

The SANDBAR

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Legal Reporter for the National Sea Grant College Program

The Carnival Fantasy

New Tourism Collides with Old World Charm
in Charleston, South Carolina

Also,

The Right to Clean Air, Pure Water, and the Preservation of the
Environment: Pennsylvania Supreme Court Rules on Drilling Legislation

Coast Guard Has No Affirmative Duty to Rescue Mariners in Peril

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THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR*, contact: Barry Barnes at bdbarne1@olemiss.edu.

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The **SANDBAR**

CONTENTS

The Carnival Fantasy: New Tourism Collides with Old World Charm in Charleston, South Carolina 4

The Right to Clean Air, Pure Water, and the Preservation of the Environment: Pennsylvania Supreme Court Rules on Drilling Legislation 7

Coast Guard Has No Affirmative Duty to Rescue Mariners in Peril 9

Battle Brewing over North Carolina Oceanfront Property Owners' Dry Sand Beach Activities 12

Billionaire Beats Surfers in Beach Access Case 15

Littoral Events 16

THE CARNIVAL FANTASY: NEW TOURISM COLLIDES WITH OLD WORLD CHARM IN CHARLESTON, SOUTH CAROLINA

Marc Fialkoff¹



The Carnival Fantasy at port in Charleston, South Carolina; courtesy of Corey Seeman.

This past January, the South Carolina Supreme Court dismissed a complaint against Carnival Corporation and its vessel *Fantasy* alleging that the cruise company's use of a Charleston terminal violated local zoning ordinances and was a nuisance to the local community.² Although the court acknowledged that the cruise ship may cause general inconvenience and disrupt the historic charm of the city's Old and Historic District, the court ruled that the issue should be addressed by the legislature, rather than the courts.

The Complaint

The Carnival *Fantasy*, an 855-foot long, 60-foot tall cruise vessel capable of carrying 2,056 passengers and 829 crewmembers, uses the Union Pier Terminal in the Old

and Historic District of Charleston as its home port. The Old and Historic District is listed on the Department of Interior's register of National Historic Places. In response to growing concerns over traffic, noise pollution, and fear of being removed from the registry, four Charleston citizens' groups brought suit.³

The plaintiffs sought injunctive relief based on claims that Carnival was unlawfully misusing the terminal where *Fantasy* was docked. Specifically, the complaint alleged that the cruise ship creates a nuisance when thousands of passengers and crew cause major traffic congestion and the closure of public roads, as well as by disrupting the historic skyline. The groups also argued the noise from the loud speakers and particulates from the diesel engines violated the South

Carolina Pollution Control Act. The groups further claimed that the large Carnival symbol on the smokestack violated a local sign ordinance. Finally, the groups argued that the ship violated a local zoning ordinance, because the area where the terminal was located was zoned as light industrial and the *Fantasy* was housing passengers, akin to accommodation type zoning.

The defendants, joined by the South Carolina State Ports Authority, which owns and operates the Terminal, and the City of Charleston, initially filed motions to dismiss, claiming that the plaintiffs lacked standing to sue and the local zoning ordinance is preempted by federal law. Before the circuit court could rule on the motions, the defendants petitioned the South Carolina Supreme Court to exercise its original jurisdiction to hear the case. The petition was granted; however, a circuit court judge was appointed as special referee to conduct a hearing to make recommendations on the motion to dismiss.

Report Recommendations

Upon listening to the arguments of both sides, the circuit court judge recommended dismissal of the South Carolina Pollution Control Act and local zoning and sign ordinance claims, reasoning that neither the ordinances nor the Pollution Control Act applied to the *Fantasy*.⁴ As for the nuisance claims, the judge believed that the plaintiffs made sufficient allegations to allow these claims to proceed.⁵ The report was silent as to the matter of standing and preemption. In its decision, the supreme court considered the following issues: (1) whether plaintiffs possess standing to assert their claims; (2) whether the zoning ordinances apply to the *Fantasy*'s use of the terminal; (3) if the zoning ordinances are applicable, whether they are preempted by federal or state law; (4) whether the plaintiffs' public nuisance claim should be dismissed for failing to state facts sufficient to constitute a cause of action; and (5) whether plaintiffs' private nuisance claim should be dismissed for failing to state facts sufficient to constitute a cause of action.⁶

No Standing to Sue

The South Carolina Supreme Court determined that the plaintiffs did not have standing to bring the claims against Carnival. The court began its discussion by laying out the three requirements for standing. First, the plaintiff must have suffered an injury-in-fact, *which is concrete, particularized, and actual or imminent*.⁷ Second, a causal connection must exist between the injury and challenged conduct. Third, a favorable ruling by the court must be able to resolve the injury. Citing *Lujan v. Defenders of Wildlife*, the court pointed out that

generalized grievances that affect the public at large are not particularized enough to meet the first prong.⁸ The court noted that the citizens' groups lacked standing, because no plaintiffs within the associations have suffered any concrete harm.

Although the court determined the plaintiffs did not have standing to sue, the court went on to discuss the nuisance and zoning claims. Public nuisance claims are usually filed by states on behalf of the general public.⁹ While private individuals can file public nuisance claims, a "special injury" must be present. The individual filing suit must have suffered harm in a specific and particularized way, distinct from the harm suffered by the public at large. The court concluded that because no particularized injury was shown by the plaintiffs, their public nuisance claim must be dismissed.¹⁰

As to the zoning claim, the court acknowledged that Section 6-29-950 of the South Carolina Code enables citizens who are adjacent to a structure violating the zoning ordinance to bring suit.¹¹ The initial argument by the groups was that the terminal was zoned in a light industrial district and *Fantasy* was acting as an accommodation, violating the zoning ordinance. Although the Coastal Conservation League is a tenant on nearby property and the Preservation Society holds a conservation easement, the court found that neither satisfies the zoning requirements for being adjacent property holders. Furthermore, neither plaintiff alleged sufficient facts to show harm from the vessel at the terminal.

The plaintiffs' final argument dealt with an exception to the standing requirement that allows individuals standing when "an issue is of such public importance as to require its resolution for further guidance."¹² The plaintiffs argued that because the court exercised its original jurisdiction over this case to resolve an issue of "public interest," the exception to standing applied to their case.¹³ The court disagreed, noting that the "public interest" necessary for jurisdiction in this case was not interchangeable with the "public importance" standard that is required for the standing exception.

In concluding the opinion, the court made it clear that the judiciary is not the forum for resolving general grievances or issues of public policy. The court stated that "in our constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the 'judicial power.'"¹⁴ If the public suffers harm or a general grievance, the remedy is sought through legislative and executive branches. If the public is still dissatisfied, their remedy is at the ballot box, not the courts.

Conclusion

Ultimately, the South Carolina Supreme Court dismissed the claim brought by the citizens' groups against Carnival because the plaintiffs did not suffer any concrete harm from the Fantasy's use of the terminal. The Southern Environmental Law Center (SELC), which represented the citizens' groups, noted that the decision was based on a legal technicality and that if individuals harmed by the cruise line must bring suit, such a process will be cumbersome and judicially inefficient.¹⁵ The SELC also noted that in another suit against a cruise ship brought by the groups, a federal court judge determined that the groups had standing to sue and the permit issued for a similar terminal in Charleston was unlawful.¹⁶ Although the decision settles the matter for now, the issue of cruise lines and their impact on historic districts will continue. ❧

Endnotes

- ¹ 2014 J.D. Candidate, Roger Williams University School of Law.
- ² *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, No. 27355, 2014 S.C. Lexis 20, at *2 (S.C. Jan. 22, 2014).
- ³ These groups consist of the Historic Ansonborough Neighborhood Association, the Charlestowne Neighborhood Association, the Coastal Conservation League, and the Preservation Society of Charleston.
- ⁴ *Carnival Corp.*, 2014 S.C. Lexis 20 at *2-3.
- ⁵ *Id.*
- ⁶ *Id.* at *6-7
- ⁷ *Id.* (*emphasis added*).
- ⁸ *Id.* at *9 (citing 504 U.S. 555, 560 (1992)).
- ⁹ *Id.* at *13 (quoting *Brown v Hendricks*, 45 S.E.2d 603, 605 (S.C. 1947)).
- ¹⁰ *Id.*
- ¹¹ *Id.* at *15.
- ¹² *Id.* (citing *Davis v. Richland Cnty. Council*, 642 S.E.2d 740, 741 (S.C. 2007)).
- ¹³ *Id.* at *17
- ¹⁴ *Id.*
- ¹⁵ Press Release, Southern Environmental Law Center, Supreme Court Leaves Legality of Cruise Ship Harms in Historic Charleston Unanswered (Jan. 22, 2014) (available at http://www.southernenvironment.org/newsroom/press_releases/supreme_court_leaves_legality_of_cruise_ship_harms_in_historic_charleston_u/).
- ¹⁶ *Id.*



The Carnival Fantasy at port in Charleston, South Carolina; courtesy of Corey Seeman.

THE RIGHT TO CLEAN AIR, PURE WATER, AND THE PRESERVATION OF THE ENVIRONMENT: *PENNSYLVANIA SUPREME COURT RULES ON DRILLING LEGISLATION*

Cullen Manning¹



Marcellus Shale Gas Well; courtesy of Westminster Cable Network.

The search for alternative energy sources that will move the United States away from oil dependence continues, which has led to a recent boom in natural gas development. Growth in the industry has been rapid on the East Coast in particular where a large amount of natural gas resides in the Marcellus Shale Formation.

Unfortunately, the primary way to harvest natural gas located in hard-to-reach shale is to use the controversial method of hydraulic fracturing or “fracking.” Fracking is a drilling process that involves creating underground fissures that force natural gas pockets to the surface. To accomplish this feat, a large amount of water, sand, and chemicals are injected into the ground to form the fissures causing the pressure change that brings the gas to the surface.

In 2012, the Pennsylvania state legislature, attempting to capitalize on the Marcellus Shale Formation’s potential, passed Act 13, which both repealed and amended parts of the Pennsylvania Oil and Gas Act. The effect of this legislation was to allow the state to establish standardized drilling regulations and to remove the authority of local governments to regulate drilling within their boundaries.

Act 13 and Mandatory Local Zoning

Communities often are very vocal when a new, expansive business approaches their town. People want to know how many jobs the business will provide their citizens and whether the business will alter the aesthetic appeal of the town for better or worse.

Act 13's standardized drilling regulations required towns to develop zoning regulations and permitting programs so that companies could apply to drill within townships. Act 13 placed no limits on where these companies could operate, potentially allowing the businesses to operate in residential neighborhoods. In addition, § 3303 of Act 13 specifically preempted any local regulation of the oil and gas industry.²

Townships Sue The State To Stop Legislation

Upset that the legislature was taking away their ability to regulate drilling within their boundaries, townships united and sued the state. After years of litigation, the case eventually made it to the Pennsylvania Supreme Court where the constitutionality of Act 13 would ultimately be decided.

The primary issue before the court was whether the state legislature could take away townships' right to make permit and zoning decisions. The government argued that the bill created a great economic opportunity that allowed Pennsylvania citizens to capitalize on the relatively untapped Marcellus Shale Formation. Opponents to the law argued that the law was unconstitutional, because it violated due process by requiring local governments to enact zoning ordinances that disregarded basic zoning principles, which led to a failure to protect property owner interests from harm and altered the character of neighborhoods.

In analyzing whether Act 13 was constitutional, the court looked at Art. I § 27 of the Pennsylvania Constitution. The section, also known as the Environmental Rights Amendment, reads as follows:

*"The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."*³

The court determined that Art. I § 27 of the constitution created a reasonable expectation that residential neighborhoods would remain industry free.⁴ For example, it would be unfair for a family to move to a neighborhood based on its aesthetic beauty and clean environment, only to have an oil and gas company begin fracking next door. The family's belief that they were moving to a clean residential neighborhood is most likely a large part as to why they plan to live in the area. If they had known that a large drilling facility could move into the neighborhood, it is unlikely they would have moved to the area at all. The court decided that depriving families of the local drilling regulations severely disrupted their expectations and could result in an unforeseen deprivation of clean air, pure water, and aesthetic value of the environment.

Additionally, the court noted that the state's resources are given in trust to the "Commonwealth" as a whole, not the state legislature. The legislature, therefore, had no right to take away a community's choice to allow or not allow these businesses to operate within their boundaries. It was not the legislature's to give. As a result, the court ruled that the law violated the Environmental Rights Amendment and was therefore unconstitutional.

THE COURT DECIDED THAT DEPRIVING FAMILIES OF THE LOCAL DRILLING REGULATIONS SEVERELY DISRUPTED THEIR EXPECTATIONS AND COULD RESULT IN AN UNFORESEEN DEPRIVATION OF CLEAN AIR, PURE WATER, AND AESTHETIC VALUE OF THE ENVIRONMENT.

Conclusion

The fact that under Act 13 any oil business would simply have to apply for the appropriate permits and conform to appropriate regulations to drill virtually anywhere in a town is a rather frightening thought. The Pennsylvania Supreme Court clearly recognized the state's interest in limiting the access major gas and oil industries have to local communities. Companies may still drill in Pennsylvania, but now they must abide by town zoning regulations, as well as state requirements. Ultimately, the court ruled that local government's rights in protecting natural resources should be protected, outweighing the economic benefits of drilling for oil and gas.

Following the court's decision, Governor Tom Corbett requested the court vacate the decision and send it back to the lower courts for a new fact-finding.⁵ The court denied the request. 📧

Endnotes

¹ 2014 JD Candidate, University of Mississippi School of Law.

² 58 Pa. Cons. Stat. Ann. § 3303.

³ Pa. Const. art. I, § 27.

⁴ Robinson Twp., Washington Cnty. v. Com., 83 A.3d 901 (2013).

⁵ Mark Scoloro, *Pa. Supreme Court won't reverse gas drilling case*, SFGATE (Feb. 21, 2014).

COAST GUARD HAS NO AFFIRMATIVE DUTY TO RESCUE MARINERS IN PERIL

Adam Deitz¹

U.S. Coast Guard ship at the Wilmington, North Carolina homeport;
courtesy of Donald Lee Pardue



On July 4, 2007, Roger and Susan Turner left their home on the Little River in coastal North Carolina aboard their twenty-foot powerboat to watch holiday fireworks and attend a party on the Perquimans River. After an evening of celebration with their friends, the sun had set and the Turners boarded their vessel and set course for home. It was dark and the seas were turning rough. Swells started to reach a height of three to four feet as the Turners navigated their small vessel along the coast. The couple was over a mile offshore when Susan attempted to reposition herself, at which time

she was cast overboard without a life preserver. She cried out, and Roger attempted to bring the boat around in the turbulent seas to search for his wife; however, in the confusion, the couple slowly faded out of each other's sight.

Throughout the night and into the following morning, Susan Turner survived by treading water and clinging to a group of crab pot buoys. After twelve long hours, she finally set foot on shore. Unfortunately, her late husband's body was not located for another two days. Subsequently, Susan Turner filed suit, alleging the Coast Guard was responsible for his death and her suffering.²



U.S. Coast Guard Station in Wrightsville Beach, North Carolina; courtesy of the U.S. Coast Guard.

The Coast Guard's Response

The U.S. Coast Guard has just over 43,000 active military members to effectuate its wide variety of missions, including search and rescue.³ In 2007 alone, the year of the Turners' accident, the Coast Guard responded to 47,512 marine incidents, saved 5,200 lives and lost only 187 individuals.⁴ In order to effectively pursue its missions, the service must carefully determine how it will allocate its resources. After all, every dollar spent is a dollar that cannot be used in another emergency. As a result, the Coast Guard has developed procedures to deal with a variety of situations ranging from late mariners to sinking ships. Ultimately, however, the response is always a judgment call.

Here, the Coast Guard was first contacted just after midnight on July 5 when the Turners failed to return home at the expected time. The Coast Guard initially classified the couple as "possible overdue." The Turners were reported to be experienced mariners and strong swimmers with all the necessary safety equipment.

Furthermore, the Coast Guard already had units responding to a confirmed missing jet ski, so service command decided that the best course of action for the Turners was to make radio calls and inquire with local marinas the next morning.⁵

Only after a friend of the Turners found the couple's vessel beached and abandoned the next day did the Coast Guard change the Turners' status to "overdue distress," at which time they launched a coordinated air and sea search. Susan reached shore at about 9:00 a.m. on July 5, and the Coast Guard continued to search for Roger. From the morning of July 5 through the evening of July 6, the Coast Guard deployed twelve boats and planes, and searched 173 square nautical miles of water and coast. They finally suspended their search and rescue activities on July 6 at 7 p.m.

Susan Turner's Civil Action

In response to the Coast Guard's delay to act during her peril, Susan Turner sued the United States under the Suits in Admiralty Act, which allows a civil action to be brought

against the U.S. government in admiralty court.⁶ Specifically, Susan claimed that the Coast Guard, as an agent of the United States, committed a tortious act of negligence against the couple.

In tort law, general maritime law mirrors many principles of traditional negligence law.⁷ Therefore, Susan was merely required to establish the traditional elements of negligence, namely that the Coast Guard owed the Turners an identifiable duty, that the Coast Guard breached that duty, and that the Coast Guard's breach of duty proximately caused the Turners harm. Susan's negligence claim hinged primarily on the question of duty. If the Coast Guard did not owe the Turners a duty of care, Susan could not recover from the Coast Guard for breaching that duty.⁸

THE COURT HELD THAT THE ONLY DUTY THE COAST GUARD OWES TO MARINERS IS TO "ACT WITH REASONABLE CARE" ONCE A RESCUE OPERATION IS UNDERTAKEN.

Coast Guard's Duty to Mariners in Peril

According to its enabling statute, 14 U.S.C. § 88, the Coast Guard is authorized to undertake search and rescue efforts. The Fourth Circuit noted, however, that Congress did not impose any affirmative duty on the Coast Guard to commence such rescue operations for every reported marine incident. The court held that the only duty the Coast Guard owes to mariners is to "act with reasonable care" once a rescue operation is undertaken.

Essentially, the court noted that the Coast Guard is held to the same standard of care as other volunteers, as outlined in the "Good Samaritan" doctrine. According to the Good Samaritan doctrine, if a volunteer comes to the aid of a stranger, the person giving aid owes the stranger a duty of being reasonably careful.⁹ Thus, the only way to sue the U.S. for the actions of the Coast Guard is when the plaintiff can prove that the Coast Guard voluntarily assumed a rescue operation but failed to act reasonably or worsened the position of the mariner in peril.

In this instance, the court found that the Coast Guard neither increased the danger facing the Turners nor failed to act reasonably once the search and rescue operations started. Accordingly, the Coast Guard did not breach any duty to the Turners; therefore, Susan could not successfully recover from the U.S. government.

So, does the Coast Guard have an affirmative duty to rescue mariners in peril? The answer in the Fourth Circuit is "no." The Coast Guard may initiate a search and rescue at its discretion, after which the service is merely required to act reasonably and cause no additional harm to those in danger.

The question of the Coast Guard's duty to mariners in peril is an issue that has also been considered by other U.S. circuit courts. The exact answer varies slightly from circuit to circuit; however, in no instance has the Coast Guard been found to have an affirmative duty to rescue mariners.

For example, a district court in the First Circuit held that the Coast Guard has no affirmative duty to initiate a search, even if a court would have considered its refusal unreasonable.¹⁰ In the Second, Fifth, and Sixth Circuits, district courts held that while it is a statutory function of the Coast Guard to operate rescue facilities, the Coast Guard's decision to act is discretionary.¹¹ Lastly, a district court in the Ninth Circuit held that the Coast Guard has no affirmative duty and is not held to any higher standard of care than a private person.¹² The uniform district court holdings indicate a general agreement among courts that the Coast Guard is not obligated to respond to reports of maritime peril. ☹

Endnotes

¹ 2014 J.D., M.M.A. Candidate, Roger Williams School of Law.

² *Turner v. United States*, 736 F.3d 274 (4th Cir. 2013).

³ *Missions*, USCG, <http://www.uscg.mil/top/missions>.

⁴ *United States Coast Guard Search and Rescue Summary Statistics*, USCG, http://www.uscg.mil/hq/cg5/cg534/sarfactsinfo/SAR_Sum_stats_1964-2011.pdf.

⁵ *Turner*, 736 F.3d at 279.

⁶ 46 U.S.C. §§ 30901–30918.

⁷ See *McMellon v. United States*, 338 F.3d 287, 298 (4th Cir. 2003) (*McMellon I*), *vacated en banc on other grounds*, 387 F.3d 329 (4th Cir. 2004).

⁸ *Turner*, 736 F.3d at 280.

⁹ *Good Samaritan Rule*, LEGAL DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=821>.

¹⁰ *Daley v. United States*, 499 F. Supp. 1005, 1009 (D. Mass. 1980).

¹¹ *Albinder v. United States*, 703 F. Supp. 246, 247 (S.D.N.Y. 1987); *Foltting v. Kaevando*, 324 F. Supp. 585, 587 (S.D. Tex. 1971); *Sagan v. United States*, 342 F.3d 493, 498 (6th Cir. 2003).

¹² *Korpi v. United States*, 961 F. Supp. 1335, 1346 (N.D. Cal. 1997) *aff'd*, 145 F.3d 1338 (9th Cir. 1998).

BATTLE BREWING OVER NORTH CAROLINA OCEANFRONT PROPERTY OWNERS' DRY SAND BEACH ACTIVITIES

Kelly Anderson¹

Beach in Nags Head, North Carolina; courtesy of Chuck Allen.



Recent litigation in North Carolina has the courts once again balancing public trust and private property rights over dry sand beaches. In *Nies v. Town of Emerald Isle*,² four beachfront property owners filed an inverse condemnation lawsuit against the Town of Emerald Isle (“town”). The property owners’ claims are based on two town ordinances that restrict when and where oceanfront property owners can leave beach equipment on the “beach strand,” which is defined as “all land between the low water mark of the Atlantic Ocean and the base of the frontal dunes.”³ Because property owners’ titles include the portion of the beach

lying between the mean high water mark and the frontal dunes (an area commonly referred to as the “dry sand beach”), the property owners contend that the town’s restrictions on their use of their land constitutes an unlawful taking of private property. The town maintains that the dry sand beach is a public trust use area, and without the property restrictions at issue, public access to and government maintenance of beaches would be impaired. Embedded in this lawsuit are two important unresolved issues: (1) whether privately owned dry sand beaches in North Carolina are indeed public trust use areas open to the public; and (2) if they are, to what extent a municipality (or the State) may limit the activities oceanfront property owners may engage in on their own beachfront lands.

Background

Four property owners—Nies, Tedrick, Foster, and Watts—own oceanfront lots in Carteret County, North Carolina, on a barrier island known as the Bogue Banks.⁴ In 2003, the town commenced a “beach nourishment” project for properties along the coastline of the island, which included the properties of Nies, Tedrick, Foster, and Watts.⁵ In order to undertake this project, the town requested easements from the affected oceanfront property owners, including the aforementioned property owners, so that the town could complete the work related to the project.⁶ The town stated publicly that the beach nourishment easements would be limited in nature. The town claimed the easements would provide property access for the town to perform the nourishment project, but would stop short of “creating public access property.”⁷ The easement language ultimately presented to the property owners, however, was broad and perpetual.⁸

In response to this proposed language, property owners Nies and Watts executed a “Temporary Easement for Beach Renourishment Project” and

refused to sign the form easement that the town had prepared and distributed to other beachfront property owners.⁹ The town deemed these temporary easements insufficient. In 2004, the town commenced eminent domain proceedings against Nies and Watts, acquiring “a perpetual and assignable easement and right of way over the oceanfront portion of Nies’s and Watts’s properties and providing a perpetual easement for public use.”¹⁰

In 2010, upon completion of the beach nourishment project, the town amended its code, establishing an “Unattended Beach Equipment Provision.” The provision states that “[a]ll beach equipment must be removed from the beach strand by its owner or permitted user on a daily basis” and that any beach equipment left out overnight will be removed and disposed of by the town.¹¹ A second notable provision provided that from May 1 to September 1, “no beach equipment, *attended or unattended*, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes *at any time*.”¹² The purpose of this provision was to “maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand.”¹³

On December 9, 2011, the property owners filed suit against the town in Carteret County Superior Court. They challenged the two code provisions and asserted both inverse condemnation claims under the North Carolina Constitution and Fifth Amendment takings claims under the U.S. Constitution. The case is currently in an early procedural stage. The town first attempted to remove the case to federal court, but the federal court found that the property owners had not exhausted their state condemnation remedies and remanded it back to the state court where the complaint originally had been filed.¹⁴

Public Use of Natural Dry Sand Beaches

In their complaint, the property owners attempted to define the “public trust beach” as the “area below (i.e., seaward of) mean high water.”¹⁵ The property owners contended any public use is limited to this area. This is a direct challenge to the longstanding position of the state that all natural dry sand beaches (from the mean high water mark to the first line of vegetation) are open to public use.¹⁶

In North Carolina, as in a majority of states, if a shoreline has not been the subject of a beach nourishment project, the title of the adjacent oceanfront property owner runs to the mean high water mark, thus including the dry sand beach strand. This rule is embodied in the North Carolina General

Statutes: section 77-20(a) explicitly states that “[t]he seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark.”¹⁷ However, that same statute in subsection (d) also states that “[t]he public having made frequent, uninterrupted, and obstructed use of the full width and breadth of the ocean beaches of this State from time immemorial” has the right to “the customary free use and enjoyment of the ocean beaches.”¹⁸ Subsection (e) goes on to state that “ocean beaches” refers to:

*the area adjacent to the ocean and ocean inlets that is subject to public trust rights. This area is in constant flux due to the action of wind, waves, tides, and storms and includes the wet sand area of the beach that is subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.*¹⁹

This legislation, as well as more recent legislation,²⁰ a North Carolina Attorney General’s opinion,²¹ and the North Carolina Coastal Resources Commission’s Coastal Area Management Act rules,²² make it clear that the position and the policy of North Carolina is that the dry sand beach is open to public use as a matter of customary common law. The North Carolina courts, however, have not explicitly affirmed the existence of such a common law customary right. The *Nies* litigation may provide an answer as to whether such a right exists.

Assuming that the *Nies* case is not resolved on other procedural grounds, the court will need to address three questions. First, does the state acknowledge the common law doctrine of custom? If so, what factors does the court use to determine whether or not a customary right exists? Finally, does historic public use of the state’s dry sand beaches sufficiently satisfy these factors in order to establish the customary right?

Limitations on Dry Sand Beach Activities

If the North Carolina courts do uphold the public’s customary right of use, then the court will have to provide guidance as to the limits that may be placed on the oceanfront property owner’s use of any dry sand beach strand to which she holds title. One approach to this issue would be to treat the public right of use simply as another form of easement. If the court takes that approach, the general rule is that a servient landowner can make any use of a land parcel burdened

with an easement so long as it does not unreasonably interfere with the dominant estate's use.²³ Thus, the public, as the dominant estate user, has a right to use the oceanfront property, but this right is nonexclusive and must be shared with the property owner holding title to the dry sand area of the beach.²⁴ Therefore, in *Nies*, two factual questions are: (1) whether beach equipment left out overnight by an oceanfront property owner unreasonably interferes with the public's common law customary right to use the dry sand beach, and (2) whether the public right of use permits the town to forbid the presence of any attended or unattended beach equipment within a twenty-foot-wide strip of the beach strand.²⁵

Arguably, in the *Nies* context, beach equipment left overnight may pose a hazard to nighttime walkers on the beach and thus interfere with the public right of use. If that is true, then the town's prohibition is acceptable. The difficulty with this argument is that the town subsequently passed an amendment to the ordinance allowing oceanfront property owners to obtain two stickers permitting them to leave two properly stickered pieces of beach equipment on the beach overnight. So, if the justification for the restriction is a potential nighttime hazard, why allow any equipment to be left overnight? And why permit two pieces?

The restriction on having any beach equipment at any time within a twenty-foot-wide strip is even more problematic, especially considering the fact that historically the town has patrolled the beaches and picked up garbage without having any such strip set aside. Having this strip available may make it more convenient for the town to perform those duties, but mere convenience and ease should not be sufficient to justify restricting a property owner's use of her land and limiting where on her land she can place her umbrella, volleyball net, or blankets. A shared public right is not an exclusive right of use. And because it is shared, an oceanfront property owner should be entitled to use any portion of the dry sand beach for any purpose that does not unreasonably interfere with the public right of use.

Conclusion

The results of the *Nies* litigation may determine whether there is in fact a judicially protected common law customary right to use all dry sand beaches in the state of North Carolina and may provide guidance as to the extent of a local municipality's ability to restrict the activities of oceanfront property owners on the natural dry sand beaches. Based on the long history of such public use and substantial policy support, North Carolina courts will likely recognize a customary right of

the public to use dry sand beaches. However, this public right of use is a shared right with the property owner who holds title to the natural dry sand beach. The exact balance between public and private rights will have to be determined on a case-by-case basis and will no doubt be the subject of future litigation. ❏

Endnotes

- ¹ 2014 J.D. Candidate, University of North Carolina School of Law, and Research Law Fellow, N.C. Coastal Resources.
- ² *Nies v. Town of Emerald Isle*, North Carolina, No. 11 CVS 1569 (N.C. Superior Ct. Dec. 9, 2011).
- ³ EMERALD ISLE, N.C., CODE OR ORDINANCES § 5-100.
- ⁴ See Complaint at 4, *Nies v. Town of Emerald Isle*, North Carolina, No. 11 CVS 1569 (N.C. Superior Ct. Dec. 9, 2011) [hereinafter *Nies* Complaint].
- ⁵ See *id.* at 4.
- ⁶ See *id.* at 6.
- ⁷ See *id.* at 7.
- ⁸ See *id.*
- ⁹ See *id.*
- ¹⁰ *Id.* at 8 (emphasis omitted).
- ¹¹ EMERALD ISLE, N.C., CODE OR ORDINANCES § 5-101.
- ¹² *Id.* § 5-102(a) (emphasis added).
- ¹³ *Id.*
- ¹⁴ See *Nies v. Town of Emerald Isle*, No. 4:12-CV-10-F, slip op. at 12 (E.D.N.C. March 27, 2013).
- ¹⁵ See *Nies Complaint* at 7.
- ¹⁶ N.C. GEN. STAT. § 77-20(d) (2011); see also *id.* § 113A-134.1(b) ("The General Assembly finds that the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State.")
- ¹⁷ N.C. Gen. Stat. § 77-20(a).
- ¹⁸ *Id.* § 77-20(d).
- ¹⁹ *Id.* § 77-20(e).
- ²⁰ See N.C. GEN. STAT. § 160A-203 (2013) ("Nothing in this section shall be construed to . . . impair the right of the people of this State to the customary free use and enjoyment of the State's ocean beaches . . .").
- ²¹ Ops. N.C. Atty. Gen. 279 (Oct. 15, 1996), available at <http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Ocean-Beach-Renourishment-Projects.aspx>.
- ²² See 15A N.C. ADMIN. CODE 07M.0301.
- ²³ Joseph Kalo and Lisa Schiavinato, *Customary Right Of Use and Houses On The Beach: Current Litigation's Potential Impacts To The Public's Use of North Carolina's Beaches*, 6.1 SEA GRANT LAW AND POLICY JOURNAL 26 (2014).
- ²⁴ See *id.*
- ²⁵ See 15A N.C. ADMIN. CODE 07M.0301.

BILLIONAIRE BEATS SURFERS IN BEACH ACCESS CASE

Terra Bowling

Last October, a California trial court judge ruled that the 1848 Treaty of Hidalgo preempted public access provisions of the California Constitution, allowing a private property owner to block the public from using a beach in front of his property.¹ The decision has beach access advocates worried that the ruling might encourage other beachfront landowners in the state to deny public access.²

In 2008, Vinod Khosla, the co-founder of Sunmicrosystems, purchased 53 acres of beachfront property that included a public access road to Martin's Beach. Prior to Khosla's purchase, the beach had been popular with surfers who paid \$5 for access and parking at the beach. After the purchase, however, Khosla installed a gate blocking public access with a sign that read, "Beach closed, keep out." In an attempt to restore public access to the beach, lawsuits quickly ensued.

The first lawsuit filed by "Friends of Martin's Beach" claimed that the public trust doctrine and the state constitution prevented Khosla from restricting access to the beach. The public trust doctrine requires states to hold certain coastal lands and waters in trust for the public for uses such as navigation, fishing, and commerce. The California Constitution provides that no owners of property fronting navigable waters "shall be permitted to exclude the right of way to such water whenever it is required for any public purpose."³ And, "the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."⁴

Despite these state constitutional provisions, the trial court judge dismissed the Friends' claims. The trial court ruled that a land grant made prior to the state's Constitution, which included Khosla's property, superseded the public access doctrines. The judge noted that the grant had been upheld by the Treaty of Guadalupe Hidalgo in 1848, the treaty that ended the Mexican American War. The judge also noted that an 1859 U.S. Supreme Court decision had upheld the

validity of the land grant. The result of the ruling is that while the public is still allowed to use the beach, it must use the ocean, rather than land, to access to the beach.

The trial court's ruling will not end the dispute over Martin's Beach. The Surfrider Foundation has instituted a separate legal action seeking to restore public access to Martin's Beach based on requirements in the California Coastal Act.⁵ In its lawsuit, Surfrider alleges that Khosla violated the Act by not obtaining a coastal development permit for the new gate and signs blocking access. The case is scheduled to go to court in late spring.

In February, California Senator Jerry Hill introduced a bill to restore access to Martin's Beach. The Bill requires the State Lands Commission to negotiate with Khosla to provide access to the public. If an agreement cannot be reached, the Commission would have to acquire land through eminent domain to create a public access road.⁶

Endnotes

¹ Press Release, California State Senator Jerry Hill, Hill to Introduce Bill to Restore Public Access to Martin's Beach Near Half Moon Bay (Feb. 6, 2014) (<http://sd13.senate.ca.gov/news/2014-02-06-hill-introduce-bill-restore-public-access-martin-s-beach-near-half-moon-bay>).

² Lee Romney, Venture Capitalist Wins Round in Fight to Block Public Beach Access, L.A. Times, Oct. 25, 2013, <http://www.latimes.com/local/lanow/la-me-ln-san-mateo-county-beach-access-20131025,0,7855076.story#axzz2vflMSIXL>.

³ Cal. Const. art. X, § 4.

⁴ *Id.*

⁵ Press Release, Surfers Escalate Battle to Re-open Martin's Beach (March 12, 2013) (<http://www.surfrider.org/press-center/entry/surfers-escalate-battle-to-re-open-martins-beach>).

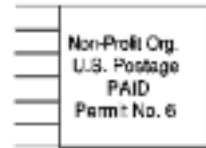
⁶ Press Release, Martin's Beach Litigation Update (Nov. 11, 2013) (<http://www.surfrider.org/coastal-blog/entry/martins-beach-litigation-update>).



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Littoral Events

Association of State Floodplain Managers (ASFPM) 2014 Conference

Seattle, WA • June 1-6, 2014

The 38th Annual National Conference of the Association of State Floodplain Managers, "Making Room for Floods & Fish", will be held at the Washington State Convention Center. The presentations will focus on the goals of habitat restoration and preservation, as well as the tenets of multi-objective management. Attendees will include local, state, and federal officials, industry leaders, consultants, and other interested parties.

For more information, visit: <http://www.floods.org/index.asp?menuID=223>

Conference on Ecological and Ecosystem Restoration (CEER)

New Orleans, LA • July 28 - August 1, 2014

The Conference on Ecological and Ecosystem Restoration is a collaborative conference from the Society for Ecological Restoration and the National Conference on Ecosystem Restoration. The conference will bring together restoration scientists and practitioners to address challenges and share information about restoration projects, programs, and research from across North America.

For more information, visit: <http://www.conference.ifas.ufl.edu/CEER2014>

Municipal Wet Weather Stormwater Conference

Charlotte, NC • August 18-19, 2014

The EPA Region 4 and the Southeast Chapter of the International Erosion Control Association (IECA) Region One are hosting an inaugural Municipal Wet Weather Stormwater Conference. The event will be held at the Crowne Plaza Executive Park. Presentations will inform and educate MS4 operators, consultants, contractors and others practicing in the discipline of stormwater management, stormwater quality and erosion and sediment control.

For more information, visit: <http://www.ieca.org/conference/roadshow/charlottes4.asp>