Naturally migrating shorelines, hurricanes, and beach erosion threaten hundreds of houses on beachfront property each year in North Carolina. State law does not allow beachfront property owners to construct a hardened structure to protect the houses from an eroding shoreline, but does permit temporary placement of sandbags. A protective wall of “temporary” sandbags has sheltered many beachfront houses for decades despite the fact that, under Coastal Area Management Act (CAMA) rules, these sandbags should have been removed years ago. Recently, the North Carolina Coastal Resources Commission (CRC) decided that old sandbags must go and is taking steps to remove them. This issue of Legal Tides examines the rules governing the placement of sandbags and the difficult task the CRC faces in enforcing its “temporary” sandbag rules.

Past Legislation Against Hardened Structures

North Carolina law prohibits the use of seawalls or other “hardened structures” along the coastline. A seawall controls shoreline erosion directly to the landward side, but in many cases it hastens the erosion of other areas along the same beach that are unprotected by the seawall. Many coastal geologists and other beachfront experts criticize the use of seawalls as the least effective and most harmful means of controlling beachfront erosion. Although a seawall may protect the shoreline behind it, critics argue that the beach as a whole suffers accelerated and more deleterious effects with a seawall than without it. Noting these problems, the CRC enacted a rule in 1979 that prohibited all permanent, hardened structures as means of erosion control. As a result, only three percent of North Carolina’s coastline is “hardened,” and permanent erosion control structures do not interfere with the natural movement of tides, currents, and sand along its coastline.

The rule, located at 15A N.C.A.C. 7H.0308, originally applied only to structures built after 1979. However, the CRC amended the rule in 1989 by adding subsection (a)(1)(C) that states the rule against permanent structures applies to all such structures, regardless of their location or date of construction. The rule contains narrow exceptions that allowed construction of seawalls at Fort Fisher and at the Cape Hatteras lighthouse, which was eventually moved away from its ineffective groins. Subsequently, in 2003, the North Carolina General Assembly codified the ban on permanent, hardened structures and the exceptions in N.C. General Statutes Section 3A-5.

Although the CAMA rule prohibits permanent structures, it specifically allows for beachfront erosion control through the use of temporary sandbags under limited circumstances. The rule allows sandbag placement only around structures that are “imminently threatened.” A structure is “imminently threatened” if it meets either of two criteria: (1) the structure sits 20 feet or less away from the erosion scarp, or (2) where an erosion...
scarp is not obvious, yet site conditions increase the risk of imminent danger to the structure. In order to place sandbags around an imminently threatened structure, a permit from the CRC is required.

CAMA rules define a “sandbag” and the shape and design of the protective structure. Permissible sandbags must be “tan in color, three to five-feet wide and seven- to 15-feet long when measured flat.” The sandbag wall cannot run beyond 20 feet in length from the end of the building, cannot be greater than six feet in height, and cannot have a base of more than 20 feet in width. The sandbag walls also must run parallel to the shoreline.

Sandbags are supposed to be temporary erosion control measures and are normally expected to be removed from the beach within two to five years unless: (1) the community is actively pursuing a beach nourishment project; (2) the sandbags have become permanently covered in dunes and vegetation or (3) the permittee has received an extension for the sandbags by requesting a variance. Absent such circumstances, sandbags protecting a structure greater than 5,000 square feet in area must be removed in five years, and those protecting a structure 5,000 square feet or less in area must be removed after two years. In addition, the permittee must remove the sandbags if the structure is no longer imminently threatened.

The underlying intent of these rules is preservation of the natural beach — one free of sandbags, seawalls, and other human-made obstructions. When that is not feasible, the State prefers the use of techniques that maintain a “natural-looking” beach, e.g., a beach nourished with beach-quality sand or one on which the sandbags appear to be part of a natural dune structure. Any deviation from this standard should be temporary.

Though these rules impose severe limitations on sandbags, the CRC has not consistently enforced them. Currently, 369 temporary sandbag structures occupy North Carolina’s coastline. While most lie there lawfully, approximately 123 do not. The CRC noted that the problem had grown to such proportions that it required action by the commission. In April 2008, the CRC sent letters to the owners of the 23 sandbags structures in grossest violation of CAMA rules.

7. Several owners refused to comply, and they are currently seeking an injunction to prevent the CRC from removing the sandbags.
ers Association, as well as the conditions of the 
FEMA grant, required unanimous approval for the 
move. In 2006, however, 24 homeowners voted 
against the proposal to accept the FEMA money 
and move the condominiums. Reasons given 
included that not every homeowner could afford 
to pay his or her share of the moving costs, and 
some homeowners claimed they would lose their 
mortgages if the condominiums were relocated. 
As a result, the FEMA grant expired, and the 
CRC extension expired as a consequence. The 
Riggings then applied for another extension on 
August 22, 2006. The CRC denied this request in 

CRC’S Denial and Action in the Superior Court

Under current North Carolina law, in order to 
receive an extension of time for temporary 
sandbags, a variance8 must be obtained from 
the CRC. To obtain a variance, the petitioner 
must demonstrate four criteria: (1) that strict application of the 
CAMA rules will cause the petitioner un-
necessary hardship; (2) that hardship results from 
conditions particular to the petitioner’s property 
(e.g., location, size, and topography); (3) that 
hardship does not result from actions taken by 
the petitioner; and (4) that the variance will be 
consistent with the spirit, purpose, and intent of the rules 
sought to be excepted.9 In denying The Riggings’ 
2006 request for an extension, the CRC decided 
that: (1) strict application of the rule will not cause unreasonable hardship; (2) any hardships that may 
may exist are not the result of geographic peculiarities, 
but instead are the result of the owners of The 
Riggings’ inability to move forward as a Home-
owners Association to relocate the buildings; (3) 
any hardships result from failure to take concrete 
actions to move forward with a relocation project; 
and (4) the variance would not be consistent with the spirit of the law. According to the CRC:

While Petitioner argues that allowing the 
sandbag structure to remain is the best way to 
achieve this goal, Staff and the Commission 
disagree. While the sandbags were meant to be a 
temporary help, the Petitioner’s membership 
continues to rely on sandbags to protect them 
from, or reduce damaging storms, instead of mak-
ing real progress toward a lasting solution. The 
Petitioner’s membership has done so for 23 years. 
Removal of sandbags may provide the needed 
 incentive for the Association members finally to 
 relocate across NC 421 farther from the ocean 
 hazard AEC, thereby reducing the public costs of 
inappropriately sited development and reducing the 
risks to life, property, and amenities.

The CRC also emphasized that:

Granting any more extensions to allow [The 
Riggings] more time to pursue its latest propos-
als would no longer preserve substantial justice 
because to do so would essentially constitute a 
permanent variance for [The Riggings], while 
allowing only truly temporary sandbag structures for 
other threatened structures along the coast.

After receiving notice of the denial of the ex-
tension, The Riggings sought a review of the CRC 
decision by the Superior Court of New Hanover 
County. The Superior Court ruled that the CRC 
had made several errors in denying the exten-
sion request. First, the court found that the CRC 
applied an incorrect legal standard in evaluating the 
hardship to which The Riggings would be subject-
ed. The CRC looked at whether the hardship 
was unreasonable. However, the court pointed out 
that the variance statute plainly states that the ap-
propriate criterion is whether the hardships would 
be unnecessary. Second, the court stated that the 
CRC improperly examined the options available 
to the owner of property. In Williams v. NC Dep’t 
of Natural Resources,10 the North Carolina Court 
of Appeals held the CRC must adjudicate variance 
requests based on the characteristics of the land 
at issue, not the characteristics or circumstances of 
the owner. “[W]hether or not the landowner 
owns other property is irrelevant and insufficient” 
to support a finding that no unnecessary hardship 
extists.11 Consequently, the Superior Court held 
that “[b]y examining and placing reliance on the 
FEMA grant and the fact that the [Riggings] 
owned additional property where the project 
might be located, the CRC [based] its denial…on 
impermissible considerations…”12

Finally, the Superior Court found that the 
CRC lacked evidence to support its denial of 
the variance. The court observed that the CRC 
“rubber stamped” the contention of the Office of 
the Attorney General (which argued against the 
Petitioners during the CRC’s December 2008 
hearing) in arriving at its decision. Accord-
ingly, the Superior Court remanded the case to 
the CRC with instructions to apply the correct 
legal standards and to affirm or deny the variance 
request based on its review and evaluation of the 
stipulated facts, instead of wholesale adoption of 
the State’s position.

After remand from the Superior Court, the 
CRC again denied a variance request at its April 
29, 2009 meeting. The position taken by the CRC 
in its most recent denial markedly departed from 
itself earlier positions. In the CRC’s 2000 and 2005 
decisions granting the Riggings’ requests for 
extensions, the CRC agreed with The Riggings 
that it had satisfied all the statutory requirements 
for a variance. However, in its 2008 denial, the 
CRC stated The Riggings had not satisfied any of 
the statutory requirements. In its April 2009 denial 
of the variance request, the CRC stated that The 
Riggings has shown the existence of only two of 
the requirements: (1) that its actions did not 
bring about the hardship; and (2) that the hardship 
resulted from actions particular to its property. 
However, the CRC decided that: (1) The Riggings 
did not face an unnecessary hardship; and (2) that 
granting the variance would not be consistent 
with the spirit of the law, contribute to the public 
welfare, or preserve substantial justice.

In concluding that The Riggings did not face 
an unnecessary hardship, the CRC also relied on 
the Williams case, which stated that “pecuniary 
loss alone is not enough to show an ‘unneces-
sary hardship’ requiring a grant of a variance.”13 
However, while Williams holds that pecuniary 
loss alone does not constitute an unnecessary 
hardship, the Court of Appeals nevertheless stated 
that regulatory agencies should consider it as a 
factor.14 Thus, the CRC could have looked at 
the sum that The Riggings would have paid for 
relocation and decided that it did constitute an 
unnecessary hardship. Instead, the CRC emphasized 
the State’s statutory ban against the construction of 
permanent erosion control structures in ocean 
shorelines.15 The CRC also reiterated State policy 
regarding sandbags by stating that “sandbags 
are intended to be a temporary erosion control 
structure, and this sandbag revetment has been in

8. Under previous CAMA rules, all a party needed to do was request an extension of time. However, under current CAMA rules, the party must now apply for a variance. A “variance” is the legal term for the exception to a regulatory agency’s rules. In order for such an exception to be granted, a petitioner must formally request from the agency a time-limited legal exception. Any regulatory agency, in any field, may grant a variance. Because a variance to a removal for sandbags would function simply as an extension of the original permit, this article refers to a variance from CAMA sandbag rules simply as an “extension.”
11. Id. at 485.
12. The Riggings v. NC Coastal Resources Comm’n, No. 08-CVS-1069 (February 18, 2009).
13. Williams, 144 N.C. App. at 486 (quoting Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946)).
14. 144 N.C. App. at 486.
In short, the CRC decided that granting another variance would be tantamount to allowing a permanent erosion control structure.

**Conclusion**

The CRC granted numerous extensions to The Riggings “in order to allow the Petitioner to explore various options for protecting Petitioner’s structure at this site.” Thus, when The Riggings decided to reject the FEMA grant on the grounds of expense and mortgage issues, the CRC was forced to deny a further extension, a decision that it deemed environmentally sound. Whether it was a legally correct decision is yet to be determined, since The Riggings has challenged the CRC’s April 2009 decision.

The Riggings situation, on one hand, presents a tough and unique set of facts. On the other hand, it is representative of the difficult coastal development policy choices confronting North Carolina in the 21st century. Both natural and human forces have interacted in such ways to preclude almost all viable options The Riggings has available to it. The choice now is to either modify the statutory ban on permanent erosion control structures, or to allow The Riggings development to face, and eventually succumb to, the forces of the sea.

The general policy of North Carolina’s coastal management plan is to either protect endangered structures through beach nourishment or relocate them to a safer site. If sea-level rise predictions are correct that storms and other forces of nature accelerate shoreline erosion, and if funds are not available for beach nourishment, then the State may have tough choices to make. In the future, the State may have to decide which areas of the coast to protect through expensive beach nourishment projects, which areas to protect by seawalls or other hardened structures, and which areas to leave to the forces of nature. Though real estate often brings this problem into focus, the choice involves more than a decision about protecting real estate. The choice also involves how to protect community infrastructure and a rich natural and human history. In addition, the State’s dry sand beaches are an irreplaceable natural treasure, a public trust resource, and an economic boon to North Carolina’s coastal economy. North Carolina’s beaches, which bring in more than $10 billion in tourism to the state’s economy every year, represent an inheritance that should not easily be sacrificed. Any change in the permanent erosion control structure ban must carefully consider both the immediate and long-term consequences, and weigh individual circumstances against sound state-wide beach management policy.

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17. Id.