

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

**In Re: Charles P. Gendron**

**Petition for Waiver or Variance from Provision  
of Rules 62B-33.002(12)(b)1.; 62B-33.002(39);  
and 62B-33.0051(1)(a)1., F.A.C.**

**OGC File No.: 22-2436  
ORCP No.: CO-1168 AR V**

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**FINAL ORDER GRANTING PETITION FOR VARIANCE**

On August 18, 2022, Charles P. Gendron ("Petitioner"), filed a petition with the Florida Department of Environmental Protection ("Department") requesting a variance or waiver<sup>1</sup> under Section 120.542, Florida Statutes ("F.S.") from Rules: 62B-33.002(12)(b)1.; 62B-33.002(39); and 62B-33.0051(1)(a)1., F.A.C.. On September 15, 2022 the Florida Department of Environmental Protection issued a request for additional information in response to the Petition. Subsequently, on October 21, 2022, the Petitioner amended the Petition in response to the request for additional information.

The Department published notice of receipt of the Petition in the Florida Administrative Register on August 23, 2022. No public comment was received.

**BACKGROUND AND APPLICABLE REGULATORY CRITERIA**

1. Petitioner owns property seaward of the Coastal Construction Control Line located at 2370 Gordon Drive, Naples FL ("Property"). On June 15, 2022, Petitioner applied for a permit for major reconstruction of an existing seawall.
2. The Department is the state agency charged with the regulation of construction of rigid coastal armoring structures under Section 161.085, F.S., and the rules promulgated thereunder.
3. Rule 62B-33.002(12)(b)1., F.A.C., defines eligible structures as 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.
4. Rule 62B-33.0051(1)(a)1., authorizes the construction of coastal armoring when: The proposed armoring is for the protection of an eligible structure.
5. Rule 62B-33.002(39), F.A.C., defines a nonconforming structure as 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.
6. The Property is currently undeveloped, but has an open CCCL Permit (CO-1161) issued by the Department on July 1, 2022, for the construction of a single-family home, pool, deck, and associated appurtenant structures.
7. The Property was previously a portion of a single-family home site (the home has been demolished) with coastal armoring.
8. The Property has coastal armoring aligned with armoring on adjacent properties in the immediate area. Nearby and adjacent seawalls are both older and reconstructed.

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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." Section 120.52(21), F.S. 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." Section 120.52(22), F.S. In this case, the relief sought can be construed as a waiver. As explained below, Petitioners seek that a portion of Rule 62B-33.0051, F.A.C. not be applied (i.e., a waiver).



9. The existing coastal armoring on the Property was constructed approximately 70 years ago and is constructed of outdated materials that are likely to degrade over time.

10. The presence of the coastal armoring was a consideration in the purchase of the Property by the Petitioners.

11. The Petitioner's coastal engineering consultant provided an opinion that while the newer cap of the existing seawall appears in good condition, the seawall is older and constructed of outdated materials that are expected to corrode and decay.

12. The Petitioner's coastal engineering consultant provided photos that demonstrate numerous complications associated with the existing seawall that were not patently obvious due to the presence of the newer concrete cap.

13. The Petitioner's real estate consultant, a licensed broker in the State of Florida, and involved in real estate brokerage in Collier County since 1983, provided an opinion that a potential buyer for similar properties in the area would value a seawall in the range of \$2 to \$3 million dollars, given that comparable properties typically sell for \$20 million and greater.

14. The major reconstruction of the seawall is necessary to maintain the expected and continued value and protection of the Property.

15. The inability of the Petitioner to perform major reconstruction of the existing seawall will diminish the current and future value of the property; and diminish the future marketability of the Property as compared to other armored properties in the area.

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

16. 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 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.

17. Rules 62B-33.002(12)(b)1., 62B-33.002(39), and 62B-33.0051(1)(a)1., F.A.C., implements in part Section 161.053, F.S., which finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access. Section 161.085, F.S., sets forth the state's policy on rigid coastal armoring structures. This section recognizes the need to protect private structures and public infrastructure from damage or destruction caused by coastal erosion. The statute provides that armoring may be permitted provided that the private structure or public infrastructure is vulnerable to damage from frequent coastal storms, and that the siting and design of the armoring takes into consideration protection of the beach-dune system, impacts on adjacent property, preservation of public beach access, and protection of native coastal vegetation and nesting marine turtles and their hatchlings. The intent of the statute is to strike the appropriate balance between the protection of the coastal system and the need to protect private structures and public infrastructure.

18. The Petitioner demonstrated that the purpose of the underlying statute will be achieved because the existing armoring has been in place for approximately 70 years without adverse impacts to the beach and dune system. Subsequent major reconstruction of the existing armoring at the same location would not result in imprudent construction.



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

19. "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. Section 120.54(2), F.S.

20. Literal or strict application of Rules 62B-33.002(12)(b)1., 62B-33.002(39), and 62B-33.0051(1)(a)1., F.A.C., would prohibit the Petitioner from performing major reconstruction because the residence permitted by CO-1161 is not an eligible structure. However, major reconstruction of the existing armoring would not result in imprudent construction that would jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.

21. The facts set forth in the Petition and supporting documentation, which are summarized above, establish that strict application of Rules 62B-33.002(12)(b)1., 62B-33.002(39), and 62B-33.0051(1)(a)1., F.A.C., would result in substantial hardship and that literal application of the rule would affect Petitioner 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 the rule.

**THEREFORE, IT IS ORDERED:**

The Petition for a waiver from Florida Administrative Code Rules 62B-33.002(12)(b)1., 62B-33.002(39), and 62B-33.0051(1)(a)1., F.A.C., is GRANTED, subject to the following conditions:

A. This waiver shall remain in effect for a period of time to run concurrently with the period of time of any Department-issued permit to Petitioners to construct armoring at this site under permit number **CO-1168 AR** or any associated modifications to permit number **CO-1168 AR**.

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.



## 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

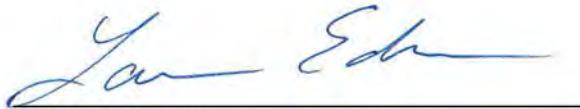
Mediation is not available in this proceeding.

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 27th day of December 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 Charles P. Gendron  
Joint Administrative Procedures Committee  
Lea Crandall, Agency Clerk  
Mark A. Powell, P.E., Agent  
Douglas W. Aarons, P.E., Administrator

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on **December 27, 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.

*Diana Dukhovskaya*

Clerk

12/27/2022

Date