

**STATE OF NEW HAMPSHIRE
CITY OF PORTSMOUTH
ZONING BOARD OF ADJUSTMENT**

IN RE: Appeal from Determination Letter (July 23, 2026) and
Supplemental Determination Letter (August 6, 2026) of the
Chief Building Inspector, City of Portsmouth

Property: 28 Blossom Street, Portsmouth, NH 03801 (MBLU 0111/0040/0000)

Owners of Record: Burke-Zabarsky Revocable Trust; Hannah & Paul J. Burke, Trustees

NOTICE OF APPEAL AND STATEMENT OF GROUNDS

(Filed pursuant to RSA 674:33; RSA 676:5; and the Portsmouth Zoning Ordinance)

TO: The Zoning Board of Adjustment, City of Portsmouth, New Hampshire

The undersigned, Kathleen B. Logan and Kent A. Logan, Trustees of the Kathleen B. Logan Revocable Trust, of 21 Blossom Street; Susan E. Lassen, Trustee of the Lassen Family Revocable Trust, of 34 Blossom Street; Scott A. Lupkas, of 33 Blossom Street; and Guy D. Spiers and Elizabeth R. Spiers, Trustees of the 3A Trust, of 241 South Street, all of Portsmouth, New Hampshire (collectively, "Appellants"), being abutters within the meaning of RSA 676:5, I, and RSA 672:3, hereby appeal to this Board the determination of the Chief Building Inspector set forth in (1) the Determination Letter dated July 23, 2026, and (2) the Supplemental Determination Letter dated August 6, 2026 (together, the "Determination"), both concerning the property at 28 Blossom Street, Portsmouth, New Hampshire ("the Property"). This appeal is timely filed within thirty (30) days of both the Determination Letter and the Supplemental Determination Letter, as required by RSA 676:5, I.

I. STATEMENT OF STANDING

Appellants own and/or occupy property that abuts, or is within the notice radius of, 28 Blossom Street, and are directly and specially affected by the Determination, which authorizes continued and expanded residential occupancy of a structure historically used as an accessory artist's studio, with attendant impacts on neighborhood character, on-street parking, density, and life

safety in the General Residence B ("GRB") zoning district. Appellants therefore have standing to bring this appeal as abutters under RSA 676:5, I, and RSA 672:3, and as aggrieved parties within the meaning of RSA 674:33, I.

II. RELATIONSHIP TO CONCURRENT BUILDING CODE APPEAL

A separate appeal has also been filed with the New Hampshire Building Code Review Board addressing building-code classification questions under Section 113.1.1 of the New Hampshire State Building Code, including whether the Chief Building Inspector correctly applied the IBC definitions of "sleeping unit" and "dwelling unit" and properly invoked the Section 104.2.4 modification authority. That appeal does not raise, and is not intended to waive, any of the zoning grounds presented here.

III. STATEMENT OF FACTS

- 28 Blossom Street is improved with a two-family dwelling that received a variance in 1987 authorizing a third residential dwelling unit. A barn structure on the Property contains a former hennery converted decades ago into an artist's studio by Melvin and Joyce Zabarsky, the parents of current co-owner Hannah Burke.
- Following the deaths of Mr. and Mrs. Zabarsky in 2019, Hannah Burke acquired an interest in the Property and later conveyed it to the Burke-Zabarsky Revocable Trust, of which she and her husband, Paul Burke, are trustees.
- Beginning in 2023, the Burkes began housing their adult son, Christopher, in the studio. When not confined in jail or committed to a mental health facility, he has been regularly housed in the studio, including to the present day. Neighbors report that, to their knowledge, the studio was never previously used as "overflow space for family and friends," as the owners now represent.
- Blossom Street neighbors have, for approximately three years, repeatedly raised concerns with City officials regarding the nonconforming residential use of the studio and regarding an unpermitted shed constructed by Paul Burke on the southeast side of the barn — a structure that does not appear on the Property's tax card to this day.

- On July 23, 2026, without public notice, hearing, or an opportunity for abutters to be heard, the Chief Building Inspector issued the Determination Letter, classifying the studio as an “R2 non-transient sleeping unit” under the 2024 International Building Code, subject to listed conditions, and citing Section 104.2.4 of the New Hampshire State Building Code (the “modifications” provision) as partial authority.
- On August 6, 2026, the Chief Building Inspector issued a Supplemental Determination Letter purporting to clarify that the July 23 letter effected no zoning reclassification, while nonetheless confirming that the studio “may continue to be used as an R-2 non-transient sleeping unit” and that the Planning Director “concurs” in that conclusion.
- As of the date of this appeal, Christopher Burke continues to be housed in the studio notwithstanding that one or more conditions of the Determination — including installation of a shower and other life-safety items — remain unsatisfied, and notwithstanding that no certificate of occupancy has issued.

IV. GROUNDS FOR APPEAL

A. The Chief Building Inspector Exceeded His Authority and Usurped the Zoning Board's Exclusive Jurisdiction

Under RSA 674:33, I, the Zoning Board of Adjustment holds exclusive authority to grant variances and to hear and decide appeals of determinations that affect the application of the zoning ordinance. The Chief Building Inspector's Section 104.2.4 authority is confined to the State Building Code and permits modification only of building-code requirements upon a finding of “practical difficulties” that does not lessen health, life-safety, or structural protections — it is not, and cannot be, a source of zoning authority.

Although the Supplemental Determination Letter disclaims any zoning reclassification, its practical and stated effect is to authorize a fourth, functionally independent sleeping arrangement in a building previously approved for only three dwelling units, subject only to building-code conditions. A determination that changes what may occupy a structure and how it may be used is a zoning determination in substance, regardless of the label placed on it. By resolving this question administratively — without notice, hearing, or referral to this Board — the Building

Inspector reached a decision reserved exclusively to the Board's variance and appeal jurisdiction under RSA 674:33 and RSA 676:5.

B. The Approved Use Is Not a Permitted Use in the GRB Zoning District

The Portsmouth Zoning Ordinance, consistent with the 2024 IBC definitions relied upon in the Determination itself, distinguishes a “dwelling unit” (which must contain permanent facilities for living, sleeping, eating, cooking, and sanitation) from a “sleeping unit” (which by definition lacks independent cooking facilities). A room or structure that provides only sleeping accommodations without a kitchen, and that operates with its own separate exterior egress, falls within the Ordinance's definition of a rooming, boarding, or co-living use rather than an accessory or incidental use of a dwelling. Rooming and boarding uses of this kind are not permitted by right in the GRB district. The Determination authorizes precisely this configuration — a non-transient sleeping unit with its own egress, prohibited only from containing a kitchen — without any of the zoning relief such a use requires.

C. The Determination Effectively Converts the Approved Three-Unit Building Into an Unauthorized Rooming, Boarding, or Co-Living Arrangement Not Permitted Outside the Downtown District

The City Council's recently adopted Co-Living Zoning Amendment demonstrates that the City itself recognizes independent sleeping units of this type as a distinct land use requiring specific zoning authorization — including tailored parking ratios — and confines that use to higher-intensity mixed-use districts such as CD4. The Council's deliberate choice not to extend that use to low- and medium-density residential districts such as GRB confirms, by clear implication, that a co-living or rooming arrangement may not be piecemealed into an existing three-family structure in the GRB district through an administrative building-code determination. The Determination effectively grants by administrative letter what the Council itself has declined to authorize by ordinance in this district.

D. The Studio Cannot Lawfully Be Treated as an Accessory Use Tied to the Separate Parcel at 161 South Street

Both Determination Letters justify the arrangement, in part, on the premise that Christopher Burke's “primary residence” is 161 South Street — a separate, non-contiguous parcel owned by his parents — where he purportedly eats, bathes, and stores his belongings, while he sleeps at the

Property. An accessory use or structure must be incidental to, and located on the same lot as, the principal use it serves; it cannot be constituted by combining facilities on one lot with sleeping quarters on an entirely different, geographically separated lot under separate ownership and separate tax assessment. The Ordinance recognizes no such cross-lot accessory-use arrangement, and the Determination's reliance on activities occurring at 161 South Street to legitimize residential occupancy at 28 Blossom Street is not a cognizable basis for approval under the Ordinance.

The Determination compounds this defect by describing 161 South Street as being “in proximity” to the Property, as though geographic nearness could substitute for the same-lot requirement that defines an accessory use under the Ordinance. It cannot. 161 South Street and 28 Blossom Street are separate, distinctly deeded and separately assessed parcels, each with its own MBLU designation, and no lot-line consolidation, lot merger, or other action has combined them into a single zoning lot. Proximity between two parcels, however close, does not create the unity of lot required for one parcel's facilities to serve as the accessory support for a use located on another.

Nor is this defect merely academic. The Determination classifies the studio itself — not Christopher Burke personally, and not the current ownership arrangement — as an R2 non-transient sleeping unit, a classification that would run with 28 Blossom Street and remain in effect for any future owner or occupant regardless of any continuing connection to 161 South Street. Nothing in the Determination requires common ownership of the two parcels, requires the sleeping unit's occupant to have any relationship to 161 South Street, or provides for reconsideration if the two properties are ever conveyed separately. Should the Burkes sell 28 Blossom Street alone, sell 161 South Street alone, or sell the two properties to different purchasers — any of which they remain free to do at any time — the entire factual predicate for the Determination would disappear, yet the studio would continue to exist as an approved fourth sleeping unit, permanently detached from the very arrangement used to justify it. That the Determination's central premise cannot survive the ordinary, foreseeable alienation of either parcel confirms that it was never a proper accessory-use analysis in the first place, and illustrates why a permanent change in occupancy classification of this kind must be evaluated by this Board — which can consider the use on a durable, parcel-specific basis — rather than rest on an

administrative letter premised on a currently convenient but legally unenforceable arrangement between two separately alienable properties.

E. The Determination Fails to Address Density, Parking, and Historic District Requirements Triggered by the Use

Even if a sleeping unit of this kind were otherwise permissible, the Determination does not address, and the Building Inspector had no authority to waive, the following additional zoning and land-use requirements implicated by the proposed occupancy:

- **Density:** The GRB district imposes a minimum lot area per dwelling or sleeping unit. Adding a fourth independent living arrangement increases the intensity of use beyond what was approved by the 1987 variance and may require a dimensional variance.
- **Parking:** Off-street parking on Blossom Street is, and has long been, a documented problem. An additional independent sleeping unit triggers additional off-street parking requirements that the Property may be unable to satisfy without a parking variance.
- **Historic District Commission review:** The Property lies within Portsmouth's Historic District. Because the studio has its own separate exterior egress, any exterior modifications required to bring the space into compliance with the R-2 life-safety conditions in the Determination — egress doors, emergency escape openings, exterior lighting — require a Certificate of Approval from the Historic District Commission before such work may proceed.
- **Unresolved nonconforming use and unpermitted construction:** The Determination does not address the unpermitted shed attached to the barn, which does not appear on the Property's tax card, or the multi-year history of unresolved neighbor complaints regarding nonconforming use of the Property, both of which bear directly on whether any further intensification of use should be authorized.

V. RELIEF REQUESTED

For the foregoing reasons, Appellants respectfully request that the Board:

1. Accept jurisdiction over this appeal pursuant to RSA 674:33, I, and RSA 676:5;

2. Reverse and vacate the Determination Letter dated July 23, 2026, and the Supplemental Determination Letter dated August 6, 2026, in their entirety;
3. Declare that the proposed non-transient sleeping unit at 28 Blossom Street constitutes a change of use requiring, at a minimum, a Use Variance, a Dimensional Variance, and a Parking Variance from this Board before any such use may lawfully continue;
4. Direct that no certificate of occupancy or building permit issue for the studio unless and until the owners obtain all required approvals from this Board, the Historic District Commission, and the Planning Board, in that sequence; and
5. Grant such other and further relief as the Board deems just and proper, including referral of the unpermitted shed and ongoing nonconforming occupancy to the City's code enforcement office.

VI. EXHIBITS

- Exhibit A — Determination Letter, City of Portsmouth Building Department, dated July 23, 2026
- Exhibit B — Supplemental Determination Letter, City of Portsmouth Building Department, dated August 6, 2026

Respectfully submitted,

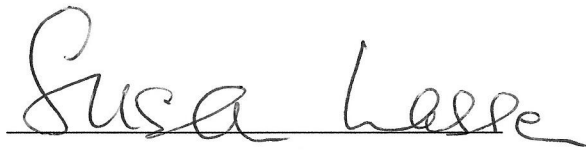
Handwritten signature of Kathleen B. Logan and Kent A. Logan. The signature is written in cursive and includes the names of both individuals, with a stylized flourish at the end.

Kathleen B. Logan and Kent A. Logan, Trustees

Kathleen B. Logan Revocable Trust

21 Blossom Street

Portsmouth, NH 03801



Susan E. Lassen, Trustee

Lassen Family Revocable Trust

34 Blossom Street

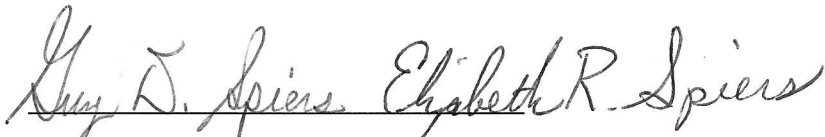
Portsmouth, NH 03801



Scott A. Lupkas

33 Blossom Street

Portsmouth, NH 03801



Guy D. Spiers and Elizabeth R. Spiers, Trustees

3A Trust

241 South Street

Portsmouth, NH 03801

Date: 8-20-2026



Inspection Department
Shanti R. Wolph, Chief Building Inspector

July 23, 2026

To: Hannah and Paul Burke, 161 South St., Portsmouth, NH 03801
Subject: Official Determination Regarding Occupancy Classification
Property Address: 28 Blossom St., Portsmouth, NH MBlu: 0111/ 0040/ 0000/ /

Determination Letter

This letter serves as the official determination of the City of Portsmouth Building Department regarding the occupancy classification and permissible use of the structure/art studio (studio) attached to the end dwelling at 28 Blossom Street, Portsmouth, New Hampshire.

For context, the property is owned by Burke-Zabarsky REV TST and Burke Hannah & Paul J TTES. In 1987, the two-family dwelling located at 28 Blossom Street was granted a variance authorizing a third residential dwelling unit. The studio is attached to the side of the third dwelling unit, and, according to the owners, has historically been used as overflow space for family and friends for more than 50 years. The owners have represented that the studio has not been, and is not currently being, rented, but is instead being used as a safe, quiet space for the Burkes' cognitively impaired adult son. He spends time in the studio primarily in the evening. During the day, he is at his parents' house, where he eats his meals, washes his clothes, and stores his belongings.

The Building Department received a complaint from an abutter asserting that the studio was not being used lawfully because it was being used for sleeping. The complaint also raised safety concerns related to the current occupant. The Department reviewed the matter for purposes of determining whether the existing space may be classified and regulated as a sleeping unit without creating or authorizing a fourth dwelling unit on the property.

As part of this review, Shanti Wolph, Chief Building Inspector for the City of Portsmouth, consulted with Phil Grankowski of the International Code Council (ICC) regarding the appropriate occupancy classification for the existing space. The purpose of the consultation was to determine whether the space could be classified in a manner that permits sleeping while avoiding designation as a separate dwelling unit, which would require separate zoning review and approval.

Upon review, the Building Department determines that the studio may be classified as an **R2 non-transient sleeping unit**, rather than as a dwelling unit, provided that the conditions set forth below are satisfied. This classification recognizes the historical use of the structure as accessory

overflow space for family and friends and avoids authorizing permanent cooking facilities or any independent dwelling use.

While the studio may be able to satisfy the sleeping-unit requirements, it is attached to a rental property. The son's parents reside on a separate property, which is in proximity. Therefore, an alternative code path has also been considered.

Basis for Determination:

1) 2024 IBC:

A) SLEEPING UNIT. A single unit that provides rooms or spaces for one or more persons, includes permanent provisions for sleeping and can include provisions for living, eating and either sanitation or kitchen facilities but not both. Such rooms and spaces that are also part of a dwelling unit are not sleeping units.

Commentary to the above definition:

❖ This definition is included to coordinate the Fair Housing Act guidelines with the code. The definition for "Sleeping unit" clarifies the differences between sleeping units and dwelling units. In addition, using the term "sleeping unit" for spaces where people sleep will replace a multitude of other terms (e.g., patient room, cell, guestroom) so that there is consistent application across occupancies. Some examples of sleeping units are hotel guest rooms; bedrooms in different types of congregate living facilities; patient sleeping rooms in hospitals, nursing homes or assisted living facilities; or housing cells in a jail. Another example would be a studio apartment with a kitchenette (i.e., countertop microwave, sink, refrigerator). Since the cooking arrangements are not the traditional permanent appliances (i.e., a range), this configuration would be considered a sleeping unit and not a dwelling unit. As defined in the code, a "Dwelling unit" must contain permanent facilities for living, sleeping, eating, cooking and sanitation.

2) 104.2.4 of the NH State Building Code

In addition, I relied, in part, on the authority provided under 104.2.4 of the NH State Building Code, including amendments, which states as follows:

Modifications. Where there are practical difficulties involved in carrying out the provisions of this code, the building official shall have the authority to grant modifications for individual cases, upon application of the owner or the owner's authorized agent, provided that the building official shall first find that special individual reason makes the strict letter of this code impractical, the modification is in compliance with the intent and purpose of this code and that such modification does not lessen health, accessibility, life and fire safety or structural requirements. The details of action granting modifications shall be recorded and entered in the files of the department of building safety.

Commentary to the above code section:

❖ *The building official may amend or make exceptions to the code as needed where strict compliance is impractical. Only the building official has authority to grant modifications. Consideration of a particular difficulty is to be based on the application of the owner and a demonstration that the purpose of the code is accomplished. This section is not intended to permit setting aside or ignoring a code provision; rather, it is intended to provide acceptance of equivalent protection. Such modifications do not, however, extend to actions that are necessary to correct violations of the code. In other words, a code violation or the expense of correcting one cannot constitute a practical difficulty.*

Conditions of Approval:

- **Plumbing:** The studio currently contains a water closet and lavatory. A shower shall be installed to satisfy the hygiene requirements applicable to an R2 non-transient sleeping unit. Permanent cooking facilities shall not be installed or maintained in the studio.
- **Life Safety:** The studio shall have compliant means of egress and emergency escape and rescue openings. Smoke and carbon monoxide detectors shall be installed and maintained. The existing two-hour fire separation from the adjacent dwelling, established during a previous renovation, shall be maintained.
- **Building Systems:** The heating, electrical, and insulation systems shall be suitable for the approved use and shall comply with applicable code requirements.
- **Use Limitation:** The studio is approved only as an R2 non-transient sleeping unit and shall not be rented, leased, or otherwise used as an independent dwelling unit.
- **Cooking Facilities:** The studio shall not contain permanent cooking facilities, including a range or other equipment that would establish the space as a dwelling unit.

Conclusion:

Based on the foregoing, the Building Department determines that the studio may continue to be used as an R2 non-transient sleeping unit, provided that all conditions listed above are satisfied and maintained. This determination does not authorize the creation of a fourth dwelling unit, does not authorize rental occupancy of the studio, and does not waive any separate zoning, building, fire, life safety, health, or accessibility requirements that may apply. Any certificate of occupancy issued for the studio shall include a condition stating that the unit is approved for non-transient sleeping use only and shall not be rented or used as an independent dwelling unit.

Appeal Process:

SECTION 113 of the NH State Building Code, including amendments

Means of Appeals: *In order to hear and decide appeals of orders, decisions or determinations made by the building official relative to the application and interpretation of this code, the local jurisdiction is permitted to create a board of appeals per RSA 155-A:3. The board of appeals shall be appointed by the applicable governing authority and shall hold office at its pleasure. The board*

shall adopt rules of procedure for conducting its business and shall render all decisions and findings in writing to the appellant with a duplicate copy to the building official.

Currently, Portsmouth does not have a local board of appeals, therefore, the following applies.

113.1.1. Should the local jurisdiction elect not to create a board of appeals, the Building Code Review Board shall hear appeals of orders, decisions, or determinations made by the local building official relative to the application and interpretation of the state building code and state fire code as defined in RSA 155-A:1 per RSA 155-A:11-b.

113.2 Limitations on authority. An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply or an equivalent or better form of construction is proposed. The board shall not have authority to waive requirements of this code.

Appeals of a local building official shall be filed within Thirty (30) days of the final determination. The Board typically meets monthly, at 10 a.m. on the second Friday of the month at 33 Hazen Drive, 2nd floor conference room in Concord, NH.

The State Building Code Review Board:

- **Physical Address**
110 Smokey Bear Blvd. Concord, NH
- **Mailing Address**
33 Hazen Drive. Concord, NH 03305
- **Phone** (603) 223-4231
- **Email** bldgcodebrd@dos.nh.gov

Thank you,

Shanti Wolph, Chief Building Inspector, City of Portsmouth

cc: Susan Morrell, City of Portsmouth City Attorney
Trevor P. McCourt, City of Portsmouth Deputy City Attorney
Jason Page, City of Portsmouth Legal Enforcement Officer



Inspection Department
Shanti R. Wolph, Chief Building Inspector

August 6, 2026

To: Hannah and Paul Burke, 161 South St., Portsmouth, NH 03801
Subject: Supplement to Official Determination Regarding Occupancy Classification.
Property Address: 28 Blossom St., Portsmouth, NH MBlu: 0111/ 0040/ 0000/ /

Supplemental Letter

This supplemental letter clarifies the City's prior correspondence regarding the occupancy classification of the existing art studio at 28 Blossom Street. The prior determination was not intended to limit, reclassify, or otherwise change the zoning status of the space. Rather, it identified how the space is currently being used from a building code and life-safety perspective. Because "sleeping unit" is a building code term and is not a separate zoning classification under the Portsmouth Zoning Ordinance, no zoning reclassification has occurred and no zoning variance is required.

Summary Highlights

- **Occupancy Determination:** The existing art studio attached to the three-family apartment building may continue to be used as an R-2 non-transient sleeping unit for building code purposes.
- **Safety Requirements:** Continued use is contingent upon the installation and maintenance of all life-safety items identified in the initial letter.
- **Prohibited Uses:** The studio may not be rented, leased, or used as an independent dwelling unit. Permanent cooking facilities, including ranges or similar equipment, are prohibited to prevent the space from being classified as a dwelling unit.
- **Zoning and Building Code:** From a zoning perspective, the space remains a preexisting residential art studio. The Portsmouth Zoning Ordinance does not prohibit periodic or nightly sleeping by the owner or occupant, provided the space is not used as an independent living unit.
- **Departmental Coordination:** Planning Director Peter Britz concurs with this interpretation and with the distinction between building code life-safety requirements and zoning classification.

Detailed Analysis

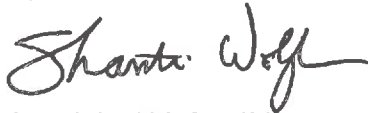
The "Sleeping Unit" Distinction: This clarification is based on the specific use of the studio by the owners' son. Although he may spend nights in the studio, his primary residence remains 161 South Street, where he bathes, eats meals, and keeps his personal belongings. The studio does not contain the facilities necessary to function as an independent dwelling unit, such as

permanent cooking or bathing facilities. However, because the space is used for sleeping, it is treated as a sleeping unit for building code purposes and must comply with applicable life-safety requirements.

Regulatory Rationale

- **Building Code Perspective:** The building code focuses on life safety. If a space is used for sleeping, even periodically, it must satisfy the applicable R-2 safety requirements, including detection and egress.
- **Zoning and Assessing Perspective:** I have been advised that the space has existed for more than 50 years and therefore, it will continue to be recognized, assessed, and treated as a residential art studio. The City's records from their prior Zoning Approval and Assessing records both show it as a barn/art studio.
- **Legal Safeguards:** Prohibiting permanent cooking facilities helps ensure that the space is not converted into an unauthorized fourth dwelling unit under both the Building Code and the Zoning Ordinance.

Thank you,



Shanti Wolph, Chief Building Inspector, City of Portsmouth



Peter Britz, Director of Planning and Sustainability

cc: Karen Conard, City of Portsmouth City Manager
Susan Morrell, City of Portsmouth City Attorney
Trevor P. McCourt, City of Portsmouth Deputy City Attorney
Jason Page, City of Portsmouth Legal Enforcement Officer



Trevor P. McCourt
Deputy City Attorney

CITY OF PORTSMOUTH

Legal Department
Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
tmccourt@portsmouthnh.gov
(603) 610-7234

Date: September 8, 2026

To: Beth Margeson, Chair, Zoning Board of Adjustment

From: Trevor P. McCourt, Deputy City Attorney

Re: Administrative Appeal of the Chief Building Inspector's Occupancy Determination for 28 Blossom Street (Assessor Map 111, Lot 40), General Residence B (GRB) and Historic Districts — Appeal of Kathleen B. & Kent A. Logan, Susan E. Lassen, Scott A. Lupkas, and Guy D. & Elizabeth R. Spiers; ZBA public hearing scheduled September 15, 2026

I. Introduction

The abutters identified above (the “Appellants”) have appealed to this Board two letters issued by the Chief Building Inspector concerning the property located at 28 Blossom Street: a Determination Letter dated July 23, 2026 (Exhibit A), and a Supplemental Determination Letter dated August 6, 2026 (Exhibit B) (together, the “Determination”). This memorandum is intended to orient the Board to the history of the matter and to explain the process applicable to this appeal.

To be clear on the scope, this memorandum addresses only the zoning questions properly before this Board; it does not address, and the Board should not attempt to resolve the building code questions that the Appellants have separately placed before the New Hampshire Building Code Review Board.

II. Background

A. The Property and the Studio

28 Blossom Street is improved with a residential building that, by virtue of a 1987 variance, is authorized for three dwelling units. Attached to the side of the third dwelling unit is a structure that the parties refer to as the “art studio”. This structure was originally a henhouse or barn structure, converted decades ago to studio use by the prior owners (the parents of current co-owner Hannah Burke). The property is owned by the Burke-Zabarsky Revocable Trust (Hannah and Paul

J. Burke, Trustees). The property lies within the General Residence B (GRB) zoning district and the Historic District.

The studio presently contains a water closet and lavatory but no shower and no permanent cooking facilities. It has its own separate exterior means of egress. According to the owners, the studio has historically been used as “overflow space for family and friends.” The Appellants dispute that characterization and represent that, to the neighbors’ knowledge, the studio was not used for residential sleeping until recent years. The owners allege that their adult son resides with them at their single-family home located at 161 Blossom Street, and that he uses the art studio space, and will occasionally sleep on the couch located within the space. The abutters dispute this allegation and claim the owners’ adult son resides in the art studio. The abutters have raised concerns with City officials over an approximately three-year period regarding residential use of the studio and regarding an unpermitted shed constructed on the barn that, they represent, does not appear on the property’s tax card.

B. The Chief Building Inspector’s Determination

Following a complaint from an abutter, on July 23, 2026 the Chief Building Inspector issued the Determination Letter. Relying on the 2024 International Building Code (IBC) definition of “sleeping unit” and on the modifications authority in Section 104.2.4 of the New Hampshire State Building Code, the Inspector determined that the studio may be classified as an “R-2 non-transient sleeping unit”, provided that a series of conditions is satisfied. Those conditions include the following: the installation of a shower; compliant egress and emergency escape and rescue openings; smoke and carbon-monoxide detection; maintenance of the existing two-hour fire separation; and prohibition on permanent cooking facilities and on rental or use as an independent dwelling unit. The letter states that the classification “does not authorize the creation of a fourth dwelling unit” and “does not waive any separate zoning . . . requirements that may apply.”

On August 6, 2026, the Inspector issued the Supplemental Determination Letter, which states that the July 23 letter “was not intended to limit, reclassify, or otherwise change the zoning status of the space,” that “sleeping unit” is a building-code term and “not a separate zoning classification,” and that “no zoning reclassification has occurred and no zoning variance is required.” The Supplemental Letter nevertheless confirms that the studio “may continue to be used as an R-2 non-transient sleeping unit,” states that the Zoning Ordinance “does not prohibit periodic or nightly sleeping by the owner or occupant,” and represents that the Planning Director concurs in that interpretation. It is signed by the Chief Building Inspector and on behalf of the Planning Director.

III. The Question Presented and the Decision Before the Board

The question the Board must answer proceeds in two steps. First, as a threshold matter: **do the physical changes the Determination requires convert the space from an art studio into something else.** Second, if the answer to the first question is yes: **is that new use accessory to a**

permitted principal use on the lot, or a separate use that is not permitted by right in the GRB district and therefore requires a variance?

IV. The Board's Authority and Scope of Review

I would recommend this Board refrain from commenting on the Appellants' appeal under the IBC. "An administrative appeal to the zoning board of adjustment . . . is the proper venue for an abutter who is dissatisfied with a building official's determination concerning a nonconforming use." Loughlin, P. New Hampshire Practice: Land Use Planning and Zoning Ch. 22.02. State law provides that the Board shall "hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance." RSA 674:33 (I).

In the context of an administrative appeal, the Board "may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken." RSA 674:33 (II).

This appeal is therefore *de novo*, meaning that the Board may make any decision the Chief Building Inspector and the Director of Planning and Sustainability could have made in interpreting the zoning ordinance, and owes no deference to the underlying decision. Ouellette v. Town of Kingston, 157 N.H. 604 (2008).

EXHIBITS

- **Exhibit A:** Determination Letter, City of Portsmouth Inspection Department, dated July 23, 2026.
- **Exhibit B:** Supplemental Determination Letter, City of Portsmouth Inspection Department, dated August 6, 2026.

cc: Susan G. Morrell, City Attorney
Shanti Wolph, Chief Building Inspector
Peter Britz, Director of Planning and Sustainability
Stefanie Casella, Planner



Inspection Department
Shanti R. Wolph, Chief Building Inspector

July 23, 2026

To: Hannah and Paul Burke, 161 South St., Portsmouth, NH 03801
Subject: Official Determination Regarding Occupancy Classification
Property Address: 28 Blossom St., Portsmouth, NH MBlu: 0111/ 0040/ 0000/ /

Determination Letter

This letter serves as the official determination of the City of Portsmouth Building Department regarding the occupancy classification and permissible use of the structure/art studio (studio) attached to the end dwelling at 28 Blossom Street, Portsmouth, New Hampshire.

For context, the property is owned by Burke-Zabarsky REV TST and Burke Hannah & Paul J TTES. In 1987, the two-family dwelling located at 28 Blossom Street was granted a variance authorizing a third residential dwelling unit. The studio is attached to the side of the third dwelling unit, and, according to the owners, has historically been used as overflow space for family and friends for more than 50 years. The owners have represented that the studio has not been, and is not currently being, rented, but is instead being used as a safe, quiet space for the Burkes' cognitively impaired adult son. He spends time in the studio primarily in the evening. During the day, he is at his parents' house, where he eats his meals, washes his clothes, and stores his belongings.

The Building Department received a complaint from an abutter asserting that the studio was not being used lawfully because it was being used for sleeping. The complaint also raised safety concerns related to the current occupant. The Department reviewed the matter for purposes of determining whether the existing space may be classified and regulated as a sleeping unit without creating or authorizing a fourth dwelling unit on the property.

As part of this review, Shanti Wolph, Chief Building Inspector for the City of Portsmouth, consulted with Phil Grankowski of the International Code Council (ICC) regarding the appropriate occupancy classification for the existing space. The purpose of the consultation was to determine whether the space could be classified in a manner that permits sleeping while avoiding designation as a separate dwelling unit, which would require separate zoning review and approval.

Upon review, the Building Department determines that the studio may be classified as an **R2 non-transient sleeping unit**, rather than as a dwelling unit, provided that the conditions set forth below are satisfied. This classification recognizes the historical use of the structure as accessory

overflow space for family and friends and avoids authorizing permanent cooking facilities or any independent dwelling use.

While the studio may be able to satisfy the sleeping-unit requirements, it is attached to a rental property. The son's parents reside on a separate property, which is in proximity. Therefore, an alternative code path has also been considered.

Basis for Determination:

1) 2024 IBC:

A) SLEEPING UNIT. A single unit that provides rooms or spaces for one or more persons, includes permanent provisions for sleeping and can include provisions for living, eating and either sanitation or kitchen facilities but not both. Such rooms and spaces that are also part of a dwelling unit are not sleeping units.

Commentary to the above definition:

❖ This definition is included to coordinate the Fair Housing Act guidelines with the code. The definition for "Sleeping unit" clarifies the differences between sleeping units and dwelling units. In addition, using the term "sleeping unit" for spaces where people sleep will replace a multitude of other terms (e.g., patient room, cell, guestroom) so that there is consistent application across occupancies. Some examples of sleeping units are hotel guest rooms; bedrooms in different types of congregate living facilities; patient sleeping rooms in hospitals, nursing homes or assisted living facilities; or housing cells in a jail. Another example would be a studio apartment with a kitchenette (i.e., countertop microwave, sink, refrigerator). Since the cooking arrangements are not the traditional permanent appliances (i.e., a range), this configuration would be considered a sleeping unit and not a dwelling unit. As defined in the code, a "Dwelling unit" must contain permanent facilities for living, sleeping, eating, cooking and sanitation.

2) 104.2.4 of the NH State Building Code

In addition, I relied, in part, on the authority provided under 104.2.4 of the NH State Building Code, including amendments, which states as follows:

Modifications. Where there are practical difficulties involved in carrying out the provisions of this code, the building official shall have the authority to grant modifications for individual cases, upon application of the owner or the owner's authorized agent, provided that the building official shall first find that special individual reason makes the strict letter of this code impractical, the modification is in compliance with the intent and purpose of this code and that such modification does not lessen health, accessibility, life and fire safety or structural requirements. The details of action granting modifications shall be recorded and entered in the files of the department of building safety.

Commentary to the above code section:

❖ *The building official may amend or make exceptions to the code as needed where strict compliance is impractical. Only the building official has authority to grant modifications. Consideration of a particular difficulty is to be based on the application of the owner and a demonstration that the purpose of the code is accomplished. This section is not intended to permit setting aside or ignoring a code provision; rather, it is intended to provide acceptance of equivalent protection. Such modifications do not, however, extend to actions that are necessary to correct violations of the code. In other words, a code violation or the expense of correcting one cannot constitute a practical difficulty.*

Conditions of Approval:

- **Plumbing:** The studio currently contains a water closet and lavatory. A shower shall be installed to satisfy the hygiene requirements applicable to an R2 non-transient sleeping unit. Permanent cooking facilities shall not be installed or maintained in the studio.
- **Life Safety:** The studio shall have compliant means of egress and emergency escape and rescue openings. Smoke and carbon monoxide detectors shall be installed and maintained. The existing two-hour fire separation from the adjacent dwelling, established during a previous renovation, shall be maintained.
- **Building Systems:** The heating, electrical, and insulation systems shall be suitable for the approved use and shall comply with applicable code requirements.
- **Use Limitation:** The studio is approved only as an R2 non-transient sleeping unit and shall not be rented, leased, or otherwise used as an independent dwelling unit.
- **Cooking Facilities:** The studio shall not contain permanent cooking facilities, including a range or other equipment that would establish the space as a dwelling unit.

Conclusion:

Based on the foregoing, the Building Department determines that the studio may continue to be used as an R2 non-transient sleeping unit, provided that all conditions listed above are satisfied and maintained. This determination does not authorize the creation of a fourth dwelling unit, does not authorize rental occupancy of the studio, and does not waive any separate zoning, building, fire, life safety, health, or accessibility requirements that may apply. Any certificate of occupancy issued for the studio shall include a condition stating that the unit is approved for non-transient sleeping use only and shall not be rented or used as an independent dwelling unit.

Appeal Process:

SECTION 113 of the NH State Building Code, including amendments

Means of Appeals: *In order to hear and decide appeals of orders, decisions or determinations made by the building official relative to the application and interpretation of this code, the local jurisdiction is permitted to create a board of appeals per RSA 155-A:3. The board of appeals shall be appointed by the applicable governing authority and shall hold office at its pleasure. The board*

shall adopt rules of procedure for conducting its business and shall render all decisions and findings in writing to the appellant with a duplicate copy to the building official.

Currently, Portsmouth does not have a local board of appeals, therefore, the following applies.

113.1.1. Should the local jurisdiction elect not to create a board of appeals, the Building Code Review Board shall hear appeals of orders, decisions, or determinations made by the local building official relative to the application and interpretation of the state building code and state fire code as defined in RSA 155-A:1 per RSA 155-A:11-b.

113.2 Limitations on authority. An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply or an equivalent or better form of construction is proposed. The board shall not have authority to waive requirements of this code.

Appeals of a local building official shall be filed within Thirty (30) days of the final determination. The Board typically meets monthly, at 10 a.m. on the second Friday of the month at 33 Hazen Drive, 2nd floor conference room in Concord, NH.

The State Building Code Review Board:

- **Physical Address**
110 Smokey Bear Blvd. Concord, NH
- **Mailing Address**
33 Hazen Drive. Concord, NH 03305
- **Phone** (603) 223-4231
- **Email** bldgcodebrd@dos.nh.gov

Thank you,

Shanti Wolph, Chief Building Inspector, City of Portsmouth

cc: Susan Morrell, City of Portsmouth City Attorney
Trevor P. McCourt, City of Portsmouth Deputy City Attorney
Jason Page, City of Portsmouth Legal Enforcement Officer



Inspection Department
Shanti R. Wolph, Chief Building Inspector

August 6, 2026

To: Hannah and Paul Burke, 161 South St., Portsmouth, NH 03801
Subject: Supplement to Official Determination Regarding Occupancy Classification.
Property Address: 28 Blossom St., Portsmouth, NH MBlu: 0111/ 0040/ 0000/ /

Supplemental Letter

This supplemental letter clarifies the City's prior correspondence regarding the occupancy classification of the existing art studio at 28 Blossom Street. The prior determination was not intended to limit, reclassify, or otherwise change the zoning status of the space. Rather, it identified how the space is currently being used from a building code and life-safety perspective. Because "sleeping unit" is a building code term and is not a separate zoning classification under the Portsmouth Zoning Ordinance, no zoning reclassification has occurred and no zoning variance is required.

Summary Highlights

- **Occupancy Determination:** The existing art studio attached to the three-family apartment building may continue to be used as an R-2 non-transient sleeping unit for building code purposes.
- **Safety Requirements:** Continued use is contingent upon the installation and maintenance of all life-safety items identified in the initial letter.
- **Prohibited Uses:** The studio may not be rented, leased, or used as an independent dwelling unit. Permanent cooking facilities, including ranges or similar equipment, are prohibited to prevent the space from being classified as a dwelling unit.
- **Zoning and Building Code:** From a zoning perspective, the space remains a preexisting residential art studio. The Portsmouth Zoning Ordinance does not prohibit periodic or nightly sleeping by the owner or occupant, provided the space is not used as an independent living unit.
- **Departmental Coordination:** Planning Director Peter Britz concurs with this interpretation and with the distinction between building code life-safety requirements and zoning classification.

Detailed Analysis

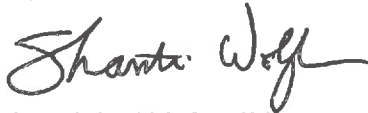
The "Sleeping Unit" Distinction: This clarification is based on the specific use of the studio by the owners' son. Although he may spend nights in the studio, his primary residence remains 161 South Street, where he bathes, eats meals, and keeps his personal belongings. The studio does not contain the facilities necessary to function as an independent dwelling unit, such as

permanent cooking or bathing facilities. However, because the space is used for sleeping, it is treated as a sleeping unit for building code purposes and must comply with applicable life-safety requirements.

Regulatory Rationale

- **Building Code Perspective:** The building code focuses on life safety. If a space is used for sleeping, even periodically, it must satisfy the applicable R-2 safety requirements, including detection and egress.
- **Zoning and Assessing Perspective:** I have been advised that the space has existed for more than 50 years and therefore, it will continue to be recognized, assessed, and treated as a residential art studio. The City's records from their prior Zoning Approval and Assessing records both show it as a barn/art studio.
- **Legal Safeguards:** Prohibiting permanent cooking facilities helps ensure that the space is not converted into an unauthorized fourth dwelling unit under both the Building Code and the Zoning Ordinance.

Thank you,



Shanti Wolph, Chief Building Inspector, City of Portsmouth



Peter Britz, Director of Planning and Sustainability

cc: Karen Conard, City of Portsmouth City Manager
Susan Morrell, City of Portsmouth City Attorney
Trevor P. McCourt, City of Portsmouth Deputy City Attorney
Jason Page, City of Portsmouth Legal Enforcement Officer



CITY OF PORTSMOUTH

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

September 10, 2026

City of Portsmouth
Board of Adjustment

Dear Chair Margeson and Members of the Board of Adjustment:

This letter is in reference to the Administrative Appeal of the Chief Building Inspector's Occupancy Determination for 28 Blossom Street filed by Susan E. Lassen, Trustee of the Lassen Family Revocable Trust, of 34 Blossom Street; Scott A. Lupkas, of 33 Blossom Street; and Guy D. Spiers and Elizabeth R. Spiers, Trustees of the 3A Trust, of 241 South Street. Specifically, I am providing some background on how this appeal relates to the Portsmouth Zoning Ordinance.

Simply, the art studio located at 28 Blossom exists today as an art studio. We do not treat a property that does not have a kitchen as a residence for the purposes of zoning. This studio attached to the third dwelling unit is used as an art studio and continues to be used in that manner and no change to that use has been made.

The definition of dwelling unit in the City's Zoning Ordinance is: *A building or portion thereof providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. This use shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses.*

While the building inspector recommended a path forward for the space to be considered a sleeping unit there is no definition for a sleeping unit in the Zoning Ordinance. This is a building code definition that is not included in any of the uses classified in the zoning ordinance. Given that there has been no effort to convert this space into an independent living space and there is, in fact, no kitchen, and does not appear to be any place to store personal belongings or bathing facilities, it would not be treated as a residential unit.

Importantly, this artist studio could not be treated as a residence, only as an art studio for this or any future users of the space because the existing use does not meet the definition for a dwelling unit.

Sincerely,

Peter Britz

Director of Planning and Sustainability

Cc: Stefanie Casella, Planner II
Trevor McCourt, Deputy City Attorney
Shanti Wholph, Chief Building Inspector