observed that "[t]here 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." 152 N.H. 577.

Per Figure 10.5A41.10D of the Ordinance, the CD5 District *consists of a high density center with a mix of **building** types and residential, retail and other commercial uses. There are no **front yards** or **side yards**, and limited **landscaping** and public parking facilities. **Streets** have **sidewalks** and trees or other pedestrian amenities, and define small to medium **blocks**.*

A significant portion of downtown, and the areas around the North Mill Pond commonly referred to as the "Northern Tier", are zoned CD5 and fall within the DOD. **Exhibit C**. These are the areas with the greatest density of existing and proposed retail and restaurant uses. Restaurant and retail related uses are the predominant ground floor uses throughout the CD5 Zoning District and DOD, consistent with the City's vision for the downtown and Northern Tier.

As evidenced by Figure 10.5A41.10D, the Ordinance intends for near maximum build out of properties zoned CD5. It specifically encourages build-out to the front and side yard property lines which is consistent with the goal of promoting ground floor retail, restaurant and related uses within the downtown. By the way it was written, it appears that the Ordinance contemplates open space being primarily situated to the rear of buildings within the CD5 Zoning District. Otherwise, the Ordinance would not have been written to encourage near maximum side and front lot line buildouts.

Aside from the properties, such as Vaughn Mall, that are owned by the City, a majority of the properties that surround 147 Congress Street have no green space and are otherwise consistent in appearance to what is proposed. **Exhibit D.** The Property is situated at the end of a city block where there is little or no separation between buildings or landscaping other than the trees that have been planted in and around the sidewalk areas of the City right-of-way. The landscaping along the Maplewood Avenue side of the Property is actually somewhat of an oddity when you consider the lack of landscaped areas around surrounding buildings in this block of Portsmouth.

In the case of *Belanger v. Nashua*, the NH Supreme Court opined: “[w]hile we recognize the desired interrelationship between the establishment of a plan for community development and zoning, we believe that municipalities must also have their zoning ordinances reflect the current character of neighborhoods.” 121 N.H. 389 (1981).

“Open space” is defined by Section 10.1530 of the Ordinance as follows:

Land area vertically open to the sky, free of all **structures**, parking area/lots, **driveways** and other **uses** which preclude attractive **landscaping** in such area. **Open space** shall be predominantly pervious, may be landscaped with lawn, trees, shrubs or other planting, and may include walks and terraces. For the purposes of this definition, water areas are considered to constitute **open space**.

Requiring that the Property meet the 5% open space threshold serves no legitimate purpose in the present case, as a majority of other properties surrounding it have been built out to the properties lines and have no green space at all. Because of how the term *open space* is defined by the Ordinance and has been interpreted by the City, many areas of the Property that would otherwise be considered in the calculation are discounted for one reason or another. For example, the City has interpreted the definition to preclude areas that are less than 5’ in width to be used in the calculation regardless of the fact that they are *open to the sky*. In the present case, the proposed design results in several areas that are less than 5’ in width that are not counted. If counted, 4.5% of the Property is *open to the sky* and otherwise meets the definition of *open space*. Moreover, areas that are landscaped with vegetation or would otherwise count towards the open space requirement but have a canopy over all or a portion of them are not *open to the sky* and cannot be used in the calculation. This results in an apparent contradiction with what the Ordinance intended, as sidewalks that are *open to the sky* can be counted as *open space* but areas that are nicely landscaped with vegetation but have a canopy over them cannot. If the proposed canopied areas of the building could be counted in the open space computation, the Property could meet the 5% *open space* requirement. The proposed canopies are strongly favored by the HDC and add very attractive design features to the building.

The term open space is nebulously defined and ultimately leaves interpretation to the City. It is a term that has not been consistently interpreted by the City since it was defined. Therefore, it is incumbent to look at the spirit and intent of the Ordinance and the character of the area in which a property is located.

What is proposed for an addition will actually make the Property more compliant with respect to the primary and secondary front yard setback provisions of the Ordinance. Therefore, while the goal behind one requirement of the Ordinance (open space) is not strictly achieved, as interpreted by the City, others (i.e. lot line buildout) are more closely met.

With the proposed renovation, there will be several life safety improvements that would have not been mandated otherwise, including a new sprinkler system on all three (3) floors and fire rated stairwells and hallways. In addition, Mr. Labrie intends to grant easements to the City over portions of the Congress Street and Worth Lot sidewalks which are privately held. The 100' long concrete sidewalk along Maplewood Avenue will be replaced with red brick at Mr. Labrie's cost.

For the foregoing reasons, granting the variances will not alter the essential character of the area or negatively impact public health, safety or welfare. The aesthetic and functional improvements made to the Property will be a benefit to the City and the public and be consistent with the spirit and intent of the Ordinance.

B. Substantial Justice will be done in granting the variance relief sought.

To determine whether substantial justice is done, the Board must balance the equities between the rights of a private landowner and the public interest in deciding whether to grant or deny a variance request. The "only guiding rule is that 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 \(2007\)*](#).

Ultimately, the question is whether or not preserving the existing landscaping along the Maplewood Avenue side of the building is more important than improving and expanding upon the building and the City obtaining easements over portions of the sidewalk that are presently owned by Mr. Labrie. In the present case, there is no gain to the public by denying the variance to the open space requirement. To the contrary, denying the variance would be a detriment to the public, and would constitute a loss to the Applicant. Granting the variance will result in a much-improved building aesthetically and otherwise at no cost to the public.

C. Surrounding property values will not be diminished by granting the variance.

The Board is justified in relying upon its own knowledge and expertise to reach the conclusion that surrounding property values will only be improved with the proposed renovation and building addition. The landscaping that will be removed and replaced by the addition adds no value to the building. The improved appearance of the building will benefit surrounding properties and their values. The HDC approves of the current design, which is further evidence of the fact that granting the variance will not diminish surrounding property values.

D. Denying the variance would constitute an unnecessary hardship.

The Property has some obvious special conditions that distinguish it from surrounding properties. It is a relatively small, rectangular corner lot with a long, narrow building on. The lack of linear (window) frontage along Congress Street makes the ground floor of the building ill-suited for retail restaurant uses related which are the predominant (and encouraged) uses in this area of Portsmouth and throughout the CD5 District and DOD. In addition, the Property has frontage on two different public streets, Maplewood Avenue and Congress Street. However, the existing building has a long, brick wall with no access via Maplewood Avenue. Therefore, the Applicant is unable to take advantage of the secondary frontage on Maplewood Avenue due to the existing condition of the building.

Reducing the open space to less than what is required in the CD5 Zoning District will render the Property non-conforming in this respect. However, this is offset by the build-out of the Property along Maplewood Avenue, which will bring it into greater conformance with the *minimum* secondary front yard setback requirement set forth in Figure 10.5A41.10D.

The reduction in green space will actually make the Property more consistent in appearance to surrounding properties. Thus, owing to the special conditions of the Property there is no fair and substantial relationship between the general purposes of the Ordinance provisions and their application to the Property.

Finally, the proposed use of the Property will remain consistent with CD5 zoning. Therefore, it is reasonable per se.

Conclusion

In conclusion, the five (5) criteria for granting the variance are met. Accordingly, the Applicant respectfully requests your approval.

Respectfully Submitted,

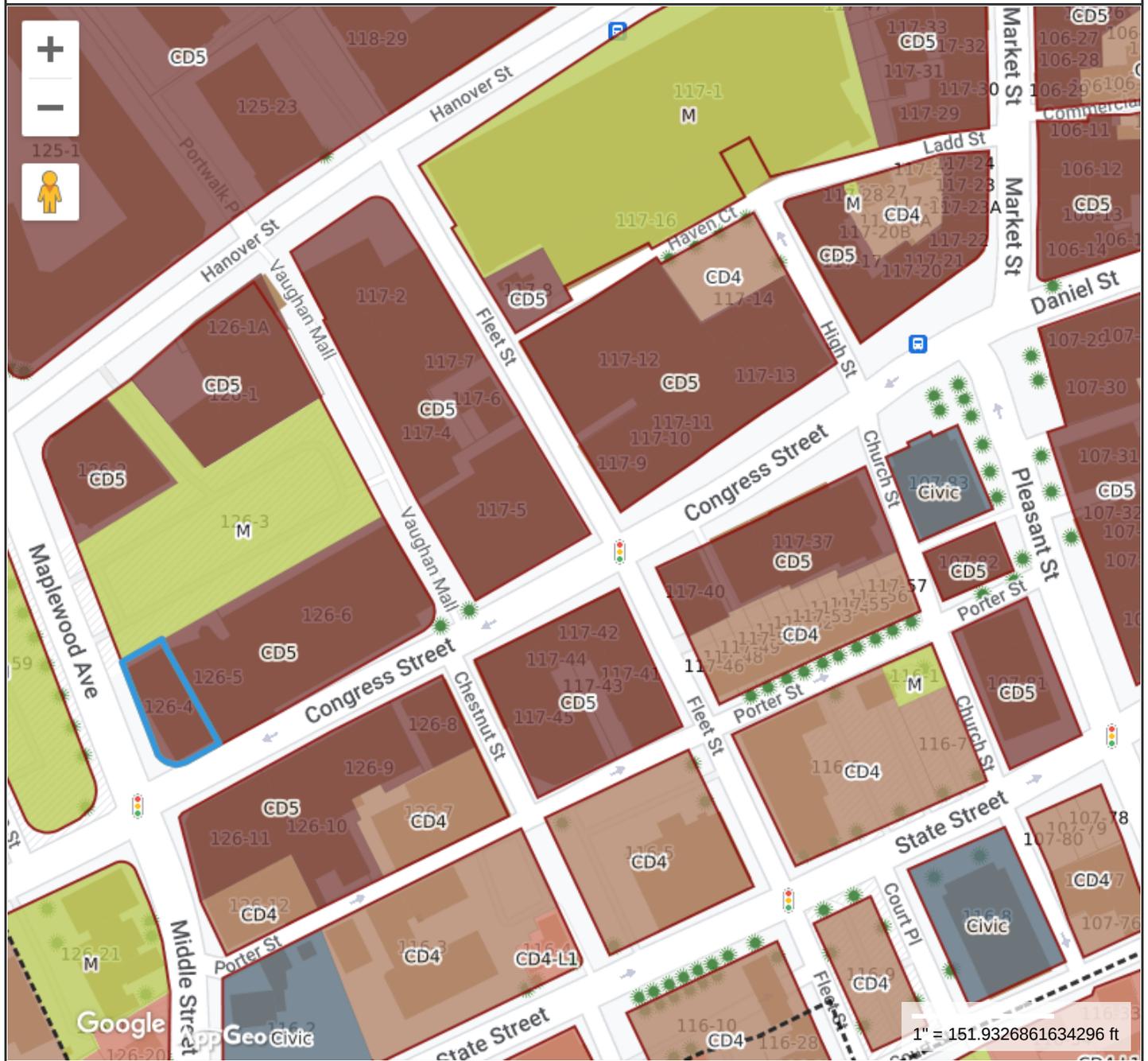
Lucky Thirteen Properties LLC



By: Derek R. Durbin, Esq.
DURBIN LAW OFFICES PLLC
144 Washington Street
Portsmouth, NH 03801
(603)-287-4764
derek@durbinlawoffices.com

Dated: December 26, 2022

Exhibit A



Property Information

Property ID 0126-0004-0000
 Location 147 CONGRESS ST
 Owner LUCKY THIRTEEN PROPERTIES LLC



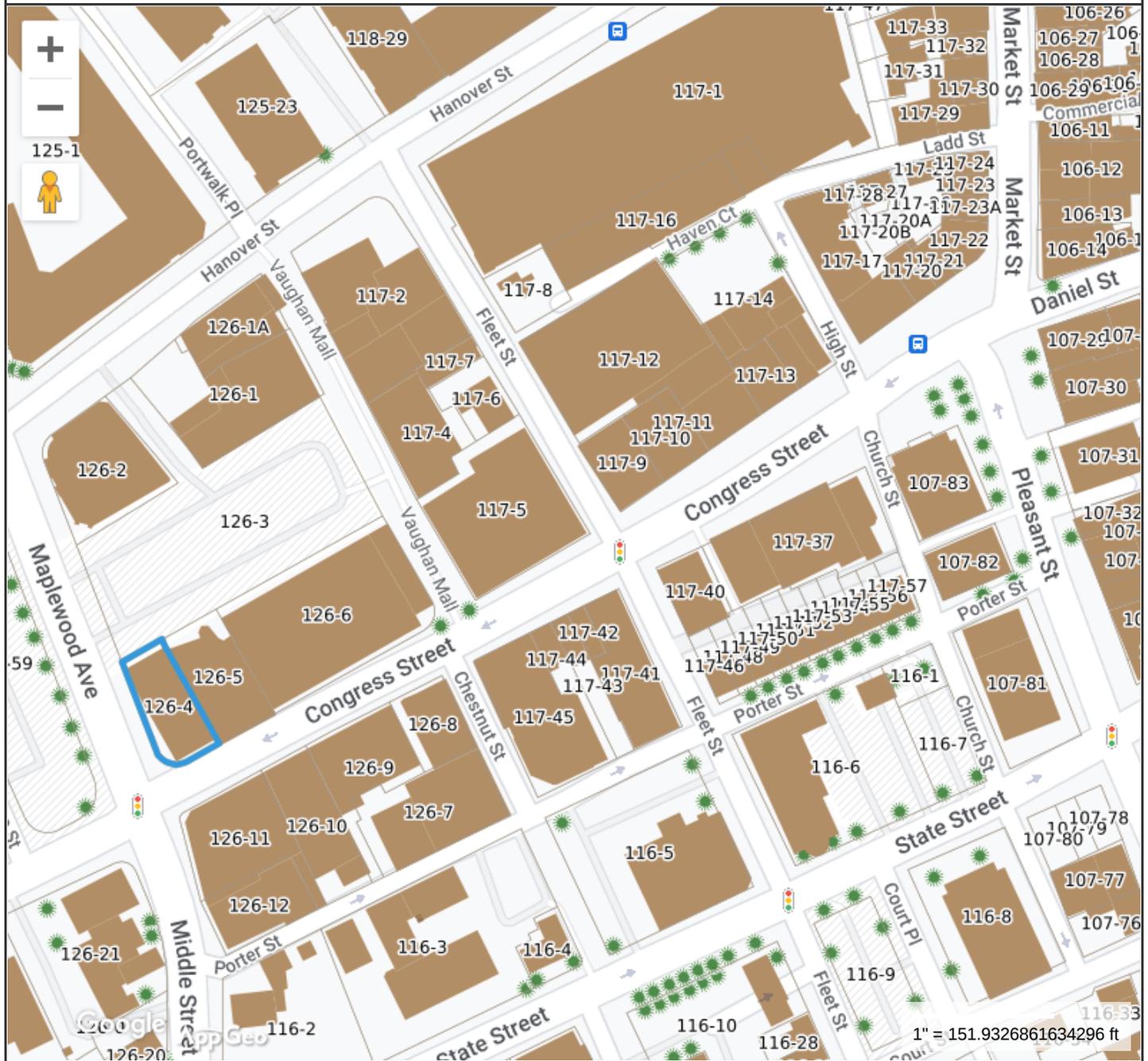
MAP FOR REFERENCE ONLY
NOT A LEGAL DOCUMENT

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 09/21/2022
 Data updated 3/9/2022

Print map scale is approximate. Critical layout or measurement activities should not be done using this resource.

Exhibit B



Property Information

Property ID 0126-0004-0000
 Location 147 CONGRESS ST
 Owner LUCKY THIRTEEN PROPERTIES LLC



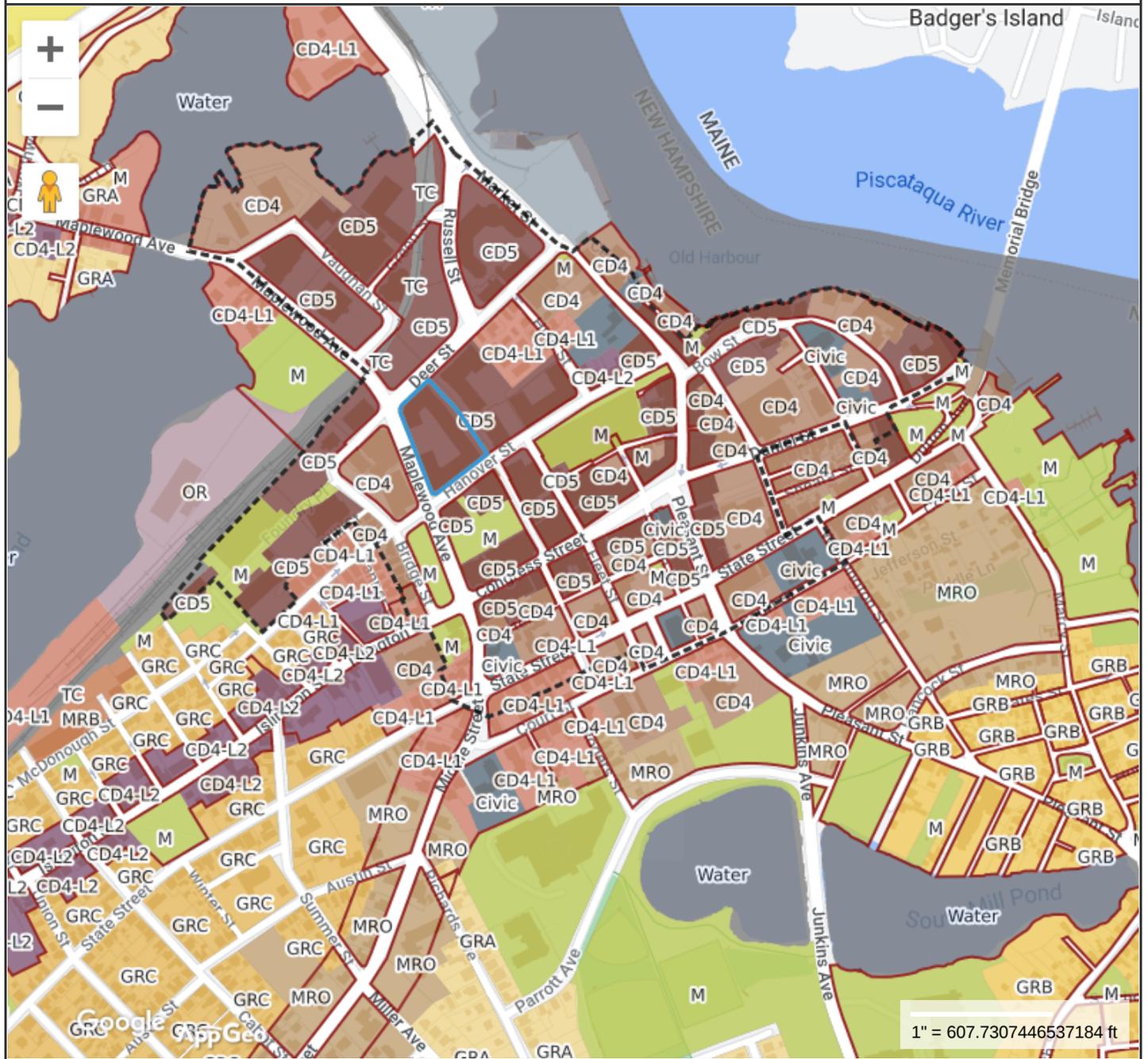
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Geometry updated 09/21/2022
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Exhibit C



Property Information

Property ID 0125-0001-0000
 Location 195 HANOVER ST
 Owner PARADE OFFICE LLC



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View of Block from Corner of Maplewood Ave. and Congress Street (North)



View of Block from Corner of Maplewood Ave. and Congress Street (South)



View of Block (Congress St) from Vaughn Mall



View of Landscaping on Maplewood Ave Side of Building at 147 Congress Street



View of Worth Parking Lot from Vaughn Mall

NOT FOR CONSTRUCTION

ISSUED FOR:
BOARD OF ADJUSTMENT

ISSUE DATE:
DECEMBER 21, 2022

NO.	DESCRIPTION	BY	DATE
0	INITIAL SUBMISSION	EDW	11/01/22
1	INITIAL BOA SUBMISSION	EDW	12/21/22

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APPROVED BY: _____ EDW
DRAWING FILE: _____ 5392.dwg

SCALE:
22" x 34" - 1" = 10'
11" x 17" - 1" = 20'

OWNER/APPLICANT:
LUCKY THIRTEEN PROPERTIES, LLC
P.O. BOX 300
RYE, NH 03870-0300

PROJECT:
PROPOSED REDEVELOPMENT

TAX MAP 126, LOT 4
147 CONGRESS STREET
PORTSMOUTH, NH

TITLE:

SITE PLAN

SHEET NUMBER:

C-1

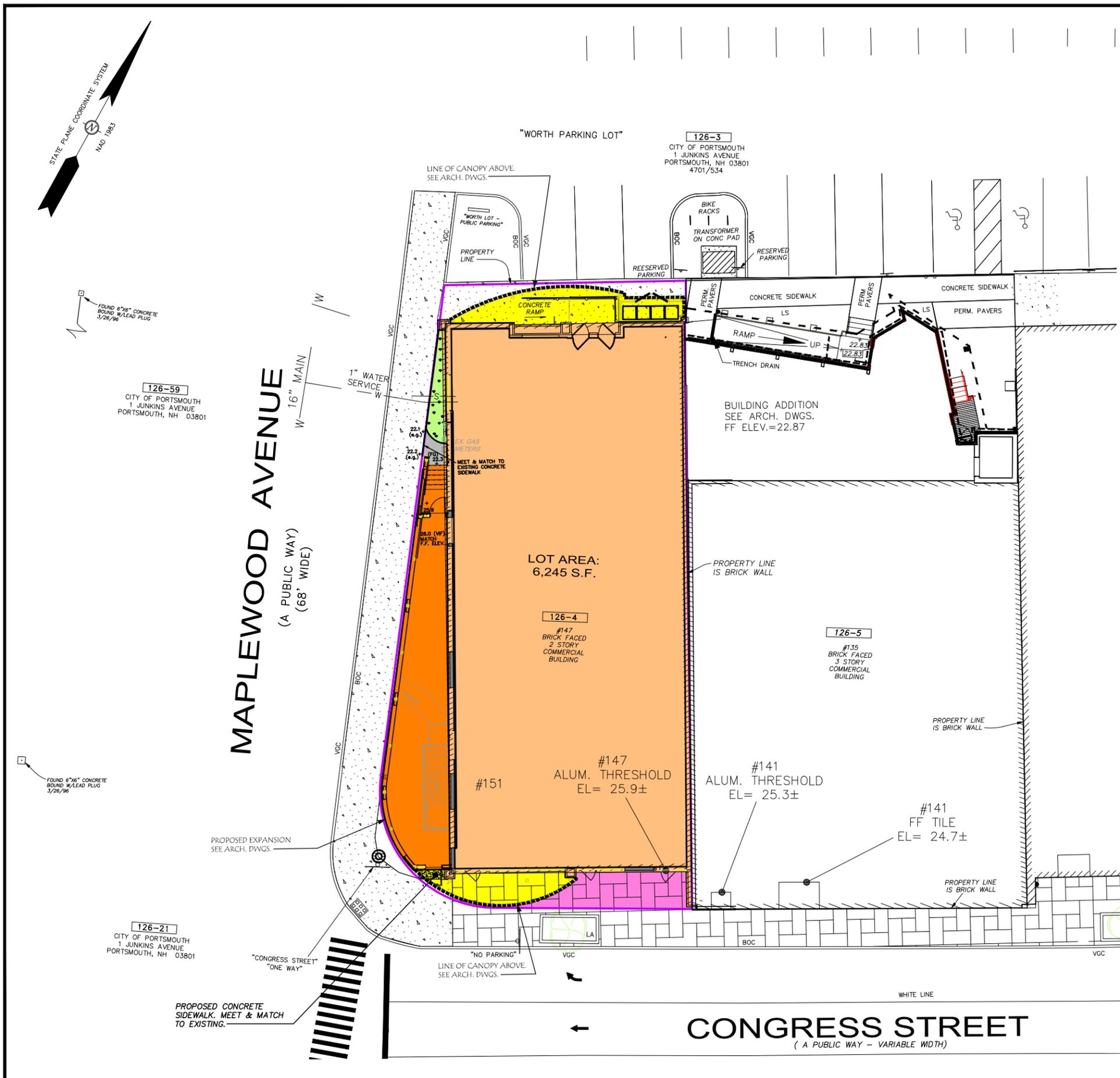
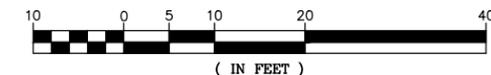
SITE NOTES

- DESIGN INTENT - THIS PLAN SET IS INTENDED TO DEPICT THE EXPANSIONS & IMPROVEMENTS OF THE SITE FOR A MIXED USE.
 - APPROXIMATE LOT AREA: 6,245 S.F.±
 - ZONE: HISTORIC DISTRICT CD5, DOWNTOWN OVERLAY DISTRICT
 - DIMENSIONAL REQUIREMENTS:
MIN. LOT AREA: NR
MAX. BLDG BLOCK LENGTH: 225'
FRONT SETBACK: 5' MAX.
SIDE SETBACK: NR
REAR SETBACK: 5' MIN.
MAX. BUILDING HEIGHT: 2-3 STORIES, 40' ALLOWED
MIN. GROUND STORY HT: 12'-0" (±11' EXISTING)
REQUIRED FACADE TYPE: SHOPFRONT
MAX. BLDG. COVERAGE: 95% (±78% EXISTING) 94.6% PROPOSED (5,910 SF)
MIN. OPEN SPACE: 5% (±18.5% EXISTING) 2.3% PROPOSED (146 SF)
OPEN TO SKY: NR (±22% EXISTING) 4.5% PROPOSED (282 SF)
MAX. BLDG. FOOTPRINT: 20,000 S.F.
MAX. ENTRANCE SPACING: 50'
MIN. FRONT LOT LINE B.O.: 80%
- PARKING REQUIREMENTS (SECTION 10.1115):**
RESTAURANT: NO REQUIREMENT
RETAIL: NO REQUIREMENT
- THERE ARE NO WETLANDS ON OR WITHIN THE VICINITY OF THE PARCEL.
 - PAVEMENT MARKINGS AND SIGNS SHALL CONFORM TO THE REQUIREMENTS OF THE "MANUAL ON UNIFORM TRAFFIC DEVICES," "STANDARD ALPHABETS FOR HIGHWAY SIGNS AND PAVEMENT MARKINGS" AND THE AMERICANS WITH DISABILITIES ACT (ADA), LATEST EDITIONS.
 - ALL CONSTRUCTION SHALL MEET THE MINIMUM STANDARDS OF THE CITY OF PORTSMOUTH & NHDOT'S STANDARD SPECIFICATION FOR ROAD & BRIDGE CONSTRUCTION, LATEST EDITIONS. THE MORE STRINGENT SPECIFICATION SHALL GOVERN.
 - CLEAN AND COAT VERTICAL FACE OF EXISTING PAVEMENT AT SAWCUT LINES WITH RS-1 IMMEDIATELY PRIOR TO PLACING NEW BITUMINOUS CONCRETE.
 - ALL BONDS AND FEES SHALL BE PAID/POSTED PRIOR TO INITIATING CONSTRUCTION.
 - THE CONTRACTOR SHALL VERIFY ALL BENCHMARKS AND TOPOGRAPHY IN THE FIELD PRIOR TO CONSTRUCTION.
 - THE CONTRACTOR SHALL VERIFY ALL BUILDING DIMENSIONS WITH THE ARCHITECTURAL AND STRUCTURAL PLANS PRIOR TO CONSTRUCTION. ALL DISCREPANCIES SHALL BE IMMEDIATELY BROUGHT TO THE ATTENTION OF THE ARCHITECT AND ENGINEER FOR RESOLUTION.
 - BUILDING AREA SHOWN IS BASED ON FOOTPRINT MEASURED TO THE EDGE OF FOUNDATIONS AND/OR SLABS. ACTUAL INTERIOR SPACE WILL DIFFER.
 - ALL SITE LIGHTING WILL BE BUILDING MOUNTED.

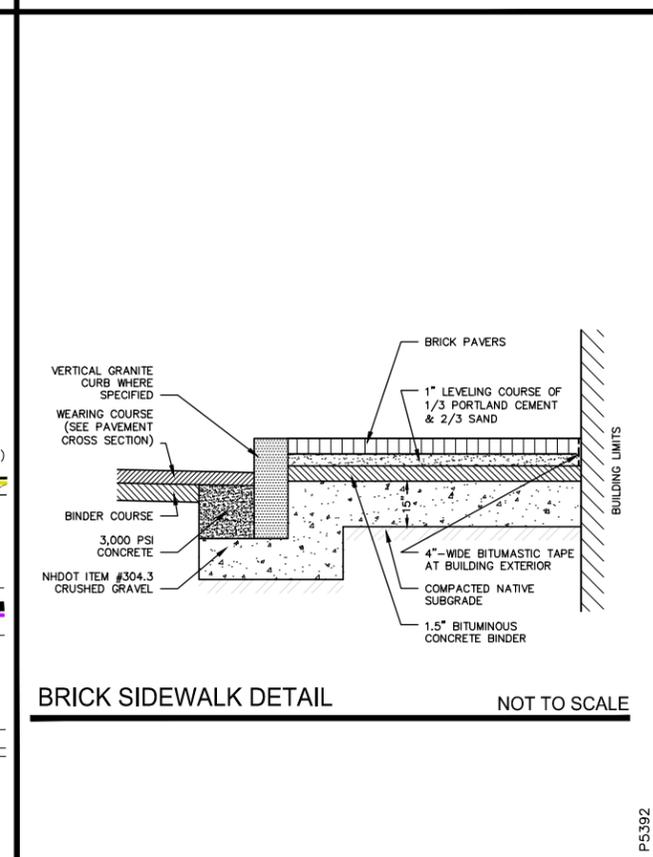
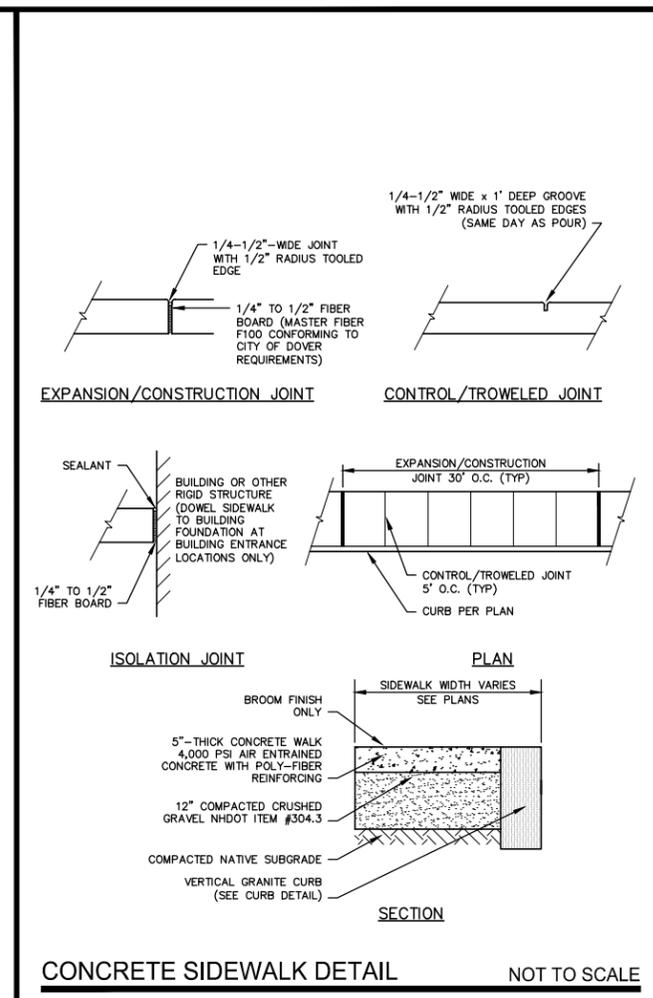
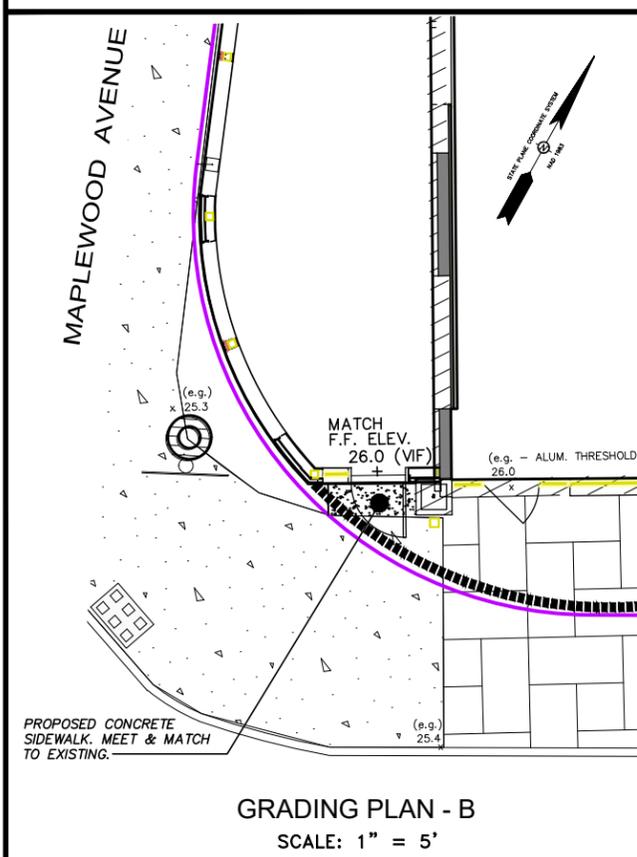
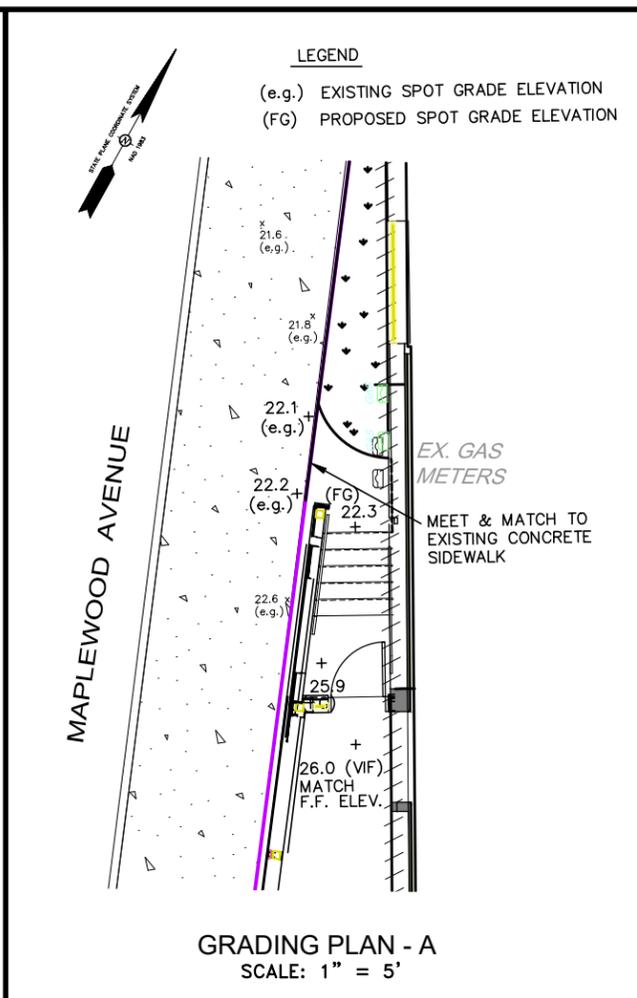
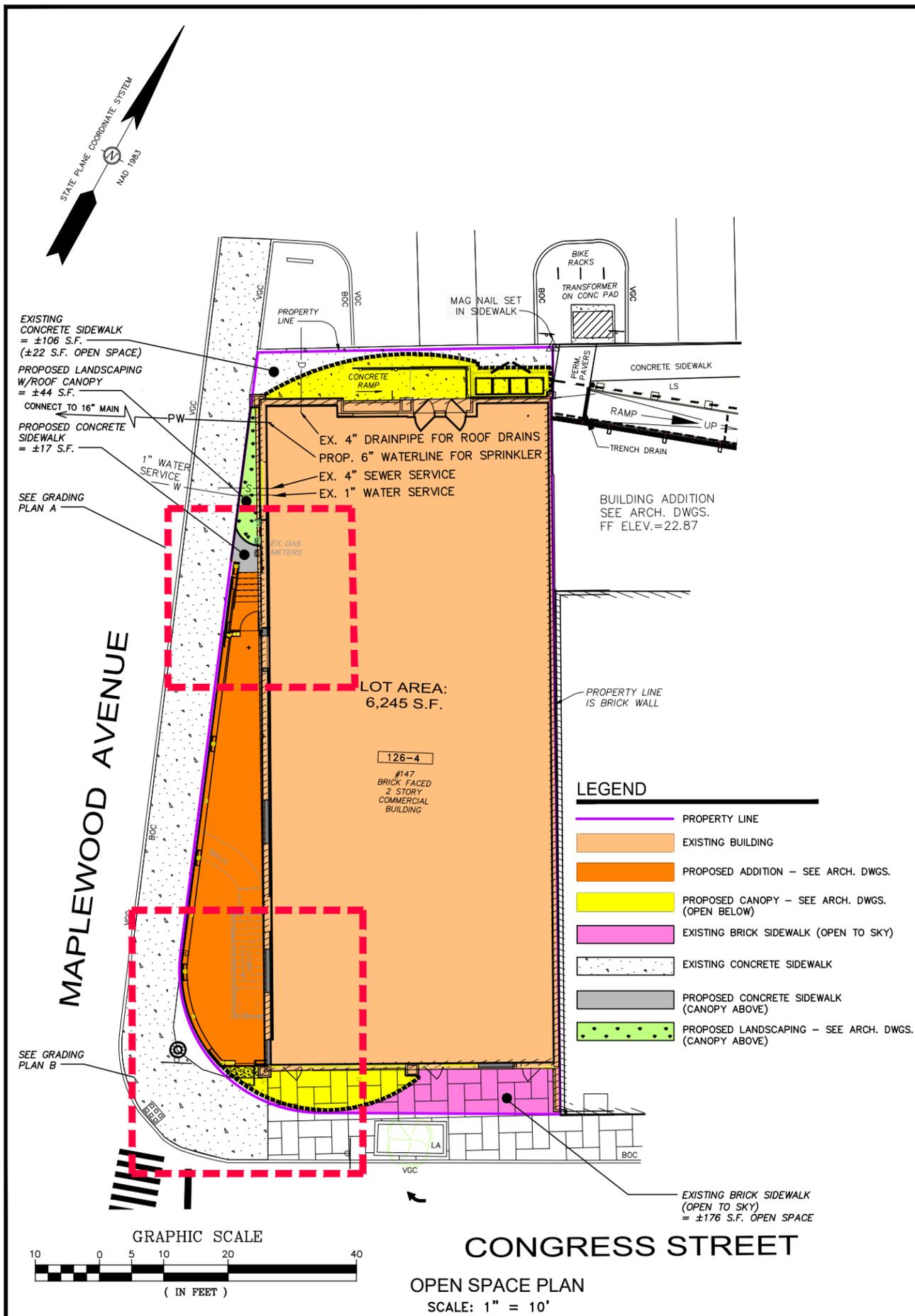
LEGEND

-  PROPERTY LINE
-  EXISTING BUILDING
-  PROPOSED ADDITION - SEE ARCH. DWGS.
-  PROPOSED CANOPY - SEE ARCH. DWGS. (OPEN BELOW)
-  EXISTING BRICK SIDEWALK (OPEN TO SKY)
-  EXISTING CONCRETE SIDEWALK (OPEN TO SKY)
-  PROPOSED CONCRETE SIDEWALK (CANOPY ABOVE)
-  PROPOSED LANDSCAPING - SEE ARCH. DWGS. (CANOPY ABOVE)

GRAPHIC SCALE



P-5392



ALTUS ENGINEERING
133 Court Street Portsmouth, NH 03801
(603) 433-2335 www.altus-eng.com

NOT FOR CONSTRUCTION

ISSUED FOR:
BOARD OF ADJUSTMENT

ISSUE DATE:
DECEMBER 21, 2022

NO.	DESCRIPTION	BY	DATE
0	INITIAL SUBMISSION	EDW	11/01/22
1	BOA SUBMISSION	EDW	12/21/22

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DRAWING FILE: _____ 5392.dwg

SCALE:
22" x 34" - AS SHOWN
11" x 17" - AS SHOWN

OWNER/APPLICANT:
LUCKY THIRTEEN PROPERTIES, LLC
P.O. BOX 300
RYE, NH 03870-0300

PROJECT:
PROPOSED REDEVELOPMENT

TAX MAP 126, LOT 4
147 CONGRESS STREET
PORTSMOUTH, NH

TITLE:
OPEN SPACE PLAN & GRADING PLANS

SHEET NUMBER:
C-2

PS392



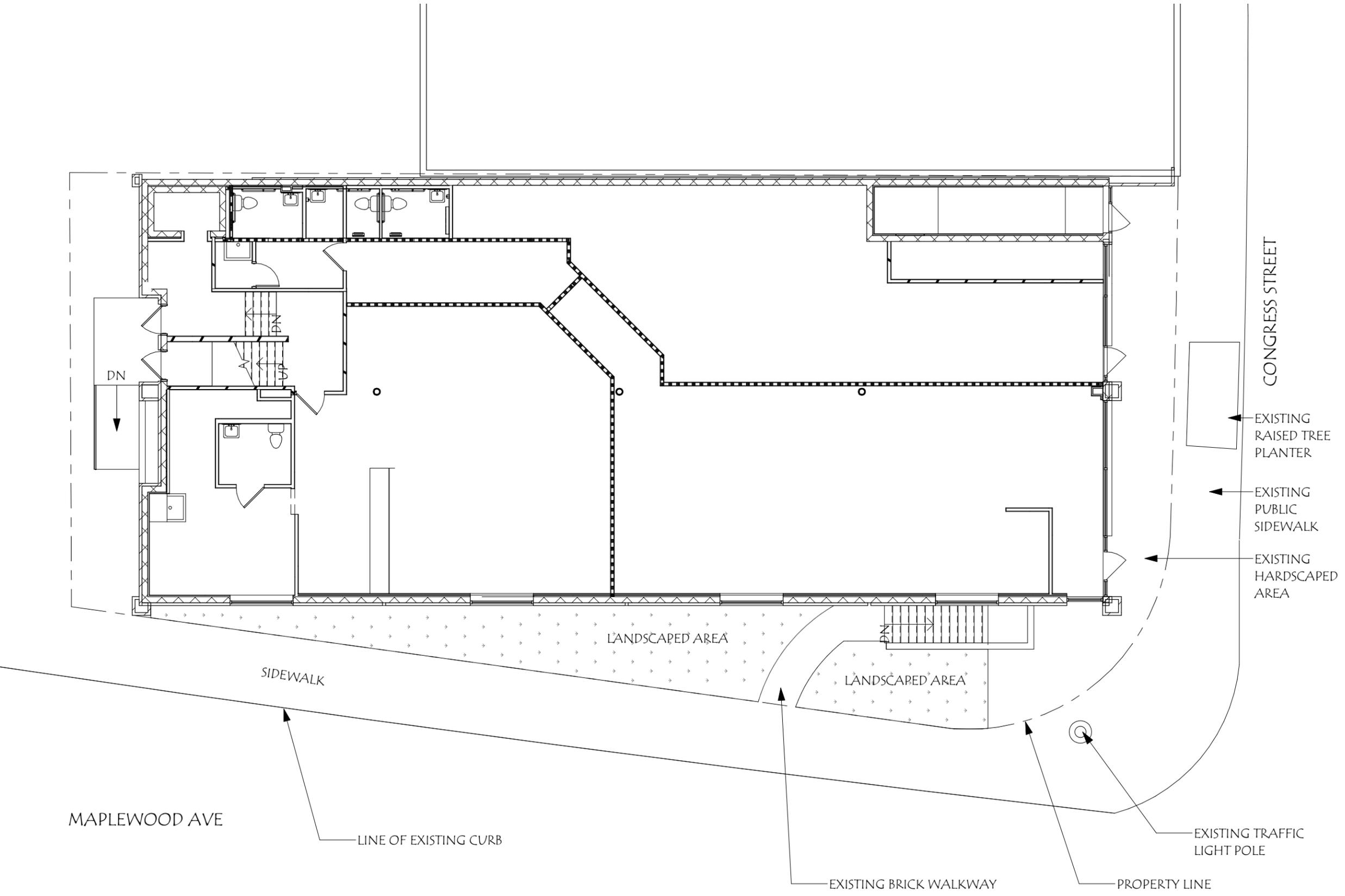
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PREVIOUSLY APPROVED



PREVIOUSLY APPROVED

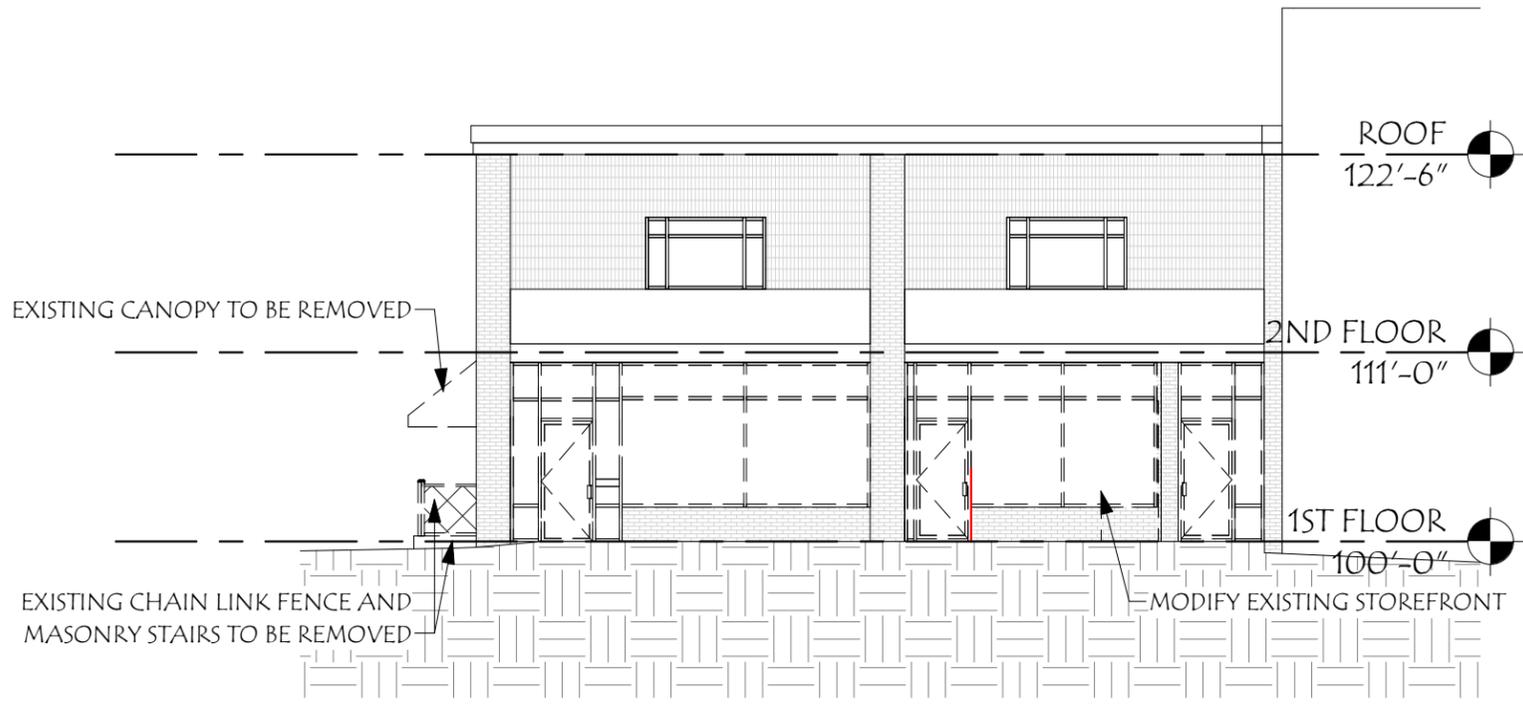
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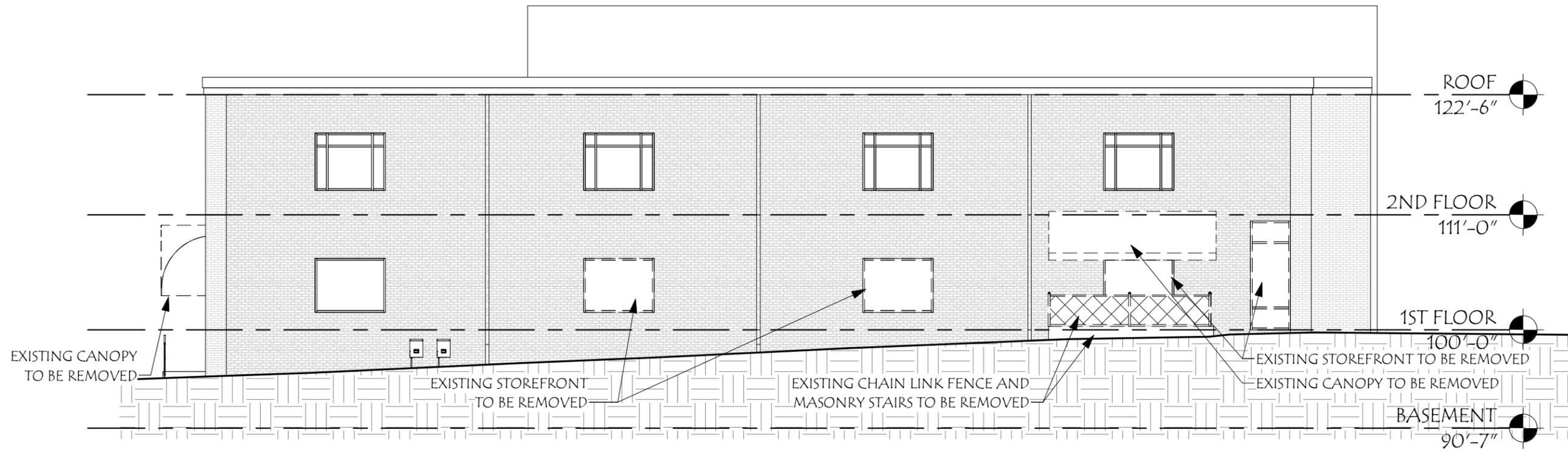
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147 CONGRESS

147 Congress St
 Portsmouth, NH 03801



SOUTH ELEVATION



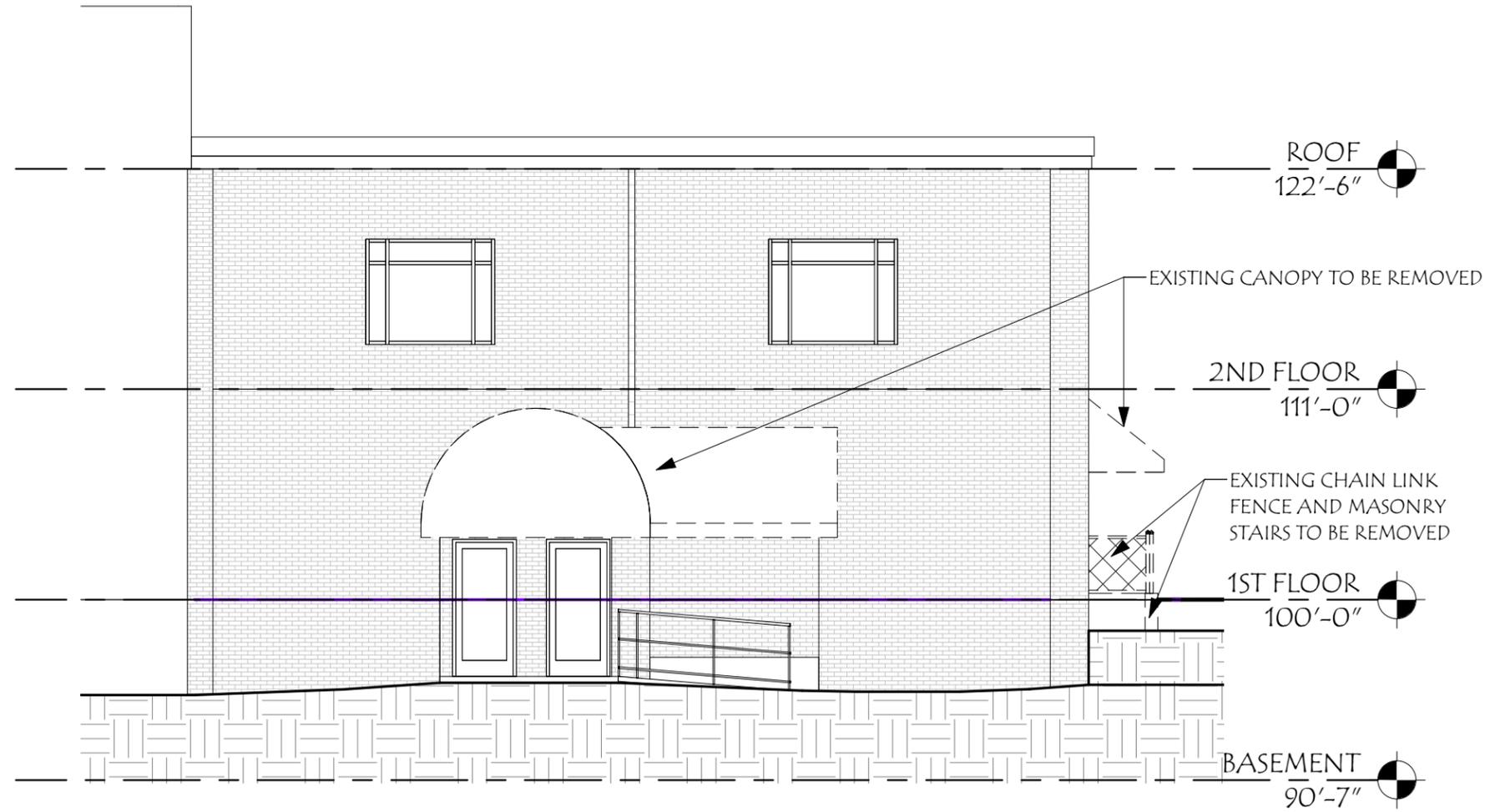
WEST ELEVATION

PREVIOUSLY APPROVED

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	4



NORTH ELEVATION

PREVIOUSLY APPROVED



HISTORIC DISTRICT COMMISSION ADMINISTRATIVE APPROVAL
DECEMBER 2022

147 CONGRESS

147 Congress St
Portsmouth, NH 03801

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TITLE:	DEMO ELEVATIONS
	5



147 CONGRESS ST

CAFE

PROPOSED

147 CONGRESS
 147 Congress St
 Portsmouth, NH 03801

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PROPOSED CONTEXT	



147 CONGRESS ST

SIGNAGE

147 CONGRESS

147 Congress St
 Portsmouth, NH 03801

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PROPOSED CONTEXT	

PROPOSED



PROPOSED

HISTORIC DISTRICT COMMISSION ADMINISTRATIVE APPROVAL
 DECEMBER 2022

147 CONGRESS
 147 Congress St
 Portsmouth, NH 03801

Revisions #	Description	Date

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PROPOSED CONTEXT	



PROPOSED

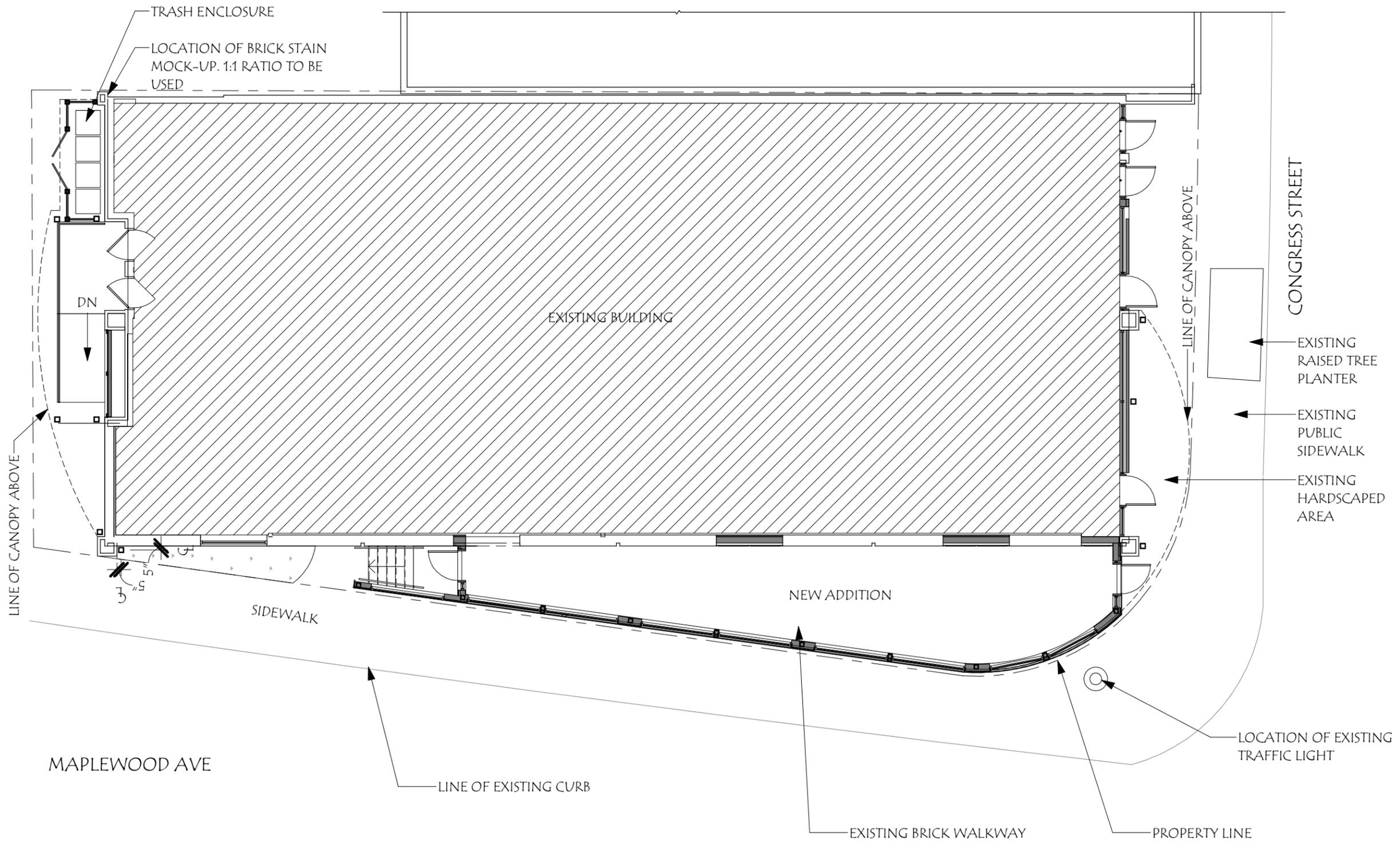
HISTORIC DISTRICT COMMISSION ADMINISTRATIVE APPROVAL
 DECEMBER 2022

147 CONGRESS
 147 Congress St
 Portsmouth, NH 03801

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FLOOR PLAN

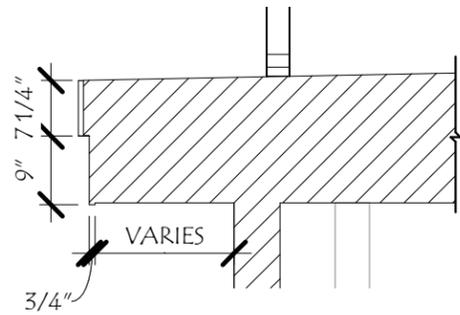
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 147 Congress St
 Portsmouth, NH 03801

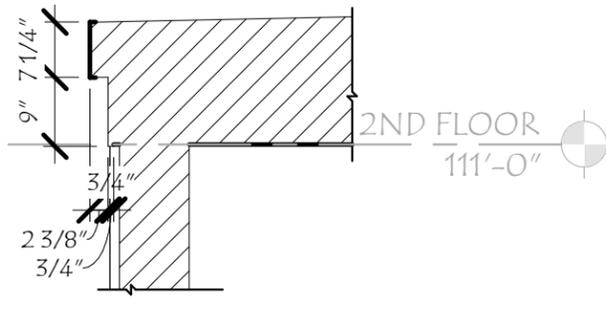
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DATE:	11/18/22

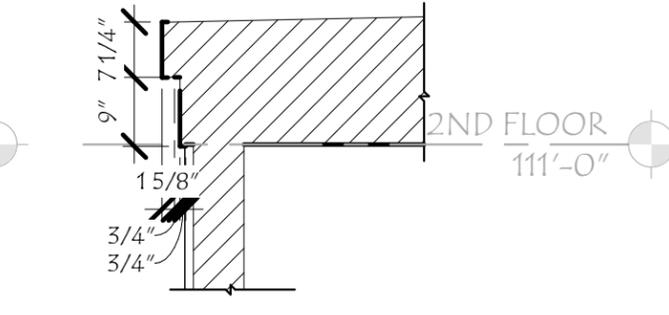
TITLE:	PROPOSED PLAN
	12



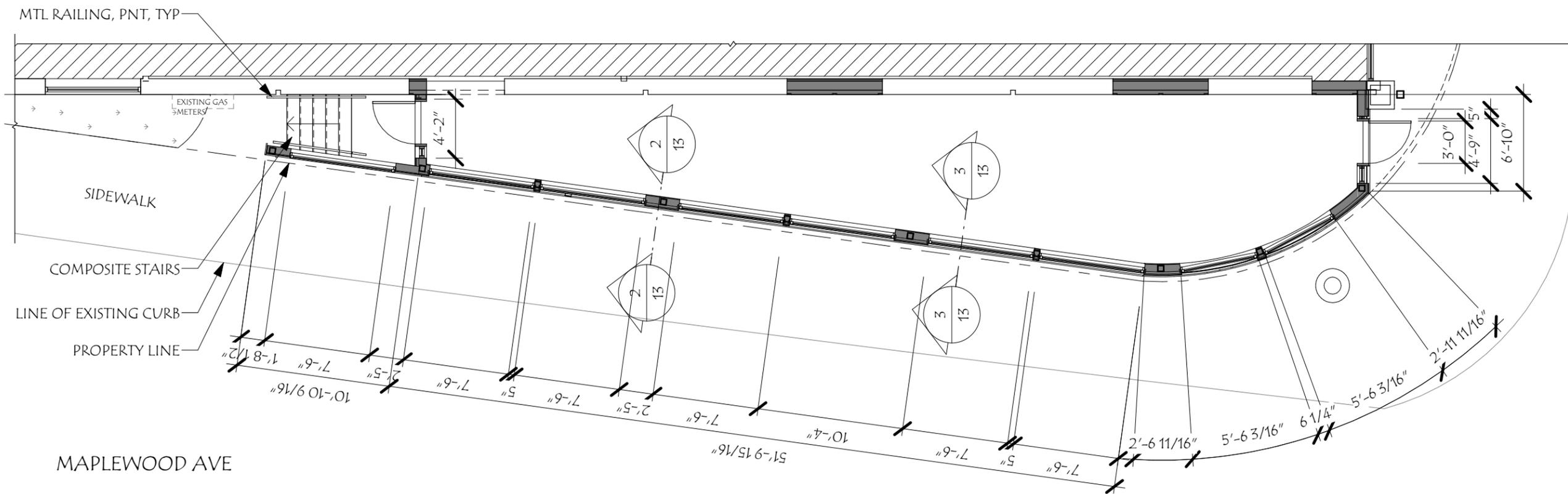
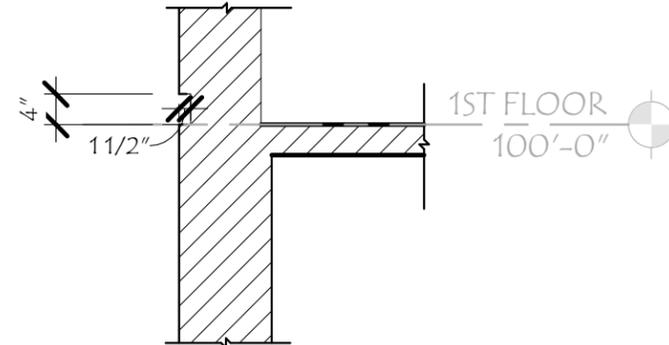
DETAIL 3



DETAIL 2



DETAIL 1



ENLARGED WEST ADDITION **PROPOSED**



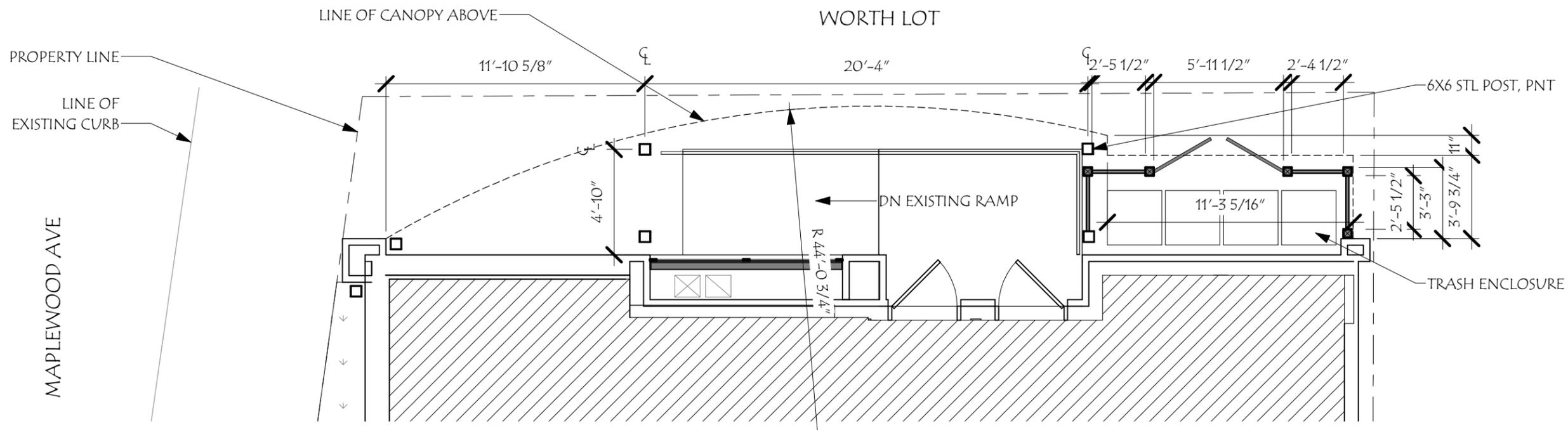
HISTORIC DISTRICT COMMISSION ADMINISTRATIVE APPROVAL DECEMBER 2022

147 CONGRESS
147 Congress St
Portsmouth, NH 03801

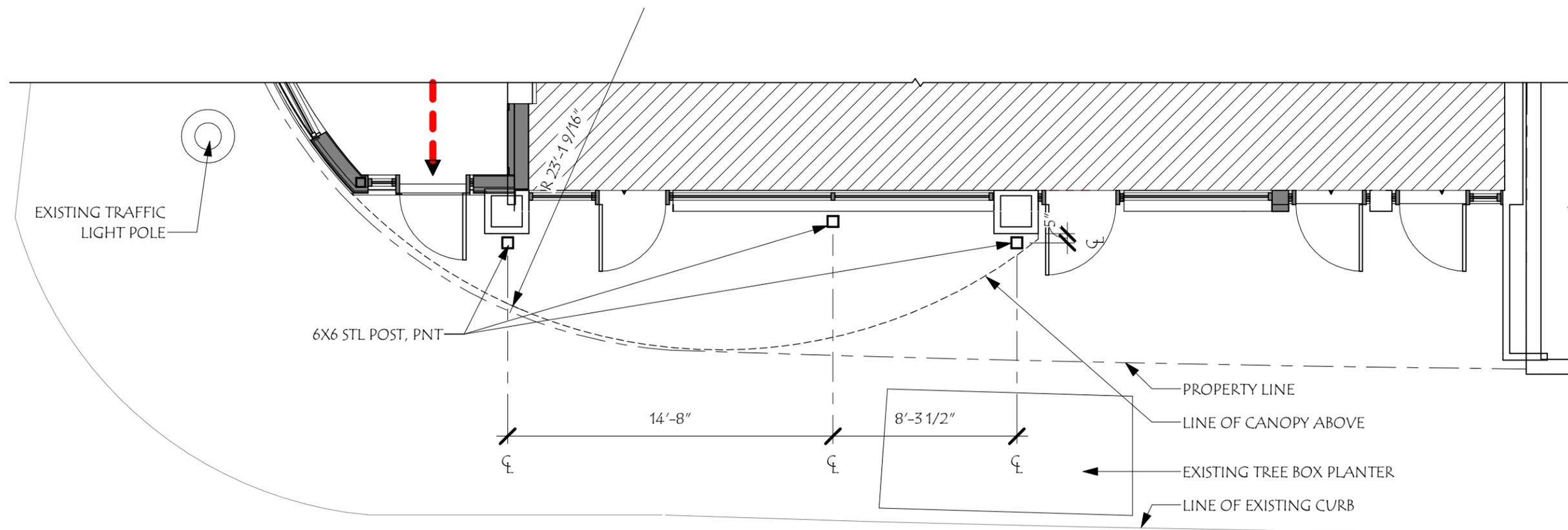
Revisions #	Description	Date

SCALE:	As Indicated
DRAWN BY:	SNH
CHECKED BY:	RJH
PROJECT NO.:	202209
DATE:	11/18/22

TITLE:	ENLARGED PLAN
	13



ENLARGED NORTH CANOPY PLAN



ENLARGED SOUTH CANOPY PLAN

CONGRESS STREET **PROPOSED**

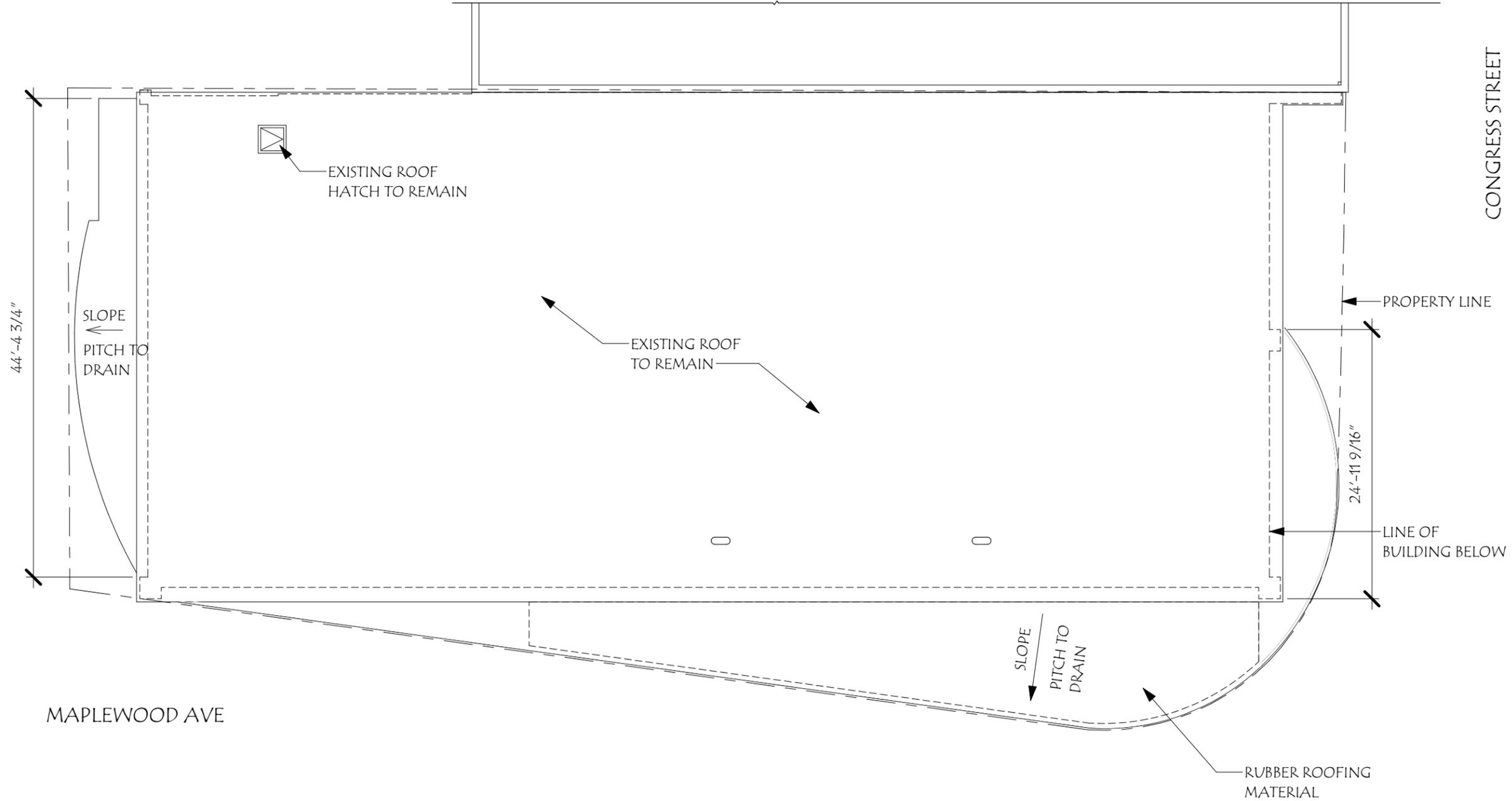
147 CONGRESS

147 Congress St
 Portsmouth, NH 03801

Revisions #	Description	Date

SCALE:	3/16" = 1'-0"
DRAWN BY:	SNH
CHECKED BY:	RJH
PROJECT NO.:	202209
DATE:	11/18/22

TITLE:	ENLARGED PLAN
	14



ROOF PLAN

PROPOSED



HISTORIC DISTRICT COMMISSION ADMINISTRATIVE APPROVAL
DECEMBER 2022

147 CONGRESS
147 Congress St
Portsmouth, NH 03801

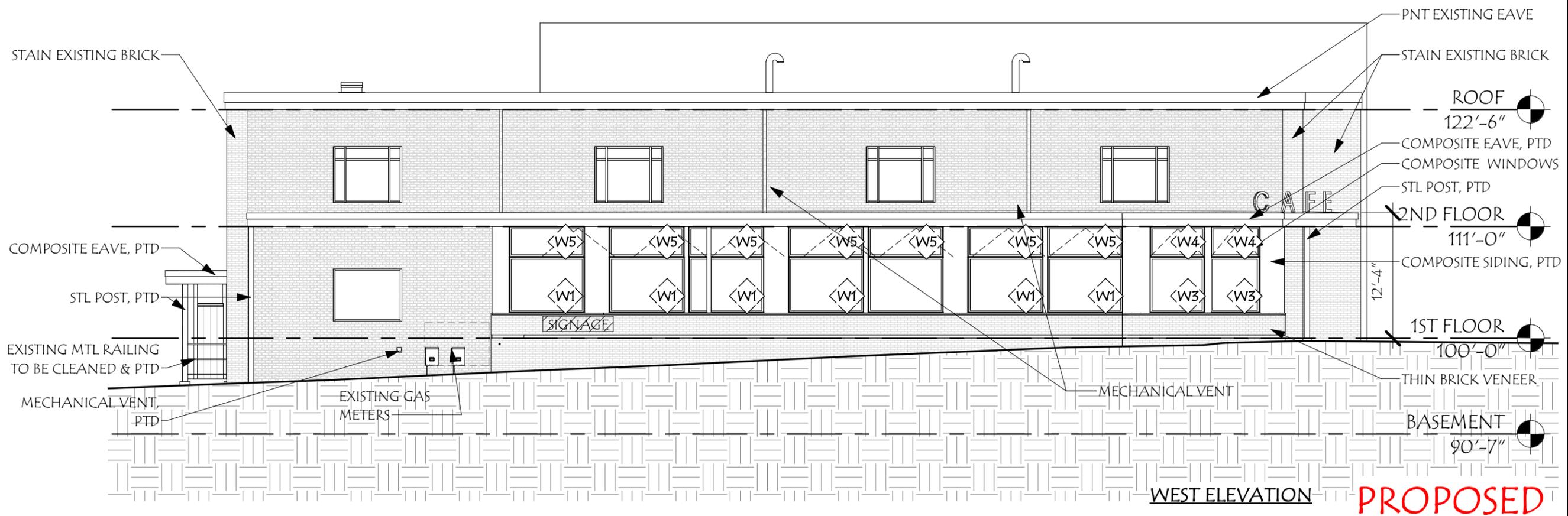
Revisions #	Description	Date

SCALE:	3/32" = 1'-0"
DRAWN BY:	SNH
CHECKED BY:	RJH
PROJECT NO.:	202209
DATE:	11/18/22

TITLE:	ROOF PLAN
	15



INSPIRATION IMAGES AND MATERIALS



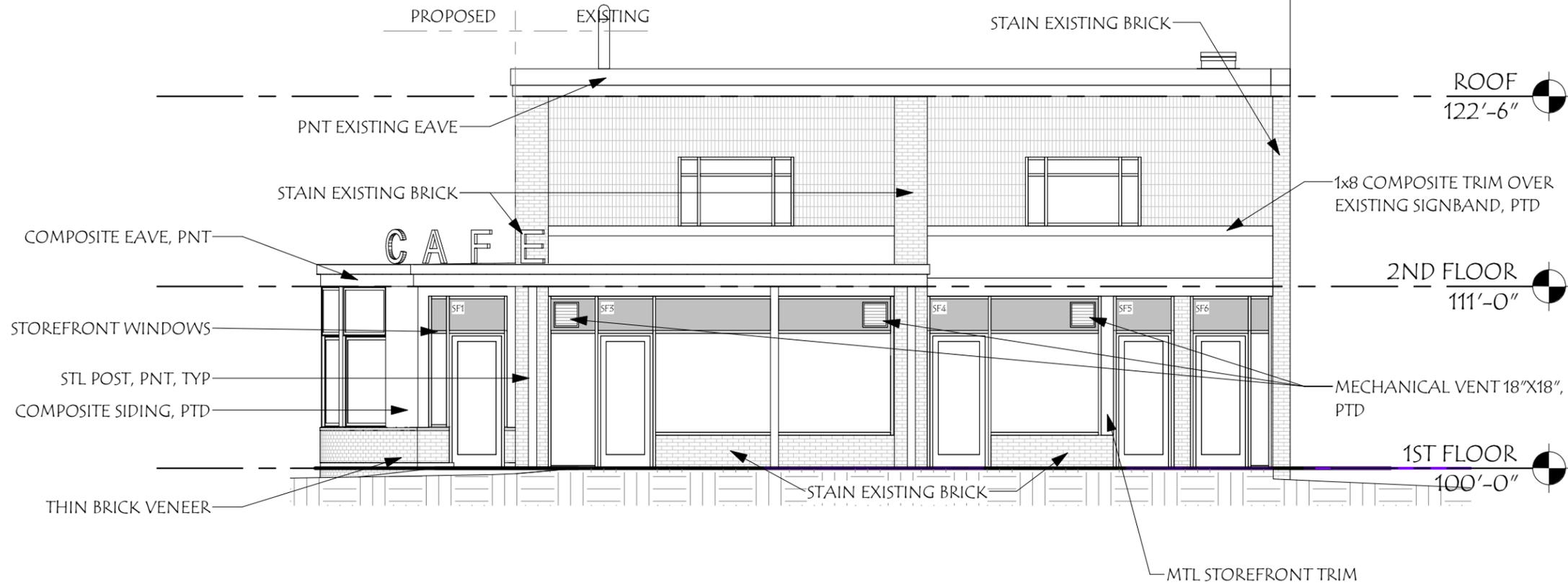
147 CONGRESS

147 Congress St
 Portsmouth, NH 03801

Revisions:	#	Description	Date

SCALE:	3/32" = 1'-0"
DRAWN BY:	SNH
CHECKED BY:	RJH
PROJECT NO.:	202209
DATE:	11/18/22

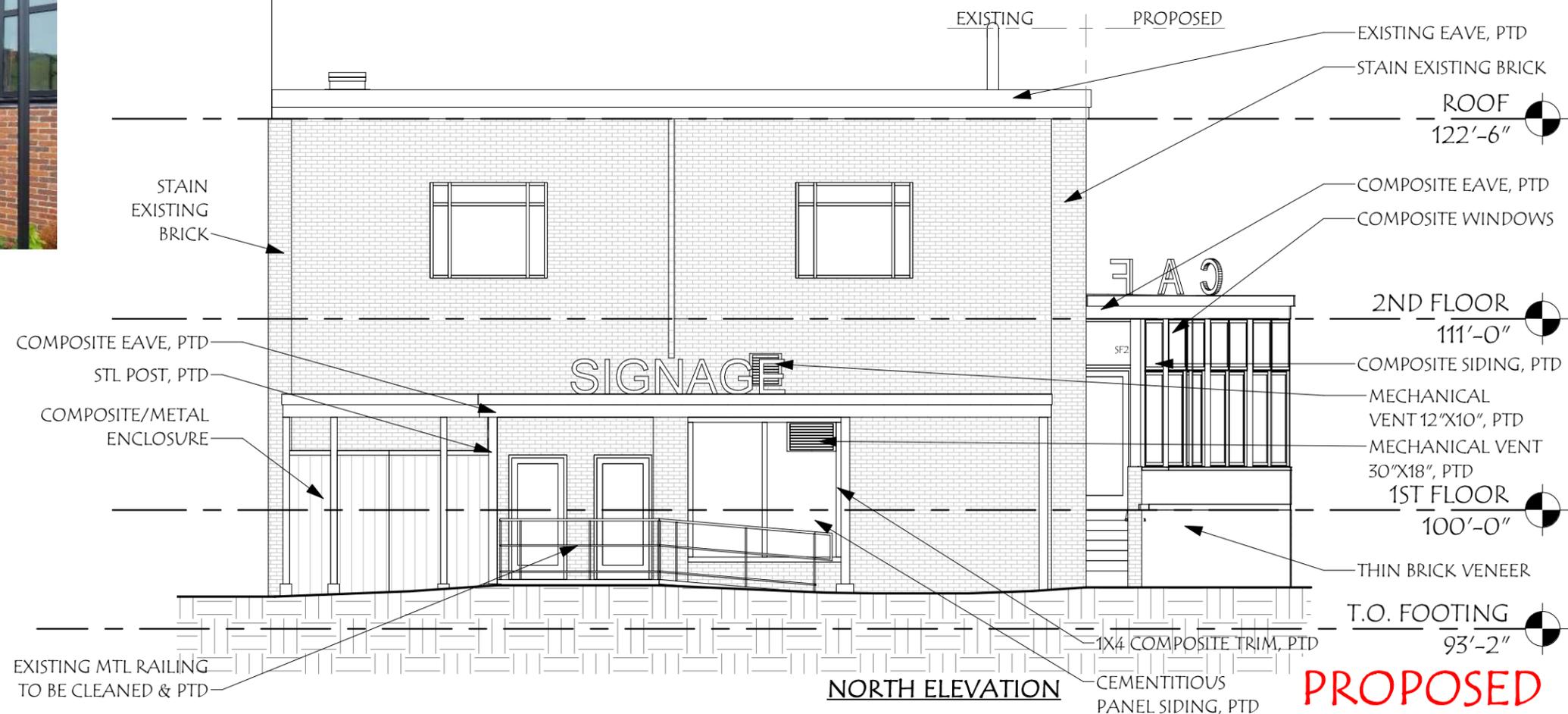
TITLE:	PROPOSED ELEVATIONS
	16



SOUTH ELEVATION



ENCLOSURE INSPIRATION



NORTH ELEVATION

PROPOSED

Revisions:	#	Description	Date

SCALE:	1/8" = 1'-0"
DRAWN BY:	SNH
CHECKED BY:	RJH
PROJECT NO.:	202209
DATE:	11/18/22

TITLE:	PROPOSED ELEVATIONS
	17