



October 31, 2014

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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