

Received
7/12/12
@ 1:00 PM

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In Re: CRP/HLV Highlands Ranch, LLC
Petition for Variance

OGC File No. _____

**PETITION FOR VARIANCE
FROM RULE 62-342.700(4), F.A.C.**

Pursuant to Section 120.542, *Florida Statutes* (2011) ("F.S.") and Rule 28-104.002, *Florida Administrative Code* ("F.A.C."), CRP/HLV Highlands Ranch, LLC ("Highlands Ranch") requests a variance from the financial responsibility requirements set forth in Rule 62-342.700(4), F.A.C. with respect to the construction and implementation of its Highlands Ranch Mitigation Bank under Permit Number 10-308703-001, in Clay County, Florida. In support thereof, Highlands Ranch states as follows:

The Petitioner

1. The name and address of the Petitioner is:

CRP/HLV Highlands Ranch, LLC
c/o Marc Hassan
9803 Old St. Augustine Road, Suite 1
Jacksonville, FL 32257

2. The name and address of Petitioner's attorney in this matter is:

Eric T. Olsen
Hopping Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500

The Rule from Which a Variance is Requested

3. The rule from which a variance is requested is Rule 62-342.700(4), F.A.C. Under this rule, in order to provide reasonable assurances that the proposed Highlands Ranch Mitigation Bank will meet the requirements of Section 373.4136, F.S., Rule 62-342.700, F.A.C.,

and the associated permit conditions, non-governmental bankers such as Petitioner are required to provide proof of financial responsibility for the construction and implementation phase of the bank. Fla. Admin. Code r. 62-342.700(1), and (4). Proof of financial responsibility must be provided in the form of a surety bond, performance bond, irrevocable letter of credit, or trust fund. Fla. Admin. Code r. 62-342.700(4)(b). Moreover, the financial responsibility mechanism must become effective prior to the release of any mitigation credits. Fla. Admin. Code r. 62-342.700(4)(d).

4. In this Petition for Variance, Highlands Ranch is requesting that the Department waive the requirement that it provide proof of financial responsibility for the construction and implementation phase of the bank and the release of mitigation credits.

Citation to the Statute The Rule Implements

5. The Department rule from which a variance is requested cites the following statute as “Specific Authority”: Section 373.4136(11), F.S. This rule also cites the following as the “Laws Implemented”: Sections 373.4135 and 373.4136, F.S.

The Type of Action Requested

6. Highlands Ranch requests a variance from the financial responsibility requirements set forth in Rule 62-342.700(4), F.A.C., on the grounds that under the specific circumstances unique to the Highlands Ranch Mitigation Bank, the purposes of the underlying statute can be achieved by other means (*i.e.*, mitigation success will be achieved before the release of credits) and that application of the financial responsibility requirements at the Highlands Ranch Mitigation Bank would impose a substantial hardship. In this particular case, Highlands Ranch is seeking a pilot performance based permit in which the work generating the ecological value reflected in the award of credits will be successfully completed before these

credits are released. As such financial responsibility guaranteeing the completion of such work is not necessary. Therefore, Highlands Ranch requests that the Department waive the financial responsibility requirements set forth in Rule 62-342.700(4), F.A.C. as to the construction and implementation phase of the Highlands Ranch Mitigation Bank.

Facts Demonstrating a Substantial Hardship

7. As noted earlier, under Rule 62-342.700(4), F.A.C., non-governmental bankers are required to provide proof of financial responsibility for the construction and implementation phase of the bank; additionally, said financial responsibility must become effective prior to the release of any mitigation credits. *See* Fla. Admin. Code r. 62-342.700(4).

8. In the case of Highlands Ranch Mitigation Bank, under this rule Highlands Ranch would be required to post a letter of credit or bond in the amount of approximately \$1.5 million to guarantee the work needed to construct and implement the bank.

9. These expenses would be extremely burdensome to Highlands Ranch, and would not result in any benefit to the Department or the State of Florida with regard to ensuring that mitigation would be successfully achieved after the release of mitigation credits, because the work generating the ecological value represented by the credits released will be successfully achieved before the Department releases the credits associated with such work. This differs from the other mitigation banks where a portion of the credits are released before all of the work is completed where adequate financial responsibility guarantees completion of such work.

The Reason Why the Variance Would Serve the Purposes of the Underlying Statute

10. Sections 373.4135 and 373.4136, F.S., generally authorize mitigation banking. The overall purpose to be served by the statutes is articulated in this legislative declaration of policy:

The Legislature finds that the adverse impacts of activities regulated under this part *may be offset by the creation, maintenance, and use of mitigation banks and offsite regional mitigation*. Mitigation banks and offsite regional mitigation can *enhance the certainty of mitigation* and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management.

§ 373.4135(1), F.S. (emphases added).

11. The variance proposed by Highlands Ranch would fulfill the Legislature's purpose: unlike in other situations where a mitigation bank might seek the release of mitigation credits before the applicable mitigation success criteria have been achieved, the Highlands Ranch Mitigation Bank will achieve mitigation success associated with the credits generated *before* the release of any credits associated with that phase. Accordingly, the "certainty of mitigation" sought by the Legislature will be achieved up front, and thus the Department does not need to secure it in the future by requiring Highlands Ranch to provide financial responsibility mechanisms.

State as to Whether the Requested Variance is Permanent or Temporary

12. The requested variance is permanent.

Conclusion

13. Highlands Ranch respectfully requests that the Department grant it a variance from the financial responsibility requirements of Rule 62-342.700(4), F.A.C.

Respectfully submitted,

Eric T. Olsen, Fla. Bar No. 823120
HOPPING GREEN AND SAMS
119 South Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500
(850) 224-8551 (fax)

Attorney for CRP/HLV Highlands Ranch,
LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original of the foregoing was filed this 12th day of July,
2012, with:

Lea Crandall, Clerk
Department of Environmental Protection
Office of General Counsel
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

And that four additional copies were hand-delivered to:

Joint Administrative Procedures Committee
The Holland Building, Room 120
Tallahassee, Florida 32399-1300

Attorney