



**Adirondack
Park Agency**

ANDREW M. CUOMO
Governor

TERRY MARTINO
Executive Director

STATE OF NEW YORK: ADIRONDACK PARK AGENCY

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In the matter of the apparent
violation of Executive Law § 806
and Section 575 of Title 9 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York (9 NYCRR)
by:

GEORGE H. CARROTHERS
AUSTIN L. CARROTHERS

Agency File #E2019-0070

Respondents.

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**MEMORANDUM OF LAW IN SUPPORT OF AGENCY STAFF'S
NOTICE OF APPARENT VIOLATION AND REQUEST FOR
ENFORCEMENT COMMITTEE DETERMINATION**

Respectfully submitted by:

Jennifer Hubbard, Senior Attorney
Adirondack Park Agency Staff

October 28, 2019

PRELIMINARY STATEMENT

This administrative enforcement proceeding is brought by Adirondack Park Agency (Agency) staff to enforce Executive Law § 806 and 9 NYCRR § 575 against George and Austin Carrothers (Respondents) to address a deck attached to the eastern side of an existing commercial use structure within 50 feet of Jennings Pond that was constructed by Respondent G. Carrothers on property in the Town of Long Lake, Hamilton County (the subject property or Lot 5).

Agency staff request a determination by the Enforcement Committee pursuant to 9 NYCRR § 581-2.6(d) that the apparent violation alleged in the Notice of Apparent Violation and Request for Enforcement Committee Determination (the NAV) has occurred and is occurring. Agency staff further request that the Enforcement Committee determine appropriate injunctive relief and penalties against Respondents as provided by 9 NYCRR § 581-2.6(d).

FACTS

Respondents own tax map parcel 25.016-1-5, the subject property, which is an approximately 2.80-acre parcel located in the Town of Long Lake, Hamilton County. Affidavit of Trevor Fravor, dated October 28, 2019 (Fravor Aff.), ¶ 4. The subject property is located on lands classified Hamlet by the official Adirondack Park Land Use and Development Plan Map. Fravor Aff. ¶4, Exhibit A. The property is improved by a pre-existing commercial use structure. Fravor Aff. ¶ 5. The building is located almost entirely within 50 feet of the mean high-water mark of Jennings Pond and Long Lake. Affidavit of Shaun LaLonde, dated October 24, 2019 (LaLonde Aff.), ¶ 5.

In May 2018, the Agency received a request from Respondent G. Carrothers for a pre-application file regarding a proposal to expand an existing building located almost entirely within the shoreline setbacks of Jennings Pond and Long Lake. Affidavit of Colleen C. Parker, dated October 28, 2019 (Parker Aff.), ¶ 4. At this time, Respondents did not own the subject property and Agency staff advised Respondent G. Carrothers that his proposal, which included a new deck attached to the eastern side of the existing building, required an Agency variance. In a telephone conversation with Respondent G. Carrothers, Agency staff explained the variance review process and the criteria that must be met for issuance of an Agency shoreline structure setback variance. Subsequently, Respondents purchased the subject property on May 30, 2018. Parker Aff. ¶ 4.

On June 13, 2018, Agency staff met with Respondent G. Carrothers at Agency headquarters. Agency staff reviewed Respondent G. Carrothers' preliminary plans to expand the existing structure on the subject property and convert it into a diner and watersport store. Respondent G. Carrothers' plans included the addition of a deck on the eastern side of the building that would bring the structure closer to the mean high-water mark of Jennings Pond. Agency staff discussed the variance review process in detail, focusing on alternatives to the deck and non-jurisdictional options to achieve Respondents' goal of outdoor seating. Staff also advised Respondent G. Carrothers that if he chose to pursue a variance for the deck, he would be required to minimize the variance being requested. Parker Aff. ¶¶ 5-6.

On June 27, 2018, Agency Engineer Shaun LaLonde and Colleen Parker, the lead Environmental Program Specialist assigned to Respondents' pre-application file, met with Respondent G. Carrothers at the subject property. Staff reviewed Respondent G. Carrothers' plans to construct a 16-foot wide deck on the eastern side of the existing structure, bringing the structure closer to Jennings Pond. Staff again explained the variance review process and advised Respondent G. Carrothers on non-jurisdictional alternatives to the proposed deck. Staff reiterated that any variance application for the deck would have to document whether the request was for the minimum variance necessary. Parker Aff. ¶ 7.

On August 23, 2018, the Agency received a formal application from Respondents. The application requested three variances from the shoreline setback requirements to expand the existing structure on the subject property, including a 16-foot wide deck on the east side of the structure, a 12 by 30 inch roof overhang on the west side of the structure, and an 11 by 12 foot deck on the back (south) side to fill-in the area between two existing decks. Parker Aff. ¶ 8. By telephone on September 10, 2018, and in writing in a subsequent email, Agency staff advised Respondent G. Carrothers that additional information would be required to complete his variance request. Parker Aff. ¶ 9.

On September 21, 2018, staff issued a Variance Information Request (VIR) that listed the additional information staff needed to support Respondents' application. Among other questions, staff requested that Respondents provide information on alternatives of not constructing a deck or constructing a smaller deck on the eastern

side of the building, and to explain how the size of the proposed deck represents the minimum relief necessary. Due to the fact that the leaching components of the existing on-site wastewater treatment system on Lot 5 cannot meet horizontal setbacks to Jennings Pond and Long Lake, Agency staff also requested Respondents provide information on the existing on-site wastewater treatment system so that staff could determine whether the existing system is adequate for the proposed use and if additional review of this system would be required. The VIR stated that Respondent G. Carrothers' proposed building expansion may not be undertaken until an Order granting the variance was issued by the Agency. Parker Aff. ¶ 10. In October 2018, Respondent G. Carrothers notified staff that he had hired an engineer and would be pursuing his variance request. Parker Aff. ¶ 11.

Agency staff followed up with Respondent G. Carrothers on May 1, 2019 after staff did not receive a response to the VIR. Parker Aff. ¶ 12. Less than a month later, the Agency received a complaint that Respondents had constructed a deck within the shoreline setback area without obtaining an Agency variance. Fravor Aff. ¶ 6. On June 3, 2019, Agency Enforcement Officer Trevor Fravor and Staff Engineer Shaun LaLonde met with Respondent G. Carrothers on the project site. This site inspection found that Respondent G. Carrothers had constructed a deck approximately 12 feet in width and 41 feet in length entirely within the shoreline setback area on Lot 5. The deck is attached to the eastern side of the commercial use structure, in the same location as the deck that was proposed as part of Respondents' variance application. Fravor Aff. ¶

8; LaLonde Aff. ¶ 6. At its closest point, the deck is approximately 27 feet from the mean high-water mark of Jennings Pond. LaLonde Aff. ¶ 6.

Respondents did not obtain a variance from the Agency prior to constructing this deck. Fravor Aff. ¶ 9. Respondent G. Carrothers did, however, receive a building permit from the Town of Long Lake for renovations to the existing structure on the subject property. Fravor Aff. ¶ 11. Agency staff and Respondents have been unable to reach a Settlement Agreement to resolve this matter. Agency staff propose that Respondents be required to remove the deck attached to the eastern side of the structure on Lot 5 in order to bring the structure into compliance with the Agency's shoreline restrictions. Fravor Aff. ¶ 15. This is consistent with Agency practice for resolving apparent shoreline setback violations in these circumstances. Affidavit of John M. Burth, dated October 28, 2019, ¶ 4.

ARGUMENT

Procedural Basis

This enforcement proceeding is brought pursuant to 9 NYCRR Subpart 581-2. As provided by 9 NYCRR § 581-2.6(b), Agency staff has initiated this proceeding by serving a NAV on Respondents. Respondents have 30 days to serve their Response on Agency staff pursuant to 9 NYCRR § 581-2.6(c). Agency staff request a determination by the Enforcement Committee in this matter pursuant to 9 NYCRR § 581-2.6(d).

Respondents' Shoreline Violation

Pursuant to Executive Law § 806, a variance is required from the Adirondack Park Agency prior to the construction of any new principal building or accessory structure greater than 100 square feet in size within 50 feet of the mean high-water mark of any lake on Hamlet lands in the Adirondack Park. Agency regulations implementing these requirements at 9 NYCRR § 575.5 provide that a variance is required from the Adirondack Park Agency prior to the expansion of an existing structure within the shoreline setback area, including through any increase in the structure's footprint, width, or height.

Agency staff investigation indicates that Respondents have expanded the pre-existing commercial use building on Lot 5 by constructing an attached deck within 50 feet of the mean high-water mark of Jennings Pond. Fravor Aff. ¶ 8; LaLonde Aff. ¶ 6. Because Respondents failed to obtain a variance from the Agency prior to construction of the deck resulting in the expansion of the existing building within the shoreline setback area, they have violated and are continuing to violate § 806 of the Executive Law and 9 NYCRR § 575.5.

RELIEF SOUGHT

Remediation

For remediation of this continuing violation, Agency staff seek a determination from the Enforcement Committee requiring removal of the deck constructed in 2019 on the eastern side of the existing commercial building on Lot 5 in order to bring the

structure into compliance with Executive Law § 806 and 9 NYCRR § 575.5. Fravor Aff. ¶ 15.

Penalty

Agency staff recommend that the Enforcement Committee determine an appropriate penalty in this matter based on consideration of the following relevant factors from the Enforcement Committee’s General Penalty Guidelines:

1. Potential Harm and Actual Damage

This factor focuses on the extent to which the violators’ conduct resulted in or could potentially result in harm to the environment or human health. The penalty should be proportional to potential or actual harm.

Respondents have expanded their commercial use building by constructing a deck that brings the structure closer to the mean high-water mark of Jennings Pond and is visible from Jennings Pond and neighboring properties. Fravor Aff. ¶ 8.

Respondents’ activities have been undertaken in derogation of the statutory goal of providing “adequate protection of the quality of the lakes, ponds, rivers and streams of the park and the qualities of their shorelines”. Executive Law § 806.

2. Culpability

The violators’ culpability is relevant in assessing the amount of a penalty; a higher penalty is appropriate where a violator is culpable for the violation. In assessing the degree of Respondents’ culpability, staff recommend consideration of the following:

(i) how much control Respondents had over the events constituting the violation; and (ii) the foreseeability of the violation.

Agency staff verbally advised Respondent G. Carrothers that a variance was needed for the construction of a deck along the eastern side of the building on Lot 5 prior to Respondents purchasing the subject property and constructing the expansion. Parker Aff. ¶ 4. Agency staff also verbally advised Respondent G. Carrothers of this same information during a meeting at Agency headquarters and in a site visit to the subject property. Parker Aff. ¶ 5. In August 2018, Respondent G. Carrothers submitted a variance application to the Agency and Agency staff issued a VIR advising Respondent G. Carrothers in writing that a variance was required for Respondents' proposal, including the proposal for a 16-foot wide deck on the eastern side of the structure. The VIR made clear that no part of the building expansion requiring an Agency variance could be undertaken until the Agency had issued an approval Order. Parker Aff. ¶¶ 8, 10.

After receiving no response to the VIR, on May 1, 2019, Agency staff sent an email asking the status of the proposal and whether Respondent G. Carrothers had any questions about the VIR. Parker Aff. ¶ 12. Less than a month later the Agency was alerted that a deck had been constructed along the eastern side of the structure on the subject property. Fravor Aff. ¶ 6. Respondent G. Carrothers was on notice that a variance was required to construct this deck and had been advised of this fact multiple times by Agency staff, both verbally and in writing, including prior to Respondents

purchasing the subject property. Respondent G. Carrothers chose to construct a deck in violation of the Agency's shoreline restrictions.

3. Cooperation

The cooperation of violators in remedying a violation and the self-reporting of a violation may be mitigating factors in determining an appropriate penalty. Those factors do not apply in this case, as Agency staff only discovered Respondents' violation when construction of the deck was reported to the Agency by a party other than Respondents. In addition, although Respondents have cooperated in Agency staff's investigation of the matter, they have not agreed to sign a settlement agreement with staff or otherwise resolve the violation with staff in accordance with Agency standards for resolving apparent violations of the shoreline restrictions. *Fravor Aff.* ¶ 13.

4. Extent of Compliance Attained Through Resolution

In this case, full compliance with the shoreline restrictions of Executive Law § 806 and 9 NYCRR § 575.5 will be achieved if Respondents are required to remediate their shoreline violation based on staff's recommendation. It is appropriate for the Committee to take the costs of remediating the shoreline violation into consideration in determining an appropriate penalty.

5. Importance to the Regulatory Scheme

This factor focuses on the importance of the violated requirements in achieving the goal of the underlying statute. The shoreline restrictions of Executive Law § 806 were enacted to protect the quality and shorelines of the lakes, ponds, rivers, and

streams of the Adirondack Park. Executive Law § 806(1). In this case, Respondents failed to obtain the required variance for the construction of their deck, resulting in the expansion of their commercial use building closer to the mean high-water mark of Jennings Pond. Fravor Aff. ¶¶ 8, 9.

CONCLUSION

Agency staff request a determination by the Enforcement Committee pursuant to 9 NYCRR § 581-2.6(d) that the apparent violation alleged in the NAV has occurred and is continuing to occur. Agency staff further request that the Committee determine appropriate injunctive relief and penalties against Respondents as authorized by 9 NYCRR § 581-2.6(d) and consistent with the NAV and Agency staff's recommendations.