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ATTORNEY GENERAL

**STATE OF NORTH CAROLINA**  
DEPARTMENT OF JUSTICE

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December 6, 2024

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Certified Mail/ Return Receipt Requested  
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**Re: Variance Request, CRC-VR-24-07**  
**Town of Oak Island**

Dear Brian:

At its November 2024 meeting, the Coastal Resources Commission granted Petitioner Town of Oak Island's request for a variance. 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 local permitting authority or the Division of Coastal Management.

If for some reason Petitioner does not agree to the variance as issued, it may 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, please send me a copy 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

**Brian Edes, Esq**  
**December 6, 2024**  
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cc: M. Renee Cahoon, Chair electronically  
Christine A. Goebel, Esq., electronically  
Tancred Miller, electronically  
Mike Lopazanski, electronically  
Robb Mairs, electronically  
Angela Willis, electronically  
Tara MacPherson, electronically  
Patrick Amico, electronically

STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES
COUNTY OF BRUNSWICK	)	COMMISSION
	)	<b>CRC-VR-24-07</b>
	)	
	)	
IN THE MATTER OF:	)	
PETITION FOR VARIANCE	)	<b>FINAL AGENCY DECISION</b>
BY <b>TOWN OF OAK ISLAND</b>	)	

On July 17, 2024, Petitioner Town of Oak Island 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 .0306(a)(3), (5), .0308(b)(1)[sic] (should be .0308(c)(1)) and .0309(a) to construct a Dune Infiltration System partially located within the Ocean Hazard Setback adjacent to the Atlantic Ocean at Ocean Drive and Cromwell Street in the Town of Oak Island, North Carolina. 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 November 14, 2024 at the Ocean Isle Beach Town Hall in Ocean Isle Beach, 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 Town of Oak Island.

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 Oak Island (“Petitioner” or “Town”), is a North Carolina municipal corporation and body politic organized and existing in Brunswick County, North Carolina.
2. The Proposed project (“Project”) is located along Ocean Drive, between the intersections of Crowell Street and Sherrill Street. The extent of the project spans approximately 540 linear feet of Ocean Drive and includes the public beach access located between 1009 and 1101 Ocean Drive (the “Site”). Photographs of the Site are shown on the PowerPoint provided as a stipulated exhibit.

3. The Town owns Ocean Drive and Crowell Street, which is the Site of the Project. These streets were publicly dedicated to and accepted by the Town, as shown on the 1955 plat recorded at Map Book 4, Page 34 of the Brunswick County Registry, provided as a stipulated exhibit.

4. The average annual erosion rate in the Site is two feet per year, as shown on the diagram from the DCM Map Viewer, provided as a stipulated exhibit. The Commission's rules at 15A N.C. Admin. Code 07H.0306(a)(3)(I) allow for a setback of sixty feet landward of the pre-project vegetation line for "infrastructure that is linear in nature, such as roads, bridges, pedestrian access such as boardwalks and sidewalks, and utilities providing for the transmission of electricity, water, telephone, cable television, data, storm water[.]"

5. This Site is within the boundaries of a large-scale nourishment project and is subject to a pre-project vegetation line from 1998. The location of this line, as well as the historic ocean shorelines, is shown on the diagram from the DCM Map Viewer, provided as a stipulated exhibit.

6. The Site is located within the Ocean Erodible Area of Environmental Concern ("AEC") and development within this AEC requires approval through a CAMA permit pursuant to N.C. Gen. Stat. § 113A-118.

7. The Town asserts that its existing stormwater infrastructure is insufficient to manage the increased frequency and intensity of flooding events that impact Ocean Drive and the properties adjacent to Ocean Drive. Examples of these flooding events are depicted in the pictures of flooding provided by the Town, provided as a stipulated exhibit.

8. The Project is intended to address persistent roadway and driveway flooding along Ocean Drive and the side streets by installing an underground stormwater dune infiltration system.

9. The Project narrative describes the Project as follows: the Project will use 540 linear feet of eighteen inch reinforced concrete pipe and five NCDOT catch basins installed in the dune to capture ponding water from Ocean Drive. A small pump station with wet well and 100 feet of 6 inch PVC force main will push stormwater into an approximately 2,670 square feet underground infiltration chamber system. The chambers will be located underneath the existing beach access in the dune system. The existing ramp and dune topography will be rebuilt and revegetated. A copy of the narrative is provided as a stipulated exhibit.

10. The Town asserts that thirty-one residential properties will directly benefit from this project, as road and driveway access are severely impacted due to the periodic roadway flooding of Ocean Drive. These thirty-one lots are shown on the project drawing as lots touching the blue shaded “flooding” area.

11. The Town asserts that the reduction of flooding severity and duration will restore access to Ocean Drive, which has four public beach access points within the flooded area and is a very busy road during tourist seasons. A popular restaurant and community building is located just east of the flooding area, meaning these areas have limited road access during frequent flooding events. The flooding can impede emergency responders.

12. The Town asserts that Ocean Drive and the immediate surrounding area has experienced growth and property development in the last several years adding increased demand to the public infrastructure, including roads, sanitary sewer, other utility service, and stormwater management. In addition, there are vacant parcels within this area that may exacerbate these conditions as future development occurs. Developed and vacant parcels are shown on the aerial 2023 Development Site Map provided as a stipulated exhibit.

13. The proposed project will construct an underground dune infiltration system within the frontal dune system at the Crowell Street public beach access and is intended to reduce the chronic flooding on Ocean Drive between south east 78th Street and Barbee Boulevard. Roadway flooding in this area spans approximately 1,300 linear feet and impacts driveway access to thirty-one residential properties shown touching the blue shaded area on the project plan.

14. The Town asserts that flooding also impacts the operation of a sanitary sewer pump station located at the corner of Sherrill St and Ocean Drive. Active erosion has been observed around the lid. Pump station failure could lead to dangerous sanitary sewer overflows. The Town asserts that frequent flooding of pavement and other adjacent utilities is causing deterioration of those assets and decreasing service life as well.

15. The proposed dune infiltration system includes approximately 540 linear feet of 18 inch reinforced concrete pipe and five standard NCDOT catch-basins installed to capture ponding water on Ocean Drive. A small pump station with wet well and 100 linear feet of a six inch PVC force main will push stormwater across the beach access area and up to an approximately 2,670 square-foot underground infiltration chamber system. The infiltration system will be located underneath the existing beach access in the dune system. The beach access ramp and the dune topography and ecosystem will be rebuilt and restored with native plantings.

16. The proposed site's proximity to public beach access provides educational opportunities for visitors and residents to learn about the benefits of infiltration systems and stormwater management. The Town plans to install signage at the Site explaining the dune infiltration system and how it functions.

17. The Town asserts that the project site was selected to maximize the use of the

existing dune system and the available publicly owned land near known flooding locations. The feasibility of other dune infiltration system sites was investigated by engineering firm WK Dickson as part of the "Ocean Drive Drainage Study" dated August 24, 2021, provided as a stipulated exhibit. This study evaluated eight other sites in the vicinity of areas of known flooding for the following:

- Feasibility of using the Town's Public Beach accesses to determine if the ponded flood waters can be infiltrated into the Secondary Dune system.
- Feasibility of diverting flood waters to the existing Town Right-of-Way on E. Pelican Drive to determine if the existing Right-of-Way can be converted into an infiltration gallery to infiltrate the ponded flood waters.
- Feasibility of diverting flood waters to the existing Satellite Water Reclamation Facility (SWRF).
- A geotechnical analysis to determine the Seasonally High-Water Table (SHWT) and hydraulic conductivity of in-situ soils.
- The available site area ensures proper ground elevation and vertical separation to SHWT and horizontal separation between the infiltration system and surrounding structures, including residential walkways and residential buildings.
- Estimate of the volume of water ponding within the roads.
- Evaluation of the size of the pumps to be comparable to the stormwater infiltration rate based upon the surface area of the proposed infiltration system.
- Evaluation of reducing flooding level (draw-down) in less than twelve hours.

18. After the Town's review and consultation with the engineering firm, it was determined by both the engineering firm and Town staff that the Crowell Street dune infiltration



system site to be the most feasible site based on the above criteria. Reduced efficacy and increased costs would be assessed if a different method or site was selected to improve flooding along Ocean Drive in the vicinity of the Crowell Street intersection.

19. On September 20, 2023, DCM Field Representative Patrick Amico met with the Town's CAMA Agents WK Dickson Consultants (Mark Horstman, PE) on the Site to discuss the Project.

20. On or about October 6, 2023, the Town, through its authorized CAMA agent WK Dickson Consultants (Mark Horstman, PE), submitted application materials for a CAMA Minor Permit to DCM. A copy of the cover letter, minor permit application form, agent form, notice map, site plans, AEC Hazard Notice are stipulated exhibits.

21. On December 14, 2023, Mr. Amico emailed the Town's agent with a list of items needed for a complete application. On January 10, 2024, the Town's agent responded through a letter addressing the items needed and the documents were sent on January 17, 2024. A copy of this email and response are stipulated exhibits.

22. Notice of the proposed project was received by 24 adjacent owners, some of whom were riparian and others were adjacent but not riparian. A list of the owners whom the Town notified is a stipulated exhibit, along with notice information.

23. As shown in the site plans, portions of the project did not meet the sixty-foot setback from the pre-project vegetation line. The most waterward portion of the dune infiltration system is approximately five feet landward of the vegetation line and there is approximately 1000 square feet of structure waterward of the sixty foot setback from the pre-project vegetation line.

24. On March 4, 2024, DCM, through District Manager Tara MacPherson, denied the

Town's minor permit application on the grounds that the proposed development was inconsistent with Commission's rules, specifically:

- 15A N.C. Admin. Code 07H.0306(a)(3) as portions of the Project do not meet the applicable sixty-foot oceanfront erosion setback as measured landward from the pre-project vegetation line;
- 15A N.C. Admin. Code 07H.0309 because the project does not meet the requirements for any exception to the oceanfront setback rule;
- 15A N.C. Admin. Code 07H.0306(a)(5) requires development to be landward of the frontal dune or oceanfront setback whichever is landward. In this case, the pre-project vegetation line is landward.
- 15A N.C. Admin. Code 07H.0308(b)(1) (the correct cite is (c)(1)) – dune protection

25. In April of 2024, the Town received a Golden Leaf Foundation grant in the amount of \$579,500 for this project. A copy of the award letter was provided as a stipulated exhibit.

26. The Town seeks a variance from the Commission's oceanfront erosion setback rules found at 15A N.C. Admin. Code 7H .0306 *et seq*, in order to develop the proposed stormwater infiltration system as proposed.

27. The Town stipulates that the proposed project is inconsistent with the rules listed in the denial letter.

28. As part of the variance process, the Town has notified the adjacent property owners that they are seeking this variance.

- DCM has received comment on the proposed variance from the following and copies of the comments in support from Pamela Wedding of 1101 Ocean Drive received

September 11, 2024 and Patrick Timm of 1106 Ocean Drive received on September 5, 2024 were provided as stipulated exhibits.

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

1. Plat Map 4/34
2. Erosion Rate for Site on Map Viewer
3. Pre-project vegetation line depicted on Map Viewer
4. Historic Shorelines on Map Viewer
5. 2023 Ocean Dr. Development Site Map
6. CAMA Minor Permit Application Materials
7. Incomplete letter and response
8. Notice of project to Adjacent Riparian Owners (and other adjacent owners)
9. August 2021 Ocean Drainage Study by WK Dickson
10. March 4, 2024 Denial Letter
11. Golden Leaf Award Letter
12. Golden Leaf Appendices 11 - Crowell St Flooding Pics
13. Golden Leaf Appendices 12 - Documentation of Flooding
14. July 15, 2024 letter – WK Dickson
15. Notice of Variance Request to adjacent riparian owners with tracking
16. Emails in support of the project
17. PowerPoint with aerial and ground level photographs of the Site 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 oceanfront setback rules would cause unnecessary hardships. The Town seeks a variance from three of the Commission's oceanfront rules including 1) the oceanfront setback which requires development to be landward of the sixty foot setback as measured from the applicable pre-project vegetation line (if it does not meet any of the .0309 exceptions), 2) the setback rules which require development to be landward of primary and frontal dunes, and 3) 07H.0308(c)(1) which prohibits the removal of primary or frontal dunes. These rules are intended to protect oceanfront dunes by keeping significant development landward of these important features, and also to minimize losses to property from storms and long-term erosion. The strict application of these rules would prevent the construction of the engineered dune infiltration system designed to alleviate flooding at this location. The dune infiltration project is designed to be buried under the dunes near the location of the floodwater collection point and to filter stormwater underneath the dunes.

The Commission agrees with the parties that strict application of the Commission's setback rules and rules protecting dunes causes the Town an unnecessary hardship because the development will be placed under the dune and the dune will be reconstructed and revegetated after the underground systems are installed. 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 project area is prone to frequent

flooding events. 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 asserts and DCM agrees that the Town has not taken any action that has resulted in this hardship. Thus, 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 ocean front setback rules from which a variance is sought is to protect oceanfront dune systems and to locate development more landward to reduce storm impacts. The Commission agrees with the parties that the request to vary the Commission's oceanfront erosion setback rules and allow this project is consistent with the spirit, purpose, and intent of the Commission's rules because impacts to the dune system will be short-term as the existing dune will be rebuilt and revegetated after installation of the project. Also, the risk of impacts to the project will be reduced because it will be buried under the dune. The Town has a beach management plan approved by the Commission in 2023, and a nourishment project planned for this winter or possibly next winter. That future renourishment will help protect the reconstructed dunes and project underneath them.

The second factor that the Commission assesses is whether the variance request is consistent with the goal of maintaining public safety. The proposed system will address public safety and welfare by limiting the need to close Ocean Drive due to stormwater flooding, and by reducing water quality impacts from stormwater flooding on the road. Moreover, the project will only cause short-term impacts to the protective nature of the oceanfront dune.

The last factor the Commission considers is whether the variance request will preserve substantial justice. The Commission agrees that granting the Town’s requested variance will preserve substantial justice by reducing flood-related impediments to the Town’s road in manner that represents minimal potential impact to coastal resources.

In addition, granting this variance would preserve substantial justice because while the CAMA makes exceptions for buried utilities, it does not make an exception for this type of project, despite the similarities in purpose.

\* \* \* \* \*

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

**ORDER**

THEREFORE, the requested variance from 15A N.C. Admin. Code 07H .0306(a)(3), (5), .0308(c)(1) and .0309(a) is GRANTED and the Town is authorized to construct a Dune Infiltration System partially located within the Ocean Hazard Setback adjacent to the Atlantic Ocean at Ocean Drive and Cromwell Street in the Town of Oak Island, North Carolina.

The granting of this variance does not relieve Petitioner of the responsibility for obtaining the 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 6th day of December 2024.



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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 and other interested persons by the methods indicated below:

**Method of Service**

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This the 6th day of December, 2024.



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