

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

IN RE: The Town of Palm Beach

**Petition for Waiver or Variance from
Provisions of Rules 62B-33.002(27),
and 62B-33.0051(2)(b)3., F.A.C.**

**OGC Case No. 21-1323
ORCP File No. PB-1399 AR V**

FINAL ORDER GRANTING PETITION FOR VARIANCE OR WAIVER FROM RULES 62B-33.002(27) and 62B-33.0051(2)(b)3., FLORIDA ADMINISTRATIVE CODE

On December 15, 2021, the Town of Palm Beach (“Petitioner”) 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.”), from Rule 62B-33.002(27) and 62B-33.0051(2)(b)3., Florida Administrative Code (“F.A.C.”), which defines major reconstruction and limits the level of storm design. The petitioner states that rebuilding the seawall to its original design creates substantial hardships and violates principles of fairness.

Notice of receipt of the Petition was published in the Florida Administrative Register on December 15, 2021. No comments were received in response to the notice.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. Petitioner maintains an approximate 2,700 linear feet segment of seawall which is publicly owned along South Ocean Boulevard. The seawall is entirely seaward of the Coastal Construction Control Line.
2. Petitioner states that the seawall was constructed/installed in 1929.
3. Petitioner has proposed to replace the existing aging seawall. The existing seawall provides storm protection to South Ocean Boulevard, including public infrastructure. The road serves as the Hurricane Evacuation Route for this segment of Palm Beach Island.
4. The Department is the state agency charged with the duty and power to establish special siting and design considerations seaward of the established coastal construction control line in order to ensure the protection of the beach and dune system, proposed or existing structures, and adjacent properties; the preservation of public beach access; and the regulation of rigid coastal armoring structures under Sections 161.041, 161.053 and 161.085, F.S., and the rules promulgated thereunder.
5. Pursuant to Rule 62B-33.002(27), F.A.C., the term “Major Reconstruction” means the complete or partial replacement or rebuilding, to its original level of protection, of a significant portion of an existing armoring structure which has failed or deteriorated.

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).

6. Pursuant to Rule 62B-33.0051(2)(b)3., F.A.C., “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.”

7. A variance to Rule 62B-33.002(27), F.A.C., is required because it is not feasible to rebuild the seawall to its original level of protection, as the original level of protection is unknown and unidentifiable.

8. A variance to Rule 62B-33.0051(2)(b)3., F.A.C., is required for authorization of the reconstruction of the existing bulkhead which will exceed the 50-year design storm criteria.

THE VARIANCE 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 the 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, F.S. 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* Section 161.053, F.S. (“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 Section 161.085, F.S. (“The state recognizes the need to protect private structures and public infrastructure from damage or destruction caused by coastal erosion”).

11. Both the existing seawall and the reconstructed seawall will provide protection to South Ocean Boulevard, including public infrastructure, from damage or destruction caused by coastal erosion and are eligible for coastal armoring under section 161.085, F.S., and Rule 62B-33.0051, F.A.C.

12. Section 161.085, F.S., 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, F.S. 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, F.S.

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. *See* Section 120.54(2), F.S.

14. Petitioner states that strict application of Rule 62B-33.002(27), F.A.C., to the reconstruction of the existing seawall would result in a substantial hardship to the Petitioner as the original design standards are unknown and the construction under the standards imposed today would exceed the 50-year design storm criteria.

15. The existing seawall was constructed in 1929 before the enactment of Section 161.085, F.S., or Rule 62B-33.002(27) and 62B-33.0051(2)(b)3., F.A.C.

16. The facts set forth by the Petitioner, which are summarized above, establish that strict application of Rule 62B-33.002(27) and 62B-33.0051(2)(b)3., F.A.C., would result in substantial hardship to the Petitioner, and literal application of the rules would affect Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, Petitioner has demonstrated that it has met the requirements for a permanent variance of Rule 62B-33.002(27) and 62B-33.0051(2)(b)3., F.A.C. Therefore, Petitioner's request for a permanent variance is GRANTED. Petitioner's variance is subject to the following conditions:

A. This variance shall remain in effect for a period to run concurrently with the time period of a Department-issued permit to Petitioner to construct armoring on the 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 Petitioner 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.

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 Rules 28-106.201 and 28-106.301, 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, and telephone number of the petitioner; the name, address, and telephone number 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, or via electronic correspondence at Agency_Clerk@dep.state.fl.us. 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.

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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 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 Florida Rules of Appellate Procedure 9.110 and 9.190 with the Clerk of the Department in the Office of General Counsel (Station #35, 3900 Commonwealth Boulevard, 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 must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 25th day of May 2022 in LEON COUNTY, FLORIDA.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Lainie Edwards
Deputy Director
Office of Resilience and Coastal Protection

Copies furnished to:

Petitioners The Town of Palm Beach
Joint Administrative Procedures Committee
Lea Crandall, Agency Clerk
Mike Barnett, P.E., Agent
Douglas W. Aarons, P.E., Administrator

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on May 25, 2022, 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.

Alex Robson
Clerk

5/25/2022
Date