

To: **Antigonish Town Council**

From: **Planning Staff (EDPC)**

Date: **February 18, 2020**

Reference: **Application by Mr. Steve Cleroux, Vice President of Development, Atlantic Crombie REIT for a non-substantive amendment to the Development Agreement (Document Registration Number: 82357295) between Sobey's Group Inc. and the Antigonish Mall Ltd. with the Town of Antigonish to allow for the development of a 2,200 square foot extension to their building for a quick serve restaurant without a drive-through on property PID# 01295971.**

**Recommendation:**

That Municipal Council **approve** the discharge of the development agreement attached to this staff report as Appendix “A” between Sobey’s Group Inc. and the Antigonish Mall Ltd. with the Town of Antigonish and replace it with a new agreement between the property owners Crombie OSR Property Holdings Limited and the Town including in the new agreement a “non-substantive amendment” with respect to the development of a 2,200 square foot extension to their building for a quick serve restaurant without a drive-through on property PID# 01295971 in accordance with the provisions of the *Municipal Government Act*.

	Description
<b>Designation:</b>	Commercial Highway
<b>Restrictive Overlay:</b>	Floodway 1-20 years Floodway 1-100 years
<b>Zoning:</b>	C-2 Highway Commercial
<b>Building Sizes</b>	NSLC: 14,000 sq. ft. Sobeys: 36,600 sq. ft. Addition: 2,200 sq. ft.
<b>Context and Zoning Map:</b>	Figure 1, Page 2
<b>Parcel Area:</b>	11967.7 square meters
<b>Site Visit:</b>	February 6, 2020

**Information:**

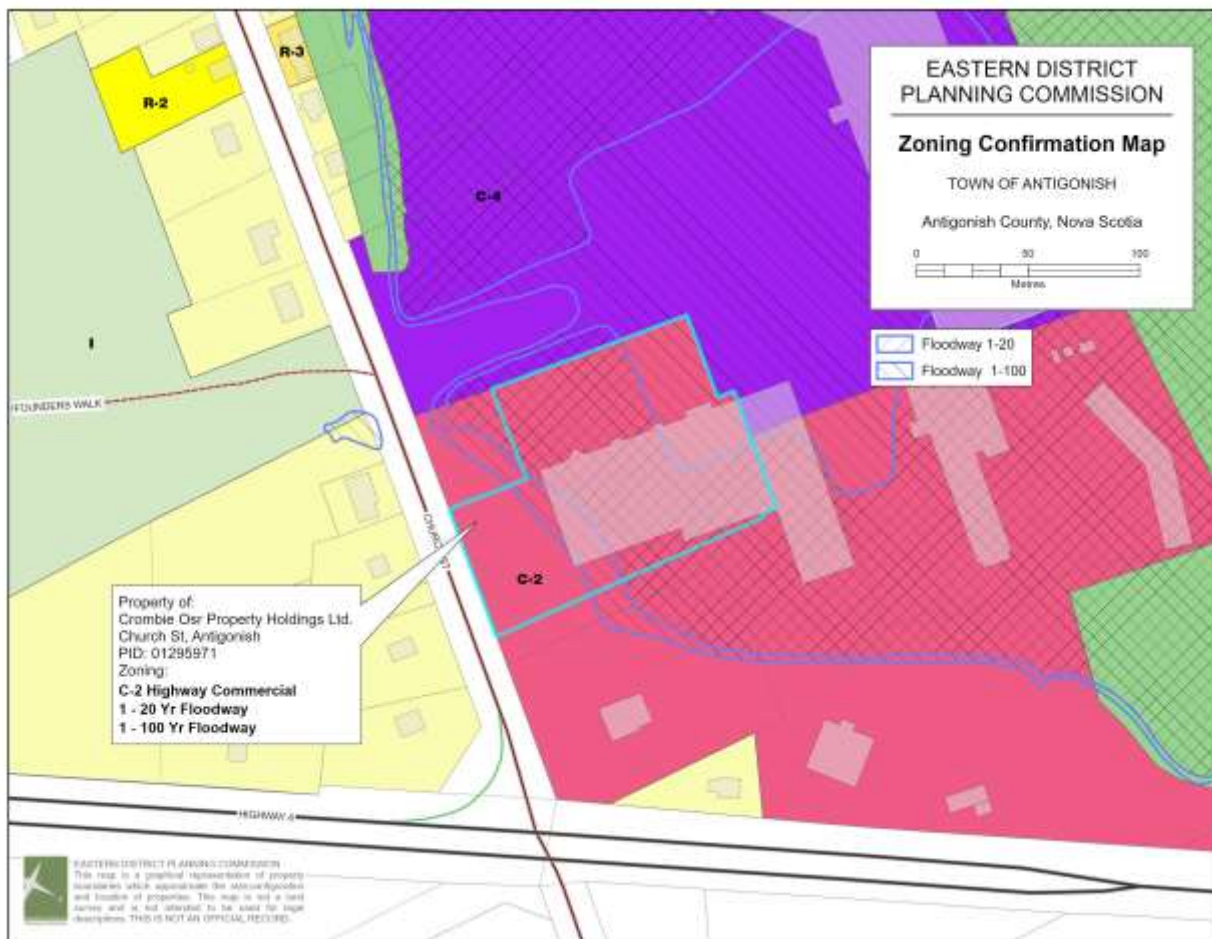
The *Municipal Government Act* in subsection 227(3) allows that “A development agreement may (a) identify matters which are not substantive or, alternatively, identify matters that are substantive;”. Subsection 230(7) then further notes that “Amendments to those items in a development agreement that the parties have identified as not substantive, if the substantive items were identified in the agreement, or that were not identified as being substantive, do not require a public hearing.”

The development agreement registered at the Registry of Dees as document no. 82357295 between Sobey’s Group Inc. and the Antigonish Mall Ltd. with the Town of Antigonish in Part 13

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defines among other items “The provisions of this Agreement relating to the following matters are not deemed to be substantial and may be amended, upon written request, by the Development Officer... A minor variation or modification of the plans and specifications of Schedule B if such variation or modification is not contrary to the spirit and the intent of this Development Agreement” and “Future changes in occupant, or type of occupancy.”

January 9, 2020 staff received a formal application from Mr. Steve Cleroux, Vice President of Development, Atlantic for Crosbie Real Estate Investment Trust for a non-substantive amendment to their development agreement to allow for a 2,200 square foot addition to their existing Sobeys’ store to accommodate a quick service restaurant *without* a Drive-Thru window service which would eliminate nine parking spaces along the side of the building.



**Figure 1: Context and Zoning**

The property is designated Commercial Highway on the Generalized Future Land Use Map in the *Municipal Planning Strategy* and zoned Highway Commercial (C-2). The property is also in the Restrictive Overlays with respect to both the 1-20 and the 1-100 years floodways.

A site visit was conducted on February 6, 2020 when portions of the property were walked and

pictures were taken on site and from the abutting Dairy Queen property. Presently both a 36,600 square foot grocery store and a 14,000 square foot liquor store are located on the property. Access to the property is from the central lane access to the Antigonish Shopping mall which intersects with Church Street at a traffic light controlled intersection.



**Figure 2: Site from Abutting Property**

### **Analysis:**

Unlike a review of the original development agreement the review of a non-substantive amendment is guided by the conditions in the existing development agreement. For example, and most importantly, if an agreement does not identify what would be considered a non-substantive amendment, any amendment no matter how minor would require a new agreement examined against the policy in place in the current *Municipal Planning Strategy* and *Land Use By-law*. The new agreement would then also be subject to a public hearing and the corresponding appeal process. In this instance Part 13 **does** allow for non-substantive and substantive amendments to the agreement. The agreement however allows that these amendments can be approved by the Development Officer. This is not the case. The *Municipal Government Act* in Subsection 230 (1) states that it is “council [that] shall adopt or amend a development agreement by policy.”

Therefore there are only three criteria for Council to consider with respect to amending this development agreement: 1) that the amendment is identified as non-substantive; 2) that the amendment is minor; and 3) that the amendment is not contrary to the spirit and the intent of the agreement.

#### *1. Non-Substantive*

The agreement identifies two areas where this amendment could be considered as non-substantive. First the agreement allows for the variation or modification of the plans and specifications of Schedule B of the agreement. Schedule B includes a site plan of the property and elevation drawings of the building. An addition to the building would require the modification of both portions of Schedule B: the site plan and the elevations.

Secondly the agreement allows for future changes in occupant, or type of occupancy. A restaurant would be a change of occupancy.

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### 2. *Minor*

While the agreement allows for the variation or modification of the plans and specifications of Schedule B of the agreement, the agreement does specify such variations need be “minor” in nature.

The applicant suggests in their application that the amendment would be minor because of the small size of the addition, the nature of the restaurant and the relatively few parking spots being eliminated by the expansion.

The addition results in an approximately 4.3% increase in floor area to the existing building. When the *Municipal Government Act* was adopted in 1998, it no longer referring to variances as “Minor” as had been the case in the former *Planning Act*. Nevertheless even in the old *Act*, did not quantify what was considered as “minor”. Staff were expected to look at the context of the situation to determine what was minor as opposed to arbitrarily using a percentage. Therefore on a small lot, a small percentage could be still considered to be “major” while on a larger lot the same percentage could be considered “minor”. In this instance the lot in question is approximately 11,967.7 square metres. The addition of a 204.4 square metre addition increases total lot coverage by approximately 1.7% for a total lot coverage of 41.0% lot coverage. Staff therefore agree with the applicant that the increase in floor area is minor.

Similarly the reduction of parking spaces from 112 spaces by 9 spaces would be considered to be a minor increase. Examining air photos of the property there is room on the site to replace these peripheral parking spaces. Also there are an extra 87 spaces available to the grocery and liquor stores in the immediate vicinity of the stores.

Finally, staff agree with the applicant that a “Drive-thru” Restaurant would be considered a major amendment to this agreement given the traffic generated by such facilities. The absence of a drive-thru again supports the minor nature of this amendment.

### 3. *Spirit and Intent*

Thirdly while the agreement allows for the variation or modification of the plans and specifications of Schedule B of the agreement, the agreement does specify such variations need not be contrary to the spirit and the intent of the agreement. The intent of the agreement is found in the preamble. It states that the intent of the agreement is to allow for the “...the development of commercial uses with building footprints over 10,000 square feet in area.” While it could be argued that the specific intent of the agreement was to allow for the expansion of the liquor store, the provision for change of occupancy broadens the agreement. The addition of a small restaurant to the development is consistent with both the spirit and intent of this agreement.

**Conclusion and Recommendation:**

In the opinion of staff the requested amendment to the Development Agreement (Document Registration Number: 82357295) between Sobey's Group Inc. and the Antigonish Mall Ltd. with the Town of Antigonish to allow for the development of a 2,200 square foot extension to their building for a quick serve restaurant without a drive-through on property PID# 01295971 can be considered as a non-substantive amendment. (See Appendix "B" and "C")

Further staff recommend that Town Council approve the discharge of the development agreement attached to this staff report as Appendix "A" between Sobey's Group Inc. and the Antigonish Mall Ltd. with the Town of Antigonish and replace it with a new agreement between the property owners Crombie OSR Property Holdings Limited and the Town including, in the new agreement a "non-substantive amendment" with respect to the development of a 2,200 square foot extension to their building for a quick serve restaurant without a drive-through on property PID# 01295971 in accordance with the provisions of the *Municipal Government Act*

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### Appendix "A" Development Agreement DA4.04

THIS AGREEMENT made this 22nd day of February 2005.,

BETWEEN: Sobey's Group Inc. and Antigonish Mall Ltd.  
(hereinafter called the "Developers")

- and -

The Town of Antigonish, a body corporate, in the County of Antigonish, Province of Nova Scotia, (hereinafter called the "Town")

WHEREAS the Developers are the registered owner of lands located at 133 Church St., Antigonish, Nova Scotia, (hereinafter called the "Lands"), and which said lands are more particularly described in two Schedule "A"s attached hereto;

AND WHEREAS the Developers have requested that the Town enter into a development agreement pursuant to the provisions of policy P-4.2.1 of the Municipal Planning Strategy concerning the development of commercial uses with building footprints over 10,000 square feet in area (hereinafter called the Development);

THEREFORE in consideration of the benefits accrued to each party from the terms herein contained, the Parties agree as follows:

#### Part 1: Definitions

"Land Use By-Law" means the Land Use By-Law of the Town of Antigonish adopted by the Antigonish Town Council under the provisions of the Planning Act and approved by the Minister of Municipal Affairs on August 9, 1994 and includes all current, approved revisions, (hereinafter referred to as the "LUB").

"Municipal Planning Strategy" means the municipal planning strategy of the Town of Antigonish adopted by the Antigonish Town Council under the provisions of the Planning Act and approved by the Minister of Municipal Affairs on August 9, 1994 and includes all current, approved revisions, (hereinafter referred to as the "MPS").

"Municipal Government Act" means Chapter 18 of the Statutes of Nova Scotia, 1998. (hereinafter referred to as the "MGA")

All other words shall carry their customary meaning except those defined in Part 2 of the LUB wherein such words shall carry the meaning defined therein.

#### Part 2: Schedules & Use

- 2.1 The Developers shall develop and use the Lands in conformance with the site plans, design drawings, and supporting technical documents attached as Schedule "B": Site-plans and drawings.
- 2.2 It is proposed that a 14,000 square foot commercial building be erected on the lands for the purpose of housing a new Nova Scotia Liquor Commission retail outlet.

#### Part 3: Plans

- 3.1 The development shall be constructed in conformity with Schedule "B", Plans and Specifications.

**Part 4: Parking**

- 4.1 The Developers shall construct and maintain in good repair the parking areas and access laneway as shown on Schedule "B".
- 4.2 The Developers agree that, as co-signatories to this document, they will share in the provision of parking for the development.

**Part 5: Signs and Lighting Requirements**

- 5.1 As per Schedule B - or, where not indicated in the plans of Schedule B, as per the Antigonish Land Use By-Law.

**Part 6: Landscaping & Site Development**

- 6.1 The Developer shall construct the work, including landscaping, in accordance with Schedule "B".
- 6.2 Where trees are to be planted, as indicated on Schedule "B", they shall have a caliper of not less than 40 mm if deciduous or stand a minimum of four feet high if coniferous.
- 6.3 Landscaping required under this agreement shall be completed within one year of completion of construction.

**Part 7. Servicing**

- 7.1 No foundation or other drain carrying storm or ground water shall be connected to a sanitary drain.
- 7.2 No servicing or building permits shall be issued until such a time as drawings, suitable to the engineering department, have been submitted for review and approval.
- 7.3 Should assessment by the Insurers Advisory Organization indicate fire flow deficiencies, The Developer agrees that they will provide a hydrant on or adjacent the lands, as per the recommendation of IA0.

**Part 8. Hours of Operation**

- 8.1 NA

**Part 9. Environmental Protection**

- 9.1 The Developer shall take all necessary precautions to protect the lands from erosion and sedimentation during construction and shall follow practices as published by the Nova Scotia Department of the Environment in their *Erosion and Sedimentation Control Handbook for Construction Sites*.

**Part 10: Permits and Construction**

- 10.1 Nothing in this agreement shall exempt the Developer or any successor in title from complying with other Bylaws or Regulations in force within the Town or from obtaining any license, permission, permit authority or approval required thereunder, including any permission required under the Provincial Fire Code, or those of any other authority having jurisdiction.
- 10.2 The Developer shall commence construction of the Development within 24 months subject to weather conditions and following the issuance of the necessary permits for the Development. If construction does not begin within the period set out herein, this Development Agreement may be discharged by the Town Council.

**Part 11: Demolition**

- 11.1 The Developer agrees that all construction debris resulting from demolition associated with this agreement, shall be taken to the Guysborough Land Fill. Said materials shall be separated and shipped as per the requirements of the Land Fill.

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### **Part 12: Maintenance**

- 12.1 The Developer agrees that while this Development Agreement continues in effect the developer shall ensure that the exterior of the buildings, the grounds and all landscaping required under this agreement, are well maintained and in good condition.
- 12.2 The Developer further agrees that, during the period of construction, the site and surroundings shall be kept reasonably clean and free from construction debris.

### **Part 13: Amendments**

- 13.1 The provisions of this Agreement relating to the following matters are not deemed to be substantial and may be amended, upon written request, by the Development Officer:
1. The requirements for commencement and completion imposed by section 10.2.
  2. A minor variation or modification of the plans and specifications of Schedule B if such variation or modification is not contrary to the spirit and the intent of this Development Agreement.
  3. Future changes in occupant, or type of occupancy.
  4. The requirements of 11.1 concerning land filling of demolition debris provided the Developer proposes an alternate plan suitable to the Department of Engineering.
- 13.2 Amendments to any matters not identified under Section 13.1 shall be deemed substantial and may only be amended in accordance with the approval requirements of the Act.

### **Part 14: Registration, Effect of Conveyances and Discharge**

- 14.1 A copy of this Agreement and every amendment and discharge of this Agreement shall be recorded at the office of the Registry of Deeds at Antigonish, Nova Scotia.
- 14.2 The Developer shall provide the Town a copy of the registered agreement
- 14.3 This Agreement shall be binding upon the parties hereto, their heirs, successors, assigns, mortgagees, lessees and all subsequent owners, and shall run with the land which is the subject of this Agreement until this Agreement is discharged by the Council.
- 14.4 Upon the completion of the development, Council may review this Agreement, in whole or in part, and may:
1. retain the Agreement in its present form or
  2. discharge this Agreement on the condition that for those portions of the development that are deemed complete by Council, the Developer's rights hereunder are preserved and the Council shall apply appropriate zoning pursuant to the Strategy and By-law.

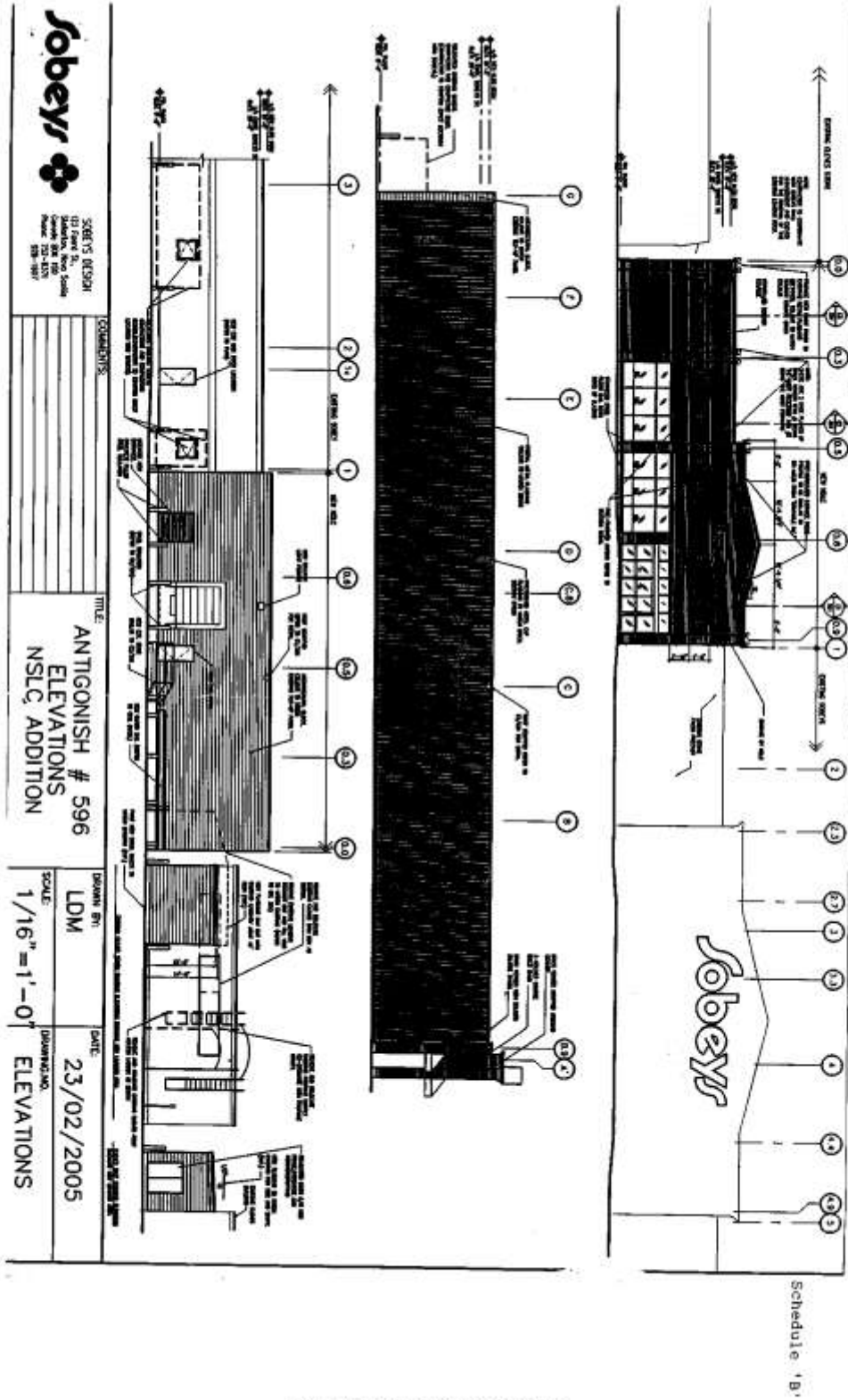
### **Part 15: Undertaking**

- 15.1 The Developer shall pay all expenses related to the advertising and signage requirements associated with the Development Agreement Process.
- 15.2 Prior to advertising adoption of this agreement, the Developers agree to provide a legal agreement concerning future disposition of the lands should one, or the other of the two developers seek to be released from this contract or any title to the lands.
- 15.3 The Developer shall pay all costs related to the registration of this Agreement.
- 15.4 On completion of the project, the Developer shall provide the Town an "as-built" plan of survey indicating all buildings, details of the redeveloped parking area and landscaping improvements required under this agreement.

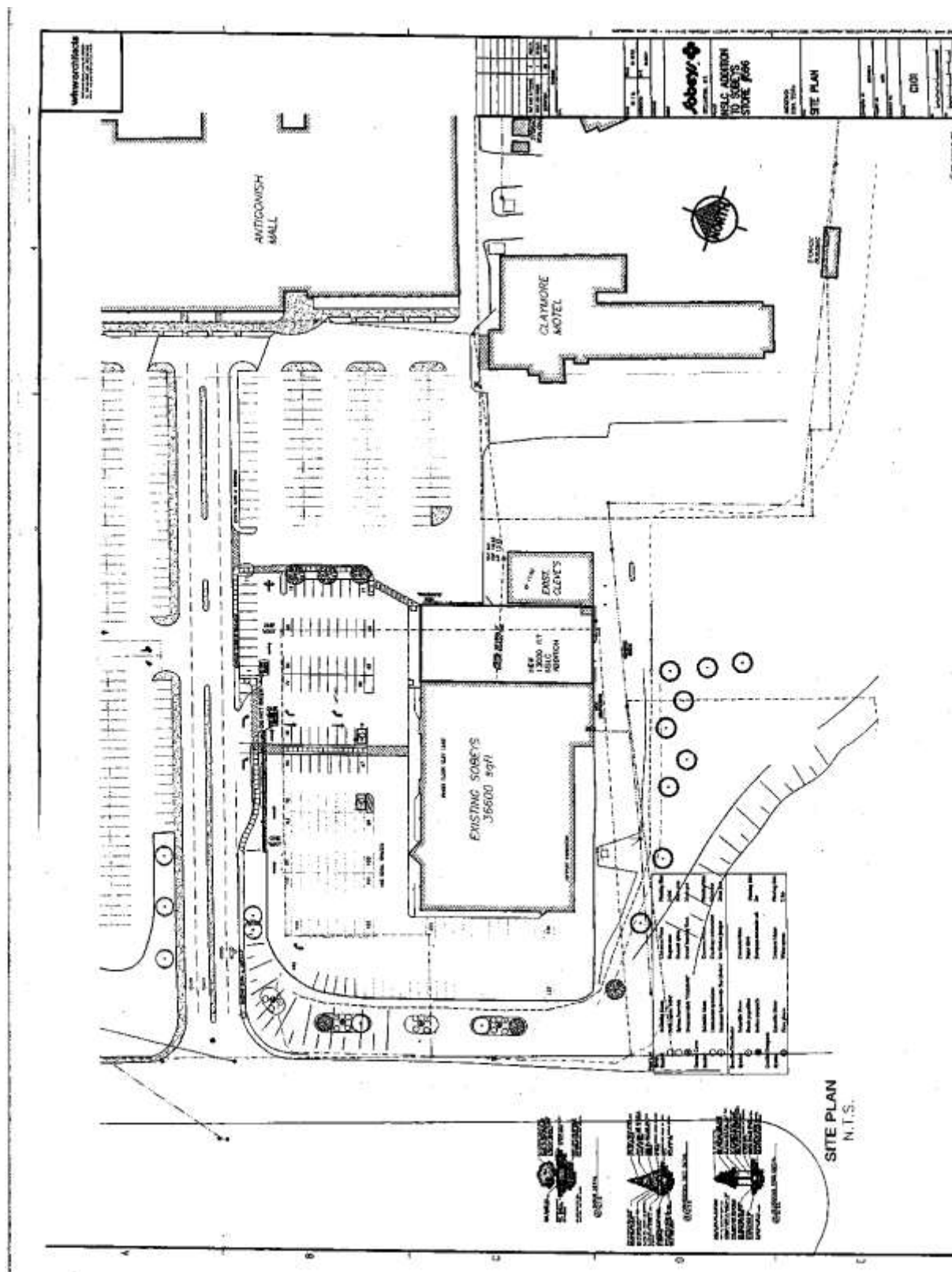


**Part 16: Enforcement, Rights And Remedies**

- 16.1 The Developer agrees that any officer appointed by the Town to enforce this Agreement shall be granted access onto the Lands during all reasonable hours without obtaining consent of the Developer. The Developer further agrees that, upon receiving written notification from an officer of the Town to inspect the interior of any building located on the Lands, the Developer agrees to allow for such an inspection during any reasonable hour within 2 days of receiving such a request.
- 16.2 In the event of a breach by the Developer of any of the terms or conditions of this Agreement, the Town may:
1. Apply for an injunction or injunction type relief; or
  2. Prosecute under the MGA, LUB, or Building Bylaw; or
  3. Sue for specific performance of any terms or conditions; or
  4. Sue for breach of contract; or
  5. Discharge this Agreement; or
  6. Undertake any remedies permitted by the MGA; or
  7. Any combination of the above; or
  8. Do nothing without prejudice to its continuing rights to do any of the above.
- 16.3 It is agreed that the provisions of this Agreement are severable from one another and that the invalidity or unenforceability of one provision shall not prejudice the validity or enforceability of any other provision.

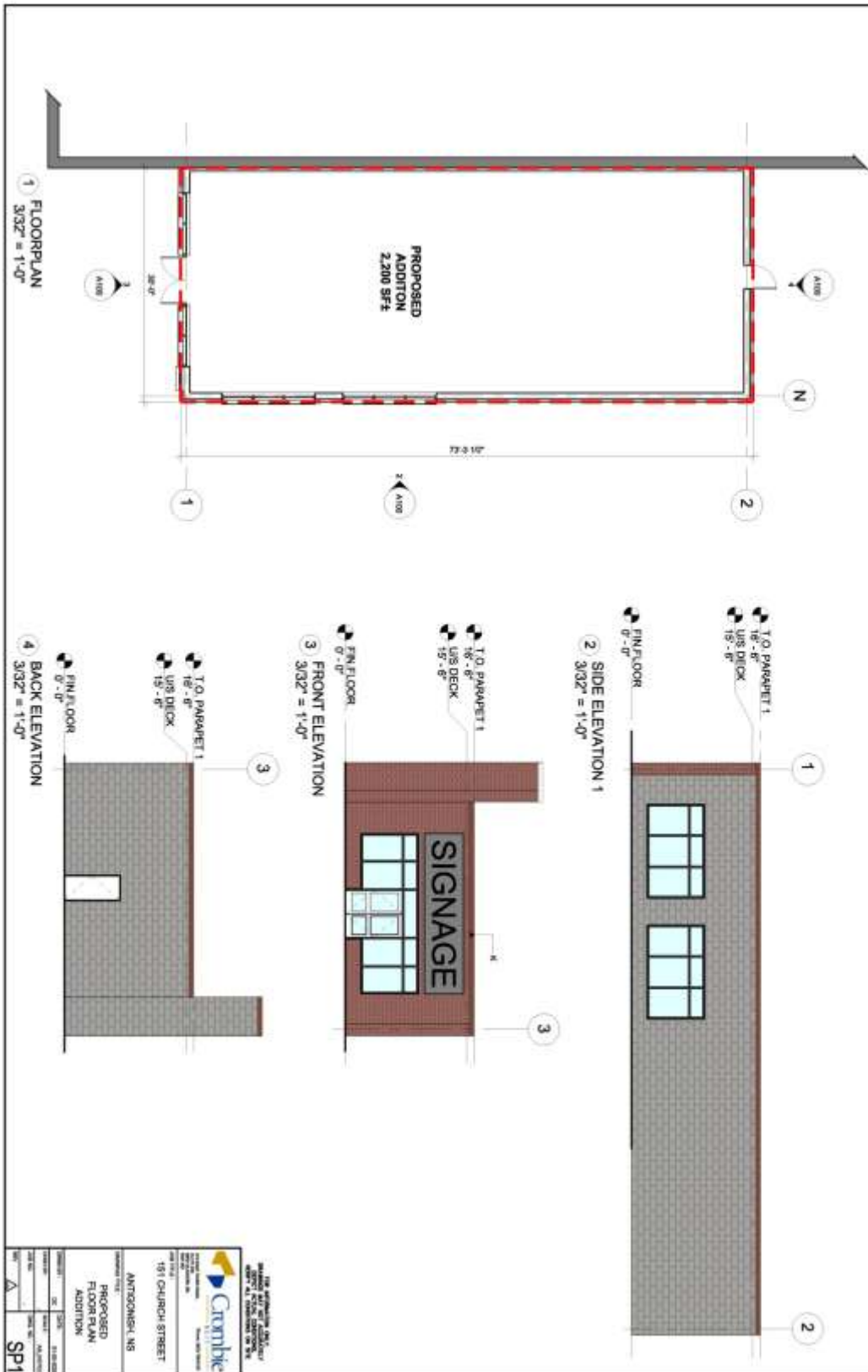


Document Registration Number: 82357295



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Appendix B – Proposed Building Elevations



Appendix C – Proposed Addition Site Plan

