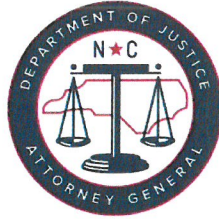


JOSH STEIN  
ATTORNEY GENERAL



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

## Memorandum

To: N.C. Coastal Resources Commission

cc: Braxton Davis, Executive Director, DCM  
Mike Lopazanski, Policy & Planning Section Chief, DCM  
Christine A. Goebel, Esq., Counsel to DCM

Fr: Mary Lucasse, Special Deputy Attorney General and Counsel to the Commission

Date: January 17, 2019

Re: The Riggings Homeowners, Inc.'s Request to revise the Final Agency Decision in CRC-VR-15-08

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On December 7, 2018, The Riggings Homeowners, Inc. ("The Riggings HOA") submitted its third annual update as required under the terms of the variance issued by the Commission in 2015. In that update, the Riggings HOA requested that the Commission revise the variance and remove the annual reporting requirement given the N.C. General Assembly's revisions to N.C. Gen. Stat. §113A-114(c1).

The Commission will make a final decision on this request at its February 2019 meeting. I have attached a draft revised final agency decision for your consideration and some other relevant documents.

Attachments:

1. Draft Revised Final Agency Decision in CRC-VR-15-08
2. Original Final Agency Decision in CRC-VR-15-08 issued December 14, 2015
3. December 7, 2018 letter to Braxton Davis from William Wright providing update

	1	
STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES COMMISSION
COUNTY OF NEW HANOVER	)	<b>CRC-VR-15-08</b>
	)	
	)	
IN THE MATTER OF:	)	<b>REVISED FINAL AGENCY DECISION</b>
PETITION FOR VARIANCE	)	<b>(February 21, 2019)</b>
BY RIGGINGS HOMEOWNERS, INC.	)	

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On December 7, 2018, Petitioner, the Homeowners Association for The Riggings (“the Riggings HOA”) submitted its third annual update as required by the Final Agency Decision issued in the above captioned case by the Coastal Resources Commission (“Commission”) on December 11, 2015 (“2015 Decision”) granting The Riggings HOA’s request for a variance. In its update, The Riggings HOA explained that, as a result of the enactment of Session Law 2018-14, any future request to repair or replace existing sandbags at its Kure Beach property, will not require a variance from the Commission. Before the North Carolina General Assembly’s revision to N.C. Gen Stat. § 113A-114(c1), such a request would have been time barred by the Commission’s rules. In its update, The Riggings’ HOA asserts that as long as a future request complies with the remaining requirements in the Commission’s rules, DCM will be able to issue a permit for repair or replacement of the existing sandbags without a variance. Accordingly, The Riggings HOA notified the Commission that its permanent solution to the erosion issues in front of its complex will be to repair and replace the existing sandbag structure on the site. Given the material change in the law since the 2015 Decision, the Riggings HOA respectfully requested that it no longer be required to report to the Commission on an annual basis.

The Commission considered the Riggings HOA’s request at its regularly scheduled meeting on February 27-28, 2019 at the History Museum of Carteret County in Morehead City, North Carolina. The Commission affirmatively agrees that under the revised statute, DCM may issue a

permit to the Riggings HOA for a permit to repair or replace the existing sandbags as long as the proposed work meets all requirements in the Commission's rules other than the time limitation which was the subject of the variance granted in the 2015 Decision. In addition, the Commission affirmatively finds that the changes to N.C. Gen Stat. § 113A-114(c1) enacted in 2018 are material changes that impact its 2015 Decision.

### **ORDER**

THEREFORE, the 2015 Decision granting The Riggings HOA's request for a variance from 15A NCAC 7H. 0308(a)(2) and 15A NCAC 7H .1705(a)(7) is hereby revised as follows:

1. The Findings of Fact and Conclusions of law in the 2015 Decisions are hereby incorporated by reference except to the extent that the Conclusions of Law are in conflict with the revised statute.
2. The Commission hereby revises the 2015 Decision and deletes Conditions 3 and 4. Accordingly, the temporary sandbags authorized by the variance are no long time limited in conformance with the revised statute and The Riggings HOA is no longer required to submit an annual written update to the Commission.

This revision to the 2015 Decision does not relieve Petitioner of the responsibility to obtain other required permits from the proper permitting authorities. This variance is based upon the Findings of Facts and Conclusions of Law incorporated, the stipulated facts and exhibits which make up the record, and the arguments presented in The Riggings HOA's December 07, 2018 annual report letter from William G. Wright to Braxton Davis, Executive Secretary of the Commission. The Commission reserves the right to reconsider its revision of the 2015 Decision if there is a material change to any of the facts or law upon which the revision was granted. .

This the \_\_ day of February, 2019.

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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 REVISED FINAL AGENCY

DECISION upon the parties by the methods indicated below:

The Riggings Homeowners, Inc.  
Dawn Gual, Registered Agent  
P.O. Box 1124  
Carolina Beach, NC 28428

Certified Mail/ Return Receipt  
Requested

William G. Wright  
Shipman & Wright, L.L.P.  
575 Military Cutoff Road, Suite 106  
Wilmington, NC 28405

U.S. Mail and Electronically at  
wwright@shipmanlaw.com

Christine A. Goebel, Esq.  
Assistant General Counsel  
N.C. Department of Environmental Quality  
217 West Jones Street  
Raleigh, NC 27603

Electronically at  
christine.goebel@ncdenr.gov

Braxton C. Davis  
Angela Willis  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

Electronically at  
braxton.davis@ncdenr.gov and  
angela.willis@ncdenr.gov

This the \_\_ day of February, 2019

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

STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES COMMISSION
COUNTY OF NEW HANOVER	)	<b>CRC-VR-15-08</b>
	)	
	)	
IN THE MATTER OF:	)	
PETITION FOR VARIANCE	)	<b>FINAL AGENCY DECISION</b>
BY RIGGINGS HOMEOWNERS, INC.	)	

On October 6, 2015, Petitioner, the Homeowners Association for The Riggings condominium development in Kure Beach, New Hanover County, submitted a request seeking a variance from Rule 15A NCAC 7H .1705(a)(7) to allow sandbags to remain on the beach for a period longer than is allowed by the rules of the North Carolina Coastal Resources Commission (“Commission”). The matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the Commission on November 17, 2015 in Atlantic Beach, North Carolina pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A NCAC 7J .0700, *et seq.* Assistant Attorney General Christine A. Goebel, Esq. appeared for the Department of Environmental Quality, Division of Coastal Management and William G. Wright, Esq. appeared on behalf of Petitioner.

Upon consideration of the record documents and the arguments of the parties, the Commission adopts the following:

**FINDINGS OF FACTS**

1. Petitioner Riggings Homeowners, Inc. (“Riggings HOA” or “Petitioner”) is a non-profit corporation organized under the laws of the State of North Carolina. “The Riggings” is also the name of the 48-unit residential condominium project bordering the Atlantic Ocean in Kure Beach, New Hanover County, North Carolina, whose unit owners are members of Riggings HOA.

2. The Riggings was constructed in 1985 near the boundary between the town of Kure Beach and the Fort Fisher State Historic Site. Immediately south of The Riggings is Fort Fisher, a North Carolina State Park, which is also located on the shoreline of the Atlantic Ocean.

3. The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.

4. In the 1920's the Board of County Commissioners of New Hanover County allowed a contractor to remove some of the coquina rock outcropping northeast of Fort Fisher for use in the completion of a section of U.S. Highway 421, a public project.

5. The contractor removed approximately 6,000 cubic yards of rock from a strip approximately 50 to 100 feet wide.

6. An intertidal rock outcrop near Fort Fisher, known as the Fort Fisher Coquina Outcrop Natural Area, was entered on the official North Carolina Registry of Natural Heritage Areas on February 6, 1982.

7. Among other things, coquina rock outcroppings can provide a partial natural barrier against beach erosion.

8. Currently some of these coquina rock outcroppings are within sight of The Riggings, and the southern portion of a large outcropping is situated in front of the northern section of The Riggings.

9. A large part of the rock outcroppings within sight of The Riggings was uncovered during Hurricane Floyd, and its vegetation was uprooted by the storm surge.

10. Since 2000, beach nourishment projects conducted by the U.S. Army Corps of Engineers have covered some coquina rock outcroppings north of The Riggings.

11. The first CAMA permits for sandbags at The Riggings were issued by the Local Permit Officer for the Town of Kure Beach.

12. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management ("DCM").

13. In 1994 DCM issued CAMA General Permit No. 13355-D, which authorized repair of the sandbags and the addition of new ones.

14. Permit No. 13355-D was modified in February 1995 to allow the filling of holes in the sandbag revetment with sandbags.

15. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, could legally remain in place until May 1, 2000.

16. In order to protect Fort Fisher from the effects of erosion from the Atlantic Ocean, the State of North Carolina erected a permanent revetment from July 1995 to January 1996.

17. At the time the revetment was erected, the general policy of the State of North Carolina did not permit the construction of hardened structures like the Fort Fisher revetment in recognition of the adverse erosion effects such structures can cause to adjacent properties. However, the revetment was constructed under an exception to this policy for the protection of federal and state historic sites, such as Fort Fisher.

18. Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of The Riggings increased, but since then the rate of erosion has decreased.

19. On May 26, 2000, the Commission granted a variance to the Riggings HOA extending the deadline for removing the sandbag to May 26, 2001. (Stipulated Exhibit 6, pp 164-68)

20. The Carolina / Kure Beach Renourishment Project of 2001 included a large part of Carolina Beach and 98 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.

21. The Riggings HOA made various attempts to get the United States Army Corps of Engineers to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts did not succeed.

22. The Corps of Engineers informed U.S. Representative Mike McIntyre by letter dated February 25, 2000, that the “primary reason that the (beach nourishment) project stops short of the Riggings is due to the intertidal coquina rock outcropping.” The letter further states that the “rock outcropping has been declared a natural heritage area by the North Carolina Natural Heritage Program and burying them was not an acceptable alternative.”

23. On February 4, 2002, the Commission granted a variance to the Riggings HOA, extending the deadline for removal of the sandbags until May 23, 2003. (Stipulated Exhibit 6, at 158-63)

24. On May 9, 2003, CRC signed an order granting a variance to allow the sandbags to remain in place until May 9, 2005. (Stipulated Exhibit 6, at 152-57)

25. After obtaining estimates for relocating the condominium, Riggings HOA sought financial assistance to relocate certain of the condominium buildings by contacting the North Carolina Division of Emergency Management (“NCDEM”), the Natural Heritage Trust Fund and DCM, and requested the Town of Kure Beach apply for beach access and/or FEMA grants.

26. In July 2004 the Town of Kure Beach was awarded a \$3.6 million FEMA grant to acquire a portion of the property on the ocean-side where some of the buildings comprising The



Riggings are located, once these buildings were relocated across the street. The grant included \$2.7 million dollars from FEMA, with the individual unit owners of The Riggings being required to contribute the remaining \$900,000.

27. In March 2005 Riggings HOA was working with architects and surveyors to finalize plans to rebuild across the street and to remove the current structures. It also had contractors ready to start construction once the planning was complete.

28. In its most recent variance order, dated April 25, 2005, CRC said the sandbags were to be removed “prior to the expiration of the FEMA grant.” (Stipulated Exhibit 6, at 145-51)

29. In order to comply with the provisions of the grant, Riggings HOA was required to obtain the unanimous consent of the unit owners. On May 1, 2006, Riggings HOA notified the Town of Kure Beach that twenty-four of the homeowners of The Riggings had voted not to accept the FEMA pre-disaster grant. Although it is not certain why each individual owner voted as he or she did, among the reasons owners may have voted against the grant were:

- a. Each unit owner would have been required to contribute approximately \$125,000 toward the cost of relocation and reconstruction. Some homeowners lacked the financial capability to relocate.
- b. There was no guarantee in the grant contract that the provisions of the grant, particularly the provision regarding the use of the oceanfront property, would not change.
- c. Some owners had been informed by the holders of their mortgages that no relocation of the units could occur without their consent, and some of those lenders had expressed concerns about whether that consent would be given.

30. Subsequently, DCM was notified on June 20, 2006, by the State Hazard Mitigation Officer of NCDEM that the grant had been terminated, notwithstanding its June 30, 2007 expiration date, and had been closed out June 1, 2006.

31. The Carolina / Kure Beach Renourishment Project of 2007 included a large part of Carolina Beach and 98 percent of Kure Beach, but again fell approximately 1,500 feet short of The Riggings.

32. Sometimes sandbags at The Riggings are buried under sand and sometimes they are exposed. This depends on the beach profile, which can change quickly.

33. A former member of the U.S Army Corps of Engineers is on record as stating that the Riggings sandbags have not had any deleterious effect on surrounding property nor have they come into contact with the Atlantic Ocean except during major storm events.

34. Whether the public can walk along the beach without detouring landward around the sandbags depends on the beach profile at the time, but even at high tide the public can get around the sandbags by going between the sandbags and The Riggings buildings closest to the ocean.

35. The Riggings HOA proposes that the sandbags remain in place until such time as their proposed Habitat Enhancement Project, a copy of which is incorporated herein by reference, and/or a renourishment project, either privately or publicly funded, has been completed.

36. Petitioner filed its fifth request for a variance in 2006. In conjunction with resolving two other legal cases, Petitioner and DCM Staff agreed to a set of stipulated facts in 2007, and the variance request was heard at the Commission's January 17, 2008 meeting. The Commission

found against the request of all four variance factors, and denied the variance through a written order dated January 31, 2008 (Stipulated Exhibit 6, at 172-85)

37. On March 7, 2008, a Petition for Judicial Review was timely filed by Petitioners pursuant to N.C. Gen. Stat. § 150B-45. On February 20, 2009, the Honorable Superior Court Judge Jay Hockenbury found that the CRC's denial of the Riggings variance request was i) based on an error of law, ii) was made upon unlawful procedure, iii) was not supported by substantial evidence in the record, and iv) was arbitrary and capricious. The court reversed the Commission's Order and remanded the matter back to Commission pursuant to the instructions contained in his Order. The CRC did not appeal from that Order, and the matter was remanded back to the Commission. (Stipulated Exhibit 6, at 199 - 212)

38. On April 29, 2009, Petitioner's variance request was reheard by the Commission. The Commission agreed with Petition on the second and third variance factors, but disagreed with Petitioner on the first and fourth variance factors. Accordingly, the Commission denied the variance through a May 21, 2009 Final Order. (Stipulated Exhibit 6, at 236-47)

39. On June 17, 2009, Petitioner timely filed a Petition for Judicial Review pursuant to N.C. Gen. Stat. § 113A-123 and § 150B-45, which was heard by Judge Hockenbury on March 12-13, 2012. Following that hearing, Judge Hockenbury entered a June 1, 2012 Order holding in pertinent part the Commission erred in concluding: (1) the Petitioner did not demonstrate strict application of 15A NCAC 7H.1705 would result in unnecessary hardship to the Riggings Property; and (2) that Petitioner did not meet the fourth element of the variance request: that the variance is consistent with the spirit, purpose, and intent of the rules, standards or order; will secure public safety and welfare; will preserve substantial justice and that the Commission's

decision is not supported by substantial evidence and there is substantial evidence to grant the variance. On some other matters, Judge Hockenbury found in the Commission's favor. Judge Hockenbury reversed the Commission's Order and remanded the matter back to Commission for a new hearing, consistent with the mandates and instructions contained within his Order. (Stipulated Exhibit 6, at 260-81)

40. On June 27, 2012, the Commission gave written notice of appeal to the North Carolina Court of Appeals, appealing Judge Hockenbury's June 1, 2012 Order. On June 29, 2012, Petitioner gave written notice of cross-appeal. Following Oral Arguments on April 10, 2013, the majority of the three judge panel of the North Carolina Court of Appeals ruled on August 6, 2013, affirming Judge Hockenbury's ruling. Judge Bryant filed a Dissenting Opinion. (Stipulated Exhibit 1)

41. On September 10, 2013, the Commission filed its Notice of Appeal based on the dissenting opinion of the Court of Appeals panel, and also petitioned the Court for discretionary review as to all other issues resolved adversely to the Commission. On September 24, 2013, The Riggings conditionally petitioned the Court for discretionary review as to the issues resolved adversely to the Riggings. (Stipulated Exhibit 2)

42. On January 24, 2014, the Supreme Court allowed both of the petitions for discretionary review of the Court of Appeals decision and the appeal. (Stipulated Exhibit 3)

43. On December 19, 2104 following oral argument, an equally divided panel of the North Carolina Supreme Court, with Justice Robert Hunter abstaining due to his participation on the panel of the Court of Appeals, affirmed the decision of the Court of Appeals. (Stipulated Exhibit 4)

44. The Petitioner's variance has been remanded back to the Commission, as noted in the April 9, 2015 letter to DCM Staff Counsel and Petitioner's Counsel from Commission Counsel Lucasse. (Stipulated Exhibit 5)

### **STIPULATED EXHIBITS**

Included with the Petition and the Staff Recommendation for the Commission's review were the following Stipulated Exhibits:

1. Decision of the NC Court of Appeals and Dissent, August 6, 2013;
2. CRC's Notice of Appeal and Petition & Riggings' Conditional Petition to the Supreme Court, September 10, 2013;
3. Supreme Court's Order granting both petitions, January 23, 2014;
4. Decision of the NC Supreme Court, December 19, 2014;
5. CRC Counsel's April 9, 2015 letter to DCM Counsel and Riggings' Counsel;
6. The Record on Appeal to the NC Court of Appeals (297 pages);
7. PowerPoint presentation.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. Petitioner has met the requirements in N.C.G.S. § 113A-120.1(a) and 15 NCAC

07J .0703(f) which must be found before a variance can be granted as set forth below.

**A. Strict application of the rules relating to temporary erosion control structures will cause Petitioner unnecessary hardships.**

The Commission affirmatively finds that strict application of 15A NCAC 7H. 0308(a)(2) and 15A NCAC 7H.1705 would cause Petitioner unnecessary hardship. The rules relating to temporary erosion control structures are designed to allow the temporary use of sandbags to counteract erosion, "but only to the extent necessary to protect property for a short period of time until the threatened structures can be relocated or until the effects of a short-term erosion event is

reversed.” 15A NCAC 7M .0200. Without the variance, Petitioner would not be able to keep the sandbags to protect their condominiums. In its recent variance request, Petitioner requests additional time to develop its proposed Habitat Enhancement Project and/or a renourishment project. In addition, Petitioner states, if a variance is granted and the sandbags are allowed to remain at the Site, this “will permit the residents of the Riggings Condominium time to explore alternative options . . . such as private renourishment of the beach.” (Attachment C to Staff Recommendation at 3)

The Commission, in its May 21, 2009 Final Agency Order, disagreed with Petitioner on this factor, and held that “Petitioner ha[d] not demonstrated that strict application of Rules 15A NCAC 7H .0308(a)(2) and 15A NCAC 7H .1705(a)(7) will result in an unnecessary hardship, as required by N.C.G.S. § 113A-120.1(a)” (CRC’s May 21, 2009 order, p. 6). While acknowledging Petitioner’s hardships from erosion and its resulting use of sandbags since 1985, along with Petitioner’s lack of success in its efforts to relocate the structures or be included in the Corps’ renourishment project, the Commission concluded that another variance from sandbag time limits to allow their continued use on the site for a time-period without an end point would not result in “unnecessary” hardships.

The Superior Court’s June 1, 2012 Order on Judicial Review reversed the Commission, and held that the Commission’s conclusion that “erosion is stable” was not supported by the record, was contradicted by the Stipulated Facts, and held that “even though the rate of erosion has decreased, there still is erosion of the shoreline at The Riggings.” (June 1, 2012 Order, p. 9) The Superior Court also determined that the Commission’s “unnecessary hardship” analysis improperly focused on the Riggings owners and their actions, and not on their property.

The Court of Appeals noted that there was a mutual disagreement of the parties of the meaning of the Stipulated Facts concerning the statements “erosion is stable” and “the rate of erosion is stable” and concluded that erosion was still occurring at the property. (Court of Appeals Decision, p. 16) The Court went on to hold that the Commission improperly based its consideration of this factor on the property owners, and not the property, in its unnecessary hardships analysis. (Id., pp. 18-19)

The 3-3 split at the Supreme Court (with Justice Hunter not participating) upheld the Court of Appeals decision “without precedential value” for the Court of Appeals’ reasoning. Given these appellate decisions and analysis, DCM did not recommend the Commission find against Petitioner on this variance factor.

For the reasons set forth above, the Commission affirmatively finds that strict application of the rule providing for the temporary use of sandbags would cause Petitioner unnecessary hardship in light of Petitioner’s request for time for the residents of the Riggings Condominium time to explore alternative options . . . such as private renourishment of the beach.” For these reasons, the Commission affirmatively finds that Petitioner has met the first factor without which a variance cannot be granted.

**b. Petitioner has demonstrated that the hardship results from conditions peculiar to Petitioner's property.**

The Commission affirmatively finds that Petitioner has demonstrated that the hardship results from conditions peculiar to the property. Specifically, Petitioner's property is located between the Fort Fisher revetment and the intertidal coquina rock outcropping. Based on the physical features adjacent to the Site, in the Commission’s Final Agency Order dated May 21, 2009, the Commission held,

The CRC concludes as a matter of law that Petitioner has demonstrated any hardship which might result from strict application of the time limits for use of sandbags as a temporary erosion measure, if any, would be from conditions peculiar to Petitioner's property such as the location, size, or topography of the property.

(CRC's May 21, 2009 order, pp. 8-9). As the Commission has previously found in Petitioner's favor on this variance factor, DCM recommended that the Commission again find in Petitioner's favor on this variance factor for the same reasons outlined in the Commission's May 21, 2009 Final Agency Order, and as directed by the Superior Court's June 1, 2012 Order on Judicial Review which was upheld by the Court of Appeals and the Supreme Court.

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

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

In the Commission's In the Commission's Final Agency Order dated May 21, 2009, the Commission held,

The CRC concludes as a matter of law that Petitioner has demonstrated any hardship which might result from strict application of the time limits for use of sandbags as a temporary erosion measure, if any, would not result from actions the Petitioner has taken. (SF 20-21, 25-31)

(CRC's May 21, 2009 order, p. 9) As the Commission has previously found in Petitioner's favor on this variance factor, DCM recommended that the Commission again find in Petitioner's favor on this variance factor for the same reasons outlined in the Commission's May 21, 2009 Final Agency Order, and as directed by the Superior Court's June 1, 2012 Order on Judicial Review which was upheld by the Court of Appeals and the Supreme Court.



For these reasons, the Commission affirmatively finds that Petitioner has demonstrated that the hardships do not result from actions taken by Petitioner. Therefore, Petitioner has met the third factor required for the grant of its request 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.**

In order to receive a variance, Petitioner must demonstrate (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 Temporary Erosion Control Structure Rule is to give Petitioner some time, but not an unlimited amount of time, to protect its property from erosion. *See* 15A NCAC 7H .0308(a)(2) and 15A NCAC 7H .1705(a)(7).

The Commission, in its May 21, 2009 Final Agency Order, disagreed with Petitioner on this factor, and held that "The proposed variance is inconsistent with the spirit, purpose, and intent of the CRC's rules because sandbags are intended to be a temporary erosion control structure and this sandbag revetment has been in place for almost 24 years." (May 21, 2009 Final Agency Order, p. 10) The Commission also held that the variance did not preserve public safety and welfare as it was difficult for the public to use this portion of the Public Trust Area because of the sandbags on the beach. (*Id.* p. 10) Finally, the Commission held that a variance would not preserve substantial justice because both the legislature and the Commission's express directive was that sandbags could only be used as a temporary erosion control structure. (*Id.*, p. 10)

The Superior Court's June 1, 2012 Order on Judicial Review reversed the Commission, and held that in addition to the Commission's focus on 15A NCAC 7M.0202(a) which limits

erosion control measures so that they are consistent with and minimize impacts to the public use of the beach, the Commission should give more weight to the factors in N.C.G.S. 113A-102, specifically focusing on minimizing the loss of private resources to erosion and reducing potential debris from the “potential destruction of The Riggings that can harm other structures and/or inhibit public access to the beach. (June 1, 2012 Order, pp. 16-18) The 2-judge majority opinion of the Court of Appeals upheld the Superior Court, but Judge Bryant drafted a separate dissent, questioning the majority’s application of the standard of review and stating that the Commission’s decision on the fourth variance factor was supported by “substantial evidence” as required. (Court of Appeals Dissent, pp. 2-4) The dissent concluded that the majority improperly substituted its own judgement for that of the Commission. (*Id.*)

The 3-3 split at the Supreme Court (with Justice Hunter not participating) resulted in the Court of Appeals decision being upheld “without precedential value.” In light of this appellate history, DCM recommended that the Commission find in Petitioner’s favor on this variance factor as long as reasonable and appropriate conditions and safeguards are included in the final agency decision.

#### **REASONABLE AND APPROPRIATE CONDITIONS AND SAFEGUARDS**

N.C.G.S. 113A-120.1(b) provides, “The Commission may impose reasonable and appropriate conditions and safeguards upon any variance it grants.” The Superior Court noted this provision with approval in its June 1, 2012 Order. (*See* Order at p. 8) In the current request, “The Riggings HOA proposes that the sandbags remain in place until such time as their proposed Habitat Enhancement Project, and/or a renourishment project, either privately or publically funded, has been completed.” (Stipulated Fact 35)

In its recommendation, DCM suggested that the Commission include conditions to safeguard the beach in front of The Riggings. Specifically, Petitioner shall remove any existing visible sandbag debris based on 15A NCAC 7H .0308(a)(G) which requires that “Prior to completing any erosion response project, all exposed remnants of or debris from failed erosion control structures must be removed by the permittee.” In addition, Petitioner shall ensure that any new sandbags placed shall be installed in conformance with the Commission’s sandbag rules, with the exception of the time limits in .0308(a)(2)(F). Instead, DCM recommended that the Commission place as a condition on its grant of Petitioner’s variance request a time limit of up to five (5) years from the date of the variance order for the replacement of any sandbag structures. Finally, DCM requested the Commission require that the HOA submit an annual written update of progress on alternative solutions to the Commission’s Executive Secretary. Such a condition would allow the Commission and Staff to follow Petitioner’s progress in seeking long-term solutions to address erosion at The Riggings, and could provide an opportunity for the Commission and Staff to suggest other avenues for addressing erosion as Petitioner moves toward achieving its proposed “Habitat Enhancement Project, and/or a renourishment project, either privately or publically funded.”

During the hearing on the variance request, Petitioner’s counsel agreed that the conditions proposed by DCM be included in any variance granted by the Commission.

For the reasons provided above, which include the conditions proposed by DCM, the Commission affirmatively finds that Petitioner's request to keep the sandbags for a limited period of time is consistent with the spirit, purpose, and intent of the Commission’s Temporary Erosion Control Structure Rule, will be protective of public safety and welfare, and will preserve

substantial justice by balancing private property interests with the longstanding right of the public to use the ocean beaches as long as Petitioner meets the conditions included in the variance.

**ORDER**

THEREFORE, the requested variance from 15A NCAC 7H. 0308(a)(2) and 15A NCAC 7H .1705(a)(7) is GRANTED subject to the following conditions:

1. Petitioner shall remove all exposed remnants of or debris from failed erosion control structures as required by 15A NCAC 7H .0308(a)(G) prior to completing any erosion response project;
2. Petitioner shall ensure that any new sandbags placed shall be installed in conformance with the Commission's sandbag rules, with the exception of the time limits in .0308(a)(2)(F);
3. The temporary sandbags authorized by this variance may only be left in place for a period of five (5) years from the date of this final agency decision (up to December 11, 2020);
4. The Board of the HOA shall submit a detailed annual written update to the Commission including information regarding the steps it has taken and the progress made on finding and implementing alternative solutions to address erosion at The Riggings. This annual update shall be provided on December 11 to the Executive Secretary of the Coastal Resources Commission at the following address:

Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

The granting of this variance does not relieve Petitioner of the responsibility to obtain other required permits from the proper permitting authority. This variance is based upon the Findings of Facts set forth above, the stipulated facts and exhibits which make up the record, and the arguments presented. The Commission reserves the right to reconsider the grant of this variance if there is a material change to any of the facts upon which it was granted. .

This the 11<sup>th</sup> day of December 2015.

*Frank D. Gorham III*

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Frank D. Gorham, III, Chairman  
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:

Riggings Homeowners, Inc.  
Dawn Gual, Registered Agent  
P.O. Box 1124  
Carolina Beach, NC 28428

Certified Mail/ Return Receipt Requested

William G. Wright  
Shipman & Wright, L.L.P.  
575 Military Cutoff Road, Suite 106  
Wilmington, NC 28405

U.S. Mail and Electronically at  
wwright@shipmanlaw.com

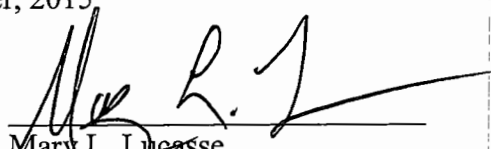
Christine A. Goebel, Esq.  
Assistant Attorney General  
N.C. Department of Justice

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Braxton C. Davis  
Angela Willis  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

Electronically at  
braxton.davis@ncdenr.gov and  
angela.willis@ncdenr.gov

This the <sup>14<sup>th</sup> 05</sup> 11<sup>th</sup> day of December, 2015.

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

# SHIPMAN & WRIGHT, L.L.P.

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Writer's email: [wwright@shipmanlaw.com](mailto:wwright@shipmanlaw.com)

December 7, 2018

**VIA USPS FIRST CLASS MAIL**

RECEIVED

Braxton Davis  
Executive Secretary of Coastal Resources Commission  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

DEC 10 2018

DCM-MHD CITY

Re: Annual Update on Alternative Solutions to Address Erosion at the Riggings

To the Honorable Coastal Resources Commission:

Please allow this letter to serve as the annual report by my clients The Riggings Homeowners, Inc. ("the Riggings HOA") in satisfaction of the condition of the Variance issued by the Coastal Resources Commission's (CRC) Final Agency Decision issued on December 11, 2015 seeking alternative solutions for erosion.

Since the last annual report, the North Carolina General Assembly has enacted Session Law 2018-114. Session Law 2018-114 amends N.C. Gen. Stat. section 113A-114 and provides at subsection (c1) in pertinent part:

(c1) The Commission may authorize the repair or replacement of a temporary erosion control structure that was originally permitted prior to July 1, 1995, if the Commission finds that (i) the structure is located adjacent to an intertidal marine rock outcropping designated by the State as a Natural Heritage Area . . . and (ii) the replacement structure will comply with all applicable laws and with all rules, other than the rule or rules with respect to which the Commission granted the variance, that are in effect at the time the structure is replaced.

The Riggings clearly meet all of the requirements of S.L. 2018-114. Pursuant to 15A NCAC 07J.0201, the Commission has delegated to the Division of Coastal Management

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December 7, 2018

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("DCM") the responsibility for issuing CAMA permits. Prior to the enactment of the S.L. 2018-114, DCM would have been required to deny a future request (beyond the present variance) for a permit to repair or replace the Riggings' sandbag structure as such a request would not have complied with the five (5) year time limit in 15A NCAC 7H.1705(a)(7). Accordingly, the Riggings would have likely been required to seek another variance from the Commission in the future. The impact of the session law is that now a permit to repair or replace the existing sandbags can be issued by DCM even if it would have been time barred (since that limitation is part of the rule from which the Commission granted a variance) as long the Riggings HOA's request complies with the remaining requirements in the rules. In sum, The Riggings will not need a variance for their sandbags to remain in place beyond five (5) years of the 2015 variance so long as they comply with the remaining rules. Accordingly, my clients are notifying the Commission that the Riggings HOA intends for the permanent solution to the erosion issues in front of its complex to be the repair and replacement of the existing sandbag structure on site.

Given the material change in circumstances and facts under which the variance was granted, the Riggings HOA respectfully requests that it no longer be required to report to the Commission on an annual basis. Please do not hesitate to have staff or your counsel contact me if the Commission needs additional information or if staff or your counsel would like to discuss this matter further. I look forward to the Commission's thoughts on this request.

With best wishes I am,

Sincerely,

  
William G. Wright

cc: Mary Lucasse via e-mail  
Christine A. Goebel via e-mail

RECEIVED  
DEC 10 2018  
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