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From the Editors

As reflected by recent headlines and editorials, North Carolina's coast continues to generate strong feelings and conflicting viewpoints. This newsletter highlights several important aspects of the legal and policy framework affecting the current debate on coastal issues, including the history and limits of the public trust doctrine, tools for combating erosion, and private property rights in manmade waters. These articles underscore the challenge of balancing the public and private owners' use and enjoyment of the coast.

We hope you find this edition of the Coastal Land Use Newsletter to be of interest and we welcome any feedback (email bill.brian@klgates.com or mack.paul@klgates.com).

Your Land Is Our Land: Public Claims to Private Beach Property in North Carolina

By: William J. Brian, Jr.

At a time when the owners of beachfront property in North Carolina are besieged by problems relating to beach erosion, including state restrictions on sandbags, prohibitions on hardened beach preservation structures, and restrictions on construction imposed under the terms of the Coastal Area Management Act ("CAMA"), a new threat has arisen in the form of land use regulations being imposed by cities and counties which seek to compel property owners to demolish beachfront structures without the payment of any compensation, under the guise of public nuisance abatement ordinances. These ordinances are based upon the notion that the general public enjoys certain "public trust rights" in all property on the beach, regardless of whether it is privately owned, and that any house or other structure by definition impairs the public's use of beachfront areas and therefore is a nuisance which must be removed. To add insult to injury, these communities demand that the property owners themselves incur all the costs associated with the removal of the structure, or face fines and enforcement lawsuits. One of the more insidious forms these new restrictions take is the denial of the permits necessary to make routine repairs to storm damaged beachfront properties, thereby creating a situation in which homes become uninhabitable because they have no utilities and cannot otherwise be maintained. These regulations apparently are designed to make life so difficult for the owners of beachfront properties that they just will demolish their homes and surrender without a fight rather than incur the costs and risks of a court battle. However, a number of landowners have refused to knuckle under to these pressures, and have filed lawsuits to protect themselves.

A Vexatious Problem

How is it that the owners of beachfront property, many of whom rent that property to vacationers as a business, got so far out of alignment with their local governments? After all, the economies of nearly all of North Carolina's coastal communities rely upon money generated directly or indirectly by tourism and vacation rentals. As such, the owners of beachfront properties are, in a real sense, the founders of the feast for those communities. What is it that has set these two groups – property owners and local governments – at such odds with one another? The answer lies in a web of inconsistent public policies and the inability of the various stakeholders in the state, local and private sectors to work together to solve their common problems.

Government policies in this regard have been hopelessly inconsistent. On the one hand, the State and local governments have encouraged beachfront development through their tourism policies. Every year, hundreds of thousands of people come to the North Carolina coast to enjoy the beach and spend millions of dollars. These folks need places to stay, eat and otherwise entertain themselves, and businesses which thrive on these tourist dollars have sprung up in large numbers in beach communities over the past 30 years. The building or improvement of new highways to the beach (e.g., I-40 in the south and I-64 in the north) has facilitated and encouraged beachfront development by facilitating and encouraging access to the beach.

Much of this development has been "single family" in character. Single family homes on the beach have been a good investment. Single family home construction costs are relatively low. The property on which they are located has increased quickly in value as developable land became scarce, and the houses built were useful both to their owners and also as rental property for vacationers. Single family residential construction usually is a generally permitted use on the beachfront, thereby making it possible to avoid the costly rezoning battles that larger hotel projects have to face, and the relatively low overhead associated with the upkeep of single family homes makes them more economically viable than hotels. In fact, single family construction with an eye toward the rental market has been so popular that the size of beachfront houses in many areas (e.g., Corolla) has grown to an extent that many are *de facto* rooming houses, or "mini-hotels" whose owners rely heavily upon rental income. In other areas, local real estate companies have purchased or manage large numbers of beachfront houses for the sole purpose of rental. In short, the policy of encouraging beach tourism has been a smashing success for beachfront development in North Carolina.

However, at the same time it has been following policies which have increased beachfront development pressures, various levels of government have been following policies which discourage and in some cases prohibit beachfront development. These policies run the gamut from outright prohibitions of construction based upon the location of the first line of stable vegetation on the beach, which may or may not actually be relevant to the rate of erosion in the area, to regulations which prohibit or discourage the use of sandbags and other types of erosion control devices, to the failure of the State legislature to fund needed beach renourishment projects in areas where erosion has occurred and is threatening beachfront houses and other structures. It is this last policy (or lack of policy) which has driven coastal local governments to distraction.

The State essentially has told local governments that renourishment is their problem to fund. Local governments in turn have been compelled to seek support from the voters for special tax assessments to pay for renourishment, which is a very expensive process. Not surprisingly, taxpayers have been slow to vote new taxes upon themselves, especially in locations where the populations are split between "folks who live here" and beachfront property owners, many of whom are absentee landlords. In these communities the problem is not so much that the proposed taxes are not fairly apportioned, but rather that the people who live in those communities year-round and work in the businesses that support the renters who occupy the beachfront houses, do not generally live on the beachfront and do not feel that they should have to pay extra taxes to help out the owners of those properties. Putting aside the inherent illogicality of this point of view (since everyone will suffer if the beachfront erodes away and people do not come to visit), the result has been a nasty political stalemate.

In the meantime, storms keep rolling through, and properties on the beach have become more seriously threatened. Many are now located waterward of the first line of stable vegetation, and some are in such danger that very high tides and windswept storm surges inundate their foundations and pilings. The owners of these properties have successfully fought Mother Nature with an ingenious combination of sandbags, extra deep pilings upon which the threatened houses are set, and sand replacement/sand pushing projects which both protect septic tanks and other utilities and infrastructure, and also replace sand being eroded away with sand being trucked-in and added to the property from the landward side. All of these efforts are legal, and when used skillfully in combination, can be very successful in preventing substantial erosion and damage to beachfront houses.

The problem is that these efforts have left some houses in a position many consider to be aesthetically unpleasing. These houses, which often appear to be very far out on the beach, enrage some folks for reasons that are not entirely clear. Some people want to see such houses go because they own property in the next line of houses back from the beach so that if the houses in front of their property are demolished, they will go from owning property near the beachfront, to owning property on the beachfront. Such is the nature of personal interest in politics. Of course, these people also will have long-term problems if the beach is not renourished, since the erosion is not stopping and eventually will threaten their properties too. This is not a theoretical problem. Erosion can happen very quickly, and sometimes dramatic erosion can occur suddenly in a major storm.

For those who want to see both renourishment and the demolition of the houses farthest out on the beaches, the situation has become a race in which they hope for renourishment soon - but not too soon, i.e., not in time to save the houses on the beach. From their perspective, the problem is that the owners of those houses have been incredibly successful in holding the tides at bay. Those owners are running a race too - trying to keep their houses intact until a renourishment project happens so that they will be well-placed to take advantage of their location on forefront of the new beach. The positive impact of a renourishment project upon the value of those properties would be substantial.

So, the two groups stand eye-to-eye, one hoping that a storm or other tragedy will wipe out the houses of the other before renourishment occurs, and the other trying to hold on in the hopes that renourishment will justify their preservation efforts and enhance the value of their investments.

It is to break this stalemate that some local governments have jumped into the middle of the fray on the side of those who want to see the houses far out on the beachfront gone, spurred on by officials elected on a platform of "getting rid of" the offending houses. Unfortunately, rather than just acquire these properties through exercise of their powers of eminent domain, which would be expensive but fair, they have chosen instead to try to push these properties out of existence by labeling them "public nuisances." The property owners have pushed back, and the result has been litigation which benefits nobody.

Public Trust Rights – A Doctrine Abused?

The medium for the efforts of local governments which are out to get beachfront properties has been a legal concept known as the "public trust doctrine." In short, it is well-established that land which is located seaward of the mean high water mark on the beach (a geographic line established by examining mean high tides over a period of 19 years) belongs to the State of North Carolina. These lands are known as "public trust" lands, meaning that they are owned and administered by the State in trust for the public. In other words, a private property owner can lose title to his land as the result of erosion over time, as the public trust encroaches upon his property. The public trust area of the beach (i.e., that area lying between the mean high water mark and the open ocean) also is referred to as the "wet sand beach."

The idea that the public trust area belongs to and is held for the benefit of the public by the State is fairly common in the United States. But, North Carolina goes further with a concept known as "public trust rights." According to this idea, the public has customary rights to use the portion of the beach located landward of the mean high water mark, between that point and a vaguely defined point at which various "natural indicators" such as the first line of stable vegetation, the storm trash

line and the toe of the frontal dune are located. In this area, also referred to as the "dry sand beach," many North Carolina commentators and regulators maintain that the public has easement rights to use the beach for recreational purposes. Therefore, they argue, nobody who owns this area of the beach may take action to prevent the public from using it. The exact breadth of the doctrine of public trust rights in the dry sand beach is not clear. Indeed, the origin and validity of the doctrine in North Carolina is not clear. It never has been established by any court or statute, although there are statutes which "recognize" the existence of such rights as defined by the courts. See, e.g., N.C.G.S. § 77-20(d). The problem with those statutes is that the courts have not defined or established the rights in question and therefore it is very unclear what rights there are to be recognized. The only direct attempt to get a court to define these rights more clearly ended in a dismissal of the case on unrelated technical grounds - surely one of the great "dodge ball" moves in North Carolina legal history. See Fabrikant v. Currituck County, 174 N.C. App. 30, 621 S.E.2d 19 (2005).

Accordingly, there is an ill-defined legal notion that an ill-defined area of the "dry sand beach" is subject to certain ill-defined customary public rights of use, which the owners of this land must respect.

However, some local governments have seized upon this vague notion of public trust rights to enact ordinances designed to force the owners of houses located on the dry sand beach to demolish them. The logic of these ordinances is that any house on the dry sand beach by definition must impair the rights of the public to use that area of the beach, and therefore the maintenance of a house in this location is a public nuisance. It is this notion which is being challenged by affected property owners in court. Given the tenuous legal basis for the notion of public trust rights, and the fact that the limited statutory authority given to local governments to deal with nuisances does not include the power to demolish houses located on the dry sand beach, these ordinances push the envelope to the breaking point. Therefore, these governments, presumably lacking confidence in their nuisance authority to accomplish their goal, have turned to zoning ordinance amendments which attempt to define the dry sand beach area as a zone in which residential development is not permitted. The problem, of course, is that the dry sand beach area itself is not clearly defined, and the houses that are the target of these ordinance amendments have been there long enough to have vested rights to continue to exist. Therefore rather than attack the continued existence of these houses directly, these ordinances cause them to be classified as non-conformities and then prohibit the issuance of building permits to repair them when they are damaged by storms, as all coastal structures are from time to time. These ordinances also are under attack in the courts.

Regardless of your position on the ultimate issue of whether houses should, or should not, continue to exist on the dry sand beach, it seems clear that the use of the public trust rights doctrine as a basis for declaring all such houses to be nuisances *per se* is a misuse of that doctrine. There is little legal basis for such a conclusion, without property-specific findings that the houses in question pose a threat to the public. Aside from the legal issues, however, court action seems like a poor method for resolving the larger public policy issues arising from the private ownership of the dry sand beach. Rather, the situation seems to cry out for a comprehensive legislative solution which takes into account the legitimate concerns of both the landowners who worry about the loss of their investments, and the local governments who are trying to create clear beaches for the benefit of the general public. This clash of public and private interests is exactly what the 5th amendment power of eminent domain was designed to resolve, and the fact that the problem is one that is common to the entire coast suggests that a legislative solution of statewide application, rather than inconsistent *ad hoc* actions on the part of individual local governments, would be the most appropriate solution. Unfortunately, given the depth of the state budget crisis, it seems unlikely that this matter will be resolved any time soon, short of court action.

Defining the Breadth of the Public Trust Doctrine in North Carolina: A Conversation with Professor Joseph Kalo

By: William J. Brian, Jr. and Megan C. Lambert

Professor Joseph Kalo of the University of North Carolina School of Law was recently interviewed to discuss the public trust doctrine as it applies both to the dry sand and wet sand beaches. Professor Kalo is an unabashed supporter of the concept of public trust rights in the dry sand beach, and is one of the leading authorities on the public trust doctrine in North Carolina. Professor Kalo first got interested in environmental issues as a young man while hunting and fishing on the shores of the Great Lakes in his native Michigan. Later, as a member of the faculty at the University of North Carolina School of Law, he was appointed to the NC Marine Science Council, which later became the NC Ocean Affairs Council. He went on to become the co-director of the NC Coastal Resources Law, Planning and Policy Center, a partnership of the University of North Carolina School of Law, the University of North Carolina Department of City and Regional Planning, and the North Carolina Sea Grant Program. In this capacity, Professor Kalo has directed and participated in a number of substantial research projects for the State of North Carolina, has conducted numerous education programs on coastal issues, and has authored a number of articles on NC coastal issues, including "The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina," 78 N.C. L. Rev. 1869 (2000), the leading academic resource on public trust issues in North Carolina.

Our discussion with Professor Kalo began with general questions regarding the "public trust" doctrine, and the basis for the "public trust rights" doctrine. We also touched upon the limits of municipal authority over the beaches, and the balance between private rights of ownership, and "public trust rights" as Professor Kalo defines them.

I. Making a Distinction between Lands within the Public Trust and Areas Subject to Public Trust Rights

In Professor Kalo's view, "there are really different facets of the public trust and sometimes people confuse different aspects of them."[1] Two of those facets come into play when discussing beachfront areas: (1) actual "public trust lands" and (2) privately-owned lands subject to "public trust rights [or] uses." First, the geographical scope of the public trust determines what lands are to be considered within the public trust itself. These public trust lands include state-owned submerged lands which are defined as lands "that [are] beneath navigable wate[r]" and lands raised above the mean high water line as a result of a publicly-financed beach nourishment project. Navigable waters are those waters that are navigable in fact. All submerged lands lying under navigable in fact waters below the mean high water line are considered to be owned by the State "unless there has been a valid conveyance of the land by the State to private parties and even if there is a conveyance, those lands are subject to public trust uses unless the conveyance specifically states it is being made free of public trust rights." In addition, the waters "that overlie those submerged lands are public trust waters."

Other land that is privately-owned but nonetheless subject "to public trust uses" includes "ocean and inlet natural dry sand beaches to the vegetation line." In Professor Kalo's view, "the important thing is that even though the particular submerged land or the dry sand beach is privately-owned, there may still be public trust rights [or] uses of those areas."

A. Defining the Lands within the Public Trust and Those Subject to Public Trust Rights on the North Carolina Coast

[1] Telephone interview with Joseph Kalo, University of North Carolina School of Law, Chapel Hill, N.C. (Dec. 17, 2010). All quotations in this article are direct quotes from the telephone interview with Professor Kalo.

Professor Kalo states there are three distinct areas located on the beach. The first area, the wet sand beach, is "that area between the mean high tide line and the mean low tide line." Although this area is located seaward of the mean high water line, these lands are "not going to be underwater all the time." The mean high water line is "[t]he average of all high tides over an 18.6 year, 19 year cycle … [as] the rule of thumb." Therefore, "at some portions of time, [it is] going to be underwater and other portions of time, it may be completely dry." The State holds title to the wet sand beach area which is considered to be the public trust submerged lands. The wet sand beach therefore can be used freely by the public. In fact, from a legal standpoint, the wet sand beach is "indistinguishable from the water and from the submerged lands that lie under … the rest of the ocean bottom out to the three mile limit."

The second area, the dry sand beach, is the land that lies between the mean high water line and the first line of stable vegetation or the area marked by certain natural indicators such as the beginning of a dune or the storm trash line. These various boundaries (i.e., the mean high water line or the vegetation line) are "ambulatory," meaning that they "may move one way or another, and as [each moves,] the location [of] the dry sand beach moves." That is to say that "the line that defines the dry sand beach changes as the contours of the beach change [and] that shoreline moves."

A natural dry sand beach is <u>not</u> public land. Rather, Professor Kalo refers to it as privately-owned land that is subject to public trust rights. A nourished beach, however, is publicly-owned public trust land.

The final area of the beach is located landward of the vegetation line and is considered "private upland." The public generally cannot use this land without the permission of its owner.

B. The Concept of Public Trust Rights and Its Origins

The dry sand beach is the only privately-owned area of the beach that is subject to public trust rights. Professor Kalo's definition of public trust rights includes "the full reasonable, recreational uses of the dry sand beach – sun bathing, beach volleyball, fishing, walking…the type of things people would customarily do on the shore – holding a wedding." However, these uses "would have to be recreational uses, not commercial uses." An exception to this is fishing as "fishing is a traditional public trust activity, and … both commercial and recreational fishing would be included in one of the public trust activities." However, Professor Kalo noted that "the conflict [existing] between private property owners who own the uplands and [the] public using the beach tend[s] to be over the recreational activities."

But where did the notion that the public has the right to use privately-owned dry sand beaches come from? What is the authority on which the concept is based? According to Professor Kalo, the concept derives from "the common law doctrine of custom. The public has a customary common law right to make those uses [called] public trust uses of the dry sand beach." Although North Carolina General Statute 1-45.1 implies the public has a right to use dry sand beaches, Professor Kalo confirms that in North Carolina "[there is] no case that has expressly confirmed the existence of a customary common law right to use all dry sand beaches." "[T]he question has never been directly addressed by the North Carolina Court of Appeals or the North Carolina Supreme Court." However, there is a North Carolina Supreme Court opinion which struck out language from a North Carolina Court of Appeals case which stated that "the public trust doctrine would not secure public access across the land of a private property owner." See <u>Concerned Citizens of Brunswick County Taxpayer Ass'n v. State ex. rel. Rhodes</u>, 329 N.C. 37, 404 S.E.2d 677 (1991). In that case, Professor Kalo explained that the North Carolina Supreme Court held that "particular statement [was not] necessary to the Court of Appeals decision and … expressly disavowed that comment." In Professor Kalo's view, this "tends to suggest that there was at least some thinking on the Court at that time that the public trust doctrine [or similar common law doctrine] … did in fact provide the public with the basis for a legal right to use the dry sand beaches." Professor Kalo added, "the evidence of such a customary right to use the dry sand beaches is basically all around us" and is "based upon the historical information [showing] how North Carolina beaches were utilized over time."

Professor Kalo analogizes this customary right "to the law of easements" and calls it a "quasi-easement" which "exists outside the chain of title" for the public benefit. The law of easements can

serve as a "guidepost for determining what are reasonable uses by the public, because the public would be the equivalent of the dominant estate in the easement context [and the burdened private property equates to] the servient estate." The specific uses included in the context of public trust rights are not fixed because "notions of what is 'recreational' change" and therefore "what the public can do changes." Professor Kalo concludes that "the use [by] the public as a general matter is limited to recreational uses and those have to be reasonable, recreational uses. And what is reasonable may change over time ... depending on [the] perceptions of … unacceptable conduct." Furthering this analogy, "the general law of easements [states that the] servient estate owner is allowed to make any use of an easement area that does not unreasonably interfere with the right of the easement holder." As a result, "the owner of oceanfront property [cannot] do things or allow things to be in place that unreasonably interferes with the public's use of the dry sand beach."

As an example, Professor Kalo explored the idea of a private property owner placing a house or structure on the dry sand beach. He then made an analogy to the doctrine of nuisance and stated that he did not "think a house on the beach is a nuisance *per se* … that the mere fact that the house is on the dry sand beach in all settings, and in all situations, constitutes an unreasonable interference by the property owner with the public's right to use the dry sand beach." He opined that the determination of "whether a structure on the beach is a significant interference with public use would be … somewhat fact specific." For a structure to constitute a public nuisance, it would have to unreasonably interfere with the public's customary right to access and use the dry sand beach. Nonetheless, Professor Kalo stated that "the mere fact that [the structures are] sitting out on the beach, the dry sand beach, [does not] in and of itself make those a substantial or significant interference with the public's ability to use the rest of the beach."

II. Local Governmental Authority to Regulate Lands within the Public Trust and Areas Subject to Public Trust Rights and Uses

As a corollary to the issue of the scope of the public trust, Professor Kalo also commented upon questions regarding local government authority to regulate the use of this area. Local governments have no jurisdiction to regulate public trust lands unless they are within their territorial boundaries or the State has granted the municipality jurisdiction over these areas.

The "jurisdictional boundaries of coastal communities" are "the territorial limits [or] corporate limits of various towns along the North Carolina coast. And it really varies as to what those limits are." Professor Kalo noted that the boundaries of coastal communities range from "the high water mark[2] of the Atlantic Ocean" for some, to "the Atlantic Ocean" for others. He then pointed out that some towns have specific statutory authority over portions of the public trust (i.e., the ocean). For example, North Topsail Beach has corporate boundaries "1,200 feet out into the water." He also gave an example of recent legislation pertaining to Duck where a "session law of 2001 says that [the Town's jurisdictional limit is] a thousand feet easterly from the mean high water mark of the Atlantic Ocean."

Professor Kalo next explained that aside from the specific statutes defining the corporate boundaries of coastal communities, "there are other local statutes that have given municipalities specific authority to regulate certain activities that take place in the adjacent ocean waters." For example, local statutes give municipalities the power to regulate beach activities such as "how close people on surf boards can get to peers." Therefore, these local statutes must be researched "to determine whether a particular municipality had been given specific authority by the State to regulate in an area beyond the corporate boundaries." These laws are "not uniform up and down the coast."

However, absent such specific statutory authorization, some local governments probably have no authority to regulate the open ocean or the use of public trust submerged lands. The State of North Carolina has the authority, but particular towns and counties may not.

III. Conclusion

Although Professor Kalo is an aggressive proponent

[2] "Mean high water mark" is synonymous with "mean high water line."

of the existence of a customary public trust right to use the dry sand beaches of North Carolina and the doctrine of the public trust in general, the legal basis for this doctrine, and its breadth, are questionable in North Carolina. North Carolina General Statute 1-45.1 states that public trust rights to use the dry sand beach derive from the common law. But the North Carolina courts have not specifically addressed these points, and therefore there is no common law from which these rights may be derived. Cases from the few other states which recognize public trust rights (e.g., Oregon) are instructive but not determinative. Further, to the extent that these rights exist at all, it is by virtue of customary usage, and the scope of this custom is not clear. For example, what is the definition of reasonable? What are recreational uses? What uses may private landowners make of the dry sand beach? Aside from this, there are questions relating to which governmental authority has the power to enforce public trust rights and regulate in certain public trust areas. Therefore, until the North Carolina courts make a determination with respect to public trust rights, the validity and meaning of that concept remains open to debate. However, Professor Kalo believes that a custom so long enjoyed by the people of North Carolina and so important to its tourist economy will be affirmed by the courts in some form or fashion.

Various Beach Nourishment Projects in North Carolina

By: James L. Joyce

This article provides a status report on the several beach nourishment projects that are either planned or underway across the North Carolina coast.

Morehead City Harbor Dredging and Nourishment Nearing Completion

The Morehead City Harbor Federal Navigation Project, a dredging project designed to deepen the Morehead City Harbor by dredging sand from near the port, through Beaufort Inlet, and out into the ocean side of the channel, has been adding sand to Bogue Banks beaches since November and is nearing completion.

Some 14,000 linear feet of beach has already been nourished, and only one stretch of about 3,500 linear feet remains. Beaches at Fort Macon State Park have already been prepared for use. Once finished, the project will add approximately 1.1 million cubic yards of sand to the beach from Fort Macon State Park to the Atlantic Beach Circle on the main strand of Atlantic Beach.

Despite some early difficulties, the project has remained on schedule and should finish well in advance of the end of the window for completing the project on April 30, 2011. The project must be completed by April 30 to avoid the onset of sea turtle nesting season.

Controversial Nags Head Project Down to the Wire

For years, the Town of Nags Head has been working to get a beach nourishment project started. The Town is closer than ever in achieving that goal. Mayor Bob Oakes recently declared his intention to begin work in April on a $36 million project that would add 4.6 million cubic yards of sand to a 10-mile stretch of beach. Nonetheless, significant obstacles remain before this project can be successful.

Until recently, the most significant obstacle was how the Town would cover a $10 million funding gap. A $24 million bond referendum failed in 2007, and a 2010 petition drive to establish a special assessment district on the oceanfront fell short as well. Following these failed efforts, in December 2010, the Town decided to use $1.8 million of occupancy tax funds out of the Town's general fund as collateral for a $10 million bond. To fill the hole left in the Town's budget, as the occupancy tax funds account for roughly 16% of the Town's annual revenue, the Town has decided to raise property taxes. Although the precise amounts could change, the current proposal involves a 2% increase throughout Nags Head and a 16% rise on certain beachfront property within two municipal service districts. These service districts will perform essentially the same function as the special assessment district – raising taxes on beachfront property owners – without the need for owner approval.

Another obstacle is obtaining easements needed to work on privately owned beachfront above the mean high water line. Although the Town wrote into the easements its own interpretation of state law

regarding the seaward boundary of private property and an expansive scope of rights, it had obtained roughly half of the easements required. The Town decided in January to ask Dare County to assign some 255 easements, and plans to obtain the others by eminent domain. However, a number of landowners have filed a lawsuit against the Town opposing its plans to condemn the easements it has not been able to obtain.

Even with these obstacles out of the way, two significant questions remain: (1) the project as currently proposed does not involve a plan for ongoing maintenance and (2) time is of the essence. First, despite being located in one of the most volatile areas of the North Carolina coast, the project does not include an ongoing maintenance plan, which means it will not qualify for reimbursement from the Federal Emergency Management Agency ("FEMA") in the event that the project is wiped out by a major storm. Second, Mayor Bob Oakes wants to begin the project in April 2011 as planned. However, making this happen would include requesting, receiving, and evaluating bids so that the Town could choose a contractor and negotiate a contract in advance of the March 2 Board of Commissioners meeting. At this meeting, the Board needs to be prepared to approve the issuance of the bond. Following this meeting, the Town needs the approval of the Local Government Commission at its April 5 meeting. Aside from these approvals, Mayor Oakes wants to force owners to remove houses that are close to the shoreline before the project begins, even though the Town is currently mired in litigation over many of those properties. All of these steps take time making the April start date difficult to achieve.

Topsail Beach Nourishment Underway

The dredge *Jekyll Island* began work on a locally-funded interim nourishment project for Topsail Beach. Dredging is scheduled to continue non-stop, with the addition of two other dredges, until the project is complete, likely some time in late March. The end result will be 900,000 new cubic yards of sand on the beach.

The Town of Topsail Beach had been looking for ways to buy in to a 50-year federal nourishment plan for hurricane protection, which would involve paying $2 million for 800,000 cubic yards of sand every four years, but decided to move forward with this project as an interim measure in order to control erosion.

The Town will pay for the $8 million project by using $1 million of matching state funds, another $1 million from available general fund money, and the remaining $6 million out of its beach nourishment fund. The Town has been setting aside 4 cents of its 31-cents-per $100 property tax for beach nourishment projects.

Update on the Use of Sandbags to Protect Coastal Properties from Beach Erosion

By: Mack A. Paul, IV

May 2011 will mark the third anniversary of the sandbag deadline – the date permits expired on sandbag structures protecting approximately 150 properties along North Carolina's coast. During the past three years, the sandbag issue has taken a number of twists and turns. While State action and significant civil penalties continue to hang over many property owners, North Carolina is inching toward significant policy reform.

As the property owners and the State battled over enforcement during 2008 and 2009, the General Assembly passed Session Law 2009-479, which put in place a one year moratorium on enforcement of the sandbag deadline for structures in communities actively pursuing a beach nourishment project. The moratorium expired in September 2010.

Unfortunately, the State did not reach any consensus on how to handle sandbags during the moratorium. In July 2010, the Coastal Resources Commission (CRC) discussed various options, including the suggestion by the Science Panel of the Division of Coastal Management (DCM) that the State do away with time limits and regulate the size of sandbag structures instead. The CRC rejected the Science Panel recommendation and ultimately voted to commence with enforcement when the moratorium expired in September 2010.

Despite the CRC's vote to proceed with enforcement, DCM staff scheduled a series of sandbag stakeholder meetings. Participants included local government officials, DCM staff,

individual members of the CRC, oceanfront property owners, sandbag fabricators and contractors. One key issue that has emerged in these meetings is that sandbags are often a symptom of a larger problem: structures that remain on the beach when no long-term solution to erosion exists. If there were a mechanism to remove these structures, sandbags would no longer be necessary. The group identified a number of policies such as FEMA regulations that encourage property owners to reinforce structures rather than removing them.

The stakeholder group held its fourth and final meeting on February 23, 2011. At that meeting, the group reached consensus on several points and will make formal recommendations to the CRC at its April meeting. The recommendations fall into two categories: what to do with structures remaining on the beach and what to do with sandbags situated in communities pursuing a strategy to address the erosion.

Recommendations about the structure issue include funding for removal of the structure and creating tax credits to compensate property owners who voluntarily agree to convey oceanfront property when erosion overtakes it and to remove their structure at the appropriate time. Other recommendations addressed better ways to force property owners to remove a structure when they encroach on the public trust.

The stakeholder group struck a balance on the use of sandbags. They agreed that sandbags have a place in North Carolina as a valuable alternative to hardened structures and retreat. The group noted that in many places sandbags have worked well, protecting property until a community completed a nourishment project. The group also acknowledged that inlet areas require management plans that are different from other oceanfront areas because nourishment does not work near inlets. Consequently, the group also will recommend eliminating time limits in communities that meet certain requirements to demonstrate they are successfully pursuing a management strategy to address the erosion.

The same day the stakeholder group reached consensus on potential rulemaking, DCM staff sent enforcement letters to 13 property owners, notifying them that sandbags must be removed within 30 days. These properties are all located in Nags Head and ranked highest on the State's priority list for removal. DCM staff has acknowledged that the enforcement process will take many months so that rulemaking can move forward on a parallel track. It is staff's opinion that proposed rulemaking will not affect these properties.

Sandbags have long been a source of controversy in North Carolina. Much of the controversy rests on the fact that the State has very few tools available to addressing erosion. As noted, sandbags become a focal point of public anger when they are protecting structures that encroach on the public trust. Unfortunately, this controversy has made it difficult for the State to make thoughtful policy changes that recognize most sandbags structures serve a vital purpose. Based on the outcome of the stakeholder meetings, the State may be finally moving toward a sandbag policy that strikes the right balance between private property rights and public interest.

Recent Coastal Cases Clarify Rights in Manmade Waters

By: Stanford D. Baird

A pair of recent decisions handed down by the North Carolina Court of Appeals has expanded the rights of the public and adjacent property owners in manmade surface water bodies, such as upland canals, marinas, and harbors. At the same time, the rights of private property owners who built or owned such manmade waters have been curtailed, with potentially chilling implications to development of upland waterways.

The issue in the first case, Fish House, Inc. v. Clarke, 693 S.E.2d. 208 (N.C. App. 2010), was whether a manmade upland canal was subject to the public trust doctrine – and therefore usable by the general public – simply because it was navigable. In this case, the plaintiff and defendant both operated fish houses on opposite sides of a manmade canal in Englehard in Hyde County. The canal had been in place for many years and was entirely located on property owned or leased by the plaintiff. Additionally, the manmade canal connected to a natural navigable waterway and was used by fishing boats who sold fish to both fish houses. The plaintiff sued the defendant on a

trespass theory in an effort to cease the defendant fish house's use of the canal. The defendant asserted as a defense that the manmade canal was a navigable water such that the public trust doctrine permitted use of the canal by the general public.

Previous North Carolina cases had described the public trust doctrine as applying to waterways that were navigable in their natural condition. The Court of Appeals in the Fish House case significantly expanded the public trust doctrine and held that "any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes 'navigable water' under the public trust doctrine of this state." The case also indicated that the submerged lands beneath such waters similarly become State-owned public trust lands and no longer private property. Thus, if Fish House was correctly decided, then all navigable manmade canals and marinas connected to naturally navigable waters are now open to public use.

In a second case impacting land use rights related to manmade waters, the Court of Appeals issued its opinion in Newcomb v. Carteret County, 701 S.E.2d 325 (N.C. App. 2010), also known as the Marshallberg Harbor case, in November 2010. One important issue in the case was whether owners of property adjacent to a manmade harbor had riparian rights related to the harbor, including the right to construct piers, wharves, etc. Marshallberg Harbor was constructed by the U.S. Army Corps of Engineers in the 1950s on upland private property pursuant to easements granted for that purpose by property owners. The harbor was used for decades by local citizens in Carteret County who built docks and similar facilities around the harbor without the permission of the surrounding property owners. In 2005, several such property owners sued to establish their riparian rights related to the Marshallberg Harbor.

In an opinion that cited Fish House as authority, the Court held that owners of property adjacent to manmade navigable waters had riparian rights to such waters. It was previously thought that riparian rights might only apply to property adjacent to naturally navigable waters. This case clearly decided this point and found that the landowner plaintiffs had riparian rights to Marshallberg Harbor. The holding of this case would generally apply to grant riparian rights to any property adjacent to a navigable water, whether natural or manmade. The potential applicability of the holdings of the Fish House case and the Newcomb case should be noted by coastal developers considering the creation of manmade navigable waterways as part of a project.

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