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August 22, 2016

Via Electronic Mail to [lsnell@nantucket-ma.gov](mailto:lsnell@nantucket-ma.gov)  
Via First Class Mail

Barry G. Rector, Chairman  
Nantucket Planning Board  
2 Fairgrounds Road  
Nantucket, MA 02554

**Re: Definitive Subdivision and Special Permit Applications of Richmond Great Point Development LLC (“Applicant”) relative to Property located off Old South Road, Nantucket, MA (“Richmond Project”)**

Dear Chairman Rector:

This office represents the Naushop Homeowners Association Trust (hereinafter “Naushop”), a trust representing the individual owners and residents of the residential community containing approximately 196 single family homes directly across Old South Road from the Richmond Project. Our office and Naushop have reviewed the June 2016 definitive subdivision and special permit applications of the Applicant. Based upon that review, Naushop has significant concerns with the impacts of the Richmond Project on its property interests and is therefore closely monitoring the Planning Board’s (“Board”) review of the Richmond Project. Our client will continue to attend any and all public hearings and public meetings and will advise both the Applicant and the Board of any ongoing concerns so that both will have an opportunity to address same. Our initial review reveals the following.

**Application No. 1 (Retail Buildings):**

The first application that we reviewed seeks approval of a major commercial development special permit and major site plan review to allow for the construction of five “retail “line” buildings” located on five contiguous lots ( $\pm$  2.39 total acres) with frontage on Old South Road beginning just east of Lovers Lane. The buildings are proposed to be one story and are integrated in the sense that the parking, travel ways, vehicular access, drainage, sewer, water, etc. are all interconnected to varying degrees. The size of the buildings are proposed as 5,170 gross square feet, 3,235 gross square feet, 2,400 gross square feet, 1,500 gross square feet and

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3,200 gross square feet. Additionally, there is proposed a 1,200 square foot outdoor dining area adjacent to the 3,200 gross square feet building.

The location of the outdoor dining facility causes significant concern to Naushop due to the proximity of same in relation to the Naushop property. In order to minimize the impact, Naushop requests that the outdoor dining facility be relocated further west to the retail liner building located closest to Lovers Lane. Additionally, Naushop requests that the Board including consider the following conditions in any special permit that it may grant relative to the outdoor dining:

(a) Hours of operation be restricted as follows:

(i) Winter Season (Defined as November 1 through March 31)

Monday through Sunday: 11:00 AM to 9:00 PM

(ii) Summer Season (Defined as April 1 through October 31)

Monday through Thursday: 11:00 AM to 9:00 PM

Friday and Saturday: 11:00 AM to 10:00 PM

Sunday: 11:00 AM to 9:00 PM

- (b) Prohibit live entertainment, mechanical entertainment and so-called piped out music;
- (c) Limit use of the area to patrons being served food such that there is no use of the area for the consumption of alcoholic beverages outdoors;
- (d) Require that any outside lighting be installed so as not to interfere with the use and enjoyment of the nearby Naushop property; and
- (e) Limit the number of patrons in the area to no more than twenty-five.

**Application No. 2 (Meadows II Rental Apartments):**

The second application reviewed seeks approval of a special permit to create a "Workforce Rental Community" located on the southerly side of Old South Road southeast of the site referenced in Application No. 1. The project will be accessed from the "Primary Project Entrance" as shown on the Plan which is located directly across from Naushop. Specifically, the proposal includes 225 units constructed in 40 two-story structures scattered across  $\pm$  14 acres. The proposal includes on-site parking that exceeds the requirements of the Bylaw and will be serviced by new infrastructure (water, sewer, drainage, lighting, landscaping, etc.). It includes a mix of studio units (22), one bedroom units (87), two bedroom units (94) and three bedroom units (22) which creates a total of 363 bedrooms. Fifty-six of those units, or 25%, will be so

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called affordable units, restricted in perpetuity, in accordance with the requirements of the Massachusetts Department of Housing and Community Development. All fifty-six of the units will qualify for Nantucket's Subsidized Housing Inventory List. These units will count towards the State requirement that 10% of the housing stock be qualified affordable housing units.

Naushop has no specific concerns with the rental apartments at this time.

**Application No. 3 (Sandpipe Place – Single Family Lots):**

The third application seeks a special permit and subdivision approval to create "Workforce Homeownership Housing" located on the southerly side of Old South Road immediately east of the site referenced in Application No. 2. Like the project described in Application No. 2, this project will also be accessed from the "Primary Project Entrance" which is located directly across from Naushop. This proposal seeks to create 100 single family house lots on  $\pm$  17 acres of land along with the necessary infrastructure (water, sewer, drainage, lighting, landscaping, etc.) to service the project. Lot sizes range from a small of 4,000 square feet to a large of 4,500 square feet. Twenty-five of the lots, or 25%, will contain so called affordable homes, restricted in perpetuity, in accordance with the requirements of the Massachusetts Department of Housing and Community Development. All twenty-five of the homes will qualify for Nantucket's Subsidized Housing Inventory List. These homes will count towards the State requirement that 10% of the housing stock be qualified affordable housing units. The project also include a "community focal point" adjacent to the main entrance and shown on the plan submitted as "Community Focal Point/Meeting House and Park". This will be community space including a meeting house, barn, outdoor common area with patio and stage area as well as other landscaping improvements.

The location of the Community Focal Point/Meeting House and Park, as well as the use thereof, causes significant concern to Naushop due to the proximity of same in relation to the Naushop property. In order to minimize the impacts, Naushop requests that the outdoor dining facility be relocated further south into the Richmond Project. Lastly, Naushop requests that the Board consider including the following conditions in any special permit that it grants relative to the Community Focal Point/Meeting House and Park:

- (a) Hours of operation be restricted to Sunday thru Wednesday - 11:00 AM to 9:00 PM and Thursday thru Saturday - 9:00 AM to 10:00 PM;
- (b) Prohibit live entertainment, mechanical entertainment and so-called piped out music;
- (c) Limit use of the area to those residents and guests of Sandpiper Place. General public assembly is prohibited;
- (d) Require that any outside lighting be installed so as not to interfere with the use and enjoyment of the nearby Naushop property;

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- (e) Limit the number of occupants in the area to the less or 100 persons or as otherwise restricted by law;
- (f) Install significant live screening on the Richmond Project property to buffer the impacts of this area; and
- (g) Prohibit the consumption of alcoholic beverages outdoors.

**Application No. 4 (Old South Road Crossing):**

The fourth application seeks definitive subdivision approval for the series of roads and lots located immediately south of the land that makes up Application No. 1. The proposal is somewhat administrative in that there is no construction of structures proposed on this area of the Richmond Property. The primary objective of the subdivision is to reconfigure, re-route, and improve the engineering design, safety, and conditions of portions of the existing Nancy Ann Lane and Greglen Avenue roadways to better accommodate the proposals set forth above. This includes straightening, widening and improving the existing roadway layouts and the slight reconfiguration of fifteen existing lots (most of which are vacant and 13 of which appear to be owned by Richmond). Naushop has no specific concerns with this application at this time.

**General Comments:**

In addition to the above areas of concern, Naushop has the following general but significant areas of concern with the impacts of the overall Richmond Project.

Notwithstanding, the long term proposal to mitigate traffic impacts as set forth in the Old South Road Corridor Study, Naushop is concerned that the Richmond Project will cause significant traffic issues in this area that will impact Naushop's quality of living. Any mitigation measures offered by implementation of the aforesaid Study, will not be achieved in the near future, therefore, Naushop requests that the Board and the Applicant consider short term traffic mitigation including improvements to the roadway system located south of the Richmond Project. One specific improvement Naushop believes to be necessary is the widening of Old South Road up to Naushop's entrance at Goldfinch Drive East. The agreed upon mitigation should be completed prior to the issuance of any certificate of occupancy relative to the Richmond Project.

Additionally, Naushop is concerned with the impact of the Richmond Project on the municipal sewer system. These concerns are magnified by delays in finalizing the Sewer Connection and Dedication Agreement with Richmond Great Point Development, LLC. The lack of agreement has stalled the necessary implantation of the upgrades to the South Valley lift station which serves the area, including Naushop. Notwithstanding the lack of Agreement, the Town has allowed the Applicant to connect their new sewer main to the lift station in the area thus adding additional flow to an already troubled system. Naushop requests that the Board

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include a condition in any permits issued that the aforesaid Agreement be finalized and the contemplated upgrades be performed prior to issuance of any building permits at the Richmond Project.

Our review of the Richmond Project reveals that the resulting impacts therefrom on the Naushop community will be varied and significant. Zoning regulations are designed to, amongst other things, lessen congestion in the streets, conserve health, secure safety, provide adequate light and air, prevent overcrowding of land, avoid undue concentration of land and facilitate adequate provision of water supply, drainage and sewerage facilities. It is our opinion that the proposed Richmond Project will not accomplish the aforesaid and this will have significant negative impacts on Naushop that can only be mitigated by addressing the concerns raised herein. Accordingly, Naushop requests that the Board and the Applicant give serious consideration to our client's concerns and proposals to address same so as to mitigate the impacts on the Naushop community.

Your consideration of this matter is greatly appreciated. Should you have any questions or comments, please do not hesitate to contact the undersigned. We look forward to being involved in future public meetings.

Sincerely,

MIRRIONE LAW GROUP, LLC



Walter Mirrione, Esq

cc: Ken Gentner Via Electronic Mail  
[kgentner@optonline.net](mailto:kgentner@optonline.net)



August 24, 2016

**BY ELECTRONIC MAIL: [CAncero@nantucket-ma.gov](mailto:CAncero@nantucket-ma.gov)  
AND FIRST CLASS MAIL**

Nantucket Planning Board  
Town of Nantucket  
2 Fairgrounds Road  
Nantucket, MA 02554

Re: Development Applications / Richmond Great Point Development, LLC  
Off Old South Road, Nantucket

Dear Members of the Planning Board:

As you may recall, this firm represents the Cedar Crest III Homeowners Association Trust (“CCHAT”), the legal organization of homeowners within the Cedar Crest III subdivision comprised of homes on Mayflower Circle, Daffodil Lane and Evergreen Way on Nantucket, which abuts the 100-lot “Sandpiper Place” residential subdivision proposed by Richmond Great Point Development, LLC (the “Project” and the “Developer” or “Richmond”).

At the Board’s hearing on July 11, 2016, one of the members had asked whether the Declaration of Restrictions and Easements filed with the Nantucket Registry of Deeds as Document Number 91664, which I referenced at the hearing and in my previous letter dated July 11, 2016, was still enforceable. Certain land use restrictions expire by operation of law (G.L. c. 184, §27) thirty years after they are imposed, subject to the timely recording of extensions. The Declaration here was executed on July 24, 2000 and recorded shortly thereafter, and therefore we are still well within the thirty-year initial enforceability period. Moreover, the Declaration itself states a term of thirty years (§5.05), with the option for extensions of successive periods of twenty years, consistent with the statute. Therefore, the Declaration is currently enforceable.

I would also like to stress the importance of insisting upon the submission of a “traffic impact and access study” (“TIAS”) by the Developer for the Sandpiper Place special permit application (#43-16) and the other Richmond applications pending before you (#40-16, #39-16, #7988, and #7918). Through these applications, the Developer is proposing a series of connected development projects that will result in the most significant commercial and residential growth on Nantucket in years, and which will inevitably cause a substantial increase in motor vehicle, bicycle and pedestrian traffic on Old South Road and the local roads that intersect Old South Road between downtown and the airport. This stretch of Old South Road is

already congested during peak hours of the day, and has gotten busier with recent residential development growth.

I have personally spoken to representatives of Richmond about this issue, and they have so far demurred, insisting that a traffic study will be produced at some later date, without any firm commitment. Perhaps Richmond intends to try to delay the presentation of its TIAS until after it obtains special permits for its projects. Clearly, this would be to Richmond's advantage, as any traffic study will almost certainly shine a bright light on a major infrastructure challenge that cannot be ignored. If consideration of traffic issues is postponed until after the discretionary permits are issued, Richmond will have more leverage to resist contributing to the infrastructure costs of the inevitable widening, signaling and other upgrades to Old South Road and other neighborhood streets that will be necessary to accommodate the increased traffic and new traffic patterns. It's also possible that a review of a TIAS would lead to the conclusion that the existing roadway network simply cannot be expanded or improved so as to adequately mitigate the impacts and accommodate the proposed growth at the density proposed by Richmond, in which case a smaller or less-dense set of projects may be more appropriate.

For these reasons, the Board should not close its hearing and not issue any special permits until Richmond has submitted a complete TIAS using accepted engineering practices and Massachusetts Department of Transportation (MassDOT) traffic analysis procedures. The Developer's TIAS should then be thoroughly scrutinized by an independent traffic peer review engineer retained by the Planning Board, with advice given to the Board concerning whether the existing roadways can be expanded and improved to accommodate the increased traffic, and if so, how and at what expense.

Importantly, it would be perilous for the Board to delay its consideration of these issues until the subsequent Site Plan Review process. While I recognize that Nantucket's Site Plan Review bylaw, §139-23, gives the Planning Board authority to evaluate the adequacy of town services and infrastructure, and to deny a site plan review application if traffic management arrangements are inadequate, this legal framework is at odds with the state Zoning Act and most of the decisional law that has evolved under the Act. Specifically, the Supreme Judicial Court has repeatedly emphasized the distinction between special permits and site plan review, observing that the later can only be used to shape a project, not deny it. See, Presidential Ins. Co. of Am. v. Bd. of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986). Moreover, a town's site plan review authority does not extend to "issues of density," which are directly relevant here if Richmond's projects create so much traffic that no improvements to Old South Road could possibly be made to adequately accommodate the growth. See, Castle Hill Apartments Ltd. Partnership v. Planning Bd. of Holyoke, 65 Mass. App. Ct. 840, 847 (2006). See also, M. Bobrowski, *Massachusetts Land Use and Planning Law*, §9.07 (3<sup>rd</sup> Ed. 2011) (copy enclosed).

Thus, the Board risks having a site plan review decision vacated by the courts if its decisionmaking exceeds its legal authority. In contrast, the Board would be on much safer ground to impose strict conditions or to deny a special permit on traffic grounds. If the Board has any doubt as to whether to consider traffic impact issues during this special permit proceeding

versus the anticipated site plan review proceeding, I strongly recommend that it seek guidance from Town Counsel. It goes without saying that traffic is of utmost concern to the residents of the Cedar Crest III Homeowners Association.

Thank you for your attention to this matter.

Very truly yours,

  
Daniel C. Hill

Encs.

cc: Andrew Burek, Esq.  
Clients

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Law & Business

It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if such plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to the subdivisions of land. . . .

For a generation, the MRD model has been pervasively used to mandate cluster development or to exact affordable housing. Any municipal ordinance or bylaw *requiring* subdivisions of a certain number of lots to obtain a special permit for these purposes is suspect after *Wall Street*. However, regulations offering “increases in the permissible density of population or intensity of a particular use” by voluntary application for a special permit are unaffected by *Wall Street*.<sup>113</sup>

### § 9.07 SITE PLAN REVIEW

Site plan review establishes criteria for the layout, scale, appearance, safety, and environmental impacts of commercial or industrial development in an attempt to “fit” larger projects into the community.<sup>114</sup> The Zoning Act contains no reference to site plan review.<sup>115</sup> It is entirely the creature of the cities and towns and the judiciary. Because site plan review is often confused with or attached to the special permit process,<sup>116</sup> discussion of the device is appropriate in this chapter.

The Supreme Judicial Court defined its understanding of site plan review as “regulation of a use rather than its prohibition . . . contemplating primarily the imposition for the public protection of reasonable terms and conditions.”<sup>117</sup> The Supreme Judicial Court has repeatedly focused on this pronouncement to distinguish site plan review from the special permit process.<sup>118</sup> Site plan review can only be used to shape a project.<sup>119</sup> On the other hand, in the special permit process, the full range of discretion is available to the granting authority.<sup>120</sup>

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<sup>113</sup> See § 9.06.

<sup>114</sup> Site plan approval usually focuses on parking, traffic, drainage, roadway construction, signage, utilities, screening, lighting, and other aspects of the proposal to arrive at the best possible design for the location. In the usual format, site plan approval must be obtained before the building or special permit is issued. For a more detailed discussion of site plan review, see Mark Bobrowski, *Recent Developments in Community Growth Control*, 73 Mass. L. Rev. 36 (1988).

<sup>115</sup> However, the concept is endorsed in the DCA Report.

<sup>116</sup> See, e.g., *Bruno v. Board of Appeals of Wrentham*, 62 Mass. App. Ct. 527, 534-535 (2004).

<sup>117</sup> *Y. D. Dugout v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970).

<sup>118</sup> See *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986); *Auburn v. Planning Bd. of Dover*, 12 Mass. App. Ct. 998 (1981).

<sup>119</sup> However, this power does not extend to “issues of density” which were previously resolved “in a legislative sense” when the city or town enacted the ordinance or bylaw permitting a certain density by right. *Castle Hill Apartments Ltd. P’ship v. Planning Bd. of Holyoke*, 65 Mass. App. Ct. 840, 847 (2006).

<sup>120</sup> See § 9.04.

Conceptually, uses or structures must be authorized by either a special permit or a building permit.<sup>121</sup> Site plan review operates in conjunction with one of these two devices. It is important to identify the link between site plan review and one of these mechanisms because the nexus determines the procedures for appeal of adverse decisions.

Site plan review in conjunction with a special permit application is the earliest version of the device and remains quite common.<sup>122</sup> Generally, any use requiring a special permit also requires review of a site plan. The site plan ostensibly serves to provide detailed information to the granting authority on aspects of the proposed development. The leading case of *Y. D. Dugout v. Board of Appeals of Canton*<sup>123</sup> found the process "in substance, . . . equivalent to permitting any commercial building construction . . . only upon special permit."<sup>124</sup> In *Auburn v. Planning Board of Dover*,<sup>125</sup> a bylaw provision required site plan approval for all buildings to be erected in a business district through issuance of a special permit.<sup>126</sup> The Court held that the "requirement that a site plan be approved before the issuance of a special permit does not impose impermissible restrictions on the allowed use."<sup>127</sup>

Site plan review may also be attached to as-of-right uses. The process is used to impose reasonable conditions before the issuance of the building permit. In *Prudential Insurance Co. of America v. Board of Appeals of Westwood*,<sup>128</sup> the Court examined such a case.<sup>129</sup> Even though the plaintiff's proposed office buildings were a permitted use, the board of appeals denied site plan approval primarily because of traffic concerns raised by the project. The Appeals Court held that this result was contrary to *Y. D. Dugout*, which limited site plan review to "regulation of a use rather than its prohibition."<sup>130</sup>

The Appeals Court has ruled that, unless the local ordinance or bylaw so requires, no written decision is required of the site plan review board,<sup>131</sup> and the decision of the board may be made by simple majority vote, not the supermajority

<sup>121</sup> See Mass. Gen. L. ch. 40A, §§ 7, 9. The variance procedure is not applicable, because it applies only to otherwise disallowed uses or structures. See Mass. Gen. L. ch. 40A, § 10.

<sup>122</sup> See *Woods v. City of Newton*, 351 Mass. 98 (1966); *Coolidge v. Planning Bd. of North Andover*, 337 Mass. 648 (1958).

<sup>123</sup> 357 Mass. 25 (1970).

<sup>124</sup> *Y. D. Dugout*, 357 Mass. at 31.

<sup>125</sup> 12 Mass. App. Ct. 998 (1981).

<sup>126</sup> *Id.* Site plan approval was required "in order to ensure the most advantageous use of all properties within the . . . district and for the reasonable protection of the legitimate interests of adjoining property owners." Submitted site plans must satisfy nine criteria that are all concerned with proper and safe use of land.

<sup>127</sup> *Auburn*, 12 Mass. App. Ct. at 998.

<sup>128</sup> 23 Mass. App. Ct. 278 (1986).

<sup>129</sup> See also *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513 (1971); *Richardson v. Zoning Bd. of Appeals of Framingham*, 351 Mass. 372 (1966); *Salah v. Board of Appeals of Canton*, 2 Mass. App. Ct. 488 (1974).

<sup>130</sup> *Prudential*, 23 Mass. App. Ct. at 282.

<sup>131</sup> *Bowen v. Board of Appeals of Franklin*, 36 Mass. App. Ct. 954, 955 (1994).

required for the issuance of a special permit.<sup>132</sup> The powers of site plan review board were described by the Appeals Court in *Prudential*.<sup>133</sup> The Court held that such boards may: (1) reject a site plan that fails to furnish adequate information required by the bylaw; (2) impose reasonable conditions in connection with site plan approval (even at the expense of the applicant); and (3) reject a site plan that, “although proper in form, may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable.”<sup>134</sup>

### [A] Problems

Notwithstanding *Prudential*'s clear statement of powers, site plan review remains a minefield for the unwary board or applicant.<sup>135</sup> Several problems persist and deserve the immediate attention of the Legislature.<sup>136</sup>

First, there has been no decision detailing minimum procedural safeguards for site plan review. Virtually every decision has involved a bylaw that described minimum procedures or incorporated special permit procedures under Mass. Gen. L. ch. 40A, § 9.<sup>137</sup> Communities using site plan to shape as-of-right uses have sometimes relied on an informal process roughly equivalent to preliminary plan review under the Subdivision Control Act.<sup>138</sup> The review board conducts plan evaluation at a regular business meeting; notice is limited to observance of the Open Meeting Law.<sup>139</sup> This practice is consistent with procedures under the State

<sup>132</sup> *Osberg v. Planning Bd. of Sturbridge*, 44 Mass. App. Ct. 56, 59 (1997).

<sup>133</sup> *Prudential*, 21 Mass. App. Ct. at 283-284 n.9. For a particularly instructive application of these standards, see *Gutierrez v. Town of Framingham*, Misc. Case No. (Land Ct. 1996).

<sup>134</sup> “This would typically be a case in which, despite best efforts, no form of reasonable conditions could be devised to satisfy the problem with the plan. . . .” *Id.* There has never been a case under this clause at the appellate level. However, the trial court is starting to see some action under clause (3) of *Prudential*. See, e.g., *New York Cellular v. Brugnoli*, Misc. Case No. 217445 and 263705 (Land Ct. 1999); *Wolcott-Marshall, Inc. v. Town of Rutland*, Misc. Case No. 246745 and 248309 (Land Ct. 1999). The Court found in either case no problem “so intractable that it could admit of no reasonable solution.” A site plan may also be denied where the use is not available as of right or by special permit under the local ordinance or bylaw. *Balzotti Corp. v. Baldassini*, Misc. Case No.: 260128 (Land Ct. 2002).

<sup>135</sup> For a thorough discussion of these problems, see Mark Bobrowski, *Reform of the Zoning Act: An Open Letter to the Legislature*, 34 Suffolk U. L. Rev. 19 (2000).

<sup>136</sup> The Appeals Court has, on two occasions, suggested that the Legislature ought to address the statutory silence regarding site plan review. See *Osberg v. Planning Bd. of Sturbridge*, 44 Mass. App. Ct. 56, 59 n.5 (1997); *Dufault v. Millenium Power Partners, L.P.*, 49 Mass. App. Ct. 137, 143 n.15 (2000).

<sup>137</sup> Section 9 requires special permit determinations to be made after a public hearing, duly advertised for two weeks prior to the hearing, with notice to abutters; the statute also requires a formal decision within 90 days of the hearing, with written findings.

<sup>138</sup> See Mass. Gen. L. ch. 41, § 81S, for preliminary plan procedures under the Subdivision Control Law.

<sup>139</sup> Interested parties make their views clear to the board through informal comments, written or oral, delivered at the meeting. The applicant interprets the site plan with the board, and notes the board's criticism and suggested modifications. The applicant and board may negotiate terms or conditions that might be imposed on the plan.

Building Code; the initial decision of the building inspector or building commissioner is not, under the regulations, the product of a formal hearing.<sup>140</sup>

Since site plan review has been consistently characterized as functionally less than a special permit decision,<sup>141</sup> the Massachusetts courts are likely to find that the same intricate procedural safeguards are unnecessary. Under *Prudential*, site plan review has been confirmed as regulation of a use, rather than its prohibition; a review board has only limited, if quasi-discretionary, powers. In effect, site plan review should not present such risks to the property rights of an applicant or abutters as to necessitate formal pre-deprivation hearings.<sup>142</sup>

Second, how should a court reconcile conditions imposed in the course of site plan review with those imposed by the special permit-granting authority? Where the special permit-granting authority also serves as site plan review board, this result cannot occur. But where, hypothetically, the board of appeals serves as special permit-granting authority and the planning board sits in review of site plans, there is a potential for conflict.<sup>143</sup> Conditions imposed in the approval of the project by one board may run counter to those attached by the other. No appellate level decision reviews such a circumstance. Since site plan review powers have been clearly delineated to include the imposition of conditions,<sup>144</sup> it is unlikely that the special permit decision would supersede its counterpart. Given the usual tension between these two boards, the prospects for eventual judicial review of this quagmire are quite promising.

Third, does a site plan approval vest rights in light of zoning changes subsequently adopted by Town Meeting? In *Towermarc Canton Limited Partnership v. Town of Canton*,<sup>145</sup> a zoning amendment set a height limitation that seriously affected plaintiff's project, shown on an approved site plan. The Land Court held that the freeze provision of Mass. Gen. L. ch. 40A, § 6 does not apply to site plan

<sup>140</sup>The Supreme Judicial Court has held, in *O'Donnell v. Board of Appeals of Billerica*, 349 Mass. 324 (1965), that code provisions functionally equivalent to 780 CMR 114.1 are not "in performance of judicature" and are not subject to procedural due process constraints at this point in the application trail. *Id.* at 327.

<sup>141</sup>See *Y.D. Dugout*, 357 Mass. at 31: "The board's authority to enforce compliance with (site plan review) is only to 'assure' protection of the public interest 'to a degree consistent with a reasonable use of the site for the purposes permitted or permissible by the regulations of the district. . . .'", *Prudential*, 23 Mass. App. Ct. at 282-283: "Thus, the judge was not required, as he would have been if a special permit had been in issue, simply to ascertain whether there was 'sufficient basis to warrant (the board's) decision.'"

<sup>142</sup>See *Mathews v. Elridge*, 424 U.S. 319 (1976). See also *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd.*, 9 Mass. App. Ct. 775, 789-792 (1980); *American Sign & Indicator Corp. v. Town of Framingham*, 9 Mass. App. Ct. 66, 71 (1980). Both decisions discuss due process concepts in decisions involving the licensing of signs.

<sup>143</sup>This occurs fairly often. The reason may stem from the fact that planning boards were excluded from special permit granting authority until at least 1975, when amendments to Mass. Gen. L. ch. 40A first opened this door.

<sup>144</sup>See § 9.07[B] for a discussion of *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986).

<sup>145</sup>Misc. Case No. 131947 (Land Ct. 1989).

approval.<sup>146</sup> The absence of any reference to site plan approval in the freeze paragraphs of the statute was fatal to plaintiff's claim. Note, however, that this result is from a lower court.

Fourth, what is the effect of a constructive grant of site plan approval? Is the approval subject to modification, as in the case of a definitive subdivision plan?<sup>147</sup> There are no reported cases on this point.

Fifth, the lack of a clear appellate route is particularly troublesome. Mass. Gen. L. ch. 40A, § 17 establishes the appeal mechanism for all adjudicatory decisions made pursuant to the Zoning Act. Thus, the procedures for the appeal of a variance or a special permit are uniform. The spurned applicant or aggrieved person takes the matter directly to a court of competent jurisdiction, as set forth in the statute.<sup>148</sup>

The appeal of a site plan review decision is not so predictable.<sup>149</sup> Several earlier decisions—notably, *Prudential*, *Auburn*, and *Y.D. Dugout*—mention, without comment, site plan decisions appealed directly to a § 17 Court.<sup>150</sup> However, in *McDonald's Corp. v. Town of Seekonk*,<sup>151</sup> the Appeals Court reconfigured the appellate procedure for uses available as of right. The plaintiff was denied site plan approval by the planning board for a restaurant. Subsequently, the building inspector refused to issue the building permit, citing the action of the planning board. McDonald's appealed the planning board decision to the board of appeals but did not pursue that route, instead opting to appeal the site plan denial directly to Superior Court. The Appeals Court held that the proper appellate route was an appeal of the denied building permit to the board of appeals under Mass. Gen. L. ch. 40A, §§ 8 and 15, and dismissed the action for failure to exhaust administrative remedies.

In *Quincy v. Planning Board of Tewksbury*,<sup>152</sup> the Appeals Court attempted a reconciliation of these alternatives. The local bylaw allowed certain retail uses as of right, subject to a site plan special permit issued by the planning board. The planning board denied the site plan special permit and the decision was appealed directly to Land Court. The jurisdictional question was raised for the first time at the Appeals Court. The Court observed that

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<sup>146</sup> See § 5.02 for a discussion of freeze provisions.

<sup>147</sup> See § 5.04.

<sup>148</sup> Mass. Gen. L. ch. 40A, § 17 states that appeals may be filed in Land Court, Superior Court (in which the land concerned is situated), the Housing Court, if in Hampden County, or the District Court (in which the land concerned is situated), if in a county other than Hampden County, subject to the right of any party to file a claim for trial in the Superior Court within 25 days after service of the appeal is completed.

<sup>149</sup> The Appeals Court has ruled, however, that certiorari pursuant to Mass. Gen. L. ch. 249, § 4 was not the appropriate avenue for review when recourse was available under Mass. Gen. L. ch. § 40A, § 17. See *Cumberland Farms, Inc. v. Planning Bd. of Bourne*, 56 Mass. App. Ct. 605 (2002).

<sup>150</sup> Nor was the direct appeal of a site plan decision to a § 17 Court an issue in *Osberg*, decided in 1997, where the shopping center was available as of right.

<sup>151</sup> 12 Mass. App. Ct. 351, 353 (1981).

<sup>152</sup> 39 Mass. App. Ct. 17 (1995).

## SPECIAL PERMITS

[s]ince the only decisions of the planning board that are appealable to the courts directly are those in which the planning board has acted as a special permit granting authority, the planning boards disapproval of the site plan had to be run through the board of appeals.<sup>153</sup>

However, the Court further ruled that the “procedural framework [of the local bylaw], including the designation of the planning board as a special permit-granting authority, survived the . . . judgment intact.”<sup>154</sup> Hence, the court ruled that the denial of [this] site plan application constitutes a decision by the special permit-granting authority, which is directly appealable under G.L. c. 40A, § 17.”<sup>155</sup> Accordingly, where the local ordinance or bylaw makes the mistake of creating a site plan special permit, the review board should be treated as a special permit-granting authority for the purposes of appeal, and the matter should proceed to a § 17 Court. If the local ordinance or bylaw does not equate site plan review with a special permit, *Quincy* directs the appeal to the board of appeals.

The timing of this latter appeal to the board of appeals was established in *St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority*.<sup>156</sup> The Supreme Judicial Court reviewed an “adequacy determination” by the Boston Redevelopment Authority, a process it equated to site plan review. The Court addressed the timing of an appeal for a use available as of right:

An approval after site plan review, when required in connection with the issuance of a building permit, is not a final action, but only a prerequisite to the grant of the permit. The Appeals Court has said, we think correctly, that the right of an aggrieved person to appeal a local planning board’s site plan decision arises only when the building permit for the proposed project is issued or denied by the building inspector.<sup>157</sup>

In *Dufault v. Millenium Power Partners, L.P.*,<sup>158</sup> the Appeals Court ruled that the logic of *St. Botolph* applied to cities and towns governed by Chapter 40A.

Unfortunately, these decisions — *Quincy*, *St. Botolph*, and *Dufault* — only complicate the picture.<sup>159</sup> *Quincy* is limited to those circumstances in which the municipality has codified its misinterpretation of site plan review by equating it

<sup>153</sup> *Id.* at 20-21 (footnote omitted).

<sup>154</sup> *Id.* at 21.

<sup>155</sup> *Id.* at 22. In so ruling the Court guts the special permit granting authority. “[W]here the proposed use is one permitted by right the planning board may only apply substantive criteria consistent with *Prudential* . . . (i.e., it may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use).” *Id.* at 21. This is the same type of reduced special permit power the Appeals Court created in *Willard v. Board of Appeals of Orleans*, 25 Mass. App. Ct. 15, 21-22 (1987), in the review of proposed alterations to nonconforming single family homes, also with confusing results. See discussion in § 6.06.

<sup>156</sup> 429 Mass. 1 (1999).

<sup>157</sup> *Id.* at 9.

<sup>158</sup> 49 Mass. App. Ct. 137, 142 (2000).

<sup>159</sup> For more proof of the problem, see *Cumberland Farms, Inc. v. Planning Board of Bourne*, 67 Mass. App. Ct. 67 (2006).

with special permitting. A better result would have been to establish uniform procedures for site plan review, without regard to the vagaries of local draftsmanship. In ruling, when the use is as of right, that the planning board decision is appealable to the board of appeals, *St. Botolph* and *Dufault* have invented political and practical quagmires. The appellate route does not take into account the effect it will have on the intramural relations of these boards, particularly when the planning board's superior expertise in site design and layout are considered. Moreover, if the planning board decision is only appealable when the building permit is issued or denied by the building inspector, there are consequences for all sides. The applicant whose plan is denied or unreasonably conditioned must apply for a building permit with the knowledge that it will be denied; this is an expensive exercise in frustration. The person aggrieved by the approval of a site plan must monitor the building inspectors' office for the approval of the building permit, a task the Appeals Court has already ruled unfair.<sup>160</sup>

The Legislature should address these deficiencies by taking, at a minimum, the following steps. First, site plan review should be defined in the Zoning Act in a manner consistent with the ruling in *Prudential*. Second, all site plan decisions should be reduced to a written form, and filed within 14 days in the office of the city or town clerk. Finally, appeals of site plan decisions should be taken, pursuant to Mass. Gen. L. ch. 40A, § 17, directly to a court of competent jurisdiction.<sup>161</sup>

#### [B] Scope of Review

In *Prudential*, the Appeals Court announced the scope of judicial review for site plan decisions for uses available as of right. Where the site plan is approved with conditions, the usual deference is granted. However, where site plan approval is denied, "[t]he judge . . . examines] the proposal to see if the . . . problem was so intractable that it could admit of no reasonable solution. Short of independently finding that, he was not obliged to give deference to the board's decision."<sup>162</sup>

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<sup>160</sup> *Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 482 n.17 (1984):

The problems arising out of an aggrieved party's being unaware of the issuance of a building permit still exist. The holder of a building permit has up to six months from the date of its issuance to commence work under the permit. See 780 Code of Mass. Regs. § 114.3 (1980) There is no public notice of the issuance of a building permit. A permit holder could keep the fact of the permit's issuance secret, refrain from beginning construction under the permit for the thirty-day period established by § 15, and thereby foreclose any further direct review of the legality of the permit's issuance.

<sup>161</sup> In *Rehabilitative Servs., Inc. v. Planning Bd. of Sturbridge*, Case No.: 03-P-233 (App. Ct. 2004), the Appeals Court ruled that where the local bylaw provided for a direct appeal to Superior Court, this result was not inconsistent with the ruling in *St. Botolph*. See also *Castle Hill Apartments Ltd. P'ship v. Planning Bd. of Holyoke*, 65 Mass. App. Ct. 840, 846 (2006).

<sup>162</sup> *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 283 (1986).

## CHAPTER 9

# SPECIAL PERMITS

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### § 9.05 CONDITIONS

*Page 286, add new note 72.1 after the word “conditions” in the first line of first paragraph:*

... conditions,<sup>72.1</sup> safeguards and limitations ...

<sup>72.1</sup> In *Killoran v. Zoning Bd. of Appeals of Andover*, 80 Mass. App. Ct. 655 (2011), the Appeals Court ruled that a condition placed in a variance or special permit is not a “condition or restriction” subject to the thirty-year sunset clause limit in Mass. Gen. L. c. 184, § 23.

*Page 286, add at end of note 77:*

However, if renewal is not automatic, extension requests must be made prior to expiration of the term. See *Milton Legion Post No. 114 v. Alves*, 10 Misc. 427658 (Land Ct. 2011).

### § 9.07 SITE PLAN REVIEW

*Page 294, add before Subsection [A]:*

In *Jewish Cemetery Assoc. v. Board of Appeals of Wayland*, 08 MISC 386750 (Land Ct. 2010), the Land Court ushered in a new era of site plan review for religious, educational, and child care uses otherwise exempt pursuant to G.L. c. 40A, s. 3 “as long as such review is limited to reasonable regulations.” A long line of appellate cases, including *Bible Speaks*, *Tufts*, and *Petrucci*, held that site plan review could not be applied against a use protected by s. 3. See also *Bay Farm Montessori Academy, Inc. v. Town of Duxbury*, 08 MISC 329566 (Land Ct. 2008).

The Land Court’s position makes practical sense. If site plan review is limited to the imposition of “reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements” as per s. 3, the heavy lifting otherwise required of the building inspector as initial intake officer can be shifted to a board. When the building inspector denied the s. 3 use (as so often happened), the zoning board of appeals could reverse only with a supermajority. A limited site plan review would allow the matter to proceed by simple majority vote.

[A] Problems

Page 298, add at end of note 161:

In *Wildstar Farm, LLC v. Planning Board of Westwood*, 81 Mass. App. Ct. 1114 (2012) (published in table format), the Appeals Court examined a local by-law providing that an appeal of a site plan decision for an as of right use “shall be appealed in accordance with G.L. c. 40A, [§] 17[,] to a court of competent jurisdiction.” The court ruled this as a proper exercise of local authority because the “town has expressly instructed through its by-law that exhaustion will not be required.” See also *M&K Partners LLC v. Planning Board of Stoughton*, 14 MISC 481559 (Land Ct. 2014) and *Pandya v. Brushwood Nominee Trust*, 14 MISC 481861 (Land Ct. 2014) (appeal directly to court); *Bourne v. Sudbury Zoning Board of Appeals*, 10 MISC 434334 (Land Ct. 2014) (appeal of site plan decision by Board of Selectmen directly to ZBA as per local by-law consistent with *Wildstar*).

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1 3,235 SF RETAIL - SOUTHEAST PERSPECTIVE  
P-00

SCALE: NO SCALE

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Anton Levchenko  
Andrew Hankermeyer

# PRITON

## RETAIL LINER BUILDINGS

DCML 13-362

The Richmond Company  
SCHEMATIC DESIGN

- △ HDC COMMENTS
- △
- △
- △

DRAWN BY: AWH CHECK BY:

ARCH D SCALE: NA

JULY 2016

3,235 SF RETAIL

P-00

Project: Collaborator: Engineer: Architect: Stage: Client: Revisions: Dwg Info: Scale: Date: Plan: Plan No.:



1 3,235 SF RETAIL - SOUTH ELEVATION  
P-01

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



2 3,235 SF RETAIL - WEST ELEVATION  
P-01

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

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LINER BUILDINGS

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The Richmond Company

SCHEMATIC DESIGN

- △ HDC COMMENTS
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ARCH D 1/4" = 1'-0"

JULY 2016

3,235 SF RETAIL

P-01

Project: Collaborator: Engineer: Architect: Stage: Client: Revision: Dwg Info: Scale: Date: Plan: Plan No.:



1 3,235 SF RETAIL - NORTH ELEVATION  
P-02

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



2 3,235 SF RETAIL - EAST ELEVATION  
P-02

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

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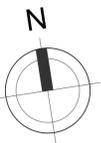
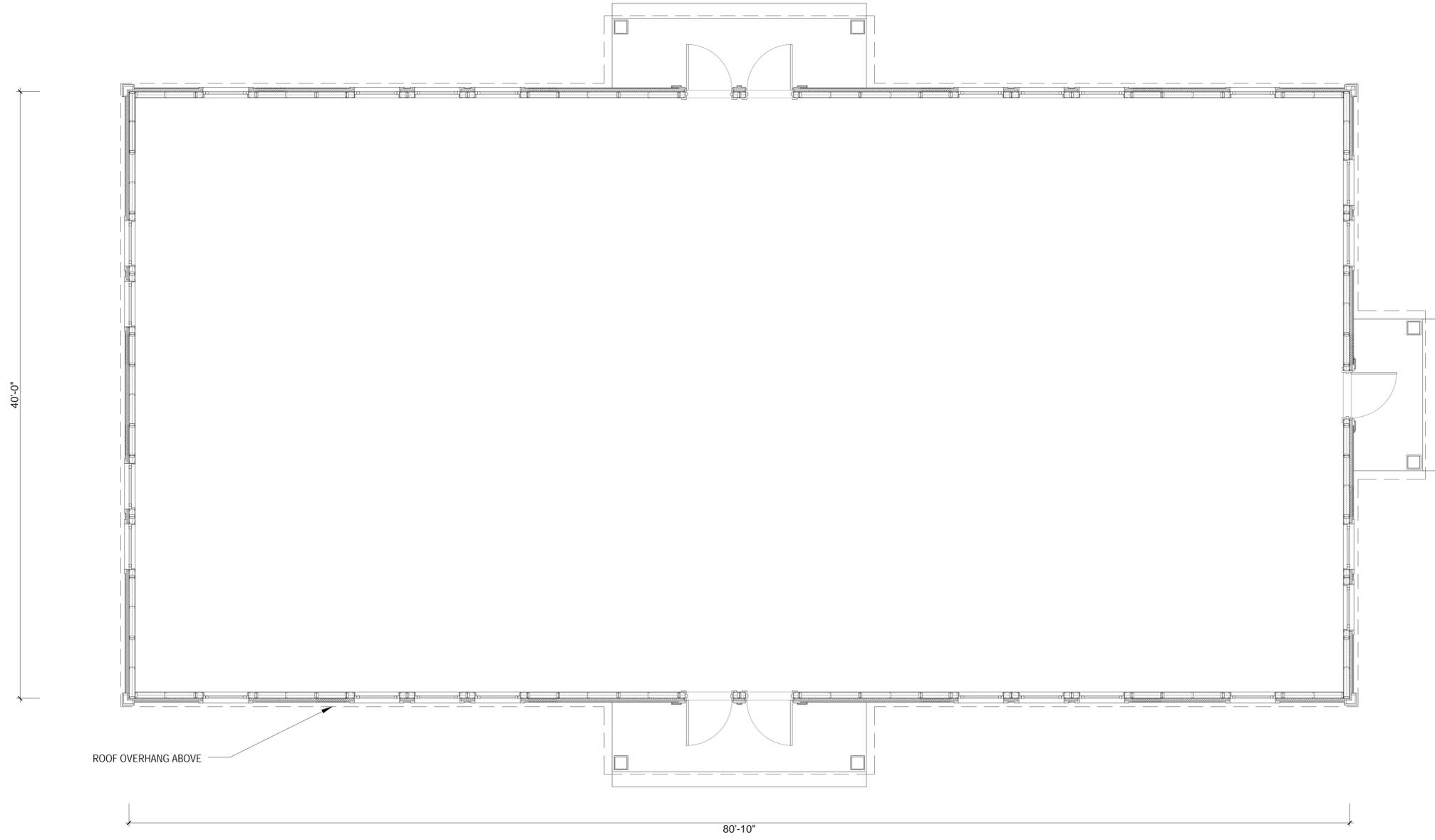
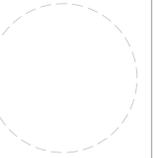
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3,235 SF RETAIL

P-02

Project: Collaborator: Engineer: Architect: Stage: Client: Revision: Dwg Info: Scale: Date: Plan: Plan No.:



1  
A-00 3,235 SF RETAIL - PLAN

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

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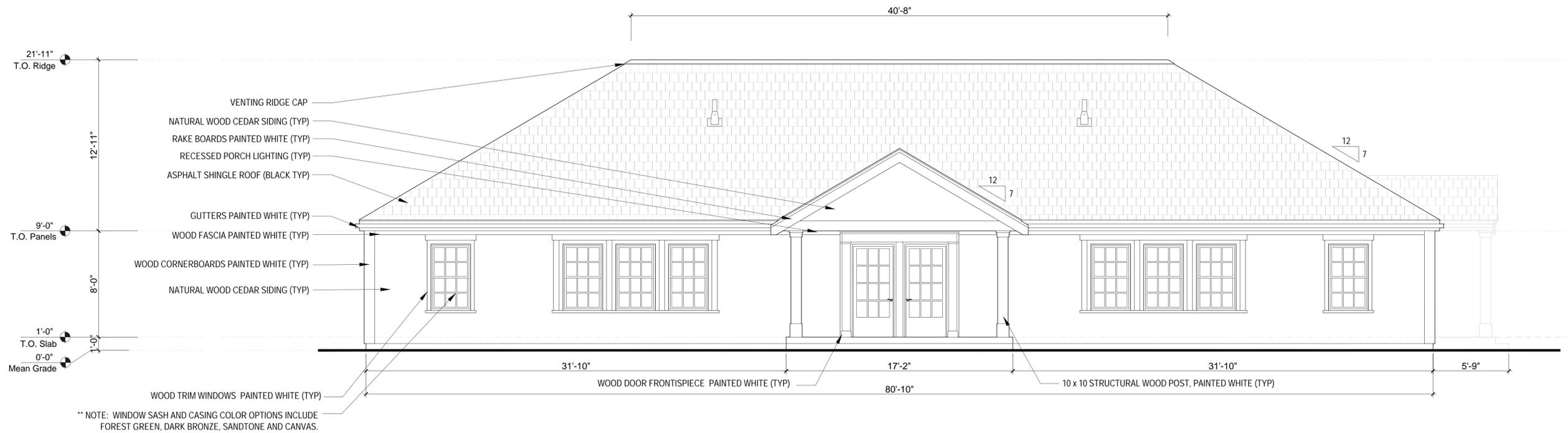
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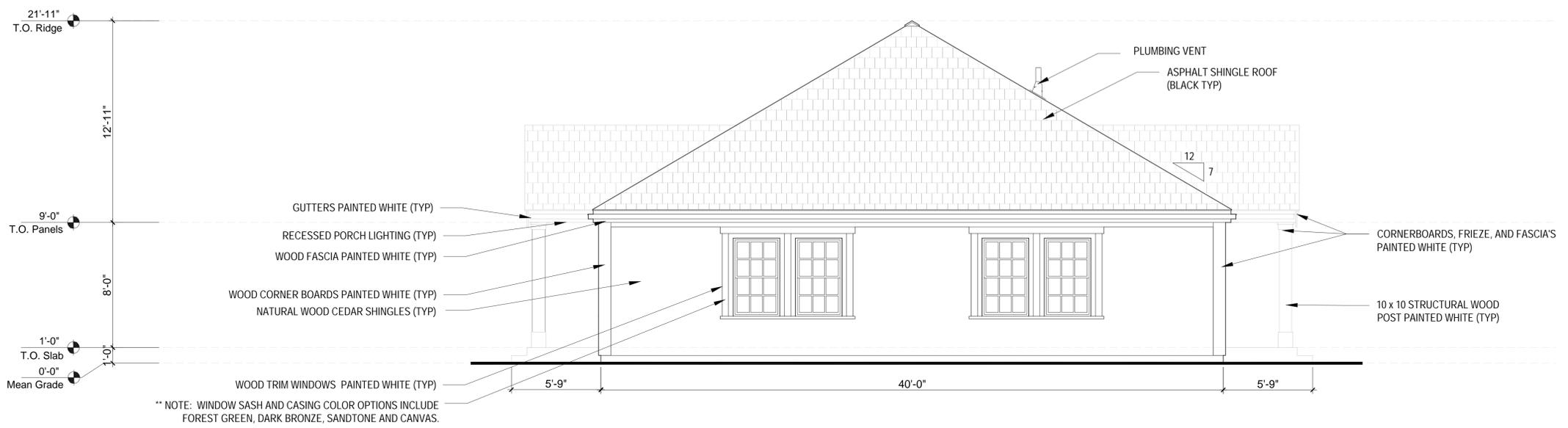
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1 3,235 SF RETAIL - SOUTH ELEVATION  
A-01

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



2 3,235 SF RETAIL - WEST ELEVATION  
A-01

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

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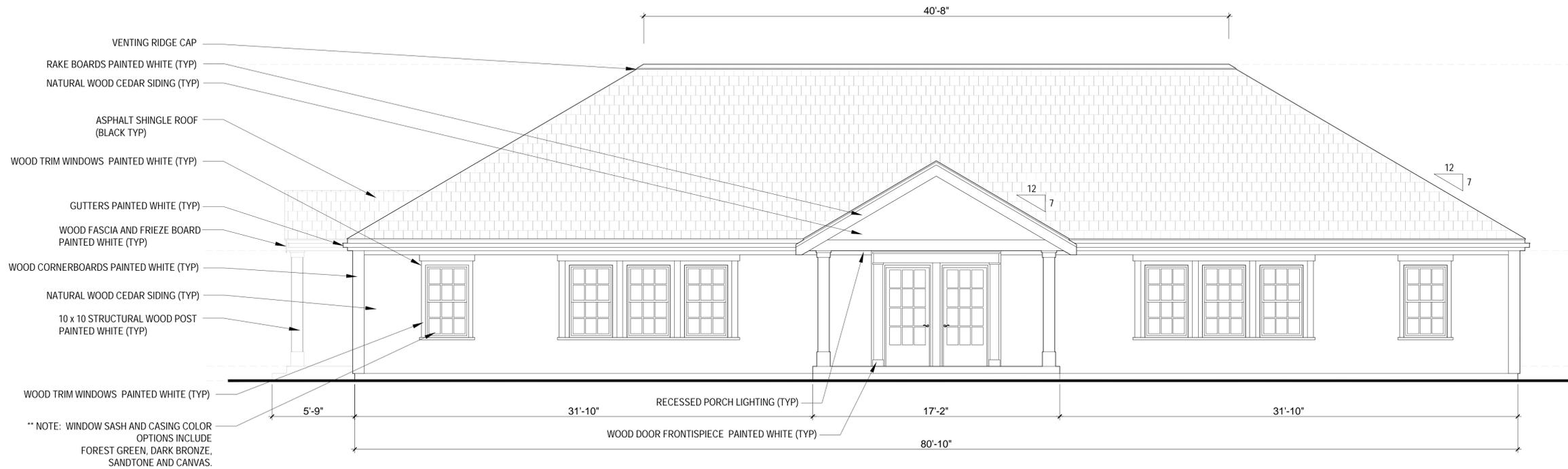
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3,235 SF RETAIL

A-01

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1 3,235 SF RETAIL - NORTH ELEVATION  
A-02

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

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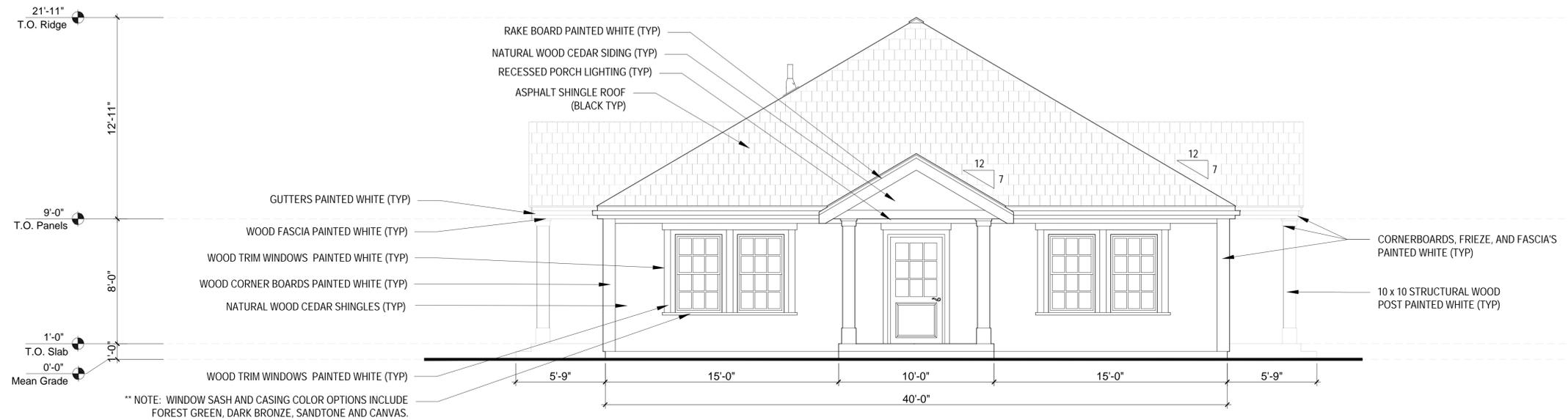
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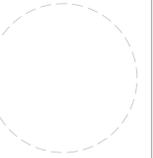
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2 3,235 SF RETAIL - EAST ELEVATION  
A-02

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



1 5,170 SF RETAIL - SOUTHEAST PERSPECTIVE  
P-00

SCALE: NA

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SCHEMATIC DESIGN

- △ HDC COMMENTS
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DRAWN BY: AWH CHECK BY:

ARCH D NO SCALE

JULY 2016

5170 SF RETAIL

P-00

Project: Collaborator: Engineer: Architect: Stage: Client: Revisions: Dwg Info: Scale: Date: Plan: Plan No.:



1  
P-01 5,170 SF RETAIL - EAST ELEVATION

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



2  
P-01 5,170 SF RETAIL - SOUTH ELEVATION

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

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SCHEMATIC DESIGN

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ARCH D 1/4" = 1'-0"

JULY 2016

5170 SF RETAIL

P-01

Project: Collaborator: Engineer: Architect: Stage: Client: Revisions: Dwg Info: Date: Plan: Plan No.:



1 5,170 SF RETAIL - WEST ELEVATION  
P-02

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



2 5,170 SF RETAIL - NORTH ELEVATION  
P-02

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

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RETAIL  
LINER BUILDINGS

DCML 13-362

The Richmond Company

SCHEMATIC DESIGN

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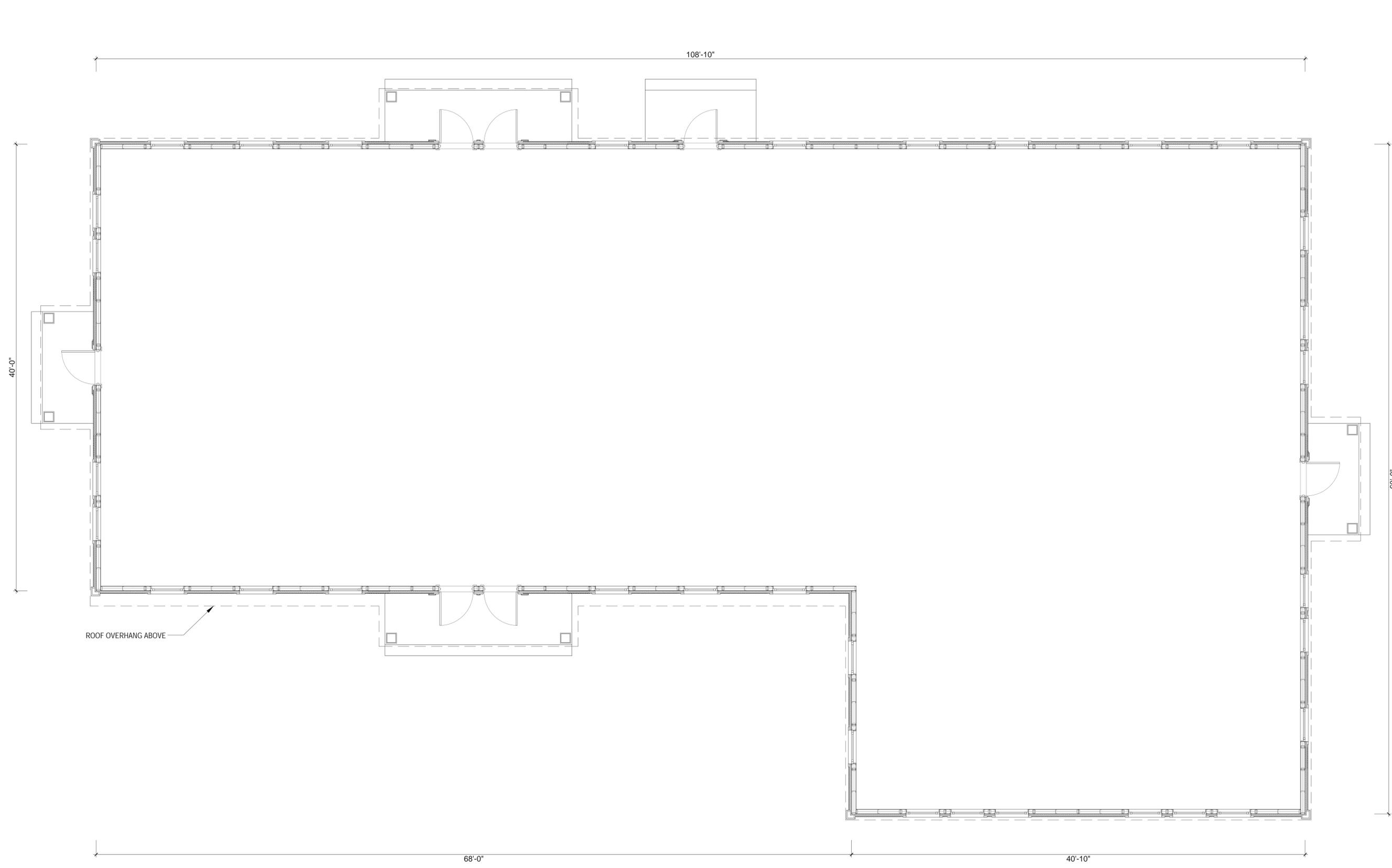
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JULY 2016

5170 SF RETAIL

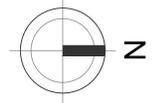
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Project: Collaborator: Engineer: Architect: Stage: Client: Revisions: Dwg Info: Date: Plan: Plan No.:



1  
A-00 5,170 SF RETAIL - PLAN

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



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Andrew Hankermeyer

**PRITON**

RETAIL  
LINER BUILDINGS

DCML 13-362

The Richmond Company  
SCHEMATIC DESIGN

Revision	Description
△	HDC COMMENTS
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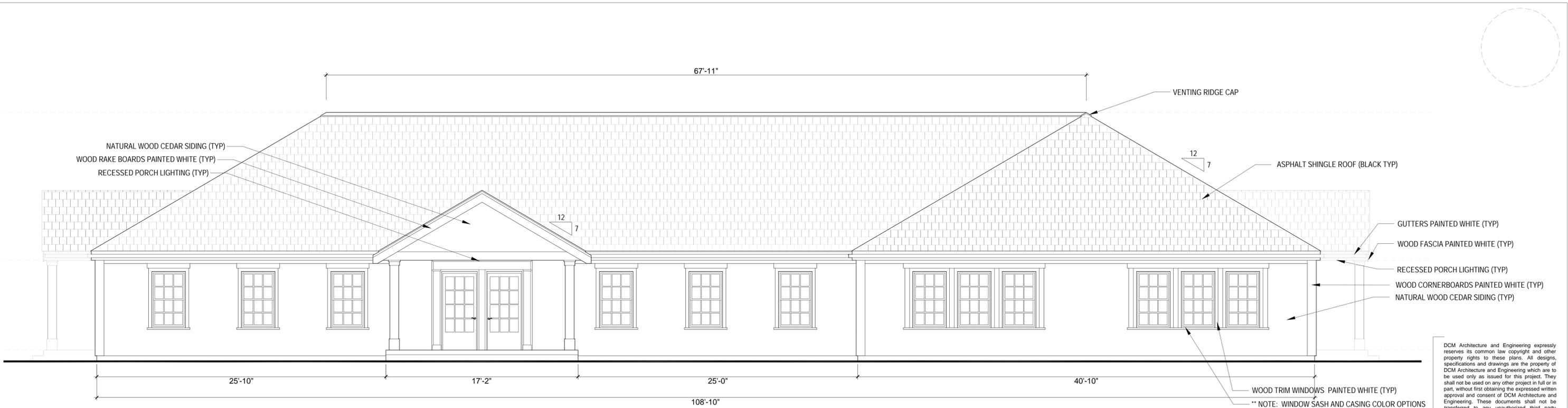
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ARCH D 1/4" = 1'-0"

JULY 2016

5170 SF RETAIL

A-00



1 5,170 SF RETAIL - EAST ELEVATION  
A-01

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

\*\* NOTE: WINDOW SASH AND CASING COLOR OPTIONS INCLUDE FOREST GREEN, DARK BRONZE, SANDTONE AND CANVAS.

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The Contractor shall make no structural changes or substitutions without the written approval of the Architect.



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Project: Collaborator: Engineer: Architect:

EDUARDO GUZMAN, R.A.

ROBERT BENSON, PE

Anton Levchenko  
Andrew Hankermeyer



RETAIL  
LINER BUILDINGS

DCML 13-362

The Richmond Company  
SCHEMATIC DESIGN

Revision:	Stage:	Client:
△	HDC COMMENTS	
△		
△		
△		

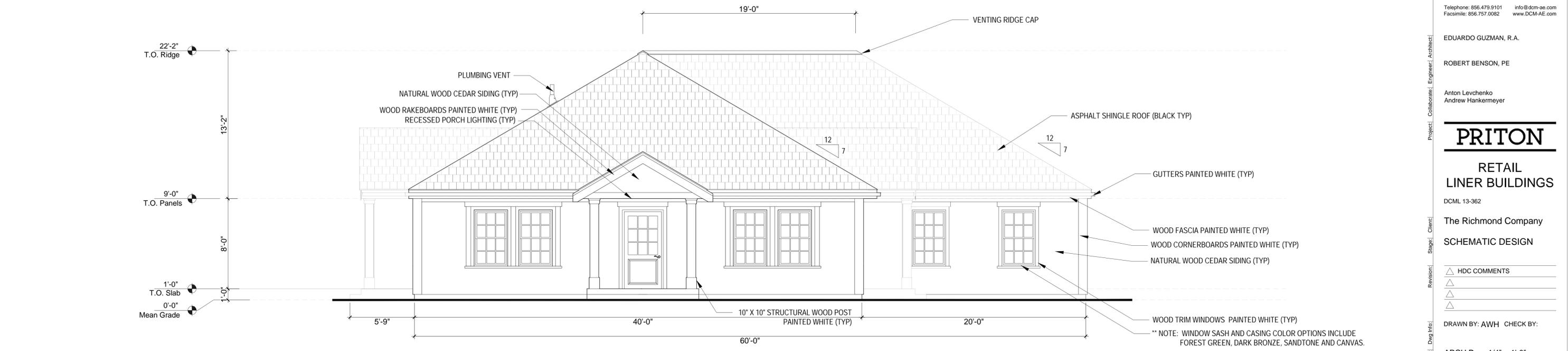
DRAWN BY: AWH CHECK BY:

ARCH D 1/4" = 1'-0"

JULY 2016

5170 SF RETAIL

A-01



2 5,170 SF RETAIL - SOUTH ELEVATION  
A-01

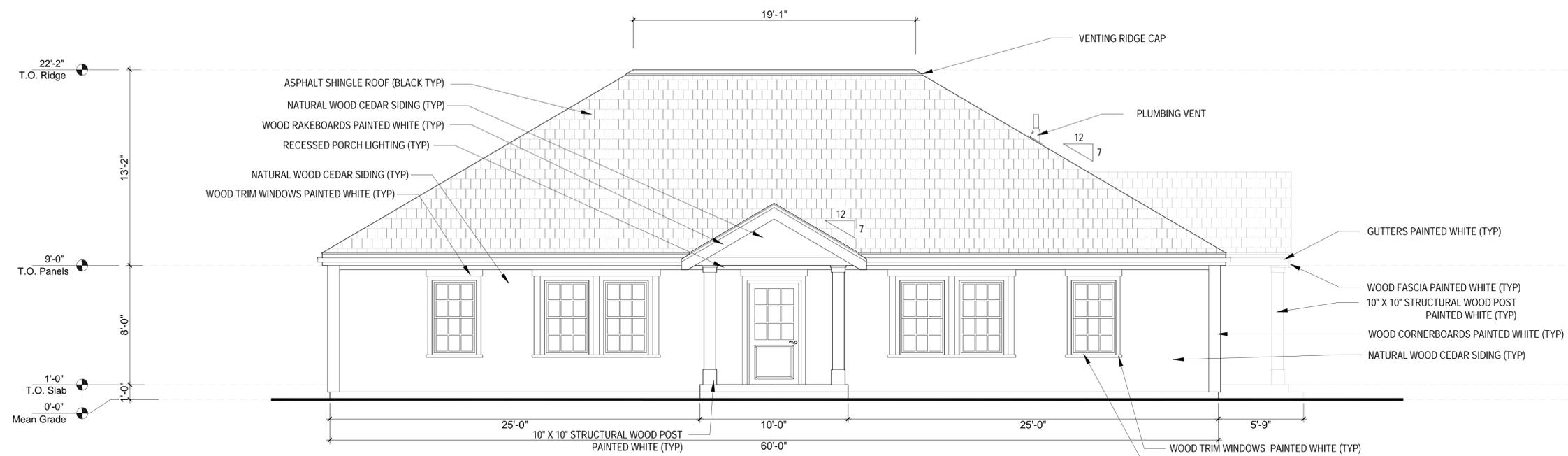
SCALE: 1/4" = 1'-0"

\*\* NOTE: WINDOW SASH AND CASING COLOR OPTIONS INCLUDE FOREST GREEN, DARK BRONZE, SANDTONE AND CANVAS.



1 5,170 SF RETAIL - WEST ELEVATION  
A-02

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



2 5,170 SF RETAIL - NORTH ELEVATION  
A-02

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

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**10 YEARS DCM**  
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EDUARDO GUZMAN, R.A.  
ROBERT BENSON, PE  
Anton Levchenko  
Andrew Hankermeyer

**PRITON**  
RETAIL  
LINER BUILDINGS  
DCML 13-362  
The Richmond Company  
SCHEMATIC DESIGN

△ HDC COMMENTS  
△  
△  
△

DRAWN BY: AWH CHECK BY:

ARCH D 1/4" = 1'-0"

JULY 2016

5170 SF RETAIL

A-02



NANTUCKET  
EMORIUM

NANTUCKET  
SEAFOOD

MARINE HOME  
CENTER APTS.

VALERO & SONS  
GARDEN CENTER

NAUSHOP RESIDENTIAL  
COMMUNITY

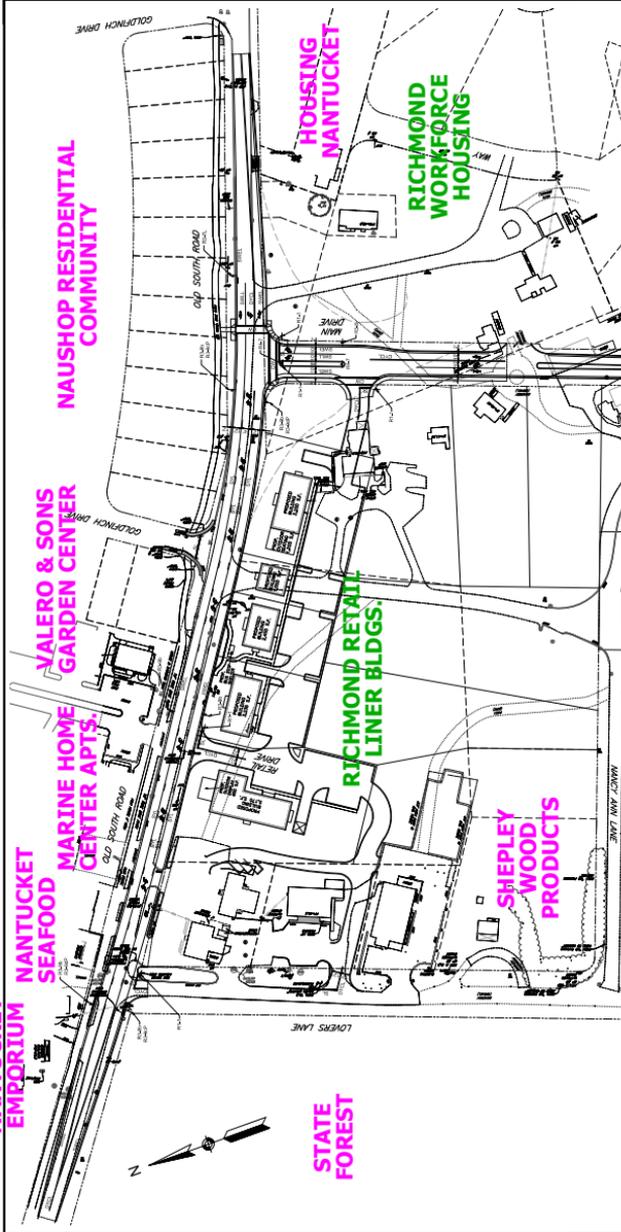
STATE  
FOREST

RICHMOND RETAIL  
LINER BLDGS.

HOUSING  
NANTUCKET

RICHMOND  
WORKFORCE  
HOUSING

SHEPLEY  
WOOD  
PRODUCTS



SIGN LEGEND	
R1-1	
R1-2A	
R1-2	
R1-7	

PAVEMENT MARKING LEGEND	
DIVL	DOUBLE YELLOW CENTER LINE
SWEL	SOLID WHITE EDGE LINE
RYL	YELLOW CENTER LINE
RYL	BROKEN YELLOW LINE
SL	STOP LINE
SWL	SOLID WHITE LANE LINE
CVL	CROSSWALK



SCALE	DESIGNER	DATE
1" = 40'	ROB MILLER & ASSOCIATES	
Traffic Engineering and Consulting Services 200 WEST MAIN STREET, SUITE 200 NANTUCKET, MASSACHUSETTS 01904		
PROPOSED CENTER TURN LANE OLD SOUTH ROAD NANTUCKET, MASSACHUSETTS		
CONCEPTUAL IMPROVEMENT PLAN 8/18/16		
FIGURE 1		

SUBDIVISION PLAN OF LAND IN NANTUCKET

John J. Shugrue, Inc., Surveyors

March 12, 1986

16514-40

KEY SHEET  
Sheet 1 of 6



SHEET	LOT INDEX
1	Lot 663
2	Lots 615 thru 626, and 628 thru 630
3	Lot 627 and 631 thru 638
4	Lots 639 thru 644 and 653 thru 661
5	Lots 648 thru 652 and Lot 664
6	Lots 645 thru 647 and Lot 662

Subdivision of the Remainder of Lot 402  
Shown on Plan 16514-14  
Filed with Cert. of Title No. 13923  
Registry District of Nantucket County

Separate certificates of title may be issued for land  
shown hereon and on Sheets 2 through 6 as Lots 615 through 664  
By the Court.

*Charles M. Mearns*  
Recorder

JAN. 8, 2001

JMF-041V

Copy of part of plan  
filed in  
LAND REGISTRATION OFFICE  
JAN. 8, 2001  
Scale of this plan 200 feet to an inch  
Louis A. Moore, Engineer for Court