

**JOSH STEIN**  
**ATTORNEY GENERAL**



REPLY TO:  
MARY L. LUCASSE  
(919) 716-6962  
[MLUCASSE@NCDOJ.GOV](mailto:MLUCASSE@NCDOJ.GOV)

### **Memorandum**

To: North Carolina Coastal Resource Commission  
Fr: Mary L Lucasse, Esq.  
Re: Legal Update to the Coastal Resources Commission (**CRC 23-16**)  
Date: April 4, 2023

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#### **I. NORTH CAROLINA SUPREME COURT**

**Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC (Carteret Co.)** Docket No. 94A22. The Commission appealed the Court of Appeal's decision based on Judge Tyson's dissent that would have held that no fees should have been awarded because the Commission's decision denying the Petitioners' request for a hearing was substantially justified. The matter is fully briefed, and we are waiting to hear the date for the oral argument.

#### **II. NORTH CAROLINA COURT OF APPEALS**

**Henry Fonvielle v. CRC (New Hanover Co.)** Docket No. COA 22-742. Petitioner Henry Fonvielle is appealing the superior court's order affirming the Commission's final agency decision denying his untimely request for a contested case hearing based on its determination that he was not entitled to notice as an adjacent riparian property owner. The Court of Appeals held oral argument on March 22, 2023 at the NC Central Law School. We are waiting the Court's decision.

#### **III. PETITIONS FOR JUDICIAL REVIEW (PJR)**

**Petitioners Clifton et. al. (22 CVS 1074) – Carteret Co. Superior Court.** The Commission denied the request of several lot owners in the Beaufort Waterfront RV Park to appeal the permit issued to Collette Properties LLC & Beaufort Waterway RV Park to construct a dock on the waterfront by their lots. The Chair held that the property and contract claims raised were not within DCM, CRC, or OAH's jurisdiction. Petitioners filed a PJR in superior court. An order to stay was filed December 21, 2022 at Petitioner's request to allow time to explore settlement with the permit holder.

#### **IV. OFFICE OF ADMINISTRATIVE HEARINGS (OAH)**

**Louis Wetmore v. Coastal Resources Commission (23 EHR 1224)** The Town of Baldhead Island's LPO denied Mr. Wetmore application for a CAMA permit to add a two-story structurally separate deck adjacent to his existing residence and deck as the proposed development is oceanward of the setback. Mr. Wetmore filed a petition for a contested case hearing in OAH on March 13, 2022. The PHS is due April 21, 2023. Discovery shall be complete by June 13, 2023. A hearing is scheduled in Bolivia, North Carolina during the week of July 10, 2023. I have been assigned to defend the Commission in this litigation.

**V. VARIANCES**–At your last meeting, the Commission granted the variance requests from the Town of Carolina Beach and the variance request from the Town of Ocean Isle. Attached are the final agency decisions documenting your decisions.

**VI. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH:** Following is a review of the outstanding requests:

**Dewey and Amy Haizlip (CMT 23-01)** submitted a request for a contested case hearing to challenge CAMA General Permit 85942 authorizing the construction of two finger piers and boat lifts at property located in Southport, North Carolina. The Chair denied the petition because Petitioners had failed to show they were directly affected by the decision and failed to allege facts or make legal arguments that a hearing would not be frivolous. Any appeal of this decision must be filed in superior court by April 14, 2023.

**P.L. Saunders (CMT 23-02)** submitted a request for a contested case hearing to challenge a CAMA permit authorizing construction of a new pool and pool fence at 9629C E. Spencer in the Town of Nags Head, Dare County. The Chair denied the request on April 6, 2023 based on Petitioner's failure to meet any of the factors required by statute. Any appeal of this decision must be filed in superior court by May 6, 2023.

**Pecan Grove Yacht Club (CMT-03)** submitted a request for a contested case hearing to challenge a CAMA General Permit authorizing construction of a pier in Shop Gut, Pamlico County, North Caroling. The Chair's decision is due April 27, 2023.



JOSH STEIN  
ATTORNEY GENERAL

STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

REPLY TO:  
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February 27, 2023

*Electronically: cnfox@craigeandfox.com*

C. Noel Fox, Esq.  
Craig & Fox  
701 Market Street  
Wilmington, NC 28401

**Re: Variance Request for Town of Carolina Beach  
CRC-VR-22-06**

Dear Noel:

At its February 23, 2023 meeting, the North Carolina Coastal Resources Commission granted Petitioner Town of Carolina Beach's request for a variance from 15A N.C. Admin. Code 07J .0701(a), 07H.0306(a)(9)(c) and 07H .0309(a) to construct a bathhouse replacing and expanding an existing bathhouse. Thank you for agreeing to accept service on behalf of your client the Town of Carolina Beach. Attached is a copy of the final agency decision signed by the Chair of the Coastal Resources Commission. Prior to undertaking the development for which a variance was sought, Petitioner must first obtain a CAMA permit from the Division of Coastal Management and any other required permits.

If for some reason the Petitioner does not agree to the variance as issued, the Town has the right to appeal the Coastal Resources Commission's decision by filing a petition for judicial review in the superior court as provided in N.C.G.S. § 150B-45 within thirty days after receiving the final agency decision. A copy of the judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

William F. Lane, General Counsel  
Dept. of Environmental Quality  
1601 Mail Service Center  
Raleigh, NC 27699-1601

If Petitioner files a petition for judicial review, I request that you send me a courtesy copy of the petition for judicial review at the email address listed in the letterhead.

If you have any questions, please feel free to contact me.

Sincerely,



Mary L. Lucasse  
Special Deputy Attorney General and  
Counsel for the Coastal Resources Commission

cc: M. Renee Cahoon, Chair electronically  
Christine A. Goebel, Esq. electronically  
Braxton C. Davis, electronically  
Mike Lopazanski, electronically  
Robb Mairs, electronically  
Angela Willis, electronically

STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES
COUNTY OF NEW HANOVER	)	COMMISSION
	)	<b>CRC-VR-22-06</b>
	)	
	)	
IN THE MATTER OF:	)	
PETITION FOR VARIANCE	)	<b>FINAL AGENCY DECISION</b>
BY <b>TOWN OF CAROLINA BEACH</b>	)	

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On December 27, 2022, Petitioner The Town of Carolina Beach submitted a request for a variance from the North Carolina Coastal Resources Commission’s (“Commission”) rules set forth at 15A N.C. Admin. Code 07J .0701(a), 07H.0306(a)(9)(c) and 07H .0309(a) to construct a bathhouse replacing and expanding an existing bathhouse. Pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A N.C. Admin. 07J .0700, *et seq.*, this matter was heard on oral arguments and facts stipulated to by Petitioner and Respondent Department of Environmental Quality, Division of Coastal Management (“DCM”) at the regularly scheduled meeting of the Commission on February 23, 2003 in the Town of Ocean Isle, North Carolina. Assistant General Counsel Christine A. Goebel, Esq. appeared for Respondent DCM. Attorney Noel Fox appeared on behalf of Petitioner.

When reviewing a petition for a variance, the Commission acts in a quasi-judicial capacity. *Riggings Homeowners, Inc. v. Coastal Resources Com’n*, 228 N.C. App. 630, 652, 747 S.E.2d 301, 314 (2013) (Commission has “judicial authority to rule on variance requests [] ‘reasonably necessary’ to accomplish the Commission’s statutory purpose.”); *see also Application of Rea Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (discussing the Board of Adjustment’s quasi-judicial role in allowing variances for permits not otherwise allowed by ordinance). In its role as judge, the Commission “balance[es] competing policy concerns under CAMA’s statutory framework.” *Riggings*, 228 N.C. App. at 649 n.6, 747 S.E.2d at 312.

Petitioner and Respondent DCM are the parties appearing before the Commission. The

parties stipulated to facts and presented relevant documents to the Commission for its consideration. *See*, N.C. Admin. Code 15A 07J .0702(a). If the parties had been unable to reach agreement on the facts considered necessary to address the variance request, the matter would have been forwarded to the North Carolina Office of Administrative Hearings (“OAH”) for a full evidentiary hearing to determine the relevant facts before coming to the Commission. *Id.* 07J .0702(d). As in any court, the parties before the decision-maker are responsible for developing and presenting evidence on which a decision is made. If DCM and Petitioner had entered into other stipulated facts, it is possible that the Commission would have reached a different decision. In this case, the record on which the Commission’s final agency decision was made includes the parties’ stipulations of facts, the documents provided to the Commission, and the arguments of the parties.

#### **FACTS STIPULATED TO BY PETITIONER AND DCM**

1. Petitioner, The Town of Carolina Beach (“Town”), is a North Carolina municipal body politic organized and existing in Carolina Beach, New Hanover County, North Carolina. The Town is represented by its Town Attorney, Charlotte Noel Fox.

2. The Carolina Beach Building Line Act was passed in 1963. The 1963 Session Law granted the Town title to the land between the building line and the low water mark of the Atlantic Ocean subject to the public trust rights. The 1963 Session Law also provides that no building or structure shall be built and erected on the made and built-up land lying East of “the building line” and further provides that all made and constructed land lying East of “the building line” shall be at all times kept open for the use of the public as streets, highways, or for the development and use as a public square or park, “as the governing authorities of the Town of Carolina Beach by ordinance shall determine.” A copy of the 1963 Session Law and the Building Line Map (Map

Book 8, Page 52) was provided to the Commission as a Stipulated Exhibits.

3. In 1985, the Legislature amended the State Lands Act, found in Chapter 146, by adding a new section addressing title to land in or immediately along the Atlantic Ocean raised above the mean high-water mark. (State Lands Act of May 30, 1985, 1985 N.C. Sess. Laws Ch. 276, sec. 2 (codified at N.C. Gen. Stat. §146-6(f)). Under this section, publicly funded projects involving hydraulic dredging or deposition of spoil materials or sand vest title to the raised land in the State.

4. A portion of the site where the bathhouse is proposed to be located was described by the Town in its Statement of Ownership portion of the CAMA permit application as follows: Title to all lands east of the established “building line” was conveyed to the Town of Carolina Beach in the 1963 North Carolina General Assembly House Bill 612, Chapter 511. A portion of the site was conveyed to the Town and New Hanover County via Sheriff’s Deed dated November 27, 1973 and recorded in Book 990, Page 46 of the New Hanover County Registry, a copy of which was provided to the Commission as a stipulated exhibit.

5. Though the Commission’s development line rules have now been repealed, the Town had adopted a development line in September 2016, the location of which is depicted on the Development Line Map recorded at Book 62, Page 145 of the New Hanover County Registry, a copy of which was provided to the Commission as a Stipulated Exhibit. The development line was in the same location as the 1963 Building Line. The development line/building line is shown as a blue line overlain on 2021 aerial imagery on the schematic prepared by the Town as part of the CAMA permit application showing the approximate location of the proposed bathhouse, a copy of which was provided to the Commission as a Stipulated Exhibit. The Site for the proposed

bathroom is located just east/oceanward of the development line/building line, on land subject to the 1963 Act which vested title in this land to the Town.

6. Prior to the adoption of the Town's development line, in accordance with 15A N.C. Admin. Code 07J.1200 *et seq.*, the Town had a static line exception which had been approved by the Commission since August 2009. The static line exception was last renewed by the Commission in February 2020 and following the repeal of the Commission's development line rules, the static line exception remains in effect.

7. The Site for the proposed bathroom, which has a physical address of 9 Boardwalk, is located east of the development line/building line and east of Boardwalk Avenue. The Site is located just landward (west) of the existing Carolina Beach wooden boardwalk. The Site is located east of where Cape Fear Boulevard would extend to the ocean.

8. The Site is within the Ocean Erodible Area of Environmental Concern, and per N.C. Gen. Stat. § 113A-118, any development at the Site requires authorization through a CAMA permit.

9. The Site is currently developed with an existing one story brick and cinderblock bathroom building. This building is not accessible directly from the boardwalk. A wheelchair or similar device must leave the wooden boardwalk and access the bathroom from the alley. This access route is shown on aerial photographs provided to the Commission as stipulated exhibits. The existing structure does not have any ADA compliant bathroom stalls.

10. On September 7, 2022, the Petitioner applied for a CAMA minor development permit (Permit Application Number CB22-13) ("Application") requesting approval of construction of a two story thirty-six-foot by twenty-eight-foot bathroom facility to replace the



existing facility. As the Town was the permit applicant, pursuant to N.C. Gen. Stat. § 113A-118(b) DCM processed the minor permit application for the Town.

11. The second floor of the proposed bathroom facility will connect directly to the Carolina Beach wooden boardwalk and will include three handicap accessible stalls.

12. The ground floor of the proposed bathroom facility will include three handicap accessible stalls as seen on the site plan drawings and the elevation drawings which are part of the Application and were provided to the Commission as a Stipulated Exhibit.

13. The Town stipulates that the proposed bathroom facility is located in a VE- Coastal High Hazard Flood Zone and does not meet the requirements for construction as designed. Pursuant to Chapter 30-95 of the Town's Code of Ordinances, the Town will seek a variance from the Town's Board of Adjustment. The Town contends that as a condition precedent to seeking the local variance, the Town must first receive a variance from the Coastal Resource Commission and a subsequent CAMA permit. Accordingly, the Town also seeks a procedural variance from the Commission's rule 15A N.C. Admin. Code 7J .0701 which requires a variance petitioner to first "seek relief from local requirements restricting use of the property."

14. DCM posted a notice placard on the Site on September 28, 2022, a copy of which was provided to the Commission as a Stipulated Exhibit. DCM also ran notice of the proposed project in the Wilmington Star News on October 2, 2022 and in Star News Online.

15. On September 28, 2022, the Town issued a press release on their website describing the proposed project. A copy of the website notice was provided to the Commission as a Stipulated Exhibit. On September 29, 2022, the Town put notice of their CAMA permit application on their Facebook Page.

16. As part of the CAMA Minor Permit process, notice of the project was required to be given to the adjacent riparian landowners: Carolina Beach Land Holdings, LLC, URCOWA Investments, LLC and JLM Partnership. These owners received notice by certified mail delivered on September 20, 2022, October 3, 2022, and September 19, 2022 respectively. Copies of the notice letters and certified mail and tracking information were provided to the Commission as Stipulated Exhibits.

7. DCM received correspondence regarding the project through a September 29, 2022 email from Ms. Amanda LaValley who indicated support for the project. A copy of her comment email was provided to the Commission. DCM also received an email on September 29, 2022 from David Hall with questions regarding ventilation. A copy of his email was provided to the Commission.

18. On October 4, 2022, the DCM denied the Town's Application because the development extended oceanward of the landward-most adjacent habitable building or structure as described in the static line exception rules at 15A N.C. Admin. Code 07H .0306(a)(9)(C), and a bathhouse is not among the setback exceptions listed in 15A N.C. Admin. Code 07H .0309(a).

19. In accordance with 15 N.C. Admin. Code 07H .0309(a), development is not permitted if it is seaward of the vegetation line or pre-project vegetation line. A portion of the proposed two-story bathroom facility is to be constructed seaward of the static vegetation line.

20. In accordance with 15 N.C. Admin. Code 07H. 0306 (a)(9)(C), "No portion of a building or structure, including roof overhangs and elevated portions that are cantilevered, knee braced, or otherwise extended beyond the support of pilings or footings, extends oceanward of the landward-most adjacent habitable building or structure." The proposed two-story bathroom facility

is to be constructed oceanward of the most-adjacent habitable buildings.

21. The Town previously petitioned for and received three variances for development more seaward than the vegetation line or pre-project vegetation line, including:

- a. CRC-VR-14-02 for the boardwalk
- b. CRC-VR-15-07 allowing the northern end of the now-existing boardwalk
- c. CRC-VR-21-01 Beach Mats

22. As part of the variance process, 15A N.C. Admin. Code 07J .0701(c)(7) requires that notice of the variance petition sent certified mail, return receipt requested to the adjacent property owners and persons who submitted written comments to the Division of Coastal Management during the permit review process. Neighbor JLM Partnership received notice, as evidenced by the certified mail information, copies of which are attached as stipulated exhibits. The Notice sent to URCOWA Investments, LLC was classified by the USPS as unclaimed on January 17, 2023 and was in the process of being returned to sender on January 30, 2023, as shown on the tracking report provided to the Commission as a stipulated exhibit.

23. The Town stipulates that the proposed bathhouse facility is inconsistent with 15A N.C. Admin. Code 07H .0306(a)(9)(c) and that the bathhouse is not within the listed exceptions to the setback found in 07H .0309(a).

24. The Town requests a variance from the Commission from the Commission's setback rules at 07H .0306(a)(9)(C) in order to develop the bathhouse as proposed in its CAMA minor permit application.

**STIPULATED EXHIBITS PROVIDED TO THE COMMISSION**

1. 1963 Session Law
2. Building Line Map recorded in Map Book 8, Page 52
3. 1985 Session Law
4. Deed recorded in Book 990, Page 46 of the New Hanover County Registry
5. Development Line Map recorded in Map Book 62, Page 145
6. Area Aerial showing steps/ramps from boardwalk to existing bathhouse
7. CAMA Minor Permit application, including:
  - 2021 Aerial Imagery showing the proposed structure and the Static Vegetation Line, 60 Foot setback, Stable Vegetation Line, and Development Line.
  - Plans prepared by Ardurra showing elevations and site plans
  - Application Form and AEC Hazard Notice
8. Town Ordinance 30-95
9. Site posting placard
10. Island Gazette Notice publication info
11. Town's 9/28/22 Press Release
12. Town's 9/29/22 Facebook Post
13. Notice to neighbors plus USPS tracking showing delivery
14. LaValley and Hall comments
15. CAMA Permit Denial Letter
16. Notice to neighbors re: variance request with USPS tracking showing delivery
17. PowerPoint presentation

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. Petitioner has requested a procedural variance from the Commission's rule that requires "[b]efore filing a petition for a variance from a rule of the Commission, the person must seek relief from local requirements restricting use of the property." 15A N.C. Admin. Code 07J .0701(a). The Commission grants the request and holds that Petitioner is not required to seek a

variance from the Town's ordinances before requesting a variance from the Commission's rules.

4. Petitioner has met the requirements in N.C. Gen. Stat. § 113A-120.1(a) and 15A N.C. Admin. Code 07J .0703(f) which must be found before a variance can be granted as set forth below.

**a. Strict application of the rules will cause unnecessary hardships.**

The Commission affirmatively finds that strict application of the N.C. Admin. Code 07H.0306(a) and 07H.0309(a) would cause Petitioner unnecessary hardship. These rules are designed to ensure that development within the Ocean Hazard Area of Environmental Concern ("AEC") is compatible with the biological and physical functions of the AEC and limit harm to persons or property. Without the variance, the Town would not be able to replace and expand the existing bathhouse which will provide additional bathroom facilities for the general public including persons with mobility disabilities.

In creating CAMA, the legislature recognized the importance of preserving and protecting the public's opportunity to enjoy the physical, aesthetic, cultural and recreational qualities of the shorelines of the State. Included among the stated goals of CAMA are insuring the orderly and balanced use and preservation of coastal resources on behalf of the people of North Carolina and the nation and the establishment of policies, guidelines, and standards for economic development, recreation and tourist facilities, preservation, and enhancement of the historic and cultural aspects of the coastal area. N.C. Gen. Stat. § 113A-102(b)(1) & (2).

Strict application of 15 N.C. Admin. Code 07H .0306(a)(9) and 07H .0309(a) will prevent the Town from "providing and protecting public rights for . . . recreation and . . . and manag[ing] the public trust areas so as to safeguard and perpetuate their biological, economic and aesthetic

values.” 15A N.C. Admin. Code 07H .0203 and .0207(c), The Commission’s rules are designed, in part, to limit a private individual’s ability to infringe on the public’s access to the public trust areas.

The Town’s boardwalk has existed in some form since the early 1930s. Due to its proximity to the Atlantic Ocean, the boardwalk allows the public to view, enjoy, and access the public resources of the dry and wet sand beaches, and the Atlantic Ocean. The Town has worked to provide public access to public trust areas for years. The boardwalk is constructed in a deliberate manner to maximize access for persons with disabilities. Specifically, the boardwalk is constructed in the Town’s popular central business district in proximity to public parking and is accessed by an ADA compliant ramp. The boardwalk includes two additional ADA compliant ramps which provide access to the public beach for persons with disabilities. In 2021, the Town received a variance which allowed for the installation of beach mats which connect to the ADA compliant ramps further improving access to the ocean beach for the aged and handicapped. The boardwalk is routinely used by those with disabilities. Currently, there is no access to a public bathroom facility directly from the boardwalk and the existing bathroom facility is not ADA compliant.

The lack of convenient access to public bathroom facilities for people with health conditions or impairments that limit mobility creates a significant hardship. The expanded bathhouse will replace the existing facilities and will double the number of accessible stalls and provide direct access to those facilities from the boardwalk. Moreover, the proposed location of the expanded bathhouse is on the uniquely Town-owned public beach within the Town’s Central Business District. The proposed structure largely meets the oceanfront setback, except for a portion of the structure approximately 130 square feet in area that is waterward of the pre-project

vegetation line. Accordingly, strict application of the oceanfront erosion setback will cause the Town unnecessary hardships by limiting public access instead of increasing public access by allowing a small portion of the proposed bathhouse to extend waterward of the pre-project vegetation line. This de minimus intrusion results in a substantial benefit by allowing space for ADA compliant stalls and direct wheelchair access from the boardwalk to the bathhouse.

An undue hardship to the Town, its citizens, and visitors, many of whom have health conditions or impairments which limit mobility and impair access to the boardwalk and the oceanfront, will be created if strict application of 15 N.C. Admin. Code 07H.0306(a)(9) and 07H.0309(a) prevents construction of this public bathroom facility. For these reasons, the Commission affirmatively finds that Petitioner has met the first factor without which a variance cannot be granted.

**b. The hardship results from conditions peculiar to Petitioner's property.**

The Commission affirmatively finds that Petitioner has demonstrated that the hardship results from conditions peculiar to the property: specifically, the Town's unique ownership of the historically maintained dry sand beach and the existing boardwalk which already includes enhanced handicap access.

First, the property upon which the proposed two-story bathroom facility is located is property was raised from the tides of the Atlantic Ocean by taxpayer funded beach nourishment efforts first undertaken by the Corps in the mid-1960's. The land was deeded to the Town by the North Carolina General Assembly pursuant to the provisions of the governing 1963 Session Law. The 1963 Session Law balances public and private property rights by recognizing that the Corps' publicly funded beach nourishment project extinguished the common law littoral rights of the

impacted oceanfront property owners. The General Assembly deeded the raised lands to the Town and required the Town to use the raised lands for public street and public park purposes.

Second, previous variances granted by the Commission (CRC-VR-14-02, CRC-VR-15-07 and CRC-VR-21-01) allowed the Town to improve the property in such a manner as to significantly increase access to the boardwalk and public beach by persons with health conditions, impairments, or limited mobility. The Town's significant investments in improving the boardwalk to create a more accessible environment has created a unique ocean front area enjoyed by all.

Accordingly, the Commission affirmatively finds that Petitioner has demonstrated that this hardship results from conditions peculiar to the property and has met the second factor required for the grant of its request for a variance.

**c. The hardship does not result from actions taken by Petitioner.**

The Commission affirmatively finds that Petitioner has demonstrated that the hardship does not result from actions taken by the Town. Specifically, the hardships result from the unique nature of the Town's public property and the provisions of the governing 1963 Session Law requiring the property be used as a public park. The hardship further results from a shortage of public facilities in proximity to restaurants, parking and the ocean and a need to provide adequate bathroom facilities for all members of the public including people with health conditions or impairments which limit mobility. The proposed replacement bathhouse is located on the same site as the existing bathhouse. Given the existing structures on the Site, the Town does not have the ability to site the larger structure entirely landward of the pre-project vegetation line and has minimized any incursion into the setback area.

For these reasons, the Commission affirmatively finds that Petitioner has demonstrated that



they have met the third factor required for a variance.

- d. Petitioner has demonstrated that the requested variance is consistent with the spirit, purpose, and intent of the Commission's rules, will secure public safety and welfare, and will preserve substantial justice.**

The Petitioner has demonstrated (a) that the requested variance is consistent with the spirit, purpose, and intent of the Commission's rules, (b) that it will secure public safety and welfare, and (c) that it will preserve substantial justice.

First, the Commission affirmative finds that Petitioner's proposed development is consistent with the spirit, purpose and intent of the rules, standards or orders issued by the Commission. The Commission's rule explains,

It is the objective of the Coastal Resources Commission to conserve and manage estuarine waters, coastal wetlands, public trust areas, and estuarine and public trust shorelines, as an interrelated group of [Areas of Environmental Concerns], so as to safeguard and perpetuate their biological, social, economic, and aesthetic value. . . . Furthermore, it is the objective of the Coastal Resources Commission to protect present common-law and statutory public rights of access to the lands and waters of the coastal area.

15A N.C. Admin. Code 07H. 0203. The Commission's rule is in keeping with the legislature's mandate to provide and preserve all of the public's opportunity to enjoy the physical, aesthetic, cultural and recreational qualities of the shorelines of the State.

Constructing a replacement two-story bathroom facility that is ADA compliant supports and preserves the public's right to enjoy the North Carolina ocean shoreline and to decrease any hurdles that might limit the public's enjoyment of this natural resource. By granting the requested variance, the Commission supports the Town's goal and ability to provide access to public bathroom facilities on the boardwalk for all individuals, including those persons with limited

mobility.

Although this proposed use and location are not within the development exceptions allowed within the setback area by 15A N.C. Admin. Code 07H .0309, the proposed development is consistent with the Commission's general policy of allowing only small-scale development within the setback area. The proposed bathhouse is in the same location as the existing bathhouse and results in a de minimis encroachment, approximately 130 square feet of area, waterward of the pre-project vegetation line. However, it results in significantly increased access for visitors with disabilities specifically and for the public generally, which meets the legislative goals of CAMA.

The second assessment made by the Commission is whether granting the proposed variance would impact public safety and welfare. Petitioner and DCM submit, and the Commission agrees, that the proposed development will secure and improve public safety and welfare. The proposed two-story bathroom facility will replace the inadequate, non-ADA compliant, existing facility. The Town routinely allows organizations supporting those with disabilities to hold special events and camps in this location. The proposed two-story bathroom facility is conveniently located next to and connected to the boardwalk providing persons with mobility disabilities direct access to the bathroom. The proposed development is also adjacent to an access ramp, and in close proximity to the location where the Town installs the beach mats. The expansion will increase access to the public beach and boardwalk for all visitors with mobility disabilities and improve restroom access for the public at large through more stalls, including ADA compliant stalls.

Finally, the Commission agrees that granting a variance to allow construction of the two-story bathroom facility will preserve substantial justice by affording the general public convenient access to public bathroom facilities in proximity to highly accessible public infrastructure. It will

further preserve substantial justice by providing persons with mobility disabilities improved access to bathroom facilities. The Commission agrees with DCM that the Town's commitment to improving access for visitors with disabilities is exemplary, and in keeping with the goals of the CAMA and the Commission's rules.

\* \* \* \* \*

For these reasons, the Commission affirmatively finds that Petitioner has met the fourth factor required by N.C. Gen. Stat. § 113A-120.1(a).

**ORDER**

THEREFORE, the Commission hereby GRANTS the Town's request for a variance from 15A N.C. Admin. Code 07J .0701(a). The Commission FURTHER GRANTS the Town's request for a variance from 15A N.C. Admin. Code 07H.0306(a)(9)(c) and 07H .0309(a) to construct a replacement bathhouse as described in the Town's Application for a CAMA permit.

The granting of this variance does not relieve Petitioner of the responsibility for obtaining any other required permits from the proper permitting authority. This variance is based upon the Stipulated Facts set forth above. The Commission reserves the right to reconsider the granting of this variance and to take any appropriate action should it be shown that any of the above Stipulated Facts was not correct or accurate when submitted to the Commission.

This the 27<sup>h</sup> day of February 2023.



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M. Renee Cahoon Chair  
Coastal Resources Commission

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served the foregoing FINAL AGENCY DECISION upon the parties by the methods indicated below:

	<b><u>Method of Service</u></b>
<b><u>Attorney for Petitioner:</u></b> C. Noel Fox, Esq. Craig & Fox 701 Market Street Wilmington, NC 28401	Electronically: cnfox@craigeandfox.com
<b><u>Attorney for NC DCM</u></b> Christine A. Goebel Assistant General Counsel NC Department of Environmental Quality 217 West Jones Street Raleigh, NC 27603	Electronically: Christine.goebel@ncdenr.gov
Braxton C. Davis, Director DCM Michael Lopazanski, Deputy Director DCM Robb Mairs, DCM Minor Permit Coordinator Angela Willis, Administrative Assistant Division of Coastal Management 400 Commerce Ave. Morehead City, NC 28557	Electronically: Braxton.Davis@ncdenr.gov Mike.Lopazanski@ncdenr.gov Robb.Mairs@ncdenr.gov Angela.Willis@ncdenr.gov

This the 27<sup>th</sup> day of February 2023.

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Mary L. Lucasse  
Special Deputy Attorney General and Commission Counsel  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, N. C. 27602

**From:** [Lucasse, Mary](#)  
**Sent:** Tuesday, February 28, 2023 8:05 AM  
**To:** [longz@uncw.edu](mailto:longz@uncw.edu); [maria.dunn@ncwildlife.org](mailto:maria.dunn@ncwildlife.org);  
[kathryn\\_matthews@fws.gov](mailto:kathryn_matthews@fws.gov)  
**Cc:** [Renee Cahoon](#); [Goebel, Christine A](#); '[briane@cmclawfirm.com](mailto:briane@cmclawfirm.com)';  
[daisy@oibgov.com](mailto:daisy@oibgov.com); [justin@oibgov.com](mailto:justin@oibgov.com); [Davis, Braxton C](#); [Mairs, Robb L](#)  
**Subject:** Coastal Resources Commission's grant of Ocean Isle Beach's variance request  
**Attachments:** 2023-03-28 FAD granting VR23-01 with conditions (signed plus zl).pdf

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Professor Long, Ms. Dunn, and Ms. Matthews:

At the North Carolina Coastal Resources meeting last week, the Commission granted (subject to conditions) the Town of Ocean Isle Beach's request for a variance to use hay and pine straw bales as sand fencing at the street ends on the eastern end of the Town's shoreline. One of the conditions imposed by the Commission was that the Town consults with you before DCM issues the permit. The Commission wanted the Town to benefit from any suggestions you might have regarding the design and installation of the sand fencing and monitoring the development following the installation. The goal of the Commission is to minimize any adverse environmental impacts on sea turtles and other endangered species while supporting the Town's efforts to build protective dunes in this area. I have attached a copy of the final agency decision for your information.

I wanted to give you a heads-up that the Town will be reaching out to have these conversations. Thank you all in advance for your time. If you have any questions about the Commission's decision, please feel free to reach out to me by email or cell phone. ~ Mary Lucasse



Mary L. Lucasse (she/her)  
Special Deputy Attorney General & Counsel to the Commission  
NCDOJ - Environmental Division  
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*Please note messages to or from this address may be public records.*



JOSH STEIN  
ATTORNEY GENERAL

STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

REPLY TO:  
MARY L. LUCASSE  
ENVIRONMENTAL DIVISION  
(919)716-6962  
MLUCASSE@NCDOJ.GOV

February 28, 2023

**U.S. Mail and Electronically: [briane@cmclawfirm.com](mailto:briane@cmclawfirm.com)**

Brian E. Edes, Esq.  
Crossley McIntosh Collier Hanley & Edes, PLLC  
5002 Randall Parkway  
Wilmington, North Carolina 28403

**Re: Variance Request for Town of Ocean Isle Beach  
CRC-VR-23-01**

Dear Brian:

At its February 23, 2023 meeting, the North Carolina Coastal Resources Commission granted Petitioner Town of Ocean Isle Beach's request for a variance with conditions from 15A N.C. Admin. Code 07H.0311(c) authorizing the use of hay and pine straw bales in place of sand fencing. Thank you for agreeing to accept service on behalf of your client the Town of Ocean Isle Beach. Attached is a copy of the final agency decision signed by the Chair of the Coastal Resources Commission. Before undertaking the development for which a variance was sought, Petitioner must first obtain a CAMA permit from the Division of Coastal Management and any other required permits. In addition, before a CAMA permit can be issued, the variance condition requiring that the Town consult with staff at the North Carolina Wildlife Resources Commission and the US Fish and Wildlife Services regarding the proposed development must be met.

If for some reason the Petitioner does not agree to the variance as issued, the Town has the right to appeal the Coastal Resources Commission's decision by filing a petition for judicial review in the superior court as provided in N.C.G.S. § 150B-45 within thirty days after receiving the final agency decision. A copy of the judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

William F. Lane, General Counsel  
Dept. of Environmental Quality  
1601 Mail Service Center  
Raleigh, NC 27699-1601

If Petitioner files a petition for judicial review, I request that you send me a courtesy copy of the petition for judicial review at the email address listed in the letterhead.

**Brian E. Edes, Esq.**

**February 28, 2023**

**Page 2**

If you have any questions, please feel free to contact me.

Sincerely,



Mary L. Lucasse  
Special Deputy Attorney General and  
Counsel for the Coastal Resources Commission

cc: M. Renee Cahoon, Chair electronically  
Christine A. Goebel, Esq. electronically  
Braxton C. Davis, electronically  
Mike Lopazanski, electronically  
Robb Mairs, electronically  
Angela Willis, electronically  
Daisy Ivey, electronically  
Justin Whiteside, electronically

STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES
COUNTY OF BRUNSWICK	)	COMMISSION
	)	<b>CRC-VR-23-01</b>
	)	
	)	
IN THE MATTER OF:	)	
PETITION FOR VARIANCE	)	<b>FINAL AGENCY DECISION</b>
BY <b>THE TOWN OF OCEAN ISLE</b>	)	

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On January 11, 2023, Petitioner the Town of Ocean Isle submitted a request for a variance from the North Carolina Coastal Resources Commission’s (“Commission”) rule set forth at 15A N.C. Admin. Code 07H.0311(c) to use hay and straw bales in place of sand fencing. This matter was heard pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A N.C. Admin. Code 07J .0700, *et seq.*, at the regularly scheduled meeting of the Commission held on February 23, 2023 in the Town of Ocean Isle, North Carolina. Assistant General Counsel Christine A. Goebel, Esq. appeared for Respondent Department of Environmental Quality, Division of Coastal Management (“DCM”). Brian Edes, Esq. appeared on behalf of Petitioner the Town of Ocean Isle.

When reviewing a petition for a variance, the Commission acts in a quasi-judicial capacity. *Riggings Homeowners, Inc. v. Coastal Resources Com’n*, 228 N.C. App. 630, 652, 747 S.E.2d 301, 314 (2013) (Commission has “judicial authority to rule on variance requests . . . ‘reasonably necessary’ to accomplish the Commission’s statutory purpose.”); *see also Application of Rea Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (discussing the Board of Adjustment’s quasi-judicial role in allowing variances for permits not otherwise allowed by ordinance). In its role as judge, the Commission “balance[es] competing policy concerns under CAMA’s statutory framework.” *Riggings*, 228 N.C. App. at 649 n.6, 747 S.E.2d at 312.

Petitioner and Respondent DCM are the parties appearing before the Commission. The parties stipulated to facts and presented stipulated documents to the Commission for its



consideration. *See*, N.C. Admin. Code 15A 07J .0702(a). If the parties had been unable to reach agreement on the facts considered necessary to address the variance request, the matter would have been forwarded to the North Carolina Office of Administrative Hearings (“OAH”) for a full evidentiary hearing to determine the relevant facts before coming to the Commission. *Id.* 07J .0702(d). As in any court, the parties before the decision-maker are responsible for developing and presenting evidence on which a decision is made. If DCM and Petitioner had entered into other stipulated facts, it is possible that the Commission would have reached a different decision. In this case, the record on which the Commission’s final agency decision was made includes the parties’ stipulations of facts, the stipulated documents provided to the Commission, and the arguments of the parties.

**FACTS STIPULATED TO BY PETITIONER AND DCM**

1. Petitioner Town of Ocean Isle Beach (“Town”) is a North Carolina municipal corporation and body politic organized and existing in Brunswick County, North Carolina. The Town is represented by Brian E. Edes of the law firm of Crossley McIntosh Collier Hanley & Edes, PLLC located in Wilmington, North Carolina.

2. The Town owns the street-ends which run generally perpendicular to the ocean and dead-end at the beach. These streets were publicly dedicated to and accepted by the Town, as shown on the recorded plats and Powell Bill roll provided to the Commission as stipulated exhibits. These road-ends are used for beach access. In this variance, the six street-end sites at issue are (moving east to west at the eastern end of the island) the east end of E. 3rd Street, Columbia Street, Shallotte Boulevard, Charlotte Street, Durham Street and Lumberton Street. The Town proposed placing the bales to comply with the Commission’s requirements for a normal wooden slat and

wire sand fencing. With the exception of the area along E. Third St., public access is provided at each street end. The minimum opening for public access at these sites would be eight feet. The street end placement areas for each street measure as follows:

Lumberton St – 50 feet

Durham St – 50 feet

Charlotte St – 50 feet

Shallotte Blvd – 100 feet

Columbia St – 50 feet

Area along sandbags adjacent to E. Third St – 212 feet

The total linear footage of the placement area at the street ends equals 472 feet (512 feet minus 40 feet for public access).

3. These six sites are at the east end of the Town and the approximate distance from the western-most Durham Street site to the eastern-most east end of E. 3rd Street site is about a half-mile.

4. The Town's six sites at issue in this variance are located within the Ocean Hazard Area of Environmental Concern ("AEC"). While the current (old) Inlet Hazard Area ends at the appropriate location of the groin, the pending (new) Inlet Hazard Area extends west past the western-most site at Lumberton Street and encompasses all six sites. A copy of the old and new Inlet Hazard AEC boundaries in the area of the Site were provided to the Commission as a stipulated exhibit. The Commission's average annual erosion rates used for determining erosion setbacks for the sites (moving west to east) are 2 feet per year for Lumberton Street, 4 feet per year for Durham and Charlotte Streets, and 5 feet per year for Shallotte Boulevard, E. 3rd Street, and

Columbia Street. An image showing these erosion rates was provided to the Commission as a stipulated exhibit.

5. For several decades, the Town has contended with chronic erosion along the easternmost portion of the Town's oceanfront shoreline. Over the years, the Town has implemented various measures to address this erosion in attempts to stem the economic losses resulting from damages to structures due to hurricane and storm activity, as well as the loss of beachfront land due to the ongoing shoreline erosion along the east end of the island in proximity to Shallotte Inlet.

6. In 2001, the United States Army Corps of Engineers' (USACE) first nourished the Ocean Isle beach through the Town's Coastal Storm Risk Reduction (CSRSM) project. However, due to the chronic erosion along the east end, the USACE's pre-project cost/benefit analysis determined that placing material east of Shallotte Blvd. should not be included in the project. Accordingly, no material was placed east of Shallotte Blvd. as part of the CRSM project leaving that area vulnerable.

7. In response, the Town and many private property owners installed sandbag revetments along approximately 1,400 feet of shoreline, beginning at a point just west of Shallotte Boulevard and extending east to 469 East 3rd Street. Most of the sandbags were initially installed round 2005 and have been periodically repaired and replaced as some of the bag revetments have failed under the continued landward retreat of the shoreline.

8. Due to continued erosion, the sandbag revetment was extended 400 feet to the west just past Charlotte Street in 2012.

9. Under CAMA, these sandbag revetments are not authorized to provide permanent

shoreline protection solution for the impacted area. N.C. Gen. Stat. § 113A-115.1 and 15A N.C. Admin. Code 07H .0308(a). Working with Coastal Protection Engineering of North Carolina, Inc., (“CPE”) as their coastal engineer, the Town sought a permanent solution for the impacted area and received permits to construct a terminal groin in 2016. A copy of CAMA Major Permit No. 107-16 was provided to the Commission as a stipulated exhibit.

10. Following a delay due to NEPA-related federal litigation in which the Town ultimately prevailed, the Town’s terminal groin project was completed in April of 2022. The groin project included a 1,050 ft long terminal groin structure located approximately one block east of Columbia Street, just east of the easternmost building along the Town’s oceanfront shoreline. The project also included approximately 270,000 cubic yards of beach fill sand to form an “accretion fillet” placed immediately to the west of the groin structure. According to CPE Project Manager and Senior Biologist Brad Rosov, this project is designed to provide long-term protection to the easternmost 3,000 ft of the Town’s oceanfront shoreline. A copy of Mr. Rosov’s December 2, 2022 Statement (“Rosov Statement”) regarding the variance request and a copy of his CV was provided to the Commission as stipulated exhibits.

11. Following the construction of the terminal groin and associated beach fill project, the Town covered many of the sandbags within the project area with stockpiled sand to create “starter dunes” to provide additional protection. The Town also planted dune vegetation atop these “starter dunes” to help increase their stability as the roots grow and trap aeolian- transported sand thereby functioning to build the dune in size over time. The Town’s consultant Mr. Rosov contends that to date these starter dunes do not provide adequate protection from storm events.

12. Commission rules allow sandbags to remain on a site if they are covered by sand.

15A N.C. Admin. Code 07H .0308(a)(2)(J). Any portion of the temporary erosion control structure that becomes exposed above grade after the expiration of the permitted time must be removed by the property owner within 30 days of receiving official notification from DCM.

13. From a coastal engineering perspective, Mr. Rosov recommends using sand fencing to facilitate dune growth along the landward portion of the beach. In Mr. Rosov's opinion, a robust dune along the east end of Ocean Isle Beach could help prevent storm-induced flooding. *See* Rosov Statement.

14. Although this area has the newly installed terminal groin, the groin's fillet, and the existing sandbags covered with sand and vegetated as described in other stipulated facts, the condition of the east end of the Town's shoreline remains vulnerable to storm event over wash given the lack of a dune system in that area.

15. On November 10, 2021, the Commission met in Atlantic Beach, North Carolina. According to the meeting minutes, a copy of which was provided to the Commission as a stipulated exhibit, during the Executive Secretary's Report portion of the meeting, DCM Director Braxton Davis reported that "last weekend a coastal low-pressure system combined with king tides caused impacts due to flooding and ocean over wash in numerous areas." Director Davis went on to report that "[w]e are aware that some sandbags were over-washed in Ocean Isle."

16. Later in that meeting, during the Coastal Resources Advisory Council's ("Advisory Council") Report to the Commission, the meeting minutes reflect that Greg "Rudi" Rudolph, Chair of the Advisory Council reported on a discussion regarding "the possibility of using hay bales in lieu of sand fencing. Figure Eight Island property owners have been trying this approach and reports that it is working well." Commission Chair Renee Cahoon directed staff to "look at rule

amendments that would allow the use of hay bales.”

17. In May 2015, hay bales were initially placed without CAMA permit authorization on two lots on Figure Eight Island covering approximately 200 linear feet of shoreline. DCM staff along with staff from the North Carolina Wildlife Resources Commission (“WRC”) met with members of the Figure Eight Island Homeowners Association (“HOA”) on site to observe the unauthorized hay bales. In an effort to bring the unpermitted development into compliance, the HOA agreed to remove the unauthorized hay bales. The HOA submitted a CAMA Minor Permit application on August 12, 2015 for replacement of the hay bales. Prior to the issuance of that permit, DCM sought agency comments from both WRC and U.S. Fish and Wildlife Service (“USFWS”). USFWS responded that they “don’t have much more concerns for these structures than for sand fencing.” WRC responded in part, that the use of hay bales as sand fencing “could have merit.” WRC also stated that “[i]t appears from an earlier endeavor that the bales will do reasonably well catching the sand” and that “it would be nice to only allow the bale installation on an experimental basis.” WRC suggested that if allowed, the hay bales should be monitored by way of “picture documentation on a monthly/seasonal/storm event basis (nothing intensive) and stated a concern regarding bale decomposition.” On August 31, 2015, DCM staff issued CAMA Minor Development Permit 15-48 authorizing the use of hay bales as sand fencing on Figure Eight Island. A copy of this permit was provided to the Commission as a stipulated exhibit, along with the CAMA minor permit application and emails from WRC and USFWS providing comments on the proposed use of hay bales on Figure Eight Island.

18. The hay bales installed on Figure Eight Island were in place for no more than a few months before storm activity washed them away.

19. In response to Chair Cahoon's direction, on January 28, 2022, DCM Assistant Major Permit Coordinator Curt Weychert drafted a memorandum to the Commission regarding the possible use of hay bales as an alternative to sand fencing in the 7K sand fencing exemption rule ("Memo"). The subject line of the Memo is "Amendments to 15A NCAC 7K .0212 – Installation and Maintenance of Sand Fencing." A copy of the Memo was provided to the Commission as a Stipulated Exhibit. The Memo states that early site visits and photographs of the use of hay bales at the Figure Eight Island site indicated that the hay bales captured and held sand within the first month of placement on the site.

20. In the Memo, Mr. Weychert outlined the criteria for sand fencing and described the process authorizing the use of hay bales at Figure Eight Island, including permit conditions proposed by WRC limiting the height to one bale and removal of bindings on the bales.

21. The Memo concludes with the following recommendation: "To date, no CAMA permit applications for the use of hay bales as sand fencing have been denied. At this time, DCM Staff recommends maintaining the current minor permitting process for hay bales until more information can be gathered from multiple sites across the state and further analyzed by resource agencies."

22. On February 10, 2022, the Commission met in Beaufort, North Carolina. During that meeting, Mr. Weychert conveyed the contents of the Memo including DCM Staff's recommendation to the Commission. The minutes of that meeting, a copy of which was provided to the Commission as a stipulated exhibit, do not reflect any opposition to said recommendation.

23. Town Mayor Debbie Smith and Assistant Town Administrator Justin Whiteside attended the November 21, 2021, Commission meeting. Assistant Town Administrator Justin

Whiteside attended the February 10, 2022, Commission meeting. After attending these meetings and observing the discussion concerning the use of hay bales as a potential alternative to traditional sand fencing, the Town decided to pursue the installation of hay bales along various sections of the east end of the island. The Town's submission of the permit application for the hay bales coincided with the completion of the terminal groin construction project in April 2022. A letter describing this timeline drafted by Assistant Town Administrator Justin Whiteside was provided to the Commission as a stipulated exhibit.

24. The Town submitted a CAMA minor permit application dated April 6, 2022 to DCM proposing to use hay bales instead of sand fencing at the six street ends noted in the facts above.

25. DCM received the Town's permit application on April 14, 2022. Although the Town's original application only requested authorization to use hay bales, DCM staff requested that the Town use both hay bales and pine straw bales so DCM could compare the effectiveness of each. On May 10, 2022,<sup>1</sup> DCM wrote to the Town asking for additional information regarding the proposed project.

26. As part of the CAMA Minor Permit process, the Town sent notice of the application to the adjacent riparian owners of the six sites. Copies of the notice letters, the certified mail receipts and the tracking information were provided to the Commission as stipulated exhibits. No objections to the proposed development from neighbors or the general public were received.

27. On May 6, 2022 DCM Field Representative Brendan Brock emailed Maria Dunn,

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<sup>1</sup> The project application was incomplete until the Town provided additional information. As long as the application was incomplete, the twenty-five day period to issue a permit decision under the timeframe set forth in N.C. Gen. Stat. § 113A-121(c) was tolled.



WRC Coastal Coordinator, a copy of the Town's permit application and site plan showing where the Town planned to place hay and pine straw bales.

28. On June 14, 2022, the WRC expressed concerns about the Town's proposed use of bales for sand fencing as "they have undetermined impacts that should be vetted prior to allowance." In addition, WRC stated:

The direct, secondary, and cumulative impacts bales may have on these resources coast wide is unknown and should be discussed in more detail prior to the inclusion of bales as a management tool by the NCDCM. No information has been found regarding bale use on ocean shorelines in other states, so previously studied examples cannot be compared. Therefore, we request additional conversation occur between the NCDCM, NCWRC, and [USFWS] to discuss impacts bales may have in the immediate area of installation, the cumulative impact they may have on repeat installations in the same area, the cumulative impact they may have on habitats with coast wide use, and the regulation of use if determined to be an appropriate tool. These discussions should occur prior to the issuance of any permits or allowances of bales on ocean shorelines.

29. On June 16, 2022, the USFWS emailed DCM stating that USFWS generally agreed with NCWRC's comments.

30. On June 16 2022, DCM denied the Town's application for a CAMA Minor Permit to install hay bales and pine straw bales at the six road-end sites on the east end. DCM informed the Town that their CAMA Minor Permit application was denied as it was deemed inconsistent with 15A N.C. Admin. Code 07H.0311(c) which states:

Sand fencing shall not be installed in a manner that impedes, traps or otherwise endangers sea turtles, sea turtle nests or sea turtle hatchlings. CAMA permit applications for sand fencing shall be subject to review by the Wildlife Resources Commission and the U.S. Fish and Wildlife Service in order to determine whether or not the proposed design or installation will have an adverse impact on sea turtles or other threatened or endangered species.

31. Upon receipt of the CAMA permit denial letter, the Town shared WRC's and USFWS's stated concerns with CPE Senior Biologist Rosov who responded and provided his opinion on the pros and cons of using hay bales in place of sand fencing, concluding that the benefits outweigh the potential for negative impacts. *See* Rosov Statement.

32. At its September 22, 2022 meeting, the Commission discussed a proposed rule about a minimum vegetation growing period for planted vegetation. DCM Minor Permit Coordinator Mr. Mairs described speaking with Steve Mercer at Coastal Transplants about this issue. A copy of those minutes was provided to the Commission as a stipulated exhibit.

33. On September 30, 2022, the east end of Ocean Isle experienced overwash due to the effects of Hurricane Ian. These effects are depicted in photos provided to the Commission as stipulated exhibits along with a statement from the photographer.

34. The Town asserts that the desire to use straw bales in place of traditional sand fencing is a result of the unavailability of traditional sand fencing due to supply chain delays and material shortages coupled with labor shortages. The Town further asserts that these shortages have been observed by CPE. Specifically, the Town reports that CPE contacted Mr. Peter McClintock, owner of Emerald Forest Landscaping, to inquire about the future availability of sand fencing material. CPE was informed that of the two main wholesale suppliers, one is currently providing materials exclusively to Emerald Forest Landscaping who is currently backordered with other customers and the other supplier, a smaller company, is also faced with a backlog and not accepting new orders at this time.

35. As recently as January 10, 2023, the Town's customary sand fence vendor, Green Resource, informed the Town that sand fence "[m]anufacturers are experiencing more than normal

backlogs due to raw material cost and labor shortages as well. We are outsourcing this product from other sources but currently do not have a lead time on availability and delivery.” A January 10, 2023 letter from Green Resource was provided to the Commission as a stipulated exhibit.

36. After receiving the Town’s variance petition, DCM reached out to some contractors and towns to ask what their recent experience with obtaining sand fencing. DCM Minor Permit Coordinator Robb Mairs contacted the Town of Wrightsville Beach and learned that its last purchase of sand fence was in May of 2022 and that in addition to the “slightly longer wait” there was a “drastic price increase.” Green Resource in Supply, NC has been the Town of Wrightsville Beach’s supplier for many years. DCM Elizabeth City District Manager Ron Renaldi reached out to a beach-push contractor who said that after a few weeks of no supply, Kempsville Building Materials recently got a truckload which sold out quickly and appears to have been used in the Corolla area.

37. On January 3, 2023 DCM LPO Minor Permits Coordinator Robb Mairs disseminated an email to LPOs providing guidance to Towns and property owners with respect to the use of Christmas Trees in dune restoration and/or beach sand fencing, and when the 7K exemption was appropriate and when a CAMA Minor Permit was needed A copy of this email and the attached guidance document was provided to the Commission as a stipulated exhibit.

38. For purposes of this variance application, Petitioner stipulates that the proposed development is inconsistent with the Commission’s rules from which it seeks a variance, including 15A N.C. Admin. Code 07H. .0311(c).

39. After receiving the Town’s Variance Petition, DCM sent a copy of the petition to WRC and USFWS and asked them to provide any comments on the petition to DCM. Through a

January 27, 2023 letter, a copy of which was provided to the Commission as a stipulated exhibit, USFWS stated its continuing concerns about the use of straw/hay bales as sand fencing, specifically as it related to sea turtles. USFWS also stated concerns that a study project could incorrectly give oceanfront owners the impression the use of straw/hay bales was approved state-wide. Through a January 31, 2023 letter, a copy of which was provided to the Commission as a stipulated exhibit, WRC stated its continuing concerns about the use of straw/hay bales, most specifically regarding impacts to sea turtles. WRC also indicated that while there could be an opportunity for a study, it “should involve significant consultation between NCWRC, NCDCM, and USFWS staff.” DCM subsequently forwarded the WRC and USFWS comments to the Town on January 30 and 31, 2023 respectively.

40. On January 30, 2021, along with new comments from WRC and USFWS, DCM provided the Town with contact information for UNCW Professor Dr. Zachary Long and Steve Mercer of Coastal Transplants as these individuals had expressed interest to DCM in working with the Town on a potential monitoring program.

41. Justin Whiteside, the Town’s Assistant Manager contacted Mr. Mercer (but did not contact Dr. Long). On February 8, 2023 Mr. Mercer corresponded with Assistant Town Administrator Justin Whiteside and stated:

I would like to respond in writing to your questions about sand fence and supply chain issues over the [past several years]. My order wait time in 2019 was a average of 2-3 weeks for . . . sand fence. Since 2019 we have seen that wait time extend to 9-11 months due to the delays in receiving materials and the lack of labor due to Covid concerns and Covid workplace protocols. A phone call placed today reviled a 4 month wait for fence even in the off season. Also, as can be expected, the cost of a delivered roll of sand fence in 2018 was \$35.00 and the last shipment I received from the same manufacture in April of 2022 was \$62.37. That included an incentive to “RUSH”

my order that I had been waiting on for 9 months. The fence I bought off the open market in October/November was \$81.00 a roll delivered from a broker out of Washington State.

I have always tried to keep several truckloads at my shop so I would never be without, but even my supplies dwindled to nothing in late 2021-2022. In order to complete contracts, I was having to buy fence from hardware stores, brokers, and distributors all across the US.

Our discussion also led to the use of hay bales. I am in favor with caveat of no grass bales. Commonly available wheat or oat straw with twine or clean pine straw with twine would be fine. Pine straw bales should not contain broom grass or broom sage so I would advise a harvested straw. I thought the town [Ocean Isle Beach] had been asked to try both and I was looking forward to seeing the results for sand trapping and the pros and cons of each.

42. To minimize impacts to wildlife, the Town proposes to remove any ties or ropes from the bales during installation. The Town proposes to monitor the status of the bale sand fencing post installation. This monitoring will consist of picture documentation on a monthly, seasonal, and post storm basis. The Town will likewise provide a statement regarding the status of bale decomposition. The aim of this monitoring will be to document bale effectiveness, material durability (intactness and decomposition), and the bale fencing's effect on the surrounding habitat. If requested, the Town agrees to erect signage at the project site that informs the public that the bale fencing project is a pilot study. The Town proposed this monitoring after receiving the most recent late-January concerns from WRC and USFWS.

#### **EXHIBITS PROVIDED TO THE COMMISSION BY PETITIONER AND DCM**

1. Town Plats of dedicated streets at the six sites and Powell Bill roll showing subject streets
2. Image from DCM Map Viewer showing current and pending Inlet Hazard AEC
3. Image from DCM Map Viewer showing erosion rates at the sites
4. CAMA Major Permit No. 107-16 for Town's terminal groin

5. CV and December 2, 2022 Statement from Coastal Protection Engineers of North Carolina, Senior Biologist Brad Rosov
6. November 2021 CRC Meeting Minutes
7. Figure Eight Island's 2015 CAMA Minor Permit 15-48 with application and emails from WRC/USFWS
8. January 28, 2022 Memo from DCM to Commission re Use of Hay Bales
9. February 2022 CRC Meeting Minutes
10. January 10, 2023 letter from Justin Whiteside
11. CAMA Minor Permit application and related materials dated May 6, 2022
12. May 10, 2022 letter to Town requesting additional information
13. Notice of permit application to adjacent riparian owners with receipts and tracking
14. May 6, 2022 email from DCM to WRC with permit application
15. June 14, 2022 response from WRC to application
16. June 16, 2022 responses from USFWS to application
17. June 6, 2022 letter to Town from DCM denying permit request
18. September 2022 CRC Minutes
19. Photos of Hurricane Ian overwash and Mr. Hill's signed statement
20. January 3, 2023 Email from DCM to LPOs re: Christmas Trees
21. January 27, 2023 Response from WRC re variance petition
22. January 27, 2023 Response from USFWS re variance petition
23. PowerPoint of aerial/ground level photos of the sites and surrounding area

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. As set forth in detail below, Petitioner has met the requirements in N.C. Gen. Stat.

§ 113A-120.1(a) and 15 N.C. Admin. Code 07J .0703(f) which must be found before a variance can be granted.

**a. Strict application of the rule will cause unnecessary hardships.**

The Commission affirmatively finds that strict application of the Commission's rule at 15A N.C. Admin. Code 07H .0311(c) would cause unnecessary hardships. The purpose of this rule is to prevent development from impeding, trapping, or otherwise endangering sea turtles, sea turtle nests or sea turtle hatchlings. In order to determine whether the proposed development will have adverse impacts, the rule requires that DCM forward the application to staff at the Wildlife Resources Commission and the U.S. Fish and Wildlife Service for their comments on whether the proposed design or installation will have an adverse impact on sea turtles or other threatened or endangered species.

In April of 2022, the Town completed the construction of a properly permitted terminal groin at the east end of the Town. The groin was installed to combat the severe erosion the Town has been experiencing in that area for decades. Since that time the Town has attempted to create a dune system adjacent to the groin by covering the previously placed permitted sandbags with sand and planting dune vegetation atop these "starter dunes." To date these efforts have not created a dune system sufficient to provide protection. *See* Stipulated Fact 11 and Rosov Statement.

As recently as September 30, 2022 the Town experienced extreme storm overwash in this area. Based on information provided by Petitioner, traditional sand fencing materials are not readily available due to supply chain delays as well as material and labor shortages. *See* Stipulated Facts 34 an 41. If the Town is not granted a variance to use hay or pine straw bales in place of traditional sand fencing, the Town will most likely have to wait a significant amount of time to install a sand fence which will leave the area unprotected and vulnerable. The tax base in the area adjacent to the groin is valued at in excess of \$16,500,000. This is exclusive of the public

infrastructure servicing these properties such as public water and sewer infrastructure, public roadways (including some State-owned roadways), electrical, telephone, cable, and internet infrastructure.

The Commission has been considering whether straw and hay bales could be used as sand fencing. *See* Stipulated Facts 19 and 20. The Commission is aware that hay bales were installed on Figure Eight Island. Before these hay bales were washed away, monitoring indicated they captured and held “sand within the first month of placement on the site.” *See* Stipulated Facts 17-19. DCM Staff has recommended to the Commission that it should gather more information on this issue. *See* Stipulated Facts 21 and 22. In response to the permit application, DCM asked the Town to consider using both straw bales and hay bales so that any impacts as a result of the difference in material could be assessed. *See* Stipulated Fact 25.

Comments from the NC Wildlife Resources Commission and the US Fish and Wildlife Service indicated that the environmental impacts from the use of straw/hay bales in place of the traditional sand fencing is undetermined. *See* Stipulated Fact 28 and e-mails from WRC and USFWS dated June 14, 2022 and June 16, 2022 responding to the Permit application and emails from WRC and USFWS dated January 27, 2023 responding to the variance. The concerns raised by both agencies include the potential obstruction of nesting habitat, potential for introduction of invasive species, and decomposition of the bales which could result in temperature impacts on sea turtle nests. The resource agencies also raised concerns about the possible cumulative impacts of the use of bales coast-wide in the state. WRC acknowledged there may be “an opportunity to consider a related research project on bales as a potential alternative to sand fencing.” Concerns were raised as to whether a study is appropriate for this proposal and whether it could be designed



before the variance hearing. *See* Stipulated Facts 28-29, 39.

The Commission, and others, are interested in developing data to assess potential impacts from the use of straw/hay bales in lieu of traditional sand fencing. *See* Stipulate Facts 21, 22, 28, 29, 39, 40-41.

The Town has agreed to minimize impacts to wildlife by removing any ties or ropes from the bales during installation. The Town also agreed to monitor the status of use of straw/hay bales in place of traditional sand fencing following installation. This monitoring will consist of picture documentation on a monthly, seasonal, and post storm basis. The Town will likewise provide a statement regarding the status of bale decomposition. The aim of this monitoring will be to document bale effectiveness, material durability (intactness and decomposition), and the bale fencing's effect on the surrounding habitat. The Town agreed to erect signage at the project site that informs the public that the bale fencing project is a pilot study.

As shown by the stipulated facts, strict application of the rule would cause Petitioner hardship by leaving a vulnerable area unprotected. This hardship is unnecessary insofar as by conditioning the variance to require monitoring of the project post installation and requiring removal if the monitoring reflects adverse impacts, any adverse impacts from the proposed development can be mitigated. For these reasons, the Commission affirmatively finds that Petitioner has met the first factor without which a variance cannot be granted.

**b. The hardship results from conditions peculiar to Petitioner's property.**

The Commission affirmatively finds that Petitioner has demonstrated that the hardship results from conditions peculiar to the property. Specifically, the Town has experienced significant erosion on the east end shoreline. The Town sought and obtained permits to construct a terminal

groin as a permanent solution to the erosion. The groin has been constructed. However, despite the positive effects of the groin, the adjacent area remains unprotected. Sandbags and vegetation have been installed in this area. However according to Mr. Rosov, the area is still vulnerable to erosion. It is also important to note that when originally constructed, the above-described tax base and infrastructure was not “front or second row” from the oceanfront and the present threat is due to erosion, not to any act attributable to the Town.

Accordingly, the Commission affirmatively finds that Petitioner has demonstrated that this hardship results from conditions peculiar to the property and has met the second factor required for the grant of its request for a variance.

**c. Petitioner has demonstrated that the hardship does not result from actions taken by Petitioner.**

The Commission affirmatively holds that Petitioner has demonstrated that the hardship does not result from its actions. Specifically, Petitioner has done nothing to accelerate or otherwise aggravate the erosion problem at the east end of Town. Moreover, the Town constructed the groin to combat this erosion problem. The Town is not responsible for the supply chain delays affecting the availability of traditional sand fencing. In its Recommendation, DCM agreed that the Town did not cause the erosion at the Site nor is it responsible for supply chain delays.

For these reasons, the Commission affirmatively finds that Petitioner has demonstrated that it has met the third factor required for a variance.

**d. Petitioner has demonstrated that the requested variance is consistent with the spirit, purpose and intent of the Commission’s rules, will secure public safety and welfare, and will preserve substantial justice.**

The Petitioner has demonstrated (a) that the requested variance is consistent with the spirit, purpose and intent of the Commission’s rules, (b) that it will secure public safety and welfare, and

(c) that it will preserve substantial justice. The principal purpose of the Commission's rule from which a variance is sought is to protect sea turtles and endangered species. 15A N.C. Admin. Code 07H .0311(c). This purpose can be met by conditioning the variance on Petitioner consulting with WRC and USFWS to implement a design and installation of hay and pine straw bales as sand fencing that will not have adverse impacts on sea turtles. In addition, the Commission has granted the request subject to the condition that the Town monitor the installation in order to manage or mitigate environmental impacts from the proposed development.

In its Recommendation, DCM agrees that the Commission has expressed interest in reviewing the use of alternative sand fencing materials and using the CAMA Minor Permit process "until more information can be gathered from multiple sites across the state and further analyzed by resource agencies." Granting the variance subject to conditions will provide additional information which will be useful to the Commission as it considers whether to change the rules to specifically allow alternative sand fence materials. Thus, the Commission affirmatively holds that Petitioner's proposed development is consistent with the spirit, purpose, and intent of the Commission's rule as long as the conditions of this decision are met.

The second assessment is whether the variance proposed by the Petitioner will impact public safety and welfare. Petitioner submits, and the Commission agrees that the variance sought by the Town will secure public safety and welfare by protecting over \$16,500,00 of the Town's tax base and a significant amount of public infrastructure. It will likewise protect and enhance the public beach adjacent to the proposed project.

Finally, the Commission agrees that granting the Town's requested variance will preserve substantial justice in that the Town has expended a significant amount of money to construct the

authorized and properly permitted groin and is seeking to protect the adjacent area by installing sand fencing as soon as possible. The commenting agencies have expressed concerns over the possibility of adverse impacts to sea turtles but have not concluded these impacts will necessarily follow installation of a sand fence constructed with hay and pine straw bales. The Commission believes it may be helpful to undertake a pilot project to examine how bales perform longer term after consultation with the WRC and USFWS.

\* \* \* \* \*

For these reasons, the Commission affirmatively finds that Petitioner has met the fourth factor required by N.C.G.S. § 113A-120.1(a) as conditioned by the variance.

**ORDER**

THEREFORE, the requested variance from 15A N.C. Admin. Code 07H .0311(c) is GRANTED with the following CONDITIONS as allowed by N.C. Gen. Stat. § 113A-120.1(b):

- (1) To minimize impacts to wildlife, the Town shall remove any ties or ropes from the bales during installation;
- (2) Before issuance of the permit, the Town shall consult with Dr. Zac Long at UNCW, Department of Biology and Marine Biology, and staff at NC WRC and USFWS regarding the proposed development and consider any suggestions provided by these resource agencies and Dr. Long;
- (3) Following installation of the hay and straw bales the Town shall monitor the sand fencing. This monitoring will consist of picture documentation on a monthly, seasonal, and post storm basis. The Town will likewise provide a statement regarding the status of bale decomposition. The aim of this monitoring will be to document bale effectiveness, material durability (intactness and decomposition), and the bale fencing’s effect on the surrounding habitat;
- (4) The Town shall erect signage at the project site that informs the public that the straw/hay bale fencing project is a pilot

study;

- (5) If the monitoring provides any evidence of negative impacts from the installation of the hay bales or pine straw bales, the Town shall remove the hay or pine straw bales within 30 days of receiving official notification from DCM.

The granting of this variance does not relieve Petitioner of the responsibility for obtaining any other required permits from the proper permitting authority. This variance is based upon the Stipulated Facts set forth above. The Commission reserves the right to reconsider the granting of this variance and to take any appropriate action should it be shown that any of the above Stipulated Facts are not accurate or correct.

This the 28<sup>th</sup> day of February 2023.



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M. Renee Cahoon Chair  
Coastal Resources Commission

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served the foregoing FINAL AGENCY DECISION upon the parties by the methods indicated below:

**Method of Service**

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This the 28<sup>th</sup> day of February, 2017.



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