

LEGAL TIDES

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A TRILOGY OF SIGNIFICANT COASTAL CASES

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During the last few months, two coastal cases of significance to North Carolina waterfront property owners were decided by the courts and, as of October 19, 2010, a decision is still pending in a third. One case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*¹, was decided by the Supreme Court of the United States on June 17, 2010. The other decided case, *Fish House, Inc. v. Clarke*², was decided by the North Carolina Court of Appeals on May 10, 2010. The third case, *Newcomb v. County of Carteret*³, was argued before the North Carolina Court of Appeals on February 23, 2010, and a decision is pending.

Stop the Beach Renourishment and Implications for North Carolina

Closely watched by oceanfront property owners and coastal communities across the country, the *Stop the Beach Renourishment* case presented the Supreme Court of the United States with the question of whether the State of Florida violated the Fifth Amendment to the U.S. Constitution and committed a taking of private property of oceanfront property owners when it authorized

a beach nourishment project on the northwest coast of Florida.

Under Florida law, as is the case also in North Carolina, along the natural shoreline, the title of oceanfront property owners extends to the mean high water mark. Prior to the initiation of the Florida beach nourishment project, the location of the existing mean high water line was determined. After the completion of the project, that pre-project mean high water line would then be the waterward boundary of oceanfront property owners. Title to all dry sand beach created beyond that line would be to the State of Florida and be open to public use.

The same holds true under North Carolina law. Before a beach nourishment project gets underway, the existing mean high water line is determined by the State, and that line becomes the fixed boundary of the oceanfront property within the project area. Once the project is completed, all the newly created beach seaward of that line is owned by the State and is open to public use.

Although this project was designed to restore over six miles of North Florida beaches

that became eroded as part of hurricane damage, a number of oceanfront property owners objected.⁴ The basis of their objection was that prior to the initiation of the project their common law property rights included: (1) the right to remain in direct contact with the water; and (2) the right to all future accretions to the shoreline directly in front of their property. However, if the pre-project mean high water line became the waterward boundary of their property, they would no longer be in direct contact with the water and would no longer be entitled to any future accretions to the shoreline in front of their property. This, they asserted, constituted a taking of two of their important common law property rights for which they were entitled to be compensated by the State. In the absence of such compensation, they argued, the Fifth Amendment to the United States Constitution barred the

1. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

2. *Fish House, Inc. v. Clarke*, 693 S.E.2d 208 (N.C. Ct. App. 2010) review denied, 263P10, 2010 WL 3501636 (N.C. Aug. 26, 2010).

3. *Newcomb v. County of Carteret*, No. COA 09-1254, (N.C. App., argued Feb. 23, 2010).

4. *Stop the Beach Renourishment*, 130 S. Ct. at 2594-2595. Although the nourished beach would provide significant storm protection to oceanfront owners on these seriously eroding beaches, the objecting owners' principal reason for opposing the project and claiming a right to compensation was that the nourished beach would be an area open to public use. Unlike North Carolina, in which the public has the right to use all dry sand public beaches, public rights in Florida do not include the right to use natural dry sand beaches. In Florida, the oceanfront property owner's title, and right to exclude the public, extends to the mean high water line in areas where the beach is a natural (unnourished) beach. In North Carolina, although the oceanfront property owner's title extends to the mean high water line, the public has a customary right to use the dry sand beach and may not be excluded by the oceanfront property owner.

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State of Florida from undertaking the project.⁵

The key to the U.S. Supreme Court's rejection of the property owners' claim is a basic principle of federalism: property rights are determined by state law, not federal law. Therefore, the nature and extent of private property rights are creatures of the law of each individual state. Furthermore, the law of the various coastal states may differ in significant ways.

In the *Stop the Beach Renourishment* case, the Florida Supreme Court read existing Florida common law as establishing two propositions. First, the "State as owner of submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and of littoral landowners."⁶ Second, Florida law treats the filling of state-owned submerged lands the same as state common law treats avulsive changes in the shoreline. Under the common law, an avulsive change is a sudden rapid change of the shoreline. So, if a hurricane increases the width of a beach by fifty feet, then that would be an avulsive change. Under such a circumstance, the added fifty feet of width would not be owned by the adjacent shoreline owner. Instead, it would be state owned. In addition, if that fifty feet cut off a shoreline owner's access to the water, that owner would no longer possess any common law right to direct access to the water or any right to future accretions to the shore. The waterward boundary of the owner of such land would be where the mean high water line stood prior to the avulsive event.

Although one may quarrel with Florida characterizing a beach nourishment project (a manmade, not a natural, event) as an avulsive event, that is a characterization that the Florida Supreme Court was free to make because it was not inconsistent with earlier state Supreme Court decisions. Consequently, the U.S. Supreme Court agreed with the Florida Supreme Court that there was no taking of any private property rights because the claimed rights did not exist.

What are the implications of this case for beach nourishment projects in North Carolina? In some situations, oceanfront property owners objecting to a proposed beach nourishment project have argued that they are entitled to be compensated for any loss of direct contact to the ocean,

5. *Stop the Beach Renourishment* at 2596. For a more detailed discussion of this case and the arguments made, see *Do Publicly Funded Beach Nourishment Projects Deprive Oceanfront Property Owners of Private Property Rights Without Just Compensation?*, LEGAL TIDES, North Carolina Coastal Resources Law, Planning and Policy Center, Oct. 19, 2009, <http://blogs.nceagrants.org/legaltides/2009/10/19>.

6. *Stop the Beach Renourishment*, 130 S.Ct. at 2595.

loss of direct access to the ocean and loss of their right to future accretions.⁷ The decision in *Stop the Beach Renourishment* deflates those claims.

Although no North Carolina case equates a beach nourishment project with a natural avulsive event, submerged lands seaward of the mean high water line are state-owned public trust lands, and the State of North Carolina has the right to authorize filling of those lands so long as it does not interfere with the rights of oceanfront property owners. Furthermore, existing North Carolina case law strongly suggests that a beach nourishment project may not only result in the termination of an oceanfront property owner's direct contact with the water and loss of any right to future accretions, but under some circumstances could result in the loss of any right of direct access to the ocean.

*Slavin v. Town of Oak Island*⁸ concerned a beach nourishment project that was undertaken to create sea turtle habitat and to restore a seriously eroded beach. After the completion of the project, some oceanfront property owners objected to the fact that they were prohibited from going directly from their oceanfront homes, across the newly created dunes, to reach the beach and water. Instead, they had to walk to the nearest public access point to get to the beach and water. This restriction was imposed to protect the newly created sand dunes and sea turtle habitat. The oceanfront property owners asserted that this was an uncompensated and, therefore, unconstitutional taking of their right to direct access to the ocean. The North Carolina Court of Appeals disagreed. According to the court, "the right of direct access is a qualified one... and subject to reasonable regulation," and no one contended that the particular regulation was in fact unreasonable.

The Oak Island project was an unusual one. Oceanfront property owners normally should not fear a loss of their right to direct access to the ocean as a result of a more typical beach nourishment project. In the typical project, the design calls for placement of some sand landward of the pre-project mean high water mark. Consequently, the project sponsor (e.g., a local government) will need an easement from each oceanfront property owner in order to do that. As part of the easement agreement between the oceanfront property owner and the project sponsor, there will be a provision recognizing the right of the oceanfront property

7. *Id.* See, e.g., Hucheson, Amanda, *New Topsail commissioners to re-examine beach nourishment project*, STARNEWS ONLINE, Nov. 27, 2009, <http://www.starnewsonline.com/article/20091127/ARTICLES/911274002>.

8. *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 584 S.E.2d 100 (N.C. Ct. App. 2003).

owner to continue to have full access across the full frontage of their property to the water's edge after the completion of the project. In the *Slavin* case, the project sponsor did not get easements because it did not need them. It did not need them because all the sand was placed seaward of the pre-project mean high water line. No sand was placed landward of that line. As a result, (1) the oceanfront property owners were no longer in direct contact with the ocean; (2) the newly created beach was state-owned land open to the public; (3) any future accretions belonged to the State and not to the oceanfront property owners; and (4) any right to direct access to the ocean was gone. *Slavin*'s importance is that it illustrates that under North Carolina common law an oceanfront property owner's common law rights of access are not absolute.

After the decision in *Stop the Beach Renourishment*, beach nourishment project sponsors should not be intimidated by the potential of objecting oceanfront owners claiming an unconstitutional taking or a fear that funds must be found to compensate the objecting owners. Neither the *Stop the Beach Renourishment* decision nor existing North Carolina law provide support for such claims. On the other hand, oceanfront property owners should examine carefully any proposed beach nourishment easement agreement to make sure there are no unreasonable limitations on their right of direct access.

The Fish House Case: What Waters are Public Waters?

The central issue in the *Fish House* case was whether a manmade canal is a navigable waterway open to public use. The dispute involved the owners of two fish houses, both of which were located along a dead-end manmade canal running along the borders of the two properties, but lying entirely within the boundaries of plaintiff's property. The plaintiff instituted a trespass action seeking to enjoin the use and partial blockage of the canal by defendant and vessels using defendant's fish house. The trial court concluded that the canal waters were public and dismissed plaintiff's action. The plaintiff then appealed.

The canal was clearly navigable. In North Carolina, the general rule is that waters that are navigable-in-fact in their natural condition are open to public use. Thus, the question was whether this rule also applied to waterways that are navigable-in-fact, but were artificially created by digging or dredging out privately owned uplands and connected to natural, navigable-in-fact water bodies.

In the *Fish House* case, the Court of Appeals concluded that “any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes ‘navigable water’” and is open to public use.⁹ This conclusion is sound. By creating and connecting a manmade canal or marina or boat basin by dredging out uplands to a natural navigable body of water, such as the Pamlico Sound or Neuse River, public waters flow into, and make feasible the use of, the canal, marina or boat basin. The presence of those public waters and public natural resources associated with those waters carries with them the right of the public to make public trust uses of those very same waters.

The North Carolina Division of Coastal Management Handbook for Development in Coastal North Carolina puts developers of artificial waterways, marinas and similar facilities on notice of this. Section 2(A)(1) of the handbook states that public trust areas include: (1) “all navigable natural water bodies”; (2) “all water in artificially created water bodies that have significant public fishing resources and are accessible to the public from other waters”; and (3) “all waters in artificially created water bodies where the public has acquired rights by prescription, custom, usage, dedication or other means.”¹⁰

The *Fish House* decision provides an answer to the often-asked question of whether fishermen may enter the waters of a private marina to fish, when the marina was created by dredging out

9. Although the reasoning of the court is subject to serious criticism, the result is correct. See, e.g., Burti, Chris, *Manmade Canal Held to be Public Trust Lands by COA, Newsletter and Legal Memorandum, STATEWIDE TITLE*, June 1, 2010, <http://www.statewidetitle.com/newsletterarticle.asp?Article=311>.

Although Mr. Burti’s criticism of the court’s use of the public trust doctrine is well taken, his analogy to connecting a driveway to a state highway is not. In the driveway analogy the owner supplies and owns the concrete creating the driveway; however, the creator of an artificial body of water connected to public navigable-in-fact waters does neither and has no legal title to the water. However, the Court of Appeals’ discussion of the public trust doctrine suggesting that the submerged lands under a navigable-in-fact manmade body of water are state-owned public trust submerged lands, I think, is just plain wrong and shows both a misunderstanding of state public trust law and a failure to distinguish between what waters are available for public use and what submerged lands under navigable waters are state owned.

10. *CAMA Handbook for Development in Coastal North Carolina: Section 2(A)(1)*, N.C. DIVISION OF COASTAL MANAGEMENT, <http://dcm2.enr.state.nc.us/handbook/section2.htm> (last modified Oct. 24, 2007).



Renourished beaches, like this one above, are raising complex legal issues in North Carolina and beyond. Photo: Spencer Rogers

uplands and connecting it to navigable-in-fact public waters. Although only the public right of navigation was directly implicated in the *Fish House* case, public use of artificially created navigable-in-fact waters should include all other appropriate public trust uses, such as fishing and other appropriate water-related activities. So, if the marina waters are navigable-in-fact and contain sports fish, a significant public trust resource, then fishermen should be able to enter the area in pursuit of those fish.

Marshallberg Harbor Case (*Newcomb v. County of Carteret*)

The *Fish House* case did not involve an issue as to whether owners of land adjacent to an artificially created, navigable-in-fact waterbody possessed any traditional riparian rights. That question, however, is present in the Marshallberg Harbor litigation. In the Marshallberg Harbor situation, the issue is whether the owners of such land have the same riparian right to wharf out as owners of land adjacent to natural navigable-in-fact waters.

Marshallberg Harbor was created as a small boat harbor in 1956–57, as the result of federal legislation.¹¹ The U.S. Army Corps of Engineers created the harbor by dredging out an upland area. Before the Corps began the project, the various owners of the affected uplands signed easement agreements with the county, and the county, in turn, signed easement agreements with the federal government.

The purpose of the project was to create a small boat harbor for use by the people of Marshallberg, surrounding communities, transient

11. The Rivers and Harbors Act of 1950 (“Waterway From Pamlico Sound to Beaufort Harbor, N.C. – Harbor Improvement at Marshallberg”), House Document No. 68, 81st Congress, 1st Session; as depicted on “Corps of Engineer Map Entitled Right-of-Way Required for Channel and Basin at Marshallberg, File No. PSB 90 dated 18 October 1956.”

boaters and the general public. According to the testimony at the trial level, no natural creek or other body of water existed in the upland area in which the small boat harbor was created.

The new harbor is small, approximately 1,000 feet in length, less than 150 feet wide at its widest point and averages 6 feet in depth. It is bordered by private lands on both sides and by a public landing area at the head of the harbor, with bulkheads and various docks having been constructed along both sides and at the head of the harbor for use by the citizens of Marshallberg and the public. Now, more than fifty years later, the present owners of the adjacent private lands are asserting that they possess common law riparian rights, including the right to wharf out into the CAMA-defined areas of access in front of their lands. If the court agrees with the landowners, most of the existing docks and boat slips constructed by the citizens of Marshallberg would have to be removed. In addition, if docks and boat slips are placed in these claimed areas of access, then the publicly available navigable open water would be reduced to a narrow channel of less than fifty feet at the widest point in the harbor.

Although the general rule in most states is that only landowners adjacent to natural navigable-in-fact waterbodies possess common law riparian rights, both the *Fish House* case (which was decided after the Marshallberg Harbor case was argued) and a 1997 North Carolina Court of Appeals decision, *Pine Knoll Association v. Cardon*¹², may lend some support to the position of the landowners. The *Fish House* case treats both natural and artificially created navigable-in-fact waters the same insofar as the public’s right to use the waters. In the *Cardon* case, the court assumed, without deciding, that the landowners adjacent to a privately created artificial canal possessed common law riparian rights.¹³ So, the panel of the Court of Appeals that heard the arguments in the Marshallberg Harbor case may be trying to determine the applicability of *Fish House* and *Cardon*, and whether these cases compel a finding that the adjacent landowners in the Marshallberg Harbor case have a common law right to wharf out.

On the other hand, when manmade waterbodies are created, the various agreements

12. *Pine Knoll Ass’n, Inc. v. Cardon*, 126 N.C. App. 155, 484 S.E.2d 446, rev. denied, 347 N.C. 138, 492 S.E.2d 26 (1997).

13. Because, in *Cardon*, it was in neither party’s interest to raise the issue of whether common law riparian rights exist on an artificially created water body, the Court of Appeals did not directly address or decide this issue.

necessary to acquire the rights to dredge and flood an area and other relevant legal documents (such as the federal legislation creating the Marshallberg Harbor project) may show that there was no intent to grant adjacent landowners any riparian rights. In such situations, the documents and other legal instruments would be controlling.

So, the panel before which the Marshallberg Harbor case was argued may be examining closely the documents authorizing the original project and those creating the easements that were necessary to the original project to determine whether the language of these documents negates the existence of any common law riparian rights.

If the court concludes that the adjacent landowners have, or do not have, a common law right

to wharf out into manmade navigable waters, the Marshallberg Harbor case would settle an important coastal question. However, if the court rests its decision on the documents authorizing the harbor project and conveying the necessary easements, then the case would be of minor importance in the development of North Carolina coastal law.

Conclusion

As the contours of our shorelines and natural waterways are altered, the effect of these manmade activities on the rights of the public and adjacent private landowners looms large. The *Stop the Beach Renourishment* and *Fish House* cases provide us with some answers. The Marshallberg Harbor case may end up shedding even more light on this question.

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