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A First Step in the Wrong Direction: Slavin v. Town of Oak Island and the Taking of Littoral Rights of Direct Beach Access

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A First Step in the Wrong Direction: *Slavin v. Town of Oak Island* and the Taking of Littoral Rights of Direct Beach Access

The North Carolina courts have long followed the lead of the United States Supreme Court in preserving landowners' rights of direct access to bodies of water that border their property.[1] The courts have held this to be a qualified right, however, maintaining that the Legislature may enact rules for the protection of public rights in navigable bodies of water.[2] Generally, courts have limited the right of direct access only when property owners have unreasonably restricted the public's use of the beach or navigable waters, or when the landowner's property is taken by the State in an effort to preserve the beach.[3] In the former situation, landowners are forced to remove their obstruction of the public's use of the beach or waterway.[4] In the

1. *See* Shepard's Point Land Co. v. Atl. Hotel, 132 N.C. 517, 537, 44 S.E. 39, 45 (1903) (citing Yates v. Milwaukee, 77 U.S. 497, 504 (1871)); *see also* Capune v. Robbins, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968) (holding that a pier owner did not have the legal right to prevent someone from passing under his pier); Weeks v. N.C. Dept. of Natural Res. & Cmty. Dev., 97 N.C. App. 215, 225, 388 S.E.2d 228, 234 (1990) (stating that a 900-foot pier was too great an intrusion into the public's use of a body of water).

2. *See Capune*, 273 N.C. at 588, 160 S.E.2d at 886; Jones v. Turlington, 243 N.C. 681, 683, 92 S.E.2d 75, 77 (1956) (explaining that in the absence of any specific legislation, a littoral proprietor holds a right of direct access to the navigable waters); Bond v. Wool, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890) (stating that "a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging, by nature, to their land"); Pine Knoll Ass'n v. Kardon, 126 N.C. App. 155, 159, 484 S.E.2d 446, 448 (1999) (stating that riparian owners have a qualified property right in the waterfront belonging to their land); *Weeks*, 97 N.C. App. at 226, 388 S.E.2d at 234 (allowing restriction of littoral rights when they substantially impair the public's use of navigable waters). These rights apply only to navigable waters. Navigable waters are defined as those waters which are navigable and which, in connection with other waters, form a continuous channel for commerce. *See* Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 68, 197 S.E. 714, 717 (1938).

3. *See* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970) (permitting a pier tall enough to allow boats and pedestrians to travel freely below it); Roanoke Rapids Power Co. v. Roanoke Navigation & Water Power Co., 159 N.C. 393, 403, 75 S.E. 29, 33 (1912) (holding that although riparian rights are subject to the rights of the public, they may only be taken for the public upon due compensation); *Shepard's Point Land Co.*, 132 N.C. at 538, 44 S.E. at 45 (holding that the property may be taken for the public good if necessary, but only upon due compensation); *Weeks*, 97 N.C. App. at 226, 388 S.E.2d at 234 (denying a property owner the right to build a pier over 900 feet into the water which would impede navigation); *In re* Protest of Mason, 78 N.C. App. 16, 24, 337 S.E.2d 99, 104 (1985) (arguing riparian rights may be taken only for the public trust upon due compensation).

4. *See Carolina Beach Fishing Pier*, 277 N.C. at 303, 177 S.E.2d at 516; *Weeks*, 97

latter, the State has traditionally provided landowners with due compensation.[5]

While this area of law has become reasonably settled over the last century, technological advancements allowing for beach nourishment projects have given rise to new problems that must be balanced against the long-held direct access rights of oceanfront property owners. In *Slavin v. Town of Oak Island*,[6] a case of first impression, the North Carolina Court of Appeals misapplied both an entire century of precedent as well as North Carolina's current statutory law by allowing a municipality to deny oceanfront property owners any reasonable right of direct access to the water without providing compensation.[7]

In *Slavin*, the Army Corps of Engineers conducted a beach nourishment project within the Town of Oak Island ("Oak Island").[8] The nourishment project, entitled "The Turtle Habitat Restoration Project," involved the placement of a strip of new sand on the oceanside of the mean high water mark.[9] Once the beach nourishment was completed and the new sand in place, the title to the new sand vested in the state.[10] The project required Oak Island to provide vegetation and maintenance for the newly created sand dunes.[11] In an effort to comply with the project's requirements, Oak Island adopted an Access Plan.[12] The Access Plan provided for the

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N.C. App. at 226, 388 S.E.2d at 234.

5. *See Roanoke Rapids Power Co.*, 159 N.C. at 399, 75 S.E. at 33 (explaining that riparian rights may be taken for the public good upon due consideration); *Shepard's Point Land Co.*, 132 N.C. at 535, 44 S.E. at 45 (explaining that riparian rights may be separated from their owner only for public purposes and for compensation); *In re Protest of Mason*, 78 N.C. App. at 24, 337 S.E.2d at 104 (denying a property owner due compensation because his riparian rights had not been taken). Due compensation refers to payment by the government after it has taken property, usually representing the property's fair market value. BLACK'S LAW DICTIONARY 277 (7th ed. 1999).

6. 160 N.C. App. 57, 584 S.E.2d 100 (2003), *cert. denied*, 357 N.C. 659, 590 S.E.2d 271 (2003).

7. *See id.* at 61, 584 S.E.2d at 102 (holding that littoral rights are qualified rights and Oak Island may restrict them without compensation).

8. *Id.* at 58, 584 S.E.2d at 101.

9. *Id.* The Corps of Engineers project manager stated that the objective of the project is to restore the degraded sea turtle nesting habitat, to prevent death or injury to nesting turtles and hatchlings, and to expand disposal capacity for the Atlantic Intercoastal Waterway. Record at 250, Slavin v. Town of Oak Island, 160 N.C. App. 57, 584 S.E.2d 100 (2003) (No. COA02-671) [hereinafter Record].

10. N.C. GEN. STAT. § 146-6(f) (2003). The statute also states that title to land raised above the high water mark without the help of publicly financed projects vests in the adjacent littoral property owner. *Id.*

11. Record, *supra* note 9, at 250.

12. *See id.* Oak Island's Assistant Town Manager stipulated that Oak Island was not

construction of a fence in front of the dunes along the nourished beach.[13] The fence denied all oceanfront property owners the right to walk directly from their property to the water or build a walkway over the fence.[14] Oak Island's oceanfront property owners then brought suit, alleging that the fence denied their littoral[15] rights of direct beach access without just compensation.[16] The trial court granted summary judgment in favor of Oak Island.[17] The court of appeals ruled in favor of Oak Island.[18] The court held that littoral rights were not absolute, but rather were qualified and could be subjugated, without compensation, where necessary to further public trust protections.[19] The court further determined that Oak Island's protection of sea turtle nesting areas satisfied the public trust requirement.[20] In December of 2003, the Supreme Court of North Carolina denied certiorari and dismissed the property owners' appeal.[21]

This Recent Development argues that the North Carolina Court of Appeals incorrectly allowed the fence to stay and denied the property owners' demand for due compensation. The court's decision does not reflect the current state of North Carolina statutory or common law for several reasons. First, the Town cannot look to its delegated police powers for authorization. Such an action would greatly exceed the reasonable scope of municipal police powers, which are expressly limited to the preservation of the health, safety, or welfare of citizens and the peace and dignity of the city.[22] Additionally, the action is expressly preempted by the state statute governing the protection of refurbished beaches, which vests this power exclusively in the Department of Administration.[23] Moreover,

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required to adopt an Access Plan. *Id.* at 254.

13. *Id.* at 255.

14. *Slavin*, 160 N.C. App. at 59, 584 S.E.2d at 101.

15. BLACK'S LAW DICTIONARY 944 (7th ed. 1999) (explaining that oceanfront property owners possess littoral land and rights of direct access). Riparian and littoral rights differ only in the type of water the property borders. *Id.* at 1328. Littoral rights are concerned with the use of an ocean, sea, or lake, while riparian rights deal with a river or stream. *Id.*

16. *Slavin*, 160 N.C. App. at 59, 584 S.E.2d at 101.

17. *Id.*

18. *Id.*

19. *Id.*

20. *See id.*

21. *See Slavin*, 357 N.C. 659, 590 S.E.2d 271 (2003).

22. N.C. GEN. STAT. § 160A-174(a) (2003).

23. *See id.* § 160A-174(b)(5) (prohibiting municipal regulation where there is a clear intent by the State to regulate exclusively); *id.* § 146-1(a) (vesting in the Department of the Administration responsibility for the management of all unappropriated lands, title to

even if the court's interpretation of littoral rights as qualified rights is correct, the pertinent case law establishes that rights of direct access may be limited only by a clear legislative directive.[24] Under the same statute from which Oak Island claims authorization for the erection of its fence, the Legislature stated that beach nourishment projects cannot be used, in any way, to limit the full exercise of common law rights of direct access.[25] In reaching its holding, the *Slavin* court misinterpreted prior cases by expanding the meaning of a "qualified right" in such a way as to limit the rights of oceanfront property owners to an extent never before seen in the United States.[26] Finally, the *Slavin* decision sets a dangerous precedent from a public policy perspective by allowing a municipality to restrict oceanfront property owners' direct access to the water without compensation in publicly financed beach nourishments.

This Recent Development argues that Oak Island's Access Plan should have failed, first, because the Town lacked the statutory authority to impair the littoral rights of oceanfront proprietors. Oak Island attempted to justify its Access Plan by deriving such authorization from a city's delegated police powers.[27] The General Statutes of North Carolina provide that "a city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."[28]

Thus, according to North Carolina law, if Oak Island's Access

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which vests in the state); Act effective Oct. 1, 1995, ch. 529, § 5, 1995 N.C. Sess. Laws 1917, 1923 (stating that authority under this section rests exclusively with the Department of Administration).

24. *See* Capune v. Robbins, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968) (explaining that in the absence of specific legislation on the subject, littoral property owners have a right of direct access to the water); Shepard's Point Land Co. v. Atl. Hotel, 132 N.C. 517, 535, 44 S.E. 39, 45 (1903) (explaining that a waterfront property owner is entitled to all the rights of a riparian proprietor subject to such rules as the Legislature may see proper for the protection of public rights); Bond v. Wool, 107 N.C. 139, 146, 12 S.E. 281, 284 (1890) (articulating that a littoral proprietor has a right of direct access to, and to build piers into, navigable bodies of water "subject to such general rules and regulations as the legislature, in the exercise of its powers, may prescribe").

25. § 146-1(d).

26. *Slavin*, 160 N.C. App. at 61, 584 S.E.2d at 101; *see also infra* note 80 (discussing holdings of courts in other states).

27. *See Slavin*, 160 N.C. App. at 61, 584 S.E.2d at 101.

28. § 160A-174(a). This statute is the first section of Chapter 160A, Article 8, dealing with cities and towns and is titled, "Delegation and Exercise of the General Police Power." *See id.* The State has delegated part of its police powers to municipalities through this section. *See* Town of Atlantic Beach v. Young, 307 N.C. 422, 427, 298 S.E.2d 686, 690 (1983) (citations omitted).

Plan falls within one of these enumerated purposes of the police power, then the fence would be authorized by statute. It is not self-evident that the Access Plan is necessary to preserve the "health, safety, or welfare" of the public. It is possible that it is generally in the best interest of the public to protect the environment, including animals species living in the vicinity. However, the protection of sea turtles does not necessarily require a total denial of littoral rights. The right of private beach entry by sand footpath or structural accessway has coexisted with public efforts to protect sea turtles in many oceanfront communities along the North Carolina coast.[29] Furthermore, the mere fact that an ordinance is in the interest of public welfare does not make it a valid exercise of police power on its own.[30] The determination is whether the means employed by the ordinance are reasonably related to the health and welfare of the citizens of Oak Island.[31]

One may argue that the Access Plan is necessary to abate nuisances[32] or preserve public convenience.[33] To make this determination, the Town would have to conclude that allowing littoral property owners to freely pass between their property and the beach either causes a public nuisance or restricts public convenience. It could be argued that people trespass on the lots of vacant or unoccupied beach homes for the purpose of using their accessways. Such a problem could be remedied by prohibiting direct beach access from all oceanfront property. However, it is difficult to justify such an overinclusive restriction. Although many oceanfront property owners are likely to be concerned about trespassers, they are likely to

29. While not expressly stating a purpose or intent to protect sea turtles, the Coastal Area Management Act, codified in section 113A-100 of the General Statutes of North Carolina, was enacted for a variety of reasons, including the protection of coastal wildlife. *See generally* Milton S. Heath, Jr. & David W. Owens, Note, *Coastal Management Law in North Carolina: 1974–1994*, 72 N.C. L. REV. 1413 (1994) (describing the development of the Coastal Area Management Act in North Carolina).

30. *See Town of Atlantic Beach*, 307 N.C. at 428, 298 S.E.2d at 691.

31. *Id.*

32. *See* § 160A-174(a); *see, e.g.*, Town of Conover v. Jolley, 277 N.C. 439, 177 S.E.2d 879 (1970) (holding that a city may not prohibit the use of a mobile home residence as a public nuisance when it presents no threat to the health or safety of its occupants or others); City of Fayetteville v. Spur Distrib. Co., Inc., 216 N.C. 596, 5 S.E.2d 838 (1939) (allowing a city to prevent construction of a large gasoline tank in a congested part of the city as an abatement of a public nuisance).

33. *See* City of Winston-Salem v. S. Ry. Co., 248 N.C. 637, 641, 105 S.E.2d 37, 40 (1958) (stating that the police power may be exercised reasonably for the promotion of public safety, general welfare, and public convenience); Town of Wake Forest v. Medlin, 199 N.C. 83, 85, 154 S.E. 29, 31 (1930) (holding that the police power extends to regulations promoting public health, public morals, public safety, and public convenience).

be much more concerned about the denial of their littoral rights of direct access and the resulting decrease in the value of their property.

Even if one were to interpret the North Carolina statute as authorizing Oak Island's Access Plan as an exercise of police powers, such authority would not apply in this situation because this ordinance has been implicitly preempted by state statute. The relevant statute states that a municipal ordinance must be consistent with state law.[34] It further provides that an ordinance is not consistent with state law when "[t]he ordinance purports to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation."[35] However, just because the State has regulated a similar field or activity, it does not necessarily follow that local regulation is preempted.[36] When the Legislature clearly intends to provide a complete system of regulation, local regulation must give way.[37]

Oak Island attempted to support its police powers argument by pointing to North Carolina law, which extends the reach of municipal police powers into the Atlantic Ocean.[38] The language of this statute plainly authorizes municipalities to regulate littering, glass bottles, and swimming on the beach or in the ocean.[39] However, this statute cannot be interpreted as empowering municipalities to deny littoral rights to property owners who adhere to the Town's beach use regulations.

The Supreme Court of North Carolina stated in *Craig v. County of Chatham*[40] that the Legislature need not expressly exclude local regulation for such regulation to be preempted.[41] The court explained

34. § 160A-174(b) (mandating that a municipal ordinance must be consistent with North Carolina law).

35. § 160A-174(b)(5).

36. *See* Craig v. County of Chatham, 356 N.C. 40, 44, 565 S.E.2d 172, 176 (2002) ("[S]tatewide law does not necessarily prevent a county from regulating in the same field.").

37. For a detailed discussion of North Carolina preemption law, see generally Christy Noel, Recent Development, *Preemption Hogwash: North Carolina's Judicial Repeal of Local Authority to Regulate Hog Farms in* Craig v. County of Chatham, 80 N.C. L. REV. 2121 (2002) (criticizing the decision in *Craig* as preventing local regulation of hog farms).

38. *See* Appellee's Brief at 13, Slavin v. Town of Oak Island, 160 N.C. App. 57, 584 S.E.2d 100 (2003) (No. COA02-671) (arguing that section 160A-176.2(a) of the General Statutes of North Carolina extends municipal authority into the ocean).

39. *See* N.C. GEN. STAT. § 160A-176.2(a) (2003) ("A city may adopt ordinances to regulate and control swimming, surfing and littering in the Atlantic Ocean adjacent to that portion of the city within its boundaries or within its extraterritorial jurisdiction. . . .").

40. 356 N.C. 40, 565 S.E.2d 172 (2002).

41. *See id.* at 46, 565 S.E.2d at 175–76.

that when legislative intent is not readily apparent from the Act, it is necessary to "primarily look to the 'spirit of the act and what the act seeks to accomplish.' "[42] However, such analysis of legislative intent is unnecessary in the case at hand. In enacting section 146, the General Assembly included a provision expressly restricting regulatory authority to the State Department of Administration.[43] The General Statutes of North Carolina provide that it is the responsibility of the Department of Administration to manage all unappropriated lands owned by the state.[44] In addition, a 1995 amendment to subchapter I of the State Lands Act[45] mandates that "[t]he authorization established under this act applies only to the Department of Administration and shall not be used by any other agency to administer or regulate activities affecting the public trust."[46] The Legislature could not have expressed its intention to prohibit local regulation of state-owned waterfront lands held in public trust more explicitly. This provision is applicable to the case at hand because, as the *Slavin* court concedes, the newly created beach in Oak Island falls within the jurisdiction of the State Lands Act.[47]

The only purposes offered by Oak Island for erecting the fence and denying littoral beach access were the protection of the newly created sand dunes, protection of sea turtle nesting habitats on the new beach, and the establishment of new vegetation on the beach.[48] The Legislature's purpose in passing subchapter one of the State Lands Act was to provide for the management, control, and disposition of state-owned beaches.[49] Thus, if the Legislature

42. *Id.* (quoting State v. Anthony, 351 N.C. 611, 615, 528 S.E.2d 321, 323 (2000) (quoting Taylor v. Taylor, 343 N.C. 50, 56, 468 S.E.2d 33, 37 (1996))) (holding that a county could not regulate swine farmers where the State intended to regulate the industry); *see also* State v. Williams, 283 N.C. 550, 554, 196 S.E.2d 756, 759 (1973) (finding the State's uniform system of control over the sale and purchase of intoxicating beverages to preempt the Town of Mount Airy from passing an ordinance restricting the possession of open containers of alcoholic beverages).

43. *See* Act effective June 2, 1959, ch. 683, § 1, 1959 N.C. Sess. Laws 612, 613.

44. § 146-1(a); *see also* § 146-2 (granting the Department of Administration the power to manage, control, and dispose of unappropriated lands).

45. § 146.

46. Act to Amend the Provisions of Chapter 146 Concerning State-Owned Submerged Lands, ch. 529, § 5, 1995 N.C. Sess. Laws 1917, 1923.

47. *See* Slavin v. Town of Oak Island, 160 N.C. App. 57, 59–60, 584 S.E.2d 100, 101 (2003) (explaining that section 146-4(f) of the General Statutes of North Carolina vests title to new beaches created by publicly financed nourishment projects in the state), *cert. denied*, 357 N.C. 659, 590 S.E.2d 271 (2003).

48. *See* Record, *supra* note 9, at 250 (quoting Oak Island's Assistant Town Manager).

49. § 146-1(a) ("It is the purpose and intent of this Subchapter to vest in the Department of Administration ... responsibility for the management, control and disposition of all vacant and unappropriated lands ... title to which is vested in the

intended to provide a complete and integrated regulatory scheme for state-owned beach management to the exclusion of local control, then Oak Island's Access Plan would be preempted.

If the court had found that Oak Island did not have adequate authorization for the fence under its police powers, the Town could have attempted to justify its actions as specifically authorized by the Legislature. North Carolina courts have stated numerous times that littoral property owners hold a right of direct access " '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 waters.' "[50] Therefore, while courts have limited property owners' littoral rights only in situations where the property owners were interfering with public use, the Legislature could enact legislation to restrict littoral rights to a greater extent.

In searching for statutory authorization for the denial of littoral rights, the *Slavin* court turned to the State Lands Act, which provides for the management and control of state-owned waterfront property.[51] There are a variety of provisions in this subchapter which one may interpret as authorizing the fence built under Oak Island's Access Plan. An argument may be made that the purpose clause of the subchapter on unallocated state lands,[52] which delegates to the Department of Administration "responsibility for the management, control, and disposition" of all such lands,[53] provides authorization for the plan itself.[54] Such an interpretation would authorize the Agency to do whatever it deems necessary to properly manage state-owned beaches, without requiring any consideration of littoral rights. However, this statutory provision is immediately followed by a provision expressing the contrary intention of the Legislature.[55] The statute mandates that the Agency balance the rights of littoral proprietors with its obligation to protect the public trust rights of all citizens.[56] Thus, the Legislature specifically states that the rights of

State.").

50. Capune v. Robbins, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968) (quoting Bond v. Wool, 107 N.C. 139, 146, 12 S.E. 281, 284 (1890)); O'Neal v. Rollinson, 212 N.C. 83, 83, 192 S.E. 688, 689 (1937).

51. § 146-1(a) (vesting responsibility for the management, control, and disposition of unappropriated state lands in the Department of Administration).

52. *Id.*

53. *Id.*

54. *See* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970) (applying the provisions of section 146 of the General Statutes of North Carolina to oceanfront property).

55. § 146-1(b).

56. *Id.*

littoral property owners must be taken into account when managing public beach lands.

Despite these initial possible interpretations of the Act as providing statutory authorization for restricting littoral rights after a beach refurbishment, a further reading of the Act expressly refutes any such possibility.[57] The statute plainly states, "Nothing in this Subchapter shall be construed to limit or expand the full exercise of common law riparian or littoral rights."[58] The Legislature left nothing for interpretation and unmistakably expressed its intent to preserve the littoral rights of direct access vested in oceanfront property owners.[59]

If the Town possessed statutory authorization for its Access Plan, the property owners could not challenge the existence of the fence and the discussion would end there. As shown above, a detailed examination of the applicable statutes reveals that the Legislature did not purport to alter common law littoral rights at all.[60] Thus, the property owners may look to the common law to remedy the denial of their littoral rights of direct access.

There are no North Carolina cases on record where littoral rights have been denied without compensation in circumstances similar to those in the *Slavin* case. The only cases where courts have characterized littoral rights as qualified rights in such a way as to restrict access can be easily distinguished from the situation at hand.[61] In extreme cases, littoral property owners built structures extending from their property which significantly restricted the public's use of the beach or navigable waters.[62] The Supreme Court of North

57. § 146-1(d).

58. *Id.*

59. For a more specific statute authorizing Oak Island's Access Plan, see *id.* § 146-12(a), which describes the process by which littoral owners may receive authorization for building piers from their property to deep water. This statute is particularly significant in that it allows municipalities to determine the location of the deep water line in front of their land. *Id.* Thus, the decision rests with each oceanfront town independently to determine how far piers may protrude from littoral property. Theoretically, a town could establish its deep water line at the very beginning of the beach, thereby preventing all beach entry by structural accessway. However, municipalities rarely establish a deep water line on the oceanfront side of their jurisdiction. Interview with Joseph John Kalo, Graham Kenan Professor of Law, University of North Carolina at Chapel Hill School of Law, in Chapel Hill, N.C. (Feb. 15, 2004). Municipalities generally utilize this statute only to establish deep water lines for sound front property. *Id.*

60. § 146-1(d).

61. *See* Capune v. Robbins, 273 N.C. 581, 590, 160 S.E.2d 881, 887 (1968); Weeks v. N.C. Dept. of Natural Res. & Cmty. Dev., 97 N.C. App. 215, 225–26, 388 S.E.2d 228, 234 (1990).

62. *See id.*

Carolina established the standard for determining when littoral rights must be limited in this way:

> We . . . adhere to our long established rule that littoral rights do not include ownership of the foreshore.
>
> The littoral owner may, however, in the exercise of his right of access, construct a pier in order to provide passage from the upland to the sea. But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from low to high water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high.[63]

This standard has been further clarified by two principal cases in which North Carolina courts have limited the littoral rights of oceanfront property owners through the characterization of the right as a qualified one.

In the first case, *Capune v. Robbins*,[64] the supreme court explained that the littoral rights of oceanfront property owners do not authorize constructing a pier that prevents passage beneath it.[65] The court affirmed that the property owner's littoral rights included the right to build a sportfishing pier extending 1000 feet into the ocean.[66] However, the court held that the owner of the pier did not have the right to attempt to assault a person paddling a surfboard below the pier simply because the defendant was a littoral property owner.[67] In *Capune*, the court's qualification and restriction of littoral rights was narrowly limited to situations where property owners have attempted to use the right to prevent others from passing under piers or walkways extending from their property.

In the second case where the court limited littoral property rights, *Weeks v. North Carolina Department of Natural Resources & Community Development*,[68] the North Carolina Court of Appeals denied a sound front property owner's request to build a 900-foot pier

63. *See* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 302–03, 177 S.E.2d 513, 516 (1970) (citations omitted).

64. 273 N.C. 581, 160 S.E.2d 881 (1968).

65. *Id.* at 590, 160 S.E.2d at 887. The primary issue in *Capune* was whether the pier owner had assaulted another party traveling under the pier on a paddleboard. *Id.* A further issue in the case was whether littoral rights include the right to prevent others from traveling below the pier. *Id.*

66. *Id.*

67. *Id.*

68. 97 N.C. App. 215, 388 S.E.2d 228 (1990).

that would significantly impede navigation on the waters of Bogue Sound.[69] The court reasoned that the pier would extend into the sound so as to substantially impede the traditional public uses of that area.[70] The court further explained that such a pier would be substantially longer than the majority of piers in the area, which extended only 150 to 250 feet.[71] Again, the court's qualification of littoral rights was narrowly confined to the case in which property owners build structures from their property that significantly impede necessary public uses of navigable waters.

Capune and *Weeks* describe extreme situations where property owners exercised their littoral rights in such a way as to substantially interfere with the public use of the beach or waterway. The *Capune* and *Weeks* courts balanced the qualification of the littoral right against the public's traditional rights in the navigable waters.[72] The cases illustrate that littoral rights may not be qualified simply because their restriction serves some government purpose. The narrow holdings of the *Capune* and *Weeks* cases qualifying littoral rights appear to be limited to circumstances of substantial interferences with the public's use and enjoyment of the beach or navigable waters.

In *Slavin*, on the other hand, the North Carolina Court of Appeals allowed Oak Island to completely deny littoral property owners direct beach access, even though the owners' use of the property did not obstruct the public's use of the beach.[73] The property owners' only potential interference with the public's use of the beach was the potential erosion caused by foot traffic, which is no different than that caused by the general public.[74] There is, however, no North Carolina precedent in which littoral rights have been limited, without payment of compensation, for a purpose other than preserving public beach and water access.

It is possible to defend *Slavin* by arguing that it is distinguishable from prior cases limiting littoral rights because the *Slavin* case involved a renourished beach. Oak Island argued that because title to sand placed above the mean high tide line in a beach nourishment

69. *Id.* at 225, 388 S.E.2d at 235.

70. *Id.* at 221, 388 S.E.2d at 231 (explaining that this area was commonly used for travel by small boats and that it would be blocked by the construction of a 900-foot pier).

71. *See id.* at 219, 388 S.E.2d at 230.

72. *Capune*, 273 N.C. at 588–89, 160 S.E.2d at 886–87; *Weeks*, 97 N.C. App. at 225–26, 388 S.E.2d at 234–35.

73. *See* Slavin v. Town of Oak Island, 160 N.C. App. 57, 61, 584 S.E.2d 100, 101 (2003).

74. *See id.* at 59, 584 S.E.2d at 101 (explaining that plaintiffs simply wanted direct access).

project vests in the state, this strip of land cuts off the littoral rights of oceanfront property owners.[75] However, littoral property owners have always had to cross some amount of state-owned land in order to access the navigable waters.[76] North Carolina law provides that title to the foreshore, or the land between the high and low water marks, vests in the state.[77] Consequently, every time a littoral proprietor accesses the deep water from his property, he must cross the state-owned foreshore. Despite this strip of foreshore, littoral property owners in North Carolina have always enjoyed a right of direct access to and from the deep water and their property.[78] Therefore, the fact that a thin strip of state-owned beach has been laid between oceanfront property and the water should have no legal effect on littoral rights of access.

Due to the lack of North Carolina case law supporting an expanded limitation on the rights of littoral property owners and the absence of statutory authorization for Oak Island's Access Plan, the court of appeals is clearly breaking new ground with its holding in *Slavin*. The holding stands plainly against the repeated confirmations of North Carolina courts that a littoral property owner enjoys "(1) [t]he right to be and remain a riparian proprietor and to enjoy the natural advantage thereby conferred upon the land by its adjacency to the water, [and] (2) the right of access to the water, including a right of way to and from the navigable parts."[79] But the true novelty of this decision is even more apparent when compared to the decisions of courts in other states across the country.[80]

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75. *See* Appellee's Brief at 5, Slavin v. Town of Oak Island, 160 N.C. App. 57, 584 S.E.2d 100 (2003) (No. COAO2-571).

76. *See* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 301–02, 177 S.E.2d 513, 516 (1970) (explaining that the State owns title to the foreshore).

77. *Id.* at 302, 177 S.E.2d at 516 (stating that in North Carolina, littoral rights do not include ownership of the foreshore); *see also* West v. Slick, 313 N.C. 33, 60, 326 S.E.2d 601, 617 (1985) ("In North Carolina private property fronting coastal waters ends at the high-water mark and the property lying between the high-water mark and the low-water mark known as the 'foreshore' is the property of the State.").

78. *See* Shephard's Point Land Co. v. Atl. Hotel, 132 N.C. 517, 537, 44 S.E. 39, 45 (1903); *see also* Capune v. Robbins, 273 N.C. 581, 589, 160 S.E.2d 881, 886 (1968) (recognizing that while littoral property rights are qualified, they usually include the right of access to the water); Weeks v. N.C. Dept. of Natural Res. & Cmty. Dev., 97 N.C. App. 215, 225–26, 388 S.E.2d 228, 234 (1990) (providing that a littoral property owner is not guaranteed an absolute property right).

79. *In re* Protest of Mason, 78 N.C. App. 16, 25, 337 S.E.2d 99, 104 (1985) (citations omitted).

80. *See* Hayes v. Bowman, 91 So. 2d 795, 801 (Fla. 1957); Rogers v. S. Slope Holding Corp., 656 N.Y.S.2d 169 (N.Y. Sup. Ct. 1997); Arnold's Inn, Inc. v. Morgan, 317 N.Y.S.2d 989 (N.Y. App. Div. 1970); *see also* Dalton v. Hazelet, 182 F. 561, 572 (9th Cir. 1910) (stating that under Alaska law a railway line built between a waterfront lot and the water

While applying slightly differing standards, the general rule in several states is that littoral rights of access are vested property rights that cannot be taken without due compensation.[81] For example, the New York courts have repeatedly held that littoral property owners have certain rights to the beach, apart from those they possess as members of the public, that allow them unobstructed ingress and egress from the water and their property.[82] The Florida courts have gone so far as to require that littoral owners not only be allowed a direct access to and from the water, but also an unobstructed view of the navigable waters.[83] Mississippi encountered a situation similar to *Slavin*, where the state-owned beach property between the water and the littoral property owner. The Supreme Court of Mississippi explained that while the state holds ownership of the submerged lands, the owners of the adjoining lands hold a littoral right of direct and exclusive access to the waters adjoining their property.[84]

The gravity of the *Slavin* holding is found in its potentially broad consequences. Presumably, one of the most attractive features of oceanfront property is the ability to walk directly from one's doorstep to the beach. The denial of such a right could result in a significant decrease in the value of oceanfront property.[85] Additionally, due to the susceptibility of the North Carolina coast to erosion, beach nourishment projects are becoming more common.[86] After the *Slavin* decision, littoral rights of access could be denied to property owners anywhere that a publicly financed beach nourishment has taken place. Just the possibility of a beach nourishment project could greatly

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does not cut off the littoral rights of access held by the upland lot); Shorehaven Golf Club, Inc. v. Water Res. Comm., 153 A.2d 444, 446 (Conn. 1959) (stating that the owner of land from which the tide ebbs and flows has the exclusive right to dig channels and build wharves so long as he does not impede navigation); Langley v. Meredith, 376 S.E.2d 519, 523 (Va. 1989) (reiterating that the riparian owner has a right of access from his property to the navigable part of the waterway); Sea View Estates Beach Club, Inc. v. State Dept. of Natural Res., 588 N.W.2d 667, 675 (Wis. Ct. App. 1998) (reiterating that a riparian owner has the right to use the shoreline and the right to access to the water).

81. *See* sources cited *supra* note 80.

82. *See Rogers*, 656 N.Y.S.2d at 173–74; *Arnold's Inn*, 317 N.Y.S.2d at 991.

83. *See Hayes*, 91 So. 2d at 801.

84. *See* Harrison County v. Guice, 140 So. 2d 838, 842 (Miss. 1962).

85. It can, however, be argued that nourishment projects and the resulting erosion prevention would increase property values more than a denial of littoral rights would reduce them.

86. *See* JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 108–10 (1994); DAVID J. BROWER, ACCESS TO THE NATION'S BEACHES: LEGAL AND PLANNING PERSPECTIVES 12–16 (1978); STEVEN M. SILVERBERG & MARK S. DENNISON, WETLANDS AND COASTAL ZONE REGULATION AND COMPLIANCE 103–04 (1993).

reduce oceanfront property values along the North Carolina coastline. Such adverse consequences make the *Slavin* decision very troubling.

A few adjustments to Oak Island's Access Plan could yield a workable solution. The purpose of the fence in question is to preserve vegetation on the dunes and protect sea turtle movement. Oak Island could adopt one of two options that would allow the Town to keep the fence in place while still allowing property owners direct access. First, Oak Island could provide a single gate in the fence in front of each lot, providing a means of access while fencing the majority of the waterfront.[87] Second, the Town could keep the entire fence in place, but allow property owners to build wooden walkways above the fence that meet Coastal Area Management Act ("CAMA")[88] regulations.[89] Either of these plans would allow the Town to keep the vast majority of the fence in place without denying oceanfront property owners their littoral rights. Therefore, it is possible for littoral rights to co-exist with public efforts to protect sea turtles.

The Supreme Court of North Carolina should have granted certiorari in this case and should have reversed the decision of the court of appeals, holding that Oak Island cannot restrict littoral rights for their stated purpose without providing some form of compensation. The court of appeals misinterpreted the nature of the phrase "qualified rights" to mean a right that can be denied whenever doing so serves the purposes of the state. A proper interpretation of case law reveals that littoral rights are "qualified" only in the respect that they may not be exercised to the detriment of public use of beaches and navigable waters. The *Slavin* decision also misapplied two state statutory provisions, interpreting them as authorizing a town to deny littoral rights without compensation. A reversal of the *Slavin* decision by the Supreme Court of North Carolina would not have left the State without a means of keeping people off certain

87. A look at the project documentation of the Army Corps of Engineers shows an expectation on their part that oceanfront property owners could not be denied direct access as a result of the nourishment project. *See* Record, *supra* note 9, at 668. The Corps stated that such easements would be needed to complete a number of tasks essential to the Turtle Habitat Restoration Project while "reserving, however, to the littoral landowner the right to construct a wooden walkway access structure across said easement." *See id.*

88. N.C. GEN. STAT. § 113A-100 (2003). CAMA establishes a joint program between state and local governments for the management of coastal areas. *See* Heath & Owens, *supra* note 29, at 1417–21.

89. See N.C. ADMIN. CODE tit. 15A r. 7K.0207 (July 2003) (providing certain building requirements for structural pedestrian accessways over frontal dunes).

parts of the beach. If a denial of access rights to littoral property owners is necessary to protect sea turtles, the North Carolina Legislature should pass a statute authorizing the Access Plan. Until that time, Oak Island does not have the authority to deny the littoral rights that oceanfront property owners have possessed in North Carolina for over a century.

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