



M E M O R A N D U M

**To:** James Townsend, Counsel  
**From:** Paul Van Cott, Associate Attorney  
**Date:** November 5, 2014  
**Re:** Delegation of variance approval authority

For Agency consideration and possible action, please find attached proposed language for inclusion in an amended "Resolution of the Adirondack Park Agency on Delegating Certain Powers And Responsibilities" (the "Delegation Resolution") to delegate limited variance approval authority to the Deputy Director Regulatory Programs ("DDRP"). The full text of the Delegation Resolution, including additional technical changes throughout the document, is on the CD included in the mailing to the Agency.

This memorandum summarizes the proposed delegation to the DDRP, and describes the Agency's current variance process and how the proposed delegation would affect the existing process. It also explains the basis for the Agency's authority to make such a delegation. Finally, it responds to public comment received on the proposed delegation. Copies of comments received from the public are attached for the Agency's consideration.

Staff have withdrawn the proposed consensus rule modifying 9 NYCRR § 572.11; the proposal would have allowed for the issuance of a permit by the DDRP when a variance is also required. Based on some confusion about the proposed rule in public comments, further discussions related to the proposal are recommended before the Agency either advances the rule as a consensus rule, or proposes it through a more formal rule making process with accompanying public hearings.

This withdrawal means that the Agency Board will continue to review all projects that require both a permit and a variance. Examples of such variance requests/projects previously provided by staff include signs associated with readily approvable commercial uses and boardwalks slightly larger than 100 square

feet that also need and meet the standards for issuance of a wetlands permit.

Staff will continue to try to reach out to the public in an effort to clear up this confusion so that the rule making can proceed as a consensus rule.

***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. The revised proposal would delegate 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; and
- (5) proposals with minor impacts, including impacts to adjoining uses.

One public comment suggested elimination of (1) and (4). From staff's perspective, making this change would not alter the intended scope of the proposed delegation since all discussions of (1) and (4) have focused on variance requests that would have "minor impacts" and would thus be captured under (5). In addition, (4) was suggested by Agency Member Booth, so any change requires further Agency discussion.

Another public comment sought further clarification of the types of variances that would be subject to delegation. With respect to (2), "dam safety proposals," staff recommend that further clarification could be provided by revising the language to say: "dam safety proposals under an order of the Department of Environmental Conservation pursuant to ECL § 15-0507(3)." Such orders may only be made by DEC's commissioner when "necessary to safeguard life or property or to protect the natural resources of the state." While it is true as the commenter suggests that (3), "shoreline stabilization structures," may involve other agencies and questions of property ownership, these issues are typically addressed during the review process on a case-by-case basis. Finally, as previously discussed with the Agency, staff recommend not trying to further define (5), "minor impacts," because that determination is so fact-dependent. Also, determining whether impacts are "minor" is similar to fact-dependent determinations the DDRP already makes such as whether a permit amendment request is minor or material in nature. Finally, staff believe that the variance approval criteria of 9 NYCRR § 576.1 provide sufficient guidance to the DDRP in the exercise of the proposed delegated authority.

If the Agency delegates the proposed variance approval authority to the DDRP, the staff review process would remain the same. The DDRP would apply the same approval criteria as the Agency, thus continuing to ensure consistent decision-making for all variance requests. Even for 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.

One public comment suggests that the DDRP should be delegated the authority to disapprove certain variances. Staff do not support this suggestion. The proposed delegation is intended to parallel the existing Agency delegation of project approval authority to the DDRP.

### ***Overview of current variance process***

The procedure for the review of a request for a variance from the "strict letter of the provisions of the plan or the shoreline restrictions," and for hearings on variance requests, is set forth in 9 NYCRR Part 575.

Shortly after receipt of a variance request, a staff team including the DDRP convenes to discuss what additional information, if any, to request from the applicant to address

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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 the information has been provided addresses the variance criteria. Once sufficient information has been obtained, staff schedules a variance hearing.

A hearing is required for every variance request and is conducted pursuant to 9 NYCRR § 576.5. One public comment suggests that the hearings on variance requests are subject to Executive Law § 812, which by its terms applies to hearings on projects held pursuant to § 809. Project hearings are conducted pursuant to the Agency's adjudicatory hearing procedures set forth in 9 NYCRR Part 580. However, based on 9 NYCRR § 576.1 and Agency practice, hearings on variance requests, particularly those that appear to meet the criteria for issuance of a variance, are generally less formal. As the Agency's regulations make clear (§ 572.10(b)), the Agency's Part 580 adjudicatory hearing procedures are only applicable to variance request hearings when the Agency is also conducting a hearing on an associated project application.

Staff determine the level of formality of the § 576.5 hearing based on an assessment of: (1) whether or not the applicant has satisfactorily addressed 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. It is likely that variance requests which require more formal hearings will not fit within the proposed delegation.

The hearings are held in the community where the variance is proposed, and notice is provided to neighbors and the general public. Public notice of the hearing is required to be provided to all landowners within 500 feet of the variance site and by a newspaper of general circulation in the area of the variance site. A hearing officer presides over all hearings, and a record of information addressing the variance criteria is developed by the applicant and staff.

The Agency generally must make its decision on variances within 45 days of the hearing.<sup>1</sup> Staff present the variance request to the Regulatory Programs Committee and respond to questions from the Committee or other members. After a recommendation from the Committee, the Agency approves or denies the variance request. As with any final 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 staff 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 proposed delegation does not delegate authority to the DDRP to deny a variance request, so the Agency would still review any variance request where the DDRP believes denial is or may be appropriate.

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. His report is already included in the mailing and is posted on the Agency's website for public review. The report provides Agency members the opportunity to request review of a particular variance request. It also serves to provide notice to the public of pending variance requests.

One commenter suggested that additional public notice of delegated variances should be provided. Staff believe that notice of the variance hearing (see above), together with the DDRP's monthly report, provide notice of variance requests under review by Agency staff, including those that may be subject to the proposed delegation. However, staff agree to include additional notice measures as part of the implementation of the delegation.

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 or to refer it to the Agency would depend upon the significance of the adverse impacts from

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<sup>1</sup> § 576.7. A longer time is permissible when a stenographic record is developed or with the agreement of the applicant.

the variance, the extent of public interest in the request, and other factors. As noted above, it is long-standing Agency practice for the DDRP to refer applications of significance or subject to significant public interest to the Agency for decision. The limits on the proposed delegation are consistent with this Agency practice.

The rationale in support of the proposed limited delegation of variance approval authority was questioned by one public comment. The Agency will achieve efficiencies in the review process for variances. The benefit of greater inter-governmental coordination, particularly in addressing situations that involve threats to life or property, is evident. For such situations, there have been, and will be, situations where a decision on a variance request between Agency meetings is an appropriate Agency action. The proposed delegation makes such a time-sensitive decision possible.

#### ***Agency authority to delegate***

Executive Law § 803 permits 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."

The Agency has historically undertaken delegations of its discretionary authority to staff through its rules<sup>2</sup> and the Delegation Resolution<sup>3</sup>. One commenter contends that the proposed delegation can only be made by rule, but does not explain why that is the only way such a delegation may be made. Also, the case cited in the public comment, Matter of Bizarre, Inc. v. State Liquor Authority, 29 A.D.2d 500, 502 (1st Dept., 1968), involved an agency's delegation of authority beyond what was authorized by statute. That is not the case here.

Executive Law § 803 does not limit the Agency's authority to delegate, nor does it specify how the delegation must be made like some other statutes do. See, e.g., Transportation Law § 16 and footnote 4 below. In any event, whether the Agency's delegation is made by rule or through the Delegation Resolution, it is made through a public process, with the opportunity for

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<sup>2</sup> 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.

<sup>3</sup> 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.

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public comment, and the final product is posted on the Agency's website.

Before presenting the proposed delegation to the Agency, staff had researched the case law supporting the legality of the proposed delegation. Staff's research included, but went beyond the general rule cited in one public comment. The commenter quoted from a secondary legal research source that cites several older cases with statutory authority and facts different from the statute and proposed delegation involved here. Staff believe that more recent case law, based on more similar statutory authority and facts, supports the proposed delegation of variance approval authority to the DDRP pursuant to Executive Law § 803.

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 permitting administrative agencies to delegate administrative powers and duties to their staff to the extent provided 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.<sup>4</sup> 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 a formal personnel determination, after a hearing, in a disciplinary proceeding.<sup>5</sup> Staff believe that this case supports the proposed delegation of variance approval authority to the DDRP as one of the discretionary "powers and duties" § 813 permits the Agency to delegate.

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 for projects has few exceptions. In approving projects, the DDRP applies the relevant decision criteria from Executive Law § 809(10) and/or Agency regulations. The DDRP may refer any project to the Agency for review.

The proposed delegation would give the DDRP similar authority to approve a more limited class of variances. He would also have 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 variance request based on the same thorough review process described above.

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<sup>4</sup> Transportation Law § 16 allows such delegations to be made "by official order filed with the department of transportation." Staff believe the Agency's Delegation Resolution provides a similar level of formality to any delegation.

<sup>5</sup> Pelham v. White also confirms that a subdelegated decision may be quasi-judicial in nature and made after a hearing.



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The specific types of variance requests proposed for delegation and the standards for approval of a variance provide 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 much broader than the proposed delegation of variance approval authority, further supporting the more limited, proposed delegation of variance approval authority.

Under the proposed delegation, as for projects, the DDRP would make a threshold discretionary judgment as to whether to approve the variance request himself or to refer it to the Agency. His decisions will be based on compliance with the variance approval criteria and other factors, including public interest in the application. The Agency controls this exercise of discretion by requiring the DDRP to report 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.

As discussed above, this proposed delegation achieves efficiencies in the Agency's review of variances and for better inter-governmental coordination on matters involving threats to life or property. This rationale supports 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

**Proposed Substantive Amendments to Delegation  
Resolution for Delegation of Variance Approval  
Authority to Deputy Director Regulatory Programs**

*(Title page and Table of Contents omitted)*

WHEREAS, in addition to those procedures set forth in, and delegations made by rule and regulation, the Agency desires to establish certain additional procedures and delegate certain additional responsibilities in order to conduct business in an efficient manner.

NOW, THEREFORE, BE IT RESOLVED, pursuant to Sections 803, 804 and 809(14) of the Adirondack Park Agency Act, Section 15-2709 of the Wild, Scenic and Recreational Rivers System Act, and Section 24-0801 of the Freshwater Wetlands Act, the Agency delegates the responsibilities and establishes the procedures that follow:

**I. POWERS RESERVED TO THE AGENCY**

The Agency reserves to itself all lawful authority not delegated by 9 NYCRR Subtitle Q (the "Agency Rules and Regulations") or this resolution, including but not limited to the following:

- A. To review and approve, to approve subject to conditions, to grant permits with respect to, and to determine whether to hold a public hearing with respect to, all projects subject to Agency jurisdiction other than those with respect to which authority to act has been delegated by the Agency Rules and Regulations or this resolution.
- B. To exercise exclusive authority to disapprove projects after public hearings.
- C. To review and take final action concerning all requests for variances **other than those with respect to which authority to act has been delegated by this resolution.**

*(Subdivisions D-K of Section I, and Sections II and III omitted)*

#### **IV. AUTHORITY OF THE DEPUTY DIRECTOR REGULATORY PROGRAMS**

The Deputy Director Regulatory Programs, under the supervision of the Executive Director, shall have authority to exercise the following powers on behalf of the Agency:

- A. To approve projects in accordance with Section 809 of the Adirondack Park Agency Act, and as specified in Section 572.11 of the Agency Rules and Regulations, and to approve determinations with respect to projects by State agencies called for in Section 579.3(d) of the Agency Rules and Regulations.
- B. To approve variances in accordance with Part 576 of the Agency Rules and Regulations for variance applications 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. The Deputy Director Regulatory Programs shall have discretion to refer any such application to the Agency for review.

*(Subdivisions C-I of Section IV and Sections VI and VII omitted)*

#### **VIII. COMMITTEES OF THE AGENCY**

*(Subdivisions A and B omitted)*

- C. STANDING COMMITTEES OF THE AGENCY - FUNCTIONS AND RESPONSIBILITIES

Agency committees shall meet in combined session on matters of joint interest, as determined appropriate by the Agency Chairperson in consultation with the Committee chairpersons. The following Standing Committees have been established with membership to be reviewed periodically and determined by the

Agency Chairperson in consultation with Agency Members:

*(Paragraph 1 of Subdivision C omitted)*

2. REGULATORY PROGRAMS COMMITTEE

The Regulatory Programs Committee, established by Section 572.12 of the Agency Rules and Regulations, shall:

- (a) Monitor staff review of applications for project permits or other determinations submitted to the Agency under Sections 809 and 814 of the Adirondack Park Agency Act; the Wild, Scenic and Recreational Rivers System Act; and the Freshwater Wetlands Act. The Committee will act on those applications directed to the Agency for decision by Section 572.11 of the Agency Rules and Regulations and this resolution, and by the Deputy Director Regulatory Programs or at the request of one or more Agency Members.
- (b) Monitor staff review of applications for variances of the provisions of Section 806 of the Adirondack Park Agency Act, the Wild, Scenic and Recreational Rivers System Act and the Agency Rules and Regulations. *The Committee will act on those applications directed to the Agency for decision by this resolution, and by the Deputy Director Regulatory Programs or at the request of one or more Agency Members.*

*(Subparagraphs c-i, the remainder of Paragraph 2, and Paragraphs 3-9 of Subdivision C, and Sections IX-XI omitted)*

**Palmer, Mary B (APA)**

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**From:** Curtis Stiles  
**Sent:** Thursday, October 30, 2014 7:59 PM  
**To:** apa.sm.PublicComment  
**Subject:** Delegation of Variances to DDRP  
**Attachments:** PublicCommentMemorandum.pdf; ATT00001.htm

2nd attempt - address rejected - Hard copy sent via mail

In reply to the Agency's request for public comment on the proposed delegation of authority, specifically as it relates to variances, the following comments are offered:

1. I generally support and endorse the delegation process as I did in 2008. However, I am none the less concerned regarding the proposed changes. The proposal is flawed by the involvement of Associate Counsel Van Cott and his direct involvement in the process both as a Village Trustee and as an Attorney for the Agency particularly as it relates to the Lake Flower Hotel Project which will require a variance from the Agency.
2. While Mr. Van Cott has 'recused' himself late in the Village process, the mere 'appearance' suggests a significant conflict of interest. His early advocacy for the Lake Flower Project is well established, as well as his involvement in the creation of the PUDD Law to enable the project. The Agency clearly will have one or more variance decisions to make on this project.
3. The Agency needs to publicly acknowledge and clarify roles and ensure zero involvement and total recusal by Mr. Van Cott with the entire Lake Flower Project and any variances associated with local government projects.
4. As for the specific proposal, removal of # 1 and # 4 (Page 2, 10/17/14 memo from Van Cott to Townsend -pdf attached) would ensure an arms length review process for local government related projects. The number of these projects should not be significant nor a burden to be reviewed by the full Board.
5. Today's political process presents both the opportunity and the appearance of blurring the lines between personal advocacy and regulatory responsibility for local and State Government. The Agency's role must be to preserve the integrity of the Regulatory Process and its responsibility under State Law in a totally transparent manner.
6. Please ensure copies of this document are provided to the following:
  - Chairwoman Ulrich
  - Executive Director Martino
  - Chief Counsel Townsend

Thank you for your consideration,

Respectfully,

Curt Stiles



October 31, 2014

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Philip Terrie

Peter Bauer  
**Executive Director**

Paul Van Cott  
Associate Attorney  
Adirondack Park Agency  
P.O. Box 99  
Ray Brook, New York 12977

**RE: Proposed limited delegation of variance approval authority to the Agency's Deputy Director - Regulatory Programs**

Dear Mr. Van Cott:

Protect the Adirondacks has reviewed the Agency's proposal to revise its Delegation Resolution to effect a limited delegation of variance approval authority to the Deputy Director - Regulatory Programs. PROTECT is troubled by aspects of the proposal revision for several reasons.

General Principle on Delegation of Decision-making Authority

First, PROTECT would assert that the authority to approve shoreline variances cannot be delegated to staff because the exercise of this authority is judicial in nature and therefore non-delegable under settled law. "As a general rule, matters of judgment or discretion may not be delegated to a subordinate. Thus, an administrative agency may not abdicate its duty to determine the sufficiency of evidence, or its decisional function." NY Jur 2d, Administrative Law, S75, citing *Kilgus v Board of Estimate*, 308 NY 620 (1955); *Nemeroff Realty Corp v Kerr*, 38 AD2d 437 (2d Dept, 1972) order affd 32 NY2d 873 (1973) and *Bizarre, Inc*, supra.

APA Act Limitations on Delegation of Board's Authority

The staff memo contends that the APA Board can delegate its authority to the Deputy Director - Regulatory Affairs, citing the text in sec. 803 of the Act. However, assuming any such quasi-judicial authority can properly be delegated at all, PROTECT believes that the Board can do this only to a limited degree: only those shoreline restriction variance applications subject to the procedures set out in Section 806 of the APA Act, i.e., shoreline restriction variances not "associated with" jurisdictional projects. This is because of the language in Section 812(1) and (4) which requires a vote by the members after any adjudicatory hearing.

Section 806 establishes the mandatory "shoreline restrictions" (setbacks, lot widths, etc.) and also sets out the procedure for shoreline restriction variance hearings on requests which are not "associated with" a jurisdictional project. Since this provision lacks the language in sec. 812(4) requiring the Board's vote, PROTECT concludes that APA's decision-

making authority can be delegated to the Deputy Director for such requests.

#### Procedure Necessary for Delegation of Variance Approval Authority

Article IV, Section 8 of the State Constitution provides that no state agency rule or regulation is effective unless filed with the Secretary of State, “except such as relates to the organization or internal management” of such agency. The term “rule” is defined in the State Administrative Procedure Act (SAPA) [Section 102(2)(a)] to mean:

The whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes . . . the procedure or practice requirement of any agency. . . [not including] rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public . . .

The courts have been diligent in enforcing the rule-making requirement. The Court of Appeals restated in 2007 a 1985 holding that a rule or regulation is “a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme it administers.” (*Cubas v Martinez*, 8 NY3d 611, 621, quoting *Matter of Diocese v DOH*, 66 NY2d 948, 951.) That opinion cites many of the Court’s earlier decisions.

Additionally, see *Matter of Bizarre, Inc v SLA*, 29 AD2d 500, 502 (1st Dept, 1968): “Even if there were validity to such delegation of power [to determine an application for an on-premises liquor license] to Deputy Commissioners..., there is a basic irregularity in the failure of the [State Liquor] Authority to have filed with the Secretary of State...notice to the effect [that it had delegated the power] \*\*\* Certainly, a rule or regulation of such spacious scope delineating a deputy’s power vis-a-vis the public, is well within the power of this constitutional command.”

Thus, we conclude, the proposed delegation must be effected through formal rule-making.

The APA has recognized in the past that delegation of its project approval authority must be done by rule-making. Thus, it delegated broad project approval authority to the “deputy director- regulatory programs” in sec. 572.11 of its regulations. However, the Agency did not delegate decision-making authority to staff in its regulations for variances of the shoreline regulations subject to sec. 806 procedures. Instead, sec. 572.11(a)(4) explicitly withholds approval delegation in the case of “projects requiring variances which have been the subject of a public hearing held pursuant to section 576.5.

While the staff memo does propose to amend sec. 572.11 in addition to the Delegation Resolution amendments, this rule-making is insufficient in scope.

#### Unconvincing Rationale for Delegation

The rationale for the proposed delegation of variance authority is not convincing. The October 17 memorandum (Van Cott to James Townsend) is largely silent on the rationale for this proposed delegation of variance approval authority to the Deputy Director.

In a review of the meeting record of the September Legal Affairs Committee meeting, we find many discrepancies.

1. “Efficiency for applicants.” Staff argued that this delegation is advisable, in part, because it would result in more “efficiency for applicants”. This would purportedly occur because variances would be granted quickly, without waiting for the monthly Agency meeting. This is hardly a strong rationale for the proposed change.

The Agency should not be operating in the mode of customer service, with the applicants being customers to be satisfied by quick Agency permitting. This approach ignores and obscures the Agency's regulatory and public service objectives. The Agency's monthly meeting schedule has been in place for many decades and can hardly be a surprise to applicants.

2. "Predictability" of decisions. This rationale was rejected by the APA Board members at the September meeting.

3. "Intergovernmental-cooperation." It is unclear how more legitimate intergovernmental cooperation would result from a delegation of variance approval authority to the Deputy Director. Quite frankly, this suggests a process which would allow local governments to do whatever they want with shoreline development, with no independent Agency decision-making.

4. "Efficient use of staff resources." Again, the proffered rationale is unclear and unpersuasive. As described in the October 17 memorandum, APA staff are and must be involved in project/variance review, preparation for and implementation of the required public hearings, and preparation of draft decisions. This work responsibility should not change with any delegation. If this delegation proposal is intended to relieve staff of preparing carefully crafted justifications for variance approvals, based on the evidence of record, it is a good reason to disapprove the proposed delegation.

In the September meeting, staff indicated they spend a lot of time persuading applicants to redesign projects to avoid the need for variances; but, again, this work should not change with the proposed delegation.

Exactly how work responsibilities would legitimately change for staff under the delegated authority is unclear.

5. "Relieving the Agency from review of some approvable variances." Again, the rationale is not persuasive. Staff's own statistics indicate that the number of variance applications presented to the members for decision over the past five years was very small (only 28), far less than expected after the regulatory revision several years ago. He also said that only five of the 28 would have been affected by this proposed delegation. As the Agency spends a great deal of time in listening to and discussing matters over which they have no jurisdiction, there seems to be no legitimate argument that they lack time to consider all variance applications.

6. Approval of variances of the shoreline restrictions should be done in public. The shoreline restriction mandates may be the only undisputed requirements of the APA Act left for the Agency to administer (after the ACR decision). These restrictions are intended to protect water quality and natural shorelines in the Park. It would be far too easy to grant more variance requests once these decisions are out-of-sight, made by a person in a policy-making position who serves at the pleasure of higher-ups. The wide-spread suspicion both inside and outside the Agency that this Agency is now subject to the dictates of the Governor's office should argue against this proposed delegation. The Agency members, sitting in public session to decide these variance applications, are the best protection against an erosion of the statutory shoreline restrictions.

#### Delegation of Disapproval More Appropriate Option

Assuming the present procedure actually imposes a burden on the Board, a more appropriate mitigation would be to delegate to the Deputy Director the authority to disapprove applications for variances of the shoreline restrictions not associated with projects, leaving approvals of such requests to the Board. The working presumptions behind any variance delegation proposal should be (i) that the shoreline restrictions serve an important public purpose and (ii) that very few variances are actually necessary and most can be



avoided by redesign.

### Delegation for Variances in Developed Hamlet areas

Projects in “highly developed” Hamlet areas with local planning and zoning boards – There is simply no good reason to delegate variance authority over such projects to the Deputy Director. Massive projects might be proposed at the shoreline in Hamlets, with local planning boards and zoning boards of appeals – not to mention chambers of commerce and politicians – all enthusiastic about approval, and eager to ignore the shoreline restrictions. For instance, the Lake Flower hotel proposed in Saranac Lake – 69 feet high and only 32 feet from the shoreline – has been embraced by the Planning Board and the requested rezoning to allow a building two times higher than allowed by current zoning and closer than the local 50-foot shoreline setback will be approved by the Village Board on November 10. Since submitting the plan 15 months ago, the developer has not revised the design to respect the modest 50-foot shoreline setback in the APA Act and Village zoning law. More importantly, neither the Planning Board nor the Village Board has even mentioned the incursion into the shoreline setback as an issue or a matter of any concern. This project and others like it deserve a public discussion and a decision by the APA Board.

### Conflict of Interest

The work on this change of policy has been undertaken by staff attorney Paul Van Cott. This creates at least the appearance of a conflict of interest as Mr. Van Cott is also an elected Trustee of the Village of Saranac Lake and in that capacity has been an ardent supporter of the proposed Lake Flower Hotel, which is a project that would benefit from the proposed changes to the Delegation Resolution. Moreover, as the proposed delegation would be for the benefit of local governments generally. Additionally, it is clear from his October 17 memorandum that Mr. Van Cott regularly serves on every “staff team” convened to review particular variance requests and to decide on the “level of formality” of the public hearing and to assess the hearing record and make a recommendation to the Board on approval or disapproval of the variance request. He is in a position, then, to assist the Lake Flower Hotel in obtaining a significant variance of the shoreline setback to allow its building as planned. Clearly, APA leaders are aware of Mr. Van Cott’s elected position and the potential for a conflict of interest on this policy matter and the proposed Lake Flower Hotel.

### Conclusion

PROTECT does not believe, in the first instance, that the authority to approve shoreline variances can be delegated to APA staff. Assuming this can be done, what the APA is proposing can only be done through revision of the APA’s Rules & Regulations. The staff memo and presentation to the Board detailing the supposed need for these changes is unpersuasive. This matter reveals the appearance of a conflict of interest that the APA should address.

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to submit these public comments on this important matter.

Sincerely,

Peter Bauer  
Executive Director



The mission of the ADIRONDACK COUNCIL is to ensure the ecological integrity and wild character of the ADIRONDACK PARK for current and future generations.

October 31, 2014

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Associate Attorney  
Adirondack Park Agency  
P.O. Box 99  
Ray Brook, NY 12977

*(Via Electronic Submission)*

**RE: Proposed Limited Delegation of Variance Approval Authority to the Deputy Director of Regulatory Programs**

Dear Mr. Van Cott,

On behalf of the Adirondack Council, I would like to thank you for the opportunity to offer the following comments on the *Proposed Limited Delegation of Variance Approval Authority to the Deputy Director of Regulatory Programs (DRPP)*. We recognize that the proposed delegation authority outlined in the October 17<sup>th</sup> memo and discussed at length in the September and October Adirondack Park Agency (APA) Board meetings is part of a larger move to refine and streamline efficiencies within the Agency.

Overall, the Council can support these efficiency efforts and the attempt by the Agency to improve response times for variance requests if certain issues listed below are addressed. We agree that it is important for the Agency to save time and resources where possible and reallocate those limited resources to high priority issues, especially those dealing with compliance on both public and private land. We believe that this limited delegation authority is a positive step forward as long as the process stays transparent, is comprehensive in its analysis, open to public review and comment, and does not jeopardize natural resources protection. The Council strongly feels that public input and review must remain an integral component to any variance issued by the APA, whether through Board approval or delegated through the DRPP.

With respect to other elements within the proposed action, the Council offers the following specific comments and recommendations that need to be addressed:

DEFENDING THE EAST'S GREATEST WILDERNESS

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SUSTAINABLE FORESTRY INITIATIVE

1. The Agency needs to provide a better notification process for variances that will be handled by the DRPP beyond simply noting them as part of a monthly APA report. Posting notifications to the ENB, APA website, or other electronic forums would allow for fuller transparency and provide greater public awareness and input.
2. The list of proposed variance requests that the DRPP would be permitted to approve needs to be further defined and clarified. Many of the proposed activities are vague and have a high level of subjectivity involved.
  - a. “Municipally-sponsored proposals.” While the Lake Placid band shell was the provided example, in general, the public tends to associate these types of proposals with larger projects, such as water and sewer installations, salt sheds, town garages, etc which could have regional impacts. This category needs to be more fully defined.
  - b. “Dam safety proposals under the jurisdiction of the Department of Environmental Conservation (DEC)” are likely to involve public lands or significant water and land impacts. This is especially true if a dam needs to be moved or involves significant alterations to the topography. Except in times of emergency or when there is direct threat to life and property, the APA’s review is an important check and balance to ensure compliance with the State Land Master Plan and other regulations.
  - c. “Shoreline stabilization structures necessary for protection of life or property” are often more complicated and nuanced than is easily apparent. The construction of structures in water bodies, especially lakes and rivers, can often include shared jurisdictions and permit review and confusing legal status. Waters where the APA shares overlapping jurisdictions, such as the with NYS Canal Corporation, which issues permits for use of the shoreline on lakes in Herkimer County, needs to be clarified.
  - d. “Highly-developed portions of Hamlets with local planning and zoning boards” needs further explanation. Does this include Hamlets that have planning and zoning boards but do not have APA approved land use plans or weak/non-existent variance procedures? Recent examples such as the variance for the Mirror Lake residence and the Zip Flyer project in Queensbury show that even Hamlets with local planning/zoning boards and thoughtful land use planning can still make decisions that undermine resource protection and affect the larger character of the community.
  - e. “Proposals with minor impacts, including impacts to adjoining uses” is entirely too vague and needs more definition. As the Willsboro Stream Stabilization project underscored, opinions vary on what constitutes minor impacts, scale, aesthetics, etc. Additional language needs to be created that outlines a threshold and process for addressing impacts to adjoining uses such as wetlands, Forest Preserve, and critical environmental areas.

3. Finally, as stated on page 5, under this delegation of power the DDRP cannot deny a variance. Please add language that clarifies this statement and addresses when a variance may need to be denied by the DDRP or how that variance would move to the Board of Commissioners for resolution if the DDRP will not be in a position to issue the denial himself.

In closing, the Adirondack Council believes that the *Proposed Limited Delegation of Variance Approval Authority to the Deputy Director of Regulatory Programs* can refine and streamline efficiencies within the Agency that will allow an improved allocation of staff time and resources to both better protect the natural resources and provide a benefit to the people who live within the Park. Improvements can and should be made that will further address the issues stated above to make this delegation authority more transparent and practical. With those changes we support this initiative. Thank you for accepting and reviewing our comments.

Respectfully,

Rocci Aguirre  
Conservation Director