

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

In Re: Bagby Investment Properties, LLC

**Petition for Waiver or Variance from Provision
of Rule 62B-33.005(5), F.A.C.**

**OGC File No.: 21-0969
ORCP No.: SJ-1705 V**

FINAL ORDER GRANTING PETITION FOR VARIANCE OR WAIVER FROM RULE 62B-33.005(5), FLORIDA ADMINISTRATIVE CODE

On September 15, 2021, Petitioner, Bagby Investment Properties, LLC, filed a petition with the Florida Department of Environmental Protection (“Department”) requesting a variance or waiver¹ pursuant to Section 120.542, Florida Statutes (“F.S.”), with respect to the Petitioner’s property located at 2777 South Ponte Vedra Blvd., St. Johns County, Florida, and subsequently filed an amended petition on October 11, 2021. Petitioner seeks a permanent waiver or variance from Rule 62B-33.005(5), Florida Administrative Code, (F.A.C.), requiring that prior to the issuance of a permit for a single-family dwelling meeting the criteria of Section 161.053(5)(c), F.S., the manmade frontal dune must be maintained for a minimum of 12 months and be demonstrated to be as stable and sustainable as the natural frontal dune system, 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 September 20, 2021. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. Petitioner holds equitable title to the parcel of property on which the variance is sought via a Contract for Deed, executed between Petitioner and the owners of the land, Monika M. Frey-Moore and Brenden Albert Moore. The property is located at 2777 South Ponte Vedra Boulevard, St. Johns County, Florida, Parcel I.D. No. 1440100000, and is further described as Lot 19, Block 3, South Ponte Vedra Beach, as recorded in Map Book 6, Pages 24, 25 and 26 of the Public Record of St. Johns County, Florida ("Property").
2. Petitioner currently has a contract with a third party to construct a single-family dwelling on the Property.
3. The Department is the state agency charged with the regulation of coastal construction and excavation, pursuant to Section 161.053, F.S., and the rules promulgated thereunder.
4. Pursuant to Florida Administrative Code Rule 62B-33.005(5), in order for a single-family dwelling to be constructed seaward of the Coastal Construction Control Line it must be landward of the frontal dune structure. In order for a manmade frontal dune to be considered as a frontal dune defined under Section 161.053(5)(a)1., F.S., the manmade frontal dune shall be constructed to meet or exceed the protective value afforded by the natural frontal dune system in the immediate area of the subject shoreline.

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 a waiver. As explained below, Petitioners seek that a portion of DEP’s rule’s 12-month success period requirements not be applied (i.e., a waiver).

Prior to the issuance of a permit for a single-family dwelling meeting the criteria of Section 161.053(5)(c), F.S., the manmade frontal dune must be maintained for a minimum of 12 months and be demonstrated to be as stable and sustainable as the natural frontal dune system.

5. Petitioner seeks a permanent variance or waiver from Rule 62B-33.005(5), F.A.C., to obtain a permit for construction of a single-family dwelling on the Property, which provides in pertinent part:

- *the manmade frontal dune must be maintained for a minimum of 12 months and be demonstrated to be as stable and sustainable as the natural frontal dune system.*

6. St. Johns County, Florida is engaged in construction of a dune restoration project, funded in conjunction with the United States Federal Emergency Management Agency ("FEMA") that will construct and maintain a frontal dune system in the portion of South Ponte Vedra Beach where the Property is located (the "Dune Project"). The Dune Project construction includes construction of a frontal dune landward of the beach adjacent to the Property which will have sufficient vegetation, height, continuity, and configuration to provide protective value to the Property. St. Johns County will insure that the project is maintained for a minimum of 12 months and will be as stable and sustainable as the natural frontal dune system. The Dune Project is fully funded and St. Johns County, by and through its contractors, is fully capable of successfully completing it.

7. The proposed location of the single-family dwelling on the Property is seaward of the 30-year erosion projection.

8. The Department has not issued any other variance to the rules cited herein for a neighboring property for manmade dune criteria on properties in the vicinity of Petitioners' property.

THE WAIVER WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

9. Section 120.542(2), F.S., 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 coastal construction and excavation regulations implement Section 161.053, F.S. This statute expresses after October 1, 1985, and notwithstanding any other provision of this part, the department ... may not issue a permit for any structure ... which is proposed for a location that, based on the department's projections of erosion in the area, will be seaward of the seasonal high-water line within 30 years after the date of application for the permit. Likewise, the statute provides that the department may issue a permit for a single-family dwelling seaward of the projected 30-year seasonal high-water line for the parcel if the proposed single-family dwelling is located landward of the frontal dune structure.

11. To balance these two goals of the statute, the Department required that a manmade dune, otherwise meeting the statutory definition of a frontal dune, must be maintained for a minimum of 12 months and be demonstrated to be as stable and sustainable as the natural frontal dune system. The Department reasoned that the manmade dune with a 12-month success period would function as a natural dune, providing protection one might expect of a natural dune.

12. St. Johns County, with support of funding from the federal government, is in the process of completing a beach project, with a manmade frontal dune component.

13. Because an entity of government is obligated to the construction and maintenance of this specific beach and dune project, through an active, funded permit, the purposes of the rule and underlying statute will be served.

14. The Petitioner demonstrated that the purpose of the underlying statute will be achieved because St. Johns County, with support of funding from the federal government, is constructing the manmade dune in question and will have ongoing maintenance responsibilities, far beyond the 12-month success period required by the rule.

SUBSTANTIAL HARDSHIP AND VIOLATIONS OF PRINCIPLES OF FAIRNESS

15. “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.

16. Frank Bagby is President of Bagby Investment Properties, Inc., a company he owned with his late wife. The Contract for Deed was executed by Petitioner in anticipation of developing the Property to benefit Mrs. Bagby, who at the time was battling cancer. Although Petitioner has developed numerous homes, the Property was the last parcel owned or controlled by Petitioner and was the last parcel Petitioner intended to develop. Unfortunately, Mrs. Bagby succumbed to cancer in October 2020.

17. Petitioner, through its President, expended and is committed to expending substantial sums of money to permit, design and construct a single-family dwelling on the Property. As a consequence of Mrs. Bagby’s passing, Petitioner now desires and intends to complete the project pursuant to the contract he is bound to as a final home construction project. Petitioner’s purpose for acquiring the Property through the Contract for Deed was for the construction of a single-family dwelling thereon to benefit Mrs. Bagby, and despite her loss, Petitioner is still bound by the contract. Petitioner will lose the existing contract to construct a single-family home on the Property if Petitioner is required to wait the 12-month period of maintenance following construction by St. Johns County of the manmade frontal dune. Petitioner will suffer a severe financial penalty if the rule is strictly applied.

18. St. Johns County has made the commitment for and is engaged in the process of constructing the manmade frontal dune that will protect the Property and can be relied upon, based on its construction and maintenance plans to ensure that the constructed dune is intact and fully functional more than 12 months following construction. With these assurances in place, it would violate principles of fairness to require Petitioner to delay construction and likely cause loss of the contract to purchase the Property and to construct the dwelling on the Property.

19. The facts set forth in Petitioners’ petition and supporting documentation, which are summarized above, establish that strict application of Rule 62-33.005(5), F.A.C., 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 waiver from Florida Administrative Code Rule 62-33.005(5). 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 a single-family dwelling at the subject property. A permit for single family dwelling 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., Rule 62B-33.005(5), F.A.C.

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 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, 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

Rhonda Edwards

Clerk Date

Copies furnished to:

Petitioners Bagby Investment Properties, LLC
Joint Administrative Procedures Committee
Lea Crandall, Agency Clerk