

# LEGAL TIDES

From the North Carolina Coastal Resources Law, Planning and Policy Center • Spring/Summer 2012

## Recent and Ongoing State Coastal Law Litigation: Balancing Public Trust and Private Property Rights

BY JOSEPH J. KALO

GRAHAM KENAN PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW AND  
CO-DIRECTOR, NORTH CAROLINA COASTAL RESOURCES LAW, PLANNING AND POLICY CENTER

A recent North Carolina Court of Appeals decision and a lawsuit filed by some oceanfront property owners in Emerald Isle involve coastal law issues of great significance. The Court of Appeals decision is *Town of Nags Head v. Cherry et al.*,<sup>1</sup> and the recently filed lawsuit is *Nies v. Town of Emerald Isle*.<sup>2</sup>

### *Town of Nags Head v. Cherry et al.*

The Court of Appeals decision in *Town of Nags Head v. Cherry* undermines the ability of municipalities to enforce public trust rights and to effectively monitor and regulate activities on natural dry sand beaches in the State. The dry sand beach — the area between the mean high tide line and the first line of vegetation — is traditionally understood to be a coastal area open to public use, typically known as the public trust beach. In this area, the public may engage in a wide range of activities on the beaches of our barrier islands. These activities, referred to as public trust uses, range from lying on beach blankets, sunbathing, surf fishing and driving on the beach strand to playing volleyball, throwing Frisbees and even holding weddings with the ocean as a backdrop.

The *Town of Nags Head v. Cherry* litigation is part of the continuing battle between the town and owners of oceanfront beach houses that lie on the public trust dry sand beach or, in some

cases, are seaward of the mean high tide line and therefore in public trust waters.<sup>3</sup> Most of these houses no longer have any approved means of sewage disposal, are disconnected from utilities, and are unable to be relocated to a safer landward area. Some are damaged and deteriorating. All of these structures interfere with the public's ability to use the dry sand beach, and to move up and down the beach strand. To address this problem, the town declared these structures to be public nuisances and ordered that they be demolished or removed at the expense of the owners. Litigation immediately followed, and in January 2011, the trial court entered an order directing the owners to abate the nuisances, that is, remove them at their own expense. The case was appealed to the North Carolina Court of Appeals. On February 21, 2012, the appeals court reversed and remanded the case back to the trial court.

For coastal municipalities, the critical issue raised in this litigation was whether a municipality had the legal right to enforce the State's public trust doctrine. The surprising holding of the Court of Appeals was that a municipality has no such right under existing State law. According to the Court of Appeals, only the State, acting through the North Carolina Attorney General, can bring an action *affirmatively* enforcing the State's public trust rights.

3. For more information, see Lay, Russ, "A Long Legal Road to Cleaning Up the Shoreline," *The Outer Banks Voice*, April 16, 2010 at: <http://outerbanksvoice.com/2010/04/16/a-long-legal-road-to-cleaning-up-the-beach/>. Accessed March 2, 2011.

In a future of predicted sea level rise, the number of structures stranded on the public beach is likely to rise. On one hand, requiring the Attorney General's office to participate in all such litigation in which public trust rights are being asserted seems to be placing an unnecessary burden on that office. On the other hand, the existence and the extent of the public trust use rights of the people of North Carolina should not be dependent on how a particular municipality asserts or litigates the issue. The rights are a matter of Statewide interest, and the interests of a particular municipality may conflict with the wider interests of the people of the State. Perhaps what is needed is specific legislation that authorizes municipalities to assert the State's public trust rights when seeking to remove such obstructions, unless the Attorney General's office either objects or decides to participate in the litigation. To the extent that the Attorney General's office has concerns about the potential adequacy of the representation of the State's public trust rights or whether the particular case is appropriate to assert those rights, the office either may object or take control of that aspect of the litigation.

The motivating factor underlying the court's decision seems to be that the structures ended up where they did through erosion and not through any affirmative act of the owners. What the court failed to take into account, however, is that anyone who builds structures along our highly dynamic coast is taking exactly the risk that these owners took. That is, a lawfully constructed oceanfront

1. \_\_\_N.C. App.\_\_\_ (February 21, 2012).

2. *Nies et al. v. The Town of Emerald Isle*, 11 CVS 1569 (December 9, 2011). The lawsuit was removed to the federal district court in 2012.

house may end up in an unlawful location and the responsibility for the consequences of such an event is one that the owner assumed when the structure was built or acquired.<sup>4</sup>

The court did not preclude the Town of Nags Head from declaring particular structures public nuisances under the town ordinance, which applies to structures that pose a reasonable “likelihood of personal or property injury.” Whether a structure posed such a danger would have to be determined individually. Such an approach would potentially leave the beach blocked and cluttered by structures and the pilings that support them.

This decision by the Court of Appeals not only seriously undermines any local efforts to remove structures impeding the public’s ability to use the dry sand beach, but also may have other implications. If, in the absence of a specific statute granting a municipality the power to regulate public trust activities,<sup>5</sup> only the State may affirmatively *enforce* public trust rights, what authority does a municipality have to *regulate* public trust activities on the dry sand beach?

### *Nies v. Emerald Isle*

The next case raises a cautionary flag of which every oceanfront property owner should take special note. The origins of the *Nies v. Emerald Isle* litigation can be traced back to Emerald Isle’s 2005 beach nourishment project. As is customary with such projects, the town sought easements from all oceanfront property owners. Two of the plaintiffs signed the Perpetual Easement agreement prepared by the town; the other two plaintiffs refused to do that. Ultimately, the town sued those particular two plaintiffs to condemn the necessary easements, and a consent order was entered. The easement received by the town pursuant to the consent order was temporary and more limited in scope than the Perpetual Easement signed by the other plaintiffs.

In the present litigation, all four plaintiffs are asserting that amendments to the Town of Emerald

Isle code constitute a taking of their private property rights and, therefore, they have filed a reverse condemnation lawsuit.

### **Prohibition on Unattended Beach Equipment**

Among others, oceanfront property owners are challenging a 2010 addition to the Emerald Isle’s code entitled “Unattended Beach Equipment Prohibited.” One part states that:

All beach equipment must be removed from the beach strand by its owner or permitted user on a daily basis. All beach equipment unattended and remaining on the beach strand between 7 PM and 8 AM will be classified as abandoned property and will be removed and disposed of by the town.

Oceanfront property owners can get “up to 2 special exemption stickers”<sup>6</sup> allowing them to leave two pieces of equipment out overnight with the stickers affixed. Whether this code ordinance is a taking of the rights of oceanfront property owners depends on the situation.

### **Natural Dry Sand Beaches**

In the absence of a beach nourishment project or the granting of an easement, the law of North Carolina is clear. The oceanfront property owner’s seaward boundary is the mean high tide line. The right of the oceanfront property owner to use the dry sand beach, which is her property, is only limited by the common law customary right to use the dry sand beach that also applies to the public (see Diagram A).

In this situation, the town may be able to prohibit people who do not have the owner’s permission, such as daytrippers, from leaving equipment on the beach overnight, but not restrict oceanfront property owners. If the town could not restrict the amount of recreational equipment someone leaves in their backyard overnight, it should not be able to restrict the number of pieces of beach equipment an oceanfront property owner leaves overnight in her oceanfront beach backyard. The public does have a right to use the dry sand beach, but the public’s right is not exclusive. It is a right shared with the oceanfront property owner. The oceanfront property owner cannot interfere with the public’s right, but the oceanfront property owner legally has the right to make any use of an unnourished dry sand beach that does not interfere with the public’s right of use. Unless beach equipment substantially

6. The stickers will not be issued to guests of owners, although the owners may affix the stickers to equipment offered as part of a total rental package. Therefore, for example, family members, who are not owners, but who are there with the owner’s permission would not be entitled to obtain stickers.

interferes with the public right of use, the town cannot arbitrarily limit the number of items the oceanfront property owner leaves on the beach.

### **Nourished Dry Sand Beaches**

However, if the beach is nourished, then everything may change. When a beach is nourished, title to the filled area seaward of the pre-project mean high tide line lies with the State.<sup>7</sup> That part of the newly created beach is State-owned public trust lands (see Diagram B).

Title to any area filled landward of the pre-project mean high tide line is, and remains, in the hands of the oceanfront property owner. Prior to placing sand on the beach, the town would have acquired an easement over that area from the adjacent oceanfront owner. The town needs the easement for two reasons. First, beach nourishment project equipment will need to move up and down the existing beach. Second, to achieve the proper beach contour, sand will have to be deposited landward of the mean high tide line, in the area owned by the oceanfront property owner. To do that, permission is needed in the form of an easement (see Diagram C).

What rights an oceanfront property owner has to access and use the filled area seaward of the pre-project mean high tide line all may depend upon the exact language of the easement agreement signed by the property owner. For example, the easements for the Town of Topsail Beach nourishment project in 2010 contain specific language stating that oceanfront property owners retain “all such rights and privileges that arise from the status of a littoral property owner, including but not limited to access to the mean high water line.” If such language is in the agreement, then the oceanfront property owner should retain the same rights of use over the newly created dry sand beach as she had over the pre-project dry sand beach. However, in the absence of such language, the rights of the oceanfront property owner may be no greater than that of the general public and subject to the limitations imposed by the Town of Emerald Isle code.

### **The Town’s Claim of An Exclusive Easement**

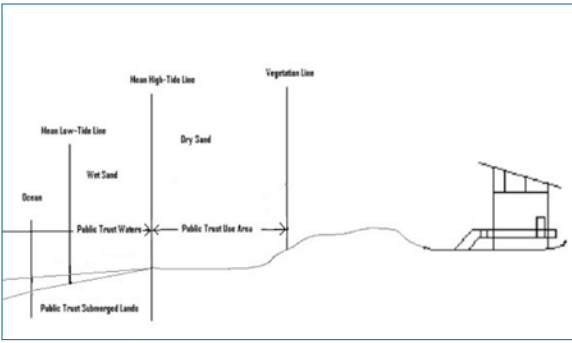
A second, and even more legally questionable, part of the town’s “Unattended Beach Equipment” prohibition is that from May 1 to September 1:

No beach equipment, *attended or unattended*, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes *at any time*, so as to maintain an unimpeded vehicle travel lane

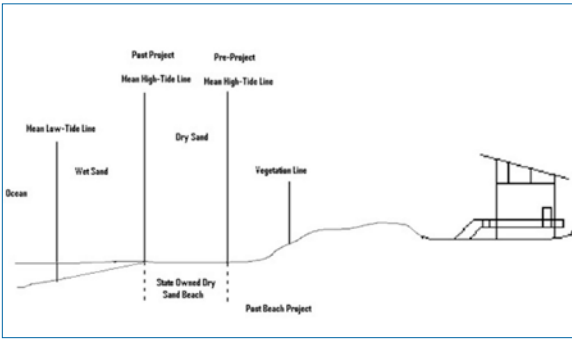
7. N.C. Gen. Stat. 146-6(f).

4. Another troubling aspect of the Court of Appeals decision is the court’s statement that “this is a case where a governmental agency is attempting to...*claim land* on the basis it currently lies within a public trust area.” *Town of Nags Head*, supra at \_\_\_ (emphasis added). That is not quite correct. Title to the area in which the houses are located would still be in the owners of the houses, but that area, due to the natural movement of the shoreline, would now be encumbered by public trust use rights.

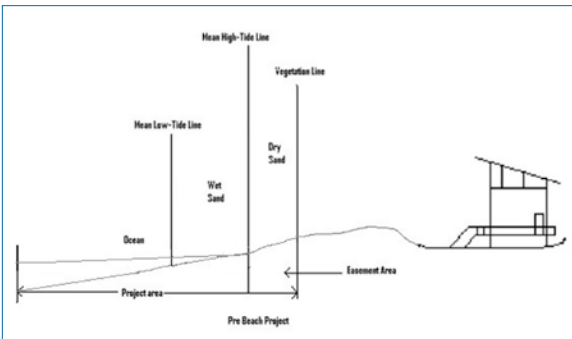
5. Such authority may be given a municipality by the General Assembly in a Local Bill. An example of this is a bill passed in 1967 granting the board of commissioners of Surf City and Topsail Beach the ability to regulate and prohibit surfing on the waters of the Atlantic Ocean. House Bill 1293, 1967 Session, North Carolina General Assembly.



**Diagram A: A natural, dry-sand beach.**



**Diagram B: A post-project nourished beach.**



**Diagram C: A pre-project eroded beach showing easement area.**

for emergency services personnel and other Town personnel providing essential services on the beach strand. (emphasis added)<sup>8</sup>

Again, the legality of such a prohibition differs depending on whether the beach is a natural dry sand beach or whether the adjacent beach has been the subject of a beach nourishment project. In the latter situation, the exact language of the easement agreement will be critical.

### Natural Dry Sand Beaches

Although the motive behind this prohibition may be laudatory, unfortunately this prohibition is unconstitutional when applied to the natural dry sand beach strand of an oceanfront property

8. In November 2011, after the Nies lawsuit was filed, the ordinance was amended to limit its application to the period of “high beach visitation” based on its finding that “there was no practical need for a designated lane at other times of the year.” That change does not change the conclusions reached in this article.

owner. In essence, the town is declaring that it has an exclusive, 20-foot-wide easement across an area to which an oceanfront property owner holds title. The issue is whether the town is entitled to such an exclusive easement without compensating the oceanfront property for the loss of her right to use the strip in which the easement is located.

No one would argue that, without paying just compensation to the oceanfront property owner, the town could condemn or claim an exclusive easement for emergency or other purposes across the portion of the property owner’s land fronting on the public road. The oceanfront property owner holds the same fee title to the dry sand beach as she does to land fronting on the public road. The only difference being it is a title encumbered by public trust use rights. The public right to use the dry sand beach is a right shared with the oceanfront property owner. Even if emergency and other essential services are part of the package of public trust use rights, that does not entitle the town to claim the exclusive right to use any portion of the dry sand beach to which an oceanfront property owner holds title.

In addition, if the alleged basis for such a code provision is to protect public trust use rights, the Court of

Appeals decision in the *Cherry* case appears to preclude the town from making that argument. If only the State may affirmatively enforce public trust use rights and a town lacks the authority to force an oceanfront property owner to remove a structure from the beach, then the town lacks the authority to require oceanfront property owners to remove volleyball and other beach equipment that allegedly interferes with public trust use rights.

### Nourished Dry Sand Beaches

If the adjacent beach was the subject of a beach nourishment project, the issue gets dicier. In that situation, there will be easement agreements to consider. The agreement may limit the rights of the oceanfront property owner to use that part of her land subject to the easement. The extent to which such use is limited depends on the exact language of the particular easement agreement.

Two of the plaintiffs in the *Nies* litigation signed easement agreements. Those easement

agreements grant the town an “easement and right-of-way” to allow the town “to . . . patrol, protect, . . . [and] maintain . . . the public beach . . .”<sup>9</sup> The issue then is whether these words mean that the town can claim the right to use an unobstructed, 20-foot-wide strip of the oceanfront property owner’s land so that police, emergency vehicles, trash pickup equipment and other town workers can move up and down the beach strand. A strong argument against such an interpretation is that the agreement should be read in light of practices existing at the time it was signed because it should be assumed that, absent any information to the contrary, that was what the parties intended. In addition, the practices followed immediately after the completion of the beach nourishment project would be further evidence of what rights the agreement was intended to convey to the town.<sup>10</sup>

At the time the easement agreement went into effect, in the morning before the beachgoers hit the beaches in Emerald Isle, town garbage trucks moved along the dune line emptying trash containers. However, once the beach became populated, patrolling the beach and other municipal activities required police, emergency personnel and other municipal workers to take into account, and move around, oceanfront property owners’ and beachgoers’ equipment on the beach. In fact, it was not until five years after the completion of the project that the town claimed a right to an unobstructed 20-foot-wide strip. All of this strongly suggests that the easement agreement was not intended to grant the town an exclusive right to unobstructed use of a 20-foot-wide strip of ocean beach, title to which is held by an oceanfront property owner.

Furthermore, in the over 400-word paragraph creating and describing the easement being created, immediately following the language about patrolling, protecting and maintaining, the agreement states that among the specific rights granted are:

The right to deposit sand together with the right of public use and access over such deposited sand; to accomplish any alterations of contours on said land; to construct berms and dunes; to nourish

9. This wording is common in easement agreements and appears in both the Topsail Island and Emerald Isle agreements. The difference between the Topsail Island easement agreement and the Emerald Isle one is the Topsail Island agreement contains language preserving the rights of littoral owners.

10. See *Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E. 2d 785 (1995). (“[T]he scope [of an easement] may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant.”)

and renourish periodically; to move, store and remove equipment and supplies; to erect and remove temporary structures; and to perform any other work necessary and incident to the construction, periodic renourishment and maintenance of the [beach nourishment project]; to plant vegetation on said dunes and berms; to erect silt screens and sand fences; to facilitate preservation of the dunes and vegetation through the limitation of access to dune areas; to trim, cut, fell, and remove from said land all grass, underbrush, debris, obstructions, and other vegetation, structures or obstacles within the limits of the easement...

Although removal of obstructions is mentioned, it is in the context of what is necessary to do during the initial beach nourishment project and any future maintenance. There is nothing that

suggests a broader perpetual exclusive unobstructed easement is being granted.

### A Cautionary Warning

As the wording of beach nourishment easements becomes more complex, oceanfront property owners may have a legitimate concern that by signing an easement agreement they may be inadvertently giving up their rights to use any part of the newly created beach. To ensure that such agreements are not read in a manner as to take away such rights, it may be wise to add language to the agreement such as "any ambiguity in this agreement should be construed in favor of the preservation of the Grantor's littoral rights as they existed prior to the signing of this agreement."

Although beach nourishment projects benefit the oceanfront property owner as much as they do the public, easement agreements, like any other

If you would like to receive *Legal Tides*, comment on articles, or suggest topics, contact Lisa Schiavinato at [lisa\\_schiavinato@ncsu.edu](mailto:lisa_schiavinato@ncsu.edu) or 919/515-1895. Or write to: *Legal Tides*, North Carolina Sea Grant, NC State University, Box 8605, Raleigh, NC 27695-8605. Let us know if want to receive *Legal Tides* electronically, or an e-mail alert when a new issue is available online.

---

legal document, need to be carefully evaluated by the property owner before signing it. Oceanfront property owners should read the proposed easement agreement carefully and consult with a knowledgeable coastal law attorney to make sure that the oceanfront property owners' future rights to use all the dry sand beach and have access to the ocean are adequately protected.

---

Nonprofit Organization  
U.S. Postage  
PAID  
Raleigh, NC  
Permit No. 896

LEGAL TIDES  
North Carolina Sea Grant  
Campus Box 8605  
North Carolina State University  
Raleigh, NC 27695-8605