



AGENDA

REGULAR MEETING OF THE BIRMINGHAM PLANNING BOARD

WEDNESDAY MAY 22, 2024 – 7:30 PM

151 MARTIN ST., CITY COMMISSION ROOM 205, BIRMINGHAM MI*

- A.** Roll Call
- B.** Review and Approval of the Minutes of the Regular Meeting of **May 8, 2024**
- C.** Chairpersons' Comments
- D.** Review of the Agenda
- E.** Meeting Open to the Public for Items Not on the Printed Agenda
- F.** Unfinished Business
- G.** Rezoning Applications
- H.** Community Impact Studies
- I.** Special Land Use Permits
 - 1. **219 Elm St. – All Seasons 2 – Public Hearing to Review Request for Special Land Use Permit Amendment for New Commercial Use on First Floor of Independent Senior Living Facility**
- J.** Site Plan & Design Reviews
 - 1. **219 Elm St. – All Seasons 2 – Public Hearing to Review Request for Special Land Use Permit Amendment for New Commercial Use on First Floor of Independent Senior Living Facility**
 - 2. **245 Townsend – Parkview Townhomes – Request for Preliminary Site Plan Review for New Attached Single Family Development**
- K.** Study Session
 - 1. **The Birmingham Plan 2040 – Prioritization of Key Actions**
 - 2. **Triangle District Mixed-Use Requirements – Study Session**
- L.** Miscellaneous Business and Communications:
 - 1. Pre-Application Discussions
 - 2. Communications
 - i. **Project Updates**
 - ii. **Joint Planning Board & City Commission Meeting June 10, 2024**
 - iii. **June Planning Board Meeting(s)**
 - 3. Administrative Approval Correspondence
 - i. **May 3, 2024 – May 17, 2024**
 - 4. Draft Agenda – **June 26, 2024**
 - 5. Action List – **2024**
 - 6. Other Business
- M.** Planning Division Action Items
 - 1. Staff Report on Previous Requests
 - 2. Additional Items from Tonight's Meeting
- N.** Adjournment

*Please note that board meetings will be conducted in person once again. Members of the public can attend in person at Birmingham City Hall OR may attend virtually at:

Link to Access Virtual Meeting: <https://zoom.us/j/111656967>

Telephone Meeting Access: 877-853-5247 US Toll-Free

Meeting ID Code: 111656967

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City Of Birmingham
Regular Meeting Of The Planning Board
May 8, 2024
City Commission Room
151 Martin Street, Birmingham, Michigan

Minutes of the regular meeting of the City of Birmingham Planning Board held on May 8, 2024.
The meeting was convened at 7:30 p.m.

A. Roll Call

Present: Chair Scott Clein, Vice Chair Bryan Williams; Board Members Robin Boyle, Stuart Jeffares, Bert Koseck, Daniel Share, Janelle Whipple-Boyce

Absent: Alternate Board Members Jason Emerine, Nasseem Ramin

Staff: Planning Director Dupuis; City Transcriptionist Eichenhorn

B. Approval Of The Minutes Of The Regular Planning Board Meeting of March 27, 2024

05-13-24

Motion by Mr. Williams

Seconded by Mr. Share to approve the minutes of the Regular Planning Board meeting of March 27, 2024 as amended.

Motion carried, 7-0.

VOICE VOTE

Yeas: Whipple-Boyce, Williams, Share, Clein, Boyle, Koseck, Jeffares

Nays: None

C. Chair's Comments

The Chair welcomed everyone to the meeting and reviewed the meeting's procedures.

D. Review Of The Agenda

E. Meeting Open to the Public for Items Not on the Printed Agenda

F. Unfinished Business/Courtesy Review

G. Rezoning Applications

H. Community Impact Study and Site Plan Review

I. Special Land Use Permits

J. Site Plan & Design Reviews

K. Study Session

PD Dupuis presented the items and answered informational questions from the Board.

1. Triangle District Mixed-Use Requirements – Study Session

Board members' comments were as follows:

- The Triangle zoning requirements and the allowances for additional floors need to be revisited. There was some interest in requiring that developments in the Triangle have a certain percentage of commercial use on the first floor. Payment in lieu of parking was likely no longer an appropriate option to offer in the Triangle. There would likely be an opportunity for more development on both sides of Adams.
- LEED certification should likely be a universal requirement for future building. The process of revising the Triangle District Mixed-Use requirements should proceed in two parts in order to minimize the amount of further development that can occur contrary to the City's vision for the Triangle. The goal would be to address five or six of the most pressing items immediately in order to impact more imminent development, and then to do a more thorough ongoing review.
- Bonus floors in exchange for LEED certification was not an appropriate exchange at this point. While a percentage of first-floor commercial should be required along the busier thoroughfares of the Triangle, it may be appropriate to permit residential on the first floors of the less-busy streets. It might even be reasonable to require that the entirety of first floors along the busier streets in the Triangle be commercial. The options for receiving bonus stories does not have to include five items. Only the highest priorities should be included as options for receiving bonus stories.
- Exchanging LEED certification for bonus floors was not resulting in appropriate value for the City. In terms of pressing items, the City should remove the option to receive bonus floors in exchange for LEED certification; select a required percentage of first-floor commercial; and consider whether to allow the payments in lieu of parking to go towards public amenities instead of only to a parking deck.
- There may be some issue with switching the payment in lieu of parking from a parking deck to a public amenity because the parking deck may have represented more of a direct benefit for developers. If LEED certification is required it could be a challenge for some of the small, high-quality architecture firms in town who would need to hire an outside expert, and there would need to be a process for addressing developments that attempted LEED certification and ultimately did not receive it.
- Revising the Triangle District Mixed-Use requirements will be a multi-step process, as opposed to a two-step process. The first step would address the most pressing changes, which should include how to activate the street without recreating an experience similar to the downtown shopping area, and switching the payment in lieu of parking from a parking deck to a public amenity. Intervening steps would include reviewing the five ways to receive bonus stories and possibly revising the numbers contained therein. Longer term steps would include reviewing all of the zoning, which could include Adams Square and other considerations. It would be appropriate to create incentives for bonus stories that are worthwhile to developers before removing the LEED certification incentive since that has been the most frequently used option and the City wants to encourage dense development.
- The Haynes Square project will have implications for the Triangle that must be considered. An appropriate incentive might grant bonus stories to developers that cede some sidewalk space to the City in order to create proper tree wells and streetlights. Another might allow the developers extra stories for moving the electric underground. A third might require some amount of attainably-priced housing - as determined by the Commission - in exchange for bonus stories. Worth and Webster should likely be exempted from any first-

floor commercial requirements. The goal for those two streets should be to have them actively tie into a public amenity.

2. The Birmingham Plan 2040 – Prioritization of Key Actions

Board members' comments were as follows:

- All Woodward topics are some of the biggest priorities. The area just north of 14 Mile at Woodward needs to be looked at for potential aesthetic and development improvements.
- The Board should do the prioritization of its items at its next meeting.
- In preparation for the joint meeting, it would be helpful to clarify what the Board's priorities are, and what they might recommend the Commission's priorities should be stemming from the 2040 Plan.
- Staff has done an excellent job of categorizing the 2040 Plan actions.
- Joint meetings with other boards would be appropriate. It could also be useful to coordinate with other boards so that multiple boards are working together on their shared topics at once.
- The Planning Board and the MMTB should meet to discuss approaches to Woodward. Woodward should also likely be added to the Commission's action list.

L. Miscellaneous Business and Communications

- 1. Pre-Application Discussions**
- 2. Communications**
 - i. Project Updates**
 - ii. June Planning Board Meeting(s)**
- 3. Administrative Approval Correspondence**
- 4. Draft Agenda**

The Board will review options for achieving bonus stories at upcoming meetings.

- 5. Action List - 2024**
- 6. Other Business**

Board members' comments were as follows:

- There may be some opportunity to pursue a park at the eastern end of Adams Square.
- The City should explore the possibility of a small plaza and pocket park adjacent to the Walgreens which ideally would include the property in that area that was deeded to the City.
- If Haynes and Bowers are aligned to square off Woodward, there may be an opportunity for a plaza and/or a park as part of that project.
- There may be an opportunity for a plaza and/or a park where the post office is presently.
- Parks and plazas can have a positive impact on the value of adjacent real estate.
- If the Commission is interested in a review process for public projects, it would also need to clarify what standards should be used for the review process. It seems inappropriate that the senior/recreation center project will not be reviewed by the Planning Board.
- Absent some extenuating circumstances, public projects should be reviewed by the Board because of its holistic approach, and those projects should be held to the same standards as the ones used for private projects.

M. Planning Division Action Items
a. Staff Report on Previous Requests
b. Additional Items from tonight's meeting

N. Adjournment

No further business being evident, the meeting was adjourned at 8:57 p.m.

A blue ink signature of Nick Dupuis, consisting of a stylized 'N' and 'D'.

Nick Dupuis, Planning Director

A black ink signature of Laura Eichenhorn, consisting of a stylized 'L' and 'E'.

Laura Eichenhorn, City Transcriptionist



MEMORANDUM

Planning Division

DATE: May 22, 2024

TO: Planning Board Members

FROM: Nicholas Dupuis, Planning Director

SUBJECT: 219 Elm St. – All Seasons 2 – Special Land Use Permit Amendment (SLUP), Final Site Plan & Design Review – Public Hearing

The subject site, 219 Elm Street, is located at the north end of the Triangle District in the MU3 (Triangle Overlay) and O2 (Office/Commercial) Zoning Districts. The site is directly adjacent to the existing All Seasons of Birmingham senior living establishment that was completed around 2015. The newly completed development at 219 Elm, also known as All Seasons 2, received Special Land Use and site plan approval in 2021, and was recently granted a Temporary Certificate of Occupancy. A complete list of key dates in the approval history of the project is provided in the table below:

Application Type	Approval Date	Documents
Community Impact Study	Planning Board 5/13/20	Agenda – Minutes
Preliminary Site Plan Review	Planning Board 6/10/20	Agenda – Minutes
Final Site Plan & Design Review	Planning Board 12/9/20	Agenda – Minutes
	City Commission 3/8/21	Agenda – Minutes
Special Land Use Permit	Planning Board 1/27/21	Agenda – Minutes
	City Commission 3/8/21	Agenda – Minutes
Building Permit	7/25/22	-
Temporary Certificate of Occupancy	4/4/24	-

At this time, the applicant has submitted a Special Land Use Permit Amendment, Final Site Plan and Design Review application to revise the first-floor layout to include one commercial tenant space. The tenant space would be approximately 1,500 sq. ft. and would transition the middle of three existing ground-floor residential units to commercial. There is no tenant associated with the space at this time, and the transition would include some exterior renovations to create a storefront for the space that more closely aligns with the architectural standards of the Triangle District.

As required by Article 7, Section 7.37 of the Zoning Ordinance, once a permit for a special land use has been granted as to any parcel of land, no change in that use may be made nor may any addition to or change in the building or improvements on the parcel of land take place until a new request for approval has been filed with the City Commission and the City Commission has approved the request for change. Prior to its consideration of a special land use application for an initial permit or an amendment to a permit, the City Commission shall refer the Site Plan and the design to the Planning Board for its review and recommendation.

1.0 Land Use and Zoning

- 1.1 Existing Land Use – The existing site is the recently completed 5-story All Seasons 2 independent senior living facility.
- 1.2 Existing Zoning – O2 (Office-Commercial) & MU3 (Mixed-Use)
- 1.3 Summary of Adjacent Land Use and Zoning – The following chart summarizes the existing land use and zoning adjacent to and/or in the vicinity of the subject site.

	North	South	East	West
Existing Land Use	Multiple-Family Residential	Office/Commercial	Multiple-Family Residential	Commercial
Existing Zoning District	O2 (Office/Commercial)	O1 (Office)	O2 (Office/Commercial)	O2 (Office/Commercial)
Overlay Zoning District	MU5 (Mixed-Use)	ASF3 (Attached Single-Family)	MU3 (Mixed-Use)	MU5 (Mixed-Use)

2.0 Setback and Height Requirements

There are no issues with the bulk, area or placement of the proposed addition. The building was approved in 2021 and was built to plan which met all of the requirements.

However, the applicants request does have implications on the additional building height provisions in Article 3, Section 3.08 (E) of the Zoning Ordinance, which state that:

Buildings or portions of buildings that are 100 feet or more from a single-family residential zoning district may have the additional building height (in number of stories and/or feet of height) noted in Section 3.08B, Section 3.08C, and Section 3.08D where 2 or more of the following are provided as part of the development. Additional stories shall be stepped back at a 45-degree angle from the top story allowed by right without the height bonus.

1. A multi-level parking structure that offers parking available to the public at the rate of one parking space available to the public for every 300 square feet of building floor area allowed in the additional stories. Where additional building height is proposed without additional stories, then the parking shall be based upon the building floor area in the top floor. The applicant may provide payment-in-lieu to the City for construction of parking in a public parking deck at an offsite location. Parking rates will be calculated as follows:
 - a. The rate of \$27,500 per space to match the current cost per above-ground structured parking space in 2018.
 - b. Starting July 1st, 2019, the rate of payment per parking space shall be increased by 3 percent each year.
2. Dedication of an improved public plaza with an area that is at least equal to 25% of the additional floor area of building area allowed in the additional stories. Where additional building height is proposed without additional stories, then public plaza space shall be based upon 25% of the building floor area on the top floor. The location and design of the plaza shall be approved by the Planning Board and shall be in accordance with the Triangle District Urban Design Plan.
3. A mixed-use building that provides residential dwelling units above first-floor commercial where a minimum of 50% of the buildings floor area is residential.
4. Leadership in Energy and Environmental Design (LEED) building design, accredited based upon the rating system of the United States Green Building Council.
5. Transfer of development rights for additional floor area that zoning would permit on a site containing an historic building or resource designated under Section 127 of the Birmingham Code. The development rights shall be dedicated through recording a conservation easement on the designated historic resource, which shall be reviewed and approved by the Historic District Commission.

The 2021 approval was granted based on the applicant meeting the parking payment-in-lieu option, as well as the LEED certification option. At this time, the applicant has paid the required fee-in-lieu, and is working towards final LEED certification to furnish to the City. The applicant is now proposing to amend their proposal to provide a mixed-use building instead of providing the payment-in-lieu. Should the applicant be successful in gaining approval, they would still meet the minimum requirements of Section 3.08 (E) and would be able to maintain their current height, which includes two bonus stories.

3.0 Screening and Landscaping

- 3.1 Dumpster Screening – There are **no changes** proposed to the existing dumpster enclosure as a part of the Special Land Use Permit Amendment, Final Site Plan and Design Review application submitted.
- 3.2 Parking Lot Screening – There are **no changes** proposed to the existing parking facilities as a part of the Special Land Use Permit Amendment, Final Site Plan and Design Review application submitted.
- 3.3 Mechanical Equipment Screening – There are **no changes** proposed to the previously approved mechanical screening enclosures on site as a part of the Special Land Use Permit Amendment, Final Site Plan and Design Review application submitted.
- 3.4 Landscaping – There are **no changes** proposed to most of the previously approved landscaping on site. However, there are minor modifications at the south end that meet the requirements of the Zoning Ordinance.
- 3.5 Streetscape – There are **no changes** proposed to the streetscape as a part of this Special Land Use Permit Amendment and Final Site Plan/Design Review application.

4.0 Parking, Loading and Circulation

- 4.1 Parking – Article 4, Section 4.45 of the Zoning Ordinance requires independent senior living complexes to provide 0.5 off-street parking spaces per unit proposed. With the transition of one unit to commercial, the building would now contain 23 units; thus 12 off-street parking spaces are required for the residential portion of the development.

For commercial uses, the Planning Division assumes a standard commercial or office user which requires 1 off-street parking space for each 300 sq. ft. of floor area. The proposed 1,500 sq. ft. commercial tenant space would require 5 off-street parking spaces.

The site currently contains 19 off-street parking spaces, 9 of which are in private garages. The applicant is required to provide 17 off-street parking spaces, thus meeting the requirements for off-street parking.

- 4.2 Loading – Commercial uses less than 5,000 sq. ft. do not require an off-street loading space. Thus, there are **no changes** proposed to the loading conditions on site.
- 4.3 Vehicular Circulation and Access – There are **no changes** proposed to the vehicular circulation and access to the site. Vehicles will continue to enter the site from the drive on the south side of the property along Elm.
- 4.4 Pedestrian Circulation and Access – There are **no changes** proposed to pedestrian circulation and access of the site. The site will retain the existing pedestrian walkways and main pedestrian entrance.

5.0 Lighting

There are no new light fixtures proposed as a part of the Special Land Use Permit Amendment, Final Site Plan and Design Review application submitted.

6.0 Design Review

The majority of the building façade and site are not proposed to change as a part of the Special Land Use Permit Amendment, Final Site Plan and Design Review application submitted.

However, the applicant is proposing some changes to the façade in the area of the proposed commercial space. The changes include new/increased glazing and new awnings. The existing light fixtures, entry doors, gate and façade materials are proposed to remain. The transition to a mixed-use building in the Triangle District does trigger the commercial/mixed use architectural requirements in Article 3, Section 3.09 that previously were not applied to the project, as the building was completely residential, although the standards were still reviewed at the time.

At this time, the applicant meets most of the architectural standard requirements outlined in Section 3.09. The applicant has provided a prominence through the amended façade and increased fenestration, and has provided some architectural detail that lends itself to distinction as a different space than the adjacent residential units as well as a main entrance to the commercial unit. The new façade at the commercial space will exceed the glazing requirements at 73.5%.

Due to the uniqueness of the proposal in having one ground-floor commercial tenant space sandwiched between two ground-floor residential units, the following standards require further review.

- Storefront/Ground Floor. Ground floors shall be designed with storefronts that have windows, doorways and signage, which are integrally designed and painted. No less than 70% of the storefront/ground floor façade between 1 and

8 feet above grade shall be clear glass panels and doorway. Glass areas on storefronts shall be clear glazing on the first floor.

- This standard appears to apply to the entire ground floor façade and not just the single commercial tenant space. Although not provided, the Planning Department is unsure that the ground floor façades glazing calculations would meet this requirement in its entirety.

In addition, the applicant has provided awnings that project 2 ft. into the right-of-way. Removable architectural elements such as awnings, canopies, marquees may be approved by the Planning Board to project into the right of way provided that they are constructed to support applicable loads without any ground mounted supports on public property. Encroachments with less than 15 ft. of clearance above the sidewalk shall not extend into or occupy more than two-thirds of the width of the sidewalk or 5 ft., whichever is less, and must not interfere with any existing or planned streetscape elements or infrastructure. The awning meets these requirements. In addition to projection, the architectural standards of the Triangle District requires that awnings be positioned immediately above the ground floor window area of the façade and have a straight shed that projects from the building at a straight angle *with open sides*. The awnings as designed to not have open sides.

Finally, the architectural standards require that all walls of the building facade exposed to public view from the street, or parking area shall be constructed of not less than 60% brick, stone or glass. The remaining façade may include wood siding or fiber cement siding. Although the applicant has not submitted specific calculations the building does appear to meet this standard.

Overall, the Planning Board may request the specific information required to meet the architectural standards of the Triangle District. Should the Planning Board find the proposal to be satisfactory without such information, modifications to any requirements that the applicant may not meet may be made pursuant to Article 3, Section 3.11 of the Zoning Ordinance which states that:

The Planning Board may approve deviations to the architectural requirements of Section 3.09 and Section 3.10 in order to allow for creativity and flexibility in design. A front elevation drawing of the proposed building shall be provided superimposed on a color drawing or photograph of the entire block showing the relation of the proposed building design to other buildings along the block, which shall be utilized to evaluate the proposed building design based upon all of the following criteria:

- A. Demonstrates innovation in architectural design, provided the building design shall be in keeping with the desired character of the Triangle Overlay District, as articulated in the Triangle District Urban Design Plan.
- B. The building is oriented towards the front sidewalk with a functioning entrance and enhances the continuity of the pedestrian oriented environment. A modification shall not result in an increased dominance of vehicular parking or garage doors along the front of the building.
- C. The roof design shall not be out of character with other buildings along the block and shall be within the minimum and maximum height requirements of the district.
- D. The exterior finish materials shall be of equal or better quality and durability as those permitted herein, with the intent to allow for new technologies in building material while maintaining the desired character of the Triangle Overlay District.
- E. Ground floor windows shall be provided along the front sidewalk to maintain the pedestrian orientation of the streetscape and upper story windows shall not be incompatible with the rhythm and proportions of windows on other buildings along the block.

7.0 Required Attachments

	Submitted	Not Submitted	Not Required
Existing Conditions Plan	☒	☐	☐
Detailed and Scaled Site Plan	☒	☐	☐
Certified Land Survey	☒	☐	☐
Interior Floor Plans	☒	☐	☐
Landscape Plan	☒	☐	☐
Photometric Plan	☐	☐	☒
Colored Elevations	☒	☐	☐
Material Specification Sheets	☒	☐	☐
Material Samples	☐	☐	☒
Site & Aerial Photographs	☒	☐	☐

8.0 Approval Criteria

In accordance with Article 7, section 7.27 of the Zoning Ordinance, the proposed plans for development must meet the following conditions:

- (1) The location, size and height of the building, walls and fences shall be such that there is adequate landscaped open space so as to provide light, air and access to the persons occupying the structure.

- (2) The location, size and height of the building, walls and fences shall be such that there will be no interference with adequate light, air and access to adjacent lands and buildings.
- (3) The location, size and height of the building, walls and fences shall be such that they will not hinder the reasonable development of adjoining property nor diminish the value thereof.
- (4) The site plan, and its relation to streets, driveways and sidewalks, shall be such as to not interfere with or be hazardous to vehicular and pedestrian traffic.
- (5) The proposed development will be compatible with other uses and buildings in the neighborhood and will not be contrary to the spirit and purpose of this chapter.
- (6) The location, shape and size of required landscaped open space is such as to provide adequate open space for the benefit of the inhabitants of the building and the surrounding neighborhood.

In addition, Article 7, Section 7.26 requires applications for a Special Land Use Permit to meet the following criteria:

- (1) The use is consistent with and will promote the intent and purpose of this Zoning Ordinance.
- (2) The use will be compatible with adjacent uses of land, the natural environment, and the capabilities of public services and facilities affected by the land use.
- (3) The use is consistent with the public health, safety and welfare of the city.
- (4) The use is in compliance with all other requirements of this Zoning Ordinance.
- (5) The use will not be injurious to the surrounding neighborhood.
- (6) The use is in compliance with state and federal statutes.

9.0 Recommendation

Based on a review of the site plan submitted, the Planning Department recommends that the Planning Board recommend **APPROVAL** of the Special Land Use Amendment and Final Site Plan/Design Review application for 219 Elm St. – All Seasons 2 – subject to the following conditions:

1. The applicant must provide more detail on how the architectural standards of Article 3, Section 3.09 are met; and
2. The applicant must comply with the requests of all City Departments.

10.0 Sample Motion Language (*Final Site Plan & Design Review*)

Motion to recommend for **APPROVAL** the Final Site Plan & Design Review for 219 Elm St. – All Seasons 2 – subject to the following conditions:

1. The applicant must provide more detail on how the architectural standards of Article 3, Section 3.09 are met; and
2. The applicant must comply with the requests of all City Departments.

OR

Motion to **POSTPONE** the Final Site Plan & Design Review for 219 Elm St. – All Seasons 2 – pending receipt of the following:

1. The applicant must provide more detail on how the architectural standards of Article 3, Section 3.09 are met; and
2. The applicant must comply with the requests of all City Departments.

OR

Motion to recommend for **DENIAL** to the City Commission the Final Site Plan & Design Review for 219 Elm St. – All Seasons 2 – for the following reasons:

1. _____
2. _____
3. _____

11.0 Sample Motion Language (*Special Land Use Permit Amendment*)

Motion to recommend for **APPROVAL** to the City Commission the Special Land Use Permit Amendment for 219 Elm St. – All Seasons 2 – subject to the conditions of Final Site Plan & Design Review approval.

OR

Motion to **POSTPONE** the Special Land Use Permit Amendment 219 Elm St. – All Seasons 2 – pending receipt of the following:

1. The; and
2. The applicant must comply with the requests of all City Departments.

OR

Motion to recommend for **DENIAL** to the City Commission the Special Land Use Permit Amendment for 219 Elm St. – All Seasons 2 – for the following reasons:

1. _____

2. _____
3. _____



ALEXANDER V. BOGAERTS & ASSOCIATES, P.C.

Architecture

Planning

Interior Design

2445 Franklin Rd.
Bloomfield Hills, MI 48302
248/ 334-5000
fax: 248/ 334-0092

April 11, 2024

Members of the Planning Board
151 Martin Street,
Birmingham, Michigan 48009

Re: 219 Elm Street
Proposed Mixed Use building

Members of the Planning Board,

We are proposing a Mixed-use building for 219 Elm Street.
Our proposed design is consistent with and will promote the intent of the Triangle District ordinance.

We comply with specific Triangle District ordinance design requirements for Mixed-use based on the following design approach:

Qualification requirements for additional height and stories

In order to qualify for 2 additional bonus stories and 24 additional feet to our building we are required to provide 2 of 5 ordinance criteria choices; and the additional stories must be stepped back at a 45-degree angle.

We believe we meet zoning ordinance Section 3.08 E:

3. A Mixed-use building that provides residential dwelling units above first-floor commercial where a minimum of 50% of the buildings floor area is residential.
4. Leadership in Energy and Environmental Design (LEED) building design, accredited based upon the rating system of the United States Green Building Council.

3. We designed and constructed a LEED accredited building.

4. We are proposing a Mixed-use building.

Finally, the building was designed and built with the 4th and 5th floors stepped back at a 45-degree angle.

We are proposing to convert the center of the first floor to a commercial space.

We choose the center of the building...

because it will be a major focal point on the building.

Mixed- use buildings with commercial uses on the first floor and residential uses on the upper floors must incorporate the following key zoning ordinance design requirements:

Provide large areas of store front windows with a primary entry door to the commercial space

Currently the existing center unit has typical residential windows and entry door design, similar to the all of the other residential units.

*We significantly increased the glass for the proposed commercial space by creating two large storefront glass areas which will allow views by passing pedestrians and vehicles into the commercial space. We expanded the existing 3 wide widow sections to 4 wide and added lower window units to the 4 sections. We also added a lower window unit to the existing single window section. The ordinance calls for a minimum of 70% glass and door openings **which we exceed.** (see before and after 3D renderings)*

Create a distinct and separated ground floor area

We created a distinct and separated ground floor area by: adding a projected stone sill to the center of the building that will align with the existing projected stone sills on the adjacent units. In addition to the projected stone still, we added blue fabric awnings above the large storefront windows that match the existing awnings that are currently on the building.

*The blue awnings and the projected stone sill **create a strong visual break** separating the ground floor commercial component from the residential units above (see 3D renderings)*

Floor plan revisions

We removed existing walls and a bathroom creating an open floor plan typical to commercial space planning design;

This open floor plan will allow potential commercial tenants to fit out the space to meet their needs.

(see before and after floor plans)

Our building meets the Special Land Use Conditions and Standards as follows:

Our mixed-use building and façade will be compatible with the adjacent neighborhood; the scale of the building and façade detailing are complimentary to the surrounding neighborhood. The Triangle District encourages Mixed-use buildings, which is what we are proposing based on current market conditions. This proposed modification will allow us to meet the current demands for commercial space in this area of the city.

The use will not be injurious to the neighborhood, rather it will add diversity and interest to the visual experience pedestrians have as they walk along Elm; it adds strong complimentary architectural detailing to the overall Elm Street façade. ***Our entire team agrees, it is a definite improvement to the existing Elm Street façade.***

The building was designed and constructed to meeting all applicable building codes and federal statutes.

The building and site are in a transitional location.

The property is situated on the outer edges of the downtown commercial district with single-family directly to the south/east.

A percentage of commercial space mixed with residential units on the first floor makes sense for this transitional location along Elm Street.

There is definitely a demand for the type of micro commercial space we are proposing. There are compatible small commercial uses in the general vicinity of our building. For example, across the street from the building on the west side of Elm Street are light retail uses and across the alley along Forest Avenue are commercial uses next to single family and other residential buildings.

This type of commercial space can promote activation of the pedestrian streetscape depending on the tenant;

We will attempt to lease to tenants with the goal of activating the streetscape which we understand is a strong desire of the cities Triangle District, however the market will ultimately dictate the tenant. Currently this is not a major commercial area. There are, very few public street parking spots available and there is no large public parking garage in the area to support large retail or commercial tenants.

Because the building was ***designed and built as a LEED building*** it protects the natural environment and conserves natural resources and energy.

Public services and facilities should not be negatively impacted by the conversion of the residential unit to a commercial space. We are able to meet the parking requirements for both the commercial and residential all on site. The commercial space will have less turn over than residential units typically have which will result in less traffic impacts. Typically, Senior housing is more taxing on EMS services than commercial. Finally, the Triangle District was zoned for both of these types of residential and commercial mixed-use components on Elm Street.

We believe our mixed-use building design ***meets the spirit and the intent*** of the Triangle District. We look forward to presenting our project to you at your May Planning Board meeting.

Sincerely

Mark Abanatha

Mark Abanatha
Architect

ALL SEASONS OF BIRMINGHAM PH2

MIXED USE BUILDING

BIRMINGHAM, MI

PROJECT DESCRIPTION

CONVERT EXISTING RESIDENTIAL UNIT TO TENANT COMMERCIAL SPACE.

BUILDING CODES

2015 MICHIGAN BUILDING CODE
2015 MICHIGAN REHABILITATION CODE
2021 MICHIGAN MECHANICAL CODE
2021 MICHIGAN PLUMBING CODE
2015 MICHIGAN ENERGY CODE
2023 NATIONAL ELECTRICAL CODE
NFPA 13

BUILDING INFORMATION

EXISTING USE: R2 & U (GARAGES)
PROPOSED USE: MIXED USE
CONSTRUCTION TYPE: (NO CHANGE)
FIRE SPRINKLER SYSTEM: NONE (NO CHANGE)

UNIT INFORMATION

EXISTING USE: R2
PROPOSED USE: B
AREA: ± 1,500 S.F. (NO CHANGE)
FIRE SPRINKLER SYSTEM: NONE (NO CHANGE)

DRAWING INDEX	
Sheet Number	Sheet Name
P-2.0	CIVIL SITE PLAN (BY PEA)
1	SITE PLAN - EXISTING CONDITIONS
2	EXISTING SITE PHOTOGRAPHS
3	UNIT 102 COMMERCIAL RETROFIT
4	AWNING & WINDOW DETAILS
5	3D RENDERINGS
6	3D RENDERINGS
7	3D RENDERINGS

OWNER/APPLICANT/DEVELOPER

Beztak Companies

31731 NORTHWESTERN HWY, SUITE 250W,
FARMINGTON HILLS, MI 48334
CONTACT: SAM BEZNOS
PHONE: (248) 737-6110
EMAIL: SBEZNOS@BEZTAK.COM

CIVIL ENGINEER

PEA, INC.

2430 ROCHESTER CT, SUITE 100
TROY, MI 48083
CONTACT: JOHN B. THOMPSON
PHONE: (248) 689-9090
EMAIL: JTHOMPSON@PEAINC.COM

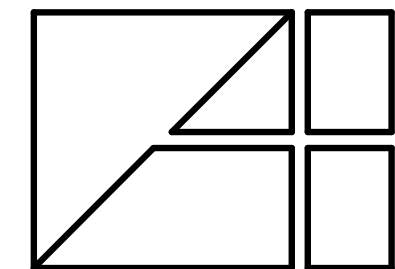
ARCHITECT

ALEXANDER V. BOGAERTS + ASSOCIATES, P.C.

2445 FRANKLIN ROAD
BLOOMFIELD HILLS, MI 48302
CONTACT: XANDER BOGAERTS
PHONE: (248) 791-5022
EMAIL: XBOGAERTS@BOGAERTS.US



1 VICINITY PLAN
1" = 400'-0"



Interior Design
2445 Franklin Road
Bloomfield Hills, MI 48302
248 • 334 • 5000

SHEET TITLE
TITLE SHEET

CLIENT PROJECT
Beztak Companies
All Seasons of Birmingham Ph2
Birmingham MI

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■ PRELIMINARY
04-19-2024

■ BIDS
08-21-2021

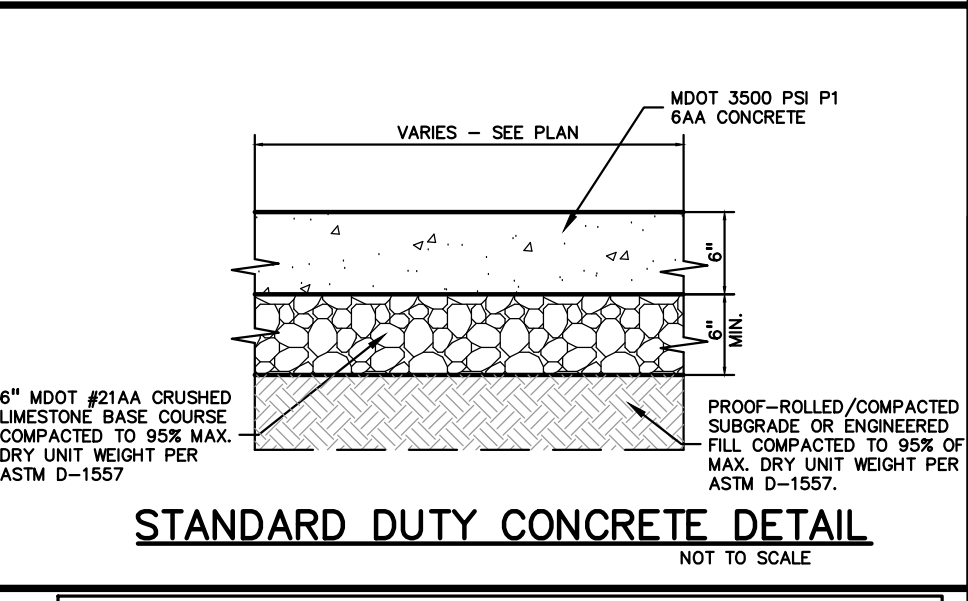
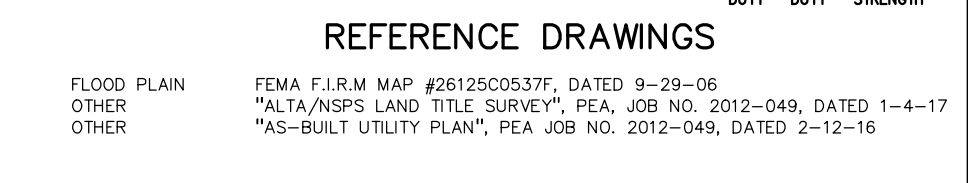
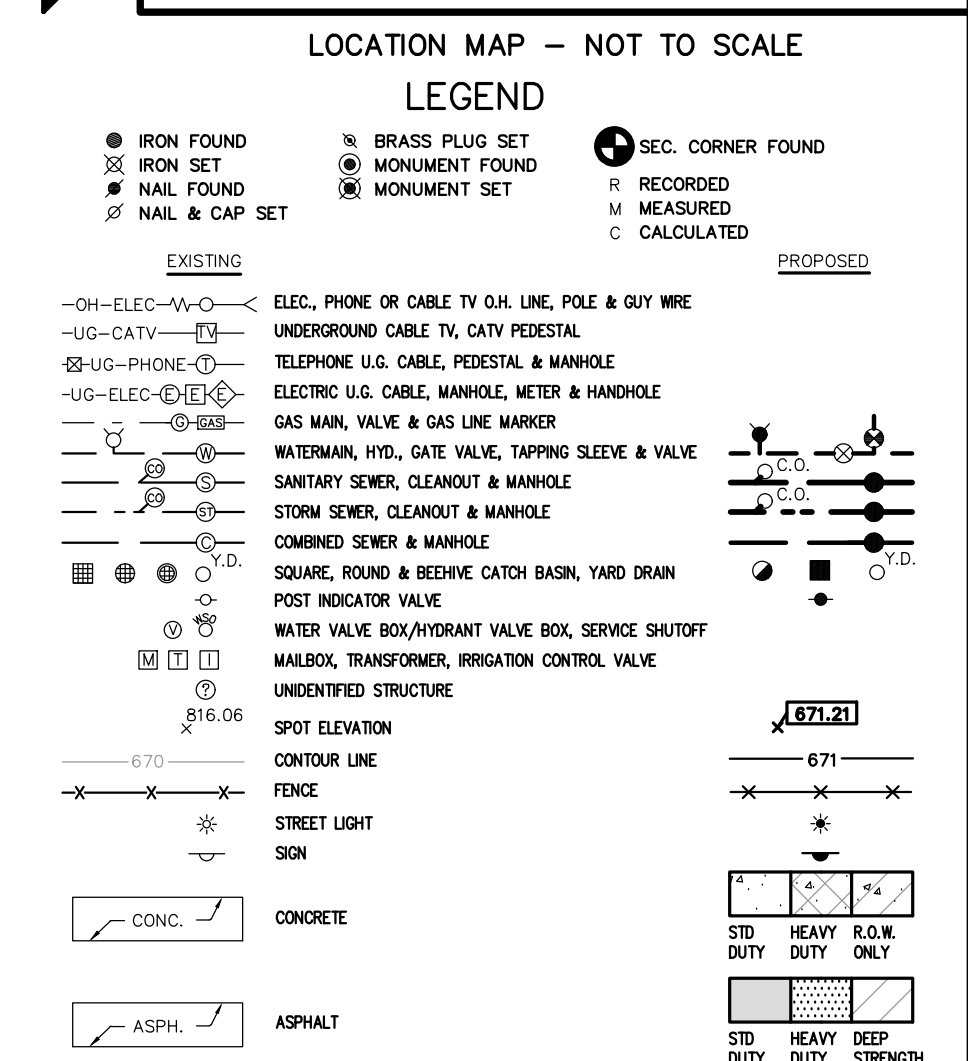
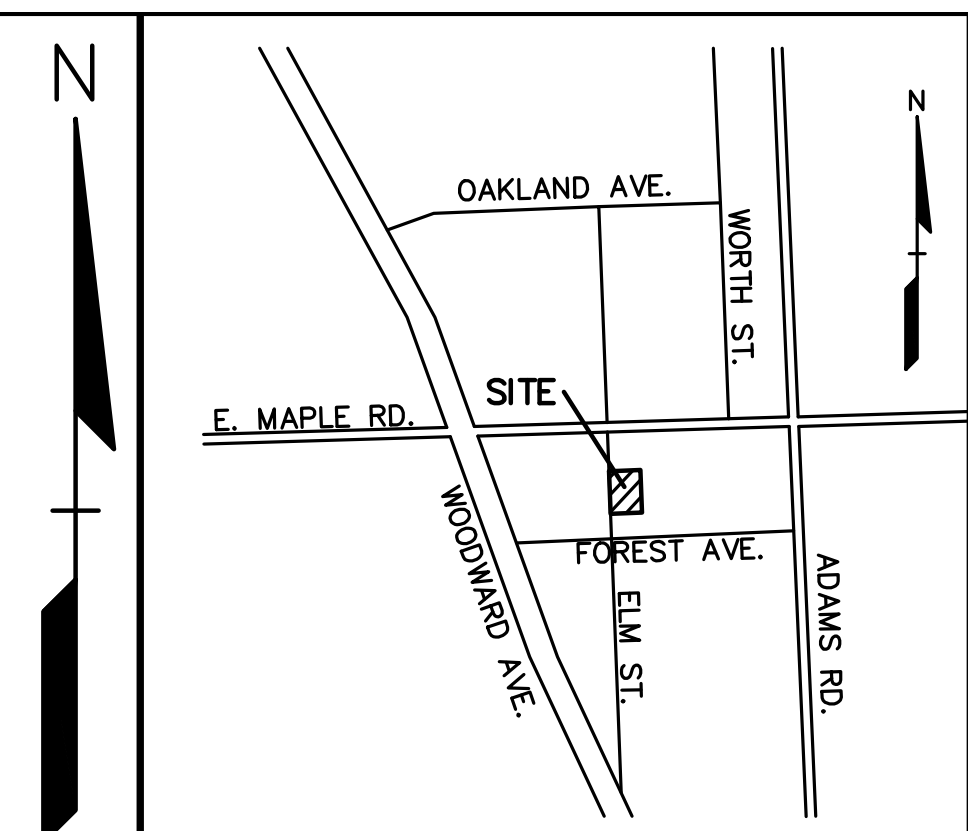
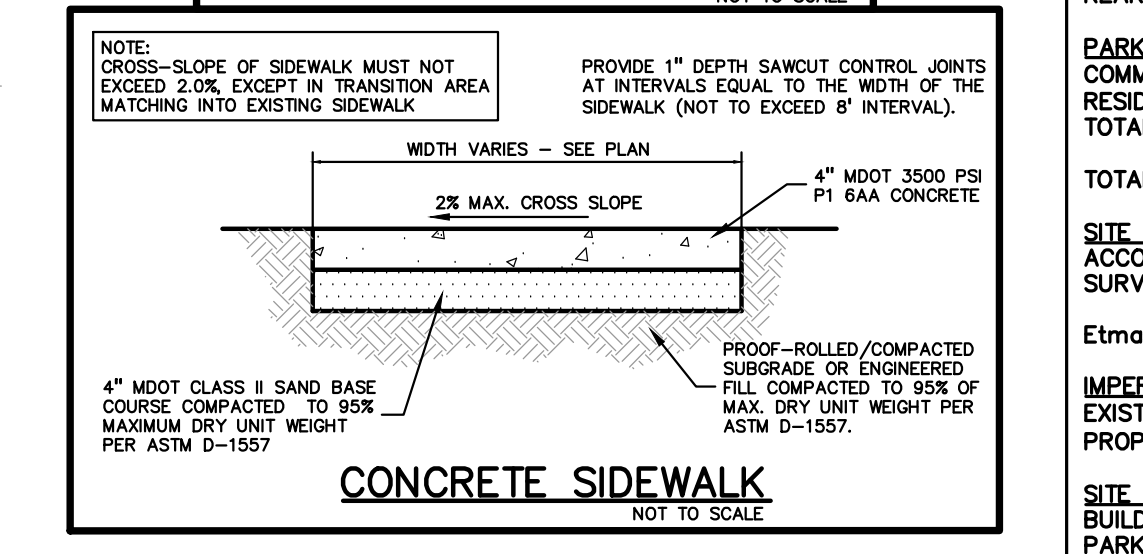
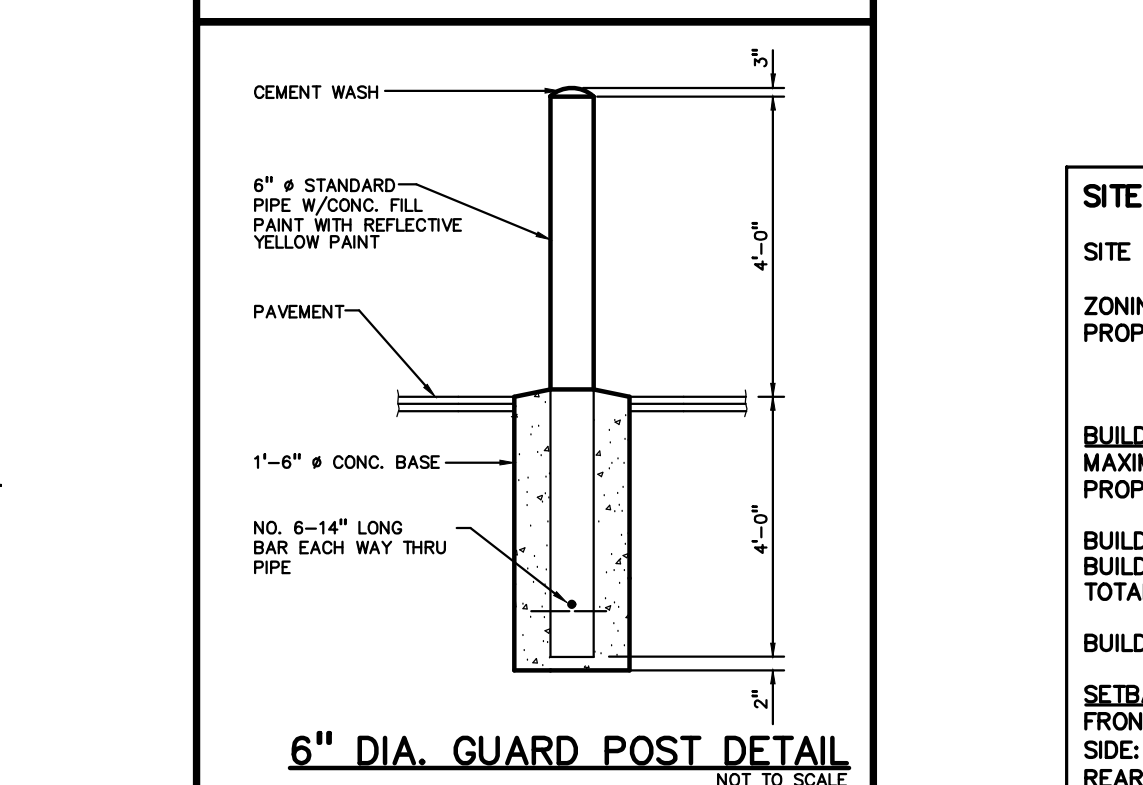
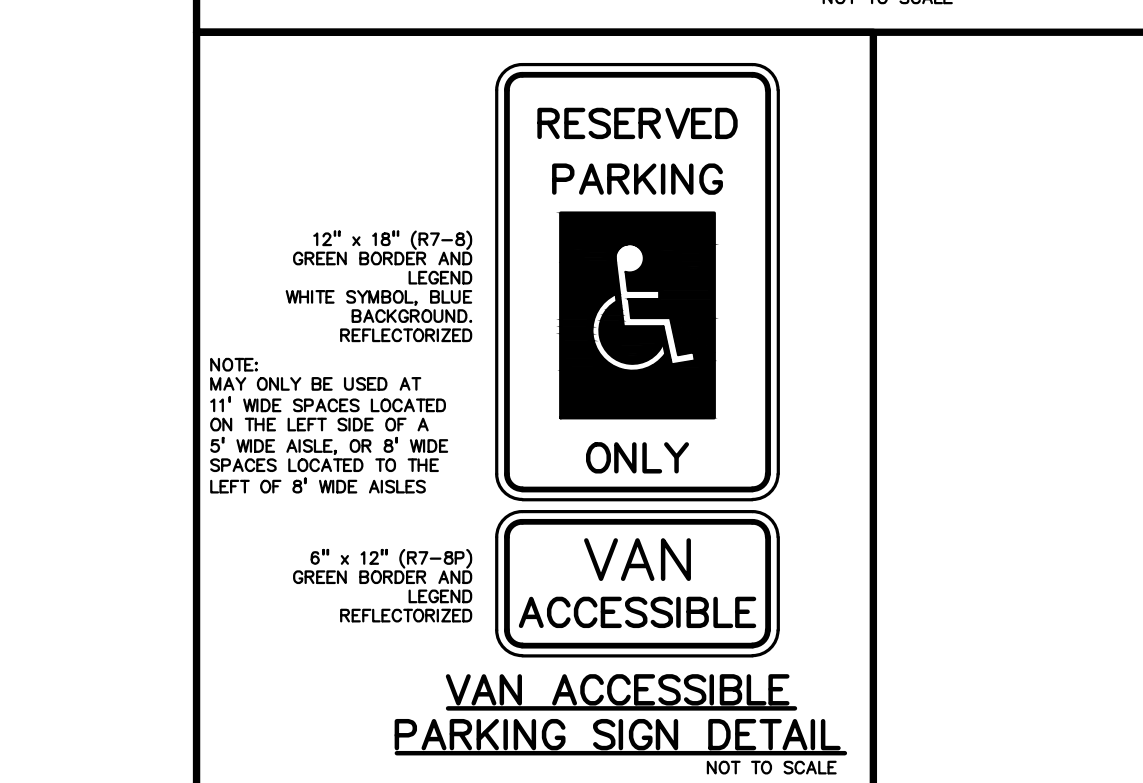
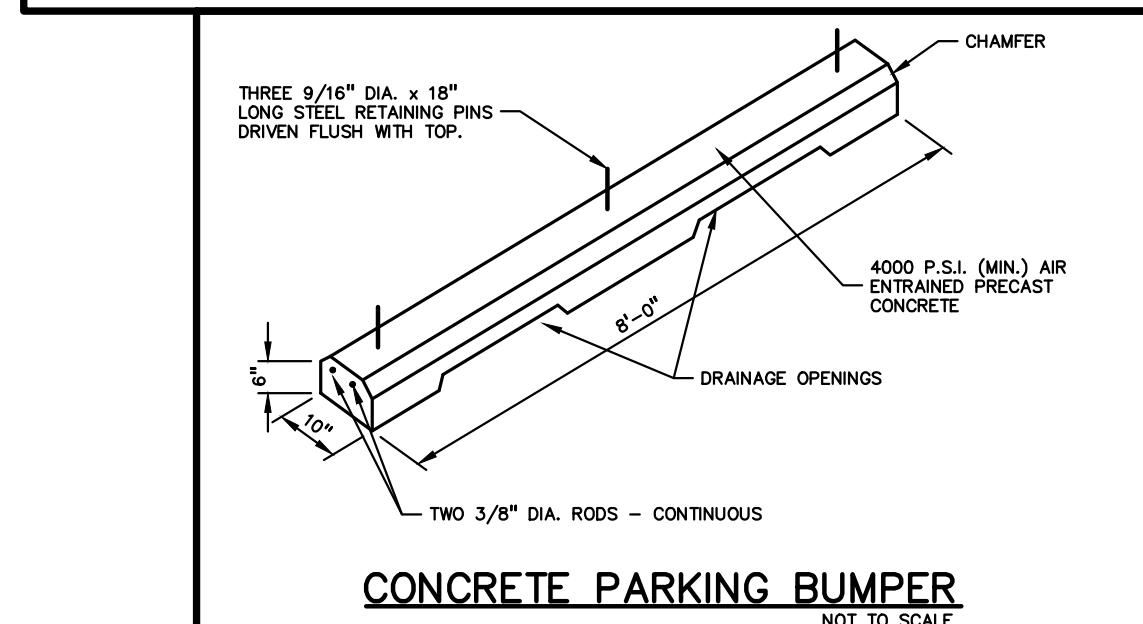
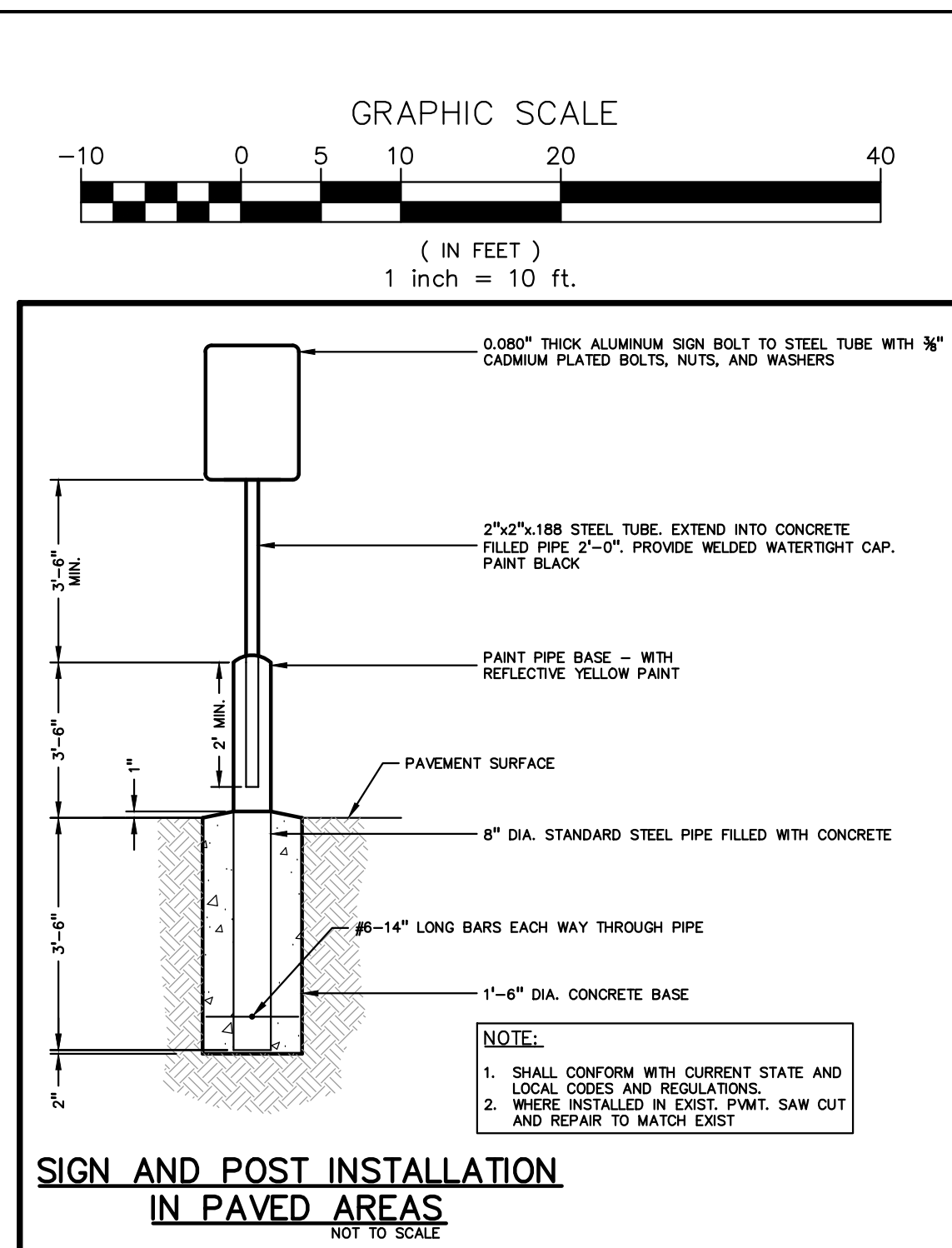
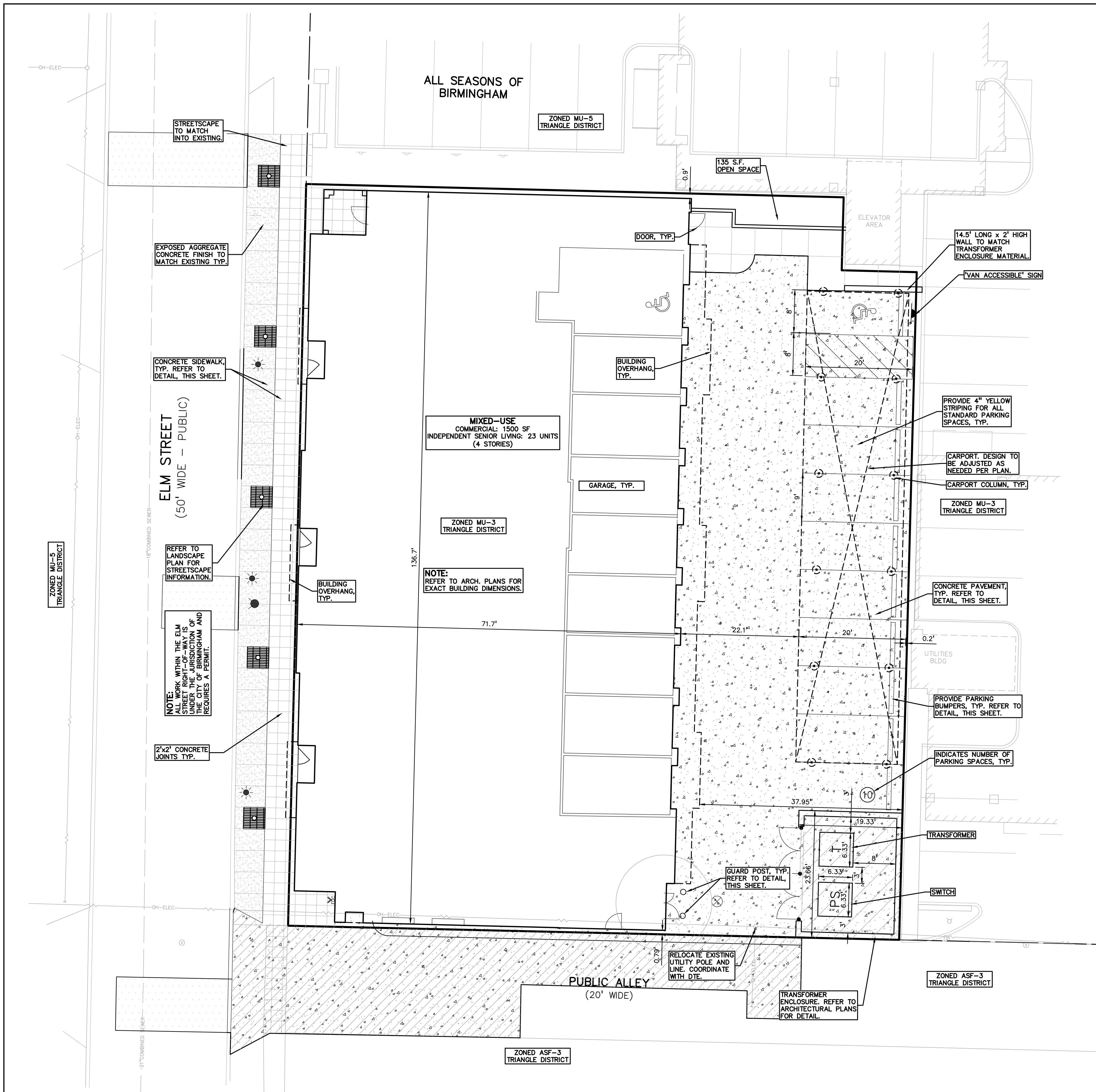
■ PERMITS
03-25-2021

■ CONSTRUCTION
08-27-2021

REVISIONS

DRAWN BY
MM
FILE NAME
BIM 300/All Seasons
Birmingham/All
Seasons.rvt
CHECKED BY
MA
JOB NUMBER
1975
DATE
04/17/24
SHEET NUMBER
T1





GENERAL NOTES:
THESE NOTES APPLY TO ALL CONSTRUCTION ACTIVITIES ON THIS PROJECT.
1. ALL DIMENSIONS SHOWN ARE TO BACK OF CURB, FACE OF SIDEWALK, OUTSIDE FACE OF BUILDING, PROPERTY LINE, CENTER OF MANHOLE/CATCH BASIN OR CENTERLINE OF PIPE UNLESS OTHERWISE NOTED.
2. REFER TO NOTES & DETAILS SHEET FOR ON-SITE PAVING DETAILS.
3. REFER TO NOTES & DETAILS SHEET FOR ON-SITE SIDEWALK RAMP DETAILS.

SITE DATA TABLE:	
SITE AREA:	0.36 ACRES (15,646 SQ.FT.) NET AND GROSS
ZONING:	MU-3 (TRIANGLE DISTRICT)
PROPOSED USE:	MIXED-USE COMMERCIAL: 1,500 SF INDEPENDENT SENIOR LIVING: 23 UNITS
BUILDING INFORMATION:	
MAXIMUM ALLOWABLE BUILDING HEIGHT =	50 FEET (4 STORIES)
PROPOSED BUILDING HEIGHT =	4 STORY
BUILDING FOOTPRINT AREA =	9,522 SQ.FT.
BUILDING PORCHES AREA =	135 SQ.FT.
TOTAL BUILDING AREA =	9,657
BUILDING LOT COVERAGE =	61.7%
SETBACK REQUIREMENTS:	
FRONT:	REQUIRED: 0' PROPOSED: 0'
SIDE:	REQUIRED: 0' PROPOSED: 0.9'/0.79'
REAR:	REQUIRED: 0' PROPOSED: 37.95'
PARKING CALCULATIONS:	
COMMERCIAL ±1,500/300 =	5
RESIDENTIAL 23 X 0.5 =	12
TOTAL PARKING REQUIRED =	5+12 = 17 SPACES
TOTAL PROPOSED PARKING SPACES =	19 SPACES INC. 2 H/C SPACES
SITE SOILS INFORMATION:	
ACCORDING TO THE USDA NATURAL RESOURCES CONSERVATION SERVICE WEB SOIL SURVEY FOR OAKLAND COUNTY, THE SITE CONSISTS OF THE FOLLOWING SOIL TYPES:	
EtmoaE - UDORTHENTS AND UDIPSAMMENTS, NEARLY LEVEL TO HILLY	
IMPERVIOUS AREA:	
EXISTING (61.3% SQ.F.)	
PROPOSED (96.3% S.F.)	
SITE AREAS:	
BUILDING FOOTPRINT =	9,522 SQ. FT.
PARKING, DRIVES, AND SIDEWALK =	5,790 SQ. FT.
LANDSCAPE AREAS =	199 SQ. FT.
TOTAL SITE AREA =	15,646 SQ. FT.

REVISIONS	
NO.	DESCRIPTION
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100	ADD CATCH BASIN

CAUTION!!
THE LOCATION AND ELEVATIONS OF EXISTING UTILITIES SHOWN ON THIS DRAWING ARE ONLY APPROXIMATE. NO GUARANTEE IS GIVEN FOR THE LOCATION AND ELEVATIONS OF EXISTING UTILITIES. THE CONTRACTOR SHALL BE RESPONSIBLE FOR DETERMINING THE EXACT UTILITY LOCATIONS AND ELEVATIONS PRIOR TO THE START OF CONSTRUCTION.

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CONSTRUCTION CONTRACTOR AGREES THAT IN CONNECTION WITH THE CONSTRUCTION OF THE PROJECT, THE CONTRACTOR SHALL BE RESPONSIBLE FOR THE PROTECTION AND MAINTENANCE OF ALL EXISTING UTILITIES AND STRUCTURES. THE CONTRACTOR SHALL BE RESPONSIBLE FOR THE PROTECTION AND MAINTENANCE OF ALL EXISTING UTILITIES AND STRUCTURES. THE CONTRACTOR SHALL BE RESPONSIBLE FOR THE PROTECTION AND MAINTENANCE OF ALL EXISTING UTILITIES AND STRUCTURES.

3 FULL WORKING DAYS BEFORE YOU DIG CALL 811

Know what's below Call before you dig

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1-800-482-7171 www.missdig.org

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Troy, MI 48063-1872
t: 248.689.9090
f: 248.689.1044
www.peainc.com

BEZTAZ COMPANIES
31731 NORTHWESTERN HWY. SUITE 250W
FARMINGTON HILLS, MI 48334

PRELIMINARY SITE PLAN
ALL SEASONS OF BIRMINGHAM PH. II
PART OF THE NE 1/4 OF SECTION 36, T. 2N, R. 10E,
CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN

DES. T.M.K. DN. T.M.K. SUR. K.T.R. P.M. J.B.T.

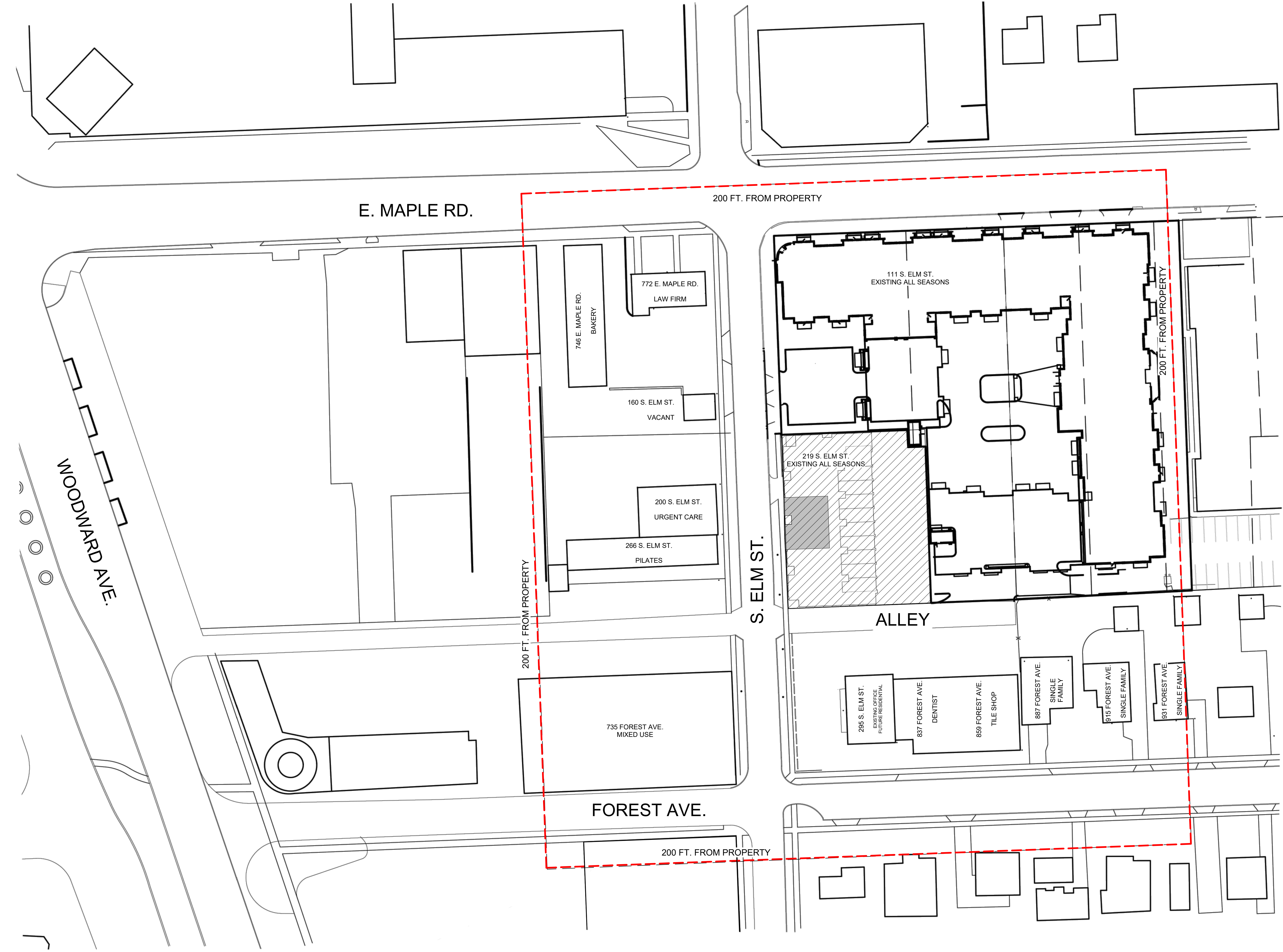
ORIGINAL ISSUE DATE:
SEPTEMBER 25, 2020

PEA JOB NO. 2012-049

SCALE: 1" = 10'

DRAWING NUMBER:
P-2.0

NOT FOR CONSTRUCTION



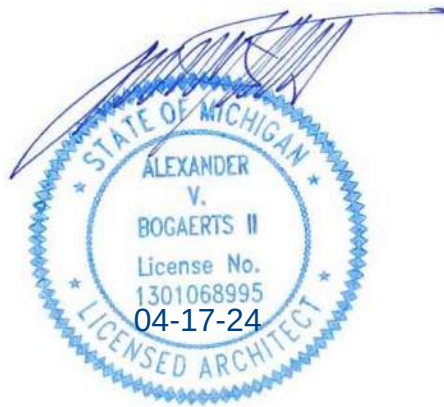
1 SITE PLAN
1" = 40'-0"



Alexander V. Bogaerts + Associates, P.C. ▪ Architecture ▪ Planning ▪ Interior Design

2445 Franklin Road
Bloomfield Hills, MI 48302
248 ▪ 334 ▪ 5000

SHEET TITLE SITE PLAN - EXISTING CONDITIONS	
CLIENT PROJECT Beztaak Companies All Seasons of Birmingham Ph2 Birmingham MI	
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■ PRELIMINARY 04-19-2024	
■ BIDS 08-21-2021	
■ PERMITS 03-25-2021	
■ CONSTRUCTION 08-27-2021	
REVISIONS	
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CHECKED BY MA	JOB NUMBER 1975
DATE 04/17/24	SHEET NUMBER 1



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CLIENT PROJECT
BeztaK Companies
All Seasons of Birmingham Ph2
Birmingham MI

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04-19-2024

☐ BIDS

☐ PERMITS

☐ CONSTRUCTION

REVISIONS

DRAWN BY

MM

FILE NAME

04-19-2024 Seasons

Birmingham/MI

Seasons.rvt

CHECKED BY

MA

JOB NUMBER

1975

DATE

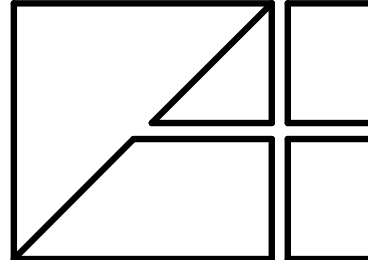
04/17/24

SHEET NUMBER

2

SHEET TITLE
EXISTING SITE PHOTOGRAPHS

2445 Franklin Road
Bloomfield Hills, MI 48302
248.334.5000



FENESTRATION CALCULATIONS:

4.90.B.1 STOREFRONT WINDOWS	
FACADE BETWEEN 1 AND 8 FT ABOVE GRADE =	291 S.F.
REQUIRED STOREFRONT = 291 SF x 70% =	204 S.F.
PROPOSED STOREFRONT =	214 S.F.
4.90.E UPPER STORY WINDOWS	
TOTAL FACADE =	2,762 S.F.
MAXIMUM UPPER STORY WINDOWS =	1,381 S.F.
EXISTING UPPER STORY WINDOWS =	642 S.F.

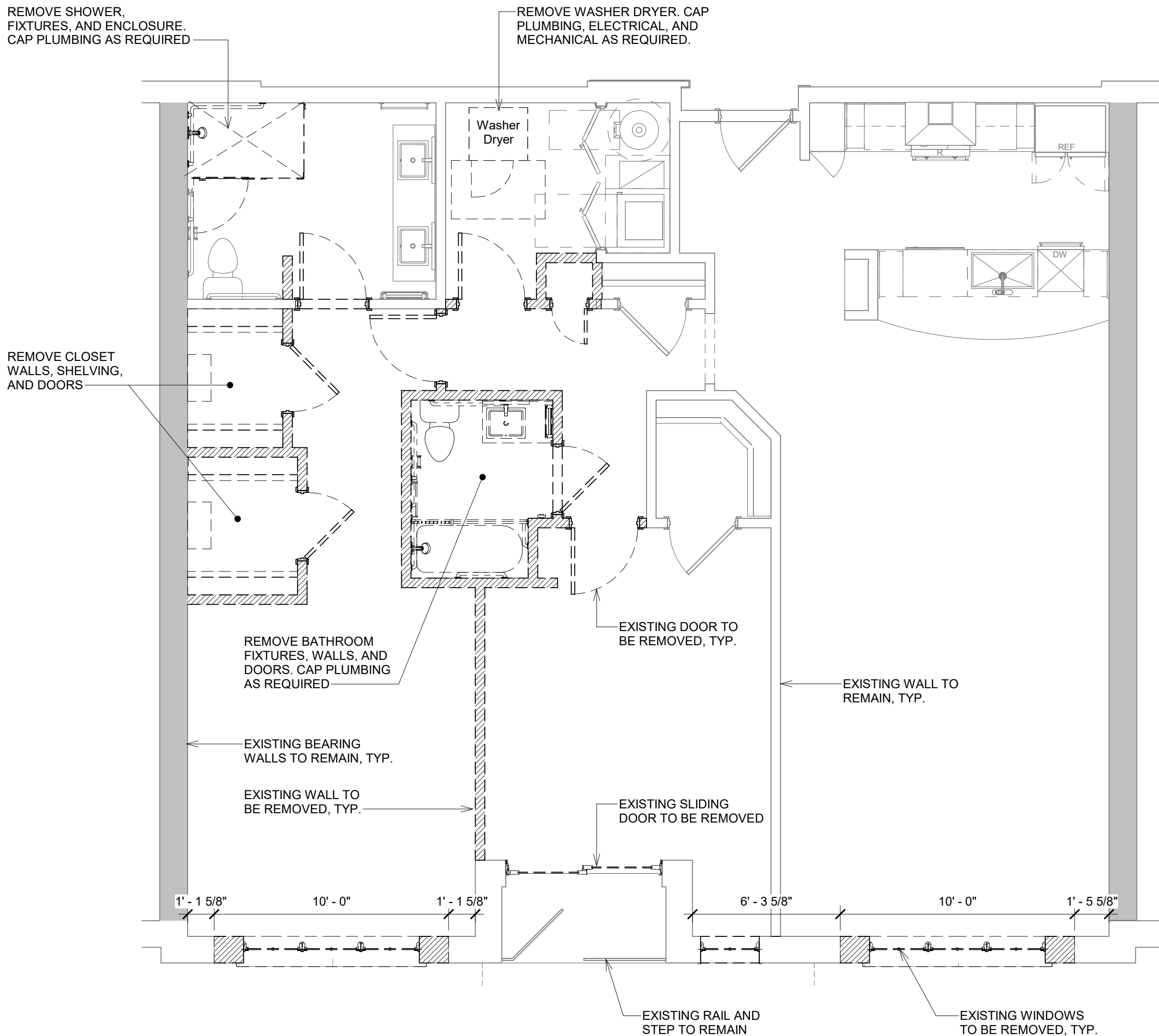
WINDOW SCHEDULE		
TYPE	WIDTH	HEIGHT
AA	± 2' - 8"	± 2' - 8"
CC	± 2' - 8"	± 5' - 0"

VERIFY IN FIELD EXISTING WINDOW SIZES AND MATCH ADJACENT.

DOOR SCHEDULE							
TYPE	Width	Height	Thickness	DOOR FINISH	DOOR MATERIAL	FRAME FINISH	FRAME MATERIAL
102A	3' - 0"	8' - 0"	1 3/8"	STN-X	SCWD/GL	STN-X	PHWT
102B	3' - 0"	8' - 0"	1 3/8"	STN-X	SCWD/GL	STN-X	PHWT
102C	3' - 0"	8' - 0"	1 3/4"	STN-X	SCWD	STN-X	PHWT

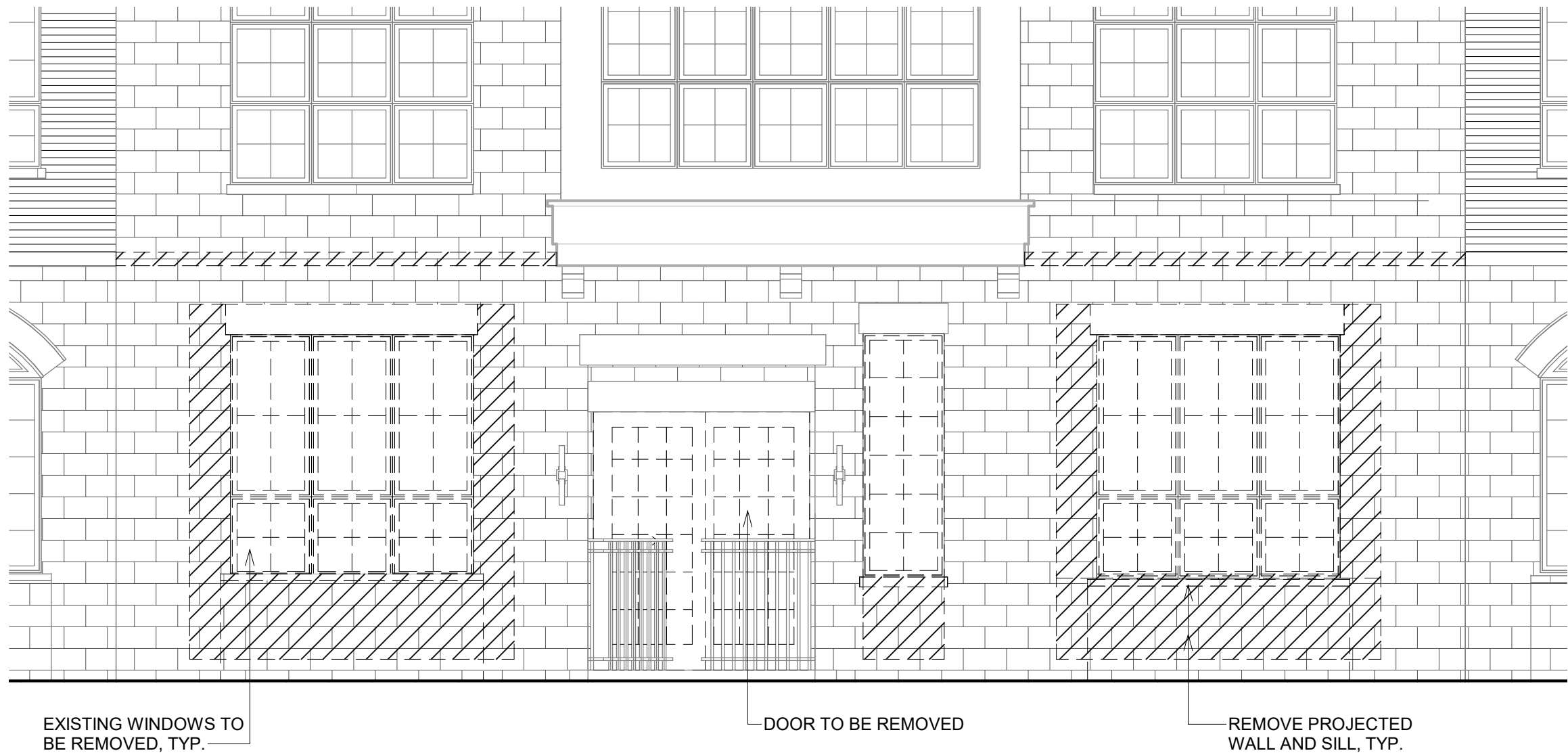
ABBREVIATIONS:
GL-2 - SAFETY GLASS
SCWD - SOLID CORE WOOD DOOR
STN - STAIN W CLEAR COAT
PH - PREHUNG SPLIT JAMB
WT - WOOD TRIM (CASING)

- GENERAL NOTES:
- SEE SHEETS #2 & 3 FOR ACCESSIBLE DETAILS.
 - G.C. IS RESPONSIBLE FOR CLEANING OF JOB-SITE AND REMOVAL OF DEBRIS AND DUST.
 - PATCH AND REPAIR ALL FINISHES AFTER DEMOLITION TO MATCH EXISTING AND ADJACENT FINISHES.
 - G.C. MAY REUSE ITEMS THAT ARE BEING REMOVED, INCLUDING BUT NOT LIMITED TO FINISHES, DOORS, AND WINDOWS.
 - REMOVE ONLY NON-BEARING CONSTRUCTION AND PARTITIONS. G.C. TO VERIFY NO STRUCTURAL COMPONENTS ARE DESIGNATED FOR REMOVAL OF ANY CONSTRUCTION IN QUESTION OR DEVIATING FROM THE DESIGN INTENT.
 - ALL STRUCTURAL SYSTEMS SHALL BE MAINTAINED THROUGHOUT DEMOLITION AND CONSTRUCTION.
 - FIRE RATING OF ALL IMPACTED WALLS SHALL BE MAINTAINED.
 - HVAC AND LIGHTING SHALL BE MAINTAINED AND NOT ALTERED UNLESS NOTED OTHERWISE. TO BE ADJUSTED BY TENANT.
 - ADA TACTILE SIGNAGE BY OWNER/TENANT AS REQUIRED.



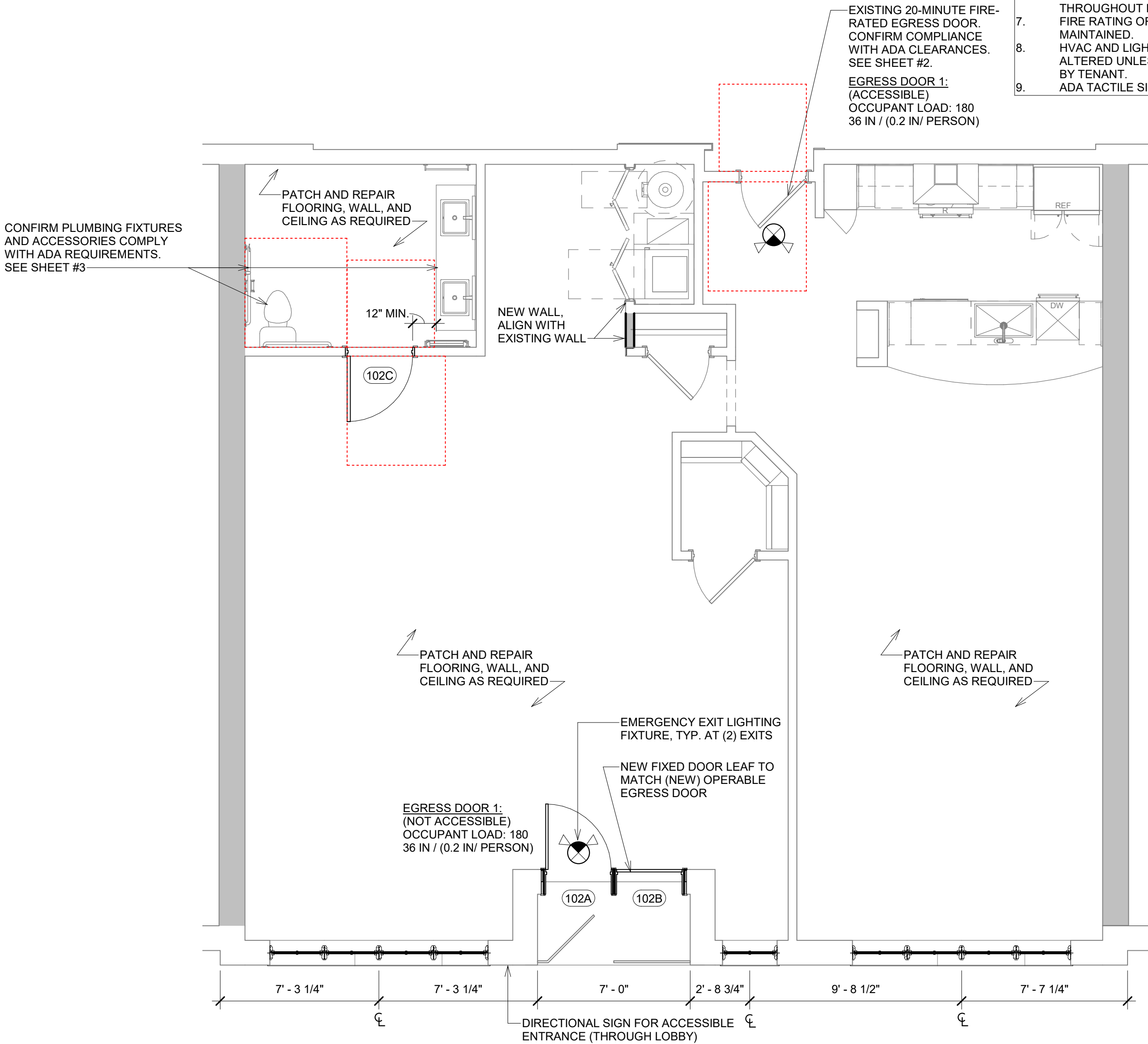
FLOOR PLAN -
DEMOLITION

1
A206
1/4" = 1'-0"



EXTERIOR
ELEVATION -
DEMOLITION

3
1/4" = 1'-0"



FLOOR PLAN -
CONSTRUCTION ± 1,500 S.F.

2
A206
1/4" = 1'-0"

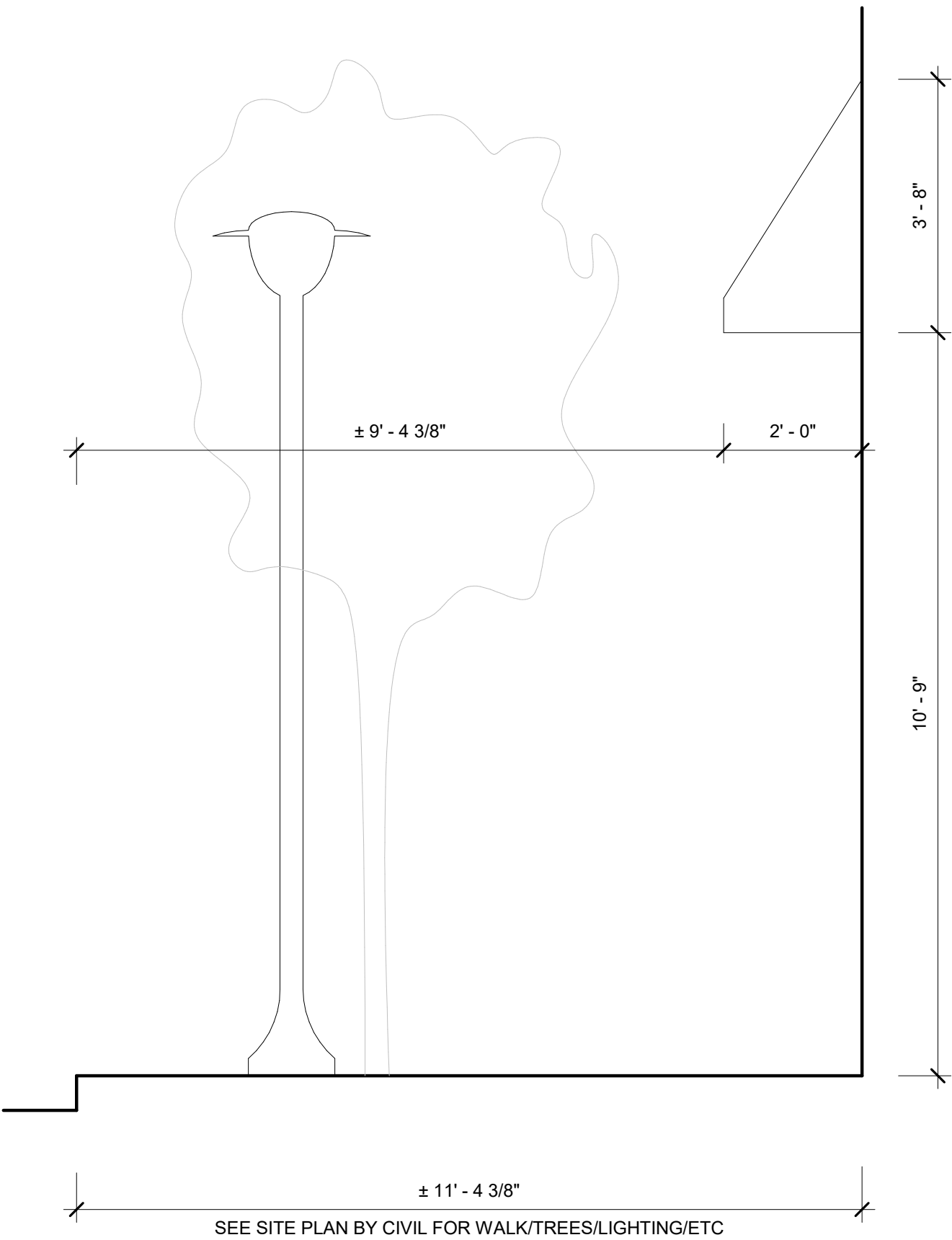


EXTERIOR
ELEVATION -
CONSTRUCTION

4
1/4" = 1'-0"



1
1/2" = 1'-0"



AWNING
PROFILE

SECTION 10 73 00 METAL AWNINGS AND CANOPIES

PART 1 GENERAL

1.1 SECTION INCLUDES

- A. Metal Awnings and Canopies of the following types:
1. Traditional Awning

1.2 RELATED SECTIONS

- A. Section 05 12 13 - Architecturally-Exposed Structural Steel Framing.
B. Section 05 40 00 - Cold-Formed Metal Framing.

1.3 SUBMITTALS

- A. Submit under provisions of Section 01 30 00 - Administrative Requirements.
B. Product Data:
1. Manufacturer's data sheets on each product to be used.
2. Preparation instructions and recommendations.
3. Storage and handling requirements and recommendations.
4. Typical installation methods.
C. Verification Samples: One representative units of each type, size, pattern and color.
D. Shop Drawings: Include details of materials, construction and finish. Include relationship with adjacent construction.

1.4 QUALITY ASSURANCE

- A. Manufacturer Qualifications: Company specializing in manufacturing products specified in this section with a minimum ten years documented experience.
B. Installer Qualifications: Company specializing in performing Work of this section with minimum five years documented experience with projects of similar scope and complexity, and approved by Manufacturer.
C. Source Limitations: Provide each type of product from a single manufacturing source to ensure uniformity.
D. Mock-Up: Construct a mock-up with actual materials in sufficient time for Architect's review and to not delay construction progress. Locate mock-up as acceptable to Architect and provide temporary foundations and support if necessary
1. Intent of mock-up is to demonstrate quality of workmanship and visual appearance.
2. If mock-up is not acceptable, rebuild mock-up until satisfactory results are achieved.
3. Retain mock-up during construction as a standard for comparison with completed work.
4. Do not alter or remove mock-up until work is completed or removal is authorized.

1.5 PRE-INSTALLATION CONFERENCE

- A. Convene a conference approximately two weeks before scheduled commencement of the Work. Attendees shall include, Contractor and trades involved. Agenda shall include schedule, responsibilities, critical path items and approvals.

1.6 DELIVERY, STORAGE, AND HANDLING

- A. Store and handle in strict compliance with manufacturer's written instructions and recommendations.
B. Protect from damage due to weather, excessive temperature, and construction operations.

1.7 PROJECT CONDITIONS

- A. Maintain environmental conditions i.e. temperature, humidity, and ventilation within limits recommended by manufacturer for optimum results. Do not install products under environmental conditions outside manufacturer's recommended limits.

1.8 WARRANTY

- A. Manufacturer's Warranty: Aluminum frames are warranted against defects in workmanship for five years from date of installation.

PART 2 PRODUCTS

2.1 MANUFACTURERS

- A. Acceptable Manufacturer: Marygrove Awnings, 12700 Merriman Road, Livonia, Michigan 48150; Marygrove.com
B. Requests for substitutions will be considered in accordance with provisions of Section 01 60 00 - Product Requirements.

2.2 METAL AWNINGS AND CANOPIES

- A. Performance and Design Requirements:
1. Standards Compliance: Comply with local building codes.
B. Traditional Awning, Basis of Design Marygrove Awnings
1. Material: Extruded aluminum, alloy 6063-T6.
2. Fabrication Method: Welded and mechanically fastened.
3. Slope Surface: Fabric
4. Fabric: Sunbrella Fabric color: Marine Blue #6078-0000
5. Slope: As indicated on Drawings.
6. Frame: Extruded aluminum tube frame.
7. Box Height: per drawings
8. End Finish: Matches slope surfaces.
9. Underside: Open.
10. Width: As indicated on Drawings.
11. Projection: As indicated on Drawings.
12. Frame & fabric awning
13. Finish: AAMA 2603 compliant two-part polyurethane enamel finish or powder coat finish; submit warranty and finish to owner & architect for selection & approval

PART 3 EXECUTION

3.1 EXAMINATION

- A. Do not begin installation until substrates have been properly constructed and prepared.
B. Confirm dimensions and elevations.
C. Verify that wall structure can support canopy loads.
D. If substrate preparation is the responsibility of another installer, notify Architect in writing of unsatisfactory preparation before proceeding.

3.2 PREPARATION

- A. Clean surfaces thoroughly prior to installation.
B. Prepare surfaces using the methods recommended by the manufacturer for achieving the best result for the substrate under the project conditions.

3.3 INSTALLATION

- A. Install in accordance with manufacturer's instructions, approved submittals, and in proper relationship with adjacent construction.

3.4 FIELD QUALITY CONTROL

- A. Field Inspection: Coordinate field inspection in accordance with appropriate sections in Division 01.

3.5 CLEANING AND PROTECTION

- A. Clean products in accordance with the manufacturer's recommendations.
B. Touch-up, repair or replace damaged products before Substantial Completion.



2417 E. Judd
Burton MI 48529
877-WINDOWS
www.antcliffwindows.com



QUOTE BY : John Zizka
SOLD TO :
PO# :
Ship Via : Ground
QUOTE # : JW240400F0W - Version 0
SHIP TO :
PROJECT NAME: BEZTAK
REFERENCE :
U-Factor Weighted Average: 0.28
SHGC Weighted Average: 0.22

LINE	LOCATION SIZE INFO	BOOK CODE DESCRIPTION	NET UNIT PRICE	QTY	EXTENDED PRICE
Line 1		Frame Size : 64 X 124 Siteline Standard, Clad Mull Auralast Pine, Casement/Awning Product, Desert Sand Exterior, Interior-Paint Perfect White/M64EXW31123, Nail Fin (Standard), Color Match Metal DripCap, 2 Wide 3 High, 4 9/16 Jamb, 4/4 Thick, Insulated SunStable Tempered Glass, Protective Film, Black Spacer, Argon Filled, Traditional Glz Bd, The selected colors may vary slightly in appearance between their AAMA- 2604 and AAMA-2605 versions. Please contact your sales representative to review color samples as needed prior to finalizing order..Mulled Window Assembly Has Not Been Tested To AAMA 450. PEV 2024.1.0.4593/PDV 7.293 (03/03/24)NW	\$5,605.12	2	\$11,210.24
Viewed from Exterior. Scale: 1/2" = 1'					

Line 2		Frame Size : 64 X 124 Siteline Standard, Clad Mull Auralast Pine, Casement/Awning Product, Desert Sand Exterior, Interior-Paint Perfect White/M64EXW31123, Nail Fin (Standard), Color Match Metal DripCap, 2 Wide 3 High, 4 9/16 Jamb, 4/4 Thick, Insulated SunStable Tempered Glass, Protective Film, Black Spacer, Argon Filled, Traditional Glz Bd, The selected colors may vary slightly in appearance between their AAMA- 2604 and AAMA-2605 versions. Please contact your sales representative to review color samples as needed prior to finalizing order..Mulled Window Assembly Has Not Been Tested To AAMA 450. PEV 2024.1.0.4593/PDV 7.293 (03/03/24)NW	\$5,605.12	2	\$11,210.24
Viewed from Exterior. Scale: 1/2" = 1'					

cust-3081 Page 1 of 3 (Prices are subject to change.) JW240400F0W (Ver0)-04/16/2024 11:57 AM
Quote Date: 04/11/2024 Drawings are for visual reference only and may not be to exact scale. Last Modified: 04/16/2024
All orders are subject to review by JELD-WEN

LINE	LOCATION SIZE INFO	BOOK CODE DESCRIPTION	NET UNIT PRICE	QTY	EXTENDED PRICE
Line 3		Frame Size : 32 X 124 1/2 Siteline Standard, Clad Mull Auralast Pine, Casement/Awning Product, Desert Sand Exterior, Interior-Paint Perfect White/M64EXW31123, Nail Fin (Standard), Color Match Metal DripCap, 1 Wide 3 High, Factory Structural Mull, 4 9/16 Jamb, 4/4 Thick, Insulated SunStable Tempered Glass, Protective Film, Black Spacer, Argon Filled, Traditional Glz Bd, The selected colors may vary slightly in appearance between their AAMA- 2604 and AAMA-2605 versions. Please contact your sales representative to review color samples as needed prior to finalizing order..Mulled Window Assembly Has Not Been Tested To AAMA 450. Horizontal Structural Mull 2 Horizontal Spreads, 1/4" High, PEV 2024.1.0.4593/PDV 7.293 (03/03/24)NW	\$3,172.10	1	\$3,172.10
Viewed from Exterior. Scale: 1/2" = 1'					

Line 4		PRCISW6080 Frame Size : 71 1/4 X 95 1/2 Siteline Clad Auralast Pine, Inswing Door Product, (Single-Swing) Two Panel Door, (Left/Stat) Equal Panel Widths, 4 5/8" Stile, 8 1/4" Bottom Rail, Desert Sand Exterior, Clear Frame, Interior-Paint Perfect White/M64EXW31123, Nail Fin (Standard), Color Match Metal DripCap, 4 9/16 Jamb, HYDROLOCK Sill, Black Sill, Matte Black Hardware, Black/Bronze Strike Plate, Harleston Traditional , Multi Point Bore, Keyed, Adjustable Hinges, Black/Bronze Hinge Insulated SunStable Tempered Glass, Protective Film, Black Spacer, Argon Filled, Traditional Glz Bd, 5/8" Flat GBG Desert Sand Grid, Colonial All Lite(s) 3 wide 6 High, Door No Screen, Door closers should not be used with adjustable hinges. Inswing doors are not intended for Light Commercial applications. JGThick=0.756(1/8 / 1/8).The selected colors may vary slightly in appearance between their AAMA-2604 and AAMA-2605 versions. Please contact your sales representative to review color samples as needed prior to finalizing order..(Note: Color Tone Of Grille May Vary As A Result Of Glass Option). U-Factor: 0.30, SHGC: 0.19, VLT: 0.33, Energy Rating: 13.00, CR: 60.00, CPD: JEL-N-866-23885-00001 PEV 2024.1.0.4593/PDV 7.293 (03/03/24)NW	\$4,173.75	1	\$4,173.75
Viewed from Exterior. Scale: 1/2" = 1'					

cust-3081 Page 2 of 3 (Prices are subject to change.) JW240400F0W (Ver0)-04/16/2024 11:57 AM
Quote Date: 04/11/2024 Drawings are for visual reference only and may not be to exact scale. Last Modified: 04/16/2024
All orders are subject to review by JELD-WEN

LINE	LOCATION SIZE INFO	BOOK CODE DESCRIPTION	NET UNIT PRICE	QTY	EXTENDED PRICE
Line 5		LABOR TO MULL TOGETHER WINDOWS ON SITE, INSTALL PRODUCT INTO NEW OPENING MADE BY OTHERS	\$5,437.50	1	\$5,437.50
					Total: \$35,203.83
					Sales Tax (6.0000%): \$1,785.98
					Net Total: \$36,989.81
					Total Units: 7

AuraLast Protect yourself when you choose JELD-WEN AuraLast pine products backed by a limited lifetime warranty against wood rot and termite damage.

Note: All products are custom-built per customers' specifications and are non-refundable/returnable. Putting a deposit/signature on an order acknowledges that the order is accurate and accepted as is by the customer. All orders are width x height measurements only Product lead times may vary due to manufacturer capacity and capability and do not warrant order discount or cancellation as it is beyond the control of Antcliff Windows. For replacement products, all measurements are the sole responsibility of the installation party. Antcliff does not assume responsibility for any project that is not being installed by Antcliff.

cust-3081 Page 3 of 3 (Prices are subject to change.) JW240400F0W (Ver0)-04/16/2024 11:57 AM
Quote Date: 04/11/2024 Drawings are for visual reference only and may not be to exact scale. Last Modified: 04/16/2024
All orders are subject to review by JELD-WEN



Alexander V. Bogaerts + Associates, P.C.

Interior Design
Architecture
Planning

2445 Franklin Road
Bloomfield Hills, MI 48302

248 • 334 • 5000

CLIENT PROJECT
AWNING & WINDOW DETAILS

CLIENT PROJECT
Beztak Companies
All Seasons of Birmingham Ph2
Birmingham MI

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ALEXANDER V.
BOGAERTS + ASSOC.

PRELIMINARY
04-19-2024

BIDS

PERMITS

CONSTRUCTION

REVISIONS

DRAWN BY
MM

FILE NAME
BM 360JAN Seasons
Birmingham/All
Seasons.rvt

CHECKED BY
MA

JOB NUMBER
1975

DATE
04/17/24

SHEET NUMBER
4



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■ PRELIMINARY
04-19-2024

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REVISIONS

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MM

FILE NAME
BM 360/JAN Seasons
Birmingham/AJ
Seasons.rvt

CHECKED BY
MA

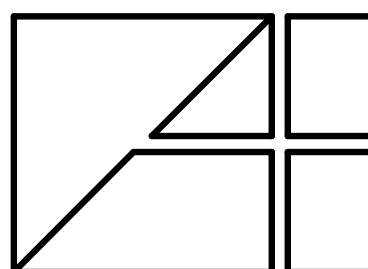
JOB NUMBER
1975

DATE
04/17/24

SHEET NUMBER
5

SHEET TITLE
3D RENDERINGS

2445 Franklin Road
Bloomfield Hills, MI 48302
248 ▪ 334 ▪ 5000





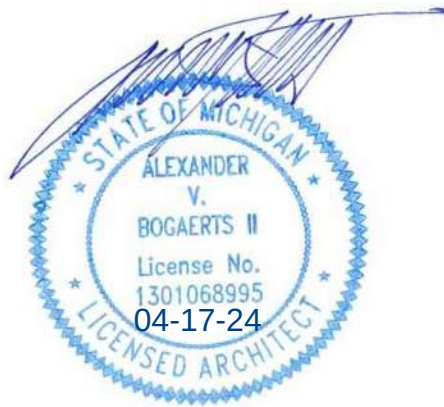
Alexander V. Bogaerts + Associates, P.C. ▪ Architecture ▪ Planning ▪ Interior Design

CLIENT PROJECT
BeztaK Companies
All Seasons of Birmingham Ph2
Birmingham MI

SHEET TITLE
3D RENDERINGS

2445 Franklin Road
Bloomfield Hills, MI 48302
248 ▪ 334 ▪ 5000

© COPYRIGHT 2022 ALEXANDER V. BOGAERTS + ASSOC.	PRELIMINARY 04-19-2024	BIDS 08-21-2021	PERMITS 03-29-2021	CONSTRUCTION 08-27-2021	REVISIONS	DRAWN BY MM	FILE NAME BM 300JAN Seasons Birmingham/All Seasons.rvt	CHECKED BY MA	JOB NUMBER 1975	DATE 04/17/24	SHEET NUMBER 6
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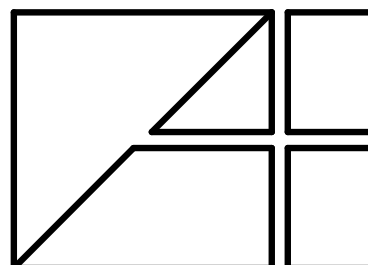
Alexander V. Bogaerts + Associates, P.C. ▪ Architecture ▪ Planning ▪ Interior Design

CLIENT PROJECT
Beztaak Companies
All Seasons of Birmingham Ph2
Birmingham MI

SHEET TITLE
3D RENDERINGS

© COPYRIGHT 2022 ALEXANDER V. BOGAERTS + ASSOC.	■ PRELIMINARY 01-18-2021	■ BIDS 08-21-2021	■ PERMITS 03-29-2021	■ CONSTRUCTION 08-27-2021	REVISIONS
DRAWN BY MM	FILE NAME BIM 300/All Seasons Birmingham/All Seasons.rvt	CHECKED BY MA	JOB NUMBER 1975	DATE 04/17/24	SHEET NUMBER 7

2445 Franklin Road
Bloomfield Hills, MI 48302
248 ▪ 334 ▪ 5000





MEMORANDUM

Planning Division

DATE: May 14, 2024

TO: Planning Board Members

FROM: Brooks Cowan, Senior Planner

APPROVED: Nick Dupuis, Planning Director

SUBJECT: 245 Townsend Street – Preliminary Site Plan Review

The subject site is located on the southeast corner of Townsend Street and Bates Street in the R-8 zoning district. The existing property currently consists of a two story apartment complex and parking lot for Shain Park Apartments. The applicant is proposing to demolish the existing building to construct four (4) new attached single family residential units. Attached single family residential use is permitted within the R-8 zoning district, which is defined in Article 9, section 9.02 as follows:

A building that has not more than 8 one-family dwelling units erected side-by-side as a single building, each being separated from the adjoining units by walls extending from the basement floor to the roof, which meet or exceed the sound transmission class (STC) rating of 45 for residential buildings as established by the most current addition of the International Code Council's (ICC) Building Code as promulgated and published by the Building Officials and Code Administrators International, Inc. No two single-family dwelling units may be served by the same stairway or by the same exterior door of the dwelling.

The applicant is proposing four (4) new attached single-family residential units that are side by side in a single building facing Townsend Street. Each attached single-family unit is proposed to be separated from the adjoining unit by a wall extending from the basement floor to the roof, with each separating wall to meet or exceed an STC rating of 45. Each residential unit has its own stairway and individual front door that leads directly into each unit.

1.0 Land Use and Zoning

- 1.1 Existing Land Use - The existing site is used as a multi-family apartment building with eight (8) total units.
- 1.2 Existing Zoning – The existing site is zoned R-8, Attached Single-Family Residential.
- 1.3 Summary of Land Use and Zoning - The following chart summarizes existing land use and zoning adjacent to and/or in the vicinity of the subject site.

	North	South	East	West
Existing Land Use	Public Property	Attached Single-Family Residential	Attached Single-Family Residential	Attached Single-Family Residential
Existing Zoning District	PP, Public Property	R-8, Attached Single-Family Residential	R-8, Attached Single-Family Residential	R-8, Attached Single-Family Residential
Overlay Zoning District	N/A	N/A	N/A	N/A

2.0 Setback and Height Requirements

The applicant appears to satisfy the majority of the bulk, height, and area requirements for the R8, attached single-family use. The townhomes are proposed to be 2.5 stories and 30' in height with a pitched roof. The building placement has a 16.8' front setback, a 20' rear setback, a 7' interior sideyard setback to the east, and a 15' corner lot side setback to the west.

The front entrance is accesible by a four-step stairway and the main level begins at 4' above grade. The second level begins at 14'8" above grade and the the attic level begins at 24'4" above grade. The midpoint of the pitched roof for the attic level is 30' in height.

City staff is in the process of verifying the distance between principle structures standard for attached-single family developments vs. single family developments in the R8 zone. Article 2, Table 2.20.2 of the current Zoning Ordinance for R8 states that the distance between residential structures on adjacent lots is required to be a minimum of 14 feet or 25% of the total lot width, whichever is greater. However, prior attached-single family developments within the R8 zone under old Zoning Ordinance formats have

not required this distance between structure requirement, and have only required the 10' corner and 7' interior side setbacks. If applied to the proposed attached-single family development, the distance between structure requirement on the east side would be 30', requiring a variance of 16' from the Board of Zoning Appeals. The Planning Division is in the process of reviewing versions of old Zoning Ordinances and past developments within the R8 zone and intends to have a determination with the Building Official by Wednesday, May 22, 2024.

A second issue for discussion is the requirement of Article 4, Section 4.62 of the Zoning Ordinance that requires a variation of front setbacks of dwelling units of at least 4 feet for attached single-family dwellings in the R8 zone. The Planning Board may reduce this requirement provided that the reduction shall not impair the free flow of air, light and other living amenities to the residents of the building and adjacent residential buildings. The proposed plan does not show a 4 foot variation in the setback between any of the units. **The Planning Board may wish to reduce the 4' variation requirement to 0', or the applicant will be required to obtain a variance from the Board of Zoning Appeals.**

3.0 Screening and Landscaping

- 3.1 Screening – All required parking spaces are within attached garages. The applicant has indicated a 6' masonry screen wall along the southern and eastern portions of the access drive to satisfy the screening requirement for any driveway furnishing access to a parking facility. **The applicant will need to submit a specification sheet for the screen wall at Final Site Plan review to ensure that the screening is complementary to the building, uses proper materials, and meets the required dimensions.**

No rooftop mechanical units are proposed, nor is there an outdoor dumpster proposed, therefore no screening is required for either. Garbage will be stored within each garage and taken to the curb on collection day.

- 3.2 Landscaping – A complete landscaping review will be conducted at Final Site Plan.

One street tree is required for each 40 linear foot of frontage. It is also of note that Article 4, Landscaping Standards, Section 4.20(E), requires 1 deciduous tree and 1 Evergreen tree on-site per 2 dwelling units. The Planning Board may approve alternate landscaping if the alternative proposal meets the spirit and intent of the landscape ordinance and/or the site involves space limitations or is unusually shaped; or predominant development patterns in the surrounding neighborhood justify an alternative plan for in-fill projects in older established areas of the City.

- 3.3 Utilities – Article 4, section 4.29 of the Zoning Ordinance states that all R-8 developments must have underground utilities running to the site. The applicant has advised that all required utilities will be run underground.
-

4.0 Open Space

- 4.1 Required Open Space – Per Article 4, Section 4.34 Open Space Standards of the Zoning Ordinance, the applicant is required to provide a total of 180 SF of open space per unit, which is to be enclosed with a solid wood or masonry fence, with a minimum height of 6' and a maximum height of 8'. The site plan indicates two terrace balconies on the southern elevation for each unit satisfying the open space requirements. The balconies on the second floor are proposed to be 100 SF and the attic level balconies are proposed to be 208 SF. The architect has indicated that the balconies on the second level have a screenwall that is 6' in height and consists of masonry material.
- 4.2 Projections into Open Space – Chapter 126, Article 04, section 4.30 (C) states that steps may project into a front open space for a maximum distance of 10 feet. This provision further states that the required front setback cannot be reduced to less than 10' by the projection of steps. The front steps project 6'8" into the front setback and the applicant has provided a 10' front setback from the edge of the steps to the property line as required.

5.0 Parking, Loading and Circulation

- 5.1 Parking - A total of 8 parking spaces are required. The applicant is proposing enclosed garages in the lower level in order to meet this requirement. The driveway for each unit will be sloped down to the lower level garage, similar to the townhomes on the corner of Brown and Bates. The proposed garage space for each unit is 21'6" x 23'1" to accommodate space for two vehicles.
- 5.2 Circulation – Vehicles will access the site from Bates Street through a 20' driveway. The public sidewalk is proposed to remain in its current location along Townsend Street and Bates Street. Four new walkways connecting from each unit to the sidewalk on Townsend Street are proposed.

6.0 Lighting

A complete lighting review will be conducted at Final Site Plan Review.

7.0 Departmental Reports

- 7.1 Engineering Department – The Engineering Department will provide comments by Wednesday, May 22, 2024.
 - 7.2 Department of Public Services – Please see attached comments from DPS.
 - 7.3 Fire Department – Please see attached comments from the Fire Department.
 - 7.4 Police Department – The Police Department has no concerns.
-

7.5 Building Division – Please see attached comments from the Building Division.

7.6 Parking Manager – The Parking Systems Manager has no concerns.

8.0 Design Review

A complete design review will be conducted at Final Site Plan Review. The applicant is proposing the following materials for the building:

- Brick and stucco for the building facade;
- Limestone for accents and trim, entryways;
- Fiberglass shingles for the main roof section;
- Copper flashing;
- Metal railings for windows and balconies
- Painted wood trim.

As mentioned above, in accordance with Article 4, section 4. 62 of the Zoning Ordinance, the R8 zone requires a variation of front setbacks of dwelling units of at least 4 feet; however, the Planning Board may reduce this requirement provided that the reduction shall not impair the free flow of air, light and other living amenities to the residents of the building and adjacent residential buildings. The proposed plans do not show a 4' variation. The applicant has advised that the individual units are proposed to be distinguished by their architectural style, and a waiver of the 4' variation is requested. **The Planning Board may reduce the 4' variation requirement, or the applicant will be required to obtain a variance from the Board of Zoning Appeals.**

9.0 Required Attachments

	Submitted	Not Submitted	Not Required
Existing Conditions Plan	☒	☐	☐
Detailed and Scaled Site Plan	☒	☐	☐
Certified Land Survey	☒	☐	☐
Interior Floor Plans	☒	☐	☐
Landscape Plan	☐	☒	☐
Photometric Plan	☐	☒	☐
Colored Elevations	☒	☐	☐
Material Specification Sheets	☒	☐	☐
Material Samples	☐	☒	☐
Site & Aerial Photographs	☒	☐	☐

10.0 Approval Criteria

In accordance with Article 7, section 7.27 of the Zoning Ordinance, the proposed plans for development must meet the following conditions:

- (1) The location, size and height of the building, walls and fences shall be such that there is adequate landscaped open space so as to provide light, air and access to the persons occupying the structure.
- (2) The location, size and height of the building, walls and fences shall be such that there will be no interference with adequate light, air and access to adjacent lands and buildings.
- (3) The location, size and height of the building, walls and fences shall be such that they will not hinder the reasonable development of adjoining property not diminish the value thereof.
- (4) The site plan, and its relation to streets, driveways and sidewalks, shall be such as to not interfere with or be hazardous to vehicular and pedestrian traffic.
- (5) The proposed development will be compatible with other uses and buildings in the neighborhood and will not be contrary to the spirit and purpose of this chapter.
- (6) The location, shape and size of required landscaped open space is such as to provide adequate open space for the benefit of the inhabitants of the building and the surrounding neighborhood.

11.0 Recommendation

Based upon review of the site plan submitted, The Planning Division recommends the Planning Board APPROVE the Preliminary Site Plan for 245 Townsend St. with the following conditions:

1. The Planning Board approve a waiver of the required 4' variation in front setbacks between units;
 2. The applicant submit lighting and material specifications, samples, photometric plan and all other required information for the proposed building to complete the Design Review at Final Site Plan; and
 3. The applicant comply with the requests of all City Departments.
-

12.0 Sample Motion Language

Motion to APPROVE the Preliminary Site Plan for 245 Townsend St. with the following conditions:

1. The Planning Board approve a waiver of the required 4' variation in front setbacks between units;
2. The applicant submit lighting and material specifications, samples, photometric plan and all other required information for the proposed building to complete the Design Review at Final Site Plan; and
3. The applicant comply with the requests of all City Departments.

OR

Motion to DENY the Preliminary Site Plan for 245 Townsend St. for the following reasons:

1: _____
2: _____

OR

Motion to POSTPONE the Preliminary Site Plan for 245 Townsend St. for the following reasons:

1: _____
2: _____

**Zoning Compliance Summary Sheet
Preliminary Site Plan Review
245 Townsend**

Existing Site: Shain Park Multi-Family Apartment Complex

Zoning: R-8, Attached Single-Family Residential

Land Use: Residential

Existing Land Use and Zoning of Adjacent Properties:

	North	South	East	West
Existing Land Use	Public Property	Attached Single-Family Residential	Attached Single-Family Residential	Attached Single-Family Residential
Existing Zoning District	PP, Public Property	R-8, Attached Single-Family Residential	R-8, Attached Single-Family Residential	R-8, Attached Single-Family Residential
Overlay Zoning District	N/A	N/A	N/A	N/A

Land Area:	Existing:	12,289 SF
	Proposed:	12,289 SF
Dwelling Units:	Existing:	8
	Proposed:	4
Minimum Lot Area/Unit:	Required:	3,000 SF per unit
	Proposed:	> 3,000 SF per unit
Min. Floor Area /Unit:	Required:	900 SF
	Proposed:	> 3,000 SF
Max. Total Floor Area:	Required:	N/A
	Proposed:	N/A

Min. Open Space:	Required:	180 SF enclosed with solid wood or masonry fence
	Proposed:	100 SF 2 nd level, 208 SF Attic level
Max. Lot Coverage:	Required:	N/A
	Proposed:	N/A
Min Front Setback:	Required:	15' 6" - average setback of residential buildings within 200 ft. along Townsend St. on same side of street
	Proposed:	16.8 ft.
Side Setbacks	Required:	10' corner lot line 7' interior lot line
	Proposed:	15' west side to Bates St. 7' east side interior lot
Rear Setback:	Required:	20 ft.
	Proposed:	20' 1" ft.
Min. Front+Rear Setback	Required:	N/A
	Proposed:	N/A
Max. Bldg. Height:	Permitted:	30 ft., 2.5 stories (midline for pitched roofs)
	Proposed:	30 ft., 2.5 stories (midline of pitched roof)
Min. Eave Height:	Required:	N/A
	Proposed:	N/A
Floor-Ceiling Height:	Required:	N/A
	Proposed:	N/A
Front Entry:	Required:	N/A
	Proposed:	N/A
Absence of Bldg. Façade:	Required:	N/A
	Proposed:	N/A
Opening Width:	Required:	N/A
	Proposed:	N/A
Parking:	Required:	8 spaces - 2 spaces of 180 ft ² each/unit; parking must be provided in a garage, carport or in/under the building
	Proposed:	8 spaces in attached garages, 2 parking space per unit
Min. Parking Space Size:	Required:	180 ft ²
	Proposed:	180 ft ²
Parking in Frontage:	Required:	N/A

	Proposed:	N/A
Loading Area:	Required:	N/A
	Proposed:	N/A

Screening:

<u>Parking:</u>	Required:	6 ft. screenwall
	Proposed:	Interior parking

<u>Loading:</u>	Required:	N/A
	Proposed:	N/A

<u>Rooftop Mechanical:</u>	Required:	Full screening to compliment the building
	Proposed:	All mechanical placed inside of units, thus fully screened by the building

<u>Elect. Transformer:</u>	Required:	Fully screened from public view
	Proposed:	No transformer proposed

<u>Dumpster:</u>	Required:	6 ft. high capped masonry wall with wooden gates
	Proposed:	Trash to be stored within the building

CITY OF BIRMINGHAM
Community Development – Building Department
151 Martin Street, Birmingham, MI 48009

May 15, 2024

RE: Preliminary Site Plan Review Comments
245 Townsend, New Attached Single Family

As requested, the Building Department has examined the plans for the proposed project referenced above. The plans were provided to the Planning Department for site plan review purposes only and present conceptual elevations and floor plans. Although the plans lack sufficient detail to perform a code review, the following comments are offered for Planning Design Review purposes and applicant consideration:

Applicable Building Codes:

- **2015 Michigan Building Code.** Applies to all buildings other than those regulated by the *Michigan Residential Code*.
- **2015 Michigan Residential Code.** Applies to all detached one and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories in height with a separate means of egress and their accessory structures.
- **2021 Michigan Mechanical Code.** (Residential requirements for mechanical construction in all detached one and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories in height with a separate means of egress and their accessory structures are contained in the Michigan Residential Code)
- **2021 Michigan Plumbing Code.** (Residential requirements for plumbing construction in all detached one and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories in height with a separate means of egress and their accessory structures are contained in the Michigan Residential Code)
- **2023 National Electrical Code *along with the Michigan Part 8 Rules*.** (Residential requirements for electrical construction in all detached one and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories in height with a separate means of egress and their accessory structures are contained in the Michigan Residential Code)

Review Comments:

1. No apparent building code concerns at this time.



MEMORANDUM

Department of Public Services

DATE: May 16, 2024

TO: Brooks Cowan, Senior Planner

FROM: Brendan McGaughey, Parks and Forestry Foreman

SUBJECT: DPS Forestry Preliminary Site Plan Review – 245 Townsend

The Department of Public Services has completed a review of the The Parkview on Shain Park – 245 Townsend preliminary site plans dated April 26, 2024, with respect to conformance with City ordinances and the Birmingham Tree Manual and Standards of Practice. Our comments are as follows:

Proposed forestry on S. Bates:

- (2) existing elm trees need to be identified, protected and preserved throughout construction. Any proposed nearby excavation must be at least 6' away from the base of the trees.

Proposed forestry on Townsend:

- A tree permit will be required: (3) existing trees on Townsend need to be removed and replaced with (4) 3-3.5" DBH Ginko 'Princeton Sentry' following the majority of construction activities. Locations to be approximately centered on each unit.



CITY OF BIRMINGHAM FIRE DEPARTMENT

572 SOUTH ADAMS • BIRMINGHAM, MICHIGAN 48009 • 248.530.1900 FAX 248.530.1950

Champion Development Proposed Townhouse Development

Parcel #19-36-137-001
245 Townsend Street, Birmingham, Michigan 48009

Preliminary Site Plan Comments

The following list are preliminary comments for the Proposed Townhouse Development proposal.

Follow International Fire Code 2015 ed. for reference on submitted plans or adopted code at time of construction.

Follow Chapter 33 of IFC 32015 ed. "Fire Safety during Construction and Demolition."

The AHJ encourages the use of NFPA 13R, Residential Sprinkler Systems, as well appropriate Fire Alarm systems according to NFPA 72.

Rear access shall not be less than 20 feet in width, and unobstructed vertical clearance of not less than 13 feet 6 inches; IFC 2015, 503.2.1 Dimensions.

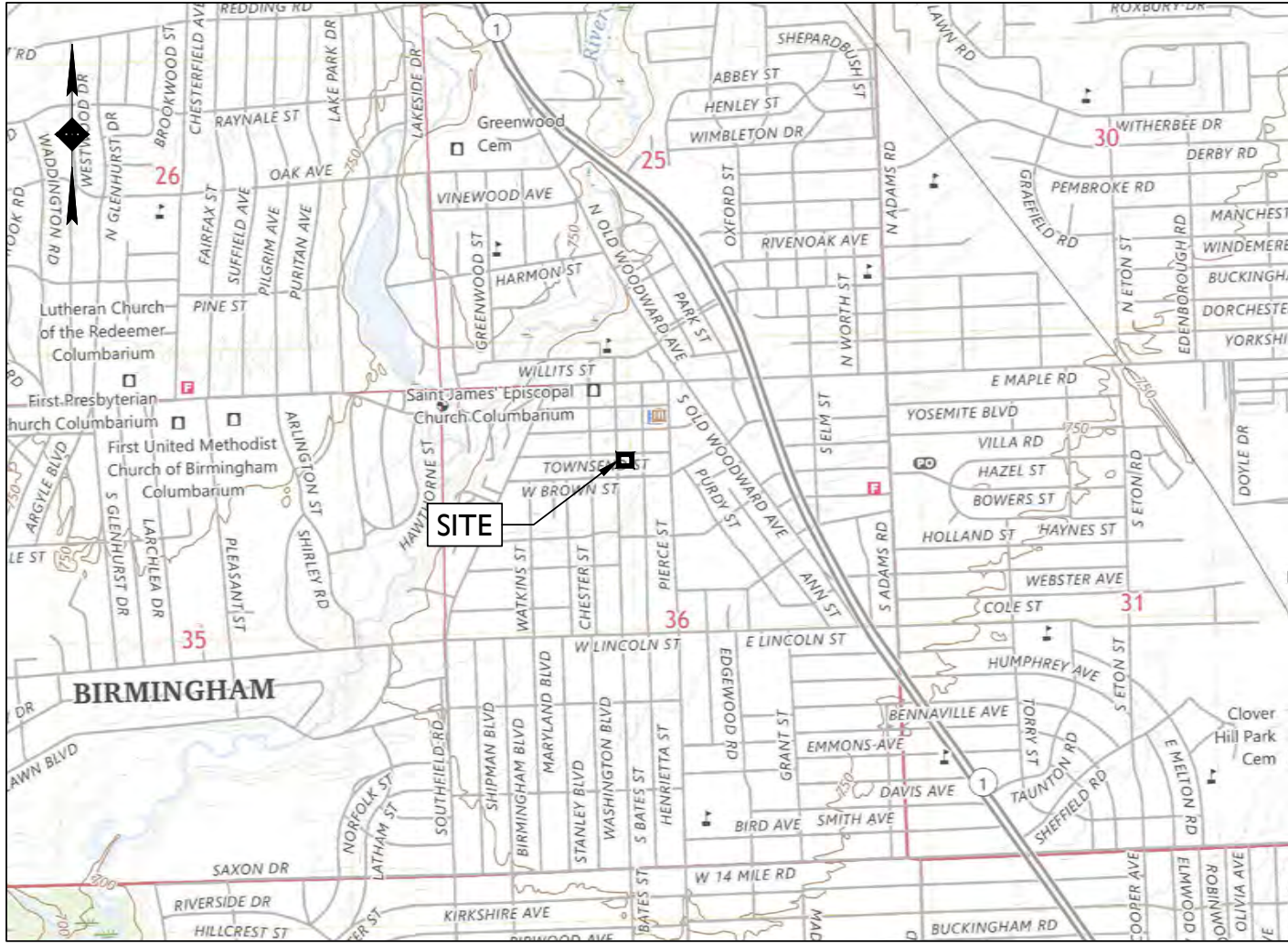
All life safety requirements listed in IFC and NFPA documents and standards shall be followed and enforced.

These comments are preliminary only, and future comments or concerns will be addressed as the project progresses.

Should you have any questions, please contact the Fire Marshal's Office at 248-530-1903.

In Fire and Life Safety,

Jeff Scaife
Fire Marshal
City of Birmingham



SOURCE: USGS ONLINE MAPPER

LOCATION / KEY MAP

SCALE: 1" = 2,000'±



SOURCE: GOOGLE EARTH PRO

AERIAL MAP

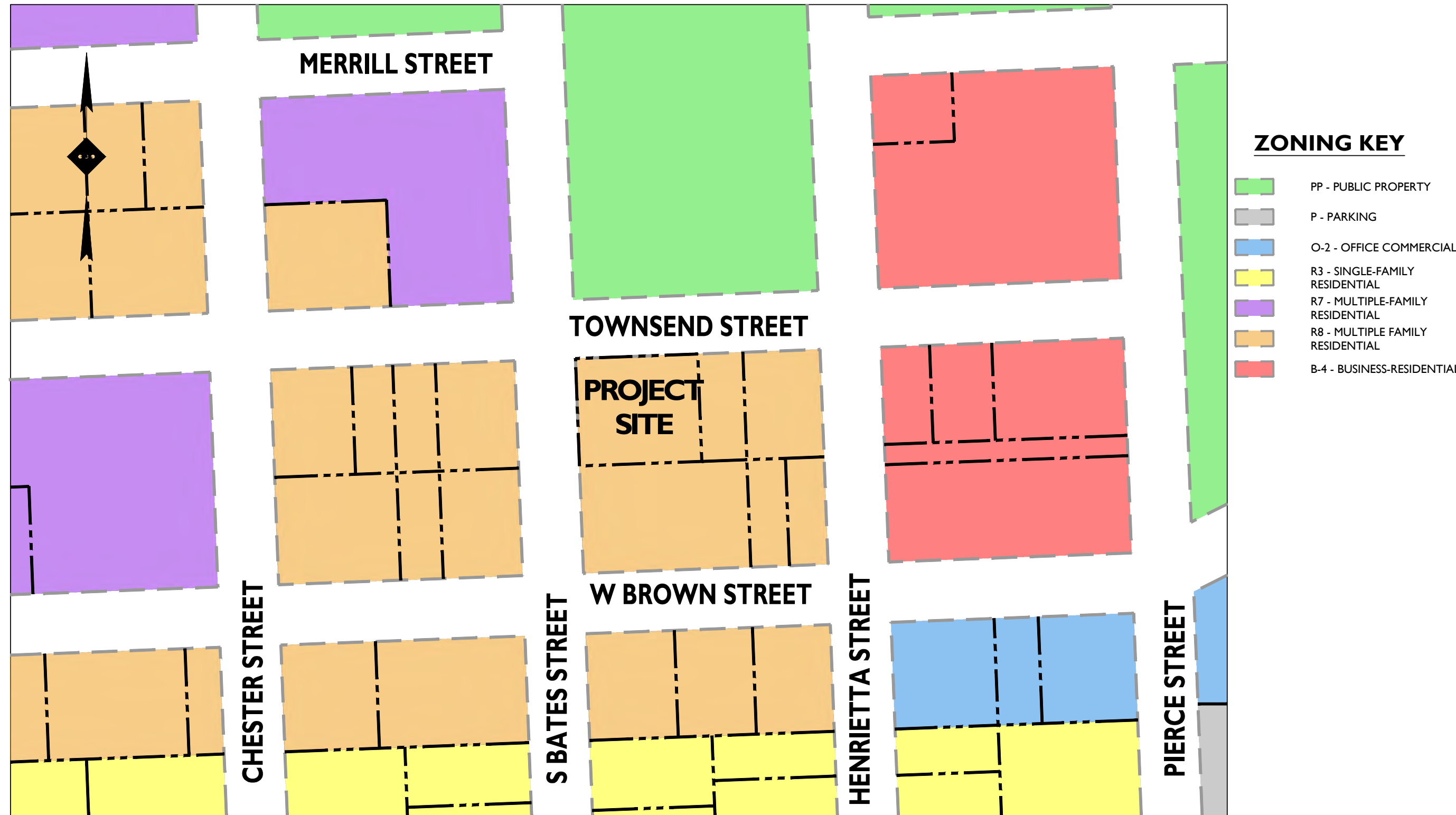
SCALE: 1" = 100'±

SITE DEVELOPMENT PLANS FOR CHAMPION DEVELOPMENT PROPOSED TOWNHOUSE DEVELOPMENT

PARCEL ID: 19-36-137-001

245 TOWNSEND STREET

CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN



SOURCE: CITY OF BIRMINGHAM ZONING MAP, UPDATED AUGUST 2021

ZONING MAP

SCALE: 1" = 100'±

APPLICANT

CHAMPION DEVELOPMENT GROUP
7395 TRUMBLE ST
ST CLAIR TOWNSHIP, MI 48079
248-444-0624
ANTHONY@CHAMPDEVGROUP.COM

ARCHITECT

CHRISTOPHER J LONGE ARCHITECTURE & INTERIORS
124 PEABODY
BIRMINGHAM, MI 48009
248-258-6940
CJLONGE@CJLONGEIA.COM

NOT APPROVED FOR CONSTRUCTION

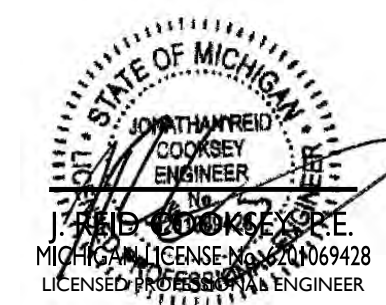


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SITE DEVELOPMENT PLANS CHAMPION DEVELOPMENT PROPOSED TOWNHOUSE DEVELOPMENT

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN



SCALE: AS SHOWN PROJECT ID: DET-240092

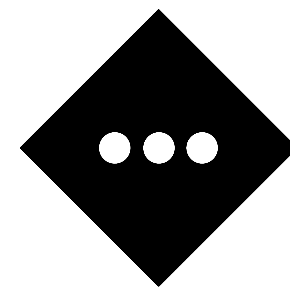
TITLE:

COVER SHEET

DRAWING:

C-I

PLANS PREPARED BY:



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PLAN REFERENCE MATERIALS:

- THIS PLAN SET REFERENCES THE FOLLOWING DOCUMENTS INCLUDING, BUT NOT LIMITED TO:
 - ALTA / NSPS LAND TITLE SURVEY PREPARED BY FENN & ASSOCIATES DATED 2/27/2024
 - ARCHITECTURAL PLANS PREPARED BY CHRISTOPHER J LONGE ARCHITECTURE & INTERIORS DATED 03/28/2024
 - AERIAL MAP OBTAINED FROM GOOGLE EARTH PRO 04/24/2024
 - LOCATION MAP OBTAINED FROM USGS ONLINE MAPPER 04/24/2024
- ALL REFERENCE MATERIAL LISTED ABOVE SHALL BE CONSIDERED A PART OF THIS PLAN SET AND ALL INFORMATION CONTAINED WITHIN THESE MATERIALS SHALL BE UTILIZED IN CONJUNCTION WITH THIS PLAN SET. THE CONTRACTOR IS RESPONSIBLE TO OBTAIN A COPY OF EACH REFERENCE AND REVIEW IT THOROUGHLY PRIOR TO THE START OF CONSTRUCTION.

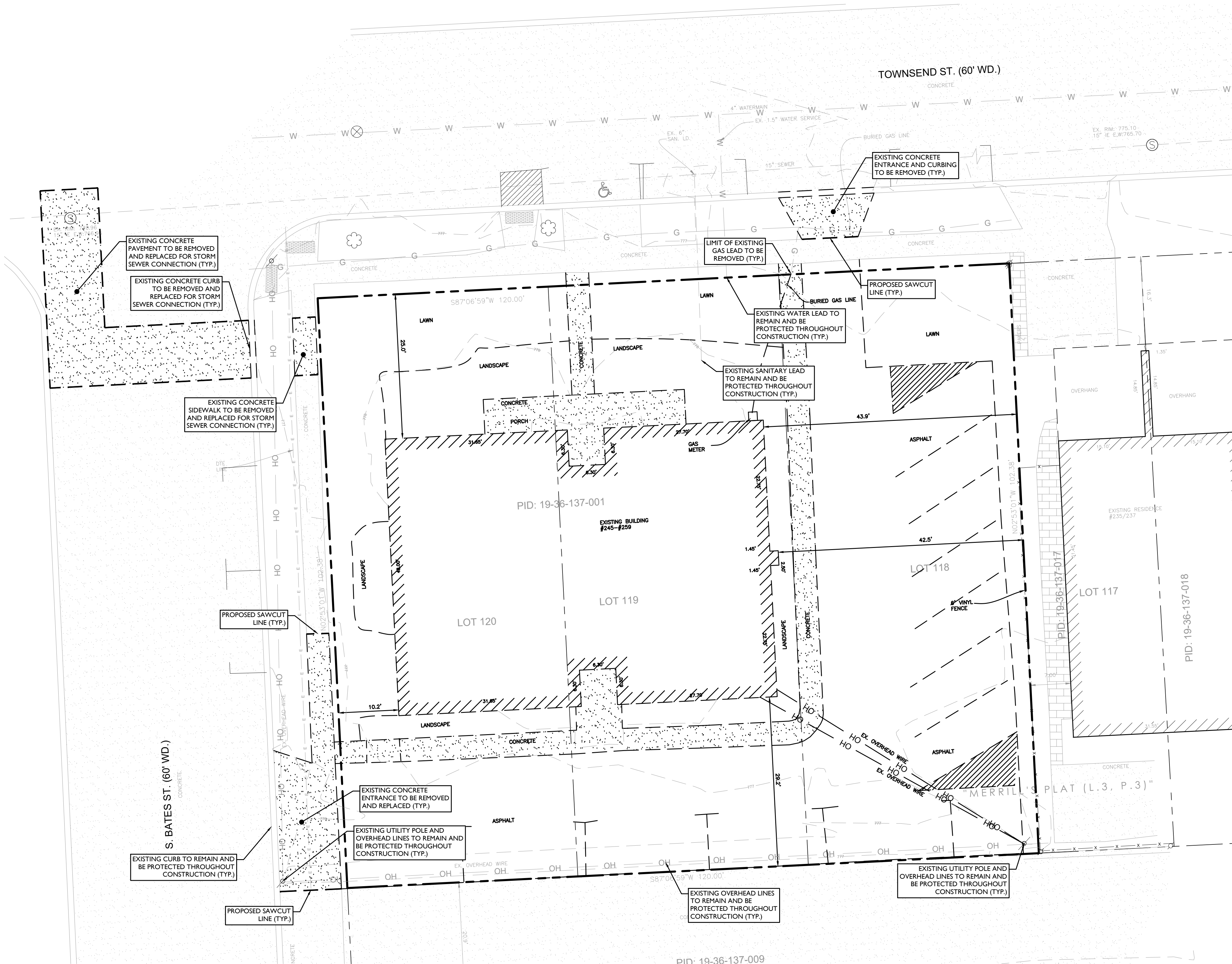
SHEET INDEX

DRAWING TITLE	SHEET #
COVER SHEET	C-1
DEMOLITION PLAN	C-2
SITE PLAN	C-3
GRADING PLAN	C-4
PRELIMINARY STORM WATER CONVEYANCE & UTILITY PLAN	C-5
LIGHTING PLAN	C-6
CONSTRUCTION DETAILS	C-7

ADDITIONAL SHEETS

DRAWING TITLE	SHEET #
ALTA / NSPS LAND TITLE SURVEY	I OF I
BUILDING SETBACK AERIAL EXHIBIT	I OF I

\\01702140571240021\CHAMPION DEVELOPMENT\48 TOWNSEND STREET, BIRMINGHAM, MI\CDR\LOT120.DWG



SYMBOL	DESCRIPTION
---	FEATURE TO BE REMOVED / DEMOLISHED
---	LOD
---	LIMIT OF DISTURBANCE

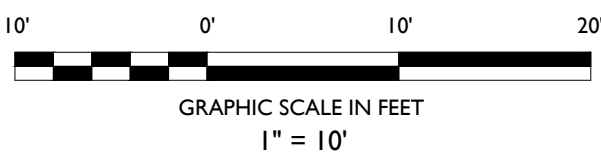
ALL SITE FEATURES WITHIN THE LIMIT OF DISTURBANCE INDICATED ON THIS PLAN ARE TO BE REMOVED / DEMOLISHED UNLESS OTHERWISE NOTED. THE CONTRACTOR SHALL NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC. IF SIGNIFICANT DISCREPANCIES ARE DISCERNED BETWEEN THIS PLAN AND FIELD CONDITIONS



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DEMOLITION NOTES

1. THE WORK REFLECTED ON THE DEMOLITION PLAN IS TO PROVIDE GENERAL INFORMATION TOWARDS THE EXISTING ITEMS TO BE DEMOLISHED AND/OR REMOVED. THE CONTRACTOR IS RESPONSIBLE TO REVIEW THE ENTIRE PLAN SET AND ASSOCIATED REPORTS/REFERENCE DOCUMENTS INCLUDING ALL DEMOLITION ACTIVITIES AND INCIDENTAL TASKS NECESSARY TO COMPLETE THE SITE IMPROVEMENTS.
2. THE CONTRACTOR IS RESPONSIBLE TO DETERMINE THE MEANS AND METHODS OF DEMOLITION ACTIVITIES.
3. EXPLOSIVES SHALL NOT BE USED UNLESS WRITTEN CONSENT FROM BOTH THE OWNER AND ANY APPLICABLE GOVERNING AGENCY IS OBTAINED. BEFORE THE START OF ANY EXPLOSIVE PROGRAM, THE CONTRACTOR IS RESPONSIBLE TO OBTAIN ALL LOCAL, STATE, AND FEDERAL PERMITS. ADDITIONALLY, THE CONTRACTOR WILL BE RESPONSIBLE FOR ALL SEISMIC TESTING AS REQUIRED AND ANY DAMAGES AS THE RESULT OF SAID DEMOLITION PRACTICES.
4. ALL DEMOLITION ACTIVITIES SHALL BE PERFORMED IN ACCORDANCE WITH LOCAL, STATE, AND FEDERAL CODES. THE CONTRACTOR IS RESPONSIBLE FOR ENSURING ALL UTILITIES ARE DISCONNECTED IN ACCORDANCE WITH THE UTILITY AUTHORITY'S REQUIREMENTS PRIOR TO STARTING THE DEMOLITION OF ANY STRUCTURE. ALL EXCAVATIONS ASSOCIATED WITH DEMOLISHED STRUCTURES OR REMOVED TANKS SHALL BE BACKFILLED WITH SUITABLE MATERIAL AND COMPACTED TO SUPPORT SITE AND BUILDING IMPROVEMENTS. A GEOTECHNICAL ENGINEER SHOULD BE PRESENT DURING BACKFILLING ACTIVITIES TO OBSERVE AND CERTIFY THAT BACKFILL MATERIAL WAS COMPACTED TO A SUITABLE CONDITION.
5. DEMOLISHED DEBRIS SHALL NOT BE BURIED ON SITE. ALL WASTE/DEBRIS GENERATED FROM DEMOLITION ACTIVITIES SHALL BE DISPOSED OF IN ACCORDANCE WITH ALL LOCAL, STATE, AND FEDERAL REQUIREMENTS. THE CONTRACTOR IS RESPONSIBLE TO MAINTAIN ALL RECORDS OF THE DISPOSAL TO DEMONSTRATE COMPLIANCE WITH THE ABOVE REGULATIONS.



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SITE DEVELOPMENT PLANS

CHAMPION DEVELOPMENT

**PROPOSED TOWNHOUSE
DEVELOPMENT**

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN



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SCALE: 1" = 10' PROJECT ID: DET-240092

TITLE:

DEMOLITION PLAN

DRAWING:

C-2

LEGAL DESCRIPTION

THE LAND REFERRED TO IN THIS COMMITMENT, SITUATED IN THE COUNTY OF OAKLAND, CITY OF BIRMINGHAM, STATE OF MICHIGAN, IS DESCRIBED AS FOLLOWS:

LOTS 118, 119, AND 120 OF MERRILL'S PLAT, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 3 OF PLATS, PAGE 3, OAKLAND COUNTY RECORDS

TAX ITEM NO. 19-36-137-001

LAND USE AND ZONING		
PARCEL ID: 19-36-137-001		
ATTACHED SINGLE-FAMILY RESIDENTIAL (R8)		
PROPOSED USE		
ATTACHED SINGLE-FAMILY		
PERMITTED USE		
ZONING REQUIREMENT	REQUIRED	PROPOSED
MINIMUM LOT AREA	12,000 SF ⁽¹⁾	12,389 SF
MINIMUM FLOOR AREA	900 SF	> 900 SF
MAXIMUM IMPERVIOUS COVERAGE	N/A	9,484 SF
MAXIMUM BUILDING COVERAGE	N/A	6,365 SF
MAXIMUM BUILDING HEIGHT	30 FT (2.5 STORIES)	30 FT
MINIMUM FRONT YARD SETBACK	16.7 FT ⁽²⁾	16.8 FT
MINIMUM SIDE YARD SETBACK (INTERIOR)	7 FT	7.0 FT
MINIMUM SIDE YARD SETBACK (CORNER)	10 FT	14.3 FT
MINIMUM REAR YARD SETBACK	20 FT	20.0 FT

(1) 3,000 SF PER UNIT: (3,000 SF)(4 UNITS) = 12,000 SF

(2) AVERAGE SETBACK OF RESIDENTIAL BUILDINGS WITHIN 200 FT OR 25 FT

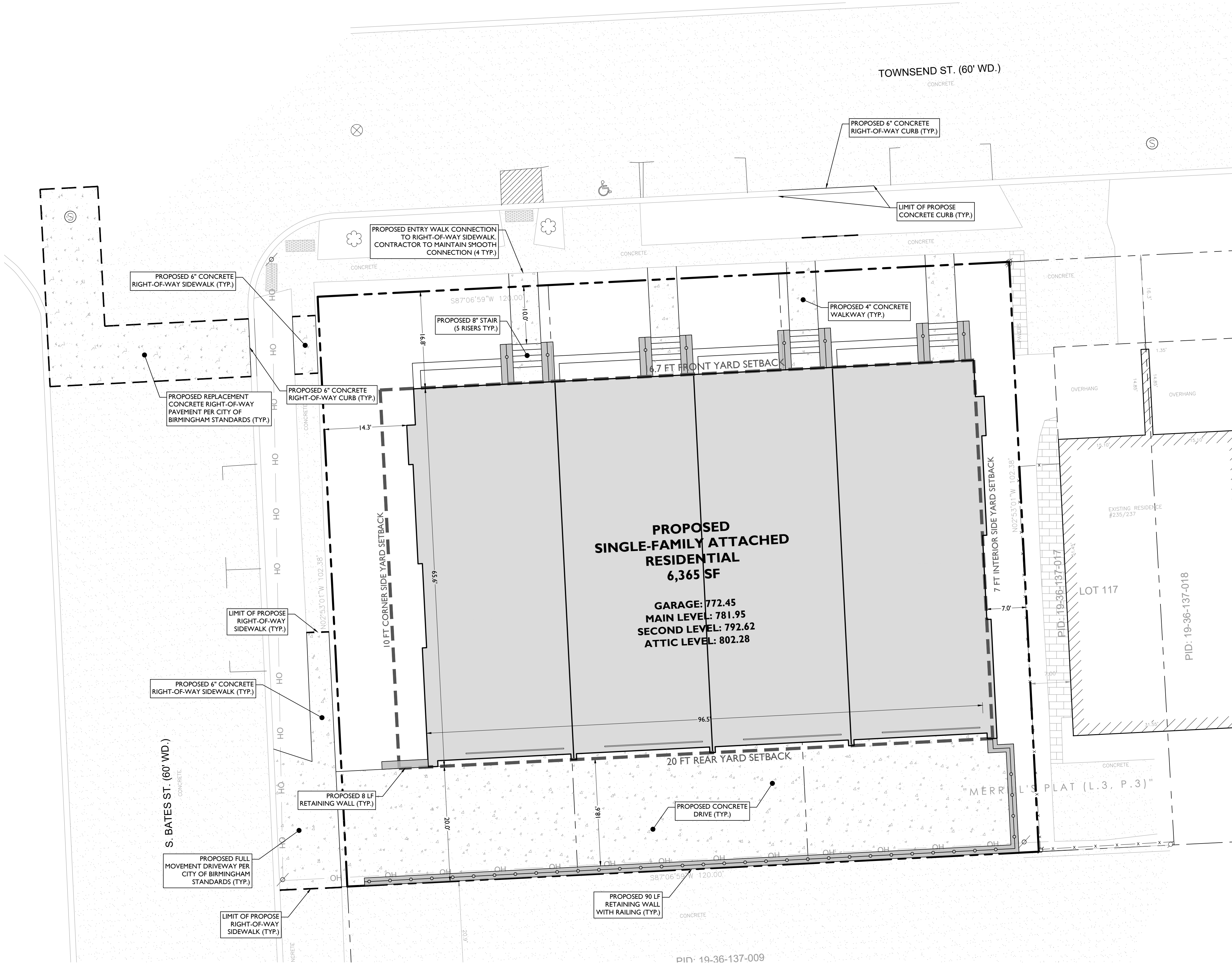
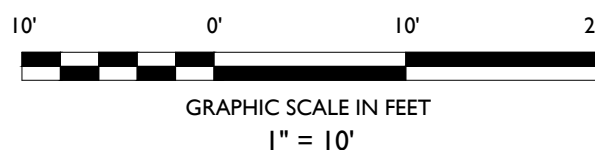
SYMBOL DESCRIPTION

- PROPERTY LINE
- SETBACK LINE
- SAWCUT LINE
- PROPOSED CURB
- PROPOSED FLUSH CURB
- PROPOSED SIGNS / BOLLARDS
- PROPOSED BUILDING
- PROPOSED CONCRETE
- PROPOSED AREA LIGHT
- PROPOSED RETAINING WALL
- PROPOSED HANDRAIL
- PROPOSED BUILDING DOORS

TRASH PICK UP SHALL BE VIA INDIVIDUAL TRASH BINS THAT RESIDENTS SHALL BRING TO THE STREET ON THE DESIGNATED PICK UP DAY AND COORDINATED WITH THE TRASH SERVICE

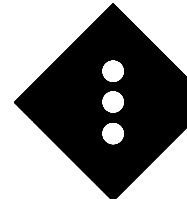
GENERAL NOTES

- THE CONTRACTOR SHALL VERIFY AND FAMILIARIZE THEMSELVES WITH THE EXISTING SITE CONDITIONS AND THE PROPOSED SCOPE OF WORK (INCLUDING DIMENSIONS, LAYOUT, ETC.) PRIOR TO INITIATING THE IMPROVEMENTS IDENTIFIED WITHIN THESE DOCUMENTS. SHOULD ANY DISCREPANCY BE FOUND BETWEEN THE EXISTING SITE CONDITIONS AND THE PROPOSED WORK, THE CONTRACTOR SHALL NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC PRIOR TO THE START OF CONSTRUCTION.
- THE CONTRACTOR SHALL OBTAIN ALL NECESSARY PERMITS AND ENSURE THAT ALL REQUIRED APPROVALS HAVE BEEN OBTAINED PRIOR TO THE START OF CONSTRUCTION. COPIES OF ALL REQUIRED PERMITS AND APPROVALS SHALL BE KEPT ON SITE AT ALL TIMES DURING CONSTRUCTION.
- ALL CONTRACTORS WILL, TO THE FULLEST EXTENT PERMITTED BY LAW, INDEMNIFY AND HOLD HARMLESS STONEFIELD ENGINEERING & DESIGN, LLC, AND ITS SUB-CONSULTANTS FROM AND AGAINST ANY DAMAGES AND LIABILITIES INCLUDING ATTORNEY'S FEES ARISING OUT OF CLAIMS BY EMPLOYEES OF THE CONTRACTOR IN ADDITION TO CLAIMS CONNECTED TO THE PROJECT AS A RESULT OF NOT CARRYING THE PROPER INSURANCE FOR WORKERS COMPENSATION, LIABILITY INSURANCE, AND LIMITS OF COMMERCIAL GENERAL LIABILITY INSURANCE.
- THE CONTRACTOR SHALL NOT DEVIATE FROM THE PROPOSED IMPROVEMENTS IDENTIFIED WITHIN THIS PLAN SET UNLESS APPROVAL IS PROVIDED IN WRITING BY STONEFIELD ENGINEERING & DESIGN, LLC.
- THE CONTRACTOR IS RESPONSIBLE TO DETERMINE THE MEANS AND METHODS OF CONSTRUCTION.
- THE CONTRACTOR SHALL NOT PERFORM ANY WORK OR CAUSE DISTURBANCE ON A PRIVATE PROPERTY NOT CONTROLLED BY THE PERSON OR ENTITY WHO HAS AUTHORIZED THE WORK WITHOUT PRIOR WRITTEN CONSENT FROM THE OWNER OF THE PRIVATE PROPERTY.
- THE CONTRACTOR IS RESPONSIBLE TO RESTORE ANY DAMAGED OR UNDERMINED STRUCTURE OR SITE FEATURE THAT IS IDENTIFIED TO REMAIN ON THE PLAN SET. ALL REPAIRS SHALL USE NEW MATERIALS TO RESTORE THE FEATURE TO ITS EXISTING CONDITION AT THE CONTRACTOR'S EXPENSE.
- CONTRACTOR IS RESPONSIBLE TO PROVIDE THE APPROPRIATE SHOP DRAWINGS, PRODUCT DATA, AND OTHER REQUIRED SUBMITTALS FOR REVIEW. STONEFIELD ENGINEERING & DESIGN, LLC, WILL REVIEW THE SUBMITTALS IN ACCORDANCE WITH THE DESIGN INTENT AS REFLECTED WITHIN THE PLAN SET.
- THE CONTRACTOR IS RESPONSIBLE FOR TRAFFIC CONTROL IN ACCORDANCE WITH MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, LATEST EDITION.
- THE CONTRACTOR IS REQUIRED TO PERFORM ALL WORK IN THE PUBLIC RIGHT-OF-WAY IN ACCORDANCE WITH THE APPROPRIATE GOVERNING AUTHORITY AND SHALL BE RESPONSIBLE FOR THE PROCUREMENT OF STREET OPENING PERMITS.
- THE CONTRACTOR IS REQUIRED TO RETAIN AN OSHA CERTIFIED SAFETY INSPECTOR TO BE PRESENT ON SITE AT ALL TIMES DURING CONSTRUCTION & DEMOLITION ACTIVITIES.
- SHOULD AN EMPLOYEE OF STONEFIELD ENGINEERING & DESIGN, LLC, BE PRESENT ON SITE AT ANY TIME DURING CONSTRUCTION, IT DOES NOT RELIEVE THE CONTRACTOR OF ANY OF THE RESPONSIBILITIES AND REQUIREMENTS LISTED IN THE NOTES WITHIN THIS PLAN SET.



NOTED: 04/05/24: 24002: CHAMPION DEVELOPMENT 345 TOWNSEND STREET, BIRMINGHAM, MI 48204-0000, SITE PLAN

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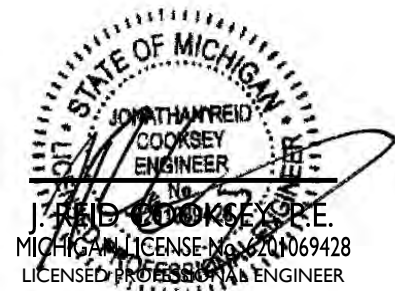
Phone 248.247.1115

SITE DEVELOPMENT PLANS

CHAMPION DEVELOPMENT

PROPOSED TOWNHOUSE
DEVELOPMENT

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN



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SCALE: 1" = 10' PROJECT ID: DET-240092

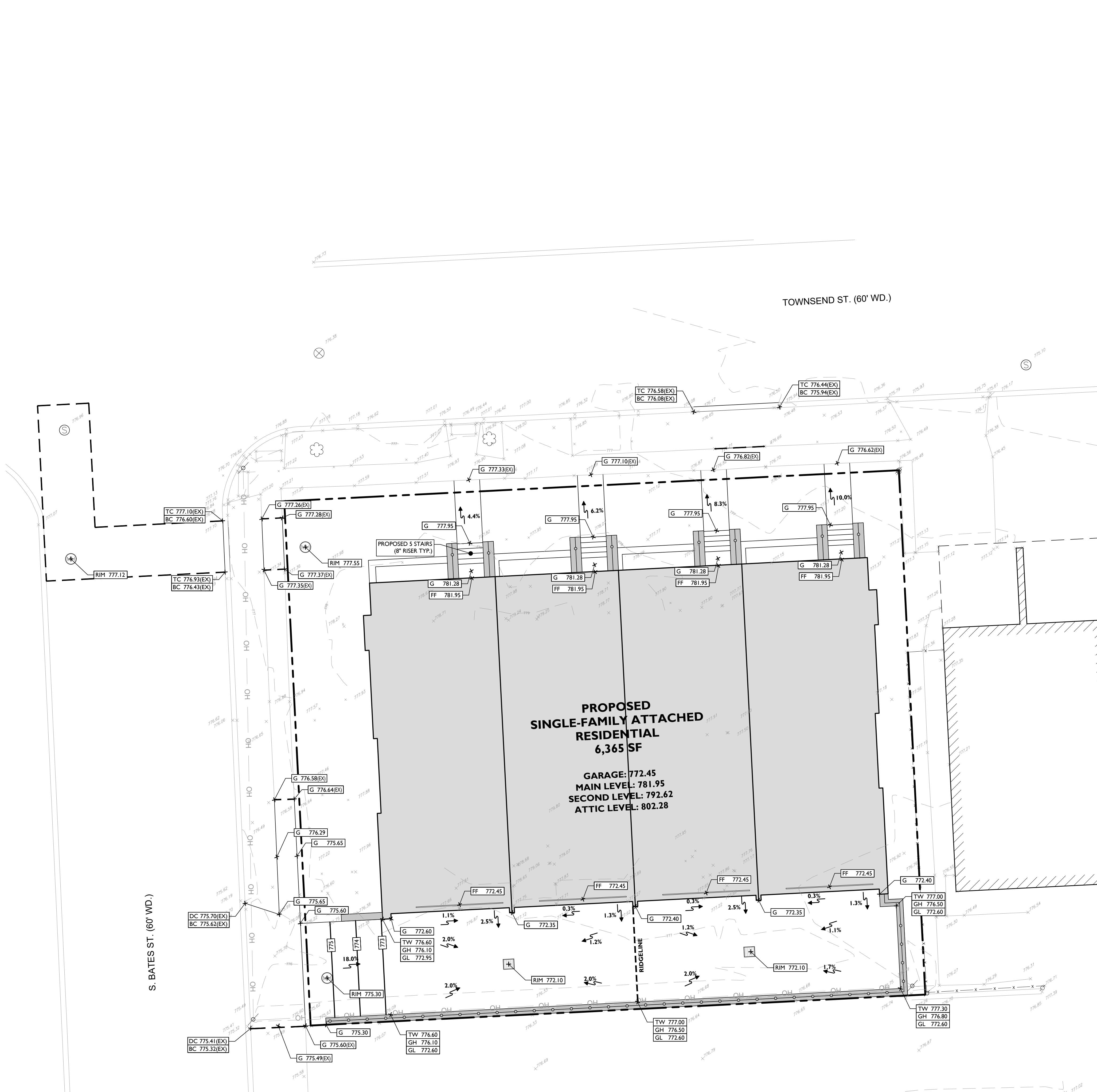
TITLE:

SITE PLAN

DRAWING:

C-3

V:\0710140517-24092- CHAMPION DEVELOPMENT-45 TOWNSEND STREET-BIRMINGHAM- MI\CADD\0710140517-24092- GRADING.DWG



AVERAGE GRADE CALCULATIONS:

EXISTING ELEVATION #1: 778.27 (NW CORNER OF BUILDING)
EXISTING ELEVATION #2: 778.71 (WEST SIDE OF PORCH)
EXISTING ELEVATION #3: 778.77 (EAST SIDE OF PORCH)
EXISTING ELEVATION #4: 778.20 (NE CORNER OF BUILDING)
EXISTING ELEVATION #5: 777.96 (SW CORNER OF BUILDING)
EXISTING ELEVATION #6: 779.06 (WEST SIDE OF REAR ENTRANCE)
EXISTING ELEVATION #7: 779.07 (EAST SIDE OF REAR ENTRANCE)
EXISTING ELEVATION #8: 777.95 (SE CORNER OF BUILDING)

AVERAGE ELEVATION: 778.50

MAXIMUM BUILDING HEIGHT: 808.50 (TO CENTER OF GABLE)

SYMBOL

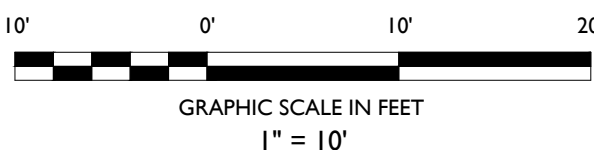
- PROPERTY LINE
- 100 --- PROPOSED GRADING CONTOUR
- RIDGE LINE --- PROPOSED GRADING RIDGE LINE
- ← PROPOSED DIRECTION OF DRAINAGE FLOW
- X G 100.00 PROPOSED GRADE SPOT SHOT
- X TC 100.50 BC 100.00 PROPOSED TOP OF CURB / BOTTOM OF CURB SPOT SHOT
- X FC 100.00 PROPOSED FLUSH CURB SPOT SHOT
- X DC 100.12 BC 100.00 PROPOSED DEPRESSED CURB / BOTTOM OF CURB SPOT SHOT
- X TW 102.00 BW 100.00 PROPOSED TOP OF WALL / BOTTOM OF WALL SPOT SHOT

GRADING NOTES

- ALL SOIL AND MATERIAL REMOVED FROM THE SITE SHALL BE DISPOSED OF IN ACCORDANCE WITH LOCAL, STATE, AND FEDERAL REQUIREMENTS. ANY GROUNDWATER DE-WATERING PRACTICES SHALL BE PERFORMED UNDER THE SUPERVISION OF A QUALIFIED PROFESSIONAL. THE CONTRACTOR IS REQUIRED TO OBTAIN ALL NECESSARY PERMITS FOR THE DISCHARGE OF DE-WATERED GROUNDWATER. ALL SOIL IMPORTED TO THE SITE SHALL BE CERTIFIED CLEAN FILL. CONTRACTOR SHALL MAINTAIN RECORDS OF ALL FILL MATERIALS BROUGHT TO THE SITE.
- THE CONTRACTOR IS REQUIRED TO PROVIDE TEMPORARY AND/OR PERMANENT SHORING WHERE REQUIRED DURING EXCAVATION ACTIVITIES INCLUDING BUT NOT LIMITED TO UTILITY TRENCHES TO ENSURE THE STRUCTURAL INTEGRITY OF NEARBY STRUCTURES AND STABILITY OF THE SURROUNDING SOILS.
- PROPOSED TOP OF CURB ELEVATIONS ARE GENERALLY 4 INCHES TO 7 INCHES ABOVE EXISTING GRADES UNLESS OTHERWISE NOTED. THE CONTRACTOR WILL SUPPLY ALL STAKEOUT CURB GRADE SHEETS TO STONEFIELD ENGINEERING & DESIGN, LLC. FOR REVIEW AND APPROVAL PRIOR TO POURING CURBS.
- THE CONTRACTOR IS RESPONSIBLE TO SET ALL PROPOSED UTILITY COVERS AND RESET ALL EXISTING UTILITY COVERS WITHIN THE PROJECT LIMITS TO PROPOSED GRADE IN ACCORDANCE WITH ANY APPLICABLE MUNICIPAL, COUNTY, STATE AND/OR UTILITY AUTHORITY REGULATIONS.
- MINIMUM SLOPE REQUIREMENTS TO PREVENT PONDING SHALL BE AS FOLLOWS:
 - CURB GUTTER: 0.50%
 - CONCRETE SURFACES: 1.00%
 - ASPHALT SURFACES: 1.00%
- A MINIMUM SLOPE OF 1.00% SHALL BE PROVIDED AWAY FROM ALL BUILDINGS. THE CONTRACTOR SHALL ENSURE POSITIVE DRAINAGE FROM THE BUILDING IS ACHIEVED AND SHALL NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC IF THIS CONDITION CANNOT BE MET.
- FOR PROJECTS WHERE BASEMENTS ARE PROPOSED, THE DEVELOPER IS RESPONSIBLE TO DETERMINE THE DEPTH TO GROUNDWATER AT THE LOCATION OF THE PROPOSED STRUCTURE. IF GROUNDWATER IS ENCOUNTERED WITHIN THE BASEMENT AREA, SPECIAL CONSTRUCTION METHODS SHALL BE UTILIZED AND REVIEWED/APPROVED BY THE CONSTRUCTION CODE OFFICIAL. IF SUMP PUMPS ARE UTILIZED, ALL DISCHARGES SHALL BE CONNECTED DIRECTLY TO THE PUBLIC STORM SEWER SYSTEM WITH APPROVAL FROM THE GOVERNING STORM SEWER SYSTEM AUTHORITY.

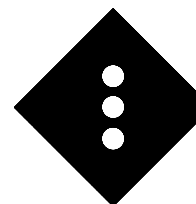
ADA NOTES

- THE CONTRACTOR SHALL MAINTAIN A MAXIMUM 2.00% SLOPE IN ANY DIRECTION WITHIN THE ADA PARKING SPACES AND ACCESS AISLES.
- THE CONTRACTOR SHALL PROVIDE COMPLIANT SIGNAGE AT ALL ADA PARKING AREAS IN ACCORDANCE WITH STATE GUIDELINES.
- THE CONTRACTOR SHALL MAINTAIN A MAXIMUM 5.00% RUNNING SLOPE AND A MAXIMUM OF 2.00% CROSS SLOPE ALONG WALKWAYS WITHIN THE ACCESSIBLE PATH OF TRAVEL (SEE THE SITE PLAN FOR THE LOCATION OF THE ACCESSIBLE PATH). THE CONTRACTOR IS RESPONSIBLE TO ENSURE THE ACCESSIBLE PATH OF TRAVEL IS 36 INCHES WIDE OR GREATER UNLESS INDICATED OTHERWISE WITHIN THE PLAN SET.
- THE CONTRACTOR SHALL MAINTAIN A MAXIMUM 2.00% SLOPE IN ANY DIRECTION AT ALL LANDINGS. LANDINGS INCLUDE, BUT ARE NOT LIMITED TO, THE TOP AND BOTTOM OF AN ACCESSIBLE RAMP. AT ACCESSIBLE BUILDING ENTRANCES AT AN AREA IN FRONT OF A WALK-UP ATM, AND AT TURNING SPACES ALONG THE ACCESSIBLE PATH OF TRAVEL THE LANDING AREA SHALL HAVE A MINIMUM CLEAR AREA OF 60 INCHES BY 60 INCHES UNLESS INDICATED OTHERWISE WITHIN THE PLAN SET.
- THE CONTRACTOR SHALL MAINTAIN A MAXIMUM 8.33% RUNNING SLOPE AND A MAXIMUM 2.00% CROSS SLOPE ON ANY CURB RAMPS ALONG THE ACCESSIBLE PATH OF TRAVEL. WHERE PROVIDED, CURB RAMP FLARES SHALL NOT HAVE A SLOPE GREATER THAN 10.00% IF A LANDING AREA IS PROVIDED AT THE TOP OF THE RAMP. FOR ALTERATIONS, A CURB RAMP FLARE SHALL NOT HAVE A SLOPE GREATER THAN 8.33% IF A LANDING AREA IS NOT PROVIDED AT THE TOP OF THE RAMP. CURB RAMPS SHALL NOT RISE MORE THAN 6 INCHES IN ELEVATION WITHOUT A HANDRAIL. THE CLEAR WIDTH OF A CURB RAMP SHALL BE NO LESS THAN 36 INCHES WIDE.
- ACCESSIBLE RAMPS WITH A RISE GREATER THAN 6 INCHES SHALL CONTAIN COMPLIANT HANDRAILS ON BOTH SIDES OF THE RAMP AND SHALL NOT RISE MORE THAN 30" IN ELEVATION WITHOUT A LANDING AREA IN BETWEEN RAMP RUNS. LANDING AREAS SHALL ALSO BE PROVIDED AT THE TOP AND BOTTOM OF THE RAMP.
- A SLIP RESISTANT SURFACE SHALL BE CONSTRUCTED ALONG THE ACCESSIBLE PATH AND WITHIN ADA PARKING AREAS.
- THE CONTRACTOR SHALL ENSURE A MAXIMUM OF 1/4 INCHES VERTICAL CHANGE IN LEVEL ALONG THE ACCESSIBLE PATH. WHERE A CHANGE IN LEVEL BETWEEN 1/4 INCHES AND 1/2 INCHES EXISTS, CONTRACTOR SHALL ENSURE THAT THE TOP 1/4 INCH CHANGE IN LEVEL IS BEVELED WITH A SLOPE NOT STEEPER THAN 1 UNIT VERTICAL AND 2 UNITS HORIZONTAL (2:1 SLOPE).
- THE CONTRACTOR SHALL ENSURE THAT ANY OPENINGS (GAPS OR HORIZONTAL SEPARATION) ALONG THE ACCESSIBLE PATH SHALL NOT ALLOW PASSAGE OF A SPHERE GREATER THAN 1/4 INCH.



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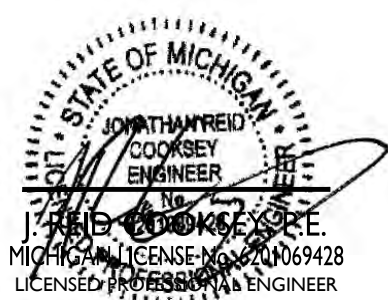
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CHAMPION DEVELOPMENT
PROPOSED TOWNHOUSE DEVELOPMENT

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN



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SCALE: 1" = 10' PROJECT ID: DET-24092

TITLE:

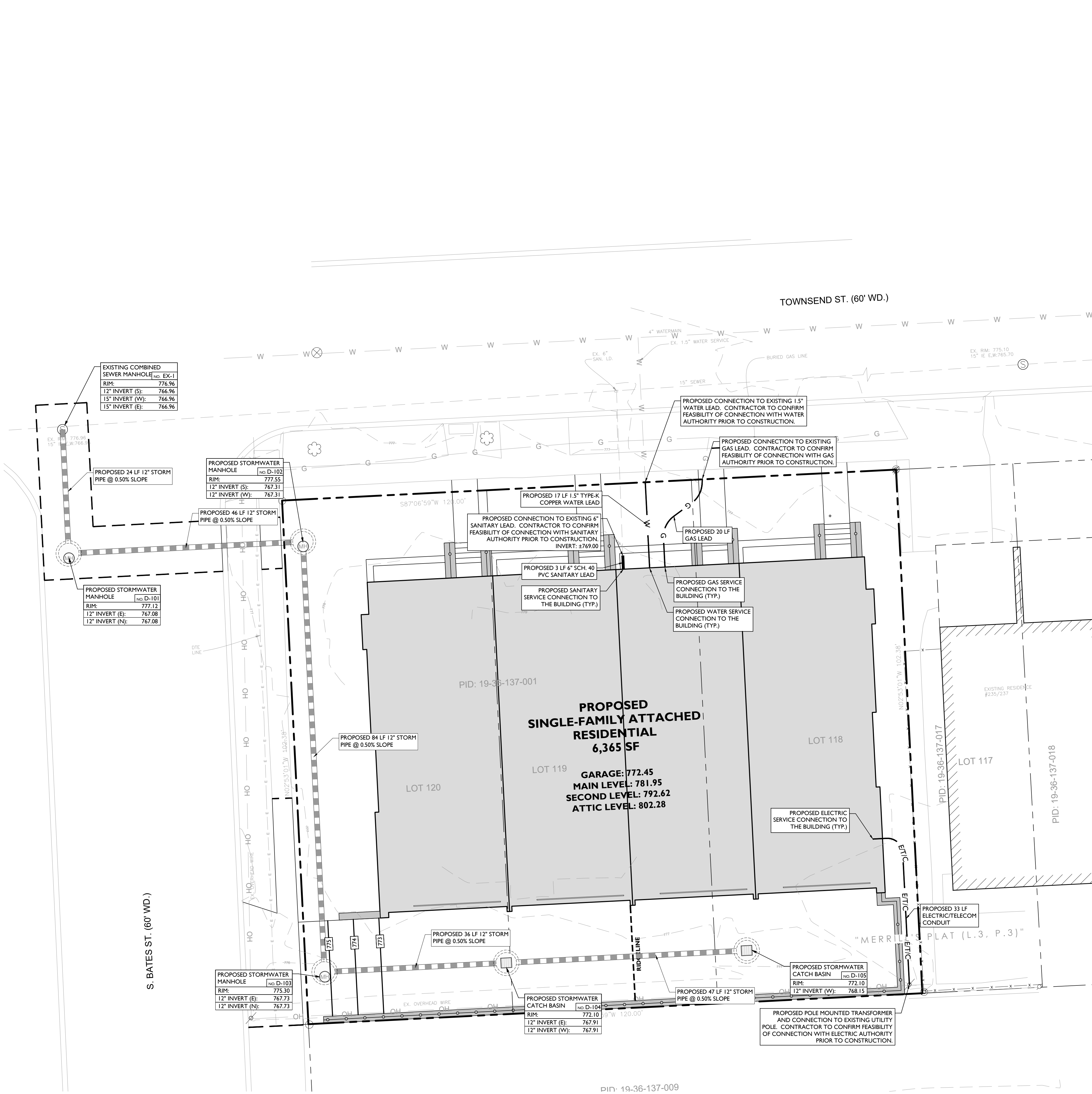
GRADING PLAN

DRAWING:

C-4

DATE	BY	DESCRIPTION
04/24/2024	JRC	SUBMISSION FOR PRELIMINARY PLANNING APPROVAL

NOTED: 04/27/2022, CHAMPION DEVELOPMENT, 48 TOWNSEND STREET, BIRMINGHAM, MI 48204, 03/04/2022, STPH/LLW



DRAINAGE AND UTILITY NOTES

1. THE CONTRACTOR IS REQUIRED TO CALL THE APPROPRIATE AUTHORITY FOR NOTICE OF CONSTRUCTION/EXCAVATION AND UTILITY MARK OUT PRIOR TO THE START OF CONSTRUCTION IN ACCORDANCE WITH STATE LAW. CONTRACTOR IS REQUIRED TO CONFIRM THE HORIZONTAL AND VERTICAL LOCATION OF UTILITIES IN THE FIELD. SHOULD A DISCREPANCY EXIST BETWEEN THE FIELD LOCATION OF A UTILITY AND THE LOCATION SHOWN ON THE PLAN SET OR SURVEY, THE CONTRACTOR SHALL NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC, IMMEDIATELY IN WRITING.
2. THE CONTRACTOR IS RESPONSIBLE TO PROTECT AND MAINTAIN IN OPERATION ALL UTILITIES NOT DESIGNATED TO BE REMOVED.
3. THE CONTRACTOR IS RESPONSIBLE FOR REPAIRING ANY DAMAGE TO ANY EXISTING UTILITY IDENTIFIED TO REMAIN WITHIN THE LIMITS OF THE PROPOSED WORK DURING CONSTRUCTION.
4. A MINIMUM HORIZONTAL SEPARATION OF 10 FEET IS REQUIRED BETWEEN ANY SANITARY SEWER SERVICE AND ANY WATER LINES. IF THIS SEPARATION CANNOT BE PROVIDED, A CONCRETE ENCASEMENT SHALL BE UTILIZED FOR THE SANITARY SEWER SERVICE AS APPROVED BY STONEFIELD ENGINEERING & DESIGN, LLC.
5. ALL WATER LINES SHALL BE VERTICALLY SEPARATED ABOVE SANITARY SEWER LINES BY A MINIMUM DISTANCE OF 18 INCHES. IF THIS SEPARATION CANNOT BE PROVIDED, A CONCRETE ENCASEMENT SHALL BE UTILIZED FOR THE SANITARY SEWER SERVICE AS APPROVED BY STONEFIELD ENGINEERING & DESIGN, LLC.
6. THE CONTRACTOR TO PERFORM A TEST PIT PRIOR TO CONSTRUCTION (RECOMMEND 30 DAYS PRIOR) AT LOCATIONS OF EXISTING UTILITY CROSSINGS FOR WATER AND SANITARY SEWER CONNECTION IMPROVEMENTS. SHOULD A CONFLICT EXIST, THE CONTRACTOR SHALL IMMEDIATELY NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC, IMMEDIATELY IN WRITING.
7. THE CONTRACTOR IS RESPONSIBLE FOR COORDINATING GAS, ELECTRIC AND TELECOMMUNICATION CONNECTIONS WITH THE APPROPRIATE GOVERNING AUTHORITY.
8. CONTRACTOR SHALL START CONSTRUCTION OF ANY GRAVITY SEWER AT THE LOWEST INVERT AND WORK UP-GRADE.
9. THE CONTRACTOR IS RESPONSIBLE TO MAINTAIN A RECORD SET OF PLANS REFLECTING THE LOCATION OF EXISTING UTILITIES THAT HAVE BEEN CAPPED, ABANDONED, OR RELOCATED BASED ON THE DEMOLITION/REMOVAL ACTIVITIES REQUIRED IN THIS PLAN SET. THIS DOCUMENT SHALL BE PROVIDED TO THE OWNER FOLLOWING COMPLETION OF WORK.
10. THE CONTRACTOR IS RESPONSIBLE TO MAINTAIN A RECORD OF THE AS-BUILT LOCATIONS OF ALL PROPOSED UNDERGROUND INFRASTRUCTURE. THE CONTRACTOR SHALL NOTE ANY DISCREPANCIES BETWEEN THE AS-BUILT LOCATIONS AND THE LOCATIONS DEPICTED WITHIN THE PLAN SET. THIS RECORD SHALL BE PROVIDED TO THE OWNER FOLLOWING COMPLETION OF WORK.

DRAINAGE AND UTILITY NOTES

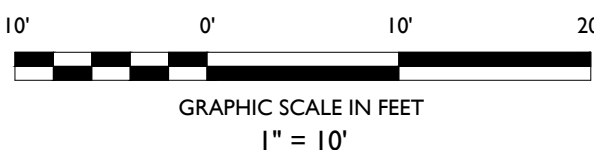
1. THE CONTRACTOR TO PERFORM A TEST PIT PRIOR TO CONSTRUCTION (RECOMMEND 30 DAYS PRIOR) AT LOCATIONS OF EXISTING UTILITY CROSSINGS FOR STORMWATER IMPROVEMENTS. SHOULD A CONFLICT EXIST, THE CONTRACTOR SHALL IMMEDIATELY NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC, IMMEDIATELY IN WRITING.
2. CONTRACTOR SHALL START CONSTRUCTION OF STORM LINES AT THE LOWEST INVERT AND WORK UP-GRADE.
3. THE CONTRACTOR IS REQUIRED TO CALL THE APPROPRIATE AUTHORITY FOR NOTICE OF CONSTRUCTION/EXCAVATION AND UTILITY MARK OUT PRIOR TO THE START OF CONSTRUCTION IN ACCORDANCE WITH STATE LAW. CONTRACTOR IS REQUIRED TO CONFIRM THE HORIZONTAL AND VERTICAL LOCATION OF UTILITIES IN THE FIELD. SHOULD A DISCREPANCY EXIST BETWEEN THE FIELD LOCATION OF A UTILITY AND THE LOCATION SHOWN ON THE PLAN SET OR SURVEY, THE CONTRACTOR SHALL NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC, IMMEDIATELY IN WRITING.
4. THE CONTRACTOR IS RESPONSIBLE TO MAINTAIN A RECORD OF THE AS-BUILT LOCATIONS OF ALL PROPOSED UNDERGROUND INFRASTRUCTURE. THE CONTRACTOR SHALL NOTE ANY DISCREPANCIES BETWEEN THE AS-BUILT LOCATIONS AND THE LOCATIONS DEPICTED WITHIN THE PLAN SET. THIS RECORD SHALL BE PROVIDED TO THE OWNER FOLLOWING COMPLETION OF WORK.

EXCAVATION, SOIL PREPARATION, AND DEWATERING NOTES

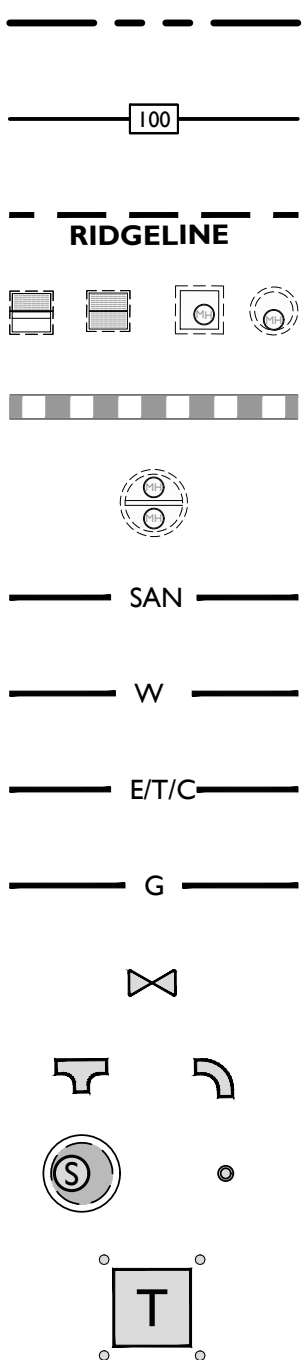
1. THE CONTRACTOR IS REQUIRED TO REVIEW THE REFERENCED GEOTECHNICAL DOCUMENTS PRIOR TO CONSTRUCTION. THESE DOCUMENTS SHALL BE CONSIDERED A PART OF THE PLAN SET.
2. THE CONTRACTOR IS REQUIRED TO PREPARE SUBGRADE SOILS BENEATH ALL PROPOSED IMPROVEMENTS AND BACKFILL ALL EXCAVATIONS IN ACCORDANCE WITH RECOMMENDATIONS BY THE GEOTECHNICAL ENGINEER OF RECORD.
3. THE CONTRACTOR IS RESPONSIBLE FOR PROVIDING SHORING FOR ALL EXCAVATIONS AS REQUIRED. CONTRACTOR SHALL HAVE THE SHORING DESIGN PREPARED BY A QUALIFIED PROFESSIONAL SHORING DESIGNER. SHORING DESIGNS SHALL BE SUBMITTED TO STONEFIELD ENGINEERING & DESIGN, LLC, AND THE OWNER PRIOR TO THE START OF CONSTRUCTION.
4. THE CONTRACTOR IS RESPONSIBLE FOR ENSURING THAT ALL OPEN EXCAVATIONS ARE PERFORMED AND PROTECTED IN ACCORDANCE WITH THE LATEST OSHA REGULATIONS.
5. THE CONTRACTOR IS RESPONSIBLE FOR ANY DEWATERING DESIGN AND OPERATIONS, AS REQUIRED, TO CONSTRUCT THE PROPOSED IMPROVEMENTS. THE CONTRACTOR SHALL OBTAIN ANY REQUIRED PERMITS FOR DEWATERING OPERATIONS AND GROUNDWATER DISPOSAL.

STORMWATER UNDERGROUND BMP CONSTRUCTION NOTES

1. THE CONTRACTOR SHALL INSTALL AND BACKFILL THE UNDERGROUND BMP IN ACCORDANCE WITH THE MANUFACTURER'S SPECIFICATIONS.
2. UNDERGROUND BASINS SHALL UTILIZE A STONE BACKFILL WITH A MINIMUM VOID RATIO OF 40%.
3. NO CONSTRUCTION LOADING OVER UNDERGROUND BASINS IS PERMITTED UNTIL BACKFILL IS COMPLETE PER THE MANUFACTURER'S SPECIFICATIONS. NO VEHICLES SHALL BE STAGED OR OPERATE FROM A FIXED POSITION OVER THE BASIN.



SYMBOL



DESCRIPTION

- PROPERTY LINE
- PROPOSED GRADING CONTOUR
- PROPOSED GRADING RIDGELINE
- PROPOSED STORMWATER STRUCTURES
- PROPOSED STORMWATER PIPING
- PROPOSED UNDERGROUND OUTLET STRUCTURE
- PROPOSED SANITARY LATERAL
- PROPOSED DOMESTIC WATER SERVICE
- PROPOSED ELECTRICAL/DATA CONDUITS
- PROPOSED GAS LINE
- PROPOSED VALVE
- PROPOSED WATER TEE / BEND
- PROPOSED SANITARY MANHOLE / CLEANOUT
- PROPOSED TRANSFORMER ON CONCRETE PAD WITH BOLLARDS

SITE DEVELOPMENT PLANS

**CHAMPION DEVELOPMENT
PROPOSED TOWNHOUSE
DEVELOPMENT**

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN



SCALE: 1" = 10' PROJECT ID: DET-240092

TITLE:
**PRELIMINARY STORM
WATER CONVEYANCE &
UTILITY PLAN**

DRAWING:

C-5

STONEFIELD
engineering & design

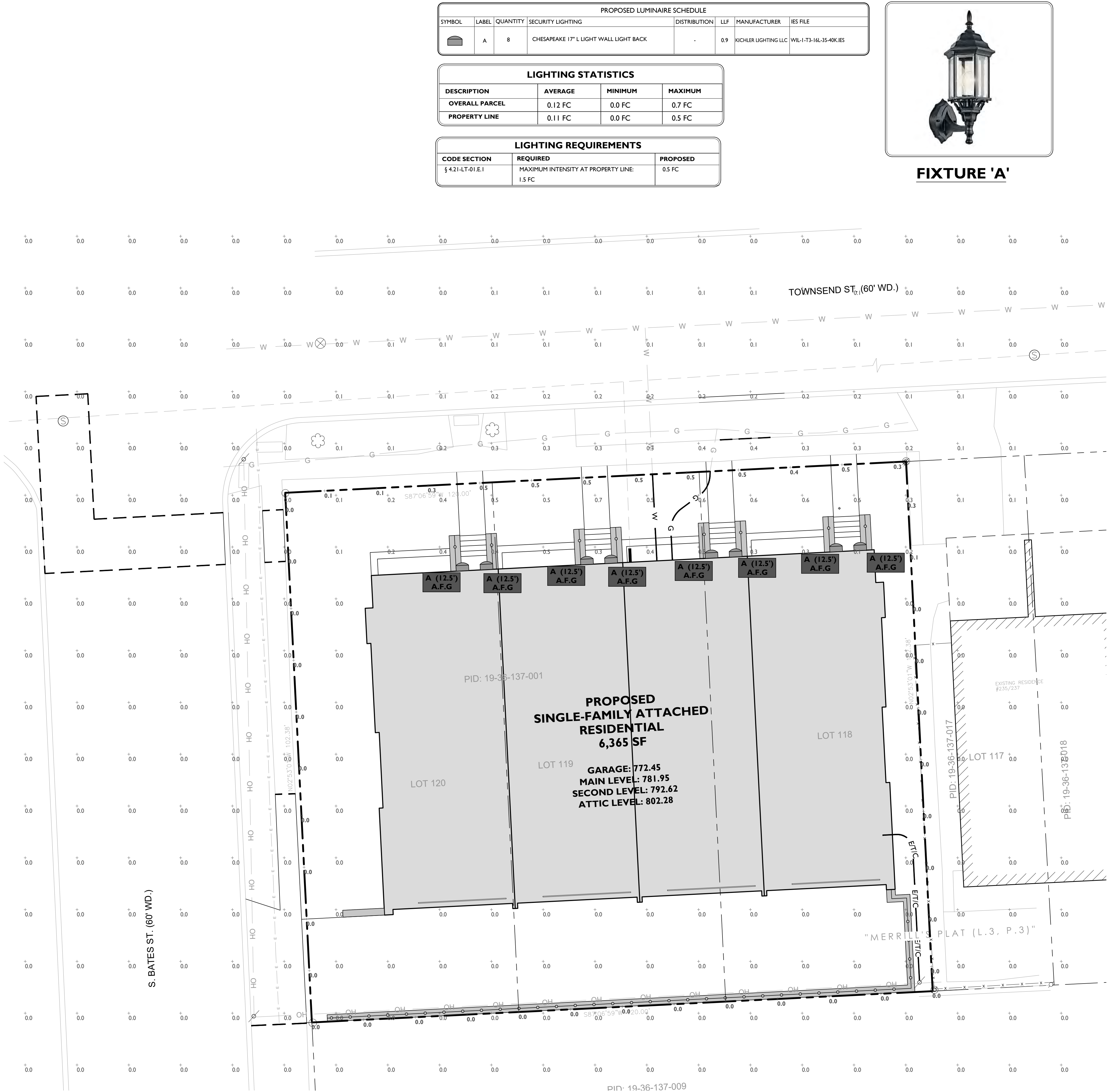
Rutherford, NJ • New York, NY • Salem, MA
Princeton, NJ • Tampa, FL • Detroit, MI
www.stonefielddesign.com

607 Shelby Suite 200, Detroit, MI 48226
Phone 248.247.1115

NOT APPROVED FOR CONSTRUCTION

DATE	BY	DESCRIPTION
04/27/2021	JRC	SUBMISSION FOR PRELIMINARY PLANNING APPROVAL

\\0170214057-2-0002-CHAMPION DEVELOPMENT-045 TOWNSEND STREET, BIRMINGHAM, MI CAD\PROJECTS\045 LIGHT.DWG



PROPOSED LUMINAIRE SCHEDULE						
SYMBOL	LABEL	QUANTITY	SECURITY LIGHTING	DISTRIBUTION	LLF	MANUFACTURER
	A	8	CHESAPEAKE 17" L LIGHT WALL LIGHT BACK	-	0.9	KICHLER LIGHTING LLC
		WIL-1-T3-16L-35-40KIES				

LIGHTING STATISTICS			
DESCRIPTION	AVERAGE	MINIMUM	MAXIMUM
OVERALL PARCEL	0.12 FC	0.0 FC	0.7 FC
PROPERTY LINE	0.11 FC	0.0 FC	0.5 FC

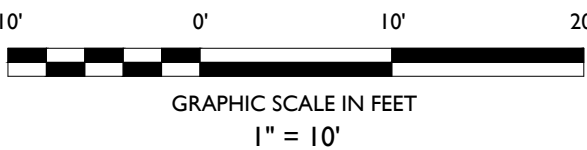
LIGHTING REQUIREMENTS		
CODE SECTION	REQUIRED	PROPOSED
§ 4.21-LT-01.E.1	MAXIMUM INTENSITY AT PROPERTY LINE: 1.5 FC	0.5 FC



FIXTURE 'A'

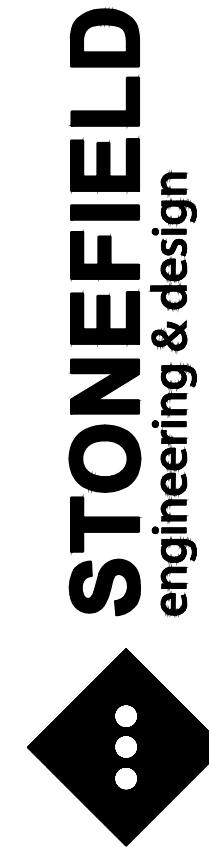
SYMBOL	DESCRIPTION
	PROPOSED CALCULATION AREA
A (XX')	PROPOSED LIGHTING FIXTURE (MOUNTING HEIGHT)
+XX	PROPOSED LIGHTING INTENSITY (FOOTCANDLES)
	PROPOSED BUILDING MOUNTED LIGHT

- GENERAL LIGHTING NOTES**
- THE LIGHTING LEVELS DEPICTED WITHIN THE PLAN SET ARE CALCULATED UTILIZING DATA OBTAINED FROM THE LISTED MANUFACTURER. ACTUAL ILLUMINATION LEVELS AND PERFORMANCE OF ANY PROPOSED LIGHTING FIXTURE MAY VARY DUE TO UNCONTROLLABLE VARIABLES SUCH AS WEATHER, VOLTAGE SUPPLY, LAMP TOLERANCE, EQUIPMENT SERVICE LIFE AND OTHER VARIABLE FIELD CONDITIONS.
 - WHERE APPLICABLE, THE EXISTING LIGHT LEVELS DEPICTED WITHIN THE PLAN SET SHALL BE CONSIDERED APPROXIMATE. THE EXISTING LIGHT LEVELS ARE BASED ON FIELD OBSERVATIONS AND THE MANUFACTURER'S DATA OF THE ASSUMED OR MOST SIMILAR LIGHTING FIXTURE MODEL.
 - UNLESS NOTED ELSEWHERE WITHIN THIS PLAN SET, THE LIGHT LOSS FACTORS USED IN THE LIGHTING ANALYSIS ARE AS FOLLOWS:
 - LIGHT EMITTING DIODES (LED): 0.90
 - HIGH PRESSURE SODIUM: 0.72
 - METAL HALIDE: 0.72
 - THE CONTRACTOR SHALL NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC IN WRITING, PRIOR TO THE START OF CONSTRUCTION, OF ANY PROPOSED LIGHTING LOCATIONS THAT CONFLICT WITH EXISTING/ PROPOSED DRAINAGE, UTILITY, OR OTHER IMPROVEMENTS.
 - THE CONTRACTOR IS RESPONSIBLE TO PREPARE A WIRING PLAN AND PROVIDE ELECTRIC SERVICE TO ALL PROPOSED LIGHTING FIXTURES. THE CONTRACTOR IS REQUIRED TO PREPARE AN AS-BUILT PLAN OF WIRING AND PROVIDE COPIES TO THE OWNER AND STONEFIELD ENGINEERING & DESIGN, LLC.



SUBMISSION FOR PRELIMINARY PLANNING APPROVAL		DESCRIPTION	
	JRC	BY	
04/24/2024		DATE	
1		ISSUE	

NOT APPROVED FOR CONSTRUCTION



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Phone 248.247.1115

SITE DEVELOPMENT PLANS

CHAMPION DEVELOPMENT
PROPOSED TOWNHOUSE
DEVELOPMENT

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN

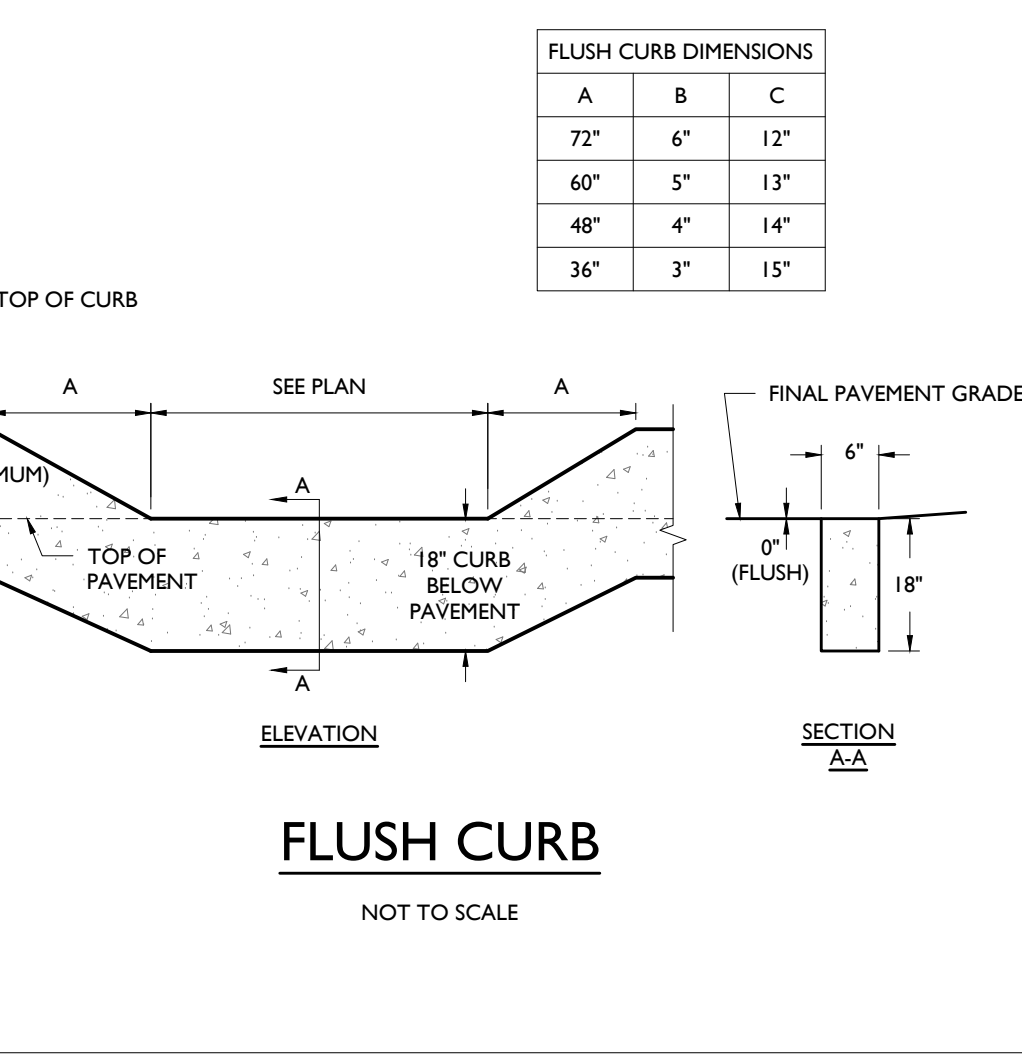
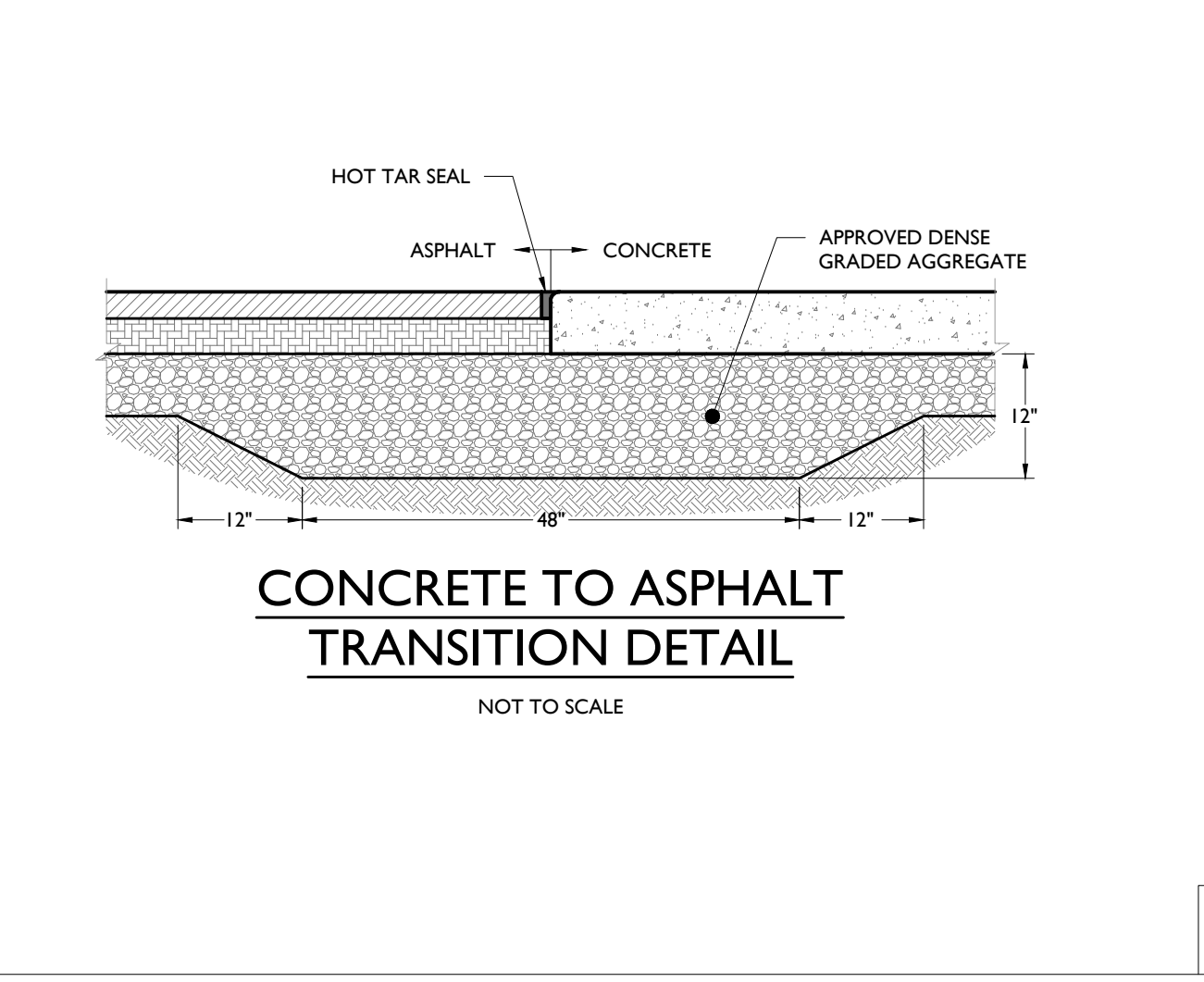
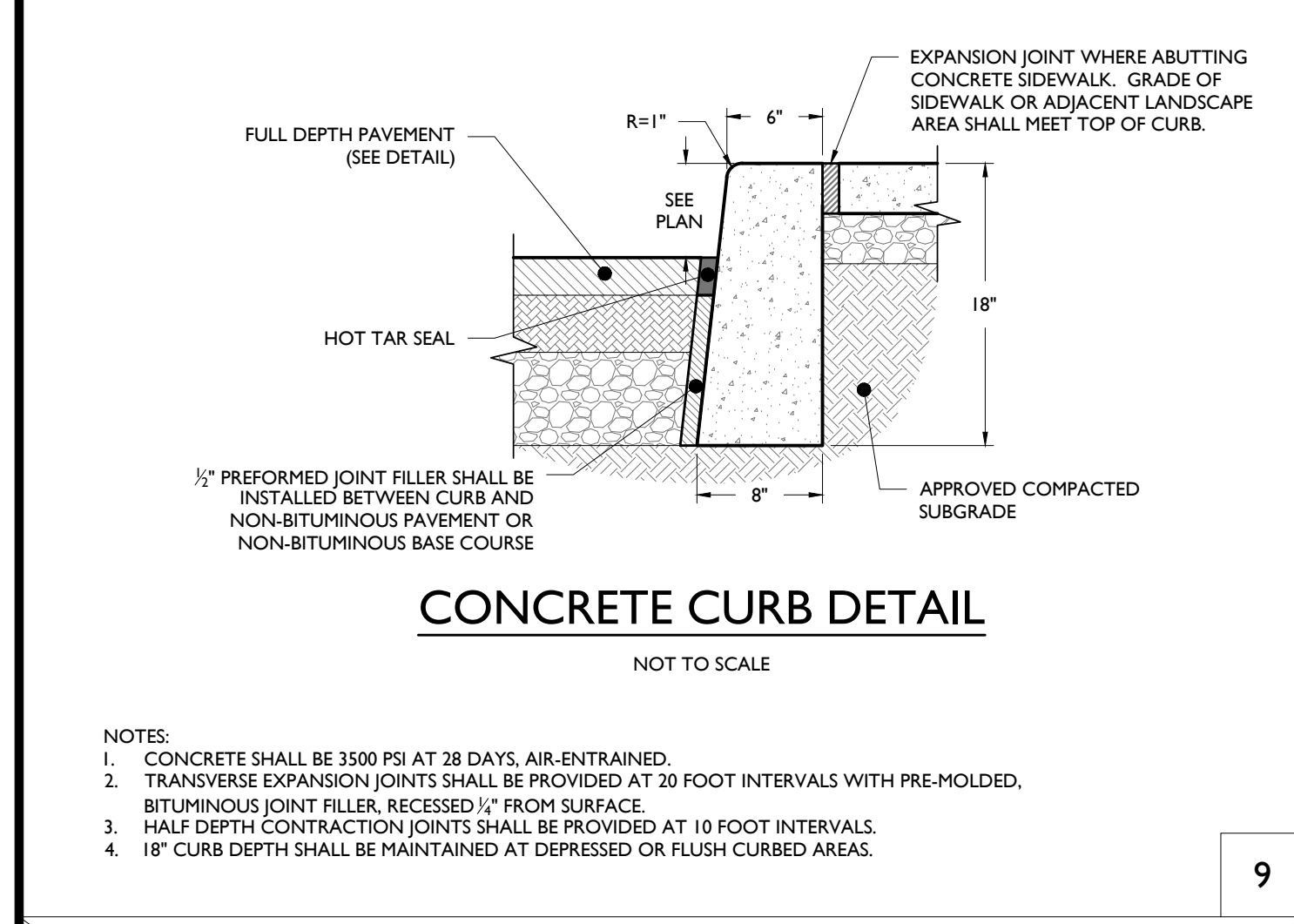
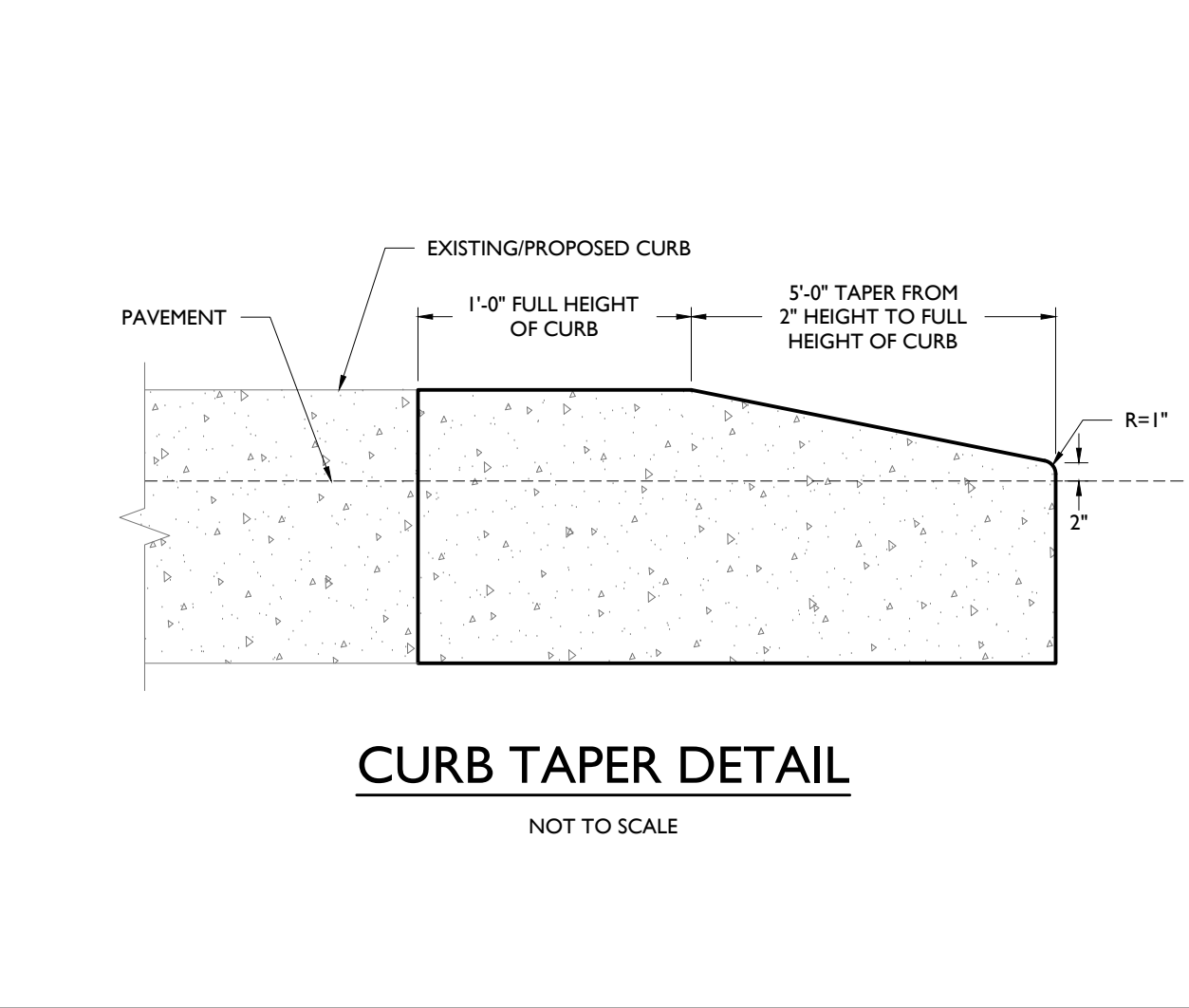
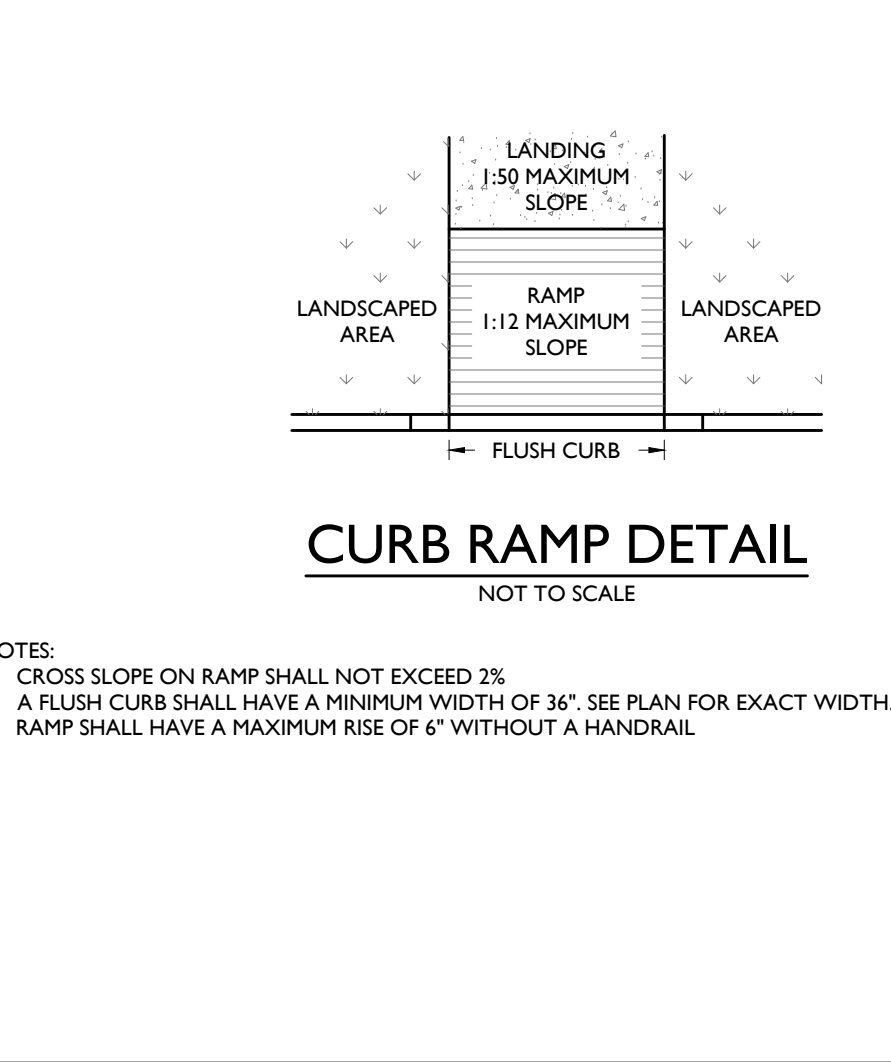
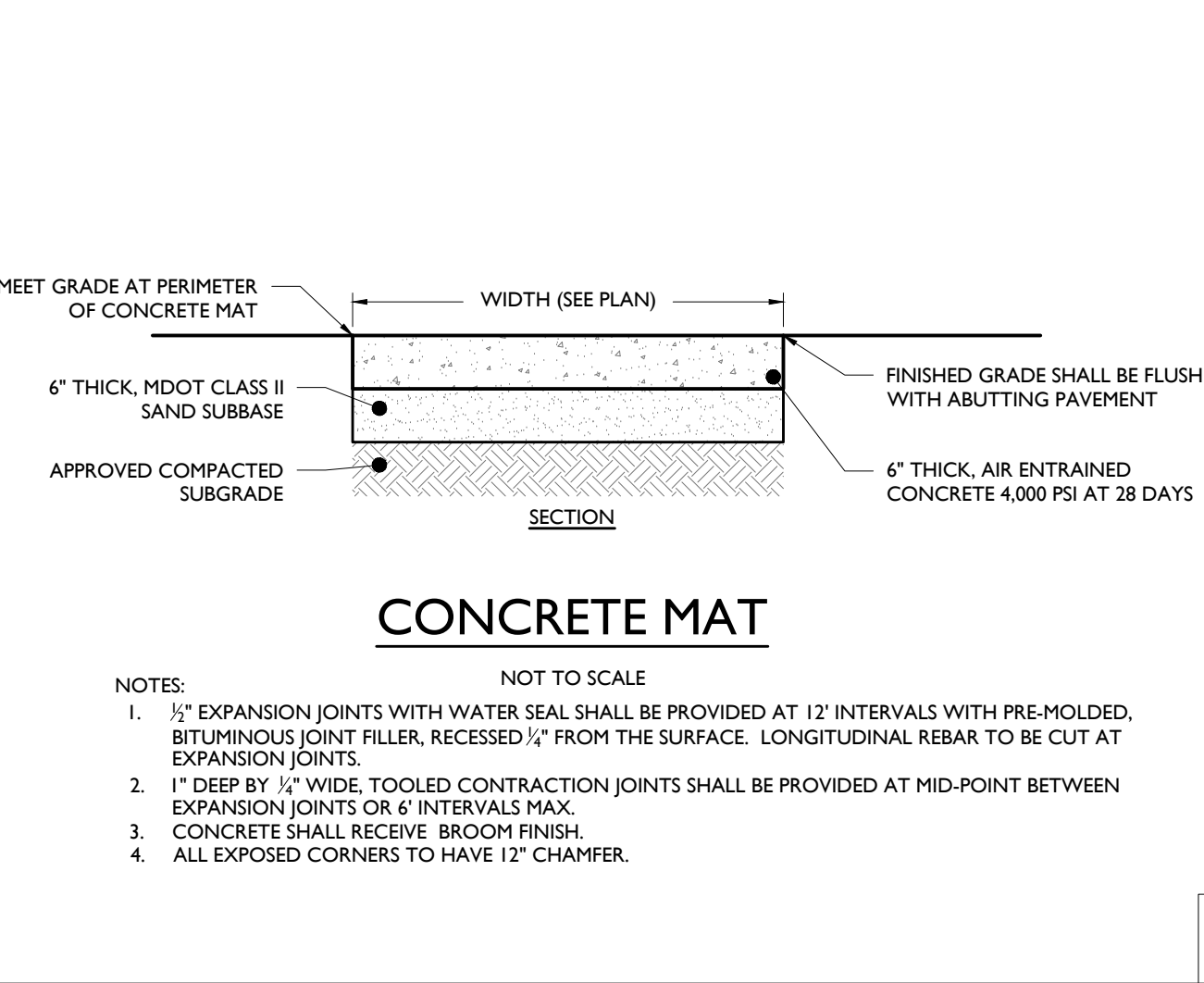
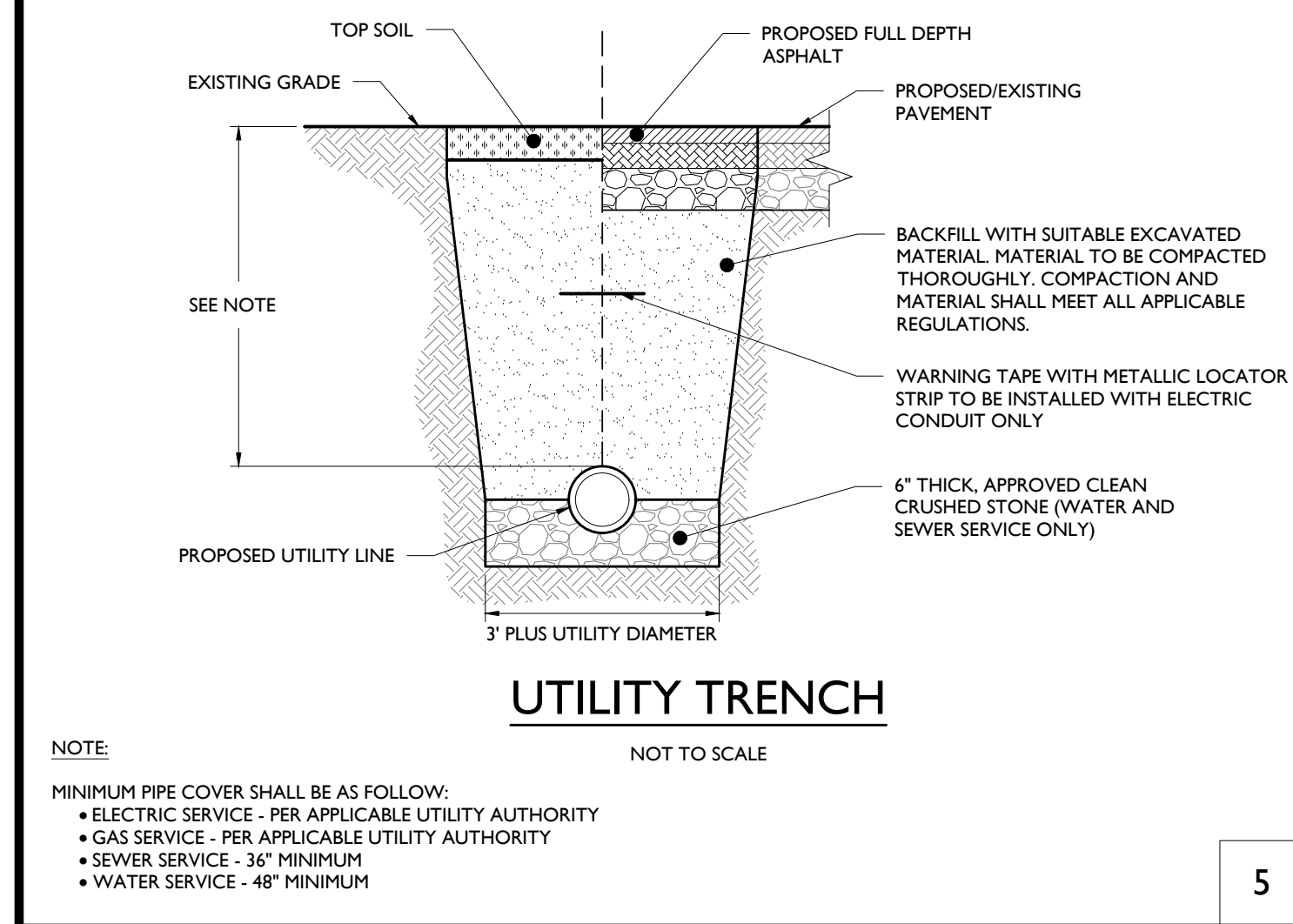
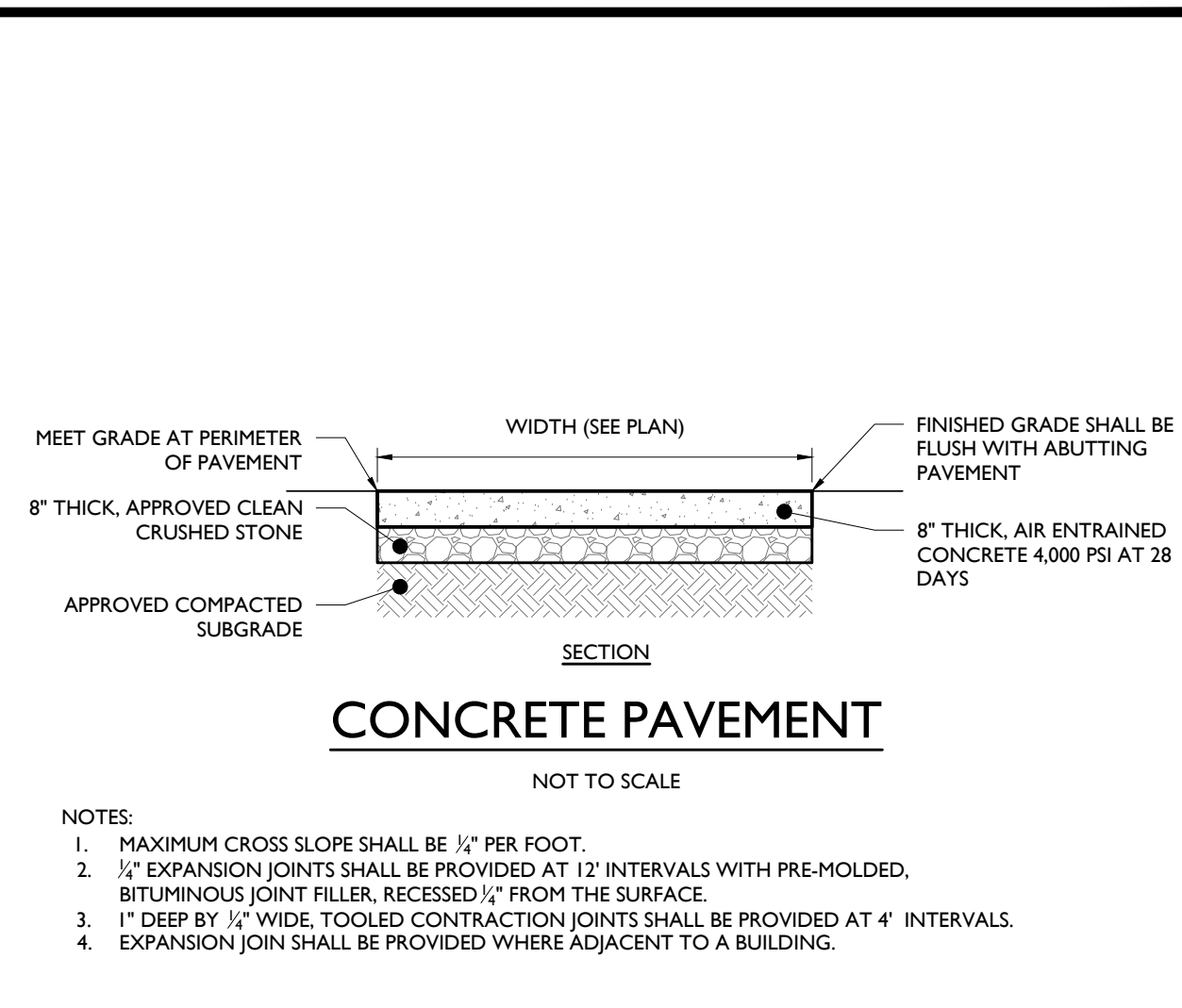
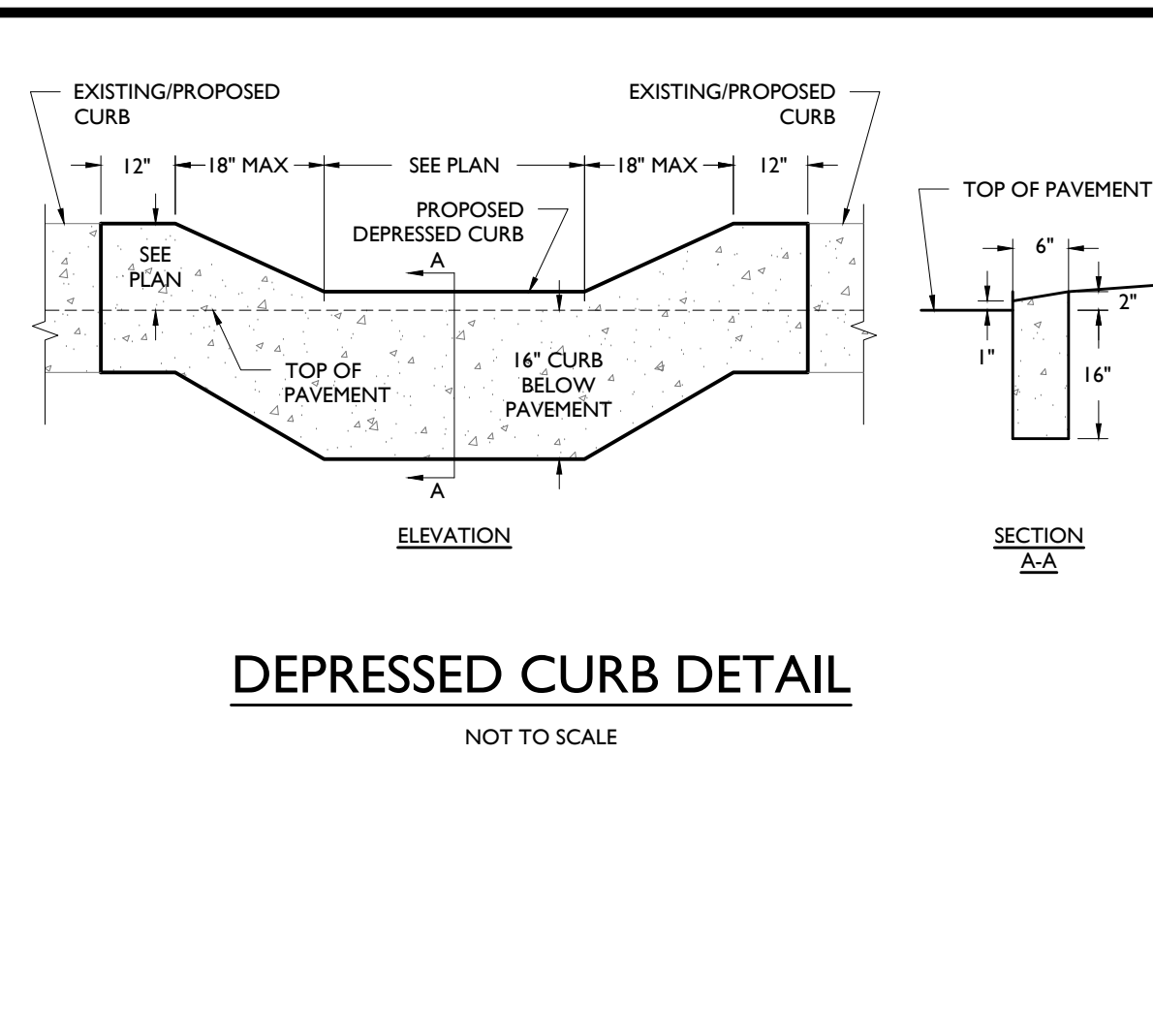
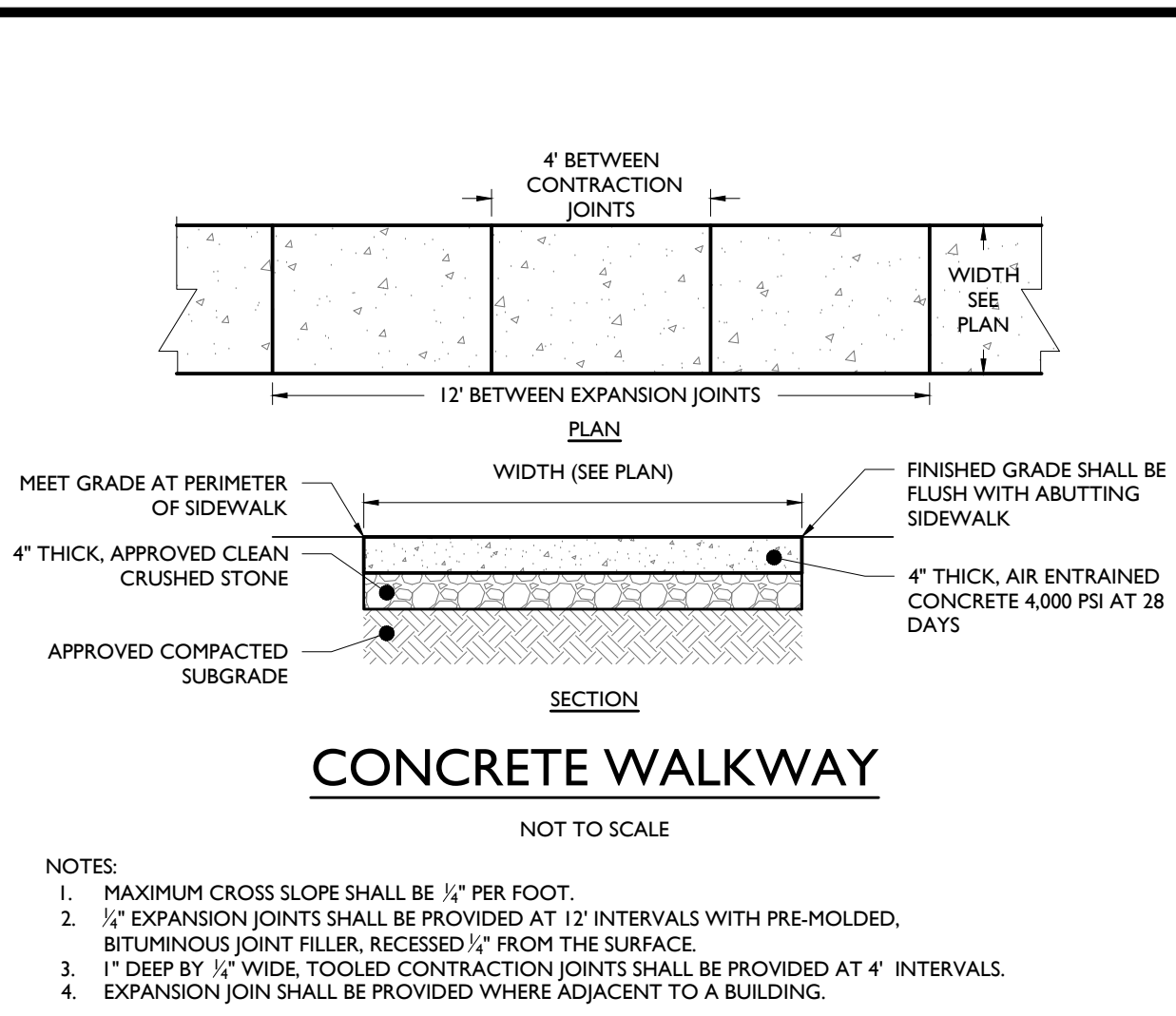
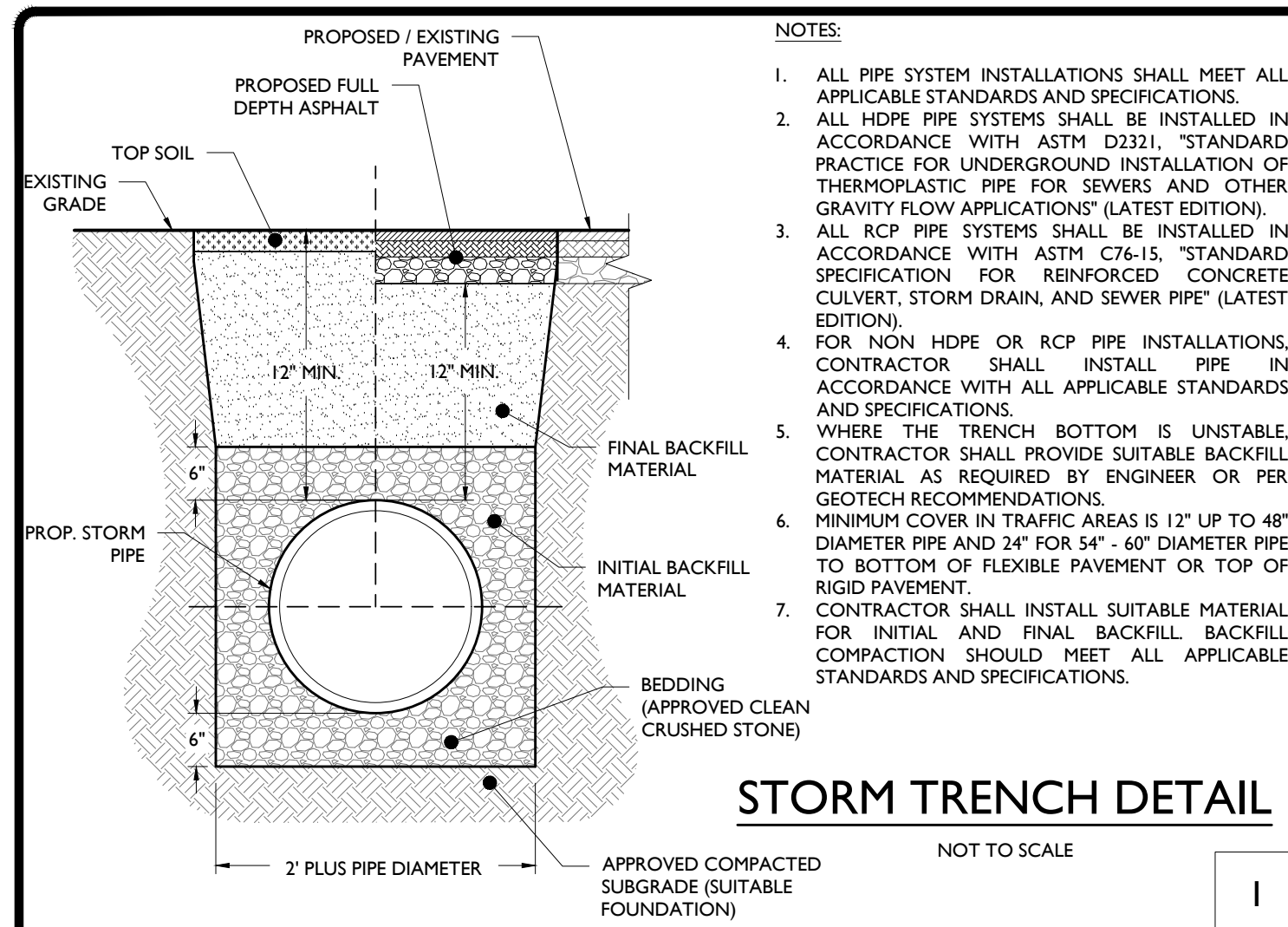


SCALE: 1" = 10' PROJECT ID: DET-240092

TITLE:
LIGHTING PLAN

DRAWING:

C-6



Chesapeake™ 17" x 1 Light Wall Light Black

49255B

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SPECIFICATIONS

Certifications/Qualifications

www.kichler.com/warranty

Dimensions

Base Backplate	4.50" X 6.00"
Extension	7.75"
Weight	2.20 LBS
Height from center of Wall opening (Spec Sheet)	14.00"
Height	17.00"
Width	6.50"

Light Source

Dimmable	Yes
Lamps Included	Not Included
Lamp Type	A19
Light Source	Incandescent
Max or Nominal Watt	100.00
# of Bulbs/LED Modules	1
Socket Type	Medium
Socket Wire	150"

Mounting/Installation

Interior/Exterior	Exterior
Location Rating	Wet
Mounting Style	Wall Mount
Mounting Weight	2.20 LBS

FIXTURE ATTRIBUTES

Housing

Diffuser Description	Clear Beveled
Primary Material	ALUMINUM
Shade Dimensions	6.50" SQ X 17.00"

Product/Ordering Information

SKU	49255BK
Finish	Black
Style	Traditional
UPC	763027318653

Finish Options

☒ Black

☐ Tannery Bronze

☐ White

ALSO IN THIS FAMILY

9776BK

9774BK

49255TZ

9777BK

49255WH

9774WH

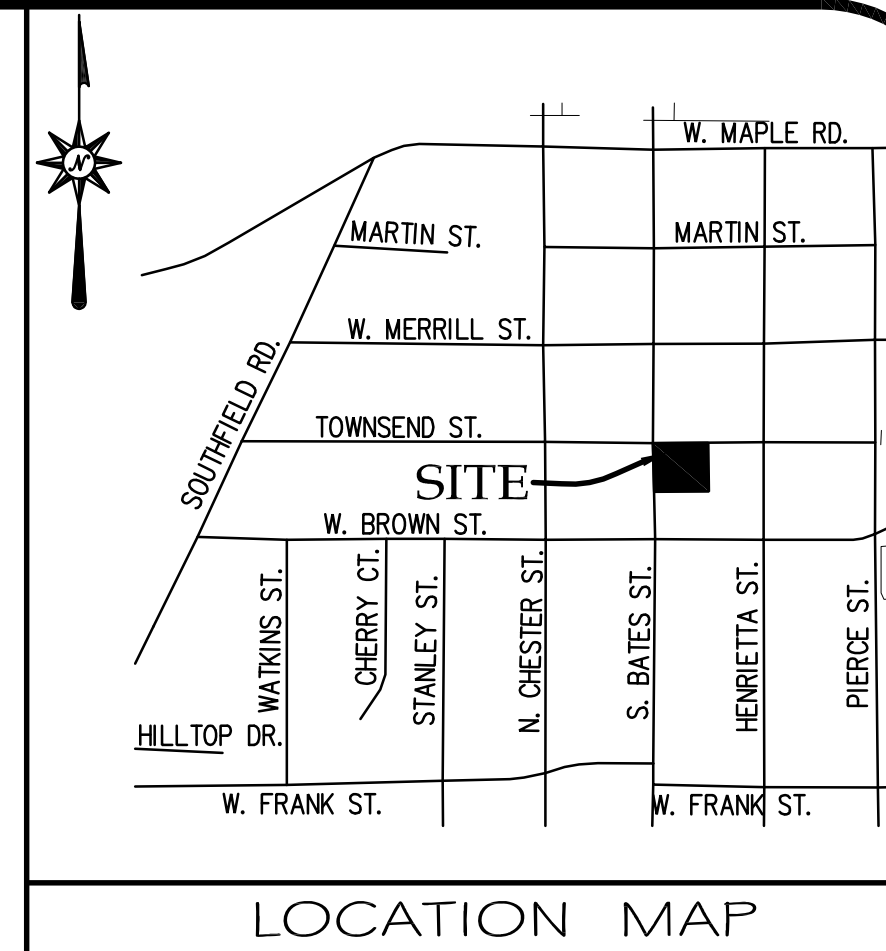
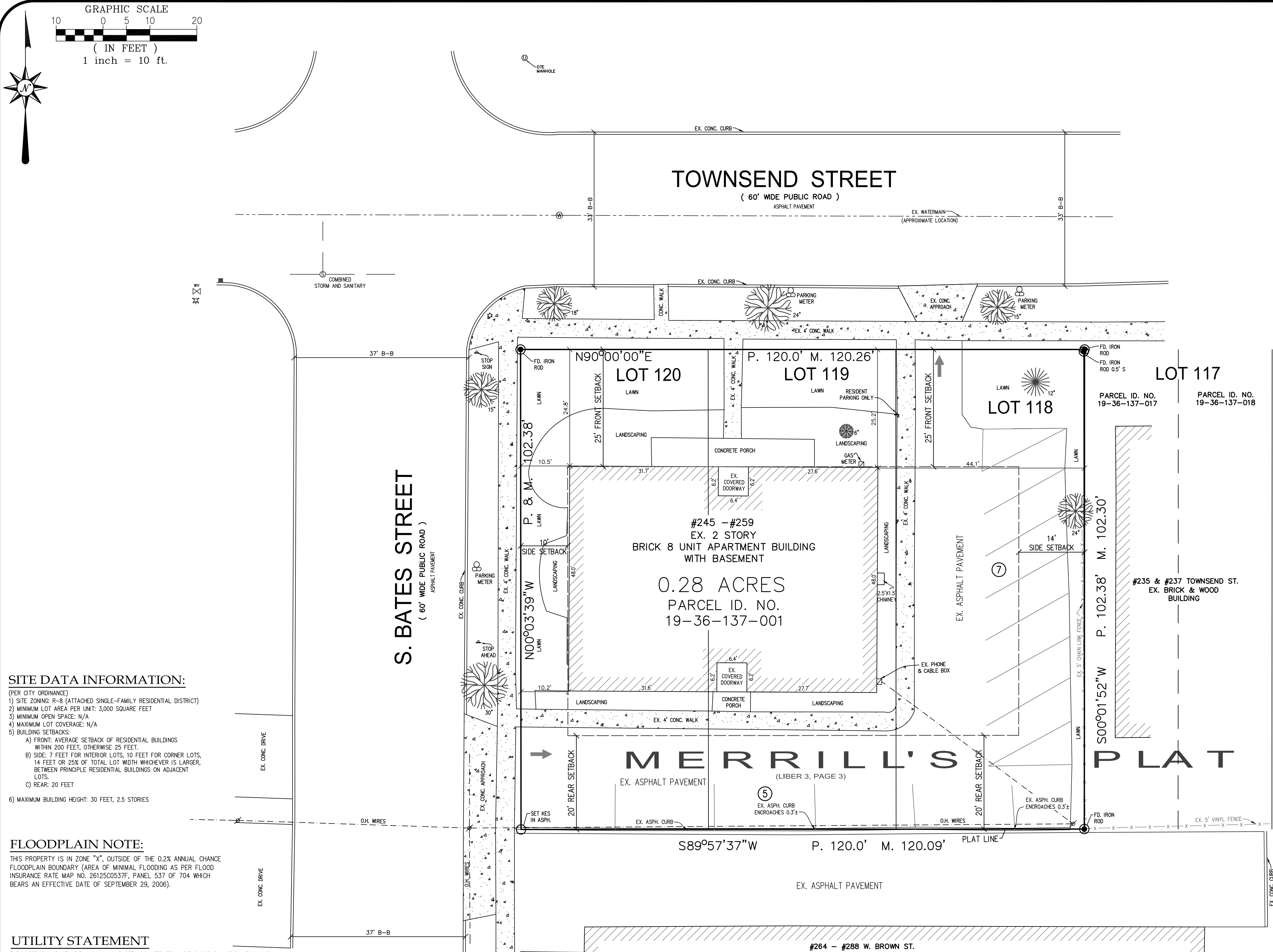
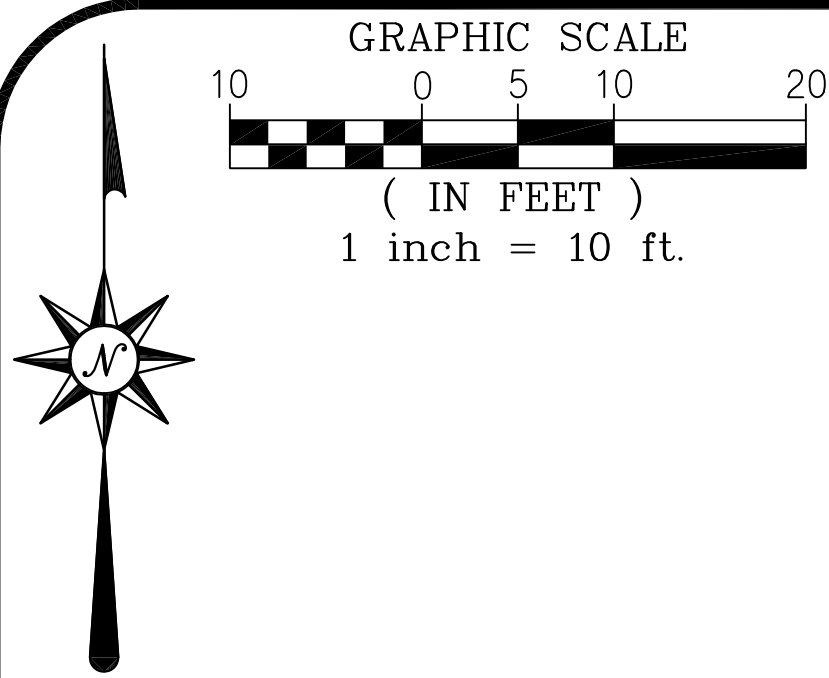
WIL-I-T3-I6L-35-40K.IES

Kichler.com

KICHLER.

MOUNTED LIGHTING

NOT TO SCALE



LEGEND			
●	FOUND PROPERTY CORNER	①	EX. STORM MANHOLE/CATCHBASIN
○	SET PROPERTY CORNER	■	EX. STORM CATCHBASIN
⊙	EX. UTILITY POLE	⊙	EX. SANITARY MANHOLE
—	EX. OVERHEAD WIRES	—	EX. SANITARY SEWER
⊙	EX. LIGHT POLE	⊙	EX. FIRE HYDRANT
⊙	EX. ROAD SIGN	⊙	EX. WATER MANHOLE
⊙	EX. UTILITY MANHOLE	—	EX. WATERMAIN
⊙	EX. DECIDUOUS TREE	⊙	EX. PARKING METER
⊙	EX. CONIFEROUS TREE	⊙	EX. ADA PARKING SPACE
		⑤	EX. PARKING SPACE COUNT

LEGAL DESCRIPTION AS PROVIDED:

THE LAND REFERRED TO IN THIS COMMITMENT, SITUATED IN THE COUNTY OF OAKLAND, CITY OF BIRMINGHAM, STATE OF MICHIGAN, IS DESCRIBED AS FOLLOWS:

LOTS 118, 119, AND 120 OF MERRILL'S PLAT, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 3 OF PLATS, PAGE 3, OAKLAND COUNTY RECORDS.

TAX ITEM NO. 19-36-137-001

BASIS OF BEARING:

ASSUMED BEARING BASIS
AS N 90°00'00" E, NO BEARINGS
ON PLAT.

CERTIFICATION:

TO SHAIN PARK APARTMENTS, L.L.C.; JACK W. THOMPSON, TRUSTEE OF THE JACK W. THOMPSON REVOCABLE LIVING TRUST U/A 3/28/73; FIRST AMERICAN TITLE INSURANCE COMPANY, COMMITMENT NO. 618454, DATED JANUARY 4, 2013; AND MBC LOANS.

THIS IS TO CERTIFY THAT THIS MAP OR PLAT AND THE SURVEY ON WHICH IT IS BASED WERE MADE IN ACCORDANCE WITH THE 2011 MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/ACSM LAND TITLE SURVEYS, JOINTLY ESTABLISHED AND ADOPTED BY ALTA AND NSPS, AND INCLUDES ITEMS 1, 2, 3, 4, 7A, 8, 9, 11A, & 14 OF TABLE A THEREOF. THE FIELD WORK WAS COMPLETED ON JULY 26, 2013.

DATE _____ DAVID J. KENNEY, P.S., LICENSE NO.39083

SITE DATA INFORMATION:

- (PER CITY ORDINANCE)
- 1) SITE ZONING: R-8 (ATTACHED SINGLE-FAMILY RESIDENTIAL DISTRICT)
 - 2) MINIMUM LOT AREA PER UNIT: 3,000 SQUARE FEET
 - 3) MINIMUM OPEN SPACE: N/A
 - 4) MAXIMUM LOT COVERAGE: N/A
 - 5) BUILDING SETBACKS:
 - A) FRONT: AVERAGE SETBACK OF RESIDENTIAL BUILDINGS WITHIN 200 FEET, OTHERWISE 25 FEET.
 - B) SIDE: 7 FEET FOR INTERIOR LOTS, 10 FEET FOR CORNER LOTS, 14 FEET OR 25% OF TOTAL LOT WIDTH WHICHEVER IS LARGER, BETWEEN PRINCIPLE RESIDENTIAL BUILDINGS ON ADJACENT LOTS.
 - C) REAR: 20 FEET
 - 6) MAXIMUM BUILDING HEIGHT: 30 FEET, 2.5 STORIES

FLOODPLAIN NOTE:

THIS PROPERTY IS IN ZONE "X", OUTSIDE OF THE 0.2% ANNUAL CHANCE FLOODPLAIN BOUNDARY (AREA OF MINIMAL FLOODING AS PER FLOOD INSURANCE RATE MAP NO. 26125C0537F, PANEL 537 OF 704 WHICH BEARS AN EFFECTIVE DATE OF SEPTEMBER 29, 2006).

UTILITY STATEMENT

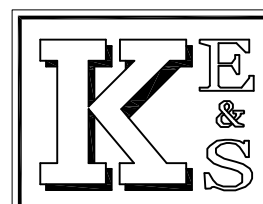
THE UNDERGROUND UTILITIES SHOWN HAVE BEEN LOCATED FROM FIELD SURVEY INFORMATION AND EXISTING DRAWINGS. THE SURVEYOR/ENGINEER MAKES NO GUARANTEES THAT THE UNDERGROUND UTILITIES SHOWN COMPRISE ALL SUCH UTILITIES IN THE AREA, EITHER IN SERVICE OR ABANDONED. THE SURVEYOR/ENGINEER FURTHER DOES NOT WARRANT THAT THE UNDERGROUND UTILITIES SHOWN ARE IN THE EXACT LOCATION INDICATED, ALTHOUGH HE DOES CERTIFY THAT THEY ARE LOCATED AS ACCURATELY AS POSSIBLE FROM INFORMATION AVAILABLE. THE SURVEYOR/ENGINEER HAS NOT PHYSICALLY LOCATED THE UNDERGROUND UTILITIES.

SCALE:
1"=10'

CLIENT:
SHAIN PARK APARTMENTS, LLC
C/O MR. JONATHAN CLAPPER
36700 GRAND RIVER AVENUE
FARMINGTON HILLS, MI 48335
PHONE: 248.720.9368
EMAIL: jon@flatlantic.com



Three full working days
before you dig, call the
MISS DIG System at
1-800-482-7171



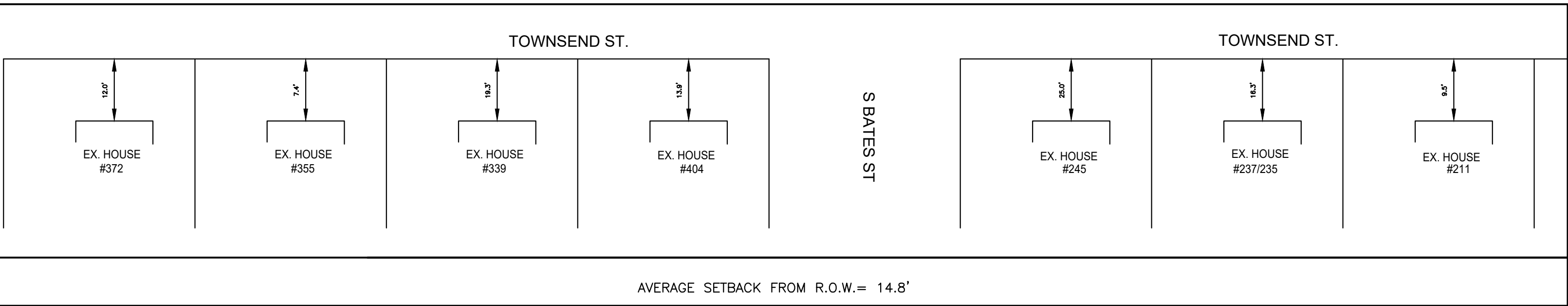
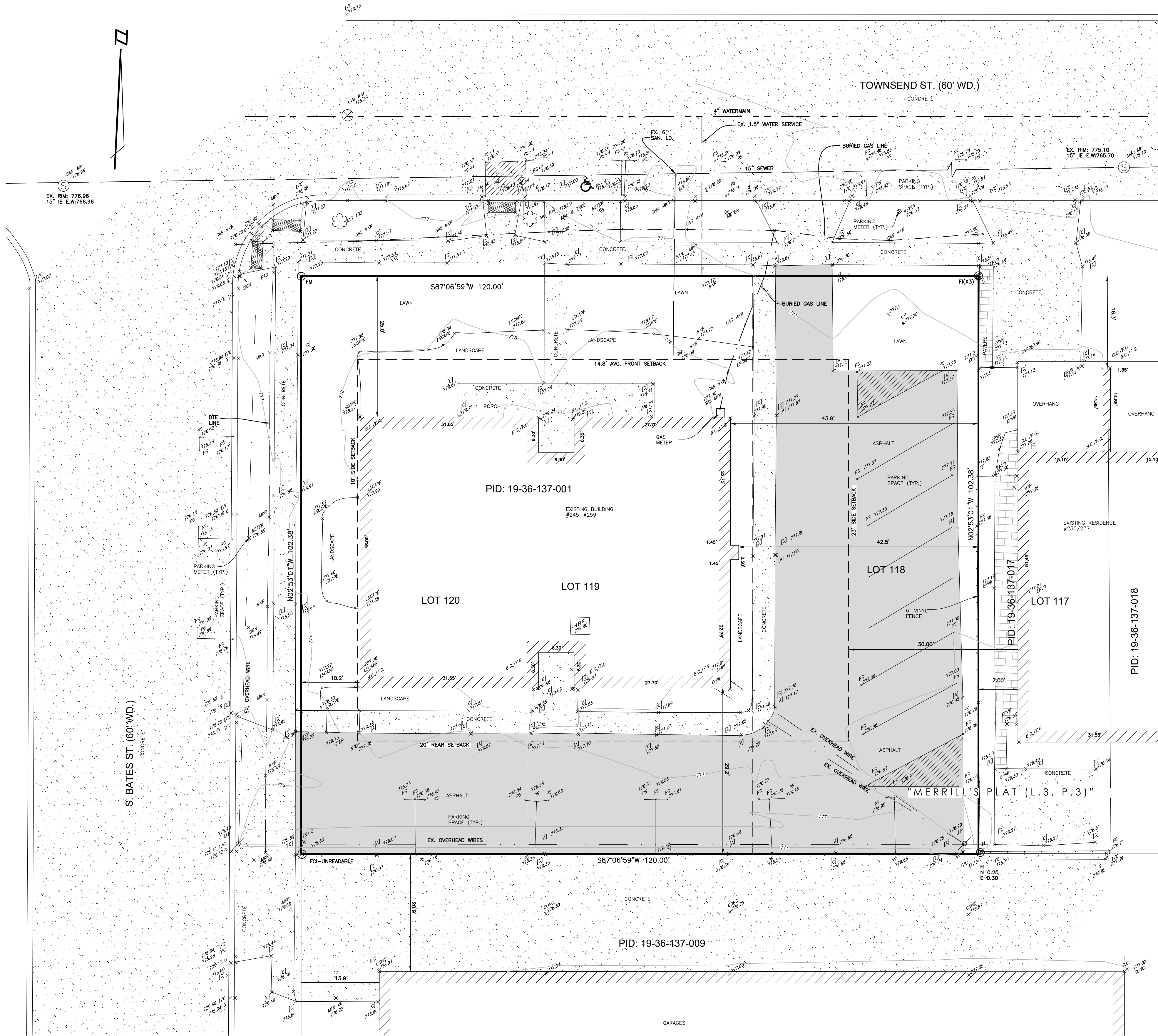
PREPARED BY:
KRAFT ENGINEERING & SURVEYING, INC.
engineers - surveyors - planners
409 WEST SEVENTH STREET FLINT, MICHIGAN 48503
PHONE: 810.234.2694 or 810.234.2695 FAX: 810.234.2696
E-MAIL: MIKE@KRAFTENGINEERING.COM

SHAIN PARK APARTMENTS LLC
#245-#259 TOWNSEND STREET
LOTS 118, 119, 120 OF MERRILL'S PLAT, LIBER 3, PAGE 3
BIRMINGHAM, OAKLAND COUNTY, MI

ALTA/ACSM LAND
TITLE SURVEY

REVISIONS	DRN. BY:	DEB	07.31.2013	SHEET NO: 1 of 1
	FLD. BY:	DJK/TLO	"	
	CHK'D. BY:	RADO	"	
	APPR. BY:	DJK	"	

KES JOB NO. 13-28712



TAG #	DIA. (IN.)	SPECIES	SPREAD (FT.)
103	14	MULBERRY	40
104	10	MAPLE	30

SITE DATA

ADDRESS:
245 TOWNSEND ST.
BIRMINGHAM, MI. 48009

PID:
19-36-137-001

ZONING:
R8

MINIMUM FRONT YARD SETBACK:
• AVERAGE SETBACK OF RESIDENTIAL BUILDINGS WITHIN 200 FEET, OTHERWISE 25 FEET
MINIMUM REAR YARD SETBACK:
• 20 FEET
MINIMUM COMBINED FRONT AND REAR SETBACK:
• N/A
MINIMUM SIDE YARD SETBACK:
• 7 FEET FOR INTERIOR LOTS
• 10 FEET FOR CORNER LOTS
• 14 FEET OR 25% OF TOTAL LOT WIDTH WHICHEVER IS LARGER, BETWEEN PRINCIPAL RESIDENTIAL BUILDINGS ON ADJACENT LOTS

LEGEND

SECTION CORNER	ELEC. PHONE OR CABLE TV O.H. LINE, POLE & GUY WIRE
FOUND IRON, MON., NAIL	UNDERGROUND CABLE TV
SET IRON	TELEPHONE U.G. CABLE, SPLICING BOX & MANHOLE
RECORDED	ELECTRIC U.G. CABLE & MANHOLE
MEASURED	GAS MAIN & VALVE
CALCULATED	WATERMAIN, HYD., GATE VALVE, TAPPING SLEEVE & VALVE
	SANITARY SEWER, CLEANOUT & MANHOLE
	STORM DRAIN & MANHOLE
	COMBINED SEWER & MANHOLE
	CATCH BASIN, INLET
	YARD BASIN
	STORM DRAIN & END SECTION
	POST INDICATOR VALVE
	WATER SERVICE SHUTOFF, HYDRANT VALVE BOX
	MAILBOX
	POINT ELEVATION (AT X OR END OF LEADER)
	CONTOUR LINE
	FENCE
	GUARD RAIL
	STREET LIGHT
	SIGN
	TREE

PARCEL DESCRIPTION
T2N, R10E, SECTION 36
LOTS 118, 119, & 120 OF MERRILL'S PLAT
CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN

Utility Information, as shown, indicates the approximate locations and types of utilities as disclosed to this firm by various utility company's marking(s) and/or plans provided.
No guarantee is provided or implied as to the existence, accuracy or completeness of any utilities.
All locations and depths of any utilities that may exist shall be verified in the field by others prior to the start of construction.
Extreme caution shall be utilized during construction when operating near overhead and/or buried utilities.

CALL MISS DIG
72 HOURS (3 WORKING DAYS - EXCLUDING SAT., SUN. & HOLIDAYS)
CALL MISS DIG
1-800-482-7171
OR
811
(TOLL FREE) FOR THE LOCATION OF UNDER GROUND FACILITIES

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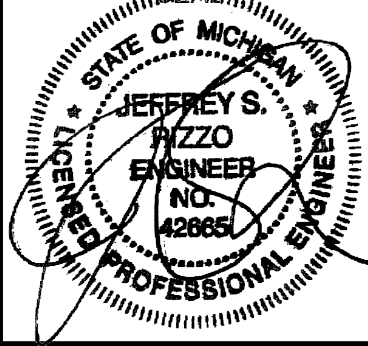


Fenn & Associates, Inc.
Land Surveying and Civil Engineering
14933 Commercial Drive, Shelby Township, MI 48315
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www.fennsurveying.com

TOPOGRAPHIC MAPPING
245 TOWNSEND ST.
PART OF SECTION 36, T2N, R10E
CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN

DISTRIBUTION
PRELIMINARY
APPROVAL
CONSTRUCTION
AS-BUILT

REVISIONS	
DATE	REMARKS
4/5/24	ADD TOPO INFO
4/25/24	ADD CONTOURS



CLIENT
THE PARKVIEW DEV. LLC
5000 E. GRAND RIVER AVE
HOWELL, MI 48843
CONTACT:
MICHAEL NADOLSKI
PHONE: 248-444-0824

PROJECT NAME
245
TOWNSEND ST.

PROJECT NUMBER
C24-006.02X

SHEET NAME
TOPOGRAPHIC
MAPPING

DRAWING SCALE: 1"= 10'
SHEET SIZE: 24X36
DATE: 2/27/24
PROJECT MANAGER: TWD
DESIGNED BY: N/A
DRAWN BY: R.PERRI
FIELD BY: VA/CS
CHECKED BY: TWD/JSR, PE

SHEET NUMBER
1 OF 1

THE LAND REFERRED TO IN THIS COMMITMENT, SITUATED IN THE COUNTY OF OAKLAND, CITY OF BIRMINGHAM, STATE OF MICHIGAN, IS DESCRIBED AS FOLLOWS:

LOTS 118, 119, AND 120 OF MERRILL'S PLAT, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 3 OF PLATS, PAGE 3, OAKLAND COUNTY RECORDS

TAX ITEM NO. 19-36-137-001

FRONT YARD SETBACK TABLE (WITHIN 200 FT)		
BUILDING ADDRESS	CURRENT ZONE	SETBACK DISTANCE
237 & 235 TOWNSEND ST	R8	16.3 FT
211 TOWNSEND ST	R8	9.5 FT
404 S BATES ST	R8	15.2 FT
339 TOWNSEND ST	R8	20.4 FT
355 TOWNSEND ST	R8	16.3 FT
371 & 391 TOWNSEND ST	R8	14.0 FT
370, 372, 374, 376 TOWNSEND ST	R8	7.9 FT
380 S BATES ST	R7	8.7 FT
208 W BROWN ST	R8	4.3 FT
228 W BROWN ST	R8	7.7 FT
252, 266, 272, 274, 276, 288 W BROWN ST	R8	4.0 FT
312 & 324 W BROWN ST	R8	8.5 FT
346 W BROWN ST	R8	6.2 FT
350, 366, 372, 384 W BROWN ST	R8	4.0 FT
211 W BROWN ST/526 HENRIETTA ST	R8	19.0 FT
253 W BROWN ST	R8	17.6 FT
277, 287, 297 W BROWN ST	R8	18.0 FT
329, 335, 341, 347 W BROWN ST	R8	17.4 FT
AVERAGE SETBACK:		11.9 FT

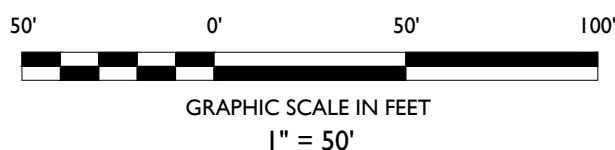
FRONT YARD SETBACK TABLE (TOWNSEND STREET)		
BUILDING ADDRESS	CURRENT ZONE	SETBACK DISTANCE
237 & 235 TOWNSEND ST	R8	16.3 FT
211 TOWNSEND ST	R8	9.5 FT
404 S BATES ST	R8	15.2 FT
339 TOWNSEND ST	R8	20.4 FT
355 TOWNSEND ST	R8	16.3 FT
371 & 391 TOWNSEND ST	R8	14.0 FT
370, 372, 374, 376 TOWNSEND ST	R8	7.9 FT
380 S BATES ST	R7	8.7 FT
444 CHESTER ST	R7	27.0 FT
491 TOWNSEND ST	R7	28.2 FT
505 TOWNSEND ST	R7	10.4 FT
525 TOWNSEND ST	R7	18.4 FT
555 TOWNSEND ST	R7	6.4 FT
410, 420, 430 TOWNSEND ST	R8	8.5 FT
464 TOWNSEND ST	R8	17.3 FT
494 TOWNSEND ST	R8	2.2 FT
504 TOWNSEND ST	R8	17.0 FT
518, 522, 530, 542 TOWNSEND ST	R8	9.5 FT
AVERAGE SETBACK:		14.1 FT



<u>SYMBOL</u>	<u>DESCRIPTION</u>
	PROPERTY LINE

GENERAL NOTES

- THE CONTRACTOR SHALL VERIFY AND FAMILIARIZE THEMSELVES WITH THE EXISTING SITE CONDITIONS AND THE PROPOSED SCOPE OF WORK (INCLUDING DIMENSIONS, LAYOUT, ETC.) PRIOR TO INITIATING THE IMPROVEMENTS IDENTIFIED WITHIN THIS PLAN SET. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL REQUIRED APPROVALS FROM THE EXISTING SITE CONDITIONS AND THE PROPOSED WORK. THE CONTRACTOR SHALL NOTIFY STONEFIELD ENGINEERING & DESIGN, LLC. PRIOR TO THE START OF CONSTRUCTION.
- THE CONTRACTOR SHALL OBTAIN ALL NECESSARY PERMITS AND ENSURE THAT ALL REQUIRED APPROVALS HAVE BEEN OBTAINED PRIOR TO THE START OF CONSTRUCTION. COPIES OF ALL REQUIRED PERMITS AND APPROVALS SHALL BE PROVIDED TO THE CLIENT AND THE PROJECT MANAGER.
- ALL CONTRACTOR WILL TO THE FULLEST EXTENT PERMITTED BY LAW, INDEMNIFY AND HOLD HARMLESS STONEFIELD ENGINEERING & DESIGN, LLC. AND ITS SUB-CONSULTANTS FROM AND AGAINST ANY DAMAGES AND LOSSES, INCLUDING REASONABLE ATTORNEY'S FEES, THAT MAY BE INCURRED BY THE CONTRACTOR IN ADDITION TO CLAIMS CONNECTED TO THE PROJECT AS A RESULT OF NOT CARRYING THE PROPER INSURANCE FOR WORKERS COMPENSATION, LIABILITY INSURANCE, AND LIMITS OF COMMERCIAL GENERAL LIABILITY INSURANCE.
- THE CONTRACTOR SHALL NOT DEViate FROM THE PROPOSED IMPROVEMENTS IDENTIFIED WITHIN THIS PLAN SET UNLESS APPROVAL IS PROVIDED IN WRITING BY STONEFIELD ENGINEERING & DESIGN, LLC.
- THE CONTRACTOR IS RESPONSIBLE TO DETERMINE THE MEANS AND METHODS OF CONSTRUCTION.
- THE CONTRACTOR SHALL NOT PERFORM ANY WORK OR CAUSE DISTURBANCE TO ANY OTHER PROPERTY NOT CONTROLLED BY THE PERSON OR CITY/VIW HAS AUTHORIZED THE WORK WITHOUT PRIOR WRITTEN CONSENT FROM THE OWNER OF THE PRIVATE PROPERTY.
- THE CONTRACTOR IS RESPONSIBLE TO RESTORE ANY DAMAGES OR DISTURBANCES TO THE EXISTING FEATURE THAT IS IDENTIFIED TO REMAIN ON THE PLAN SET. ALL REPAIRS SHALL USE NEW MATERIALS TO RESTORE THE FEATURE TO ITS EXISTING CONDITION AT THE CONTRACTOR'S EXPENSE.
- THE CONTRACTOR IS RESPONSIBLE TO PROVIDE A PRIOR WRITTEN NOTICE, DURING THE DESIGN PHASE, OF ANY SPECIAL REQUIREMENTS FOR MATERIALS, PRODUCTS, AND/OR OTHER REQUIRED SUBMITTALS FOR STONEFIELD ENGINEERING & DESIGN, LLC. WILL REVIEW THE SUBMITTALS IN ACCORDANCE WITH THE DESIGN INTENT AS REFLECTED WITHIN THE PLAN SET.
- THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL APPROVALS IN ACCORDANCE WITH MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, LATEST EDITION.
- THE CONTRACTOR IS REQUIRED TO PERFORM ALL WORK IN THE PUBLIC RIGHT-OF-WAY IN ACCORDANCE WITH THE APPROPRIATE GOVERNING JURISDICTION. THE CONTRACTOR SHALL BE RESPONSIBLE FOR THE PROCUREMENT OF STREET OPENING PERMITS.
- THE CONTRACTOR IS REQUIRED TO RETAIN AN OSHA CERTIFIED SAFETY SUPERVISOR TO BE PRESENT ON SITE AT ALL TIMES DURING CONSTRUCTION & MAINTENANCE OF THE PROJECT.
- SHOULD AN EMPLOYEE OF STONEFIELD ENGINEERING & DESIGN, LLC. BE PRESENT ON SITE AT ANY TIME DURING CONSTRUCTION, IT DOES NOT RELIEVE THE CONTRACTOR OF ANY OF ITS RESPONSIBILITIES AND REQUIREMENTS LISTED IN THE NOTES WITHIN THIS PLAN SET.



SITE DEVELOPMENT PLANS

CHAMPION DEVELOPMENT

PROPOSED TOWNHOUSE DEVELOPMENT

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN

J. REID COOKSEY, P.E.
MICHIGAN LICENSE No. 6201069428
LICENSED PROFESSIONAL ENGINEER



SCALE: 1" = 50' **PROJECT ID:** DET-240092

TITLE:
**BUILDING FRONT
YARD SETBACK AERIAL
EXHIBIT**

DRAWING:

EX-1

STONEFIELD
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Princeton, NJ • Tampa, FL • Detroit, MI
www.stonefieldeng.com

www.stonefieldeng.com

607 Shelby Suite 200, Detroit, MI 48226

Phone 248.247.1115

LEGAL DESCRIPTION

THE LAND REFERRED TO IN THIS COMMITMENT, SITUATED IN THE COUNTY OF OAKLAND, CITY OF BIRMINGHAM, STATE OF MICHIGAN, IS DESCRIBED AS FOLLOWS:

LOTS 118, 119, AND 120 OF MERRILL'S PLAT, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 3 OF PLATS, PAGE 3, OAKLAND COUNTY RECORDS

TAX ITEM NO. 19-36-137-001

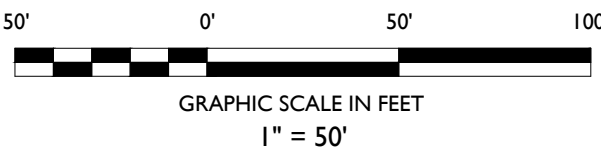
INTERNAL SIDE YARD SETBACK TABLE (WITHIN 200 FT)			
BUILDING ADDRESS	CURRENT ZONE	SETBACK DISTANCE (EAST)	SETBACK DISTANCE (WEST)
237 & 235 TOWNSEND ST	R8	6.4 FT	7.0 FT
211 TOWNSEND ST	R8	N/A	7.6 FT
404 S BATES ST	R8	N/A	0.8 FT
339 TOWNSEND ST	R8	10.1 FT	3.9 FT
355 TOWNSEND ST	R8	4.7 FT	4.4 FT
371 & 391 TOWNSEND ST	R8	5.7 FT	N/A
370, 372, 374, 376 TOWNSEND ST	R8	3.0 FT	N/A
380 S BATES ST	R7	N/A	3.4 FT
208 W BROWN ST	R8	N/A	3.0 FT
228 W BROWN ST	R8	5.5 FT	7.2 FT
252, 266, 272, 274, 276, 288 W BROWN ST	R8	5.0 FT	N/A
312 & 324 W BROWN ST	R8	N/A	4.8 FT
346 W BROWN ST	R8	7.6 FT	7.3 FT
350, 366, 372, 384 W BROWN ST	R8	2.0 FT	N/A
211 W BROWN ST/526 HENRIETTA ST	R8	N/A	6.9 FT
253 W BROWN ST	R8	11.1 FT	8.0 FT
277, 287, 297 W BROWN ST	R8	4.5 FT	N/A
329, 335, 341, 347 W BROWN ST	R8	N/A	5.8 FT
AVERAGE SETBACK:		5.7 FT	

BUILDING SEPARATION TABLE (WITHIN 200 FT)				
BUILDING ADDRESS	CURRENT ZONE	PROPERTY WIDTH	SEPARATION DISTANCE (EAST)	SEPARATION DISTANCE (WEST)
237 & 235 TOWNSEND ST	R8	45.0 FT	14.0 FT	14.0 FT
211 TOWNSEND ST	R8	74.0 FT	N/A	14.0 FT
404 S BATES ST	R8	78.5 FT	N/A	10.9 FT
339 TOWNSEND ST	R8	45.9 FT	10.9 FT	8.6 FT
355 TOWNSEND ST	R8	35.1 FT	8.6 FT	10.1 FT
371 & 391 TOWNSEND ST	R8	78.4 FT	10.1 FT	N/A
370, 372, 374, 376 TOWNSEND ST	R8	114.2 FT	6.4 FT	N/A
380 S BATES ST	R7	123.6 FT	N/A	6.4 FT
208 W BROWN ST	R8	37.4 FT	N/A	8.5 FT
228 W BROWN ST	R8	40.0 FT	8.5 FT	13.2 FT
252, 266, 272, 274, 276, 288 W BROWN ST	R8	161.9 FT	13.2 FT	N/A
312 & 324 W BROWN ST	R8	77.3 FT	N/A	12.4 FT
346 W BROWN ST	R8	45.9 FT	12.4 FT	9.3 FT
350, 366, 372, 384 W BROWN ST	R8	114.6 FT	9.3 FT	N/A
211 W BROWN ST/526 HENRIETTA ST	R8	80.0 FT	N/A	18.0 FT
253 W BROWN ST	R8	77.4 FT	18.0 FT	12.5 FT
277, 287, 297 W BROWN ST	R8	86.9 FT	12.5 FT	N/A
329, 335, 341, 347 W BROWN ST	R8	139.6 FT	N/A	13.5 FT
AVERAGE SEPARATION:			11.3 FT	



SYMBOL	DESCRIPTION
---	PROPERTY LINE

- GENERAL NOTES**
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 - THE CONTRACTOR SHALL OBTAIN ALL NECESSARY PERMITS AND ENSURE THAT ALL REQUIRED APPROVALS HAVE BEEN OBTAINED PRIOR TO THE START OF CONSTRUCTION. COPIES OF ALL REQUIRED PERMITS AND APPROVALS SHALL BE KEPT ON SITE AT ALL TIMES DURING CONSTRUCTION.
 - ALL CONTRACTORS WILL, TO THE FULLEST EXTENT PERMITTED BY LAW, INDEMNIFY AND HOLD HARMLESS STONEFIELD ENGINEERING & DESIGN, LLC, AND ITS SUB-CONSULTANTS FROM AND AGAINST ANY DAMAGES AND LIABILITIES INCLUDING ATTORNEY'S FEES ARISING OUT OF CLAIMS BY EMPLOYEES OF THE CONTRACTOR IN ADDITION TO CLAIMS CONNECTED TO THE PROJECT AS A RESULT OF NOT CARRYING THE PROPER INSURANCE FOR WORKERS COMPENSATION, LIABILITY INSURANCE, AND LIMITS OF COMMERCIAL GENERAL LIABILITY INSURANCE.
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 - CONTRACTOR IS RESPONSIBLE TO PROVIDE THE APPROPRIATE SHOP DRAWINGS, PRODUCT DATA, AND OTHER REQUIRED SUBMITTALS FOR REVIEW. STONEFIELD ENGINEERING & DESIGN, LLC, WILL REVIEW THE SUBMITTALS IN ACCORDANCE WITH THE DESIGN INTENT AS REFLECTED WITHIN THE PLAN SET.
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 - SHOULD AN EMPLOYEE OF STONEFIELD ENGINEERING & DESIGN, LLC, BE PRESENT ON SITE AT ANY TIME DURING CONSTRUCTION, IT DOES NOT RELIEVE THE CONTRACTOR OF ANY OF THE RESPONSIBILITIES AND REQUIREMENTS LISTED IN THE NOTES WITHIN THIS PLAN SET.



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SITE DEVELOPMENT PLANS

CHAMPION DEVELOPMENT

**PROPOSED TOWNHOUSE
DEVELOPMENT**

PARCEL ID: 19-36-137-001
245 TOWNSEND STREET
CITY OF BIRMINGHAM
OAKLAND COUNTY, MICHIGAN

J. REID COOKSEY, P.E.
MICHIGAN LICENSE No. 6201069428
LICENSED PROFESSIONAL ENGINEER

STONEFIELD
engineering & design

SCALE: 1" = 50' PROJECT ID: DET-240092

TITLE:
**BUILDING SIDE YARD
SETBACK AERIAL
EXHIBIT**

DRAWING:

EX-2

SUBMISSION FOR PRELIMINARY PLANNING APPROVAL

DESCRIPTION

BY

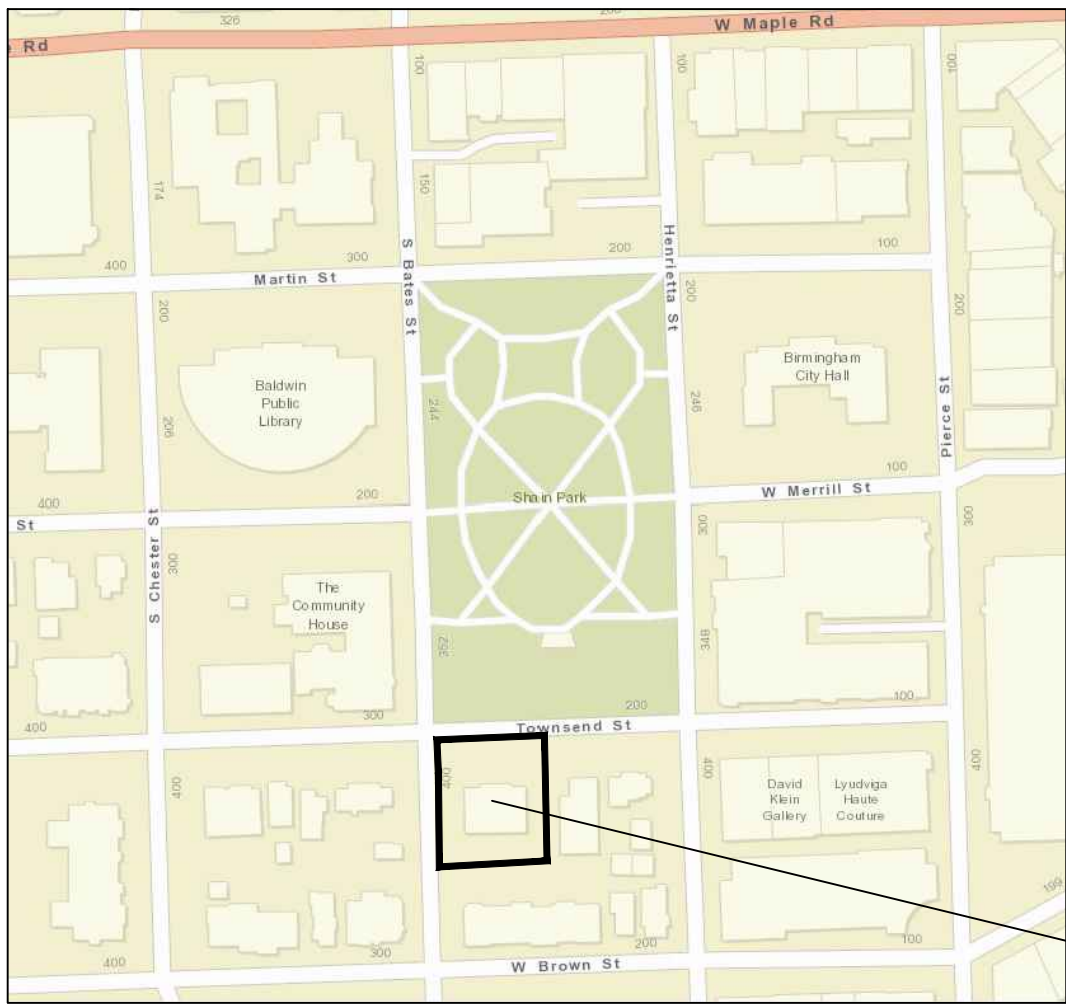
DATE

ISSUE

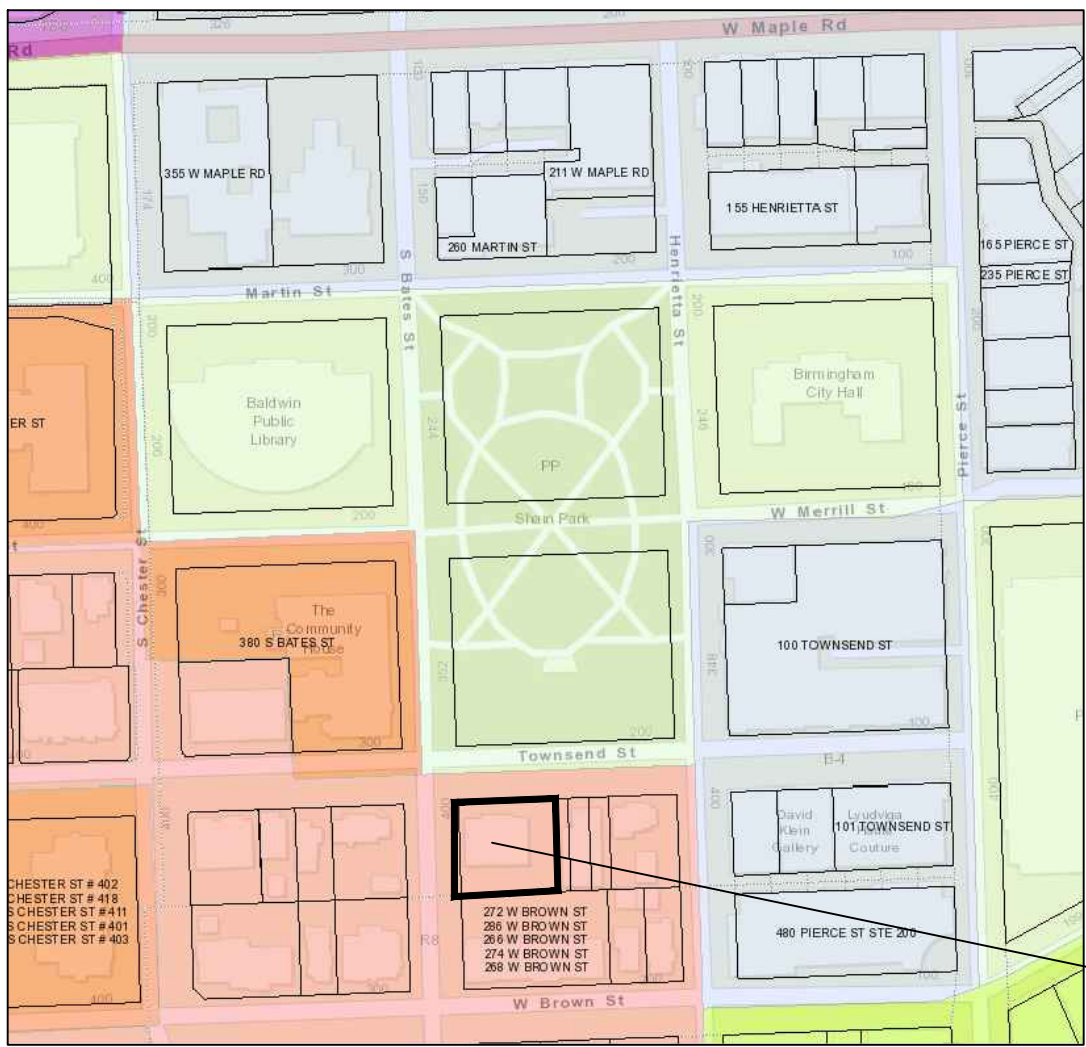
NOT APPROVED FOR CONSTRUCTION

THE PARKVIEW on SHAIN PARK

Birmingham, MI 48009



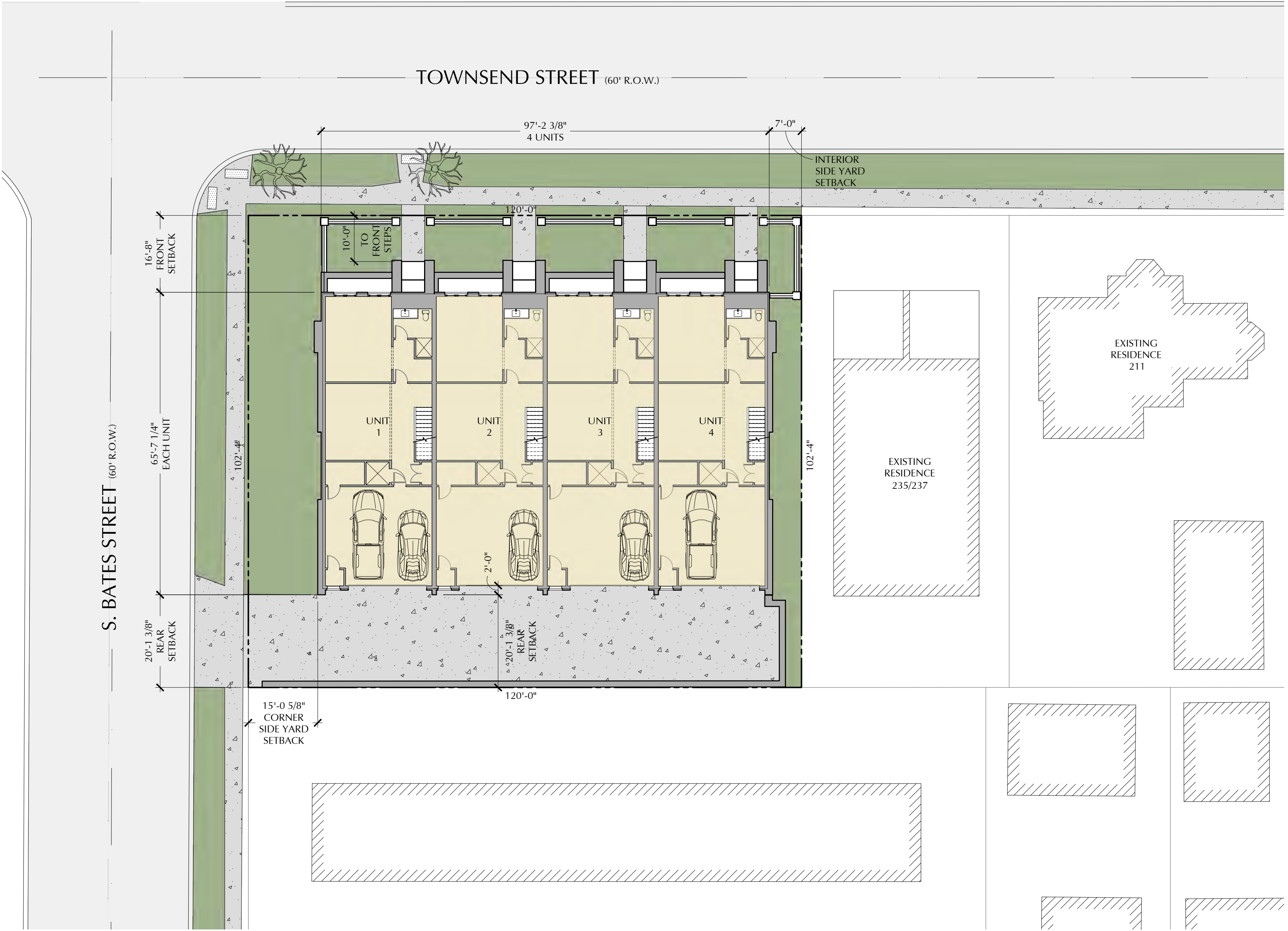
LOCATION MAP



ZONING MAP

SITE LOCATION:
245 TOWNSEND ST

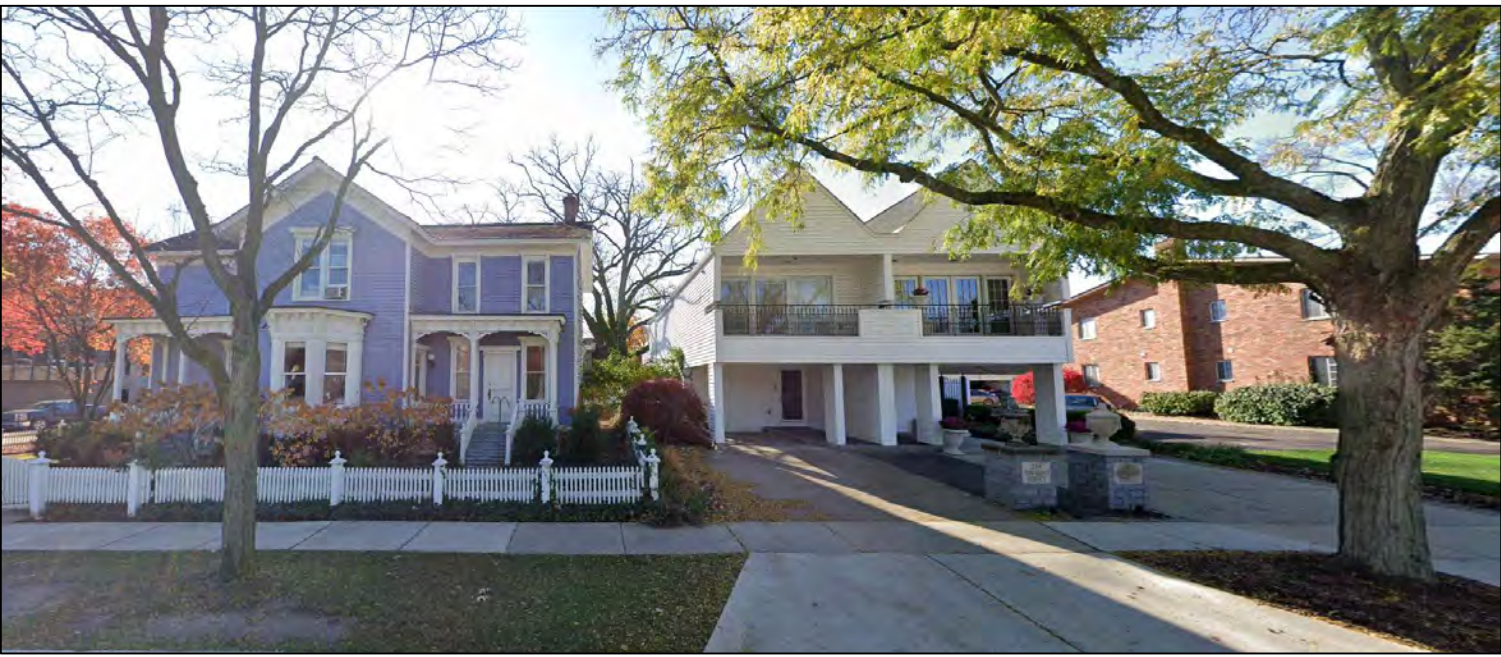
SITE LOCATION
ZONING: R8



Proposed Site Plan

Scale : 1/16"=1'

CHRISTOPHER J LONGE AIA
ARCHITECTURE
INTERIORS
124 Peabody, Birmingham, Michigan 48009 248.258.6940

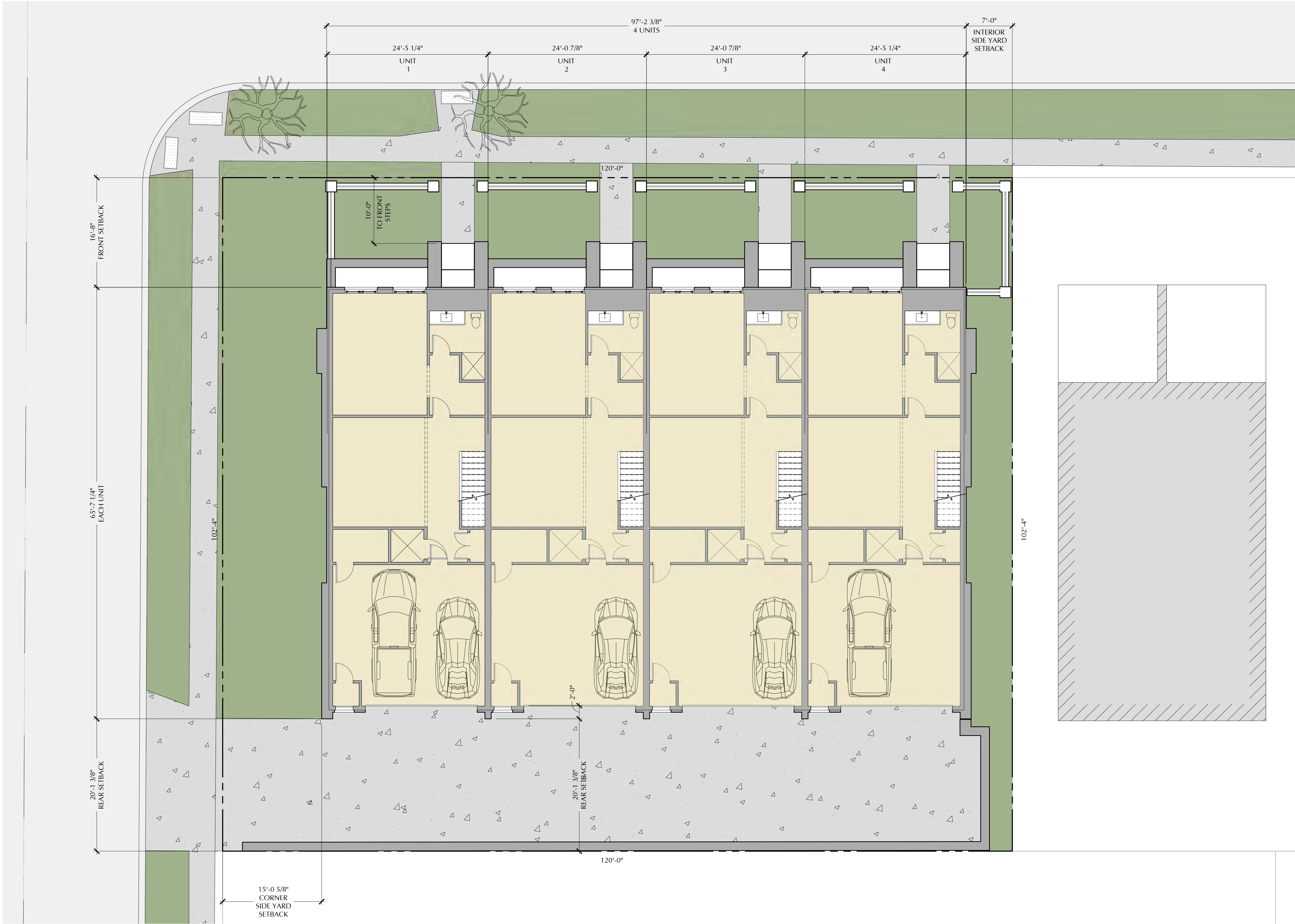


05/02/2024

SD.1

THE PARKVIEW on SHAIN PARK

Birmingham, MI 48009



Lower Level

Scale : 1/8"=1'

THE PARKVIEW on SHAIN PARK

Birmingham, MI 48009



Main Level

Scale : 1/8"=1'

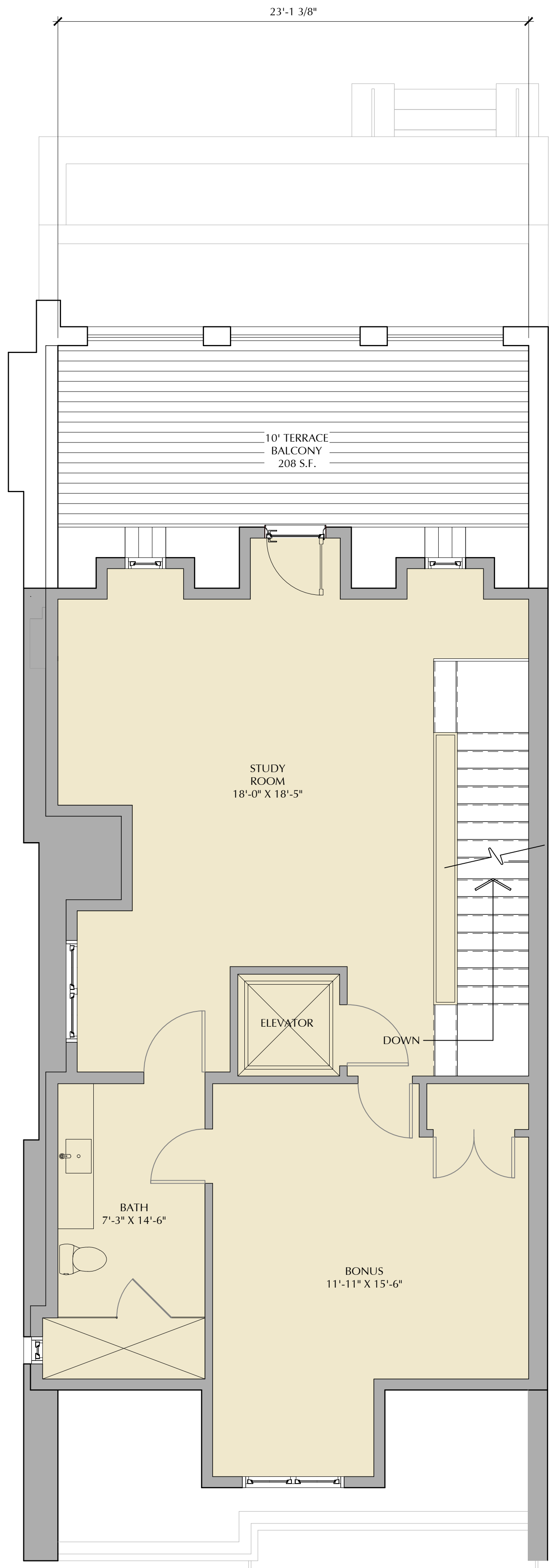
CHRISTOPHER J LONGE AIA
ARCHITECTURE
INTERIORS
124 Peabody, Birmingham, Michigan 48009 248.258.6940

05/02/2024

SD.3

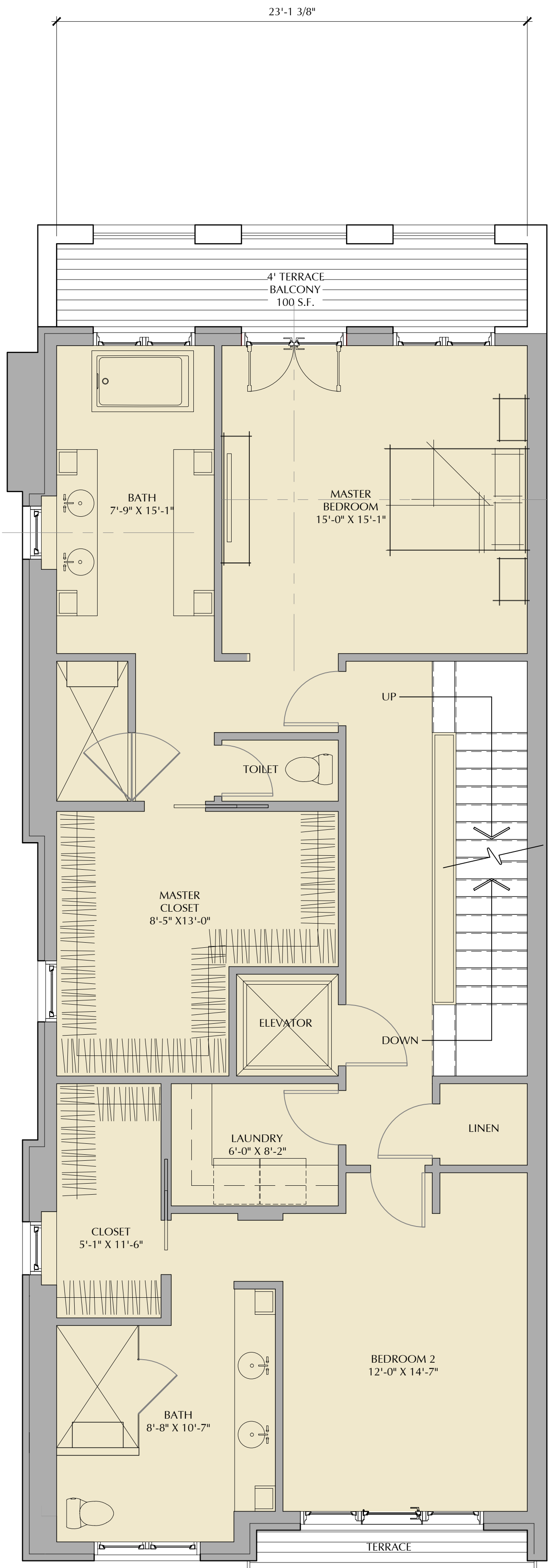
THE PARKVIEW on SHAIN PARK

Birmingham, MI 48009



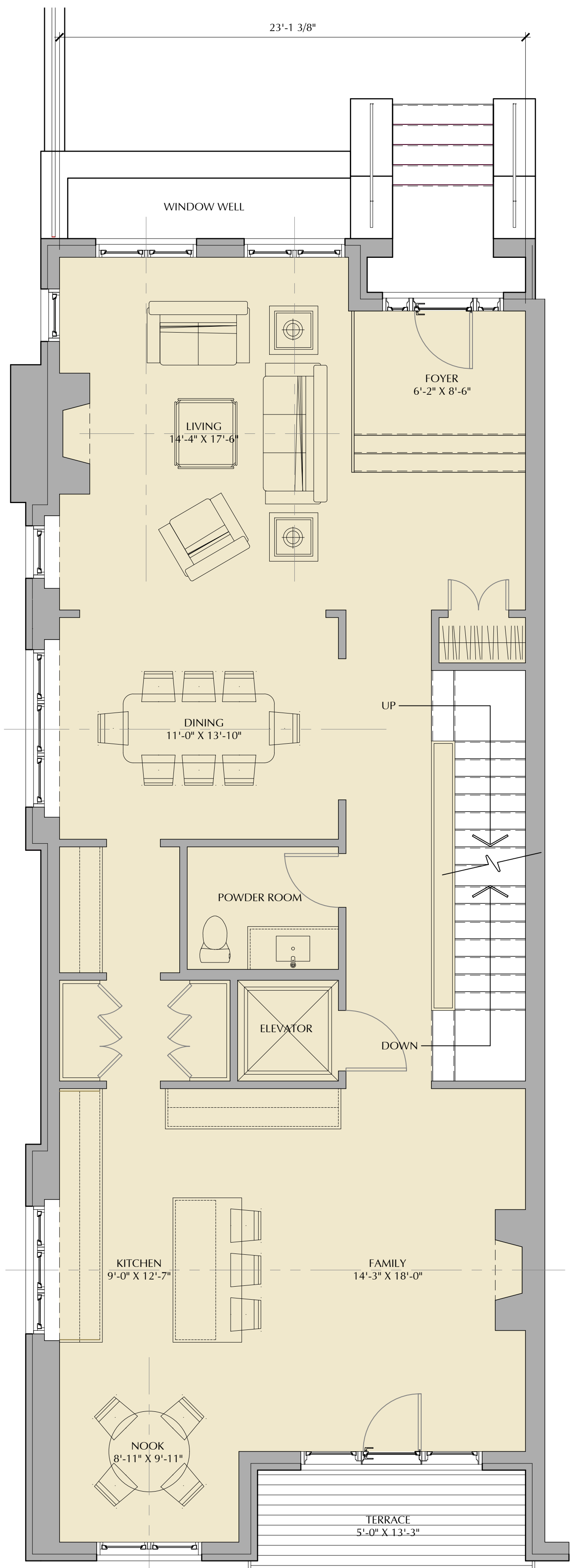
Attic Level

Scale : 1/4"=1'
806 S.F.



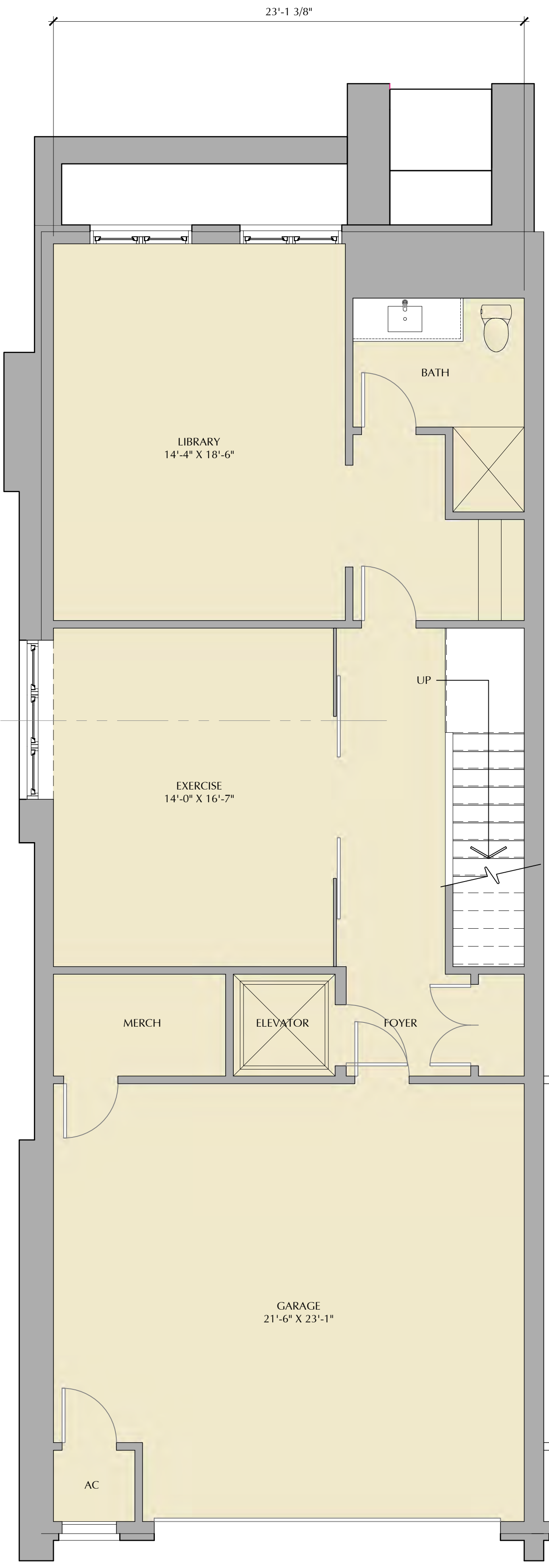
Upper Level

Scale : 1/4"=1'
1211 S.F.



Main Level

Scale : 1/4"=1'
1266 S.F.

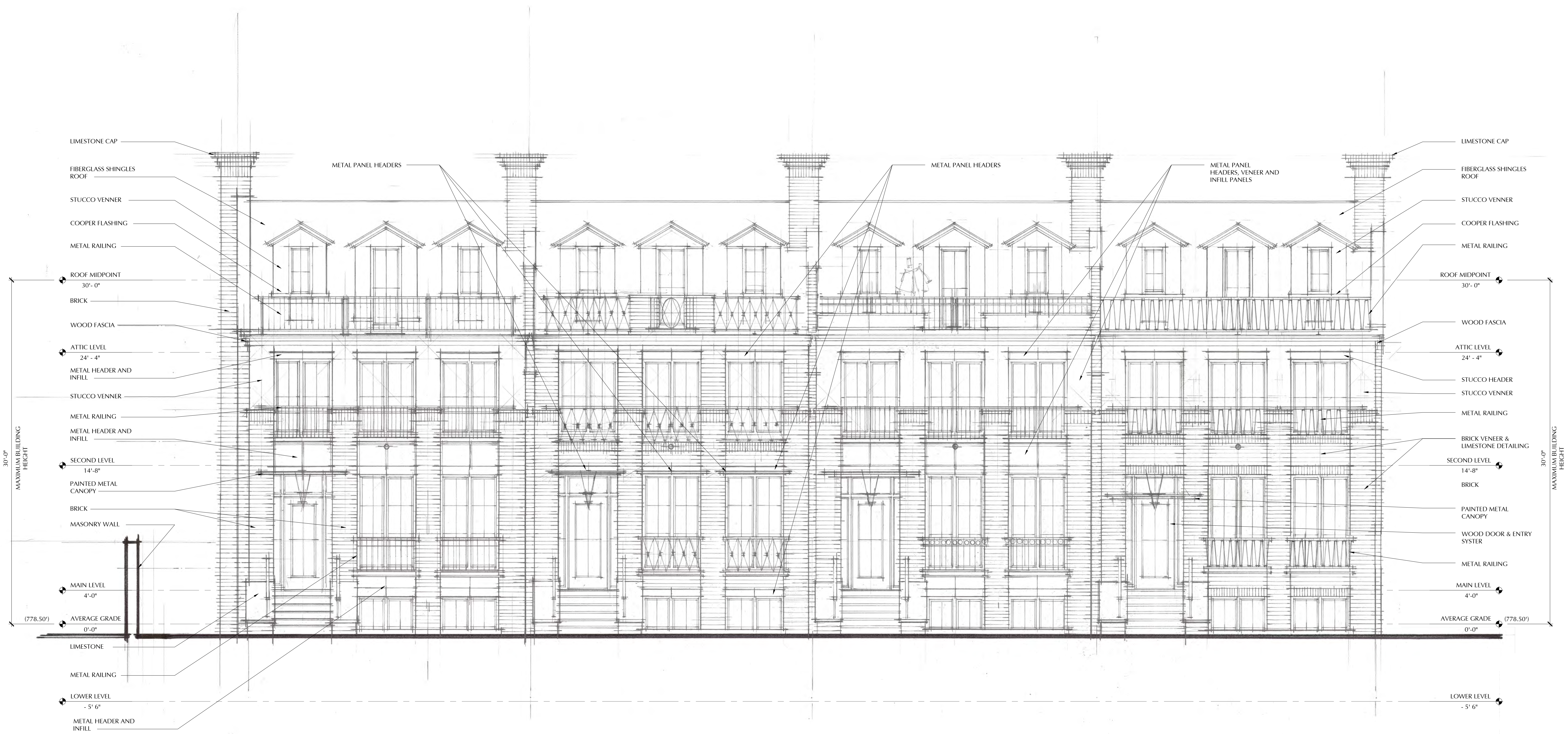


Lower Level

Scale : 1/4"=1'
1367 S.F.

SHAIN PARK TOWNHOMES

Birmingham, MI 48009



FRONT ELEVATION

SCALE : 1/4"=1'-0"

CHRISTOPHER J LONGE AIA
ARCHITECTURE
INTERIORS

124 Peabody, Birmingham, Michigan 48009 248.258.6940

02/14/2024

SD.5

SHAIN PARK TOWNHOMES

Birmingham, MI 48009



REAR ELEVATION

SCALE : 1/4"=1'-0"

CHRISTOPHER J LONGE AIA
ARCHITECTURE
INTERIORS
124 Peabody, Birmingham, Michigan 48009 248.258.6940

02/14/2024

SD.6

SHAIN PARK TOWNHOMES

Birmingham, MI 48009



EAST ELEVATION

SCALE : 1/4"=1'-0"

CHRISTOPHER J LONGE AIA
ARCHITECTURE
INTERIORS
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02/14/2024

SD.7

SHAIN PARK TOWNHOMES

Birmingham, MI 48009



WEST ELEVATION

SCALE : 1/4"=1'-0"

CHRISTOPHER J LONGE AIA
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INTERIORS
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02/14/2024

SD.8



MEMORANDUM

Planning Division

DATE: June 10, 2024

TO: Jana L. Ecker, City Manager

FROM: Nicholas Dupuis, Planning Director

SUBJECT: Planning Board & City Commission Joint Meeting

1. The Birmingham Plan 2040 – Prioritization of Key Actions

On May 22, 2023 ([Agenda](#) – [Minutes](#)), the City Commission moved to adopt and approve in its entirety the Birmingham Plan 2040, inclusive of all maps, plats, charts, and other related matter, figures and the Future Land Use Map.

Once a master plan is adopted, the City is tasked with prioritizing and considering the recommendations of the plan through in-depth reviews. Within the Birmingham Plan 2040 ("2040 Plan"), the consultants consolidated and categorized nearly 130 recommendations located throughout the plan into 33 key actions. The consultants then prioritized the key actions based on their assessment of need and time horizon.

As the City moves forward with the implementation of the plan, it is key to remember that a master plan is not a static document. An annual review of a master plan is necessary to complete the following tasks. Every year, the Planning Board should:

1. Review goals and major recommendations.
2. Review action table and progress toward completing annual priorities.
3. Review prior year's rezoning and development decisions. Discuss if there are any trends that need to be addressed.
4. Identify any potential plan amendments to work on for the upcoming year that can be prepared and adopted then incorporated at a later date when the master plan is updated.
5. Identify any Zoning Ordinance updates to undertake in the coming year.

Performing the annual review and thoroughly documenting the process and the machinations of the master plan is essential when it comes to the master plan review after 5 years of adoption as required by the Michigan Planning Enabling Act. At 5 years, it

should be determined whether any amendments are needed or whether the plan is still relevant to today's conditions. Generally, the goals, objectives and future land use plan should be carefully reviewed to contrast with current development trends as well as any major changes or diversions from the plan that have taken place in order to consider whether the plan needs to be updated.

On December 13, 2023 ([Agenda](#) – [Minutes](#)), the Planning Board discussed at a high level the Summary of Key Actions and how to begin the implementation of the Birmingham Plan 2040. Much discussion was had regarding an implementation framework and it was acknowledged that although the Planning Board does not have the direct authority to assign duties to other boards, commissions or staff members, it does have duties as listed in [Sec. 82-33](#) of the Birmingham Code of Ordinances to “carry out the goals, objectives and intent of the city's adopted master plan”, among other duties. It was also re-emphasized that each of these action items will be vetted in the public sphere at open meetings, and that the public engagement we invite would be focused on the merits of each recommendation and the work that stems from such rather than the merits of the 2040 Plan itself.

On January 10, 2024 ([Agenda](#) – [Minutes](#)), the Planning Division presented a reformatted version of the Summary of Key Actions table, which placed actions into separate tables based on which group would be the “primary” agent for that recommendation or action. The Planning Board and Planning Division discussed each of the tables and how interconnected a lot of the actions will be. Ultimately, the Planning Board requested that a few actions be moved to other sections.

On January 24, 2024 ([Agenda](#) – [Minutes](#)), the Planning Board reviewed the Summary of Key Actions tables with the few minor changes that were requested at the last meeting. In addition, the Planning Division provided a draft letter for review that would be sent around to other boards/commissions that have direct responsibilities related to the 2040 Plan.

On February 28, 2024 ([Agenda](#) – [Minutes](#)) the Planning Division has made the requested changes to the Summary of Key Actions tables, and has provided a full suite of draft letters to be circulated to the various boards at which the actions will be ultimately assigned by the City Commission. In addition, the Planning Division has made an attempt to organize the “Zoning Code Update” into different buckets: one that could be handled by a consultant within a comprehensive update to the Zoning Ordinance, and one that could require more attention from the Planning Board.

Questions:

- Do you [the City Commission] feel as though the Planning Board has successfully organized and prioritized the key actions provided in the approved 2040 Plan?
- Would the City Commission consider making this an agenda item at the next available City Commission meeting for the purposes of directing the related boards/commissions to commence work on the associated key actions?

2. Public Project Review Process

Over the years, the Planning Board has reviewed several public projects at a courtesy level including the recent library expansions and fire station 2. Overall, Planning Board feels as though the role and purview for the review of these projects could be expanded to ensure that public development projects are required to meet the same standards as private development to ensure a harmonious and consistent urban environment.

Questions:

- Does the City Commission desire to require a formal, thorough site plan and design review for public development projects?
- If so, which board/commission should be responsible for the site plan and design review? What standards should be applied to public projects?
- Does the City Commission wish to have a guide outlining a set of standards for the review of public projects?

3. Woodward Avenue

The Planning Board has observed a heightened attention to the Woodward corridor from projects such as the Brown/Forest intersection and the road diet project that was recently completed in Ferndale. In addition, there are 8 or more recommendations within the 2040 Plan that are related to Woodward which could lead to large, multi-jurisdictional projects that involve significant policy decisions and need for significant involvement from City leadership.

- How does the City Commission wish to approach the Woodward Avenue right-of-way and the various ongoing and future proposals?
- Where should the recommendations regarding Woodward be in the prioritization of the 2040 Plan?

Planning Board

Type	Title	Description	Where	In Progress	Notes
Policy	Zoning Code Update	Update the zoning code. The following goals are provided greater detail within the chapters listed. See additional goals under “Best Practice Recommendations” in the “Update the Zoning Code” section.		☐	
	Comprehensive	Focus on brevity, clarity, graphics, and aligning zones with Future Land Use categories.	2	☐	
		Consolidate zones and uses as much as is practical and ensure the updated document is legible, clear, and predictable	2	☐	
		Extend D2 zoning to the multi-family properties along the west side of Old Woodward up to Quarton.	4	☐	
		Modify the MX District to enable the urban development envisioned for the Rail District.	4	☐	
		Develop an Overlay Zoning District for the Lower Rail District that permits the existing, but somewhat improved condition to persist for the area south of Palmer Street.	4	☐	
		Create a zoning district to enable neighborhood destinations.	1	☐	
		Reduce the amount of open space required per unit for townhomes and multi-family.	2	☐	
		Adjust residential zone boundaries and standards to better match existing housing. Including a study of the city’s residential architectural styles and building types, their key characteristics, position on their properties, driveway configuration, age, and the areas where each common type is located.	3	☐	
		Review and update site, building, and design codes to prevent increased rainwater runoff and other negative impacts from new house construction.	3	☐	
		Consider age-in-place-friendly building regulations, such as grab-bars, ramps, and elevators in single family homes, with careful attention paid to the city’s architectural heritage.	3	☐	
		Address neighborhood lighting standards, including exterior residential lighting intensity and color temperature. See the International Dark Sky Association recommended standards.	3	☐	
	Further Study	Create a new zoning district or modify the transition zone districts to enable infill development of small homes, townhomes, duplexes, and small multi-family buildings, limited to buffer and activity district seams.	2	☐	
		Develop storefront design, signage, and other standards to retain the small-scale business character of Market North.	4	☐	
		Enable Accessory Dwelling Units (ADUs) in already compatible zones: MX, TZ1, TZ3, and R4 through R8. Study ADUs for additional locations within the city and the regulations necessary to ensure compatibility.	2	☐	
		Create subdivision and zoning standards to encourage redevelopment of the Adam’s Square shopping center.	1	☐	
		Establish zoning standards to encourage redevelopment of South Woodward Gateway properties.	4	☐	
		Establish zoning standards to enable Neighborhood Sleeves in the South Woodward Gateway	4	☐	
		Establish zoning standards to enable shared-use alleys, particularly in the South Woodward Gateway.	4	☐	

		Incentivize South Woodward Gateway redevelopment through increased zoning capacity, permitting housing, and reduced parking requirements.	4	☐	
New Plans	Woodward Safety & Beautification Plan	Create a Woodward Safety and Beautification Plan. The following goals are provided greater detail within the chapters listed.		☐	(This section shared with MMTB)
		Improve Woodward crossings following best practices for pedestrians and cyclists.	1	☐	
		Study lane reduction and re-striping options for Woodward.	1	☒	
		Pursue a speed reduction on Woodward through legislative means.	1	☐	
		Plant a full and consistent tree canopy along the Woodward median throughout Birmingham, beginning with the northern and southern entries.	4	☐	
		Adjust Elm to meet Woodward perpendicularly.	1	☒	
		Adjust Worth to meet Woodward perpendicularly.	1	☐	
New Plans	North Old Woodward Streetscape	Develop a streetscape plan along North Old Woodward, up to Big Woodward, with a focus on adding on-street parking and pedestrian and bicycle amenities and improving safety	4	☐	
New Plans	Mixed-use Streetscape Plan	Create a streetscape improvement plan for the Triangle District and Rail District.	1	☐	
New Plans	Tree Canopy Improvement Plan	Create a Tree Canopy Improvement Plan. The following goals are provided greater detail within Chapter 3.		☐	
		Establish comprehensive policies for trees in streets and open spaces.	3	☐	
New Plans	Woodward Gateways Plan	Create a Woodward Gateways Plan to comprehensively address the three gateway areas along Woodward.		☐	
		Revisit and adopt plan components for the South Woodward Gateway Plan.	1, 4	☐	
		Create plan components for a North Woodward Gateway, including the future use of public land.	1, 4	☐	
		Create plan components a Downtown Gateway Plan for the Big Woodward and Maple intersection.	1	☐	
New Plans	Haynes Square Plan	Create a Haynes Square Plan which provides the details, timing, and funding for implementing Haynes Square recommendations.	1	☐	

Sustainability Board*

Type	Title	Description	Where	In Progress	
Policy	Zoning Code Update	Update the zoning code. The following goals are provided greater detail within the chapters listed. See additional goals under “Best Practice Recommendations” in the “Update the Zoning Code” section.		☐	
	Comprehensive	Advance building sustainability in new construction, especially within the City’s mixed-use districts and for municipal buildings.	5	☐	
Programs & Boards	Sustainability Board	Establish a Sustainability Board to oversee the recommendations of this plan section and other future sustainability initiatives.	5	☒	
New Plans	Green Infrastructure	Create a Green Infrastructure Plan to address stormwater run-off and areas experiencing regular flooding.	5	☐	
New Plans	Sustainability Action Plan	Create a Sustainability Action Plan. The following goals are provided greater detail within chapter 5.		☒	
		Reduce environmental impacts of municipal operations	5	☐	
		Incentivize green building, renewable energy, and green landscaping.	5	☐	
		Expand recycling and composting	5	☐	
		Implement green stormwater practices in streets and parks.	5	☐	
		Support Rouge River Natural Area improvements.	5	☐	
		Implement other sustainability focused recommendations of this plan.	5	☐	
		Create a Hazard Mitigation Plan addressing the City’s future climate	5	☐	
		Increase inter-governmental cooperation around sustainability initiatives.	5	☐	
		Study the best path towards encouraging or requiring businesses reduce plastic and Styrofoam use.	5	☐	
New Plans	Rouge River Restoration Plan	Develop a plan to improve and maintain the Rouge River natural area. The following goals are provided greater detail within chapter 5.		☐	
		Inventory and analyze the Rouge corridor’s wildlife, ecology, natural systems, and pollution sources.	5	☐	
		Stabilize riverbanks, remove invasive species, reintroduce native ground covers, wildflowers, under-story, and canopy tree species.	5	☐	
		Mitigate potential pollution or chemical sources, including the existing Springdale snow storage dumping area.	5	☐	
		Work with area organizations and agencies to oversee, build support, and raise funding for the park’s enhancements.	5	☐	
		Work with other area and regional organizations and communities to improve the quality of the Rouge River watershed.	5	☐	
New Plans	Tree Canopy Improvement Plan	Create a Tree Canopy Improvement Plan. The following goals are provided greater detail within Chapter 3.		☐	
		Create 5-, 10-, and 15- year goals to expand tree canopy cover.	3	☐	

		Study the condition of neighborhood tree canopies in parks and private spaces and potential improvements.	3	☐	
		Require that trees removed due to construction be replaced, as well as mandatory contributions to fund new off-site trees.	3	☐	
		Prevent existing, healthy trees from being removed due to new construction.	3	☐	
		Survey areas with constrained root area and establish a plan to add additional soil volume.	3	☐	

*Although a formal Sustainability Board does not exist at this time, the Ad Hoc Environmental Sustainability Committee will consider many of these key actions in their Sustainability and Climate Action Plan, and the rest may be considered by a future formal Sustainability Board.

Multi-Modal Transportation Board

Type	Title	Description	Where	In Progress	Notes
Policy	Zoning Code Update	Update the zoning code. The following goals are provided greater detail within the chapters listed. See additional goals under “Best Practice Recommendations” in the “Update the Zoning Code” section.		☐	
	Comprehensive	Adopt a policy requiring a minimum 6 foot clear path along the sidewalk throughout mixed-use districts.	4	☐	
New Plans	Woodward Safety & Beautification Plan	Create a Woodward Safety and Beautification Plan. The following goals are provided greater detail within the chapters listed.		☐	(This section shared with Planning Board)
		Improve Woodward crossings following best practices for pedestrians and cyclists.	1	☐	
		Study lane reduction and re-striping options for Woodward.	1	☒	
		Pursue a speed reduction on Woodward through legislative means.	1	☐	
		Plant a full and consistent tree canopy along the Woodward median throughout Birmingham, beginning with the northern and southern entries.	4	☐	
		Adjust Elm to meet Woodward perpendicularly.	1	☒	
		Adjust Worth to meet Woodward perpendicularly.	1	☐	
New Plans	Mixed-use Districts Parking Plan	Create a Mixed-use Districts Parking Plan. The following goals are provided greater detail within the chapters listed.		☐	
		Study bike parking and electric vehicle charging stations in garages.	4	☐	
Policy	Residential Street Standards	Update the Residential Street Standards, aligning the streetscape elements with Future Land Use categories. Update the Multi-modal Plan accordingly.	3	☐	
		Lower the posted speed on streets throughout town as much as possible.	3	☐	
Policy	Mixed-use District Streets	Adopt a policy requiring a minimum 6-foot clear path along the sidewalk be retained throughout mixed-use districts.	4	☐	
Existing Plan Updates	Multi-modal Plan Update	Update the Multi-modal Plan. The following goals are provided greater detail within the chapters listed. See additional goals under headings “Multimodal Plan Updates” and “Best Practice Recommendations for the Multimodal Plan” in Chapters 1 and 4.		☐	
		Address increased pedestrian activity anticipated in mixed-use districts that will grow in residential population.	1	☐	
		Support increased pedestrian activity on both sides of North Old Woodward and provide streetscape amenities.	4	☐	
		Complete gaps in sidewalks, add accessible corner ramps where not already specified, and replace street trees which are displaced by the process.	3	☐	
		Address recent experiences with increased outdoor dining.	1, 4	☐	
		Ensure bicycle facilities are protected on all streets posted at or above 35mph.	1	☐	
		Study bicycle accommodation alternatives along Lincoln.	3	☐	

		Include mobility routes based upon bicycle boulevard practices.	1	☐	
		Implement additional transportation mode best practices for new mobility technology and modes such as micro EVs, golf carts, and micro-mobility.	1	☐	
		Improve the conditions at bus stops along more major roads.	1	☐	
		Add Electric Vehicle charging stations throughout the city at garages, public parking lots, and on-street in Mixed-use Districts.	5	☐	
		Adopt a policy regulating street lighting, including intensity, color temperature, luminaire, and pole height and frequency.	3	☐	
		Include a public education component.	1	☐	
Existing Plan Updates	Eton Road Corridor Plan	Update the Eton Road Corridor Plan. The following goals are provided greater detail within Chapter 4.		☐	
		Increase connectivity for pedestrians, bikes, and cars for the area south of Hazel Street including future rail crossings.	4	☐	
		Provide access to the Troy Transit Center and consider the development of surrounding properties.	4	☐	
Studies	Circulator	Study a public circulator to provide viable means of accessing mixed-use districts and other significant destinations without a car.	1	☐	

City Commission

Type	Title	Description	Where	In Progress	Notes
Policy	Zoning Code Update*	Update the zoning code. The following goals are provided greater detail within the chapters listed. See additional goals under “Best Practice Recommendations” in the “Update the Zoning Code” section.		☐	
	Further Study	Encourage renovations to expand existing houses rather than the construction of new houses.	3	☐	
	Further Study	Allow cafes, food trucks, carts, and kiosks in parks (currently the Public Property district).	1	☐	
Policy	Unbundled Parking*	Pilot unbundled residential parking within Downtown parking garages.	2	☐	
Studies	Residential Districts Parking	Study citywide street on-parking restrictions and permits	3	☐	
New Plans	Mixed-use Districts Parking Plan*	Create a Mixed-use Districts Parking Plan. The following goals are provided greater detail within the chapters listed.		☐	
		Establish unbundled residential parking policies within Downtown garages.	2	☐	
		Establish unbundled residential parking policies in all mixed-use districts in existing and future parking garages.	2	☐	
		Provide public parking as recommended in the 2007 Triangle District Plan	1, 2, 4	☐	
		Provide public parking in the Rail District. Consider redevelopment of the DPS building to occupy a portion of a public parking garage in its place, which services the lower Rail District.	2, 4	☐	
		Provide public parking for the western Haynes Square district.	2	☐	
		Study opportunities to accommodate more monthly garage permits.	4	☐	
		Study monthly parking pass fees to better align with prevailing rates.	4	☐	
		Study tiered parking pricing to encourage use of under-utilized garages.	2, 4	☐	
		Study tiered parking meter pricing to encourage use of under-utilized on-street parking.	4	☐	
		Study the potential for Public Private Partnerships to construct garages.	1	☐	
		Study additional parking assessment districts or incremental tax districts for land purchases and financing the development of parking garages.	1	☐	
		Study parking garages at the Bates Street Extension and Lot 6.	4	☐	
		Study technological improvements to ease usage of parking garages.	4	☐	
Policy	Unimproved Streets	Adopt policy recommendations specified by the Ad-hoc Unimproved Streets Committee (AHUSC), including the following:		☐	
		Establish a yearly budget to remedy unimproved streets, considering the general fund plus bond strategy and repayment timelines.	3	☐	
		Survey the current condition of unimproved streets, categorized by the current quality such that streets in the most extreme states of disrepair can be prioritized for improvement.	3	☐	

		Remedy unimproved streets according to the repair priority and budget, ensuring improvements occur in multiple Planning Districts each year.	3	☐	
Studies	Civic Facilities Study	Study key civic facilities to continue to support Birmingham residents. The following goals are provided greater detail within chapters specified.		☐	
		Study the location, programming, and funding for new facilities for Next.	1	☒	
		Study a permanent, open-air farmers market pavilion with public restrooms on the portion of Lot 6 that is along Old Woodward.	4	☐	
		Establish policy to continue the tradition of constructing Birmingham’s civic buildings and parks as iconic structures and landscapes to the highest standards and at a civic scale	1	☐	
		Study how a Community Foundation / Fund may further Master Plan goals.	1	☐	
Existing Plan Updates	Parks and Recreation Master Plan Update	Expand the 2018 Parks and Recreation Master Plan or create a new plan beyond the 2022 horizon. The following goals are provided greater detail within the chapters listed. See additional goals under headings “Parks Best Practices” in Chapter 4.		☒	COMPLETED - Parks & Recreation Plan adopted in 2023
		Purchase part of the Adams Square parking lot for park space, or ensure that redevelopment would require that future park space be provided near Adams and Bowers.	3	☐	
Studies	Shared-use Streets*	Study shared-use streets. The following goals are provided greater detail within the chapters listed.		☐	
		Study a shared-use streetscape retrofit along with a social district in the Maple & Woodward district.	1, 4	☐	
		Study a shared-use street section along Cole and Commerce Streets.	4	☐	
		Study additional opportunities in other mixed-use districts.	1, 4	☐	
Boards & Programs	Civic Events	Extend the role of the Public Arts Board or other existing board, or establish a Civic Events Board, to develop regular civic events to continue engaging the community throughout the year and promote existing civic institutions.	1, 4	☐	
		Consider regular events in community parks.	3	☐	
		Consider activities and special events to attract office workers and residents to shop and dine downtown, including weekly events at Shain Park.	4	☐	
Studies	Parking Technology	Review master plan parking recommendations in 2030-35 to evaluate new technologies and trends.	4	☐	

**Likely to be directed to the Planning Board when City Commission is ready*

Parks & Recreation Board

Type	Title	Description	Where	In Progress	Notes
Existing Plan Updates	Parks and Recreation Master Plan Update	Expand the 2018 Parks and Recreation Master Plan or create a new plan beyond the 2022 horizon. The following goals are provided greater detail within the chapters listed. See additional goals under headings “Parks Best Practices” in Chapter 4.		☐	
		Differentiate parks by type to better determine appropriate amenities, services, and best practices.	3	☐	
		Utilize Planning Districts to determine sufficiency of park access across the city, availability of amenities, and consideration of activities and recreation in each season.	3	☐	
		Formalize the public use of school and institutional open spaces for neighborhood recreation, prioritizing under-served Planning Districts.	1, 3	☐	
		Develop Worth Park to provide needed open space for Torry.	3	☐	
		Develop the contemplated linear park and trail along the Rail District.	4	☐	
		Build a cafe or provide accommodations in Booth Park as recommended in the 2016 Downtown Plan.	1, 4	☐	
		Increase amenities and connections in Downtown’s parks and mini-parks.	4	☐	
New Plans	Rouge River Trails and Access Master Plan	Develop and implement a trails and access master plan to improve the Rouge River trails and trail heads.		☐	
		Install pedestrian linkages to the park’s surrounding neighborhoods and commercial districts, including to Quarton Road.	5	☐	
		Secure easements to expand the park area and improve its walkability, for complete ecological restoration, and universal accessibility.	5	☐	
		Coordinate with Bloomfield and Beverly Hills to expand trail connections.	5	☐	
		Install an environmentally sensitive, hard-surfaced pathway for pedestrians and cyclists along the Rouge River.	5	☐	
		Expand the extent of the trail system, crossing the river at more locations to access large portions of the natural area currently cut off.	5	☐	
		Install bridges, ramps, and other enhancements to enable access by all ages and abilities.	5	☐	
		Install other amenities such as bicycle racks, lighting, markers, seating, and signage at trail heads, and seating, markers, and interpretive features throughout the trail system.	5	☐	

Historic District Commission

Type	Title	Description	Where	In Progress	Notes
Policy	Historic Districts Policy	Adopt a policy to proactively establish new historic districts as well as landmarks.	3	☒	

Public Arts Board

Type	Title	Description	Where	In Progress	Notes
Policy	Public Art Policy	Permit murals and wraps like the popcorn utility wrap to be city-initiated or by the Public Arts Board.	1	☐	
Policy	Art Murals Policy	Implement an art-mural program for large blank wall surfaces in key locations. Coordinate with the Mixed-use Districts Branding Plan.	4	☐	

Wayfinding & Branding Committee

Type	Title	Description	Where	In Progress	Notes
New Plans	Woodward Safety & Beautification Plan	Create a Woodward Safety and Beautification Plan. The following goals are provided greater detail within the chapters listed.		☐	
		Provide way-finding and informational signage for public parking	1, 4	☒	
New Plans	Mixed-Use Districts Branding Plan	Create a Mixed-use Districts Branding Plan, in coordination with the Birmingham Shopping District, to brand the City’s multiple mixed-use districts.	1, 4	☐	



MEMORANDUM

Planning Division

DATE: May 22, 2024

TO: Planning Board Members

FROM: Nicholas Dupuis, Planning Director

SUBJECT: Triangle District Additional Bonus Height Provisions

As development applications have increased in the Triangle District of Birmingham, the Planning Board has expressed concerns over the proportions of mixed use buildings, specifically as it relates to the opportunity for bonus stories.

In the Triangle District, buildings or portions of buildings that are 100 feet or more from a single-family residential zoning district may have additional building where 2 or more of the following are provided as part of the development:

1. A multi-level parking structure that offers parking available to the public at the rate of one parking space available to the public for every 300 square feet of building floor area allowed in the additional stories. Where additional building height is proposed without additional stories, then the parking shall be based upon the building floor area in the top floor. The applicant may provide payment-in-lieu to the City for construction of parking in a public parking deck at an offsite location. Parking rates will be calculated as follows:
 - a. The rate of \$27,500 per space to match the current cost per above-ground structured parking space in 2018.
 - b. Starting July 1st, 2019, the rate of payment per parking space shall be increased by 3 percent each year.
2. Dedication of an improved public plaza with an area that is at least equal to 25% of the additional floor area of building area allowed in the additional stories. Where additional building height is proposed without additional stories, then public plaza space shall be based upon 25% of the building floor area on the top floor. The location and design of the plaza shall be approved by the Planning Board and shall be in accordance with the Triangle District Urban Design Plan.
3. A mixed use building that provides residential dwelling units above first-floor commercial where a minimum of 50% of the buildings floor area is residential.
4. Leadership in Energy and Environmental Design (LEED) building design, accredited based upon the rating system of the United States Green Building Council.

5. Transfer of development rights for additional floor area that zoning would permit on a site containing an historic building or resource designated under Section 127 of the Birmingham Code. The development rights shall be dedicated through recording a conservation easement on the designated historic resource, which shall be reviewed and approved by the Historic District Commission.

Using figures from recent development proposals, the percentage of commercial area provided has been less than 5 percent of total gross floor area, and in one case less than 2 percent. While the requirement noted above contains a clear percentage threshold for residential floor area, it does not address the commercial floor area.

Study Session #1

On August 9, 2023 ([Agenda](#) – [Minutes](#)), the Planning Division provided draft ordinance amendments for discussion at the Planning Board level. The amendment added a percentage required for commercial uses alongside the minimum residential percentage. During the discussion, it was determined that adding a simple broad percentage may not address the issue fully in that it would not meet what the Planning Board felt was the intent of the [Triangle District Urban Design Plan](#). The Planning Board directed the Planning Division to explore percentage requirements for the first floor excluding parking, frontage lines, and the type of commercial uses that the City would prefer to see in these spaces.

Study Session #2

On September 13, 2023 ([Agenda](#) – [Minutes](#)), the Planning Division revised the proposed ordinance language to better capture the intent of the changes requested in terms of activation, and provided more clarity on where/what the commercial space would be, and what size the commercial space should be. The Planning Board revisited the LEED incentive and expressed some desire to improve that condition while we have the ordinance language open.

Study Session #3

On October 11, 2023 ([Agenda](#) – [Minutes](#)), the Planning Board reviewed revisions that made an attempt to define what activation means in the spirit of the Triangle District Urban Design Plan, and what we should be looking for on the ground floors of buildings in the Triangle District. The Planning Division also provided data on the composition of the first floors of the recent developments in the Triangle District for consideration. During the discussion, the Planning Board requested revisions to try to promote activity rather than focus on specific uses or percentages, especially along the streets of Adams, Haynes, Bowers, Woodward and Maple. In addition, the LEED provision were further discussed in terms of usefulness and enforceability. Ultimately, the Planning Division asked for another opportunity to further analyze the LEED condition as it relates to the concerns expressed by the Planning Board.

Study Session #4

On November 8, 2024 ([Agenda](#) – [Minutes](#)) the Planning Division presented researched LEED certification further including feedback from several LEED professionals to better understand the different challenges that relate to this specific ordinance requirement. The concerns were summarized into two main categories: *certification level* and *enforceability*.

Certification Level: It has been stated several times that the base-level LEED certification ("LEED Certified") is too similar to current codes to warrant the issuance of up to two additional bonus stories for developments in the Triangle District. Even the second level

of certification, LEED Silver, may not provide enough of a public benefit to earn the same two “bonus” levels. However, LEED certifications of Gold and/or Platinum do seem to pull away from the base-level codes and provide a development with a greater opportunity to reduce a buildings energy sage and enhance the natural environment. This is directly correlated to the Triangle District Urban Design Plan and its goal to encourage sustainable development. The Planning Division does understand that there is a significant cost to LEED certification in both time and capital, but was reassured by LEED professionals that the benefits, both to the developer and the City, could be worth the investment with the two bonus stories. As noted in the previous study session, the various LEED certification levels are based on points accumulated from the [LEED Checklist for Building Design and Construction](#).

Enforceability: The Planning Division acknowledges the uniqueness of LEED certification as it relates to the other requirements in that a developer cannot achieve certification until the building has been constructed. The Planning Division also has learned and acknowledges that LEED certification may not come immediately, and that it could take 1-2 months post-construction in a best-case scenario to finish the requirements for certification to be able to submit to the City. That being said, there may be mechanisms for the Planning Division and Planning Board to ensure that LEED certification is being pursued, and that certification has been granted.

The solution to ensuring LEED certification could come in 3 phases. First, the applicant would outline their plans for certification to the Planning Board at Community Impact Study and Preliminary Site Plan Review. Once accepted/passed, the conditions for bonus stories chosen by the applicant would be included in the conditions of approval. When the applicant applies for building permits, the permits would only be issued by the Planning Division with a signed affidavit from the applicant expressing their understanding of the requirements and the expectations of the Planning Board. Finally, the City could withhold a full certificate of occupancy (issuing a temporary certificate of occupancy) until the applicant furnished a full certificate of completion.

Study Session #5

On May 9, 2024 ([Agenda](#)), the Planning Department discussed a “reset” on the subject to better understand the goals of the Planning Board and the direction in which they would like to go. The following questions will help guide the conversation into the future and provide the Planning Department with a general direction on what direction to go with revised ordinance language proposals. The following questions were discussed:

1. Does the Planning Board wish to remove the LEED incentive for bonus stories? If so, does the Planning Board want to make LEED certification standard or required for all new buildings in the Triangle District instead? Remove altogether?
2. In regards to mixed-use requirements, would the Planning Board entertain a simple percentage requirement for commercial use on first floor habitable space?
3. Considering the 2040 Plan and other relevant current positions, should other incentives be revised to reflect current realities (transfer of development rights, parking payment, public plaza)?

Study Session #6

At this time, there is consensus at the Planning Board that a more comprehensive review of the development incentives for additional building height in the Triangle District. In general, the Planning Board seemed interested in revisiting all of the conditions and constructing a new list based on the recommendations of the Birmingham Plan 2040, current conditions, public needs, and other health, safety and welfare considerations. The current ordinance was drafted based on the principles and recommendations of the Triangle District Urban Design Plan (2007), some of which have been carried over into the 2040 Plan. In order to achieve a robust and thorough review of options, the Planning Board requested a list of options to consider and ultimately building an ordinance around those that provide a clear public purpose and is based on the principles of the City's master plans. Below is a list of considerations (in no particular order):

- Public Parking
- Sustainability
- Transit Access
- Affordable Housing
- Public Amenity (Parks & Open Space)
- Urban Design
- Mixed-Use
- Historic Preservation
- Childcare

In addition, the Planning Board suggested the possibility of phasing and taking care of a short-term need while continuing work on the larger goals for the Triangle District. The attached language is intended to address the short-term need.

CITY OF BIRMINGHAM

ORDINANCE NO. _____

THE CITY OF BIRMINGHAM ORDAINS:

AN ORDINANCE TO AMEND THE ZONING ORDINANCE OF THE CITY OF BIRMINGHAM:

TO AMEND ARTICLE 3, SECTION 3.08, HEIGHT AND PLACEMENT REQUIREMENTS, TO ADD COMMERCIAL FLOOR AREA REQUIREMENTS TO BONUS HEIGHT PROVISION.

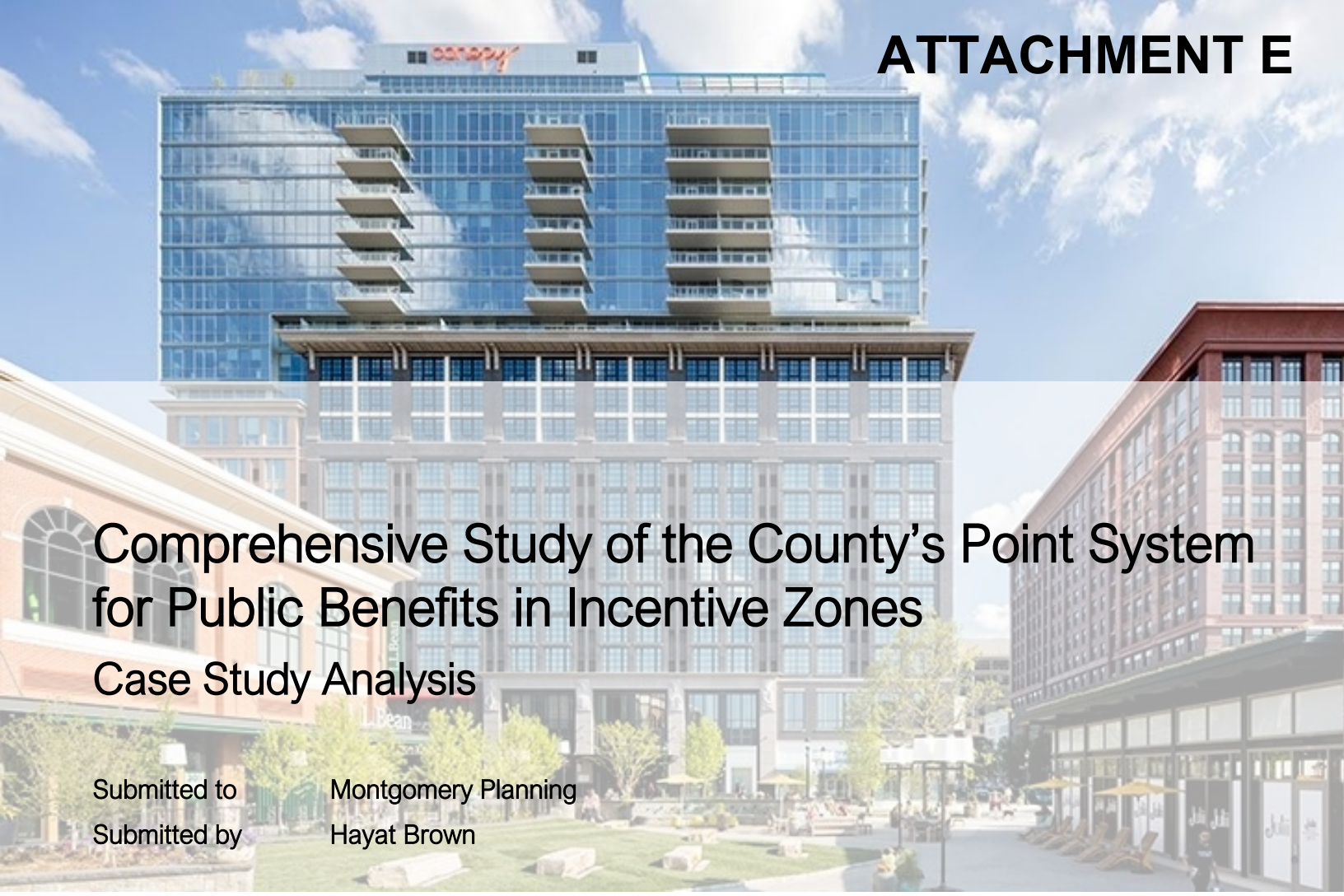
- E. Additional Building Height: Buildings or portions of buildings that are 100 feet or more from a single-family residential zoning district may have the additional building height (in number of stories and/or feet of height) noted in Section 3.08B, Section 3.08C, and Section 3.08D where 2 or more of the following are provided as part of the development. Additional stories shall be stepped back at a 45-degree angle from the top story allowed by right without the height bonus.
1. A multi-level parking structure that offers parking available to the public at the rate of one parking space available to the public for every 300 square feet of building floor area allowed in the additional stories. Where additional building height is proposed without additional stories, then the parking shall be based upon the building floor area in the top floor. The applicant may provide payment-in-lieu to the City for construction of parking in a public parking deck at an offsite location. Parking rates will be calculated as follows:
 - a. The rate of \$27,500 per space to match the current cost per above-ground structured parking space in 2018.
 - b. Starting July 1st, 2019, the rate of payment per parking space shall be increased by 3 percent each year.
 2. Dedication of an improved public plaza with an area that is at least equal to 25% of the additional floor area of building area allowed in the additional stories. Where additional building height is proposed without additional stories, then public plaza space shall be based upon 25% of the building floor area on the top floor. The location and design of the plaza shall be approved by the Planning Board and shall be in accordance with the Triangle District Urban Design Plan.
 3. A mixed use building that provides residential dwelling units above first-floor commercial where a minimum of 50% of the buildings first floor area is residential- **and a minimum of 50% of the buildings first floor habitable area is commercial.**

4. Leadership in Energy and Environmental Design (LEED) building design, accredited based upon the rating system of the United States Green Building Council, **at a level of Gold or higher. To ensure that LEED certification is achieved, the applicant must provide the following:**
 - a. **A draft LEED checklist for review by the Planning Board at Community Impact Study and Preliminary Site Plan Review;**
 - b. **At the Building Permit phase, an updated checklist and signed affidavit demonstrating an understanding of the requirement as it relates to additional building height and the issuance of a full Certificate of Occupancy;**
 - c. **A completed and verified certificate of accreditation before a full Certificate of Occupancy will be granted.**
5. Transfer of development rights for additional floor area that zoning would permit on a site containing an historic building or resource designated under Section 127 of the Birmingham Code. The development rights shall be dedicated through recording a conservation easement on the designated historic resource, which shall be reviewed and approved by the Historic District Commission.

ORDAINED this _____ day of _____, 2024 to become effective 7 days after publication.

Elaine McLain, Mayor

Alex Bingham, City Clerk



Comprehensive Study of the County's Point System for Public Benefits in Incentive Zones Case Study Analysis

Submitted to
Submitted by

Montgomery Planning
Hayat Brown

December 5, 2023

Hayat Brown

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1. Introduction

Overview and Methodology

The Hayat Brown team developed a series of case studies highlighting developer incentive programs in municipalities in the greater Washington DC region and across the country. These case studies are focused on accomplishing two goals:

- Identifying successful programs implemented in comparable municipalities beyond the region and highlighting specific elements that Montgomery Planning could consider as a part of this update.
- Understanding how regional peer jurisdictions employ programs to incentivize the delivery of specific public benefits by offering additional density, height, regulatory, and financial incentives.

The team worked with Montgomery Planning to identify appropriate case study subjects with each municipality providing valuable insights and recommendations for future initiatives. Six case studies were selected, three focused on national municipalities – Austin, Texas; Detroit, Michigan; and Seattle, Washington; along with three regional municipalities – Arlington, Virginia; Fairfax, Virginia; and Washington, D.C. The analysis of the three national case studies focused on identifying best practices that might be considered for Montgomery Planning's update to its Incentive Zoning policy while the three regional cases focused on understanding how incentive programs are utilized to encourage the delivery of specific public benefits. Associated pros and cons are also enlisted for each regional jurisdiction.

In the section that follows, we provide a detailed description of each case study.

2. Case Study Analysis

Austin, Texas

Background

Austin is the capital city of Texas and is in the central part of the state. The city has a comparable population (975,000) to Montgomery County (1.02 million), although at 305 square miles, it is physically smaller than Montgomery County (500 square miles). The city has a strong and growing economy which has significantly increased real estate development over the past 10 to 20 years. This rapid expansion has also created challenges such as a lack of affordable housing and concerns about maintaining the city's unique character. Austin appears in professional and academic studies as a strong example of a city with an incentive zoning program. Austin's programs have been more effective in generating affordable housing units and payment in lieu than peer cities. [1] [2]

Program Overview – Downtown Density Bonus Program

Austin's Downtown Density Bonus Program (DDBP) is an incentive-based policy established in 2014 to promote a vibrant, dense, and pedestrian-friendly downtown area while also encouraging the development of affordable housing and other community benefits.[3] Similar to Montgomery County, this program allows developers to achieve greater height and density in exchange for providing a high-quality building and streetscape as well as community benefits. The DDBP applies to certain areas within the city, as established by zoning ordinance which also stipulates maximum FAR and heights that applicants can achieve through the program. This is a comparable approach to the incentive zones in Montgomery County.



According to the Austin Planning & Zoning Department, the fundamental principles underlying the density bonus program are:[4]

1. Density should be encouraged, not penalized.
2. Retain existing zoning as the baseline.
3. All development should provide high-quality urban design.
4. There should be a clear administrative, and predictable pathway to density.
5. Allow additional density only where appropriate.

Participation in the program is optional and allows developers to capitalize on the growing demand for housing while helping the city meet its housing goals. If an applicant opts into the program, in addition to providing affordable housing that unlocks incrementally more density, there are 'gatekeeper requirements' that all projects in the DDBP process must abide by. These include providing a streetscape that meets Austin's Great Streets Program requirements, committing to achieving a minimum two-star rating under Austin Energy's Green Building (AEGB) program, and being compliant with Austin's Urban Design guidelines. Compliance with these programs includes executing restrictive covenants and receiving approval from the Design Commission. [5] This contrasts with Montgomery County, where the applicant can choose from any of the 36 public benefits in the menu. (Optional method projects may be associated with other requirements such as adequate public facilities and functional plan conformance, but these requirements are technically independent of the incentive zones and points system).

Development Incentives

The primary incentives provided through the DDBP are additional height and density. Developers may generate bonus density above a project's base entitlement up to an area's maximum FAR and height as defined in the DDBP ordinance.

The DDBP is part of a group of development incentive programs in Austin that promote rental and for-sale affordable housing for low- and moderate-income households. In addition to providing affordable housing for more density and height through the DDBP, Austin also has other affordable housing incentives independent of the DDBP including fee waivers, density bonuses, and tax incentives. Affordability is also supported through development agreements such as land lease agreements and master development agreements that may waive aspects of the zoning code in exchange for additional affordable housing on a fee-in-lieu [8]. Like Austin, Montgomery County offers multiple policies incentivizing affordable housing, which highlights its significance as a development goal in both jurisdictions.[6] For additional information, please see a summary of Austin's affordable housing development incentive programs in Attachment A.[6]

Implementation

To comply with the DDBP, an applicant must meet the gatekeeper requirements and outline the specific benefits they will include beyond the gatekeeper requirements. Public benefits are associated with different amounts of bonus density. At least 50% of the bonus must be achieved by providing affordable housing units or by paying a development bonus fee into the Affordable Housing Trust Fund. In addition to affordable housing, developers may provide additional benefits such as daycare services, cultural uses, live music uses, historic preservation, sustainability features, and publicly accessible space.[7]

Table 1 summarizes the different amount of density associated with each public benefit.

Table 1: Downtown Density Bonus Community Benefit Summary Table[7]

Community Benefits	Description	Bonus Amount
Affordable Housing*	Must provide affordable units for sale (units must remain affordable for 99 years and must be affordable to those making 120% of MFI or less) or for rent (units must be affordable for a minimum of 40 years and must be affordable to those making 80% of MFI or less)	1 sf of bonus area for each 1 sq foot of on-site affordable housing
Rainey Street Subdistrict Historic Preservation	Must rehabilitate or preserve historically significant buildings on-site or relocated to a location as determined appropriate by the Historic Landmark Commission.	25,000 sf of bonus area for each restored and preserved building
Day Care Services	Must execute a restrictive covenant to provide daycare services within the project for a period of at least 10 years.	2 sf of bonus area for each 1 sq foot of daycare service space
Cultural Uses	Must execute a restrictive covenant to provide on-site cultural uses within the project for a period of at least 10 years.	2 sf of bonus area for each 1 sf of cultural use space
Live Music	Must provide on-site live music use for a period of at least 10 years.	2 sf of bonus area for each 1 sf of live music space
On-Site Improvements for Historic Preservation	Must provide on-site improvements for historic preservation.	5 sf of bonus area shall be granted for each 1 sf of historic building preserved on-site
Off-Site Historic Preservation	Must pay a development bonus fee to the Historic Preservation Fund administered by the City of Austin.	See Table 2 below for fee details
Green Building	Must construct project to green building standards that exceed Gatekeeper Requirements and execute a restrictive covenant committing to achieving a specific rating under the AEGB Program or the LEED Program currently in effect.	Bonus area equal to 25% of the site's primary entitlement for 3-star AEGB or LEED Silver rating
Publicly Accessible On-Site Plaza	Must provide a publicly accessible on-site plaza.	5 sf of bonus area for each 1 sf of eligible plaza space
Off-site open space	Must pay a development bonus fee for off-site open space	See Table 2 below for fee details
Green Roof	Must provide a green roof built to the Vegetated Roof Performance standards in the Environmental Criteria Manual	See Table 3 for benefit details.

*Developers may receive an additional bonus area of 150 square feet for each family-friendly eligible bedroom (any bedroom over one bedroom within a dwelling unit that provides affordable housing)

Importantly, the DDBP also offers a fee-in-lieu as an alternative means of compliance for projects to achieve bonus density without providing public benefits on site. Table 2 summarizes the range of fees, which are sensitive to development type and location.

The fees were calibrated by Housing and Planning Department staff using an excel-based calibration tool created by economic consultants, EcoNorthwest, in 2020. The research and analysis completed by Housing and Planning Department staff to calibrate the fees involved tuning the model to the zoning parameters of the current Land Development Code, updating the Affordable Housing Policy inputs, and testing a range of market scenarios. [8]

Table 2: Downtown Density Bonus Fee In-Lieu Table*[9]

Development Type	Downtown District	Development Bonus Fee (\$/SF Bonus Area)
Residential	Rainey Street District	\$5/ SF Bonus Area
Residential properties with CBD	All Districts other than Rainey Street District	\$12/ SF Bonus Area
Residential properties with zoning other than CBD	All Districts other than Rainey Street District	\$10/ SF Bonus Area
Commercial properties with CBD zoning	All Districts	\$18/ SF Bonus Area
Commercial properties with zoning other than CBD	All Districts	\$12/ SF Bonus Area

*Development Bonus Fees were updated May 31, 2021

These fees are directed towards supporting housing solutions for individuals experiencing chronic homelessness. The focus of these funds is on housing approaches that have low barriers to entry (Immediate and easy access shelters that have lower barriers to entry and are open 24/7).[8]

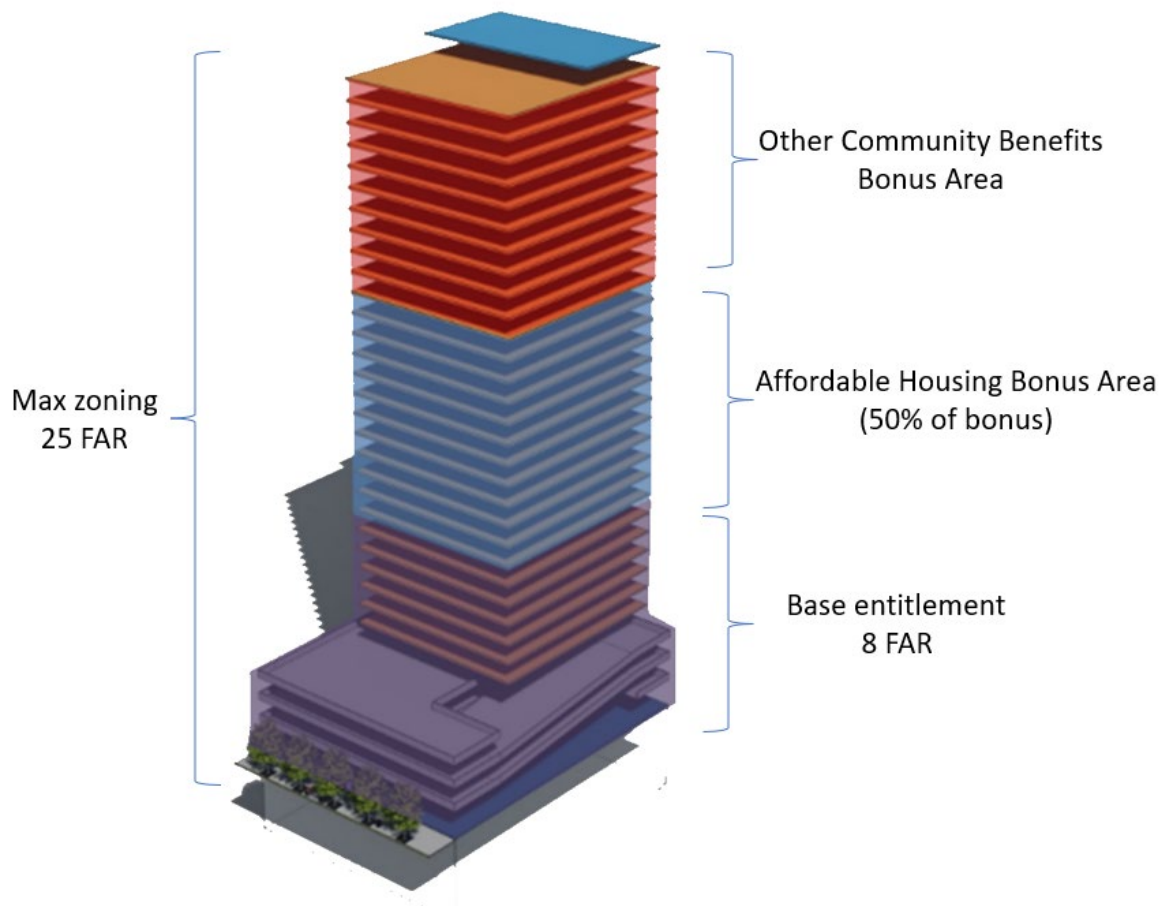
Table 3: Bonus Area for Green Roof Community Benefit[7]

Percent Vegetated Roof Cover	Bonus Area Granted for 1 Square Foot of Green Roof	Bonus Area Granted for 1 Square Foot of Publicly Accessible Green Roof	Bonus Area Granted for 1 Square Foot of Green Roof meeting the Downtown Public Plaza Standards
30-49%	2 bonus square feet	2 additional bonus square feet	2 additional bonus square feet
50% or greater	3 bonus square feet		

Example

In the image below, an example project is shown maxing out available density. In this example, 50% of the developer's bonus area was generated by providing affordable housing (or paying the fee-in-lieu), and the remaining 50% was generated by providing additional community benefits. Notably, the applicant could build up to 8.0 FAR by right and not go through the DDBP process. In Montgomery County, the public benefits are triggered once an applicant seeks 0.5 or 1.0 FAR, a much lower threshold. Mapped density does not typically exceed 8.0 FAR anywhere in Montgomery County, so the underlying economics of the Austin and Montgomery County programs may be different.

- Figure 1: Sample Project Receiving Bonus Density^[10]



Best Practices

The Austin DDBP Program has three key best practices relevant to Montgomery Planning.

1. Similar to many cities across the country, Austin has a lack of affordable housing. In response, the DDBP program requires that 50% of the density bonus must be achieved by providing affordable housing. This element of the program ensures that developers are providing the community benefit seen as most valuable to the city. Montgomery Planning could similarly identify specific public benefits and clearly identify them as countywide priorities. Currently, public benefits are only prioritized through the master planning process for the relevant neighborhoods.
2. The DDBP Program requires that all projects requesting bonus density meet gatekeeper requirements. As discussed in the implementation section above, the DDBP program specifically includes three key gatekeeper requirements that assist the city with furthering design and sustainability goals in addition to receiving community benefits in exchange for density. Montgomery Planning could articulate “Gatekeeper Requirements” to all optional method projects requiring that those projects meet expected levels of design, sustainability, etc. This could allow the department to streamline the overall menu of public benefits and align it more directly to desired policy outcomes.
3. Every three years, the City Manager, per the DDBP ordinance, is tasked with evaluating and if necessary, recommending adjustments to the development bonus fees, the menu of community benefits, the on-site affordable housing bonus area, and the allocation of money generated by bonus fees. This clause helps to ensure that the program remains market-feasible and continues to incentivize developers to provide critical community benefits. Ongoing monitoring and a streamlined process to make changes to the point system would similarly enable Montgomery Planning’s Incentive Density Program to remain nimble in responding to changing market conditions and updated policy priorities over time.
4. The City of Austin clearly articulates the fundamental principles guiding the bonus density program, acknowledges additional density as a desired outcome and emphasizes the importance of a clear regulatory process.

Detroit, Michigan

Background

Detroit, Michigan is a city with a diverse population. As of 2022, the estimated population is around 620,376. However, the city has experienced a significant decline in population over the past few decades, as it was home to over 1.8 million residents in the 1950s.

The city of Detroit, Michigan is transforming, reflecting the city's revitalization efforts and economic diversification. Like Montgomery County, Detroit seeks to strike a balance between preserving its diverse neighborhoods and introducing new developments to attract investors and businesses. Detroit's historic architecture, relative affordability, and redevelopment incentives have drawn opportunity-seeking businesses. Downtown Detroit is seeing the conversion of vacant buildings into mixed-use developments, apartments, and entertainment spaces. However, challenges related to high vacancy rates remain.

Program Overview – Community Benefits Ordinance

Detroit, Michigan faced severe economic challenges in recent decades which led to the decline of its neighborhoods and the erosion of community trust. In response, the city enacted the *Community Benefits Ordinance* (CBO) in 2016, aimed at fostering equitable development and community engagement. The CBO was amended in 2021. The Detroit CBO establishes requirements for developers seeking major projects, including the provision of Community Benefits Agreements (CBAs) negotiated with neighborhood representatives. [11]



The CBO outlines a transparent process including public meetings with the Neighborhood Advisory Council (NAC) and the developer during the development of the CBA and annual public meetings for a specified period post-CBA execution. Additionally, the CBO provides for compliance monitoring and enforcement which is overseen by the city's Civil Rights, Inclusion, and Opportunity Department (CRIO). Per the ordinance, CRIO produces a biannual compliance report as well as periodic compliance monitoring reports for each project, a copy of the biannual compliance report executive summary is provided in Attachment B. If a project is found to be out of compliance, CRIO may use enforcement mechanisms that include withholding or withdrawing city-provided benefits, revocation of land transfers or land sales, debarment provisions, and proportionate penalties and fees.

Since the ordinance was enacted, residents have secured many commitments and benefits from developers for their communities through the process. CRIO is currently monitoring 11 projects, as shown in the table below.

Table 4: Detroit CBO Active Projects*[12]

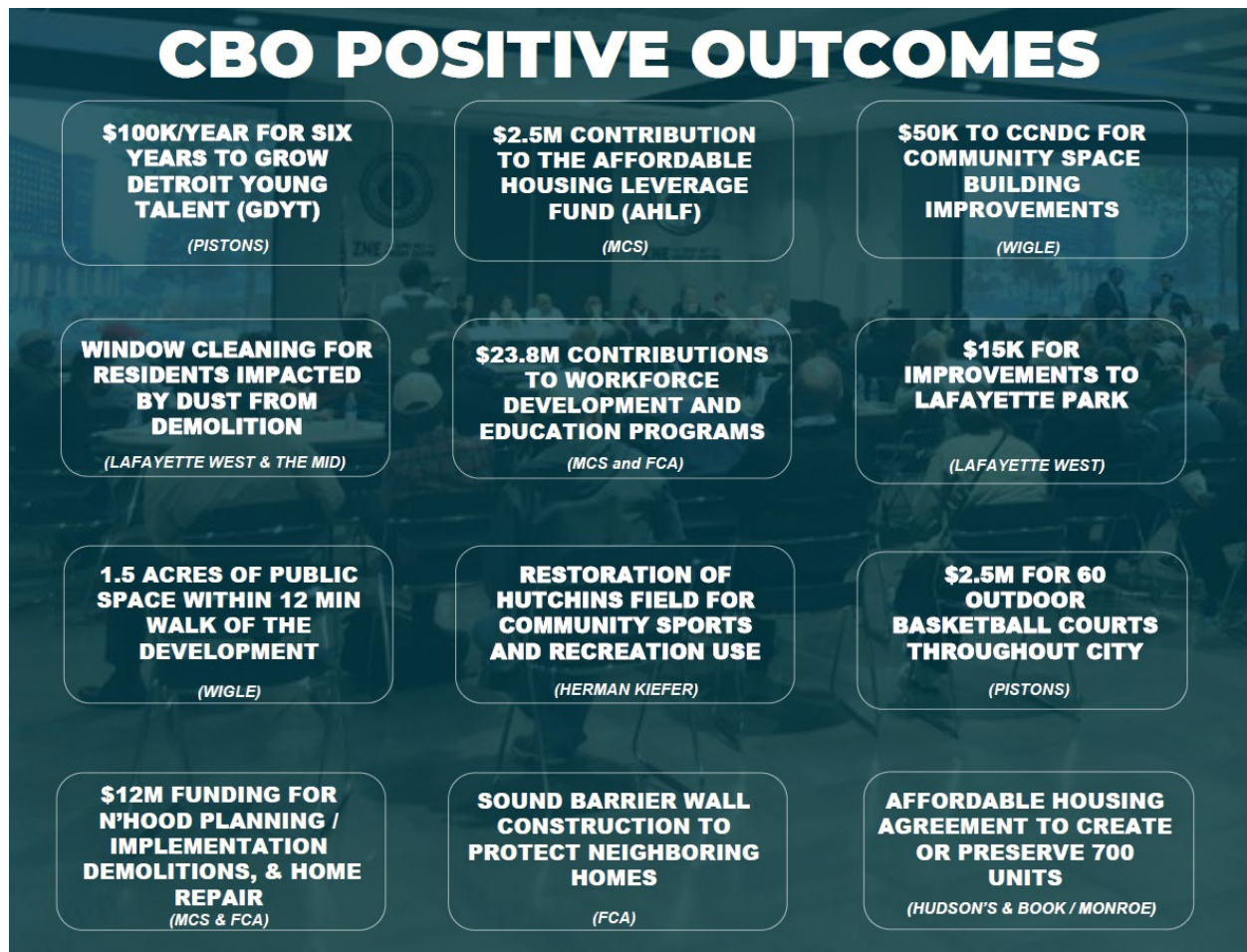
Project Name	CBO Commitments	NAC Meetings
Herman Kiefer	12	5
Hudson's	19	5
Michigan Central Station	43	8
Book Building and Tower	20	6
Monroe Blocks	26	6
Detroit Pistons Performance Facility and HQ	24	6
Wigle: Midtown West	23	8
Fiat Chrysler Assembly Plant	67	8
Lafayette West	55	5
The Mid	26	5
Michigan and Church	63	6

*For additional information on each project and the full list of CBO commitments, please see the links above.

The compliance monitoring process includes determining whether each CBO commitment is on track.

The CBO has produced a significant number of public benefits for the community as shown in Figure 3, below. However, the program's critics feel that the NACs are not extracting enough from developers due to the relatively short negotiation timeframe and the fact that NAC members are not always well equipped to negotiate with developers.^[13] Other criticisms include concerns about the size of the program's thresholds as several high profile projects did not trigger the CBO, for example, a \$71M plan to redevelop the former American Motors headquarters missed the \$75M minimum. ^[14]

Figure 2: CBO Outcomes^[15]



Implementation

The Community Benefits Ordinance applies to development projects that are greater than \$75 million in construction cost, receive \$1 million or more in property tax abatements, or receive \$1 million or more of city land (through a sale or transfer) as determined by the City Assessor or independent appraiser. The process begins with a review of the project scope. The City's Planning department subsequently uses that information to define the project's impact area. The city then convenes a nine-member NAC consisting of impact area residents selected by the Planning Department, the neighborhood, and local elected officials. The NAC is charged with negotiating with the developer on behalf of the community and establishing community benefits that address potential negative impacts of the proposed development. There is a template community benefits agreement, however, the benefits package developed for each project is unique. The process typically takes about three months and includes public meetings to ensure transparency. The negotiated benefits are included in the final development agreement that is approved by the Detroit City Council.^[16]

Best Practices

The Detroit CBO Program has two key best practices relevant to Montgomery Planning.

1. One of the central principles of the CBO is community engagement. Developers are required to engage with the affected communities to gather input, understand concerns, and negotiate community benefits that address the specific needs of the area. The inclusion of community input is key to promoting transparency, engagement, and equity in the development process. While Montgomery Planning currently requires developers to hold pre-application meetings with community members, and community members are invited to provide testimony during the planning board approval process, the role community members play in outlining the public benefits delivered could potentially be strengthened.
2. Another key aspect of the CBO is ensuring ongoing compliance with negotiated agreements. The ordinance provides for a detailed compliance monitoring process and outlines enforcement mechanisms to ensure that the City receives the agreed upon benefits in a timely manner. As mentioned previously, ongoing monitoring and a streamlined process to make changes to the point system would similarly enable Montgomery Planning's Incentive Density Program to remain nimble in responding to changing market conditions and updated policy priorities over time.

Seattle, Washington

Background

Seattle is the largest city in Washington and the 17th largest city in the United States, with a population of 749,256, is notably smaller in population when compared to Montgomery County (1.05M). Seattle's population has seen a 1.7% growth rate from 2020 to 2022, following the last census in 2020, which recorded a population of 737,018.

Like Montgomery County, real estate development in Seattle has surged in recent years, where the economy has been shaped by the tech industry's presence, led by companies like Amazon and Microsoft. Demand for both residential and commercial properties has resulted in a surge in construction and redevelopment projects. This growth has transformed Seattle into a thriving city but has also created concerns about housing affordability and preserving green spaces.

Program Overview – Incentive Zoning Program

Seattle, Washington has maintained an incentive zoning program since the 1980s. The goal of the program is to help the city achieve certain public policy objectives in exchange for additional density. The program was originally implemented in the central business district (CBD) and has been expanded to include additional areas of the city. Developers may provide public amenities across five categories: affordable housing, childcare, open space amenities, transferable development potential, and rights or regional



development credits in exchange for extra floor area.^[17] Developers may deliver affordable housing, childcare, and open space amenities on-site or off-site (performance option) or have the option to make contributions to city departments instead of providing public amenities (payment option). In exchange, developers get extra floor area or height beyond the base amount allowed for their building by the Land Use Code up to a maximum FAR or height. The ability to deliver amenities on-site or off-site under the performance option or to exercise the payment option provides developers with flexibility. For instance, a commercial developer may have the option to provide affordable housing off-site or through the payment option, as applicable, given the project's zone.

The incentive zoning requirements vary by zone and some zones have minimum green building or transportation management standards, similar to the gatekeeper requirements adopted by the city of Austin, which must be met to qualify for the program. Additionally, some zones require a combination of public amenities to gain extra floor area, the options are determined by the zone, building height, and project type. This attempts to align the benefits required with the characteristics of the zone. For

zones with height limits of 85 feet or less, all extra floor area must be achieved through providing affordable housing and childcare. [18] For zones with height limits greater than 85 feet, residential floor area must be achieved by providing 60% affordable housing and 40% other benefits, for nonresidential floor area, 75% of bonus area must be achieved by providing affordable housing and 25% through other benefits.[19]

Under the performance option, the total amount of the required public amenity is determined by the applicable percentage of affordable housing or by a childcare percentage slot, both are established by the land use code. Currently, developers must provide affordable housing equal to 15.6% of extra floor area for commercial use, and equal to 14% for residential use. For example, to qualify for 10,000 square feet of extra residential floor area, a developer must multiply the square footage times the applicable percentage of affordable housing – 10,000 times 14% – to determine the minimum required square footage of affordable housing or 1,400 square feet in this example. The current land use code reduces the requirement to 8% if restricted to households with incomes of 50% of median income or below. In a zone where the childcare facility space must be sufficient to support 0.000127 childcare slots, to qualify for 100,000 square feet of extra floor area, a developer must multiply the square footage times the applicable number of childcare slots – 100,000 times 0.000127 – to determine the minimum number of children care slots required or 12.7 in this example. Of these slots, 20% must be affordable or 2.54 slots.

The payment in lieu of the affordable housing option is restricted to buildings in zones where the maximum height is greater than 85 feet. The current Land Use Code sets the affordable housing payment at \$15.15 per square foot for residential and \$18.75 for nonresidential. The fees are scheduled to increase to \$21.68 and \$24.43, respectively, and will continue to increase annually with inflation. The payment in lieu of providing childcare is \$3.25 per square foot of extra floor area.[20]

In zones where open space public amenities are allowed, under the performance option, extra floor area is based on a bonus ratio. It is shown as the ratio of extra floor area for a given square foot of public amenity. The table below shows the current bonus ratios for each open-space public amenity.

Table 5: Open Space Public Amenity Bonus Ratios

Open Space Public Amenity	Bonus Ratio (extra floor area sf:public amenity sf)
Neighborhood Open Space	7:1
Green Street Setback	5:1
Green Street Improvement	5:1
Mid-block Corridor	7:1
Residential or Non-residential Hillside Terrace	5:1

The only open space public amenity with a payment option is neighborhood open space. The payment is based on estimated per-square-foot land value based on recent transactions.

In zones where transferable development potential and transferable development rights are permissible, a developer may transfer excess, unused floor area on a 1:1 basis from another lot. Typically, this occurs on lots not developed to their full potential, such as lots with designated landmarks, low-income housing developments, major performing arts facilities, public open space, or vulnerable masonry structures.

Developers may receive regional development credits from farms and working forests in the region if their site is located in a designated area. Projects receive extra floor area for each regional development credit. The specific square footage per credit is set in the Land Use Code.

The incentive zoning program has been effective in the CBD and was used by 40 projects between 2004 and 2018, with 14 of those projects fully meeting their incentive requirements through the provision of affordable housing and childcare facility contributions and the remainder meeting their incentive requirements through a combination of affordable housing, childcare facility contributions, and other public amenities.

Implementation Process

To begin the incentive zoning process, developers must submit plans documenting compliance with the incentive zoning program as a part of their application for a Master Use Permit (MUP). Documentation includes detailed diagrams, FAR calculations, and calculations for incentive zoning performance or payment. In addition to the plans, the city also reviews any related declarations, covenants, or agreements. The city records a declaration for all projects using incentive zoning and creates a draft of the declaration at the MUP stage. The declaration is finalized and recorded after reviewing final plans during the building permit stage. The timing of the process varies depending on the size and complexity of the project, but the approval process is included in the city's standard development entitlement process.

Best Practices

Studies have shown that Seattle's incentive zoning program has had a positive impact on affordable housing[21]. Seattle's incentive zoning program has also been successful in promoting public benefits beyond housing. The program has led to the creation of public spaces, improved pedestrian amenities, and enhanced streetscapes in certain areas. These community benefits contribute to the overall livability and quality of life in Seattle.

The Seattle Incentive Density Program utilizes the following best practices relevant to Montgomery Planning.

1. Payments in lieu of affordable housing are adjusted annually based on the CPI, which helps to ensure that the payments remain in line with market metrics. Montgomery Planning could similarly explore ways to update payment in lieu options more frequently than the current standards for various public benefits.

2. The Land Use Code allows for a reduction in the amount of affordable housing provided if a developer provides deeper affordability. This mechanism helps to increase the amount of affordable housing offered at various income levels. Montgomery Planning could explore ways to incentivize a broader range of affordability by calibrating the points awarded for providing various levels of affordable housing.
3. The program recognizes the diversity in building types and typical heights for residential and commercial projects. Structuring the required benefits and density bonus according to these variations, promotes development and public amenities that are aligned with the unique characteristics of each zone.
4. The program offers developers the flexibility to deliver amenities on-site or off-site under the performance option or to exercise the payment option. For instance, a commercial developer may have the option to provide affordable housing off-site or through the payment option, as applicable, given the project's zone.

Arlington, Virginia

Background

While Arlington County does not have a comprehensive countywide Incentive Zoning Program, it does utilize a set of programs designed to encourage the provision of particular public benefits. In this case study, our primary focus has been on the Green Building Density Incentive program, which has proven effective in facilitating the development of sustainable projects. This aligns with Montgomery County's objectives, as articulated in Thrive Montgomery 2050.

Program Overview – Green Building Density Incentive Program

Arlington County's Green Building Density Incentive Program (also known as the Green Building Incentive Policy) is a voluntary program that encourages developers to build high-performance green buildings to reduce energy consumption and greenhouse gas emissions to help achieve Arlington's long-term carbon emissions goals. The program is voluntary and uses the US Green Building Council's LEED (Leadership in Energy and Environmental Design) building rating system to set development standards.

Developers are eligible for additional density if they meet a minimum LEED Gold standard (or EarthCraft for multifamily) as well as other prerequisites. The Arlington County Board updated



LEED is a green building certification program and the globally recognized standard for designing, constructing and operating high-performance green buildings and neighborhoods.



The EarthCraft Multifamily Program is a multifamily-specific green building program providing certifications for new construction and renovation projects.

Arlington's Green Building Incentive Policy on December 12, 2020, increasing the minimum standard to LEED Gold and adding prerequisites related to equity, diversity, and inclusion programs. [22]

On December 12, 2020, the Arlington County Board enacted substantial changes to Arlington's Green Building Incentive Policy. These revisions elevated the minimum green building certification requirement to LEED Gold, demonstrating a commitment to sustainability. Furthermore, the updated policy expanded its flexibility by incorporating five distinct participation levels, ranging from 0.25 FAR to 0.70 FAR, increasing the flexibility of the program for participants. For projects exceeding the baseline 0.25 FAR level, compliance with the specified requirements is mandatory, with additional elements selected from an "Extra" list that encourages renewable energy, energy storage, electrification of building systems, enhanced energy efficiency, the use of low carbon materials, and the integration of affordable housing initiatives. At the highest three participation levels, applicants are given the option to pursue even more demanding building certifications such as Passive House, Net Zero Energy, or Zero Carbon. A summary of the details of each participation level is included in Table 6, below.

To ensure alignment with the Community Energy Plan goals, the policy incorporated an Automatic Update, effective June 30, 2023, which would raise the minimum energy optimization standards for each participation level.

Public Benefits

As of December 2020, 146 projects that received incentive density under this program have been approved by the Arlington County Board. Of these 146 buildings, 92 have committed to achieving LEED certification, with 57 having completed construction with their LEED commitments and complying with the green building site plan conditions of approval. Approximately 17 million square feet of development in Arlington has received some form of green certification in the last twenty years. The table below summarizes the green building approvals in Arlington since 2001.[23]

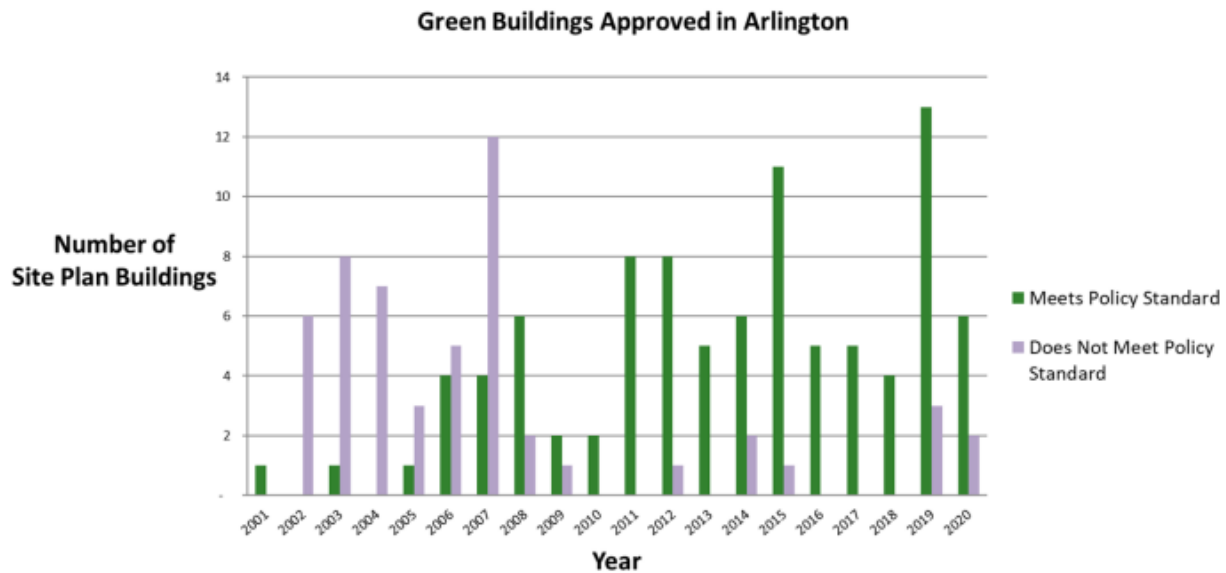


Figure 3 Green Building Approvals[23]

Development Incentives

Arlington County provides developers with the opportunity to attain varying levels of bonus density by meeting different sustainability criteria. Table 6, presented below, outlines the prerequisites that must be met at each FAR level to be eligible for bonus density. All projects participating in the program are also required to meet specific baseline prerequisites related to the following categories:

- ENERGY STAR appliances and fixtures
- WaterSense Plumbing fixtures
- Refrigerant leakage
- Equity Diversity and Inclusion program
- Energy Benchmarking
- Light Pollution Reduction
- Air Sealing of Ventilation Supply and Exhaust
- Electric Vehicle Charging Infrastructure
- Human Interaction with Nature
- Bird-Friendly Materials
- Renewable Energy

Table 6: Green Building Incentive Policy Bonus Density Requirements

0.25 FAR	0.35 FAR	0.45 FAR	0.55 FAR	0.70 FAR
• LEED Gold 4 or 4.1 • Energy Optimization Performance Improvement Baseline Prerequisites • ENERGY STAR Score 75 – or- LEED site EUI performance verification	• LEED Gold 4 or 4.1 • Energy Optimization Performance Improvement • Baseline Prerequisites • ENERGY STAR Score 80 – or- LEED site EUI performance verification • 3 Items from Extra list	Option 1: • LEED Gold 4 or 4.1 • Energy Optimization Performance Improvement • Baseline Prerequisites • ENERGY STAR Score 85 – or- LEED site EUI performance verification • 4 Items from Extra List Option 2: • Baseline Prerequisites • Passive House (PHIUS) certification	Option 1: • LEED Gold 4 or 4.1 • Energy Optimization Performance Improvement • Baseline Prerequisites • ENERGY STAR Score 90 – or- LEED site EUI performance verification • 6 Items from Extra List including: ○ Energy Optimization ○ Renewable Energy plus Storage • Carbon Offsets (ILFI reference) Option 2: • Baseline Prerequisites • Passive House (PHIUS) certification • Carbon Offsets (ILFI reference) Renewable Energy plus Storage from Extra List	• LEED Gold 4 or 4.1 • Energy Optimization Performance Improvement • Baseline Prerequisites • Zero Energy – or – Zero Carbon certification

Implementation Process

Throughout the development process, there is a clear procedure in place to ensure the integration of green building standards. In the initial 4.1 site plan submission, developers provide LEED scorecards and energy model summaries, outlining their proposed energy-saving strategies alongside their site plan application. At this stage, developers specify the LEED credits they intend to pursue, and the corresponding number of points required to support their request for bonus density or increased height allowances. Subsequently, developers formally file for LEED certification and rating through the U.S. Green Building Council (USGBC). Following these steps, the proposed site plan undergoes a comprehensive standard review process, and the final approved site plan mandates adherence to the designated green building requirements. This commitment to green building doesn't stop with approval; the County maintains vigilant oversight during the construction phase to ensure compliance with these standards. In cases where the requirements are not met, the County takes appropriate enforcement measures to uphold sustainability goals. It should be noted that a LEED Accredited Professional is required to be a part of the project team.

Pros and Cons

Pros

- Submitting the LEED scorecard and energy model summary during the site plan submission phase allows for early evaluation of the project's sustainability goals and helps align development plans with the program requirements and County goals.
- The Policy is required to be reviewed and updated (as needed) every 3-5 years or when the LEED rating system is updated to ensure relevance to current energy standards. [22] Including a required review and update clause similar would help to ensure that Montgomery Planning's incentive density program was consistent with market realities and would continue to incentivize desired behavior.
- The inclusion of a LEED accredited professional throughout the implementation process provides an expert's continued input into each project's sustainability plan. This also supports reporting and documentation submission during design and construction phases and facilitates ongoing compliance monitoring.

Cons

- One of the primary drawbacks of this program is that it only applies to new development. Redevelopment projects can leverage this program to create additional density in exchange for improving sustainability.

- Achieving LEED Certification increases construction costs, the increased density may not be sufficient to offset the cost of the certificate program, especially in projects with a tight margin or for projects seeking greater levels of density.

Fairfax County, Virginia

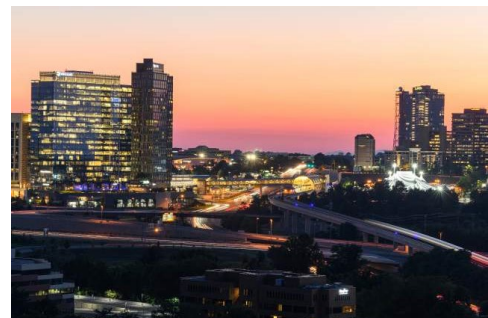
Background

Fairfax County does not utilize a countywide incentive zoning program. The county primarily uses the proffer system, where developers offer benefits in exchange for zoning approval, to negotiate for public benefits. This case study will focus on the County's Economic Incentive Program which aims to incentivize economic development in specific areas of the County. This program was selected because, in contrast to the other programs, the program utilizes economic incentives to encourage economic development.

Program Overview – Economic Incentive Program

Fairfax County adopted the Economic Incentive Program (EIP) on September 15, 2020. It provides an economic incentive for the private sector to purchase, assemble, revitalize, and redevelop property for economic development purposes.

The Economic Incentive Program (EIP) offers incentives to encourage the private sector to purchase, assemble, revitalize, and redevelop property to spur economic development.



To be eligible for this program, the development proposal should be situated within one of six designated Economic Incentive Areas, also called Commercial Revitalization Districts (CRD), including the Annandale CRD, Bailey's Crossroads/Seven Corners CRD, McLean CRD, Lincolnia CRA, Richmond Highway CRD, and Springfield CRD, along with the non-single-family portion of the Springfield TSA. Other eligibility requirements include:

- Projects must be commercial, industrial, and/or multi-family residential.
- The application must include a new consolidation of at least two contiguous parcels, with different owners and a combined minimum of two acres.
- The proposal must align with the consolidation and use recommendations of the County's Comprehensive Plan and comply with all applicable laws and policies regarding affordable housing provision and preservation.

Public Benefit

The EIP aims to encourage growth in regions with limited development compared to the level of intensity envisioned in the county's comprehensive plan. It targets areas facing declining competitiveness and outdated architectural styles particularly older commercial districts termed

commercial revitalization districts. The primary goal is to breathe new life into these zones, transforming them into vibrant and attractive mixed-use centers that can stimulate fresh economic activity.

Development Incentives

Due to limited development activity relative to comprehensive plan potential, unsustainable land development patterns, and outdated architectural designs, the county's economic competitiveness was being hampered. To address these issues, the county established the EIP program to provide financial and regulatory incentives to induce development activity. Financial incentives available to developers include a reduction in site plan fees or partial real estate tax abatements. Regulatory incentives include expedited zoning application scheduling, concurrent processing of a comprehensive plan amendment and associated zoning application, concurrent processing of a site plan and a zoning application, inclusion in the Land Development Services (LDS) project management program, and a lower project value to qualify for the LDS modified processing program.

Implementation Process

All applications must first be submitted to the Fairfax County Department of Planning and Development (DPD) for evaluation. The DPD reviews applications for provisional eligibility based on zoning or site plan criteria. Upon provisional eligibility, the application is forwarded to the Department of Tax Administration (DTA) for appraisal.

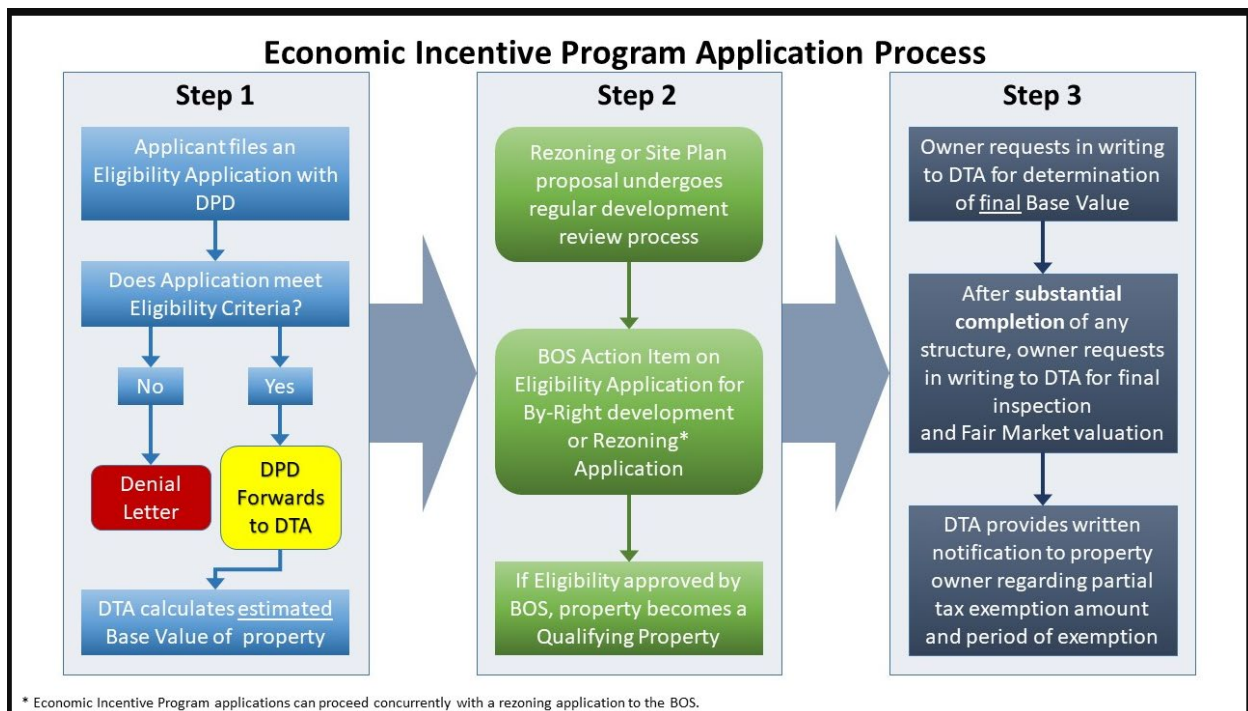
DTA schedules an appraisal inspection to estimate the property's base fair market value. Final eligibility approval rests with the Board of Supervisors, who also receive the estimated fair market values.

Approved applications become Qualifying Properties and are sent to DTA for final base fair market value determination. Developers must request this determination in writing. Once construction is 'substantially complete,' a final inspection is conducted, and the fair market value is determined.

The program has a ten-year duration from Board adoption for each Economic Incentive Area, with variable start dates detailed in the ordinance for each area."

The diagram below, Figure 5, outlines the typical EIP application process.

Figure 4: Economic Incentive Program Application Process



Pros and Cons

Pros

- The process is well-structured, with clear submission requirements and steps. This transparency ensures that applicants understand the program requirements and inserts predictability into the process.
- Providing developers with a combination of financial and regulatory incentives improves potential project feasibility and increases speed to market, potentially increasing the speed of economic growth in targeted areas.

Cons

- The program is limited to projects in six designated economic incentive areas and requires projects to be located on new consolidated parcels. This limits the program's reach and does not incentivize existing owners to consider redevelopment projects.
- The multi-step approval process involving various departments might lead to administrative complexities and potential delays. Bureaucratic delays can cause significant harm to a real estate project. Programs with streamlined processes can reduce the risk to the developer associated with bureaucratic delays.

- The program does not include community involvement, this is a concern as the program's goal is to incentivize development in older established areas. The lack of community involvement leaves key stakeholders out of the development process.

Washington, District of Columbia

Background

The Green Area Ratio program in the District is an example of a regulation that supports a specific benefit. The Green Area Ratio program is independent of the development review process in D.C. whereby applicants negotiate a package of public benefits with the city. Given its dense and built-up nature, ensuring green spaces into the future is an important goal for the city.

Program Overview – Green Area Ratio

The Green Area Ratio (GAR) is a zoning regulation that integrates landscape elements into parcel site design to promote sustainable and aesthetically pleasing development. GAR sets minimum lot-coverage standards for landscape and site design features to promote greater livability, ecological function, green space accessibility, and climate adaptation in the urban environment.



GAR promotes sustainable practices in large projects, but its ultimate effect is to ensure that new development embodies principles of environmentally friendly urban living with benefits that help reduce stormwater runoff, improve air quality, and mitigate heat island effect.

The GAR program is an example of a program that targets a goal that is easy to define and specific to D.C.'s urban and built-up nature.

Implementation Process

To ensure compliance with Green Area Ratio (GAR) requirements for a project, the first step involves determining the specific zoning district in which the project is located and identifying the mandated GAR score for that district. Once the required GAR score is established, the next phase entails utilizing the GAR scoresheet (provided in Attachment C) to calculate the total area of landscape elements needed to attain the specified score. With a design that meets or exceeds the minimum GAR score requirements, the project proceeds to the submission phase. As part of the building permit application, the necessary GAR documentation, including details of the landscape design, must be included. Following approval, the final step involves the construction and ongoing maintenance of the project, ensuring that it aligns with the approved plans and continues to meet the GAR criteria throughout its lifecycle.

Pros and Cons

Pros

- The process is straightforward, with clearly articulated expectations for compliance with the program. Developers can easily estimate the requirements for their projects based on the zoning district and the required GAR score, which streamlines the planning and design phases.
- The use of a GAR Scoresheet provides an objective method for calculating the required area of landscape elements, reducing ambiguity and subjective interpretation.
- GAR is designed to address a specific policy goal relevant to the jurisdiction.

Cons

- Increased landscaping elements required by the program increase project costs. Increases in project costs may negatively impact project feasibility.
- GAR is not applicable in some zones, in buildings that do not require a certificate of occupancy, and in interior renovation of existing buildings in the Central Employment Area. These exclusions exempt large sections of the city from the regulation, thereby reducing its overall effectiveness.

3. Key Findings

The case studies in the section above profile municipalities across the country with programs that attempt to incentivize or compel developers to provide public benefits. The programs represent a variety of approaches and illustrate a set of best practices and techniques that may be leveraged by Montgomery County Planning as the County's Public Benefits Incentive Program is reevaluated.

In this section, we compare the Montgomery County Incentive Density program to the three national and three local case studies profiled above and ask the following questions to compare the approaches profiled and highlight key best practices that may be incorporated into the County's program.

- Is the program required?
- Are the benefits prescriptive or ad-hoc?
- What incentives are offered to developers?
- How is the program implemented?

Is the Program Required?

Of the six municipalities profiled, four of the programs were voluntary, similar to Montgomery County, and two were mandatory for projects meeting certain criteria. The mandatory programs were the Community Benefits Ordinance in Detroit and the Green Area Ratio program in Washington DC. The Community Benefits Ordinance mandates projects that meet specific criteria to work with the community to develop a set of unique benefits memorialized in a Community Benefits Agreement. A feature unique to this program is that the benefits package is developed with community input. Community involvement promotes equity and helps to ensure that the benefits provided meet the current needs of the community. It should be noted that Detroit CBO is the only program profiled that directly engages the community in the negotiation process. This is in contrast with the other mandatory program, the Washington DC Green Area Ratio which is a zoning regulation designed to promote sustainable practices in development and applies to all projects that meet certain criteria. A key drawback to these mandates is that developers may intentionally structure projects that don't meet program criteria to avoid participation, as observed in Detroit. [19]

Inclusionary Zoning

A key variable effecting why a municipality may elect to mandate an incentive program is the existence of legislation prohibiting inclusionary zoning (IZ). IZ ordinances either require or encourage builders of new residential developments to set aside a certain percentage of housing units for low-or moderate-income residents. [18] In municipalities where IZ is prohibited, local policymakers may incentivize developers to create affordable housing using voluntary incentive programs.

Mandating specific minimum development requirements is a common planning tool, however it is not commonly used in density bonus programs and does not represent a best practice for incentivizing community benefits. Detroit's CBO program is unique in that participation is mandated for projects that meet the program criteria, however each benefit package is unique to a project and requires

significant public resources. This approach would not be reasonable for a large municipality with a significant number of projects, such as Montgomery County.

Are the benefits prescriptive or ad-hoc?

Montgomery County's program, with a menu of 36 different public benefits across 7 categories, offered the largest set of options available to developers when compared with the case studies. In comparison, Austin and Seattle, the municipalities with the most similar benefit menus provided between 5 and 11 options, respectively. Additionally, both municipalities required developers to include affordable housing in their public benefits package, ensuring the highest priority public benefits were addressed by developers.

Austin's DDBP includes gatekeeper requirements or initial program prerequisites focused on addressing public benefits including energy efficiency and urban design requirements. Gatekeeper Requirements ensure developers meet minimum thresholds in specific categories related to other public goods. When combined with the program requirement to achieve 50% of any density bonus through the provision of affordable housing, the DDBP aligns Austin's priority goals with the benefits sought through the program while allowing developers the flexibility to provide additional benefits. Similarly, in Seattle, some zones require compliance with minimum green building or transportation management standards to be eligible for bonus density. This represents a best practice in the design of density bonus programs.

In contrast, Detroit's CBO provides a forum for developers and community representatives to craft a unique public benefits package on a case-by-case basis. These packages are specifically tailored to the needs of the local community and the CBO is the only program profiled that incorporates direct public input into the negotiation process. However, program critics have raised concerns about community representatives' ability to negotiate with developers. Additionally, the community benefits agreements lack consistency and require significant public resources to develop and monitor.

The remaining case studies, Arlington and Fairfax, both incentivize specific behavior. In Arlington, the Green Building density program encourages developers to incorporate sustainability into development projects. Developers receive a specified amount of bonus density based on meeting specific criteria. Fairfax provides developer incentives related to streamlining the development process and reducing the costs to incentive development in revitalization districts. In both cases, the policies enacted are targeted toward incentivizing specific public benefits and don't represent a viable approach for Montgomery County as the County seeks to incentivize a range of public benefits.

What incentives are offered to developers?

The voluntary programs profiled included a range of incentives, the primary incentive being bonus density. This is the only incentive offered by Montgomery County that is similar to Austin, Seattle, and Arlington. However, density bonuses are most successful under specific conditions including markets with strong development activity, an appetite for high density construction, and limited land availability. Additionally, density bonus programs must be aligned with market economics to properly incentivize developers and to balance incentives with public benefits. This can be challenging in

larger municipalities, such as Montgomery County with varying market conditions and economics. Best practices include utilizing a sliding scale based on formulas to account for these variations. In Austin, the DDBP ordinance requires the City Manager to evaluate and if necessary, recommend adjustments to the program to ensure alignment with current market economics. Similarly, Seattle's incentive zoning program ordinance requires the calculation for payments in lieu of benefits to be adjusted annually based on increases to the CPI. Requiring periodic revisions to calculations and other aspects of the program contributes to ensuring the program's ongoing success.

In contrast, Fairfax County offered a range of incentives designed to streamline the development process and reduce costs for developers. These incentives were crafted to catalyze economic development in commercial revitalization zones. Incentives designed to streamline the development process can be successful when redevelopment is one of the key public benefits sought. Providing developers with a combination of financial and regulatory incentives improves potential project feasibility and increases speed to market, potentially increasing the speed of economic growth in targeted areas.

How is the program implemented?

Density bonus programs are generally affected by zoning ordinances. The process involves stating the purpose of the program, defining the applicable area, and outlining the policy for providing bonuses. The majority of the programs profiled in this report are implemented through each municipality's planning department with the exception of Washington DC's Green Area Ratio which is implemented through the Department of Energy and the Environment.

Successful programs outline clear guidelines for program participation and include objective approval criteria. The City of Austin goes a step further and clearly articulates the fundamental principles guiding the bonus density program, acknowledges additional density as a desired outcome and emphasizes the importance of a clear regulatory process. Clarity and objectivity reduce risk for developers pursuing density bonuses. Additionally, incorporating the approval process into a municipality's standard development approval process is a best practice that reduces bureaucratic requirements and approval timelines.

Another key best practice, observed in Austin and Arlington, is a requirement to review and update the program at regular intervals, typically every three to five years, to ensure that the program continues to effectively meet its goals. Similarly, in Seattle, payments in lieu of affordable housing are adjusted annually based on the CPI, which helps to ensure that the payments remain in line with market metrics.

A key feature of Detroit's CBO is ensuring ongoing compliance with negotiated agreements. The ordinance provides for a detailed compliance monitoring process and outlines enforcement mechanisms to ensure that the City receives the agreed upon benefits in a timely manner. As mentioned previously, ongoing monitoring and a streamlined process to make changes to the point system would similarly enable Montgomery Planning's Incentive Density Program to remain nimble in responding to changing market conditions and updated policy priorities over time.

Appendix

Attachment A – Austin Affordable Housing Incentive Program Overview

City of Austin Affordable Housing Development Incentive Policy Overview - Updated January 20, 2023

Policy	Incentive Policy Type	Applicability	Development Incentives & Waivers/Modifications	Affordability Set-Aside Requirements	Maximum Income Limit (as % of MFI)*		Affordability Period		Fee-In-Lieu Rate	Year Adopted	Most Recent Amendment	Original Ordinance/Regulating Plan	Land Development Code Reference
					Owner	Rental	Owner	Rental					
Affordability Unlocked (AU)	Density Bonus	Citywide	Waiver of compatibility, duplex design, and site area, FAR, dwelling unit occupancy requirements, modified parking requirements, front & rear setback reduced by 50%, min lot size & width reduction, height increase	50% of total units**	80%	60%	99 years	40 years	None	2019		Ordinance No. 20190509-027	§ 25-1-720
Downtown Density Bonus (DOB)	Density Bonus	Central Business District	Increased maximum height and floor-to-area ratio (FAR)	10% of residential bonus area	120%	80%	99 years	40 years	Interim Fees: \$5 - Residential Rainey Street; \$12 - Residential with CBD zoning other than Rainey Street; \$10 - Residential with zoning other than CBD other than Rainey Street; \$18 - Commercial with CBD zoning; \$12 - Commercial with zoning other than CBD	2013		Ordinance No. 20130627-105	§ 25-2-556
East Riverside Corridor (ERC) Development Bonus	Density Bonus	East Riverside Corridor Regulating District	Increased maximum height, FAR, and modification to compatibility standards	25% of bonus area	80%	60%	99 years	40 years	\$1 per gross bonus square foot for buildings over 90 ft. (no in-lieu option under 90')	2013		Regulating Plan	§ 25-2-149
Micro-Unit Density Bonus	Density Bonus	Applies to multifamily use in Transit Oriented Development Districts or along Core Transit Corridors when units are 500 square feet or less	Waiver of minimum site area requirements and reduction in off-street parking requirements	10% of total units	80%	50%	99 years	40 years	None	2014		Ordinance No. 20141211-228	§ 25-2-780
North Burnet Gateway (NBG) Development Bonus	Density Bonus	North Burnet Gateway Regulating District	Increased maximum height and FAR	10% of bonus area	80%	60%	99 years	40 years	\$8 per gross bonus square foot	2009		Regulating Plan	§ 25-2-148
Planned Unit Development (PUD) Density Bonus	Density Bonus	Planned Unit Developments where the proposed land use exceeds base entitlements	Increased maximum height, FAR, and building coverage	10% of bonus area (rental) and 5% of bonus area (ownership)	80%	60%	99 years	40 years	\$8 per gross bonus square foot	2008	Ordinance No. 20131003-056	Ordinance No. 20080618-058	§ 25-2-Subchapter B Article 2.5
Rainey Street Density Bonus	Density Bonus	Rainey Street Subdistrict	Waiver of maximum height up to 8:1 FAR	5% of total residential area	80%	80%	none	none	None	2005	Ordinance No. 20140227-054	Ordinance No. 20050407-063	§ 25-2-739
S.M.A.R.T. Housing	Fee Waivers & Development Incentives	Citywide	Permit, Inspection, and Capital Recovery fee waivers	At least 10% of total units	80%	80%	1 year	5 years	None	2007	Ordinance No. 20071129-100	Ordinance No. 20141106-124	§ 25-1 Article 15.2
S.M.A.R.T. Housing Greenfield Single-Family Density Bonus	Density Bonus	SF-2 & SF-3 zoning districts on lots 3 acres or greater	Site may be developed under SF-4A zoning district standards	10% of total units	80% and 100%	60%	1 year	5 years	None	2008		Ordinance No. 20080131-132	§ 25-2-556
S.M.A.R.T. Housing Greenfield Multi-Family Density Bonus	Density Bonus	Undeveloped lots with MF-2 through MF-5 zoning	Site may be developed under MF-6 zoning district standards	10% of total units	80% and 100%	60%	99 years	40 years	None	2008		Ordinance No. 20080131-132	§ 25-2-557
Transit Oriented Development (TOD) Development Bonus	Density Bonus	Plaza Sattilo, Lamar/Justin Lane, and MLK Transit Oriented Development Districts	Increased maximum height, FAR, and modification to compatibility standards	At least 10% of total area	80%	50% and/or 60%	99 years	40 years	\$13 per gross bonus square foot for Lamar/Justin Lane and Plaza Sattilo; \$12 per gross bonus square foot for MLK	2009		TOD Regulating Plans	§ 25-2 Subchapter C Article 3.10
University Neighborhood Overlay (UNO) Density Bonus (Pre 2/24/14)	Density Bonus	University Neighborhood Overlay District, On or Before February 24, 2014	Increased maximum height, FAR, and modification to compatibility and parking standards	At least 10% of total units	65% and/or 80%	65% and/or 80%	15 years 15 years	15 years 15 years	None \$1 per net rentable square foot	2004	Ordinance No. 20140213-056	Ordinance No. 040902-58	§ 25-2 Subchapter C Article 3.09
University Neighborhood Overlay (UNO) Density Bonus (Post 2/24/14)	Density Bonus	University Neighborhood Overlay District, After February 24, 2014	Increased maximum height, FAR, and modification to compatibility and parking standards	At least 10% of total area	50% and/or 60%	50% and/or 60%	40 years 40 years	40 years 40 years	\$1 per net rentable square foot for residential use or \$2 per net rentable square foot for hotel use	2014	Ordinance No. 20191114-067	Ordinance No. 20140213-056	§ 25-2 Subchapter C Article 3.09
Vertical Mixed Use 1 (VMU 1)	Density Bonus	Vertical Mixed Use and Mixed Use Combining Districts	Relaxed site area requirements, setbacks, and parking requirements, and waiver of FAR	10% of total units	80%	60%	99 years	40 years	None (Fee amount for commercial space above ground floor pending)	2010	Ordinance No. 20220509-080	Ordinance No. 20100408-049	§ 25-2-Subchapter E Article 4.3
Vertical Mixed Use 2 (VMU 2)	Density Bonus	Vertical Mixed Use and Mixed Use Combining Districts	VMU 1 bonuses plus increased maximum height	At least 10-12% of total units; location dependent	80%	50% or 60%	99 years	40 years	None (Fee amount for commercial space above ground floor pending)	2022	Ordinance No. 20220509-080	Ordinance No. 20100408-049	§ 25-2-Subchapter E Article 4.3

City of Austin Affordable Housing Development Incentive Policy Overview - Updated January 20, 2023

Policy	Incentive Policy Type	Applicability	Development Incentives & Waivers/Modifications	Affordability Set-Aside Requirements	Maximum Income Limit (as % of MFI)*		Affordability Period		Fee-in-Lieu Rate	Year Adopted	Most Recent Amendment	Original Ordinance/Regulating Plan	Land Development Code Reference
					Owner	Rental	Owner	Rental					
Residential in Commercial	Density Bonus	Certain commercial districts without existing creative spaces or multi-family structures	Makes a commercial-residential development a permitted use in certain commercial base districts; modifications to dimensional standards	10% of total units	80%	60%	99 years	40 years	None	2022	Ordinance No. 20221201-055	Ordinance No. 20221201-055	§ 25-1 Article 15 (pending)
Compatibility on Corridors	Density Bonus	Corridor Overlay Combined Districts	Waives or eases height and setback requirements related to compatibility regulations on certain corridors	10% of total units	80%	60%	99 years	40 years	None	2022	Ordinance No. 20221201-056	Ordinance No. 20221201-056	§ 25-2-32 and § 25-2-181
DISCLAIMER: The City of Austin Housing and Planning Department makes reasonable efforts to ensure the information contained herein is accurate and current. However, this document is not intended to provide a comprehensive summary of all policy/program requirements. Interested parties should refer to the appropriate sections (referenced herein) of the Land Development Code and Regulating Plans for further details. *MFI = Median Family Income. See http://www.austintexas.gov/page/income-limits for more information. **Additional requirements may apply. See https://www.austintexas.gov/department/affordability-unlooked-development-bonus-program for more information.													

Attachment B – City of Detroit Community Benefits Ordinance Biannual Report - Executive Summary



Civil Rights, Inclusion
and Opportunity

COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVENUE, SUITE 1240
DETROIT, MICHIGAN 48226
PHONE: 313.224.4950

To: Honorable Detroit City Council
Neighborhood Advisory Councils

From: **Kimberly Rustem, Director, Civil Rights, Inclusion and Opportunity**

Date: **February 4, 2022**

Re: **Community Benefits Ordinance Biannual Report -Executive Summary**

The Civil Rights, Inclusion, and Opportunity (CRIO) Department has been given the responsibility of monitoring Community Benefits Agreements.

The Community Benefits Ordinance (CBO) requires a biannual compliance report be submitted to City Council and each NAC associated with a Tier 1 Project within the City of Detroit. The following report details compliance with each Community Benefits Provision commitment.

Ten projects are currently in the enforcement phase and included in this report:

1. The **Herman Kiefer** development has a total of **12 commitments**, with **10** of their commitments in the "On Track" or "Completed" status and **0** commitment "Off Track"
2. The **Hudson's** development has a total of **19 commitments**, with **15** of their commitments in the "On Track" or "Completed" status and **0** commitments "Off Track"
3. The **Michigan Central Station** development has a total of **43 commitments**, with **38** of their commitments in the "On Track" or "Completed" status and **1** commitment "Off Track"
4. The **Book Building and Tower** has a total of **20 commitments**, with **12** of their commitments in the "On Track" or "Completed" status and **0** commitments "Off Track"
5. The **Monroe Block** development has a total of **26 commitments**, with **10** of their commitments in the "On Track" or "Completed" status and **0** commitments "Off Track"
6. The **Detroit Pistons Performance Facility and Headquarters** development has a total of **24 commitments**, with **24** of their commitments in the "On Track" or "Completed" status and **0** "Off Track"
7. The **Wigle: Midtown West** development has a total of **23 commitments**, with **16** of their commitments in the "On Track" or "Completed" status and **0** commitments "Off Track"
8. The **Fiat Chrysler Automotive** development has a total of **66 commitments**, with **60** of their commitments in the "On Track" or "Completed" status and **1** commitment "Off Track"
9. The **Lafayette West** development has a total of **55 commitments**, with **45** of their commitments in the "On Track" or "Completed" status and **0** commitments "Off Track"
10. The **Mid** development has a total of **26 commitments**, with **3** of their commitments "On Track" or "Completed" and **0** commitments "Off Track"
11. The **Michigan and Church** development has a total of **63 commitments**, with **5** of their commitments "On Track" or "Completed" and **0** commitments "Off Track"

If you have any questions, do not hesitate to contact my office at 313-224-4950

Respectfully,

Kimberly Rustem
Director
Civil Rights, Inclusion and Opportunity
Department

Approved as to form:

Chuck Raimi
Interim Corporation Counsel
City of Detroit Law Department

Attachment C - Washington DC Green Area Ratio Score sheet

		Green Area Ratio Scoresheet			
★ ★ ★ Address Other		Square	Lot	Zone District	
Lot size (enter this value first) *		Lot area (sf)	Minimum Score	Multiplier	GAR Score
		SCORE: #DIV/0!			
Landscape Elements		Square Feet	Factor	Total	
A Landscaped areas (select one of the following for each area)					
1	Landscaped areas with a soil depth < 24"	square feet	0.30	-	
2	Landscaped areas with a soil depth ≥ 24"	square feet	0.60	-	
3	Bioretention facilities	square feet	0.40	-	
B Plantings (credit for plants in landscaped areas from Section A)					
1	Groundcovers, or other plants < 2' height	square feet	0.20	Native Bonus square feet	-
2	Plants ≥ 2' height at maturity - calculated at 9-sf per plant	# of plants	0.30	# of plants	-
3	New trees with less than 40-foot canopy spread - calculated at 50 sq ft per tree	# of trees	0.50	# of trees	-
4	New trees with 40-foot or greater canopy spread - calculated at 250 sq ft per tree	# of trees	0.60	# of trees	-
5	Preservation of existing tree 6" to 12" DBH - calculated at 250 sq ft per tree	# of trees	0.70	# of trees	-
6	Preservation of existing tree 12" to 18" DBH - calculated at 600 sq ft per tree	# of trees	0.70	# of trees	-
7	Preservation of existing trees 18" to 24" DBH - calculated at 1300 sq ft per tree	# of trees	0.70	# of trees	-
8	Preservation of existing trees 24" DBH or greater - calculated at 2000 sq ft per tree	# of trees	0.80	# of trees	-
9	Vegetated wall, plantings on a vertical surface	square feet	0.60	square feet	-
C Vegetated or "green" roofs					
1	Over at least 2" and less than 8" of growth medium	square feet	0.60	square feet	-
2	Over at least 8" of growth medium	square feet	0.80	square feet	-
D Permeable Paving***					
1	Permeable paving over 6" to 24" of soil or gravel	square feet	0.40	-	
2	Permeable paving over at least 24" of soil or gravel	square feet	0.50	-	
E Other					
1	Enhanced tree growth systems***	square feet	0.40	-	
2	Renewable energy generation	square feet	0.50	-	
3	Approved water features	square feet	0.20	-	
		sub-total of sq ft = 0			
F Bonuses					
1	Native plant species	square feet	0.10	-	
2	Landscaping in food cultivation	square feet	0.10	-	
3	Harvested stormwater irrigation	square feet	0.10	-	
		Green Area Ratio numerator =			
*** Permeable paving and structural soil together may not qualify for more than one third of the Green Area Ratio score.					
Total square footage of all permeable paving and enhanced tree growth.					

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Incentive Zoning

Meeting Urban Design and Affordable Housing Objectives

M a r y a M o r r i s



American Planning Association

Planning Advisory Service
Report Number 494

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Incentive Zoning: Meeting Urban Design and Affordable Housing Objectives

MARYA MORRIS, AICP



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Preface

The rapid growth that many communities experienced throughout the 1990s has spawned interest in planning, regulatory, and development approaches and techniques that both manage growth and meet community objectives, including the improvement of community design and the provision of affordable housing. Many new plans and land development regulations now subscribe to the principles of smart growth, which include: using land resources more efficiently through compact building forms and infill development; mixing land uses; promoting a variety of housing choices; supporting walking, cycling, and transit as attractive alternatives to driving; improving the development review process and development standards so that developers are encouraged to apply the smart growth principles; and connecting infrastructure planning to development decisions to make efficient use of existing facilities and ensure that infrastructure is in place to serve new development.

Incentive zoning is a technique that has received renewed attention as communities aim to inculcate smart growth principles into planning and development processes. Incentive zoning involves a trade-off between a community and a developer. A developer gets to build a project that would not otherwise be permitted under the existing zoning regulations in exchange for providing something that is in the community's interest—something that the city would not otherwise require of the developer (Meshenberg 1976, 43). Usually, the trade-off involves a city allowing the developer to build a larger, higher-density project. This is done by increasing the allowable floor area of a project above what is permitted in the zoning ordinance or by increasing the allowable number of dwelling units in a residential development. Additionally, setback, height, and bulk standards are often allowed to be modified to accommodate the added density or, in the case of affordable housing, to reduce development costs. Waivers of specific regulatory requirements or fees—such as parking standards or impact fees—are also included as an incentive for a developer to provide various amenities.

The common types of community benefits or amenities for which state and local governments have devised incentive programs are urban design, human services (which includes affordable housing), and transit access. Some programs, particularly those that include affordable housing as a bonusable amenity, allow developers to pay cash in lieu of building or supplying the amenity for which the incentive is being provided. Some states group all types of incentives (e.g., those for urban design, affordable housing, or transit) into an umbrella statute that authorizes local governments to use innovative land-use regulations. In several states (California, New Jersey, Oregon, and Florida), the zoning and regulatory incentive statutes for affordable housing are part of a broader statewide housing program and thus are enacted separately.

Research for this report was conducted as part of APA's Growing SmartSM project, a multi-year effort to draft the next generation of model statutes governing planning and the management of change. Model state legislation for incentive zoning and zoning bonuses will be provided in Chapter 9 of the Growing SmartSM *Legislative Guidebook* (APA, forthcoming Spring 2001). An excerpt of a draft of the model legislation governing the use of incentives is provided in the appendix of this report.

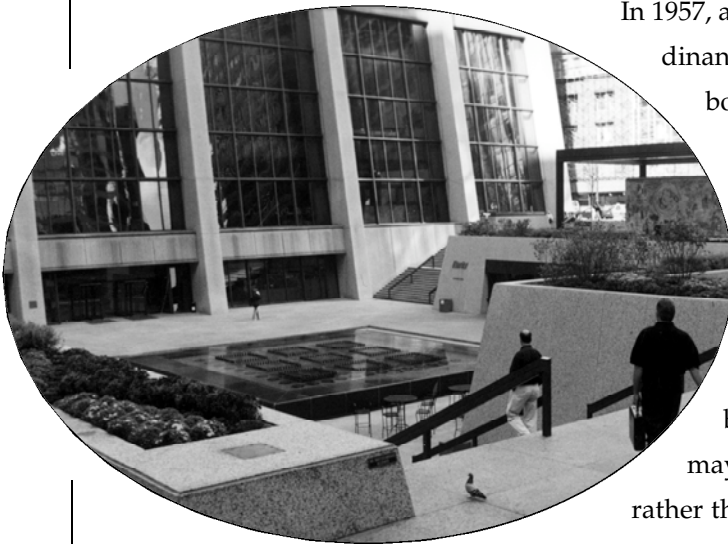
Part 1 of this report provides a historical perspective on incentive zoning for all purposes, contains an overview of state enabling legislation, and describes the key substantive and legal issues local governments must address in crafting such regulations. Part 2 is a description of incentive zoning for urban design and smart growth implementation. Case studies from Arlington County, Virginia, Chicago, Minneapolis, New York City, and Seattle are presented to demonstrate how incentives can be used to achieve smart growth objectives. Part 3 describes the use of density bonuses for affordable housing as the chief mechanism used in several states and municipalities to implement inclusionary housing programs. Case studies from California, New Jersey, and Montgomery County, Maryland, are provided in that section.

PART 1

Historical Perspective and Statutory Overview

ZONING INCENTIVE SYSTEMS CAME INTO USE IN THE LATE 1950S AND 1960S. CITIES WERE LOOKING FOR WAYS TO ENJOIN PRIVATE DEVELOPERS IN IMPROVING THE APPEARANCE OF THE CITIES WITHOUT SPENDING PUBLIC MONEY. Planners were also looking for ways to lessen the rigidity of Euclidean zoning that, in its preoccupation with separating land uses, was resulting in sterile, sometimes dysfunctional central business districts and neighborhoods. Euclidean zoning also made it more difficult to meet social objectives, such as affordable housing and day care. What began as an experimental technique at using zoning to improve community design has mushroomed into a fairly common tool for meeting a range of planning objectives. To wit: Jerold Kayden, an attorney, Harvard University professor, and an acknowledged zoning expert, estimated that at least one-half of all cities and towns that have zoning ordinances include bonus provisions in one form or another (Kayden 1999).

In 1957, as part of a comprehensive revision of its zoning ordinance, Chicago became the first city to enact a zoning bonus system. That system encourages developers of downtown office buildings to provide public plazas and arcades in exchange for additional density. Unlike other cities that instituted bonus programs to exact public benefits from developers, the impetus for the Chicago bonus system was to stimulate development of high-rise office buildings, too many of which, in the view of the late mayor Richard J. Daley, were being built in New York rather than Chicago. The City of Chicago's enthusiasm for offering bonuses created what is now thought of as an overly permissive system that has resulted in very large buildings with minimal public benefit at the street level (Smith 1999). Beginning in 1998, Chi-



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Inclusionary housing programs and ordinances, including voluntary or mandatory density bonuses for affordable housing, first appeared in the 1960s as a policy response to exclusionary zoning practices by local governments.

Chicago planning staff undertook a comprehensive examination of the zoning bonus provisions. In July 2000, a study of the provisions was released and a draft amendment to the zoning ordinance that will substantially overhaul the process was introduced in the city council. The report and staff recommendations are presented as a case study in this report.

New York City began its zoning incentive program in 1961 and now has the most extensive system of any city. The city uses bonuses for two purposes: to secure street-level amenities, such as plazas, arcades, and shopping galleries in high-density residential and commercial districts, and to protect the character of special districts and neighborhoods, such as theater districts. The New York system, like Chicago's, is also under scrutiny in 2000.

Inclusionary housing programs and ordinances, including voluntary or mandatory density bonuses for affordable housing, first appeared in the 1960s as a policy response to exclusionary zoning practices by local governments. (Exclusionary zoning means zoning that has the effect of keeping out of a community racial minorities, low-income residents, or additional population of any kind.) The problem of housing exclusion was brought to the fore by the 1968 report to Congress (U.S. National Commission 1969) by the National Commission on Urban Problems (known as the Douglas Commission). The commission noted that large lot-size requirements (e.g., one dwelling unit per acre as a minimum in residential zones) were the most common exclusionary technique. Others include minimum floor area requirements (e.g., house size or unit size) and prohibitions on housing types (e.g., garden apartments). Despite widespread recognition of the exclusionary effects of zoning, the Douglas Commission noted indifference on the part of courts:

Where public action—and use control—is used to exclude large numbers of persons from certain areas on the basis of economic status, size of family, or race, fundamental questions arise for a democratic society. Generally, however, the courts have refused to consider such questions in the context of land use control cases. They continue to view such cases as largely matters of police power vs. private property rights, with no consideration of broader social implications or the right of the non-parties—those that are excluded. (p. 217)

The inaction by courts ostensibly ended with the New Jersey Supreme Court decisions in *Mt. Laurel I* (*South Burlington County NAACP v. Mount Laurel*, 67 N.J. 151, A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975)) and *Mt. Laurel II* (*South Burlington County NAACP v. Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983)), which, with the subsequent passage of the state's Fair Housing Act, gave New Jersey municipalities the responsibility for accommodating their fair share of affordable housing and providing for a variety of housing needs, including those of low- and moderate-income households. Similar laws passed by the California legislature in 1979 and 1980 required each local government to assume its fair share of regional housing needs, to provide "regulatory concessions and incentives" to enable moderate-cost housing to be built, to zone lands at appropriate densities to meet all housing needs, and to speed-up review procedures (Schwartz and Johnston 1983, 5-6).

Nearly two decades after their inception, many states and local governments have followed the lead of California and New Jersey and have enacted inclusionary housing programs. The challenge of translating regulatory requirements into bricks and mortar still remains, as the case studies of these state programs (and that of Montgomery County, Maryland) illustrate in Part 3.

The authority of local governments to institute an incentive and bonus program comes from state enabling legislation (e.g., California Government Code, Section 65915; Connecticut General Statutes, Section 8-2g(a); Florida Statutes, Chapter 163.3202(3); and Maryland General Municipal Laws, Section 10603). At least 10 states have enacted legislation expressly enabling local governments to offer zoning bonuses and other incentives in exchange for certain public benefits. None of the statutes reviewed prescribe directly what types of urban design amenities local governments may require or what types of bonuses they may offer. Statutes dealing with density bonuses for affordable housing are much more prescriptive.

Some state incentive statutes, including California's, aim to achieve one specific public purpose, such as affordable housing. Many state statutes, including those in Florida, Maryland, and Rhode Island, list incentive zoning as one of the innovative techniques that local governments can include in their zoning ordinance. Other techniques include transfer of development rights, design review, and density controls. The New York statute has unique provisions that require local governments that implement incentive zoning to evaluate whether the existing public facilities that will serve the additional density can adequately accommodate that development and to also prepare an environmental impact assessment of the proposed amenities.

In addition to the inclusionary housing requirements, California has legislation that authorizes the use of density bonuses to increase development density near transit stations with the dual goal of creating mixed-use neighborhoods with a range of housing and transportation choices and reducing both vehicle miles traveled and auto emissions. The Transit Village Development Planning Act of 1994 was linked to a demonstration program of the California Department of Transportation to test the effectiveness of increasing densities of residential development in close proximity to mass transit to increase the benefit from public investment in mass transit (California Government Code 14045(a)). The demonstration program legislation requires that participating local governments have an adopted land-use plan and zoning ordinance encouraging high-density residential development near mass transit stations. Participating governments must also demonstrate how they are implementing state legislation regarding development agreements (California Government Code, Section 65864); redevelopment plans (Article 4, Section 33330 of the state Health and Safety Code); and congestion management plans (California Government Code, Section 65099).

The act enables cities and counties to prepare a transit village plan that provides for the following.

- (a) A neighborhood centered around a transit station that is planned and designed so that residents, workers, shoppers, and others find it convenient and attractive to patronize transit
- (b) A mix of housing types, including apartments, within not more than a quarter mile of the exterior boundary of the parcel on which the transit station is located
- (c) Other land uses, including a retail district oriented to the transit station and civic uses, including day care centers and libraries
- (d) Pedestrian and bicycle access to the transit station, with attractively designed and landscaped pathways
- (e) A rail transit system that should encourage and facilitate intermodal service and access by modes other than single occupant vehicles

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- (f) Demonstrable public benefits beyond the increase in transit usage, including all of the following:
 - (1) Relief of traffic congestion
 - (2) Improved air quality
 - (3) Increased transit revenue yields
 - (4) Increased stock of affordable housing
 - (5) Redevelopment of depressed and marginal inner-city neighborhoods
 - (6) Live-travel options for transit-needy groups
 - (7) Promotion of infill development and preservation of natural resources
 - (8) Promotion of a safe, attractive, pedestrian-friendly environment around transit stations
 - (9) Reduction of the need for additional travel by providing for the sale of goods and services at transit stations
 - (10) Promotion of job opportunities.
 - (11) Improved cost-effectiveness through the use of the existing infrastructure
 - (12) Increased sales and property tax revenue
 - (13) Reduction in energy consumption
- (g) Sites where a density bonus of at least 25 percent may be granted pursuant to specified performance standards

Connecticut's inclusionary zoning legislation (Connecticut General Statutes, Section 8-2g(a)) allows local governments to provide developers with a special exemption from zoning density limits in districts that permit multifamily housing. The exemption is applicable where the developer agrees to build a certain number of units of affordable housing. A local housing agency is charged with administering the program and setting thresholds to determine what sales and rent prices are to be considered affordable and the income groups that would be eligible to live in such housing. Developers must enter into a development agreement with the municipality that stipulates the number of affordable housing units being provided, the sales price or rents to be charged for the units, and deeds conveying covenants that indicate that the units will remain as affordable housing for 30 years.

Florida's growth management law mandates that local governments prepare a comprehensive plan including a housing element (Florida Statutes, Chapter 163.3177(6)(f)) and enact land development regulations to implement the plan. The enabling legislation for the regulations encourages the use of innovative land development regulations, including incentive and inclusionary zoning, as well as provisions for transfer of development rights, planned unit developments, and impact fees (Florida Statutes, Chapter 163.3202(3)).

Maryland has broadly worded language in its zoning enabling legislation that permits local governments to "encourage innovation and to promote flexibility, economy, and ingenuity in development" as well as provisions authorizing increases in the permissible density or intensity of a particular use (Maryland General Municipal Laws, Section 10603). Maryland also expressly enables counties and cities to enact ordinances that "impose inclusionary zoning and award density bonuses to create affordable housing units" and "impose restrictions on the use, cost, and

resale of housing . . .” (Annotated Code of Maryland, Article 66B, Section 12.01).

Minnesota’s Community-Based Planning Act of 1997 contains 11 goals for local governments to address in preparing comprehensive plans, most of which are centered on smart growth principles, such as encouraging a mix of land uses, promoting compact development, increasing the amount of affordable housing, and supporting public transit (Article 4, Community-Based Planning Act, Section 1, Subdivision 2(9)). The act also created an advisory council and directed it to, among other things, develop criteria and guidelines to promote “livable” communities in the state. The council is also directed to recommend the creation of incentives to encourage local governments to develop community-based plans. According to the act, these incentives could include assistance with computerized geographic information systems, builder’s remedies and density bonuses, and revised permitting processes (Article 4, Section 13, Subdivision 2(8)). The work of the council was completed in June 1998. The act lists several tools and strategies that local governments would be able to use to achieve the livable community goals, including “densities, urban growth areas, purchase or transfer of development rights programs, public investment surcharges, transit and transit-oriented development, and zoning and other official controls.”

New Hampshire has a catch-all statute for innovative land-use controls that permits a local planning board or the person who administers a zoning ordinance to enact 14 different types of standards that constitute incentives, including changes to standards affecting:

- intensity and use,
- impact fees;
- planned unit development;
- cluster development;
- performance standards; and
- inclusionary zoning (New Hampshire Revised Statutes Annotated, Title 64, Section 674.21).

The statute provides no criteria or guidelines on the type or magnitude of incentive that may be provided, nor any guidance about the use of other innovative provisions that local governments are empowered to employ, with the exception of impact fees.

New York state has an umbrella incentive zoning statute that is intended to “advance the city’s specific physical, cultural and social policies in accordance with the city’s comprehensive plan and in coordination with other community planning mechanisms or land use techniques” (Laws of New York, General City Law, Section 81-d). The law permits municipalities to amend the zoning ordinance to include bonus provisions and to evaluate the effects of any potential incentives to ensure that the district in which any additional density will be built contains “adequate resources, environmental quality and public facilities, including adequate transportation, water supply, waste disposal and fire protection.” Local governments are also required to prepare a “generic environmental impact statement” (paid for in part by the developer) to determine if the granting of incentives or bonuses will have a significant effect on the environment. In addition to the environmental review, the statute also requires local governments “to evaluate the impact of the bonus provisions upon the potential development of affordable housing gained by the pro-

vision of such incentives or bonus afforded to an applicant or lost in the provision by an applicant of any community amenity to the city.”

The statute specifies procedures that must be followed by local governments in providing the incentives, including:

- descriptions of the incentives and bonuses to be provided;
- the community benefits and amenities that may be accepted from developers;
- procedures for obtaining bonuses; and
- provisions for a public hearing on the proposed project (but only if it would not otherwise be subject to a zoning hearing).

The provisions described here pertain to New York municipalities classified (because of their size and structure) as cities. The law contains separate, although virtually identical, provisions for towns and villages in New York (Laws of New York, Town Law, Section 261-b; Village Law, Section 7-703).

The Oregon statute that implements urban growth boundaries (Oregon Revised Statutes, Section 197.296(7)) enables local governments to undertake “actions or measures to ensure that adequate levels of residential development are achieved within urban growth boundaries.” The actions and measures include “enacting provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer.” Other actions include an increase in zoned residential densities overall, the provision of financial incentives, and redevelopment and infill strategies. The statute also permits the “removal or easing of approval standards or procedures” in order to achieve higher densities.

Rhode Island has an all-inclusive statute (General Laws of Rhode Island, Section 45-24-33) similar to New York’s that authorizes local governments to use development incentives for several purposes. The incentives provide for “increases in the permitted use or dimension [of a building or structure, for example] as a condition for, but not limited to:

- (1) increased open space;
- (2) increased housing choice;
- (3) traffic and pedestrian improvements;
- (4) public and/or private facilities; and
- (5) other amenities as desired by the city or town and consistent with its comprehensive plan” (Section 45-24-33(B)(1)).

PART 2

Incentive Zoning for Urban Design and Smart Growth

THE FIRST MATTER A LOCAL GOVERNMENT MUST ADDRESS IN CONSIDERING AN INCENTIVE PROGRAM IS WHAT HARVARD LAND-USE PROFESSOR JEROLD KAYDEN TERMS, “THE NECESSITY ISSUE.” In other words, is the incentive necessary to obtain the amenity (Kayden 1992)? And, if the amenity is important enough to the public, shouldn’t it be provided directly by the local government through other means rather than leaving it to chance that a developer may opt to provide it? Or should it be made an outright requirement of the developer where the amenity is intended to mitigate the impacts of high-density development? Once a local government has addressed the necessity issue and chosen to proceed, there are four key issues that a city must consider when designing its incentives (Brooks 1970). This section presents those issues with commentary from the literature.

ESTABLISHING THE PURPOSES

The reason for providing the incentives and the community’s need for specific amenities should be established in the local comprehensive plan or specific plans. These policies should also be included in the statement and intent section of the zoning ordinance. Typical purposes include mitigating the impacts of large-scale development, improving the visual appearance of an area, providing open space, and encouraging the inclusion of specific land uses in the development that the community considers desirable, such as affordable housing, day care, retail stores, and theaters. This statement of purpose will also recognize which amenities should be provided by the government and which should be required of the developer.



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SELECTING THE DESIRED AMENITIES

The specific amenities that the public may want and that the local government chooses to require will vary depending on the type of jurisdiction and the public purposes being served. In large cities, developers have traditionally been asked to provide pedestrian plazas and arcades, and improved access to transit. Less commonly, they have been asked to provide design and streetscape improvements, such as fountains and public art, and to include certain uses in the development itself, such as ground-floor retail and neighborhood commercial uses. Cities have also given bonuses for provision of certain necessary community features, such as affordable housing and child care facilities.

From a legal standpoint, the amenities selected by local governments tend to fall into two groups: those that are justifiable on the basis of a “traditional externalities analysis” of the local government police power and those that are justifiable on the basis of a general welfare analysis of the police power (Heyman 1970, 45). Pedestrian plazas and arcades are supported by a “traditional externalities analysis” wherein there is a rational nexus between the floor area bonuses provided and the amelioration of congestion realized by the improvements required. In other words, in the case of an office building development using a bonus that increased floor area and the number of offices, wider sidewalks and arcades can accommodate the additional pedestrian traffic generated by the additional office floor area.

When the externalities analysis focuses on the local government’s right to protect the public’s health and safety, incentive zoning is likely to result in trade-offs that enhance the community’s social, economic, and physical environment (Heyman 1970, 46). Such bonuses, which often result in the provision of day care, affordable housing, and design features (e.g., streetscape improvements and ground-floor retail space), are justified under the general welfare analysis.

In a successful bonus program, policy makers will periodically review the list of amenities that are being provided in exchange for increased density to ensure that those amenities meet the most current planning objectives of the city. Such an audit is useful both in evaluating the type, design, and location of the amenities, and in evaluating the public purpose being served.

In a successful bonus program, policy makers will periodically review the list of amenities that are being provided in exchange for increased density to ensure that those amenities meet the most current planning objectives of the city. Such an audit is useful both in evaluating the type, design, and location of the amenities, and in evaluating the public purpose being served.

New York, Chicago, and Seattle, in their analyses of their bonus programs, all concluded that some of the amenities, such as plazas and arcades, were poorly designed, placed, and ultimately detrimental to the overall city design. In other words, the bonuses were not meeting (or perhaps had never met) the city planning objectives even though they had been approved by the city in the first place.

In the case of Chicago, the bonuses also had become essentially an “entitlement” for developers. Thus, the planning staff’s recommendation that the program be substantially overhauled (e.g., reducing allowable bonuses in some instances and requiring better design for the amenities being provided) was met with resistance at first. As of fall 2000, however, significant changes were being considered by the city council.

In Minneapolis, consensus among planning staff in late 1999 was that the bonus system, which dated back to the 1960s, had not given the city the kinds of amenities it was looking for (Wittenberg 1999). The new system, adopted in November 1999, redirects the bonuses toward achieving smart growth goals contained in the city’s new comprehensive plan. (More detail on the Minneapolis bonus system is provided below.)

DETERMINING THE BONUSES TO BE GRANTED

Matching an appropriate bonus to each amenity is the most complex aspect of a zoning incentive program. In general, the value of the bonus (e.g., the increase in floor area) should be proportionate to the cost to the developer of providing the amenity. If the cost of the amenity exceeds the bonus value, the developer will have no incentive to provide the amenity. From the public's point of view, a local government ideally would provide only that amount or incentive precisely necessary to encourage a developer to build to the bonusable density and to provide the amenity because the incentive itself carries a social cost (Kayden 1992, 571). Kayden notes, for instance, that construction of a proposed high-rise development that had received a floor area bonus was blocked by a public interest organization because the building would have had a "social cost" in the form of a shadow over Central Park.

Moreover, local governments have to recognize that the building density and intensities that result from developers making use of the program have to correspond with what the private real estate market is demanding in terms of building size.

Zoning bonuses themselves are based on underlying zoning densities. When such programs were new, legal experts noted the possibility of governments artificially manipulating the baseline zoning; that is, tightening regulations beyond what otherwise would be appropriate, then loosening them in return for the provision of amenities (Mandelker 1970, 18-21; Kayden 1992, 571). The opportunity for governments to "low ball" the base zoning is theoretically more likely in cases where the city has revised its entire zoning ordinance and added a bonus program to revised zoned densities. For example, the now-defunct San Francisco downtown plan, which involved rezoning major portions of the downtown area, reduced base FAR in the office district to 14 from the pre-existing range of 16 to 20 to encourage developers to apply for the bonus (Weinstein 1994). And, in fact, Seattle's 1985 incentive ordinance was accompanied by a major downzoning, where the base FAR went from 10 to 5 and the maximum height went from 400 feet to 250 feet.

Commonly, however, bonus programs are employed with existing base densities that have been in place for some time, thus diffusing the potential for argument that densities are artificially low. Plus, experience has not supported such concerns about local government abuse. In fact, evaluations of bonus systems in New York (Kayden 1992, note 36) and Chicago (Chicago 2000) have revealed that incentives have been underpriced and that developers have been granted bonuses that far exceed the value of the amenities provided. With respect to the issue of bonuses vis-à-vis market forces, in Hartford, Connecticut, which has been very slow to recover from the real estate downturn in the early 1990s, there has not been a proposal for a development large enough to meet even the maximum base density limit—let alone be large enough to qualify for bonus—since the late 1980s (Klee 1999).

The Hartford scenario raises another issue—in an environment where amenities are being provided only through incentive zoning, a soft economy will result in various public objectives not being met if other arrangements are not made (e.g., the public either mandating that amenities be provided, instituting design guidelines, or providing the amenities itself). Despite meeting some of San Francisco's objectives of improving pedestrian movement and access to transit, the city did away with its bonus system in 1980 because overall it was regarded as ineffective in promoting good urban design (Weinstein 1994). It was replaced with mandatory design standards, including a requirement for all developments to incorpo-

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rate open space into most projects. The philosophy of the change was that any amenities worth encouraging with bonuses should be seen as essential to downtown development and thus should be required.

Returning to the issue of matching bonuses to amenities, several methods of calculating the value of each have been used and studied. In 1987, the City of Chicago planning staff surveyed cities that were using zoning bonuses and identified five different approaches that have been used or considered in calibrating zoning bonuses. Getzels and Jaffe (1988) summarized the work of the city of Chicago planners. The models they found are described in the following paragraphs.

Equivalent Land-Cost Model

The equivalent land-cost model compares the costs of providing the amenity to the cost a developer would incur by purchasing additional land to achieve the same overall project density allowed with the bonus. This method is used by Seattle and Bellevue, Washington, to assign bonus values to various amenities. Getzels and Jaffe (1988) reported that both cities indicated that the formula was working well at that time. The major disadvantage they noted is in determining the boundaries of the area with which to compare land values, given that values can vary widely from district to district and even block to block in a city.

Equivalent Development Rights Model

The equivalent development rights model is similar to the land-cost model, except that it considers what a developer would have to pay to acquire additional development space or rights on the open market and not merely additional land acquisition costs. This method is used by New York City for its low-income housing bonus. The development rights are calculated using the sales prices of adjacent lots or developments similar in site area and FAR to the proposed building. The bonus is determined by dividing the cost of providing the desired amenity by the equivalent development rights costs, as illustrated in the following equation:

$$\begin{aligned} & \text{Added square footage of building needed to compensate amenity costs} \\ &= (\text{development rights cost}) \text{ divided by } (\text{cost of amenity}) \end{aligned}$$

Return-on-Investment Approach

The return-on-investment approach measures the potential benefits to a developer of the amenities and the bonus (for a detailed explanation, see Seyfried 1991). It assumes that developers will choose the bonus option that results in the greatest return on their investment. The aim of planners who administer the bonuses is to calibrate the bonus so that return on investment is higher than it would be otherwise, or, at a minimum, that the return on investment is the same as it would be without the bonus system. Use of this model requires knowledge of developers' economic projections made in a pro forma. Getzels and Jaffe note that this is problematic because it provides developers with an incentive to understate net operating income to obtain higher bonus ratios (Getzels and Jaffe 1988, 19).

Marginal Cost-to-Profit Approach

The marginal cost-to-profit model compares the marginal profits derived from bonus office space to the cost of the amenity that the developer chooses to provide. In essence, the cost of providing each square foot of an amenity is defrayed by the city, permitting the developer to add a specific number of square feet of bonus floor area equal in value to the

square-foot cost of the amenity. As with the return-on-investment approach, data on the square-foot costs of development and projected revenues to a developer are needed to accurately price the bonused amenity. The marginal cost-to-profit approach was used by San Francisco in the 11 years it had a bonus program.

Cost-Plus Formula

Similar to the marginal cost-to-profit approach, the cost-plus formula attempts to determine the square footage of bonus space needed to compensate a developer for building a particular amenity. The methodology requires first determining the number of square feet of building needed to cover the cost of the amenity, then multiplying that figure by a conversion ratio, which is the difference between the net rentable square feet of the building and what is allowed by the base zoning. The resulting amount is multiplied by a “plus factor,” which is the added incentive required to persuade the developer to construct the amenity. This approach was devised by Jerold Kayden, a professor at the Harvard Graduate School of Design, and has never been used by a city. It was intended to be used on a site-by-site basis, which circumvents the problem with the land and development rights equivalency models that require data on construction costs and revenues from comparable properties in the same district.

ADMINISTERING BONUS PROGRAMS

The central issue for a city administering a bonus program is whether to grant bonuses as of right or to use a discretionary process involving negotiation between the city and the developer. Most cities use both. In reality, even where bonuses are granted as of right, the local government typically still exercises its discretion in the site plan review or urban design review process to which most larger projects are subjected. Naturally, any on-site amenities that the developer provides would be subject to scrutiny as well. In Seattle, the size of the bonus is directly proportional to the size of the amenity provided (based on the equivalent land-cost model described above). Thus, in practice, the developer may not know the exact size of the bonus until after the city has signed off on the proposed size, orientation, and overall design of the amenities.

Early bonus programs relied heavily on negotiations. Cities had the discretion to decide both the amount of floor area or density bonuses that would be granted as well as the type and exact design of the amenities the developer would be required to provide. Negotiating bonuses allows cities to tailor the details of a bonus arrangement to the unique aspects of each particular site. The disadvantages to this approach are the same as for all discretionary land-use review processes; namely, the process typically means additional time, expense, and uncertainty for the developer, and there is the likelihood that similar properties will not be treated uniformly, which can give rise to charges of unfairness or unequal treatment (Getzels and Jaffe 1988, 11-12).

As-of-right incentive zoning spells out the precise elements of each bonus feature and its corresponding potential density gain (Lassar 1989, 12). New York City relies largely on an as-of-right system. The bonus standards are very carefully described in a city’s implementing ordinance. Seattle’s system is largely discretionary, but the city does provide very detailed size and dimensional standards for most amenities. In Seattle, bonuses provided for two public benefit features—major retail stores and performing arts theaters—are determined by conditional use review of the city council. For many amenities, the city provides a range of minimum and maximum area and dimensional standards. For example, in

The central issue for a city administering a bonus program is whether to grant bonuses as of right or to use a discretionary process involving negotiation between the city and the developer. Most cities use both.

In Chicago, the evaluation determined that design guidelines were sorely needed to improve the appearance of the amenities being provided. The study also concluded that the gains to developers through bonuses far outpaced the public benefit of any of the amenities provided.

In redrafting its bonus provisions, Minneapolis refocused the amenities to meet progressive smart growth and sustainability goals contained in the city's new comprehensive plan.

order to be eligible for a bonus, a parcel park (e.g., a vest pocket park) must be at least 3,000 square feet and no more than 7,000 square feet of contiguous space.

In an analysis of incentive zoning schemes, Mandelker noted several scenarios that elucidate the right vs. discretion problem (Mandelker 1970, 17). For example, a city may not like the developer's design of certain amenities, even if the developer complies with the formal requirements. Moreover "substantive ambiguities" inherent in design guidelines mean that explicit procedures are needed to ensure that the public gets the amenities commensurate with the bonuses being provided. Another problem noted by Mandelker has not been borne out in the last 30 years; namely, a developer may not develop the site to its fullest potential but the site still qualifies for the bonus. In reality, the base zoning that is permitted as of right is typically adequate and is at the low end of the range of what is actually desired in a given district or on a site. The additional density that is allowed via a bonus represents the maximum acceptable density at the site.

CASE STUDIES

Zoning incentives are being used extensively by local governments to meet urban design and planning objectives, such as provision of urban design amenities, human services, and transit-related improvements. As has been described, in many cases, the amenities provided by developers, while meeting the requirements of the ordinances, have fallen short of producing a high-quality urban environment where the public benefit is of equal value to the increased return on investment realized by the developer through increased density or floor area.

Some cities, including Chicago and Minneapolis, have found it necessary to evaluate their programs to determine how well the amenities being provided meet the needs of the public and to assess their impact on urban design. In Chicago, the evaluation determined that design guidelines were sorely needed to improve the appearance of the amenities being provided. The study also concluded that the gains to developers through bonuses far outpaced the public benefit of any of the amenities provided. In redrafting its bonus provisions, Minneapolis refocused the amenities to meet progressive smart growth and sustainability goals contained in the city's new comprehensive plan. In short, the bonuses offered and the amenities required by cities must be evaluated and reconsidered to ensure that they meet contemporary community planning objectives. With that in mind, we now address how incentive zoning has been used to meet state and local goals of smart growth.

Arlington County, Virginia

Two of the earliest applications of bonuses to meet smart growth objectives were in the Ballston and Rosslyn neighborhoods of Arlington County, Virginia. The extension of Metrorail service in the late 1970s prompted the county to prepare a series of station-area sector plans for the areas in the immediate vicinity of the new train stations, including Ballston. At the time, the Ballston area lacked a downtown or definable center and was regarded as ripe for redevelopment.

The Ballston Sector Plan, which was adopted by the county in May 1980, called for Ballston to be transformed into a modern housing and commercial center focused around the Metrorail station (Bernick and Cervero 1997, 220). Indeed, that has occurred in the last 20 years. A key implementation mechanism for the plan was the use of density incentives to achieve a desired built form. A seven-block area around the Metro sta-

tion was designated as a coordinated mixed-use district with high permitted densities of 3.5 FAR for commercial buildings, 135 dwelling units per acre for apartments, and a maximum of 210 dwelling units per acre for hotels. Street-level retail uses were also required for all commercial-office buildings within the district. The FAR for commercial buildings is allowed to be increased to 6 from 3.5 for buildings that have 50 percent or more of their floor space as residential units.

In 1962, well before the Ballston Sector Plan process, a redevelopment plan for the Rosslyn area of Arlington County had led to rezoning of the area from a mishmash of low-intensity warehouses and industrial buildings to very-high-density commercial and residential development. The county sought to capitalize on Rosslyn's proximity to downtown Washington, D.C., Georgetown, and federal employment centers, as well as a new Metrorail station. The resulting development, according to Bernick and Cervero (1997), reflected the state of planning practice of the 1960s; namely, it aimed for an automobile-oriented environment with broad boulevards, wide plazas, a skywalk system, and little street-level pedestrian amenity or activity.

An Amended Plan for the Rosslyn Area was adopted in 1992, and new zoning regulations followed in 1996. The amended plan "refines the vision for Rosslyn as a first-class urban center and incorporated new goals and objectives" for development in the area (Arlington County 2000). Under the new zoning ordinance, the base density in the downtown area is 3.8 FAR, which means that almost every project is large enough that it is subject to a site plan review process. Through this process, additional density is granted to the developer, and the developer provides public benefits and amenities.

There is a wide range of public benefits that developers may provide in exchange for additional floor area. These include connections to transit stations, public art, subsidies for retail parking, and streetscape improvements. The Rosslyn bonus program is unique in that additional floor area can be granted in exchange for not only urban design benefits, but also for off-site amenities and economic development benefits. Developers may also receive density bonuses in exchange for cash contributions to the Rosslyn Fund, monies from which have been used to convert a movie theater into a performing arts space and to install a wayfinding signage system in Rosslyn.

The County Board established the Rosslyn Fund in 1991 as a Trust and Agency Account with an initial contribution of \$25,000. Subsequent funds have been contributed by developers of projects in Rosslyn as part of their development agreement with the county. The Rosslyn Station Area Plan Addendum of 1992 outlined future capital improvement projects related to skywalks, streetscape, and entryways to Rosslyn. As of May 2000, some of these improvements have been made or are in process as part of site plan projects and the county's capital improvements program.

To implement the economic development element of the Rosslyn Plan, developers may also be granted additional density in exchange for providing high-technology upgrades within office towers. Developers of the 1801 N. Lynn project, a 24-story office tower, the first building to be approved under the new zoning ordinance, are spending \$2.7 million on "smart-building technology," including prewiring for voice, data, and video communications, a teleconference center, and energy efficient HVAC systems, among other features. Robert Adkinson, economic development planner with Arlington County says that, when completed, it will be the only building of its kind in the country.

The Rosslyn bonus program is unique in that additional floor area can be granted in exchange for not only urban design benefits, but also for off-site amenities and economic development benefits.

Bernick and Cervero (1997) note that the sector plans for Rosslyn and Ballston are examples of the Washington Metro Area Transit Authority (WMATA) aggressively pursuing joint development opportunities that link transit stations to high-density, public and private development in close proximity to the stations. Although these initiatives were not characterized as transit-oriented development (TOD) plans at the time they were prepared, today they are recognized as a precursor to the TOD planning paradigm.

Chicago

As noted above, Chicago was the first city to use zoning bonuses when it adopted incentive provisions in 1957. The primary goal of the 1957 ordinance was not to obtain public amenities. Rather, it was to encourage large-scale development by making it possible to build bigger buildings (Chicago Department of Planning and Development 2000). Developers in downtown Chicago may increase the FAR from a base of 16 to 30 if they provide plazas and arcades. A 15 percent as-of-right increase in floor area is provided for buildings that adjoin a public open space, which in Chicago includes parks, the Chicago River, and even Lake Michigan.

In 1998, the city began a comprehensive analysis of its bonus provisions. A full study of the system was released in July 2000, and a draft amendment to the Chicago zoning ordinance that would significantly overhaul the system was introduced to the city council at the same time. Similar to the situation in New York and Minneapolis, which are also revamping their programs, Chicago's system has resulted in overly generous bonuses vis-à-vis the amenities received in exchange, and it has been only marginally successful in meeting the city's needs with regard to design and public improvements.

The 2000 study by the city Department of Planning and Development identified six major problem areas with the system:

- 1. The ordinance awards huge FAR increases for minimal amenities.* Under current regulations, a ground-floor plaza on a building with a base FAR of 16 would qualify for three separate bonuses, all of which could be "stacked" onto the base building. It would receive: a bonus of 10 FAR for a 20-foot, full-height building setback; a 6.83 FAR increase for upper-story setbacks; and a 1.14 FAR increase for ground-level open space. This would bring the total allowable FAR to 33.97, and more than double the size of the building.

- 2. No design standards are prescribed for open space amenities.* The only requirement for open space amenities under the current system is that they be "suitably paved and landscaped." Many of the open spaces that have been provided in return for added FAR are unusable and unappealing to people.

- 3. Some bonusable amenities are of questionable value.* Some of the amenities for which bonuses are provided no longer reflect the best approach to urban design and community aesthetics. Arcades are the feature most commonly criticized (not just in Chicago, but Minneapolis and New York too). Arcades disrupt the continuity of street-level retail uses and often terminate at blank walls, creating dark unpleasant environments for pedestrians. The lack of design guidelines has also contributed to their misuse as loading areas, service ramps, and areas for mechanical storage.

- 4. The menu of bonusable amenities does not adequately address the city's needs.* Chicago has many needs in the downtown that the bonus system could be designed to provide. Such things include more public open space, additions to the Chicago Riverwalk, urban heat island reduction, better designed parking structures, historic preservation, and transit improvements.



Marva Morris

In some cases in Chicago, areas that should have been designed as public open space in exchange for increased floor area have instead been used for trash receptacles or loading areas..

EXAMPLE OF FAR INCREASE DUE TO MULTIPLE BONUSES

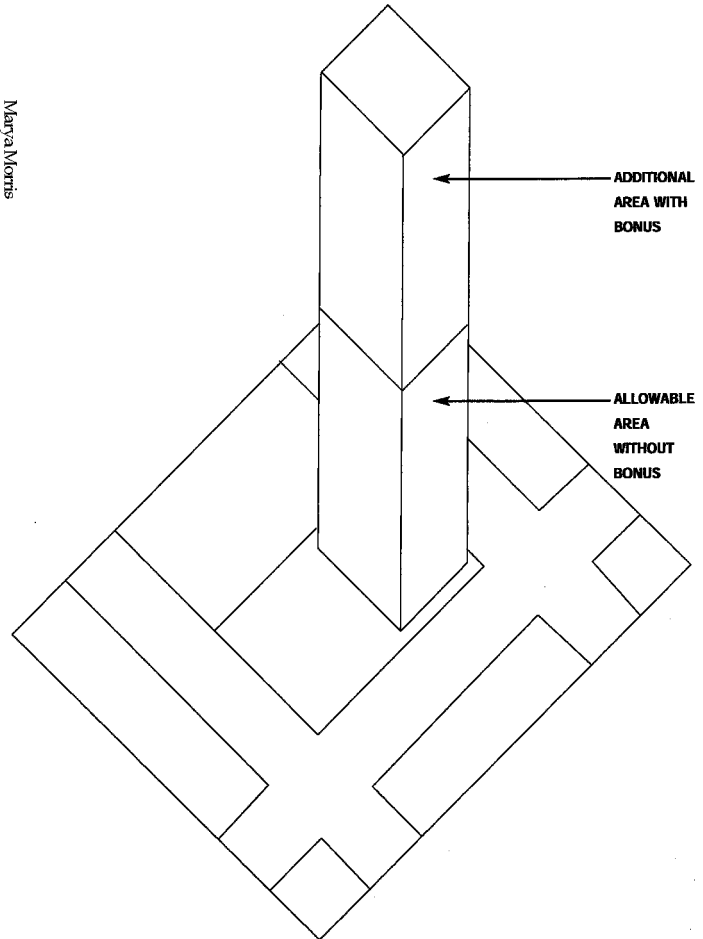
Assuming a 20-story building proposed on the same 25,000-square-foot site with a 12,500-square-foot plaza and 20-foot building setbacks along lot lines, the FAR can be increased as follows:

Basic FAR	12.00
20-foot building setback along 3 street frontages	6.00
Ground-floor open area bonus	1.32
Upper-floor open area bonus	3.96
Total FAR:	23.28

Allowable Floor Area:

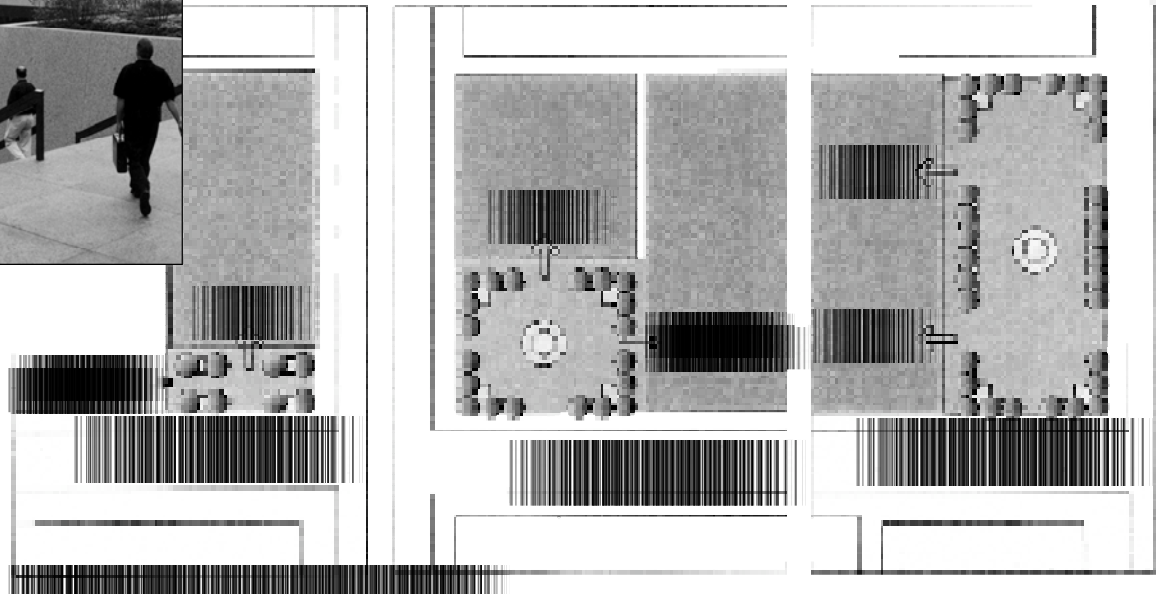
Without bonus:	300,000 square feet
With bonus:	582,000 square feet

By combining all the bonuses, the base FAR has nearly doubled.



rya Morris

(Left) Developers in downtown Chicago may increase the FAR from a base of 16 to 30 if they provide plazas and arcades. (Below) In neighborhoods that lack open spaces, public plazas and parks offer residents and workers opportunities for rest and relaxation in open, bright landscaped spaces.





Marya Morris

Developers who opt to participate in Chicago's adopt-a-landmark program provide money to owners of nearby designated historic landmarks for substantial interior or exterior renovation work.

5. Density "pricing" is much lower in Chicago than in other cities that have bonus systems.

The Chicago planning staff reviewed bonus systems in "peer cities" and found Chicago to have the most permissive system of any major city. (See Table 2-1 on pages 22-23.) A ground-level plaza in Chicago could earn an FAR bonus equivalent of 100 percent, whereas in New York it would earn a 20 percent bonus. The study notes that "the generosity of the present bonus system makes it difficult for Chicago officials to bargain aggressively with developers during planned development negotiations" (City of Chicago 2000).

6. The current negotiated, ad hoc bonus system is unpredictable and unfair.

Most large projects in Chicago where bonuses and amenities are exchanged go through the planned development process. Although the city and developers do benefit from the flexibility the process provides, it has led to piecemeal decision making with very little predictability.

The new bonus system proposed in Chicago aims to improve the existing system by adding some new amenities to meet the city's current needs, to more closely link the value of the bonus floor area with the amenities provided, and to institute design guidelines for the plazas, arcades, and amenities. The bonuses will be capped at a maximum of 6 FAR for public plazas and pedestrian parks, which will be the highest bonus allowed. Multiple bonuses for one design feature, such as the example above where the one plaza was eligible for three bonuses, will be eliminated. "Green roofs," (i.e., rooftop gardens designed to help mitigate the urban heat island) are a new option eligible for a .30 FAR increase. And cash contributions for five

types of off-site improvements, including an adopt-a-landmark provision, would also be provided. Developers who opt to participate in the adopt-a-landmark program would provide money to owners of nearby designated historic landmarks for substantial interior or exterior renovation work.

Several building design features were considered for bonuses but were ultimately omitted from the proposed amendments. Ground-floor retail, for example, which is a bonusable amenity in numerous other cities, was not added to the list because the city believes that, if it is important enough in high-density areas, it should be provided as a practice rather than an exception worthy of a bonus.

Minneapolis

Minneapolis has had provisions for zoning “premiums” (the term the city uses for bonuses) in place since 1960. Like many other cities, Minneapolis offered floor area bonuses in the downtown for street-level plazas and arcades. It also provided floor area premiums for pedestrian connections to parking garages, sidewalk canopies to protect pedestrians from inclement weather, and off-street parking and loading. These provisions met the planning objectives of the era in which they were enacted; namely, they were aimed at improving design in an automobile-oriented downtown. But as was true in other cities, the quality of the amenities being provided was not considered high, and changes needed to be made to the ordinances.

The plan for Downtown Minneapolis 2010 (an excerpt appears in the sidebar) was adopted in 1996. It addresses the use of zoning premiums in the central business district. The planning process provided the city with the opportunity to rethink the bonus system to ensure that it meets the city’s up-

CONTINUING THE VISION INTO THE 21ST CENTURY

An Excerpt From the Downtown Minneapolis 2010 Plan

Implementation: Zoning

Revising the downtown zoning will be an important part of the process of implementing the land-use and development recommendations of this plan. Revising the code will enable the city to ensure the highest standards for new development while protecting the private investment that already has been made in downtown.

The City is currently comprehensively revising its zoning code. The current code needs to recognize the changes in the nature of development as well as the physical changes that have occurred with the City over the past 30 years.

The current zoning code divides most of downtown (excluding the Loring Park and Elliot Park neighborhoods) into 13 zoning districts and subdistricts. The boundaries and standards of these districts should be revised and updated to reflect the recommendations contained in this plan. Particular attention should be paid to the following:

- Revise the organization and boundaries of the B4 districts to reflect current development patterns and objectives for future growth.
- Revise the parking requirements to balance transit policies with the goals of retaining a compact core and providing parking to meet projected demand.
- Revise the bonus system to more effectively match bonuses with amenities that benefit the public and develop design standards to ensure quality results.

Bonuses for the following should be evaluated:

- Street-level retail (beyond what might be required in certain districts)
- Weather-protected bus stops that are incorporated into office and retail development
- Large urban plazas or parks; smaller plazas and parks; indoor atriums designed for public use
- Short-term parking
- Indoor public display areas for art or cultural exhibits
- Develop standards for street-level development such as street-level retail, street-level building design, and parking lot landscaping.
- Develop a residential mixed-use zoning district for downtown residential districts.
- Revise the T and TC Districts to reflect projected demand in the Minnesota Technology Corridor.
- Incorporate a Transfer of Development Rights mechanism for designated historic buildings.
- Revise the approvals process in order to achieve an understandable and efficient process.

Responsibility: City Planning Department, Downtown Council



Jason Wittenberg

Street-level arcades were removed from the list of bonusable amenities when Minneapolis revised its system in 1999.

Indoor open spaces, such as the Crystal Court in the IDS Center in downtown Minneapolis, are required to be open to the public during normal business hours.

dated planning objectives. To implement the plan, the city adopted a new zoning ordinance in November 1999, which includes several major changes to the bonus program. Bonus floor area may now be granted in exchange for 11 types of amenities, including public outdoor open space, interior through-block connections, pedestrian connections to the city's extensive skyway system, public art, historic preservation, and ground-floor retail. Ground-floor retail is also mandated in some parts of downtown through an overlay district. Floor area premiums range from an increase in the FAR of one—for through-block connections, skyway connections, transit facilities, widened sidewalks, and street-level retail—up to eight for projects that include outdoor open space.

Blake Graham, the city's planning supervisor, says the first order of business in drafting the



Jason Wittenberg

new premium standards was to remove street-level arcades from the list of amenities for which bonus floor area would be granted. Graham joked that, before the arcade bonus was eliminated, he had been tempted on occasion to grant a developer a bonus if they would agree *not* to include such an arcade. (Such a “trade-off” actually did happen in Chicago on more than one occasion.) Added to the list of bonuses is a mixed-use retail provision.

The new ordinance provisions also contain design standards regulating the location and appearance of the amenities to be provided. The city’s planning director or the director’s designee is charged with administrative review of all applications for premiums. In that capacity, the director does have discretion to approve alternatives to the proscribed standards; those decisions may be appealed to the planning commission. Large projects in the downtown must go through site plan review. The appendix to this report includes an excerpt of the new premium provisions in the Minneapolis ordinance.



Jason Wittenberg

The Minneapolis system provides bonus floor area for buildings that make connections to the city’s famed skyway system (above). Street-level retail—with awnings or canopies for weather protection—may also garner additional floor area for office towers (right).



Jason Wittenberg

Table 2-1. HEIGHT AND DENSITY LIMITS AND ZONING INCENTIVES IN MAJOR U.S. OFFICE MARKETS, 1998

CITY	METRO OFFICE MARKET (millions of square feet)	ZONING BONUS SYSTEM	BONUSABLE AMENITIES	BULK/HEIGHT LIMITS ¹	HIGHEST BUILT FAR
Boston	143.8	Limited	Bonus (typically 2 FAR plus additional height) for participation in "large project review"	4 to 10 FAR for downtown districts; 155-foot height limit as of right with large project review bonus; 400-foot limit achievable through PD process.	Not known
Atlanta	91	Yes	- Bonus of 55 square feet of office space per 1 square foot of residential space. 100 square feet of office space per 1 to 2 square feet of public open space.	3 to 5 FAR in most downtown districts; 10 to 25 FAR if within overlay districts centered on rapid transit stations (generally 1,500-foot radius). Wider sidewalks mandated in overlay districts.	Not known
San Francisco	84	Limited	For existing construction only, limited bonus for provision of affordable housing. Seldom used. More extensive bonus program repeated in 1984.	5 to 9 base FAR in downtown districts; by purchasing unused development potential from other sites within a given district, maximum FAR of 18 is obtainable	Approximately 24 (pre-1984)
Philadelphia	83	Yes	FAR bonus of 8 if building provides all of following: frontage on at least two streets, landscaped public space (can be enclosed), public art, retail space. On certain streets, additional bonuses up to maximum of 4 for observation decks, through-block connections, transit or park improvements, housing fund contributions, etc. TDR from historic sites permitted. Retail space, day care facilities, etc., do not count toward FAR.	Base FAR of 12 in highest density district; maximum of 24 with bonuses, although see below. No overall height limit, but height limits apply on certain streets. Additional 20 percent FAR allowed for TDR south of Chestnut Street; judging from ordinance, this is above and beyond 24 FAR limit.	Not known
Denver	70	Yes	Bonuses for downtown housing, historic preservation, child care facilities, "residential support facilities," schools, "pedestrian activity uses" (e.g., storefronts), "sunlight preservation," outdoor art, etc. 1.5 to 4 square feet of additional space allowed per 1 square foot of amenity; qualifying outdoor art earns 0.25 FAR bonus; additional FAR obtainable through TDR.	17 FAR limit, unless 50 percent of building is residential, in which case 20 FAR limit. No height limit in downtown core; 400-foot height limit in one peripheral downtown area (transitions to residential area), 200-foot in another (preserves mountain views).	Approximately 15
Seattle	53	Yes	Various "public benefit features," e.g., low-income housing, transferred development rights, either are not counted against FAR or earn FAR bonus.	450-foot height limit in downtown districts. Base FAR 5; can be increased to 14 through bonuses in highest density districts.	28 (Columbia Seattle Center)

Table 2-1. HEIGHT AND DENSITY LIMITS AND ZONING INCENTIVES IN MAJOR U.S. OFFICE MARKETS, 1998

CITY	NETRO OFFICE MARKET (millions of square feet)	ZONING BONUS SYSTEM	BONUSABLE AMENITIES	BULK/HEIGHT LIMITS ¹	HIGHEST BUILT FAR
New York	462.7	Yes	Bonuses are offered for arcades, open plazas, covered pedestrian spaces, subway improvements, and other public amenities. Bonuses vary by zoning classification; special bonuses apply in defined districts (e.g., midtown). Additional FAR obtainable through transfer of development rights (TDR).	No overall height limits apply in some lower-density special districts. Base FAR of 15 in highest density districts; maximum FAR of 18 with bonuses. Development rights may be transferred from adjacent structures, typically landmarks, by special permit; no limit to obtainable FAR. In TDR districts, adjacency not required, but 21.6 FAR limit applies.	Approximately 26 (several pre-1961 buildings); 21.6 max since 1961
Washington, D.C.	243.7	Yes	Bonuses provided for "preferred uses" (e.g., department stores, theatres) at a rate of 1.3 square feet of floor space per 1 foot of preferred use space. TDR program permits unused FAR from renovated historic buildings to be transferred to 1 of 5 "receiving zones" outside downtown.	130-foot height limit (street width plus 20 feet) except for certain blocks on north side of Pennsylvania Avenue, where 160-foot limit applies; however, other limits apply to these blocks. Base FAR of 10 in highest districts; may be increased to 10.5 with bonuses.	Approximately 11
Dallas	175 (Includes Fort Worth)	Yes	For building setback beyond 10-foot minimum requirement: Six square feet of additional floor space permitted for each square foot of additional ground floor open space, up to max FAR of 24.	Base FAR of 20 in downtown districts; maximum FAR 24. No statutory height limit.	Approximately 25 (Nations Bank received variance)
Houston	167	No; there is no zoning	NA	No statutory limits. Houston has no zoning ordinance.	Approximately 27 (1.7 million-square-foot building on 62,500 square-foot site)
Chicago	163	Yes	In business districts: • arcades • full-height setbacks • ground-floor open space • upper-story setbacks In residential districts: • reduction in units • adjacent to public open space	No statutory height or bulk limits. Base FAR of 16 in highest density districts. FARs of 33+ achievable with bonuses.	32.7 (Three First National Plaza)
Los Angeles ²	158	Limited	"Transfer of floor area ratio" (same as TDR) permitted in CBD redevelopment area, where base FAR is 3 or 6; transfer entails payment of excitation fee to city. Projects within 1,000 feet of transit station eligible for 20 percent reduction in parking requirement.	13 FAR in highest density districts. No overall height limit; height limits apply in certain areas (e.g., historic preservation districts).	17 (Library Tower; see note 2)

1. "Bulk/Height Limits" refers to statutory limits in the municipal zoning code or equivalent. In some cities, practical limits may apply to some properties due to FAR limits, private deed restrictions, sewer restrictions, and the like.

2. In Los Angeles, FAR of 17 was granted to 73-story Library Tower by special ordinance in which several building lots near LA Central Library were consolidated for purposes of density calculation; FAR of entire site including Library Tower is 11.8.

Source: City of Chicago



Once plazas are constructed, it takes ongoing monitoring to ensure that they remain open to the public. This one, at 90 Washington Street in New York City, provides little if any benefit to the neighborhood.

New York

The use of zoning bonuses has had its most profound impact on the built environment of New York City. That program, in place since 1961, has resulted in more than 500 public plazas, arcades, and open spaces at about 325 commercial and residential towers (Kayden 2000).

The city of New York uses density bonuses in high-density districts in two ways. First, they are used to provide street-level amenities in high-density residential and commercial districts, including plazas, arcades, and shopping gallerias. Second, bonuses are used to protect the neighborhood character of certain districts. In residential and commercial districts, developers receive either floor area bonuses or are allowed



The lively plaza at 1755 Broadway in New York City serves both the building's tenants and passersby very well.

to reduce lot sizes in exchange for a plaza or arcade (New York City Zoning Resolution, Section 23-16-18).

In lower-density residential districts, floor area bonuses are available in exchange for deep front and wide side yards. In most cases, the bonuses are available as of right. Bonuses for large residential developments and buildings that contain community facilities (e.g., a library or a museum) are subject to a special permitting procedures—similar to a planned unit development review process—through which the developer and the city negotiate the amenities and bonuses to be provided. All residential projects that incorporate bonuses are subject to mandatory streetscape urban design guidelines (Weinstein 1994). Arcades, for example, must run the length of a block and cannot be terminated by a blank wall, although they can be interrupted by a pedestrian plaza.

Incentive zoning regulations are also applied in special districts in New York City to help achieve certain planning objectives. These districts are areas deemed to have special character or specific development issues, such as theater districts, tourist areas, and mixed-use shopping and residential districts. Additional regulations—including the zoning bonuses—are applied as overlay regulations in these districts. The purpose of the Special Midtown District, for example, which was enacted in 1980, is (1) to encourage intensive development in some subdistricts, such as Times Square, (2) to protect and preserve various Broadway theaters (many of which were being demolished and replaced with office towers), and (3) to protect the overall character of the theater district. The same basic types of amenities are provided in special districts in exchange for increased floor area, but the exact requirements and design guidelines are specific to each special district and even further refined within subdistricts. Moreover, some of the special districts also apply transfer of development rights to shift development and density from one part of the district to another.

In 1999, the city began its Unified Bulk Program, which includes (1) a study of problems of building height and bulk that have resulted from the city's existing zoning regulations, and (2) a draft comprehensive revision to the city's zoning resolution that is intended to clarify rules regarding the height and bulk of large buildings throughout the city. Part of the program involves an examination of the height and bulk problems caused by the too generous allowances given through zoning bonuses. For example, the study notes that "floor areas bonuses for residential plazas and certain other public spaces have too often produced larger buildings without providing meaningful public benefits" (New York City 1999). Moreover, plazas for residential high-rises have been privatized for enjoyment by building residents—they do not serve the general public as open space. Under the draft revision, bonuses would no longer be provided for residential plazas, with the exception of residential projects in high-density commercial districts areas, where bonuses are allowed by special permit. Bonuses for commercial and community facility plazas, which are of greater value because of the public nature of the buildings, would be retained.

Incentive zoning regulations are also applied in special districts in New York City to help achieve certain planning objectives. These districts are areas deemed to have special character or specific development issues, such as theater districts, tourist areas, and mixed-use shopping and residential districts. Additional regulations—including the zoning bonuses—are applied as overlay regulations in these districts.

Seattle: The Denny Triangle Neighborhood

Seattle has provided zoning bonuses, which the city refers to as "public benefit features," in its downtown since the early 1980s. The 28 public benefit features that developers may provide in exchange for additional development density include the common ones, such as shopping atriums, plazas, affordable housing, and transit station access. There is also a long list of unique features that includes rooftop gardens, hill climb as-



Zoning bonuses and transferable development rights are being used to transform the Denny Triangle neighborhood in downtown Seattle from a mix of underused, low-density commercial and industrial sites into a high-density, mixed-use center.



sists, sculptured building tops, short-term parking, and green streets. A green street is a street right-of-way that is part of the city's street circulation pattern that has been improved through sidewalk widening, landscaping, traffic calming, and pedestrian-oriented features. Improvements to green streets may qualify for a zoning bonus.

The state of Washington's Growth Management Act of 1990 required that Seattle and other cities update their comprehensive plan to meet statewide goals for growth over a 20-year period. Seattle's comprehensive plan, *Toward a Sustainable Seattle*, was adopted by the city council in 1994 (Seattle 2000). The plan called for future growth in the Puget Sound region to be concentrated in the city's 37 neighborhoods. The plan established a neighborhood planning process that involves nongovernmental neighborhood planning associations to prepare their own plans.

The Denny Triangle neighborhood is an area adjacent to downtown Seattle that is relatively underdeveloped.

The comprehensive plan designated the area as an "urban center village," which, to paraphrase the technical definition, meant that the area was considered to have the greatest potential of the city's five downtown neighborhoods to accommodate much more residential density than what existed there at the time. Specifically, the city plan suggested a target of 3,778 additional housing units to be built in that area, which contained only about 1,000 people when the plan was prepared.

Seattle's downtown housing program allows commercial developers to increase their permitted FAR and add commercial square footage by earning housing bonus credits through either a cash option (e.g., payments to a housing trust fund in lieu of

building housing) or a production option (e.g., the developer builds both the housing and the commercial space).

The Denny Triangle Neighborhood Plan calls for the city to rezone the area to permit higher densities and taller buildings in certain areas, and to use zoning bonuses and transfers of development rights to generate moderate-income housing in the area. Specifically, the plan calls for the city to provide a “super bonus” above what was already provided for (1) the first 300 housing units serving residents in the 50 to 80 percent median-income range, and (2) the first 200 units serving residents in the 80 percent to 120 percent median-income range. The neighborhood plan noted that the area contains only low-income and low-to-moderate-income housing, thus the bonuses should be used to promote a mix of housing prices, particularly moderate-income housing. Developers are given additional commercial development capacity in exchange for the housing and other public amenities provided.

CRITIQUES OF INCENTIVE PROGRAMS AND LEGAL ISSUES

There have been very few legal challenges to incentive zoning programs, most likely because such arrangements are generally beneficial to developers, allowing them to build at higher densities and achieve profits that are greater than what may otherwise result with the underlying zoning. Plus, even when bonuses are provided as of right, incentive zoning is an elective rather than mandatory land-use control (Getzels and Jaffe 1988, 14).

In some cases, developers have expressed legitimate concern that the underlying zoned density is set artificially low to arm twist them into providing amenities to increase the size of the project to an economically feasible level. But as long as the base zoning does not extinguish reasonable development rights under the ordinance, developers would have difficulty proving that their investment-backed expectations had been thwarted. Also, through planning, communities can establish a solid rationale for linking the amenity to the mitigation of impacts created by additional density (Getzels and Jaffe 1988, 15).

The use of incentives also raises the issue of uniformity of treatment. Allowing density for a given project to be increased above what is permitted by the base zoning in exchange for certain amenities understandably leads to questions about the legitimacy of the underlying zoned densities. A developer of a similarly situated property that was completed prior to enactment of bonuses may ask why his developable density was limited to begin with. Moreover, residents of buildings adjacent to bonused buildings may question if the public benefit conferred by the developer (e.g., a public plaza) is adequate compensation to them or the general public for something like the loss of sunlight that occurs because of the added height of the new building.

Another concern is what Jerold Kayden refers to as “privately owned public space.” When a developer enters into an agreement with a city to provide an amenity, such as a street-level plaza, in exchange for increased floor area, the developer also consents to allow the plaza to be open to the public. For indoor bonusable spaces, such as a through-block shopping arcade, the building owner must agree to allow the public in the space during normal hours of operation. What Kayden found in an extensive study of such spaces is that, gradually, building owners privatize the public space by: using gates to restrict public access; opening cafes and restaurants in the space, which gives the perception that it is private space; or otherwise find ways to discourage people from simply hanging around. The issue is one of enforcement, but building and zoning enforcement of-

The use of incentives also raises the issue of uniformity of treatment. Allowing density for a given project to be increased above what is permitted by the base zoning in exchange for certain amenities understandably leads to questions about the legitimacy of the underlying zoned densities.

ficers simply have higher priorities than to police the use of these spaces. One possible solution: establish a public space conservancy and use volunteers to inspect the spaces and report violations to the city.

A final issue, which has been addressed above to a certain degree, is that local government objectives change, and bonus programs need to be regularly adapted to those changes. As the twentieth century ends, many communities are refocusing their plans and land development regulations to meet smart growth objectives, including encouraging compact development, developing town centers in suburbs that lack them, mixing land uses to shorten trips and reduce car trips overall, expanding housing choices, and promoting pedestrian and bicycle facilities. Incentive zoning is a tool that should be applied directly to meet these objectives.

PART 3

Zoning Incentives for Affordable Housing

INCLUSIONARY ZONING IS A MEANS OF REMEDYING THE ECONOMIC SEGREGATION IN HOUSING THAT HAS RESULTED FROM DECADES OF LOCAL GOVERNMENTS' WIDESPREAD USE OF LARGE-LOT ZONING, LARGE MINIMUM HOUSE SIZES, AND THE NEAR EXCLUSION OF MULTIFAMILY OR OTHER AFFORDABLE HOUSING (Roberts 1986, Sec. 3A.01). Given the vacuum of local initiative to solve affordable housing shortages, several states enable or require local governments to adopt inclusionary zoning provisions for affordable housing (see, for example, California Government Code, Sections 65913-65918; Connecticut General Statutes, Section 8-2g; Annotated Code of Maryland, Article 66B, Section 12.01; New Hampshire Revised Statutes, Section 674:21; General Laws of New York, Town Law, Section 261-b and Village Law, Section 7-703; Code of Virginia Annotated, Section 15.1-491.9). Common tools included in inclusionary housing programs and ordinances are mandatory set-aside provisions,

density bonuses, and waiving or relaxing certain regulatory requirements. Such techniques are essentially regulatory "fixes" for a societal problem that the free market does not readily address—the provision of housing for low- and moderate-income households.

Local land-use regulations are a commonly named culprit in making housing unaffordable. Among the techniques that are considered to have an exclusionary effect: minimum lot area requirements; minimum floor area requirements; limitations on multifamily dwellings and manufactured housing; minimum yard, setback, and bulk requirements; overzoning (e.g., devoting a disproportionate amount of land area to low-density, single-family use); and



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Research for this report indicates overwhelmingly that density bonuses and regulatory waivers, in and of themselves, do not lead to the creation of affordable housing units. Such techniques are used most effectively in concert with direct subsidies and where there is adequate land zoned to accommodate housing of all types and for all income groups.

growth management caps (Callies et al. 1999). In a study of inclusionary housing programs in California, Schwartz and Johnson (1983) note that “There is no substitute for basic development policies that provide a suitable supply of vacant land zoned for housing at a wide variety of densities, permit subdivisions of lots at appropriate rates, and do not persistently restrict the rate of building permit approval below demand.” Research for this report indicates overwhelmingly that density bonuses and regulatory waivers, in and of themselves, do not lead to the creation of affordable housing units. Such techniques are used most effectively in concert with direct subsidies and where there is adequate land zoned to accommodate housing of all types and for all income groups.

This section of the report addresses the inclusionary techniques that are considered incentives per se (i.e., bonuses and waivers). Other mechanisms (e.g., mandatory set-asides, fee-in-lieu programs) are referenced here only in the context that they relate to incentive provisions. State requirements for local housing planning are also discussed here because the jurisdictions that are considered to have had success with such housing programs are by and large in states that mandate local governments to use such techniques.

Mandatory set-asides require that residential developments over a certain size include a prescribed percentage of units for low- and moderate-income households. Under some ordinances, set-asides may only be required where federal and state housing subsidies are available for the lower-income units or if a public housing authority plans to acquire or lease them (Mandelker 1997, Section 7.26). Density bonuses are sometimes offered with mandatory set-asides. Bonuses are granted to developers wherein each unit of affordable housing provided is equated with an added number of dwelling units permitted to be sold or rented at market rate. Some ordinances scale the density bonuses according to certain affordability ranges (i.e., greater bonuses are offered for the provisions of the most needed or difficult-to-provide housing for target populations). Where there are not subsidies available, density bonuses may be combined with set-asides to help defray the losses incurred by the developer on the lower-income units.

Additional incentives are provided to developers in the form of waivers or reductions in site development standards or modifications of zoning code requirements or architectural design requirements. These include reductions in setback, floor area, and off-street parking requirements. Inclusionary ordinances also often contain alternative means for developers to meet the intent of law (e.g., making payments to a housing trust fund in lieu of actually constructing the housing, providing the housing off site, or dedicating land to the jurisdiction on which such housing will be built by a public or nonprofit entity).

CALIFORNIA

California enacted legislation in 1989 (California Government Code, Section 65915) requiring local governments to prepare a housing plan element and provide density bonuses and other incentives and concessions to developers of affordable housing. The impetus for the legislation was a housing shortage for low- and moderate-income families and ever-increasing housing costs brought on by skyrocketing real estate values in the 1970s and 1980s. Local government permitting processes and land-use regulations aimed at slowing or managing growth were also factors (Calavita and Grimes 1998). The California program has been described as “decentralized, flexible, ad hoc, diverse and complex, as it reflects the political, economic and cultural traits of each locality over time” (Calavita

and Grimes 1998, 164). The political aspect of this description refers to differing philosophies among governors and their administrations between the 1970s and 1990s regarding both the causes of the affordable housing shortage and the appropriate level of government intervention to solve the problem. The result of this ongoing debate has been that, although local governments are mandated to adhere to certain inclusionary housing requirements, most local governments that have had any success in getting housing produced have crafted their own solutions, using the state requirements more as a framework than an absolute plan. Petaluma and San Jose, described below, are two such communities. The downside to the fluctuating message from the state regarding this issue has been that many communities have merely adopted housing plan elements and inclusionary housing ordinances, but have not implemented them.

The housing legislation requires local governments to first prepare a housing plan element as part of a general plan and to subsequently provide density bonuses in order to meet their affordable housing goals. The housing element must consist of “an analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing” (Section 65583). The element must also outline the actions the local government will undertake to implement the housing element, including land-use and development controls, regulatory concessions and incentives, and the use of federal and state financing and subsidy programs.

Local governments are also required by state statute to provide incentives—in the form of density bonuses and regulatory waivers—to developers who build affordable housing (Section 65915). The law provides that local governments shall grant density bonuses of at least 25 percent, plus an additional incentive or equivalent financial incentive, to housing developers who agree to construct at least: 20 percent of the units affordable to lower-income households, 10 percent of the units affordable to very-low-income households, or senior citizen housing. The law also requires local governments to establish procedures to waive or modify “development and zoning standards which would otherwise inhibit the utilization of the density bonus on specific sites. These procedures shall include, but not be limited to, such items as minimum lot size, side yard setbacks, and placement of public works improvements.”

The most recent figures available show that, as of 1992, 26 California counties (out of 58) and 196 municipalities (out of 474) had enacted density bonus ordinances (Office of Planning Research 1992).

The other incentives and concessions that local governments may provide include:

- a reduction in setback and square-footage requirements;
- a reduction in parking requirements;
- approval of mixed-use zoning; and
- other regulatory incentives or concessions that a developer or the city may propose for which “identifiable cost reductions” can be shown.

To implement the density bonuses, the statute enables local governments to require developers to enter into a development agreement. Such an agreement would stipulate the exact terms of the bonuses the developer would receive and the incentives and concession made by the local government. Finally, the law directs courts to uphold the decision of a city or county, or to grant the density bonus if it finds that the bonus will as-

California’s housing legislation requires local governments to first prepare a housing plan element as part of a general plan and to subsequently provide density bonuses in order to meet their affordable housing goals. . . . Local governments are also required by state statute to provide incentives—in the form of density bonuses and regulatory waivers—to developers who build affordable housing.

sist the local government in meeting its share of the regional housing needs or in implementing its congestion management plan.

Finally, the California Community Redevelopment Law is also instrumental in getting affordable housing units built in areas where that law is being applied. Under the redevelopment law, 20 percent of the revenues generated in locally designated redevelopment areas must be used to increase or improve housing for low- and moderate-income households (Section 33334.2). Local redevelopment agencies are further required to ensure that at least 30 percent of all the new or rehabilitated units it develops are affordable to low- and moderate-income persons, with no less than half of those units affordable to persons of very low income. Only half of those new units have to be in the redevelopment area (Section 33413(b)). Within redevelopment areas, 15 percent of all private and public units must be affordable. In fiscal year 1994-1995, there were 5,037 affordable units produced under the 30 percent requirement and 251 units under the 15 percent requirement (Calavita and Grimes 1998).

According to Linda Wheaton, housing policy specialist with the California Department of Housing and Community Development, the most common use of the density bonuses is for assisted rental housing (Wheaton 1999). The bonuses are used less often for for-sale residential developments because the statute requires that they remain affordable for 10 to 30 years. Such a requirement provides no opportunity for equity recapture on the part of first-time home buyers. Thus, says Wheaton, the requirements aimed at keeping housing units affordable are not reconciled with overarching goals helping families build equity and financial stability through home ownership. Finally, in terms of regulatory concessions, Wheaton says the most common waiver offered by local governments and sought out by developers is the reduction in parking requirements.

As mentioned above, two California cities, Petaluma and San Jose, that have been recognized for having effective affordable housing programs, rely far more on locally crafted solutions than state directives to meet housing goals. These solutions have involved direct subsidies (with money generated through the state redevelopment law) and leveraging.

The city of Petaluma, California, is recognized as having one of the most successful affordable housing programs in California (Amoroso 2000). Between 1990 and 1999, the city financed more than 100 new affordable housing units annually. Bonnie Gaebler, the city's housing administrator, says that density bonuses and regulatory waivers may "sweeten the pot" for developers of affordable housing but, in the absence of financial subsidies, "would not result in a single unit of affordable housing getting built" (Gaebler 2000). In addition to money, the other key to the city's success she says is the "longstanding, unwavering commitment" of the Petaluma City Council to providing housing for all residents, from homeless single persons to first-time home buyers. Gaebler notes that the regional housing needs determination assigned to Petaluma is far below what will be needed in that city, given the city's job creation projection.

The city has a housing trust fund that is financed by tax increment revenues in designated redevelopment areas, Community Development Block Grant monies, and developer contributions in lieu of building affordable housing. The fund is used to leverage private and nonprofit investments in affordable housing. It also is used to pay for impact fees for affordable housing units in developments where 10 to 15 percent of the units have been set aside for low-income or very-low-income households. As such, affordable housing projects are not necessarily excused from all impact or permit fees, but, rather than coming out of the developer's

pocket or being passed on to the home buyer, there is a transfer of city funds from one account to another. Gaebler says the fact that affordable housing developments pay their own way, albeit indirectly, helps relieve political pressure against them.

A similar scenario exists on the opposite end of the Bay Area in San Jose. That city's success with regard to affordable housing is attributable to outright land acquisition, leveraged private investment using revenue generated through property tax increments in the city's redevelopment planning areas, and a flexible approach to accommodating housing development wherever possible says Kent Edens, Deputy Director of Planning (Edens 2000). San Jose generates approximately \$20 million per year for affordable housing through the tax increment mechanism. The city's housing agency uses that money to leverage approximately seven times that amount in private investment.

The San Jose 2020 General Plan serves as the "definitive" guide to land development in the city and has several mechanisms built in to encourage housing development. Adopted in 1994, it is the city's first modern plan that meets the various requirements of state law, if not the exact letter of the law, says Edens. To start, the plan designates a substantial amount of land for housing development. Further, it contains "Discretionary Alternate Use Policies" that allow various commercial or industrial sites to be redeveloped as housing at the discretion of the city council. For example, sites along major commercial streets and around future light rail stations may be redeveloped as high-density housing if a proposal meets the goals and policies of the General Plan. Most development in San Jose takes place through Planned Residential District zoning, which provides the city and developers with a lot of flexibility as to where housing may be built, but gives the city council substantial control in implementing housing goals overall. Finally, the city does provide density bonuses. Zoned densities of 12 to 25 dwelling units per acre may be increased to 25 to 40 dwelling units per acre if 100 percent of the units in the project are affordable. Similar bonuses are available for projects that contain all rental units.

Edens says the city has more than met the intent of the state-mandated housing element and exceeded its allocated Regional Housing Needs Determination assigned to it by the Association of Bay Area Governments.

NEW JERSEY

The statewide inclusionary housing program in New Jersey was born out of two significant state Supreme Court decisions regarding an exclusionary zoning ordinance in the Philadelphia suburb of Mt. Laurel. In the first Mt. Laurel decision (*South Burlington County NAACP v. Mount Laurel*, 67 N.J. 151, A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975)), the N.J. Supreme Court established a constitutional obligation for each of the 566 municipalities in the state to use zoning and land-use powers to establish a realistic opportunity for the provision of its fair-share, low- and moderate-income housing obligations. In *Mt. Laurel I*, the court's decision established a "builder's remedy." Consequently, when a developer sued a municipality for exclusionary zoning practices, the municipality would have been ordered by the court to allow, for example, four market-rate units for every unit of affordable housing built. Essentially the builder would go to court to get the building permit. Following the second Mount Laurel ruling, known as *Mt. Laurel II* (92 N.J. 158, 456 A.2d 390 (1983)), more options were introduced for how each municipality could reach its constitutional obligation. *Mt. Laurel II* led to the passage of the Fair



These homes in Washington Township in Mercer County are the result of New Jersey's provisions for its fair-share, low- and moderate-income housing program.



In Wall Township in Monmouth County, New Jersey, the affordable housing initiative has used infill housing to create more affordable housing opportunities.

Housing Act and the formation of the Council on Affordable Housing (COAH), which the state charged with implementing the fair-share doctrine and now serves as an administrative alternative to the court system. *Mt. Laurel II* approved and required affirmative governmental actions to meet the fair-share obligation, including the use of density bonuses and mandatory set-asides (Mandelker 1997).

The New Jersey Fair Housing Act (New Jersey Statutes Annotated, Section 52:27 D-310) provides municipalities with the option of preparing a housing element for their general plans and describes the essential components of such elements. The housing element must include:

- an inventory of existing housing stock and a projection of probable future construction of new affordable housing units;
- an analysis of demographic and income trends and incomes;
- employment projections;
- a determination of the municipality's present and prospective fair share for low- and moderate-income housing;
- the municipality's capacity to accommodate its present and prospective housing needs, including its fair share of low- and moderate-income housing; and
- a consideration of the lands within the jurisdiction that are appropriate for construction of affordable housing as well as analysis of existing structures that may be appropriate for conversion to affordable housing.

The Fair Housing Act enables a municipality to provide for its fair share of low- and moderate-income housing "by means of any technique or combination of tech-

niques which provide a realistic opportunity for the provision of the fair share.” In preparing the housing element, municipalities are to consider eight types of techniques.

- 1) Rezoning for densities necessary to ensure the economic viability of any inclusionary developments, either through mandatory set-asides or density bonuses, as may be necessary to meet all or part of the municipality's fair share
- 2) Determination of the total residential zoning necessary to ensure that the municipality's fair share is achieved
- 3) Determination of measures that the municipality will take to ensure that low- and moderate-income units remain affordable to low- and moderate-income households for a period of not less than six years
- 4) A plan for infrastructure expansion and rehabilitation if necessary to ensure the achievement of the municipality's fair-share goal for low- and moderate-income housing
- 5) Donation or use of municipally owned land or land condemned by the municipality for purposes of providing low- and moderate-income housing
- 6) Tax abatements for the purpose of providing low- and moderate-income housing
- 7) Use of funds obtained from any state or federal subsidy toward the construction of low- and moderate-income housing
- 8) Use of municipally generated funds toward the construction of low- and moderate-income housing

New Jersey municipalities enter the COAH process voluntarily by filing the housing element described above, which must include a fair-share plan establishing how the municipality will provide for a number of units affordable to low- and moderate-income households.

New Jersey municipalities enter the COAH process voluntarily by filing the housing element described above, which must include a fair-share plan establishing how the municipality will provide for a number of units affordable to low- and moderate-income households. The municipalities' fair share is predetermined by COAH using a computation formula that establishes the number of new and rehabilitated units of affordable housing that must be accommodated in each housing region across the state and within each municipality. The formula is based on projections of economic growth and development likely to occur in the region.

Within two years of filing its housing plan, a municipality must petition COAH for substantive certification (i.e., approval) of the plan if a municipality is to remain under COAH's jurisdiction. Petitioning protects the municipality from lawsuits while COAH reviews the housing element. Certification is granted for a six-year period and may be withdrawn if a municipality fails to provide a “realistic opportunity” to fulfill its fair-share housing obligation.

Municipalities that do not participate in the process are not shielded from lawsuits. Cases in which a developer has had repeated difficulty getting a housing development approved are referred to COAH, which can do one of two things. For site-specific issues, it can directly prescribe a permitted density on which the developer will provide affordable housing as part of a larger development (similar to how the builder's remedy was used prior to *Mt. Laurel II*). Or COAH can negotiate a settlement between the developer and the municipality as to how the housing will be accommodated within the municipality or through a regional contribution agreement.

This house provides a five-bedroom group home for seniors of low and moderate income in Bridgewater, New Jersey.

Council on Affordable Housing



As of June 1998, 41 percent of New Jersey's 566 municipalities were participating in the COAH process (www.state.nj.us/dca/coah); that is, they have submitted a housing element and fair-share plan to COAH, which has certified it or is in the process of doing so. The most common technique used by municipalities to implement the housing plan is to rezone lands at higher density levels than what is typically allowed to create realistic opportunities for affordable housing to be developed (Slachetka 2000). Another common technique is an affordable housing overlay zone through which local governments permit affordable housing development in underused industrial areas in order to capture housing opportunities. This is especially common in cities that have a shortage of vacant land available for affordable housing.

An additional incentive for municipalities to enter the COAH certification process is that they can then levy development fees on market-rate residential development and nonresidential development. Monies raised from the fees are deposited into a housing trust fund. The New Jersey Supreme Court, in *Holmdel Builder's Ass'n. v. Holmdel Township*, 121 N.J. 550 (1990) determined that mandatory development fees are both statutorily and constitutionally permissible. COAH reviews and approves all local development fee ordinances and the accompanying spending plans.

As of June 1999, 97 municipalities had enacted development fee ordinances, and 84 of them had COAH-approved spending plans. A total of \$74 million in fees had been collected by that time. Brick Township, for example, has collected more than \$1 million, which is earmarked for low-interest loans and closing costs, rehabilitation, new single-family infill construction, and senior housing (New Jersey Council on Affordable Housing 1999). Local governments may impose fees of no more than one-half of 1 percent of the equalized assessed value of residential development and up to 1 percent of equalized assessed value for nonresidential development. In specified districts, the local government may provide density bonuses through rezoning. In such areas, the local government may impose development fees of up to 6 percent of the equalized value of the additional market-rate residential units generated through the density bonus. Developers are exempt from paying development fees on affordable housing units.

The Fair Housing Act also permits municipalities with COAH-certified plans (as well as those under court order to comply) to transfer up to 50 percent of their fair-share obligations to one or more municipalities within the applicable housing region. Such arrangements are called regional contribution agreements (RCAs). The sending municipality must transfer a

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negotiated payment now established at \$20,000 per unit as the minimum. Funds may be used by receiving municipalities to subsidize new construction or to rehabilitate existing units for occupancy by low- or moderate-income households. There are 22 municipalities acting as receiving areas under RCAs (www.state.nj.us/dca/coah). Almost \$150 million has been transferred into these areas through the RCAs (Slachetka 2000).

Under certain conditions, a municipality's fair-share allocation may be adjusted downward by COAH. Generally, this is done if implementation of the fair-share allocation would violate other community planning objectives or if the municipality has a shortage of vacant and developable land. Considerations include the potential impact on infrastructure, historic preservation, environmentally sensitive lands, farmland and open space preservation, and an established pattern of development. These considerations are intended to ensure that the affordable housing program is integrated into the municipality's comprehensive planning process and that it is consistent with the designated planning areas in the State Development and Redevelopment Plan (Sections 1 through 12 of Public Law 1985, c.398 (C.52:18A-196 et seq.)). The Planning Areas are: PA1: Metropolitan Planning Area; PA2: Suburban Planning Area; PA3: Fringe Planning Area; PA4: Rural Planning Area, which includes PA4B, the Rural/Environmentally Sensitive Planning Area; and PA5: Environmentally Sensitive Planning Area, which includes PA5B, the Environmentally Sensitive/Barrier Island Planning Area.

These planning areas reflect distinct geographic and economic units within the state and serve as an organizing framework for application of the statewide policies of the state plan. Within each of the planning areas, municipalities designate "centers," which are areas that include already urbanized uses and into which additional development (ideally in compact patterns at higher density than what would normally exist in the absence of a state planning process), is directed. Much of the housing obligation that is transferred via RCAs is directed into these centers. This helps meet the objectives of the state plan in terms of stemming sprawl, results in direct investment in areas that might otherwise not experience it, and fulfills affordable housing goals for the sending and receiving municipalities.

OREGON

The Oregon inclusionary housing program uses the statewide land-use planning program to ensure that each municipality provides an adequate supply of land for housing of all types.

Goal 10 of Oregon's statewide planning program on housing calls for local governments to encourage the availability of adequate housing at prices and rents affordable to Oregon households. Goal 14 on urbanization requires local governments to adopt urban growth boundaries that contain land sufficient to accommodate projected growth, which includes growth in the need for affordable housing. (A complete description of the Oregon Statewide Land Use Program and the 19 Statewide Goals is available at www.lcd.state.or.us/.)

The state Land Conservation and Development Commission (LCDC) reviews local plans and land-use regulations to ensure that the plans comply with state goals. In *Seaman v. City of Durham*, LCDC No. 770925(1978), the commission held that the state housing goal incorporates the *Mt. Laurel* fair-share doctrine. The state legislation (Oregon Revised Statutes, Section 197.296(b)(3)) to implement the fair-share policy describes the housing needs analysis that local governments must undertake when they periodically review and amend their urban growth boundaries. If the analysis reveals that sufficient land does not exist to accommodate af-

Under certain conditions, a municipality's fair-share allocation may be adjusted downward by COAH. . . . Considerations include the potential impact on infrastructure, historic preservation, environmentally sensitive lands, farmland and open space preservation, and an established pattern of development. These considerations are intended to ensure that the affordable housing program is integrated into the municipality's comprehensive planning process. . . .

fordable housing, the statute provides local governments with several options. It may:

- amend the urban growth boundary;
- amend its comprehensive plan or land-use regulations to include new measures to increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for 20 years without expansion of the urban growth boundary (Section 197.296(4)); and
- undertake additional actions or measures to ensure that sufficient buildable land exists, including:
 - (a) increases in the permitted density on existing residential land;
 - (b) financial incentives for higher-density housing;
 - (c) provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer;
 - (d) removal or easing of approval standards or procedures;
 - (e) minimum density ranges;
 - (f) redevelopment and infill strategies;
 - (g) authorization of housing types not previously allowed by the plan or regulations; and
 - (h) adoption of an average residential density standard (Section 197.297(7)).

In the Portland metropolitan area, Goal 10 is supplemented with an administrative rule adopted by LCDC that specifies overall average density objectives, ranging from 6 to 10 units per acre, for each of the cities and urban portions of the three counties that make up the region (Oregon Administrative Rules 660-007-0035). Moreover, the rule requires most of the cities in the region to “provide for the opportunity for at least 50 percent of new residential units to be attached single-family housing or multiple-family housing” (Oregon Administrative Rules 660-007-0030).

In the Portland metropolitan area, 50 percent of new residential units must be attached single-family housing or multiple-family housing, such as these row houses on Killingsworth Avenue in the Sabin neighborhood of Northeast Portland.





Marya Morris

The City of Portland has an extensive set of programs to encourage affordable housing and meet the goals set by the fair-share plan for the region. In response to a 1999 survey by Portland Metro on affordable housing tools, the city of Portland listed seven primary and 38 total regulatory and financial techniques that it currently uses to promote affordable housing.

Mike Saba of the Portland Planning Bureau says that, while regulatory tools are useful in making projects more feasible and support innovative projects, direct or indirect funding (e.g., property tax relief), either upfront or ongoing, is far more effective in producing tangible results (Saba 2000).

According to a 1997 assessment of the entire Oregon statewide planning process, "Oregon's land use laws have had a significant, if unheralded, impact in sharply increasing the amount of land zoned for more affordable types of housing from apartment build-

Center Commons is a high-density, affordable housing development in Northeast Portland. It meets both the city and Metro governments' goals to provide affordable housing on infill sites that are accessible by public transit. The MAX light rail station is visible to the right of the building shown below.



Marya Morris

ings to manufactured housing” (1000 Friends 1997,19). Even with this glowing assessment, the study gave the state an overall grade of “B” in meeting statewide housing objectives, indicating that projected population growth will require even more affordable housing to be built than current projections have planned for. Additional progress could be made by permitting accessory dwelling units in single-family zones, adopting inclusionary zoning (specifically mandatory set-asides), and setting firm minimum densities that encourage compact, affordable development.

Despite the report’s recommendations for increased use in mandatory set-asides, Oregon Governor Kitzhaber signed a bill in June 1999 (HB 2658) that expressly prohibits local governments from adopting regulations, or imposing as a condition for development approval, a requirement that has the effect of establishing the sales price for a housing unit or that requires a housing unit to be designated for sale to any particular class or group of purchasers. Such provisions are typical in mandatory set-aside requirements. The act also states, however, that it is not intended to limit the authority of local governments to implement incentives, contract commitments, density bonuses, or other voluntary regulations, provisions, or conditions designed to increase the supply of moderate- or lower-cost housing units.

With HB 2658 effectively prohibiting mandatory inclusionary housing programs in Oregon, the Portland Metro Regional Affordable Housing Strategy, the housing plan adopted in June 2000 by the Metro government, recommended that the agency instead implement a voluntary regionwide inclusionary housing program (among many other tools). As part of the program, Metro will prepare a model ordinance and a set of best practice guides for use by location jurisdictions. The strategy also contains a recommendation to tie inclusionary housing requirements to a regional housing funding source and to recognize affordable housing as a “special land need” for which the urban growth boundary could be amended.

The regional strategy further recommends that local governments enact voluntary inclusionary housing programs as well as some creative zoning techniques that can help make affordable housing feasible, including minimum densities, maximum square-footage limits, single-car garage requirements, and minimum percentages for land zoned for multifamily housing.

FLORIDA

Similar to the way that California, New Jersey, and Oregon address housing affordability issues, the state of Florida requires local governments to prepare a housing element in the local comprehensive plan. The state comprehensive plan also contains a housing goal and calls on the public and private sectors to “increase the affordability of housing for low-income and moderate-income persons” (Florida Statutes, Section 187.201(5)(a)). The local housing element must contain a housing needs analysis and set forth standards and plans for providing housing for all existing and projected future residents and “adequate sites for future housing for low-income and moderate-income families” (Section 163.3177(6)(f)). State law expressly enables local governments to “encourage the use of innovative land development regulations which include provisions such as transfer of development rights, incentive and inclusionary zoning, planned-unit development, impact fees, and performance zoning” (Section 163.33202(3)).

In addition to the housing element, local governments must prepare a local housing assistance plan to be eligible to participate in the State

Housing Initiatives Partnership Program (SHIPP), which is Florida's statewide housing trust fund. The housing assistance plans are intended to increase the availability of affordable residential units by combining local resources and cost-saving measures into a local housing partnership and using private and public funds to reduce the cost of housing (Section 420.9075). Specifically, SHIPP funds are available to create local housing partnerships, to expand production of and preserve affordable housing, and to increase housing-related employment (Section 420.9072).

Florida's housing statute defines local housing incentives broadly to include expedited permitting procedures, ongoing review of local policies and ordinances to ensure that housing costs are minimized, and "other regulatory reforms" (Section 420.9071 (16)). The reforms that local governments may implement include:

- modification, reduction, or waivers of impact fees;
- modification of street standards;
- allowance of increased density, zero lot line configurations, and accessory apartments; and
- reduction of parking and setback requirements (Section 420.9076 (4)).

A unique provision in the Florida statute includes mandates that each municipality prepare a printed inventory of locally owned public land suitable for affordable housing (Section 420.9076 (4)(j)).

The city of Orlando has provisions for regulatory incentives and density bonuses for affordable housing (as well as for urban design features in the downtown). The regulatory incentive programs are intended to implement the housing objectives of the city's growth management plan by providing alternative development standards in the form of flexible design options that "incorporate cost saving measures without compromising the quality of the resulting development" (Orlando Code, Section 67.601).

Developers who wish to take advantage of the alternative development standards are required to have their development application certified as an affordable housing project by the city. Once a project is certified, the developer may be eligible for relaxation of certain site development standards, such as lot coverage and setback standards. According to Orlando housing planner Frances DeJesus, the most important provision is that developers are reimbursed for 100 percent of the road and sewer impact fees, and receive a 62 percent discount on school impact fees for housing units in certified affordable housing developments. Funds to pay for the reimbursements come directly from the city's general revenue fund.

Developers of market-rate housing may qualify for a density bonus in exchange for a financial contribution to the city's local housing trust fund (Orlando Code, Section 67.302(14)). This provision is rarely used, according to DeJesus, who says that zoned densities in the city of Orlando are high enough that developers generally are not looking for ways to add density.

As is the case with the California cities described above, density bonuses and regulatory waivers for affordable housing are "one piece of the puzzle" in making housing affordable, says DeJesus. These tools are only effective, she says, when coupled with direct financial incentives provided through the state housing investment program, such as construction loans and down payment assistance.

As is the case with the California cities described above, density bonuses and regulatory waivers for affordable housing are "one piece of the puzzle" in making housing affordable in Orlando, says DeJesus. These tools are only effective, she says, when coupled with direct financial incentives provided through the state housing investment program, such as construction loans and down payment assistance.



The Montgomery County, Maryland, affordable housing program is regarded by many as the most successful one of its kind in the country. Because affordable housing is provided in every new subdivision in the county, the program has also been credited with creating neighborhoods of mixed income and race. (Above) A duplex containing two MPDUs in the Clagget Farm subdivision. (Below) A market-rate, single-family home with similar appearance to the MPDU duplex, also in Clagget Farm subdivision.

MONTGOMERY COUNTY, MARYLAND

The Montgomery County, Maryland, affordable housing program is regarded by many as the most successful one of its kind in the country. Since 1974, the county's Moderately Priced Dwelling Unit (MPDU) program, which combines mandatory set-asides and density bonuses, has produced approximately 10,000 dwelling units (Montgomery County Code Chapter 25A). By contrast, New Jersey's statewide fair-share program has produced 23,000 units (some of which have yet to be built). In California, 75 municipalities that have implemented the density bonus program have collectively produced 25,000 units since the early 1980s (Swope 2000). Because affordable housing is provided in every new subdivision in the county, the program has also been credited with creating neighborhoods of mixed income and race.



The program was adopted as part of the county zoning legislation and is managed by the county department of housing and community development. Certain program requirements, such as income limits, maximum sales prices, and rental rates, are set through executive regulations that are developed by the department staff and approved by the county council and the county executive. (For more information, consult the program's web site, www.co.mo.md.us/services/hca/Housing/MPDU/mpdu.htm).



A typical MPDU is a three-bedroom, bath-and-a-half townhome, such as this one in the Potomac Regency subdivision of North Bethesda.

The program requires that 12.5 to 15 percent of all housing units in residential developments of 50 units or more be priced affordably. In exchange, the developer is allowed to build up to 22 percent more units than the zoning would otherwise permit. The program serves both moderate-income homebuyers and renters and low-income renters. In the first category, moderate-income households (i.e., those whose incomes are 65 percent of the median for the county) are able to purchase or rent housing at a below-market rate. In 1997, the average income of an MPDU purchaser was \$29,014, and the average MPDU sold for \$90,180 (Swope 2000). According to the county's web site, MPDUs range in price from \$60,000 for a one-bedroom condominium to approximately \$110,000 for a three-bedroom detached house with a basement and garage (www.co.mo.md.us/services/hca/Housing/MPDU/summary.htm). The units that are sold are price-controlled for 10 years.

The second category is aimed at low-income renters. One-third of the affordable units provided by developers are set aside for purchase by the county's Housing Opportunities Commission (the county's public housing authority) or nonprofit groups, which in turn rent the units to low-income households. The income of tenants who rent these units ranges from below \$10,000 to \$36,150. As of May 2000, HOC owns 1,600 housing units, and nonprofit housing sponsors have purchased about 65 units.

The program's two most commonly noted achievements are the high number of units provided over the last three decades and the economic and racial integration of suburban neighborhoods. These achievements are also the root of the most common criticisms and limitations of the program, the first of which is that the program is too dependent on sustained long-term growth. The success of the program has been the di-

rect result of a favorable housing market in which there has been high demand for market-rate units. When the economy slowed down in the early 1990s, for example, fewer than 350 units of affordable housing were provided, enough to provide housing for just 20 percent of households on the waiting list. This scenario is similar to the urban design bonus program in Hartford, Connecticut, described in Part 2, where there has been no downtown development project large enough since the 1980s that would trigger the bonus program, thus no street-level amenities have been provided.

And while the healthy housing market helped meet Montgomery County's housing goals for all income levels, it also fueled urban sprawl and put pressure on county roads, sewers, and schools. The rapid growth and high residential densities resulting from the program have brought criticism from slow growth or no-growth advocates who are concerned about the county's ability to provide adequate services for all residents.

Maryland's smart growth program, enacted in 1992 and expanded in 1997, adds another wrinkle to the scenario. In the state's effort to stem sprawl and urbanization of the remaining undeveloped areas in the state, cities and counties have been directed to draw Priority Funding Areas where growth will be directed and into which state monies that support growth will be channeled. In large part, housing built under the affordable housing program has been on greenfield sites on the urban fringe, in the types of areas where growth will now be discouraged as the state tries to get a handle on urban sprawl. Using state spending on schools, roads, and other infrastructure as an incentive, much of the new growth that is projected in the state in the coming decades will be within city and county designated Priority Funding Areas. Aside from the growth management issue, the county may be running out of land for large projects anyway; much of the land zoned for one-half acre and smaller lots has already been developed, therefore fewer subdivisions of 50 or more units will be submitted for development approval in the future.

Another common criticism has been that the mix of race and income in the suburbs that results from the mandatory set-aside is a form of social engineering. Supporters of the program, such as urban theorist and former Albuquerque mayor David Rusk, have noted that the program is in fact an antidote to the "purest form" of social engineering—namely, exclusionary zoning (Walljasper 1999).

In the coming decades, the county will have to address both the dwindling supply of affordable units as the 10-year price controls on those units expire as well as the loss of rental housing to conversion to market-rate, upscale condominiums. These changes, coupled with dwindling land supply and the state's emphasis on compact development, will likely mean a change of strategy for the county.

CONCLUSIONS

Analyzing inclusionary housing legislation for the purpose of identifying best local practices or creating model legislation raises as many questions as it does answers. What is clear from looking at the most extensive state programs is that provision of density bonuses and regulatory waivers of fees or development standards—while two of the most common tools used to implement mandatory housing plans—are not sufficient incentives in and of themselves to get developers to build affordable housing. What does work are carefully crafted packages of financial and regulatory techniques that remove barriers to affordable housing but also meet the overall community planning objectives.

What is less clear is the appropriate role of state government in overseeing such programs and in promulgating standards. Planners in San Jose and Petaluma concurred that, at times, state requirements, such as the mandatory implementation of a density bonus ordinance, may create more work for local governments than is necessary and not be an effective technique for getting housing built. Moreover, the regional housing needs determination, which is the number of units that the regional agencies assign to each government of its "fair share" of affordable housing, may be alternately too low or too high given population and employment projections. The latter situation has occurred in New Jersey, where the state Council on Affordable Housing has had to issue rules describing the myriad conditions under which a local government may lower its regional fair-share requirement so that it is tailored to local conditions regarding buildable land, employment projections, and other factors.

That said, the cities of Petaluma and San Jose are rare exceptions to the rule—communities whose residents and elected officials have made an ongoing commitment to providing affordable housing. In other communities where regulatory barriers are the norm and little effort is expended in accommodating all housing types, it would seem that mandating a housing element and the use of these tools is the only method for solving the problem, short of a steady stream of litigation.

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Appendix

1. Premium (Bonus) Provisions in the Minneapolis, Minnesota, Zoning Code
2. A Draft of Model Statute Governing the Use of Incentive Zoning
3. An Excerpt from the American Planning Association Policy Guide on Affordable Housing

PREMIUM (BONUS) PROVISIONS IN THE MINNEAPOLIS, MINNESOTA, ZONING CODE

Title 20 (Zoning Code)

Chapter 549 (Downtown Districts)

Article II (Floor Area Ratio Premiums)

549.220. Floor area ratio premiums.

The following floor area ratio premiums shall be available as specified in Table 549-4, Maximum Floor Area Ratio Premiums in the Downtown Districts [see below], subject to the provisions of this article, provided all other requirements of this zoning ordinance are met:

Urban open space, outdoor, subject to the following standards:

- Outdoor open space shall comprise at least 50 feet of street frontage. Small outdoor open space shall contain not less than 5,000 contiguous square feet. Large outdoor open space shall contain not less than 7,500 contiguous square feet.
- Outdoor open space shall be easily accessible from the adjacent sidewalk and shall contain lighting for nighttime illumination.
- Outdoor open space shall be located near building entrances. Not less than 40 percent of the first-floor facade facing the outdoor open space shall include windows of clear or lightly tinted glass that allow views into and out of the building at eye level.
- Outdoor open space shall be paved with materials that exceed city standards for sidewalk finishes and shall be landscaped with not less than 1 permanent canopy tree and not less than 5 shrubs for each 1,000 square feet of open space. All landscaping shall comply with the plant material and installation standards as specified in Chapter 530, Site Plan Review. Outdoor open space may include additional sidewalk area where the existing sidewalk is less than 15 feet wide. The remainder of the area shall be covered with turf grass, native grasses, or other perennial flowering plants.
- Outdoor open space shall be open to the sky and located to maximize the access of sunlight, except that up to 30 percent of the space may include a covered arcade with a minimum height of 28 feet.
- Outdoor open space shall be designed to encourage use by the general public through the provision of facilities and features including convenient and comfortable seating at a rate of not less than 1 seat per 200 square feet of open space, tables, trash receptacles, plants, water features, and areas for public entertainment or public display of art or cultural exhibits.
- Outdoor open space may contain tables and facilities for food service, but a majority of the space shall be available for general public use without charge.
- The outdoor open space shall be open to the general public at least during the normal business hours of the surrounding area.

- The outdoor open space shall be maintained in good order for the life of the principal structure.

Urban open space, indoor, subject to the following standards:

- Indoor open space shall be located at street level and shall be not more than 3 feet above or below the level of the sidewalk. Small indoor open space shall contain not less than 5,000 contiguous square feet. Large indoor open space shall contain not less than 7,500 contiguous square feet.
- Indoor open space shall be clearly visible and easily accessible from adjacent sidewalks or streets. Walls of an indoor open space area facing sidewalks or an outdoor open space area shall provide a clear view between interior and exterior space.
- Indoor open space shall include an average height not less than 35 feet and a minimum height of 20 feet, and shall include natural light through a glazed roof or windows at a level sufficient to sustain a variety of plants and trees.
- Indoor open space shall be designed to encourage use by the general public through the provision of facilities and features including convenient and comfortable seating at a rate of not less than 1 seat per 200 square feet of open space, tables, trash receptacles, plants and trees, water features, drinking fountains and toilet facilities, and areas for public entertainment or public display of art or cultural exhibits. Not less than 20 percent of the open space shall consist of landscaping or landscaping and water features.
- Indoor open space may contain tables and facilities for food service, but a majority of the space shall be available for general public use without charge. Food preparation areas shall not qualify as required space.
- The indoor open space shall be open to the general public at least during the normal business hours of the surrounding area.
- The indoor open space shall be maintained in good order for the life of the principal structure.

Interior through-block connection, subject to the following standards:

- The connection shall connect two public streets on opposite sides of the block, or shall connect a public street to an urban open space on the opposite side of the block, or shall connect two urban open spaces on opposite sides of the block, or shall connect to another interior through-block connection. In addition, on developments involving less than one-half block, the interior through-block connection may connect 2 public streets on opposite sides of the block in combination with corridors in 1 or more buildings.
- The connection shall be located not more than 3 feet above or below the level of the sidewalk, shall have a minimum interior clear width of 12 feet and a minimum height of 12 feet. The maximum interior through-block connection premium shall be increased by 1 where the interior through-block connection has a minimum interior clear width of 16 feet.
- The connection shall be open to the general public at least during the normal business hours of the surrounding area.
- The connection entrances shall be clearly visible from adjacent sidewalks or streets.
- The connection shall be maintained in good order for the life of the principal structure.

Skyway connection, subject to the following standards:

- The skyway shall connect two blocks on opposite sides of the street.

- The bottom of the skyway shall be a minimum of 16 feet, 6 inches above the street. If street lights are removed, street lighting shall be provided at the bottom of the skyway.
- Skyways and connecting corridors shall have a minimum interior clear width of 12 feet. Skyways shall be no wider than 30 feet. The maximum skyway premium shall be increased by 1 where the skyway and connecting corridor have a minimum interior clear width of 16 feet.
- Skyways shall be single story and designed to be horizontally level with the street. Changes in grade shall be accommodated so that the skyway appears level from the exterior.
- Except where crossing streets and alleys, skyways shall be located within private property.
- At least 80 percent of the vertical enclosure of the skyway shall be windows of clear or lightly tinted glass that allow views into and out of the skyway.
- Skyways shall be designed to facilitate access between street and skyway levels. Elevators, stairs, and escalators linking the street and skyway levels shall be conveniently located with clear directional signs.
- Skyways shall be heated to a minimum of 55 degrees in winter and ventilated to not exceed outdoor temperatures in the summer.
- The skyway shall be open to the general public at least during the hours recommended by the skyway advisory board and approved by the city council.
- The skyway shall be maintained in good order for the life of the principal structure.

Transit facility, subject to the following standards:

- The transit facility shall be located at a transit stop location approved by the planning director in consultation with the city engineer. The maximum transit facility premium shall be increased by 1 where the transit facility is located at an approved light rail transit stop.
- The transit facility shall be open to the general public at least during the normal hours of transit service.
- The transit facility shall be similar to the principal structure in design and materials, shall be weather protected, heated, and lighted, and shall contain at least 2 entries.
- The transit facility shall be clearly visible from the street and sidewalk, and transit users shall be able to see oncoming transit vehicles from the facility.
- The transit facility shall contain a combination of leaning rails and seating for at least 30 percent of projected peak demand, trash receptacles, and connections for transit schedule monitors.
- The transit facility shall be maintained in good order for the life of the principal structure.

Street-level retail uses, subject to the following standards:

- Retail uses shall be limited to Retail Sales and Services uses and Food and Beverages uses included in Table 549-1 Principal Uses in the Downtown Districts.
- Retail uses shall extend along at least 60 percent of the building wall fronting on any street.
- Each retail use shall have at least 1 separate entrance from the sidewalk.
- Street-level uses shall include awnings or canopies to provide protection to pedestrians and to emphasize individual uses and building entrances.

- At least 40 percent of the first floor facade that faces a public street, sidewalk, or parking lot shall be windows or doors of clear or lightly tinted glass that allow views into and out of the building at eye level, except within the NM Nicollet Mall Overlay District, where such district standards shall apply.
- The street-level retail space shall be maintained in good order for the life of the principal structure.

Public art, subject to the following standards:

- The art shall be valued at not less than one-fourth of 1 percent of the capital cost of the principal structure.
- The art shall be located where it is highly visible to the public. If the art is located indoors, such space shall meet the minimum requirements for an indoor open space, interior through-block connection or skyway connecting corridor, as specified in this article.
- The art shall be maintained in good order for the life of the principal structure.

Freight loading terminal, subject to the following standards:

- All freight loading facilities shall be located entirely below grade or entirely enclosed within the principal structure served.
- The freight loading facilities shall be designed to meet the needs and requirements of all uses on the zoning lot.
- The freight loading facility shall be maintained in good order for the life of the principal structure.

Sidewalk widening, subject to the following standards:

- The existing sidewalk shall be less than 15 feet wide.
- The widened sidewalk shall be at least 15 feet wide, open to the sky, paved with materials that meet or exceed city standards for sidewalk finishes, and shall include the provision of street trees as approved by the planning director.
- The widened sidewalk shall be maintained in good order for the life of the principal structure.

Mixed-use residential, subject to the following standards:

- At least 10 percent of the gross floor area of the principal structure shall be occupied by dwelling units.
- The dwelling units shall be located above the first floor.
- The dwelling units shall be maintained in good order for the life of the principal structure.

Historic preservation, subject to the following standards:

- The structure shall be a locally designated historic structure or shall be determined to be eligible to be locally designated as a historic structure, as provided in Chapter 34 of the Minneapolis Code of Ordinances, Heritage Preservation Commission.
- The historic structure, if undesignated, shall be subject to the same restrictions that are applicable to locally designated historic structures and the recommendations contained in The Secretary of the Interior's Standards for Rehabilitation.
- The historic structure shall be rehabilitated pursuant to the applicable guidelines of the heritage preservation commission and the recommendations contained in The Secretary of the Interior's Standards for Rehabilitation, if necessary.
- The historic structure shall be maintained in good order for the life of the principal structure.

TABLE 549-4
MAXIMUM FLOOR AREA RATIO PREMIUMS IN THE DOWNTOWN DISTRICTS¹

Premium Type	Zoning District and Premium Value			
	B4-2	B4-1 & B4S-2	B4S-1	B4C-1, 2
Urban Open space, small	4.0	3.0	2.0	—
Urban Open space, large	8.0	6.0	4.0	—
Interior through-block connection	1.0 or 2.0	1.0 or 2.0	1.0 or 2.0	1.0 or 2.0
Skyway connection	1.0 or 2.0	1.0 or 2.0	1.0 or 2.0	—
Transit facility	2.0 or 3.0	2.0 or 3.0	2.0 pr 3.0	2.0 or 3.0
Street-level retail	2.0	1.0	1.0	—
Public art	2.0	2.0	1.0	1.0
Freight loading terminal	2.0	2.0	2.0	2.0
Sidewalk widening	2.0	2.0	1.0	1.0
Mixed-use residential	4.0	3.0	—	2.0
Historic preservation	4.0	3.0	2.0	2.0

¹Less than the maximum premium may be approved where the amenity includes alternatives to the standards of this article, pursuant to Section 549.240.

B4 = Downtown Business District; B4S = Downtown Service District; B4C = Downtown Commercial District

DRAFT OF A MODEL INCENTIVE ZONING STATUTE

Excerpted from the preliminary final draft (July 2000) of Chapter 9 of the Growing SmartSM Legislative Guidebook (Chicago: American Planning Association, forthcoming). Section numbers in brackets refer to other sections within the Legislative Guidebook. Other numbers in brackets (e.g., [five] years) are amounts suggested by the authors of the model. An extensive commentary on this part of the Guidebook has been incorporated into the text of this PAS Report and is therefore not repeated here.

The model statute in Section 9-501 below is an adaptation and refinement of the well-drafted California statute that requires local governments to grant density bonuses of at least 25 percent, plus an additional incentive(s) or equivalent financial incentive to developers of affordable housing. In contrast to the California statute, which distinguishes between the types or categories of affordable housing (i.e., between low-income, very-low-income, and senior citizen housing), the model below makes no such differentiation, giving that discretion to local governments. The developer is required to enter into a development agreement with the local government that will formalize the manner in which the affordable housing is to be kept affordable and other administrative details relating to the project. The model statute also authorizes development incentives for increased nonresidential floor area for provision of “public benefit amenities,” such as plazas, parks, and open space, access to transit stations, overhead weather protection, and street arcades. A public benefit amenity may also include provision of affordable housing as part of a nonresidential development for which a density bonus may be granted. A local government may also adopt a “uniform incentives ordinance” that addresses both provision of affordable housing and dedication of open space and/or provision of community design amenities.

APA’s evaluation of the California statute has determined that, if such program is to be successful at the local level, it is necessary to have a long-term commitment to the program by the local government as well as a dedicated source of funds. Monies such as revenues from tax increment financing (TIF) initiatives and federal community development block grant (CDBG) programs are essential sources to

provide subsidies for affordable housing. (See the Petaluma and San Jose case studies in Part 3 of this report.)

9-501 Land-Use Incentives for Affordable Housing, Community Design, and Open Space Dedication; Unified Incentives Ordinance

- (1) The legislative body of a local government, in the manner for the adoption and amendment of land development regulations pursuant to Section [8-103 or cite to some other provision, such as a municipal charter or state statute governing the adoption of ordinances]:
 - (a) shall adopt and amend an ordinance that authorizes incentives for the provision of affordable housing; and
 - (b) may adopt and amend an ordinance that authorizes incentives for open space dedication and provision of public benefit amenities.
- (2) The purpose of this Section is to authorize the adoption and amendment of:
 - (a) an affordable housing incentives ordinance in order to respond to and accommodate present and future needs for affordable housing;
 - (b) a community design and open space incentives ordinance to provide additional amenities for public use or benefit in new development that carry out goals and policies of a local government identified in its local comprehensive plan; and
 - (c) a unified incentives ordinance that incorporates subparagraphs (a) and (b) above.
- (3) As used in this Section:
 - (a) “Affordable Housing” means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate- or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which annual housing costs constitute no more than [28] percent of such gross annual household income for a household of the size that may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the affordable rent is no more than [30] percent of such gross annual household income for a household of the size that may occupy the unit in question.
 - (b) “Affordable Housing Development” means any housing development that is subsidized by the federal, state, or local government, or any housing development in which at least [20] percent of the dwelling units are subject to covenants or restrictions that require such dwelling units to be sold or rented at prices that preserve them as affordable housing pursuant to this Section.
 - (c) “Affordable Housing Incentives” mean a density bonus and other development incentives granted under an affordable housing incentive ordinance pursuant to this Section.
 - (d) “Affordable Rent” means monthly housing expenses, including a reasonable allowance for utilities, for affordable housing units that are for rent to low- or moderate-income households.
 - (e) “Affordable Sales Price” means a sales price at which low- or moderate-income households can qualify for the purchase of affordable housing, calculated on the basis of underwriting standards of mortgage financing available for the housing development.
 - (f) “Bonusable Area” means space that is occupied by a public benefit amenity and that is determined by the local government to satisfy requirements under its land development regulations for additional gross floor area or dwelling units.

- (g) "Bonus Ratio" means the ratio of additional square feet of non-residential floor area granted per square foot of bonusable area.
- (h) "Density Bonus" means the percentage of density increase granted over the otherwise maximum allowable net density under the applicable zoning ordinance as of the date of the application to the local government for incentives by a developer. The density bonus applicable to affordable housing shall be at least a 25 percent increase, and shall apply to the site of the affordable housing development.

Commentary: *California communities offer density bonuses well in excess of 25 percent., in some cases as high as 150 to 175 percent. See Robert A. Johnston, Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith, and Michael Caplan, "Selling Zoning: Do Density Bonuses for Moderate-Cost Housing Work?" Land Use Law & Zoning Digest 42, no. 8 (August 1990): 3-9.*

- (i) "Development Agreement" means a development agreement authorized by Section [8-701].
- (j) "Development Incentives" mean any of the following:
 1. reductions in building setback requirements;
 2. reductions or waivers of impact fees, application fees for development permits, utility tap-in fees, or other dedications or exactions;
 3. reductions in minimum lot area, width, or depth;
 4. reductions in required parking spaces per dwelling unit;
 5. increased maximum lot coverage;
 6. increased maximum building height and/or stories;
 7. reductions in minimum building separation requirements, provided that such reductions do not conflict with building code requirements of the state or the local government, as applicable;
 8. reductions or waivers of public or nonpublic improvements;
 9. approval by the legislative body of a local government of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will contribute significantly to the economic feasibility of the housing development and if the mixed-use zoning is consistent with the local comprehensive plan;
 10. authorization for the affordable housing development to include nonresidential uses, provided such uses or such authorization is consistent with the local comprehensive plan;
 12. authorization for the affordable housing to be located in a nonresidential zoning district, provided such authorization is consistent with the comprehensive plan; or
 13. other incentives proposed by the developer of an affordable housing project or by the local government that result in identifiable cost reductions for affordable housing, including direct financial aid by the local government in the form of a loan or grant to subsidize or provide low-interest financing for on- or off-site improvements, land, or construction costs.
- (k) "Floor Area Ratio" means the ratio of the maximum gross floor area on a lot or parcel to the area of the lot or parcel that is permitted pursuant to the land development regulations of a local government.

- (l) “Housing Cost” means the sum of actual or projected monthly payments for any of the following associated with for-sale affordable housing units: principal and interest on a mortgage loan, including any loan insurance fees; property taxes and assessments; fire and casualty insurance; property maintenance and repairs; homeowner association fees; and a reasonable allowance for utilities.
- (m) “Housing Development” means construction, including rehabilitation, projects consisting of five or more residential units, including single-family, two-family, and multiple-family residences for sale or rent.
- (n) “Incentives” mean one or more of the following:
 1. affordable housing incentives;
 2. bonus ratio; and
 3. density bonus.
- (o) “Low-Income Housing” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (p) “Moderate-Income Housing” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (q) “Public Benefit Amenity” means one or more features for public use or benefit contained in a development that will entitle the development to a bonus ratio or a density bonus, as applicable, including, but not limited to:
 1. shopping atriums;
 2. plazas, parks, and other open spaces;
 3. overhead weather protection and street arcades;
 4. performing arts theaters;
 5. museums;
 6. access to transit stations and transit easements;
 7. provision of child day-care centers;
 8. provision of affordable housing as part of a nonresidential development; and
 9. [other].
- (r) “Unified Incentives Ordinance” means an ordinance that provides incentives for both:
 1. provision of affordable housing; and
 2. dedication of open space and/or provision of community design amenities; and that complies with all requirements of this Section for both an affordable housing incentives ordinance and a community design and open space incentives ordinance.

-
- (4) The legislative body of a local government may adopt and amend an affordable housing incentives ordinance only after it has adopted a local comprehensive plan that contains:
 - (a) a housing element pursuant to Section [7-207]; and
 - (b) a policy in written and/or mapped form that encourages affordable housing incentives.
 - (5) The legislative body of a local government may adopt and amend a community design and open space incentives ordinance only after it has adopted a local comprehensive plan that contains:
 - (a) a housing element pursuant to Section [7-207] if a density bonus for residential development for the public benefit amenity of a plaza, park, or other open spaces is authorized; and
 - (b) a community design element pursuant to Section [7-214] if any other type of bonus ratio is authorized; and
 - (c) a policy in written and/or mapped form that describes the relationship between the applicable public benefit amenities and the density bonus or bonus ratio and supports the granting of such density bonus or bonus ratio.
 - (6) An affordable housing incentive ordinance, a community design and open space incentives ordinance, or a unified incentives ordinance shall include the following minimum provisions:
 - (a) a citation to enabling authority to adopt and amend the ordinance;
 - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with the purposes of this Section;
 - (c) a statement of consistency with the local comprehensive plan that is based on findings made pursuant to Section [8-104];
 - (d) definitions, as appropriate for such words or terms contained in the affordable housing incentive ordinance. Where this Chapter or Section defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
 - (e) procedures for the review of applications for incentives;
 - (f) a requirement that every developer that is to receive incentives shall enter into a development agreement with the local government;
 - (g) designation of an officer or body to review and approve applications for incentives; and
 - (h) provisions for enforcement, including the issuance of certificates of compliance.
 - (7) An affordable housing incentives ordinance or a unified incentives ordinance shall also include the following minimum provisions:
 - (a) a requirement that, where a developer proposes a housing development within the jurisdiction of the local government, the local government shall provide the developer with affordable housing incentives for the production of affordable housing within the development if the developer meets the requirements set forth in paragraphs (11) and (12) below; and
 - (b) provisions to ensure that once affordable housing is built through subsidies or other means as part of a housing development, its availability will be maintained through measures that establish income qualifications for affordable housing renters or purchasers, promote affirmative marketing measures, and regulate the price and rent, including resale price, of affordable housing units.

- (8) A community design and open space incentives ordinance or a unified incentives ordinance shall also include the following minimum provisions:
 - (a) a statement of the types or categories of public benefit amenities for which a bonus ratio or density bonus shall be authorized, the amount of the respective bonus ratio or density bonus, and the zoning use district or overlay district to which public benefit amenity and the respective bonus ratio or density bonus apply;
 - (b) locational and other development standards for the public benefit amenities, including a statement of the minimum bonusable area that a public benefit amenity must contain in order to be eligible for a bonus ratio or a density bonus; and
 - (c) requirements for permanent public access to the public benefit amenity, including signage indicating the nature of the public access, secured by either:
 1. a conveyance of the plaza, park, or other open space, or access to transit stations or transit easements, to the local government or appropriate governmental unit as a public use as a condition of approval of the development permit, provided that the conveyance is in a form approved by the attorney of the local government or governmental unit; or
 2. where the public benefit amenity will not be owned by the local government or another governmental unit, provisions in the development agreement requiring permanent maintenance by the property owner, except that permanent public access may be limited to normal business hours.
- (9) An affordable housing incentives ordinance or a unified incentives ordinance may require that any new housing development within the jurisdiction of the local government contain at least [15] percent affordable housing if such a requirement is consistent with a policy contained in the local comprehensive plan. The incentives offered to the developer, whether density bonuses, development incentives, or both, shall be at least of equivalent financial value to the cost of making the affordable housing units affordable.
- (10) A community design and open space incentives ordinance or a unified incentives ordinance may:
 - (a) include a manual of graphic and written design guidelines to assist developers in the preparation of applications for community design and open space incentives, but such guidelines shall be advisory only;
 - (b) include a statement of the maximum bonusable area that a public benefit amenity may contain in order to be eligible for a bonus ratio or a density bonus;
 - (c) include a provision that allows the developer to provide the public benefit amenity offsite as a condition of receiving a bonus ratio or density bonus, including standards of proximity of the development to the off-site public benefit amenity; and
 - (d) be adopted as an overlay district to all or portions of existing zoning use districts. The boundaries of the overlay district shall be shown on the zoning map pursuant to Section [8-201(3)(o)].
- (11) Where a developer proposes a housing development that is to be an affordable housing development, the local government shall either:
 - (a) grant a density bonus and at least one development incentive, unless the local government makes a written finding that the development incentive is not necessary to reduce the price or rent of the dwelling units in order to ensure that they are affordable housing; or

- (b) provide, in lieu of subparagraph (a) above, development incentives of equivalent financial value based upon the land cost per dwelling unit. The value of such equivalent development incentives shall equal at least the land cost per dwelling units that would result from a density bonus and shall contribute significantly to the economic feasibility of providing the affordable housing units.
- (12) The development agreement entered into between the developer of a housing development that is to be an affordable housing development and the local government shall include provisions to ensure the availability of affordable housing for sale or rent.
 - (a) The development agreement shall provide for a period of availability for affordable housing as follows:
 - 1. Newly constructed low- and moderate-income sales and rental dwelling units shall be subject to affordability controls for a period of not less than [15] years, which period may be renewed pursuant to the development agreement;
 - 2. Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.
 - 3. Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.
 - 4. Any dwelling unit created through the conversion of a non-residential structure shall be considered a new dwelling unit and shall be subject to affordability controls as delineated in subparagraph (a) 1 above.
 - 5. Affordability controls on owner- or renter-occupied accessory apartments shall be applicable for a period of at least [5] years.
 - 6. Alternative living arrangements not otherwise described in this subparagraph shall be controlled in a manner deemed suitable to the local government and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.
 - (b) In the case of for-sale housing developments, the development agreement shall include the following affordability controls governing the initial sale and use and any resale:
 - 1. All conveyances of newly constructed affordable housing dwelling units subject to the affordable housing incentives ordinance that are for sale shall contain a deed restriction and mortgage lien, which shall be recorded with the county [recorder of deeds]. Any restrictions on future resale shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies.
 - 2. Affordable housing units shall, upon initial sale, and resale in the period covered by the development agreement, be sold to eligible low- or moderate-income households at an affordable sales price and housing cost.
 - 3. Affordable housing units shall be occupied by eligible low- or moderate- income households during the period covered by the development agreement.
 - (c) In the case of rental housing developments, the development agreement shall include the following affordability controls governing the use of affordable housing units during the use restriction period:

1. rules and procedures for qualifying tenants, establishing affordable rent, filling vacancies, and maintaining affordable housing rental units for qualified tenants;
 2. requirements that owners verify tenant incomes and maintain books and records to demonstrate compliance with the agreement and with the ordinance;
 3. requirements that owners submit an annual report to the local government demonstrating compliance with the agreement and with the ordinance.
- (d) The development agreement shall include a schedule that provides for the affordable housing units to be built concurrently with the units that are not subject to affordability controls.
- (13) The approval of incentives shall constitute a development permit. The incentives shall be part of the unified development permit review process established pursuant to Section [10-201].
- (14) This Section does not limit or require the provision of direct financial aid by the local government, the provision of publicly owned land, or the waiver or reduction of fees, including impact fees pursuant to Section [8-602], or of dedication or exaction requirements pursuant to Section [8-601].
- (15) The [state planning agency or state department of development] shall by [date] prepare and distribute a model affordable housing incentives ordinance and related guidelines to assist local governments in complying with this Section.

EXCERPTS FROM THE AMERICAN PLANNING ASSOCIATION POLICY GUIDE ON HOUSING

This is an edited excerpt from the American Planning Association's Policy Guide on Housing that pertains to issues presented in this report; namely, housing supply and demand, housing location, and the use of comprehensive planning, zoning, and subdivision controls as a means for improving housing supply and affordability in a region or local jurisdiction. The full policy guide on housing is available on the APA web site at www.planning.org.

Adopted by the Chapter Delegate Assembly, April 25, 1999

Ratified by the Board of Directors, April 26, 1999

This Policy Guide is dedicated to the late Marsha Ritzdorf, planner, educator, and tireless advocate for social equity.

FINDINGS

1. There were 97.7 million households in the U.S. in 1995. Of these, 63.5 million were owner-occupants and 34.2 million were renters. Almost one-third (31 percent) of all households lived in central cities, while another 31 percent lived in suburbs. Thirty-eight percent lived in rural areas.¹

Housing Quality and Housing Costs

2. Homeowners as well as renters face problems with housing quality and affordability. According to the American Housing Survey, 16.1 million renters and 15.9 million homeowners experienced moderate or severe housing problems in 1995. Moderate housing problems include housing costs greater than 30 percent of household income, overcrowding, and moderately inadequate housing conditions.²

Severe housing problems, on the other hand, include housing costs greater than 50 percent of household income and/or severely inadequate housing conditions. Households spending more than 30 percent of income for housing have little money available to meet other basic needs, such as food and clothing, much less disposable income to contribute to the economy.

3. Affordable rental units are diminishing in number. Between 1993 and 1995, 900,000 rental units affordable to households with incomes at or below 50 percent of area median were lost due to expiration of public subsidies, demolition of substandard subsidized units, and redevelopment.^{3,4} From 1995 to 1997, the federal government issued no new Section 8 Certificates or Vouchers to increase the number of renter households assisted through this program or to offset expiring project-based subsidies. The 1998 and 1999 HUD budget provided the first increases in new Section 8 Vouchers, intended for welfare to work transitions. Nevertheless, these allocations do not begin to offset the impact of expiring subsidies for privately owned low-rent housing.⁵

4. Research demonstrates that affordable housing does not negatively affect surrounding single-family property values. In some instances, affordable housing development can actually trigger increases in surrounding property values.⁶

...

Jobs/Housing Balance

9. Low-income households remain concentrated in central cities while new low-wage jobs are created in suburbs. One of every five urban families lived in poverty in 1996 compared to fewer than one in 10 families in the suburbs. From 1991 to 1994, 87 percent of new low-skilled jobs were created outside of central cities.⁷

...

GENERAL POLICIES

General Policy 1. Planners should strive to identify and address housing needs in urban, suburban, and rural areas.

General Policy 2. Planners should promote, through comprehensive plans, zoning codes, and subdivision regulations, housing stock in a wide range of prices, with a variety of types and configurations, to offer choice in location, type, and affordability to all members of the community.

...

General Policy 4. Planners should help to eliminate housing discrimination in their communities.

General Policy 5. Planners should work to minimize the economic stratification of cities by income level, segregating the poor into one district, the middle-class into another, and the rich into yet another. Although this has been federal policy for more than 20 years, its implementation at the local level has been slow.

...

General Policy 7. Planners should promote better balance between the location of jobs and housing.

...

General Policy 9. Planners must work with nonprofit as well as for-profit residential developers to implement housing goals.

SPECIFIC POLICIES

1. Planning

a. Residential development is a principal feature of communities, and should be represented in the comprehensive plan not only as a land use but also as an important element of community vitality and economic health. Planners should encourage their jurisdictions to develop and maintain a comprehensive plan housing element that analyzes housing needs for all types and price ranges, and recommends specific measures to address gaps in the housing supply.

b. Planners should help preserve the environment by encouraging residential construction that is consistent with the principles of smart growth. Planners should promote housing that is energy efficient and does not place undue demands on the environment. Regional plans should promote compact and clustered development patterns while discouraging leapfrogging and sprawl development.

c. Planners should encourage their jurisdictions to adopt and implement plans and policies that reflect federal and state requirements regarding housing, that promote housing choice and affordability across all price ranges, and that make effective use of federal, state, and local programs and incentives to meet housing needs not adequately addressed through the marketplace.

d. APA National and Chapters should support national, state, and local policies that contribute to residential stability, affordability, and choice. These policies should not be limited to traditional homeownership models, but embrace nontraditional forms of homeownership, such as limited equity cooperatives, mutual housing, and community land trusts. Similarly, provision should be made for quality rental housing, not only through traditional multifamily forms, but also through single-family, mixed-use, and mixed-tenure development.

e. Planners should encourage housing strategies to revitalize older urban neighborhoods, while taking steps to minimize displacement of existing businesses and residents. Such strategies might include mixed-use and infill development, mixed-income housing, homeownership zones, urban homesteading, and housing rehabilitation.

f. Planners should promote infill housing strategies that encourage compatibility with existing housing stock. Planners should be at the forefront of ensuring that housing not only has good immediate utility, but also represents a long-term, value-added investment to the neighborhood and the larger community.

g. Planners should use their technical skills to weigh objectively whether rehabilitation or clearance and redevelopment of severely blighted neighborhoods presents the most viable solution to urban blight. In making such an evaluation, planners should involve neighborhood residents and institutions in the planning process, and examine whether financing is in place to complete redevelopment activities after initial clearance of the site.

h. Planners should engage neighborhoods in planning for revitalization, making use of collaborative planning tools and techniques that bring a wide range of interests and voices to the table, and that empower citizens to exercise influence in and access to the policy development process. (See APA Policy Guide on Neighborhood Collaborative Planning, adopted April 1998.)

i. APA National and chapters should encourage and facilitate collaboration and coordination among planning, housing, and code enforcement trade associations and interest groups.

j. APA National and Chapters recognize that housing is a regional issue in metropolitan areas, usually requiring interjurisdictional dialogue and cooperation. APA National and Chapters should support a regional fair-share distribution of affordable housing, particularly in proximity to moderate- and low-wage jobs.

...

3. Affordable Housing

a. APA National and Chapters should collaborate with nonprofit and for-profit housing providers to educate citizens and elected officials about affordable housing and work to eliminate negative perceptions and stereotypes. Zoning requests for residential development affordable to low-income households should not be arbitrarily denied.

b. APA National and Chapters should encourage national, state, and local initiatives designed to preserve and expand affordable housing opportunities at a variety of income levels. Planners should work to ensure that scarce housing subsidies are used to provide long-term benefits to those in need of assistance. In general, capital subsidies for construction or acquisition of housing should also be accompanied by measures that ensure long-term affordability. (See APA Policy Guide on The Supply of Public and Subsidized Housing, adopted October 18, 1991.)

c. Planners should expand affordable housing opportunities by facilitating the development and preservation of accessory apartments, cluster housing, elder cottages, manufactured housing, mixed-income housing, shared residences, and single room occupancy (SRO) developments.

d. APA National and Chapters should work to preserve the federal Low-Income Housing Tax Credit, a critical tool for affordable housing finance, and to encourage accountability in the management of LIHTC projects.

e. APA National and Chapters should work to renew and expand the availability of federal funding for Section 8 Certificates and Vouchers or alternative models of direct rent subsidy to enable low-income households to afford decent housing in the private market. Alternative models should not be limited to federally supported initiatives but also embrace state and local programs.

f. APA National and Chapters should support, based on local conditions, controls on conversion of rental housing to condominiums where it affects the availability of affordable housing; controls on unreasonable increases in rent; and requirements for just cause for eviction of renters. These tools should remain available to local governments for use in response to locally defined needs, and not preempted by state or federal legislation.

g. APA National and Chapters should work with state, federal, and local governments to facilitate economic development strategies that will yield living wage jobs and enable families and individuals to afford housing without the necessity of additional public subsidies and incentives.

h. APA National and Chapters should support and promote programs and incentives that encourage private and nonprofit development of affordable housing to supplement publicly owned and managed housing, and that complement local housing delivery systems. These measures include density bonuses, land donations, low-income housing tax credits, and commercial linkage impact fees.

i. APA National and Chapters should support, based upon local conditions, the provision of affordable housing for farm employees and their families, and other seasonal workers.

...

6. Jobs/housing Balance

a. APA National and Chapters should work to preserve existing housing stock near major employers in order to reduce transportation and air quality problems, and create housing opportunities in close proximity to new suburban, exurban, and rural employment centers. Economic development and housing planners, in conjunction with large employers (if feasible), should perform housing impact studies to analyze the availability of affordable housing for their workers in proximity to work locations.

b. APA National and Chapters should emphasize the role of an adequate supply of affordable housing in economic development strategies.

c. APA National and Chapters should encourage employers to invest in their workers and their neighborhoods by supporting employer-assisted housing programs, especially ones that encourage employees to own or rent in the neighborhood adjacent to the employer.

d. APA National and Chapters should support transportation and transit improvements that allow low-income households in central cities to access jobs in surrounding suburbs.

e. APA National and Chapters encourage new employment centers in or near existing residential neighborhoods, provided such development can be accomplished without displacement of existing residents.

f. Local governments should, in coordination with regional planning efforts, identify strategies to meet housing demand generated by economic development.

ENDNOTES

1. National Low Income Housing Coalition, *Advocates Resource Book: Low Income Housing Profile*, 1998.
2. U.S. Department of Housing and Urban Development. "Rental Housing Assistance: The Crisis Continues," April 1998.
3. U.S. Department of Housing and Urban Development. "Rental Housing Assistance: The Crisis Continues, Executive Summary," April 1998.
4. U.S. Department of Housing and Urban Development, *Waiting in Vain; Update on America's Rental Housing Crisis* (Washington, D.C., 1999).
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6. Ron Smith, ed., *The Las Vegas Metropolitan Area Project* (Las Vegas: The University of Nevada, Las Vegas, 1998), pp.145-66. See also Michael S. Marous, "Low-Income Housing in our Backyards: What Happens to Residential Property Values," *Appraisal Journal* 64: 27-33 and Marco A. Martinez, "Effects of Subsidized and Affordable Housing on Property Values: A Survey of Research" (Sacramento: California Department of Housing and Community Development, 1988); Xavier de Souza Briggs, Joe T. Darden, and Angela Aidala, "In the Wake of Desegregation: Early Impacts of Scattered-Site Public Housing on Neighborhoods in Yonkers, New York," *Journal of the American Planning Association* (Winter 1999): 27-49.
7. U.S. Department of Housing and Urban Development, "The State of the Cities: 1998."



MAKING GREAT COMMUNITIES HAPPEN

The American Planning Association provides leadership in the development of vital communities by advocating excellence in community planning, promoting education and citizen empowerment, and providing the tools and support necessary to effect positive change.

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1972

The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks

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THE CHICAGO PLAN: INCENTIVE ZONING AND THE PRESERVATION OF URBAN LANDMARKS

John J. Costonis *

Present legal methods for preserving America's architectural landmarks are being shown to be only minimally effective in preserving landmarks located in high development sections of the nation's cities. Professor Costonis examines the economic and legal reasons for the ineffectiveness of these ordinances. He then proposes an alternative approach — the Chicago Plan — which promises to be a more effective solution to the landmark problem. After discussing in detail the features of the Plan, Professor Costonis goes on to examine and rebut the various legal challenges that might be brought against the Chicago Plan.

"[T]he issues really being raised concern the relationship of the city's past to its present, and what new construction gives a city in functional, societal and architectural, as well as economic, terms. Questions are being asked everywhere about institutional attitudes toward development objectives and the effect of rigid investment patterns. Ultimately, the problem is the quality of the urban environment and who is responsible for it."

— Ada Louise Huxtable ¹

URBAN landmarks merit recognition as an imperiled species alongside the ocelot and the snow leopard. Over fifty per cent of the 12,000 buildings listed in the Historic American Buildings Survey, commenced by the federal government in 1933, have since been razed.² The threat to the remainder continues undiminished as the recent loss of Chicago's Old Stock Exchange Building³ and the precarious status of New York's Grand Cen-

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¹ Huxtable, *Bank's Building Plan Sets Off Debate on 'Progress,'* N.Y. Times, Jan. 17, 1971, § 8, at 1, col. 2.

² See Conti, *Preserving the Past*, Wall St. J., Aug. 8, 1970, at 1, col. 1.

³ The Old Stock Exchange Building was the work of Louis Sullivan and Dankmar Adler, two of the most accomplished practitioners of the internationally renowned Chicago School of Architecture. A precursor of the modern skyscraper, it has been favorably compared with the great palaces of Renaissance Italy in terms of its historic import. See Huxtable, *The Chicago Style — On Its Way Out?*, N.Y. Times, Nov. 29, 1970, § 2, at 27, col. 1. The Chicago Landmark Commission, on two separate occasions during the period 1970-71, urged that the Exchange be

tral Terminal attest.⁴ If this trend is not reversed, the nation at its bicentennial in 1976 will mourn the loss of an essential part of its architectural and cultural heritage rather than celebrate the visible evidence of its past.

The demise of so many cherished buildings is a peculiarly American phenomenon. In part it reflects the national penchant for identifying change with progress, even at the cost of destroying the nation's links with its past. More fundamentally, however, it is the product of a system that vests the initiative for most urban development decisions in private property owners, whose choices, predictably enough, are shaped by the necessities of the real estate market. The stubborn reality underlying the landmarks dilemma is that landmark ownership in downtown areas of high land value is markedly less profitable than redevelopment of landmark sites. Hence there is an incessant trade-off — injurious to the urban environment — of buildings of unique architectural distinction for glass and steel towers that are crammed with as much rentable floor area as local zoning permits and as the market will absorb.

Over the last decade, American cities have adopted a variety of incentive zoning programs in a determined attempt to expand their leverage over private land use decisions.⁵ By modifying the economics of downtown development, these programs encourage development decisions that would normally be precluded by the harsh realities of the marketplace. Where successful, they have enabled cities to channel development in accordance with munici-

accorded formal landmark status, but the Chicago City Council on both occasions refused to accept the Commission's recommendation. A permit for the building's demolition was issued in October 1971. See Huxtable, *Non-Fables for Our Time*, N.Y. Times, Nov. 14, 1971, § 2, at 22, col. 4.

⁴ The New York Central Railroad, as owner of the site of the Grand Central Terminal, sought in the early sixties to lease the air rights over the Terminal to a developer who intended to erect a second Pan-Am type building there. The New York City Landmarks Commission, however, refused to approve the project on the ground of its aesthetic incompatibility with the facade of the Terminal, a designated landmark. The New York Central responded by threatening to overturn the Commission's action in the courts, but bankruptcy of its successor company, the Penn Central Company, and the softening of the New York City office space market have relieved the pressure on the Terminal, at least for the time being. See Address by Norman Marcus, First Conference on Legal Techniques in Preservation, in Washington, D.C., May 2, 1970 (sponsored by National Trust for Historic Preservation) [hereinafter cited as Marcus].

⁵ See THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 125-238 (N. Marcus & M. Groves eds. 1970) [hereinafter cited as NEW ZONING]; Comment, *Bonus or Incentive Zoning — Legal Implications*, 21 SYR. L. REV. 895 (1970); cf. URBAN LAND INSTITUTE, NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT: A STUDY OF CONCEPTS AND INNOVATIONS (Tech. Bull. No. 40, 1961).

pally selected urban design policies. Although these programs differ widely among themselves, they are all premised upon a trade between the city and the developer. The city relaxes its zoning bulk restrictions,⁶ thereby allowing the developer to build more profitably by including more rentable floor area in his project than the prevailing zoning otherwise permits. In return the developer must either provide a public amenity, such as a plaza, at his own expense or make a cash payment that will enable the city to finance the purchase of a public improvement.

How does the city derive the additional floor area that it allocates to the developer? If the city seeks an amenity, it simply creates the floor area *ex nihilo* and bestows it upon the developer as a so-called "zoning bonus." The amount of the bonus is calculated to equal or slightly to exceed in value the cost that the developer incurs in providing the amenity. The case is more complicated where the city seeks to retain buildings, such as landmarks, that enrich its character. Recognizing that these buildings often fail to exhaust the floor area authorized for their sites under local zoning, the city allows their owners to sell their unused floor area to developer-owners of other sites, a practice commonly referred to as the "transfer of development rights." The cash carrot that results, it is hoped, will induce owners of the "underimproved" sites to forego demolition of their buildings.

Zoning bonus programs have been enthusiastically received by private developers and by municipal governments.⁷ The response to these programs in New York City, the nation's most innovative practitioner of incentive zoning,⁸ is illustrative. Almost every major office or commercial development erected in Manhattan's central business district since adoption of the New York bonus provisions in 1961 has included bonus space.⁹ The City has employed bonuses to enhance its Broadway theater,¹⁰ Lincoln

⁶ Some communities might also relax use and tower coverage requirements and coordinate variance procedures for the miscellaneous minor adjustments that are necessitated by the grant of increased floor area. Cf. Svirsky, *San Francisco: The Downtown Development Bonus System*, in *NEW ZONING* 139, 142-43.

⁷ But see note 229 *infra*.

⁸ For a review of the various incentive zoning programs that have been adopted or considered in New York City, see Burks, *City Wants Air Rights to Hop, Skip and Jump*, N.Y. Times, Apr. 26, 1970, § 8, at 1, col. 1; Gilbert, *Saving Landmarks*, HIST. PRESERVATION July-Sept. 1970, at 13; Marcus.

⁹ *NEW ZONING* 201.

¹⁰ *NEW YORK, N.Y., ZONING RESOLUTION* art. VII, ch. 1, § 81-00 *et seq.* (1971). This provision creates a Special Theater District that includes the area between 40th and 57th Streets and 6th and 8th Avenues. Developers owning parcels within the District who agree to include a legitimate theater in their projects may receive an increase of up to 20 per cent in the floor area authorized

Center,¹¹ and Fifth Avenue retail¹² districts. It is currently banking upon bonuses to induce private developers to provide a coordinated network of physical facilities to service the traffic generated by its 10,000,000 square foot World Trade Center.¹³ And it has even proposed that bonuses be enrolled in the effort to encourage the production of moderate and low income housing.¹⁴

Development rights transfer programs, on the other hand, have fared poorly. Again the New York experience is instructive.

for their parcels under prevailing zoning. See Weinstein, *How New York's Zoning Was Changed to Induce the Construction of Legitimate Theaters*, in *NEW ZONING* 131. Plans for the construction of five theaters pursuant to the provision have been announced. See N.Y. Times, May 19, 1970, at 39, col. 2.

¹¹NEW YORK, N.Y., ZONING RESOLUTION art. VIII, ch. 2, § 82-00 *et seq.* (1971).

¹²NEW YORK, N.Y., ZONING RESOLUTION art. VIII, ch. 7, § 87-00 *et seq.* (1971). This provision created a Fifth Avenue Retail District encompassing Fifth Avenue between 38th and 59th Streets. It mandates that the two lower floors of any building constructed within the District be used for retail purposes. Developers who elect to provide more than the minimum retail space will be given additional floor area to be used for apartments or hotel accommodations.

¹³NEW YORK, N.Y., ZONING RESOLUTION art. VIII, ch. 6, § 86-00 *et seq.* (1971), creates a Special Greenwich Street Development District encompassing a 29 square block area between the World Trade Center and Battery Park. The District regulations include a map and a manual which prescribe a firm area network of circulation features consisting of open and covered arcades, pedestrian bridges, subway connections, elevated plazas, and the like. Developers building within the District will be required to provide some of these features and may elect to provide others. In return for these features and for payment of sums into a subway improvement fund, developers will receive increases in the floor area authorized for their lots and may also be allowed to build towers that cover a greater amount of lot area than the zoning would otherwise permit.

The District differs in two respects from New York's existing special districts. First, the desired features have been previously mapped so that every lot owner knows beforehand which mandatory and optional features he must or may provide in return for the increased floor area. Second, the area plan is so specific and the schedule of bonuses so precise that developers need not negotiate with the Planning Department, submit their development plans for site and design review, or secure a special permit, all of which are a part of the approval procedure under the regulations applicable to the other districts. See N.Y. Times, Dec. 6, 1970, § 8, at 1, col. 1. See also Huxtable, *Concept Points to 'City of the Future,'* N.Y. Times, Dec. 6, 1970, § 8, at 1, col. 3.

¹⁴The New York Planning Commission proposed the establishment of a Special Development District on New York's Lower East Side that would contain 2,355 apartments, of which 1,837 would be luxury class and 418, low income class. Developers were to be given the option either of providing 15 per cent of the units in their buildings for low income rental or of paying \$15.30 per square foot of the lot area of their parcels into a special fund to be used to acquire public housing sites. They would have received an additional floor area authorization in return. But the proposal appears to have died as a result of opposition of community residents who saw it as a "give-away" to developers and as a disguised means of displacing low income persons in the area. See N.Y. Times, May 13, 1970, at 40, col. 1.

Although that city adopted a transfer program in 1968¹⁵ that was designed to preserve its landmark buildings, the program has not as yet figured in a single executed transaction.¹⁶ A number of reasons account for its failure to win the confidence of landmark owners, real estate developers, and title insurers, as well as at least one member of the New York City Planning Commission.¹⁷ Inadequate analysis of the economic burdens of landmark ownership and of the urban design consequences of development rights transfers have hampered the program. Onerous administrative controls of dubious necessity have dampened the enthusiasm of the private sector for the program. And wholly apart from the merits of the New York program itself has been the uneasiness of its prospective participants concerning the underlying legality of the transfer mechanism.

The object of this article is to offer a development rights transfer proposal, referred to herein as the Chicago Plan,¹⁸ that will provide an effective foundation for municipal landmark preservation efforts. The article contains three sections. The first details the economic causes behind the grave attrition of America's urban landmarks and reviews the conventional legislative responses of the nation's cities to this threat. The second analyzes the use of development rights transfers to preserve urban landmarks, examining the structure and deficiencies of the New York

¹⁵ See N.Y. Times, Oct. 7, 1969, at 34, col. 4; NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, §§ 74-79, 74-791 to -793 (1971).

¹⁶ One transfer has almost taken place. All of the formalities relating to the transfer of the excess floor area of the Amster Yard, a designated landmark, have been completed, but the transaction has been stalled by the softening of the New York office space market. See Huxtable, *City Landmark Gets a Chance for Survival*, N.Y. Times, Aug. 2, 1970, § 8, at 1, col. 1; Marcus.

¹⁷ See p. 628 *infra*.

¹⁸ Prior to the demolition of Chicago's Old Stock Exchange Building, the National Trust for Historic Preservation and the Chicago Chapter Foundation of the American Institute of Architects commissioned the author and Jared Shlaes, a real estate consultant, to devise a transfer proposal that would safeguard the Exchange and Chicago's remaining architectural landmarks. The product of this study appeared as a report entitled *Development Rights Transfers: A Solution to Chicago's Landmarks Dilemma* (Chicago Chapter Foundation of the American Institute of Architects & National Trust for Historic Preservation, May 13, 1971) [hereinafter cited as Chicago Report]. The Chicago Report contains a summary legal and economic analysis of the proposal discussed in this article. It also includes draft amendments to the Illinois Historic Preservation and Zoning Enabling Acts and to the Chicago Zoning Code that would permit implementation of the proposal. See Chicago Report apps. I, II & III. The proposed amendments to the state legislation have since been adopted. See Ill. Pub. A. No. 77-1373 (Ill. Leg. Serv., Aug. 31, 1971), *amending* ILL. REV. STAT. ch. 24, § 11-13-1 (1969); Ill. Pub. A. No. 77-1372 (Ill. Leg. Serv., Aug. 31, 1971), *in part to be codified at* ILL. REV. STAT. ch. 24, § 11-48.2-1A, *in part amending* ILL. REV. STAT. ch. 24, § 11-48.2-2 & -6 (1969).

transfer program and then the content of the Chicago Plan. The third addresses the issues that are likely to arise in a comprehensive legal challenge to the validity of the Chicago Plan.

I. THE PROBLEM: THE VANISHING URBAN LANDMARK

A. *Economics and Landmark Ownership*

The history of Chicago's Old Stock Exchange Building illustrates the economic vulnerability of urban landmarks. It was located in Chicago's Loop, an area in which most of the city's other architectural gems are concentrated and, ominously, an area of skyrocketing land values. Its height of thirteen stories exhausted less than one-third of the approximately forty-five stories authorized for its site under present zoning regulations. Hence, it realized a mere fraction of the rental income that a modern office tower would have returned if located on the same site. Its mechanical systems, interior space, and exterior walls were in need of substantial renovation. Even with refurbishing, moreover, the annual maintenance costs of the seventy-eight year old building would probably have exceeded those of its modern steel and glass competitors. Typical of other turn-of-the-century buildings, its interior space was carved up with courts, columns and other structural features that diminished its appeal to large corporate tenants.¹⁹

Chicago's zoning bonus program intensified the Exchange's vulnerability. Like the programs of other cities, it is intended to encourage the provision of plazas, arcades, and other amenities. By awarding enormous premiums for projects occupying a half block or more,²⁰ however, the program has brought development

¹⁹ The competitive disadvantages suffered by urban landmarks should not be overstated, however. A review of income and operating expense data for Chicago office buildings revealed that, while maintenance-related expenses

do tend to increase with the age of the building, [they] do not increase at such a rate as to impose unreasonable burdens upon older buildings as such.

It is not apparent from national averages that buildings over 40 years old suffer from any striking competitive disadvantage; indeed, they net more per square foot than buildings 25-40 years old on a national basis, perhaps because of special characteristics of buildings constructed during the depression and war years 1930-45. Net income before depreciation and capital charges for buildings over 40 years old is approximately 78% of the national average for all buildings but tends to approach \$1.60 per square foot, indicating that these older buildings, while somewhat penalized by their age, are by no means functionally obsolete.

Chicago Report 21. See E. SHULTZ & W. SIMMONS, OFFICES IN THE SKY 88 (1959) [hereinafter cited as OFFICES].

²⁰ An example serves to illustrate the extent of these bonuses. CHICAGO, ILL., MUNICIPAL CODE, ZONING ORDINANCE ch. 194A, art. 8.5-6(5)(c) (1970) provides:

On any zoning lot, for each floor above the ground floor which is set back from one or more lot lines, a premium equal to 0.4 times the open area of

on small lots to a standstill, and hastened the amalgamation of existing smaller holdings into assemblages that can exploit the program to best advantage. Ironically, therefore, the Exchange was as much the victim of the city's own zoning regulations as of the speculative motives of the building's owners.²¹

If the Exchange's owners had been forced to maintain the Exchange as a landmark, they would thus have suffered several economic disadvantages. They would have been prevented from redeveloping the site or capitalizing on the site's premium value for assemblage purposes. Designation might also have precluded the owners from internal modernization of the Exchange that would have increased its return by increasing its operating efficiency. They would also have been unable to obtain mortgage financing on terms competitive with those extended to the owners of properties unencumbered by landmark designation. Finally, profitable operation of the landmark might have been eventually endangered as the building continued to age and the net income from operation progressively declined.²²

B. Municipal Preservation Ordinances: An Inadequate Response

In light of these factors, the conventional municipal ordinance²³ offers scant hope of achieving the preservation of threat-

the lot at the level of such floor divided by the gross lot area may be added to the permissible floor area ratio

The "floor area ratio" (FAR) is an integer prescribed by the ordinance for each bulk district, which, when multiplied by the area of the zoning lot, gives the amount of floor area that may be included in a building erected on that lot. Thus, if the district FAR is 10, the maximum floor space of a building erected on a 10,000 square foot lot is 100,000 square feet. However, if the developer of this 10,000 square foot site decided to leave 50% of his lot open when he constructed a building upon it, he would be entitled under the above-quoted provision to 140,000 square feet of floor space. He would receive a premium of 0.4 times 0.5 times the number of initial floors he was entitled to build ($0.4 \times 0.5 \times 20$), bringing the FAR to 14. While the above-quoted provision theoretically has equal application to large and small lots, in practice only large projects can benefit from it. There is little economic advantage in building tall buildings with a small base since too much of the space on each floor is devoted to nonrentable uses, such as elevator and support constructions.

²¹ See note 229 *infra*.

²² The economic consequences of designation are not entirely negative. Its prestige factor could operate to attract stable, high quality tenants and to reinforce pride of ownership which would be reflected in the marketplace. See *Hearings Before the Commission on Chicago Architectural and Historical Landmarks Concerning the Designation of the Monadnock Building as an Official Chicago Landmark* 90 (Apr. 1970) (on file with the Commission on Chicago Historic and Architectural Landmarks). Moreover, designation makes space in a landmark attractive to tenants who wish to avoid relocation and other vagaries of the development process.

²³ State and local landmarks legislation and programs are reviewed in J. Mor-

ened urban landmarks. The typical ordinance calls for the designation of individual landmarks, such as the Exchange, and of entire historic districts, such as New Orleans' Vieux Carré.²⁴ The ordinance enumerates the cultural, aesthetic, and historic criteria that the city landmark commission, often with the advice of the city planning commission, must take into account in proposing designation of individual buildings or historic districts.²⁵ Actual designation, however, generally rests with the legislative body.²⁶

After designation, permits for demolition or significant alteration of individual landmarks or of buildings within historic districts require the approval of the landmarks commission.²⁷ If the commission withholds its consent, it then has a grace period²⁸ in which to devise a compromise plan acceptable to the landmark owner that will safeguard the structure. If the owner rejects the plan, some ordinances authorize the commission to deny the permit outright regardless of economic hardship²⁹ while others require approval in such cases.³⁰ In most cities, however, the

RISON, *HISTORIC PRESERVATION LAW* (1965); J. PYKE, *LANDMARK PRESERVATION* (Citizens Union Research Foundation, Inc., 1970); Wilson, *The Response of State Legislation to Historic Preservation*, 36 *LAW & CONTEMP. PROB.* No. 3 (to be published); Wolfe, *Conservation of Historic Buildings and Areas — Legal Techniques*, in 2 *ABA SECTION ON REAL PROP., PROBATE, & TRUST LAW PROCEEDINGS* 18 (1963); Note, *The Police Power, Eminent Domain and the Preservation of Historic Property*, 63 *COLUM. L. REV.* 708 (1963); Note, *The Landmark Problem in New York*, 22 *N.Y.U. INTRAMURAL L. REV.* 99 (1967); Comment, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 *U. CHI. L. REV.* 362 (1968).

²⁴ See, e.g., CHICAGO, ILL., MUNICIPAL CODE § 21-64(a) (1970); Mobile, Ala. Ordinance 87-036, Mar. 20, 1962; NEW ORLEANS, LA., CODE § 65-6 (1956).

²⁵ See, e.g., CHICAGO, ILL., MUNICIPAL CODE § 21-64(b) (1970); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 207-1.0h & k (1971).

²⁶ See, e.g., CHICAGO, ILL., MUNICIPAL CODE § 21-64(f) (1970). The New York ordinance allows the Landmark Commission to designate landmarks; its decision, however, may be overridden or modified by the Board of Estimate. See NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 207-2.0f(2) (1971).

²⁷ See, e.g., CHICAGO, ILL., MUNICIPAL CODE § 21-64.1 (1970); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, §§ 207-4.0 to -8.0 (1971); CHARLESTON, S.C., CODE §§ 51-28 to -30 (1966).

²⁸ The usual period is 180 days. See, e.g., Mobile, Ala., Ordinance 87-036, Mar. 20, 1962 (6 months); CHARLESTON, S.C., CODE § 51-30(4) (1966). But see Los Angeles, Cal., Ordinance 121,971, Apr. 30, 1962 (up to 360 days).

²⁹ See, e.g., NEW ORLEANS, LA., CODE § 65-10 (1956); CHARLESTON, S. C., CODE § 51-30 (1966).

³⁰ See, e.g., Mobile, Ala., Ordinance 87-036, Mar. 20, 1962.

The New York City Landmarks Ordinance contains a unique provision that authorizes outright denial of a permit for alteration or demolition in the case of designated landmarks whose owners either receive state or local tax relief or obtain a "reasonable return" — identified as a 6% return on the assessed valuation of the property. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, §§ 207-1.0q,

landmark commission has no power after this grace period to stay the demolition or alteration of a landmark, but can only recommend that the legislature acquire or condemn the threatened building.³¹

These ordinances have proven useful in preserving both buildings that are within historic districts and landmarks that are outside of high land value areas. These structures usually hold little interest for speculators because they tend to be smaller, easily maintained residential structures located in low density zones. In fact, at times owners of buildings within historic districts will welcome designation for the prestige it lends to the neighborhood and for its beneficial impact upon land values there.³² Few owners of these buildings litigate permit denials because the prospects for financial gain through demolition or alteration seldom offset the costs and delays of a legal challenge.³³

The picture differs dramatically for landmarks located on downtown parcels. The gap between the income potential of these parcels as presently developed and as improved to their most profitable use is such that few owners — speculators or otherwise³⁴ — warmly embrace designation. The typical response of an owner who contemplates redeveloping his site is to force the city's hand by demanding that it either acquire the property outright or issue a demolition permit forthwith.³⁵

207-8.0 (1971). By setting the return at this relatively low rate, *see* Comment, *The Landmark Problem in New York*, *supra* note 23, at 107, and requiring the landmark owner to come forward with rather precise evidence establishing the economic burden entailed by designation, the ordinance enables the city's Landmark Commission to exert considerably greater leverage in dealing with landmark owners than commissions in other cities enjoy.

³¹ *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE § 21-64.2 (1970); CHARLESTON, S.C., CODE § 51-30(7) (1966).

³² *See, e.g.*, N.Y. Times, May 27, 1970, at 35, col. 3; Chicago Sun-Times, Oct. 22, 1970, at 3, col. 2.

³³ In 1970, the author surveyed preservation agencies in 12 representative cities to obtain their appraisals of the efficacy of their ordinances. The agencies were generally enthusiastic about their success in administering historic districts, but many suggested that nonlegal factors, such as those mentioned in the text, accounted for their success.

The agencies were far less sanguine about their efforts in safeguarding individual landmarks. All noted that their city governments assigned a relatively low priority to historic preservation, especially if the latter necessitated the expenditure of general revenues. Few instances of the use of eminent domain or the purchase of threatened properties on behalf of these agencies were reported. Although at least four of the cities are authorized by state law to accord real estate tax abatement to official landmarks, moreover, only one city was actually doing so.

³⁴ The stakes are so high where downtown properties are concerned that even those institutions that want to "do the right thing," such as museums, churches and service organizations, also balk at designation. *See The Chicago Style*, note 3 *supra*.

³⁵ The position of the Building Managers of Chicago (BMA) is representative

The city's options when the gauntlet is thrown down are not enviable. Even those landmark commissions that have the power to deny a demolition or alteration permit are unlikely to do so. The constitutionality of provisions authorizing such denials is dubious;³⁶ moreover, political pressures from downtown developers make such an action by the commission improbable in many cities. On the other hand, condemnation is also unlikely. Other demands of greater priority preclude most cities from expending the enormous sums required for the acquisition of downtown properties.³⁷ Nor would the city's costs end with

of the views of most downtown building owners and managers in the United States. In the BMA's view:

[W]e can see no way to accomplish [the preservation of urban landmarks] unless the City, State or Federal Government purchase the property in question, spend large amounts of money toward rehabilitation and be [sic] prepared to operate the property, possibly at a loss.

. . . [T]he more we study the subject . . . the more we are convinced that the only solution is for a Government agency to purchase the building and maintain it. The willingness of some Government agency to purchase should be ascertained *before* proceedings are instituted to designate a building as a landmark so as to avoid unnecessary harm to the owner.

Letter from Richard M. Palmer, President, BMA, to Samuel A. Lichtmann, Chairman, Commission on Chicago Historical and Architectural Landmarks, Aug. 6, 1970. For similar views in New York, see N.Y. Times, May 27, 1970, at 35, col. 3; N.Y. Times, Apr. 29, 1970, at 27, col. 3.

³⁶ Courts have consistently held that landmark preservation statutes may not impose undue economic hardships on landmark owners, and that in cases of undue economic hardship the city must either acquire the building or permit its demolition. *See, e.g.,* *People ex rel. Marbro Corp. v. Ramsey*, 28 Ill. App. 2d 252, 171 N.E. 246 (1960); *In re Opinion of the Justices*, 333 Mass. 773, 128 N.E.2d 557 (1955); *cf.* note 93 *infra*. Thus, the imposition of permanent landmark status on a building that is currently unprofitable seems clearly unconstitutional. On the other hand, the constitutionality of ordinances such as New York's, *see* note 30 *supra*, that do allow permanent designation if the landmark is returning a net profit of 6% of assessed valuation is less clear. While "undue economic hardship" is perhaps not normally thought to apply to ownership of buildings that return a profit, it is certainly arguable that in cases where the landmark owner is forced by designation to forego a vastly more profitable sale of his site the foregone opportunity constitutes such a hardship. *See* Comment, *The Landmark Problem in New York*, *supra* note 23, at 104.

³⁷ The Committee feels that the aesthetic value of the Old Stock Exchange Building does not exceed the relative cost and, in this day of demand to meet urgent financial needs in other areas, the City of Chicago cannot afford the luxury of a building as a landmark that, though it may be treasured for historic value and architectural originality, is too far deteriorated to warrant the cost of rehabilitation. The Committee is confident that the people of the City of Chicago would want better application of their tax dollars for we are convinced of a resultant dollar deficiency if rehabilitation were attempted — the building would become known as Chicago's White Elephant.

Committee on Cultural and Economic Development, Special Report Relative to Designation of the Old Stock Exchange Building 6 (August 1970) (advising the Chicago City Council to reject the Landmark Commission's recommendation that the Old Stock Exchange be designated).

acquisition. The building may require substantial refurbishing in addition to ordinary maintenance. Removing it from the municipal tax roll will deny the city not only the increased taxes that the proposed project would yield,³⁸ but also the taxes currently being returned by the landmark property. In addition, redevelopment of the landmark site with a modern structure may benefit the general economic health of the city by revitalizing an entire block or district.³⁹

II. THE SEARCH FOR AN ALTERNATIVE ECONOMIC FRAMEWORK: LANDMARK PRESERVATION THROUGH DEVELOPMENT RIGHTS TRANSFERS

Conventional preservation ordinances have failed to safeguard urban landmarks because they ignore the economic realities that lie at the heart of the landmarks dilemma. Owners will not and cities cannot shoulder the full costs of preservation. Resolution of this dilemma requires enlarging the present economic framework to include other participants who will themselves assume a major share of these costs. The most obvious solution, of course, would be to spread the costs of preservation to all taxpayers within the city by a general levy. But political obstacles rule out this approach at the present time:⁴⁰ the corollary to the refusal of American cities to spend for preservation⁴¹ is their unwillingness to tax for this purpose.

If preservation efforts are to have any chance of success, therefore, another basis of cost allocation must be found that does not threaten to drain the city's general revenues. New York City's effort to redistribute these costs through development rights transfers constitutes a giant step in this direction.⁴² To date, however, that effort has not borne fruit. An examination

³⁸ The differences between the taxes presently received on the Old Stock Exchange and a new 45-story tower on its site, for example, are estimated at \$640,000 per year. See Conti, *supra* note 2.

³⁹ Lewis Hill, Commissioner of the Chicago Planning Department and a member of the Landmark Commission, voted against designation of the Old Stock Exchange on the ground that:

It remains my judgment that the designation of this building will not contribute to the strengthening of LaSalle Street as the great economic center of the mid-west.

Letter from Lewis W. Hill to Samuel A. Lichtmann, Chairman, Commission on Chicago Historical and Architectural Landmarks, March 17, 1971.

⁴⁰ See note 33 *supra*.

⁴¹ See *id*; cf. Elliot, *Introduction* to NEW ZONING at xv (cities lack capital required to maintain or enhance amenity level of urban areas).

⁴² NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, §§ 74-79, 74-791 to -793 (1971). The discussion in the following two paragraphs of the text is based on the provisions of these statutes.

of the reasons for its lack of success has given rise to the rather different transfer proposal discussed in this article. The following paragraphs summarize the New York transfer program, catalog its defects, and then turn to a detailed examination of the Chicago Plan.

A. Transfers Under the New York Zoning Resolution

New York landmark owners may transfer the authorized but unbuilt floor area of their landmarks to adjacent lots in certain districts within the city. The "authorized but unbuilt floor area" that may be transferred is determined by multiplying the lot area of a landmark by a factor, known as a floor area ratio (FAR), that differs for the city's various bulk districts.⁴³ From this product is subtracted the floor area already exhausted by the landmark. An adjacent lot is defined as one that is contiguous to or across a street or intersection from a landmark lot; it may also be one of a series of lots that connect with the landmark lot, provided that all of these lots are in single ownership. Although in most zones the floor area of the transferee lot may not be increased by more than twenty per cent above its authorized level, no limit is set for transferee lots in high density commercial zones. Transfers may be made to one or several lots until the excess floor area is exhausted. Once transferred, the excess floor area is irrevocably withdrawn from the authorized floor area of the landmark lot.

Procedures for obtaining approval of a proposed transfer are complex. First, the New York Landmark Commission must examine the plans for the development which will utilize the transferred development rights in order to determine whether the new development's materials, design, scale, and location are compatible with the landmark. The owners of the landmark and the transferee lot must then apply to the New York Planning Commission for preliminary approval of the transfer. Accompanying this application must be a site plan for both lots showing the proposed development of the adjoining lot, a program for continuing maintenance of the landmark, and a report of the Landmark Commission detailing the effect of the proposed transfer upon the landmark. The Planning Commission must then decide whether the transfer will have unduly detrimental effects on the occupants of buildings in the vicinity of the transferee lot and whether the proposed maintenance program will in fact result in preservation of the landmark. If the Planning Com-

⁴³ For a detailed evaluation of the FAR system, see OFFICES 280-82; Note, *Building Size, Shape, and Placement Regulations: Bulk Control Zoning Reexamined*, 60 YALE L.J. 506 (1951).

mission recommends approval, the application then goes to the Board of Estimate, which has final authority to grant or deny the application. The difficulties of obtaining transfer approval are further complicated by the power of the Planning Commission in certain instances to condition approval of the transfer upon provision of an amenity by the development rights purchaser; in these cases, the Planning Commission must approve the purchaser's submission for the amenity as well.

Despite the ingenuity evident in its conception, the New York initiative contains at least five drawbacks that have crippled its effectiveness as a vehicle for a comprehensive municipal preservation program. Heading the list is the absence of a rational incentive structure for inducing landowners to agree to preserve their landmarks. By limiting development rights transfers to adjacent lots, the program imposes severe restraints upon the potential market for these rights. Existing zoning in New York and other cities already permits developers to shift unused floor area to contiguous parcels.⁴⁴ Hence, the plan is useful only

⁴⁴ The New York Zoning Resolution defines the term "zoning lot" to include the following:

(c) A tract of land, located within a single *block*, which at the time of filing for a building permit . . . is designated by its owner or developer as a tract all of which is to be used, *developed*, or built upon as a unit under single ownership. A zoning lot, therefore, may or may not coincide with a lot as shown on the official tax maps of the City of New York or on any recorded subdivision plat or deed.

For the purposes of this definition, ownership of a *zoning lot* shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration.

NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10 (1971). See CHICAGO, ILL., MUNICIPAL CODE, ZONING ORDINANCE ch. 194A, art. 3.2 (1970). Under these provisions a developer may increase the authorized floor area on the project site by obtaining a long-term lease on an underimproved or vacant adjacent site, designating both that site and the project site as a single "zoning lot," and shifting the unused floor area from the former to the latter.

One hundred thousand square feet of excess floor area authorized for the site of the Appellate Division Courthouse, a New York landmark, were transferred to an adjacent project site pursuant to § 12-10 and without the aid of § 74-79, the landmark transfer provision, which, at the time of the transaction, was not applicable to publicly owned landmarks. A developer, desiring to incorporate the additional floor area into his project on the adjacent site, leased the landmark property for a 50-year period with a 25-year renewal option, then subleased it back to the City reserving the 100,000 square feet of floor area. The operative clause of the lease provides:

Section 4.01. (a) Tenant is hereby given the right, prior to or during the Demised Term, to combine the zoning lot of the Demised Premises with the zoning lot of the Adjoining Premises, so as to obtain a combined Floor Area Ratio . . . for the zoning lots of the Demised Premises and the Adjoining Premises; however, as a result of such combination of zoning lots, Tenant shall not obtain more than one hundred thousand (100,000) square feet of floor area from the zoning lot of the Demised Premises.

Lease between the City of New York and 41 Madison Company § 4.01(a), Apr.

when a developer can be found who happens to own a lot located across a street or an intersection from a landmark or when a landmark owner who owns a series of lots that connect with the landmark lot desires to build on one or more of those lots. Under the plan, moreover, the market value of the rights is controlled wholly by the vagaries of construction activity within the immediate vicinity of the landmark. Thus, while the transfer of, for example, two hundred thousand square feet of floor space may command a premium if the landmark adjoins the site of a projected skyscraper, that space may be worthless if no construction is contemplated on the sites adjacent to the landmark. Nor does the plan offer a secure basis for predicting that the income received from the transfer of development rights in any given instance will equal or exceed rather than fall short of the economic burdens of landmark ownership. As pointed out earlier,⁴⁵ these burdens are attributable to a variety of factors in addition to the unused development potential of the landmark site. Physical and functional obsolescence, assemblage value, and impairment of mortgageability and feasibility of renovation are only some of these additional factors. In a limited number of instances, moreover, the landmark may already utilize virtually all of the floor area authorized for its site.⁴⁶ Finally, the New York plan fails to provide supplementary funding for those cases in which development rights sales do not promise full compensation.

The second weakness of the New York plan lies in its labyrinthine procedures governing the issuance of transfer permits. The maze of discretionary approvals based upon vague aesthetic, planning, and urban design criteria are hardly calculated to attract the voluntary participation of developers and landmark owners. These permits, moreover, are issued *after* formal designation has occurred. Yet the battle to safeguard threatened buildings of landmark quality is often lost at the designation stage itself. Owners of proposed landmarks typically oppose designation in response to their quite reasonable fears concerning its economic impact. Local governing bodies, too, have proven reluctant to designate buildings of unquestioned landmark status, as the Exchange debacle itself illustrates.⁴⁷ This reluctance may stem either from the potent political influence of downtown realtor and developer groups, who generally oppose meaningful pres-

10, 1970. See Sher, 'Air Rights' Lease, *Zoning*, 164 N.Y.L.J. Oct. 9, 1970, at 1; N.Y. Times, Apr. 16, 1970, at 34, col. 1. Sher notes that the method is "used commonly by private developers." Sher, *supra*, at 2.

⁴⁵ See pp. 579-80 *supra*.

⁴⁶ An example is the Monadnock Building, Chicago's last and tallest skyscraper of masonry construction, which was designed by John Root.

⁴⁷ See note 3 *supra*.

ervation programs,⁴⁸ or from a concern for the eventual fiscal consequences that designation would entail for the city.⁴⁹ If approval of an equitable incentive package, including an appropriate transfer authorization, were included in the designation process, it seems likely that the resistance of landmark owners and local governing bodies would lessen.

A third difficulty with the plan is its reliance upon the voluntary participation of landmark owners. They may balk, because they question the legality of the plan or the marketability of the development rights, because they are developers who wish to proceed with redevelopment of the landmark site, or for any number of other reasons. Without their participation, of course, the prospects for preservation revert to their former unhappy state.

Fourth, it can be questioned whether the New York initiative adequately insures that the landmarks of participating landowners will in fact be preserved. Relying essentially upon the transfer of some or all of a landmark's floor area for this purpose is unnecessarily risky. Under the New York plan a landmark owner apparently retains the right to demolish his landmark and replace it with a building of equivalent bulk if he decides that redevelopment would be more profitable.⁵⁰ In addition, a subsequent increase in the FAR of the district in which the landmark is located would rekindle speculative interest in the property; by recreating the excess floor area that had previously been transferred, it would give the owner an incentive to replace his landmark with a larger structure. The New York plan also lacks a mechanism that precisely defines the obligations assumed by the present and future owners of the landmark in consequence

⁴⁸ See note 35 *supra*.

⁴⁹ See pp. 583-84 & notes 37-39 *supra*.

⁵⁰ Mr. Frank Gilbert, Secretary of the New York Landmarks Preservation Commission, suggests that development rights transfers would discourage but not prohibit the destruction of the landmark:

[W]hen completed, [a development rights transfer] reduces much of the economic pressure to tear down the landmark since it *could be replaced only by another building with the same amount of floor space*.

Gilbert, *supra* note 8, at 14 (emphasis added).

The absence of an express requirement that a landmark owner convey an interest in the property obligating himself and future owners not to demolish or alter the landmark also points in this direction. Either § 74-791, which calls for a "program for . . . continuing maintenance," or § 74-793, which requires filing at the county registry of "[n]otice of the restrictions upon further development" of the landmark and transferee lots might be construed to include the conveyance of a preservation restriction. NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, §§ 74-791, -793 (1971). But both are extremely vague. Significantly, no such restriction was contemplated in the Amster Yard transaction, discussed in note 16 *supra*.

of the transfer authorization and that affords the city an effective remedy for the breach of these obligations.

Finally, the adjacency limitation of the New York plan needlessly produces a number of unfortunate urban design consequences. First, mammoth concentrations of bulk within the compass of a block or less⁵¹ might lead to an excessive demand for municipal services and to traffic congestion in the vicinity of the landmark. Second, a landmark building might be suffocated in adjacent superdensity, the visual enjoyment of a landmark being blotted out by the tall buildings around it. New York has responded to these risks by encasing development rights transfers in the straightjacket of administrative controls discussed above. But these controls have served only to deaden the enthusiasm of landmark owners and developers whose participation in the plan is absolutely essential to its success.

B. The Chicago Plan

1. *An Overview.* — The discussion of the plight of the Old Stock Exchange Building touched upon four characteristics that are fairly common among urban landmarks throughout the United States. First, most utilize only a fraction of the floor area authorized for their sites under modern zoning. Second, most landmarks are currently able to operate at a profit;⁵² their imperilment stems from the greater value of their land as the site of large office or commercial structures.⁵³ Third, endangered landmarks tend to be grouped in one or more reasonably compact areas of the city, usually in high land value commercial and service districts. Finally, municipal facilities and supportive services are also most heavily concentrated in these districts. This network of public facilities and services enables these districts to absorb

⁵¹ The magnitude of density is enormous in the case of certain New York landmarks. For example, the excess development rights of the United States Customs House are 789,800 square feet, an amount equal to the floor area of the 60-story Woolworth Building. See Burks, *supra* note 8, at 9, col. 5.

⁵² See notes 19 & 22 *supra*.

⁵³ The impact of rising land values on existing downtown development has been described as follows:

In our big cities of a half million or more population, [the] demolition of older structures was made economically feasible by parabolic increases in land values. *As a matter of fact, there are very few parcels of land in our largest cities which have not had as many as three different structures on them in the last hundred years* Our megalopolitan cities have grown so fast, however, that we have seen 25-year periods . . . where the land value has increased so rapidly that it has become economic to demolish even a fairly new building in order to use the land more intensively — to exploit to its highest and best use the new land value created in a short span of time.

Nelson, *Appraisal of Air Rights*, 23 APPRAISAL J. 495 (1955) [hereinafter cited as *Air Rights*] (emphasis added).

large numbers of people with greater efficiency than other areas of the city.

The Chicago Plan attempts to avoid the drawbacks of the New York plan through recognition of these factors. Briefly, the Plan would operate as follows. The city council, upon recommendation of the landmark and planning commissions, would establish one or more "development rights transfer districts,"⁵⁴ which would roughly coincide with the areas where downtown landmarks are concentrated. Upon designation of his landmark or at any time thereafter, the landmark owner would be entitled to transfer its development rights to other lots within the transfer district in which the landmark is located and to receive a real estate tax reduction reflecting the reduced value of his property. Transfers may be made to one or more transferee lots provided that the constructive lot area of any transferee lot is not increased by more than fifteen per cent.⁵⁵ Transfers would be subject to additional planning controls set forth in the municipality's preservation ordinance. In return for this transfer authorization, the owner would be required to convey to the city a "preservation restriction," which would bind him and future owners of the landmark to maintain it in accordance with reasonable standards and to refrain from demolishing or altering it without the city's permission.

Should a landmark owner reject the transfer option, the city would step in and condemn a preservation restriction and the landmark's development rights, though, in exceptional cases, the city might choose to condemn the landmark property in fee. Acquisition costs and other expenses of the program would be funded through a municipal "development rights bank." The bank would be credited with development rights that have been condemned from recalcitrant owners, rights donated by owners of other landmarks, and rights transferred from publicly owned landmarks. The city would sell these pooled development rights as necessary

⁵⁴ A development rights transfer district should not be confused with the traditional historic district referred to at p. 581 *supra*. Unlike the historic district, it serves as a marketing area for development rights and contains only a small number of buildings of significant architectural or historic character in relation to the total number of buildings within its boundaries. In addition, the municipal landmark commission reviews only those applications for alteration or demolition that relate to designated individual landmarks within a transfer district. In contrast, the commission engages in building permit review with respect to all buildings within historic districts.

⁵⁵ The figure of 15% was concurred in by municipal planners and architects in Chicago who viewed it as low enough to protect against the risk of urban design abuse, but not so low as to deprive the plan of economic appeal for landmark owners. Other cities may wish to increase or decrease this figure on the basis of their peculiar urban design needs and preferences.

to meet program costs, subject to the same planning controls that apply to private owners.

As outlined above, the Chicago Plan redistributes preservation costs equitably and realistically. Transfer authorizations — or cash awards, if the city is forced to condemn the property — and tax relief compensate the landmark owner for his losses. Eliminating the property's development potential by acquisition of the preservation restriction decreases the value of the site and extinguishes speculative interest in it. Landmarks will remain in private hands as vital commercial or office buildings instead of undergoing mummification as museums. Hence, the city avoids outlays for fee acquisition, restoration, and maintenance, and may continue to tax the landmark property, although at a lesser rate. Moreover, these tax losses will be more than offset by increased tax yields from the larger buildings authorized by the transferred development rights. And, in return for their financial contribution to the landmarks program, downtown developers receive full value in the form of governmental licenses to build larger structures than local zoning otherwise permits.

In addition to safeguarding threatened landmarks, the Chicago Plan promises to expedite downtown development generally by easing the difficulties of land assembly. Developers who have assembled all but a small fraction of a unified tract would be permitted to fill out the remainder by purchasing development rights from landmark owners or from the municipal development rights bank. This privilege would be subject, of course, to appropriate safeguards — again set out in advance in the preservation ordinance — concerning light, air and other design features of these projects. At the present time, developers often obtain bulk variances on spurious legal grounds⁵⁶ or spend months or years trying to acquire the additional strip needed to make their project economically feasible.⁵⁷

2. *The Elements of the Chicago Plan: A Closer Examination.* — a. *The Incentive Package.* — Unlike the New York program, the Chicago Plan is designed to compensate the landmark owner for the actual losses that he suffers. Prior to proposing designation of a landmark, the landmark commission will obtain an appraisal of the property that details the economic consequences of designation. The appraisal will also enumerate any structural defects, restoration or rehabilitation problems, or unique maintenance problems that further intensify the burdens of private ownership. The commission will then devise a package to com-

⁵⁶ See authorities cited in note 201 *infra*.

⁵⁷ See *Air Rights* 497. The author is personally familiar with a number of land assemblies in Chicago that required from four to six years to complete.

pensate the owner that will include an authorization to transfer up to one hundred per cent of the landmark's lot area and an appropriate real estate tax reduction. Transfers under the Chicago Plan will be measured in terms of lot area rather than floor area,⁵⁸ since the introduction of zoning bonuses and other complications into modern zoning codes makes lot area, rather than floor area, the factor that developers use to calculate the size and volume of projected developments.⁵⁹ An additional subsidy, funded out of the municipal development rights bank, may be included to cover losses not met by the package and to deal with special difficulties affecting the building.

The real estate tax reduction, an integral element of the Chicago Plan, should prove especially attractive to landmark owners.⁶⁰ The impact of a real estate tax reduction can be dramatic because real estate taxes are the largest single item in the cost of operating downtown buildings.⁶¹ A study recently undertaken in Chicago, for example, concluded that a twenty-five per cent reduction in the assessed valuation of downtown office buildings would result in a tax saving equal to twice the average repairs and maintenance budget for such properties.⁶² These savings alone will compensate the owners of many landmarks for their losses.⁶³ Since tax reductions under the Plan will be geared to the drop in appraised value that landmark properties suffer as a

⁵⁸ The Chicago Plan uses the same technique—combination of the lot area of the landmark and project sites—that was used in the Appellate Division Courthouse transaction. See note 44 *supra*. It does *not* entail the transfer of "air rights." The latter are a property interest in a three-dimensional location in space. Development rights, on the other hand, are simply a governmental license to build a defined amount of floor area as measured by the amount of lot area that has been constructively "transferred" to the project site.

⁵⁹ Another difference between the New York and Chicago Plans concerns the permanence of a development rights transfer. Transfers of development rights are "irrevocable" in New York. See NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, § 74-792 (4) (1971). Under the transfer proposal, on the other hand, landmark owners may be authorized by the municipal landmark commission and city council to purchase additional development rights to use on their sites if their buildings are destroyed by natural or other casualty occurrences beyond their control.

⁶⁰ Real estate tax relief is not included in the New York plan as such. The New York Landmarks Act, N.Y. GEN. MUN. LAW § 96(a) (McKinney Supp. 1970) and the Preservation of Landmarks and Historical Districts Ordinance, NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 207-8.0a(2) (1971) both authorize tax abatement. But the latter has not yet been extended to New York landmark owners, either generally or in conjunction with development rights transfers.

⁶¹ OFFICES 123.

⁶² Chicago Report 22.

⁶³ *Id.* at 15.

result of permanent designation, these reductions can be expected to equal or exceed the twenty-five per cent figure in a large number of instances.

b. Preservation Restriction. — Under the Chicago Plan, municipalities will obtain a preservation restriction in landmark properties except in the rare case when fairness requires that the city acquire a property in fee.⁶⁴ The advantages of less-than-fee acquisition are substantial. By this means, government limits its interference with private ownership, yet secures the preservation of landmarks. The latter continue in their original use or in an adaptive reuse that serves the space needs of the downtown area. The condemnation award will be reduced; maintenance and restoration costs are borne by the owner aided, in appropriate cases, by subsidies from the development rights bank; and the landmark property remains on the tax rolls.

Other advantages of preservation restrictions may also be cited. The preservation restriction enables landmark owners to qualify for federal⁶⁵ and state⁶⁶ income tax and local⁶⁷ real estate tax benefits that they might not otherwise enjoy. It also allows for more precise regulation of the obligations of landmark ownership. While these obligations can also be defined to some extent by general ordinance, as in New York, the interests of the city and the landmark owner are better served by an instrument that has been carefully tailored to take account of the peculiarities of individual properties. Finally, the preservation restriction offers accurate notice to mortgagees, purchasers, and other interested parties of the encumbrances attaching to the landmark property.⁶⁸

⁶⁴ This will be the case when the economic burdens of landmark ownership, as a result of an individual landmark's structural unsoundness, functional obsolescence or other cause, rise to such a level that its profitable operation is impossible.

⁶⁵ A preservation restriction may help to ensure that donors of development rights to the development rights bank receive a federal charitable deduction. *See* INT. REV. CODE OF 1954, § 170; Rev. Ruling 64-205, 1964-2 CUM. BULL. 62. *See also* R. BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND* ch. 5 (1967) [hereinafter cited as BRENNEMAN]. Presently under consideration is a change in the federal income tax laws that would liberalize guidelines for qualifying donations of preservation restrictions as charitable deductions. Address by Kenneth Gemmill, First Conference on Legal Techniques in Preservations, in Washington, D.C., May 2, 1970 (sponsored by National Trust for Historic Preservation).

⁶⁶ Twenty-six states have a personal income tax base that is derivative of the federal income tax base. Hence, charitable deductions taken under the latter may be included under the former as well. Address by Kenneth Gemmill, *supra* note 65.

⁶⁷ The existence of a preservation restriction would have probative value in showing a lower appraisal value of property. *See, e.g.*, ILL. REV. STAT. ch. 24, § 11-48.2-6 (1969); N.M. STAT. ANN. § 4-27-14 (Supp. 1971).

⁶⁸ The adequacy of existing recording indexes for this purpose, however, has

c. The Development Rights Transfer District.—The adjacency restriction is a principal culprit in the failure of the New York initiative to win the support of the real estate industry and of landmark owners. It severely impairs the marketability of development rights. It scatters density throughout the city on the capricious principle of how closely proposed developments border on landmarks. And it necessitates burdensome design review procedures to insure that landmark buildings are not overwhelmed by adjacent behemoths.⁶⁹

The Chicago Plan dispenses with the adjacency requirement by permitting transfers to any property within the development rights transfer district in which the landmark is located. This approach promises to avoid the economic and planning difficulties that have crippled the New York plan. The market for development rights under the Chicago Plan should prove more lucrative than the market under the New York plan on two counts. First, transfer districts are likely to encompass the high land value

been questioned on two grounds. First, the absence of an index specifically devoted to public restrictions complicates title searches on landmark properties. Second, in the absence of special legislation, recorded preservation restrictions are subject to termination pursuant to state obsolete restrictions and marketable title acts. See note 167 *infra*.

⁶⁹ The adoption of the adjacency restriction in New York, despite these drawbacks, was motivated by a desire to fit development rights transfers into the legal rationale that purportedly justifies the award of zoning bonuses. See Marcus. The latter, it will be recalled, are granted in return for an amenity. Located on the same lot as the oversize building, the amenity, it is claimed, "digests" the building's extra floor area by providing additional light and air or by facilitating the movement of traffic generated by the building. This rationale thus answers the concern of city planners that the increased intensity of use resulting from the granting of zoning bonuses will be absorbed by the amenity for which the bonus was given. See generally DEPARTMENT OF CITY PLANNING, SAN FRANCISCO DOWNTOWN ZONING STUDY, FINAL REPORT (1966); Ruth, *Economic Aspects of the San Francisco Zoning Ordinance Bonus System*, in NEW ZONING 159; Svirsky, *supra* note 6. Landmarks, too, are viewed as amenities in the form of so many "light and air parks." See Marcus. But they obviously cannot be located on the same lot as the building to which their excess floor area has been transferred. If they are to digest this additional density, it is thought, they must be as close to the building as possible. Hence, the origin of the adjacency restriction.

While the adjacency restriction thus fits within the digestion rationale, the advantages of this rationale may be more apparent than real. It has not received express judicial approval. Moreover, the rationale seems more metaphorical than legal in content since it is difficult to conceive of an operational test that indicates how much light and air is needed to "digest," let us say, 50,000 additional square feet of office space. In addition, the digestion rationale is demonstrably inadequate as an explanation for some types of incentive zoning. Amenities such as theaters, see note 10 *supra*, or retail stores, see note 12 *supra*, will actually increase traffic at the project site.

areas of the city since, as already noted,⁷⁰ threatened urban landmarks tend to be grouped in such areas. It can be assumed that municipalities will capitalize on this advantage in drawing the boundaries of their development rights transfer districts. Second, the marketability of development rights will not be dependent upon the vagaries of construction activity on sites immediately adjacent to landmarks. They will be governed instead by the general vigor of the construction and real estate markets in the particular municipality's central commercial and service areas.

The area-wide approach, as conceived under the Chicago Plan, also promises to minimize the undeniable risk of urban design abuse that attends any incentive zoning program. It will do so by means of controls that govern the establishment of development rights transfer districts and that regulate transfers that subsequently take place within these districts. Prior to recommending the establishment of any district, the municipal landmark and planning commissions will prepare a study of the area in question that inventories the number and type of prospective landmarks there; that estimates the amount of floor area — over and above that already authorized for the area under present zoning — that might be transferred upon designation of the landmarks; and that details the capacity of the area's public services and facilities to absorb this additional density. In addition, the planning commission will review the compatibility of the proposed district with the municipality's comprehensive plan and its detailed plan, if any, for the area. This study and the accompanying recommendation of the two agencies will provide the basis for the local governing body's decision to establish the district and to determine its boundaries.

Once established, transfer districts will be protected from undue concentrations of density in at least three respects. First, an upper bound on the amount of lot area that may be transferred within a district is fixed by the number of designated landmarks there. That number is not likely to be excessive in absolute terms: Chicago's architecturally-rich Loop area, for example, will probably have no more than thirty designated landmarks. Nor will all of the landmarks within a district incur substantial depreciation upon designation. Measured against the size of the district and its capacity to absorb density, therefore, the total amount of transferable density is likely to be marginal.⁷¹

⁷⁰ See p. 582 *supra*.

⁷¹ It is estimated that the transfer of some 300,000 feet of lot area, coupled with appropriate tax reductions, will be sufficient to fund a preservation program for the landmark buildings in Chicago's Greater Loop area. See Chicago Report 20. Because the scope of the program is so limited, concern that a city will be

Second, most if not all of the floor area that will be added to new projects under the Chicago Plan will already have been authorized by existing zoning. The main thrust of the Plan, therefore, is upon the redistribution of previously authorized floor area rather than upon the creation of wholly new floor area as in the case of zoning bonuses. Hence, the Plan will occasion little or no net increase in presently authorized density of the district.⁷²

Third, the proposal envisages that transfers will be restricted to selected use and bulk districts — essentially high density commercial and apartment zones — within the development rights transfer district, and that no transferee site may be increased by more than fifteen per cent of its actual lot area. These limitations will further minimize the possibilities of urban design abuse. Preliminary indications are that the principal buyers of development rights will be developers of smaller interior lots in commercial zones that cannot practicably utilize zoning bonuses and of lots devoted to high-rise apartment developments.⁷³ Such shifts in density are unlikely to distort the cityscape within the transfer district. With the advent of the skyscraper and the absence of stringent height limitations, the American cityscape has assumed a distinctly irregular form best exemplified by the Manhattan skyline. Sprinkling an additional four to six stories on lots in these centrally located districts will make little difference in such a setting.⁷⁴

engulfed in surplus density is misplaced. But proposals have been made that would escalate development rights transfers to a level that might produce this result. For example, Ira Duchan, New York City Commissioner of Real Estate, has suggested that excess floor area be transferable to nonadjacent sites from *any* building or facility owned by the city. See Burks, *supra* note 8.

⁷² Under the New York plan, no net increase in density can occur because transfer of only the authorized but unused floor area is allowed from any landmark site. See p. 584 *supra*. A net increase is theoretically possible under the transfer proposal, however, because transfers of up to 100% of a landmark's lot area may be authorized in appropriate cases. But data compiled in the Chicago Report indicate that a net increase in the density of a transfer district is highly improbable. Relatively few landmarks are likely to incur such grave depreciation that only a full 100% transfer authorization over and above real estate tax relief will promise to compensate their owners fairly. See Chicago Report 12-15. In fact, tax relief alone will be sufficient to compensate landmark owners in many cases. *Id.* at 21-22. Nor should it be anticipated that all of the lot area pooled in the municipal development rights bank will be put on the market. On the contrary, only an amount necessary to provide supplementary funding for the municipal preservation program will be transferred. *Id.* at 20.

⁷³ See Chicago Report 16-19.

⁷⁴ As described in the text, development rights transfer districts would roughly coincide with geographic areas of the city in which urban landmarks are concentrated. In this way an urban design tradeoff is achieved: bulk within the district

d. *The Role of the Municipality.* — The municipality's role under the New York plan is both too little and too great. It is too little because the city must expend its own scarce revenues to safeguard threatened landmarks if the development rights carrot fails to entice landmark owners. And it is too great because the plan's labyrinth of discretionary approvals tends to discourage owners and developers from electing to participate in the program at all.

The Chicago Plan directly addresses both of these problems. As to the first, it enables the municipality to finance a vigorous preservation program without dipping into general revenues. Sales of development rights from the municipal development rights bank should provide the financial basis for effective public intervention in whatever form individual cases may require.

Development rights credited to the bank will derive from three sources. The principle source will be landmark owners who decline the transfer option and insist that the city pay them a

is redistributed in exchange for the increased amenity resulting from the presence of low density structures there. Moreover, the bulk restrictions of the traditional bulk zones within the district are left unchanged.

A second approach is conceivable under which transfer districts would coincide with areas that, though presently zoned to relatively low densities, are expected to undergo intensive development soon. Whether or not these areas contain landmarks would be irrelevant. In rezoning them to the greater densities warranted by development expectations, densities permitted as of right would be deliberately skewed to levels falling somewhat short of the total amount of density that the market could absorb and that would be consistent with community health and safety. Developers within these areas would be permitted to purchase the remaining density increments from landmark owners, wherever located, or from the municipal development rights bank.

A proposal for restoring the Georgetown Waterfront Historic District has been advanced along these lines. Premised on the expectation that the stringent height limitations presently in force in downtown Washington will be removed, it would enable owners of property within the Historic District to sell development rights to developers within the downtown Washington area, the receipts of these sales being used to upgrade the Historic District. See Von Eckardt, *Getting Charm and Height*, Wash. Post, Feb. 27, 1971, § C, at 1, col. 5.

Unlike the Chicago Plan, this alternative method is open to serious due process challenges. As will be shown later, the existence of the Chicago Plan casts no doubt on the underlying reasonableness of the bulk restrictions that remain in effect on nontransferee lots in the development rights transfer district, see pp. 628-31 *infra*. Under the alternative, however, communities have conceded that the bulk levels permitted as of right in the transfer district are below those that would pose a threat to public health and safety.

That the landowners may nevertheless obtain what the courts may deem a "reasonable return" on their property is not a sufficient answer to this objection. In addition to meeting the reasonable return criterion, communities adopting these programs must also convince the courts that the development potential of private property may be regulated under the police power to raise funds or otherwise provide compensation for public improvements that government is unable to

cash award for their losses.⁷⁵ The bank will receive an increment of lot area in such cases equal to the value of the award but in no event greater than one hundred per cent of the landmark site. A second source will be other landmark owners who donate lot area. That such donations will be forthcoming is highly probable in view of the tangible federal, state, and local tax benefits that donors will enjoy and, perhaps more importantly, in light of the central role that private philanthropy has traditionally played in the American preservation movement. The third will be the city itself, which is likely to own a fair number of the community's landmarks. The bank would be credited in the last two instances with increments of lot area proportional to the authorized but unbuilt floor area of the landmarks.

The lion's share of the city's preservation costs will be covered by the sale of condemned development rights. But additional funds will be necessary for subsidies and for the relatively infrequent cases in which the transfer authorization-tax reduction package fails to provide adequate compensation. Donated development rights and those provided by the city should provide an ample cushion in these cases.

The Plan also seeks to simplify the administrative procedures governing development rights transfer authorizations. The problem here is to strike a correct balance between preventing urban design abuse through proper planning controls and facilitating the marketability of development rights by freeing them of onerous restrictions. Under its program New York has little choice

finance through general tax revenues. That question will be resolved affirmatively only if the courts are prepared frankly to extend the general welfare concept in the incentive zoning context to include fiscal as well as regulatory objectives. Whether the courts will take this step at the present time is unclear.

⁷⁵ Some commentators have intimated that an award of development rights alone may be sufficient to meet the constitutional requirement of just compensation that incentive zoning programs may trigger. Professor Mandelker, for example, speaks of zoning bonuses as "a *de facto quid pro quo* for corresponding increases in development costs." Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint?*, in *NEW ZONING* 16. Norman Marcus has suggested that the availability of the transfer option might make it more difficult for landmark owners to establish that landmark restrictions deprive them of a reasonable return on their property. See Marcus. While this view may be acceptable in some jurisdictions, see generally Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963), it is open to two objections in others. First, the jurisdiction may require that compensation for the interest taken be in cash. See, e.g., 3 P. NICHOLS, *NICHOLS' THE LAW OF EMINENT DOMAIN* § 8.2 (3d rev. ed. 1970) [hereinafter cited as NICHOLS]; *Department of Pub. Works v. Caldwell*, 301 Ill. 242, 133 N.E. 642 (1921). Those jurisdictions that do permit special benefits to be set off against the interest taken might nevertheless regard development rights as having too uncertain a value to merit recognition as a form of special benefits.

but to err on the side of the former. Because every transfer shifts bulk to a site adjacent to a landmark, its aesthetic impact on the landmark must be examined on an individualized basis and in terms of highly subjective criteria. Moreover, the New York program provides no assurance beforehand that the physical services and facilities in the landmark's immediate area will be able to absorb the additional density resulting from the transfer. This uncertainty, too, necessitates case-by-case review.

The Chicago Plan largely avoids both problems by permitting transfers throughout development rights transfer districts. Few, if any, transfers under the Plan will be to sites adjacent to landmarks because the number of potential transferee sites is vastly expanded and because most cities already permit such transfers as of right under conventional zoning provisions. Except in the rare cases when such transfers occur, therefore, no need for design review exists. Further, development rights transfer districts are selected expressly upon the basis of the capacity of their public services and facilities to absorb any increased density that may be allocated within them under the Plan. Preselecting the districts in this way also enables the city to dispense with case-by-case review. The remaining controls envisaged under the Plan, such as the limitations concerning bulk and use districts to which transfers may be made and the permitted increases in the size of transferee lots, will be set forth in advance in the preservation ordinance and need not, therefore, be administered on a discretionary basis. An additional advantage of the Chicago Plan is that it telescopes into a single proceeding the separate proceedings in New York. By this means, it will tend to reduce the resistance of owners and city councils to the formal designation of landmark buildings.⁷⁶

e. Implementation of the Chicago Plan. — The Chicago Plan employs zoning techniques to advance preservation objectives; thus it could be implemented either as a zoning or as a preservation measure. This choice will determine whether municipal authority to adopt the Plan should originate in state zoning or state preservation enabling legislation and whether the zoning or the preservation ordinance should be the primary tool for its implementation at the municipal level. It may also shape the relative influence of the local planning and landmark commissions in administering the Plan.

The American Law Institute's Model Land Development Code⁷⁷ offers an ideal solution. Intended to serve as a comprehensive state enabling act to empower local communities to regu-

⁷⁶ See pp. 587-88 *supra*.

⁷⁷ ALI MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 2, 1970).

late land use and development, the Code treats zoning⁷⁸ and preservation⁷⁹ as two categories of this regulatory power. It thereby recognizes the close ties of technique and objective that zoning and preservation share,⁸⁰ but does not ignore their separate identities. It envisages adoption at the local level of a single Land Development Ordinance⁸¹ to be administered by a single Land Development Agency.⁸² Under this arrangement, the Plan could serve as one component of the Ordinance, which is intended to address a variety of land use concerns on a coordinated basis. "Ultimate responsibility"⁸³ for administering the Ordinance — and thus the Plan — would rest with the Agency, an entity that most resembles the municipal planning commission. But landmark commissions would likely play an influential role as well in view of the Code draftsmen's suggestion that the Agency "delegate the administration of historic and other special preservation regulations to specialized bodies expert in architecture and planning."⁸⁴

The Code, unfortunately, is still adrafting, and resort must be had to a less satisfactory approach. Two alternatives are suggested by the existing legislative framework that governs zoning and preservation matters. First, the Plan might be treated essentially as a preservation undertaking: authority to adopt it would appear in the state preservation enabling act; its mechanics would

⁷⁸ *Id.* Art. 2.

⁷⁹ *Id.* §§ 2-208 to -209.

⁸⁰ Municipal preservation efforts have been upheld as a manifestation of local zoning powers. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 415, 389 P.2d 13, 17 (1964). They have been deemed "auxiliary to the general zoning power" in states having independent preservation enabling acts. *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 440, 250 N.E.2d 282, 287 (1969). Many municipalities incorporate some or all of their preservation measures in their zoning ordinances. *See, e.g.*, NEW YORK, N.Y., ZONING RESOLUTION art. 1, ch. 1, § 11-121; art. 2, ch. 1, § 21-00; art. 2, ch. 3, § 23-69; art. 7, ch. 4, §§ 74-71, 74-79 (1971); CHARLESTON, S.C., CODE ch. 51, art. III (1966). Some state legislatures have expressly authorized municipalities to pursue historic preservation objectives under the zoning power. *See, e.g.*, MO. REV. STAT. § 89.040 (1971); NEB. REV. STAT. § 19-903 (1970). And numerous preservation enabling acts contain provisions expressly keyed into local zoning procedures. *See, e.g.*, N.H. REV. STAT. ANN. § 31:89-b (1970) ("All [historic] districts and [preservation] regulations shall be established in relation to the comprehensive plan and the comprehensive zoning ordinance of the city, or town"); R.I. GEN. LAWS ANN. § 45-24.1-7 (1971) (denials of building permits by the historic district commission appealable to zoning board of appeals).

⁸¹ ALI MODEL LAND DEVELOPMENT CODE § 2-101 (Tent. Draft No. 2, 1970).

⁸² *Id.* § 2-301.

⁸³ *Id.* § 2-209, Note at 52.

⁸⁴ *Id.* § 2-209, Note at 52.

be detailed in the local preservation ordinance; and its administration would be vested primarily in the municipal landmark commission. The second alternative, on the other hand, would emphasize the Plan's hybrid character by according an increased role to the state zoning enabling act and to the local zoning ordinance and planning commission.

The first of these routes was generally followed in Illinois.⁸⁵ That state's preservation enabling act was amended in 1971 to empower municipalities to implement all features of the Plan, including establishment of a development rights bank, acquisition of preservation restrictions and transfer of development rights.⁸⁶ As a precautionary measure, the "purposes" section of the state zoning enabling act was also revised to reflect that preservation of historic buildings is a proper objective of zoning.⁸⁷ Local communities will implement the Plan through their preservation ordinances,⁸⁸ but must revise the definition of "zoning lot" in their zoning ordinances to include the constructive lot area which owners are authorized to transfer under the Plan as well as actual lot area.⁸⁹ The respective responsibilities of the landmark and planning commissions assume the form outlined earlier in this article.⁹⁰

The second approach has been chosen in New York. Provisions implementing the New York program appear in the city's zoning ordinance,⁹¹ which assigns the dominant administrative role to the planning commission.⁹² Since no amendatory legislation was sought at the state level, the city apparently concluded that its state zoning enabling act already empowered it to adopt these provisions.

Although either approach is workable, the Illinois route seems preferable because it permits coordinated treatment in a single statutory enactment of the property, condemnation, and land use features of the Plan. In addition, it recognizes that zoning and

⁸⁵ See Ill. Pub. A. No. 77-1372 (Ill. Leg. Serv., Aug. 31, 1971), *in part to be codified at* ILL. REV. STAT. ch. 24, § 11-48.2-1A, *in part amending* ILL. REV. STAT. ch. 24, § 11-48.2-2 & -6 (1969).

⁸⁶ *Id.*

⁸⁷ See Ill. Pub. A. No. 77-1373 (Ill. Leg. Serv., Aug. 31, 1971), *amending* ILL. REV. STAT. ch. 24, § 11-13-1 (1969). Other state zoning enabling acts containing a similar provision are listed in note 80 *supra*.

⁸⁸ See Chicago Report app. III.

⁸⁹ *Id.*

⁹⁰ See pp. 591-92, 595 *supra*.

⁹¹ See NEW YORK, N.Y., ZONING RESOLUTION, art. VII, ch. 4, § 74-79 *et seq.* (1971).

⁹² See p. 585 *supra*.

the regulation of individual landmarks are actually separable manifestations of the police power.⁹³

III. LEGALITY OF THE TRANSFER PROPOSAL

Despite the economic feasibility and sound urban design features of the Chicago Plan, the prospect of a legal challenge may deter its acceptance by landmark owners, the real estate industry, and local government. A court test of the plan is likely to center upon three of its principal features: the condemnation of preservation restrictions, insofar as it makes possible the sale of development rights; the use of preservation restrictions to encumber landmark properties; and the authorization of greater floor area for development rights purchasers than for other property owners within the transfer district. Opponents of the proposal will contend that it violates the "public use" limitation on governmental

⁹³ The misconception that zoning and the regulation of individual landmarks are indistinguishable manifestations of the police power probably results from the fact that early preservation ordinances focused almost exclusively on the regulation of historic districts. Historic districting may properly be viewed as a special case of zoning because of its area-wide focus. But a "zoning" measure that singles out an individual landmark property for severe bulk, use, and area restrictions not applicable to its neighbors generally would risk invalidation on spot zoning and equal protection grounds. *See also* note 36 *supra*. Further, while zoning establishes area-wide restrictions that may be varied only in cases of individual hardship, most preservation ordinances treat *all* formally designated landmarks as potential candidates for variances. Formal designation does not and is not intended to impose permanent landmark status on these properties. Rather, it continues under most ordinances only so long as the landmark owner consents or, under others, until the owner establishes that designation entails undue economic burdens. *See* p. 581 *supra*. It is for this reason that courts typically reject due process attacks on designation alone, but caution that designation and its attendant restrictions must be lifted upon a proper showing of economic deprivation. *See, e.g., Trustees of Sailor's Snug Harbor v. Platt*, 53 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct. 1967), *rev'd on other grounds*, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1968); *Manhattan Club v. Landmark Preservation Comm'n*, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966); *cf. State ex rel. Marbro Corp. v. Ramsey*, 28 Ill. App. 2d 252, 171 N.E.2d 246 (1960); *In re Opinion of the Justices*, 33 Mass. 773, 128 N.E. 2d 557 (1955).

If individual landmarks could be regulated through the zoning power, the objectives of the Chicago Plan could be achieved largely by downzoning all landmark sites to the bulk of their present improvements. Measures akin to this technique were upheld in *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969) (downzoning of commercial area around President Lincoln's home to low density residential uses upheld), and underlie the "limited height district" provision of the New York Zoning Resolution. *See* NEW YORK, N.Y., ZONING RESOLUTION art. 1, ch. 1, § 11-121; art. 1, ch. 2, § 12-10 (1971) (strict height limits may be imposed throughout designated historic districts). Both examples, however, entail regulation of entire areas of a city, not of individual landmarks.

power under the state and federal constitutions to condemn property because the acquisition of preservation restrictions is linked to a scheme of selling development rights on the private market. They will attack the use of preservation restrictions on various grounds: the most troublesome is that such restrictions are not recognized property interests and that their acquisition is not authorized by existing preservation enabling acts and ordinances. And they are likely to assert that nonuniform floor area allocations violate state zoning enabling legislation and deny equal protection and due process to property owners who do not purchase development rights.

A. *The Public Use Requirement*

If the Chicago Plan envisaged only the condemnation of an interest in landmark properties, no serious constitutional objection based on the public use requirement could be asserted against the Plan's employment of the condemnation power. The courts have repeatedly held that landmark preservation is a public use, in aid of which that power may be exercised.⁹⁴ Moreover, the objection that acquisition of less-than-fee interests fails to promote a public use because such interests are not susceptible to physical use or occupation by the public has also been discredited.⁹⁵ It is now recognized that visual enjoyment alone constitutes a sufficient use by the public to warrant condemnation.

But the Chicago Plan also authorizes municipalities to resell in the private market the development rights associated with the preservation restriction that it condemns in private properties. Because condemnation of the preservation restriction and resale of the associated development rights are connected steps in an integral scheme, opponents of the Chicago Plan may assert that it violates the public use requirement on two further grounds. First, it may be argued that, despite its claimed public objectives, the Plan in fact serves the interests of a distinct private group, namely development rights purchasers. Second, it may be argued that governmental action taken to recoup the costs of condemnation of the preservation restriction violates the public use requirement.

⁹⁴ See, e.g., *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929); *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896); *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939); *United States v. Certain Parcels of Land*, 99 F. Supp. 714 (E.D. Pa. 1951), *aff'd*, 215 F.2d 140 (3d Cir. 1954).

⁹⁵ See, e.g., *Kansas City v. Liebi*, 298 Mo. 569, 252 S.W. 404 (1923); *In re New York*, 57 App. Div. 166, 173, 68 N.Y.S. 196, 200-01, *aff'd per curiam*, 167 N.Y. 624, 60 N.E. 1108 (1901); *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

1. *Private Benefit*. — Without the active participation of private developers, the transfer proposal cannot succeed. To secure their support, it accords them preferential treatment by relaxing zoning restrictions to permit them to build more profitably than nonparticipants in the program. Hence, there is the possibility of an attack on grounds that the proposal serves private rather than public interests and that the use of eminent domain to this end is invalid. Similar charges are seen in cases dealing with governmental efforts to enlist private enterprise in programs designed to renew urban areas,⁹⁶ attract industry to depressed locations,⁹⁷ revitalize port and terminal facilities,⁹⁸ and secure the construction of parking facilities⁹⁹ and government buildings.¹⁰⁰

This charge is a difficult one for the courts to handle. The dangers of improper private gain are often quite real. And, regrettably, favoritism or venality on the part of the public officials who administer these programs is not uncommon. But this century has witnessed a vast expansion of governmental responsibilities as a result of population growth and the population movement to the cities. The courts have responded by broadening earlier notions of the ambit of the public use concept and by according legislatures wide discretion in selecting means for meeting these responsibilities.¹⁰¹ Moreover, the charge that a program, legislatively declared to be a public use, actually serves private interests requires courts to go behind the statute to peer into legislative motive and into the program's history and implementation. Few courts welcome these tasks.

Judicial discomfort in the face of these difficulties pervades the decisions that examine allegations of undue private gain. Four conclusions emerge from an examination of such cases. First, private gain, whether accruing to identified individuals¹⁰²

⁹⁶ See, e.g., *Belovsky v. Redevelopment Auth.*, 357 Pa. 329, 340, 54 A.2d 277, 282 (1947).

⁹⁷ See, e.g., *City of Frostburg v. Jenkins*, 215 Md. 9, 16-17, 136 A.2d 852, 856 (1957); *Basesore v. Hampden Indus. Dev. Auth.*, 433 Pa. 40, 50, 248 A.2d 212, 217 (1968).

⁹⁸ See, e.g., *People ex rel. Adamowski v. Chicago R.R. Terminal Auth.*, 14 Ill. 2d 230, 236, 151 N.E.2d 311, 315 (1958).

⁹⁹ See, e.g., *Poole v. City of Kankakee*, 406 Ill. 521, 530, 94 N.E.2d 416, 421 (1950); *Court St. Parking Co. v. Boston*, 336 Mass. 224, 230, 143 N.E.2d 683, 687 (1957).

¹⁰⁰ See, e.g., *People ex rel. Adamowski v. Public Bldg. Comm'n*, 11 Ill. 2d 125, 144, 142 N.E.2d 67, 77-78 (1957).

¹⁰¹ See, e.g., *People ex rel. Adamowski v. Public Bldg. Comm'n*, 11 Ill. 2d 125, 142 N.E.2d 67 (1957); *Lerch v. Maryland Port Auth.*, 240 Md. 438, 214 A.2d 761 (1965); *Court St. Parking Co. v. Boston*, 336 Mass. 224, 143 N.E.2d 683 (1957).

¹⁰² See, e.g., *Hanston v. Danville & W. Ry.*, 208 U.S. 598 (1908); *Town of Steilacoom v. Thompson*, 69 Wash. 2d 705, 419 P.2d 989 (1966).

or to the private sector generally,¹⁰³ does not itself invalidate a program. Second, private gain must be justified by the benefits accruing to the public under the program.¹⁰⁴ Judicial tests of justification are crude and, in large measure, conclusory: some courts reason that private gain must be "incidental" or "subordinate" to the public gain;¹⁰⁵ others emphasize that the public gain must justify the risk sustained by the government in the program.¹⁰⁶ Third, each case turns very much on its own facts and the specific legislative framework within which the program operates. Fourth, and perhaps most important, allegations of undue private gain are rejected in the overwhelming majority of cases; they prevail only under circumstances of clearly disproportionate private gain.¹⁰⁷

These conclusions augur well for the transfer proposal. That developers receive substantial benefits does not of itself taint the proposal. Authoritative recognition of landmark preservation as a public use is persuasive evidence that the public advantages of the proposal offset those benefits.¹⁰⁸ Moreover, the transfer proposal contains safeguards to insure that the benefits to private developers do not become the tail that wags the dog. Condemned development rights are credited to the municipal bank in an amount strictly calculated to reimburse the city for its condemnation costs. Besides, since developers will be expected to bid for the development rights on the open market, the value of these rights will be returned to the city in the form of cash payments from these developers.

2. *Recoupment.* — The second aspect of the public use limitation proscribes condemnation solely designed to recoup the cost of public programs or to add to the public fisc generally. It is on this basis, for example, that courts have frowned upon excess condemnation,¹⁰⁹ the acquisition of more land than is needed for

¹⁰³ See cases cited notes 96-100 *supra*.

¹⁰⁴ See Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717, 724-25 (1964); Note, *The 'Public Purpose' of Municipal Financing for Industrial Development*, 70 YALE L.J. 789, 796 (1961).

¹⁰⁵ See, e.g., *Papadinis v. City of Somerville*, 331 Mass. 627, 632, 121 N.E.2d 714, 717 (1954); *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451, 458, 99 N.E.2d 235, 238 (1951).

¹⁰⁶ See *Price v. Philadelphia Parking Auth.*, 422 Pa. 317, 336, 221 A.2d 138, 149 (1966).

¹⁰⁷ See, e.g., *Shizas v. Detroit*, 333 Mich. 44, 52 N.W.2d 589 (1952); *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451, 99 N.E.2d 235 (1951); *Price v. Philadelphia Parking Auth.*, 422 Pa. 317, 221 A.2d 138 (1966); Note, *State Constitutional Limitations on Eminent Domain*, *supra* note 104, at 724-25.

¹⁰⁸ See cases cited note 94 *supra*.

¹⁰⁹ See *Cincinnati v. Vester*, 33 F.2d 242 (6th Cir. 1929), *aff'd*, 281 U.S. 439 (1930); cf. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371,

a public project with the intent to resell the remainder at a profit after completion of the project. Needless to say, the recoupment objection has particular relevance to the transfer proposal: only by selling development rights acquired from nonparticipating landmark owners will a city be able to compensate them for their losses.

The courts have been no more comfortable with the recoupment objection than with the claim of undue private benefit. Again, the competing considerations are not easily reconciled. The key objection to recoupment concerns the propriety of utilizing eminent domain, one of the harshest of governmental powers, to fund public programs, rather than resorting to general tax revenues for this purpose. Municipal poverty, it is argued, does not justify such drastic interference with private ownership.¹¹⁰ For some, the objection is ideological:¹¹¹ government has no place in the private real estate market and thus should not be able to sell or lease portions of condemned property to private parties. For others, it rests on the practical consideration that government enjoys unfair advantages over the private real estate industry in any competition between the two.¹¹² Still others express misgivings about the wisdom of government becoming involved in high-risk ventures.¹¹³ The final objection is the familiar one that opportunities for favoritism and corruption are heightened by public programs that return large sums of money to municipalities.¹¹⁴ On the other hand, adherents of recoupment counter that expanding governmental responsibilities in this century have created demands for public funding that simply cannot be met out of

102 N.E. 619 (1913). See generally R. CUSHMAN, *EXCESS CONDEMNATION* (1917) [hereinafter cited as CUSHMAN]; Hodgman, *Air Rights and Public Finance: Public Use in a New Guise*, 42 S. CAL. L. REV. 625 (1969).

¹¹⁰ See, e.g., CUSHMAN 14-16.

¹¹¹ See *Housing Auth. v. Johnson*, 209 Ga. 560, 563, 74 S.E.2d 891, 894 (1953) (to permit eminent domain for urban renewal would "cut the very foundation from under the sacred right to own property").

¹¹² See, e.g., *Wilmington Parking Auth. v. Ranken*, 34 Del. Ch. 439, 485, 105 A.2d 614, 640 (Sup. Ct. 1954) (dissenting opinion); *Adams v. Housing Auth.*, 60 So. 2d 663, 668-69 (Fla. 1952); *Courtesy Sandwich Shop, Inc. v. Port Auth.*, 12 N.Y. 2d 379, 398, 190 N.E.2d 402, 411, 240 N.Y.S.2d 1, 13-14 (1963) (Van Voorhis, J., dissenting).

¹¹³ See, e.g., *Adams v. Housing Auth.*, 60 So. 2d 663, 670 (Fla. 1952) (characterizing urban renewal as a "gigantic real estate promotion"). After detailing the enormous losses of public monies suffered by European countries that utilized excess condemnation schemes in the 19th century, Cushman states that "[t]he first conclusion is that the risk of loss is too serious to warrant [the] adoption [of excess condemnation] as a method of municipal finance." CUSHMAN 212.

¹¹⁴ See, e.g., *Pennsylvania Mut. Life Ins. Co. v. Philadelphia*, 242 Pa. 47, 57-58, 88 A. 904, 908 (1913).

general tax revenues.¹¹⁵ Without recoupment of at least some of these funds, they note, many programs of vital importance to public welfare would be gravely endangered.¹¹⁶

Caught between these opposing contentions, the courts have found uneasy refuge in the formula that recoupment objections will be overridden if the recoupment is but an "incidental" element of a program that furthers an independent public use.¹¹⁷ This formula is first cousin to the judicial formula used to evaluate claims of undue private gain, both formulas approving the challenged feature if it rides piggyback on a recognized public use.¹¹⁸ While both formulas are imprecise, they allow the judiciary to control the more egregious of legislative excesses. And both formulas result in the approval of the great majority of the programs to which they are applied.

Three groups of cases serve to illustrate judicial reluctance to invalidate the use of eminent domain because of a recoupment objection. The first concerns the propriety of selling a byproduct of property condemned for a public project,¹¹⁹ best illustrated in litigation dealing with the sale of electricity from navigation improvement projects undertaken by federal and state agencies. Recoupment challenges to such sales have been decisively rejected.¹²⁰ In rejecting such challenges, the courts have pointed to three grounds for validating such sales: they enable public agencies to recapture the costs of public improvements;¹²¹ they

¹¹⁵ See, e.g., *Wilmington Parking Auth. v. Ranken*, 34 Del. Ch. 439, 461, 105 A.2d 614, 627 (Sup. Ct. 1954); cf. *Haar & Hering*, *supra* note 75; *Hodgman*, *supra* note 109.

¹¹⁶ See cases cited note 101 *supra*.

¹¹⁷ See, e.g., *Kaukauna Water Power Co. v. Green Bay & Miss. Canal*, 142 U.S. 254, 273 (1891); *Wilmington Parking Auth. v. Ranken*, 34 Del. Ch. 439, 450, 105 A.2d 614, 620-21 (Sup. Ct. 1954); *Courtesy Sandwich Shop, Inc. v. Port Auth.*, 12 N.Y.2d 379, 390, 190 N.E.2d 402, 406, 240 N.Y.S.2d 1, 7 (1963).

¹¹⁸ An examination of the opinions reveals that a court's willingness to label the recoupment feature "incidental" to the underlying purpose frequently turns upon its willingness to concede that the latter is indeed a public purpose. Compare *In re Opinion of the Justices*, 332 Mass. 769, 126 N.E.2d 795 (1955), and *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171 (1959), with *Lerch v. Maryland Port Auth.*, 240 Md. 438, 214 A.2d 761 (1965), and *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137 (Tex. 1954), *appeal dismissed*, 350 U.S. 804 (1955). Especially illustrative of the mixing of the two issues is the dissenting opinion of Judge Van Voorhis in *Courtesy Sandwich Shop, Inc. v. Port Auth.*, 12 N.Y.2d 379, 393, 190 N.E.2d 402, 407, 240 N.Y.S.2d 1, 9 (1963).

¹¹⁹ See, e.g., *Ashwander v. TVA*, 297 U.S. 288 (1936); *Arizona v. California*, 283 U.S. 423 (1931); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254 (1891).

¹²⁰ See cases cited note 119.

¹²¹ See, e.g., *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53,

advance community welfare by making possible the fulfillment of vital public needs that would otherwise go unmet for lack of funds;¹²² and they encourage the productive use of valuable resources.¹²³

In the byproduct cases no portion of the condemned land is devoted to private uses. The recoupment question is more difficult in the second group of cases, which examine projects in which space in buildings erected on condemned land is leased to private firms to defray project costs. Such arrangements are common in highway, port, railroad terminal, governmental center, and parking projects.¹²⁴ Again, however, the courts generally find that recoupment of project costs through leasing arrangements with private firms is "incidental" to an overall public use.¹²⁵

Certain factors stand out in the leasing cases which are relevant to the Chicago Plan. If the project cannot be carried on without recoupment or if it responds to a public need that private enterprise cannot or will not meet, the courts are likely to be sympathetic.¹²⁶ That the project involves government in competition with private enterprise is irrelevant provided that an independent public use is served by the endeavor.¹²⁷ Nor are the courts im-

72-73 (1913); *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 273 (1891).

¹²² See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 336-37 (1936); *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 273 (1891).

¹²³ Cf. *Ashwander v. TVA*, 297 U.S. 288 (1936); *Arizona v. California*, 283 U.S. 423 (1931).

¹²⁴ See, e.g., *People ex rel. Adamowski v. Public Bldg. Comm'n*, 11 Ill. 2d 125, 142 N.E.2d 67 (1957) (public buildings); *Lerch v. Maryland Port Auth.*, 240 Md. 438, 214 A.2d 761 (1965) (port facilities); *Court St. Parking Co. v. Boston*, 336 Mass. 224, 143 N.E.2d 683 (1957) (parking facilities); *Bush Terminal Co. v. New York*, 282 N.Y. 306, 26 N.E.2d 269 (1940) (railroad terminal facilities).

¹²⁵ See, e.g., *Wilmington Parking Auth. v. Ranken*, 34 Del. Ch. 439, 105 A.2d 614 (Sup. Ct. 1954) (lease of space in municipal parking facility); *People ex rel. Adamowski v. Chicago R.R. Terminal Auth.*, 14 Ill. 2d 230, 151 N.E.2d 311 (1958) (lease of space in railroad terminal); *In re Opinion of the Justices*, 330 Mass. 713, 113 N.E.2d 452 (1953) (lease of space for restaurants and filling stations along highways). But see *Shizas v. Detroit*, 333 Mich. 44, 52 N.W.2d 589 (1952) (lease of space in parking facility invalid); *Price v. Philadelphia Parking Auth.*, 422 Pa. 317, 221 A.2d 138 (1966) (same).

¹²⁶ See cases cited note 125 *supra*; cf. *In re Slum Clearance*, 331 Mich. 714, 50 N.W.2d 340 (1951).

¹²⁷ In his dissenting opinion in *Courtesy Sandwich Shop, Inc. v. Port Auth.*, 12 N.Y.2d 379, 393, 190 N.E.2d 402, 407, 240 N.Y.S.2d 1, 9 (1963), Judge Van Voorhis warned that centralization of international trade firms in one governmentally sponsored center threatened to wreak havoc with New York City's private real estate market. However, private enterprise has no constitutionally protected immunity from competition by governmental agencies, see, e.g., *Green v. Frazier*, 253 U.S. 233, 243 (1920); *Poole v. City of Kankakee*, 406 Ill. 521, 529, 94 N.E.2d 416, 420 (1950).

pressed with claims that a program is not financially feasible; they defer to legislative judgment on questions of program content and merit unless the program is patently unreasonable.¹²⁸ Similarly, they reject the oft-repeated charge that use of the eminent domain power in part for recoupment goals opens the way to "outside land speculation" and other abuses.¹²⁹ Should these abuses eventuate, they note, an appropriate remedy will lie in the courts. Otherwise, government, too, is entitled to exercise sound business judgment in the formulation and conduct of public programs.¹³⁰

In the final group of cases, which deal with the recoupment objection in the context of urban renewal, the government's involvement with the condemned property is the most attenuated. In urban renewal programs, after the city has acquired and cleared the land, it resells it to private developers. Once again, however, the courts have overridden the recoupment objection. Public use of the land, these courts say, is achieved once the city has acquired and cleared it.¹³¹ Its resale to private developers

¹²⁸ See, e.g., *Wilmington Parking Auth. v. Ranken*, 34 Del. Ch. 439, 448-49, 105 A.2d 614, 620 (Sup. Ct. 1954); *Lerch v. Maryland Port Auth.*, 240 Md. 438, 449, 214 A.2d 761, 767 (1965).

¹²⁹ See, e.g., *People ex rel. Adamowski v. Public Bldg. Comm'n*, 11 Ill. 2d 125, 144, 142 N.E.2d 67 (1957); *People ex rel. Gutknecht v. Chicago*, 3 Ill. 2d 539, 545, 121 N.E.2d 791, 795 (1954); *Courtesy Sandwich Shop, Inc. v. Port Auth.*, 12 N.Y.2d 379, 391, 190 N.E.2d 402, 406, 240 N.Y.S.2d 1, 7 (1963).

¹³⁰ In *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946), the Supreme Court upheld the condemnation of a strip of land not directly included within a TVA project area against the claim that the TVA's sole motive in acquiring the land was to reduce project costs. The Court reasoned:

The cost of public projects is a relevant element [T]he Government, just as anyone else, is not required to proceed oblivious to elements of costs. . . . And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interests of all the public.

Id. at 554 (citations omitted). Numerous cases, both before and since, have expressly acknowledged that government may exercise its power of eminent domain in accordance with sound business judgment provided, of course, that a valid public use underlies the governmental program. See, e.g., *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925); *Simmonds v. United States*, 199 F.2d 305, 306 (9th Cir. 1952); *Boston v. Talbot*, 206 Mass. 82, 90, 91 N.E. 1014, 1016 (1910); cf. *Brown v. United States*, 263 U.S. 78 (1923).

¹³¹ See, e.g., *People ex rel. Tuohy v. Chicago*, 394 Ill. 477, 485, 68 N.E.2d 761, 766 (1946); *Papadinis v. City of Somerville*, 331 Mass. 627, 632, 121 N.E.2d 714, 717 (1954); *Foeller v. Housing Auth.*, 198 Ore. 205, 241, 256 P.2d 752, 769 (1953). It should be noted, however, that a number of jurisdictions find that the public use requirement is satisfied whenever a government program serves a public purpose. See, e.g., *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 104 A.2d 365 (1954). These jurisdictions, therefore, would not even need to focus on the city's temporary occupancy of condemned land in considering the validity of an urban renewal program.

thereafter is but an "incidental" aspect of the urban renewal process, akin to, if not identical with, the general municipal practice of disposing of city property no longer needed for public purposes. Retention of the land, they note, would be poor municipal stewardship because resale enables the community to recapture much of its initial outlay and to return the land to productive use and to the tax rolls.¹³²

Taken together, the three groups of cases indicate that the success of a recoupment challenge to the condemnation of preservation restrictions under the Chicago Plan is extremely unlikely, even though condemnation is connected with a scheme of selling development rights to fund the costs of condemnation. Like by-product sales, the transfer of development rights enables public agencies to recapture the costs of public improvements (the costs of preserving landmarks); to fulfill community needs that would go otherwise unmet (landmark preservation being impractical without the sale of development rights); and to ensure the productive use of valuable resources (the unused but authorized development rights of public and private landmarks otherwise being lost upon permanent designation).

The leasing cases reinforce this conclusion. They emphasize the legal irrelevancy of the fact that the sale of development rights may involve the city in competition with private enterprise if developers elect to purchase these rights rather than to acquire privately owned parcels in completing land assemblages. The leasing cases confirm that competition between government and the private sector is not legally objectionable so long as government enters the private marketplace in furtherance of a program that serves an independent public use. Questions concerning the financial feasibility of the Chicago Plan will also not be litigable under these precedents. Finally, charges that the Chicago Plan might involve a municipality in land speculation and other abuses will receive scant attention since the leasing cases establish that this question will be considered only if and at the time that such abuses eventuate.

The urban renewal cases offer further proof that, in and of itself, the recoupment feature of the Chicago Plan does not constitute a basis for the Plan's invalidation. Under the Plan the city retains a continuing interest in the landmark property in the form of a preservation restriction. Yet, in the urban renewal context, many courts have rejected the recoupment objection under a rationale that does not obligate the city to keep any interest what-

¹³² See, e.g., *In re Slum Clearance*, 331 Mich. 714, 722, 50 N.W.2d 340, 344 (1951).

soever in the urban renewal tracts that it resells to private developers.¹³³

B. The Preservation Restriction

The purchase or condemnation of preservation restrictions raises a host of legal problems that lack clear resolution in most states. Their range is suggested in *Pontiac Improvement Co. v. Board of Commissioners*,¹³⁴ a 1933 Ohio case that puzzled over a statute authorizing local governments to condemn the "fee or any lesser interest" in real estate. In *Pontiac*, the Cleveland Park Commission attempted to condemn the right to impose controls respecting drainage, construction, planting, and the like over the plaintiff's land, which adjoined a city park. The court invalidated the taking in a rather confused opinion that appears to reflect at least three concerns. One is the injustice to the plaintiff of taking a less-than-fee interest in his land, thereby leaving him with all of the responsibilities but few of the privileges of ownership.¹³⁵ The second is the novelty of the interest in question and, by implication, the vagueness of the statutory mandate on which the taking was premised. The court might have approved the taking had the interest fit within one of the traditional less-than-fee interests recognized at common law or had the authority for its acquisition been clearly spelled out in the statute. Third, its doubts on both counts led it to conclude that, whatever the nature of the interest, the statute failed to define the rights and obligations of the parties with sufficient clarity to be enforceable.¹³⁶

¹³³ To be sure, all local governments sell urban renewal tracts subject to restrictive covenants that ensure that the urban redevelopment plan for the area will be accomplished. Cf. *Project Planning* ch. 2, at 1 (RHA No. 7207.1, 1969), in U.S. DEPT OF HOUSING & URBAN DEVELOPMENT, URBAN RENEWAL HANDBOOK (1971). Some jurisdictions, in finding that urban renewal serves a public use, point to this factor. See, e.g., *Foeller v. Housing Auth.*, 198 Ore. 205, 256 P.2d 752 (1953). A significant number of other jurisdictions, however, find that a public use is achieved merely by the city's ownership of the urban renewal property during the period of clearance. See, e.g., *People ex rel. Tuohy v. Chicago*, 394 Ill. 477, 485, 68 N.E.2d 761, 766 (1946).

¹³⁴ 104 Ohio St. 447, 135 N.E. 635 (1922). See also *Albright v. Sussex County Lake & Park Comm'n*, 71 N.J.L. 303, 57 A. 398 (Ct. Err. & App. 1904) (taking under statute authorizing acquisition of "rights of fishing common to all in freshwater lakes" held invalid).

¹³⁵ *Pontiac Improvement Co. v. Board of Comm'rs*, 104 Ohio St. 447, 456-57, 135 N.E. 635, 637-38 (1922).

¹³⁶ *Id.* at 463-64, 135 N.E. at 640. A further ground for the court's invalidation was its conclusion that the condemnation did not promote a public use. *Id.* at 459, 135 N.E. at 638. This conclusion seems clearly inapplicable to preservation restrictions, see p. 603 *supra*.

Pontiac dealt not with a preservation restriction but with what would now be termed a "conservation" or "scenic easement."¹³⁷ The relation between the two types of interests, however, is sufficiently close that the concerns expressed in *Pontiac* provide a useful framework for an examination of the legal problems affecting the preservation restriction.

1. *Acquisition in Fee.* — *Pontiac*'s concern that a less-than-fee taking by itself is unfair to the landowner seems misplaced. It runs counter to the well-settled view that public authorities neither may nor should take a greater interest in or amount of land than the public use necessitates.¹³⁸ This view finds strong support in the policies that favor limiting outlays of public funds and minimizing governmental interference with private ownership.¹³⁹ *Pontiac*'s concern seems especially inapplicable to urban landmarks. Most of these buildings return amounts well in excess of their taxes and operating expenses. Thus, even after condemnation of a preservation restriction (with its concomitant tax reduction), the landmark should be able to operate at a profit.

However, in some cases landmarks will be unable to return a profit after condemnation of a preservation restriction. In these cases, leaving a landmark owner with what one commentator calls the "rump rights"¹⁴⁰ of ownership may raise questions of equity to the landmark owner. Structural unsoundness, advanced deterioration, or changes in the surrounding neighborhood may mean that acquisition of a preservation restriction will, in effect, saddle the owner with a white elephant. In such instances, the landmark commission should recommend that the city acquire the property in fee.

2. *Acquisition of a Less-Than-Fee Interest.* — The powers of purchase and eminent domain granted in many preservation acts

¹³⁷ The literature concerning this interest has been extensive in recent years. See, e.g., BRENNEMAN; S. SIEGEL, *THE LAW OF OPEN SPACE* (1960); A. STRONG, *OPEN SPACE FOR URBAN AMERICA* (1965); W. WHYTE, *SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS* (Urban Land Institute, Technical Bull. No. 36, 1959); N. WILLIAMS, *LAND ACQUISITION FOR OUTDOOR RECREATION — ANALYSIS OF SELECTED LEGAL PROBLEMS* (Outdoor Recreation Resources Review Comm'n Study Report No. 16, 1962) [hereinafter cited as WILLIAMS]; Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960).

¹³⁸ See, e.g., *Miller v. Commissioners of Lincoln Park*, 278 Ill. 400, 406, 116 N.E. 178, 181 (1917); 3 NICHOLS § 9.2 (3d rev. ed. 1965); WILLIAMS 46.

¹³⁹ 3 NICHOLS § 9.2 (3d rev. ed. 1965).

¹⁴⁰ WILLIAMS 48. In Professor Williams' view, a "policy of taking conservation easements under the characteristic general statute is undesirable, potentially unfair, and legally dangerous." *Id.*

are as imprecisely defined as those in the *Pontiac* statute.¹⁴¹ Do these acts authorize the acquisition of a preservation restriction in landmark properties? As suggested above, that question can be answered affirmatively only if a court is prepared to conclude either that preservation restrictions fall within one of the less-than-fee interests recognized at common law or that the statutory language itself creates a novel property interest.

(a) *Traditional Interests*. — The first alternative assumes an extremely sympathetic court. Preservation restrictions do not easily assume the garb of easements, real covenants, or equitable servitudes, the relevant common law categories.¹⁴² They are most often compared with negative easements,¹⁴³ which obligate a landowner to refrain from performing acts on his property that would otherwise be permitted as an incident of fee ownership. Landmark owners, for example, may not build in the airspace over their buildings nor may they demolish or significantly alter them. But negative easements have normally been restricted to the four types approved in the early English cases: easements for light, for air, for support of a building laterally or subjacently, and for the flow of an artificial stream.¹⁴⁴ Although resembling easements for light and air in its restriction against building above the landmark, a preservation restriction goes beyond the former in its controls over alteration and demolition.¹⁴⁵ In addition, some courts may not enforce negative easements that are not "appurtenant" to the benefited parcel, the dominant estate.¹⁴⁶ The appurtenancy requirement is satisfied only if the easement benefits the owner of that estate in the physical use and enjoyment of the

¹⁴¹ See, e.g., FLA. STAT. ANN. § 266.06 (1962) ("real property or rights or easements therein"); IND. ANN. STAT. § 48-9004(1) (Supp. 1971) ("any real estate").

¹⁴² The discussion of this extremely complex topic is necessarily abbreviated in this paper. More detailed analyses may be found in BRENNEMAN 20-64; WILLIAMS 37-55; Commonwealth of Massachusetts: Metropolitan Area Planning Council, Massachusetts Open Space Law: Government's Influence Over Land Use Decisions, 4 Open Space and Recreation Program for Metropolitan Boston, April 1969, at 18-23, 140-56.

¹⁴³ See, e.g., WHYTE, *supra* note 137, at 44-46; Comment, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611, 621 (1970). The easement category appears to be the one most readily invoked by courts when confronted with a novel less-than-fee interest. See, e.g., *Buck v. City of Winona*, 271 Minn. 145, 151, 135 N.W.2d 190, 194 (1965); *Piper v. Ekern*, 180 Wis. 586, 596, 194 N.W. 159, 163 (1923).

¹⁴⁴ See 2 AMERICAN LAW OF PROPERTY §§ 8.5, 9.12, 9.24 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY]; RESTATEMENT OF PROPERTY §§ 450(e), 452 (1944). But see BRENNEMAN 23-24; WILLIAMS 49-50 & nn. 72-76.

¹⁴⁵ See pp. 618-19 *infra*.

¹⁴⁶ See 2 AMERICAN LAW OF PROPERTY § 8.2. But see WILLIAMS 51.

land and was created expressly for the purpose of conferring that benefit.¹⁴⁷ If these requirements are not met, the easement will be deemed to be held "in gross." Municipal ownership of parcels that will qualify as "appurtenant" is likely to be infrequent unless the courts will so categorize city-owned properties within the general vicinity of a landmark or the publicly owned streets and alleys that border on it.¹⁴⁸ Even assuming that a jurisdiction approves negative easements in gross, moreover, the assignability of these interests has been questioned.¹⁴⁹

It is even less likely that preservation restrictions will be enforceable as real covenants. Courts generally insist that these interests, too, must be appurtenant to a benefited dominant estate.¹⁵⁰ An additional requirement, privity of estate between the original promisor and promisee, dictates that the benefited and burdened parcels must initially have been in common ownership and that the burden must have been imposed on the latter parcel at the time the ownership was divided. Otherwise, the burden of the real covenant will not bind subsequent takers of the parcel.¹⁵¹ Because few, if any, cases under the transfer proposal are likely to duplicate these rather specialized facts, it is doubtful whether a municipality will be able to enforce a preservation restriction against a successor of the owner who executed it. In addition, some jurisdictions balk at the enforcement of affirmative duties in real covenants,¹⁵² a qualification that could prove troublesome if a municipality wished to include maintenance obligations in the preservation restriction.¹⁵³

Characterizing a preservation restriction as an equitable servitude offers a more promising route than either of the pre-

¹⁴⁷ See 2 AMERICAN LAW OF PROPERTY §§ 8.6, 9.8.

¹⁴⁸ See WILLIAMS 50.

¹⁴⁹ For accounts of the confused state of the law on this problem, see, e.g., BRENNEMAN 30; C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND 67-79 (2d ed. 1947); Comment, *Assignability of Easements in Gross*, 32 YALE L.J. 813 (1923).

¹⁵⁰ See, e.g., *Young v. Cramer*, 38 Cal. App. 2d 64, 100 P.2d 523 (1940); *London County Council v. Allen*, [1914] 3 K.B. 642. But see *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938). The British National Trust, which typically acquires real covenants in historic properties, has secured legislation that eliminates the common law requirement that it own nearby land as a condition to its right to enforce the benefit of the covenants. See National Trust Act, 1 Edw. 8 & 1 Geo. 6, c. lvii, § 8 (1937).

¹⁵¹ See, e.g., *Hall v. Risley*, 188 Ore. 69, 213 P.2d 818 (1950); BRENNEMAN 54. But see *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959); CLARK, *supra* note 149, at 116-21.

¹⁵² See, e.g., *Miller v. Clary*, 210 N.Y. 127, 103 N.E. 1114 (1913); BRENNEMAN 57; Lloyd, *Enforcement of Affirmative Agreements Respecting the Use of Land*, 14 VA. L. REV. 419 (1928).

¹⁵³ See pp. 618-19 *infra*.

vious alternatives. Equitable servitudes are not restricted to four specific types as are negative easements, but may incorporate any obligation that does not violate public policy.¹⁵⁴ No privity of estate other than that provided by the agreement need exist between the landmark owner who executes it and the city in order for the agreement to be effective against successors of the former.¹⁵⁵ Servitudes are enforceable by injunction¹⁵⁶ and may include affirmative as well as negative obligations.¹⁵⁷ They must reflect the intent to bind subsequent takers;¹⁵⁸ and the latter must have notice of the agreement,¹⁵⁹ requirements easily satisfied by careful draftmanship and use of the deeds registry, respectively. But in many jurisdictions servitudes held in gross are not enforceable against subsequent takers of the burdened parcel¹⁶⁰ and may not be assignable as well.¹⁶¹ So again, municipalities in these jurisdictions must be prepared to argue that municipally owned property, whether adjacent to or nearby the landmark property, will be directly benefited by enforcement of the servitude.

The technicalities attending each of the common law interests confuse the status of the preservation restriction under the common law. Though the courts in some jurisdictions may be willing to enforce the preservation restriction under the rubric of one of the foregoing interests, a preferable solution would seem to lie in clarifying legislation.

(b) *Statutory Authorization*. — Whether statutory authorization to acquire an imprecisely defined, less-than-fee interest relieves a municipality of the burdensome restrictions of the common law rules is problematic. *Pontiac* suggests not. But an opposite view, which may well have supplanted *Pontiac* in most jurisdictions,¹⁶² was tersely stated by then Chief Judge Holmes in *Newton v. Perry*:

¹⁵⁴ BRENNEMAN 50-51, 55.

¹⁵⁵ See, e.g., *Trustees of Columbia College v. Lynch*, 70 N.Y. 440 (1877); 2 AMERICAN LAW OF PROPERTY § 9.26; BRENNEMAN 56.

¹⁵⁶ BRENNEMAN 55. Real covenants, on the other hand, may only be enforced in an action at law for damages. *Id.*

¹⁵⁷ See BRENNEMAN 57; Lloyd, *supra* note 152.

¹⁵⁸ See Mass. Open Space Law, *supra* note 142, at 148-49.

¹⁵⁹ *Id.* at 148.

¹⁶⁰ See 2 AMERICAN LAW OF PROPERTY § 9.32; BRENNEMAN 58. But see *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913); *Pratte v. Balatsos*, 99 N.H. 430, 113 A.2d 492 (1955).

¹⁶¹ See BRENNEMAN 59.

¹⁶² See, e.g., *State ex rel. Ervin v. Jacksonville Expressway Auth.*, 139 So. 2d 135, 138 (Fla. 1962); *Cornwell v. Central Ky. Natural Gas Co.*, 249 S.W.2d 531, 533 (Ky. Ct. App. 1952).

[I]t is plain . . . that the purpose of the taking must fix the extent of the right. The right, whether it be called easement or by any other name, is statutory, and must be construed to be large enough to accomplish all that it has taken to do.¹⁶³

The question is further confused by decisions that subsume less-than-fee interests under one of the traditional categories even though they clearly fail to meet the formal requirements of the latter.¹⁶⁴

State legislatures have grown uneasy with the dubious formalism of the common law and the ambiguity in the case reports. To facilitate highway beautification and open-space programs, many have expressly authorized state and local agencies to acquire "scenic easements," "development rights," and other novel less-than-fee interests.¹⁶⁵ Although the statutes fail to detail precisely what is intended by these labels, *Kamrowski v. State*,¹⁶⁶ which upheld a Wisconsin statute authorizing acquisition of "scenic easements" along the Great River Road, confirms the readiness of the judiciary to construe them most favorably to the public agency. Significantly, *Kamrowski* did not even mention the possible difficulties posed by the differences between the statutory easement and its common law cousin, but focused instead upon the compatibility of the statute with the public use requirement.

¹⁶³ 163 Mass. 319, 321, 39 N.E. 1032, 1032 (1895).

¹⁶⁴ See, e.g., cases cited note 143 *supra*; *Burger v. St. Paul*, 241 Minn. 285, 64 N.W. 2d 73 (1954). *Burger* is of special interest to this article because it construes a statute that parallels the transfer proposal in enabling municipalities to zone by acquiring the development potential of parcels within "designated residential districts" in order to prevent them from being utilized for other than low-density, residential uses. See MINN. STAT. ANN. §§ 462.12-.14 (1963). In *Burger*, the court variously labeled the interest that the statute empowered communities to condemn an "easement," a "negative easement," a "reciprocal negative easement," a "restrictive covenant," and, for good measure, a "negative equitable easement." *Burger v. St. Paul*, *supra* at 293, 294, 297, 299, 64 N.W.2d at 78, 79, 80, 81. It did not discuss whether the common law formalities applicable to easements and real covenants were superseded by the statute notwithstanding the obvious differences between the interest acquired and the common law interests. Other cases construing the statute include *State ex rel. Madsen v. Houghton*, 182 Minn. 77, 233 N.W. 831 (1930); *Summers v. Midland Co.*, 167 Minn. 453, 209 N.W. 323 (1926); *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 144 Minn. 1, 176 N.W. 159 (1920). Approving a similar zoning scheme, the Missouri Supreme Court labeled the interest acquired a "negative restriction." *Kansas City v. Kindle*, 446 S.W.2d 807, 813-14 (Mo. 1969). That court, too, ignored the common law problems associated with its characterization of the interest.

¹⁶⁵ See, e.g., CAL. GOV'T CODE §§ 6950-54 (West 1966); MASS. ANN. LAWS ch. 92, § 79 (1969); WIS. STAT. ANN. § 23.30 (Supp. 1971).

¹⁶⁶ 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

Of greater interest are statutes in three states¹⁶⁷ that accord express recognition to the preservation restrictions as an independent, valid less-than-fee interest. Directly addressing the difficulties outlined in this section, these statutes provide that preservation restrictions shall not be unenforceable because of lack of privity of estate or of ownership of benefited land. They also stress the assignability of preservation restrictions, even if held "in gross." Less elaborate statutes have also been passed¹⁶⁸ that modify the common law by recognizing "easements in gross," which are assignable and, if negative, not restricted to the four types known to the common law. By clarifying an intolerably opaque area of the law, both groups of statutes enable government and the private sector to participate in preservation and conservation programs confident that some hoary doctrine will not frustrate their reasonable expectations.

3. *Indefiniteness.* — The *Pontiac* court considered that the rights acquired by the park department were so indefinite as to be incapable either of valuation or of enforcement. The valuation objection does not seem well taken. Less-than-fee interests are condemned as a matter of course by government and public utilities. In these cases, a basic "before and after" theory of valuation is used that measures the value of the parcel with and without the encumbrance.¹⁶⁹ And, although "not simple," setting a price tag for preservation restrictions "by no means goes beyond techniques which are widely recognized in the field of real estate valuation."¹⁷⁰

Nor is the court's skepticism concerning enforcement insuperable if the preservation restriction is properly drafted. In fact,

¹⁶⁷ See CONN. GEN. STAT. REV. P.A. No. 173, § 2 [Jan. 1971] Conn. Legis. Service No. 2 (May 16, 1971); ILL. REV. STAT. ch. 24, § 11-24.2-1A(2) (1971); MASS. GEN. LAWS ANN. ch. 184, § 32 (Supp. 1970).

In addition to curing the ambiguities of the common law in relation to preservation restrictions, the Massachusetts statute also provides for the recordation of these interests on a public tract index and suspends the operation of Massachusetts' marketable title and obsolete-restrictions legislation for any interest entered upon the index. See MASS. GEN. LAWS ANN. ch. 184, §§ 3, 33 (Supp. 1970).

¹⁶⁸ See, e.g., MD. ANN. CODE art. 21, § 8 (1957); VA. CODE ANN. § 21.12 (Supp. 1971).

¹⁶⁹ For appraisal techniques used with respect to the acquisition of less-than-fee interests generally, see, e.g., 4 NICHOLS § 12.4 (3d rev. ed. 1971); South v. Texas E. Transmission Co., 332 S.W.2d 442 (Tex. Civ. App. 1960). A useful analysis of the valuation techniques used in the acquisition of scenic easements along highways is found in DEPARTMENT OF TRANSPORTATION OF WISCONSIN, A MARKET STUDY OF PROPERTIES COVERED BY SCENIC EASEMENTS ALONG THE GREAT RIVER ROAD IN VERNON AND PIERCE COUNTIES (Special Report No. 5, 1967). Valuation of preservation restrictions is discussed in Chicago Report 11-15.

¹⁷⁰ Chicago Report 11.

with the increasing refinement of these instruments, indefiniteness no longer appears to be a serious problem. Typical preservation restrictions¹⁷¹ detail the legal authority on which acquisition is premised, restrictions on use, maintenance obligations, duration, remedies, and miscellaneous matters. Public agencies and preservation societies carefully spell out the statutory basis for acquisition to emphasize that they are empowered to acquire the interest and that enforcement of the latter is consistent with sound public policy. Use restrictions are as varied as the character and setting of particular landmarks. They may include prohibitions against alteration or demolition, signs, subdivision of the landmark tract, addition of buildings to the site and specified uses of the landmark. Administrative provisions detail the procedures for obtaining approval for permitted modifications and for making periodic inspections of the premises to insure that the restrictions are being honored. Maintenance obligations are variously stated. Landmark owners may agree simply to keep their properties in good repair or they may undertake to comply with property maintenance standards that are incorporated by reference into the preservation restriction. In some instances, owners even commit themselves to restore the properties in accordance with detailed specifications and schedules.

Duration of the restriction may be in perpetuity or be limited to a number of years. The instruments underscore the intent of the parties that the benefits and burdens of the restriction shall run to their successors in interest. The remedies clause identifies who may sue for breach of the restriction and what relief may be obtained. Miscellaneous provisions may include anything from rights of first refusal to express disclaimers of rights of public access to the landmark. Surveys, line drawings, and photographs appear increasingly as appendices to preservation restrictions. They permit precise identification of prized interior or exterior features, such as paneling, fireplaces, and cornices.

Although most preservation restrictions relate to residential properties at the present time, they can be drawn just as effectively for downtown office and commercial buildings. Remedies and legislative authority clauses will be similar in the two cases. Use restrictions should prove simpler for downtown buildings

¹⁷¹ Instruments reviewed in compiling the outline in the text are those actually being used by the following organizations and institutions: Maryland Historic Trust; Historic Annapolis, Inc.; Historic Savannah Foundation; Ipswich (Mass.) Historic Trust; Cambridge (Mass.) Historic Trust; and the United States Dept. of the Interior. Useful guidelines and examples for use in drafting conservation and, derivatively, preservation restrictions may be found in BRENNEMAN apps. II, IV; WHYTE, *supra* note 137, at 44-46, apps. A-H *passim*; WILLIAMS 53-55; Mass. Open Space Law, *supra* note 142, at app. 8.

because tract subdivision and the addition of new buildings are not serious problems. Continuation of office or commercial uses within these buildings, moreover, will not impair their status as landmarks. Controls over alteration will deal mostly with changes in the exterior facades of these buildings, an infrequent occurrence and one that is relatively easy to regulate.

The definition of proper maintenance standards is no different for downtown landmarks than for other centrally located office and commercial buildings. It is a routine responsibility for attorneys who represent the holders of mortgages on the latter structures and the tenants who occupy space in them under long-term leases. The task will be somewhat complicated, however, if the landmark commission's appraisal of a building reveals that restoration of the building or one or more of its characteristic features is in order. In those instances, the financial package that the commission proposes to the landmark owner may include sums for this work. If so, the nature of the restoration and any specific requirements regarding subsequent maintenance must be detailed in the restriction or in a related document, as the sense of the transaction dictates.

The most troublesome drafting problem is posed by the fact that many downtown office and commercial buildings have a limited economic life. The day may come, sooner for some landmarks than for others, when they can no longer meet debt service and operating costs as a result of increases in the latter and declining revenues. At that point, ownership for private profit obviously becomes impossible.

Among the potential solutions to this problem, three seem especially promising.¹⁷² One is to project the costs and income curves of individual landmarks to arrive at a date in the future when those curves are likely to intersect. The owner of the landmark could be given the option at that date either of continuing to operate the building or of turning it over to the city. Acquisition costs then would be nominal because of the landmark site's lack of development potential and the further age of the building. The city could use the building for its own space needs or lease it to a suitable tenant who desires the prestige of a landmark location.¹⁷³ The second is to devise appropriate subsidies for

¹⁷² The Department of Housing and Urban Development has awarded a demonstration grant to the National Trust for Historic Preservation to examine the general applicability of the transfer proposal in the United States. A major concern of this broader study, which is being directed by the author of this article, is the problem of duration discussed in the text.

¹⁷³ Numerous illustrations of this possibility are recounted in *Dollars and Sense: Preservation Economics*, HIST. PRESERVATION, Apr.-June 1971, at 15. See also N.Y. Times, Aug. 12, 1971 at 1, col. 1, for an account of the plans to rent the Villard

landmark owners out of monies generated by the development rights bank. The third is to seek an institutional buyer, such as a college or other nonprofit organization, to acquire the building after its development rights have been transferred. Developers and speculators will probably not wish to retain the building after that point, and the buyer will be in a position to acquire it at a favorable price.

C. Development Rights Transfers

The Chicago Plan contemplates a two-level system of bulk zoning regulation — development rights purchasers are permitted to build larger structures than the other lot owners in a development rights transfer district. The legal issues inherent in this disparate treatment will be addressed in this section, examining, first, challenges based on the uniformity provisions of state zoning acts and the equal protection clauses of the federal and applicable state constitutions, and, second, objections grounded in issues of substantive due process.

I. "Uniformity" as a Statutory and Constitutional Restraint. — The question whether application of a dual standard of bulk regulation to lots within a transfer district denies uniform treatment to property owners within the district may be posed in either statutory or constitutional terms. The relevant statutory text is the requirement of most state zoning enabling acts that "[a]ll [zoning] regulations shall be uniform for each class or kind of buildings throughout each district."¹⁷⁴ The governing constitutional principle is the equal protection requirement of the federal¹⁷⁵ and applicable state constitutions.

As seen above,¹⁷⁶ the Chicago Plan could be implemented exclusively through a preservation enabling act. There are, however, compelling reasons for analyzing the legal issues inherent in the Plan's two-level system of bulk regulation through examining judicial interpretations of the uniformity requirement of state zoning enabling acts. In the first place, it is doubtful whether the preservation enabling legislation of any state,¹⁷⁷ Illinois excepted,

Houses, designated New York landmarks, to a "conservative commercial firm that will use and maintain them in a style befitting a landmark."

¹⁷⁴ ADVISORY COMMITTEE ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 2 (rev. ed. 1926).

¹⁷⁵ U.S. CONST. amend. XIV, § 1.

¹⁷⁶ See p. 601 *supra*.

¹⁷⁷ While not expressly authorizing municipalities to engage in such programs, the following state preservation enabling acts contain grants of power that may be of sufficient breadth to warrant such a construction. CAL. GOV'T CODE § 37361 (West 1968); N.M. STAT. ANN. § 14-21-4 (1968). A less affirmative but possibly

authorizes the use of transfers as a means of safeguarding landmarks. Thus communities that wish to avoid the problem of securing amendments to that legislation must look to their zoning enabling acts as the basis for their power to authorize development rights transfers. Second, zoning precedents offer the most useful basis for predicting the likely judicial reaction to the transfer technique even if it is implemented under preservation enabling statutes. If transfers pass muster under zoning precedents, they would undoubtedly be valid under a properly drafted preservation statute as well. Finally, commentators are in general agreement that the statutory requirement of uniformity duplicates the constitutional requirement of equal protection.¹⁷⁸ Hence, if the transfers of development rights do not run afoul of the uniformity requirement, it would appear that these transfers would survive the equal protection challenge as well.

At first blush, the uniformity requirement seems to present an obstacle to the legality of the Chicago Plan: regulations for buildings within a development rights transfer district are not uniform in the sense that purchasers of development rights can build to greater bulk than other property owners within the district. This reading of the uniformity requirement, however, ignores the growing recognition of urban planners and municipal governments that in many cases the individual lot is not the appropriate unit of development control, and the corresponding willingness of the courts to interpret the uniformity requirement so as not to foreclose alternative planning methods.¹⁷⁹

useful basis for implementing the proposal might be found in the language of many state preservation enabling acts authorizing local preservation commissions to devise an "economically feasible plan" to safeguard threatened landmarks in private ownership. See, e.g., MD. ANN. CODE art. 66B, § 8.09 (Interim Supp. 1970); MICH. COMP. LAWS ANN. § 399.205(4) (Supp. 1971).

¹⁷⁸ The chief draftsman of the Standard State Zoning Enabling Act has written that the purpose of the uniformity requirement is "to make it understood that all property situated alike shall be treated alike." E. BASSETT, ZONING 50 (1940). See, e.g., Haar, "In Accordance with a Comprehensive Plan," 68 HARV. L. REV. 1154, 1172 (1955). Significantly, the uniformity provision has most frequently been invoked in the spot-zoning context—where a small tract is zoned differently from its surrounding area. See, e.g., *Bartram v. Zoning Comm'n*, 136 Conn. 89, 68 A.2d 308 (1949); *Cassel v. Mayor & City Council*, 195 Md. 348, 73 A.2d 486 (1950). Spot zoning, however, raises the statutory issue of conformity with a "comprehensive plan" and the constitutional issue of equal protection. See Haar, *supra*. It does not put in issue the statutory requirement of uniformity, which, by the terms of the zoning enabling act, relates only to the manner in which regulations are applied within the *same* zoning district.

¹⁷⁹ At least four factors account for the current disrepute, among land use scholars and local governments, of the premise that the individual lot should serve as the unit of development control. First, it hampers sound planning on a community-wide basis and promotes sterile design on individual sites. Second, it

Virtually every major innovation in the land use field over the last fifteen years rejects the notion that individual lots must serve as the unit of development control.¹⁸⁰ Two of these innovations — density zoning and the special development district — are of particular relevance to the question whether development transfers conflict with the uniformity requirement: they provide the twin pillars upon which the development rights transfer element of the Chicago Plan is founded. Rejecting the individual lot as the unit of bulk control, density zoning¹⁸¹ substitutes entire areas of the community in its place. It prescribes a maximum amount or range of bulk for an area as a whole, and permits developers to concentrate bulk there in accordance with flexible site planning or urban design criteria. Typically, density zones are overlay districts that include one or more traditional bulk zones within their boundaries. Developers may elect to build under the bulk regulations of the density zone or under those of the residual bulk zone.

The special development district¹⁸² complements density zoning by particularizing the development goals that will guide the distribution or redistribution of bulk within a density zone. A special development district is established only after a municipality has evaluated the special functions or needs of the geographic area in question, and selected the goals that will channel development or redevelopment there. In most cases, these goals are

assumes that development still occurs on a lot-by-lot basis rather than on large landholdings, as in urban renewal areas and on the metropolitan fringe. Third, it fails to take account of the special needs and functions of a community's unique areas and to protect these areas from the destructive impact of private market decisions. Finally, it prevents communities from enhancing their amenity levels generally by means of incentive zoning programs such as those described in this article. See, e.g., E. LOVELACE & W. WEISMANTEL, *DENSITY ZONING: ORGANIC ZONING: ORGANIC ZONING FOR PLANNED RESIDENTIAL DEVELOPMENT* (Urban Land Institute, Technical Bull. No. 42, 1961); *NEW ZONING passim*; Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959); *Symposium, Planned Unit Development*, 114 U. PA. L. REV. 1 (1965).

¹⁸⁰ Among these developments are expanded use of the variance and special exception, and innovations such as floating zones, cluster zones, planned unit developments, overlay districts, and special development districts. Accounts of the evolution of these techniques may be found in authorities cited note 179 *supra*.

¹⁸¹ See authorities cited note 179 *supra*.

¹⁸² For discussions of special development districts see, e.g., Fonoroff, *Special Districts: A Departure from the Concept of Uniform Controls*, in *NEW ZONING* 82; Huxtable, *A Solid Dross City?*, N.Y. Times, Mar. 14, 1971, § 2, at 16, col. 5; Huxtable, *supra* note 13. Examples of special development districts include the New York Special Theater District, see note 10 *supra*; Fifth Avenue Retail District, see note 12 *supra*; and the Special Greenwich Street Development District, see note 13 *supra*.

incorporated into a detailed area plan that itself is coordinated with the community's comprehensive plan.

A development rights transfer district is, in effect, a special development district in which bulk is redistributed in accordance with the density zoning technique. It encompasses an area of the community that is unique because of the concentration there of many of the community's landmark buildings. The community's goal in establishing the transfer district, of course, is to safeguard the landmarks within the district from destruction. The detailed plan that the landmark and planning commissions draw up for the district is the product of exhaustive studies by both agencies that inventory the landmark buildings there, identify the boundaries within which transfers may be made, and coordinate bulk concentrations within the district with the community's overall development program. Bulk is allocated within the transfer district on an area-wide rather than lot-by-lot basis because landmark lots must remain underimproved while lots utilizing the transferred development rights must be allowed to exceed the bulk limitations that are prescribed for individual lots in the traditional bulk zones within the district. The regulations of the residual bulk zone are superseded when the local governing body approves development rights transfer authorizations recommended by the landmark commission.

Judicial reaction to challenges to density zoning measures under the uniformity requirement augur well for the Chicago Plan: no density zoning measure that has come before the courts to date has been invalidated on the ground that it denies uniform treatment to affected property owners.¹⁸³ Challenges to these

¹⁸³ See, e.g., *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); *Chrinko v. South Brunswick Tp. Planning Bd.*, 77 N.J. Super., 594, 187 A.2d 221 (L. Div. 1963); *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968); cf. *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 242-43, 69 Cal. Rptr. 251, 265-66 (1968) (dictum).

The rock on which some density zoning ordinances have foundered has not been the uniformity objection but the challenge of improper delegation of legislative power. See, e.g., *Millbrae Ass'n for Residential Survival v. City of Millbrae*, *supra*; *Hiscox v. Levine*, 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961). See generally Krasnowiecki, *Planned Unit Development: A Challenge to Established Legal Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47 (1965); Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. L.Q. 60 (1963). Although the decisions are hardly consistent, compare *Cheney v. Village 2 at New Hope, Inc.*, *supra*, with *Hiscox v. Levine*, *supra*, some courts have invalidated these measures on the ground that the regulation of bulk and area requirements on a district-wide basis is a legislative function that cannot be delegated to a planning commission, an administrative agency. See, e.g., *Millbrae Ass'n for Residential Survival v. City of Millbrae*, *supra*.

measures have arisen in the context of two distinct applications of the density zoning technique: cluster zoning and planned unit development (PUD). Cluster zoning ordinances offer the developer a trade: if he agrees to devote a prescribed percentage of this tract to a community use, such as a park or a school-ground, he is authorized in return to build the same number of residential units on the remaining portion of his tract that he formerly could have built on the tract as a whole.¹⁸⁴ PUD ordinances go further by relaxing building type and use restrictions as well as area restrictions: single family, multifamily, and high-rise units, and residential, commercial, and light industrial uses — all of which are segregated within separate districts under traditional zoning — often may be included within a single zone under these ordinances.¹⁸⁵

The courts have expressly held that both types of ordinances will meet the uniformity requirement if they entitle all property owners within the cluster or PUD district to take advantage of the opportunity to develop their parcels in accordance with the flexible density, building type, or use requirements of these ordinances.¹⁸⁶ Rejecting a uniformity objection to a cluster ordinance, for example, a New Jersey appellate court held in *Chrinko v. South Brunswick Township Planning Board*¹⁸⁷ that the clustering technique “accomplishes uniformity because the option is open to all developers within a zoning district.”¹⁸⁸ *Chrinko* echoes a number of earlier, nondensity zoning cases in emphasizing that the uniformity required by statute refers not to the end product of the development decisions within the district — in *Chrinko*, the minimum lot size of the dwellings actually constructed there — but to uniform application of the regulation to all landowners within the district.¹⁸⁹

Since the Chicago Plan vests approval for transfers in the local legislative body, rather than in the planning commission, it will be immune from delegation problems that have afflicted other density transfer measures.

¹⁸⁴ See URBAN LAND INSTITUTE, *NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT* (Tech. Bull. No. 40, 1961); W. WHYTE, *CLUSTER DEVELOPMENT* (1964). Representative state and local cluster provisions are collected in W. WHYTE, *supra*, at apps. B & C.

¹⁸⁵ See, e.g., Goldston & Scheuer, *supra* note 179, at 255-62 (1959); *Symposium*, *supra* note 179.

¹⁸⁶ See, e.g., *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); *Chrinko v. South Brunswick Tp. Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963); *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968).

¹⁸⁷ 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963).

¹⁸⁸ *Id.* at 601, 187 A.2d at 225.

¹⁸⁹ See, e.g., *Greenpoint Sav. Bank v. Board of Zoning Appeals*, 281 N.Y. 534,

The same rationale appears in *Orinda Homeowners Committee v. Board of Supervisors*,¹⁹⁰ which upheld a PUD ordinance against a claim of nonuniform application of district regulations concerning building types:

A residential planned unit development . . . does not conflict with [the uniformity provision] merely by reason of the fact that the units are not uniform, that is, they are not all single family dwellings and perhaps the multi-family units differ among themselves. [The uniformity provision] provides that the *regulations* shall be uniform for each class or kind of building or use of land throughout the zone. It does not state that the units must be alike even as to their character, whether single family or multi-family.¹⁹¹

The uniformity problem is somewhat more complicated than the stated rationale in *Chrinko*, *Orinda* and related cases indicates because access to the benefits of cluster or PUD ordinances is normally limited to owners of sizeable parcels.¹⁹² However, neither uniformity nor its constitutional equivalent, equal protection, would appear to be violated by the size criterion. Discriminations among the members of a regulated class are permissible if they can be reasonably grounded in the purpose of the underlying regulation.¹⁹³ Since the principal objective of both cluster and PUD ordinances is to promote large-scale developments of attractive design, limiting the benefits of these ordinances to developers with substantial land holdings would appear to meet this test.¹⁹⁴

540, 24 N.E.2d 319, 322 (1939), *appeal dismissed*, 309 U.S. 633 (1940); *Mandis v. Gorski*, 24 App. Div. 2d 181, 186, 265 N.Y.S.2d 210, 216 (1965).

¹⁹⁰ 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

¹⁹¹ *Id.* at 773, 90 Cal. Rptr. at 90-91.

¹⁹² See, e.g., *id.* (187 acres); *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968) ("a large tract of land").

¹⁹³ See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *Goesaert v. Cleary*, 336 U.S. 106 (1949). More rigorous review has been applied when "fundamental interests" or "suspect classifications" are involved. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969). However, strict review does not appear to apply to wealth classifications by themselves. See p. 627 *infra*.

¹⁹⁴ Whether the uniformity provision is even applicable to bulk or area regulations is dubious. On its face, it appears to deal only with use restrictions. See p. 620 *supra*. But see IND. ANN. STAT. § 53-755(1) (1964):

Regulations as to *height, area, bulk* and use of buildings and as to the area of *yards, courts* and *open spaces* shall be uniform for each class of buildings throughout each district. (Emphasis added.)

At least one court has held the uniformity requirement inapplicable to bulk restrictions. See *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 418,

These density zoning precedents strongly indicate that the development rights transfer component of the Chicago Plan will not fall before the objection that it denies uniform treatment to lot owners within a transfer district. By providing for the disposal of development rights through appropriate public bidding and sale procedures, the Plan will insure that all district owners have access to the purchase and enjoyment of development rights. This is not to say, of course, that some lot owners may not enjoy greater advantages than others as a result of the Plan. The configuration of particular lots may be such that the acquisition of additional development rights would carry no economic benefit for their owners.¹⁹⁵ Since the demand for the rights will probably exceed the available supply at any given time,¹⁹⁶ many lot owners will lack the financial resources to acquire these rights at prevailing market prices. But these or similar impediments to practical as opposed to formal access attend any program in which surplus public property is disposed of by public sale and bidding procedures. Moreover, though the benefits of cluster and PUD zoning are limited to owners of large acreage, and thus possibly to a wealthier class of developers, this has not deterred judicial acceptance of these plans. A uniformity challenge to the Chicago Plan, based on the fact that the bidding technique for disposal of transfer rights favors wealthier bidders, would thus seem unlikely to succeed.

Finally, the Chicago Plan is likely to encounter even less judicial resistance under the uniformity requirement than PUD ordinances and other forms of innovative zoning that mix diverse building types and uses. Use zoning has traditionally proven more controversial than bulk zoning because of its more immediate impact upon surrounding property.¹⁹⁷ The increasing willingness of American courts to approve the mixture of uses and building types once thought incompatible¹⁹⁸ offers strong evi-

79 Cal. Rptr. 872, 877 (1969). Numerous others have implied this result. *See, e.g.,* Rockhill v. Township of Chesterfield, 23 N.J. 117, 126, 128 A.2d 473, 478 (1957); Schmidt v. Board, 9 N.J. 405, 417, 88 A.2d 607, 612-13 (1952); Walker v. Elkin, 254 N.C. 85, 118 S.E.2d 1 (1961). These decisions appear to recognize that use zoning has a more immediate impact upon community welfare than bulk or area zoning. Hence, they do not insist that the latter secure mathematical uniformity, but seem willing to approve the flexible application of bulk or area regulations even in traditional bulk zones.

¹⁹⁵ As lot size decreases, higher construction becomes unprofitable because a substantial portion of a building's interior space must be given over to its elevator core and mechanical systems.

¹⁹⁶ *See* Chicago Report 16-19.

¹⁹⁷ *Cf.* Heyman, *Innovative Land Regulation and Comprehensive Planning*, in *NEW ZONING* 23.

¹⁹⁸ *See, e.g.,* Millbrae Ass'n for Residential Survival v. City of Millbrae, 262

dence that the marginal bulk adjustments permitted under the Chicago Plan will not be found offensive by the courts.

The Chicago Plan appears equally able to surmount any direct equal protection challenge to its transfer feature. Recent Supreme Court decisions have suggested that the mere fact that a law works to the disadvantage of less wealthy individuals does not call for more than a rational basis for the state's actions.¹⁹⁹ This basis is present in the Chicago Plan: by selling development rights at the highest possible price, the city maximizes the revenues it has available for the operation of its landmark preservation program.

Basing the development rights transfer component of the Chicago Plan on the density zoning precedents above carries the additional advantage of differentiating transfers from the traditional zoning variance. At first blush, the two may be confused because both enable their recipients to erect larger buildings than are permitted by the regulations of the bulk zone in which the buildings will be located. A court that identified a development rights transfer with a variance, however, would probably invalidate the transfer because transfer authorizations are not administered by the board of zoning appeals and are not granted on the basis of economic hardship, as required for variances by most zoning enabling acts.²⁰⁰ But the right of the development rights purchaser to build to greater bulk originates in the bulk regulations applicable to the transfer district, and hence is substitutive of, rather than a variation from, the regulations of the traditional bulk zone. This right, moreover, is founded on the planning considerations that support density zoning generally, not on grounds of special hardship.

The transfer authorization and the variance are not wholly unrelated, however. The administration of variances by lay

Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968); *Hiscox v. Levine*, 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961).

¹⁹⁹ See, e.g., *James v. Valtierra*, 402 U.S. 137 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970). See Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 349 (1969).

An equal protection challenge to the Chicago Plan should be distinguished from equal protection challenges to government zoning practices that have the effect of pricing housing in a given community out of the reach of low-income groups. This practice, referred to as "exclusionary zoning," has aroused the increasing concern of commentators, see, e.g., Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971). Unlike exclusionary zoning, the Chicago Plan appears to have no differential impact on the housing of low-income groups.

²⁰⁰ See, e.g., ADVISORY COMMITTEE ON ZONING, DEP'T OF COMMERCE, *supra* note 174, § 7; CAL. GOV'T CODE § 65906 (West 1966).

boards has been roundly condemned on all sides²⁰¹ because these boards, whether through incompetence or outright corruption, have freely granted variances with little regard for the statutory requirement of economic hardship. Municipalities that adopt the Chicago Plan can restore the variance to its proper role by requiring developers who seek bulk variances on spurious grounds to purchase development rights from landmark owners or from the municipal development rights bank.

2. *Substantive Due Process as a Constraint Upon Transfer Authorizations.* — Of the various obstacles to public and judicial acceptance of development rights transfer programs such as the Chicago Plan, none looms larger than the specter of urban design abuse that critics of these programs have raised. For example, Beverly Moss Spatt, as a member of the New York City Planning Commission, denounced that city's landmarks transfer program as a "gimmick" that "can only lead to an unplanned future — to chaos."²⁰²

The argument implicit in this charge cannot be easily dismissed. The greater bulk authorizations permitted for transferee sites under the program do appear to call into question the reasonableness either of the community's existing zoning plan or of the transfer program. If the existing zoning is sound, it may be claimed, relaxing bulk restrictions on transferee sites will overload public services and distort the urban landscape, thereby producing the planning chaos of which Mrs. Spatt warns. If it is too stringent, the proper course is to raise prevailing bulk limitations within the area generally and, in the process, to remove unwarranted public restrictions on the rights of property owners there. But, the argument proceeds, a program that retains existing bulk levels for most property owners while relaxing them for development rights purchasers sacrifices sound zoning and planning to short-term fiscal advantage. Hence, it is an arbitrary exercise of the police power, condemned under the due process clause of the fourteenth amendment.²⁰³

This argument fundamentally misconceives the process by

²⁰¹ See, e.g., R. BABCOCK, *THE ZONING GAME* 7 (1966); S. TOLL, *ZONED AMERICAN* 184 (1969); Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962).

²⁰² Dissent from Resolution CP-21166 of the New York City Planning Commission to the Board of Estimate, May 13, 1970.

²⁰³ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinances are valid unless shown to be "clearly arbitrary and unreasonable"). One commentator has summarized the current content of the due process challenge to zoning regulations as follows:

[W]here a zoning ordinance is challenged on the ground that it takes property without due process of law, [a court] will consider: (1) the impact of the restriction upon the land of the plaintiff (How serious is the

which bulk levels are determined and the functions that they serve. As a result, it invests the numbers in the zoning code with an aura of scientific exactitude that is largely without foundation in fact. The precision that is attainable in setting bulk limitations in the downtown commercial and high-rise residential zones that will be included in transfer districts under the Chicago Plan turns upon the purposes that these limitations are designed to achieve. Among these purposes are the following: regulating population; insuring an adequate amount of light, air, and open space; rationing demands upon public services and facilities; and accommodating market demands for new office and residential space.²⁰⁴

The process by which these objectives are translated into numbers is among the most complex in the urban design field.²⁰⁵ It proceeds on at least two levels: fact determination and political judgment. The facts that must be established or projected, such as the correlation of population increments with demands upon public facilities or the capacity of the market to absorb a stated amount of office space over a given period, are often elusive and inevitably tentative.²⁰⁶ Political judgment must be exercised in selecting the desired development objectives for specific areas of the city and in resolving conflicts that may be inherent in these objectives. For example, the bulk levels that will satisfy demands for office space in a booming economy may clash with those that are thought appropriate for the particular city's aesthetic character.²⁰⁷ Such clashes are unscrambled, not on the planner's slide rule, but in the political arena²⁰⁸ and, in some instances, in public referenda as well.²⁰⁹

deprivation attributable to the ordinance?); (2) the objective of the restriction (Is it intended to serve the public health, safety, morals, or the general welfare?); and (3) the reasonableness of the restriction (Do the means selected have a rational tendency to achieve the objective?).

Anderson, *A Comment on the Fine Line Between "Regulation" and "Taking,"* in *NEW ZONING* 66, 70. The due process challenge discussed in text relates primarily to the last consideration enumerated by Anderson.

²⁰⁴ See authorities cited note 43 *supra*.

²⁰⁵ Accounts of this process may be found in, e.g., G. FORD, *BUILDING HEIGHT, BULK AND FORM* (Harvard City Planning Studies II, 1931); S. TOLL, *supra* note 201, at 161-66; Randall, *The Question of Size: A Re-approach to the Study of Zoning*, 54 *ARCH. F.* 117 (1931).

For excellent analyses of the process by which the City of San Francisco arrived at the bulk levels of its present zoning ordinance, see Ruth, *supra* note 69; Svirsky, *supra* note 6.

²⁰⁶ See authorities cited notes 43 & 205 *supra*.

²⁰⁷ Members of the real estate industry have expressed the view that contemporary zoning impairs downtown development by overemphasizing requirements of light, air, and open space in central areas. See, e.g., *OFFICES* 280-81; *Air Rights* 497.

²⁰⁸ See S. TOLL, *supra* note 201, *passim*.

²⁰⁹ Objecting to the "Manhattanization" of their skyline resulting from in-

The specific bulk levels that emerge from this two-step process fall considerably short of Platonic absolutes, the slightest deviation from which threatens the dire planning consequences predicted by Mrs. Spatt.²¹⁰ Were it not for the risk of discriminatory official action,²¹¹ in fact, it would be far less arbitrary to express bulk levels in terms of a *range* of integers rather than as *fixed* integers.²¹² Whether office buildings in the downtown section of a major city are permitted to go to sixty-five rather than sixty-two stories, after all, is not an issue of great moment. What is critical, however, is that this range of stories — or its equivalent in terms of FAR's — accurately reflects the development objectives that the city seeks to achieve in its downtown section.

On the basis of this analysis, the charge that the Chicago Plan fosters arbitrary zoning should be rejected since the bulk increments allotted to development rights purchasers fall within a range that is defensible in planning terms. The reasonableness of deviations under the Chicago Plan from preexisting bulk regulations is not called into doubt by the presumed soundness of these regulations: the net increases, if any,²¹³ in overall density in the district under the Chicago Plan will not be enough to bring the overall density of the district outside that range originally decided upon, and the increases in bulk on individual transferee lots will not be arbitrary in planning terms.²¹⁴ The argument that builders

creased bulk levels adopted in 1961, an organization of San Franciscans succeeded in having submitted to referendum a proposition that would have required specific voter approval of the construction of any building over six stories or 72 feet. The proposition was defeated. N.Y. Times, Nov. 4, 1971, at 36, col. 1.

²¹⁰ In an exhaustive examination of the problem of the optimum size of downtown structures, one commentator concluded:

Conclusive quantitative proof of the desirability of these things [sunlight, air, etc.] is almost impossible, as is also the setting up of any unqualified standard for safety and well-being below which we should not go. The general indications would lead to the belief that, while sunlight, air, outlook, privacy, the avoidance of a sense of "shut-in-ness" and of actual congestion are highly desirable, we are not able to set up a minimum which, let us say, if curtailed by 10 per cent would spell disaster or if augmented by 10 per cent would spell relative happiness and prosperity.

Randall, *supra* note 205, at 117; see S. TOLL, *supra* note 201, at 137.

²¹¹ Professor Mandelker has noted that "conventional lot regulations are utilized because they simplify the problems of control." Mandelker, *Reflections on the American System of Planning Controls: A Response to Professor Krasnowiecki*, 114 U. PA. L. REV. 98, 101 (1965).

²¹² One interesting attempt at expressing density for individual parcels on the basis of a sliding scale of integers is the Land Use Intensity system described in Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15, 22-30 (1965).

²¹³ See notes 71 & 72 *supra*.

²¹⁴ See p. 590 & note 55 *supra*.

who do not purchase development rights are suffering unconstitutional encroachments upon their right to develop their property is equally unsound. If all builders in the development rights district were allowed to exceed the original bulk restrictions, then the increase in bulk *would* exceed the range that had been previously decided upon.

There is good reason to believe that the courts will accept this analysis and uphold the Plan against the due process attack. Judicial approval of density zoning²¹⁵ implies acceptance of the principle that a community may prescribe multiple densities for individual lots as long as a sound planning rationale supports this decision. Moreover, the courts have traditionally accorded wide deference to legislative economic measures that are challenged on substantive due process grounds.²¹⁶ In the land use field, the American judiciary has proven especially responsive to the efforts of local governments to meet pressing development needs,²¹⁷ and, since 1926,²¹⁸ has approved a broad array of innovative measures that, like the Chicago Plan, promised to enhance community welfare.²¹⁹ In light of this fact, it seems most unlikely that the courts would undertake to second-guess either the wisdom or the arithmetic²²⁰ of a community's transfer program if the latter is rooted in careful planning studies of the kind envisaged in the Chicago Plan.²²¹

²¹⁵ See cases cited note 183 *supra*.

²¹⁶ See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

²¹⁷ See *Anderson, supra* note 203, at 75; cf. D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 75-76 (1971); Heyman, *supra* note 197, at 40, 51-52.

²¹⁸ The United States Supreme Court upheld zoning as a constitutional exercise of the police power that year in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Prior to this decision, substantial conflict existed among the state courts concerning the constitutionality of zoning. See Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245, 257 (1967).

²¹⁹ See, e.g., *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (Ct. App. 1970) (PUD zoning); *Beall v. Montgomery County Council*, 240 Md. 77, 212 A.2d 751 (1965) (floating zoning); *Bucholz v. Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963) (conditional zoning); *Chrinko v. South Brunswick Tp. Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963) (cluster zoning).

²²⁰ On the basis of an exhaustive review of bulk zoning decisions, one commentator has concluded that "[s]o far, courts have shown a healthy respect for the figures arrived at after careful research and planning." Note, *supra* note 43, at 512.

²²¹ The importance of thorough, well-documented planning studies in withstanding due process as well as equal protection and spot-zoning challenges to innovative measures has been stressed in a comprehensive analysis of incentive zoning measures prepared by Professor Heyman. See Heyman, *supra* note 197, *passim*. The recurring thesis of the Heyman study provides additional support for

IV. CONCLUSION

Despite their apparent novelty, the principal features of the Chicago Plan are solidly grounded in precedents derived from the areas of condemnation, property, and land use law. Public programs in which government resells or leases condemned interests in order to recapture program costs are commonplace today, as the byproduct, leasing, and urban renewal cases discussed earlier illustrate.²²² Similarly, government, whether with or without clear statutory authority, has acquired some portion of the development potential of private property for any number of reasons including open space preservation,²²³ highway beautification,²²⁴ and even use zoning based on eminent domain rather than the police power.²²⁵ Finally, local governments in recent years have employed their land use powers imaginatively to secure desired patterns of community development in areas other than landmark preservation. Density zoning (which underpins PUD and cluster zones), special development districts, and a variety of other measures that duplicate or surpass development rights transfers in the degree of their departure from traditional zoning have been sanctioned in numerous decisions of state courts.²²⁶

Taken collectively, these precedents should provide a firm basis for judicial approval of the Chicago Plan. The prospects for the Plan's success in court would be even further improved by an assist from state legislatures. Either of two types of legislation should prove sufficient. The first, adopted in Illinois,²²⁷ would provide in a single enactment an independent statutory foundation for each of the Plan's three principal features: the condemnation and resale of development rights, the acquisition of preservation restrictions, and the transfer of development rights within transfer districts. The second would proceed more modestly against the backdrop of existing statute and case law, providing legislative sanction only for particular features of the

the position that the Chicago Plan will be upheld by the courts. As stated by Heyman:

[The] courts should and will approve a flexible regulatory device where it is shown that its use sensibly relates to public objectives identified in advance in a planning process and is justified by a detailed explanation showing the actual relationship between the objective and the action.

Id. at 40.

²²² See pp. 605-11 *supra*.

²²³ See WHITE, *supra* note 137.

²²⁴ See notes 137 & 165-66 *supra*.

²²⁵ See note 164 *supra*.

²²⁶ See notes 183 & 219 *supra*.

²²⁷ Ill. Pub. A. No. 77-1372 (Ill. Leg. Serv., Aug. 31, 1971), *in part to be codified at* ILL. REV. STAT. ch. 24, § 11-48.2-1A, *in part amending* ILL. REV. STAT. ch. 24, §§ 11-48.2-2 & -6 (1969).

Plan, such as the enforceability of preservation restrictions, which may be in doubt in a given jurisdiction.²²⁸

The likelihood that the Chicago Plan will withstand judicial challenge, of course, does not of itself establish that it should be implemented by local governments. In the author's judgment, the truly hard questions posed by the Plan's adoption are not legal ones at all. Three of these questions bear special mention. First, are the risks of favoritism or worse that attend administration of the Plan acceptable ones for communities that wish to preserve urban landmarks? There is no easy answer to this question. The willingness of communities throughout the United States to adopt a wide variety of other innovative land use measures that carry equivalent or greater risks, however, suggests that the risk factor alone should not necessarily prove conclusive against the Plan. Second, can municipal planning agencies handle the urban design challenges that they will confront in establishing development rights transfer districts and in supervising the other planning controls in the Chicago Plan? While the unhappy history of zoning bonuses in some cities gives cause for hesitation,²²⁹ the grim prospects for the nation's remaining urban landmarks if nothing is done must also be weighed in the balance.

Finally, the impact of the Plan on the community's other incentive programs and development goals must be scrutinized. In a stagnant real estate market, for example, the development rights made available under the Plan may undermine the value of development rights offered to builders under other incentive programs. Again, the community's other development goals, which may include, for example, increasing the supply of residential units, will be deterred to the extent that the city requires builders to purchase development rights rather than directly relaxes the bulk levels permitted as of right in the pertinent

²²⁸ See pp. 611-17 *supra*.

²²⁹ Zoning bonuses were originally conceived for the laudable purpose of raising urban amenity levels by encouraging light, air, and circulation in downtown areas. Abetted by high land and construction costs and allocated on an overly generous basis, however, they have threatened or destroyed the diversity and vitality of these areas in some instances. Ada Louis Huxtable's description of their impact upon the redevelopment of New York's Sixth Avenue is vivid and bleak:

The zoning is a failure in urbanistic terms — or how a city looks and works. The zoning, combined with the rising cost of land and building, has been the definitive factor in driving out the small enterprises, the shops, restaurants and services that make New York a decent and pleasurable place in which to live and work. In their place is a cold parade of standard business structures set back aimlessly from the street on blank plazas that ignore each other.

Huxtable, *Thinking Man's Zoning*, N.Y. Times, Mar. 7, 1971, § 2, at 22, col. 1; see Chicago Report 17.

zones.²³⁰ Hence, in pondering the advisability of adopting the Chicago Plan or any other incentive program for that matter, the community must ask itself — incentives for what? Resolving this question requires frank recognition that landmark preservation must compete with other worthy candidates for favorable regulatory treatment.

²³⁰ The conflict of goals portrayed in the text has arisen in New York City. See Marcus.



MEMORANDUM

Planning Division

DATE: May 8, 2024

TO: Planning Board Members

FROM: Nicholas Dupuis, Planning Director

SUBJECT: Project Updates & Information

The following report contains the most recent updates on projects that have completed by the Planning Board and are on to the next steps of approval. In addition, other significant development-related projects that have been reviewed or embarked upon by boards/commissions such as the Historic District Commission, Design Review Board, Multi-Modal Transportation Board, or similar bodies have been included for reference as well.

Site Plan & Design Reviews

- 2159 E. Lincoln – Lincoln Yard – Temporary Certificate of Occupancy has been issued
- 34965 Woodward – Peabody Redevelopment – Permitting, numerous extensions requested & granted
- 35001 Woodward – Land lease executed by City Commission/Design development, site plan extension granted on October 11, 2023
- 707 S. Worth – Under construction
- 36877 Woodward – Gasow Veterinary Hospital – Under construction
- 243 Merrill – La Strada – Permitting/Construction
- 320 Martin – Birmingham Post Office – Design Development
- 185 N. Old Woodward – Bell Bistro – Permitting
- 460 N. Old Woodward – Wilders – Under construction
- 295 Elm St. – Forest Townhomes – Building permits under review
- 34350 Woodward – Fred Lavery Porsche – Design Development
- 479 S. Old Woodward – Birmingham Tower – Under construction
- 245 S. Eton – Big Rock – Approved by City Commission on April 15, 2024
- 33866 Woodward – Polestar – Permitting/Design development
- 370 E. Brown – Permitting
- 33816 Woodward – Auto Europe – Design development

Ordinance Amendments/Master Planning

- -

Non-Planning Board Projects

- 185 Oakland – Belfor – Façade renovations, design development
- 33680 Woodward – Petrucci Studio – Under construction
- 163 W. Maple – Seven Daughters – Under construction
- 138 W. Maple – Blakeslee Building – Façade renovations, permitting
- 172 N. Old Woodward – National Bank Building – Façade renovations, design development
- 151 N. Eton – Façade and screening improvements, permitting
- 137 W. Maple – New 4-story addition
- 34500 Woodward – Golling Fiat – Façade renovations, design development
-
- Historic Preservation Master Plan – In progress.

Sustainability & Climate Action Plan/Greenhouse Gas Emissions Inventory

- Next meeting – May, 2024
- Greenhouse Gas Emissions inventory – COMPLETE
- Sustainability and Climate Action Plan – In progress



AGENDA
REGULAR MEETING OF THE BIRMINGHAM PLANNING BOARD
WEDNESDAY JUNE 26, 2024 – 7:30 PM
151 MARTIN ST., CITY COMMISSION ROOM 205, BIRMINGHAM MI*

- A.** Roll Call
- B.** Review and Approval of the Minutes of the Regular Meeting of **May 22, 2024**
- C.** Chairpersons' Comments
- D.** Review of the Agenda
- E.** Meeting Open to the Public for Items Not on the Printed Agenda
- F.** Unfinished Business
- G.** Rezoning Applications
- H.** Community Impact Studies
- I.** Special Land Use Permits
- J.** Site Plan & Design Reviews
- K.** Study Session
 - 1. **Triangle District Mixed-Use Requirements – Study Session**
 - 2. **The Birmingham Plan 2040 – Next Steps**
- L.** Miscellaneous Business and Communications:
 - 1. Pre-Application Discussions
 - 2. Communications
 - i. **Project Updates**
 - 3. Administrative Approval Correspondence
 - i. **May 17, 2024 – June 21, 2024**
 - 4. Draft Agenda – **July 10, 2024**
 - 5. Action List – **2024**
 - 6. Other Business
- M.** Planning Division Action Items
 - 1. Staff Report on Previous Requests
 - 2. Additional Items from Tonight's Meeting
- N.** Adjournment

*Please note that board meetings will be conducted in person once again. Members of the public can attend in person at Birmingham City Hall OR may attend virtually at:

Link to Access Virtual Meeting: <https://zoom.us/j/111656967>

Telephone Meeting Access: 877-853-5247 US Toll-Free

Meeting ID Code: 111656967

NOTICE: Due to Building security, public entrance during non-business hours is through the Police Department — Pierce St. Entrance only. Individuals with disabilities requiring assistance to enter the building should request aid via the intercom system at the parking lot entrance gate on Henrietta St.

Persons with disabilities that may require assistance for effective participation in this public meeting should contact the City Clerk's Office at the number (248) 530-1880, or 248-644-3405 (TDD) at least one day before the meeting to request help in mobility, visual, hearing, or other assistance.

Las personas con incapacidad que requieren algún tipo de ayuda para la participación en esta sesión pública deben ponerse en contacto con la oficina del escribano de la ciudad en el número (248) 530-1800 o al (248) 644-5115 (para las personas con incapacidad auditiva) por lo menos un día antes de la reunión para solicitar ayuda a la movilidad, visual, auditiva, o de otras asistencias. (Title VI of the Civil Rights Act of 1964).



AGENDA
REGULAR MEETING OF THE BIRMINGHAM PLANNING BOARD
WEDNESDAY JULY 10, 2024 – 7:30 PM
151 MARTIN ST., CITY COMMISSION ROOM 205, BIRMINGHAM MI*

- A.** Roll Call
- B.** Review and Approval of the Minutes of the Regular Meeting of **June 26, 2024**
- C.** Chairpersons' Comments
- D.** Review of the Agenda
- E.** Meeting Open to the Public for Items Not on the Printed Agenda
- F.** Unfinished Business
- G.** Rezoning Applications
- H.** Special Land Use Permits
- I.** Community Impact Studies
- J.** Site Plan & Design Reviews
- K.** Study Session
 - 1. **Triangle District Mixed-Use Requirements – Study Session**
- L.** Miscellaneous Business and Communications:
 - 1. Pre-Application Discussions
 - 2. Communications
 - i. **Project Updates**
 - ii. **June Planning Board Meeting(s)**
 - 3. Administrative Approval Correspondence
 - i. **June 21, 2024 – July 5, 2024**
 - 4. Draft Agenda – **July 24, 2024**
 - 5. Action List – **2024**
 - 6. Other Business
- M.** Planning Division Action Items
 - 1. Staff Report on Previous Requests
 - 2. Additional Items from Tonight's Meeting
- N.** Adjournment

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Planning Board Action List – 2024

Topic	General Goals	City Commission Directive?	2040 Plan	Quarter	Status	
					In Progress	Complete
Comprehensive Zoning Ordinance Update	Update the Zoning Ordinance based on recommendations of the 2040 Plan.	☐	☒	Ongoing	☐	☐
Mixed Use Requirements	Consider changing the requirements for mixed use in the Triangle District.	☐	☐	1 st (January-March)	☒	☐
“Encourage renovations to expand existing houses rather than the construction of new houses.”	Support neighborhoods.	☐	☒	2 nd (April-June)	☐	☐
“Create a Woodward Safety and Beautification Plan.”	Begin to bridge the Woodward divide.	☐	☒	3 rd (July-September)	☐	☐
Ordinance Enforcement	Maintain a vibrant community.	☐	☐	4 th (October-December)	☐	☐