

LEGAL TIDES

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SANDBAGS: TEMPORARY OR PERMANENT? THE RIGGINGS CASE STUDY

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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.¹ 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

1. N.C. Gen. Stat. §113A-115.1 (2008). Originally a CAMA rule, the General Assembly codified what it considered to be a successful policy.



According to North Carolina law, sandbags are supposed to be a temporary fix for beachfront structures threatened by erosion. Photo: Spencer Rogers

coastal geologists and other beachfront experts criticize the use of seawalls as the least effective and most harmful means of controlling beachfront erosion.² Although a seawall may protect the shoreline behind it, critics argue that the beach as a whole suffers accelerated and more deleterious

2. ORRIN H. PILKEY ET. AL., *THE NORTH CAROLINA SHORE AND ITS BARRIER ISLANDS: RESTLESS RIBBON 90* (Duke University Press 1997).

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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 113A-115.1.

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.³ 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-foot wide and seven- to 15-foot long when measured flat.”⁴ 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;⁵ (2) the sandbags have become permanently covered in dunes and vegetation;⁶ 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

3. 15A N.C.A.C. 7H.0308(a)(2)(B) (2007).

4. 15A N.C.A.C. 7H.0308(a)(2)(J) (2007).

5. 15A N.C.A.C. 7H.0308 (a)(2)(G) (2007).

6. 15A N.C.A.C. 7H.0308 (a)(2)(H) (2007).

7. Several owners refused to comply, and they are currently seeking an injunction to prevent the CRC from removing the sandbags.



The construction of a seawall in 1996 to protect Fort Fisher, a State historic site, increased erosion at a nearby development called The Riggings. Photo: Spencer Rogers

The Riggings Case

A condominium development in Kure Beach called The Riggings demonstrates the choice that some beachfront property owners must confront as a result of the CRC’s decision to enforce the CAMA sandbag rules. They can (1) remove the temporary sandbags and watch the beach continue to erode; or (2) they can use the legal process and fight to retain their sandbags.

Due to the somewhat unique natural features and human actions, the shoreline in front of The Riggings has been eroding since 1926. As a result, The Riggings has needed temporary sandbag protection since it was built in 1985. The major causes of the erosion along this particular stretch of beach consist of the natural topography of the area and human-made changes to it. Bracketing the shoreline in front of The Riggings are two large outcroppings of coquina rock jutting into the ocean: one lies immediately to the north and the other immediately to the south. The northern outcropping acts as a natural groin. It traps sand moving from north to south, depriving the shoreline in front of The Riggings of sand and thus accelerating erosion. The southern outcropping also should act as a natural groin, trapping sand and providing some protection for the shoreline immediately to the north. Unfortunately, approximately 6,000 cubic yards of this southern outcropping were removed in 1926 as part of the construction of U.S. Highway 421 (prior to 1926, this outcropping extended 100 feet farther out into the ocean than it presently does). As a result, the shoreline to the north lost much of the benefit of this natural groin. Therefore, when The Riggings was built between these two features in 1985, its shoreline was already in trouble.

Actions by the State to protect nearby Fort Fisher further exacerbated the erosion problem. In 1996, the State constructed a seawall to protect Fort Fisher. The fort was built during the Civil War and since has been designated a State historic

site. Since its abandonment in 1865, the shoreline in front of the fort has eroded severely. In fact, between 1926 and 1931, the shoreline in front of the fort lost 280 feet. To preserve the fort, the State built a seawall around it. However, the seawall had an unintended effect — it increased the erosion in front of The Riggings. Although the rate of erosion subsided after a few years, The Riggings’ shoreline continues to erode more quickly than it did prior to the seawall’s construction.

To combat this erosion and protect its condominium buildings, The Riggings has used sandbags since 1985. At that time, CAMA rules — which the CRC has since revised — authorized The Riggings’ sandbags to remain in place until 1995, at which point they would require an extension to remain. The Riggings sought an extension in 1995, and the CRC extended their permit another five years.

Between 1996 and 1999, five hurricanes struck in the vicinity of The Riggings, and by 2000 the beach had not recovered to its pre-hurricane condition. Furthermore, a 2001 Kure Beach nourishment project did not include The Riggings. With the 1995 extension about to expire, The Riggings homeowners decided they needed more time to continue to explore other options, including relocation of the buildings across U.S. Highway 421 to other land owned by the development. The homeowners association then filed a request to the CRC for an additional three-year extension. However, The CRC only granted an additional one-year extension, giving The Riggings homeowners more time to seek a long-term solution to its erosion problem.

In 2002, the CRC granted The Riggings another one-year extension, as it sought to resolve issues surrounding a plan to relocate its buildings. In 2003, The Riggings applied for another extension, which the CRC granted this time for two years to allow The Riggings homeowners to finalize a relocation plan. In 2004, \$2.7 million in financial assistance for relocation was made available to The Riggings through a conditional Federal Emergency Management Agency (FEMA) grant. In 2005, The Riggings applied for another extension, as it was still finalizing plans for relocation. The CRC, noting that The Riggings had hired contractors and had developed extensive plans for relocation, granted the extension only for the duration of the FEMA grant, which would expire in 2007 or upon rejection by the intended grantee.

The FEMA grant stipulated that The Riggings homeowners would pay the additional cost of relocating the buildings that exceeded \$2.7 million. The by-laws of The Riggings Homeown-

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 January 2008.

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 unnecessary 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 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 Homeowners 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

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 an 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."
9. N.C. Gen. Stat. §113-120.1 (2008) (laying out the four variance criteria).

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 making 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 proposals 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 extension, 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 extension request. First, the court found that the CRC applied an incorrect legal standard in evaluating the hardship to which The Riggings would be subjected. The CRC looked at whether the hardship was unreasonable. However, the court pointed out that the variance statute plainly states that the appropriate 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 exists.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

10. 144 N.C. App. 479 (2001).

11. Id. at 485.

12. *The Riggings v. NC Coastal Resources Comm'n*, No. 08-CVS-1069 (February 18, 2009).

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. Accordingly, 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 its 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 'unnecessary 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

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.

15. N.C. Gen. Stat. §113A-115.1.

place for almost 24 years.”¹⁶ 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.”¹⁷ 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

16. The Riggings Homeowners’ Association, CRC-VR-06-33 (N.C. Coastal Resources Comm’n) (May 21, 2009).

17. Id.

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.

In the Next Edition

In the next issue of Legal Tides, Center co-director Joe Kalo explains the Florida Supreme Court decision for the Stop Beach Nourishment case that will go before the U.S. Supreme Court.

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