



M E M O R A N D U M

To: James Townsend, Counsel
From: Paul Van Cott, Associate Attorney
Date: October 17, 2014
Re: Delegation Resolution

For public comment, please find attached: (1) proposed changes in legislative format to the Agency's Delegation Resolution to delegate limited variance approval authority to the Deputy Director Regulatory Programs (DDRP) and make other, non-material amendments to the document; and (2) a proposed consensus rule. The Agency will consider public comment and possible action on the proposed amendment to the Delegation Resolution and initiation of a consensus rule making at its November meeting.

This memorandum provides background information to assist the public in understanding our current variance process, how the delegation would affect the existing process, and the authority for the Agency to make such a delegation.

Amendment of Delegation Resolution

The proposed limited delegation of variance approval authority to the DDRP involves three sections of the Delegation Resolution:

- (1) Powers reserved to the Agency (Page 3, Section I(C));
- (2) Authority delegated to the DDRP (Page 7, Section IV(B)); and
- (3) Responsibilities of the Regulatory Programs Committee (Page 19, Section VIII(C)(2)(b)).

The proposed amendments are intended to be consistent with existing language and formatting in the document.

The Agency revised staff's proposal during its October, 2014 meeting and authorized staff to seek public comment on the proposed amendment.

Staff propose delegation of variance approval authority to the DDRP for variance requests involving:

- (1) municipally-sponsored proposals;
- (2) dam safety proposals under the jurisdiction of the Department of Environmental Conservation;
- (3) shoreline stabilization structures necessary for protection of life or property;
- (4) highly-developed portions of Hamlets with local planning and zoning boards; or
- (5) proposals with minor impacts, including impacts to adjoining uses.

If Agency delegates the proposed variance approval authority to the DDRP, the staff review process would remain the same, and the DDRP would apply the same approval criteria as the Agency, thus ensuring consistent decision-making for all variance requests. Even for the delegated variance requests, the DDRP could still refer a particular variance request to the Agency for review, or an Agency Member could request review of a particular variance request.

Consensus Rule

The proposed consensus rule accompanies the proposed amendment to the Delegation Resolution by modifying the delegation of permit issuance authority provided to the DDRP in 9 NYCRR § 572.11 to allow for the issuance of a permit by the DDRP when a variance is also required. As currently written, this regulation does not allow the DDRP to issue, for example, a sign variance where a commercial use permit is also required, or a structure variance for a boardwalk that also requires a wetlands permit. The proposed rule would only restrict the DDRP from issuing permits for variance requests that the Agency reviews. Public comment is also welcome on this proposed consensus rule.

Background

Former Agency Counsel John Banta and I brought this delegation concept to the Agency Legal Affairs Committee for discussion in July and August, 2010. Mr. Banta thought the delegation might help the Agency handle an anticipated influx of variance requests for lateral expansions of pre-existing, non-conforming

single family dwellings. Prior to a 2008 rule making¹, those expansions had been non-jurisdictional.²

At the time, the 2008 rule had been in effect for less than two years and Agency members felt it was still new enough so that they preferred to continue to review all variances. Former Agency Legal Affairs Committee Chairman Wray and Agency Member Booth questioned the need for any delegation given the limited number of variances requested each year. Mr. Wray succinctly stated two goals for any changes to the variance process: (1) To relieve the burden on the applicant; and (2) To relieve the burden on staff. The Committee asked staff to give further thought to possible changes to the variance process.

In the intervening four years, staff have made changes to improve the variance application review process to ensure the consistent application of the variance approval criteria set forth in 9 NYCRR § 576.1 and to make the process as efficient as possible for staff and the applicant.

Overview of Current Variance Process

The procedure for review of a variance application is set forth in 9 NYCRR § 576.5.

Shortly after receipt of a variance application, a staff team comprised of the DDRP, the assigned environmental program specialist ("EPS"), staff attorney, RASS personnel and me, convenes to discuss whether and what additional information to request from the applicant to address the variance criteria. The team also makes an initial assessment as to whether the application has addressed all of the variance criteria set forth in 9 NYCRR § 576.1. Based on this meeting, staff generally send the applicant a request for additional information.

After receiving the requested additional information, the staff team meets again to assess whether sufficient information has been provided to address the variance criteria. If additional information is deemed necessary, staff send a second request to the applicant for additional information. Staff schedule a hearing on the application once the applicant provides sufficient information or when it is apparent that any additional information must be sought through the hearing.

¹ A revised § 575.5 governing expansions was effective on December 31, 2008.

² Only five of the twenty-seven variances that have been considered by the Agency since the 2008 rule went into effect would have been non-jurisdictional prior to promulgation of that rule.

A hearing is required for every variance application and is conducted pursuant to 9 NYCRR § 576.5. Staff determine the level of formality of the hearing based on an assessment of: (1) whether or not the applicant has provided sufficient information to address the variance criteria; (2) whether or not the application appears to meet the standards for issuance of a variance; and (3) the number and nature of public comments received.

The hearings are held in the community where the variance is proposed, and notice is provided to neighbors and the general public. A hearing officer presides over all hearings, and assigned staff are in attendance, including a staff attorney. The applicant or representative provides an overview of the application and answers questions posed by staff. Staff may provide information during the hearing to ensure a complete record for the Agency's consideration. Both the applicant and staff provide testimony and respond to questions in the development of a full record. Hearings for variance requests that appear to be approvable based the application and other supporting information are generally more legislative in nature. Other variance requests may require a more formal hearing, possibly even necessitating the appointment of an administrative law judge.

Following the hearing, the staff team meets for a final time to help the DDRP form his recommendation to the Agency. Based on this meeting, the EPS and staff attorney develop a memorandum and a proposed variance order for the Agency mailing, and then a powerpoint presentation for the Agency meeting. The DDRP and I both review the mailing materials and assist, as necessary, in the development of the powerpoint presentation. Counsel and the Executive Director also review all Agency mailing materials for variances before they are finalized.

The Agency generally must make its decision on variances within 45 days of the hearing.³ Assigned staff are present during consideration of the variance by the Regulatory Programs Committee and the Agency. Staff make the presentation and respond to questions from the Committee or other members or designees. The DDRP is also present, and I am available to assist staff as necessary. The DDRP makes any final changes to the variance order required by the Agency's vote and issues the order approving or denying the variance. As with any final

³ § 576.7. A longer time is permissible when a stenographic record is developed or with the agreement of the applicant.

agency determination, aggrieved parties then have 60 days to challenge the Agency's variance order in court.

How Delegation would Affect the Current Variance Process

Delegation of limited variance approval authority to the DDRP would follow the same review process described above. The DDRP could only approve a variance based on findings that the variance request meets the approval criteria set forth in 9 NYCRR § 576.1. Instead of making a recommendation for approval of a variance to the Agency, the DDRP would approve the variance request in the place of the Agency. The DDRP would not have the authority to deny a variance.

During the review process, as part of his monthly report to the Agency, the DDRP would advise the Agency of any particular variance request he believes to be within the scope of the proposed delegation. This would give Agency Members the opportunity to request review of the variance request.

The DDRP would only decide whether to approve a variance or to refer it to the Agency for a decision after the hearing. Even if the DDRP believes that a variance request subject to the delegation meets the approval criteria, his decision on whether to approve the request himself would depend upon the significance of the adverse impacts from the variance, the extent of public interest in the request, and other factors. Even if a variance request appeared to meet the variance criteria, would have only minor adverse impacts and was within the scope of the Agency's delegation, public opposition to a variance request would lead the DDRP to refer the request to the Agency absent a compelling reason not to do so.

Agency Authority to Delegate

Executive Law § 803 provides the express statutory authority for the Agency to delegate its authority to approve variances to the DDRP:

"The Agency may delegate to one or more of its members, officers, agents and employees, such powers and duties as it sees fit."

James Townsend, Counsel

October 17, 2014

Page 6

The Agency has historically undertaken delegations of its discretionary authority to staff through its rules⁴ and the Delegation Resolution⁵.

The scope of the "powers and duties" the Agency may delegate was the subject of litigation in Bolton v. Adirondack Park Agency, 128 Misc.2d 59 (1985). In Bolton, the petitioners challenged the Agency's delegation of authority to the DDRP (then, the "director of operations") to grant permits. The petitioners asserted that the Agency only had the authority to delegate ministerial, not discretionary, powers and duties. Justice Mercure of NYS Supreme Court, Warren County, confirmed that the statute allowed the Agency to make such a delegation of its discretionary powers, and rejected the petitioners' attempt to place limits on which "powers and duties" the Agency could delegate to "one or more of its members, officers, agents and employees."

The decision in Bolton follows the principle allowing administrative agencies to delegate administrative powers and duties to their staff to the extent allowed by the statutes that give such powers and duties to the agencies. The requirements for such a "subdelegation" were concisely summarized in In re Vermont Marble Co., 162 Vt. 355, 358, 648 A.2d 381, 383 (1994):

"The keys to subdelegation are that the ability to delegate be authorized, and that the delegating authority articulate clear standards under which the delegated authority is to be used."

The Appellate Division, Third Department, upheld such a subdelegation by the Department of Transportation's commissioner in Pelham v. White, 166 A.D.2d 824, 825, 563 N.Y.S.2d 171, 172-73 (1990). There, the statute allowed the commissioner to "delegate any of his powers or duties to any" of his deputies. Based on the statutory language allowing the commissioner to make such a delegation, the Court rejected a challenge to the subdelegated authority of a deputy commissioner to make to a personnel disciplinary determination, after a hearing, "as to incompetence and penalty".⁶

⁴ E.g., 9 NYCRR § 572.11 authorizes the DDRP to approve permits for most projects; § 581-2.3(2) authorizes the Executive Director to settle violations.

⁵ E.g., the Delegation Resolution authorizes the Executive Director to reverse variances approved by municipalities with Agency-approved local land use programs and to make SEQR determinations of significance.

⁶ Pelham v. White also confirms that a subdelegated decision may be quasi-judicial in nature and made after a hearing.

Executive Law § 803, as read by the court in Bolton, authorizes the proposed delegation of variance approval authority, satisfying the first requirement for proper subdelegation. The second requirement for subdelegation is that the Agency must "articulate clear standards under which the delegated authority is to be used." The proposed delegation of variance approval authority to the DDRP meets this second requirement by:

- (1) Limiting the proposed delegation to certain types of variance requests;
- (2) Applying the same process and standards for review of delegated variance requests as for those reviewed by the Agency; and
- (3) Paralleling the existing delegation to the DDRP to issue permits.

The Agency's rule delegating authority to the DDRP to issue permits has three exceptions: (1) subdivisions involving 50 or more lots; (2) projects which have been the subject of a public hearing because they may not be approvable; and (3) projects which also require variances. However, as § 572.11(c) provides, the DDRP "shall have the discretion to refer any project to the agency for review." The DDRP regularly exercises this discretion by referring projects to the Agency which he knows (e.g., cell towers that may not comply with the towers policy) or believes present facts or issues significant enough to warrant Agency review and decision. In approving permits, the DDRP applies the relevant decision criteria from Executive Law § 809(10) and/or Agency regulations.

The proposed delegation would give the DDRP similar authority to approve certain types of variances, accompanied by the discretion to refer any delegated variance to the Agency. The DDRP, in exercising this delegated authority, would follow the same legal principles as the Agency in determining that the application meets the criteria for issuance of a variance. Staff would review the application based on the same thorough review process described above.

The specific types of variance requests proposed for delegation and the standards for approval of a variance provide clear and ample guidance to the DDRP on the scope of the delegation and the limits of his discretion. The delegation of permit issuance authority affirmed in Bolton is broader than the proposed delegation of variance approval authority. In both contexts, the DDRP must make a discretionary judgment as to whether the significance of the adverse impacts, public interest in the

James Townsend, Counsel

October 17, 2014

Page 8

application, or other factors merit Agency review rather than the exercise of his own delegated approval authority. The exercise of his approval authority is further controlled by the requirement in the Delegation Resolution that he must report to the Agency every month about pending applications, giving Agency members the chance to require Agency review of any pending variance or project application. Finally, any decision on a project or variance made by the DDRP follows after a consistent staff review process and based on the same approval criteria as applied by the Agency.

The rationale for this proposed delegation is to promote better use of Agency time and resources by not requiring Agency review of certain types of variance requests for which approval is justified based on compliance with the approval criteria and the lack of public objection to the request. This limited delegation has the potential to save staff time and to allow the Agency to focus more on issues of regional importance. This rationale provides further support for the Agency's delegation of limited variance approval authority to the DDRP.

Conclusion

The Agency has the authority to make the proposed delegation of variance approval authority, and the proposed delegation is accompanied by a process and clear standards that will guide and constrain its unfettered use by the DDRP. The proposed delegation is limited in nature and subject to the same review process and approval criteria as variance requests considered by the Agency. Approval of the proposed delegation would benefit the Agency and the public, while maintaining the consistent application of the Agency's approval criteria for variances.

PVC:mp

Attachments