

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC

ATTORNEYS AT LAW

127 Parrott Avenue | Portsmouth, NH, 03801
Telephone: 603.436.0666 | Facsimile: 603.431.0879 | www.hpgrlaw.com

May 18, 2026

HAND DELIVERED

Neil Niman, Chair
Town of Durham
8 Newmarket Road
Durham, NH 03824

RECEIVED
Town of Durham

MAY 20 2026

Planning, Zoning
and Assessing

Re: Applicant: David and Karen Della Penta
Property: 561 Bay Road
Tax Map 239, Lot 9
Residence Coastal (RC) Zoning District
Wetland Conservation Overlay District (WCOD)

Dear Chair Niman:

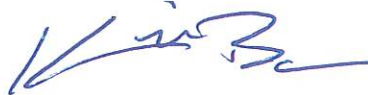
On behalf of the owners and applicants, David and Karen Della Penta, we are pleased to submit the enclosed application materials in support of their request for zoning relief for the above-referenced property.

Enclosed please find an original and eight (8) copies of the following documents:

1. Application for Variance.
2. February 25, 2026 Planning Board Meeting Minutes in lieu of denial letter.
3. Memorandum in Support of Variance with supporting exhibits.

Also enclosed is an Abutter's list (x10) on mailing labels together with my firm's check in the amount of \$424.00 to cover the \$100.00 Application Fee, \$225.00 cost of legal notice and \$99.00 abutter fee (\$9 x 11). Please do not hesitate to contact us should you need anything further.

Very truly yours,



Kevin M. Baum, Esq.
Stephanie J. Johnson, Esq.

KMB:kc
Enclosures

cc: Client; Altus Engineering; Matthew Cunningham Landscape Design, LLC

DANIEL C. HOEFLE	ALEC L. MCEACHERN	PETER V. DOYLE	STEPHEN H. ROBERTS In Memoriam
R. TIMOTHY PHOENIX	KEVIN M. BAUM	MONICA F. KIESER	OF COUNSEL:
LAWRENCE B. GORMLEY	JACOB J.B. MARVELLEY	CHRISTOPHER P. MULLIGAN	SAMUEL R. REID
R. PETER TAYLOR	GREGORY D. ROBBINS	STEPHANIE J. JOHNSON	JOHN AHLGREN

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC

ATTORNEYS AT LAW

127 Parrott Avenue | Portsmouth, NH, 03801
Telephone: 603.436.0666 | Facsimile: 603.431.0879 | www.hpgrlaw.com

May 18, 2026

HAND DELIVERED

Neil Niman, Chair
Town of Durham
8 Newmarket Road
Durham, NH 03824

RECEIVED
Town of Durham

MAY 20 2026

Planning, Zoning
and Assessing

Re: Applicant: David and Karen Della Penta
Property: 561 Bay Road
Tax Map 239, Lot 9
Residence Coastal (RC) Zoning District
Wetland Conservation Overlay District (WCOD)

Dear Chair Niman:

On behalf of the owners and applicants, David and Karen Della Penta, we are pleased to submit the enclosed application materials in support of their request for zoning relief for the above-referenced property.

Enclosed please find an original and eight (8) copies of the following documents:

1. Application for Variance.
2. February 25, 2026 Planning Board Meeting Minutes in lieu of denial letter.
3. Memorandum in Support of Variance with supporting exhibits.

Also enclosed is an Abutter's list (x10) on mailing labels together with my firm's check in the amount of \$424.00 to cover the \$100.00 Application Fee, \$225.00 cost of legal notice and \$99.00 abutter fee (\$9 x 11). Please do not hesitate to contact us should you need anything further.

Very truly yours,



Kevin M. Baum, Esq.
Stephanie J. Johnson, Esq.

KMB:kc
Enclosures

cc: Client; Altus Engineering; Matthew Cunningham Landscape Design, LLC

DANIEL C. HOEFLE	ALEC L. MCEACHERN	PETER V. DOYLE	STEPHEN H. ROBERTS In Memoriam
R. TIMOTHY PHOENIX	KEVIN M. BAUM	MONICA F. KIESER	OF COUNSEL:
LAWRENCE B. GORMLEY	JACOB J.B. MARVELLEY	CHRISTOPHER P. MULLIGAN	SAMUEL R. REID
R. PETER TAYLOR	GREGORY D. ROBBINS	STEPHANIE J. JOHNSON	JOHN AHLGREN



**TOWN OF DURHAM
ZONING BOARD OF ADJUSTMENT**

8 NEWMARKET RD
DURHAM, NH 03824
PHONE: 603/868-8064
www.ci.durham.nh.us

VARIANCE

Prior to seeking a variance, the property owner must have been denied a building permit by the Building Inspector or denied approval by the Planning Board.

Name of Applicant David and Karen Della Penta, Trustees of the David T. Della Penta 2013 Trust and Karen S. Della Penta 2013 Trust

Address: 561 Bay Road, Durham, New Hampshire

Phone # 603-868-4665 Email: kdella@durhamnh.com

Owner of Property Concerned Same
(If same as above, write "Same")

Address: Same
(If same as above, write "Same")

Location of Property: 561 Bay Road
(Street & Number)

Tax Map & Lot number Tax Map 258, Lot 9

A Variance is requested from Article(s) DZO Art. XIII Section(s) 175-60.B(11), 175-65.A of the Zoning Ordinance to permit: grading within the 100' wetland buffer beyond that necessary to support a structure outside of the WCOD; and to permit soil disturbance within 50' of the wetland buffer reference line.

All applications must include a statement explaining how the applicant meets each of the five (5) statutory requirements for granting a variance, (A) through (E), which are found on page 2. The Zoning Board of Adjustment may consider the variance application incomplete if these five statements have not been addressed. In addition, all applications must be accompanied by adequate plans and exhibits.

Owner Authorization and Signature:

- I/we do hereby authorize Hoefle, Phoeni x, Gormley & Roberts, PLLC to file this application with the Zoning Board of Adjustment, to appear before the Board and to act on my/our behalf.
- I/we do hereby authorize members of the Zoning Board of Adjustment and/or staff to enter upon the property on the afternoon prior to the Zoning Board meeting for purposes of reviewing this application.
- To the best of my/our knowledge the information contained in this application is complete and accurate.

Owner's Signature(s): *David Della Penta* David Della Penta (May 18, 2026 10:14:58 EDT) Date: _____

Owner's Signature(s): *Karen Della Penta* Karen Della Penta (May 18, 2026 10:39:52 EDT) Date: _____

PRINTED NAME(S): David Della Penta, Trustee of the David T. Della Penta 2013 Trust Date: _____

PRINTED NAME(S): Karen S. Della Penta, Trustee of the Karen S. Della Penta 2013 Trust Date: _____

RSA 674:33 Powers of the Zoning Board of Adjustment:

I(a) The zoning board of adjustment shall have the power to:

- (1) 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 adopted pursuant to RSA 674:16; and
- (2) Authorize, upon appeal in specific cases, a **variance** from the terms of the zoning ordinance if:
 - (A) **The variance will not be contrary to the public interest;**
 - (B) **The spirit of the ordinance is observed;**
 - (C) **Substantial justice is done;**
 - (D) **The values of surrounding properties are not diminished; and**
 - (E) **Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

(b)(1) For purposes of this subparagraph I(a)(2)(E), "**unnecessary hardship**" means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (A) 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
- (B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) are not 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.

(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

EXPIRATION PERIOD FOR VARIANCES

Any Variances granted shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.








Variance Application

Final Audit Report

2026-05-18

Created:	2026-05-18
By:	Stephanie Johnson (sjohnson@hpgrlaw.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAoqAKyJR4mAJGgUR9h3cmn3uU-A4OUpLN

"Variance Application" History

-  Document created by Stephanie Johnson (sjohnson@hpgrlaw.com)
2026-05-18 - 1:43:45 PM GMT
-  Document emailed to David Della Penta (david@dellapenta.com) for signature
2026-05-18 - 1:43:50 PM GMT
-  Document emailed to Karen Della Penta (primokc13@gmail.com) for signature
2026-05-18 - 1:43:50 PM GMT
-  Email viewed by David Della Penta (david@dellapenta.com)
2026-05-18 - 2:08:04 PM GMT
-  Document e-signed by David Della Penta (david@dellapenta.com)
Signature Date: 2026-05-18 - 2:14:58 PM GMT - Time Source: server - Signature Appearance Selected: MOBILE_DRAW
-  Email viewed by Karen Della Penta (primokc13@gmail.com)
2026-05-18 - 2:38:43 PM GMT
-  Document e-signed by Karen Della Penta (primokc13@gmail.com)
Signature Date: 2026-05-18 - 2:39:52 PM GMT - Time Source: server - Signature Appearance Selected: TYPE
-  Agreement completed.
2026-05-18 - 2:39:52 PM GMT

These minutes were approved at the April 8, 2026 meeting.

**TOWN OF DURHAM
DURHAM PLANNING BOARD MEETING**

Wednesday, February 25, 2026

Town Council Chambers, Durham Town Hall

7:00 pm

MEMBERS PRESENT: Paul Rasmussen (Chair), Sally Tobias (Vice Chair), Peyton McManus, Gary Whittington, Robert Sullivan, Heather Grant (Council Rep), Darrell Ford (Alternate Council Rep), Julian Smith (Alternate), Peter Howd (Alternate), Emma Hollander (Alternate), Munish Nanda (Alternate); Richard Kelley arrived late.

ALSO PRESENT: Town Planner Michael Behrendt

I. Call to Order

Chair Paul Rasmussen called the Durham Planning Board meeting of February 25, 2026 to order at 7:00 pm.

II. Roll Call and Seating of Alternates

Chair Rasmussen called the roll and seated Munish Nanda for Richard Kelley.

II. Approval of Agenda

No modifications

Chair Rasmussen moved to approve the agenda as presented; SECONDED by Peyton McManus; APPROVED: 7-0.

IV. Town Planner's Report

Mr. Behrendt said *Item IX. 561 Bay Road* is postponed to March 11 at applicant's request, Conservation Commission rescheduled meeting due to weather; Site Walk on Saturday for Strafford Avenue with quorum of 4 Planning Board members present.

V. Reports from Board Members who serve on Other Committees

Reporting from Town Council: Councilor Grant said the Town Council met February 16 with active public comments prior to "heights" public hearing; mostly re guns on campus and taxes and affordability in Durham. Largest point 50 ft-4 stories was approved; current State changes passed easily; question re depth of retail floors, look at that and identify 5th story.

Richard Kelley arrived at the Planning Board meeting at 7:04 pm.

Chair Rasmussen said he spoke with Joe Friedman about an item on the next Council Agenda to determine how best to continue trying to figure out what to do with downtown; could be committees or open to a broader section of people with more expertise. Mr. Behrendt said architectural standards could be updated. Mr. Smith said Architectural Standards are 10 years old and need to be updated; he also spoke to the Town Council about the plan to remove Mill Pond Dam and pointed out there was nothing budgeted recently to deal with the aftermath of pond drainage.

Reporting from Conservation Commission: Mr. Sullivan said Conservation Commission postponement caused some difficulties for the project at 561 Bay Road; continuing work on WCOD/SPOD.

Chair Rasmussen said this is potentially our last meeting with current councilors and thanked them for their service; asked members to think about what committees they would like to cover. Mr. Smith said he filed an application to be a "citizen representative" to the Conservation Commission.

VI. Public Comments - None

VII. Review of Minutes (old): None

VIII. Public Hearing - Strafford Avenue – 2-lot subdivision. 20 Strafford Avenue. 2-lot subdivision placing two existing houses on separate lots. Steven Kimball, Pine Ledge Holdings, property owner. Phillip Yetman, surveyor, Haley Ward, agent. Map 106, Lot 11. Residence A District. Recommended action: Discuss and continue to March 11.

Discussion: Mr. Behrendt said staff is going to walk the site to look at parking and the request for a second driveway to be scheduled after March 11 meeting. He said unless the Board has particular concerns, it may make sense to postpone it to the March 25 meeting. Mr. McManus asked for confirmation that the printed handouts are the same as the digital version; Mr. Behrendt said the only change was to the small wetland which was not part of the buffer.

Ms. Hollander said she drove by the site and said some of the parking spaces are currently unusable because of snow. Councilor Ford said with the proposed driveway those spaces would be lost permanently and the issue of the agreement between the Town and UNH is not addressed.

Mr. Steve Kimball said he is hoping to a way to have a single-family residence with its own driveway access. He pointed out that there are existing breaks along Strafford Avenue for driveways; the university has 4 or 5, with one to a large parking lot off Strafford Avenue and there is a precedent to leave gaps for driveways there. Chair Rasmussen said the town staff is walking the site March 13 and Mr. Kimball will be rescheduled to come back March 25, 2026.

Chair Rasmussen moved to open the Public Hearing on Stafford Avenue 2-lot subdivision; SECONDED by Gary Whittington; APPROVED: 7-0.

Chair Rasmussen moved to continue this Public Hearing on Stafford Avenue to March 25, 2026; SECONDED by Gary Whittington; APPROVED: 7-0.

- IX. 561 Bay Road Permitted Use B.** Permitted Use B application for retaining walls, stone walls, steps, regrading and landscaping within the Wetland Conservation Overlay District for a single family house. A Permitted Use B approval was granted in 2023 for a different design. David and Karen Della Penta, property owner. Eric Weinrieb and Erik Saari, engineers, Altus Engineering. Map 239, Lot 9. Residence Coastal District. Recommended action: Final action if ready.

POSTPONED TO MARCH 11

Mr. Kelley asked for clarification on which Permitted Use B the applicant is applying for. Mr. Behrendt said the Board decided to hear it as Permitted Use B but it could also be Conditional Use (CU) if the Board wants to make that call.

- X. Amendment to allow Electric Vehicle Charging.** Proposed amendment to the Zoning Ordinance to allow electric vehicle charging facilities in all zoning districts. Recommended action: Schedule a public hearing if ready.

Chair Rasmussen asked why a definition for electric vehicle is needed here and said he has a lot of issues with this definition. Board agreed to remove the definition for electric vehicles. Mr. Whittington suggested adding: equipment for plug-in powered transfer to a vehicle powered by electricity. Chair Rasmussen defined Electric Vehicle Charging Station as: "equipment and structure necessary for the safe charging of an electric vehicle."

Table of Uses: Councilor Grant asked about Special Exception (SE) under Residential Zones. Chair Rasmussen said it makes sense for RA and RB, not sure about R and RC because Route 4 and Route 108 are basically good options and there may be issues with "P". Mr. Howd asked if the Board needs to differentiate between a residential charging station and a commercial charging station and asked about chargers put in homes; Chair Rasmussen said that would be an accessory use to a residence permitted by right.

Mr. Whittington said when the Board talks about a use for a parcel, an Electrical Vehicle Charging Station is always an accessory use but not parking. Chair Rasmussen said we allow accessory parking, just not a parking lot. Mr. Kelley said certainly pavement is required, taken into context site-specifically and SE (special exception) is spot on for certain residential zones and maybe some commercial cores as well. Mr. Sullivan said the genesis of this was saying we want the market to take care of this, and here we have incentivized people to put in electric vehicle charging stations.

Gary Whittington moved that the Board schedule a Public Hearing on Electric Vehicle Changing Stations for March 11, 2026; SECONDED by Councilor Grant; APPROVED: 7-0.

- XI. **Zoning Amendments recommended by Housing Task Force.** Discussion about amendments proposed by the task force to expand opportunities for residential development with changes to the Table of Uses, Table of Dimensions, and Zoning Text affecting single-family property; two, three, and four-unit residential; multi-unit residential; senior housing; mixed-use with residential; lot sizes; density; setbacks; frontage; and other elements. **Recommended action:** Ongoing discussion.

Chair Rasmussen said the Board should first look at the Table of Uses and determine what styles and types of housing belong in each zone, then take the Table of Dimensions and ensure the density numbers make sense, and lastly address the text. The Board agreed. Chair Rasmussen said we noticed in our research that the OR 108 Zone did not go in the direction originally expected and is now just business and residential on Route 108 north of Route 4. Vice-Chair Tobias said the residential there is non-compliant at this point.

Chair Rasmussen said this is a chance to rename the OR zone more appropriately and Business Residential (BR) was suggested; also renaming the category to Residential-Commercial Zones from Research-Industry Zones; looking to bring back family housing to those four zones; can only build them as part of a Conservation Subdivision. Mr. Behrendt said the intention is to not cut out one or two lots for single-family.

Chair Rasmussen said duplexes were changed to 2-, 3-, or 4-unit with same permitted uses as single-family except in Coe's Corner and said we are talking about taking single-family and making it denser, getting density where we already have it in downtown and surrounding neighborhoods. Mr. Kelley said this is not selling units or dividing lots but building a housing complex for rent, which is not a Conservation Subdivision. Vice Chair Tobias said the Housing Task Force approach was property "to purchase" for missing middle-class ownership.

Mr. Kelly said he sees the situation as dominoes permitted in all rural districts, then someone knocks down their house and builds apartment units with parking in between and 4 units to rent; it addresses the need but at some point new infrastructure will be needed. Mr. McManus said it would be easier to have infill closer to downtown; in Rural and RC would have to have wells. Chair Rasmussen said other towns actually have specific zones split into R-1, -2, -3 or -4.

Mr. Smith said it might make sense in rural zones to have multi-unit development surrounded by open land with its own sewage system, etc. Chair Rasmussen said they can do that with Conservation Subdivision. Councilor Grant said multi-unit was allowed for senior housing and permitted anywhere, why not envision them for multi-age groups. Mr. Sullivan said he agrees that they could undo the 55-and-older restriction and accomplish the same goal. Mr. Behrendt said we have to guard against putting a 4-unit house in the middle of a family neighborhood and need to figure out what works on different kinds of sites.

Mr. Behrendt advised that the Board balance the need for housing with neighborhood character. Mr. Kelley asked what document Mr. Behrendt was referring to; Mr. Sullivan said it was a map showing all the lots with scaling through RA and RC. He suggested making Rural and RC P4; Chair Rasmussen P4 is only conservation subdivisions. Mr. McManus asked if being in an HOA could prevent denser housing within their controlled environment; Mr. Behrendt said definitely. Ms. Hollander said it seems like over complicating something that is not even a current problem and said huge houses would not look out of place with a 4-unit development next door.

Mr. Behrendt suggested starting with one particular thing and figuring out what would make sense for that lot. Chair Rasmussen asked to go back to Coe's Corner for single-family residential and asked why it is X on the chart. Mr. Behrendt said it is core commercial and a key intersection of Route 108 and Route 4. Chair Rasmussen said it is Young Drive and asked that the Board make it commercial like BR. Vice Chair Tobias said not all lots will be workable for 4 units; Mr. Whittington said there will be incremental gains. Board agreed to make all Residential zones "P" including Coe's Corner.

Mr. McManus said he wants this to be data-driven as people are going to want to know the impact. Chair Rasmussen said the Table of Uses lets us say what is the largest thing we can possibly put there and the Table of Dimensions lets us fine tune it and determine how many times it can happen, then you can do the data-driven analysis and make some estimates. Mr. Kelley said before we vote to make something happen we certainly need that data in front of us, but not tonight. Vice Chair Tobias said cost data will be needed to demonstrate the validity of these changes to the community.

Chair Rasmussen reminded the Board that RA does not have Architectural Standards and has always grown organically. Mr. Kelley said what is being proposed answers the bell in terms of what the Board is trying to do. Chair Rasmussen said the Board has to go through this to get input to the models. Mr. Sullivan said this is months away from anything approvable, but decisions need to be made that seem reasonable. Councilor Grant suggested assigning 2 people to have discussions with Rich Reine.

Mr. Smith said if the Board decides to make things "P" where they are now "X", that might drive extension of water and sewer service. Chair Rasmussen said currently there is not a huge appetite to extend services and said it is just infill not expansion. He asked for comments on 2-, 3-, or 4-unit Residential: Mr. McManus asked why Courthouse is "X". Vice Chair Tobias said Courthouse is multi-unit already. Board agreed to get rid of sub-note 5 taking away Senior Housing bonus.

Chair Rasmussen asked to allow Pork-Chop Subdivisions for RA and RB which allows subdivision vertically vs horizontally. Vice Chair Tobias asked why it could not be allowed in BR; Chair Rasmussen said because you would rather have single-family houses vs multi-unit, and you want pork-chops on 3rd tier residential streets not on Route 108. ADUs: Mr. Behrendt said per State

Law you have to allow detached ADUs wherever you allow single-family by right. The board agreed to remove distinction between attached and detached and mark as "P" for all zones.

Mr. Smith said Child Care Home should be Child Care Facility, but Chair Rasmussen said per State Law all towns are allowed to have home-based childcare in private homes. Mr. Behrendt said the Board has already gone through this. Vice Chair Tobias said the Board decided to allow Mixed-Use with Residential in all commercial zones; Chair Rasmussen asked it be allowed as an option, but did not want to make mixed-use required.

Councilor Grant asked about reaching out to Rich Reine; Mr. Kelley said the Board needs to ask about sewer and water capacities. Chair Rasmussen asked if there were particular areas where there is concern about bottlenecks, and said what we really need to know is our excess capacity. Mr. Sullivan recommended asking him about the overall capacity and where there are chokepoints. Mr. Nanda said they should also ask what it would take to exceed overall capacity.

Chair Rasmussen said concerns about RA are probably non-issues; the big jump will be in multi-unit in commercial. He asked Mr. Kelley to draft a question as a place to start in determining dimensions. Councilor Ford volunteered to speak with Rich Reine as they have a long history together.

XII. Review of Minutes: February 7, 2026 Site Walk

Vice Chair Tobias moved to approve the Site Walk Minutes of February 7, 2026; SECONDED by Councilor Grant; APPROVED: 4-0 with 3 abstentions.

XIII. Other Business:

Mr. Sullivan asked about revision of Architectural Standards to make sure they are consistent and up to date. Chair Rasmussen said if that is what the Board wants to address next; Councilor Grant asked about Conservation Subdivisions. Chair Rasmussen said that for downtown the Board needs to look at where they will be allowing 5 stories and modify how retail on the first floor is written. He said he could bring a black and white GIS map of our zoning districts and use colors to designate where commercial zones would be or where to do as 5th story.

XIV. Adjournment

Vice Chair Tobias moved to adjourn the Planning Board Meeting of February 25, 2026; SECONDED by Councilor Grant; APPROVED: 7-0.

The Planning Board Meeting was adjourned at 10:00 pm.

Respectfully submitted,

Durham Planning Board Meeting
February 25, 2026
Page 7

Patricia Denmark, Minute Taker
Durham Planning Board

**MEMORANDUM IN SUPPORT OF
APPLICATION FOR VARIANCE**

TO: Durham Zoning Board of Adjustment (“ZBA”)
FROM: Kevin M. Baum, Esq.
 Stephanie J. Johnson, Esq.
DATE: May 18, 2026
RE: David and Karen Della Penta, Owner/Applicant
 561 Bay Road
 Tax Map 239, Lot 9
 Residence Coastal (RC) Zoning District
 Wetland Conservation Overlay District (WCOD)

On behalf of David and Karen Della Penta (“Applicants”), please accept this Memorandum and the attached exhibits in support of an Application for Variance to be considered by the Zoning Board of Adjustment (“ZBA”) at its June 9, 2026, meeting.

I. EXHIBITS

- A. Site Plans – Altus Engineering
 - Existing Conditions Plan
 - Overall Site Plan
- B. Proposed Landscape Plan – Matthew Cunningham Landscape Design, LLC
- C. Tax Map 239

II. OVERVIEW OF PROPERTY/SUMMARY OF REQUEST

The Della Pentas own the property located at 561 Bay Road (also identified as Tax Map 239, Lot 9) (the “Property”) in the RC Zoning District and WCOD. The Property was developed with a residence, detached garage and shed and an older septic system. Exhibit A (Existing Conditions Plan). The existing home and septic system were both non-compliant with current setbacks. Id. The proposal moved the new septic system farther from the wetlands located to the rear of the lot. That portion of the lot is also restricted by a conservation easement. On April 9, 2024, the Della Pentas were granted a Special Exception permitting them to replace the home and septic system with a new residential structure including an advanced treatment subsurface waste disposal system located within the fifty-foot side structure setback of the Durham Zoning Ordinance (“DZO”) Section 175-54 (Table of Dimensions).

On January 24, 2023, the Planning Board also issued an approval of the Della Pentas’ Permitted Use B application to proceed with installing retaining walls, steps, regrading, and a well

within the WCOD (the “Original Landscaping Plan”). After obtaining these approvals, the home was razed, ledge was removed to prepare the site for the new foundation, and the new well was drilled.

As the Della Pentas moved forward with the Original Landscaping Plan it became apparent that it involved significant re-engineering of the yard and would be less accessible than a more gently sloping yard and was at odds with their intent to age in place on the Property. Accordingly, rather than proceed with the original design that included multiple retaining walls and stairs, the Della Pentas have opted for a new landscaping design. Exhibit B. The new landscaping design utilizes reclaimed granite boulders to make a curved retaining wall supporting the structure and regrading to reduce the slope of the Property from the rear of their home to the wetland conservation area at the back of the Property. The revised plan eliminates the need for retaining walls and stairs, making the Property’s backyard more accessible. The rear of the lot, which is currently primarily lawn, will remain lawn albeit with a lesser and more accessible grade.

The Della Pentas previously submitted a Part B application to the Durham Planning Board for consideration at its February 25, 2026, meeting. The Della Pentas also met with the Conservation Commission on March 4, 2026. The revised proposal was well received by both the Planning Board and Conservation Commission. However, the Planning Board ultimately felt that the proposed landscaping went beyond what was strictly “necessary to accommodate” the associated on-site structures, as permitted pursuant to DZO §175-60.B. Accordingly, the proposed grading lies in a somewhat gray area of the DZO, and the Della Pentas were advised that variances were required due to the proposed grading being more than necessary to support the proposed single-family residence. Thus, the Della Pentas request relief to proceed with their new landscaping proposal. If granted, the Della Pentas will move the project forward pursuant to DZO §175-60.B, which will include further Planning Board review and approval and Conservation Commission review to the extent such additional review is deemed necessary by the Board and Planning Staff.

III. REQUESTED RELIEF

1. DZO Art. XIII, Section 175-60.B(11) (Permitted Uses in the WCOD) – to permit grading within the 100’ wetland buffer beyond that necessary to support a structure outside of the WCOD.

2. DZO Art. XIII, Section 175-65.A (Naturally Vegetative Buffer Strip) – to permit soil disturbance within fifty feet (50’) of the wetland buffer reference line to allow the required grading.

IV. Variance Requirements

1. The variance will not be contrary to the public interest.
2. The spirit of the ordinance is observed.

The first step in the ZBA’s analysis is to determine whether granting the variance is not contrary to the public interest and is consistent with the spirit and intent of the ordinance, considered together pursuant to *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007) and its progeny. Upon examination, it must be determined whether granting a variance “would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” *Id.* “Mere conflict with the zoning ordinance is not enough.” *Id.*

The proposed variances do not conflict with the general purposes of the DZO. The DZO was enacted “to regulate the use of land for the purpose of protecting the public health, safety, convenience and general welfare of the residents of the Town of Durham.” DZO §175-3. Specifically, the DZO is designed to:

- Implement the Master Plan and other policies designed to promote orderly growth – The proposed variances meet the Master Plan’s stated vision of housing stock being environmentally conscious, attractive, and respects the existing wetland and conservation areas, maintaining the rear yard’s open, meadow-like appearance. Following site work the buffer, associated wetlands, and conservation area will remain protected.
- Preserve air and water quality – The Project will not negatively impact air or water quality, and the regrading may improve infiltration of stormwater runoff on the Property due to less steeply graded landscaping.
- Conserve open space and agricultural resources – The Project will maintain native meadow seed within the wetland area and preserve the existing deciduous and evergreen trees on the Property.
- Encourage the installation of renewable energy systems and protect access to renewable energy sources – There is no impact on any renewable energy systems if the requested variances are granted.
- Protect natural and scenic resources from degradation – As noted above, the proposal maintains the Property’s open space and seamlessly blends the conservation area with the Property’s rear lawn.
- Provide for recreational needs – The proposal permits a more usable and accessible yard.

- Protect life and property from flooding and other natural hazards – Not applicable. There are no changes proposed that would create risk of hazard from flooding or other natural hazards.
- Preserve historic sites and structures – Not applicable.
- Ensure development is commensurate with the character and physical limitations of the land – The proposed home is set back from the wetland area, and the landscaping plan works in harmony with the existing wetland.
- Ensure the timing, location and nature of new development considers the immediate and long-range financial impacts of proposed uses and enhances the Town's economic development goals – Single family residential use is permitted in the zone, and the redesigned landscaping is a safer alternative for those with mobility challenges, making it possible to age in place and enjoy the Property's landscape.

DZO Part B sets forth the general requirements within each zoning district. With respect to the RC District, the stated purpose is “to protect the water quality of the community’s principal surface waters and to preserve the rural character and scenic beauty of these coastal areas including the view of the shore as seen from the water.” DZO §175-41.A. Residential development in the RC District “shall be limited to housing that is designed so that the character of the district is maintained, the scenic quality of coastal areas is protected, and a significant amount of open space is permanently preserved.” Id. The Della Pentas’ proposal comports with the DZO’s stated purpose, particularly as it removes a retaining wall and offers an unobstructed view from the home to Great Bay. As noted above, the proposed landscaping works with the existing landscape, changing the grade to allow for a gentle slope, rather than interrupting the land with retaining walls and stairs. The regrading with flatter slope slows and modestly increases infiltration of stormwater runoff compared to the approved, impervious stone retaining walls and stairs. Thus, the proposal is consistent with DZO Part B’s stated purpose. Further, if granted, the Della Pentas will continue the Planning Board and Conservation Commission review contemplated by the provision.

The requested relief addresses the somewhat gray and inconsistent area in the ordinance with respect to permitted uses within the Wetland Conservation Overlay District (“WCOD”). For example, DZO §175-60.B(6) permits repair or replacement of existing retaining walls within the wetland buffer, and DZO §175-60.B(11) permits grading of the site within the WCOD when necessary to accommodate a structure outside of the WCOD. “Accessory structures and buildings other than those allowed as permitted uses” are permitted as conditional uses. DZO §175-61.A(4). Grading to support such structures is also allowed as a conditional use. DZO

§175-61.A. Given that accessory structures, repair and replacement of retaining walls, and grading to support structures are all contemplated as acceptable under the DZO, it stands to reason that removal of a retaining wall within 75' of the wetland buffer and regrading a lot to negate the need for multiple replacement retaining walls ought to be permitted under the DZO.

Clearly the requested variances do not “[i]n a marked degree conflict with the ordinance such that it violates the ordinance basic zoning objectives.” *Malachy Glen*, supra which also held:

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality... . Another approach to [determine] whether granting the variance violates basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare. (emphasis added).

The requested variances, to permit regrading within the wetland buffer beyond that needed to support the proposed residence, is wholly consistent with the character of the surrounding area. The proposal would not result any change to the area nor the public health, safety or welfare as it will simply maintain the lot's use for a single-family residence. Because the DZO contemplates grading within the wetland buffer to support structures located outside of the wetland buffer (the question here is what the extent of “necessary” versus additional grading) the proposal does not conflict with the DZO's basic objectives. Accordingly, the first two requirements are met.

3. Substantial justice will be done by granting the variance.

If “there is no benefit to the public that would outweigh the hardship to the applicant” this factor is satisfied. *Harborside Associates, L.P. v. Parade Residence Hotel, L.L.C.*, 162 N.H. 508 (2011). That is, “any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice.” *Malachy Glen*, supra at 109. The requested variances allow the Applicants to develop the Property in a more accessible way that blends in with the open wetland and conservation area situated between their residence and Great Bay. There will be no gain to the general public by denying the variance. The proposal offers a more accessible option as the stairs are removed in favor of a gentle slope, making the rear yard easier to enjoy for those with mobility challenges. Thus, granting the variances poses no harm to the general public. Conversely, denial deprives the Applicants reasonable use of the Property. There is no benefit to the public that

outweighs the harm to the owner if the requested variances are not granted. Denial would result in an unreasonable and unconstitutional taking of the owner's rights.

4. Granting the variance will not diminish surrounding property values.

The Applicants' proposal essentially maintains the status quo of the Property and Bay Road neighborhood. Their replacement home and septic were previously approved via special exception. The reformulated proposal reduces the size of the proposed home's footprint and regrades the landscape rather than installing multiple retaining walls and stairs. This Project will not result in any noticeable change to the surrounding property owners. To the contrary, the proposal improves sight lines and makes use of the existing land rather than breaking it up with retaining walls and stairs. In light of these factors, granting the requested variances will not diminish surrounding property values.

5. Denial of the variances results in an unnecessary hardship.

a. Special conditions distinguish the property from others in the area.

The Property is a 65,754 s.f. lot burdened by a Conservation Easement and wetlands encompassing approximately one-third (1/3) of the lot. Any change to the grading or landscaping in the rear yard would require relief due to the required wetland buffers. The Della Pentas' replacement home complies with the DZO's dimensional requirements, unlike the existing structure. The proposed landscaping plan works in harmony with the existing land, removing the existing retaining wall and stairs, slightly decreasing impervious surfaces within the wetland buffer and is far more useable and accessible than the Original Landscaping Plan. The proposed grading will encourage better infiltration of stormwater runoff. The Della Pentas have further agreed to stop mowing through the wetland area as was the practice on the lot for the prior twenty years, allowing the wetland to grow in its natural state, and adding native plantings throughout the Property to complement its location next to Great Bay. Thus, the Project is arguably more compliant with the intent of the ordinance than the previously-approved residence and landscaping plan.

b. No fair and substantial relationship exists between the general public purposes of the ordinance and its specific application in this instance.

The general public purpose of the DZO's restriction on grading within the wetland buffer is to preserve the existing soils, natural vegetation, and minimize the potential of disruption to delicate wetland areas. Although the proposed grading will create disturbance within the buffer,

the proposal is better than the previously-approved alternative, as it reduces the need for multiple retaining walls and stairs within the buffer. No work will occur within the wetland itself. The proposal blends in with the open, meadow-like conservation area, rather than breaking up the landscape with retaining walls and stairs between the home and conservation area. As proposed, replacing the previously-approved retaining walls and stairs with a sloped lawn would allow the Della Pentas to enjoy their land and the connected conservation area as they age.

c. The proposed use is reasonable.

The proposal to allow grading within the wetland buffer and within 50' of the reference line is reasonable. The DZO is ambiguous in terms of what is and is not allowed within wetland buffer areas. For example, DZO §175-60.B(6) permits repair or replacement of existing retaining walls within the wetland buffer, and DZO §175-60.B(11) permits grading of the site within the WCOD when necessary to accommodate a structure outside of the WCOD. The Project would remove a retaining wall 75' from the wetland, and rather than replace it, regrade the soil to allow for a gentle, accessible slope leading from the home to the wetland and conservation area. Native plants would be added to the site, and the wetland area would not be mowed, preserving and restoring the wetland to its natural state. As such, and for all of the reasons stated above, the proposed use is reasonable.

IV. CONCLUSION

For all of the reasons stated, the Applicants, David and Karen Della Penta, respectfully request that the Zoning Board of Adjustment grant the requested variances to allow the proposed grading on the Property.

Respectfully Submitted,

DAVID & KAREN DELLA PENTA

By: 

Kevin M. Baum, Esquire
Stephanie Johnson, Esquire
Hoefle, Phoenix, Gormley & Roberts, PLLC
127 Parrott Avenue
Portsmouth, NH 03801
(603) 436-0666