

*SAMPLE COVER LETTER TO ZBA CHAIR*

[November 12, 2009 Example]

ZBA Chair  
Zoning Board of Appeals  
Agency-approved Local Land Use Program

Re: Town with an ALLUP-Variance (Applicant: Reversal Determination)

Dear ZBA Chair:

I am writing on behalf of the Adirondack Park Agency's November 12, 2009 receipt of the record of the Zoning Board of Appeals (ZBA) grant of the Applicant's variance. Please be advised that, pursuant to sections 806(3) and 808(3) of the Adirondack Park Agency Act (the APA Act), we hereby reverse the variance. The variance would have allowed a proposed 557 square foot deck and attached walkways 42-feet from the shoreline of *The Lake*, in non-conformance with the shoreline restrictions of the APA Act.

The two-tier system provided in the APA Act authorizes the Town administration of the shoreline setbacks provisions of Section 806 of the Act as part of its Agency-approved local land use program. The Town's Code establishes a 75-foot setback from the shoreline for the Applicant's parcel. The Act establishes a setback of 50-feet from the mean high water mark for structures in excess of 100 square feet in area at this location on *The Lake*. Therefore, the proposal requires a variance from both Town and APA Act standards that apply to expansion of the non-conforming structure. This is the second review of this matter by the Agency. I have asked Agency staff to explain the record and reasons for this determination in detail in a separate memorandum included herewith. In our deliberation of the variance, we evaluate both Town Law and the APA Act. The attached memorandum is an integral part of this determination.

I have also enclosed the Agency's published guidance on how we address the "appropriate statutory basis" for a variance of APA Act standards under the authority of the LLUP Zoning Board of Appeals. The enclosed guidance explains how the decision criteria described in Part 576 of the Agency's regulations to evaluate local variance referrals.

I look forward to working with you to ensure effective administration of the Town's local land use program. With respect to the Applicant variance, I hope that we can begin fresh dialogue between our local

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services staff and the Town's professional staff and board members to look at what might be appropriate next steps to reach a shared view for the land use program and the resources of the town. I appreciate your volunteer service and how hard it can be to resolve these often difficult questions of rights and opportunity for development in the sensitive shoreline area in your community.

Sincerely,

APA Executive Director

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MEMORANDUM

TO: Executive Director  
FROM: Planning Director & Agency Counsel  
RE: Agency-approved Local Land Use Program Variance (Applicant:  
Reversal Determination)

This memorandum addresses a variance granted by the Town from the statutory shoreline setback established for tax parcel 000.00-0-00, located within the Moderate Intensity Use land use area in the vicinity of the shoreline of *The Lake*. The record of this determination was received by the Agency on November 12, 2009. An Agency determination whether the Town decision is founded on the appropriate statutory basis pursuant to Section 808(3) of the APA Act must be transmitted to the Town by December 12, thirty days after the receipt of the record. This memorandum reviews the record and applicable decision standards, and recommends an Agency determination that the variance is not supported by the record before the Agency.

**The Record**

This is the second referral of a variance approval by the Town for substantially the same proposal for this parcel of land. The first proceeding, resulted in a record received July 31, 2009, authorizing a 593 square foot deck extending to within 41-feet of the shoreline of *The Lake*. The Agency advised the Town in a letter dated August 11, 2009 that it was reversing the Town's authorization "without prejudice to reconsideration of the matter by the ZBA."

That record consisted of:

1. Variance Application, received by the Town on June 19, 2009 from Applicant Engineer on behalf of Applicant.
2. Minutes of the Town Zoning Board of Appeals for July 14, 2009.
3. July 16, 2009 Planning Office notification of decision addressed to Ms. Applicant.
4. Applicant Engineer's Site Plan, issued 6/15/09, in three sheets: Sheet A-101, an overall site plan; Sheet A-102 showing floor plans for basement and first floor; and Sheet A-201

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showing elevations for the proposed structure from all four sides.

This proceeding followed the Agency's August reversal involving the same property and resulted in the following record received November 12, 2007:

1. Minutes of the October 20, 2009 Town Zoning Board of Appeals meeting.
2. Notice of Adirondack Park Variance Determination APA Approved Local Land Use Program. Addressed to Local Government Services, from the Town Code Enforcement Officer, dated November 10, 2009.
3. Site Plan prepared by Applicant Engineer, issued 6/15/09, in three sheets: Sheet A-101 with hand written annotation, "Revised to show reduced deck size," dated 9/14/09; Sheet A-102 showing floor plans for basement and first floor; and Sheet A-201 showing elevations for the proposed structure from all four sides.

**Pertinent Facts**

**Existing conditions and proposed construction:**

The Applicant's property is within the Town's R-3 Residential Medium Density Zoning District. The Town of LLUP Zoning Law establishes 75-feet as the minimum shoreline setback for structures exceeding 100 square feet in size. The property is located in a Moderate Intensity Use land use area as designated by the Adirondack Park Land Use and Development Plan Map where the statutory shoreline setback is 50-feet.

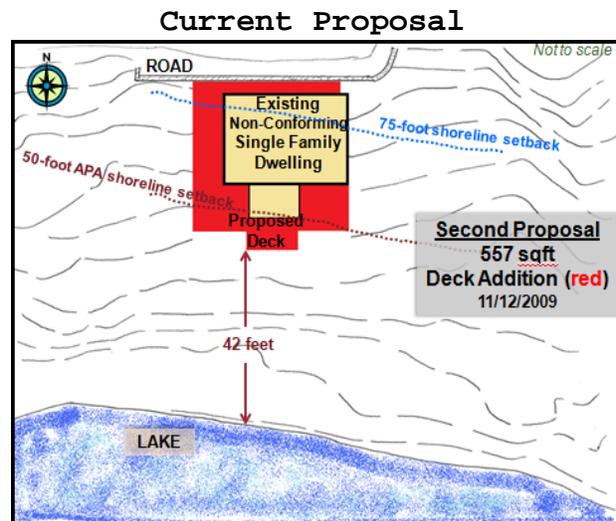
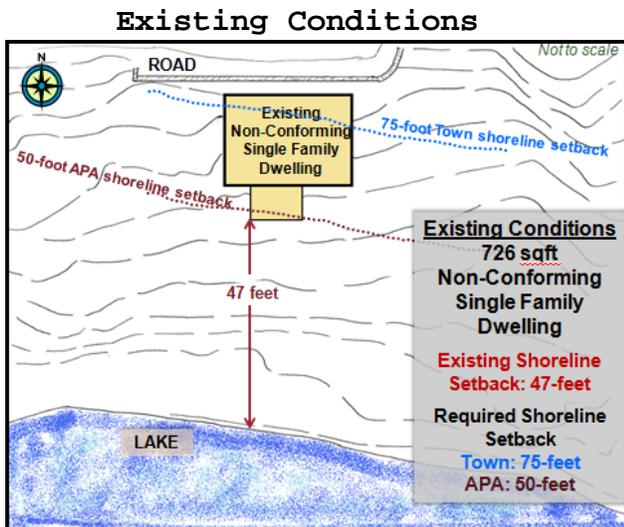
The record describes the subject property as an irregular shaped lot, 108 x 74 x 94 x 58 feet, on Lake Rd. (tax map parcel 000.00-0-00). The lot, extending between the road and the shoreline, is improved by a small single family dwelling with a total footprint of 726 square feet indicated on the current plans, located 47-feet from the shoreline at its closest point.

The plans submitted, as part of the record, also indicate a partially finished walk-out basement within the 726 square feet footprint. In addition, the plans include a "screen porch" in the finished structure, separately identified on the June plans.

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The applicant proposes to construct a 344 square foot deck attached to the shoreline side of the existing non-conforming dwelling. The deck is proposed to be 42-feet from the shoreline and to be built around the former screened porch that extends from the middle of the dwelling on the shoreline side. In addition, the deck is proposed to be attached to a new 4-foot-wide walkway which will run the length of the west side of the existing dwelling and continue across most of the roadside portion of the dwelling. A set of stairs is proposed to be built from the side walkway. A total of 557 square feet of deck and walkways are proposed to surround the existing dwelling on three sides. Six hundred and ninety six (696) square feet of the existing dwelling (not including the "laundry space"/walkout basement), and 425 square feet of proposed deck and walkways are within the Town's 75-foot shoreline setback area. One hundred and fifty square feet of the proposed deck and walkways are within the Agency's statutory 50-foot shoreline setback area.

This determination is a modification of a variance which was granted by the ZBA in July 2009. The July 2009 variance was subsequently reversed by the Agency in August 2009. The current project has been modified to remove two sections on either end of the deck measuring 2 x 8 feet and 2 x 10 feet. This reduced the proposed non-conforming shoreline setback by one foot and the total area of increased non-conformance from the Town's shoreline requirements from 461 square feet to 425 square feet. This proposal also reduced the total area of increased non-conformance from the Agency's shoreline requirements from 234 square feet to 150 square feet.



**ZBA Proceeding:**

The request for the area variance for the proposed deck, stairs and landing attached to the existing non-conforming single family dwelling were considered by the ZBA on October 20, 2009. At the meeting, variances for alterations to a non-conforming structure and deficient side, front, rear and shoreline setbacks were considered. The representative for the project, Applicant's Engineer, explained in the minutes that the applicants propose to construct a deck of a "minimum size to accommodate a table, chairs and a grill." Mr. Engineer also states that this was the only location for the deck, as the property is sloped toward the lake. The record indicates that the front walkway is necessary to address a safety concern.

The minutes reflect that, in response to the APA's reversal of this variance based on the prior record, there was in fact no screened-in porch. This confusion arose from the incorrect labeling of the 12 x 8 foot portion of the dwelling on earlier plans. The 12 x 8 foot portion is actually a fully enclosed portion of the dwelling. The plans now before the ZBA have been changed to reflect this.

**ZBA Determination:**

On October 20, 2009, the ZBA approved a motion to grant a shoreline setback variance for the deck and attached walkways.

The Board found that:

1. The benefit could not be achieved by any other means feasible to the applicant besides an area variance; this is a series of setback requirements that require a variance. They are dimensional considerations.
2. There will be no undesirable change in the neighborhood character or to nearby properties. All of the homes are in a row with decks of some sort to enjoy outside living.
3. The request is not substantial; this property has very challenging topography. The applicant has shown that this request for lakeside deck surface is a minimum for supporting a table, chairs and a grill for outdoor cooking.
4. The request will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; storm water measures will be taken to mitigate those possibilities.
5. The alleged difficulty is not self-created, inasmuch that the

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applicant did not design the lay of the land. In order for the applicant to enjoy their lakeside property, they need a flat surface.

The benefit to the applicant is not outweighed by the potential detriment to health, safety and welfare of the community.

**Discussion**

In granting the requested "area variance" allowing the deck to be placed 42-feet from the shoreline, varying both the Town 75-foot and the APA Act 50-foot shoreline setbacks, the ZBA nominally followed Town Law, sec. 267-b(3), reiterated in the Town's zoning law. This involves review of the following:

- Character of the neighborhood;
- Alternatives that might eliminate the need for or minimize the size of the variance sought;
- Whether the variance is substantial;
- Whether the variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood;
- Whether the variance was self created.

Town Law also directs that the ZBA may only grant the "minimum variance that it deems necessary and adequate ...." Town Law also refers to the "difficulty" giving rise to the request for variance.

These considerations parallel, in part, the decision elements set out in Agency regulations to explain and elaborate the essential elements for variance approval under the APA Act. The comparable list from 9 NYCRR Part 576 is:

- Practical difficulties in carrying out the strict letter of the provisions of the official Adirondack Park Land Use and Development Plan governing shorelines;
- Whether the applicant requests the minimum relief necessary;
- Whether the variance will create a substantial detriment to adjoining or nearby landowners;
- Whether the variance 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.

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The record identifies the difficulty addressed here as the steep slope leading to the waterside; conflicts with a public or shared pathway along the mean high water; and safety concerns related to access from the road to the camp.

The "correction" relating to the "screen porch" did not address the lawfulness of that expansion which may have required a prior variance, as indicated by the statements in the June record by the contractor that earlier work which was initiated and later abandoned on this site may have been done without proper local approvals. Similar questions might be raised regarding the enclosed or proposed enclosed basement space, though the Agency would not have considered those to involve the APA Act under regulations in effect prior to December 31, 2008. We note that this proceeding appears to be a good faith effort to remedy any shortfalls regarding compliance with the Town's regulations associated with the prior work.

It is Agency staff's position that a variance authorizing what are effectively two decks, one on either side of the enclosed porch, along with the walkway is not the "minimum variance" contemplated under either Town Law or the Agency's regulations. There are two considerations: the first involves the difficulty alleged as a basis for a variance; that is, safe access and minimum exterior space. The record's assertion that the additional exterior structures are to "enjoy the view" is not a basis for the difficulty standard, but rather a benefit sought by the landowner. A structure for the enjoyment of the viewer could be placed in another location instead of protruding closer to the shoreline. The requested assemblage of decks and walkways is clearly not the minimum necessary for safe access to the exterior. Other configurations or locations on the property lack serious consideration. Secondly, a mere personal benefit is not sufficient to overcome the legislative rationale for the minimum "shoreline restrictions" of the APA Act. In this instance, a former outdoor space (the "screened porch") has been enclosed, resulting in a request for new outdoor deck space. These latter considerations follow a pattern of shoreline development where existing structures are enlarged with components built increasingly closer to the shoreline. The expansions change the character of the shoreline over time and lead to removal of native vegetation and degradation of lake water quality. The proposed decks would be almost entirely within the Town's 75-foot and approximately 30% within the Agency's statutory 50-foot shoreline setback. In addition, the only portion of the proposed project outside of the Town's 75-foot shoreline setback is the 32 x 4 foot walkway on the roadside of the house. This is the section that the applicant states is needed for "safety" due to the topography of the parcel. Portions of the walkway outside of the 50-foot shoreline setback area would

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not involve the APA Act, although they may be an appropriate part of the ZBA determination.

Any "alleged difficulty" in this matter is self-created, as the landowner has requested a 557 square foot deck and walkways surrounding three sides of the existing non-conforming dwelling. The dwelling is located 47-feet from the shoreline of *The Lake* and currently encroaches 3-feet into the Agency's statutory shoreline setback area and 28-feet into the Town's shoreline setback area. Any additions to the shoreline side of the structure via the proposed deck would further increase the shoreline non-conformance of the structure. The record lacks a discussion of possible alternatives that would provide a place to sit outdoors while minimizing the size and location of the proposed structure. Such opportunities include a patio at ground level, or in different relationships to the existing structure, such as only on one side.

**Conclusion**

The record in this matter fails to support the ZBA's granting of a shoreline setback variance under the APA Act or under Town Law because it is not the minimum variance necessary to provide relief; there is little discussion of alternatives; and the difficulty is largely self-created.