

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

IN RE: Steven Tarr

**OGC #15-0659
DEP FILE: SL-308 V**

**FINAL ORDER
GRANTING PETITION FOR VARIANCE**

On November 21, 2015, Steven Tarr (Petitioner) filed an amended petition under Section 120.542, Fla. Stat., and Rule 28-104, F.A.C., for a permanent variance or waiver from Rule 62B-33.024(2)(d)3., F.A.C. Petitioner seeks a variance or a waiver from the cited rule provision to calculate the 30- year erosion projection line by using the Erosion Control Line (ECL) instead of the pre-project survey Mean High Water Line (MHWL), as required by the cited rule provision. Notice of receipt of the amended petition was published in the Florida Administrative Register on December 31, 2015. No comments were received in response to the notice.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. The Florida Department of Environmental Protection (“Department”) is the state agency charged with the duty and power to establish special siting and design considerations seaward of established coastal construction control lines to ensure the protection of the beach and dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access.

2. The Petitioner seeks a permanent variance or waiver from Rule 62B-33.024(2)(d)3., F.A.C., which provides in pertinent part:

62B-33.024 Thirty-Year Erosion Projection Procedures.

(2) A 30-year erosion projection shall be determined using one or more of the following procedures:

(d) Beach nourishment or restoration projects shall be considered as follows:

3. The [Mean High Water Line (MHWL)] to [Seasonal High Water Line (SHWL)] distance landward of the erosion control line (ECL) shall be determined. If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL. The pre-project SHWL shall be located by adding the MHWL to the SHWL distance landward of the pre-project MHWL (usually the ECL). The remaining project life, which is the number of years the restored beach MHWL is expected to be seaward of the ECL, shall be subtracted from the 30 years as a credit for the nourishment project. The non-credited remaining years times the pre-project shoreline change rate for the site yields the 30-year projection distance landward of the pre-project SHWL.

3. Petitioner's property is located at 1160 S. Ocean Drive, Fort Pierce, Florida.
4. Petitioner's property had previously received a CCCL permit from the Department.

The CCCL permitting history of the subject property is as follows:

- a. On September 21, 2004, the Department issued to Linda J. Ojeda and Binth Rustad, permit SL-200 with a notice to proceed to construct a three story duplex and accessory structures and activities seaward of the Coastal Construction Control Line (CCCL) on property located at S.R. A1A, Fort Pierce, FL 34949.
- b. On October 11, 2005, the Department received a permit transfer agreement transferring the permit to ZOG Limited Partnership.
- c. On October 21, 2005, the Department issued an Approval of Permit Transfer.
- d. During the period of 2005-2006, the owners began construction of the duplex and installed all 67 pilings depicted on the plans, and approximately half of the pile caps.
- e. On March 20, 2008, the Department received an Application for Permit Renewal.
- f. On May 5, 2008, the Department issued an Approval of Permit Renewal which extended the expiration date of permit SL-200 to September 21, 2009.
- g. On April 25, 2011, the Department received an Application for Permit Time Extension to complete construction authorized under Permit SL-200.
- h. On April 28, 2011, the Department received a Petition for Variance to allow an extension of the permit expiration date.
- i. On September 16, 2011, the Department issued a Final Order Granting Petition for Variance extending the expiration date of the permit to July 1, 2013.
- j. On or around December 2011, the principal owner passed away, and the property became neglected.
- k. On September 2, 2014, Petitioner purchased the property.
- l. On March 27, 2015, Petitioner submitted an application for a permit to continue the construction of a duplex on the property. The application was withdrawn on July 20, 2015.
- m. On July 20, 2015, the Department informed the Petitioner that a variance would be required before a permit could be issued.

- n. On September 24, 2015, Petitioner submitted a petition for variance, and subsequently submitted an amended petition for variance on November 21, 2015.
- o. A beach nourishment project along the subject shoreline has been maintained seaward of the ECL.

5. The location of the proposed duplex, once constructed, will conform to the existing line of construction in the area. Other structures north and south of the Petitioner's property were issued Department permits, and also conform to the existing line of construction.

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

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**

6. The Petitioner seeks a permanent variance or waiver from Rule 62B-33.024(2)(d)3., F.A.C., on the grounds that applying these rules to his situation would be unreasonable, unfair, and would create an unintended result and substantial hardship, would result in economic hardship, and would violate the principles of fairness.

7. Petitioner alleges that application of the rule requirement to use the pre-project MHWL survey instead of the ECL would be unreasonable, unfair, and would create unintended consequences because (a) the rule does not take into consideration that a previous permit was issued for this project, (b) substantial monies were expended in the start of construction of the duplex structure by the prior owner in reliance on the previous permit, (c) similar projects on properties to the north of Petitioner's property have received CCCL permits from the Department, (d) the project will conform to the existing line of construction in the area, and (e) strict application of the rule would have the unintended result of causing Petitioner to remove the existing pilings (estimated by Petitioner to be \$35,00.00) and incur replacement costs of the pilings (estimated by Petitioner to be \$115,000.00).

8. The Petitioner further alleges that strict application of the rule would create a substantial economic hardship for Petitioner because he would have to remove the existing pilings at a cost of approximately \$35,000 and re-install them at a cost of \$115,000.

9. Petitioner alleges that strict application of the rule will lead to an unreasonable, unfair, and unintended result when compared to other persons subject to the rule, and that principles of fairness are also violated. The Petitioner asserts that the rule does not take into consideration the fact that a previous Department permit was issued for the proposed structure and that considerable funds were expended to construct the existing pilings in reliance on that permit; that considerable funds would be required to demolish and then reconstruct those pilings; that the duplex once constructed will conform to the existing line of construction in the area. In addition, Petitioner asserts that because properties to the north of the Petitioner's property received Department permits, strict application of the rule would affect him differently than the rule affects others subject to it.

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

10. 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 proposed duplex is located seaward of the CCCL, and therefore, is subject to those statutes and rules.

11. Section 161.053, F.S., sets forth the state's policy on coastal construction. This section recognizes the need to protect the state's sandy beaches from damage or destruction caused by imprudent coastal construction. The statute provides that construction seaward of the CCCL is permissible provided

the provisions of Section 161.053 are met, including the rules promulgated to implement the section. The intent of the statute is met if construction seaward of the CCCL meets the special siting and design considerations of the statute so that protection of the beach-dune system, proposed or existing structures, and adjacent properties and preservation of public beach access is ensured. Section 161.053(5), F. S. of the CCCL statute is intended to prevent imprudent construction within areas that the Department projects to be seaward of the seasonal mean high water line within 30 years of the date of permit application. See Rule 62B-33.024, F.A.C. In determining erosion rates, the Department may consider the effect of existing beach nourishment or restoration projects for which all funding arrangements have been made and all permits have been issued at the time the application is submitted. See Section 161.053(5)(d), F.S. (“(t)he department shall consider each year there is sand seaward of the erosion control line that no erosion took place that year...”).

CONCLUSION

12. Section 120.542, F.S., requires the agency to consider the Petitioner’s “substantial hardship” (economic, technical, legal and other hardship) when considering whether a variance from or waiver of the rule(s) should be granted. The section also directs the Department to consider whether the “principles of fairness” are violated when the literal application of the rule(s) affects a particular person in a manner significantly different than other similarly situated persons who are subject to the rule(s).

13. Variance or waiver of the pre-project MHWL survey “starting point” in favor of using the ECL is appropriate and will otherwise meet the underlying purpose of Section 161.053, F.S. given the specific circumstances at Petitioner’s property. It is appropriate to permanently grant the requested variance given the previous permit issued by the Department for this site; the hardship and unfairness as alleged by the Petitioner; the permits that were issued for other similar structures on properties to the north of Petitioner’s property; conformance of the duplex with the line of construction in the area; and the beach nourishment project along the subject shoreline that has been maintained seaward of the ECL.

14. Taken as a whole, literal application of the rule in this instance would be unfair based on the allegations of the Petition, as set forth therein.

THEREFORE, IT IS ORDERED:

The petition of Steven Tarr for a permanent variance from Rule 62B-33.024(2)(d)3., F.A.C., is GRANTED.

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, and 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 15 day of January, 2016, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Jane Herndon, Esquire, 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.

Samela K Rogers 1-15-16
CLERK DATE

Electronic Copies Furnished to:

Steven Tarr, Petitioner

Tony McNeal, DEP CCCL Program (tony.mcneal@dep.state.fl.us)

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