

LEGAL TIDES

From the North Carolina Coastal Resources Law, Planning and Policy Center • Summer/Fall 2007

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

The center is a partnership of North Carolina Sea Grant, the UNC School of Law, 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 center's co-directors are Joseph J. Kalo, Graham Kenan professor of law, and Lisa C. Schiavinato, North Carolina

Sea Grant coastal law, policy, and community development specialist.

The increasing pressure on coastal lands and waters presents many major policy questions and raises issues that involve federal, state and local laws, regulations and ordinances. *Legal Tides* explores legal, planning and policy issues as they relate to North Carolina's coastal land, waters, and natural resources. Articles are intended to present a balanced and informative analysis of issues. This issue of *Legal Tides* will cover the rise of "dockominiums" in North Carolina public trust waters.

Legal Tides is a free publication distributed

to interested coastal citizens. Although primarily written for a legal and policy audience, we hope the articles appeal to all readers interested in coastal issues.

If you would like to receive *Legal Tides*, comment on articles, or suggest topics, contact Lisa Schiavinato at lisa_schiavinato@ncsu.edu or at 919-515-1895. You may also write to: *Legal Tides*, North Carolina Sea Grant, NC State University, Box 8605, Raleigh, NC 27695-8605. Please let us know if you would prefer receiving *Legal Tides* in an electronic format, or an e-mail alert that a new issue is available online.

Dockominiums: Exclusive rights to public trust waters and lands?

BY JOSEPH KALO, GRAHAM KENAN PROFESSOR OF LAW
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The increasing number of dockominium-style marinas in North Carolina's inner coastal waters troubles many people because the marketing of these developments gives the appearance of either the improper sale of, or the granting of, exclusive rights to public trust waters to private entities and people. The ultimate goal of a dockominium marina is, by one legal device or another, to transfer the exclusive right to use a particular boat slip within the dockominium marina to individual boat owners. Prices for dockominium slips vary based on footage. In North Carolina, reported prices can reach as much as \$90,000 for larger slips, not including annual mainte-

nance and other fees. Elsewhere along the east coast, the prices and fees are even higher.

Dockominiums come in many different sizes and shapes. Some dockominiums may be created through a conversion of an existing marina.¹ Others may be new construction. A number of the dockominiums are marinas built in connection with an adjacent planned community or

subdivision. A dockominium may lie over public trust waters, or it may be built over an upland area that has been dug out and connected to public trust waters.² The latter type of dockominium does not raise questions about the sale or granting of exclusive rights to public trust waters. In that situation, water bottom is not public trust submerged land, and title remains in private hands.

Title to the dockominium piers, ancillary structures and facilities, and usually the adjacent shoreline frontage will be held by the dockominium operator, which may be a separate business entity or a non-profit corporation, such as a sailing club or the planned community's property owners' association. The typical purchaser

Center Developments

Lisa Schiavinato joins North Carolina Sea Grant and the Coastal Resources Law, Planning and Policy Center

Fall program scheduled for New Bern

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of a slip in a dockminium development receives the exclusive right to use a particular slip and rights in common with other slip owners to the use of the other dockminium common areas.

Riparian Rights: The Foundation for Dockminiums

The underlying legal foundation for a dockminium is based on the existence of riparian rights. The owner of the dockminium structure owns the adjacent riparian shoreline. With ownership of the riparian shoreline normally comes the qualified right to erect piers from the shore to have access to water deep enough to navigate in a sound, tidal river or creek or other navigable waterbody. The right is qualified because it is subject to such rules and regulations as the General Assembly prescribes³ and because Section 146-12 of the North Carolina General Statutes requires that an easement be obtained from the N.C. Department of Administration for any marina placed in public trust waters after October 1, 1995.

Is the Riparian Right to “Pier Out” Severable in North Carolina?

With piers, of course, comes the incidental right to moor boats in the slips that lie over public trust waters. In reality, it is this incidental right to moor a boat in a particular slip that is being transferred to a purchaser as an exclusive right, and this is where the legal issue arises. If the purchaser of a dockminium slip does not hold title to any of the adjacent riparian land, then she or he is not a riparian owner. Normally, only riparian owners have and can exercise riparian rights. Thus, the sale of a dockminium slip without a grant of some title to adjacent riparian land would present the question — may the right be severed and transferred in whole or part to someone who does not own any riparian land?

In a majority of states, such a severance is permissible. However, in some states the riparian right to erect piers for access to navigable waters cannot be transferred except by transfer of title to riparian land. In other words, the right to “pier out” belongs only to an owner of riparian land, and only that owner can exercise this right.

North Carolina follows the minor-

ity rule and does not permit severance. Although the issue has never been directly decided by the North Carolina Supreme Court, it has stated in its 1903 decision *Shepard’s Point Land Co. v. Atlantic Hotel* that:

This Court has held that “riparian rights being incidental to land abutting navigable waters cannot be conveyed without a conveyance of such land...”⁴



Grace Harbor at River Dunes, Oriental, N.C.

This principle is buttressed by language of General Statute Section 146-12, requiring easements for structures placed in public trust waters, such as dockminiums. In 1995, the General Assembly made significant changes to Section 146-12, adding Subsection 146-12(g), among other provisions. Section 146-12(g) provides that:

[t]he terms of each easement [grant-ed] shall provide that the easement:

(1) is appurtenant to specifically described, adjacent riparian or littoral property and runs with the land.

The use of this particular, and presumably carefully chosen, language effectively prohibits any severance of the riparian right. Under generally accepted property law principles, an “appurtenant” easement that “runs with the land” is a right that attaches only to the described riparian or littoral property and passes only with a legal transfer of title to the property to which it is appurtenant. Such easements by their very nature are not

severable. Therefore, as to dockminiums constructed in public trust waters, as a matter of common law and statutory law, there cannot be a legitimate transfer to purchasers of slips in the dockminium of the riparian right to pier out. That means it is impermissible for a developer to sell a unit in a condo along with a particular slip in an adjacent dockminium when the owner of the condo does not hold title to any riparian shoreline. Such a transfer would be an invalid attempt to sever riparian rights, and the purchaser would not obtain any “title” to the slip.

Dockminium Legal Structure: Avoiding the Severance Issue

Although it may not be legally permissible to sever the riparian right to pier out, there are a number of ways to structure a dockminium to sidestep the severance issue, so long as the ownership of the marina facility is tied to the ownership of some adjacent riparian land. Creative real estate lawyers are using all of them.

For example, if a sailing club is formed to own the adjacent riparian land and the marina, it may assign to individual members the exclusive right to a particular slip. This right could then be transferred with the transfer of the club membership. Another method is to put title to the shoreline and the marina in a property owners’ association, which is part of a larger residential development, such as a condominium complex. Owners of units within the larger development, as members of the property owners’ association, could be assigned exclusive rights of use to particular slips. The right to use the slip would then pass with the passage of title to the condominium unit. A third means is to carve out a narrow strip of riparian land adjacent to the marina. Each purchaser would be granted an undivided interest as a “tenant in common” in the adjacent riparian land and the marina facility. Each “tenant” would be given exclusive rights to a particular slip.

In each situation, no severance occurs. In the first instance, each slip “owner” is a member of the club that owns the adjacent riparian land and the marina, and they continue to possess all the associated riparian rights. The use of a particular slip is a right of membership and does not involve any transfer of title. In the second

situation, the property owners' association operates much like the sailing club. In the third situation, each "tenant in common" is legally considered to be the owner of the riparian land, with all the rights of riparian ownership. The right to use a particular slip involves an accepted legal means of allocating among co-owners the rights to use co-owned property. Finally, the same result could be accomplished through the use of a long-term lease by the owner of the dockominium facility. The lease would grant the right to use a particular dockominium slip to the lessee for the term of the lease.

In each example, the exclusive right to use a particular slip in the dockominium ends up with the "purchaser." Which legal device is used may depend on a number of business factors such as marketing strategies, financing considerations, insurance, and linkage to associated upland residential development. Consequently, despite appearances otherwise, these forms of dockominiums do not involve a legally improper sale or grant of exclusive rights to purchasers. Large profits may be made by the dockominium developers, but these developments fit firmly within accepted, traditional principles of North Carolina property law.

The Easement Fee Structure: Does It Violate the Exclusive Emoluments Clause?

Despite the legality of the various forms of dockominiums, the appearance persists of private interests profiting from the sale of exclusive rights to areas of public trust waters.

Underlying this perception is the easement fee structure the General Assembly created in 1995 when it amended Section 146-12. Under the statutory fee structure, the fee for a 50-year easement is \$1,000 per acre of "footprint coverage."⁵ Therefore, if a marina occupies 10 acres of public trust waters, the maximum fee for a 50-year easement is \$10,000.

However, in reality the state collects even less. The amount of the "riparian credit" would be deducted from that fee. The riparian credit is calculated by multiplying the linear number of feet of shoreline by a factor of 54. Consequently, if the shoreline associated with the dockominium was 500 feet, the credit would be

\$27,000. Thus, the fee for the easement would be nothing! Owners of marinas in existence prior to Oct. 1, 1995 were not even required to obtain an easement. Section 146-12(c) made such easements purely voluntary. And, at the time Section 146-12 was amended, there was not much incentive to obtain one.⁶ It is not surprising then, with dockominium slip prices being so high and the easement fee so low, that there is a perception of private profiteering surrounding dockominiums.

It has been suggested that the low fees for easements may violate the North Carolina Constitution's Exclusive Emolument Clause. This clause states that:

*No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration for public services.*⁷

The argument is that the below market-value fee for a marina easement over state-owned public trust lands constitutes the granting of an exclusive privilege to use State property, without either a public benefit or fair compensation being paid to the State. However, under the modern test for exclusive emoluments used by the North Carolina courts, the easements granted under Section 146-12 would not be unconstitutional. In *Emerald Isle v. State*, the Court stated that a statute does not create an exclusive emolument if:

*(1) the exemption is intended to promote the general welfare rather than the benefit of the individual and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.*⁸

Section 146-1, which is the first Section in the subchapter of which Section 146-12 is a part, provides the rationale for the granting of easements under Section 146-12. Section 146-1 states:

[T]he State is unable to provide the necessary access for its citizens to exercise public trust rights and, therefore, recognizes the role that publicly and privately owned piers, docks, wharves, marinas, and other structures located in or over State-owned lands covered by navigable waters generally serve in furthering public trust purposes.

Based on existing case law, the courts are likely to defer to this statement by the

General Assembly that Section 146-12 easements, by increasing access to public trust waters, promotes the general welfare rather than the interests of marina owners. One could argue that if the State's goal is to provide the public with access to public trust waters, the State should require all marinas to provide some slip space available for general public use. However, on the other hand, even wholly private marinas aid in providing some of the necessary access that the State is unable to provide itself. Therefore, the granting of low fee easements to private marina facilities is, in fact, in exchange for some public service and not a violation of the Exclusive Emoluments Clause.

What Can Be Done to Assure the Public Adequate Compensation for Use of Public Trust Waters?

Earlier this year, in its final report to the General Assembly, the North Carolina Waterfront Access Study Committee recommended that "the General Assembly re-examine and reformulate the State's public trust submerged lands easement fee structure."⁹ Such a re-examination is needed to ensure that the public, as represented by the State, is fully and fairly compensated by those making private use and profit from public trust assets. Such an examination is needed before even more dockominiums are constructed. As to those already in existence, until the easements expire, the political and policy choice has already been made.

1. Wayfarer Cove, located 12 miles up the Neuse River from Oriental, North Carolina, contains a dockominium created by renovating an existing marina.

2. The River Dunes development located where Broad Creek flows into the Neuse River contains a 400-slip dockominium created in this fashion.

3. See, e.g. *Walker v. N.C. Department of Environment, Health, and Natural Resources*, 111 N.C. App. 851 (1993).

4. 132 N.C. 517, 541 (1903). The *Shepard's Point* Court was quoting from an earlier decision in *Zimmerman v. Robinson*, 114 N.C. 39, 19 S.E. 102 (1894).

5. Allocated on a yearly basis, the developer of a dockominium would pay \$20.00 for each acre of public trust waters occupied or enclosed by the marina facilities.

6. The deadline for submission of applications for voluntary easements was October 1, 2001.

7. North Carolina Constitution, art. I, Section 32.

8. 320 N.C. 640, 654 (1987)

9. *Waterfront Access Study Committee Final Report*, April 13, 2007, p. 29.

New Developments

Schiavinato Joins Center

This spring, Walter Clark retired from North Carolina Sea Grant and stepped down as co-director of the North Carolina Coastal Law, Planning and Policy Center. Lisa Schiavinato has joined North Carolina Sea Grant as Clark's successor and is the new co-director of the center. Schiavinato comes to North Carolina from the Louisiana Sea Grant Legal Program, where she was the legal coordinator for nearly five years. There, she focused on such issues as land use, coastal hazards, property rights, taxes and international trade laws. She also served as writer and co-editor of the *Louisiana Coastal Law* newsletter, and helped draft state management plans and grant proposals.

Schiavinato holds a bachelor's degree in political science from the University of South Florida in Tampa. She graduated with a law degree from the University of Florida in Gainesville.

Fall Program in New Bern

On Friday, October 26, 2007, the Center will sponsor a four-hour continuing legal education program. This program will be held in New Bern at the Riverfront Conference Center. The morning program topic will be: "Climate Change and Sea Level Rise: Implications for North Carolina Coastal Policies." The speakers will be Stan Riggs, coastal geologist, East Carolina University; and Courtney Hackney, chairman of the N.C. Coastal Resources Commission. The afternoon program topics will be: "Coastal Stormwater Management Issues" and "All You Need to Know About Conservation Easements." The speakers will be Richard Whisnant of the UNC School of Government; and Camille Herlevich and Lee Lidy, N.C. Coastal Land Trust.

For more information on this program, or to receive a program brochure, please contact Jackie Carlock at the UNC School of Law (jcarlock@email.unc.edu or 919-962-7815). Written requests may be sent to the UNC School of Law CB #3380, Chapel Hill, NC 27599-3380.

In the Next Edition

In the next issue of Legal Tides, center co-director Lisa Schiavinato will discuss issues related to the potential placement of wind facilities in North Carolina's ocean waters. Although no specific projects have been proposed for North Carolina, other states have projects in development. Many believe the wind resources off the North Carolina coast have great potential for the generation of wind energy.

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