

## Customary Right of Use: Potential Impacts of Current Litigation to Public Use of North Carolina's Beaches

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*Abstract: This Article analyzes the legal questions surrounding public use of the dry sand beaches in North Carolina. For much of the state's history, the relative rights of the public and oceanfront property owners to use the dry sand beaches have been loosely defined. Two cases, however, bring this issue to the forefront and encourage a more concrete definition of both the public's rights and private property owners' rights. This Article analyzes these legal questions within the context of a coastal town's claim of an easement to protect public trust use of the beach, and a post-storm scenario where a house or multiple houses may end up on the dry sand beach. These scenarios bring up two major legal questions: (1) whether North Carolina's common law makes all natural dry sand beaches open to public use; and (2) whether the government may force an oceanfront property owner to remove her house that ends up on the dry sand beach due to natural forces. With respect to the first question, the authors argue in support of the right of customary use of North Carolina's dry sand beaches, but recommend court resolution of certain common law questions to fully settle the issue. As to the second question, the authors find limited federal authority to require removal of houses that constitute an obstruction to navigation, and they also find limited North Carolina legal authority to require removal of houses that end up on the dry sand beach. The authors' suggested central test for determining whether the State of North Carolina legally may require removal is whether a particular house or group of houses unreasonably interferes with the public's ability to exercise its public trust rights.*

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## I. Introduction

North Carolina's ocean beaches and waters define and support the state's coastal economy.<sup>2</sup> Hundreds of thousands of tourists flock to the coast every year spreading across the dry sand beaches and venturing into the near-shore waters.<sup>3</sup> To meet the demand of vacationers, oceanfront and non-oceanfront hotels, motels, houses, and cottages provide accommodations. Many older, smaller cottages are, or have been, knocked down and replaced by large "oceanfront homes" with eight or more bedrooms.<sup>4</sup> The importance of public beaches to the economies of beach towns sometimes comes into conflict with the rights of oceanfront property owners, and parties turn to the court system to resolve these challenging legal and public policy issues.

The conflicting viewpoints come from general assumptions made by the public that dry sand beaches are a form of public park, upon which they can put up their volleyball nets and beach umbrellas, spread out their blankets, and eat their picnic lunches. For them, the beaches are "public."<sup>5</sup> Some owners and renters of oceanfront homes, on the other hand, may hold different assumptions about the use of dry sand beaches, perhaps because some of these people come from states with a different legal tradition—a tradition in which the dry sand beaches are viewed as private, areas from which the public may be excluded.<sup>6</sup>

Unfortunately, North Carolina law does not provide easy answers to these questions. For much of North Carolina's history, the relative rights of the public and oceanfront property owners to use the dry sand beaches have been loosely defined.<sup>7</sup> This was due in part to the slow pace of development of much of the state's oceanfront shoreline and, in some cases, limited access to the more remote parts of the Outer Banks.<sup>8</sup> Consequently, there were fewer opportunities for conflict between oceanfront property owners and the general public. All that changed in the latter half of the 20<sup>th</sup> century. Over the past 60

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<sup>2</sup> See, e.g., 2000 N.C. Sess. Laws ch. 67, § 13.9(a)(3) ("North Carolina's beaches are vital to the State's tourism industry."); Jeff Hampton, *Hatteras Tourism Study Buys N.C. 12 Advocates*, PILOTONLINE.COM (July 14, 2013), <http://hamptonroads.com/2013/07/hatteras-tourism-study-buoys-nc-12-advocates> ("According to the \$25,000 study by the University of North Carolina, tourists on Hatteras Island spent \$204 million in 2011, creating more than 2,600 jobs with a payroll of \$41 million. Property and sales taxes there contributed \$10.3 million to state coffers and \$9.4 million to local revenue. Property values total \$2.1 billion."); Rob Morris, *\$12.3 Million in Sandy Aid to Help Area Parks*, THE OUTER BANKS VOICE (May 7, 2013), <http://outerbanksvoice.com/2013/05/07/12-3-million-in-sandy-aid-to-help-parks-and-refuges/> (reporting U.S. Senator Kay Hagan (D-NC) as saying "[o]ur parks, refuges, and beaches are critical to North Carolina's coastal economy" and that "thousands of residents and visitors ... visit [coastal North Carolina] each year and fuel [the state's] tourism economy").

<sup>3</sup> See N.C. DEP'T OF ENVTL. AND NATURAL RES., NORTH CAROLINA BEACH AND INLET MANAGEMENT PLAN: FINAL REPORT at XII-2 to XII-3 (April 2011), available at <http://dcm2.enr.state.nc.us/BIMP/BIMP%20Section%20XII%20-%20Funding%20Prioritization%20Formatted.pdf>.

<sup>4</sup> See KAREN BACHMAN, NORTH CAROLINA'S OUTER BANKS 359 (2009).

<sup>5</sup> See Joseph J. Kalo, *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, 1878 (2000) [hereinafter Kalo, *Changing Face*].

<sup>6</sup> See *id.* at 1876–77.

<sup>7</sup> See Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. REV. 1427, 1429 n.3 (2005) [hereinafter Kalo, *Oceanfront Property*].

<sup>8</sup> See *id.* at 1429–31; Kalo, *Changing Face*, *supra* note 5, at 1874–76.

years, the barrier islands experienced a marked increase in development, better roads, and expanded public access to beaches.<sup>9</sup> This growing public presence on the beach has led to more conflicts between the beach-going public and adjacent oceanfront property owners.

These conflicts have led to litigation that may provide some answers as to the degree, if any, dry sand beaches are public. One case, *Nies v. Town of Emerald Isle*,<sup>10</sup> presents the issue of whether the state or a local municipality can limit the activities of oceanfront property owners in their use of the dry sand beach if they hold title to that portion of the beach.<sup>11</sup> The other case, *Town of Nags Head v. Cherry*,<sup>12</sup> raises the related issue of whether an oceanfront property owner has to remove any structure that ends up on the dry sand beach as a result of natural shoreline erosion.<sup>13</sup> These two cases raise four unresolved questions. *Nies* raises the first two questions outlined below, while *Cherry* implicates the third and fourth questions.

- (1) Does the common law, as interpreted by North Carolina courts, in fact make all natural dry sand beach areas open to public use?
- (2) If yes, as an exercise of the power to regulate activities on dry sand beaches to protect the public's rights, to what extent may the appropriate governmental entity limit oceanfront property owners' use of the dry sand beach?
- (3) May the appropriate governmental entity force an oceanfront property owner to remove any structure that ends up on the dry sand beach due to the natural movement of the shoreline?
- (4) If through the natural movement of the shoreline, a house, structure, or part of a house or other structure ends up lying seaward of the mean high water mark (MHW),<sup>14</sup> under what circumstances may either the federal government or the state require the owner of the house or other structure to remove it, or remove it and assess the costs to the owner? This question implicates both federal and state law.

The answers the courts give to these questions will determine the future of North Carolina's ocean beaches. Part II of this Article will discuss the unsettled legal issue of whether the state's common law recognizes a customary right of use of the dry sand beaches and then address the issue of to what extent a governmental entity may limit an oceanfront property owner's use of the dry sand beach. Part III will discuss the right of state government or federal government to force an oceanfront property owner to remove a structure that ends up on the dry sand beach or in navigable waters or, in the

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<sup>9</sup> See Kalo, *Oceanfront Property*, *supra* note 7, at 1430 n.6.

<sup>10</sup> *Nies v. Town of Emerald Isle*, North Carolina, No. 11 CVS 1569 (N.C. Superior Ct. Dec. 9, 2011).

<sup>11</sup> See Complaint at 14–26, *Nies v. Town of Emerald Isle*, North Carolina, No. 11 CVS 1569 (N.C. Superior Ct. Dec. 9, 2011) [hereinafter *Nies Complaint*].

<sup>12</sup> 723 S.E.2d 156 (N.C. App. 2012), *appeal dismissed*, 732 S.E.2d 580 (N.C. 2012), *discretionary review denied*, 733 S.E.2d 85 (N.C. 2012).

<sup>13</sup> *Id.* at 157.

<sup>14</sup> MHW is sometimes referred to as the "mean high water line" (MHW line) or, in tidal areas, as the "mean high tide line" (MHTL). While the term is a somewhat nebulous one, it may be defined, at least in North Carolina, as "an average of the heights of tidal waters over some period of time" rather than a more rigid "line, such as the vegetation line, determined by the height of the highest tides." Kalo, *Changing Face*, *supra* note 5, at 1879–83.

alternative, whether the appropriate governmental entity may remove the structure and then assess removal costs to the owner. Part IV calls for the North Carolina courts to provide guidance on questions that involve state common law.

## II. Does the Public have a Customary Right to Use Dry Sand Beaches in North Carolina?

In discussing the first two questions, it is important to draw a distinction between North Carolina's public trust doctrine and the public's common law customary right to use the state's dry sand beaches. Both are common law doctrines, but the geographic scope of each differs. Under North Carolina's common law public trust doctrine, navigable-in-fact waters and submerged lands lying seaward of the MHWL are public trust waters<sup>15</sup> and State-owned public trust submerged lands.<sup>16</sup> There is no disagreement as to that. The disagreement and uncertainty are about whether the public has a common law customary right to use an area above the MHWL, that area being the dry sand beach. The dry sand beaches are generally defined as the area lying between the MHWL and the first line of protective dunes or vegetation.<sup>17</sup> Furthermore, the disagreement is limited to the public's right to use *natural* dry sand beaches. If the dry sand beach is nourished through a publically funded beach nourishment project then, according to subsection 146-6(f) of the North Carolina General Statutes, the dry sand beach is State-owned public trust lands.<sup>18</sup> Those dry sand beaches are simply State-owned submerged lands that have been raised above the MHWL.

On the other hand, if the dry sand beach is natural and unnourished, then fee title to the dry sand beach will generally be part and parcel of the title of the oceanfront property owner.<sup>19</sup> As a general rule, the oceanward title of the property owner extends to the MHWL. This doctrine is codified in subsection 77-20(a) of the North Carolina General Statutes, which provides that the "seaward boundary of all property within the State of North Carolina ... which adjoins the ocean, is the mean high water mark."<sup>20</sup> Therefore, the legal uncertainty and disagreement is limited to whether the title of the owner of a natural dry sand beach is subject to a common law customary public right of use. The answer to the question may lie in the court's response to the *Nies* litigation.

### A. *Nies v. Emerald Isle—The Essential Facts*

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<sup>15</sup> Although the State doesn't hold title to these waters, CRC rules state these waters are "public trust waters."

<sup>16</sup> N.C. GEN. STAT. § 77-20(a) ("The 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."); Kalo, *Changing Face*, *supra* note 5, at 1879.

<sup>17</sup> N.C. GEN. STAT. § 77-20(e) ("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.").

<sup>18</sup> *See id.* § 146-6(f) ("[T]he title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the State. Title to such lands raised through projects that received no public funding vests in the adjacent littoral proprietor. All such raised lands shall 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 part of the common heritage of the people of this State.").

<sup>19</sup> Kalo, *Changing Face*, *supra* note 5, at 1896.

<sup>20</sup> N.C. GEN. STAT. § 77-20(a).

In *Nies*, four plaintiffs filed an inverse condemnation lawsuit against the Town of Emerald Isle, asserting that recent amendments to the town code constitute a taking of their private property rights.<sup>21</sup> The origins of *Nies* can be traced back to Emerald Isle's 2005 beach nourishment project.<sup>22</sup> As is customary with such projects, the town sought easements from all oceanfront property owners.<sup>23</sup> Two of the plaintiffs signed the Perpetual Easement agreement prepared by the Town, while the other two plaintiffs did not.<sup>24</sup> Ultimately, the town sued the two plaintiffs who did not sign to condemn the necessary easements, and a consent order was entered.<sup>25</sup> According to the *Nies* complaint, plaintiffs argue that the 2005 beach nourishment project did not result in the deposit of sand onto their properties, but instead "seaward of the mean high water mark and only on the public trust portion of the beach below mean high water."<sup>26</sup>

### B. Emerald Isle Beach Equipment Ordinance

After the beach nourishment project was completed, the town amended its code in 2010 to include a section entitled "Unattended Beach Equipment Prohibited."<sup>27</sup> Section 5-101 of the ordinance states:

All beach equipment must be removed from the beach strand by its owner or permitted user on a daily basis. All beach equipment unattended and remaining on the beach strand between 7 PM and 8 AM will be classified as abandoned property and will be removed and disposed of by the town.<sup>28</sup>

Oceanfront property owners can get "up to 2 special exemption stickers," which allow them to leave that number of equipment out overnight with the stickers affixed.<sup>29</sup> Section 5-102 of the ordinance provides 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*, so as to maintain an unimpeded vehicle

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<sup>21</sup> See *Nies Complaint*, *supra* note 11, at 14–26. The remaining claims are other takings claims. See *id.* at 26–30.

<sup>22</sup> See *id.* at 4.

<sup>23</sup> See *id.* at 6–7.

<sup>24</sup> See *id.* at 7–9.

<sup>25</sup> See *id.* at 9. The consent order easement was more limited than the one signed by the other plaintiffs. See *id.* at 11.

<sup>26</sup> See *id.* at 5.

<sup>27</sup> Emerald Isle, N.C., Ordinance of 1-12-10(1) (codified as amended at EMERALD ISLE, N.C., CODE OF ORDINANCES ch. 5, art. VIII (2012)).

<sup>28</sup> EMERALD ISLE, N.C., CODE OF ORDINANCES § 5-101 (emphasis added).

<sup>29</sup> The stickers will not be issued to guests of owners, although the owners may affix the stickers to equipment offered as part of a total rental package. See *Unattended Beach Equipment Ordinance: General Notes and Information*, TOWN OF EMERALD ISLE (2010), available at <http://www.emeraldisle-nc.org/pdfs/BeachEquipmentFAQ.pdf>. Therefore, for example, family members of the owners, who are there with the owner's permission, would not be entitled to obtain stickers.

travel lane for emergency services personnel and other Town personnel providing essential services on the beach strand.<sup>30</sup>

Among a number of claims, the *Nies* plaintiffs are challenging both of these prohibitions. The case remains in its early procedural stages; the town recently attempted to remove the case to federal court, but that court refused to accept the case and remanded it to the state court where the complaint had been filed originally.<sup>31</sup>

The enforceability of these prohibitions against oceanfront property owners and their guests in the first instance depends upon whether the easement rights acquired by the town are broad enough to encompass such prohibitions. If the court decides that the easements allow such prohibitions, then there is no need for the court to decide more fundamental questions about the public's common law customary right to use dry sand beaches.

However, the plaintiffs' complaint does raise these more fundamental questions. In their complaint, the plaintiffs characterize the "public trust beach" as the "area below (i.e., seaward of) mean high water."<sup>32</sup> According to the plaintiffs, public use is limited to this area. This assertion is a direct challenge to the position of the State that all natural dry sand beaches, from the MHWL to the first line of vegetation or the frontal dunes, are open to public use.<sup>33</sup>

### C. *Natural Dry Sand Beaches and North Carolina's Public Trust Doctrine*

It is the position of the State of North Carolina that, as a matter of customary law, all natural dry sand beaches are open to public trust uses, and that any private title to that area is burdened by the right of the public to make such uses. Subsection 77-20(d) of the North Carolina General Statutes states:

The 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.<sup>34</sup>

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<sup>30</sup> EMERALD ISLE, N.C., CODE OF ORDINANCES § 5-102(a) (emphasis added). In November 2011, after the *Nies* lawsuit was filed, the ordinance was amended to limit its application to the period of "high beach visitation" based on its finding that "there was no practical need for a designated lane at other times of the year." See Emerald Isle, N.C., Ordinance of 11-15-11 (codified as amended at EMERALD ISLE, N.C., CODE OF ORDINANCES ch. 5, art. VIII (2012)). That amendment does not change the conclusions reached in this article.

<sup>31</sup> See *Nies v. Town of Emerald Isle*, No. 4:12-CV-10-F, slip op. at 12 (E.D.N.C. Mar. 26, 2013). The federal district court found that the Nieses had not exhausted their state condemnation remedies and that their federal claims were unripe for purposes of federal jurisdiction, and even went so far as to grant the Nieses' motion for attorney's fees after concluding that "the [Town] lacked an objectively reasonable basis for seeking removal." See *id.* at 5, 8-9, 11.

<sup>32</sup> See *Nies Complaint*, *supra* note 11, at 7.

<sup>33</sup> See notes 34-35 and accompanying text.

<sup>34</sup> N.C. GEN. STAT. § 77-20(d); 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.").

Left undefined and uncertain in subsection 77-20(d) is what area is encompassed by the term “ocean beaches.” Subsection 77-20(e) offers some clarification, stating that “[t]he landward extent of the ocean beaches is established by the common law and interpreted and applied by the courts of the State.”<sup>35</sup> That subsection then continues, “[n]atural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable vegetation; the toe of the frontal dune; and the storm trash line.” The area described by subsection (e) is what the public customarily calls the “dry sand beach.” Thus, the subsection is a clear statement that the General Assembly believes the public has a common law customary right of use of the dry sand beaches. In addition, newly enacted legislation re-affirms the legislature’s assertion of a customary right.<sup>36</sup> Two other state-level entities have also asserted the customary right—the North Carolina Attorney General and the Coastal Resources Commission (CRC). The North Carolina Attorney General’s Office asserts the customary right in a 1996 advisory opinion,<sup>37</sup> while the CRC asserts the customary right in its shorefront access policies.<sup>38</sup> However, the State’s position remains untested in the courts.

Whether the courts ultimately accept the existence of a common law right depends on their answers to three basic questions:

- First, does North Carolina recognize the general common law doctrine of custom? Some states such as Florida,<sup>39</sup> Oregon,<sup>40</sup> and Hawaii<sup>41</sup> recognize this doctrine, but most states do not.<sup>42</sup> North Carolina’s body of law contains only two cases discussing the doctrine, and neither is directly on point. An 1857 Supreme Court decision suggests that the doctrine is not part of North Carolina law<sup>43</sup> and an 1870 case suggests that it may be.<sup>44</sup>
- Second, if the doctrine of custom is part of the state’s common law, what are the criteria for determining whether a customary right exists? The leading case is *State ex rel Thornton v. Hay*,<sup>45</sup> a 1969 Oregon decision. In *Thornton*, the Oregon Supreme Court set forth the

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<sup>35</sup> *Id.* § 77-20(e).

<sup>36</sup> *See id.* § 160A-203 (“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...”).

<sup>37</sup> 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>.

<sup>38</sup> *See* 15A N.C. ADMIN. CODE 07M.0301.

<sup>39</sup> *See City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974) (in which the Florida Supreme Court recognized the doctrine of custom as a means by which the public can establish rights to use the dry sand beaches of Florida for recreational purposes).

<sup>40</sup> *See State ex rel. Thornton v. Hay*, 462 P.2d 691, 673 (Or. 1969) (in which the Oregon Supreme Court recognized a customary right of the public to use dry sand beaches in the state).

<sup>41</sup> *In re Application of Ashford*, 440 P.2d 76 (Haw. 1968) (in which the Hawaii Supreme Court recognized that Hawaii’s land laws are based on ancient tradition, custom, practice, and usage).

<sup>42</sup> *See generally* JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND*, § 6:3 (2013) (discussing easements derived from the public trust doctrine and collecting cases).

<sup>43</sup> *See Winder v. Blake*, 49 N.C. 332, 336 (1857) (implying that the doctrine of custom cannot affect common law rights).

<sup>44</sup> *See Bost v. Mingues*, 64 N.C. 44, 46–47 (1870) (recognizing custom of the country to allow livestock to run at large).

<sup>45</sup> 462 P.2d 671 (Or. 1969).

essential elements of a claim of customary use: (1) Long and general usage; (2) Without interruption; (3) Peaceful and free of dispute; (4) Reasonable; (5) Certain as to its scope and character; (6) Without objection by landowners; and (7) Not contrary to other customs or laws of the state.<sup>46</sup> One may assume that, if the North Carolina courts recognize the common law doctrine of custom, they would apply the same criteria.

- Third, does the evidence of public use of North Carolina's dry sand beaches establish the requisite "long and general usage"? In Oregon, the "general usage" of the state's dry sand beaches was traced back to use by Native Americans prior to the arrival of European settlers.<sup>47</sup> Historical evidence does exist regarding the use of North Carolina beaches to support a claim of a long-term, varied use by various segments of the public.<sup>48</sup>

If the North Carolina courts affirm the existence of the public's customary right of use, a follow-up question arises—to what extent is the oceanfront property owner's use of the dry sand beach limited by the public's right of use? The best analogy lies in the general law of easements. Under accepted easement principles, a servient landowner may make any use of land burdened by an easement that does not unreasonably interfere with the dominant estate's use.<sup>49</sup> Assuming the public has a common law customary right to use the dry sand beach, one must remember the public's use is not exclusive. It is a right shared with the oceanfront property owner who holds title to the dry sand beach.

In *Nies*, the town may have authority to prohibit people who do not have the oceanfront property owner's permission from leaving beach equipment overnight,<sup>50</sup> but not necessarily to restrict what the oceanfront property owner does on her property. If the town could not restrict the amount of recreational equipment an oceanfront property owner leaves in her backyard overnight, it may not be able to restrict the *number of pieces* of beach equipment an oceanfront property owner leaves overnight in her oceanfront beach backyard *unless* the overnight presence of the beach equipment can be shown to *unreasonably interfere* with the public's right of use. In this instance and in the absence of such a showing, the restriction might be a "taking."<sup>51</sup>

Another example to illustrate this distinction might be a restriction on allowing dogs on the beach. Assuming the town has the authority to issue such a regulation,<sup>52</sup> it could place restrictions on the

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<sup>46</sup> *Id.* at 677 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*75-\*78).

<sup>47</sup> *Id.* at 673.

<sup>48</sup> See DAVID BROWER, LISA BUCKLEY & KATE ESCHELBACH, UNIV. OF N.C. AT CHAPEL HILL, DEP'T OF CITY & REG'L PLANNING, NORTH CAROLINA TRADITIONAL BEACH USE PILOT STUDY 1 (2005) (on file with authors).

<sup>49</sup> BRUCE & ELY, *supra* note 42, § 8:20, ("The owner of the servient estate *may utilize* the easement area *in any manner and for any purpose* that does not unreasonably interfere with the rights of the easement holder." (emphasis added)).

<sup>50</sup> Whether a municipality has such authority and, if so, the extent of that authority, are issues discussed *infra* in connection with the *Cherry* case.

<sup>51</sup> While this issue is important in *Nies*, establishing whether or not there is a taking is beyond the scope of this article. *But see* *Andrus v. Allard*, 444 U.S. 51 (1979). "[T]he denial of one traditional property right does not always amount to a taking. At least where one owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66.

<sup>52</sup> See e.g., KILL DEVIL HILLS, N.C., CODE OF ORDINANCES, § 94.06 (2006).



general public bringing their dogs to the beach but likely could not prohibit the oceanfront property owner or her guests from doing so on that portion of the public beach to which she holds title.

#### *D. Nourished Dry Sand Beaches and the Public Trust Doctrine*

If a strand of beach is the product of a publicly financed beach nourishment project, then the analysis may change. When a beach is nourished, title to the filled area seaward of the pre-project MHWL lies with the State as public trust lands.<sup>53</sup> Title to any area filled landward of the pre-project MHWL is, and remains, in the hands of the oceanfront property owner. Prior to the nourishment project, the entity responsible for the project would acquire an easement over that area from the adjacent oceanfront owner.

What rights an oceanfront property owner has to access and use the filled area seaward of the pre-project MHWL all may depend upon the exact language of the easement agreement signed by the property owner. For example, the easements for the 2010 Town of Topsail Beach nourishment project contain specific language stating that oceanfront property owners retain “all such rights and privileges that arise from the status of a littoral property owner, including but not limited to access to the [MHWL].”<sup>54</sup> If such language is in the agreement, then the oceanfront property owner should retain the same rights of use over the newly created dry sand beach as she had over the pre-project dry sand beach.<sup>55</sup> However, in the absence of such language, the rights of the oceanfront property owner may be no greater than that of the general public and subject to limitations such as those imposed by the Town of Emerald Isle Code.

#### *E. The Town’s Claim of an Easement*

In its town code chapter regulating beach activities, the Town of Emerald Isle also is, in essence, declaring that it has a 20-foot-wide easement across a portion of the dry sand beach.<sup>56</sup> Although the town’s motive may be laudable, in its effort to protect public trust use of its beach and promote the safety of beachgoers, the issue remains—is the town entitled to such an easement without compensating the oceanfront property owner?

##### 1. Natural Dry Sand Beaches

If the oceanfront property owner is being prohibited from placing any beach equipment in an area of a natural dry sand beach to which the oceanfront property owner holds legal title, that prohibition

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<sup>53</sup> N.C. GEN. STAT. § 146-6(f).

<sup>54</sup> Easement Agreement between Town of Topsail Beach and Ocean Front Property Owner ¶ 3 (Oct. 28, 2009) (on file with authors) [hereinafter “*Topsail Easement*”].

<sup>55</sup> What exactly those “littoral rights” are may be open to debate.

<sup>56</sup> See EMERALD ISLE, N.C., CODE OF ORDINANCES § 5-102 (2012).

may be unconstitutional.<sup>57</sup> There is a strong argument that, without paying just compensation to the oceanfront property owner, the town could not condemn or claim an easement for emergency or other purposes across the portion of the property owner's land fronting on the public road.<sup>58</sup> The oceanfront property owner holds the same fee title to the dry sand beach as she does to land fronting on the public road, the only difference being that it is a title encumbered by public trust use rights. Even if emergency and other essential services are part of the package of customary public use rights,<sup>59</sup> that does not entitle the town to claim the exclusive right to use any portion of the dry sand beach to which an oceanfront property owner holds title. The public right of use is a shared right. The oceanfront property owner continues to have the right to make any use of the area that does not unreasonably interfere with the public's right.<sup>60</sup> Coastal municipalities have historically provided emergency services to beach users without needing or making any claim to exclusive use of a strip of dry sand beach.<sup>61</sup> Municipal convenience is likely not a sufficient justification for stripping the oceanfront property owner of her right to use any area to which she holds title.

## 2. Nourished Dry Sand Beaches

If the adjacent beach was the subject of a beach nourishment project, however, the issue gets dicier. In that situation, again there will be easement agreements to consider. The agreement may limit the rights of the oceanfront property owner to use that part of her land subject to the easement. The extent to which such use is limited depends on the exact language of the easement agreement.

Two of the plaintiffs in *Nies* signed easement agreements prior to the town's 2005 beach nourishment project. Those easement agreements grant the town an "easement and right-of-way" to allow the town "to ... patrol, protect, [and] maintain ... the public beach."<sup>62</sup> The issue then is whether these words mean that the town can claim the right to use an unobstructed, 20-foot-wide strip of the oceanfront property owner's land so that police, emergency vehicles, trash pickup equipment, and other town workers can move up and down the beach strand. One argument against such an interpretation is that the agreement should be read in light of practices existing at the time it was

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<sup>57</sup> See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (in which the U.S. Supreme Court set forth a test to establish whether a permit condition would survive a Fifth Amendment takings challenge. To survive such a challenge, an essential nexus must exist between the permit condition and a legitimate state interest, and there also must be a rough proportionality between the permit condition and the impact of the development to the public).

<sup>58</sup> See *id.*

<sup>59</sup> Some evidence of the fact that such a "right" is not part of the public's rights to use the dry sand beach is that the first time the Town (or any N.C. town) asserted such a right was five years after the beach nourishment project was completed.

<sup>60</sup> See *supra* notes 49-52 and accompanying text.

<sup>61</sup> Email from Gregory Rudolph, Shore Protection Manager, Carteret Cnty., N.C., to Joseph J. Kalo (Aug. 13, 2013, 2:34 PM EST) (on file with authors).

<sup>62</sup> *Nies Complaint*, *supra* note 11, at 11-12. This wording is common in easement agreements and appears in some form in both the Topsail Island and Emerald Isle agreements. See *Topsail Easement*, *supra* note 54, ¶ 1; *Nies Complaint*, *supra* note 11, at 11-12. The difference between the Topsail Island easement agreement and the Emerald Isle one is the Topsail Island agreement contains language preserving the rights of littoral owners. See *Topsail Easement*, *supra* note 54, ¶ 3.

signed because it should be assumed, absent any clear language in the agreement itself, that was what the parties intended.<sup>63</sup> In addition, the practices followed immediately after the completion of the beach nourishment project would be further evidence of what rights the agreement was intended to convey to the town.<sup>64</sup>

At the time the easement agreement went into effect, four-wheel drive pick-up trucks moved along the dune line emptying trash containers in the early hours of the morning before beachgoers reached the beaches in Emerald Isle.<sup>65</sup> As the beaches became more populated later in the day, beach patrolling and other municipal activities required police, emergency personnel, and other municipal workers to move around oceanfront property owners' and beach-goers' equipment.<sup>66</sup> In fact, it was not until five years after the completion of the project that the town claimed a right to an unobstructed 20-foot-wide strip. All of this strongly suggests that the easement agreement was not intended to grant the town a right to an unobstructed use of a 20-foot-wide strip of ocean beach, title to which is held by an oceanfront property owner.

Furthermore, in the paragraph establishing and describing the easement being created, immediately following the language about patrolling, protecting, and maintaining, the agreement states that among the specific rights granted are:

The right to deposit sand together with the right of public use and access over such deposited sand; to accomplish any alterations of contours on said land; to construct berms and dunes; to nourish and renourish periodically; to move, store and remove equipment and supplies; to erect and remove temporary structures, and to perform any other work necessary and incident to the construction, periodic renourishment and maintenance of the [beach nourishment project]; to plant vegetation on said dunes and berms; to erect silt screens and sand fences; to facilitate preservation of the dunes and vegetation through the limitation of access to dune areas; to trim, cut, fill and remove from said land all grass, underbrush, debris, obstructions and any other vegetation, structures, [or] obstacles within the limits of the easement.<sup>67</sup>

Although removal of obstructions is mentioned, it is in the context of what is necessary during the initial beach nourishment project and future maintenance.<sup>68</sup> There is nothing that suggests a broader perpetual exclusive unobstructed easement is being granted.

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<sup>63</sup> See Restatement (Third) of Prop.: Servitudes § 4.1(1) (2000) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the *circumstances surrounding creation* of the servitude, and to carry out the purpose for which it was created." (emphasis added)); see also *Town of Newfane v. Walker*, 637 A.2d 1074, 1077 (Vt. 1993) (holding that the grantor's intent may be inferred from use of the property prior to and at the time the easement was granted).

<sup>64</sup> See *Swaim v. Simpson*, 463 S.E.2d 785, 786 (N.C. Ct. App. 1995) ("[T]he scope [of an easement] may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant." (quoting 1 PATRICK K. HETRICK & JAMES B. MCLAUGHLIN, JR., *WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA* § 15-21 (4th ed. 1994))).

<sup>65</sup> Email from Frank Rush, Town Manager, Town of Emerald Isle, N.C., to Lisa Schiavinato (Oct. 30, 2013, 2:07 PM EST) (on file with authors).

<sup>66</sup> See *id.*

<sup>67</sup> *Nies Complaint*, *supra* note 11, at 12.

<sup>68</sup> See *id.*

### F. *An Argument for Customary Use and its Limits*

To answer the first question posed at the beginning of this article, North Carolina courts likely would recognize a customary right to use dry sand beaches. While the lack of clear case law complicates the issue, there is strong policy support for recognizing this right, e.g., subsection 77-20(d) of the General Statutes, a 1996 Attorney General Advisory Opinion, and CRC rules on shorefront access.<sup>69</sup> In addition to long-standing state policy, customary use is a reality in North Carolina. The question is whether it should be a legally recognized right and under what doctrine.

In the past, some state officials in North Carolina, such as the Attorney General and the CRC, viewed the public trust doctrine as the legal doctrine that supports the public's customary right to the use the dry sand beaches.<sup>70</sup> This view raises the legal question of whether North Carolina's common law public trust doctrine does include a public right of use. However, the only occasion in which a North Carolina court mentions this issue is in *Concerned Citizens of Brunswick County v. Holden Beach*. In this case, the court, without discussing the issue, rejected a lower court's dicta to the effect that no such public right exists.<sup>71</sup> The question of whether the public has a public trust right or a customary right to use the natural dry sand beach was not actually raised in the litigation. Rather, the issue in *Concerned Citizens* was whether the public had acquired a public prescriptive easement to gain access to the beach.<sup>72</sup>

While this case is likewise not directly on-point, the North Carolina Supreme Court's decision in *Gwathmey v. State of North Carolina* undercuts the view that the public trust doctrine supports a customary right of use. In *Gwathmey*, a case involving title to submerged lands, the court appears to limit the public trust doctrine to navigable-in-fact waters and the submerged lands beneath those waters.<sup>73</sup> Therefore, the common law doctrine of custom now appears to be the more appropriate doctrine upon which to rely in support of the public right to use dry sand beaches. A remnant of the earlier thinking by entities such as the CRC and local coastal governments is the continued use of the phrase "public trust area" in CRC rules and local government ordinances to describe the dry sand beach as the area to which the public has a customary right of use.

As explained earlier in this Article, there is nothing in North Carolina common law or legislation that precludes the North Carolina Supreme Court from concluding that a common law customary right

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<sup>69</sup> See *supra* notes 34-38.

<sup>70</sup> See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (1984) (the public must be given both access to and use of privately owned dry sand areas as reasonably necessary).

<sup>71</sup> *Concerned Citizens of Brunswick Cnty. Taxpayers Ass'n v. State ex rel. Rhodes*, 404 S.E.2d 677, 688 (N.C. 1991) ("We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. As the statement was not necessary to the Court of Appeals opinion, nor is it clear that in its unqualified form the statement reflects the law of this state, we expressly disavow this comment." (internal citation omitted), reversing *Concerned Citizens of Brunswick Cnty. v. Holden Beach Enters.*, 381 S.E.2d 810 (N.C. Ct. App. 1989).

<sup>72</sup> *Id.* at 679.

<sup>73</sup> See *Gwathmey v. State of North Carolina*, 342 N.C. 287 (1995) (in which the N.C. Supreme Court ruled that the public trust doctrine is a common law right rather than a constitutional right, and that it applies to all navigable-in-fact waters). Under this precedent, it is an open question whether state common law supports an expanded version of the public trust doctrine to include dry sand beaches.

exists as a matter of both historical practice and sound public policy, as well as a reflection of the reasonable expectations of North Carolina oceanfront property owners. Key to establishing a customary right will be evidence that public use of the dry sand beaches meets the elements of custom—which may involve proving that customary use of the dry sand beaches has existed since colonial times.<sup>74</sup> Evidence does exist to allow the State to prove these elements.<sup>75</sup>

If state common law recognizes the doctrine of custom, the next question would be whether the courts would apply it to all natural dry sand beaches or take the Florida route and require establishment of custom on a local basis. North Carolina common law does not recognize local custom<sup>76</sup>; therefore, if the common law recognizes customary right of use, then the courts likely would apply the doctrine to all dry sand beaches.

As to the second question, a governmental entity's right in North Carolina to limit oceanfront property owners' use of the dry sand beach likely will be limited to the takings standards set forth by the U.S. Supreme Court. These standards will apply even if North Carolina courts recognize the doctrine of custom. As previously stated, an oceanfront property owner enjoys use of the dry sand beach as part of her oceanfront property title. Even if the state courts recognize the doctrine of custom, the right to use natural dry sand beaches remains a shared right. While the Town of Emerald Isle may place restrictions on the public's use of the beach area, it's unlikely that it has a right to its claimed easement without paying just compensation. Regardless of how a court would answer the takings question, however, traditional easement law principles still apply. The owner of burdened land is entitled to make any use of the burdened area that does not interfere with the use rights of the easement holder. In order for the town to prevail, it would need to show that the public right includes a dedication of a strip of privately owned beach as an avenue of passage for town garbage trucks, emergency vehicles, and the like.<sup>77</sup>

### G. A Cautionary Note

Although beach nourishment projects benefit the oceanfront property owner as much as they do the public, easement agreements, like any other legal document, need to be carefully evaluated by the property owner before signing. Oceanfront property owners should read the proposed easement agreement carefully and consult with a knowledgeable coastal law attorney to make sure that the oceanfront property owners' future rights to use all the dry sand beach and have access to the ocean are adequately protected.

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<sup>74</sup> See Kalo, *Changing Face*, *supra* note 5, at 1894.

<sup>75</sup> See *supra* note 49.

<sup>76</sup> See *supra* note 43. *But see* Alice Gibbon Carmichael, Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. REV. 159, 174-75 (asserting that it is unlikely that N.C. courts would accept the doctrine of custom, since it is a minority rule).

<sup>77</sup> However, in 2013, the General Assembly passed a law authorizing cities to enforce ordinances in public trust areas. It remains to be seen to what extent this strengthens the town's legal position. See N.C. GEN. STAT. § 160A-203 ("In addition, a city may, in the interest of promoting the health, safety, and welfare of the public, regulate, restrict, or prohibit the placement, maintenance, location, or use of equipment, personal property, or debris upon the State's ocean beaches").

As the wording of beach nourishment easements becomes more complex, oceanfront property owners may have a legitimate concern that by signing an easement agreement they may be inadvertently giving up their rights to use any part of the newly created beach. To ensure that such agreements are not read in a manner as to take away such rights, it may be wise to add language to the agreement such as “any ambiguity in this agreement should be construed in favor of the preservation of the Grantor’s littoral rights as they existed prior to the signing of this agreement.” Or, perhaps even more broadly: “any ambiguity in this agreement should be construed in favor of the preservation of the Grantor’s rights as they existed prior to the signing of this agreement.”

### III. Post-Storm: Houses on the Beach or in the Water—What can be Done?

The discussion in this section of the Article focuses on: (1) whether a governmental entity may force an oceanfront property owner to remove any structure that ends up on the dry sand beach due to the natural movement of the shoreline; and (2) under what circumstances, if any, a governmental entity may require such removal or remove the structure itself and then assess costs to the owner. After a major storm hits a state’s coast, an oceanfront house may end up sitting in ocean waters, the surf zone, or on the dry sand beach. A question that frequently arises is whether the homeowner is legally and financially responsible for the removal of her structure, or parts thereof, from either ocean waters or the dry sand beach. This is more than just an academic question for the owner of the impacted house and for relevant government entities. For the homeowner, the extent of coverage under her homeowner’s insurance policy is critical after a storm. After a storm damages a house, the homeowner must contact her insurance company in order to file a claim under her policy, and this involves fully documenting the damage to the home and the value of its contents. Filing a homeowner’s insurance claim is already a complex process. However, the issue becomes more complicated with respect to the question of whether insurance would cover the cost to remove a house or parts thereof. Generally, the answer to any insurance question depends on the language of the policy and the particular facts in a specific claim. The insurance the homeowner carries may cover damage or destruction of the house, but not necessarily cover the cost of removing the house or relocating it to a safer upland location.<sup>78</sup> Therefore, if the homeowner must remove or relocate her house, it is likely she will have to pay the

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<sup>78</sup> This is generally the case for policies underwritten by the North Carolina Insurance Underwriters Association (NCIUA) for beachfront properties. See Email from Bob Eades, Director of Claims Operations, N.C. Joint Underwriting Ass’n/N.C. Ins. Underwriting Ass’n, to Jack Lyman, Research Assistant, N.C. Coastal Res. Law, Planning and Pol’y Ctr. (Aug. 29, 2013, 11:54 EST). NCIUA policies do not cover damage from flooding or erosion. See *id.* As such, oceanfront property owners also typically seek flood insurance policies from the National Flood Insurance Program, which may offer some coverage, again, depending on the language of the policy and the specific facts surrounding the claim. See *id.*; FED. EMERGENCY MGMT. AGENCY, NAT’L FLOOD INS. PROGRAM, DWELLING FORM STANDARD FLOOD INSURANCE POLICY (2010), available at <http://www.fema.gov/media-library-data/20130726-1730-25045-6388/f122dwellingform0809.pdf>. If an NFIP plan would cover removal due to flood damage, beachfront homeowners might have the incentive to simply leave the house and hope the next storm would severely damage or destroy it and the loss would be covered. Finally, aside from insurance, an oceanfront homeowner might also hope that a future beach nourishment project might save the structure and her investment.

cost. On the other hand, if the homeowner does not or cannot pay, then the cost must be paid by the federal, state, or local government.

A. *Federal Authority to Remove Houses Lying in Ocean Water*

If a house is actually lying in ocean waters, seaward of the MHW, then it is lying in “navigable waters of the United States.”<sup>79</sup> Because “navigable waters of the United States” are subject to the federal navigation servitude,<sup>80</sup> and obstructions to navigation in these waters are prohibited by the Rivers and Harbors Act of 1899 (RHA),<sup>81</sup> the federal government could order the owners of the houses to remove them. If they fail to do so, the federal government could remove them and then recover the costs of removal.

Normally, when the federal government damages or destroys private property, the Fifth Amendment to the U.S. Constitution requires that the federal government pay just compensation to the affected private property owner.<sup>82</sup> However, under the federal navigation servitude doctrine no compensation is required when the federal government destroys or damages any state-permitted structures, such as piers, or unauthorized structures (e.g., a house in the water), when the government is acting to aid navigation.<sup>83</sup> Therefore, the federal navigation servitude is a legal doctrine that insulates the U.S. from liability when it damages or destroys any structures that are hazards or obstructions to navigation. No financial responsibility for the removal of such structures is imposed on the owners, however.

Congress does have the power to regulate activities taking place in or affecting navigable waters of the U.S. One of the oldest statutes through which Congress has exercised this power is the RHA.<sup>84</sup> Section 10 of the RHA prohibits the creation of any obstruction to the navigable capacity of the waters of the U.S.<sup>85</sup> Section 12 authorizes the issuance of an injunction ordering the removal of any structures

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<sup>79</sup> See, e.g., *Leslie Salt Co v. Froehle*, 578 F.2d 742, 753 (9th Cir. 1978) (holding that, in tidal areas, “navigable waters of the United States” under the federal Rivers and Harbors Act extend to all places covered by the ebb and flow of the tide to the mean high water mark in its unobstructed, natural state); 33 C.F.R. § 329.4 (“Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide.”); *id.* § 329.12(a) (“Regulatory jurisdiction [of the U.S. Army Corps of Engineers] in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water.”).

<sup>80</sup> See, e.g., *United States v. Rands*, 389 U.S. 121, 123 (1967) (“This power to regulate navigation [under the Commerce Clause] confers upon the United States a ‘dominant servitude,’ which extends to the entire stream and the stream bed below ordinary high-water mark.” (internal citation omitted)); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 627–28 (1978) (“This navigational servitude—sometimes referred to as a dominant servitude or a superior navigation easement—is the privilege to appropriate without compensation which attaches to the exercise of the power of the government to control and regulate navigable waters in the interest of commerce.” (internal citations and quotation marks omitted)).

<sup>81</sup> See 33 U.S.C. § 403.

<sup>82</sup> See U.S. CONST. amend. V.

<sup>83</sup> See generally WATERS AND WATER RIGHTS § 35.02(c) (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2004).

<sup>84</sup> 33 U.S.C. § 401 *et. seq.*

<sup>85</sup> *Id.* § 403.

erected in violation of section 10.<sup>86</sup> Although on their face neither sections 10 nor 12 appear applicable in this instance, *United States v. Milner*<sup>87</sup> establishes they are, at least in the Ninth Circuit.

The specific language of the first part of section 10 is directed at the “creation” or “construction” of the obstructions to navigation.<sup>88</sup> When hurricanes and other severe storms result in movement of the ocean shoreline, and homes previously sited on dry land are left sitting in ocean waters, it can be argued that the owner of the houses did not create, construct, or “erect” a structure in ocean waters. In fact, more likely the owner has tried, with sandbags, seawalls, or other protective structures, to protect the house from the ravages of the sea.<sup>89</sup> Section 12 is directed at “structures or parts of structures erected in violation of” section 10.<sup>90</sup> Prior to *Milner*, sections 10 and 12 appeared to be limited to situations in which the defendant had directly or indirectly intended to place the offending structures in navigable waters.<sup>91</sup> However, *Milner* holds that no such intent is necessary.

The particular facts of *Milner* revolve around the Equal Footing Doctrine, Native American treaty rights, coastal Native American uplands that have passed into private hands, the U.S. as trustee of submerged lands for the Native American tribe, and a migrating shoreline. Stripped of some of the non-essential facts, *Milner* can be recast as a situation in which the upland owners constructed seawalls and other shoreline erosion defense structures landward of the MHWL but, due to the natural migration of the shoreline, ocean waters were lapping at the base of the structures when the government brought suit.<sup>92</sup>

The first issue the *Milner* court addressed is the location of the MHWL when a shoreline structure prevents any natural movement further shoreward. According to the court,

Both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion.<sup>93</sup>

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<sup>86</sup> *Id.* § 406.

<sup>87</sup> 583 F.3d 1174 (9th Cir. 2009).

<sup>88</sup> 33 U.S.C. § 403.

<sup>89</sup> See, e.g., Jackson Mabry, *Sandbags: Temporary or Permanent? The Riggings Case Study*, LEGAL TIDES, N.C. COASTAL RESOURCES LAW, PLANNING AND POLICY CENTER (Sept. 2009), [http://www.nccoastallaw.org/legaltides/lt\\_summer\\_09.pdf](http://www.nccoastallaw.org/legaltides/lt_summer_09.pdf) (describing practice of beachfront property owners in North Carolina using sandbags to protect beachfront structures).

<sup>90</sup> 33 U.S.C. § 406.

<sup>91</sup> See, e.g., *U.S. v. Bigan*, 274 F.2d 729 (3d Cir. 1960) (holding that, where defendant mining company's deposit of removed earth was washed into the river by a storm, thus creating a bar projecting roughly fifty feet from the shore line, defendant's conduct did not amount to a “building or erecting of a structure” under the RHA); *U.S. v. Oak Beach Inn Corp.*, 744 F. Supp. 439 (S.D.N.Y. 1990) (granting government's application for injunctive relief where defendant's moored ferry and barge obstructed navigation in violation of the RHA); *U.S. v. Seda Perez*, 825 F. Supp. 447 (D.P.R. 1993) (affirming Army Corps of Engineers' determination that defendants' floating houses constituted “permanently-moored structures and obstructions in the navigable waters” that violated the RHA).

<sup>92</sup> *U.S. v. Milner*, 583 F.3d 1174, 1181–82 (9th Cir. 2009).

<sup>93</sup> *Id.* at 1188.



The court then rejected the argument of the upland owners that “once the [MHWM] intersects the face of their defense structures, the boundary becomes fixed and remains so unless the tide line overtops the structures or recedes.”<sup>94</sup> To the contrary, the court held that “the [upland owners] do not have the right to permanently fix the property boundary absent consent from [the owner of the tidelands].”<sup>95</sup>

The court then turned to the RHA claims, addressing the issue of whether the upland owners’ failure to remove their shoreline defenses violated section 10.<sup>96</sup> The court held that it did. “Although § 10 does not explicitly mention the maintenance of structures in navigable waters, in the sense of keeping structures in place, we have interpreted the RHA as making unlawful the failure to remove structures prohibited by § 10, even if they were previously legal.”<sup>97</sup> Furthermore, it was not necessary for the federal government to prove that the structures interfered with navigation because “structures violating clauses two and three are presumed to be obstructions under the first clause.”<sup>98</sup>

Applying *Milner* to houses or other unpermitted structures lying seaward of the MHWM, even though the natural movement of the shoreline, and not any act of the owner, was responsible for a house or other unpermitted structure being seaward of the MHWM, once the owner is instructed to remove the house or other unpermitted structure but fails to do so, the owner is violating section 10, and the federal government may seek injunctive relief and other penalties.<sup>99</sup> As the *Milner* court observed: “Just as one who develops below the [MHWM] does so at his peril, those who build too close

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1190.

<sup>96</sup> *Id.* at 1191.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1192 (citation omitted).

<sup>99</sup> There are two other sections of the RHA that arguably might apply to houses left in ocean waters. Section 13, sometimes referred to as the “Refuse Act,” makes it illegal to deposit or cause to be deposited any refuse matter of any kind into navigable waters. 33 U.S.C. § 407. There is case authority to support the proposition that the government does not need to prove criminal intent to establish a violation of section 13. *See, e.g.,* U.S. v. White Fuel Corp., 498 F.2d 619, 622 (1st Cir. 1974); U.S. v. U.S. Steel Corp., 328 F. Supp. 354, 356 (N.D. Ind. 1970); U.S. v. Am. Cyanamid Co., 354 F. Supp. 1202, 1205 (S.D.N.Y. 1973). However, an “act of God” may serve as a defense to any violation of this section. *Cf.* 33 U.S.C. § 1321(f)(1)–(3) (providing a defense to liability for the discharge of oil or hazardous substances into waters of the United States “where an owner or operator [of a vessel, onshore, or offshore facility] can prove that a discharge was caused solely by ... an act of God”); 42 U.S.C. § 9607(b)(1) (exempting otherwise liable persons from CERCLA liability “who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by ... an act of God”). If a hurricane or other strong storm event causes severe shoreline erosion resulting in a house sitting in the water, then it was not an act or omission of the homeowner that caused the situation, but rather the consequence of an Act of God.

The only other marginally relevant section of the RHA is section 15, which states that:

It shall not be lawful to ... sink, or permit or cause to be sunk, vessels or other craft in navigable channels.... And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, it shall be the duty of the owner, lessee, or operator of such sunken craft to ... commence the immediate removal of the same and prosecute such removal diligently, and failure to do so shall be considered an abandonment of such craft....

33 U.S.C. § 409. Because section 15 is limited to “vessels or other craft,” it would not be applicable to houses that end up in ocean waters as the result of storm shoreline movements.

to the [MHWM] also run the risk that their structures eventually may become obstructions and be subject to the [prohibitions of the RHA].”<sup>100</sup>

Under the law of many states, the MHWM moves with the natural movement of the shoreline when that movement is due to erosion but not avulsion.<sup>101</sup> This distinction exists under the law of the State of Washington,<sup>102</sup> which was applied by the *Milner* court.<sup>103</sup> Thus in *Milner*, if the shoreline defense structures were landward of the MHWM prior to the avulsive event, then legally they would still be considered landward of the MHWM after the event, notwithstanding the shoreline movement. And, if that were the situation, there would be no liability under the RHA. Fortunately, that would not be an issue in North Carolina because under state law the MHWM moves with the natural movement of the shoreline, whether that movement was caused by erosion or avulsion.<sup>104</sup> Therefore, in North Carolina, a violation of section 10 exists whenever the movement of the shoreline leaves houses or structures stranded seaward of the existing MHWM.

## B. State Authority to Remove Houses Lying in Ocean Waters

### 1. State Common Law

If a house or other object is sitting in ocean waters, it is situated on state-owned submerged lands.<sup>105</sup> The natural assumption tends to be that the State has authority to force the homeowner to remove the house and, if the homeowner fails to do so, the State could remove it and recover the costs of removal from the owner.<sup>106</sup> However, both of these assumptions may be incorrect.

If severe shoreline storms cause erosion and move the MHWM landward to such an extent that an oceanfront house is left sitting in ocean waters, or severe storm winds leave the decks, walkways, roofs, or other parts of an oceanfront house floating in the ocean, the house or other objects are no longer

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<sup>100</sup> *Milner*, 583 F.3d at 1193 (footnote omitted) (internal quotation marks omitted).

<sup>101</sup> See, e.g., *Coastal Indus. Water Authority v. York*, 532 S.W.2d 949, 952 (Tex. 1976) (“The general rule is that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly added or taken to or from his fast bank or shore. Erosion is the process of wearing away the land. Accretion is the process of gradual enlargement of the fast land. A different rule is usually applied in case of the sudden removal or deposit of land, the rapid or perceptible change being termed avulsion. It is often held that title does not pass by avulsion.” (citations omitted)); see also *Milner*, 583 F.3d at 1182 n.5 (“Under the doctrine of avulsion, a sudden and abrupt change in the shoreline—an avulsive event—does not alter the boundary line.” (citations omitted)); BLACK’S LAW DICTIONARY 157 (9th ed. 2009) (defining avulsion as “[a] sudden removal of land caused by change in a river’s course or by flood,” and noting that “[l]and removed by avulsion remains the property of the original owner”).

<sup>102</sup> See *Parker v. Farrell*, 445 P.2d 620, 622 (Wash. 1968).

<sup>103</sup> *Milner*, 583 F.3d at 1182 n.5. The trial court held that the doctrine did not apply in this instance, a ruling the upland owners did not appeal. *Id.*

<sup>104</sup> See N.C. GEN. STAT. § 77-20(a).

<sup>105</sup> See, e.g., *Gwathmey v. State ex rel. Dep’t of Env’t, Health, & Natural Res.*, 464 S.E. 2d 674, 682 (N.C. 1995) (“[L]ands submerged by waters which are determined to be navigable in law are subject to the public trust doctrine.”).

<sup>106</sup> The general common law rule is that the oceanward legal boundary does not change when the shoreline changes due to avulsion. However, N.C. does not follow this common law rule. In N.C., the oceanward legal boundary moves with both ordinary erosion and changes through avulsion. See *State v. Johnson*, 278 N.C. 146 (1971). See also *Kalo*, *supra* note 9, at 1440-41.

real property. Once situated upon state-owned submerged lands or floating in state navigable waters, the house or other objects become an unauthorized structure.<sup>107</sup> In those circumstances, the owner of the house or debris may simply decide that the house or debris has no further value to her and abandon all claims of ownership.<sup>108</sup> When that happens, under traditional common law principles, the former owner no longer has any legal rights or legal responsibilities for the house or other object. Therefore, in the absence of a statute that imposes or creates a continuing liability, the abandoning owner cannot be forced to remove the house or objects from ocean waters and cannot be compelled to pay for such removal.

Although there are no North Carolina cases directly on point, there are cases in which courts in other jurisdictions have applied the traditional common law principles. In *Lisser v. Kelly*,<sup>109</sup> a 1972 Nevada case, the defendant's boathouse and pier were destroyed, floated away, and became lodged along the shore and pier owned by the plaintiff, a neighbor, as a result of a severe storm on Lake Tahoe.<sup>110</sup> Subsequent storms caused the defendant's boathouse to smash into the plaintiff's boathouse and pier, causing substantial damage for which the plaintiff sued.<sup>111</sup> It was clear that the cause of these events were extreme acts of nature (often referred to by courts as "acts of God").<sup>112</sup> However, the plaintiff argued that, after the first storm, the defendant had a duty to remove the boathouse and pier from the plaintiff's property before the force of new storms caused further damage to plaintiff's boathouse and pier.<sup>113</sup> The court rejected this contention.

The [common] law imposes no duty upon one to retrieve his property, which has been rendered debris and carried away by an act of God.... The destruction of the [defendant's] boathouse and pier and the lodging thereof upon the [plaintiff's] property was caused solely by an act of God. Where, as here, there is no negligence in the first instance, *the sufferer must get rid of the instrument of injury as he may*. The owner may *abandon* the debris, as did [the defendant], and the plaintiff then has his remedy in his own hands by removing it himself.<sup>114</sup>

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<sup>107</sup> See *Bond v. Wool*, 12 S.E. 281, 284 (N.C. 1890) (recognizing the right of littoral and riparian owners "to construct wharves, piers, or landings subject to such general rules and regulations as the legislature, in the exercise of its powers, may prescribe for the protection of public rights in rivers or navigable water"). Under North Carolina law, one needs an easement, license, or valid conveyance to construct or maintain a structure on state-owned submerged lands. See N.C. GEN. STAT. §§ 146-10 to -12.

<sup>108</sup> Although one cannot "abandon" real property, it is arguable that the stranded house is not a "fixture" and therefore real property. A "fixture" is personal property attached to the owner's real property. *Moore's Ferry Dev. Corp. v. City of Hickory*, 601 S.E.2d 900, 903 (N.C. Ct. App. 2004) (citing BLACK'S LAW DICTIONARY 669 (8th ed. 2004)). But if the house is not attached to land owned by its owner, it does not meet the definition of a "fixture." It is just "personal property," and personal property may be abandoned. See, e.g., *Kitchen v. Wachovia Bank & Trust Co., N.A.*, 260 S.E.2d 772, 774 (N.C. Ct. App. 1979) ("[P]ersonal property may be abandoned.").

<sup>109</sup> 502 P.2d 108 (Nev. 1972).

<sup>110</sup> *Id.* at 109.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 109-10.

<sup>113</sup> *Id.* at 110.

<sup>114</sup> *Id.* (emphasis added) (citations omitted).

Therefore, if the owner of the wayward house or other object expressly or implicitly gives up all attempts to recover the house or other objects, that is abandonment, and she no longer has a common law legal responsibility for the house or other objects. They have become “unowned property.”

On the other hand, if the owner continues to make a claim to it, then the owner and her house or other structure is trespassing upon the lands of another—in this case, submerged lands owned by the State. According to the Restatement (Second) of Torts, an action for trespass lies when a person “intentionally ... causes a thing [to enter the lands of another,] or fails to remove from the land a thing which he is under a duty to remove.”<sup>115</sup> As the *Milner* court observed:

Although the shore defense structures may have been legal as they were initially erected, this is not a defense against the trespass action.... [To be liable for trespass, i]t is enough that the [upland owners] caused the structures to be erected and that the structures subsequently rested on the tidelands.<sup>116</sup>

In addition, a wayward house or other structure may constitute a common law obstruction of navigation.<sup>117</sup> In both instances, the State may seek a court order directing the owner to remove the structure that is continuing to trespass on state lands or constitutes an obstruction of navigation.<sup>118</sup>

## 2. State Statutes

By legislation, a state obviously can change or modify the common law and could make owners of such houses or debris financially responsible for the removal of such things. To answer the question of whether North Carolina has done so requires careful examination of three statutes.

The first is section 104B-1, which states:

Whenever the house ... or any part thereof, or other property of a person ... shall be deposited on the land of another by any hurricane ... tidal wave, flood or other act of nature and is not removed from said land within 30 days after the deposit, the owner of such land may notify in writing the owner of the house ... or other property of such deposit and may require [the] owner to remove the property so deposited within 60 days after receipt of the notice. If the owner of the deposited property fails to remove it within 60 days after receipt of the notice, the owner of the land may remove the deposited property and destroy it or may use it as he sees fit without incurring liability to the owner of the deposited property, or may sell it and retain the proceeds for his own use; provided, the amount by which the proceeds of any such sale exceed the cost

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<sup>115</sup> RESTATEMENT (SECOND) OF TORTS § 158 (1965) (emphasis added).

<sup>116</sup> *Milner*, 583 F.3d at 1190–91 (citation omitted).

<sup>117</sup> See, e.g., *State v. Baum*, 38 S.E. 900 (N.C. 1901) (holding that defendant’s placing of posts in a navigable stream constituted an unlawful obstruction of navigation); *State v. Narrows Island Club*, 5 S.E. 411 (N.C. 1888) (holding that defendant’s placing of iron pipes in a navigable stream constituted an unlawful obstruction of navigation).

<sup>118</sup> See *Roanoke Rapids Power Co. v. Roanoke Navigation & Water Power Co.*, 68 S.E. 190, 200 (N.C. 1910) (instructing trial court to “issue an injunction against the defendant, restraining it from maintaining” a later addition to a dam that obstructed river flow beyond that which was allowed by the defendant’s original charter).

of removal and sale shall be paid to the owner of the deposited property or held for his account.<sup>119</sup>

Although the statute contains the language “may require [the] owner to remove the property so deposited within 60 days,” it is unlikely the General Assembly intended to impose an affirmative financial obligation on the owner. The statute should be read against the background of the pre-existing common law.<sup>120</sup> Under the common law, if abandoned property is left on someone else’s land, the owner of that land may remove, destroy, or claim it for himself.<sup>121</sup> However, the common law rules as to what constitutes “abandonment” can leave room for dispute as to whether, under the particular circumstances, a person intended to abandon the property or intended to reclaim it.<sup>122</sup> The uncertainty poses a legal dilemma for the owner of land upon which the other person’s property comes to rest after a storm. If it is abandoned, one can destroy it; but, if it is not, then the person who destroys the property may be liable for damages.

The probable purpose of section 104B-1 is to establish a set of clear rules to avoid any misunderstandings and eliminate the legal dilemma. The statute requires notice to the owner of the property and provides an opportunity to remove it before it is destroyed or taken by the owner of the land on which it has been “deposited.”<sup>123</sup> In essence, if the notice is given and the owner of the property does not remove it within 60 days after receiving the notice, it is deemed abandoned. The statute does not create a basis for imposing a financial removal obligation on the owner of the abandoned property. Therefore, the State, as owner of the submerged land upon which the house is situated after a storm, may destroy or remove it, but section 104B-1 would not enable the State to impose the costs of such action upon the prior owner of the abandoned property.

The fact that an abandoned house, roof, or deck also is an obstruction to navigation should not change the result. It is true that the general common law rule is that all unauthorized material obstructions to navigation are public nuisances.<sup>124</sup> However, a general principle of the law of public nuisance is that “one cannot be said to create or maintain a nuisance where the condition or state of affairs complained of is due solely to natural causes, and he has not by his or her own act contributed to bring about the alleged nuisance.”<sup>125</sup>

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<sup>119</sup> N.C. GEN. STAT. § 104B-1.

<sup>120</sup> See *Samantar v. Yusuf*, 130 S. Ct. 2278, 2289 n.13 (2010) (“The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law.”).

<sup>121</sup> See, e.g., Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 590 (1995) (“[Abandoned property] is property to which the original owner has relinquished all right, title, claim, and possession with the intention of terminating ownership but without vesting ownership in any other person and without any intention of reclaiming it in the future ... Courts consider such property to have returned to a “state of nature” and thus, as unowned property, subject to appropriation by the first person who reduces it to possession. Thus, ... the finder of abandoned property who appropriates its possession acquires absolute title to it, with no duties to the original owner.” (internal citations omitted)).

<sup>122</sup> See, e.g., *Columbus-America Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992) (discussing difficulties of showing intent to abandon “in the lost property at sea context”).

<sup>123</sup> N.C. GEN. STAT. § 104B-1.

<sup>124</sup> *Gaither v. Albemarle Hospital, Inc.*, 70 S.E.2d 680, 692 (N.C. 1952) (citations omitted).

<sup>125</sup> 66 C.J.S. *Nuisances*, § 14 (2013).

Consequently, based on this principle, the owner of a house or other parts of a house sitting or floating in state waters would not be liable for the costs of removal of the structure or other objects when the cause was a violent storm, series of storms, or other natural events. Although the State certainly has the power to declare what constitutes a public nuisance and the circumstances under which a person would be liable for the costs of abatement, any legislation must be read against the backdrop of this general common law principle.

In its exercise of the power to declare nuisances and impose liabilities, the State has enacted three sets of statutes. However, none of the statutes would impose liability upon the unfortunate homeowner whose house or parts of it end up in ocean waters. According to subsection 76-40(a) of the North Carolina General Statutes, it is "unlawful for any person ... to place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any ... debris ... or other similar waste material in or upon any body of navigable water in this State."<sup>126</sup>

This statute is not applicable in this setting. First, the statute is a criminal statute and makes a violation a misdemeanor.<sup>127</sup> Normally, criminal statutes require that the person act with a specific intent.<sup>128</sup> The language of this statute should be read consistent with this traditional interpretation of criminal statutes. Second, the statute is directed at affirmative conduct of a person who places, deposits, or leaves debris in the navigable waters of the State.<sup>129</sup> It can hardly be said that a person's now-abandoned home that lies in ocean waters, was placed, deposited, or left there by that person. This is consistent with the traditional idea that one is not liable for the consequences of uncontrollable natural events.<sup>130</sup> Third, part (a) of section 76-40 does not impose an obligation to remove or create liability for removal costs for the listed violations.<sup>131</sup> Other parts of section 76-40 do create removal liabilities but those other parts are not applicable to houses or related debris left in ocean waters following a storm.<sup>132</sup>

A second statute, subsection 113-131(c), does permit the Department of Environment and Natural Resources to seek an injunction when "any person ... has unlawfully encroached upon, usurped, or

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<sup>126</sup> N.C. GEN. STAT. § 76-40(a).

<sup>127</sup> *Id.*

<sup>128</sup> *See, e.g.,* Cheek v. U.S., 498 U.S. 192, 199–200 (1991) ("The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses."); State v. Nobles, 404 S.E.2d 668, 671 (N.C. 1991) ("There is a common law principle that the existence of guilty knowledge on the part of the defendant is essential to criminality although it is not required by the statute in express terms." (citations omitted)).

<sup>129</sup> N.C. GEN. STAT. § 76-40(a).

<sup>130</sup> *See supra* note 119 and accompanying text; Tuthill v. Norfolk & S. R.R. Co., 93 S.E. 446, 446 (N.C. 1917) (noting that where personal property held by a common carrier was "destroyed and lost by reason of a wind and rain storm of such unusual violence and proportions that it amounted to 'an act of God,'" the carrier may be relieved of liability for the loss).

<sup>131</sup> N.C. GEN. STAT. § 76-40(a).

<sup>132</sup> *See id.* § 76-40(a1) (depositing of medical waste in navigable waters); § 76-40(b) (erecting structures in navigable waters without a permit); § 76-40(c) (abandonment of lawfully erected structures by the owner). None of these situations exists when storm forces move the shoreline or otherwise result in houses and parts of houses being left in ocean waters.

otherwise violated the public trust rights of the people of the State."<sup>133</sup> Because ocean waters are public trust waters subject to public trust use rights and ocean submerged lands are public trust lands subject to similar public trust use rights, the Director of Marine Fisheries has the power to seek a mandatory injunction directing the removal of any unlawful structure.<sup>134</sup> However, the key words in the statute are "unlawfully encroached." In the context of abandoned houses and parts thereof ending up in ocean waters following a storm, there is no conduct of any person that could reasonably be identified as being "unlawful." If the reason for the present location of a house or parts of a house is a storm event, then abandonment of the structure or parts where they may lie is lawful under the common law and sanctioned by section 104B-1.<sup>135</sup>

Finally, the possibility of municipal or county governments having the authority to order removal of such houses, and parts of houses, must be considered. The granting of such jurisdiction over ocean waters to North Carolina's municipalities has not been done in any consistent or uniform manner.<sup>136</sup> Some have jurisdiction over ocean waters; others do not.<sup>137</sup> Even among those that do, they do not necessarily have the same offshore jurisdictional authority.<sup>138</sup>

Assuming that a municipality has local jurisdiction over ocean waters in which a house or parts of a house are left after a storm, the question that arises is whether the municipality has the power to order the removal of the house or parts of the house at the owner's expense. The General Assembly has granted municipalities powers to remove or order the removal of unsafe and dangerous buildings. For example, section 160A-426 of the North Carolina General Statutes authorizes municipalities to condemn unsafe buildings, and section 160A-432 authorizes enforcement of municipal orders to correct or otherwise abate such conditions by judicial orders.<sup>139</sup> However, if a derelict house or parts of it are lying in ocean waters, and the owner has abandoned any claim to it, there is no longer an "owner" under the statutes to whom such an order may be properly directed.

In the absence of an express statement by the General Assembly, these various state statutes should be read both in a consistent manner and in light of traditional common law.<sup>140</sup> Read in such a manner, it seems clear that owners of wayward houses or parts of houses who choose to abandon their property rights in these things cannot be forced to remove or be liable for their removal.

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<sup>133</sup> N.C. GEN. STAT. § 113-131(c).

<sup>134</sup> *See id.*

<sup>135</sup> *See id.* § 104B-1; *supra* notes 117-123 and accompanying text.

<sup>136</sup> *See* OCEAN JURISDICTION DATA, N.C. COASTAL RESOURCES LAW, PLANNING AND POLICY CENTER (on file with authors).

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> N.C. GEN. STAT. § 160A-426; § 160A-432.

<sup>140</sup> *See Samantar v. Yusuf*, 130 S.Ct. 2278, 2289 n.13 ("[Legislatures are] understood to legislate against a background of common-law ... principles, and when a statute covers an issue previously governed by the common law, [courts] interpret the statute with the presumption that [the legislature] intended to retain the substance of the common law." (omission in original) (citations omitted)); *Victory Cab Co. v. City of Charlotte*, 68 S.E.2d 433-437 (N.C. 1951) ("[I]n respect to related statutes, ordinarily they should be construed, if possible by reasonable interpretation, so as to give full force and effect to each of them, it being a cardinal rule of construction that where it is possible to do so, it is the duty of the courts to reconcile laws and adopt that construction of a statute which harmonizes it with other statutory provisions." (citations omitted)).

### 3. Municipal Authority to Remove Houses on the Dry Sand Beach

*Town of Nags Head v. Cherry* is part of the continuing battle between the Town of Nags Head and owners of oceanfront houses that are lying on the dry sand beach.<sup>141</sup> Many of these houses no longer have any approved means of sewage disposal, are disconnected from utilities, and are unable to be relocated to a safer landward area.<sup>142</sup> Some are damaged and deteriorating.<sup>143</sup> All of these structures interfere with the public's ability to use the dry sand beach, and to move up and down the beach strand.

In November 2009, following a severe storm, the town declared a somewhat damaged<sup>144</sup> beachfront cottage, owned by defendant Cherry and at that time located on the public trust beach,<sup>145</sup> to be a public nuisance pursuant to a relatively new ordinance, and directed that the cottage be demolished.<sup>146</sup> In April 2010, the town filed a complaint seeking an order of abatement directing Cherry

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<sup>141</sup> See Russ Lay, *A Long Legal Road to Cleaning Up the Shoreline*, OUTER BANKS VOICE (Apr. 16, 2010), <http://outerbanksvoice.com/2010/04/16/a-long-legal-road-to-cleaning-up-the-beach/> [hereinafter Lay, *Long Legal Road*] (describing competing views of what constitutes the public trust beach in Nags Head); Russ Lay, *Owners Continue to Battle against Beach Easements*, OUTER BANKS VOICE (July 7, 2011), <http://outerbanksvoice.com/2011/07/07/owners-continue-battle-against-beach-easements/> (describing legal challenges brought by beachfront property owners against the Town of Nags Head's efforts to obtain easements for its 2011 beach nourishment project); Russ Lay, *Supreme Court Puts Local Beach Rules in Limbo*, OUTER BANKS VOICE (Oct. 25, 2012), <http://outerbanksvoice.com/2012/10/25/supreme-court-puts-local-beach-rules-in-limbo/> [hereinafter Lay, *Beach Rules in Limbo*] (reporting on the North Carolina Supreme Court's denial of discretionary review in *Cherry* and the impacts of that decision for the Town of Nags Head). The Town of Kitty Hawk, just north of Nags Head, had similar difficulty addressing homes that had succumbed to the forces of erosion. The unincorporated beach area of Currituck County, north of Kitty Hawk and known locally as Corolla, is also facing similar problems.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> The Town's building inspector inspected the cottage several times following the November 2009 storm, and determined, at the time of inspection:

- a. That the Dwelling was in a deteriorated and damaged condition;
  - b. That the Dwelling was disconnected from utilities;
  - c. That the Dwelling was disconnected from approved means of sewage disposal;
  - d. That components of the Dwelling's on-site sewage disposal system were visibly damaged or missing;
- [and]

...

- h. That the Dwelling had incurred storm and/or erosion damage.

*Nags Head v. Cherry*, 723 S.E.2d 156, 157 (N.C. Ct. App. 2012).

<sup>145</sup> The inspector also determined during, at the time of inspection:

- e. That the Dwelling was located in its entirety on the wet sand beach as evidenced by the high tide swash line and tidal pools located westward of the Dwelling;
- f. That the Dwelling restricted vehicle access along the public trust beach area;
- g. That the Dwelling restricted pedestrian access along the public trust beach area; [and]

...

- i. That the Dwelling was located wholly or partially on land subject to the public trust and within the public trust beach area.

*Id.*

<sup>146</sup> *Id.* at 157, 163. The inspector had also determined "that there did not appear to be an opportunity for relocation of the Dwelling on its lot in a manner complying with relevant federal, state and local laws and regulations." *Id.* at 157.



to demolish the cottage.<sup>147</sup> In January 2011, the trial court granted partial summary judgment for the town as to its claim for public nuisance and the order of abatement, and ordered that Cherry, “at its sole expense, abate the public nuisance ... by demolishing or removing the structure.”<sup>148</sup> Cherry appealed, and on February 21, 2012, the North Carolina Court of Appeals reversed and remanded the case back to the trial court.<sup>149</sup>

No one disputed the fact that, if the town could establish that a particular structure was a nuisance under traditional nuisance law, the town had the necessary authority under state law to abate the nuisance and require that the structure be repaired or removed. However, under the pertinent Town ordinance, “[a]ny structure, regardless of condition, or any debris from damaged structure which is located in whole or in part in a public trust area or public land” was also deemed to be a public nuisance.<sup>150</sup> Therefore, even those in a relatively sound condition, but uninhabitable for lack of services, were subject to the Town’s order.

For coastal municipalities, the critical issue in *Cherry* was whether a municipality had the legal right to enforce the State’s public trust doctrine. The Court of Appeals held in this case that a municipality has no such right under existing State law.<sup>151</sup> According to the Court of Appeals, only the State, acting through the North Carolina Attorney General, can bring an action *affirmatively* enforcing the State’s public trust rights.<sup>152</sup> While this ruling came as a surprise to some coastal local governments and some in the legal community, one must remember that North Carolina is not a home rule state. Therefore, local governments in the state do not have a broad delegation of authority, but rather authority is delegated through subject-specific general statutes and local acts.<sup>153</sup> The Court of Appeals decision in *Cherry* reinforces this limit on the ability of municipalities to enforce public rights through nuisance ordinances and to effectively monitor and regulate activities on natural dry sand beaches of the State. Even if the litigation had properly characterized the issue as a question of which entity had the power to

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 158.

<sup>149</sup> *Id.* at 164. The court determined that summary judgment was improper in this circumstance, since the primary issue was whether the structure’s condition constituted a “reasonable likelihood” of “personal or property injury,” a question typically reserved for a factfinder. *Id.* (citing NAGS HEAD, N.C., CODE OF ORDINANCES § 16–31(6)(b) (2007), available at <http://library.municode.com/index.aspx?clientId=13763>).

<sup>150</sup> *Id.* at 158 (citing NAGS HEAD, N.C., CODE OF ORDINANCES § 16–31(6)). The town ordinance uses the term “public trust beach.” See *id.* However, perhaps it would better to define the area in the same manner as subsections 77-20(d) and (e) of the North Carolina General Statutes.

<sup>151</sup> *Id.* at 161. Note that the *Cherry* court did not address whether the provisions of N.C. Gen. Stat. 160A-426 (unsafe buildings in condemned areas) or 160A-432 (enforcement and removal of unsafe buildings) would apply in this case. However, the court held that those provisions could apply. “Viewing the evidence in the light most favorable to defendant, as we must for purposes of summary judgment, it appears that the main defects in the dwelling are the lack of connections to a septic tank, electricity, and water and some exterior damage to stairs, but it is structurally sound and in need of relatively minor repairs, which defendant would have promptly performed if plaintiff had not refused to issue the required permits.” *Town of Nags Head v. Cherry, Inc.*, 723 S.E.2d 156, 164 (N.C. Ct. App. 2012). Therefore, N.C. Gen. Stat. 160A-426 and 160A-432 likely would not have applied in this case, because it was not confirmed that the structure at issue was deemed unsafe.

<sup>152</sup> *Id.*

<sup>153</sup> See N.C. Const. art. VII, § 1 and § 3. “North Carolina is one of only a few non-home rule states.” See Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 2003 (2006). “There are provisions in the state constitution that relate to local governments, but they either authorize the legislature to enact laws relating to local governments or provide limitations on local government actions.” *Id.*

enforce the public's customary rights, the result would probably have been the same. Fortunately, during the 2013 General Session, the General Assembly overturned the *Cherry* decision and provided municipalities with the necessary authority.<sup>154</sup>

Leaving aside the issue of which governmental entity has the authority to enforce the public's customary rights, the central question is under what circumstances, if any, may the owner of a house or other structure be compelled to remove it from the dry sand beach area when that house or structure ends up there due to the natural movement of the shoreline? Statements by the Court of Appeals in *Cherry* suggest that if the court were to decide this question, it would get it wrong. The *Cherry* court stated that:

This is a case where a governmental agency is attempting to take private property from an individual, destroy the Dwelling, and claim the land on the basis that it currently lies within a public trust area ... Plaintiff does not contest that the dwelling was originally lawfully constructed in its current location and that the mean high water line has changed to some extent since it was constructed ...<sup>155</sup>

First of all, the court fails to give sufficient consideration that a risk of building on the oceanfront is that the shoreline and MHWL may move, and if that happens then there are legal consequences that follow. Second, the "government agency" is not claiming the land, it is claiming that the public's customary right to use the dry sand beach is an ambulatory right, in that it moves just as the oceanfront owner's ambulatory oceanfront boundary moves. Surely the court does not believe that, if a house, lawfully constructed landward of the MHWL but due to the natural movement of the shoreline ends up seaward of the new MHWL and the State sought the removal of the house, that the State would be making an unconstitutional claim to the submerged lands lying under the house and could not require the trespassing structure to be removed. If one accepts the concepts of ambulatory waterward property boundary lines and of a public customary right to use natural dry sand beaches, then the boundaries of that right are, and should be, as ambulatory as any other oceanfront coastal property line.<sup>156</sup>

The central test for determining whether a house or other structure must be removed should be the same as used for other easement conflict cases; that is, whether the particular structure unreasonably interferes with the public's ability to traverse the dry sand beach and use it for appropriate beach activities.<sup>157</sup> Whether there is an unreasonable interference would be fact-specific.<sup>158</sup> Arguably, a house,

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<sup>154</sup> See N.C. GEN. STAT. § 160A-203 ("Notwithstanding the provisions of G.S. 113-131 or any other provision of law, a city may, by ordinance, define, prohibit or abate any unreasonable restriction of the public's right to use the State's ocean beaches").

<sup>155</sup> *Cherry*, 723 S.E.2d at 160–61.

<sup>156</sup> In the end, the central issue is whether that customary right exists as a matter of N.C. common law.

<sup>157</sup> See, e.g., *Strickland v. Shew*, 134 S.E.2d 137 (N.C. 1964) ("One, who by his deed has specifically granted to another an easement of access, may not obstruct the easement in such manner as to prevent or to interfere with its reasonable enjoyment by his grantee. The grantor is obligated to refrain from doing, or permitting anything to be done, which results in the impairment of the easement." (citing 17A AM. JUR. *Easements* § 137 (2013))).

<sup>158</sup> See, e.g., *Sidney F. Ansbacher, Kristen G. Juras & Robert K. Lincoln, Stop the Beach Nourishment Stops Private Beachowners' Right to Exclude the Public*, 12 VT. J. ENVTL. L. 43, 72 (2010) (comparing two Florida appellate decisions for the proposition that establishment of access rights is fact-specific in nature).

such as the famous one from the movie "Nights in Rodanthe," which sat on a remote section of the beach and people could freely pass around and use large stretches of the surrounding beach, does not.<sup>159</sup> On the other hand, a set of houses, clustered together and leaving little space for the public to pass or only to pass under the houses' pilings do interfere with the public rights.

#### IV. Conclusion—Court Resolution Needed

Whether the public has the customary right to use the State's dry sand beaches and, if that right exists, how that will affect the rights of oceanfront property owners are critical questions that will shape the character and economy of coastal North Carolina. *Nies* will test the limits of the state's coastal municipalities to restrict the activities of oceanfront property owners on the dry sand beach to which they hold title, while situations like the one in *Cherry* raise the question of whether an oceanfront property owner must remove any part of their structure that ends up on the dry sand beach due to shoreline erosion.

Local governments in coastal North Carolina rely on tourism to fuel their economies, with many owners of oceanfront houses renting their properties to vacationers during the summer months. It is, therefore, in a coastal local government's economic interest to maintain public beach areas and to help maintain such a market. At the same time, however, property owners want to protect their valuable investments and personal memories. While the interests of coastal local governments and oceanfront property owners are often mutual, conflicts may arise that will require involvement from, and resolution by, the courts. North Carolina is in a quandary. There is ample policy support from the General Assembly and the CRC on customary use, but according to state law, "these public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State."<sup>160</sup> The problem is that there is no state common law that directly addresses customary right of use of the dry sand beaches. Legal resolution from the courts is needed at this point to provide clarity and structure, for the government and the public.

As the courts, property owners, and local governments have recognized, striking a balance between protecting property rights and the public's use of ocean beaches is a challenge. There are no easy answers from either a legal or a policy standpoint, as both sets of rights are important to American law and culture. Given the added complexities of shoreline erosion and the potential for storms and flooding along the coast, situations similar to *Cherry* likely will become more common in North Carolina and other coastal states. Local and state governments will need to plan for future scenarios and determine legally how they can respond in a way that meets the needs of both property owners and the public.

There is not any one legal rule or policy solution that will fit all coastal states. While federal case law provides some insight through *Milner* when houses or other structures are lying in navigable waters of the U.S., that case is limited to the Ninth Circuit, and resolution of the legal issues is trickier at the state level. The answers to legal questions will turn on whether a coastal state is a mean high water or low

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<sup>159</sup> See NIGHTS IN RODANTHE (Warner Bros. 2008); see also *The Inn from "Nights in Rodanthe:" Rescued and Renovated*, HOOKED ON HOUSES (July 25, 2011), <http://hookedonhouses.net/2011/07/25/the-inn-from-nights-in-rodanthe-rescued-and-renovated/>.

<sup>160</sup> N.C. GEN. STAT. § 77-20(e).

mean water state, whether a state recognizes customary right of use, and how it defines abandonment. *Cherry* tested how far North Carolina is willing and able to go to protect its public trust use areas,<sup>161</sup> and the case will be instructive as to how far other coastal states may go. Public enjoyment of ocean beaches is not just a law, policy, or economic issue. Regardless of each state's unique rules and policies regarding public use of ocean beaches, it is in one form or another, a fact of life for a coastal state. In North Carolina, protecting public enjoyment of ocean beaches has been long considered important by the State and an expectation by the public. What is before the state courts, then, is the continuing challenge of how to balance public use and enjoyment without sacrificing private property rights. The opportunity for the North Carolina courts to take up the question of customary right of use is likely to arise again, and the authors welcome them tackling this question to provide clarity and resolution of whether the doctrine of custom is a part of the state's common law and the precise nature of those rights.

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<sup>161</sup> However, the question of customary right of use of ocean beaches remains unsettled.