

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

**In Re: Gulf Island Strand  
Condominium Association, Inc.  
AR V**

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**OGC File No. 16-1238  
DWRM No. CH-612**

**FINAL ORDER  
GRANTING PETITION FOR WAIVER**

On August 12, 2016, Petitioner Gulf Island Strand Condominium Association, Inc. filed a petition with the Florida Department of Environmental Protection (“Department”) requesting a variance or waiver<sup>1</sup> pursuant to Section 120.542, Florida Statutes, with respect to the Gulf Island Strand Condominium building (“Condominium”), 2770 North Beach Road, Englewood, Florida, Charlotte County. Because the Condominium was constructed under a DEP Coastal Construction and Excavation permit issued after 1985, it is not eligible to be protected by armoring<sup>2</sup> pursuant to Florida Administrative Code Rules 62-33.002(18), 62-33.002(44), and 62-33.0051(1)(a)1. Petitioner seeks a waiver or variance from this eligibility requirement and alleges that its application would create substantial hardships and violate principles of fairness.

The Department published notice of receipt of the petition in the Florida Administrative Register on August 29, 2016. No public comment was received.

**BACKGROUND AND APPLICABLE REGULATORY CRITERIA**

1. Petitioner Gulf Island Strand Condominium Association, Inc. is an active Florida not-for-profit corporation charged with the purpose of operating the Gulf Island Strand Condominium located at 2770 North Beach Road in Englewood (Charlotte County), Florida.

2. The Department is the state agency charged with the regulation of rigid coastal armoring structures pursuant to Sections 161.041, 161.053, and 161.085, Florida Statutes, and the rules promulgated thereunder.

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<sup>1</sup>

A *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.” § 120.52(21), Fla. Stat. A *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.” § 120.52(22), Fla. Stat. In this case, the relief sought can be construed as both a variance and a waiver. As explained below, Petitioner seeks a modification of the DEP’s eligibility requirements in its armoring rule (i.e., a variance) or, put another way, Petitioner seeks that a portion of DEP’s armoring rule’s eligibility requirements not be applied (i.e., a waiver).

<sup>2</sup>

“Armoring” is a manmade structure designed to either prevent erosion of the upland property or protect eligible structures from the effects of coastal wave and current action. See Fla. Admin. Code R. 62B-33.002(5).

PETITIONER: Gulf Island Strand Condominium Association, Inc.  
DWRM No. CH-612 AR V  
OGC File No. 16-1238

3. Pursuant to Florida Administrative Code Rule 62B-33.0051, a structure that is constructed pursuant to a DEP Coastal Construction and Excavation permit issued after March 17, 1985, is not eligible for coastal armoring. *See* Fla. Admin. Code R. 62B-33.0051(1)(a)1 (limiting armoring protection to “eligible structures”); *Id.* at R. 62-33.002(18) (defining “eligible structures” as, among other things, “non-conforming habitable structures”); and *Id.* at R. 62-33.002(44) (defining “non-conforming structures” to exclude structures “constructed pursuant to a permit issued by the Department pursuant to Section 161.052 or 161.053, Florida Statutes on or after March 17, 1985”).

4. The Condominium was constructed under a DEP Coastal Construction and Excavation permit CH-437 that was issued after March 17, 1985

5. Section 120.542(2), Florida Statutes, 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 and waiver procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

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

6. The Department’s armoring regulations implement Sections 161.053 and 161.085, Florida Statutes. When read together these statutes express the Legislature’s intent to balance protection of the coastal system and the need to protect private structures and public infrastructure. *Compare* § 161.053, Fla. Stat. (“The Legislature finds and declares that . . . it is in the public interest to preserve and protect [beaches] from imprudent construction which can jeopardize the stability of the beach dune system, accelerate erosion, endanger adjacent properties, or interfere with public beach access.”) with § 161.053, Fla. Stat. (“The state recognizes the need to protect private structures and public infrastructure from damage or destruction caused by coastal erosion.”).

7. To balance these two goals of the statute, the Department limited the availability of armoring to structures that were built prior to the modern coastal construction standards (i.e., prior to March 17, 1985). Modern coastal construction standards require that the structure is designed to withstand a 100-year storm event. The Department reasoned that structures that are designed to withstand a 100-year storm event do not need armoring protection.

8. This balance would not be disturbed by allowing the Condominium to apply for a coastal armoring permit to protect its structure from threats associated with a beach that DEP has determined is critically eroded and that the county has declared (by emergency resolution) to present an immediate threat of substantial damage and vulnerability to damage or collapse from ongoing surf action and coastal erosion.

PETITIONER: Gulf Island Strand Condominium Association, Inc.  
DWRM No. CH-612 AR V  
OGC File No. 16-1238

### **SUBSTANTIAL HARDSHIP AND VIOLATIONS OF PRINCIPLES OF FAIRNESS**

9. “Substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the entity requesting the variance or waiver. “Principles of fairness” are violated when the literal application of a rule affects a particular entity in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. § 120.54(2), Fla. Stat.

10. Petitioner’s factual allegations and supporting documentation establish that the Condominium is situated on a DEP-designated critically eroded beach and has been declared by a county resolution to be under a state of emergency due to an immediate threat of substantial damage and vulnerability to damage or collapse from ongoing surf action and coastal erosion. As a result, Petitioner has incurred substantial repair costs and the Condominium has become difficult to finance and is experiencing a substantial decline in marketability. Petitioner has established that strict application of Rules 62-33.002(18), 62-33.002(44), and 62-33.0051(1)(a)1 of the Florida Administrative Code rule would result in substantial economic hardship to Petitioner and that literal application of the rule would affect Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

### **THEREFORE, IT IS ORDERED:**

11. The petition of Gulf Island Strand Condominium Association, Inc. for a variance from Florida Administrative Code Rules 62-33.002(18), 62-33.002(44), and 62-33.0051(1)(a)1. is GRANTED, subject to the following conditions:

A. This variance shall remain in effect for a period of time to run concurrent with the period of time of any Department-issued permit to Petitioner to construct coastal armoring at the subject property. A permit for coastal armoring allows for a construction period of 3 years from date of issuance pursuant to Florida Administrative Code Rule 62B-33.008(8).

B. This order in no way relieves Petitioner from any other procedural or substantive rule requirements associated with obtaining a coastal armoring permit, nor does it guarantee that such a permit will be granted. Petitioner is required to satisfy all permit criteria other than the criteria waived herein (i.e., Florida Administrative Code Rules 62-33.002(18), 62-33.002(44), and 62-33.0051(1)(a)1).

### **NOTICE OF RIGHTS**

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

PETITIONER: Gulf Island Strand Condominium Association, Inc.  
DWRM No. CH-612 AR V  
OGC File No. 16-1238

#### Petition for Administrative Hearing

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing 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, telephone number, and any e-mail address of the petitioner; the name, address, telephone number, and any e-mail address 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 agency's proposed action;

(f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; 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.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

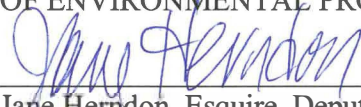
#### Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing must be filed within 21 days of receipt of this written notice. The failure 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, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

#### Extension of Time

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. 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.

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on December 22, 2016, to the above listed persons.

FILING AND ACKNOWLEDGMENT FILED, on this date, under 120.52(7) of the Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

 12/22/2016  
Clerk Date

Copies furnished to:

Petitioner  
Joint Administrative Procedures Committee



## General Permit Conditions

Rule 62B-33.0155, Florida Administrative Code

1. The following general permit conditions shall apply, unless waived by the Department or modified by the permit:

(a) The permittee shall carry out the construction or activity for which the permit was granted in accordance with the plans and specifications that were approved by the Department as part of the permit. Deviations therefrom, without written approval from the Department, shall be grounds for suspension of the work and revocation of the permit pursuant to Section 120.60(7), F.S., and shall result in assessment of civil fines or issuance of an order to alter or remove the unauthorized work, or both. No other construction or activities shall be conducted. No modifications to project size, location, or structural design are authorized without prior written approval from the Department. A copy of the notice to proceed shall be conspicuously displayed at the project site. Approved plans shall be made available for inspection by a Department representative.

(b) The permittee shall conduct the construction or activity authorized under the permit using extreme care to prevent any adverse impacts to the beach and dune system, marine turtles, their nests and habitat, or adjacent property and structures.

(c) The permittee shall allow any duly identified and authorized member of the Department to enter upon the premises associated with the project authorized by the permit for the purpose of ascertaining compliance with the terms of the permit and with the rules of the Department until all construction or activities authorized or required in the permit have been completed and all project performance reports, certifications, or other documents are received by the Department and determined to be consistent with the permit and approved plans.

(d) The permittee shall hold and save the State of Florida, the Department, and its officers and employees harmless from any damage, no matter how occasioned and no matter what the amount, to persons or property that might result from the construction or activity authorized under the permit and from any and all claims and judgments resulting from such damage.

(e) The permittee shall allow the Department to use all records, notes, monitoring data, and other information relating to construction or any activity under the permit, which are submitted, for any purpose necessary except where such use is otherwise specifically forbidden by law.

(f) Construction traffic shall not occur and building materials shall not be stored on vegetated areas seaward of the control line unless specifically authorized by the permit. If the Department determines that this requirement is not being met, positive control measures, such as temporary fencing, designated access roads, adjustment of construction sequence, or other requirements, shall be provided by the permittee at the direction of the Department. Temporary construction fencing shall not be sited within marine turtle nesting habitats.

(g) The permittee shall not disturb existing beach and dune topography and vegetation except as expressly authorized in the permit. Before the project is considered complete, any disturbed topography or vegetation shall be restored as prescribed in the permit with suitable fill material or revegetated with appropriate beach and dune vegetation.

(h) All fill material placed seaward of the control line shall be sand which is similar to that already existing on the site in both coloration and grain size. All such fill material shall be free of construction debris, rocks, clay, or other foreign matter; shall be obtained from a source landward of the coastal construction control line; and shall be free of coarse gravel or cobbles.

(i) If surplus sand fill results from any approved excavation seaward of the control line, such material shall be distributed seaward of the control line on the site, as directed by the Department, unless otherwise specifically authorized by the permit.

(j) Any native salt-tolerant vegetation destroyed during construction shall be replaced with plants of the same species or, by authorization of the Department, with other native salt-tolerant vegetation suitable for beach and dune stabilization. Unless otherwise specifically authorized by the Department, all plants installed in beach and coastal areas – whether to replace vegetation displaced, damaged, or destroyed during construction or otherwise – shall be of species indigenous to Florida beaches and dunes, such as sea oats, sea grape, saw palmetto, panic grass, saltmeadow hay cordgrass, seashore saltgrass, and railroad vine, and grown from stock indigenous to the region in which the project is located.

(k) All topographic restoration and revegetation work is subject to approval by the Department, and the status of restoration shall be reported as part of the final certification of the actual work performed.

(l) If not specifically authorized elsewhere in the permit, no operation, transportation, or storage of equipment or materials is authorized seaward of the dune crest or rigid coastal structure during the marine turtle nesting season. The marine turtle nesting season is May 1 through October 31 in all counties except Brevard, Indian River, St. Lucie, Martin, Palm Beach, and Broward counties where leatherback turtle nesting occurs during the period of March 1 through October 31.

(m) If not specifically authorized elsewhere in the permit, no temporary lighting of the construction area is authorized at any time during the marine turtle nesting season and no additional permanent exterior lighting is authorized.

(n) All windows and glass doors visible from any point on the beach must be tinted to a transmittance value (light transmission from inside to outside) of 45% or less through the use of tinted glass or window film.

(o) The permit has been issued to a specified property owner and is not valid for any other person unless formally transferred. An applicant requesting transfer of the permit shall sign two copies of the permit transfer agreement form, agreeing to comply with all terms and conditions of the permit, and return both copies to the Bureau. The transfer request shall be provided on the form entitled "Permit Transfer Agreement" – DEP Form 73-103 (Revised 1/04), which is hereby adopted and incorporated by reference. No work shall proceed under the permit until the new owner has received a copy of the transfer agreement approved by the Department. A copy of the transfer agreement shall be displayed on the construction site along with the permit. An expired permit shall not be transferred.

(p) The permittee shall immediately inform the Bureau of any change of mailing address of the permittee and any authorized agent until all requirements of the permit are met.

(q) For permits involving major structures or activities, the permittee shall submit to the Bureau periodic progress reports on a monthly basis beginning at the start of construction and continuing until all work has been completed. If a permit involves either new armoring or major reconstruction of existing armoring, the reports shall be certified by an engineer licensed in the State of Florida. The permittee or engineer, as appropriate, shall certify that as of the date of each report all construction has been performed in compliance with the plans and project description approved as a part of the permit and with all conditions of the permit, or shall specify any deviation from the plans, project description, or conditions of the permit. The report shall also state the percent of completion of the project and each major individual component. The reports shall be provided to the Bureau using the form entitled "Periodic Progress Report" – DEP Form 73-111 (Revised 6/04), which is hereby adopted and incorporated by reference. Permits for minor structures or activities do not require submittal of periodic reports unless required by special permit condition.

(r) For permits involving habitable major structures, all construction on the permitted structure shall stop when the foundation pilings have been installed. At that time the foundation location form shall be submitted to and accepted by the Bureau prior to proceeding with further vertical construction above the foundation. The form shall be signed by a professional surveyor, licensed pursuant to Chapter 472, F.S., and shall be based upon such surveys performed in accordance with Chapter 472, F.S., as are necessary to determine the actual configuration and dimensioned relationship of the installed pilings to the control line. The information shall be provided to the Bureau using the form entitled "Foundation Location Certification" – DEP Form 73-114B (Revised 9/05), which is hereby adopted and incorporated by reference. Phasing of foundation certifications is acceptable. The Department shall notify the permittee of approval or rejection of the form within seven (7) working days after staff receipt of the form. All survey information upon which the form is based shall be made available to the Bureau upon request. Permits for repairs or additions to existing structures with nonconforming foundations are exempt from this condition.

(s) For permits involving major structures, the permittee shall provide the Bureau with a report by an engineer or architect licensed in the State of Florida within thirty (30) days following completion of the work. The report shall state that all locations specified by the permit have been verified and that other construction and activities authorized by the permit have been performed in compliance with the plans and project description approved as a part of the permit and all conditions of the permit; or shall describe any deviations from the approved plans, project description, or permit conditions, and any work not performed. Such report shall not relieve the permittee of the provisions of paragraph 62B-33.0155(1)(a), F.A.C. If none of the permitted work is performed, the permittee shall inform the Bureau in writing no later than 30 days following expiration of the permit. The report shall be provided on the form entitled "Final Certification" DEP Form 73-115B (Revised 9/05), which is hereby adopted and incorporated by reference.

(t) Authorization for construction of armoring or other rigid coastal structures is based on an engineering review and assessment of the design and anticipated performance and impact of the structure as a complete unit. Construction of any less than the complete structure as approved by the Department is not authorized and shall result in the assessment of an administrative fine and the issuance of an order to remove the partially constructed structure. Modifications to the project size, location, or structural design shall be authorized by the Department in accordance with Rule 62B-33.013, F.A.C.

2. The permittee shall not commence any excavation, construction, or other physical activity on or encroaching on the sovereignty land of Florida seaward of the mean high water line or, if established, the erosion control line until the permittee has received from the Board of Trustees of the Internal Improvement Trust Fund the required lease, license, easement, or other form of consent authorizing the proposed use.
3. The permittee shall obtain any applicable licenses or permits required by Federal, state, county, or municipal law.
4. This permit does not authorize trespass onto other property.
5. In the event of a conflict between a general permit condition and a special permit condition, the special permit condition shall prevail.
6. Copies of any forms referenced above can be obtained by writing to the Department of Environmental Protection, Bureau of Beaches and Coastal Systems, 3900 Commonwealth Boulevard, Mail Station 300, Tallahassee, Florida 32399-3000, or by telephoning (850)488-7708.