

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

In Re: Florida Department of Transportation

**Petition for Waiver or Variance from Provision
of Rule 62B-331.0051(2)(b)3., F.A.C.**

OGC File No.: 21-0389

ORCP No.: PB-1285 AR V

FINAL ORDER GRANTING PETITION FOR VARIANCE OR WAIVER FROM RULE 62B-33.0051(2)(b)3., FLORIDA ADMINISTRATIVE CODE

On April 13, 2021, Petitioners Florida Department of Transportation (“FDOT”), 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 SR A1A at Sloan’s Curve, Palm Beach, Palm Beach County, Florida. Petitioners seek a permanent waiver or variance from Rule 62B-33.0051(2)(b)3., Florida Administrative Code, (F.A.C.), limiting the level of storm design for coastal armoring and alleges 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 April 20, 2021. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. FDOT owns the existing rock revetment located within the Town of Palm Beach along the seaward side of State Road A1A between the areas know as Widener’s Curve and Sloan’s Curve, abutting the subject site at Sloan’s Curve (hereafter referred to as the “revetment”). The revetment is over one mile in length.
2. The revetment was constructed as a single, continuous and uniform coastal armoring structure that provides a level of storm protection to State Road A1A greater than a 50-year design storm.
3. FDOT is currently undertaking a project which proposes a rehabilitation to the revetment that includes reconstructing the older segment of the revetment that abuts the southern terminus of the revetment and extending the revetment by approximately 109 feet southward along the shoreline. The existing revetment was designed and constructed to a level greater than a 50-year design storm.
4. 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.

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).

5. Pursuant to Florida Administrative Code Rule 62B-33.0051(2)(b)3., all armoring shall be designed to remain stable under the hydrodynamic and hydrostatic conditions for which they are proposed. Armoring shall provide a level of protection compatible with existing topography, not to exceed a 50-year design storm.

6. The Department has not issued any other permits (including Final Orders granting variance to the rules cited herein for a neighboring property) for coastal armoring on properties in the vicinity of Petitioners' property.

THE WAIVER WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

7. 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.

8. 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.").

9. The existing revetment provides protection for over one mile of State Road A1A at a level of protection greater than the 50-year design storm limitation in Rule 62-33.0051(2)(b)3.

10. Both the existing structure and the proposed extension of approximately 109 feet of rock revetment will provide protection to portions of State Road A1A which are vulnerable to erosion and eligible for coastal armoring under section 161.085, Florida Statutes, and Rule 2B-33.0051, F.A.C.

11. Section 161.085, Florida Statutes, allows the installation of rigid coastal armoring to protect vulnerable public infrastructure so long as the construction qualifies for a permit under either section 161.041 or 161.053, Florida Statutes. Furthermore, other than requiring a permit under sections 161.041 or 161.053, there is no stated limitation on the level of protection that coastal armoring may provide in Section 161.085, Florida Statutes.

12. The Petitioner demonstrated that the purpose of the underlying statute will be achieved because the installation avoids additional adverse impacts by extending the existing rock revetment by approximately 109 feet southward along the shoreline of an existing mile long rock revetment that is designed for a level of protection greater than a 50-year design storm.

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. Designing the proposed revetment extension to a 50-year design storm imposes a substantial hardship on FDOT as failure of this revetment could allow damage to occur to the existing rock revetment, designed to withstand greater storm events. Flanking, erosion that occurs as adjacent, unprotected shorelines continue to erode, could occur when the revetment extension suffers damage from a greater than 50-year design storm event. The revetment extension failure can occur when larger than the design waves impact the structure and displace large portions of the main revetment armor layer. Removal of the main armor layer exposes smaller filter layer rock and underlying sand. The revetment will subsequently collapse as wave action removes those materials. This erosion of the sand at the southern terminus of the existing revetment could allow wave action to remove material from behind or landward of the existing revetment. The removal of underlying sand, which a revetment intends to protect, could cause subsequent unraveling and localized collapse of the existing revetment - further exposing State Road Al A in this area to wave action and potential damage.

15. Construction of the project with a differing design and level of protection from the revetment imposes a substantial hardship on FDOT because it requires two separate schedules for necessary maintenance and replacement activities as the coastal armoring structure with the lower level of protection requires earlier maintenance and replacement actions than the structure with the higher level of protection. This imposes a hardship because FDOT would have to schedule, fund, and perform separate maintenance and replacement activities not only to sustain the project but to preserve the existing revetment.

16. The facts set forth in Petitioners' petition and supporting documentation, which are summarized above, establish that strict application of Rule 62-33.0051(2)(b)3. 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.

THEREFORE, IT IS ORDERED:

The Petition for a variance from Florida Administrative Code Rule 62-33.0051(2)(b)3. 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

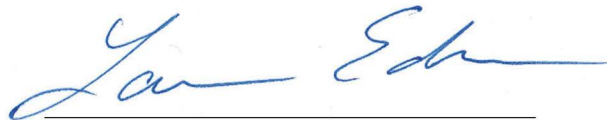
Mediation is not available in this proceeding.

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 12th day of July 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 7/12/2021, 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.

7/12/2021 Jacob Koerner
Clerk Date

Copies furnished to:

Petitioners Florida Department of Transportation
Joint Administrative Procedures Committee
Lea Crandall, Agency Clerk