



P.O. Box 99 • Ray Brook, New York 12977 • (518) 891-4050

**APA Order Denying  
Variance  
2014-39**

Date Issued: February 25, 2015

In the Matter of the Application of

**RAYMOND BUTLER and AMY BUTLER**

for a variance pursuant to Executive Law §806

**SUMMARY AND DENIAL**

Raymond Butler and Amy Butler ("applicants") are denied a variance from the applicable 75-foot shoreline structure setback required by Section 806(1)(a)(2) of the Executive Law ("Adirondack Park Agency Act" or "APA Act") for the vertical expansion of a single family dwelling 42.7± feet from the mean high water mark of Great Sacandaga Lake, in an area classified Rural Use by the Official Adirondack Park Land Use and Development Plan Map in the Town of Northampton, Fulton County.

**APPLICABLE LAWS**

Section 806(1)(a)(2) of the APA Act establishes a minimum shoreline setback of 75 feet from the mean high water mark of Great Sacandaga Lake for all accessory structures and principal buildings greater than 100 square feet in size, other than docks and boathouses. The applicants requested a variance from this structure setback requirement pursuant to Section 806(3)(a) of the APA Act.

**RELEVANT FACTS AND BACKGROUND**

**Variance Site**

The variance site is identified on Town of Northampton Tax Map Section 17.2, Block 1, as Parcel 3, classified Rural Use by the Official Adirondack Park Land Use and Development Plan Map, and located between NY State Route 30 and Great Sacandaga Lake. Using

dimensions from the Survey Map, the parcel is 2,840± square feet in size, or 0.06± acres. The parcel is 61± to 67± feet deep and 45± feet wide.

The existing single-story, three-bedroom single family dwelling on the variance site is 19 feet tall, on posts, with a footprint of 739± square feet (30'1" by 24' plus 6 attached steps). It is dark red in color. The dwelling is 42.7± feet from the mean high water mark of Great Sacandaga Lake (horizontally). The entire dwelling is within the applicable 75-foot shoreline structure setback.

The dwelling is close to three property lines: 1.4± feet from the Hudson River Black River Regulating District ("HRBRRD") to the north, 5.5± feet from residential property to the west, and 2.9± feet from residential property to the east. A steep slope (>60 percent) exists between the dwelling and the property line to the south. The parking area for the dwelling is located immediately south of the parcel and at the top of this steep slope. The parking area is located on a strip of State land between the parcel and NY State Route 30. An existing set of uncovered stairs with 55± steps provides access to the bottom of the slope (dwelling level) from the top of the slope (road level). Most existing trees on this slope were cut recently (about one year ago) when the new well was installed.

There is not sufficient area available on the variance site to install a standard wastewater treatment system with a leaching component, whether within 100 feet or greater than 100 feet from the mean high water mark of Great Sacandaga Lake, due to the parcel's small size and the significant area of steep slopes. In addition, the applicants found no suitable off-site locations for a leaching facility that meet applicable standards.

### **Background/Property History**

The existing dwelling was constructed in 1970. In 1972, the variance site was created by subdivision, separating it from the 0.07±-acre neighboring property to the west, which contains a dwelling similar in size and location to the subject dwelling.

On August 8, 2012, the applicants submitted a Jurisdictional Inquiry Form to the Agency for a proposal to demolish the existing dwelling, replace it with a new dwelling greater than 75 feet from the mean high water mark of Great Sacandaga Lake, and install an on-site wastewater treatment system within 100 feet of the mean high water mark of Great Sacandaga Lake.

On August 22, 2012, the Agency issued jurisdictional determination J2012-0464 finding that the replacement dwelling would not require an Agency permit or variance, but the on-site wastewater treatment system would require a variance. The same letter stated that "[p]ursuant to §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."

On September 26, 2012, the Town of Northampton Zoning Board of Appeals met and denied approval of Case #2012-13 that was the same project presented in J2012-0464. The Zoning Board of Appeals Deputy Chair Corrigan stated, at the end of the meeting: "To rehab that building with the existing footprint and upgrade a septic and well as close as you can get to them. That is what needs to happen here."

On January 9, 2013, the applicants purchased the variance site, as described in a deed from James Harvey Rivet (as Executor of the Estate of Anne O. Rivet) to Raymond Butler and Amy Butler, dated January 9, 2013, and recorded the same day in the Fulton County Clerk's Office as Instrument Number 2013-17737. Just before purchasing the property, the applicants installed a new water supply well in the southeast corner of the parcel and removed most of the trees on the parcel's steep slope.

On March 14, 2014, the applicants submitted an Application for Variance from Shoreline Restrictions to the Agency, which sought a variance for vertical expansion of the existing dwelling.

### **Environmental Setting**

Great Sacandaga Lake is a navigable water body with a mean high water mark of 771 feet above mean sea level. Lands owned by the State of New York and administered by the Hudson River Black River Regulating District ("HRBRRD") separate the variance site from the lake. There are no other water bodies or wetlands on the variance site or within 200 feet.

The variance site is part of a 0.5±-mile-long stretch of shoreline that consists of 25 Rural Use parcels each less than 0.5±-acre in size and located between NY State Route 30 and the lake. The land on either side of this string of 25 parcels between the highway and the lake is forested and owned by NY State, for 0.53± miles to the east and 0.36± miles to the west. According to Real Property Service records, seven of these 25 parcels contain a year-round single family dwelling, nine contain a seasonal residence (including the variance

site), one contains a mobile home, and eight parcels are undeveloped. A group of four undeveloped parcels in the middle of the string provide a stretch of forested shoreline. Within this string of 25 parcels, the variance site is the third parcel from the west.

The variance site is very similar to the parcel immediately to its west. Both have a modestly sized one-story single family dwelling located within a few feet of their lakeside property line with the HRBRRD. The two dwellings are 14± feet apart. There are no live trees or shrubs between either of the dwellings and Great Sacandaga Lake, and so both are plainly visible from the lake. The variance site dwelling is most visible from the lake when the viewer is directly north of the site and the gap in the shoreline trees provides a clear view of it. If the viewer moves to the west or east, intervening trees on HRBRRD land eventually screen the dwelling from view.

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± 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 the HRBRRD property. 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.

Across the lake from the variance site, to the north, the shoreline is entirely forested, except for two discrete locations where structures are visible.

#### **Variance Record**

The Agency has reviewed the record for this variance request consisting of all of the variance application and staff review materials, including but not limited to the application, plans, maps, photographs and documents, the recording of the public hearing, public comment letters, the staff recommendation memorandum, and the staff presentation of the variance request to the Agency.

#### **Variance Request**

The applicants' objectives, as stated in their variance application, 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." At the hearing, they stated their position that the variance is necessary in order to provide safe access from the road level to the dwelling, which is now only accessible by the outside stairs.

The applicants have requested an Agency variance for the vertical expansion of the existing three-bedroom single family dwelling, 19 feet in height, to replace it with a three-bedroom single family dwelling 33 feet in height (an increase of 14 feet in height, or 74%). The dwelling's footprint (739± square feet) would not change, except for a rearward (road side) expansion of 24.3± square feet for an entry porch (entirely within the setback) plus 32± square feet for a walkway (partially within the setback). The portion of these rearward expansions within the setback are considered minor (less than 250 square feet) and do not require an Agency variance.

The replacement 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. The holding tank would be equipped with a gauge and high-level alarm. The holding tanks may need 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.

The dwelling would also be served by existing overhead utilities and the existing on-site water supply well.

The proposed replacement of the dwelling requires grading and filling south of the dwelling, between the dwelling and steep slope. There would be no separate retaining wall; the lowest level of the dwelling would have a thick concrete wall and the space between the dwelling and slope would be backfilled with select material.

A silt fence and straw bales are proposed between the dwelling and the shoreline of Great Sacandaga Lake, on HRBRRD lands, for erosion and sediment control during construction.

The applicants propose planting 6 River Birch trees on the variance site. They propose planting 3 trees between the dwelling and Great Sacandaga Lake and an additional 3 trees between the dwelling and the NY State Route 30 right-of-way. The dwelling would have a brown exterior with dark trim and a brown roof.

A reduced-scale copy of the survey and site plan for the variance site (Record Exhibits 5 and 21) are attached as a part of this Order for reference.

### PROCEDURAL HISTORY

Following receipt of the variance application, the Agency notified all parties as required by the Agency regulations. On December 4, 2014, the Agency held a public hearing on the variance request in the Town of Northampton. The hearing was attended by Agency staff, the applicants, their authorized representative, their builder, the Town Code Enforcement Officer, Executive Director of the HRBRRD, and two members of the public. Staff and applicant witnesses provided testimony, and opportunity was provided to each party for cross-examination of witnesses. Other comments and information were provided by the Town Code Enforcement Officer, the HRBRRD Executive Director and a member of the public.

The Agency received four comment letters from adjoining and nearby landowners and one additional comment letter expressing concerns and opposition to the variance. Concerns raised in the letters included: impacts to the immediate neighbor's privacy, views, and natural lighting; the location of the proposed wastewater holding tank in relation to the neighbor's well; that equipment use and excavation on the variance site could cause erosion and/or instability of steep slopes along the property line; impacts to the water quality of the lake and groundwater; and impacts to the character of Rural Use shorelines.

The entire record as of February 4, 2015 was forwarded to the Agency on that date, along with a staff memorandum with a recommendation and a draft order. Staff presented the variance request to the Agency's Regulatory Programs Committee on February 12, 2015. The Agency's Regulatory Programs Committee considered this variance request on February 12, 2015 and the Agency considered it on February 13, 2015.

### DISCUSSION

APA Act Section 806(1) establishes protection of water quality and the qualities of Adirondack shorelines as the purposes to be served by the shoreline restrictions. APA Act Section 806(1)(a)(2) provides the setback restrictions from shorelines for principal buildings, which include single family dwellings. Finally, APA Act Section 806(3)(a) authorizes the Agency to grant a variance where there are practical difficulties in carrying out the restrictions set forth in Section 806(1)(a)(2) of the APA Act. The Agency has considered the standards and factors set forth in 9 NYCRR §576.1(b)-(c) and makes the following findings:

**§576.1(b): Whether the adverse consequences to the applicant resulting from denial are greater than the public purpose sought to be served by the restriction.**

Given the facts outlined herein, the adverse consequences to the applicants resulting from denial are less than the public purpose sought to be served by the restriction.

The relevant public purposes of the shoreline restrictions are protection of the water quality and shoreline aesthetics and character of Great Sacandaga Lake. The requested variance is substantial and the impacts to the water quality, aesthetics, and character of Great Sacandaga Lake cannot be adequately mitigated through project design or by condition. Furthermore, the lands involved are designated Rural Use, adding importance to the need for protecting their shoreline character, including avoiding the undesirable precedents that would occur from the granting of the variance. The requested variance is inconsistent with the character of the lands surrounding the variance site, which are mostly more protective of the vegetated shoreline character of Great Sacandaga Lake.

Denial of the requested variance will have adverse consequences to the applicants' ability to achieve their goals for use of the property. This is particularly true with respect to their goal of having one-level access from the road side of the dwelling, rather than continuing to use the existing outdoor staircase. The applicants have also stated (without supporting information) that they need to build the larger dwelling in order to realize a return on their investment in the property. This is due to increased costs of construction associated with any major construction at the bottom of the slope on the variance site. When considering these adverse consequences, it is relevant that the applicants created this difficulty, since they had notice that a variance would be required for their proposal prior to purchasing the variance site.

The applicants can achieve reasonable use of their property without the requested variance, through a lesser variance, or without any variance. They can continue to use the existing single-story, three-bedroom single family dwelling with 722± square feet of floor space and access via the outdoor staircase, as it has existed since 1970, or they can renovate the existing dwelling without the need for an Agency variance, including winterization and/or certain minor expansions.

**§576.1(c)(1): Whether the application requests the minimum relief necessary.**

The Agency finds, giving due consideration to the objectives of the applicants for use of their land and because of the substantiality of the requested variance relative to the statutory requirement, that the requested variance is not the minimum relief necessary.

The applicants seek a 14-foot variance from the shoreline restrictions to increase the height of the existing dwelling from 19' to 33'. The resulting dwelling would include 3 levels of living/storage space. The applicants are opposed to any further reduction in dwelling height, because such a reduction would not, in their opinion, meet their objectives.

The requested variance is substantial and would represent a 74% increase in the height of the dwelling. It is possible for the applicants to 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 to 5 feet, representing a 26% increase in height. A lesser variance would still increase the space in their dwelling available for living and storage. Moreover, the applicants would have continued use of the existing stairs for access to the dwelling. Accordingly, the applicants' request is not the minimum relief necessary to achieve reasonable use of the variance site. However, nothing in this Order suggests that any other request would be approved or denied.

**§576.1(c)(2): Whether granting the variance will create a substantial detriment to adjoining or nearby landowners.**

The proposed dwelling is 14± feet from, and would be 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 would be less than 50 feet from their well.

The impacts to the neighboring dwelling would not 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 lighting are insignificant because the trees immediately east of the proposed dwelling already shade the area more than a taller dwelling would. 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.



The proposed dwelling is not consistent with the character of neighboring properties to the east, the forested lands across the lake to the north, and the undeveloped and forested 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± 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 the HRBRRD property. 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.

The Adirondack Park Land Use and Development Plan places value on protecting the open space character of Rural Use lands. 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.

**§576.1(c)(3): Whether the difficulty can be obviated by a feasible method other than a variance.**

The existing dwelling has been used as a seasonal residence since its construction in 1970 and the applicants can continue to use it as such. They could also replace the posts with a new foundation and winterize the dwelling. They could even increase the roofline height by 2 feet or add a 250-square-foot addition to the rear (road side) of the existing dwelling. 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.

During the hearing, the applicants acknowledged that there are other feasible alternatives which would not require a variance. However, the applicants rejected such alternatives because they do not serve their proposed goals for the use of and access to their property.

**§576.1(c)(4): The manner in which the difficulty arose.**

This factor considers how the conflict between the applicants' goals for their property and the shoreline restrictions arose. While the Agency cannot deny a variance solely because of this factor (9 NYCRR § 576.4), it is relevant to the Agency's determination.

The conflict here was self-created. The applicants had notice prior to purchase of the variance site that the Agency's shoreline restrictions constrained their ability to achieve their development goals. Their purchase of the property created the conflict between their goals for the property and the shoreline restrictions. 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. The same letter stated that "[p]ursuant to §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." Thereafter, on September 12, 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. The applicants then proceeded to purchase the property on January 9, 2013.

**§576.1(c)(5): Whether granting the variance will adversely affect the natural, scenic, and open space resources of the Park and any adjoining water body due to erosion, surface runoff, subsurface sewage effluent, change in aesthetic character, or any other impacts which would not otherwise occur.**

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. 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).

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.

The proposed holding tank wastewater treatment system poses a risk of adverse effects to water quality. Pursuant to New York Department of Health regulations: "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. This is due to high maintenance costs and the need for continuous operation attention related to a holding tank. The failure to maintain or pump the system out could result in the discharge of sewage effluent into Great Sacandaga Lake or groundwater. Groundwater is the water source for on-site and neighboring well supplies, further increasing the importance of proper treatment and/or disposal of sewage effluent.

The proposed holding tank may need to be pumped out as often as every three days. This frequency is based on New York State Department of Health's projected design flows for a three-bedroom dwelling. In addition, wastewater volume is likely to increase from current levels with the addition of laundry facilities and a new well. While continuous, year-round use of the dwelling is not proposed by the applicants, the risk to water quality from the potential year-round use of a holding tank is not acceptable.

**§576.1(c)(6): Whether the imposition of conditions upon the granting of the variance will ameliorate the adverse effects noted above.**

To ameliorate the adverse visual effects of the proposed 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 and to use natural colors for the dwelling's exterior. Conditions requiring these measures would not satisfactorily mitigate the adverse visual impacts caused by the substantial variance requested by the applicants.

The proposed 8 to 10-foot-tall trees planted at the time of construction will not adequately screen the dwelling as viewed from the lake for a period of 20± years. Furthermore, with only 1.4± feet between the dwelling and HRBRRD lands, the trees would need to be planted on HRBRRD lands. Similarly, screening for the dwelling depends on trees associated with properties to the east and west of

the variance site. The Agency has no authority to require the planting of trees on HRBRRD lands or on private lands neighboring the variance site.

### **Undesirable precedent**

Granting the requested variance would create an undesirable precedent. First, it would make it difficult for the Agency to deny a similar variance, if requested, for expansion of the dwelling immediately west of the variance site or for the similar-sized structure two parcels to the east. Second, preservation of the aesthetic character of Rural Use lands is a key element of the Adirondack Park Land Use and Development Plan (the "Plan"). The granting of such a substantial variance with its resulting adverse effects on the shoreline character of Rural Use lands would also create an undesirable precedent for future variance applications.

### **Development capacity of the variance site**

The existing dwelling is reasonably proportionate to the applicants' 2,840±-square-foot parcel. 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, the parcel does not support an expanded structure.

### **CONCLUSION**

The Agency has considered all of the standards and factors for issuance of a variance as set forth in 9 NYCRR Part 576. Based on Agency deliberations as reflected in the findings set forth above, the Agency makes the following conclusions of law:

1. The public purposes sought to be served by the shoreline restrictions are greater than the adverse consequences to the applicant resulting from denial of the variance request;
2. The requested variance is not the minimum relief necessary;
3. The requested variance will cause a substantial detriment to the surrounding neighborhood and open space character;

- 4. Alternatives to the requested variance exist which do not require a variance;
- 5. The applicants' difficulty was self-created;
- 6. The requested variance will adversely affect the natural, scenic, and open space resources of the Park and Great Sacandaga Lake due to changes in changes in aesthetic character; and
- 7. Conditions imposed upon the granting of a variance would not ameliorate such adverse effects.

Accordingly, the applicants have not established that practical difficulties exist pursuant to APA Act § 806(3)(a) and their variance request is therefore denied.

ORDER issued this            day  
of                            , 2015.

ADIRONDACK PARK AGENCY

BY: \_\_\_\_\_  
Richard E. Weber III  
Deputy Director (Regulatory Programs)

STATE OF NEW YORK)  
  ) ss.:  
COUNTY OF ESSEX    )

On the            day of                            in the year 2015, before me, the undersigned, a Notary Public in and for said State, personally appeared Richard E. Weber, III personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he

executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

REW:ADL:PVC:mlr