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## King v. State of North Carolina, 481 S.E.2d 330 (N.C. Ct. App. 1997)

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the land and expressly reserving the water right, or by conveying the land and water right separately. The new owner may not enlarge a transferred water right beyond the original owner's use.

Once a water right is acquired, the holder must continue to use the water right for a beneficial purpose or risk losing it through abandonment. Abandonment arises when there is nonuse and intent to abandon. Evidence of a long period of continuous nonuse raises a rebuttable presumption of intent to abandon the water right.

In this instance, the spring water went unused on the small parcel for a period of eleven years. M.S. Consulting argues that such nonuse resulted in a loss of the water right. The Axtells argue that their predecessors in interest did not abandon the water right because the record shows that a water conveyance system existed during that time.

In reviewing the record, the court held that several issues of material fact existed with respect to the abandonment of the water right. These disputes were material to the outcome of this case. If the water right appurtenant to the small parcel was not abandoned, then the Axtells would have acquired the right. If abandoned, the water right was not available to pass with the conveyance of the small parcel. Therefore, the court reversed and remanded the case to the district court for further proceedings.

*Tracy Rogers*

## NORTH CAROLINA

**King v. State of North Carolina, 481 S.E.2d 330 (N.C. Ct. App. 1997)**  
(finding that a refusal to grant a 33 U.S.C.A. § 1341 Clean Water Act certification, which resulted in Plaintiff being unable to subdivide property as she desired, did not constitute a denial of all economically viable use of the property and therefore, no taking had occurred).

Plaintiff desired to build a road and construct a 50 lot subdivision on her property—a peninsula. The originally proposed project called for placing between 10,000 and 20,000 cubic yards of fill material on the property. According to Clean Water Act section 404, Plaintiff must obtain a permit from the Army Corps of Engineers "COE" prior to placing fill material onto wetlands. In addition, Plaintiff must provide the COE with a certification that discharge of fill material is consistent with state water quality standards. The Division of Environmental Management ("DEM"), the department responsible for reviewing section 401 certification requests, refused to issue a certification, finding that the proposed wetland fill would degrade surrounding shellfish waters, and that there were less environmentally damaging alternatives for construction of the road.

Plaintiff appealed the decision, and later filed a claim asserting that the decision to refuse section 401 certification and the section 404 permit had denied Plaintiff all reasonable use of her property and,

therefore, constituted a taking.

The court found that because the DEM had determined that less environmentally damaging alternatives for construction of the road existed, the state had not denied Plaintiff all economically viable use of her property. The State had no obligation to allow Plaintiff the most profitable use of her property; it must only allow some economically viable use of the property.

Under *Lucas v. South Carolina Coastal Council*, the U.S. Supreme Court held that to support a takings claim, Plaintiff must show either a physical invasion or that the State's action has denied her all economically beneficial or productive use of her land. The test in North Carolina for determining whether a taking has occurred, set out in *Finch v. City of Durham*, is whether the property has a practical use and a reasonable value. The State contends that because the decision not to grant the permit only affects one quarter of Plaintiff's entire parcel, and because other alternatives for road construction and development of the property are available, the property still has a practical use and reasonable value. Therefore, an essential element of Plaintiff's takings claim—deprivation of all practical use and reasonable value, is eliminated. By establishing that alternatives existed to Plaintiff's proposed plan, the court determined that the State had met its burden of proving that Plaintiff had not been deprived of all practical use and reasonable value of her property.

*Heidi A. Anderson*

**Pine Knoll Ass'n v. Cardon, 484 S.E.2d 446 (N.C. Ct. App. 1997)** (holding that where the configuration of the shoreline is irregular, the proper allocation of water space between abutting riparian owners is governed by a "rule of reasonableness," and is a question for the jury).

Pine Knoll Shores Association ("Pine") and Cardon owned adjacent waterfront property along the Davis Landing Canal (the "Canal"). Pine, a homeowner association, owned a tract of land that ran along the Canal's end. Cardon, a member of the association, owned a lot situated immediately west of Pine's property with a small protrusion of its boundary located on the western bank of the Canal. A seawall ran east-west along Pine's property and north-south along Cardon's land. Pine had earlier adopted a restrictive covenant prohibiting the placement of obstructions in the extensions of the property lines abutting the Canal. Cardon maintained a dock along his property and moored two boats, approximately thirty feet in length, perpendicular to the dock and parallel to Pine's seawall.

Pine claimed that the boats intruded upon, and interfered with, its right of access to the Canal, and sued for violation of the restrictive covenants, trespass and violation of its riparian rights. At trial, Pine withdrew its complaint for violation of the covenants, and the court granted summary judgment for the Defendant on the two remaining