



M E M O R A N D U M

To: James Townsend, Counsel
From: Paul Van Cott, Associate Attorney
Date: Delegation of Authority to Issue Variances
Re: September 4, 2014

Staff propose a limited delegation of Agency authority to the Deputy Director – Regulatory Programs (“DDRP”) for approval of certain types of variances. This memorandum explains our proposal and how it could be implemented.

Background

Former Agency Counsel John Banta and I brought this concept to the Agency Legal Affairs Committee for discussion in July and August, 2010. Mr. Banta thought the delegation could 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 that time, the 2008 rule had been effect for less than two years and Agency members felt that 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. Staff were asked to give further thought to possible changes to the variance process.

In the intervening four years, improvements have been made to the staff review process for variance applications to ensure the consistent application of the variance criteria and to make the

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.

process as efficient as possible for staff and the applicant. We have continued to discuss an Agency delegation of variance approval authority to the DDRP, and to refine our thoughts on when such a delegation may be desirable.

We believe that delegating variance approval authority to the DDRP would advance both of the goals stated by Mr. Wray. As discussed below, there are three categories of variances where staff believe such a delegation makes particular sense: (1) When the variance is sought by a public entity and will result in a clear public benefit; (2) When the Agency is coordinating with DEC on an action requiring the issuance of a variance; and (3) When the requested variance is *de minimis* in nature.

Overview of Current Process

As a critical part of the jurisdictional inquiry and variance review processes, staff work with applicants to explore alternatives that meet their goals but do not require a variance. In this discussion with applicants, staff use legal and technical guidance that has been developed over the past few years for implementation of the 2008 rule. As a result, these efforts to find solutions that do not require a variance have limited the number of variances required from the Agency.³

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.

A public hearing is required for every variance application. Before one is scheduled, the staff team convenes again to assess whether sufficient information has been provided, or can be obtained through the hearing, to address the variance criteria. Staff also decide how formal the hearing needs to be. This judgment is based on a staff assessment of: (1) whether the applicant has provided sufficient information to address the variance criteria; and (2) whether the application appears to meet the standards for issuance of a variance.

³ For example, since September of 2011, the Agency has determined 43 expansions of single family dwellings within the shoreline setback to be non-jurisdictional and, since 2009, has determined 187 retaining walls to be non-jurisdictional.

The hearings are held in the community where the variance is proposed, and notice is provided to neighbors and general public. Public Information Officer Keith McKeever presides over less formal hearings, and assigned staff are in attendance. 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. A formal public hearing is convened by an administrative law judge, and both the applicant and staff provide testimony and may be cross-examined in the development of a full record.

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 is required to make its decision on variances within 45 days of the hearing, in most circumstances.⁴ Assigned staff are present during consideration of the variance by the Regulatory Programs Committee and the Agency. They 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 agency determination, aggrieved parties then have 60 days to challenge the Agency's variance order in court.

Agency Authority to Delegate

Executive Law § 803 empowers 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."⁵

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

⁵ Former Appellate Division, Third Department, Justice Thomas Mercure, sitting as a NYS Supreme Court Justice in Warren County, rejected an attempt to limit the scope of the Agency's authority to delegate its power to issue permits to the DDRP in Bolton v Adirondack Park Agency, 1128 Misc.2d 59 (1985).

The Agency has undertaken delegations of its authority through its rules⁶ and the Delegation Resolution⁷.

The Agency's rule that delegates authority to the DDRP to issue permits has only 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.

The Agency may delegate similar authority to the DDRP to approve variances. The DDRP, in exercising this delegated authority, would still be guided by the same legal principles in determining that the application meets the criteria for issuance of a variance. This would occur through the same thorough staff review process described above. The only portion of the process that would be omitted would be the preparation and presentation of the delegated variances to the Agency.

Categories of Variances Proposed for Delegation

Based on the Agency's statutory authority to make such a delegation, staff propose delegation of approval authority to the DDRP for three categories of variances:

(1) *When the variance is sought by a public entity and will result in a clear public benefit*

There have been eight variances issued to public entities by the Agency since 2009 which resulted in a clear public benefit: (1) Wilmington's universally-accessible fishing platform; (2) Willsboro's river shoreline stabilization project; (3) Harrietstown's retaining wall; (4) Webb's TOBIE Trail; (5) Moriah's shoreline stabilization; (6) Lake Placid's bandshell; (7) Glens Falls' dam spillway; and (8) Keeseville's Veteran's Memorial Park. All of the variance locations were in Hamlet

⁶ 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.

⁷ 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.

except for Willsboro's and Glens Falls'. Agency staff recommended approval of all of these variances based on an assessment that they met the variance approval criteria. Delegation of this category of municipally-sponsored variances to the DDRP would provide greater cooperation with local governments on projects of importance to their communities.

(2) *When there is a need for the Agency to coordinate with DEC on an action requiring the issuance of a variance*

In our discussions with DEC concerning the draft "emergency project" rules, one of our primary goals has been to improve coordination on shoreline stabilization projects that pose an immediate threat to life or property. However, both agencies recognize that there are certain shoreline stabilization or possibly dam projects⁸ where prompt action is required but the circumstances do not rise to the level constituting an emergency. In these situations, if a variance is required, the proposed delegation of approval authority would allow the DDRP to coordinate more closely with DEC Regional Permit Administrators involved in issuing DEC permits, including coordination of the timing of decisions by both agencies.

(3) *When the variance is de minimis in nature*

There are certain variances that may not rise to the level of warranting Agency time and consideration. This may be due to the size or specific facts of the requested variance. This category of variance does not have a significant effect on the environment⁹ and is not controversial. Examples include variances of only a few feet into the setback; small areas of living space; retaining walls that are larger than the 200 square feet allowed by Agency rules but that otherwise comply with those rules; and signs that do not comply with the Agency's sign standards. Staff recommend against trying to place limits on this delegation in terms of the size or environmental impact of the variance, since what is *de minimis* is fact-dependent. For example, a proposed lateral expansion of a well-screened, non-conforming single family dwelling set back 130 feet from the water in a Recreational River Area will likely have less impact than the same proposed expansion of a dwelling set back 30 feet from a the water in Moderate Intensity.

⁸ Based on discussions with DEC, Agency staff have developed guidelines to allow non-jurisdictional dam replacements and/or repairs that comply with DEC dam safety criteria and result in the same "normal pool elevation" for the impoundment.

⁹ Under DEC's SEQR regulations, area variances are all classified as Type II actions that will not have a significant effect upon the environment.

Staff Proposal

Staff propose delegation of approval authority to the DDRP for the three categories of variances discussed above. Depending on the direction provided by the Agency, staff will prepare the steps necessary for the Agency to make such a delegation.

In exercising this limited delegation, the DDRP would only approve those applications he believes meet the criteria for issuance of a variance. He would employ the same rigorous staff review process described above. The DDRP would also have the discretion to refer delegated variances to the Agency and he would not have the authority to deny variances.

The proposed delegation would benefit applicants through more timely decisions. It would allow for better coordination with local governments and DEC. It would indirectly benefit all project and variance applicants involved in the Agency's review process by limiting staff time and resources absorbed by the preparation and presentation of delegated variances to the Agency. Finally, it would benefit Agency members and designees by ensuring that variances on their agenda present facts or issues significant enough to warrant Agency review and decision.

If the Agency chooses to pursue delegation of variance approval authority to the DDRP, staff will prepare a draft amendment to the Delegation Resolution for a first reading at the October Agency meeting. A second reading and adoption of the amendment could then occur at the November meeting. The proposed delegation would also necessitate a minor rule change that can be developed and initiated on a parallel track.

PVC:mp