

Attachment F:

Stipulated Exhibit No. 6

Record on Appeal to the
NC Court of Appeals (297 pp.)

NORTH CAROLINA COURT OF APPEALS

RIGGINGS HOMEOWNERS, INC.)
)
 Petitioner-Appellee,)
)
 v.)
)
 NORTH CAROLINA COASTAL RESOURCES)
 COMMISSION,)
)
 Respondent-Appellant.)

From NEW HANOVER COUNTY
09 CVS 2761

RECORD ON APPEAL

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CLERK OF THE COURT OF APPEALS
 OF NORTH CAROLINA

2012 OCT 26 PM 12: 02

FILED

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STATEMENT OF ORGANIZATION OF SUPERIOR COURT PER RULE 9(a)(2)b

Respondent-Appellant, North Carolina Coastal Resources Commission appeals the Order on Petitioner-Appellee's Petition for Judicial Review, by the Honorable Jay D. Hockenbury, Senior Resident Superior Court Judge. This Order reversed the Commission's May 21, 2009 Final Order denying Petitioner-Appellee's variance petition on re-hearing. Judge Hockenbury heard the matter during the March 12, 2012 Non-Jury Civil Session of the New Hanover Superior Court, and the Order was issued out of session on June 1, 2012.

Record on Appeal filed 10-26-12
Docketed 11-6-12

STATEMENT OF RECORD ITEMS SHOWING
JURISDICTION OF THE COMMISSION, PER RULE 9(a)(2)c

On August 22, 2006, Petitioner-Appellee, Riggings Homeowners, Inc., filed a petition for a fourth variance of the Coastal Resource Commission's administrative rules regarding sandbag time-limits. The request was filed pursuant to N.C. Gen. State. § 113A-120.1 and 15A N.C.A.C. 07J .0700 et. seq. Respondent-Appellant, North Carolina Coastal Resources Commission heard the variance petition at its regularly scheduled meeting on January 17, 2008. The Final Agency Order denying Petitioner-Appellee's variance petition was issued in writing on January 31, 2008 and was properly served on Petitioner-Appellee.

Following a Judicial Review appeal and Order on Judicial Review remanding the case back to the Commission for Re-hearing, the variance was considered again at the Commission's regularly scheduled meeting on April 29, 2009. The Final Agency Order on Re-hearing, again denying Petitioner-Appellee's variance, was issued in writing on May 21, 2009 and was properly served on Petitioner-Appellee.

RECEIVED
-3- OFFICE OF GENERAL COUNSEL CS 03-1069

STATE OF NORTH CAROLINA

File No
MAR 1 2003

New Hanover County

ENVIRONMENTAL The General Court Of Justice
DISTRICT Superior Court Division

Name Of Plaintiff
Riggings Homeowners, Inc.
Address
S. Port Fisher Blvd
City, State, Zip
Kure Beach, NC 28449

2003 MAR -7 PM 1:13
CIVIL SUMMONS
 ALIAS AND PLURIES SUMMONS
G.S. 1A-1, Rules 3, 4

VERSUS

Name Of Defendant(s)
Coastal Resources Commission of the State of North Carolina and
Robert R. Emory, Jr., Chairman of CRC of State of N.C.

Date Original Summons Issued
Date(s) Subsequent Summons Issued
TRUE COPY
NEW HANOVER COUNTY

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1
Coastal Resources Commission of the State of North Carolina
c/o Mary Penny Thompson, General Counsel & Registered Agent
Dept. of Envir. and Natural Resources
1601 Mail Service Ct. Raleigh, NC 27699

Name And Address Of Defendant 2
Robert R. Emory, Jr., Chairman of CRC of State of N.C.
c/o Mary Penny Thompson, General Counsel and Registered Agent
Dept. of Envir. & Natural Resources, 1601 Mail Service Center
Raleigh, NC 27699-1601

A Civil Action Has Been Commenced Against You

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)
Gary K. Shipman
575 Military Cutoff Road, Suite 106
Wilmington, NC 28405

Date Issued 3/20/03 4:15
Time AM PM
Signature
 Deputy CSC Assistant CSC Clerk Of Superior Court

ENDORSEMENT

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement
Time AM PM
Signature
 Deputy CSC Assistant CSC Clerk Of Superior Court

NOTE TO PARTIES: Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and if so, what procedure is to be followed.

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF NEW HANOVER 20081413 -7 FILE NO.: 08-CVS-____

RIGGINGS HOMEOWNERS, INC.)
)
Petitioner,)
)
vs.)
)
COASTAL RESOURCES)
COMMISSION OF THE STATE)
OF NORTH CAROLINA and)
ROBERT R. EMORY, Jr., Chairman)
of Coastal Resources Commission)
)
Respondents.)
_____)

PETITION FOR JUDICIAL REVIEW

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY _____
Assistant Clerk

NOW COMES Petitioner, Riggings Homeowners, Inc, by and through their undersigned counsel, and hereby alleges and says:

PARTIES

1. Petitioner Riggings Homeowners, Inc. (herein "Riggings"), is a non-profit corporation organized and existing 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 located in Kure Beach, New Hanover County, North Carolina, whose unit owners are members of the Riggings.
2. Respondent Coastal Resources Commission of the State of North Carolina (herein "CRC"), is an agency of the State of North Carolina charged with the administration of the Coastal Area Management Act, N.C.G.S. § 113A-100 *et seq*, who determines variance requests.
3. Respondent Robert R. Emory, Jr. (herein "Emory") is Chairman of the CRC.

JURISDICTION & VENUE

4. This Court has jurisdiction over this matter pursuant to N.C.G.S. §113A-120.1 and N.C.G.S. § 113A-123. Petitioner is an aggrieved party directly affected by the final Order of the CRC denying Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7). Petitioner has exhausted all administrative remedies available to it with respect to its request for a variance and no adequate procedure for judicial review is provided by another statute. The CRC's Order denying Petitioner's request for a variance resulted from a hearing held using stipulated facts and oral arguments.

5. The Superior Court of New Hanover County is the proper venue to hear this matter pursuant to N.C.G.S. § 113A-123 as the Riggings is located in New Hanover County, North Carolina.

FACTUAL ALLEGATIONS

6. Petitioner obtained a CAMA permit to place sandbags on the oceanfront abutting their property.

7. On or around August 22, 2006, Petitioner, pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 7J.0700, *et. seq.*, applied to the CRC for a variance which would allow Petitioner to maintain temporary sandbags to protect their property.

8. The Petitioner and the Division of Coastal Management agreed on a set of stipulated facts, a copy of which are attached as Exhibit "A" and incorporated herein by reference, and on January 17, 2008, Petitioner's variance request was heard at the regularly scheduled CRC meeting

9. At the meeting, the Riggings variance request was unanimously denied.

10. The CRC's final order, which was not dated, denied Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7). A copy of the Order denying Petitioner's variance request is attached hereto, as Exhibit B, and incorporated herein by reference.

11. The CRC's final order denying the variance request was received by the Petitioner, through its counsel, on February 7, 2008.

12. This Petition for Judicial Review is timely filed pursuant to N.C.G.S. § 150B-45.

13. The Order of the CRC is a final agency decision within the meaning of Article 4, Chapter 150B of the North Carolina General Statutes and Petitioner is directly affected by said Order and entitled to judicial review of the CRC's decision.

14. The CRC's decision denying Petitioner's request for a variance was in violation of constitutional provisions, was in excess of the statutory authority and/or jurisdiction of the CRC, was based on unlawful procedure, is in error as a matter of law, is unsupported by substantial evidence, and is arbitrary and capricious.

15. The CRC erred in its finding that Petitioner did not demonstrate that strict application of 15A NCAC 7H.1705(a)(7) would result in unnecessary hardship to the Riggings, and that finding is not supported by substantial evidence and is arbitrary and capricious::

- a. CRC takes the position that the hardships suffered by the Riggings are no longer "unreasonable" due to i) the amount of time that has elapsed since the sandbags were initially placed in front of the Riggings and ii) the Riggings denial of the FEMA Grant. However, Stipulated Fact #10 provides that "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) In addition, according to the Final Orders of the CRC issued concerning Petitioner's previous variance requests, dated April 25, 2006; May 9, 2003; February 4, 2002, and August 9, 2000, Petitioner demonstrated that strict application of 15A NCAC 7H.1705(a)(7) would result in unnecessary hardship. CRC now takes the position that since the Riggings did not accept the FEMA Grant the hardships they suffer are not "unreasonable." As is clearly reflected in the record before the CRC, it was impossible for the Riggings to accept the

FEMA Grant because, as stated in the stipulated facts, i) acceptance of the Grant required an 100% vote of approval, ii) each unit owner would have been required to contribute approximately \$125,000.00 toward the costs of relation and reconstruction, and iii) some Riggings homeowners lacked the financial capability to provide the funds necessary for relocation, as shown in their Affidavits which were part of the record before the CRC. (Stipulated Fact ¶ 29, Affidavit of Patty Forest, Affidavit of Sandy Iemma, Affidavit of John Parnell). As such no fundamental change has occurred to the Riggings since their previous variance request, where Respondent found unnecessary hardship, that would be grounds for Respondent's change in position.

16. The CRC erred in its finding that Petitioner did not demonstrate that its hardships result from conditions peculiar to Petitioner's property, such as the location, size, or topography of the property, and that finding is not supported by substantial evidence and is arbitrary and capricious::

- a. There is no more unique property then the Riggings community which is literally placed between a rock and hard place. To the immediate south of the Riggings community is the Fort Fisher revetment (Stipulated Fact ¶ 2) and to the immediate north of the Riggings there are communities which took part in the Carolina Beach / Kure Beach Renourishment projects of 2001 and 2007.
 - i. Fort Fisher: 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. (Stipulated Fact ¶ 16) 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. (Stipulated Fact ¶ 17). Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased. (Stipulated Fact ¶ 18).
 - ii. Beach Renourishment: 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. (Stipulated Fact ¶ 20, 31) The Riggings HOA made various attempts to get the United States Army Corps of Engineers to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts did not succeed. (Stipulated Fact ¶ 21). 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." (Stipulated Fact ¶ 22) However, since 2000, beach renourishment projects conducted by the US Army Corps of Engineers have covered coquina rock outcroppings north of the Riggings. (Stipulated Fact ¶ 9)

- iii. Removal of Coquina Rock Outcropping in front of the Riggings: In the 1920's some of the coquina rock outcroppings northeast of Fort Fisher were 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. (Stipulated Fact ¶ 4). Among other things, coquina rock outcroppings can provide a partial natural barrier against the threat of beach erosion (Stipulated Fact ¶ 6).

As such, there was no evidence to suggest the Riggings is not a unique property as the CRC found previously when granting previous Riggings variance requests.

17. The CRC erred in its finding that Petitioner failed to demonstrate that its hardships did not result from actions taken by the Petitioner, and that finding is not supported by substantial evidence and is arbitrary and capricious::

In it's Final Order, the CRC expresses the opinion that any hardships Petitioner might face now are a result of its own inability, or unwillingness, to respond to its long-standing situation with a permanent solution. As stated previously, Petitioner has attempted to do everything it

could possibly do to assist itself: it's applied for beach renourishment and has attempted to relocate. The CRC confuses "inaction" or "impossibility" by the Riggings with "action" in their ruling that the Petitioner did not satisfy the third requirement for granting of variance. "Actions taken by the petitioner" is the third requirement and there is no evidence to suggest that any action of Petitioner caused their problems. It is the combined action of local, state, and Federal agencies that have created Petitioner's hardships. As such, there was no evidence to suggest that the hardships suffered by the Riggings result from actions they took.

18. The CRC erred in its finding that the Variance request of the Petitioner would not be consistent with the spirit, purpose, and intent of the rules, standard, or orders; will secure public safety and welfare; and will preserve substantial justice, and that finding is not supported by substantial evidence and is arbitrary and capricious:

- a. Again the CRC Order discusses the FEMA Grant for the notion that Petitioner's request is not consistent with the spirit, purpose, and intent of the rules, standard, or orders; will secure public safety and welfare; and will preserve substantial justice, however that grant could never have been accepted. In addition the CRC Order states that "the continued existence of the sandbag structure on the public beach area and increasing encroachment of the buildings impede the public's right of access and use of the beach area." This is directly contrary to stipulated fact ¶ 34 which provides that "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." (Stipulated Fact ¶ 34). As such, the CRC based their denial of the variance on incorrect evidence or evidence not before the CRC.

19. The CRC erred by failing to apply the United States Constitution and the North Carolina Constitution to the regulations adopted and applied by the CRC with respect to the Petitioner's variance request. Pursuant to N.C.G.S. § 113A-128 the CRC can not issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States. The applicable prohibition against hardened structures and the denial of the variance request by the CRC denies Petitioner the right to protect its property and therefore constitutes a

violation of the Petitioner's, and its homeowners, constitutional rights afforded to them by the United States Constitution and the North Carolina Constitution, and constitutes or will constitute a taking by the CRC of the unit owners' property without just compensation, something clearly impermissible.

20. Upon information and belief, the CRC erred in its Order and as a result violated Petitioner's, and its homeowners Equal Protection rights by treating other ocean community variance requests differently, and more favorably, than the Petitioner.

21. The CRC erred in its Order by adopting DCM's position and by doing so, coupled with other collusive efforts with DCM, violated the separation of powers doctrine.

22. The CRC erred in hearing the variance request, as they were not an impartial tribunal and did not consider the variance request based on the evidence presented to them, and by doing so violated Petitioner's, and its homeowners' due process rights.

23. Because of the aforementioned constitutional violations, CRC's final order was in error as it was in excess of their statutory authority and the jurisdiction of the CRC.

24. The CRC erred by voting to accept Staff's Position at a public hearing, and then, subsequent to the hearing and prior to the Final Order being issued, changing their position to remove portions of Staff's Position.

25. The CRC erred by using the wrong analysis in consideration of the Petitioner's variance request. The Final Order states that "[b]ased on the current facts, Staff now contends and the Commission concludes that the application of the rules, standards, or orders of the Commission will not cause Petitioner unreasonable hardships, and Petitioner can make reasonable use of its property without a continued variance." The determination that the CRC is

required to make is not whether the hardship is unreasonable but whether it is unnecessary. The CRC failed to do this.

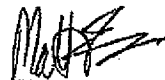
26. The CRC also erred in other respects that will be shown at the hearing of this Petition.

27. Based on the errors of the CRC, the CRC's decision to deny the Petitioner's variance request should be reversed and the CRC should be directed to grant the Petitioner's variance.

WHEREFORE, the Petitioner prays for relief as follows:

1. That the Court reverse the CRC's Order denying the variance request and direct Respondent to grant the Petitioner's variance request;
2. That the Court stay any action seeking the removal of the sandbags until this matter is concluded;
3. For such other and further relief as the Court deems just and proper

SHIPMAN & WRIGHT, LLP
Attorneys for Plaintiff



GARY K. SHIPMAN
N.C. State Bar No.: 9464
MATTHEW W. BUCKMILLER
N.C. State Bar No.: 35194
575 Military Cutoff, Suite 106
Wilmington, NC 28405
(910) 762-1990

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

Hand delivering a copy hereof to each said party or the attorney thereof.

Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

Mary Penny Thompson, General Counsel
Dept. of Environmental and Natural Resources
1601 Mail Service Center
Raleigh, NC 27699-1601

James C. Gulick, Senior Deputy Attorney General
Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

This the 7th day of March, 2008.

SHIPMAN & WRIGHT, L.L.P.



MATTHEW W. BUCKMILLER

VIA Certified Mail # 002761

STATE OF NORTH CAROLINA

File No.

New Hanover County

FILED
2009 JUN 17 PM 2:13

In The General Court Of Justice
 District Superior Court Division

Name Of Plaintiff
Riggings Homeowners, Inc
Address
S. Fort Fisher Blvd
City, State, Zip
Kure Beach NC 28449

CIVIL SUMMONS
 ALIAS AND PLURIES SUMMONS

VERSUS
Name Of Defendant(s)
Coastal Resources Commission of the State of North Carolina

Date Original Summons Issued
Date(s) Subsequent Summons(es) Issued
G.S. 1A-1, Rules 3, 4
RECEIVED
OFFICE OF GENERAL COUNSEL
JUN 18 2009

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1
Coastal Resources Commission of the State of North Carolina
c/o Mary Penny Thompson, General Counsel
Dept. of Environment & Natural Resources, 1601 Mail Service Cntr
Raleigh NC 27699-1601

Name And Address Of Defendant 2
~~ENDORSEMENT & RETURNED RECEIPTS~~

A Civil Action Has Been Commerced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

- 1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
- 2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)
Gary K Shipman
575 Military Cutoff Road, Suite 106
Wilmington, NC 28405

Date Issued
6/17/09
Time
2:13 AM PM
Signature
D. Nicole Shortt
 Deputy CSC Assistant CSC Clerk Of Superior Court

ENDORSEMENT

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement
Time
 AM PM
Signature
 Deputy CSC Assistant CSC Clerk Of Superior Court

NOTE TO PARTIES: Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.

A TRUE COPY
(Over) CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: D. Nicole Shortt
Deputy Clerk of Superior Court

STATE OF NORTH CAROLINA)
COUNTY OF NEW HANOVER)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 09-CVS-____

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

PETITION FOR JUDICIAL REVIEW

NOW COMES Petitioner, Riggings Homeowners, Inc, by and through their undersigned counsel, and hereby alleges and says:

PARTIES

1. Petitioner Riggings Homeowners, Inc. (herein "Riggings"), is a non-profit corporation organized and existing 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 located in Kure Beach, New Hanover County, North Carolina, whose unit owners are members of the Riggings.

2. Respondent Coastal Resources Commission of the State of North Carolina (herein "CRC"), is an agency of the State of North Carolina charged with the administration of the Coastal Area Management Act, N.C.G.S. § 113A-100 *et seq.*, who determines variance requests.

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: D. Nicole Shortt
Deputy Clerk of Superior Court

JURISDICTION & VENUE

3. This Court has jurisdiction over this matter pursuant to N.C.G.S. §113A-120.1 and N.C.G.S. § 113A-123. Petitioner is an aggrieved party directly affected by the final Order of the CRC denying Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7). Petitioner has exhausted all administrative remedies available to it with respect to its request for a variance and no adequate procedure for judicial review is provided by another statute. The CRC's Order denying Petitioner's request for a variance resulted from a hearing held using stipulated facts and oral arguments.

4. The Superior Court of New Hanover County is the proper venue to hear this matter pursuant to N.C.G.S. § 113A-123 as the Riggings is located in New Hanover County, North Carolina.

FACTUAL ALLEGATIONS

5. Petitioner obtained a CAMA permit to place sandbags on the oceanfront abutting their property.

6. On or around August 22, 2006, Petitioner, pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 7J.0700, *et. seq.*, applied to the CRC for a variance which would allow Petitioner to maintain temporary sandbags to protect their property.

7. The Petitioner and the Division of Coastal Management agreed on a set of stipulated facts, a copy of which are attached as Exhibit "A" and incorporated herein by reference, and on January 17, 2008, Petitioner's variance request was heard at the regularly scheduled CRC meeting.

8. At the meeting, the Riggings variance request was unanimously denied. A copy of the Order denying Petitioner's variance request is attached hereto, as Exhibit B, and incorporated herein by reference.

9. A Petition for Judicial Review of the CRC's Order was timely filed on March 7, 2008.

10. On February 20, 2009, after having reviewed the Record for the Riggings Variance Request, reviewed 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. A copy of Judge Hockenbury's Order reversing the CRC's Order and remanding the Riggings variance request back to the CRC is attached hereto as Exhibit C, and incorporated herein by reference.

11. On April 29, 2009, the variance request of the Riggings was reheard at the regularly scheduled meeting of the North Carolina Coastal Resources Commission.

12. The CRC's final order, dated May 21, 2009, denied Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7). A copy of the CRC's final order is attached hereto as Exhibit D, and incorporated herein by reference.

13. This Petition for Judicial Review is timely filed pursuant to N.C.G.S. § 150B-45.

14. The Order of the CRC is a final agency decision within the meaning of Article 4, Chapter 150B of the North Carolina General Statutes and Petitioner is directly affected by said Order and entitled to judicial review of the CRC's decision.

15. The CRC's decision denying Petitioner's request for a variance was in violation of constitutional provisions, was in excess of the statutory authority and/or jurisdiction of the CRC, was based on unlawful procedure, is in error as a matter of law, is unsupported by substantial evidence, is contrary to Judge Hockenbury's Order, and is arbitrary and capricious.

16. The CRC erred in finding that strict application of 15A NCAC 7H.1705(a)(7) would not result in unnecessary hardship(s) to the Riggings by relying solely, or in part, on the fact that the Riggings has had variance requests granted before, an impermissible consideration.

17. The CRC erred in finding that strict application of 15A NCAC 7H.1705(a)(7) would not result in unnecessary hardship(s) to the Riggings by relying solely, or in part, on the fact that the Riggings has had sandbags on their property for a certain amount of time, an impermissible consideration.

18. The CRC erred in finding that strict application of 15A NCAC 7H.1705(a)(7) would not result in unnecessary hardship(s) to the Riggings by relying solely, or in part, on the policy position of the CRC, an impermissible consideration, and not on the statutory variance requirements of N.C.G.S. § 113A-120.1.

19. The CRC erred in finding that strict application of 15A NCAC 7H.1705(a)(7) would not result in unnecessary hardship(s) to the Riggings by relying solely, or in part, on the law upon which the Riggings is granted a statutory right to request a variance from.

20. The CRC erred in finding that strict application of 15A NCAC 7H.1705(a)(7) would not result in unnecessary hardship(s) to the Riggings by relying solely, or in part, on the notion that the Riggings could not provide an endpoint for their proposed Habitat Enhancement Project due to the fact that the CRC and DCM prohibiting communication regarding said Habitat Enhancement Project during the pending variance request.

21. The CRC erred in its finding that Petitioner did not demonstrate that strict application of 15A NCAC 7H.1705(a)(7) would result in unnecessary hardship to the Riggings, and that finding is not supported by substantial evidence and is arbitrary and capricious because in previous Final Orders of the CRC issued concerning Petitioner's past variance requests, dated April 25, 2006; May 9, 2003; February 4, 2002, and August 9, 2000, Petitioner demonstrated that strict application of 15A NCAC 7H.1705(a)(7) would result in unnecessary hardship. Since that time nothing about the condition of the Riggings property has changed and accordingly the CRC has erred.

22. The CRC erred by finding that one of the reasons Petitioner has not suffered unnecessary hardships is that erosion is now stable in front of the Riggings. That conclusion of law is unsupported by the Stipulated Facts.

23. The CRC's independent rulings on the elements necessary to be granted a variance were inconsistent in that:

- a. The Riggings was found to have not met variance requirement #1 that "Unnecessary hardships would result from strict application of the rules, standards, or orders."
- b. However the CRC found that the Riggings had met the second requirement of variance in that the "The Hardships", the statutory meaning of which is the "Unnecessary Hardships" referenced in requirement one of the variance request, result from conditions that are peculiar to the property, such as the location, size, or topography of the property.
- c. And the CRC also found that the Riggings had met the third requirement that the "The Hardships", the statutory meaning of which is the "Unnecessary Hardships" referenced in requirement one of the variance request, result from actions taken by the Petitioner
- d. In essence if the CRC found variance elements were met for the second and third requirement, the CRC was required to find that requirement #1, "unnecessary hardships", was met as well.

24. The CRC erred in finding that the "unique underlying geology and topography of this property do not affect the naturally occurring erosive forces of wind and wave, that have, in fact, caused erosion at this site since at least 1985 when Petitioner first obtained a permit to use a sandbag revetment to attempt to stop the erosion" and that finding is unsupported by the stipulated facts and other evidence in this matter.

25. The CRC erred in finding that "there has been at least one instance during this 24-year placement where holes in the sandbag revetment had to be filled with other sandbags" and that finding is unsupported by the stipulated facts and other evidence in this matter.

26. The CRC erred in its finding that the Variance request of the Petitioner would not be consistent with the spirit, purpose, and intent of the rules, standard, or orders; will secure public safety and welfare; and will preserve substantial justice, and that finding is not supported by substantial evidence and is arbitrary and capricious in that:

- a. The CRC focuses on impermissible considerations; the amount of time the Riggings has had the sandbags and policies of the CRC which are inconsistent with the North Carolina General Statutes.

27. The CRC erred by failing to apply the United States Constitution and the North Carolina Constitution to the regulations adopted and applied by the CRC with respect to the Petitioner's variance request. Pursuant to N.C.G.S. § 113A-128 the CRC can not issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States. The applicable prohibition against hardened structures and the denial of the variance request by the CRC denies Petitioner the right to protect its property and therefore constitutes a violation of the Petitioner's, and its homeowners, constitutional rights afforded to them by the United States Constitution and the North Carolina Constitution, and constitutes or will constitute a taking by the CRC of the unit owners' property without just compensation, something clearly impermissible.

28. Upon information and belief, the CRC erred in its Order and as a result violated Petitioner's and its homeowners Equal Protection rights by treating other ocean community variance requests differently, and more favorably, than the Petitioner.

29. The CRC erred in its Order by adopting DCM's position with respect to requirements #1 and #4 and by doing so, coupled with other collusive efforts with DCM, violated the separation of powers doctrine.

30. The CRC erred in hearing the variance request, as they were not an impartial tribunal and did not consider the variance request based on the evidence presented to them, and by doing so violated Petitioner's, and its homeowners' due process rights.

31. Because of the aforementioned constitutional violations, CRC's final order was in error as it was in excess of their statutory authority and the jurisdiction of the CRC.

32. The CRC erred by acting contrary to Judge Hockenbury's Order and applicable case law by examining the amount of time the sandbags had been in front of the Riggings and using that as a basis for denial of the variance, and not focusing solely on the condition of the property as is required.

33. The CRC also erred in other respects that will be shown at the hearing of this Petition or in the briefing by the parties prior to said hearing.

34. Based on the errors of the CRC, the CRC's decision to deny the Petitioner's variance request should be reversed and the CRC should be directed to grant the Petitioner's variance.

WHEREFORE, the Petitioner prays for relief as follows:

1. That the Court reverse the CRC's Order denying the variance request and direct Respondent to grant the Petitioner's variance request;
2. That the Court stay any action seeking the removal of the sandbags until this matter is concluded;
3. For such other and further relief as the Court deems just and proper

This is the 17th of June, 2009.

SHIPMAN & WRIGHT, LLP
Attorneys for Petitioner



GARY K. SHIPMAN
N.C. State Bar No.: 9464
MATTHEW W. BUCKMILLER
N.C. State Bar No.: 35194
575 Military Cutoff, Suite 106
Wilmington, NC 28405
(910) 762-1990

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

Hand delivering a copy hereof to each said party or the attorney thereof.

Via facsimile

Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

Mary Penny Thompson, General Counsel
Dept. of Environment and Natural Resources
1601 Mail Service Center
Raleigh, NC 27699-1601

Jennie Wilhelm Hauser, Special Deputy Attorney General
Department of Justice
PO Box 629
Raleigh, NC 27602

This is the 17th of June, 2009.

SHIPMAN & WRIGHT, L.L.P.



GARY K. SHIPMAN

N.C. State Bar No.: 9464

WILLIAM G. WRIGHT

N.C. State Bar No.: 26891

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FILED

STATE OF NORTH CAROLINA 2008 APR -3 PM 1:04 THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NEW HANOVER COUNTY NEW HANOVER COUNTY, G.S.C. 08 CVS 1069

BY _____

RIGGINGS HOMEOWNERS, INC.,)
)
 Petitioners,)
)
 v.)
)
 NORTH CAROLINA COASTAL)
 RESOURCES COMMISSION,)
 Robert R. Emory, Jr., Chairman,)
 Coastal Resources Commission,)
)
 Respondents.)

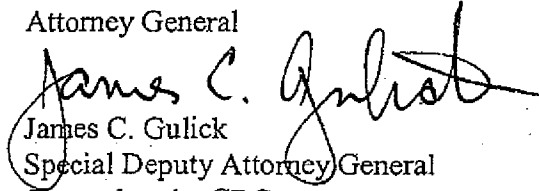
A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY

BY 
Assistant Deputy Clerk Superior Court

**CERTIFIED COPY OF
RECORD OF PROCEEDINGS**

NOW COMES the respondent-agency, North Carolina Coastal Resources Commission ("CRC"), pursuant to N.C. Gen. Stat. §§ 150B-47 and 113A-123, and transmits to the court a certified copy of the record of proceedings before the North Carolina Coastal Resources Commission *In the Matter of the Variance Request by Riggings Homeowners, Inc.*

This the 1st day of April, 2008.

ROY COOPER
 Attorney General

 James C. Gulick
 Special Deputy Attorney General
 Counsel to the CRC
 N. C. Department of Justice
 Post Office Box 629
 Raleigh, NC 27602-0629
 (919) 716-6600

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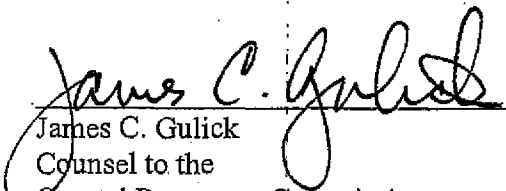
STATE OF NORTH CAROLINA

COUNTY OF WAKE

CERTIFICATION

I, James C. Gulick, Counsel to the Coastal Resources Commission, do hereby certify that the attached documents are the true and correct record of the proceedings before the North Carolina Coastal Resources Commission *In the Matter of the Variance Request by Riggings Homeowners, Inc.*, CRC-VR-06-33.

In witness whereof, I hereunto subscribe my name this the 1st day of April, 2008.


James C. Gulick
Counsel to the
Coastal Resources Commission

Subscribed and sworn to before me
this the 1 day of April, 2008.


Notary Public

My commission Expires: June 17, 2012
(SEAL)

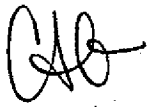


CRC-VR-06-33

State of North Carolina

Department of Justice
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

ROY COOPER
ATTORNEY GENERAL

TO: Coastal Resources Commission
FROM: Christine A. Goebel
Assistant Attorney General 
DATE: December 21, 2007 (for the January 17-18, 2008 CRC Meeting)
RE: Variance Request by The Riggings Homeowners Association, Inc.

Petitioner is a Homeowners Association for The Riggings condominium development in Kure Beach, New Hanover County. They own oceanfront property where the development is currently located, as well as vacant property directly across NC 421. They have sought, and have been granted four prior variances from this Commission to keep sandbags in front of their property for a period longer than allowed by Rule 15A NCAC 7H .1705(a)(7). They are now seeking a variance to keep the bags 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: Petitioners' Variance Request Materials and Attachments
- Attachment E: Additional Exhibits

cc: The Riggings HOA c/o William Wright, Esq., Petitioner
Town of Kure Beach CAMA LPO
Jim Gulick, Senior Deputy Attorney General & CRC Counsel
DCM Staff

ATTACHMENT A

RELEVANT STATUTES OR RULES

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. . . 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 the estuarine shoreline.

**15A NCAC 7H .1700 General Permit for Emergency Work Requiring a CAMA
and/or Dredge and Fill Permit**

.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.

.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.

(7) A temporary erosion control structure . . . 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,

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.

STIPULATED FACTS

ATTACHMENT B

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.
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.
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:
 - 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.

CRC-VR-06-33

For the Petitioner:

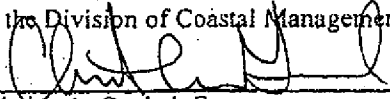


Matthew Buckmiller, Esq.

Counsel for Petitioner
Shipman & Wright, LLP
675 Military Cutoff Road, Suite 106
Wilmington, NC 28405

Date: 12/19/07

For the Division of Coastal Management:



Christine A. Goebel, Esq.
Assistant Attorney General
N.C. Department of Justice
Attorney for Respondent
9001 Mail Service Center
Raleigh, NC 27699-9001

Date: 12/19/07

ATTACHMENT C

Petitioner's and Staff's Positions

- 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.**

Petitioner's Position: Yes. (Taken verbatim from their Petition)

In issuing the variance extensions 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* Finding of Fact # 2 in the Final Orders' attached as Exhibit A for 2005, Exhibit B for 2003, Exhibit C for 2002, and Exhibit D for 2000. 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.

Furthermore, the Commission concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that application of these rules to Petitioner's property will result in unnecessary hardship. *See* Conclusion of Law #4 in the respective attached Final Orders.

Today, the threat to the condominium is as imminent as it was at those previous times and, if anything, has worsened. 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.

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 for the requested time 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. 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. Similarly, interference with public use of the beach is minimal since the sandbags are covered by sand much of the time, and even when uncovered they allow persons to pass between the high tide line and the building.

Staff's Position: No.

In the past, Staff had agreed with Petitioner that strict application of the development rules regarding how long the sandbag structures could remain causes Petitioner an unnecessary hardship. Staff agreed that the use of temporary erosion control structures, such as these sandbag structures, is to afford homeowners time to relocate their property or to seek beach nourishment. In this case, Petitioner discovered that nourishment was not an acceptable alternative at this location, due to the coquina rock located in front of their property, and they began attempting to secure funds to relocate. At the last variance hearing in April 2005, the fact that the Town had recently been awarded a \$3.6 million dollar FEMA grant to acquire the current site for a park, once Petitioners rebuilt and removed the current structures by June 2007, was the primary reason staff supported the April 2005 variance request, and its finding that an unnecessary hardship existed. Staff understood the award of the grant to be extraordinary, and removal of the sandbag structure at that time, when they appeared to have crossed the biggest hurdle to relocation, would be an unnecessary hardship. In the nearly 3 years since the last variance hearing, Petitioner has not been able to get the required support from its members, and in May 2006, formally rejected the FEMA grant. Based on the current facts, Staff now contend that the application of the rules, standards, or orders of the Commission will not cause Petitioner unreasonable hardships, and Petitioner can make reasonable use of their property without a variance.

In 2003, CAMA was amended to include 113A-115.1, which prohibited the use of erosion control structures along the ocean shoreline. The Commission's rules did allow for the continued use of "temporary erosion control structures" made of sandbags to protect only immanently threatened structures which were those within 20 feet of the erosion scarp. The installation and design standards in the CRC's rules reflect the temporary nature of the structures, and demonstrates that sandbags were not intended as permanent fortresses. Further, the Commission stated in 15A NCAC 07M.0202(e) that these temporary measures are to be used "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." This rule demonstrates that sandbags should only offer immediate relief and time to find a permanent solution.

Staff's position is that there are few *reasonable* uses for property that has been imminently threatened behind a sandbag structure for the last 23 years, and which has suffered damage from erosion multiple times during this period. Staff believes the Association's expectations for this property should have been decreasing with every passing hurricane, nor'easter, and storm, and Staff feels the continued presence of the sandbag structure has artificially inflated the Association's expectations for use of the oceanfront property. The amount of time the bags have been allowed to remain is beyond the scope of what the rules allow, and the sandbag structure today has taken on the characteristics of a permanent erosion

control structure which is prohibited under CAMA. Finally, Petitioner offers no signs of progress different from those offered in the past, which were hopes and ideas instead of real, concrete steps toward relocation. Instead, Petitioner proposes the "Habitat Restoration Project" which may very well be illegal based on the hardened structures ban. In the alternative, Petitioner also proposes a private nourishment project which would likely cover the natural heritage and hard-bottom habitat coquina rock. Both of these proposals may not even be permissible, and staff feels they are not real steps toward finding a permanent solution to their problem.

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

Petitioner's Position: Yes. (Taken verbatim from their Petition)

Our situation is unique in that we are located at the very end of approximately 3 miles of renourished public beach. A beach renourishment program for Kure Beach was completed in May 2001 and stopped less than 1500 feet north of the Riggings property because of three coquina rock outcroppings. These rocks, which at one time were quarried for use in highway projects, are now considered "Registered Natural Heritage Areas" and cannot be covered with sand or disturbed in any manner. Thus the Riggings have been prevented so far from being a part of any beach nourishment program, even though a far greater portion of the coquina rock outcropping is north of the Riggings, not directly in front of it. In a recent renourishment program approximately 2500 feet north of the Riggings, other beach areas containing coquina outcroppings were included in the renourishment project and covered by sand.

Adjacent to the property to the south, the U.S. Army Corps of Engineers has constructed a rock seawall to protect Fort Fisher State Park. Between the rock seawall and the renourished part of the beach, the force from the incoming tides is channeled onto the beach in front of the Riggings, accelerating the erosion process.

The Riggings is truly stuck between a rock and a hard place, and the Commission has concluded that the aforementioned conditions are peculiar to the Riggings' Property when issuing the Final Orders in April 2005, May 2003, and August 2000. See Conclusion of Law #5 in the respective attached Final Orders.

Staff's Position: No.

As indicated in prior Staff Recommendations and Orders of the CRC, Staff had agreed that Petitioner's unnecessary hardship results from conditions which were peculiar to the Petitioners' property--specifically the location of coquina rock formations preventing the placement of sand in past nourishment projects, and the Fort Fisher rock revetment. While both of these structures still exist, Staff has argued in the previous factor that the Petitioner no longer has an unnecessary hardship, and so there could not now be an unnecessary hardship resulting from conditions peculiar to the property. At this point, any hardships that may exist are a result of Petitioner's inability to move forward as an Association in order to relocate their buildings, despite years of extra time allowed by previous variances from the Commission. 23 years is more than ample time to seek more permanent solution, as is the intent of the temporary nature of the sandbag rules.

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

Petitioner's Position: No. (Taken verbatim from their Petition)

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. 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 Petitioners had no way of knowing that the 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, we 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 hardships.

Staff's Position: Yes.

Staff notes that Petitioner's argument that they did not cause the coquina rock's National Heritage Area designation and were not involved in construction of the Fort Fisher rock revetment ignore the fact that these two things have existed since 1982 and 1995, respectively. Petitioner was first aware of the erosion problems at their site in 1985 when the structures became imminently threatened and the sandbag structures were first installed. Since 1992, Petitioner has owned the parcel landward of NC 421 where the owners could re-locate, but have not yet done so. Petitioner has known at least since the 2001 Corps nourishment project that the coquina rock could prevent nourishment being placed at or near the Riggings in future projects. Despite Petitioner's awareness of all these circumstances, they have still not been able to take

concrete actions to move forward with a relocation project. In the past, Petitioners argued that all they needed was a little more time to find funding, but when they finally got the FEMA grant, they turned it down. As in past variances, Petitioner claims to have a new solution, specifically its "habitat restoration" project or private nourishment. Staff is concerned that as in the past, Petitioner will make these same promises, but could easily again fail to actually implement a permanent solution and the bags would remain even longer. Staff is also concerned that Petitioner's request to keep the bags until one of its solutions is complete, is much too open-ended because these projects may be illegal or not-permittable and if never completed, the bags would remain indefinitely. For these reasons, any hardships Petitioners might face now are a result of their own inability to react to their long-standing situation with a permanent solution.

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

Petitioner's Position: Yes. (Taken verbatim from their Petition)

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.

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.

Issuing the requested variance will 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, this restraint on public beach access is de minimis since any restraint on public use will be temporary because I) the sandbags are

normally covered by sand and 2) the beach area in question constitutes only a small portion of Kure Beach, which is sandwiched between the three mile long Kure Beach renourishment project and the over one-half mile long Fort Fisher State Park seawall.

For the aforementioned reasons, the variance will secure the public safety and welfare as well.

Similarly, while it may be argued that the Riggings HOA has "had their chance," they 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. *See "Attachment D."* 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. *See "Attachment D."*

Indeed some members of the Riggings HOA, by voting in the affirmative to move the Condominium, have done, and are still feverishly, doing all they can to resolve this situation. At least as to these Riggings members the granting of a variance would preserve substantial justice until they have an adequate time to explore further options.

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.

Staff's Position: No.

Staff understands that one of the Commission's main objectives for the ocean hazard AEC is to eliminate unreasonable danger to life, property, and amenities, pursuant to 15A NCAC 7M.0201. While Petitioner argues that allowing the sandbag structure to remain is the best way to achieve this goal, Staff disagrees. Staff believes that while the sandbags were meant to be a temporary band-aid, they have instead become a crutch to the members of the Association. They continue to rely on the sandbags to protect them from, or reduce damage from storms, instead of making real progress toward a lasting solution, and have done so now for 23 years. Removal of the sandbags may provide the needed incentive for the Association members to finally relocate across NC 421 further from the ocean hazard AEC, consequently reducing the public costs of inappropriately sited development and reducing the risks to life, property, and amenities.

Petitioner's argument fails to address the importance of the Commission's other stated goals of preventing encroachment of permanent structures on public beach areas, of preserving the natural ecological conditions of the barrier dune and beach systems, and protecting present common law and statutory rights of access to, and use of the lands and waters of the coastal area. The continued existence of the sandbag structure on the public beach area and the increasing encroachment of the buildings impedes the public's rights of access and use of the beach area. As argued above, the existing sandbag structure is continually losing its "temporary" characteristics and is becoming a more permanent illegal hardened erosion control structure, contrary to CAMA and the Commission's rules and objectives.

Staff notes that Petitioner has been afforded plenty of time and several "second chances" to relocate the threatened structures or find another permanent solution, but has failed to do so. Allowing the sandbags to remain any longer for an uncertain period of time is not within the spirit of CAMA and the CRC's rules, and for the same reasons, will not protect the public's welfare.

It is becoming clear to Staff that Petitioners are no longer working diligently to relocate the buildings, as evidenced by the refusal of the FEMA grant, combined with its newly proposed solutions which may not even be permissible. After extensions of one more year, one more year, two more years, and two more years, granting any more extensions to allow more time to pursue their latest proposals, allowing the bags to remain until one of those plans is completed, if ever, would be no longer preserve substantial justice because to do so would essentially constitute a permanent variance for Petitioner, while allowing only truly temporary sandbag structures for other threatened structures along the coast.

**STAFF RECOMMENDATION
ATTACHMENT D**

Petitioner's Variance Request Materials

Including:

- Variance Form (DCM Form 11)
- Answer to four variance criteria
- Copy of FEMA grant document
- May 1, 2006 letter from Petitioner to Mayor
- The Riggings Beach Fill Plan
- The Riggings Habitat Restoration Plan
- Affidavit of Tom Jarrett
- Affidavit of John Parnell
- Affidavit of Patty Forest
- Affidavit of Sandy Iemma

-42-

S Shipman & Wright, L.L.P.

A t t o r n e y s A t L a w

11 South Fifth Avenue • Wilmington, North Carolina 28401
(T) 910.762.1990 • (F) 910.762.6752 • 800.762.1990

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

Angellque Adams

William G. Wright

Brian A. Geschickter

August 22, 2006

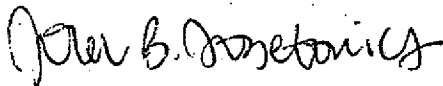
Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 27699

Re: Riggings Home Owners Association CAMA Variance Request

To Whom It May Concern:

Please find enclosed CAMA Variance Request for Riggings Home Owners Association with referenced attachments A-D and exhibits A-D. Please do not hesitate to contact me should you have any questions.

Sincerely,



Jolen B. Jozefowicz
Paralegal

/bj

Enclosures

cc: Attorney General's Office
Ms. Jean Cashion

PRACTICE AREAS

Focused Trial Practice in all Federal and State Courts
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Product Liability • Nursing Home Negligence • Mold Litigation •

DCM FORM 11
(revised 6/26/06)

CAMA VARIANCE REQUEST

DCM FILE NO.

06-33

Petitioner supplies the following information:

Riggings Homeowners' Association
1437 Forth Fisher Blvd.
Kure Beach, NC 28449

Attorneys:

Gary Shipman
William Wright
Shipman & Wright, L.L.P.
11 South Fifth Avenue
Wilmington, NC 28401
Telephone: (910) 762-1990
Facsimile: (910) 762-6752
gshipman@shipmanlaw.com
wwright@shipmanlaw.com

Have you received a decision from the Division of Coastal Management (DCM) or a Local Permit Officer denying your application for a CAMA permit?

no (You are not entitled to request a variance until your permit application has been denied.)

yes (You may proceed with a request for a variance.)

What did you seek a permit to do?

Erect and temporarily maintain a sandbag revetment on the ocean shoreline in front of the Riggings Condominium.

What Coastal Resources Commission rule(s) prohibit this type of development?

Rules 15A NCAC 7H.0308 (a)(2)(F) and (N).

Can you redesign your proposed development to comply with this rule? N If your answer is no, explain why you cannot redesign to comply with the rule.

Without the sandbags' protection the Riggings Condominium property will ultimately fully erode and the condominium on such property will be destroyed.

Can you obtain a permit for a portion of what you wish to do? N If so, please state what the permit would allow.

State with specificity what you are NOT allowed to do as a result of the denial of your permit application. It will be assumed that you can make full use of your property, except for the uses that are prohibited as a result of the denial of your permit application.

We are not allowed to maintain sandbags to protect the Riggings condominium. The removal of sandbags will in turn lead to the complete erosion of the Riggings property, extinguishing all uses of the property.

RESPOND TO THE FOUR STATUTORY VARIANCE CRITERIA:

- I. Identify the hardship(s) you will experience if you are not granted a variance and explain why you contend that the application of this rule to your property constitutes an unnecessary hardship. [The North Carolina Court of Appeals has ruled that this factor depends upon the unique nature of the property rather than the personal situation of the landowner. It has also ruled that financial impact alone is not sufficient to establish unnecessary hardship, although it is a factor to be considered. The most important consideration is whether you can make reasonable use of your property if the variance is not granted. [*Williams v. NCDENR, DCM, and CRC*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).]

See Attachment A(1)

- II. Describe the conditions that are peculiar to your property (such as location, size, and topography), and cause your hardship.

See Attachment A(2)

- III. Explain why your hardship does not result from actions that you have taken.

See Attachment A(3)

- IV. Explain why the granting of the variance you seek will be consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; preserve substantial justice; and secure public safety.

See Attachment A(4)

Please attach copies of the following:

Permit Application and Denial documents
Site Drawing with Survey and Topographical Information (NEED)

Any letters filed with DCM or the LPO commenting on or objecting to your project
Provide a numbered list of all true facts that you are relying upon in your explanation as to why you meet the four criteria for a variance. Please list the variance criterion, ex. unnecessary hardship, and then list the relevant facts under each criterion. [The DCM attorney will also propose facts and will attempt to verify your proposed facts. Together you will arrive at a set of facts that both parties agree upon. Those facts will be the only facts that the Commission will consider in determining whether to grant your variance request.]

1. See Attachment B: Facts Relied Upon.
2. See Attachment C: Site Drawing with Survey and Topographical Information.

Attach all documents you wish the Commission to consider in ruling upon your variance request. [The DCM attorney will also propose documents and discuss with you whether he or she agrees with the documents you propose. Together you will arrive at a set of documents that both parties agree upon. Those documents will be the only documents that the Commission will consider in determining whether to grant your variance request.]

See Attachment D for Relevant Documents.

Pursuant to N.C.G.S. 113A-120.1 and 15A NCAC 7J .0700, the undersigned hereby requests a variance.

Date: 8/22/2006

Signature: 

This variance request must be filed with the Director, Division of Coastal Management, and the Attorney General's Office, Environmental Division, at the addresses shown on the attached Certificate of Service form.

CERTIFICATE OF SERVICE

I hereby certify that this Variance Request has been served on the State agencies named below by United States Mail or by personal delivery to the following:

Original served on: Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

copy: Attorney General's Office
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001

This the 22nd day of August, 2006.



Signature of Petitioner or Attorney

ATTACHMENT A

1. *Identify the hardship(s) you will experience if you are not granted a variance and explain why you contend that the application of this rule to your property constitutes an unnecessary hardship.*

In issuing the variance extensions 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 Finding of Fact # 2 in the Final Orders attached as Exhibit A for 2005, Exhibit B for 2003, Exhibit C for 2002, and Exhibit D for 2000. 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.

Furthermore, the Commission concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that application of these rules to Petitioner's property will result in unnecessary hardship. See Conclusion of Law #4 in the respective attached Final Orders.

Today, the threat to the condominium is as imminent as it was at those previous times and, if anything, has worsened. 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.

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 for the requested time 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. 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. Similarly, interference with public use of the beach is minimal since the sandbags are covered by sand much of the time, and even when uncovered they allow persons to pass between the high tide line and the building,

2. *Describe the conditions that are peculiar to your property (such as location, size, and topography), and cause your hardship.*

Our situation is unique in that we are located at the very end of approximately 3 miles of renourished public beach. A beach renourishment program for Kure Beach was completed in May 2001 and stopped less than 1500 feet north of the Riggings property because of three coquina rock outcroppings. These rocks, which at one time were quarried for use in highway projects, are now considered "Registered Natural Heritage Areas" and cannot be covered with sand or disturbed in any manner. Thus the Riggings

have been prevented so far from being a part of any beach nourishment program, even though a far greater portion of the coquina rock outcropping is north of the Riggings, not directly in front of it. In a recent renourishment program approximately 2500 feet north of the Riggings, other beach areas containing coquina outcroppings were included in the renourishment project and covered by sand.

Adjacent to the property to the south, the U.S. Army Corps of Engineers has constructed a rock seawall to protect Fort Fisher State Park. Between the rock seawall and the renourished part of the beach, the force from the incoming tides is channeled onto the beach in front of the Riggings, accelerating the erosion process.

The Riggings is truly stuck between a rock and a hard place, and the Commission has concluded that the aforementioned conditions are peculiar to the Riggings' Property when issuing the Final Orders in April 2005, May 2003, and August 2000. See Conclusion of Law #5 in the respective attached Final Orders.

3. *Explain why your hardship does not result from actions that you have taken.*

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. 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 Petitioners 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, we 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 hardships.

4. *Explain why the granting of the variance you seek will be consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; preserve substantial justice; and secure public safety.*

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.

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.

Issuing the requested variance will 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, this restraint on public beach access is de minimis since any restraint on public use will be temporary because 1) the sandbags are normally covered by sand and 2) the beach area in question constitutes only a small portion of Kure Beach, which is sandwiched between the three mile long Kure Beach renourishment project and the over one-half mile long Fort Fisher State Park seawall.

For the aforementioned reasons, the variance will secure the public safety and welfare as well.

Similarly, while it may be argued that the Riggings HOA has "had their chance," they 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. See "Attachment D." 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. See "Attachment D."

Indeed some members of the Riggings HOA, by voting in the affirmative to move the Condominium, have done, and are still feverishly, doing all they can to resolve this situation. At least as to these Riggings members the granting of a variance would preserve substantial justice until they have an adequate time to explore further options.

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Petitioner's Attachment B

(Omitted because it was their proposed Stipulated Facts, which are replaced by the Final Stipulated Facts found at Attachment B to the Staff Recommendation)

PROJECT: PDM-C-PJ-04-NC-2003-0001
COST CENTER: 532

**NORTH CAROLINA
PRE-DISASTER MITIGATION PROPERTY ACQUISITION AND
RELOCATION PROJECT GRANT AGREEMENT**

THIS PRE-DISASTER MITIGATION PROPERTY ACQUISITION AND RELOCATION PROJECT GRANT AGREEMENT (the Agreement) is entered into by and between the State of North Carolina, Department of Crime Control and Public Safety, Division of Emergency Management, Raleigh, North Carolina (hereinafter referred to as the "AGENCY/GRANTEE"), and Town of Kure Beach (hereinafter referred to as the "RECIPIENT/ SUBGRANTEE").

WHEREAS, Congress authorized financial assistance to States and communities for Pre-Disaster Mitigation project and activities; and

WHEREAS, the Federal Emergency Management Agency recognizes a need to provide States and communities with much needed source of pre-disaster mitigation funding for cost-effective hazard mitigation activities that are part of a comprehensive mitigation program, and that reduce injuries, loss of life, and damage and destruction of property; and

WHEREAS, the North Carolina Emergency Management Act, N.C.G.S. §166A-1 *et seq.*, N.C.G.S. §166A-6.01(b)(2)a.3. (Senate Bill 300), N.C.G.S. §143B-476; §203 and §322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 *et seq.*, *as amended*, §102 of the Disaster Mitigation Act of 2000, P.L. 107-73, 115 Stat. 651, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002 and Catalog of Federal Domestic Assistance (CFDA) §83.557 authorize the relationship as described herein; and

WHEREAS, the RECIPIENT/SUBGRANTEE represents that it is fully qualified, possesses the requisite skills, knowledge, qualifications and experience to provide the services identified herein, and does agree to perform as described herein;

NOW, THEREFORE, the AGENCY/GRANTEE and the RECIPIENT/ SUBGRANTEE do mutually agree as follows:

(1) SCOPE OF WORK

The RECIPIENT/SUBGRANTEE shall draft the Pre-Disaster Mitigation Property Acquisition and Relocation Project, as described in Attachment A to this Agreement, in accordance with the approved scope of work indicated therein, the estimate of costs indicated therein, the allocation of funds indicated therein, and the terms and conditions of this Agreement.

RECIPIENT/SUBGRANTEE shall not deviate from the approved Project and the terms and conditions of this Agreement. RECIPIENT/SUBGRANTEE shall comply with any and all applicable statutes, rules, regulations, ordinances, codes and standards in performing work funded under this Agreement.

(2) FUNDING AND INSURANCE

The AGENCY/GRANTEE shall provide Pre-Disaster Mitigation Program Funds for costs incurred in performing the Project identified in Attachment A as follows:

Federal Share	\$ 2,713,218
Local In-kind Match	\$ 904,406
TOTAL	\$ 3,617,624

Allowable costs shall be determined in accordance with the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et seq., *as amended*, §102 of the Disaster Mitigation Act of 2000; 44 C.F.R. Part 13; OMB Circular A-87, N.C.G.S. §166A-6.01(b)(2)b. (Senate Bill 300), and other applicable Pre-Disaster Mitigation Program guidance.

The RECIPIENT/SUBGRANTEE shall utilize the forms entitled "Request for Advance" and "Cost Report" to obtain funds under this agreement. RECIPIENT/SUBGRANTEE shall not receive funds under this agreement if it does not submit a Cost Report or Request For Advance form. To receive funds under this agreement, RECIPIENT/SUBGRANTEE shall complete the Designated Agent Form and forward it to the appropriate Division of Emergency Management Pre-Disaster Mitigation Program Project Manager. As per Paragraph 12(d) of this Agreement, if RECIPIENT/SUBGRANTEE designates different representatives or designated agents, RECIPIENT/SUBGRANTEE shall notify AGENCY/ GRANTEE.

To receive funds under this agreement, the Designated Agent shall sign the Cost Report or Request for Advance Form. These forms are hereby incorporated into this Agreement by reference. Following full execution of this Agreement, the Fiscal Section of the Department of Crime Control and Public Safety will forward the Cost Report to the RECIPIENT/SUBGRANTEE. (See sample Cost Report attached). RECIPIENT/SUBGRANTEE shall complete the Cost Report and attach appropriate invoices or other appropriate documentation and forward it to the appropriate Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist. AGENCY/ GRANTEE will reimburse RECIPIENT/SUBGRANTEE for eligible costs

*Don't have **

RECIPIENT/SUBGRANTEE shall not deviate from the approved Project and the terms and conditions of this Agreement. RECIPIENT/ SUBGRANTEE shall comply with any and all applicable statutes, rules, regulations, ordinances, codes and standards in performing work funded under this Agreement.

(2) FUNDING AND INSURANCE

The AGENCY/GRANTEE shall provide Pre-Disaster Mitigation Program Funds for costs incurred in performing the Project identified in Attachment A as follows:

Federal Share	\$ 2,713,218
Local In-kind Match	

TOTAL

Allowable costs shall be determined in Stafford Disaster Relief and Emergenc et seq., as amended, §102 of the Disas C.F.R. Part 13; OMB Circular A-87, N Bill 300), and other applicable Pre-Dis

The RECIPIENT/SUBGRANTEE sha for Advance" and "Cost Report" to ob RECIPIENT/ SUBGRANTEE shall n agreement if it does not submit a Cost form. To receive funds under this agr SUBGRANTEE shall complete the D to the appropriate Division of Emerge Mitigation Program Project Manager. Agreement, if RECIPIENT/SUBGRA representatives or designated agents, notify AGENCY/ GRANTEE.

To receive funds under this agreement, the Designated Agent shall sign the Cost Report or Request for Advance Form. These forms are hereby incorporated into this Agreement by reference. Following full execution of this Agreement, the Fiscal Section of the Department of Crime Control and Public Safety will forward the Cost Report to the RECIPIENT/ SUBGRANTEE. (See sample Cost Report attached). RECIPIENT/ SUBGRANTEE shall complete the Cost Report and attach appropriate invoices or other appropriate documentation and forward it to the appropriate Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist. AGENCY/ GRANTEE will reimburse RECIPIENT/SUBGRANTEE for eligible costs

~~\$~~ 904,406
 Steve Dondson
 negotiator
 town
 should have
 pd.
 \$904,406

here Builders Come First

Don't have *

in increments of Five Hundred Dollars (\$500.00) or greater. The final payment of funds will be made only after the plan created pursuant hereto has been completed by the RECIPIENT/SUBGRANTEE and approved by the AGENCY/GRANTEE, submission of all required documentation and a request for final reimbursement.

RECIPIENT/ SUBGRANTEE agrees, as a condition of receipt of funding pursuant to this Agreement, where necessary, to obtain reasonably available, adequate, and necessary insurance for the type or types of hazard for which the major disaster was declared, in accordance with the requirements of the Flood Insurance Administration (FIA), 44 C.F.R. Parts 206, 209 and any other applicable law or regulation.

(3) **DUPLICATION OF BENEFITS PROHIBITION**

In accordance with the provisions of 42 U.S.C. §5155 (Section 312 of the Stafford Act) duplication of benefits is prohibited. The RECIPIENT/ SUBGRANTEE shall notify the AGENCY/GRANTEE, as soon as practicable, of the existence of any insurance coverage for the costs identified in the application, and of any entitlement to or recovery of funds from any other source for the Project costs, including, as applicable, Federal, State, local and private funding. Allowable costs shall be reduced by the amount of duplicate sources available. The RECIPIENT/ SUBGRANTEE shall be liable to the AGENCY/GRANTEE to the extent that the RECIPIENT/SUBGRANTEE receives duplicate benefits from any other source for the same purposes for which the RECIPIENT/ SUBGRANTEE has received payment from the AGENCY/GRANTEE.

The RECIPIENT/SUBGRANTEE shall immediately remit to the AGENCY/ GRANTEE any duplication of benefits payment received by the RECIPIENT/ SUBGRANTEE. In the event the AGENCY/ GRANTEE determines a duplication of benefits has occurred RECIPIENT/SUBGRANTEE hereby authorizes the Controller of the Department of Crime Control & Public Safety to take offset action against any other available funding due the RECIPIENT/SUBGRANTEE. In addition, RECIPIENT/SUBGRANTEE shall ensure, as a condition of funding under this Agreement, that all required Privacy Act releases and Duplication of Benefit paperwork is completed.

(4) **INCORPORATION OF LAWS, RULES, REGULATIONS AND POLICIES**

Both the RECIPIENT/SUBGRANTEE and the AGENCY/GRANTEE shall be governed by applicable State and Federal laws, rules and regulations, including but not limited to those identified in Attachments B, C, and D.

(5) PERIOD OF AGREEMENT

This Agreement becomes effective upon execution of the signatures of all parties of the agreement. The date of execution shall be the date of the last signature. The termination date is June 30, 2007 unless terminated earlier in accordance with the provisions of paragraphs (6), (8), (11), (13) or (17).

(6) MODIFICATION OF CONTRACT

Either party may request modification of the provisions of this Agreement. Changes, which are mutually agreed upon, shall be valid only when reduced in writing, duly signed by each of the parties hereto, and attached in the original of this Agreement.

(7) RECORD KEEPING, PROCUREMENT AND PROPERTY MANAGEMENT

- (a) If applicable, RECIPIENT/SUBGRANTEE's performance under this Agreement shall be subject to 44 C.F.R. Part 13, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" and/or OMB Circular No. A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations," and/or OMB Circular No. A-87, "Cost Principles for State and Local Governments," OMB Circular No. A-21, Cost Principles for Educational Institutions," or OMB Circular No. A-122, "Cost Principles for Nonprofit Organizations."
- (b) If applicable, all financial and programmatic records, supporting documents statistical records and other records of RECIPIENT/SUBGRANTEE shall be retained pursuant to 44 C.F.R. Part 13. All original records pertinent to this Agreement shall be retained by the RECIPIENT/SUBGRANTEE for three years following the date of termination of this Agreement or of submission of the final closeout report, whichever is later, with the following exceptions:
- If any litigation, claim or audit is started before the expiration of the three year period and extends beyond the three year period, the records will be maintained until all litigation, claims or audit findings involving the records have been resolved.
- (c) All records, including supporting documentation of all program costs, shall be sufficient to determine compliance with the

requirements and objectives of the Budget and Scope of Work – Attachment A – and all other applicable laws and regulations.

- (d) The RECIPIENT/SUBGRANTEE, its employees or agents, including all subcontractors or consultants to be paid from funds provided under this Agreement, shall allow access to its records at reasonable times to the AGENCY/GRANTEE, its employees, and agents. "Reasonable" shall be construed according to the circumstances but ordinarily shall mean during normal business hours of 8:00 a.m. to 5:00 p.m., local time, on Monday through Friday. "Agents" shall include, but not be limited to, auditors retained by the AGENCY/GRANTEE.

(8) **REPORTS**

- (a) The RECIPIENT/SUBGRANTEE shall provide monthly progress reports to the AGENCY/GRANTEE, using the attached Progress Report Form, Attachment F. Reports are due by the tenth of the following month. Reports shall indicate the status and completion date for each plan funded, any problems or circumstances affecting completion dates, or the scope of work, or the plan costs, and any other factors reasonably anticipated to result in noncompliance with the terms of the grant award. Interim inspections shall be scheduled by the RECIPIENT/SUBGRANTEE prior to the final inspection and may be requested by the AGENCY/GRANTEE based on information supplied in the progress reports.

The AGENCY/GRANTEE may require additional reports as needed. The RECIPIENT/SUBGRANTEE shall, as soon as possible, provide any additional reports requested by the AGENCY/GRANTEE. The AGENCY/GRANTEE contact will be the Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist for all reports and requests for reimbursement.

- (b) RECIPIENT/SUBGRANTEE shall provide the AGENCY/GRANTEE with a close-out report on forms provided by the AGENCY/GRANTEE. The close-out report is due no later than forty-five (45) days after termination of this Agreement or upon completion and approval of the plan that is the subject of this Agreement.
- (c) If all required reports and copies are not sent to the AGENCY/GRANTEE or are not completed in a manner acceptable to the AGENCY/GRANTEE, the AGENCY/GRANTEE may withhold further payments until they are

completed or may take such other action as set forth in paragraph (11). The AGENCY/GRANTEE may terminate the Agreement with a RECIPIENT/SUBGRANTEE if reports are not received within thirty (30) days after written notice by the AGENCY/GRANTEE. "Acceptable to the AGENCY/GRANTEE" means that the work product was completed in accordance with generally accepted principles and is consistent with the Budget and Scope of Work, Attachment A.

- (d) Upon request by the AGENCY/GRANTEE, the RECIPIENT/SUBGRANTEE shall provide such additional program updates or information as may be required by the AGENCY/GRANTEE.

(9) **MONITORING**

The RECIPIENT/SUBGRANTEE shall constantly monitor its performance under this Agreement to ensure that time schedules are being met, the Budget and Scope of Work is being accomplished within specified time periods, and other performance goals are being achieved. Such review shall be made for each function, or activity set forth in Attachment A to this Agreement and incorporated by reference herein.

(10) **LIABILITY**

- (a) Except as otherwise provided in subparagraph (b) below, the RECIPIENT/SUBGRANTEE shall be solely responsible to parties with whom it shall deal in carrying out the terms of this agreement, and shall save the AGENCY/GRANTEE harmless against all claims of whatever nature by third parties arising out of the performance of work under this agreement. For purposes of this agreement, RECIPIENT/SUBGRANTEE agrees that it is not an employee or agent of the AGENCY/GRANTEE, but is an independent contractor.
- (b) Any RECIPIENT/SUBGRANTEE who is a state agency or subdivision, agrees to be fully responsible for its own negligent acts or omissions or tortious acts. Nothing herein is intended to serve as a waiver of sovereign immunity by any RECIPIENT/SUBGRANTEE to which sovereign immunity applies. Nothing herein shall be construed as consent by a state agency or subdivision of the State of North Carolina to be sued by third parties in any matter arising out of any contract.

(11) **DEFAULT: REMEDIES: TERMINATION**

- (a) If any of the following events occur ("Events of Default"), all

obligations on the part of the AGENCY/GRANTEE to make any further payment of funds hereunder shall, if the AGENCY/GRANTEE so elects, terminate, and the AGENCY/GRANTEE may at its option exercise any of its remedies set forth herein, but the AGENCY/GRANTEE may make any payments or parts of payments after the happening of any Events of Default without thereby waiving the right to exercise such remedies, and without becoming liable to make any further payment:

1. If any warranty or representation made by the RECIPIENT/SUBGRANTEE in this Agreement or any previous Agreement with the AGENCY/GRANTEE shall at any time be false or misleading in any respect, or if the RECIPIENT/SUBGRANTEE shall fail to keep, observe or perform any of the terms or covenants contained in this Agreement or any previous agreement with the AGENCY/GRANTEE and has not cured such in timely fashion, or is unable or unwilling to meet its obligations thereunder;
 2. If any material adverse change shall occur in the financial condition of the RECIPIENT/SUBGRANTEE at any time during the term of this Agreement from the financial condition revealed in any reports filed or to be filed with the AGENCY/GRANTEE, and the RECIPIENT/SUBGRANTEE fails to cure said material adverse change within thirty (30) days from the time the date written notice is sent by the AGENCY/GRANTEE;
 3. If any reports required by this Agreement have not been submitted to the AGENCY/GRANTEE or have been submitted with incorrect, incomplete or insufficient information;
 4. If the RECIPIENT/SUBGRANTEE has failed to perform and complete in timely fashion any of the services required under the Budget and Scope of Work attached hereto as "Attachment A".
 5. If the necessary funds are not available to fund this agreement as a result of action by Congress, the N.C. Legislature, or the Office of State Budget and Management.
- (b) Upon the happening of an Event of Default, then the AGENCY/GRANTEE may, at its option, upon written notice to the RECIPIENT/SUBGRANTEE and upon the RECIPIENT/

SUBGRANTEE's failure to timely cure, exercise any one or more of the following remedies, either concurrently or consecutively, and the pursuit of any one of the following remedies shall not preclude the AGENCY/GRANTEE from pursuing any other remedies contained herein or otherwise provided at law or in equity:

1. Terminate this Agreement, provided that the RECIPIENT/SUBGRANTEE is given at least fifteen (15) days prior written notice of such termination. The notice shall be effective when placed in the United States mail, first class mail, postage prepaid, by registered or certified mail return receipt requested, to the address set forth in paragraph (12) herein;
 2. Commence an appropriate legal or equitable action to enforce performance of this Agreement;
 3. Withhold or suspend payment of all or any part of a request for payment;
 4. Exercise any other rights or remedies which may otherwise be available under law.
- (c) The AGENCY/GRANTEE may terminate this Agreement for cause upon such written notice to RECIPIENT/SUBGRANTEE of such termination and specifying the effective date thereof, at least one (1) day before the effective date of termination. Cause shall include, but not be limited to, misrepresentation in the grant application, misuse of funds; fraud; lack of compliance with applicable rules, laws and regulations; failure to perform in a timely manner, and refusal by the RECIPIENT/SUBGRANTEE to permit public access to any document, paper, letter, or other material subject to disclosure under N.C. General Statutes.
- (d) Suspension or termination constitutes final AGENCY/GRANTEE action. Notification of suspension or termination shall include notice of administrative hearing rights and time frames.
- (e) The RECIPIENT/SUBGRANTEE shall return funds to the AGENCY/GRANTEE if found in non-compliance with laws, rules, regulations governing the use of the funds or this Agreement.
- (f) Notwithstanding the above, the RECIPIENT/SUBGRANTEE shall not be relieved of liability to the AGENCY/GRANTEE by virtue of any breach of Agreement by the RECIPIENT/SUBGRANTEE.

The AGENCY/ GRANTEE may, to the extent authorized by law, withhold any payments to the RECIPIENT/SUBGRANTEE for purpose of set-off until such time as the exact amount of damages due the AGENCY/GRANTEE from the RECIPIENT/SUBGRANTEE is determined.

(12) NOTICE AND CONTACT

(a) All notices provided under or pursuant to this Agreement shall be in writing, first class, certified mail, return receipt requested, to the representative identified below and said notification attached to the original of this Agreement.

(b) The name and address of the AGENCY/GRANTEE contract manager for this Agreement is:

**Hazard Mitigation Section Chief
Department of Crime Control & Public Safety
NC Division of Emergency Management
Disaster Recovery Operations Center
1830-B Tillery Place
Raleigh, NC 27604**

(c) The name and address of the Representative of the RECIPIENT/ SUBGRANTEE (Designated Agent) responsible for the administration of this Agreement is:

**Overnight and Mailing Address
Tim Fuller, Commissioner
Town of Kure Beach
117 Settlers Lane
Kure Beach, NC 28449**

(d) In the event that different representatives (designated agents) are designated by either party after execution of this Agreement, notice of the name, title and address of the new representative (new designated agent) will be rendered as provided in (12)(a) above. To receive funds under this agreement, RECIPIENT/ SUBGRANTEE shall complete the Designated Agent Form and forward it to the appropriate Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist. To receive funds under this agreement, the Designated Agent shall sign the Cost Report or Request for Advance Form.

(13) OTHER PROVISIONS

- (a) The validity of this Agreement is subject to the truth and accuracy of all the information, representations, and materials submitted or provided by the RECIPIENT/SUBGRANTEE, in the Application, in any subsequent submission or response to the AGENCY/GRANTEE request, or any submission or response to fulfill the requirements of this Agreement, and such information, representations, and materials are incorporated by reference. The lack of accuracy thereof or any material changes shall, at the option of the AGENCY/GRANTEE and with thirty (30) days written notice to the RECIPIENT/SUBGRANTEE, cause the termination of this Agreement and the release of the AGENCY/GRANTEE from all its obligations to the RECIPIENT/SUBGRANTEE.
- (b) This Agreement shall be construed under the laws of the State of North Carolina and venue for any actions arising out of this Agreement shall be filed in State Court in Wake County, North Carolina. If any provision hereof is in conflict with any applicable statute or rule, or is otherwise unenforceable, then such provision shall be deemed null and void to the extent of such conflict, and shall be deemed severable, but shall not invalidate any other provision of this Agreement.
- (c) No waiver by the AGENCY/GRANTEE of any right or remedy granted hereunder or failure to insist on strict performance by the RECIPIENT/ SUBGRANTEE shall affect or extend or act as a waiver of any other right or remedy of the AGENCY/GRANTEE hereunder, or affect the subsequent exercise of the same right or remedy by the AGENCY/ GRANTEE for any further or subsequent default by the RECIPIENT/ SUBGRANTEE. Any power of approval or disapproval granted to the AGENCY/ GRANTEE under the terms of this Agreement shall survive the terms and life of this agreement as a whole.
- (d) Where applicable, all National Flood Insurance Program documentation and repetitive loss information will bear the notice:
- "The information contained in this document is legally privileged and confidential. Its use is protected under the privacy act of 1974, 5 U.S.C., Section 552(a). Use of this information should be restricted to applicable routine use cited in the systems notice published in 56 FR 26415."**

(14) AUDIT REQUIREMENTS

- (a) If applicable, RECIPIENT/SUBGRANTEE shall provide the following completed documentation to the AGENCY/GRANTEE:
- Designation of Applicant's Agent;
 - State-Applicant Disaster Assistance Agreement;
 - Private Non-Profit Organization Certification (if required);
 - Summary of Documentation Form itemizing actual costs expended for large project payment requests;
 - Monthly Progress Reports;
 - Hard copies of Single Audit Reports within 60 days of close of fiscal year.

If the RECIPIENT/SUBGRANTEE fails to provide any of the documentation discussed or requested in this Agreement, the AGENCY/GRANTEE will be under no obligation to reimburse the RECIPIENT/SUBGRANTEE for eligible expenses.

- (b) The RECIPIENT /SUBGRANTEE agrees to maintain financial procedures and support documents and to establish and maintain a proper accounting system to record expenditures of disaster assistance funds in accordance with generally accepted accounting principles or as directed by the Governor's Authorized Representative, to account for the receipt and expenditure of funds under this Agreement. If applicable, RECIPIENT/SUBGRANTEE shall conduct audit(s) pursuant to the Single Audit Act of 1984, 31 U.S.C. § 7501 et. seq., 44 C.F.R. Part 14, OMB Circular A-133, "Audits of States, Local Governments, and Non-profit Organizations," and applicable North Carolina laws, rules and regulations. Further, RECIPIENT/SUGRANTEE must provide a hard copy of the Single Audit Report within sixty (60) days of the close of its fiscal year. Otherwise, pursuant to 44 C.F.R. §13.43, the AGENCY/GRANTEE may withhold or suspend payments under any grant award.
- (c) These records shall be available at all reasonable times for inspection, review, or audit by the N.C. State Auditor and other personnel duly authorized by the AGENCY/GRANTEE. "Reasonable" shall be construed according to circumstances, but ordinarily shall mean normal business hours of 8:00 a.m. to 5:00 p.m., Eastern Standard Time, Monday through Friday.
- (d) The RECIPIENT/SUBGRANTEE shall also provide the AGENCY/ GRANTEE with the records, reports or financial

statements upon request for the purposes of auditing and monitoring the funds awarded under this Agreement.

- (e) The RECIPIENT/SUBGRANTEE shall provide the AGENCY/GRANTEE and the Office of the State Auditor with an annual financial audit report.
 - The annual financial audit report shall include all management letters and the RECIPIENT/SUBGRANTEE's response to all findings, including corrective actions to be taken.
- (f) In the event the audit shows that the entire funds disbursed hereunder, or any portion thereof, were not spent in accordance with the conditions of this Agreement, the RECIPIENT/SUBGRANTEE shall be held liable for reimbursement to the AGENCY/GRANTEE of all funds not spent in accordance with these applicable regulations and Agreement provisions within thirty (30) days after the AGENCY/GRANTEE has notified the RECIPIENT/SUBGRANTEE of such non-compliance.
- (g) The RECIPIENT/SUBGRANTEE shall retain all financial records, supporting documents, statistical records, and any other documents pertinent to this contract for a period of three years after the date of submission of the final expenditures report. However, if litigation or an audit has been initiated prior to the expiration of the three-year period, the records shall be retained until the litigation or audit findings have been resolved.

(15) SUBCONTRACTS

- (a) If the RECIPIENT/SUBGRANTEE subcontracts any or all of the work required under this Agreement, the RECIPIENT/SUBGRANTEE agrees to include in the subcontract that the subcontractor is bound by the terms and conditions of this Agreement with the AGENCY/GRANTEE.
- (b) The RECIPIENT/SUBGRANTEE agrees to include in the subcontract that the subcontractor shall hold the AGENCY/GRANTEE and RECIPIENT/SUBGRANTEE harmless against all claims of whatever nature arising out of the subcontractor's performance of work under this Agreement, to the extent allowed and required by law.
- (c) If the RECIPIENT/SUBGRANTEE subcontracts, a copy of the executed subcontract must be forwarded to the

AGENCY/GRANTEE within ten (10) days of execution of said subcontract.

- (d) Contractual arrangement shall in no way relieve the RECIPIENT/SUBGRANTEE of its responsibilities to ensure that all funds issued pursuant to this grant be administered in accordance with all state and federal requirements.

(16) **TERMS AND CONDITIONS**

This Agreement and any exhibits and amendments annexed hereto and any documents incorporated specifically by reference represents the entire Agreement between the parties and supersedes all prior oral and written statements or agreements.

(17) **STANDARD CONDITIONS**

The RECIPIENT/SUBGRANTEE agrees to be bound by the following standard conditions:

- (a) The State of North Carolina's performance and obligation to pay under this Agreement is contingent upon an annual appropriation by the North Carolina Legislature (where applicable) and/or the Congress of the United States to provide funding for Pre-Disaster Mitigation Project Grant projects.
- (b) If otherwise allowed under this Agreement, extension of an agreement for contractual services shall be in writing and shall be subject to the same terms and conditions set forth in the initial agreement.

Upon FEMA approval, there shall be only one extension of the agreement unless the failure to meet the criteria set forth in the agreement for completion of the agreement is due to events beyond the control of the RECIPIENT/SUBGRANTEE.

- (c) The AGENCY/GRANTEE reserves the right to unilaterally cancel this Agreement for refusal by the RECIPIENT/SUBGRANTEE to allow public access to all documents, papers, letters or other material subject to the provisions of N.C. General Statutes and made or received by the Contractor/RECIPIENT/SUBGRANTEE in conjunction with the Agreement.

(18) ATTACHMENTS

- (a) All attachments to this Agreement are incorporated as if set out fully herein.
- (b) In the event of any inconsistency or conflict between the language of this Agreement and the attachments hereto, the language of such attachments shall be controlling, but only to the extent of such conflict or inconsistency.
- (c) This Agreement includes the following attachments or documents incorporated by reference as if fully set out herein:
 - 1. Attachment A Approved Project Budget & Scope of Work
 - 2. Attachment B Program Statutes and Regulations
 - 3. Attachment C Lobbying Prohibition/Certification
 - 4. Attachment D Statement of Assurances
 - 5. Attachment E Special Conditions
 - 6. Cost Reports and Request for Advance
 - 7. Progress Report Form
 - 8. N.C. Division of Emergency Management minimum criteria for local hazard mitigation projects

(19) FUNDING/CONSIDERATION

- (a) This is a cost-reimbursement Agreement. The RECIPIENT/ SUBGRANTEE shall be reimbursed for costs incurred in the satisfactory performance of work hereunder in an amount not to exceed **Three Million, Six-Hundred Seventeen Thousand, Six Hundred and Twenty-Four Dollars (\$3,617,624)** subject to the availability of funds. The above-referenced costs do not include the Local share to be provided by the RECIPIENT/ SUBGRANTEE in the amount of **Nine Hundred and Four Thousand, Four Hundred and Six Dollars (\$904,406)**.
- (c) Any advance payment under this Agreement is subject to the approval of the AGENCY/GRANTEE. The amount that may be advanced may not exceed the expected cash needs of the RECIPIENT/SUBGRANTEE for a three-day period. For a federally funded contract, any advance payment is also subject to 44 C.F.R. Part 13, Federal OMB Circulars, A-110, A-122 and the Cash Management Improvement Act of 1990. If an advance payment is requested, the budget data on which the request is

based and a justification statement shall be submitted to the Division of Emergency Management Contract Manager using the Cost Report and Request for Advance Form. RECIPIENT/SUBGRANTEE shall specify the amount of advance payment needed and provide an explanation of the necessity for and proposed use of these funds.

- (d) All funds shall be requested using the appropriate forms that are provided by the AGENCY/GRANTEE.

(20) **STATE LOBBYING PROHIBITION**

No funds or other resources received from the AGENCY/GRANTEE in connection with this Agreement may be used directly or indirectly to influence legislation or any other official action by the N.C. General Assembly or any state department.

Refer to Attachment C for additional terms and provisions relating to lobbying.

(21) **LEGAL AUTHORIZATION**

The RECIPIENT/SUBGRANTEE certifies with respect to this Agreement that it possesses the legal authority to receive the funds to be provided under this Agreement and that, if applicable, its governing body has authorized, by resolution or otherwise, the execution and acceptance of this Agreement with all covenants and assurances contained herein. The RECIPIENT/SUBGRANTEE also certifies that the undersigned possesses the authority to legally execute and bind RECIPIENT/SUBGRANTEE to the terms of this Agreement.

Pursuant to the North Carolina Emergency Management Act, N.C.G.S. §166A-6.01(b)(2)a.3. (Senate Bill 300); §203 and §322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et seq., *as amended*, §102 of the Disaster Mitigation Act of 2000, P.L. 107-73, 115 Stat. 651, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002; 44 C.F.R. Parts 201 and 206; and the Catalog of Federal Domestic Assistance (CFDA) §83.557 communities are eligible to apply for Pre-Disaster Mitigation Project Project Grants. Communities on probation or suspended under 44 C.F.R. Part 60 of the NFIP are not eligible.

(22) **ASSURANCES**

The RECIPIENT/SUBGRANTEE shall execute and comply with the Statement of Assurances incorporated as Attachment D.

(23) SPECIAL CONDITIONS

- (a) The RECIPIENT/SUBGRANTEE shall comply with the special conditions set forth in Attachment E, attached hereto and incorporated by this reference.
- (b) Failure of the RECIPIENT/SUBGRANTEE to comply with the special conditions listed in Attachment E or the program statutes and regulations in Attachments B and D of this Agreement shall be cause for the immediate suspension of payments or the immediate termination of this Agreement.

(24) HAZARD MITIGATION PLAN

IF RECIPIENT/SUBGRANTEE is a local governmental entity, RECIPIENT/ SUBGRANTEE shall complete and adopt an all-hazards mitigation plan in a manner satisfactory to the State Hazard Mitigation Officer within three hundred and sixty-five (365) calendar days following execution of this Agreement. The all-hazards mitigation plan shall be developed in accordance with the minimum criteria for local hazard mitigation plans as determined by the AGENCY/ GRANTEE. The minimum criteria are incorporated by reference into this Agreement as if fully set out herein.

(25) VOLUNTEER LABOR

The RECIPIENT/SUBGRANTEE shall have the authority to use volunteer labor or any other labor force and shall have the authority to use acquired materials, equipment and supplies necessary to construct, build or erect replacement housing in areas affected by FEMA-1134-DR-NC, FEMA-1240-DR-NC, FEMA-1291-DR-NC and FEMA-1292-DR-NC. Further, when constructing, building, or erecting replacement housing in the aforementioned affected areas, the RECIPIENT/SUBGRANTEE shall use the replacement housing in lieu of purchasing eligible property pursuant to 44 C.F.R. Section 206.434(d) under the AGENCY/GRANTEE Hazard Mitigation Acquisition and Relocation Program.

The RECIPIENT/SUBGRANTEE may use the difference between the actual cost to construct replacement housing and the pre-disaster fair market value of the acquired property as a credit or offset against the grant to acquire additional eligible properties.

(26) PROJECT IMPLEMENTATION REQUIREMENTS FOR PRE-DISASTER MITIGATION PROJECTS

*as Value
all
insurance*

Pursuant to the Interim Rule set forth as 44 C.F.R. §209.10(b) by FEMA at Vol. 65, No. 29 of the Federal Register, participating property owners may receive assistance up to the fair market value of their real property as of September 1, 1999 (reduced by any potential duplication of benefits from other sources)...

Pursuant to the Interim Rule set forth as 44 C.F.R. §209.10(c) by FEMA at Vol. 65, No. 29 of the Federal Register, the following restrictive covenants must be conveyed in the deed to any property acquired, accepted, or from which structures are removed:

- (1) The property must be dedicated and maintained in perpetuity for uses compatible with open space, recreational, or wetlands management practices; and
- (2) No new structure(s) will be built on the property except for the following:
 - (i) A public facility that is open on all sides and functionally related to a designated open space or recreational use;
 - (ii) A public rest room; or
 - (iii) A structure that is compatible with open space, recreational, or wetlands management usage and proper floodplain management policies and practices, which the FEMA Director approves in writing before the construction of the structure begins.
- (3) After completing the project, no application for additional disaster assistance will be made for any purpose with respect to the property to any Federal entity or source, and no Federal entity or source will provide such assistance.
- (4) Any structures built on the property must be located to minimize the potential for flood damage, be floodproofed, or be elevated to the Base Flood Elevation plus one foot of freeboard.
- (5) Every two years on October 1st, the RECIPIENT/ SUBGRANTEE will report to the AGENCY/GRANTEE certifying that the property continues to be maintained consistent with the provisions of this Agreement.
- (6) Allowable open space, recreational, and wetland management uses include parks for outdoor recreational

Campground

activities, nature reserves, cultivation, grazing, camping (except where adequate warning time is not available to allow evacuation), temporary storage in the open of wheeled vehicles which are easily movable (except mobile homes), unimproved, permeable parking lots, and buffer zones. Allowable uses generally do not include walled buildings, flood reduction levees, or other uses that obstruct the natural and beneficial functions of the floodplain.

IN WITNESS WHEREOF, the AGENCY/GRANTEE and the RECIPIENT/SUBGRANTEE have each executed this Agreement, this the _____ day of _____ 2004.

CONTRACTING AGENCY
DIVISION OF EMERGENCY MANAGEMENT
DEPARTMENT OF CRIME CONTROL
AND PUBLIC SAFETY

WITNESS:

Gail M. Raynor

BY:

Kenneth B. Taylor

DR. KENNETH B. TAYLOR, DIRECTOR
DIVISION OF EMERGENCY MANAGEMENT
DATE *10/13/2004*

WITNESS:

BY:

GERALD A. RUDISILL, JR.
DEPUTY SECRETARY
DEPARTMENT OF CRIME CONTROL
& PUBLIC SAFETY
DATE _____

WITNESS:

Frances Jones

BY:

Tim Fuller

TIM FULLER
COMMISSIONER
TOWN OF KURE BEACH
RECIPIENT/SUBGRANTEE
FEDERAL EMPLOYER I.D. #56-6002681
DATE *Oct 28, 2004*

APPROVED AS TO PROCEDURES:

BY:

BENNIE AIKEN, CONTROLLER
DEPARTMENT OF CRIME CONTROL
& PUBLIC SAFETY
DATE _____

APPROVED AS TO FORM SUBJECT TO EXECUTION BY GERALD A. RUDISILL, JR., DEPUTY SECRETARY OF THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY.

ROY COOPER
ATTORNEY GENERAL OF NORTH CAROLINA

BY: *Charles A. Perry*
ASSISTANT ATTORNEY GENERAL

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ATTACHMENT A

BUDGET AND SCOPE OF WORK

RECIPIENT/SUBGRANTEE shall implement the Pre-Disaster Mitigation Project summarized below and as described in the approved Project application (Project # PDM-C-PJ-04-NC-2003-0001). That application is hereby incorporated by reference into this Agreement. The AGENCY/GRANTEE shall reimburse eligible costs according to the following expenditures:

? what are they - line items - exactly what is going to be done

I Funding Summary

A: Project Costs:

Federal Share	\$ 2,713,218
Local In-kind Match	\$ 904,406
TOTAL	\$ 3,617,624

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II. Scope of Work Summary

The scope of work includes acquisition and demolition of the condominium complex:

The Riggins
1437 Ft. Fisher Boulevard, South
Kure Beach, NC 28449

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ATTACHMENT B

PROGRAM STATUTES AND REGULATIONS

This Agreement, the North Carolina Legislature, the Hazard Mitigation Grant Program (HMGP) and the North Carolina Division of Emergency Management as administrators of this Pre-Disaster Mitigation Grant are governed by the following statutes and regulations:

- (1) The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et. seq. *as amended*;
- (2) The Disaster Mitigation Act of 2000, §102;
- (3) 44 C.F.R. Parts 7, 9, 10, 13, 14, 17, 18, 25, 206, 220, 221, 44 C.F.R. Part 209 and any other applicable FEMA policy memoranda and guidance documents;
- (4) Chapter 166A of the N.C. General Statutes, N.C.G.S. §166A-1 et. seq., "The N.C. Emergency Management Act";
- (5) State of North Carolina Administrative Plan for the Hazard Mitigation Grant Program (the §404 Plan);
- (6) The North Carolina Hazard Mitigation §322 Plan developed pursuant to the §322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et seq., *as amended*;
- (7) All applicable laws and regulations delineated in Attachments D&E of this Agreement;
- (8) All applicable laws, ordinances, codes, rules, regulations, licensing requirements and other regulatory matters that are applicable to the work performance under this Agreement, including those of federal, state and local agencies having appropriate jurisdiction.

C-1

ATTACHMENT C

LOBBYING PROHIBITION

The undersigned certifies, to the best of his or her knowledge and belief, that:

- (a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence either directly or indirectly an officer or employee of any state or federal agency, a member of the N.C. Legislature, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-L, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (c) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representative of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

RECIPIENT/SUBGRANTEE

BY: Tim Fuller

TIM FULLER
COMMISSIONER
TOWN OF KURE BEACH

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ATTACHMENT D

STATEMENT OF ASSURANCES

The RECIPIENT/SUBGRANTEE hereby assures and certifies that:

- (a) It possesses legal authority to enter into this agreement, and to execute the proposed program.
- (b) Its governing body has duly adopted or passed as an official act a resolution, motion or similar action authorizing the filing of the HMGP application to FEMA, including all understandings and assurances contained therein, and directing and authorizing the RECIPIENT/SUBGRANTEE's chief executive officer to act in connection with the application and to provide such additional information as may be required.
- (c) No member of or delegate to the Congress of the United States, and no Resident Commissioner, shall be admitted to any share or part of this agreement or to any benefit to arise from the same. No member, officer, or employee of the RECIPIENT/SUBGRANTEE, or its designees or agents, no member of the governing body of the locality in which the program is situated, and no other public official of such locality or localities who exercises any functions or responsibilities with respect to program during his tenure or for one year thereafter, shall have any interest direct or indirect, in any contract or program assisted under this agreement. The RECIPIENT/SUBGRANTEE shall incorporate or cause to be incorporated, in all such contracts or subcontracts a provision prohibiting such interest pursuant to the purposes stated above.
- (d) It will comply with and conduct audit(s) pursuant to the Single Audit Act of 1984, 31 U.S.C. §7501 et. seq., 44 C.F.R. Part 14, OMB Circular A-133 "Audits of States, Local Governments and Non-profit Organizations", and applicable North Carolina laws, rules and regulations. Additionally, the RECIPIENT/ SUBGRANTEE shall comply with the requirements related to audits and financial management pursuant to the Single Audit Act of 1984, 31 U.S.C. §7501 et. seq. and shall provide the documentation discussed below and requested under this Agreement. RECIPIENT/ SUBGRANTEE must provide a hard copy of the Single Audit Act Report within sixty (60) days of the close of its fiscal year. Otherwise, pursuant to 44 C.F.R. §13.43, the AGENCY/SUBGRANTEE may withhold or suspend payments under any grant award. Failure to provide such documentation or to comply with said requirements shall terminate any obligation on behalf of the AGENCY/ GRANTEE to reimburse the RECIPIENT/SUBGRANTEE for eligible expenses.

D-2

1. The AGENCY/GRANTEE shall review the RECIPIENT/SUBGRANTEE's performance periodically to determine whether the RECIPIENT/SUBGRANTEE has substantially completed its program as described in the approved Application and this Agreement. Training and technical assistance shall be provided by the AGENCY/GRANTEE, within limits of staff time and budget, upon written request by the RECIPIENT/SUBGRANTEE and/or upon a determination by the AGENCY/GRANTEE of RECIPIENT/ SUBGRANTEE need.
2. The RECIPIENT/SUBGRANTEE shall allow the AGENCY/ GRANTEE to carry out monitoring, evaluation, and technical assistance and shall assure the cooperation of its employees, sub-RECIPIENT/SUBGRANTEES and subcontractors during such activities.
3. In the event that the AGENCY/GRANTEE suspends funding pursuant to the provision of this Agreement, said suspension shall take effect as of the receipt of the notice of said suspension by the RECIPIENT/SUBGRANTEE. Any requests for payment for which the AGENCY/GRANTEE has not yet disbursed payment shall be subject to said suspension.
4. Should the RECIPIENT/SUBGRANTEE fail to enforce the provisions of any promissory note, mortgage, security agreement, or other obligation specified in any Participating Party Agreement or in written contract with a beneficiary, contractor, agent, or sub-RECIPIENT/ SUBGRANTEE who received payment or benefit from funds disbursed under this Agreement, the AGENCY/ GRANTEE may, with thirty days (30) written notice to the RECIPIENT/SUBGRANTEE, automatically substitute itself for the RECIPIENT/SUBGRANTEE in said Participating Party Agreement or written contract for the purpose of enforcing said Participating Party Agreement or written contract and may, at its discretion, continue to administer said Participating Party Agreement or written contract.

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5. The RECIPIENT/SUBGRANTEE's application for funds to the State for funding consideration under the FEMA Hazard Mitigation Grant Program is made a part of this Agreement by reference.
6. RECIPIENT/SUBGRANTEE shall establish and maintain a proper accounting system to record expenditures of disaster assistance funds in accordance with generally accepted accounting principles or as directed by the Governor's Authorized Representative. The RECIPIENT/SUBGRANTEE, its employees, and agents, shall maintain records and supporting documents as prescribed in 44 CFR Part 13, Subpart C "Reports, Records Retention and Enforcement". These records shall be maintained at a readily accessible site within the jurisdiction and under the jurisdiction's control.
7. Program Income is defined in 44 CFR Section 13.25. Program Income must be returned to the AGENCY/GRANTEE within five (5) days of receipt, to the following address:

Controller
N.C. Department of Crime Control
& Public Safety
512 N. Salisbury Street
Raleigh, NC 27603

8. All RECIPIENT/SUBGRANTEE or sub-RECIPIENT/SUBGRANTEE contracts for which the N.C. Legislature is in any part a funding source, shall contain language to provide for termination with reasonable costs to be paid by the RECIPIENT/ SUBGRANTEE for eligible contract work completed prior to the date the notice of suspension or termination is received by the RECIPIENT/SUBGRANTEE may not be funded with funds provided under this Agreement unless previously approved in writing by the AGENCY/GRANTEE. All sub-RECIPIENT/ SUBGRANTEE contracts shall contain provision for termination for cause or convenience and shall provide for the method of payment in such event.
9. All amendments requiring prior AGENCY GRANTEE

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approval must be approved in writing by the AGENCY/GRANTEE prior to the RECIPIENT/SUBGRANTEE's submission of a closeout package. Any closeout package received prior to the written approval of said amendment is considered void ab initio, and is not considered a closeout package for the purposes of eligibility or potential penalty issues related to closeout.

10. Submission of inaccurate information by the RECIPIENT/SUBGRANTEE in monitoring report responses; audit or audit finding responses; quarterly, closeout, program income, or other reports; or Requests for Funds that result in subsequent official AGENCY/GRANTEE action based on that inaccurate information (such as the granting of administrative or final closeout status, releasing funds, or clearing findings) may at the option of the AGENCY/GRANTEE, subject the RECIPIENT/SUBGRANTEE to revocation of the official AGENCY/GRANTEE action(s) predicated on that report or submission, (e.g., revocation of closeout status, audit clearance, monitoring report clearance, etc.).

(e) Where applicable, it will comply with:

- (1) Contract Work Hours and Safety Standards Act of 1962, 40 U.S.C.327 et seq., requiring that mechanics and laborers (including watchmen and guards) employed on federally assisted contracts be paid wages of not less than one and one-half times their basic wage rates for all hours worked in excess of forty hours in a work week; and
- (2) Federal Fair Labor Standards Act, 29 U.S.C. Section 201 et seq., requiring that covered employees be paid at least the minimum prescribed wage, and also that they be paid one and one-half times their basic wage rates for all hours worked in excess of the prescribed work-week.
- (3) Davis-Bacon Act, 40 U.S.C. §276a et. seq.
- (4) National Environmental Policy Act of 1969, 42U.S.C. §4321; et. seq.; EO115154; EO11988; Coastal Zone Management Act of 1972, 16U.S.C. §1451 et. seq.; Section 176(c) of the Clean Air Act of 1955, 42U.S.C. §7401 et. seq.; Safe Drinking Water Act of 1974, 42U.S.C. §300f et.

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seq.; Endangered Species Act of 1973, 16U.S.C. §1532 et. seq.; Wild and Scenic Rivers Act of 1968, 16U.S.C. §1271 et. seq.

- (5) Section 106 of the National Historic Preservation Act of 1966, 16U.S.C. §470 et. seq.; EO11593; Archaeological and Historic Preservation Act of 1974, 16U.S.C. §469a-1 et. seq.

(f) It will comply with:

- (1) Title VI of the Civil Rights Act of 1964 (P.L. 88-352), and the regulations issued pursuant thereto, which provides that no person in the United States shall on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity for which the RECIPIENT/SUBGRANTEE receives Federal financial assistance and will immediately take any measures necessary to effectuate this assurance.
- (2) If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the RECIPIENT/ SUBGRANTEE, this assurance shall obligate the RECIPIENT/ SUBGRANTEE, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits;
- (3) Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975, as amended (42 U.S.C.; 6101-6107) which prohibits discrimination on the basis of age or with respect to otherwise qualified handicapped individuals as provided in Section 504 of the Rehabilitation Act of 1973;
- (4) Executive Order 11246 as amended by Executive Orders 11375 and 12086, and the regulations issued pursuant thereto, which provide that no person shall be discriminated against on the basis of race, color, religion, sex or national origin in all phases of employment during the performance of federal or federally assisted construction contracts; affirmative action to insure fair treatment in employment, upgrading, demotion, or transfer; recruitment advertising; layoff or termination, rates of pay or other forms of compensation; and election for training and apprenticeship.

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- (g) The RECIPIENT/SUBGRANTEE agrees to comply with the Americans With Disabilities Act (Public Law 101-336, 42 U.S.C. Section 12101 et seq) if applicable, which discrimination by public and private entities on the basis of disability in the areas of employment, public accommodations, transportation, State and local government services, and in telecommunications.
- (h) It will comply with the Anti-kickback (Copeland) Act of 1934, 18 U.S.C. Section 874 and 40 U.S.C. Section 276a, which outlaws and prescribes penalties for "kickbacks" of wages in federally financed or assisted construction activities. It will comply with the provision of the Hatch Act, which limits the political activity of employees. *
- (i) It will comply with the provision of the Hatch Act, which limits the political activity of employees.
- (j) It will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 as amended. Pub. L. 93-156, 87 Section 975, approved December 31, 1973. Section 103(a) required, on and after March 2, 1974, the purchase of flood insurance in communities where such insurance is available as a condition for the receipt of any Federal financial assistance for construction or acquisition purposes for use in any area, that has been identified by the Secretary of the Department of Housing and Urban Development as an area having special flood hazards. The phrase "Federal financial assistance" includes any form of loan, grant guaranty, insurance payment, rebate, subsidy, disaster assistance loan or grant, or any other form of direct or indirect Federal assistance.
- (k) It will require every building or facility (other than a privately owned residential structure) designed, constructed, or altered with funds provided under this Part to comply with the "uniform Federal Accessibility Standards," (UFAS) which is Appendix A to 41 CFR Part 40 for residential structures. The RECIPIENT/ SUBGRANTEE will be responsible for conducting inspections to ensure compliance with these specifications by the contractor.
- (l) The RECIPIENT/SUBGRANTEE will comply with applicable N.C. General Statutes when negotiating contracts for services.
- (m) It has adopted and is enforcing a policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in nonviolent civil rights demonstrations, and has

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adopted and is enforcing a policy of enforcing applicable State and federal laws against physically barring entrance or exit from a facility or location which is the subject of such nonviolent civil rights demonstration within its jurisdiction in accordance with section 519 of Public Law 101-140 of the 1990 HUD Appropriations Act.

- (n) It will comply with Title IX of the Education Amendments of 1972, as amended (20 U.S.C.: 1681-1683 and 1685-1686) which prohibits discrimination on the basis of sex;
- (o) It will comply with the Drug Abuse Office and Treatment Act of 1972 (P.L. 91-616) as amended, relating to nondiscrimination on the basis of drug abuse;
- (p) It will comply with the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, relating to nondiscrimination on the basis of alcohol abuse or alcoholism.
- (q) It will comply with 523 and 527 of the Public Health Service Act of 1912 "(42 U.S.C. 290 dd-3 and 290 ee-3)", as amended, relating to confidentiality of alcohol and drug abuse patient records;
- (r) It will comply with Lead-Based Paint Poisoning Act "(42 U.S.C. 4801 et seq.)" which prohibits the use of lead based paint in construction of rehabilitation or residential structures;
- (s) It will comply with the Energy Policy and Conservation Act, 42 U.S.C. §6291 et. Seq.
- (t) RECIPIENT/SUBGRANTEE certifies that it:
 - (1) Is not presently debarred, suspended, proposed for debarment, declared ineligible, sentenced to a denial of Federal benefits by a State or Federal court, or voluntarily excluded from participating in Federal grants or awards by any Federal department or agency; and
 - (2) Has not within a three-year period preceding this contract been convicted of or had a civilian judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

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- (3) Is not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (2) above; and,
 - (4) Has not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.
- (u) RECIPIENT/SUBGRANTEE further agrees that it will include the above certifications, without modification, in all lower tier contracts and in all solicitations for lower tier contracts.

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ATTACHMENT E

SPECIAL CONDITIONS

This agreement shall be executed by the RECIPIENT/SUBGRANTEE, and returned to the AGENCY/GRANTEE at the following address:

**Hazard Mitigation Section Chief
Department of Crime Control & Public Safety
NC Division of Emergency Management
1830-B Tillery Place
Raleigh, NC 27604**

This agreement will be executed within thirty (30) days after receipt. All time periods in this Agreement refer to calendar days. After receipt by the AGENCY/GRANTEE of the signed Agreement, the AGENCY/GRANTEE will execute this Agreement and return an original to the RECIPIENT/SUBGRANTEE.

**Tim Fuller, Commissioner
Town of Kure Beach
117 Settlers Lane
Kure Beach, NC 28449**

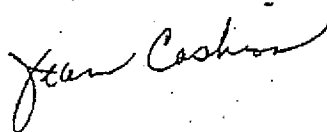
The Riggings Home Owners Association
1437 Fort Fisher Blvd.
P.O. Box 157
Kure Beach, NC 28449

RECEIVED MAY 10 2006

May 1, 2006

TO: Mayor Tim Fuller
Town of Kure Beach Commissioners
Stacey Fuller, Mitigation Specialist

FROM: Jean Cashion, President of The Riggings HOA



RE: FEMA Grant for the Riggings

I am writing to let you know that twenty four homeowners of the Riggings voted "No" toward accepting the FEMA pre-disaster grant. There were also ten homeowners who were either absent or failed to turn in their proxy for the meeting. I, as well as, our entire board of directors and homeowners appreciate the many hours of time spent working on our behalf regarding the grant. Unfortunately legal issues regarding transfer of deeds, financial issues, time, and various other factors have made acceptance of the grant impossible for many homeowners.

We are very well aware of the serious problem of erosion and will continue to work toward a workable and acceptable solution. We also look forward to working with Mayor Fuller and Commissioners for the Town of Kure Beach as we move forward to solve our problems. Words can only convey a portion of the gratitude that we feel for the help that we have received from all of you. Kure Beach is indeed a most wonderful place to live.

Thank you for your help and please call me at 919-776-7019, if you have any questions.

**EVALUATION OF BEACH FILL OPTION
RIGGINGS CONDOMINIUM
KURE BEACH, NORTH CAROLINA**

INTRODUCTION

The Riggings Homeowners Association, Inc. (RHOA) proposes to seek permits that would allow it to pay for the southward extension of the Kure Beach storm damage reduction project to include the shoreline fronting its property. The Kure Beach project was initially constructed by the Corps of Engineers (USACE) between June 1997 and February 1998. Due to concerns over possible burial of the coquina rock outcrop in front of the Riggings and predicted high rates of erosion from the fill if placed in this area, the federal project terminated north of the Riggings Condominium.

The Kure Beach project covers a total of 18,000 feet of shoreline including a 1,500-foot transition section on the south end. The primary or main fill section covers 16,500 feet of the project shoreline and consists of a 25-foot wide artificial dune constructed to an elevation of 13.5 feet above National Geodetic Vertical Datum (NGVD) fronted by a 50-foot wide storm berm at elevation 9.0 feet above NGVD. The 1,500-foot transition section also includes a dune with a variable crest elevation and the storm berm for about 1,000 feet. The last 500 feet of the project consists of a tapered 6.5-foot NGVD berm which gradually merges with the existing shoreline. The volume of material needed to fill the entire active beach profile is placed in front of the 9-foot NGVD berm in the form of a variable width construction berm at elevation +6.5 ft NGVD. Typical cross-sections of the main beach fill and transition fill are shown on Figure 1.

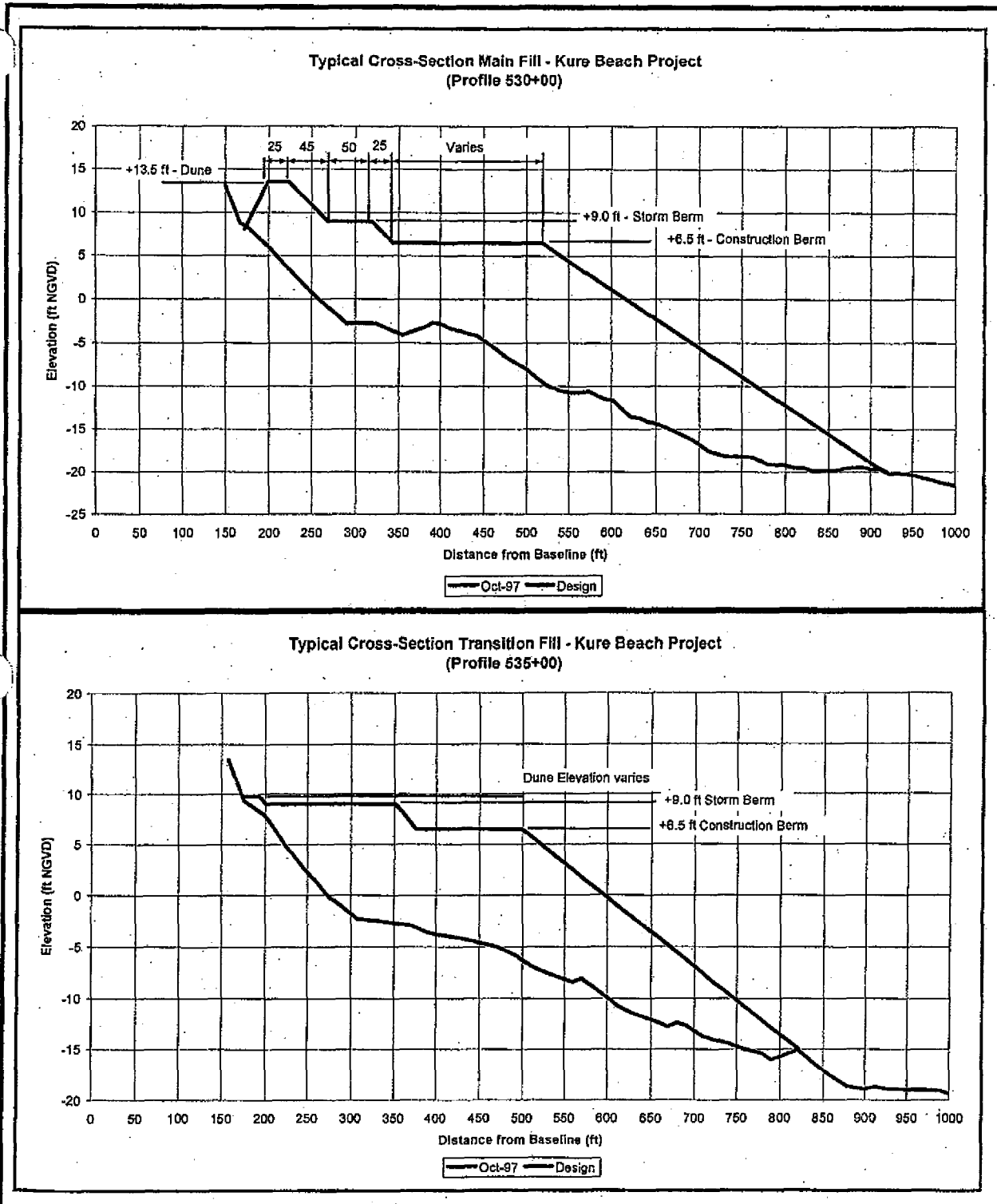


Figure 1. Typical cross-sections of the Kure Beach storm damage reduction project.

The main fill section of the Kure Beach project ends at a point approximately 2,030 feet north of the north property line of the RHOA while the south end of the transition section ends 530 feet north of the north property line. Approximately 550 feet of shoreline fronting the Dunes Condominiums was also excluded from the Kure Beach project.

Periodic nourishment of the Kure Beach project is on a three-year renourishment cycle with past nourishment operations conducted in April-May 2001, March-April 2004, and April-May 2007. The next periodic nourishment operation is scheduled for calendar year 2010. The initial fill for the Kure Beach project was obtained from a borrow area located approximately 2 miles offshore. Material for the first renourishment cycle came from the Cape Fear River navigation channel as a byproduct of the Wilmington Harbor deepening project while the 2004 and 2007 nourishment operations used the offshore borrow area.

Between July 1995 and January 1996, the USACE and the State of North Carolina constructed a stone revetment to protect the Fort Fisher State Historic Site (Figure 2). The northern terminus of the stone revetment abuts the south property line of the RHOA. The USACE began collecting beach profile surveys along the 2,500 feet of shoreline north of the revetment in May 1995. The monitoring surveys, which are conducted about every 6 months, are intended to document pre- and post-revetment behavior of this section of the shoreline; however, the surveys also captured the performance of the southern end of the Kure Beach project following its initial construction and subsequent nourishment operations. The complete survey data set (May 1995 to May 2007) for the area extending from the north wingwall of the revetment to the end of the main fill section of the Kure Beach project, provided by USACE, was used to assess the possible performance of a beach fill placed in front of the Riggins and assess the potential for burial of the coquina rock outcrop.

The USACE profile stations of interest in this evaluation, referenced to the Fort Fisher baseline, are shown on Figure 3 and include profiles 530+00, 535+00, 539+00, 543+00, 547+00, 550+00, 552+00, and 555+00. As a matter of reference, profile 530+00 approximates the south end of the main fill section of the Kure Beach project while profile 543+00 is slightly north of the end of the south transition. Profiles 547+00 and 550+00 lie outside of the direct placement area of the Kure Beach project. Profiles 547+00 and 550+00 appear to cut across the coquina rock outcrop located just north of the Riggings. Profile 550+00 is located near the north property line of the RHOA while profile 552+00 is near the center of the RHOA property. Profile 552+00 also cuts across the coquina rock outcrop located directly seaward of the Riggings. Profile 555+00 extends seaward from the north wingwall of the Fort Fisher revetment and cuts across the coquina rock outcrop south of the Riggings.

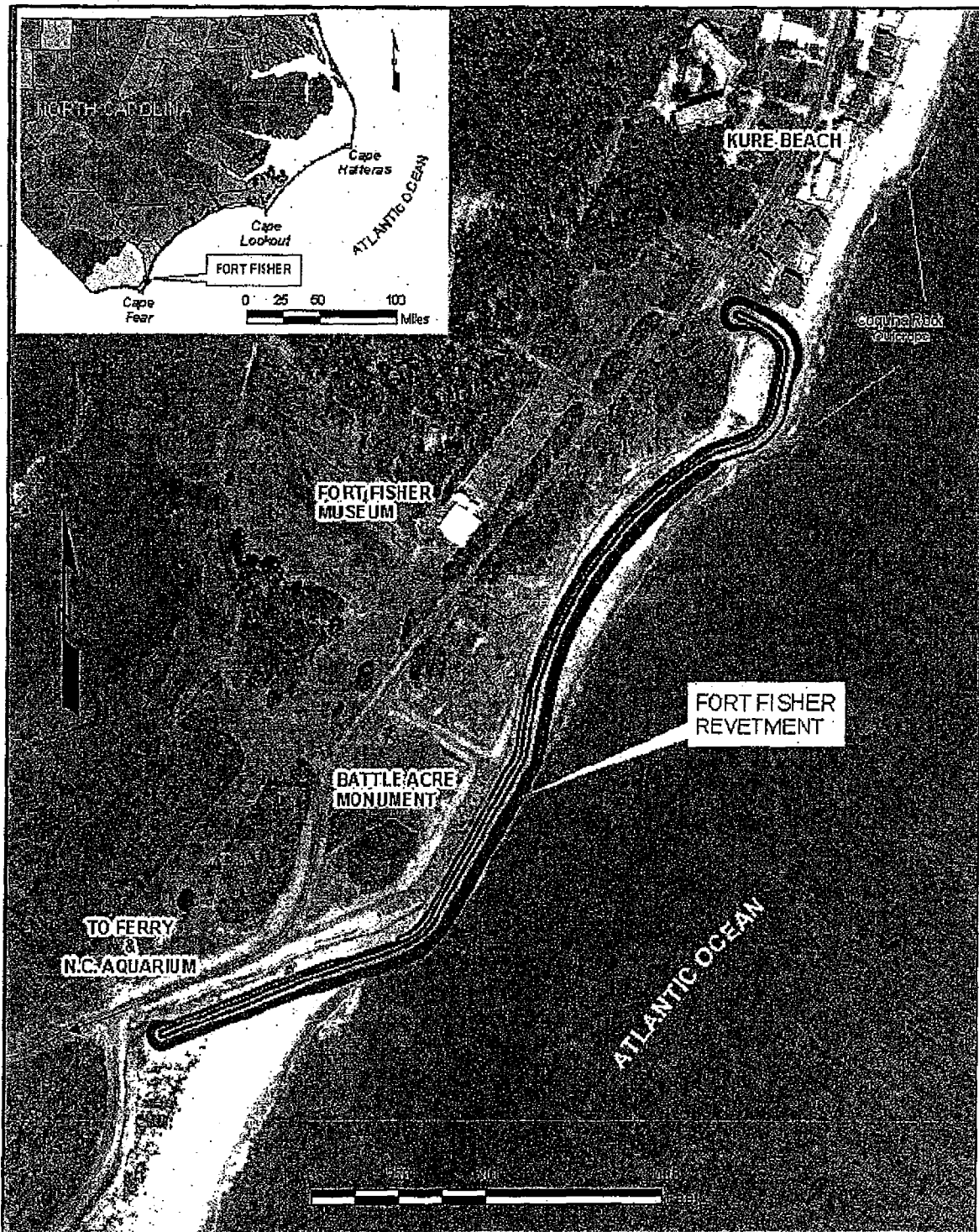


Figure 2. Fort Fisher revetment (Copied from USACE Fort Fisher Monitoring Program – Report No. 9)



Figure 3. Fort Fisher Monitoring Program beach profile stations (Copied from USACE Fort Fisher Monitoring Program – Report No. 9)

All of the beach profile surveys generally covered the area landward of the -2-foot NGVD (approximately mean low water (MLW)) depth contour with surveys conducted between October 1997 and October 2001 extending out beyond the -30-foot NGVD depth contour. The area landward of the -2-foot depth contour (MLW) essentially represents the visible portion of the beach.

The two areas of interest with regard to the extension of the Kure Beach project; namely, (1) the predicted performance of the fill extension and (2) the potential burial of the coquina rock outcrops, are addressed in the following sections.

BEACH FILL PERFORMANCE

The USACE beach profile data was used to determine changes in the position of the +2-foot NGVD (MHW) contour and changes in the volume of material landward of the -2-foot NGVD (MLW) depth contour for each of the profile stations listed above.

Mean High Water (+2-ft NGVD) Shoreline Changes:

Plots of the cumulative change in the position of the +2-foot NGVD contour between May 1995 and May 2007 for each profile are provided in Figures 4 to 11. The overall rate of change in the position of the +2-foot contour between May 1995 and May 2007, determined by linear regression, is given on each plot. Profiles 530+00 to 547+00, which received some direct fill placement associated with the Kure Beach project, also have rates of change for the +2-foot contour that occurred prior to the initial fill and following each of the nourishment operations (initial, 1st renourishment, and 2nd renourishments). Note that profile 547+00 lies outside the authorized limits of the Kure Beach project, however, some of the fill material apparently spilled out of the authorized placement area during construction resulting in some widening of the beach.

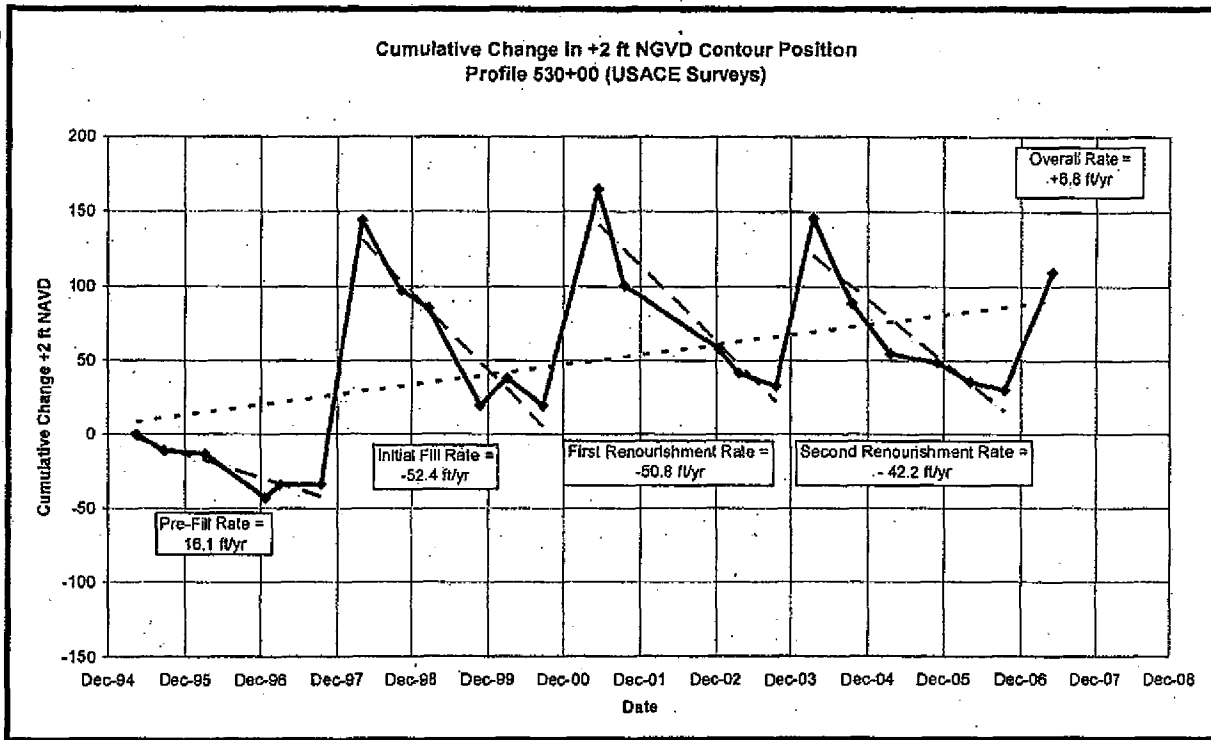


Figure 4. Cumulative change in +2-foot contour position for Profile 530+00.

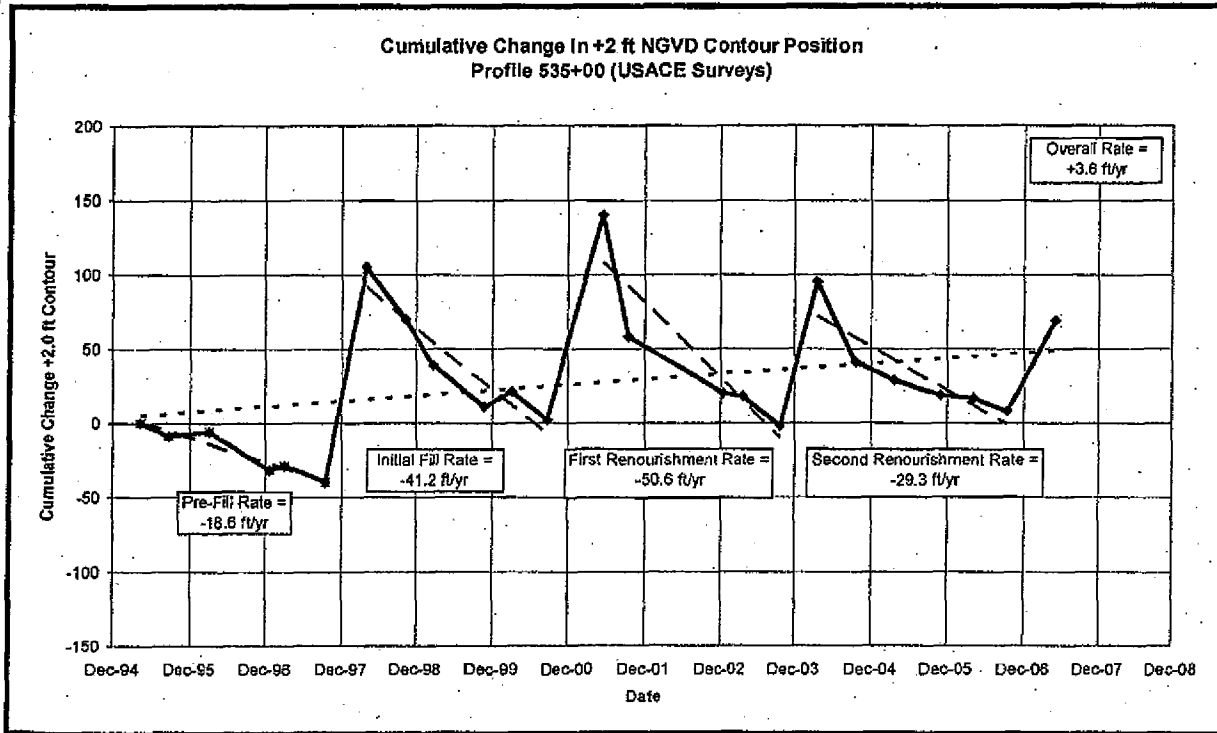


Figure 5. Cumulative change in +2-foot contour position for Profile 535+00.

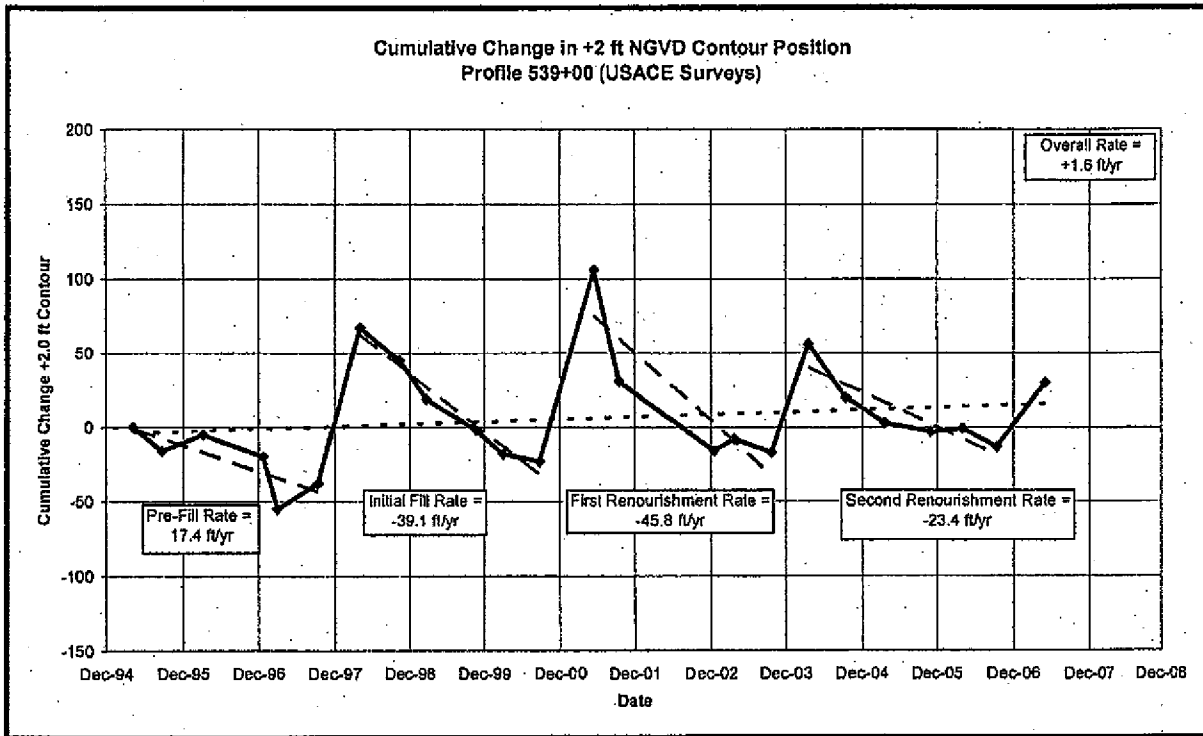


Figure 6. Cumulative change in +2-foot contour position for Profile 539+00.

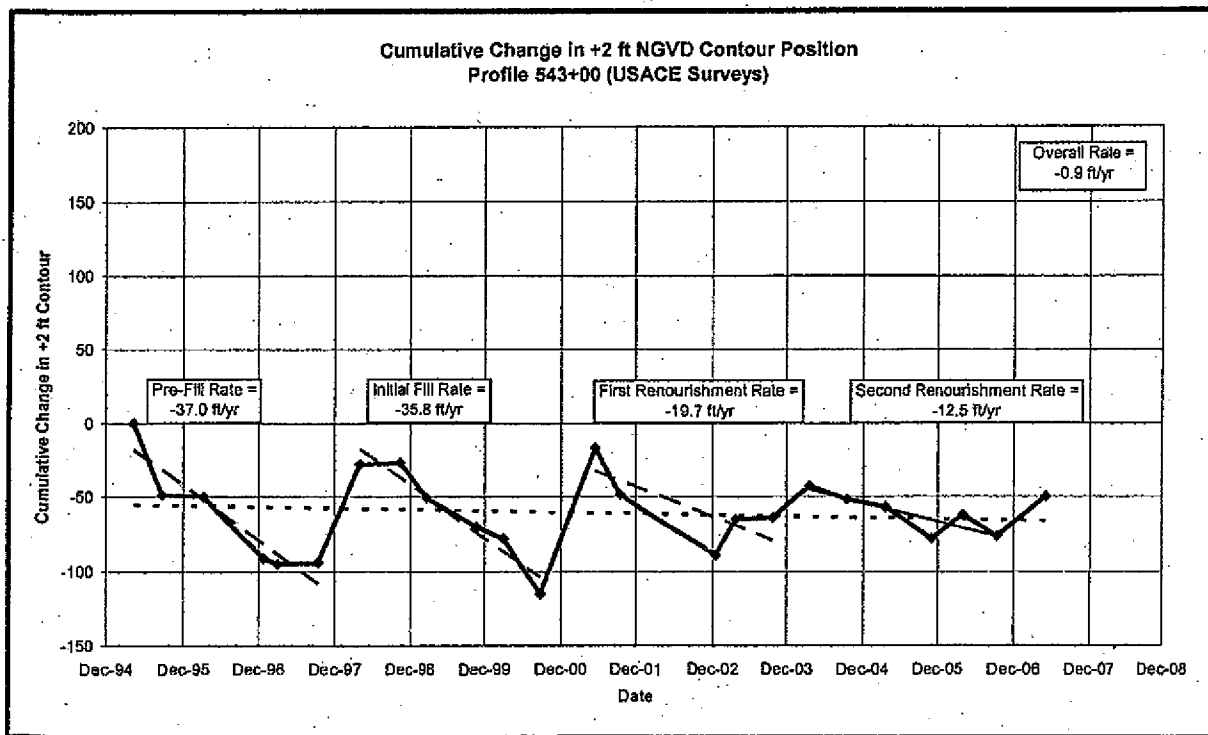


Figure 7. Cumulative change in +2-foot contour position for Profile 543+00.

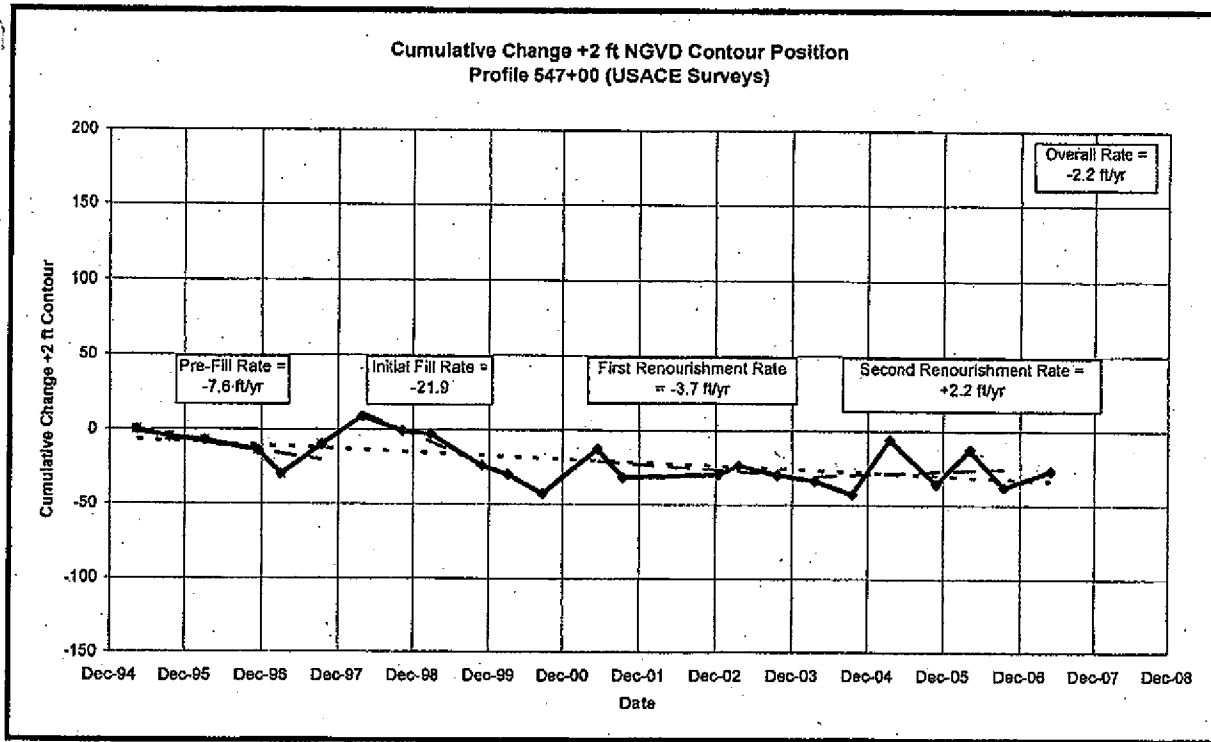


Figure 8. Cumulative change in +2-foot contour position for Profile 547+00.

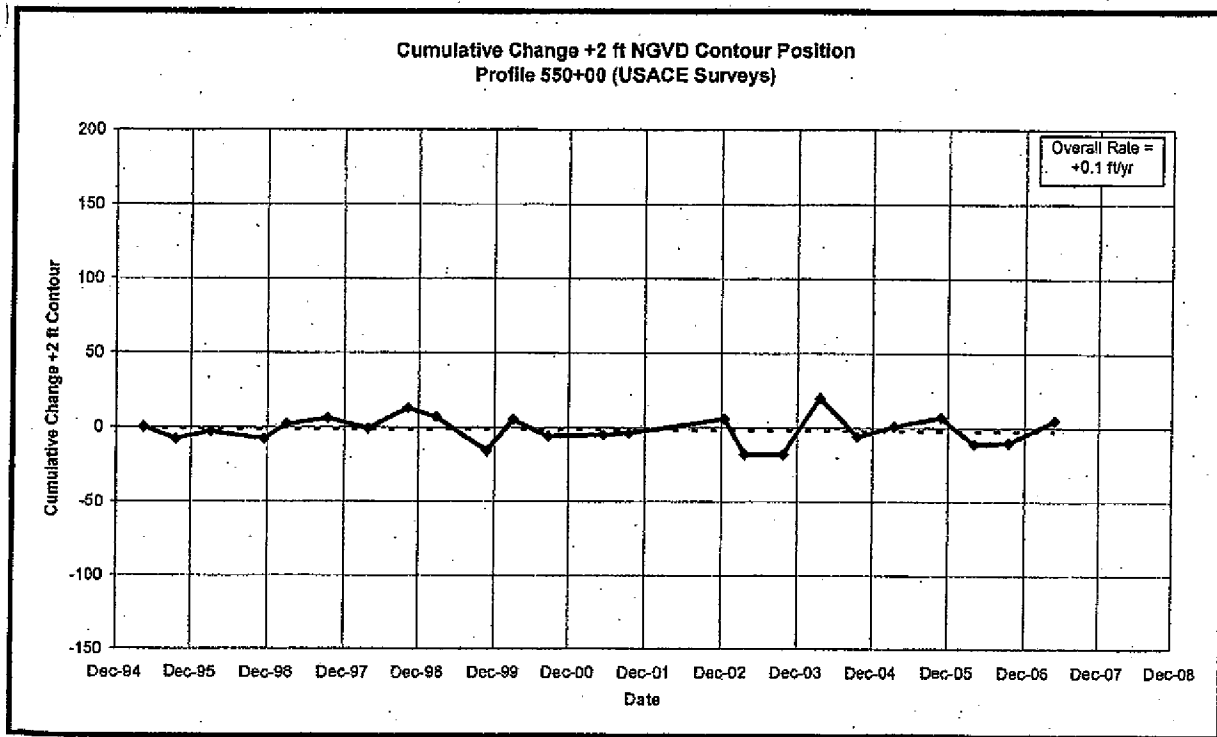


Figure 9. Cumulative change in +2-foot contour position for Profile 550+00.

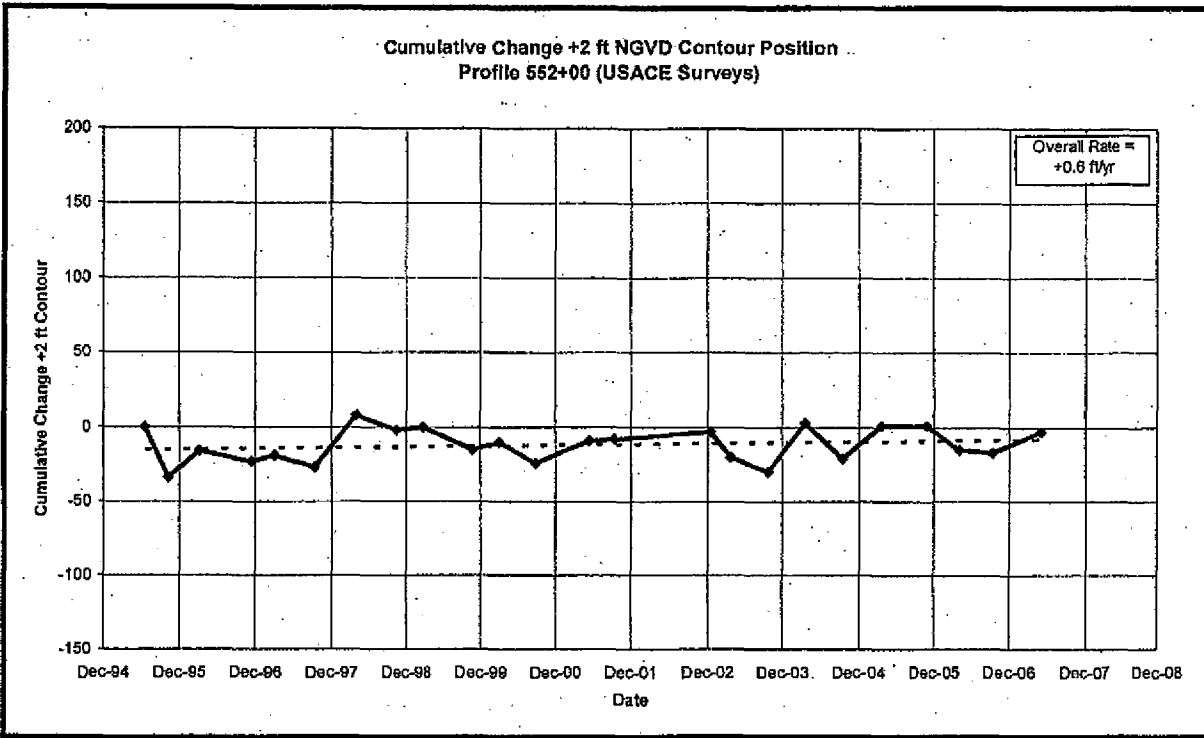


Figure 10. Cumulative change in +2-foot contour position for Profile 552+00.

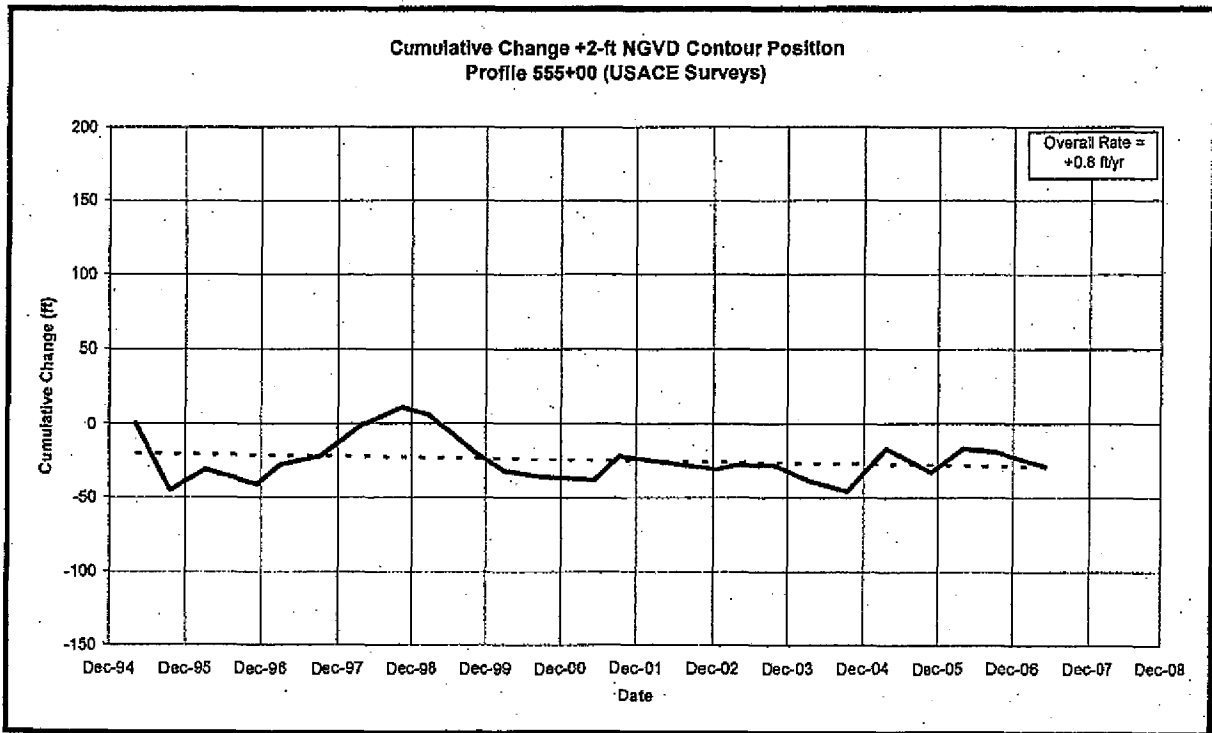


Figure 11. Cumulative change in +2-foot contour position for Profile 555+00.

An analysis of the rates of change in the +2-foot contour position found the change rates to be dependent on alongshore position, as represented by the profile station number, and the added width of the beach provided by each fill increment. To demonstrate this relationship, the rate of change in the +2-foot contour position was normalized by dividing the rate of change of the +2-foot contour by the increase in beach width (see Table 1) and the resulting average normalized rates plotted versus the profile station as shown in Figure 12.

Table 1. Post-fill rates of change in the position of the +2-foot NGVD contour and normalized rates of change.

Profile	Fill	Fill Width (W) (ft)	Recession Rate (ER) (ft/yr)	Normalized Rate = ER/W
530+00	Initial	178	-52.4	-0.29
	First Renourishment	145	-50.8	-0.35
	Second Renourishment	113	-42.2	-0.37
	Average			-0.34
535+00	Initial	145	-41.2	-0.28
	First Renourishment	138	-50.6	-0.37
	Second Renourishment	97	-29.3	-0.30
	Average			-0.32
539+00	Initial	105	-39.1	-0.37
	First Renourishment	129	-45.8	-0.36
	Second Renourishment	73	-23.4	-0.32
	Average			-0.35
543+00	Initial	66	-35.8	-0.54
	First Renourishment	98	-19.7	-0.20
	Second Renourishment	21	-12.5	-0.60
	Average			-0.45
547+00	Initial	19	-21.9	-1.15
	First Renourishment	30	-3.7	-0.12
	Second Renourishment	-4	2.2	-0.55
	Average			-0.61

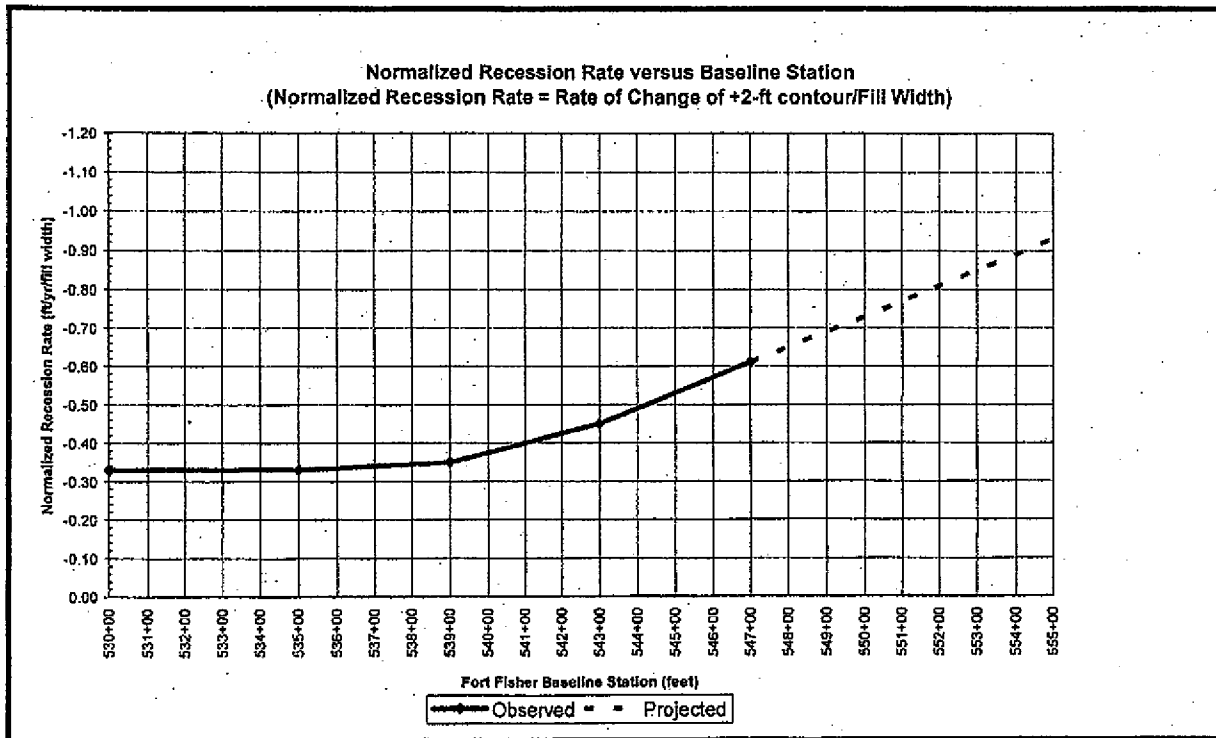


Figure 12. Normalized +2-foot contour change rate versus baseline (profile) station.

The solid blue line in Figure 12 runs through the observed average normalized recession rates of the +2-foot NGVD contour presented in Table 1 while the red dashed line is a projection of the normalized recession rates into the shoreline area fronting the Riggings. This projection was used to estimate expected recession rates for the +2-foot NGVD contour (MHW shoreline) for various fill widths with these projected rates given in Table 2.

Table 2. Estimated recession rates for the +2-foot NGVD shoreline versus fill width in the area fronting the Riggings.

Profile	Fill Width (feet)						
	25	50	75	100	125	150	175
550+00	-18.3	-36.5	-54.8	-73.0	-91.3	-109.5	-127.8
552+00	-20.3	-40.5	-60.8	-81.0	-101.3	-121.5	-141.8
553+00	-21.3	-42.5	-63.8	-85.0	-106.3	-127.5	-148.8
554+00	-22.5	-45.0	-67.5	-90.0	-112.5	-135.0	-157.5
555+00	-23.3	-46.5	-69.8	-93.0	-116.3	-139.5	-162.8

The estimated recession rates for a fill placed in front of the Riggings are only slightly less than the added beach width implying regardless of the added width of beach, most of the added width would be gone within a year to a year and a half.

Volumetric Changes Landward of the -2-foot NGVD Contour.

Volumetric changes landward of the -2-foot NGVD contour were analyzed in a manner similar to the changes in the +2-foot NGVD contour except rates of volume change following each nourishment cycle were computed for all profiles even if they did not directly receive beach fill. Plots of the cumulative change in volume above -2 feet NGVD and the linear regression rates of volume change following each nourishment operation as well as the pre-fill rates are given in Figures 13 to 20.

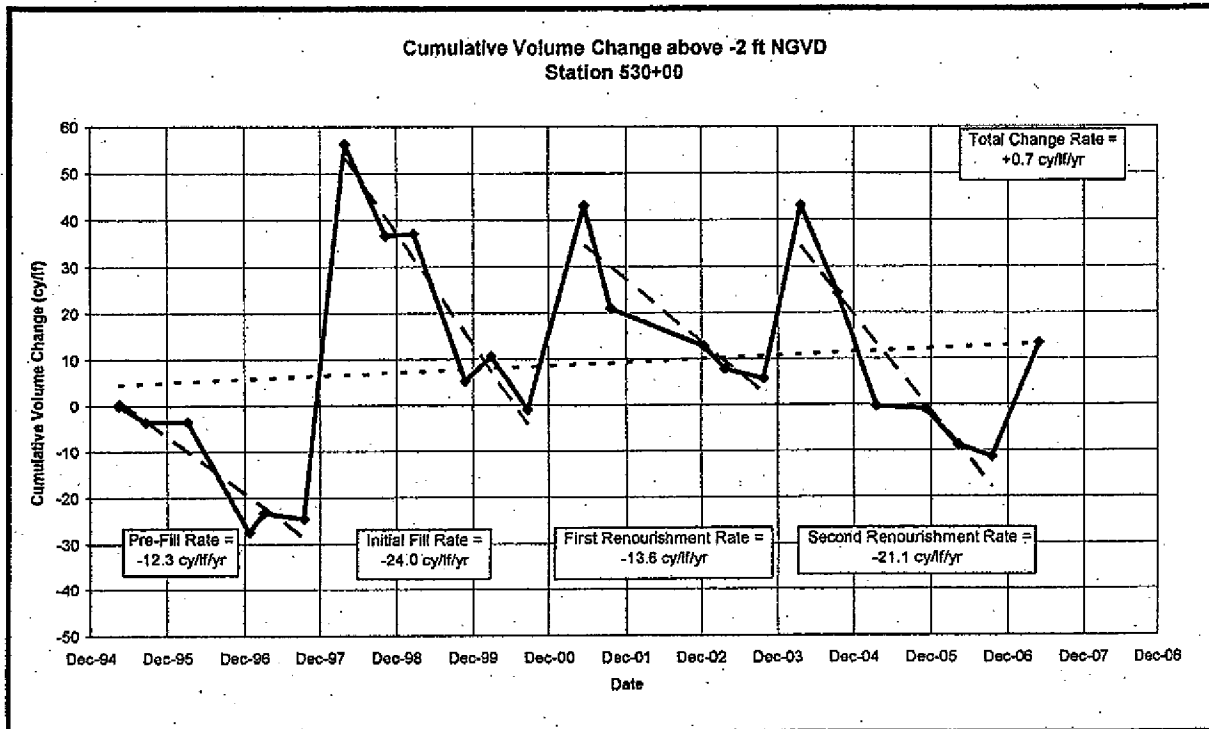


Figure 13. Cumulative volume change above -2 ft NGVD for profile 530+00.

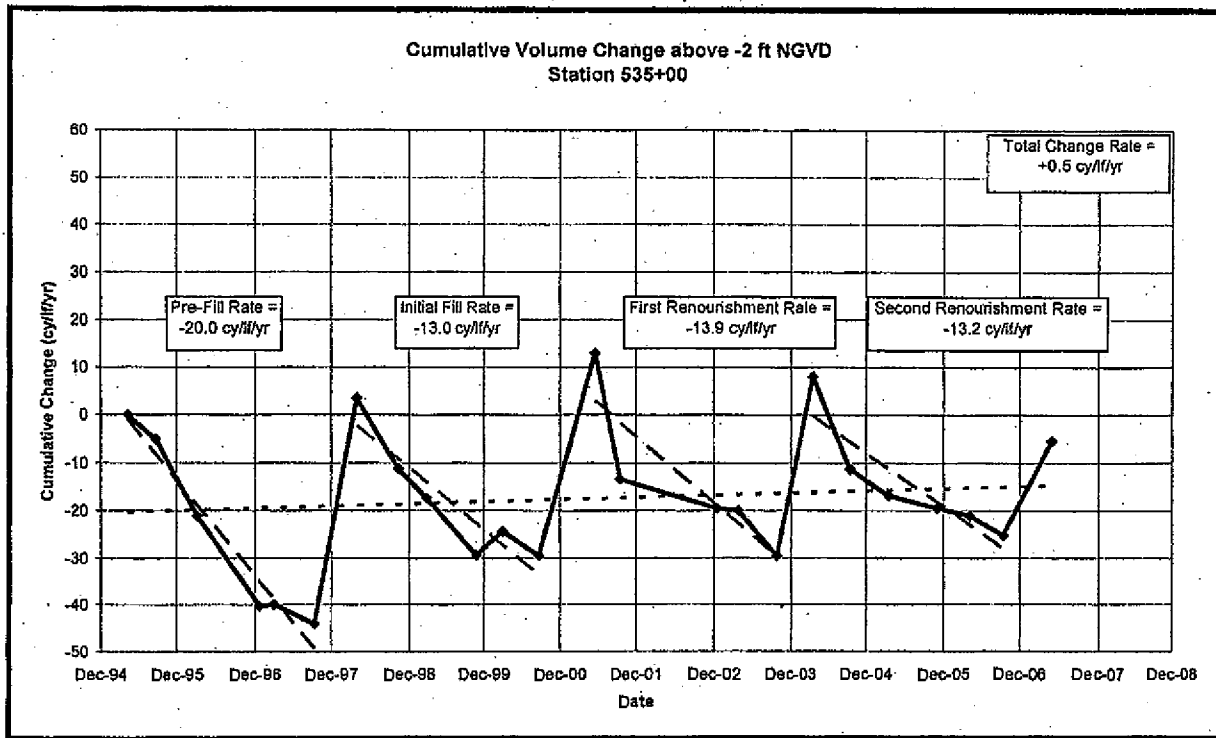


Figure 14. Cumulative volume change above -2 ft NGVD for profile 535+00.

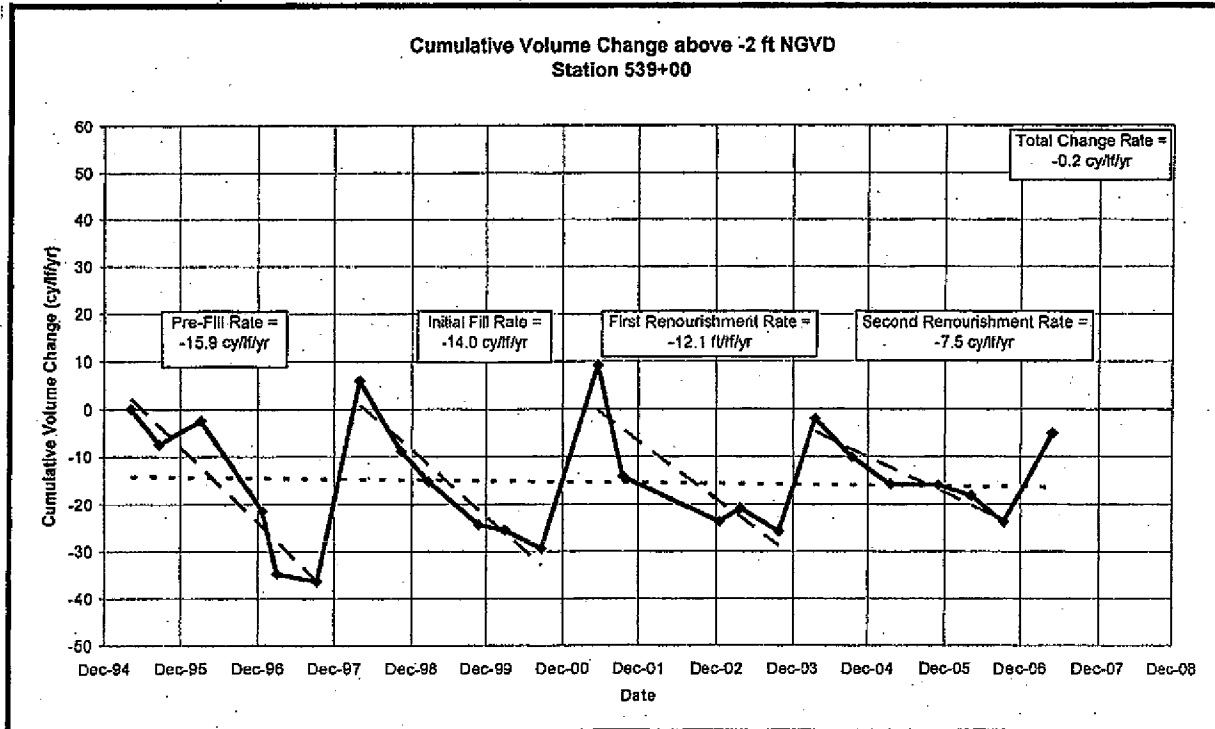


Figure 15. Cumulative volume change above -2 ft NGVD for profile 539+00.

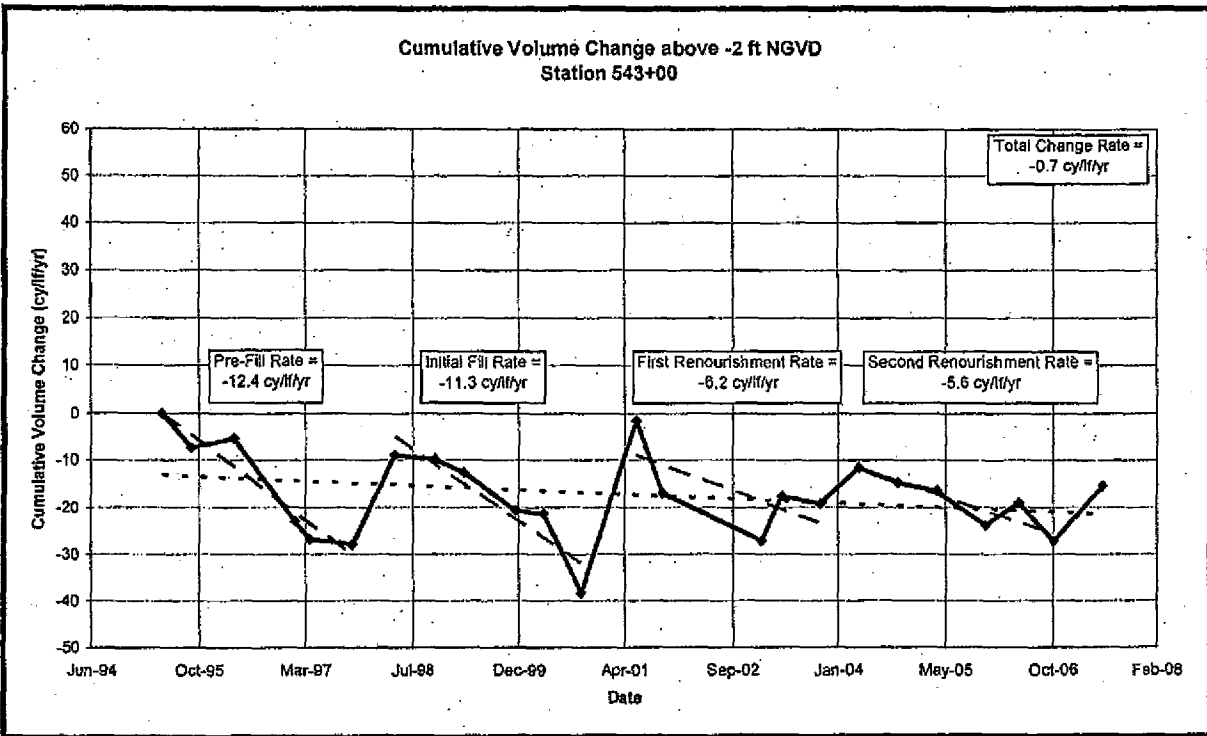


Figure 16. Cumulative volume change above -2 ft NGVD for profile 543+00.

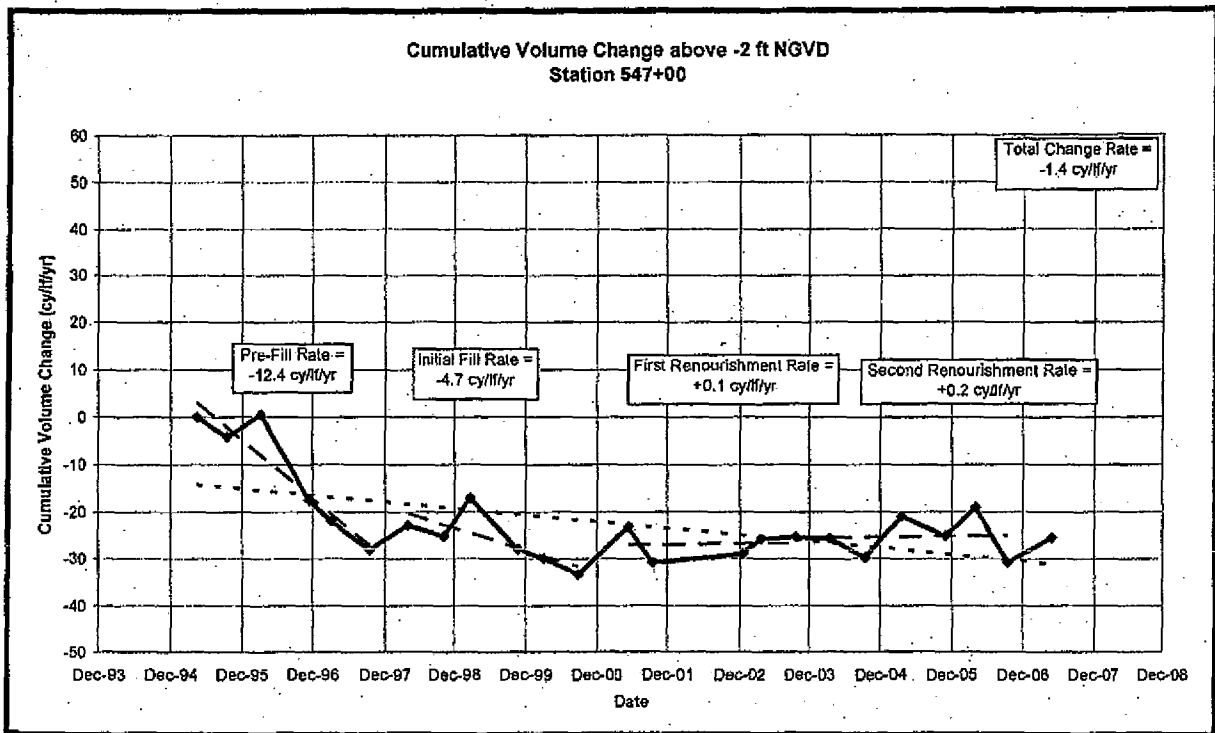


Figure 17. Cumulative volume change above -2 ft NGVD for profile 547+00.

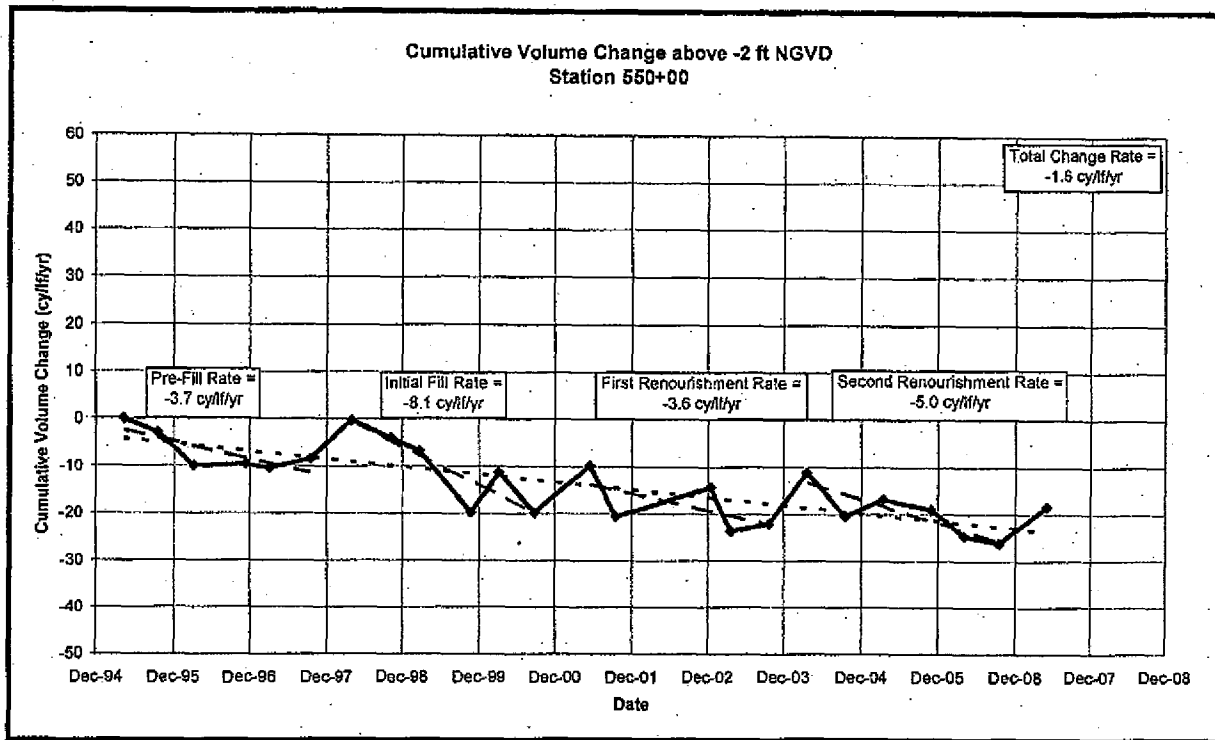


Figure 18. Cumulative volume change above -2 ft NGVD for profile 550+00.

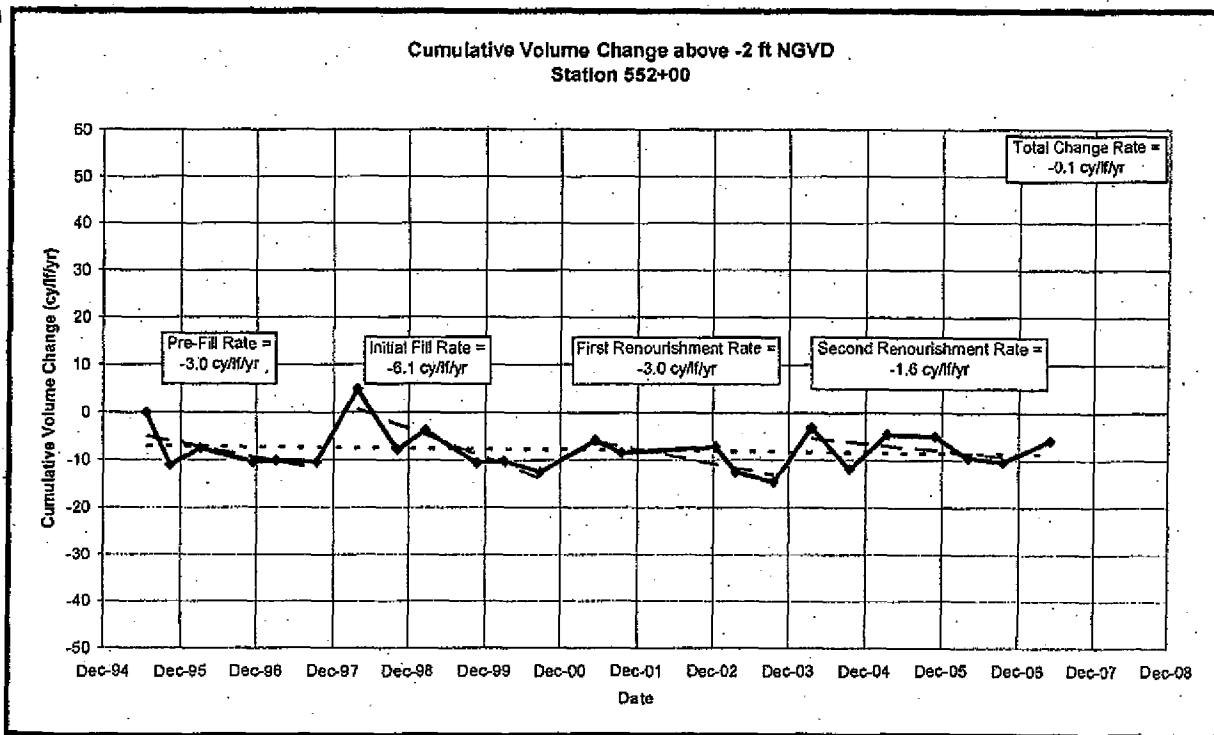


Figure 19. Cumulative volume change above -2 ft NGVD for profile 552+00.

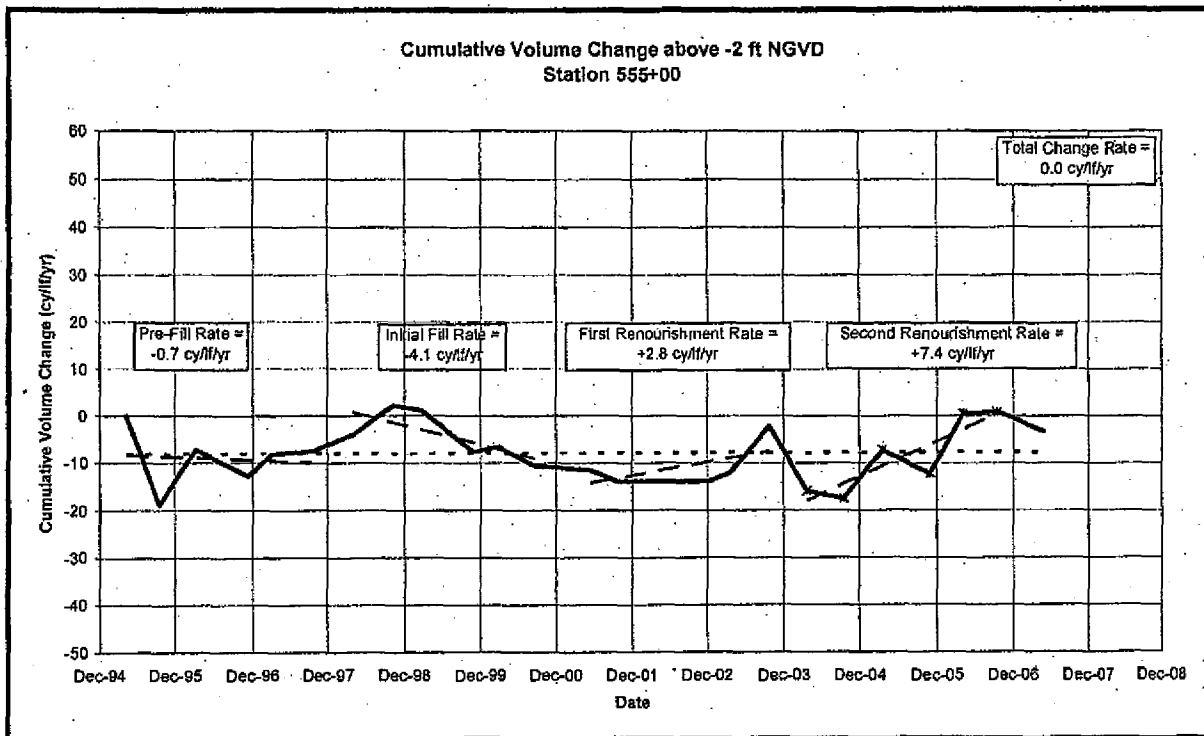


Figure 20. Cumulative volume change above -2 ft NGVD for profile 555+00.

Table 3 provides a summary of the volume of material placed above the -2-foot depth contour for profiles 530+00 to 547+00, the volumetric erosion rate of the material placed above -2 feet NGVD, and the width of the construction berm created by the fill. As a matter of note, the total volume of material placed on each profile out to the -20-foot NGVD depth contour during each nourishment operation was approximately twice the amount placed above -2 feet NGVD. For example, the total volume placed on profile 530+00 during initial construction was 174.3 cy/lf versus 80.8 cy/lf placed above -2 feet NGVD. This same general relationship was observed at other profiles that included survey coverage out to the -20-foot depth contour.

Surveys of profiles 530+00, 539+00, and 543+00 between April 1998 and September 2000, or following the initial fill extended out to the -20-foot NGVD contour and were used to estimate the total volumetric change on the profiles relative to changes above the -2-foot NGVD depth contour. For these three profiles, the average volume change for the initial fill out to -20 feet NGVD was 1.7 times the rate observed above -2 feet NGVD. Again using profile 530+00 as an example, the volume rate of change for the initial fill above -2 feet NGVD was -24.0 cy/lf/yr while the total volume change out to -20 feet NGVD was -40.6 cy/lf/yr. This average relationship will be used later to estimate total volume losses for the southward extension of the Kure Beach project.

The volumetric rate of erosion above -2 feet NGVD (ER) for profiles 530+00 to 547+00 following each nourishment operation (only initial for 547+00) were normalized by dividing the erosion rate by the width (W) of the fill with the results provided in Table 3. The average ratio

of ER/W at each profile station was plotted versus the profile station as shown in Figure 21. As can be seen on Figure 21, ER/W increases from profile 539+00 to 547+00. This general trend was extended south to include the shoreline fronting the Riggings (red dashed line in Figure 21). The projected ER/W values were used to estimate possible volumetric erosion rates above -2 ft NGVD for a fill placed south of profile 547+00 to profile 555+00. These projected volumetric erosion rates for various fill widths are given in Table 4.

Table 3. Fill volumes above -2 feet NGVD, volumetric erosion above -2 feet NGVD, fill widths, and normalized volumetric erosion rates (ER/W) for profiles 530+00 to 547+00.

Profile	Fill Operation	Volume of fill above -2 ft NGVD (V) cy	Volumetric Erosion Rate (ER) above -2 ft NGVD cy/lf/yr	Width of Fill (W)	Normalized Volumetric Erosion Rate = (ER/W)
530+00	Initial	80.8	-24.0	178	-0.135
	1 st Renourishment	44.1	-13.6	145	-0.094
	2 nd Renourishment	37.4	-21.1	113	-0.187
	Average	54.1	-19.6	145	-0.138
535+00	Initial	47.5	-13.0	145	-0.090
	1 st Renourishment	42.4	-13.9	138	-0.101
	2 nd Renourishment	37.6	-13.2	97	-0.136
	Average	42.5	-13.4	127	-0.109
539+00	Initial	42.2	-14.0	105	-0.133
	1 st Renourishment	38.6	-12.1	129	-0.094
	2 nd Renourishment	23.8	-7.5	73	-0.103
	Average	34.9	-11.2	102	-0.110
543+00	Initial	19.0	-11.3	66	-0.171
	1 st Renourishment	36.7	-6.2	98	-0.063
	2 nd Renourishment	7.6	-5.6	21	-0.267
	Average	21.1	-7.7	62	-0.167
547+00	Initial	5.2	-4.7	19	-0.247

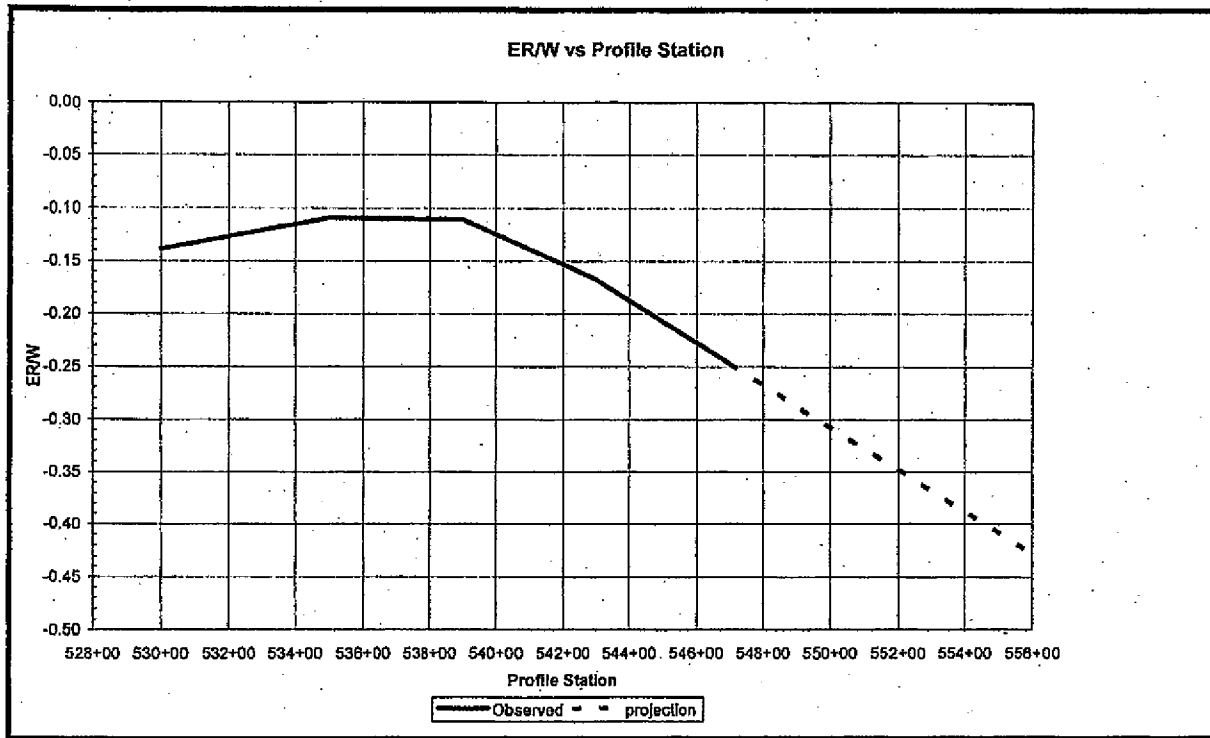


Figure 21. Normalized volumetric erosion rate (= ER/W) versus profile station. Blue line is observed and red dashed line is projected south to include the Riggings shoreline.

Table 4. Estimated volumetric erosion rates for various beach fill widths placed along the Riggings shoreline. Volumetric erosion rates apply to material placed above the -2-foot NGVD depth contour.

Profile	Estimated ER/W (From Fig 21)	Volumetric Erosion Rate (cy/lf/yr) above -2 feet NGVD for Beach Fill Widths =		
		25 feet	35 feet	50 feet
547+00	-0.247	-6.2	-8.7	-12.4
550+00	-0.308	-7.7	-10.8	-15.4
552+00	-0.348	-8.7	-12.2	-17.4
555+00	-0.408	-10.2	-14.3	-20.4

The beach fill widths referenced in Table 4 represent the width of the construction berm. As a general rule, approximately 0.5 cubic yard/lineal foot of fill is needed above -2-foot NGVD for each foot of width of the construction berm. Accordingly, placement rates above -2 feet NGVD for the 25-foot, 35-foot and 50-foot beach widths given in Table 4 would be 12.5, 17.5, and 25.0 cubic yards/lineal foot, respectively.

Based on the volumetric rates of placement above -2 feet NGVD, the life of the fill along the Riggings shoreline would range from about 2 years at profile 547+00 to 1.2 years at profile 555+00. The recession rates for the +2-ft contour would seem to indicate the fill would be essentially gone within 1 to 1.5 years. The reason for this apparent difference in the longevity of

the fill based on recession rates for the +2-foot contour and volumetric erosion rates is due to the normal adjustments in the shape of the beach profile that occur immediately following placement. The fill templates for the Kure Beach project (Figure 1) included a construction berm. The construction berm contains material that is expected to slough seaward as the fill material adjusts to wave and tide conditions. When placed, the slope of the material seaward of the crest of the construction berm is normally much steeper than the slope of the natural beach. Over time, the fill material will assume slopes comparable to the slopes of the natural beach and this post-nourishment adjustment is reflected in abnormally high recession rates of the upper portion of the beach profile.

The estimated total volume losses, i.e., out to -20 feet NGVD, for the various fill widths are provided in Table 5 with the total volume loss based on the 1.7 factor discussed above.

Table 5. Estimated volumetric erosion rates out to -20 feet NGVD for various fill widths placed along the Riggings shoreline.

Profile	Estimated ER/W (From Fig 21)	Volumetric Erosion Rate (cy/lf/yr) out to -20 feet NGVD for Beach Fill Widths =		
		25 feet	35 feet	50 feet
547+00	-0.247	-10.5	-14.8	-21.1
550+00	-0.308	-13.1	-18.4	-26.2
552+00	-0.348	-14.8	-20.7	-29.6
555+00	-0.408	-17.3	-24.3	-34.7

General Assessment of Beach Fill Performance in Front of the Riggings:

A beach fill placed directly in front of the Riggings would seemly have a relatively short duration in terms of significant and long-term widening of the beach based on the information provided above. However, the disposal of material north of the Riggings and the southward transport of that material have reduced shoreline recession and volumetric changes in this area. Prior to the construction of the Kure Beach project and the Fort Fisher revetment, shoreline recession rates measured at profiles 550+00, 552+00, and 555+00 averaged -4.5, -6.2, and -6.9 ft/yr, respectively (USACE, Aug 2006). For the total survey period included in the USACE monitoring program (May 1995 to May 2007) shoreline change rates for these three stations have averaged +0.1, +0.6, and +0.8 ft/yr, respectively (see Figures 9 to 11), i.e., all three profiles have experienced relative stability.

In essence, the south end of the Kure Beach project acts as a "feeder beach" for the shorelines located south of the project. The north wingwall of the Fort Fisher revetment may also have some influence on the shoreline immediately to the north (see Figure 22) due to its seaward protuberance, but this impact is believed to be relatively minor.



Figure 22. New Hanover County 2006 aerial photo (New Hanover County GIS Online Mapping Service).

The implication of the observed shoreline behavior fronting the Riggings during the post-Kure Beach project period suggest one possible ameliorating measure for protection of the Riggings would be to overfill the south end of the Kure Beach project beyond the limits authorized for the USACE project. By adding more material to the south end of the Kure Beach project, this section of the project would become an even more effective "feeder beach" as sediment transport

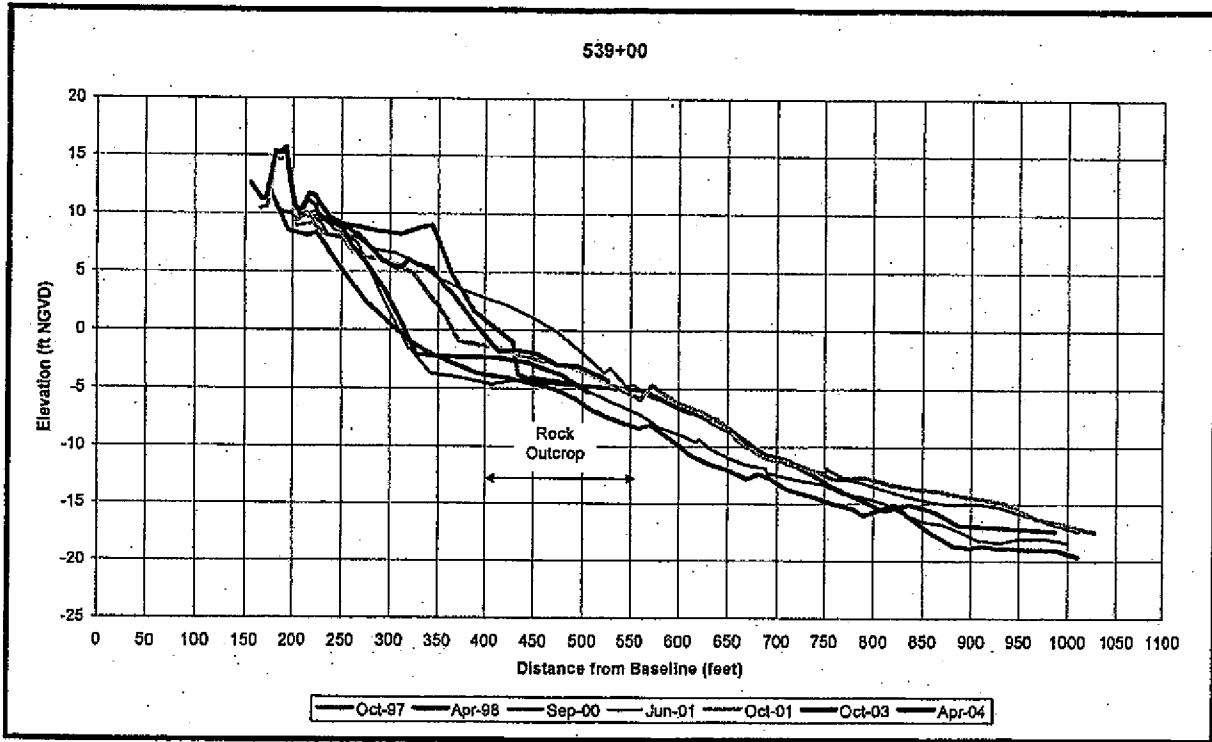


Figure 23. Offshore fill adjustments at Profile 539+00 (direct fill area).

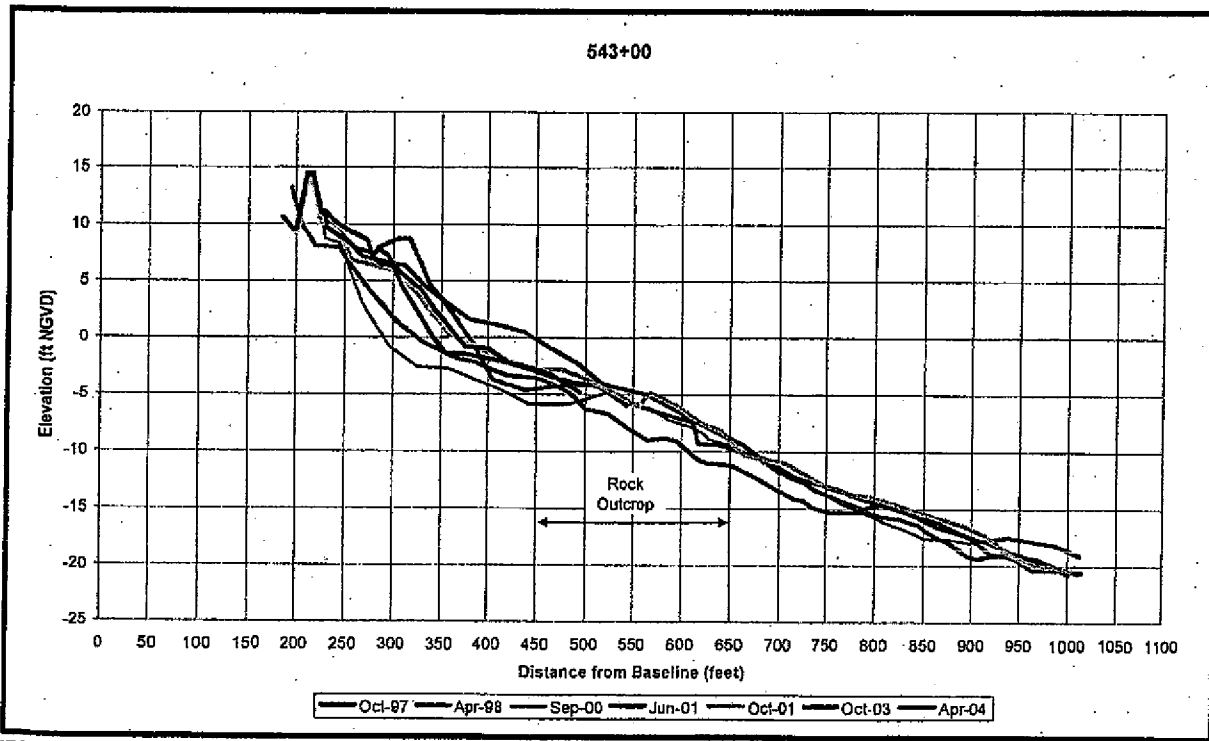


Figure 24. Offshore fill adjustments at Profile 543+00 (direct fill area).

off the end of the fill would increase and help maintain the beach fronting the Riggings. The creation of a larger "feeder beach" on the south end of the Kure Beach project could be combined with a relatively small beach fill directly in front of the Riggings. With the added influx of material off the south end of the Kure Beach project, the performance of the fill directly in front of the Riggings should be better than that predicted above.

Before formulating a plan involving direct placement of material in front of the Riggings and/or the use of a feeder beach, potential impacts on the coquina rock outcrops must be considered.

Impacts of Kure Beach Project on Coquina Rock Outcrops.

The exact location of the coquina rock outcrops located between profiles 530+00 and 555+00 is not known. An estimate of the location of the rock outcrops was made from the USACE plan drawings for the Kure Beach project which show some general outlines of the coquina rock. The source of this information is not clear, however, the locations appear to be reasonable based on aerial photos of the area.

Plots of the profiles taken between 539+00 and 555+00 before and after the initial, 1st renourishment, and 2nd renourishment operations are provided on Figures 23 to 28 with rough estimates of the location of the coquina rock outcrops, taken from the USACE design drawings, indicated on each profile. The primary point of emphasis for these plots is to demonstrate the apparent direct burial of the northernmost coquina rock outcrop during fill placement at profiles 539+00 and 543+00 and secondary and ephemeral burial of the coquina rock outcrops south of the direct placement area.

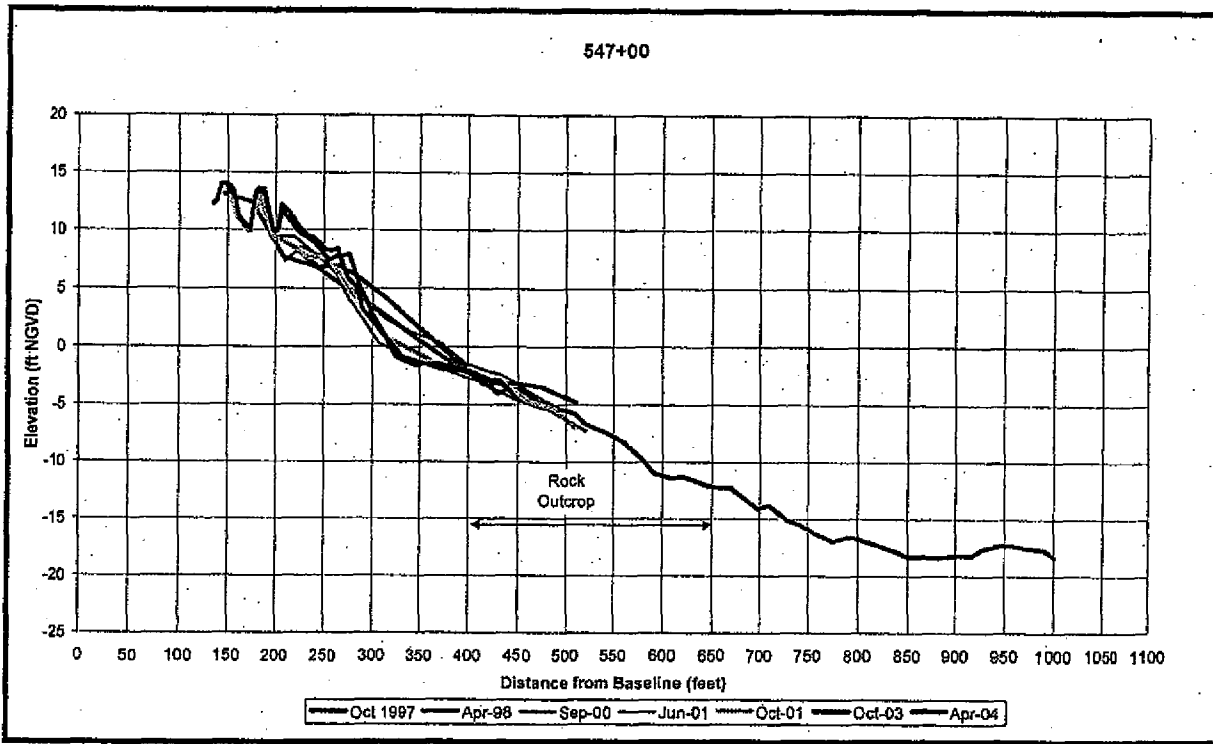


Figure 25. Offshore changes at Profile 547+00 south of direct fill area.

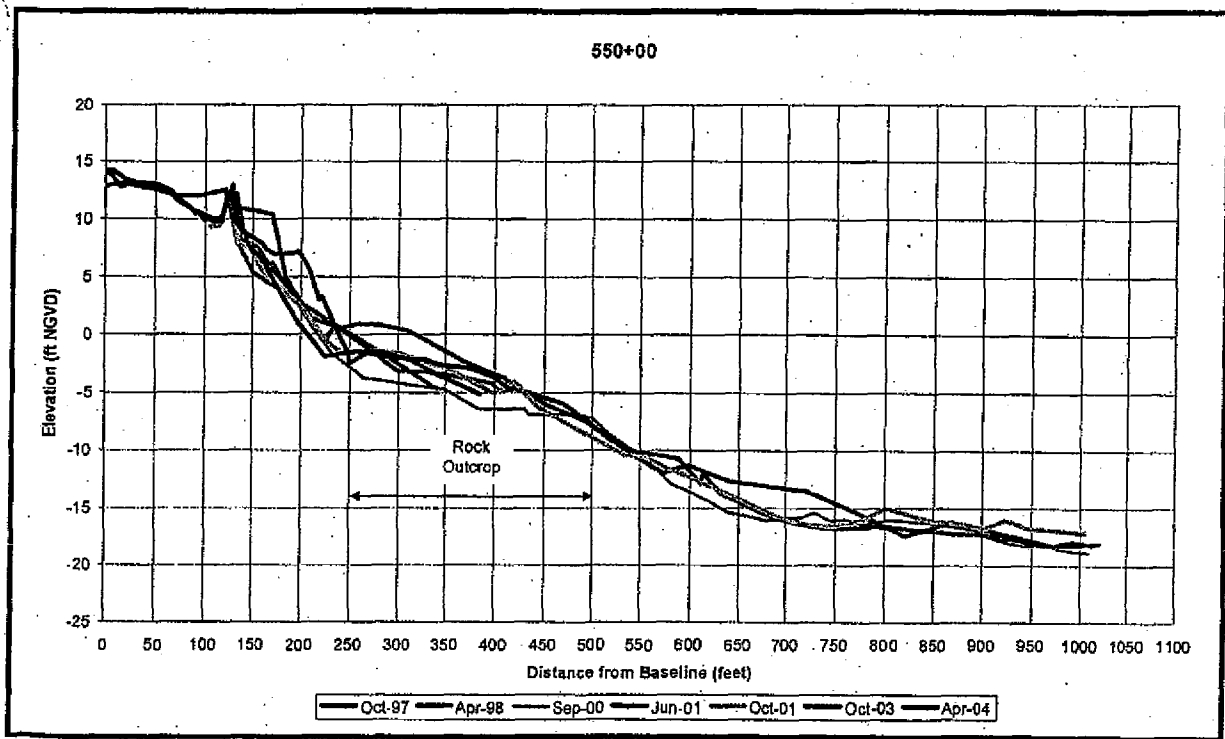


Figure 26. Offshore changes at Profile 550+00 south of direct fill area.

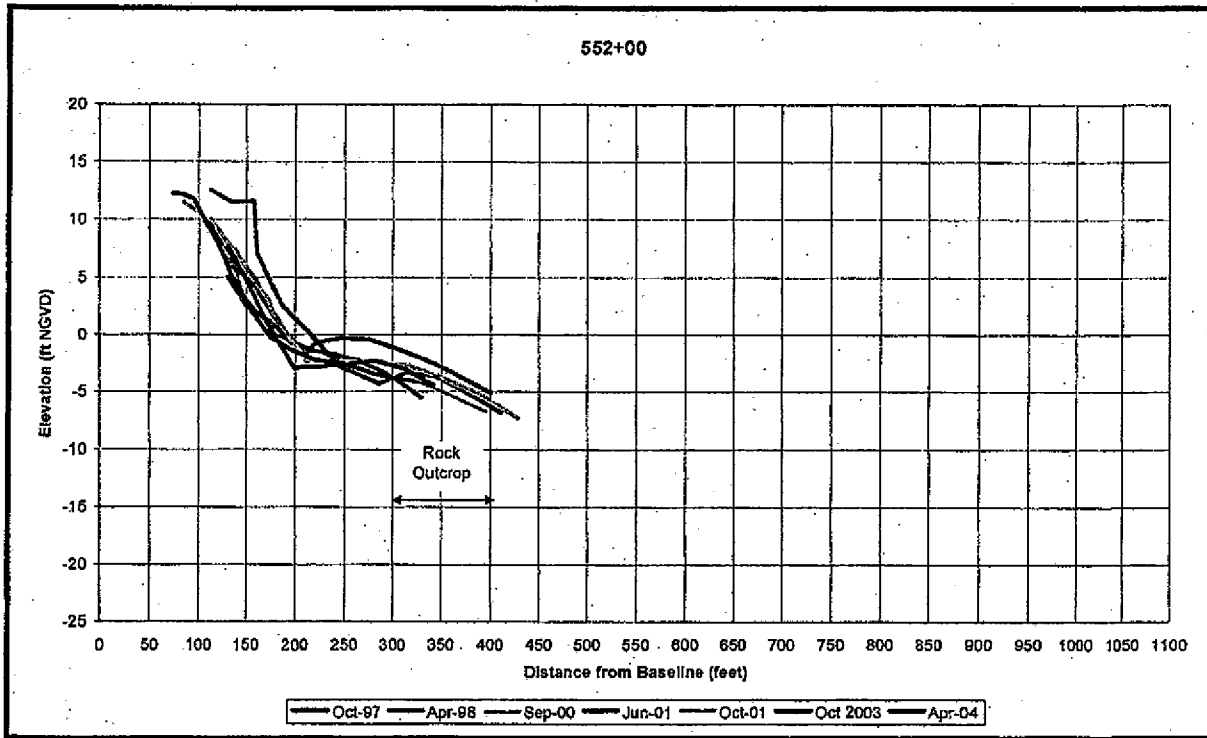


Figure 27. Offshore changes at Profile 552+00 south of direct fill area.

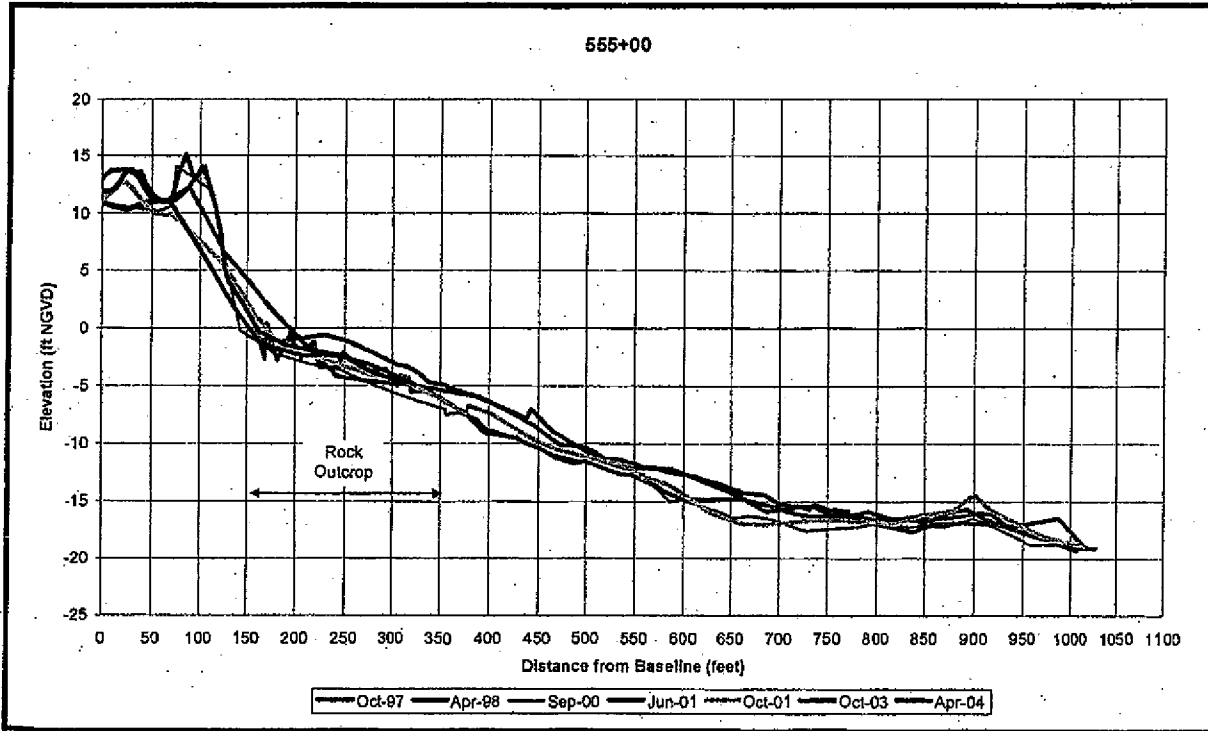


Figure 28. Offshore changes at Profile 555+00 south of direct fill area.

During each nourishment operation, the rock outcrops experienced some direct and indirect burial between profiles 539+00 and 543+00. The greatest amount of direct burial occurred during the 1st renourishment (June 2001 survey) which used material from the deepening of Wilmington Harbor. The material from the harbor deepening project was apparently finer than the material obtained from the offshore borrow area which resulted in rather flat fill slopes. The direct burial associated with the harbor material was short lived as indicated by the October 2001 survey which indicated considerable deepening of profiles 539+00 and 543+00 between the +5-foot and -5-foot NGVD depth contours. The initial fill and the 2nd renourishment profiles assumed much steeper slopes during placement and appeared to closed with the pre-fill profile in water depths around -5 feet NGVD, resulting in only minimal direct burial of the near shore coquina rock outcrops. Post-placement adjustments of material from the offshore borrow area (initial and 2nd renourishment) moved sediment seaward resulting in some indirect burial of the rock outcrops.

In the area south of the direct fill placement (profiles 547+00 to 555+00), offshore sediment transport into the apparent outcrop areas was not as extensive and was probably associated with normal fluctuations in the near shore bottom due to changes in wave and tide conditions. One exception appears to be the June 2001 survey where considerable change was observed generally between 0 NGVD and -10 feet NGVD. Again, the June 2001 profiles reflect changes associated with the finer fill material obtained from the Wilmington Harbor deepening project. With a high percentage of the material being displaced seaward during and immediately following placement, this material obviously spread south rather rapidly resulting in the observed near shore changes. As was the case for profiles 539+00 and 543+00, the near shore accumulation of material caused by the harbor material was essentially gone by October 2001. Similar responses south of the direct placement areas did not occur following the initial and 2nd renourishment due to the apparent coarseness of the fill material.

Summary of Impacts on the Coquina Rock Outcrops.

Construction and subsequent periodic nourishment of the Kure Beach project has had some direct and indirect impacts the near shore coquina rock outcrops. Direct burial of the rock outcrops appeared to be minimal when the coarser material from the offshore borrow area was used compared to the impacts associated with the Wilmington Harbor material. Even with the Wilmington Harbor material, the direct burial of the rock outcrops did not persist very long with most of the material removed by normal littoral transport processes within 4 months.

South of the direct placement area for the Kure Beach project, sediment transported off of the fill did not produce any significant indirect burial of the near shore rock outcrops as profiles 547+00 to 555+00 only experienced what appeared to be normal fluctuations. Again the one exception was following the 1st renourishment cycle, but this impact was of short duration.

Riggings Beach Nourishment Plan.

The behavior of the Kure Beach project and its impacts on the shoreline and beach south of the project area suggest beach nourishment could be used to provide some level of erosion protection

for the Riggings. While direct placement of a massive beach fill in front of the Riggings would not be practical due to high rates of erosion of the fill, a minimal beach fill, with a placement rate of 25 cubic yards/lineal foot, together with the addition of material to the south transition section of the Kure Beach project to act as a feeder beach, would appear to have the potential to provide a reasonable level of erosion protection for the Riggings. This relatively small beach fill would serve as a pilot or test project to determine the feasibility and effectiveness of the overall plan. Post project monitoring would be conducted to document the performance of the fill and determine if significant burial of the near shore coquina rock outcrops occur. In addition to the profile surveys, pre- and post-nourishment biological assessments of the rock outcrops would be performed by marine biologist.

Details of the pre- and post-construction monitoring program will be developed during the permitting process. In general, characterization of the coquina rock habitat would be accomplished by marine biologist trained in the procedures and methods of BEAMR (Benthic Ecological Assessment for Marginal Reefs) developed by Coastal Planning & Engineering. BEAMR involves a completed census of physical, abiotic, and biotic functional groups (parameters) within each sample quadrat established along geo-referenced transects.

The proposed beach fill would begin at profile 530+00 with the additional volume rate of placement gradually increasing from 0 to 25 cy/lf at station 545+00 (end of the Kure Beach transition fill). The fill would continue at 25 cy/lf between profiles 545+00 and 555+00 and then transition to 0 cy/lf at profile 560+00 located in front of the Fort Fisher picnic area. A typical cross-section of the proposed fill is shown in Figure 29 with the preliminary layout shown in Figure 30. The estimated total volume of the fill would be 50,000 cubic yards.

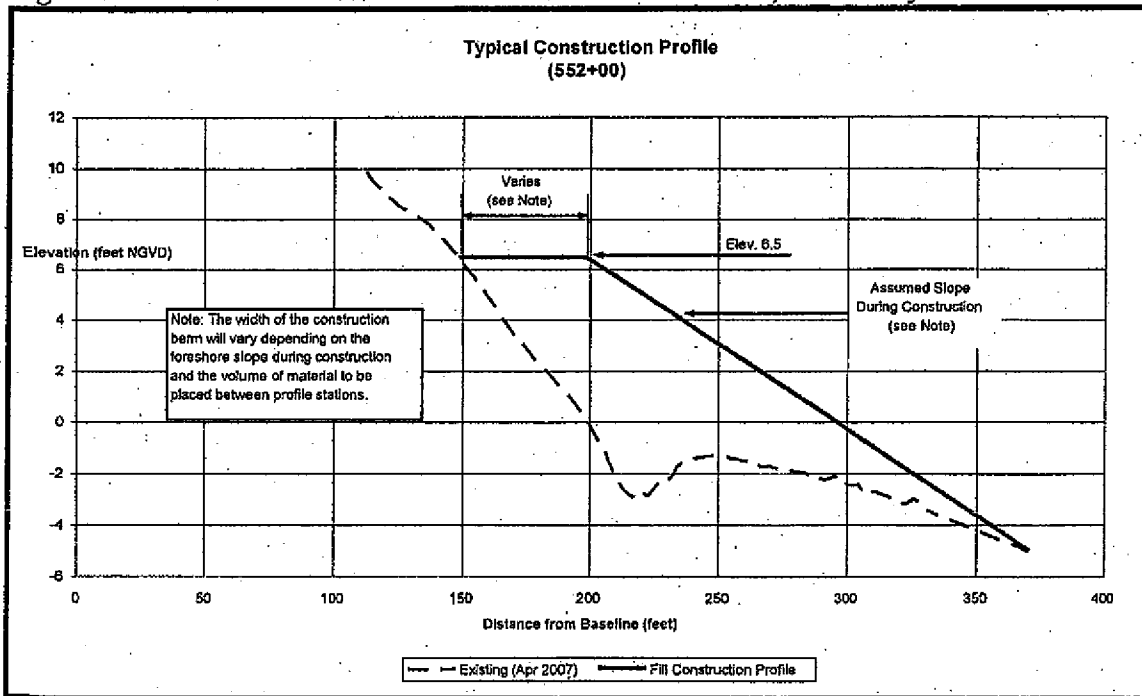


Figure 29. Typical cross-section proposed fill.



Figure 30. Preliminary beach fill plan for the Riggings Condominium.

Cost Estimate. Detailed cost estimates for the construction and pre- and post-construction monitoring have not been prepared at this time. Based on bids received for the 2007 Kure Beach renourishment, unit costs for the beach fill material could range from \$5.00/cubic yard to \$9.00/cubic yard. The Corps of Engineers estimate for the 2007 nourishment was \$4.60/cubic yard; however, the low bidder offered \$8.94/cubic yard. In this regard, the 2007 Kure Beach nourishment was one of three jobs included in the bid package, namely, Kure Beach, Ocean Isle, and Carolina Beach, so the costs for the Kure Beach portion may have been inordinately high. The average unit costs received for the nourishment operation, including the Corps of Engineers estimate, was approximately \$7.00/cubic yard. Accordingly, the cost for placing 50,000 cubic yards between profile 530+00 and 560+00 could range from \$250,000 to \$450,000. In addition, the Riggings HOA may have to pay for incremental mobilization and demobilization costs associated with the southward extension of the fill project.

Pre- and post-construction beach profile monitoring should not be very expensive and may well be covered by the Corps of Engineers Fort Fisher monitoring program. The significant monitoring costs would be associated with the biological monitoring of the coquina rock outcrop. Again, estimates of these costs cannot be made until input is provided from the various State and Federal resource agencies.

Predicted Fill Performance.

Placement of 25 cy/lf of fill would require a construction berm width of approximately 50 feet. Accordingly, the predicted performance of the fill is based on projected volumetric erosion rates of the fill out to -20 feet NGVD (Table 5). Based on these projected rates, the fill would apparently be gone in about one year. However, the rates given in Table 5 were developed without the benefit of the additional material placed on the south end of the Kure Beach project to serve as a feeder beach. The added influx of material off of the south end of the Kure Beach project should reduce the predicted volumetric erosion and prolong the life of the fill. At this preliminary stage of the plan development, the impact of the feeder beach material has not been addressed as this would require numerical modeling of the beach fill behavior which is beyond the scope of this preliminary design.

Summary.

Construction of a minimal beach fill along the shoreline fronting the Riggings Condominium combined with a feeder beach added to the south end of the Kure Beach project appears to offer some degree of erosion protection for the Riggings. The costs of providing the fill could approach \$500,000 with additional costs associated with pre- and post-construction monitoring.

There would be some impacts on the near shore coquina rock outcrops due to direct and indirect burial of these near shore features; however, the existing Kure Beach project is also having some impact on the rock outcrops. Should the Riggings proposal be permitted, pre- and post-construction monitoring of the coquina rock outcrops provide detailed information on the degree of the impacts of both the Kure Beach project and the proposed southward extension. The

results of the coquina rock monitoring would provide information on the biological characteristics and importance of the near shore rock formations that is not presently available.

Coquina Rock Outcrop Habitat Restoration – Kure Beach, NC

Prepared for Riggings Homeowners Association, Inc.

by

Coastal Planning & Engineering of NC, Inc.

The Riggings Condominium was constructed in 1985 near the boundary between the town of Kure Beach and the Fort Fisher State Historic Site (Figure 1). Erosion of the shoreline fronting the condominium became an immediate problem prompting the Riggings Homeowners Association (Riggings HOA) to obtain a permit from the State in 1985 to construct a sand bag revetment. Over the years, the Riggings HOA has sought and been granted permit extensions for the sand bag revetment.

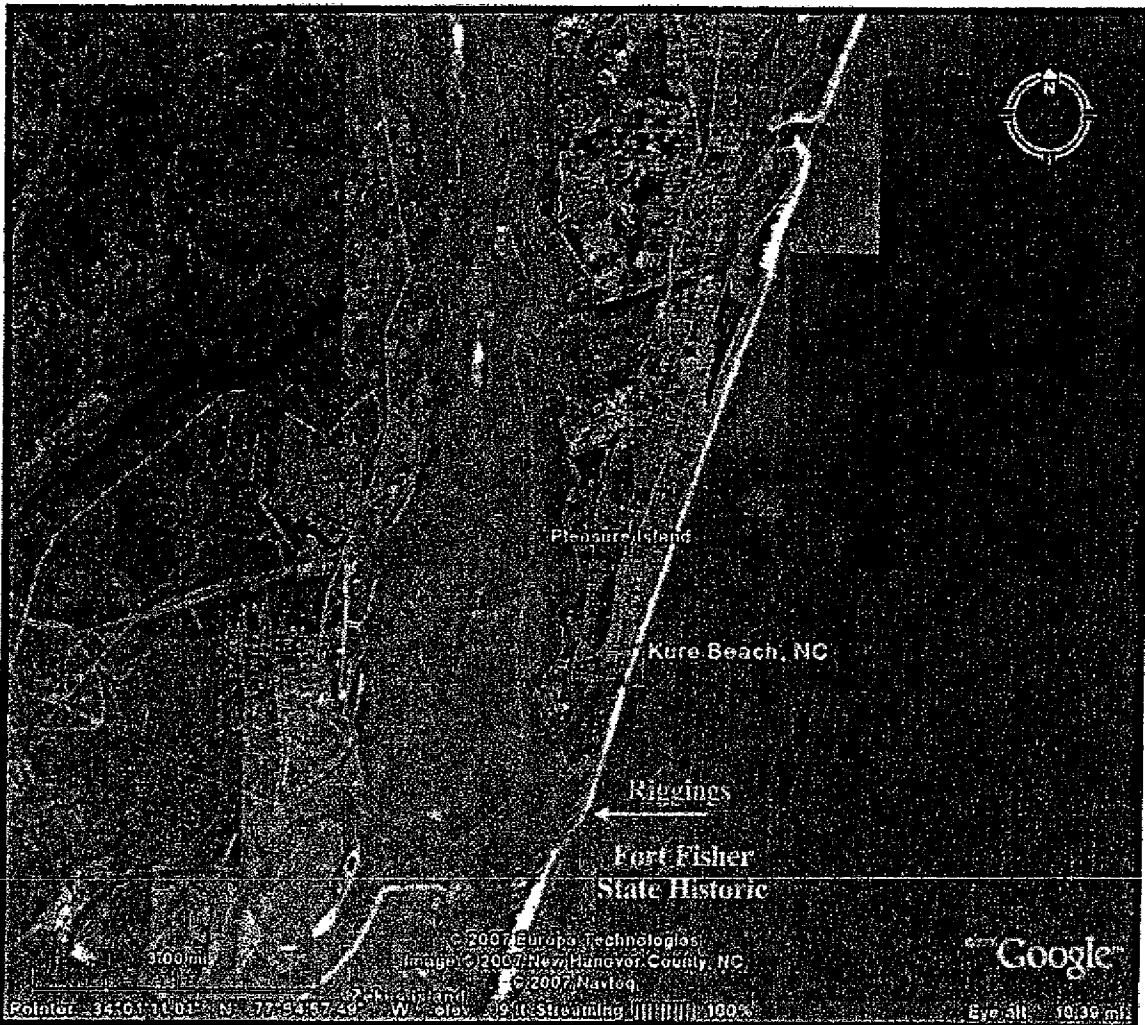


Figure 1. Location map.

The shoreline fronting the Riggings Condominium is unique as it contains an intertidal and subtidal coquina rock outcrop that extends from the beach into the surf zone. According to the State's Coastal Habitat Protection Plan⁽¹⁾, the outcrop "supports a diversity of organisms such as starfish, anemones, sea urchins, crabs, octopi, and numerous fish species." In addition to providing a unique habitat not found along other sections of the North Carolina coast, the coquina rock outcrop also has a major influence of shoreline processes in the area. Over the years, the coquina rock outcrop appears to have suffered some deterioration due in part to man's activities and the constant exposure to ocean waves, currents, and coastal storms.

Based on historical accounts, approximately 6,000 cubic yards of coquina rock was removed from the beach northeast of Fort Fisher around 1926⁽²⁾. The rock was used for road base along a section of US Highway 421 that passes through the area. Immediately following the removal of the coquina rock, the shoreline fronting Fort Fisher began to erode at an inordinate rate, receding approximately 280 feet between 1926 and 1931⁽²⁾. Erosion of the shoreline fronting the Fort Fisher State Historic Site continued, resulting in the loss of some of the remaining earthen mound fortifications. In 1996, a 3,040-foot long rubble mound revetment was constructed along the historic site shoreline to protect the remaining fortifications.

The erosion of the Fort Fisher shoreline eventually began to impact the shoreline north of the historic site exposing two coquina rock outcrops as shown on a 1956 aerial photo of the area (Figure 2). The southernmost outcrop effectively functioned as a groin for several years as evidence by the condition of the shoreline in 1963 (Figure 3). Between 1963 and 1985 (Figure 4), the southernmost outcrop appeared to diminish in size which lessened its influence on the shoreline to the north. In this regard, the coquina rock is very friable and is easily eroded by constant wave action, currents, and occasional coastal storms. As the shoreline north of the fort continue to erode, the second or northern outcrop began to have a greater influence on the shoreline by impounding material to the north. With the southern outcrop slowly decreasing in size, its ability to retain material also diminished. This combined with the entrapment of material north of the northern outcrop induced accelerated erosion of the shoreline fronting the Riggings Condominium.

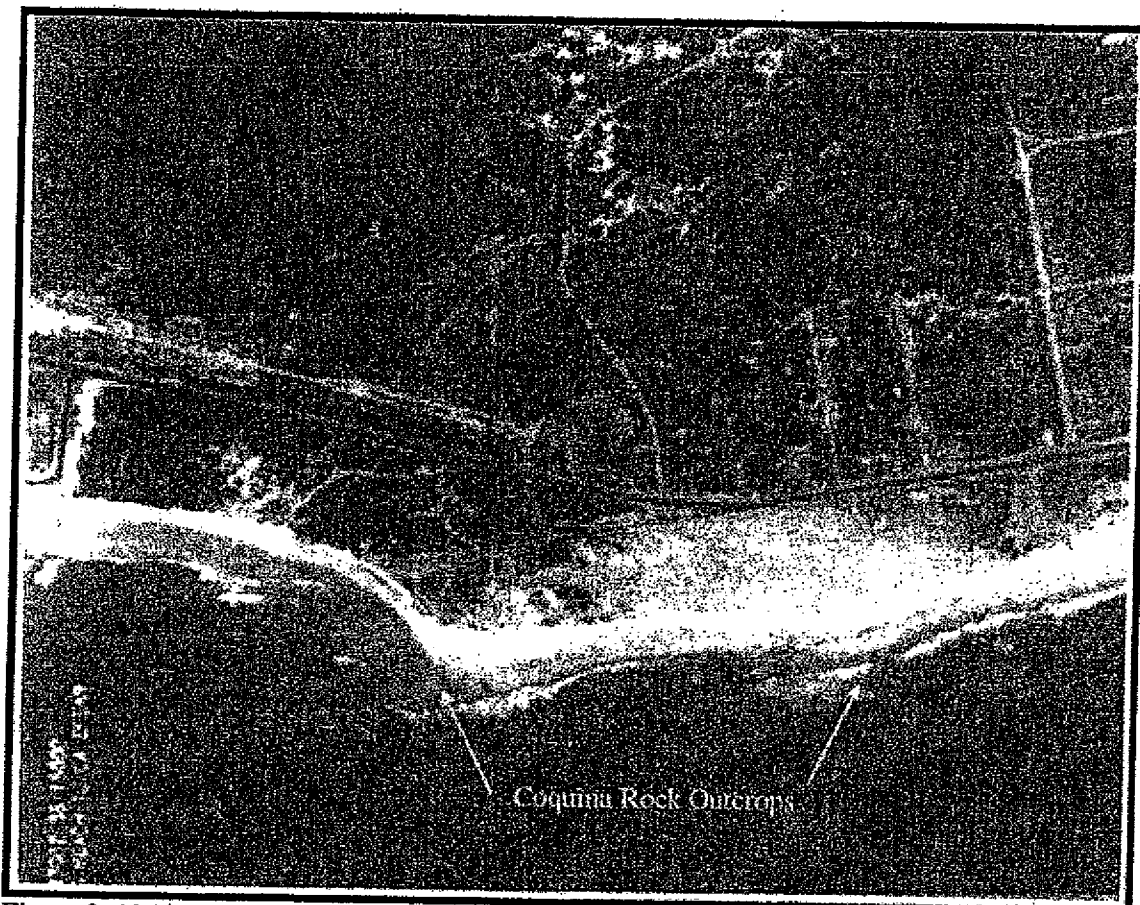


Figure 2. 1956 aerial photo. (Photo from US Army Corps of Engineers, Wilmington District).

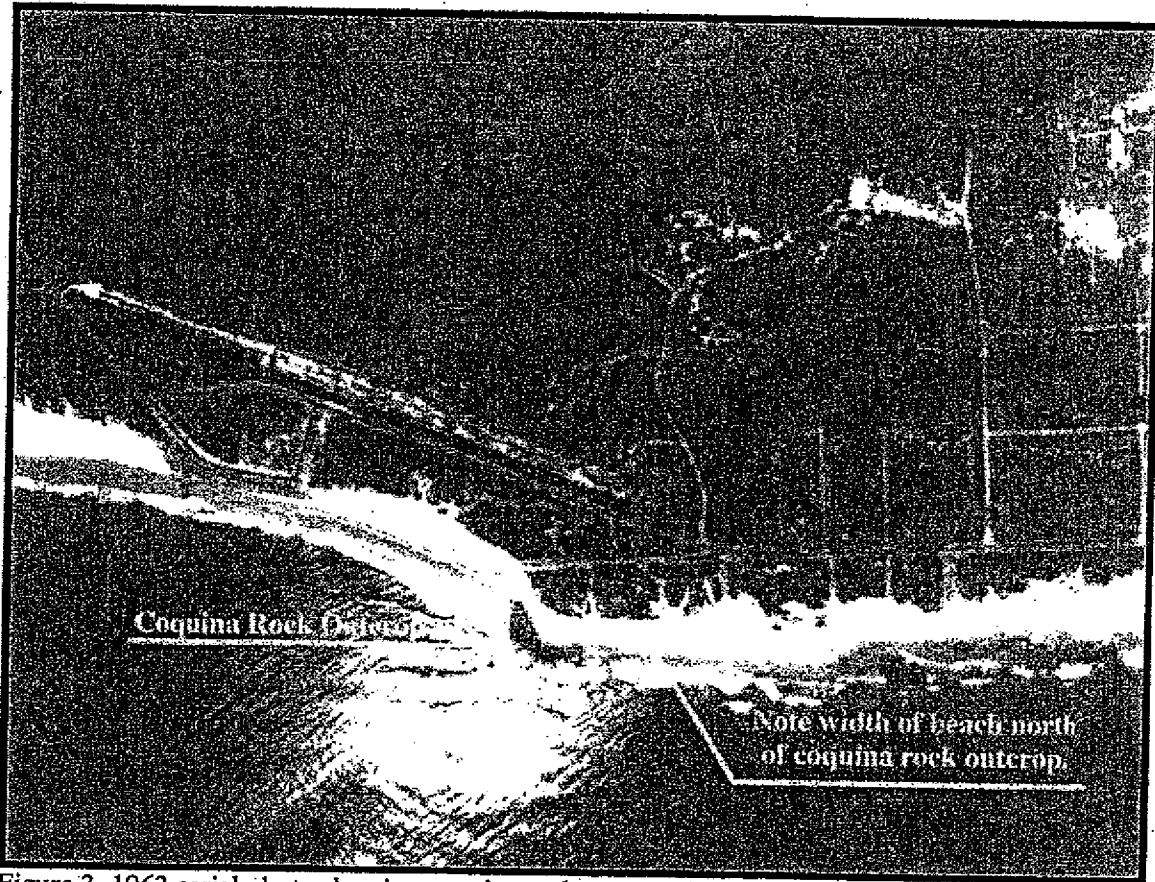


Figure 3. 1963 aerial photo showing coquina rock outcrop south of the Riggings Condominium property and relatively wide beach north of the outcrop. (Photo from US Army Corps of Engineers, Wilmington District).

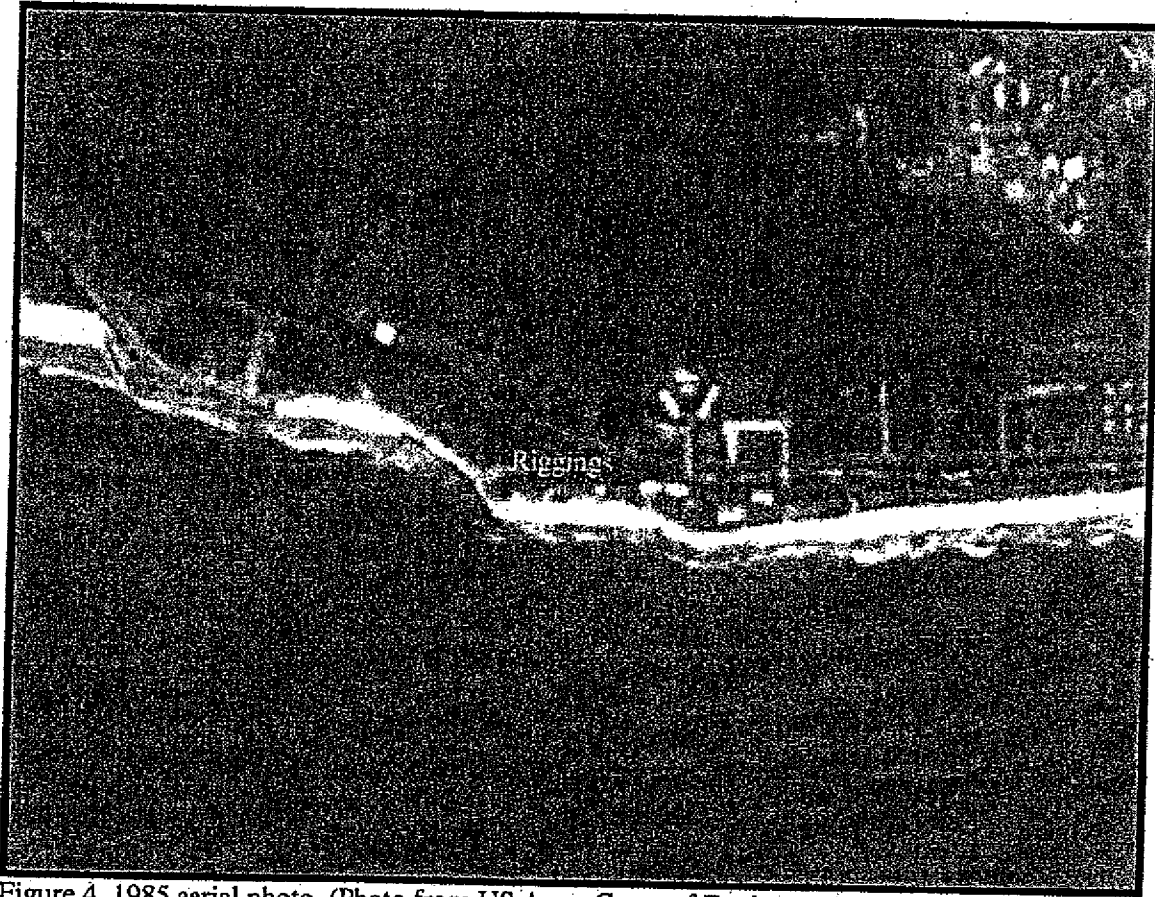


Figure 4. 1985 aerial photo. (Photo from US Army Corps of Engineers, Wilmington District).

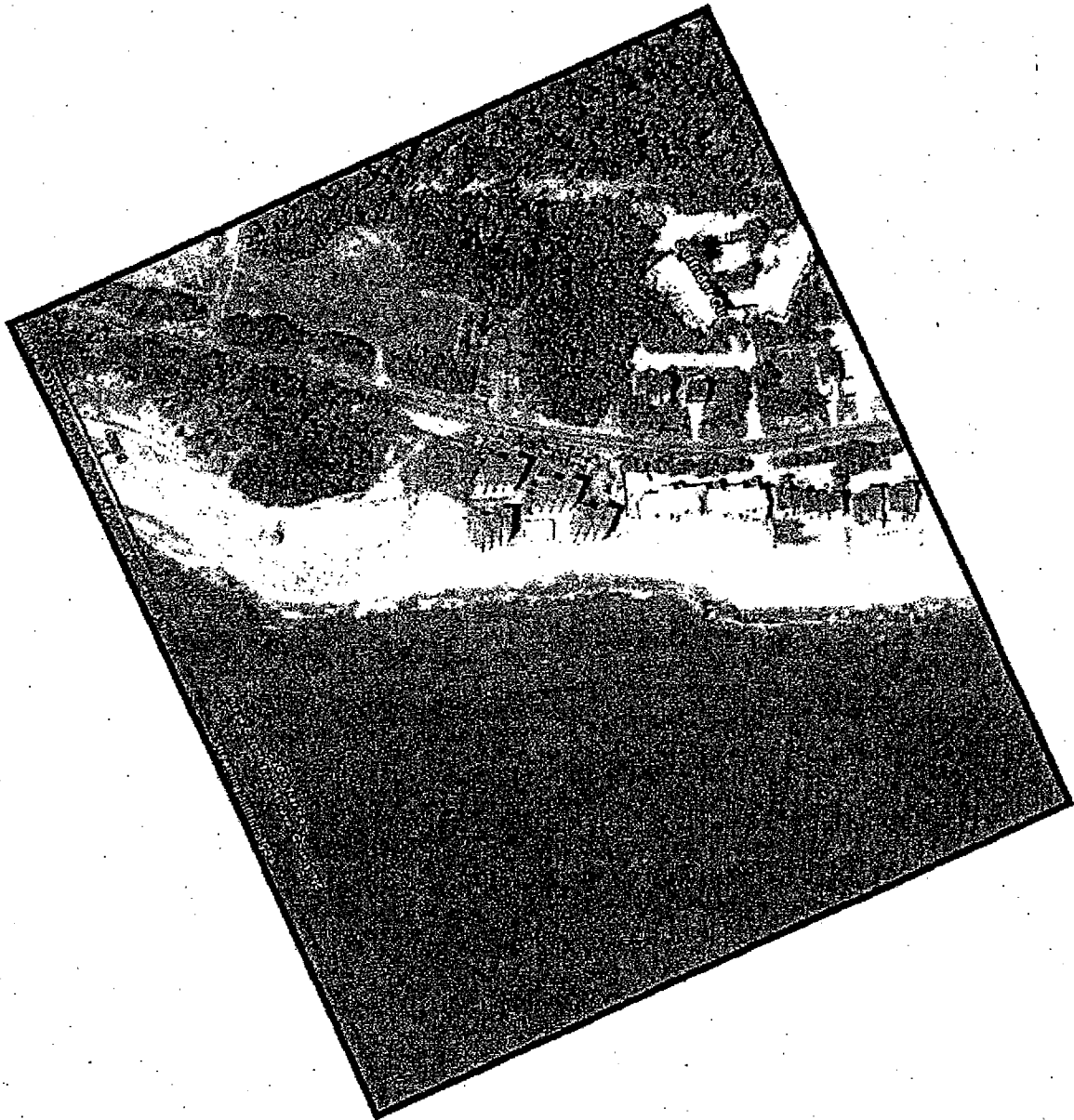
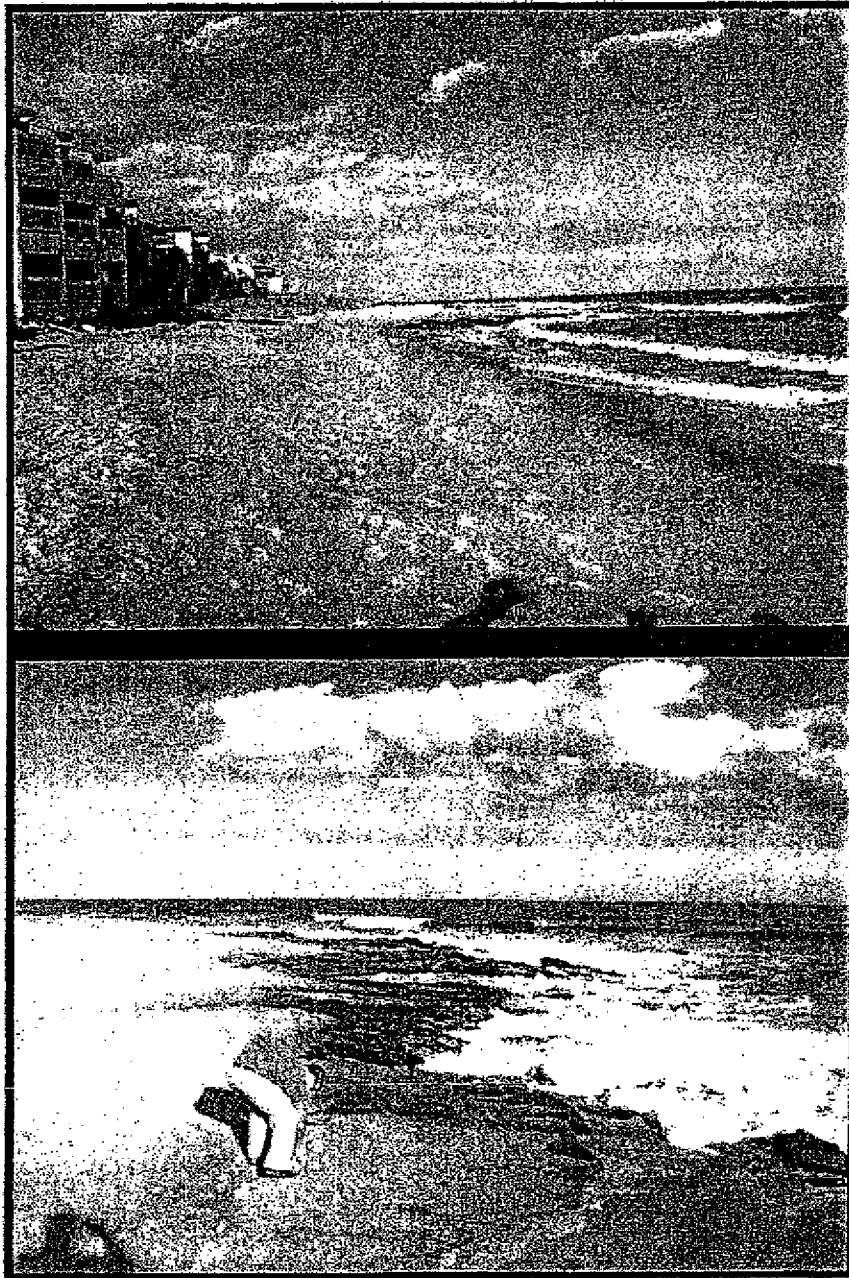


Figure 5. Existing shoreline condition. (Photo from Google Earth).

The current condition of the shoreline fronting the Riggings Condominium is shown on Figure 5. The rock outcrop south of the Riggings Condominium shown on Figure 5 appears to be considerably smaller than that shown on the 1963 photo (Figure 3) while the northern outcrop has become more prominent. Ground level photos of the northern outcrop, taken on December 12, 2006, are provided on Figure 6 while a view looking south toward the Fort Fisher revetment is provided on Figure 7. The ground level photos of the northern outcrop support its groin-like characteristics. Also, there is clear evidence that this outcrop is also undergoing erosion as large

chunks of rock were observed along the beach fronting the Riggings Condominium. To the south of the Riggings Condominium, the rubble mound revetment protecting the Fort Fisher State Historic Site now extends into the surf zone during high tide as a result of continued shoreline erosion fronting the Riggings Condominium and appears to be exerting groin-like influences on the shoreline.



project would take place along the shoreline located between the two existing outcrops as shown on Figure 8. As a matter of reference, the distance between the two rock outcrops is approximately 650 feet while the length of the proposed artificial reef would be around 250 feet, the width of the Riggings Condominium property.

The proposed reef shown on Figure 8 is only conceptual. Detailed design and development of the habitat restoration plan will consider a wide range of possible reef configurations, lengths, and locations in order to develop a project that would provide the greatest level of environmental enhancement and protection to the existing rock outcrops.

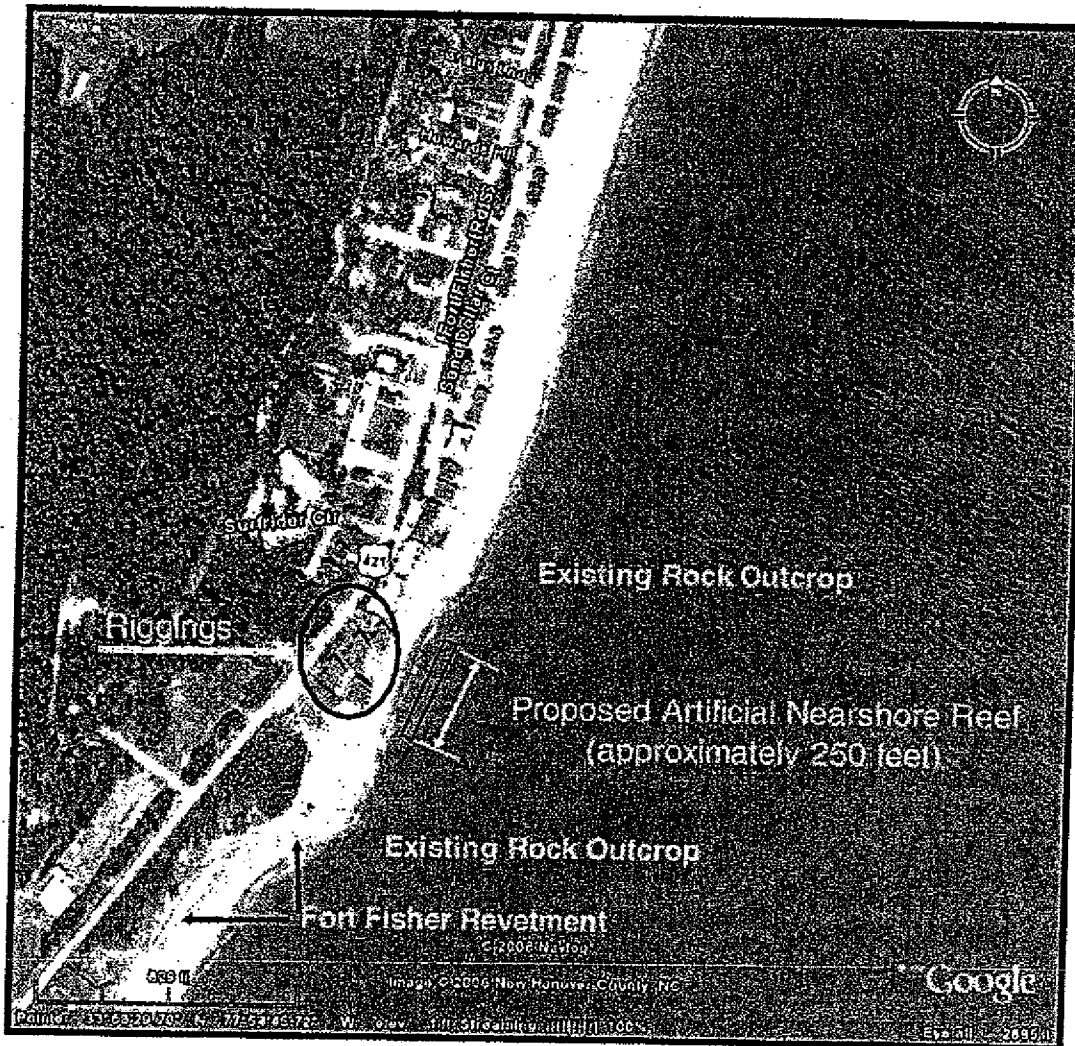


Figure 8. Concept plan, coquina rock restoration.

Detailed development of the habitat restoration plan will require a considerable amount of geologic, engineering, and environmental investigations. Of prime consideration is the installation of artificial units that would be fully compatible with the existing rock outcrop and provide a habitat comparable to the natural rock outcrops. Stability considerations will also be paramount to assure that the artificial units remain in place during severe storm conditions. Steps that would be taken to fully develop the habitat restoration project are presented later.

While there are a multitude of possible artificial units that could be used to construct the artificial nearshore reef such as marine limestone, concrete slabs, granite units, etc., the present concept is based on using a propriety unit know as Reef Balls™. A photograph of typical Reef Balls, which are made of concrete, is provided on Figure 9. Reef Balls™ come in various sizes as shown in Table 1 which was copied from the Reef Ball Foundation website (<http://www.artificialreefs.org/index.html>).

Table 1
Reef Ball™ Specifications

Style	Width	Height	Weight	Concrete Volume	Surface Area	# Holes
Goliath	6 feet (1.83 m)	5 feet (1.52 m)	4,000-6,000 lbs (1,818-2,722 kg)	1.5 yd ³ (1.19 m ³)	230 ft ² (21.4 m ²)	25-40
Super Ball	5 feet (1.52 m)	4.5 feet (1.37 m)	4,000-6,000 lbs (1,818-2,722 kg)	1.5 yd ³ (1.19 m ³)	190 ft ² (17.6 m ²)	22-34
Ultra Ball	5 feet (1.52 m)	4 feet (1.22 m)	3,500-4,500 lbs (1,591-2,045 kg)	1.2 yd ³ (0.91 m ³)	150 ft ² (13.9 m ²)	22-34
Reef Ball	4 feet (1.22 m)	3 feet (0.91 m)	3,000-4,200 lbs (1,364-1,909 kg)	0.75 yd ³ (0.57 m ³)	110 ft ² (10.2 m ²)	22-34
Pallet Ball	4 feet (1.22 m)	2.9 feet (0.88 m)	2,500-2,200 lbs (1,134-1,000 kg)	0.53 yd ³ (0.40 m ³)	75 ft ² (7.0 m ²)	22-34
Bay Ball	3 feet (0.91 m)	2 feet (0.61 m)	3,750-5,500 lbs (1,700-2,491 kg)	1.0 yd ³ (0.76 m ³)	110 ft ² (10.2 m ²)	22-34
Mini-Bay Ball	2.5 feet (0.76 m)	1.5 feet (0.46 m)	150-200 lbs (68-91 kg)	less than 50 lb bag		6-10
Co-Pro	2 feet (0.61 m)	1.5 feet (0.46 m)	80-130 lbs (36-59 kg)	less than 2 50 lb bags		6-10
Oyster	1.5 feet (0.46 m)	1 foot (0.30 m)	30-45 lbs (14-20 kg)	less than 1 50 lb bag		6-8

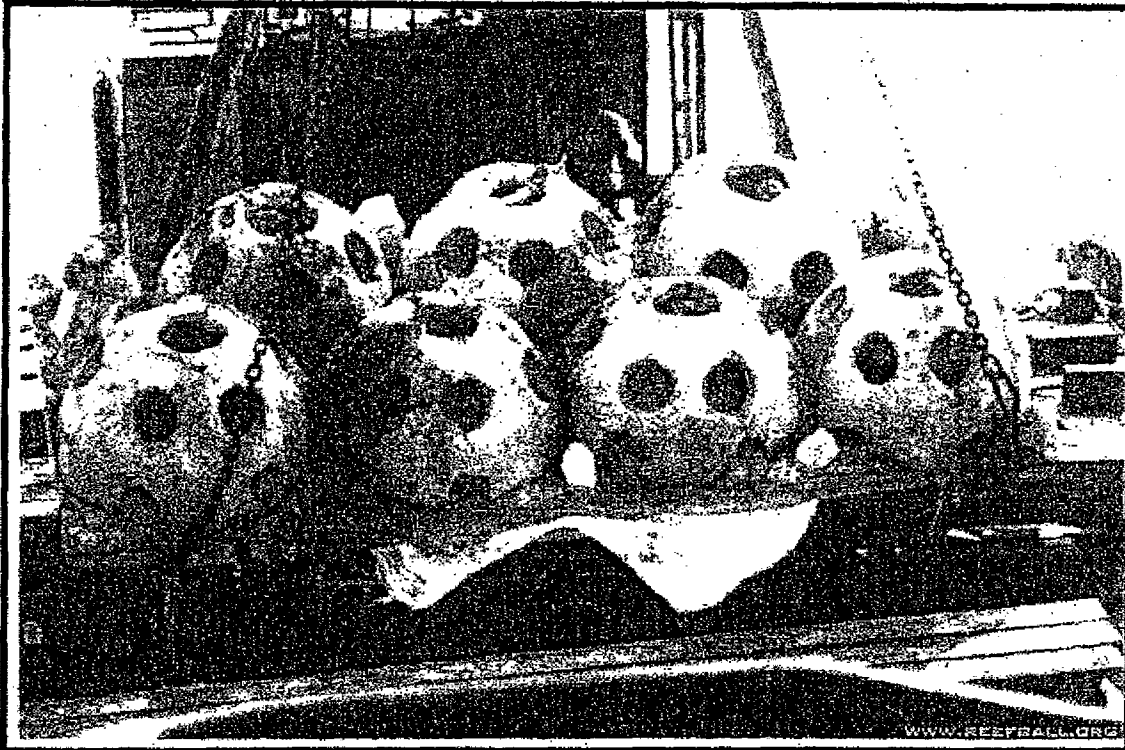


Figure 9. Reef Balls™ ready for installation (source: <http://www.artificialreefs.org/index.html>).

Due to stability considerations, the style of the Reef Balls needed for the restoration project could range from the Goliath (6 feet wide x 5 feet high) to the Reef Ball (6 feet wide x 3.8 feet high). The crest elevation of the artificial reef would be at or just below mean tide level. Accordingly, the reef would be constructed in water depths of between 4 and 5 feet relative to mean tide level.

Typical installations of similar reefs have included 3 to 5 rows of reef balls resulting in widths of the order of 18 to 30 feet. Two examples of nearshore reefs constructed in water depths similar to conditions existing offshore of the Riggings Condominium are shown on Figures 10 and 11. In both instances, the artificial reefs were situated approximately 100 to 110 feet seaward of the pre-placement shoreline. Depending on the final length of the artificial reef and the number of rows of Reef Balls, between 125 and 150 Reef Balls™ would be needed to construct the artificial reef along 250 feet of shoreline immediately offshore of the Riggings Condominium. Costs for the nearshore reef would depend on its size and environmental site conditions. Information in an internet brochure by The Reef Company⁽⁵⁾ gives a range of costs from \$200,000 to \$1,000,000 for a 100 meter (328-foot) long nearshore artificial reef.

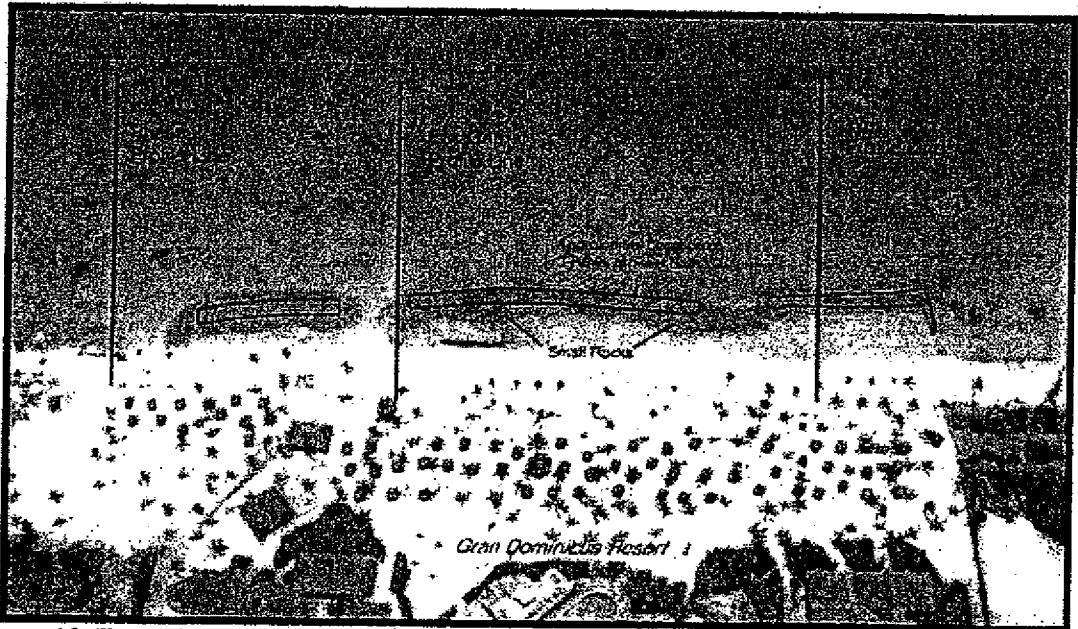


Figure 10. Example of nearshore reef constructed with Reef Balls™, Gran Dominicus Beach Resort, southern shore of the Dominican Republic⁽³⁾.

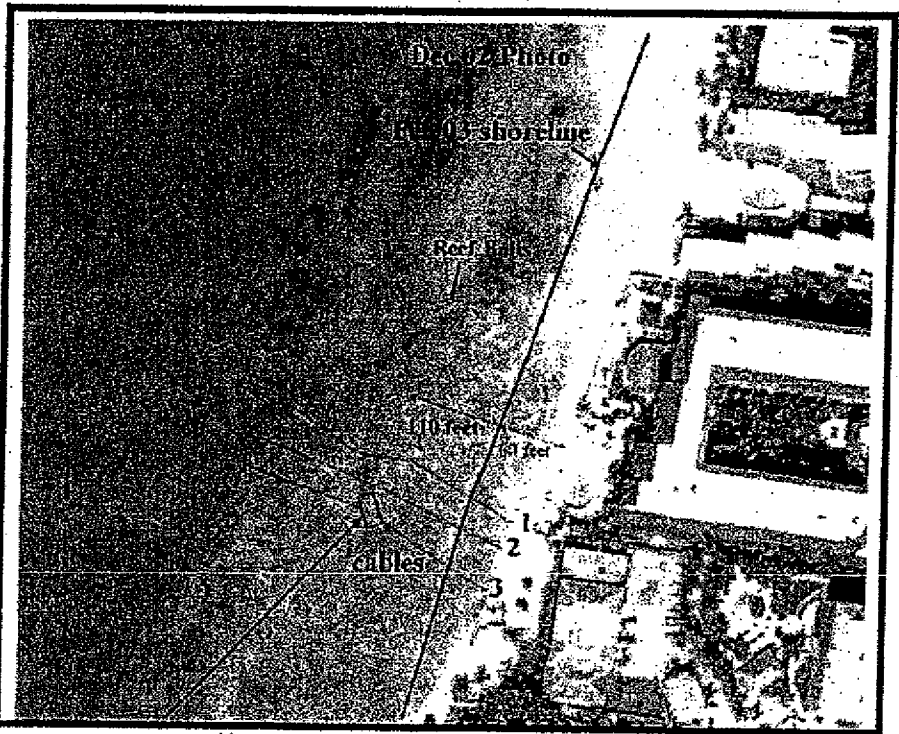


Figure 11. Example of nearshore reef constructed with Reef Balls™, Marriott Resort, Grand Cayman⁽⁴⁾.

Engineering and environmental considerations that would be undertaken to fully develop the coquina rock restoration plan include but are not necessarily limited to the following:

1. Meetings with various state and federal resource agencies to obtain their input, concerns, and suggestions regarding the design of the artificial reef and its potential positive and negative impacts.
2. Hydrographic and topographic surveys of the area situated between the two outcrops. The topographic survey would extend landward to the seaward face of the structures while the hydrographic survey would extend seaward to approximately the 25 foot depth contour measured relative to the North American Vertical Datum (NAVD). If conditions allow, the hydrographic survey would be conducted using multibeam technology in order to capture the 3-dimensional characteristics of the rock outcrop below the water surface.
3. Subsurface investigations to determine the thickness of the rock outcrops and other foundation conditions required for the design of the artificial reef.
4. Assessment of wave and water level characteristics for both normal and storm conditions. This information would be used to determine the stability requirements of the artificial reef units (natural or man-made) as well as the wave energy transmission through and over the reef.
5. Evaluation of changes in the size of the coquina rock outcrops and changes in the shoreline over time using aerial photos.
6. Evaluation of the potential impacts of the reef on sediment transport upcoast, downcoast, and immediately landward of the reef. This evaluation would be used to predict possible negative and positive shoreline impacts due to the reef.
7. Documentation of the flora and fauna using or associated with the rock outcrops.

References

1. North Carolina Coastal Habitat Protection Plan, Michael W. Street, Anne S. Deaton, William S. Chappell, and peter D. Mooreside, North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries, Morehead City, NC, July 1, 2004.
2. To Great and Useful Purpose-A History of the Wilmington District, U.S. Army Corps of Engineers, Ronald B. Hartzler.
3. Appendix: Survey data and Beach Profile Graphs for the Reef Ball™ Artificial Reef Submerged Breakwater at Gran Dominicus Beach Resort, Near Bayahibe, Dominican Republic, Dr. Lee E. Harris, Florida Institute of Technology, Melbourne, Florida, May 2001.
4. Status Report for the Submerged Reef Ball™ Artificial Reef Submerged Breakwater Beach Stabilization Project for the Grand Cayman Marriott Hotel, Dr. Lee E. Harris, Florida Institute of Technology, Melbourne, Florida, August 2003.
5. The Reef Company Internet Brochure, Reef Ball Development Group, Ltd, <http://www.reefbeach.com/internetbrochurereefbeachcompany.htm>

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, <i>ex rel.</i> ,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)

AFFIDAVIT OF TOM JARRETT

TOM JARRETT, being first duly sworn, deposes and says:

I am Tom Jarrett, a former member of the United States Army Corps of Engineers, and I possess unique knowledge related to the Riggings Condominiums. I am over the age of eighteen (18) and competent to testify to the matters contained herein. It is my testimony 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.

AND FURTHER THE DEPONENT SAYETH NOT.

This the 20 day of September, 2007.

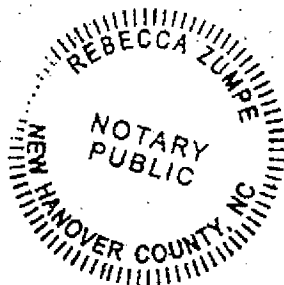

TOM JARRETT

Sworn to and subscribed before me

This the 20th day of September, 2007.


NOTARY PUBLIC

My Commission Expires: 5/29/2011



STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, <i>ex rel.</i> ,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)

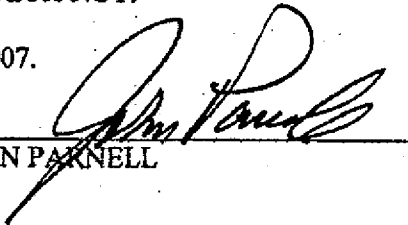
AFFIDAVIT OF JOHN PARNELL

JOHN PARNELL, being first duly sworn, deposes and says:

I am John Parnell and have been a resident of the Riggings Condominiums. I am over the age of eighteen (18) and competent to testify to the matters contained herein. At a Riggings Homeowners' Association Meeting in 2006, I voted "No" towards accepting the FEMA pre-disaster grant because I lacked the financial capability to provide the funds necessary for relocation.

AND FURTHER THE DEPONENT SAYETH NOT.

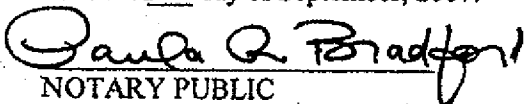
This the 21 day of September, 2007.



JOHN PARNELL

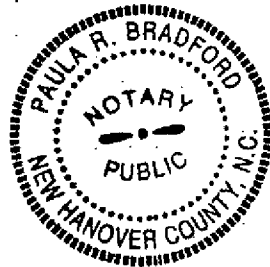
Sworn to and subscribed before me

This the 21 day of September, 2007.



NOTARY PUBLIC

My Commission Expires: 12-18-07



STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, <i>ex rel.</i> ,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)

AFFIDAVIT OF PATTY FOREST

PATTY FOREST, being first duly sworn, deposes and says:

I am Patty Forest and have been a resident of the Riggings Condominiums since they were constructed. I am over the age of eighteen (18) and competent to testify to the matters contained herein. At a Riggings Homeowners' Association Meeting in 2006, I voted "No" towards accepting the FEMA pre-disaster grant because I lacked the financial capability to provide the funds necessary for relocation.

AND FURTHER THE DEPONENT SAYETH NOT.

This the 17 day of September, 2007.

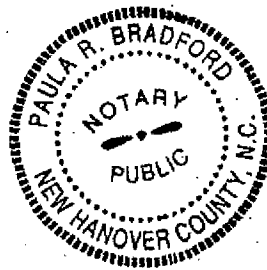
Patty Forest
PATTY FOREST

Sworn to and subscribed before me

This the 17 day of September, 2007.

Paula R. Bradford
NOTARY PUBLIC

My Commission Expires: 12-18-07



STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, <i>ex rel.</i> ,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)

AFFIDAVIT OF SANDY IEMMA

SANDY IEMMA, being first duly sworn, deposes and says:

I am Sandy Iemma and have been an owner of the Riggings Condominiums since they were constructed. I am over the age of eighteen (18) and competent to testify to the matters contained herein. At a Riggings Homeowners' Association Meeting in 2006, I voted "No" towards accepting the FEMA pre-disaster grant because I lacked the financial capability to provide the funds necessary for relocation.

AND FURTHER THE DEPONENT SAYETH NOT.

This the 17th day of September, 2007.

Sandy Iemma
SANDY IEMMA

Sworn to and subscribed before me

This the 17th day of September, 2007.

Alycia Mann
NOTARY PUBLIC

My Commission Expires: _____

My Commission Expires 11-27-2010



**STAFF RECOMMENDATION
ATTACHMENT E**

Other Exhibits

Including:

- July 10, 2006 letter from DCM to Petitioner, with attachments
- August 15, 2006 NOV letter from DCM to Petitioner
- September 18, 2006 CNOV letter from DCM to Petitioner
- CRC's Final Order for Variance 05-02
- CRC's Final Order for Variance 03-06
- CRC's Final Order for Variance 01-15
- CRC's Final Order for Variance 00-10
- Information from the Coastal Habitat Protection Plan, Hard Bottom Chapter



North Carolina Department of Environment and Natural Resources
Division of Coastal Management

Michael F. Easley, Governor

Charles S. Jones Director

William G. Ross Jr., Secretary

July 10, 2006

CERTIFIED MAIL # 7004 2890 0002 3425 1661
RETURN RECEIPT REQUESTED

Ms. Jean Cashion, President
Riggings Homeowners' Association
1437 Fort Fisher Blvd.
Kure Beach, North Carolina 28449

Re: Removal of Sandbags
Riggings Condominiums
New Hanover County

Dear Ms. Cashion:

In July 2004, the Town of Kure Beach was awarded a \$3.6 million dollar FEMA grant to acquire the current site of the Riggings Condominiums once the buildings are relocated across NC Highway 421. The grant included approximately million dollars from FEMA and a \$904,406.00 local in-kind match, which was to be achieved by the Riggings' donation of its oceanfront parcel after the condominiums were relocated. On February 14, 2005, the Riggings Homeowners' Association filed a Variance Request with the Director, Division of Coastal Management to allow the existing sandbags to remain in place until the condominiums could be relocated across the street. As you are aware, this was the fourth such Variance Request by the Riggings Homeowners' Association for extensions of the deadlines for removal of the sandbags, which have been in place since 1985.

The North Carolina Coastal Resources Commission (CRC) heard the Petition for Variance by the Riggings Homeowners' Association on April 8, 2005 in Morehead City, North Carolina. The CRC granted the variance from T15A NCAC 7H.1705(a)(7) in a Final Order dated April 25, 2005, signed by Courtney Hackney, Chairman of the CRC. The Final Order allowed the sandbags to remain in place until the FEMA grant expired and required the Riggings Homeowners' Association to remove the sandbags prior to the expiration of the grant.

On May 1, 2006, the Riggings Homeowners' Association notified the Town of Kure Beach that twenty four homeowners of the Riggings voted "No" toward accepting the FEMA pre-disaster grant and that legal issues regarding transfer of deeds, financial issues, time and various other factors have made acceptance of the grant impossible for many homeowners.

On May 17, 2006, Mr. Tim Fuller, Mayor, Town of Kure Beach, notified the N.C. Division of Emergency Management (NCEM) that the Town had been informed by the Board of Directors of the Riggings Homeowners' Association that the Homeowners' Association had not gotten sufficient voluntary participation to fulfill the terms of the FEMA grant to relocate the Riggings and was therefore unable to continue with the grant. The Town of Kure Beach, as agent for the grant, requested that the grant be terminated and that funds be made available to other applicants or programs.

Ms. Jean Cashion, President
Riggings Homeowners' Association
7/10, 2006
Page Two


On June 20, 2006, Mr. Chris Crew, State Hazard Mitigation Officer with the N.C. Division of Emergency Management, notified the Division of Coastal Management that the grant had been terminated. Mr. Crew stated that notwithstanding the June 30, 2007 expiration date of the grant agreement between Kure Beach and NCEM, the grant would be closed out effective June 1, 2006.

This Office has recently received a request from Mr. Michael Bledsoe, Sr., Acting Property Manager for the Riggings, to replace additional sandbags which would supplement an earlier authorization given by this office on April 17, 2006, to repair 15 sandbags damaged by Hurricane Ophelia.

This letter is to notify you that all existing sandbags located at the Riggings Condominium site must now be removed. The requirement for the removal of the sandbags is based on the following: 1) the conditions of the CRC Final Order dated April 25, 2005 required that the sandbags be removed prior to the expiration of the FEMA grant; 2) the FEMA grant was terminated by the NCEM, at the request of the Town of Kure Beach, acting as agent for the Riggings Homeowners' Association; and 3) the FEMA grant expired on June 1, 2006, when it was officially closed out by NCEM. All existing sandbags must be removed within 30 days of receipt of this letter to avoid a Notice of Violation, civil penalties and/or an injunction. This letter is also to notify you that because the time period for the sandbags remaining in place has expired, no additional sandbags may be installed. Please keep in mind that the requirement to remove the sandbags does not eliminate your ability to protect the threatened structures by the creation of protective sand dunes pursuant to N.C.G.S. § 113A-103 (5)(b)(5).

The attached copies of the above-mentioned documents and letters for your convenience. Please call me at (910) 796-7266 if you have questions concerning this matter.

Sincerely,



Jim Gregson
District Manager

ENCLOSURES

cc: Charles Jones, DCM
Ted Tyndall, DCM
Jill Hickey, DOJ
Christine Goebel, DOJ
James E. Wallace (Registered Agent, Riggings Homeowners, Inc.)

107

127 Cardinal Drive Extension, Wilmington, North Carolina 28405-3845
Phone: 910-910-796-7215 Fax: 910-395-3964 Internet: www.nccoastmanagement.net

The Riggings Home Owners Association
1437 Fort Fisher Blvd.
P.O. Box 157
Kure Beach, NC 28449

RECEIVED MAY 10 2006

May 1, 2006

TO: Mayor Tim Fuller
Town of Kure Beach Commissioners
Stacey Fuller, Mitigation Specialist

FROM: Jean Cashion, President of The Riggings HOA *Jean Cashion*

RE: FEMA Grant for the Riggings

I am writing to let you know that twenty four homeowners of the Riggings voted "No" toward accepting the FEMA pre-disaster grant. There were also ten homeowners who were either absent or failed to turn in their proxy for the meeting. I, as well as, our entire board of directors and homeowners appreciate the many hours of time spent working on our behalf regarding the grant. Unfortunately legal issues regarding transfer of deeds, financial issues, time, and various other factors have made acceptance of the grant impossible for many homeowners.

We are very well aware of the serious problem of erosion and will continue to work toward a workable and acceptable solution. We also look forward to working with Mayor Fuller and Commissioners for the Town of Kure Beach as we move forward to solve our problems. Words can only convey a portion of the gratitude that we feel for the help that we have received from all of you. Kure Beach is indeed a most wonderful place to live.

Thank you for your help and please call me at 919-776-7019, if you have any questions.



TOWN OF KURE BEACH

117 SETTLERS LANE • POST OFFICE BOX 3 • KURE BEACH, NORTH CAROLINA 28449
TELEPHONE (910) 458-8216 • FAX (910) 458-7421

May 17, 2006

RECEIVED JUN 01 2006

Ms. Stacy Fuller
N.C. Department of Crime Control and Public Safety
Division of Emergency Management
1830 B Tillery Place
Raleigh, N.C. 27604

Subject: FEMA Pre-Disaster Mitigation Grant
The Riggings, Kure Beach, N.C.

Dear Ms. Fuller:

We have been informed by the Board of Directors of the Riggings Homeowner's Association that they have not gotten sufficient voluntary participation to fulfill the terms of the FEMA grant to relocate the Riggings and are therefore unable to continue with the grant.

The Town of Kure Beach, as agent for the grant, hereby requests that you terminate this grant and make the funds available to other applicants or programs.

Thank you for all your help on this project. Everyone involved made a great effort to make this a successful example of pre-disaster mitigation. We look forward to working with you again in the future.

Sincerely,
Town of Kure Beach

Tim Fuller
Mayor

cc: Ms. Mary Ellen Stevens-Simmons, Office of Congressman Mike McIntyre
Ms. Jean Cashion, Riggings Homeowner's Association



North Carolina Department of Crime Control and Public Safety
Division of Emergency Management

Michael F. Easley, Governor
Bryan E. Beatty, Secretary

H. Douglas Hoell, Jr., Director

June 20, 2006

Jim Gregson
NC Division of Coastal Management
127 Cardinal Drive
Wilmington NC 28504

RE: FEMA Pre-Disaster Mitigation Grant # PDM-C-PJ-04-NC-2003-0001
Town of Kure Beach, NC acquisition and demolition of Riggings Condominiums

Mr. Gregson:

Per our telephone conversation, this letter will confirm that the above referenced grant has been terminated. Pursuant to the terms of the grant agreement between NCEM and the Town of Kure Beach, Kure Beach has withdrawn the project and asked that the North Carolina Division of Emergency Management as Grantee return the obligated Federal share of funds to the Federal Emergency Management Agency.

Notwithstanding the June 30, 2007 expiration date of the grant agreement between Kure Beach and NCEM, we will notify FEMA of the town's withdrawal and make arrangements to return obligated funds and close out the grant effective June 1, 2006, the date we received the request from Kure Beach as Subgrantee.

Please let me know if I may provide you with any further information.

Sincerely,

Chris Crew, CFM
State Hazard Mitigation Officer

Copy to Tim Fuller, Mayor, Kure Beach

MAILING ADDRESS:
4716 Mail Service Center
Raleigh, NC 27699-4716
Telephone: 919-715-8000



www.NCCrimeControl.org
An Equal Opportunity/Affirmative Action Employer

LOCATION:
1830-B Tillery Place
Raleigh, NC 27604-1356
Fax: 919-733-6129

RECEIVED

AUG 18 2006



North Carolina Department of Environment and Natural Resources
Division of Coastal Management

Michael F. Easley, Governor

Charles S. Jones, Director

William G. Ross Jr., Secretary

NOTICE OF VIOLATION
August 15, 2006

CERTIFIED MAIL #7004 2510 0001 8280 0260
RETURN RECEIPT REQUESTED

Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
1437 Fort Fisher Blvd.
Kure Beach, North Carolina 28449

RE: VIOLATION(S) OF CAMA GENERAL PERMIT NO. 13355-D
CAMA VIOLATION #06-71-D

Dear Ms. Cashion:

This letter confirms that on August 15, 2006, Robb Mairs, Field Representative with the Division of Coastal Management, was onsite at your property located at the Riggings Condominiums adjacent to the Atlantic Ocean located in or near Kure Beach, off Fort Fisher Blvd, New Hanover County, North Carolina. The purpose of the visit was to monitor the permitted development of the temporary erosion control structure (sandbags) adjacent to the Atlantic Ocean. Please reference my July 16, 2006 letter to you concerning the required removal of the temporary erosion control structure. The July 16, 2006 letter notified you that the structure must be removed within 30 days of receipt of the letter to avoid a Notice of Violation, civil penalties and/or an injunction.

Information gathered by me for the NC Division of Coastal Management shows that you have violated the terms or conditions of CAMA/Dredge and Fill State Permit No. 13355-D which was issued to you by the Coastal Resources Commission and the North Carolina Department of Environment and Natural Resources. I hereby request that you immediately **CEASE AND DESIST** such violation(s) and comply with the terms and conditions of the above permit.

On December 3, 1994, State Permit No. 13355-D was issued to The Riggings Homeowners' Association for the installation of new sandbags adjacent to the Atlantic Ocean on property located in New Hanover County, North Carolina, off Fort Fisher Blvd. This permit was issued for a CAMA Major Development in an Area of Environmental Concern, in accordance with North Carolina General Statutes (N.C.G.S.) 113A-118, and for excavation and filling, N.C.G.S. 113-229(a). This permit included the following terms and conditions(s):

1. 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 or 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. The property

Ms. Jean Cashion
August 15, 2006
Page 2 of 4.

owner shall be responsible for removal of the temporary structure within 30 days of the end of the allowable time period.

For the following reasons, you are in violation of the above terms and conditions(s) of your permit:

1. The Riggings Homeowners' Association was granted four variances from the Coastal Resources Commission (CRC) allowing the time period for removal of the sandbags authorized under CAMA General Permit No.13355-D and the preexisting sandbags and to be extended. The last CRC Variance, issued in a final order dated April 25, 2005, allowed the sandbags to remain in place until the expiration of a FEMA grant which was awarded to the Town of Kure Beach to acquire the current site of the Riggings Condominiums once the buildings are relocated across NC Highway 421.
2. Mr. Chris Crew, State Hazard Mitigation Officer with the N.C. Division of Emergency Management, notified the Division of Coastal Management that the FEMA grant had been terminated effective June 1, 2006.
3. My July 10, 2006 letter notified you that the sandbags must be removed within 30 days of the receipt of the letter that was delivered by the U.S. Postal Service on July 14, 2006.
4. An inspection of the property on August 15, 2006 revealed that the sandbags had not been removed.

If the terms and conditions of a permit are not complied with, the permit is null and void from the date of its issuance. To comply with the terms and condition(s) of the permit issued to you, you must:

1. Remove all existing sandbags at the Riggings Condominium site. The method of removal of the sandbags must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

If you intend to cooperate with this request, please sign one of the attached Restoration Agreements and return it in the enclosed, self-addressed envelope within ten (10) days of receipt of this letter. Failure to comply with this request or respond back to this office prior to the requested deadline with an acceptable schedule for compliance will be interpreted as a refusal to cooperate and will result in a Notice of Continuing Violation, as well as a court injunction being sought ordering compliance.

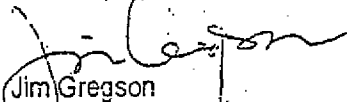
A civil penalty of up to Twenty-Five Hundred Dollars (\$2500) may be assessed, or an injunction or criminal penalty may be sought against any person who violates a CAMA Major Development permit. It is the policy of the Coastal Resources Commission to assess a minimum civil penalty of \$350 against all violations. This is done to recoup some of the costs of investigating violations and/or to compensate the public for any damage to its natural resources. Whether a higher amount will be assessed will depend on several factors, including the nature and area of the resources that were affected and the extent of the damage to them. If restoration of the affected resources is requested but is not undertaken or completed satisfactorily, a substantially higher civil penalty will be assessed and a court injunction will be sought ordering restoration (N.C.G.S. 113A-126). In addition, criminal penalties, damages, and/or an injunction may be sought against any person who violates a Dredge and Fill Permit in accordance with N.C.G.S. 113-229(k) and (l).

The relevant statutes and regulations are available from this office, and I am willing to assist you in complying with the requirements of these laws. A site inspection will be made in the near future to determine whether this REQUEST TO CEASE AND DESIST has been complied with. I request that you contact me immediately.

Ms. Jean Cashion
August 15, 2006
Page 3 of 4

Thank you for your time and cooperation in resolving this important matter. If you have any questions about this or related matters, please call me at (910) 796-7215. Upon completion of the restoration as requested in the Restoration Plan Agreement to the satisfaction of the Division of Coastal Management, you will be notified as to the amount of the civil assessment for failure to act in accordance with the terms, conditions, or requirements of such permit.

Sincerely,


Jim Gregson
District Manager

Cc: Ted Tyndall, Assistant Director, DCM
Roy Brownlow, Compliance Coordinator, DCM
Jill Hickey, DOJ
Christine Goebel, DOJ
James E. Wallace (Registered Agent, Riggings Homeowners, Inc.)
William G. Wright (Shipman and Wright)

ENCLOSURE

Ms. Jean Cashion
August 15, 2006
Page 4 of 4

RESTORATION PLAN AND AGREEMENT
For
Riggings Homeowners' Association Property
CAMA Violation No. 06-71D
Property located at 1437 Fort Fisher Blvd., New Hanover County

All existing sandbags at the Riggings Condominium site must be completely removed. The method of removal of the sandbags must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

I, Jean Cashion, as President of the Riggings Homeowners' Association, agree to remove all existing sandbags at the Riggings Condominium site and to coordinate the removal with the Division of Coastal Management.

We agree to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by September 15, 2006, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: _____

DATE: _____

It is the policy of the Coastal Resources Commission to levy a minimum civil assessment \$350 and higher against all violations of this type depending upon the damage to the resources. If restoration is not undertaken or satisfactorily completed, a substantially higher civil assessment will be levied and an injunction sought to require restoration.



North Carolina Department of Environment and Natural Resources

Division of Coastal Management

Michael F. Easley, Governor

Charles S. Jones, Director

William G. Ross Jr., Secretary

NOTICE OF CONTINUING VIOLATION

September 18, 2006

CERTIFIED MAIL #7006 0100 0000 0881 9774

RETURN RECEIPT REQUESTED

RECEIVED

SEP 21 2006

**N.C. ATTORNEY GENERAL
Environmental Division**

Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
PO Box 157
Kure Beach, North Carolina 28449

RE: NOTICE OF CONTINUING VIOLATION AND REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT - CAMA VIOLATION #06-71-D

Dear Ms. Cashion:

This letter is in reference to the Notice of Violation that was issued to you on August 15, 2006 by the North Carolina Division of Coastal Management for unauthorized development in violation of the Coastal Area Management Act (CAMA). The violation occurred onsite your property located at the Riggings Condominiums adjacent to the Atlantic Ocean located in or near Kure Beach, off Fort Fisher Blvd., New Hanover County, North Carolina.

Information gathered by me for the NC Division of Coastal Management shows that you have violated the terms or conditions of CAMA/Dredge and Fill State Permit No. 13355-D which was issued to you by the Coastal Resources Commission and the North Carolina Department of Environment and Natural Resources. I hereby request that you immediately **CEASE AND DESIST** such violation(s) and comply with the terms and conditions of the above permit.

On December 3, 1994, State Permit No. 13355-D was issued to The Riggings Homeowners' Association for the installation of new temporary erosion control structures, in this case sandbags, adjacent to the Atlantic Ocean on property located in New Hanover County, North Carolina, off Fort Fisher Blvd. This permit was issued for a CAMA Major Development in an Area of Environmental Concern, in accordance with North Carolina General Statutes (N.C.G.S.) 113A-118, and for excavation and filling, N.C.G.S. 113-229(a). This permit included the following terms and conditions(s):

1. 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

127 Cardinal Drive Ext., Wilmington, North Carolina 28405-3845

Phone: 910-796-7215 \ FAX: 910-350-2004 \ Internet: www.nccoastalmanagement.net

Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
September 18, 2006
Page 2 of 4

to five years if the building has a total floor area or 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. The property owner shall be responsible for removal of the temporary structure within 30 days of the end of the allowable time period.

Any subsequent violation of these narrative standards as incorporated within the permit shall be a permit violation. For the following reasons, you are in violation of the above terms and conditions(s) of your permit:

1. The Riggings Homeowners' Association was granted four variances from the Coastal Resources Commission (CRC) allowing the time period for removal of the sandbags authorized under CAMA General Permit No.13355-D and for the pre-existing sandbags to be extended. The last CRC Variance, issued in a final order dated April 25, 2005, allowed the sandbags to remain in place until the expiration of a FEMA grant which was awarded to the Town of Kure Beach to acquire the current site of the Riggings Condominiums once the buildings were relocated across NC Highway 421.
2. Mr. Chris Crew, State Hazard Mitigation Officer with the N.C. Division of Emergency Management, notified the Division of Coastal Management that the FEMA grant had been terminated effective June 1, 2006.
3. My July 10, 2006 letter notified you that the sandbags must be removed within 30 days of the receipt of the letter that was delivered by the U.S. Postal Service on July 14, 2006.
4. An inspection of the property on August 15, 2006 revealed that the sandbags had not been removed.

To comply with the terms and condition(s) of the permit, you must:

Totally remove all existing sandbags at the Riggings Condominium site. The method of removal must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

A civil penalty of up to Twenty-Five Hundred Dollars (\$2,500) may be assessed, or an injunction or criminal penalty may be sought against any person who violates a CAMA Major Development permit. It is the policy of the Coastal Resources Commission to assess a minimum civil penalty of \$350 against all violations. This is done to recoup some of the costs of investigating violations and/or to compensate the public for any damage to its natural resources. Whether a higher amount will be assessed will depend on several factors, including the nature and area of the resources that were affected and the extent of the damage to them. If restoration of the affected resources is requested but is not undertaken or completed satisfactorily, a substantially higher civil penalty will be assessed and a court injunction will be sought ordering restoration (N.C.G.S. 113A-126). In addition, criminal penalties, damages, and/or an injunction may be sought against any person who violates a Dredge and Fill Permit in accordance with N.C.G.S. 113-229(k) and (l).

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Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
September 18, 2006
Page 3 of 4

You have failed or refused to complete the restoration requested in both my July 16, 2006 letter and the August 15, 2006 Notice of Violation. Based on the following, I conclude your failure or refusal to comply with the permit terms and conditions constitutes a willful and continuing violation of the Coastal Area Management Act.

In accordance with the N.C. Administrative Code, Subchapter 7J.0409(f)(4)(G)(ii), you may be subject to a daily minimum penalty of one hundred dollars (\$100.00) per day starting from the date of receipt of the Notice of Violation. A court order may also be sought for an injunction to require restoration as described above.

Once the project site is brought into compliance with terms and conditions of CAMA/Dredge and Fill State Permit No. 13355-D, you will be notified as to the amount of a civil assessment. Please call me at (910) 796-7215 should you decide to enter into good faith negotiations in resolving this matter. I am available to meet with you onsite to discuss the requested restoration measures.

Sincerely,


Jim Gregson
District Manager

Cc: M. Ted Tyndall, Assistant Director, DCM
Roy Brownlow, Compliance Coordinator, DCM
Jill Hickey, DOJ
Christine Goebel, DOJ
James E. Wallace (Registered Agent, Riggings Homeowners, Inc.)
William G. Wright (Shipman and Wright)

ENCLOSURE

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Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
September 18, 2006
Page 4 of 4

RESTORATION PLAN AND COMPLIANCE AGREEMENT
For
Riggings Homeowners' Association Property
CAMA Violation No. 06-71D
Property located at 1437 Fort Fisher Blvd., New Hanover County.

All existing sandbags at the Riggings Condominium site must be completely removed. The method of removal of the sandbags must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

I, Jean Cashion, President of the Riggings Homeowners' Association, agree to have all existing sandbags removed from the Riggings Condominium site and to coordinate the removal with the Division of Coastal Management.

The Riggings Homeowners' Association agrees to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by September 15, 2006, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: _____

DATE: _____

It is the policy of the Coastal Resources Commission to levy a minimum civil assessment \$350 and higher against all violations of this type depending upon the damage to the resources. If restoration is not undertaken or satisfactorily completed, a substantially higher civil assessment will be levied and an injunction sought to require restoration.

127 Cardinal Drive Ext., Wilmington, North Carolina 28405-3845
Phone: 910-796-7215 \ FAX: 910-350-2004 \ Internet: www.nccoastalmanagement.net

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC-VR-05-02

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY RIGGINGS HOME)
OWNERS ASSOCIATION)

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on April 8, 2005, in Morehead City, North Carolina pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 71.0700, *et seq.* Assistant Attorney General Christine A. Goebel appeared for the Department of Environment and Natural Resources, Division of Coastal Management; Deborah Holmes appeared on behalf of Petitioner Riggings Home Owners Association.

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

STIPULATED FACTS

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit Officer for the Town of Kure Beach.
4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management.
5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the



Printed Name	2005	Date	5/10/06	Page	7
To	Jim Gregson	From	Jill Hickey		
Contact					
Phone #			716-1111		

sandbags and the addition of new ones.

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

7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, could remain in place for five years from May 1, 1995, i.e., until May 1, 2000.

8. The sandbags at the Riggings Condominium were to be removed on or before May 1, 2000.

9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.

10. The Riggings Homeowners Association, Inc. did not seek judicial review of the Commission's Order.

11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.

12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is directly in front of the Riggings.

13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.

14. The coquina rock outcroppings were registered as the Fort Fisher Coquina Outcrop Natural Area on February 6, 1982.

15. Sometimes the sandbags are buried under sand and sometimes they are exposed depending on the beach profile which can change quickly.

16. Whether the public can walk along the beach without detouring landward around the

sandbags depends on the beach profile, but even at high tides, the public can get around the bags by going between the bags and the most oceanward building.

17. Between 1996 and 2000, North Carolina was struck by a high number of hurricanes. During 1996 and 97, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher, and Hurricane Bonnie struck the area in 1998. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.

18. On May 26, 2000, the Coastal Resources Commission granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag revetment until May 26, 2001.

19. The last Carolina/Kure Beach Renourishment Project in 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.

20. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina/Kure Beach Renourishment Project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.

21. 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.

22. The Riggings Homeowners Association owns property across the street of sufficient size to

relocate or rebuild all the buildings.

23. The Riggings Homeowners Association worked with the Kure Beach City Council to resolve several issues involving the relocation of the buildings, and the Council approved the initial relocation proposal.

24. After obtaining estimates for relocating the condominium, the Riggings Homeowners Association sought financial assistance in relocating the condominium by contacting the North Carolina Division of Emergency Management, the Natural Heritage Trust Fund and the Division of Coastal Management, as well as requesting the Town of Kure Beach to act as applicant for beach access and/or FEMA grants.

25. On February 4, 2002, the Coastal Resources Commission granted a variance to the Riggings Condominium Association further extending the deadline for removal until May 23, 2003.

26. On October 8, 2002, Chris Crew of the North Carolina Division of Emergency Management met with Petitioners' representatives, the Carolina Beach mayor and other elected officials and determined among other findings that the Riggings is "potentially eligible" for flood mitigation assistance funds which will become available in 2003.

27. On May 9, 2003, the Commission signed an order granting a variance to allow the sandbags to remain in place until May 9, 2005.

28. In July 2004, the Town of Kure Beach was awarded a \$3.6 million dollar FEMA grant to acquire the current site once the Riggings relocates across the street. The grant includes \$2.7 million dollars from FEMA, and the Petitioners will contribute the remaining \$900,000.00, consisting mainly of the oceanfront land donation to the City once they have relocated. The grant lasts until June 2007.

29. As of March 2005, Petitioners are currently working with architects and surveyors to finalize plans to rebuild the structures across the street and remove the current structures, and have contractors ready to start construction once the planning is complete.

30. The current Variance Request was filed with the Director, Division of Coastal Management, on February 14, 2005 to keep the sandbags in place until the relocation has taken place.

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.
4. The Petitioner has demonstrated that strict application of Rule 15A NCAC 7H .1705(a)(7) will result in unnecessary hardship. The Petitioner's variance request materials and the staff recommendation are incorporated by reference as support for this conclusion.
5. Petitioner has demonstrated that its hardship is peculiar to Petitioner's property. The Petitioner's variance request materials and the staff recommendation are incorporated by reference as support for this conclusion.
6. The Petitioner has demonstrated that its hardship does not result from actions it has taken. The Petitioner's variance request materials and the staff recommendation are incorporated by reference as support for this conclusion.
7. The Petitioner has demonstrated that its proposed development 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. The Petitioner's variance request materials and the staff

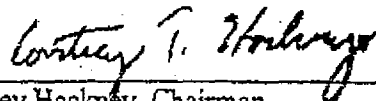
recommendation are incorporated by reference as support for this conclusion.

ORDER

THEREFORE, the variance from 15A NCAC 7H .1705(a)(7) is GRANTED to allow the sandbags to remain in place until the FEMA grant expires in June, 2007. Petitioner shall be responsible for removal of the sandbags prior to expiration of the FEMA grant. This condition is consistent with Petitioner's representation at the April 8, 2005 CRC meeting, that the grant requires Petitioner to remove the sandbags prior to its expiration.

The granting of this variance does not relieve Petitioner of the responsibility for obtaining a CAMA permit from the proper permitting authority.

This the 25 day of April, 2005.



Courtney Hackney, Chairman
Coastal Resources Commission

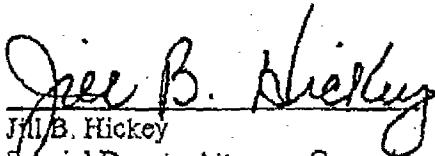
CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Petitioner by depositing a copy thereof in the U.S. Postal Service CERTIFIED MAIL, RETURN RECEIPT REQUESTED with sufficient postage for delivery and addressed to:

RIGGINGS HOME OWNERS ASSOCIATION
Lloyd Steve Goodson
316 Valley Rd.
Fayetteville, NC 28305

Christine A. Goebel Hand Delivery
Assistant Attorney General
N.C. Department of Justice

This the 25 day of April, 2005.



Jill B. Hickey
Special Deputy Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
(919) 716-6942
Counsel to the Commission

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC - VR - 03 -06

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY THE RIGGINGS)
HOMEOWNERS ASSOCIATION)

FINAL ORDER

MAY 12 2003

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on April 23, 2003 in Atlantic Beach, North Carolina pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 7J.0700, et seq. Assistant Attorney General David G. Heeter appeared for the Department of Environment and Natural Resources, Division of Coastal Management; H. Glenn Dunn appeared on behalf of Petitioners.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

STIPULATED FACTS

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit Officer for the Town of Kure Beach.
4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management.
5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the sandbags and the addition of new ones.
6. Permit No. 13355-D was modified in February, 1995, to allow the filling of holes in the revetment with sandbags.
7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, could remain in place for five years from May 1, 1995, to and May 1, 2000.



8. The sandbags at the Riggings Condominium were to be removed on or before May 1, 2000.
9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.
10. The Riggings Homeowners Association, Inc. did not seek judicial review of the Commission's Order.
11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.
12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is directly in front of the Riggings.
13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.
14. The cochina rock outcroppings were registered as the Fort Fisher Cochina Outcrop Natural Area on February 6, 1982.
15. Sometimes the sandbags are buried under sand and sometimes they are exposed depending on the beach profile which can change quickly.
16. Whether the public can walk along the beach without detouring landward around the sandbags depends on the beach profile, but even at high tides, the public can get around the bags by going between them and the oceanward building.
17. Between 1996 and 2000, North Carolina was struck by a high number of hurricanes. During 1996 and 99, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher, and Hurricane Bonnie struck the area in 1998. The beach has not recovered to its pre-hurricane condition. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.
18. On May 26, 2000, the Coastal Resources Commission granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag revetment until May 26, 2001.
19. The last Carolina Kure Beach Renourishment Project in 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.
20. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the

2001 Carolina Kure Beach Renourishment Project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.

MAY 12 2003

COASTAL

21. The Corps of Engineers informed U.S. Representative Mike McInture 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 cochina 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."
22. The Riggings Homeowners Association owns property across the street of sufficient size to relocate all the buildings.
23. The Riggings Homeowners Association has been working with the Kure Beach City Council to resolve several issues involving the relocation of the buildings, and the Council has approved the initial relocation proposal.
24. The relocation proposal may have to be modified because of FEMA guidelines.
25. The Riggings Homeowners Association cannot just relocate the most oceanward building across Highway 421. Because the other buildings block the relocation of the oceanward building, the entire condominium complex must be relocated across the highway.
26. On September 21, 2001 the Riggings Homeowners Association obtained a written estimate from Carolina Specialists, Inc. of Wilmington, N.C. for moving the condominium complex across the Highway 421 to property owned by the Association. The amount of the estimate was \$2,649,978.00. (See Attachment F to the Staff Memorandum)
27. The Association has sought written estimates from other contractors from Myrtle Beach, but has not yet received them.
28. Since obtaining the estimate for relocating the condominium, the Riggings Homeowners Association has sought financial assistance in relocating the condominium by contacting the North Carolina Division of Emergency Management, the Natural Heritage Trust Fund and the Division of Coastal Management, as well as requesting the Town of Kure Beach to act as applicant for beach access and/or FEMA grants.
29. On February 4, 2002, the Coastal Resources Commission granted a variance to the Riggings Condominium Association further extending the deadline for removal until May 23, 2003.
30. Regarding the variance issued to Petitioners in 2002, the DCM staff took the following positions:

- MAY 12 2003
- (a) It agreed that unnecessary hardships will result from strict application of the guidelines, rules, standards or other restrictions applicable to the property.
- (b) It agreed that the condition giving rise to the hardships are peculiar to the property.
31. The Riggings Homeowner's Association has been prohibited from pushing up sand from in front of the sandbags in order to cover them.
32. Sandbags are the only structural alternative to beach renourishment allowed under CAMA development standards for protecting structures from ocean erosion.
33. On October 8, 2003, Chris Crew of the North Carolina Division of Emergency Management met with Petitioners' representatives, the Carolina Beach mayor and other elected officials and determined among other findings that the Riggings is "potentially eligible" for flood mitigation assistance funds which will become available in 2003. (Attachment G to the Staff Memorandum is the Site Visit Report by Chris Crew dated 10/18/02.)
34. On March 7, 2003, Jim Gregson, District Manager, Division of Coastal Management, sent a letter to Steve Goodson, President, Riggings Homeowners Association, advising that all sandbags authorized under CAMA General Permit No. 13355-D must be removed by May 26, 2003.
35. The current Variance Request was filed with the Director, Division of Coastal Management, on March 24, 2003.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.
4. The Petitioners have demonstrated that strict application of Rules 15A NCAC TH 13355(a)(2)(F) and (N) to their permit application will result in unnecessary hardship.
5. The Petitioners have demonstrated that their hardship results from conditions peculiar

to the project property.

6. The Petitioners have demonstrated that their hardship does not result from their own actions.

7. The Petitioners have demonstrated that their proposed development 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.

ORDER

THEREFORE, the petition for variance from Rules 15A NCAC 7H .0308(a)(2)(F) and (N) is GRANTED for a period of two years from the date of this Order.

This the 9th day of May, 2003.

Eugene B. Tomlinson, Jr.

Eugene B. Tomlinson, Jr., Chairman
Coastal Resources Commission

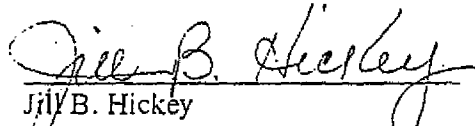
COASTAL MANAGEMENT

CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Petitioner by depositing a copy thereof in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed to:

H. Glenn Dunn
Poyner & Spruill, LLP
PO Box 10096
Raleigh, NC 27605

This the 9 day of May, 2003.



Jill B. Hickey
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6942

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC 01 - 15

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY RIGGINGS HOMEOWNERS)
ASSOCIATION)

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on October 23, 2001, in Wilmington, North Carolina pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 7J.0700, et seq. Assistant Attorney General Dave Heeter appeared for the Department of Environment and Natural Resources, Division of Coastal Management; Dina Goodson, President, appeared for Petitioners, Riggings Homeowners Association.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

FINDINGS OF FACT

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit



Officer for the Town of Kure Beach.

4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management.
5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the sandbags and the addition of new ones.
6. Permit No. 13355-D was modified in February, 1995, to allow the filling of holes in the revetment with sandbags.
7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, may remain in place for five years from May 1, 1995.
8. The sandbags at the Riggings Condominium must be removed on or before May 1, 2000.
9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.
10. The Riggings Homeowners Association, Inc., did not seek judicial review of the Commission's Order.
11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.
12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is located directly in front of the Riggings.
13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.

14. The beach has not recovered to its pre-hurricane condition.
15. During the last four years, North Carolina has been struck by a high number of hurricanes.
16. During 1996 and 99, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher. Hurricane Bonnie struck the area in 1998.
17. The last Carolina Kure Beach Renourishment Project included a large part of Carolina Beach and 98 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.
18. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina Kure Beach renourishment project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.
19. The Riggings Homeowners Association owns property across the street of sufficient size to relocate all the buildings.
20. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.
21. On May 26, 2000, the Coastal Resources Commission granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag revetment until May 26, 2001.
22. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina Kure Beach renourishment project southward all the way to the Riggings complex.
23. The 2001 Carolina Kure Beach renourishment project stopped some 1,500 feet north

4

of the Riggings Condominium.

24. The Riggings Homeowners Association has been working with the Kure Beach City Council to resolve several issues involving the relocation of the buildings, and the Council has approved the initial relocation proposal.
25. The relocation proposal may have to be modified because of FEMA guidelines.
26. The current Variance Request was filed with the Director, Division of Coastal Management, on June 26, 2001.
27. The Commission's consideration of the Homeowners Association's' current variance request was continued until its October, 2001, meeting.
28. The Homeowner's Association has been prohibited from pushing up sand from in front of its sandbags in order to cover them.

Based on the foregoing Stipulated Facts, the Coastal Resources Commission makes the following:

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.
4. The Commission elects to extend the variance to May 26, 2003.

ORDER

THEREFORE, the petition for variance extending its previous deadline for removal of the

sandbags is GRANTED until May 26, 2003.

This the 4th day of February, ~~2001~~ ²⁰⁰².

Eugene B. Tomlinson, Jr.

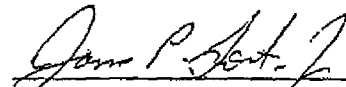
Eugene B. Tomlinson, Jr., Chairman
Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Permittee by depositing a copy thereof in the U.S. Postal Service with sufficient postage for delivery by first class mail, certified mail, return receipt requested and addressed to:

Dina Goodson, President
Riggings Homeowners Association
316 Valley Rd.
Fayetteville, NC 28305

This the 4th day of ^{February 2003} ~~November, 2001~~.



James P. Longest, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6954

ep 52507

STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION

COUNTY OF BRUNSWICK

CRC 00 - 10

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY RIGGINGS HOMEOWNERS)
ASSOCIATION)

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on May 26, 2000, in Tarboro, North Carolina pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 71.0700, et seq. Assistant Attorney General Dave Heeter appeared for the Department of Environment and Natural Resources, Division of Coastal Management; Dina Goodson, President, appeared for Petitioners, Riggings Homeowners Association.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

FINDINGS OF FACT

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit Officer for the Town of Kure Beach.
4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal



Management.

5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the sandbags and the addition of new ones.
6. Permit No. 13355-D was modified in February, 1995, to allow the filling of holes in the revetment with sandbags.
7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, may remain in place for five years from May 1, 1995.
8. The sandbags at the Riggings Condominium must be removed on or before May 1, 2000.
9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.
10. The Riggings Homeowners Association, Inc., did not seek judicial review of the Commission's Order.
11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.
12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is located directly in front of the Riggings.
13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.
14. The beach has not recovered to its pre-hurricane condition.
15. During the last four years, North Carolina has been struck by a high number of hurricanes.
16. During 1996 and 99, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher. Hurricane Bonnie struck the area in 1998.

17. The last Carolina/Kure Beach Renourishment Project included a large part of Carolina Beach and 98 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.
18. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina/Kure Beach renourishment project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.
19. The Riggings Homeowners Association owns property across the street of sufficient size to relocate all the buildings.
20. The Board of Directors of the Riggings Homeowners Association agrees to relocate the buildings within three years as a condition of any variance allowing the sandbags to remain in place for up to three years. The Board agrees to accept such a condition in any variance and not seek administrative or judicial review of it.
21. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.

Based on the foregoing Stipulated Facts, the Coastal Resources Commission makes the following:

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.

4. Application of Rules 15A NCAC 7H .0308(a)(2)(F)&(N) to Petitioner's property will result in unnecessary hardships.

5. Petitioner's hardship does result from conditions peculiar to Petitioner's property.

6. At the time that it adopted Rules 15A NCAC 7H .0308(a)(2)(F)&(N), the Coastal Resources Commission could not have anticipated the combination of conditions currently present at Petitioner's property.

7. The Petitioners have requested a three year extension from the deadlines imposed by Rules 15A NCAC 7H .0308(a)(2)(F)&(N) for removal of sandbags.

8. The Commission elects to grant the variance for a period of one year from May 26, 2000 to May 26, 2001.

ORDER

THEREFORE, the petition for variance from Rules 15A NCAC 7H .0308(a)(2)(F)&(N) is GRANTED for a period of one year from the day the decision was made.

This the 9th day of August, 2000.

Eugene B. Tomlinson, Jr.

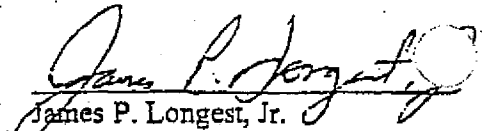
Eugene B. Tomlinson, Jr., Chairman
Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Perr
by depositing a copy thereof in the U.S. Postal Service with sufficient postage for delivery by
class mail, certified mail, return receipt requested and addressed to:

Dina Goodson, President
Riggings Homeowners Association
316 Valley Rd.
Fayetteville, NC 28305

This the 9th day of August, 2000.


James P. Longest, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6954

ep/42005

Table 7.1 Hard bottom and possible hard bottom locations in North Carolina by coastal bay. [Source: Point and line data identified by SEAMAP-SA (2001). Results from Moser and Taylor (1995) in parentheses.]

Bottom Type	Long Bay	Onslow Bay	Raleigh Bay	North of Hatteras	Total
Hard bottom (point)	2 (19)	14 (58)	1 (4)	2 (3)	19 (86)
Hard bottom (line)	3 (6)	25 (39)	1 (2)	0 (2)	29 (49)
Possible hard bottom (point)	1	8	3	4	16
Possible hard bottom (line)	5	37	12	5	59
Total	11 (25)	84 (97)	17 (6)	11 (5)	123 (135)

Twenty sites were reported as high-profile relief, defined by Moser and Taylor (1995) as vertical relief greater than two meters. Two of these sites, one off Carolina Beach and one off New River, are extensive in both area and topographic relief; these areas are particularly close to shore, making them more vulnerable to land-based, fishing, and boating-related impacts. A unique intertidal and subtidal coquina rock outcrop extends from the beach into the surf zone at Fort Fisher. This unique habitat supports a diversity of organisms such as starfish, anemones, sea urchins, crabs, octopi, and numerous fish species.



Distribution of man-made hard bottom

There are 11 artificial reefs of varying construction located in North Carolina State ocean waters, 28 in federal ocean waters (Map 7.1), and seven in estuarine waters. The estuarine artificial reefs are located in Pamlico Sound, Albemarle Sound, Neuse River, and Pamlico River. The artificial reef program periodically adds material to the 39 existing ocean sites, rather than creating new reefs. Gentile (1992) listed 46 documented wrecks in North Carolina waters south of Hatteras Inlet. The majority of the wrecks is located northeast and west of the mouth of the Cape Fear River (Map 7.1). There are many more wrecks in federal waters, with concentrations around the three cape shoals. There are also two jetty systems and three groin systems along the ocean shoreline. The groins are located on the south side of Oregon Inlet, off the former site of the Cape Hatteras Lighthouse, and at the west side of Beaufort Inlet. There is a single jetty at the west side of Cape Lookout; Masonboro Inlet has jetties on both sides—one attached to Wrightsville Beach and the other attached to Masonboro Island. The Little River Inlet, which is the state boundary between North and South Carolina, also has a dual jetty system, but both structures are located in South Carolina. There are also numerous small groins and jetty systems in estuarine waters, but these features have not been mapped.

For the purposes of this document, estuarine shell bottom (e.g., oyster reefs, beds, bars) is not categorized as hard bottom habitat. Although technically a “hard” substrate that shares some characteristics with hard bottom (e.g., three-dimensional structure), shell bottom differs in its formation, spatial distribution, function, and species composition from those of oceanic hard bottom; it is classified as a distinct habitat type⁸⁰. In addition, shell bottom can be either inter- or subtidal, whereas hard bottom is typically subtidal (with the single exception of the exposed coquina outcrops near Fort Fisher).

7.2. ECOLOGICAL ROLE AND FUNCTIONS

Productivity

Exposed hard substrate (whether rock outcrops, jetties, artificial materials, or semi-compacted sediments) provides surface area for colonization by invertebrates and algae. Hard substrate with vertical relief or irregular surface areas provides more complex habitat, allowing a greater variety of species to coexist (Wenner et al. 1984). This “live bottom” structure, in turn, provides a source of abundant food and

⁸⁰ Refer to the Shell Bottom chapter (Chapter 3).

hard bottom in the vicinity of dredge sites.

In North Carolina, the frequency and magnitude of beach nourishment have increased over time.⁸⁵ If all requested and proposed projects are eventually authorized and conducted, a maximum of 155 miles (48% of ocean shoreline) could be affected and potentially degraded, excluding the beaches nourished periodically from channel and inlet dredging. All of the existing projects and the majority of the newly authorized projects are located south of Cape Lookout where hard bottom is most abundant, especially in the nearshore area. *The transport of sand from nourished beaches over time should be monitored. Future research should attempt to determine if the probability or extent of burial are affected by sand volume, type, or grain size, by the time-of-year of project initiation, or by the distance between nourished beach and hard bottom. A DENR Beach Management Plan should be developed and implemented which includes specific guidelines to minimize impacts to hard bottom from nourishment projects.*

Fishing and diving

Commercial fishing

Bottom longlines, dredges, fish traps, and bottom trawls can cause rapid and extensive physical damage to living and non-living components of hard bottom (SAFMC 1998b). In a comparative analysis of benthic fishing activities, the largest relative declines in benthic species richness and total numbers of individuals were associated with intertidal dredging (Collie et al. 2000). Fishing gear dragged across the bottom causes direct damage and mortality by breaking attached benthic organisms, such as sponges, anemones, and corals, or outcrop structures from the seafloor. Damage is especially extensive where the bottom is uneven and there is a concentration of coral and other invertebrates. The removal of structure and attached benthic organisms decreases species diversity and reduces structural complexity of hard bottom (Watling and Norse 1998). Dragged gear also indirectly damages bottom habitat by increasing the vulnerability of injured organisms to subsequent diseases and predation, smothering invertebrates with sediment (Auster and Langton 1999), and partially or completely destroying burrows and tubes constructed by invertebrates (Watling and Norse 1998). Trawling also results in an immediate reduction of mobile benthic invertebrates (e.g., crabs and polychaete worms) on and adjacent to hard bottom, reducing food resources available to other reef organisms.⁸⁶

Roller-rigged trawls are a specific type of trawl with large rubber discs that is designed to roll over hard bottom habitat without becoming entangled. A study in South Carolina on the effects of roller-rigged trawls found that 32% of the sponges, 30% of the hard corals, and 4% of the soft corals at a hard bottom site were damaged by a single tow (Van Dolah et al. 1987). Damaged individuals require years to completely regenerate to their initial, pre-disturbance sizes, due to the organisms' slow growth rates (Van Dolah et al. 1987). Another study evaluated impacts from a roller-framed shrimp trawl and found that 50% of the sponges, 80% of the hard corals, and 40% of the soft corals were damaged (Tilmant 1979). In addition, catch rates of all animal groups declined over a five-year period; fewer animals may have been available to be caught due to past trawling effort.

Of the fishing gears that can potentially damage hard bottom, longlines, dredges, and fish traps are of minimal concern because they are used little or not at all in North Carolina state waters. There is currently no active dredge fishery in North Carolina's intertidal or subtidal ocean waters. Use of bottom longlines was prohibited by federal regulations in depths of less than 50 fathoms (300 ft) throughout the South Atlantic area as part of Amendment 4 of the Snapper Grouper Fishery Management Plan in 1991 to reduce fishing mortality and habitat damage. Fish traps can cause significant damage if placed on or dragged through hard bottom. However, federal regulations (Amendment 4, Snapper-Grouper Fishery Management Plan) prohibited the use of large fish traps in 1991. Smaller sea bass pots are allowed if equipped with escape vents and biodegradable panels to release undersize fish and eliminate waste from

⁸⁵ Refer to the soft bottom threats section for status, trends, and location of beach nourishment activity, Map 6.2.

⁸⁶ Refer to Appendix L for a list of the fishing gears used in North Carolina waters and their probable habitat impacts.



State of North Carolina

Department of Justice
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

Reply to:
James C. Gulick
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
Tel: (919) 716-6600
Fax: (919) 716-6767

ROY COOPER
ATTORNEY GENERAL

January 31, 2008

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Mr. Gary Simpson
William Wright
Shipman & Wright, LLP
11 South Fifth Avenue
Wilmington, North Carolina 28401

Re: Variance Request for Coastal Area Management Act (CAMA) Permit,
By The Riggings Homeowners Association, Inc.
CRC-VR-06-33

Dear Mr. Simpson :

At its January 17, 2008 meeting, the Coastal Resources Commission denied your variance request. Attached is a copy of the order, signed by the Chairman of the Coastal Resources Commission.

You have the right to appeal the Coastal Resources Commission's decision by filing a petition for judicial review in superior court of New Hanover county within thirty days after receiving the order. A copy of the judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

Mary Penny Thompson, General Counsel
Dept. of Environment and Natural Resources
1601 Mail Service Center
Raleigh, NC 27699-1601

If you choose to file a petition for judicial review, I request that you also serve a copy of the petition for judicial review on me at the above address. If you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "James C. Gulick".

James C. Gulick
Senior Deputy Attorney General

cc: Christine A. Goebel
Angela Willis, DCM Morehead City
Robert R. Emory, Jr., Chairman of CRC

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC-VR-06-33

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY THE RIGGINGS HOMEOWNERS)
ASSOCIATION, INC.)

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on January 17, 2008, in New Bern, North Carolina pursuant to N.C.G.S. § 113A-120.1 and T15A NCAC 7J.0700, et seq. Assistant Attorney General Christine A. Goebel appeared for the Department of Environment and Natural Resources, Division of Coastal Management; Gary Shipman appeared on behalf of the Riggins Homeowners Association, Inc.

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

STIPULATED FACTS

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.
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.

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

- a. Each unit owner would have been required to contribute approximately \$125,000 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 US 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 and/or a renourishment project, either privately or publicly funded, has been completed.

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. The Petitioner has not demonstrated that strict application of Rule 15A NCAC 7H .1705(a)(7) will result in unnecessary hardship. In the past, Staff and the Commission have agreed with Petitioner that strict application of the development rules regarding how long the sandbag structures could remain causes Petitioner an unnecessary hardship. Staff and the Commission agreed that the use of *temporary* erosion control structures, such as these sandbag structures, is allowable to afford homeowners time to relocate their property or to seek beach nourishment. In this case, Petitioner discovered that nourishment was not an acceptable alternative at this location, due to the coquina rock located in front of its property, and Petitioner began attempting to secure funds to relocate. At the last variance hearing in April 2005, the fact that the Town had recently been awarded a \$3.6 million dollar FEMA grant to acquire the current site for a park, once Petitioner rebuilt and removed the current structures by June 2007, was the primary reason staff and the commission supported the April 2005 variance request, and the finding that an unnecessary hardship existed. Staff and the Commission understood the award of the grant to be extraordinary,

and removal of the sandbag structure at that time, when Petitioner appeared to have crossed the biggest hurdle to relocation, would be an unnecessary hardship. In the nearly 3 years since the last variance hearing, Petitioner has not been able to get the required support from its members, and in May 2006, formally rejected the FEMA grant. Based on the current facts, Staff now contends and the Commission concludes that the application of the rules, standards, or orders of the Commission will not cause Petitioner unreasonable hardships, and Petitioner can make reasonable use of its property without a continued variance.

In 2003, CAMA was amended to include 113A-115.1, which prohibited the use of erosion control structures along the ocean shoreline. The Commission's rules did allow for the continued use of "temporary erosion control structures" made of sandbags to protect only imminently threatened structures. The installation and design standards in the CRC's rules reflect the temporary nature of the structures, and demonstrate that sandbags were not intended as permanent fortresses. Further, the Commission provided in 15A NCAC 07M.0202(e) that these temporary measures are to be used "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." This rule demonstrates that sandbags should only offer immediate relief and time to find a permanent solution.

4. The Petitioner has not demonstrated that its hardship results from conditions peculiar to Petitioner's property, such as the location, size, or topography of the property. The sandbag rules are a temporary measure used to protect property. There is nothing peculiar about the site that would justify Petitioner's taking more time than the twenty three years it has already had to find a permanent solution. In the past, the Staff and Commission have agreed that Petitioners had unnecessary hardship resulting from conditions which were peculiar to the Petitioner's property--specifically the location of coquina rock formations preventing the placement of sand in past nourishment projects, and the Fort Fisher rock revetment. While both of these structures still exist, Staff now argues, and the Commission has concluded, that the Petitioner no longer has an unnecessary hardship, and so there can no longer be an unnecessary hardship resulting from conditions peculiar to the property. At this point, any hardships that may exist are a result of Petitioner's inability to move forward as an Association in order to relocate its buildings, despite years of extra time allowed by previous variances from the Commission. Twenty-three years has been more than ample time for Petitioner to seek more permanent solution, in keeping with the intent and purpose of the statute and the Commission's rules.

5. The Petitioner has failed to demonstrate that its hardship does result from actions it has taken. Upon receiving the FEMA grant, Petitioner's decision was to keep the building where it was which could have avoided the need for the sandbag structure if the building was moved.

Petitioner was first aware of the erosion problems at its site in 1985 when the structures became imminently threatened and the sandbag structures were first installed. Since 1992, Petitioner has owned a parcel landward of NC 421 where the owners could re-locate, but they have not yet done so. Petitioner has known at least since the 2001 Corps nourishment project that the coquina rock could prevent beach nourishment at or near the Riggings in future projects. Despite Petitioner's awareness of all these circumstances, it has still failed to take concrete actions to move forward with a relocation project. In the past, Petitioner argued that all it needed was a little more time to find funding, but when it finally got the FEMA grant, its membership turned the grant down.

As in past variances, Petitioner claims to have a new solution, specifically, its "habitat restoration" project or private nourishment. Staff is concerned that, as in the past, Petitioner will make these same promises, but could easily again fail to actually implement a permanent solution and the bags would remain even longer. The Commission shares this concern. Staff is also concerned that Petitioner's request to keep the bags until one of its solutions is complete, is much too open-ended because these projects may be illegal or non-permittable. The Commission shares this concern as well. For these reasons, any hardships Petitioner might face now are a result of its own inability, or unwillingness, to respond to its long-standing situation with a permanent solution.

6. The Petitioner has not demonstrated that its 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. One of the Commission's main objectives for the ocean hazard AEC is to eliminate unreasonable danger to life, property, and amenities, pursuant to 15A NCAC 7M.0201. While Petitioner argues that allowing the sandbag structure to remain is the best way to achieve this goal, Staff and the Commission disagree. While the sandbags were meant to be a temporary help, the Petitioner's membership continue to rely on the sandbags to protect them from, or reduce damage from storms, instead of making real progress toward a lasting solution. The Petitioners' membership has done so now for 23 years. Removal of the sandbags may provide the needed incentive for the Association members finally to relocate across NC 421 farther from the ocean hazard AEC, thereby reducing the public costs of inappropriately sited development and reducing the risks to life, property, and amenities.

Petitioner's argument fails to address the importance of the Commission's other stated goals: preventing encroachment of permanent structures on public beach areas; preserving the natural ecological conditions of the barrier dune and beach systems; and protecting present common law and statutory public rights of access to, and use of the lands and waters of the coastal area. The continued existence of the sandbag structure on the public beach area and the increasing encroachment of the buildings impede the public's rights of access and use of the beach area. The existing sandbag structure is continually losing its "temporary" characteristics and is becoming a

more permanent, illegal hardened erosion control structure, contrary to CAMA and the Commission's rules and objectives.

Staff contends and the Commission agrees that Petitioner has been afforded plenty of time and several "second chances" to relocate the threatened structures or find another permanent solution, but has failed to do so. Allowing the sandbags to remain for any further, uncertain period of time is not within the spirit of CAMA and the CRC's rules, and for the same reasons, will not protect the public's welfare.

Petitioner has failed to work diligently to relocate the buildings, as evidenced by the refusal of the FEMA grant. Moreover, its newly proposed solutions may not even be permissible and have not progressed far. After repeated extensions, granting any more extensions to allow Petitioner more time to pursue its latest proposals, would no longer preserve substantial justice because to do so would essentially constitute a permanent variance for Petitioner, while allowing only truly temporary sandbag structures for other threatened structures along the coast.

ORDER

THEREFORE, the variance from T15A NCAC 7H.1705(a)(7) is denied. This variance denial is based upon the Stipulated Facts set forth above. The Commission reserves the right to reconsider the granting of this variance and to take any appropriate action should it be shown that any of the above Stipulated Facts is not true.

This the _____ day of January, 2008.

Robert R. Emory, Jr.

Robert R. Emory, Jr., Chairman
Coastal Resources Commission

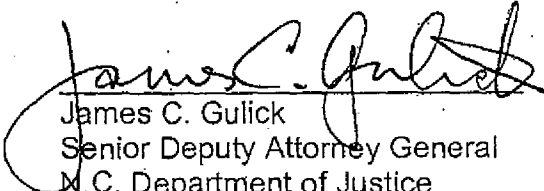
CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Petitioner by depositing a copy thereof in the U.S. Postal Service CERTIFIED MAIL, RETURN RECEIPT REQUESTED with sufficient postage for delivery and addressed to:

Gary Shipman
William Wright
Shipman & Wright, LLP
11 South Fifth Avenue
Wilmington, NC 28401

Christine A. Goebel HAND DELIVERY
Assistant Attorney General
N.C. Department of Justice

This the 31st day of January, 2008.


James C. Gulick
Senior Deputy Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Acting Counsel to the Commission

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1. Article Addressed to: Mr. Gary Simpson <i>Shipman</i> William Wright Shipman & Wright, LLP 11 South Fifth Avenue Wilmington, NC 28401	B. Received by (Printed Name) <i>MARY ELLEN MORAN</i>	C. Date of Delivery
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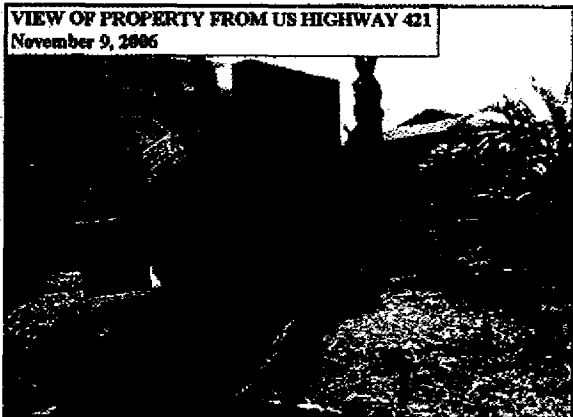
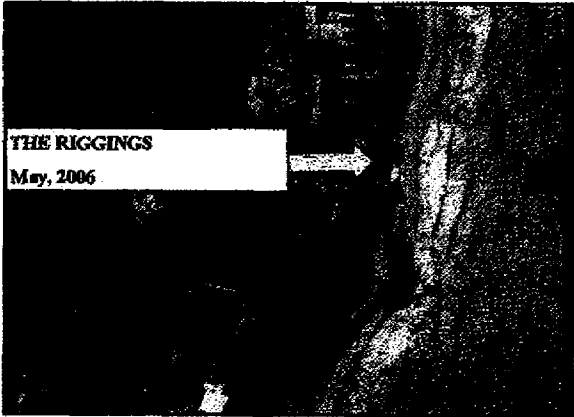
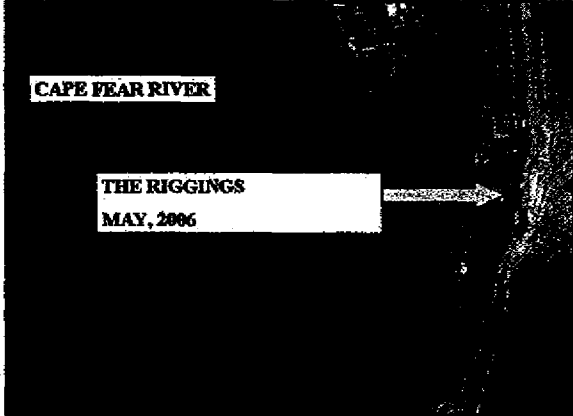
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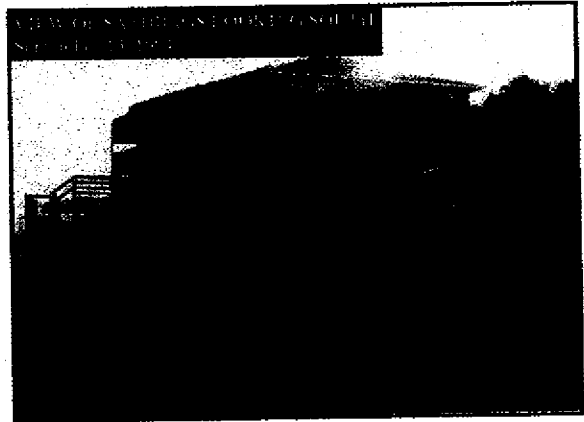
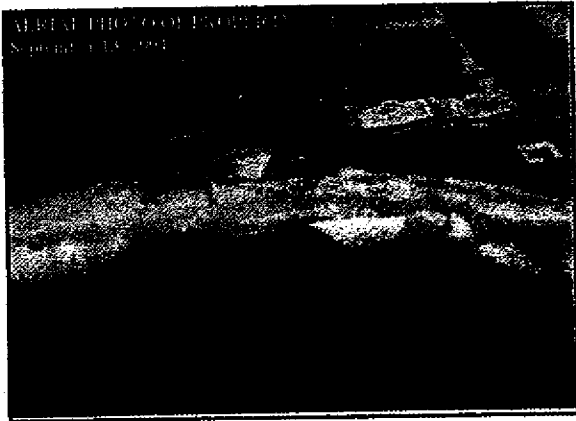
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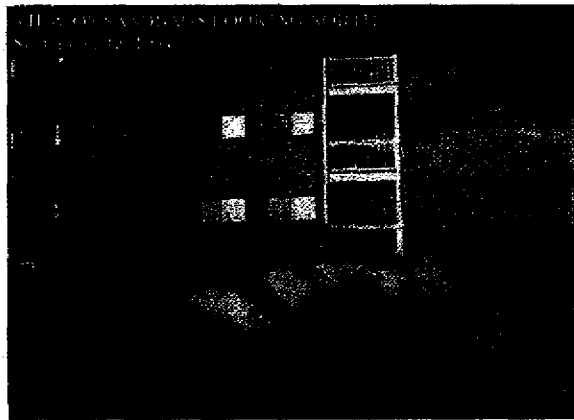
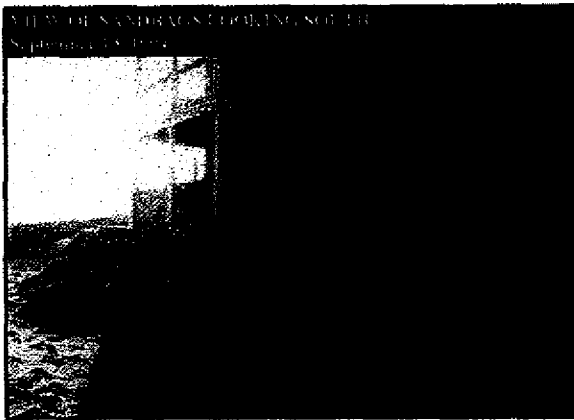
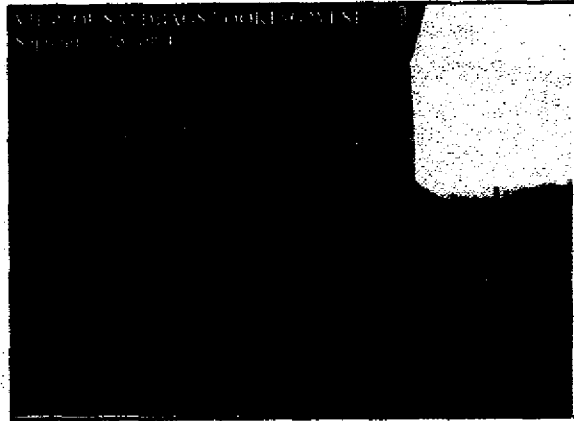
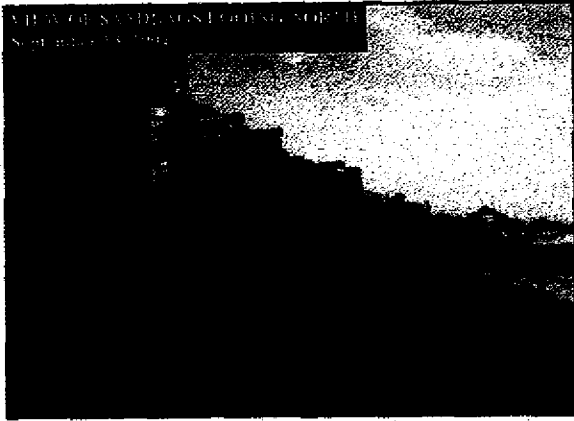
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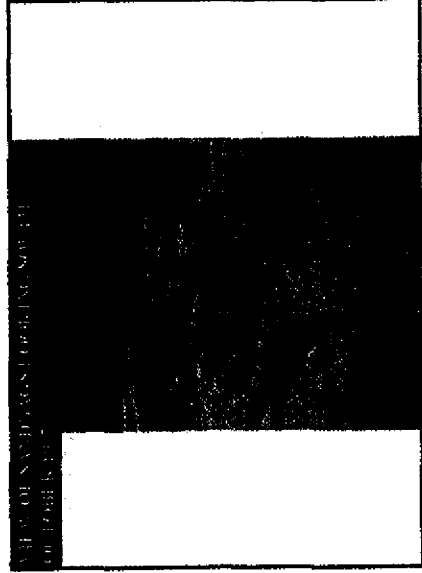
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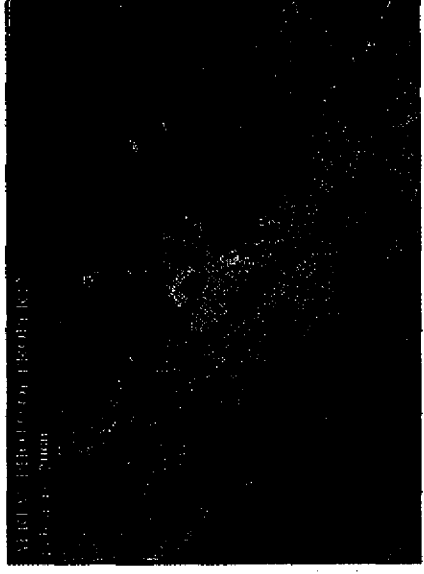
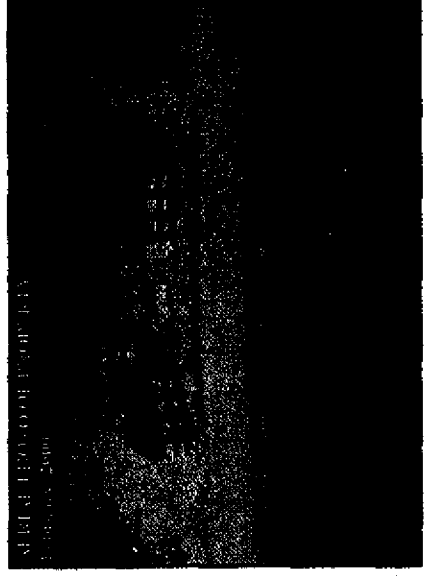
THE RIGGINGS HOMEOWNERS
ASSOCIATION
VARIANCE REQUEST
January 17-18, 2008
Kure Beach
New Hanover County

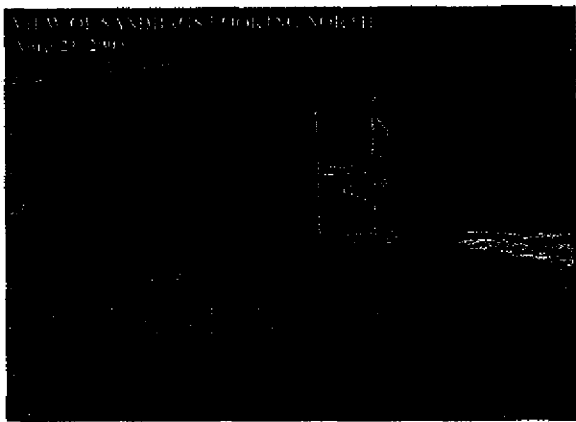
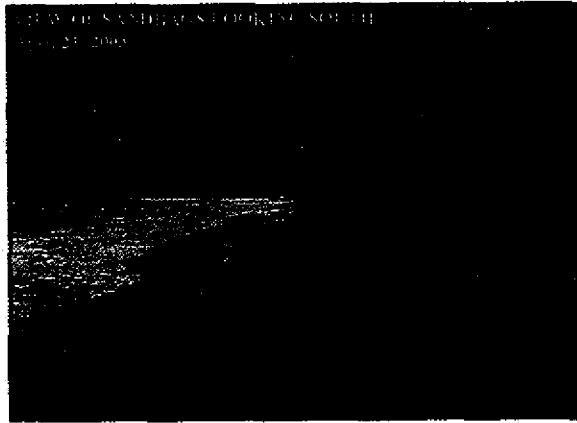
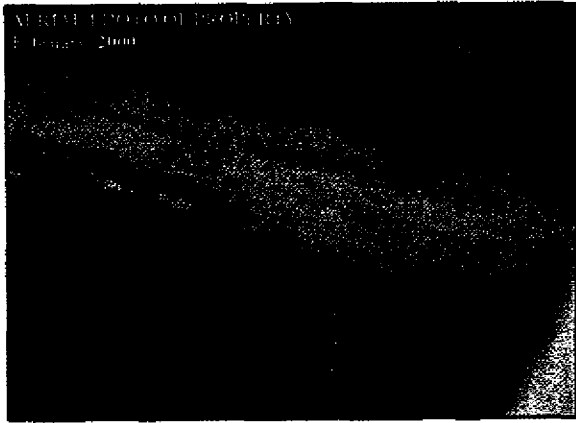


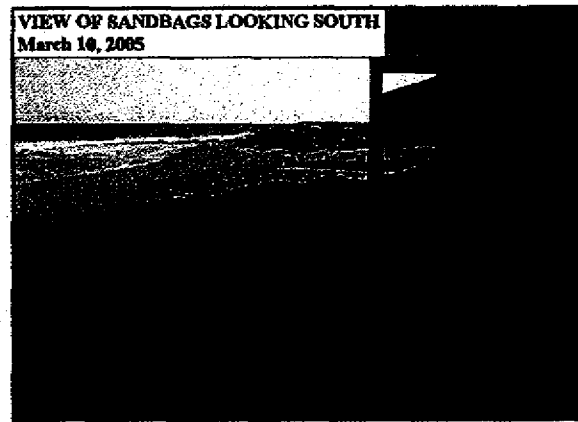
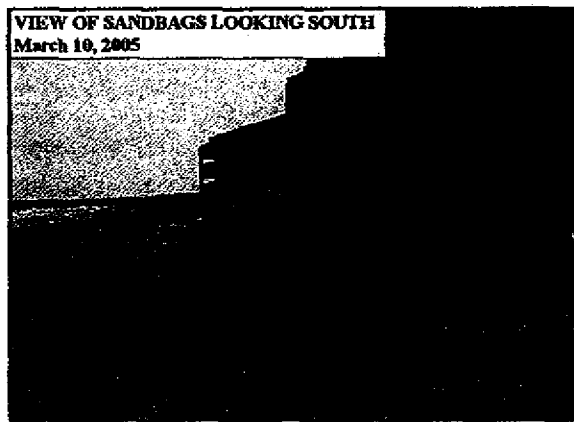
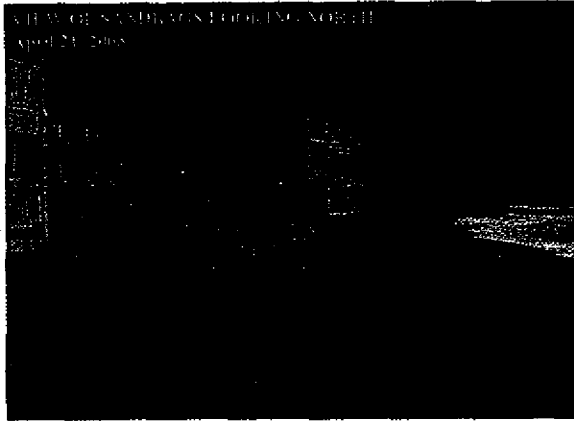


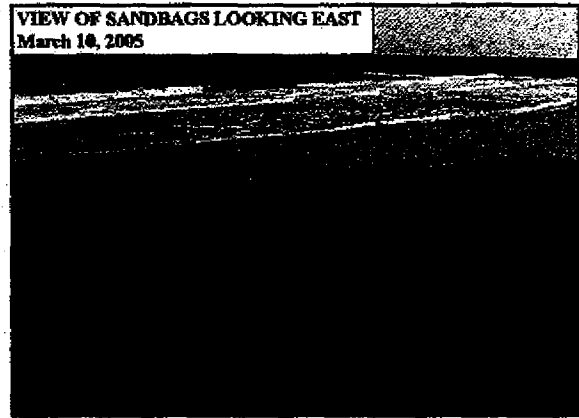
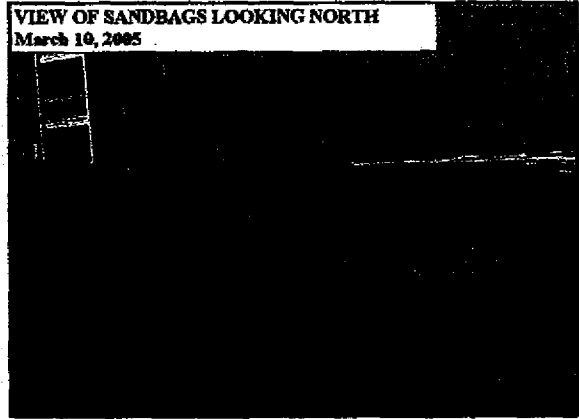
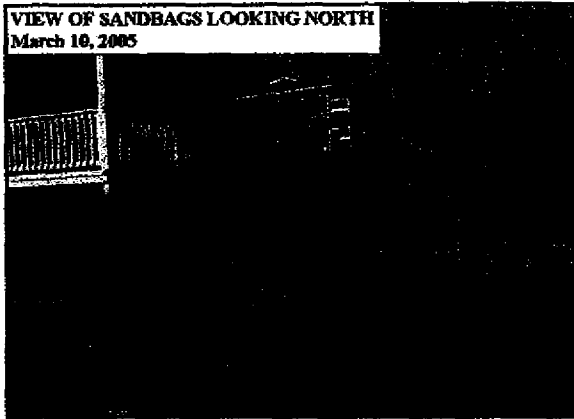


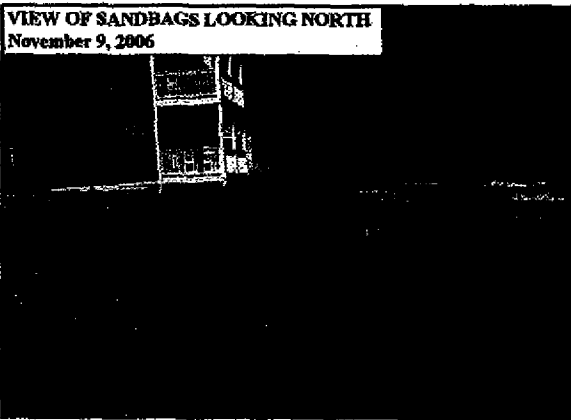
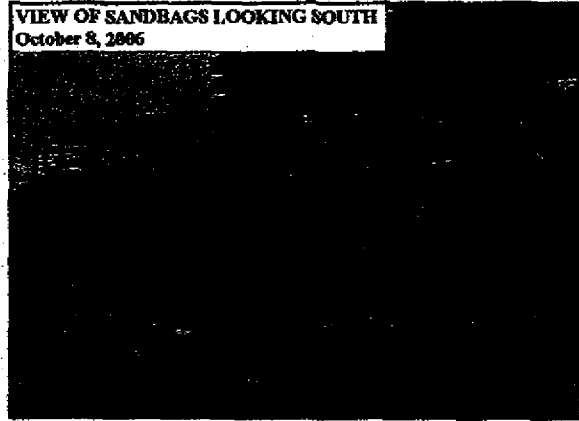
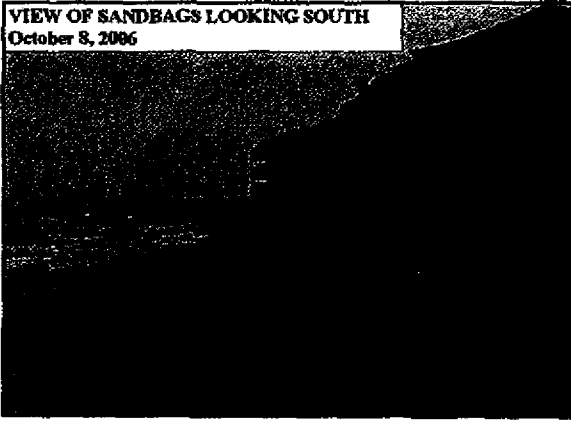


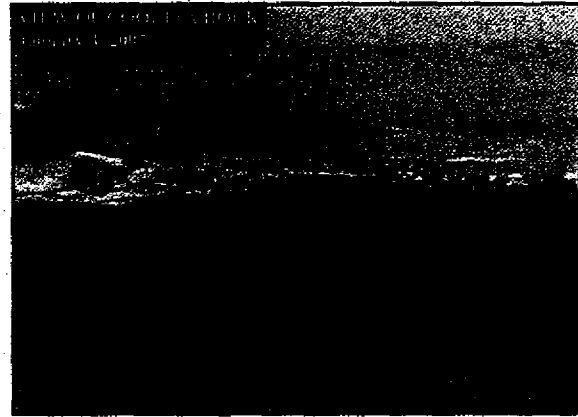
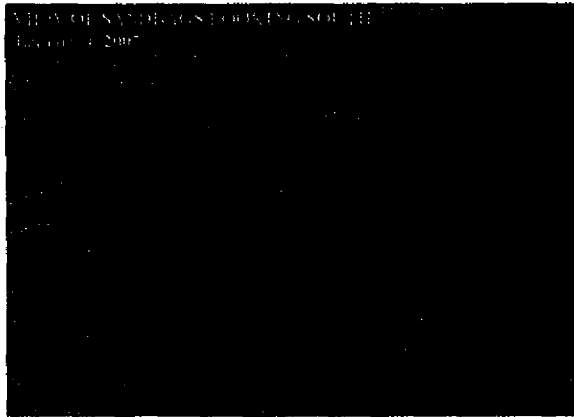


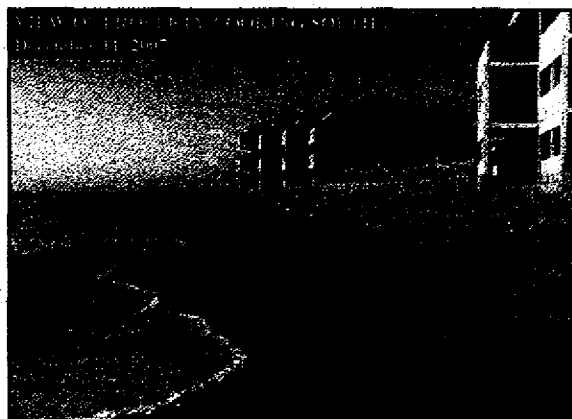
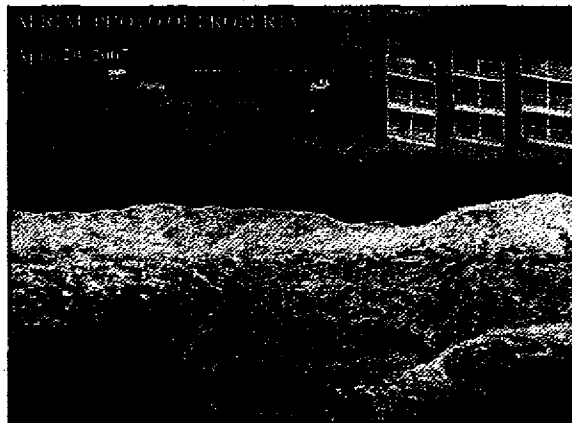
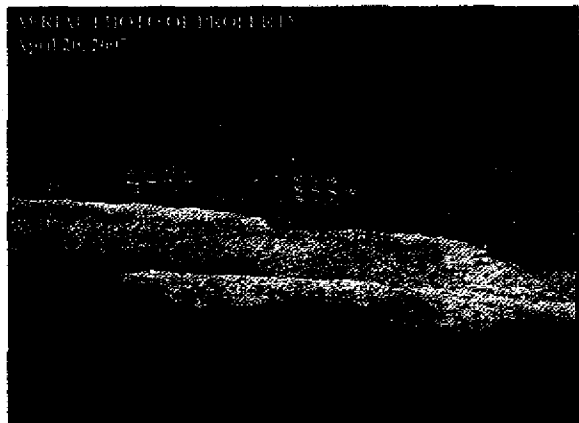












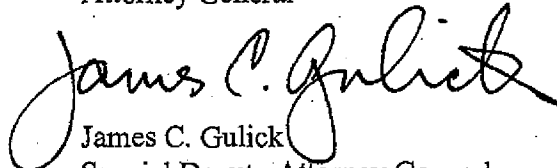
CERTIFICATE OF FILING AND SERVICE

This is to certify that I have this day mailed the certified copy of the Record of Proceedings to the Clerk of Superior Court for New Hanover County and have served a copy of the foregoing certified copy of Record of Proceedings upon the attorney for petitioner by US Mail and addressed as follows:

Gary K. Simpson
Matthew W. Buckmiller
Shipman & Wright, LLP
575 Military Cutoff, Suite 106
Wilmington, NC 28405

This the 1st day of April, 2008.

ROY COOPER
Attorney General



James C. Gulick
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6600

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 08-CVS-1069

2009 FEB 20 P 4: 02

RIGGINGS HOMEOWNERS, INC. Petitioner, D.C.

BY _____)

Petitioner,)

vs.)

COASTAL RESOURCES)
COMMISSION OF THE STATE)
OF NORTH CAROLINA and)
ROBERT R. EMORY, Jr., Chairman)
of Coastal Resources Commission)

Respondents.)

ORDER

This appeal came on for hearing before the undersigned Superior Court Judge, presiding over the January 5, 2009 Civil, Non-Jury Session of the Superior Court Division of New Hanover County, the same having been called for hearing on January 6, 2009, upon appeal filed by the Petitioner herein by Petition and a Writ of Certiorari issued by this Court to review the January 31, 2008 Final Order of North Carolina Coastal Resources Commission. The Petitioner was represented by its attorneys, Gary K. Shipman and William G. Wright and Respondents were represented by their attorneys, Assistant Attorneys General Christine A. Goebel and Allen Jernigan.

On August 22, 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 until such time as Petitioner's proposed Habitat Enhancement Project and/or a renourishment project, either

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NEW HANOVER COUNTY
BY: *Marie Oliva*
Deputy Clerk of Superior Court

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

In the Order denying Petitioner's variance request, the CRC made the following pertinent

Conclusions of Law:

3. The Petitioner has not demonstrated that strict application of Rule 15A NCAC 7H.1705(a)(7) will result in unnecessary hardship. In the past, Staff and the Commission agreed with the Petitioner that strict application of the development rules regarding how long sandbag structures could remain causes petitioner and unnecessary hardship. Staff and the Commission agreed that the use of *temporary* erosion control structures, such as these sandbag structures, is allowable to afford homeowners timers to relocate their property or to seek beach renourishment. In this case, Petitioner discovered that nourishment was not an acceptable alternative at this location, due to coquina rock located in front of its property, and Petitioner began attempting to secure funds to relocate. At the last variance hearing in April 2005, the fact that the Town had recently been awarded a \$3.6 million dollar FEMA grant to acquire the current site for a park, once Petitioner rebuilt and removed the current structures by June of 2007, was the primary reason staff and the commission supported the April 2005 variance request, and finding the unnecessary hardship existed. Staff and the Commission understood the award of the grant to be extraordinary, and removal of the sandbag structure at that time, when Petitioner appeared to have crossed the biggest hurdle to relocation, would be an unnecessary hardship. In the nearly 3 years since the last variance hearing, Petitioner has not been able to get the required support from its members, and in May 2006, formally rejected the FEMA grant. Based on the current facts, Staff now contends and the Commission concludes that the application of the rules standards or orders of the Commission will not cause Petitioner unreasonable hardships, and Petition can make reasonable use of its property without a continued variance.

4. The Petitioner has not demonstrated that its hardship result from conditions peculiar to Petitioner's property, such as location, size or topography. . . . In the past, the Staff and Commission have agreed that Petitioners [sic] had unnecessary hardship resulting from conditions which were peculiar to the Petitioner's property - specifically the location of the coquina rock formations preventing the placement of sand in past renourishment projects, and the Fort Fisher revetment. While both of these structures still exist, Staff now argues, and the Commission has concluded, that the Petitioner no longer has an unnecessary

hardship, and so there can no longer be an unnecessary hardship resulting from conditions peculiar to the property. At this point, any hardships that may exist are a result of Petitioner's inability to move forward as an Association in order to relocate its buildings, despite years of extra time allowed by previous variances from the Commission. . . .

5. The Petitioner has failed to demonstrate that its hardship does result from actions it has taken. Upon receiving the FEMA grant, Petitioner's decision was to keep the building where it was which could have avoided the need for the sandbag structure if the building was moved.

Petitioner was first aware of the erosion problems at its site in 1985 when the structures imminently threatened and the sandbag structure was first installed. Since 1992, Petitioner has owned a parcel landward of NC 421 where the owners could re-locate, but they have not yet done so. Petitioner has known at least since the 2001 Corps nourishment project that the coquina rock could prevent beach nourishment at or near the Riggings in future projects. Despite Petitioner's awareness of all these circumstances, it has still failed to take concrete actions to move forward with a relocation project. In the past, Petitioner argued that all it needed was a little more time to find funding, but when it finally got the FEMA grant, its membership turned it down.

As in past variances, Petitioner claims to have a new solution, specifically, its "habitat restoration" project or private renourishment. Staff is concerned that, as in the past, Petitioner will make these same promises, but could easily again fail to actually implement a permanent solution and the bags would remain even longer. The Commission shares this concern as well. For these reasons, any hardships Petitioner might face now are a result of its own inability, or unwillingness, to respond to its long-standing situation with a permanent solution.

6. The Petitioner has not demonstrated that its 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. One of the Commission's main objectives for the ocean hazard AEC is to eliminate unreasonable danger to life, property and amenities, pursuant to 15A NCAC 7M.0201. While Petitioner argues that allowing the sandbag structure to remain is the best way to achieve this goal, Staff and the Commission disagree. While the sandbags were meant to be a temporary help, the Petitioner's membership continues to rely on sandbags to protect them from, or reduce damaging storms, instead of making real progress toward a lasting solution. The Petitioner's membership has done so for 23 years. Removal of the sandbags may provide the needed incentive for the Association members finally to relocate across NC 421 farther from the ocean hazard AEC, thereby reducing the public costs of inappropriately sited development and reducing the risks to life, property, and amenities.

....

Staff contends and the Commission agrees that Petitioner has been afforded plenty of time and several "second chances" to relocate the threatened structures or find another permanent solution, but has failed to do so. Allowing the sandbags to remain for any further, uncertain period of time is not within the spirit of the CAMA and the CRC's rules, and for the same reasons, will not protect the public's welfare.

Petitioner has filed to work diligently to relocate the buildings, as evidenced by the refusal of the FEMA grant. Moreover, its newly proposed solutions may not even be permissible and have not progressed far. After repeated extensions, granting any more extensions to allow Petitioner more time to pursue its latest proposals, would no longer preserve substantial justice because to do so would essentially constitute a permanent variance for Petitioner, while allowing only truly temporary sandbag structures for other threatened structures along the coast.

The Order of the CRC is a final agency decision within the meaning of Article 4, Chapter 150B of the North Carolina General Statutes and Petitioner is directly affected by said Order and entitled to judicial review of the CRC's decision. N.C.G.S. § 150B-43 (2008). The CRC's final order, which denied Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7) was received by the Petitioner, through its counsel, on February 7, 2008. The Petition for Judicial Review was timely filed pursuant to N.C. Gen. Stat. § 150B-45 on March 7, 2008.

At the outset, the Respondents contend that Respondent Robert Emory Jr., Chairman of the CRC was improperly named as a Respondent to this appeal. Counsel for Petitioner chose not to object or be heard on the removal of Mr. and Emory, and thus the appeal against Mr. Emory is dismissed with prejudice.

The issues are whether: (I) the decision of the CRC was based on an error of law, in that the CRC applied the wrong standard: "Unreasonable hardship" as opposed to "Unnecessary hardship," as a basis for denying the variance request (II) in placing reliance upon the issues surrounding the Petitioner's application for a FEMA grant and the availability of other property owned by the Petitioners where the Riggings project might be relocated, the CRC violated the

law by denying the Petitioners Equal Protection, and whether the decision denying the variance request was therefore based upon unlawful procedure; and whether (III) the decision of CRC is supported by substantial evidence and whether CRC's decision was arbitrary and capricious, in that it appears that CRC adopted Staff's position as bases for denying the variance request, instead of basing its decision upon the Stipulated Facts.

The Standard of Review

The standard of review to be employed by the trial court on judicial review of an agency decision depends on the particular issues presented by the parties. Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999); Dew v. State ex rel. North Carolina Dept. of Motor Vehicles, 127 N.C. App. 309, 488 S.E.2d 836 (1997). The reviewing court may be required to utilize both the "whole record" and the "de novo" standards of review, when reviewing an agency decision, if warranted by the nature of the issues raised. Skinner v. North Carolina Dept. of Correction, 154 N.C. App. 270, 572 S.E.2d 184 (2002).

When a petitioner alleges that an agency violated his or her constitutional rights, the court will undertake *de novo* review. In re North Carolina Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155, 349 N.C. 656, 509 S.E.2d 165 (1998). Similarly, judicial review of whether an agency decision was based on an error of law requires *de novo* review. Hodgkins v. North Carolina Real Estate Com'n, 130 N.C. App. 626, 504 S.E.2d 789 (1998); Beneficial North Carolina, Inc. v. State ex rel. North Carolina State Banking Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997). Where a petitioner asserts that the agency misinterpreted a statute, the proper standard of review for this question was *de novo*, and the reviewing court could substitute its judgment for that of the state agency if the agency's decision was affected by an error of law. Associated Mechanical

Contractors, Inc. v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); accord Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998); Walker v. Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, 127 N.C. App. 156, 487 S.E.2d 839 (1997); Yates Const. Co., Inc. v. Commissioner of Labor for the State of N.C., 126 N.C. App. 147, 484 S.E.2d 430 (1997); Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999). A *de novo* standard of review applies to claims that an agency violated a constitutional provision, was in excess of statutory authority, made a decision upon unlawful procedure or made some other error of law. Moore v. Charlotte-Mecklenburg Bd. of Educ., --- N.C. App. ---, 649 S.E.2d 410 (2007).

In a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. In re Appeal of the Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003); R.J. Reynolds Tobacco Co. v. North Carolina Dept. of Environment & Natural Resources, 148 N.C. App. 610, 560 S.E.2d 163 (2002) ("De novo review" requires the court to consider a question anew, as if not considered or decided by the agency previously, and to make its own findings of fact and conclusions of law rather than relying upon those made by the agency).

When the issue on appeal is whether the agency's decision was supported by substantial evidence or whether the agency's decision was arbitrary and capricious, the reviewing court must apply the "whole record" test. ACT-UP Triangle, 345 N.C. at 706, 483 S.E.2d at 392; Associated Mechanical Contractors v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); Powell, 347 N.C. at 623, 499 S.E.2d at 185. The "whole record" test requires the court to determine whether there was substantial evidence to support the agency's conclusions by taking all the evidence, both supporting and conflicting, into account. Powell, 347 N.C. at 623, 499 S.E.2d at 185;

Associated Mechanical Contractors, 342 N.C. at 832, 467 S.E.2d at 401. Substantial evidence is "more than a scintilla" and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Lackey v. Dept. of Human Resources, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982); Norman v. Cameron, 127 N.C. App. 44, 48, 488 S.E.2d 297, 300 (1997). Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment. Johnston Health Care Center, L.L.C. v. North Carolina Dept. of Human Resources, Div. of Facility Services, Certificate of Need Section, 136 N.C. App. 307, 524 S.E.2d 352 (2000). In interpreting an agency order, the order "should be read as a whole." In re Bass Income Fund, 115 N.C. App. 703, 705, 446 S.E.2d 594, 595 (1994).

In this case, the Court is required to apply two standards of review (i) de novo review for constitutional questions, questions regarding the statutory authority and jurisdiction of the CRC, questions regarding errors of law made by the CRC, and/or questions regarding unlawful procedure of the CRC and; (ii) the "whole record test" is to be applied to determine whether the CRC's Order was supported by substantial evidence, and/or was arbitrary or capricious.

In this case, the Petitioner argues The Final Order issued by the CRC consists of nothing more than the adoption of the Division of Coastal Management's Position statement filed as a "brief" before the CRC, and not on the basis of the Stipulated Facts, which is the only evidence properly presented to the CRC. The Petitioner contends that the decision of the CRC was based on legally impermissible considerations; that the CRC misapplied the applicable statute; and that the Final Order was unsupported and contradictory to the only evidence, the Stipulated Facts, before the CRC. After applying the applicable standards of review, this Court agrees.

The Grant of Variance and Unnecessary Hardship versus Unreasonable Hardship

Petitioner argues the CRC made an error of law by applying the wrong standard of "unreasonable hardship" as opposed to "unnecessary hardship." The Court agrees.

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.G.S. § 113A-120.1 (2008).

In the third Conclusion of Law subject Order, the CRC provides in pertinent part: "Staff now contends and the Commission concludes that the application of the rules standards or orders of the Commission will not cause Petitioner unreasonable hardships, and Petition can make reasonable use of its property without a continued variance." The legal standard, however, is not whether strict application of the rules would result in "unreasonable" hardship to the Petitioner's property, but whether the hardship would be "unnecessary." N.C.G.S. § 113A-120.1(1). The Order is unclear and the Court is uncertain as to whether the CRC applied the correct legal standard. Accordingly, it was inappropriate and contrary to the relevant statute to use

"unreasonable" hardship as a basis for any of the conclusions reached by CRC. The Court finds that the CRC Order was ambiguous and unclear that the proper legal standard was used in the denial of the variance request. Therefore this Court reverses the denial of the Petitioner's variance request, and remands the matter back to the CRC for a new hearing, with a mandate to apply "unnecessary" and not "unreasonable" to the determination of the hardships suffered by the Petitioner.

II

The Commission's Consideration of the denial of the FEMA Grant and Petitioner's failure to relocate to its other property

The Petitioner next contends that CRC improperly placed reliance upon the issues surrounding the Petitioner's application for a FEMA grant and the availability of other property owned by the Petitioners where the Riggings project might be relocated, and that in so doing, the Final Order was made upon unlawful procedure. The Court agrees.

The Court of Appeals in Williams v. North Carolina Dept. of Environment and Natural Resources, 144 N.C. App. 479, 548 S.E.2d 793 (2001) held in pertinent part:

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).

By examining and placing reliance upon the FEMA grant and the fact that the Petitioner owned additional property where the project might be relocated, the CRC bases its denial of

Petitioner's variance request on impermissible considerations in that it focuses on the condition of the landowner (The Petitioner and its members) and not the proper inquiry, which is the unique nature of the property. Id. The findings concerning the denial of the FEMA grant and the failure to relocate to the Petitioner's other property across NC 421 permeates the CRC's Order in each of its Conclusions of Law (¶¶ 3-6) addressing the denial of the variance.

By examining and placing reliance upon the FEMA grant and the other property owned by the Petitioner, the CRC based its Final Order on an improper factor, and accordingly, the Final Order was made upon unlawful procedure. It is clear to this Court that the CRC improperly utilized this factor as a basis for its Final Order. Consideration and reliance on this information by CRC was clearly improper as the very reason that the circumstances of the landowner are not to be examined according to Williams is so that similarly situated person and property owners are not treated differently, giving rise to equal protection of law issues.

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.

The proper inquiry in a variance request before the CRC is concerning the property and not the property owner. In this case, however, the denial of Petitioner's variance request was based in large part on the contention that the Riggings should have accepted the FEMA Grant and relocated. The CRC's consideration of whether the FEMA Grant was rejected by the Riggings and/or whether the Riggings had additional property in which it could relocate was improper in deciding whether or not to grant the variance request. 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.

Similarly, the CRC erred by applying the wrong legal standard of hardship to the petitioner as opposed to hardship to Petitioner's property. The standard, as articulated in Williams, supra, in determining unnecessary hardship 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.). As such, the CRC erred by applying the wrong standard. In this case, the standard is whether strict application of the rules would result in unnecessary hardship to Petitioner's property; not the Petitioner. That, however, was not the standard applied by the CRC. Because the CRC improperly considered the circumstances surrounding the FEMA grant denial and the other property owned by the Petitioner and the potential for relocation of the project, the Order was made upon unlawful procedure. This error consequently requires reversal and remand. On remand, the Court instructs the CRC that in undertaking a review of Petitioner's variance request, the circumstances surrounding the FEMA grant and the other property owned by the Petitioner shall not be considered by it.

III

Adoption of Staff's Contentions

Petitioner argues that the Final Decision was not supported by substantial evidence in the Record, and the CRC erred in adopting the contentions of Staff without competent evidence in the Record to support its Findings of Fact and/or Conclusions of Law. The Court agrees.

"It is axiomatic that arguments of counsel are not evidence" to form the basis of Conclusions of Law. State v. Collins, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). In the instant case, the Conclusions of Law are not supported by the Findings of Fact, and they must be. The CRC must use independent judgment as to whether or not to grant a variance. The Court is

concerned that the CRC did not undertake an independent analysis of the stipulated facts, which comprise the only competent evidence in the Record. Staff's "position" statements, through counsel or otherwise, do not constitute competent evidence and CRC's "adoption" of Staff's position was clearly erroneous. The Conclusions of law are not supported by the Stipulated Facts, but instead are only supported by the arguments of Counsel and the Staff, which again, does not constitute competent evidence. It is inappropriate for the CRC to recite legal argument as a Conclusion of Law when again, the Findings of Fact must be supported by competent evidence; and the Conclusions of Law must be supported by the Findings of Fact. By not relying on its own conclusions and instead rubber-stamping the Staff recommendations, the CRC's Conclusions of Law were not supported by the findings of fact and/or substantial evidence, and its decision, applying the whole record test, was arbitrary and capricious and therefore, made upon unlawful procedure.

These errors mandate that the Final Order of the CRC be reversed, and that the matter be remanded for a new hearing on the basis of the Stipulated Facts. Upon remand, the CRC is instructed to base its Findings of Fact only upon competent evidence, including any Stipulated Facts, and shall not utilize the "contentions" of Staff or counsel as a basis for its Findings of Fact or Conclusions of Law.

IV

Additional Arguments of Petitioner

Petitioner also argues the Order of the CRC constitutes an unconstitutional taking, the actions of the CRC violate the separation of powers doctrine, and that the CRC is not an impartial tribunal. For the reasons set forth in the CRC's Brief filed with this Court, the Court disagrees that that actions of the CRC violates the separation of powers doctrine or that the CRC

was not an impartial tribunal. As to the issue of whether the CRC Order constitutes an unconstitutional taking, this issue is not ripe for hearing until a final determination of a denial of the variance, per N.C.G.S. § 113A-123(b). Accordingly, these arguments are denied.

CONCLUSIONS OF LAW


1. This Court has jurisdiction over the parties and the subject matter of this proceeding.
2. ROBERT R. EMORY, Jr., Chairman of the Coastal Resources Commission is dismissed with prejudice from this appeal.
3. The Final Order of the CRC was based on an error of law.
4. The Final Order of the CRC was made upon unlawful procedure.
5. The Final Order of the CRC is not supported by substantial evidence in the record, and is arbitrary and capricious.
6. As to the issue of taking by the CRC, it is premature to bring the Petitioner's claim, and thus that issue is denied.
7. As to the issue of a breach of the separation of powers by the CRC, that issue is denied.
8. That CRC's Order is reversed and this matter is remanded to the CRC pursuant to the instructions contained in this Order.

**WHEREFORE, BASED UPON THE FOREGOING, IT IS HEREBY ORDERED,
ADJUDGED AND DECREED AS FOLLOWS:**

That the Final Order of the CRC, denying the Petitioner's variance application be, and the same is hereby REVERSED. This matter is remanded to the CRC for a new hearing, consistent

with the mandates and instructions contained within this Order. .

This the 18th day of ~~January~~ ^{February}, 2009.



JAY D. HOCKENBURY
SUPERIOR COURT JUDGE



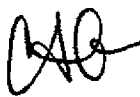
CRC-VR-06-33
on Remand 4/09

State of North Carolina

Department of Justice
PO Box 629
Raleigh, North Carolina
27602

ROY COOPER
ATTORNEY GENERAL

TO: Coastal Resources Commission

FROM: Christine A. Goebel 
Assistant Attorney General

DATE: April 16, 2009 (for the April 29, 2009 CRC Meeting)

RE: **Variance Request by The Riggings Homeowners Association, Inc.**

Petitioner is a Homeowners Association for The Riggings condominium development in Kure Beach, New Hanover County. They own oceanfront property where the development is currently located. They have sought, and have been granted four prior variances from this Commission to keep sandbags in front of their property for a period longer than allowed by Rule 15A NCAC 7H .1705(a)(7). In January of 2008, the CRC denied this current variance request. In January of 2009 at the Judicial Review hearing in New Hanover Superior Court, Judge Jay Hockenbury remanded the variance request back to the CRC for a rehearing. The Petitioner again seeks a variance to keep the bags 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 Variance Criteria
- Attachment D: Petitioners' Variance Request Materials and Attachments
- Attachment E: Additional Exhibits
- Attachment F: A copy of the remand Order from Judge Hockenbury
- Attachment G: Copies of revised positions of the parties

cc: The Riggings HOA c/o William Wright, Esq., Petitioner
Town of Kure Beach CAMA LPO
Jennie W. Hauser, Special Deputy Attorney General & CRC Counsel
DCM Staff

ATTACHMENT A

RELEVANT STATUTES OR RULES

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. . . 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 the estuarine shoreline.

**15A NCAC 7H .1700 General Permit for Emergency Work Requiring a CAMA
and/or Dredge and Fill Permit**

.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.

.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.

(7) A temporary erosion control structure . . . 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,

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.

STIPULATED FACTS

ATTACHMENT B

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.
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.
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.

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On Remand 04/09

For the Petitioner:

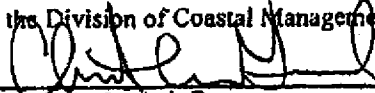


Matthew Buckmiller, Esq.

Counsel for Petitioner
Shipman & Wright, L.L.P.
675 Military Cutoff Road, Suite 106
Wilmington, NC 28405

Date: 12/19/07

For the Division of Coastal Management:



Christine A. Goebel, Esq.
Assistant Attorney General
N.C. Department of Justice
Attorney for Respondent
9001 Mail Service Center
Raleigh, NC 27699-9001

Date: 12/19/07

ATTACHMENT C

Petitioner's and Staff's Positions

- 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.**

Petitioner's Position: Yes. (Taken verbatim from their revised written response to the criteria)

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 Record of Proceedings, p. 4-6 (Stipulated Facts), 18-24 (Variance Request))

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." (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 those previous Variance Orders there has been no change in the 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.¹ As such, no fundamental change has occurred to the Riggings property since

¹ The only change that has occurred to the Riggings is that some of the unit owners' denied the FEMA grant for potential relocation, however pursuant to 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

their previous variance request, where the CRC and Staff 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.²

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 for the requested time 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.

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))

² Pursuant to Judge Hockenbury's Order the proper inquiry in a variance request before the CRC is concerning the property and not the property owner. (Hockenbury Order at p. 10)

Staff's Position: No.

In the past, Staff had agreed with Petitioner that strict application of the development rules regarding how long the sandbag structures could remain caused Petitioner an unnecessary hardship. Staff agreed that the use of temporary erosion control structures, such as these sandbag structures, is to afford homeowners time to retreat from erosion by relocating their property, or to obtain beach nourishment. After initially attempting to secure nourishment for their property, and obtaining variances from the Commission to pursue this option, Petitioner discovered that, according to the Army Corps of Engineers, nourishment was not an acceptable alternative at this location due to the coquina rock located in front of their property. See Stipulated Facts #21-22 Having failed at the nourishment option in 2000, Petitioner then began trying to retreat from the erosion by attempting to secure funds to relocate the structures away from the Ocean Hazard area. See Stipulated Facts # 25-27 At the variance hearing in April 2005, Petitioner emphasized the fact that the Town had recently been awarded a \$3.6 million dollar FEMA grant to acquire the current Riggings site for a park, and Petitioner would retreat by rebuilding the structures to an adjacent parcel by June 2007. These new facts concerning the Petitioner's proposed retreat and relocation were the primary reason staff supported the April 2005 variance request, and its finding that an unnecessary hardship existed. Staff understood the award of the grant to be extraordinary, and noted that it appeared that Petitioner's retreat option was about to come to fruition, and so removal of the sandbag structure at that time would be an unnecessary hardship. However, in the four years since the last variance hearing, the members of the Petitioner-HOA have not been able to get the required support from its members, formally rejected the FEMA grant in 2006. Based on the current variance petition, Petitioner has apparently abandoned any retreat plan, being the one proposed in the FEMA grant or otherwise, as their current request is now to keep the sandbags "...until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publically funded, has been completed." See Stipulated Fact # 35. Based on the current stipulated facts, Staff now contends that the application of the rules, standards, or orders of the Commission will not cause Petitioner unnecessary hardships, as explained below.

In 2003, the CAMA was amended to include N.C.G.S. § 113A-115.1, which prohibited the use of erosion control structures along the ocean shoreline. The Commission's rules did allow for the continued use of "temporary erosion control structures" made of sandbags to protect only immanently threatened structures which were those within 20 feet of the erosion scarp. The installation and design standards in the CRC's rules reflect the temporary nature of the structures, and demonstrate that sandbags were not intended as permanent fortresses. Further, the Commission stated in 15A NCAC 07M.0202(e) that these temporary measures are to be used "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." This

rule demonstrates that sandbags should only offer immediate relief and time to find a permanent solution.

When evaluating this variance factor of whether "strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships," it is instructive to look at guidance from the North Carolina Court of Appeals. The Court looked at the CAMA variance criteria in the case of Williams v. NCDENR, DCM and CRC, 144 N.C. App. 479, 548 S.E. 2d 793 (2001). In Williams, the Court stated,

"We hold that to determine whether a parcel of property suffers from unnecessary hardship due to strict application of CAMA, the CRC must make findings of fact and conclusions of law as to the impact of the act on the landowner's ability to make *reasonable use* of his property."

Id. at 487 (emphasis added). The standard is not, as Petitioner appears to contend, that no "fundamental changes" have taken place since the last variance.

In evaluating this variance criteria for this variance hearing based on the facts stipulated to by the parties, Staff contend that there are few *reasonable* uses for property that has been imminently threatened behind a sandbag structure for the last 24 years, and which has suffered damage from erosion multiple times during this period. Staff believes that any reasonable expectations of use for this property should be decreasing with every passing hurricane, nor'easter, and storm, as the property continues to suffer from the effects of the continuing erosive forces of the ocean, something which is common to Ocean Hazard areas all along the North Carolina coast. Additionally, the amount of time the bags have been allowed to remain is far beyond the scope of what the rules allow, and the sandbag structure today has taken on the characteristics of a permanent erosion control structure which is prohibited under the CAMA. As the reasonable uses for this property continue to erode with the continuing erosive forces placed on the property by the Atlantic Ocean, the strict application of the Commission's time limits for sandbag structures does not cause the Petitioner and its property unnecessary hardship.

Finally, Petitioner offers no proposed solution which is approved by the Commission and which is different from those offered in the past. As stated above, the Commission's approved responses to oceanfront erosion are retreat through demolition or relocation, or nourishment. This Petitioner was afforded extra time through earlier variances to pursue, albeit unsuccessfully, beach nourishment for the area in front of its property. There is no evidence that the circumstances which prevented it in the past have changed and would now allow nourishment in the near future. Additionally, while Petitioner had hopes to retreat from the erosion through relocation, and had taken some concrete steps to this end including obtaining the grant, having discussions with architects and other consultants, and securing a variance to continue with the

relocation process, this process has apparently now been abandoned by Petitioner.

Instead, Petitioner now proposes the "Habitat Restoration Project" which may very well be illegal based on the hardened structures ban of N.C.G.S. § 113A-115.1. In the alternative, Petitioner also proposes a new nourishment project, either privately or publically funded, which would likely cover the natural heritage and hard-bottom habitat coquina rock. Both of these proposals may not even be permissible, may be illegal, no funding has been identified, and so staff feels they are not real steps toward finding a permanent solution to Petitioner's erosion problem.

In conclusion, staff contend that the strict application of the applicable development rules, standards, or orders issued by the Commission" do not cause the petitioner unnecessary hardships because, using the Court of Appeals' reasoning from Williams for this factor, the Petitioner can make reasonable use of its property, despite the strict application of the sandbag time limits, because the reasonable uses for Petitioner's property have been significantly reduced as the erosional forces of the Atlantic Ocean continue to impact Petitioner's property. Petitioner attempted to get nourishment and abandoned that effort, then attempted retreat through relocation and abandoned that effort. Now, it has proposed keeping the sandbags until completion of its proposed habitat project, which is likely illegal, is built, or until a theoretical but not planned or permitted future nourishment project, with no identified source of funding, is completed. As Petitioner has tried and failed at both the retreat and nourishment options, and now offers no concrete plan to resolve the continuing effects of erosion in the short-term, the reasonable uses for this property are greatly diminished, and so strict enforcement of the Commission's time limits for sandbags will not cause Petitioner unnecessary hardships.

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

Petitioner's Position: Yes. (Taken verbatim from their revised written response to the criteria)

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.¹ Accordingly, the fact that the Riggings has used the sandbags for twenty (20) years 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.

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 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 abandoned, at least

¹ 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. (Hockenbury Order at p. 9-11)

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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 three separate 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 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: No.

As indicated in prior Staff Recommendations and Orders of the CRC, Staff had agreed that Petitioner's unnecessary hardship results from conditions which were peculiar to the Petitioner's property--specifically the location of coquina rock formations preventing the placement of sand in past nourishment projects, and the Fort Fisher rock revetment. While both of these structures still exist, Staff has now argued in the previous factor that the Petitioner no longer has an unnecessary hardship. As the statutory variance criteria is, "[d]o such hardships result from conditions peculiar to the petitioner's property, such as location, size, or topography of the property?", it is logical that if there are no hardships identified in the first criteria, then there can

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not be an unnecessary hardship that results from conditions peculiar to the property. That is what is now being argued by Staff.

Petitioner's argument focuses on the long history of the coquina rock in the area near its property, and on the Fort Fisher revetment, and argues that these features have (1) prevented the beach in front of Petitioner's property in the inclusion of a nourishment project, and (2) have increased erosion on the beach in front of Petitioner's property. The coquina being the Corps' reason not to include the Riggings in its public nourishment project, while unfortunate for Petitioner, does not constitute an unreasonable use of Petitioner's property which causes Petitioner unnecessary hardships. This is because beach nourishment is not an automatic right of an oceanfront owner, and so causes no unnecessary hardships to Petitioner. Also, Stipulated Fact #18 states, "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." Any effects on the erosion rate in front of Petitioner's property by the construction of the revetment at Fort Fisher were temporary and occurred in 1995-96. As there has been no significant increases in the erosion rate at Petitioner's property caused by the Fort Fisher revetment, the only hardship which remains is the regular erosive forces of the Atlantic Ocean. There are no stipulated facts that these regular erosive forces are caused by the coquina or Fort Fisher revetment. These regular erosive forces are certainly not peculiar to Petitioner's property, and are no different than the many others properties in the Ocean Hazard AECs, where the Commission's rules acknowledge that such areas have a "special vulnerability to erosion or other adverse effects of sand, wind, and water. . ." and have a "substantial possibility of excessive erosion or flood damage." 15A NCAC 7H.0301.

As Petitioner suffers no unnecessary hardship, no unnecessary hardship is caused by conditions peculiar to Petitioner's property. Additionally, the hardship of erosion is a known hardship for oceanfront owners, and was acknowledged by the Commission's rules, specifically in the Ocean Hazard AECs definitions enacted in 1977. There is nothing peculiar or unique about the forces impacting Petitioner's property. Instead, this "special vulnerability to erosion or other adverse effects of sand, wind, and water..." is common to all oceanfront owners in the Ocean Hazard AECs.

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

Petitioner's Position: No. (Taken verbatim from their revised written response to the criteria)

"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.¹ 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 any action the Riggings has taken has caused the potential hardships for their property should their variance request be denied.

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: Yes.

Staff notes that Petitioner's argument, that they did not cause the coquina rock's National Heritage Area designation and were not involved in construction of the Fort Fisher rock revetment, ignore the fact that these two things have existed since 1982 and 1995, respectively. Petitioner was first aware of the erosion problems at their site in 1985 when the structures became imminently threatened and the sandbag structures were first installed. Additionally, the Commission's rules, enacted in 1977, themselves acknowledge the "special vulnerability to erosion or other adverse effects of sand, wind, and water. . ." which is common to all oceanfront

¹ 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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owners in the Ocean Hazard AECs, including Petitioner. Since the time the erosion at this site was apparent to Petitioner, it has attempted and failed at getting a nourishment project extended to its area of the beach, and then later, to complete its retreat through relocation plan. This Commission had even granted Petitioner extensions for its sandbag removal deadline to allow Petitioner the ability to fully explore both these options to address their erosion problem. Nonetheless, Petitioner has now abandoned its attempts to retreat from the erosion through relocation of its structures, and is focusing now on a proposed hardened structure and/or nourishment.

Petitioner has now proposed the possibility of a future publically or privately funded nourishment project which has not been designed, permitted, or a funding source identified. Petitioner proposes this despite knowing that at least since the 2000, the Corps indicated that the coquina rock would likely prevent nourishment being placed at or near the Riggings. Additionally or in the alternative, Petitioner also proposes a habitat restoration plan that is likely in conflict with the hardened structures ban of N.C.G.S. § 113A-115.1, and also has not been permitted or a funding source identified. These proposals, which will certainly be costly and both do not identify a funding source, seem highly unlikely to Staff to come to pass, as Petitioner has indicated in Stipulated Fact # 29 that "some homeowners lacked the financial capability (of \$125,000) to relocate" when voting on the FEMA grant in 2006. Staff believes that the chances are slim that homeowners unable to afford the \$125,000 supplemental relocation costs in 2006 could now all afford to fund a private nourishment or habitat restoration plan.

Despite the lack of concrete details for either plan now proposed, Petitioner requests that they be able to keep the sandbags until one of these projects is completed. Staff is very concerned that as in the past, Petitioner will make promises that they have a solution to the erosion problem affecting their property, but could easily again fail to implement a permanent solution and the bags would remain even longer then the 24 years they have existed thus far. Staff is also concerned that Petitioner's request to keep the bags until one of it's solutions is complete, is much too open-ended. These projects may be illegal or not-permittable and if never completed, the bags would remain indefinitely. For these reasons, any hardships Petitioners might face, though Staff argue above that there are no unnecessary hardships affecting Petitioners now, are a result of their own inability to react to their long-standing situation with a long-term solution of nourishment or retreat through relocation.

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

Petitioner's Position: Yes. (Taken verbatim from their revised written response to the criteria)

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.¹

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

¹ If this tribunal is inclined to consider the denial of the FEMA Grant, which would be impermissible pursuant to Judge Hockenbury's Order 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. Indeed some members of the Riggings HOA, by voting in the affirmative to move the Condominium, have done, and are still feverishly, doing all they can to resolve this situation. At least as to these Riggings members the granting of a variance would preserve substantial justice until they have an adequate time to explore further options.

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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)

Staff can't 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 Judge Hockenbury's instructions in his Order that the proper inquiry in a variance request is concerning the property and not the property owner. (Page 10 of Judge Hockenbury Order) 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: No.

Staff understands that one of the Commission's main objectives for the ocean hazard AEC is to eliminate unreasonable danger to life, property, and amenities, pursuant to 15A NCAC 7M.0201. While Petitioner argues that allowing the sandbag structure to remain is the best way to achieve this goal, Staff disagrees. Staff believes that while the sandbags were meant to be a temporary band-aid while Petitioner sought nourishment and then retreat through relocation, the bags have instead inflated expectations of what reasonable uses are for the property. Petitioner continues to rely on the sandbags to protect or reduce damage from storms, instead of finding a realistic lasting solution to erosion problems. Instead of learning from prior failed attempts at nourishment and retreat through relocation, Petitioner now proposes more of the same regarding nourishment, as well as a problematic habitat restoration plan which is likely a hardened structure banned by the CAMA.

The rule authorizing the use of sandbags is found under the heading of "Specific Use Standards for Ocean Hazard Areas" and specifically describes the allowable ocean shoreline erosion control activities. These standards make it clear that permanent erosion control structures

"may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and, therefore, *are prohibited*. Such structures include bulkheads, seawalls, revetments, jetties, groins and breakwaters."

15A NCAC 7H.0308(a)(1)(b). To allow property owners some temporary relief from erosion, sandbags are allowed only in very limited circumstances. The rules only allow sandbags in very limited sizes, in very limited situations, in very limited locations, and for a very limited period of time. Petitioner's contentions that the intent of the rule is to allow them to take whatever measures are necessary to protect their structures, for how ever long that may take the Petitioner, if those measures are even ever taken, is plainly contradicted by the rules. The Petitioner has already been afforded an extra nine years by the Commission, in addition to the 13 initial years the sandbags were allowed. The previous extensions of one, two, or three years at a time, were granted while Petitioner was taking specific actions for nourishment and then retreat through relocation. These short, defined extensions in order to take specific action were deemed by the Commission to be within the spirit of the rules regarding attempts to eliminate unreasonable danger to life, property, and amenities. However, the current open-ended, undefined request based on the completion of one of the two proposed plans by Petitioner, both of which are questionably permissible or likely illegal, and lack clear funding sources simply is not within the spirit of the Commission's rules for temporary erosion control structures.

Petitioner's argument also fails to address the importance of the Commission's other stated goals of preventing encroachment of permanent structures on public beach areas, of preserving the natural ecological conditions of the barrier dune and beach systems, and protecting present common law and statutory rights of access to, and use of the lands and waters of the coastal area. While Petitioner points to Stipulated Fact # 34 and notes that the public can pass, though sometimes by walking up near Petitioner's property, this ignores the continued existence of the sandbag structure on the public beach area and the increasing encroachment of the buildings impedes the public's rights of access and use of the beach area. While the public may be able to pass by, it certainly cannot use the beach where the sandbags are located, a large area of the public's beach shown in the site photographs included in the record. As argued above, the existing sandbag structure is continually losing its "temporary" characteristics and is becoming a more permanent illegal hardened erosion control structure, contrary to the CAMA and the Commission's rules and objectives.

In addition to Petitioner's request not being consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission as described above, it also does not secure the public safety and welfare as required by this variance factor. Petitioner simply argues that it meets this criteria by avoiding "potential debris from the Riggings that can harm other structures and/or inhibit public access to the beach." While this "harm" is speculative and could be avoided altogether if the structures were relocated as once proposed, Petitioner also ignores the impacts to public safety and welfare from the existing sandbags which would continue if this variance is granted and the bags are allowed to remain. In addition to the bags impeding the public's rights of access and use of the beach area, these bags, some of which fall subject to the ocean's forces and wear out, can cause real safety concerns for the public, primarily those of entanglement in derelict bags. Examples of this can be seen in the site pictures in the accompanying power-point presentation.

Finally, this variance factor requires Petitioner to demonstrate that the requested variance would preserve substantial justice. Petitioner claims that because it is in a unique position where DCM requires removal of the sandbags but the Corps won't allow nourishment because of the coquina designation by the heritage designation, and because the impacts on the public beach are not all that bad since the public can still pass along the beach even at high tide, substantial justice would be preserved.

Staff contend that instead, substantial justice would not be preserved if a time extension was granted for Petitioner's sandbags until their newly proposed nourishment project or habitat restoration plan is completed. It appears to Staff that Petitioners are no longer working diligently to seek nourishment, to implement their habitat restoration plan, and have abandoned attempts to relocate the buildings, as evidenced by the lack of a retreat/relocation plan proposed in this variance petition. While past variances were granted for short, defined periods of time in order to take specific prescribed steps, first for nourishment and then for retreat through relocation, Petitioner's current proposal is vastly different. The current proposals have significant problems in that they may not be permissible, may be illegal, and have no clear source of funding. Petitioner has been granted extraordinary help by this Commission through the past time extensions and afforded enough time to make real attempts at nourishment and retreat through relocation. As attempts at both these responses to erosion endorsed by the Commission's rules have failed or been abandoned by Petitioner, to grant an extension now to re-try these options would not preserve substantial justice. Allowing the bags to remain until one of those plans is completed, if ever, would be no longer preserve substantial justice because to do so would essentially constitute a permanent variance for Petitioner, while allowing only truly temporary sandbag structures for other threatened structures along the coast.

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC-VR-06-33

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY RIGGINGS HOMEOWNERS)
ASSOCIATION, INC.)

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on April 29, 2009, in Beaufort, North Carolina pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 7J.0700, et seq. Assistant Attorney General Christine A. Goebel appeared for the Department of Environment and Natural Resources, Division of Coastal Management (DCM); Gary Shipman appeared on behalf of Petitioner Riggings Homeowners Association, Inc.

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

STIPULATED FACTS

1. Riggings Homeowners, Inc. ('Riggings HOA' or 'Petitioner') is a non-profit corporation organized under the laws of the State of North Carolina. "The Riggings" is also the name of the 48-unit residential condominium project bordering the Atlantic Ocean in Kure Beach, New Hanover County, North Carolina, whose unit owners are members of Riggings HOA.
2. 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.

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.

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, the 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, the 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, the 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:

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, and/or a renourishment project, either privately or publicly funded, has been completed.

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. a) Petitioner's property is located within the Ocean Hazard Area of Environmental Concern. 15A NCAC 7H .0301.
3. b) Based on substantial evidence in the record, including the Stipulated Facts (SF) referenced herein, the CRC concludes as a matter of law that Petitioner has not demonstrated that strict application of Rules 15A NCAC 7H .0308(a)(2) and 15A NCAC 7H .1705(a)(7) will result

*Changed @
hearing by Ct.*

in an unnecessary hardship, as required by N.C.G.S. § 113A-120.1(a). See Williams v. DENR, 144 N.C. App. 479, 485, 548 S.E.2d 793, 797-98 ("Whether strict application of [CAMA] places an 'unnecessary hardship' on a parcel of property, depends on the unique nature of the property; not the landowner.") The North Carolina Supreme Court has held that "pecuniary loss alone is not enough to show an 'unnecessary hardship' requiring a grant of a variance." Williams, 144 N.C. App. at 486 (citation omitted). With regard to Petitioner's specific request for variance, the plain language of the statute and regulations allow use of sandbags to prevent imminent endangerment to structures as a temporary, not a permanent, erosion control measure. N.C.G.S. § 113A-115.1; 15A NCAC 7H .0308(a)(2); 15A NCAC 7H .1701; 15A NCAC 7H .1705(a); 15A NCAC 7M .0202(e).

Petitioner began to be threatened by erosion, and first began using a sandbag revetment to address erosion at this location, in 1985. SF 10. South of Petitioner's property is the Ft. Fisher State Park. SF 2. The Ft. Fisher revetment was constructed in 1996, and initially after construction of the Ft. Fisher revetment erosion increased at Petitioner's property, but now erosion is stable. SF 10, 18. The two variances previously granted to Petitioner to allow the sandbags to remain in place have extended the use of sandbags at this location for a number of years (SF 19, 23-24); however, the placement of sandbags as erosion control measures is intended to be time-limited.

While disallowing Petitioner's request for yet another variance from the time limit contained in the sandbag rules may cause a hardship for Petitioner, Petitioner has not shown that the resulting hardship would be unnecessary; in fact, limiting the role that sandbags play in protecting oceanfront property from the effects of beach erosion is a policy position that has been

intentionally chosen by the General Assembly and the CRC. If removal of the sandbags at this location results in damage to the structures on Petitioner's property, this result is contemplated by the State's decision that property owners may use sandbags only as a temporary measure in the prevention of erosion that imminently threatens structures and any damage caused by erosion in this situation is a "necessary" not an "unnecessary" hardship.

Petitioner has enjoyed the benefits of this regulatory provision since 1985 when the sandbags were first placed to control erosion at this location; beginning in 2000, the variances granted to Petitioner to allow the sandbags to remain in place at this location have extended the placement of these temporary erosion control measures in order to allow the Petitioner to explore various options for protecting Petitioner's structures at this site. SF 10-15, 19, 23-29. Petitioner's current request that a variance be granted allowing the sandbags to remain 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 does not offer any endpoint for the placement of what is supposed to be a temporary erosion control measure. Additionally, although it is uncertain whether beach nourishment is an option at this location (SF 20-22, 31), during oral argument at the April 29, 2009 CRC meeting counsel for Petitioner told the Commission that Petitioner could not pursue certain beach renourishment possibilities until this variance proceeding has terminated. For each of these reasons, Petitioner has not demonstrated that failing to grant a variance to the time limit set for the use of sandbags results in an unnecessary hardship based on the unique nature of Petitioner's property.

4. Based on substantial evidence in the record, including the Stipulated Facts referenced herein, 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. As discussed above, Petitioner's is a unique property located within the Ocean Hazard AEC between the Ft. Fisher revetment and an intertidal coquina rock outcropping that has been declared a natural heritage area by the North Carolina Natural Heritage Program. SF 1-9, 16-17, 22. The unique underlying geology and topography of this property do not affect the naturally occurring erosive forces of wind and wave that have, in fact, caused erosion at this site since at least 1985 when Petitioner first obtained a permit to use a sandbag revetment to attempt to stop the erosion. See SF 8-10, 32. Moreover, this conclusion does not change the Commission's preceding conclusion of law that Petitioner has not demonstrated that failing to grant a variance to the time limit set for the use of sandbags results in an unnecessary hardship.

5. Based on substantial evidence in the record, including the Stipulated Facts referenced herein, 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. This conclusion, however, does not change the Commission's conclusion of law that Petitioner has not demonstrated that failing to grant a variance to the time limit set for the use of sandbags results in an unnecessary hardship.

6. The North Carolina Court of Appeals has held that it is unnecessary for the CRC to make conclusions of law regarding this part of the statutory criteria where the CRC concludes the application does not meet the elements of the three-part test set out above. Williams, 144

N.C. App. at 490. Despite the Court's indication that additional analysis of the application is not necessary, and based on substantial evidence in the record including the Stipulated Facts referenced herein, the CRC concludes as a matter of law the Petitioner has not demonstrated (a) that the requested variance is consistent with the spirit, purpose and intent of the Commission's rules, (b) that it will secure public safety and welfare, and (c) that it will preserve substantial justice. The 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. SF 10-15, 19, 23-24, 28, August 22, 2006 Variance Petition, and N.C.G.S. § 113A-115.1; 15A NCAC 7H .0308(a)(2); 15A NCAC 7H .1701; 15A NCAC 7H .1705(a); 15A NCAC 7M .0202(e). Additionally, the CRC concludes as a matter of law that the situation with the sandbag revetment protecting Petitioner's 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. SF 14, 32-34. Finally, allowing these sandbags to remain to protect Petitioner's structures over an even greater period of time will not preserve substantial justice because both the legislature and the CRC's intent for the use of sandbags is as a temporary erosion control structure. N.C.G.S. § 113A-115.1; 15A NCAC 7H .0308(a)(2); 15A NCAC 7H .1701; 15A NCAC 7H .1705(a); 15A NCAC 7M .0202(e).

ORDER

THEREFORE, the variance from 15A NCAC 7H .0308(a)(2) and 15A NCAC 7H.1705 is
DENIED.

This the 21st day of May 2009.

Robert R. Emory, Jr.

Robert R. Emory, Jr., Chairman
Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing FINAL ORDER upon the parties by the methods indicated below:

Gary Shipman
William Wright
Shipman & Wright, LLP
675 Military Cutoff Road, Suite 106
Wilmington, NC 28405

CERTIFIED MAIL/
RETURN RECEIPT REQUESTED
(Electronic mail wwrightshipmanlaw.com
gshipman@shipmanlaw.com)

Jean Cashion, President
Riggings Homeowners Assoc.
1437 Fort Fisher Blvd.
Kure Beach, NC 28449

CERTIFIED MAIL/
RETURN RECEIPT REQUESTED

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

(Electronic mail cgoebel@ncdoj.gov)

Pamela A. Jones
Certified Paralegal
N.C. Department of Justice

(Electronic mail pajones@ncdoj.gov)

James H. Gregson
Angela Willis
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

(Electronically Jim.Gregson@ncmail.net
Angela.Willis@ncmail.net)

This the 21st day of May 2009.



Jennie Wilhelm Hauser
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N. C. 27602
Commission Counsel



State of North Carolina

ROY COOPER
ATTORNEY GENERAL

Department of Justice
PO Box 629
Raleigh, North Carolina
27602

Reply to:
Jennie Wilhelm Hauser
Environmental Division
Tel: (919)716-6690
Fax: (919)716-6767
Jhauser@ncdoj.gov

May 21, 2009

Gary Shipman
William Wright
Shipman & Wright, LLP
675 Military Cutoff Road, Suite 106
Wilmington, NC 28405

CERTIFIED MAIL/
RETURN RECEIPT REQUESTED

Jean Cashion, President
Riggings Homeowners Assoc.
1437 Fort Fisher Blvd.
Kure Beach, NC 28449

CERTIFIED MAIL/
RETURN RECEIPT REQUESTED

Re: Variance Request for Coastal Area Management Act (CAMA) Permit,
CRC-VR-06-33

Dear Sirs:

At its April 29, 2009 meeting the Coastal Resources Commission denied your variance request. Attached is a copy of the order, signed by the Chairman of the Coastal Resources Commission.

You have the right to appeal the Coastal Resources Commission's decision by filing a petition for judicial review in superior court of New Hanover County within thirty days after receiving the order. A copy of the judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

Mary Penny Thompson, General Counsel
Dept. of Environment and Natural Resources
1601 Mail Service Center
Raleigh, NC 27699-1601

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse, so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		<p>A. Signature <input checked="" type="checkbox"/> <i>Ellen Horton</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p>	
<p>1. Article Addressed to:</p> <p>Matthew Buckmiller/William Wright Shipman & Wright, LLP 675 Military Cutoff Rd., Ste. 106 Wilmington, North Carolina 28405</p>		<p>B. Received by (Printed Name) MAY ELEN MORN</p>	<p>C. Date of Delivery 5-22-07</p>
		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>	
		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>2. Article Number (Transfer from service label)</p>		<p>7005 2570 0002 0989 5089</p>	

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Shipman & Wright, LLP
675 Military Cutoff Rd., Ste. 106
Wilmington, North Carolina 28405
Case No.: CRC-VR-06-33

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Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Sent to: Jean Cashion, President
Riggins Homeowners Association
1437 Fort Fisher Boulevard
Kure Beach, North Carolina 28449
Case No.: CRC-VR-06-33

Postmark: RALEIGH, NC 27602 MAY 21 2007 N.C. DEPT. OF JUSTICE

7005 2570 0002 0989 5089

CERTIFICATE OF FILING AND SERVICE

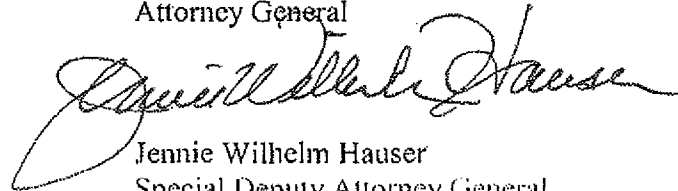
This is to certify that I have this day filed the certified copy of the Record of Proceedings in the office of the Clerk of Superior Court for New Hanover County and have served a copy of the foregoing certified copy of Record of Proceedings upon the parties in the manner indicated and addressed as follows:

Gary K. Shipman
Matthew W. Buckmiller
Shipman & Wright, LLP
575 Military Cutoff, Suite 106
Wilmington, NC 28405

US MAIL

This the 15th day of July, 2009.

ROY COOPER
Attorney General



Jennie Wilhelm Hauser
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6600

FILED

STATE OF NORTH CAROLINA 2009 JUL 15 PM 1:15 THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF NEW HANOVER NEW HANOVER COUNTY, N.C. 09 CVS 2761

BY _____

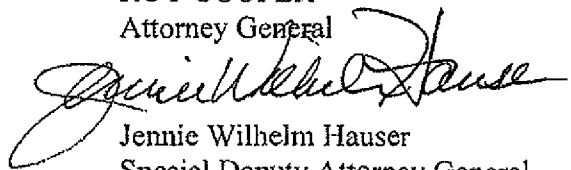
RIGGINGS HOMEOWNERS, INC.)
)
Petitioners,)
)
v.)
)
NORTH CAROLINA COASTAL)
RESOURCES COMMISSION,)
)
Respondent.)

CERTIFIED COPY OF
RECORD OF PROCEEDINGS

NOW COMES the respondent-agency, North Carolina Coastal Resources Commission ("CRC"), pursuant to N.C. Gen. Stat. §§ 150B-47 and 113A-123, and transmits to the court a certified copy of the record of proceedings before the CRC *In the Matter of the Variance Request by Riggings Homeowners, Inc., CRC-VR 06-033.*

This the 13 day of July 2009.

ROY COOPER
Attorney General



Jennie Wilhelm Hauser
Special Deputy Attorney General
Counsel to the CRC
N. C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6600

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY nm
Assistant Deputy Clerk Superior Court

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF NEW HANOVER 2011 NOV 21 PM 12:16

09 CVS 2761

RIGGINGS HOMEOWNERS, INC.

NEW 11)
BY)

Petitioner,

v.

NOTICE OF HEARING

NORTH CAROLINA COASTAL RESOURCES
COMMISSION,

Respondent.

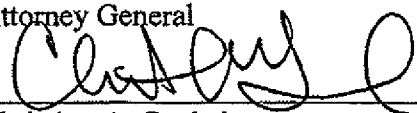
TO: William G. Wright
Shipman & Wright, L.L.P.
11 South Fifth Street
Wilmington, NC 28401

PLEASE TAKE NOTICE that, as mutually agreed, the HEARING ON JUDICIAL REVIEW
will be heard before the Court in the New Hanover County Judicial Building, 316 Princess Street,
Wilmington, North Carolina, on Thursday, February 9, 2012 at 9:30 A.M. or as soon thereafter as
the Court may hear it.

This the 18th day of November, 2011.

ROY COOPER
Attorney General

BY:



Christine A. Goebel
Assistant Attorney General
NC Bar # 27286
cgoebel@ncdoj.gov

Marc Bernstein
Attorney General
NC Bar #21642
Mbernstein@ncdoj.gov

NC Department of Justice

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: *Jacqueline J. Tozour*
Deputy Clerk

9001 Mail Service Center
Raleigh, NC 27699-9001
(919) 716-6000 phone
(919) 716-6767 fax

CERTIFICATE OF SERVICE

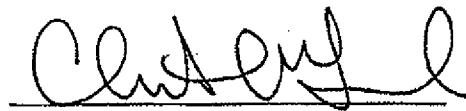
The undersigned hereby certifies that a copy of the foregoing NOTICE OF HEARING was served on counsel for Petitioner addressed as follows:

William G. Wright wwright@shipmanlaw.com

This the 18th day of September, 2011.

ROY COOPER
Attorney General

By:



Christine A. Goebel
Assistant Attorney General

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2008 OCT - 9 FILE NO. 08-CVS-1069

RIGGINGS HOMEOWNERS, INC.)

Petitioner,)

vs.)

COASTAL RESOURCES)
COMMISSION OF THE STATE)
OF NORTH CAROLINA and)
ROBERT R. EMORY, Jr., Chairman)
of Coastal Resources Commission)

Respondents.)

NEW HANOVER COUNTY, C.S.C.

BY _____

NOTICE OF HEARING

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: *Jessica N. Stevens*
Deputy Clerk of Superior Court

PLEASE TAKE NOTICE that the undersigned will bring this matter on for hearing before the Superior Court Judge presiding the Petitioner's Petition for Judicial Review, at the January 6, 2009, Non-Jury Civil Session of New Hanover County Superior Court, New Hanover County Courthouse, Wilmington, North Carolina, at 9:30 a.m., or as soon thereafter as the matter can be heard.

This the 9th day of October, 2008.

SHIPMAN & WRIGHT, L.L.P.
Attorneys for Petitioner

Matt Buck

GARY K. SHIPMAN
N.C. State Bar No.: 9464
WILLIAM G. WRIGHT
N.C. State Bar No.: 26891
MATTHEW W. BUCKMILLER
N.C. State Bar No.: 35194
575 Military Cutoff, Suite 106
Wilmington, North Carolina 28405
Tel: (910) 762-1990

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

Hand delivering a copy hereof to each said party or the attorney thereof.

Via facsimile

Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

J. Allen Jernigan
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Fax: 919.716.6763

This is the 9th of October, 2008.

SHIPMAN & WRIGHT, L.L.P.



GARY K. SHIPMAN
N.C. State Bar No.: 9464
WILLIAM G. WRIGHT
N.C. State Bar No.: 26891
MATTHEW W. BUCKMILLER
N.C. State Bar No.: 35194
Attorneys for Petitioner
575 Military Cutoff Road, Suite 106
Wilmington, NC 28401
Telephone: 910-762-1990
Facsimile: 910-762-6752

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 1069

RIGGINGS HOMEOWNERS, INC.,)

Petitioner,)

v.)

COASTAL RESOURCES COMMISSION)
OF THE STATE OF NORTH CAROLINA and)
ROBERT R. EMORY, Jr., Chairman of)
Coastal Resources Commission,)
Respondents.)

NOTICE OF HEARING

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY

TO: Gary K. Shipman
Matthew W. Buckmiller
Shipman & Wright, LLP
575 Military Cutoff Road, Suite 106
Wilmington, North Carolina 28405

51
Assistant, Deputy, Clerk Superior Court

PLEASE TAKE NOTICE that, as mutually agreed, the Petitioner's Petition for Judicial Review will be heard before the Court in the New Hanover County Judicial Building, 316 Princess Street, Wilmington, North Carolina, on Tuesday, October 7, 2008 at 9:30 a.m. or as soon thereafter as the Court may hear it.

This the 10 day of July, 2008.

ROY COOPER
Attorney General

BY:



J. Allen Jernigan
Special Deputy Attorney General
State Bar No. 10950
Email: ajern@ncdoj.gov

BY: Christine A. Goebel / [Signature]

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

NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
(919) 716-6600 phone
(919) 716-6767 fax

CERTIFICATE OF SERVICE

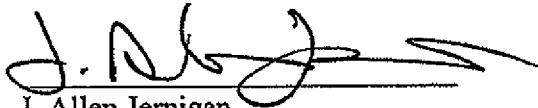
The undersigned hereby certifies that a copy of the foregoing NOTICE OF HEARING was served on counsel for defendant by depositing a copy in the United States Mail, first class, postage prepaid, addressed to:

Gary K. Shipman
Matthew W. Buckmiller
Shipman & Wright, LLP
575 Military Cutoff Road, Suite 106
Wilmington, North Carolina 28405

This the 10 day of July, 2008.

ROY COOPER
Attorney General

By:



J. Allen Jernigan
Special Deputy Attorney General

DESIGNATION OF VERBATUM TRANSCRIPT
FROM JUDICIAL REVIEW HEARING PER RULE 9(c)

The Judicial Review Hearing of this case before the Honorable Jay D. Hockenbury, Senior Resident Superior Court Judge presiding, occurred on March 12th and 13th of 2012. Pursuant to North Carolina Rule of Appellate Procedure 9(c), the complete stenographic transcript of the proceeding in this case, taken by Tina R. Stancill, Official Court Reporter for New Hanover County, and consisting of 126 pages was delivered to the parties on August 7, 2012. Upon the filing of this record, Counsel for the Respondent-Appellant will notify Ms. Stancill, who shall cause the transcript to be filed electronically pursuant to Rule 7.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF NEW HANOVER

SUPERIOR COURT DIVISION

FILE NO.: 09-CVS-2761

2012 JUN -1 PM 1:23

RIGGINGS HOMEOWNERS, INC.

Petitioner,

vs.

COASTAL RESOURCES
COMMISSION OF THE STATE
OF NORTH CAROLINA

Respondent.

ORDER

COPY
A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: Camellia E. Reed
County Clerk

This appeal came on for hearing before the Honorable Jay D. Hockenbury, Superior Court Judge, presiding over the March 12 and 13, 2012 Civil, Non-Jury Session of the Superior Court Division of New Hanover County, upon appeal filed by the Petitioner herein on a Petition for Judicial Review issued by this Court to review the May 21, 2009 Final Order of North Carolina Coastal Resources Commission ("CRC"). The Petitioner was represented by its attorney, William G. Wright and Respondent was represented by its attorneys, Assistant Attorney General Christine A. Goebel and Special Deputy Attorney General Marc Bernstein.

Procedural History

On August 22, 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 its property longer than is allowed under the rules,¹ and until such time as Petitioner's proposed Habitat Enhancement

¹ 15A NCAC 7H.1705 provides:

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

Project and/or a renourishment project, either privately or publicly funded, has been completed.
(See Record of Proceedings, p. 4-6 (Stipulated Facts), 18-24 (Variance Request))

First Variance Hearing

The Petitioner and the Division of Coastal Management agreed on a set of stipulated facts and on January 17, 2008, Petitioner's variance request was heard at a regularly scheduled CRC meeting. (R.O.P., p. 4-6) At the meeting, the Riggings' variance request was unanimously denied. (R.O.P., p. 146-160 (CRC First Order))

Appeal of First Variance Hearing

A Petition for Judicial Review was timely filed pursuant to N.C. Gen. Stat. § 150B-45 on March 7, 2008. On February 20, 2009, after having reviewed the Record for the Riggings Variance 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. The Court reversed the CRC's First Order and remanded the matter back to CRC pursuant to the instructions contained in his Order. (R.O.P., p. 173-186)

Second Variance Hearing

(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.

On April 29, 2009, the variance request of the Riggings was re-heard at the regularly scheduled meeting of the CRC. The CRC's First Order, dated May 21, 2009, denied Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7). (R.O.P. pp. 373-384) In its Final Order, the CRC concluded that Petitioner did meet two (2) of the four (4) criteria in its 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." (R.O.P., p. 380- 381) 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." (R.O.P., p. 381)

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. (R.O.P., p. 378-3) Moreover, the CRC 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

The CRC's Final Order, which denied Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7) was received by the Petitioner, through its counsel, on May 22, 2009. The Petition for Judicial Review was timely filed pursuant to N.C. Gen. Stat. § 150B-45 on June 17, 2009. The Final Order of the CRC is a final agency decision within the meaning of Article 4, Chapter 150B of the North Carolina General Statutes and Petitioner is directly affected by said Final Order and entitled to judicial review of the CRC's decision. N.C.G.S. § 150B-43 (2012).

The Standard of Review

The standard of review to be employed by the trial court on judicial review of an agency decision depends on the particular issues presented by the parties. Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999); Dew v. State ex rel. North Carolina Dept. of Motor Vehicles, 127 N.C. App. 309, 488 S.E.2d 836 (1997). The reviewing court may be required to utilize both the "whole record" and the "de novo" standards of review, when reviewing an agency decision, if warranted by the nature of the issues raised. Skinner v. North Carolina Dept. of Correction, 154 N.C. App. 270, 572 S.E.2d 184 (2002).

When a petitioner alleges that an agency violated his or her constitutional rights, the court will undertake *de novo* review. In re North Carolina Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155, 349 N.C. 656, 509 S.E.2d 165 (1998). Similarly, judicial review of whether an agency decision was based on an error of law requires *de novo* review. Hodgkins v. North Carolina Real Estate Comm'n, 130 N.C. App. 626, 504 S.E.2d 789 (1998); Beneficial North Carolina, Inc. v. State ex rel. North Carolina State Banking Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997). Where a petitioner asserts that the agency misinterpreted a statute, the proper standard of review for this question was *de novo*, and the reviewing court could substitute its judgment for that of the state agency if the agency's decision was affected by an error of law. Associated Mechanical Contractors, Inc. v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); *accord* Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998); Walker v. Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, 127 N.C. App. 156, 487 S.E.2d 839 (1997); Yates Const. Co., Inc. v. Commissioner of Labor for the State of N.C., 126 N.C. App. 147, 484 S.E.2d 430 (1997); Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App.

31, 505 S.E.2d 581 (1998), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999). A *de novo* standard of review applies to claims that an agency violated a constitutional provision, was in excess of statutory authority, made a decision upon unlawful procedure or made some other error of law. Moore v. Charlotte-Mecklenburg Bd. of Educ., 185 N.C. App. 566, 649 S.E.2d 410 (2007).

In a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. In re Appeal of the Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003); R.J. Reynolds Tobacco Co. v. North Carolina Dept. of Environment & Natural Resources, 148 N.C. App. 610, 560 S.E.2d 163 (2002) ("De novo review" requires the court to consider a question anew, as if not considered or decided by the agency previously, and to make its own findings of fact and conclusions of law rather than relying upon those made by the agency).

When the issue on appeal is whether the agency's decision was supported by substantial evidence or whether the agency's decision was arbitrary and capricious, the reviewing court must apply the "whole record" test. ACT-UP Triangle, 345 N.C. at 706, 483 S.E.2d at 392; Associated Mechanical Contractors v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); Powell, 347 N.C. at 623, 499 S.E.2d at 185. The "whole record" test requires the court to determine whether there was substantial evidence to support the agency's conclusions by taking all the evidence, both supporting and conflicting, into account. Powell, 347 N.C. at 623, 499 S.E.2d at 185; Associated Mechanical Contractors, 342 N.C. at 832, 467 S.E.2d at 401. Substantial evidence is "more than a scintilla" and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Lackey v. Dept. of Human Resources, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982); Norman v. Cameron, 127 N.C. App. 44, 48, 488 S.E.2d 297, 300 (1997). Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in

bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment. Johnston Health Care Center, L.L.C. v. North Carolina Dept. of Human Resources, Div. of Facility Services, Certificate of Need Section, , 136 N.C. App. 307, 524 S.E.2d 352 (2000). In interpreting an agency order, the order "should be read as a whole." In re Bass Income Fund, 115 N.C. App. 703, 705, 446 S.E.2d 594, 595 (1994).

In this case, the Court is required to apply two standards of review (i) de novo review for constitutional questions, questions regarding the statutory authority and jurisdiction of the CRC, questions regarding errors of law made by the CRC, and/or questions regarding unlawful procedure of the CRC and; (ii) the "whole record test" is to be applied to determine whether the CRC's Order was supported by substantial evidence, and/or was arbitrary or capricious.

The Issues for Appeal

The issues on this appeal are:

(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.

(III) Whether the CRC was required to prepare Findings of Facts and Conclusions of Law regarding the impact of a variance denial on the Petitioner's ability to make reasonable use of the property. The court used the de novo review standard for this issue.

(IV) Whether the order of the CRC constitutes an improper taking, violates the Separation of Powers Doctrine and whether the CRC is an impartial tribunal. The Court used the de novo review standard for this issue.

The Court also observes that the CRC's Final Order commingles in the Conclusions of Law, many Findings of Fact that should not be included within the Conclusions of Law section, making it difficult to differentiate between the CRC's Conclusions of Law and Findings of Fact. The better practice for future orders would be to put all the Findings of Fact under that named heading and the Conclusions of Law under that named heading.

Also in the CRC's Final Order there were two paragraphs under the Conclusions of Law both marked number 3. The Court, during the hearing and with the agreement of the parties, re-numbered the first Conclusion of Law number 3; 3(A) and the second Conclusion of Law number 3; 3(B) for clarity. These new paragraph numbers are followed in this Order.

Legal Analysis

The North Carolina General Assembly provided the circumstances or elements under which a landowner whose permit has been denied may obtain a variance: N.C. Gen. Stat. 113A-120.1 (2008)

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.

In this case, Petitioner sought a variance from 15A NCAC 7H.1705 which would allow it to maintain sandbags to protect its property until such time as its proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed. If a Petitioner demonstrates all four requirements for a variance are met, the CRC shall grant said variance and may 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).

The Court holds the evidence in this case demonstrates the Riggings satisfied all four requirements for its variance request and therefore denial of its request by the CRC was improper. The Final Order issued by the CRC, as will be shown below, was based on legally impermissible considerations, misapplied applicable statute and was unsupported and contradictory to the stipulated evidence before the CRC. (R.O.P. p. 187-356 (DCM's Staff Recommendation), 373-394 (Final Order))

I. The CRC erred in its Conclusion of Law 3(B) that the Petitioner did not demonstrate that strict application of 15A NCAC 7H.1705(a)(7) would result in unnecessary hardship to the Riggings Property

The CRC erroneously concluded that Petitioner did not demonstrate that strict application of the Rules would result in an unnecessary hardship. As detailed below, the CRC made several errors in finding that strict application of 15A NCAC 7H.1705(a)(7) would not result in unnecessary hardship to the Riggings property.

a. The CRC misinterpreted the Stipulated Facts supporting its Conclusion of Law number 3(B).

The CRC's Conclusion of Law 3(B) that Petitioner did not demonstrate that strict application of the Rules would result in an unnecessary hardship is based on a clear misinterpretation of some of the Stipulated Facts. In Page 7 of its Order, the CRC concludes that "[t]he Ft. Fisher revetment was constructed in 1996, and initially after construction of the Ft. Fisher revetment erosion increased at Petitioner's property, but now **"erosion is stable"**. (emphasis added) SF 10, 18." (R.O.P., p. 379) However, the finding that **"erosion is stable"** is not supported, and is in fact contradicted by the Stipulated Facts 10 and 18 cited below.

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

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"**. (Emphasis added)

Nowhere in the Stipulated Facts is there mention of the erosion of the Riggings shoreline being **"stable."** (emphasis added) The unambiguous meaning of Stipulated Fact 18 is that, even though the rate of erosion has decreased, there still is erosion of the shoreline at The Riggings. Therefore, the CRC conclusion of law that the Petitioner failed to show that unnecessary hardships would result from strict application of the rules, standards, or orders is based on a clear misinterpretation of the Stipulated Facts, which constitutes unlawful procedure.

As this Court said in its previous reversal of the CRC's ruling:

The Court is concerned that the CRC did not undertake an independent analysis of the stipulated facts, which comprise the only competent evidence in the Record...The Conclusions of law are not supported by the Stipulated Facts, but instead are only supported by the arguments of Counsel and the Staff, which again, does not constitute competent evidence. It is inappropriate for the CRC to recite legal argument as a Conclusion of Law when again, the Findings of Fact must be supported by competent evidence; and the Conclusions of Law must be supported by the Findings of Fact... Upon remand, the CRC is instructed to base its Findings of Fact only upon competent evidence, including any Stipulated Facts, and shall not utilize the "contentions" of Staff or counsel as a basis for its Findings of Fact or Conclusions of Law. (R.O.P., p. 183)

However, the CRC for whatever reason chose to base its Conclusion of Law on a misinterpretation of the facts and as a result Conclusions of Law 3(B) was based on unlawful procedure and based on an incorrect and unsubstantiated fact (**that the erosion is stable**), and therefore, was arbitrary and capricious.

b. The CRC erred at law by basing its decision on the condition of the property owners and not the property, despite the mandates and instructions of this Court's previous Order and the Stipulated Facts, by improperly basing its decision on the amount of time the Riggings has had their sandbags in place and the number of previous variance requests by the Riggings.

As articulated 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 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). This Court articulated that 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. (R.O.P., p. 182)

However, despite the clear case law and this Court's instructions, 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 variance requests. (R.O.P., p. 379-380) (pgs.7-8 CRC Final Order) As such, the CRC has made an error in law by applying, again, the wrong legal standard. In this case, the standard is whether strict application of the rules would result in unnecessary hardship to Petitioner's property; not the Petitioner. The hardship test on the Petitioner's property is what is to be examined and not the hardship on the Petitioner. The stipulated evidence is that the sandbags are needed to protect the Riggings property as erosion continues.

Stipulated Fact 10: The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.

Stipulated fact 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".

The very reason that the circumstances of the landowner are not to be examined according to Williams is so that similarly situated person and property owners are not treated differently, giving rise to equal protection of law issues.

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.

How long the Riggings have had its sandbags in place is not a relevant consideration for element 1. Similarly, the number of variance requests by the Petitioner, which the CRC discussed in some detail as findings of fact in Conclusion of Law 3(B), is not an inquiry into "the condition of the property itself" as is required, but is instead an improper analysis of the actions Petitioner has previously taken to protect its property. Further, how long the sandbags have been in place is not an inquiry into "the condition of the property itself" in its present state or its future state based upon potential removal of the sandbag, as is required, but again, is instead an improper analysis of the actions Petitioner has previously taken to protect its property.

The CRC in its final paragraph in Conclusion of Law number 3(B) (Pg. 8 of CRC Final Order) also states that the variance should be denied because the Riggings have given no stated endpoint for when the sandbags should be removed. Again the CRC fails to focus on the Petitioner's Property, which is to be the sole examination of "unnecessary hardship" under element 1.

The statute granting a variance for the sandbags has limitations as to how long the permit is allowed and the CRC may impose reasonable and appropriate conditions and safeguards upon any variance it grants. N.C.G.S. § 113A-120.1 (2012).

c. The CRC'S Finding that no unnecessary hardship would result from strict application of the rules, standards, or order for Element #1 is contradictory to its findings in elements 2 and 3 that hardship would result from removal of the sandbags.

The CRC concluded in Conclusion of Law 4 that Petitioner's property would suffer hardship from strict application of these rules as a result of the peculiarity of the property,

thereby satisfying element 2 for obtaining a variance. (Record of Proceeding, p. 380- 381) (pg. 8 of CRC Final Order) In addition, the CRC in Conclusion of Law number 5 stated 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" (R.O.P., p. 381) (pg. 9 of CRC Final Order) thereby satisfying element 3 for obtaining a variance. Under the facts of this case, this Conclusion of Law is contradictory to its conclusion of no "unnecessary hardship" under Conclusion of Law number 3(B)for element 1.

The Court finds under the following stipulated facts, it is not possible to have hardships but not unnecessary hardships.

Stipulated Fact 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.

Stipulated Fact 4: The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide.

Stipulated Fact 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.

Stipulated Fact 6: Among other things, coquina rock outcroppings can provide a partial natural barrier against the threat of beach erosion.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 10: The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.

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

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

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

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

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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."

Stipulated Fact 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.

Stipulated Fact 24: On May 9, 2003, CRC signed an order granting a variance to allow the sandbags to remain in place until May 9, 2005.

Stipulated Fact 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.

The CRC found that the Riggings had met the second requirement in obtaining a variance in that the hardships resulted from conditions that are peculiar to the property, such as the location, size, or topography of the property per N.C. Gen. Stat. 113A-120.1(a)(2);. The CRC also found that the Riggings had met the third requirement to obtain the variance, that the "unnecessary hardships" do not result from actions taken by the Petitioner per N.C. Gen. Stat. 113A-120.1(a)(3).

Under the Stipulated Facts 3-24, 31 as set forth on the previous pages of this order, the Court finds that The Riggings property has no like or equal property within the state. This unique history began over 90 years ago in the 1920's when coquina rock was dug up in front of the property for road construction by a governmental agency; to the titanic rock revetment built next to the property to protect Fort Fisher by a governmental agency in 1996, to the beach renourishment projects by a governmental agency in 2001 and 2007 which cover all of Kure Beach except The Riggings property, even though the nourishment covers coquina rock north of the property; to the fact that the sandbags have been in place since 1985 with either permits being granted or the CRC approving the use of the sandbags for 20 years.

Under the above facts, the Court finds that it is contradictory and irreconcilable and an error of law for the CRC to find elements 2 and 3 and not to find element 1, that there is no unnecessary hardship on the property. Under the above facts, the CRC's finding that the

variance elements were met for the second and third requirements, the CRC was required to find, under the facts of this case, that element 1, "Unnecessary Hardships", was met as well. Otherwise its Conclusions of Law are contradictory and irreconcilable. On remand the CRC is directed to correct this contradiction.

II. The CRC erred in its Conclusion of Law 6 that the Petitioner did not meet the fourth element of a 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; and will preserve substantial justice and that the decision of the CRC is supported by substantial evidence.

The CRC erred in its finding that the variance request of the Petitioner would not be consistent with i) the spirit, purpose, and intent of the rules, standard, or order; ii) will not secure public safety and welfare; and iii) will not preserve substantial justice, and that the CRC finding is supported by substantial evidence.

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. Coastal Management policy objectives include the following: **"Private property rights to oceanfront properties including the right to protect that property in ways that are consistent with public rights should be protected."** 15A NCAC 7M.0202(a) **"Erosion response measures designed to minimize the loss of private and public resources to erosion should be economically, socially, and environmentally justified."** 15A NCAC 7M.0202(b) (Emphasis added). Other important objectives include: (1) achieving an optimal balance between the financial, safety and societal factors involved in coastal hazard area development; (2) minimizing loss of life and property resulting from storms and long-term erosion; (3) preventing encroachment of permanent structures on public beach areas; (4) preserving the natural ecological conditions of the barrier dune and beach systems; (5) reducing the public costs of inappropriately sited developments; and

(6) 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.

The Court holds under the stipulated facts in this case that granting the variance is consistent with the spirit, purpose and intent of the use, rules, standards, and order, the extension will secure public safety and welfare and will preserve substantial justice.

The options as set forth in the situated facts regarding the FEMA Grant and the Corps of Engineers' Beach Nourishment Projects were virtually impossible to obtain. (SF 26-30) (Although, the Court notes that oddly, **Stipulated Fact 9** states, that the Corps did cover coquina rock with sand north of the Riggings)

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 28: In its most recent variance order, dated April 25, 2005, CRC said the sandbags were to be removed "prior to the expiration of the FEMA grant."

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

- a. **Each unit owner would have been required to contribute approximately \$125,000 towards the cost of relocation and reconstruction.** (emphasis added) 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.

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

Granting the variance will minimize the loss of private resources to erosion and reduce potential debris from the potential destruction of The Riggings that can harm other structures and/or inhibit public access to the beach.

The Court further holds the stipulated facts demonstrate that issuing the requested variance will also preserve substantial justice. Under the Stipulated Facts 3-24, 31 as set forth on pages 13, 14 and 15 of this order, the Court finds that The Riggings property is a totally unique property in the state. This history began over 90 years ago in the early 1920's when coquina rock was dug up in front of the property for road construction by a governmental agency; to the immense rock revetment built next to the property to protect Fort Fisher by a governmental agency in 1996, to the beach nourishment projects by a governmental agency in 2001 and 2007 which cover all Kure Beach but excepts The Riggings property even though the nourishment covers coquina rock north of the property; to the fact that the sandbags have been in place since 1985 via either a permit being granted or the CRC approving the use of the sandbags for 20 years. This entire time there has been no issue as to the public safety and welfare since the sandbags were first placed in front of the property. There has been no deleterious effect on the surrounding property and the public has had access to the beach. (SF 33-34)

The Riggings property is in a one of a kind situation, between a literal "rock and a hard place" 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 Natural Heritage Area by yet a third government agency. The only stated issue that might be

compromised if the variance is granted is the public right of access to, and use of, the beach. However, the Court holds this restraint on public beach access is *de minimis* since the Court finds that Stipulated Facts 32, 33, and 34 demonstrate that any restraint on public use will be temporary because 1) the sandbags are normally covered by sand and 2) the beach area in question is accessible even at high tide and constitutes only a small portion of Kure Beach, which is sandwiched between the three mile long Kure Beach Renourishment Project and the over one-half mile long Fort Fisher State Park revetment.

Stipulated Fact 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.

Stipulated Fact 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.

Stipulated Fact 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.

For the aforementioned reasons, the Court finds that the variance is consistent with the Spirit, Purpose, and Intent of the Rules, Standards or Order; will continue to secure Public Safety and Welfare; and will preserve Substantial Justice.

Under the "Whole Record Test", the Court holds that the CRC's Final Order was not supported by substantial evidence and there is substantial evidence to grant the variance.

III. Under the Revised Statute, the CRC Was Not Required to Prepare Findings of Fact and Conclusions of Law Regarding the Impact of a Variance Denial on the Petitioner's Ability to Make a Reasonable Use of Its Property.

The CRC did not err when it did not make findings of fact as to the reasonable use that Petitioner could make of his property if the sandbags were removed.

Williams held that “to determine whether a parcel of property suffers from unnecessary hardship due to strict application of CAMA, the CRC must make findings of fact and conclusions of law as to the impact of the act on the landowner’s ability to make reasonable use of his property.” 144 N.C. App. at 487, 548 S.E.2d at 798. The application of Williams to the present case does not require such findings and conclusions in this case.

When Williams was decided, the variance statute provided: 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, (ii) such difficulties or hardships result from conditions which are peculiar to the property involved, (iii) such conditions could not reasonably have been anticipated when the applicable guidelines, rules, standards, or restrictions were adopted or amended, *the Commission may* vary or modify the application of the restrictions to the property so that the spirit, purpose, and intent of the restrictions are preserved, public safety and welfare secured, and substantial justice preserved. . . .

Id. at 484, 548 S.E.2d at 797 (quoting N.C. Gen. Stat. § 113A-120.1 (1989) (emphasis added)). Clearly the statute then required the CRC to make findings. Following the Williams decision in 2001, the General Assembly in 2002 amended the variance statute. It now requires that “[t]o qualify for a variance, *the petitioner must show*” that all of the elements have been met. N.C. Gen. Stat. § 113A-120.1 (2009) (emphasis added). The requirement that the CRC find anything was specifically deleted. Also, the Williams case is distinguishable under its facts. In Williams, the petitioner sought a variance to construct a building on wetlands on his property in the future. Here, The Riggings site is already developed and the sandbag structures have been in place for decades. Therefore, the portion of the Williams case requiring the CRC to make findings of fact as to the reasonable use that Petitioner could make of his property with the sandbags removed, is not required.

IV. Whether the order of the CRC constitutes an unconstitutional taking, violates the Separation of Powers Doctrine and whether the CRS is an impartial tribunal.

As to the issue of whether the CRC's Final Order constitutes an unconstitutional taking, this issue is not ripe for hearing until a final determination on a denial of the variance has been made, per N.C.G.S. § 113A-123(b).

The Court has previously rejected the Petitioner's argument that the CRC's action violated the Separation of Powers Doctrine. (Hockenbury Order pg. 12) The Petitioner has provided the Court with no cause to revisit that determination.

The Court, after reviewing the Coastal Area Management Act (CAMA) concludes it is constitutional and, the CRC is an impartial tribunal. Also, under the principle of quasi-estoppel, where one who voluntarily proceeds under a statute and claims benefits thereby confirmed will not be heard to question its constitutionality in order to avoid its burdens. Shell Island Homeowners Association, et al. v. Eugene B. Tomlinson, North Carolina Coastal Resources Commission, et al., 134 N.C. App. 217, 517 S.E.2d 406 (1999). The Petitioner has used the CRC for 12 years to receive variances for installation of sandbags to protect its property. The Petitioner now cannot question the constitutionality of the statutes or the impartiality of the tribunal.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this proceeding.
2. The CRC erred in its Conclusion of Law 3(B) that the Petitioner did not demonstrate that strict application of 15A NCAC 7H.1705(a)(7) would result in unnecessary hardship to the Riggings Property. The Petitioner did demonstrate that strict application of 15A NCAC 7H.1705(a)(7) would result in unnecessary hardship to the Riggings Property.
3. The CRC erred in its Conclusion of Law 6 that the Petitioner did not meet the fourth element of a 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 supported by substantial evidence. The Petitioner did meet the fourth element of a 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.

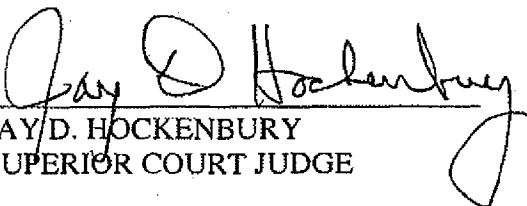
4. Under the Current Statute, the CRC is Not Required to Prepare Findings of Fact and Conclusions of Law Regarding the Impact of a Variance Denial on the Petitioner's Ability to Make a Reasonable Use of Its Property.

5. The actions of the CRC do not violate the Separation of Powers doctrine. The CRC is an impartial tribunal. As to the issue of whether the CRC Order constitutes an unconstitutional taking, this issue is not ripe for hearing until a final determination of a denial of the variance is made, per N.C.G.S. § 113A-123(b).

WHEREFORE, BASED UPON THE COURT'S FOREGOING FINDINGS AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That the Final Order of the CRC, denying the Petitioner's variance petition is hereby REVERSED. This matter is remanded to the CRC for a new hearing, consistent with the mandates and instructions contained within this Order.

This the 1st day of June, 2012.


JAY D. HOCKENBURY
SUPERIOR COURT JUDGE

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

~~FILED~~
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2012 JUN 27 AM 10:20 09-CVS-2761

NEW HANOVER COUNTY, N.C.

RIGGINGS HOMEOWNERS, INC.,

BY JCT

Petitioner,

v.

NOTICE OF APPEAL

NORTH CAROLINA COASTAL
RESOURCES COMMISSION,

Respondent.

Respondent, the North Carolina Coastal Resources Commission (CRC), hereby gives Notice of Appeal to the North Carolina Court of Appeals from the Order issued by the Honorable Jay D. Hockenbury signed and filed on June 1, 2012 in the Superior Court of New Hanover County. This Order reversed the final agency decision of the CRC which had denied Petitioner Riggings Homeowners, Inc.'s (Petitioner) request for a variance from the temporary erosion control structure (sandbags) time limit rules. That variance had been filed pursuant to N.C. Gen. Stat. §113A-120.1 of the Coastal Area Management Act (CAMA) and 15A N.C.A.C. 7J.0700 *et seq.* (The CRC's administrative rules for variances). The Order remanded the case to the CRC with instructions to re-hear Petitioner's variance request, consistent with the mandates and instructions contained within the Order.

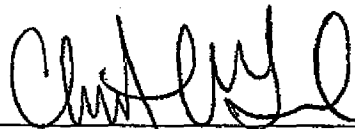
Respectfully Submitted, this the 26th day of June, 2012.

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, New Hanover County

L. Diane Seward
Deputy Clerk of Superior Court
June 28, 2012

ROY COOPER
Attorney General

Jennie W. Hauser
Special Deputy Attorney General
N.C. State Bar No. 16103
Jhauser@ncdoj.gov



Christine A. Goebel
Assistant Attorney General
N.C. State Bar No. 27286
Cgoebel@ncdoj.gov

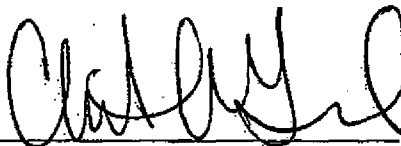
N. C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
(919) 716-6600 phone
(919) 716-6767 fax

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF APPEAL was served on the attorney of record for the Petitioner by depositing a copy in the United States Mail, first-class, postage prepaid, addressed as follows:

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

This the 26th day of June, 2012.



Christine A. Goebel
Assistant Attorney General



FILED

2012 JUN 27 AM 10:20

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

ROY COOPER
ATTORNEY GENERAL

REPLY TO:
CHRISTINE A. GOEBEL
cgoebel@ncdoj.gov

June 26, 2012

By Fed Ex Overnight Delivery
The Honorable Jan G. Kennedy
Clerk of Superior Court
New Hanover County Judicial Building
P.O. Box 2023
Wilmington, NC 28402-2023

Re: *Riggings Homeowners, Inc. v. N.C. Coastal Resources Commission*
New Hanover Co. Superior Court No. 09-CVS-2761

Dear Ms. Kennedy:

Enclosed, please find the original and one copy of Respondent's Notice of Appeal to the Court of Appeals in the above referenced case. Please file the original and return the file stamped copy in the enclosed self-addressed, stamped envelope. By copy of this letter I am serving a copy of the enclosed on opposing counsel.

Thank you for your assistance. If you have any questions or require anything further, please do not hesitate to contact me.

Very truly yours,

Christine A. Goebel
Assistant Attorney General

Enclosure
cc (w/enc.): William G. Wright, Esq.
Jennie W. Hauser, Special Deputy AG

FILED

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 2761
NEW HANOVER CO., C.S.C

RIGGINGS HOMEOWNERS, INC. BY _____)

Petitioner,)

vs.)

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

Respondent.)

NOTICE OF CROSS APPEAL

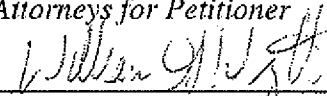
A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY _____
CLERK

NOW COMES the Petitioner Riggings Homeowners, Inc., by and through counsel, and hereby gives Notice of Appeal to the North Carolina Court of Appeals, from the 1 June 2012 Order of the Honorable Jay D. Hockenbury reversing the decision of Respondent in this action denying Petitioners' request for a variance. To the extent said Order is found to be in error based on Appellant's proposed Issues on Appeal, Petitioner's notice of appeal includes but is not limited to the rulings by Judge Hockenbury on Petitioner's arguments and assigned errors below upon which the Court did not rule in Petitioner's favor.

Respectfully submitted, this the 29th day of June, 2012.

SHIPMAN & WRIGHT, L.L.P.

Attorneys for Petitioner



MATTHEW W. BUCKMILLER

N.C. State Bar No.: 35194

GARY K. SHIPMAN

N.C. State Bar No.: 9464

WILLIAM G. WRIGHT

N.C. State Bar No.: 26891

575 Military Cutoff, Suite 106

Wilmington, NC 28405

(910) 762-1990

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day the forgoing document in the above-entitled action was duly served on all parties to this cause by:

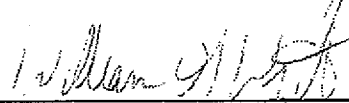
- Hand delivering a copy hereof to each said party or the attorney thereof.
- Sending via facsimile a copy hereof to each party or the attorney thereof.
- Depositing a copy hereof, postage pre-paid in the United States Mail, properly

addressed to:

Christine A. Goebel
Jenny Hauser
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Fax: 919.716.6767

This is the 29th of June, 2012.

SHIPMAN & WRIGHT, L.L.P.



MATTHEW W. BUCKMILLER

N.C. State Bar No.: 35194

GARY K. SHIPMAN

N.C. State Bar No.: 9464

WILLIAM G. WRIGHT

N.C. State Bar No.: 26891

Attorneys for Petitioner

575 Military Cutoff Road, Suite 106

Wilmington, NC 28401

Telephone: 910-762-1990

Facsimile: 910-762-6752

FILED

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

2012 JUL -5 PM 2:17
NEW HANOVER CO., C.S.C. 09 CVS 2761
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

RIGGINGS HOMEOWNERS, INC.,

Petitioner,

vs.

COASTAL RESOURCES
COMMISSION OF THE STATE
OF NORTH CAROLINA

Respondent.

BY _____

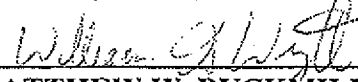
TRANSCRIPT DOCUMENTATION

A TRUE COPY
OF THE SUPERIOR COURT
NEW HANOVER COUNTY
IN THE GENERAL DIVISION
CASE NO. 09 CVS 2761

Pursuant to Rule 7(a) of the North Carolina Rules of Appellate Procedure, Plaintiff Riggings Homeowners, Inc. hereby files a copy of their agreement with Tina R. Stancill, Official Court Reporter, 316 Princess Street, Suite 519, Wilmington, North Carolina, 28401, to contract for the transcription of the proceedings that took place on March 12th through 13th, 2012 in this action. (See Attachment A.)

Respectfully submitted, this the 5th day of July, 2012.

SHIPMAN & WRIGHT, L.L.P.
Attorneys for Petitioner



MATTHEW W. BUCKMILLER

N.C. State Bar No.: 35194

GARY K. SHIPMAN

N.C. State Bar No.: 9464

WILLIAM G. WRIGHT

N.C. State Bar No.: 26891

575 Military Cutoff, Suite 106

Wilmington, NC 28405

(910) 762-1990

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day the forgoing document in the above-entitled action was duly served on all parties to this cause by:

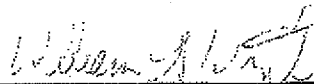
- Hand delivering a copy hereof to each said party or the attorney thereof.
- Sending via facsimile a copy hereof to each party or the attorney thereof.
- Depositing a copy hereof, postage pre-paid in the United States Mail, properly

addressed to:

Christine A. Goebel
Jenny Hauser
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Fax: 919.716.6767

This is the 5th of July, 2012.

SHIPMAN & WRIGHT, L.L.P.



MATTHEW W. BUCKMILLER

N.C. State Bar No.: 35194

GARY K. SHIPMAN

N.C. State Bar No.: 9464

WILLIAM G. WRIGHT

N.C. State Bar No.: 26891

Attorneys for Petitioner

575 Military Cutoff Road, Suite 106

Wilmington, NC 28401

Telephone: 910-762-1990

Facsimile: 910-762-6752

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 09 CVS 2761

RIGGINGS HOMEOWNERS, INC.)
)
 Petitioner,)
vs.)
)
COASTAL RESOURCES COMISSION)
OF THE STATE OF NORTH CAROLINA)
)
 Respondent.)
_____)

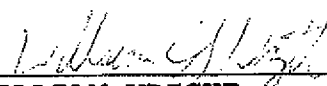
CONTRACT

The undersigned hereby contracts with Tina Stancill, Official Court Reporter, that the transcript in the above-entitled case is duly ordered. The Court Reporter and undersigned have agreed that this contract incorporates by reference Rule 7(b) of the North Carolina Rules of Appellate Procedure, which makes this transcript due in electronic "PDF" format sixty (60) days after service of this contract.

The undersigned agrees that payment for said transcript will be paid within 30 days of delivery of said transcript, and that if the transcript order is cancelled, the undersigned will be responsible for payment for any completed portion of the transcript.

The undersigned further agrees not to provide copies of the transcript to any other parties, except as required by the Rules of Appellate Procedure. The Court Reporter and undersigned have agreed that other parties to this appeal are responsible for purchasing copies of said transcript for delivery to the respective parties pursuant to rule 7(b)(2) of the North Carolina rules of Appellate Procedure, and all parties are notified of this requirement by service of this agreement upon them.

This 5th day of July, 2012.



WILLIAM WRIGHT
NC State Bar No.: 26891
SHIPMAN & WRIGHT, LLP
575 Military Cutoff Road, Ste. 106
Wilmington, NC 28405

STATE OF NORTH CAROLINA FILED
COUNTY OF NEW HANOVER JUL 11 AM 10:26

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-2761

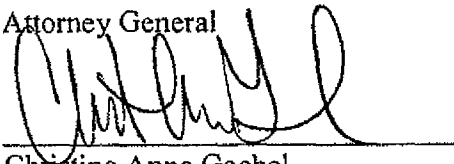
NEW HANOVER COUNTY C.S.C.
RIGGINGS HOMEOWNERS, INC.,)
BY _____)
Petitioner,)
v.)
NORTH CAROLINA COASTAL)
RESOURCES COMMISSION,)
Respondent.)

TRANSCRIPT DOCUMENTATION

Pursuant to Rule 7(a) of the North Carolina Rules of Appellate Procedure, Respondent North Carolina Coastal Resources Commission hereby files a copy of the agreement with Tina R. Stancill, Official Court Reporter, 316 Princess Street, Suite 519, Wilmington, North Carolina, 28401, to contract for the transcription of the entire judicial review proceeding which took place before the Honorable Jay D. Hockenbury, Senior Resident Superior Court Judge presiding, on March 12-13, 2012 in this action. (See Attachment A) This transcript will be part of the record on appeal to the North Carolina Court of Appeals.

Respectfully Submitted, this the 11th day of July, 2012.

ROY COOPER
Attorney General



Christine Anne Goebel
Assistant Attorney General
N.C. State Bar No. 27286

N. C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
(919) 716-6600 phone
(919) 716-6767 fax

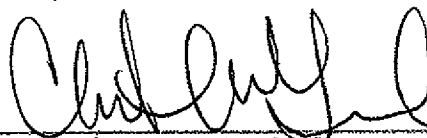
A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: *Leri M. Knowles*
Deputy Clerk

CERTIFICATE OF SERVICE OF PROPOSED RECORD ON APPEAL

I certify that I have served a copy of the foregoing Proposed Record on Appeal on Petitioner-Appellee, bearing sufficient postage, and deposited in the care and custody of Federal Express, addressed to counsel of record as follows:

Shipman & Wright, LLP
William G. Wright
575 Military Cutoff Road, #106
Wilmington, NC 28405

This the 10th day of September, 2012.



Christine A. Goebel
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, NC 27602

STIPULATIONS OF COUNSEL

The parties hereby stipulate that the following:

1. At all times herein, the Superior Court and the North Carolina Coastal Resources Commission were properly constituted and organized; all parties were properly before the respective tribunals and all notices, orders, testimony, exhibits and notice of appeal were properly filed and were properly served upon all parties to this appeal.
2. The foregoing documents, as listed in the Index to this Record on Appeal are deemed genuine, true, and accurate copies of the documents from which they were copied.
3. The stenographic transcript is an accurate transcription of the testimonial evidence and shall be part of the record on appeal and will be filed with the Clerk of the North Carolina Court of Appeals; and
4. The parties to this appeal have omitted documents which are not necessary to understand any of the proposed issues on appeal.
5. The parties agree to the contents of the Record on Appeal as of the date below.

Date: 10/12/12
LJW

Shipman & Wright, LLP

By: William G. Wright
William G. Wright
575 Military Cutoff Road, #106
Wilmington, NC 28405
(910) 752-1990

Date: 10-11-12

North Carolina
Department of Justice

By: Christine A. Goebel
Christine A. Goebel
Assistant Attorney General
NC Department Of Justice
PO Box 629
Raleigh, NC 27602

PROPOSED ISSUES ON APPEAL

Respondent- Appellant identifies the following Proposed Issues on Appeal:

1. Did the Superior Court err in its Conclusion of Law 2 where the finding that "erosion is stable" was not prejudicial error?
2. Did the Superior Court err in its Conclusion of Law 2 by mis-applying the *Williams* case?
3. Did the Superior Court err in its Conclusion of Law 2 by holding that the Commission's finding on variance element #1 contradicts its findings on variance factors 2 and 3?
4. Did the Superior Court err in its Conclusion of Law 3 by, in the Superior Court's whole record review and determination, substituting its own judgment for that of the Commission where there was substantial evidence in the record to support the Commission's finding on variance factor 4?
5. Did the Superior Court err in its Conclusion of Law 3, as a matter of law, where it ignored the Commission's policies most specifically dealing with the relief requested by Petitioner's variance petition?

Petitioner-Appellee identifies the following Proposed Issues on Cross-Appeal:

6. Whether the Superior Court erred in Conclusion of Law Number 4 in holding that the Commission was not required to prepare Findings of Facts and Conclusions of Law regarding the impact of a variance denial on the Petitioner's ability to make reasonable use of the property.
7. Whether the Superior Court erred in Conclusion of Law Number 5 in holding that the issue of whether the Order of the CRC constitutes an unconstitutional taking was not ripe for hearing until a final determination of the denial of the variance was made per N.C. Gen. Stat. § 113A-123(b).
8. Whether the Superior Court erred in Conclusion of Law Number 5 in holding that the actions of the Commission do not violate the Separation of Powers Doctrine.
9. Whether the Superior Court erred in Conclusion of Law Number 5 in holding that the Commission is an impartial tribunal.

IDENTIFICATION OF COUNSEL

For Respondent-Appellant:

Marc Bernstein
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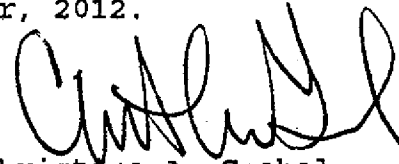
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CERTIFICATE OF SERVICE OF SETTLED RECORD ON APPEAL

I certify that I have served a copy of the foregoing Record on Appeal Settled by Agreement on Petitioner-Appellee, addressed to counsel of record as follows:

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This the 11th day of October, 2012.



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