

**BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**IN RE: Town of Palm Beach  
Petition for Variance**

---

**OGC # 14-0127  
CCCL # PB-1123 AR V**

**FINAL ORDER GRANTING PETITION FOR  
VARIANCE FROM RULE 62B-33.0085, F.A.C.**

On March 17, 2014, the Town of Palm Beach, filed a petition for variance under Section 120.542, Fla. Stat., and Rule 28-104.002, F.A.C., for a permanent variance or waiver from Rule 62B-33.0085, F.A.C., which requires each application for a new permit or for a change in permit status to be considered by the Department be accompanied by a fee. Notice of receipt of the petition was published in the Florida Administrative Register on March 28, 2014. No comments were received.

**Background And Applicable Regulatory Criteria**

1. Petitioner is the governing body for the Town of Palm Beach, a Florida Municipal Corporation. Its principal office is located at Town Hall, 360 South County Road, Palm Beach, Florida 33480. The Town filed its petition for a permanent variance or waiver from Rule 62B-33.0085, F.A.C., for its North Ocean Boulevard seawall replacement adjacent to the Palm Beach Country Club.
2. The Department of Environmental Protection (Department) is the state agency charged with the duty and power to abate and prevent pollution to waters of the state.
3. The Town of Palm Beach, Palm Beach County, the Department, and the Florida Fish and Wildlife Conservation Commission agreed to enter into a Beach Management Agreement (BMA) Pilot Project to coordinate beach management activities.
4. The established BMA process coordinates the regulatory responsibilities of the FDEP with other state and federal agencies, and with the interests of the BMA Participants and the public in a streamlined program to protect the environment and to provide net ecosystem benefits pursuant to subsection 403.0752(2)(a), F.S. It is intended to coordinate and facilitate flexible permitting for beach management and to achieve net ecosystem benefits and related

public objectives for the area. The BMA's approach to authorizing projects and activities is centered on regional management of the coastal system rather than the conventional project-by-project permitting process. The BMA is expected to generate a more cost-effective and efficient permitting process that will reduce the BMA Participants' costs, time delays, and permitting uncertainty.

5. The long-term "Outfalls Removal" will include a phased capital improvement effort to improve the Town of Palm Beach's beach and dune system. Of the 67 identified discharges for the outfalls, 56 are located along the North Ocean Boulevard seawall adjacent to the Palm Beach Country Club and discharge through the seawall

6. "Outfalls Removal" is one of the primary net ecosystem benefits identified within the BMA. The North Ocean Boulevard seawall replacement adjacent to the Palm Beach Country Club was listed as the first non-monitoring activity scheduled to address the BMA's "Net Ecosystem Benefits". The replacement seawall will not include any discharges for the outfalls, and therefore, will eliminate said discharges onto the beach.

7. The permitting fees associated with the North Ocean Boulevard seawall, as calculated under Rule 62B-33.0085, F.A.C., total the sum of \$19,500.

8. Rule 62B-33.00085, F.A.C., provides in pertinent part:

*Rule 62B-33.0085(4), F.A.C.: The total permit fee shall be the sum of the fees assessed for each individual major structure plus any additional fee for minor structure. The fees for each activity, experimental project, rigid coastal structure, permit modification, time extension, permit renewal, area wide permit, or structure or addition, when any portion of the foundation or any habitable portion of such structure or addition is proposed by the applicant to extend seaward of the CCCL, shall be assessed in accordance with the following schedule:*

...

*Rule 62B-33.0085(k), F.A.C.: Rigid Coastal Structures: \$3,000 for structures up to 100 feet in length, plus \$500 for each additional 50 feet of length or portion thereof. For fee payment purposes, the length of the structure shall include return walls.*

9. Rule 62B-33.0085, F.A.C., implements Section 161.0535, F.S

**Section 120.542, F.S., Variance And Waiver Provision**

10. Section 120.542, F.S., provides in pertinent part:

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. . . Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section.

\* \* \*

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, “substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, “principles of fairness” are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

11. Section 120.52(21), F.S. defines “variance” to mean:

(21) “Variance” means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

12. Section 120.52(22), F.S. defines “waiver” to mean:

(22) “Waiver” means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule.

**Principles Of Fairness And Substantial Hardship To The Petitioner**

13. The Town alleges that the waiver requested would still meet the purpose of underlying statutes (161.053, 161.0535, and 161.085, F.S.) because not only is it providing net ecosystem benefits under the BMA, but it will pay associated fees and costs for the projects listed in the BMA.

14. Coastal Construction Control Line (CCCL) projects identified within the BMA, do not include a fee for individual project approval (for dune restoration). Coastal armoring structures are excluded from the BMA.

15. Petitioner alleges that principles of fairness are violated in that other listed CCCL Projects included in the BMA include no associated fees.

16. The BMA was issued as an ecosystem management agreement under 403.0752, F.S. Consideration for waivers of procedural requirements is included under 403.0752, F.S. Section 403.0752 (4), F.S., states that an ecosystem management agreement may include incentives for participation and implementation by a regulated entity; in this instance the following applies:

(b) Permitting process flexibility, and

(g) Alternative means of environmental protection which provide for equivalent or reduced overall risk to human health and the environment and which are available under existing law such as variances, waivers, or other relief mechanisms.

#### **The Variance Or Waiver Will Meet The Underlying Purpose Of The Statute**

17. Section 120.542(2), F.S., states "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness." The variance procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

18. The purpose of the underlying statute will be met since 403.0752, F.S., governing the BMA allows flexibility in processing permits, including the flexibility to waive a permit fee.

#### **CONCLUSION**

Based on the foregoing reasons, the Petitioner has demonstrated that it has met the requirements for a permanent waiver of rule.

**THEREFORE, IT IS ORDERED:**

The Town of Palm Beach is GRANTED a waiver or a variance from Rule 628-33.0085, F.A.C., for CCCL permitting fees in the amount of \$19,500, associated with the North Ocean Boulevard seawall.

**Notice of Rights**

The Department's proposed agency action will become final unless a timely petition for an administrative hearing is filed under sections 120.569 and 120.57 of the Florida Statutes before the deadline for filing a petition. The procedures for petitioning for a hearing are set forth below.

A person whose substantial interests are affected by the Department's Order may petition for an administrative proceeding (hearing) under sections 120.569 and 120.57 of the Florida Statutes. The petition must contain the information set forth below and must be filed (received) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, or via email at [agency.clerk@dep.state.fl.us](mailto:agency.clerk@dep.state.fl.us). Petitions filed by the Petitioner or any of the parties listed below must be filed within twenty-one days of receipt of this written notice.

Under rule 62-110.106(4), Florida Administrative Code, a person whose substantial interests are affected by the Department's action may request an extension of time to file a petition for an administrative hearing. Requests for extension of time must be filed (received by the clerk) with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, or via email at [agency.clerk@dep.state.fl.us](mailto:agency.clerk@dep.state.fl.us), before the end of the time period for filing a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

Petitions filed by any persons other than those entitled to written notice under section 120.60(3), Florida Statutes must be filed within twenty-one days of publication of the notice or within twenty-one days of receipt of the written notice, whichever occurs first. Under section 120.60(3), Florida Statutes, however, any person who asked the Department for notice of agency action may file a petition within twenty-one days of receipt of such notice, regardless of the date of publication.

A petitioner must mail a copy of the petition to Thomas G. Bradford, Town Manager, Town of Palm Beach, 360 South County Road, Palm Beach, FL 33480, email: [townmanager@townofpalmbeach.com](mailto:townmanager@townofpalmbeach.com), at the time of filing. The failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under sections 120.569 and 120.57 of the Florida Statutes, or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will only be at the discretion of the presiding officer upon the filing of a motion in compliance with rule 28-106.205 of the Florida Administrative Code.

A petition that disputes the material facts on which the Department's action is based must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the Department action;

(f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action; and

(g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise contain the same information as set forth above, as required by rule 28-106.301.

Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the Department final action may be different from the position taken by it in this notice. Persons whose substantial interests will be affected by any such final decision of the Department have the right to petition to become a party to the proceeding, in accordance with the requirements set forth above.

Mediation is not available for this proceeding.

Once this permitting decision becomes final, any party to the final agency action has the right to seek judicial review of it under section 120.68 of the Florida Statutes, by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the clerk of the Department in the Office of General Counsel, Mail Station 35, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000, or via email at [agency.clerk@dep.state.fl.us](mailto:agency.clerk@dep.state.fl.us), and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice must be filed within thirty days after this order is filed with the clerk of the Department.

DONE AND ORDERED this 26th day of January, 2015, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

*for (unt) Rad*

---

Danielle H. Irwin, PWS, LEED AP  
Deputy Director  
Division of Water Resource Management  
2600 Blair Stone Road  
Tallahassee, Florida 32399-2400

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

*Della Weaver*      01/26/2015  
CLERK                              DATE

Electronic Copies Furnished to:

Thomas G. Bradford, Town Manager,  
Town of Palm Beach (townmanager@townofpalmbeach.com)

Tony McNeal, DEP CCCL Program (tony.mcneal@dep.state.fl.us)  
Betsy Hewitt, DEP Office of General Counsel (betsy.hewitt@dep.state.fl.us)  
Lea Crandall, DEP Agency Clerk (agency.clerk@dep.state.fl.us)

Suzanne Printy, Chief Attorney,  
Joint Administrative Procedures Committee (printy.suzanne@leg.state.fl.us)