



# FLORIDA DEPARTMENT OF Environmental Protection

CENTRAL DISTRICT OFFICE  
3319 MAGUIRE BLVD., SUITE 232  
ORLANDO, FLORIDA 32803

**Ron DeSantis**  
Governor

**Jeanette Nuñez**  
Lt. Governor

**Noah Valenstein**  
Secretary

BEFORE THE STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

In re: Andy Estates, LLC

OGC Case No. 20-0202

Petition for Variance from

Provisions of Rule 62-330.010(4), F.A.C.

DEP File No.: 0379980-002-EV

## **ORDER GRANTING PETITION FOR VARIANCE**

On March 10, 2020, Andy Estates, LLC., Petitioner, filed a petition with the Florida Department of Environmental Protection (Department) requesting a section 120.542, Florida Statutes, variance from the requirements of Section 10.2.5(a)(4), Applicant's Handbook Volume I from Rule 62-330.010(4), F.A.C. which requires that prior to the mooring of any vessel at the dock, there shall be existing structures with toilet facilities located on the uplands. The Petitioner seeks a variance in order to construct a dock with one temporary mooring slip.

Notice of receipt of the petition was published in the Florida Administrative Register on March 13, 2020. Public comment was received objecting to issuance of the variance. These comments were taken into consideration while making the final determination whether to grant or deny the Petition for Variance.

## **BACKGROUND AND APPLICABLE REGULATORY CRITERIA**

The activities authorized by this variance are located at Parcel ID 26-37-06-02-A, located directly east of the intersection of Crispin Street and S Tropical Trail, Merritt Island, Florida 32952, in Section 6, Township 26 S, Range 37 E in Brevard County, at 28°15'21.56"N, 80°39'37.55"W.

The applicable rules state in pertinent part: "The Agency shall deny a permit for a regulated activity located (a) In Class II or Class III waters, as designated in Chapter 62-302, F.A.C., that are classified by the Department of Agriculture and Consumer Services (DACs) as "approved", "restricted", "conditionally approved", or "conditionally restricted" for shellfish harvesting... This provision (also) shall not apply to docking facilities that meet all of the following criteria: (4) Prior to the mooring of any vessel at the dock, there shall be existing structures with toilet facilities located on the uplands."

THE VARIANCE WILL MEET THE UNDERLYING  
PURPOSE OF THE STATUTE

Section 120.542(2), Fla. Stat., 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 procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

The proposed project area, located in the South Banana River, is designated as “Conditionally Approved” by the Department of Agriculture and Consumer Services (DACS), therefore subjecting the proposed dock under ERP application 0379980-001-EI to the requirements of Section 10.2.5(a)(4), Applicant’s Handbook Volume I, in accordance with Chapter 62-330.302(1)(c), F.A.C. The purpose of the rule is met, as all authorized users of the proposed mooring area have toilet facilities located in their independently owned upland parcels, which are all located approximately one-quarter of a mile or less from the proposed structure.

DACS reviewed the proposed project and determined that the construction activities associated with the project are not expected to adversely impact water quality in the shellfish harvesting area, and if completed as proposed, the construction will not require re-classification or temporary closure of the closest shellfish harvesting area.

The Petitioner demonstrated that the purpose of the underlying statute has been achieved by limiting the use of mooring vessels at the proposed dock to only those members of Andy Estates, LLC. whom own homes with toilet facilities located on their uplands. The owner of the one undeveloped lot, Lot 17, has recorded a restrictive covenant with Brevard County to preclude use of the slip at the proposed dock.

VIOLATIONS OF PRINCIPLES OF FAIRNESS

“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 120.54(2), Florida Statutes.

Petitioner requests a variance or waiver of the strict application of Rule 62-330.201(1)(c), F.A.C., because applying the rules for licensure application would be unfair and would create an unintended result and would violate the principles of fairness.

The Petitioner demonstrated that literal application of the rule would affect the Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

The ownership of Parcel ID 26-37-06-02-A is unique in that the waterfront parcel is owned by nearby property owners of Andy Estates, LLC, however it is not immediately associated with the deeds of their individually owned homes, therefore separating the uplands of Parcel ID 26-37-06-02-A from those parcels with the toilet facilities. However, all toilets are

located approximately one-quarter mile or less from Parcel ID 26-37-06-02-A. Further, the parcel is not configured in a way which would reasonably allow the construction of an independent toilet facility. The majority of the docks in this region along S Tropical Trail all, all within the same “Conditionally Approved” waters for shellfish harvesting, also have docks on the east side of S Tropical Trail, with their homes located on the west side of the roadway.

**THEREFORE, IT IS ORDERED:**

Based on the foregoing reasons, the Petitioner has demonstrated that it has met the requirements for a variance of Section 10.2.5(a)(4), Applicant’s Handbook Volume I. PETITIONERS REQUEST FOR A VARIANCE IS GRANTED.

This variance shall remain in effect for the duration of the structure authorized in accordance with ERP Permit No. 379980-001-EI, if issued.

**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 26<sup>th</sup> day of May, 2020 in Orange County, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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Aaron Watkins,  
Central District Director

**CERTIFICATE OF SERVICE**

The undersigned duly designated deputy clerk hereby certifies that this document and all attachments were sent on the filing date below to the following listed persons:

Ravi Sharma, FDEP Office of General Council, [Ravi.Sharma@FloridaDEP.gov](mailto:Ravi.Sharma@FloridaDEP.gov)

Don Nesbitt, Dock Contractor, [Docks@cfl.rr.com](mailto:Docks@cfl.rr.com)

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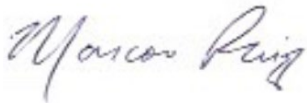
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**FILING AND ACKNOWLEDGMENT**

FILED, on this date, pursuant to Section 120.52, F. S., with the designated Department Clerk, receipt of which is hereby acknowledged.



\_\_\_\_\_  
Clerk

May 26, 2020

Date