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,

Kathleen B. Logan, Trustee

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

Shanti Wolph, Chief Building Inspector, City of Portsmouth

Shanti Wolph on behalf of Peter Britz

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

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

Trevor P. McCourt
Deputy City Attorney

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

Shanti Wolph, Chief Building Inspector, City of Portsmouth

Shanti Wolph on behalf of Peter Britz

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 9, 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 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. 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

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
ZBA Case No.: LU-26-114

APPELLANTS' MOTION FOR REHEARING

(Filed pursuant to RSA 677:2)

NOW COME Appellants Kathleen B. Logan and Kent A. Logan, Trustees of the Kathleen B. Logan Revocable Trust; Susan E. Lassen, Trustee of the Lassen Family Revocable Trust; Scott A. Lupkas; and Guy D. Spiers and Elizabeth R. Spiers, Trustees of the 3A Trust (collectively, "Appellants"), and, pursuant to RSA 677:2, respectfully move this Board for rehearing of its decision, by a vote of 5–2, denying Appellants' appeal of the Determination Letter dated July 23, 2026, and the Supplemental Determination Letter dated August 6, 2026, issued by the Chief Building Inspector of the City of Portsmouth. In support of this Motion, and specifying the grounds therefor as required by RSA 677:2, Appellants state as follows:

I. PROCEDURAL BACKGROUND AND TIMELINESS

1. On August 20, 2026, Appellants filed a Notice of Appeal and Statement of Grounds with this Board, appealing the Determination Letter and Supplemental Determination Letter described above.

2. On September 15, 2026, this Board held a hearing on Appellants' appeal and, by a vote of 5–2, denied the appeal.

3. At that hearing, the genesis and history of the City's enforcement action were placed squarely at issue by the Board itself. Planning Director Peter Britz initially testified that the City's Legal Department zoning code enforcement officer had never been involved in this matter. Inspector Wolph then clarified that Legal Enforcement Officer Jason Page and the Legal Department had, in fact, been "read in on everything." As set forth in Part II.C below, neither witness's testimony disclosed that Mr. Page had actual knowledge of the studio's occupancy well before the City's June 18, 2026 cease-and-desist letter issued. The newly discovered evidence described in Part II bears directly on the accuracy and completeness of the account the Board received on this point.

4. This Motion is filed within thirty (30) days after the Board's decision, as required by RSA 677:2, and is Appellants' complete statement of the grounds upon which rehearing is sought.

II. GROUNDS FOR REHEARING

A. The Certified Record Furnished by the City After the Board's Vote

5. On the morning of September 16, 2026 — the day after this Board's vote — the City of Portsmouth furnished Appellants with a certified record of documents (the "Certified Record") compiled by Chief Building Inspector Shanti Wolph and previously ordered produced in the related proceeding before the New Hampshire State Building Code Review Board, Docket No. 2026-4. The Certified Record was certified by Inspector Wolph on September 2, 2026, but was not furnished to Appellants until the day following this Board's vote on their appeal. A true and accurate copy of the Certified Record is attached hereto as Exhibit A and incorporated herein by reference.

6. Appellants did not have access to the Certified Record, and could not reasonably have obtained its contents through the exercise of due diligence, before this Board's September 15, 2026 vote. The Certified Record was compiled and produced solely because of the separate, concurrent proceeding before the State Building Code Review Board, and its contents were not otherwise available to Appellants or the public prior to its production.

7. The Certified Record accordingly constitutes newly discovered evidence within the meaning of RSA 677:2, which Appellants could not, with reasonable diligence, have discovered or presented at the hearing on their appeal.

B. The Newly Discovered Evidence Is Material to Grounds Already Raised Before This Board

The Certified Record is not merely cumulative. Several documents within it bear directly on the genesis of the City's enforcement action and on grounds Appellants raised in their original appeal:

8. July 10, 2026 email from Inspector Wolph to the International Code Council (Tab 7 of the Certified Record). In this contemporaneous communication — made before the Determination Letter issued and before any final decision had been reached — Inspector Wolph stated that the owners of 28 Blossom Street "do not reside on this property" and "live nearby at a separate residence and rent the three dwelling units." Inspector Wolph then wrote: "If the studio were clearly accessory to one of the dwelling units and used by the occupants of that unit, I do not believe there would be a significant issue. The challenge is that the studio does not appear to be accessory to any particular dwelling unit and is functioning as a stand-alone space... The question I am struggling with is whether the son's regular overnight use of the studio constitutes a code violation. During the day, he returns to his parents' residence, where he eats, showers, and does laundry. The studio is used primarily as a place for him to sleep at night." This contemporaneous statement, from the Building Inspector himself, directly corroborates the ground raised in Appellants' original appeal that the studio cannot lawfully be treated as an accessory use of 161 South Street.

9. June 30, 2026 letter from Hannah and Paul Burke to Inspector Wolph (Tab 5 of the Certified Record). In this letter, the property owners themselves wrote: "If the City denies us the right to have our son sleep in the studio, there will be no place for him to live." This admission, from the owners, confirms that the studio functions as Christopher Burke's actual residence rather than as incidental overflow space, and further corroborates Appellants' contention that the space operates in substance as an independent dwelling or sleeping unit.

10. July 14, 2026 email from Inspector Wolph to the Burkes (Tab 8 of the Certified Record). This email identifies Section 104.11 of the Building Code — the alternative-materials-and-methods provision, invoked expressly on the basis of "humanitarian considerations" — as the code path under consideration at that time. The Determination Letter ultimately issued on July 23, 2026 instead relies on Section 104.2.4, a different provision governing modifications for practical difficulties. This shift in the legal authority relied upon, over the course of two weeks and without any apparent intervening change in the facts, is material to Appellants' contention that the Determination reflects an outcome-driven search for regulatory authority rather than a natural application of the code.

11. June 22, 2026 letter from Inspector Wolph to the Burkes (Tab 4 of the Certified Record). In this letter, Inspector Wolph wrote: "The cease-and-desist letter was issued after I received information from a Portsmouth Police Officer indicating that your son had stated he was living in the structure." As Appellants stated in their original appeal, this police report was only the most recent development in a pattern of concern: Blossom Street neighbors, including Appellants, had repeatedly raised the same nonconforming residential use of the studio with City officials for approximately three years before the cease-and-desist letter issued. The genesis of this matter is accordingly broader than any single report, and, as set forth in Part II.C below, the completeness of this account bears directly on the testimony given to the Board at the September 15, 2026 hearing regarding the City's knowledge of and involvement in this matter.

12. July 29, 2026 inspection report (Tab 11 of the Certified Record). This is the first inspection of the studio reflected anywhere in the Certified Record. It occurred six days after the Determination Letter issued on July 23, 2026. Nothing in the Certified Record indicates that Inspector Wolph, or anyone from the City, physically inspected the studio at any point before the Determination Letter issued. A Determination that identifies specific life-safety conditions of approval — a shower, particular egress and detection requirements, and a described two-hour fire separation — before any inspection confirming the studio's actual physical condition had taken place is further evidence that the classification, and the conditions attached to it, were settled in advance and verified only after the fact.

13. August 13, 2026 inspection report (Tab 12 of the Certified Record). This report states that, as of that inspection, “a shower had not yet been installed,” notwithstanding that the July 23, 2026 Determination Letter made installation of a shower an express condition of the studio's continued use as an R2 non-transient sleeping unit. The report nonetheless concludes that “the studio is safe to use.” This document is material to Appellants' contention, raised in the related building-code appeal and relevant here, that the conditions of the Determination have not been verified or enforced before continued occupancy was permitted to proceed.

C. The Hearing Testimony Regarding the Legal Department's Knowledge and Involvement Was Incomplete

14. At the September 15, 2026 hearing, Planning Director Peter Britz initially testified that the City's Legal Department zoning code enforcement officer had never been involved in this matter. Inspector Wolph subsequently clarified, testifying that Legal Enforcement Officer Jason Page and the Legal Department had been “read in on everything.”

15. Neither witness disclosed to the Board that Mr. Page had actual knowledge of Christopher Burke's occupancy of the studio well before the City's June 18, 2026 cease-and-desist letter issued. Appellant Kathleen B. Logan documented her own direct communications with Mr. Page concerning this same occupancy on June 24, 2025, and again on May 27, 2026. Ms. Logan's reports to the City's Inspection and Police Departments regarding the occupancy of the studio date back to 2023, when, at various times, Christopher was subject to bail and protective orders barring him from both the 28 Blossom Street and 161 South Street properties.

16. This history was not before the Board at the September 15, 2026 hearing. It bears directly on the completeness and accuracy of the testimony the Board received regarding when and how the City became aware of the studio's occupancy, and on the weight the Board should give to the City's account of the genesis of this matter. Appellants are prepared to present this evidence, together with the Certified Record, on rehearing.

D. This Evidence Could Not Reasonably Have Been Obtained Before the Board's Decision

Appellants recognize that a motion for rehearing is not an occasion to introduce evidence that could, with reasonable diligence, have been obtained and presented at the original hearing. That is not the case here. The Certified Record was compiled by the City in response to a scheduling order issued by a different tribunal, in a separate proceeding, and was not requested by or available to Appellants through ordinary means before this Board's vote. The certification date of September 2, 2026, followed by production to Appellants only on September 16, 2026 — the morning after this Board's decision — reflects a gap in timing that was not within Appellants' control and that could not have been shortened through diligence on their part. And while Ms. Logan's own records of her communications with Mr. Page have long been in Appellants' possession, their significance did not become apparent as a ground for rehearing until the Legal Department's role and knowledge were placed in dispute by the testimony at the September 15, 2026 hearing itself — testimony Appellants could not have anticipated or addressed in advance.

E. The Board's Written Decision Does Not Address the Grounds of Appeal

The Board's written decision on Appellants' appeal, dated September 22, 2026, states in its entirety that the Board voted to deny the appeal because "the physical changes requested by the Code Official would not convert the space into something other than an art studio and there is nothing in those physical changes that is incompatible with the use of an art studio."

This stated rationale addresses only whether the physical modifications identified as conditions of approval in the Determination — installation of a shower, compliant egress, and smoke and carbon monoxide detection — are compatible with continued use of the space as an art studio. It does not address, and the written decision contains no discussion of, the grounds Appellants actually raised in their Notice of Appeal: that the Chief Building Inspector usurped this Board's exclusive zoning jurisdiction under RSA 674:33 and RSA 676:5; that the approved use is not a permitted use in the General Residence B zoning district; that the Determination effectively authorizes an unauthorized rooming, boarding, or co-living arrangement; that the studio cannot lawfully be treated as an accessory use of the separate, non-contiguous parcel at 161 South Street; and that the Determination fails to address density, parking, and Historic District Commission requirements triggered by the use.

A decision that evaluates only the physical compatibility of specific building modifications with an art studio, without addressing whether the occupancy those modifications are meant to support is a lawful use under the Zoning Ordinance, does not reflect consideration of the case Appellants actually presented. Appellants received this stated rationale for the first time with the Board's written decision on September 22, 2026, and could not have addressed this gap in the Board's reasoning any earlier. Rehearing is warranted so that the Board may consider, and render a decision that addresses, the zoning-use grounds Appellants actually raised, rather than the narrower physical-compatibility question the Determination itself did not present as the operative issue.

E. On the Merits, the Board's Decision Improperly Delegated the Meaning, Construction and Interpretation of the Zoning Ordinance to the Building Inspector and/or the City's Code Enforcement Department(s).

In denying the appeal, the Board improperly delegated the authority to interpret, construe and apply the City's Zoning Ordinance to the Building Inspector. Specifically, the Building Inspector reclassified the space as an "R2 non-transient sleeping unit" under the International Building Code and authorized its continued use for that purpose.

The Building Inspector's determination effectively executed an end-run around the plain meaning of the Zoning Ordinance, which distinguishes between "dwelling units" and "sleeping units", and does not permit "sleeping units" (or any other rooming, boarding or co-living use) in the GRB zoning district. The owners of the address in question have conceded that their adult son is living in the artists' studio on the property, which also includes a three-unit apartment building. The owners do not actually live on this property. Thus, this artist studio building is being used as a fully separate dwelling unit, which is not a permitted use in this location under the Portsmouth Zoning Ordinance. The Determination simply ignores the non-compliance of the use being made of the building with the Zoning Ordinance itself. The Board's September 15, 2026 decision, after hearing argument on these points, affirms that use notwithstanding the clear and obvious violation of the Zoning Ordinance. In so doing, the Board has improperly delegated its power to determine whether a use is compliant with the plain and ordinary terms of the Zoning Ordinance to the Building Inspector, or another administrative officer.

In addition, the Board's decision constitutes *ad hoc* rulemaking. The Board's decision ratifies a code enforcement determination of the Building Inspector that cannot be reconciled with the plain language of the Zoning Ordinance. The City Council deliberately chose not to extend rooming, boarding and co-living uses into GRB residential districts, confining them to districts such as the CD4 district. The Board's decision ratifying the Building Inspector's determination effectively rewrites the Zoning Ordinance without City Council or voter approval. In so doing, the Board is usurping the power to enact changes to the Zoning Ordinance from the proper legislative authority of the City of Portsmouth, the Planning Board, and the voters themselves.

Furthermore, the Board's decision appears to permit a use accessory to a primary residence on another lot altogether. The owners reside at 161 South Street, and the artist studio in question is located at 28 Blossom Street. The Building Inspector's decision, ratified expressly or implicitly by the Board on September 15, 2026, permits the linkage between a primary use and an accessory use on separately identified, assessed and taxed lots. This baffling decision is contrary to the Zoning Ordinance and undermines the City's zoning scheme altogether.

F. This Appeal Restates and Reincorporates Each of the Arguments Made In Its Appeal of August 20, 2026.

Attached hereto is the Appeal dated August 20, 2026. Because the Board failed to address any of the merits arguments contained therein, the Appellants expressly incorporate and restate each argument attached hereto lest there be any suggestion of failure to preserve any issue or argument made herein or therein.

III. THE BOARD SHOULD GRANT REHEARING

RSA 677:2 authorizes this Board to grant rehearing where, "in its opinion good reason therefor is stated in the motion." Good reason exists here. The newly discovered evidence, together with the incompleteness of the hearing testimony regarding the Legal Department's knowledge and involvement, bears directly on the credibility of the account of this matter's origin presented to the Board, on the accessory-use ground raised in Appellants' original appeal, and on whether the Determination reflects a consistent and good-faith application of the Building Code or a shifting search for regulatory cover — the latter underscored by a Determination that specified detailed life-safety conditions before any inspection of the studio had ever taken place. And apart from

that evidence, the Board's own written decision confirms that its stated rationale did not reach the zoning-use grounds Appellants actually raised. Fundamental fairness, and the interest of this Board in deciding this matter on a complete and accurate record and in addressing the grounds actually presented, favor rehearing so that this evidence and these grounds may be considered.

IV. RELIEF REQUESTED

WHEREFORE, Appellants respectfully request that the Board:

a. Grant rehearing of its September 15, 2026 decision denying Appellants' appeal, for consideration of all issues raised herein or therein;

b. Accept the Certified Record, attached as Exhibit A, as part of the record on rehearing;

c. Upon rehearing, reconsider and reverse its September 15, 2026 decision in light of the newly discovered evidence and the merits arguments raised in the Appeal; and

d. Grant such other and further relief as the Board deems just and proper.

Appellants further state that, should this Motion be denied in whole or in part, Appellants intend to preserve all rights of appeal available under RSA 677:4, and file this Motion, in the alternative, for the purpose of exhausting the prerequisite to any such appeal.

V. EXHIBITS

- Exhibit A — Certified Record, City of Portsmouth Building Department (certified September 2, 2026; produced to Appellants September 16, 2026)

CERTIFICATE OF SERVICE

Appellants hereby certify that a copy of this Motion has been filed with the Zoning Board of Adjustment, City of Portsmouth, and served upon the City of Portsmouth and all other parties of record, by the method(s) required by the Board's rules and RSA 677:2.

Respectfully submitted,

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

By their Attorneys,

ORR & RENO, P.A.

By: */s/ Jeremy D. Eggleton*

Jeremy D. Eggleton, Esq. (NH Bar #18170)
45 South Main Street
P.O. Box 3550
Concord, NH 03302-3550
Phone: 603-224-2381
Fax: 603-224-2318
jeggleton@orr-reno.com

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,

Kathleen B. Logan, Trustee

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

Shanti Wolph, Chief Building Inspector, City of Portsmouth

Shanti Wolph on behalf of Peter Britz

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

INDEX OF RECORD+
FOR
CITY OF PORTSMOUTH INSPECTION DIRECTOR SHANTI WOLPH

NEW HAMPSHIRE STATE BUILDING CODE REVIEW BOARD
Docket No. 2026-4. Appeal by Kathleen B. Logan and Kent A. Logan; Susan E. Lassen; Scott A. Lupkas; Guy D. Spiers and Elizabeth R. Spiers, Appellants, of the City of Portsmouth Building Official in Matter #2026-4, 28 Blossom Street, Portsmouth, NH 03801

INDEX OF CERTIFIED RECORD

Tab	Document / Record Description	Record Page(s)
1	Certification Page	1
2	06/18/2026 — Cease and Desist Letter Sent from Inspections Director Shanti Wolph to Hannah and Paul Burke (The Burkes). The purpose of the letter was to ensure that the art studio was not being used as a dwelling unit.	2-3
3	06/19/2026 — Email from The Burkes Request for the appeal process.	4
4	06/22/2026 — Letter from Inspections Director Explanation of the appeal and next step process.	5-6
5	06/30/2026 — Email attachment from the Burkes This document explains why the appeal is requested and includes the Burkes' letter describing the studio's use over the past 50 years and most recently.	7-8
6	06/30/2026 — Email attachment from Inspections Director Acknowledgement of the most recent communication from the Burkes as well as providing some potential solutions. The letter included a request to meet at City Hall to discuss the different options.	9-10
7	07/10/2026 — Email from Inspections Director Email sent to the International Code Council requesting guidance on a code interpretation regarding the studio's use.	11-12

8	07/14/2026 — Email from Inspections Director Shanti Wolph The email informed the Burkes that a conversation had taken place with one of the ICC plan reviewers and included a meeting request.	13
9	07/23/2026 —Letter emailed to the Burkes The letter explained the code path as well as the requirements needed to allow the art studio to continue being used as described.	14–17
10	08/06/2026 — Supplemental Letter This letter provided clarification that the studio was not being re-classified but simply identified to provide a path for life safety requirements.	18-19
11	Inspection Results dated 07/29/2026 Initial inspection with the goal of ensuring certain life safety items were in place	20
12	Inspection Results dated 08/13/2026 Inspection to confirm that certain life safety items had been completed	21

I, Shanti Wolph, Inspections Director for the City of Portsmouth, New Hampshire, hereby certify as follows:

I have reviewed and compiled the materials maintained by the Inspections Department concerning the interpretation of the art studio located at 28 Blossom Street as an R-2 non-transient sleeping unit. To the best of my knowledge, the certified record includes all communications relevant to that interpretation and to my decision. The record does not include every email concerning 28 Blossom Street, because the request was limited to records relevant to my decision.

I certify that the foregoing is true and accurate to the best of my knowledge and is based on the records maintained by the Inspections Department.

Dated: 9/2, 2026

Shanti Wolph
Inspections Director
City of Portsmouth, New Hampshire

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

On this 2nd day of September, 2026, before me personally appeared Shanti Wolph, known to me or satisfactorily proven to be the person whose name is subscribed to the foregoing instrument, and acknowledged that she executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Notary Public/Justice of the Peace
My Commission Expires: March 27, 2029

SALLY A. KELLAR
STATE OF
-MY-
COMMISSION
EXPIRES
MARCH 27, 2029
NEW HAMPSHIRE
JUSTICE OF THE PEACE

City of Portsmouth

Inspection Department
Shanti R. Wolph, Chief Building Inspector

Cease and Desist

June 18, 2026

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

Dear Mr. and Mrs. Burke,

It has been brought to our attention that a building on the property you own at 28 Blossom St. in Portsmouth, NH, is being occupied as a dwelling unit or sleeping unit. This building has not been approved for use as a dwelling unit or sleeping unit.

You are in violation of the State of New Hampshire Building Code, specifically:

2021 IBC
[A] 111.1 Change of occupancy.
A building or structure shall not be used or occupied in whole or in part, and a change of occupancy of a building or structure or portion thereof shall not be made, until the building official has issued a certificate of occupancy therefore as provided herein. Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction. Certificates presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid.

To avoid immediate fines and legal action, the following is recommended:

Option 1: No later than July 2, 2026, confirm that the building is not being used as a dwelling unit or sleeping unit. This confirmation will require an inspection by a City official.

OR

Option 2: In addition to complying with Option 1, apply for a building permit to convert the building to a dwelling unit. This conversion would likely require a variance due to the nonconforming use of multiple dwellings on a single parcel. Once the building permit has

been approved, an additional deadline will be established for bringing the building into compliance.

Starting on the date of this notice, the City will assess a **statutory penalty of $275 per day** for each day this code violation remains unresolved. If you remedy this violation in accordance with the timeline set forth in Option 1 or Option 2, the City will waive this statutory penalty. If you fail to remedy this serious code violation within the applicable timeline, you shall be responsible for payment of the full penalty, and the City reserves the right to bring an action in a court of competent jurisdiction to enforce this penalty. Nothing in this letter shall be read to waive the City's right to assess any other penalty or fine or to take further legal action it may identify as applicable in the future.

Respectfully,

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 Zoning Officer

Outlook

Webform submission from: Building Code Board of Appeals > Body Blocks

From City of Portsmouth <webmaster@portsmouthnh.gov>
Date Fri 6/19/2026 8:51 AM
To Shanti R. Wolph <srwolph@portsmouthnh.gov>

Submitted on Fri, 06/19/2026 - 08:51

Submitted by: Anonymous

Submitted values are:

Name
Paul and Hannah Burke

Email
classicbd@comcast.net

Subject
Appeal assumed code violation

Message
We are requesting an appeal to a Cease and Desist Order we received, based on a complaint by a malicious neighbor. The decision was based on one sided, biased information to cause harm to our family. We have the right to address the facts in this complex situation. Please advise to our next course of action.

bcc-email
srwolph@portsmouthnh.gov

City of Portsmouth

Inspection Department
Shanti R. Wolph, Chief Building Inspector

June 22, 2026

To: Hannah and Paul Burke, 161 South St., Portsmouth, NH 03801
VIA Email (classicbd@comcast.net)
Subject: Improper Occupancy
Property Address: 28 Blossom St., Portsmouth, NH MBlu: 0111/0040/0000/

Dear Mr. and Mrs. Burke,

Thank you for your prompt response regarding the cease-and-desist letter concerning the alleged improper occupancy of the structure located at 28 Blossom Street in Portsmouth, New Hampshire.

I understand that you are seeking information regarding the appeal process and the next steps available. At this point, there are two primary ways to proceed:

1. You may demonstrate that the structure is not being occupied. If you wish to pursue this option, I am available to meet you at the property and conduct a brief walkthrough to confirm the current condition and use of the structure.
2. You may file an appeal of the administrative decision. The matter will be heard by the Portsmouth Building Code Board of Appeals. In filing any appeal, it is important that you clearly identify the specific issue being appealed. For example, please specify whether you are contesting my interpretation or application of the building code, or whether you are asserting that the structure is not, in fact, being occupied. The cease-and-desist letter was issued after I received information from a Portsmouth Police Officer indicating that your son had stated he was living in the structure.

Please advise how you would like to proceed. If you would like to schedule a walkthrough, please provide several available dates and times. If you intend to file an appeal, please identify the specific decision or determination you are appealing

Respectfully,

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

6/30/2026

Dear Mr. Wolph,

I assume you have received the email that we sent regarding the studio space. We would like to file an appeal based on the fact that the space has been used in the same manner for over five decades. Furthermore our son has a disability. We are aware that a neighbor across the street from the property was able to get a variance for construction, based on the fact that her husband was disabled.

We also find it hard to believe that a police officer reported a code violation. The Portsmouth Police Department have been nothing but supportive and compassionate towards us, our son and his challenges.

We are available to meet Wednesday or Thursday.

Paul and Hannah Burke

The "Studio"
28 Blossom Street
Portsmouth, NH

Dear Mr. Wolph,

I wanted to clarify the use of this space. For the over fifty years the studio has been used in the same manner. It was originally my Dad's art studio, with storage for his art, a sitting area and a half bath in the attic area. It was also a space for family to stay when in transition. Today it lives on as a multi use creative space, with a small shop, a writing area, a drafting/art studio with a sitting area. There is no bedroom, kitchen or shower. It also stores my parents art. It has been a sanctuary many times for family members and friends.

Most recently our son, who has a medical condition, has been utilizing the space when he is not at our home, which is just around the corner. He has his meals, showers and has all of his clothing at our house. Due to his condition it is important that he have his own quiet space at times. There are nights that he sleeps in the studio, as many others have. We last utilized it ourselves when we were caretaking my Dad shortly before his passing. It is NOT an apartment and rent has never been received for the space. If the City denies us the right to have our son sleep in the studio, there will be no place for him to live. Perhaps none of you have been in the agonizing position of finding a safe place for a loved one who has mental health challenges. NH has nothing! Believe me, I have searched far and wide for options. This arrangement allows for us to have oversight and support our son.

Furthermore, we pay $37,000.00 to the City for our property taxes! This is an enormous amount of our income and if the taxes continue to go up in this outrageous way, we will need to look at contingency plans.

Not every situation fits into the same box. It is not appropriate to take away the rights we have utilized within this space for over fifty years.

If we need a variance at this point, we will go through the steps to do so. Unfortunate that in a world where there are so many struggles, that this somehow gets on the list. No harm towards anyone, and a salvation for us and our son.

Sincerely,

Hannah and Paul Burke

City of Portsmouth

Inspection Department
Shanti R. Wolph, Chief Building Inspector

June 30, 2026

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

Dear Mr. and Mrs. Burke,

Thank you for your most recent response. I appreciate your willingness to discuss this further, and I agree that it would be helpful to meet in person to review the available options and the applicable code and zoning requirements together.

For context, a sleeping unit as defined in section 202 of the NH State Building Code (the Building Code) is not permitted on a property unless it is contained within one of the occupancy classifications described in section 310.3 and table 2902.1 of the Building Code. For example, a hotel, motel, dormitory, etc,

Under Section 111.1, and Chapter 12 of the Building Code, the structure must meet the applicable requirements for a dwelling unit, including access to toilet, shower, and cooking facilities, as well as heat, light, ventilation, and other life-safety requirements.

An appeal of an administrative decision is generally available when a party believes that the Building Inspector has incorrectly interpreted or applied the applicable building code provisions. If you would like to appeal my decision, you can file that with the State Building Code Board of Review in Concord, NH.

If you are inclined to add the additional facilities needed for overnight occupancy, you would be creating a fourth dwelling unit on the property and you would need to apply for a variance to the Zoning Board of Adjustment, and possibly seek other zoning relief. Please note, that approval of a variance is discretionary and cannot be guaranteed. That said, if you would like to explore that option, City staff can help explain the application process and identify the materials that would be needed for submission.

Please let me know which days next week you are available to meet at City Hall. I would be glad to discuss the applicable requirements, answer questions, and review potential next steps with you.

Respectfully,

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 EnforcementOfficer

Outlook

ICCTO-7725 Is this occupancy allowed?

From Jira Service Management Widget <jira@icc-ts.atlassian.net>
Date Fri 7/10/2026 12:50 PM
To Shanti R. Wolph <srwolph@portsmouthnh.gov>

Reply above this line.

Thank you for your code opinion request. Your request will be assigned to a member of the International Code Council's Technical Services team, who will follow-up to provide an answer or request additional information as soon as possible. You may reply to this email to add comments to your request.

Question Subject: Is this occupancy allowed?

Question Details: The property contains a two-family dwelling, with the first and second floors functioning as separate dwelling units. Attached to the side of the building is a former carriage house that has been converted into a dwelling unit. Attached to the carriage house is an additional structure identified as a "studio."

The property is currently recognized as a three-family building (Group R-2) with an attached studio, which the owner describes as a "relaxing space." The owner states that the studio has been used for more than 50 years as overflow space for guests when family and friends visit.

It is important to note that the owners do not reside on this property. They live nearby at a separate residence and rent the three dwelling units. Recently, the City received a complaint from an abutter alleging that someone was living in the studio. After speaking with the property owners, I learned that their son, who has a developmental disability, occasionally sleeps in the studio. According to the parents, he requires this separate space at night to help him remain calm and grounded.

The studio contains a toilet, sink, heat, emergency egress, smoke detectors, and other life-safety features. However, it does not contain a shower or cooking facilities. As such, it would not appear to meet the definition of a dwelling unit, though it may more closely resemble a sleeping unit.

The owners are understandably distressed by the situation, and I find myself in the difficult position of balancing their circumstances with my responsibility to administer and enforce the code. If the studio were clearly accessory to one of the dwelling units and used by the occupants of that unit, I do not believe there would be a significant issue. The challenge is that the studio does not appear to be accessory to any particular dwelling unit and is functioning as a stand-alone space.

The question I am struggling with is whether the son's regular overnight use of the studio constitutes a code violation. During the day, he returns to his parents' residence, where he eats, showers, and does laundry. The studio is used primarily as a place for him to sleep at night.

This is the code path that I had identified: Aa sleeping unit as defined in section 202 of the NH State Building Code (the Building Code) is not permitted on a property unless it is contained within one of the occupancy classifications described in section 310.3 and table 2902.1 of the Building Code. For example, a hotel, motel, dormitory, etc,

Under Section 111.1, and Chapter 12 of the Building Code, the structure must meet the applicable requirements for a dwelling unit, including access to toilet, shower, and cooking facilities, as well as heat, light, ventilation, and other life-safety requirements.

This is shared with srwolph@portsmouthnh.gov.

Outlook

28 Blossom- Follow-Up Regarding Art Studio and Meeting Request

From Shanti R. Wolph <srwolph@portsmouthnh.gov>
Date Tue 7/14/2026 2:53 PM
To Hannah Burke <classicbd@comcast.net>
Cc Susan G. Morrell <sgmorrell@portsmouthnh.gov>; Jason C. Page <jcpage@portsmouthnh.gov>; Abigail K. Cargile <akcargile@portsmouthnh.gov>

Good afternoon Mr. and Mrs. Burke,

As promised, I contacted one of the plan reviewers at the International Code Council (ICC), the organization that develops the model codes adopted by New Hampshire as part of the State Building Code.

After reviewing the configuration and current use of the art studio, the reviewer concluded that, with the addition of a shower, the space could qualify as an **R-2 non-transient sleeping unit**. This would allow the existing use of the studio to continue while also providing an overnight accommodation option for your son.

Section 104.11 of the building code provides an alternative approval path that allows the Building Official to approve alternative materials, designs, and methods of construction. In this case, it would provide a mechanism for approval based on humanitarian considerations and practical application, provided that the necessary life-safety features are in place.

To pursue this option, a licensed plumber would need to apply for a plumbing permit, and a building permit would also be required for the installation of a code-compliant shower. In addition, we would need to verify the presence of adequate heat, operational smoke and carbon monoxide alarms, and compliant means of egress.

In my opinion, this approach would not require a variance, as it would essentially formalize and bring into compliance an existing use of the space.

Would you be available on **Wednesday, July 22, at 2:00 p.m.** to meet with us in the Legal Department? The purpose of the meeting would be to finalize any remaining details and answer any questions you may have.

Thank you,

Shanti Wolph
Inspections Director/Chief Building Inspector
City of Portsmouth
(603)610-7261

City Hall Hours: Monday, 8:00 a.m. – 6:00 p.m.; Tuesday – Thursday, 8:00 a.m. – 4:30 p.m.; and Friday, 8:00 a.m. – 1:00 p.m.
(NOTE: If a holiday falls on a Monday, City Hall will be open until 6:00 p.m. on Tuesday)

The information in this message may be legally privileged and confidential. It is intended only for the use of the named individual. If you receive this communication in error, please notify me and delete the communication

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. Section 202 Definitions:

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

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

Shanti Wolph on behalf of Peter Britz

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

Inspection Department
Shanti R. Wolph, Chief Building Inspector

July 29, 2026

To: Hannah and Paul Burke, 161 South St., Portsmouth, NH 03801
Subject: Inspection to Determine the Condition of the Studio
Property Address: 28 Blossom St., Portsmouth, NH MBlu: 0111/ 0040/ 0000/ /

Inspection Description
The site visit at the Art Studio of Hannah and Paul Burke served as a follow-up inspection to verify the conversion of an overflow/workshop space into an R-2 non-transient sleeping area. The inspection focused on life safety requirements and the installation of a new shower facility.

Inspection Findings & Requirements
The space was evaluated for habitability and code compliance. The following items were identified as necessary for the space to be considered complete:

- **Life Safety:** Installation of interconnected smoke and carbon monoxide detectors on every level of the structure.
- **Sanitation:** Installation of a shower (minimum 30x30 inches, though 36x36 was recommended for comfort) to complement the existing toilet and hand sink.
- **Finishing:** Sheetrock/drywall needs to be completed around the new shower area and the exposed insulation foam insulation needs to be covered with thermal ignition barrier.

The inspection is currently subject to a 30-day window regarding potential appeals or objections from third parties

Inspection Department
Shanti R. Wolph, Chief Building Inspector

August 13, 2026

To: Hannah and Paul Burke, 161 South St., Portsmouth, NH 03801
Subject: Studio Life Safety Inspection
Property Address: 28 Blossom St., Portsmouth, NH MBlu: 0111/ 0040/ 0000/ /

Inspection Findings & Requirements

1. Interconnected smoke/carbon monoxide detectors had been installed.
2. A thermal barrier had been installed over the exposed foam insulation.
3. A shower had not yet been installed.

Conclusion: The studio is safe to use.

To: 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
ZBA Case No.: LU-26-114

Letter of Authorization for Representation by Counsel

Dear City of Portsmouth Board of Adjustment:

We, Kathleen B. Logan and Kent A. Logan, Trustees, Kathleen B. Logan Revocable Trust; Susan E. Lassen, Trustee, Lassen Family Revocable Trust; Scott A. Lupkas; and Guy D. Spiers and Elizabeth R. Spiers, Trustees, 3A Trust, hereby authorize Orr & Reno, P.A. (Jeremy D. Eggleton, Esq.) to represent us for the purposes of the above-referenced Appeal from Determination Letter (July 23, 2026) and Supplemental Determination Letter (August 6, 2026) of the Chief Building Inspector, City of Portsmouth, including appearing on our behalf at any requisite hearings of the Board.

Thank you in advance for your consideration of this matter.

Scott Lupkas — 10.14.2026
Signature — *Date*

Kathleen B Logan — 10/14/26
Signature — *Date*

Susan Lassen — 10.14.26
Signature — *Date*

Guy D. Spiers Elizabeth R. Spiers — 10/14/2026
Signature — *Date*

11/8/26
Docket No. 2026-4

Response to the Motion for a Rehearing and the Appellant's Brief

Let us not be mistaken that this entire matter has nothing to do with a zoning issue, but is one of many ongoing attempts of malicious harassment by Kathy Logan. This matter is a clear case of discrimination against our son who has struggled with a medical condition. Their Attorney in fact, brings up information that is discriminatory against our son and has nothing to do with a zoning issue. *(C-15) In the Motion for a Rehearing. Under *C-16 their Attorney further elaborates on his desire to enter information he believes is accurate and again has nothing to do with a zoning issue. Please be clear of the fact that if the Appellant's were to get the "relief" they seek, our son would sleep at 161 South Street and continue to spend other waking hours in the studio space. He would be "sleeping" on either one side of Logan's property, or the other, as her house is sandwiched between our two properties.

The attack on Inspector Wolph and the sequence of events is misleading and irrelevant. Inspector Wolph was professional and unbiased in his findings.

After clarification of the facts:

- The studio space has been used in the same manner for over five decades.
- There does not exist a kitchen, shower or separate bedroom space.
- Our son utilizes our home as his primary residence, showering, eating and keeping his clothing at 161 South Street.
- The studio provides an opportunity for him to have some autonomy and quiet space to retreat to. This is essential to his well being.
- Inspector Wolph proved complete due diligence in his decision by reaching out to the ICC to further confirm his findings in a situation that was unique. A time was then made for an inspection of the space.

The two items that needed to be addressed were:

- Bluetooth smoke/carbon monoxide detectors were to be installed on each of the two floors.
- The hard insulation that had previously been installed had some minor edges that needed to be taped and sealed.

Both items were addressed and Inspector Wolph came by for a follow up inspection to confirm this.

*The issue of a shower being installed will be completed once this matter is fully resolved. The space has been prepared for the re-installation of a shower, where there had been one previously removed. The lack of a shower is NOT a safety issue.

The International Code Council (ICC), the organization that develops the model codes adopted by NH as part of the State Building Code; concluded upon review of the facts, that the space qualifies as an **R-2 non-transient sleeping unit.**

Section 104.2.4 of the NH Building Code provides an alternative approval path:

104.2.4 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, provided that the building official shall first find that one or more special individual reasons make the strict letter of this code impractical, and that 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 the written request for and action granting modifications shall be recorded and entered in the files of the department of building safety.

We ask for the relentless harassment by Kathy Logan towards our family end here. This is a straight forward situation concerning a space our family has owned for decades and has been used in a similar manner for an equal amount of time. We pay enormous property taxes to this City and it is unconscionable that we should not be able to continue the use of the studio space for the needs of our family.

Sincerely,

Hannah and Paul Burke