No. _____

In the

Supreme Court of the United States

GREGORY P. NIES and DIANE S. NIES,

Petitioners,

v.

TOWN OF EMERALD ISLE,
a North Carolina municipality,

Respondent.

On Petition for Writ of Certiorari to the North Carolina Court of Appeals

PETITION FOR WRIT OF CERTIORARI

KEITH P. ANTHONY
Of Counsel
Morningstar Law Group
630 Davis Drive, Suite 200
Morrisville, N.C. 27560
Telephone: (919) 590-0385
E-mail: kanthony@morningstarlawgroup.com

J. DAVID BREEMER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

Whether the Takings Clause permits a state to statutorily redefine an entire coastline of privately owned dry beach parcels as a "public trust" area open for public use, without just compensation?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 2

STATUTES AT ISSUE 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

A. The Setting 7

B. The Nies' Property 8

1. The Nature and Scope of the Nies' Beachfront Lot 8

2. The Town's Initial Attempt To Take the Property 10

C. The Town Passes Ordinances Declaring Private Dry Beaches To Be Public Trust Areas 11

1. The Town Authorizes Public Driving on Private Dry Beach Areas 11

2. The Town Imposes a Twenty-Foot Town Vehicle Lane on the Nies' Property 12

D. Procedural Background 13

TABLE OF CONTENTS—Continued

Page

1. The Initial Suit 13

2. The Appellate Court Decision 14

   a. The Appellate Court Holds That N.C.G.S. § 77-20 Imposes the Public Trust Doctrine and Related Public Use Rights on Privately Owned Dry Beaches . . 15

   b. The Appellate Court Concludes That the Town Did Not Unconstitutionally Take the Nies' Dry Beach Property in Permitting Public and Government Use of the Land . . . 17

   c. The North Carolina Supreme Court Grants Review and Then Dismisses the Case Without Explanation 18

REASONS FOR GRANTING THE WRIT 19

I. THE DECISION BELOW RAISES FEDERAL CONSTITUTIONAL PROPERTY RIGHTS ISSUES OF FAR-REACHING AND CRITICAL IMPORTANCE 20

   A. The Decision Below Suddenly and Drastically Eviscerates the Property Rights of Thousands of North Carolina Dry Beach Owners 20

TABLE OF CONTENTS—Continued

Page

1. Under State Common Law, Private Dry Beaches Have Never Been Subject to Public Trust Uses . . 21

2. Under the Decision Below, N.C.G.S. § 77-20 Destroys Common Law Property Rights So As To Create Public Trust Rights on Private Beaches 22

II. THE LOWER COURT'S CONCLUSION THAT N.C.G.S. § 77-20 IS NOT A TAKING CONFLICTS WITH THIS COURT'S PRECEDENT 27

A. The Lower Court's Decision That N.C.G.S. § 77-20 Is Not a Physical Taking Conflicts with This Court's Precedent 27

1. Physical Takings Law 27

2. N.C.G.S. § 77-20 Is a Physical Taking under *Nollan* and Related Precedent 28

B. The Decision Below Conflicts with Takings Cases Limiting the Legislative Redefinition of Common Law Property Rights 30

III. THE LOWER COURT'S DECISION THAT N.C.G.S. § 77-20 IS NOT A TAKING CONFLICTS WITH THE DECISIONS OF OTHER COASTAL STATES 32

CONCLUSION 35

TABLE OF CONTENTS—Continued

Page

APPENDIX

Decision, Court of Appeals of North Carolina, filed Nov. 17, 2015 . . . . . A-1

Order, Supreme Court of North Carolina, filed Dec. 14, 2016 . . . . . B-1

Order, State of North Carolina, County of Carteret Superior Court, filed Aug. 26, 2014 . . . . . C-1

TABLE OF AUTHORITIES

Page

Cases

Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) . . . 34

Borax Consolidated v. City of Los Angeles,
296 U.S. 10 (1935) 22

*Carolina Beach Fishing Pier, Inc. v.
Town of Carolina Beach*,
177 S.E.2d 513 (N.C. 1970) 6, 8, 21

Cooper v. United States,
779 F. Supp. 833 (E.D.N.C. 1991) 6, 21

Dickinson v. Pake,
201 S.E.2d 897 (N.C. 1974) 23

Dolan v. City of Tigard,
512 U.S. 374 (1994) 25

Fabrikant v. Currituck County,
621 S.E.2d 19 (N.C. Ct. App. 2005) 15, 24

*Friends of Hatteras Island Nat'l Historic
Maritime Forest Land Trust for Pres. v.
Coastal Res. Comm'n*,
452 S.E.2d 337 (N.C. Ct. App. 1995) 15

Glass v. Goeckel, 703 N.W.2d 58 (Mich. 2005) 7

*Gwathmey v. State Through Dep't of Env't,
Health, & Nat. Res. Through Cobey*,
464 S.E.2d 674 (N.C. 1995) 4, 6, 21, 31

Hildebrand v. S. Bell Telephone & Telegraph Co.,
14 S.E.2d 252 (N.C. 1941) 23

Illinois Cent. R.R. v. Illinois,
146 U.S. 387 (1892) 3, 6

TABLE OF AUTHORITIES—Continued

Page

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 25, 28

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 27

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 27-28

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 31

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) 19

Metcalf v. Black Dog Realty, LLC,
684 S.E.2d 709 (N.C. Ct. App. 2009) 9

Nies v. Town of Emerald Isle,
780 S.E.2d 187 (N.C. Ct. App. 2015) 1

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 27-29, 34

Opinion of the Justices,
313 N.E.2d 561 (Mass. 1974) 33

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 27

Phillips Petroleum Co. v. Mississippi,
484 U.S. 469 (1988) 6, 32

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998) 30-31

Preseault v. I.C.C., 494 U.S. 1 (1990) 29

TABLE OF AUTHORITIES—Continued

Page

Purdie v. Attorney General,
732 A.2d 442 (N.H. 1999) 33-34

Sansotta v. Town of Nags Head,
724 F.3d 533 (4th Cir. 2013) 26

Severance v. Patterson,
370 S.W.3d 705 (Tex. 2012) 26

Shively v. Bowlby, 152 U.S. 1 (1894) 21-22

Stevens v. City of Cannon Beach,
510 U.S. 1207 (1994) 5

Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, 560 U.S. 702 (2010) 25, 30-31

Summa Corp. v. California ex rel. State Lands Comm'n, 466 U.S. 198 (1984) 26

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302 (2002) 28

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 5, 30, 34

West v. Slick,
326 S.E.2d 601 (N.C. 1985) 6, 8-9, 21

Winder v. Blake,
49 N.C. (4 Jones) 332 (1857) 22

Constitution

U.S. Const. amend. V 1-2

TABLE OF AUTHORITIES—Continued

Page

Statutes

28 U.S.C. § 1331 1

42 U.S.C. § 1983 1

N.C.G.S. § 77-20(a) 6, 8

§ 77-20(d) 2-3, 23

§ 77-20(e) 2-3

Town Code § 5-1 (2013) 11

§ 5-1 (2015) 11

§ 5-19 (2015) 24

§ 5-19(a) (2013) 13

§ 5-19(b) (2011) 12

§ 5-21(a) (2015) 24

§ 5-60 (2013) 11-12

§ 5-61 (2013) 11-12

§§ 5-60 - 5-66 (2015) 24

§ 5-102(a) (2010) 12

Miscellaneous

3 Powell, Richard R.,
Powell on Real Property (1994) 9

Archer, Jack H. & Stone, Terrance W.,
The Interaction of the Public Trust Doctrine and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas, 20 Vt. L. Rev. 81 (1995) 30

TABLE OF AUTHORITIES—Continued

Page

Bederman, David J., *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375 (1996) 22

Callies, David L. & Breemer, J. David, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002) 29

Echeverria, John D., *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. Davis L. Rev. 931 (2012) . . . 30

Kalo, Joseph J. & Schiavinato, Lisa, *Customary Right of Use: Potential Impacts of Current Litigation to Public Use of North Carolina's Beaches*, 6 Sea Grant L. & Pol'y J. 26 (2014) . . . 20

Kalo, Joseph J., *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869 (2000) 7, 23

Morris, Sean T., *Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?*, 52 Cath. U. L. Rev. 1015 (2003) 29-30

TABLE OF AUTHORITIES—Continued

Page

NOAA Office for Coastal Mgmt., Shoreline Mileage Of the United States, https://coast.noaa.gov/data/docs/states/shorelines.pdf (last visited Apr. 17, 2017) 21

Pagano, Celeste, *Where's the Beach? Coastal Access in the Age of Rising Tides*, 42 Sw. L. Rev. 1 (2012) 7

Rasband, James R., *Equitable Compensation for Public Trust Takings*, 69 U. Colo. L. Rev. 331 (1998) 30

PETITION FOR WRIT OF CERTIORARI

Gregory and Diane Nies (Nies) respectfully petition for a writ of certiorari to review the judgment of the North Carolina Court of Appeals.

OPINIONS BELOW

The published opinion of the North Carolina Court of Appeals issued on November 17, 2015. It is available at *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015). The opinion is attached here as Appendix A.

The North Carolina Supreme Court issued its order dismissing the Nies' appeal from the lower court judgment on December 14, 2016.[1] It is attached as Appendix B. The order of the North Carolina Superior Court, Carteret County, is attached as Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution.

[1] On February 15, 2017, the Chief Justice granted Petitioners' application to extend the time to file this Petition to, and including, April 28, 2017.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

STATUTES AT ISSUE

North Carolina General Statutes § 77-20(d) & (e) states:

> (d) The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.
>
> (e) . . . "[O]cean beaches" means the area adjacent to the ocean and ocean inlets that is subject to public trust rights. This area is in constant flux due to the action of wind, waves, tides, and storms and includes the wet sand area of the beach that is subject to

> regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

INTRODUCTION

This case raises an important Takings Clause issue concerning whether a state, here North Carolina, can legislatively classify an entire coastline of private dry beach parcels as a "public trust" area subject to public and government access, without paying just compensation. The North Carolina courts concluded that North Carolina could, and in fact, did so under N.C.G.S. § 77-20(d) & (e).[2] *See* Pet. App. A-14 to A-19. The state court held that N.C.G.S. § 77-20 extends the "public trust doctrine" to privately owned dry beach lands, *id.* at A-14 to A-22, in derogation of a common law tradition limits the public trust doctrine to the state-owned wet beach. *See Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892) (explaining that a state's "title" to tidelands is "held in trust for the people of the state" for fishing, navigation and commerce). In so doing, the statute has taken private

[2] For brevity, Petitioners will refer to N.C.G.S. § 77-20(d) & (e) as simply N.C.G.S. § 77-20 throughout this Petition.

dry beaches the length of North Carolina's Atlantic coast.

The dispute arises from Emerald Isle, a barrier island off the coast of North Carolina. The Petitioners (Nies) bought a residentially developed beachfront lot on Emerald Isle in 2001. Like most North Carolina beachfront parcels, their lot extends seaward to the mean high water line—the boundary of state-owned beaches. The Nies' lot therefore includes a dry sand area lying between the mean high water line and the first line of dunes or vegetation. Under state common law, this private dry beach is not subject to the "public trust doctrine" which allows public use of state-owned wet beaches. *Gwathmey v. State Through Dep't of Env't, Health, & Nat. Res. Through Cobey*, 464 S.E.2d 674, 678 (N.C. 1995) ("the public trust doctrine is not an issue . . . where the land involved is above water").

Subsequent to the Nies' purchase, the Town passed ordinances authorizing the public and governmental officials to use and drive on private dry beaches, such as that owned by the Nies'. When the Nies' sued the Town, alleging that this invasion of their property caused an unconstitutional taking, the Town claimed that private dry beaches are a public trust area open for public use. As authority, it pointed to N.C.G.S. § 77-20.

State courts have never previously opined on the meaning of that 1998 statute. Nevertheless, in this case, the state appellate court adopted the position that N.C.G.S. § 77-20 changed the common law so as to

expand the "public trust"-impressed beach to privately owned dry beach parcels.[3] It held, for instance:

> N.C. Gen. Stat. § 77-20(d) . . . states the position of the General Assembly that the public trust portions of North Carolina ocean beaches include the dry sand portions of those beaches . . . .

Pet. App. A-14. Although the Nies' argued that N.C.G.S. § 77-20 caused an unconstitutional taking of property if read this way, *see* Plaintiffs-Appellants' New Brief at 28-29, the appellate court rejected this contention. The North Carolina Supreme Court then agreed to hear the case, but it changed its mind, leaving the appellate opinion as the final word.

To say that the lower court's conclusion that N.C.G.S. § 77-20 turned an entire coastline of private lots into a public beach "raises a serious Fifth Amendment takings issue is an understatement." *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1335 (1994) (Scalia, J., dissenting from denial of certiorari). The Nies and other beachfront property owners bought fee simple titles to dry sandy land that has never been encumbered by public trust doctrine access rights. N.C.G.S. § 77-20 suddenly makes their title subservient to the public trust doctrine, and related public use rights, in conflict with a century-long common law tradition. And it does so without compensation. This leaves North Carolina coastal governments, like the Town in this case, free to invade

---

[3] The state appellate courts' reading of the State's statute, subsequently finalized when the North Supreme Court denied review, "is within the [state] court's competency" and the Court "must take the statute as so read and interpreted." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

private dry beach property for public and government purposes, eviscerating the owners' right to control, use, and protect their land, without compensation. Absent this Court's review, N.C.G.S. § 77-20 will not only deprive the Nies' of their property rights, it will accomplish one of the most far-reaching legislative takings of coastal property in American history.

STATEMENT OF THE CASE

For over a century, North Carolina state courts have recognized, like most coastal states, that the state holds the tidelands it acquired upon statehood in "trust" for certain public navigation, fishing and recreational uses. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988); *Illinois Cent. R.R.*, 146 U.S. at 452. North Carolina courts have also recognized that state ownership of tidelands ends at the mean high water mark. *West v. Slick*, 326 S.E.2d 601, 617 (N.C. 1985).

Since the public trust doctrine flows from the state's title, and that title terminates at the mean high water mark, public trust doctrine rights also end at the mean high water mark under state common law. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 177 S.E.2d 513, 516 (N.C. 1970). More landward areas—often called the "dry beach"—are privately owned, *id.*; N.C.G.S. § 77-20(a); and not subject to public trust uses. *Gwathmey*, 464 S.E.2d at 678 ("the public trust doctrine is not an issue . . . where the land involved is above water"); *Cooper v. United States*, 779 F. Supp. 833, 835 (E.D.N.C. 1991) ("This court is not aware of any decision by the courts of North Carolina creating a public trust right in privately-owned dry sand . . . ."). This is consistent

with this Court's precedent and the law of every other coastal state except one.[4]

As indicated above, this Petition arises from the lower court's determination that N.C.G.S. § 77-20 expanded the public trust doctrine beach area to privately owned dry beaches, allowing the Town to authorize uncompensated public and government use of the Nies' and others' land.

A. The Setting

The barrier island of Emerald Isle was virtually undeveloped until approximately 1973, when the first modern bridge connecting the island to the mainland was built. Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 n.35 (2000). In recent times, Emerald Isle has grown in population and development. Homes fill the coast line along the southwest end of the island, where the Nies' property sits. Adjacent to the homes is dry sand and then, the shore. The island is a popular spot during summer months due to its warm waters, vacation homes, and recreational options.

---

[4] *Glass v. Goeckel*, 703 N.W.2d 58, 68 (Mich. 2005) ("In applying the public trust doctrine to the oceans, courts have traditionally held that rights . . . extend from the waters themselves and the lands beneath them to a point on the shore called the "ordinary high water mark."); *see also* Celeste Pagano, *Where's the Beach? Coastal Access in the Age of Rising Tides*, 42 Sw. L. Rev. 1, 10 (2012) (explaining that most states recognize the public trust to the mean high water mark, some limit it to more—seaward low water mark, and that "New Jersey alone applies the public trust doctrine to so-called 'dry beach' above the high tide line").

B. The Nies' Property

1. The Nature and Scope of the Nies' Beachfront Lot

The Nies initially became aware of Emerald Isle when vacationing there on several occasions prior to 2001. Pet. App. A-1. They liked it so much that, in 2001, they bought a parcel of residential beachfront property at 9909 Shipwreck Lane. *Id.* The land included a home similar to surrounding houses. The purchase was consummated with transfer of fee simple deed. In subsequent years, the Nies lived in the home, while occasionally renting it out during summer months.

According to their deed, the subdivision plat creating their lot, and North Carolina law, the Nies' property extends seaward to the mean high water mark. N.C.G.S. § 77-20(a); *West*, 326 S.E.2d at 617. The Nies' title thus includes dry beach land lying between the mean high water mark and the first line of vegetation or dunes. (R pp 53, 611.) Tidelands seaward of the mean high water mark (and thus, of the Nies' dry sand property), are State-owned property. *Carolina Beach*, 177 S.E.2d at 516.

The Nies' dry beach measures about 150 feet in width (from mean high water mark to the vegetation line) and 76 feet in length (between their lot lines and parallel to the Atlantic), comprising approximately 11,000 square feet. (R p 611.) The area is effectively the Nies' backyard. (R p 611.)

At the time of purchase, the public sometimes drove on the hard packed wet beach bounded on the landward side by the mean high water mark, but no driving occurred on upland dry sand beaches.

(R pp 245-248.)[5] This was consistent with a 1980 Town ordinance in effect at the time, which allowed public shoreline driving only on the "foreshore[6] and area . . . consisting of hardpacked sand." (R at 526.)[7] The Nies' title is not subject to a recorded public access easement or a right-of-way proven in court under common law doctrines such as prescription or dedication.[8] (R p 611.)

---

[5] The lower court suggested the Nies' conceded dry beach driving lawfully existed at the time of purchase. Pet. App. A-6 to A-8. This is false. The Nies' unrebutted record testimony showed that no dry sand driving occurred at the time of, or in the immediate years after, their purchase of the property. (R pp 245-248.)

[6] The "foreshore" is a term that refers, under state law, to the area of beach lying between open water and the mean high water mark. *See West*, 326 S.E.2d at 617.

[7] The lower court's statement that "the record does not contain the [pre-2001 (1980)] Carteret County Beach Vehicular Ordinance" is not true. Pet. App. A-5. The ordinance is in the Record on Appeal at page 526. The court's statement that a later (2004) Ordinance allowing driving "primarily" on "hardpacked sand" "accurately reflects the defined permitted driving area from the time Plaintiffs purchased the Property in June of 2001" is also wrong. Pet. App. A-5 to A-6.

[8] As in other states, people can acquire access to particular tracts of private property by proving the existence of a prescriptive (adverse possession) easement the land. This is a fact issue, in which the claimant bears the burden to prove that all the factual elements of prescription are present. *West*, 326 S.E.2d at 610-11. "Prescriptive easements, by their nature, can be utilized only on a tract-by-tract basis, and thus cannot be applied to all beaches within a state." 3 Richard R. Powell, *Powell on Real Property* § 34.11[6], at 34-171 (1994). Individual tracts may also be dedicated to the public upon judicial proof of the elements of a dedication. *Metcalf v. Black Dog Realty, LLC*, 684 S.E.2d 709, 723 (N.C. Ct. App. 2009). The Town neither pled or argued these

(continued...)

2. The Town's Initial Attempt To Take the Property

In 2003, the Town attempted to secure an access easement on the Nies' dry sand land to facilitate a Beach Renourishment Project. The Town sent the Nies a form easement that would have given the Town a perpetual access easement on their land. (R pp 55-59.) The Nies declined to sign this easement, however, and instead executed a temporary easement that expired on March 31, 2005. (R p 61.) Finding this inadequate (R pp 630-631), the Town filed a complaint and a declaration of taking against the Nies in the Carteret County Superior Court, to obtain its desired access easement through a "quick take" eminent domain procedure. (R pp 75, 634-636.)

Through this action, the Town immediately condemned a perpetual public and Town access easement over the dry sand portion of the Nies' property. (R pp 633-635.) However, the Nies contested the taking in the state trial court (R pp 637-645). Approximately a year later, that court issued a "Consent Order Modifying Beach Re-nourishment Easement" (R pp 652-662), that significantly reduced the easement the Town acquired through the quick take procedure. The modified easement allowed the Town to access the Nies' dry beach property only to inspect and restore erosion damage from major storms. (R pp 659-660.) It did not give the public a right to access the Nies' property, nor did it give the Town itself a right to use the property for general municipal purposes, such as driving. (R pp 659-661.) The

[8] (...continued)
doctrines with respect to the Nies' property or any other dry beach lands.

easement declares that it is not to be construed to interfere with the Nies' right to use their property. (R p 661.) The Town has acquired no easement since then.

C. The Town Passes Ordinances Declaring Private Dry Beaches To Be Public Trust Areas

1. The Town Authorizes Public Driving on Private Dry Beach Areas

In 2004, the Town amended its ordinances to allow public driving "primarily" on the "hardpacked sand" between the sea and ten feet seaward of the dunes. (R p 541.) In 2013, it amended the driving ordinance further, this time permitting public driving on the "public trust beach," defined as "all land and water area between the Atlantic Ocean and the base of the frontal dunes." Town Code § 5-1; Pet. App. A-6 to A-8. This provision cited to N.C.G.S. § 77-20. *Id.*[9] The operative public driving ordinance, one of the ordinances challenged here, thus allows public driving on all private dry sand areas between the dunes and mean high water mark—the dry beach.

Under the 2013 driving ordinance, the public is allowed to drive on privately owned dry sandy beach lands between September and May (R p 549-550 (Town Code § 5-60)), upon paying a fee to the Town and obtaining a permit. Town Code §§ 5-60 - 5-61. The

---

[9] The relevant law states: "the public trust beach area, [] defined by G.S. 77-20, and includes all land and water area between the Atlantic Ocean and the base of the frontal dunes." Town Code § 5-1.

ordinance allows the Town manager to regulate these permits. *Id.*

The Town has issued many permits allowing the public to drive on the Nies' and others' dry sand beaches. In 2014, the Town issued 1,246 driving permits and generated $78,000 in income in so doing. (R p 682.) Under authority of these Town permits, the public regularly drives the Nies' property, leaving trash and tire ruts in their wake. (R pp 443:18; 462, 668-681.)

2. The Town Imposes a Twenty-Foot Town Vehicle Lane on the Nies' Property

In 2010, the Town enacted a different ordinance giving the Town itself vehicular access to private dry beach lands. (R p 98.) This ordinance stated:

> No beach equipment, attended or unattended, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes at any time, so as to *maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand*.

(R p 98 (Town Code § 5-102(a)) (emphasis added).) It is undisputed that the strip of land lying "twenty feet seaward of the base of the frontal dunes" includes privately owned dry sand areas, such as that owned by the Nies'. In 2011, the Town amended this ordinance to make the "twenty-foot from the dunes" driving lane applicable from May 1 through September 14. (R p 545 (Town Code § 5-19(b)).) In 2013, the Town amended the Ordinance to reiterate that it was intended to clear the

way "for unimpeded vehicle travel by emergency vehicles and town service vehicles on the public trust beach area." (R p 545 (Town Code § 5-19(a)).)

Under this Town road ordinance, Town garbage trucks, construction vehicles, police cars, and "quads" regularly drive and park on the Nies' dry sand beach land. (R pp 311-312, 461-463 (Nies deposition).) Walking on the land became unsafe and sometimes impossible for the older Nies. (R p 314:15-18; *id.* p 315:5-12.)

Moreover, because the Town's twenty-foot dry beach travel lane is defined on the landward side by an ambulatory boundary (vegetation or dunes), the Town has capitalized on storm-induced erosion to move its traffic lane further into the Nies' residential lot. (R p 738 (Nies affidavit).) In 2011, Hurricane Irene moved the dunes inland by approximately thirty feet. (*Id.*) Immediately afterward, the Town began driving "vehicles over the whole [newly denuded, sandy] area including some with caterpillar treads . . . municipal vehicles were already using an additional 30 feet of our property." (*Id.*)

D. Procedural Background

1. The Initial Suit

The Nies and four other property owners sued the Town in the North Carolina Superior Court, Cateret County, in December 2011. Pet. App. A-8 to A-11. In so doing, they filed an Inverse Condemnation action and a complaint alleging in part that the Town had taken the Nies' property in violation of the United States Constitution and the North Carolina Constitution. (R pp 3-100.) The complaint asserted: "Defendant Town's adoption of ordinances, based on claimed

authority of North Carolina General Statutes § 77-20 Sections (d) and (e), purporting to allow and/or regulate use by Defendant Town and the public of the 'dry sand' portions of Plaintiffs' property above mean high water is . . . an unconstitutional taking of Plaintiffs' property." (R p 37 ¶ 109.) The Nies sought just compensation and damages under 42 U.S.C. § 1983. (R pp 35-38.)

After the Town unsuccessfully attempted to remove the case to the federal district court (R pp 102-104), the Nies' case was separated from the other plaintiffs and they proceeded to litigate on a pro se basis in the North Carolina superior court. The Town subsequently filed an Answer that offered one substantive defense to the Nies' takings claims: that the state's public trust doctrine permitted its actions. It did not allege or seek to prove that there was a common law easement on the Nies' property under doctrines like prescription, or dedication.

On August 25, 2014, the state trial court granted the Town's motion for summary judgment on all the Nies' claims, including their takings claims, without elaboration. (R p 757.) The Nies then appealed to North Carolina Court of Appeals, raising only their takings claims.

2. The Appellate Court Decision

In the state appellate court, the Town argued that N.C.G.S. § 77-20 legislatively extended public rights associated with the public trust doctrine to privately owned dry sand areas, thus allowing public and Town use of the Nies' property. Defendant-Appellee's Brief at 10. The Nies argued that this reading of the statute

turned it into an unconstitutional taking. Plaintiffs-Appellants' New Brief at 28-29.

a. The Appellate Court Holds That N.C.G.S. § 77-20 Imposes the Public Trust Doctrine and Related Public Use Rights on Privately Owned Dry Beaches

On November 17, 2015, the Court of Appeals issued a published decision affirming judgment for the Town on the Nies' takings claims. *See* Pet. App. A. The Court initially noted the existence of certain public rights in "the watercourses of the State" under the public trust doctrine. *Id.* at A-12 (quoting *Fabrikant v. Currituck County*, 621 S.E.2d 19, 27 (N.C. Ct. App. 2005)).[10] The lower court recognized that dry sand beaches located landward of the mean high water mark are privately owned, Pet. App. A-3 to A-5, and that it could find no case law extending public trust rights to privately owned dry beaches, *id.* at A-14 to A-16. This prompted the court to turn to N.C.G.S. § 77-20. It concluded that:

> N.C. Gen. Stat. § 77-20(d) . . . states the position of the General Assembly that the *public trust portions of North Carolina ocean*

[10] The court noted that "public trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common. . . . They 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 and estuarine beaches . . . ." Pet. App. A-11 to A-12 (quoting *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres. v. Coastal Res. Comm'n*, 452 S.E.2d 337, 348 (N.C. Ct. App. 1995)).

> *beaches include the dry sand portions of those beaches* . . . .

Pet. App. A-14 (emphasis added). The court elaborated:

> The [North Carolina] General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights.

Id. at A-15.

The court clarified that the landward boundary of the beaches subject to public trust doctrine rights under N.C.G.S. § 77-20 is the vegetation or dune line. This meant that all private dry beaches are subject to public trust doctrine rights: "[t]he ocean beaches of North Carolina, as [thus] defined in N.C. Gen. Stat. § 77-20(e) and this opinion, *are subject to public trust rights* unless those rights have been expressly abandoned by the State." *Id.* at A-19 to A-20 (emphasis added). In sum, the court held N.C.G.S. § 77-20 "mandate[s]" public access "to the dry sand beaches of North Carolina." *Id.* at A-17.[11]

In reaching this decision, the Court ignored and necessarily rejected the argument that N.C.G.S. § 77-20 results in an unconstitutional taking as construed to extend public trust rights to private dry beach areas. *See* Plaintiffs-Appellants' New Brief at 28-29 (arguing

---

[11] The court below also referred briefly to "public consciousness," to "what the majority of North Carolinians understand as a 'public' beach," and to the Nies' out-of-state origin, in recognizing public trust rights on private dry beaches. Pet. App. A-19. Of course, since neither naked (purported) public opinion or parochialism are a source of state property law, the court's decision necessarily and explicitly rests on N.C.G.S. § 77-20. *Id.* at A-19 to A-21.

"[e]ven if one wanted to read N.C.G.S. § 77-20 as extending public trust beach rights to private dry uplands, it could not be construed that way without causing an unconstitutional taking.").

b. The Appellate Court Concludes That the Town Did Not Unconstitutionally Take the Nies' Dry Beach Property in Permitting Public and Government Use of the Land

Once it held that N.C.G.S. § 77-20 impressed private dry beaches with public trust rights, the court below proceeded to hold that the statute absolved the Town of liability for authorizing public and governmental driving on the Nies' dry beach. The court stated, "it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights." Pet. App. A-32. In the court's view, N.C.G.S. § 77-20's imposition of public trust rights eliminated the Nies' right to exclude the public or government from their dry beach, and this prevented them from claiming a taking based on the Town's actions:

> The right to prevent the public from enjoying the dry sand portion of the Property was never part of the "bundle of rights" purchased by Plaintiffs in 2001. Because Plaintiffs have no right to exclude the public from public trust beaches, those portions of the Ordinances regulating beach driving, even if construed as ordinances "allowing"

> beach driving, cannot effectuate a Fifth Amendment taking.

Id. at A-21 (footnote omitted).

The court similarly held that the Town's use of the Nies' property for Town vehicles was not a taking given the court's prior conclusion that N.C.G.S. § 77-20 impressed the land with public trust doctrine. *Id.* at A-24 to A-27.

c. The North Carolina Supreme Court Grants Review and Then Dismisses the Case Without Explanation

After the North Carolina Court of Appeals issued its decision, the Nies' petitioned the North Carolina Supreme Court for review. In the Petition, the Nies' argued that review was justified in part because the lower court's construction of N.C.G.S. § 77-20 "causes a taking of property and conflicts with the principle that legislatures may not define away vested property interests—at least not without paying just compensation." Petition for Discretionary Review at 23-24.

On April 12, 2016, the state supreme court granted review. The parties then fully briefed the case. Again, the Nies argued that the appellate court's view of N.C.G.S. § 77-20 was wrong and converted the statute into an unconstitutional taking. Plaintiffs-Appellants' New Brief at 29.

On September 30, 2016, the Nies sold their property and moved for health reasons. A few days later, they filed a letter explaining that they had not sold or waived their takings claims, and that the

claims were not moot because they sought damages. *See Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8-9 (1978) (constitutional claims arising from a subsequently terminated injury to property interests are not moot if the claims seek damages). There was no response from the Town, State or Court. On November 7, 2016, the composition of the North Carolina Supreme Court changed due to an election. On December 14, 2016, the state court issued an order dismissing the Nies' appeal without explanation.

REASONS FOR GRANTING THE WRIT

This case raises an important issue as to whether a state may statutorily classify a coastline of privately owned dry beaches as a public trust doctrine area, subject to public and government use, without just compensation. Although N.C.G.S. § 77-20 has never been previously interpreted to impose public trust rights on private dry beach parcels (indeed, it has never been construed at all until now), the decision below has authoritatively construed the statute to do just that.

N.C.G.S. § 77-20 thus creates a "public trust doctrine" easement on all dry sand private property, without compensation to the owners. This divests thousands of citizens of their fundamental property rights. Indeed, the far-reaching and sudden nature of the court's decision unsettles titles to all private dry beach areas along North Carolina's Atlantic coast. It is grossly unjust and conflicts with this Court's Takings Clause precedent, and with the decisions of other state courts.

The Court should grant the Petition.

I

THE DECISION BELOW RAISES FEDERAL CONSTITUTIONAL PROPERTY RIGHTS ISSUES OF FAR-REACHING AND CRITICAL IMPORTANCE

A. The Decision Below Suddenly and Drastically Eviscerates the Property Rights of Thousands of North Carolina Dry Beach Owners

As the following shows, N.C.G.S. § 77-20 jettisoned a standard, established common law framework under which the public trust doctrine applies to tidelands below the mean high water mark, so as to subject all private dry beaches to public and government access. In denying that the owners have a constitutional right to compensation, the decision below dramatically and unfairly effects a great transfer of real property from private to public hands. These are highly important developments that will effect the nature and status of the coastline now and in the future. Joseph J. Kalo & Lisa Schiavinato, *Customary Right of Use: Potential Impacts of Current Litigation to Public Use of North Carolina's Beaches*, 6 Sea Grant L. & Pol'y J. 26, 52 (2014) ("Whether the public has the . . . right to use the State's dry sand beaches and, if that right exists, how will that affect the rights of oceanfront property owners[,] are critical questions that will shape the character and economy of coastal North Carolina.").

1. Under State Common Law, Private Dry Beaches Have Never Been Subject to Public Trust Uses

North Carolina's coast line is approximately three-thousand (3,000) miles in length.[12] Since dry beaches located landward of the mean high water line were not part of the tidelands to which the State took title upon entry to the Union, those areas were put into private ownership and subdivided long ago. *Cooper*, 779 F. Supp. 835 (noting 1938 subdivision including dry beach property). Such areas have been bought, sold, otherwise transferred, leased, taxed, and sometimes developed, as part of private parcels that extend to the mean high water mark. *Cooper*, 779 F. Supp. at 836; *Gwathmey*, 464 S.E.2d at 678.

During this time, no court decision ever applied the common law public trust doctrine to private dry beach areas, *Cooper*, 779 F. Supp. at 835. *Gwathmey*, 464 S.E.2d at 678 ("the public trust doctrine is not an issue . . . where the land involved is above water"); *Carolina Beach Fishing Pier*, 177 S.E.2d at 515-16 (noting that "[t]he 'strip of land between the high- and low-tide lines' . . . 'is reserved for the use of the public'" and recognizing that the high tide line is a "mean high water mark"); *West*, 326 S.E.2d at 617-18 (same). The State's traditional limitation of the public trust doctrine to State-owned wet beaches flows from this Court's precedent, which also recognizes the public trust doctrine on State-owned tidelands seaward of the "ordinary" high tide line. *Shively v. Bowlby*, 152 U.S. 1, 13 (1894) ("title in the soil of the sea, or of arms of the sea, below *ordinary high-water mark*, is in the king . . .

---

[12] *See* https://coast.noaa.gov/data/docs/states/shorelines.pdf (last visited Apr. 17, 2017).

and that this title, jus privatum, whether in the king or in a subject, is held subject to the public right" (emphasis added; citations omitted)); *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22-23 (1935) ("[B]y the common law, the shore 'is confined to the flux and reflux of the sea at ordinary tides.' It is the land '*between ordinary high and low-water mark*, the land over which the daily tides ebb and flow.' " (emphasis added; citations omitted)).

The lower court acknowledged the absence of state common law authority extending the public trust to private dry beaches located inland of the mean high water mark. Pet. App. A-14 to A-16. There is no other inherent common law public easement on private dry beach property.[13]

2. Under the Decision Below, N.C.G.S. § 77-20 Destroys Common Law Property Rights So As To Create Public Trust Rights on Private Beaches

In light of the state's common law tradition, private titles to dry beaches have always been like any

---

[13] In the state appellate proceedings, the Town and certain amici occasionally referred to the English doctrine of customary law as a potential source of inherent public rights in dry beaches. *See generally*, David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375 (1996). The North Carolina Supreme Court has, however, specifically rejected customary law as a source of state property rules. *Winder v. Blake*, 49 N.C. (4 Jones) 332 (1857). Moreover, the Town declined to raise customary law as a defense in the trial court, (R pp 116-117, 119), or to argue it in the appellate court, and the decision below did not rely on custom; it relied on N.C.G.S. § 77-20.

other title to private land. Individual tracts can be encumbered by prescriptive easements upon proof in a court of law,[14] but until then, they are fee simple interests that include normal ownership rights, such the right to privately use the property and to exclude others, including the government, from its use.[15] *Hildebrand v. S. Bell Telephone & Telegraph Co.*, 14 S.E.2d 252, 256 (N.C. 1941).

When N.C.G.S. § 77-20 was enacted in 1998, no one understood it to change the common law or to create public rights on dry beaches.[16] It was considered to be a policy statement. Kalo, *The Changing Face of the Shoreline*, 78 N.C. L. Rev. at 1895. Since passage of N.C.G.S. § 77-20, no State court has construed the statute, much less held that it abrogates common law public trust doctrine rules.

Yet, under the decision below, N.C.G.S. § 77-20 converts the entire private dry beach coastline into a public trust area that the public may "freely use and

---

[14] *See supra*, footnote 8.

[15] The Town has pointed out that people have been on and around the North Carolina shore for a long time. But the presence of people does not create public rights under the public trust doctrine. Such rights flow exclusively from the State's title to tidelands. Indeed, a mere public presence cannot even create an easement by prescription. *Dickinson v. Pake*, 201 S.E.2d 897, 900 (N.C. 1974) (public use of private land is presumed to be permissive or with the owner's consent and does not alone create rights).

[16] The text of the law states: "public trust rights in the ocean beaches *are established in the common law* as interpreted and applied by the courts of this State." N.C.G.S. § 77-20(d) (emphasis added).

enjoy," including for beach driving. Pet. App. A-12. It allows the government to use private beaches as a service road. *Id.* at A-19 to A-21. The owners cannot constrain, deny or make rules regarding public access to their dry beach land. The government has that right.[17] The government can sell vehicular access to the owners land for a profit. The owners cannot peaceably enjoy the dry beach land for their own purposes. The public has that right. Indeed, there is no principled limitation on the "public trust" activities that the public may now engage in on the Nies and others' privately owned dry beaches or on government's ability to access such land.[18] The practical result for property owners is virtually non-stop traffic (R pp 311-312), "litter, noise, bonfires, relief of bodily functions, requests for use of the bathroom and the telephone, and unauthorized use of [private] outdoor showers." *Fabrikant*, 621 S.E.2d at 23.

N.C.G.S. § 77-20 strips all dry sand owners of the right to exclude non-owners from the land, including

---

[17] In the past, local coastal governments have used eminent domain proceedings to acquire access to private dry beaches for re-nourishment of adjacent state beaches, providing due process and, potentially, compensation to affected owners. This is now unlikely to occur, as N.C.G.S. § 77-20 secures the desired government access to private dry beaches by legislative fiat.

[18] In Emerald Isle, site of the Nies' property, the Town permits the public to engage in the following activities on "public trust areas": vehicle parking and driving, public alcohol consumption, and horseback riding. It decides when and under what conditions such activities may occur. Town Code §§ 5-60 - 5-66. Conversely, the Town code bars people, such as property owners, from selling anything on public trust lands. Town Code § 5-21(a). It bars owners from leaving personal property on the "public trust" land they own. *See* Town Code § 5-19.

the government, and to control or prevent objectionable activity on their property. These rights are among the "most essential" in the bundle of rights we call "private property." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).[19] N.C.G.S. § 77-20 accomplishes this intrusion without a dime in compensation to the fee title holders.

Titles to dry beach parcels have been completely upended. Property owners pay taxes on their dry beach property and perhaps bear liability, yet they now hold their land "in trust" for public use. The owners purchased the land for private enjoyment, but it is the public and government that controls the land. Without warning in the text of N.C.G.S. § 77-20 or in common law, a coastline of separately divided and individually used and sold parcels of private dry beaches are now a uniform public trust area. Such a radical statutory change to pre-existing property rights raises serious constitutional concerns. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 715 (2010) ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property . . . .") (emphasis deleted).

Indeed, N.C.G.S. § 77-20 not only takes all existing privately dry beaches for "public trust" uses, it ensures that additional areas of coastal land will be taken without just compensation in the future. This is because the dry sand area now subject to the public

---

[19] Because of its centrality to the concept of private property, the right to exclude strangers is itself a fundamental property right that may not be destroyed without compensation. *Kaiser Aetna*, 444 U.S. at 180.

trust doctrine under the statute is not fixed; it is migratory and subject to inland shifts.

As sea levels rise and storms cause the vegetation and dunes which mark the public trust area to erode inland, more areas of private coastal property will end upon on the dry sand public trust area. *Sansotta v. Town of Nags Head*, 724 F.3d 533, 537 (4th Cir. 2013) ("Like many parts of North Carolina's Outer Banks, the Town's beaches have eroded in recent decades, some of them at a rate of approximately two feet per year for over two decades."). When this happens, parcels that have never previously part of the beach or used by the public will instantly become open for public access and use under N.C.G.S. § 77-20(d) and (e). (R pp 375-376) (Nies' testimony describing how a storm moved the dunes inland by 30 feet, creating an additional thirty feet of dry sand on their land, which the Town proceeded to use). This will "depriv[e] oceanfront property owners of a substantial right . . . without requiring compensation or proof of actual use of the property allegedly encumbered whenever natural forces cause the vegetation line to move inland so that property not formerly part of the dry beach becomes part of the dry beach." *Severance v. Patterson*, 370 S.W.3d 705, 726 (Tex. 2012).

By imposing a public trust easement on private dry beaches, N.C.G.S. § 77-20 suddenly wipes out fundamental and constitutionally protected property rights for the current land owners and for those who come to own dry sandy areas in the future. This is extraordinary land grab. The Court should not let it stand. *See Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984) (reviewing a case where a state attempted to suddenly assert a

public trust easement over all land that was tidelands at the time of statehood, regardless of present, private status).

II

THE LOWER COURT'S CONCLUSION THAT N.C.G.S. § 77-20 IS NOT A TAKING CONFLICTS WITH THIS COURT'S PRECEDENT

This Court has never directly addressed the issue of whether states can use legislation to redefine privately owned beach areas as a "public trust " area subject to public use, consistent with the Takings Clause. However, the idea conflicts with this Court's precedent.

A. The Lower Court's Decision That N.C.G.S. § 77-20 Is Not a Physical Taking Conflicts with This Court's Precedent

1. Physical Takings Law

The Fifth Amendment's prohibition against the taking of private property for public use without just compensation applies to the states through the Fourteenth Amendment. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Under this Court's jurisprudence, any governmental action that results in a physical occupation of land is considered a *per se* taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-40 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). An uncompensated physical occupation is unconstitutional "'without regard to whether the action achieves an important public benefit or has only a minimal

economic impact on the owner.'" *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (quoting *Loretto*, 458 U.S. at 434-35). Physical invasions of property are judged so strictly (at least in part) because they eviscerate the owner's right to exclude strangers, a fundamental property right. *Kaiser Aetna*, 444 U.S. at 176, 180.

Unconstitutional physical occupations of property may be most obvious when the government "directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002). But such direct appropriation is not necessary for a physical taking. Such a taking may also occur when the government authorizes third parties to use private property. *Nollan*, 483 U.S. at 832 (a physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed"). Such access is equivalent to an easement, and "if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna*, 444 U.S. at 180. It makes no difference if the public (or government) exercises a public access right only intermittently; it is granting of *the right* to use private land that causes a physical taking. *Nollan*, 483 U.S. at 832.

2. N.C.G.S. § 77-20 Is a Physical Taking under *Nollan* and Related Precedent

Here, N.C.G.S. § 77-20 makes dry beaches that are not subject to the public trust doctrine under common law into a public trust area available for public access, recreation and driving. The effect is

creation of an expansive public trust easement on all privately owned dry beaches—one that destroys the owners' right to exclude non-owners (or to control the time, place, and manner of any access they want to permit). The statute includes no provision for compensation, and the state courts did not infer one.

As so construed, N.C.G.S. § 77-20 conflicts with precedent, such as *Nollan*, which indicates that imposing public access on private land by fiat is a *per se* physical taking, without compensation. 483 U.S. 831-32; *see also*, *Preseault v. I.C.C.*, 494 U.S. 1, 24 (1990) (O'Connor, J., concurring) (reading *Nollan* to stand for the proposition that "a taking would occur if the Government appropriated a public easement"). Both the North Carolina appellate court and state supreme court heard this argument and rejected it. For the Nies, the decision means N.C.G.S. § 77-20 gives the public a "public trust" right to drive, park, and recreate on their dry beach property, and the Town can use the land as a road, without violating the Takings Clause.

The Court should grant the Petition to confirm that the legislative creation of a public area on private beach lands is an unconstitutional, *per se* taking, without just compensation.[20]

---

[20] Commentators have long noted that the interaction between the public trust doctrine and the Takings Clause in the coastal property rights context raises important and controversial issues. *See* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); Sean T. Morris, *Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?*, 52 Cath. U. L. Rev. 1015 (continued...)

B. The Decision Below Conflicts with Takings Cases Limiting the Legislative Redefinition of Common Law Property Rights

N.C.G.S. § 77-20 not only conflicts with this Court's physical invasion takings precedent, it is inconsistent with a line of cases holding that states cause a taking when they define away previously established common law private property rights.

Beginning with *Webb's*, 449 U.S. at 163-65, this Court has made clear that states cannot alter common law property rules so as to erase important property rights, without just compensation. In *Webb's*, the Court reviewed a statute that changed interest earned on funds deposited with state courts from private property into public funds. The Court held this was a taking, stating "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.* at 164. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998), the Court re-confirmed that "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." More recently, in *Stop the Beach Renourishment*, 560 U.S. at 713, the Court observed that "States effect a taking if they

---

[20] (...continued)
(2003); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. Colo. L. Rev. 331 (1998); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. Davis L. Rev. 931 (2012); Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust Doctrine and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 Vt. L. Rev. 81 (1995).

recharacterize as public property what was previously private property."

The lower court's construction of N.C.G.S. § 77-20 conflicts with this strand of Takings Clause precedent. As previously noted, the common law has never identified private dry beaches in North Carolina as a public trust doctrine area open for public use. *Gwathmey*, 464 S.E.2d at 678 ("the public trust doctrine is not an issue . . . where the land involved is above water"). As the decision below notes, N.C.G.S. § 77-20 disavows this understanding, Pet. App. A-19 to A-21. In so doing, it re-characterizes private dry beach property as public trust property, without compensation. *Stop the Beach*, 560 U.S. at 713; *Phillips*, 524 U.S. at 167. Thus, even if N.C.G.S. § 77-20 can be characterized as a "modification" of state common law property rights, rather than as an explicit and affirmative grant of a public access easement on private land, it conflicts with this Court's Takings Clause precedent.

It is true that statutes may codify common law understandings that already limit private property rights without violating the Takings Clause. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-31 (1992). But that is not what happened here. Pet. App. A-14 to A-16. If N.C.G.S. § 77-20 merely codified the common law, it would recognize that public trust doctrine rights end at the mean high water mark boundary of state-owned beaches, as held by state courts. But N.C.G.S. § 77-20 now "modifies" the common law to extend public trust doctrine rights to privately owned, upland dry sand beaches. Pet. App. A-14 to A-16. This is a legislative redefinition of property

rights that wipes out private property interests recognized and protected under the common law.[21]

This Court should grant the Petition to confirm that, while state legislatures have power to modify common law rules, the exercise of that power is subject to the condition of just compensation when legislative changes destroy important, pre-existing private property rights, including the right to exclude others from private property.[22]

III

THE LOWER COURT'S DECISION THAT N.C.G.S. § 77-20 IS NOT A TAKING CONFLICTS WITH THE DECISIONS OF OTHER COASTAL STATES

Several other states besides North Carolina have considered legislation extending the public trust beach from state-owned shore areas to privately owned, upland beaches. But courts in those states have concluded that such legislation violates the Takings Clause. The decision below conflicts with that precedent.

---

[21] Although states may generally have power to define the scope public trust rights in tidal areas acquired at statehood, *Phillips*, 484 U.S. at 484, this Court has never held that states may expand the geographic reach of the public trust doctrine from tidelands acquired at statehood to private inland areas, without paying just compensation.

[22] The case should then be remanded to the state courts to reconsider whether the Town's actions against the Nies' property cause a taking warranting compensation.

In *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974), the Massachusetts Supreme Court considered the constitutionality of legislation that sought to establish a public right-of-way across privately owned dry beaches (areas lying between the mean high water mark and the highest reach of the water). The court noted that the effect was to "take easements for the benefit of the public" that "require private owners to permit affirmative physical use of their property by the public." *Id.* at 568. Noting "the interference with private property here involves a wholesale denial of an owner's right to exclude the public," *id.*, and did not provide compensation, the court held that the law was an unconstitutional taking. *Id.*

Purdie v. Attorney General, 732 A.2d 442, 447 (N.H. 1999), is similar. There, the New Hampshire legislature passed a statute that extended the boundary of the "public trust" beach from the mean high tide line to the highest water mark, again, the vegetation line. The result was to impress private dry sand areas with "public trust rights." The New Hampshire Court held this was a taking:

> the legislature went beyond [] common law limits by extending public trust rights to the highest high water mark. Although the legislature has the power to change or redefine the common law to conform to current standards and public needs [citation omitted], property rights created by the common law may not be taken away legislatively without due process of law [citation omitted]. Because [the statute]

> unilaterally authorizes the taking of private shoreland for public use and provides no compensation . . . it violates the prohibition in Part I, Article 12 of the State Constitution and the Fifth Amendment of the Federal Constitution . . . .

Id. (citing *Nollan*, 483 U.S. at 831-32).

Unlike the New Hampshire and Massachusetts courts, the court below held that legislation expanding the public trust beach area from the mean high water mark to private, inland parcels was not an unconstitutional physical taking of property. The decision below thus squarely conflicts with *Purdie* and *Opinion of the Justices*.[23] While New Hampshire and Massachusetts invalidated the uncompensated, state-wide conversion of private beach lands into a public (trust) area, North Carolina sanctioned this result, eviscerating rights and destabilizing titles along the length of the State's Atlantic coast.

The Court should grant the Petition to resolve the conflict. *Webb's*, 449 U.S. at 159 (noting probable jurisdiction due to a conflict among state courts on a taking issue).

---

[23] *See also Bell v. Town of Wells*, 557 A.2d 168, 176-78 (Me. 1989) (a statute expanding the nature of permitted public trust rights on private shore lands caused a taking).

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: April, 2017.

Respectfully submitted,

KEITH P. ANTHONY
Of Counsel
Morningstar Law Group
630 Davis Drive, Suite 200
Morrisville, N.C. 27560
Telephone: (919) 590-0385
E-mail: kanthony@morningstarlawgroup.com

J. DAVID BREEMER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org

Counsel for Petitioners

Appendix A–1

IN THE COURT OF APPEALS
OF NORTH CAROLINA

No. COA15-169

Filed: 17 November 2015

Carteret County, No. 11 CVS 1569

GREGORY P. NIES and DIANE S. NIES, Plaintiffs,

v.

TOWN OF EMERALD ISLE, a North Carolina Municipality, Defendant.

Appeal by Plaintiffs from order entered 26 August 2014 by Judge Jack W. Jenkins in Superior Court, Carteret County. Heard in the Court of Appeals 24 August 2015.

Pacific Legal Foundation, by J. David Breemer; and Morningstar Law Group, by Keith P. Anthony, for Plaintiffs-Appellants.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Brian E. Edes and Jarrett W. McGowan, for Defendant-Appellee.

McGEE, Chief Judge.

Gregory P. Nies and Diane S. Nies ("Plaintiffs") purchased an oceanfront property ("the Property") in Defendant Town of Emerald Isle ("the Town") in June of 2001. Plaintiffs had been vacationing in the Town from their home in New Jersey since 1980. Plaintiffs filed this matter alleging the inverse condemnation taking of the Property by the Town.

I.

"Generally speaking, state law defines property interests[.]" *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 707-08, 177 L. Ed. 2d 184, 192 (2010) (citations omitted). North Carolina's ocean beaches are made up of different sections, the delineation of which are important to our decision. *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 33, 621 S.E.2d 19, 22 (2005). The "foreshore," or "wet sand beach," is the portion of the beach covered and uncovered, diurnally, by the regular movement of the tides. *Id.* The landward boundary of the foreshore is the mean high water mark. "Mean high water mark" is not defined by statute in North Carolina, but our Supreme Court has cited to a decision of the United States Supreme Court in discussing the meaning of the "mean" or "average high-tide." *Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970). The United States Supreme Court decision cited by *Fishing Pier* defined "mean high tide" as the average of all high tides over a period of 18.6 years. *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 26-27, 80 L. Ed. 9, 20 (1935).[1]

The "dry sand beach" is the portion of the beach landward of the mean high water mark and continuing to the high water mark of the storm tide. *Fabrikant*, 174 N.C. App. at 33, 621 S.E.2d at 22. The landward boundary of the dry sand beach will generally be the foot of the most seaward dunes, if dunes are present; the regular natural vegetation line, if natural

[1] This time period is used because there is "'a periodic variation in the rise of water above sea level having a period of 18.6 years[.]'" *Id.*

vegetation is present; or the storm debris line, which indicates the highest regular point on the beach where debris from the ocean is deposited at storm tide. Traveling further away from the ocean past the dry sand beach one generally encounters dunes, vegetation, or some other landscape that is not regularly submerged beneath the salt waters of the ocean.

The seaward boundary of private beach *ownership* in North Carolina is set by statute:

> (a) The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark. Provided, that this section shall not apply where title below the mean high water mark is or has been specifically granted by the State.
>
> (b) Notwithstanding any other provision of law, no agency shall issue any rule or regulation which adopts as the seaward boundary of privately owned property any line other than the mean high water mark. The mean high water mark also shall be used as the seaward boundary for determining the area of any property when such determination is necessary to the application of any rule or regulation issued by any agency.

N.C. Gen. Stat. § 77-20 (2013).

None of these natural lines of demarcation are static, as the beaches are continually changing due to erosion or accretion of sand, whether through the forces of nature or through human intervention.

Furthermore, the State may acquire ownership of public trust *dry sand* ocean beach if public funds are used to raise that land above the mean high water mark:

> Notwithstanding the other provisions of this section, the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in *the State*. Title to such lands raised through projects that received no public funding vests in the adjacent littoral proprietor. *All such raised lands shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches, which rights are part of the common heritage of the people of this State.*

N.C. Gen. Stat. § 146-6(f) (2013) (emphasis added).

The Town, from time to time, has engaged in beach "nourishment" projects. The purpose of these projects has been to control or remediate erosion of the Town's beaches. The Town embarked on one such project in 2003 ("the Project"). According to Plaintiffs, the result of the Project was an extension of the dry sand beach from Plaintiffs' property line—the pre-Project mean high water mark—to a new mean high water mark located seaward of their property line. Therefore, the State now owns dry sand beach—which it holds for the public trust—between Plaintiffs' property line and the current mean high water mark—which no longer represents Plaintiffs' property line.

The Town was incorporated in 1957. The public has enjoyed access to its beaches, including both the publicly-owned foreshore—or wet sand beach—and the private property dry sand beaches, since at least that date. This access has included fishing (both commercial and recreational), sunbathing, recreation, horseback riding, and the driving of automobiles upon the beach strand. According to the unchallenged affidavit of Frank Rush ("Rush") who, at the time of the summary judgment hearing, had been the Town's Town Manager since July 2001, "[b]each driving has been allowed within the Town since its incorporation in 1957." Rush averred that, since at least 1980, the Town had been restricting beach driving within its borders to a "permitted driving area," which was defined in the Emerald Isle Code of Ordinances (Oct. 2010) ("the Ordinances" generally, or "the 2010 Ordinances" specifically). According to the minutes of the 9 December 1980 Regular Monthly Meeting of the Emerald Isle Town Board of Commissioners, which meeting was open to the public, beach driving in the Town was regulated by the Carteret County Beach Vehicular Ordinance at that time. In this 9 December 1980 meeting of the Board of Commissioners, the Board voted to rescind use of the Carteret County Beach Vehicular Ordinance and "re-adopt [the Town's] original Beach Vehicular Ordinance[.]" The record does not contain the Carteret County Beach Vehicular Ordinance, or any pre-1980 ordinances related to beach driving.

According to Plaintiffs: "Historically, the [Ordinances] permitted public driving on"

> the foreshore and area within the [T]own consisting primarily of hardpacked sand and

> lying *between the waters of the Atlantic Ocean . . . and a point ten (10) feet seaward from the foot or toe of the dune closest to the waters of the Atlantic Ocean[.]*

This is the language from Section 5-21 of the 2010 Ordinances, and accurately reflects the defined permitted driving area from the time Plaintiffs purchased the Property in June of 2001 until the filing of this action on 9 December 2011. This statement also constitutes an acknowledgement by Plaintiffs that, "historically," the public has been driving on private property dry sand beach, and that this behavior has been regulated by the Town. However, the ordinances "allowing" driving on the designated driving areas were in fact restrictive, not permissive, in that they restricted previously allowed behavior and did not create any new rights:

> <u>Sec. 5-22. Driving on beach and sand dunes prohibited: exceptions.</u>
>
> It shall be unlawful for any vehicular traffic to travel upon the beach and sand dunes located within the town between 9 pm on April 30 and 5 am on September 15. . . . . This does not apply to commercial fisherm[e]n holding valid state licenses while engaged in commercial fishing activities.
>
> <u>Sec. 5-23. Driving on designated areas only.</u>
>
> It shall be unlawful for any vehicular traffic holding and displaying a duly authorized permit issued pursuant to this article to travel on any portion of the beach and sand dune areas other than those areas designated herein as permitted driving areas and the

> limited access ways as defined in section 5-21.

Emerald Isle Code of Ordinances §§ 5-22, 5-23 (Aug. 2004). The 1980 ordinances contained similar restrictive language related to beach driving. The Ordinances appear to have been adopted to regulate pre-existing behavior, not to permit new behavior.

In 2010, the Town adopted some new sections to the Ordinances, including Section 5-102, which stated:

> (a) No beach equipment, attended or unattended, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes at any time, so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand.

Emerald Isle Code of Ordinances § 5-102 (Jan. 2010). "Beach strand" was defined by the 2010 Ordinances as "all land between the low water mark of the Atlantic Ocean and the base of the frontal dunes." Emerald Isle Code of Ordinances § 5-100 (Jan. 2010). Section 5-104 stated that any beach equipment found in violation of the Ordinances would be removed and disposed of by the Town, and could result in fines. Emerald Isle Code of Ordinances § 5-104 (Jan. 2010). According to Plaintiffs, Town and other permitted vehicles regularly drive over, and sometimes park on, the dry sand beach portion of the Property.

In 2013, subsequent to the filing of this action, the Town amended the Ordinances, completely reorganizing the contents of Chapter 5. For example, prohibitions previously found in Section 5-102 of the

2010 Ordinances are now found in Section 5-19 of the 2013 Ordinances. Section 5-1 of the 2013 Ordinances states: "Unless otherwise noted, this chapter shall be applicable on the public trust beach area, as defined by NCGS 77-20, and includes all land and water area between the Atlantic Ocean and the base of the frontal dunes." Emerald Isle Code of Ordinances § 5-1 (Oct. 2013). Sections 5-60 and 5-61 of the 2013 Ordinances limit driving on "the public trust beach area" to certain time periods, and restrict driving on these areas to permitted vehicles. Emerald Isle Code of Ordinances §§ 5-60, 5-61 (Oct. 2013). Permits are issued to qualified applicants by the Town Manager. Emerald Isle Code of Ordinances § 5-61 (Oct. 2013). Though the language used in Section 5-19 of the 2013 Ordinances differs in some respects from the previous language found in Section 5-102 of the 2010 Ordinances, Section 5-19 still reserves an unimpeded twenty-footwide strip along the beach measured seaward from the foot of the frontal dunes. Plaintiffs' action is not materially affected by the 2013 amendment to the Ordinances. Relevant to this appeal, Plaintiffs claim that the effect of the contested Ordinances was the taking of the dry sand beach portion of the Property by the Town.

Plaintiffs, along with other property owners not parties to this appeal, filed this action on 9 December 2011. The complaint alleged, *inter alia*, violation of the Takings Clause of the Fifth Amendment of the United States Constitution. The Town moved for summary judgment on 25 July 2014. Summary judgment in favor of the Town was granted by order entered 26 August 2014, and Plaintiffs' action was dismissed. Plaintiffs appeal.

II.

Plaintiffs' sole argument on appeal is that the trial court erred in granting summary judgment in favor of the Town because the contested ordinances effected a taking of the Property in violation of the Takings Clause of the Fifth Amendment. In support of their argument, Plaintiffs contend that the dry sand ocean beach portion of their property is not subject to public trust rights.

> Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A–1, Rule 56(c) (2013). We review de novo an order granting summary judgment.

Falk v. Fannie Mae, 367 N.C. 594, 599, 766 S.E.2d 271, 275 (2014) (citation omitted). We affirm the ruling of the trial court.

III.

Plaintiffs first argue that privately owned dry sand beaches in North Carolina are not subject to the public trust doctrine. We disagree.

Our Supreme Court has noted that "the law involving the public trust doctrine has been recognized . . . as having become unnecessarily complex and at times conflicting." *Gwathmey v. State of North Carolina*, 342 N.C. 287, 311, 464 S.E.2d 674, 688 (1995). The public trust doctrine is a creation of common law. *Fabrikant*, 174 N.C. App. at 41, 621

S.E.2d at 27. Our General Assembly has codified recognition of the continuing legal relevance of common law in the State:

> N.C.G.S. § 4–1 provides:
>
> > All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

Gwathmey, 342 N.C. at 295-96, 464 S.E.2d at 679.

> [T]he "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. N.C.G.S. § 4–1. Further, much of the common law that is in force by virtue of N.C.G.S. § 4–1 *may be modified or repealed by the General Assembly*, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment.

Id. at 296, 464 S.E.2d at 679 (emphasis added); *see also Shively v. Bowlby*, 152 U.S. 1, 14, 38 L. Ed. 331, 337

(1894) ("The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States."). The General Assembly has the power to make or amend laws so long as those laws do not offend the constitutions of our State or the United States. As our Supreme Court has recognized:

> "(U)nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." Absent such constitutional restraint, questions as to public policy are for legislative determination. When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity."

Martin v. Housing Corp., 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) (citations omitted).

This Court has recognized both public trust lands and public trust rights as codified by our General Assembly:

> The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public. As this Court has held, "public trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State

> in common. . . . . They 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 and estuarine beaches and public access to the beaches.'" *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n*, 117 N.C. App. 556, 574, 452 S.E.2d 337, 348 (1995) (emphasis omitted) (quoting N.C. Gen. Stat. § 1–45.1 (1994)).

Fabrikant, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation omitted). Public trust rights are associated with public trust lands, but are not inextricably tied to ownership of these lands. For example, the General Assembly may convey ownership of public trust land to a private party, but will be considered to have retained public trust rights in that land unless specifically relinquished in the transferring legislation by "the clearest and most express terms." *Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684. Public trust rights are also attached to public trust resources which, according to our General Assembly, may include both public and private lands:

> "public trust resources" means land and water areas, *both public and private*, subject to public trust rights as that term is defined in G.S. 1-45.1.

N.C. Gen. Stat. § 113-131(e) (2013) (emphasis added). As noted above, N.C. Gen. Stat. § 1-45.1 defined public trust rights as including the "right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." *Fabrikant*, 174 N.C. App.

at 41, 621 S.E.2d at 27 (citation and quotation marks omitted). This Court has adopted the N.C. Gen. Stat. § 1-45.1 definition of public trust rights. *Id.*

Concerning "ocean beaches," the General Assembly has found:

> The public has traditionally fully enjoyed the State's beaches and coastal waters and public access to and use of the beaches and coastal waters. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State. The General Assembly finds that the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State.

N.C. Gen. Stat. § 113A-134.1(b) (2013). The General Assembly considers access to, and use of, ocean beaches to be a public trust right. N.C. Gen. Stat. § 1-45.1; N.C. Gen. Stat. § 113A-134.2 (2013). This Court has indicated its agreement. *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27.

N.C. Gen. Stat. § 77-20(e) defines "ocean beaches" as follows:

> "[O]cean beaches" means the area adjacent to the ocean and ocean inlets that is *subject to public trust rights*. This area is in constant flux due to the action of wind, waves, tides, and storms and *includes the wet sand area of the beach that is subject to regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides*,

> including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

N.C. Gen. Stat. § 77-20(e) (emphasis added). Having attempted to define "ocean beaches," N.C. Gen. Stat. § 77-20(d) further states the position of the General Assembly that the public trust portions of North Carolina ocean beaches include the dry sand portions of those beaches:

> The public having made frequent, uninterrupted, and unobstructed use of the *full width and breadth of the ocean beaches of this State from time immemorial*, this section shall not be construed to impair the *right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State*.

N.C. Gen. Stat. § 77-20(d). N.C. Gen. Stat. § 77-20 was last amended in 1998, before Plaintiffs purchased the Property.

The Executive Branch, through a 1996 opinion of the Attorney General, also adopted this assessment.

> Because the public ownership stops at the high water line, the public must either be in the water or on the dry sand beach when the tide is high. The term "dry sand beach" refers to the flat area of sand seaward of the dunes or bulkhead which is flooded on an irregular basis by storm tides or unusually high tides. *It is an area of private property which the State maintains is impressed with public rights of use under the public trust doctrine and the doctrine of custom or prescription.*

*Opinion of Attorney General Re: Advisory Opinion Ocean Beach Renourishment Projects, N.C.G.S. § 146-6(f), 1996 WL 925134, *2* (Oct. 15, 1996) ("Advisory Opinion") (emphasis added) (citation omitted); *See also* 15A N.C.A.C. 7M.0301 (2015) (wherein the Department of Environment and Natural Resources expresses a similar view).

The General Assembly has made clear its understanding that at least some portion of privately-owned dry sand beaches are subject to public trust rights. The General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights. *Gwathmey*, 342 N.C. at 296, 464 S.E.2d at 679.

There is, however, potential ambiguity in the definition of "ocean beaches" provided in N.C. Gen. Stat. § 77-20(e):

> The landward extent of the ocean beaches is established by the common law as interpreted

> and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

N.C. Gen. Stat. § 77-20(e). A thorough search of the opinions of this Court and our Supreme Court fails to uncover any holding establishing the landward extent of North Carolina's ocean beaches. Further, it is not clear that any North Carolina appellate court has specifically recognized the dry sand portion of our ocean beaches as subject to public trust rights. In *Concerned Citizens*, this Court, in *dicta*, discussed the public trust doctrine relative to privately owned property in the following manner:

> Finally, we note that in its joint brief plaintiffs and plaintiff-intervenor rely heavily on the "public trust doctrine." They argue that holding our State's beaches in trust for the use and enjoyment of all our citizens would be meaningless without securing public access to the beaches. However, plaintiffs cite no North Carolina case where the public trust doctrine is used to acquire additional rights for the public generally at the expense of private property owners. We are not persuaded that we should extend the public trust doctrine to deprive individual property owners of some portion of their property rights without compensation.

Concerned Citizens v. Holden Beach Enterprises, 95 N.C. App. 38, 46, 381 S.E.2d 810, 815 (1989) (*Concerned Citizens I*), *rev'd*, *Concerned Citizens v.*

Holden Beach Enterprises, 329 N.C. 37, 404 S.E.2d 677 (1991). However, our Supreme Court reversed this Court's opinion in *Concerned Citizens* on different grounds and expressly disavowed the above *dicta*:

> We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. *Concerned Citizens v. Holden Beach Enterprises*, 95 N.C. App. at 46, 381 S.E.2d at 815. As the statement was not necessary to the Court of Appeals opinion, nor is it clear that in its unqualified form the statement reflects the law of this state, we expressly disavow this comment.

Concerned Citizens v. Holden Beach Enterprises, 329 N.C. 37, 55, 404 S.E.2d 677, 688 (1991) (*Concerned Citizens II*).

We acknowledge both the long-standing customary right of access of the public to the dry sand beaches of North Carolina[2] as well as current legislation mandating such. *See* N.C. Gen. Stat. § 77-20. It is unclear from prior North Carolina appellate opinions whether the common law doctrine of custom is

---

[2] Though the issue of historical right of public access to the dry sand beaches was not fully argued below, and is not extensively argued on appeal, it is unchallenged that the Town had allowed public access on privately-owned dry sand beaches since its incorporation. The statement of our General Assembly that the "public ha[s] made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial," N.C. Gen. Stat. § 77-20(d), is also uncontested by Plaintiffs. *See also* N.C. Gen. Stat. § 113A-134.1(b); N.C. Gen. Stat. § 146-6(f).

recognized as an independent doctrine in North Carolina, or whether long-standing "custom" has been used to help determine where and how the public trust doctrine might apply in certain circumstances. The General Assembly apparently considers "custom" as a factor in determining the reach of public trust rights in North Carolina. *See* N.C. Gen. Stat. § 77-20(d). Our Attorney General, at least in 1996, was of the opinion that the doctrine of custom operated to preserve public access to North Carolina's dry sand beaches. *Advisory Opinion*, 1996 WL 925134, *2. In any event, we take notice that public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness. Native-born North Carolinians do not generally question whether the public has the right to move freely between the wet sand and dry sand portions of our ocean beaches. Though some states, such as Plaintiffs' home state of New Jersey, recognize different rights of access to their ocean beaches, no such restrictions have traditionally been practiced in North Carolina. *See* Kalo, *The Changing Face of the Shoreline*, 78 N.C. L. Rev. at 1876-77 ("[O]ut-of-state buyers came from areas with different customs and legal traditions. Many of these buyers came from states, like New Jersey, where dry sand beaches were regarded as private or largely private. Consequently, many of them brought their expectations of privacy with them to North Carolina. The customs and traditions of North Carolina, however, are not necessarily those of New Jersey, Virginia, or Massachusetts.").

N.C. Gen. Stat. § 77-20 establishes that some portion, at least, of privately-owned dry sand beaches are subject to public trust rights. Lacking further

guidance from prior opinions of our appellate courts, we must determine the geographic boundary of public trust rights on privately-owned dry sand beaches. We adopt the test suggested in N.C. Gen. Stat. § 77-20(e): "Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line." *Id.* We adopt this test because it most closely reflects what the majority of North Carolinians understand as a "public" beach. *See, e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 (2000) ("the custom of the dry sand beaches being open to public trust uses has a long history in North Carolina"). We hold that the "ocean beaches" of North Carolina include both the wet sand beaches—generally, but not exclusively, publically owned—and the dry sand beaches—generally, but not exclusively, privately owned.

For the purposes of N.C. Gen. Stat. § 77-20, the landward boundary of North Carolina ocean beaches is the discernable reach of the "storm" tide. This boundary represents the extent of semi-regular submersion of land by ocean waters sufficient to prevent the seaward expansion of frontal dunes, or stable, natural vegetation, where such dunes or vegetation exist. Where both frontal dunes and natural vegetation exist, the high water mark shall be the seaward of the two lines. Where no frontal dunes nor stable, natural vegetation exists, the high water mark shall be determined by some other reasonable method, which may involve determination of the "storm trash line" or any other reliable indicator of the mean regular extent of the storm tide. The ocean beaches of North

Carolina, as defined in N.C. Gen. Stat. § 77-20(e) and this opinion, are subject to public trust rights unless those rights have been expressly abandoned by the State. *See Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684.

The limits of the public's right to use the public trust dry sand beaches are established through appropriate use of the State's police power. As the United States Supreme Court has stated:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 120 L. Ed. 2d 798, 820 (1992) (citations omitted).

The right to prevent the public from enjoying the dry sand portion of the Property was never part of the "bundle of rights" purchased by Plaintiffs in 2001. Because Plaintiffs have no right to exclude the public from public trust beaches, those portions of the Ordinances regulating beach driving,[3] even if construed as ordinances "allowing" beach driving, cannot effectuate a Fifth Amendment taking.

IV.

We must next determine whether the Town, pursuant to public trust rights or otherwise, may enforce ordinances reserving unimpeded access over portions of Plaintiffs' dry sand beach without compensating Plaintiffs. We hold, on these facts, that it may.

Public trust rights in Plaintiffs' property are held by the State concurrently with Plaintiffs' rights as property owners. Though the Town may prevent Plaintiffs from denying the public access to the dry sand beach portion of the Property for certain activities, that does not automatically establish that the Town can prevent, regulate, or restrict other specific uses of the Property by Plaintiffs without implicating the Takings Clause of the Fifth Amendment to the United States Constitution:

> The Takings Clause—"nor shall private property be taken for public use, without just compensation," U.S. Const., Amdt. 5—applies as fully to the taking of a landowner's [littoral] rights as it does to the taking of an estate in land. Moreover, though the classic

[3] Sections 5-21 through 5-32 of the 2010 Ordinances, and Sections 5-1 and 5-60 through 5-64 of the 2013 Ordinances.

> taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking."

Stop the Beach, 560 U.S. at 713, 177 L. Ed. 2d at 195 (citations omitted).

As Plaintiffs acknowledge: "Takings tests vary depending on whether the challenged imposition is a physical invasion of property or a regulatory restriction on the use of property." "In *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798 (1992)], the [United States Supreme] Court established two categories of regulatory action that require a finding of a compensable taking: regulations that compel physical invasions of property and regulations that deny an owner all economically beneficial or productive use of property." *King v. State of North Carolina*, 125 N.C. App. 379, 385, 481 S.E.2d 330, 333 (1997) (citation omitted). Plaintiffs argue on appeal that the contested ordinances violate the "physical invasions" prong of *Lucas* and *King*, and therefore effect a *per se* taking. Plaintiffs do not argue that the contested ordinances constitute a regulatory taking.

A.

Plaintiffs cannot establish that the contested beach driving ordinances[4] constitute physical invasion of the Property for purposes of the Takings Clause. The majority of Plaintiffs' argument is predicated on Plaintiffs' contention that the dry sand portion of the Property is not encumbered by public trust rights. We have held that the dry sand portion of the Property is so encumbered. Because public beach driving across the Property is permissible pursuant to public trust rights, regulation of this behavior by the Town does not constitute a "taking."

Plaintiffs have never, since they purchased the Property in 2001, had the right to exclude public traffic, whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property. The Town has the authority to both ensure public access to its ocean beaches, and to impose appropriate regulations pursuant to its police power. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27; *see also Kirby v. N.C. Dep't of Transp.*, __ N.C. App. __, __, 769 S.E.2d 218, 230 (2015), disc. rev. allowed, __ N.C. __, 775 S.E.2d 829 (2015); *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 584 S.E.2d 100 (2003). The contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulate a right that the public already enjoyed. *See also, e.g.*, N.C. Gen. Stat. § 160A-308 (2013) ("A municipality may by ordinance regulate, restrict and prohibit the use of dune or beach buggies, jeeps, motorcycles, cars, trucks, or any other form of power-driven vehicle specified by the governing body of the

[4] Sections 5-21 through 5-32 of the 2010 Ordinances, and Sections 5-1 and 5-60 through 5-64 of the 2013 Ordinances.

municipality on the foreshore, beach strand and the barrier dune system. . . . . Provided, a municipality shall not prohibit the use of such specified vehicles from the foreshore, beach strand and barrier dune system by commercial fishermen for commercial activities.").

B.

Plaintiffs also contest Section 5-102 of the 2010 Ordinances and Section 5-19 of the 2013 Ordinances. Section 5-102 prohibits any beach equipment "within an area twenty . . . feet seaward of the base of the frontal dunes at any time, so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand." Emerald Isle Code of Ordinances § 5-102 (Jan. 2010). Plaintiffs argue that the beach equipment ordinance prevents them from "station[ing] any beach gear in the strip of land near the dunes during May-September (and many other times) due to the passing of Town vehicles, and for the same reason (and due to the ruts left by the vehicles) they can barely walk on the land."

The 2013 Ordinances include the following provisions related to beach equipment:

> Sec. 5-19. Restricted placement of beach equipment.
>
> a) In order to provide sufficient area for unimpeded vehicle travel by emergency vehicles and town service vehicles on the public trust beach area, no beach equipment, including beach tents, canopies, umbrellas, awnings, chairs, sporting nets, or other similar items shall be placed:

> 1. Within an area twenty (20) feet seaward of the base of the frontal dunes on the public trust beach area;
>
> 2. Within the twenty (20) feet travel lane on the public trust beach areas that extends from any vehicle access ramp.
>
> b) The requirements of subsection a) shall apply only between May 1 and September 14 of each year, and emergency vehicles and town service vehicles shall only utilize said areas when no safe alternative vehicle travel area is available elsewhere on the public trust beach area.
>
> c) In order to promote the protection of threatened and/or endangered sea turtles, no beach equipment, including beach tents, canopies, umbrellas, awnings, chairs, sporting nets, or other similar items shall be placed within twenty (20) feet of any sea turtle nest.
>
> d) Violations of this section shall subject the offender to a civil penalty of fifty dollars ($50.00).

Emerald Isle Code of Ordinances § 5-19 (Oct. 2013). We have already held that the public, including the Town, has the right to drive on public trust beaches. This right may be regulated, within the Town's limits, through the Town's police power. Therefore, no part of Section 5-19 of the 2013 Ordinances[5] "allowing" or

[5] We will analyze Section 5-19 of the 2013 Ordinances, but our analysis applies to Section 5-102 of the 2010 Ordinances as well.

regulating driving on the dry sand portion of the Property can constitute a taking.

As our Supreme Court has noted:

> "The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." "The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of the police power are noncompensable."

Barnes v. Highway Commission, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (citations omitted). Further:

> "What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest." "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." "The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of the public health, safety, morals

> and general welfare." "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property."
>
> > [T]he police power[ ] [is] the power vested in the Legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.
>
> "Laws and regulations of a police nature . . . do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." "'Regulation' implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the property subject to the regulation."

Kirby, __ N.C. App. at __, 769 S.E.2d at 229-30 (citations omitted). The only "physical invasion" of the Property arguably resulting from Section 5-19 is Town vehicular traffic. However, we have held that Town vehicular traffic is allowed pursuant to the public trust doctrine and, therefore, cannot constitute a taking.

Within Plaintiffs' argument that the contested Ordinances constitute a physical invasion of the

Property, Plaintiffs contend that if this Court determines that public trust rights apply to the dry sand portion of the Property, we should still find a taking has occurred. Plaintiffs argue that the beach equipment regulation "imposed new and excessive burdens on an existing easement, without compensation." However, Plaintiffs do not argue that the beach equipment restrictions are an invalid use of the Town's police power. Plaintiffs cite to no authority in support of their argument that imposing certain restrictions on the placement of beach equipment, which might result in occasional or even regular diversion of beach traffic on the Property, could constitute an invalid use of the police power. Nor do Plaintiffs argue or demonstrate that the ordinance "is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, [so that] it comes within the purview of the law of eminent domain." *Kirby*, __ N.C. App. at __, 769 S.E.2d at 230 (citation omitted). Plaintiffs also fail to "show that [the] regulation deprives the owner of all economically beneficial or productive use of the land[.]" *Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 592, 572 S.E.2d 832, 835 (2002), *see also Slavin*, 160 N.C. App. 57, 584 S.E.2d 100. In fact, Plaintiffs make no argument implicating regulatory takings jurisprudence.

Assuming, *arguendo*, Plaintiffs argued that a regulatory taking had occurred, this argument would fail.

> Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as

> per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good[.]"

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324-25, 152 L. Ed. 2d 517, 541-42 (2002) (citations omitted). The United States Supreme Court then went on to state:

> [E]ven though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on "the parcel as a whole":
>
> > "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole[.]"

> This requirement that "the aggregate must be viewed in its entirety" . . . clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, . . . were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."

Id. at 327, 152 L. Ed. 2d at 543 (citations omitted). Plaintiffs fail to forecast evidence that the regulation restricting certain uses of a portion of the Property could rise to the level of a taking of the entire Property.

We note that our General Assembly has addressed the specific issue of regulating beach equipment on North Carolina ocean beaches in legislation that became effective on 23 August 2013. N.C. Gen. Stat. § 160A-205, entitled "Cities enforce ordinances within public trust areas," states:

> (a) Notwithstanding the provisions of G.S. 113-131 or any other provision of law, a city may, by ordinance, define, prohibit, regulate, or abate acts, omissions, or conditions upon the State's ocean beaches and prevent or abate any unreasonable restriction of the public's rights to use the State's ocean beaches. In addition, a city may, in the interest of promoting the health, safety, and welfare of the public, regulate, restrict, or prohibit the placement, maintenance, location, or use of equipment, personal property, or debris upon the State's ocean beaches. A city may enforce any ordinance

> adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries. A city may enforce an ordinance adopted pursuant to this section by any remedy provided for in G.S. 160A-175. For purposes of this section, the term "ocean beaches" has the same meaning as in G.S. 77-20(e).
>
> (b) Nothing in this section shall be construed to (i) limit the authority of the State or any State agency to regulate the State's ocean beaches as authorized by G.S. 113-131, or common law as interpreted and applied by the courts of this State; (ii) limit any other authority granted to cities by the State to regulate the State's ocean beaches; (iii) deny the existence of the authority recognized in this section prior to the date this section becomes effective; (iv) impair the right of the people of this State to the customary free use and enjoyment of the State's ocean beaches, which rights remain reserved to the people of this State as provided in G.S. 77-20(d); (v) change or modify the riparian, littoral, or other ownership rights of owners of property bounded by the Atlantic Ocean; or (vi) apply to the removal of permanent residential or commercial structures and appurtenances thereto from the State's ocean beaches.

N.C. Gen. Stat. § 160A-205 (2013). This provision is found in Chapter 160A, Article 8—"Delegation and

Exercise of the General Police Power." The 2013 Ordinances were adopted subsequent to the effective date of this legislation.

We hold that passage of Section 5-102 of the 2010 Ordinances, and Section 5-19 of the 2013 Ordinances, constituted legitimate uses of the Town's police power. We hold that the regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was "'within the scope of the [police] power[.]'" *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989) (citation omitted). Further, the "'means chosen to regulate,'" prohibiting large beach equipment within a twenty-foot-wide strip along the landward edge of the ocean beach, were "'reasonable.'" *Id.* (citation omitted).

C.

The contested provisions in the 2010 Ordinances and the 2013 Ordinances did not result in a "taking" of the Property. First, though Plaintiffs argue that the Ordinances deprived them of "the right to control and deny access to others," as discussed above, it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27. The Ordinances restrict and regulate certain public and private uses pursuant to the Town's police power. The Town's reservation of an obstruction-free corridor on the Property for emergency use constitutes a greater imposition on Plaintiffs' property rights, but does not rise to the level of a taking.

Though Plaintiffs argue that "the Town has made it impossible for [them] to make any meaningful use of the dry [sand] [P]roperty[,]" Plaintiffs retain full use of, and rights in, the majority of the Property. *Tahoe-Sierra*, 535 U.S. at 327, 152 L. Ed. 2d at 543. Plaintiffs' rights in the dry sand portion of all but the twenty-foot-wide strip of the Property are the same as when they purchased the Property. *Id.* Concerning the twenty-foot-wide strip, Plaintiffs retain all the rights they had when they purchased the Property other than the right to use large beach equipment on that portion of the Property "between May 1 and September 14 of each year." The Town, along with the public, already had the right to drive on dry sand portions of the Property before Plaintiffs purchased it. We affirm the judgment of the trial court.

AFFIRMED.

Judges ELMORE and DAVIS concur.

No. 409PA15 THREE-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

GREGORY P. NIES and DIANE S. NIES

v

TOWN OF EMERALD ISLE,
a North Carolina Municipality

From N.C. Court of Appeals
(15-169)
From Carteret
(11CVS1569)

14 December 2016

* * * * * * * * *

ORDER

Appeal dismissed ex mero motu by order of the Court in Conference, this the 14th day of December 2016.

s/ Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of December, 2016.

(seal) J. Bryan Boyd
Clerk, Supreme Court of North Carolina
s/ M. C. Hackney
M. C. Hackney
Assistant Clerk, Supreme Court
Of North Carolina

* * * * *

Appendix C–1

FILED Aug. 26, 2014

STATE OF NORTH CAROLINA

COUNTY OF CARTERET

GREGORY P. NIES and DIANE S. NIES,	:	IN THE GENERAL COURT OF JUSTICE
Plaintiffs,	:	SUPERIOR COURT DIVISION
vs.	:	11 CVS 1569
TOWN OF EMERALD ISLE, a North Carolina Municipality,	:	**ORDER**
Defendant.	:	

THIS CAUSE COMING ON TO BE HEARD and being heard before the undersigned Honorable Superior Court Judge presiding at the August 4, 2014 Civil Session of Superior Court for the County of Carteret upon Defendant's Motion for Summary Judgment. The Court, having reviewed the record proper, the cases and briefs submitted by the parties as well as having considered the arguments of parties during the hearing, finds that there are no genuine issues of material fact(s) and that Defendant is entitled to Judgment in its favor as a matter of law. Accordingly the Court concludes Defendant Town of Emerald Isle is entitled to Summary Judgment in its favor.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Summary Judgment is GRANTED in favor of the Defendant Town of Emerald Isle and against the Plaintiffs. Plaintiffs' Complaint, as amended, against said Defendant is hereby dismissed.

So ORDERED this the 25th day of August, 2014.

s/ Jack W. Jenkins
Honorable Jack W. Jenkins,
Judge Presiding