

LEGAL TIDES

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Welcome to the second issue of *Legal Tides*, a publication of the North Carolina Coastal Resources Law, Planning and Policy Center.

The Center is a partnership of the UNC School of Law, North Carolina Sea Grant, the UNC Department of City and Regional Planning and the UNC Coastal Studies Institute. The Center serves the citizens of North Carolina by bringing together the wealth of resources provided by its partners to address contemporary coastal issues.

The increasing development pressure

on coastal lands and waters raises issues that involve federal, state and local laws, regulations and ordinances. *Legal Tides* explores legal and planning issues as they relate to North Carolina's coastal area and the Atlantic Ocean. Articles present a balanced and informative analysis of issues. We will also attempt to keep our readers up to date on the latest publications, workshops and conferences that pertain to coastal and ocean law and policy.

Legal Tides is a free publication distributed to interested coastal citizens. Primarily written for a legal and policy audience, we hope to craft the

publication to appeal to all readers interested in such issues. Please, let us know what you think.

If you would like to receive *Legal Tides* and haven't done so already, contact Walter Clark at walter_clark@ncsu.edu or at 919/515-1895.

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Rights of Oceanfront Property Owners in the 21st Century: Part II

BY JOSEPH KALO AND WALTER CLARK

In the first issue of *Legal Tides*, we discussed the concepts of littoral (oceanfront) ownership and littoral rights, and how the seaward boundary of oceanfront property changes as the location of the mean high tide line changes due to the natural processes of erosion, accretion and avulsion.ⁱ In this issue, we will examine the legal effect of artificial additions to the shoreline. These additions occur when the beach is expanded and the shoreline is altered as the result of beach nourishment projects or other activities involving the deposit of sand.

As a foundation for examining the effect of these types of additions to the shoreline, three points should be kept in mind:

- As a general matter, all submerged land seaward of the mean high tide line is owned by the state. These submerged lands are typically referred to as public trust lands or, on occasion, as "sovereignty lands."

- Without permission from the state, no one has the right to fill state-owned public trust lands.

In fact, an unauthorized filling of these lands is considered a trespass, and the person responsible for the filling is liable.

- If someone, without state permission, fills public trust lands and raises the submerged land above the mean high tide line, the person acquires no right or title to the land no matter how much time passes.ⁱⁱ The traditional doctrine of adverse possession is not applicable to claims involving public trust lands.

With these points in mind, we will examine the law of North Carolina in the 21st Century, as it relates to filling state-owned public trust lands for beach nourishment or other activities involving the deposit of sand.

Privately Funded Beach Filling Projects

If an oceanfront property has eroded as a result of natural causes, North Carolina General Statute (NCGS) 146-6(c), allows the property owner to fill and recover the beach. However, the

property owner must first obtain a state Coastal Area Management Act (CAMA) permit and a federal permit from the U.S. Army Corps of Engineers. Before the state permit can be issued, CAMA regulations require the N.C. Division of Coastal Management to determine that the filling will not jeopardize the public's right of access or public trust rights or interests. Before the federal permit is issued, the Corps conducts a public interest review to determine that the filling is consistent with the Clean Water Act, the Endangered Species Act, and other federal legislation and will not interfere with, or impair, navigation.

Unlike unauthorized fillings, in authorized situations the oceanfront owner will have title to the raised land. The new seaward boundary of the property will be where the mean high tide line intersects the raised beach. Consequently, after the filling, the oceanfront property owner remains a littoral owner with full littoral rights. These rights include the ownership of any future natural

accretions to the raised beachⁱⁱⁱ and the right of direct access to the beach and ocean waters. This access is across the full breadth of the portion of beach lying between the owner's extended sideline property boundaries.

Publicly Funded Beach Filling Projects

Publicly funded beach nourishment projects can have a dramatic effect on the private property rights of an adjacent oceanfront property owner. In North Carolina, NCGS-146-6(f) clearly states that the "title to land . . . along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the state."

Due to the very high cost of beach filling projects, most require some type of public funding. This is particularly true with long-term Corps beach nourishment projects.

Beach nourishment projects sponsored by the Corps take years to plan. They require congressional approval, are site-specific and have a project life of 50 years. During these 50 years, additional nourishment is contemplated every five years after the initial work is completed. Because of the size of these projects, their time span and the periodic additional nourishment, they often cost millions. Currently, most of the funding for Corps projects comes from the federal government, with the remainder provided by state and local governments. It should be noted, that there are also less expensive short-term federal projects that involve a one-time deposit of sand to eroded beaches.

Regardless, both long- and short-term projects involve some form of hydraulic dredging or other depositions of spoil materials or sand on state-owned public trust lands. When these projects raise public trust land above the mean high tide line, title to the raised land remains with the state. Although this result makes sense — because the land is raised from state-owned property — it generates some important questions. For example, if the title is in the state, where is the seaward boundary of



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Both long- and short-term projects involve some form of hydraulic dredging or other depositions of spoil materials or sand on state-owned public trust lands.

the adjacent oceanfront property? Is the oceanfront property owner still a littoral owner?

After a nourishment project, the seaward boundary of oceanfront property is located where the mean high tide line was physically located prior to the project. The result is that the oceanfront property owner is no longer truly "oceanfront" because his or her property is separated from the water by a publicly owned nourished beach. The result is that the property owner no longer has littoral rights. She or he has no right to natural additions to the beach and, most importantly, has no littoral right of direct access to ocean waters. In other words, after a nourishment project, an adjacent property owner has no right of use of the beach that is different from, or superior to, the rights held by the general public.

A Case on Point: *Slavin v. Town of Oak Island*^{iv}

Following the devastation caused by Hurricane Floyd in 1999, the beaches of Oak Island, North Carolina, were severely eroded. Most of the dunes and oceanfront houses were severely damaged or destroyed. A beach nourishment project was desperately needed and sand was available. These two circumstances combined

to provide an avenue for an accelerated sand placement project. First, the Corps was about to begin a major dredging operation as part of the Wilmington Harbor Project. The project included dredging the channel of the mouth of the Cape Fear River, and the Corps needed a sand disposal site.

The second circumstance involved the Oak Island Turtle Habitat project. The dunes on Oak Island, like many of the dunes along the Carolina coast, provide nesting habitat for sea turtles. However, much of the important dune structure had been lost during the past twenty years as a result of storms. But under Section 1135

of the federal Water Resources Development Act of 1986, funds were available that could be used for the purpose of restoring sea turtle habitat by dredging sand from the Atlantic Intracoastal Waterway and placing it on Oak Island's shoreline.

Both projects involved the placement of sand seaward of the mean high tide line, leaving a narrow depression of submerged land between the landward boundary of the projects and the mean high tide line. Sand was placed in this location because placement landward of the original mean high tide line would have required that all the affected oceanfront property owners grant easements for the purpose of restoring sea turtle nesting grounds. Placement of sand seaward of the mean high tide line, however, did not require any private easements because the submerged land lying seaward of that line was state public trust submerged land.

Because one major objective of the Sea Turtle Project was protection of turtle habitat, the project agreement required the town to adopt a "Beach Access Plan." The plan called for fencing the length of the Sea Turtle Project's nourished beach and limiting access to the new dry sand beach via designated beach access points. As a result, affected property owners could no longer go directly from their beachfront homes to the dry sand beach. Instead, their access was limited to the public CAMA access points located approximately every quarter of a mile along the beach. This restriction upset many property owners, and some filed suit alleging that because they lost

their right of direct access they were entitled to compensation.

In February 2002, the trial court entered summary judgment in favor of the town. The plaintiffs appealed. In August 2003, the Court of Appeals of North Carolina handed down its decision in *Slavin*. The court upheld the restriction on the basis that an oceanfront property owner's littoral right of direct access is subordinate to public trust rights and interests. Therefore, among the possible implications of a beach project is loss of all littoral rights, which could include a loss of direct access to the beach itself.^v

Beach Nourishment and the Easement Requirement

Unlike the Oak Island project, the contouring of most beach projects requires that sand be placed landward of the existing mean high tide line. This means that sand must be placed on privately owned oceanfront land, and permission from the oceanfront property owner is needed. Generally, this permission is in the form of an easement from the owner.

In addition to an easement, most federally funded projects require that the nourished beach be available for public use. This requirement is in return for use of public money. The nourished beach is generally defined as the full breadth of the beach from the "project line" to the post-project mean high tide line. The "project line" is the landward limit of the beach project, and it is determined prior to commencement of the nourishment work.

In most situations in North Carolina, this federal requirement has little significance for two reasons: First, in North Carolina the public is currently viewed as having the right, either as a matter of custom or as an incidental public trust right, to the full use of the natural dry sand beaches. Second, when waves are lapping at the decks of oceanfront homes or the remains

of storm-ravaged dunes, most oceanfront property owners are interested in getting sand in front of their property, so they willingly grant the requested easements. Holding out could mean the loss of more land or even their homes.

An Interesting Exception to the Rules

Unfortunately, the rules of law are never as certain as we might like, and most are subject to exceptions. One of these exceptions applies to federal navigation structures or other projects that alter the natural movement of sand.

Sand moves in the water column along the shoreline via ocean currents, often termed "longshore currents." Structures placed in these currents tend to trap sand on the up-current side of the structure, and this can result in severe beach erosion on the down-current side. There is federal case authority that holds that the federal government may be liable to private oceanfront property owners whose beaches are eroding from actions stemming from a federally authorized structure. In addition, Congress has passed legislation that authorizes the Corps to take corrective action, including the deposition of sand, when a federal navigation structure is causing such

After a nourishment project, an adjacent property owner has no right of use of the beach that is different from, or superior to, the rights held by the general public.



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erosion.

This type of federal corrective action would involve public money. When this fact is combined with the language of NCGS 146-6(f) — which states that when public funds are used for beach nourishment projects, the raised beach belongs to the state — it presents a potential issue for the oceanfront property owner. If NCGS 146-6(f) is applied, the property owner's seaward boundary is the location of the mean high tide line prior to the corrective action. This result may seem unfair to the owner because it was the federal activity that caused the erosion, and the Corps is realistically taking corrective action for the benefit of the oceanfront owner, not for the benefit of the public.

For these reasons, it would seem more appropriate to apply NCGS 146-6(c) in these situations. Under this application, the oceanfront property owner's boundary would be the post-project mean high tide line. Consequently, this would fully preserve the owner's littoral rights. This result would be more in keeping with the purpose of the federal involvement.

Conclusion

In this time of increased demand for beach nourishment projects, it is important for oceanfront property owners to fully appreciate that the cost of public nourishment projects can go beyond monetary terms. The cost can include a loss of littoral rights.

For a more detailed examination of beach nourishment issues, see Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-first Century*, 83 *North Carolina Law Review* 1427-1506 (2005).

End Notes

ⁱStatutes use the term *mean high water mark*. For tidal water bodies, the mean high water mark is the *mean high tide line*. The mean high tide line is an 18.6 year average of all tides. Therefore, determination of where the

mean high tide line is physically located on a beach requires knowledge of the tidal data and a survey. It does not coincide with the wave run-up line you may see as you walk along the beach.

ⁱⁱNorth Carolina General Statute 1-45.1 prohibits adverse possession of public trust lands. In the context of this discussion, the submerged lands raised above the mean high tide line would be state-owned beaches, which are subject to public trust rights and therefore, whether submerged or filled, section 1-45.1 precludes acquisition of private rights through adverse possession.

ⁱⁱⁱThe opposite is true if erosion occurs. In this situation, the property owner loses the ownership to any raised lands lost to erosion.

^{iv}100 N.C. App. 57, 584 S.E. 2d 100 (2003).

^vIt is interesting to note that should shoreline conditions change, the former oceanfront owner might regain his or her status as a littoral owner. If erosion should cause the beach to recede, moving the mean high tide back to or beyond its location prior to the beach project, then the property owner would regain her or his littoral status and rights. This is true under the doctrine of promotion discussed in the prior issue of *Legal Tides*.

In the Next Edition

In the next issue of *Legal Tides*, we will discuss the current state of the law governing beach hardening structures, such as seawalls, riprap, bulkheads and similar structures. We will also analyze if oceanfront property owners have the right to pier out from their properties, or whether their rights of access are limited to simply having access to ocean waters.

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