



TO: Regulatory Programs Committee

FROM: Richard Weber, Deputy Director, Regulatory Programs

DATE: May 1, 2014

RE: Cincotta Variance (P2013-0249)

SUMMARY

Anthony and Katherine Cincotta ("applicants") are the owners of a 0.8±-acre property located on River Road in the Town of Jay, Essex County, and within the boundary of the West Branch of the AuSable River, a designated recreational river under the NYS Wild, Scenic and Recreational Rivers Act. The 0.8±-acre parcel is located in an area classified Low Intensity Use on the Adirondack Park Land Use and Development Plan Map.

The variance requests involve the construction of a single family dwelling with an attached covered porch and covered entrance porch, as well as the construction of a garage within the 150 foot setback from the mean high water mark of the West Branch of the AuSable River. The Agency has jurisdiction over the proposal pursuant to 9 NYCRR §577.6(b)(3) which precludes structures, with limited exceptions, within 150 feet of the mean high water mark of a recreational river in a Low Intensity land use area without a variance. Agency review of the variance requests is pursuant to part 576.1 of Agency regulations. For the reasons described below, Agency staff recommends approval of the draft Order attached as Attachment 1.

Procedural History

On November 14, 2013, the Agency received an application from Robert M. Marvin, Jr., the applicants' consultant and designated representative, seeking Agency variances for the construction of a single family dwelling and a garage within the setback of the West Branch of the AuSable River [Hearing Exhibit 3].

On November 29, 2013, the Agency sent the applicants' consultant a Request for Additional Information [Hearing Exhibit 5]. The supplemental information was received on January 15, 2014 [Hearing Exhibit 6]. The Agency sent a second request for additional information to the applicants' consultant on February 6, 2014 [Hearing Exhibit 10]. The supplemental information was received on March 4, 2014 [Hearing Exhibit 11].

A public hearing on the requested variances was held on March 28, 2014 at 10:00 a.m. at the Town of Jay Town Hall in AuSable Forks, NY. APA Hearing Officer Keith McKeever conducted the hearing pursuant to 9 NYCRR §576.5 of the Agency's regulations. The applicants' consultant provided testimony at the public hearing in support of the application.

Environmental Program Specialist Tracy Darrah also provided testimony and discussed the variance factors set forth in 9 NYCRR §576.1(c). Ms. Darrah stated staff's opinion that the project, as proposed, meets the criteria for approval. No public comment was made at the hearing. One public comment letter was received by the Agency from an adjoining landowner expressing an interest in having the proposed structures located the furthest distance from his residence as possible.

Staff Analysis

In arriving at its determination whether to grant a variance, the Agency must consider the criteria set forth in 9 NYCRR §576.1. It is staff's opinion that this application is approvable under these criteria. Staff's discussion of the decision factors is found in Finding of Fact number 19 on pages 9-11 of the attached draft Order.

The subject parcel was created by a 19 lot subdivision in 1965 and approved by the New York State Department of Health on February 25, 1965. On September 30, 1974, the Agency determined that this subdivision, the AuSable Acres subdivision, is a preexisting subdivision.

Because the applicants' parcel is part of a preexisting subdivision, a Rivers Project permit is not required for the proposed single family dwelling and garage, even though they are located in a Recreational River Area. See 9 NYCRR § 577.7.

However, variances are required because the two structures do not comply with the 150 foot shoreline setback restriction set forth in §577.6(b)(3).¹

The applicants' objective is to obtain regulatory approval for a single family dwelling and garage on the parcel prior to selling their property. To accomplish this objective, the applicant is seeking a variance for a 1500 square foot single family dwelling, with an additional 424 square feet for a covered entrance porch and covered deck, as well as a 480 square foot garage. As proposed, the single family dwelling will be located 107± feet at the closest point from the mean high water mark of the West Branch of the AuSable River. Thus, the variance request for the single family dwelling is for a 43 foot variance from the 150 foot shoreline setback from the West Branch of the AuSable River.² The garage will be located 138± feet at the closest point from the mean high water mark of the West Branch of the AuSable River. Thus, the variance request for the garage is for a 12 foot variance from the 150 foot shoreline setback from the West Branch of the AuSable River.

The single family dwelling is proposed to be served by an onsite wastewater treatment system. The proposed system is located outside the 100-foot setback area and does not require a separate Agency variance. In addition, the proposed system is designed in accordance with the standards set forth in Appendix Q-4 of the Agency's regulations and NYS Department of Health regulations.

¹ The Agency has previously granted three variances for single family dwellings in the AuSable Acres subdivision. Agency Permit and Order 92-363 granted a variance of 75 feet from the applicable 150 foot shoreline structure setback for the construction of a single family dwelling. Agency Order 2001-72 granted a 48 foot variance from the applicable 150 foot shoreline structure setback and authorized the construction of a three-bedroom single family dwelling with an attached porch and attached garage. Agency Order 2003-256 granted a 26 foot variance from the applicable 150 foot shoreline structure setback variance and allowed for the construction of a two-bedroom single family dwelling with an attached garage and porch.

² It is also important to note that the property is located in a Low Intensity land use area on the Adirondack Park Land Use and Development Plan Map. In a Low Intensity land use area, any new structure over 100 square feet in size (except docks and boathouses) must be set back at least 75 feet from the mean high water mark of any river or stream which is navigable by boat, including canoe, and all lakes and ponds. Here, the proposal would exceed the shoreline setback requirements for a Low Intensity land use area if the property was not also located within a designated recreational river area.

The applicants' property extends from the West Branch of the AuSable River to River Road. It is subject to a deed restriction imposing a frontline setback of 50 feet for all buildings from the center line of River Road.³ In order to comply with the deed restriction, the applicants have no alternative except to construct their proposed single family dwelling and garage within the 150-foot setback from the West Branch of the AuSable River. In fact, there is only a 5 to 10 foot wide strip of land on the property that can be built upon without violating the deed restrictions or the Agency's shoreline setback restrictions. As such, no feasible alternatives for the structures were identified that could be undertaken without variances. See 9 NYCRR §576.1(c)(3).

It is also staff's opinion that no resources will be adversely affected by the granting of this variance, provided the proposal is undertaken as authorized and conditioned as proposed in the draft order (Attachment 1). See 9 NYCRR §576.1(c)(5). The single family dwelling and garage will be located at least 107± feet from the West Branch of the AuSable River and the existing shoreline vegetation will be retained, thus screening the structures from off-site viewpoints. In addition, the proposed septic system is located outside the 100-foot setback area and is designed to limit impacts to the waterbody, thereby protecting water quality.

Conclusion

In determining whether a variance is appropriate, the Agency must consider whether the adverse consequences to the applicant resulting from denial are greater than the public purpose sought to be served by the restrictions, i.e. protection of the aesthetic character and water quality of the West Branch of the AuSable River. The factors set forth in 9 NYCRR §576.1(c) are to be considered, on balance, when making this determination.

Denial of this variance would effectively preclude the construction of a single family dwelling and garage on this property. Staff has concluded that the construction of a single family dwelling and garage will have no identifiable impacts on the water quality or aesthetic character of the shoreline. Staff believes the Agency can find that the adverse consequences to the applicant resulting from denial are greater than the public purpose sought to be served by the shoreline restrictions and may reasonably grant the requested variance.

³ See Liber 438 of Deeds, page 29 recorded in the Essex County Clerk's Office on November 10, 1965 included as part of Exhibit 3.