

DISPLAY THIS CARD ON PRINCIPAL FRONTAGE OF WORK

**CITY OF PORTLAND**

BUILDING DEPARTMENT

**PERMIT**

Permit Number: 081469

Please Read  
Application And  
Notes, If Any,  
AttachedThis is to certify that A & M PARTNERS LLC / A & M Partners andhas permission to Change of use from auto garage to Office / Corrections / Parole Interior renovationsAT 105 WASHINGTON AVECase No. 012 P018001

provided that the person or persons, firm or corporation accepting this permit shall comply with all of the provisions of the Statutes of Maine and of the Ordinances of the City of Portland regulating the construction, maintenance and use of buildings and structures, and of the application on file in this department.

Apply to Public Works for street line and grade if nature of work requires such information.

Notification of inspection must be given and written permission procured before this building or part thereof is lath or other work is set-in. 2 HOUR NOTICE IS REQUIRED.

A certificate of occupancy must be procured by owner before this building or part thereof is occupied.

## OTHER REQUIRED APPROVALS

Fire Dept. Covey Cross

Health Dept. \_\_\_\_\_

Appeal Board \_\_\_\_\_

Other \_\_\_\_\_

Department Name

*Jeanne Bonke* 11/21/08  
Director - Building & Inspection Services

PENALTY FOR REMOVING THIS CARD

**City of Portland, Maine - Building or Use Permit Application**

389 Congress Street, 04101 Tel: (207) 874-8703, Fax: (207) 874-8716

Permit No: 08-1469	Issue Date:	CBL: 012 P018001
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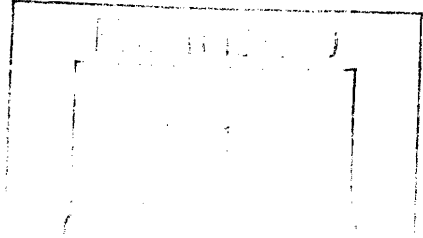
Location of Construction: 105 WASHINGTON AVE	Owner Name: A & M PARTNERS LLC	Owner Address: 120 EXCHANGE ST	Phone:
Business Name:	Contractor Name: A & M Partners / Lou Wood	Contractor Address: 120 Exchange Street Portland	Phone: 2074506128
Lessee/Buyer's Name	Phone:	Permit Type: Change of Use - Commercial	Zone: B-2b

Past Use: Commercial - Auto Garage	Proposed Use: Commercial - Office of Corrections/ Parole- Change of use from auto garage to Office of Corrections/ Parole w/ Interior renovations	Permit Fee: \$485.00	Cost of Work: \$38,400.00	CEO District: 1
Proposed Project Description: Change of use from auto garage to Office of Corrections/ Parole w/ Interior renovations		FIRE DEPT: <input checked="" type="checkbox"/> Approved <input type="checkbox"/> Denied <i>See Conditions</i>	INSPECTION: Use Group: <i>B</i> Type: <i>IBL-2003</i>	
		Signature: <i>Greg Cass</i> Signature: <i>JWB 11/21/08</i>		
PEDESTRIAN ACTIVITIES DISTRICT (P.A.D.)				
Action: <input type="checkbox"/> Approved <input type="checkbox"/> Approved w/Conditions <input type="checkbox"/> Denied				
Signature: _____ Date: _____				

Permit Taken By: Idobson	Date Applied For: 11/18/2008
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**Zoning Approval**

<ol style="list-style-type: none"> <li>This permit application does not preclude the Applicant(s) from meeting applicable State and Federal Rules.</li> <li>Building permits do not include plumbing, septic or electrical work.</li> <li>Building permits are void if work is not started within six (6) months of the date of issuance. False information may invalidate a building permit and stop all work..</li> </ol>	<b>Special Zone or Reviews</b> <input type="checkbox"/> Shoreland <input type="checkbox"/> Wetland <input type="checkbox"/> Flood Zone <input type="checkbox"/> Subdivision <input type="checkbox"/> Site Plan <input type="checkbox"/> Major <input type="checkbox"/> Minor <input type="checkbox"/> MM <input type="checkbox"/>	<b>Zoning Appeal</b> <input type="checkbox"/> Variance <input type="checkbox"/> Miscellaneous <input type="checkbox"/> Conditional Use <input type="checkbox"/> Interpretation <input type="checkbox"/> Approved <input type="checkbox"/> Denied <i>Superior Court (Attached) reversed the ZBAS decision with instructions to issue the permit</i>	<b>Historic Preservation</b> <input checked="" type="checkbox"/> Not in District or Landmark <input type="checkbox"/> Does Not Require Review <input type="checkbox"/> Requires Review <input type="checkbox"/> Approved <input type="checkbox"/> Approved w/Conditions <input type="checkbox"/> Denied
	Date: <i>11/18/08</i>	Date: <i>Oct 28, 2008</i>	Date: <i>[Signature]</i>



**CERTIFICATION**

I hereby certify that I am the owner of record of the named property, or that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his authorized agent and I agree to conform to all applicable laws of this jurisdiction. In addition, if a permit for work described in the application is issued, I certify that the code official's authorized representative shall have the authority to enter all areas covered by such permit at any reasonable hour to enforce the provision of the code(s) applicable to such permit.

SIGNATURE OF APPLICANT	ADDRESS	DATE	PHONE
RESPONSIBLE PERSON IN CHARGE OF WORK, TITLE		DATE	PHONE

## BUILDING PERMIT INSPECTION PROCEDURES

Please call 874-8703 or 874-8693 (ONLY)

to schedule your inspections as agreed upon

Permits expire in 6 months, if the project is not started or ceases for 6 months.

The Owner or their designee is required to notify the inspections office for the following inspections and provide adequate notice. Notice must be called in 48-72 hours in advance in order to schedule an inspection:

By initializing at each inspection time, you are agreeing that you understand the inspection procedure and additional fees from a "Stop Work Order" and "Stop Work Order Release" will be incurred if the procedure is not followed as stated below.

A Pre-construction Meeting will take place upon receipt of your building permit.

Framing/Rough Plumbing/Electrical: Prior to Any Insulating or drywalling

Final/Certificate of Occupancy: Prior to any occupancy of the structure or use.  
NOTE: There is a \$75.00 fee per inspection at this point.

Certificate of Occupancy is not required for certain projects. Your inspector can advise you if your project requires a Certificate of Occupancy. All projects DO require a final inspection.

If any of the inspections do not occur, the project cannot go on to the next phase, REGARDLESS OF THE NOTICE OR CIRCUMSTANCES.

**CERIFICATE OF OCCUPANICES MUST BE ISSUED AND PAID FOR, BEFORE THE SPACE MAY BE OCCUPIED.**

  
Signature of Applicant/Designee

  
Date

  
Signature of Inspections Official

  
Date

**City of Portland, Maine - Building or Use Permit**

389 Congress Street, 04101 Tel: (207) 874-8703, Fax: (207) 874-8716

Permit No: 08-1469	Date Applied For: 11/18/2008	CBL: 012 P018001
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Location of Construction: 105 WASHINGTON AVE	Owner Name: A & M PARTNERS LLC	Owner Address: 120 EXCHANGE ST	Phone:
Business Name:	Contractor Name: A & M Partners / Lou Wood	Contractor Address: 120 Exchange Street Portland	Phone (207) 450-6128
Lessee/Buyer's Name	Phone:	Permit Type: Change of Use - Commercial	

Proposed Use: Commercial - Office of Corrections/ Parole- Change of use from auto garage to Office of Corrections/ Parole w/ Interior renovations	Proposed Project Description: Change of use from auto garage to Office of Corrections/ Parole w/ Interior renovations
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**Dept:** Zoning      **Status:** Approved with Conditions      **Reviewer:** Marge Schmuckal      **Approval Date:** 11/18/2008

**Note:****Ok to Issue:** 

- 1) This property shall remain parole offices for the Office of Corrections. Any change of use shall require a separate permit application for review and approval.
- 2) Separate permits shall be required for any new signage.
- 3) This permit is being approved on the basis of plans submitted. Any deviations shall require a separate approval before starting that work.

**Dept:** Building      **Status:** Approved with Conditions      **Reviewer:** Jeanine Bourke      **Approval Date:** 11/21/2008

**Note:****Ok to Issue:** 

- 1) The bathroom fixture count is based on the letter from the Dept. Of Corrections for employee use. If a future tenant occupies the space, this may require an increase in the amount.
- 2) Separate permits are required for any electrical, plumbing, HVAC or exhaust systems. Separate plans may need to be submitted for approval as a part of this process.

**Dept:** Fire      **Status:** Approved with Conditions      **Reviewer:** Capt Greg Cass      **Approval Date:** 11/18/2008

**Note:****Ok to Issue:** 

- 1) An evacuation plan is required
- 2) Fire extinguishers required. Installation per NFPA 10
- 3) Emergency lights and exit signs are required
- 4) Application requires State Fire Marshal approval.

**Comments:**

11/18/2008-ldobson: previous permit#070572 fees applied to this permit

11/18/2008-mes: This permit is tied to the original permit #07-0572 which was denied based on B-2b uses not allowing governmental uses such as a State parole office. The ZBA On 8/2/07 denied the appellant's interpretation appeal. The appellant took the case to Superior Court. On October 28, 2008 Superior Court Justice Thomas E. Delahanty II issued a decision that the zoning ordinance should not prohibit this use (copy of decision attached to the permit) with the order that the permit be issued for zoning purposes.



# General Building Permit Application

If you or the property owner owes real estate or personal property taxes or user charges on any property within the City, payment arrangements must be made before permits of any kind are accepted.

Location/Address of Construction: <u>107 1/2 Washington Ave</u>		
Total Square Footage of Proposed Structure <u>5000 SF</u>		Square Footage of Lot
Tax Assessor's Chart, Block & Lot Chart#      Block#      Lot#	Owner: <u>ARM Partners LLC</u> <u>120 Exchange St.</u> <u>Portland, ME 04101</u>	Telephone: <u>Lou Wood</u> <u>207-450-6128</u>
Lessee/Buyer's Name (If Applicable)	Applicant name, address & telephone: <u>Same As Owner</u> <u>Louis Wood</u> <u>207-874-6959 - Office</u> <u>207-450-6128 - Cell</u>	Cost Of Work: \$ <u>38,400.00</u> Fee: \$ _____ C of O Fee: \$ _____
Current legal use (i.e. single family) <u>VACANT</u> If vacant, what was the previous use? <u>Auto Garage</u> Proposed Specific use: <u>Office Space</u> Is property part of a subdivision? <u>NO</u> If yes, please name _____ Project description: <u>Interior renovations, Wall Construction of Non-load Bearing</u> <u>Paint/Carpet</u>		
Contractor's name, address & telephone: <u>Same As Owner</u> Who should we contact when the permit is ready: <u>Louis Wood</u> Mailing address: _____ Phone: <u>450-6128</u>		

Please submit all of the information outlined in the Commercial Application Checklist, Failure to do so will result in the automatic denial of your permit.

In order to be sure the City fully understands the full scope of the project, the Planning and Development Department may request additional information prior to the issuance of a permit. For further information or to download copies of this form and other applications visit the Inspections Division on-line at [www.portlandmaine.gov](http://www.portlandmaine.gov), or stop by the Inspections Division office, room 315 City Hall or call 874-8703.

I hereby certify that I am the Owner of record of the named property, or that the owner of record authorizes the proposed work and that I have been authorized by the owner to make this application as his/her authorized agent. I agree to conform to all applicable laws of this jurisdiction. In addition, if a permit for work described in this application is issued, I certify that the Code Official's authorized representative shall have the authority to enter all areas covered by this permit at any reasonable hour to enforce the provisions of the codes applicable to this permit.

Signature of applicant: Louis Wood Date: 5/17/07

This is not a permit; you may not commence ANY work until the permit is issued.



# CITY OF PORTLAND, MAINE

Department of Building Inspections

20 07

Received from J. J. [unclear]

Location of Work 100 [unclear] St.

Cost of Construction \$ 45,000

Permit Fee \$ 785

Building (I) Plumbing (I5) Electrical (I2) Site Plan (U2)

Other \_\_\_\_\_

CBL: 19-1-1

Check #: \_\_\_\_\_ Total Collected \$ 785

## THIS IS NOT A PERMIT

No work is to be started until PERMIT CARD is actually posted upon the premises. Acceptance of fee is no guarantee that permit will be granted. PRESERVE THIS RECEIPT. In case permit cannot be granted the amount of the fee will be refunded upon return of the receipt less \$10.00 or 10% whichever is greater.

WHITE - Applicant's Copy  
YELLOW - Office Copy  
PINK - Permit Copy

**City of Portland, Maine - Building or Use Permit Application**

389 Congress Street, 04101 Tel: (207) 874-8703, Fax: (207) 874-8716

Permit No: 07-0572	Issue Date:	CBL: 012 P018001
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Location of Construction: 105 WASHINGTON AVE	Owner Name: A G CAR CO INC	Owner Address: 120 EXCHANGE ST	Phone:
Business Name:	Contractor Name: A&M Partners, LLC	Contractor Address: 120 Exchange Street Portland	Phone 2077752100
Lessee/Buyer's Name	Phone:	Permit Type: Change of Use - Commercial	Zone:

Past Use: Commercial - Auto Garage	Proposed Use: Commercial - Office - Change of use from auto garage to Office, Interior renovations	Permit Fee: \$485.00	Cost of Work: \$38,400.00	CEO District: 1
		FIRE DEPT: <input type="checkbox"/> Approved <input type="checkbox"/> Denied	INSPECTION: Use Group: Type:	

Proposed Project Description: Change of use from auto garage to Office, Interior renovations	Signature:	Signature:
<p><i>Previously Denied</i></p>	PEDESTRIAN ACTIVITIES DISTRICT (P.A.D.)	
	Action: <input type="checkbox"/> Approved <input type="checkbox"/> Approved w/Conditions <input type="checkbox"/> Denied	
	Signature: <i>Permit</i>	Date:

Permit Taken By: Idobson	Date Applied For: 05/18/2007	<b>Zoning Approval</b>
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<p>1. This permit application does not preclude the Applicant(s) from meeting applicable State and Federal Rules.</p> <p>2. Building permits do not include plumbing, septic or electrical work.</p> <p>3. Building permits are void if work is not started within six (6) months of the date of issuance. False information may invalidate a building permit and stop all work..</p>	<b>Special Zone or Reviews</b> <input type="checkbox"/> Shoreland <input type="checkbox"/> Wetland <input type="checkbox"/> Flood Zone <input type="checkbox"/> Subdivision <input type="checkbox"/> Site Plan Maj <input type="checkbox"/> Minor <input type="checkbox"/> MM <input type="checkbox"/> Date:	<b>Zoning Appeal</b> <input type="checkbox"/> Variance <input type="checkbox"/> Miscellaneous <input type="checkbox"/> Conditional Use <input type="checkbox"/> Interpretation <input type="checkbox"/> Approved <input type="checkbox"/> Denied Date:	<b>Historic Preservation</b> <input type="checkbox"/> Not in District or Landmark <input type="checkbox"/> Does Not Require Review <input type="checkbox"/> Requires Review <input type="checkbox"/> Approved <input type="checkbox"/> Approved w/Conditions <input type="checkbox"/> Denied Date:
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**CERTIFICATION**

I hereby certify that I am the owner of record of the named property, or that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his authorized agent and I agree to conform to all applicable laws of this jurisdiction. In addition, if a permit for work described in the application is issued, I certify that the code official's authorized representative shall have the authority to enter all areas covered by such permit at any reasonable hour to enforce the provision of the code(s) applicable to such permit.

\_\_\_\_\_  
SIGNATURE OF APPLICANT ADDRESS DATE PHONE

\_\_\_\_\_  
RESPONSIBLE PERSON IN CHARGE OF WORK, TITLE DATE PHONE

OFFICE COPY  
WBA

June 16, 2005

Mr. Mike Scarks  
Neptune Properties  
120 Exchange Street  
Portland, ME 04101

RE: 107 Washington Avenue, parking lot  
ID #2005-0026, CBL #012-P-019

Dear Mr. Scarks:

On June 15, 2005, the Portland Planning Authority approved a parking lot to be located at 107 Washington Avenue as shown on the approved plan with the following condition:

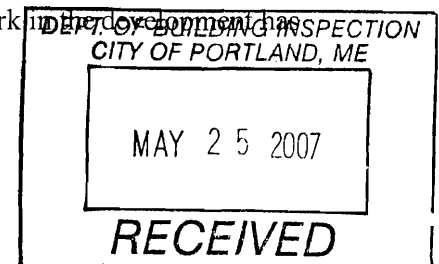
- i. that when the existing building is occupied, the Zoning Administrator shall review the number of parking spaces required for the reuse.

The approval is based on the submitted site plan. If you need to make any modifications to the approved site plan, you must submit a revised site plan for staff review and approval.

Please note the following provisions and requirements for all site plan approvals:

1. Where submission drawings are available in electronic form, the applicant shall submit any available electronic Autocad files (\*.dwg), release 14 or greater, with seven (7) sets of the final plans.
2. A performance guarantee covering the site improvements as well as an inspection fee payment of 2.0% of the guarantee amount and 7 final sets of plans must be submitted to and approved by the Planning Division and Public Works prior to the release of the building permit. If you need to make any modifications to the approved site plan, you must submit a revised site plan for staff review and approval.
3. The site plan approval will be deemed to have expired unless work in the development has

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commenced within one (1) year of the approval or within a time period agreed upon in writing by the City and the applicant. Requests to extend approvals must be received before the expiration date.

4. A defect guarantee, consisting of 10% of the performance guarantee, must be posted before the performance guarantee will be released.
5. Prior to construction, a pre-construction meeting shall be held at the project site with the contractor, development review coordinator, Public Work's representative and owner to review the construction schedule and critical aspects of the site work. At that time, the site/building contractor shall provide three (3) copies of a detailed construction schedule to the attending City representatives. It shall be the contractor's responsibility to arrange a mutually agreeable time for the pre-construction meeting.
6. If work will occur within the public right-of-way such as utilities, curb, sidewalk and driveway construction, a street opening permit(s) is required for your site. Please contact Carol Merritt at 874-8300, ext. 8828. (Only excavators licensed by the City of Portland are eligible.)
7. The Development Review Coordinator must be notified five (5) working days prior to date required for final site inspection. The Development Review Coordinator can be reached at the Planning Division at 874-8632. Please make allowances for completion of site plan requirements determined to be incomplete or defective during the inspection. This is essential as all site plan requirements must be completed and approved by the Development Review Coordinator prior to issuance of a Certificate of Occupancy. Please schedule any property closing with these requirements in mind.

If there are any questions, please contact Kandice Talbot at 874-8901.

Sincerely,

Alexander Jaegerman  
Planning Division Director

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cc: Lee D. Urban, Planning and Development Department Director  
Alexander Jaegerman, Planning Division Director

Sarah Hopkins, Development Review Services Manager  
Kandice Talbot, Planner  
Jay Reynolds, Development Review Coordinator  
Marge Schmuckal, Zoning Administrator  
Inspections  
Michael Bobinsky, Public Works Director  
Traffic Division  
Eric Labelle, City Engineer  
Jeff Tarling, City Arborist  
Penny Littell, Associate Corporation Counsel  
Fire Prevention  
Assessor's Office  
Approval Letter File

STATE OF MAINE  
CUMBERLAND,ss

2008 OCT 29 A 8:12

SUPERIOR COURT  
Civil Action  
Docket No. AP- 08-11 ✓

A & M PARTNERS, LLC,

PLAINTIFF

v.

**DECISION AND JUDGMENT**  
(M.R.Civ.P. 80B)

CITY OF PORTLAND,

Respondent

### I. BEFORE THE COURT

This matter comes before the court for the second time on the petition of A&M Partners, LLC (A&M) renewed Rule 80B appeal from a decision of the Zoning Board of Appeals (ZBA) for the City of Portland (the City) denying A&M's building permit application.<sup>1</sup>

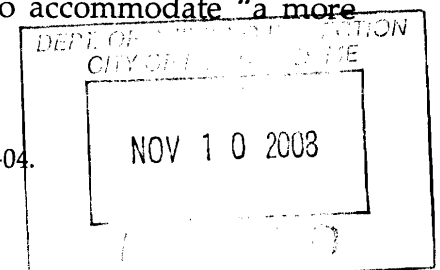
### II. PROCEDURAL HISTORY AND BACKGROUND

The petitioner is seeking to renovate a vacant and derelict automobile repair garage and convert it into an office building which it then intends to lease to the State of Maine for use as office space for State of Maine probation services.

The property is located in the City's B-2b Community Business Zone (the B-2b zone), a mixed-use area. According to section 14-181(b) of the City of Portland Code of Ordinances (the Ordinance), the "B-2b zone is intended to provide neighborhood and community retail, business and service establishments that are oriented to and built close to the street." Additionally, the B-2b zone is meant to accommodate "a more

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<sup>1</sup> See this court's prior decision dated February 26, 2008, Docket No. AP-07-04.



compact urban development pattern” or “a neighborhood compatible commercial district” with “a pedestrian scale and character.” *Id.*

A&M applied for a building permit and specified that the renovated structure would be used as “office space.”<sup>2</sup> After initial approval from the City’s Zoning Administrator, Marge Schmuckal (Schmuckal), A&M entered into a ten-year lease agreement with the State. However, Schmuckal subsequently reversed her decision and denied the permit after learning that the building would house government offices. A&M appealed her decision, but after a hearing on August 2, 2007, the ZBA agreed with Schmuckal, voting to deny the application. After appeal to this court, the case was remanded to the ZBA for factual findings. A second hearing was held on March 20, 2008, and the Board again denied A&M’s application. It voted that the proposed use of the building is not included in §§ 14-182 and 14-183 and is not permitted in the B-2(b) zone. A&M then again appealed to this court.

### III. DISCUSSION

#### A. Standard of Review

This court will uphold a board’s decision unless that decision is an abuse of discretion, contrary to law or lacks the support of substantial evidence on the record. *Uliano v. Bd. of Env’tl Prot.*, 2005 ME 88, ¶¶ 6-7, 876 A.2d 16, 18. The interpretation of a zoning ordinance is a question of law that the court reviews *de novo*. *Brackett v. Town of Rangeley*, 2003 ME 109, ¶ 15, 831 A.2d 422, 427. However, the court may not substitute its own judgment for that of the Board on factual determinations. *Forbes v. Town of*

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<sup>2</sup> The Ordinance allows for “general, business and professional offices, as defined in section 14-47” in the B-2b zone. City of Portland Code of Ordin. (Me.) § 14-182(b)(1) (2007). Section 14-47 defines the term “professional office,” as “[t]he office of a doctor, dentist, optometrist, psychologist, accountant, lawyer, architect, engineer or similar professional.” *Id.* at § 14-47. There is no definition provided in the Ordinance for “general office” or “business office.” Similarly, there are no definitions for “municipal use”, “county use” or “governmental use” even though those terms are used in the Ordinance and as political sub-divisions carry on a wide variety of public functions causing their properties to be subject to many different uses.

*Southwest Harbor*, 2001 ME 9, ¶ 6, 763 A.2d 1183, 1186. The burden of persuasion is on the party challenging a board's decision to show that the evidence compels a different result. *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995).

#### **B. Petitioner's Intended Use of the Property**

If the language of a municipal ordinance is unambiguous, the question of whether a structure meets the criteria for a certain defined classification is a question of fact for the Board. *Jordan v. City of Ellsworth*, 2003 ME 82, ¶ 8, 828 A.2d 768, 771. However, if there is ambiguity, the interpretation of the municipal ordinance is a question of law for the court. *Id.* ¶ 9, 828 A.2d at 771. As the Law Court has explained, "the terms or expressions in an ordinance are to be construed reasonably with regard to both the objectives sought to be obtained and the general structure of the ordinance as a whole." *Id.* (quotations and citations omitted). The court should "look first to the plain language of the provision to be interpreted." *Gensheimer v. Town of Phippsburg*, 2002 ME 22, ¶ 22, 868 A.2d 161, 167. When any terms are "ambiguous or uncertain," the court should consider "the context within which the term appears." *Robinson v. Bd. of Appeals, Town of Kennebunk*, 356 A.2d 196, 198 (Me. 1976). The court also "must construe an ordinance reasonably to avoid an absurd result." *Lipman v. Town of Lincolnville*, 1999 ME 149, ¶5, 739 A.2d 842, 843.

A&M contends that a state probation office qualifies as either a "general," "business" or "professional" office under section 14-182(b)(1). However, upon remand, the ZBA issued a written decision on March 20, 2008 stating:

The language of the ordinance prohibits uses not listed in sections 14-182 [and] 14-183. State governmental buildings are not listed. Additionally, there is a separate category for Institutional, which includes municipal buildings; this category would likely be the category under which state buildings would be listed. Thus, the governmental use is not permitted in

this zone since it is not listed in 14-182. These uses are explicitly in other zones, such as B-4, B-5.<sup>3</sup>

According to section 14-184, “[u]ses not enumerated in sections 14-182 and 14-183 as either permitted uses or conditional uses are prohibited.” While municipal buildings and uses are included in the list of permitted uses in section 14-182, state or federal government buildings and uses are absent. Thus, the City contends that the Ordinance forbids A&M’s intended use of the property.<sup>4</sup>

Despite this apparent prohibition on any state governmental use of property in the B-2b zone, A&M correctly notes that the portion of the Ordinance concerning the B-2b zone was adopted in 1988, when local zoning laws were not binding on the State. See 30-A M.R.S. § 4352(6) (1988);<sup>5</sup> see also *Senders v. Town of Columbia Falls*, 647 A.2d 93 (Me. 1994). Because the State would have been exempt from any zoning restriction at the time the relevant sections were adopted, A&M persuasively argues that the absence of any explicit allowance of governmental uses does not lead to the inevitable conclusion that they are disallowed in the B-2b zone. While it also does not mean that the Ordinance necessarily permits such uses, if the court agrees with the City’s interpretation of the sections at issue, it must also address the constitutional concerns raised by A&M.

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<sup>3</sup> In addition to the zones listed by the ZBA, the B-5b and the B-7 zones also explicitly allow for governmental use.

<sup>4</sup> It should be noted that although the intended use of the building at issue here can be classified as “governmental,” the structure itself could not be considered a government building because it is owned by a private entity.

<sup>5</sup> The current version of section 4352(6) generally requires the State to comply with zoning ordinances, but allows the Governor to waive restrictions if certain criteria are met. No waiver is presented here.

### C. Past Interpretations

A&M asserts that the City's current interpretation of the permitted uses of the B-2b zone is inconsistent with prior interpretations of the ordinance and that it has been denied the equal protection of the law as a result.

According to A&M, the City has previously allowed governmental uses in the B-2b zone and in other zones even though the ordinance does not expressly permit them. At the first hearing, A&M provided the ZBA with a list of nineteen government offices that it claims are located in those zones, but the list did not include the dates of occupancy for most of those buildings, nor did it provide any information about the ordinance provisions that were in effect at the time the use was approved.<sup>6</sup> At the second hearing, A&M offered additional materials for the ZBA to consider, including public records, to address the deficiency. However, the ZBA refused to take new evidence and instead limited its review to the evidence offered at the first hearing. In its written decision, the ZBA concluded that "[t]here is no record of a pattern of granting such uses in front of the Board." After a careful review of the record, it is impossible to conclude that the evidence compels a different result. It was A&M's burden to show at the first hearing that the ZBA had previously interpreted the ordinance differently, and A&M failed to meet that burden.

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<sup>6</sup> In addition to the list, Michael Scarks, president of A&M, testified at the hearing that he did not know when the government uses in the list provided by A&M were approved, but stated that "many of them were fairly recent." He cited as one example, "the offices of the court" (Administrative Office of the Courts) on Presumpscot Street, which is in the B-3 zone according to the list submitted by A&M. The B-3 zone includes general, business and professional offices, § 14-217(a)(2)(a/b), and "county and municipal uses", § 14-217(a)(4)(a), without defining county and municipal use. It does not provide for general governmental use. (The court also notes that the State of Maine Motor Vehicle Registry is located in a building adjacent to the Administrative Office of the Courts.)

The Ordinance (those portions provided as part of the record) does not list State or federal use of buildings in any zone although they are clearly present in a number of areas in the city. Also, the list provided by A&M of government offices in other zones included occupation dates for five of the nineteen offices.

#### **D. Validity of Restriction**

Although A&M is unable to show that the ZBA has treated it unfairly in comparison to others, if the court decides that the City's interpretation of the zoning ordinance was correct and that state or federal governmental uses were in fact prohibited from the B-2b zone, the validity of such a restriction must still be addressed.

For a restriction contained in a zoning ordinance to be valid, it "must bear a substantial relation to public health, safety, morals, or general welfare," and "may not be unreasonable or discriminatory as applied." *LaPointe v. City of Saco*, 419 A.2d 1013, 1015 (Me. 1980). On remand the Board refused to address this issue. Record at p. 178. An ordinance, however, is presumed to be constitutional and it "will not be declared unconstitutional without clear and irrefutable evidence that it infringes the paramount law." *Barnard v. Zoning Bd. of Appeals of Yarmouth*, 313 A.2d 741, 744 (Me. 1974) (quotations and citations omitted).

The restriction contained in section 14-184, which prohibits uses not expressly enumerated in the preceding sections, is not unreasonable on its face. A municipality has legitimate reasons for specifying which uses are or are not appropriate in any given area or zone. Indeed, the Law Court has stated that "[c]ommunities cannot be condemned for seeking such ends as preservation of open space and local 'beauty,' avoidance of heavy traffic congestion and overcrowded housing, maintenance of property values, or even the stabilization of the burdens of spending for municipal services." *Id.* at 745. However, the question raised by A&M here concerns the constitutionality of the restriction as it applies to governmental uses. The City's interpretation of the Ordinance does not prevent only particular governmental uses that perhaps could be determined to have an impact on the surrounding community, e.g.,



the county jail, but instead serves to prevent entirely any and all uses of property by state or federal government within the B-2b zone.

It may be that the City has not re-examined the Ordinance since the State became subject to local comprehensive plans, 30-A M.R.S. § 4352(6). Without specific regulation, the more precise issue is whether a blanket prohibition on all state and federal governmental uses, but not municipal,<sup>7</sup> within the B-2b zone vis-à-vis other uses are reasonably related to any legitimate interest that the City may protect through zoning regulation. The court concludes, considering the proposed use here, that it does not.


#### IV. DECISION AND JUDGMENT

The clerk will make the following entry as the decision and judgment of the court:

- The appeal of A&M Partners, LLC is sustained. The case is remanded to the Zoning Board of Appeals for the City of Portland with instructions to approve the application of A&M Partners, LLC for a building permit.

SO ORDERED

October 28, 2008



Thomas E. Delahanty II  
Justice, Superior Court

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<sup>7</sup> "Municipal buildings and uses" are included in the list of permitted institutional uses under section 14-182 of the Ordinance.



STATE OF MAINE  
DEPARTMENT OF CORRECTIONS  
111 STATE HOUSE STATION  
AUGUSTA MAINE  
04333-0111

JOHN ELIAS BALDACCI  
GOVERNOR

MARTIN A. MAGNUSSON  
COMMISSIONER

June 5, 2006

Lou Wood

RE: Proposed Portland Office Use

Dear Lou,

Below is a brief summary of the staffing and intended usage of the proposed office site on Washington Avenue. Please let me know if you have any additional questions.

Use of Proposed new office space on Washington Avenue

Site will house approximately 15 Adult Probation staff. The staff is made up of a combination of probation officers, supervisory and clerical personnel.

The largest number of the staff assigned to this office are probation officers (approximately 10-11). They actually spend the majority of their time outside of the office working with the court system, doing field reporting, conducting house visits on clients, etc. The people who spend the majority of their time in the office are the clerical support staff (2), and the supervisory staff (2) who split their time between the office and working in the field.

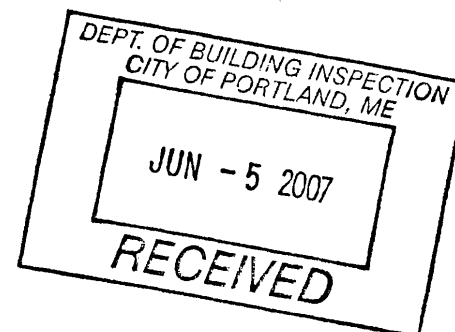
One of the major functions of the office is client reporting. Reporting days occur four days per week. The probation officers have a certain percentage of their client caseloads that are required to report to the office. The clients come in to provide updates to their assigned probation officer. When they report, they could be required to submit to a drug test. On reporting days, one bathroom in the site will be dedicated for this use. The probation officers will take clients into the bathroom, one at a time, and make them submit to a urine test. The probation officer oversees this process. When not being used for drug testing purposes, the bathroom will be used as a second staff bathroom. This is the same set-up that we use in all of our probation offices across the state.

Other than clients reporting, our probation offices do not see a lot of public traffic at all. Occasionally, there might be a meeting with a treatment provider, etc., but they are not a common occurrence.

Sincerely,

Mark S. McCarthy

Mark McCarthy  
Correctional Operations  
Ph. 207-287-4389  
Email – mark.s.mccarthy@maine.gov



# A & M PARTNERS, INC.

REAL ESTATE DEVELOPMENT/MANAGEMENT

120 EXCHANGE STREET PORTLAND, MAINE 04101



(207) 879-1358

Jeanie Bourke  
Division Director  
Inspection Services Program  
City of Portland, Maine  
Re: 107 Washington Avenue Permit

June 5, 2007

12 P18  
070572

Dear Jeanie,

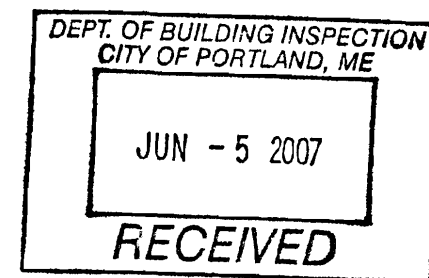
Thank you for reviewing our building permit for 107 Washington Avenue. When we met you brought up the issue regarding the bathroom facilities for the Maine Parole Board at that office. I am enclosing a letter from the Maine Parole that will explain the reasons that they have laid out the plan as it exists.

I would appreciate your review in allowing the bathroom facilities as shown. If not please call me as soon as possible so that I can work with the Department of Correction to redesign the space.

Please feel free to call my cell phone so that we can discuss this.

Sincerely,

Lou Wood  
A & M Partners, LLC  
450-6128 cell



**Lessor Federal ID #01-0524253**

**OFFICE LEASE**

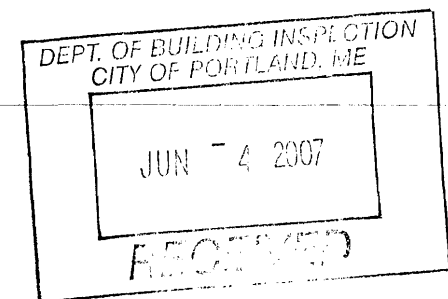
between

**A & M Partners, LLC**

and

**THE STATE OF MAINE**  
**Department of Administrative & Financial Services**  
**Bureau of General Services**  
**on behalf of the**

**Maine Department of Corrections**  
**Region I Adult Community Corrections**



This Office Lease is made and entered into this 21st day of May 2007, by and between A & M Partners, LLC whose address is 120 Exchange Street, Portland, Maine 04101 for themselves, their heirs, executors, administrators, successors and assigns (hereinafter called the "Lessor") and the State of Maine, Department of Administrative & Financial Services, Bureau of General Services, whose address is 77 State House Station, Augusta, Maine 04333-0077 on behalf of the Maine Department of Corrections, Region I Adult Community Corrections (hereinafter called the "Department"),

1. **LEASED PREMISES:** The Lessor does hereby lease, demise and let to the Department the following premises:

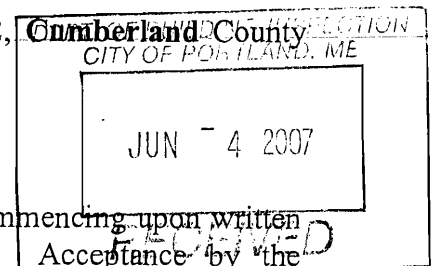
- (a) A commercial office building to be constructed or rehabilitated on the Land by Lessor at Lessor's expense in accordance with the site plan, building plans and specifications identified in **Exhibit D**, which commercial office building (the "Building"), located at 107 Washington Avenue, Portland, Maine 04101, shall contain a net usable area of **4,877** square feet of interior space; and
- (b) A parking lot on the Land by Lessor as shown in the site plan, building plans and specifications identified in **Exhibit D**, which parking lot (the "Parking Lot") shall contain spaces for a minimum of twelve (12) vehicles.

The Land, Building and Parking Lot are collectively referred to herein as the "Leased Premises".

(c) Lessor herein warrants that it owns the Leased Premises free and clear of all encumbrances except those listed below:

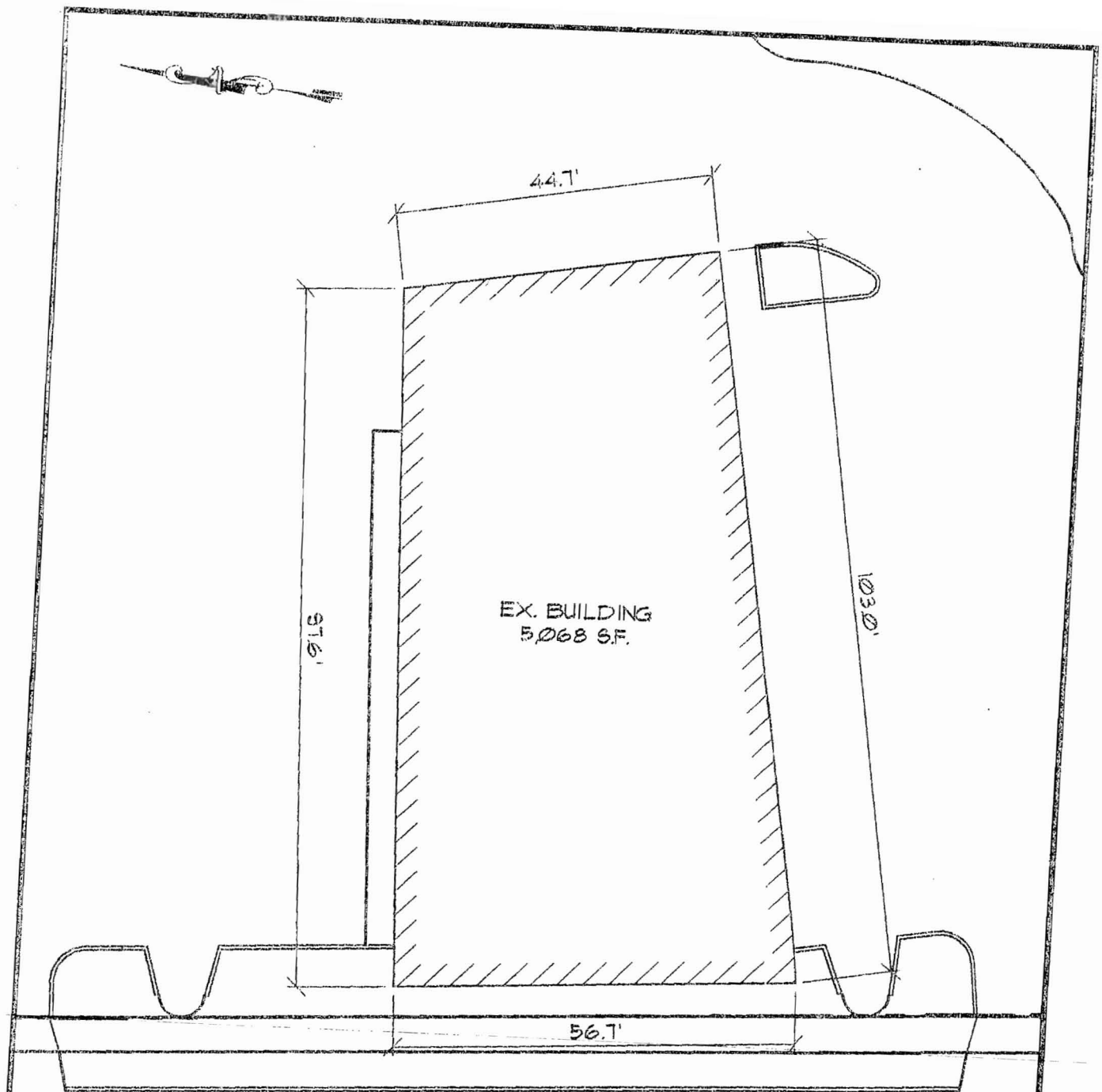
(i) A & M Partners, LLC is the sole owner of the property at 107 Washington Avenue, Portland, Maine 04101.

(d) Lessor Title Reference is as follows: Book **25070**, Page **52**,  
Registry of Deeds.



2. **TERM:**

- (a) The term of this Office Lease shall be for ten (10) years commencing upon written acceptance of the Leased Premises by the Department. Department shall be in the form set forth in Commencement Notice, **Exhibit B**, attached hereto and made a part hereof. In the event that commencement occurs after the first day of a month, a partial first month shall be added to the initial term of this Office Lease.
- (b) The Department shall have no obligation to accept the Leased Premises until (i) all construction or renovations have been completed to the satisfaction of the Department; (ii) an unlimited and unrestricted Certificate of Occupancy has been issued by the City of Portland; (iii) receipt of an Architects Certificate of Substantial Completion; (iv) receipt of a Certified Air Balancing Report acceptable to the



WASHINGTON AVENUE

### BUILDING DIMENSIONS

DEPT. OF BUILDING INSPECTION  
CITY OF PORTLAND, ME

JUN 4 2007

RECEIVED



PINKHAM & GREER

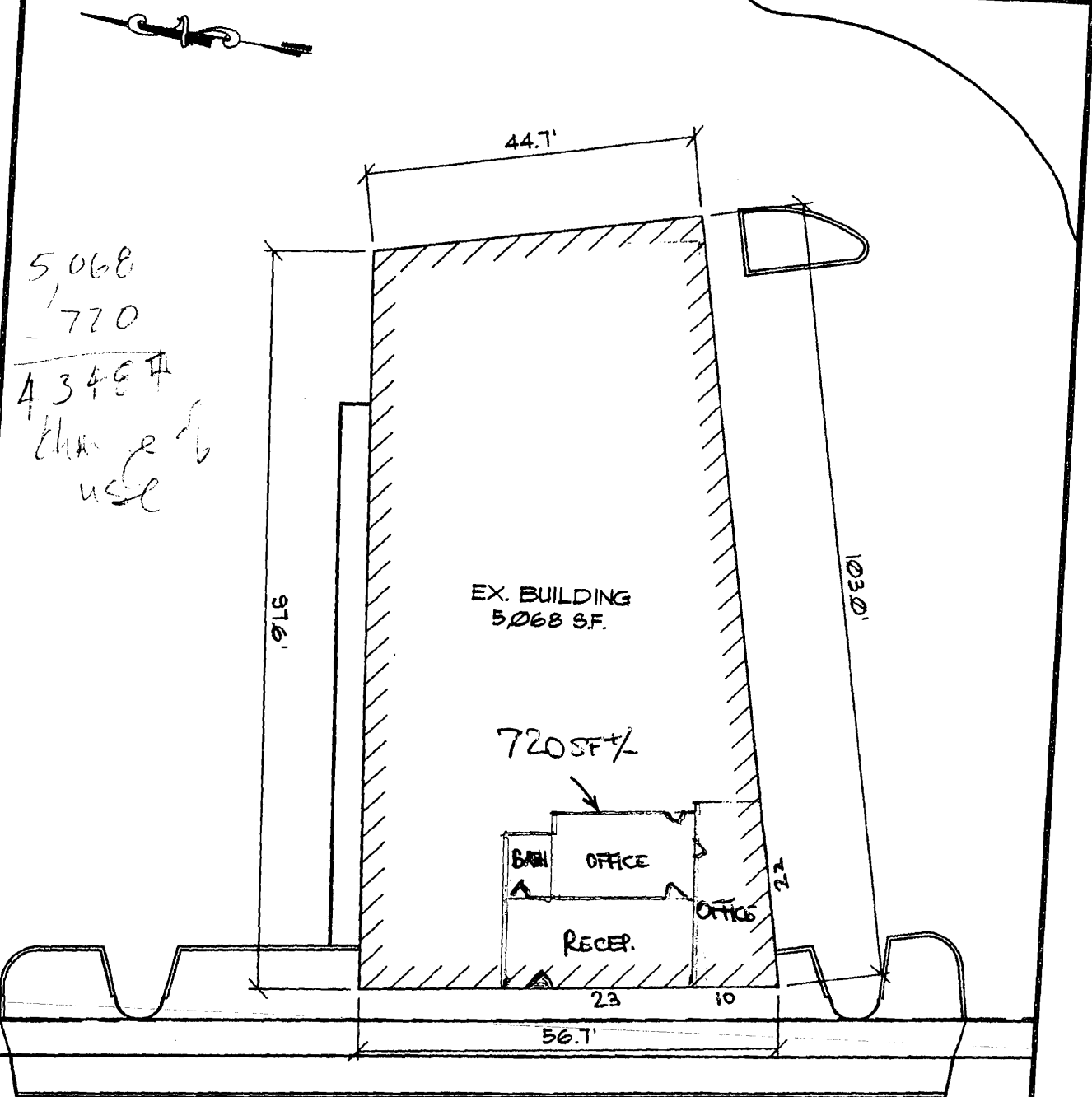
CONSULTING ENGINEERS

107 WASHINGTON AVE.  
PORTLAND, MAINE

SCALE: 1"=20'  
DATE: MAY 31, 2007  
DESG BY: MRB  
PROJECT: 02181

01

FORMER LAYOUT - 36's GARAGE



WASHINGTON AVENUE

DEPT. OF BUILDING INSPECTION  
CITY OF PORTLAND, ME

JUN - 4 2007

RECEIVED

**BUILDING DIMENSIONS**

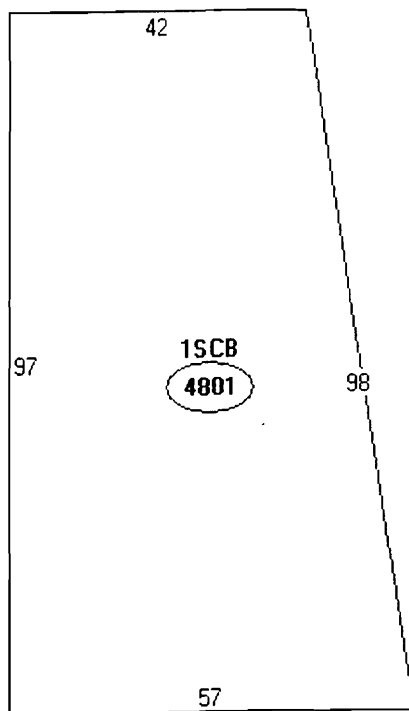
107 WASHINGTON AVE.  
PORTLAND, MAINE

PINKHAM & GREER

SCALE: 1"=20'  
DATE: MAY 31, 2007  
DESIGNED BY: MRB  
PROJECT: 02181

CONSULTING ENGINEERS

01



Descriptor/Area

A: 1SCB  
4801 sqft





*Strengthening a Remarkable City, Building a Community for Life • www.portlandmaine.gov*

*Lee Urban- Director of Planning and Development  
Marge Schmuckal, Zoning Administrator*

June 18, 2007

A & M Partners, Inc.  
120 Exchange Street  
Portland, ME 04101  
Attn: Lou Wood

RE: 105-107 Washington Avenue – 012-P-018 – B2b Zone – application #07-0572

Dear Lou Wood,

As you know, this office is in receipt of your permit application to add government offices at the above location. I am denying your application because governmental buildings and uses are not expressly listed in the B2b zone in which this property is located. Section 14-184 states, "Uses not enumerated in sections 14-182 and 14-183 as either permitted uses or conditional uses are prohibited". The proposed use is a State government use and is therefore not permitted within the B2b zone.

You have the right to appeal my decision concerning use. If you wish to exercise your right to appeal, you have 30 days from the date of this letter in which to appeal. If you should fail to do so, my decision is binding and not subject to appeal. Please contact this office for the necessary paperwork that is required to file an appeal.

Very truly yours,

Marge Schmuckal  
Zoning Administrator

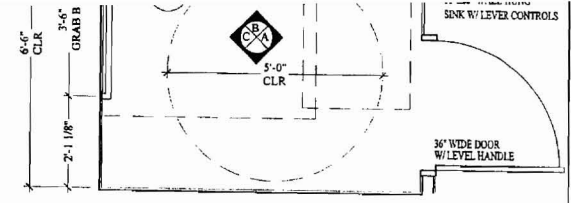
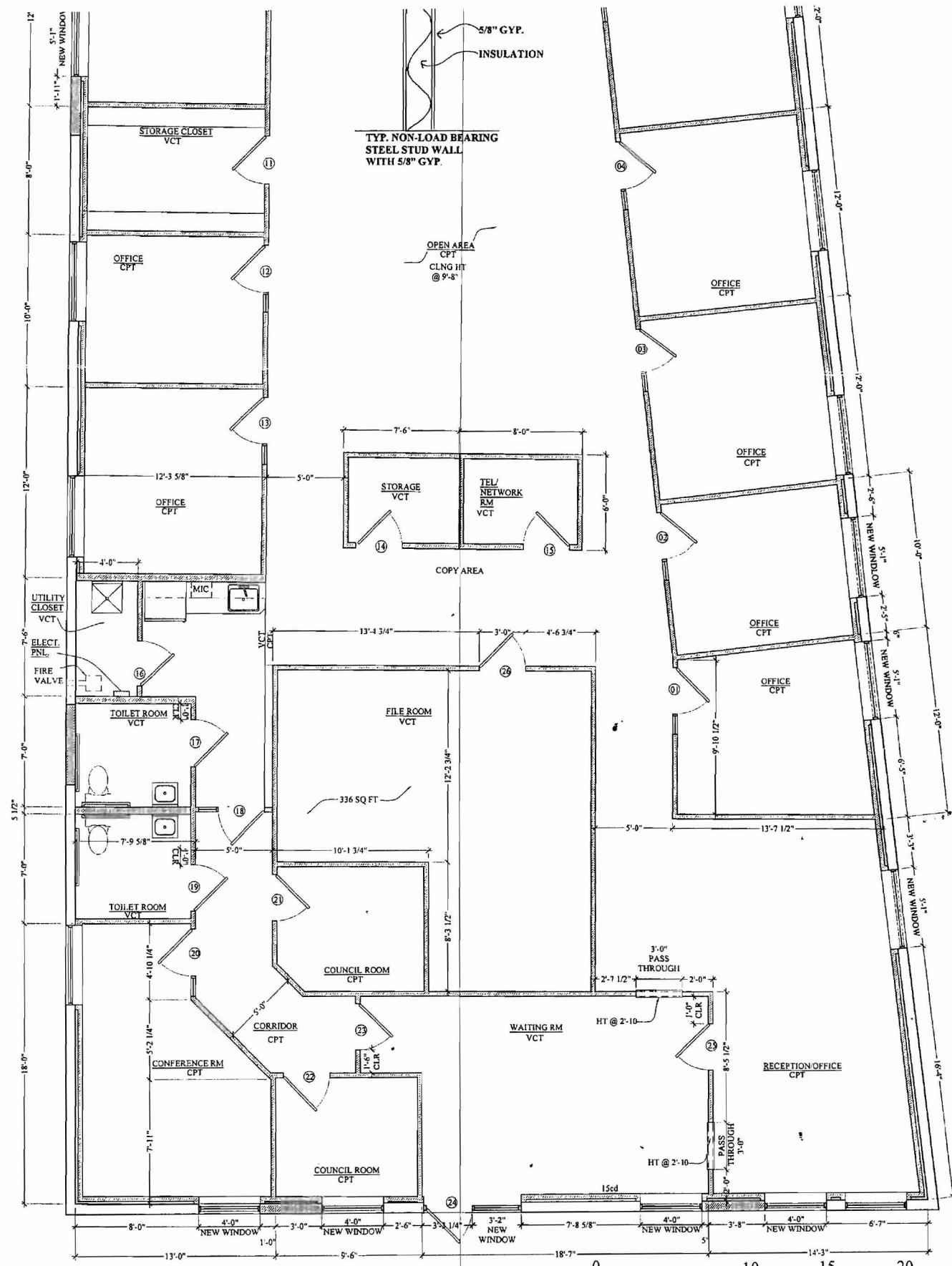
Cc: Corporation Counsel  
File

**From:** Marge Schmuckal  
**To:** ALEX JAEGERMAN; Cheryl Leeman; Joe Gray; Lee Urban  
**Date:** 9/10/2007 10:02:28 AM  
**Subject:** 105-107 Washington AVE appeal

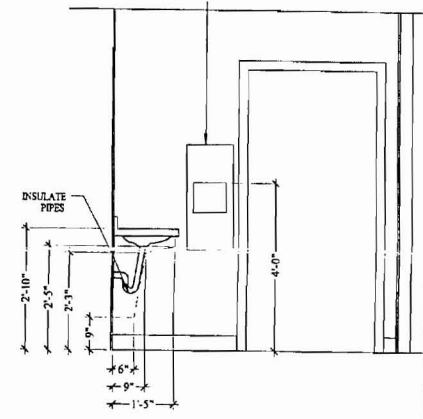
At the end of last week, I was notified by the Legal Department that Mike Scarks has appealed the ZBA denial of his interpretation appeal to allow the parole offices to Superior Court.

I will keep every one in the loop when I know more.

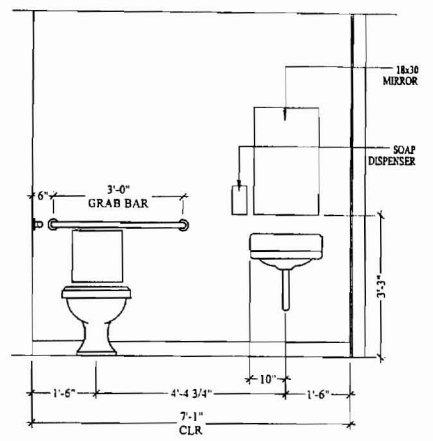
Marge Schmuckal



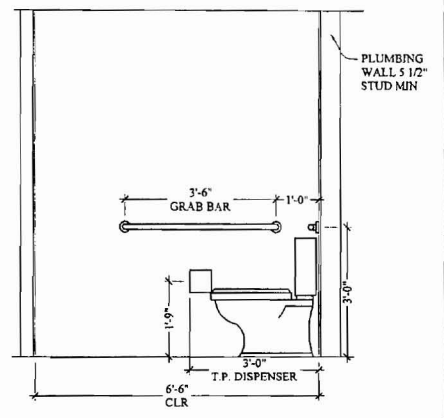
2/H.C. TOILET PLAN TYP.  
SCALE: 1" = 1'-0"



A/H.C. TOILET ELEVATION TYP.  
SCALE: 1" = 1'-0"



B/H.C. TOILET ELEVATION TYP.  
SCALE: 1" = 1'-0"



C/H.C. TOILET ELEVATION TYP.  
SCALE: 1" = 1'-0"

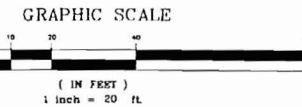
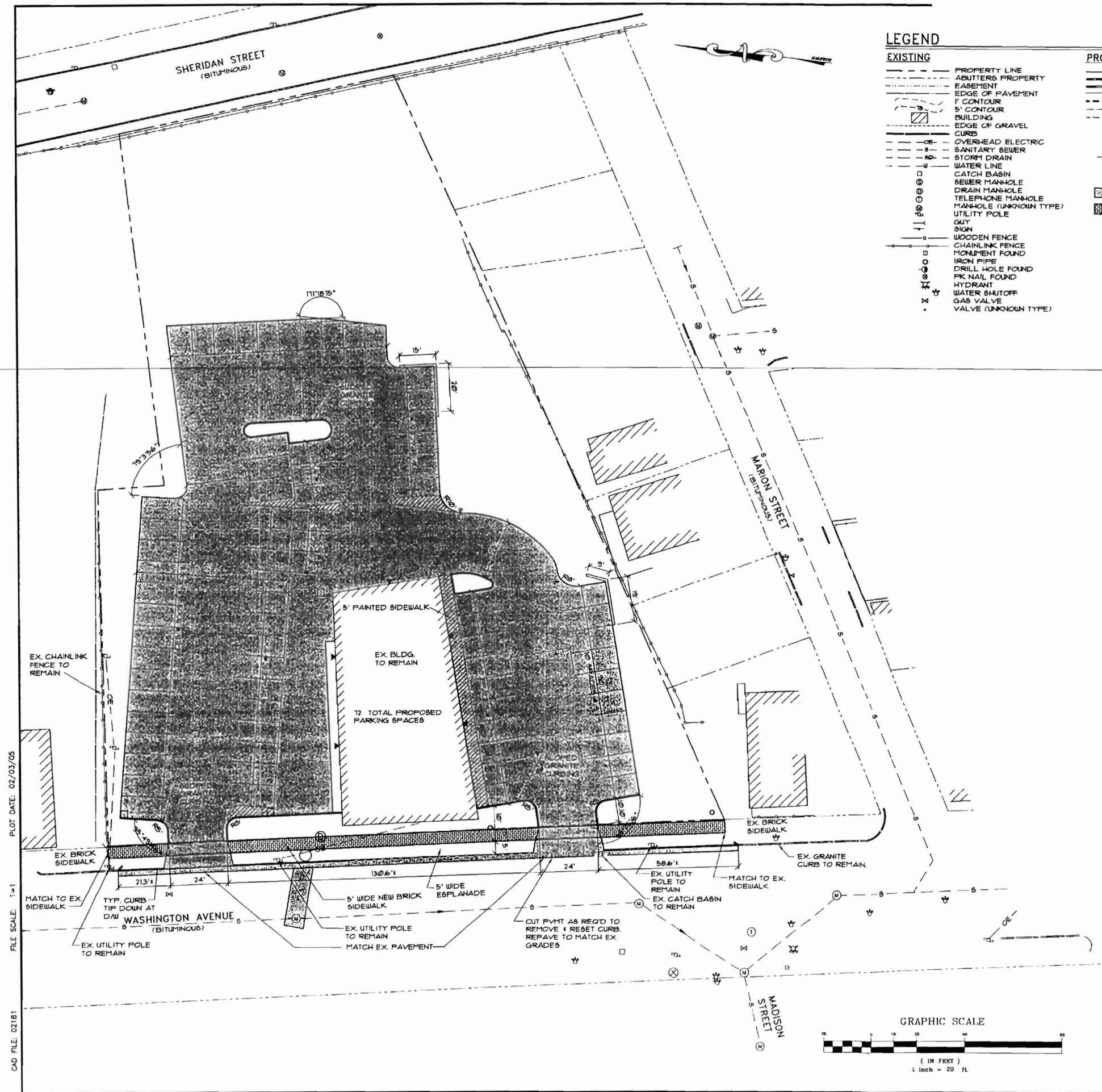


1/ PLAN  
SCALE: 1" = 1'-0"

<b>A-1</b>	<b>PROPOSED</b>	Date 14 FEB, 2007	Scale AS NOTED	Project:	<b>ARCHETYPE, P.A. ARCHITECTS</b> 48 Union Wharf Portland, Maine 04101 (207) 772-6022 Fax (207) 772-4056	OWNER: A&M PARTNERS LLC 120 EXCHANGE STREET PORTLAND, ME 04101
	<b>FLOOR PLAN</b>	Revisions:		107 WASHINGTON STREET PORTLAND, MAINE		

### LEGEND

EXISTING	PROPOSED
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PLOT DATE: 02/03/05  
 FILE SCALE: 1"=1'  
 CAD FILE: 02181