An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-652-2

Filed: 18 December 2018

Brunswick County, No. 14 CVS 919

EDWARD F. WILKIE and DEBRA T. WILKIE, Plaintiffs,

v.

CITY OF BOILING SPRING LAKES, Defendant.

Upon remand from the Supreme Court of North Carolina for further review of an appeal by defendant from judgment entered November 2015 by Judge Ebern T. Watson III in Brunswick County Superior Court. Originally heard in the Court of Appeals 16 November 2016 with opinion filed 30 December 2016. An opinion reversing the decision of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court of North Carolina on 2 March 2018.

Kurt B. Fryar for Plaintiffs.

Cauley Pridgen, P.A., by James P. Cauley III, David M. Rief, and Geneva L. Yourse, for Defendant.

BERGER, Judge.

The City of Boiling Springs Lake ("Defendant City") initially appealed from an order entered in a proceeding for inverse condemnation in which the trial court found that a taking had occurred. This Court reversed the trial court, finding the property owned by Edward and Debra Wilkie ("Plaintiffs") had not been taken by Defendant City for a public use or benefit. Plaintiffs appealed this Court's decision. Our Supreme Court reversed our decision, holding that a public use or benefit is not an element of takings under inverse condemnation analysis, and remanded the case back to this Court for determination of the remaining issues raised by Defendant City.

Defendant City argues the trial court erred in holding that a taking by inverse condemnation occurred because (1) flooding of the Plaintiffs' property was temporary and not likely to recur; (2) the encroachment upon and damage to Plaintiffs' property was not foreseeable; (3) the trial court misapplied the principles enunciated in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012); (4) Plaintiffs were estopped from complaining about the effects of a decision they had requested Defendant City make; and (5) the trial court failed to make adequate findings of fact concerning the boundaries of Plaintiffs' property and of the property Defendant City had allegedly taken. We affirm the trial court in part and remand in part.

Factual and Procedural Background

The relevant facts from the decision of our Supreme Court are set forth below:

> Plaintiffs own a house and lot bordering Spring Lake, a thirty-one acre body of water owned by [Defendant City] that is fed by natural springs that empty into the lake and by surface water runoff from the surrounding area. Two fixed pipes drain excess water from Spring Lake.
>
> On 25 June 2013, [Defendant City]'s Board of Commissioners received a petition signed by [P]laintiffs and other persons owning property adjacent to Spring Lake requesting that defendant modify the height of the drain pipes. According to a number of persons who owned property adjoining Spring Lake, the installation of replacement pipes a number of years earlier had lowered the lake level. On 2 July 2013, after several meetings during which concerns about the lake level continued to be expressed, the Board voted "to return Spring Lake to its original shore line as quickly as can be done."
>
> On or about 11 July 2013, "elbows" were placed onto the inlet side of the two outlet pipes for the purpose of raising the pipes by eight or nine inches and elevating the lake level. After the pipes were raised, [P]laintiffs claimed that portions of their property were covered by the lake. Plaintiffs and a number of other lakeside property owners signed a second petition seeking removal of the "elbows" from the outlet pipes that was presented to the Board on 6 August 2013.
>
> After receiving the second petition, the Board voted to lower the lake level by three inches. A number of additional Board meetings were held between 6 August 2013 and 13 January 2014, during which several residents complained that water from the lake continued to encroach upon their property. However, a majority of the Board refrained from voting to remove the elbows during these meetings. On 13 January 2014, the Board voted to hire Sungate Design Group, an engineering firm, to determine the appropriate lake level. In light of Sungate's

recommendation that the lake be returned to its original level, the elbows were removed on 30 July 2014.

On 23 May 2014, [P]laintiffs filed a complaint in which they sought, among other things, compensation pursuant to N.C.G.S. § 40A-51. In support of their request for relief, [P]laintiffs asserted that they had "lost approximately fifteen to eighteen percent" of their lakeside property "due to the installation of the 'elbow' and subsequent rise of Spring Lake's water level," that the Board "voted to install an elbow on a drainage pipe within Spring Lake for the purpose of raising Spring Lake's water level" "to further a public use and public purpose," and that "[Defendant] City did not file a complaint containing a declaration of this taking." As a result, [P]laintiffs sought compensation for the taking of their property pursuant to N.C.G.S. §§ 40A-8 and 40A-51, the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 19 of the North Carolina Constitution.

After conducting a hearing pursuant to N.C.G.S. § 40A-47 for the purpose of resolving all disputed issues between the parties other than the amount of damages, if any, to which [P]laintiffs were entitled, the trial court entered an order on 5 November 2015 determining that the installation of the elbows "for the benefit of, and at the sole request of, residents around the lake" elevated the lake level and "encroached upon and submerged" [P]laintiffs' property and resulted in a "taking of [Plaintiffs'] property without just compensation being paid." Although [D]efendant [City] "maintain[ed] Spring Lake at elevated levels" "for a private use," the trial court determined that [P]laintiffs had "proven their N.C.G.S. §[ ]40A-51 cause of action" because [D]efendant [City] took a temporary easement in a portion of [P]laintiffs' property without filing a complaint containing a declaration of taking. As a result, the trial court ordered that further proceedings be held for the purpose of determining the amount of compensation to which [P]laintiffs were entitled in light of the temporary taking of a portion of their property.

Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 541-42, 809 S.E.2d 853, 854-55 (2018). Defendant City's appeal is before this Court again on remand from our Supreme Court for determination of the remaining issues.

Standard of Review

"[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Town of Matthews v. Wright*, 240 N.C. App. 584, 591, 771 S.E.2d 328, 333 (2015) (citation and quotation marks omitted).

Analysis

I. Temporary Taking

Defendant City contends the trial court erred when it found a taking by inverse condemnation occurred where the flooding was not permanent and there was no potential for subsequent encroachment. Specifically, Defendant City argues that, pursuant to *Akzona, Inc. v. Southern Railway Company*, 314 N.C. 488, 334 S.E.2d 759 (1985), Plaintiffs' inverse condemnation claim should be dismissed. We disagree.

"Both our State and Federal Constitutions condition the exercise of eminent domain with the required payment of just compensation." *Beroth Oil Co. v. N.C. Dep't of Transp.*, ___ N.C. App. ___, ___, 808 S.E.2d 488, 499 (2017). The United

States Constitution requires just compensation to be paid when a sovereign takes private property for a public use. U.S. Const. amend. V. "Although the North Carolina Constitution does not expressly prohibit the taking of private property for public use without payment of just compensation, our Supreme Court has considered this fundamental right as part of the 'law of the land' clause in article I, section 19 of our Constitution." *Guilford Cnty. Dep't of Emergency Services. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 11, 441 S.E.2d 177, 182-83 (1994). It is well-established in North Carolina that just compensation shall be paid when private land is taken by government actions. *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 78, 131 S.E.2d 900, 907 (1963).

Defendant City argues that the situation here is analogous to that found in *Akzona, Inc. v. Southern Railway Company*. In *Akzona*, the defendant railroad had constructed culverts beneath its trestle bridge and covered these culverts to create an earthen dam that restricted water flow beneath its tracks. *Akzona, Inc. v. S. Ry. Co.*, 314 N.C. 488 490, 334 S.E.2d 759, 760 (1985). The restriction of the flow caused water to back up behind the bridge culvert, and the "pressure caused by relentless rainfall" created a breach of the dam that resulted in considerable flooding of plaintiff's property. *Id.* at 494, 334 S.E.2d at 763. After this breach, the defendant railroad did not replace the culverts, but removed the embankment so the water flow was no longer restricted and no longer would "subject plaintiff's property to

permanent liability to intermittent, but inevitably recurring, overflows." *Id.* (citation, quotation marks, and brackets omitted). Our Supreme Court declined to find a taking had occurred because "[a] single instance of flooding with no possibility of recurrence . . . is not a taking[.]" *Id.*

Prior to *Akzona*, our Supreme Court reiterated principles of law in *Lea Company v. N.C. Board of Transportation* that govern inverse condemnation actions in which a landowner seeks compensation for the flooding of his or her property as a result of government action:

> 'In order to create an enforceable liability against the government it is, at least, necessary [(1)] that the overflow of water be such as was reasonably to have been anticipated by the government, to be the direct result of the structure established and maintained by the government and [(2)] constitute an actual permanent invasion of the land or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property.'

Lea Co. v. N.C. Board of Transp., 308 N.C. 603, 611, 304 S.E.2d 164, 171 (1983) (quoting *Midgett v. Highway Comm'n*, 260 N.C. 241, 248, 132 S.E.2d 599, 606-07 (1963)) (citations and emphasis in original omitted). The *Akzona* Court discussed this holding in *Lea*, but determined "[w]e need not address the first element of the *Lea* standard in this case because the evidence does not show that 'the defendant's structures caused an actual, permanent invasion of the plaintiff's land....' " *Akzona*, 314 N.C. at 494, 334 S.E.2d at 762 (quoting *Lea*, 308 N.C. at 618, 304 S.E.2d at 175).

Like *Akzona*, *Lea* addressed flooding that had been the result of a substantial storm. In *Lea*, the storm that had caused the flooding was calculated to have been one with a frequency of between 26 and 100 years, and, therefore, the trial court found it to be a reasonably foreseeable and recurring event. *Lea Co.*, 308 N.C. at 614, 304 S.E.2d at 173. However, unlike the result in *Akzona*, our Supreme Court found a taking had occurred because, in *Lea*, "[p]ermanent liability to intermittent, but inevitably recurring, overflows constitute[d] a taking." *Id.* at 618, 304 S.E.2d at 175 (citation and quotation marks omitted). That Court adopted language from the United States Supreme Court, which had stated:

> There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain.

Id. (*quoting United States v. Cress*, 243 U.S. 316, 328-329 (1917)).

Additionally, our Supreme Court declined in *Lea* to adopt "a frequency requirement per se in cases involving a governmental taking by intermittent flooding." *Id.* at 619, 304 S.E.2d at 175. Instead, the Court focused on "whether the value of the property has been substantially impaired by the additional flooding directly caused by the State's structures." *Id.* at 620, 304 S.E.2d at 176.

Here, Plaintiffs' property was continuously flooded for over one year. Despite complaints from Plaintiffs and other owners of property adjoining the lake, Defendant City declined to reduce the water level on Spring Lake until July 2014. During this time, Plaintiffs were deprived of the full use of more than 1,100 square feet of their real property until Defendant City eventually took action to reduce the water level. Because of this action, and the corresponding permanent reduction in Spring Lake's water level, Defendant City contends that the flooding of Plaintiff's property was not a compensable taking, and that this encroachment on Plaintiffs' property should be assessed as a non-recurring, one-time flooding event similar to that in *Akzona*.

However, a 'taking' occurs when, "for more than a momentary period," property is occupied, or otherwise "appropriat[ed] or injuriously affect[ed,] in such a way as substantially to oust the owner and deprive him [or her] of all beneficial enjoyment thereof." *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950) (citation omitted). Action by a legislative body which "convert[s] the taking into a temporary one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, Cal.*, 482 U.S. 304, 319 (1987) (internal quotation marks omitted). "A 'temporary' taking, which denies a landowner all use of his or her property for a finite period, is no different in kind from a permanent taking, and requires just compensation for the use of the land during the period of the taking."

City of Charlotte v. Combs, 216 N.C. App. 258, 261, 719 S.E.2d 59, 62 (2011) (brackets and quotation marks omitted) (citing *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 318-19). "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church*, 482 U.S. at 321.

In this case, a taking occurred because Plaintiffs had been ousted from their property and deprived of all beneficial enjoyment for more than a year. Plaintiffs are entitled to compensation for the time period of the temporary flooding because, under both the North Carolina and the United States Constitutions, just compensation must be paid for a taking of this kind. Furthermore, the subsequent actions taken by Defendant City to reduce the water level to its previous, natural level did not relieve Defendant City's burden to compensate Plaintiffs for their loss.

Returning to the two elements of the standard set forth in *Lea* above, in order to create an enforceable liability against the government, it is first necessary for the Plaintiffs to prove that the overflow be reasonably anticipated by the government as a direct result of its actions. Here, Plaintiffs presented evidence of Defendant City's knowledge of the foreseeability of potential flooding resulting from the installation of the elbows in the dam, which were specifically intended to raise the water level of Spring Lake. Second, Plaintiffs must prove that the overflow constituted an "actual

permanent invasion of the land." An "actual permanent invasion of the land" is one where the landowner's customary use of the land is prevented or where a diminished land value is a direct result of the government action. Again, Plaintiffs lost the use and enjoyment of more than 1,100 square feet of real property. Their evidence tended to show that topsoil and centipede grass were removed and damaged by the encroachment of Spring Lake, and this resulted in a reduction in the property value.

We therefore affirm the trial courts holding that Defendant City's actions constituted a compensable taking.

II. Foreseeability of Encroachment

Defendant next contends a taking did not occur because the encroachment upon and damage to the Plaintiffs' property was not foreseeable. We disagree.

"[A]n unforeseeable flood is one the coming of which is not to be anticipated from the usual course of nature. A reasonably foreseeable flood is one, the repetition of which, although at uncertain intervals, can be anticipated." *Lea Co.*, 308 N.C. at 616, 304 S.E.2d at 174. "Injury properly may be found to be a foreseeable direct result of government structures when it is shown that the increased flooding causing the injury would have been the natural result of the structures *at the time their construction was undertaken*." *Id.* at 617, 304 S.E.2d at 174. Whether flooding was foreseeable by a state actor is a factual determination, and the burden of proof on the Plaintiff. *Id.* at 616, 304 S.E.2d at 174.

Both parties rely on the foreseeability standard from *John Horstmann Co. v. United States*, 257 U.S. 138 (1921). In *Hortsmann*, the Supreme Court held that a taking where "no human knowledge could even predict" is not foreseeable. *Id.* at 146. However, the mere lack of human knowledge does not completely absolve the foreseeability standard as our Supreme Court in *Lea* found a "one hundred years" flood is foreseeable. *Lea Co.*, 308 N.C. at 617, 304 S.E.2d at 174. Here, the trial court stated in Finding of Fact 25 that "Spring Lake's encroachment onto the [Plaintiffs'] property was *foreseeable* by the City prior to installation of the elbows." (emphasis added). We agree.

The Defendant City's Commissioners intentionally increased the water level by approximately 8 inches with the addition of the elbows. Even with the subsequent reduction by three inches on July 30, 2014, it was probable that this substantial increase in the water level would impact adjoining lands. Moreover, statements made by Commissioners reflect the fact that, not only was the encroachment foreseeable, but anticipated by Defendant City. Commissioner Caster stated he saw the potential of "flooding someone out"; Commissioner Forte expressed concerns regarding Spring Lake encroaching on the beach; and Commissioner Glidden noted that flooding was an issue at Spring Lake. Because increasing the water level was the sole aim of Defendant City, the trial court did not err in determining the encroachment and subsequent damage was foreseeable.

III. Arkansas Game & Fish Balancing Test

Defendant City next argues the trial court misapplied the principles articulated by the United States Supreme Court in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012). We disagree.

"[G]overnment-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id*. at 38. "[I]f government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." *Id*. at 26. In determining the extent of such a taking in *Arkansas Game and Fish Commission*, the United States Supreme Court weighed four factors. First, when there is a temporary physical invasion that interferes with private property as a result of government action, "time is indeed a factor in determining the existence *vel non* of a compensable taking." *Id*. at 38 (citations omitted). Second, also relevant is "the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Id.* at 39 (citations omitted). [Third, so] are the "character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use." *Id*. (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)). Fourth, the "[s]everity of the interference figures in the calculus as well." *Id*.

A. Duration of Physical Invasion

In its discussion of whether or not a compensable taking existed in *Arkansas Game and Fish Commission*, the United States Supreme Court found that "takings temporary in duration can be compensable" and "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 32-33 (citation omitted). Notwithstanding the duration of the physical invasion, where government action floods an individual's land "as to substantially destroy their value there is a taking within the scope of the 5th Amendment." *United States v. Lynah*, 188 U.S. 445, 470 (1903).

Here, the government-induced flooding was not merely momentary or temporary as it lasted over one year in duration, and Defendant City is not relieved from providing compensation for the length of time that its actions caused the physical invasion of Plaintiffs' land. In order to constitute a taking, the government-induced flooding need not be frequent nor permanent to be compensable. The more important consideration is whether the temporary government-induced flooding was a substantial destruction of the Plaintiffs' rights in their property, and for how long this destruction of rights persisted.

B. <u>Foreseeability</u>

As previously stated in Sections I and II, the encroachment and damage on the Plaintiffs' property was the foreseeable result of Defendant City's actions in altering

the way in which the lake drained. A deprivation of Plaintiffs' property rights by the government that is foreseeable constitutes a compensable taking.

C. Expectations Regarding Land Use and Character of the Land

A "reasonable investment-backed expectation" is the established monetary value in one's property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). In *Palazzolo v. Rhode Island*, the Supreme Court weighed the "reasonable investment-backed expectations" that the landowner had in his property to determine whether the regulation at issue in that case amounted to a government-induced taking. *Id*. Similarly, in *Arkansas Game and Fish Commission*, the Supreme Court weighed the reasonable "investment-backed expectations" that the Arkansas Game and Fish Commission had in its 23,000 acre wildlife management area. The Court found that, because the Commission used that land as a timber resource, and because the federal government's actions caused that land to flood regularly, destroying or degrading 18 million board feet of timber that led to the invasion of undesirable plant species, a taking had occurred. *Arkansas Game and Fish Commission*, 568 U.S. at 39.

Here, Plaintiffs had made an investment in their residential lot on Spring Lake, and had a reasonable expectation that the shoreline of their lot would not significantly change. Unfortunately, Defendant City's alteration of the lake's dam caused the character of the land to be changed by the increased water level of the lake: Plaintiffs lost 20 to 30 feet of their shoreline. Additionally, not only did the

water destroy Plaintiffs' centipede grass and topsoil, more than 1,100 square feet of land was completely submerged and unusable. The encroachment deprived Plaintiffs of value in their property and the Plaintiffs' "reasonable investment-backed expectation."

D. Severity of the Interference

The final factor considered in government-induced flooding cases has been the severity of interference on the subject property. The Supreme Court explicitly stated that "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Id.* at 31. Although most interference inquiries are situation and fact specific, a temporary interference can constitute a taking that is compensable. *Id.* at 33-34. Furthermore, when "real estate is actually invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 181 (1871).

Whether government action has interfered with a property owner's rights depends on their right to use and enjoyment, regardless if the interference is intentional or unintentional. *See Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 455, 553 S.E.2d 431, 436 (2001). "An intentional invasion or interference occurs when a person acts with the purpose to invade another's interest

in the use and enjoyment of their land, or knows that it will result, or will substantially result." *Id.*

Here, the trial court found in its sixth conclusion of law that "the use and enjoyment of property is particular to the individual" and Plaintiffs' use and enjoyment of the Property was diminished because a portion was submerged for over a year. Plaintiffs could no longer exercise their rights to freely use the land along the lake, even after the water receded because of the resulting damage to the vegetation and topsoil along the shoreline.

Defendant City's installation of the elbows and subsequent flooding caused substantial destruction of Plaintiffs' property. In weighing the *Arkansas Game and Fish Commission* factors, it becomes clear that the trial court's original order was correct in finding that Defendant City's actions had resulted in a compensable taking pursuant to both the North Carolina and United States Constitutions.

IV. Defense of Estoppel

At trial, Defendant City asserted the affirmative defense of estoppel because Plaintiffs had signed the petition that induced Defendant City to initially alter the dam on Spring Lake. Defendant City argues here that the trial court erred in holding that a taking by inverse condemnation occurred without ruling on its affirmative defense of estoppel. We disagree.

On appeal, both parties rely on our Supreme Court's precedent in *State Highway Commission v. Thornton*:

> [Equitable] estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence *induces* another to believe certain facts exist, and such other rightfully *relies and acts on* such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

State Highway Comm'n v. Thornton, 271 N.C. 227, 240, 156 S.E.2d 248, 258 (1967) (citation and quotation marks omitted). It is undisputed that Mr. Wilkie had signed the petition to raise the water level of the lake. However, even though Plaintiffs had lobbied for an increase in the water level, the Defendant City is constitutionally required to compensate for the taking. Moreover, almost immediately after the elbows were installed, Plaintiffs informed Defendant City about the encroaching water line on their property. It is also undisputed that Plaintiffs are neither engineers nor experts in maintaining water levels of naturally occurring bodies of water. Nearly twenty other property owners also petitioned Defendant City to raise the water level, and Defendant City did so without consulting an engineering firm to determine the impact of the elbows.

We conclude the trial court's failure to rule on Defendant City's affirmative defense is harmless. We affirm.

V. <u>Boundary of Property and Value of Land Taken</u>

In its last argument, Defendant City claims the trial court erred in holding an inverse condemnation occurred because it failed to identify Plaintiff's property lines and the value of the property affected. We remand this issue to the trial court to determine the area and value of the property affected.

The General Assembly requires the trial court to "hear and determine any and all issues raised by the pleadings other than the issue of compensation, including but not limited to, the condemner's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C. Gen. Stat. § 40A-47. The trial court has the authority to determine the "area taken" as a result of the inverse condemnation, but the "issue of compensation" is a question of fact for a jury. *Id.*

Here, the trial court relied on two surveys conducted by Plaintiffs to determine the property lines and the amount of area taken by Defendant City. Both parties are requesting clarification on the issue of the property line. The trial court found that "980 square feet in one place and 220 in another" were taken but it decreased the affected total from 1,190 to 1,120 square feet. Contrary to the trial court's finding of fact, Plaintiffs request upon remand a finding that the area taken amount to approximately 1,400 square feet. Similarly, Defendant City requests this Court to remand with a determination of 1,192 square feet based on the May 14, 2014 survey. Even though the trial court relied upon Plaintiffs' surveys, both parties agree the trial

court erred in defining the proper property line. The crux of the issue is identifying the original property line.

It is well-established in this State that riparian property owners along non-navigable waters own all exposed land up to the water line, but do not own the land covered by the water. *Hodges v. Williams*, 95 N.C. 331, 339, 59 Am. Rep. 242, 246, (1886). In *Hodges*, the water-level of Lake Mattamuskeet had naturally receded revealing additional land that was being claimed by the property owner of the shoreline. The issue was whether the sovereign or the property owner retains title to the newly exposed land. Our Supreme Court held, "if the land covered by the water lying adjacent to the shore is relicted by a sudden recession of the water, the land belongs to the sovereign, but if relicted gradually and imperceptibly, it belongs to the riparian proprietor." *Id.* In this instance, the water level artificially accreted from the natural level of Defendant City's elbow installation in Spring Lake's dam. An artificial accretion because of government-induced flooding does not affect an individual's natural property line, and the trial court must determine the Plaintiffs' property line accordingly upon remand.

"The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the [trial] courts to consider on remand." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 441 (1982). Therefore, we remand this issue to the trial court to determine the actual "area taken" as a result of

government-induced flooding and remanding for a jury to determine the value of the "area taken."

Conclusion

For the foregoing reasons, the trial court did not err in finding that a compensable taking of Plaintiffs' property by Defendant City did occur. We remand for the trial court to determine the identity of the land actually taken and valuation thereof.

AFFIRMED IN PART; REMANDED IN PART.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).