

NORTH CAROLINA GENERAL ASSEMBLY
1971 SESSION

CHAPTER 1159
HOUSE BILL 705

AN ACT TO PROVIDE FOR THE CONTROL OF BEACH EROSION AND FOR THE PROTECTION AND CONSERVATION OF COASTAL AREAS, SAND DUNES AND ESTUARINE AREAS.

The General Assembly of North Carolina enacts:

Section 1. Article 21 of Chapter 143 of the General Statutes of North Carolina is amended by adding thereto a new part, to be numbered Part 7, and to read as follows:

"Part 7. Hurricane Flood Protection and Beach
"Erosion Control Project Revolving Fund.

"§ 143-215.62. **Revolving fund established; conditions and procedures.** — (a) There is established under the control and direction of the North Carolina Board of Water and Air Resources, a Hurricane Flood Protection and Beach Erosion Control Project Revolving Fund, to consist of any moneys that may be appropriated for use through the Fund by the General Assembly or that may be made available to it from any other source for the purpose of financing the local portion of the nonfederal share of the cost of hurricane flood protection and beach erosion control projects. The Board shall, when funds are available, and in accordance with priorities established by the Board, make advances from the Fund to any county or municipality for:

- (1) Advance planning and engineering work necessary or desirable in order to promote the development, construction, or preservation of hurricane flood protection and beach erosion works or projects;
- (2) Construction of hurricane flood protection and beach erosion control works or projects, or other related costs which are a responsibility of local government, including costs associated with construction, such as the acquisition of land or rights of way or the relocation of public roads and utilities;
- (3) Maintenance and nourishment of the constructed works or project.

Such advances shall be subject to repayment by the recipient to the Board from the proceeds of bonds or other obligations for the beach erosion control and hurricane flood protection works or projects, or from other funds available to the recipient, including grants.

(b) Prior to making any advance to a county or municipal government the Board shall advise the county or municipal government:

- (1) Its opinion as to whether or not the projected works or project would further beach erosion control or provide protection to life or property from flood waters resulting from hurricanes;
- (2) Its opinion as to whether or not there is a reasonable prospect of federal aid in the financing of the projected works or project and whether or not the advance will exceed the local portion of the nonfederal share of the cost of the works or project to be financed by the county or municipality making the application;
- (3) Its opinion as to whether or not the anticipated financial outlays in connection with the projected works or project for the county or

municipality making the application would constitute an unreasonable burden on the citizens of the county or municipality;

The Board shall make no advance to a county or municipal government without first receiving satisfactory assurances from such government that the projected works or project shall be undertaken and the funds advanced repaid as provided herein.

(c) Repayment of any advance may be in equal installments or in a lump sum, but the term for such repayment shall not exceed a term often (10) years. All moneys received from repayments on advances shall be paid into the Revolving Fund and shall be used for the purposes set forth in this section.

(d) The Board may adopt such rules and regulations with respect to making application as are consistent with the terms and purposes of this section."

Sec. 2. G.S. 160-200 of the General Statutes is amended by adding thereto a new subsection, to be appropriately numbered, and to read as follows:

"To levy taxes and appropriate tax or nontax funds for the acquisition, construction, reconstruction, extension, maintenance, improvement, or enlargement of groins, jetties, dikes, moles, walls, sand dunes, vegetation, or other types of works or improvements which are designed for the control of beach erosion or for protection from hurricane floods and for the preservation or restoration of facilities or natural features which afford protection to the beaches or other land areas of the municipalities or to the life and property thereon."

Sec. 3. G.S. 153-9(56) of the General Statutes is hereby rewritten to read as follows:

"(56) Beach Erosion Control, Protection from Hurricane Floods. To appropriate funds to finance the acquisition, construction, reconstruction, extension, maintenance, improvement, or enlargement of groins, jetties, dikes, moles, walls, sand dunes, vegetation, or other types of works or improvements which are designed for the control of beach erosion or for protection from hurricane floods or for the preservation or restoration of facilities and natural features which afford protection to the beaches and other land areas of the county and to the life and property thereon. Expenditures by counties for these purposes are hereby declared to be a special purpose and a necessary expense, and all such counties shall have authority and are hereby given special approval to levy special taxes and to appropriate tax and nontax money for such purposes."

Sec. 4. Article 3 of Chapter 104B of the General Statutes (Protection of Sand Dunes along the Outer Banks) is amended by adding thereto a new section, to be numbered G.S. 104B-16, and to read as follows:

"§ 104B-16. Regulation and enforcement powers of Board of Water and Air Resources.

— The power and authority vested by this Article in the boards of county commissioners of any county to adopt regulations, establish a shore protection line, appoint or designate a shoreline protection officer, fix inspection fees and charges, institute proceedings, and take other actions for the protection of sand dunes along the Outer Banks of North Carolina may also be exercised by the North Carolina Board of Water and Air Resources in any county that has not adopted regulations and appointed a shoreline protection officer under the authority of this Article by December 31, 1971. In exercising the powers and authority of this Article the Board of Water and Air Resources shall have all the powers (except the power to levy a special tax), and shall be subject to all the requirements and limitations, imposed on boards of county commissioners by this Article. If the Board of Water and Air Resources elects to designate a county or municipal employee or official as a shoreline protection officer, it may do so only with the approval of such county or municipal governing body. Appeals to the Board of Water and Air Resources from actions of a shoreline protection officer may be heard by the Board, or by its

designated members, employees, or a committee in Wake County or in any county containing land affected by the denied permit.

If the Board of Water and Air Resources decides to exercise the powers and authority of this Article in any county as authorized by this section, it shall do so by first adopting a resolution stating its intent. From and after the adoption of the resolution of intent, the Board of Water and Air Resources shall have exclusive jurisdiction in any county named in the resolution in the exercise of the powers and authority of this Article. The board of county commissioners of any county named in the resolution of intent shall not be authorized to exercise any of the powers and authority of this Article thereafter unless and until the said commissioners request that the Board of Water and Air Resources rescind its resolution of intent. The Board of Water and Air Resources shall rescind its resolution and vacate its jurisdiction within sixty (60) days after receipt of the resolution from the board of county commissioners; provided the resolution from the said commissioners includes a plan for carrying out the duties, responsibilities, and provisions of this Article. In the event that the county fails to carry out the duties, responsibilities, and provisions of this Article, the Board may reassume the powers and responsibilities of this Article."

Sec. 5. G.S. 104B-10 is rewritten so it shall read as follows:

"§ 104B-10. Appeal from decision of shoreline protection officer; review of decision of county commissioners. — (a) In the event that a shoreline protection officer denies a permit under this Article, the applicant may within 30 days file an appeal with the board of county commissioners. In the event that a shoreline protection officer grants a permit under this Article, any property owner whose property may be damaged by action taken under the permit or any interested State agency may within 30 days file an appeal with the board of county commissioners. In the event that a shoreline protection officer grants a permit under this Article, any property owner whose property may be damaged by action taken under the permit or any interested State agency may within 30 days file an appeal with the board of county commissioners. On receipt of any appeal, the board of county commissioners shall be entitled to consider the matter ab initio and may take any action which the shoreline protection officer could have taken under this Article.

(b) Every decision of the board of county commissioners on such an appeal as well as every decision granting or denying a permit by a board of county commissioners performing the functions of shoreline protection officer, shall be subject to review by the superior court of the county by proceedings in the nature of certiorari. Pending the final disposition of such appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Article."

Sec. 6. Chapter 113 of the General Statutes is hereby amended by rewriting certain subsections of G.S. 113-229 so that subsections (a), (e), (f), (h), (k), (l), (m) and (n) of G.S. 113-229 shall read as follows:

"(a) Before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the North Carolina Department of Conservation and Development. Granting of a State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The North Carolina Department of Water and Air Resources shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(e) Applications for permits shall be circulated by the Department of Conservation and Development among all State agencies and in the discretion of the Director, appropriate federal agencies, having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the

public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. The Department shall act upon an application for permit within ninety days after the application is filed and failure to so act shall automatically approve the application.

(f) If any State agency or the applicant raises an objection to the action of the Department of Conservation and Development regarding the permit application within 20 days after said action was taken, the Department shall call a meeting of a Review Board composed of the directors (or their designees) of the following State agencies: The Department of Administration, the Department of Conservation and Development, the Board of Health, the Department of Water and Air Resources, the Wildlife Resources Commission, and any other agency that may be designated by the Governor. The Director of the Department of Conservation and Development, if he does not sit on the review himself, may appoint two designees, one to represent conservation interests and one to represent development interests. The Review Board shall set a date for a hearing not more than 60 days from the date of the departmental action. At said hearing, evidence shall be taken by the Review Board from all interested persons, who shall have a right to be represented by counsel. After hearing the evidence, the Review Board shall make findings of fact in writing and shall affirm, modify or overrule the action of the Department concerning the permit application. Any State agency or the applicant may appeal from the ruling of the Review Board to the superior court of the county where the land or any part thereof is located, pursuant to the provisions of Article 33 of Chapter 143 of the General Statutes.

(h) The granting of a permit to dredge or fill shall be deemed conclusive evidence that the applicant has complied with all requisite conditions precedent to the issuance of such permit, and his right shall not thereafter be subject to challenge by reason of any alleged omission on his part, except failure to notify adjacent riparian landowners as required by subsection (d) of this section.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment of not more than ninety (90) days, or both. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. Notice to cease shall be pursuant to G.S. 113-229(g)(9).

(l) The Director may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the Superior Court in the name of the State upon the relation of the Director, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and to work to be performed by the State Government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the North Carolina State Board of Health and local

health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130-206 through G.S. 130-209. Provided, further, this act shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

- (1) 'State-owned lakes' include man-made as well as natural lakes.
- (2) 'Estuarine waters' means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department of Conservation and Development and the Wildlife Resources Commission, within the meaning of G.S. 113-129.
- (3) 'Marshland' means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tide waters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt-water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cat-Tail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina Cynosuroides*)."

Sec. 7. Chapter 113 of the General Statutes is hereby amended by adding immediately following G.S. 113-229 a new section to be designated G.S. 113-230 and to read as follows:

"§ 113-230. Orders to control activities in coastal wetlands. — (a) The Director of the Department of Conservation and Development, with the approval of the Board of Conservation and Development, may from time to time, for the purpose of promoting the public safety, health, and welfare, and protecting public and private property, wildlife and marine fisheries, adopt, amend, modify, or repeal orders regulating, restricting, or prohibiting dredging, filling, removing or otherwise altering coastal wetlands. In this section, the term 'coastal wetlands' shall mean any marsh as defined in G.S. 113-229(n)(3), as amended, and such contiguous land as the Director reasonably deems necessary to affect by any such order in carrying out the purposes of this section.

(b) The Director shall, before adopting, amending, modifying or repealing any such order, hold a public hearing thereon in the county in which the coastal wetlands to be affected are located, giving notice thereof to interested State agencies and each owner or claimed owner of such wetlands by certified or registered mail at least twenty-one days prior thereto.

(c) Upon adoption of any such order or any order amending, modifying or repealing the same, the Director shall cause a copy thereof, together with a plan of the lands affected and a list of the owners or claimed owners of such lands, to be recorded in the register of deeds office in the county where the land is located, and shall mail a copy of such order and plan to each owner or claimed owner of such lands affected thereby.

(d) Any person, firm or corporation that violates any order issued under the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment for not more than six months, or both in the discretion of the court.

(e) The superior court shall have jurisdiction in equity to restrain violations of such orders.

(f) Any person having a recorded interest in or registered claim to land affected by any such order may, within ninety days after receiving notice thereof, petition the superior court to determine whether the petitioner is the owner of the land in question, and in case he is adjudged the owner of the subject land, whether such order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation. If the court finds the order to be an unreasonable exercise of the police power, as aforesaid, the court shall enter a finding that such order shall not apply to the land of the petitioner; provided, however, that such finding shall not affect any other land than that of the petitioner. The Director shall cause a copy of such finding to be recorded forthwith in the register of deeds office in the county where the land is located. The method provided in this paragraph for the determination of the issue of whether any such order constitutes a taking without compensation shall be exclusive, and such issue shall not be determined in any other proceeding.

(g) After a finding has been entered that such order shall not apply to certain land as provided in the preceding paragraph, the Department of Administration, upon the request of the Board of Conservation and Development, shall take the fee or any lesser interest in such land in the name of the State by eminent domain under the provisions of Chapter 146 of the General Statutes and hold the same for the purposes set forth in this section.

(h) This section shall not repeal the powers, duties and responsibilities of the Department of Conservation and Development under the provisions of G.S. 113-229."

Sec. 8. Severability. If any provision of this act or its application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or applications, and to this end the provisions of this act are declared to be severable.

Sec. 9. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 21st day of July, 1971.