

BLUFF RECESSION AND SETBACK ACT

Act of May. 13, 1980, P.L. 122, No. 48

Cl. 32

AN ACT

Providing for the regulation of structure setbacks in bluff recession hazard areas throughout the Commonwealth to limit property damage and shoreline erosion recession, imposing duties and conferring powers on the Department of Environmental Protection and municipalities, providing for penalties and enforcement. (Title amended July 7, 2011, P.L.301, No.72)

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the "Bluff Recession and Setback Act."

Section 2. Purpose and policy.

The policy and purpose of this act is to:

(1) Encourage planning and development in bluff areas which is consistent with sound land use practices.

(2) Protect people and property in bluff areas from the dangers and damage associated with the inevitable recession of bluffs.

(3) Prevent and eliminate urban and rural blight which results from the damages of bluff erosion and recession.

(4) Minimize the expenditure of public and private funds for shoreline protection and bluff stabilization structures and activities.

(5) Authorize a comprehensive and coordinated program to regulate development activities through the use of setback ordinances in bluff recession hazard areas, designed to preserve and restore the natural ecological systems, and to prevent continuing destruction of private property and structures.

(6) Encourage local administration and management of bluffs consistent with the Commonwealth's duty as trustee of natural resources, and the people's constitutional right to the preservation of the natural, scenic, aesthetic and historic values of the environment.

Section 3. Definitions.

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Bluff." Any high bank or bold headland with a broad, precipitous cliff face, overlooking a lake.

"Bluff line." The edge or crest of the bluff.

"Bluff recession." The loss of material along the bluff face caused by the direct or indirect action by one or a combination of groundwater seepage, water currents, wind generated water waves or high water levels.

"Bluff recession hazard area." An area or zone where the rate of progressive bluff recession creates a substantial threat to the safety or stability of nearby or future structures or utility facilities. The term shall not include any area where the horizontal distance, measured perpendicular to the shoreline, between the shoreline and the bluff toe is in excess of 250 feet and such area shall not be subject to any Environmental Quality Board regulations or municipal bluff setback ordinance or regulation established under this act. (Def. amended July 7, 2011, P.L.301, No.72)

"Bluff setback ordinance and regulations." Building codes, zoning ordinances, subdivision regulations, health regulations, special purpose ordinances, and other applications of the police power, which provide standards for the location of structures and facilities in bluff recession hazard areas.

"Bluff toe." The base of a bluff. (Def. added July 7, 2011, P.L.301, No.72)

"Department." The Department of Environmental Protection of the Commonwealth. (Def. amended July 7, 2011, P.L.301, No.72)

"Development":

(1) The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving:

(i) a group of two or more buildings; or

(ii) the division or allocation of land or space between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features.

(2) A subdivision of land.

"Lake." A body of fresh water covering at least 9,000 square miles.

"Municipality." A city, borough, town or township, or any county or other governmental unit when acting as an agent thereof, or any combination thereof acting jointly.

"Person." An individual, partnership, public or private association or corporation, firm, trust estate, municipality, governmental unit, public utility or any other legal entity whatsoever which is recognized by law as the subject of rights and duties. Whenever used in any section prescribing or imposing a penalty, the term "person" shall include the members of a partnership, the officers, members, servants and agents of an association, officers, agents and servants of a corporation, but shall exclude any department, board, bureau or agency of the Commonwealth.

"Shoreline." The ordinary high water mark of Lake Erie of 573.4 feet as defined in accordance with the International Great Lakes Datum 1985 (IGLD 1985) as recognized by the United States Army Corps of Engineers. (Def. added July 7, 2011, P.L.301, No.72)

"Structure." Any man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land.

"Structure life span." The useful life of the structure considering both economic and physical factors.

"Substantial improvement." Any repair, reconstruction or improvement of a structure, the cost of which equals or exceeds 50% of the market value of the structure either:

- (1) before the improvement or repair is started; or
- (2) if the structure has been damaged, and is being restored, before the damage occurred or any repairs, reconstructions or improvements of a structure occurring over a five-year period, the aggregate cost of which equals or exceeds 50% of the market value of the structure either:
 - (i) before the first improvement or repair is started; or
 - (ii) if the structure has been damaged, and is being restored, before the damage occurred.

For the purposes of this definition "substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor or other structure part of the building commences, whether or not that alteration affects the external dimensions of the structure. The term does not, however, include any project for improvement of a structure to comply with existing State or local health, sanitary or safety specifications which are solely necessary to assure safe living conditions; or any alterations of a structure listed on the National Register of Historic Places or a State inventory of historic places.

Compiler's Note: The Department of Environmental Resources, referred to in the def. of "department," was abolished by Act 18 of 1995. Its functions were transferred to the Department of Conservation and Natural Resources and the Department of Environmental Protection.

Section 4. Designation of areas with bluff recession hazards.

(a) The department shall conduct studies necessary to identify areas in the Commonwealth subject to bluff recession hazards.

(b) The department shall notify the chief executive officer of each municipality which is tentatively identified as containing one or more areas subject to bluff recession hazards. Each such municipality shall be invited to submit within 60 days of notification by the department any technical data or comments on the proposed identification of a bluff recession hazard. The department shall submit its report, together with the comments of the affected municipality, to the Environmental Quality Board.

(c) Following receipt of the department's report, and after public notice and public hearings, the Environmental Quality Board shall by regulation identify and designate those areas and municipalities subject to bluff recession hazards.

Compiler's Note: Section 502(c) of Act 18 of 1995, which created the Department of Conservation and Natural Resources and renamed the Department of Environmental Resources as the Department of Environmental Protection, provided that the Environmental Quality Board shall have the powers and duties currently vested in it, except as vested in the Department of Conservation and Natural Resources by Act 18 of 1995, which powers and duties include those set forth in section 4.

Section 5. Bluff setback requirements.

(a) In any area designated as having a bluff recession hazard, no person shall construct, install, or engage in

substantial improvement to any structure, or any utility facility such as but not limited to water, sewage, electric, gas, oil or telephone facilities, in violation of the bluff setback requirements established pursuant to this section.

(b) The Environmental Quality Board shall, by regulation, establish minimum bluff setback requirements for bluff recession hazard areas. In setting such standards, the board shall consider the applicable bluff recession rates, the appropriate life span of various classes of structures, and other relevant factors affecting the public safety and bluff stability.

(c) The Environmental Quality Board shall adopt regulations providing standards and procedures for variances to the bluff setback requirements. Such regulations shall require at a minimum that the applicant demonstrate and the administering agency determine that:

(1) A parcel established prior to a bluff recession hazard area designation does not have adequate depth considering the minimum bluff setback requirements to provide for any reasonable use of the land; or the proposed structure or utility facilities require access to the body of water and there is no feasible alternative for obtaining such access.

(2) Sound land use practices will be applied to the design, placement, construction and use of the structure or utility facilities to control runoff, erosion and acceleration of bluff recession.

(3) The structure or utility facilities will, to the maximum extent feasible, comply with the bluff setback requirements and will otherwise be designed and constructed in a manner which adequately protects against potential dangers from bluff recession, and will incorporate all feasible measures to minimize risks to life and property.

(d) The department may grant variances to the bluff setback requirements in the period prior to formal approval of a municipal bluff setback ordinance and regulations. Following approval by the department of a municipality's bluff setback ordinance and regulations, variances shall be granted by the designated municipality.

Compiler's Note: Section 502(c) of Act 18 of 1995, which created the Department of Conservation and Natural Resources and renamed the Department of Environmental Resources as the Department of Environmental Protection, provided that the Environmental Quality Board shall have the powers and duties currently vested in it, except as vested in the Department of Conservation and Natural Resources by Act 18 of 1995, which powers and duties include those set forth in section 5.

Section 6. Municipal bluff setback regulations.

(a) Within six months following designation by the Environmental Quality Board of an area and municipality subject to bluff recession hazards, each designated municipality shall adopt or amend, and shall implement such ordinances and regulations as are necessary to regulate construction and development activities in areas subject to bluff recession hazards in a manner consistent with the minimum bluff setback requirements established pursuant to section 5. Such ordinances and regulations shall require permits for all proposed construction, installation or substantial improvement of structures, or water, sewage, electric or gas utility services located in designated bluff recession hazard areas.

(b) The adoption and administration by municipalities of bluff setback ordinances and regulations which are necessary to comply with this act shall be governed by the provisions of the act of July 31, 1968 (P.L.805, No.247), known as the "Pennsylvania Municipalities Planning Code," or other applicable enabling legislation; provided that a municipality may adopt bluff setback ordinances and regulations for a bluff recession hazard area without adopting ordinances and regulations governing any other area of the municipality, notwithstanding any provision of the "Pennsylvania Municipalities Planning Code" or other applicable enabling legislation.

(c) No provision of this act shall be construed as in any way limiting the power of any municipality to adopt more restrictive ordinances, codes or regulations governing construction and development in bluff recession hazard areas than the minimum bluff setback requirements established pursuant to section 5.

Compiler's Note: Section 502(c) of Act 18 of 1995, which created the Department of Conservation and Natural Resources and renamed the Department of Environmental Resources as the Department of Environmental Protection, provided that the Environmental Quality Board shall have the powers and duties currently vested in it, except as vested in the Department of Conservation and Natural Resources by Act 18 of 1995, which powers and duties include those set forth in section 6.

Section 7. Department oversight of municipal compliance.

(a) The department shall review and approve all municipal bluff setback ordinances and regulations, and amendments thereto. The department shall approve the ordinances and regulations if it determines that they comply with the minimum requirements of this act. If the department disapproves an ordinance or regulation, it shall notify the affected municipality in writing, stating the reasons for disapproval.

(b) If the department fails to either approve or disapprove an ordinance or regulation, or amendment thereto, within 90 days following submission by the municipality to the department, the ordinance or regulation shall be deemed to be approved.

(c) The department shall periodically review the implementation and administration by municipalities of bluff setback ordinances and regulations in order to assure coordinated and consistent enforcement of the setback requirements established pursuant to this act.

(d) Following public notice and public hearing, the Environmental Quality Board shall adopt, and periodically review and amend, regulations establishing:

(1) Criteria and standards for the coordinated and consistent enforcement of bluff setback requirements by municipalities.

(2) Requirements and procedures for the submission, review and approval of municipal bluff setback ordinances and regulations.

(3) Requirements and procedures for maintenance of records concerning municipal implementation and administration of bluff setback ordinances and regulations, and for periodic submission of such records or reports to the department for review.

(e) Where conditions affecting a bluff recession hazard area are changed, including changes created by artificial erosion and recession control projects, the Environmental

Quality Board shall review and as appropriate amend regulations under this section.

Compiler's Note: Section 502(c) of Act 18 of 1995, which created the Department of Conservation and Natural Resources and renamed the Department of Environmental Resources as the Department of Environmental Protection, provided that the Environmental Quality Board shall have the powers and duties currently vested in it, except as vested in the Department of Conservation and Natural Resources by Act 18 of 1995, which powers and duties include those set forth in section 7.

Section 8. Failure to adopt or implement bluff setback ordinances.

(a) The department may institute an action in mandamus in the Commonwealth Court to compel a municipality to adopt and submit bluff setback ordinances and regulations which comply with the requirements of this act.

(b) If the department finds that a municipality has failed to implement and enforce, in a consistent and effective manner, the bluff setback ordinances and regulations required by this act, the department shall provide written notice of violation to the municipality.

(c) Within 60 days of the receipt of a notice of violation, the municipality shall report to the department regarding the action which it is taking to correct the violation and to comply with the requirements of this act.

(d) If within 90 days of the receipt of a notice of violation, the department determines that the municipality has failed to comply with the requirements of this act, the department shall issue an administrative order to the municipality and its officers specifying the actions necessary to correct the violation and to achieve full compliance with the requirements of this act. Any order issued under this section shall take effect upon receipt of notice unless the order specifies otherwise.

(e) Any municipality or municipal officer who violates or fails to comply with an order of the department issued pursuant to subsection (d), from which no appeal has been taken, or which has been sustained on appeal, or which has been appealed but where no supersedeas has been granted, shall be deemed to be in contempt of such order. Upon petition and certification of such order by the department, the Commonwealth Court or the court of common pleas of the county where the municipality is located, shall, if it finds that the respondent municipality or officer is not in compliance with the order, adjudge the respondent in contempt of the order and shall assess civil penalties of an amount not less than \$100 nor greater than \$1,000 per violation plus \$200 for each continuing day of violation. Where the respondent has not as of the date of hearing before the court complied with the order of the department or board, the court shall specifically order the respondent to immediately and fully comply with such order, and may issue any further order as may be appropriate.

Section 9. Coordination with environmental protection programs.

The department and municipalities shall coordinate the implementation of this act with the administration of the environmental protection programs for erosion and sedimentation control, stormwater management and water obstructions.

Section 10. Inspections.

(a) An agent or employee of the department or of a municipality administering bluff setback ordinances and

regulations shall have the power to, upon presentation of proper credentials:

(1) Enter any land for the purpose of surveying bluff recession hazard areas.

(2) Enter any land in a bluff recession hazard area for the purpose of ascertaining the location of structure or structures.

(3) Enter land or any structure located in a bluff recession hazard area for the purpose of ascertaining the compliance or noncompliance with the bluff setback ordinance and regulations adopted pursuant to this act.

(b) Whenever an agent or employee of the department or a municipality charged with the enforcement of the provisions of this act has been refused access to property for the purposes of conducting a survey or inspection as authorized by this section or reasonably requires access to such property without prior notice to the owner, such agent or employee may apply for an inspection warrant to any Commonwealth official authorized by law to issue a search or inspection warrant to enable him or her to have access and inspect such property. It shall be sufficient probable cause to issue an inspection warrant that the inspection is necessary to properly enforce the provisions of this act.

(10 amended July 7, 2011, P.L.301, No.72)

Compiler's Note: The Department of Environmental Resources, referred to in this section, was abolished by Act 18 of 1995. Its functions were transferred to the Department of Conservation and Natural Resources and the Department of Environmental Protection.

Section 11. Grants and reimbursements to municipalities.

(a) The department is authorized to administer grants to municipalities to assist or reimburse them for costs in preparing or amending bluff setback ordinances and actual administrative enforcement and implementation costs as required by this act. Grants and reimbursements shall be made from and to the extent of Federal funding augmentation under the Federal Coastal Zone Management Act as appropriated by the General Assembly for such purposes and shall be made in accordance to rules and regulations adopted by the department in accordance with the following:

The grant shall be limited to:

(i) Seventy-five per cent of the allowable costs for preparation of a bluff setback ordinance, and administrative, enforcement, and implementation costs required by this act; and revisions of a bluff setback ordinance incurred by any municipality, which prior to the effective date of this act, adopted a bluff setback ordinance.

(ii) Fifty per cent of the allowable costs for administration of an ordinance incurred by any municipality. Allowable costs for administration of bluff setback ordinance shall not include those costs which are offset by reasonable permit fees imposed by the municipality.

(b) Nothing in this section shall be construed to impair or limit application of this act to any municipality or person, or to relieve any municipality or person of duties imposed under this act.

Section 12. Criminal penalties.

(a) Any person other than the officers of a municipality, county or governmental unit who violates the requirements of

section 5 or any bluff setback ordinance or regulation, is guilty of a summary offense and, upon conviction, shall be sentenced to pay a fine of not less than \$100 nor more than \$1,000 for each separate offense, and, in default of the payment of such fine, to imprisonment for a period of not more than 60 days. All summary proceedings under this act may be brought before any district magistrate of the county where the violation occurred, and jurisdiction is hereby conferred upon said district magistrates subject to appeal by either party in the manner provided by law. In the case of any appeal from any such conviction in the manner provided by law for appeals from summary conviction, it shall be the duty of the district attorney of the county to represent the interests of the Commonwealth.

(b) Any person who, within two years after a conviction in a summary proceeding as provided in subsection (a), violates the requirements of section 5 or any bluff setback ordinances or regulations, is guilty of a misdemeanor of the third degree and, upon conviction, shall be sentenced to pay a fine of not less than \$500 nor more than \$5,000 for each separate offense or to imprisonment for a period of not more than one year, or both.

(c) Each day of continued violation of any provision of this act or any bluff setback ordinances or regulation shall constitute a separate offense under subsections (a) and (b). Section 13. Civil remedies.

(a) Any activity conducted in violation of section 5, or of any bluff setback ordinances or regulations adopted hereunder, is declared to be a public nuisance.

(b) Suits to restrain, prevent or abate violations of this act or any bluff setback ordinances or regulations adopted hereunder, may be instituted in equity or at law by the department, any affected county or municipality, or any aggrieved person. Except in cases of emergency where, in the opinion of the court, the circumstances of the case require immediate abatement of the unlawful conduct, the court may, in its decree, fix a reasonable time during which the person responsible for the unlawful conduct shall correct or abate the same. The expense of such proceedings shall be recoverable from the violator in such manner as may now or hereafter be provided by law. ((b) repealed in part Oct. 5, 1980, P.L.693, No.142) Section 14. Appeals.

(a) Any person or municipality aggrieved by an action of the department shall have the right within 30 days of the receipt of notice of such action to appeal such action to the Environmental Hearing Board, pursuant to section 1921-A of the act of April 9, 1929 (P.L.177, No.175), known as "The Administrative Code of 1929," and the Administrative Agency Law.

(b) An appeal of any action under this act shall not act as a supersedeas. A supersedeas may be granted by the Environmental Hearing Board upon a showing by the petitioner:

(1) that irreparable harm to the petitioner or other interested parties will result if supersedeas is denied;

(2) that there is a likelihood of the petitioner's success on the merits; and

(3) that the grant of a supersedeas will not result in irreparable harm to the Commonwealth.

The hearing board may grant such a supersedeas subject to such security as it may deem proper.

Compiler's Note: Section 504 of Act 164 of 1980 provided that section 14 is repealed insofar as it is inconsistent with Act 164.

Section 15. Repealer and savings clause.

(a) All acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

(b) The provisions of this act shall not affect any suit or prosecution pending or to be instituted to enforce any right or penalty or punish any offense under the authority of any act of Assembly or part thereof repealed by this act.

Section 16. Effective date.

This act shall take effect immediately.