



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

**STATE OF NORTH CAROLINA**  
**DEPARTMENT OF JUSTICE**

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

December 9, 2024

Stephen D. Coggins, Esq.  
Attorney for Petitioner  
Rountree Losee, LLP  
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Electronically: Scoggins@routreelosee.com

Donald McCoy Registered Agent  
McCoy ENC LLC  
3113 Camille Dr.  
Winterville, NC 28590

Certified Mail, return receipt requested and  
Electronically: mccoyencllc@gmail.com

**Re: Variance Request CRC-VR-24-09**  
**McCoy ENC LLC**

Dear Steve:

At its November 2024 regularly scheduled meeting, the North Carolina Coastal Resources Commission denied your client's variance request. Thank you for agreeing to accept service of the attached Final Agency Decision signed by the Chairman of the Coastal Resources Commission. Your client may appeal this decision by filing a petition for judicial review in superior court as provided in N.C. Gen. Stat § 150B-45 within thirty days after receiving the Final Agency Decision (by my calculation that petition must be filed by January 8, 2025).

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 filed copy at the email address listed in the letterhead.

Stephen D. Coggins, Esq.  
Donald McCoy Registered Agent  
December 9, 2024  
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If you have questions, do not hesitate to contact me.

Sincerely,



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

cc electronically or US Mail:

M. Renee Cahoon, Commission Chair  
Christine A Goebel, Esq. DEQ Assistant General Counsel  
Tancred Miller, Director  
Mike Lopazanski, Deputy Director  
Robb Mairs, LPO Minor Permits Coordinator  
Angela Willis, Administrative Assistant  
Ron Renaldi, District Manager  
Yvonne Carver, Field Representative  
K.D. Jackson, CAMA LPO

STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES
COUNTY OF DARE	)	COMMISSION
	)	<b>CRC-VR-24-09</b>
	)	
	)	
IN THE MATTER OF:	)	
PETITION FOR VARIANCE	)	<b>FINAL AGENCY DECISION</b>
BY MCCOY ENC, LLC	)	

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On September 16, 2024, Petitioner McCoy ENC, LLC submitted a request for a variance from the North Carolina Coastal Resources Commission’s (“Commission”) setback rule set forth at 15A N.C. Admin. Code 07H .0306 and the exceptions provided in 07H.0309(a) to construct a five-bedroom residence at property owned at 41791 Ocean View Drive in Avon, Dare County, 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”). Stephen D. Coggins, Esq. appeared on behalf of Petitioner McCoy ENC, LLC.

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 exhibits 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 exhibits provided to the Commission, and the arguments of the parties.

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

1. Petitioner McCoy ENC, LLC, a North Carolina Limited Liability Company, is represented by Stephen D. Coggins, Esq. of Rountree Losee, LLP. DCM is represented by the Department of Environmental Quality, (“DEQ”) Assistant General Counsel, Christine Goebel.

2. Petitioner McCoy ENC, LLC was organized in North Carolina in 2017. The creation filing and 2024 annual report were provided as stipulated exhibits. Donald McCoy is the Registered Agent and Managing Member. Petitioner has owned 41971 Ocean View Drive in Avon, Dare County (the “Site”) since September 22, 2021, according to a deed recorded at Book 2547, Page 139 of the Dare County Registry, a copy of which is a stipulated exhibit.

3. The Site is also known as Lot No. 10, Kinnakeet Shores Phase 2 as shown on a plat

recorded on May 6, 1986 and recorded in Plat Cabinet C, Slide 23-C of the Dare County Registry, a copy of which is a stipulated exhibit. The Site was platted after June 11, 1979 (when the Commission's oceanfront setback rules first were adopted). The Site is 0.34 acres in area.

4. The Lot is bordered by federal land and then the Atlantic Ocean to the east, Ocean View Drive to the west, 41957 Ocean View to the north (owned by Mark and Melissa Reilly), and 41981 Ocean View Drive to the south (owned by Kathleen Lake).

5. The Site is undeveloped. The Site and surrounding area are shown on the PowerPoint which has both ground level and aerial (current and past) photos and is a stipulated exhibit.

6. The Lot is located within the Ocean Erodible Area of Environmental Concern ("AEC"). N.C. Gen. Stat. §113A-118 requires a CAMA permit prior to any development on the Site.

7. At the Site, the currently applicable long term average erosion rate adopted by the Commission in 2020 is six feet per year. A building less than 5,000 square feet requires a minimum setback of thirty times the erosion rate which at the Site equals 180 feet. 15A N.C. Admin. Code 07H.0306(a)(3)(A).

8. An image from the DCM Map Viewer (provided as a stipulated exhibit) shows the applicable average erosion rate, the historic shorelines at the Site, the location of the pre-project vegetation line on the Site, and the erosion measured at the nearest transects to the Site (-5.81 feet to the north and -5.87 feet to the south).

9. The Site is subject to a pre-project vegetation line (formerly known as the static vegetation line) based on the location of the vegetation line on August 12, 2021. This is the date

contractor CSE surveyed the flagged pre-project vegetation line before the County's large-scale nourishment in the area of the Site. This large-scale project began on June 19, 2022 and was completed on July 27, 2022 according to the Dare County Nourishment website. [Avon Beach Nourishment Project | Dare County, NC](#). The County has not been approved by the Commission for a static line exception or a beach management plan. Accordingly, under the Commission's rules, the setback is measured landward from the pre-project vegetation line or the Vegetation Line, whichever is more restrictive.

10. The location of the pre-project vegetation line (labeled "static line") is shown on the Site plan survey dated July 12, 2024 by Frederick A. House, P.L.S., a copy of which is a stipulated exhibit. The pre-project vegetation line is located waterward of the Lot and is more restrictive than the Vegetation Line which was flagged on June 5, 2024 by Dare County Local Permit Officer ("LPO") K.D. Jackson. The 180 foot setback is also shown on this survey and is located approximately 37 feet (northern side) to 42 feet (southern side) waterward of the western property line.

11. On April 19, 2019, the Dare County Board of Commissioners approved a special tax district for Avon in order to pay for the planned 2022 nourishment project that included the Site.

12. Mr. Hamilton, Petitioner's predecessor-in-interest, applied for a permit for the development of a peat septic system on the Site on June 29, 2021. His application was approved on August 31, 2021. Copies of these documents are provided as stipulated exhibits.

13. On October 5, 2021, a perpetual easement to Dare County for beach nourishment for the Site was recorded at Book 2551, Page 316 of the Dare County Registry. It was signed on

September 22, 2021 by Hamilton Real Estate Holdings, LLC, the prior owner of the Site.

14. In 2021, Petitioner obtained a survey of the Site from Seaboard Surveying, a copy of which is a stipulated exhibit. This Survey shows the 180-foot oceanfront setback measured landward of the vegetation line applicable to the Site at the time. This is based on a vegetation line flagged by Dare County LPO K.D. Jackson on August 3, 2021 (the survey indicates it was “Approved by CAMA on 8/4/21”).

15. On October 19, 2021, the Reillys on the lot to the north of the Site received CAMA Minor Permit HI-3-2021 authorizing the development of a 2,437 square foot residence which met the 180-foot setback from the vegetation line. A copy of the permit and site plan drawings are stipulated exhibits as is a 2021 aerial photograph showing the location of the vegetation line at that time.

16. On June 14, 2022, Petitioner submitted his first application for a CAMA Minor Permit (HI-20-2022), a copy of which is a stipulated exhibit. It proposed an 8-bedroom building with pool and cabana located 180 feet landward of the vegetation line delineated on August 4, 2021.

17. A comparison of the location of the vegetation line from the 2022 site plan and the 2024 site plan shows that the vegetation line has moved seaward by approximately 17 feet.

18. The LPO requested changes to the Site Plan to show the pre-project vegetation line location and the corresponding 180-foot setback from that line. This was completed by Seaboard Surveying on August 16, 2022, a copy of the revised Site Plan is a stipulated exhibit.

19. On November 4, 2022, the LPO denied Petitioner’s CAMA Minor Permit Application as the proposed development did not meet the 180-foot setback from the pre-project

vegetation line. A copy of the denial letter is a stipulated exhibit. Petitioner did not appeal.

20. On or about May 7, 2024, the CAMA LPO for Dare County, K.D. Jackson, received a CAMA minor permit application (HI-71-24) from Petitioner, through its authorized agent Rick House of House Engineering, PC, a copy of which is a stipulated exhibit. It proposed construction of a three-story, piling-supported, five-bedroom rental cottage, septic system, gravel driveway, a covered deck, a swimming pool with six-foot wide concrete surround, 470 square feet of open decking, a gazebo, fire pit, bench, and beach accessway. The residence would have a total floor area of 1,996 square feet. A copy of these plans was provided as a stipulated exhibit. The initial site plan used the 2021 vegetation line and the LPO requested an updated vegetation line be shown. The updated site plan was received on July 15, 2024.

21. As part of the CAMA Minor permitting process, the Petitioner sent notice of the project to the two adjacent riparian owners through letters dated May 7, 2024 and mailed on May 10, 2024. According to usps.gov, delivery of the notice letter to the Reillys occurred on May 13, 2024. Copies of notice information was provided as a stipulated exhibit.

22. The letter to Ms. Lake was never delivered. On October 29, 2024 in anticipation of this variance and upon discovering that the notice during permit review was not delivered, Counsel for Petitioner notified Ms. Lake of the variance request. Delivery information is a stipulated exhibit and shows delivery to Ms. Lake on November 2, 2024.

23. On August 7, 2024, Dare County CAMA LPO Jackson denied the CAMA Minor Permit as inconsistent with 15A N.C. Admin. Code 07H .0306 because the proposed development did not meet the 180-foot setback from the pre-project vegetation line. Petitioner did not file a contested case petition to challenge the denial.



24. Petitioner stipulates that the permit application was properly denied based on 15A N.C. Admin. Code 07H .0306(a)(5) because the proposed development does not meet the applicable setback (180 feet from the pre-project vegetation line and does not meet any of the exceptions in 07H.0309(a)).

25. Petitioner also stipulates that before seeking a variance from the Commission, it did not seek relief from local setbacks as required by the Commission's rule at 15A N.C. Admin. Code 07J.0701. Petitioner seeks a variance from this procedural rule.

26. As part of the variance process, Petitioner sent notice to the adjacent riparian owners on September 16, 2024. Tracking information shows these letters were received by Mr. Rilley on September 27, 2024 and by Ms. Lake on September 24, 2024. DCM has not received any correspondence from either neighbor.

27. In addition to the variance from the Commission's local variance requirement noted in fact 25 above, Petitioner is seeking a variance from the Commission's setback rule at 15A N.C. Admin. Code 07H.0306(a)(5) to develop the lot as described in the 2024 application materials.

28. Without a variance, a CAMA permit could be issued for the type of development allowed within a setback area pursuant to 15A N.C. Admin. Code 07H .0309. A CAMA permit could also be issued for development on the Site in the area landward of the 180-foot setback from the pre-project vegetation line pursuant to 15A N.C. Admin. Code 07H.0306.

29. 15A N.C. Admin. Code 07H .0309(b) includes a provision allowing some types of development on "a lot existing as of June 1, 1979[.]" This is the date the Commission's oceanfront setback rules first became effective. Any proposed development must meet four conditions including a minimum 60-foot setback, a footprint of no more than 1,000 square foot, and a

maximum total floor area of 2,000 square feet.

30. During the spring and summer of 2023, DCM Staff were working with the Commission to revise 07H.0305, 7H.0306 and 07H.0309 to, among other things, remove the 1979 date for the sixty-foot set-back exception. A copy of the April 12, 2023 memo from DCM to the Commission and the April 26, 2023 CRC Minutes are stipulated exhibits and show that the Commission sent the revised rules to public hearing.

31. On June 15, 2023, the Commission conditionally approved the fiscal review for the amended version of 07H.0309 pending approval of the fiscal note by the North Carolina Office of State Budget and Management. A copy of the June 2023 CRC meeting minutes is a stipulated exhibit. The amendments to these rules have not appeared on the Commission's agendas since the June 2023 meeting. The rules have not been finally approved by the Commission or sent to the North Carolina Rules Review Commission for its approval.

32. Petitioner asserts that he had intended his 2024 design and location to meet the revised language of 07H.0306 which has never taken effect.

33. Donald McCoy, who with his wife are the sole owners of McCoy ENC, LLC, signed a sworn affidavit dated October 30, 2024 in anticipation of this variance hearing. He states that he was unaware that a pre-project vegetation line would be adopted and applicable to the Site in 2022. A copy of the sworn statement is a stipulated exhibit, though DCM Staff takes no position on the truth of the statements in the affidavit.

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

1. McCoy ENC, LLC Creation Filing and 2024 Annual Report
2. Deed in 2547/139
3. Plat C/23-C

4. DCM Map Viewer of Site with erosion, average rate, historic shorelines and pre-project vegetation line
5. July 12, 2024 House Survey of Site with proposed development
6. 2021 Hamilton Septic Application and Approval
7. 2021 Nourishment easement from Hamilton to Dare Co
8. 2021 Seaboard Surveying Survey of Site
9. Reilly 2021 CAMA Permit and Site Plan
10. Petitioner's June 2022 CAMA Minor Permit Application materials
11. Petitioner's 2022 CAMA Permit Denial
12. Petitioner's 2024 CAMA Minor Permit Application materials
13. Petitioner's notice to Mark and Melissa Reilly with tracking documentation
14. Petitioner's notice to Kathleen Lake with tracking documentation (undelivered)
15. Petitioner's August 7, 2024 CAMA Minor Permit Denial
16. Notice to Mark and Melissa Reilly and Kathleen Lake in anticipation of variance
17. April 12, 2023 memo from DCM to CRC re: revisions to 07H.0305, .0306, 0309
18. April 2023 CRC Minutes
19. June 2023 CRC Minutes
20. Donald McCoy Affidavit
21. PowerPoint showing ground, aerial and historic ariel photos of 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. The Commission granted Petitioner's request for variance from the Commission's rule at 15A N.C. Admin. Code 07J.0701 which requires a petitioner to seek a variance from the local government before approaching the Commission with a variance request.
4. The Petitioner is seeking a variance from the Commission's oceanfront setback rules at 15A N.C Admin. Code 07H. 0306(a)(5) (establishing the setback) and 07H .0309(b) (allowing limited exceptions to the setback). The Petitioner's proposed development is sited oceanward of the CAMA setback on the Lot and does not meet an exception to the setback under 15A N.C. Admin. Code 07H .0309(b). "Any person may petition the Commission for a variance

granting permission to use his land in a manner otherwise prohibited by rules . . . prescribed by the Commission.” *Williams v. N.C. Dep't of Env't & Nat. Res., Div. of Coastal Mgmt.*, 144 N.C. App. 479, 484, 548 S.E.2d 793, 797 (2001). However, “[i]f the landowner cannot meet each of the . . . enumerated requirements [in N.C.G.S. § 113A-120.1], the variance must not be granted.” *Williams*, 144 N.C. App. at 484, 548 S.E.2d at 797. In this case, Petitioner has failed to establish one of the requirements imposed by CAMA without which a variance cannot be granted. Specifically, the Commission determined that the Petitioner has failed to establish that the hardship results from conditions peculiar to the property. Therefore, as set forth in more detail below, the Petitioner has failed to meet all the requirements in N.C.G.S. § 113A-120.1(a) and 15A 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 setbacks and the exceptions provided at 15A N.C. Admin. Code 07H .0309(b) will cause an unnecessary hardship. The purpose of these rules is to protect oceanfront dunes by keeping significant development landward of these important features, to minimize losses to property from storms and long-term erosion, and to only allow development if it meets certain conditions. The strict application of these rules would prevent the construction of the proposed residence and other structures at this location.

Currently, the exception to the oceanfront setback contained in 15A N.C. Admin. Code 07H .0309(b) is limited to lots existing before June 1, 1979. This is the date the Commission’s oceanfront setback rules became effective. To qualify for the exception, any proposed development must meet four conditions including that the lot exist before June 1, 1979.

The Commission agrees with Petitioner that it has been reconsidering whether the date limitation is necessary to protect coastal resources and prevent harm to structures and persons that can result from improperly sited development in the Ocean Hazard AEC. Specifically, in a memorandum dated April 12, 2023, the Commission's staff at DCM proposed that the Commission amend 15A 07H .0309(b) to remove the 1,000 square feet footprint requirement, retain the requirement that development be limited to a total floor area of 2,000 square feet, and remove the requirement that lots exist prior to June 1, 1979. On April 26, 2023, the Commission accepted the proposal and sent the proposed amendments to 15A N.C. Admin. Code 07H .0309(b) out for public hearing. The Commission did not receive any objections to the proposed amendment at the public hearing. On June 15, 2023, the Commission approved the fiscal analysis for the proposed amendment to 15A N.C. Admin. Code 07H .0309(b) which removed the requirement that development excepted from 15A N.C. Admin. Code 07H .0306 setbacks must be on lots existing before June 1, 1979. Based on the proposed amendment, it appears that as long as a proposed development meets the other requirements in 15A N.C. Admin. Code, 07H .0309(b), it would be an unnecessary hardship to deny the request based solely on whether the lot was in existence in 1979.

The Site has an average annual erosion rate of six feet per year which results in a setback (for a 5,000 square foot or less structure) of 180 feet measured landward of the vegetation line. This Site has never been developed. In 2022, Dare County undertook a large-scale nourishment project which included the Site, in response to long-term erosion in the area, at which time the pre-project vegetation line took effect in accordance with Commission's rules. Although the Site has only been in existence since 1986, it meets all the other requirements for an exception – the

development meets a minimum 60-foot setback, the development has a footprint of no more than 1,000 square foot, and it contains a maximum total floor area of 2,000 square feet. Under these circumstances, the Commission holds that denying Petitioner a permit to build a small (less than 2000 square feet) residential structure that is landward of the First Line of Stable and Natural Vegetation (“FLSNV”) by approximately 201 to 205 feet and is approximately 120 feet landward of the pre-project vegetation line is a hardship.

The Commission considers this hardship unnecessary insofar as the proposed project meets the remaining requirements of the rule which take in account factors that allow development to be appropriately sited on the oceanfront. For these reasons, the Commission affirmatively finds that Petitioner has met the first factor without which a variance cannot be granted.

**b. The hardship does not results from conditions peculiar to Petitioner's property.**

The second requirement is that a petitioner must show that the hardship is caused by some condition peculiar to the property. In CAMA, the location, size, or topography of the property are listed as examples of conditions that may be peculiar to a specific property. N.C. Gen. Stat. § 113A-120.1. The shape of the property or the natural conditions on it could also be relevant. By requiring a petitioner to show that any hardships will result from conditions peculiar to his property, the General Assembly has imposed a requirement in CAMA that is not found in zoning enabling acts.

The Court of Appeals’ discussion in *Williams* regarding the “peculiar condition” requirement in CAMA provides guidance on how to apply this second requirement. *Williams* involved a request for a variance so that the applicant could fill in about one-half acres of his low-lying property to build a fast freezer and storage unit building. The vegetation on the property

included coastal wetlands species, and “[f]rom at least 1954 until at least 1978 two residences and other structures existed on the property. Those structures were removed at some time before 1995.” *Williams*, 144 N.C. App. at 481-82, 548 S.E.2d at 795-96. In denying the variance request, the Commission “concluded that the property is not affected by ‘conditions peculiar’ to it alone” because “wetlands occur throughout the coastal area and reemergence of wetland vegetation once structures have been removed from low-lying areas adjacent to surface waters is not unusual.”

On appeal, the Court of Appeals determined that the Commission’s conclusion was not supported by the record. The Court noted that “all parties agree that wetlands species exist on this property.” However, the parties disagreed on whether the existence of past development on the property which had reduced the coastal wetlands on the property was a condition peculiar to the property. The Court held that because the record did not show when the residences had been removed, the record did not support the Commission’s claim “that any conditions peculiar to this land have dissipated due to the ‘long absence of residences’ on this property.” *Williams*, 144 N.C. App. at 487-88, 548 S.E.2d at 799, The Court further held that there was no evidence in the record as to whether this “particular parcel of property is similar to other nearby properties or” how soon “wetlands regularly reemerge when structures are removed.” *Id.* Accordingly, based on a review of the whole record, the appellate court held that “there is not substantial evidence upon which to base the [Commission’s] conclusion of law [that the hardship was caused by conditions peculiar to the property].” *Id.*, (citing *Powell v. N.C. DOT*, 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998)). Instructive here is that in *Williams*, the appellate court focused on whether there was information in the record showing there was something different about the property for which a variance was sought compared with other similarly situated properties and whether the hardship was caused by

a “peculiar” feature of that specific property.

In Black’s Law Dictionary, “peculiar” is defined as something that is “[d]ifferent from the norm; special; particular.” Black’s Law Dictionary (11th ed. 2019). Further analysis of what is meant by “peculiar” can be found in our appellate courts’ discussion of “peculiar” in cases addressing hazards relating to occupations. For example, the North Carolina Supreme Court has explained that “peculiar to the occupation” means that “the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations . . . and is in excess of that attending employment in general.” *Keller v. Wilmington Police Dep’t*, 65 N.C. App. 675, 677, 309 S.E.2d 543, 545 (1983) (quoting *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 473, 256 S.E.2d 189, 199 (1979)). In *Keller*, the North Carolina Court of Appeals further explained that certain medical conditions were not “peculiar” to the plaintiff’s employment as a police officer, because they are common to all occupations requiring a great deal of sitting. *Keller*, 65 N.C. App. at 678, 309 S.E.2d at 545.

The Commission notes that Petitioners makes two arguments regarding the second factor and neither identifies a condition peculiar to the property. First, Petitioner claims that the 2022 denial of Petitioner’s first application for a CAMA Minor Development Permit was in error. Second, Petitioner allude to the Commission’s ongoing rule-making which is not yet completed. Neither of these describes how any hardship is a result of a peculiarity of the location, size or topography of the property.

Moreover, the Commission agrees with DCM that there are no peculiarities with the size, location or topography of the Site which cause any hardships to Petitioner. The Site has a high average annual erosion rate of six feet per year and corresponding setback of 180 feet (for a



structure 5,000 square feet or less). Despite this lot being platted in 1986, it remains undeveloped. Due to erosion in the area of the Site, the Site is also now within the bounds of a large-scale beach nourishment project with a corresponding pre-project vegetation line from which to measure the setback. This is common in many areas along the coast where the vegetation line has retreated due to storms and other natural coastal processes. Petitioner has not identified any conditions peculiar to this property which have caused the claimed hardship.

Accordingly, the Commission affirmatively finds that Petitioner has failed to demonstrate that this hardship results from conditions peculiar to the property. Accordingly, the Commission holds that Petitioner has failed to meet the second factor required for the grant of its request for a variance. On this ground alone, the variance request must be denied.

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

The Commission affirmatively holds that Petitioner has demonstrated that the hardship does not result from its actions. Specifically, any hardships result largely from the landward movement of the vegetation line due to erosion on the Site combined with the nourishment and pre-project vegetation line, as well as Petitioner's inability to qualify for the legacy exception provided for lots existing before 1979.

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 provide exceptions for development within the Ocean Hazard ACE setback when proposed development cannot meet the required setback based on the current erosion rate. This rule limits the exception to lots created before June 1, 1979, for development with a total floor area no greater than 2,000 square feet, a maximum 1,000 square feet footprint, and requires the structure to be set back the maximum feasible distance on the lot (a minimum of 60-feet) and no more oceanward than the landward-most adjacent structure. The purpose and intent of the Rules is to protect natural resources, life, and property.

Aside from the date requirement, the Proposed Development meets the other requirements for an exception as it is less than 2000 square feet with a footprint less than 1000 square feet. It is no more oceanward than the landward-most adjacent structure. The proposed development is approximately 201 to 205 feet landward of the FLSNV setback. The proposed development would be located as far landward of the ocean as is feasible on the lot.

The Commission's rule were implemented to further the goals set out in N.C. Gen. Stat. § 113A-102(b) – to minimize losses to life and property resulting from storms and long-term erosion, prevent encroachment of permanent structures on public beach areas, preserve the natural ecological conditions of the barrier dune and beach systems, and reduce the public costs of development within ocean hazard areas, and protect common-law and statutory public rights of access to and use of the lands and waters of the coastal area. 15A N.C. Admin. Code 07H .0303(b).

For these reasons, the Commission affirmatively holds that Petitioner's proposed development is consistent with the spirit, purpose, and intent of the Commission's rule.

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 will secure public safety and welfare because the proposed development is located 202 to 206.4 feet landward of the FLSNV. Further, the proposed development will be located no further oceanward than the adjacent structures. Moreover, the Proposed Development that is the subject of this variance request is much smaller than that previously proposed.

Further, the public welfare is secured by the fact that the Proposed Development will be consistent with Dare County Zoning Ordinances. The lot on which the Proposed Development is located is within Zoning District R-1 Low Density Residential. Per the Dare County, North Carolina Code of Ordinances at Section 22- 21(b), the permitted uses of lots in the R-1 district include: detached single-family dwellings. Petitioner seeks to develop a single-family dwelling, conforming with the Dare County Ordinance. The Proposed Development is thus consistent with the public welfare.

The Commission agrees that granting the Town's requested variance will preserve substantial justice in that the proposed design for the residence is limited in scope and meets all but the date requirements for the exception to the setback rules allowed under the Commission's rules. Finally, neither the adjacent riparian neighbors nor Dare County have articulated any objections to the proposed development.

\* \* \* \* \*

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, because the Petitioner failed to show that any hardships were caused by

conditions peculiar to the property, the requested variance from 15A N.C. Admin. Code 07H .0309(b) is DENIED.

This the 9th 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 9th day of December, 2024.



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