

THIS IS A TWO-SIDED DOCUMENT

 <p>Adirondack Park Agency</p> <p>P.O. Box 99, 1133 NYS Route 86 Ray Brook, New York 12977 Tel: (518) 891-4050 Fax: (518) 891-3938 www.apa.ny.gov</p>	<p>APA Order Granting Variance 2017-0032</p>
	<p>Date Issued: October 13, 2017</p>
<p>In the Matter of the Application of KIMBERLY DELVECCHIO AND RANDALL CALE Permittees</p> <p>for a variance pursuant to Executive Law § 806</p>	<p>To the County Clerk: This order must be recorded on or before December 12, 2017. Please index this Order in the grantor index under the following names:</p> <ol style="list-style-type: none">1. Kimberly DelVecchio2. Randall Cale

SUMMARY AND AUTHORIZATION

Kimberly DelVecchio and Randall Cale are granted a variance, as conditioned herein, from the applicable 75-foot shoreline structure setback required by Section 806(1)(a)(2) of the Executive Law ("Adirondack Park Agency Act"), to allow for the construction of a 100-foot long natural boulder retaining wall within the mean high water mark of Lake Champlain, in an area classified Rural Use by the Official Adirondack Park Land Use and Development Plan Map in the Town of Essex, Essex County.

Nothing contained in this Order shall be construed to satisfy any legal obligations of the applicants to obtain any governmental approval or permit from any entity other than the Agency, whether federal, State, regional or local.

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 Lake Champlain for all accessory structures and principal buildings greater than 100 square feet in size. The applicants requested a variance from this structure setback requirement pursuant to § 806(3)(a) of the APA Act.

RELEVANT FACTS AND BACKGROUND

Variance Site

The variance site is a 0.58± acre parcel of land identified on Town of Essex Tax Map Section 49.15, Block 2, as Parcel 1, and described in a deed from Kimberly A. DelVecchio to Kimberly A. DelVecchio as Trustee of the Kimberly A. DelVecchio Revocable Trust, dated March 6, 2014, and recorded March 7, 2014 in the Essex County Clerk's Office at Book 1760, Page 229. The applicants initially purchased the variance site in 2013.

The variance site has approximately 350 feet of shoreline on Lake Champlain. It is developed with a pre-existing single family dwelling and garage. The dwelling and garage are set back approximately 30 feet from the mean high water mark of Lake Champlain (99.8 feet above mean sea level).

There is an existing rock retaining wall structure in the same vicinity as the new retaining wall authorized herein. The existing retaining wall is approximately 1,029 square feet in footprint measured in plan view. The structure is in disrepair and will be removed prior to construction of the retaining wall authorized herein.

The variance site is located in the Whallon Bay portion of Lake Champlain where the shoreline runs west and east and is subject to wind and wave action from the north. The fetch of the wind and waves from the north range from 24.5 miles from South Hero, Vermont to 3 miles from Charlotte, Vermont. This wave action has resulted in continuous shoreline erosion of the variance site that has increased as shoreline vegetation and the current retaining wall on the variance site have deteriorated. The applicants' dwelling is approximately 7 feet from the top of the eroding bank at its closest point. The ongoing shoreline erosion threatens the foundation of both the dwelling and garage, and it is apparent that the existing shoreline will continue to fail due to the natural wave action at the variance site.

Slopes in the vicinity of the existing residential development range from 0 to 3 percent. Slopes along the shoreline of Lake Champlain in the location of the authorized retaining wall are greater than 25 percent.

There are three large deciduous trees on the steep bank above the authorized retaining wall, and trees and hedges between the garage and the lake as shown on the site plan maps. The shoreline west of the retaining wall is vegetated with a mix of coniferous and deciduous trees and shrubs.

There is seasonal shrub vegetation in the vicinity of the mean high water mark of Lake Champlain that grows relative to the seasonal changes of the lake elevation.

The adjoining property to the east of the variance site is developed with a single family dwelling on the south side of Albee Lane. The shoreline on this property is protected with a 325-foot long boulder retaining wall. The adjoining property to the west of the variance site is also developed with a single family dwelling on the south side of Albee Lane. The top of bank of the shoreline of this property is much lower in elevation relative to the elevations of the variance site. The shoreline of this lot includes natural stones and shows some erosion.

Variance Request

The variance request involves the replacement and expansion of an existing rock retaining wall structure within 75 feet of the mean high water mark of Lake Champlain. The existing structure is approximately 1,029 square feet in footprint and the new structure will be approximately 1,905 square feet in footprint. The new structure will be approximately 6 feet in height, which is 1 foot taller than the existing structure, and will extend 9.5± feet closer towards Lake Champlain than the existing structure. The existing and new structures are both 100± feet long.

The retaining wall authorized herein was designed to stabilize the shoreline and absorb the energy of the waves through the use of variously sized natural boulders. The existing vegetation located on the variance site to the east of the retaining wall will remain undisturbed. The existing seasonal shrub vegetation located in the vicinity of the mean high water mark will be replaced by planting live cuttings and live stakes within the retaining wall as shown on the Planting Plan described below.

The applicants originally proposed a larger retaining wall, along with two concrete retaining walls. During the review process, the two concrete retaining walls were removed from the proposal, and the stone retaining wall was reduced in size.

The variance proposal is shown on the following maps and plans (Project Plans):

1. Sheet 1 titled "DelVecchio – Cale, 73 Albee Lane, Essex, New York, Proposed Plan" dated March 26, 2016 and last revised January 2, 2017 (Proposed Plan – Sheet 1).
2. Sheet 2 titled "DelVecchio – Cale, 73 Albee Lane, Essex, New York, Proposed Plan" dated March 26, 2016 and last revised July 11, 2017 (Proposed Plan – Sheet 2).
3. Sheet 3 titled "DelVecchio – Cale, 73 Albee Lane, Essex, New York, Proposed Profile" dated March 26, 2016 and last revised January 2, 2017 (Proposed Profile).
4. Sheet 4 titled "DelVecchio – Cale, 73 Albee Lane, Essex, New York, Proposed Plan" dated March 26, 2016 and last revised July 11, 2017 (Proposed Plan – Sheet 4).
5. Sheet 5 titled "DelVecchio – Cale, 73 Albee Lane, Essex, New York, Planting Plan" dated September 12, 2017 (Planting Plan).

A reduced-scale copy of Proposed Plan - Sheet 4 is attached as a part of this Order for reference. The original, full-scale maps and plans described in this paragraph are the official plans for the variance, with copies available upon request from Adirondack Park Agency headquarters in Ray Brook, New York.

PROCEDURAL HISTORY

Following receipt of the variance application, the Agency notified all parties as required by Agency regulations. On September 7, 2017, the Agency held a public hearing on the variance request in the Town of Essex. The hearing was attended by Agency staff, one of the applicants, their consultant and the Town of Essex Supervisor. No other members of the public attended and there were no comments other than support for the variance voiced by the Supervisor.

USACE and DEC Permitting

The proposed retaining wall also requires review and approval from New York State Department of Environmental Conservation (DEC) pursuant to Section 401 – Clean Water Act Water Quality Certification and Article 15 Title 5 Excavation and Fill in Navigable Waters, and from U.S. Army Corps of Engineers (ACOE) pursuant to Nationwide General Permit #13.

On October 10, 2017 the applicants were granted approval by DEC for the project proposed herein under DEC general permit GP-5-10-002. By letter dated November 7, 2016 the ACOE informed the applicants that the project may be authorized under Department of the Army Nationwide General Permit #13.

DISCUSSION

The Agency may 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).

§ 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.

The adverse consequences of denial include a further loss of land, continuation of an on-going safety hazard, and resultant loss of the existing dwelling and garage.

The public purposes of the shoreline restrictions are the protection of the water quality of Lake Champlain and the quality of the shoreline of the Lake.

As authorized and conditioned herein, construction of the natural boulder retaining wall will not result in additional degradation of water quality and shoreline quality. Water quality will be improved by reducing sediment entering the lake through erosion. The natural boulders and plantings will minimize aesthetic impacts and maintain the quality of the shoreline.

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

The applicants originally proposed a larger retaining wall, along with two concrete retaining walls. The final design includes only one natural boulder retaining wall at the minimum size and shape necessary to stabilize the shoreline. The amount of material required to construct the retaining wall has been reduced to only that necessary to maintain a stable slope.

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

The retaining wall has been designed to stabilize the shoreline and absorb the energy of the waves through the use of variously sized natural boulders. The authorized wall may help protect the west end of the retaining wall located to the east of the variance site. In addition, the authorized wall will not change the prevailing wave patterns to the west or deflect wave energy from the variance site toward the shoreline to the west.

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

The applicants evaluated alternatives that would not have required a variance. The option to replace the existing wall in kind or construct a smaller wall would not eliminate the ongoing erosion or stabilize the shoreline as the existing retaining wall has not adequately protected the shoreline. Due to the substantial wave energy on the variance site, non-jurisdictional vegetative plantings or other methods would not provide enough protection to eliminate the ongoing erosion and sedimentation.

The shoreline can only be stabilized within the 75-foot structure setback area as this is the area where the shoreline erosion is occurring.

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

The applicants purchased the property in 2013, and the single family dwelling and garage were already on the site. The erosion of the shoreline of the variance site has occurred naturally as a result of the wave action of Lake Champlain. The existing retaining wall was not substantial enough to prevent shoreline erosion, and shoreline erosion has increased as the existing retaining wall and shoreline vegetation deteriorated. There is no way to alleviate the erosion on the variance site without stabilizing the shoreline. Any severe weather events will likely exacerbate the erosion along the shoreline.

§ 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.

The retaining wall is to be constructed in a manner such that the natural boulders are sized and placed to minimize impacts to aesthetic resources while providing for a stable slope. The three large deciduous trees on the steep bank above the authorized retaining wall, and trees and hedges between the garage and the lake as shown on the Project Plans, will not be disturbed and will remain intact. The shoreline east of the retaining wall is vegetated with a mix of coniferous and deciduous trees and shrubs that will remain undisturbed.

The proposed live cuttings and live stakes within the footprint of the retaining wall will add vegetation to the structure. The construction of the retaining wall will have a visual impact on the shoreline of Lake Champlain in the immediate vicinity of the variance site. However, over a period of time, the visual impacts will be partially mitigated if existing vegetation is maintained and new vegetation is successfully established on the retaining wall and slope above the structure.

Construction of the retaining wall in conformance with the Project Plans will prevent additional erosion and sedimentation resulting in impacts to surface water quality of Lake Champlain. Compliance with NYSDEC and Army Corps permits will serve to provide additional protection during construction activities limiting water quality impacts.

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

1. This Order shall be recorded in the Essex County Clerk's Office by **XXXX**.
2. The authorization to construct the retaining wall and stabilize the slope as authorized by this Variance Order shall expire four years from the date this Order is recorded in the Essex County Clerk's office unless written authorization has been obtained from the Agency extending this deadline.
3. The variance shall be undertaken as depicted on the Project Plans. Any changes to the locations, sizes, dimensions, or other aspects of the structure shall require a new or amended Agency Order or a letter of compliance.

4. Within 35 feet of the mean high water mark, except for the clearing depicted on Proposed Plan - Sheet 2 and Proposed Profile of the Project Plans, no trees, shrubs, or other woody stemmed vegetation may be cut, culled, trimmed, pruned or otherwise removed or disturbed without prior written Agency authorization, except for the removal of dead or diseased vegetation, rotten or damaged trees, or any other vegetation that presents a safety or health hazard.

Additionally, the three trees between the dwelling and Lake Champlain shown on the Project Plans shall not be cut, culled, trimmed, pruned or otherwise removed or disturbed on the variance site without prior written Agency authorization. If any of these trees do not survive, documentation of the loss shall be provided to the Agency within 30 days of the loss and a revised planting plan to replace the tree that has not survived shall be provided to the Agency within 60 days of the loss. Any revised planting plan, once approved, shall be fully implemented the first growing season after removal of the affected tree.

5. All shrubs depicted on the Planting Plan shall be planted during the construction of the retaining wall. Shrubs that do not survive shall be replaced annually until established in a healthy growing condition.
6. Plantings on the variance site shall only include species native to the region. Further, no plant species recognized on the New York State Department of Environmental Conservation's most recently updated list of Prohibited and Regulated Invasive Plants (as listed in 6 NYCRR Part 575) shall be planted on the variance site.
7. When brought from off-site, all equipment including but not limited to trucks, excavators, tractors, etc., and hand excavation tools such as shovels, rakes, and picks, to be used on the variance site shall be clean and free of soil, mud, or other similar material. If washed on the variance site, equipment shall be washed in one location to prevent the distribution of propagules among different wash sites. Any fill brought to the site shall not contain invasive species.
8. At the request of the Agency, the permittee or the permittee's successor shall report in writing the status of the variance, including details of compliance with any terms and conditions of this permit.

CONCLUSION

The Agency has considered all of the standards and factors for issuance of a variance as set forth in 9 NYCRR Part 576. The Agency hereby finds that the applicants' variance request meets the approval criteria, provided the authorized activities are undertaken as described herein and in compliance with the conditions set forth above.

A variance of the terms of the Executive Law is not personal and runs with the land. Recording of this Order is intended to provide notice to subsequent owners of the variance site.

APA Order & Variance
2017-0032

ORDER issued this day
of , 2017.

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ADIRONDACK PARK AGENCY

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

STATE OF NEW YORK
COUNTY OF ESSEX

On the day of in the year 2017, 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:TES:slp