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Sponsors: Reps. Herbkersman, J.E. Smith, Toole, Newton, Brannon, Anderson, Daning, Crosby and Norrell

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Summary: Coastal zone critical areas

**HISTORY OF LEGISLATIVE ACTIONS**

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1/22/2015 House Member(s) request name added as sponsor: J.E.Smith

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1/27/2015 Scrivener's error corrected

2/4/2015 House Member(s) request name added as sponsor: Norrell, Bowers

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**VERSIONS OF THIS BILL**

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[1/27/2015](file:///p:\pprever\2015-16\3378_20150127.docx)

**A** **BILL**

TO AMEND SECTION 48‑39‑130, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PERMITTING REQUIREMENTS FOR CRITICAL AREAS, SO AS TO GRANT THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL SOLE AUTHORITY IN GRANTING EMERGENCY ORDERS OVER A BEACH OR DUNE CRITICAL AREA AND TO ESTABLISH GUIDELINES FOR THE USE OF SANDBAGS IN THESE AREAS; TO AMEND SECTION 48‑39‑280, RELATING TO THE FORTY‑YEAR RETREAT POLICY, SO AS TO PROHIBIT THE SEAWARD MOVEMENT OF THE FINAL BASELINE FOR AN EROSION ZONE; AND TO AMEND SECTION 48‑39‑290, AS AMENDED, RELATING TO RESTRICTIONS ON CONSTRUCTION SEAWARD OF THE BASELINE, SO AS TO RESTRICT THE DEVELOPMENT OF NEW GROINS OTHER THAN TERMINAL GROINS AND TO REQUIRE THE DOCUMENTATION OF SPECIAL PERMIT CONDITIONS IN THE DEED OF CONVEYANCE.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 48‑39‑130(D) of the 1976 Code, as last amended by Act 41 of 2011, is further amended to read:

“(D) It shall not be necessary to apply for a permit for the following activities:

(1) The accomplishment of emergency orders of an appointed official of a county or municipality or of the State, acting to protect the public health and safety, upon notification to the department. However, with regard to the beach/dune critical area, ~~only the use of sandbags, sandscraping, or renourishment, or a combination of them, in accordance with guidelines provided by the department is allowed pursuant to this item.~~ issuance of emergency orders is within the sole authority of the department. Property owners acting under an emergency order allowing the use of sandbags are required to post a bond for the eventual removal of all sandbags. Emergency orders for sandbags shall be limited to the protection of existing habitable structures and critical public infrastructure.

(2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, repletion and research activities of state agencies and educational institutions or boating or other recreation provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area.

(3) The discharge of treated effluent as permitted by law; provided, however, that the department shall have the authority to review and comment on all proposed permits that would affect critical areas.

(4) Dredge and fill performed by the United States Corps of Engineers for the maintenance of the harbor channels and the collection and disposal of the materials so dredged; provided, however, that the department shall have authority to review and certify all such proposed dredge and fill activities.

(5) Construction of walkways over sand dunes in accordance with regulations promulgated by the department.

(6) Emergency repairs to an existing bank, dike, fishing pier, or structure, other than oceanfront erosion control structures or devices, which has been erected in accordance with federal and state laws or provided for by general law or acts passed by the General Assembly, if notice is given in writing to the department within seventy‑two hours from the onset of the needed repairs.

(7) Maintenance and repair of drainage and sewer facilities constructed in accordance with federal or state laws and normal maintenance and repair of any utility or railroad.

(8) Normal maintenance or repair to any pier or walkway provided that such maintenance or repair not involve dredge or fill.

(9) Construction or maintenance of a major utility facility where the utility has obtained a certificate for such facility under ‘The Utility Facility Siting and Environmental Protection Act’, Chapter 33 of Title 58 of the 1976 Code. Provided, however, that the South Carolina Public Service Commission shall make the department a party to certification proceedings for utility facilities within the coastal zone.

(10) Dredging in existing navigational canal community developments by counties or municipalities of manmade, predominately armored, recreational use canals and essential access canals conveyed to the State or dedicated to the public for that purpose between 1965 and the effective date of this act if the maintenance dredging is authorized by a permit from the United States Army Corps of Engineers pursuant to the Federal Clean Water Act, as amended, or the Rivers and Harbors Act of 1899. All other department administered certifications for such dredging are deemed waived.”

SECTION 2. Section 48‑39‑280 of the 1976 Code is amended to read:

“(A) A forty‑year policy of retreat from the shoreline is established. The department must implement this policy and must utilize the best available scientific and historical data in the implementation. The department must establish a baseline which parallels the shoreline for each standard erosion zone and each inlet erosion zone.

(1) The baseline for each standard erosion zone is established at the location of the crest of the primary oceanfront sand dune in that zone. In standard erosion zones in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, groins, or other manmade alterations, the baseline must be established by the department using the best scientific and historical data, as where the crest of the primary oceanfront sand dunes for that zone would be located if the shoreline had not been altered.

(2) The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. In collecting and utilizing the best scientific and historical data available for the implementation of the retreat policy, the department, as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors, must consider: historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets.

(3) The baseline within inlet erosion zones that are stabilized by jetties, terminal groins, or other structures must be determined in the same manner as provided for in item (1). However, the actual location of the crest of the primary oceanfront sand dunes of that erosion zone is the baseline of that zone, not the location if the inlet had remained unstabilized.

~~(4)~~ ~~Notwithstanding any other provision of this section, where a department‑approved beach nourishment project has been completed, the local government or the landowners, with notice to the local government, may petition an administrative law judge to move the baseline as far seaward as the landward edge of the erosion control structure or device or, if there is no existing erosion control structure or device, then as far seaward as the post project baseline as determined by the department in accordance with Section 48‑39‑280(A)(1) by showing that the beach has been stabilized by department‑approved beach nourishment. If the petitioner is asking that the baseline be moved seaward pursuant to this section, he must show an ongoing commitment to renourishment which will stabilize and maintain the dry sand beach at all stages of the tide for the foreseeable future. If the administrative law judge grants the petition to move the baseline seaward pursuant to this section, no new construction may occur in the area between the former baseline and the new baseline for three years after the initial beach nourishment project has been completed as determined by the department. If the beach nourishment fails to stabilize the beach after a reasonable period of time, the department must move the baseline landward to the primary oceanfront sand dune as determined pursuant to items (1), (2), and (3) for that section of the beach. Any appeal of an administrative law judge’s decision under this section may be made pursuant to Title 23 of Chapter 1.~~

(B) To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan.

(C) The department, before July 3, 1991, must establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line must not be revised before July 1, 1998, nor later than July 1, 2000. After that revision, the baseline and setback line must be revised not less than every eight years but not more than every ten years after each preceding revision. Nothing in this section allows the seaward movement of the baseline from its position on June 14, 2011. In the establishment and revision of the baseline and setback line, the department must transmit and otherwise make readily available to the public all information upon which its decisions are based for the establishment of the final baseline and setback line. The department must hold one public hearing before establishing the final baseline and setback lines. Until the department establishes new baselines and setback lines, the existing baselines and setback lines must be used. The department may stagger the revision of the baselines and setback lines of the erosion zones so long as every zone is revised in accordance with the time guidelines established in this section.

(D) In order to locate the baseline and the setback line, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baseline. Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near‑term development and in areas currently developed, the interval, at the discretion of the department, may be more frequent. The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty‑year erosion rate. In cases where no primary oceanfront sand dunes exist, a study conducted by the department is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered. The department, by regulation, may exempt specifically described portions of the coastline from the survey requirements of this section when, in its judgment, the portions of coastline are not subject to erosion or are not likely to be developed by virtue of local, state, or federal programs in effect on the coastline which would preclude significant development, or both.

(E) A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The requests must be forwarded to the department board in accordance with Section 44‑1‑60 and the final decision of the board may be appealed to the Administrative Law Court as provided in Chapter 23 of Title 1.

(F) Subject to Section 48‑39‑290(D), the baseline established under the South Carolina Beachfront Management Act must not move seaward from the position established on June 14, 2011.”

SECTION 3. Section 48‑39‑290 of the 1976 Code, as last amended by Act 25 of 2011, is further amended to read:

“Section 48‑39‑290. (A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) wooden walkways no larger in width than six feet;

(2) small wooden decks no larger than one hundred forty‑four square feet;

(3) fishing piers and associated amenity structures which are open to the public. Those fishing piers with their associated amenity structures including, but not limited to, baitshops, restrooms, restaurants, and arcades which existed September 21, 1989, may be rebuilt if they are constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated amenity structures which existed on September 21, 1989, that were privately owned, privately maintained, and not open to the public on this date also may be rebuilt and used for the same purposes if they are constructed to the same dimensions;

(4) ~~golf courses;~~

~~(5)~~ normal landscaping;

~~(6)~~(5) structures specifically permitted by special permit as provided in subsection (D);

~~(7)~~(6) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device;

~~(8)~~(7) existing groins may be reconstructed, repaired, and maintained. New groins may not be permitted by the department, with the exception of terminal groins. Terminal ~~New~~ groins may only be allowed on beaches that have high erosion rates with erosion threatening existing development or public parks. In addition to these requirements, ~~new~~ terminal groins may be constructed and existing groins may be reconstructed only in furtherance of an on‑going beach renourishment effort which meets the criteria set forth in regulations promulgated by the department and in accordance with the following:

(a) The applicant shall institute a monitoring program for the life of the project to measure beach profiles along the groin area and adjacent and downdrift beach areas sufficient to determine erosion/accretion rates. For the first five years of the project, the monitoring program must include, but is not necessarily limited to:

(i) establishment of new monuments;

(ii) determination of the annual volume and transport of sand; and

(iii) annual aerial photographs.

Subsequent monitoring requirements must be based on results from the first five‑year report.

(b) Terminal groins may only be permitted after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas. The applicant shall provide a financially binding commitment, such as a performance bond or letter of credit that is reasonably estimated to cover the cost of reconstructing or removing the groin and/or restoring the affected beach through renourishment pursuant to subitem (c).

(c) If the monitoring program established pursuant to subitem (a) shows an increased erosion rate along adjacent or downdrift beaches that is attributable to a groin, the department must require either that the groin be reconfigured so that the erosion rate on the affected beach does not exceed the pre‑construction rate, that the groin be removed, and/or that the beach adversely affected by the groin be restored through renourishment.

(d) Adjacent and downdrift communities and municipalities must be notified by the department of all applications for a groin project.

(e) Nothing in the section shall be construed to create a private cause of action, but nothing in this section shall be construed to limit a cause of action under recognized common law or other statutory theories. The sole remedies, pursuant to this section, are:

(i) the reconstruction or removal of a groin; and/or

(ii) restoration of the adversely affected beach and adjacent real estate through renourishment pursuant to subitem (c).

An adjacent or downdrift property owner that claims a groin has caused or is causing an adverse impact shall notify the department of such impact. The department shall render an initial determination within sixty days of such notification. Final agency action shall be rendered within twelve months of notification. An aggrieved party may appeal the decision pursuant to the Administrative Procedures Act.

A permit must be obtained from the department for items (2) through (8). However, no permit is required under this chapter for associated amenity structures constructed on fishing piers if local governmental bodies having responsibility for the planning and zoning authorize construction of those amenity structures. Associated amenity structures do not include those employed as overnight accommodations or those consisting of more than two stories above the pier decking. Associated amenity structures, excluding restrooms, handicapped access features, and observation decks, may occupy no more than thirty‑five percent of the total surface area of the fishing pier or be constructed at a location further seaward than one‑half of the length of the fishing pier as measured from the baseline.

(B) Construction, reconstruction, or alterations between the baseline and the setback line are governed as follows:

(1) Habitable structures:

(a) New habitable structures: If part of a new habitable structure is constructed seaward of the setback line, the owner must certify in writing to the department that the construction meets the following requirements:

(i) The habitable structure is no larger than five thousand square feet of heated space. The structure must be located as far landward on the property as practicable. A drawing must be submitted to the department showing a footprint of the structure on the property, a cross section of the structure, and the structure’s relation to property lines and setback lines which may be in effect. No erosion control structure or device may be incorporated as an integral part of a habitable structure constructed pursuant to this section.

(ii) No part of the building is being constructed on the primary oceanfront sand dune or seaward of the baseline.

(b) Habitable structures which existed on the effective date of Act 634 of 1988 or constructed pursuant to this section:

(i) Normal maintenance and repair of habitable structures is allowed without notice to the department.

(ii) Additions to habitable structures are allowed if the additions together with the existing structure do not exceed five thousand square feet of heated space. Additions to habitable structures must comply with the conditions of new habitable structures as set forth in subitem (a).

(iii) Repair or renovation of habitable structures damaged, but not destroyed beyond repair, due to natural or manmade causes is allowed.

(iv) Replacement of habitable structures destroyed beyond repair due to natural causes is allowed after notification is provided by the owner to the department that all of the following requirements are met:

a. The total square footage of the replaced structure seaward of the setback line does not exceed the total square footage of the original structure seaward of the setback line. The linear footage of the replaced structure parallel to the coast does not exceed the original linear footage parallel to the coast.

b. The replaced structure is no farther seaward than the original structure.

c. Where possible, the replaced structure is moved landward of the setback line or, if not possible, then as far landward as is practicable, considering local zoning and parking regulations.

d. The reconstruction is not seaward of the baseline unless permitted elsewhere in Sections 48‑39‑250 through 48‑39‑360.

(v) Replacement of habitable structures destroyed beyond repair due to manmade causes is allowed provided the rebuilt structure is no larger than the original structure it replaces and is constructed as far landward as possible, but the new structure must not be farther seaward than the original structure.

(2) Erosion control devices:

(a) No new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.

(b) Erosion control structures or devices which existed on the effective date of this act must not be repaired or replaced if destroyed:

(i) more than eighty percent above grade through June 30, 1995;

(ii) more than sixty‑six and two‑thirds percent above grade from July 1, 1995, through June 30, 2005;

(iii) more than fifty percent above grade after June 30, 2005.

(iv) Damage to seawalls and bulkheads must be judged on the percent of the structure remaining intact at the time of damage assessment. The portion of the structure or device above grade parallel to the shoreline must be evaluated. The length of the structure or device parallel to the shoreline still intact must be compared to the length of the structure or device parallel to the shoreline which has been destroyed. The length of the structure or device parallel to the shoreline determined to be destroyed divided by the total length of the original structure or device parallel to the shoreline yields the percent destroyed. Those portions of the structure or device standing, cracked or broken piles, whalers, and panels must be assessed on an individual basis to ascertain if these components are repairable or if replacement is required. Revetments must be judged on the extent of displacement of stone, effort required to return these stones to the prestorm event configuration of the structure or device, and ability of the revetment to retain backfill material at the time of damage assessment. If the property owner disagrees with the assessment of a registered professional engineer acting on behalf of the department, he may obtain an assessment by a registered professional engineer to evaluate, as set forth in this item, the damage to the structure or device. If the two assessments differ, then the two engineers who performed the assessments must select a registered professional engineer to perform the third assessment. If the first two engineers are unable to select an engineer to perform the third assessment, the clerk of court of the county where the structure or device lies must make the selection of a registered professional engineer. The determination of percentage of damage by the third engineer is conclusive.

(v) The determination of the degree of destruction must be made on a lot by lot basis by reference to county tax maps.

(vi) Erosion control structures or devices must not be enlarged, strengthened, or rebuilt but may be maintained in their present condition if not destroyed more than the percentage allowed in Section 48‑39‑290(B)(2)(b)(i), (ii), and (iii). Repairs must be made with materials similar to those of the structure or device being repaired.

(c) Erosion control structures or devices determined to be destroyed more than the percentage allowed in Section 48‑39‑290(B)(2)(b)(i), (ii), and (iii) must be removed at the owner’s expense. Nothing in this section requires the removal of an erosion control structure or a device protecting a public highway which existed on the effective date of Act 634 of 1988.

(d) The provisions of this section do not affect or modify the provisions of Section 48‑39‑120(C).

(e) Subitem (a) does not apply to a private island with an Atlantic Ocean shoreline of twenty thousand, two hundred ten feet which is entirely revetted with existing erosion control devices. Nothing contained in this subitem makes this island eligible for beach renourishment funds. For a private island with an Atlantic Ocean shoreline of twenty thousand, two hundred ten feet which is entirely revetted with existing erosion control devices, the baseline is established for this private island at the landward edge of the erosion control device and the setback line is established twenty feet landward of the baseline.

(3) Pools, as defined in Section 48‑39‑270(12):

(a) No new pools may be constructed seaward of the setback line unless the pool is built landward of an erosion control structure or device which was in existence or permitted on the effective date of this act and is built as far landward as practical.

(b) Normal maintenance and repair is allowed without notice to the department.

(c) If a pool, existing on July 1, 1988, is destroyed beyond repair, as determined by the department pursuant to Section 48‑39‑270(11), it may be replaced if the owner certifies in writing to the department that:

(i) It is moved as far landward as practical. This determination of practicality must include the consideration of local zoning requirements.

(ii) It is rebuilt no larger than the destroyed pool.

(iii) It is constructed according to acceptable standards of pool construction and cannot be reinforced in a manner so as to act as an erosion control structure or device.

(d) If a pool is not destroyed beyond repair as determined by the department pursuant to Section 48‑39‑270(11) but the owner wishes to replace it, the owner may do so if:

(i) The dimensions of the pool are not enlarged.

(ii) The construction conforms to sub‑subitem (iii) of subitem (c).

(4) All other construction or alteration between the baseline and the setback line requires a department permit. However, the department, in its discretion, may issue general permits for construction or alterations where issuance of the general permits would advance the implementation and accomplishment of the goals and purposes of Sections 48‑39‑250 through 48‑39‑360.

(C)(1) Notwithstanding the provisions relating to new construction, a person, partnership, or corporation owning real property that is affected by the setback line as established in Section 48‑39‑280 may proceed with construction pursuant to a valid building permit issued as of the effective date of this section. The person, partnership, or corporation may proceed with the construction of buildings and other elements of a master plan, planned development, or planned unit development notwithstanding the setback line established in this chapter if the person, partnership, or corporation legally has begun a use as evidenced by at least one of the following:

(a) All building permits have been applied for or issued by a local government before July 1, 1988.

(b) There is a master plan, planned development, or planned unit development:

(i) that has been approved in writing by a local government before July 1, 1988; or

(ii) where work has begun pursuant to approval as evidenced by the completion of the utility and infrastructure installation designed to service the real property that is subject to the setback line and included in the approved master plan, planned development, or planned unit development.

(2) However, repairs performed on a habitable structure built pursuant to this section are subject to the guidelines for repairs as set forth in this section.

(3) Nothing in this section prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline, if permitted by the department.

(D) Special permits:

(1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48‑39‑250 through 48‑39‑360, the department may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the department orders the removal. However, the use of the property authorized under this provision, in the determination of the department, must not be detrimental to the public health, safety, or welfare.

(2) The department’s Permitting Committee is the committee to consider applications for special permits.

(3) In granting a special permit, the committee may impose reasonable additional conditions and safeguards as, in its judgment, will fulfill the purposes of Sections 48‑39‑250 through 48‑39‑360.

(4) A party aggrieved by the decision to grant or deny a special permit application may appeal pursuant to Section 48‑39‑150(D).

(5) The department shall require that special permit conditions be documented on the deed of conveyance, in addition to any applicable disclosures required in Section 48‑39‑330.

(E) The provisions of this section and Section 48‑39‑280 do not apply to an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the federal Rivers and Harbors Act of 1968, as amended by the federal Water Resources Development Act of 1986, and approved by the United States Army Corps of Engineers. Nothing contained in this subsection makes this area ineligible for beach renourishment funds. The baseline determined by the local governing body and the department is the line of erosion control devices and structures and the department retains its jurisdiction seaward of the baseline. In addition, upon completion of a department approved beach renourishment project, including the completion of a sand transfer system if necessary for long‑term stabilization, an area under a Section 111 Study becomes subject to all the provisions of this chapter. For the purposes of this section, a beach nourishment project stabilizing the beach exists if a successful restoration project is completed consisting of at least one hundred fifty cubic yards a foot over a length of five and one‑half miles, with a project design capable of withstanding a one‑in‑ten‑year storm, as determined by department, and renourishment is conducted annually at a rate, agreed upon by the department and local governing body, equivalent to that which would occur naturally if the navigation project causing the erosion did not exist. If the two parties cannot agree, then the department must obtain the opinion of an independent third party. Any habitable structure located in an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study, which was in existence on September 21, 1989, and was over forty years old on that date and is designated by the local governing body as an historical landmark may be rebuilt seaward of the baseline if it is rebuilt to the exact specifications, dimensions, and exterior appearance of the structure as it existed on that date.”

SECTION 4. This act takes effect upon approval by the Governor; however, Section 48‑39‑130, as amended, remains subject to the repeal provision pursuant to Section 5, Act 41 of 2011.

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