



Adirondack Park Agency

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MEMORANDUM

TO: Regulatory Programs Committee

FROM: Richard Weber, Deputy Director, Regulatory Programs *REW*
Sarah Reynolds, Associate Counsel *SR*

DATE: November 2, 2016

RE: L.S. Marina, LLC; Permit 2016-29; Variance 2014-53
Appeal of Agency staff's August 2016 request for information

Summary

L.S. Marina, LLC seeks a permit and variance to allow for the expansion of an existing marina on Lower Saranac Lake. The proposal involves two different properties, known as the Main Marina and Annex sites. On August 16, 2016, Agency staff forwarded a third request for information regarding these applications. On September 16, 2016, the applicant submitted an appeal of portions of this request.

Pages 1-12 of the appeal contain a summary by the applicant of the history of Agency and municipal review of the proposal. Although staff disagree with a number of the factual and other statements made in this summary, the issues raised on pages 1-12 are not subject to review by the Agency members at this time.

Instead, the matter presented for review and action by the Agency is found on pages 12-19 of the appeal, where the applicant challenges Questions 5, 7, and 8, and portions of Questions 4 and 12 from staff's request for information. As a guide for review of the appeal, the request is attached to this memorandum, with highlights showing the portions challenged by the applicant.

Pages 12-14 of the appeal include calculations by the applicant of potential wetland impacts from the proposal. These calculations differ from the numbers presented by staff in the request for information. Staff accept that the applicant has provided alternate calculations, and will include both sets of numbers as part of the application and record for future Agency review.

Pages 14-18 of the appeal include challenges to staff's questions regarding avoidance and minimization of the proposal, and to staff's comments regarding the proposed wetland compensation plan. Staff acknowledge that these responses reflect the

applicant's position, and accept that the applicant has no further information to provide. Staff believe these responses may not provide sufficient information to allow the Agency to make the permit and variance findings necessary for approval. However, for the purpose of commencing Agency review and preparing a variance record, staff have no further questions regarding these issues.

Finally, on pages 14 and 18-19 of the appeal, the applicant challenges staff's requests for the depiction of wetlands on the final plans for the Main Marina site and for the submission of stormwater plans for both the Main Marina and Annex sites. No response is provided to these requests.

Given the need to document the location of wetland resources on the project site and the potential water quality and wetland impacts from stormwater runoff caused by the proposal, staff request that the Agency members affirm the need for submission of the following:

- Final plans depicting the four wetland areas at the Main Marina site;
- An updated stormwater plan addressing the changes made to the proposal since July 2014 at the Main Marina site; and
- A proposed stormwater plan for the Annex site.

Relevant Facts and Project Review History

On April 15, 2014, the Agency received a variance application from L.S. Marina, LLC for the construction of shoreline structures within 50 feet of the mean high water mark of Lower Saranac Lake. These structures were proposed as part of an expansion of an existing marina located on two different properties, both on Hamlet lands in the Town of Harrietstown, Franklin County: the Main Marina is located within Crescent Bay and is accessed from Route 3, and the Annex site is located within Ampersand Bay and is accessed from Lake Street. The Annex site is approximately one mile northeast of the Main Marina. A portion of the proposal at the Main Marina extends onto private lands underwater whose owner is not yet determined, and a portion of the proposal at the Annex site extends onto Forest Preserve lands underwater that are managed by the Department of Environmental Conservation (DEC).

On May 2, 2014, Agency staff issued a Request for Additional Information related to the variance application. This request stated that staff's preliminary assessment of the site indicated the presence of wetlands, and that a site visit would be required to confirm and evaluate the wetlands and potential impacts to the aquatic ecosystem. On July 30, 2014, staff issued a supplement to this request, based on conditions observed during a July 10, 2014, site visit. The supplement confirmed the presence of wetlands at both sites, and stated that an Agency permit for activities involving wetlands would be required.

On February 4, 2016, the Agency received a permit application for proposed activities involving wetlands at the Annex site, as well as a response to the May 2, 2014, and July 30, 2014 requests for information. On February 19, 2016, Agency staff issued a first Notice of Incomplete Permit Application, which stated only that the application for a permit for wetland activities at the Annex site could not be reviewed without application materials for wetland activities at the Main Marina, as the proposal involves wetlands at both locations. On March 9, 2016, the Agency received wetland application materials for the Main Marina location.

On March 24, 2016, Agency staff issued a second request for additional information for the permit and variance applications. The March 24 request served as the first substantive request for information related to the permit application. The Agency received a response to this request on August 1, 2016.

On August 16, 2016, Agency staff issued its third request for information (hereinafter the NIPAVIR). On September 16, 2016, the Agency received the applicant's appeal of portions of the NIPAVIR. No response has been received by the Agency to the portion of the NIPAVIR that was not appealed, and the applications remain incomplete.

Legal Background and Review Process

Permit Review

The applicant's proposal involves wetlands and requires an Agency permit under the New York State Freshwater Wetlands Act. The portion of the proposal located on private land also requires an Agency permit under the Adirondack Park Agency Act (APA Act). Prior to approving this project, the Agency must find that the proposal:

- will be consistent with the land use and development plan;
- will be compatible with the character description and purposes, policies, and objectives of the Hamlet land use area;
- will be consistent with the overall intensity guidelines for the Hamlet land use area;
- will comply with the shoreline restrictions of § 806 of the Act;
- will not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the Park or upon the ability of the public to provide supporting facilities and services made necessary by the project; and
- will secure the natural benefits of wetlands associated with the project, consistent with the general welfare and beneficial economic, social, and agricultural development of the state.

In addition, because the proposal involves wetlands with a value rating of 2 at both the Main Marina and Annex sites, §578.10 of Agency regulations requires the Agency to find that the proposal:

- will result in minimal degradation or destruction of the wetland or its associated values; and
- is the only alternative that can reasonably accomplish the applicant's objectives or provides an essential public benefit.

Staff analyze any proposal that requires an Agency permit to ensure that the application is "complete for the purpose of commencing review," as set forth in §809(2)(b) of the APA Act. To do this, staff request information from applicants as necessary to allow for Agency consideration of the findings described above.

When a complete permit application contains sufficient information to allow the Agency to make the required findings, the Agency may approve the project, with conditions as necessary. When a complete permit application contains disputed information or contains insufficient information to support approval, staff may recommend that the Agency hold a public hearing on the proposal. As noted in §809(3)(d) of the Act, the Agency may require a public hearing to review "significant issues relating to any findings or determinations the Agency is required to make." Public hearings provide an opportunity for additional information to be gathered on specific factual questions, including testimony on disputed issues. When, after a public hearing, the information included in a permit application remains insufficient to allow the Agency to make the findings required for approval, the Agency may deny the proposal.

Variance Review

The applicant's proposal involves the construction of accessory structures greater than 100 square feet in size within 50 feet of the mean high water mark of Lower Saranac Lake, and requires a variance under the APA Act. The Agency reviews variance requests as described in §576.1 of Agency regulations. This regulation requires consideration of the following factors:

- Whether the application requests the minimum relief necessary;
- Whether granting the variance will create a substantial detriment to adjoining or nearby landowners;
- Whether the difficulty can be obviated by a feasible method other than a variance;
- The manner in which the difficulty arose;
- 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; and
- Whether the imposition of conditions upon the granting of the variance will ameliorate the adverse effects referred to above.

In addition, §576.1(b) states that “a variance will be granted when the adverse consequences to the applicant resulting from denial are greater than the public purpose sought to be served by the restriction.” Pursuant to §806(1) of the APA Act, the public purposes of the shoreline restrictions are the protection of the qualities of shorelines and the protection of water quality.

Staff analyze any proposal that requires a variance in order to develop a record for Agency review. To do this, staff work with variance applicants to ensure that sufficient information is provided in the record for consideration of the factors identified in §576.1. When a variance record contains sufficient information to allow for consideration and approval pursuant to these factors, the Agency may grant the variance with conditions as necessary. When the information in a variance record is insufficient to allow for a full consideration of the factors or does not support approval of a proposal, staff may recommend that the Agency deny the variance. Denial of a variance occurs without prejudice, which means that an applicant may apply again.

NIPAVIR Appeal

Pages 1-12 of the appeal contain a summary by the applicant of the history of Agency and municipal review of the marina proposal. Staff disagree with a number of the factual and other statements made in this summary. However, the issues raised on pages 1-12 of the appeal are not subject to review by the Agency members at this time. The applicant’s summary, along with all other submissions by the applicant, will be included as part of the permit application and variance record for future Agency review.

The matter presented for review and action by the Agency members at this time is a challenge to a portion of the questions included by staff in the NIPAVIR. Specifically, on pages 12-19 of the appeal, the applicant challenges Questions 5, 7, and 8, and portions of Questions 4 and 12 in the NIPAVIR. The appeal does not challenge Questions 1, 2, 3, 6, 9, 10, or 11.

The NIPAVIR is attached to this memorandum. Staff have highlighted the questions challenged in the appeal; any portion that is not highlighted was not challenged by the applicant. This document was prepared using the “proposed, revised” information request included by the applicant as Exhibit 1 to the appeal.

Responses Considered Sufficient

- Question 4, pages 4-5 of the NIPAVIR (except as noted below):

The applicant’s August 1, 2016, submission provided sufficient information to allow staff to analyze the scope of potential impacts to wetlands at both the Main Marina and Annex sites. In an effort to provide a summary of this analysis to the applicant, Question 4 of the NIPAVIR documented staff’s calculations of the square footage of the shading, filling, and dredging proposed in wetlands, and noted the potential for

“additional impacts from the expansion of navigation routes through wetlands at the Annex site.”

On pages 12-14 of the appeal, the applicant challenged staff's analysis, and provided alternate calculations of potential wetland impacts. Staff acknowledge that the applicant disagrees with the calculations included in the NIPAVIR. However, for the purpose of commencing Agency review and preparing a variance record, staff have no questions regarding this issue.

The applicant's figures, along with staff's analysis, will be included as part of the permit application and variance record for future Agency review.

- Questions 5, 7, and 8, pages 5-8 of the NIPAVIR:

The information requests forwarded to the applicant in May 2014 and March 2016 asked in general terms for an explanation of steps taken to minimize the proposed shoreline structures and wetland impacts. However, until the Agency received the applicant's August 1, 2016 submission, staff did not have sufficient information to analyze specific opportunities for minimization or avoidance of the need for a variance or permit. In particular, the August 2016 submission significantly altered certain shoreline structures, confirmed details regarding other shoreline structures, and proposed a new wetland compensation plan.

In response to the information received in August 2016, staff were able to ask specific questions related to avoidance and minimization of the proposal, and to provide comments regarding the compensation plan. Staff also provided a final opportunity for the applicant to ensure that both the permit and variance applications contain all supporting information related to avoidance and minimization prior to Agency review, by requesting that the applicant “describe any additional efforts made to avoid or minimize the need for variances and for a wetlands permit, and any justification for why these alternatives are not proposed.”

The applicant responded to these requests on pages 14-18 of the appeal. Staff acknowledge that these responses reflect the applicant's position, and accept that the applicant has no further information to provide. Staff believe these responses may not provide sufficient information to allow the Agency to make the permit and variance findings necessary for approval. However, for the purpose of commencing Agency review and preparing a variance record, staff have no further questions regarding these issues.

The applicant's responses, along with staff's analysis, will be included as part of the application and record for future Agency review.

Questions Remaining

- Question 4, final paragraph, page 5 of the NIPAVIR:

“Please also revise the plans for the Main Marina site to include wetland areas labeled #1, #2, #4, and #5 as shown on the LA Group’s figure 1, entitled ‘Crescent Bay Submerged Aquatic Vegetation Coverage Diagram’ and dated March 1, 2016.”

Agency practice requires that all wetlands involved in a proposal be documented on an application’s final plans. This documentation allows for the Agency to perform the required analysis and review, and for the applicant, landowners, and contractors to understand the location of wetland resources and any associated permit or variance conditions. As noted in the appeal, the wetland areas at the Main Marina site were depicted on a plan submitted with the permit application. However, this documentation was not included in the plans received on August 20, 2016, which contain significant updates to the proposal and were submitted as final plans.

Given the importance of having wetlands documented on final plans for proposals involving wetlands, staff request that the Agency members affirm the need for the wetland areas labeled #1, #2, #4, and #5 to be depicted on the applicant’s final plans.

- Questions 12a and 12c, pages 8-9 of the NIPAVIR:

Annex site (12a): “Given the potential for upland runoff to impact wetlands, including the proposed mitigation area, please provide a stormwater management plan for the Annex site.”

Main Marina site (12c): “Please provide a final SWPPP not marked Draft for Agency review. Include a summary of any changes that have resulted since the July 24, 2014 preparation date.”

As described above, before the Agency can approve the wetland permit application, the Agency must find that the proposal will not have an undue adverse impact on the natural resources of the Park, will secure the natural benefits of the wetlands associated with the project, and will result in only minimal degradation or destruction of the wetland or its associated values. To ensure that a permit application can be approved under these criteria, Agency practice requires the submission of a stormwater management plan for sites where runoff may drain into wetlands. A stormwater management plan typically includes site planning and treatment details that allow the Agency to review potential impacts to wetlands from stormwater runoff resulting from proposed development activities. In order to provide a consistent approach for applicants, the Agency requires that the stormwater plan follow established DEC stormwater standards, even where the site disturbance may be less than the threshold for DEC jurisdiction.

The wetland permit application received on March 9, 2016, referenced a Draft Stormwater Pollution Prevention Plan (SWPPP). Staff requested a copy of this SWPPP in its March 24, 2016 request for information, and the Draft SWPPP was submitted on August 1, 2016. Except for a stormwater plan approved through a prior Agency Settlement Agreement authorizing the construction of a building at the Annex site in 1989, staff had no information regarding the applicant's plans to address stormwater at the Annex or Main Marina sites until receipt of the draft SWPPP on August 1, 2016.

The Draft SWPPP was prepared in July 2014, and does not account for significant updates to the proposal since that time. In addition, the draft SWPPP addresses only the Main Marina site. Other than the previously approved stormwater plan associated with the prior enforcement action, no stormwater controls were provided for other proposed development activities at the Annex site.

Given the potential impacts to wetlands from stormwater runoff at both the Main Marina and Annex sites, and in order to ensure that the wetland permit application contains sufficient information to allow for review under the Agency's permitting standards, staff request that the Agency members affirm the need for submission of the following:

- For the Main Marina site, an updated final version of the stormwater plan that addresses changes to the proposal that have occurred since 2014; and
- For the Annex site, a proposed stormwater management plan.

Conclusion

For the reasons stated above, staff request that the Agency members affirm the need for responses to Questions 4, 12a, and 12c of the NIPA/VIR.