

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

IN RE: Destin Guardian Group

**OGC #17-00881
DEP FILE: OK-522 V**

**FINAL ORDER
GRANTING PETITION FOR VARIANCE**

On June 27, 2017, Destin Guardian Group (Petitioner), filed a petition under Section 120.542, Florida Statutes (F.S.), and Chapter 28-104, Florida Administrative Code (F.A.C.), for a permanent variance or waiver from subparagraph 62B-33.024(2)(a)2., F.A.C. Petitioner seeks a variance or a waiver from the above-cited rule provision to calculate the 30-year erosion projection (30-YEP) line by using the methodology set forth in subparagraph 62B-33.024(2)(a)3., F.A.C. Notice of receipt of the petition was published in the Florida Administrative Register on August 17, 2017. 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 subparagraph 62B-33.024(2)(a)2., 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:

(a) An average annual shoreline change rate in the location of the mean high water line (MHWL) at a Department reference survey monument shall be determined and multiplied by 30 years. The resulting distance shall be added landward of the SHWL located on the application survey. The rate shall be determined as follows:

2. The shoreline change rate shall include the zone spanned by three adjacent Department reference monuments on each side of the site. A lesser or greater number of reference monuments can be used as necessary to obtain a rate representative of the site, and a rationale for such use shall be provided.

3. The Petitioner’s property is located at 57 Land’s End Drive, Destin Pointe, Destin, Florida.

4. Properties adjacent to the Petitioner's property have previously received CCCL permits from the Department to construct single-family homes since the Planned Unit Development was platted in 1994. The Petitioner's proposed single-family dwelling is compatible in size and location as the previously permitted adjacent homes. Additionally, the Department granted a similar variance from the cited rule to JJS Properties (JJS) in March 2017, and issued a CCCL permit to JJS in March 2017. This project is located in the same Planned Unit Development as the Petitioner's property. According to the Petition, the project area periodically receives dredge material from East Pass. Additionally, the Petitioner's property received the benefits of the West Destin Beach Restoration Project that was completed in February 2013. Information provided by the Petitioner indicates that the shoreline has accreted approximately 120 feet seaward in the project area, and that the shoreline of the project area has been stable since the beach restoration project was completed.

5. The location of the proposed single-family home, once constructed, will conform to the existing line of construction in the area. Other structures east and west of the Petitioner's property were issued Department permits, and also conform to the existing line of construction.

6. The Petitioner's proposed single-family dwelling home is located seaward of the 30-YEP of the seasonal high water line utilizing a shoreline change rate of -5.5 feet per year and the methodology prescribed in Rule 62B-33.024(2)(a)2., F.A.C. Single-family homes on the adjacent properties authorized by the Department were determined to be landward of the 30-YEP utilizing a shoreline change rate of -1.0 feet per year and the methodology prescribed in Rule 62B-33.024(2)(a)3., F.A.C., based on the shoreline conditions at that time.

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**

7. The Petitioner seeks a permanent variance or waiver from subparagraph 62B-33.024(2)(a)2., F.A.C., on the grounds that applying these rules to its 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. Petitioner alleges hardship in that the 2016 Certified Market Value of the property is \$1,335,660.00, and that without the requested variance, the property is unable to be developed, resulting in severe economic loss to the Petitioner.

8. The Petitioner alleges that strict application of the requirement contained in subparagraph 62B-33.024(2)(a)2, F.A.C., to use the shoreline change rate of -5.5 feet per year would be unreasonable, unfair, and would create unintended consequences because the rule does not take into consideration: (a) the 1991 Development Agreement between the Department and Destin Guardian Group which governed developments of lots 150 through 159; Petitioner's lot is within this group; (b) similar projects on properties to the east and west of Petitioner's property have received CCCL permits from the Department, and that the single-family home will conform to the existing line of construction in the area; (c) that a similar variance to the cited rule was issued in March, 2017 to JJS for Lot 155; and (d) the rule as strictly applied does not take into account the positive effects of the periodic placement of dredge material from East Pass and the positive effects of the West Destin Beach Restoration Project in stabilizing the shoreline in the project area. The Petitioner asserts that the shoreline has accreted approximately 120 feet seaward in the project area since 2014 and that the vegetated dune constructed as a part of the West Destin Project remains at an elevation of +14 feet (NAVD 88) in the project area.

9. The 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, considering the Petitioner's allegation as set forth in paragraph 8., above. In addition, Petitioner asserts that because properties to the east and west of the Petitioner's property received Department permits and that Lot 155 received a similar rule variance in March 2017, strict application of the rule would affect it 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 single-family home 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, F.S., 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 calculating the 30-year erosion projection line, the Department is authorized to consider a -1 foot per year shoreline change in areas it determines to be stable or accreting. See subparagraph 62B-33.024(2)(a)3., F.A.C.

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 subparagraph 62B-33.024(2)(a)2., F.A.C., and the shoreline change rate of -5.5 feet/year in favor of the methodology set forth in subparagraph 62B-33.024(2)(a)3., F.A.C., for areas that are stable or accreting in this instance 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 hardships and unfairness as alleged by the Petitioner; including the positive effects of shoreline stabilization on the project area shoreline resulting from the periodic placement of dredge material in the project area and the effect of the West Destin Beach Nourishment Project; Petitioner's economic hardship if the permit for the single-family home is not able to be issued; the single-family home will not advance the existing line of construction in the project area; and permits (including the variance for Lot 155) that were issued for other similar structures on properties to the east and west of Petitioner's property.

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

THEREFORE, IT IS ORDERED:

The petition of Destin Guardian Group, for a permanent variance from subparagraph 62B-33.024(2)(a)2., F.A.C., in favor of using the methodology set forth in subparagraph 62B-33.024(2)(a)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), F.S., 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), F.S.; 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.

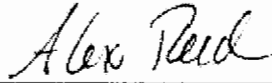
Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the Department final action may be different from the position taken by it in this notice. Persons whose substantial interests will be affected by any such final decision of the 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, F.S., 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 September, 2017, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Alex Reed, 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.



CLERK

9/15/2017

DATE

Electronic Copies Furnished to:

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