



Adirondack Park Agency

SHERMAN CRAIG
Chairman

TERRY MARTINO
Executive Director

MEMORANDUM

TO: Regulatory Programs Committee

FROM: Richard Weber – Deputy Director, Regulatory Programs *REW*

DATE: May 26, 2017

RE: Variance Request P2016-100, Camp Majano LLC

OVERVIEW OF VARIANCE REQUEST

Camp Majano LLC (“applicant”) is the current owner of shoreline property and is seeking a variance to construct decks on a pre-existing shoreline structure (single family dwelling with boat slips) on Lake Placid. The applicant has requested a variance for the addition of two decks to the front (lake side) of the shoreline structure, resulting in an increase in non-compliance with the shoreline restrictions, specifically an increase in footprint. Each deck is proposed to measure 10 feet x 10 feet for a total of 200 additional square feet. The east deck will be over a pre-existing dock and the west deck will be over the water of Lake Placid. The applicant’s objective is to have open air decks added to the shoreline structure for morning and afternoon sun without removing any trees.

The variance site is located on Buck Island on Lake Placid in the Town of North Elba, Essex County, on an 18.6±-acre property in an area designated as Rural Use on the Adirondack Park Land Use and Development Plan Map. The tax map numbers for the property are: Section 33.016, Block 1, Parcel 2 and Section 33.015, Block 2, Parcel 9. The property is improved by a 10-bedroom single family dwelling (constructed 1917), a guest cottage (constructed c. 1920), and a single family dwelling with boat slips (constructed c. 1920).

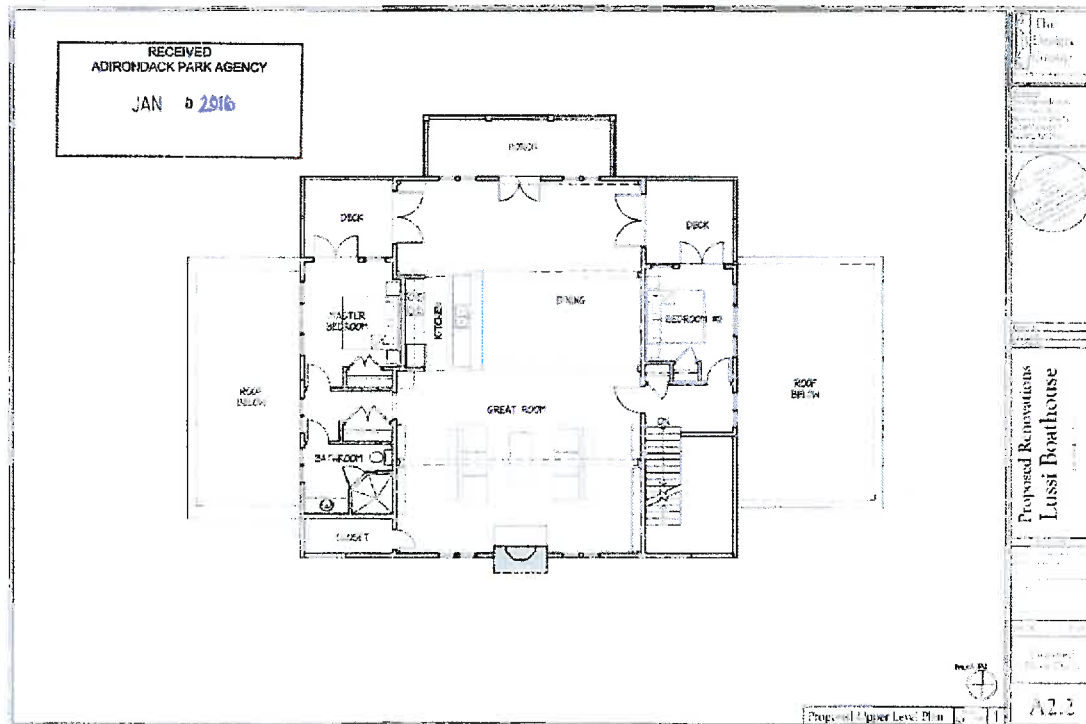
A variance from the Adirondack Park Agency is required for the two decks pursuant to Executive Law § 806. Executive Law § 806 requires that all principal buildings and accessory structures (except boathouses and docks) in excess of one hundred square feet in a Rural Use land use area be set back at least 75 feet from the shoreline.

The purpose of this memorandum is to summarize the facts from the record that are relevant to the Agency’s consideration of the requested variance.

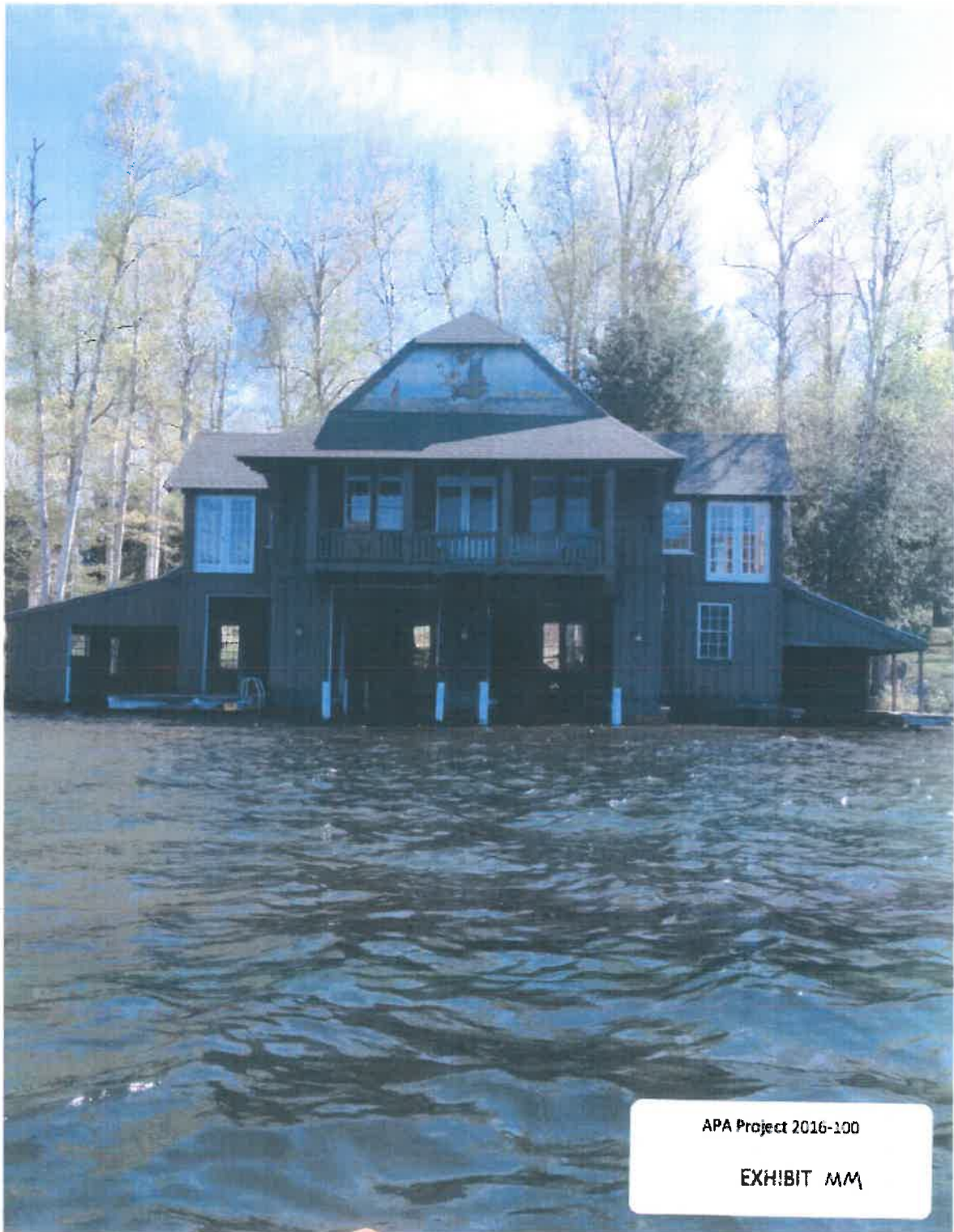
This is a photograph depicting the shoreline structure as it existed when the variance application was submitted (Exhibit CC-55):



This is a floor plan depicting the location of the proposed decks, as well as proposed gable additions that do not require Agency review (Exhibit F):



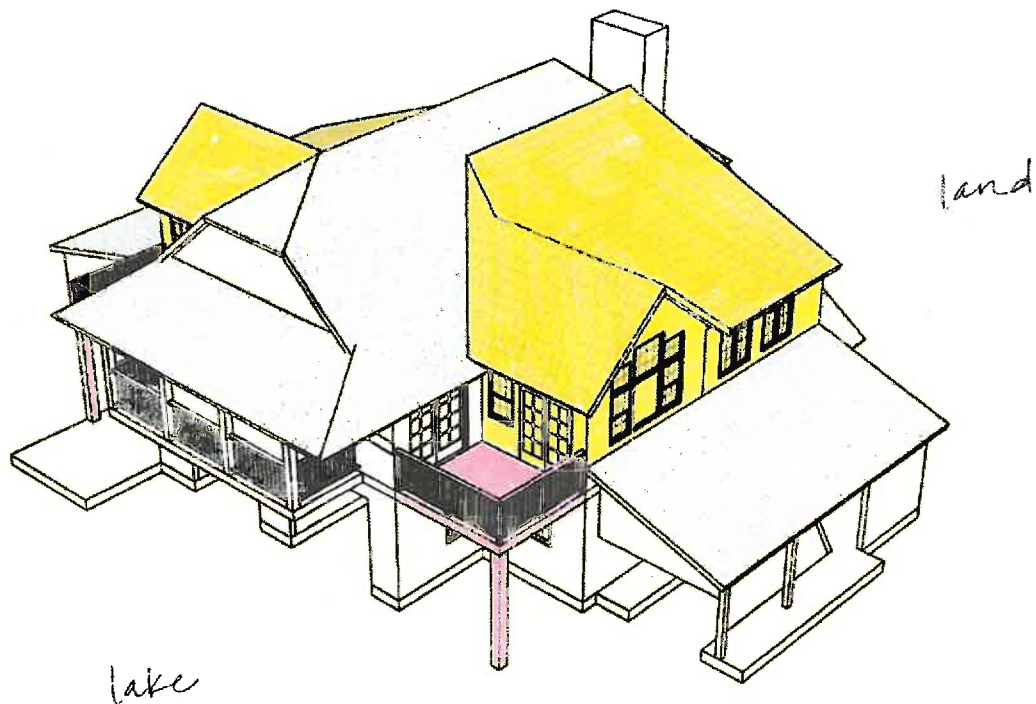
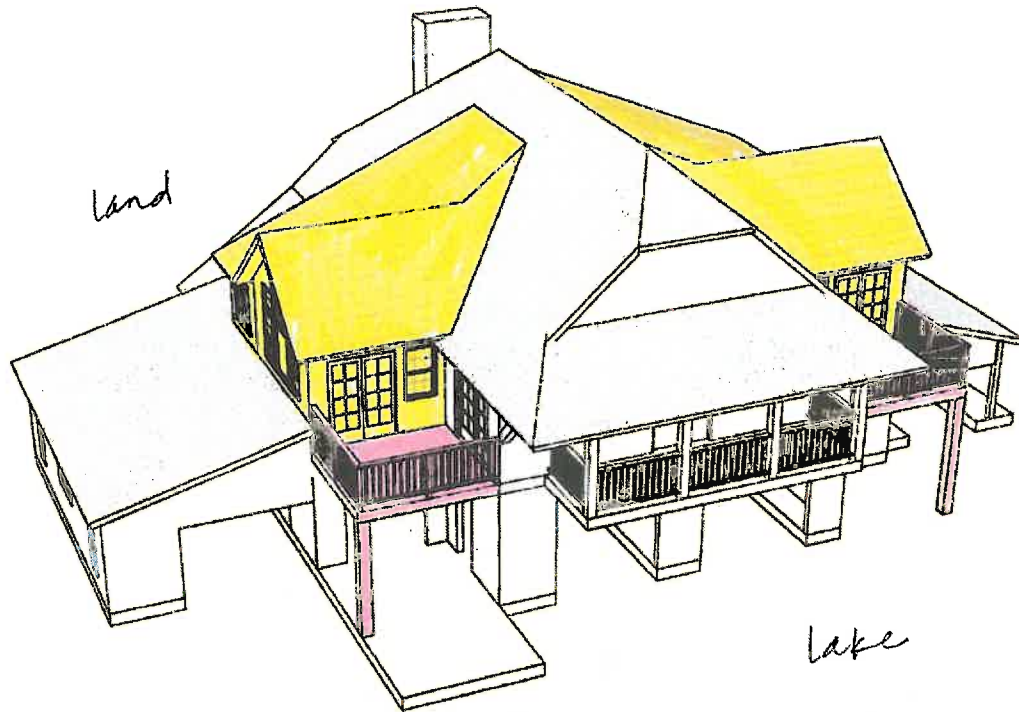
This is a photograph depicting the shoreline structure as it existed on May 20, 2017 (Exhibit MM):



APA Project 2016-100

EXHIBIT MM

These are schematic drawings depicting the location of the proposed decks (in pink) and non-jurisdictional gable expansions (in yellow), showing first the east deck and then the west deck (Exhibit HH):



PUBLIC HEARING

On Monday, May 22, 2017 at 2:00 pm at the Town of North Elba Town Hall, 2693 Main Street, Lake Placid, NY, Honorable Maria E. Villa, Administrative Law Judge, conducted a hearing pursuant to APA Act § 806 and 9 NYCRR § 576.5. In attendance for the applicant were Cristina Lussi (authorized representative), Arthur Lussi, and Martina Lussi. In attendance for the Agency were Paul Van Cott (Associate Attorney), Ariel Lynch (Environment Program Specialist 2), and Shaun LaLonde (Professional Engineer 2 Civil/Environmental). There were no members of the public in attendance; no public comment was given.

REVIEW BY OTHERS

In a February 16, 2016 letter, the Office of Parks, Recreation and Historic Preservation noted that the shoreline structure is eligible for listing in the State and National Registers of Historic Places as a contributing resource to the Buck Island Camps Historic District and determined that "the proposed work will have No Adverse Impact upon this historic resource" (Exhibit H).

At their June 15, 2016 meeting, the Town of North Elba Joint Review Board approved construction of the two decks that are the subject of this variance request, as well as the east and west gables that are non-jurisdictional for the Agency (Exhibit CC-11). On June 22, 2016, the Town of North Elba issued a building permit for the decks and gables (Exhibit SS).

The variance request does not require a Protection of Waters permit from the NYS Department of Environmental Conservation because the one new caisson supporting the west deck will be less than 12 inches in diameter and will not be filled with concrete (Exhibit AA).

APPLICABLE LAW

The Adirondack Park Agency may vary the restrictions of Executive Law § 806 if the applicant establishes that there are practical difficulties or unnecessary hardships in carrying out the strict letter of the restrictions. 9 NYCRR § 576.1(b) provides that an Agency 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." The purpose of the shoreline restrictions is protection of water quality in the lake and the quality of the shoreline itself. Executive Law § 806(1).

In determining whether to grant a variance, the Agency considers the factors set forth in 9 NYCRR § 576.1(c):

Whether the application requests the minimum relief necessary.

Staff believe that the applicant has provided a reasonable explanation why the two decks are the minimum relief necessary to achieve the applicant's objectives of

open air decks on their shoreline structure that will allow them to enjoy morning and afternoon sunshine. The decks do not extend further towards the lake than an existing porch on the structure, and do not increase the structure's width or height.

Whether granting the variance will create a substantial detriment to adjoining neighbors.

Staff agree with the applicant that the decks for which a variance is requested will not adversely affect neighboring properties because, among other reasons, they would be back-dropped by the gables on either side of the shoreline structure.

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

The Agency Board must consider whether there is a feasible alternative that does not require a variance and still meets the applicant's objectives. To provide information to the Agency Board needed to assess this variance factor, Agency staff consistently ask applicants to consider alternatives to a variance request. Because of staff's experience with applying the shoreline restrictions, staff often suggest alternatives for the applicant to consider. Some applicants find that these alternatives meet their needs and avoid the need for a variance. Others provide considered and/or substantiated responses explaining why suggested alternatives are not feasible or, even if they are feasible, why they do not meet the applicant's objectives. These responses become part of the application and make it possible for staff and the Agency Board to assess this variance factor.

Here, staff believe there are two feasible, non-jurisdictional alternatives (Alternatives A and B) that may meet the applicant's objectives.

Alternative A involves moving the gables 10 feet back towards the shore so that the decks can be built on the lakeward side and within the footprint of the existing structure.¹ Staff believe that this alternative would provide open air decks of the size sought by the applicant that offer lake views and morning and afternoon sunshine. As viewed from the lake, staff do not believe that this alternative would differ materially from the applicant's proposal.

The applicant has never responded to staff's questions about the feasibility of Alternative A and whether it would meet the applicant's objectives. The applicant acknowledged this at the hearing, and attempted to respond through testimony.² Unfortunately, the applicant's testimony did not address Alternative A. Rather, the applicant's testimony focused on the feasibility of having the decks on the rear of the structure and how that alternative would require the removal of trees. The applicant's lack of a substantive response to Alternative A makes it difficult for

¹ Exhibit O, Pg. 2, Item (4)(b) and Exhibit T, Pg. 2, Item 3

² Hearing recording from 1:17:45 – 1:22

Agency staff to conclude that this alternative is not feasible or, if it is, why it would not meet the applicant's objectives.

When the applicant wrote Agency staff on May 24, 2016 of its intention to proceed with construction of the gables during the variance review process, staff advised the applicant on June 8, 2016 that doing so could limit alternatives that would not require a variance.³ The applicant commenced construction in August 2016, and the gables are substantially completed.⁴ However, as the applicant proceeded with the gable construction at its own risk and after being advised of the implications of doing so by staff, staff's questions with respect to Alternative A remain valid. Alternative A still appears to be a feasible alternative that may meet the applicant's objectives.

Alternative B involves construction of decks over the boat-slips on the shoreline structure. The applicant has readily acknowledged that Alternative B is feasible, but asserts that this alternative would not meet its objectives principally because the alternative would require the removal of seventeen trees, 10 on the east and seven on the west sides of the structure, to allow sufficient sunlight onto the decks.⁵

Staff accept and appreciate that one of the applicant's objectives is to avoid removing trees as a result of the construction of new decks on the shoreline structure. To enable the Agency Board to evaluate the applicant's assertion that Alternative B would not meet this objective, in its May 18, 2016 information request, staff asked the applicant to identify the number and location of the trees that would need to be removed on a site plan.⁶

On May 24, 2016 the applicant responded by e-mail to staff's request. The response identified the type and size of the 17 trees, but did not specify their location.⁷ The applicant also declined to provide the site plan requested by staff.⁸

Staff asked for this information again in its June 8, 2016 information request, and gave the applicant the option of annotating an existing aerial photo to show the location of the trees that would need to be removed.⁹ This approach is consistent with staff's efforts to work with applicants to minimize the burden of providing information for variance requests whenever circumstances allow.

³ Exhibit T, Pg.1

⁴ Exhibits MM, NN, OO, PP and QQ

⁵ Exhibit P, Pg.1, Item 4(b)

⁶ Exhibit O, Pg.3, Item 5; Hearing recording, 1:43:20 – 1:44:08

⁷ Exhibit P, Pg. 1, Item 5(b)

⁸ Exhibit P, Pg. 2, Item 8. Staff note that the variance application requires and applicants routinely provide site plan maps to support variance requests. Review of Agency files over the past three years shows that professionally prepared plans were provided for all other variance requests. Site plan maps show the context and extent of the variance request in an objective and measurable way, including vegetation in the vicinity of the variance request. Most municipalities require similar maps as part of the application process for site plan review.

⁹ Exhibit T, Pg. 2, Item 3

In its April 29, 2017 response to staff's June 8, 2016 information request, the applicant did not provide the locational information for the 17 trees that staff had requested.¹⁰ At the May 22, 2017 variance hearing, the applicant acknowledged that the locations of the specific trees had not been provided and offered to identify them on aerial photographs as staff had requested.¹¹ Staff counsel at the hearing said that if the applicant wanted to provide this information staff would consider it. Further adding to the need for more information regarding the location of the trees, staff testimony at the hearing suggests that decks over the boat slips might receive sunlight without the removal of any or a substantial number of trees.

Without information from the applicant in response to staff's un-answered questions about Alternatives A and B, staff cannot assess whether there are feasible non-jurisdictional alternatives to the applicant's variance request that would meet its objectives.

The manner in which the difficulty arose.

The applicant's difficulty is self-created as the applicant has known since it became the owner of the variance site in 2015 that the shoreline restrictions would require a variance for the proposed decks.

The applicant has added to that difficulty by constructing the gables on the existing structure after being advised of the implications of doing so by Agency staff and prior to the Agency's determination of its variance request. The construction of the gables does not foreclose Alternative A as a potentially feasible alternative that may meet the applicant's objectives.

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.

Vegetative impacts

Staff have not been able to evaluate whether the proposed decks would be environmentally preferable to the non-jurisdictional decks, in part because of the lack of information concerning tree removal. It is unclear which trees the applicant believes would need to be removed to allow for sunlight to reach the non-jurisdictional decks over the existing boats slips (Alternative B).¹² In addition, as noted above, staff testimony at the hearing suggests that these non-jurisdictional decks might receive sunlight without the removal of any or a substantial number of trees.¹³

¹⁰ Exhibit CC, Pg. 1, VIR2-Item 3

¹¹ Hearing recording, 1:22:30 – 1:23:52

¹² Hearing recording, 1:29:15 – 1:36:22

¹³ Hearing recording, 1:36:25 – 1:37:40 and 1:40:20 – 1:42:15; Exhibit QQ

The applicant has remained consistent in its proposal to not remove any trees if the variance is granted. However, as reflected throughout the record and in testimony at the hearing, staff analysis indicates that four trees may need to be removed to allow sunlight to reach the applicant's proposed eastern deck.¹⁴ Tree removal has the potential to impact water quality and shoreline character, and staff have been unable to evaluate any impacts that would result from the removal of any trees.

Despite the applicant's proposal to not remove any trees, the applicant has opposed any variance condition that would require the retention of trees in the vicinity of the shoreline structure. Even though staff respect the applicant's pledge not to remove any trees if the variance request is granted, variances run with the land, so there is no guarantee that the trees would not be removed by a different owner or if the applicant discovers that some trees do need to be removed in order to allow sufficient sunlight on their decks.

Stormwater impacts

If the variance is granted, it will result in the expansion of the footprint of the shoreline structure by 200 square feet, 100 square feet of which will be over the water and the remainder over an existing dock. While there will be some additional water quality impacts from increased stormwater runoff, staff do not consider them significant enough to justify imposition of any water quality-related conditions.

During the review process, staff had asked the applicant to consider making some stormwater treatment improvements to its existing structure, such as gutters directing stormwater towards the shore, to offset the additional stormwater impacts that will occur if its variance request is approved. This is something that other applicants have done to provide an environmental benefit from their project. The applicant did not pursue this opportunity.

Whether the imposition of conditions upon the granting of the variance will ameliorate the adverse effects discussed to in the preceding variance factor.

If the Agency board grants the applicant's variance request, Agency staff recommend a condition that prohibits the enclosure of the decks without a further Agency review.

As part of any approval, Agency staff also recommend the inclusion of a condition that requires the retention of trees for a distance of 50 feet on either side of the existing shoreline structure. This condition would be subject to amendment upon request from the applicant to the Deputy Director – Regulatory Programs pursuant to 9 NYCRR § 576.9. Staff believe that the tree cutting condition would be a reasonable precaution to ensure that the shoreline character immediately surrounding the structure is permanently protected as envisioned by the applicant, while still allowing for the possibility of future tree removal subject to review and approval by Agency staff. Staff note that vegetative removal or even planting

¹⁴ Hearing recording, 1:29:15 – 1:36:22.; See also, Exhibit O, Pg. 3, Item 5 and Exhibit T, Pg.3. Item 6

conditions are often required by the Agency Board as part of variance approvals when justified by the circumstances. Here, staff believe that the lack of certainty about any future tree removal makes this a reasonable and appropriate condition.¹⁵

CONCLUSION

After reviewing the variance factors, staff are unable to conclude that the “adverse consequences to the applicant from denial of the variance request are greater than the public purpose sought to be served by the” shoreline restrictions. Based on the application, the exhibits, and the recording of the hearing, the applicant has not demonstrated that there are no feasible non-jurisdictional alternatives to its variance request that would meet its objectives. Staff are also unable to conclude that approval of the variance request is environmentally preferable to non-jurisdictional Alternative B. Thus, it is unclear what adverse consequences, if any, the applicant would incur from denial of its variance request or the full extent of impacts to the shoreline restrictions. Furthermore, the applicant’s difficulty is self-created, and the risk that it took in building the gables on the existing structure before an Agency determination on its variance request is entirely its own.

The applicant’s decision not to provide certain necessary information to date has resulted in the inability of staff to assess whether there are feasible non-jurisdictional alternatives to its variance request that would meet the applicant’s objectives. Specifically, the applicant failed to respond to staff’s questions whether the non-jurisdictional alternative of moving the decks back 10 feet towards the shore is not a feasible option or whether it meets the applicant’s objectives (Alternative A). Also, the applicant did not respond to staff’s request for specific locational information about the trees that the applicant claims would need to be removed if non-jurisdictional decks were built over the existing boat slips (Alternative B). Accordingly, even though the applicant’s request can be assessed for other variance factors, staff are unable to recommend its approval.

To properly evaluate the applicant’s variance request with respect to alternatives and impacts, Agency staff believe that the applicant should provide the locational information about the trees it claims would need to be removed for Alternative B. In addition, staff believe that the applicant should provide a substantive response to whether Alternative A is feasible, and if so, whether it would meet the applicant’s objectives. The Agency Board would then be able to assess whether feasible non-jurisdictional alternatives exist to the requested variance that would meet the applicant’s objectives, and whether granting the variance request is environmentally preferable to the non-jurisdictional alternatives. Staff believe that the Agency Board could act at the June meeting to provide the applicant the opportunity to submit this supplemental information in support of its variance request.

¹⁵ Hearing recording; 1:45:15 – 1:46:05

Agency staff recognize and respect the Agency Board's discretion to act on the applicant's variance request as it deems appropriate. If the Agency determines to approve the variance, Agency staff recommend inclusion of the conditions discussed in this memorandum as part of that determination.
