



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

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January 14, 2008

MEMORANDUM

CRC 08-04 amended

TO: Coastal Resources Commission
FROM: Jeffrey Warren, PhD
Coastal Hazards Specialist
SUBJECT: Public Comments and Staff Recommendations for 15A NCAC 07H.0306
(General Use Standards for Ocean Hazard Areas)

Draft rule language for 15A NCAC 07H.0306 was approved for public hearing by the CRC on July 27, 2007 at their meeting in Raleigh. As per GS 150B (Administrative Procedures Act or APA), following fiscal review by DCM (and subsequent approval of said review by DENR and the State Budget Office), the rule was published in the State Register (vol. 22, #9) on November 1, 2007. The public hearing was held on November 29, within the 60-day comment period (November 1 through December 31). A synopsis of the comments for each rule is provided in the body of this memo. This memo also has numerous appendices included in your mail-out package:

Appendix A – Draft rule language with color-coded annotation to clarify modifications and changes from the existing rules, as well as the draft rules subjected to public comment

Appendix B – Non-annotated, revised draft rule language (i.e., “clean copy”) incorporating changes by DCM that are recommended for additional public comment (i.e., vote to send this version back out for an additional public comment period and hearing)

Appendix C – Transcript from November public hearing

Appendix D – Written comments received by DCM via mail, fax and email during the official public comment period

Appendix E – Written comments received by DCM after the official public comment period had closed (i.e., received after December 31)

SUMMARY OF PUBLIC HEARING COMMENTS

Twenty people made verbal comments at the public hearing, of which 10 submitted written comments following the hearing. These 20 stakeholders represented three municipalities (Emerald Isle, Oak Island and Ocean Isle Beach), three non-governmental organizations or NGOs (NC Beach Inlet and Waterway Association, NC Coastal Federation, Home Owner Association management company representing 16 associations with oceanfront buildings), three commercial interests (marina owner, LLC partner with planned oceanfront development, representative of two oceanfront hotels), one law firm representing the Village of Bald Head

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Island, and 10 oceanfront homeowners (Emerald Isle, Figure 8 Island, Oak Island, Ocean Isle Beach, Pine Knoll Shores, Topsail Beach). The transcript of these comments is found in Appendix C. Due to the similarities between the verbal and written comments, both are addressed concurrently in the discussion that follows.

SUMMARY OF WRITTEN COMMENTS

A total of 110 written comments were received during the official public input period and are included in their entirety in Appendix D. Three additional comments were received after the closure of this period and are included in their entirety in Appendix E. Eleven comments, nine of which were submitted by representatives from local governments, were received by DCM prior to November 1 and were previously distributed to the CRC at the July meeting in Raleigh. While they are not included as an appendix to this memo, they remain available online for your review (www.nccoastalmanagement.net/setbacks.htm). The following statistics, however, only address those comments included in Appendix D. Of these 110 submissions, five were submitted by municipalities (Atlantic Beach, Emerald Isle, Oak Island, Ocean Isle Beach, Wrightsville Beach), three by realtors, five by NGOs (NC Beach Inlet and Waterway Association, Business Alliance for a Sound Economy, NC Restaurant and Lodging Association, Land Alliance of NC, NC Association of Realtors, NC Home Builders Association), three from law firms and one oceanfront hotel (Wrightsville Beach). The overwhelming majority of comments received (82 out of 110) were from private homeowners from Atlantic Beach (7), Bald Head Island (8), Carolina Beach (1), Emerald Isle (5), Caswell Beach (2), Oak Island (58), Ocean Isle Beach (1) and Topsail Beach (1). Ten additional comments were received from non-oceanfront communities (including one each from Georgia and South Carolina) and one from a contractor with projects on Oak Island. Indeed, half of all written comments received were from private homeowners (and one contractor) on Oak Island. (For simplicity, Oak Island shall refer to the island as a whole and include the towns of Oak Island and Caswell Beach). Due to the similarities between the verbal and written comments, both are addressed concurrently in the discussion that follows.

In addition, 39 written comments were submitted by persons with interests in the Village of Bald Head Island. Although the majority of these submissions were identified in their headings or textual bodies as being relevant to 15A NCAC 07H.0306, they instead addressed the proposed boundary changes to the State's Inlet Hazard Areas (IHAs). These comments are not germane to the rule being proposed herein (15A NCAC 07H.0306) and are, therefore, not included as an appendix to this memo.

DISCUSSION OF VERBAL AND WRITTEN COMMENTS

The comments had two distinct groupings; they either discussed setbacks or the static line but rarely both. More than three quarters of the comments solely addressed the static vegetation line exception (81 out of 110). The majority of the remaining comments discussed the proposed increase in oceanfront setbacks. Less than five percent of the comments (i.e., <6 stakeholders) addressed both the static vegetation line and setbacks.

Static Line Exception

Within the group of stakeholders that commented on the static line exception (81), approximately 4 out of 5 supported the creation of a static line exception. Half of those in favor of the static line exception (34 out of 66) specifically stated that they were not in favor of limiting development allowed under the exception to 2,000 square feet, and many suggested values ranging between 2,500 and 3,500 square feet. Three people who were in favor of the static line exception also supported development limitations with regard to the static line exception (i.e.,

were in favor of 2000 square feet or less), although one offered support under the condition that covered porches and decks not be considered in the calculation of total floor area. The remaining half of those in favor of the static line exception (32 out of 66) did not stipulate one way or the other with respect to size limitation.

The Town of Emerald Isle included a dataset with its comments that reported total floor area or TFA (heated living space only; exterior areas such as covered and attached decks and walkways were not included) for the 160 single-family homes adjacent to the static vegetation line. While the average TFA equaled 1,849 square feet, only 68% of the homes are 2,000 square feet or less, 18% are between 2,000 and 2,500 square feet, and 7% are between 2,500 and 3,000 square feet. Although not included in the comments, the Division of Coastal Management also received similar data from the towns of Oak Island and Ocean Isle Beach, and these data shared similar trends. For Oak Island, while the average TFA equaled 1,475 square feet, 59% of the oceanfront homes adjacent to the static vegetation line are 2,000 square feet or less, 17% are between 2,000 and 2,500 square feet, and 15% are between 2,500 and 3,000 square feet (n=478). For Ocean Isle Beach, while no average TFA was provided, 86% of the oceanfront homes adjacent to the static vegetation lines are 2,000 square feet or less, 10% are between 2,000 and 2,500 square feet, and 2% are between 2,500 and 3,000 square feet (n=209).

DCM response: *This rule creates an option for limited development under limited conditions within the current setback. Therefore, staff continues to recommend that the size of development allowed under the static line exception be regulated by the CRC. As discussed during rule development, the justification for this number is twofold: 1) 2,000 square feet generally is considered “easily” moveable in the event that beach fill fails and the shoreline returns to pre-existing conditions, and 2) this size is generally consistent with the size limitations under the single-family exemption for lots platted prior to 1979 (1,000 sq ft footprint x 2 living stories = 2,000 sq ft). In order to calculate total floor area (TFA), current rules include roof-porches that are structurally attached to heated living space. The proposed amendments do not change this method. This method of TFA determination is not employed by local governments or industry for valuations assessments (i.e., common calculations refer only to heated living space). Furthermore, in the event a home does have to be removed, structurally attached decks and walkways are easily removed in order to facilitate physical movement of the structure off of the property. In light of this consideration, the square footage numbers provided above from Emerald Isle, Oak Island and Ocean Isle Beach, at the request of DCM, have been calculated based on heated living space in order to establish a statistically valid comparison. Although DCM still supports its initial recommendation of 2,000 square feet for the reasons discussed above, staff does recommend that the draft rule language be modified to remove covered porches, decks and walkways from the calculation of TFA. Because ancillary structures such as decks and porches can add at least 500 to 1,000 square feet to a home’s floor area, a 2,000 square foot limit based solely on heated living space is the equivalent of increasing the TFA in the current proposal to 2,500 or 3,000 square feet. Upon consideration of the TFA data presented by the local governments, the revised DCM recommendation represents three out of four homes in the combined dataset and is above the average home size (where those data are provided). One specific comment stated that it did not support the static line exception because it required all oceanfront development landward of large-scale beach fill to be limited by a maximum TFA of 2,000 square feet. This draft rule limits TFA for development landward of a large-scale and long-term beach fill project only if it falls within the current setback (i.e., oceanward of the static vegetation line).*

Setbacks

Of those that commented on the proposed setback increases (30 out of 110), half expressed opposition (15 out of 30). The remaining half requested: 1) additional forums for stakeholder input and/or that potential impacts of the proposal be studied further (n=13) or adoption of the more stringent setback proposal outright (n=2). With regard to local governments, the Town of Wrightsville Beach requested that the CRC retain current setback criteria. The Town of Atlantic Beach encouraged additional public comment on the issue and also expressed concern about an increased residential setback for structures >5,000 square feet. The towns of Oak Island and Ocean Isle Beach generally supported the concept of the graduated setback (increased setback factor between 60 and 90 for structures between 10,000 and 100,000 square feet). Emerald Isle did not address the graduated setback.

DCM response: *DCM continues to support the classification of setback based on size and not use as the hazards to which the structures are exposed are the same. Analysis by DCM estimates no more than 200 oceanfront homes in North Carolina exceed 5,000 square feet (comparatively, DCM estimates approximately 7,000 total oceanfront structures). For larger structures (>10,000 square feet), this proposal has introduced graduated setback factors between 60 and 90 times the erosion rate. For the largest buildings (greater than 100,000 square feet), a maximum setback increase (from 60 to 90) for the majority of the oceanfront (average erosion rate of 2 feet per year) would be 60 feet landward of the setback defined by current rules.*

Large oceanfront structures (primarily commercial and multi-family) fall into three general categories:

- 1) development that is conforming currently (setback factor of 60) and would continue to be conforming under a maximum setback factor of 90,*
- 2) development that is conforming currently (setback factor of 60), would be non-conforming under a maximum setback factor of 90, but a substantial building envelope exists in which re-development could occur (although not necessarily in the same footprint or configuration),*
- 3) development that is conforming currently (setback factor of 60), would be non-conforming under a maximum setback of 90, and has little to no building envelope available for re-development (regardless of footprint or configuration), and*
- 4) development that is non-conforming currently (setback factor of 60) and, therefore, would continue to remain non-conforming under an increased setback factor.*

An initial review of these three subsets of development using aerial orthophotography show multiple examples of large-scale development along the oceanfront that would continue to remain conformable under the proposed rules (category 1) or have an option for similar large-scale re-development (category 2). The data suggest that the majority of large-scale oceanfront development falls into the fourth category wherein large-scale re-development could not occur even under existing rules).

The proposed setback policy reduces risk to life and property from general coastal hazards. The policy is simple: the larger the structure, the greater the setback. Application of this graduated concept takes advantage of re-development by moving development incrementally in a landward direction. In this scenario, shallow land parcels potentially will require smaller

structures. Variance procedures exist for unique situations of non-conforming re-development to be addressed by the CRC on a case-by-case basis.

Grandfathering was addressed by numerous stakeholders, primarily to allow buildings damaged by hazards other than coastal (primarily fire) to be re-built within existing footprints.

DCM response: *It has been a long-standing policy of the CRC to not support “grandfathering” of non-conforming, ocean hazard area development. The risk to life and property is the same to a structure regardless of whether it is new construction or re-development following a fire. Furthermore, the issue of what constitutes repair versus replacement (i.e., re-development) is not governed by the rule being considered.*

Cantilevering into the setback was addressed by five people (one developer, two homeowners and two law firms). Four were against limiting cantilevering altogether and one was in support of the prohibition of cantilevering. Those opposed to disallowing cantilevering were also against increasing setbacks.

DCM response: *Strict interpretation of existing rules disallows most development oceanward of the setback. Because limited cantilevering had been allowed over time, cantilevering continues to be allowed for the sake of consistency with interpretation and enforcement. During development of the setback proposal, the CRC initiated the effort to strictly enforce the oceanfront setback by the prohibition of cantilevers.*

Infrastructure, primarily roads, was a concern of numerous stakeholders. The proposed rule did not change the setback for roadways (i.e., anything >5,000 square feet requiring a setback factor of 60 times the erosion rate), however, it did limit the setback factor to no more than 60. This was necessary so as to exempt roads from the graduated setback factors between 60 and 90 for development between 10,000 and 100,000 square feet. The draft rules also limit the setback factor of utilities to 30 times the erosion rate (thereby exempting large projects from a setback factor of 60).

DCM response: *Examples provided in the public comments indicate this proposed rule would make many oceanfront roads non-conforming structures. That is untrue for the reasons stated above (i.e., there was no change in the policy for roads). After internal discussion and consideration of stakeholder input, DCM is recommending that the proposed rules and overall policy be amended to treat roads as infrastructure, which is limited to the minimum setback factor of 30.*

Numerous stakeholders addressed the need for additional opportunities for stakeholder participation.

DCM response: *For a period spanning more than a year, DCM solicited input from stakeholders.,. The recommendations in this memo incorporated this input. At the July 2007 CRC meeting, DCM staff expressed concern that they had reached a point of diminishing return relative to stakeholder input to the proposed setback policy. The primary reason for*

recommending that the CRC approve the draft rules for public hearing at that time was to provide incentive for additional stakeholder input through the APA process.

One specific comment stated that these rules represented an increase in the Ocean Erodible Area of Environmental Concern (AEC) and should, therefore, be subject to additional public hearings in each of the affect CAMA counties.

DCM response: *This draft rule increases setbacks under certain conditions but does not change the boundary of an AEC. The Ocean Erodible AEC will continue to be defined in 15A NCAC 07H.0304(1) as distance landward from the vegetation line equal to 60 times the erosion rate plus the distance of the 100-year storm recession line.*

DCM STAFF RECOMMENDATIONS

Staff recommends that the CRC incorporate its two recommendations into the draft rule language: 1) removal of structurally attached covered porches and decks from the total floor area equation, and 2) providing an exemption of roads from any setback greater than the minimum (i.e., 30 times the erosion rate). By approving this amended rule language (presented in Appendix B to this memo), DCM feels the changes are substantial enough to merit an additional public comment period and public hearing. The likely date for the public hearing is at the May CRC meeting in Washington.