STATE OF NEW YORK ADIRONDACK PARK AGENCY

In the matter of the apparent
Violation of Executive Law § 806 by:

JOSEPH COTAZINO, JR.
JOY COTAZINO,

Agency File #2019-0127

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO NOTICE OF APPARENT VIOLATION

BACKGROUND

The salient background facts are set forth in the affidavit of respondent, Joseph Cotazino, Jr. Respondents respectfully request that the Enforcement Committee find that there is no violation of Executive Law § 806. In the alternative, (1) Respondents should be given an opportunity to apply for a variance for the Deck; and, if necessary, (2) a hearing should be held (including the opportunity for full disclosure) pursuant to 9 NYCRR Subpart 581-4 prior to issuing a final decision in this matter.

ARGUMENT

POINT I

THERE MUST BE A FINDING OF 'NO VIOLATION' BECAUSE THE AGENCY HAS NOT OFFERED ADMISSIBLE EVIDENCE SUFFICIENT TO ESTABLISH A VIOLATION OF EXECUTIVE LAW § 806

Executive Law § 806[a][3] requires a variance prior to the construction of any new principal building or accessory structure greater than 100 square feet in size within 50 feet of the "mean high water mark" of any lake on hamlet lands in the Adirondack Park (hereinafter the "Setback"). It is well-settled that the Adirondack Park Agency (hereinafter "Agency") has the

burden of establishing, by substantial evidence, a violation of the law (*see Protect the Adirondacks! Inc. v Adirondack Park Agency*, 121 AD3d 63, 69 [3d Dept 2014]). The Notice of Apparent Violation must recite "the material facts and documentary evidence, and the provisions of law upon which the notice is based" (9 NYCRR 581-2.6[b]). "Although the objectives of the [APA] legislation are desirable and necessary, where state agencies have such power, the exercise thereof should not only be in a fair and equitable manner but also based on a definite, readily ascertainable and official standard" (*Tyler v Bd. of Members of Adirondack Park Agency*, 92 Misc 2d 754, 757 [Sup Ct 1978]).

Officer Favor claims that "most, if not all" of Respondents' Deck is within 50 feet of the mean high water mark of Lake Algonquin (hereinafter the "Lake"). First, Officer Favor has not set forth in his affidavit what he claims the mean high water mark is for the Lake. As far as Respondent is aware, the mean high-water level of the Lake has not been established (see NYCRR 9 Subt. Q, App. Q-2). Thus, Officer Favor has not sufficiently identified in his affidavit where the Setback line is located as it compares to the Deck (see 9 NYCRR 571.3).

Officer Favor has also failed to provide any measurements to identify with specificity which portion(s) of the Deck is(are) alleged to be within the Setback. Based upon the foregoing, Officer Favor has not established a prima facie case that Respondents' Deck is in violation of Section 806[a][3] (*see Tyler v Bd. of Members of Adirondack Park Agency*, 92 Misc 2d at 757]).

Second, Officer Favor's failure to specify whether he is alleging that all – or merely a portion – of the Deck is within the Setback should be fatal to this Enforcement Action. At a minimum, if only a *portion* of the Deck is within the Setback, then the Agency's request that the *entire* Deck be removed is unlawful. Without any measurements from Officer Favor, this Committee does not have a sufficient evidentiary basis to rule that the entire Deck must be

removed.

POINT II

THERE MUST BE A FINDING OF 'NO VIOLATION' BECAUSE THE AGENCY CREATED THE CONDITION WHICH CAUSES THE ALLEGED VIOLATION

As set forth in the Affidavit of Mr. Cotazino, the Agency should be estopped from asserting a violation because Officer Favor and Engineer LaLonde sited the House and Deck and told him that he did not need a variance.

The doctrine of equitable estoppel may be invoked against governmental agency "when failure to do so would operate to defeat a right legally and rightfully obtained" (*Hauben v Goldin*, 74 AD2d 804, 805 [1st Dept 1980]). A governmental agency may also be subject to estoppel when "a manifest injustice has resulted from actions taken in its proprietary or contractual capacity... [that have] induced justifiable reliance by a party who then changes position to his or her detriment" (*Baxter v County of Suffolk*, 201 AD2d 603, 604 [2d Dept 1994]).

Had Respondents not sought to cooperate with the Town's request that the House and Deck be moved further from Kibler Point Road, and allowed Officer Favor and Engineer LaLonde to relocate the House and Deck, there would be no violation. Based upon the foregoing, the Agency should be estopped from requiring that Respondents remove their Deck.

POINT III

THE RELIEF SOUGHT IS UNREASONABLE AND EXTREME UNDER THE CIRCUMSTANCES OF THIS CASE

The Agency seeks removal of the entire Deck. If the Enforcement Committee finds there is a violation, as set forth above, this request (as well as the request for a monetary penalty) should not be granted because there is no proof that the entire Deck is within the Setback. In addition, Respondents have spent over $20,000 to construct the Deck, and it would be thousands more to

take it down. The request for an order removing the Deck is also unreasonable and extreme based upon the fact that Officer Fravor and Engineer LaLonde are the cause of it being built (either wholly or partially) in the Setback.

Respondents have zero culpability in this matter. The Deck would not have been built in the Setback had Respondents not accommodated the Town's request and Officer Fravor and Engineer LaLonde not relocated the Deck within the Setback. Every action taken by Mr. Cotazino indicates his intent to comply with all statutes, rules and regulations. Respondents were never on notice that the new location of the Deck would be within the Setback.

The Agency also misconstrues the 2017 Agency jurisdictional determination. The request for the jurisdictional determination was in relation to a change to the already approved septic system – it had nothing to do with the Deck. The representation by Agency counsel that Respondents had been told "multiple times by Agency staff" that a variance would be required to build the Deck is unsupported by the record and blatantly false.

The alleged lack of "cooperation" by Respondents is another blatant misrepresentation. After the condition causing the violation was created by Agency staff, the Agency demanded nothing less than removing the entire Deck. There was no discussion of alternative ways to resolve remediate. The Agency demanded nothing less than full capitulation, which was completely unreasonable in light of the facts.

The Enforcement Committee can see that Respondents have built a relatively small, and beautiful deck, off of their house. A deck with a view of the lake in the Adirondacks is an extremely common sight and not offensive to anyone. Respondents also own the lots on either side of the Property. Even assuming the Deck is within the Setback, the Agency has not actually stated how its present location negatively impacts the Lake, or further the purpose of Executive Law § 806.

CONCLUSION

Joseph Cotazino, Jr. Respondent respectfully requests that the Enforcement Committee find that there is no violation of Executive Law § 806. In the alternative, (1) Respondent should be given an opportunity to apply for a variance for the Deck; and, if necessary, (2) a hearing should be held (including the opportunity for full disclosure) pursuant to 9 NYCRR Subpart 581-4 prior to issuing a final decision in this matter.

Dated: March 2, 2020

Justin W. Gray, Esq.