

**BEACH ACCESS IN NORTH CAROLINA**  
**Public Rights and Public Implications**  
*Koenig v. Town of Kure Beach*

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## 1.0 EXECUTIVE SUMMARY

In the United States, “shorelands, bottomlands, tidelands, tidewaters, navigable freshwaters and the plant and animal life living in these waters are accorded special treatment under State and Federal law” under the public trust doctrine (Slade, 1990, p. xvi). These areas are held in trust by the state for the general public for commercial and recreational purposes. It may be argued that public access to these areas is a necessity for the public trust doctrine to have any meaning. The legal battles between private property owners’ rights and the public’s rights to access these areas are important conflicts in many coastal communities.

“By using a beach for many years, paying little or no attention to the property rights of littoral owners, the public may acquire rights in the beach. Adverse possession, prescription, and implied dedication are familiar legal doctrines which recognize that under certain circumstances rights in land may be obtained through use” (Owens & Brower, 1976, p. 83). These same common law principles may be applied when looking at the public’s right to access easements through private property to beach areas.

The *Koenig v. Town of Kure Beach* case is a civil lawsuit occurring over a 10-foot wide strip of oceanfront property in Kure Beach, North Carolina. In this case, the Plaintiffs are private property owners who have contested the public rights in a “pedestrian access easement” on their property. The court’s initial decision has granted this access easement to the residents living in the Kure by the Sea subdivision in Kure Beach, not the general public. This decision has been appealed by the residents living in the area west of the easement (not within the limits of the subdivision). The area in question had been used as a beach access by the residents living in the area for approximately 40 years.

Both legal and policy issues surround this case:

### Legal Issues

- A public access easement should be provided at the Site by *express dedication*; the language in the property deed states: “this property is conveyed subject to a public access easement 10-feet in width, running parallel to and along the northern boundary of the lot”. The survey of the property,

- recorded in Map Book 29, Page 151, of New Hanover County Register of Deeds depicts a “10’ pedestrian access easement” running along the northern property boundary.
- The *public trust doctrine* holds the title to land below the mean high-tide line in trust by the State for public benefit. A critical aspect of the public trust doctrine is the right of access; without some means of access, the public’s right to use the foreshore is meaningless.
  - If a private landowner donates property to the public and the public accepts the donation, this property belongs to the public under the common law principle of *implied dedication*. The courts have interpreted the donative intent broadly; in the past it has been considered to occur when the private property owner fails to object to the use of property by the public. In North Carolina, if uncontested use of the Site occurred for at least 20 years, an easement should be established through the Site by implied dedication
  - If previous use of land is historic and free from dispute, the public will establish a *customary right* to use private land. Based on the fact that a well-established path was present at the Site, the public had established rights in the land based on principles of custom.

### **Policy Issues**

- The previously established public rights in the land at the Site justify the use of municipal tools and police power by the Town of Kure Beach to establish a public access easement. The use of eminent domain or condemnation of the Site is warranted.
- The public beach access points in the area are currently insufficient to satisfy the requirement set forth in the Kure Beach Draft Land Use Plan for “local access area every quarter-mile to give neighborhood residents/pedestrians and bicyclists access to the beach” (Town of Kure Beach, undated, p. 95).
- The public beach access points in the area are currently insufficient to satisfy the guidance provided in the North Carolina Administrative Code (NCAC) where local governments are encouraged to have one “local access site” per block (NCAC, 2005).
- The public beach access points in the area are currently sufficient to satisfy the United States Army Corps of Engineers (USACE) requirements for a “public beach” for Federal cost share

programs for beach renourishment. However, the requirements established by the USACE are *minimum* guidance and additional public access areas are always encouraged. If the USACE looks at two potential projects, one with minimum public access provided, and another with many public access opportunities, the project with additional public access points and parking will be preferred. Oceanfront property owners are acting in their own best interest when they allow for plentiful public access; without the Federal cost share dollars it seems that beach renourishment projects would be prohibitively expensive for small coastal communities like Kure Beach, and oceanfront homes may be threatened by shoreline erosion.

- 15A NCAC 7M Section .0303, “Development shall not interfere with the public’s right of access to the waterfront where such access has been established through donation, acquisition, express or implied dedication or prescriptive easement” (NCAC, 2005).

The following sections present the common law principles of the public trust doctrine, public prescriptive easements, implied dedication, customary access, and takings, and apply these principles to the facts of the *Koenig v. Town of Kure Beach* case. Similar legal cases that have been previously decided are also presented in an effort to facilitate the judicial interpretation of traditional rights of public access. Local, state, and federal public beach access requirements are explored, and the access opportunities in Kure Beach are reviewed. Municipal tools available for local governments to obtain public access to beaches are also presented.

In light of the applicable common law principles, local, state and federal access requirements, and the registered property deed for the 830 Fort Fisher Boulevard North site, it may be argued that the pedestrian access easement in question should be granted to the public for public use.

“The public’s trust rights are not self-executing and exist primarily because courts have enforced them. Without judicial recognition there would be no Public Trust Doctrine” (Slade, 1990, p. 282). This pending decision is important in terms of public access rights for all citizens living in North Carolina, and for the public in general.

## 2.0 INTRODUCTION

As the oceanfront property in the United States has increasingly come under private ownership, beach access has become an important social, political, and legal issue. It seems the demand for beach recreation has increased, while the supply of beach areas readily available for public recreation has decreased. This imbalance has led to a crisis situation in some communities; “[p]rivate property rights, along with an increased sensitivity to the fragile nature of the coastal environment, has led to an ever-dwindling beach that is freely available for public use” (Owens & Brower, 1976, p. 1).

The *public trust doctrine* holds the legal title of the land below the mean high-tide line in the state, for the use of the general public (Kalo, Hildreth, Rieser, Christie, & Jacobson, 2002). Although this preservation of the land below the mean high-tide line for the public is important, for the individual citizen to enjoy their rights below the mean high-tide line, they must be able to access these waters (Owens et al., 1976). The shoreline in the United States is limited, and the general public, who has rights to use the shoreline, is relatively unlimited. The owner of the land adjacent to the shore has no greater right to the use of the water than any other member of the public; thus, access opportunities should be provided for everyone, not just those fortunate enough to own shore frontage (Nixon, 1994).

### 2.1 The North Carolina Administrative Code

The North Carolina Administrative Code (NCAC) contains guidelines for policies and procedures for North Carolina. Title 15A of the NCAC contains guidelines for *Environment and Natural Resources*; Chapter 7 contains guidelines for *Coastal Management*; Subchapter M contains *General Policy Guidelines* for the Coastal Area; and Section .0300 contains *Shorefront Access Policies*. The general policy under 15A NCAC 7M Section .0300 states;

“The public has traditionally and customarily had access to enjoy and freely use the ocean beaches and estuarine and public trust waters of the coastal region for recreational purposes and the State has a responsibility to provide continuous access to these resources. It is the policy of the State to foster, improve, enhance and ensure optimum access to the public beaches and waters of the 20 county coastal region” (NCAC, 2005).

The NCAC has expressly appointed the State the responsibility of ensuring the public trust waters continue to be available for use by the public, and the State should seek to improve access opportunities, where available.

The NCAC also states under 15A NCAC 7M Section .0303,

“Development shall not interfere with the public’s right of access to the waterfront where such access has been established through donation, acquisition, express or implied dedication or prescriptive easement” (NCAC, 2005).

Based upon the language in these guiding principles for North Carolina, it is clear that the ability of the public to access the beaches and estuaries of the State is an important right that should be maintained. Even in the case of “development”, public access rights are to be protected where they have been established. The rights of private property owners are important; however, in some cases “the public may already have a right of access across and/or the right to use what is generally considered privately owned land, meaning that private ownership may already be limited by existing public rights in the land” (Brower, Dreyfoos, Epstein, Pannabecker, Stroud & Owens, 1978, p. 32).

As stated in Section .0303 of the NCAC, public access projects should be consistent with those policies outlined in the local government’s land use plan, and local governments are encouraged to have one “local access site” per block. These types of access points offer minimal or no facilities, and are primarily for use by pedestrians who reside within a few hundred yards of the access point (NCAC, 2005). Although these access areas are typically only 10-feet wide, they serve as important pathways for local citizens to freely enjoy the public trust rights they are granted along the shoreline.

## **2.2 The Town of Kure Beach Land Use Plan**

The Town of Kure Beach is a small community located on the southern half of Pleasure Island in southeastern North Carolina. The Town has approximately 1,750-full-time residents and this population is estimated to triple in the summer months (Town of Kure Beach, 2005).

The Coastal Area Management Act (CAMA) requires each of the coastal counties in North Carolina to have a local land-use plan in accordance with guidelines established by the Coastal Resources Commission (CRC). Each land-use plan includes local policies that address growth issues, desired types of economic development, natural resource protection, and the reduction of storm hazards (North Carolina Department of Environment and Natural Resources: Division of Coastal Management, 2005). As previously cited in Section .0303 of the NCAC, public access projects should be consistent with those policies outlined in the local government's land use plan.

The Division of Coastal Management (DCM) provides grants for local land-use planning under CAMA. These local land-use plans provide guidance for individual projects and a broad range of policy issues (North Carolina Department of Environment and Natural Resources: Division of Coastal Management, 2005). The Town of Kure Beach is currently participating in this voluntary land-use planning program; their Draft Land Use Plan (LUP) is currently under review by the DCM.

In the Town of Kure Beach's Draft LUP, the first "goal for the future" listed is a public access goal statement: "[t]o optimize public access opportunities to the ocean beach and the public trust area of Kure Beach" (Town of Kure Beach, undated, p. 90). The LUP continues to state "the Town will provide local access areas every quarter-mile to give neighborhood resident/pedestrians and bicyclists access to the beach" (Town of Kure Beach, undated, p. 95). As stated in the Draft LUP, public access is a major priority. It seems relatively clear that both the State and local governments working together in Kure Beach wish to protect the public trust rights of the citizens and optimize the public access opportunities available in the Town.

The readily available public access easements in Kure Beach may be taken for granted, until their existence is threatened. As oceanfront development increases in the area and the value of property along the shore increases, private property owners may become more demanding of their perceived rights. It is important to recognize and understand the legal principles and tools available to the public that allow for the continued existence and protection of access easements to public trust lands.

### **3.0 BEACH RENOURISHMENT**

In order to deal with the problems of shoreline erosion and provide storm protection in coastal communities, beach renourishment has been adopted as a solution. In this process, offshore sand deposits are dredged and pumped onto eroding beaches (Beatley, Brower & Schwab, 2002).

#### **3.1 Federal Cost Share for Beach Renourishment**

Beach renourishment projects are typically extremely costly; project costs may be shared with the United States Army Corps of Engineers (USACE) under the Federal cost share program if the project occurs on “public shores” (U.S. Army Corps of Engineers, 2003). Under the USACE regulations, “public use means use by all on equal terms” (U.S. Army Corps of Engineers, 1989).

In order to qualify for federal funding, the beaches within the project area receiving material must be open to the public and provide reasonable public access. For the USACE to consider a beach “public”, the project area “must provide public access points every one-half mile, with sufficient public parking within one-quarter mile” (U.S. Army Corps of Engineers, 2003, p. E-5). Private access points for oceanfront subdivisions that are not open to the general public do not count towards the public access requirements for a project area (Clay, 2005).

North Carolina is an unusual state in that public access has not typically been a problem. Most oceanfront communities within North Carolina contain residential development unlike typical “vacation” states (i.e. Florida). In the “vacation” states, access opportunities are plentiful; tourism is a major industry, and public access is required to sustain that industry. In North Carolina, public access opportunities have not typically been a priority for the residentially developed beaches. However, in the last five years, public access has become a major priority when the USACE looks to appropriate federal funding for beach renourishment projects. Future renourishment projects will require that public access to beaches is adequate to meet the minimum requirements set by the USACE, and previously used access sites and parking will be reassessed by the USACE to ensure they are still available to the general public (Clay, 2005).

If a renourishment project has insufficient public access sites, the local government will be required to pay 100% of the project costs for the renourishment of the portion of the beach that is not reasonably accessible by the public. For example; in a 6-mile beach renourishment project, if one-mile of beach is not covered with public access points and sufficient parking every half-mile, the local government will be required to pay for 100% of the project cost in this one-mile stretch of beach. For the 5-mile portion of public beach, the Federal cost share program provides 65% of the cost in federal dollars; the remaining 35% for the 5-mile stretch will be paid in non-federal dollars, through local funding (Clay, 2005). Although this flexibility in the Federal cost share program allows for renourishment projects to continue even when there are insufficient public access points, this pay structure may be prohibitively expensive for local governments. Additionally, the USACE makes every effort to avoid these types of renourishment situations, unless absolutely necessary (Clay, 2005).

In order to justify federal funding for beach renourishment projects, there must be a national interest in the project, not just a local interest (Clay, 2005). The projected cost of renourishment projects is so great, that “it is doubtful that Congress and the State will be both willing and able to fund all the recommended nourishment activities” (Kalo, 2000, p. 1888). In the future, some projects may not warrant this large amount of federal funding. When projects are considered by the USACE, the one-half-mile public access requirement is the *minimum* that must be satisfied; additional access points are encouraged. When the USACE looks at two potential renourishment projects, at the same cost, the project that provides the most public access and parking for the beach will be preferred (Clay, 2005).

Based upon the USACE requirements for Federal cost share program qualification for beach renourishment projects, public access sites are extremely important. It may be argued that without the Federal cost share program, beach renourishment would be prohibitively expensive for small coastal communities as a means to deal with shoreline erosion problems and to provide storm protection for oceanfront properties. In order for oceanfront properties to be protected in the future, public access opportunities must continue to be provided at least every half-mile.

### **3.2 North Carolina Renourishment Implications**

North Carolina law is clear; “publicly-financed replenished beaches are public beaches” (Kalo, 2000, p. 1888). Under the North Carolina General Statutes, when land is raised above the mean high-water mark (as in beach renourishment projects), the title to that land rests in the state:

“[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” (North Carolina General Statutes, 1959, c.683, s.1; 1979, c.414; 1985, c.276).

CAMA regulations applicable to beach nourishment also provide that renourished areas belong to the general public; the applicable regulations require that “[t]he entire restored portion of the beach shall be in permanent public ownership” (NCAC, 1995).

The property rights of oceanfront landowners change once a publicly financed renourishment project occurs adjacent to their property. When public funds are spent for beach renourishment projects, the title to the beach belongs to the State as a trustee for the general public’s rights.

### **4.0 KURE BEACH RENOURISHMENT PROJECTS**

“Kure Beach was the object of a \$14.2 million dollar project completed in 1998” (Kalo, 2000, p. 1888). Since Kure Beach is a small coastal community, it is unlikely they could afford to undertake such a large financial project without Federal assistance.

Kure Beach and Carolina Beach were renourished in a joint project undertaken by the USACE in 1998 (Colella, 2005). At this time it was determined that public access opportunities and public parking facilities in the project area were sufficient to meet the federal requirements set by the USACE. Public access and public parking will be reevaluated when the next renourishment project occurs in the area. At this time, if one of the previously established access points is no longer available, the Town of Kure Beach will be required to provide sufficient public beach access in any areas that are lacking. Providing public access to

the beach is a community responsibility that must be fulfilled for Federal cost share dollars to be dispersed (Colella, 2005).

### **5.0 CASE BACKGROUND – Laura M. Koenig and Salvatore P. Russo v. Town of Kure Beach<sup>1</sup>**

Residents of the area formerly known as Hanby Beach (now the northernmost section of the Town of Kure Beach) had accessed the shoreline and the ocean through a well-established path at the 830 Fort Fisher Boulevard North site (the Site). Notarized letters from ten different families in the area have documented the use of this path since at least 1964. One of the letters described the access point as being granted by Dow Chemical, an industrial facility that was operated in Kure Beach since approximately 1930.

In 1995, the Russos (the Plaintiffs) acquired the property at 830 Fort Fisher Boulevard North as vacant lot from a developer who was in the process of creating the Kure by the Sea subdivision. The legal description of the property in the deed states: “this property is conveyed subject to a public access easement 10-feet in width, running parallel to and along the northern boundary of the lot.” The survey of this property, recorded in Map Book 29, Page 151, of New Hanover County Register of Deeds depicts a “10’ pedestrian access easement” running along the northern property boundary. Copies of the property deed and the survey are included in Appendix A.

The Russos authorized a perpetual easement to their property on November 29, 1995; this easement provides access to the area in between the dunes and the mean high tide line, and is required by beach renourishment projects at the Site. The language for this easement states, “[g]rants do hereby grant a perpetual easement and assignable easement and right-of-way in, over and across the hereinafter described land to nourish, renourish, protect, operate and maintain a public beach thereon, including the right to provide use and access to the public”. This “express dedication” applies only to their dry-sand property, between the dunes and the mean high tide line.

At the time when the Russos purchased their property, they were able to access the beach by simply walking over the dunes. The entire Kure Beach strand could be accessed in this manner, until 1997, when

the Town of Kure Beach passed Ordinance Section 5-65 to prohibit people from crossing over the dunes to access the beach. This ordinance was passed to protect the dune grasses that had been planted to help prevent erosion. Sand fencing was also placed in the dunes at this time, and this feature physically prohibited the public from crossing over the dunes to access the beach from the Site. Beginning in 1997, the public was only able to access the Kure Beach strand from existing dune walkovers, and oceanfront property owners were required to apply for a permit from the Town of Kure Beach and the DCM to construct a private walkover through the dunes.

In 1999, the Russos began building the house on their property, which they currently occupy as their principal residence. During the construction, the Russos inquired with the Town of Kure Beach regarding the intentions for the “easement” listed on their deed. At this time, the Town’s building inspector told the Russos “not to worry”, and that the 10-foot strip would “never be developed” because “there was no parking” at that location. The Russos built their house and to comply with the Town’s Ordinance 5-65, applied for a permit to build a private walkover to access the beach from their house. The Russos’ neighbors to the north also constructed a walkover in accordance with Ordinance 5-65, and their two walkovers extend out from their respective houses, across the dunes, and onto the dry sand beach where they almost intersect. Photographs of the Site and an aerial photograph of the properties depicting the dune walkovers are included in Appendix B. Portions of these walkovers are constructed within the 10’ pedestrian access easement shown on the Russo property survey, and effectively block this area from being used by the public.

Following the passage of the Town’s Ordinance 5-65, the residents in the vicinity of the 830 Fort Fisher Boulevard North property organized in an attempt to have a dune walkover constructed at the location of their former beach access path, and within the “10’ pedestrian access easement” depicted on the Russos’ property survey. The residents offered to pay the costs of construction for a walkway in accordance with the Town’s Ordinance, and went to the Town of Kure Beach for assistance in this endeavor. On April 15,

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<sup>1</sup> *The following facts have been derived from court documents and a review of the case file for case 03CVS2775 at the New Hanover County Superior Court Division on September 8, 2005. The Trial Brief, Pre-Trial Order, and Order and Judgment Documents have specifically been relied on to outline the facts of the case.*

2003, the Town of Kure Beach approved a resolution to build a wooden ramp and bridge over the 10-foot strip on the Russo's property for the purpose of opening it as a "local access site" for public beach access.

On April 24, 2003, the Town applied to the DCM for a CAMA Minor Development Permit for a pedestrian beach access and dune walkover running along the northern boundary of the Russo property. On the Town's application for the CAMA permit, rather than including the language in the property deed, the Kure by the Sea subdivision map (see Appendix A) is cited in support of their claim that the property is subject to a public easement. This surveyed map illustrates a "10' pedestrian access easement" on the northern boundary of the property. This is not as descriptive as the language in the deed, which states "this property is conveyed subject to a public access easement 10-feet in width, running parallel to an along the northern boundary of the lot".

After reviewing the package submitted by the Town of Kure Beach, the DCM issued a CAMA permit on May 12, 2003 to build a dune walkover at the 830 Fort Fisher Boulevard North easement. At this point Laura M. Koenig and Salvatore P. Russo filed a third-party hearing request with the North Carolina Coastal Resources Commission (CRC). The CRC determined that the issue to be decided was one of title, and not appropriately before the CRC, and denied the Plaintiffs' hearing request.

On July 30, 2003, the Plaintiffs filed the declaratory judgement and quiet title action against the Town of Kure Beach in the New Hanover County Superior Court; this case is referred to as *Laura M. Koenig and Salvatore P. Russo v. Town of Kure Beach*. The Plaintiffs argued that the developer of the Kure by the Sea subdivision intended the easement to be utilized as a beach access solely by non-oceanfront residents of the Kure by the Sea development. The developer insisted that the language be included in the deed in order to be sure that the non-oceanfront residents of Kure by the Sea would have a beach access point if his plan to construct another beach access for the subdivision was denied. The alternative access has since been approved and constructed. The Plaintiffs argue that the developer did not intend to dedicate any part of the property at the Site to the general public.

The Plaintiffs also argue that the Town has no legal interest in the subject property, as the Town received no deeded conveyance of the property from any of the Plaintiffs' predecessors. North Carolina follows the

general common law rule known as the “stranger to the deed” rule. This rule states that a reservation in a deed in favor of a stranger to the title does not provide any rights or interests to the “stranger”. Thus, the language in the Russo deed attempting to provide an easement to the public has no legal effect. The Plaintiffs argue that the Town acquired no easement or other interest in the Russo property.

Finally, the declarations that have been recorded for the Kure by the Sea development contain the following provision: “13. Dedication to Public Use: Nothing in these Restrictions, nor in the recording of any plat or deed pursuant hereto, shall dedicate (or be deemed to dedicate) to public use any of the streets, common lands or other grounds within Kure by the Sea”. Arguably, this statement negates the idea that the strip of land on the Russo property was intended for public use.

On October 14, 2003, individuals residing on Dow Avenue in Kure Beach, just west of the Site, filed a Motion to Intervene in this action, as a third party in the suit that wishes to protect their own interests. The Right to Intervene was granted to these parties on November 14, 2003. The Interveners are generally the same individuals who had organized to construct the “local access site” with the assistance of the Town.

In this case, the Town bears the burden of proof on the issue of whether it has acquired an easement by dedication. As decided in *Pritchard v. Fields* (228 N.C. 441, 45 S.E.2d 575 (1947)), the burden of proof is on the party seeking to establish the property right; a party claiming an easement has the burden of proof, and an easement generally must be established by clear and convincing evidence.

Based upon the facts presented and the Plaintiffs’ arguments, the New Hanover County Superior Court Judge reached a decision on January 7, 2005. The court decided (without a jury) that the owner of the property did not sign the map that illustrates the public access easement at the same time that it was recorded, so the map is insufficient to establish a public access easement of any type. Additionally, the court found the language in the deeds “ambiguous”, and ruled the intent of the language was to dedicate the access areas to the residents of the subdivision of Kure by the Sea. Since no deed or title instrument was executed to pass the title to the 10-foot wide strip to the Town of Kure Beach, the access area does not belong to the Town or to the general public.

On January 13, 2005, the Interveners filed an appeal of the judge's decision with the New Hanover County Clerk of Superior Court. The decision regarding the appeal of this case has not been reached as of the date of this report.

## 6.0 PRESENTATION OF SIMILAR CASES

Reviewing the decisions made by the courts in previous access easement cases may be helpful in our understanding of applicable theories; however, caution should be taken in generalizing the interpretation of public trust law to other states. Individual states treat cases of this nature differently; what is true and just in New Hampshire may not be fully applicable to North Carolina.

“Nearly one-third of all public trust lands in the United States is privately owned. Much of the public trust litigation centers around State efforts to exercise its public trust authority over privately held trust land... Courts interpret the conveyance instrument against the grantee, in contrast with nearly all other real estate transactions. Many cases involve claims of prescriptive rights or adverse possession of trust lands” (Slade, 1990, p. 176). With one-third of public trust land in private ownership, and the majority of the nation's coastline developed by private entities, access to public trust lands will become increasingly limited. However, the nature of public trust lands is such that the public's rights are generally protected; in contrast with most other real estate law. Under English common law, “any conflict between the exercise of public and private rights, was resolved in favor of the public” (Slade, 1990, p. 180).

### 6.1 *Oshita v. Hill*

In *Oshita v. Hill*, 65 N.C. App. 326, 308 S.E.2d 923 (1983), the case centered on a prescriptive easement through a tract of land that was used almost daily as a driveway from 1932 until 1974. During the years of use, the tenant neither asked for, nor receive permission to use the road, nor was he physically stopped by the plaintiff installing a fence or otherwise. The tenant maintained and improved the road at his own expense, on a least three separate occasions. In *Oshita*, the jury recognized the plaintiffs' easement and a judgement was entered to that effect.

In *Oshita v. Hill* we see that a prescriptive easement may be established through use (forty-two years); without express permission or an attempt to physically prevent the use from occurring. In contrast to the *Koenig* case, this use was established by one individual, rather than the general public. The nature of the *Oshita* easement is such that this was the primary ingress and egress to the tenant's property.

## **6.2         *Andrews v. Country Club Hills***

In *Andrews v. Country Club Hills, Incorporated*, 18 N.C. App. 6, 195 S.E.2d 584 (1973), the defendant wished to withdraw two areas in the Country Club Hills Subdivision from public use. The areas had been recorded in 1945 and 1946 on maps of the subdivision, which contained a layout of streets by name and lots by number; lots were sold by reference to these maps. These areas consisted of several acres of land referred to as "Hyde Park", and a 100-foot-wide unnamed street at the western end of "Hyde Park". A declaration of withdrawal from public use was filed under G.S. 136-96, and the areas were conveyed to a private individual. Under G.S. 136-96, any "strip, piece, or parcel of land" which has been dedicated to public use by a "deed, grant, map, plat, or other means", which was not actually opened and used by the public within 15 years after dedication, may be withdrawn from public use. If the public has not used this land, it is presumed to have been abandoned by the public, and no person shall have any right to enforce any public or private easement therein. An exception contained in G.S. 136-96 is "[t]he provisions of this section shall have no application in any case where the continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway" (North Carolina General Statutes, 1921, c.174; c.s., ss. 3846(rr), 3846(ss), 3846(tt); 1939, c.406; 1953, c.1091; 1957, c.517; 1987, c.428).

The plaintiffs, who own property in the Country Club Hills Subdivision, filed suit claiming that there had been a dedication of the Hyde Park and the unnamed street to public use; Hyde Park had been used continuously as a park by purchasers of lots in Country Club Hills since its dedication in 1945. The trial court found that (1) there had been a dedication by Country Club Hills of Hyde Park and the 100-foot-wide street, (2) Hyde Park had been used as a park by the plaintiffs since its dedication in 1945, (3) the unnamed street had not been opened, and (4) the declarations of withdrawal under G.S. 136-96 were ineffective.

The defendants appealed this decision; they made no exceptions or assignments of error to the judgement in relation to the Hyde Park area; however, they contended since the unnamed street was never “opened” or used by the public, it could be withdrawn from public use. The decision rests upon where the right to use the street is necessary to “afford convenient ingress or egress to and from the park” under G.S. 136-96. Since the Hyde Park area is bordered by three other public streets, the 100-foot-wide strip may not be necessary to provide convenient ingress or egress to the park; if this is the case, the unused land may be withdrawn from public use. The judgment was remanded to the lower court, to determine if the unnamed street is necessary for “convenient ingress and egress”.

The application of the G.S. 136-96 principles to the *Koenig* case is an interesting exercise. Based upon G.S. 136-96, public rights cannot be withdrawn from land “necessary to afford convenient ingress or egress to any lot or parcel of land sold or conveyed by the dedicator of such street or highway”; although the easement in question in the *Koenig* case is not necessarily a “street or highway”, for the purposes of this application we may think of it in this manner. On November 29, 1995, the Russos granted a perpetual easement to their property for beach renourishment. This perpetual easement provides access to the area in between the dunes and the mean high tide line, and states “[g]rantors do hereby grant a perpetual easement and assignable easement and right-of-way in, over and across the hereinafter described land to nourish, renourish, protect, operate and maintain a public beach thereon, including the right to provide use and access to the public”. Since the Russos conveyed the rights to the dry sand area in front of their home to the public, it is reasonable to assume that they cannot withdraw the easement across their site which provides “convenient ingress and egress” to this area.

### **6.3            *Janicki v. Lorek***

In *Janicki v. Lorek*, 255 N.C. 53; 120 S.E.2d 413 (1961), the plaintiffs filed suit because the defendants had obstructed a strip of land they wished to use for a street. In this case, the street had been dedicated in 1906, and had not been used by the public generally until 1954. At this time, the corporation that had created the subdivision dissolved, and the property owner adjacent to the unopened street filed a withdrawal of dedication. Under G.S. 136-96, if the offer is not accepted by the public within 15 years after the dedication, the offer may be withdrawn. However, if the offer of dedication is “accepted by the public, by

opening and using the street, at any time before withdrawal, the dedication is complete and it may not thereafter be withdrawn". The adjacent property owner was granted the authority to withdraw the street from public use when the corporation dissolved, and the plaintiffs were granted no rights in the land, since the offer of the land to the general public had not been accepted within 15 years of dedication. Due to the lapse in acceptance, the public lost rights to the unnamed street.

In the *Koenig* case, it is unclear if or when the "offer" of the public pedestrian easement was officially made to the public. However, since the public had been using the path through the dunes for approximately forty years, it appears they had "accepted" any donation that was made by the property owner.

#### **6.4**            *Perley v. Langley*

The case of *Perley v. Langley*, 7 N.H. 233 (1834), may be the earliest American case dealing with customary rights. In this case, the defendant took sand from the plaintiff's property to mix with lime for the purpose of making mortar; the defendant plead that this action was a *right of custom* as inhabitants of Meredith Bridge Village had always taken sand from this area.

The terms *custom* and *prescription* are often used as synonyms, but there are slight differences between these terms. If rights are common to the general public they are held in *custom*; if rights are limited to an individual and his descendants or attached to a particular estate, they are held in *prescription*. All the rights that are held as custom can also be held as prescription; but not vice versa. The right to take a profitable entity from the property of another cannot be held as a local *custom*; this claim must be sustained as a *prescription*. An easement to an area may be held in *custom*, but the right to remove profit from the land of another cannot be held in custom. The defendant was wrong to take sand from the plaintiff's property as a right held in *custom*.

In the *Koenig* case, no profit is being taken from the Plaintiffs; in fact, nothing at all is being taken from the Plaintiffs. The established public access easement is an area that the public should be allowed to traverse. The Russos will still own the property, even if the general public has established rights in the land through either prescription or custom.

### **6.5           *Nudd v. Hobbs***

In *Nudd v. Hobbs*, 17 N.H. 524 (1845), the defendant pleaded that customary rights had been established in the plaintiff's property to access the shores of the Atlantic ocean to collect sea-weed and rock-weed from the plaintiff's property. The defendant claimed that a right of way, common to all the inhabitants of Hampton, New Hampshire, had been established over the land where the trespasses were committed. A judgement was entered in favor of the defendant with regards to the establishment of the easement, but the sea-weed and rock-weed were judged to belong to the owner of the land upon which they were deposited.

Similarities exist between the *Nudd v. Hobbs* case and the *Koenig* case; in either situation, the public wishes to establish an easement through private land to reach the seashore. In the *Nudd* case, the easement was established through customary use.

### **6.6           *Elmer v. Rodgers***

In *Elmer v. Rodgers*, 106 N.H. 512; 214 A.2d 750 (1965), for over sixty years the public had used a right of way over the defendants' premises to reach the shores of Mirror Lake for bathing and picnicking. The evidence presented showed that members of the general public, as well as members of the adjacent church and their guests, used the beach and an area near the beach for bathing and picnicking purposes continuously for a period in excess of sixty years. The defendants contend that the use of the premises by the public has been with the consent and permission of the church, and therefore the public acquired no rights by adverse possession or dedication. Witnesses testified that they had used the property for bathing and picnicking openly, under a claim of right without obtaining permission from the church officials. The use of the premises by the general public was of such a nature and to such an extent that the owners of the land should have known that the right was being exercised without regard to the consent of the owners.

The court found that the general public had continuously, openly, without interruption, under a claim of right, and without the permission of the owners, used the right of way over the land owned by the defendants for ingress and egress to the shores of Mirror Lake for bathing and picnicking purposes, for a period in excess of twenty years, and therefore the public acquired a right of way for these purposes by prescription.

In the *Koenig* case, the use of the access point through the dunes by the general public was to such an extent that a well-worn path was established; the owners of the property should have known that the right was being exercised without regard to their consent. Under these circumstances, a prescriptive easement is established in the land.

## 7.0 DISCUSSION OF THEORIES

English common law is the basis for many of the legal principles we have adopted in the United States. Several common law theories are applicable to the establishment and continued maintenance of public access areas to the wet sand beach. These common law theories include the *public trust doctrine*, *public prescriptive easements*, *implied dedication*, and *customary access*; a discussion of *takings* principles is also warranted, as a legal means for oceanfront property owners to protect their economic interests and private property rights.

### 7.1 Public Trust Doctrine

As previously stated, in the United States, “shorelands, bottomlands, tidelands, tidewaters, navigable freshwaters and the plant and animal life living in these waters are accorded special treatment under State and Federal law” (Slade, 1990, p. xvi). These lands, waters, and wildlife are owned by the public, but held in trust by the State for public benefit under the Public Trust Doctrine (Slade, 1990). The boundaries for public trust lands may differ from state to state; however, in North Carolina tidal waters, the public trust land typically includes areas seaward of the mean high tide line. The mean high tide line is defined as “the average height of all of the high waters over a period of 18.6 years” (Slade, 1990, p. 59). Clearly, the public is afforded the right to use the areas seaward of the mean high tide line in North Carolina.

In some states, the State recognizes public trust interests in privately owned dry sand areas upland of the mean high tide line. These additional public trust interests may be referred to as the “expanded public trust doctrine”, and the rights for the public to use these lands may extend up to the vegetation line (Slade, 1990). In the states where the “expanded public trust doctrine” has been accepted, the courts have recognized that the use of the dry sand beach is essential for the public to fully enjoy their public trust

rights (Slade, 1990). This “expanded public trust doctrine” has allowed the public the right to rest on the shore when swimming, or to sunbathe in areas that may have typically been considered privately owned.

A critical aspect of the public trust doctrine is the right of public access. “It has been recognized by several courts that in order for the public trust doctrine to have substance, the public must have reasonable access to trust lands and waters. Without some means of access the public right to use the fore shore would be meaningless” (Slade, 1990, p. xxvi). Although the right to access public trust lands is not expressly stated, it is implied as a necessary right for the public to receive any of the privileges or benefits granted by the public trust doctrine.

The North Carolina General Statutes specifically address adverse possession of property subject to public trust rights. Under the North Carolina General Statutes, item 1-45.1:

“Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession... public trust rights... include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State’s ocean estuarine beaches and public access to the beaches” (North Carolina General Statutes, 1985).

Based upon North Carolina’s statutory law, it appears that the expanded public trust doctrine grants the general public the right to use the both the wet sand and dry sand beach areas of the State for recreation. In North Carolina, “public access to the beaches” is included within the definition of public trust rights (Slade, 1990). This is a very important right granted to the public in North Carolina; although it is not clear how this public access should be achieved. The dry sand beach area has also traditionally been used by the public in North Carolina, and the statutory law implicitly recognizes a public trust easement between the mean high tide line and the vegetation line (Slade, 1990).

It is important to note that the public trust doctrine “grants no right or privilege to the public for perpendicular access over privately held land to reach public trust lands or waters” (Slade, 1990, p. 162). Although it may be implied that access to trust lands and waters is necessary for their enjoyment, by itself, the public trust doctrine does nothing to take away those rights held by private property owners.

As times change and oceanfront property comes under private ownership for development, access opportunities to the public trust lands will become increasingly limited. It has been argued that “[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit” (Nixon, 1994, p. 87). In the future, the public trust doctrine may be interpreted as placing more importance on public rights than private rights in public trust lands. Perhaps greater emphasis or pressure should be placed on oceanfront property owners to provide access opportunities to the general public in order to reach the lands to which they are entitled.

## **7.2 Public Prescriptive Easements**

The principal legal theory that allows for the creation of a public easement across privately owned land is prescription. The doctrine of prescriptive easements holds that public prescriptive easements may be created through continuous, open, and adverse use of private land, without permission of the owner (Ducsik, 1974).

Five requirements are necessary to establish a public “prescriptive easement” right in land:

- (1) “There must be actual use of the property by the general public;
- (2) The use must be continuous (not occasional) and uninterrupted for a set period;
- (3) The use must be open and fully visible to the owner;
- (4) The user must be claiming a right to use the property; and,
- (5) The use must be adverse to the property interests of the owner.” (Brower et al., 1978, p. 30).

The right to the land may only be established by actual, continuous, uninterrupted use. The length of time necessary to establish this right differs from state to state; in North Carolina the uninterrupted use of the easement area must continue for twenty years in order for an easement by prescription to be established (Slade, 1990). The use of the land must be adverse to the owner, and it must be visible, so that the property owner knows that it is occurring. The use of the easement by the public must be inconsistent with the owner’s own use and enjoyment of his lands, and the owner should have the legal right to prevent this use, such as action for trespass (Owens et al., 1976).

The first key element in prescription is the “adverse interest” (Slade, 1990, p. 268); the user must gain the right of use against the interest and without the permission of the owner. Secondly, the “general public” must use the land. Not all public use of beaches or shorelines may give rise to a prescriptive easement; “[n]either occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches. [City of Daytona Beach v. Tona-Rama, Inc., 271 So.2d at 770]” (Owens et al., 1976, p. 135). Thus, both the intention of the owner and the amount and frequency of use are important factors when considering if private land may be subject to a public prescriptive easement.

If it is determined that the public has acquired a prescriptive easement, then the public has a right to continue to use the area in the same manner. What was initially considered trespassing may eventually become a legal right to use the beach or a beach access point. The owner still retains “ownership” of the property, but cannot do anything to reduce the public’s established rights to use it (Brower et al., 1978). Thus, the public has rights in the land, despite the private property owner’s rights; the public rights have been established against the owner’s will, by adverse use over a set period of time.

### **7.3 Implied Dedication**

Dedication is defined as the devotion of property to a public use by act of the owner, coupled with the intention that the property shall be accepted by the public, and used presently or in the future (Ducsik, 1974). The donative intent of the owner is an important aspect of dedication, as well as the acceptance by the donee (Slade, 1990).

*Express dedication* occurs when the private owner signs a deed granting the land to the public and some public body formally agrees to accept the dedication. However, there are no such formalities required for *implied dedications*. Courts have interpreted the “donative intent” more broadly; in the past, it has been considered to occur when the private property owner fails to object to the use of the property by the public. The public use of the property must be to such a degree that “a reasonable man would believe the owner intended to give this land to the public” (Owens et al., 1976, p. 300). The owner’s intent to give the land to the public may be implied from his conduct of not preventing public use of the beach or the beach access

point. No formally written deed is required for implied dedication; both the donation and the acceptance may be implied by the conduct of the owner and the general public (Brower et al., 1978). A public access easement to the beach may be acquired if the owner does nothing to stop the public from crossing his property to get to the beach areas.

“Once constructive intent is found, however, the implied dedication becomes, in the eyes of the law, a gift to the public” (Owens et al., 1976, p. 113). The owner cannot revoke his dedication, and the public cannot lose its rights through nonuse or adverse possession (Owens et al., 1976). Land subject to implied dedication cannot be taken from the public and returned to strictly private uses.

#### **7.4 Customary Use**

The public can acquire rights in land under the English doctrine of custom after long, immemorial use of a piece of property (Owens et al., 1976). A custom is defined as a long and unvarying habit that has acquired common adoption (Ducsik, 1974). A public access easement to the beach may be acquired through custom if the general public uses the easement for a lengthy period of time.

There are seven requirements that must be met before it can be said that the public has a “customary right” to use a beach area:

- (1) “The use must be “ancient”, so long that nobody remembers otherwise;
- (2) The use must have been without interruption, which is to say the public must not have been excluded by the upland owner during this period;
- (3) The use must have been peaceable and free from dispute, the public entering and using the area without resorting to force;
- (4) The use must have been reasonable and in keeping with the character of the land;
- (5) There must be certainty as to just what land was being used;
- (6) The use must have been obligatory for the upland landowners, that is, the public’s use not being subject to the option of each individual upland owner; and,
- (7) The use must not be repugnant or inconsistent with public policy and other laws.” (Brower et al., 1978, p. 28).

In order for the public to have a customary right to use a beach access point, the previous use of this land for access must be historic and free from dispute. To show that there is certainty regarding what land was

being used by the public, a well-established path should be present. If the seven requirements for customary access are satisfied, the public may be entitled to rights in privately owned land.

## **7.5 Takings**

The Fifth and Fourteenth Amendments to the United States Constitution require payment of “just compensation” to the landowner when private property is taken by the government for public use (Kalo et al., 2002). Given the strong property interests of coastal landowners, it is inevitable that claims of takings of private property rights will occur when public trust rights are exercised in the coastal zone (Slade, 1990). These claims should be expected, although they may not be fully warranted.

When a State exercises its public trust authority, it is exercising power over its own property. The coastal resource manager is in a well-protected position from successful takings arguments when protecting the rights of the general public in public trust lands. By exercising its public trust authority, a State is managing its own property; thus, nearly all of the takings case law is irrelevant (Slade, 1990). Property cannot be taken from an entity that does not fully own it; private property owners cannot claim that they have been negatively affected. “The land has been held in trust or subject to the trust from the outset and therefore nothing has been taken; a private owner cannot have any reasonable investment-backed expectations” (Slade, 1990, p. 286). As an agent for the general public, the State is granted some protection from takings claims set forth by private landowners when dealing with public trust lands. Although private landowners may believe that they own all rights to their property, some may be held in trust for the general public. If the state attempts to exercise public trust rights in privately owned land, they may be met with resistance, but the public trust rights are legitimate and should be protected.

Public access easements may not necessarily be considered “public trust lands”; however, these easements may be presented in a way that demonstrates the necessity of their existence in order for public trust lands to have meaning. Although the definition of these easements as “public trust lands” may not necessarily be accepted, the special nature of beach areas may make easements across oceanfront property seem less like a government “taking”.

## **8.0 MUNICIPAL GOVERNMENTS' TOOLS TO ACQUIRE ACCESS**

The Coastal Zone Management Act of 1972 addressed the national interest in the effective management of the coast. The Act was strengthened in 1976 pursuant to Congressional recognition that “access to public beaches... has come to be identified as one of the critical problems facing state and local governments.” Section 305 (b) of the Act as amended in 1976, provides that “the management program for each coastal state shall include... a planning process for the protection of, and access to, public beaches and other coastal areas...” The Act, in Section 315(2) which was also added in 1976, authorizes grants to states for up to 50 percent of the costs of acquiring access to beaches (Brower et al., 1978, p. 8).

“In many instances, there will be insufficient existing public rights in the beach resource... In such instances, the additional rights may be acquired either through purchase or through noncompensatory means” (Owens et al., 1976, p. 209). Public access easements may be established through the actual use of these areas as discussed in the previous section, or through the actions of the local municipal government.

### **8.1 Purchase of Rights**

“In most instances, state and local governments clearly have the power to purchase rights in property in order to promote public recreation” (Owens et al., 1976, p. 210). Easements may be purchased through oceanfront property to allow the general public to access the beach.

“However, because there is often a much greater demand for than supply of beach recreation resources, purchase of lands for this purpose can be prohibitively expensive. This is particularly true in those areas where public beaches are perhaps most needed – near urban areas where existing public beach facilities are inadequate” (Owens et al., 1976, p. 211). Oceanfront property is typically expensive; the scenic views and recreation potential associated with these areas typically cause oceanfront property to be more expensive than other properties; even those located just several hundred feet away from the shore. Purchasing several easements – even if they are only 10-foot wide – may be prohibitively expensive for many small coastal communities. In order to offset the costs for purchasing public access easements, fees may be used to finance public use of beach resources; these fees could be charged to beachgoers, or collected for use of nearby parking facilities.

One potential drawback of this method of access establishment is that the government is limited to property available in the market, and must compete with other potential buyers (Brower et al., 1978). Only those properties for sale may be purchased, and competing buyers may drive the price of an oceanfront lot even higher.

## **8.2 Eminent Domain**

“Eminent domain is the process by which governmental entities can acquire proprietary interests in privately held land in exchange for compensation, regardless of the owner’s willingness to sell” (Brower et al., 1978, p. 91). Using eminent domain, the government may take an individual’s property, so long as just compensation is provided to the private owner. Public access easements may be established in this way; land could be subject to the easement, but the private property owner could continue to maintain ownership. The oceanfront property owners may not be particularly receptive to this idea, but if appropriate compensation is provided, and the easement is put to “public use”, the government has the ability to establish access points in this manner.

## **8.3 Construction Regulation**

In order to secure public easements through planned oceanfront subdivisions, conditional approval may be granted to subdivision plans in the pre-construction stages; beach access easements may be a necessary condition of subdivision approval. This regulatory method provides a power of control over the subdivider, which can easily be applied to secure a public easement through any planned subdivision which threatens to block access to the beach (Owens et al., 1976). Obtaining public beach access points in this manner has several advantages; it is inexpensive and it does not necessarily require previous public use. However, it applies only to land facing immediate development (Owens et al., 1976).

Local government may also require the extension of all roads and rights-of-ways perpendicular to the beach down to the foreshore, and dedication of these roads to the public. Again, this condition is most applicable to new construction (Brower et al., 1978).

#### **8.4 Acquisition by Gift**

“Outright donations of land for public purposes have long played an important role in public resource development” (Brower et al., 1978, p. 73). The property owner may be provided tax savings as an incentive to donate land to the public. Additionally, the landowner may provide deed restrictions outlining how the property should be used in the future. If the deed restrictions are acceptable, the government can accept the donation provided by the property owner, and the land may be transferred to public use.

#### **8.5 Condemnation of Flood-Prone Areas**

“Under the National Flood Insurance Act (42 USC 4102), the federal government is authorized to purchase properties damaged substantially beyond repair rather than pay the insured to reconstruct whatever was on the property before the damage occurred. In practice, this may allow for purchase whenever there is greater than 50 percent damage” (Brower et al., 1978, p. 104). If a structure is damaged beyond repair, it could be acquired, cleared, and used as an access point for the general public. It seems that this practice would be reasonable, and best for the general public in the long term; federal dollars would not be repeatedly provided for private property owners to rebuild poorly sited homes. Areas that are risky sites for construction may be more suitable for public access or recreation purposes.

### **9.0 APPLICATIONS OF THEORIES**

Based upon the facts presented in the *Koenig v. Town of Kure Beach* case, it appears that several of the common law principles may be applicable as a means for the public to protect the beach access easement they have established at the 830 Fort Fisher Boulevard North site. In attempting to secure the public access easement, it is important that all of the previously established rights of the public are recognized.

Additionally, the Town of Kure Beach could have (and still may) applied some management tools in order to ensure that the public access point located at the 830 Fort Fisher Boulevard North site is maintained. “The common law approach could be closely coordinated with overall resource planning and management, and this could go a long way in eliminating the difficulties it tends to create when used in an ad hoc and fragmented fashion” (Ducsik, 1974, p. 136). By using both the common law approach and resource

planning and development committed to optimizing public access opportunities, the Town of Kure Beach will be able to continue to protect the rights of the public.

“Effective use of the Public Trust Doctrine requires that coastal managers systematically invoke its principles in their planning and permitting decisions” (Slade, 1990, p. 239). Oceanfront communities are highly sought after for both residential development and vacation destinations. If the Town of Kure Beach wishes to maintain its economy based on residential tax dollars and tourist spending, it is important to ensure that the public will continue to have beach access opportunities. Maintaining public trust rights for citizens and tourists should be a high priority for the local government in the Town of Kure Beach.

### **9.1 Application of the Public Trust Doctrine**

The general purpose of the public trust doctrine is clear; “to preserve and continuously assure the public’s ability to fully use and enjoy public trust land, waters and resources” (Slade, 1990, p. 224). Based upon this general principal, it is clear that in order for the public to fully utilize their public trust rights, they must be able to access public trust areas. As private oceanfront development occurs, the right of access to the public trust lands becomes increasingly limited.

The public trust doctrine is a common law principal, and it may be adapted to circumstances as they change through time. Since oceanfront development is increasing, and the access rights of the public are threatened, the public trust doctrine may be used as a means to justify the right of public access. “The doctrine’s traditional flexibility permits States to weigh social values and thereby balance different uses at different times. This flexibility can be seen in the growing number of uses that courts (and other coastal managers) have found to be subject to the Public Trust Doctrine” (Slade, 1990, p. 238).

In the *Koenig v. Town of Kure Beach* case, the right of the citizens west of the 830 Fort Fisher Boulevard North site to access public trust lands has been limited by the private development at the Site. In accordance with the NCAC statues (15A NCAC 7M Section .0303), the rights of the public to access these public trust lands should be maintained, despite the private development.

At the 830 Fort Fisher Boulevard North site, the Plaintiffs are not claiming they *own* the dry sand beach and the wet sand areas in front of their home, but by not allowing the public to access the beach from the previously used access point, they will have more control over the area. The general public, as they travel to spend days at the beach, are less likely to walk all the way to Plaintiffs' "backyard" for the afternoon; rather they will congregate in areas in the vicinity of the other public access points. The desire of the *Koenig* Plaintiffs to maintain a more private "backyard" is similar to the desires of the Plaintiffs in the *Whalehead* litigation in Corolla, North Carolina. In the *Whalehead* case, "CAMA beach access points encouraged a massive influx of visitors parking in the parking lots, walking to the beach, spreading out their blankets and volleyball nets, and frolicking in the water...The Whalehead property owners neither liked nor intended to tolerate this sudden invasion of their previously secluded refuge" (Kalo, 2000, p. 1878). Under the public trust doctrine, the private oceanfront property owners have no greater right to the use of the public trust lands than the general public. Private property owners also have no right to exclude the general public from utilizing public trust lands. Although the *Koenig* Plaintiffs are not specifically "excluding" the public from using their public trust lands, by blocking the former public access easement, they are certainly making the use of these lands more difficult and less likely. As in the *Whalehead* litigation, the *Koenig v. Town of Kure Beach* case "represents more than a legal dispute; it is a culture clash, with elements of class conflict" (Kalo, 2000, p. 1878).

This "class conflict" is even more obvious when the offer provided by the Plaintiffs in mediation is presented. The *Koenig* Plaintiffs reportedly offered the Defendants the use of the access easement, provided that a locking gate was installed, and the Defendants were the only parties able to use the access point. The Plaintiffs also offered a golf cart to the Defendants, as a means to travel from their home, to the oceanfront access easement (Lambeth, 2005). The Defendants refused this settlement offer, because they desire the access point to be accessible to the general public. Based upon this settlement offer, it appears that the Plaintiffs do not object to the Defendants using the beach access easement; rather, they object to the general public walking past their living room and recreating in their "backyard" on a daily basis.

In North Carolina, it is a natural extension of the "public trust rights" to maintain public ownership of previously established public beach access easements so that the general public may access public trust

lands. North Carolina has typically been liberal when deciding public rights to dry sand areas, and should continue to be protective of public rights when private oceanfront property owners attempt to reduce the public rights in these areas. It is the duty of the State as a “trustee to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust” (Slade, 1990, p. 179). It is important that previously established public rights in private land are maintained.

## **9.2 Application of Public Prescriptive Easement Rights**

The establishment of a public prescriptive easement requires that continuous, uninterrupted use of the area continue, adverse to the desires of the private property owner. In the *Koenig v. Town of Kure Beach* case, an easement by prescription may not be applicable. The Interveners have made no mention of the fact that the easement was used against the desires of the previous property owner, and when the Town of Kure Beach placed sand fences in the dunes, the use of this easement did not continue. However, the “spirit of the law” should be considered when the public’s use of the easement stopped upon the installation of the sand fences. The public no longer crossed the dunes at the Site because they were complying with Ordinance 5-65; this ordinance was passed to protect the public’s resource. The ordinance was passed to protect dune grasses and prevent the erosion of the beach. Naturally, the public would want to protect their resource, and they should not be faulted for acting in a manner consistent with the protection of the common good.

Secondly, in order to establish a public prescriptive easement, the “general public” must use the path in question. In the *Koenig* case, it seems that the easement was used not by the general public, but by the non-oceanfront property owners in the area. The use by such a limited number of citizens may not be sufficient to establish a public easement by prescription.

## **9.3 Application of Implied Dedication**

In the *Koenig v. Town of Kure Beach* case, it seems that the easement in question may be established through the principal of implied dedication. Dedication of private land for public use is established when the private owner donates property to the public, and the public accepts the donation. Both the donative

intent of the owner and the acceptance of the rights by the donee are important. Courts have interpreted the “donative intent” broadly; in the past, it has been considered to occur when the private property owner fails to object to the use of the property by the public. If the uncontested use of the easement at 830 Fort Fisher Boulevard North occurred for approximately forty years, it seems clear that both the owner and the public intended for this use to occur. An easement could be established through implied dedication in this instance.

In the *Koenig v. Town of Kure Beach* case, the “express dedication” of the public access easement may have occurred based upon the language in the property deed, and the depiction of the easement on the map associated with the deed. In the initial decision regarding the access easement, the court decided that the language in the deed was ambiguous; thus the easement was not granted to the public. However, no formal agreement between the property owner and the public should be necessary based upon implied dedication principles. The language in the deed and the depiction of the easement on the property map should be considered, but the decision regarding the public rights in the land do not need to rest solely on these pieces of evidence.

In real estate law, “conveyances of real estate, when ambiguous, are generally construed most strongly against the grantor (seller) and in favor of the grantee (buyer) with the presumption that the grantor intended to convey all that he or she had the power to convey unless clear and specific words indicate otherwise” (Slade, 1990, p. 179). Typically, private property owners’ rights are most strongly protected when disputes occur regarding the ownership of land; however, when public trust rights are concerned, the rights of the public are considered most strongly. “When the parcel is all or partly public trust lands, ambiguous terms are construed even more strongly against the grantee and in favor of the government, because in such a case, the government is not only the representative of the property interests of the people as a whole (the *jus privatum*), but is also trustee of the public’s trust rights in those lands (the *jus publicum*). Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public’s dominant trust rights.” (Slade, 1990, p. 79). Although the easement in question is not necessarily “public trust lands”, it is an important means for the general public to access

public trust lands. The courts should consider this aspect of the easement; it is not simply an established path across privately owned lands, this path leads to publicly owned land.

In the *Koenig* case, the Plaintiffs should have been aware of the “intent to dedicate” the public access easement when reviewing their property deed despite any “ambiguous” language. Based upon the previously established easement, the Plaintiffs should not be allowed to revoke the dedication rights that were previously established. These public rights in the land were established by both implied dedication, and were expressly stated in the Plaintiff’s property deed. Technicalities regarding the signing of the property survey and the “ambiguous” language of the deed should not take away from the public’s previously established rights in the land through implied dedication.

Additionally, the fact that the Plaintiffs went to the Town of Kure Beach prior to construction to obtain information regarding the intention of the Town to use the easement, seems to demonstrate that the Plaintiffs were aware that the easement was present. If the language on the property deed was “ambiguous”, it seems reasonable to assume that the Plaintiffs would not have had concerns regarding this area during the construction of their home. The language in the deed, coupled with the previous use of the easement by the public indicates that the public should hold rights in the land by both express and implied dedication.

#### **9.4 Application of Customary Use**

In order for the public to have a customary right to use a beach access point, the previous use of this land for access must be historic and free from dispute. To show that there is certainty regarding what land was being used by the public, a well-established path should be present. In the *Koenig v. Town of Kure Beach* case, the Interveners state that the access point had been used since at least 1964. Notarized letters from the residents in the area state that a clear path through the dunes was present. The letters indicate that the path was used by multiple families from the 1970’s through 1997 when sand fencing was installed. The evidence seems to indicate the use of this path was historic.

The very fact that Plaintiffs have attempted to “block” the access area in question by constructing their private dune walkover through the access point, and almost intersecting the walkover constructed by their

neighbor to the north (see photographs in Appendix B), is suggestive of traditional public use. While most dune walkovers are constructed perpendicular to the shore, the Plaintiffs' construction seems to be intentionally built in a manner that prevents the public's use of the previously established easement. The Plaintiffs' construction of the walkover in this manner seems suspect, and supports the presumption that this area is impressed with a right of customary use by the public.

## **9.5 Application of Takings Principles**

If the appeals court decides the *Koenig v. Town of Kure Beach* case in favor of the public, and public rights are restored in the land, the Interveners will construct a public access easement across the 830 Fort Fisher Boulevard North site. If this action occurs, the Plaintiffs may contest that their land has been "taken" for public use, and request just compensation. In this case, if the public rights have already been established in the land, nothing will be taken from the Plaintiffs when the public beach access point is reestablished. The Plaintiffs will have lost very little in the case, they will still be able to use their property, they simply will not be able to restrict others from using it.

## **9.6 Application of Municipal Tools in Kure Beach**

"The Coastal Zone Management Act comprehensively addresses coastal resource management. States with federally-approved CZM programs (and those States without an approved CZM program) rely heavily on traditional police power authority to implement their CZM programs. The police power has several significant limitations, however. Fortunately, the Public Trust Doctrine is another powerful, complementary, source of authority that can be used for effective coastal management." (Slade, 1990, p. 223). The use of municipal tools in obtaining public access to beach areas may typically be an exercise in police power by a municipality; however, the acts of police power can be easily justified by the public trust doctrine.

Eminent domain could be used at the 830 Fort Fisher Boulevard North site to provide public access to the beach. The Russos' property could be subject to the access easement as depicted on the property deed and map. The government would have to provide "just compensation" for the use of the easement; however, since this easement is recorded on the property deed, it should be relatively inexpensive since the land is

already subject to use for purposes of access. The additional use by the general public should have only a marginal effect (if any) on the Russos' property value (Brower et al., 1978).

The Town of Kure Beach should have acted earlier in this instance; efforts should have been put forth to maintain the public access easement prior to the Russos constructing a portion of their private dune walkover through the 10-foot area. The approval for the construction of the Kure by the Sea subdivision could have been contingent on public beach access being provided to the dry sand area in front of the subdivision. Similarly, the permit approval for the construction of the Russo home could have been subject to the access easement being formally transferred to the Town as a trustee for the general public. It is not clear how the Russos were granted permits to construct their private dune walkover through this area that had been deeded to the general public.

The Town of Kure Beach also could have established rules (again, prior to oceanfront construction), where the rights-of-way from public streets running perpendicular to the beach extended to the mean high-tide line on the shore. This type of arrangement would have eliminated the need for beach access at the 830 Fort Fisher Boulevard North Site; an easement would have been established just two parcels north of the Site.

## **10.0 FIELD INVESTIGATIONS**

Based upon the facts presented in the *Koenig v. Town of Kure Beach* case, and the review of the relevant literature, several questions have surfaced that warrant further study. The following sections present new research regarding the case, and facts that answer some important questions surrounding the public access easement at the 830 Fort Fisher Boulevard North site.

### **10.1 Distance Measurements**

On November 15, 2005, distance measurements were taken using a Rolatape Measuring System, Model 400. A map illustrating the measured distances between access points in the vicinity of the 830 Fort Fisher Boulevard North Site, and photographs documenting the currently available access points in this area, are attached to this report in Appendix C. As illustrated in Appendix C, the distance between the public beach access point to the north of the Site, and the next available public beach access point to the south of the Site

is 1,736-feet (approximately one-third of a mile, where a mile measures 5,280-feet). The private beach access points for the Kure by the Sea, Kure Estates, and Kure Beach Village subdivisions should not be included as “valid” public access points for the purposes of USACE calculations regarding public beach access. These access points are labeled “private” with “private parking” (see photographs); thus, their use is not on equal terms for all citizens.

If a public beach access point is established at the 830 Fort Fisher Boulevard Site, the distance between public access points in this area of the beach would be reduced to 1,267-feet (less than one-quarter of a mile, where a quarter-mile measures 1,320-feet).

Based upon these field measurements, the public access opportunities in this section of Kure Beach are insufficient to meet the recommendations of one local access site per block, set forth by 15A NCAC 7M Section .0303. The public access opportunities are also insufficient to meet the goals of one public access site per quarter-mile as outlined in the Town of Kure Beach’s Draft LUP. If the public access point was reestablished at the 830 Fort Fisher Boulevard North site, both of these public access recommendations would be in compliance. The current distance between public access points is sufficient to meet the minimum criteria to establish an area as a “public” beach for USACE renourishment projects; however, renourishment projects for Kure Beach would be given higher priority and better justification for future Federal cost share programs if a public access point was established at the Site. Better and more numerous public access opportunities are always encouraged by the USACE (Clay, 2005).

## **10.2 Kure Beach Permitting Processes**

Based upon a conversation with Mr. Dixon Ivey, the Building Inspector for the Town of Kure Beach, permits to construct private dune walkovers are required from both the Town of Kure Beach and CAMA. An oceanfront homeowner applies for a Building Permit for a dune walkover with the Town, and the Building Inspector will file the necessary paperwork to obtain a CAMA permit. The process typically takes approximately two to three weeks for approval (Ivey, 2005).

In order to obtain a CAMA permit for a private dune walkover, a brief application is required, along with certified letters notifying adjacent property owners to the north and south of the proposed construction. A

site plan and deed registration from the tax office is also required. With respect to the accuracy of the submitted site plans; CAMA typically accepts what is provided by the Building Inspector. Mr. Ivey was not serving as the Building Inspector for the Town of Kure Beach at the time when the Russos' private dune walkover was constructed; he could offer little information with respect to what paperwork was filed for the walkover at the Site. Town records for these standard permitting processes are also incomplete (the Russos' walkover was constructed in 1999). Mr. Ivey did report that under normal circumstances, CAMA would not have issued a permit to construct a private dune walkover through an area that was depicted on a survey as a public access easement; CAMA would be inclined to protect the rights of the general public (Ivey, 2005).

Based on the reported information regarding the application process for a private homeowner to construct a dune walkover, it is unclear how the Russos were able to construct their walkover through the public access easement depicted on their property deed. It is not likely that CAMA would have permitted this construction to occur if they were aware a potential public access easement was present in this portion of the Site.

### **10.3 Dow Chemical Easement**

An attempt was made to verify the reported information that Dow Chemical had granted the public access easement at the Site. A representative of the Public Affairs Department at Dow Chemical was contacted to discuss any previous transfer of the property. As of the date of this report, no information has been located by Dow Chemical that indicates they previously granted a public access easement at the 830 Fort Fisher Boulevard North site (Horne, 2005). Based upon the date that the granting of this easement would have occurred (some time between 1930 and 1970), and the fact that the Dow Chemical plant at Kure Beach is no longer operational, it is not surprising that if an easement was granted it would be difficult to locate the documentation. If important information is obtained from Dow Chemical that further indicates the public's previous rights in the land, an addendum will be issued to this report.

#### **10.4 Historic Aerial Photographs**

Historic aerial photographs were obtained of the 830 Fort Fisher Boulevard North Site from the New Hanover County Engineering Office located in Marketplace Mall, Wilmington, North Carolina, on November 15, 2005. A 2002 color aerial photograph was obtained from the New Hanover County Tax Office, Marketplace Mall, Wilmington, North Carolina, as a reference to review the historic aerials on November 15, 2005. Additional aerial photographs were obtained from the New Hanover County GIS Downloads Web page; these photographs were retrieved on November 21, 2005. Copies of the reviewed aerial photographs have been attached to this report as Appendix D.

The New Hanover County Engineering Office had aerial photographs of the Site from 1974, 1986, and 1990. All three of these aerial photographs show the 830 Fort Fisher Boulevard North property as vacant and undeveloped; a clear path is also visible in the vegetation through the dunes at the Site. The adjacent property to the north is constructed as today, with a single-family home; the adjacent property to the south is vacant and undeveloped.

The New Hanover County GIS Downloads Web page had aerial photographs of the Site from 1949, 1956, 1981, and 1998. Very few houses were visible in the Site area in the 1949 photograph; no path was visible through the dunes. The 1956 aerial photograph showed the two houses to the north of the Site developed as today; the vegetation in the dunes was not full enough to show any type of path. In the 1981 and 1998 aerial photographs a clear path was visible in the vegetation through the dunes at the Site; the Site was vacant. A 1966 flight was available on the GIS Downloads Web page; however, the photographs of the county do not cover areas far enough south to show the Site (New Hanover County GIS Downloads Web page, 2004).

Based on the historic aerial photography, a clear path through the vegetation in the dunes was present from at least 1974, until at least 1998. The fact that the path is apparent on the small scales used for aerial photography of the Site indicates that it was well established during this time period. This visible evidence, coupled with the notarized letters from residents documenting historic use, should prove that the use of the

easement across the 830 Fort Fisher Boulevard North site was actual, continuous, and fully visible to the property owner.

## 11.0 DISCUSSION AND CONCLUSIONS

“America is rapidly approaching a crisis in the availability of beaches that are open to the public. Traditionally, States and citizens have taken one of three approaches to open access to public trust waters and lands... [I]f the public has used a path to the beach over a long period of time, it may be considered a public easement under the related common law doctrines of custom, implied dedication or prescription. There are, however, evidentiary problems with the theory of easements, involving proof of public use as well as actions of private landowners” (Slade, 1990, p. 245). In the *Koenig v. Town of Kure Beach* case, a path was historically used by the residents in the area as a means to access public trust lands. This path was not only used and established but was mentioned as a “public access easement” on the property deed when the Plaintiffs took possession of the Site.

The public trust doctrine may be used to justify the access to public trust lands and waters. “[I]t is perfectly appropriate for courts, legislatures and State government agencies to recognize this corollary to the doctrine and preserve and/or create meaningful access” (Slade, 1990, p. 245). The issue here is the extent to which the public can pass through privately held lands (Slade, 1990). The rights of the private property owner must be taken into account when using the public trust doctrine *alone* as a means to justify public access at a particular site. In the *Koenig v. Town of Kure Beach* case, it appears that the public should have already established rights to the easement in question, by using the well-established path from at least 1964 until 1998. The documentation – both aerial photography and notarized letters from the residents in the area - of the (minimum) 34-year use should be sufficient to establish the public’s rights in the land, prior to the Plaintiffs’ possession of the property. The deed for the oceanfront property also notes that the public has an established right in the 10-foot strip of land.

Due to the expense of obtaining/constructing public access sites, municipalities should take advantage of every opportunity when citizens offer to bear the burden of this cost. The citizens on Dow Avenue have offered to pay the construction costs for the dune walkover, and the litigation has largely been funded by

these private property owners as the Interveners. The Town of Kure Beach should assist these citizens in reestablishing their rights in the land, so that greater public access may be obtained for all citizens and residents to the area. The Town of Kure Beach has municipal tools including eminent domain, which may be utilized to provide public access opportunities. Future oceanfront development within the Town of Kure Beach should be carefully planned to ensure that public access opportunities are not threatened by private development.

Oceanfront property owners are acting in their own best interest when they allow the public to access the shore through their private property. Without sufficient public access opportunities, Federal cost share funds will not be provided for beach renourishment projects, and oceanfront homes may be vulnerable to erosion. Oceanfront property owners do not have any greater rights to public trust lands than the general public; they should not be permitted to exclude the general public from these areas.

Although the building inspector for Town of Kure Beach may have told the Plaintiffs that the easement would never be used, he did not have authority to speak on behalf of the Town of Kure Beach, or for the public in general, who had an established right in the land. The Plaintiffs should not have assumed that the building inspector had authority in this manner. “Effective use of the Public Trust Doctrine requires that coastal managers systematically invoke its principles in their planning and permitting decisions” (Slade, 1990, p. 239). Oceanfront communities are highly sought after for both residential development and vacation destinations. If the Town of Kure Beach wishes to maintain its economy based on residential tax dollars and tourist spending, it is important to ensure that the public will continue to have beach access opportunities. Maintaining public trust rights for citizens and tourists should be a high priority for the local government in the Town of Kure Beach.

The fact that the developer for Kure by the Sea picked this particular site for his “back-up” access point in developing the neighborhood should also be considered. Perhaps the reasoning for the selection of this particular location was due to the fact that the area was already being utilized as an access point by the general public; by using this area, the public would have already had rights established in the land.

The NCAC recommends one access site per block; the USACE requires one access point every half-mile to establish a “public beach”, and; the Kure Beach Draft LUP calls for access points every quarter-mile. Based upon the field measurements, without the reinstatement of the former public access point at the 830 Fort Fisher Boulevard site, this area is lacking a reasonable amount of beach access to the public as defined by the NCAC and the Town of Kure Beach. Although the currently available access points may be sufficient to meet the USACE’s minimum requirements for a “public” beach, additional public access points are always encouraged. It is the responsibility of the local government to ensure the access areas are provided and maintained. Kure Beach was acting reasonably in attempting to secure a CAMA permit to develop this access point, and should be awarded the area in dispute for the protection of the public rights.

“The public’s trust rights are not self-executing and exist primarily because courts have enforced them. Without judicial recognition there would be no Public Trust Doctrine” (Slade, 1990, p. 282). The public trust doctrine is meaningless without public access to public trust lands. This decision is important in terms of public rights; the desires of one should not be determined to outweigh the desires of many in an issue involving access to publicly owned land. It is the duty of the state to put this land to the best use for the public, and to maintain the rights that the previous use of the land has established. The residents in the vicinity of the Site have stated that they would greatly benefit from the reinstatement of the access for both safety and convenience reasons.

The ultimate decision reached in the *Koenig v. Town of Kure Beach* is important in setting a precedent for North Carolina. We should consider the cumulative effects that will be realized if public beach access points are effectively eliminated by private oceanfront homeowners. The loss of one of these easements may not be particularly damaging, but if additional oceanfront homeowners attempt to remove the public’s previously established rights in their property, the effects could be devastating (Clay, 2005). In order to maintain the rights of the general public throughout North Carolina, the decision reached in this case is important. The final decision provides an opportunity for the North Carolina judicial branch to enforce the general public’s right to access public trust lands. The verdict in this case may be applied to protect public beach access across private lands from future threats by private development.

As oceanfront land is developed for private use, the public trust doctrine does not disappear. The cumulative impact of this development may effectively eliminate the public's right to access public trust lands. The *Koenig v. Town of Kure Beach* case is important in terms of the protection of public rights, given the special character of the beach and the public interests that are established there. The courts should be mindful of both the previous use of the easement and the public's rights to access the areas on the opposite side of the Plaintiffs' home. The Plaintiffs are incorrect in their assumption that they own the land in question; public rights were established in the land prior to their possession of the property through historic use, and the public easement is identified on their property deed. The public rights in the land should be reestablished, and a public beach access should be constructed at the Site.

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**APPENDIX A**

117  
37

A. W.  
Edwards  
Contractor  
Hartford, CT

FOR REGISTRATION OFFICE OF DEEDS  
REBECCA T. O'NEILL, CLERK  
NEW HANOVER COUNTY, NC  
2005 MAY 24 03:27:20 PM  
BK 3556 PG 304-117 FEE \$12.00  
INSTRUMENT # 200502264

STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

Parcel ID: R09205-017-014-000

THIS DEED, made and entered into this the 30th day of May, 2001, by and between LINDA A. RUSSO and husband, PETER J. RUSSO, parties of the first part, and PETER J. RUSSO and wife, LINDA A. RUSSO, as TENANTS IN COMMON, having an address of 830 Fort Fisher Boulevard North, Kure Beach, North Carolina, 28449, parties of the second part,

WITNESSETH

That the parties of the first part in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations to said parties paid by the parties of the second part, the receipt of which hereby is acknowledged, have bargained and sold and by these presents do bargain, sell and convey unto the parties of the second part, as tenants in common, said parties' heirs and assigns, the following described property, to wit:

That certain lot or parcel of land lying and being situate in New Hanover County, North Carolina, and

Being that same property as described in Exhibit "A" attached here to and made a part hereof by reference

The above described property is conveyed subject to any and all restrictions, easements, covenants, rights-of-way, encumbrances and liens appearing in the public records of New Hanover County, North Carolina.

TO HAVE AND TO HOLD said property and all privileges and appurtenances thereto belonging to the parties of the second part, as tenants in common, said parties' heirs and assigns forever.

And the parties of the first part do covenant that said parties are seized of said property in fee and have the right to convey same in fee simple; that the same is free from encumbrances except any encumbrances or restrictions mentioned above and that said parties will warrant and defend the title to the same against the lawful claims of any and all persons whomsoever.

RECEIVED  
APR 25 2001  
DIVISION OF  
COASTAL MANAGEMENT

RETURNED TO  
ATTORNEY AT LAW  
WARD AND WARD

Received by  
Kathleen S. Smith, P.A.  
Contractual Services Center  
123 South 20th  
Wilmington, NC 28401

Received by  
Ward and Ward, P.A.  
123 South 20th  
Wilmington, NC 28401

Shaw

Ward



Exhibit "A"

BEGINNING at a point on the eastern right of way line of U.S. Highway 421 (30 feet from the centerline thereof) at its intersection with the northern line of the INCO Tract recorded in Book 885 at Page 724 of the New Hanover County Registry, thence from said beginning point with the eastern line of U.S. Highway 421 South 20 degrees 33 minutes West 49.50 feet to a point, thence South 69 degrees 27 minutes East 173.75 feet to the high water line of the Atlantic Ocean; thence with the high water line of the Atlantic Ocean North 20 degrees 29 minutes East 102.75 feet to a point in the northern line of the INCO Tract, thence with the northern line of the INCO Tract North 85 degrees 30 minutes West 101.61 feet to the point and place of BEGINNING, and being Lot 22, Phase I, Kura by the Sea as per map thereof recorded in Map Book 29 at Page 151, New Hanover County Registry. Being the same property conveyed to the Grantors by Warranty Deed recorded in Book 1435 at Page 1348, New Hanover County Registry. This property is conveyed subject to a public access easement 10 feet in width, running parallel to and along the northern boundary of the lot.



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**APPENDIX B**



Photograph taken by K. Theodorson, October 27, 2005

**Photograph 1** : View of 830 Fort Fisher Boulevard North site from west facing east; towards the beach



Photograph taken by K. Theodorson, October 27, 2005

**Photograph 2** : View of 830 Fort Fisher Boulevard North site from east facing west; note the Plaintiff's dune walkover extends from the porch on an angle, and almost intersects the adjacent walkover.



*Aerial photograph obtained from New Hanover County Tax Records, 2002 flight, accessed November 14, 2005*

**Photograph 3 :** Aerial view of 830 Fort Fisher Boulevard North site; note the dune walkovers almost intersecting on the dry sand area of the beach.

**APPENDIX C**



Aerial photograph obtained from New Hanover County Tax Records, 2002 flight, accessed November 14, 2005

The following photographs provide additional information regarding the properties and public access points available on Fort Fisher Boulevard North. Photographs are referenced as their illustrated street address on Fort Fisher Boulevard North.



Photograph taken by K. Theodorson, November 15, 2005

**1004 ½ FORT FISHER BOULEVARD NORTH**  
This is an existing public access site maintained by CAMA



Photograph taken by K. Theodorson, October 27, 2005

**830 FORT FISHER BOULEVARD NORTH**  
This is the Russo property; a public access site should be established



Photograph taken by K. Theodorson, November 15, 2005

**812 FORT FISHER BOULEVARD NORTH**

This is a private beach access, maintained by the Kure by the Sea subdivision



Photograph taken by K. Theodorson, November 15, 2005

**704 AND 644 FORT FISHER BOULEVARD NORTH**

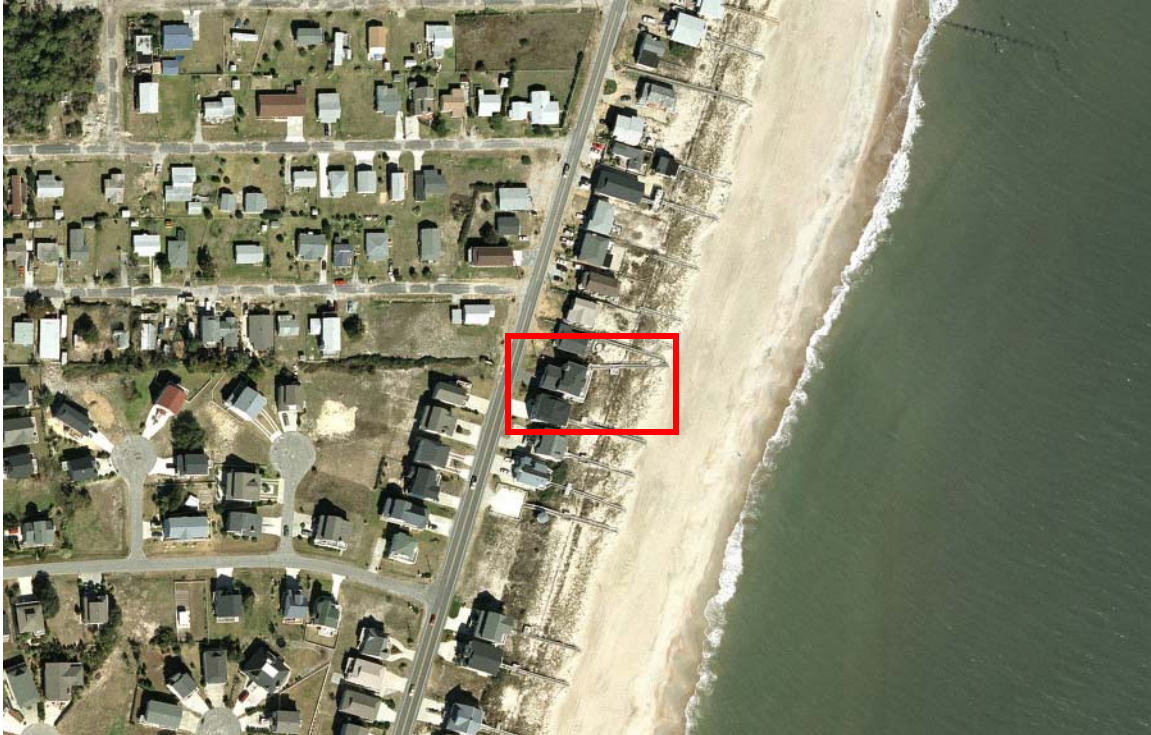
These are two separate, private beach accesses, maintained by the Kure Estates subdivision (left) and the Kure Beach Village subdivision (right), respectively



*Photograph taken by K. Theodorson, November 15, 2005*

**630 FORT FISHER BOULEVARD NORTH**  
This is an existing public access site maintained by CAMA

**APPENDIX D**



*Aerial photograph obtained from New Hanover County Tax Records, 2002 flight, accessed November 14, 2005*

**2002**

Single family home constructed at 830 Fort Fisher Boulevard North



*Aerial photograph obtained from New Hanover County Tax Records, 1998 flight, accessed November 21, 2005*

**1998**

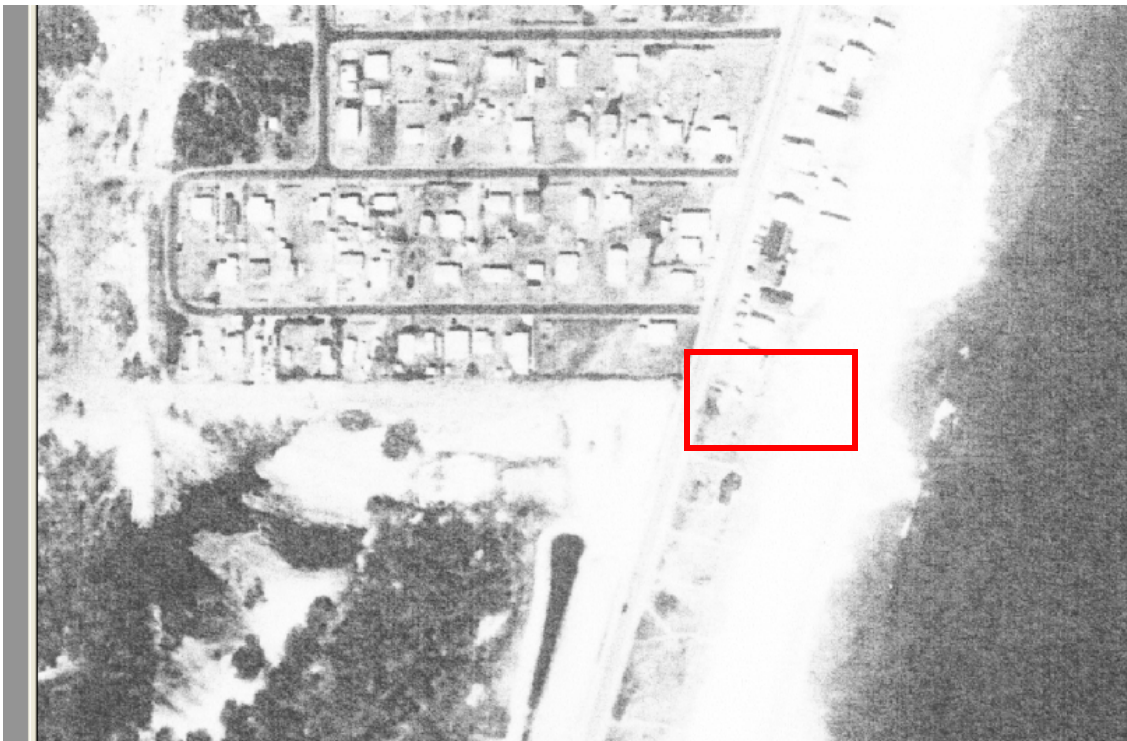
Path through the dunes visible in the vegetation



Scanned copy of aerial photograph obtained from New Hanover Engineering Dept., 1990 flight, copied November 15, 2005

**1990**

Path through the dunes visible in the vegetation



Scanned copy of aerial photograph obtained from New Hanover Engineering Dept., 1986 flight, copied November 15, 2005

**1986**

Path through the dunes visible in the vegetation; hard-copy photograph is much better quality



*Aerial photograph obtained from New Hanover County Tax Records, 1981 flight, accessed November 21, 2005*

**1981**

Path through the dunes visible in the vegetation; small scale is difficult to decipher



*Scanned copy of aerial photograph obtained from New Hanover Engineering Dept., 1974 flight, copied November 15, 2005*

**1974**

Path through the dunes visible in the vegetation



*Aerial photograph obtained from New Hanover County Tax Records, 1956 flight, accessed November 21, 2005*

**1956**

No vegetation at the Site – no path visible



*Aerial photograph obtained from New Hanover County Tax Records, 1949 flight, accessed November 21, 2005*

**1949**

No vegetation at the Site – no path visible