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REPLY TO:
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Memorandum

To: North Carolina Coastal Resource Commission
Fr: Mary L Lucasse, Esq.
Re: Legal Update to the Coastal Resources Commission (**CRC 22-30**)
Date: November 3, 2022

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. Appellant Fonvielle requested and received a 30-day extension to file his brief on November 14, 2022. The Commission's brief is due 30 days later.

III. PETITIONS FOR JUDICIAL REVIEW

Petition for Rulemaking by Nelson G. Paul (22CVS5974) – Wake Co. Superior Ct. The Commission denied Mr. Paul's Request for Rulemaking to repeal 15A NCAC 07H .0205(e). Mr. Paul appealed the decision. The Commission filed the record with the superior court and filed its Memorandum in Opposition to the Petition for Judicial Review on August 31, 2022. The matter was heard on October 13, 2022. Judge Rozier affirmed the Commission's decision and denied the petition for judicial review based on his holding that as a matter of law: 1) The Commission's rule at 15A N.C. Admin. Code 07H .0205 provides the conditions under which mowing is exempt from the permit requirements under CAMA; 2) The rule describes the conditions under which the CAMA permit requirements become applicable, i.e., when any mowing extends into the agency's authorized jurisdiction to manage possible alterations to the Coastal Wetlands Area of Environmental Concern; 3) The rule complies with the inherent authority of the agency; and, 4) The rule provides notice to the public of what may be defined as the alteration of wetlands and the boundaries of unpermitted mowing. Petitioner Paul will have 30 days after the order is filed to file a notice of appeal (about November 30).

IV. OFFICE OF ADMINISTRATIVE HEARINGS (OAH)–None

V. VARIANCES

Spogli Variance Request (CRC-VR-21-05) During your September 15, 2022 meeting, the Commission heard oral argument on Petitioner Spogli's request for a variance from 15A N.C. Admin. Code 07H .0306(a)(5), the Commission's Ocean Hazard Setback Rule, to construct a single-family residence on oceanfront property located at 706 Shoals Watch, Bald Head Island, North Carolina, 28461. The Commission denied the variance request. Following the meeting, the Petitioner was served with a written Final Agency Decision. For your information, I have attached a copy of that decision here. Under N.C. Gen. Stat § 150B-45, the Petitioner may appeal the denial by filing a petition for judicial review in superior court within thirty days after receiving the written Final Agency Decision. The deadline to file is November 9, 2022.

New Jack Partners, LLC (CRC-VR-22-05) to be considered by the Commission during the November 2022 meeting.

VI. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH: Following is the status of the current requests:

Gregory Baccari (CMT 22-08) submitted a request for a contested case hearing to challenge the CAMA permit authorizing an addition to an existing dock/pier. The Chair denied the request based on a settlement agreement signed by the Permittee and the Petitioner in 2007 which approved the location of the existing pier. Given this agreement, the Chair held that the Petitioner had failed to allege facts or make legal arguments to show a contested case hearing would not be frivolous because the location of the permitted kayak pier is within the agreed-to-footprint for the existing pier. The Petitioner did not appeal by the September 22, 2022 deadline. I will close our file.

Bianca and Edward Aniski (CMT 22-09) submitted a request for a contested case hearing to challenge CAMA permit HI-18-2022 to develop a parcel in Avon in Dare County. The Chair denied the request for a contested case hearing on the grounds that neither the Commission nor OAH have jurisdiction to resolve property line disputes or challenges to the survey submitted in support of the permit application. In addition, the Chair held that the Petitioners had failed to allege facts or make legal arguments that the permit was inconsistent with CAMA or the Commission's rules. The Petitioners did not file a petition for judicial review by the Oct 1, 2022 deadline. I will close my file.

William Stewart (CMT 22-10) submitted a request for a contested case hearing to challenge CAMA Minor Permit OI 22-44 to Karefree, LLC. The Permit authorized the construction of a house in the Ocean Hazard AEC in Oak Island, Brunswick County, North Carolina. The Chair denied the request. Specifically, the Chair held that the Commission's recent rule amendments establishing a setback for new construction measured landward of the pre-project vegetation line were not in effect at the time Karefree's application was submitted on July 13, 2022, and at the time of the CAMA permit decision on July 28, 2022. Under N.C.G.S. § 143-755, the applicant can use the rules in effect at the time the permit application was received by DCM even if the rules change during the application review period. Therefore, the Chair denied the request because the Petitioner had failed to allege facts or make legal arguments to demonstrate that the Permit decision was inconsistent with the applicable rules. The Petitioner did not submit a petition for judicial review by the October 12, 2022 deadline. I will close my file.

James Sanderson (CMT 22-11) submitted a request for a contested case hearing to challenge the August 12, 2022 issuance of CAMA Major Permit No. 84-22 to CBYC, LLC. The Permit authorized the construction of a parking area, two floating structures and six transient slips at an existing fuel dock at CBYC's current marina in the Town of Carolina Beach in New Hanover County, North Carolina. The Chair denied the request on the grounds that neither the Commission nor OAH

have jurisdiction to interpret or enforce the N.C. fire code, the handbook is not an enforceable rule, and the Petitioner failed to allege facts or make legal arguments that the permit was inconsistent with CAMA or the Commission's rules. We have not received an appeal of the Chair's decision (which was required to be filed by October 29, 2022). Assuming none is received in the next 10 days, I will close my file.

William Few (CMT 22-12) submitted a request for a contested case hearing to challenge the issuance of CAMA Permit 10-22 based on a permit application, which included the Division of Water Resources Buffer Authorization Certificate DWR # 202-0572, dated June 24, 2022, to build a storage/warehouse building in the protected buffer at 603 Isabella Ave, Washington Park, NC 27889. The Petitioner did not appeal this certificate and the time to do so has run. The Chair denied the request on the grounds that the Commission did not have jurisdiction over the EMC's rules relating to DWR's buffer authorization and the Petitioner had failed to allege facts or make legal arguments to demonstrate that a contested case hearing would not be frivolous. Any appeal of this decision is due by December 2, 2022.

W. Carter and Janet Younger, William and Jane Thorne, Marie Barresi, Herbert and Joyce Holmes, George and Ulrike Reynolds, Robert and Laurie Ross, Alice Hughes, & Leander and Elaine Wick (CMT-13) submitted a request for a contested case hearing to challenge CAMA Major Permit 113-21 issued to the Town of Duck. The Petitioners withdrew the request based on DCM's explanation of the development actually authorized by the permit.

Randy and Lynn Clifton, Dale and Karen Gokel, Dean Gokel, Gregory and Anne Gordon, David and Esther Jones, Earl and Rita Mangum, & James and Mona Moody (CMT-14) submitted a request for a contested case hearing to challenge CAMA Major Permit 72-10 issued to Collette Properties LLC & Beaufort waterway RV Park in Carteret County to construct a dock. The Chair's decision is due on November 9, 2022.

Ewald and Janet Schulz (CMT-15) submitted a request for a contested case hearing to challenge the issuance of CAMA permit to construct a boat lift at in Holden Beach based on the allegation it would obstruct the Petitioner's view. After a redesign of the location of the boat lift, the Petitioners withdrew their request.

VII PUBLIC RECORDS REQUEST: On March 3, 2022, DCM and the Commission received a second request for public records from the attorney representing Petitioner Henry Fonvielle for, among other things, documents relating to the use of the words "adjacent" and "adjoining." Work to respond to this extensive request is ongoing and DCM has begun producing documents in a rolling production.

STATE OF NORTH CAROLINA)	BEFORE THE NORTH CAROLINA
)	COASTAL RESOURCES COMMISSION
COUNTY OF BRUNSWICK)	CRC-VR-21-05
)	
)	
IN THE MATTER OF:)	
PETITION FOR VARIANCE)	FINAL AGENCY DECISION
BY RONALD P. SPOGLI, TRUSTEE OF)	
THE RONALD P. SPOGLI TRUST)	

On September 29, 2021, Petitioner Ronald P. Spogli, Trustee of the Ronald P. Spogli Trust submitted a request for a variance from the North Carolina Coastal Resources Commission’s (“Commission”) Ocean Hazard Setback Rule, 15A N.C. Admin. Code 07H .0306(a)(5), to construct a single-family residence on oceanfront property located at 706 Shoals Watch, Bald Head Island, North Carolina, 28461.

Pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A N.C. Admin. Code 7J .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 September 15, 2022 in Wilmington, North Carolina. Charles S. Baldwin, IV, Esq. appeared on behalf of Petitioner. DEQ Assistant General Counsel Christine A. Goebel, Esq. appeared for Respondent DCM.

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.”) (cleaned up); *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 presented the Commission with Stipulated Facts and Stipulated Exhibits for its consideration. *See*, N.C. Admin. Code 15A 07J .0702(a). If the parties had been unable to reach an 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. N.C. Admin. Code 15A 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. Ronald P. Spogli, Trustee of the Ronald P. Spogli Trust (“Petitioner”), owns property at 706 Shoals Watch Way, Bald Head Island, North Carolina 28461 (the “Lot”), also known as Lot 3226 Single Family 16, Cape Fear Station, Bald Head Island, Stage Two, in the Village of Bald Head Island, Brunswick County, North Carolina (the “Village”).

2. Petitioner is represented by Charles S. Baldwin, IV, Esq. of the Brooks Pierce Law Firm in Wilmington.

3. Petitioner purchased the Lot from Bald Head Island Limited, which is the original developer of the Island, pursuant to a deed dated August 8, 2003, and recorded on August 15,

2003, in the Brunswick County Registry at Book 1806, Page 1219, a copy of which was provided to the Commission as a stipulated exhibit.

4. The Lot is shown on a 2003 map recorded in the Brunswick County Registry at Map Cabinet 27, Instrument 473, a copy of which was provided to the Commission as a stipulated exhibit.

5. The Lot is bordered by the Atlantic Ocean to the south, Shoals Watch (a thirty-foot wide public right-of-way per the plat) to the north, 704 Shoals Watch to the west currently owned by James and Sherri Ruddy, and 710 Shoals Watch to the east currently owned by the David L. Peterson Living Trust.

6. The Lot is located within the Ocean Erodible and the State Ports Areas of Environmental Concern (“AEC”).

7. Based on its platted dimensions, the Lot measured approximately 540 feet in length and 116 feet in width, comprising 1.36 acres.

8. The Lot elevation in the vicinity of the proposed construction is approximately twenty to twenty-nine feet, based on the topographic survey by Walter B. Cavedo Land Surveying, a copy of which was provided to the Commission as a stipulated exhibit.

9. The proposed construction is located approximately 290 feet landward of the flood zone VE/zone X boundary and is located in lower-risk flood zone X, as shown on the Site Plan Survey (dashed black lines).

10. The surveyed mean high water level (“MHWL”) in November 2021 at the Lot was approximately 187 feet oceanward from the vegetation line and the oceanward point of the proposed building was approximately 408 from the MHWL.

11. At the Lot, the current applicable long-term average erosion rate is nine feet per year. The erosion rate for the Lot adopted in 1997 and applicable in 2003 (the year Petitioner purchased the Lot) was eleven feet per year. The erosion rate for the Lot adopted in 2004 was fifteen feet per year. The erosion rate for the Lot adopted in 2013 was ten and a half feet per year.

12. The erosion measured at the transects in the area of the Lot, which were included in the 2020 erosion rate study, is shown on the stipulated exhibit provided to the Commission. It shows the measured erosion (vs. the rate used for the setback block) between 10.2 feet and 9.7 feet per year at the Lot.

13. The area of the Lot was not subject to a static vegetation line at the time of the permit decision, nor is it approved for a static line exception or a development line as those are/were defined in the Commission's rules. At the time of the permit decision for this Lot, oceanfront erosion setbacks were measured landward from the vegetation line as defined in 15A N.C. Admin. Code 07H .0305(a)(5).

14. Since the time of the permit decision, a static line has been established in the area of the Lot and a copy of the new static line is shown on the stipulated exhibit provided to the Commission. The static line represents the location of the vegetation line prior to the 2021 large-scale nourishment project in the area of the Lot. During the hearing, the parties agreed that even if the new static line was used to establish the setback line, the proposed development would still not be permissible.

15. Major recent storm events, including Hurricane Matthew in 2016, Hurricane Florence in 2018, and Hurricane Isaias in 2020 have caused South Beach, including the eastern portion of the South Beach shoreline in the front of the Lot, to recede as the beach has eroded. A

stipulated exhibit was provided to the Commission showing the shoreline in the area of the Lot over time, based on the wet/dry line on historic aerial images determined and digitized by DCM.

16. Pursuant to the 2000 Sand Management Plan between and among the U.S. Army Corps of Engineers, Bald Head Island, Oak Island, Caswell Beach, and the State of North Carolina, sand from maintenance dredging of the Wilmington Harbor Shipping Channel is to be placed on the beaches of Bald Head Island two out of three dredging cycles with the third cycle going to Oak Island and Caswell Beach.

17. In 2009-2010 and 2018-19, which were the third phases in the dredging cycle, the Village of Bald Head Island self-funded a sand placement project with a private contractor to maintain its beaches and its engineered beach template.

18. Since the 2000 Sand Management Plan was agreed to, sand has been placed on Bald Head Island in the following years: 2021, 2015, 2013, 2007, 2004-05, and 2000-01. None of these placements on South Beach directly placed sand as far east as the Lot, except the 2021 placement. After the permit decision, DCM established a static line for the Lot based on the pre-project line for the 2021 sand placement.

19. In the past, the sand placed from maintenance dredging at Bald Head Island was placed on West and South Beaches. An example of such placement is the Corps of Engineers project concluded in 2021 which placed material on Petitioner's Lot and caused Petitioner's riparian Lot to avulse or move oceanward, approximately 140 feet, based on the survey data and aerial imagery of Olsen Associates, Inc. which were provided to the Commission as stipulated exhibits.

20. According to Mr. Boyett, as stated in his affidavit, the Village is committed to

maintaining an engineered beach with periodic sand placements at Bald Head Island pursuant to the 2000 Sand Management Plan with the U.S. Army Corps of Engineers (USACE) and supplemental Village funded sand placements. Mr. Boyett states that the next USACE sand placement may occur in 2023 or 2024, depending on shipping channel shoaling, and the next Village-funded sand placement may occur in 2027 or 2028. The Village is budgeting for the project.

21. On August 31, 2021, Petitioner, through its authorized agent Cothran Harris of Cothran Harris Architecture, applied for a CAMA Minor Permit (Permit Application No. 2021-07) for the construction of a 4,500 square foot, single-family residence on the Lot. A copy of the application was provided to the Commission as a stipulated exhibit. The Permit Application was submitted to Stephen Boyett, Bald Head Island Development Services Director and CAMA Local Permit Officer.

22. As part of the CAMA Minor permitting process, the Petitioner sent notice of the project to the two adjacent riparian owners through letters dated August 31, 2021, copies of which were provided to the Commission. Certified mail receipts and tracking information from usps.gov (also provided to the Commission) indicate delivery of the notice letter to Mr. Peterson on September 10, 2021 (pursuant to Tracking No. 7021 0350 0000 6962 5132). Delivery of the notice letter to the Ruddys was “Unclaimed/Returned to Sender” as of September 30, 2021.

23. In preparing this variance to be heard last fall, the failure to notify James and Sherri Ruddy was discovered. Notice of the permit application was resent to Mr. and Mrs. Ruddy several times including the delivery of the initial CAMA application to Mr. and Mrs. Ruddy on December 17, 2021. A copy of the tracking information was provided to the Commission. The LPO and DCM

have not received any comments on the permit application from either of the adjacent riparian property owners or anyone else to date.

24. The applicable setback from the vegetation line for the proposed 4,500 square foot house with a nine-foot per year erosion rate is 270 feet (30 by 9 feet equals 270 feet). The Site plan provided to the Commission shows the location of the First Line of Stable and Natural Vegetation (“FLSNV”) as established on September 9, 2020 and confirmed by Mr. Boyett on July 22, 2021. The approximate setback line is also shown on the Site plan provided to the Commission and is in a similar location as the thirty-foot Village street-side setback (shown in red). As a result, all the proposed development is within the setback area, waterward of the setback line. The waterward side of the house, if built, would be approximately 173 feet, 9 inches landward of the vegetation line and the rear of the house would be approximately 270 feet landward of the vegetation line.

25. On September 24, 2021, Mr. Boyett denied the CAMA Minor Permit because the proposed development is inconsistent with 15A N.C. Admin. Code 07H .0306(a)(5) and .0309(a).

26. Petitioner stipulates that the permit application was properly denied based on 15A N.C. Admin. Code 07H .0306(a)(5) and .0309(a).

27. The location of the proposed house to be constructed on the Lot relative to the houses on either side of the Lot is shown on the Site plans. The Site plan also indicates that the proposed house meets the private “Bald Head Sightline Setback” as required in the declarations, recorded at Book 263, Page 621, Brunswick County Register of Deeds.

28. The home at 704 Shoals Watch received a Certificate of Occupancy on September 13, 2006, a copy of which was provided to the Commission. The CAMA Minor Permit for that home could not be located, but based on the Certificate of Occupancy, would likely have been

issued in 2006. The 5,342 square foot home would have been subject to an erosion rate of fifteen feet per year and a setback factor of thirty times for a setback from the vegetation line of 450 feet. (The prior Commission rule only required a setback factor of thirty times for residential structures, regardless of size). Without a copy of the CAMA permit and site plan, it is not clear what setback distance was applied.

29. The home at 710 Shoals Watch received a Certificate of Occupancy on May 28, 2008 and a copy was provided to the Commission. The CAMA Minor Permit for that home was issued on September 14, 2004 and a copy was provided to the Commission. The 5514 square foot home would have been subject to an erosion rate of eleven feet per year¹ and a setback factor of 30 times² for a setback from the vegetation line of 330 feet. The CAMA Permit, however, only required that the proposed structure meet a 250-foot setback.

30. The owner of the home located at 704 Shoals Watch, which is next to and west of the Lot, has planted vegetation that extends in front of the Lot in an attempt to reestablish the first line of stable vegetation oceanward. The vegetation in the vicinity of the Lot is seen in site photos provided to the Commission as stipulated exhibits.

31. As part of the variance process, Petitioner sent notice of the variance request to the adjacent riparian owners as required by 15A N.C. Admin. Code 7J.0701. Tracking information provided to the Commission indicates that the letter to Mr. Peterson was delivered on October 5, 2021 and the letter to Mr. and Mrs. Ruddy was delivered on October 4, 2021.

32. Petitioner is seeking a procedural variance from the Commission's requirement in

¹ The 2004 erosion rates were effective on January 28, 2004.

² The applicable Commission rule required a setback factor of thirty times for all residential structures regardless of size.

15A N.C. Admin. Code 07J .0701 that he seek a variance from the Village’s street-side or side-yard setbacks before seeking a variance from the Commission’s rules. The Petitioner is also seeking a variance from the Commission’s oceanfront setback rules at 15A N.C. Admin. Code 7H.0306(a)(5) (setting forth the setback) and 7H.0309(a) (where the proposed development does not meet any of the erosion setback exceptions).

33. Without a variance, a CAMA permit could be issued for development within the setback area on the Lot for those structures listed in 15A N.C. Admin. Code 07H.0309, including campsites, driveways, parking areas, elevated decks up to a 500 square foot footprint, unenclosed uninhabitable gazebos not to exceed a footprint of 200 square feet, single-story sheds, sand-fencing, swimming pools, and temporary amusement stands.

34. An affidavit of Mr. Boyett is attached as a stipulated exhibit, describing his opinions about issues related to this Variance.

EXHIBITS PROVIDED TO THE COMMISSION BY PETITIONER AND DCM

1. September 29, 2021 Request for a Variance and Exhibits 1-22
2. North Carolina General Warranty Deed of Purchase filed on August 15, 2003 in the Brunswick County Register of Deeds beginning at Book 1806, Page 1219
3. Plat of Single Family 16, Cape Fear Station prepared by Brunswick Surveying, Inc. Dated June 11, 2002 and filed in the Brunswick County Register of Deeds Map Cabinet 27, Instrument 473) on April 17, 2003
4. Topographic survey for Ronald P. Spogli of Lot 3226 by Walter B. Cavedo Land Surveyor, L. 4098 dated September 21, 2020 including Flood Zones filed in the Brunswick County Register of Deeds at Book 1806, Page 1219, Map Cabinet 27, Page 473
5. Erosion Rate transect overlain on 2020 aerial
6. New 2021 Static Line Map
7. DCM historic shorelines overlain on 2020 aerial
8. Olsen diagram of 2021 before and after shorelines
9. Bald Head Island Beach Monitoring Program Profiles dated November 30, 2021 showing elevations on May and November 2020 and May and November 2021 by McKim & Creed, L. No. F-1222 in the vicinity of Station 206+00 (B-52)
10. Affidavit of Stephen Boyett dated April 6, 2022 and exhibits

11. CAMA Minor Permit Application materials
12. AEC Hazard Notice signed by Petitioner on September 15, 2021
13. August 31, 2021 Letters to adjacent riparian property owners James and Sherri Ruddy and James Peterson providing notice of the permit application and tracking information
14. September 24, 2021 CAMA Minor Permit denial letter
15. Sightline Setback drawing
16. Certificate of Occupancy for 704 Shoals Watch dated September 13, 2006 and Building Permit No. 040045
17. Certificate of Occupancy for 710 Shoals Watch dated May 28, 2008, Building Permit No. 040086, and CAMA Minor Permit No. BHI-2004-09
18. Notice of Variance Petition and tracking information
19. Olsen Associates, Inc. photo of Lot with MHWL overlay from November 2021 aerial and survey data
20. Drawing of Spogli Cottage by Cothran Harris Architecture using November 2021 Aerial and Survey data including MHWL and the first line of vegetation flagged by Stephen Boyett on September 1, 2020 and verified on July 22, 2021
21. Photos of 706 Shoals Watch taken July 16, 2021
22. Photo of Lot taken November 25, 2021
23. Powerpoint with ground and aerial photos of the Lot including historic shoreline imagery for 2010, 2012, 2016 and 2020 from DCM's maps

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 allowed the Petitioner to proceed with this variance request without requiring that the Petitioner request a variance from the Village's street-side or side-yard setbacks as required in 15A N.C. Admin. Code 07J .0701.
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(a) (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 any of the exceptions to the setback listed in 15A N.C. Admin. Code 07H .0309(a). "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, the 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 any 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 Commission’s ocean hazard setback rules will cause unnecessary hardships.

The first requirement imposed by CAMA is that the Petitioner must show that the strict application of the Commission’s rules will cause unnecessary hardships. Based on the stipulated facts and stipulated exhibits, the Commission holds that the Petitioner has shown the strict application of the Commission’s ocean hazard setback rules in 15A N.C. Admin. Code 07H .0306 and 07H .0309 will cause Petitioner unnecessary hardship. Specifically, without a variance, Petitioner will not be able to build the proposed single-family residence at 706 Shoals Watch, Bald Head Island.

On August 31, 2021, Petitioner, through its agent, Cothran Harris Architect, applied for a CAMA Minor Permit for the construction of a 4,500 square-foot single-family residence on the Lot. *See* Stipulated Fact 21; Stipulated Exhibit, CAMA Application (DCM Staff Recommendation, pp 36-39)

On September 24, 2021, Stephen Boyett, Bald Head Island Development Services Director and CAMA Local Permit Officer, denied the CAMA Minor Permit application as inconsistent with 15A N.C. Admin. Code 07H .0306. *See* Stipulated Fact 25; Stipulated Exhibit, Permit Denial Letter (DCM Staff Recommendation, p 24-25). In the denial letter, Mr. Boyett notes that the Commission’s rule at 15A N.C. Admin. Code 07H .0306 requires that the construction of a new single-family residence must “meet the required development setback (30 times the shoreline erosion rate of 9 feet/year from the First Line of Stable Natural Vegetation).” *Id.* Because the proposed single-family house did not meet this requirement and extended oceanward of the ocean hazard setback, the permit application was denied. *Id.*

In the vicinity of the proposed project, the Lot is twenty to twenty-nine feet above sea level. Based on its platted dimensions, the Lot is approximately 540 feet in length and 116 feet in width, comprising 59,116 square feet (including a 31,071 square foot conservation easement) based on its platted dimensions. *See* Stipulated Facts 7 & 8; Stipulated Exhibits, CAMA Permit Application, 2003 Plat Map, and 2020 Cavedo Land Survey (DCM Staff Recommendation, pp 55, 56, 66-67). That number may be different today as the boundary of the lot at the high water mark (pursuant to the deed) has changed over the years. *See e.g.*, Stipulated Facts 10 & 11; Stipulated Exhibit Shoreline (DCM Recommendation, p 59)

The applicable 270-foot setback, which is based on the FLSNV at the time of the permit application, leaves Petitioner with a very small buildable area on the Lot. *See* Stipulated Fact 24; Stipulated Exhibit, Site Plan submitted with the CAMA minor permit application (DCM Staff Recommendation, p 104, 120). The Site Plan shows the 30-foot minimum building setback required by the Village as a red line and the 270-foot CAMA setback from the FLSNV as a blue

line. From a review of the Site Plan, it is clear that seeking a variance from the Village's 30-foot setback would realistically increase the building envelope on site by less than thirty additional feet landward since the residence could not be constructed on the street-side property line. Without a variance from the Village or the Commission, the area available for building on the Lot at this time based on the FLSVN's location at the time the permit decision was made is a very small triangular area not suited for a single-family residence.

Under 15A N.C. Admin. Code 07H .0309, a CAMA permit could be issued without requiring a variance for non-residential development within the setback area on the Lot including campsites, driveways, parking areas, elevated decks up to a 500 square foot footprint, unenclosed uninhabitable gazebos not to exceed a footprint of 200 square feet, single-story sheds, sand-fencing, swimming pools, and temporary amusement stands. Stipulated Fact 32. However, the Petitioner has not requested a CAMA permit for any of these non-residential developments.

For these reasons, the Commission holds that strict application of the ocean hazard setback rules based on conditions on the Lot at the time the permit decision was made will cause the Petitioner unnecessary hardship and holds that the Petitioner has met the first factor without which a variance cannot be granted.

b. Petitioner has failed to demonstrate that the hardship 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.G.S. § 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,³ 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

³ In *Williams*, the Commission also denied the variance request based on the first requirement holding that the strict application of its rules did not cause unnecessary hardships as Mr. Williams owned another lot and thus had an alternative site for the proposed facility that "would reduce or eliminate the wetlands impacts of the project." On appeal, the court reversed the Commission's denial and remanded, based on its analysis "that whether or not the landowner owns other property is irrelevant and insufficient to support [the Commission's] conclusions of law. *Williams*, 144 N.C. App. at 485, 548 S.E.2d at 797-98. The appellate court further held that there were no findings of fact to support the Commission's decision nor substantial evidence as required by N.C.G.S. § 150B-51(b) to show that due to the strict application of CAMA, the landowner was unable "to make reasonable use of his property." *Id.*, 144 N.C. App. at 487, 548 S.E.2d at 798.

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 is 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.

1. The Petitioner's Position.

In this case, the Petitioner argued that hardships are caused by conditions peculiar to the Lot based on the following conditions: First, the Petitioner claims that the setback line for the proposed development was determined at a time when the lot was most eroded and since that time the Lot has been the recipient of a periodic sand replacement project, the neighbor has planted vegetation in front of the Lot, and although the FLSNV has not yet returned to a more oceanward location, it is likely that in the future the location of the FLSNV will move waterward and the proposed project will be in compliance with the 270-foot setback requirement. *See* Petitioner's Position (DCM Staff Recommendation, p 12). Second, the Petitioner claims that the erosion rate on this Lot is particularly high compared with other lots. *Id.* Third, the Petitioner claims that the Commission's rules make no allowance for the elevation of the site which at twenty to twenty-nine feet elevation at the location of the proposed development provides a "peculiarly protected and safe location." *Id.*

2. DCM's Position

In its Staff Recommendation, the DCM responds to Petitioner's arguments by pointing out that the vegetation line used for permitting is determined by the LPO when a permit application is submitted. The Commission's rules require a setback determination based on the structure size and corresponding erosion rate in that location at the time of permit application. Oceanfront setback determinations for development permits are conditioned to be valid for 60 days, after which time, if development has not begun, a new setback determination is required per 15A N.C. Admin. Code

07J .0403(d). This rule protects against possible changes in the vegetation line that can occur over short time periods due to the dynamic nature of the oceanfront shoreline. *See* DCM’s Position (DCM Staff Recommendation, p 12-13).

DCM responded to the Petitioner’s claims that future conditions may be more favorable given the 2021 nourishment project and planted vegetation, by reminding the Commission that when the sand placement has increased the oceanward end of a lot, the vegetation line may move (artificially) seaward after the beach nourishment project. This new vegetation line may not be a good indicator or reference feature for construction setbacks unless a community presents a plan to the Commission for maintaining the new beach profile over time. Therefore, in areas within the boundaries of a large-scale beach fill project, the Commission’s rules use the vegetation line that existed within one year prior to the onset of project construction or the “Static Vegetation Line”⁴ as the reference point for measuring oceanfront setbacks in all locations where the pre-project vegetation line is landward of the post-project vegetation line. *Id.*

Finally, DCM explained that the proposed building does not meet the oceanfront construction setback from the current vegetation line or the Static Line in this case. *See* Stipulated Fact 14; DCM Staff Recommendation, p 58. DCM also pointed out that erosion along this stretch of shoreline has been extremely variable based on records going back to 1934. *See* Stipulated Fact 15; DCM Staff Recommendation, p 59. Finally, DCM argues that although the Lot has twenty to twenty-nine feet of elevation, that is not sufficient to protect against erosion. *Id.*

⁴ The Commission may grant an exception under 15A N.C. Admin. Code 07J .1200. But no exception had been granted at this location at the time the permit application was received.

3. The Commission holds that any hardships are not caused by conditions peculiar to the property.

Based on the Stipulated Facts and Stipulated Exhibits, the Commission finds that the Petitioner has failed to establish that any hardships are based on conditions peculiar to the property. The Petitioner's position on this factor is based on a misunderstanding of the purpose of the coastal management program that the North Carolina General Assembly entrusted to the Commission. Under CAMA, the General Assembly required the Commission to identify policies and guidelines to guide development on the ocean beaches which it considers "[n]atural-hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property." N.C.G.S. §113A-113(b)(6). The Petitioner is aware that his property is located in the Ocean Hazard Area of Environmental Concern. As recently as 2021, the Petitioner acknowledged that the erosion rate on his Lot is nine feet per year and the shoreline could retreat landward as much as 860 feet as a result of a major storm. *See* Stipulated Exhibit AEC Hazard Notice included in the CAMA Permit application (DCM Staff Recommendation, p 71).

a) The Commission's setback rules are applied at the time a permit is requested.

The purpose of the Commission's oceanfront setback rules is to establish a setback line for development protective of life and property at the time the development is proposed. The Commission rules provide that a setback is determined based on the FLSNV. This is defined by the Commission as follows:

The vegetation line refers to the first line of stable and natural vegetation, which shall be used as the reference point for measuring oceanfront setbacks. This line represents the boundary between the normal dry-sand beach, which is subject to constant flux due to waves, tides, storms and wind, and the more stable upland areas. The vegetation line is generally located at or immediately oceanward of the seaward toe of the frontal dune or erosion escarpment. The

Division of Coastal Management or Local Permit Officer shall determine the location of the stable and natural vegetation line based on visual observations of plant composition and density. If the vegetation has been planted, it may be considered stable when the majority of the plant stems are from continuous rhizomes rather than planted individual rooted sets. Planted vegetation may be considered natural when the majority of the plants are mature and additional species native to the region have been recruited, providing stem and rhizome densities that are similar to adjacent areas that are naturally occurring. In areas where there is no stable and natural vegetation present, this line may be established by interpolation between the nearest adjacent stable natural vegetation by on-ground observations or by aerial photographic interpretation.

15A N.C. Admin. Code 7H.0305(5)(2020). At Petitioner's Lot, DCM determined that the newly planted vegetation is still in individual rooted sets and not yet stable. Therefore, this cannot be used as the FLSNV to determine the setback—although in the future it may become the FLSNV.

In this case, the erosion setback line was calculated from the FLSNV based on the long-term annual erosion rate. *See* 15A N.C.A.C. 7H.0306(a)(1), (5)(A). At the time the permit application was evaluated, this rate was nine feet per year and resulted in a 270-foot setback. Stipulated Facts 11 & 24. These rules are consistently applied to every applicant seeking a development permit based on the size of the proposed structure size and erosion rate at the site at the time of the permit application. There is nothing peculiar about this property that causes the Commission's rules to be applied differently to this property than to others similarly situated.

As DCM points out, oceanfront setback determinations for development permits are conditioned to be valid for 60 days, after which time, if development has not begun, a new setback determination is required per 15A N.C. Admin. Code 07J .0403(d). This requirement in the Commission's rules addresses possible changes in the vegetation line that can occur over short time periods due to the dynamic nature of the oceanfront shoreline. Any assertion that because the

vegetation line used for permitting was determined by the LPO when the vegetation line was at its most landward location is a “condition peculiar to the property” is incorrect. The Commission’s setback rule is always applied based on the condition of the property at the time the application is submitted and reviewed.

b) The Commission’s setback rules are not applied based on past conditions.

It would be absurd to apply the setback rule for construction on the Lot today based on the setback at the time the property was purchased or at any other time as the erosion rate has changed over time.⁵ It is likely that the applicable setback when the property was purchased would have allowed the construction of a single-family residence such as that contemplated by the Petitioner in this request. *See* Stipulated Exhibit, Plat Map (DCM Recommendation, p 55).

Since the date of purchase, the size of the Lot has also changed because the Deed to the Petitioner in 2003 from Bald Head Island Limited conveyed title “to the high water mark of the Atlantic Ocean.” *See* Stipulated Exhibit, General Warranty Deed (DCM Staff Recommendation, p 31-32, 53-55). The mean high water mark is a moving boundary. “Mean high water mark” is not defined by statute in North Carolina.” *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 82, 780 S.E.2d 187, 190 (2015) However, our appellate courts have explained that “the ‘foreshore,’ or ‘wet sand beach,’ is the portion of the beach covered and uncovered, diurnally, by the regular movement of the tides.” The landward boundary of the foreshore is the mean high water mark, and this is defined “as the average of all high tides over a period of 18.6 years.” *Nies*, 244 N.C. App. at 82,

⁵ At the Lot, the current applicable long-term average erosion rate is nine feet per year. The erosion rate for the Lot adopted in 1997 and applicable in 2003 (the year Petitioner purchased the Lot) was eleven feet per year. The erosion rate for the Lot adopted in 2004 was fifteen feet per year. The erosion rate for the Lot adopted in 2013 was ten and a half feet per year. Stipulated Fact 11.

780 S.E.2d at 190 citing *Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970). On this shoreline, the location of the mean high water has changed over time and in November 2021, the surveyed mean high water level at the Lot was approximately 187 feet oceanward from the vegetation line and the oceanward point of the proposed building was approximately 408 from the MHWL. Stipulated Fact 10; *See also*, Stipulated Exhibit, Shoreline from 1938-2021 (DCM Recommendation, p 59). However, the impact of the changing location of the mean high water mark on this Lot is similar to the impact on the other properties on this volatile shoreline. *Id.* The mean high water mark and the FLSNV refer to different lines on the shoreline. However, both can and have changed over time. Based on the evidence in this case, the impact of these lines is common to the properties on this shoreline.

It would be contrary to the Commission's setback rules to make a permit decision today based on the location of the setback on the date when the neighboring houses were built. The CAMA Minor Permit for 704 Shoals Watch could not be located but based on the Certificate of Occupancy issued on September 13, 2006, it likely would have been issued in 2006. At the time it was built, the 5,342 square foot home would have been subject to an erosion rate of fifteen feet per year and a setback factor of thirty times for a setback from the vegetation line of 450 feet. Regardless of size, the Commission's rule at the time only required a setback factor of thirty times for residential structures. (The Commission's setback rules now apply setback factors based on size as opposed to use.) The Commission was not provided with evidence regarding the setback distance applied in authorizing this construction pursuant to a CAMA permit. *See* Stipulated Fact 28. The evidence regarding the adjacent property at 704 is not relevant to the instant case except to the extent that this information indicates different conditions existed on the shoreline when that

house was permitted.

The home at 710 Shoals Watch received a Certificate of Occupancy on May 28, 2008. The CAMA Minor Permit was issued September 14, 2004. When the CAMA Permit was issued, the 5514 square foot home would have been subject to an erosion rate of eleven feet per year and a setback factor of 30 times for a setback from the vegetation line of 330 feet. The CAMA Permit, however, only required that the proposed structure meet a 250-foot setback. See Stipulated Fact 29. The reason for this deviation was not provided to the Commission. Thus, information regarding the adjacent property at 710 is not relevant to the instant case except to the extent that this information indicates different conditions existed on the shoreline when that house was permitted.

The policy behind the Commission's setback rule can best be understood by considering what could happen if the rule were applied in some other fashion. For example, if the project were permitted based on the setback line twenty years ago when the property was purchased or some other time in the past, this could result in the proposed single-family residence being constructed in a location on the shoreline which is underwater or on the wet sand beach at the time the application is submitted. *See* Stipulated Fact 15, Stipulated Exhibit, Shorelines (DCM Staff Recommendation, p 59).

A review of the 2020 Erosion Rate Study provided to the Commission as a Stipulated Exhibit, shows twelve of the lots platted in the vicinity of Petitioner's Lot. On these twelve lots, only three property owners have built single-family residences on this volatile shoreline. *See* Stipulated Exhibit 2020 Erosion Rate Study (DCM Recommendation, p 57). In addition, a stipulated exhibit provided to the Commission shows the shoreline in the area of the Lot from 1934 through 2020 based on the wet/dry line on historic aerial images determined and digitized by DCM.

The location of the shoreline over this almost ninety-year period has “moved in a landward (NE) direction resulting in an erosional trend relative to existing structures.” *See* Stipulated Fact 15; Shoreline Exhibits showing digitized wet/dry line and photos labeled Figures 4 and 5 showing the Cape Fear Shoreline near the point and Lot from 2003 to 2020 (DCM Recommendation, pp 43-44, 59). In 2020, the wet/dry line was at its most landward position, thereby reducing the area of the Lot landward of the wet/dry line. (*Id.*, p 59). However, the evidence before the Commission reflects that the eroded shoreline is not peculiar to the Lot but similarly impacted the other properties on this shoreline.

c) The impact of the 2021 beach renourishment project is not a condition peculiar to Petitioner’s Lot.

The Petitioner also claims that the 2021 nourishment project is a condition peculiar to the property because it caused the Lot to accrete “approximately 140 feet oceanward.” Stipulated Fact 19. Specifically, in the Spring of 2021, the sand was placed on the Lot. “As a result of the sand placement project, the mean high water line (as opposed to the FLSNV on the Lot) accreted approximately 140 feet as shown on the schematic prepared by Olsen Associates, Inc. which depicts the May 2021 condition of the beach.” *See* Stipulated Exhibit, Affidavit of Stephen Boyett, ¶ 8; Stipulated Exhibit, Comparison of November 2020 and November 2021 shoreline prepared by Olsen Associates, Inc (DCM Staff Recommendation, p 42, 60, 65). The Bald Head Island Beach Monitoring Program Profiles for 206+00 show that the elevation of the beach was highest immediately following the sand placement and had decreased by November 2021 although it was still higher than before the sand placement. *See* Stipulated Exhibit Beach Profiles (DCM Staff Recommendation, p 61).

However, although the nourishment project moved MHW, the FLSNV has not moved

significantly waterward. Over time, the nourishment along with the planting by the Petitioner's neighbor may cause the FLSNV to slowly move waterward. This has not happened yet. Moreover, nothing in the record indicates that this Lot was impacted any differently by the nourishment project than other properties on the shoreline. *See* Stipulated Fact 15, Stipulated Exhibit Shoreline Exhibit (DCM Staff Recommendation, p 59). This is a moving shoreline.

In the past, this Lot has had erosion rates as high as 15 feet per year. Stipulated Facts 11 & 12; Stipulated Exhibits 2020 Erosion Rate Study and Shoreline Exhibit (DCM Staff Recommendation, pp 42-44, 57, 58, 59). As seen from the record, this is common to the entire shoreline which has undergone significant erosion and accretion. From the record evidence and stipulated facts, the Commission concludes that erosion and accretion have not impacted this Lot any differently than it has impacted the rest of the shoreline in this area. Therefore, erosion and accretion on this Lot are not conditions peculiar to the property that would meet the requirement for a variance.

d) The possible future location of the FLSNV is not a condition peculiar to this Lot.

Similarly, it would be inconsistent to apply the Commission's setback rules based on the assumed location of the vegetation line at some unknown time in the future. *See Williams*, 144 N.C. App. at 488, 548 S.E.2d at 798 (The record failed to show how quickly coastal wetlands will emerge after structures have been removed and there was no substantial evidence that any conditions peculiar to the land (i.e., lack of coastal wetlands) had dissipated due to the long absences of residences on the property.). In this case, there is evidence before the Commission that the Petitioner's neighbor has planted vegetation extending in front of the Petitioner's Lot. Stipulated Fact 30; Stipulated Exhibit, Photo showing planted vegetation. (DCM

Recommendation, p 117) However, there is no evidence before the Commission regarding when the planted vegetation will naturalize which is required under the Commission's definition of the FLSNV or its future location.⁶ *See* 15A N.C. Admin. Code 07H .0305(5).

Moreover, evidence in the record indicates that even if there have been gains, artificial gains cannot be maintained unless sand continues to be placed on the oceanfront at the Site. The Village has had a sand replacement plan since 2002 and sand was placed in front of this Lot in 2021. Stipulated Facts 19-20; Stipulated Exhibit, Boyett Affidavit (DCM Staff Recommendation, p 62-63). The record evidence indicates that after the initial sand placement in spring 2021, the elevation gain had decreased by November 2021. *See* Stipulated Exhibit, Bald Head Beach Profile by McKim & Creed (DCM Staff Recommendation, p 61). Because of the potentially temporary benefits of sand placement, in areas within the boundaries of a large-scale beach fill project, the vegetation line that existed within one year prior to the onset of project construction is established as the reference point for measuring oceanfront setbacks in all locations where it is landward of the post-project vegetation line. 15A N.C. Admin. Code 07H .0305(6). The Commission's rules take into account that a post-project vegetation line may not be a good indicator or reference feature for construction setbacks unless a community has a static line exception (which the Village does not) or receives approval of a beach management plan from the Commission that would maintain the new beach profile over time. These rules are applied coast wide. Therefore, this is not a condition peculiar to the Petitioner's property.

⁶ If a new permit application is submitted at some future time when the FLSNV is located further waterward on the Petitioner's Lot, then the Commission's setback rules will be applied based on the conditions existing at that time. The proposed development may be permitted if it meets the setback at that time.

At the time of the Petitioner's permit application, the proposed development did not meet the oceanfront construction setback from either the vegetation line or the Static Line in this case. Stipulated Facts 14, 24. The fact that the mean high water line on the Lot accreted following sand placement as part of the Village's sand replacement plan is not a condition peculiar to the property as the sand placement plan addresses the ocean shoreline throughout the Village and the Commission's rules are applied consistently to each property based on the conditions present at the time of the application.

e) The elevation is not a condition peculiar to the Lot since property conditions are accounted for by the Commission's rules.

The Petitioner also argues that the Lot's elevation of twenty to twenty-nine feet at the building site is a condition peculiar to the property insofar as it provides more protection than is available to properties located at lower elevations. However, the Commission's setback rules are not based on elevation. Any protection provided by the elevation of the lot is already accounted for in the Commission's rules. Because the setback is based on the erosion rate, if the elevation of a property is high enough to protect against erosion, then the rate of erosion on the property will be lower as past shorelines are used to calculate the long-term erosion rate. As a result, when a setback is calculated using the erosion rate as required by the Commission's rules, a lower setback will be calculated as a result of the protection provided by the elevation in the past. This formula is applied based on conditions present at a site at the time a permit application is submitted. There is nothing about the elevation at the Petitioner's Lot which impacts the application of the Commission's rules differently than when the rules are applied to other properties. Therefore, the elevation is not a condition peculiar to Petitioner's Lot insofar as such differences in conditions are anticipated and accommodated by the uniform application of the Commission's rules.

* * * * *

For all these reasons, the Commission affirmatively finds that Petitioner has failed to demonstrate that this hardship results from conditions peculiar to the property. Without meeting each of the requirements for a variance, a variance request cannot be granted. Therefore, the Petitioner’s failure to show that any hardship is caused by conditions peculiar to his property prevents the Commission from granting a variance in this case.

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

As to the third factor, the Commission affirmatively finds that the Petitioner has demonstrated that the hardships do not result from any action taken by the Petitioner. Specifically, the Petitioner has not caused the erosion on the Lot. Major storm events, beginning with Hurricane Matthew in 2016 through Hurricane Isaias in the fall of 2020 caused South Beach, including the eastern portion of the South Beach shoreline in the front of the Lot, to recede. Stipulated Fact 15. In 2021, the Petitioner acknowledged that in a major storm, the shoreline at his property could move 860 feet landward. Stipulated Exhibit, Hazard Notice, (DCM Staff Recommendation at 71). One effect of this hurricane-induced erosion was to push the natural stable vegetation line in the area of Petitioner’s Lot landward. Stipulated Fact 15, Stipulated Exhibit showing the Shoreline, (DCM Staff Recommendation, p 59).

The natural conditions which have eroded and accreted the shoreline and caused huge variations in the location of the wet/dry line in this ocean hazard area of environmental concern have over the years resulted in substantial changes to the buildable areas on the properties located on this shoreline. This changing shoreline also had implications for the location of the FLSNV from which the setback is determined. For example, in 2006 and 2008, single-family residences

were constructed on adjacent properties to the Lot. It is likely that if the Petitioner had submitted a permit application when he bought the property in 2003, he could have constructed a single-family residence as well.

The Commission agrees that given the volatile nature of this ocean hazard area, the Petitioner did not cause any hardship. Thus, the Commission affirmatively finds that Petitioner has demonstrated that he has met the third factor required for a variance. However, Petitioner is required to meet all of the variance requirements. Therefore, this is not sufficient to support a grant of the variance request.

- 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 last requirement for a variance is that a petitioner must 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 Management Objective for the Ocean Hazard Area of Environmental Concern provides that the spirit, purpose, and intent of the Commission's rules and standards are 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). In his request, the Petitioner asserts that the variance requested is consistent with the spirit, purpose, and intent of the ocean hazard setback rules and standards prescribed by the Commission at 15A N.C. Admin. Code 07H.0306, secures public

safety and welfare, and preserves substantial justice.

In support, the Petitioner indicates that the house he intends to construct is in keeping with the structures in the area, and will be built in line with (i.e., not oceanward of) the immediately adjacent houses on each side. Petitioner's Position, (DCM Staff Recommendation, p 12) The Lot is approximately 540 feet in length to mean high water and the proposed structure will not encroach on the dry sand beach.

The second assessment to be made is whether the variance proposed by the Petitioner will impact public safety and welfare. Petitioner submits, and the Commission agrees that the proposed development if granted a variance, will have no adverse effect on public safety and welfare.

Finally, the Commission agrees that the request will preserve substantial justice. The Lot was platted and sold by the original developers of Bald Head Island as a "buildable lot." Yet, in 2003, the shoreline experienced eleven feet of erosion and in 2004, the erosion rate had increased to fifteen feet a year. Stipulated Fact 11. Petitioner asserts he does not seek to create a buildable lot where one did not previously exist, nor does he seek to build a residence different from those found on Petitioner's neighbors' lots.

Alternatively, at the current time, the Lot cannot be used to build any residence although other uses are permissible. This large, 1.36 acres Lot has a setback line drawn based on the FLSNV at the time the application was submitted before the recent sand placement project was completed and following several years of bad hurricanes.

The Commission agrees that construction of the proposed residence would allow Petitioner the benefit of his oceanfront lot and allow him to make use of the beach and public trust resources. Further, based on the affidavit of Mr. Boyette, it appears that the Lot will continue to benefit from

sand placement projects. Pursuant to the 2000 Sand Management Plan between and among the U.S. Army Corps of Engineers, Bald Head Island, Oak Island, Caswell Beach and the State of North Carolina, sand from maintenance dredging of the Wilmington Harbor Shipping Channel is placed on the beaches of Bald Head Island during two of the three dredging cycles, with the third cycle going to Oak Island and Caswell Beach. In the third dredging cycle where sand is placed on Oak Island and Caswell Beach, the Village has self-funded a sand placement project with a private contractor to maintain its beaches and its engineered beach profile. The Village also has options under the Commission's rules relating to approved beach plan. *See* N.C. Admin. Code 07H .0306(a)(8).

For these reasons, the Commission holds that the Petitioner has demonstrated that he has met the fourth factor required for a variance. However, the Petitioner is required to meet all of the variance requirements. Therefore, this is not sufficient to support a grant of the variance request.

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 .0306 is DENIED.

This the 10th day of October 2022.



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:

	<u>Method of Service</u>
<u>Attorney for Petitioner:</u> Charles Baldwin, IV, Esq. Brooks Pierce 115 North 3rd Street Suite 301 Wilmington, North Carolina 28401	Certified U.S. Mail, return receipt requested, and Electronically: cbaldwin@brookspierce.com
<u>Attorney for NC DCM</u> Christine A. Goebel Assistant General Counsel NC Department of Environmental Quality 217 West Jones Street Raleigh, NC 27603	Electronically: Christine.goebel@ncdenr.gov
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This the 10th day of October 2022.



Mary L. Lucasse
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