

**HARBORSIDE PROPERTY MANAGEMENT, LLC, APPLICANT**

**PORTSMOUTH ZONING BOARD OF ADJUSTMENT**

**LU-25-25**

**92 Brewster Street, Tax Map 138, Lot 54**

**OBJECTION TO REQUEST FOR REHEARING**

**NOW COMES**, Harborside Property Management, LLC and its member, George Hails (“Harborside”), by and through attorneys, Hoefle, Phoenix, Gormley & Roberts, PLLC, and respectfully requests that the Portsmouth Zoning Board of Adjustment deny the Request for Rehearing filed by Abby Kirschner and Chris Schnaars (“Petitioners”) with respect to the July 15, 2025 decision of the Portsmouth Zoning Board of Adjustment (“ZBA”) granting Harborside variances to construct a single family home with incorporated Accessory Dwelling Unit (“ADU”) on an existing 2,884 square foot lot at 92 Brewster Street (the “Property”).

**I. EXHIBITS**

1. July 22, 2025 – ZBA Notice of Decision & Findings of Fact
2. July 15, 2025 – ZBA Minutes (Draft).

**II. REHEARING LEGAL STANDARD**

Within thirty days after any...decision of the Zoning Board of Adjustment...any party to the action or proceedings,...may apply for rehearing in respect to any matter determined in the action...specifying in the motion for rehearing the grounds therefore; and the Board of Adjustment...may grant such rehearing if in its opinion good reason therefore is stated in the motion.  
RSA 677:2.

The New Hampshire Supreme Court has made clear that a “rehearing is not a matter of right” and “in the interest of finality of decisions by zoning boards, rehearings should not lightly be granted.” McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171 (2005). The ZBA is considered the expert on matters of zoning and local conditions and its decisions are deemed prima facie lawful. See The Board of Adjustment in New Hampshire, a Handbook for Local Officials, November, 2019 p. IV-5; Daniels v. Londonderry, 157 N.H. 519 (2008). Rehearing is proper only where the affected party can show technical error or produce new evidence that was not available at the time of the first hearing. Loughlin, 15 New Hampshire Practice, Land Use Planning and Zoning, Section 21.08 (4<sup>th</sup> Ed. 2010).

It is assumed that every case will be decided, originally, only after careful consideration of all the evidence on hand and on the best possible judgment of the

individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing.

New Hampshire Office of Energy and Planning, The Board of Adjustment in New Hampshire: A Handbook for Local Officials, Chapter IV, P. IV-3 (2024).

### III. BACKGROUND

92 Brewster Street is comprised of two historic lots since merged to a 2,884 square foot property with 52.33 feet of frontage with a curb cut width of 31.8 feet (“the Property”). The Property contains a truly tiny, dated, one-bedroom home occupying a footprint of 334 square feet plus a 90 square feet porch. The home is tucked into the northwest corner less than a foot from the north side lot line and 2.7 feet from the rear lot line, while the balance of the lot is used for parking. The south side of the Property is burdened by a 6-foot-wide right-of-way favoring lot 52. Harborside Property Management, LLC is owned and managed by George Hails, who currently resides at the Property. Harborside received targeted dimensional relief to allow reconstruction of a permitted single-family home with incorporated garage and ADU (“the Project”) as indicated below:

<u>Ordinance Section</u>	<u>Required</u>	<u>Existing</u>	<u>Proposed</u>
<u>PZO Table §10.521</u> <u>Dimensional Standards</u>			
Lot Area	3,500 s.f.	2,884 s.f.	2,884 s.f.
Frontage	70 ft.	52.33’	52.33’
Lot Area/Dwelling Unit	3,500 s.f./dwelling unit	2,884 s.f./dwelling unit	2,884 s.f./dwelling unit <sup>1</sup>
Side Yard	10’ side yard	0.9’ overhang/2.7’ wall	9.4’/9.7 overhang
Rear Yard	20’ rear yard	2.7’ overhang/3.2’ wall	9.3’ overhang/10.3 wall

Most of the relief was related to the size of the lot itself, but the Project also required relief from the right-side and rear yard requirements to accommodate the home.

The ZBA considered Harborside’s application at a duly noticed meeting on July 15, 2025. Discussion centered around the Property’s status as a nonconforming lot of record, which

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<sup>1</sup> Accessory Dwelling Unit does not require additional relief from frontage, lot area, or lot area/dwelling unit than a single-family home in the same zone.

supports a small single-family home which does not conform to current yard requirements. Petitioners neither attended the ZBA meeting nor offered comment. Given Petitioners' failure to participate in the initial hearing, we question whether they even have standing to seek rehearing for permitted single family home with ADU in a residential zone. Assuming, *arguendo*, that Petitioners have standing to raise these claims, we address each claim in turn.

#### **IV. RESPONSE TO PETITIONERS' CLAIMS OF ERROR**

Having failed to participate or offer evidence to the ZBA previously, Petitioners now claim the requested variances do not meet the required criteria because the proposed home has "three full stories" and its parking is "near the right of way path". Petitioners overlook the existence of other three-story homes in the area which exist by virtue of gables and dormers as well as the existing parking which is also close to the right-of-way path, which exists for Lot 52. Petitioners claim that the setback measurement should be from the edge of the right-of-way path, which contravenes the Ordinance. Petitioners also allege, without evidence, that the variances negatively affect the value of their property by obscuring views of North Mill Pond trees and assert no hardship exists because the variances are driven Applicant's desire to obtain two residential units.

Petitioners' claims lack evidentiary support and are wholly without merit. Petitioners' request for rehearing fails to demonstrate that the ZBA committed technical error or that the information Petitioners offers in their request for rehearing was unavailable at the time of the initial hearing. See New Hampshire Office of Energy and Planning, The Board of Adjustment in New Hampshire: A Handbook for Local Officials, Chapter IV, P. IV-3 (2024) *supra*. Accordingly, Petitioners' request for rehearing must be denied.

Petitioners' assertions regarding the home design assume unlimited ZBA jurisdiction, contrary to the Ordinance and state law. RSA 674:16 enables municipalities to enact zoning ordinances that regulate *uses* of property; the height, number of stories, size and location of buildings and structures on a lot; and yard size, lot coverage, and density. The Project constructs a single-family home with ADU in a zone where single-family homes and duplexes are permitted. The proposed height complies with the Ordinance and the home *exceeds* the 10-foot yard requirement on Petitioners' side as measured from the common lot line in accordance with the Ordinance definition of side yard. There is also no setback requirement for driveways serving a single-family home in a residential zone.

The plain language of RSA 674:16 and 674:33 do not confer authority upon the ZBA to adjudicate all aspects of a single lot residential site redevelopment. Dimensional or design aspects of Applicant's proposed home which require no variance (height, building and lot coverage) are not subject to review by the ZBA merely because other variances are requested. For these reasons, the ZBA correctly limited their review to whether the variances meet the five criteria. Accordingly, Petitioners are unable to allege a legal or technical error and their request for rehearing must be denied.

Petitioners assert, for the first time and without evidence, that granting the variances will diminish the value of surrounding properties because they will lose access to air and light, and they will be unable to view the North Mill Pond trees. The ZBA considered concerns regarding air and light at the meeting and noted the home's overall compliance with height requirements and the present nonconforming structure. (**Exhibit 2, pages 2-3**). In addition to height compliance, Applicant's new home *exceeds* the 10-foot setback requirement from the lot line shared with Petitioners and complies with building coverage so clearly does not overwhelm the surrounding properties. Petitioners are not entitled to a specific view and the construction of any new home centered on the lot would have a similar effect. As community members familiar with the neighborhood, the ZBA is empowered to rely on its collective knowledge of local conditions. Vannah v. Bedford, 111 N.H. 105 (1971). Accordingly, the ZBA correctly found that granting the variances to allow construction of a permitted single-family home with ADU (itself permitted by right under state law) does not diminish the value of surrounding properties. Petitioners offer no contrary evidence unavailable at the time of the initial hearing, but instead merely express their disagreement with the collective judgment of the ZBA.

Petitioners' assertion that the hardship is driven by the need to create two dwelling units is misplaced. The ADU required no relief from any dimensional requirement. The ZBA correctly applied the three-part hardship test to find that denial of the variances would result in an unnecessary hardship to the Applicant. A majority of the ZBA found that the Property clearly has special conditions as demonstrated by its very small size, shape, lack of depth, and easement. If the existing home were built today, identical variances would be required.

No fair and substantial relationship exists between the purpose of the regulation and its application in this instant where Applicant proposes a permitted single-family home and ADU centered on the lot, meeting the side yard setback on Petitioners' side and requiring less than a

foot of deviation on the opposite side. The rear yard setback relief is consistent with the thickly settled neighborhood and building coverage is compliant.

The neighborhood overall has several nearby parcels non-conforming for setbacks. See Rancourt v. City of Manchester, 149 N.H. 51 (2003), (noting that post-Simplex, hardship exists if "if special conditions of the land render the use for which the variance is sought is reasonable" and special conditions refers to a "property's unique setting in its environment". Id. at 54). Here many lots in the area have been merged into larger lots, while others are left as they were originally laid out. A finding of hardship does not require the Property to be the only burdened property, but only that it be burdened distinctly. Garrison v. Town of Henniker, 154 N.H. 26, 32-33 (2006).

Finally, Applicant's proposed use is reasonable because it proposes a permitted single-family home and ADU in a residential zone. If the use is permitted, it is deemed reasonable. Vigeant v. Hudson, 151 N.H. 747 (2005). The ZBA correctly determined that the request was reasonable in that the Project established a new permitted residential use where a nonconforming and outdated single family home currently exists. Given the absence of any identified error in the ZBA's hardship analysis, Petitioners' request for rehearing must be denied.

#### V. CONCLUSION

In summary, the application was supported with detailed plans, other exhibits and testimony at a duly noticed public hearing. The ZBA acted reasonably and lawfully with the reasoning of the board members contained in the minutes and findings of fact. Petitioners provide neither any factual nor technical error by the ZBA requiring rehearing nor present any new evidence that was not available at the time of the first hearing.

For all of the reasons stated herein together with the original submission, presentation, minutes and notice of decision, Harborside respectfully requests that the ZBA deny the request for rehearing.

Respectfully submitted,  
Harborside Property Management, LLC



By: R. Timothy Phoenix  
Monica F. Kieser



## CITY OF PORTSMOUTH

Planning & Sustainability  
Department  
1 Junkins Avenue  
Portsmouth, New  
Hampshire 03801  
(603) 610-7216

### **ZONING BOARD OF ADJUSTMENT**

July 22, 2025

Harborside Property Management LLC  
92 Brewster Street  
Portsmouth, New Hampshire 03801

**RE: Board of Adjustment Request for property located at 92 Brewster Street,  
Portsmouth NH 03801 (LU-25-25)**

Dear Property Owner:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **July 15, 2025**, considered your application for the property located at 92 Brewster Street whereas relief is needed to demolish the existing structure and construct a single-family home with Accessory Dwelling Unit which requires the following: 1) Variance from Section 10.521 to allow a) 2,884 s.f. of lot area where 3,500 s.f. are required, b) 2,884 s.f of lot area per dwelling unit where 3,500 s.f. are required, c) 52.33 feet of continuous street frontage where 70 feet are required, d) 9.5 foot right side yard where 10 feet are required, and e) 10 foot rear yard where 20 feet are required. Said property is shown on Assessor Map 138 Lot 54 and lies within the General Residence C (GRC) District. As a result of said consideration, the Board voted to **grant** the request as presented and advertised.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning & Sustainability Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

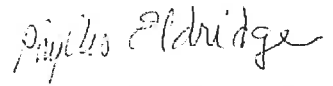
This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

*The Findings of Fact associated with this decision are available: attached here or as an attachment in the Viewpoint project record associated with this application and on the Zoning Board of Adjustment Meeting website:*

<https://www.cityofportsmouth.com/planportsmouth/zoning-board-adjustment/zoning-board-adjustment-archived-meetings-and-material>

The minutes and audio recording of this meeting are available by contacting the Planning & Sustainability Department.

Very truly yours,

A handwritten signature in cursive script, reading "Phyllis Eldridge".

Phyllis Eldridge, Chair of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

Alex Ross, Ross Engineering

## Findings of Fact | Variance

### City of Portsmouth Zoning Board of Adjustment

Date: 7-15-2022

Property Address: 92 Brewster Street

Application #: LU-25-25

Decision: **Grant**

#### Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, It now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.	YES	<ul style="list-style-type: none"><li>The building height is not really under discussion and it will be more conforming than the existing structure, so there will be additional light and air on a portion of the property.</li></ul>
10.233.22 Granting the variance would observe the spirit of the Ordinance.	YES	<ul style="list-style-type: none"><li>The building height is not really under discussion and it will be more conforming than the existing structure, so there will be additional light and air on a portion of the property.</li></ul>
10.233.23 Granting the variance would do substantial justice.	YES	<ul style="list-style-type: none"><li>There is not a benefit to the public by denying the variance, so the loss to the property owner will outweigh any benefit to the public if the variance were to be denied.</li></ul>



10.233.24 Granting the variance would not diminish the values of surrounding properties.	YES	<ul style="list-style-type: none"> <li>The neighborhood is going through some changes and modernizing, so having a more contemporary style and code-compliant house on the lot will not diminish the surrounding properties values in any way and in fact would improve them.</li> </ul>
<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(a)The property has special Conditions that distinguish it from other properties in the area. AND (b)Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one. OR Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.</p>	YES	<ul style="list-style-type: none"> <li>The property has unique characteristics because of its geometry and the right-of-way, so dimensional relief along some of the lot lines is required to place a reasonably sized house on the property. The proposed plan strikes a good balance between the size of the house and the requested relief and will not be a large deviation in terms of lot coverage.</li> </ul>

**MINUTES OF THE  
BOARD OF ADJUSTMENT MEETING  
EILEEN DONDERO FOLEY COUNCIL CHAMBERS  
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE  
PORTSMOUTH, NEW HAMPSHIRE**

**7:00 P.M.**

**July 15, 2025**

**MEMBERS PRESENT:** Phyllis Eldridge, Chair; Beth Margeson, Vice Chair; David Rheame; Thomas Rossi; Paul Mannle; Jeffrey Mattson; Thomas Nies

**MEMBERS EXCUSED:** None.

**ALSO PRESENT:** Stefanie Casella, Planning Department

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Chair Eldridge called the meeting to order at 7:00 p.m.

*Mr. Rossi moved to take Item II.C, Request for Withdrawal of the 636 Lincoln Ave petition, out of order. Mr. Mannle seconded. The motion **passed** unanimously, 6-0, with Mr. Nies recused.*

*Mr. Mannle moved to **suspend** the rules, seconded by Mr. Rheame. There was no discussion. The motion **passed** unanimously, 6-0, with Mr. Nies recused.*

*Mr. Mannle moved to **grant** the request for withdrawal of Item II.C, 636 Lincoln Ave, seconded by Mr. Rheame. The motion **passed** unanimously, 6-0, with Mr. Nies recused.*

## **I. APPROVAL OF MINUTES**

**A. Approval of the June 17, 2025 meeting minutes.**

*Vice-Chair Margeson moved to **approve** the June 17 minutes as presented, seconded by Mr. Nies. The motion **passed** unanimously, 6-0, with Mr. Rossi abstaining.*

## **II. OLD BUSINESS**

- A. The request of Harborside Property Management LLC (Owner), for property located at 92 Brewster Street** whereas relief is needed to demolish the existing structure and construct a single-family home with Accessory Dwelling Unit which requires the following: 1) Variance from Section 10.521 to allow a) 2,884 s.f. of lot area where 3,500 s.f. are required, b) 2,884 s.f of lot area per dwelling unit where 3,500 s.f. are required, c) 52.33 feet of continuous street frontage where 70 feet are required, d) 9.5 foot right side yard where 10 feet are required, and e) 10 foot rear yard where 20 feet are required. Said

property is located on Assessor Map 138 Lot 54 and lies within the General Residence C (GRC) District. (LU-25-25)

Mr. Rheume recused himself from the petition.

### **SPEAKING TO THE PETITION**

[Timestamp 6:43] Attorney Monica Kaiser was present on behalf of the applicant, along with the owner and project team. She reviewed the petition and said the applicant proposed a single-family home with an ADU that would comply with the side and front setbacks but would need relief on the rear setback. She said there was some feedback from a neighbor about the 3-story nature of the structure and the roofline's pitch, but the nearby newer homes were similar to the proposed design.

[Timestamp 13:54] Vice-Chair Margeson confirmed that there would be a basement and that the ADU would be on the ground floor and the second and third floors would be living space. Mr. Mannle confirmed that George Hales was the property owner and not just the manager of Harborside Property. Attorney Kaiser then reviewed the criteria.

[Timestamp 19:43] Vice-Chair Margeson asked if the existing structure was occupied. Attorney Kaiser agreed.

Chair Eldridge opened the public hearing.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

No one spoke, and Chair Eldridge closed the public hearing.

### **DECISION OF THE BOARD [Timestamp 20:40]**

*Mr. Rossi moved to **grant** the variances for the petition as presented and advertised, seconded by Mr. Mattson.*

Mr. Rossi said the project overall was a reasonable one. He said no variance was required for the height or the third story of the ADU because it was all within the zoning ordinance, so that left the dimensional standards, the setbacks, and the square footage of the lot. He noted that there had always been a dwelling on the lot and that the lot was nonconforming, and nothing could really be done about the width of the front yard or the size of the lot. He said it was established as a residential lot and that continuing that use would be reasonable. He said the special condition of the lot was its odd shape and the intrusion on the right side property line that squeezed the lot tighter, as well as the right-of-way for the brick walkway on the left side. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said there was some concern expressed about light, space, and air regarding the setbacks and the dimensional variances. He said the building height was not really under discussion and that it would be more

conforming than the existing structure, so there would be additional light and air on a portion of the property. He said substantial justice would be done, noting that he did not see any benefit to the public by denying the variance, so the loss to the property owner would outweigh any benefit to the public if the variance were to be denied. He said granting the variance would not diminish the values of surrounding properties, noting that the neighborhood was going through some changes and modernizing, so he did not think that having a more contemporary style and code-compliant house on the lot would diminish the surrounding properties values in any way and in fact would improve them. Regarding the hardship, he said the property had unique characteristics because of its geometry and the right-of-way, so dimensional relief along some of the lot lines was required to place a reasonably sized house on the property. He said the proposed plan struck a good balance between the size of the house and the requested relief and would not be a large deviation in terms of lot coverage. Mr. Mattson said the fact that the property used to be two lots demonstrated the historical density of it, and he thought the criteria of meeting the characteristics of the neighborhood and the spirit of the ordinance were met. He said adequate parking would also be provided, which he felt justified the small lot size accommodating the single-family home with an ADU.

Vice-Chair Margeson said she was more conflicted about the application. She said the opposite side of the street was being redeveloped in styles that were compatible with the proposed home but the houses adjacent to it were not compatible. She said the proposal had the potential to alter the area's historic character, noting that the existing house was a 1790s structure. Chair Eldridge noted that the neighborhood was in flux and would change over time anyway.

*The motion **passed** by a vote of 5-1, with Vice-Chair Margeson voting in opposition and Mr. Rheume recused.*

Mr. Rheume resumed his voting seat.

- B.** The request of **Colbea Enterprises LLC (Owners)**, for property located at **1980 Woodbury Avenue** whereas relief is needed to demolish and redevelop an existing gas station and convenience store which requires the following: 1) Variance from Section 10.5B33.20 to allow for a front lot line build out of 0% where a minimum of 75% is required for a commercial building; 2) Variance from Section 10.5B34.60 to allow for a front setback from the lot line of 27 feet on Woodbury Avenue and 53.5 feet on Gosling Road where a maximum of 20 feet is required; 3) Variance from Section 10.5B83.10 to allow for parking spaces to be located between the principal building and the street; 4) Variance from Section 10.835.31 to allow outdoor service facilities to be located within 34.5 feet and 40.5 of a lot line where 50 feet is required. 5) Variance from Section 10.835.32 to allow for drive-through lanes, bypass lanes and stacking lanes to be located within 13 feet of the property line where 30 feet is required; 6) Variance from Section 10.843.33 to allow for pump islands to be located within 34.5 feet of the lot lines where 40 feet is required; 7) Variance from Section 10.1251.10 to allow for an aggregate sign area of 309 s.f. where a maximum of 223.5 s.f. is allowed; 8) Variance from Section 10.1251.20 to allow a 134 s.f. freestanding sign where a maximum of 100 s.f. is allowed; and 9) Variance from Section 10.1253.10 to allow for a freestanding sign at a height of 26.5 feet where a