

Hand-delivered to Karen Edwards, Administrator, Durham Zoning Board of Adjustment

Please send this form with Plot Plan and List of Abutters to the Town of Durham, 8 Newmarket Rd., Durham, NH 03824, Attn: Zoning Board of Adjustment

Appeal for Applicant

State of New Hampshire
To: Zoning Board of Adjustment, Town of Durham NH 03824

Strafford, SS

Names of Applicant:

Wooden Nutmeg Farm Condominium (“WNFC”) 20/3/2:

- 1) Alan & Susan Bennett (20/3/2/B),
- 2) Cheney Revocable Trust (20/3/2/A),
- 3) Shankhassick Shorefront Association (“SSA”) (20/3/2/C).

Address (Primary): _ WNFC c/o Firoze Katrak, 565 Bay Road, Durham, NH 03824. Mr. Katrak is authorized by owners-applicants to lead this effort.

Phone (Primary): (603) 502 9123

Email (Primary): FEKatrak@aol.com

Owners of Properties Concerned: _ WNF Condominium has three owners (two residential; one boat-house/dock) as shown in applicant names above.

While not directly involved in this ZBA application, three other properties are relevant to understand why we request a variance, as explained below in Letter with supporting information. The owners of these three relevant properties are:

- 1) Katrak Bay Road Realty Trust (20/7/2);
- 2) Donald Golini & Tracey E Golini (20/6/0); and
- 4) Christopher J Daly & Stefanie T Daly (20/7/3)

Addresses of Owners:

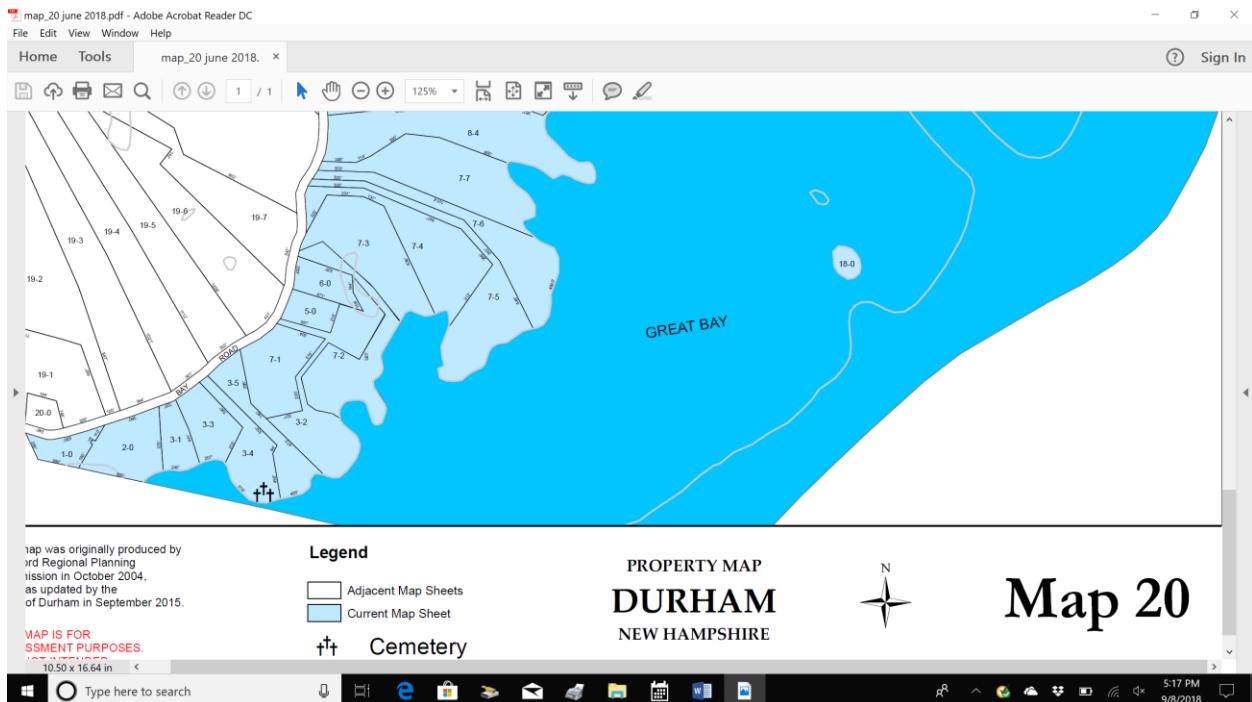
- 1) WNFC, c/o Firoze Katrak, 565 Bay Road, Durham NH 03824 {Permanent address c/o SSA, PO Box 556, Newmarket NH 03857}
- 2) Alan H Bennett & Susan McCulloch Bennett, P O Box D, Newmarket NH 03857 {or 573 Bay Road, Durham, NH 03824};
- 3) Cheney Rev Trust, 76 Exeter Street, Newmarket, NH 03857 {or c/o Walter Cheney, 575 Bay Road, Durham, NH 03824}

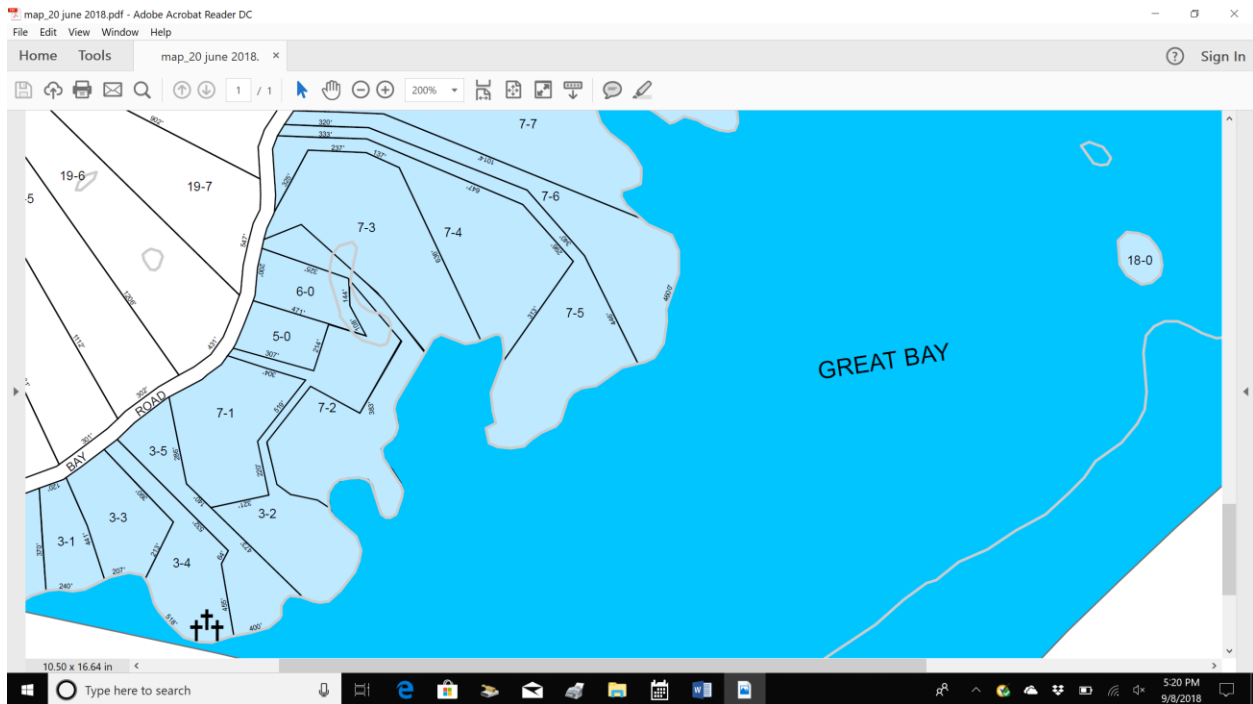
- 4) Shankhassick Shorefront Association Inc. (“SSA”), c/o Firoze Katrak, 565 Bay Road, Durham NH 03824 {Permanent address: PO Box 556, Newmarket NH 03857}.
- 5) Katrak Bay Road Realty Trust, 565 Bay Road, Durham NH 03824;
- 6) Donald Golini & Tracey E Golini, 557 Bay Road, Durham, NH 03824;
- 7) Christopher J Daly & Stefanie T Daly, 551 Bay Road, Durham, NH 03824

Location of Properties: All Lots are in **RC district**

- 1) (Applicant) 20/3/2 (573 & 575 & 577 Bay Road)
- 2) (Applicant) 20/3/2/B (573 Bay Rd)
- 3) (Applicant) 20/3/2/A (575 Bay Rd)
- 4) (Applicant) 20/3/2/C (577 Bay Rd)
- 5) 20/7/2 (575 Bay Road)
- 6) 20/6/ (557 Bay Rd)
- 7) 20/7/3 (551 Bay Road)

Description of Properties (Give Tax Map number, length of frontage, side and rear lines and other pertinent descriptive information) __Please see Tax Map 20, and Letter with supporting information.





Addresses for Conservation Easements: (Conservation Easements do not change)

There are two Conservation Easements: Cheney Conservation Easement (3.42 acres) and Cheney-England Conservation Easement (5.87 acres). Both are owned by Conservation Land Stewardship Program, Fish & Game-LCIP of the State of New Hampshire. Address for F&G-LCIP is Johnson Hall, 107 Pleasant Street, Concord, NH 03301. Phone is (603) 271-2155. Contact person is Stephen Walker, Program Director. His phone is (603) 271 2155; and his email is Steve.Walker@OSI.NH.gov

We have informed Mr. Walker of our intent and our ongoing efforts.

Addresses for View Easements: (View Easements will not change)

Names, addresses of View Easements owners are included in the List of Abutters.

Fill in Section 1, 2, 3 or 4 below as appropriate. Do not fill in more than one section. This application is not acceptable unless all required statements have been made. Additional information may be supplied on separate sheets if the space provided is inadequate.

SECTION 1: APPEAL FROM AN ADMINISTRATIVE DECISION

Not Applicable

SECTION 2: APPLICATION FOR SPECIAL EXCEPTION

Not Applicable

SECTION 3: APPLICATION FOR EQUITABLE WAIVER

Not Applicable

SECTION 4: APPLICATION FOR VARIANCE

STANDARD OF REVIEW: Prior to seeking a variance, the property owner must have been DENIED a building permit by the Building Inspector or approval by the Planning Board.

** 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**.

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A Variance is requested from Article XII.1 _ Section 175 – 54 Table of Dimensions of Zoning Ordinance to permit WNFC Lot’s two existing residential condominium units on a 150,000 sq. lot in the RC zone. This variance is needed to simplify layout to reduce unnecessary hardship through a LLR as explained in Letter below.

The New Hampshire Legislature has declared that each of the following conditions must be found in order for a variance to be legally granted. Please answer the

following questions in support of the variance request either on this form or on a separate sheet of paper.

- 1) **No decrease in value of surrounding properties will be suffered because:**
_ Please see Letter of supporting information below _____
- 2) **Granting the variance would not be contrary to the public interest because:** ___ Please see Letter of supporting information below _____

Current Law requires the existence of unnecessary hardship for granting of any variance, whether that is for a use not allowed in a particular zone or a deviation from a dimensional requirement.

- 3) **(3A) Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:**
 - a. **No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because:** _____
Please see Letter of supporting information below _____

AND

- b. **The proposed use is reasonable one because:** _ Please see Letter of supporting information below _____

OR

(3B) 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. _____ N A _____

- 4) **By granting the variance substantial justice would be done because:** _
Please see Letter of supporting information below _____
- 5) **The use will not be contrary to the spirit and intent of the ordinance because:** ___ Please see Letter of supporting information below _____

===== **End of Section 4** =====

Letter of supporting information

Chris Sterndale
Chair, Durham Zoning Board of Adjustment
And
Members of the Durham Zoning Board of Adjustment
Durham Town Hall
8 Newmarket Road, Durham NH 03824

Re: Application for a Variance for Wooden Nutmeg Farm Condominium

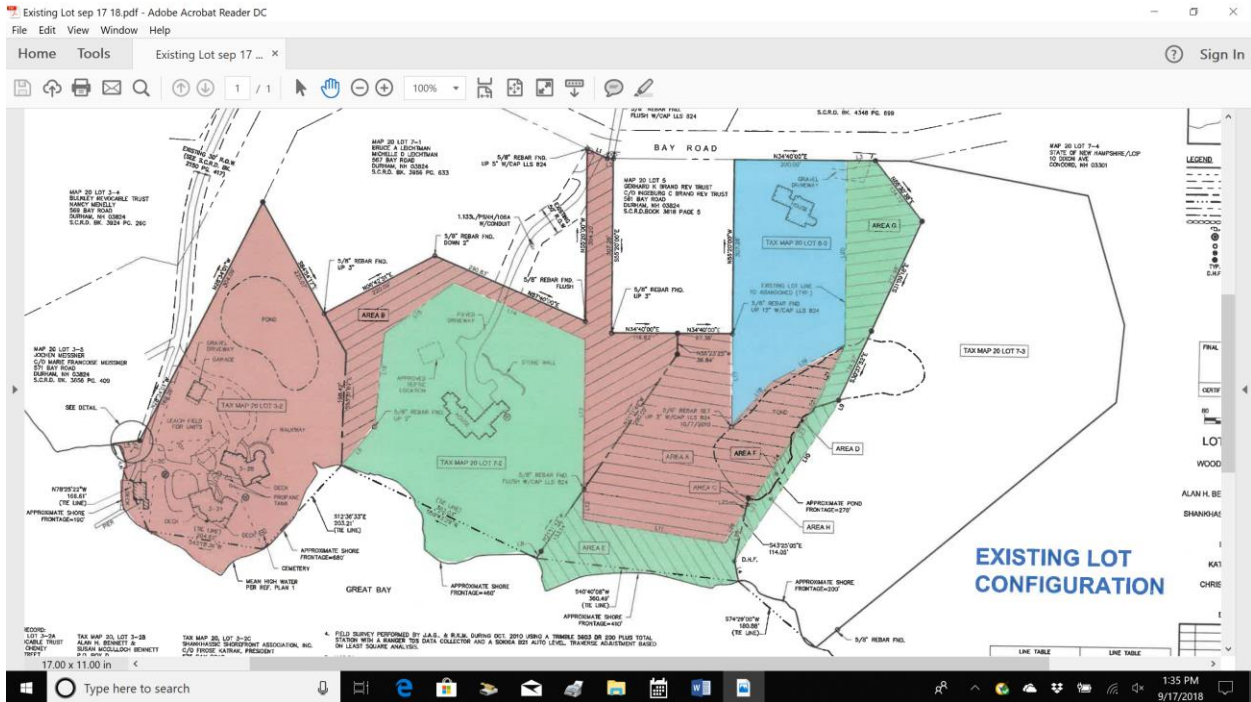
Dear Mr. Sterndale and Members of the ZBA,

We request a variance from **Article XII.1; Section 175 – 54 (Table of Dimensions)** of Zoning Ordinance to permit two existing residential condominium units on a 150,000 sq. lot in the RC zone. This variance is needed to reduce unnecessary hardship by simplifying layout through a LLR.

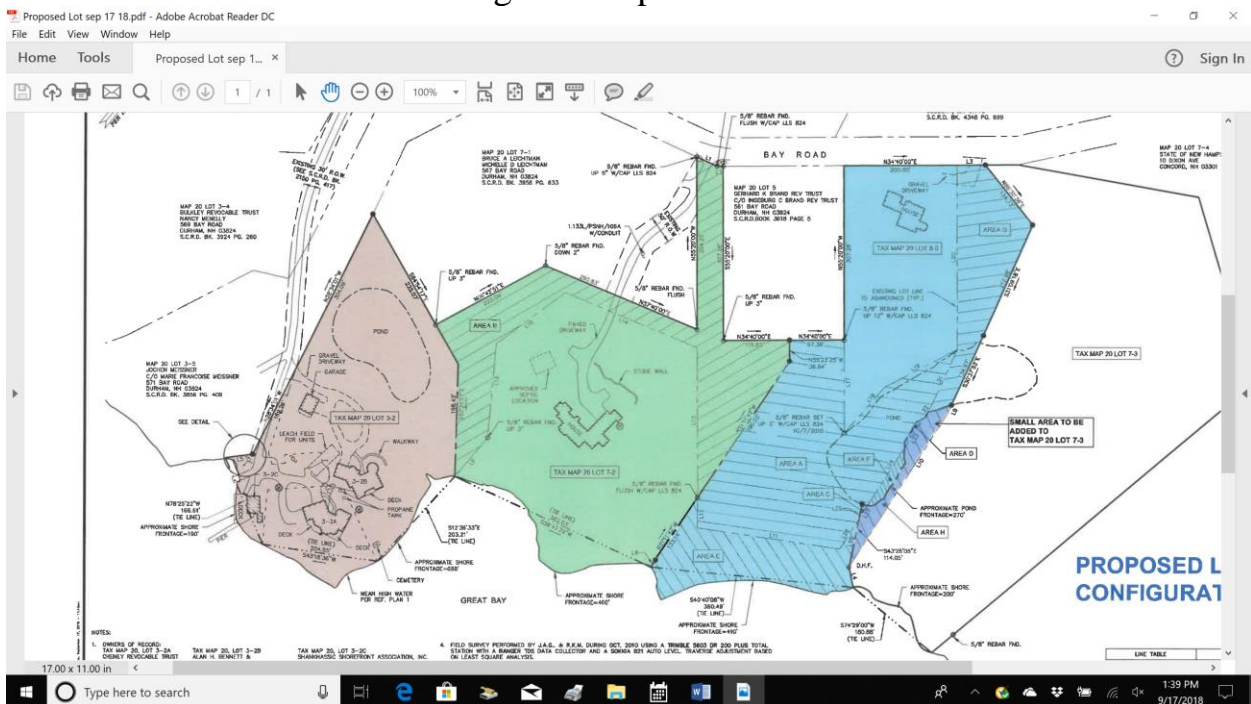
The applicants are the owners of Wooden Nutmeg Farm Condominium (“WNFC”; 20/3/2):

- 1) Alan & Susan Bennett owners of Limited Common Area II (20/3/2/B),
- 2) Cheney Revocable Trust owner of LCA I (20/3/2/A); and
- 3) Shankhassick Shorefront Association (“SSA”) owner of LCA III (20/3/2/C)

This request for variance is to help simplify a prior development scheme, bring an abutting lot into greater conformity with the regulations, to address liability issues, as well as the saleability of residences within the Shankhassick on Great Bay subdivision (“Shankhassick”) approved in 1998, which includes WNFC. As shown below and in larger sized plot in **Attachment 1, Lots 3-2 and 7-2, are presently highly gerrymandered** and Lot 6 is significantly non-conforming.



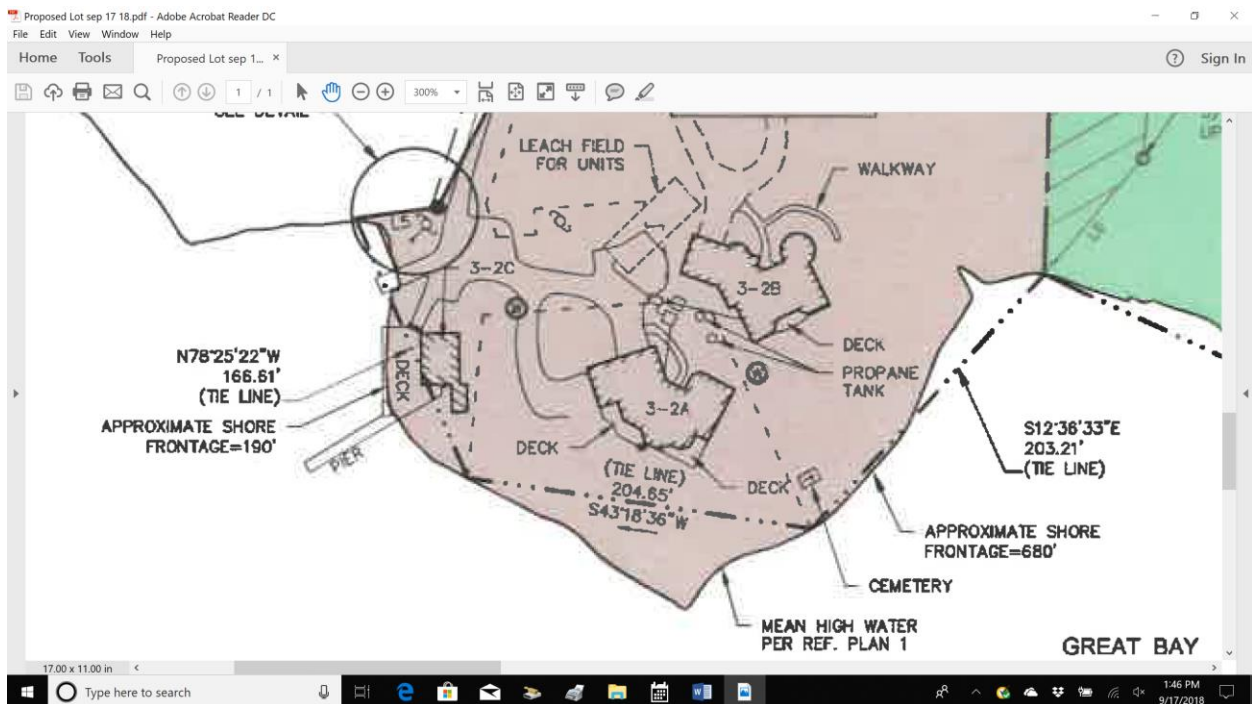
The above shown current layout creates unnecessary hardship as explained later in this letter. If ZBA were to allow a variance, we would do a LLR, the “after” vision of that is shown below and in larger sized plot in **Attachment 2**.



The only way we can get to the above shown simpler, common sense based “after” layout to reduce unnecessary hardship, is if the ZBA were to grant WNFC the variance it requests,

Current Situation

Lots 3-2 and 7-2 are gerrymandered because the WNFC’s **land itself** is a **small Cup Shaped Peninsula** (see zoom-shot below) which makes it challenging if not impossible to have a simple, logical layout that could meet the literal requirements of the Ordinance.



WNFC lot is already developed. **The unwieldy acreage and gerrymandered land configuration to meet the Ordinance has created persistent unnecessary hardship** for WNFC (and for other Shankhassic) owners. There are two residences within WNFC, plus a boat house/dock owned by the SSA, **all within a small cup shaped peninsula**. Originally when Shankhassic was beginning to be occupied, both residences were owned by the then two developers of Shankhassic, so saleability was not relevant. In 2014 the owner of Limited Common Area II of WNFC obtained a Lot Line Revision (LLR) with the abutting Lot 7-2, in an attempt to partially reduce some gerrymandering necessary to sell their property. The property was marketed for a very long time and despite several price

reductions, the configuration of the land created major objections to potential buyers, thus leading to the first LLR in 2014.

While the 2014 LLR contemplated additional reconfiguration of the condominium limited common areas to increase the simplification of the land, that next phase could not be completed due to the closing deadline. Thus this first LLR still left large gerrymandered shapes for WNFC Lot 3-2-B and Lot 7-2 which are highly encumbered by various easements which diminish the owners' ability to even utilize much of their land. Without simplification of WNFC, the owners cannot take adequate care of their lots (e.g. liability issues on far flung land, etc.), nor are these lots/homes likely to be sellable without unnecessary hardship in future, as has already been proven by the challenging events of 2014.

Since then, we have explored numerous ways to simplify the still gerrymandered layouts of WNFC and other Shankhassic lots and would like to seek Planning Board approval for another LLR, but which would first require the ZBA granting a variance from the RC zone density requirements.

Proposed Situation

If the ZBA were to provide WNFC the variance it requests, then we can apply to the Durham Planning Board for a Lot Line Revision between lots 3-2, 7-2, 6 and 7-3 which would remove almost all the gerrymandering, eliminate unnecessary easements burdening several of the parcels, as well as eliminate the associated WNFC land configuration's unnecessary hardship created by the inherent cup shape of the land and by the Ordinance. This "after" vision of what we are trying was shown earlier above, and is in a larger sized plot in **Attachment 2**.

The Town Planner has confirmed that the only way we can get to the simpler, common sense based "after" layout to reduce unnecessary hardship, is if the ZBA were to grant WNFC the variance it requests, (see the Town Planners email of rejection in **Attachment 3**)

The only way for the WNFC lot, and specifically by the Condominium 3-2 B, to avoid the unnecessary hardship inherent in its land (small cup shaped peninsula) is by allowing lesser acreage per DU, to create a simpler parcel. That would also make the WNFC Lot 3-2 more typical for a Condominium lot, reduce the owner's liability over unwieldy shape land encumbered by easements, and make the condominium units more sellable properties.

If the ZBA were to grant the requested variance, the property owners could then seek approvals from the Planning Board for Lot Line Revisions resulting in:

- Lot 3-2 being simpler, smaller more appropriately like a condominium; but less conforming for acreage per dwelling unit.
- Lot 6-0, a single family non-conforming lot, conforming with regards to acreage and more conforming with regards to frontage;
- Lots 7-2 and 7-3 will stay conforming on acreage as they are now, but with removal of Lot 7-2 gerrymandering and transfer of easement rights over portions of the lots to the current easement holders;
- Lot 3-2 new frontage of 173 feet on a Minor Private Street, while staying non-conforming as is the current frontage of 50 feet on Bay Road, will actually be significantly larger and thus more conforming;
- Lots 7-2 and 7-3 will have no change in the dimension of their frontages, but Lot 7-2 will have a more reasonable frontage layout with less gerrymandering;
- Lot 6-0 will increase road frontage from 200 feet to 250 feet and will also allow the conversion of easement rights into fee simple ownership of the land, both resulting in a more conforming lot and elimination of complicated easements which also hinder saleability;
- Lot 7-3 will gain a small portion along the edge of a pond, making it directly responsible for Conservation Easement of that portion which is also relevant for Lot 7-3 views;
- All View Easements will stay as is without any change.
- An Easement Plan, including Conservation Easements, View Easements, and other Easements will be filed during LLR process showing that they remain unchanged.

Thus, we will **not** make the overall situation of these four lots anymore non-conforming than it is today. More importantly if the ZBA were to allow the WNFC requested variance, then the subsequent LLR will **reduce** the non-conformities of WNFC 3-2 & Lot 6-0, making the overall situation more conforming than today, which is in the public's interest.

The proposed LLR will also allow greater responsibility for these land owners in managing their lands, and thus be a public benefit of improving safety and welfare. A further public benefit will be that the monitoring/enforcement of two Conservation Easements by the State of NH-LCIP will be made easier by eliminating dual/multiple responsible parties, and by simplifying currently

confusing boundary lines for key pieces of shorefront and meadows under conservation.

Literal enforcement of Ordinance will continue and increase the unnecessary hardship inherent in the cup shape of Lot 3-2. Granting the variance will allow us to do a LLR to alleviate this unnecessary hardship, and will not diminish any abutting property values. The proposed changes based on requested variance are in keeping with both the spirit and the intent of Durham's Zoning Ordinance, as well as in the public's interest.

We are therefore requesting this density variance to allow simplification of the lots and elimination of the unnecessary burdensome land configuration in keeping with spirit of Durham's Master Plan and Ordinance.

We have retained MJS Engineering to file for subdivision approval from NH DES. The NHDES regulations require that the application include a signed statement by the applicant certifying that all applicable local zoning regulations have been met. Therefore, the ZBA application is the first step. Further, based on preliminary work done for WNFC Lot, MJSE believes it is ok to move forward with ZBA & PB processes, based on the lot loading calculations which would support between 10 and 13 bedrooms; MJSE needs to complete additional fieldwork and loading calculations to confirm the total lot loading. If the ZBA were to grant the requested Variance, then MJSE will apply for State approval.

We now address the **Section 4 Criteria** below to explain why our variance request is worthy of being granted by the ZBA.

A Variance is requested from Article XII.1 _ Section 175 – 54 Table of Dimensions of Zoning Ordinance to permit to permit applicants' WNFC Lot's two existing residential condominium units on a 150,000 sq. lot in the RC zone.

1) No decrease in value of surrounding properties will be suffered because:

No additional homes are allowed to be built as per SSA Covenants (#8.1.1 SCRD Bk 2009 Pg 0311); and no new docks are allowed to be to be built on any Lots obtaining shorefront ownership through this LLA [as per PB Conditions of Approval of Shankhassic on Great Bay, and the two Conservation Easements]. Also, there is no practical change proposed in the use of the WNFC

Lot. The requested change in acreage per DU will have no impact on any of the surrounding properties, because it is the same today and has been the same for about last two decades. Therefore, no decrease in value will be suffered by any of the surrounding properties.

Please see Attachment 4: letter from real estate expert Valerie Shelton, Broker/Owner of Appledore Real Estate Inc. _____

2) Granting the variance would not be contrary to the public interest because:

WNFC's two residential units comprising a total of 7 bedrooms share a common leach field and a common well. The condominium documents regulate the maintenance of these systems and the State of NH regulates the replacement of the septic systems should failure occur in the future. Mike Sievert of MJS Engineering was retained to evaluate the proposed reduction in acreage being able to meet NHDES regulations for septic loading and to also insure granting the variance would not result in any potential negative environmental impacts. Based on preliminary work done on lot loading calculations, MJSE believes WNFC lot would support between 10 and 13 bedrooms. MJSE needs to complete additional fieldwork and loading calculations to confirm the total lot loading. If the ZBA were to grant the requested variance, then MJSE will apply for State approval. MJSE also believes that locating a replacement system in the future would need to be done in the existing location due to the setbacks from the shorefront, the wildlife pond and conservation easement restrictions. Therefore, there will be no adverse impact on public interest in meeting NHDES septic requirements.

Further, in *Gray vs. Seidel* (143 NH 327; 1999), the NH Supreme Court clarified that RSA 674:33, I.b.1 should not be read to imply that an applicant must meet any higher burden than required by statute, but merely must show that there will be no harm (i.e. will not be contrary) to the general public interest if granted. Given the uniqueness of the WNFC lot on a small cup shaped peninsula with limited usable land for development, and given that the acreage under actual use currently and as proposed is fully developed, and any changes to the systems servicing the residential units will not change location, therefore granting the variance will not be contrary to public interest.

Also, as explained earlier in this letter, the LLR possible from this variance will simplify overlapping responsibilities for Conservation Easements, and enhance public interest by making the monitoring by the State simpler.

Finally, the resultant LLR if the ZBA approves requested Variances, will be more conforming for these lots as explained earlier in this letter, and that too is in public's interest.

3) **(3a) Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:**

- a. **No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because:** Lot 3-2 (WNFC) requesting the acreage variance, and the other three lots for contemplated LLR, are in an existing unique development (Shankhassic on Great Bay) because much of the Shankhassic owners' lands (meadows as well as shore front) South of the Bay Road are in conservation, thus uniquely preserving vast open spaces. For the WNFC Lot, no physical changes are contemplated, no additional homes are allowed to be built by SSA Covenants, no new driveways are being proposed, and no new docks are being proposed. Among many factors, one thing that makes the WNFC lot unique is that it is nestled within a small cup shaped peninsula as shown earlier, and this uniqueness makes it impossible for this lot to have larger acreage without some kind of gerrymandered shape and unwieldy acreage. The only way for the WNFC lot to originally meet the density requirement of the Ordinance was to shape it awkwardly like a spoon (cup shape peninsula being body of the spoon, with extra acreage in spoon handle), or to have a large size second piece of land someplace else away from the cup, and of any shape, and which is somehow attached to the cup by a thin strip of land. This is why the earlier 1988 configuration of this WNFC lot had a long dog leg along the shore that went far from the core part of the lot (peninsula). A subsequent 2014 LLR done under distress to reduce at least some of the gerrymandering, could only be done with a still gerrymandered large piece far from the core cup shape of the lot which is what it is

now. The only way for WNFC lot to avoid the unnecessary hardship is to be allowed lesser density acreage. That would also make the WNFC lot more typical for a Condominium lot. Allowing variance for less acreage for WNFC lot would respect the spirit of our Ordinance because simultaneously it would make Lot 6 (Golini) involved in proposed LLR fully conforming with the Ordinance as to size and more conforming as to road frontage.

Thus, literal enforcement of acreage per DU would result in continuing and increasing unnecessary hardship for WNFC and others in SSA. Granting the variance will alleviate this unnecessary hardship, and will be in spirit of the purpose of our Ordinance.

AND

- b. **The proposed use is reasonable one because:** There will be no change in use for the Lot 3-2 (as well as for the other three lots), and the use will continue to be what it has been for the last two decades, which is residential use, and which by zoning is reasonable use in this location as approved by our Planning Board in 1988.
-

OR

(3B) 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. ____NA____

4) By granting the variance substantial justice would be done because:

Supporting evidence shows the condominiums on Lot 3-2, with its inherent cup shaped peninsula, and in its current configuration are significantly burdened for their saleability, as well as by almost impossible land management by the owner creating liability issues for all owners within the condominium. Granting the

density variance will significantly reduce, and more likely eliminate these burdens, and thus substantial justice would be done.

We often consider justice as being a scale, with public interest on one side and applicants' interest on the other side. In this instance, the public has nothing to gain from a denial of the requested variance, because the sole purpose of the variance is to allow the applicants and other interested property owners to seek the LLR, which will simplify the layouts of the lots, bring one lot into conformity with regards to size and more conforming with regards to road frontage, and make all lots more practical to manage and more saleable. In this specific case, the public interest is similar to applicants' interest, and not like a scale, because a denial would continue and increase applicants' unnecessary hardship which in turn could risk adversely affecting the maintenance and upkeep of these open lands which would harm the public interest. Therefore granting the variance helps everyone, the applicants and the public, and therefore substantial justice will be done by allowing the variance.

5) The use will not be contrary to the spirit and intent of the ordinance because:

Durham's Master Plan, and Zoning Ordinance strive to preserve air and water quality, and to conserve open space and to ensure that development is commensurate with the land. Lot 3-2 and the other Lots involved all already meet the spirit and intent of our Ordinance through their truly uniquely preserved open spaces. There will be no change in proposed use, the reduced acreage for Lot 3-2 will have no negative environmental impact and will continue as is, and the overall Shankhassic development will remain totally in sync with the spirit and intent of our Ordinance.

We hope we have adequately addressed the Section 4 criteria.

If the ZBA would like a site visit, we will organize one at your convenience.

We request the ZBA to please grant the variance for WNFC. Thank you for your time and service to our community.

Thank you
Sincerely,

Firoze Katrak, on behalf of and authorized by WNFC & Other owners
565 Bay Road, Durham
(603) 502 9123 cell

===== **End of Letter of supporting information**=====

List of Attachments

- Attachment 1: LLR Plot Plan showing Current layouts
- Attachment 2: LLR Plot Plan showing Proposed layouts
- Attachment 3: Town Planner’s email/letter of Rejection
- Attachment 4: Letter from Val Shelton, Broker/Owner, Appledore Real Estate Inc.
- Attachment 5: List of Abutters

===== **End of List of Attachments**=====

All Attachments provided separately

===== **End of Attachments**=====

XX End of ZBA Application for Wooden Nutmeg and Others XXXX