

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

In Re: Ping Faulhaber, Brian Sullivan and Walter Kreiseder

**OGC File No. 17-1108
DWRM No. ST-2112 AR V**

FINAL ORDER GRANTING PETITION FOR WAIVER

On November 1, 2017, Petitioners Ping Faulhaber, Brian Sullivan, and Walter Kreiseder (“Petitioners”), filed a petition with the Florida Department of Environmental Protection (“Department”) requesting a variance or waiver¹ pursuant to Section 120.542, Florida Statutes, with respect to the Petitioners’ properties located at 2309, 2305 and 2209 Casey Key Road, Nokomis, Sarasota County, Florida. In response to a request from the Department, on January 11, 2018, Petitioners submitted additional information to support their request for a waiver of the rules relating to “eligibility” of their existing single family homes for coastal armoring. Because the existing dwelling structures on the properties were all constructed under Department Coastal Construction and Excavation permits issued after 1985, the dwellings are not eligible to be protected by armoring² pursuant to Florida Administrative Code Rules 62B-33.002(17), 62B-33.002(43), 62B-33.002(63), and 62B-33.0051(1)(a)1.³ Petitioners seek a waiver or variance from the eligibility requirements of the rules, and allege that application of these rules would create substantial hardships and violate principles of fairness.

The Department published notice of receipt of the petition in the Florida Administrative Register on December 1, 2017. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. Petitioners own the properties subject of the petition, located at 2309, 2305 and 2209 Casey Key Road, Nokomis, Sarasota 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.
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. 62B-33.002(17) (defining “eligible structures” as, among other things, “non-conforming habitable structures”); *Id.* at R. 62B-33.002(43) (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”); and *Id.* At R. 62B-33.002(63) (defining “vulnerable” as a situation in which the foundation of an eligible structure is subject to erosion from 15-year return interval storm).

¹ 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, Petitioners seek a modification of the DEP’s eligibility requirements in its armoring rule (i.e., a variance) or, put another way, Petitioners seek that a portion of DEP’s armoring rule’s eligibility requirements not be applied (i.e., a waiver).

² “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).

³ Although, the petition requested relief from the provisions of Florida Administrative Code Rule 62B-33.0051(1)(a)1., the additional rules cited herein are inextricably connected to the rule from which Petitioners seek relief, and to this end those rules are considered in this Final Order.

4. The dwelling structures located on Petitioners' properties were each constructed under a Department Coastal Construction and Excavation permit (ST-1432, ST-1339, and ST-1354) that was issued after March 17, 1985.

5. The Department has determined that the segment of beach where the dwellings are located is critically eroding and threatens private development. See "Critically Eroded Beaches in Florida", Florida Department of Environmental Protection (2017) (prepared in accordance with Sections 161.101 and 161.161, Florida Statutes). Petitioners state that shoreline in the area where the dwellings are located continues to erode, and that in a 10 year period, based on erosion rates, that cumulatively Petitioners have lost a total of approximately 0.9 acres of property that has an average value of \$3 million per acre, for a total cumulative estimated loss in value of \$2.47 million.

6. Petitioners state that "substantial hardship" exists, in that their homes. Petitioner's homes are located along a segment of shoreline that was determined to have experienced "Significant Beach Erosion" under the provisions of Chapter 62B-56, F.A.C., and that since that time, Petitioners have undertaken various actions to protect their properties and homes from storms and coastal erosion, including constructing large vegetated dunes and the installation and subsequent maintenance of a geotextile dune core permitted under Chapter 62B-56, F.A.C. Petitioners submitted information to the Department in 2017 that demonstrates that the dwellings are now "vulnerable" as that term is defined in Florida Administrative Code Rule 62B-33.002(63). Petitioners state that maintenance of the geotextile dune core has become extremely burdensome; in that to date, they have collectively spent approximately \$3.5 million to obtain permits, and to construct, maintain and monitor that structure. Petitioners state that they could be expected to spend an estimated \$200,000 to \$400,000 annually to maintain the dune core in the future if rigid coastal armoring cannot be authorized.

7. Petitioners state that "principles of fairness" are violated, in that they have attempted to protect their properties in a lesser environmentally impactful way through dune restoration and construction of a geotextile dune core. They state that these measures have failed to resolve the problems of shoreline erosion, in part due to the effects of other seawalls in the area. They state that such "principles of fairness" are also violated if their waiver request is denied when their neighbors both to the north and the south of their properties have been permitted to install rigid coastal armoring.

THE WAIVER WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

8. 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.

9. 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.").

10. 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, which is a major and infrequent storm. The Department reasoned that structures that are designed to withstand a 100-year storm event do not need armoring protection.

11. The dune restoration project and the installation of the geotextile dune core seaward of the Petitioners' properties have experienced significant maintenance issues and no longer offer viable long-term protection to the upland structures from frequent storms or coastal erosion. In this case, waiving the Department's exclusion from armoring protection for structures built under post-1985 Department Coastal Construction and Excavation permits would both protect the coastal system and the private structures on the subject properties, and would thus meet the purpose of the underlying statute.

SUBSTANTIAL HARDSHIP AND VIOLATIONS OF PRINCIPLES OF FAIRNESS

12. "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.

13. The facts set forth in Petitioners' petition and supporting documentation, which are summarized above, establish that strict application of Rules 62B-33.002(17), 62B-33.002(43), 62B-33.002(63), and 62B-33.0051(1)(a)1. of the Florida Administrative Code would result in substantial economic and technical hardship to Petitioners and that literal application of the rules would affect Petitioners in a manner significantly different from the way it affects other similarly situated persons who are subject to the rules.

THEREFORE, IT IS ORDERED:

The Petition for a variance from Florida Administrative Code Rules 62B-33.002(18), 62B-33.002(43), 62B-33.002(63), and 62B-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 Petitioners to construct coastal armoring at the subject properties. 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 Petitioners 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 62B-33.002(17), 62B-33.002(43), 62B-33.002(63), and 62B-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.

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.

Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 9th day of April 2018 in LEON COUNTY, FLORIDA.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

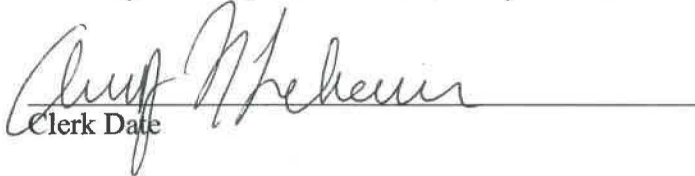


Lainie Edwards, Deputy Director
Division of Water Resource Management
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on April 9, 2018, 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.


Clerk Date

Copies furnished to:

Petitioners
Joint Administrative Procedures Committee
Lea Crandall, Agency Clerk
Edwin A. Steinmeyer at eas@steinmeyerfiveash.com