

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

City of Portsmouth

v.

SoBow Square, LLC

Docket No. _____

COMPLAINT
(Jury Trial Demanded)

Plaintiff City of Portsmouth (“City,” “Council,” or “Plaintiff”) brings this action against Defendant SoBow Square, LLC (“Developer”) (collectively, “Parties”), and states the following in support thereof:

INTRODUCTION

This matter concerns a public-private partnership between the City and Developer for development of federal property located at 80 Daniel Street in Portsmouth, New Hampshire. While the parties initially approached the endeavor in good faith, recently, Developer’s true motivations have revealed themselves – namely enhancing its own revenues while causing the City to shoulder an undue portion of the economic burden. Developer has employed unfair and deceptive acts and practices, including increasingly brazen bad faith tactics, to deprive the City of a valuable opportunity to leverage federal property within its bounds for the good of the City and its residents. As a result, the City seeks to be made whole.

PARTIES

1. Plaintiff City of Portsmouth is a political subdivision of the State of New Hampshire located in Rockingham County with a principal mailing address at 1 Junkins Avenue, Portsmouth, Rockingham County, New Hampshire 03801.

2. Defendant SoBow Square, LLC is a Delaware limited liability company with a principal place of business at 200 Commerce Way, Suite 300, Portsmouth, New Hampshire, 03801.

JURISDICTION AND VENUE

3. The New Hampshire Superior Court has subject matter jurisdiction over this action pursuant to RSA 491:7 and RSA 491:22.

4. The Rockingham County Superior Court is the proper venue for this action pursuant to RSA 507:9.

FACTUAL BACKGROUND

5. The United States, through the Government Services Administration (“GSA”), owns certain real estate known as the McIntyre Property located at 80 Daniel Street in Portsmouth, New Hampshire (the “Property”).

6. In 2017, the GSA designated the Property as eligible for the Historic Surplus Property Program (“HSPP”), which is administered by the National Park Service (“NPS”). The NPS invited the City to submit an “Application for Obtaining Real Property for Historic Monument Purposes” (“Application”) to acquire the Property from the GSA pursuant to the HSPP. If successful, the Property would be conveyed to the City for \$1, but with a deed restriction or preservation covenant requiring that the Property be preserved and used as a Historic Monument.

7. In August 2017, the City issued a Request for Proposals (“RFP”) seeking a private real estate developer to enter into a public-private partnership with the City whereby the City would acquire the Property from the GSA under the HSPP and then lease the Property to the private developer pursuant to a long-term ground lease. Under the ground lease, the developer

would be obligated to redevelop, reuse and operate the Property as a Historic Monument as generally described and detailed in the RFP.

8. On January 16, 2018, the City Council voted to accept the Developer's RFP, and authorized City staff to negotiate a development agreement and ground lease with the Developer. During the following months, the Parties proceeded to negotiate the terms of the two agreements.

9. After more than a year of negotiation, the City entered an agreement with the Developer on August 29, 2019 ("Development Agreement"), a copy of which is attached hereto as Exhibit A.

10. The Development Agreement included certain termination rights and preconditions that allowed the Parties to terminate the Development Agreement under certain conditions specified therein. One such condition allows either party to terminate the Development Agreement in the event that there is a failure to reach agreement, after good faith negotiations, on a mutually acceptable form of Application to the NPS, under section 2.1.6 of the Development Agreement.

11. Simultaneous with ratifying the Development Agreement, the City Council voted to approve an Application to submit to the NPS.

12. The NPS considered, but did not accept, the Application. Rather, NPS requested that the City make certain changes related to the density of the project and renegotiate certain financial terms with the Developer.

13. On January 28, 2020, the City Council voted to reject the proposed draft ground lease with the Developer.

14. On March 11, 2020, the Developer initiated a lawsuit against the City in Rockingham Superior Court, captioned *SoBow Square, LLC v. City of Portsmouth*, No. 218-

2020-CV-00352 (“Prior Litigation”), claiming, among other things, that the City breached the Development Agreement by rejecting the draft ground lease.

15. On April 5, 2022, the Parties entered into an agreement to settle the Developer’s claims against the City (“Settlement Agreement”), a copy of which is attached here to as Exhibit B. The Settlement Agreement was contingent on the City obtaining at least a six-month extension of its deadline to submit an Application to the NPS under the HSPP.

16. The City did so by amending the Licensing Agreement between the GSA and the City regarding the McIntyre Property, thus extending its application deadline to December 31, 2022.

17. Under the terms of the Settlement Agreement, the Developer agreed to voluntarily dismiss the pending lawsuit with prejudice. The Parties also agreed to “work together cooperatively, each acting reasonably and in good faith, to advance the development of the Project consistent with [a revised version of the development plan known as] the Community Plan” *Id.*

18. The Settlement Agreement further provided, “[t]he City and Developer shall act reasonably in addressing further development and any changes to the Community Plan necessary to address engineering, design, and marketability concerns. The City’s urban design, development, and planning firm Principle Group and the Developer’s architect shall collaborate on further development and any necessary design/plan changes. The City administration and Developer shall cooperate in seeking to obtain NPS and local board approvals.”

19. While the Developer was responsible for 100% of the development costs and the operating expenses during the lease period under the initial Development Agreement, the City agreed “that public financial support from the City will be necessary to develop and construct the

Community Plan.” The amount of public financial support from the City is not specified in the Settlement Agreement.

20. The Settlement Agreement further provides that “[t]he Parties shall agree upon an updated financial pro forma for the construction of the revised project, each acting reasonably and in good faith. The updated pro forma will project a Rate of Return on Developer’s invested capital of an unlevered return on Developer invested capital of 7.4% (the ‘Rate of Return’).” *Id.* at § 5.

21. The Settlement Agreement also requires the City to pay \$2 million to the Developer in three installments as follows: \$500,000 on or before May 15, 2022, \$1 million on or before July 15, 2022, and \$500,000 on or before July 15, 2023. The City timely paid the first two installments. The third installment has not yet come due.

22. Notably, the Settlement Agreement did not displace the Development Agreement. Rather, the Settlement Agreement provided that the Parties “shall, each acting reasonably and in good faith, negotiate and implement amendments to the Development Agreement necessary and appropriate to reflect the changes contemplated by this [Settlement] Agreement, including the construction of the ‘Community Plan’. [sic]” *Id.* at § 6.

23. The Settlement Agreement relates back to the City’s acquisition of the property for \$1.00 and the subsequent redevelopment of the McIntyre property under the HSPP. There is no obligation for the City to acquire and redevelop the Property outside of the HSPP; the City has never committed – to the Developer or anyone – to purchase and develop the Property outside of the HSPP.

24. During the months following the Settlement Agreement, the Parties engaged in negotiations regarding modifications and refinements to the Community Plan and the Development Agreement.

25. On September 28, 2022, the Developer proposed a revised development agreement, which inexplicably and without justification stripped out important termination rights and preconditions in a manner not contemplated by the Settlement Agreement or the Development Agreement.

26. In November of 2022, the Developer submitted a proposed pro forma that would have obligated the City to contribute more than \$80,000,000 toward building the Project while the Developer would contribute approximately \$40,000,000. Further, under the Developer's proposed pro forma, the City would not receive any portion of the lease revenues generated from the redeveloped property, even though the City would be making an \$80,000,000 (or greater) capital contribution.

27. The staggering costs projected in the Developer's pro forma required the City to seek a further extension from the GSA - from December 31, 2022 to March 31, 2023 – of the deadline to submit an Application to the NPS. The GSA granted the requested extension.

28. In light of the unreasonable costs embodied in the Developer's pro forma, the City engaged a financial consultant, RKG Associates, Inc., to review the costs of the Project and the projected operating revenue. RKG found a material difference in stabilized net operating income (“NOI”) between the pro forma used in the original Development Agreement and the Developer's draft pro forma for the Community Plan. This stemmed from the Developer unilaterally abandoning the lease up strategy contemplated by the parties in the original project. Instead, the Developer's proposed new pro forma assumed leasing to a large anchor “five star”

restaurant tenant requiring significant up front financial concessions, such as deeply discounted rent and fit-out at the owner's expense.

29. The Developer failed to disclose this fundamental shift in strategy to the City, no doubt because it served to shift millions of dollars in capital investment costs from the Developer to the City by driving down initial stabilized NOI while dramatically increasing the City's up front contribution under the formula in the Settlement Agreement. This approach maximizes the Developer's return in the later years of the lease at the expense of the City. This material change was never disclosed to the City.

30. RKG also found several unreasonably inflated cost assumptions in the Developer's pro forma. For example, the Developer duplicated sales costs by including both sales commissions and a full-time salaried sales management team. The Developer also inflated costs by assuming commissions to be paid based on twenty year leases when five year leases are standard for such properties. These projections all serve to benefit the Developer at the expense of the City by increasing the City's share of construction costs and lowering the Developer's share.

31. The flawed cost assumptions and self-serving, unreasonable leasing strategies embodied in the Developer's draft pro forma not only reflected bad faith negotiations, they substantially delayed the City's efforts to develop a realistic pro forma, through RKG. When RKG completed its work, which incorporated modifications to the Community Plan, the City's contribution to the Project was lowered from more than \$80,000,000 to approximately \$6,500,000, which includes reasonable profit-sharing as proposed by the City. See Exhibit C.

32. The Parties also have disputed whether the City is entitled to additional revenue sharing, above and beyond the revenue sharing provisions in the original draft Ground Lease.

The original business terms in the 2019 draft Ground Lease were based on the economics of the original development plan, including that the Developer would be responsible for all of the costs to develop the McIntyre Property. Because the City would be required to contribute millions of dollars toward building the Project under the Settlement Agreement, the City has sought to negotiate business terms in the new Ground Lease that reflect the economics of the new Community Plan, including additional revenue sharing based on the City's contribution toward development costs.

33. The Developer has categorically refused to include additional revenue sharing in the new Ground Lease based on the City's increased contribution toward the development costs, notwithstanding that the Developer has always been promised a 7.4% unlevered return on investment under the Settlement Agreement with the City.

34. The Developer also refused to include critically important termination rights and preconditions in the Development Agreement.

35. On March 11, 2023, due to the Developer's refusal to incorporate certain termination rights and preconditions from the original Development Agreement and rejection of proposed revenue sharing based on the City's contribution to the cost of the development project, the City Council concluded that the City and the Developer had reached an impasse in the negotiation of key terms of the Development Agreement and the Ground Lease.

36. Notwithstanding the City Council's finding on March 11, 2023, the City continued in its efforts to negotiate with the Developer and to provide data to RKG for use in its efforts to revise the pro forma.

37. The Developer sought to coerce the City to abandon the HPSS Program by sending numerous written threats to sue the City, based on bogus and ironic allegations that the City sought to delay the negotiations in bad faith.

38. It was not until March 29, 2023, less than 48 hours before the termination of licensing agreement, that the Developer relented and agreed to accept the termination rights and preconditions that the City had requested for months to be restored to the Development Agreement.

39. The Developer, however, persisted in its refusal to include revenue sharing based on the City's anticipated contribution of millions of dollars to the development project.

40. For its part, the City never departed from the Settlement Agreement's terms, which contemplated an unlevered return on invested capital of 7.4%.

41. As a result of the impasse, the Parties were not able to prepare and submit an Application to NPS by the March 31, 2023 deadline.

42. The City was precluded from submitting an Application to the NPS by the March 31, 2023 deadline by virtue of the Developer's bad faith negotiations and other misconduct described herein, including, but not limited to, the Developer's deceitful and inflated pro forma and its unreasonable refusal to restore the termination rights and preconditions to the Development Agreement or to agree to revenue sharing based on the City's capital contribution to the Project.

43. The City, on the other hand, fully discharged all of its obligations under the Settlement Agreement.

44. On March 31, 2023, the Parties advised the GSA that the Parties had failed to negotiate all of the key terms of the Development Agreement and the Ground Lease as of that date and, consequently, had not submitted an Application to the NPS.

45. On April 3, 2023, the GSA notified the City that it “will no longer support” conveying the McIntyre Property to the City under the HPSS Program.

46. As a result of the Developer’s bad faith negotiations and other misconduct, the City has incurred substantial damages, including the lost opportunity to purchase the McIntyre Property for \$1 and tens of thousands of dollars paid to consultants hired to assist the Parties to fulfill their obligations under the Settlement Agreement.

COUNT ONE
(Declaratory Judgment)

47. Plaintiff incorporates the allegations above by reference.

48. The initially-executed Development Agreement contained several termination rights and preconditions which the Developer in bad faith sought to eliminate from the revised Development Agreement under the Settlement Agreement.

49. The elimination of the preconditions and termination rights in the Development Agreement would be a material deviation from the original Development Agreement that would need to have been expressly stated in the Settlement Agreement to be enforceable.

50. There is no such express statement in the Settlement Agreement.

51. The Developer refused in bad faith to agree to include these provisions in a new Development Agreement.

52. The Developer also refused in bad faith to agree to revenue sharing in the Ground Lease based on the City’s contribution toward the cost to develop the McIntyre Project.

53. The Developer further engaged in bad faith and deceitful conduct in preparing the proposed pro forma, including duplicating costs and deceptively shifting from conventional and reasonable leasing assumptions to leasing assumptions that would have caused the City to pay substantially more toward the development costs, and in turn would have reduced the Developer's contribution toward the development costs.

54. The Developer committed numerous material breaches of the Settlement Agreement.

55. The City fully complied with the terms of the Settlement Agreement.

56. The Court should enter a declaratory judgment declaring that: The City fully complied with the terms of the Settlement Agreement, and the Developer committed numerous material breaches of the Settlement Agreement, as described above.

COUNT TWO
(Breach of Contract)

57. Plaintiff incorporates the allegations above by reference.

58. The Settlement Agreement constituted a valid and enforceable contract supported by adequate consideration.

59. Without legal excuse, Developer breached the terms of the Settlement Agreement by, without limitation:

- a. Materially deviating from the original Development Agreement by eliminating preconditions and termination rights contemplated therein;
- b. Refusing, in bad faith, to include precondition and termination rights provisions from the original Development Agreement in any new Development Agreement;
- c. Refusing, in bad faith, to include revenue sharing based on the City's contribution toward the cost to develop the McIntyre Project; and

- d. Duplicating costs and deceptively shifting from conventional and reasonable leasing assumptions to leasing assumptions in the proposed pro forma resulting in dramatically increased development costs for the City.

60. At the time of these breaches, the City had fully complied with all material terms of the Settlement Agreement.

61. As a direct and proximate result of the Developer's material breaches, the City has suffered damages in an amount to be proven at trial within the jurisdictional limits of this Court.

COUNT III
(Breach of the Implied Covenant)

62. Plaintiff incorporates the allegations above by reference.

63. As a valid and enforceable contract under New Hampshire law, the Settlement Agreement contained within it an implied covenant of good faith and fair dealing.

64. One function of the implied covenant of good faith and fair dealing is to ensure that parties to a contract act in good faith in performing any contractual duty that carries with it a level of discretion.

65. Here, the Settlement Agreement required the parties to, among other things, negotiate the terms of a new Development Agreement and Ground Lease in good faith.

66. Developer breached its implied contractual duties by refusing to negotiate in good faith and deceitfully advancing leasing strategies that disfavored the City and knowingly inflated costs to shift the economic benefits of the parties' arrangement in Developer's favor.

67. The effect of Developer's conduct was to deprive the City the benefit of its bargain in entering the Settlement Agreement.

68. As a direct and proximate result of Developer's conduct, the City has suffered damages in an amount to be proven at trial within the jurisdictional limits of this Court.

COUNT IV
(Tortious Interference with Business Relations)

69. Plaintiff incorporates the allegations above by reference.

70. The City's application to GSA for acquisition of the Property through the HSPP posed a real prospective economic benefit for the City in that it could purchase the Property for \$1, while reaping untold future revenues from the Property.

71. Developer had actual knowledge of this prospective advantageous relationship between the City and GSA.

72. Despite this, and knowing and understanding the impact to the City if its acquisition of the Property did not occur, Developer intentionally and improperly interfered with the City's acquisition of the Property by refusing, in bad faith, to carry out the terms of the Settlement Agreement.

73. As a direct and proximate result of Developer's interference, the City has suffered damages in an amount to be proven at trial within the jurisdictional limits of the Court.

COUNT V
(Violation of RSA 358-A)

74. Plaintiff incorporates the allegations above by reference.

75. Developer is a person engaged in trade or commerce within New Hampshire.

76. Specifically, Developer transacted with the City to develop and lease the Property for the mutual benefit of Developer, the City, and the City's residents.

77. Developer unfairly and deceptively led the City to enter the Settlement Agreement and to negotiate extensions of a License Agreement with the GSA under the guise of

Developer's willingness to collaborate with the City on developing the Property consistent with the Community Plan.

78. In truth, Developer was driven by self-interest and it sought to strong arm the City into an arrangement that Developer knew or should have known was economically unfriendly and unfeasible to the City.

79. Ultimately, Developer's bad faith tactics resulted in the City losing its opportunity to acquire, develop, and benefit from the Property.

80. As a direct and proximate result of Developer's intentionally unfair and deceptive acts and practices, the City is entitled to recover damages, including double or treble damages and attorney's fees, in an amount to be proven at trial within the jurisdictional limits of the Court.

DEMAND FOR JURY TRIAL

81. The City hereby requests a trial by jury on all claims so triable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests this Honorable Court to:

1. Enter judgment in the Plaintiff's favor against the Defendant on all counts;
 2. Enter a declaratory judgment that the City fully complied with the terms of the Settlement Agreement, and the Developer committed numerous material breaches thereof;
 3. Award damages in an amount to be proven, including up to treble damages under RSA 358-A;
 4. Award pre-judgment interest, post-judgment interest, costs and attorney's fees;
- and
5. Grant such other relief as the Court deems proper and just.

Respectfully submitted,

CITY OF PORTSMOUTH, NH

By its attorneys,

Dated: April 11, 2023

/s/ Michael J. Connolly
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COMPLAINT
EXHIBIT A

1
2 **DEVELOPMENT AGREEMENT AND AGREEMENT TO LEASE**
3
4

5 This **DEVELOPMENT AGREEMENT AND AGREEMENT TO LEASE** ("Agreement") is
6 made as of the 29 day of August, 2019 (the "Effective Date"), by and
7 between the City of Portsmouth, a New Hampshire municipal corporation, with a principal
8 place of business at c/o Nancy Colbert Puff, 1 Junkins Avenue, Portsmouth, New
9 Hampshire (referred to as "the City") and SoBow Square, LLC, a _____
10 limited liability company, with a principal place of business at
11 200 Commerce Way, Suite 300, Portsmouth, NH 03801, its successors and assigns (referred to as
12 "Developer"), and referred to collectively as the "Parties".
13

14
15 **PRELIMINARY STATEMENTS**
16

17 This Agreement relates to the possible redevelopment of certain real estate known as the
18 "McIntyre Property" located at 80 Daniel Street, Portsmouth, New Hampshire (the
19 "Property").
20

21 Reference is made to the following facts.
22

- 23 I. The Property is presently owned by the United States of America. The City has
24 been invited to submit an "Application for Obtaining Real Property for Historic
25 Monument Purposes" (the "Application") to the National Park Service to acquire
26 the Property from the General Services Administration ("GSA") under the
27 Federal Historic Surplus Property Program. Under the Historic Surplus
28 Property Program, the Property would be conveyed to the City for no cash
29 consideration but with a deed restriction or preservation covenant requiring that
30 the Property be preserved and used as a Historic Monument.
31
- 32 II. In August of 2017, the City issued a Request for Proposals (the "RFP") seeking
33 a private real estate developer to enter into a public private partnership with the
34 City whereby the City would acquire the Property from the GSA under the
35 Historic Surplus Property Program and then lease the Property to a private
36 developer pursuant to a long-term ground lease. Under the ground lease, the
37 developer shall be obligated to redevelop, reuse and operate the Property as
38 a Historic Monument as generally described and detailed in the RFP.
39
- 40 III. On or about November 6, 2017, in response to the RFP, several real estate
41 developers, including Developer, submitted proposals to ground lease and
42 redevelop the Property. In its response to the RFP, Developer proposed to
43 redevelop the Property as a mixed-use project with office, retail, and residential
44 uses and related parking, amenities, infrastructure and public spaces
45 (collectively, the "Project").
46

- 1 IV. On January 16, 2018, the Portsmouth City Council voted to select Developer
2 as its potential development partner and authorized City Staff to negotiate and
3 enter into a nonbinding memorandum of agreement with Developer with
4 respect to the Project to allow time for public input and comment on the
5 proposed Project, to allow Developer time to conduct additional due diligence,
6 and to allow the City and Developer time to work together on the National Park
7 Service Application, and to negotiate the terms of a development agreement.
8
- 9 V. On May 16, 2018, the Parties entered into a nonbinding memorandum of
10 agreement with respect to the Project entitled "McIntyre Project Negotiating
11 Principles". This Agreement supersedes and replaces that Memorandum of
12 Agreement in all respects.
13
- 14 VI. The Parties to this Development Agreement are willing to continue to work
15 together and proceed with the Project upon the terms and conditions of this
16 Agreement.
17
18

19 DEFINITIONS

20
21 "Agreement" shall mean this Development Agreement, including all Exhibits hereto, as
22 the same may from time to time be amended, modified, or supplemented in accordance
23 with the terms hereof.
24

25 "City" shall mean the City of Portsmouth, New Hampshire.
26

27 "Developer" shall mean SoBow Square, LLC.
28

29 "Development Permits and Approvals" shall mean all final, unappealed and unappealable
30 federal, state, and local permits and approvals required for the Project (including, without
31 limitation, any approvals or authorizations required from the New Hampshire Historic
32 Preservation Office).
33

34 "Project" shall mean the redevelopment, re-use, operation and management of the
35 Property as described in this Agreement to be undertaken by Developer in accordance
36 with the terms of this Agreement.
37

38 "Application" shall mean the "Application for Obtaining Real Property for Historic
39 Monument Purposes" to be submitted by Developer and the City to the National Park
40 Service in connection with the proposed acquisition and redevelopment of the Property
41 in accordance with the terms and provisions of this Agreement.
42

43 "Ground Lease" shall mean the long-term ground lease of the Property between the City
44 as landlord and Developer as tenant, pursuant to which Developer shall construct,
45 manage and operate the Project in accordance with the terms of this Agreement. The
46 terms of the Ground Lease shall be negotiated during the Application Period.

1
2 “Guarantors” shall mean, collectively and as applicable, the Completion Guarantor and
3 the Limited Guarantor (each as defined below), and substitutes therefor approved by the
4 City in its reasonable discretion or as set forth in the Ground Lease. Without limiting the
5 City’s reasonable approval right set forth below, the “Completion Guarantor” shall be the
6 completion guarantor required by Developer’s construction lender and the “Limited
7 Guarantor” shall be the party required by Developer’s first mortgage lender from time to
8 time to provide any non-recourse carve-out guaranty and/or environmental indemnity;
9 provided, however, that if Developer’s lender is not an institutional lender, then such
10 guarantor(s) shall be subject to the City’s prior approval, such approval not to be
11 unreasonably withheld, conditioned or delayed, as more particularly set forth in the
12 Ground Lease. The Completion Guarantor and the Limited Guarantor may be different
13 parties.
14
15

16 NOW, THEREFORE, the Parties hereby agree as follows:
17

18 **1. DESCRIPTION OF PROJECT / BACKGROUND**
19

20 **This Development Agreement is related to the acquisition and redevelopment of**
21 **the Property under the Federal Historic Monument Program and sets forth the**
22 **City’s and the Developer’s respective rights, responsibilities and duties with**
23 **respect to such proposed redevelopment.**
24

25 1.1. The Parties are entering into this development agreement: (i) to work
26 cooperatively to prepare and submit a joint Application to the National Park
27 Service for acquisition of the Property by the City and the redevelopment,
28 operation and management of the Property by the Developer under the terms
29 of a long-term Ground Lease (ii) to allow time for additional public input and
30 comment on the Project, (iii) to allow time for the Developer to conduct
31 additional due diligence with respect to the Property and the feasibility of the
32 Project; (iv) to finalize details about the Project, and (iv) to negotiate the terms
33 of a long-term ground lease (the “Ground Lease”) between the City as
34 landlord and Developer as tenant pursuant to which the Property will be
35 redeveloped, operated and managed by Developer, at Developer’s sole cost
36 and expense, in accordance with the Historic Surplus Property Program, the
37 Application, the terms and conditions of the this Development Agreement,
38 and the terms and conditions of the Ground Lease.
39

40 1.2. The Developer’s preliminary proposal for the redevelopment of the Property
41 has undergone a City-managed public input process to provide residents and
42 other stakeholders the opportunity to review and comment on the Developer’s
43 proposal and on how the Property should be redeveloped and reused.
44 Developer’s proposal for the Project was refined and modified as part of the
45 public input process and as the result of additional City review. Preliminary

1 plans for the Project will be finalized by Developer and the City prior to
2 submitting the Application to the National Park Service.

3
4 1.3. It is also anticipated by both Parties that the City will acquire the Property
5 subject to a restrictive covenant, as well as all applicable requirements of the
6 Historic Surplus Property Program and the Secretary of the Interior
7 “Standards for Rehabilitation” and the New Hampshire Historic Preservation
8 Office, that will contain specific requirements for how the Property will be
9 preserved, maintained and protected in the future (collectively, the
10 “Preservation Restrictions”). The Developer will, under the Ground Lease,
11 assume full responsibility for complying with such requirements as well as the
12 Preservation Restrictions and the approved Application. In no event shall the
13 existing Building be demolished (except to the extent of renovations and
14 modifications contemplated by the Application and permitted by the
15 Preservation Restrictions).

16
17 2. **DEVELOPER’S RESPONSIBILITIES, AGREEMENTS, COVENANTS AND**
18 **CONTINGENCIES**

19
20 2.1. **Developer’s Responsibilities and Covenants.**

21
22 2.1.1. **Development/Project.** Developer’s Project shall be generally
23 similar to size, mass, and configuration as the Conceptual Site Plan
24 and building elevations included within Exhibit A of this Agreement.
25 However, the Parties expressly recognize that the conceptual site
26 plan and building elevations included within Exhibit A are subject to
27 change as the state and local permitting process and the design and
28 regulatory processes move forward. All plans approved through the
29 federal, state and local permitting processes shall be incorporated
30 into this document and binding by reference.

31
32 The materials comprising the exterior of Developer’s Project shall be
33 appropriate for downtown urban architecture, complementary to
34 downtown Portsmouth’s historic character.

35
36 Upon acquisition of the Property by the City and the full execution of
37 the Ground Lease, Developer shall proceed with the redevelopment
38 of the Property in accordance with the final, approved plans therefore
39 and substantially in accordance with the Development Schedule (as
40 it may be updated by the Developer and the City from time to time)
41 at Developer’s sole cost and expense. Preliminary concept plans for
42 the Project are included as Exhibit A of this Agreement. A
43 preliminary Project budget, which shall be updated by the parties
44 prior to filing the Application and shall be further updated prior the
45 entering the Ground Lease and as set forth in the Ground Lease, is
46 attached hereto as Exhibit B (the ‘Project Budget’). A preliminary

1 Development Schedule, which shall be updated by the parties prior
2 to filing the Application and shall be further updated prior the entering
3 the Ground Lease and as set forth in the Ground Lease, is attached
4 hereto as Exhibit C (the "Development Schedule").
5

6 The Property shall be leased by the Developer "as is" with the City
7 making no warranties either express or implied as to the condition
8 of the Property.
9

10 2.1.2. **Infrastructure Improvements.** Developer shall be solely
11 responsible for the cost of designing, permitting, and constructing
12 any and all improvements to utilities, roadways, sidewalks and other
13 public and private infrastructure and public amenities necessary or
14 desirable for Developer's Project. The parties do not anticipate
15 material off-site infrastructure improvements to be required for the
16 Project, except for the infrastructure improvements contemplated in
17 the Project Budget and shown within Exhibit A attached hereto (the
18 "Infrastructure Improvements"). To the extent any off-site
19 infrastructure improvements other than the Infrastructure
20 Improvements are identified during the Permitting and Approval
21 process as necessary to mitigate the Project-related impacts, the
22 parties shall cooperate in good faith to limit the scope and expense
23 of such improvements such that the scope of the required
24 improvements is not more than necessary to fully mitigate Project-
25 related impacts.
26

27 2.1.3. **Intentionally Omitted.**
28

29 2.1.4. **Project Costs and Expenses.** Developer shall be responsible for all
30 costs and expenses associated with this Agreement and the Project
31 including, without limitation, costs of its due diligence, costs of
32 participating in the public input and review process, all costs related
33 to the preparation and submission of the Application, and all design,
34 permitting and construction costs associated with the Project.
35 Developer and the City may agree in their discretion that Developer
36 shall pay or reimburse the City for certain costs incurred by the City.
37 Developer shall have no obligation to pay or reimburse any expenses
38 incurred by the City in connection with the Project or this Agreement,
39 except to the extent of any specified expenses that the Developer
40 and the City have agreed in writing that Developer shall be
41 responsible for paying or reimbursing.
42

43 2.1.5. **Environmental.** Developer shall be responsible for the cost of any
44 environmental remediation required for the Project, shall expressly
45 release the City from any and all such responsibility and shall
46 indemnify, defend and hold harmless the City from and all lost, cost,

1 expense, claims and damages associated with environmental
2 conditions at the Property. The Parties acknowledge that the
3 Property contains asbestos and the City will assume no responsibility
4 for, or any liability or responsibility with respect thereto. Developer
5 shall assume all responsibility for compliance with all applicable laws
6 relating to asbestos and asbestos removal and disposal. In
7 connection with its due diligence, Developer agrees to perform
8 commercially reasonable environmental due diligence. All
9 environmental due diligence shall comply with the EPA's All
10 Appropriate Inquiry Rule and ASTM E1527-13 Standard. The City
11 shall receive from Developer the results of all environmental due
12 diligence (with reliance rights) which are obtained by Developer with
13 respect to the Property.
14

15 2.1.6. **National Park Service Application.** Developer shall cooperate with
16 the City in preparing the National Park Service "Application to Obtain
17 Real Property for Historical Monument Purposes." It is expected that
18 such Application will be submitted to the National Park Service on or
19 about July 2019, but no later than September 30, 2019 (the period
20 ending on such later date, as it may be extended by mutual
21 agreement of the parties, is hereby referred to as the "Application
22 Period"). Subject to further refinement as provided in this Agreement
23 and comments received from the National Park Service, it is
24 expected that the Application will be generally consistent with the
25 City's August 22, 2017 RFP and the Developer's November 6, 2017
26 Response thereto. The parties also expect to submit the proposed
27 form of Ground Lease as part of the Application. The Ground Lease
28 must be approved by the National Park Service. The Application
29 shall, at a minimum, include a detailed description of the Project, and
30 a "Program of Preservation and Utilization" which includes a
31 preservation plan, a use plan and a financial plan all as required
32 under the Federal Historic Surplus Property Program. If the
33 Application is initially rejected by the Park Service for technical
34 reasons or correctible issues then the City agrees that it will work
35 with the Developer to submit a corrected application. If the parties,
36 after good faith negotiations, fail to reach agreement on a mutually
37 acceptable form of Application during the Application Period then
38 either party may terminate this agreement in which event the Deposit
39 (and all interest earned thereon) shall be promptly returned to the
40 Developer and neither party shall have any further rights or
41 obligations hereunder except those expressly stated to survive.
42

43 If the City submits the Application, the Developer shall
44 automatically and immediately become fully responsible for all
45 requirements, obligations, duties, and commitments related to the
46 Application and the acceptance and approval of the Application

1 including, without limitation, all “constructive possession”
2 responsibilities (if any) described in the general terms and conditions
3 of the Application even if constructive possession were to occur prior
4 to satisfaction of the conditions precedent to Developer’s obligation
5 to consummate the Closing and to execute the Ground Lease (the
6 “Closing Contingencies”). The parties shall work cooperatively to
7 ensure that neither possession nor constructive possession of the
8 Property occurs until satisfaction of the Closing Contingencies and
9 the execution of the Ground Lease. In the event that the General
10 Services Administration (GSA) sends a notice requesting or
11 demanding that the City take possession of the Property within fifteen
12 (15) days before all Closing Contingencies have been fully satisfied,
13 then the City will accept the deed to the Property and the City and
14 the Developer will execute the Ground Lease with an Addendum to
15 be negotiated reasonably by the City and the Developer, which
16 Addendum will cover the interim period between execution of the
17 Ground Lease and the date on which all Closing Contingencies have
18 been satisfied. During that interim period: (i) the Developer will be
19 responsible for all obligations owed to the National Park Service
20 pursuant to the Application or the Deed and for securing, maintaining
21 and insuring the Property, (ii) subject to the terms of the Ground
22 Lease, the Developer will be allowed to enter leases, including,
23 without limitation, any space in the existing building on the Property
24 in compliance with any required environmental remediation and/or
25 asbestos removal, and to operate or lease the parking areas on the
26 Property, all in accordance with all applicable laws, regulations, and
27 building and health and life safety codes, (iii) except as may be
28 required by the National Park Service, no improvements to the
29 Property shall be made other than improvements to the existing
30 building and other appropriate repairs and maintenance,
31 environmental remediation and/or asbestos removal, and (iv) the
32 Developer will be required to pay real estate taxes on the Property,
33 but not base rent. Once all Closing Contingencies have been
34 satisfied, the Addendum will terminate and the Ground Lease will
35 commence within a 75 year term, etc. If the interim period lasts for
36 more than 12 months then (i) Developer shall provide an accounting
37 of operating expenses, taxes, insurance expenses, debt service
38 payments, other expenses and income and (ii) twenty five percent
39 (25%) of Developer’s actual income in excess of such expenses
40 incurred (but in no event more than \$49,650 annually) will be paid by
41 Developer to the City.
42

43 **2.1.7. Federal Historic Surplus Property Program.** In connection with
44 its proposed redevelopment of the Property, Developer shall comply,
45 at its sole cost and expense, with all terms, conditions and
46 requirements of the Federal Historic Surplus Property program

1 including, without limitation the Preservation Restrictions, the deed
2 of the Property to the City, and all commitments made in the
3 Application. All of the foregoing should be included in the Ground
4 Lease. The Property shall be rehabilitated and the Property
5 continuously maintained, repaired and administered by Developer in
6 accordance with the Ground Lease, the Preservation Restrictions,
7 and to the extent applicable The Secretary of the Interior's
8 "Standards for Rehabilitation", as amended from time to time.
9

10 2.1.8. **Ground Lease.** During the Application Period, the Developer shall
11 negotiate in good faith with the City the terms and conditions of the
12 Ground Lease. The basic terms of the Ground Lease are set forth in
13 Exhibit F attached hereto. The Ground Lease will contain the
14 following terms and provisions as well as others: (i) the scope of the
15 Developer's initial construction and rehabilitation obligations; (ii)
16 Developer's responsibility for all environmental matters at the
17 Property including a release and indemnity to the City with respect
18 thereto; (iii) final construction schedule; (iv) Developer financing
19 rights and obligations; (v) form of security and guarantees for
20 completion of Developer's construction work; (vi) the approved plan
21 for Developer's operation and maintenance of the Property; (vii)
22 events of default and remedies; (viii) definition of the Developer's
23 "reasonable profit" under applicable federal law; (ix) the term of the
24 Ground Lease; (x) base rent and other required payments; (xi) real
25 estate taxes; (xii) maintenance and operation requirements; (xiii)
26 insurance requirements; (xiv) events of default and remedies; (xv)
27 use restrictions and covenants; (xvi) end of term rights and
28 responsibilities; (xvii) transfer rights and limitations; (xviii) restrictions
29 on changes to the Project; and (xix) the express assumption by
30 Developer of all obligations under the Federal Historic Monument
31 Program with respect to the Property including the rehabilitation,
32 operation, management and maintenance of the Property. If the
33 Parties are unable to reach agreement on the Ground Lease prior to
34 end of the Application Period, then either party may terminate this
35 Agreement, in which event the Deposit (and all interest earned
36 thereon) shall be promptly returned to the Developer and neither
37 party shall have any further rights or obligations hereunder except
38 those expressly stated to survive. The Ground Lease shall contain
39 the agreed-upon methodology for calculating the various
40 components of all income to be paid to the City together with
41 examples of such calculations.
42

43 2.1.9. **Preliminary Design and Cost Analysis of Project.** Developer has,
44 as of the date of this Agreement, completed a preliminary analysis of
45 the financial feasibility of the construction of the Project and has
46 determined that the Project is financially feasible.

1
2 2.1.10. **Budget.** Developer has, as of the date of this Agreement, prepared
3 preliminary estimates of the cost to design, construct and implement
4 the Project as set forth in the Project Budget attached as Exhibit B.
5 The parties shall agree on a final Project Budget which shall be
6 submitted with the Application and incorporated into the Ground
7 Lease.

8
9 2.1.11. **Financing.** Developer shall diligently seek and obtain all financing
10 (debt and equity) in sufficient amounts and at such prices, rates, and
11 terms and from sources adequate to complete the Project in
12 accordance with this Agreement. As soon as reasonably practical
13 following the completion of permitting, design, construction plans and
14 construction pricing for the Project and in all events no later than sixty
15 (60) days prior to the anticipated date of Closing, Developer shall
16 provide the City with commitments for such financing for review and
17 approval by the City, not to be unreasonably withheld, conditioned or
18 delayed. The City's review and approval of such proposed financing
19 shall primarily focus on verifying that (i) the proposed financing
20 contains sufficient amounts of debt and equity to fund the total costs
21 of development and construction of the Project as set forth in the
22 Project Budget, and (ii) any equity investors are Eligible Investors (as
23 defined below). Prior to the submission of the Application to the
24 National Park Service, the Developer shall provide the City with
25 written expressions of interest from at least one prospective lender
26 and at least one prospective equity investor as evidence of their
27 interest in providing debt and equity to fund the development of the
28 Project subject to the City's review and approval, not to be
29 unreasonably withheld, conditioned or delayed.

30
31 2.1.12. **Development Schedule and Construction of Project.** A
32 preliminary Development Schedule is attached hereto as Exhibit C.
33 The Developer shall diligently prosecute to completion the design
34 and construction of the Project in accordance with the Development
35 Schedule and shall substantially complete such construction within
36 thirty (30) months after the execution of the Ground Lease, but
37 subject to excusable delays (force majeure) and such other terms
38 and conditions as may be more particularly set forth in the Ground
39 Lease. The parties shall agree on a final Development Schedule prior
40 to execution of the Ground Lease and such the Development
41 Schedule shall be incorporated into the Ground Lease.

42
43 2.1.13. **Performance and Completion Bonds; Security.** Prior to
44 commencing construction of the Project, Developer shall furnish the
45 City with payment and performance bonds assuring completion of
46 the Project from a recognized surety company having an AM Best

1 rating of A or as otherwise required under the Ground Lease, or such
2 other form of subcontractor insurance or security, as may be
3 acceptable to the City in its sole but reasonable determination, and
4 as shall be more particularly set forth in the Ground Lease.
5

6 2.1.14. **Guaranties.** Prior to commencing construction of the Project,
7 Developer shall furnish the City with a completion guaranty of the
8 Project from the Completion Guarantor for a period expiring upon the
9 issuance by the City of the final certificate of occupancy for the full
10 Project buildout (the "Completion Guaranty") and a guaranty from the
11 Limited Guarantor of the Ground Lease, limited to (1) all Preservation
12 Restrictions, Historic Surplus Property Program Requirements, and
13 all other such historic and preservation terms and conditions for the
14 benefit of the National Park Service in the approved Application (but
15 not other terms and conditions as between Developer and the City),
16 and (2) any environmental indemnities and obligations contained
17 therein (the "Limited Guaranty"). These guaranties shall be provided
18 by the Guarantors upon terms and conditions to be set forth in the
19 Ground Lease.
20

21 2.1.15. **Reasonable Profit.** Developer understands, recognizes and
22 agrees that the Application will not be approved by the National Park
23 Service unless it expressly provides that all income received by the
24 Developer in excess of costs of repair, rehabilitation, restoration,
25 maintenance, and a specified reasonable profit or payment that may
26 accrue to a lessor, sublessor, or developer in connection with the
27 management, operation, or development of the Property for revenue
28 producing activities, must be used only for public historic
29 preservation, park, or recreational purposes. Specific details of the
30 financial plan, Developer's reasonable profit, and how any "excess"
31 funds will be spent will be negotiated and agreed to by Developer
32 and the City prior to submitting the Application. Such terms and
33 conditions will be incorporated into the Ground Lease. If the National
34 Park Service does not approve the proposal for the calculation of
35 Developer's reasonable profit as set forth in the Application,
36 Developer shall have right to terminate this Agreement, in which
37 event the Deposit (and all interest earned thereon) shall be promptly
38 refunded and the parties shall have no further rights or
39 responsibilities hereunder except those expressly stated to survive
40

41 2.1.16. **Public Review and Input.** Developer understands that the Project
42 will be subject to public review and comment as the state and local
43 permitting process and the design and regulatory processes move
44 forward. If, after receiving additional public input and comments from
45 regulatory authorities and agencies, Developer proposes making
46 material changes to the Project and the City does not approve such

1 proposed changes (which approval by the City shall not be
2 unreasonably withheld, conditioned or delayed), then unless
3 Developer withdraws such proposed changes, either party may
4 terminate this Agreement and the Developer shall receive a refund
5 of its Deposit, (and all interest earned thereon) and the Parties shall
6 have no further rights or obligations hereunder except those
7 expressly stated to survive.
8

9 2.1.17. **Restrictions on Use.** The allowed uses of the Project shall be
10 specified in the Ground Lease but shall be consistent with the intent
11 of the RFP and Developer's response thereto. All uses and
12 associated with rehabilitation of the Property must also comply with
13 Secretary of the Interior's Standards for Rehabilitation and any
14 specific provisions in the Preservation Restrictions and/or the deed
15 to the City of the Property.
16

17 2.1.18. **Permits and Approvals.** Developer agrees to use good faith,
18 diligent efforts to apply for and obtain all required Development
19 Permits and Approvals at its sole cost and expense. Prior to applying
20 for any Development Permits and Approvals, Developer shall
21 provide the City with copies of proposed draft plans and applications
22 for the City's review, comment and approval (such approval not to be
23 unreasonably withheld, conditioned or delayed), and, in the case of
24 applications, the City's execution as a co-applicant to the extent
25 required, or if the City so elects. A preliminary list of anticipated
26 Permits and Approvals is attached hereto as Exhibit D. The City
27 agrees to review all such draft plans and applications with
28 reasonable promptness. Developer agrees that the first meeting in
29 connection with seeking Permits and Approvals for the Project shall
30 be with the Portsmouth Historic District Commission. The Parties
31 recognize that as of the date of this Agreement, the first meeting with
32 the Portsmouth Historic District Commission has already occurred
33 but that review process remains to be completed.
34

35 2.1.19. **Project Name.** The City shall have the right to review and comment
36 on, but not approve, the Project name, which Developer shall
37 determine following consultation with the City.
38

39 2.1.20. **Public Spaces and Amenities.** Developer shall cooperate with the
40 City to implement public and City sponsored arts, functions, concerts,
41 events and other community and cultural programming, within the
42 public realm spaces and amenities which are part of the Project.
43 Specific details shall be included in the Ground Lease.
44

45 2.1.21. **Project Changes.** After Closing and prior to completion of
46 construction of the Project, Developer shall make no material

1 changes to the exterior design of or allowed uses within Project
2 without the prior written approval of the City and, if and to the extent
3 necessary, the GSA and/or the National Park Service, as shall be
4 more particularly set forth in the Ground Lease. The Ground Lease
5 shall specify what changes may be made to the Project by the
6 Developer following completion of construction.

7
8 2.1.22. **Transfers.** After delivery of the deed and prior to the completion of
9 the construction of the Project, no legal or beneficial interest (which
10 term shall be deemed to include successors in interest of such
11 interest) shall be transferred except in accordance with the
12 requirements and limitations to be set forth in the Ground Lease.
13 Notwithstanding the foregoing, the Developer shall have the right to
14 mortgage its leasehold interest in the Ground Lease to secure the
15 payment of any loan obtained by the Developer to finance the
16 development, construction, and operation of the Project. The
17 Ground Lease shall contain customary provisions with respect to the
18 rights of any such mortgage lenders and such lenders' obligations
19 with respect to the Project in the event of a foreclosure of their
20 mortgage. Following completion of construction of the Project, the
21 restriction on transfers shall be relaxed as more particularly
22 described in the Ground Lease. Prior to Closing, Developer may
23 admit one or more additional investors, provided that (i) The Kane
24 Company and Redgate Holdings, LLC continue to control Developer
25 (subject to customary major decision rights in favor of such
26 investors), and (ii) such investors are Eligible Investors. The term
27 "Eligible Investors" shall mean investors that are either (a)
28 institutional investors, or (b) investors who have not in the prior ten
29 (10) years been involved in litigation with the City, defaulted under
30 any agreements with the City, or failed to pay any taxes to the City
31 when due.

32
33 2.1.23. **Real Estate Taxes.** During the term of the Ground Lease, Developer
34 shall pay real estate taxes for the Property (including all structures
35 and improvements added by the Developer) to the extent required
36 under applicable law (including RSA Chapter 72:23, I (b)), as if the
37 Developer were the owner of fee simple title to the Property.

38
39 2.2. **Developer's Contingencies.** Developer's obligation to execute the Ground
40 Lease and undertake the Project shall be subject to the following
41 contingencies, the failure to satisfy any one of which shall give Developer any
42 of the options set forth below and, in addition, the right to withdraw from this
43 Agreement, after which Developer shall have no further obligation to the City.

44
45 2.2.1. **Due Diligence.**
46

1 **Due Diligence Period.** Developer has completed any and all
2 assessments, tests, studies, surveys, and research, at its sole cost
3 and expense, as Developer deemed necessary or appropriate,
4 including, but not limited to, environmental site assessments
5 (including soil and groundwater testing and sub-surface
6 explorations), real estate title reviews, boundary surveys, building
7 and property inspections, flood zone reviews and certifications,
8 reviews of all applicable governmental regulations and ordinances,
9 economic and financial feasibility studies, market studies,
10 engineering studies, geotechnical studies, parking and traffic
11 studies, as well as reviews to determine the adequacy and
12 availability of public and private utilities serving the Property.
13 Notwithstanding the foregoing, Developer has not been afforded an
14 opportunity to inspect the portion of the Property occupied by the
15 Federal Bureau of Investigation (the "FBI Space"). At Closing, the
16 Property shall be in substantially the same condition that it is in now,
17 excepting reasonable wear and tear and other damage or
18 deterioration that would not materially increase the Project Budget or
19 substantially delay the Development Schedule, and free from tenants
20 and occupants (the "Delivery Condition"). Developer shall have the
21 opportunity to visually inspect the entirety of the Property (including
22 the FBI Space) prior to Closing to confirm that the Property is in the
23 Delivery Condition. If either (i) the Property is not in the Delivery
24 Condition at Closing, or (ii) Developer's inspection reveals that the
25 scope of asbestos remediation within the FBI Space is materially
26 greater than other portions of the building inspected by Developer
27 and the cost to abate such asbestos or other unanticipated
28 conditions within the FBI Space is materially greater than
29 contemplated in the Project Budget, Developer shall have right to
30 terminate this Agreement, in which event the Deposit (and all interest
31 earned thereon) shall be promptly refunded and the parties shall
32 have no further rights or responsibilities hereunder except those
33 expressly stated to survive. In such event, the City shall receive from
34 Developer any and all third party due diligence materials (with
35 reliance rights) which are undertaken by Developer with respect to
36 the Property or the Project, in electronic format (AutoCADD, if
37 applicable) or other format requested by the City.

38
39 **Title Due Diligence – Special Provisions.** Developer performed a
40 title examination of the Property, and is reasonably satisfied that title
41 to the Property is good, marketable and insurable, and not otherwise
42 subject to any Liens, encumbrances, covenants or other restrictions
43 which would prevent Developer from using the Property for
44 Developer's Project ("Title Defects"). At the Closing, good and clear,
45 record and marketable leasehold title to the Property shall be
46 conveyed to Developer subject only to the deed granted by the GSA,

1 the Preservation Restrictions, the Ground Lease, and such
2 encumbrances, covenants or other restrictions that existed of record
3 prior to [*insert effective date of Developer's title insurance*
4 *commitment prior to execution*], 2019 ("Permitted Encumbrances").
5 It shall be a condition to Closing that Developer be able to obtain a
6 customary leasehold title insurance policy with appropriate coverage
7 insuring leasehold title to the Property in Developer, subject only to
8 the Permitted Encumbrances and with the standard exceptions
9 (including the exceptions for mechanic's liens and parties in
10 possession) deleted (the "Title Insurance Policy"). In the event that
11 the City is unable or otherwise unwilling to provide good, marketable
12 and insurable title, or Developer is unable to obtain the Title
13 Insurance Policy, then Developer, at its sole option, may proceed
14 with any of the following options:
15

- 16 i. Afford the City additional time to cure said title defects;
- 17
- 18 ii. Terminate this Agreement and receive a full refund of its
19 Deposit (and all interest earned thereon); or,
20
- 21 iii. The Parties may renegotiate the Ground Rent to
22 appropriately account for the condition of title to the
23 Property, and then proceed to Closing.
24

25 **Environmental Due Diligence – Special Provisions.**

26 Developer conducted such studies and investigations as it
27 deemed necessary with respect to the environmental condition of
28 the Property and any environmental contamination or hazardous
29 material related thereto. In connection therewith, Developer
30 obtained for the following environment reports, studies and
31 assessments with respect to the Property (the "Environmental
32 Reports"): Phase I Environmental Site Assessment – Sanborn
33 Head; Geotechnical Due Diligence Summary Memorandum –
34 Sanborn Head; Hazardous Buildings Materials Survey – AXIOM
35 Partners; Property Condition Assessment – Simpson Gumpertz
36 & Heger, Inc.; and Land Survey – Tighe & Bond. All
37 environmental due diligence shall comply with the EPA's All
38 Appropriate Inquiry Rule and ASTM E1527-13 Standard.
39

40 Developer performed these tasks at its own risk and at its own
41 expense. Developer accepts full responsibility for the use of the
42 Property during its inspections and due diligence, and
43 acknowledges that such access is subject to the indemnity
44 provisions of Section 1.5.
45

1 If prior to Closing Developer discovers environmental
2 contamination or hazardous materials on or impacting the
3 Property or the development thereof that were not identified in the
4 Environmental Reports (whether such matters be pre-existing
5 conditions or caused by a new spill), and the remediation of such
6 environmental contamination or hazardous materials would
7 materially increase the Project Budget, substantially delay the
8 Development Schedule or materially limit the permitted uses of
9 the Property, Developer shall have the following options, as
10 follows:

- 11
- 12 i. Terminate this Agreement and receive a full refund of its
13 Deposit (and all interest earned thereon); or,
- 14
- 15 ii. Accept the Property in its “as is condition” and proceed to
16 Closing, subject to other contingencies as set forth within
17 this Agreement. If Developer proceeds to Closing,
18 Developer shall accept full responsibility for the Property in
19 its “as is, where is” environmental condition with respect to
20 the potential presence of hazardous waste or other buried
21 materials regardless whether such waste or other materials
22 were identified by said due diligence, tests, studies, or
23 investigations.
- 24

25 2.2.2. **Development Approvals and Permits.** This Agreement is
26 contingent upon Developer, at its sole cost and expense, obtaining
27 any and all required Development Permits and Approvals from
28 applicable governmental agencies (including without limitation the
29 full building permit necessary for construction of the Project), upon
30 such terms and conditions as are satisfactory to Developer in its
31 reasonable discretion, for the Project. A preliminary list of anticipated
32 permits and approvals is attached hereto as Exhibit D.

33

34 Developer agrees to use good faith, diligent efforts to apply for and
35 obtain all required development permits and approvals. Prior to
36 applying for any development permits and approvals, Developer
37 shall provide the City with copies of proposed draft plans and
38 applications for the City’s review and approval (such approval not to
39 be unreasonably withheld, conditioned or delayed) pursuant to
40 Section 2.1.18, and, in the case of applications, the City’s execution
41 as a co-applicant to the extent required or if the City so elects.

42

43 The City shall cooperate in the prosecution of such Development
44 Permits and Approvals, including the execution of any and all letters,
45 consents and permit applications, the attendance by City Staff at all
46 hearings, and the submission of oral and written testimony in support

1 of Developer's Project to the applicable land use boards or agencies,
2 to permit Developer to seek and obtain all development permits and
3 approvals. All Development Permits and Approvals, including any
4 conditions affecting the same, must be satisfactory to Developer and
5 the City in their reasonable discretion (provided that the City shall not
6 object to any such approvals that do not materially differ from the
7 RFP or the Application). Developer shall diligently endeavor to
8 receive such development permits and approvals within the time
9 frames established by the Development Schedule set forth in Exhibit
10 C of this Agreement. In the event that Developer, despite good faith
11 efforts, has not received all required Development Permits and
12 Approvals by the Outside Closing Date (as defined below),
13 Developer may extend the Outside Closing Date by up to six (6)
14 months, provided that Developer continues to actively prosecute
15 such Development Permits and Approvals.

16
17 Developer shall provide the City with regular status updates about
18 information concerning the prosecution of Development Permits and
19 Approvals.
20

21 The following terms and conditions shall govern Developer's Deposit
22 in relation to securing permits and approvals for Developer's Project:
23

24 a) In the event the City denies any of Developer's applications
25 for permits and approvals, then Developer may terminate this
26 Agreement and shall receive a full refund of the Deposit, including
27 interest earnings, following which this Agreement shall be null and
28 void, and of no further force or effect.
29

30 b) In the event any other governmental entity, other than the City
31 of Portsmouth, denies any of Developer's applications for permits
32 and approvals, then Developer may terminate this Agreement and
33 shall receive a full refund of the Deposit, including all interest
34 earnings, following which this Agreement shall be null and void, and
35 of no further force or effect.
36

37 c) In the event an aggrieved individual appeals any permits or
38 approvals issued for Developer's Project, and the aggrieved
39 individual's appeal prevails, then Developer may terminate this
40 Agreement and shall receive a full refund of the Deposit, including all
41 interest earnings, following which this Agreement shall be null and
42 void, and of no further force or effect.
43

44 d) In the event an aggrieved individual appeals any permits or
45 approvals issued for Developer's Project and Developer elects not to
46 contest or defend such appeal, then Developer may terminate this

1 Agreement and shall receive a full refund of the Deposit, including all
2 interest earnings, following which this Agreement shall be null and
3 void, and of no further force or effect.
4

5 e) During the period after the National Park Service approves the
6 Application, but prior to satisfying the Closing Contingencies, to
7 expedite progress on development of the Project, if Developer
8 requests that the Closing be advanced prior to satisfaction of the
9 Closing Contingencies, then the City shall take steps to acquire the
10 Property and if the City does in fact acquire the Property, then the
11 City and the Developer will execute the Ground Lease with an
12 Addendum which will cover the interim period between execution of
13 the Ground Lease and the date all Closing Contingencies have been
14 satisfied. During that interim period: (i) the Developer will be
15 responsible for all obligations owed to the National Park Service
16 pursuant to the Application or the Deed and for securing, maintaining
17 and insuring the Property, (ii) subject to the terms of the Ground
18 Lease, the Developer will be allowed to enter leases, including,
19 without limitation, any space in the existing building on the Property
20 in compliance with any required environmental remediation and/or
21 asbestos removal, and to operate or lease the parking areas on the
22 Property, all in accordance with all applicable laws, regulations, and
23 building and health and life safety codes, (iii) except as may be
24 required by the National Park Service, no improvements to the
25 Property shall be made other than improvements to the existing
26 building and other appropriate repairs and maintenance,
27 environmental remediation and/or asbestos removal, and (iv) the
28 Developer will be required to pay real estate taxes on the Property,
29 but not base rent. Once all Closing Contingencies have been
30 satisfied, the Addendum will terminate and the Ground Lease will
31 commence within a 75 year term, etc. If the interim period lasts for
32 more than 12 months then (i) Developer shall provide an accounting
33 of operating expenses, taxes, insurance expenses, debt service
34 payments, other expenses and income and (ii) twenty five percent
35 (25%) of Developer's actual income in excess of such expenses
36 incurred (but in no event more than \$49,650 annually) will be paid by
37 Developer to the City.
38

39 f) In the event Developer fails to apply for permits and approvals
40 following the foregoing review and comment process with the City,
41 or otherwise fails to diligently pursue such permits and approvals,
42 and does not cure such failure within thirty (30) days of Developer's
43 receipt of notice from the City of default under this paragraph, then
44 the City may terminate this Agreement and Developer shall forfeit its
45 Deposit, including interest earnings, following which this Agreement
46 shall be null and void, and of no further force or effect.

1
2 2.2.3. **Financing.** This Agreement is specifically contingent upon
3 Developer obtaining financing (debt and equity) in sufficient amounts
4 and from sources that are satisfactory to Developer and the City to
5 fund the total costs of development and construction of the Project
6 (the “Approved Financing”). The City’s review and approval of such
7 proposed financing shall primarily focus on verifying that (i) the
8 proposed financing contains sufficient amounts of debt and equity to
9 fund the total costs of development and construction of the Project
10 as set forth in the Project Budget, and (ii) any equity investors are
11 Eligible Investors. Prior to the submission of the Application to the
12 National Park Service, the Developer shall provide the City with
13 written expressions of interest from at least one prospective lender
14 and at least one prospective equity investor as evidence of their
15 interest in providing debt and equity to fund the development of the
16 Project subject to the City’s review and approval, not to be
17 unreasonably withheld, conditioned or delayed. If Developer is not
18 able to obtain the Approved Financing on or before the Outside
19 Closing Date, then either party may elect to terminate this
20 Agreement, in which case Developer shall forfeit its Deposit,
21 including interest earnings.
22

23 2.2.4. **Approval of Application by National Park Service.** This
24 Agreement is specifically contingent upon approval of the Application
25 by the National Park Service, such approval not to contain any
26 unanticipated material conditions, limitations, obligations or
27 restrictions (including the terms of the required Preservation
28 Restrictions) not set forth in the Application that would materially
29 increase the Development Budget, substantially delay the Project
30 Schedule, substantially increase the cost to operate the Project, or
31 materially limit the uses allowed on the Property and the revenue
32 producing activities contemplated by Developer. If the Application is
33 not approved, or if the approval or the Preservation Restrictions
34 contain such material conditions, limitations, obligations or
35 restrictions not set forth in the Application, then Developer may
36 terminate this Agreement and shall receive a full refund of the
37 Deposit, including all interest earnings, following which this
38 Agreement shall be null and void, and of no further force or effect
39

40 2.2.5. **City’s Responsibilities.** This Agreement is specifically contingent
41 upon the City completing its responsibilities as set forth within
42 Section 3.1 and otherwise pursuant to this Agreement. If the City fails
43 to fulfill any of its material responsibilities or otherwise is in material
44 breach of this Agreement after notice and opportunity to cure as
45 provided herein, then the City shall be in default under this

1 Agreement and Developer shall have the remedies set forth in
2 Section 7.2 hereof.

3
4 **3. CITY'S RESPONSIBILITIES, AGREEMENTS, COVENANTS AND**
5 **CONTINGENCIES**

6
7 3.1. **City's Responsibilities.**

8
9 3.1.1. **Public Input.** The City has coordinated a process for additional
10 public review and input on the Project. The Developer and the City
11 shall give due consideration to all such public input when preparing
12 the Application. Notwithstanding the foregoing, such understanding
13 shall not limit each party's right to review and approve the final form
14 and contents of the Application.

15
16 3.1.2. **City Council Approval.** Developer recognizes that this Agreement,
17 the Application and the form of Ground Lease, is subject to review
18 and approval by the City Council.

19
20 3.1.3. **National Park Service Application.** The City shall cooperate with
21 the Developer in preparing the National Park Service "Application to
22 Obtain Real Property for Historical Monument Purposes" to be
23 submitted by the City to the NPS and as further described in Section
24 2.1.6.

25
26 3.1.4. **Acquisition of Property from GSA.** The City shall use good faith
27 diligent efforts, in consultation and cooperation with Developer, to
28 acquire the Property from the GSA in accordance with the terms and
29 conditions of the Application and/or such other terms and conditions
30 as may be acceptable to the City.

31
32 3.1.5. **Ground Lease.** During the Application Period, the City shall
33 negotiate in good faith with the Developer the terms and conditions
34 of the Ground Lease. The Ground Lease will contain the terms and
35 conditions described in Section 2.1.8 and Exhibit F, as well as other
36 applicable terms and provisions. If the Parties are unable to reach
37 agreement on the Ground Lease prior to end of the Application
38 Period, then either party may terminate this Agreement in which
39 event the Deposit shall be promptly refunded and the parties shall
40 have no further rights or responsibilities hereunder except those
41 expressly stated to survive.

42
43 3.2. **City's Contingencies.** In addition to the contingencies set forth in Section
44 3.1 of this Agreement, the City's obligation to execute the Ground Lease of
45 the Property shall be subject to the following additional contingencies, the
46

1 failure to satisfy any one of which shall give the City any of the options set
2 forth below and, in addition, the right to withdraw from this Agreement after
3 which the City shall have no further obligation to Developer.
4

5 3.2.1. **Developer's Financing.** This Agreement is specifically contingent
6 upon Developer obtaining the Approved Financing, as more
7 particularly set forth in Section 2.2.3 above.
8

9 3.2.2. **Developer's Development Permits and Approvals.** This
10 Agreement is specifically contingent upon Developer, at its sole cost
11 and expense, obtaining any and all required Development Approvals
12 and Permits (but with cooperation from the City as provided herein)
13 from applicable governmental agencies (including without limitation
14 the full building permit for the Project). Developer's application for
15 Development Approvals and Permits shall be subject to the City's
16 review and, if applicable, approval pursuant to Section 2.1.18 hereof.
17 If Developer delivers notice to the City that Developer is unable to
18 secure said approvals and permits prior to the Closing, the City may
19 elect to terminate this Agreement, in which event Developer's
20 Deposit shall be handled as set forth within Section 2.2.2 of this
21 Agreement.
22

23 3.2.3. **Infrastructure Improvements.** This Agreement is specifically
24 contingent upon Developer being solely responsible for any and all
25 infrastructure improvements that might be required for Developer's
26 Project, as more particularly set forth in and limited by Section 2.1.2
27 above.
28

29 3.2.4 **No Adverse Change.** This Agreement is specifically contingent on
30 there being no material adverse change between now and the time
31 for Closing in the Developer or its ability to construct and manage the
32 Project that is not reasonably addressed by Developer within thirty
33 (30) days of receipt of written notice from the City of change (or such
34 longer period as may be reasonable under the circumstances).
35

36 3.2.5. **Developer's Responsibilities.** This Agreement is specifically
37 contingent upon Developer completing its responsibilities as set forth
38 within Section 2.1 and otherwise pursuant to this Agreement. If
39 Developer fails to fulfill any of its responsibilities or otherwise is in
40 breach of this Agreement after notice and opportunity to cure as
41 provided herein, then Developer shall be in default under this
42 Agreement and the City shall have the remedies set forth in Section
43 7.1 hereof.
44

45 **4. DESCRIPTION OF PROPERTY AND GROUND LEASE TRANSACTION**
46

1 4.1. **Deposit.** Upon execution of this Agreement, Developer shall provide a
2 deposit in the amount of Four Hundred Thousand Dollars (\$400,000.00). The
3 deposit shall be held by Hinckley Allen as Escrow Agent, in an interest-
4 bearing account in accordance with Section 8.19. If either party elects to
5 terminate this Agreement in accordance with its terms, the Deposit shall be
6 handled as provided herein. In the event Developer elects to proceed to
7 Closing, the Deposit, together with interest earnings, shall be applied as set
8 forth in the Ground Lease. If Developer terminates this Agreement (other than
9 pursuant to a default by the City) or defaults under this Agreement, then
10 Developer shall in all instances assign to the City (i) any and all third party
11 due diligence materials (with reliance rights) which are undertaken by
12 Developer with respect to the Property or the Project, in electronic format or
13 other format requested by the City, (ii) Developer's rights under the
14 Development Permits and Approvals, and (iii) Developer's rights to any and
15 all plans and specifications prepared for the Project.
16

17 4.2. **Access to Property.** The City, to the fullest extent practical, shall assist
18 Developer, its employees, representatives, consultants, and agents in
19 obtaining access to enter the Property during the term of this Agreement for
20 the purpose of completing due diligence and for all other purposes necessary
21 to carry out the terms of this Agreement. The Developer understands and
22 recognizes that the City does not own the Property and that access will need
23 to be coordinated with the GSA. Notwithstanding the foregoing, the Developer
24 shall be afforded an opportunity prior to Closing to visually inspect the entirety
25 of the Property (including the FBI Space) after all tenants and occupants have
26 vacated.
27

28 Developer shall defend, indemnify and hold harmless the City and its officials,
29 agents and employees (collectively, the "*Indemnified Parties*"), from and
30 against all loss, damage, expense, liability and other claims, including court
31 costs and reasonable attorneys' fees (collectively, "*Liabilities*") resulting from
32 any third party action relating to this paragraph regarding Developer's
33 inspection of the Property and from injury to or death of persons, and damage
34 to or loss of property to the extent caused by or arising out of the negligent
35 acts or omissions of, or the willful misconduct of, Developer (or its contractors,
36 agents or employees) in connection with this paragraph; provided, however,
37 that nothing herein shall require Developer to indemnify the Indemnified
38 Parties for any Liabilities to the extent caused by or arising out of the negligent
39 acts or omissions of, or the willful misconduct of the City. Additionally, to the
40 fullest extent permitted by law, no official, employee, agent, direct or indirect
41 owner, member, manager, officer, beneficiary or representative of the City or
42 Developer shall be individually or personally liable for any obligation or liability
43 of Developer under this paragraph. This paragraph shall survive any
44 termination of this Agreement. During Developer's inspection of the Property,
45 Developer shall have in force, general liability insurance, naming the City as
46 an additional insured, by written endorsement without a waiver of

1 subrogation, with respect to commercial general liability, as it pertains to this
2 paragraph, in an amount not less than the amount of \$2 million in the
3 aggregate and \$1 million per incident or occurrence. Developer shall also
4 require that any and all contractors who it retains for the purpose of
5 completing due diligence or for any other purpose necessary to carry out the
6 terms of this paragraph, and who access the Property, to obtain a certificate
7 of insurance in the amount of \$1 million in the aggregate, \$1 million per
8 occurrence naming the City as an additional insured by written endorsement
9 without a waiver of subrogation, with respect to commercial general liability,
10 as it pertains to this paragraph.

11
12 4.3. **Closing.** For purposes of this Development Agreement, the “Closing” shall
13 mean the execution and delivery by both Parties of the Ground Lease.
14 Closing may occur at any time once the foregoing conditions and
15 contingencies have been achieved and all occupants have completely
16 vacated the Property. The parties have established February 25, 2020 as the
17 target date for the Closing, as set forth within the Development Schedule
18 included as Exhibit C within this Agreement. However, in no event shall the
19 Closing occur later than the date that is twelve (12) months after the date
20 Developer has obtained the Development Permits and Approvals (the
21 “Outside Closing Date”). Notwithstanding the preceding sentence, the
22 Closing shall be extended in the event of certain delays as set forth within
23 Section 2.2.2 and Section 5.2 of this Agreement, or in the event it takes
24 additional time to acquire the Property from the GSA free of all occupants.

25
26 The Parties agree that all Closing documents, including the Ground Lease
27 and other Closing documents, shall not become effective unless and until
28 they are executed and delivered by the parties, which shall not occur until all
29 of Developer’s and the City’s respective responsibilities and contingencies
30 within Articles 2 and 3, respectively, and elsewhere in this Agreement have
31 been achieved, satisfied, or otherwise waived in writing.

32
33 In the event that any Closing conditions or contingencies have not been
34 satisfied on or before the Outside Closing Date, then, except as may
35 otherwise be provided in this Agreement, either party may terminate this
36 Agreement, in which event the Deposit and all interest earned thereon shall
37 be forthwith returned to Developer, this Agreement shall be null and void and
38 the Parties shall have no further rights or obligations herein.

39
40 4.4. **Title and Deed Restrictions.** The City shall lease the Property to Developer
41 pursuant to the Ground Lease. In addition to the terms and conditions set
42 forth within this Agreement, the Ground Lease shall provide Developer with
43 good, marketable and insurable leasehold title to the Property as referenced
44 in Section 2.2 of this Agreement subject to the Preservation Restrictions and
45 provisions in the deed of the Property to the City.

1 4.5. **City's Affidavits and Certificates.** To the extent applicable and if requested
2 to do so by Developer, the City, at the Closing, shall deliver such affidavits (in
3 customary form) as may be required by Developer or Developer's title
4 insurance company with respect to: (1) Parties in possession of the Property,
5 (2) rights of third Parties and title claims in or to the Property, (3) mechanic's
6 and materialmen's liens affecting the Property, (4) authority of the City, and
7 all signatories for the City, to enter the Ground Lease and otherwise
8 consummate this transaction, and (5) such other matters as are customarily
9 required by the grantor of the real property interest being insured. All such
10 requested affidavits and certificates shall be provided to the City at least five
11 (5) business days in advance of the closing.
12

13 4.6. **Ground Lease.** The Ground Lease shall be negotiated and finalized by the
14 Parties during the Application Period. The Parties shall enter into a long-term
15 ground lease of the Property at Closing. The basic terms of the Ground Lease
16 are set forth in Exhibit F attached hereto. The Ground Lease shall contain
17 without limitation, the following terms and provisions: (i) the scope of the
18 Developer's initial construction and rehab obligations; (ii) environmental; (iii)
19 construction schedule; (iv) Developer financing rights and obligations; (v)
20 form of security and guarantees for completion of Developer's construction
21 work; (vi) the approved plan for Developer's rehabilitation, restoration,
22 maintenance and operation of the Property; (vii) events of default and
23 remedies; (viii) definition of the Developer's "reasonable profit" under
24 applicable federal law; etc.; (ix) term; (x) base rent; (xi) additional rent; (xii)
25 maintenance and operation requirements; (xiii) insurance requirements; (xiv)
26 events of default and remedies; (xv) use restrictions and covenants; (xvi) end
27 of term rights and responsibilities; (xvii) transfer restrictions; (xviii) assumption
28 by tenant of all obligations under the Federal Historic Monument Program
29 with respect to the Property including the rehabilitation, operation,
30 management and maintenance of the Property. The Ground Lease shall
31 contain the agreed-upon methodology for calculating the various components
32 of all income to be paid to the City together with examples of such
33 calculations. If the Parties in the Ground Lease are unable to reach
34 agreement, then either party may terminate this Agreement, in which event
35 the Deposit shall be promptly refunded to Developer and the Parties shall
36 have no further rights or obligations hereunder except those expressly stated
37 to survive.
38

39 Upon acquisition of the Property from the GSA, the City shall ground lease
40 the Property to Developer subject of the terms and conditions of the Ground
41 Lease. The Ground Lease must be approved by the National Park Service
42 under the Historic Surplus Property Program. Neither the City nor Developer
43 shall be obligated to execute the Ground Lease until such time as all Closing
44 conditions and contingencies have been satisfied and Developer informs the
45 City in writing that Developer has:
46

- 1 • Completed all due diligence for Developer's Project and
2 determined that the results of such diligence are favorable for
3 development of Developer's Project;
- 4
- 5 • Secured all Development Permits and Approvals for Developer's
6 Project;
- 7
- 8 • Secured the Approved Financing; and
- 9
- 10 • Secured estimates from qualified Construction Managers or
11 General Contractors for Developer's Project which are within
12 Developer's budget for Developer's Project.
- 13
- 14

15 During the term of the Ground Lease, Developer will be responsible for all
16 financial aspects of renovating the Property, including such repairs and
17 other work as necessary to effect restoration thereof in accordance with the
18 Secretary of the Interior's Standards, this Agreement, and the Ground
19 Lease, and shall be responsible for any other repairs, maintenance or
20 improvements.

21

22 During the term of the Ground Lease, and except as provided in the Ground
23 Lease, Developer shall be responsible for all aspects of operation of the
24 Property, including, without limitation, leasing, marketing, maintenance,
25 utilities and upkeep.

26

27 The Preservation Restrictions and the Deed to the City will contain a
28 requirement that, if the Property is used for income-producing activities,
29 certain auditing and reporting requirements apply with respect to the activity.
30 The Parties acknowledge that these auditing and reporting requirements are
31 binding on the City, and that Developer, its successors and assigns, will
32 likewise be bound under the Ground Lease. Developer shall fulfill these
33 auditing and reporting requirements, as required by all applicable laws and
34 regulations. Where applicable laws and regulations require the City to fulfill
35 said auditing and reporting requirements, Developer agrees to assist the
36 City in so doing. Developer agrees to make its financial books and records
37 available for inspection by the City from time to time as may be necessary to
38 ensure compliance with the financial aspects of the Preservation
39 Restrictions, as shall be more specifically set forth in the Ground Lease.

40

41 4.7. **Delivery of Property.** The City shall deliver possession of the Property to
42 Developer at the commencement of the Ground Lease in its "as is, where is"
43 condition, in accordance with the terms of this Agreement.

44

45 4.8. **Real Estate Broker's Fees & Commissions.** The City represents to
46 Developer, and Developer represents to the City, that it has not engaged a

1 broker, and no commission or other such fee is due to any party, in connection
2 with the Closing of this transaction.

3
4 4.9. **City's Disclosures.** The City makes no warranties or representations
5 regarding environmental contamination or sub-surface environmental or
6 geotechnical conditions at the Property. The Developer agrees that leasehold
7 title to the Property will be conveyed in "as is" condition.

8
9 4.10. **Casualty.** In the event that the Property, prior to Closing, is damaged by fire,
10 flood, collapse, or other casualty, Developer may, within thirty days after
11 receiving written notice of the occurrence of such damage or casualty, elect
12 to terminate this Agreement, in which event all other obligations of the Parties
13 hereunder shall cease, the Developer's Deposit shall be returned to
14 Developer in full, including interest earnings therewith, and the Parties shall
15 have no further rights or obligations hereunder except those expressly stated
16 to survive.

17 18 5. **DEVELOPMENT SCHEDULE**

19
20 5.1. **General.** Attached to this Agreement is a Development Schedule (Exhibit C)
21 showing the anticipated date and sequence of various elements of the Project
22 to be completed by Developer and the City. The Parties acknowledge that the
23 Development Schedule is a complex schedule requiring the coordinated
24 efforts of multiple Parties and dependent in many instances on the actions or
25 approvals of third Parties, and accordingly is expected to evolve during the
26 parties' pursuit of the Project. The parties shall update the Development
27 Schedule from time to time, each acting reasonably and in good faith. The
28 Parties agree to use diligent efforts and to cooperate with each other in
29 undertaking their respective responsibilities under this Agreement, including,
30 but not limited to, those events listed in Exhibit C. The Parties agree that time
31 is of the essence in performance of their respective obligations under this
32 Agreement. Developer and the City acknowledge that the completion of the
33 Development Schedule is dependent on events to be determined following
34 the approval of this Agreement by the City Council. The City Council hereby
35 gives the Deputy City Manager the sole authority to negotiate the final
36 elements, terms, conditions, milestones, and timeframes for Exhibit C.

37
38 5.2. **Force Majeure / Excusable Delays.** For purposes of this Agreement, Force
39 Majeure Delays shall mean occurrences whereby Developer shall not be
40 considered in breach of or default in its obligations under this Agreement in
41 the event of unavoidable delay in the performance of such obligations due to
42 causes beyond its control and without its fault or negligence, including but not
43 limited to, acts of God, or of the public enemy, acts of the other party, fires,
44 floods, or other casualties, epidemics, quarantine restrictions, litigation,
45 delays stemming from unusually severe weather, or delays in obtaining any
46 Development Permits and Approvals; it being the purpose and intent of this

1 provision that in the event of the occurrence of any such enforced delay, the
2 time for commencement of construction and for performance of the
3 obligations thereunder by Developer shall be extended for the period of the
4 enforced delay, provided, that Developer, within thirty (30) days after the
5 beginning of any such enforced delay, has notified the City in writing stating
6 the cause or causes thereof and requesting an extension for the period of the
7 enforced delay.
8
9

10 **6. REPRESENTATIONS AND WARRANTIES**
11

12 6.1. **Representations and Warranties of the City.** The City hereby represents
13 and warrants to the best of its knowledge and belief that:

14
15 6.1.1. The execution and delivery of this Agreement and the performance
16 of the City's obligations hereunder have been duly authorized by
17 such municipal action as necessary, and this Agreement constitutes
18 the legal, valid and binding agreement of the City, enforceable
19 against the City in accordance with its terms subject only to the
20 conditions set out in this Agreement.
21

22 6.1.2. Subject to the conditions set out in this Agreement, neither the
23 execution or delivery by the City of this Agreement, the performance
24 by the City of its obligations in connection with the transactions
25 contemplated hereby, nor the fulfillment by the City of the terms or
26 conditions hereof conflicts with, violates or results in a breach of any
27 constitution, law or governmental regulation applicable to the City, or
28 conflicts with, violates or results in a breach of any term or condition
29 of any judgment or decree, or any agreement or instrument, to which
30 the City is a party or by which the City or any of its properties or
31 assets are bound, or constitutes a default thereunder.
32

33 6.1.3. There is no action, suit or proceeding, at law or in equity, or official
34 investigation before or by any court or Governmental Authority,
35 pending or threatened against the City, or to the City's knowledge
36 with respect to the Property, wherein an unfavorable decision, ruling
37 or finding would materially adversely affect the performance by the
38 City of its obligations hereunder or the performance by the City of its
39 obligations under the transactions contemplated hereby, or which, in
40 any way, questions or may adversely materially affect the validity or
41 enforceability of this Agreement, or any other agreement or
42 instrument entered into by the City in connection with the
43 transactions contemplated hereby.
44

45 6.2. **Representations and Warranties of Developer.** Developer hereby
46 represents and warrants to the best of its knowledge and belief that:

1
2 6.2.1. Developer has the power and authority to execute, deliver and carry
3 out the terms and provisions of this Agreement and all necessary
4 action has been taken to authorize the execution, delivery and
5 performance by it of this Agreement. This Agreement will, upon
6 execution and delivery thereof by Developer, constitute valid, legal
7 and binding obligations of Developer enforceable against Developer
8 in accordance with the respective terms thereof.
9

10 6.2.2. Neither the execution or delivery by Developer of this Agreement, the
11 performance by Developer of its obligations in connection with the
12 transactions contemplated hereby, nor the fulfillment by Developer
13 of the terms or conditions hereof conflicts with, violates or results in
14 a breach of any constitution, law or governmental regulation
15 applicable to Developer, or conflicts with, violates or results in a
16 breach of any term or condition of any judgment or decree, or any
17 agreement or instrument, to which Developer is a party or by which
18 Developer or any of its properties or assets are bound, or constitutes
19 a default there under.
20

21 6.2.3. [Intentionally Omitted].
22

23 6.2.4. There is no action, suit or proceeding, at law or in equity, or official
24 investigation before or by any court or Governmental Authority,
25 pending or threatened against Developer, its principal(s), affiliate(s),
26 or entities controlled by its principal(s), wherein an unfavorable
27 decision, ruling or finding would materially adversely affect the
28 performance by Developer of its obligations hereunder or the
29 performance by Developer of its obligations under the transactions
30 contemplated hereby, or which, in any way, questions or may
31 adversely materially affect the validity or enforceability of this
32 Agreement or any other agreement or instrument entered into by
33 Developer in connection with the transactions contemplated hereby.
34

35 **7. DEFAULT AND REMEDIES**

36 7.1. **Default by Developer.**

37
38
39 7.1.1. **Default by Developer before Closing.** If Developer shall fail to fulfill its
40 obligations hereunder prior to the Closing and such failure continues for thirty
41 (30) days after written notice from City (or such additional time as may be
42 reasonably required if such failure cannot be cured within said thirty (30) day
43 period provided that Developer is diligently pursuing said cure), then the
44 City's remedy shall be limited to its rights and remedies as set forth within the
45 specific Article, Section, or Sub-Section of this Agreement for which default
46 has occurred. However, if no rights or remedies are expressly defined within

1 the specific Article, Section, or Sub-Section in which the default occurred,
2 then the City shall have the right to terminate this Agreement and retain
3 Developer's Deposit including interest earnings related thereto which shall be
4 City's sole and exclusive remedy at law or in equity. In all instances involving
5 a default by the Developer, the Developer shall assign to the City (i) any and
6 all third party due diligence materials (with reliance rights) which are
7 undertaken by Developer with respect to the Property or the Project, in
8 electronic format (AutoCADD if applicable) or other format requested by the
9 City, (ii) Developer's rights under the Development Permits and Approvals,
10 and (iii) Developer's rights to any and all plans and specifications prepared
11 for the Project. The parties agree that the damages that will be suffered by
12 the City from a default by Developer hereunder will be difficult or impossible
13 to ascertain and that the Deposit together with receipt by the City of the above
14 described due diligence materials, permits and approvals and plans and
15 specifications is a reasonable estimate of the amount of such damages and
16 shall constitute the full, agreed and liquidated damages of the City for such
17 default.

18
19 7.1.2. **Default by Developer after Closing.** If Developer shall fail to fulfill
20 its obligations hereunder after the Closing, then the City's remedies
21 shall be as set forth in the Ground Lease.

22
23 7.2. **Default by City.** If the City shall fail to fulfill its obligations hereunder, and
24 such failure continues for thirty (30) days after written notice from Developer
25 (or such additional time as may be reasonable required if such failure cannot
26 be cured within said thirty (30) day period provided that City is diligently
27 pursuing said cure) then Developer's remedy shall be limited to its rights and
28 remedies as set forth within the specific Article, Section, or Sub-Section of
29 this Agreement for which default has occurred. However, if no rights or
30 remedies are expressly defined within the specific Article, Section, or Sub-
31 Section in which default occurred, then Developer shall have the right option
32 to (a) waive the default and proceed to Closing; or (b) give notice that it is
33 terminating this Agreement, in which event the Deposit and any interest shall
34 be immediately refunded to Developer, upon which neither party shall have
35 any further rights against the other under this Agreement; and/or (c) pursue
36 any and all rights it may have at law and in equity to address any such breach.
37 The remedies stated herein shall be cumulative.

38 39 **8. GENERAL PROVISIONS**

40
41 8.1. **Cooperation.** Developer and the City agree to cooperate with each other,
42 and to act reasonably and in good faith, in order to achieve the purposes of
43 this Agreement and, in connection therewith, to take such further actions and
44 to execute such further documents as may reasonably be requested by the
45 City, Developer, or their representatives, agents, consultants and any
46 prospective or actual lenders, investors or tenants.

- 1
2 8.2. **Entire Agreement; Amendments.** This Agreement embodies the entire
3 agreement and understanding between the Parties hereto relating to the
4 subject matter herein and supersedes all prior agreements and
5 understandings between the Parties (including without limitation the RFP and
6 the McIntyre Project Negotiating Principles). This Agreement may not be
7 changed, modified, waived, discharged or terminated orally, but only by an
8 instrument in writing signed by each of the Parties hereto or by the party
9 against which enforcement is sought. Any change, modification or
10 amendment, which requires the consent or approval of a Governmental
11 Authority, shall be effective only upon receipt of such approval.
12
- 13 8.3. **Binding Effect; Successors and Assignors.** The terms and provisions of
14 this Agreement and the respective rights and obligations of the Parties
15 hereunder shall be binding upon, and inure to the benefit of, their respective
16 heirs, successors, assigns, and nominees. The Developer shall not have the
17 right to assign this Agreement without the prior written consent of the City
18 which may be withheld in the City's sole discretion.
19
- 20 8.4. **Headings.** The headings to the sections and subsections of this Agreement
21 have been inserted for convenience of reference only and shall not modify,
22 define, limit or expand the express provisions of this Agreement.
23
- 24 8.5. **Exhibits.** All exhibits referred to in this Agreement are hereby incorporated
25 by reference and expressly made a part hereof.
26
- 27 8.6. **Governing Law.** This Agreement shall in all respects be governed by, and
28 construed and enforced in accordance with, the laws of the State of New
29 Hampshire.
30
- 31 8.7. **Enforceability and Severability.** Any provision of this Agreement that is
32 determined to be illegal or unenforceable by a court of competent jurisdiction,
33 shall be ineffective to the extent of such prohibition or unenforceability without
34 invalidating the remaining provisions hereof.
35
- 36 8.8. **Consent to Jurisdiction and Venue.** Developer and City submit to the
37 jurisdiction of the courts of the State of New Hampshire and the courts from
38 which an appeal from such trial venue may be taken or other relief may be
39 sought for purposes of any action or proceeding arising out of this Agreement
40 or any related agreement. All legal actions taken by the Parties shall be
41 commenced in Rockingham County New Hampshire Superior Court. Both
42 Parties hereby waive their right to a jury trial.
43
- 44 8.9. **Independent Parties.** Developer and City are independent Parties under
45 this Agreement, and nothing in this Agreement shall be deemed or construed
46 for any purpose to establish between any of them or among them a

1 relationship of principal and agent, employment, partnership, joint venture, or
2 any other relationship other than independent Parties.

3
4 8.10. **Survival of Agreement.** The agreements, covenants, indemnities,
5 representations and warranties contained herein shall survive the execution
6 and delivery of this Agreement, but not the Closing. Upon entering the Ground
7 Lease at Closing, this Agreement shall be superseded in all respects by the
8 Ground Lease and thereafter this Agreement shall have no further force or
9 effect and the Parties shall have no further rights or obligations hereunder.

10
11 8.11. **Waivers.** Failure on the part of any party to complain of any action or non-
12 action on the part of the other party, no matter how long the same may
13 continue, shall not be deemed to be a waiver of any such party's rights
14 hereunder. No waiver at any time of any provision hereof by any party shall
15 be construed as a waiver of any other provision hereof or a waiver at any
16 subsequent time of the same provision.

17
18 8.12. **No Rights Conferred Upon Others.** Except as expressly set out herein,
19 nothing in this Agreement shall be construed as giving any individual,
20 corporation, limited liability company, partnership, joint venture, association,
21 joint stock company, trust, unincorporated organization or government, other
22 than the Parties hereto, their successors and permitted assigns, any right,
23 remedy or claim under or in respect of this Agreement or any provision hereof.

24
25 8.13. **Preservation of Rights.** Nothing herein or in any related agreement shall
26 limit or be construed to limit in any way rights or remedies the City may have
27 for the collection of real property taxes under law, unless expressly set forth
28 herein.

29
30 8.14. **Time of the Essence.** The Parties agree that time is of the essence in
31 performance of their respective obligations under this Agreement.

32
33 8.15. **Good Faith and Fair Dealing.** Unless expressly stated otherwise in this
34 Agreement, whenever a party's consent or approval is required under this
35 Agreement, or whenever a party shall have the right to give an instruction or
36 request another party to act or to refrain from acting under this Agreement, or
37 whenever a party must act or perform before another party may act or perform
38 under this Agreement, such consent, approval, or instruction, request, act or
39 performance shall be reasonably made or done, or shall not be unreasonably
40 withheld, delayed, or conditioned, as the case may be.

41
42 8.16. **Municipal Approvals.** The execution of this Agreement does not preempt
43 or supersede the legally required review process or powers of any city or
44 other governmental board, committee, commission, or department, or excuse
45 the Parties from the requirement to apply for and receive all necessary

1 permits and approvals from all applicable governmental boards, committees,
2 commissions or departments.

3
4 8.17. **Warranties and Representations.** Developer and City each acknowledge
5 that they have not been influenced to enter into this transaction or relied upon
6 any warranties or representations not specifically set forth or incorporated into
7 this Agreement.

8
9 8.18. **Saving Clause.** In the event that any of the terms or provisions of this
10 Agreement are declared invalid or unenforceable by any court of competent
11 jurisdiction or any Federal or State Government Agency having jurisdiction
12 over the subject matter of this Agreement, the remaining terms and provisions
13 that are not effected thereby shall remain in full force and effect.

14
15 8.19. **Escrow.**

16
17 a. The Deposit shall be held by Hinckley Allen as Escrow Agent in a
18 federally insured, interest-bearing money market account and shall be duly accounted for
19 at the Closing. In the event that City or Developer sends notice to Escrow Agent certifying
20 to Escrow Agent that it is entitled to receive the Deposit pursuant to the terms of this
21 Agreement (other than at the Closing), Escrow Agent shall forward a copy of such
22 certification to the other party. If Escrow Agent does not receive an objection from such
23 party to such certification within fifteen (15) days after the date of such notice, Escrow
24 Agent may disburse all such amounts to the certifying party. If Escrow Agent receives an
25 objection or receives conflicting demands, Escrow Agent shall have the right to do either
26 of the following: (i) interplead the funds into a court of competent jurisdiction in
27 Rockingham County, New Hampshire (the cost of doing so to be deducted from the funds
28 but shared equally between the parties) and the parties shall thereafter be free to pursue
29 their rights at law or in equity with respect to the disbursement of the funds and the Escrow
30 Agent shall be fully released and discharged from its duties and obligations under this
31 Agreement; or (ii) resign and transfer the funds to a replacement escrow agent reasonably
32 satisfactory to City and Developer. Upon the transfer of funds to such replacement
33 escrow agent, the Escrow Agent shall thereupon be fully released and discharged from
34 all obligations to further perform any and all duties or obligations imposed upon it by this
35 Agreement.

36
37 b. The Escrow Agent shall incur no liability hereunder whatsoever
38 except in the event of its willful misconduct or negligence. The other parties hereto, jointly
39 and severally, agree to defend and indemnify the Escrow Agent against all reasonable
40 costs, obligations and liabilities suffered by it for which it may be claimed to be liable
41 hereunder, except for that occasioned by its willful misconduct or negligence. The
42 indemnity provided in the preceding sentence shall survive any termination of this
43 Agreement. The fees of the Escrow Agent and costs incurred by it in performing its duties
44 hereunder shall be shared equally by the parties, except that Developer shall not be liable
45 for any costs or expenses of the Escrow Agent incurred in connection with its
46 representation of City.

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c. The Developer acknowledges and understands that the Escrow Agent is City's attorney in this transaction. In the event of any dispute between the City or the Developer arising out of this Agreement, the Developer agrees that the Escrow Agent may represent the City in connection with that dispute provided that Escrow Agent also proceeds in accordance with (i) or (ii) of Paragraph (a), above. The Developer agrees that in the event of any such dispute and provided that the Escrow Agent proceeds in accordance with (i) or (ii) of Paragraph (a) above, it will not object to the Escrow Agent's representation of the City in such dispute because of any potential or actual conflict of interest arising due to the Escrow Agent's role as Escrow Agent under the terms of this Agreement.

[The remainder of this page left blank intentionally]


LIST OF EXHIBITS

- Exhibit A Preliminary Conceptual Building Elevations and Site Plans for Project [Add names of plans, engineer and date?]**
- Exhibit B Project Budget**
- Exhibit C Development Schedule**
- Exhibit D List of Anticipated Permits and Approvals**
- Exhibit E Basic Terms of Ground Lease**

[The remainder of this page left blank intentionally]

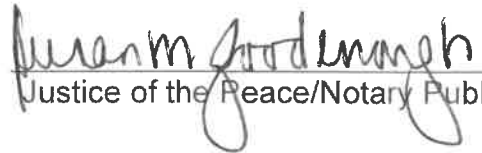
Executed as a sealed instrument this 29 day of August, 2019.

CITY OF PORTSMOUTH

By:  Date: 8-29-19
John P. Bohenko, City Manager
Duly Authorized

**STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM**

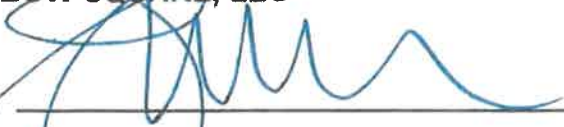
In Portsmouth, on the 29th day of August, 2019, before me, personally appeared **John P. Bohenko**, City Manager of the City of Portsmouth, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he executed said instrument for the purposes therein contained as his free and voluntary act and deed.


Justice of the Peace/Notary Public

**SUSAN M. GOODENOUGH, Notary Public
State of New Hampshire
My Commission Expires April 11, 2023**

DEVELOPER

SOBOW SQUARE, LLC

By:  Date: 8/29/19

Michael Kane
Duly Authorized


By:  Date: 8/29/19

Ralph Cox
Duly Authorized

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

Ralph Cox

In _____, on the 29th day of August, 2019, before me, personally appeared **Michael Kane and Steve Borden** of Sobow Square, LLC, known to me or proved to be the persons named in and who executed the foregoing instrument, and being first duly sworn, such persons acknowledged that they executed said instrument for the purposes therein contained as their free and voluntary act and deed.


Justice of the Peace/Notary Public

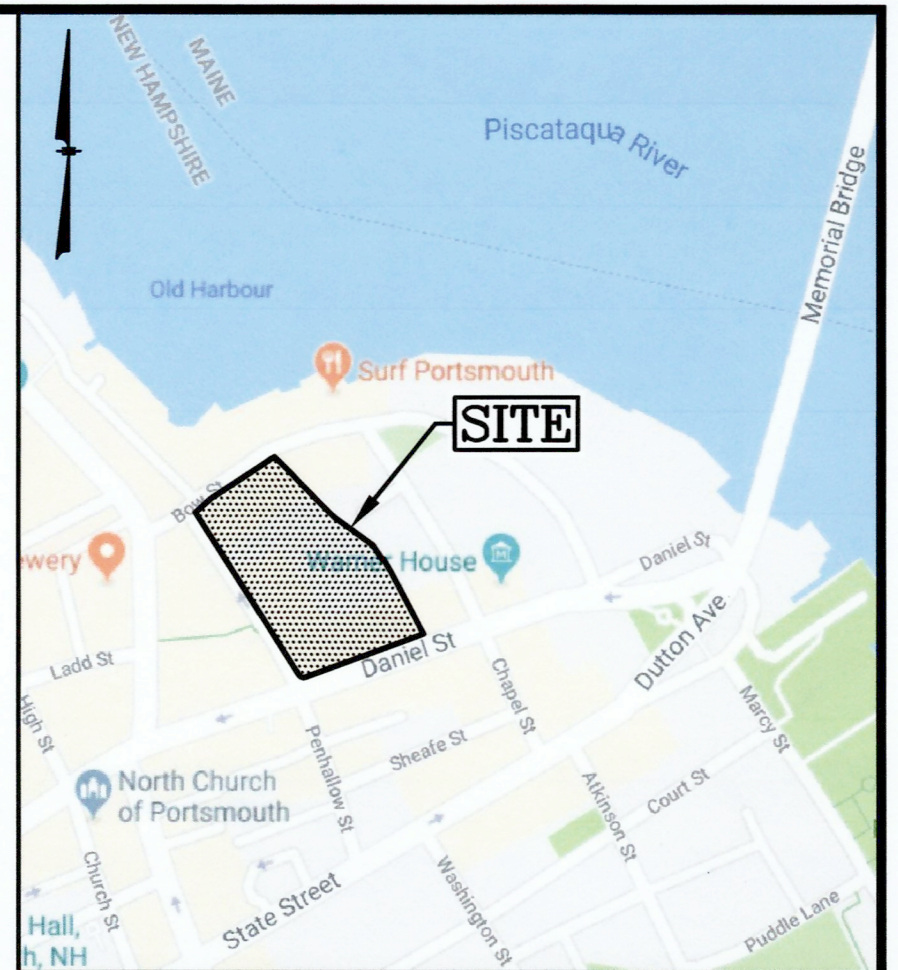
JACQUELYN N. GRINNELL
Notary Public - New Hampshire
My Commission Expires May 1, 2024

Exhibit A

Preliminary Conceptual Building Elevations and Site Plans for Project

NOTES:

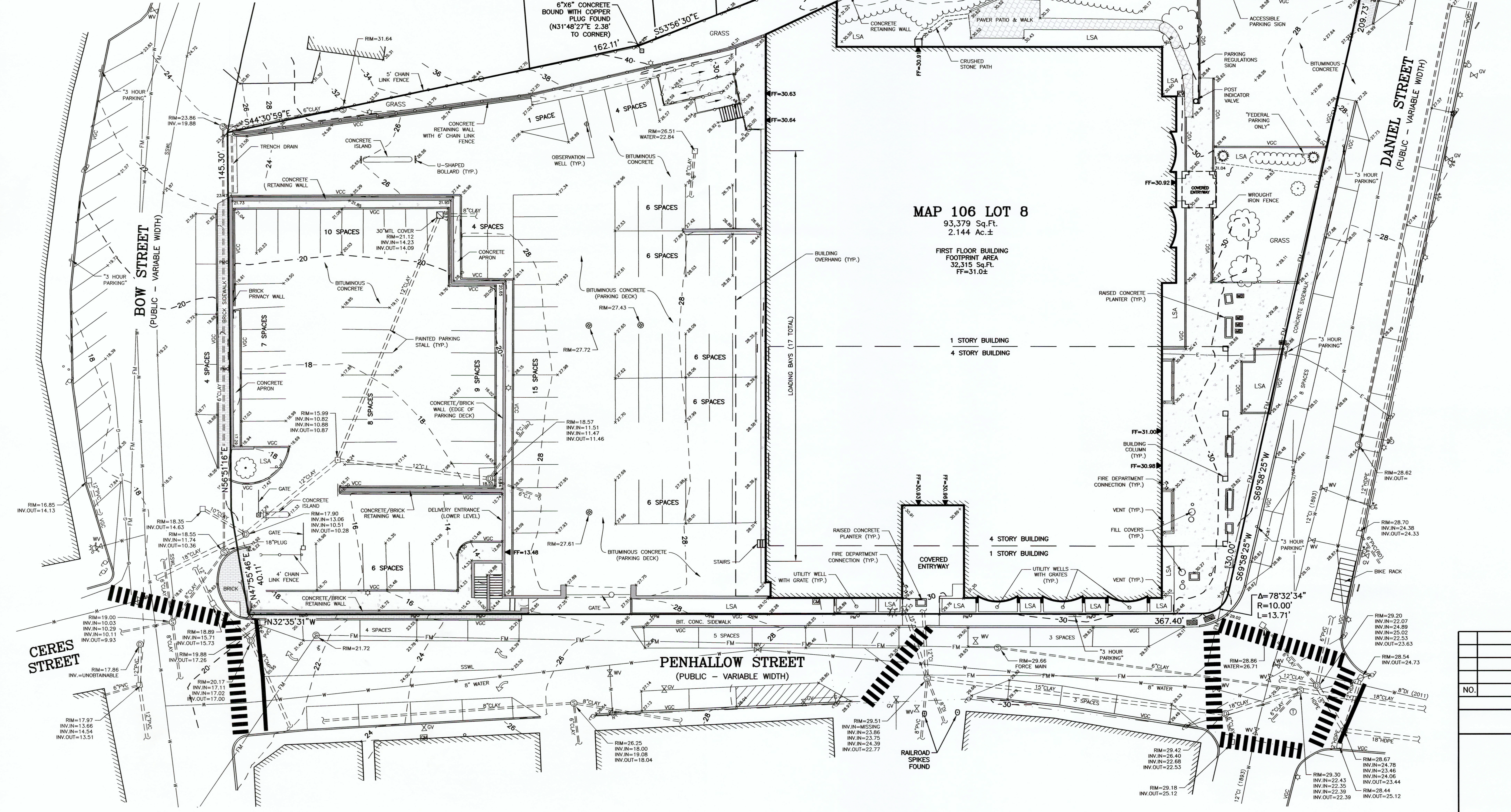
- 1) ZONE: CHARACTER DISTRICT 4 (CD4) & CHARACTER DISTRICT 5 (CD5)
REFER TO THE CITY OF PORTSMOUTH ZONING ORDINANCE FOR RESTRICTIONS AND PERMITTED USES. A ZONING REPORT OR LETTER WAS NOT PROVIDED AT THE TIME OF THIS SURVEY.
- 2) THIS PLAN IS THE RESULT OF AN ON-THE-GROUND FIELD SURVEY PERFORMED BY THIS OFFICE IN MAY & JUNE 2018.
- 3) BEARINGS SHOWN HEREON ARE BASED ON NAD83 PER GPS OBSERVATIONS PERFORMED BY THIS OFFICE ON JUNE 6, 2018.
- 4) ELEVATIONS SHOWN HEREON ARE BASED ON NGVD29 PER GPS OBSERVATIONS PERFORMED BY THIS OFFICE ON JUNE 6, 2018 (ADJUSTED UTILIZING VERTCON).
- 5) LOCATION OF UNDERGROUND UTILITIES IS APPROXIMATE ONLY. ADDITIONAL UNDERGROUND UTILITIES OTHER THAN THOSE SHOWN MAY BE ENCOUNTERED.
- 6) THE SURVEY TRACT IS NOT LOCATED IN A SPECIAL FLOOD HAZARD AREA PER FLOOD INSURANCE RATE MAP NUMBER 33015C0259E, WITH AN EFFECTIVE DATE OF MAY 17, 2005.



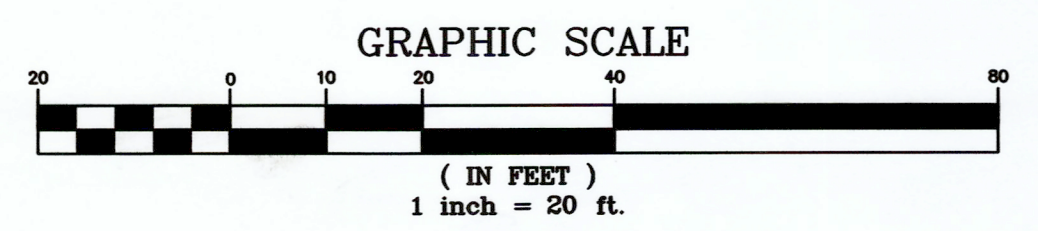
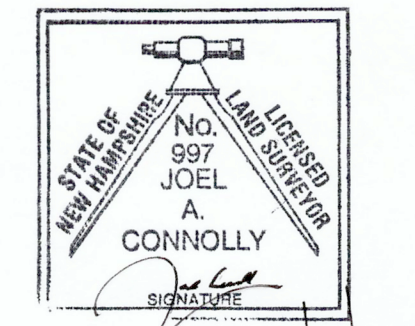
LOCATION MAP
(NOT TO SCALE)

LEGEND

- SSC SLOPED GRANITE CURB
- VSC VERTICAL GRANITE CURB
- SCC SLOPED CONCRETE CURB
- VCC VERTICAL CONCRETE CURB
- CCB CAPE COD BERM
- DSLY DOUBLE SOLID LINE YELLOW
- DDLY DOUBLE DASHED LINE YELLOW
- SDLY SINGLE DASHED LINE YELLOW
- SSLY SINGLE SOLID LINE YELLOW
- SDLW SINGLE SOLID LINE WHITE
- SDLW SINGLE DASHED LINE WHITE
- G LINE GAS LINE
- T UNDERGROUND TELEPHONE
- W WATER LINE
- E UNDERGROUND ELECTRIC
- CLF CHAIN LINK FENCE
- STF STOCKADE FENCE
- PRF POST & RAIL FENCE
- WF WIRE FENCE
- 90 CONTOUR ELEVATION
- TREE TREE
- UP UTILITY POLE
- GW GUY WIRE
- OW OVERHEAD WIRE
- TR TREELINE
- PB PULL BOX
- SN SIGN
- SE SPOT ELEVATION
- DM DRAIN MANHOLE
- CB CATCH BASIN
- SM SEWER MANHOLE
- TM TELEPHONE MANHOLE
- EM ELECTRIC MANHOLE
- WM WATER MANHOLE
- MH MANHOLE
- GV GAS VALVE
- WV WATER VALVE
- WS WATER SHUT OFF
- FH FIRE HYDRANT
- BL BOLLARD
- GM GAS METER
- EMR ELECTRIC METER
- MW MONITORING WELL
- LP LIGHT POLE



CERTIFICATION:
I CERTIFY THAT THIS SURVEY AND PLAN WAS PREPARED BY ME OR THOSE UNDER MY DIRECT SUPERVISION AND THAT THIS PLAN IS THE RESULT OF AN ACTUAL SURVEY PERFORMED ON THE GROUND IN MAY & JUNE 2018 AND HAS AN ERROR OF CLOSURE OF NOT MORE THAN ONE PART IN TEN THOUSAND.



PLAN REFERENCES:

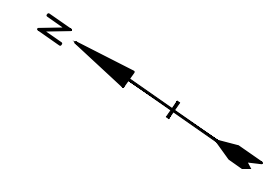
- 1) ROCKINGHAM COUNTY REGISTRY OF DEEDS (R.C.R.D) PLAN 00555.
- 2) R.C.R.D. PLAN 176.
- 3) R.C.R.D. PLAN 476.
- 4) R.C.R.D. PLAN 19045.
- 5) R.C.R.D. PLAN 37569.

OWNER OF RECORD:

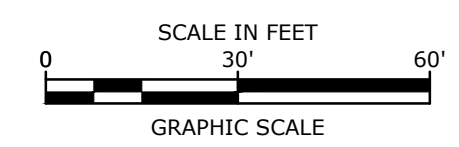
MAP 106 LOT 8
UNITED STATES OF AMERICA
1600 PENNSYLVANIA AVENUE
WASHINGTON, DC 20004
BOOK 1708 PAGE 428
BOOK 1710 PAGE 422
BOOK 1693 PAGE 470
BOOK 1719 PAGE 326
BOOK 1706 PAGE 462
BOOK 1706 PAGE 464
BOOK 1708 PAGE 66

| NO. | DESCRIPTION | BY | DATE |
|---|--------------------|---|------------------|
| REVISIONS | | | |
| EXISTING CONDITIONS PLAN | | | |
| ASSESSORS MAP 106 LOT 8 62 DANIEL STREET PORTSMOUTH, NH 03801 PREPARED FOR: SoBow SQUARE c/o REDGATE 265 FRANKLIN STREET BOSTON, MA 02110 | | | |
| | | 44 Siles Road, Suite One Salem, New Hampshire 03079 (603) 893-0720 ENGINEERS • PLANNERS • SURVEYORS www.mhfdesign.com | |
| SCALE: 1"=20' | DATE: JULY 5, 2018 | DRAWING NO. 4420TWS.DWG | |
| DRAWN BY: AKC | CHECKED BY: JAC | PROJECT NO. 442018 | SHEET NO. 1 OF 1 |

F:\Projects\040\442018\4420TWS.dwg ECP 24x36 7/05/18 4:10pm jcs



PRELIMINARY



**McIntyre Building
Federal
Property**

SoBow Square,
LLC

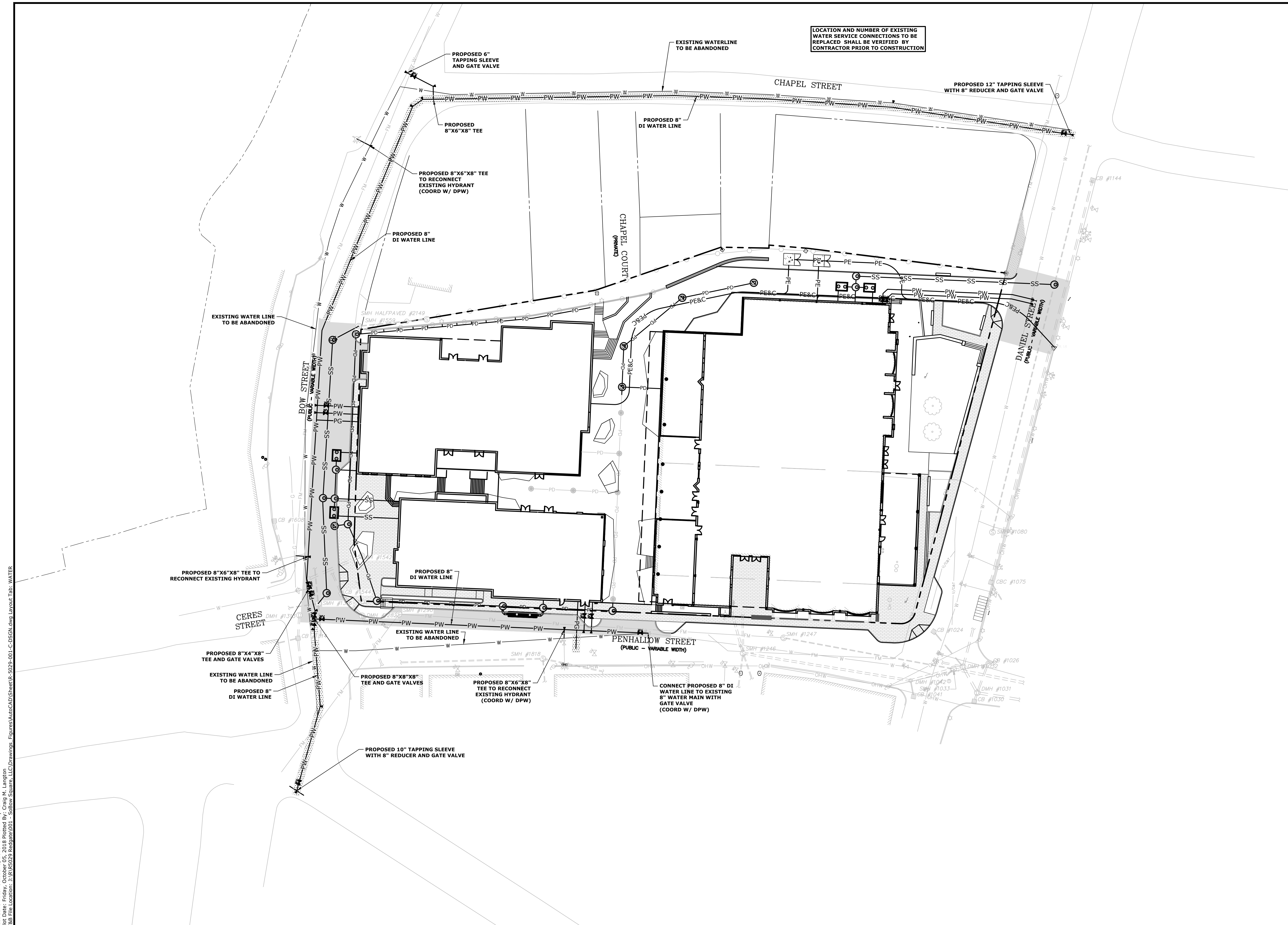
80 Daniel Street
Portsmouth, NH

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| FILE: R-5029-001-C-DSGN.DWG | | |
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| CHECKED: PMC | | |
| APPROVED: BLM | | |

**WATER MAIN REPLACEMENT
PLAN**

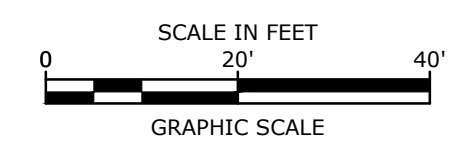
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C-104.1



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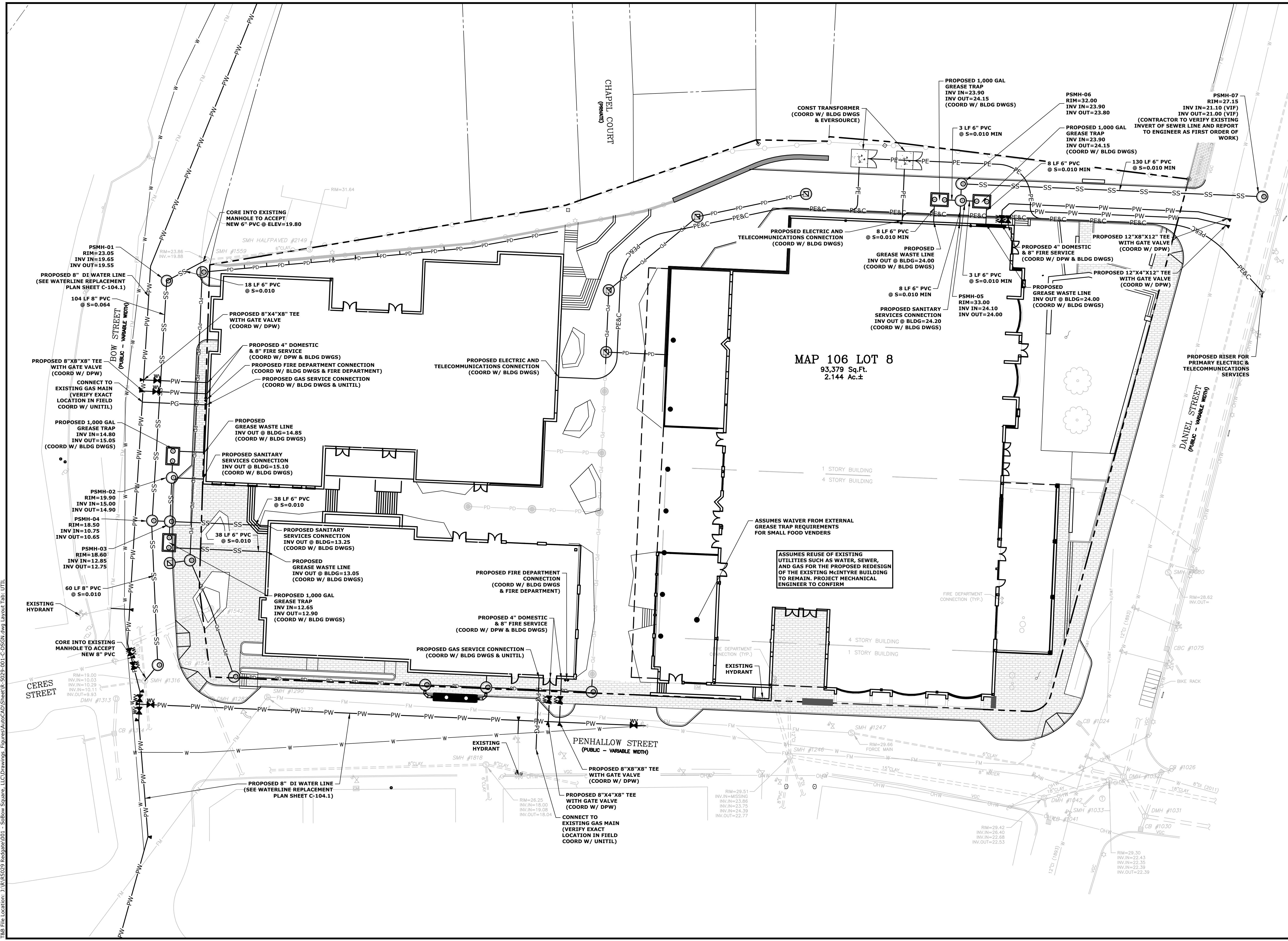
PRELIMINARY



**McIntyre Building
Federal Property**

SoBow Square, LLC

80 Daniel Street
Portsmouth, NH



MAP 106 LOT 8
93,379 Sq.Ft.
2.144 Ac.±

ASSUMES WAIVER FROM EXTERNAL GREASE TRAP REQUIREMENTS FOR SMALL FOOD VENDERS

ASSUMES REUSE OF EXISTING UTILITIES SUCH AS WATER, SEWER, AND GAS FOR THE PROPOSED REDESIGN OF THE EXISTING MCINTYRE BUILDING TO REMAIN. PROJECT MECHANICAL ENGINEER TO CONFIRM

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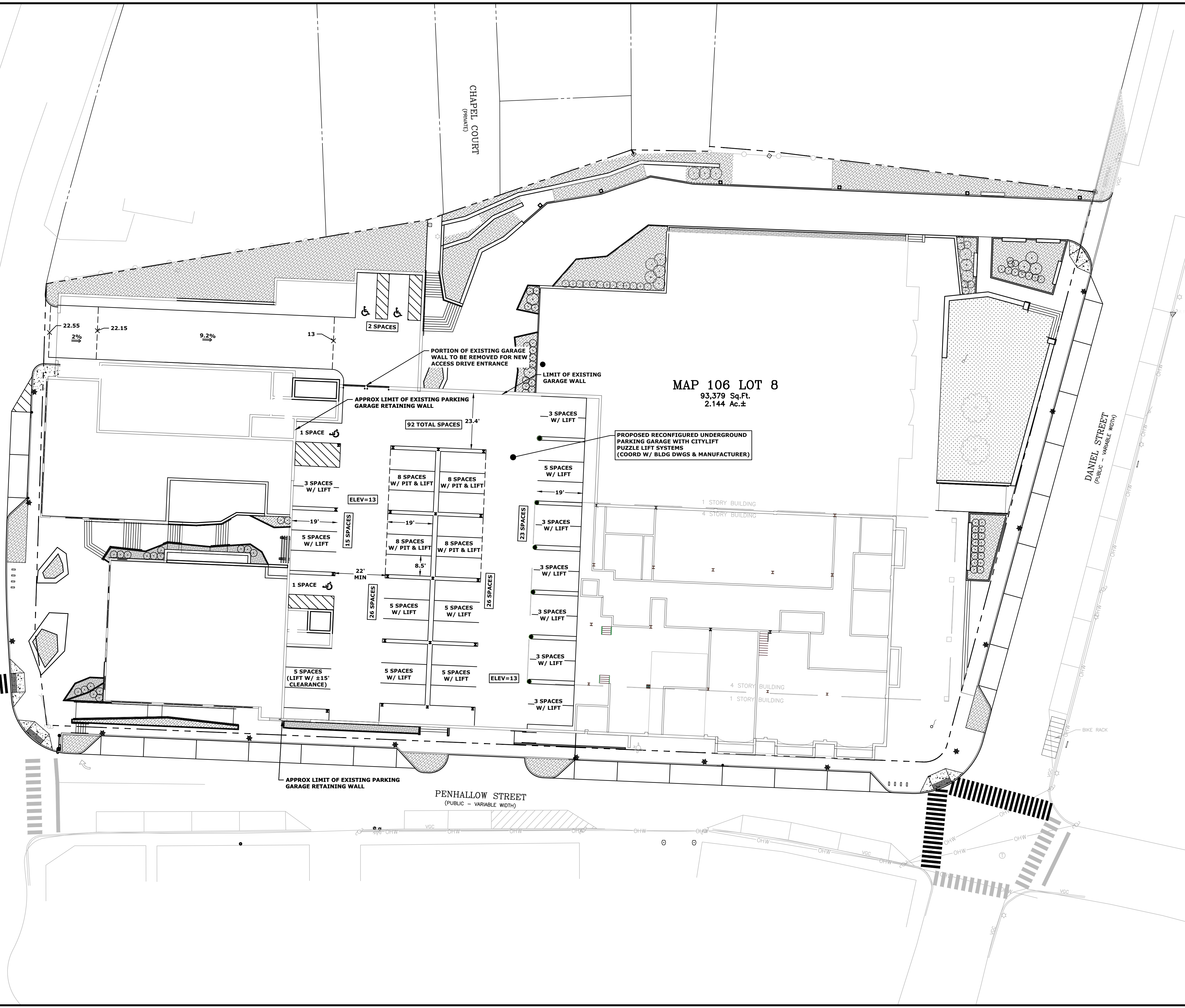
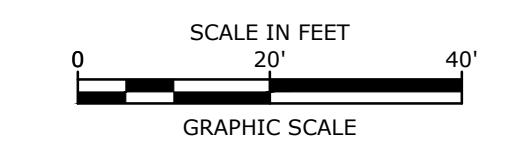
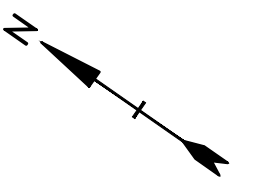
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PROJECT NO: R5029-001
DATE: 10/5/2018
FILE: R-5029-001-C-DSGN.DWG
DRAWN BY: CML
CHECKED: PMC
APPROVED: BLM

UTILITIES PLAN

SCALE: AS SHOWN

CITY OF PORTSMOUTH RECORDING NOTES:
 1. THIS SITE PLAN SHALL BE RECORDED IN THE ROCKINGHAM COUNTY REGISTRY OF DEEDS.
 2. ALL IMPROVEMENTS SHOWN ON THIS SITE PLAN SHALL BE CONSTRUCTED AND MAINTAINED IN ACCORDANCE WITH THE PLAN BY THE PROPERTY OWNER AND ALL FUTURE PROPERTY OWNERS. NO CHANGES SHALL BE MADE TO THIS SITE PLAN WITHOUT THE EXPRESS APPROVAL OF THE PORTSMOUTH PLANNING DIRECTOR.



MAP 106 LOT 8
 93,379 Sq.Ft.
 2.144 Ac.±

PROPOSED RECONFIGURED UNDERGROUND PARKING GARAGE WITH CITYLIFT PUZZLE LIFT SYSTEMS (COORD W/ BLDG DWGS & MANUFACTURER)

**McIntyre Building
 Federal Property
 Redevelopment**

SoBow Square, LLC

62 Daniel Street
 Portsmouth, NH

| | | |
|-------------|------|-----------------------|
| MARK | DATE | DESCRIPTION |
| A | | TAC Submission |
| PROJECT NO: | | R5029-001 |
| DATE: | | |
| FILE: | | R-5029-001-C-DSGN.DWG |
| DRAWN BY: | | CML |
| CHECKED: | | PMC |
| APPROVED: | | BLM |

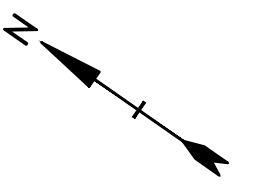
**BASEMENT LEVEL PARKING
 PLAN OPTION 1**

SCALE: AS SHOWN

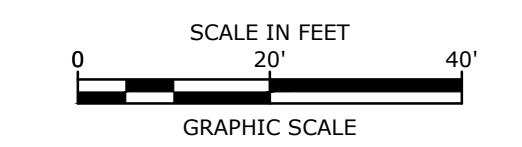
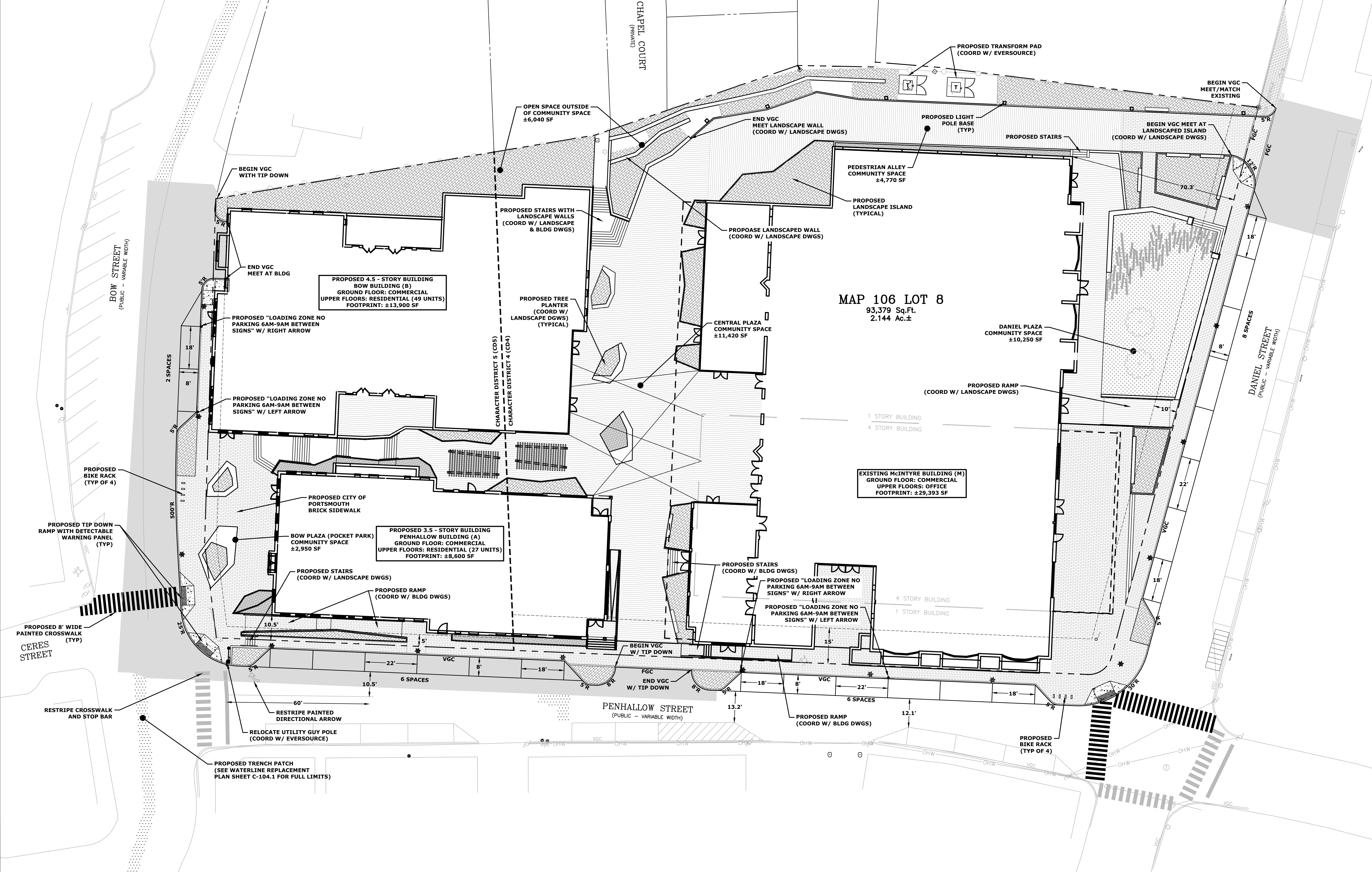
C-102.1

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CITY OF PORTSMOUTH NOTES:
 1. ALL CONDITIONS ON THIS PLAN SHALL REMAIN IN EFFECT IN PERPETUITY PURSUANT TO THE REQUIREMENTS OF THE SITE PLAN REVIEW REGULATIONS.



CITY OF PORTSMOUTH RECORDING NOTES:
1. THIS SITE PLAN SHALL BE RECORDED IN THE ROCKINGHAM COUNTY REGISTRY OF DEEDS.
2. ALL IMPROVEMENTS SHOWN ON THIS SITE PLAN SHALL BE CONSTRUCTED AND MAINTAINED IN ACCORDANCE WITH THE PLAN BY THE PROPERTY OWNER AND ALL FUTURE PROPERTY OWNERS. NO CHANGES SHALL BE MADE TO THIS SITE PLAN WITHOUT THE EXPRESS APPROVAL OF THE PORTSMOUTH PLANNING DIRECTOR.



**McIntyre Building
Federal Property
Redevelopment**

SoBow Square, LLC

62 Daniel Street
Portsmouth, NH

| | | |
|-------------|-----------------------|-------------|
| MARK | DATE | DESCRIPTION |
| | | |
| PROJECT NO: | R5029-001 | |
| DATE: | | |
| FILE: | R-5029-001-C-DSGN.DWG | |
| DRAWN BY: | CML | |
| CHECKED: | PMC | |
| APPROVED: | BLM | |

SITE PLAN

SCALE: AS SHOWN

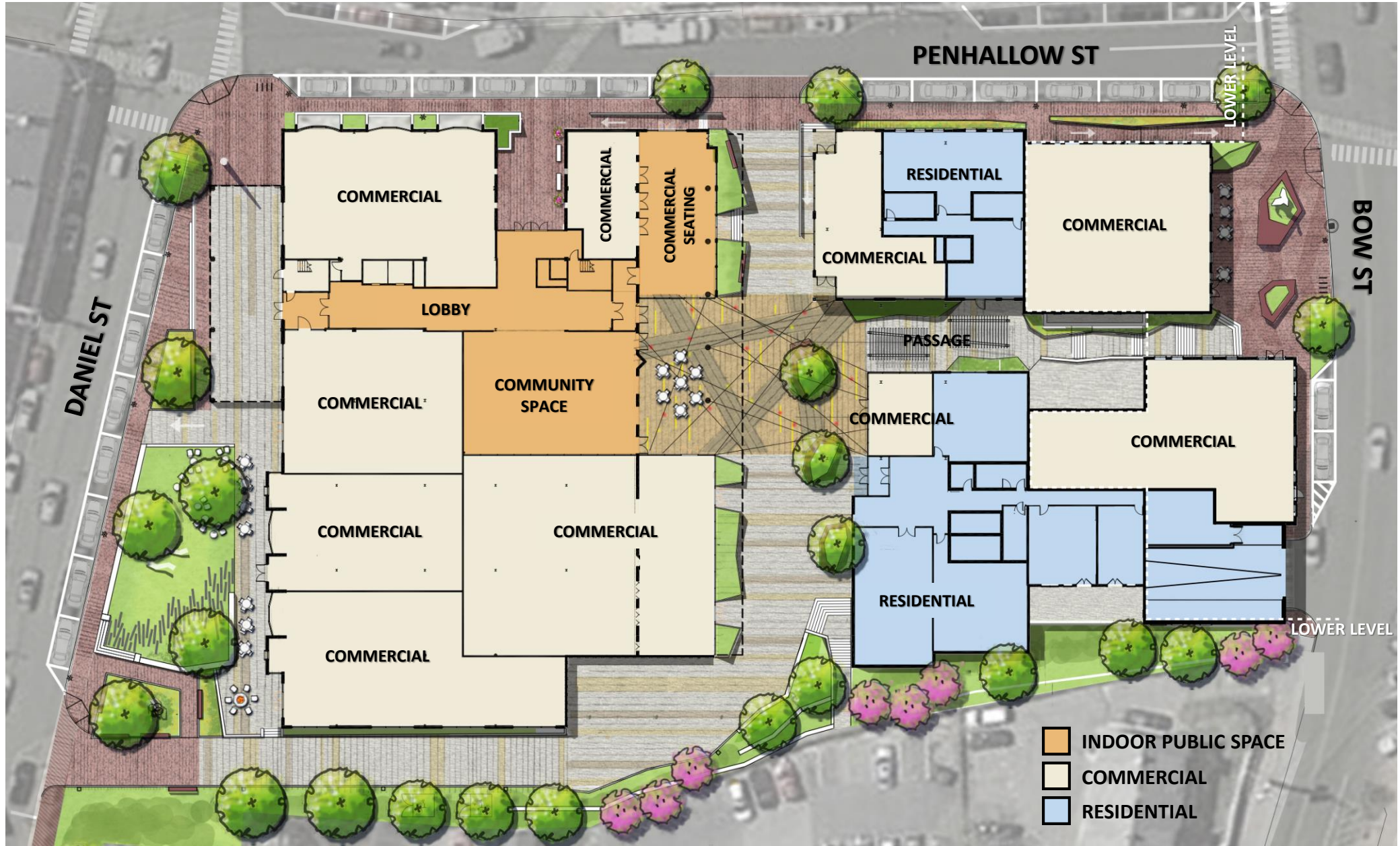
C-102

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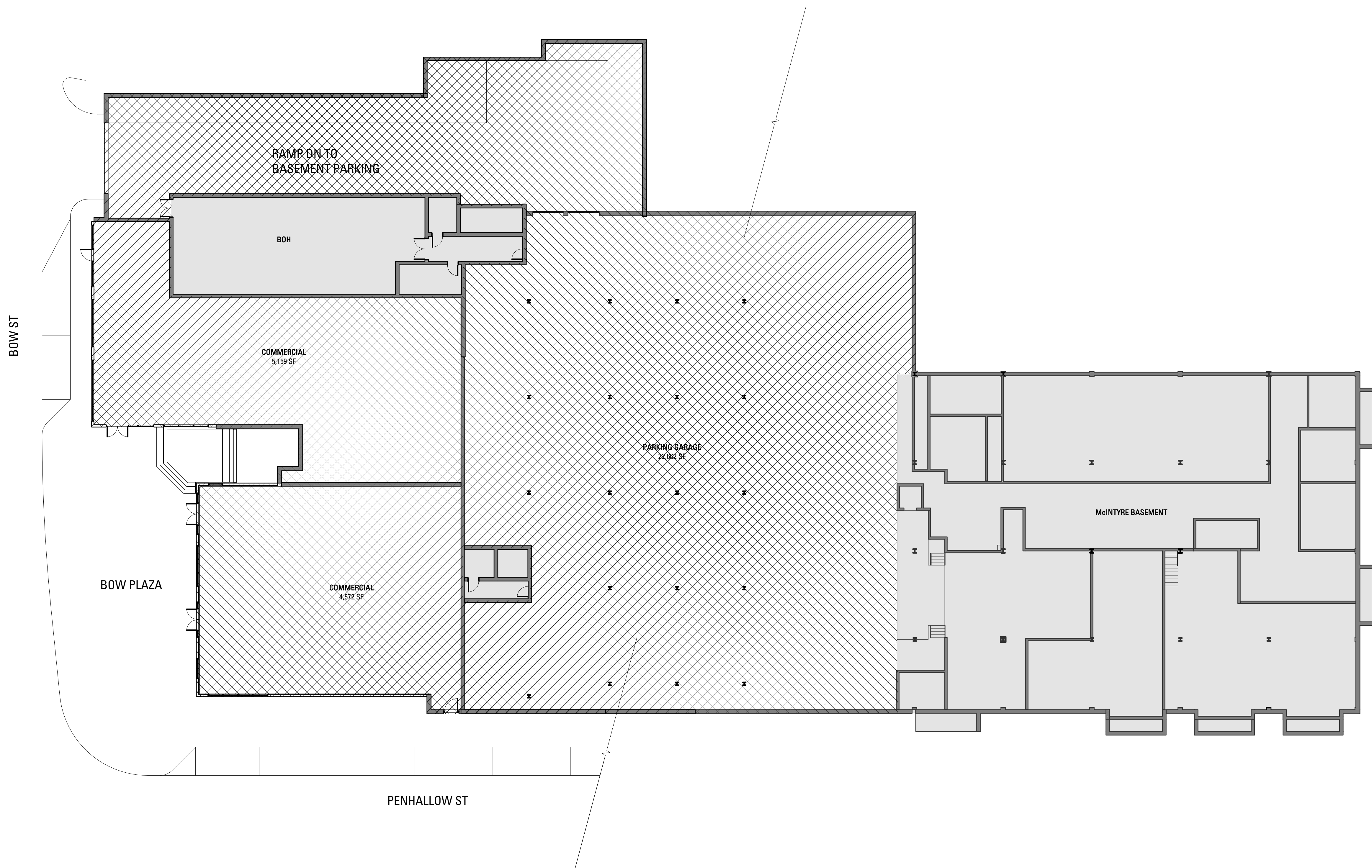
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McIntyre Project

PROPOSED PEDESTRIAN LEVEL

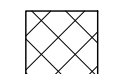




IF THIS SHEET IS NOT 22" x 34", IT HAS BEEN REDUCED OR ENLARGED.



1 OVERALL GROUND FLOOR PLAN
SCALE: 1/16" = 1'-0"

USE PLAN LEGEND

-  REVENUE PRODUCING
-  NON REVENUE PRODUCING
-  NO PUBLIC ACCESS

USE PLAN - GROUND FLOOR

IF THIS SHEET IS NOT 22" x 34", IT HAS BEEN REDUCED OR ENLARGED.

BOW ST

DANIEL ST

BUILDING B

BUILDING A




MCINTYRE BUILDING



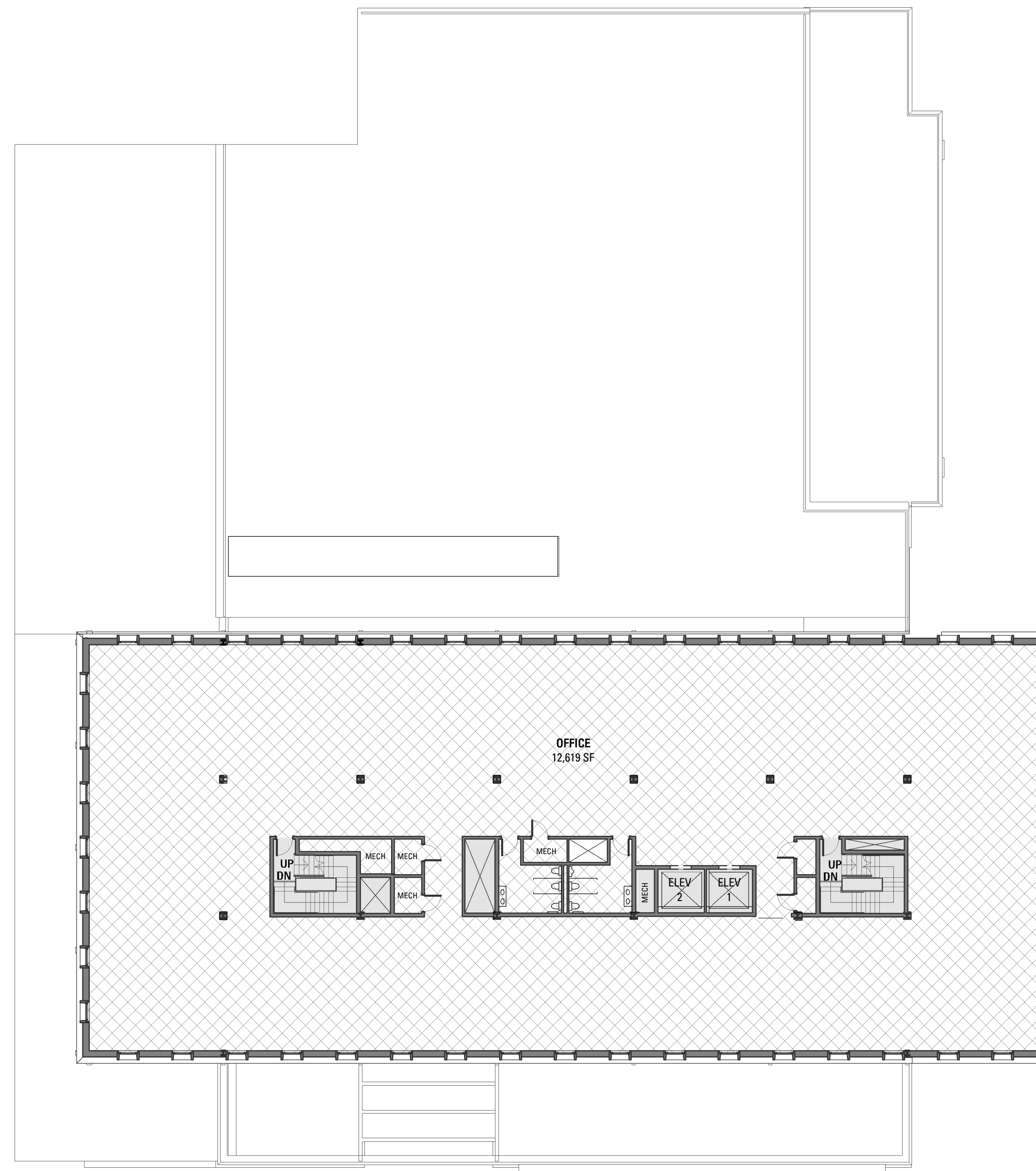
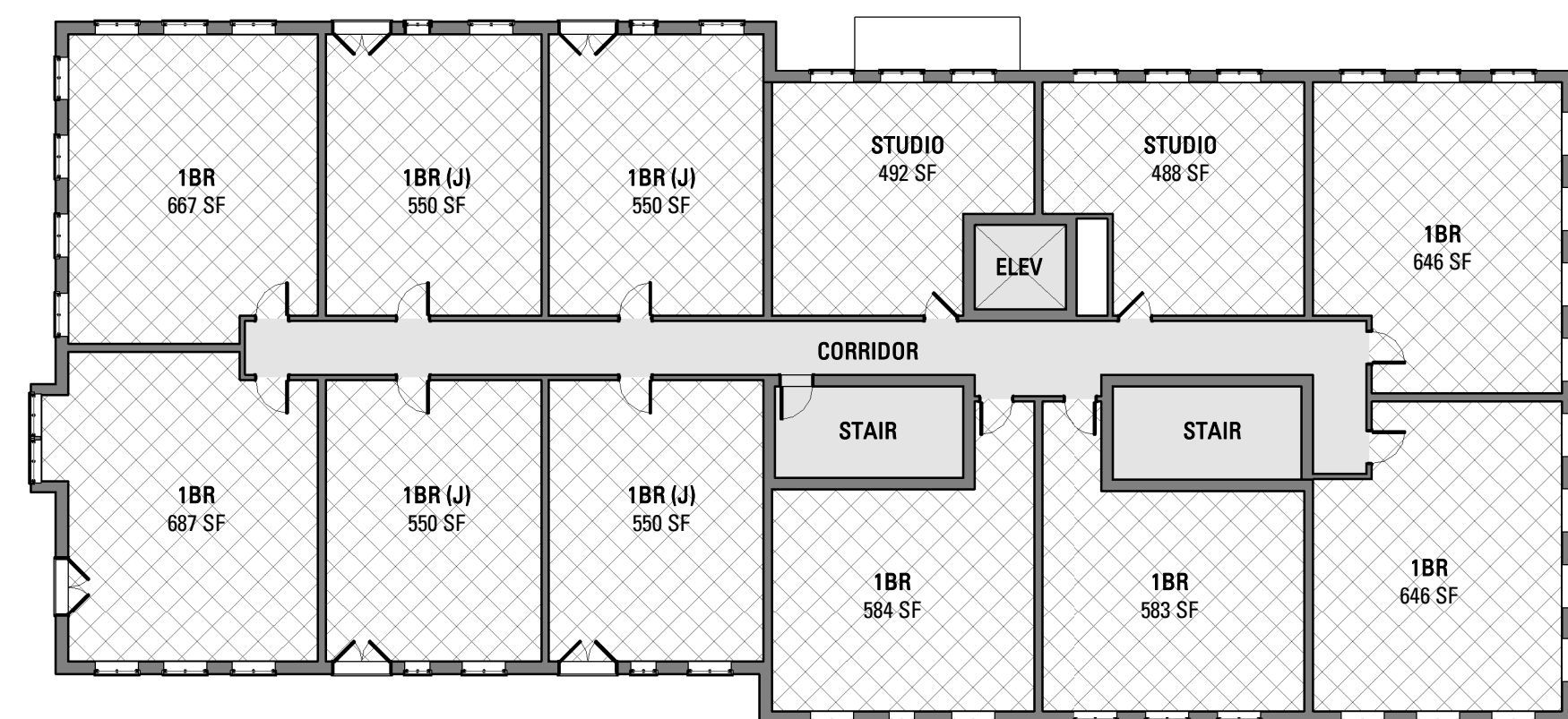
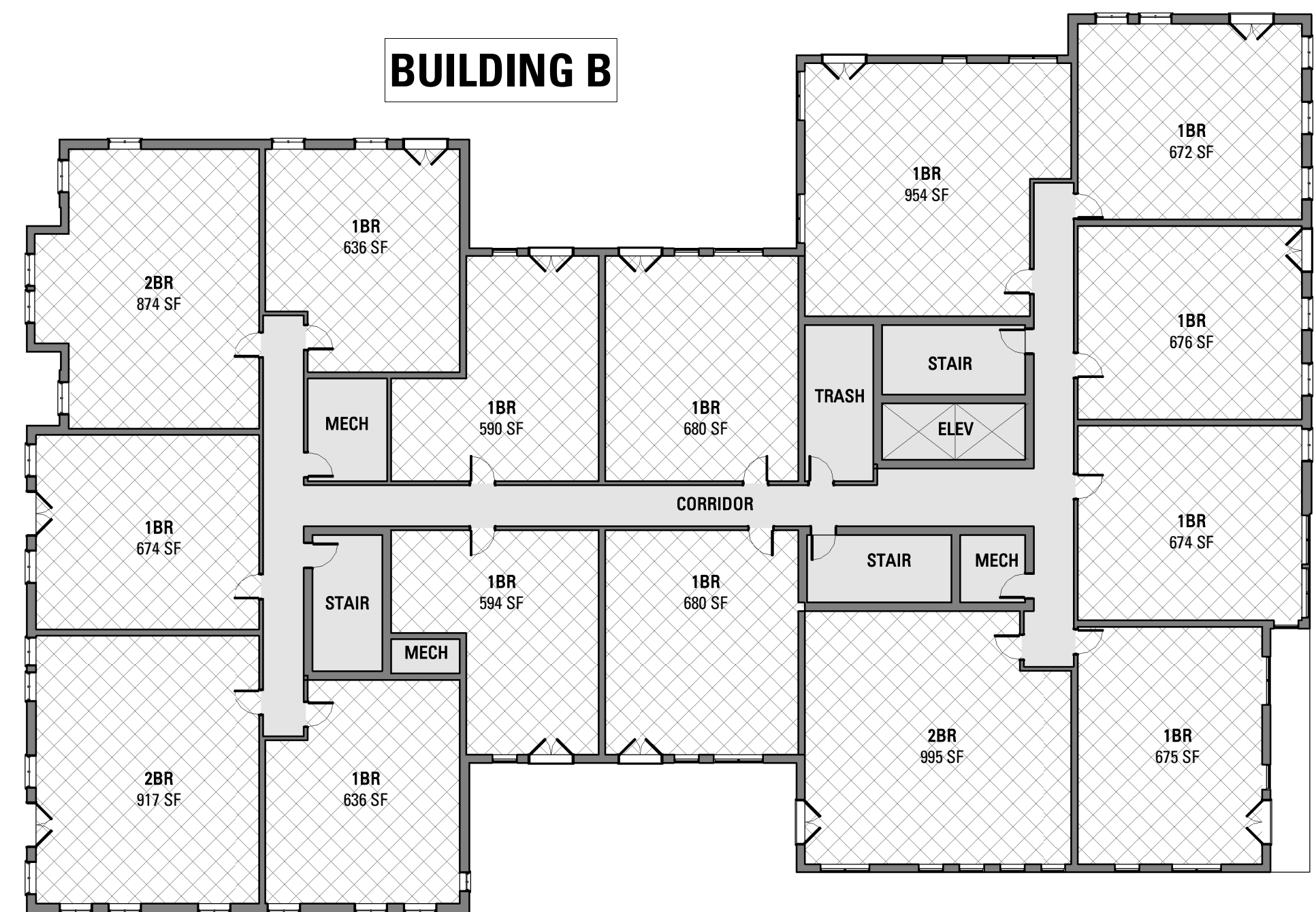
1 OVERALL 1ST FLOOR PLAN

SCALE: 1/16" = 1'-0"

USE PLAN LEGEND

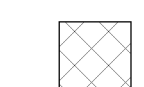


-  REVENUE PRODUCING
-  NON REVENUE PRODUCING
-  NO PUBLIC ACCESS

OVERALL USE PLAN - 1ST FLOOR

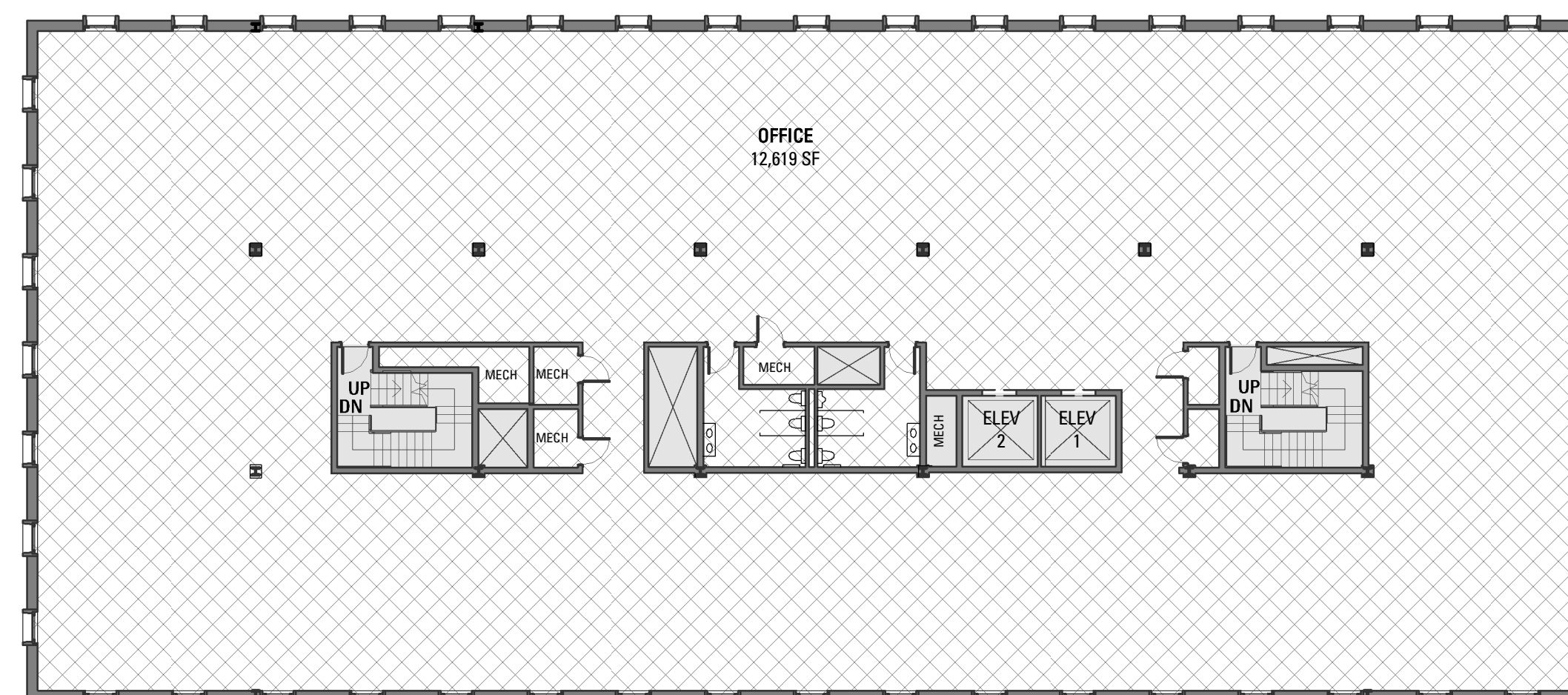
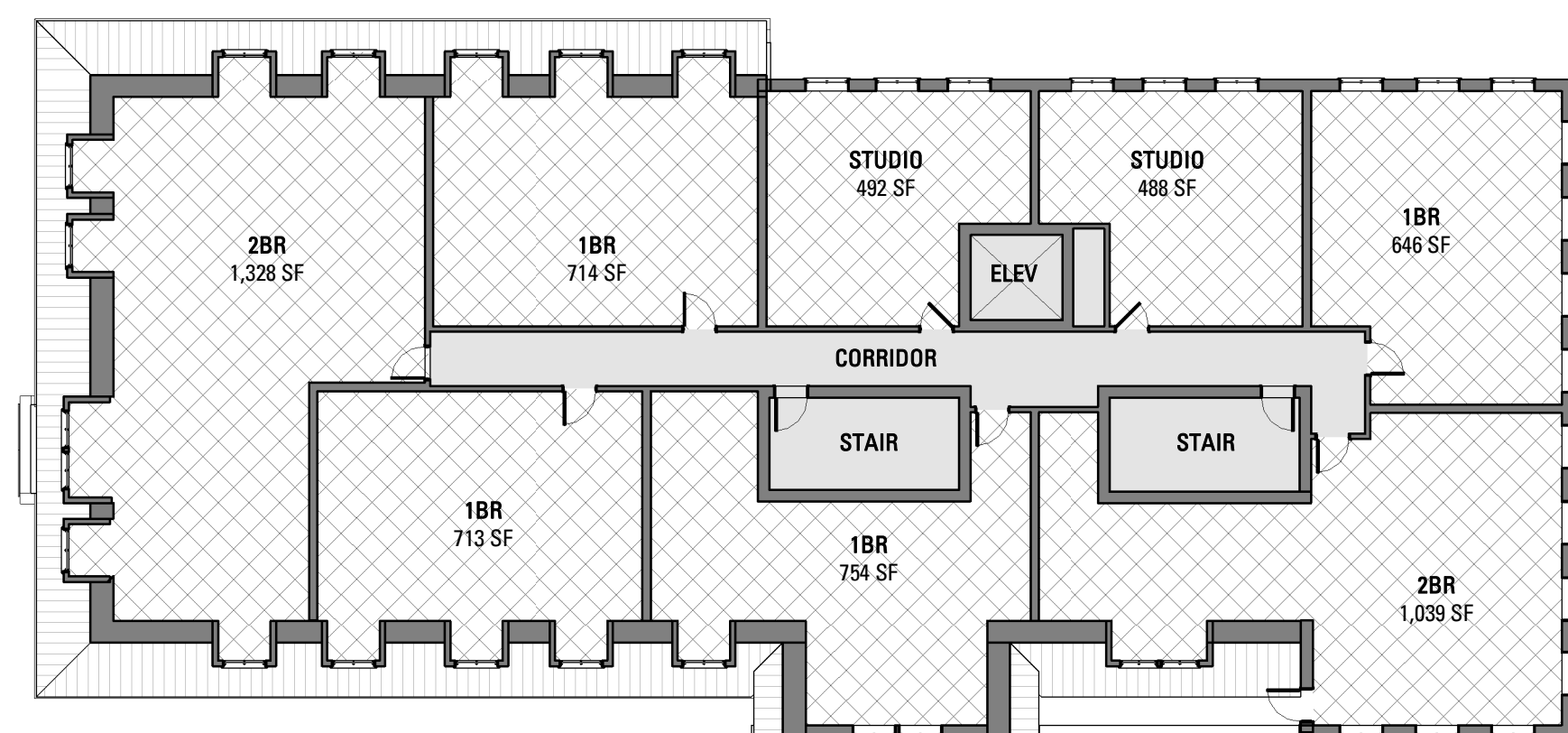
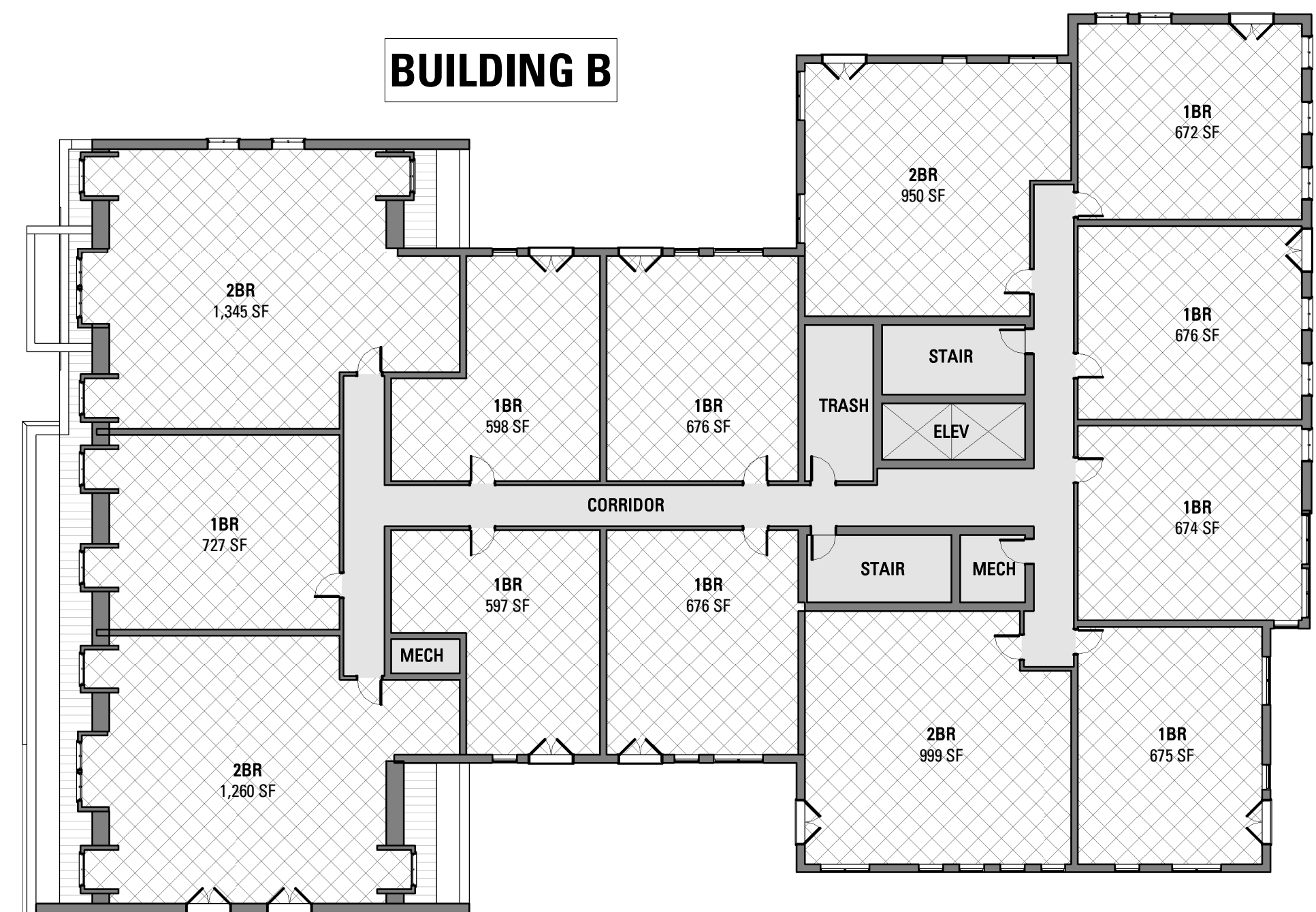


1 OVERALL 2ND FLOOR PLAN
SCALE: 1/16" = 1'-0"

USE PLAN LEGEND


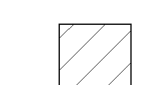

-  REVENUE PRODUCING
-  NON REVENUE PRODUCING
-  NO PUBLIC ACCESS

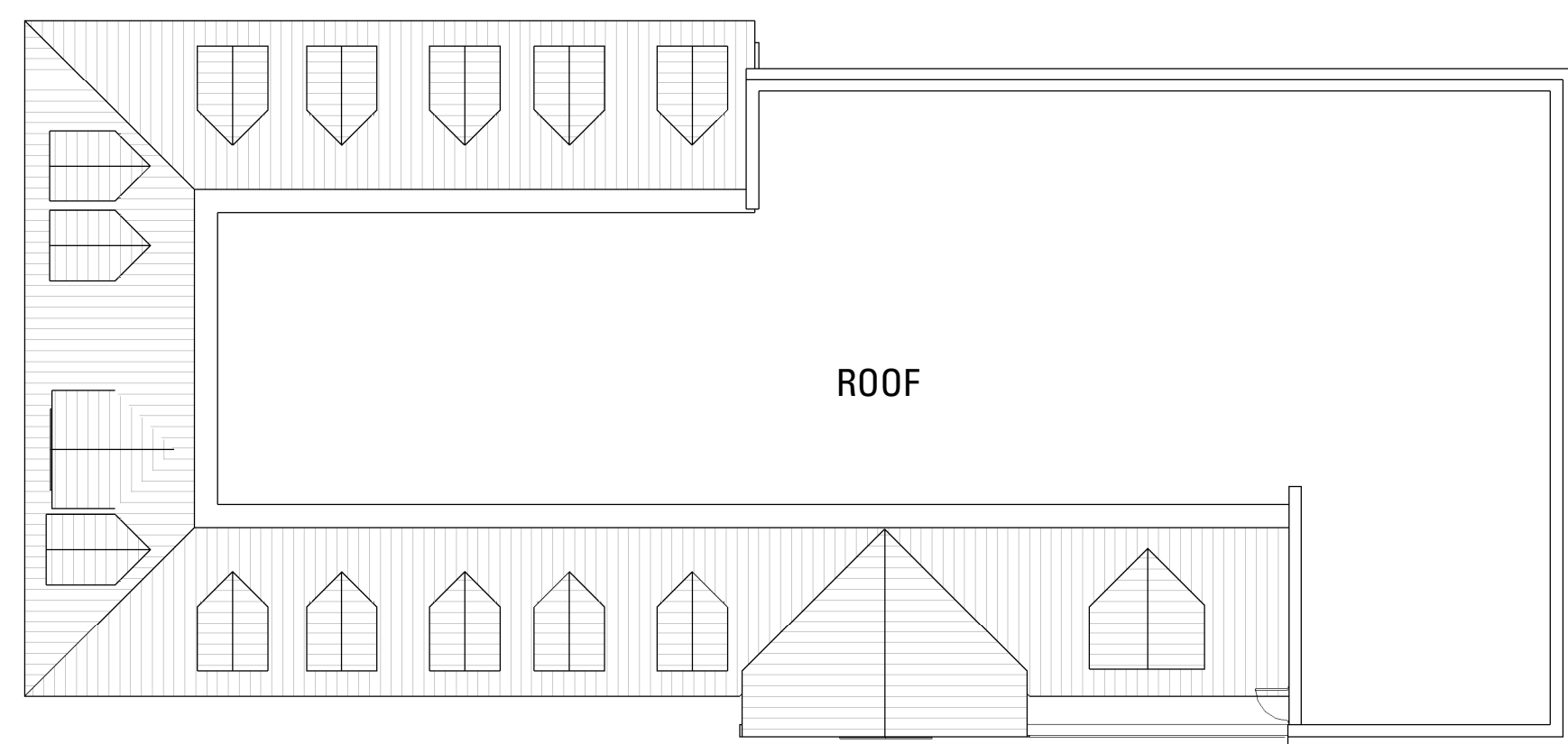
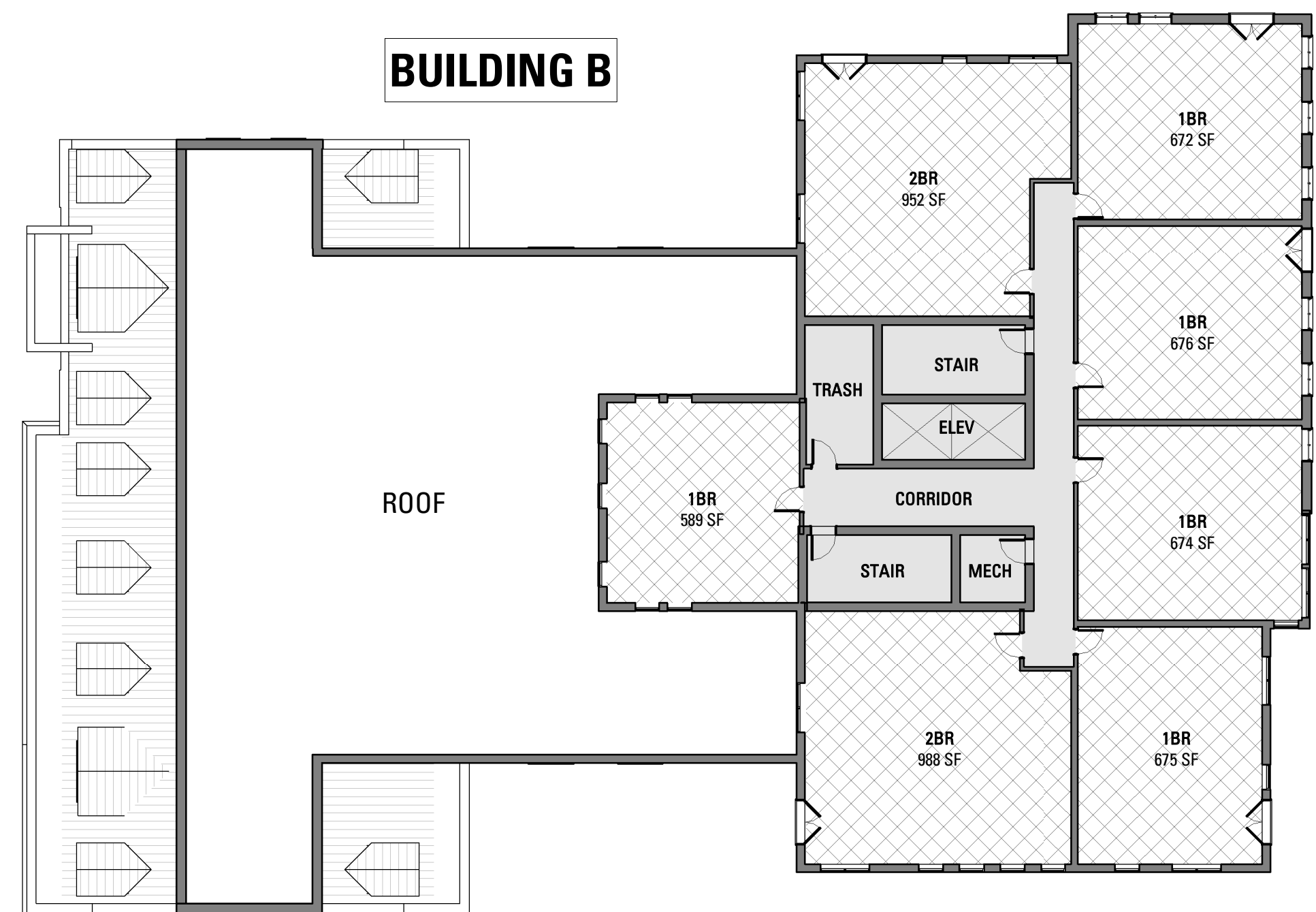
OVERALL USE PLAN - 2ND FLOOR



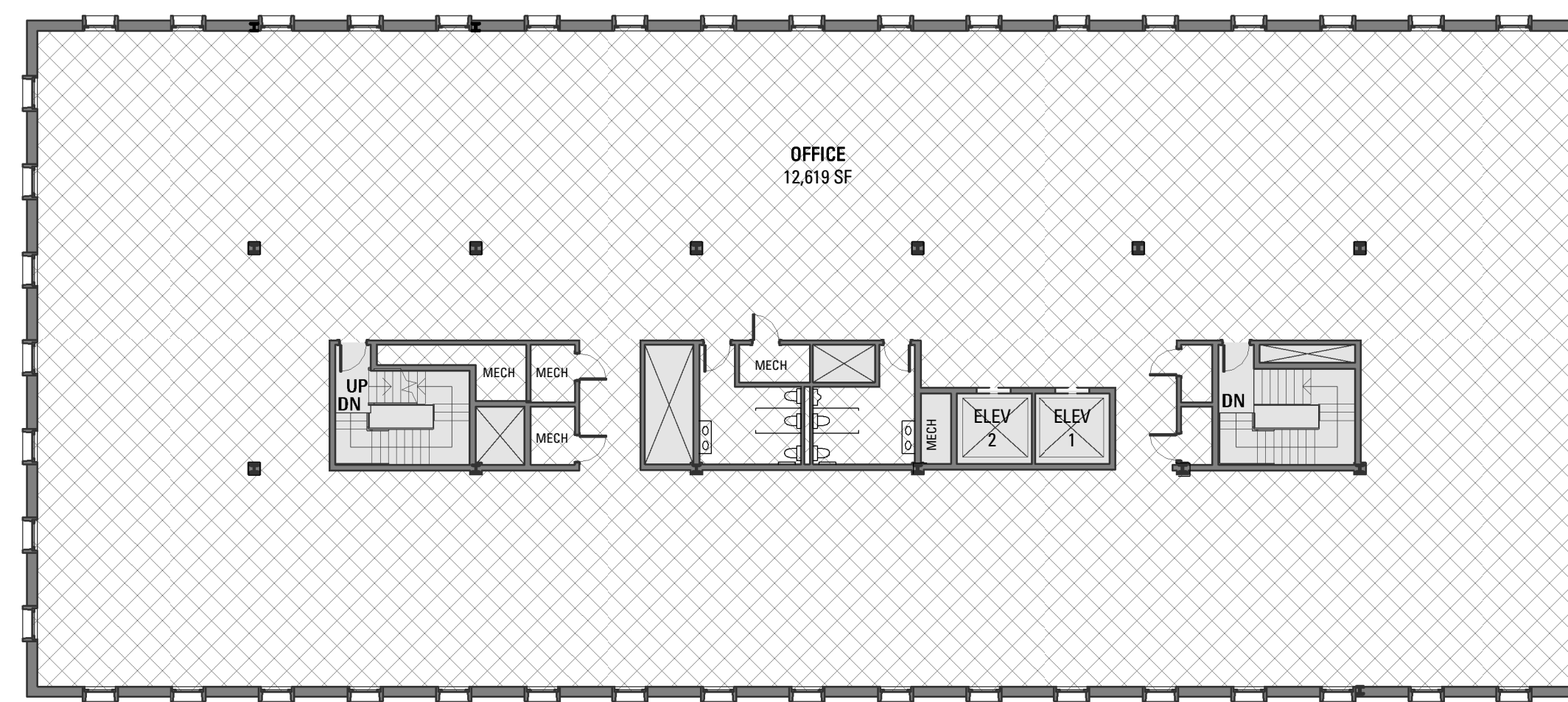
1 OVERALL 3RD FLOOR PLAN
SCALE: 1/16" = 1'-0"

USE PLAN LEGEND

-  REVENUE PRODUCING
-  NON REVENUE PRODUCING
-  NO PUBLIC ACCESS






BUILDING A



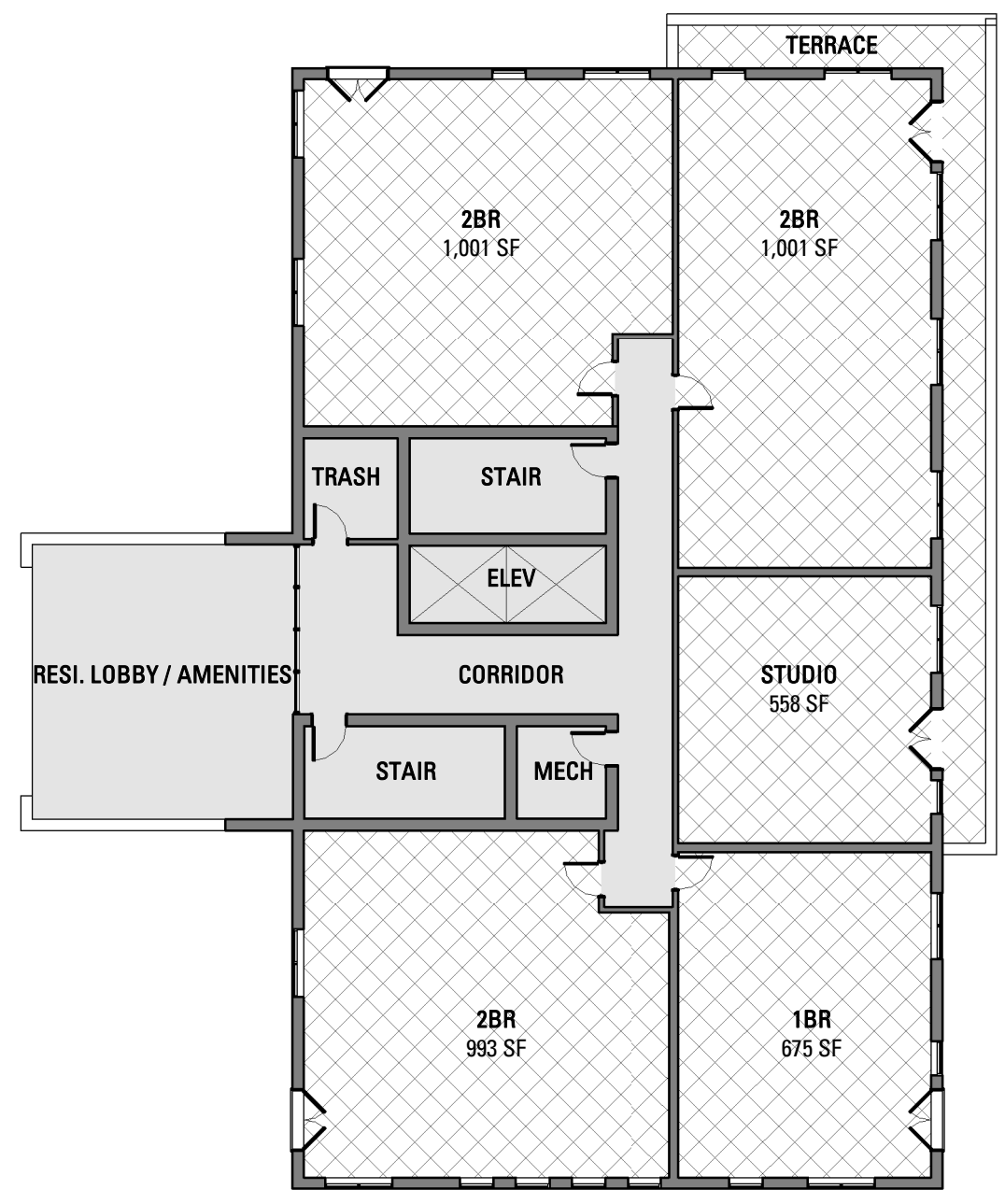
MCINTYRE BUILDING

1 OVERALL 4TH FLOOR PLAN
SCALE: 1/16" = 1'-0"

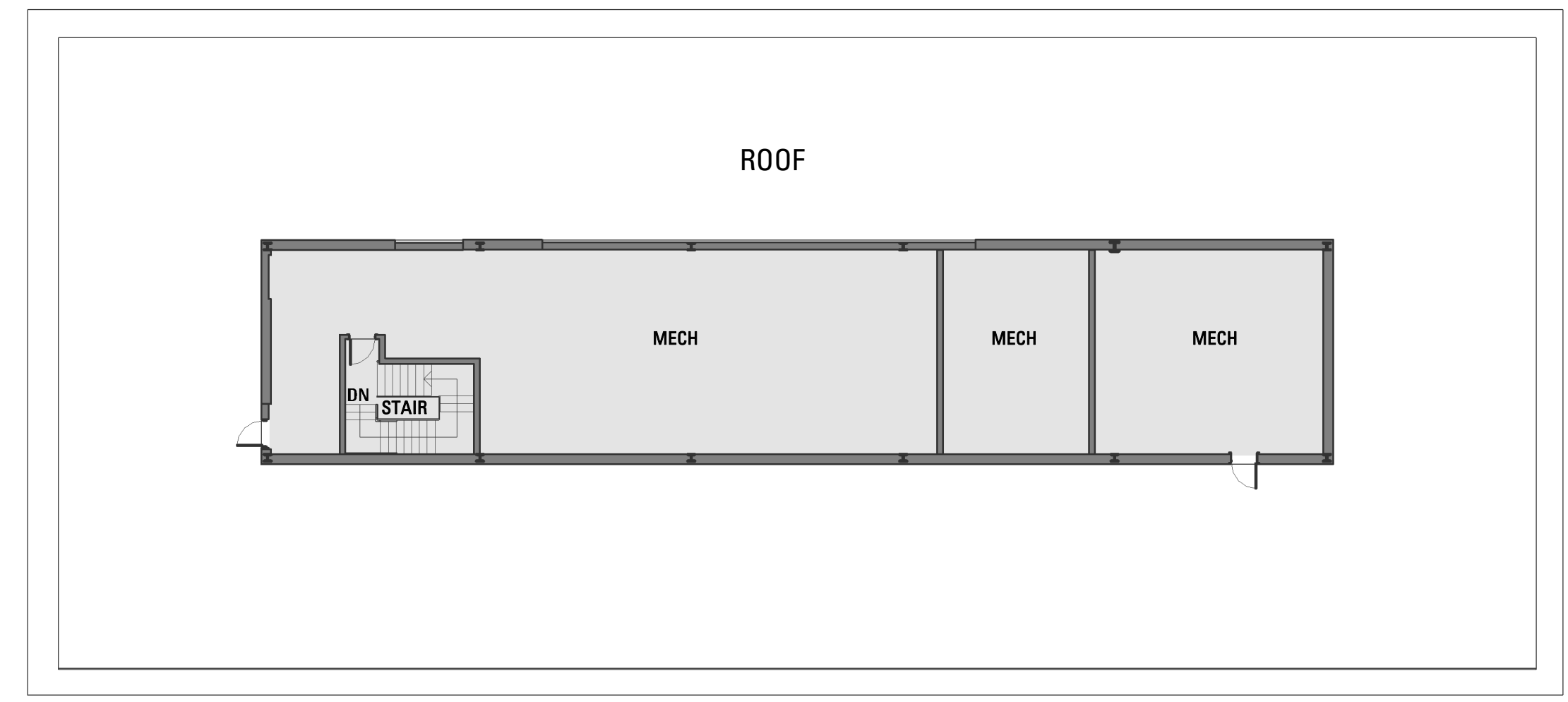
USE PLAN LEGEND

-  REVENUE PRODUCING
-  NON REVENUE PRODUCING
-  NO PUBLIC ACCESS

OVERALL USE PLAN - 4TH FLOOR






BUILDING B



MCINTYRE BUILDING

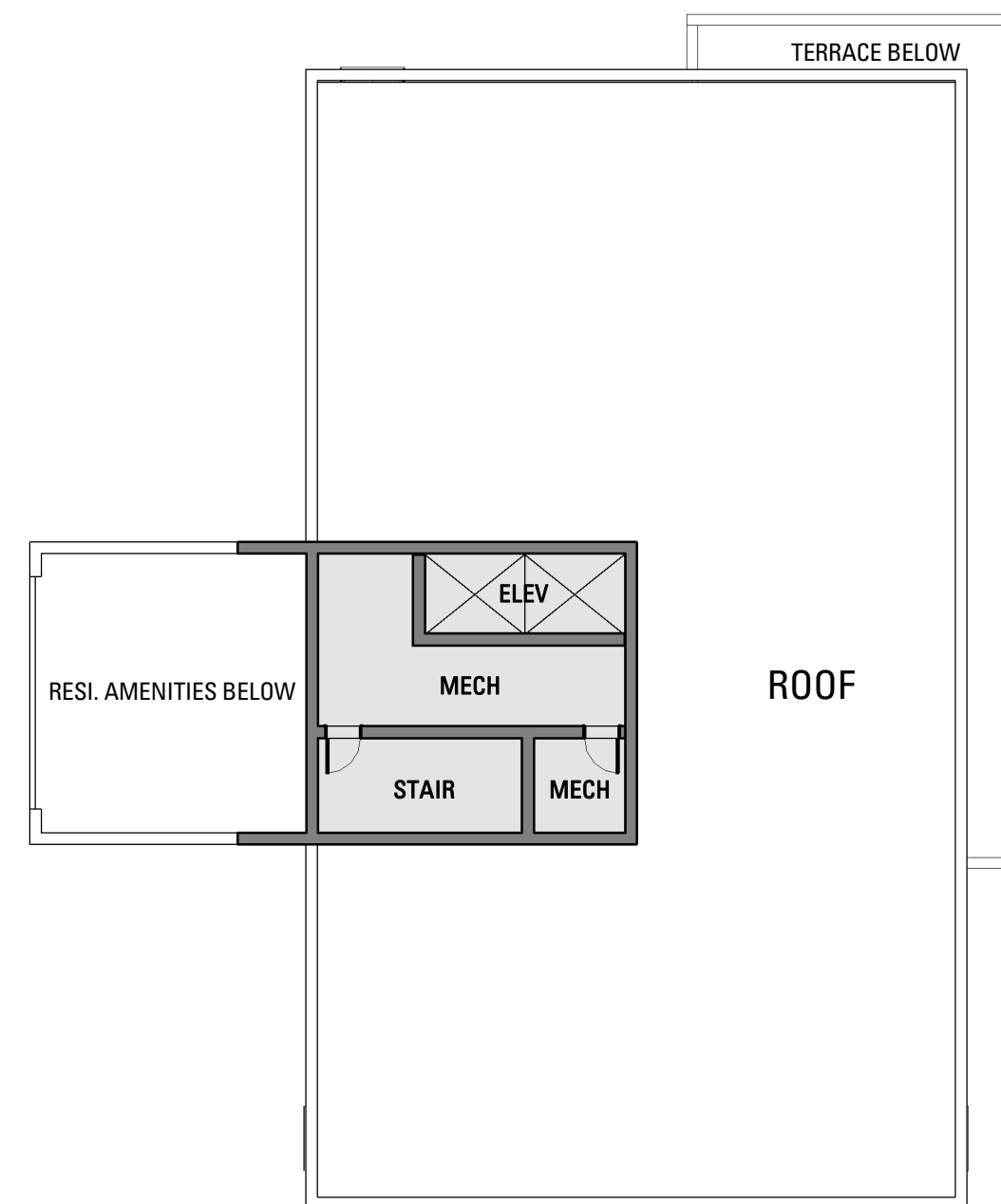
1 OVERALL 5TH FLOOR PLAN
SCALE: 1/16" = 1'-0"

USE PLAN LEGEND

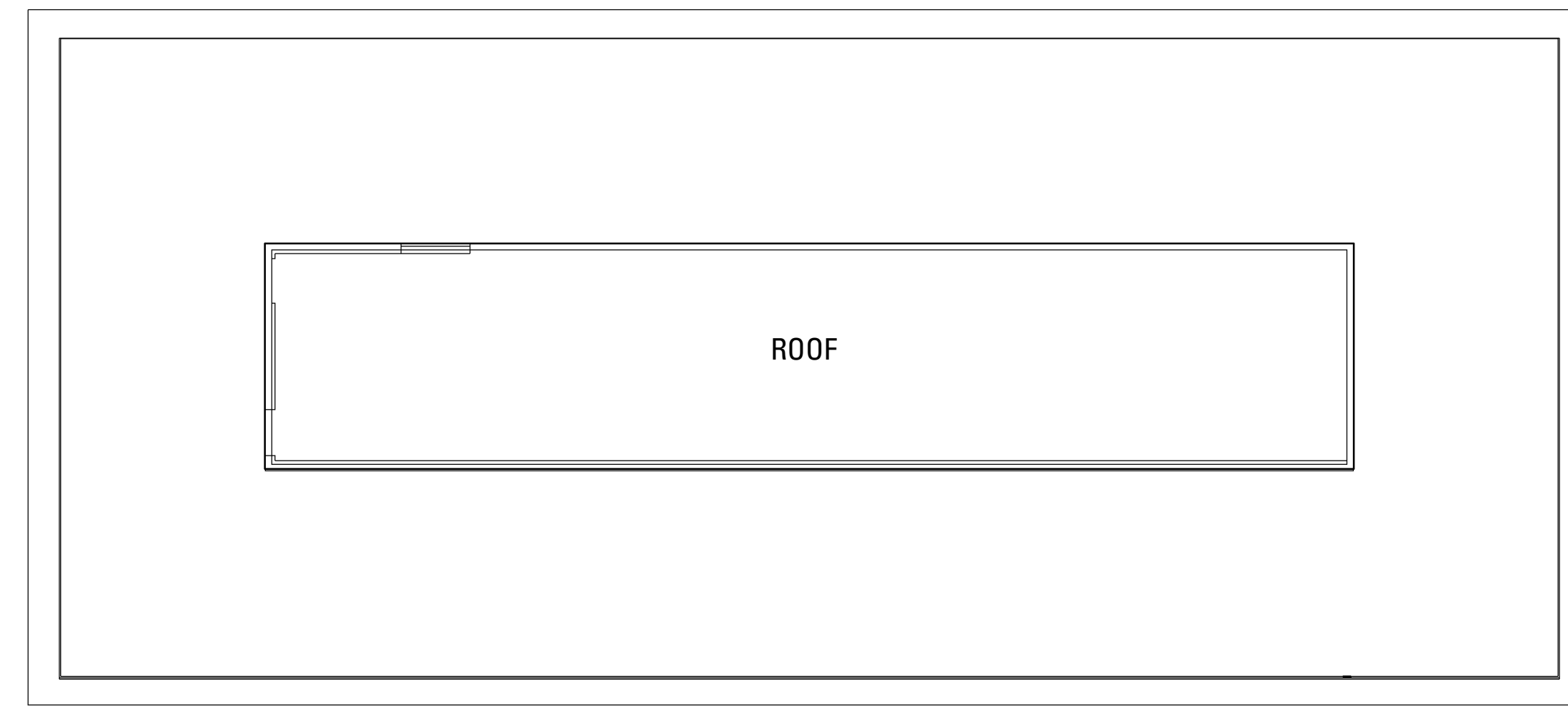
-  REVENUE PRODUCING
-  NON REVENUE PRODUCING
-  NO PUBLIC ACCESS

OVERALL USE PLAN - 5TH FLOOR

IF THIS SHEET IS NOT 22" x 34", IT HAS BEEN REDUCED OR ENLARGED.






BUILDING B



MCINTYRE BUILDING

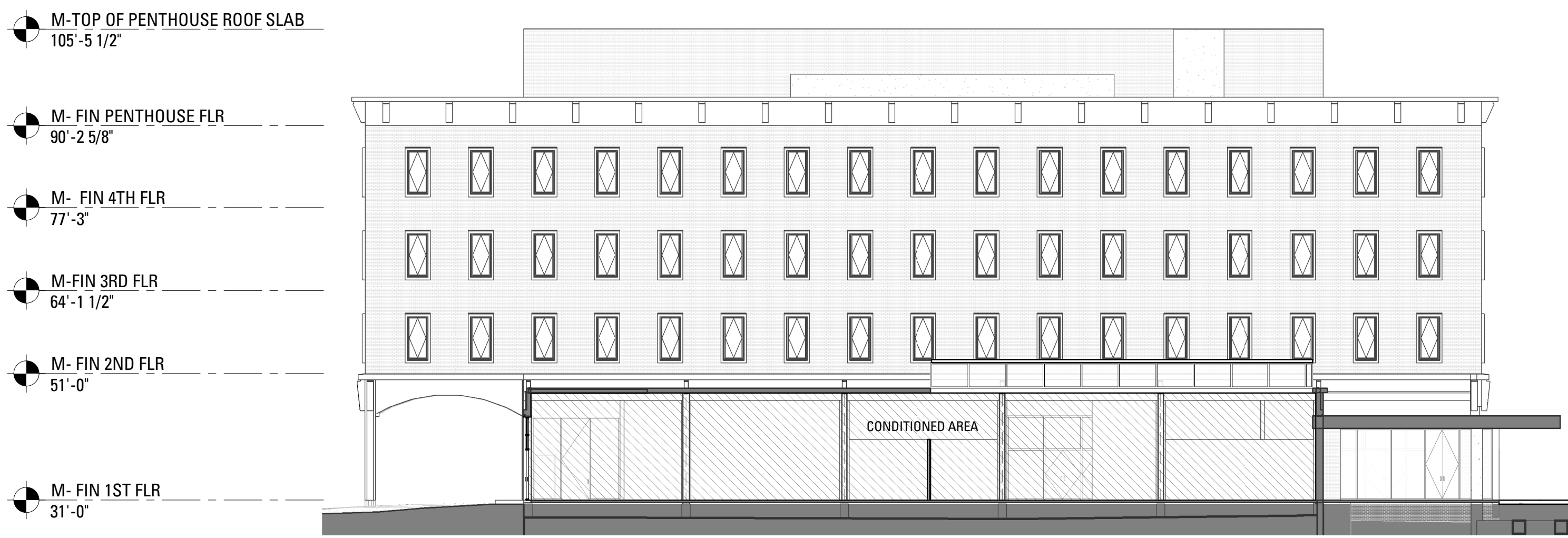
1 OVERALL 6TH FLOOR PLAN
SCALE: 1/16" = 1'-0"

USE PLAN LEGEND

-  REVENUE PRODUCING
-  NON REVENUE PRODUCING
-  NO PUBLIC ACCESS

OVERALL USE PLAN - 6TH FLOOR

IF THIS SHEET IS NOT 22" x 34", IT HAS BEEN REDUCED OR ENLARGED.



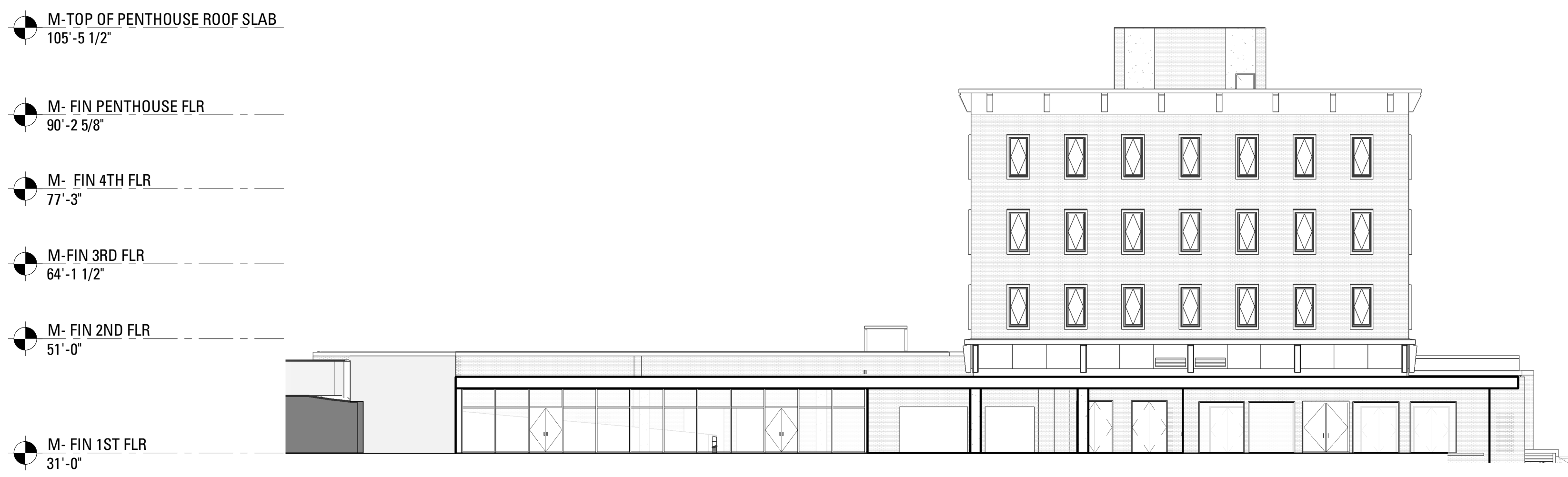
4 NORTH ELEVATION ABOVE McINTYRE
SCALE: 1/16" = 1'-0"



1 SOUTH (DANIEL STREET) ELEVATION
SCALE: 1/16" = 1'-0"



5 WEST (PENHALLOW STREET) ELEVATION
SCALE: 1/16" = 1'-0"



2 NORTH (LINDEN WAY) ELEVATION
SCALE: 1/16" = 1'-0"



3 EAST McINTYRE ELEVATION
SCALE: 1/16" = 1'-0"

| Rev. | Date | Remarks |
|------|------|---------|
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|----------------|------------------|
| Date | December 6, 2018 |
| Scale | 1/16" = 1'-0" |
| Project Number | 17.021 |
| Drawn By | KW/VR/LK |

MCINTYRE PROJECT

80 DANIEL ST
PORTSMOUTH, NH

NOT FOR CONSTRUCTION

EXTERIOR ELEVATIONS

Exhibit B
Project Budget

Exhibit B - Budget

Portsmouth McIntyre

Portsmouth, NH

June 28, 2019

CAPITAL BUDGET

| | | |
|------------------------|------------|------------|
| Gross Square Feet: | 88,657 GSF | 69,758 GSF |
| Net Square Feet (Res): | 67,340 NSF | 66,413 NSF |
| Unit Count: | 76 Units | 0 Units |

| | TOTAL BUDGET | New Construction | McIntyre Building |
|--|---------------------|-------------------------|--------------------------|
| Total Land Costs | \$ 248,781 | \$ 125,252 | \$ 123,528 |
| Subtotal Legal | \$ 475,000 | \$ 265,834 | \$ 209,166 |
| Subtotal Design Costs | \$ 2,817,390 | \$ 1,576,753 | \$ 1,240,637 |
| Subtotal Marketing Costs | \$ 1,679,895 | \$ 582,325 | \$ 1,097,570 |
| Subtotal Permits & Fees | \$ 693,376 | \$ 388,048 | \$ 305,328 |
| Subtotal Financing, Fees & Operations | \$ 4,860,653 | \$ 3,105,537 | \$ 1,755,116 |
| Total Soft Costs | \$ 10,526,314 | \$ 5,918,497 | \$ 4,607,817 |
| Total Hard Costs | \$ 50,310,775 | \$ 32,721,546 | \$ 17,589,230 |
| Total Project Cost | \$ 61,085,869 | \$ 38,765,295 | \$ 22,320,575 |

Exhibit C

Development Schedule

Exhibit C - Schedule

McIntyre Schedule

4/12/2019

| Milestone | Date | Comments |
|---|-------------------|---|
| NPS Approval | Jul '19 | |
| Predevelopment | | |
| Land Use Boards | Jul '19 - Aug '19 | Assumes Design Development is concurrent with Land Use Boards |
| Design and Contracts | Jul '19 - Dec '19 | |
| Ground Lease Closing | Jan '20 | |
| Construction | | |
| Groundbreaking | Jan '20 | |
| Phase I: McIntyre Office/Retail Core & Shell Delivery | Dec '20 | 12 Months |
| Phase II: Residential and Retail | Jul '21 | 18 Months |

Exhibit D

List of Anticipated Permits and Approvals

Exhibit D - Anticipated Permits

| <u>Federal Permits:</u> | Description |
|--|--|
| EPA NPDES permit | The project will exceed one (1) acre of disturbance. We will file the Notice of Intent (NOI) with EPA for coverage under the Construction General Permit (CGP) in order to discharge stormwater during construction activities. The NOI requires that a Stormwater Pollution Prevention Plan (SWPPP) be prepared and implemented |
| EPA Dewatering General Permit | The EPA has promulgated a general permit for the qualifying discharges of non-processed dewatering and dewatering-related activities into "waters of the United States." Will be required for utility corridors as well. |
| NPS Approval of the Application for Obtaining Real Property for Historic Monument Purposes | National Park Service to review and approve City's application in concert with the General Services Administration: Application and exhibits, development agreement and ground lease document. |
| Section 106 | GSA to conduct. |
| <u>State Permits:</u> | Description |
| NHDES Sewer Connection Permit | The project is anticipated to exceed an additional 5,000 GPD of average daily sewer flow. Requires Sign Off from City prior |
| NHDES Shoreland Protection Permit | The project is located within 250 feet of the Piscataqua River. |
| NHDES Alteration of Terrain Permit | Tighe & Bond created an exhibit and performed consultations with NHDES to work around having to submit for this project. Need NHDES letter confirming the aforementioned. |
| <u>Local Permits:</u> | Description |
| Historic District Commission | Certificate of Approval |
| Planning Board | Technical Advisory Committee Recommendation + Planning Board Site Plan Approval |
| Building Permit | Project document approval by Inspectional Services Department |
| Driveway Permit | Department of Public Works |
| Flammable Storage License (Garage Permit) | Fire Department |
| City Roads & Public Street Permits | Street Encumbrance Permit Approval from City Manager's Office |
| Food Service Permit | Approval from Health Department for Restaurant Core/Shell |

Exhibit E

Basic Terms of Ground Lease

McIntyre Project Ground Lease Summary

| | |
|--|--|
| Property Name: Address: | McIntyre Redevelopment Project 80 Daniel Street Portsmouth, NH |
| Owner / Landlord | City of Portsmouth, New Hampshire |
| Tenant | Sobow Square, LLC |
| Guarantors | Redgate and Kane Companies |
| Subordination | Ground Lease not Subordinate to Project Financing |
| Leased Premises | Approximately 2.1 Acres of Land and Improvements Thereon |
| Lease Term | 75 Years |
| Lease Commencement Date | To Be Determined |
| Base Rent Commencement Date | On the 18th Month After Issuance of a Building Permit |
| Additional Option Period and Terms | None |
| Base Rent | 100,000 Annually Payable Monthly at 8,333.33 |
| Base Rent Escalators | 2.5% Annually Beginning 12 Months After Base Rent Commencement |
| Revenue Sharing | In Addition to Base Rent, Tenant Will Pay to Landlord 1% of Annual Revenues Beginning in Year 11 |
| Capital Expense Reserve | \$25,000 Annually First 5 Years after Capital Reserve Commencement Date, \$75,000 Annually Years 6-10 |
| Capital Reserve Payment Commencement Date | 30th Month After Issuance of a Building Permit |
| Security Deposit | None Initial \$400,000 Deposit to be Released at Ground Lease Closing |
| Option to Purchase | None |
| Landlord Expense Responsibility | None |
| Tenant Expense Responsibility | All Operating Expenses of Every Kind |
| Public Spaces | Tenant to Construct and Maintain at its Sole Expense All Indoor and Outdoor Public Spaces as Illustrated on Approved Site Plan |
| Historic Tax Credit Sharing | 50/50 Sharing of Net Proceeds After Costs of Application and Administration |
| Refinance Proceeds Sharing | 7.5% of Net Financing Proceeds for 1st Refinancing Event and 10% of Net Financing Proceeds for all Subsequent Refinancing Events will be Paid to Landlord as Additional Rent |
| Profit Sharing | Upon A Leasehold Sale Landlord Will Share in 20% of Project Profit In Excess of an 18% Internal Rate of Return |

**COMPLAINT
EXHIBIT B**

SETTLEMENT AGREEMENT

This Settlement Agreement (this "Agreement") is made as of the ___ day of April, 2022, by and between the City of Portsmouth, a New Hampshire municipal corporation (the "City"), and SoBow Square, LLC, a Delaware limited liability company ("Developer") (together, the "Parties").

Agreement

For valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties hereby agree as follows.

1. Settlement Contingent on Approval by General Services Administration ("GSA").

This settlement is subject to the GSA granting the City a minimum of six-month extension of time to file an application under the Historic Surplus Property Program (the "Application") to the National Park Service (the "NPS") for the McIntyre property (the "Property"). If the GSA does not grant such extension, this Agreement shall be null and void and the status quo immediately prior to execution of this Agreement shall be restored.

2. Dismissal of Lawsuit. Following the execution of this Agreement and upon the GSA's grant to the City of a minimum six month extension per paragraph 1, the City and Developer shall jointly file with the Rockingham County Superior Court a stipulation of dismissal of their Lawsuit with prejudice in the form attached as Exhibit 1.

3. Advancement of the Community Plan. The City and Developer shall work together cooperatively, each acting reasonably and in good faith, to advance the development of the Project consistent with the Community Plan, attached hereto as Exhibit 2. The City and Developer shall act reasonably in addressing further development and any changes to the Community Plan necessary to address engineering, design, and marketability concerns. The City's urban design, development, and planning firm Principle Group and the Developer's architect shall collaborate on further development and any necessary design/plan changes. The City administration and Developer shall cooperate in seeking to obtain NPS and local board approvals. The Parties acknowledge the timing concerns occasioned primarily due to the desire of the GSA to be relieved of its obligations with regard to the Property as soon as possible and agree to use their reasonable and best efforts cooperatively to address these timing concerns.

4. Expenses. The City shall reimburse Developer \$2 million for prior Project-related expenses that have been rendered unusable due to the changeover to the Community Plan. The reimbursed expenses do not include expenses that Developer incurred prior to its selection as Project developer by a prior City Council on January 16, 2018. The reimbursement shall be made by the City in three payments consisting of \$500,000 on or before May 15, 2022, \$1 million on or before

July 15, 2022, and \$500,000 on or before July 15, 2023. Until NPS and local board approvals are obtained beyond appeal, the City shall reimburse Developer's one half of the third-party costs incurred to advance the Project that are approved by the City in advance of when they are incurred, such approval not to be unreasonably withheld, conditioned or delayed. If after NPS and local board approvals are obtained, the transaction fails to close for any reason other than (a) Developer default, (b) Developer's inability to obtain financing, or (c) a reason within Developer's reasonable control, the City shall reimburse seventy-five (75) percent of all further third-party costs incurred by Developer that are reasonable and customary for a development of this nature. The City's obligation to reimburse Developer for expenses shall not extend to expenses incurred after the execution of the Ground Lease (as revised pursuant to paragraph 5 below).

5. City Contributions to the Costs of Project Development and Construction. The Parties acknowledge that public financial support from the City will be necessary to develop and construct the Community Plan. The Parties shall agree upon an updated financial pro forma for the construction of the revised project, each acting reasonably and in good faith. The updated pro forma will project a Rate of Return on Developer's invested capital of an unlevered return on Developer invested capital of 7.4% (the "Rate of Return"). The Developer's invested capital on which the

return shall be calculated shall not include expenses reimbursed pursuant to paragraph 3 above. The City and Developer will keep each other informed of and collaborate on updated to the pro forma during the planning of the Project. Upon the determination of the updated development and construction costs following completion of design and construction pricing prior to closing, the pro format shall be adjusted to reflect actual costs. The City shall enter such further agreements as necessary to (a) make financial contributions to the cost of development and construction of the Project (through infrastructure commitments and/or monetary payments the nature and timing of which shall be negotiated in good faith by the Parties) in amounts necessary to project the Rate of Return or (b) agree to changes to the Community Plan to reduce the Project's development and construction cost or to increase the Project's projected net income as necessary to project the Rate of Return. The City shall have no obligation to subsidize or contribute to costs of operating the Project incurred after completion thereof.

6. Amendments to Development Agreement; Approval of Ground Lease. Promptly following execution of this Agreement, the City and Developer shall, each acting reasonably and in good faith, negotiate and implement amendments to the Development Agreement necessary or appropriate to reflect the changes contemplated by this Agreement, including the construction of the

“Community Plan”. Furthermore, the City acknowledges that the draft form of Ground Lease previously negotiated by Developer and the City (having draft date December 7, 2019) is a substantially acceptable starting point for further negotiation thereof, subject to revisions necessary or appropriate to reflect the changes contemplated by this Agreement, such revisions to be negotiated reasonably and in good faith by the Parties.

7. Representations and Warranties of the City. The City hereby represents and warrants to the best of its knowledge and belief that:

A. The execution and delivery of this Agreement and the performance of the City's obligations hereunder have been duly authorized by such municipal action as necessary, and this Agreement constitutes the legal, valid and binding agreement of the City, enforceable against the City in accordance with its terms subject only to the conditions set out in this Agreement.

B. Subject to the conditions set out in this Agreement, neither the execution or delivery by the City of this Agreement, the performance by the City of its obligations in connection with the transactions contemplated hereby, nor the fulfillment by the City of the terms or conditions hereof conflicts with, violates or

results in a breach of any constitution, law or governmental regulation applicable to the City, or conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which the City is a party or by which the City or any of its properties or assets are bound, or constitutes a default thereunder.

- C. There is no action, suit or proceeding, at law or in equity, or official investigation before or by any court or Governmental Authority, pending or threatened against the City, or to the City's knowledge with respect to the Property, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by the City of its obligations hereunder or the performance by the City of its obligations under the transactions contemplated hereby, or which, in any way, questions or may adversely materially affect the validity or enforceability of this Agreement, or any other agreement or instrument entered into by the City in connection with the transactions contemplated hereby.

8. Representations and Warranties of Developer. Developer hereby represents and warrants to the best of its knowledge and belief that:

- A. Developer has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all necessary action has been taken to authorize the execution, delivery and performance by it of this Agreement. This Agreement will, upon execution and delivery thereof by Developer, constitute valid, legal and binding obligations of Developer enforceable against Developer in accordance with the respective terms thereof.
- B. Neither the execution or delivery by Developer of this Agreement, the performance by Developer of its obligations in connection with the transactions contemplated hereby, nor the fulfillment by Developer of the terms or conditions hereof conflicts with, violates or results in a breach of any constitution, law or governmental regulation applicable to Developer, or conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which Developer is a party or by which Developer or any of its properties or assets are bound, or constitutes a default there under.
- C. There is no action, suit or proceeding, at law or in equity, or official investigation before or by any court or Governmental Authority, pending or threatened against

Developer, its principal(s), affiliate(s), or entities controlled by its principal(s), wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by Developer of its obligations hereunder or the performance by Developer of its obligations under the transactions contemplated hereby, or which, in any way, questions or may adversely materially affect the validity or enforceability of this Agreement or any other agreement or instrument entered into by Developer in connection with the transactions contemplated hereby.

9. Cooperation: Developer and the City agree to cooperate with each other, and to act reasonably and in good faith, in order to achieve the purposes of this Agreement and, in connection therewith, to take such further actions and to execute such further documents as may reasonably be requested by the City, Developer, or their representatives, agents, consultants and any prospective or actual lenders, investors or tenants.

10. Entire Agreement; Amendments. This Agreement embodies the entire agreement and understanding between the Parties hereto relating to the subject matter herein and supersedes all prior agreements and understandings between the Parties (including without limitation the RFP and the

McIntyre Project Negotiating Principles). This Agreement may not be changed, modified, waived, discharged or terminated orally, but only by an instrument in writing signed by each of the Parties hereto or by the party against which enforcement is sought. Any change, modification or amendment, which requires the consent or approval of a Governmental Authority, shall be effective only upon receipt of such approval.

11. Binding Effect; Successors and Assignors. The terms and provisions of this Agreement and the respective rights and obligations of the Parties hereunder shall be binding upon, and inure to the benefit of, their respective heirs, successors, assigns, and nominees. The Developer shall not have the right to assign this Agreement without the prior written consent of the City which may be withheld in the City's sole discretion.

12. Headings. The headings to the sections and subsections of this Agreement have been inserted for convenience of reference only and shall not modify, define, limit or expand the express provisions of this Agreement.

13. Exhibits. All exhibits referred to in this Agreement are hereby incorporated by reference and expressly made a part hereof.

14. Governing Law. This Agreement shall in all respects be governed by, and construed and enforced in accordance with, the laws of the State of New Hampshire.

15. Consent to Jurisdiction and Venue. Developer and City submit to the jurisdiction of the courts of the State of New Hampshire and the courts from which an appeal from such trial venue may be taken or other relief may be sought for purposes of any action or proceeding arising out of this Agreement or any related agreement. All legal actions taken by the Parties shall be commenced in Rockingham County New Hampshire Superior Court. Both Parties hereby waive their right to a jury trial.

16. Independent Parties. Developer and City are independent Parties under this Agreement, and nothing in this Agreement shall be deemed or construed for any purpose to establish between any of them or among them a relationship of principal and agent, employment, partnership, joint venture, or any other relationship other than independent Parties.

17. Waivers. Failure on the part of any party to complain of any action or non-action on the part of the other party, no matter how long the same may continue, shall not be deemed to be a waiver of any such party's rights hereunder. No waiver at any time of any provision hereof by any

party shall be construed as a waiver of any other provision hereof or a waiver at any subsequent time of the same provision.

18. No Rights Conferred Upon Others. Except as expressly set out herein, nothing in this Agreement shall be construed as giving any individual, corporation, limited liability company, partnership, joint venture, association, joint stock company, trust, unincorporated organization or government, other than the Parties hereto, their successors and permitted assigns, any right, remedy or claim under or in respect of this Agreement or any provision hereof.

19. Time of the Essence. The Parties agree that time is of the essence in performance of their respective obligations under this Agreement.

20. Good Faith and Fair Dealing. Unless expressly stated otherwise in this Agreement, whenever a party's consent or approval is required under this Agreement, or whenever a party shall have the right to give an instruction or request another party to act or to refrain from acting under this Agreement, or whenever a party must act or perform before another party may act or perform under this Agreement, such consent, approval, or instruction, request, act or performance shall be reasonably made or done, or shall not be unreasonably withheld, delayed, or conditioned, as the case may be.

21. Warranties and Representations. Developer and City each acknowledge that they have not been influenced to enter into this transaction or relied upon any warranties or representations not specifically set forth or incorporated into this Agreement.

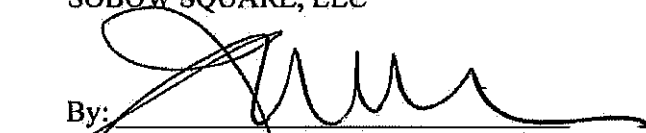
[Remainder of page intentionally blank; signature page follows]


This Agreement has been executed by the City and by Developer as a sealed instrument effective as of the date first set forth above.

CITY OF PORTSMOUTH

By: _____
Karen S. Conard, City Manager
Duly Authorized by vote of the Portsmouth City
Council on _____, 2022

SOBOW SQUARE, LLC

By: 
Michael Kane
Duly Authorized

By: 
Ralph Cox
Duly Authorized

DOCKET #: 218-2020-CV-00352

SOBOW SQUARE, LLC

v.

CITY OF PORTSMOUTH

AGREEMENT FOR DOCKET MARKINGS

NOW COME the parties in the above-captioned action and agree that the docket for all claims against and among the parties may be marked as follows:

“NEITHER PARTY. NO COSTS. NO INTEREST. NO ATTORNEY’S FEES. NO FURTHER CLAIMS FOR ANY CAUSE OF ACTION ARISING PRIOR TO APRIL 5, 2022. WITH PREJUDICE.”

Respectfully submitted,

CITY OF PORTSMOUTH, NH
By its attorneys,

Dated: April 5, 2022

By: /s/ Michael J. Connolly
Michael J. Connolly, Esq. (#14371)
Owen R. Graham, Esq. (#266701)
Hinckley, Allen & Snyder LLP
650 Elm Street, Suite 500
Manchester, NH 03101
Tel. (603) 225-4334
mconnolly@hinckleyallen.com
ograham@hinckleyallen.com

SOBOW SQUARE, LLC
By its attorneys,

DLA PIPER LLP (US)

Dated: April 5, 2022

By: /s/ Bruce E. Falby
Bruce E. Falby, Esq.
Admitted pro hac vice
33 Arch Street, 26th Floor
Boston, MA 02110-247
bruce.falby@dlapiper.com

DONAHUE, TUCKER & CIANDELLA, PLLC

Dated: April 5, 2022

By: /s/ Christopher T. Hilson

Christopher T. Hilson, Esq. (#17116)
16 Acadia Lane, PO Box 630
Exeter, NH 03833-4936
Tel. (603) 778-0686
chilson@dtclawyers.com




Reviewed and So Ordered and Approved

Date: _____

_____, **Presiding Justice**

COMPLAINT
EXHIBIT C

EXHIBIT 1 - SUMMARY OF RKG'S ADJUSTED PRELIMINARY PRO FORMA BY COMMUNITY PLAN OPTION*

| | | 1 | 2 | 3 | |
|-----------------|--|--|---|---|------------------------------------|
| | |  |  |  | |
| | Community Plan Option | Baseline | Option 1 | Option 2 | |
| | Exhibit No. | EXHIBIT 2 | EXHIBIT 3 | EXHIBIT 4 | |
| Item No. | Description | 2022 Community Plan | Squared with Open Market Hall | Arcade with Open Market Hall | |
| 1 | Total Construction Cost | \$100,676,526 | \$90,758,682 | \$95,300,346 | Costs, NOI, & Contribution Amounts |
| 2 | Net Operating Income | \$3,694,956 | \$4,001,022 | \$4,339,028 | |
| 3 | Return on Cost Percentage | 7.4000% | 7.4000% | 7.4000% | |
| 4 | Developer's Contribution Amount | \$49,931,834 | \$54,067,866 | \$58,635,509 | |
| 5 | City Contribution Amount (before reinvestment of property tax and rental income, and profit sharing as an equity partner) | \$50,744,693 | \$36,690,816 | \$36,664,837 | |
| 6 | Percentage Contribution (Equity) | 50.4% | 40.4% | 38.5% | |
| 7 | Estimated Real Property Taxes (Annual) | \$864,058 | \$935,635 | \$1,014,666 | Reinvested Taxes & Rent |
| 8 | Baseline Ground Lease (Year 1) | \$100,000 | \$100,000 | \$100,000 | |
| 9 | Annual Tax and Rent Revenue | \$964,058 | \$1,035,635 | \$1,114,666 | |
| 10 | City's Supportable Bonding Capacity (from Annual Tax and Rent Revenue) | \$12,173,266 | \$13,077,076 | \$14,075,010 | |
| 11 | Historic Tax Credit Subsidy (20% of Rehab Costs) | \$5,153,913 | \$5,153,913 | \$5,153,913 | HTC |
| 12 | City's 'Out-of-Pocket' Amount (before profit-sharing as an equity partner) | \$33,417,514 | \$18,459,827 | \$17,435,915 | Indirect Costs |
| 13 | Indirect Public Infrastructure Improvements | \$4,359,988 | \$4,359,988 | \$4,359,988 | |
| 14 | City's 'True' Cost (before profit-sharing as an equity partner) | \$29,057,526 | \$14,099,839 | \$13,075,927 | |
| 15 | Before Tax Cash Flow (BTCF - Profit in Year 1) | \$1,140,738 | \$1,236,147 | \$1,340,394 | Profit Sharing |
| 16 | City Share (Equity Percentage) | 50.4% | 40.4% | 38.5% | |
| 17 | City's pro-rated share of the BTCF Amount | \$574,974 | \$499,734 | \$515,689 | |
| 18 | City's Supportable Bonding Capacity | \$7,260,258 | \$6,310,200 | \$6,511,661 | |
| 19 | City's Net Contribution Amount after Reinvestment of Taxes and Rent and Profit-Sharing as an Equity Partner. Subject to further Revenue-Sharing Negotiations. | \$21,797,268 | \$7,789,639 | \$6,564,266 | |

* For negotiation purposes only and not yet presented to the City Council for approval.