

LEGAL TIDES

From the North Carolina Coastal Resources Law, Planning and Policy Center • Summer/Fall 2006

Welcome to the Summer/Fall 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 and the UNC Department of City and Regional Planning. 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 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 continue 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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The Rights of Oceanfront Property Owners in the 21st Century: Part III

BY JOSEPH KALO AND WALTER CLARK

In this issue of *Legal Tides*, we complete the discussion that we began in the first two issues of the newsletter regarding the littoral rights of oceanfront property owners in North Carolina. We continue the discussion with an explanation of why oceanfront property owners have no common law right to erect permanent erosion control devices, such as seawalls, to protect their shoreline property from erosion. We also explain why, unlike owners of waterfront property along lakes and rivers, oceanfront property owners have no common law right to pier into ocean waters.

Seawalls and Other Erosion Control Devices

Many parts of North Carolina's coastline are experiencing significant erosion and beach migration. In several of the state's oceanfront



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This ocean bulkhead in Sandbridge, Virginia, is reminiscent of vertical walls built in North Carolina prior to the state's ban in 1985. Most bulkheads in North Carolina have since collapsed.

communities, ocean waves crash at the base of homes threatening to undermine them. Faced with the loss of valuable seashore frontage and damage or destruction of expensive beachfront homes, it is not surprising that many oceanfront property owners want to protect their investments by placing seawalls, rip-rap or other erosion control structures along the shoreline. But most beach erosion control structures have been prohibited in North Carolina since 1985. That year, the Coastal Resources Commission (CRC), under the auspices of the Coastal Area Management Act (CAMA), adopted a regulation banning most oceanfront shoreline hardening. In 2003, the North Carolina General Assembly bolstered the CRC's regulation by embodying the ban in state law.

The reason for prohibiting erosion control structures lies in the significant adverse impacts these structures have on ocean beaches and adjacent coastal uplands. These structures prevent

the natural migration of the beach as it responds to sea level rise, as well as wind and wave action associated with coastal storms. Although homes and other buildings behind a beach erosion control structure may be protected, the shore in front of the seawall will continue to erode unabated until it completely disappears.

Erosion control structures can also affect adjacent coastal property. As the beach in front of a seawall disappears, waves strike the structure and are deflected toward each end, increasing erosion on adjacent properties. Consequently, these property owners are compelled to erect beach erosion control structures to protect their property. As this cycle continues, the public beach, the main attraction of the coast, is then lost.

Unfortunately, North Carolina's ban on most beach erosion control structures also means that many people who have invested in oceanfront property may see it wash away. The question inevitably arises, does the prohibition infringe upon some fundamental property right, and does the State have a legal obligation to compensate those whose property is lost to the sea? This question is more pronounced when out-of-town owners of the threatened oceanfront property are from states where such structures are both permitted and common.

In North Carolina, unlike some other coastal states, there is no fundamental common law right to construct beach erosion control structures to protect oceanfront homes and land. This position was affirmed in the North Carolina Court of Appeals in *Shell Island Homeowners Association v. Tomlinson*. In *Shell Island*, the court concluded, ... "plaintiffs have failed to cite to the Court any persuasive authority for the proposition that a littoral ... landowner has a right to erect hardened structures



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A vertical wall fails on Oak Island during the early 1980s.

in statutorily designated areas of environmental concern to protect their property from erosion and migration."

It should be noted that in some states, oceanfront property owners have a common law right to erect seawalls and other erosion control structures. These states follow the "common enemy rule." Under this rule, water is viewed as the common enemy of all landowners and consequently the landowner is allowed to take whatever steps necessary to protect his land from harm — even if doing so leads to greater damage



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This stone revetment was built at Fort Fisher in 1996 by the Army Corps of Engineers to protect the civil-war era fort. It was the last revetment built in North Carolina.

to neighboring land. Under this rule, it's every landowner for himself or herself. This difference in the law can be confusing to oceanfront property owners from other states where such structures are allowed.

The common enemy rule has never been part of North Carolina's law. In fact, until 1977, our state followed a modified version of the civil law, the polar opposite of the common enemy rule. Under civil law, a landowner would be liable for injury to neighboring land caused by any interference with the natural flow and movement of water.

In 1977, the North Carolina Supreme Court in *Pendergrast v. Aiken* departed from the civil law by adopting the "reasonable use" standard. The reasonable use rule allows the courts greater flexibility in determining liability by allowing for consideration of a number of factors to ascertain if a particular use is reasonable. These factors include: the purpose of the structure; the suitability of the structure for a particular watercourse; the economic benefit to the landowner; the extent of harm caused by the structure to others; the protection of existing watercourses; the impact on public trust uses; and other similar considerations.

These factors are essentially the same as those used to determine whether a particular land use or activity is a nuisance. Consequently, following this standard, a waterfront property owner could erect an erosion control structure without facing liability if the structure constitutes a reasonable use or, using a similar line of thought, the structure is not a nuisance.

Therefore, the key to answering the question of whether oceanfront property owners have a common law property right to erect beach erosion control structures is whether, in the dynamic ocean beach environment, such structures are per se nuisances.

Because erosion control structures change wave and water flow patterns in such a way as to increase the intensity of the wave and water action on neighboring coastal lands, a strong argument can be made that they are per se nuisances. This

is particularly true given the fact that the increased intensity of wave and water action generally increases the rate of erosion to neighboring lands and to the beach in front of these structures — the latter affecting the public’s right to use those beaches. Because these significant harms are associated with ocean beach erosion control structures, it would be unreasonable to allow any oceanfront landowner to place such a structure along the shoreline.



Spencer Rogers

fail to conclusively find such a right. Without clear judicial guidance, one must turn to the practicality of exercising a littoral right to pier into the ocean and how regulatory agencies have dealt with the issue.

The placement of piers in ocean waters is a different matter than constructing piers in estuarine, river and sound waters. From a practical perspective, the dynamic nature of the ocean environment

State regulations allow the use of sandbags to protect structures in emergency situations. Permits are required, and size and time limits apply.

a beach nourishment project is planned for a community, a temporary erosion control structure may remain in place for up to five years regardless of the size of the structure — but only if the community in which the structure is located was actively pursuing a beach nourishment project as of October 1, 2001.

Many scientists are predicting more intense hurricane seasons and a continued rise in sea level. As coastal development moves forward, oceanfront property owners will likely experience serious economic consequences from beach erosion and shoreline migration. Other than temporary erosion control structures, property owners are left with little recourse. Without a common law right to erect protective structures, owners will need to look to their insurers and not the state for compensation associated with these natural processes.

Placing Piers in Ocean Waters

The final topic in this issue of *Legal Tides* addresses the question of whether oceanfront property owners have a common law right to pier out into ocean waters. There are no North Carolina cases directly on point, and the two state cases that do speak to the rights of oceanfront pier owners

means that the cost of constructing, maintaining, and insuring ocean piers is substantial, so much so that few oceanfront property owners would attempt such a difficult endeavor. Presently, there are only 26 piers — most of them public — along the entire length of North Carolina’s ocean shoreline, and that number appears to be declining.

In addition, federal and state government heavily regulates the placement of piers in ocean waters. To place a pier in ocean waters, a littoral oceanfront owner would need (at a minimum) a permit from the Army Corps of Engineers, an easement from the state of North Carolina, and a CAMA development permit. The CAMA permit will only be granted if the pier provides public access.

The ability to place piers in ocean waters is so constrained that realistically there is no common law right. It appears that, in North Carolina, the placement of piers in ocean waters is purely a matter of permission, not a right.

End Notes

¹ Winter/Spring 2005 and Summer/Fall 2005.

² 15A NCAC 07H .0308(a)(1)(B); 15A NCAC .0200(f).

³ N.C. Gen. State. 113A-115.1(b) (2003); Also see N.C. Gen. State 113A-115.1(a)(1) that defines erosion control structures to include “a

It should be noted that the prohibition of erosion control structures on the oceanfront does not preclude all efforts to protect oceanfront property from erosion. Although state law and CAMA regulations prohibit the placement of permanent erosion control structures along the oceanfront, CAMA rules do permit oceanfront property owners to use temporary methods to protect homes and businesses while waiting for other solutions, including beach nourishment, relocation of the structure, or even the relocation of a migrating inlet.

Under CAMA rule 15A NCAC 7H.0308(a)(2) sandbags may be used to protect eminently threatened buildings, associated septic systems, and roads if a number of conditions are satisfied. Sandbags typically used are tan, plastic, seven to fifteen feet in length, three to five feet wide and stacked to form a protective wall. This wall may be up to 20 feet wide and no more than six feet high. Because such temporary structures present the same threats to the dry sand beach and adjacent lands as permanent structures, the regulation limits the time the sandbags can remain in place. For large structures — those with more than 5,000 square feet of floor area — the bags are allowed for up to five years. For small structures — those with 5,000 square feet or less — the sandbags must be removed after two years. If

breakwater, groin, jetty, revetment, seawall, or any similar structures.”

⁴ 134 N.C. App. 217, 517 S.E.2d 406 (1999).

⁵ Id. At 228, 517 S.E.2d at 414.

⁶ 293 N.C. 201, 236 S.E.2d 787 (1977).

⁷ The reasonable use rule differs from the common enemy and the civil law rule in that both allow for little flexibility. Under the common enemy rule, no liability would ever exist; under the civil law rule, liability would always exist.

⁸ Estuarine shorelines are currently treated differently than ocean shorelines. Under CAMA rules, in some circumstances estuarine shoreline owners may erect bulkheads and other erosion control structures.

⁹ CAMA rule 15A NCAC 7H.0308(a)(1)(H), (I) and (J) contain very limited exceptions to the ban on permanent erosion control structures, allowing such structures when necessary to protect bridges to barrier islands, historic sites of national

significance, and commercial navigation channels.

¹⁰ 15A NCAC 7H.0308(a)(2)(F).

¹¹ The first case, *Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 881 (1968), turned on the issue of whether a fishing pier owner had a legal right to throw pop bottles at a surfer passing under the pier. The court concluded, that even if the pier owner had a common law right to construct the pier, that right did not include the right to control the waters below the pier. In the second case, *Carolina Beach Fishing Pier v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E. 2d 513 (1970), the issue was whether the owner of a pier destroyed by a hurricane and other storms (which also resulted in the shoreline being completely eroded away) retained title to the area after a beach nourishment project raised the eroded land above sea level. The court concluded that because the purpose of the beach nourishment project was not to recover the lost lands for the pier owner’s benefit, that title to

the raised lands was in the state. Neither case provided any analysis or justification of the assumed right of an oceanfront property owner to construct piers extending into ocean waters. Despite some dicta in *Capune* and *Carolina Beach Fishing Pier*, the ability to place piers in ocean waters is so constrained that realistically there is no common law right.

¹² Because of oceanfront land values and the cost of repairing piers damaged in storms, there is pressure on pier owners to sell. This trend could result in declining public access to ocean waters. For an interesting article on this topic, see *Pier Pressure*, Morris, Bill, *Wildlife in North Carolina*, vol. 70, no 2, June 2006.

¹³ 15A NCAC 7H.0309(d)(1).

In the Next Edition

The next edition of Legal Tides will explore current legislation being considered by the North Carolina General Assembly that would create a committee to study the loss in diversity of uses along North Carolina’s coastal shoreline. If enacted, the legislation would charge the NC Coastal Resources Law, Planning and Policy Center with assisting the Waterfront Access Study Committee in examining incentive-based and management tools to encourage the continued diversity of development and use along the shorelines of the state’s coastal sounds and rivers. The legislation, Senate Bill 1352, is intended to address the concern that many of North Carolina’s waterfront uses — such as public marinas, boat building and boat servicing companies, commercial fishing facilities, fish houses, and other commercial establishments that depend on water access — are being displaced by residential development. For more information about the study committee, contact Walter Clark at North Carolina Sea Grant, 919/515-1895 or walter_clark@ncsu.edu.

Upcoming Workshop

October 27, 2006: The UNC School of Law and the North Carolina Coastal Resources Law, Planning and Policy Center will present a Continuing Legal Education (CLE) program on Coastal Development Issues. The program will be held at the Executive Development Center on the UNC-Wilmington campus and will cover such topics as the littoral rights of oceanfront property owners; rebuilding after coastal storms; the Coastal Area Management Act (CAMA) regulatory, permitting and appeals process; and current coastal issues. To learn more about the program and to register, contact Jackie Carlock, Director of Continuing Legal Education, UNC School of Law, 919/962-1679 or by email at jcarlock@email.unc.edu.

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