

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

IN RE: James Maxie, III and Jennifer Lea Bryant

Petition for Variance /

OGC CASE No.: 21-0321

ORCP FILE NO.: FR-1015 AR V

ORDER GRANTING PETITION FOR VARIANCE OR WAIVER

On March 26, 2021, James Maxie, III and Jennifer Lea Bryant (“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 Petitioner’s property located at 1039 Gulf Shore Boulevard, Alligator Lane, Franklin County, Florida (“Property”). 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 armoring² pursuant to Rules 62B-33.002(12), 62B-33.002(39) and 62B-33.0051(1)(a)1, Florida Administrative Code (“F.A.C.”). Petitioners seek a variance or a waiver from the cited rule provisions in order to construct coastal armoring to protect a conforming structure from coastal erosion.

Notice of receipt of the petition was published in the Florida Administrative Register on April 1, 2021. No comments were received in response to the notice.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. Petitioners own the Property subject of the petition, located in Franklin County.
2. The 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 and 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. The Petitioners seek a permanent variance or waiver from Rules 62B-33.002(12) and (39) and 62B-33.0051(1)(a)1, F.A.C., which provide in pertinent part:
 - *Rule 62B-33.002(12). F.A.C.: “Eligible Structures” are public infrastructure and private structures qualified for armoring as follows:*
 - (b) *Private structures, located partially or wholly seaward of the coastal construction control line, include:*
 1. *Non-conforming habitable structures.*

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).

(c) *Eligible structures do not include minor structures.*

- *Rule 62B-33.002(39), F.A.C.: “Non-conforming Structure” is any major habitable structure which was not constructed pursuant to a permit issued by the Department pursuant to Section 161.052 or 161.053, F.S., on or after March 17, 1985.*
- *Rule 62B-33.0051(1)(a)1, F.A.C.: Construction of armoring shall be authorized under the following conditions:*

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

4. The segment of shoreline comprising Petitioners’ property has been designated by the Department as “critically eroded” pursuant to Section 161.101, Florida Statutes. The Critically Eroded Beaches in Florida report updated in July 2021 designated 0.4 miles of Alligator Point between FDEP monuments R-220 and R-221 as “critically eroded”. The Property is located approximately 350 to 450 feet east of the Department monument R-220, within this critically eroded portion of the beach. Severe erosion occurred to this area of the beach as a result of Hurricane Michael. The seasonal high water elevation is approximately +4.81 feet (NAVD 88) in this location. Post Hurricane Michael photos taken in October 2018, show the CMU retaining walls and understructure concrete slabs being destroyed in this segment of shoreline. Additional photos provided by the Petitioners show the limit of erosion was with approximately 20 feet from the southeastern corner of the home. This erosion, greatly exceeds the average background erosion rate of -1.8 feet/year for this general area.

5. The erosion occurring at the critically eroded portion of the beach has destroyed the dune system there. A beach nourishment project that captured the subject shoreline was permitted by the State, but the nourishment project has not been funded for the beach at the location of Petitioners’ home.

6. The home’s wastewater disposal system is a septic system which is threatened by the erosion occurring at the Property. The septic tank is located just landward of the erosion escarpment. Several of the properties in this area had damaged septic tanks visible on the beach after Hurricane Michael. Compromise of the Petitioners’ septic system could result in pollution to the Gulf of Mexico. Based on the current rate of erosion, the septic system is expected to be compromised. Use of the septic system is integral to the dwelling being deemed habitable.

7. The Dwelling is vulnerable to damage from a 15-year storm event as provided in the CEG Memo. 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 \$145,000 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 several permits (including a Final Order granting variance to the rules cited herein for neighboring properties) for coastal armoring on properties in the vicinity of Petitioner's property.

**THE VARIANCE OR 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 the 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.

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 Property, and is not expected to result in significant adverse impact to the coastal system.

**SUBSTANTIAL HARDSHIP TO THE PETITIONER AND VIOLATIONS OF PRINCIPLES
OF FAIRNESS**

13. “Substantial hardship” means a demonstrated economic, technical, 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. Section 120.54(2), Florida Statutes.

14. Petitioners allege that a substantial economic hardship would exist if coastal armoring is not installed because additional erosion would require Petitioners to undertake immediate costly non-structural measures to protect the property, such as sand placement or other temporary measures. Petitioners state that sand placement is a temporary and ineffective form of protection when coupled with the excessive erosion rate occurring at this location. Petitioners allege that it is highly likely that sand placed along the property to restore the beach would be washed away in a short period of time and would not provide a permanent solution to the erosion problem.

15. Petitioners allege that a substantial economic hardship would result if further erosion damages the home’s foundation elements, plumbing, underground utilities, exterior walls, and the septic system, thereby requiring Petitioners to repair or replace the structure or appurtenances. The cost to redesign and replace support systems associated with the home would be extensive. Petitioners further allege that devaluation of the Property and loss of the home on the Property would impose a substantial economic hardship.

15. Petitioners allege that a substantial technological hardship exists because safe accessibility to the structure is already at risk and that risk will increase if erosion were to cause removal of additional sand from beneath the floor slab. Petitioners allege that erosion of sand from beneath the home would threaten the stability of the structure itself and could result in loss of the structure.

16. Petitioners seek a permanent variance or waiver from Rules 62B-33.002(12) and (39), and 62B-33.0051(1)(a)1, F.A.C., and allege that application these rules to their situation would be unreasonable, unfair, and would create an unintended result and substantial hardship and would violate the principles of fairness. Petitioners allege that application of the eligibility requirements of the rules would be unreasonable, unfair, and would create unintended consequences because the rules do not take into consideration the large scale erosion that has and is occurring at this particular segment of the shoreline. Petitioners allege that, given the excessive and pervasive erosion, the uniform application of the rules is unreasonable, unfair, and causes the unintended result of exposing the dwelling, along with the dwelling’s septic system and other essential utilities, to additional significant erosion and damage.

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17. The facts set forth in the Petition and supporting documentation, which are summarized above, establish that strict application of Rule 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.

CONCLUSION

Based on the foregoing reasons, the Petitioner has demonstrated that it has met the requirements for a permanent waiver of rule, and that the underlying Statute is met.

THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, the Petitioner has demonstrated that it has met the requirements for a variance of 62B-33.002(12) and (39), and 62B-33.0051(1)(a)1, F.A.C. Petitioners request for a Variance is GRANTED, subject to the following conditions:

A. The variance shall be 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 Property. A permit for coastal armoring allows for a construction period of 3 years from date of issuance pursuant to Rule 62B-33.008(6), F.A.C.

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) 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.

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Mediation

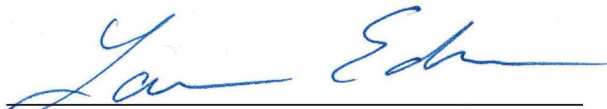
Mediation is not available in this proceeding.

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 19th day of November 2021, in LEON COUNTY, FLORIDA.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Lainie Edwards, 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 11/19/2021 Jacob Koerner, 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.

11/19/2021
Clerk Date

Copies furnished to:
Petitioners James Maxie, III and Jennifer Lea Bryant
Joint Administrative Procedures Committee
Lea Crandall, Agency Clerk