

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

**In Re: Matt and Pat Millen
Petition for Variance from
Provisions of Rule 62B-56.090(2), F.A.C.**

**File No.: SJ-1632 GT V
OGC Case No.20-0043**

FINAL ORDER GRANTING PETITION FOR VARIANCE

On January 21, 2020, Matt and Pat Millen, the Petitioners, filed a petition with the Florida Department of Environmental Protection (Department) requesting a section 120.542, Florida Statutes, variance from the requirements of Rule 62B-56.090(2), Florida Administrative Code (F.A.C.). Rule 62B-56.090(2) F.A.C., specifies certain financial instruments as proof of financial assurance to comply with the financial assurance requirements of Chapter 62B-56, F.A.C. The Petitioner seeks a variance in order to allow for an escrow agreement naming the State of Florida, Department of Financial Services, Division of Treasury (DFS) as the Escrow Agent as a permissible method of financial assurance under Rule 62B-56.090(2), F.A.C.

The Notice of receipt of the petition was published in the Florida Administrative Register on January 27, 2020. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

Petitioners have applied for a permit to construct a restored dune with a geotextile container system as the core of the restored dune along the shoreline adjacent to their home in Ponte Vedra, Florida, for a total of length of approximately 190 feet; the application number was assigned as SJ-1632 GT. The Petitioners propose to build a reconstructed dune using a geotextile container as the core of that dune seaward of the coastal construction control line in order to protect an existing major structure. Section 161.085, F.S., allows the Department to authorize dune restoration using geotextile structures and requires applicants to provide financial assurances to guarantee "that the authorized geotextile containers will be removed if the requirements of this subsection and the permit conditions are not met."

Petitioners seek a variance from the financial assurance instruments specified in Rule 62B-56.090(2), F.A.C., in order to allow for an escrow agreement with the State of Florida, Department of Financial Services, Division of Treasury (DFS) as the Escrow Agent as a permissible method of financial assurance. DFS currently administers several such escrow agreements for permittees of geotextile container systems in St. Johns County.

The Petitioners requested that the Department grant the variance because the variance will allow Petitioners to provide a financial assurance instrument without diminishing in any way the requirement that Petitioners provide appropriate financial assurance for removing the geotextile containers in the event the requirements of the statute and permit conditions are not met. Petitioners allege that they will suffer a significant economic hardship if they are required to provide a financial assurance mechanism listed in the cited rule, in that a substantial annual fee to maintain the financial assurance instrument will be required, and that this will significantly raise their costs of compliance with the provisions of the cited rule chapter. Petitioners allege that a variance from the rule will allow Petitioners to provide an appropriate financial assurance mechanism at the appropriate amount for meeting applicable permit conditions, that meets or exceeds the instruments listed in the rule, and at a fraction of the cost.

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

Section 120.542(2), 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 120.02(18), F.S. defines variance to mean:

- (18) "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), F.S.

Section 120.02(19), F.S. defines waiver to mean:

- (19) "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.

SUBSTANTIAL HARDSHIP TO THE PETITIONERS

Strict application of the rule will create a substantial hardship for Petitioners. The term "substantial hardship" is defined as a "demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver." Petitioners request a variance of the strict application of the financial instruments specified in Rule 62B-56.090(2) F.A.C., because s strict application of the rule will result in a substantial hardship for them. Specifically, Petitioners allege that they will suffer a significant economic hardship if they are required to provide a financial assurance mechanism listed in the cited rule, in that a substantial annual fee to maintain the financial assurance instrument will be required, and that this will significantly raise their costs of compliance with the provisions of the cited rule chapter. Petitioners allege that a variance from the rule will allow Petitioners to provide an appropriate financial assurance mechanism at the appropriate amount for meeting applicable permit conditions, that meets or exceeds the instruments listed in the rule, and at a fraction of the cost.

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

1. 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 reconstructed dune with the geotextile container system structure as its core is intended to protect the existing habitable major structures located on the properties.
2. The financial assurance mechanism adopted in Chapter 62B-56.090(2), F.A.C., were adopted to implement the requirements of section 161.085(9)(b), F.S., which requires that a geotextile container used as the core of a reconstructed dune be removed if the provisions of section 161.085(9), F.S., and permit conditions are not met.
3. The intent of the underlying purpose of the statute is met by issuance of a variance to Petitioners allowing the proposed Escrow Agreement naming DFS as the escrow agent; the proposed financial assurance mechanism affords the same degree of assurance that in the event the geotextile container used as the core of a reconstructed dune does not meet the provisions of section 161.085(9), F.S., or the underlying permit conditions, sufficient funding will be available to effect removal of the structure.

CONCLUSION

1. Petitioners have demonstrated that a substantial economic hardship would occur if a strict application of Rule 62B-56.090(2), F.A.C., is made and the requested relief not granted.
2. Further, the purpose of the underlying statute will be met by granting a variance because use of an Escrow Agreement naming DFS as escrow agent will assure that the costs of removal of the structure and restoration of the project site to its natural conditions will be available in the event the reconstructed dune fails to meet statute or permit conditions,
3. For the foregoing reasons, the Petitioners have demonstrated that they have met the requirements for a variance to the strict application of Rule 62B-56.090(2), F.A.C., that are required by the Department to demonstrate proof of financial assurances, subject to the following conditions:
 - a. The variance granted herein is permanent, and is conditioned on acceptance by DFS of the requested escrow agreement.
 - b. Granting of the Petition for variance or waiver does not prevent the Department from requiring removal of the geotextile container and restoration of the area under Section 161.085(9), F.S., if the reconstructed dune is determined to cause significant adverse impact to the beach-dune system including native vegetation, becomes non-functional to protect the private structure, fails to preserve public beach access, adversely affects adjacent properties, or in the case that the applicants fail to receive a Section 10 Incidental Take Permit as required, if an Incidental Take Permit is revoked by the U.S. Fish and Wildlife Service, and if applicable statutory criteria and permit conditions are not met.

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.

Mediation

Mediation is not available in this proceeding.

Judicial Review

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; 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 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 6th day of March, 2020, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Lainie Edwards, Ph.D., Assistant Director
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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.

Sandra H. Rogers 3/6/2020

Electronic Copies Furnished to:

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