



MEMORANDUM

TO: Terry Martino

FROM: Richard E. Weber, III *REW*

DATE: February 4, 2015

RE: Application of Raymond and Amy Butler (P2014-39)

Summary

Raymond and Amy Butler (“applicants”) request a variance from the shoreline restrictions for an increase in the height of their lawfully nonconforming, pre-existing single family dwelling within the shoreline structure setback of Great Sacandaga Lake. Agency staff believe the requested variance does not satisfy the variance criteria set forth in 9 NYCRR § 576.1(c). Further, it is staff’s opinion that the balancing test of 9 NYCRR § 576.1(b) favors the public purposes of protecting the character of Adirondack shorelines and water quality over the adverse consequences to the applicants resulting from denial of the requested variance. Accordingly, staff recommend that the Agency consider denying the variance requested by the applicants.

Variance site

The variance site is situated between NYS Route 30 and Great Sacandaga Lake on Rural Use lands.¹ The single family dwelling is 42.7± feet from the mean high water mark of the lake², entirely within the applicable 75-foot shoreline structure setback³. The single-story dwelling was constructed in 1970 on posts.⁴ It is 19 feet tall, with a footprint of 739± square feet. An existing set of stairs with 55 steps provides access to the dwelling at the bottom of the slope from the parking area at the top of the slope.

¹ Exhibit 24

² Exhibit 5

³ Exhibit 21

⁴ Exhibit 7a, Page 4 of application; Exhibit 32



Exhibit 28, Photo 100_3016 – red structure is existing dwelling on variance site

The small size of the lot and steep slopes significantly constrain the lot's development potential. The parcel is approximately 2,840 square feet in size, or 0.06± acres⁵. A steep slope (>60 percent) exists between the existing dwelling and the parking area.

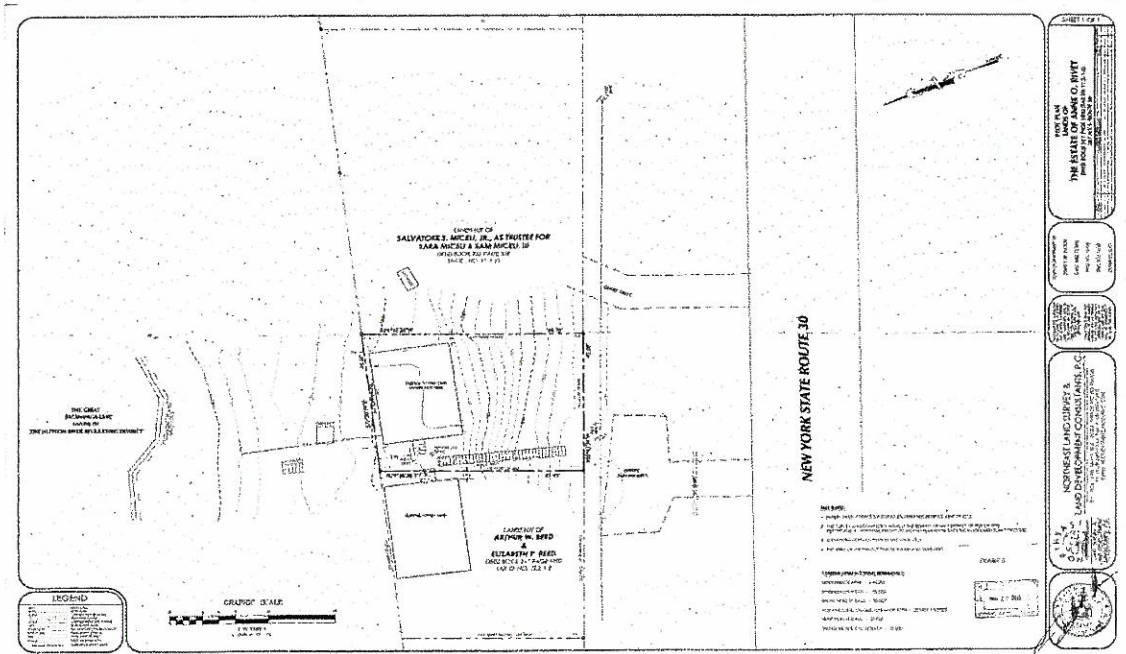


Exhibit 5 – survey map

⁵ Exhibit 5

Requested variance

The applicants' objectives are "to improve access to the property and increase the size of the current structure to have adequate space for living and storage to allow enjoyment of their vacation residence."⁶ They testified that the variance is necessary in order to provide safer, one-level access to the dwelling from the parking area.⁷

The applicants request a variance for the vertical expansion of the dwelling from 19 feet to 33 feet.⁸ The dwelling's existing footprint of 739± square feet would not materially change, and there would be no change in the number of bedrooms (i.e., three).⁹ However, including a walk-out basement, the proposed dwelling would have three floors of living/storage space compared to the one floor (on posts) that now exists.¹⁰

The proposed dwelling would be served by an updated on-site wastewater treatment system consisting of a 1,000 gallon septic tank and a 500 gallon pump station connected to a 1,000 gallon holding tank.¹¹ The holding tank would be equipped with a gauge and high-level alarm.¹² This arrangement may require the holding tank to be pumped out as often as every 3 days, based on a design flow of 330 gallons per day for a 3-bedroom dwelling.¹³

Variance factors from 9 NYCRR 576.1(c)

(1) Whether the application requests the minimum relief necessary

This variance factor considers whether an application is for relief based on what is the minimum necessary to address the constraints on the site and meet the applicants' reasonable objectives. As part of this factor, staff assessed the reasonableness of the applicants' objectives. Of particular importance to staff is the substantiality of the requested variance relative to the statutory requirement.

⁶ Exhibit 10, p. 4

⁷ Testimony of Raymond and Amy Butler, Recording of 12/4/14 public hearing

⁸ Exhibit 14, p. 2

⁹ Exhibit 22;

¹⁰ Id.

¹¹ Exhibit 23; While the applicants have said that they do not intend to use any of the additional living space as a bedroom, it is staff's opinion that the proposed additional living/storage space represents a potential for increased occupancy that could further increase wastewater generation on the premises.

¹² Id.

¹³ "Wastewater Treatment Standards Residential Onsite Systems", Appendix 75-A.3(b), Title 10, of the *Official Compilation of Codes, Rules and Regulations of the State of New York*. [3 bedrooms X 110 gallons per day X 3 days = 990 gallons of sewage flow]; Cross-examination of applicants' witnesses, Recording of 12/4/14 public hearing

During the staff review process, the applicants reduced their requested variance from 39 feet 8 inches to 33 feet 0 inches by eliminating a loft and attic within the roof level, lowering the pitch of the roof and reducing the height of the second floor walls.¹⁴ The resulting dwelling would include a basement level and two levels of living space.¹⁵ The applicants are opposed to any further reduction in dwelling height, because such a reduction would not, in their opinion, meet their objectives of having increased living/storage space and one-level access to the dwelling from the parking area.¹⁶

The requested variance is substantial. It would result in an increase of the height of the lawfully-existing, nonconforming structure by 74%. Staff believe the applicants could achieve some of their objectives through a lesser variance. For example, by removing a floor of the proposed dwelling, they could reduce their variance request from 14 feet, or 74%, to 5 feet, or 26%. While a lesser variance would increase the space in their dwelling available for living and storage, it would not achieve the applicants' goal for access into the dwelling from road level. However, the applicants would still have reasonable access to their dwelling through continued use of the stairs that currently serve that purpose.

(2) Whether granting the variance will create a substantial detriment to adjoining or nearby landowners.

For this factor, staff took into account input received from neighbors and how the proposed dwelling would fit into the character of the surrounding area comprised of Rural Use and State lands.

The proposed dwelling is 14± feet from, and would be approximately 14 feet taller than the dwelling immediately to its west. The owners of that parcel provided written comment that the taller dwelling would adversely affect their property's privacy, view, and natural lighting. They also commented that the new septic holding tank, as proposed, would be less than 50 feet from their well.

Agency staff do not believe that the impacts to the neighboring dwelling would be substantial in nature. Privacy and view impacts would be minimal, since almost all windows on both dwellings face the lake and not each other. Any impacts to natural

¹⁴ Exhibit 7c, p. 2; Exhibit 22, p. 2; Exhibit 14, p. 2

¹⁵ Exhibit 22

¹⁶ Exhibit 14, p. 3; Testimony of Raymond and Amy Butler, Recording of 12/4/14 public hearing

lighting are insignificant due to existing trees immediately to the east of the proposed dwelling that already shade the properties. Finally, the applicants have agreed to modify their proposal to move the new holding tank so that it is more than 50 feet from their neighbor's well.

Staff, however, do believe the proposed dwelling is not consistent with the character of nearby properties to the east, the forested lands across the river to the north, and the HRBRRD lands to the west. The variance site dwelling and its neighbor to the west are the exception along this stretch of shoreline. Of the 15 other dwellings, which are to the east and located across a distance of $0.46\pm$ miles, all are at or near the top of the slope, all appear situated further from the lake, and almost all are partially to fully screened, when viewed from the lake, by intervening trees either on the parcel or HRBRRD lands. These other dwellings are often larger than the existing dwelling and even larger than the proposed dwelling, but they are all less visible from the lake because they are set back further and have more intervening vegetation.¹⁷ To the west, with the exception of two small and privately-owned parcels, the shoreline is comprised of undeveloped Hudson River Black River Regulating District (HRBRRD) lands for a distance of $0.43\pm$ miles.¹⁸

The Adirondack Park Land Use and Development Plan places value on protecting the open space character of Rural Use lands.¹⁹ The undeveloped HRBRRD lands also contribute to this open space character. In this context and based on the above facts, the requested variance would result in a substantial detriment to neighborhood character.

(3) Whether the difficulty can be obviated by a feasible method other than a variance.

This factor requires an assessment of alternatives to the requested variance, including alternatives which would not require a variance. This factor is related to whether the request is for the minimum relief necessary. Applicants are required to explain why the alternatives do or do not meet their land use objectives.

The 1-story single family dwelling has been used as a seasonal residence since its construction in 1970. It is feasible for the applicants to continue to use the existing dwelling as a seasonal residence. They could also replace the posts with a new foundation and winterize the dwelling, without a variance. They could even increase the roofline height by 2 feet or add a 250-square-foot addition to the rear (road side) of the

¹⁷ Exhibit 29; Exhibit 10, Supplemental Photo

¹⁸ Exhibit 26

¹⁹ APA Act § 805(3)(f)

existing dwelling.²⁰ All of this could occur without the need for an Agency variance. A variance would, however, be required from the Town of Northampton for the rearward expansion.

Further, the applicants are not precluded from applying to the Town of Northampton for required front- and side-yard variances to build their dwelling outside the shoreline setback, even though the Town previously denied such a request. Building further up the slope and farther from the shoreline would arguably be more in keeping with the character of the neighborhood than the request for a variance from the shoreline restrictions made to the Agency.

During the hearing, the applicants acknowledged that there are other feasible alternatives which would require a lesser variance or no Agency variance.²¹ However, the applicants chose not to pursue such alternatives because they do not serve their proposed goals for the use of and access to their property. They would not provide as much living/storage space as the applicants seek, nor would they provide one-level access to the dwelling from the parking area.

(4) The manner in which the difficulty arose

In assessing this factor, staff have considered how the situation arose leading to the incongruity between the applicants' goals for their property and the shoreline restrictions. In short, the difficulty here was self-created since the applicants were on notice prior to purchase of the variance site that the shoreline restrictions constrained their ability to achieve their development goals.

Prior to the applicants' purchase of the property, the Agency issued a jurisdictional determination (J2012-0464) to the applicants on August 22, 2012, which advised that no variance would be required for replacement/expansion of the existing dwelling outside of the shoreline setback, but that a variance would be required for a wastewater treatment system within 100 feet of the mean high water mark of Great Sacandaga Lake.²² The same letter stated that "[p]ursuant to Section 575.5(b)(2) of Agency Rules and Regulations, an existing structure located within the shoreline setback area may not be expanded in any direction within the shoreline setback area, **including an increase of structure height**, without a variance." (Emphasis added.) Thereafter, on

²⁰ APA Shoreline Restrictions flyer (<http://www.apa.ny.gov/Documents/Flyers/ShorelineRestrictions.pdf>)

²¹ Cross-examination of applicants' witnesses, Recording of 12/4/14 public hearing

²² Exhibit 2

September 26, 2012, the Town of Northampton denied the applicants' request for a variance from the Town's front-yard and side-yard setback restrictions to build the dwelling outside the Agency's shoreline setback.²³ The applicants then proceeded to purchase the property on January 9, 2013²⁴.

(5) Whether granting the variance will have adverse environmental or other effects

Staff's review of this factor is consistent with the impact analysis it does for projects. Of relevance is how the substantiality of the requested variance relates to the magnitude of the impacts that would occur if the variance is granted.

Granting the variance would adversely affect the aesthetic character of the shoreline of Great Sacandaga Lake due to the substantial nature of the variance sought. By increasing the height of the dwelling by 14 feet, or 74%, the visual impacts of the dwelling when viewed from Great Sacandaga Lake would be substantially increased.²⁵ These impacts are more significant due to the lack of intervening trees between the dwelling and shoreline and due to the dwelling's position relative to the lake, being 42.7± feet from the mean high water mark of the lake (horizontally) and 9 feet above the mean high water mark (vertically).²⁶

The proposed wastewater treatment system²⁷ poses a risk of adverse effects to water quality, even though it represents an improvement over the current system. The risk of adverse environmental effects from the proposed system arises from the potential for failure of the system, which could require pumping every 3 days to avoid a discharge of sewage effluent that would potentially adversely affect Great Sacandaga Lake and/or groundwater.²⁸ This risk is increased by the potential that the building can be used on a year-round basis.²⁹ Groundwater impacts could extend to the on-site and neighboring wells.

²³ Exhibit 7b

²⁴ Exhibit 7a, Attachment A

²⁵ Exhibit 14 Photo Simulations; Exhibits 28 - 30

²⁶ Id.; Exhibit 5

²⁷ Exhibit 23

²⁸ "Wastewater Treatment Standards Residential Onsite Systems", Appendix 75-A.3(b), Title 10, of the *Official Compilation of Codes, Rules and Regulations of the State of New York*. [3 bedrooms X 110 gallons per day X 3 days = 990 gallons of sewage flow]; Cross-examination of applicants, Recording of 12/4/2014 public hearing

²⁹ See, "Holding tanks are not acceptable for long term use on year-round residences," "Wastewater Treatment Standards Residential Onsite Systems", Appendix 75-A.10(a), Title 10, of the *Official Compilation of Codes, Rules and Regulations of the State of New York*

The potential for adverse effects on trees to the east of the dwelling due to construction activities also exists. The proximity of excavation within the root zone of existing trees may damage root systems and/or cause tree mortality along the eastern property line of the variance site. In addition, the land disturbance associated with the new construction has the potential to cause erosion and sedimentation impacts thereby impacting surface and groundwater resources. While no new impervious area is proposed, unmanaged stormwater runoff from the proposal also has the potential to impact surface and groundwater resources.

(6) Whether the adverse effects can be ameliorated through conditions imposed if the variance is granted

Staff's analysis of this factor focuses on determining whether and to what extent, if the variance is granted, the adverse effects can be reduced based on conditions imposed in a variance order.

To ameliorate the adverse visual impacts of the taller dwelling as viewed from the lake, the applicants have proposed to plant three River Birch trees on the HRBRRD lands between the lake and the proposed dwelling.³⁰ They have also proposed natural colors for the dwelling's exterior to allow it to better blend into the surrounding landscape.³¹ The Agency could impose conditions requiring these measures, as well as full-cutoff exterior lighting and/or planting more trees.

The proposed planting of 8- to 10-foot-tall trees would not substantially ameliorate the adverse visual impacts of the proposed dwelling for 20± or more years after planting.³² In addition, staff believe a minimum of five trees are needed to provide adequate screening over the long term.³³ Due to the small size of the variance site and proximity of the dwelling to HRBRRD lands, the trees cannot be planted on the variance site.³⁴

³⁰ Exhibit 14, p. 4; Exhibit 21

³¹ Id.

³² Compare Exhibit 14, Attachments D-2, D-3a and D-3b

³³ Exhibits 37 and 13, p. 6; See also, Exhibit 14, pp. 8-9

³⁴ Exhibit 5

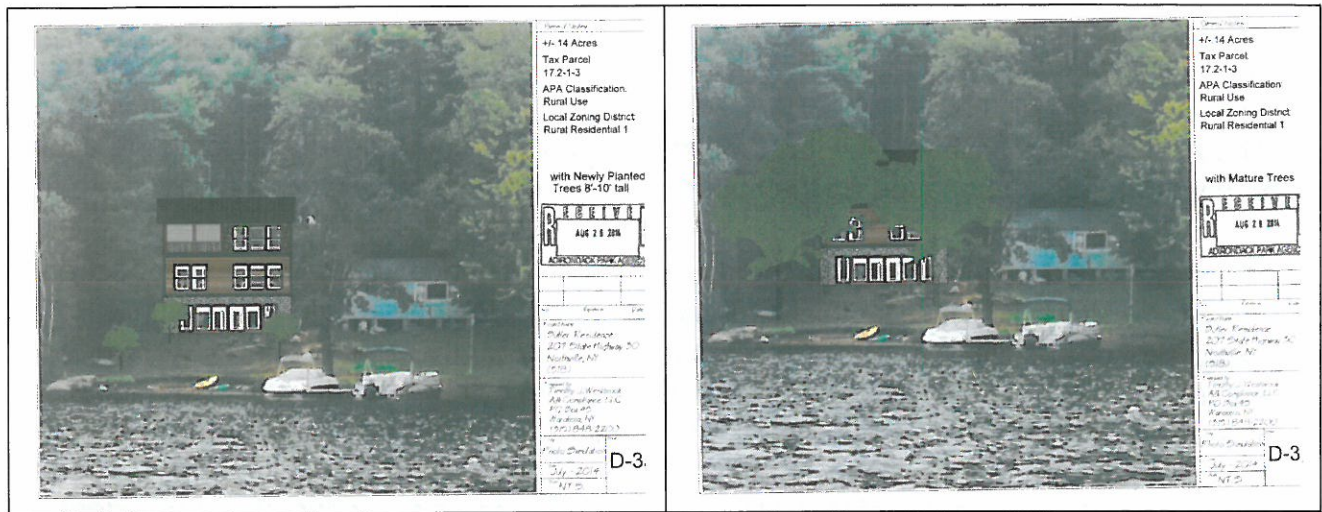


Exhibit 14 – simulations of newly planted trees (left) and mature trees (right)

Finally, while the HRBRRD would likely permit the applicants to plant trees on the HRBRRD lands shoreward of their lot³⁵, the Agency cannot enforce the planting requirements without HRBRRD concurrence since the trees would be on public lands. There is a similar problem with relying on existing trees on either side of the variance site to provide some of the screening for the proposed dwelling. The Agency has no authority to impose conditions with respect to those trees, since they are on private or public lands associated with lots on either side of the variance site.

There are no reasonable conditions that the Agency can impose that would effectively reduce the risk of failure of the wastewater treatment system and the discharge of sewage effluent. If the holding tank is not pumped out when needed, sewage effluent would leach into the soil within 100 feet of the mean high water mark of the lake and on-site and neighboring well supplies.

³⁵ Exhibits 34 and 35; Statements by HRBRRD Executive Director, Recording of 12/4/2014 public hearing

Impacts to neighboring trees during construction and other construction-related stormwater runoff and erosion and sedimentation impacts could be adequately addressed through conditions requiring the applicants to undertake construction activities and implement stormwater runoff and erosion and sedimentation controls in accordance with plans they have submitted or by permit condition.

Other relevant factors

The Agency's regulations allow the Agency to consider other relevant factors in relation to a variance request based on the specific facts and circumstances involved.

(1) Agency staff believe that granting the requested variance would create a undesirable precedent. It would make it difficult for the Agency to deny a similar variance for expansion of the dwelling immediately to the west, or for the similar-sized structure two parcels to the east. Also, preservation of the aesthetic character of Rural Use lands is a key element of the Adirondack Park Land Use and Development Plan (the "Plan"). Staff believe that the granting of such a substantial variance with its resulting adverse effects on the shoreline character of Rural Use lands would create an undesirable precedent for future variance applications involving Rural Use properties.

(2) Staff believe that the existing dwelling is reasonably proportionate to the applicants' 2,840±-square-foot parcel.³⁶ Given the serious development constraints on the property, including the immediate proximity of the existing dwelling to adjacent properties and Great Sacandaga Lake, the steep slope on the road side of the dwelling, the lack of sufficient land to support a conventional wastewater treatment system, and the lack of municipal water and sewer, staff question the overall suitability of the land to support an expanded structure.

Balancing test from 9 NYCRR § 576.1(b)

Considering the record and the variance factors discussed above, Agency staff believe that the balancing test of 9 NYCRR Section 576.1(b) favors the statutory purposes of protecting the character of Adirondack shorelines and water quality over the adverse consequences to the applicants that would occur from denial of the requested variance.

The land involved is designated Rural Use, adding further importance to the need for protecting the shoreline character, including avoiding the undesirable precedents that would occur from the granting of the variance. The requested variance is inconsistent

³⁶ Exhibit 5

with the character of the lands surrounding the variance site, which are mostly more protective of the vegetated shoreline character of Great Sacandaga Lake. Further, the requested variance is substantial and would result in adverse impacts to the water quality, aesthetics, and shoreline character of the lake which cannot be adequately mitigated through project design or condition.

Denial of the requested variance would negatively affect the applicants' ability to achieve their goals for use of the property. This is particularly true with respect to their goal of accessing the proposed dwelling from the parking level, rather than continuing to use the existing staircase. The applicants also testified (but did not provide supporting information) that due to costs associated with the difficulties of any major construction on the property, a lesser variance would not be worth the investment in the property in terms of its future value. When considering these impacts, staff believe it is relevant that the applicants have created this difficulty, since they had notice that a variance would be required for their proposal prior to purchasing the property.

Staff believe that the applicants can achieve reasonable use of their property without the requested variance, through a lesser variance, or without any variance. The staircase has provided access for the seasonal dwelling since 1970. Some portion of the applicants' goals for increased living and storage space could be achieved through a lesser variance. Alternatively, they could continue the existing seasonal use of the dwelling or winterize the dwelling, perhaps with a vertical expansion of up to 2 feet and/or a rearward expansion of up to 250 square feet, without the need for any variance from the Agency.

Conclusion

Staff believe that the above analysis of the other variance factors of Section 576.1(c) and the balancing test of Section 576.1(b) favor protection of the shoreline character and water quality of Great Sacandaga Lake over the full extent of the applicants' goals for use of their land. Accordingly, staff recommends that the Agency consider denial of the requested variance based on the attached order.

