

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

In Re: 195 Phesten Associates Palm Beach, LLC

**Petition for Waiver or Variance from Provision
of Rule 62B-33.0051(l)(a)3., F.A.C.**

**OGC File No.: 22-2821
ORCP No.: PB-1424 AR V**

FINAL ORDER GRANTING PETITION FOR VARIANCE

On November 9, 2022, 195 Phesten Associates Palm Beach, LLC ("Petitioner"), filed a petition with the Florida Department of Environmental Protection ("Department") requesting a variance or waiver under Section 120.542, Florida Statutes ("F.S."), and Rule 28-104, Florida Administrative Code ("F.A.C."), for a permanent waiver or variance from a portion of Rule 62B-33.0051(1)(a)3., F.A.C., which requires a property to be unarmored for construction of armoring to be authorized when a gap exists between a line of rigid coastal armoring that is continuous on both sides of the property.

The Department published notice of receipt of the petition in the Florida Administrative Register on November 14, 2022. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. Petitioner owns property seaward of the Coastal Construction Control Line located at 977 S. Ocean Boulevard, Palm Beach, Florida 33477 ("Property"). On August 3, 2022, Petitioner applied for a permit to reconstruct 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-33.0051, F.A.C., governs the design and construction criteria of rigid coastal armoring. For coastal armoring to be authorized, it must fall within one of the listed criteria in Rule 62B-33.0051.
4. Rule 62B-33.0051(l)(a)3., authorizes the construction of coastal armoring when:

A gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property. Such adjacent armoring shall not be deteriorated, dilapidated, or damaged to such a degree that it no longer provides adequate protection to the upland property. The top of the adjacent armoring must be at or above the still water level, including setup, for the design storm of a 15-year return interval storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination. The adjacent armoring must be stable under the design storm of 15-year return interval storm, including maximum

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." 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).

localized scour with adequate penetration, and must have sufficient continuity or return walls to prevent upland erosion and flooding under the design storm of 15-year return interval storm. Such installation shall:

- a. Be sited no farther seaward than the adjacent armoring,
- b. Close the gap between the adjacent armoring,
- c. Avoid significant adverse impacts to marine turtles,
- d. Not exceed the highest level of protection provided by the adjoining walls; and,
- e. Comply with the requirements of Section 161.053, F.S.

5. Petitioner seeks a permanent variance or waiver from the requirement that the Property be unarmored for armoring to be authorized when a gap exists between a line of rigid coastal armoring that is continuous on both sides of the property under Rule 62B-33.0051(1)(a)3.

6. Petitioner's seawall was constructed in the late 1920s by the Town of Palm Beach as part of an extensive and continuous line of armoring along the shoreline.

7. Petitioner alleges that there is an engineering concern of a risk to the stability or failure of the connected wall to the north where no return structure is present. Further, the sandy beach seaward of the existing wall in this area is narrow. Removal of the seawall on the Property would create a heightened risk of erosion and flooding to the Property and public infrastructure.

THE WAIVER WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

8. 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.

9. Rule 62B-33.0051, F.A.C., implements in part Section 161.085, F.S., which 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 structures 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.

10. The Petitioner demonstrated that the purpose of the underlying statute will be achieved because the existing armoring has been in place for almost a century without adverse impacts to the beach and dune system. Further, requiring the removal of the seawall prior to construction of the armoring would create unnecessary impacts to the beach and dune system.

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

11. "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.

12. Literal or strict application of Rule 62B-33.0051(1)(a)3., F.A.C., would require Petitioner to remove the existing wall prior to constructing the new armoring. However, removal of the existing armoring would cause unnecessary impacts to the beach and dune system, has the potential to cause the failure of the north segment of the wall, and increases the risk of erosion and flooding to the property and public infrastructure.

13. The facts set forth in the Petition and supporting documentation, which are summarized above, establish that strict application of Rule 62-33.0051(1)(a)3., 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 Rule 62-33.0051(1)(a)3. 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 **PB-1424 AR** or any associated modifications to permit number **PB-1424 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

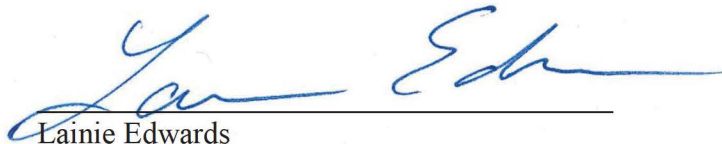
Mediation is not available in this proceeding.

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 14th 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:

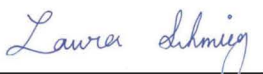
Petitioners 195 Phesten Associates Palm Beach, LLC
Joint Administrative Procedures Committee
Lea Crandall, Agency Clerk
Mark A. Powell, P.E., Agent
Douglas W. Aarons, P.E., Administrator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on **December 14, 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.



Clerk

12/14/2022

Date