

Rebuilding After Floyd?: CRC Regulations and Redevelopment Options Available to Littoral and Riparian Owners

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In the early morning hours of September 15, 1999, Hurricane Floyd ripped into North Carolina, pounding away at fragile beaches and dumping more than a foot of rain. When the skies finally cleared, almost one-third of the state was affected by flooding and heavy rains, more than a million residents were without power, hundreds of beach homes had been damaged or destroyed, and the total property damage for the state was estimated at more than \$700 million. In addition, Floyd's fifteen-foot storm surge destroyed sand dunes and vegetation used to determine the setback line for oceanfront development along some beaches, thus relocating the invisible baseline significantly inland. As a result, dozens of homes severely damaged by Floyd's fury may now be designated as non-conforming uses, thereby prohibiting these landowners from rebuilding. This article focuses on several post-hurricane issues regarding development along North Carolina ocean shorelines that have emerged in the wake of

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Hurricane Floyd.

Distinguishing Between Public and Private Property Along Oceanfront Shorelines

In North Carolina, the State retains title to lands subject to the flow of the Atlantic Ocean up to the mean high tide line (MHTL).¹ According to the North Carolina Supreme Court, the MHTL constitutes the boundary between private lands and State-owned public trust lands along ocean or inlet shorelines.² This boundary is ambulatory and moves with erosion and accretion.³ Because of the MHTL's ambulatory nature, the Division of Coastal Management (DCM) uses the presence of natural indicators of high water, such as the location of the vegetation line and trash line and observation of actual high tide, to determine the boundary's approximate location.⁴ When these indicators are disturbed as a result of a storm, the DCM establishes the MHTL by using available indicators, such as the vegetation line on adjacent lots and aerial photography. This methodology was expressly upheld in *Webb v. Coastal Resources Commission*.⁵

The validity of these indicators stems from the recognition that public trust rights have traditionally extended to the entire beach strand seaward of the first line of natural, stable vegetation or frontal dune.⁶ North Carolina General Statute § 77-20(d) recognizes that because the "public [has] made frequent, uninterrupted[,] and unobstructed use of the full width and breadth of the ocean beaches of [North Carolina] from time immemorial," the public retains the right "to the customary free use and enjoyment of the ocean beaches."⁷ This legislative recognition functions as a codification of common law doctrine of custom.⁸ The public's right to access and use oceanfront and

estuarine shorelines is recognized in several other North Carolina statutes as well.⁹

Establishment of Setback Requirements Along North Carolina's Oceanfront Shorelines

In establishing setback requirements and other natural hazard mitigation regulations, North Carolina's Coastal Resources Commission (CRC) recognized that North Carolina was subject to annual threats from severe storms as well as constantly shifting coastlines resulting from long-term erosion associated with sea level rise. Although the CRC realized that it could not provide development located adjacent to the coast with absolute safety "from the destructive forces indigenous to the Atlantic shoreline,"¹⁰ it understood that it could reduce unreasonable danger to life and property through the implementation of stringent management policies and standards. As a result, the CRC enacted various regulations that attempt to guide development or redevelopment in ocean hazard areas while balancing the financial, safety and social factors involved in hazard area development. In addition, the CRC's regulations attempt to ensure access to public trust lands, which can be hampered by debris and non-conforming structures left on the beach after severe storms. Such regulations require specific limitations and conditions on private ocean area property. However, the public tends to focus on these regulations only after severe storms, when heavy erosion shifts accepted boundaries among the ocean, public beach and private property.



Erosion at Nags Head, North Carolina
David Brower

Before discussing the various options available to both the State and private landowners after a hurricane, it is useful to detail the significant regulations applicable to ocean hazard areas. The most important of these is the requirement that oceanfront development adhere to certain setback restrictions. The CRC rules require that a setback line be established at a minimum distance from the first line of stable, natural vegetation according to the size of the structure. For all single family residences and other structures that have 5,000 square feet of total floor area or less, the setback line is determined by multiplying the annual erosion rate by thirty.¹¹ At minimum, this line must be at least sixty feet from the first line of stable, natural vegetation. In contrast, because larger structures pose increased risk to life and property and are more likely to increase public expenditures, structures that have more than 5,000 square feet of total floor area are subject to greater setback requirements. For these structures, the setback requirement is twice that of smaller structures and under no circumstance is to be less than 120 feet from the first line of stable, natural vegetation. Because of the instability associated with North Carolina's shoreline, a vegetation line determination is only valid for sixty days and is normally set only at the time that development is proposed on an oceanfront lot.

Post-Hurricane Scenarios and Landowner Options

Because of the destructive forces associated with hurricanes, shorelines can erode dramatically during such storms. Post-hurricane damage generally results in one of three scenarios: (1) the existing structure or vacant lot falls landward of the post-hurricane vegetation line but within the minimum setback area; (2) the existing structure becomes imminently threatened by coastal waters but remains on private property; or (3) the existing structure or vacant lot becomes located on public beaches or in public waters. Each one of these three scenarios gives rise to unique options and difficulties for both the State and private landowners.

The CRC provides two sets of rules for

existing structures that become located landward of the vegetation line but seaward of the minimum setback area as a result of a hurricane. North Carolina General Statute § 113A-103(5)(b)(5) allows a landowner to conduct "maintenance or repairs (excluding replacement) necessary to repair damage to structures caused by the elements . . ." The CRC rules define "replacement" as those structures that suffer damage in excess of fifty percent of the structure's value.¹² Therefore, a property owner whose existing structure is damaged at less than or equal to half its value (as determined by the local building inspection office) can institute repairs without having to obtain a development permit. In contrast, those structures that have suffered damages in excess of half their value must obtain a permit from the DCM or local government stating that it meets current setbacks before any structure can be rebuilt.

With regard to vacant lots, the CRC's rules allow for the development of single-family residential structures seaward of the applicable setback line in ocean erodible areas if each of the following conditions is satisfied: (1) the development is set back from the ocean to the maximum extent feasible and the development is designed to minimize encroachment into the setback area; (2) the development is at least sixty feet landward of the vegetation line; (3) the development is located entirely behind the landward toe of the frontal dune; and (4) specific design standards are incorporated into the development.¹³

For those lots located closer than sixty feet from the vegetation line, the only immediate option available to a landowner whose severely damaged structure or lot falls within the sixty-foot setback area is to seek a variance from the CRC once the landowner receives a final decision denying his or her CAMA permit. In order to be successful, the variance petitioner must show that each of the following circumstances exists: (1) that enforcement of the applicable development guidelines or standards will cause the landowner practical difficulties or unnecessary hardships; (2) that such difficulties result from a condition peculiar to the landowner's property; (3) that such conditions could not have reasonably been

anticipated by the CRC when the applicable guidelines or standards were adopted; and (4) that the proposed development is consistent with the spirit, purpose and intent of the CRC rules.¹⁴ The substantial difficulty in obtaining a variance is showing that the CRC did not reasonably foresee the condition as peculiar to the landowner. When the CRC adopted the setback requirements, it was most likely aware of the possibility that certain ocean area properties might be deemed unbuildable after a severe storm. As a result, the variance procedure may not provide relief to all landowners with damaged structures or unbuildable lots.

Other options are available to a landowner whose property has been deemed unsuitable for development. The landowner can wait to see if the beach naturally recovers, thus re-establishing the vegetation line further seaward. Another option is to plant, water and fertilize beach vegetation to encourage the re-establishment of stable, natural vegetation further seaward. A third choice is to seek means of artificially nourishing the beach. The problem with beach nourishment, in addition to the expense and long preparation time, is that the first line of stable, natural vegetation becomes permanent at the time nourishment commences, thus providing few tangible or immediate benefits to landowners of unbuildable lots.

Another option available to landowners is to hope that the local government will acquire their property under a grant from DCM's Public Beach and Coastal Waterfront Grant Program, which provides land acquisition priority to those lands that have been made unsuitable for development as a result of natural hazards. The final option for landowners of unbuildable property is to donate their land to the State, the local government or a qualified non-profit organization in return for a tax credit under the Conservation Tax Credit Program operated by the Department of Environment and Natural Resources (DENR). The landowner can decide, based on these options, whether he or she wishes to keep the property or be compensated for his or her loss. This is particularly advantageous to landowners because it is presumed that they purchase oceanfront property with full

knowledge of the potential dangers posed by hurricanes. Moreover, the original developers are required, as a condition of the development permit, to acknowledge the fact that they are seeking to build in a hazardous area with limited suitability for permanent structures and thus are assuming the risk associated with such development.¹⁵

Imminently Threatened Structures

The next category of oceanfront structures that raise unique issues following a hurricane is those that are deemed as "imminently threatened oceanfront structures." A structure is imminently threatened when the erosion scarp reaches within twenty feet of the structure.¹⁶ When a structure becomes "imminently threatened," the landowner's options are considerably limited, primarily because permanent erosion control structures (or beach hardening devices) are prohibited.¹⁷ As a result, the property owner is restricted to implementing temporary erosion controls until he or she can either relocate the threatened structure or until the affected local government can initiate a successful beach nourishment program. Under the CRC rules, there are two types of temporary erosion control techniques available to protect imminently threatened structures that can be employed either exclusively or in conjunction with one another: the use of sandbags and beach bulldozing.

The use of sandbags is intended to temporarily protect residences, septic tanks or roads but may not be used to protect appurtenances such as gazebos or decks.¹⁸ If a landowner decides to pursue this option, a CAMA permit is required before the sandbags may be placed in front of the threatened structure. Under the rules, the sandbags may remain in place for up to two years if the structure is 5,000 square feet or less, and up to five years for those structures that are either over 5,000 square feet or in a community that is engaging in a beach nourishment project.¹⁹ Once the sandbags are determined to no longer be necessary, the property owner has thirty days to remove them.²⁰ In addition, an imminently threatened structure may only be protected once,

regardless of ownership.²¹ The only exception to these requirements is if the sandbags become covered with sand and stable, natural vegetation, in which case they may remain in place indefinitely unless subsequently revealed by another storm.²²

The other temporary erosion control option available to landowners is beach bulldozing. The CRC rules provide for a statutory exemption that allows beach bulldozing to occur without a CAMA permit as long as the structure is considered imminently threatened and the bulldozing does not remove material located seaward of the low water line. The landowner, however, must still obtain a permit from the U.S. Army Corps of Engineers. Although a CAMA permit is not required, beach bulldozing must still adhere to certain regulations. For instance, the bulldozing may not move material in excess of one foot in depth from the original surface elevation. More importantly, there is a federal moratorium on beach bulldozing during the sea turtle nesting season (May 1- Nov. 15), although a recent CRC rule change would permit DCM, in coordination with state and federal agencies, to determine if any turtle resources exist in an area after any given storm.²³ If no turtle resources are identified, then the property owner would be permitted to commence bulldozing in the area during the moratorium for that particular year only.

Structures and Debris on Public Beaches After a Storm

The last category of oceanfront property involves those structures and debris that are located on public beaches after a storm. North Carolina applies public trust rights to its beaches seaward of the vegetation or dune line on public property. Moreover, all wet sand areas below the mean high tide line are public property. After major storms, the public beaches and nearshore waters are typically littered with debris from damaged homes and other structures. In addition, storm surges and the associated erosion occasionally result in the collapse of structures on the public beach or in the nearshore waters. This debris creates hazards to the public's health and safety while also severely limiting access to

public beaches and waters.

In recognizing the risks imposed by debris and damaged structures, the General Assembly delegated local and county governments the authority to include damaged structures and debris within their definition of public nuisances. By including damaged structures and debris within a nuisance definition, local and county governments may exert their police powers to require landowners to remove these items from public beaches or waters or to repair or remove structures that are in danger of collapsing. If the landowner refuses to eliminate the nuisance, the local or county government may remove or correct the nuisance and then seek restitution



**Collapsed pier on Pine Knoll Shores,
North Carolina**
NC Division of Emergency Management

from the property owner for the costs incurred. In addition to local and county authority, the landowner's original CAMA permit is required to include a written provision whereby the landowner agrees to remove or relocate any structure that becomes imminently threatened by changes in the shoreline.²⁴ Failure to comply with a permit condition requiring removal of a damaged structure may result in injunctive relief and/or civil or criminal penalties.

In addition to local and county authority to remove damaged structures and debris, DENR

may possess the implicit authority to secure the removal of such items when local and county governments are unable to do so. Although this authority has yet to be applied in a public beach setting, North Carolina General Statute § 113-131 provides both DENR and the Wildlife Resources Commission with the broad responsibility of protecting "public trust resources." Public trust resources include "land and water areas, both public and private, subject to public trust rights . . ." ²⁵ These agencies may request the Attorney General to bring an action "for injunctive relief to restrain the violation and for a mandatory preliminary injunction to restore the resources to an undisturbed condition." ²⁶ Even though this authority permits the agencies to require the removal of damaged structures and debris from public beaches and waters, the statute does not provide a cost recovery provision if the agencies remove the items themselves.

A more difficult question arises when erosion results in a structurally sound building being located on a public beach. When this occurs, there is unmistakably an interference with the public's use and enjoyment of the beach or in public waters. The problem is that the structure does not fall within the traditional nuisance definition in that it does not pose any clear danger to the public's health, safety or welfare. North Carolina courts have yet to address this issue, but a federal district court in Texas held that although the public retains an easement for recreational use that migrates with the vegetation line, that easement does not justify an unreasonable interference with the property rights of the fee owner.²⁷ As a result, the court held that the public's easement existed around the property owner's existing structure. The question that arises, which was not addressed by the district court, is what property rights a landowner retains if his or her structure becomes located on public property, not merely within privately owned public trust lands. **CP**

Notes

¹ See *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970) (holding that the boundary between private property and State-owned public trust lands along an ocean or inlet shoreline is the mean or ordinary high water mark).

² See *id.*

³ See *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971); *Shell Island Homeowners Assoc. v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406, 414-15 (1999); see also F. Maloney & R. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 224-26 (1974) (explaining the law of erosion and accretion and ambulatory boundaries). The exception to the general rule regarding ambulatory boundaries is when there is accretion as the result of a beach nourishment project. Under these circumstances, title to the beaches expanded through beach nourishment “remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches, which rights are a part of the common heritage of the people of [North Carolina].” N.C. GEN. STAT. § 146-6(f).

⁴ N.C. Admin. Code Rule 15A 7H.0106(1) (defining “normal high water” as “the ordinary extent of the high tide based on site conditions such as presence and location of vegetation, which has its distribution influenced by tidal action, and the location of the apparent high tide”).

⁵ *Webb v. Coastal Resources Comm’n*, 102 N.C. App. 767, 404 S.E.2d 29 (1991) (holding that the determination of the approximate MHTL by reference to physical markers, such as the vegetation line, was consistent with the intent of the North Carolina Supreme Court in *Carolina Beach Fishing Pier*).

⁶ See N.C. GEN. STAT. § 77-20(e).

⁷ *Id.* at § 77-20(d).

⁸ In order to establish the customary use over beachfront property, the following requirements must be shown: 1) a long and general usage; 2) without interruption by private landowners; 3) that is peaceful and free of dispute; 4) which is reasonable; 5) the nature of which is certain as to its scope and character; 6) without objection by landowners; and 7) is not contrary to other customs or laws. See *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (applying the common law doctrine of custom to hold that public trust lands included all of the dry sand beaches in the entire state of Oregon).

⁹ See, e.g., N.C. Gen. Stat. § 1-45.1 (defining public trust rights to include the right to freely use and enjoy the State’s ocean and estuarine beaches and access to those beaches); N.C. Gen. Stat. § 113A-134.1 (establishing the public beach access program and recognizing that “the ocean beaches are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State”).

¹⁰ N.C. Admin. Code Rule 15A 7H.0303(a).

¹¹ See *id.* at 7H.0306(a)(2), (4).

¹² See *id.* at 7J.0210.

¹³ See *id.* at 7H.0309(b)(1)-(4).

¹⁴ See *id.* at 7J.0211(c)(2)(A)-(D).

¹⁵ See *id.* at 7H.0306(j).

¹⁶ See *id.* at 7K.0103(a).

¹⁷ See *id.* at 7H.0308(a)(1)(B).

¹⁸ See *id.* at 7H.0308(a)(2)(C).

¹⁹ See *id.* at 7H.0308(a)(2)(F).

²⁰ See *id.* at 7H.0308(a)(2)(G).

²¹ See *id.* at 7H.0308(a)(2)(L).

²² See *id.* at 7H.0308(a)(2)(H).

²³ See *id.* at 7H.1805(f).

²⁴ See *id.* at 7H.306(l).

²⁵ N.C. GEN. STAT. § 113-131(e).

²⁶ N.C. GEN. STAT. § 113-131(c).

²⁷ See *Hirtz v. Texas*, 773 F. Supp. 6, 10 (S.D. Texas 1991), vacated on other grounds, *Hirtz v. Texas*, 974 F.2d 663 (5th Cir. 1992) (dismissing case because barred by the Eleventh Amendment, holding that although individuals may sue state officials in their capacity as state representatives, the Eleventh Amendment precludes suit against the state itself).