

APPLICATION FOR VARIANCE
346 COLONIAL DRIVE, PORTSMOUTH, NEW HAMPSHIRE

I. INTRODUCTION

Kenneth Young ("Mr. Young") owns the property located at 346 Colonial Drive in the City of Portsmouth (Tax Map 260, Lot 136) ("the Property"). Mr. Young lives on the Property and wishes to construct an attached accessory dwelling unit ("ADU") on the Property to allow for his aging father to reside with Mr. Young in his home.

Mr. Young is seeking variances from various provisions of the Zoning Ordinance, identified in Section III, applicable to the Single Residence -B Zoning District ("SRB Zone") to allow for the construction of that ADU.

Mr. Young previously sought a variance from the Zoning Board of Adjustment ("ZBA") to allow for the construction of an ADU on the Property, which was denied on July 16, 2019. The basis of the ZBA's denial was that: (a) granting the variance would alter the essential character of the neighborhood; (b) substantial justice would not be done as it was feasible for Mr. Young to propose a different configuration with less impact on the neighborhood; and (c) the value of surrounding properties would be diminished, particularly Mr. Young's abutter to the rear, Janice Kelley (Tax Map 260, Lot 135). The ZBA did note in its decision that "[a] plan that would shift the garage and accessory dwelling unit forward would be workable and preferable."

The proposal for which the variances are sought do exactly as the ZBA suggested by shifting the garage and attached ADU forward. Therefore, for the reasons set forth in this Application, the ZBA should grant the variance relief sought in this Application as Mr. Young can satisfy all criteria necessary for the issuance of a variance.

II. CURRENT PROPERTY LAYOUT

The Property is a .14-acre parcel in the SRB Zone. The Property is located where = Colonial Drive sharply curves and converges with Victory Road, and Decatur Road =. The Property is rectangular-shaped, with one curved sidelines on the Property's northerly and easterly boundaries. A copy of the Tax Map 22 is attached for the ZBA's convenience.

The Property is presently improved with a 1,032 square foot (gross living space) single family home of a cape design with a 276 square foot attached garage that was constructed in or around 1940. The total footprint of the structures located on the Property is approximately 1,111

square feet. The total existing building coverage on the Property is approximately 18.6%, which is 1.4% below the allowable 20% maximum coverage.

Because the Property is located on a sharp curve and has street frontage on two of its four sides, the Property is subject to the Zoning Ordinance's 30' front setback on two sides and the 30' rear setback on a third side, leaving an exceedingly small building envelope on the Property. As such, the single-family residence on the Property constitutes a pre-existing, non-conforming use as the garage is located within 5 feet of the rear sideline, the single family home is located within 7' 1" of the rear sideline, and the existing structures are located between 28' 9" and 29' 4" of the two front sidelines.

III. PROPOSED USE

The variance sought by Mr. Young is to allow Mr. Young to construct a 480 gross square foot (385 square foot GLA) ADU above the garage on the Property to allow Mr. Young to care for his aging father. Mr. Young's proposed use is more fully set forth in the floor plans and site plan appended to this variance application prepared by Charles Hoyt Design.

Starting with the changes to the site, Mr. Young's proposal will result in the demolition of the existing garage, and the construction of a new garage with the ADU built above that reconstructed garage. The existing garage is located within 5' of the existing rear property line, and, when reconstructed, per the ZBA's suggestion, the garage/ADU will be brought forward such that the rear of the reconstructed garage will be in line with the rear of the primary dwelling on the Property. As such, the garage will be relocated to 12' from the rear property line from 5'.

The front of the existing garage will also be in line with the existing primary dwelling, with the exception being that Mr. Young will build a small porch on the front of the home that will result in a slight encroachment into the Property's front northerly, front setback. The reconstructed garage/ADU will be expanded approximately 9' 4" toward the easterly, front sideline of the Property, resulting in the eastern portion of the garage/ADU to be within 19' 6" of the easterly, front sideline. The reconstructed garage/ADU will be 5' closer to the easterly, front sideline than the current garage, and a deck that will lead to the ADU and provide a second means of egress from the ADU – as required by the State Fire Code – will add an additional 4' 4" of expansion toward the easterly, front sideline. The resulting building coverage on the Property with the improvements will be approximately 23.3%, 3.3% over the allowable 20% maximum coverage. Mr. Young is also seeking a variance from Section 10.521 related to lot size because his .14 acre lot (6,098 square feet) is less than the 15,000 square feet required for the SRB Zone.

The elevation of the garage/ADU will be 20' 11" in height at the ridgeline, which is a 4' 4" increase from the ridgeline of the existing garage on the Property.

Architecturally, Mr. Hoyt designed the garage/ADU to be aesthetically consistent with the primary dwelling on the Property. The front and rear of the garage/ADU will be in line with the primary dwelling unit, and the ADU's height will be equal to the primary dwelling on the Property. The modest ADU will include the incorporation of a dormer above the front entrance of the ADU, which is consistent with suggestions made by Thomas O'Leary, one of Mr. Young's neighbors, at the ZBA's July 16, 2019 hearing. That dormer is also consistent in design with the existing cape, and will function to displace snow above the designed joint entryway.

The interior design of the ADU reflects a kitchen, a bathroom, and a studio style bedroom/living room. Access to the ADU will be through a shared entry-way that will lead to an interior staircase. A second means of access will be through the exterior staircase that will terminate at the deck (4' x 8') referenced above.

IV. APPLICABLE PROVISIONS OF ZONING ORDINANCE

Mr. Young is presently seeking a variance from the following provisions of the Zoning Ordinance:

- **Section 10.310** related to the expansion of a structure on a non-conforming lot. That section provides: "Any lot that has less than the minimum lot area or street frontage required by this Ordinance shall be considered nonconforming and no use or structure shall be established on such lot unless the Board of Adjustment has granted a variance from the applicable requirements of this Ordinance."
- **Section 10.321** related to the expansion of a lawful, non-conforming building or structure. That section provides: "A lawful nonconforming building or structure may continue and be maintained or repaired, but may not be extended, reconstructed, or enlarged unless such extension, reconstruction, or enlargement conforms to all the regulations of the district in which it is located."
- **Section 10.521** which establishes a 15,000 square feet minimum lot size requirement in the SRB Zone.
- **Section 10.521**, which establishes a 30' front setback in the SRB Zone.
- **Section 10.521**, which establishes a 30' rear setback in the SRB Zone.
- **Section 10.521**, which establishes a maximum building coverage of 20% in the SRB Zone.
- **Section 10.814.22**, which establishes requirements for attached accessory dwelling units in pre-existing, non-conforming structures. That section provides: "An attached accessory dwelling unit is permitted on existing nonconforming lots and

within existing nonconforming buildings as long as there is no increase in building height or building footprint for any portion of the existing building and no increase to the nonconformity.”

V. VARIANCE CRITERIA

To grant a variance under RSA 674:33 and Section 10.233 of the Portsmouth Zoning Ordinance, the ZBA must find that the following criteria have been satisfied: (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed by the issuance of the variance; (3) substantial justice is done by the issuance of the variance; (4) the variance will not cause the values of surrounding properties to be diminished, and (5) the literal enforcement of the provisions of the ordinance would result in unnecessary hardship.”

The variance relief sought by Mr. Young satisfies each of these criterion.

A. The issuance of a variance is not contrary to the public interest and the spirit of the Zoning Ordinance is observed by the issuance of the variance.

The requirement that the variance not be contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance. To determine whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, ZBA’s should “determine whether to grant the variance would unduly and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.”¹ Thus for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance’s basic zoning objectives.² Mere conflict with the terms of the ordinance is insufficient.³

There are two methods to determine whether a variance violates the Zoning Ordinance’s basic objectives. The first is to “examine whether granting the variance would alter the essential character of the neighborhood,” and the second is to “examine whether granting the variance would threaten the public health, safety or welfare.”⁴

At the outset, the basic zoning objectives associated with the above-referenced provisions of the Zoning Ordinance pertain to controlling the density of the subject neighborhood, maintaining vehicular safety, controlling density within a neighborhood, and controlling access to light and air.

¹ Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011) (emphasis added).

² Id.

³ Id.

⁴ Id.

The grant of a variance to allow for the construction of the proposed ADU will not alter the essential character of the neighborhood and will not be contrary to the above-noted zoning objectives. Mr. Young is seeking the variances to permit the construction of a 480 gross square foot ADU (385 square feet GLA) above Mr. Young's existing garage. While the variance will result in a modest increase in the total coverage on the Property, the proposal will actually reduce the amount of non-conformity associated the garage's encroachment within the rear sideline (from 5' to 12'). Also, the increase of the garage/ADU's ridgeline from 16' 7" to 20' 11" will not impact the access to air or light on Ms. Kelley's property, particularly when considered in conjunction with garage/ADU's increased distance from the rear sideline and the reduction in ridgeline height from Mr. Young's prior proposal.

Mr. Young's proposal will also only result in a slight further encroachment into the front setbacks by approximately 10 feet. Much of that encroachment into the front setbacks, however, will be associated with the construction of a deck and stairwell leading to the ADU for a second means of egress and a front porch. Such an expansion will not result in overcrowding the property and will certainly not impact existing open space, particularly given the character of the existing neighborhood, which consists of small lots with modest-sized homes.

The use associated with the proposed project is consistent with the existing residential use throughout the subject neighborhood, which are modest homes used for residential purposes. As was stated and noted by ZBA Member Lee at the July 16, 2019 hearing, several homes within the Colonial Drive neighborhood have similar additions to those proposed by this Application. The proposed ADU in this instance has been designed by Mr. Hoyt to be architecturally consistent with Mr. Young's existing cape residence, including insuring that the height of the ADU will not exceed the existing home.

Further, the issuance of a variance to allow for the modest addition of an ADU above a garage to allow for the housing of an aging parent will not result in a threat to public health, safety, or welfare. The proposed ADU will be 395 square foot living space that can only comfortably house one individual. As such, there is no risk of substantial increased traffic entering onto or using Colonial Drive, Decatur Road, or Victory Road. Moreover, there is no risk that one additional resident at the Property will result in water or sewer systems being overburdened. Lastly, the improvements to take place at the Property are designed to be in full compliance with all applicable provisions of the State Building and Fire Code. As such, there will be no impact to public health, safety, or welfare.

For these reasons, the application satisfies the criteria that the issuance of a variance is consistent with the spirit of the Zoning Ordinance and is not contrary to the public interest.

B. Substantial justice is done by the issuance of the variance

The Supreme Court has said of the substantial justice criteria, “the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.”⁵ To apply the standard, it is necessary for the ZBA to determine whether the general public would realize an appreciable gain from the denial of the variance that outweighs the benefits that would be gained by the applicant by the issuance of the variance.⁶

Substantial justice is done by the issuance of a variance in this instant. Here, the denial of the variance would result in an injustice to Mr. Young. Mr. Young is seeking this variance to allow for the construction of a modest ADU to care for his aging father, while allowing his father to maintain the dignity of a semi-independent living arrangement. Mr. Young’s proposal is one that has received strong policy support from the New Hampshire Legislature, the New Hampshire Office of Strategic Initiatives (formerly Office of Energy and Planning), and the New Hampshire Housing Finance Authority.⁷ Specifically, the New Hampshire Legislature enacted SB146 in 2015 for the express purpose of allowing children to provide semi-independent living arrangement for aging parents.

Mr. Young previously sought relief from this ZBA to allow for the construction of the ZBA, and received suggestions from the ZBA as to how his proposal could be improved. Mr. Young and Mr. Hoyt incorporated the ZBA’s suggestions into the proposal set forth in this application. Mr. Hoyt has opined that there are no feasible means to further modify the design to allow for the ADU for this Property. As the design set forth in this application represents the best and only feasible design, with no impacts, the denial of a variance will effectively mean that Mr. Young will be precluded from constructing an ADU for his father on the Property.

Further, the general public will not be benefited by the denial of this variance. As is stated throughout this narrative, the subject variance will not result in any impact to public health, safety, or welfare, will not alter the character of the neighborhood, and will not adversely affect abutting property owners. The ADU has been designed to be consistent with the existing neighborhood and will be aesthetically consistent with the existing structure. In fact, the proposal will actually benefit Ms. Kelley by reducing the non-conformity associated with the garage, thereby increasing the space between the existing structures on the Property and Ms. Kelley’s property.

For these reasons, this Application satisfies the requirement that substantial justice be done by the issuance of the variance.

⁵ Harborside, 162 N.H. at 515.

⁶ Id. (brackets omitted).

⁷ See 2015 SB146; RSA 674:71- :73.

C. The variance will not cause the values of surrounding properties to be diminished.

With the changes to the design, there is no risk of adverse impacts to property values of surrounding properties. As the ZBA was specifically concerned about potential impacts to property values for Ms. Kelley, Mr. Young will address how this design improves upon the prior submittal and sufficiently addresses the concerns of both Ms. Kelley and the ZBA.

At the hearing on Mr. Young's first application for a variance, Ms. Kelley's attorney expressed concerns as to the proposed height of the ADU and the close proximity of the proposed ADU to the rear property line. In that original proposal, Mr. Young did not propose to move the garage, which was going to remain in place, with the ADU increasing the ridgeline of the existing garage up to approximately 22' 8". It was these concerns, primarily the proximity of the ADU to Ms. Kelley's property that contributed strongly to the ZBA's initial denial, with ZBA Member Rheume saying that he would "feel better, if [the garage/ADU] was 10' away."

The proposal that is the subject of this variance application involves the movement of the garage by approximately 7', resulting in approximately 12' between the proposed garage/ADU and the rear sideline of the Property. Importantly, the rear sideline of the Property corresponds with Ms. Kelley's side property line, which is notable because Mr. Young's proposal would conform the side setback requirements in the Zoning Ordinance. Given the unique configuration of Mr. Young's Property, the relocation of the garage/ADU to 12' away from the rear property line is consistent with expectations in the neighborhood, and the modest addition of the ADU will not adversely impact Ms. Kelley's property values.

This proposal will also not adversely impact property values of other neighbors. As stated by ZBA Member Parrott at the July 16, 2019 hearing, there is sufficient space toward the front of the Property and neighboring properties to allow for the relocation of the garage toward the front of the Property without adverse impact. Several neighbors wrote letters of support for Mr. Young as it related to his prior proposal, and those neighbors continue to support the revised proposal submitted by Mr. Young.

As such, the subject proposal satisfies the requirement that the variance will not result in the diminution of property values.

D. The literal enforcement of the provisions of the ordinance will result in unnecessary hardship to Mr. Young.

RSA 674:33, I(b)(5) states that the ZBA may issue a variance if "[l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship." "Unnecessary hardship" means that "owing to special conditions of the property that distinguish it from other properties in

the area: (i) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (ii) the proposed use is a reasonable one.”⁸ In the event that criteria (i) and (ii) cannot be established, “an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.”⁹

Here, the Property is distinguishable from other properties in the area in that the Property is located on a sharp curve and has street frontage on two sides, and therefore is subject to the 30’ front setback requirements on two sides, and a further 30’ rear setback requirement on another side. As reflected in Mr. Hoyt’s Site Plan, the building envelope of this Property is exceptionally small, due in large part to the application of three 30- foot setback requirements. While lots in the neighborhood are small in size, Mr. Young’s Property is certainly one of the smaller lots. Compounding this issue is that the existing footprint of the pre-existing, non-conforming structures on the Property further limit the feasible building area in which an ADU could be constructed on the Property. As such, there are special conditions on the Property that distinguish it from other properties in the area.

No fair and substantial relationship exists between the general public purposes of the Zoning Ordinance provisions and the specific applications of those provisions to the Property. The purposes of the Zoning Ordinance provisions here – pertaining to setbacks, lot size, and lot coverage on a lot of non-conforming size – are to control density and access to light and air, neither of which are implicated by this proposal. The neighborhood at issue is a blue-collar neighborhood, consisting of small lots with modest single-family residences throughout. The houses are located within close proximity to one another, with many structures being within after-established setbacks. The application of the Zoning Ordinance to prevent a modest, professionally-designed ADU to house one person, such as is sought by this proposal, will not further the goals of controlling density. Nor will the application of the Zoning Ordinance to this project further the goals of maintaining access to light and air of surrounding properties, particularly where this Project will actually reduce the level of non-conformity as it relates to rear setbacks. While the purpose of setback, lot size, and coverage provisions can also be used to maintain views or to preserve open space, neither of those aspects are present in this particular neighborhood, where lots are small and there are no prominent views present.

Lastly, the proposed use in this instance is reasonable. The use in this instance is to build an ADU above Mr. Young’s garage to care for his father, while allowing his father to maintain an independent standard of living. As noted above, this is a use that has been specifically encouraged and promoted by the New Hampshire Legislature, amongst others. The use proposed is explicitly

⁸ RSA 674:33, I(b)(5)(A).

⁹ RSA 674:33, I(b)(5)(B).

allowed in the SRB Zone, and the proposed ADU is well below the maximum square footage established by Section 10.814 of the Zoning Ordinance. Further, the proposed ADU and the configuration proposed is the one with the least amount of impact, that preserves the aesthetics of the present improvements, minimizes the expansion of the existing building coverage, complies with all required State Building Codes, and complies with other provisions of the Zoning Ordinance, namely Section 10.814.

For similar reasons, even if this Board does not find that there is no fair and substantial relationship exists between the general public purposes of the ordinance provisions and the specific applications of those provisions to the Property, the Board should still grant the variance because the strict application of the zoning ordinance will prohibit Mr. Young's reasonable use of the Property. As reflected above, Mr. Young's proposal is a reasonable one that seeks to use the Property for the laudable purpose of caring for his father, while respecting his neighbors by incorporating suggestions from this Board and taking into account the concerns of abutters. The proposal submitted is the configuration and proposal that allows for this reasonable use, avoids impacts, and remains sufficiently cost-effective to be implemented.

As such, Mr. Young satisfies the "undue hardship" criteria necessary for the issuance of a variance.

VI. CONCLUSION

For the reasons set forth above, and throughout this Application, this Board should grant variances from the provisions of the Zoning Ordinance identified in Section III of this Narrative.

Mr. Young appreciates the ZBA's careful consideration of this matter.

346 Colonial Drive
Applicants House



303 Colonial Drive
Rear Abutter





328 Colonial Drive
Across from
346 Colonial Drive



337 Colonial Drive
Across from
346 Colonial Drive

364 colonial Drive
Right Abutler



- Partial Legend**
 See the cover sheet for the complete legend.
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