

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

**In Re: Cheri and Randall E. Futch**

**OGC File No. 20-0701  
DWRM No. IR-999 AR**

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

On March 23, 2020, Petitioners Cheri and Randall E. Futch (“Petitioners”), filed a petition with the Florida Department of Environmental Protection (“Department”) requesting a variance or waiver<sup>1</sup> pursuant to Section 120.542, Florida Statutes, with respect to the Petitioner’s property located at 1996 Ocean Ridge Circle, Vero Beach, Indian River County, Florida. Because the existing dwelling structure on the property was constructed under a DEP Coastal Construction and Excavation permit issued after 1985, it is not eligible to be protected by armoring<sup>2</sup> pursuant to Florida Administrative Code Rules 62B-33.002(12), 62B-33.002(39), 62B-33.002(59), and 62B-33.0051(1)(a)1. 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 March 30, 2020. No public comment was received.

**BACKGROUND AND APPLICABLE REGULATORY CRITERIA**

1. Petitioners own the property subject of the petition and located in Indian River County at 1996 Ocean Ridge Circle, Vero Beach, Florida, 32963.
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(12) (defining “eligible structures” as, among other things, “non-conforming habitable structures”); *Id.* at R. 62B-33.002(39) (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(59) (defining “vulnerable” as a situation in which the foundation of an eligible structure is subject to erosion from 15-year return interval storm).

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<sup>1</sup> 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).

<sup>2</sup> “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).

4. The dwelling structure located on Petitioners' property was constructed under a DEP Coastal Construction and Excavation permit, IR-935, that was issued by DEP on August 2, 2016.

5. The Department has determined that the segment of beach where the structure is located is critically eroding and threatens private development. See "Critically Eroded Beaches in Florida", Florida Department of Environmental Protection (2016) (prepared in accordance with Sections 161.101 and 161.161, Florida Statutes).

6. The "Erosion Analysis 1996 Ocean Ridge Circle, Vero Beach, FL" performed by the applicant and the Department's vulnerability analysis demonstrate the Dwelling is vulnerable to ongoing damage from coastal erosion and are subject to such damage from frequent coastal storms. According to historic aerials, the seaward limit of the frontal dune has retreated 117 feet since 1984. The site consistently loses large volumes of sand.

7. The Dwelling is vulnerable to damage from a 15-year storm event, which would impact one half of the Dwelling footprint, while a 25-year storm event will impact nearly the entire foundation. (Exhibit "A".) Scour effects from a 15-year storm will cause the lower level frangible walls and slab, to collapse, and would cause damage to the septic system, water service, and electric service, which could render the dwelling uninhabitable. Petitioners assert that these impacts to the dwelling and associated infrastructure constitute an economic hardship (repairs are estimate to exceed \$419,000 for anticipated damages to the aforementioned structure, and its value and marketability adversely affected without a seawall) as well as a technical hardship (loss of sand from beneath the structure as a means of protection is not viable, and inability to fully use the home if damage to it or its infrastructure occurs). Thus, the Dwelling and associated structures are susceptible to significant damage from a high frequency storm event. The Rules prevent the Petitioners from protecting their Dwelling and Property from high frequency storm events.

8. The Department has issued numerous permits (including a Final Orders granting variance to the rules cited herein for a neighboring property) for coastal armoring for other similarly located dwellings on properties in the vicinity of Petitioners' property.

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

9. 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.

10. 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.").

11. 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.

12. The beach and dune system seaward of the property has experienced significant erosion and no longer affords protection to the upland structures from frequent storm events. In this case, waiving the Department's exclusion from armoring protection for structures built under post-1985 DEP Coastal Construction and Excavation permits would protect the private structure on the subject property, and is not expected to result in significant adverse impact to the coastal system.

### **SUBSTANTIAL HARDSHIP AND VIOLATIONS OF PRINCIPLES OF FAIRNESS**

13. "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.

14. The facts set forth in Petitioners' petition and supporting documentation, which are summarized above, establish that strict application of Rules 62B-33.002(12), 62B-33.002(39), 62B-33.002(59), 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(12), 62B-33.002(39), 62B-33.002(59), 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 property. 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(6).

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(12), 62B-33.002(39), 62B-33.002(59), 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.

### Mediation

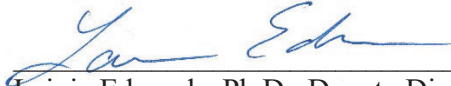
Mediation is not available in this proceeding.

### 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 11th day of June 2020 in LEON COUNTY, FLORIDA.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION




Lainie Edwards, Ph.D., Deputy Director  
Office of Resilience and Coastal Protection  
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 June 11, 2020, 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.



06/11/2020

Clerk Date

Copies furnished to:

Petitioners Cheri and Randall Futch  
Joint Administrative Procedures Committee  
Lea Crandall, Agency Clerk  
Thomas G. Tomasello at [ttomasello77@gmail.com](mailto:ttomasello77@gmail.com)  
William P. Stoddard, Engineer for Petitioners