

**City of Portland, Maine
City Council Agenda Request Form**

TO: Sonia Bean, Senior Administrative Assistant
Danielle West-Chuhta, Corporation Counsel

FROM: Alexander Jaegerman, Planning Division Director

DATE:

1) Council meeting at which action is requested:

1st reading: does not need a first reading

Final action: February 24, 2014

2) Can action be taken at a later date: X YES NO
If not, why not: _____.

3) This item is sponsored by: The Department of Planning and Urban Development

(If the item is sponsored by a Council Committee include the date the committee met and the outcome of the vote.)

If a memorandum addresses the following issues you may attach and reference the memorandum but please highlight it so staff can easily answer I-V.

I. SUMMARY OF ISSUE

This request is for the City to grant a license to EMT, LLC, the owner of 118 Congress Street, to allow for the approved development of the project known as “118 on Munjoy Hill” condominium (2 commercial units and 12 residential units). The license would allow for decks and bays to project over the Right of Way. Approval to minor variations in materials (from the *City’s Sidewalk Replacement Material Policy*) is also requested.

II. REASON FOR SUBMISSION (What issue/problem will this address?)

See above.

III. INTENDED RESULT (How does it resolve the issue/problem?)

The approval of the license agreement and authorization of the City Manager to grant the license on the City’s behalf for the projecting bays. The approval of the small areas of granite and brick materials in the ROW that vary from the *Sidewalk Material Replacement Policy*, subject to those substitutions being maintained by the owner or Condominium Association.

IV. FINANCIAL IMPACT

There is no financial impact on the City.

V. STAFF ANALYSIS & RECOMMENDATION

The Corporation Counsel's office has reviewed the license agreement and approves it as to form. DPS support the waiver for the materials.

See City Council Report attached.

Attachments:

- Orders for Overhang License
- Order for sidewalk replacement materials waiver;
- License Agreement with Exhibits A and B;
- City Council Report;
- Communication from the Planning Board

MICHAEL F. BRENNAN (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (2)
EDWARD J. SUSLOVIC (3)
CHERYL A. LEEMAN (4)

CITY OF PORTLAND
IN THE CITY COUNCIL

JOHN R. COYNE (5)
JILL C. DUSON (A/L)
JON HINCK (A/L)
NICHOLAS M. MAVODONES (A/L)

ORDER GRANTING LICENSE TO EMT, LLC

ORDERED that a license agreement from the City to EMT, LLC is hereby accepted in substantially the form attached hereto as Attachment 1.

LICENSE AGREEMENT

This License Agreement (“Agreement”) is entered into as of the ____ day of February, 2014, between the **CITY OF PORTLAND**, a Maine body corporate and politic, with a mailing address of City Hall, 389 Congress Street, Portland, Maine 04101 (the “City” or “Licensor”), and **EMT, LLC**, a Maine limited liability company, with a place of business in Portland, Maine and mailing address of 118 Congress Street, Portland, Maine 04101, its successors and assigns (hereinafter the “Licensee”), who hereby agree as follows:

FOR VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, a revocable license is hereby granted to Licensee to occupy portions of land and portions of airspace above land owned by the City and adjacent to property of Licensee located at 118 Congress Street, described in a deed to Licensee recorded in the Cumberland County Registry of Deeds in Book 14136, Page 274 (“Licensee’s Property”), for the purpose of permitting the encroachment of footings, balconies, decks, bays and/or overhangs over the City property to be located according to, and used as described in, Exhibit A attached hereto and made a part hereof (collectively the “Licensed Areas”), together with the right from time to time to bring upon the Licensed Areas and areas adjacent thereto workers, materials and machinery necessary for the use and enjoyment of the License granted herein. Occupancy of the Licensed Areas is subject to the following conditions:

1. All work performed upon and use of the Licensed Areas for the purposes set forth herein shall be at Licensee’s sole cost and expense (unless otherwise agreed in writing), the parties acknowledging that there may be temporary interruptions in enjoyment of the City’s property adjacent to the Licensed Areas related to the conduct of any work related to this License. Licensee agrees at its sole expense to restore any portion of the Licensed Areas and adjacent City property damaged by work conducted by Licensee related to this License to substantially its condition prior to such work, or as close to that condition as is reasonably practicable. Licensee, its successors and assigns, shall defend, indemnify and hold the City, its officers, agents, and employees harmless from any and all claims, including but not limited to claims for damage to City property and reasonable attorney’s fees, which arise out of Licensee’s use, or the use of others, of the City’s property as described above.

2. Licensee shall procure and maintain liability insurance in an amount of at least Four Hundred Thousand Dollars (\$400,000) combined single limit (or the amount stated in the Maine Tort Claims Act as the same may be amended from time to time), covering claims for bodily injury, death and property damage and shall either name the City of Portland as an additional insured with respect to such coverage or shall obtain a contractual liability endorsement covering the obligations of Licensee under the terms of this license. Licensee shall provide City with evidence of such insurance coverage and shall obtain an endorsement providing City with no less than ten (10) days notice prior to non-renewal or cancellation thereof. Such notice shall be sent to City of Portland, Corporation Counsel, 389 Congress Street, Portland, ME 04101. Failure of Licensee to procure or maintain such insurance coverage shall be an Event of Revocation as set forth in Section 4 below.

3. This license is assignable to any subsequent owners of the property and/or building located on the land described on the site plan of 118 on Munjoy Hill approved by the Portland Planning Board on January 28, 2014 located at 118 Congress Street, Portland, Maine, to be recorded herewith in the Cumberland County Registry of Deeds (the "Site Plan").

4. Subject to the provisions of Sections 5 and 6 hereof, this Agreement may be revoked six (6) months after receipt by the Licensee of written notice that an Event of Revocation has occurred, identifying such Event of Revocation, provided that such Event of Revocation is not cured within six (6) months after receipt of such notice by Licensee except as set forth in clause 3 below. "Event of Revocation" shall mean: 1) the building shown on the Site Plan fails to be constructed substantially in accordance with the Site Plan or any amendments thereto; 2) the building as shown on the Site Plan is destroyed, removed or otherwise thereafter ceases to exist on Licensee's Property and construction to rebuild said building has not begun within twelve (12) months of said destruction or removal, or 3) failure to maintain insurance as required under Section 2 above, and such failure is not remedied within thirty (30) days after written notice thereof. City acknowledges that Licensee may amend this Agreement, upon the written approval of the City, for the purpose of correcting and/or revising Exhibit A, to more accurately show the encroachments described above that are being licensed under this Agreement.

5. Any notice of an Event of Revocation delivered pursuant to Section 4 of this Agreement must be sent by certified mail, return receipt requested to the Licensee at the address for Licensee set forth above, or at such other address as the Licensee may provide to the City in writing from time to time. Copies of any notices sent to Licensee shall also be sent to: Thomas B. Federle, Esq., 254 Commercial Street, Portland, Maine 04101.

6. Notwithstanding any other provision herein, in the event that a notice of an Event of Revocation is delivered pursuant to Section 4 hereof, any mortgagee of Licensee's Property shall be entitled to cure the matter set forth in such notice within the time frames set forth in Section 4 hereof, and the City agrees to accept such performance by any such mortgagee of Licensee's obligations hereunder. In addition, the City agrees to accept any cure of any Event of Revocation by any of Licensee's members.

IN WITNESS WHEREOF, the City of Portland has caused this Revocable License to be executed by Mark H. Rees, its City Manager thereunto duly authorized, as of the day and year first written above.

[remainder of page left blank intentionally—signatures begin on next page]

CITY OF PORTLAND

By: _____
Mark H. Rees, its City Manager
thereunto duly authorized

STATE OF MAINE
CUMBERLAND, ss

February ____, 2014

PERSONALLY APPEARED the above-named Mark H. Rees, City Manager of the City of Portland as aforesaid, and acknowledged the foregoing instrument to be his free act and deed in his said capacity and the free act and deed of said City of Portland.

Before me,

Notary Public/Attorney at Law

Print name: _____
My commission expires: _____

Seen and Agreed to:

BY: EMT, LLC
Edward Theriault,
its Manager

Edward Theriault, Manager of EMT, LLC

EXHIBIT A
TO
LICENSE AGREEMENT
City of Portland to EMT, LLC

Licensed Areas

1. Footing easement in St. Lawrence Street

A certain easement situated along the northeasterly sideline of St. Lawrence Street in the City of Portland, County of Cumberland and State of Maine, bounded and described as follows:

Beginning at a point on the northeasterly sideline of St. Lawrence Street, which point is located N 37° 33' 00" W, as measured along St. Lawrence Street, 4.47 feet from the westernmost corner of the land now or formerly of Lawrence W. Gross (see Book 17303 Page 310) and the southernmost corner of the land now or formerly of EMT, LLC (Book 14136 Page 274, as shown on "Subdivision Recording Plat 118 on Munjoy Hill 118 Condominiums, LLC 118 Congress Street, Portland ME November 13, 2013 Pinkham & Greer Consulting Engineers" revised ;

Thence, S 52° 27' W over St. Lawrence Street 0.50 feet;

Thence, N 37° 33' W over St. Lawrence Street 4.2 feet;

Thence, N 52° 27' E over St. Lawrence Street 0.50 feet;

Thence, N 37° 33' W along St. Lawrence Street 12.8 feet;

Thence, S 52° 27' W over St. Lawrence Street 0.50 feet;

Thence, N 37° 33' W over St. Lawrence Street 4.2 feet;

Thence, N 52° 27' E over St. Lawrence Street 0.50 feet;

Thence, N 37° 33' W along St. Lawrence Street 19.8 feet;

Thence, S 52° 27' W over St. Lawrence Street 0.50 feet;

Thence, N 37° 33' W over St. Lawrence Street 4.2 feet;

Thence, N 52° 27' E over St. Lawrence Street 0.50 feet;

Thence, N 37° 33' W along St. Lawrence Street 7.67 feet;

Thence, S 52° 27' W over St. Lawrence Street 0.50 feet;
Thence, N 37° 33' W over St. Lawrence Street 4.2 feet;
Thence, N 52° 27' E over St. Lawrence Street 0.50 feet;
Thence, N 37° 33' W along St. Lawrence Street 3.49 feet;
Thence, S 52° 27' W over St. Lawrence Street 0.50 feet;
Thence, N 37° 33' W over St. Lawrence Street 4.2 feet;
Thence, N 52° 27' E over St. Lawrence Street 0.50 feet;
Thence, N 37° 33' W along St. Lawrence Street 12.05 feet;
Thence, S 52° 27' W over St. Lawrence Street 0.50 feet;
Thence, N 37° 33' W over St. Lawrence Street 4.2 feet;
Thence, N 52° 27' E over St. Lawrence Street 0.50 feet;
Thence, S 37° 33' E along St. Lawrence Street 81.01 feet to the point of beginning.

Said easement contains 13 square feet and is for the footings for the proposed building shown on the above mentioned plan.

2. Overhang easement in Congress Street

A certain easement situated along the southeasterly sideline of Congress Street in the City of Portland, County of Cumberland and State of Maine, bounded and described as follows:

Beginning at a point on the southeasterly sideline of Congress Street, which point is located N 57° 40' 00" E, as measured along Congress Street, 0.2 feet from the the point of intersection of the southeasterly sideline of Congress Street and the northeasterly sideline of St. Lawrence Street, as shown on "Subdivision Recording Plat 118 on Munjoy Hill 118 Condominiums, LLC 118 Congress Street, Portland ME November 13, 2013 Pinkham & Greer Consulting Engineers" revised ;

Thence, N 32° 20' W over Congress Street 1.4 feet;
Thence, N 57° 40' E over Congress Street 23.3 feet;
Thence, S 32° 20' E over Congress Street 1.4 feet;

Thence, N 57° 40' E along Congress Street 24.0 feet;
Thence, N 32° 20' W over Congress Street 1.4 feet;
Thence, N 57° 40' E over Congress Street 29.1 feet;
Thence, S 32° 20' E over Congress Street 1.4 feet;
Thence, N 57° 40' E along Congress Street 14.1 feet;
Thence, N 32° 20' W over Congress Street 1.4 feet;
Thence, N 57° 40' E over Congress Street 21.7 feet;
Thence, S 32° 20' E over Congress Street 1.4 feet;
Thence, S 57° 40' W along Congress Street 112.2 feet to the point of beginning.

Said easement contains 104 square feet and is for the overhangs for the proposed building shown on the above mentioned plan.

3. Overhang easement in St. Lawrence Street

A certain easement situated along the northeasterly sideline of St. Lawrence Street in the City of Portland, County of Cumberland and State of Maine, bounded and described as follows:

Beginning at a point on the northeasterly sideline of St. Lawrence Street, which point is located N 37° 33' 00" W, as measured along St. Lawrence Street, 15.1 feet from the westernmost corner of the land now or formerly of Lawrence W. Gross (see Book 17303 Page 310) and the southernmost corner of the land now or formerly of EMT, LLC (Book 14136 Page 274, as shown on "Subdivision Recording Plat 118 on Munjoy Hill 118 Condominiums, LLC 118 Congress Street, Portland ME November 13, 2013 Pinkham & Greer Consulting Engineers" revised ;

Thence, S 52° 27' W over St. Lawrence Street 2.60 feet;
Thence, N 37° 33' W over St. Lawrence Street 9.9 feet;
Thence, N 52° 27' E over St. Lawrence Street 2.60 feet;
Thence, S 37° 33' E along St. Lawrence Street 9.9 feet to the point of beginning.

Said easement contains 26 square feet and is for the overhang for the proposed building shown on the above mentioned plan.

Encroachments 8 feet or more above grade per IBC 2009 Sec. 3202.3

Awnings, canopies, marquees and signs. Awnings, canopies, marquees and signs with less than 15 feet clearance above the sidewalk shall not extend into or occupy more than two-thirds the width of the sidewalk measured from the building.

Our Congress Street sidewalk is 13'-3/4" (156.75") wide, two-thirds of the width of the sidewalk is 8'-8 1/2" (104.5"). Our canopy extends out 1'-4" and the two blade signs extend out 3'-0".

Windows, balconies, architectural features and mechanical equipment. Where the vertical clearance to such is more than 8' the following applies:

1 inch of encroachment is permitted for each additional 1 inch of clearance above 8 feet. The maximum encroachment shall be 4 feet.

On Congress Street the vertical clearance is 10'-4", which is 2'-4" above 8 feet. Our permitted encroachment is 2'-4". Our balconies/ building bumps out are 1'-4".

On St. Lawrence Street the vertical clearance is 12'-8", which is 4'-8" above 8 feet. Our permitted encroachment is 4'-0" (max. allowed). Our balcony/ building bump out is 2'-6".

BUILDING OVERHANG (SHADED)

BUILDING OVERHANG (SHADED)

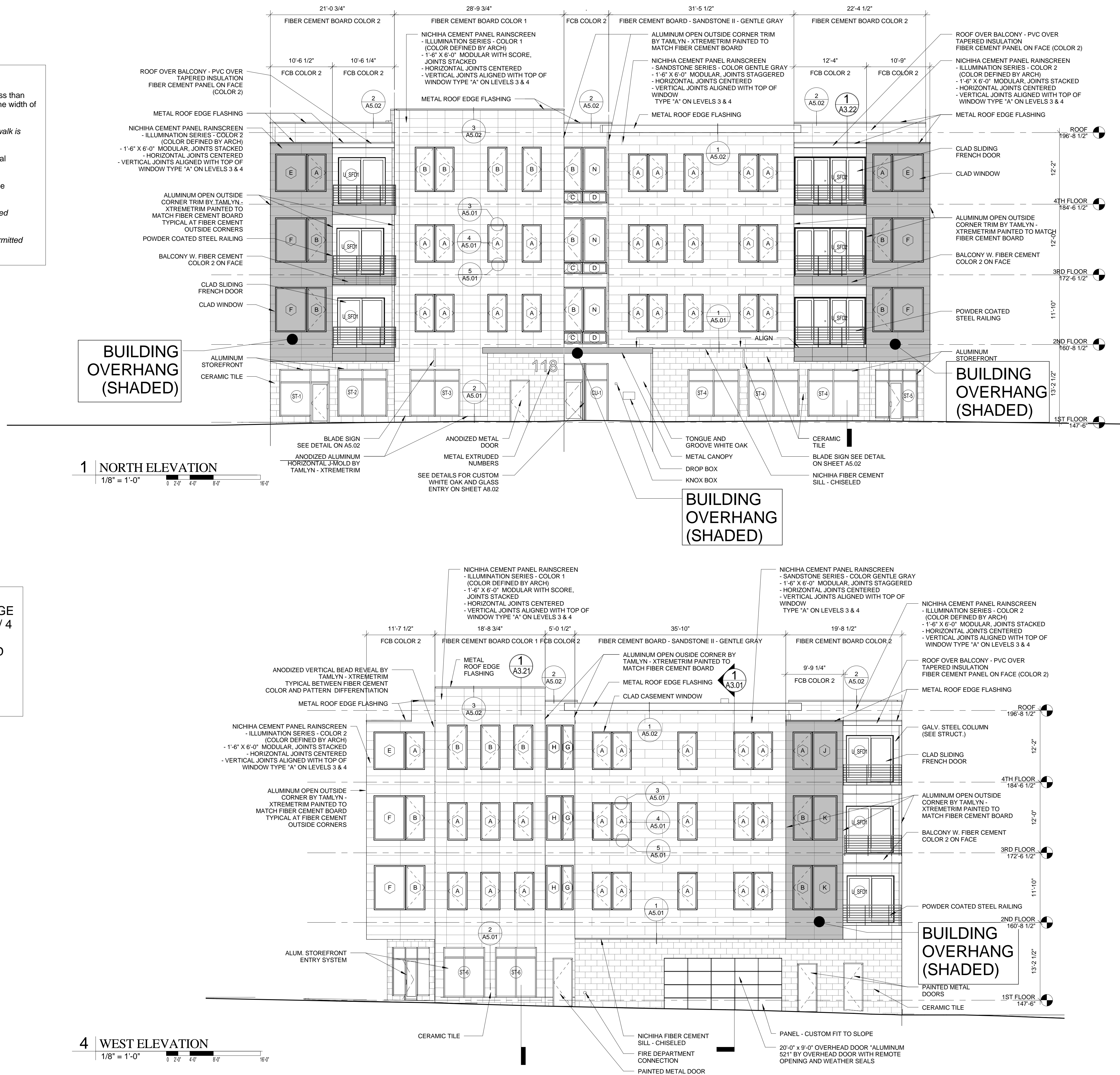
BUILDING OVERHANG (SHADED)

GENERAL NOTES:

- BUILDING HEIGHT BY DEFINITION: 4 CORNER AVERAGE GRADE - 147.15' + 147.25' + 145.00' + 147.45' = 588.5' / 4 = 146.71' AVERAGE 146' - 8 1/2" + 50' = 196' - 8 1/2" ALLOWABLE BUILDING HEIGHT (HEIGHT MEASURED TO TOP OF ROOF TRUSS)**
- ROOF PENTHOUSES NOT SHOWN IN 2D ELEVATIONS**
- RECESSED ELEVATIONS NOT SHOWN - SEE PLAN FOR WINDOW LOCATIONS**

4 WEST ELEVATION

1/8" = 1'-0" 0 2' 4' 8' 16'



Prepared For:

118 on Munjoy Hill, LLC

118 CONGRESS STREET
PORTLAND, ME 04101

Consultant:

ARCHETYPE
architects
48 Union Wharf Portland, Maine 04101
(207) 772-6022 Fax (207) 772-4056

Architect:

118 ON MUNJOY HILL

118 CONGRESS STREET
PORTLAND, MAINE

Project:

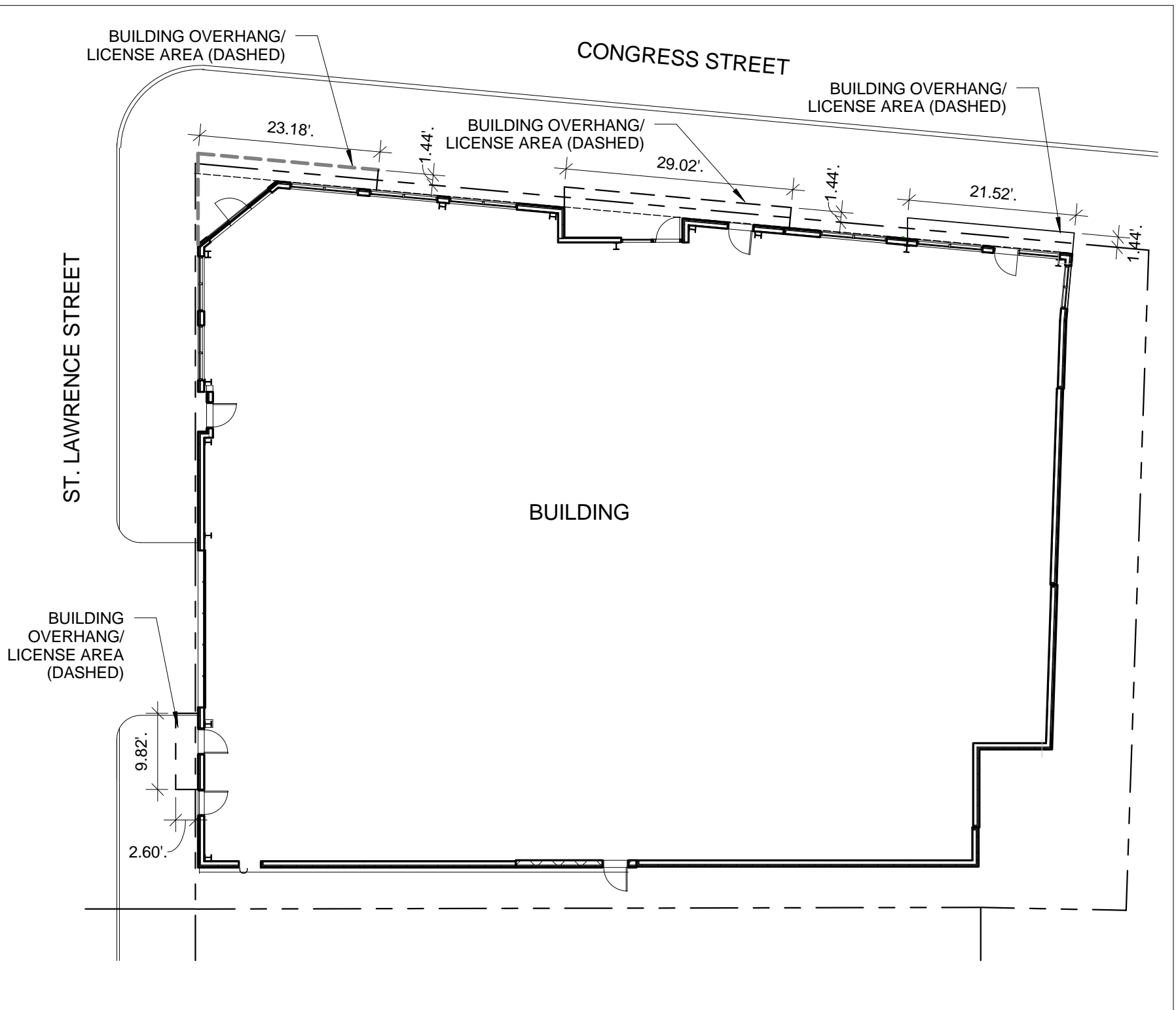
Revisions:

Scale: 1/8" = 1'-0"

Date: 10 FEB 2014

BUILDING ELEVATIONS

A2.01



ARCHITECTYPE Architects 48 Union Wharf Portland, Maine 04101 (207) 772-6022 Fax (207) 772-4056		
Architect:	Date: 10 FEB 2014	Scale: 1/16" = 1'-0"
Project: 118 ON MUNJOY HILL	LICENSE AREA EXHIBIT A	
118 CONGRESS STREET PORTLAND, MAINE		
<h1>EX.A</h1>		



Planning & Urban Development Department

To: Mayor Brennan and Members of the Portland City Council

From: Stuart G. O'Brien, Chair, Portland Planning Board

Subject: Licenses for Building Sidewalk Projections

Date: February 3, 2014

Dear Mayor Brennan and Members of the Portland City Council:

On January 28, 2014, the Planning Board approved the site plan and subdivision for the mixed retail and residential development proposed by the NewHeight Group (Chip Newell and Susan Morris) at 118 Congress Street. This project as proposed includes several box bays and open decks which protrude over the public sidewalk on both Congress and St. Lawrence Streets, and which will require license agreements from the City Council to go forward. (The applicant for the license is the current property owner, Ed Theriault of EMT LLC.) The Planning Board discussed this aspect of the project at length, ultimately approving the development as proposed with the exception of the elimination of the open deck overhang on St. Lawrence Street. This matter will likely be coming to the City Council in February for approval of license agreements for the projecting building elements.

While this is not the first project to propose projections, the deck projections in particular were unusual, and the extent of the projections generated concerns from City staff from Planning and Public Services. The Planning Board ultimately approved the plan with projections, largely on the basis of the following five factors:

1. The decks and bays are fully integrated into the overall building form so as to positive architectural relief through its mass/void articulation, combined with its fenestration rhythm, providing character that is desirable for meeting the urban design standards;
2. Pushing the building back to less than the proposed 5' rear setback to keep the projections on private property would have resulted in a loss of 40% of the rear fenestration to meet applicable fire code;
3. Pulling the building back from the front property line would compress the retail depth to less than the required 20' average depth required under the recently enacted zoning provision;
4. Compressing the building internally would have reduced the parking drive aisle to less than the required City standard; and
5. The applicant demonstrated that such projections are appropriate to the context of the immediate neighborhood

While the Board agreed that these factors support the proposed projecting building elements in this case, the question of the value of this effective “air right” was the subject of further Board discussion. The Planning Board recommends that in cases where a license enables the creation of valuable real estate floor area, the City Council consider a policy of recouping that value in the issuance of such licenses. The Board did not condition this approval on such remuneration since that is not within our jurisdiction and authority. We did, however, vote 5 to 2 (Hall and Dean opposed) to send this letter to communicate The Board’s reasoning on approving this proposal with its overhanging projections, and to suggest that the City Council develop a fair compensation mechanism to recapture the value of the air rights that result from such licenses.

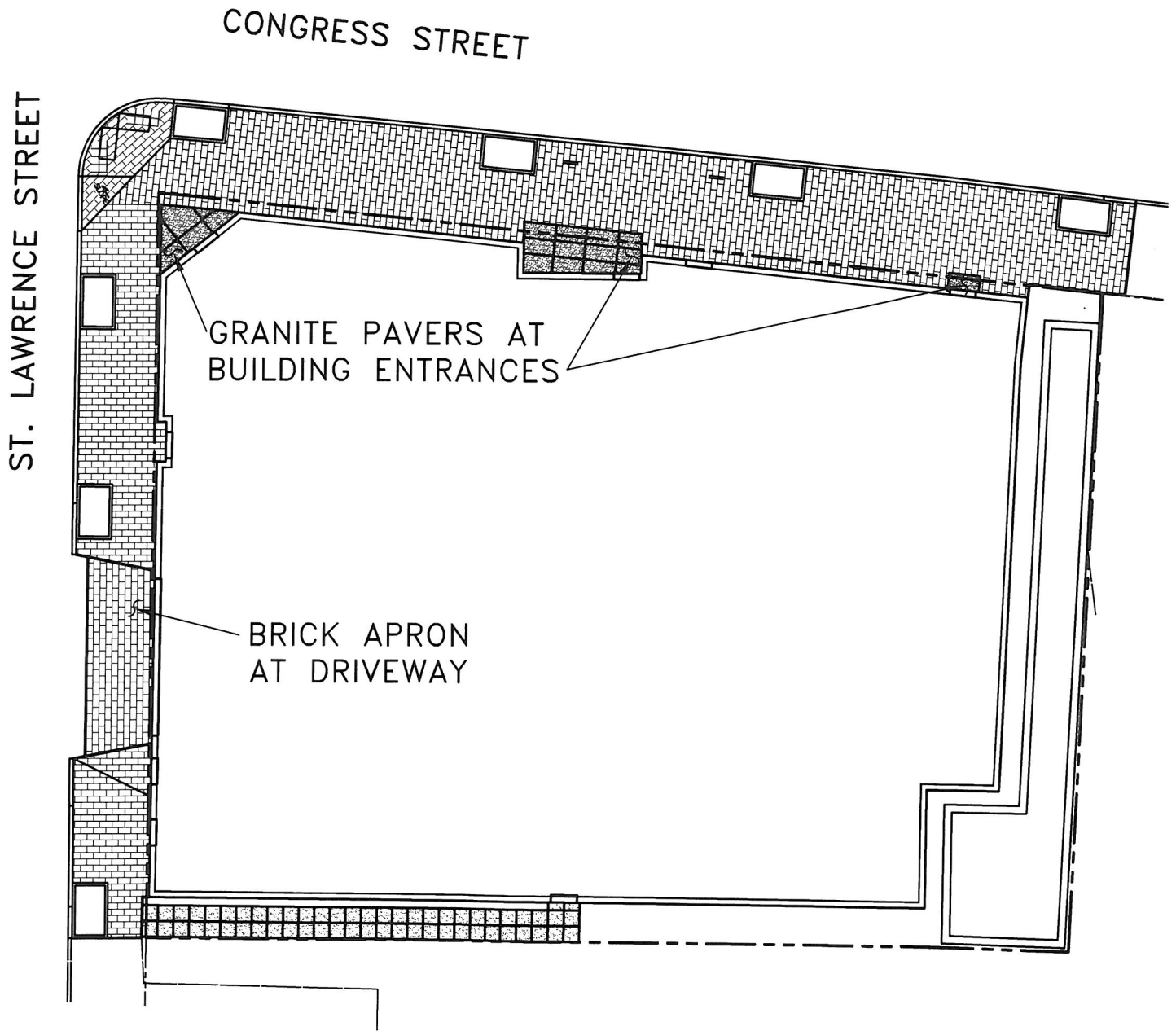
The Planning Board, in making this recommendation, does not intend that any new policy development should inhibit or delay the subject application by the NewHeight Group and EMT LLC in their business before the City Council in pursuing their license agreement.

Thank you for considering this matter.

Stuart G. O’Brien, Chair

CC: Mark Rees, City Manager
Jeff Levine, Director of Planning & Urban Development
Alex Jaegerman, Planning Division Director
Jennifer Thompson, Associate Corporation Counsel
Barbara Barhydt, Development Review Manager
Jean Fraser, Planner
NewHeight Group

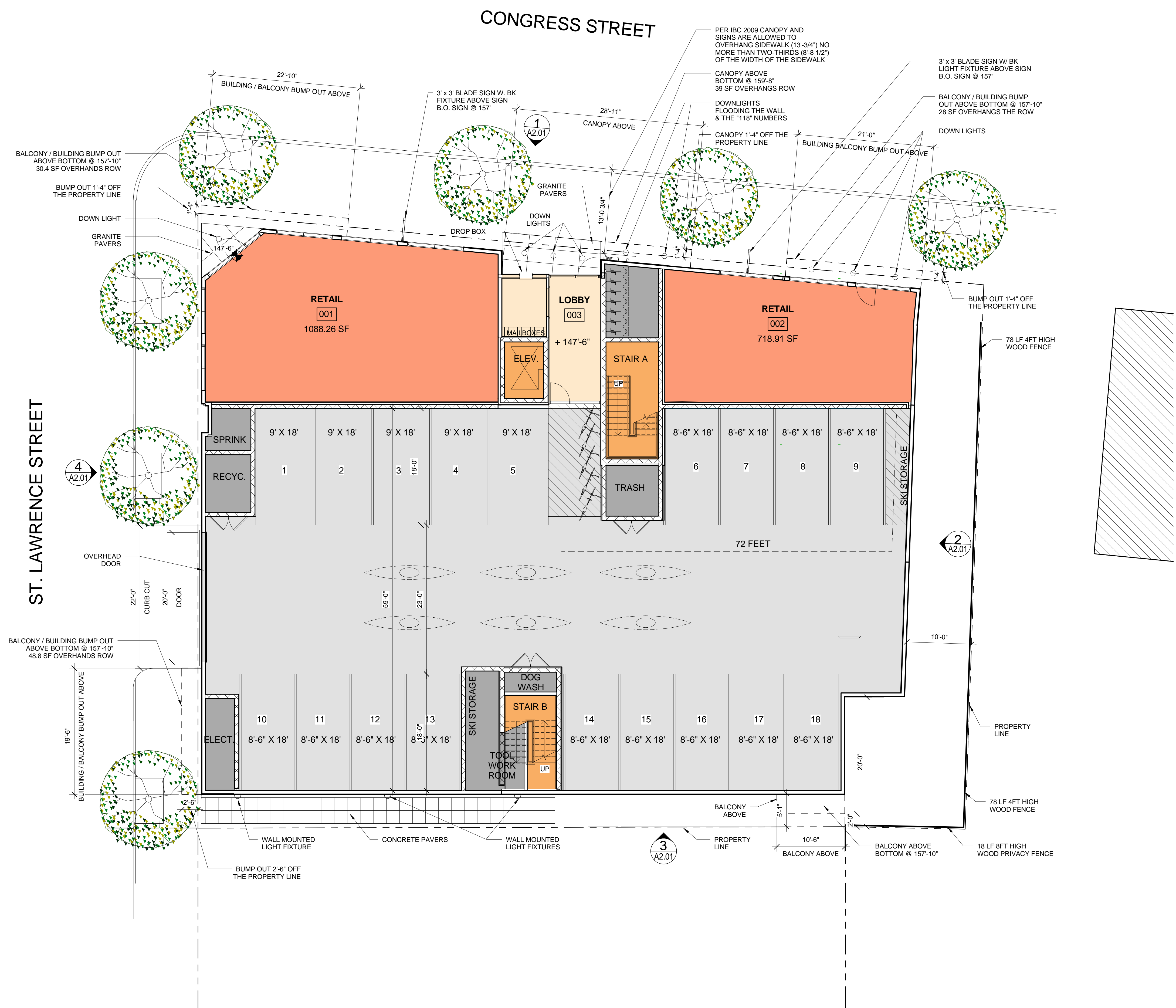
MATERIALS PLAN



118 on MUNJOY HILL
118 CONGRESS STREET, PORTLAND, ME

SCALE: 1"=20'

DATE: FEBRUARY 10, 2014



LEGEND:

BUILDING SECTION		SIM
WALL SECTION		SIM
SECTION DETAIL		SIM
PLAN DETAIL		SIM
WALL TYPE		
FLOOR TYPE		

NEW WALL - STUD & GYP. BD.	
NEW CMU WALL	
NEW MASONRY INFILL	
EXISTING CMU WALL	
EXISTING STUD WALL	
EXISTING MASONRY WALL	
DEMO AND REMOVE	

Prepared For:
118 on Munjoy Hill, LLC
 118 CONGRESS STREET
 PORTLAND, ME 04101

Consultant:
ARCHETYPE architects
 48 Union Wharf Portland, Maine 04101
 (207) 772-6022 Fax (207) 772-4056

Project:
118 ON MUNJOY HILL
 118 CONGRESS STREET
 PORTLAND, MAINE

Revisions:

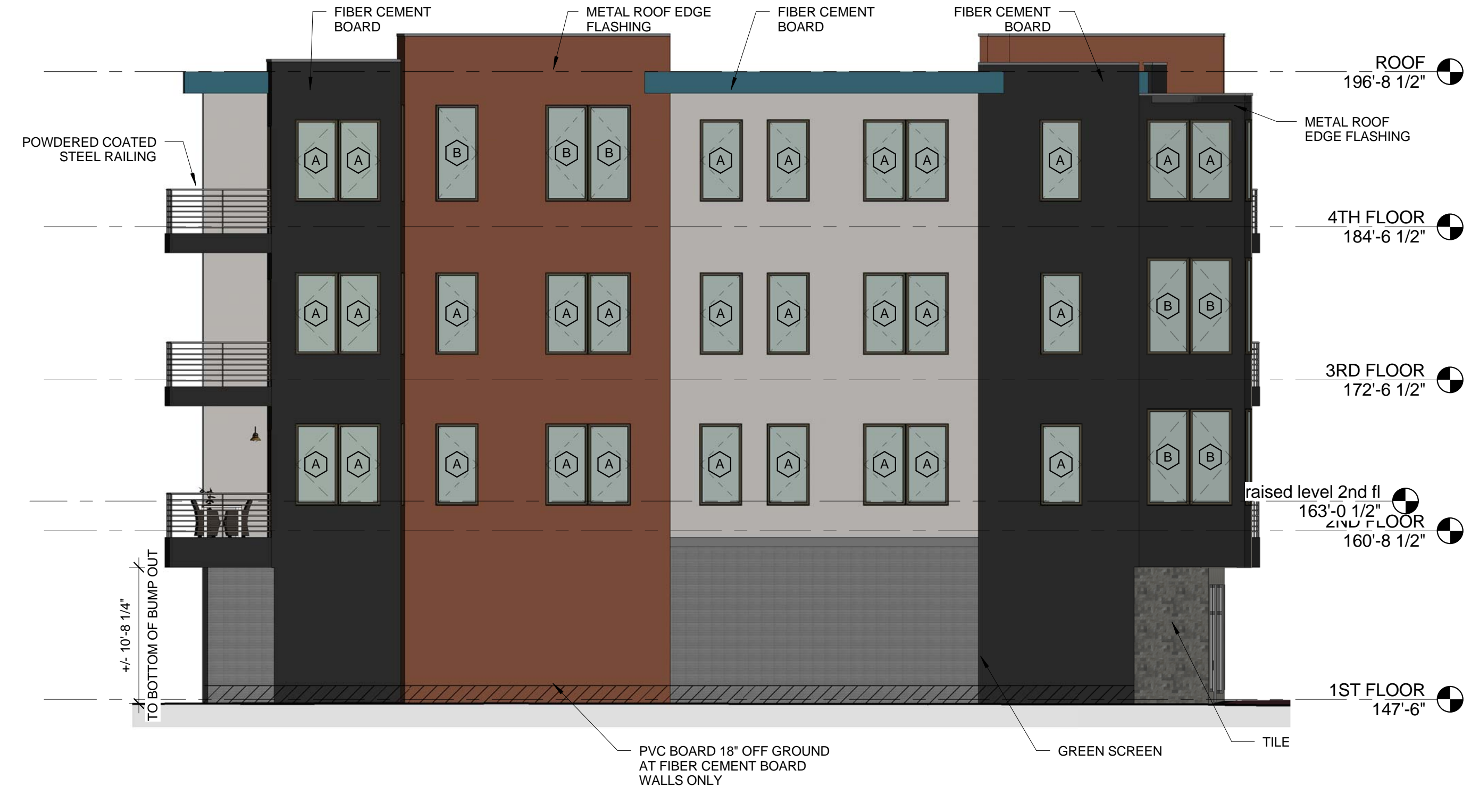
Date: DEC 27, 2013
 Scale: As indicated
GROUND FLOOR PLAN

1 | PARKING LEVEL PROJECT FOOTPRINT: 8,884 GSF
 1/8" = 1'-0"

A1.01



1 | NORTH ELEVATION
1/8" = 1'-0"



2 | EAST ELEVATION
1/8" = 1'-0"

Encroachments 8 feet or more above grade per IBC 2009 Sec. 3202.3

Awnings, canopies, marquees and signs. Awnings, canopies, marquees and signs with less than 15 feet clearance above the sidewalk shall not extend into or occupy more than two-thirds the width of the sidewalk measured from the building.

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GENERAL NOTES:

- BUILDING HEIGHT BY DEFINITION: 4 CORNER**
 AVERAGE GRADE - 147.15' + 147.25' + 145.00' + 147.45' / 4 = 146.71'
 AVERAGE 146' - 8 1/2" + 50' = 196' - 8 1/2"
 ALLOWABLE BUILDING HEIGHT (HEIGHT MEASURED TO TOP OF STEEL)
- ROOF PENTHOUSES NOT SHOWN IN 2D ELEVATIONS**



3 | SOUTH ELEVATION
1/8" = 1'-0"



4 | WEST ELEVATION
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118 CONGRESS STREET
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Project:
118 ON MUNJOY HILL
118 CONGRESS STREET
PORTLAND, MAINE

Revisions:
Date: **JAN 13, 2014**
Scale: **1/8" = 1'-0"**
BUILDING ELEVATIONS

A2.01



PERSPECTIVE C - LOOKING SOUTH EAST AT PROPOSED BUILDING



Planning & Urban Development Department

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From: Stuart G. O'Brien, Chair, Portland Planning Board

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The Planning Board, in making this recommendation, does not intend that any new policy development should inhibit or delay the subject application by the NewHeight Group and EMT LLC in their business before the City Council in pursuing their license agreement.

Thank you for considering this matter.

Stuart G. O’Brien, Chair

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NewHeight Group