



STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

ROY COOPER  
ATTORNEY GENERAL

P.O. Box 629  
RALEIGH, NC 27602

REPLY TO: CHRISTINE A. GOEBEL  
ENVIRONMENTAL DIVISION  
TEL: (919) 716-6600  
FAX: (919) 716-6767  
cgoebel@ncdoj.gov

TO: The Coastal Resources Commission

FROM: Christine A. Goebel, Assistant Attorney General *CSG*

DATE: November 3, 2015 (for the November 17-18, 2015 CRC Meeting)

RE: **Variance Request by The Riggings Homeowners Assoc., Inc. (15-08)**

Petitioner is the Homeowners Association for The Riggings condominium development in Kure Beach, New Hanover County, where it owns oceanfront property just north of Fort Fisher. Since 2000, when their original sandbag authorization expired, Petitioner has sought and has been granted four variances from this Commission to keep sandbags for a period longer than allowed by Rule 15A NCAC 7H .1705(a)(7), which limits sandbag use to up to 5 years. In January of 2008, the CRC denied a fifth variance request. On appeal, the Judge remanded the case to the Commission for rehearing. In April 2009, the Commission again denied this variance request. On appeal to Superior Court, the judge reversed the Commission's decision and remanded the case with orders to grant the variance. The Commission appealed the case to the Court of Appeals, where the majority of the Court upheld the Superior Court's Order, but where one judge dissented on one factor. The Commission appealed the case to the Supreme Court, which, on a tie vote, upheld the lower court, but without legal precedent. This fifth variance request is now before the Commission on remand, where the Petitioner seeks a variance to keep the sandbags in place longer, as described herein.

The following additional information is attached to this memorandum:

Attachment A: Relevant Rules  
Attachment B: Stipulated Facts  
Attachment C: Petitioner's Position and Staff's Responses to Criteria  
Attachment D: Petitioner's Variance Request Materials  
Attachment E: Stipulated Exhibits 1-5  
Attachment F: Stipulated Exhibit 6, Record on Appeal to NC Court of Appeals (297 pp.)  
Attachment G: Powerpoint  
cc(w/enc:) William Wright, Counsel for Petitioner, electronically  
Mary Lucasse, CRC Counsel, electronically  
John Batson, Town of Kure Beach CAMA LPO, electronically

**RELEVANT STATUTES AND RULES**

**ATTACHMENT A**

**N.C.G.S. 113A § 115.1      LIMITATIONS ON EROSION CONTROL STRUCTURES**

(a) As used in this section:

(1) “Erosion control structure” means a breakwater, bulkhead, groin, jetty, revetment, seawall, or any similar structure.

(2) “Ocean shoreline” means the Atlantic Ocean, the oceanfront beaches, and frontal dunes. The term “ocean shoreline” includes an ocean inlet and lands adjacent to an ocean inlet but does not include that portion of any inlet and lands adjacent to the inlet that exhibits the characteristics of estuarine shorelines.

(b) No person shall construct a permanent erosion control structure in an ocean shoreline. The Commission shall not permit the construction of a temporary erosion control structure that consists of anything other than sandbags in an ocean shoreline...

(b1) This section shall not be construed to limit the authority of the Commission to adopt rules to designate or protect areas of environmental concern, to govern the use of sandbags, or to govern the use of erosion control structures in estuarine shorelines.

**15A NCAC 7M .0200      SHORELINE EROSION POLICIES**

.0202 Policy Statements

(e) Temporary measures to counteract erosion, such as the use of sandbags . . . should be allowed, 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 are reversed. In all cases, temporary stabilization measures must be compatible with public use and enjoyment of the beach.

**15A NCAC 7H .1700            GENERAL PERMIT FOR EMERGENCY WORK  
REQUIRING A CAMA AND/OR DREDGE AND FILL  
PERMIT**

**15A NCAC 7H .1701            PURPOSE**

This permit allows work necessary to protect property and/or prevent further damage to property caused by a sudden or unexpected natural event or structural failure which imminently endangers life or structure. For the purposes of this general permit, major storms such as hurricanes, northeasters or southwesters may be considered a sudden unexpected natural event although such storms may be predicted or publicized in advance.

**15A NCAC 7H .1705            SPECIFIC CONDITIONS**

(a) Temporary Erosion Control Structures in the Ocean Hazard AEC

(1) Permittable temporary erosion control structures shall be limited to sandbags placed above mean high water and parallel to the shore.

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(7) Temporary sandbag erosion control structures may remain in place for up to five years or until May 2008, whichever is later, regardless of the size of the structure it is protecting if the community in which it is located is actively pursuing a beach nourishment project as of October 1, 2001. For purposes of this Rule, a community is considered to be actively pursuing a beach nourishment project if it has:

(A) been issued a CAMA permit, where necessary, approving such project,

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If beach nourishment or inlet relocation is rejected by the sponsoring agency or community, or ceases to be actively planned for a section of shoreline, the time extension is void for that section of beach or community and existing sandbags are subject to all applicable time limits set forth in Subparagraph (6) of this Paragraph.

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(10) The property owner shall be responsible for the removal of remnants of all portions of any damaged temporary erosion control structure.

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(15) Existing sandbag structures may be repaired or replaced within their originally permitted dimensions during the time period allowed under Subparagraph (6) or (7) of this Rule.

**STIPULATED FACTS**

**ATTACHMENT B**

**NOTE: Facts 1-35 are the facts upon which the variance was decided at both the January 2008 variance hearing and the April 2009 variance re-hearing. Additional facts below will describe what has happened since these facts were agreed upon in 2007.**

1. Riggings Homeowners, Inc. (“Riggings HOA”) 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. 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. In the 1920’s some of the coquina rock outcropping northeast of Fort Fisher was allowed by the Board of County Commissioners of New Hanover County to be removed by a contractor for use in the completion of a section of U.S. Highway 421, a public project.
4. The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide.
5. An intertidal rock outcrop community 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.
6. Among other things, coquina rock outcroppings can provide a partial natural barrier against the threat of beach erosion.
7. 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.
8. 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.
9. Since 2000, beach nourishment projects conducted by the U.S. Army Corps of Engineers have covered some coquina rock outcroppings north of The Riggings.

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10. The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
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. From July 1995 to January 1996, in order to protect Fort Fisher from the effects of erosion from the Atlantic Ocean, the State of North Carolina erected, or caused to be erected, a permanent revetment.
17. At the time that this 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 because of the recognition of the adverse erosion effects that 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 Coastal Resources Commission (“CRC”) granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag until May 26, 2001.
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.

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21. 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, CRC granted a variance to the Riggings HOA, extending the deadline for removal of the sandbags until May 23, 2003.
24. On May 9, 2003, CRC signed an order granting a variance to allow the sandbags to remain in place until May 9, 2005.
25. After obtaining estimates for relocating the condominium, Riggings HOA sought financial assistance in relocating certain of the condominium buildings by contacting the North Carolina Division of Emergency Management (“NCDEM”), the Natural Heritage Trust Fund and DCM, as well as requesting the Town of Kure Beach to act as applicant 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.”
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:

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a. Each unit owner would have been required to contribute approximately \$125,000 towards 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.

**NOTE: Facts 36-44 are new facts stipulated to by the parties which relate to the time period since Facts 1-35 were agreed to in 2007.**

36. The Petitioner filed its initial variance petition in 2006. In conjunction with resolving two other legal cases, the Petitioner and DCM Staff agreed to a set of stipulated facts in 2007, and

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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, a copy of which is attached as a stipulated exhibit.

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. A copy of this February 20, 2009 Order is attached as a Stipulated Exhibit.

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. A copy of this Order is attached as a Stipulated Exhibit.

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 CRC 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 pursuant to the instructions contained in his Order. A copy of this June 1, 2012 Order is attached as a Stipulated Exhibit.

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 3- judge panel of the North Carolina Court of Appeals ruled on August 6, 2013,



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affirming Judge Hockenbury's ruling. Judge Bryant filed a Dissenting Opinion. A copy of this Opinion and Judge Bryant's Dissent are attached as a Stipulated Exhibit.

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. A copy of the Notice and the Petitions are attached as Stipulated Exhibits.

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. A copy of this Order is attached as a Stipulated Exhibit.

43. Following Oral Arguments on October 6, 2014, an equally divided Panel of the 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 on December 19, 2104. A copy of this decision is attached as a Stipulated Exhibit.

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, a copy of which is attached as a Stipulated Exhibit.

ATTACHED STIPULATED EXHIBITS

1. Decision of the NC Court of Appeals and Dissent
2. CRC's Notice of Appeal and Petition & Riggings' Conditional Petition to the Supreme Court
3. Supreme Court's Order granting both petitions
4. Decision of the NC Supreme Court
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

## Petitioners' and Staff's Positions

## ATTACHMENT C

- I. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? If so, the petitioner must identify the hardships.**

**Petitioners' Position: Yes.**

Riggings Homeowner's, Inc. (herein "Riggings") applies to the Coastal Resources Commission of the State of North Carolina (herein "CRC") for a variance which would allow them to maintain temporary sandbags to protect their property longer than is allowed under the rules, and until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed. (*See* Variance Request and Proposed Facts; *see also* Record of Proceedings, p. 4-6 (Stipulated Facts), 18-24 (Variance Request)).

First and most importantly, both the Superior Court and the North Carolina of Appeals have conclusively held that strict application of sand bag rules will cause and have caused The Riggings to suffer unnecessary hardships. *See* Stipulated Exhibit 1 -- Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State, 747 S.E.2d 301, 308-09 (N.C. Ct. App. 2013) ("The Riggings suffered 'unnecessary hardships.'")<sup>1</sup>; *see also* Ex. 7 -- (Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State; 09-CVS-2761 -- June 1, 2012 Order of Judge Jay D. Hockenbury, p. 16) ("The CRC was required to find under the facts of this case, that element 1, 'Unnecessary Hardships,' was met as well.").

Further, in issuing the variance extensions to the Riggings in April 2005, May 2003, February 2002 and August 2000, the Commission has stated, that "the Riggings Condominium has been imminently threatened by erosion since 1985 and that the sandbag revetment in question has been used to protect it since that time." (*see Stipulated Exhibit 7, pp. 145-86, earlier orders*) Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that application of the rules to the Riggings' property would result in unnecessary hardship. (*Id.*)

Since the holdings of the North Carolina Appellate Courts and those previous Variance Orders, there has been no change in the unnecessary hardships the Riggings property will suffer if it is not granted a variance. Based on legally permissible criteria, Staff cannot demonstrate that the Riggings will suffer any less hardship now than they did previously and cannot articulate one factor which would justify their change in position that the strict application of the rules results in an unnecessary hardship to the Riggings property.<sup>2</sup> As such, no fundamental change has occurred

<sup>1</sup> The Court of Appeals opinion was affirmed *per curiam* by the North Carolina Supreme Court. *See* Stipulated Ex. 4 - - Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State, 367 N.C. 643, 766 S.E.2d 320 (2014).

<sup>2</sup> The only change that has occurred to the Riggings since its previous Orders is that some of the unit owners' denied

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to the Riggings property since their previous variance request, where this State's Appellate Courts have conclusively held and where the CRC and Staff previously found unnecessary hardships, which would be grounds for a change in position.

The stipulated evidence is that the threat to the Riggings property is as apparent and imminent as it was at those previous times when the previous variances were granted and, if anything, the situation has worsened. (*Id.* at p. 6-7) "The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time." (Stipulated Fact # 10) ("Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased") Without the sandbag revetment, the beach in front of the Riggings Condominium will be subject to increased erosion from nor'easters, hurricanes and other storms. Petitioner's continuing efforts to convince the U.S. Army Corps of Engineers to extend the Carolina/Kure Beach renourishment project have not succeeded so far, and nothing else has happened to reduce the erosion threat. (Stipulated Fact # 21) More importantly, there is no evidence in the record to support any conclusions that unnecessary hardships to Petitioner's property, based on the unique nature of the Property, would no longer exist with strict application of the rules.<sup>3</sup>

The strict application of these rules, which require removal of the sandbags, will cause serious damage and eventually destruction of the Riggings Condominium which will deprive Riggings' owners of *any* use of their property much less a reasonable one. This forced hardship upon the

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the FEMA grant for potential relocation, however pursuant to the aforementioned appellate decisions of this case and Judge Hockenbury's remand of this case, this is not a factor this tribunal can look at. Even if this tribunal were inclined to consider the FEMA Grant and the possibility of relocation as a factor or factors in their analysis, the uncontroversial evidence before the CRC was that acceptance of the FEMA grant by the Riggings was not possible. Stipulated Fact # 29 stated: (i) that the Riggings HOA, in order to accept the grant, was required to obtain the unanimous consent of the unit owners; (ii) that each unit owner would have been required to contribute approximately \$125,000.00 towards the cost of relocation and reconstruction; and (iii) that 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. (*Id.* at p. 6-7) In addition to these stipulated facts the Affidavits of Riggings homeowners demonstrate that they voted "No" towards accepting the FEMA Grant because they lacked the \$125,000.00 necessary for relocation. (*Id.* at p. 102-104) While only one homeowner vote in the negative was needed to turn down the FEMA grant, at least three homeowners voted "No" towards accepting the FEMA grant because they lacked the financial capability to provide the funds necessary for relocation. (R.O.P., pp. 102-104 (Affidavits of John Parnell, Patty Forest, and Sandy Lemma))

3 Pursuant to the Court of Appeals, the Supreme Court and Judge Hockenbury's Orders the proper inquiry in a variance request before the CRC is concerning the property and not the property owner. Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State, 747 S.E.2d 301, 307 (N.C. Ct. App. 2013) ("the Commission argues the trial court erred by holding the Commission improperly based its first variance factor determination on the property-owner rather than the property. We disagree."), *aff'd*, 367 N.C. 643, 766 S.E.2d 320 (2014); *see also* R.O.P, p. 351 (J. Hockenbury Order at p. 10) *See also* Ex. 2 (J. Hockenbury June 1, 2012 Order at pp. 10-12).

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residents of the Riggings Condominium is unnecessary since adherence to these rules accomplishes no significant public purpose or benefit. Allowing the sandbags to remain will not significantly compromise the rule's purpose, which is to preserve the ocean beach for public use, and will permit the residents of the Riggings Condominium time to explore alternative options that do not cause an extreme hardship to befall onto them, such as private renourishment of the beach if public authorities are unwilling. (*Id.* at p. 60-100) Only a short segment of the beach, approximately 300 feet, is affected by the sandbags, an insignificant area when compared to the large area of the beach immediately to the south of the Riggings on which the State has built a seawall to protect Fort Fisher State Park. (*Id.* Stipulated Fact # 34)

There is no evidence in the record to suggest the hardships the Riggings will suffer if their sandbags are removed are any less severe than they were when their first sandbag variance was granted, and in fact the evidence is to the contrary. Accordingly this tribunal must find that the Riggings has satisfied element #1 for a variance request.

**Staff's Position: Yes**

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 Stipulated Facts 10 and 18, 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, based on the *Williams* case, 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)

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The 3-3 split at the Supreme Court (with Justice Hunter not participating as he authored the Court of Appeals' opinion in this case in 2013 at the Court of Appeals before being appointed to the Supreme Court) results in the Court of Appeals decision being upheld "without precedential value" for the Court of Appeals' reasoning. As the Court of Appeals upheld the Superior Court's June, 2012 Order on Judicial Review, Staff recommends that the Commission now find in Petitioner's favor on this variance factor.

**II. Do such hardships result from conditions peculiar to the petitioner's property, such as location, size, or topography of the property? Explain.**

**Petitioners' Position: Yes.**

The next step in the variance process is that CRC is required to determine whether the Riggings hardships that would result from strict applications of the rules arise from conditions peculiar to the property. This tribunal must focus on the peculiar conditions of the Riggings property, and not the Riggings unit owners.<sup>4</sup> Accordingly, the time that the Riggings has used the sandbags is irrelevant. The factors that the CRC must examine in determining whether would be hardships result from conditions that are peculiar to the property are the location, size, and/or topography of the Property. There is no evidence to suggest that the Riggings is not unique or that it does not suffer hardships solely because it is unique. In fact, the Commission in its most recent Variance Order of May 21, 2009 "concluded as a matter of law that Petitioner has demonstrated any hardship which might result from strict application of the time limits for use of the sandbags as a temporary erosion measure, if any, would be from conditions peculiar to Petitioner's property." See Ex. 1, pp. 8-9.

The Riggings is unlike any other property in the State of North Carolina that has applied for or otherwise been eligible for a variance from the CRC in order to keep sandbags in front of their property for a period longer than allowed by their rules. The Riggings is truly stuck between a rock and a hard place, and the CRC, supported by Staff, have concluded in virtually all of their prior Orders that the aforementioned conditions are peculiar to the Riggings' Property when issuing its previous Orders. (R.O.P., pp. 119-142) There is no other property in the State of North Carolina where a coquina rock natural barrier was removed by the government for a public purpose: namely the construction of U.S. Highway 421. During the 1920's, some of the coquina rock outcropping in the near vicinity of the Riggings was allowed by the Board of County Commissioners of New Hanover County to be removed by a contractor for use in the completion of a section of U.S. Highway 421, a public project. (Stipulated Fact #3) The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide.

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<sup>4</sup> Denial of the FEMA grant by some of the Riggings unit owners and the fact that the Riggings owned additional property where the project might be relocated is not a factor that this tribunal can examine. (See Exs. 2 - 4; see also R.O.P., pp. 181-183 (J. Hockenbury Order at p. 9-11)).

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(Id. at #4) The parties have stipulated that coquina rock outcroppings provide a natural barrier against the threat of beach erosion; outcroppings that have been designated as a natural heritage area and accordingly, there is no dispute that due to the removal of the coquina rock, that protection no longer exists for the Riggings. (Id. at #6)

Additionally, the Riggings is the only property in the State of North Carolina that is located immediately adjacent and contiguous to a North Carolina State Park, Fort Fisher. After being threatened by erosion for a period of many years, Fort Fisher was permitted to construct a permanent revetment or hardened structure, which at the time it was constructed was contrary to the general policy of the State of North Carolina against the construction of hardened structures. (Id. at #16-18) The hardened structure prohibition was adopted in recognition of the adverse erosive effects that such structures can cause to adjacent property. (Id.) This policy was abandoned, at least legislatively, because it was believed that Fort Fisher was worthy of protection. (Id.) From July 1995 to January 1996, the State of North Carolina erected the revetment, and after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased, meaning the State of North Carolina by its direct actions caused the Riggings shoreline to erode. (Id.)

In addition, the Riggings is also the only property in the State of North Carolina located in a municipality (Town of Kure Beach) and a county (New Hanover), which have undertaken large beach renourishment projects using public money on multiple occasions since 2000. (Id. at #21) The Carolina/Kure Beach Renourishment Projects of 2001 and 2007 included a large part of Carolina Beach and 98 percent of Kure Beach, but fell approximately 1,500 feet short of the Riggings Condominium. These projects have not included the beach front adjacent to the Riggings purportedly because of a policy that prevents burying of coquina rock outcroppings. (Id. at #22) The Riggings HOA made various attempts to get the United States Army Corps of Engineers (herein “Corps of Engineers”) to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts were not successful. (Id. at #21) The parties have previously stipulated that coquina rock has been exposed and then buried on the beachfront just north of the Riggings project during both of the two prior public beach renourishment projects. (Id. at #9) In addition, the beach renourishment to the north of the Riggings has further exacerbated the erosion in front of the Riggings as the increased beach frontage to the north of the Riggings due to renourishment now serves as a “feeder beach” which captures ocean sands that would normally feed down to the Riggings to provide the Riggings increased shoreline. (R.O.P., p. 78)

As such, there is no new evidence, after this tribunal had previously found the Riggings property peculiar, to suggest the hardships the Riggings property would suffer if the Riggings were forced to remove their sandbags did not result from conditions peculiar to their Property; namely the beach renourishment projects to the North and the Fort Fisher revetment to the South which have increased the erosion of sand in front of the Riggings. Indeed, there is no more unique property in the State than the Riggings, and there is no evidence to indicate otherwise.

**Staff's Position: Yes.**

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

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)

The Commission then noted the Riggings' location between Fort Fisher and the intertidal coquina rock outcropping. As the Commission found in Petitioner's favor on this variance factor, and because it was not in dispute in any of the appeal venues (Judicial Review in Superior Court, Court of Appeals, Supreme Court), Staff recommends 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.

**III. Do the hardships result from the actions taken by the Petitioner? Explain.**

**Petitioners' Position: No.**

"Actions" taken by the petitioner is the third statutory requirement for a variance request and there is no evidence to suggest that any action of the Riggings caused the erosion problems on its Property. And the evidence shows that the Riggings has been as proactive as possible to find a solution to their erosion problems.<sup>5</sup> The Riggings Condominium was built in 1984. As with many other threatened structures on the oceanfront when erosion problems appeared, sandbags were used to protect the condominium. (Id. at #10) The initial property lines extended 380 feet from Highway 421 towards the Atlantic Ocean. The Riggings oceanfront property now has diminished to almost half of its original size. The Riggings owners had no way of knowing that designation of the coquina rock outcropping as a Registered Natural Heritage Area, would make the beach in front of the Riggings ineligible for the Carolina/Kure Beach renourishment project. Similarly, the Riggings had no part in the construction by the Corps of Engineers of the Seawall Revetment which further exacerbated the Riggings' erosion. It is the combined action of State and Federal agencies that have created these potential hardships and there is no evidence at all to suggest that

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<sup>5</sup> Consideration of whether the Riggings could relocate or the denial of the FEMA Grant is again something this tribunal cannot consider. The FEMA Grant cannot be considered, and even if this tribunal wanted to there is no evidence to suggest that i) it has caused the erosion problems to Petitioner's property, which is the analysis the CRC should undertake, as those problems were caused by the combined action of State and Federal agencies.

A rehearing on remand of CRC-VR-06-33

any action the Riggings has taken has caused the potential hardships for their property should their variance request be denied.

The Commission in its most recent Variance Order of May 21, 2009 “concluded as a matter of law that Petitioner has demonstrated any hardship which might result from strict application of the time limits for use of the sandbags as a temporary erosion measure, if any, would not result from actions the Petitioner has taken.” See Ex. 1, p. 9. Furthermore, the Commission, in concurrence with Staff’s previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that the Riggings hardship does not result from actions it has taken. (R.O.P., pp. 119-142) Accordingly, there has been no additional evidence submitted since those previous variance requests were granted which would support the notion that the hardship on the Riggings would result from any actions it has taken.

**Staff’s Position: No.**

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

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 found in Petitioner’s favor on this variance factor, and because it was not in dispute in any of the appeal venues (Judicial Review in Superior Court, Court of Appeals, Supreme Court), Staff recommends 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.

**IV. Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.**

**Petitioners’ Position: Yes.**

First and most importantly, both the Superior Court and the North Carolina of Appeals have conclusively held that variance requested by the Petitioner: (1) is consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secures the public safety and welfare; and (3) preserves substantial justice. See Riggings Homeowners, Inc. v.



## A rehearing on remand of CRC-VR-06-33

Coastal Res. Comm'n of State, 747 S.E.2d at 310, 312 (“In the present case, the Commission argues the trial court erred by determining The Riggings satisfied the fourth variance factor. We disagree.”) (“In sum, we believe The Riggings' substantial private property interest outweighs the competing public interests considered by the Commission. Consequently, we affirm the trial court's reversal of the Commission's fourth variance factor determination in result.”), *aff'd*, 367 N.C. 643, 766 S.E.2d 320; *see also* Ex. 2 (Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State; 09-CVS-2761 -- June 1, 2012 Order of Judge Jay D. Hockenbury, p. 16) (“The CRC erred in finding that the variance request of the Petitioner would not be consistent with i) the spirit, purpose, and intent of the rules, standards or orders; ii) will not secure public safety and welfare; and iii) will not preserve substantial justice. . . .”).

The CRC’s main objective for the ocean hazard area AEC is to eliminate unreasonable danger to life, property, and amenities. *See 15A NCAC 7M.0201*. Other important objectives include achieving an optimal balance between the financial, safety and societal factors involved in coastal hazard area development, minimizing loss of life and property resulting from storms and long-term erosion, preventing encroachment of permanent structures on public beach areas, preserving the natural ecological conditions of the barrier dune and beach systems, reducing the public costs of inappropriately sited developments, and protecting present common law and statutory rights of access to, and use of the lands and waters of, the coastal area. N.C. Gen. Stat. § 113A-102.

Extension of the variance is consistent with these aforementioned objective/purposes by avoiding the financial waste that would result from exposing the Riggings Condominium to erosion and eventual damage and destruction before the owners can explore viable alternative options. It will also reduce potential debris from the Riggings that can harm other structures and/or inhibit public access to the beach.

Issuing the requested variance will also preserve substantial justice. The Riggings is in a unique situation since one government agency requires removal of the sandbags but allows protection through community beach nourishment projects, while another government agency has prohibited beach nourishment for the Riggings because the area has been designated a Registered Natural Heritage Area by yet a third government agency. The only stated purpose that might be compromised if the variance is extended is the public right of access to, and use of, the beach. However, the citizens of North Carolina have not been inconvenienced by the maintenance of the sandbags since even at high tide the public can get around the sandbags by going between the sandbags and the Riggings buildings closest to the ocean. (*Id.* at #34). In addition there would be no harm in granting the variance request as the Corps of Engineers has stated that the sandbags at the Riggings have had not deleterious effect on surrounding property or property owners. (*Id.* at #33, p. 101 (Affidavit of Tom Jarrett, Former Member of United States Army Corps of Engineers)) For the aforementioned reasons, the variance will secure the public safety and welfare as well.<sup>6</sup>

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<sup>6</sup> If this tribunal is inclined to consider the denial of the FEMA Grant, which would be impermissible pursuant to the Appellate opinions and Judge Hockenbury’s Orders in this case, it should consider the following. The Riggings had

## A rehearing on remand of CRC-VR-06-33

Furthermore, while there is no harm done by permitting a variance extension in this case, the denial of a variance will have a profoundly deleterious impact on all members of the Riggings HOA who will be forced to leave their homes and the good memories that reside therein. In addition, a denial would send a clear message to the citizens of New Hanover County and North Carolina that the government would intentionally kick its own citizens out of their homes for seemingly no important or compelling governmental purpose. Most would not find substantial justice in that result.

The record evidence in this matter is that the Riggings, at its own expense, would finance its own beach renourishment. Staff should concede that sandbags are allowed to remain if a property is planning to take place in beach renourishment but fails to consider the Riggings personal beach renourishment funded entirely by the Riggings as a viable alternative. The owners of the Riggings have not sought and do not seek to have the sandbags remain permanently. Instead, the Riggings see it as a temporary solution. Through the variance request *sub judice* the Riggings seeks to implement a more permanent solution; one that other property owners in that area, through the government, have already had the benefit of, beach renourishment. The most recent variance request by the Riggings seeks simply to have owners at the Riggings be fed out of the same spoon as other property owners to the north and south of the Riggings. If the variance request were permitted, for the period before beach renourishment the public would continue to have full access to the beach adjacent to the Riggings and the sandbags would continue to serve a viable function of protecting threatened structures, and the property will therefore be saved. For years, the given reason why the beach in front of the Riggings has not been renourished was that the US Army Corps of Engineers would not permit coquina rock seaward of the Riggings to be covered. However, what the Corps of Engineers apparently did not know or consider was that the coquina rock outcropping seaward of the Riggings was removed for a public purpose, thereby depriving the Riggings of the natural protection that other property owners to the North and South have. The Corps also failed to consider that the beach renourishment projects undertaken in 2000 and 2007 uncovered and then recovered coquina rock, thereby eliminating their stated reasons as justification for not providing the owners at the Riggings the same protection that other property

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no option but to deny the FEMA Grant to move their homes. The FEMA grant required a 100% vote from all Riggings homeowners. Even one vote in the negative would nullify the grant. Moreover, under the Riggings HOA Declaration and Bylaws, a termination of the Riggings HOA would likely be needed to relocate the Condominium. This would require an affirmative vote of 100% of all the Riggings homeowners, which was not achieved. Riggings HOA members voted in the negative for several reasons. First, the grant was undervalued in that it would cost each homeowner approximately \$125,000 to relocate. Most, if not all, Riggings homeowners lacked the financial capability to provide such substantial monetary funds. Second, it was not guaranteed in the Grant contract that the provisions of the Grant, particularly the provision regarding the use of the oceanfront property, would not change. Third, Riggings homeowners were told by the mortgage holders on their homes that their mortgages could not be transferred to the new location. Finally, Riggings HOA was prohibited from building on the "relocation" property due to the Town of Kure Beach's Board of Adjustment Ruling on April 28, 1992, and their subsequent reaffirmation of that ruling on September 22, 2000.

## A rehearing on remand of CRC-VR-06-33

owner in Pleasure Island have otherwise been entitled to. Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that issuing the Riggings a variance request is within the spirit, purpose, and intent of the commission's rules; that it will secure public safety and welfare, and that it will preserve substantial justice. (R.O.P., pp. 119-142)

Finally, it should be noted the recent legislation of the State's General Assembly demonstrate the policies against hardened structures have relaxed and the policies in favor of sand bag protection have increased. The State Budget, signed September 18, 2015 by Gov. Pat McCrory, allows for two additional terminal groin structures. This new legislation further directs the Commission to amend its rules to allow temporary erosion control structures on larger areas of private property. The new legislation will require (among other things) the Commission to revise rules for sandbag walls on the beach to allow for protection of adjacent properties without a permit. Under the direction of the new legislation, the time limit for sand bags has been changed, and now the time limit will not begin to run until the last sand bag is placed at the property. Furthermore, if a property owner is fighting a lawsuit over their sandbags (as in this case), the directions for the new law would allow the property owner to be able to change and rebuild their sandbag structure during litigation. This clear shift in policy by the State's leaders further demonstrates the variance request in this matter is within the spirit, purpose, and intent of the commission's rules; that it will secure public safety and welfare, and that it will preserve substantial justice.

In sum, Staff cannot articulate one legitimate reason why the variance should be denied other than the fact that the Riggings owner have been granted variances before, and if this tribunal was inclined to base their variance decision on that fact, this tribunal would again be making a variance decision based on the characteristics and conditions of the property owners and not the property, which would violate the Appellate Courts' instructions in their Opinions that the proper inquiry in a variance request is concerning the property and not the property owner. Accordingly there is no reason, based on the consideration of legally permissible criteria, why the CRC should or can deny the Riggings variance as the Riggings has satisfied all four elements to be granted a variance request.

**Staff's Position: Yes.**

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 due to difficulties of the public to use this portion of the beach where the bags are located. (*Id.* p. 10) The Commission finally held that the variance would not preserve substantial justice where both the

A rehearing on remand of CRC-VR-06-33

legislature and the CRC's intent for sandbags was as a temporary erosion control structure only. (*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, where she questioned the majority's application of the standard of review, where she believed the Commission's decision on the fourth variance factor was supported by "substantial evidence" as required. (Court of Appeals Dissent, pp. 2-4) Instead, she believed 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 as he authored the Court of Appeals' opinion in this case in 2013 at the Court of Appeals before being appointed to the Supreme Court) results in the Court of Appeals decision being upheld "without precedential value" for the Court of Appeals' reasoning. As the Court of Appeals upheld the Superior Court's June, 2012 Order on Judicial Review, Staff recommends that the Commission now find in Petitioner's favor on this variance factor.

**REASONABLE AND APPROPRIATE CONDITIONS AND SAFEGUARDS**

N.C.G.S. 113A-120.1(b) provides that "The Commission may impose reasonable and appropriate conditions and safeguards upon any variance it grants." The Superior Court noted this provision in its June 1, 2012 Order. (*See* Order at p. 8)

As stated in Stipulated Fact 35, "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."

Staff recommends that in order to safeguard the beach in front of The Riggings, that Petitioner removes any existing visible sandbag debris. This is in connection with 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."

Further, Staff recommends that in order to safeguard the beach in front of The Riggings, 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).

Finally, Staff recommends that the Commission place a condition on any new variance that includes a time limit of up to five (5) years from the date of the variance order for the replacement of any sandbag structures. Additionally, the Commission could 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 help 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."

# Attachment D:

## Petitioner's Variance Request Materials

(With the exception of (1) Petitioner's proposed new facts and (2) any exhibits which were stipulated to and are now stipulated exhibits in Attachment E and Attachment F)

# SHIPMAN & WRIGHT, L.L.P.

ATTORNEYS AT LAW

575 Military Cutoff Road, Suite 106 | Wilmington, NC 28405

P: 910.762.1990 | F: 910.762.6752 | 800.762.1990 | www.shipmanandwright.com

**Gary K. Shipman**

Board Certified Civil Trial Specialist  
National Board of Trial Advocacy

**William G. Wright**

NCDRC Certified Superior Court Mediator

**W. Cory Reiss**

**Kyle J. Nutt**

**Erin K. Pleasant**

**Jennifer D. Scott**

Certified Real Property Specialist  
NCDRC Certified Superior Court Mediator

**Angelique Adams**

**James T. Moore**

**Gregory M. Katzman**

**Jennie R. Glish**

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

October 6, 2015

**VIA FEDERAL EXPRESS  
w/ OVERNIGHT DELIVERY**

Director of the Division of Coastal Management  
Department of Environment and Natural Resources  
400 Commerce Avenue  
Morehead City, N.C. 28557

**Re:** *Petitioner's Name: The Riggings Homeowners Association, Inc.*  
*DCM File No.: 06-33/CRC-VR-06-33*  
*Our File No.: 06-078*

Director of the Division of Coastal Management:

Please find enclosed the CAMA Variance Request for The Riggings Homeowners Association Inc. with referenced Attachments in connection with the above identified action. Also, enclosed are the additional exhibits and a copy of the prior records proceedings for your review.

Thank you in advance for your assistances with this matter and should you have any questions please do not hesitate to contact our office. With best wishes I am,

Sincerely,



Barbara G. Hamme  
*Paralegal to William G. Wright*

/bgh  
Enclosure

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Sports & Entertainment Law | Probate | Tax Planning & Defense Services | Commercial Loan Modifications

#15-08

**CAMA VARIANCE REQUEST FORM**

**DCM FORM 11**

**DCM FILE No.: 06-33/CRC-VR-06-33**

PETITIONER'S NAME The Riggings Homeowners Association, Inc.

COUNTY WHERE THE DEVELOPMENT IS PROPOSED New Hanover

Pursuant to N.C.G.S. § 113A-120.1 and 15A N.C.A.C. 07J .0700 *et seq.*, the above named Petitioner hereby applies to the Coastal Resources Commission (CRC) for a variance.

**VARIANCE HEARING PROCEDURES**

A variance petition will be considered by the CRC at a regularly scheduled meeting, heard in chronological order based upon the date of receipt of a complete petition. 15A N.C.A.C. 07J .0701(e). A complete variance petition, as described below, must be *received* by the Division of Coastal Management (DCM) a minimum of six (6) weeks in advance of the first day of a regularly scheduled CRC meeting to be eligible for consideration by the CRC at that meeting. 15A N.C.A.C. 07J .0701(e). The final set of stipulated facts must be agreed to at least four (4) weeks prior to the first day of a regularly scheduled meeting. 15A N.C.A.C. 07J .0701(e). The dates of CRC meetings can be found at DCM's website: **www.nccoastalmanagement.net**

If there are controverted facts that are significant in determining the propriety of a variance, or if the Commission determines that more facts are necessary, the facts will be determined in an administrative hearing. 15A N.C.A.C. 07J .0701(b).

**VARIANCE CRITERIA**

The petitioner has the burden of convincing the CRC that it meets the following criteria:

- (a) Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? Explain the hardships.
- (b) Do such hardships result from conditions peculiar to the petitioner's property such as the location, size, or topography of the property? Explain.
- (c) Do the hardships result from actions taken by the petitioner? Explain.
- (d) Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.

*Please make your written arguments that Petitioner meets these criteria on a separate piece of paper.*

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*The Commission notes that there are some opinions of the State Bar which indicate that non-attorneys may not represent others at quasi-judicial proceedings such as a variance hearing before the Commission. These opinions note that the practice of professionals, such as engineers, surveyors or contractors, representing others in quasi-judicial proceedings through written or oral argument, may be considered the practice of law. Before you proceed with this variance request, you may wish to seek the advice of counsel before having a non-lawyer represent your interests through preparation of this Petition.*

**For this variance request to be complete, the petitioner must provide the information listed below. The undersigned petitioner verifies that this variance request is complete and includes:**

- The name and location of the development as identified on the permit application (*See inter alia* Deed, Variance, and R.O.P. and R.O.P., pp. 21-215);
- A copy of the permit decision for the development in question (*See* R.O.P. 111-117, Position Statement Ex. 1);
- A copy of the deed to the property on which the proposed development would be located (included);
- A complete description of the proposed development including a site plan (*See* R.O.P.; *see also* R.O.P pp. 17, *et seq.*; R.O.P, pp. 212, *et seq.*; Beach Fill and Habitat Restoration);
- A stipulation that the proposed development is inconsistent with the rule at issue (agreed);
- Proof that notice was sent to adjacent owners and objectors\*, as required by 15A N.C.A.C. 07J .0701(c)(7) (see attached letters sent via certified mail);
- Proof that a variance was sought from the local government per 15A N.C.A.C. 07J .0701(a), if applicable (N/A);
- Petitioner's written reasons and arguments about why the Petitioner meets the four variance criteria, listed above (*See* Riggings Position Statement);
- A draft set of proposed stipulated facts and stipulated exhibits. Please make these verifiable facts free from argument. Arguments or characterizations about the facts should be included in the written responses to the four variance criteria instead of being included in the facts (*See* Prior Stipulated Facts, R.O.P. and additional exhibits).
- This form completed, dated, and signed by the Petitioner or Petitioner's Attorney.

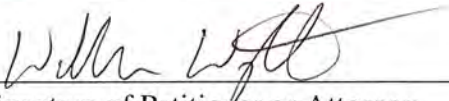
*\*Please contact DCM or the local permit officer for a full list of comments received on your permit application. Please note, for CAMA Major Permits, the complete permit application is kept in the DCM Morehead City Office.*

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Due to the above information and pursuant to statute, the undersigned hereby requests a variance.

  
\_\_\_\_\_  
Signature of Petitioner or Attorney

10/6/15  
\_\_\_\_\_  
Date

William G. Wright  
\_\_\_\_\_  
Printed Name of Petitioner or Attorney

wwright@shipmanlaw.com  
\_\_\_\_\_  
Email address of Petitioner or Attorney

575 Military Cutoff Road, Suite 106  
\_\_\_\_\_  
Mailing Address

(910) 762-1990  
\_\_\_\_\_  
Telephone Number of Petitioner or Attorney

Wilmington, North Carolina 28405  
\_\_\_\_\_  
City State Zip

(910)762-6752  
\_\_\_\_\_  
Fax Number of Petitioner or Attorney

**DELIVERY OF THIS HEARING REQUEST**

This variance petition must be **received by** the Division of Coastal Management at least six (6) weeks before the first day of the regularly scheduled Commission meeting at which it is heard. A copy of this request must also be sent to the Attorney General's Office, Environmental Division, 15A N.C.A.C. 07J .0701(e).

Contact Information for DCM:

Contact Information for Attorney General's Office:

**By mail, express mail or hand delivery:**

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

**By mail:**

Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

**By Fax:**

(252) 247-3330

**By express mail:**

Environmental Division  
114 W. Edenton Street  
Raleigh, NC 27603

**By Email:**

Check DCM website for the email address of the current DCM Director  
**[www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)**

**By Fax:**

(919) 716-6767

Revised: July 2014

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**RIGGINGS POSITION STATEMENT**

1. *Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? Explain the hardships.*

Riggings Homeowner's, Inc. (herein "Riggings") applies to the Coastal Resources Commission of the State of North Carolina (herein "CRC") for a variance which would allow them to maintain temporary sandbags to protect their property longer than is allowed under the rules, and until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed. (See Variance Request and Proposed Facts; see also Record of Proceedings, p. 4-6 (Stipulated Facts), 18-24 (Variance Request))

First and most importantly, both the Superior Court and the North Carolina of Appeals have conclusively held that strict application of sand bag rules will cause and have caused The Riggings to suffer unnecessary hardships. See Ex. 3 -- Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State, 747 S.E.2d 301, 308-09 (N.C. Ct. App. 2013) ("The Riggings suffered 'unnecessary hardships.'"); see also Ex. 2 -- (Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State; 09-CVS-2761 -- June 1, 2012 Order of Judge Jay D. Hockenbury, p. 16) ("The CRC was required to find under the facts of this case, that element 1, 'Unnecessary Hardships,' was met as well.").

Further, in issuing the variance extensions to the Riggings in April 2005, May 2003, February 2002 and August 2000, the Commission has stated, that "the Riggings Condominium has been imminently threatened by erosion since 1985 and that the sandbag revetment in question has been used to protect it since that time." (see R.O.P., pp. 119-142) Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that application of the rules to the Riggings' property would result in unnecessary hardship. (Id.)

Since the holdings of the North Carolina Appellate Courts and those previous Variance Orders, there has been no change in the unnecessary hardships the Riggings property will suffer if it is not granted a variance. Based on legally permissible criteria, Staff cannot demonstrate that the Riggings will suffer any less hardship now than they did previously and cannot articulate one factor which would justify their change in position that the strict application of the rules results in an unnecessary hardship to the Riggings property.<sup>2</sup> As such, no fundamental change has

<sup>1</sup> The Court of Appeals opinion was affirmed *per curiam* by the North Carolina Supreme Court. See Ex. 4 -- Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State, 367 N.C. 643, 766 S.E.2d 320 (2014).

<sup>2</sup> The only change that has occurred to the Riggings since its previous Orders is that some of the unit owners' denied the FEMA grant for potential relocation, however pursuant to the aforementioned appellate decisions of this case and Judge Hockenbury's remand of this case, this is not a factor this tribunal can look at. Even if this tribunal were inclined to consider the FEMA Grant and the possibility of relocation as a factor or factors in their analysis, the uncontroversial evidence before the CRC was that acceptance of the FEMA grant by the Riggings was not possible. Stipulated Fact # 29 stated: (i) that the Riggings HOA, in order to accept the grant, was required to obtain the unanimous consent of the unit owners; (ii) that each unit owner would have been required to contribute approximately \$125,000.00 towards the cost of relocation and reconstruction; and (iii) that some owners had been informed by the holders of their mortgages that no relocation of the units could occur without their consent, and

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occurred to the Riggings property since their previous variance request, where this State's Appellate Courts have conclusively held and where the CRC and Staff previously found unnecessary hardships, which would be grounds for a change in position.

The stipulated evidence is that the threat to the Riggings property is as apparent and imminent as it was at those previous times when the previous variances were granted and, if anything, the situation has worsened. (*Id.* at p. 6-7) "The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time." (*Id.* (Stipulated Fact # 10) ("Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased")) Without the sandbag revetment, the beach in front of the Riggings Condominium will be subject to increased erosion from nor'easters, hurricanes and other storms. Petitioner's continuing efforts to convince the U.S. Army Corps of Engineers to extend the Carolina/Kure Beach renourishment project have not succeeded so far, and nothing else has happened to reduce the erosion threat. (*Id.* (Stipulated Fact # 21) More importantly, there is no evidence in the record to support any conclusions that unnecessary hardships to Petitioner's property, based on the unique nature of the Property, would no longer exist with strict application of the rules.<sup>3</sup>

The strict application of these rules, which require removal of the sandbags, will cause serious damage and eventually destruction of the Riggings Condominium which will deprive Riggings' owners of *any* use of their property much less a reasonable one. This forced hardship upon the residents of the Riggings Condominium is unnecessary since adherence to these rules accomplishes no significant public purpose or benefit. Allowing the sandbags to remain will not significantly compromise the rule's purpose, which is to preserve the ocean beach for public use, and will permit the residents of the Riggings Condominium time to explore alternative options that do not cause an extreme hardship to befall onto them, such as private renourishment of the beach if public authorities are unwilling. (*Id.* at p. 60-100) Only a short segment of the beach, approximately 300 feet, is affected by the sandbags, an insignificant area when compared to the large area of the beach immediately to the south of the Riggings on which the State has built a seawall to protect Fort Fisher State Park. (*Id.* (Stipulated Fact # 34)

There is no evidence in the record to suggest the hardships the Riggings will suffer if their sandbags are removed are any less severe than they were when their first sandbag variance was

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some of those lenders had expressed concerns about whether that consent would be given. (*Id.* at p. 6-7) In addition to these stipulated facts the Affidavits of Riggings homeowners demonstrate that they voted "No" towards accepting the FEMA Grant because they lacked the \$125,000.00 necessary for relocation. (*Id.* at p. 102-104) While only one homeowner vote in the negative was needed to turn down the FEMA grant, at least three homeowners voted "No" towards accepting the FEMA grant because they lacked the financial capability to provide the funds necessary for relocation. (R.O.P., pp. 102-104 (Affidavits of John Parnell, Patty Forest, and Sandy Iemma))

<sup>3</sup> Pursuant to the Court of Appeals, the Supreme Court and Judge Hockenbury's Orders the proper inquiry in a variance request before the CRC is concerning the property and not the property owner. Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State, 747 S.E.2d 301, 307 (N.C. Ct. App. 2013) ("the Commission argues the trial court erred by holding the Commission improperly based its first variance factor determination on the property-owner rather than the property. We disagree."), *aff'd*, 367 N.C. 643, 766 S.E.2d 320 (2014); *see also* R.O.P., p. 351 (J. Hockenbury Order at p. 10) *See also* Ex. 2 (J. Hockenbury June 1, 2012 Order at pp. 10-12).

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granted, and in fact the evidence is to the contrary. Accordingly this tribunal must find that the Riggings has satisfied element #1 for a variance request.

2. *Do such hardships result from conditions peculiar to the petitioner's property such as the location, size, or topography of the property? Explain.*

The next step in the variance process is that CRC is required to determine whether the Riggings hardships that would result from strict applications of the rules arise from conditions peculiar to the property. This tribunal must focus on the peculiar conditions of the Riggings property, and not the Riggings unit owners.<sup>4</sup> Accordingly, the time that the Riggings has used the sandbags is irrelevant. The factors that the CRC must examine in determining whether would be hardships result from conditions that are peculiar to the property are the location, size, and/or topography of the Property. There is no evidence to suggest that the Riggings is not unique or that it does not suffer hardships solely because it is unique. In fact, the Commission in its most recent Variance Order of May 21, 2009 “concluded as a matter of law that Petitioner has demonstrated any hardship which might result from strict application of the time limits for use of the sandbags as a temporary erosion measure, if any, would be from conditions peculiar to Petitioner’s property.” See Ex. 1, pp. 8-9.

The Riggings is unlike any other property in the State of North Carolina that has applied for or otherwise been eligible for a variance from the CRC in order to keep sandbags in front of their property for a period longer than allowed by their rules. The Riggings is truly stuck between a rock and a hard place, and the CRC, supported by Staff, have concluded in virtually all of their prior Orders that the aforementioned conditions are peculiar to the Riggings’ Property when issuing its previous Orders. (R.O.P., pp. 119-142) There is no other property in the State of North Carolina where a coquina rock natural barrier was removed by the government for a public purpose: namely the construction of U.S. Highway 421. During the 1920’s, some of the coquina rock outcropping in the near vicinity of the Riggings was allowed by the Board of County Commissioners of New Hanover County to be removed by a contractor for use in the completion of a section of U.S. Highway 421, a public project. (Stipulated Fact #3) The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide. (*Id.* at #4) The parties have stipulated that coquina rock outcroppings provide a natural barrier against the threat of beach erosion; outcroppings that have been designated as a natural heritage area and accordingly, there is no dispute that due to the removal of the coquina rock, that protection no longer exists for the Riggings. (*Id.* at #6)

Additionally, the Riggings is the only property in the State of North Carolina that is located immediately adjacent and contiguous to a North Carolina State Park, Fort Fisher. After being threatened by erosion for a period of many years, Fort Fisher was permitted to construct a permanent revetment or hardened structure, which at the time it was constructed was contrary to the general policy of the State of North Carolina against the construction of hardened structures. (*Id.* at #16-18) The hardened structure prohibition was adopted in recognition of the adverse erosive effects that such structures can cause to adjacent property. (*Id.*) This policy was

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<sup>4</sup> Denial of the FEMA grant by some of the Riggings unit owners and the fact that the Riggings owned additional property where the project might be relocated is not a factor that this tribunal can examine. (See Exs. 2 - 4; see also R.O.P., pp. 181-183 (J. Hockenbury Order at p. 9-11)).

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abandoned, at least legislatively, because it was believed that Fort Fisher was worthy of protection. (*Id.*) From July 1995 to January 1996, the State of North Carolina erected the revetment, and after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased, meaning the State of North Carolina by its direct actions caused the Riggings shoreline to erode. (*Id.*)

In addition, the Riggings is also the only property in the State of North Carolina located in a municipality (Town of Kure Beach) and a county (New Hanover), which have undertaken large beach renourishment projects using public money on multiple occasions since 2000. (*Id.* at #21) The Carolina/Kure Beach Renourishment Projects of 2001 and 2007 included a large part of Carolina Beach and 98 percent of Kure Beach, but fell approximately 1,500 feet short of the Riggings Condominium. These projects have not included the beach front adjacent to the Riggings purportedly because of a policy that prevents burying of coquina rock outcroppings. (*Id.* at #22) The Riggings HOA made various attempts to get the United States Army Corps of Engineers (herein “Corps of Engineers”) to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts were not successful. (*Id.* at #21) The parties have previously stipulated that coquina rock has been exposed and then buried on the beachfront just north of the Riggings project during both of the two prior public beach renourishment projects. (*Id.* at #9) In addition, the beach renourishment to the north of the Riggings has further exacerbated the erosion in front of the Riggings as the increased beach frontage to the north of the Riggings due to renourishment now serves as a “feeder beach” which captures ocean sands that would normally feed down to the Riggings to provide the Riggings increased shoreline. (R.O.P., p. 78)

As such, there is no new evidence, after this tribunal had previously found the Riggings property peculiar, to suggest the hardships the Riggings property would suffer if the Riggings were forced to remove their sandbags did not result from conditions peculiar to their Property; namely the beach renourishment projects to the North and the Fort Fisher revetment to the South which have increased the erosion of sand in front of the Riggings. Indeed, there is no more unique property in the State than the Riggings, and there is no evidence to indicate otherwise.

3. *Do the hardships result from actions taken by the petitioner?*

“Actions” taken by the petitioner is the third statutory requirement for a variance request and there is no evidence to suggest that any action of the Riggings caused the erosion problems on its Property. And the evidence shows that the Riggings has been as proactive as possible to find a solution to their erosion problems.<sup>5</sup> The Riggings Condominium was built in 1984. As with many other threatened structures on the oceanfront when erosion problems appeared, sandbags were used to protect the condominium. (*Id.* at #10) The initial property lines extended 380 feet from Highway 421 towards the Atlantic Ocean. The Riggings oceanfront property now has diminished to almost half of its original size. The Riggings owners had no way of knowing that designation of the coquina rock outcropping as a Registered Natural Heritage Area, would make

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<sup>5</sup> Consideration of whether the Riggings could relocate or the denial of the FEMA Grant is again something this tribunal cannot consider. The FEMA Grant cannot be considered, and even if this tribunal wanted to there is no evidence to suggest that i) it has caused the erosion problems to Petitioner’s property, which is the analysis the CRC should undertake, as those problems were caused by the combined action of State and Federal agencies.

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the beach in front of the Riggings ineligible for the Carolina/Kure Beach renourishment project. Similarly, the Riggings had no part in the construction by the Corps of Engineers of the Seawall Revetment which further exacerbated the Riggings' erosion. It is the combined action of State and Federal agencies that have created these potential hardships and there is no evidence at all to suggest that any action the Riggings has taken has caused the potential hardships for their property should their variance request be denied.

The Commission in its most recent Variance Order of May 21, 2009 "concluded as a matter of law that Petitioner has demonstrated any hardship which might result from strict application of the time limits for use of the sandbags as a temporary erosion measure, if any, would not result from actions the Petitioner has taken." See Ex. 1, p. 9. Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that the Riggings hardship does not result from actions it has taken. (R.O.P., pp. 119-142) Accordingly, there has been no additional evidence submitted since those previous variance requests were granted which would support the notion that the hardship on the Riggings would result from any actions it has taken.

*4. Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice?*

First and most importantly, both the Superior Court and the North Carolina of Appeals have conclusively held that variance requested by the Petitioner: (1) is consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secures the public safety and welfare; and (3) preserves substantial justice. See Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State, 747 S.E.2d at 310, 312 ("In the present case, the Commission argues the trial court erred by determining The Riggings satisfied the fourth variance factor. We disagree.") ("In sum, we believe The Riggings' substantial private property interest outweighs the competing public interests considered by the Commission. Consequently, we affirm the trial court's reversal of the Commission's fourth variance factor determination in result."), *aff'd*, 367 N.C. 643, 766 S.E.2d 320; see also Ex. 2 (Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State; 09-CVS-2761 -- June 1, 2012 Order of Judge Jay D. Hockenbury, p. 16) ("The CRC erred in finding that the variance request of the Petitioner would not be consistent with i) the spirit, purpose, and intent of the rules, standards or orders; ii) will not secures public safety and welfare; and iii) will not preserves substantial justice. . . .").

The CRC's main objective for the ocean hazard area AEC is to eliminate unreasonable danger to life, property, and amenities. See *15A NCAC 7M.0201*. Other important objectives include achieving an optimal balance between the financial, safety and societal factors involved in coastal hazard area development, minimizing loss of life and property resulting from storms and long-term erosion, preventing encroachment of permanent structures on public beach areas, preserving the natural ecological conditions of the barrier dune and beach systems, reducing the public costs of inappropriately sited developments, and protecting present common law and statutory rights of access to, and use of the lands and waters of, the coastal area. N.C. Gen. Stat. § 113A-102.

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Extension of the variance is consistent with these aforementioned objective/purposes by avoiding the financial waste that would result from exposing the Riggings Condominium to erosion and eventual damage and destruction before the owners can explore viable alternative options. It will also reduce potential debris from the Riggings that can harm other structures and/or inhibit public access to the beach.

Issuing the requested variance will also preserve substantial justice. The Riggings is in a unique situation since one government agency requires removal of the sandbags but allows protection through community beach nourishment projects, while another government agency has prohibited beach nourishment for the Riggings because the area has been designated a Registered Natural Heritage Area by yet a third government agency. The only stated purpose that might be compromised if the variance is extended is the public right of access to, and use of, the beach. However, the citizens of North Carolina have not been inconvenienced by the maintenance of the sandbags since even at high tide the public can get around the sandbags by going between the sandbags and the Riggings buildings closest to the ocean. (Id. at #34). In addition there would be no harm in granting the variance request as the Corps of Engineers has stated that the sandbags at the Riggings have had not deleterious effect on surrounding property or property owners. (Id. at #33, p. 101 (Affidavit of Tom Jarrett, Former Member of United States Army Corps of Engineers))

For the aforementioned reasons, the variance will secure the public safety and welfare as well.<sup>6</sup>

Furthermore, while there is no harm done by permitting a variance extension in this case, the denial of a variance will have a profoundly deleterious impact on all members of the Riggings HOA who will be forced to leave their homes and the good memories that reside therein. In addition, a denial would send a clear message to the citizens of New Hanover County and North Carolina that the government would intentionally kick its own citizens out of their homes for seemingly no important or compelling governmental purpose. Most would not find substantial justice in that result.

The record evidence in this matter is that the Riggings, at its own expense, would finance its own beach renourishment. Staff should concede that sandbags are allowed to remain if a property is

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<sup>6</sup> If this tribunal is inclined to consider the denial of the FEMA Grant, which would be impermissible pursuant to the Appellate opinions and Judge Hockenbury's Orders in this case, it should consider the following. The Riggings had no option but to deny the FEMA Grant to move their homes. The FEMA grant required a 100% vote from all Riggings homeowners. Even one vote in the negative would nullify the grant. Moreover, under the Riggings HOA Declaration and Bylaws, a termination of the Riggings HOA would likely be needed to relocate the Condominium. This would require an affirmative vote of 100% of all the Riggings homeowners, which was not achieved. Riggings HOA members voted in the negative for several reasons. First, the grant was undervalued in that it would cost each homeowner approximately \$125,000 to relocate. Most, if not all, Riggings homeowners lacked the financial capability to provide such substantial monetary funds. Second, it was not guaranteed in the Grant contract that the provisions of the Grant, particularly the provision regarding the use of the oceanfront property, would not change. Third, Riggings homeowners were told by the mortgage holders on their homes that their mortgages could not be transferred to the new location. Finally, Riggings HOA was prohibited from building on the "relocation" property due to the Town of Kure Beach's Board of Adjustment Ruling on April 28, 1992, and their subsequent reaffirmation of that ruling on September 22, 2000.

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planning to take place in beach renourishment but fails to consider the Riggings personal beach renourishment funded entirely by the Riggings as a viable alternative. The owners of the Riggings have not sought and do not seek to have the sandbags remain permanently. Instead, the Riggings see it as a temporary solution. Through the variance request *sub judice* the Riggings seeks to implement a more permanent solution; one that other property owners in that area, through the government, have already had the benefit of, beach renourishment. The most recent variance request by the Riggings seeks simply to have owners at the Riggings be fed out of the same spoon as other property owners to the north and south of the Riggings. If the variance request were permitted, for the period before beach renourishment the public would continue to have full access to the beach adjacent to the Riggings and the sandbags would continue to serve a viable function of protecting threatened structures, and the property will therefore be saved. For years, the given reason why the beach in front of the Riggings has not been renourished was that the US Army Corps of Engineers would not permit coquina rock seaward of the Riggings to be covered. However, what the Corps of Engineers apparently did not know or consider was that the coquina rock outcropping seaward of the Riggings was removed for a public purpose, thereby depriving the Riggings of the natural protection that other property owners to the North and South have. The Corps also failed to consider that the beach renourishment projects undertaken in 2000 and 2007 uncovered and then recovered coquina rock, thereby eliminating their stated reasons as justification for not providing the owners at the Riggings the same protection that other property owner in Pleasure Island have otherwise been entitled to.

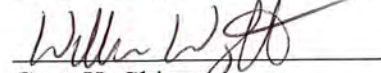
Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that issuing the Riggings a variance request is within the spirit, purpose, and intent of the commission's rules; that it will secure public safety and welfare, and that it will preserve substantial justice. (R.O.P., pp. 119-142)

Finally, it should be noted the recent legislation of the State's General Assembly demonstrate the policies against hardened structures have relaxed and the policies in favor of sand bag protection have increased. The State Budget, signed September 18, 2015 by Gov. Pat McCrory, allows for two additional terminal groin structures. This new legislation further directs the Commission to amend its rules to allow temporary erosion control structures on larger areas of private property. The new legislation will require (among other things) the Commission to revise rules for sandbag walls on the beach to allow for protection of adjacent properties without a permit. Under the direction of the new legislation, the time limit for sand bags has been changed, and now the time limit will not begin to run until the last sand bag is placed at the property. Furthermore, if a property owner is fighting a lawsuit over their sandbags (as in this case), the directions for the new law would allow the property owner to be able to change and rebuild their sandbag structure during litigation. This clear shift in policy by the State's leaders further demonstrates the variance request in this matter is within the spirit, purpose, and intent of the commission's rules; that it will secure public safety and welfare, and that it will preserve substantial justice.

In sum, Staff cannot articulate one legitimate reason why the variance should be denied other than the fact that the Riggings owner have been granted variances before, and if this tribunal was inclined to base their variance decision on that fact, this tribunal would again be making a variance decision based on the characteristics and conditions of the property owners and not the property, which would violate the Appellate Courts' instructions in their Opinions that the proper

inquiry in a variance request is concerning the property and not the property owner. Accordingly there is no reason, based on the consideration of legally permissible criteria, why the CRC should or can deny the Riggings variance as the Riggings has satisfied all four elements to be granted a variance request.

Respectfully submitted,



Gary K. Shipman

William G. Wright

SHIPMAN & WRIGHT, LLP

575 Military Cutoff Road, Suite 106

Wilmington, NC 28405

Telephone: 910-762-1990

Facsimile: 910-762-6752

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RECORDED AND VERIFIED  
REBECCA P. TUCKER  
REGISTER OF DEEDS  
NEW HANOVER CO. NC

MAR 4 4 34 PM '82

I do hereby certify this to be a true and accurate copy of the document filed and recorded in New Hanover County Register of Deeds Office as evidence in Book No 1199 Page No 276 to 275 Tammy Theusch Beasley, Register of Deeds 10/1/2015

*Sherry L. King*  
Assistant/Deputy Register of Deeds

Excise Tax

Recording Time, Book and Page

Tax Lot No. Parcel Identifier No.  
Verified by County on the day of , 19  
by

Mail after recording to The Riggings, Inc., P.O. Box 398, Carolina Beach, NC 28428

This instrument was prepared by David C. Barefoot

Brief description for the Index  
5 ac., Pt. Orrell, Ft. Fisher

### NORTH CAROLINA GENERAL WARRANTY DEED

THIS DEED made this 4<sup>th</sup> day of March, 19 82, by and between

GRANTOR

JAMES E. WALLACE AND WIFE, WANDA B. WALLACE AND R. EDWARD MITCHELL AND WIFE, DONNA YATES MITCHELL, of New Hanover County, North Carolina

GRANTEE

THE RIGGINGS, INC., a North Carolina corporation, whose mailing address is P.O. Box 398, Carolina Beach, NC 28428

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g. corporation or partnership.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple, all that certain lot or parcel of land situated in the City of Federal Point Township, New Hanover County, North Carolina and more particularly described as follows:

BEGINNING at a new concrete monument in the eastern line of the United States of America "taking" line, as described as a portion of Tract F-600 and recorded in Book 598 at Pages 123 and 124 of the New Hanover County Registry, said beginning monument being located South 27 degrees 48 minutes 30 seconds West 152.54 feet from the Southwestern corner of Block "I", Section 3, Fort Fisher as recorded in Map Book 5 at Page 110 of the New Hanover County Registry, said new concrete monument also being located South 23 degrees 11 minutes West (bearing as used by the United States of America) 152.54 feet from the aforementioned Southwestern corner of Block "I", Section 3, Fort Fisher; running thence from said beginning point and with the continuation of the Eastern "taking" line of the United States of America tract of land, South 27 degrees 48 minutes 30 seconds West 280.0 feet to a new pipe; continuing thence with the aforesaid "taking" line, South 30 degrees 09 minutes 30 seconds West 0.61 feet to a concrete monument in the Northern line of a tract of land conveyed by Bessie O. Orrell (Widow) to the State of North Carolina Department of Archives and History and recorded in the New Hanover County Registry; running thence with the Northern line of the State of North Carolina tract of land, and crossing U.S. Highway #421, South 58 degrees 05 minutes East 779.17 feet to a concrete monument; continuing thence same course, South 58 degrees 05 minutes East 75.45 feet, more or less, to the high water line of the Atlantic Ocean; running thence northwardly along said high water line, North 21 degrees 44 minutes 30 seconds East 284.51 feet to a point; running thence parallel to the Northern line of the State of North Carolina tract of land, North 58 degrees 05 minutes West 67.86 feet, more or less, to a concrete monument; continuing thence same course,

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North 58 degrees 05 minutes West 756.56 feet, more or less, to the point of beginning, containing 5.00 acres, more or less, and being a portion of the formerly Thomas R. Orrell and Louis B. Orrell, now Bessie O. Orrell, tract of land.

The property hereinabove described was acquired by Grantor by instrument recorded in .....  
Book 1193 at Page 557 of the New Hanover County Registry .....

A map showing the above described property is recorded in Plat Book ..... page .....

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated. Title to the property hereinabove described is subject to the following exceptions:

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, or if corporate, has caused this instrument to be signed in his corporate name by its duly authorized officers and its seal to be hereunto affixed by authority of its Board of Directors, the day and year first above written.

By: ..... (Corporate Name)  
..... President  
ATTEST: .....  
..... Secretary (Corporate Seal)  
R. EDWARD MITCHELL (SEAL)  
DONNA YATES MITCHELL (SEAL)  
JAMES E. WALLACE (SEAL)  
WANDA B. WALLACE (SEAL)  
NORTH CAROLINA, New Hanover County.

USE BLACK INK ONLY



I, a Notary Public of the County and State aforesaid, certify that R. EDWARD MITCHELL AND WIFE, DONNA YATES MITCHELL & JAMES E. WALLACE AND WIFE, WANDA B. WALLACE, Grantor, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this 4th day of March, 1982.  
My commission expires: June 1, 1985. Cassandra L. Williams, Notary Public

SEAL-STAMP NORTH CAROLINA, ..... County.  
I, a Notary Public of the County and State aforesaid, certify that ..... he is ..... Secretary of ..... a North Carolina corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its ..... President, sealed with its corporate seal and attested by ..... as its ..... Secretary.  
Witness my hand and official stamp or seal, this ..... day of ..... 19.....  
My commission expires: ..... Notary Public

The foregoing Certificate(s) of Cassandra L. Williams, a Notary Public.  
Is/are certified to be correct. This instrument and this certificate are duly registered at the date and time and in the Book and Page shown on the first page hereof.  
REBECCA P. TUCKER REGISTER OF DEEDS FOR NEW HANOVER COUNTY  
By Peggy R. Shora Deputy/Assistant - Register of Deeds

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# SHIPMAN & WRIGHT, L.L.P.

ATTORNEYS AT LAW

575 Military Cutoff Road, Suite 106 | Wilmington, NC 28405

P: 910.762.1990 | F: 910.762.6752 | 800.762.1990 | www.shipmanandwright.com

COPY

**Gary K. Shipman**  
Board Certified Civil Trial Specialist  
National Board of Trial Advocacy

**William G. Wright**  
NCDRC Certified Superior Court Mediator

**W. Cory Reiss**

**Kyle J. Nutt**

**Erin K. Pleasant**

**Jennifer D. Scott**  
Certified Real Property Specialist  
NCDRC Certified Superior Court Mediator

**Angelique Adams**

**James T. Moore**

**Gregory M. Katzman**

**Jennie R. Glish**

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

October 6, 2015

**VIA CERTIFIED MAIL  
w/ RETURN RECEIPT**

Town of Kure Beach  
P.O. Box 3  
Kure Beach, N.C. 28449

**Re:** *Petitioner's Name: The Riggings Homeowners Association, Inc.*  
*DCM File No.: 06-33/CRC-VR-06-33*  
*Our File No.: 06-078*

Town of Kure Beach:

As an adjacent property owner for property owned by The Riggings Homeowners Association, Inc., please find enclosed their CAMA Variance Request on their behalf with referenced Attachments in connection with the above identified action. Also, enclosed are the additional exhibits that were provided to the Director of Coastal Management along with the Variance Request.

Thank you and should you have any questions please do not hesitate to contact our office. With best wishes I am,

Sincerely,



Barbara G. Hamme  
*Paralegal to William G. Wright*

/bgh  
Enclosure

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Board Certified Civil Trial Specialist  
National Board of Trial Advocacy

**William G. Wright**  
NCDRC Certified Superior Court Mediator

**W. Cory Reiss**

**Kyle J. Nutt**

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

October 6, 2015

**VIA CERTIFIED MAIL  
w/ RETURN RECEIPT**

Ocean Dunes HOA, Inc.  
P.O. Box 1847  
Wilson, North Carolina 27894

**Re:** *Petitioner's Name: The Riggings Homeowners Association, Inc.*  
*DCM File No.: 06-33/CRC-VR-06-33*  
*Our File No.: 06-078*

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October 6, 2015

**VIA CERTIFIED MAIL**  
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1321 Mail Service Center  
Raleigh, N.C. 27699

**Re:** *Petitioner's Name: The Riggings Homeowners Association, Inc.*  
*DCM File No.: 06-33/CRC-VR-06-33*  
*Our File No.: 06-078*

State of North Carolina:

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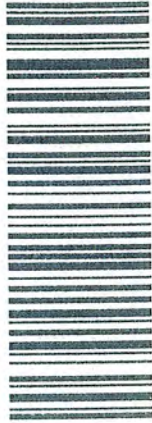
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# Attachment E:

## Stipulated Exhibits No. 1-5

1. Decision of the NC Court of Appeals and Dissent
2. CRC's Notice of Appeal and Petition & Riggings' Conditional Petition to the Supreme Court
3. Supreme Court's Order granting both petitions
4. Decision of the NC Supreme Court
5. CRC Counsel's April 9, 2015 letter to DCM Counsel and Riggings' Counsel

NO. COA 12-1299

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2013

RIGGINGS HOMEOWNERS, INC.  
Petitioner,

v.

New Hanover County  
No. 09 CVS 2761

COASTAL RESOURCES COMMISSION OF  
THE STATE OF NORTH CAROLINA,  
Respondent.

Appeal by respondent and cross-appeal by petitioner from order entered 1 June 2012 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2013.

*Shipman & Wright, L.L.P., by William G. Wright and Gary K. Shipman, for petitioner-appellee/cross-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Christine A. Goebel and Special Deputy Attorney General Marc Bernstein, for respondent-appellant/cross-appellee.*

HUNTER, JR., Robert N., Judge.

The North Carolina Coastal Resources Commission (the "Commission") appeals a trial court order: (i) reversing the Commission's denial of a variance request; and (ii) remanding the case to the Commission for new hearing. Riggings Homeowners, Inc. cross-appeals, alleging: (i) the trial court

erred in concluding the Commission did not need to make a "reasonable use" determination; (ii) the Commission's variance denial violated the takings doctrine; and (iii) the Commission's variance denial violated the separation of powers doctrine. Upon review, we affirm.

### **I. Facts & Procedural History**

Riggings Homeowners, Inc. ("The Riggings") manages a homeowners' association (a North Carolina non-profit corporation) in Kure Beach. The Riggings operates forty-eight condo units located in four buildings facing the Atlantic Ocean. The condos were built in 1985.

Immediately south of The Riggings is Fort Fisher, a North Carolina state park. From July 1995 to January 1996, the State built a permanent stone revetment<sup>1</sup> to protect Fort Fisher from erosion. Although the Coastal Area Management Act ("CAMA") generally does not allow permanent revetments, the Commission allowed this revetment under the historic sites exception.

Immediately north of The Riggings is the Fort Fisher Coquina Outcrop Natural Area. Coquina rock formations provide a natural barrier against beach erosion. In 1926, the New Hanover County Board of County Commissioners allowed a government

---

<sup>1</sup> A "revetment" is "a facing of stone, concrete, fascines, or other material to sustain an embankment." *Webster's Third New International Dictionary* 1944 (1971). When used for coastal protection, revetments prevent sand erosion.

contractor to use the coquina rock to complete a section of U.S. Highway 421. The contractor removed a 50-100 foot strip of coquina rock near The Riggings. On 6 February 1982, the Fort Fisher Coquina Outcrop Natural Area was entered on the North Carolina Registry of Natural Heritage Areas.

These two state actions have made The Riggings' beachfront especially prone to erosion. First, the removal of the coquina rock in 1926 took away a natural barrier to erosion. Second, the construction of the stone revetment at Fort Fisher protected the beachfront there but at The Riggings' beachfront increased erosion rates. This combination of state action makes The Riggings' beachfront *sui generis*.

In 1985, Kure Beach's local CAMA officer issued a permit allowing The Riggings to place a sandbag revetment on its beachfront because the condos were "imminently threatened" by erosion.<sup>2</sup> On 3 December 1994, the Division of Coastal Management ("DCM")<sup>3</sup> issued CAMA General Permit No. 13355-D, authorizing repair of the 1985 sandbags and placement of new sandbags. Permit No. 13355-D allowed the sandbags to remain in place until

---

<sup>2</sup> 15A N.C.A.C. 7H.0308(a)(2)(b) allows temporary erosion control structures when buildings are "imminently threated" by being less than 20 feet from an erosion scarp.

<sup>3</sup> In 1992, the DCM took responsibility for the issuance of CAMA permits.

1 May 2000. After 1 May 2000, The Riggings was precluded from maintaining the sandbags without a variance.<sup>4</sup>

From 2000 to 2005, The Riggings applied for and received three variances to maintain the sandbags: (i) on 26 May 2000, the Commission granted a variance allowing the sandbags to remain in place until 26 May 2001; (ii) on 4 February 2002, the Commission granted another variance, allowing the sandbags to remain in place until 23 May 2003; (iii) on 9 May 2003, a new variance allowed the sandbags to remain in place until 9 May 2005. Meanwhile, The Riggings pursued several permanent erosion solutions.

One potential solution was beach renourishment. In 2000, the U.S. Army Corps of Engineers undertook the Carolina/Kure Beach Renourishment Project. This project covered 98% of Kure Beach, but stopped 1,500 feet short of The Riggings' beachfront. The Riggings was unsuccessful in efforts to convince the U.S. Army Corps of Engineers to extend the renourishment project to The Riggings' beachfront. In a 25 February 2000 letter to U.S. Representative Mike McIntyre, the U.S. Army Corps of Engineers explained that it could not extend the renourishment project to The Riggings' beachfront because the "[coquina] rock outcropping[s] [have] been declared a natural heritage area by

---

<sup>4</sup> 15A N.C.A.C. 7H.1705(a)(14) only allows "imminently threatened" buildings to seek one permit.

the North Carolina Natural Heritage Program and burying them was not an acceptable alternative." A second Carolina/Kure Beach Renourishment Project in 2007 renourished 98% of Kure Beach, but again stopped 1,500 feet short of The Riggings' beachfront.

Concurrently, The Riggings explored rebuilding its condos across the street on the landward side of U.S. Highway 421. The Riggings contacted the North Carolina Division of Emergency Management ("NCDEM"), the Natural Heritage Trust Fund, and the DCM for financial assistance with this venture. It requested that the Town of Kure Beach assist by seeking FEMA grants to relocate these buildings.

In July 2004, the Town of Kure Beach received a FEMA pre-disaster grant for a \$3,617,624 project to: (i) acquire The Riggings' beachfront real estate; and (ii) rebuild The Riggings on the landward side of U.S. Highway 421. FEMA agreed to provide \$2,713,218 (75% of the costs), but required The Riggings' homeowners to contribute the remaining \$904,406 (25% of the costs). This grant, by its terms, would expire on 30 June 2007.

By March 2005, The Riggings had hired architects, surveyors, and other contractors to finalize plans to relocate the buildings to U.S. Highway 421's landward side. On 25 April 2005, the Commission granted The Riggings another variance to



allow the sandbags to remain in place "until the FEMA grant expires in June, 2007." The variance order also stated, "Petitioner shall be responsible for removal of the sandbags prior to expiration of the FEMA grant."

The Riggings approached its homeowners to discuss funding the remaining \$904,406 for the project. On 1 May 2006, the President of The Riggings' homeowners' association notified the Mayor of Kure Beach that The Riggings' homeowners voted to reject the FEMA grant. The homeowners cited several reasons for this decision: (i) some homeowners could not contribute the required capital; (ii) the grant did not guarantee that future permitted uses for the oceanfront real estate would not change; and (iii) the holders of some homeowners' mortgages did not consent to the project.

As a result, on 17 May 2006 the Mayor of Kure Beach requested that NCDEM terminate the FEMA grant. On 20 June 2006 a NCDEM officer notified the DCM that the FEMA grant was terminated. On 10 July 2006, a DCM district manager notified The Riggings that it had 30 days to remove the sandbags.

However, The Riggings did not comply. On 15 August 2006, the DCM sent The Riggings a Notice of Violation, requiring removal of all sandbags. On 18 September 2006, the DCM sent The Riggings a Notice of Continuing Violation.

Meanwhile, on 22 August 2006, The Riggings applied for a new variance under N.C. Gen. Stat. § 113A-120.1 and 15A N.C.A.C. 7J.0700 while it pursued a new beach renourishment project (the "Habitat Enhancement Project"). The relevant statute states that:

(a) Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:

(1) Unnecessary hardships would result from strict application of the rules, standards, or orders.

(2) The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.

(3) The hardships did not result from actions taken by the petitioner.

(4) The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

N.C. Gen. Stat. § 113A-120.1(a) (2011).

On 17 January 2008, the Commission heard the variance request. On 31 January 2008, the Commission entered an order denying the request because The Riggings did not prove: (i) that denial of a variance would result in "unreasonable hardship;"

(ii) that any hardship "result[ed] from conditions peculiar to [its] property;" (iii) that any hardship was not the result of its actions; and (iv) that its request is "within the spirit, purpose, and intent of the Commission's rules."

On 7 March 2008, The Riggings timely filed a petition for judicial review in New Hanover County Superior Court. The trial court issued a writ of certiorari and heard the case during its 5 January 2009 Civil, Non-Jury Session. On 20 February 2009, the trial court: (i) reversed the Commission's denial of the variance; and (ii) remanded the case to the Commission to apply an "unnecessary hardships" standard instead of an "unreasonable hardship" standard.

On 29 April 2009, the Commission reheard the case. On 21 May 2009, it denied The Riggings' variance request under the "unnecessary hardships" standard. On 17 June 2009, The Riggings timely filed a petition for judicial review in New Hanover County Superior Court. The trial court heard the case during its 12 March and 13 March 2012 Civil, Non-Jury Sessions.

On 1 June 2012, the trial court reversed the Commission's variance denial because it determined the Commission erred by: (i) concluding The Riggings did not demonstrate unnecessary hardship; and (ii) concluding the variance is not "consistent with the spirit, purpose, and intent of the rules." The trial

court also determined: (i) the Commission did not need to make factual findings or legal conclusions as to the impact of the variance denial on The Riggings' ability to make reasonable use of its property; (ii) the Commission's actions did not violate the takings doctrine; and (iii) the Commission's actions did not violate the separation of powers doctrine.

On 27 June 2012, the Commission filed timely notice of appeal to this Court. On 29 June 2012, The Riggings filed timely notice of cross-appeal.

## **II. Jurisdiction & Standard of Review**

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. §7A-27(b) (2011) and N.C. Gen. Stat. § 150B-52 (2011).

The Administrative Procedure Act provides the standard of review for agency decisions:

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51 (2011). Overall, “[a]n appellate court’s review proceeds in two steps: (1) examining whether the trial court applied the correct standard of review and (2) whether the trial court’s review was proper.” *City of Rockingham v. N.C. Dept. of Env’t and Natural Res., Div. of Water Quality*, \_\_ N.C. App. \_\_, \_\_, 736 S.E.2d 764, 767 (2012). The proper standard of review depends on the particular issues presented on appeal.

To this effect, our Supreme Court clarifies that:

these grounds for reversal or modification of an agency's final decision fall into two conceptual categories. The first four grounds for reversing or modifying an agency's decision—that the decision was "in violation of constitutional provisions," "in excess of the statutory authority or jurisdiction of the agency," "made upon unlawful procedure," or "affected by other error of law,"—may be characterized as "law-based" inquiries. The final two grounds—that the decision was "unsupported by substantial evidence . . . in view of the entire record" or "arbitrary or capricious,"—may be characterized as "fact-based" inquiries.

*N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (alteration in original) (internal citation omitted).

"Thus, where the gravamen of an assigned error is that the agency violated subsections 150B-51(b)(1), (2), (3), or (4) of the APA, a court engages in *de novo* review." *Id.* at 659, 599 S.E.2d at 895. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission." *Greens of Pine Glen Ltd.*, 356 N.C. at 647, 576 S.E.2d at 319 (internal citations omitted).

On the other hand, when the issue is whether (i) an agency's factual findings are supported by substantial evidence; or (ii) whether an agency's decision is arbitrary and capricious, we apply the "whole record" test. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894. "When the trial court applies

the whole record test, . . . it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Id.* at 660, 599 S.E.2d at 895 (quotation marks and citation omitted). "Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Watkins v. N.C. State Bd. of Dental Examiners*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2011).

Here, the trial court appropriately applied *de novo* review to the Commission's first variance factor determination. There, the only issue was whether The Riggings suffered "unnecessary hardships" as a matter of law. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 ("It is well settled that in cases appealed from administrative tribunals, [q]uestions of law receive *de novo* review." (alteration in original) (quotation marks and citation omitted)).

In its review of the Commission's fourth variance factor determination, the trial court noted that the Commission's order

"comings in the Conclusions of Law, many Findings of Fact that should not be included within the Conclusions of Law section." Consequently, in its fourth variance factor analysis the trial court appropriately applied: (i) the whole record test to determine whether the facts were supported by substantial evidence; and (ii) *de novo* review to the Commission's legal determinations under CAMA's statutory framework. On appeal, we apply the same standard of review.

### **III. Analysis**

On appeal, the Commission argues the trial court erred by determining The Riggings satisfied the first and fourth statutory variance factors. On cross-appeal, The Riggings argues: (i) the trial court erred in concluding the Commission did not need to make a "reasonable use" determination; (ii) the Commission's actions violate the takings doctrine; and (iii) the Commission's actions violate the separation of powers doctrine. Upon review, we affirm.

#### **A. Commission's Appeal**

Preliminarily, we discuss the regulatory framework behind the instant case. The Commission's rules only allow "imminently threatened" buildings like The Riggings to seek one permit for temporary sandbag structures. See 15A N.C.A.C. 7H.1705(a)(14). After the permit's expiration, "imminently threatened" buildings



must seek a variance to maintain temporary sandbag structures.

CAMA clarifies that:

(a) Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:

(1) Unnecessary hardships would result from strict application of the rules, standards, or orders.

(2) The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.

(3) The hardships did not result from actions taken by the petitioner.

(4) The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

N.C. Gen. Stat. § 113A-120.1 (2011).

In the instant case, The Riggings applied for a variance under N.C. Gen. Stat. § 113A-120.1. The Commission held The Riggings satisfied the second and third variance factors, but not the first or fourth factors. The trial court reversed the Commission's first and fourth variance factor determinations, and the Commission appealed. Upon review, we affirm the trial court's decision.

**1. First Variance Factor**

The Commission argues the trial court erred in its first variance factor determination by: (i) holding the Commission's statement that "erosion is stable" was prejudicial error; (ii) deciding the Commission improperly based its decision on the property-owner rather than the property; and (iii) misconstruing the phrase "unnecessary hardships." We find the Commission's arguments unpersuasive.

**a. "Erosion is stable"**

The Commission first argues the trial court erred by holding the Commission's statement that "erosion is stable" was prejudicial error. We disagree.

In its 21 May 2009 order, the Commission stated that "initially after construction of the Ft. Fisher revetment erosion increased at [The Riggings'] property, but now erosion is stable." It based this conclusion on the stipulated fact that after the stone revetment's construction "the rate of erosion of the shoreline in front of The Riggings increased, but since then the rate of erosion has decreased."

In its 1 June 2012 order, the trial court determined the Commission's statement was prejudicial error. To support this holding, the trial court cited several stipulated facts indicating erosion still occurred. For instance, the trial

court referenced Stipulated Fact No. 10, which stated "The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time." It also mentioned Stipulated Fact No. 18, which stated that "erosion of the shoreline in front of the Riggings increased [after the construction of the Fort Fisher revetment], but since then the rate of erosion has decreased."

Upon review, we believe any disagreement arises from mutual misunderstanding rather than disputed legal principles. Specifically, the Commission's statement referenced the *rate* of erosion. Under this interpretation, its statement is supported by the facts: the *rate* of erosion initially increased after the construction of the Fort Fisher revetment, but then stabilized. The trial court, on the other hand, interpreted the Commission's statement to imply erosion no longer occurs. It then cited competent evidence showing erosion still occurs.

Based on this analysis, we affirm the trial court's determination to the extent it reverses a statement that erosion no longer occurs.

**b. Property-Owner vs. Property**

Next, the Commission argues the trial court erred by holding the Commission improperly based its first variance

factor determination on the property-owner rather than the property. We disagree.

In its first variance factor analysis, the Commission may only consider its rules' effect on the petitioner's property, not the petitioner itself. *Williams v. N.C. Dep't of Env't and Natural Res.*, 144 N.C. App. 479, 548 S.E.2d 793 (2001). For instance, in *Williams* a landowner applied for a variance to build a "fast freezer" and storage unit on his property. *Id.* at 481-82, 548 S.E.2d at 795-96. However, the proposed project would have damaged adjacent wetlands. *Id.* at 488, 548 S.E.2d at 799. Moreover, the petitioner owned other properties where he could complete the project without potential wetlands damage. *Id.* In *Williams*, the Commission determined the petitioner did not prove "unnecessary hardships" because "alternatives for siting and design of the proposed facility exist that would reduce or eliminate the wetlands impacts of the project." *Id.* at 482, 548 S.E.2d at 796. The trial court reversed. *Id.*

On appeal, this Court affirmed the trial court. *Id.* at 485, 548 S.E.2d at 797-98. We elaborated that:

[w]hether strict application of the Coastal Area Management Act, (hereinafter "CAMA"), places an "unnecessary hardship" on a parcel of property, depends upon the unique nature of the property; not the landowner. If "hardship" stemmed from the situation of the landowner, then those persons owning less land would have an easier time showing

unnecessary hardship than those owning more than one parcel of land. Similarly situated persons would be treated differently, giving rise to equal protection of law issues.

*Id.* at 485, 548 S.E.2d at 797.

In the present case, the Commission appeals the trial court's reversal of its first variance factor determination. Specifically, it argues any hardship The Riggings suffers is necessary due to the Commission's prohibition of permanent erosion control structures. Based on *Williams*, we affirm the trial court's decision.

In its 21 May 2009 order, the Commission described how The Riggings had maintained the sandbags since 1985, over the course of a permit and four variances. Based on this length of time, the Commission then determined the sandbags had impermissibly become *de facto* permanent structures. Given this conclusion, the Commission ultimately decided any hardship The Riggings now suffered was necessary to uphold the regulatory prohibition of permanent erosion control structures. See N.C. Gen. Stat. § 113A-115.1(b) (2011); 15A N.C.A.C. 7M.0202(e).

However, the Commission improperly focused its analysis on the property-owner rather than the property. The Riggings' previous permit and variances are immaterial to the Commission's "unnecessary hardships" analysis. See *Williams*, 144 N.C. App. at 485, 548 S.E.2d at 797-98. As we held in *Williams*, "[i]f

'hardship' stemmed from the situation of the landowner" rather than the property itself, "[s]imilarly situated persons would be treated differently." *Id.* at 485, 548 S.E.2d at 797. For instance, under the Commission's logic someone who had not previously received variances but owned property identical to The Riggings' property would receive different treatment. Like in *Williams*, this would raise *prima facie* equal protection issues.

Consequently, we affirm the trial court's "unnecessary hardships" determination under *Williams*.

**c. "Unnecessary" Hardships**

Next, the Commission argues the trial court erred by determining "it is not possible to have hardships [under the second and third variance factors] but not unnecessary hardships [under the first variance factor]." Upon review, we conclude any error was non-prejudicial.

In its 21 May 2009 order, the Commission determined The Riggings suffered "hardships" under the second and third variance factors, but not "unnecessary hardships" under the first variance factor. As discussed previously, the Commission based its "unnecessary hardships" determination on its prohibition against permanent erosion control structures.

However, the trial court determined "it is not possible to have hardships but not unnecessary hardships."

On appeal to this Court, the Commission contends the trial court's determination would render the word "unnecessary" superfluous. Thus, the Commission argues the trial court erred in its interpretation of N.C. Gen. Stat. § 113A-120.1 (2011). See *HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) ("Such statutory construction is not permitted, because a statute must be construed, if possible, to give meaning and effect to all of its provisions.").

Since we affirm the trial court's "unnecessary hardships" determination under *Williams*, any error the trial court committed by stating "it is not possible to have hardships but not unnecessary hardships" is non-prejudicial. See *Rea v. Simowitz*, 226 N.C. 379, 383, 38 S.E.2d 194, 197 (1946) ("It is an established rule of appellate practice that the burden is on the appellant not only to show error but also to show that he was prejudiced."). Regardless of the trial court's statement, The Riggings suffered "unnecessary hardships."

Consequently, we decline to further address this argument.

## **2. Fourth Variance Factor**

The Commission next argues the trial court erred by holding The Riggings satisfied the fourth variance factor.<sup>5</sup> Specifically, The Riggings argues the trial court erred by: (i) failing to consider the Commission's rules; and (ii) substituting its own judgment for that of the Commission. Since both arguments concern the same variance factor, we consider them together. Upon review, we affirm the result of the trial court's decision.

North Carolina's Constitution recognizes the importance of our state's coastal areas:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina . . . to preserve as a part of the common heritage of this State its . . . beaches . . . and places of beauty.

N.C. Const. art. XIV, § 5. Accordingly, in 1974 our General Assembly adopted The Coastal Area Management Act because "an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina." N.C. Gen.

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<sup>5</sup> The fourth variance factor states, "The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice." N.C. Gen. Stat. § 113A-120.1(a)(4) (2011).



Stat. § 113A-102(a) (2011). CAMA has, *inter alia*, the following goal:

(4) To establish policies, guidelines and standards for:

a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value;

b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments.

N.C. Gen. Stat. § 113A-102(b) (2011). Thus, CAMA seeks to balance public interests with private property interests. See *id.*

To accomplish its goals, CAMA established the North Carolina Coastal Resources Commission. N.C. Gen. Stat. § 113A-104 (2011). The Commission's rules recognize its role in balancing private property interests with competing public interests:

It is hereby declared that the general welfare and public interest require that development along the ocean and estuarine shorelines be conducted in a manner that avoids loss of life, property and amenities. It is also declared that protection of the recreational use of the shorelines of the state is in the public interest. In order

to accomplish these public purposes, the planning of future land uses, reasonable rules and public expenditures should be created or accomplished in a coordinated manner so as to minimize the likelihood of damage to private and public resources resulting from recognized coastal hazards.

15A N.C.A.C. 7M.0201.

One way CAMA protects our coasts is by prohibiting the construction of "permanent erosion control structure[s] in an ocean shoreline." N.C. Gen. Stat. § 113A-115.1(b) (2011). Additionally, CAMA prohibits "the construction of a temporary erosion control structure that consists of anything other than sandbags in an ocean shoreline." *Id.* CAMA authorizes the Commission to regulate temporary sandbag structures. *Id.*

The Commission adopted several administrative rules regulating temporary sandbag structures. *See* N.C. Gen. Stat. § 113A-115.1(b1) (2011). For instance,

[t]emporary measures to counteract erosion, such as the use of sandbags and beach pushing, should be allowed, but only to the extent necessary to protect property for a short period of time until threatened structures may be relocated or until the effects of a short-term erosion event are reversed. In all cases, temporary stabilization measures must be compatible with public use and enjoyment of the beach.

15A N.C.A.C. 7M.0202(e); *see also* 15A N.C.A.C. 7H.1701, 15A N.C.A.C. 7H.1702. The Commission's rules further regulate

temporary sandbag structures as to: (i) situation; (ii) location; and (iii) time. See 15A N.C.A.C. 7H.0308(a)(2).

In the present case, the Commission argues the trial court erred by determining The Riggings satisfied the fourth variance factor. We disagree.

In its 21 May 2009 order, the Commission engaged in the following fourth variance factor analysis:

The proposed variance is inconsistent with the spirit purpose, and intent of the [Commission'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. . . . Additionally, the [Commission] concludes as a matter of law that the situation with the sandbag revetment protecting [The Riggings'] structures does not secure public safety and welfare. Depending on the variable nature of the beach profile sometimes the sandbags are buried and sometimes exposed, sometimes that public has to detour landward around the sandbags depending on the beach profile and the tide, and there has been at least one instance during this 24-year placement when holes in the sandbag revetment had to be filled with other sandbags. . . . Finally, allowing these sandbags to remain to protect [The Riggings'] structures over an even greater period of time will not preserve substantial justice because both the legislature and the [Commission's] intent for the use of sandbags is as a temporary erosion control structure.

The Commission based this determination on the "substantial evidence in the record." The trial court then reversed and remanded because it determined: (i) the Commission's fourth

variance factor analysis is not supported by substantial evidence; and (ii) there is substantial evidence to grant the variance. The Commission now contends the trial court erred because The Riggings' variance request does not satisfy the fourth variance factor.

To better analyze the Commission's argument, we rely on several canons of statutory construction. First, our Supreme Court describes how:

[w]here there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, *unless it appears that the legislature intended to make the general act controlling*[:.]

*McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quotation marks and citation omitted)(emphasis added). Furthermore, "statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other." *In re Declaratory Ruling by N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22, 27, 517 S.E.2d 134, 139 (1999). "Such statutes should be reconciled with each other

when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 400, 269 S.E.2d 547, 561 (1980). Lastly, our Supreme Court expressly warns:

an agency having authority to effectuate the policies of a particular statute may not effectuate such policies so singlemindedly that it wholly ignores other and equally important legislative objectives. This is especially true in the case of agencies which have both accusatorial and judgmental powers. The potential for unfairness and abuse is obvious in a situation in which an administrative officer is vested with broad rulemaking powers, determining the admissibility and weight of evidence in hearings and making the final determination on the merits of an action.

*Id.* at 409, 269 S.E.2d at 566.

In light of this discussion, we now analyze whether the requested variance satisfies the fourth variance factor.

CAMA establishes the Commission and expressly grants it the ability "to adopt rules to designate or protect areas of environmental concern, to govern the use of sandbags, or to govern the use of erosion control structures in estuarine shorelines." N.C. Gen. Stat. §§ 113A-104 and 113A-115.1(b1) (2011). Thus, the Commission clearly has the authority to make determinations regarding temporary sandbag structures. *See id.* However, we must analyze this statutory authority in the context

of CAMA's other provisions. See *In re Declaratory Ruling*, 134 N.C. App. at 27, 517 S.E.2d at 139. To this effect, both CAMA and the Commission's own rules recognize a necessary balance between private property interests and competing public interests. See N.C. Gen. Stat. § 113A-102 (2011); 15A N.C.A.C. 7M.0201. Given this legislative intent, we recognize that the Commission's fourth variance factor analysis will inherently contemplate some form of balancing.

We acknowledge the logistical difficulties of balancing private property interests with competing public interests. Indeed,

[i]t is important to reiterate that there can be no truly optimal environmental governance because resource management as well as public health and ecological protection involve to some degree measuring the unmeasurable and comparing the incomparable. Optimizing one set of virtues will often entail compromising on other values. Many environmental problems have at their core questions over which people do not—and need not—agree. At this level, the policy process is art, not science.

Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. Rev. 1495, 1519 (1999). However, administrative agencies like the Commission must engage in this type of balancing to promote fair governance:

[T]he environmental policymaking process can be sharpened through improved governance. Indeed, a well-functioning regulatory system

will generate information and analysis to inform decisionmakers, isolate the value judgments that must be made, highlight the assumptions on which decisions might turn, and tee up the critical political questions for decision in a fair and unbiased way. By reducing the zone of technical uncertainty, better decisionmaking structures and procedures narrow the range of policy disputes.

*Id.* Otherwise, without guidance as to "the assumptions on which [variance] decisions might turn," petitioners like The Riggings would be unable to make effective, informed variance requests.

Based on this discussion, we interpret the Commission's fourth variance factor analysis to implicitly balance The Riggings' private property interest with competing public interests. We construe the Commission's balancing analysis as follows.

First, the Commission recognized The Riggings' private property interest: The Riggings has been threatened by erosion since 1985 and uses the sandbags to protect its condos against this erosion. Next, the Commission balanced this private property interest with competing public interests.

For instance, the Commission considered how the sandbags may at some point impermissibly become *de facto* permanent structures. As a public policy determination, CAMA's regulatory framework expressly prohibits permanent structures. See N.C. Gen. Stat. § 113A-115.1(b) (2011); 15A N.C.A.C. 7M.0202(e).

Furthermore, the Commission referenced aesthetic concerns because "sometimes the sandbags are . . . exposed." Lastly, the Commission described how "sometimes the public has to detour landward around the sandbags depending on the beach profile and the tide.

Still, the Commission conceded that "even at high tide the public can get around the sandbags by going between the sandbags and The Riggings buildings closest to the ocean." Additionally, the Commission noted that "[a] former member of the U.S. Army Corps of Engineers is on record as stating that [T]he 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."

Given the Commission's decision to deny the variance, it is clear the Commission's order balanced these issues in favor of public interests. Since the trial court reversed the Commission, the trial court inherently balanced the competing interests differently. As a question of law, we review these balancing determinations *de novo*.<sup>6</sup> See *Carroll*, 358 N.C. at 659,

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<sup>6</sup> In her dissent, Judge Bryant contends both this Court and the trial court should have applied the whole record test, not *de novo* review, to examine the Commission's fourth variance factor determination. However, we do not dispute the Commission's factual determinations. See *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 ("It is well settled that in cases appealed from administrative tribunals, . . . fact-intensive issues such as



599 S.E.2d at 895. Upon review, we conclude The Riggings' private property interest outweighs the public interests considered by the Commission.

Here, The Riggings has a substantial private property interest. If the sandbags are removed, the condos face potential destruction from erosion. We now weigh this private property interest against the public interests considered by the Commission: (i) CAMA's prohibition of permanent erosion control structures; (ii) aesthetic concerns; and (iii) public beach access.

First, although CAMA's framework prohibits permanent structures, the sandbags have not yet become *de facto* permanent structures. We do not dispute the importance of CAMA's prohibition against permanent erosion control structures. See *Pamlico Marine Co. v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986) ("[A]n administrative agency's interpretation of its own regulation is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation."). However, in sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." (alteration in original)(quotation marks and citation omitted)). Instead, we analyze as a matter of law whether the Commission appropriately balanced competing policy concerns under CAMA's statutory framework. See N.C. Gen. Stat. § 150B-51(b)(2) and (4) (2011) Consequently, we apply *de novo* review. See *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

its latest variance petition, The Riggings proposed a new beach renourishment solution, the Habitat Enhancement Project. If this solution is successful, The Riggings would no longer need the sandbags. When The Riggings still seeks alternative erosion solutions, the Commission's prohibition of permanent structures does not outweigh The Riggings' private property interest.

Second, we acknowledge the intrinsic natural beauty of our state's coasts. See N.C. Const. art. XIV, § 5. However, this aesthetic importance does not override *all* competing interests. With 98% of Kure Beach renourished, the public has ample opportunity to enjoy nearby beaches. The public's interest in enjoying the aesthetics of The Riggings' beachfront does not outweigh The Riggings' private property interest.

Lastly, we consider the public's interest in beach access. Here, although the public may have to walk around the sandbags, the sandbags do not completely prohibit beach access. Indeed, "even at high tide, the public can get around the sandbags by going between the sandbags and The Riggings buildings closest to the ocean." Furthermore, the Fort Fisher stone revetment blocks the public from proceeding beyond The Riggings' beachfront. Thus, the public's need to pass through The Riggings' beachfront is minimal.

In sum, we believe The Riggings' substantial private property interest outweighs the competing public interests considered by the Commission. Consequently, we affirm the trial court's reversal of the Commission's fourth variance factor determination in result.

### **B. Petitioner's Cross-Appeal**

On cross-appeal, The Riggings argues: (i) the trial court erred in concluding the Commission did not need to make factual findings regarding reasonable use of the property; (ii) the Commission's actions violate the takings doctrine; and (iii) the Commission's actions violate the separation of powers doctrine. Upon review, we affirm.

#### **1. Reasonable Use**

The Riggings first argues the trial court erred by deciding the Commission did not need to make factual findings regarding the reasonable use of the property. We disagree.

The Riggings primarily relies on *Williams* for this argument. In *Williams*, the petitioner appealed the Commission's denial of his variance request. 144 N.C. App. at 481, 548 S.E.2d at 795. There, we determined the Commission erred in its first variance factor analysis because it failed to "make findings of fact and conclusions of law as to the impact of the

act on the landowner's ability to make a reasonable use of his property." *Id.* at 487, 548 S.E.2d at 798.

However, in *Williams* we applied an older version of N.C. Gen. Stat. § 113A-120.1 that stated:

Any person may petition the Commission for a variance granting permission to use his land in a manner otherwise prohibited by rules, standards, or limitations prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. *When it finds* that (i) practical difficulties or unnecessary hardships would result from strict application of the guidelines, rules, standards or other restrictions applicable to the property [and makes other specific findings, a variance may be granted.]

N.C. Gen. Stat. § 113A-120.1 (1989) (emphasis added). Shortly after we decided *Williams*, our General Assembly amended N.C. Gen. Stat. § 113A-120.1 to state:

Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, *the petitioner must show* all of the following: (1) Unnecessary hardships would result from strict application of the rules, standards, or orders.

N.C. Gen. Stat. § 113A-120.1(a) (2011) (emphasis added). This amendment shifted the burden of proving the four variance factors to petitioners. Consequently, now the Commission does

not need to make a "reasonable use" determination before denying a variance request.

The Riggings also erroneously relies on *Elkins v. City of Greensboro, Bd. of Adjustment*, 2005 WL 2429808 (N.C. Ct. App. 4 Oct. 2005), and *Robertson v. Zoning Bd. of Adjustment for Charlotte*, 167 N.C. App. 531, 605 S.E.2d 723 (2004).

In *Elkins*, the petitioner appealed the denial of a zoning variance to build a church parking lot. 2005 WL at \*1. There, we reversed and remanded because the zoning board did not make a "reasonable use" determination. *Id.* at \*4. However, *Elkins* is inapplicable to the instant case for two reasons. First, since *Elkins* is an unpublished case, it "is not controlling legal authority." *Cary Creek Ltd. P'ship v. Town of Cary*, 203 N.C. App. 99, 106, 690 S.E.2d 549, 554 (2010) (quotation marks and citation omitted); see also N.C. R. App. P. 30(e)(3). Second, the regulation at issue in *Elkins*, Greensboro Ordinance § 30-9-6.10(D), provided that "The Board may [grant a variance] *if it finds* that: (a) If the applicant complies with the provisions of this Ordinance, he can make no reasonable use of his property." 2005 WL at \*2 (emphasis added). There, unlike in the instant case, the zoning board was required to make a "reasonable use" determination.

In *Robertson*, the petitioner appealed a city zoning board's denial of his variance request. 167 N.C. App. at 531, 605 S.E.2d at 724. There, the petitioner erroneously relied on *Williams* to argue the zoning board did not need to make an "unnecessary hardships" determination. *Id.* at 538, 605 S.E.2d at 728. On appeal, this Court cited *Williams* to support its holding that the zoning board had to make an "unnecessary hardships" determination. *Id.* Since the *Robertson* court did not cite *Williams* for its "reasonable use" proposition, *Robertson* is not applicable here.

Consequently, *Williams*, *Elkins*, and *Robertson* do not support The Riggings' argument. The trial court did not err in determining the Commission did not need to make a "reasonable use" determination.

## **2. Takings Doctrine**

Next, The Riggings contends the Commission's denial of its variance request constitutes an impermissible taking. Upon review, we determine this issue is not ripe for review.

In North Carolina, "land-use challenges are not ripe for review until there has been a final decision about what uses of the property will be permitted." *Messer v. Town of Chapel Hill*, 125 N.C. App. 57, 61, 479 S.E.2d 221, 223, *vacated on other*

*grounds*, 346 N.C. 259, 485 S.E.2d 269 (1997). For takings claims,

[t]his rule is compelled by the very nature of the inquiry required by the Just Compensation Clause, because the factors applied in deciding a takings claim simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

*Id.* (quotation marks and citation omitted).

In the present case, we have affirmed the trial court's decision to reverse and remand. As such, The Riggings' takings claim is not ripe because there has not yet been a final variance decision. See *Cary Creek Ltd. P'ship*, 203 N.C. App. at 102, 690 S.E.2d at 552; *Cardwell v. Smith*, 92 N.C. App. 505, 508, 374 S.E.2d 625, 627 (1988) ("As of the date of the case *sub judice* being filed on appeal, the Zoning Board had not complied with this Court's mandate . . . . To answer [a question of ripeness], it is necessary to have a final determination of the validity of the special use permit originally granted.").

Consequently, since there has not yet been a final variance decision, the trial court did not err by determining The Riggings' takings claim is not yet ripe.

### 3. Separation of Powers Doctrine

Lastly, The Riggings argues the Commission violated the separation of powers doctrine because it acted in a quasi-legislative and quasi-judicial capacity. We disagree.

In North Carolina, it is well-established that our legislature may delegate rule-making power to administrative agencies as long as it provides sufficient guiding standards. *See Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978). In *Adams*, our Supreme Court explicitly determined the Commission's creation under CAMA is a constitutional delegation of legislative power. *See id.* at 702, 249 S.E.2d at 413. Similarly, in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), our Supreme Court determined Article IV, § 3 of our state's Constitution allows an administrative agency to take on discretionary judicial authority when "reasonably necessary to accomplish the agency's purposes." *Id.* at 379, 379 S.E.2d at 34.

Given the clear precedent of *Adams* and *Civil Penalty*, we determine The Riggings' separation of powers argument is without merit. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme



Court.” (quotation marks and citation omitted) (second and third alterations in original)). First, *Adams* already determines the Commission’s creation under CAMA is a constitutional delegation of legislative power. See *Adams*, 295 N.C. at 702, 249 S.E.2d at 413. Second, since N.C. Gen. Stat. § 113A-120.1(a) explicitly contemplates the Commission’s issuance of variances, we believe it is self-evident that judicial authority to rule on variance requests is “reasonably necessary” to accomplish the Commission’s statutory purpose.

Therefore, we hold the trial court did not err in determining the Commission’s actions did not violate the separation of powers doctrine.

#### **IV. Conclusion**

With a rock revetment to the south, and depleted coquina formations to the north, The Riggings truly is caught between a rock and a hard place. In this scenario, we must balance The Riggings’ private property interest with competing public interests to determine whether a variance is consistent with the “spirit, purpose, and intent” of CAMA’s framework. Without a variance, The Riggings’ condos will likely be destroyed by erosion. We believe this private property interest outweighs competing public interests. Consequently, the trial court’s decision is

AFFIRMED.

Judge McCULLOUGH concurs.

Judge BRYANT concurs in part and dissents in part by  
separate opinion.

NO. COA12-1299

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2013

RIGGINGS HOMEOWNERS, INC.,  
Petitioner,

v.

New Hanover County  
No. 09 CVS 2761

COASTAL RESOURCES COMMISSION OF  
THE STATE OF NORTH CAROLINA,  
Respondent.

BRYANT, Judge, concurring in part, dissenting in part.

The majority opinion reviews and affirms the order of the trial court reversing and remanding the denial of a variance to the North Carolina Coastal Resources Commission ("CRC") for a new hearing. In so doing the majority determines that the trial court applied the correct standard of review to the issues before it, and that the trial court's review of these issues was properly conducted. While I believe the trial court applied the correct standard of review and did so properly as to the first issue we review on appeal, I do not believe the trial court properly applied the correct standard of review to the second issue. Therefore, I concur in the portion of the majority opinion affirming the trial court's review and determination as to the first variance factor. However, I must dissent from the

portion of the majority opinion affirming the trial court's analysis and ruling as to the fourth variance factor.

In the portion of its order regarding "The Issues for Appeal," the trial court set out the standard of review it used for each issue as follows:

(I) Whether the CRC erred in its Conclusion of Law 3(b) that the Petition did not demonstrate that strict application of 15A NCAC 7H.1705 (a)(7) would result in an unnecessary hardship to the Riggings Property per N.C. Gen. Stat. 113A-120.1(a)(1). *On this issue the Court used the de novo review standard.*

(II) Whether the CRC erred in its Conclusion of Law 6 that the Petitioners did not meet the fourth requirement of a variance request that the granting of 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 per N.C. Gen. Stat. 113A-120.1(a)(4); and that the decision of the CRC is supported by substantial evidence. *On this issue the Court used the Whole Record review standard on the issues of substantial evidence and de novo standard on the other issues.*

(emphasis added).

As to Issue I, I agree that the trial court used the correct standard of review - de novo. However, as to Issue II, the trial court stated that it would use both whole record review and de novo review in analyzing the fourth variance factor. Based on the trial court's analysis, almost all of

which related to stipulated findings of fact from the Commission's order as well as the trial court's independent findings of fact, it appears the trial court used the whole record test exclusively. Notwithstanding the trial court's statement that it would use both de novo and whole record review in analyzing the requirements of the fourth variance, I see nothing to indicate the trial court used anything other than whole record review. And, while I think the whole record review is the correct standard to use, I do not think the trial court used it correctly.

Under whole record review the trial court must examine the whole record to determine whether there is substantial evidence to support the agency's decision. *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). Unlike de novo review, under whole record review the trial court is not allowed to substitute its judgment for that of the agency. *Meza v. Div. of Soc. Servs. & Div. of Med. Assistance of the N.C. HHS*, 364 N.C. 61, 69-70, 692 S.E.2d 96, 102 (2010). Even if, as here, the trial court could have reached a different result de novo, it "may not substitute its judgment for the agency's as between two conflicting views[.]" *Id.*

Because it appears the trial court improperly substituted its own judgment on whole record review, I believe the decision was reached under a misapprehension of the correct standard of review. Further, a correct application of a whole record review to the facts of this case could result in a determination that there exists substantial evidence to justify upholding the agency decision.

Therefore, I would reverse and remand to the trial court to properly apply the correct standard of review.

No.

FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

RIGGINGS HOMEOWNERS, INC. )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 COASTAL RESOURCES )  
 COMMISSION OF THE )  
 STATE OF NORTH CAROLINA, )  
 )  
 Respondent. )

From New Hanover County  
 No. COA 12-1299

\*\*\*\*\*

NOTICE OF APPEAL BASED ON DISSENT IN COURT OF APPEALS  
PURSUANT TO N.C.G.S. §7A-30(2) AND N.C. R. APP. P. 14

And

PETITION FOR DISCRETIONARY REVIEW UNDER  
N.C.G.S. 7A-31(c) AND N.C. R. APP. P. 15

And

PETITION FOR STAY AND SUPERSEDEAS PENDING CONSIDERATION  
OF PETITION AND ANY SUBSEQUENT REVIEW OF COURT OF APPEALS  
OPINION PURSUANT TO APP. RULE 23(b)

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No.

FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

RIGGINGS HOMEOWNERS, INC.        )  
   )  
                           Petitioner,        )  
   )  
                   v.                                )  
   )  
 COASTAL RESOURCES                    )  
 COMMISSION OF THE STATE OF        )  
 NORTH CAROLINA,                        )  
   )  
                           Respondent.        )

From New Hanover County  
 No. COA12-1299

\*\*\*\*\*

NOTICE OF APPEAL BASED ON DISSENT IN COURT OF APPEALS  
 PURSUANT TO N.C.G.S. §7A-30(2) AND N.C. R. APP. P. 14

And

PETITION FOR DISCRETIONARY REVIEW UNDER  
 N.C.G.S. 7A-31(c) AND N.C. R. APP. P. 15

And

PETITION FOR STAY AND SUPERSEDEAS PENDING CONSIDERATION  
 OF PETITION AND REVIEW OF COURT OF APPEALS OPINION  
 PURSUANT TO N.C. R. APP. P. 23(b)

\*\*\*\*\*

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Respondent, the Coastal Resources Commission of the State of North  
 Carolina (“Commission”), through counsel and pursuant to N.C.G.S. § 7A-30 and

Rule 14 of the North Carolina Rules of Appellate Procedure, hereby gives notice of appeal to the North Carolina Supreme Court from the decision of the North Carolina Court of Appeals filed on 6 August 2013 in case No. COA12-1299, based on a dissent. The Commission, pursuant to N.C.G.S. § 7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure, also respectfully petitions the Supreme Court of North Carolina to certify for discretionary review another issue within the same decision of the Court of Appeals on the basis that the subject matter of the appeal involves principles of major significance to the jurisprudence of the State. Finally, the Commission respectfully petitions for a writ of supersedeas and stay pursuant to Rule 23(b) of the North Carolina Rules of Appellate Procedure requesting that the Court stay the decision of the Court of Appeals pending consideration of the petition for discretionary review and any review by the Court. For all the reasons stated below, the Supreme Court should hear all issues raised by the Commission on their merits.

### **Facts and Procedural Background**

The Riggings Homeowners, Inc.'s ("The Riggings") is a homeowner's association, which manages a residential development in Kure Beach. This case arose out of the Commission's denial of The Riggings' fifth request for a variance to keep "temporary sandbags" in place in an Ocean Hazard Area of Environmental Concern pursuant to the Coastal Area Management Act of 1974, N.C.G.S. Chap.

113A, Art. 7 (“CAMA”). The term “The Riggings” also refers to the buildings themselves.

The Riggings development consists of forty-eight condominium units located in four buildings facing the Atlantic Ocean. Immediately south of The Riggings is Fort Fisher State Park, which since 1995 has been protected from the effects of erosion by a permanent rock revetment. The State has a policy banning hardened structures on the oceanfront, but the revetment was constructed under a historical sites exception to this policy. To the north of The Riggings is an intertidal natural coquina rock outcrop. In 1926, the New Hanover County Board of County Commissioners allowed a government contractor to excavate a 50-100 foot strip of the coquina rock to build a section of Highway 421. The Fort Fisher Coquina Outcrop Natural Area was entered on the official North Carolina Registry of Natural Heritage Areas in 1982.

The Riggings’ buildings have been “imminently threatened” by erosion, as defined by 15A NCAC 07H .0308(a)(2)(B), since 1985. A series of CAMA permits authorized the use of a temporary sandbag structure to protect the buildings from 1985 through 2000. After the sandbag permit expired in 2000, The Riggings sought and received four separate variances from the Commission allowing the sandbags to remain in place between 2000 and 2005 while The Riggings explored permanent options to protect its buildings. Applicable rules

allow sandbags as temporary measures while impacted property owners seek permanent solutions that do not involve hardened structures, namely beach nourishment and structure relocation.

The Riggings first sought to protect the oceanfront buildings with beach nourishment, but this attempt ended in 2000, when the United States Army Corps of Engineers (“Corps”) informed The Riggings that it would not extend the Corps’ nourishment project to the beach in front of The Riggings due to the coquina rock outcropping. The Riggings then explored the possibility of relocating two of the buildings to a vacant site located on the opposite side of Highway 421. The Town of Kure Beach (“Town”) was awarded a \$3.6 million FEMA grant in July of 2004 which would have allowed the Town to acquire a portion of The Riggings’ ocean side property once some of the buildings comprising The Riggings were moved or rebuilt across the street. The grant required the individual unit owners of The Riggings to contribute a total of \$900,000 towards the cost of the project. The owners rejected the grant and it was terminated on 1 June 2006. With the termination of the grant and the expiration of the fourth variance, The Riggings was ordered to remove the sandbags.

The Riggings’ fifth variance petition sought to extend the removal deadline for the sandbags and requested an open-ended authorization to keep the sandbags in place “until such time as Petitioner’s proposed Habitat Enhancement Project

and/or a renourishment project, either privately or publicly funded, has been completed.” The stipulated facts on which the variance was heard do not provide any evidence that The Riggings was pursuing either of the options set out in its proposal.

Both the Commission’s variance rules and the statute authorizing such rules set forth the following variance criteria:

1. that unnecessary hardships would result from strict application of the development rules, standards, or orders issued by the Commission;
2. that such hardships result from conditions peculiar to the petitioner’s property such as location, size, or topography;
3. that such hardships did not result from actions taken by the petitioner; and
4. that the requested variance is consistent with the spirit, purpose and intent of the Commission’s rules, standards or orders; will secure the public safety and welfare; and will preserve substantial justice.

N.C.G.S. § 113A-120.1 and 15A NCAC 7J .0703(f). The burden of proof is on a petitioner to prove all of these four factors before the Commission may grant a variance.

At the first hearing on the fifth variance request in January 2008, the Commission found that The Riggings failed to meet its burden on all four of the factors of N.C.G.S. § 113A-120.1(a). Following a hearing on The Riggings’ petition for judicial review, the Honorable Jay D. Hockenbury reversed and remanded the matter to the Commission for re-hearing. In April 2009, the fifth

variance request was re-heard and again denied by the Commission on the grounds that The Riggings had failed to show it could meet the first and fourth variance factors.

### **The Trial Court's Order**

The Riggings sought judicial review of the Commission's second denial of the fifth variance request. Following a hearing, Judge Hockenbury issued an Order on 1 June 2012 reversing the Commission's 2009 Final Decision and remanding the case for a new hearing consistent with its order ("trial court's Order"). Specifically, the Superior Court held:

- (1) The Commission misinterpreted the Stipulated Facts supporting the first criteria when it found that "erosion was stable."
- (2) The Commission erred as a matter of law by basing its decision on the first factor on facts particular to the property owners and not limiting its consideration to the conditions of the property as the Court of Appeals had previously indicated in *Williams v. DENR*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).
- (3) The Commission's findings of factors 2 and 3 in The Riggings' favor include a finding that a "hardship" exists and therefore, require a finding in The Riggings' favor on factor 1 that there is an "unnecessary hardship."
- (4) The Commission's conclusion on factor 4 was not supported by substantial evidence.
- (5) The variance statute does not require the Commission make findings and conclusions regarding The Riggings' reasonable use of the property.



- (6) The takings issue is not ripe until a final decision is made on the variance.
- (7) The Commission's decision does not violate the Separation of Powers doctrine.
- (8) The Commission is an impartial tribunal.

The Commission appealed issues (1) through (4) of the trial court's Order to the North Carolina Court of Appeals and The Riggings cross appealed issues (5) through (7).

### **The Court of Appeals' Decision**

In its 6 August 2013 published opinion, the Court of Appeals affirmed the trial court's Order and held that the trial court correctly determined that the Riggings had met the requirements of the first and fourth factors and that the trial court had correctly denied all of the issues raised in the cross appeal (issues 5, 6, and 7 above). Judge Bryant concurred in part and dissented in part stating, "I must dissent from the portion of the majority opinion affirming the trial court's analysis and ruling as to the fourth variance factor." Specifically, Judge Bryant agreed that the whole record review is the correct standard to use, but contended that the trial court improperly substituted its own judgment for that of the agency when "a correct application of a whole record review to the facts of this case could result in a determination that there exists substantial evidence to justify upholding the agency decision."

## **I. NOTICE OF APPEAL**

The Commission gives notice of appeal pursuant to N.C.G.S. § 7A-30(2) based on a dissent from the Court of Appeals' 6 August 2013 decision. The dissent in this case was entered by Judge Bryant "from the portion of the majority opinion affirming the trial court's analysis and ruling as to the fourth variance factor." (Dissent at 1-2) Judge Bryant indicated that she believed the trial court failed to properly apply the whole record standard of review correctly when it substituted its own judgment for that of the Commission regarding the fourth variance factor found at N.C.G.S. § 113A-120.1. (Dissent at 1, 4) Based on this dissent and N.C.G.S. § 7A-30(2), the Commission hereby gives notice of appeal to the North Carolina Supreme Court. A copy of the Court of Appeals' decision and of Judge Bryant's dissent is attached.

## **II. PETITION FOR DISCRETIONARY REVIEW**

The Commission, pursuant to N.C.G.S. § 7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure, also respectfully petitions the Supreme Court of North Carolina to certify the 6 August 2013 decision of the Court of Appeals for discretionary review as the subject matter of the appeal involves principles of major significance to the jurisprudence of the State.

### **Reasons Why Certification Should Issue**

The trial court's order affirmed by the Court of Appeals results in a prohibition against the Commission considering information about The Riggings' previous permit and variances despite the fact that consideration of an applicant's attempts to permanently address their erosion issues is essential to determining whether the Commission's strict application of its sandbag time-limit rules results in "unnecessary hardships" for The Riggings. *See* N.C.G.S. § 113A-120.1(a)(1) (the first variance factor). Further, although the Court of Appeals concluded that the Commission's purported focus on the property owner in its consideration of the first variance factor "would raise *prima facie* equal protection issues," the Court of Appeals failed to undertake any equal protection analysis. And if it had, such analysis is not supported by and is in conflict with the Court of Appeals' conclusion that The Riggings' property was "*sui generis*." (Slip Op. at 3, 19) These are legal principles of major significant to the jurisprudence of the State. For these reasons, this Court should certify the Commission's petition for discretionary review.

Nothing in the controlling statute requires that the Commission's analysis focus solely on the condition of the property itself. The relevant statutory language states only that "the petitioner must show . . . [that] [u]nnecessary hardships would result from strict application of the rules, standards, or orders." N.C.G.S. § 113A-

120.1(a)(1). In this case, The Riggings is seeking a variance from the sandbag time-limit rules which allow sandbags only as an interim means if acceptable means of long-term erosion control, such as beach renourishment or structure relocation, are being pursued. The Commission's analysis of the applicant's pursuit of those measures, including the duration of that pursuit, is not only relevant to resolve this issue, but absolutely necessary.

The Court of Appeals found that the Commission improperly focused its analysis on the property owner rather than the property. (Slip Op. at 18) In the Court of Appeals' view, the Commission's analysis is limited to the physical attributes of the property and the Commission errs if it considers the property owner's actions to address conditions at the site. (Slip Op. at 17-19) In this regard, the Court of Appeals, like the trial court, incorrectly relied on *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 548 S.E.2d 793 (2001). In *Williams*, the coastal wetlands at issue had not yet been filled, and Mr. Williams sought a variance from the Commission's rules against filling wetlands in order to construct a building on his property. *Id.* at 481, 548 S.E.2d at 795. The Commission concluded that there was no unnecessary hardship "in that alternatives for siting and design of the proposed facility exist that would reduce or eliminate the wetlands impacts of the project." *Id.* at 485, 548 S.E.2d at 797. In reversing that determination, the Court of Appeals held that it was error for the Commission

to consider the fact that Mr. Williams possessed other property because “[s]imilarly situated persons would be treated differently, giving rise to equal protection of law issues.” *Id.* In other words, Mr. Williams' permit application had been denied because he owned property elsewhere, whereas a similarly situated permit applicant who did not own other property would be evaluated differently. The ownership of an alternative piece of property was, in the Court's opinion, not a relevant consideration. The case at bar, however, raises no similar issue regarding equal application of the law as the Commission only considered the condition of the property and the actions taken by The Riggings relating to that property which was the subject of the variance request.

The Commission's 2009 Final Decision observed the “plain language of the statute and regulations allow[ing] use of sandbags” authorizes the use of sandbags to protect structures “as a temporary, not a permanent, erosion control measure.” (R p 242) Accordingly, the Commission properly concluded that the time that sandbags had been in place was not only a permissible consideration, but a necessary one. The Commission compared The Riggings' present open-ended variance request to their previous requests, which all proposed specific action. *E.g.*, R p 243 (recounting that previous variances “allow[ed] the Petitioner to explore various options for protecting Petitioner's structures” whereas the “current request . . . does not offer any endpoint for the placement of what is supposed to be

a temporary erosion control measure”) As the Commission’s focus was precisely where it needed to be -- on the exhaustion of realistic possibilities for a successful long-term solution in a time-limited manner and on the open-ended request before it -- and not on any other property owned by The Riggings, the Court of Appeals erred by concluding that “The Riggings’ previous permit and variances are immaterial to the Commission’s ‘unnecessary hardships’ analysis.” (Slip Op. at 18)

Before the Court of Appeal’s 6 August 2013 decision, the Commission considered an applicant’s actions regarding the property at issue as part of the “unnecessary hardships” analysis. If this decision is allowed to remain, not only would the Commission be prohibited from considering other nearby property owned by an applicant, the Commission could arguably be restricted from considering an applicant’s actions regarding the subject property in all future variances that come before the Commission.

The Court of Appeals also concluded that the Commission’s purported focus on the property owner in its consideration of the first variance factor “would raise *prima facie* equal protection issues.” (Slip Op. at 19) However, the Court failed to conduct any equal protection analysis to support this conclusion. If the required analysis had taken place, it would be shown that there were no equal protection issues resulting from the Commission’s application of the sandbag time limits to The Riggings’ variance request.

The equal protection principle “requires that all persons similarly situated be treated alike.” *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). “A claim of equal protection requires a two-tiered scheme of analysis. The first tier requires the court to apply strict scrutiny where the petitioner is either placed in a suspect class or claims an infringement of a fundamental right.” *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 10-11, 269 S.E.2d 142, 149 (1980)). If the State’s action neither affected a fundamental right nor implicated a suspect classification, the court must consider whether the State’s action bears a rational relationship to a legitimate government purpose, instead of applying strict scrutiny. *Texfi Industries*, 301 N.C. at 11, 269 S.E.2d at 149. Had the Court of Appeals undertaken such an analysis, it would have reached a different result.

First, regarding the first tier of equal protection analysis, there is nothing in the record which would support a finding that The Riggings owners are a suspect class. Likewise, the record does not support a conclusion that the denial of the fifth variance from the sandbag time limits infringes on a fundamental right. In support of this conclusion, it is instructive to look to a case with nearly identical operative facts: *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999). In *Shell Island*, the Court of Appeals concluded that those homeowners who were seeking a permanent hardened structure on the oceanfront

were not a suspect class and that their request did not concern a fundamental right. *Shell Island*, 134 N.C. App. at 227, 517 S.E.2d at 414. Like in *Shell Island*, the homeowners in this case do not allege, and the record does not support a finding of a suspect class or a fundamental right, thus second tier analysis applies.

The applicable equal protection analysis for the Court of Appeals, in this case like in *Shell Island*, is whether the Commission's sandbag time limits bore a rational relationship to a legitimate interest of government. *Texfi Industries*, 301 N.C. at 11, 269 S.E.2d at 149. For this analysis, it is again instructive to look at the Court of Appeals' conclusion in *Shell Island*. In *Shell Island*, the Court of Appeals concluded that the hardened structure ban did have a rational relationship to legitimate state interests and noted:

[T]he protection of lands of environmental concern is a conceivable and legitimate government interest, as is the preservation of value and enjoyment of adjacent properties and the need for the public to have access and use of the State's ocean beaches. The hardened structure rules, which prevent permanent structures from being erected in environmentally sensitive areas which may adversely impact the value of the land and adjacent properties, as well as the right to public enjoyment of such areas are clearly rationally related to the legitimate government end.

*Id.* at 233.

Given that the facts in this case are nearly identical to those in *Shell Island*, this analysis is persuasive here. Furthermore, sandbag time limits are in place primarily in order to prevent permanent hardened structures on the ocean beaches,



and so like the hardened structure rules, the sandbag time limits “which prevent permanent structures from being erected in environmentally sensitive areas which may adversely impact the value of the land and adjacent properties, as well as the right to public enjoyment of such areas are clearly rationally related to the legitimate government end.” *Id.* at 233.

After a full two-tier equal protection analysis in *Shell Island*, the Court of Appeals concluded that the Commission’s rules banning permanent hardened erosion control structures on the oceanfront did not raise equal protection issues. Had it done the required analysis in this case, the Court of Appeals would have reached the same conclusion here regarding the Commission’s denial of The Riggings’ fifth variance request. Ensuring that courts undertake the required analysis of equal protection issues is an issue of major significance to the jurisprudence of the State.

Wherefore, the Commission respectfully requests that this Court accept these issues for review pursuant to N.C.G.S. § 7A-31(c)(2) and Rule 15 of the North Carolina Rules of Appellate Procedure.

### **Issues to be Briefed**

The issue to be briefed based on Judge Bryant’s dissent is:

1. Did the Court of Appeals’ majority misapply the whole record standard of review when they substituted their own judgment for that of the

Coastal Resources Commission regarding the fourth variance factor found at N.C.G.S. § 113A-120.1?

In the event the Court allows this petition for discretionary review, the State intends to present the following additional issues in its brief for review:

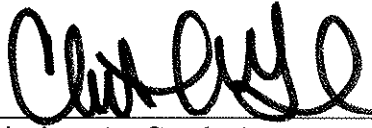
2. Did the Court of Appeals erroneously affirm the trial court's conclusion that the "Commission improperly focused its analysis on the property-owner rather than the property since The Riggings' previous permit and variances are immaterial to the Commission's 'unnecessary hardships' analysis?"
3. Did the Court of Appeals erroneously affirm the trial court's conclusion that the Commission's decision raised "*prima facie* equal protection issues" without conducting an equal protection analysis and if so, does such an analysis reveal that the Commission's application of its rules was rationally related to a legitimate State interest?

### **III. PETITION FOR WRIT OF SUPERSEDEAS AND STAY**

The Commission also petitions the Court that it stay the decision of the Court of Appeals affirming the trial court's Order remanding the matter to the Commission for a new hearing consistent with the mandates and instructions provided by the trial court pending consideration of the foregoing petition for discretionary review and any review by the Court. This Petition is made pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure and is based upon the facts and arguments set forth above.

Respectfully submitted this the 10th day of September 2013.

ROY COOPER  
Attorney General



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Christine A. Goebel  
Assistant Attorney General  
State Bar No. 27286  
cgoebel@ncdoj.gov

NC Department of Justice  
Environmental Division  
PO Box 629  
Raleigh, NC 27602-0629  
(919) 716-6600  
*Attorney for Respondent*

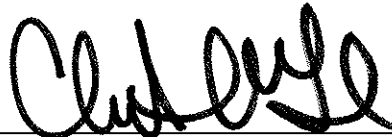
**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF APPEAL, PETITION FOR DISCRETIONARY REVIEW, and PETITION FOR STAY AND SUPERSEDEAS** and attached opinion of the N.C. Court of Appeals has been filed with the Clerk of the Supreme Court of North Carolina.

I certify that a copy of the above has been served upon opposing counsel in this cause by United States mail, first class, postage prepaid and addressed as follows:

William G. Wright  
SHIPMAN & WRIGHT, LLP  
575 Military Cutoff Road, Suite 106  
Wilmington, NC 28405  
*Counsel for Petitioner*

This 10th day of September, 2013.



---

Christine A. Goebel  
Assistant Attorney General

NO. 401A13

FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

RIGGINGS HOMEOWNERS, INC.	:	
Petitioner-Appellee,	:	
	:	
v.	:	
	:	
NORTH CAROLINA COASTAL RESOURCES	:	From New Hanover County
COMMISSION,	:	File No.: 09 CVS 2761
Respondent-Appellant	:	

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW, PETITION TO  
STAY/SUPERSEDEAS AND NOTICE OF APPEAL  
N.C. GEN. STAT. § 7A-31(c) AND N.C.R. APP. 15

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SUPREME COURT OF NORTH CAROLINA

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RIGGINGS HOMEOWNERS, INC.	:	
Petitioner-Appellee,	:	
	:	
v.	:	
	:	
NORTH CAROLINA COASTAL RESOURCES	:	From New Hanover County
COMMISSION,	:	File No.: 09 CVS 2761
Respondent-Appellant	:	

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW, PETITION TO  
STAY/SUPERSEDEAS AND NOTICE OF APPEAL  
N.C. GEN. STAT. § 7A-31(c) AND N.C.R. APP. 15

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioner-Appellee, The Riggings Homeowners, Inc., by and through Counsel, pursuant to N.C. Gen. Stat. § 7A-30(2) and N.C.R. App. 15, and hereby submits this Response to the Respondent's Petition for Discretionary Review, Petition to Stay/Supersedeas, and Notice of Appeal.

STATEMENT OF THE CASE

On 22 August 2006, pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A NCAC 7J.0700, et. seq., Petitioner, Riggings Homeowner's, Inc. (herein "Petitioner" or "Riggings") applied to the Coastal Resources Commission of the State of North Carolina (herein "CRC") for a variance which would allow Petitioner to



maintain temporary sandbags to protect their property longer than is allowed under the rules,<sup>1</sup> and until such time as Petitioner's proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed.

#### First Variance Hearing

The Petitioner and the Division of Coastal Management agreed on a set of stipulated facts and on 17 January 2008, Petitioner's variance request was heard at the regularly scheduled CRC meeting. At the meeting, the Riggings variance request was unanimously denied.

#### Appeal of First Variance Hearing

A Petition for Judicial Review was timely filed pursuant to N.C. Gen. Stat. § 150B-45 on 7 March 2008. On 20 February 2009, after having reviewed the Record for the Riggings Variance

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<sup>1</sup> At the time of the variance request 15A NCAC 7H.1705 provided:

(a) Temporary Erosion Control Structures in the Ocean Hazard AEC.

(1) Permittable temporary erosion control structures shall be limited to sandbags placed above mean high water and parallel to the shore.

. . . .

(7) A temporary erosion control structure may remain in place for up to two years after the date of approval if it is protecting a building with a total floor area of 5000 sq. ft. or less, or, for up to five years if the building has a total floor area of more than 5000 sq. ft. A temporary erosion control structure may remain in place for up to five years if it is protecting a bridge or a road. A temporary sandbag erosion control structure with a base width not exceeding 20 feet and a height not exceeding 6 feet may remain in place for up to five years or until May 2008, whichever is later, regardless of the size of the structure it is protecting if the community in which it is located is actively pursuing a beach nourishment project as of October 1, 2001.

Request, Memorandum of Law, and hearing the arguments of counsel, 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, and reversed the CRC's Order and remanded the matter back to CRC pursuant to the instructions contained in his Order. The Respondent did not take exception or appeal from that Order, implicitly accepting Judge Hockenbury's ruling, and the matter was remanded back to the CRC.

#### Second Variance Hearing

On 29 April 2009, the variance request of the Riggings was reheard at the regularly scheduled meeting of the North Carolina Coastal Resources Commission. The CRC's final order, dated 21 May 2009, denied Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7). In the Order, the CRC concluded that Petitioner did meet two (2) of the four (4) criteria for their variance request. The CRC concluded that "hardships which might result from strict application of the time limits for use of sandbags as a temporary erosion structure... would be from conditions peculiar to Petitioner's property, such as the location, size, or topography of the property." In addition the CRC concluded that "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."

However, the CRC also determined that Petitioner did not meet the other two (2) criteria for their variance request. Specifically, the CRC concluded that unnecessary hardships would not result from strict application of the rules. The CRC also concluded that the variance was not consistent with the spirit, purpose, and intent of the rules, that the variance would not secure public safety and welfare, and that the variance would not preserve substantial justice.

#### Appeal of Second Variance Hearing

A Petition for Judicial Review was timely filed pursuant to N.C. Gen. Stat. § 113A-123 and § 150B-45 on 17 June 2009. A hearing of the review was held again before Judge Hockenbury on 12 and 13 March 2012. Following that hearing Judge Hockenbury entered an Order holding in pertinent part the CRC 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 CRC's

decision is not supported by substantial evidence and there is substantial evidence to grant the variance. Judge Hockenbury reversed the CRC's Order and remanded the matter back to CRC pursuant to the instructions contained in his Order.

Appeal to the North Carolina Court of Appeals

Respondent gave written notice of appeal to the North Carolina Court of Appeals on 27 June 2012. Petitioner gave written notice of cross-appeal on 29 June 2012. The record on appeal was settled by stipulation on 11 October 2012, was filed on 26 October 2012, and was docketed on 6 November 2012. Following Oral Arguments on 10 April 2013, the North Carolina Court of Appeals ruled on August 6, 2013, that sandbags should stay on the beach in front of The Riggings condominium complex in Kure Beach. In its decision, the panel affirmed Judge Hockenbury's ruling, and remanded the matter back before the CRC.

Judge Elmore wrote in the Court's Conclusion: "With a rock revetment to the south, and depleted coquina formations to the north, The Riggings truly is caught between a rock and a hard place. In this scenario, we must balance The Riggings' private property interest with competing public interests to determine whether a variance is consistent with the "sprit, purpose and intent" of CAMA's framework. Without a variance, The Riggings'

condos will likely be destroyed by erosion. We believe this private property interest outweighs competing public interest. Consequently, the trial court's decision is AFFIRMED."

The Alleged Appeal to the North Carolina Supreme Court should be dismissed and the Petitions allegedly filed on behalf the CRC should be denied and/or vacated.

On July 26, 2013, 2013 North Carolina Laws S.L. 2013-360 became effective. (See App. pp. 1-9) As part of the Act, N.C. Gen. Stat. § 113A-104, the statute that established the CRC, was rewritten in large part with numerous sweeping changes to the composition of the CRC and an addition concerning what is a quorum for the CRC. Section 113A-104, as rewritten by the Act provides in pertinent part the following:

. . . .

**§ 113A-104 Coastal Resources Commission**

(a) Established.— The General Assembly hereby establishes within the Department of Environment and Natural Resources a commission to be designated the Coastal Resources Commission.

~~(b) Composition. The Coastal Resources Commission shall consist of 15 members appointed by the Governor, as follows:~~

~~(1) One who shall at the time of appointment be actively connected with or have experience in commercial fishing.~~

~~(2) One who shall at the time of appointment be actively connected with or have experience in~~

~~wildlife or sports fishing.~~

~~(3) One who shall at the time of appointment be actively connected with or have experience in marine ecology.~~

~~(4) One who shall at the time of appointment be actively connected with or have experience in coastal agriculture.~~

~~(5) One who shall at the time of appointment be actively connected with or have experience in coastal forestry.~~

~~(6) One who shall at the time of appointment be actively connected with or have experience in coastal land development.~~

~~(7) One who shall at the time of appointment be actively connected with or have experience in marine-related business (other than fishing and wildlife).~~

~~(8) One who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area.~~

~~(9) One who shall at the time of appointment be actively associated with a State or national conservation organization.~~

~~(10) One who shall at the time of appointment be actively connected with or have experience in financing of coastal land development.~~

~~(11) Two who shall at the time of appointment be actively connected with or have experience in local government within the coastal area.~~

~~(12) Three at-large members.~~

**(b1) Composition.- The Coastal Resources Commission shall consist of 13 members** as follows:

(1) One appointed by the Governor who shall at the time of appointment be a coastal property owner or experienced in land development.

(2) One appointed by the Governor who shall at the time of appointment be a coastal property owner or experienced in land development.

(3) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area or a marine-related science.

(4) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area or a marine-related science.

(5) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in coastal-related business.

(6) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in local government within the coastal area.

(7) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in coastal agriculture.

(8) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in commercial fishing.

(9) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in coastal forestry.

(10) One appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 who shall at the time of appointment be actively connected with or have experience in sports fishing.

(11) One appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 who shall serve at large.

(12) One appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121 who shall at the time of appointment be actively connected with or have experience in wildlife.

(13) One appointed by the General Assembly upon recommendation of the President Pro Tempore of the

Senate in accordance with G.S. 120-121 who shall serve at large.

(c) Appointment of Members.—As used in this section, the term "appointing authority" means the Governor in the case of members appointed by the Governor and means the General Assembly in the case of members appointed by the General Assembly. Appointments to the Commission shall be made to provide knowledge and experience in a diverse range of coastal interests. The members of the Commission shall serve and act on the Commission solely for the best interests of the public and public trust, and shall bring their particular knowledge and experience to the Commission for that end alone. Counties and cities in the coastal area may designate and transmit to the appointing authorities no later than May 1 of each even-numbered year qualified persons in the categories set out in subsection (b1) of this section corresponding to the Commission positions to be filled that year.

~~The Governor shall appoint in his sole discretion those members of the Commission whose qualifications are described in subdivisions (6) and (10), and one of the three members described in subdivision (12) of subsection (b) of this section.~~

~~The remaining members of the Commission shall be appointed by the Governor after completion of the nominating procedures prescribed by subsection (d) of this section.~~

(c1) The members of the Commission whose qualifications are described in subdivisions ~~(1) through (5), (9), and (11)~~, (3), (6), (7), (8), (9), (11), and (12) of subsection (b1) of this section shall be persons who do not derive any significant portion of their income from land development, construction, real estate sales, or lobbying and do not otherwise serve as agents for development-related business activities. The Governor shall require adequate disclosure of potential conflicts of interest by these members. The Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the eligibility of persons under this ~~section~~ subsection.



(c2) All members of the Commission are covered persons for the purposes of Chapter 138A of the General Statutes, the State Government Ethics Act. As covered persons, members of the Commission shall comply with the applicable requirements of the State Government Ethics Act, including mandatory training, the public disclosure of economic interests, and ethical standards for covered persons. Members of the Commission shall comply with the provisions of the State Government Ethics Act to avoid conflicts of interest.

~~(d) Nominations for Membership. On or before May 1 in every even numbered year the Governor shall designate and transmit to the board of commissioners in each county in the coastal area four nominating categories applicable to that county for that year. Said nominating categories shall be selected by the Governor from among the categories represented, respectively by subdivisions (1), (2), (3), (4), (5), (7), (8), (9), (11) two persons, and (12) two persons, of subsection (b) of this section (or so many of the above listed paragraphs as may correspond to vacancies by expiration of term that are subject to being filled in that year). On or before June 1 in every even numbered year the board of commissioners of each county in the coastal area shall nominate (and transmit to the Governor the names of) one qualified person in each of the four nominating categories that was designated by the Governor for that county for that year. In designating nominating categories from biennium to biennium, the Governor shall equitably rotate said categories among the several counties of the coastal area as in his judgment he deems best; and he shall assign, as near as may be, an even number of nominees to each nominating category and shall assign in his best judgment any excess above such even number of nominees. On or before June 1 in every even numbered year the governing body of each incorporated city within the coastal area shall nominate and transmit to the Governor the name of one person as a nominee to the Commission. In making nominations, the boards of county commissioners and city governing bodies shall give due consideration to the nomination of women and minorities. The Governor shall appoint 12 persons from among said city and county nominees to the Commission. The several boards of county~~

~~commissioners and city governing bodies shall transmit the names, addresses, and a brief summary of the qualifications of their nominees to the Governor on or before June 1 in each even-numbered year, beginning in 1974; provided, that the Governor, by registered or certified mail, shall notify the chairman or the mayors of the said local governing boards by May 20 in each such even-numbered year of the duties of local governing boards under this sentence. If any board of commissioners or city governing body fails to transmit its list of nominations to the Governor by June 1, the Governor may add to the nominations a list of qualified nominees in lieu of those that were not transmitted by the board of commissioners or city governing body; Provided however, the Governor may not add to the list a nominee in lieu of one not transmitted by an incorporated city within the coastal area that neither has a population of 2,000 or more nor is contiguous with the Atlantic Ocean. Within the meaning of this section, the "governing body" is the mayor and council of a city as defined in G.S. 160A-66. The population of cities shall be determined according to the most recent annual estimates of population as certified to the Secretary of Revenue by the Secretary of Administration.~~

~~(e) Residential Qualifications. All nominees of the several boards of county commissioners and city governing bodies must reside within the coastal area, but need not reside in the county from which they were nominated. No more than one of those members appointed by the Governor from among said nominees may reside in a particular county. No more than two members of the entire Commission, at any time, may reside in a particular county. No more than two members of the entire Commission, at any time, may reside outside the coastal area.~~

~~(f) Office May Be Held Concurrently with Others.—Membership on the Coastal Resources Commission is hereby declared to be an office that may be held concurrently with other elective or appointive offices in addition to the maximum number of offices permitted to be held by one person under G.S. 128-1.1.~~

~~(g) Terms.—The members shall serve staggered terms of office of four years. At the expiration of each~~

member's term, the ~~Governor~~ appointing authority shall reappoint or replace the member with a new member of like qualification (as specified in subsection (b)(b1) of this section), in the manner provided by subsections (c) and (d) of this section. The initial term shall be determined by the Governor in accordance with customary practice but eight of the initial members shall be appointed for two years and seven for four years. section.

(h) Vacancies.—In the event of a vacancy arising otherwise than by expiration of term, the ~~Governor~~ appointing authority shall appoint a successor of like qualification (as specified in subsection (b)(b1) of this section) section who shall then serve the remainder of his predecessor's term. ~~When any such vacancy arises, the Governor shall immediately notify the board of commissioners of each county in the coastal area and the governing body of each incorporated city within the coastal area. Within 30 days after receipt of such notification each such county board and city governing body shall nominate and transmit to the Governor the name and address of one person who is qualified in the category represented by the position to be filled, together with a brief summary of the qualifications of the nominee. The Governor shall make the appointment from among said city and county nominees. If any county board or city governing body fails to make a timely transmittal of its nominee, the Governor may add to the nominations a qualified person in lieu of said nominee; Provided however, the Governor may not add to the list a nominee in lieu of one not transmitted by an incorporated city within the coastal area that neither has a population of 2,000 or more nor is contiguous with the Atlantic Ocean.~~

(i) Officers.—The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at the pleasure of the Governor. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his—the vice-chairman's regularly appointed term.

(j) Compensation.—The members of the Commission shall receive per diem and necessary travel and subsistence

expenses in accordance with the provisions of G.S. 138-5.

~~(k) In making appointments to and filling vacancies upon the Commission, the Governor shall give due consideration to securing appropriate representation of women and minorities.~~

(l) **Attendance.**—Regular attendance at Commission meetings is a duty of each member. The Commission shall develop procedures for declaring any seat on the Commission to be vacant upon failure by a member to perform this duty.

**(m) Quorum.**— **A majority of the Commission shall constitute a quorum.**<sup>2</sup>

**SECTION 14.24.(b)** Transition of Membership of the Coastal Resources Commission.—**Except as otherwise provided in this section, the terms of all members of the Coastal Resources Commission serving on January 1, 2013, shall expire July 31, 2013.** A new Commission of 13 members shall be appointed in the manner provided by G.S. 113A-104(b1), as enacted by subsection (a) of this section. Members appointed in the manner provided by G.S. 113A-104(b1), as enacted by subsection (a) of this section, shall be appointed no later than August 1, 2013.

(1) The member serving pursuant to G.S. 113A-104(b)(1) on January 1, 2013, shall continue to serve pursuant to G.S. 113A-104(b1)(8), as enacted by subsection (a) of this section, until June 30, 2014.

(2) The member serving pursuant to G.S. 113A-104(b)(2) on January 1, 2013, shall continue to serve pursuant to G.S. 113A-104(b1)(10), as enacted by subsection (a) of this section, until June 30, 2014.

(3) The member serving pursuant to G.S. 113A-104(b)(11) on January 1, 2013, whose term would otherwise expire on June 30, 2014, shall continue to serve pursuant to G.S. 113A-104(b1)(6), as enacted by subsection (a) of this section, until June 30, 2014.

(4) The member serving pursuant to G.S. 113A-

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<sup>2</sup> This subsection was a new addition to the CRC's enabling statute.

104(b)(5) on January 1, 2013, whose term would otherwise expire on June 30, 2014, shall continue to serve pursuant to G.S. 113A-104(b1)(9), as enacted by subsection (a) of this section, until June 30, 2014.

Members of the Commission whose qualifications are described by subdivisions (1), (3), (5), (7), (11), and (13) of G.S. 113A-104(b1), as enacted by subsection (a) of this section, shall be appointed for an initial term expiring on June 30, 2015, and subsequent appointments shall be for four-year terms thereafter. Members of the Commission whose qualifications are described by subdivisions (2), (4), (6), (8), (9), (10), and (12) of G.S. 113A-104(b1), as enacted by subsection (a) of this section, shall be appointed for an initial term expiring on June 30, 2014, and subsequent appointments shall be for four-year terms thereafter.

. . . .

2013 North Carolina Law S.L. 2013-360 (emphasis added).

Accordingly, as a result of 2013 North Carolina Law S.L. 2013-360, all but four members of the CRC were effectively fired on July 31, 2013. The CRC was effectively disbanded until the remaining nine positions could be appointed by the Governor or the General Assembly respective, or until enough appointments are made so that CRC can legally muster a quorum to conduct business. As of August 26, 2013, the nine new members of the CRC had not been appointed or are undergoing ethics review, and the four remaining members of CRC (well short of the majority of the Commission as required by section 113A-104(m)) apparently held a special meeting conference call and allegedly voted: (1)

to appeal the decision of the Court of Appeals; and (2) to file the Petition for Discretionary Review and Petition for Writ of Supersedeas at issue herein. See (App. pp. 10-12) <http://nccoast.org/Article.aspx?k=d4f7f6b5-7a21-409d-91fa-739c1375724f>

Petitioner respectfully submits the CRC did not have a majority of the Commission to constitute a quorum pursuant to the newly amended subsection 113A-104(m) when it held that conference call, and accordingly, whatever decisions that were made during that call were not legally made by the CRC. Therefore, the Notice of Appeal, the Petition for Stay and Supersedeas, and the Petition for Discretionary Review that were filed herein are nullities. See e.g. Iredell Cnty. Bd. of Educ. v. Dickson, 235 N.C. 359, 362-63, 70 S.E.2d 14, 18 (1952) ("Where a power is intrusted to a board . . . composed of different individuals, the board can exercise such power only in a regular or special meeting attended by at least a quorum of its members. It cannot perform its functions through its members acting individually, informally, and separately.") (citations omitted); accord Town of Bath v. Norman, 226 N.C. 502, 505, 39 S.E.2d 363, 365 (1946) (holding the authority to consent to a judgment rests on official action of the Board rather than casual personal assent of its members).

"At common law, a majority of a body constitutes a quorum. In the absence of a valid rule establishing a different criterion, a quorum of a legislative body is a majority of the membership. This rule can be changed only by general law or charter, not by internal rule, even when the body in question is given general rule-making powers." 59 Am. Jur. 2d *Parliamentary Law* § 9 (2012)(citations omitted)(emphasis added); see also 59 Am. Jur. 2d *Parliamentary Law* § 10 (2012)(" . . . vacancies in a board having a definite number of members are to be included in computing a quorum.")(citing Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829, 159 A.L.R. 280 (1945); Mitchell v. Forest City Printing Co., 187 A.D. 743, 176 N.Y.S. 157 (3d Dep't 1919)). "If a quorum is not present, any resolution or vote by those in attendance is without effect." 59 Am. Jur. 2d *Parliamentary Law* § 9.

The General Assembly clearly made a drastic changes in the membership of the CRC by the amendments to section 113A-104. Section 113A-104(c) provides in pertinent part that:

Appointments to the Commission shall be made to provide knowledge and experience in a diverse range of coastal interests. The members of the Commission shall serve and act on the Commission solely for the best interests of the public and public trust, and shall bring their particular knowledge and experience to the Commission for that end alone.

N.C. Gen. Stat. Ann. § 113A-104(c)(2012). This clear legislative mandate is that in excess of half of the diverse group of thirteen individuals should be sitting on the CRC when any meeting is held and when any decisions are made; not less than one-quarter of the membership. The newly enacted statutory quorum and membership requirements have to be in place for any official action to be taken by the CRC. An informal-special meeting/telephone call by four of the thirteen members of the CRC is not capable of taking official action on behalf of the CRC. In other words, the ruling of less than one-quarter of the diverse membership that the statute requires does not fulfill the statutory requirements of section 113A-104, and thus, any action taken by that group is a mere nullity.<sup>3</sup>

Petitioner respectfully submits the CRC did not have a majority of the Commission to constitute a quorum pursuant to the newly amended subsection 113A-104(m) when it held that

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<sup>3</sup> It is well-established that the by-laws of the CRC cannot contradict the clear language of section 113A-104(m). See *e.g.*, 59 Am. Jur. 2d *Parliamentary Law* § 9 ("[A] quorum of a legislative body is a majority of the membership. This rule can be changed only by general law or charter, not by internal rule, even when the body in question is given general rule-making powers."); 73 C.J.S. *Public Administrative Law and Procedure* § 172 (2012) ("An administrative rule or regulation should be consistent with law, and it should not conflict with or be inconsistent with, or contrary to, the provisions of a statute, particularly the statute it seeks to effectuate. . . . [I]f an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid."); 2 Am. Jur. 2d *Administrative Law* § 223 (2012) ("An administrative rule exceeds its statutory authority if it conflicts with the language of the statute or the statute's legislative intent."); 73 C.J.S. *Public Administrative Law and Procedure* § 171 (2012)(same).



conference call, and accordingly, whatever decisions that were made during that call were not legally made by the CRC. Therefore, the Notice of Appeal, the Petition for Stay and Supersedeas, and the Petition for Discretionary Review that were filed herein are nullities, and this appeal should be dismissed and the Petitions for Supersedeas/Stay and Discretionary Review should be denied and/or vacated.

STATEMENT OF THE FACTS<sup>4</sup>

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

During the 1920's, some of the coquina rock outcropping in the near vicinity of The Riggings was allowed by the Board of County Commissioners of New Hanover County to be removed by a contractor for use in the completion of a section of U.S. Highway 421, a public project. The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide. Among other things, coquina rock outcroppings can provide The Riggings or any property owner

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<sup>4</sup>The Statement of Facts is taken from the agreed on a set of stipulated facts by Petitioner and the Division of Coastal Management on 17 January 2008.

with a partial natural barrier against the threat of beach erosion. Due to the removal of the coquina rock, that protection no longer exists for the Riggings.

The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time. The first Coastal Area Management Act (herein "CAMA") permits for sandbags at The Riggings were issued by the Local Permit Officer for the Town of Kure Beach. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management ("DCM"). In 1994, DCM issued CAMA General Permit No. 13355-D, which authorized repair of the sandbags and the addition of new ones. Permit No. 13355-D was modified in February 1995 to allow the filling of holes in the sandbag revetment with sandbags. The sandbags which were in place when Permit No. 13355-D expired on 5 March 1995, could legally remain in place until 1 May 2000. Since that time The Riggings has applied for variances to keep the sandbags in place to protect its property.

Immediately to the south of The Riggings is Fort Fisher, a North Carolina State Park, which is also located on the shoreline of the Atlantic Ocean. From July 1995 to January 1996, in order to protect Fort Fisher from the effects of erosion from the Atlantic Ocean, the State of North Carolina erected, or caused to be erected, a permanent revetment. At the time that

this 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, because of the recognition of the adverse erosion effects that 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. The construction of the revetment at Fort Fisher caused the rate of erosion of the shoreline in front of The Riggings to increase.

Kure Beach, where The Riggings is located, has taken part in several beach renourishment projects over the years funded by the county, state, and federal tax dollars. The Riggings despite its numerous requests has never been allowed to take part in beach renourishment. 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 to the south. The Riggings HOA made various attempts to get the United States Army Corps of Engineers (herein "Corps of Engineers") to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts did not succeed. The Corps of Engineers informed U.S. Representative Mike McIntyre by letter dated 25 February 2000, that the "primary reason that the (beach nourishment) project stops short of the Riggings is due

to the intertidal coquina rock outcropping." The Corps of Engineers letter further provides 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."

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. Despite the Corps of Engineers' stated reason for not extending beach renourishment to The Riggings property (i.e. not wanting to cover up the coquina rock outcropping in the vicinity of the Riggings), since 2000, beach nourishment projects conducted by the Corps of Engineers have directly covered other coquina rock outcroppings north of The Riggings. The beach renourishment to the north of The Riggings has further exacerbated the erosion in front of The Riggings as the increased beach frontage to the north of The Riggings due to renourishment now serves as a "feeder beach" which captures ocean sands that would normally feed down to The Riggings to provide the Petitioner increased shoreline.

Since The Riggings could not be part of beach renourishment because of an irrational and conflicting policy, the Riggings Board of Directors were approached with a new idea: relocation of The Riggings 48 units to property across the street. After

obtaining estimates for relocating the condominium, the Riggings HOA sought assistance in relocating by contacting the North Carolina Division of Emergency Management ("NCDEM"), the Natural Heritage Trust Fund and DCM, as well as requesting the Town of Kure Beach to act as applicant for beach access and/or Federal Emergency Management Agency (herein "FEMA") grants. In July 2004, the Town of Kure Beach was awarded a \$3.6 million FEMA grant to acquire a portion of the Riggings property on the ocean-side where some of the buildings comprising The Riggings were located, conditioned on the buildings being removed or torn down and 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 \$900,000.00 in order to obtain the Grant.

In order to comply with the provisions of the grant, Riggings HOA was also required to obtain the unanimous consent of the unit owners. On 1 May 2006, Riggings HOA notified the Town of Kure Beach that twenty-four of the homeowners of The Riggings had voted not to accepting the FEMA pre-disaster grant.

Among the reasons owners voted against the grant were:

- a. Each unit owner would have been required to contribute approximately \$125,000.00 towards 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.

While only one homeowner vote in the negative was needed to turn down the FEMA grant, at least three homeowners voted "No" towards accepting the FEMA grant because they lacked the financial capability to provide the funds necessary for relocation. Subsequently, DCM was notified on 20 June 2006, by the State Hazard Mitigation Officer of NCDEM that the grant had been terminated, notwithstanding its 30 June 2007 expiration date, and had been closed out 1 June 2006.

The 2007 Carolina/Kure Beach Renourishment Project included a large part of Carolina Beach and 98 percent of Kure Beach, but again fell approximately 1,500 feet short of The Riggings despite the Riggings' attempts to be included in the renourishment effort.<sup>5</sup>

Regarding the sandbags at issue, sometimes they are buried under sand and sometimes they are exposed. This depends on the beach profile, which can change quickly. A former member of the U.S Army Corps of Engineers has stated that the Riggings sandbags have not had any deleterious effect on surrounding

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<sup>5</sup> The Carolina/Kure Beach Renourishment Project is on a three-year cycle and followed the same renourishment coverage area in 2010 and is expected to follow the same pattern when it is done later this year.

property nor have they come into contact with the Atlantic Ocean except during major storm events. Similarly, the citizens of North Carolina have not been inconvenienced by the maintenance of the sandbags since even at high tide the public can get around the sandbags by going between the sandbags and The Riggings buildings closest to the ocean. The Riggings HOA proposed to the CRC that the sandbags remain in place until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed.<sup>6</sup> A publicly funded renourishment project for Kure Beach was scheduled for 2010.<sup>7</sup>

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED, THE PETITIONS SHOULD BE DENIED OR VACTED AND THE CERTIFICATION SHOULD NOT ISSUE.

As is provided above, Petitioner respectfully submits the CRC did not have a majority of the Commission to constitute a quorum pursuant to the newly amended subsection 113A-104(m) when it held that conference call, and accordingly, whatever decisions that were made during that call were not legally made by the CRC. The Court may take judicial notice of the actions of the CRC and its compliance with statutory amendments to

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<sup>6</sup> Unless and until a final determination is made on the Riggings underlying variance application and the Notice of Violation suit, no federal or state agency will undertake consideration of either of Petitioner's proposed options. See e.g. 15A N.C.A.C. 7J.0204(e) (2012).

<sup>7</sup> Pictures of the Riggings are contained in R pp 119-21.

section 113A-104. The Notice of Appeal, the Petition for Stay and Supersedeas, and the Petition for Discretionary Review that were filed herein are nullities, and this appeal should be dismissed and the Petitions for Supersedeas/Stay and Discretionary Review should be denied and/or vacated.

If this Court does not dismiss the appeal and/or grants or does not vacate the Petitions, the issue of the legality of the CRC's actions in holding a meeting with less than a quorum and making a decision to file the Notice of Appeal and the related Petitions for Stay/Supersedeas and for Discretionary Review should be submitted and decided by this Court.

II. REMAINING ISSUES RAISED BY OPPOSING COUNSEL DO NOT MEET THE REQUIREMENTS OF N.C.GEN. STAT. § 7A-31.

The North Carolina General Assembly provided the circumstances under which a landowner whose permit has been denied may obtain a variance:

Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:

- (1) Unnecessary hardships would result from strict application of the rules, standards, or orders.
- (2) The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.
- (3) The hardships did not result from actions taken by the petitioner.



(4)The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

N.C. Gen. Stat. § 113A-120.1 (2012).

In this case, Petitioner sought a variance from 15A NCAC 7H.1705 which would allow them to maintain sandbags to protect their property until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed. If a Petitioner meets all four requirements for a variance the CRC shall grant said variance and impose reasonable and appropriate conditions and safeguards upon it. Id.; see also Williams v. North Carolina Dept. of Environment and Natural Resources, 144 N.C. App. 479, 548 S.E.2d 793 (2001).

Relying on the well-established principles from Williams, the Superior Court and the Court of Appeals correctly held below and the evidence in this case clearly demonstrated that the Riggings satisfied all four requirements for their variance request, the Final Order issued by the CRC was based on legally impermissible considerations, misapplied applicable statute and was unsupported and contradictory to the stipulated evidence before the CRC, and therefore denial of its request by the CRC was improper.

This is the third time the CRC has been told it has erred

in its consideration of the Riggings variance application. The first time the CRC did not appeal the Superior Court's Order, which raises the issues of both the law of the case and issue preclusion for subsequent hearings of this matter. The Court of Appeals was very familiar with its opinions in both Williams and Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999) when it made its decision in the case *sub judice*. Furthermore, the Court of Appeals' opinion here is consistent with those decisions.

As articulated by this Court in the seminal case of Williams v. North Carolina Dept. of Environment and Natural Resources, 144 N.C. App. 479, 548 S.E.2d 793 (2001):

**Whether strict application of the Coastal Area Management Act, (hereinafter "CAMA"), places an "unnecessary hardship" on a parcel of property, depends upon the unique nature of the property; not the landowner. If "hardship" stemmed from the situation of the landowner, then those persons owning less land would have an easier time showing unnecessary hardship than those owning more than one parcel of land. Similarly situated persons would be treated differently, giving rise to equal protection of law issues. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Accordingly we hold that whether or not the landowner owns other property is irrelevant and insufficient to support [a finding of unnecessary hardship.]**

Williams, 144 N.C. App. at 485, 548 S.E.2d at 797-98 (emphasis added). The standard, as articulated in Williams, in determining unnecessary hardship for a variance is to examine

the effect strict application of the rules would have on Petitioner's property, and not the Petitioner itself. Williams, 144 N.C. App. at 485, 548 S.E.2d at 797-98 (holding that hardship **depends upon the unique nature of the property; not the landowner.**).

Despite the clear case law and the Superior Court's instructions,<sup>8</sup> the CRC again examined the effect of strict application of the rules on the Petitioner and not the Petitioner's property. Throughout its Order the CRC discusses as a basis for its finding of no "unnecessary hardship" how long the Petitioner has had the sandbags in place and their previous various requests. The Court of Appeals and the Superior Court correctly held the CRC made an error in law by applying, again, the wrong legal standard. The proper standard is whether strict application of the rules would result in unnecessary hardship to Petitioner's property; not the Petitioner. The Court of Appeals followed the exact analysis provided in Williams, when it provided that the CRC's analysis should focus on the property not the actions of the property owners. The analysis that Counsel submits was undertaken in Shell Island and requests in

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<sup>8</sup> The Superior Court articulated the Williams standard in its previous Order which reversed and remanded the CRC's first variance denial.

The proper inquiry in a variance request before the CRC is concerning the property and not the property owner... The Final Order focused upon an analysis into the property owners when the sole focus of the CRC's findings should be based on the condition of the property itself.

this case is simply non-existent. Ignoring the clear factual distinctions of the numerous adverse erosive effects to the Riggings that are caused by state action in contrast to the natural erosion solely present in Shell Island,<sup>9</sup> the Appellants in Shell Island brought a lawsuit against the CRC for declaratory and injunctive relief challenging the constitutionality of the hardened structure rules facially and in application, which the Court of Appeals ultimately found they were estopped to do. Id. This matter, like Williams, involves only the appeal of the denial of variance application. Furthermore, there was no two-part analysis undertaken in Shell Island that Counsel prays the Court to undertake in this matter. Additionally, the facts and the arguments in Shell Island are simply not present in this case, nor were those issues present in Williams. Counsel is trying to boot-strap arguments and other issues from other matters into Shell Island and this case that simply do not exist. Williams and this matter clearly mandate the analysis that the CRC must undertake in its variance review; the focus is on the property not the owner. This analysis insures similarly situated owners will be treated equally. That has been the law since 2001 and was reaffirmed in this matter. Accordingly, there is no need to reinvent the

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<sup>9</sup> Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 217, 229, 517 S.E.2d 406, 415 (1999)("these naturally occurring phenomena are the primary causes of any loss sustained by plaintiffs.")

wheel in this case.

If this Court does determine that it will grant discretionary review of Opposing counsel's proposed issues concerning the first variance factor, Petitioner prays the Court will address these related issues below that relate to the first variance factor and are necessary for a clear understanding of the issues before the CRC, the Superior Court and the Court of Appeals. These issues are:

1. Whether the CRC misinterpreted the Stipulated Facts in order to justify its Conclusion of Law erosion being stable at the Riggings regarding the first variance factor;
2. Whether the Superior Court Correctly held the CRC based its decision on the actions of the property owner and not the condition of the property;
3. Whether previous findings, conclusions, and ruling in pervious variance Orders and the Superior Court's first Order that was not appealed are binding on the CRC on this appeal;
4. Whether the Superior Court was correct in holding Riggings is the most unique coastal property in North Carolina;
5. Whether the CRC erred by basing its decision, in part, on the law upon which the Riggings is granted a statutory right to request a variance from and their own policy against granting variances;
6. Whether the Superior Court correctly held the CRC'S findings of No Unnecessary Hardship for Element #1 are contradictory to its finding in Elements #2 and #3 that Hardship would result from removal of the Sandbags; and
7. Whether the Superior Court erred in concluding the CRC was not required to prepare Findings of Fact and Conclusions of Law regarding the impact of the variance denial on the Petitioner's ability to make reasonable use of its property.

Similarly, if this Court does not dismiss the appeal and/or grants or does not vacate the Petitions, the issue of the legality of the CRC's actions in holding a meeting with less than a quorum and making a decision to file the Notice of Appeal and the related Petitions for Stay/Supersedeas and for Discretionary Review should be submitted and decided by this Court. The Court's ruling on this issue has significant public interest for North Carolina, and it involves legal principles of major significance to the jurisprudence of the State. N.C.G.S. § 7A-31 (2012).

**CONCLUSION**

Petitioner-Appellee prays this Honorable Court to dismiss the Appeal, deny the Petition for Discretionary Review, and deny and/or vacate the Petition for Stay and Supersedeas submitted by opposing counsel in this matter. If the Petition for Discretionary Review is granted the Petitioner-Appellee Prays that this Honorable Court will undertake review of legal issues described above.

Respectfully submitted this the 23<sup>rd</sup> day of September, 2013.

**SHIPMAN & WRIGHT, L.L.P.**  
Attorneys for Appellee

/s/ William G. Wright

**WILLIAM G. WRIGHT**

N.C. State Bar No.: 41549

wwright@shipmanlaw.com

**GARY K. SHIPMAN**

N.C. State Bar No.: 9464

gshipman@shipmanlaw.com

575 Military Cutoff Road

Suite 106

Wilmington, NC 28405

Tel.: (910) 762-1990

Fax: (910) 762-6752

**CERTIFICATE OF SERVICE**

This is to certify that on this the 23<sup>rd</sup> day of September, 2013, the undersigned has electronically filed the foregoing **RESPONSE TO PETITION FOR DISCRETIONARY REVIEW, PETITION TO STAY/SUPERSEDEAS AND NOTICE OF APPEAL N.C. GEN. STAT. § 7A-31(c) AND N.C.R. APP. 15** with the Clerk of the Supreme Court by using the CM/ECF system which will send notification of such filing to the Respondent-Appellant through its attorneys. Counsel for Petitioner-Appellee has also served this document by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the attorney or attorneys for said parties as follows:

Christine A. Goebel  
Marc Bernstein  
NC Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629  
*Respondent-Appellant*

This is the 23<sup>rd</sup> day of September, 2013.

**SHIPMAN & WRIGHT, L.L.P.**

/s/ William G. Wright  
**WILLIAM G. WRIGHT**



SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

RIGGINGS HOMEOWNERS, INC.	:	
Petitioner-Appellee,	:	
	:	
v.	:	
	:	
NORTH CAROLINA COASTAL RESOURCES	:	From New Hanover County
COMMISSION,	:	File No.: 09 CVS 2761
Respondent-Appellant	:	

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APPENDIX TO  
PETITIONER-APPELLEE'S RESPONSE TO PETITION FOR  
DISCRETIONARY REVIEW, PETITION TO STAY/SUPERSEDEAS  
AND NOTICE OF APPEAL  
N.C. GEN. STAT. § 7A-31(c) AND N.C.R. APP. 15

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Selected Sections from 2013 North Carolina  
Laws S.L. 2013-360 ..... App. 1-9

Coastal Review Online CRC Meeting: Quorum  
or Quandary (26 August 2013) ..... App. 10-12

2013 North Carolina Laws S.L. 2013-360 (S.B. 402)

NORTH CAROLINA 2013 SESSION LAWS

2013 GENERAL ASSEMBLY FIRST SESSION

Additions are indicated by **Text**; deletions by  
~~Text~~.

Vetoed are indicated by ~~Text~~;  
stricken material by **Text**.

S.L. 2013-360  
S.B. No. 402  
APPROPRIATIONS

AN ACT TO MAKE BASE BUDGET APPROPRIATIONS FOR CURRENT OPERATIONS OF STATE DEPARTMENTS, INSTITUTIONS, AND AGENCIES, AND FOR OTHER PURPOSES.

The General Assembly of North Carolina enacts:

**PART I. INTRODUCTION AND TITLE OF ACT**

**TITLE**

**SECTION 1.1.** This act shall be known as the "Current Operations and Capital Improvements Appropriations Act of 2013."

**INTRODUCTION**

**SECTION 1.2.** The appropriations made in this act are for maximum amounts necessary to provide the services and accomplish the purposes described in the budget. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and, except as allowed by the State Budget Act or this act, the savings shall revert to the appropriate fund at the end of each fiscal year.

**PART II. CURRENT OPERATIONS AND EXPANSION GENERAL FUND**

**CURRENT OPERATIONS AND EXPANSION/GENERAL FUND**

**SECTION 2.1.** Appropriations from the General Fund of the State for the maintenance of the State departments, institutions, and agencies, and for other purposes as enumerated, are made for the fiscal biennium ending June 30, 2015, according to the following schedule:

Current Operations—General Fund	2013-2014	2014-2015
		.....

**EDUCATION**

**APPROPRIATIONS, 2013 North Carolina Laws S.L. 2013-360 (S.B. 402)**


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Community Colleges System Office	1,021,295,467	1,016,487,467
		.....
Department of Public Instruction	7,867,960,649	8,048,101,622
		.....
University of North Carolina—Board of Governors		
Appalachian State University	127,908,903	127,908,903
East Carolina University		
Academic Affairs	220,012,450	220,615,626
Health Affairs	64,841,247	64,841,247
Elizabeth City State University	35,363,212	35,385,057
Fayetteville State University	49,336,186	49,336,186
North Carolina Agricultural and Technical State University	96,882,428	96,882,428
North Carolina Central University	84,084,488	84,084,488
North Carolina State University		
Academic Affairs	389,976,973	390,045,059
Agricultural Extension	39,859,682	39,859,682
Agricultural Research	54,911,053	54,911,053
University of North Carolina at Asheville	37,465,299	37,465,299
University of North Carolina at Chapel Hill		
Academic Affairs	274,632,544	274,515,010
Health Affairs	187,260,403	190,741,444

representative shall be appointed as provided by law.

## COASTAL RESOURCES COMMISSION

SECTION 14.24.(a) G.S. 113A-104 reads as rewritten:

<< NC ST § 113A-104 >>

### § 113A-104 Coastal Resources Commission

(a) Established.—The General Assembly hereby establishes within the Department of Environment and Natural Resources a commission to be designated the Coastal Resources Commission.

(b) Composition.—~~The Coastal Resources Commission shall consist of 15 members appointed by the Governor, as follows:~~

- ~~(1) One who shall at the time of appointment be actively connected with or have experience in commercial fishing.~~
- ~~(2) One who shall at the time of appointment be actively connected with or have experience in wildlife or sports fishing.~~
- ~~(3) One who shall at the time of appointment be actively connected with or have experience in marine ecology.~~
- ~~(4) One who shall at the time of appointment be actively connected with or have experience in coastal agriculture.~~
- ~~(5) One who shall at the time of appointment be actively connected with or have experience in coastal forestry.~~
- ~~(6) One who shall at the time of appointment be actively connected with or have experience in coastal land development.~~
- ~~(7) One who shall at the time of appointment be actively connected with or have experience in marine related business (other than fishing and wildlife).~~
- ~~(8) One who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area.~~
- ~~(9) One who shall at the time of appointment be actively associated with a State or national conservation organization.~~
- ~~(10) One who shall at the time of appointment be actively connected with or have experience in financing of coastal land development.~~
- ~~(11) Two who shall at the time of appointment be actively connected with or have experience in local government within the coastal area.~~
- ~~(12) Three at large members.~~

(b1) Composition.—The Coastal Resources Commission shall consist of 13 members as follows:

- (1) One appointed by the Governor who shall at the time of appointment be a coastal property owner or experienced in land development.
- (2) One appointed by the Governor who shall at the time of appointment be a coastal property owner or experienced in land development.
- (3) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area or a marine-related science.

(4) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area or a marine-related science.

(5) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in coastal-related business.

(6) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in local government within the coastal area.

(7) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in coastal agriculture.

(8) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in commercial fishing.

(9) One appointed by the Governor who shall at the time of appointment be actively connected with or have experience in coastal forestry.

(10) One appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives in accordance with G.S. 120–121 who shall at the time of appointment be actively connected with or have experience in sports fishing.

(11) One appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives in accordance with G.S. 120–121 who shall serve at large.

(12) One appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120–121 who shall at the time of appointment be actively connected with or have experience in wildlife.

(13) One appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120–121 who shall serve at large.

(c) Appointment of Members.—As used in this section, the term “appointing authority” means the Governor in the case of members appointed by the Governor and means the General Assembly in the case of members appointed by the General Assembly. Appointments to the Commission shall be made to provide knowledge and experience in a diverse range of coastal interests. The members of the Commission shall serve and act on the Commission solely for the best interests of the public and public trust, and shall bring their particular knowledge and experience to the Commission for that end alone. Counties and cities in the coastal area may designate and transmit to the appointing authorities no later than May 1 of each even-numbered year qualified persons in the categories set out in subsection (b1) of this section corresponding to the Commission positions to be filled that year.

~~The Governor shall appoint in his sole discretion those members of the Commission whose qualifications are described in subdivisions (6) and (10), and one of the three members described in subdivision (12) of subsection (b) of this section.~~

~~The remaining members of the Commission shall be appointed by the Governor after completion of the nominating procedures prescribed by subsection (d) of this section.~~

(c1) The members of the Commission whose qualifications are described in subdivisions (1) through (5), (9), and (11), (3), (6), (7), (8), (9), (11), and (12) of subsection (b1) of this section shall be persons who do not derive any significant portion of their income from land development, construction, real estate sales, or lobbying and do not otherwise serve as agents for development-related business activities. The Governor shall require adequate disclosure of potential conflicts of interest by these members. The Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the eligibility of persons under this section-subsection.

(c2) All members of the Commission are covered persons for the purposes of Chapter 138A of the General Statutes, the State

Government Ethics Act. As covered persons, members of the Commission shall comply with the applicable requirements of the State Government Ethics Act, including mandatory training, the public disclosure of economic interests, and ethical standards for covered persons. Members of the Commission shall comply with the provisions of the State Government Ethics Act to avoid conflicts of interest.

~~(d) Nominations for Membership.— On or before May 1 in every even numbered year the Governor shall designate and transmit to the board of commissioners in each county in the coastal area four nominating categories applicable to that county for that year. Said nominating categories shall be selected by the Governor from among the categories represented, respectively by subdivisions (1), (2), (3), (4), (5), (7), (8), (9), (11) two persons, and (12) two persons, of subsection (b) of this section (or so many of the above listed paragraphs as may correspond to vacancies by expiration of term that are subject to being filled in that year). On or before June 1 in every even numbered year the board of commissioners of each county in the coastal area shall nominate (and transmit to the Governor the names of) one qualified person in each of the four nominating categories that was designated by the Governor for that county for that year. In designating nominating categories from biennium to biennium, the Governor shall equitably rotate said categories among the several counties of the coastal area as in his judgment he deems best; and he shall assign, as near as may be, an even number of nominees to each nominating category and shall assign in his best judgment any excess above such even number of nominees. On or before June 1 in every even numbered year the governing body of each incorporated city within the coastal area shall nominate and transmit to the Governor the name of one person as a nominee to the Commission. In making nominations, the boards of county commissioners and city governing bodies shall give due consideration to the nomination of women and minorities. The Governor shall appoint 12 persons from among said city and county nominees to the Commission. The several boards of county commissioners and city governing bodies shall transmit the names, addresses, and a brief summary of the qualifications of their nominees to the Governor on or before June 1 in each even numbered year, beginning in 1974; provided, that the Governor, by registered or certified mail, shall notify the chairman or the mayors of the said local governing boards by May 20 in each such even numbered year of the duties of local governing boards under this sentence. If any board of commissioners or city governing body fails to transmit its list of nominations to the Governor by June 1, the Governor may add to the nominations a list of qualified nominees in lieu of those that were not transmitted by the board of commissioners or city governing body; Provided however, the Governor may not add to the list a nominee in lieu of one not transmitted by an incorporated city within the coastal area that neither has a population of 2,000 or more nor is contiguous with the Atlantic Ocean. Within the meaning of this section, the "governing body" is the mayor and council of a city as defined in G.S. 160A-66. The population of cities shall be determined according to the most recent annual estimates of population as certified to the Secretary of Revenue by the Secretary of Administration.~~

~~(e) Residential Qualifications.— All nominees of the several boards of county commissioners and city governing bodies must reside within the coastal area, but need not reside in the county from which they were nominated. No more than one of those members appointed by the Governor from among said nominees may reside in a particular county. No more than two members of the entire Commission, at any time, may reside in a particular county. No more than two members of the entire Commission, at any time, may reside outside the coastal area.~~

~~(f) Office May Be Held Concurrently with Others.— Membership on the Coastal Resources Commission is hereby declared to be an office that may be held concurrently with other elective or appointive offices in addition to the maximum number of offices permitted to be held by one person under G.S. 128-1.1.~~

~~(g) Terms.— The members shall serve staggered terms of office of four years. At the expiration of each member's term, the Governor appointing authority shall reappoint or replace the member with a new member of like qualification (as specified in subsection (b)(b1) of this section), in the manner provided by subsections (c) and (d) of this section. The initial term shall be determined by the Governor in accordance with customary practice but eight of the initial members shall be appointed for two years and seven for four years.~~section.

~~(h) Vacancies.— In the event of a vacancy arising otherwise than by expiration of term, the Governor appointing authority shall appoint a successor of like qualification (as specified in subsection (b)(b1) of this section)section who shall then serve the remainder of his predecessor's term. When any such vacancy arises, the Governor shall immediately notify the board of commissioners of each county in the coastal area and the governing body of each incorporated city within the coastal area. Within 30 days after receipt of such notification each such county board and city governing body shall nominate and transmit to the Governor the name and address of one person who is qualified in the category represented by the position to be filled,~~

## APPROPRIATIONS, 2013 North Carolina Laws S.L. 2013-360 (S.B. 402)

~~together with a brief summary of the qualifications of the nominee. The Governor shall make the appointment from among said city and county nominees. If any county board or city governing body fails to make a timely transmittal of its nominee, the Governor may add to the nominations a qualified person in lieu of said nominee; Provided however, the Governor may not add to the list a nominee in lieu of one not transmitted by an incorporated city within the coastal area that neither has a population of 2,000 or more nor is contiguous with the Atlantic Ocean.~~

(i) Officers.—The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at the pleasure of the Governor. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of ~~his~~ the vice-chairman's regularly appointed term.

(j) Compensation.—The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

~~(k) In making appointments to and filling vacancies upon the Commission, the Governor shall give due consideration to securing appropriate representation of women and minorities.~~

(l) Attendance.—Regular attendance at Commission meetings is a duty of each member. The Commission shall develop procedures for declaring any seat on the Commission to be vacant upon failure by a member to perform this duty.

(m) Quorum.—A majority of the Commission shall constitute a quorum.

**SECTION 14.24.(b) Transition of Membership of the Coastal Resources Commission.**—Except as otherwise provided in this section, the terms of all members of the Coastal Resources Commission serving on January 1, 2013, shall expire July 31, 2013. A new Commission of 13 members shall be appointed in the manner provided by G.S. 113A-104(b1), as enacted by subsection (a) of this section. Members appointed in the manner provided by G.S. 113A-104(b1), as enacted by subsection (a) of this section, shall be appointed no later than August 1, 2013.

(1) The member serving pursuant to G.S. 113A-104(b)(1) on January 1, 2013, shall continue to serve pursuant to G.S. 113A-104(b1)(8), as enacted by subsection (a) of this section, until June 30, 2014.

(2) The member serving pursuant to G.S. 113A-104(b)(2) on January 1, 2013, shall continue to serve pursuant to G.S. 113A-104(b1)(10), as enacted by subsection (a) of this section, until June 30, 2014.

(3) The member serving pursuant to G.S. 113A-104(b)(11) on January 1, 2013, whose term would otherwise expire on June 30, 2014, shall continue to serve pursuant to G.S. 113A-104(b1)(6), as enacted by subsection (a) of this section, until June 30, 2014.

(4) The member serving pursuant to G.S. 113A-104(b)(5) on January 1, 2013, whose term would otherwise expire on June 30, 2014, shall continue to serve pursuant to G.S. 113A-104(b1)(9), as enacted by subsection (a) of this section, until June 30, 2014.

Members of the Commission whose qualifications are described by subdivisions (1), (3), (5), (7), (11), and (13) of G.S. 113A-104(b1), as enacted by subsection (a) of this section, shall be appointed for an initial term expiring on June 30, 2015, and subsequent appointments shall be for four-year terms thereafter. Members of the Commission whose qualifications are described by subdivisions (2), (4), (6), (8), (9), (10), and (12) of G.S. 113A-104(b1), as enacted by subsection (a) of this section, shall be appointed for an initial term expiring on June 30, 2014, and subsequent appointments shall be for four-year terms thereafter.

## COASTAL RESOURCES ADVISORY COMMISSION

**SECTION 14.25.** G.S. 113A-105 reads as rewritten:

&lt;&lt; NC ST § 113A-105 &gt;&gt;

**§ 113A-105 Coastal Resources Advisory Council**

(a) Creation.—There is hereby created and established a council to be known as the Coastal Resources Advisory Council.

(b) **Membership and Terms.**—The Coastal Resources Advisory Council shall consist of not more than 45-20 members appointed or designated as follows:

~~(1) Two individuals designated by the Secretary from among the employees of the Department;~~

~~(1a) The Secretary of Commerce or person designated by the Secretary of Commerce;~~

~~(2) The Secretary of Administration or person designated by the Secretary of Administration;~~

~~(3) The Secretary of Transportation or person designated by the Secretary of Transportation; and one additional member selected by the Secretary of Transportation from the Department of Transportation;~~

~~(4) The State Health Director or the person designated by the State Health Director;~~

~~(5) The Commissioner of Agriculture or person designated by the Commissioner of Agriculture;~~

~~(6) The Secretary of Cultural Resources or person designated by the Secretary of Cultural Resources;~~

~~(7) One member from each of the four multi-county planning districts of the coastal area to be appointed by the lead regional agency of each district;~~

~~(8) One representative from each of the counties in the coastal area to be designated by the respective boards of county commissioners;~~

~~(9) No more than eight additional members representative of cities in the coastal area and to be designated by the Commission;~~

~~(10) Three members selected by the Commission who are marine scientists or technologists;~~

~~(11) One member who is a local health director selected by the Commission upon the recommendation of the Secretary.~~

by the Coastal Resources Commission. Counties and cities in the coastal area may nominate candidates for consideration by the Commission. The terms of all Council members serving on the Council on January 1, 2013, shall expire on July 31, 2013. A new Council shall be appointed in the manner provided by this subsection with terms beginning on August 1, 2013, and expiring on June 30, 2015. Members may be reappointed at the discretion of the Commission, provided that one-half of the membership at the beginning of any two-year term are residents of counties in the coastal area.

**PART XV. DEPARTMENT OF COMMERCE****SET REGULATORY FEE FOR UTILITIES COMMISSION**

**SECTION 15.1.(a)** The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is thirteen one-hundredths of one percent (0.13%) for each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 2013, and on or after July 1, 2014.

**SECTION 15.1.(b)** The electric membership corporation regulatory fee imposed under G.S. 62-302(b1) for the 2013-2014 and the 2014-2015 fiscal year is two hundred thousand dollars (\$200,000).



**APPROPRIATIONS, 2013 North Carolina Laws S.L. 2013-360 (S.B. 402)**

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**SECTION 38.4.(b)** The budget enacted by the General Assembly is for the maintenance of the various departments, institutions, and other spending agencies of the State for the 2013–2015 biennial budget as provided in G.S. 143C–3–5. This budget includes the appropriations of State funds as defined in G.S. 143C–1–1(d)(25).

The Director of the Budget submitted a recommended continuation budget to the General Assembly on March 15 and 18, 2013, in the document “State of North Carolina Recommended Continuation Budget and Fund Purpose Statements, 2013–2015” and in the Budget Support Document for the various departments, institutions, and other spending agencies of the State. The adjustments to these documents made by the General Assembly are set out in the Committee Report.

**SECTION 38.4.(c)** The budget enacted by the General Assembly shall also be interpreted in accordance with G.S. 143C–5–5, the special provisions in this act, and other appropriate legislation.

In the event that there is a conflict between the line-item budget certified by the Director of the Budget and the budget enacted by the General Assembly, the budget enacted by the General Assembly shall prevail.

**REPORT BY FISCAL RESEARCH DIVISION ON CHANGES TO THE BUDGET/PUBLICATION**

**SECTION 38.4A.(a)** The Fiscal Research Division of the Legislative Services Commission shall issue a report on budget actions taken by the 2013 Regular Session of the General Assembly. The report shall be in the form of a revision of the Committee Report adopted for Senate Bill 402 pursuant to G.S. 143C–5–5 and shall include all modifications made to the 2013–2015 biennial budget prior to sine die adjournment of the 2013 Regular Session.

**SECTION 38.4A.(b)** The Director of the Fiscal Research Division of the Legislative Services Commission shall send a copy of the report issued pursuant to this section to the Director of the Budget. The report shall be published on the General Assembly’s Internet Web site for public access.

**ADJUSTMENT OF ALLOCATIONS TO GIVE EFFECT TO THIS ACT FROM JULY 1, 2013**

**SECTION 38.4B.(a)** The appropriations and authorizations to allocate and spend funds set out in S.L. 2013–184 expire when this act becomes law. At such time, this act governs appropriations and expenditures.

When this act becomes law, the Director of the Budget shall adjust allocations to give effect to this act from July 1, 2013.

**SECTION 38.4B.(b)** Sections 4 and 7 of S.L. 2013–184 are repealed.

**SEVERABILITY CLAUSE**

**SECTION 38.5.** If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid.

**EFFECTIVE DATE**

**SECTION 38.6.** Except as otherwise provided, this act becomes effective July 1, 2013.

In the General Assembly read three times and ratified this the 25th day of July, 2013.

**APPROPRIATIONS, 2013 North Carolina Laws S.L. 2013-360 (S.B. 402)**

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**Approved 1:00 p.m. this 26th day of July, 2013**

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End of Document

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## Coastal Review Online

08.26.2013 **CRC Meeting: Quorum or Quandary**

TOPICS: [COASTAL MANAGEMENT](#), [LEGISLATURE](#)

**By Kirk Ross**

RALEIGH – After the state legislature fired most of its members this summer, a short-handed N.C. Coastal Resources Commission will meet today in a special session to decide whether to appeal a court decision over a variance to the state’s policy on sandbags on the beach.

If everyone joins the conference-call meeting, only four CRC members will be present. They survived the mass firing, but have yet to be joined by nine new appointees. Today’s meeting, then, raises questions whether the commission can legally muster a quorum to conduct business.

The special session was called to address an Aug. 6 ruling by the state Court of Appeals in favor of the owners of The Riggings, a Kure Beach condominium complex, whose owners challenged the CRC’s order to remove sandbags that have been in place since 1985. In its ruling, the Court of Appeals sent the case back to the CRC for review. The commission must make a decision whether to appeal the decision by Sept. 10. Its next regularly scheduled meeting isn’t until Sept. 24.



Todd Miller

But in order to call the meeting, state officials first had to consider whether the commission could take action, given that it is operating with only a fraction of its membership. Provisions in the state budget passed by the Republican-controlled legislature ended the terms of all but four of the 15 CRC members and reduced the board to 13. The budget bill also eliminated seats designated for representatives of conservation groups and local governments.

Gov. McCrory, a Republican, signed the budget bill, which took effect July 31.



Bob Emory

The legislation states that for the new commission “a majority of the Commission shall constitute a quorum.” That would mean that at least seven members would be needed for a quorum. But officials with the state Department of Environmental and Natural Resources said last week they are relying on the CRC bylaws, which establish a quorum as a majority of the “duly-appointed” members. Under that standard, only three of the four remaining members would be needed. The other members of the reconstituted CRC have either not been appointed yet or are undergoing ethics review.

Michelle Walker, a DENR spokeswoman, said the quorum issue was cleared by the department’s attorneys last week. She said the term “duly appointed” applies to the sitting four members — Bob Emory of New Bern, Renee Cahoon of Nags Head, Ben Simmons of Fairfield and Lee Wynns of Colerain — but not to two appointments made to the commission by Sen. Phil Berger, the state Senate’s president pro-tem, at the close of the legislative session.

Berger appointed Caswell Beach Mayor Harry Simmons and Marc Hairston of Onslow County to the commission under the new appointment criteria spelled out in the budget bill.

Walker said the two won’t be considered “duly-appointed” until their appointments pass through a required state ethics review and they are officially sworn in.

House Speaker Thom Tillis and McCrory have yet to announce their appointments, and Walker said it is still unclear when the rest of the commission members will be appointed and sworn in.

With CRC facing a deadline to decide on the appeal in the Riggings case, she said, the decision was made to move ahead with the meeting.

Todd Miller, the executive director of the N.C. Coastal Federation, said environmental advocates warned about the consequences of removing most CRC members at the same time. The sandbag issue, he noted, is a long-running

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## App. 11

dispute on whether the state has the authority to order removal of a temporary barrier. The outcome could have far-reaching effects on the state's beaches.

"The commission must decide if it should defend our state's long-standing ability to protect the public trust rights on our oceanfront beaches," Miller wrote in an email response. "Before state lawmakers and the governor fired all but four of the existing Coastal Resource Commission members, a broader balance of coastal stakeholders would have met to decide whether or not to appeal this bad legal ruling that will make it very difficult for the state to safeguard its beautiful beaches for future generations."

Bob Emory, one of the four remaining members and the CRC chair until the McCrory designates a new one, said the commission had little choice considering the timetable for appeal.

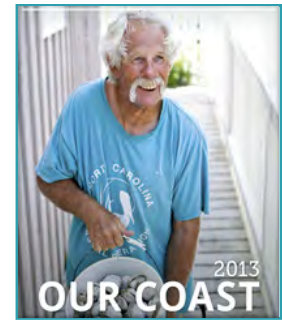
Emory, who recently told *Coastal Review Online* he was worried about the quorum issue in the wake of the budget bill provisions, said he was comfortable with the advice from DENR that the commission could meet under its existing by-laws.

"This is a time-sensitive matter and we're going to go ahead and give it consideration," Emory said. "We don't have any options."

Emory said he expects all four members to be at the closed meeting, which will include a briefing on the ruling and discussion of legal strategy with CRC attorneys.

"Fortunately, the people who are taking part are all seasoned veterans members of the commission," Emory said.

Miller said he expects the move to face legal questions of its own. "It was never the intent of the law for four people to decide such a critical coastal management decision," Miller said. "If the CRC votes to appeal this case, I'm sure its decision will be challenged on whether or not it was made with a legal quorum."




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**ABOUT THE AUTHOR:** Kirk Ross

Kirk Ross is a longtime North Carolina journalist and photographer who splits his time between Chapel Hill and Pleasure Island. He was the founding editor of "The Carrboro Citizen," where he publishes a weekly column. He also writes news stories and a monthly column on state politics and public policy for the "Independent Weekly" in Raleigh. Kirk plays guitar and sings in one of the truly great Chapel Hill bands, Lud.

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# Supreme Court of North Carolina

**RIGGINGS HOMEOWNERS, INC.**

v

**COASTAL RESOURCES COMMISSION OF THE STATE OF NORTH CAROLINA**

From N.C. Court of Appeals  
( 12-1299 )  
From New Hanover  
( 09CVS2761 )

## **ORDER**

Upon consideration of the conditional petition filed on the 24th of September 2013 by Petitioner in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 23rd of January 2014."

**s/ Beasley, J.  
For the Court**

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

Petitioner shall forthwith submit an appeal bond to this Court, as provided by Appellate Rule 17(b). The bond may be in cash or by a written undertaking with good and sufficient surety in the sum of \$250.00.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of January 2014.



Christie Speir Cameron Roeder  
Clerk, Supreme Court of North Carolina

A handwritten signature in black ink, appearing to read "M. C. Hackney".

M. C. Hackney  
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Ms. Christine A. Goebel, Assistant Attorney General, For Coastal Resources Commission - (By Email)

Mr. William G. Wright, Attorney at Law, For Riggings Homeowners, Inc. - (By Email)

Mr. Gary Shipman, Attorney at Law - (By Email)

Ms. Mary Louise Lucasse, Special Deputy Attorney General - (By Email)

Mr. Marc Bernstein, Special Deputy Attorney General - (By Email)

West Publishing - (By Email)

Lexis-Nexis - (By Email)

IN THE SUPREME COURT OF NORTH CAROLINA

No. 401A13

Filed 19 December 2014

RIGGINGS HOMEOWNERS, INC.,  
Petitioner

v.

COASTAL RESOURCES COMMISSION OF THE STATE OF NORTH  
CAROLINA,  
Respondent

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, \_\_\_ N.C. App. \_\_\_, 747 S.E.2d 301 (2013), affirming an order entered on 1 June 2012 by Judge Jay D. Hockenbury in Superior Court, New Hanover County. On 23 January 2014, the Supreme Court allowed respondent's petition for discretionary review of additional issues and petitioner's conditional petition for discretionary review. Heard in the Supreme Court on 6 October 2014.

*Shipman & Wright, L.L.P., by William G. Wright and Gary K. Shipman, for petitioner-appellant/appellee.*

*Roy Cooper, Attorney General, by Christine A. Goebel, Assistant Attorney General, and Mary L. Lucasse and Marc Bernstein, Special Deputy Attorneys General, for respondent-appellant/appellee.*

PER CURIAM.

Justice HUNTER took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and

RIGGINGS HOMEOWNERS V. COASTAL RES. COMMN.

*Opinion of the Court*

stands without precedential value. *See, e.g., Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011).

AFFIRMED.





STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

ROY COOPER  
ATTORNEY GENERAL

P.O. Box 629  
RALEIGH, NC 27602

REPLY TO: MARY L. LUCASSE  
ENVIRONMENTAL DIVISION  
TEL: (919) 716-6962  
FAX: (919) 716-6767  
mlucasse@ncdoj.gov

April 9, 2015

Via US Mail and Email:

William G. Wright, Esq.  
Shipman and Wright, LLP  
575 Military Cutoff Road, Suite 106  
Wilmington, NC 28405

Via E-mail

Christine A. Goebel, Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**Re: Riggings Homeowners' Inc. v. NC Coastal Resources Commission  
From New Hanover 09 CVS2761  
North Carolina Court of Appeals No. COA12-1299  
North Carolina Supreme Court No. 401A13**

Dear Counsel:

On April 1, 2015 the Coastal Resources Commission ("Commission") received the Certification of Judgment in the above referenced case from the New Hanover Superior Court affirming the Judgment of the North Carolina Court of Appeals. I have attached a copy for your information and files. In its August 6, 2013 Opinion, the North Carolina Court of Appeals affirmed New Hanover Superior Court Judge Jay D. Hockenbury's Order filed June 1, 2012 on the Petition for Judicial Review remanding the matter to the Commission for a new hearing consistent with the mandates and instructions contained in the Order.

Accordingly, I am writing to alert you to the fact that as this matter has been remanded to the Commission for a new hearing, the interests of the Commission and the Division of Coastal Management ("DCM") are no longer aligned as they were during the appeal. Therefore, Christine A. Goebel and I have constructed an ethics barrier within our organization to prevent exchanges or communications that could lead to conflicts of interest. From this point forward, any communications to or from me as counsel for the Commission should be sent to all parties. And, it is not necessary to include me in discussions between the parties unless you seek an answer from the Chair on any issue prior to the hearing. Let me know if you have any questions regarding this process.

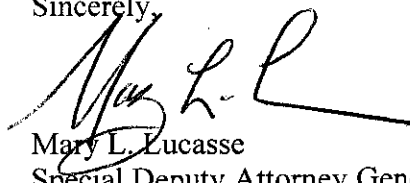
Information regarding the variance procedure applicable to the hearing on remand is set forth in N.C. Gen. Stat. § 113A-120.1 and 15 NCAC 07J .0701 et seq. In order to be heard at the Commission's July 15 and 15, 2015 meeting, the deadline to submit a Petition requesting a variance for the existing sandbag revetment is June 3, 2015 and stipulated facts must be agreed to by June 17, 2015.

**William Wright, Esq.**  
**Christine A. Goebel, Esq.**  
**April 9, 2015**  
**Page 2**

If these dates are not convenient, the next Commission meeting is scheduled for September 23 and 24, 2015. The deadline to submit a variance petition for the September meeting is August 12, 2015 and the deadline for reaching agreement on stipulated facts is August 26, 2015.

Please let me know if you have any questions regarding this information.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mary L. Lucasse', with a long horizontal flourish extending to the right.

Mary L. Lucasse  
Special Deputy Attorney General

cc: Frank Gorham, III, Chairman, Coastal Resources Commission (electronically)



# North Carolina Court of Appeals

JOHN H. CONNELL, Clerk  
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No. COA12-1299

[RIGGINGS HOMEOWNERS, INC.,  
Petitioner,]

v

[COASTAL RESOURCES  
COMMISSION OF THE  
STATE OF NORTH CAROLINA,  
Respondent.]

From New Hanover  
09CVS2761

## CERTIFICATION OF JUDGMENT

This cause came on to be argued upon the transcript of the record from the North Carolina Court of Appeals. Upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Court of Appeals.

It is therefore considered and adjudged by the Court here that the opinion of the Court be certified to the said North Carolina Court of Appeals to the intent that the judgment of the Court of Appeals is Affirmed.

And it is considered and adjudged further, that the Respondent (Coastal Resources Commission) do pay the costs of the appeal in this Court incurred, to wit, the sum of Two Hundred and Thirteen and 75/100 (\$213.75), and execution issue therefor.

Certified to the Clerk of Superior Court New Hanover County, North Carolina under my hand and seal this the 13th day of January 2015.

John H. Connell  
Clerk, North Carolina Court of Appeals

Copy to:

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Clerk of Superior Court, New Hanover County

By Heather C. Miller  
Assistant Deputy, Clerk of Superior Court

Date 3-30-15

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