

To the Planning Board (cc to Atty. Brunelle and the applicant),
Please see my responses to Attorney Brunelle's comments below.

Michael Behrendt

Durham Town Planner
8 Newmarket Road
Durham, NH 03824
(603) 868-8064

From: Suzanne Brunelle <SBrunelle@devinemillimet.com>
Sent: Wednesday, April 26, 2023 11:58 AM
To: Michael Behrendt <mbehrendt@ci.durham.nh.us>
Subject: RE: Main Street #74 - responses to Attorney Brunelle *

Michael: Thank you for your continued attention to this matter.

1. The plans as submitted cannot be approved with the Potential New Shared Easement plan attached (last plan provided). The abutter does not agree with this proposal and the same should be removed from the submittal package.

I believe the applicant provided this sheet showing an option for modifying the existing easement pursuant to the revised site plan but if the abutter does not want this sheet included in the approved plan set then it seems fine to me for it to be removed.

2. I have attached copies of the two (2) easements in question and the 2018 subdivision plan. A review of all will show that the proposed building being squared off on the new site plan encroaches into the easement area. By our estimates, its 10 to 14 feet at the rear of the property. If you look at the hatching on the 2018 subdivision plan on the developer's property, that is where the new proposed squared off building will be located and the property encompasses part of the easement area at the rear of the property for access by the abutter. The hatching indicates no parking in order for access per the terms of the easement.

I don't understand this comment. There are two easements granted to the owners of the abutting lot, one for passage along a strip of land between the two lots and one for access to the rear of the abutting lot. The proposed plan keeps the passage between the two lots open, along the same dimension as the existing pavement, according to the documentation provided by the applicant. The rear is being reconfigured pursuant to the redevelopment of the site. Access to the rear of the abutting lot is being preserved though the layout is different pursuant to the redevelopment. While the configuration of the rear access is changing, of

necessity with the redevelopment, the access appears to be comparable to, if not better than, the existing access. Regardless, the Planning Board does not have jurisdiction to determine compliance with private easements.

3. Finally, I attached our frontage analysis with regard to Ballard Street and the approval of the 2018 subdivision plan.

I do not believe that this assertion is valid. When the subject lot was subdivided from the larger lot that also contains the Aroma Joe's building, the remaining lot with the Aroma Joe's building was deemed to meet the requirement for having 50 feet of frontage on "a street right of way." My understanding is that Ballard Street was never discontinued so it remained as a street right of way (on paper only). The applicant for the 2-lot subdivision argued to the Planning Board that the Aroma Joe's lot therefore met the frontage requirement. It was a reasonable legal argument which the Planning Board accepted. Therefore, even though the Aroma Joe's lot does not have direct frontage on Main Street (other than the lower section which is 28.3 feet in length) it has frontage on Ballard Street, the paper street. Nothing regarding frontage is changing with this site plan. There is no actual street here within the Ballard Street right of way. The Town's small parking area is not a street. In removing the parking area and small driveway connecting with Main Street, the status of Ballard Street/the Ballard Street right of way is not changing in any fashion. It is and will remain a paper street.

- Related to this point, I should state the reasons, once again, that the Town staff strongly support removing this parking area, as follows:
- The parking area in front of the two lots is problematic. One must access the site from the rear from Pettee Brook Lane and drive along the strip between the two lots to reach the front parking spaces. This is very awkward and there is no easement to allow the public to use that private strip of land. I do not believe that many people know that this parking is available to the public unless they are specifically informed of it. Arguably, the use becomes somewhat "private."
- Related to the first reason, it is difficult to physically maneuver into these parking spaces. By removing the parking we will create a few on street parking spaces that are much more usable. The applicant is paying for this work and also for the installation of a loading zone on Main Street just before the 66 Maina Street parking lot. The applicant is doing this work in

exchange for the Town allowing them to use the Pettee Brook parking lot and a portion of the front park for construction.

- The Town will gain significant new park space extending the existing park at the corner of Pettee Brook Lane and Main Street.
- The current arrangement is at odds with best planning practice for a downtown. In a downtown, all parking should be located on street, behind buildings, or in garages. Parking lots located right on the street create unattractive dead space.

Thank you.

Suzanne Brunelle, Chair of the Real Estate Practice Group

Devine, Millimet & Branch, P.A.

111 Amherst Street

Manchester, NH 03101

p. 603-695-8570

f. 603-669-8547



EASEMENT DEED

NOW COMES Clark Properties, LLC, a New Hampshire Limited Liability Company with an address of 19 Dowling Drive, Middleton, New Hampshire, for consideration paid, grants to Town & Campus Inc., a New Hampshire Corporation with and address of 105 Perkins Road, Madbury, New Hampshire with Quitclaim Covenants, the following described easements:

An Easement to pass and repass for the purpose of restaurant related deliveries and trash removal and for the purposes of ingress and egress for the parking spaces at the back of the building at Tax Map 2, Lot 14-1 over the northeasterly paved portion of a certain tract of parcel of land in the Town of Durham, County of Strafford and State of New Hampshire owned by the Grantor known as Tax Map 2, Lot 14-1-1, for the benefit of a certain tract or parcel of land in the Town of Durham, County of Strafford and State of New Hampshire owned by the Grantees known as Tax Map 2, Lot 14-1. Grantee agrees that it shall only pass and repass over said easement and shall not park or otherwise impede or block the easement area in any way.

An Easement to pass and repass on the paved driveway currently existing on the north-south boundary of a certain tract of parcel of land in the Town of Durham, County of Strafford and State of New Hampshire owned by the Grantor known as Tax Map 2, Lot 14-1-1, for the benefit of a certain tract or parcel of land in the Town of Durham, County of Strafford and State of New Hampshire owned by the Grantees known as Tax Map 2, Lot 14-1. The parties shall share the cost of maintenance and repair of said driveway easement.

This instrument shall be binding upon, and inure to the benefit of Grantor and Grantees, and their respective heirs, successors and assigns and shall be covenants running with the land in perpetuity.

Meaning and intending to convey an easement over a portion of the premises conveyed to Grantor by deed recorded at the Strafford County Registry of Deeds at Book 4607, Page 835.

This is not homestead property of the Grantor.

This easement is subject to minimum transfer tax as no consideration has been paid.

WHEREFORE the Grantor has hereunto set his hand this 23rd day of October, 2018.

[Signature]
Witness

[Signature]
Douglas Clark, Manager,
Clark Properties, LLC

STATE OF NH
COUNTY OF Strafford

October 23, 2018

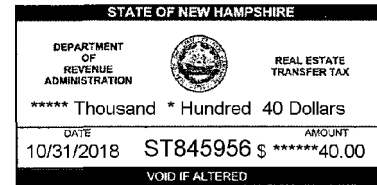
Personally appeared the above-named Douglas Clark , known to me, or satisfactorily proven, to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Before me,

[Signature]
Justice of the Peace – Notary Public
My Commission Expires:

SUSAN E. PREBLE
Notary Public, State of New Hampshire
My Commission Expires August 27, 2022





EASEMENT DEED

NOW COMES Town & Campus Inc., a New Hampshire Corporation with and address of 105 Perkins Road, Madbury, New Hampshire Clark Properties, LLC, a New Hampshire Limited Liability Company with an address of 19 Dowling Drive, Middleton, New Hampshire, for consideration paid, grants to Clark Properties, LLC, a New Hampshire Limited Liability Company with an address of 19 Dowling Drive, Middleton, New Hampshire, the following described easements:

An Easement to pass and repass on the paved driveway currently existing on the north-south boundary of a certain tract of parcel of land in the Town of Durham, County of Strafford and State of New Hampshire owned by the Grantor known as Tax Map 2, Lot 14-1, for the benefit of a certain tract or parcel of land in the Town of Durham, County of Strafford and State of New Hampshire owned by the Grantees known as Tax Map 2, Lot 14-1-1. The parties shall equally share the cost of maintenance and repair of said driveway easement.

This instrument shall be binding upon, and inure to the benefit of Grantor and Grantees, and their respective heirs, successors and assigns and shall be covenants running with the land in perpetuity.

Meaning and intending to convey an easement over a portion of the premises conveyed to Grantor by deed recorded at the Strafford County Registry of Deeds at Book 4607, Page 835.

This is not homestead property of the Grantor.

This easement is subject to minimum transfer tax as no consideration has been paid.

WHEREFORE the Grantor has hereunto set his hand this 16 day of October, 2018.

Barb P. Or
Witness

Jesse Gangwer
Jesse Gangwer, its President
Town & Campus, Inc.

STATE OF NH
COUNTY OF Strafford

October 16, 2018

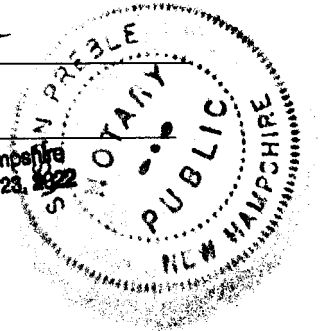
Personally appeared the above-named Jesse Gangwer, known to me, or satisfactorily proven, to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

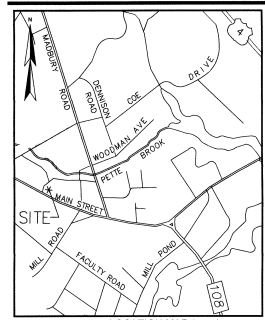
Before me,

Susan Preble

Justice of the Peace – Notary Public
My Commission Expires:

SUSAN E. PREBLE
Notary Public, State of New Hampshire
My Commission Expires August 23, 2022



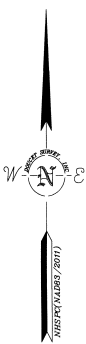


EASEMENT NOTES:

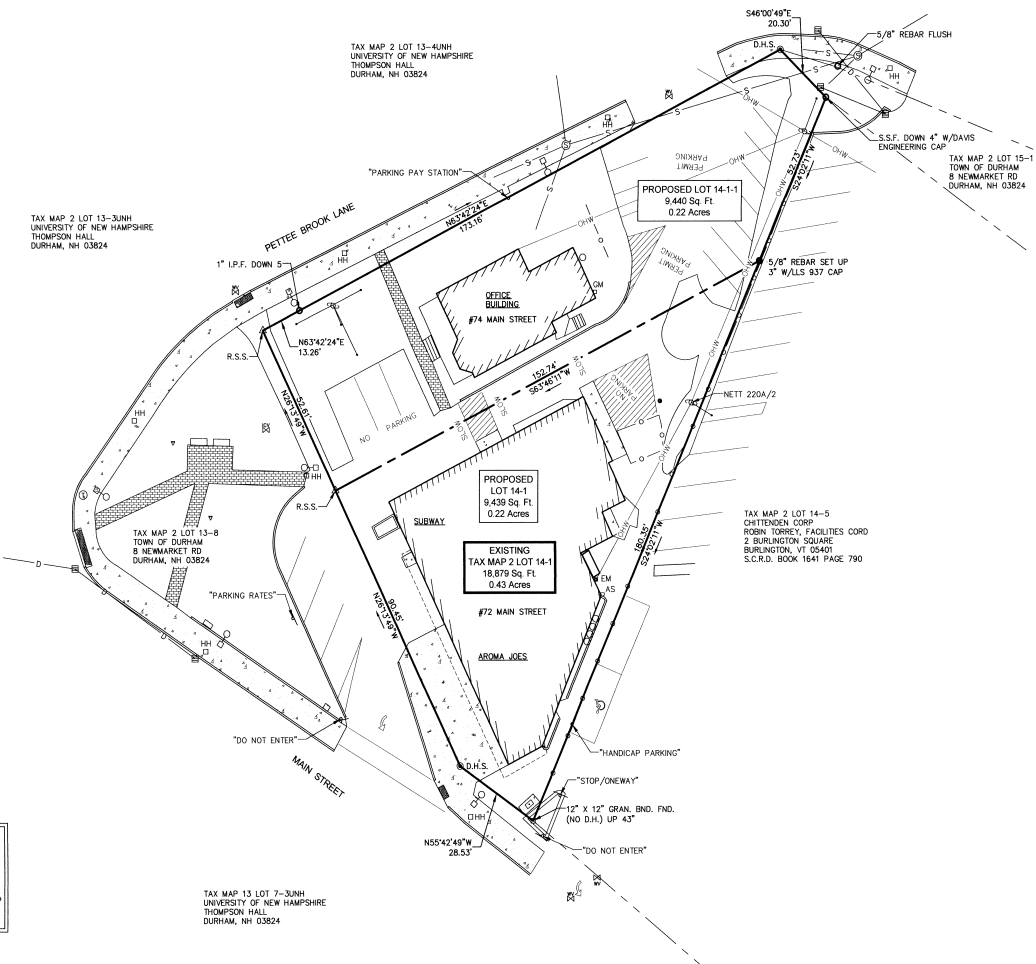
- TAX MAP 2, LOT 14-1 IS EITHER SUBJECT TO, BUT NOT LIMITED TO, THE FOLLOWING EASEMENTS/RIGHTS OF RECORD:
- RIGHTS GRANTED TO NET&T FROM TOWN & CAMPUS, INC. TO ABANDON UNDERGROUND CABLES ON THE PREMISES. SAID RIGHTS DO NOT ALLOW GRANTEE TO PLACE ADDITIONAL CABLE ON THE PREMISES. EASEMENT RECORDED IN S.C.R.D. BOOK 1061, PAGE 652.
 - NO RECORDED EASEMENT WAS FOUND FOR THE EXISTING POLES AND ANCHORS ON THE PREMISES.
 - EXISTING PARKING SPACES ARE SHOWN ON THIS PLAN BOTH AT THE FRONT OF THE NEW NORTHERLY LOT AND IN THE TOWN'S PROPERTY NEAR MAIN STREET. IT IS UNDERSTOOD THAT NO EASEMENT TO PROVIDE ACCESS TO THESE SPACES IS BEING ESTABLISHED AS PART OF THIS SUBDIVISION.
 - EASEMENTS ARE TO BE RECORDED HEREMETH TO DEFINE ITEMS INCLUDING BUT NOT LIMITED TO PARKING, ACCESS, UTILITIES AND MAINTENANCE.

REFERENCE PLANS:

- "BOUNDARY LINE ADJUSTMENT MAIN ST. & PETTE BROOK RD. DURHAM, STRAFFORD COUNTY, NEW HAMPSHIRE, BETWEEN TOWN & CAMPUS, INC. & TOWN OF DURHAM" DATED APRIL 16, 1987 BY THOMAS F. MORAN INC. S.C.R.D. PLAN 284-116.
- "BOUNDARY LINE ADJUSTMENT PLAN GAMMA THETA CORP., MAIN STREET DURHAM, NH," DATED 12-15-03 WITH A REVISION DATE OF 1-9-04 BY CAMMETT ENGINEERING. S.C.R.D. PLAN 74-56.

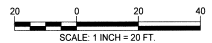


- LEGEND**
- EXISTING LOT LINE
 - - - PROPOSED LOT LINE
 - ○ CHAIN LINK FENCE
 - ○ — OVERHEAD WIRE
 - ○ — SEWER LINE
 - ○ — DRAIN LINE
 - ○ — CONCRETE
 - ○ — BRICK
 - ○ — UTILITY POLE & GUY WIRE
 - ○ — SIGN
 - ○ — LIGHT POLE W/ARM
 - ○ — BOLLARD
 - ○ — WATER GATE VALVE
 - ○ — HAND HOLE
 - ○ — CATCH BASIN
 - ○ — IRRIGATION CONTROL VALVE
 - ○ — BOUND FOUND
 - ○ — IRON ROD/PIPE FOUND
 - ○ — IRON PIPE FOUND
 - ○ — S.S.F. STEEL STAKE FOUND
 - ○ — D.H.S. DRILL HOLE SET (9/6/18)
 - ○ — R.S.S. RAILROAD SPIKE SET (9/6/18)
 - ○ — E.P. EDGE OF PAVEMENT
 - ○ — V.C.C. VERTICAL GRANITE CURB
 - ○ — S.B.B. SLOPED BITUMINOUS BERM
 - ○ — V.B.B. VERTICAL BITUMINOUS BERM
 - ○ — S.W.L. SINGLE WHITE LINE
 - ○ — A.S. AUTO SPRINKLER
 - ○ — E.M. ELECTRIC METER
 - ○ — M.B. MAILBOX
 - ○ — ACCESSIBLE PARKING SPACE



NOTES:

- REFERENCE: TAX MAP 2, LOT 14-1
- TOTAL PARCEL AREA: 18,879 SQ. FT. OR 0.433 AC.
- OWNER OF RECORD: TOWN & CAMPUS, INC. 105 PIERRE ROAD MADRURY, NH 03823 S.C.R.D. BOOK 638, PAGE 056
- ZONE: CB
 DIMENSIONAL REQUIREMENTS:
 MIN. LOT AREA: N/A
 MIN. FRONTAGE: 55' FT.
 MIN. FRONT SETBACK: SEE DEVELOPMENT STANDARDS FOR CB ZONE
 MIN. SIDE/REAR SETBACK: SEE DEVELOPMENT STANDARDS FOR CB ZONE
- ZONING INFORMATION LISTED HEREIN IS BASED ON THE TOWN OF DURHAM ZONING ORDINANCE DATED 4/16/16 AS AVAILABLE ON THE TOWN WEBSITE ON 5/25/18. ADDITIONAL REGULATIONS APPLY, AND REFERENCE IS HEREBY MADE TO THE EFFECTIVE ZONING ORDINANCE. THE LAND OWNER IS RESPONSIBLE FOR COMPLYING WITH ALL APPLICABLE MUNICIPAL, STATE AND FEDERAL REGULATIONS.
- FIELD SURVEY PERFORMED BY J.P.E. & P.J.M. DURING MAY 2018 USING A TRIMBLE S7 TOTAL STATION WITH A TRIMBLE TSC3 DATA COLLECTOR. TRAVERSE ADJUSTMENT BASED ON LEAST SQUARES ANALYSIS.
- HORIZONTAL DATUM BASED ON NEW HAMPSHIRE STATE PLANE(2800) NAD83(2011) DERIVED FROM REDUNDANT GPS OBSERVATIONS UTILIZING THE KEYNET GPS VRS NETWORK.
- VERTICAL DATUM IS BASED ON NAVD83 PER DISK "UNH 13".
- UNDERGROUND UTILITIES SHOWN HEREIN ARE BASED ON OBSERVABLE PHYSICAL EVIDENCE AND PAINT MARKS FOUND ON-SITE.
- THE INTENT OF THIS PLAN IS TO SHOW THE LOCATION OF BOUNDARIES IN ACCORDANCE WITH AND IN RELATION TO THE CURRENT LEGAL DESCRIPTION, AND IS NOT AN ATTEMPT TO DEFINE UNWRITTEN RIGHTS, DETERMINE THE EXTENT OF OWNERSHIP, OR DEFINE THE LIMITS OF TITLE.
 THE INTENT OF THIS PLAN IS ALSO TO SUBDIVIDE THE EXISTING TAX MAP 2, LOT 14-1 INTO TWO PARCELS OF APPROXIMATELY EQUAL SQUARE FOOTAGE. THE NEW LOT NUMBERS SHALL BE 14-1 AND 14-1-1. THE NEW STREET ADDRESSES SHALL BE 72 MAIN STREET AND 74 MAIN STREET AS SHOWN ON THE PLAN.
- ALL ELECTRIC, GAS, TEL, WATER, SEWER AND DRAIN SERVICES ARE SHOWN IN SCHEMATIC FASHION. THEIR LOCATIONS ARE NOT PRECISE OR NECESSARILY ACCURATE. NO WORK WHATSOEVER SHALL BE UNDERTAKEN ON THIS SITE USING THIS PLAN TO LOCATE THE ABOVE SERVICES. CONSULT WITH THE PROPER AUTHORITIES CONCERNED WITH THE SUBJECT SERVICE LOCATIONS FOR INFORMATION REGARDING SUCH. CALL DIG-SAFE AT 1-888-DIG-SAFE.
- THE BUILDINGS ON THE PARCEL ARE SERVICED BY MUNICIPAL WATER AND SEWER. THE SEWER IS BELIEVED TO BE SERVICED FROM PETTE BROOK LANE AS INDICATED HEREON. THE WATER IS BELIEVED TO BE SERVICED FROM MAIN STREET. THE EXACT LOCATIONS OF THE SERVICES WAS NOT OBSERVED DURING THE SURVEY. FURTHERMORE, THE TOWN ENGINEERING DEPARTMENT DO NOT HAVE THIS INFORMATION AVAILABLE.
- FOR MORE INFORMATION ABOUT THIS SUBDIVISION, OR TO SEE THE COMPLETE PLAN SET, CONTACT THE TOWN OF DURHAM PLANNING DEPARTMENT, 8 NEWMARKET ROAD, DURHAM, NH. (603) 868-8064.



**SUBDIVISION PLAN
 FOR
 TOWN & CAMPUS, INC.
 OF
 TAX MAP 2, LOT 14-1
 72 MAIN STREET
 DURHAM, NEW HAMPSHIRE**

NO.	DATE	REVISIONS PER TOWN CONDITIONS	J.F.K.	BY
1	09/06/18			

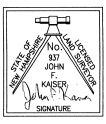
DRAWN BY:	E.J.S.	DATE:	JULY 11, 2018
CHECKED BY:	J.F.K.	DRAWING NO.:	5548A
JOB NO.:	5549	SHEET:	1 OF 1



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 2 Commerce Drive (Suite 202) Bedford, NH 03110 (603) 814-4069
 10 Storer Street (Riverview Suite) Keene/Norfolk, ME (207) 502-7005
 http://www.doucetsurvey.com

I CERTIFY THAT THIS SURVEY AND PLAN WERE PREPARED BY ME OR BY THOSE UNDER MY DIRECT SUPERVISION AND FALLS UNDER THE URBAN SURVEY CLASSIFICATION OF THE NH CODE OF ADMINISTRATIVE RULES OF THE BOARD OF LICENSES FOR LAND SURVEYORS. I CERTIFY THAT THIS SURVEY WAS MADE ON THE GROUND AND IS CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. RANDOM TRAVERSE SURVEY BY TOTAL STATION, WITH A PRECISION GREATER THAN 1:15,000.

[Signature] L.L.S. #937
 DATE: 9/7/18



TAX MAP 13 LOT 7-3UNH
 UNIVERSITY OF NEW HAMPSHIRE
 THOMPSON HALL
 DURHAM, NH 03824

FINAL APPROVAL BY DURHAM PLANNING BOARD
 CERTIFIED BY: *[Signature]* DATE: 11/22/18

LOT FRONTAGE ANALYSIS

The proposed site plan can not be approved as presented due to the unlawful taking of 74 Main Street (Map 106 Lot 61) & 72 Main Street's (Map 106 Lot 59) frontage on Ballard Street. Currently each lot has frontage on the Town's right-of-way known as Ballard Street (72 Main Street enjoys 90.45 feet and 74 Main Street Map enjoys 52.61 foot on frontage). Additionally, 74 Main Street has 173.16 feet of frontage on Pettee Brook and 72 Main Street may have limited frontage on Main Street of 28.35 feet).

For decades, Ballard Street served a thorough way from Main Street crossing through Pettee Brook (formerly Rosemary Lane) & Garrison Ave ending it what appears to be a cul-de-sac. Most of Ballard Street was taken over by the University of New Hampshire; however, there was nothing found in the Town's records showing that it was discontinued in accordance with acceptable procedures outlined by NH state statutes and case law.

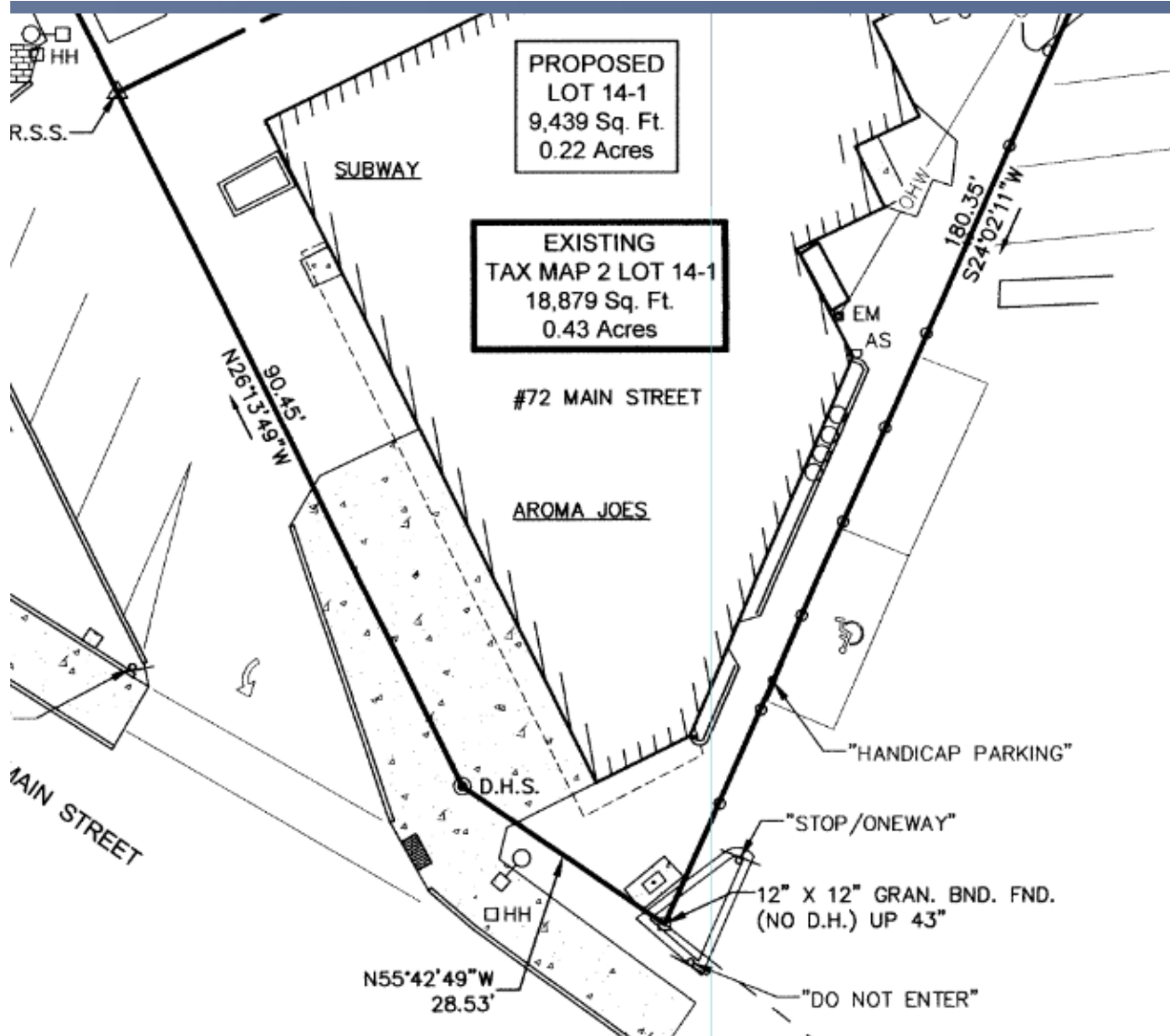
The Ballard Street frontage served 72 Main Street well and has been a vital part of its development and operations allowing for pick-up and deliveries from oversized tractor trailer trucks and served as an access point for customers and patrons alike. The discontinuance of Ballard Street has not been demonstrated or determined.

The Town's records reveal that in 1989 the Town through an ordinance (#89-01) called for the discontinuance of vehicular traffic on Ballard Street, recognized as a Town's right-of-way, between Rosemary Lane and Main Street. This ordinance provided no mention of any discontinuance of Ballard Street. Although the 1989 actions of the Town are questionable, the Town voted to discontinue vehicular traffic but nothing was found to discontinue the road as that would require a separate process with notification requirements.

Ordinances Passed by the Town Council in 1989	Name	Date Passed
	89-01 An Ordinance Calling For The Discontinuance Of Vehicular Traffic On Ballard Street Between Rosemary Lane And Main Street	June 5

Further, in 2018, a subdivision plan was presented to the Town for its approval and at that time, each lot was required to have 50 feet of frontage on a street right-of-way. The subdivision plan was approved and properly recorded at the Strafford County Registry of Deeds as Plan No. P0117-0006. The approval of the subdivision plan required 50 feet of frontage for 72 Main Street. The only way to meet this requirement was with the frontage on Ballard Street. Without this frontage, the subdivision could not be approved as presented. The Town's zoning requires 50 feet of minimum lot frontage (See Section 175-54 TABLE OF DIMENSIONS require a minimum lot frontage in feet of 50 feet. *Lot Frontage* is defined as "A lot line dividing the lot from a street right-of-way"). It is not entirely clear whether the

28.53 feet of "frontage" is on Main Street. Even assuming it is, the frontage requirement could only be satisfied utilizing the frontage on Ballard Street. To approve the current site plan with the proposed reconfiguration of the area in front of 72 Main Street would create a lot with the less than the required frontage; thus creating a non-conforming lot and an unlawful taking of 72 Main Street's property rights.



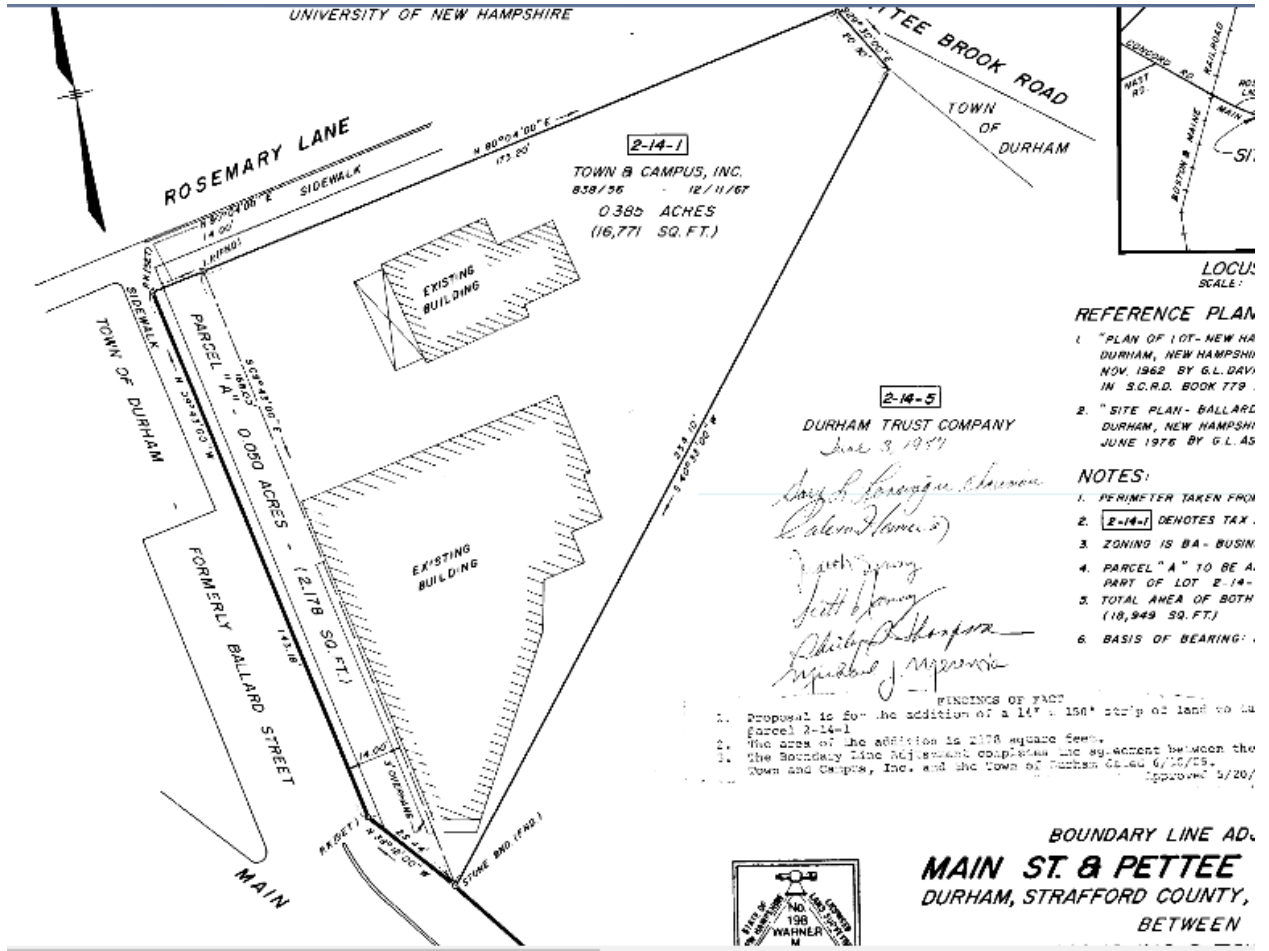
The approval of the original site plan was unlawful as it created a non-conforming lot in violation of the Town's regulations. The current plan does the same.

The following actions are necessary by the Planning Board:

1. Restoration of the Ballard Street lot frontage for 72 Main Street whether by a site plan amendment or revocation of the previously approved site plan; and/or

2. Denial of the current site plan amendment for the reasons set forth herein.

** The 1985 agreement complicates the situation. At that time, there was basically a land swap. The Town received land from Gangwer off of Beech Street and Gangwer received a 14 foot strip in front of his lot with a right to purchase the remaining land if the Town ever decided to sell it. This is where it is confusing. The land in question appears to be Ballard Street and the Town would have no authority to sell it but only to discontinue the right-of-way. See Plan P028A-0118 dated June 1987 below:



This 1987 plan does not provide any references to the discontinuance of Ballard Street.

** Also, I did not research all of the Town records prior to 1987 to see if there was a vote to discontinue the road. The 1989 ordinance does not reference any discontinuance nor does any of my other research or plans reviewed.