

**The Adirondack Park Agency
Policy Perspective
October 2010**

The Adirondack Park Agency offers the *Policy Perspective - October 2010* to the Governor, Legislature, Local Government Review Board, constituent groups and residents of the Adirondack Park. The Agency's commentary is presented through the following framework:

- (1) Adirondack Park Agency: Regulation vs. Legislation
- (2) The Statutory Requirement of "No Undue Adverse Impact"
- (3) Judicial Review
- (4) APA Commissioner Appointment
- (5) Enforcement
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 - Acquisition
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- (7) Statute of Limitations
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(1) Adirondack Park Agency: Regulation vs. Legislation

Rule making is the Agency's job and responsibility and has been undertaken with public involvement, including the Local Government Review Board's participation at the table.

Some have characterized recent Agency actions to update regulations as inappropriate due to a perception that the Agency is over-stepping its authority by "legislating" via regulation. The 2010 boathouse regulation has been referenced as a case-in-point.

The Agency began a program of administrative reform with the *Report of the Task Force on the Administration of the Adirondack Park Agency* in 1995. The Task Force included the Adirondack Park Local Government Review Board (LGRB) and numerous other representatives of local government, environmental organizations and the regulated community. The reform program brought the LGRB to the table for Agency Board deliberations in the late nineties. The Task Force, which included full representation of local interests advanced by the LGRB and other groups, concluded that rule making was an essential element of the Agency's administrative responsibilities.

APA, like all State agencies, has an obligation and specific authority to create, amend and clarify regulations. The Agency published a Generic Environmental Impact Statement and has followed an exhaustive and inclusive process with informal advice and formal State Administrative Procedure Act (SAPA) notices and hearings for each step of the regulatory revision process. The SAPA process for rule adoption is a lengthy and very public process with extensive oversight by State government and residents of the Park as well as environmental constituencies. Dating back to early 2001, the Agency has completed the following regulatory revisions:

- 2001 - Project conceptual review, accessory uses like bed and breakfast and guest cottage, and other changes;
- 2002 - Boathouse definition revised to "single story" with specific restrictions on use and other changes;
- 2003 - Front-to-back rewrite of enforcement regulations;
- 2005 - Technical corrections, with major recommendations on campgrounds tabled;
- 2008 - Shoreline variance criteria; wetland subdivision jurisdiction;
- 2010 - Boathouse update to "single story" and dock clarification.

The revisions to the definitions of boathouse and dock were undertaken as part of a statutorily required, five-year review and clarification of APA regulations following the 2002 promulgation of a boathouse definition. Additional changes were made in 2010 as a result of public comment received during the rule making process.

The regulatory change to the boathouse definition is prospective only. Lawfully existing boathouse structures may be repaired or replaced pursuant to Section 811 of the APA Act within the existing building envelope. An APA variance is required, however, to exceed the size parameters or expand a larger existing boathouse. Standard shoreline cutting and wetland jurisdictional thresholds still apply in all cases. The new definition of boathouse establishes a footprint of 1,200 square feet and 15 feet in height above the boat berth; it also substitutes the dimensional requirements of the Lake George Park Commission for Lake George. In towns with an approved local land use

program, the shoreline restrictions of the APA Act are locally administered and the Agency involvement in such dimensional requirements would only be in the case of a local variance from the Agency-approved local standards.

With regard to revisions of Agency boathouse regulations, the intent was to clarify definitions in the APA Act that discouraged shoreline development of large structures with potential negative impacts to shoreline vegetation and habitat. There is a well understood, scientific basis for protection of shoreline habitat. Agency regulations have been developed to protect wetlands, fish spawning areas and other significant ecological features. In addition, one of the purposes of the APA Act is to protect the aesthetic conditions in the Park, and to protect and maintain a "Park-like" atmosphere in making its land use decisions for both private and public lands.¹

All regulation changes must follow a very rigorous process under the SAPA. Prior to release for public comment, the proposed changes must receive approval from GORR (Governor's Office of Regulatory Reform). The LGRB was involved in the process every step of the way along with the full Agency Board of Commissioners.

(2) The Statutory Requirement of "No Undue Adverse Impact"

The Adirondack Park Agency Act requires the Agency to address "no undue adverse impact" and to establish conditions in permits to avoid regionally significant environmental impacts. The Agency's reform agenda has sought to increase clarity and consistency in this process.

A common assertion is that the "APA routinely expands its authority by imposing more restrictive requirements" than are required by law, which go beyond the statutory requirement of "no undue adverse impact." Seven counties filed a lawsuit against the Agency.

¹ APA Act, Section 801: "The basic purpose of this article is to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park."

In the fall of 2009 the New York State Supreme Court affirmed the Park Agency's rule making authority for shoreline and wetlands protection. The decision resulted from litigation filed by seven Adirondack counties and various stakeholder interests challenging regulatory revision effective on December 31, 2008. In the ruling, the Court cited the 1977 Wambat case, which held that the purpose of the APA Act is "to serve a supervening state concern transcending local interests." The Court also found that the regulations are consistent with "the comprehensive land use and development plan, which is decidedly a substantial state concern."²

In relation to the Agency's regulation to limit shoreline expansions of pre-existing, lawful structures, the Court noted, "What has occurred here is that the administrative agency charged with interpreting and enforcing a statute has reconsidered a regulation it adopted years ago pursuant to its perceived legislative mandate. The revised regulation, now adopted and in force, clearly takes a more restrictive view of the subject statute and does change the opportunities for owners of such residences for expanding their premises without Agency jurisdiction."³

Contrary to recent assertions, the Agency has consistently recognized hunting and fishing cabins as distinct from vacation dwellings. While the Supreme Court rejected specific regulatory criteria introduced in 2009, the Court validated the prior Agency regulation addressing this issue and reinstates practices in effect prior to the rule making.

Similarly, while the Agency strictly regulates the subdivision of agricultural land for residential development, it does not regulate agricultural uses or agricultural use structures. The Agency has incorporated the direction of the Court regarding single-family houses for farm workers in its standard guidance regarding agriculture.

² Blue Line Council, et al. v. APA, Supreme Court, Essex County, Decision and Order, November 19, 2009, 9. (Page references to unpublished slip opinion.)

³ Ibid., 15.

(3) Judicial Review

Local government is prohibited from suing State Agencies based on the New York State Constitution, not "opinions" or "arguments" of the Agency or Attorney General.

The LGRB has stated, "When local governments attempt to bring judicial review lawsuits, they are met with arguments by the attorney general that they lack standing and capacity to sue a state administrative agency." The LGRB calls for a statutory amendment to permit local governments and the Review Board "to bring judicial review lawsuits, to intervene in lawsuits, and to file amicus curiae briefs in lawsuits involving issues important to their well being."

This issue was revisited in the November 2009 New York State Supreme Court, which reaffirmed "Counties (and Towns), as political divisions of the State, except in very limited circumstances, have no capacity to sue their creator. 'New York has long followed the Federal rationale for finding that municipalities lack the capacity to bring suit to invalidate State legislation.'"⁴ The Court ruling also noted, "The petitioners in Clinton County cite their separate participation in the Adirondack Park Local Government Review Board (see Executive Law 803-a). Such Board, itself, has no capacity to sue (matter of Adirondack Park Local Govt. Review Bd. v Adirondack Park Agency, 89 AD2d642 (1982)) and therefore the counties can garner no greater power from their participation in appointing the Board's members."⁵ Further, in 1990 the Appellate Division determined it was illegal and unconstitutional for the LGRB to use public funds to fund such legal research or litigation.⁶

There is sound basis in the law to protect taxpayers from inappropriate use of public funds for the purpose of litigation that benefits private interests. Town and county government can legitimately influence public policy, legislation, promulgation of regulations and rule making through procedures set up under State law.

⁴ BlueLine Council et al. v. APA, Essex County Supreme Court, November 19, 2009, 6.

⁵ Ibid., 7.

⁶ Cooper v. Wertime, 164 A.D. 2d 221 (1990).

Where there is any actual "case and controversy," the individuals affected will have standing and Agency decisions can be challenged in court via an Article 78 proceeding.

Finally, the Agency has a policy to not discuss pending litigation and to not engage in public dialogue in any manner that could influence pending outcomes.

(4) APA Commissioner Appointments

The APA Board appointment process was established by law when the NYS Legislature enacted the Adirondack Park Agency Act in 1973.

It has been asserted that Agency Board appointments are made "with no official local government role in the appointment process," and that "many times in the past resident commissioner seats have remained vacant for long periods of time causing imbalance of representation."

By statute, the Agency Board has membership from both outside and inside the Adirondack Park, as well as three State agencies (DEC, DOS, ESD), so that both local and statewide perspectives are represented. Five of the Agency members must be in-park residents. Any local or county government entity, advocacy group, Adirondack Association of Towns and Villages (AATV) or the LGRB, can suggest candidates for the Agency Board, and like all Park and non-Park residents, influence candidate selection through the Governor's appointments process and the Legislature. By statute, the Governor nominates and the Senate approves appointments to the APA Board. Every appointment of Agency commissioners, from 1973 to the present, has been approved by the NYS Senate. Currently there are two former town supervisors from within the Adirondack Park serving on the Agency Board. Considerations for Board appointment should include, as with any policy making entity, skills and abilities from varied backgrounds including representation from economic, business, education, forest products, and science. Policy-setting boards should have the broadest perspective possible, drawing on any and all talent available. In the past, there have been delays when the Governor and Senate do not quickly agree on a candidate for confirmation. However, incumbents generally continue to serve beyond their term until they are replaced or reappointed.

There is no evidence that would require change to the existing process for APA appointments.

(5) Enforcement

The Agency overhauled the Enforcement Program in consultation with the LGRB and other constituent groups as part of regulatory reform.

The LGRB asserts recent highly visible enforcement cases against some wealthy landowners have created concerns that the Agency's enforcement program seeks to threaten landowners with steep fines or to assess fines against landowners who frequently have no culpability because a violation preceded their ownership of a property.

The primary objective of the Agency Enforcement Program is to obtain compliance with regulatory environmental requirements. In any case where there is ongoing environmental damage, the Agency will seek cessation of the ongoing action and immediate remediation of the damage.

Comprehensive revisions over the last decade have been done to ensure a consistent and timely enforcement program. In 2003, there was a comprehensive revision of the enforcement chapter of the Agency regulations, followed by Agency Board debate, review and approval of new "General Guidelines" in 2003 and new "Penalty Guidelines" in 2007. The LGRB was an active participant in the regulatory revision and guidance development and made many points that were incorporated in the final rules and guidelines.

The Agency has a well-defined policy on civil penalties adopted after careful review by the Agency Board. The Agency makes every effort to work with property owners to ensure timely settlements and takes into consideration when violations occurred during a prior ownership. In practice, penalties are never assessed against individuals who did not commit the violation. In 2009, Agency staff resolved 351 violations, which included 317 settlements. Landowners undertook remediation based on informal agreements with enforcement staff for an additional 29 minor violations.

The Agency, by statute, is limited to civil penalties. While working to resolve settlements at the staff level, the guidelines are used in relation to the individual circumstances of each case and generally involve modest

penalties. When cases do go to the Agency Enforcement Committee, the Committee can determine an appropriate penalty (five cases in 2009 went to the Committee for determinations of violation, resolution and penalty). During the 2009 calendar year, the Agency received total civil penalties in the amount of \$36,800, and they ranged from \$100 to \$4,000 in amounts. For cases where the Attorney General's office becomes involved in an Agency enforcement action, there is the potential for a more significant penalty in a court proceeding.

(6) Adirondack Park Agency Role in State Land Planning

The APA does not play any role in the state's purchase of land. The public often misunderstands the roles and responsibilities of the Adirondack Park Agency and Department of Environmental Conservation for acquisition and management of State lands in the Adirondack Park.

New York State's land acquisition programs are governed by the NYS Open Space Plan, which is administered by NYS DEC and NYS OPRHP. The Open Space Plan contains very specific acquisition recommendations and is not open-ended as some groups, including the LGRB, claim. Environmental Protection Funds (EPF) are used to purchase Forest Preserve as well as conservation easements on private lands to protect working forests from development. In recent years, the primary tool for protection of open space in the Park is the purchase of conservation easements by NYS DEC. These easements open private lands to public recreational opportunities while helping to protect working forest, part of the backbone of the economy for the Park. Even purchase of lands in fee contribute to the local tax base due to the longstanding practice of the State paying local taxes for Forest Preserve lands for more than a century.

The Adirondack Park Agency has no role in the acquisition of State land but is responsible for the classification of land once it is in State ownership. The classification scheme in the State Land Master Plan (SLMP) ranges from Wilderness to Intensive Use areas. The SLMP includes very specific guidelines and criteria for classification decisions such as remoteness, ability of the land to sustain recreational use, uniqueness of flora and fauna and location to other State lands.

Wilderness does not allow any motorized use while Wild Forest allows motorized access on roads and winter snowmobile use. The current proportion of the two major classifications is 1.2 million acres classified Wild Forest and slightly over 1 million acres classified as Wilderness. The classification system ensures unique recreational experiences for all residents and visitors, which results in significant economic opportunities for Adirondack communities. Other land use classifications include world class downhill skiing at Whiteface and Gore Mountains, the St. Regis Canoe area and numerous DEC Intensive Use campgrounds.

Snowmobile Guidance

The LGRB White Paper asserts the snowmobile planning in the Park has been derailed. On the contrary, APA and DEC developed new snowmobile trail construction guidelines that will allow the development of community connector trails and a variety of snowmobile trails and cross-country ski trails in the Park's Wild Forest units.

The Park needs a snowmobile trail system that integrates the trails on Forest Preserve lands with those on private lands. Although the "no material increase" provision of the SLMP limits the total snowmobile trail mileage on Forest Preserve to 848 miles, this limit has not yet been reached. There are also over 1,000 miles of snowmobile trails on private lands in the Park that provide a tremendous variety of snowmobile riding experience for residents and visitors when combined and integrated with Wild Forest snowmobile trails.

Snowmobile planning in the Adirondack Park has not been derailed by the Agency but rather has been obviously enhanced. The APA in conjunction with DEC has acknowledged and defined the need and process for Community Connector trails and the closing of superfluous trails in the interior, recognizing the economic value of snowmobiling to the Adirondack Park economy. Recently approved snowmobile guidelines describe the approach in detail. The Agency's efforts to clarify language in the SLMP have allowed unit management planning for Wild Forest units to proceed more expeditiously.

(7) Statute of Limitations

There is no precedent for a statute of limitations for building or zoning regulations anywhere in the United States.

Senator Little and Assemblywoman Sayward have sponsored bills for an APA statute of limitations that would require the APA to begin enforcement proceedings within 10 years of the violation.

The statute of limitations proposal would create a floating "safe date" for building and environmental violations that, unlike crimes, persist every day of non-compliance. A filled wetland no longer functions until it is restored. An unsafe structure is not safer with the passage of time. The "safe date" will have no verifiable reference or record. Such a statute will set neighbor against neighbor and create uncertainty in real estate transactions, which no administrative process can resolve.

In 2005, the Agency initiated proposals to revise its jurisdiction over subdivision to eliminate the current statutory reference to lots created since 1973 and with that regulatory simplification to establish an amnesty for existing lots. These proposals failed to garner any interest or support in the Legislature or with local government.

(8) Legislative Reform

The Adirondack Park Agency has been committed to legislative reform since 1995. We believe there are current improvements that could be made that will benefit the Agency, the region's environment and economy.

In 2008, the Agency initiated legislative proposals for an incentive for affordable housing; a local planning fund using modest fees and enforcement penalties; and to make procedural revision to the permit process to expedite permits, clarify procedures and facilitate development rights transfer. The proposals were resubmitted in 2009/10. Significant adjustments were made in response to concerns from the LGRB and AATV. The proposals did not progress in the Legislature and failed to garner support from local legislators.

The Agency remains open to a dialogue on reform that would improve administrative procedures, simplify jurisdiction and focus the expertise and capacities of the Agency on matters of statewide and regional concern.

(9) Open Meetings

The APA operates an open and transparent process with monthly meetings that are webcast, with detailed documentation of decisions, and regular response to public requests for documents pursuant to the Freedom of Information Act.

The LGRB sits at the table during Agency meetings and has access to detailed records of decisions and proceedings available to the Agency Board, as do all members of the public through the Agency web site and webcast of monthly meetings. The Agency webcasts are archived for public reference dating back to 2008. The Agency continually strives to keep its web site fully accessible and organized for easy access to guidance, meeting information and other background to assist the public in contacting and conducting business with the Agency.

(10) The Economy of the Adirondack Park

The Adirondack Park offers an unparalleled opportunity to balance environmental protection with sustainable communities. Outstanding public recreation contributes to travel and tourism for residents and visitors. One hundred and three towns and villages are the locations for goods, services and jobs in diverse communities with unique main streets, farms, small businesses, working forests and open space. The Agency should not be viewed as restricting development, but as a partner to ensure adequate environmental review.

For many months, demographic and economic data collected in the Adirondack Park Regional Assessment Report (APRAP) has been used to conclude that negative economic and demographic trends in the Park are in direct relationship to the Park's regulatory controls and amount of land in state ownership. There has been an exaggeration in relation to claims about the amount of land that cannot be developed in the Park. There have also been statements about the "loss of tax revenue" on Forest Preserve lands and misrepresentation of the Park's regional zoning

categories with claims that only a small percentage (1/2 of 1%) of the Park is classified commercial or industrial use.

Released in the spring of 2009, the APRAP report was a milestone in the presentation of factual data about the 103 towns and villages throughout the Adirondack Park. The project research focused on eight areas to address community life, infrastructure and demographic trends: Adirondack Geography and People, General Government, Emergency Services, Infrastructure, Community Life, Land Use and Ownership and Public Education. The study profiled important information from census data and other sources. A joint effort between not-for-profits and municipal governments, including the AATV, the research results "affirm how Adirondack communities share in the challenge of providing services for their residents and visitors, while simultaneously serving as gateways to the Park's public lands."⁷

Various trends identified in the report included the loss of school enrollments and an aging population in Park communities with a corresponding challenge in providing volunteer services. The increases of public sector employment at the expense of private sector jobs were also identified. The report cited no conclusions regarding the cause of these trends and the report intentionally did not interpret the data. APRAP's Executive Summary states "a deliberate effort was made to avoid excessive interpretation or to arrive at conclusions beyond the obvious."⁸

Readers of the APRAP report are cautioned that demographic and economic data is influenced by the fact that only two Park counties, Essex and Hamilton, are totally within the Blue Line. Economic data is especially influenced by urban centers just outside the Park such as Glens Falls, Plattsburgh and Watertown.

The Adirondack Park Land Use and Development Plan identifies areas where specific types of uses may be more compatible. Under the APA Act, there are no regulatory prohibitions on commercial uses in any land use area in the

⁷ APRAP, Executive Summary, 2009, v.

⁸ Ibid., v.

Park. The Agency's project review process simply ensures that development avoids undue adverse impacts and is located in the appropriate locations within the Park.

Economic development opportunities exist within the Park, which include the expansion of entrepreneurship and businesses; maintenance of open space in working forests and agriculture; expansion of local food production; coordination of marketing for tourism, product identification and regional branding as Adirondack and Adirondack Park products; improvements to infrastructure with increased broadband and cell phone coverage; working to secure stimulus funds for water and sewer upgrades; creation of pedestrian-friendly and walkable communities; and increased efforts on energy efficiency and conservation for homes and public buildings. These are opportunities in which we can all participate and that the Adirondack Park Agency endorses and is constantly working to secure.

Although half the Park is under State ownership, lands in the State's 480-a program can be developed at any time and contribute to the working economy of the Park. While the 480-a program is separate from the State's conservation easement program, the State purchase of public easements also helps keep timber harvesting operations viable. The conservation easements result in land being less susceptible to real estate speculation, which can inflate the value of land prices and make it difficult to keep land in timber production. It has been a longstanding practice for the State to pay local taxes on Forest Preserve lands, and this practice has been extended to State easement lands for which taxes are apportioned between the State and private landowner.

As we have learned through environmental disasters, truly sustainable development must be accomplished with adequate environmental review in order to protect the very economy we all wish to sustain and grow. We know Park communities face very real issues compounded by national and regional economic downturns. We strongly believe the environmental quality and uniqueness of the Adirondack Park fundamentally supports the region's economy.