

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

**IN RE: Tides Beach Club Condominium
Association, Inc.**

**OGC NO. 19-0182
DEP FILE: PI-704 V**

**FINAL ORDER
DENYING PETITION FOR VARIANCE OR WAIVER**

On February 28, 2019, Tides Beach Club Condominium Association, Inc. (Petitioners), filed a petition under Section 120.542, Florida Statutes (F.S.), and Chapter 28-104.002, Florida Administrative Code (F.A.C.), for a permanent variance or waiver from subparagraphs 62B-33.0051(1)(a)1., .2, and 3., F.A.C. Petitioners seek a variance or a waiver from the above-cited rule provisions which require that in order to qualify for a permit for coastal armoring, the structure proposed to be protected must be an eligible structure and that the structure proposed to be protected must be vulnerable, or, that a gap between a line of rigid coastal armoring that is continuous on both sides of the unarmored property does not exceed 250 feet. Notice of receipt of the petition was published in the Florida Administrative Register on March 12, 2019. No comments were received in response to the notice. On April 26, 2019, Petitioners filed an Addendum to Petition, which asserted that on April 19, 2019, a severe weather event in the Tampa Bay area resulted in erosion to the property; Petitioners allege that this event eliminated any gains from the most recent beach nourishment project. Photographs of Petitioners property were included in the Addendum.

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 Petitioners seek a permanent variance or waiver from subparagraphs 62B-33.0051(1)(a)1., 2., and 3., F.A.C., which provide in pertinent part:

62B-33.0051 Coastal Armoring and Related Structures.

(1) General Armoring Criteria. In determining the appropriate means to protect existing private structures and public infrastructure from damage from frequent coastal storms, applicants should be aware that armoring may not be the only option for providing protection. Applicants are encouraged to evaluate other protection methods such as foundation modification, structure relocation, and dune restoration. If armoring (other than through the use of geotextile containers as the core of a reconstructed dune, which are governed exclusively by Chapter 62B-56, F.A.C.), is the selected option, the following siting, design, and construction criteria shall apply in order to minimize potential adverse impacts to the beach and dune system:

(a) Construction of armoring shall be authorized under the following conditions:

1. The proposed armoring is for the protection of an eligible structure; and,

2. *The structure to be protected is vulnerable. The determination of vulnerability will be made utilizing the dune erosion model contained in the report entitled "Erosion due to High Frequency Storm Events," by the University of Florida, dated November 22, 1995, which is incorporated herein by reference. Where direct application of the model shows that the structure to be protected is not vulnerable, but the construction otherwise meets the requirements of this rule chapter, an applicant may further demonstrate vulnerability by taking into account the effects of shoreline change rates, natural physical features, and existing manmade structures in accordance with the following circumstances: ...*

; or,

3. *A gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property. Such adjacent armoring shall not be deteriorated, dilapidated, or damaged to such a degree that it no longer provides adequate protection to the upland property. The top of the adjacent armoring must be at or above the still water level, including setup, for the design storm of a 15-year return interval storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination. The adjacent armoring must be stable under the design storm of 15-year return interval storm, including maximum localized scour with adequate penetration, and must have sufficient continuity or return walls to prevent upland erosion and flooding under the design storm of 15-year return interval storm....*

3. Petitioners' property fronts the Gulf of Mexico and is located in North Redington Beach, Pinellas County, Florida, and consists of multiple multi-family structures, located between 16750 Gulf Boulevard near FDEP monument R-107, and 16450 Gulf Boulevard between FDEP monument R-108 and R-109. Construction on the property finished in 2000 without the need to obtain a permit under Chapter 161, F.S., or Rule Chapter 62B-33, F.A.C.; Petitioners acknowledge that their structures are constructed landward of the Coastal Construction Control Line ("CCCL") and further acknowledge that the structures proposed to be protected by coastal armoring are not within the jurisdiction of the CCCL program.

4. At this time, Petitioner has not applied for a permit to construct a seawall or other form of coastal armoring to protect the structures pursuant to Section 161.053, F.S., as alleged in the petition. Petitioner sought and received consultation from the Department on the effects of a 15-year interval storm event impacting the property under a consultation request in November 2017.

5. A beach nourishment project which increased the storm protection level of the beach was constructed along the subject shoreline, which included the subject property, in 2018 as stated in the petition.

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

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.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency’s rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

- (a) The rule from which a variance or waiver is requested.
- (b) The type of action requested.
- (c) The specific facts that would justify a waiver or variance for the petitioner.
- (d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

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) 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 PETITIONERS**

6. The Petitioners seek a permanent variance or waiver from subparagraphs 62B-33.0051(1)(a)1., 2., and 3., 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.

7. Petitioners allege that strict application of the requirements contained in subparagraphs 62B-33.0051(1)(a)1., 2, and 3., F.A.C., will result in economic hardships (replacement costs of sand lost to storms, reduction in property value due to loss of sand and vegetation, costs of foundation monitoring of the structures, diminished marketability of the condominium units without a seawall) and will violate principles of fairness, in that other properties on both the north and south sides of the Petitioners’ property have constructed seawalls, and that those seawalls exacerbate erosion to Petitioners’ property.

8. Petitioners allege that strict application of the rules will lead to an unreasonable, unfair, and unintended result when compared to other persons subject to the rules, and that principles of fairness are also violated, taking into account the Petitioners' allegations as set forth in paragraph 7, above, if they are unable to obtain a permit for coastal armoring.

**THE REQUESTED VARIANCE OR WAIVER CANNOT MEET THE
UNDERLYING PURPOSE OF THE STATUTE**

The Department's jurisdiction under the CCCL program and the applicability of Section 120.542, F.S.

9. The CCCL program was established to protect Florida's beaches and dunes while assuring reasonable use of private property lying seaward of the CCCL. Construction activities which take place seaward of the CCCL require Department approval; i.e., a CCCL permit. In the instant case, the structures proposed to be protected are located landward of the CCCL, and are therefore, not subject to the CCCL statutes and administrative rules. The CCCL is a line of jurisdiction within which the Department exercises regulatory jurisdiction for the purposes set forth in Sections 161.053 and 161.085, F.S. *See Pope v. Ray*, 2004 WL 1211594, DOAH Case No. 03-003981 (Fla. Dept. Env. Prot. 2004); *Karatinos v. Dept. of Natural Resources*, 9 FALR 2781, DOAH Case No. 86-002168 (Fla. DNR 1987). Because the Petitioners' structures are located outside the Department's regulatory jurisdiction, the requested relief cannot be granted because the CCCL statutes and rules do not apply.

10. Section 120.542, F.S., provides that agencies are authorized to grant variances and waivers to requirements of their rules, consistent with the provisions of the section. Section 120.542(2), F.S., provides:

(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. (Emphasis added).

Section 120.542(5), F.S., further provides:

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

- (a) The rule from which a variance or waiver is requested.
- (b) The type of action requested.
- (c) The specific facts that would justify a waiver or variance for the petitioner.
- (d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute. (Emphasis added).

Section 120.52(21) and (22), F.S., define "variance" and "waiver" as those terms are used in Section 120.542, F.S.; both definitions limit relief to a person who is subject to the agency rule at issue.

Again, Petitioners, as owners of structures located landward of the CCCL, are not entitled to a variance or waiver under the statute as they are not subject to the CCCL statutes and rules. The relief afforded by Section 120.542, F.S., is limited to persons who are subject to an agency rule. In the instant case, Petitioners are not subject to the CCCL statutes or rules, and as such are not eligible to request the relief that Section 120.542, F.S., can provide. See *In re Photonico, L.L.C.*, 18 ER FALR 62, OGC Case No. 17-0953 (Fla. Dept. Env. Prot. 2017).

Chapter 62B-33 Florida Administrative Rules from which Petitioners request relief

11. The “Close the Gap” provision/Rule 62B-33.0051(1)(a)3., F.A.C.: Petitioners are unable to demonstrate that they could obtain a variance to subparagraph 62B-33.0051(1)(a)3., F.A.C., regarding the “gap closure” provisions of the rule. Section 161.085(2)(c), F.S., also contains the limitation that applies to proposed armoring that exceeds 250 feet in length; Petitioners’ acknowledge that the “gap” between the existing armoring on either side of the property exceeds 250 feet in length. The underlying purpose of the statute cannot therefore be met by waiving or varying the cited rule provision. Further, Section 120.542, F.S., cannot provide relief from a statutory provision.

12. Eligibility/Vulnerability Requirements for Coastal Armoring/Rules 62B-33.0051(1)(a)1. and 2., F.A.C.: Petitioners’ habitable major structures meet the definition of an “eligible structure” as that term is defined in Rule 62B-33.002(12)(b)1., F.A.C.; the habitable major structures are nonconforming structures that were not constructed pursuant to a permit issued by the Department under Section 161.053, F.S., on or after March 17, 1985. This, however, is based on the fact that the Petitioners’ structures are located landward of the CCCL and no permit under Section 161.053, F.S., and its implementing rules was required. Petitioners have alleged that the structures have been determined to be “vulnerable” as that term is defined in Department rule, based on a CCCLa model run (Petitioners’ Exhibit B of the petition) performed by the Department for the property in November, 2017, as part of a permitting pre-application consultation with the Department. However, based on the date of that model run and the underlying survey upon which it was based, it is outdated and can no longer be relied upon to establish vulnerability. Additionally, the Department takes official recognition of the fact that the Sand Key beach nourishment project that placed 1.3 thousand cubic yards of sand from R-Monument 58A to R-Monument R108A, was completed in October 2018; that project now completely captures and protects Petitioners’ property. One goal of the beach nourishment project is to protect upland structures so that they are not vulnerable to damage from a frequent coastal storm. Again, however, even if a more current topographic survey can be used for a new model run in an attempt to establish vulnerability, Petitioners are ultimately not eligible for a permit for coastal armoring as their structures are landward of the CCCL, and they are not subject to those statutes and rules. Finally, Section 161.085(2)(a), F.S., authorizes the Department to issue permits for installation of coastal armoring if it is determined that a private structure is vulnerable to damage from frequent coastal storms. Relief from a statutory provision cannot be obtained by way of a Section 120.542, F.S., waiver or variance.

CONCLUSION

13. Section 120.542, F.S., requires the agency to consider a 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). Further, Section 120.542(1), F.S., limits consideration of regulatory relief by an agency to its rules; it does not authorize agencies to grant variances or waivers to statutes.

14. Variance or waiver of subparagraphs 62B-33.0051(1)(a)1., .2, and 3., F.A.C., is not available to Petitioners as they are not subject of the cited rules, as required by Section 120.542, F.S. Additionally, the Department is unable to grant the relief requested by Petitioners under Section 120.542, F.S., to Rules 62B-33.0051(1)(a)2. and 3., F.A.C., as those rules simply reflect the requirements contained in the underlying statutes.

THEREFORE, IT IS ORDERED:

The Petition of Tide Beach Club Condominium Association, Inc., for a permanent variance from subparagraphs 62B-33.0051(1)(a)1.,2., and 3., F.A.C., must be DENIED for the reasons set forth herein.

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.

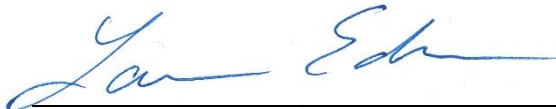
Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the Department final action may be different from the position taken by it in this notice. Persons whose substantial interests will be affected by any such final decision of the 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 24 day of May, 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Lainie Edwards, Ph.D., Deputy Director
Division of Water Resource Management
2600 Blair Stone Road
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FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.



MAY 24, 2019

CLERK

DATE

Electronic Copies Furnished to:

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