

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

IN RE: JOHN and VALERIE MEYER

**OGC #15-0145
DEP FILE: SJ-1206 AR V**

**FINAL ORDER
GRANTING PETITION FOR VARIANCE**

On March 17, 2015, John and Valerie Meyer (Petitioners) filed a petition for variance under Section 120.542, Fla. Stat., and Rule 28-104, F.A.C., for a permanent variance or waiver from Rules 62B-33.002(18), 62B-33.002(43), and 62B-33.0051(1)(a)1, F.A.C. Notice of receipt of the petition was published in the Florida Administrative Register on March 20, 2015. No comments were received in response to the notice.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. The Department is the state agency charged with the duty and power to abate and prevent pollution to waters of the state.
2. The Petitioners seek a permanent variance from Rules 62B-33.002(18) and (43), and 62B-33.0051(1)(a)1, F.A.C., which provide in pertinent part:
 - *Rule 62B-33.002(18). F.A.C.: "Eligible Structures" are private structures qualified for armoring as follows:*
 - ...
 - (b) *Private structures include:*
 1. *Non-conforming habitable structures.*
 - (c) *Eligible structures do not include minor structures.*
 - *Rule B2B-33.002(43), F.A.C.: "Non-conforming Structure" is any major habitable structure which was not constructed pursuant to a permit issued by the Department pursuant to Section 161.052 or 161.053, F.S., on or after March 17, 1985.*
 - *Rule 62B-33.0051(1)(a)1, F.A.C.: Construction of armoring shall be authorized under the following conditions:*
 1. *The proposed armoring is for the protection of an eligible structure;*
3. Petitioner's property is located at 3870 Coastal Highway, St. Augustine, Florida 32084.
4. Petitioners seek a variance from the cited rule provisions in order to construct coastal armoring to protect a conforming structure from coastal erosion, and prevent pollution to state waters.
5. The segment of shoreline comprising Petitioners' property has been designated by the Department as "critically eroded." The FDEP Critically Eroded Beaches in Florida report updated in June 2014 designated 1.6 miles of Vilano Beach located between FDEP monuments

R-109 and R-117 as "critically eroded." The subject property is located approximately 400 feet south of Monument R-111 and is within this critically eroded portion of the beach.

6. St. Johns County issued several Emergency Proclamations in 2014, with the most recent issued on December 8, 2014, declaring a shoreline emergency along the entire county coastline.

7. There is an on-site domestic wastewater system that is located within 5 feet of the bluff on the subject property. The current and expected rate of erosion can be expected to compromise Petitioners' domestic wastewater system, which can constitute a source of pollution to state waters and a danger to the public health, safety, and welfare. Relocation of the domestic wastewater system is not feasible or practical on the property. Use of the domestic wastewater system is integral to the dwelling.

8. Petitioners' domestic wastewater system is located on the south side of the primary dwelling and in line with the seaward edge of the foundation of the dwelling. The seaward edge of the tank is approximately 75 feet seaward of the CCCL. The top of dune as of January 19, 2015, was approximately 5 to 10 feet seaward of the foundation of the residence and the domestic wastewater system.

9. Petitioners propose to install coastal armoring to protect the domestic wastewater system and dwelling at 3870 Coastal Highway, St. Augustine, Florida. Petitioners also propose to connect to the existing coastal armoring structure located at the adjacent property (3860 Coastal Highway, St. Augustine, Florida), and has received authorization from the property owner.

10. Armoring is sited adequately to minimize impacts to the beach-dune system and adjacent properties and adequately preserve beach access, as required by section 161.085, F.S., and Rule 62B-33.0051, F.A.C.

SECTION 120.542, F.S., VARIANCE AND WAIVER PROVISION

11. 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.

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).

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

12. The Petitioners seek a permanent variance from Rules 62B-33.002(18) and (43), and 62B-33.0051(1)(a)1, F.A.C., because applying these rules to their situation would be unreasonable, unfair, and would create an unintended result and substantial hardship for them and violate the principles of fairness.

13. The Petitioners allege that a substantial economic hardship is created if further erosion undermines the dwelling and its associated elements, including the domestic wastewater system.

14. Petitioners allege that strict application of the rules will lead to an unfair result when compared to other persons subject to the rules. The Petitioners have a domestic wastewater system that is at risk of discharging untreated sewage on a public beach if erosion were to continue and the system be left unprotected. While section 161.085, F.S., does not directly address the presence or risks associated with sewage exposure, Chapter 403, F.S., and the rules adopted thereunder, does. By rigidly applying section 161.085, F.S., without consideration of the impact of domestic wastewater system, Petitioners allege the Department is putting public health at risk from exposure to sewage outflows that may be discharged directly on to the beach, or not be sufficiently treated to protect public health by reducing required local setbacks from surface waters.

15. Petitioners allege that principles of fairness are violated in that other properties in the vicinity were issued armoring permits.

THE VARIANCE OR WAIVER WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

16. The Coastal Construction Control Line ("CCCL") program was established to protect Florida's beaches and dunes while assuring reasonable use of private property lying

seaward of the CCCL. One purpose of the program is to protect the coastal system from improperly sited and designed structures which can destabilize the beach and dune system, accelerate erosion, endanger adjacent properties, or interfere with public beach access. Construction activities which take place seaward of the CCCL require Department approval. In the instant case, the armoring and the habitable major structure and its associated domestic wastewater system it is intended to protect are located seaward of the CCCL.

17. Section 161.085, F.S., sets forth the state's policy on rigid coastal armoring structures. This section recognizes the need to protect private structures and public infrastructure from damage or destruction caused by coastal erosion. The statute provides that armoring may be permitted provided that the private structures or public infrastructure is vulnerable to damage from frequent coastal storms, and that the siting and design of the armoring takes into consideration protection of the beach-dune system, impacts on adjacent property, preservation of public beach access, and protection of native coastal vegetation and nesting marine turtles and their hatchlings. The intent of the statute is to strike the appropriate balance between protection of the coastal system and the need to protect private structures and public infrastructure. Further, section 403.061, F.S, provides that the Department shall have the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it. The requested variance will protect the domestic wastewater system from the effects of erosion, thereby protecting state waters and public health from the effects of pollution.

CONCLUSION

18. Under most ordinary circumstances, the Petitioners' request for variance or waiver of the Department's rules regarding eligibility would not reflect the appropriate balance between the need to protect private structures and protection of the beach-dune system. However, given the specific circumstances at Petitioner's property, including the location of the domestic wastewater system in proximity to the erosional bluff as a result of winter storms, the appropriate siting of the armoring to minimize adverse effects to the beach-dune system, marine turtles, and adjacent property owners, the economic and other hardships as alleged, it is appropriate to grant the requested variance.

19. Section 120.542, F.S., requires the agency to consider the Petitioners' "substantial hardship", both economic and otherwise, when considering whether a variance or waiver to the rule(s) should be granted. The section also directs the Department to consider and balance whether the "principles of fairness" are violated when the literal application of the rule(s) affect a particular person in a manner significantly different than other similarly situated persons who are subject to the rule(s).

20. Petitioners have demonstrated an actual substantial economic hardship that will be suffered if the armoring is not allowed to be installed, and that pollution to waters will occur in the event the domestic wastewater system becomes too close to the bluff.

21. Petitioners' circumstances in the instant case are also unique as opposed to others to whom the rules regarding armoring are applicable – Petitioners are seeking approval of armoring similar to that approved for properties in the immediate vicinity, also due to severe erosion from winter storms and the St. Augustine Inlet.

Taken as a whole, the Petitioners are uniquely – which may be considered as unfairly – affected by literal application of the rules the Petitioners seeks relief from.

THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, the Petitioners John and Valerie Meyer have demonstrated that they have met the requirements for a permanent waiver or variance of Rules 62B-33.002(18) and (43), and 62B-33.0051(1)(a)1, F.A.C.

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. 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) of the 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, 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.

The petitioner shall mail a copy of the petition to the applicant at the address indicated above 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, F.A.C.

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

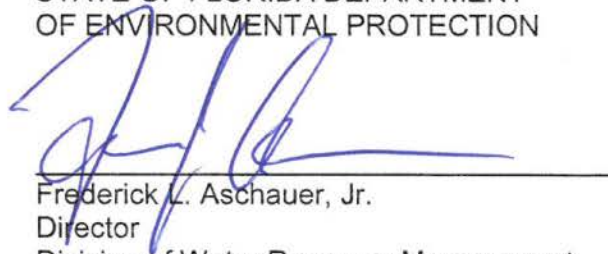
such final decision of the Department have the right to petition to become a party to the proceeding, in accordance with the requirements set forth above.

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, 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 3rd day of June, 2015, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Frederick L. Aschauer, Jr.
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.

Sandra K Rogers 6/3/2015
CLERK DATE

Electronic Copies Furnished to:

John "Buddy" Kollar, Kollar Brothers, Inc. (jkollar417@aol.com)
Laura L. Mahoney, Toco Engineering, Inc. (lmahoney@toco.com)
Agents for Petitioners
Tony McNeal, DEP CCCL Program (tony.mcneal@dep.state.fl.us)
Betsy Hewitt, DEP Office of General Counsel (betsy.hewitt@dep.state.fl.us)
Lisa Brown, DEP Office of General Counsel (lisa.l.brown@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)