No. 409PA15 THIRD DISTRICT

THE SUPREME COURT OF NORTH CAROLINA

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GREGORY P. NIES and DIANE S. NIES, Plaintiffs,	)	
v.	)	From Carteret County
	)	COA 15-169
TOWN OF EMERALD ISLE, a North Carolina Municipality, Defendant.	)	

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PLAINTIFFS-APPELLANTS' REPLY TO AMICI BRIEFS

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The Court has received a number of amicus briefs in support of Defendant Town of Emerald Isle (Town) by anxious government and environmental organizations. While the briefs of these Amici are authored by different people, they suffer from the same fundamental defect: they seek to slay a dragon that does not exist. The Amici see this case as a monster that would stop people from walking on beaches.[1] But like the foe of the hero in *Don Quixote*, it's all in their head. Setting out

[1] In taking a fearful and extreme approach to this case, the Amici seem to take their cue from the Town, which exclaims on its official webpage: "If the NC Supreme Court overturns the NC Court of Appeals ruling, all of these activities are in jeopardy. . . sunbathing, swimming, surfing, surf fishing, walking, running, driving, playing volleyball / bocce ball / cornhole / other beach games, flying kites, observing wildlife, and so on and so on;" and "The entire North Carolina beach experience is at stake in this case." *See* http://www.emeraldisle-nc.org/emerald-isles-fight-to-preserve-

(continued...)

to knock down their imaginary monster, the Amici compound their confusion by attacking clumsily with a "customary law" weapon that is not available here and/or does not exist.

This is a takings case against Town-authorized public driving and the Town's creation of a municipal service lane on a particular parcel owned by Diane and Gregory Nies (Nieses). The Nieses' complaint does not arise from public walking or basic recreation. Indeed, like most beachfront owners, the Nieses permit such activity. The case will not turn public beaches into private ones or foreclose legitimate, existing easements. The issues are much narrower and revolve around the scope of one legal concept related to easements: the public trust doctrine. The only question here is whether that single doctrine allows an ongoing, year-round invasion of the Nieses' land by Town cars, four-wheel drive trucks, garbage trucks, ATV's, bulldozers, and vehicles driven by members of the public holding Town permits.[2] In its briefing, the Town failed to identify any public trust precedent that would transform its actions

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[1] (...continued)
the-publics-right-to-use-the-beach-continues-to-the-nc-supreme-court (last visited Aug. 17, 2016).

[2] A few Amici suggest the Town does not authorize public driving, but only regulates it. This is belied by the fact that people must obtain and pay for Town "permits" before engaging in beach driving. *See* Town Code § 5-61.

from a taking of property to benign enforcement of a pubic trust title limitation. Amici's sparse public trust arguments do not save the Town.

In fact, the Amici search for and propose an even more extreme position. They urge the Court to declare a coast-wide easement on all private dry sand parcels, of any size or history, under an unprecedented version of "custom." This over-reach misses the mark on multiple levels. The Amici ask this Court to declare a customary easement without regard for proper presentation of the issue below, the need for factual adjudication and participation of affected owners, or the effect of a "customary" dry sand easement on the stability of coastal land titles. The Amici's arguments fail to address, much less justify, the Town's use of the Nieses' property as an exclusive Town service lane or the recent imposition of public driving on the Nieses' property.

The Amici fight public access battles that do not exist, ignore constitutional dangers that do, and get lost in inapplicable theories. Ultimately, their position denies the Nieses any private rights in land that is indisputably private. To the Amici, the Nieses have no property rights different from, or superior to, the rights of the public or government. Nothing in the Nieses' title or North Carolina law supports this idea, and it violates the Constitution.

I. THE AMICI'S FEW PUBLIC TRUST ARGUMENTS FAIL TO HELP THE TOWN

The Amici's relatively few arguments on the public trust doctrine issues in this case fail to support the Town. Instead, in most instances, they support the Nieses' position.

A. The Authority Cited by Amici Does Not Extend the Public Trust Doctrine from the Mean High Water Mark to the Dry Sand

To shore up the Town's crumbling position—that the public trust doctrine associated with state tidelands extends to private, dry upland beaches—the Amici point to an attorney general opinion, a few regulations, and a bit of precedent. None of it helps the Town.

1. The 1996 Attorney General's Opinion Confirms the Nieses' Position

The State and other Amici put great stock in a 1996 attorney general advisory opinion. *See, e.g.*, State's Brief at 5-6. They highlight a portion of the opinion that says the "dry sand" 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, at *2 (N.C.A.G. Oct. 15, 1996). This passage does not undercut the Nieses' arguments. The only authority the Attorney General cites to support the referenced passage is

Concerned Citizens, but that case was not a public trust case, mentions the issue only tangentially, in dicta, and does not change precedent limiting the public trust to the mean high water mark. If application of the common law public trust to dry sand areas is such a traditional "background principle," one would expect the Attorney General (and Amici) to have something more. But they do not. That the State "maintains" that the dry sand beach is subject to an easement adds nothing. Anyone can have an opinion. But when the State or its political subdivisions acts on its beliefs to invade property, the common law of easements requires it to *prove*, not "maintain," that the professed public right in fact exists on the subject land—or else pay just compensation. *Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981) ("the burden of proving every essential [easement] element . . . [is] on the party who is claiming against the interests of the true owner"). The Town has done neither in this case.

Other portions of the 1996 Attorney General opinion undermine the Amici's overall, fearful theme, that a decision upholding the traditional, mean high water mark public trust boundary will end dry beach access. For instance, the Attorney General opinion makes clear that North Carolina governments can create public dry beach areas by re-nourishing state-owned wet beaches. 1996 WL 925134, at *2-*4. The amicus brief of Dare County adds an extra layer of assurance in explaining how local communities use beach re-nourishment projects to acquire access to existing, private

dry sand areas as well as to create new, public dry beaches. Amicus Brief of the County of Dare, *et al.*, at 4-5. It proudly observes that the Town of Nags Head acquired access easements from "well-over 1000" dry beach owners without financial cost. It notes that Kill Devil Hills, Kitty Hawk, and Duck are soon to engage in similar projects and have acquired dry beach easements "at no charge." *Id.* at 5. Holden Beach is also acquiring free access easements the same way.[3] This shows that local governments do not need to confiscate private areas through unsupportable public trust theories to secure beach access, and that the failure of such a theory here will not doom beach access.

2. Coastal Management Regulations Confirm the Public Trust's Limited Reach

Some of the Amici argue that state regulations arising from the Coastal Area Management Act (CAMA) support the idea, found nowhere in North Carolina's common law precedent, that the public trust doctrine applies to private uplands inland of the mean high water mark. Not so. No current CAMA provision creates or recognizes a public trust doctrine area on private property landward of the mean high water mark, and there is certainly no evidence of such a historic understanding. Indeed, CAMA rules confirm the opposite.

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[3] *See* http://www.starnewsonline.com/news/20160812/holden-beach-plans-15-million-beach-nourishment-project (last visited Aug. 19, 2016).

Amicus Coastal Resources Commission acts as if the current CAMA rules have always been the same. They have not. They have changed significantly over time. Versions in existence until 1998 (attached as an Appendix to this brief) disprove the notion that there is some background understanding that dry beaches are public trust areas. For instance, in defining the term "beach," the 1979 version of 15A N.C. Admin. Code 07M.302 notes that the "public does have clear rights *below the MHW mark*" and that CAMA rules "do *not* in any way require private property owners to provide public access to the beach." *See* Appendix at 2 (emphasis added). They also note the possibility that property owners may have "specifically and legally restricted access above the mean high water line." *Id.* These statements remained mostly unchanged until amendments in 1998.

Even the current regulations undercut the Amici's arguments. Most obviously and importantly, the Amici neglect 15A N.C. Admin. Code 07.H.0207, a directly relevant regulation. That regulation, which is a CAMA implementing rule, states:

> Public trust areas are all waters of the Atlantic Ocean and the lands thereunder from *the mean high water mark to the seaward limit of state jurisdiction* . . . .

(Emphasis added.) This duly adopted regulation, which remains in effect, disposes of the idea that coastal regulations affirm public trust rights in the Nieses' dry beach parcel.

Other CAMA rules support the Nieses, not the Town. For instance, N.C.G.S. § 113A-113(b)(5) states that the Coastal Resources Commission may designate as an "Area of Environmental Concern" "[a]reas such as waterways and *lands under or flowed by tidal waters or navigable waters*, to which the public may have rights of access or *public trust rights*." (Emphasis added.) The Nieses' land is not under or flowed by water.

Finally, CAMA requires the state to construe its provisions consistently with private property rights and to avoid a taking of such rights. N.C.G.S. § 113A-102. ("[P]rivate property rights shall be preserved in accord with the Constitution of this State and of the United States."); N.C.G.S. § 113A-128 ("Nothing in this Article authorizes any governmental agency to adopt a rule or issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States."). As a result, CAMA cannot be construed to extend public trust rights from the mean high water mark to private uplands, as such an expansion of public rights at public expense would be a prohibited taking.

Notably, the Amici cite no CAMA law or regulation that addresses or creates an exclusive municipal driving lane or paid public driving/parking area on private beachfront land, the takings issues in this case. The Amici focus on CAMA concerns that do not address, much less relieve, the Town's constitutional liability for invading

the Nieses' land. Moreover, the regulatory history undermines the idea that there is a long-standing, common law understanding that private dry beaches are public under the public trust doctrine.

3. Neither *Fisher* Nor Any Other Court of Appeals' Opinion Holds That Public Trust Doctrine Rights Apply to Private Dry Sand Areas, Much Less Permit a Town Driving Lane

Amici point to a Court of Appeals' opinion in *Fisher v. Town of Nags Head*, 220 N.C. App. 478, 725 S.E.2d 99 (2012), to support the Town's expansive view of the public trust doctrine.[4] *See, e.g.*, Amicus Brief of the County of Dare, *et al.*, at 17-19. Dare County misleadingly cites *Fisher* for the proposition that the mean high water mark public trust boundary "can be located by natural indicators." *Id.* (citing *Fisher*, 220 N.C. App. at 485, 725 S.E.2d at 105). That's not what *Fisher* says. *Fisher* dealt with Nag's Heads' attempt to secure a easement on private beachfront land by condemnation. The court held that the notice of condemnation describing the desired beach easement according to natural indicators, like the vegetation line, was sufficiently definite to provide notice to the owners. 220 N.C. at 485, 725 S.E.2d at

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[4] The Amici also cite *Webb v. North Carolina Dep't of Env't, Health & Natural Res., Coastal Res. Comm'n*, 102 N.C. App. 767, 772, 404 S.E.2d 29, 32 (1991). *Webb* merely says that agencies regulating coastal construction can approximate the mean high water mark when permitting construction. *Webb* does not address public trust easements or related public access on private land. It never holds or suggests that the vegetation line is a reasonable approximation of the mean high water line, even in the permitting context.

105 (The "description of the 'Easement Area' was sufficient for plaintiffs to determine the requested property, or at least for a hired surveyor to locate."). *Fisher* does not hold that the boundary of the public trust beach is the vegetation line, and it certainly does not sanction a public and Town driving and parking area on private land.

B. The Mean High Water Mark Boundary for State Beaches Is Not at Issue Here and the Amici's Attacks on that Boundary Are Dangerous and De-stabilizing to Coastal Titles

Several of the Amici question North Carolina and United States Supreme Court precedent establishing that the "ordinary high water mark" boundary of state-owned tidelands is determined according to a "mean" that averages the tides over an 18.6-year period. *See Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970) (citing *Borax Consol. v. City of Los Angeles*, 296 U.S.10, 27, 56 S. Ct. 23, 31, 80 L. Ed 9 (1935)). Indeed, the term "mean" in the phrase "mean high water mark" arises from and reflects decisions holding that "ordinary high water" is gauged as an average tidal elevation over an 18.6-year period. *Id*.

This case does not present the issue of the correctness or advisability of this precedent or the mean high water mark regime. In proceedings below and in briefing here, the Town conceded that the "boundary between private lands and State-owned public trust lands on an ocean shoreline is the *mean* high water mark." Town Brief at 35 (emphasis added). It also conceded that the mean is found according to an average

of tides over an 18.6-year period. *Id.* It does not ask the Court to overrule this long standing system.

The Nieses note that, in adopting the 18.6-year average methodology for gauging ordinary high water boundaries, this state is in line with every other coastal state that follows English common law. Changing the mean high water mark regime at this late date would cause chaos in North Carolina land titles. Beach front land has been surveyed, plotted, and sold based on the *mean* high water mark boundary. (R. p. 53) (survey of subdivision showing lots going out to the mean high water mark); *see also*, N.C.G.S. § 77-20(a). Any judicial or legislative relocation of this boundary from the mean high water mark to a more upland line now currently on private land (such as vegetation line) would destabilize titles and unconstitutionally take private property.[5]

[5] The Amici seem to think the Nieses claim the mean high water mark is easy to identify. They have not said that. What they have said is that the mean high water mark is much more desirable as a private/public property rights boundary because (being based on an average) it is not susceptible to drastic shifts caused by weather events. This contrasts with a line, like the vegetation line, that is not averaged and which moves easily. This case shows that the vegetation or dune line can move thirty feet inland with one event. The same event would hardly move the mean high water mark because it is based on an average of the high tides over 18.6 years, not tides at one (extreme) point in time. The Amici do not address this difference in stability.

II. THE PUBLIC TRUST IS THE ONLY EASEMENT ISSUE, AND THE AMICI'S IMPROPER, DRASTIC, AND UNCONSTITUTIONAL INTERPRETATION OF CUSTOM CONFIRMS IT SHOULD STAY THAT WAY

Effectively confirming that the public trust doctrine is not available to create an easement on dry sand beaches in North Carolina, the Amici focus the bulk of their energy on the doctrine of custom. They argue that this Court should declare a customary easement of perpetual public access on all private dry sandy beach land in North Carolina. *See, e.g.*, State's Brief at 16-17, 27.

There are multiple, serious problems with this position. The Nieses' principle reply brief explained in detail that the Town waived the issue of custom, and that the issue is not before the Court. The Nieses will not repeat those arguments. Amici cannot inject issues that the parties did not properly raise.[6] *In re R.L.C.*, 361 N.C. 287, 291, 643 S.E.2d 920, 922 (2007) (refusing to address the arguments of amicus curiae when the issue was not raised or litigated below); *In the Matter of Stallings*, 318 N.C.

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[6] The brief of Amicus Professor Kalo, *et al.*, argues that the Town did not waive the doctrine of custom because it really meant "custom" when, throughout this litigation it referred to "public trust." Brief of Amicus Professor Kalo, *et al.*, at 17 n.8. This is a bit too inventive even for the Town, as it makes no such excuse. As the Town and Amicus note, the Town knew of the concept of "law of custom" or "customary" right, having used such terms once or twice in appellate briefing without supporting argument. *See id.* Yet, the Town nevertheless consistently referenced and relied on the "public trust" doctrine in its Answer and subsequent litigation. It must be presumed to have meant what it said.

565, 577, 350 S.E.2d 327, 333 (1986) ("The interesting question raised by the amicus curiae brief must await resolution until presented in a proper case.").[7]

If the Town had not waived the issue of custom, this Court should still reject Amici's arguments because they suffer from great legal and policy flaws. First, they fail to adequately address the threshold issue of whether the doctrine of custom exists in this State. Most American courts have rejected the concept of custom as a method of altering property rights derived from more settled rules—with good reason. Second, the Amici simply do not understand the doctrine. They neglect to address the elements of custom with the necessary facts or specificity. They fret about pedestrian beach use, while largely ignoring the driving practices at issue here. Finally, the Amici fail to address the unconstitutionality of declaring a customary public right on all private dry sandy land, and the policy problems that will result when erosive events suddenly create new dry sand areas on developed lots which the public has never used.

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[7] The State claims the appellate court passed on the issue of customary law. It did not. It decided the case based on "public trust rights." Indeed, it could not have addressed custom given the absence of evidence or argument on the issue in the trial court and the Town's failure to raise the issue on appeal. Moreover, if the appellate court had addressed the issue, the Town would have abandoned it by not raising in its response to the Nieses' Petition.

A. This Court Rejected Custom in *Winder*, Rendering It a Non-Issue

The Amici run so quickly to custom in this case that they largely forget to address a critical, threshold issue: does the English doctrine of custom even exist in North Carolina? It does not.

In connection with property, the English doctrine of "custom" is the idea that certain " 'special customs' . . . in particular localities, are allowed to supercede the common law" of property rights. *Winder v. Blake*, 49 N.C. (4 Jones) 332, 336 (1857). It incorporates the notion that certain people may have a right to engage in particular practices on private land, in contravention of the owner's common law right to exclusive use.

Notably, custom is *not* a common law rule, it is an *exception* to it. *Id.* Thus, that North Carolina adopted English common law does not mean that it has also adopted the "custom" loophole. In fact, it is precisely because custom *abrogates* common law and statutory property rules, that "*[v]ery few* American states recognize the English doctrine of public easements by local custom." *Bell v. Town of Wells*, 557 A.2d 168, 179 (Me. 1989) (citing 3 *Powell on Real Property* ¶ 414[9] (1986 & Supp. 1988)) (emphasis added); *see also Smith v. Bruce*, 241 Ga. 133, 146, 244 S.E.2d 559, 569 (1978) (stating in beach case: "The theory of custom has been adopted in very few jurisdictions, has never been recognized in Georgia and will not be adopted [here].").

North Carolina is among those states that long ago rejected the doctrine of custom as a method for creating easements. *See Winder v. Blake*, 49 N.C. (4 Jones) 332. In *Winder*, a person was sued for trespassing after entering private land and taking fish. The defendant tried to claim a right to enter the property under English custom. The Court squarely and directly rejected the doctrine of custom as an option for acquiring easements on private land:

> We did not import from the mother country any of the "special customs," which, in particular localities, are allowed to supercede the common law. All legislative power is vested in our General Assembly. We can recognise no other law-making power, and there is no intimation to be met with in any of our decisions, that special customs can grow up among us, whereby rights may be affected, or the common law be in anywise changed. *By the common law an imaginary line is thrown around the land of every one, which may not be entered without subjecting the wrong-doer to an action. No custom or usage can change this law*.

Id. at 336 (emphasis added).

This Court has never overruled *Winder*. *Cf. Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697, 702 (1925) (listing all ways easements can be acquired and leaving out custom). Nevertheless, the Amici try to generate a conflict on the issue in this Court's precedent by citing cases like *Penland v. Ingle*, 138 N.C. 456, 50 S.E. 850 (1905), *State v. Anderson*, 123 N.C. 705, 31 S.E. 219 (1898), and *Griffin v. Goldsboro Water Co.*, 122 N.C. 206, 30 S.E. 319 (1898). But these cases do not overrule *Winder* or adopt custom.

For example, *Penland* briefly discusses the role of business usage in interpreting an ambiguous contract, an entirely different type of custom than the Blackstonian property doctrine at issue here. *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383, 390, 19 L. Ed. 987 (1870) ("The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of the extrinsic evidence [relating to the custom or usage]."). [8] *State v. Anderson*, 123 N.C. 70, 531 S.E. 219, involved cattle rights on property, but was resolved on statutory grounds. *Anderson* briefly discusses English practice, but the passage is dicta, and does not address *Winder* or the elements of custom. [9] And *Griffin* simply affirms regulatory authority over common carriers. 122 N.C. at 207-08, 30 S.E. at 319.

Only *Winder* deals with trespassing on private property, and it specifically rejects custom as a rule of decision in that context. *Winder* is good law. It is controlling law. Given this reality, the Amici would have to persuade this Court to

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[8] The court elaborated further on custom in trade: "It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses . . . ." *Barnard*, 77 U.S. at 390.

[9] The State cites a number of non-real property cases that use the phrase "time immemorial." State's Brief at 15 n.3. None of these cases discusses or adopts the Blackstonian property doctrine of custom. None address or overrule *Winder*. They are off-point.

overrule Winder before applying custom here (assuming it was properly raised). But neither the Town or Amici ask for that remedy. Second, overruling a decision is a major step, a case in itself, that requires full and careful briefing. None of the Amici has briefed the standards for overruling precedent or the consequences of overruling *Winder*.

Whether the Court should overrule *Winder* and adopt custom, and how that doctrine functions, may pose interesting issues. But such questions must arise from an appropriate case. This is not the right case. The Court should resolve the public trust doctrine issues which have driven this case all along, and leave the waived, inadequately briefed, and controversial issue of *Winder* and the viability of custom for another day.

B. The Amici Fail To Properly Present or Apply the Elements of Custom

The Amici not only improperly raise custom and fail to deal with *Winder*, they badly misrepresent the scope and elements of the doctrine and the proof required to establish a customary easement. First, Amici wrongly treat custom as a legal question. It is not. It involves a highly factual inquiry. *Bell*, 557 A.2d at 179 ("[T]wo *factual* predicates usually required for application of the local custom doctrine, namely, the public usage must have occurred 'so long as the memory of man runneth not to the contrary' and it must have been . . . free from dispute.") (emphasis added); *Trepanier v. County of Volusia*, 965 So. 2d 276, 289-90 (Fla. Dist. Ct. App. 2007) ("proof is

required to establish the elements of a customary right"). Facts must be tried in a case of custom, and this did not happen here.

Second, the Amici wrongly treat custom as if it is the same as common law, i.e., a general rule for all people within an entire state. Again, it is not. Where it exists, custom protects only *local* customs, and thus confers rights only on limited groups.[10] 2 William Blackstone, Commentaries *263 ("custom is properly a *local* usage"); *Winder*, 49 N.C. (4 Jones) at 336 (referring to customs "in particular localities"); *Bell*, 557 A.2d at 179 (referring to the doctrine as a "local custom doctrine"); *Trepanier*, 965 So. 2d at 289 ("the acquisition of a right to use private property by custom is intensely local"), Alice Gibbon Carmichael, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. Rev. 159, 174 (1985) (doctrine limits "the application of a custom to the inhabitants of a particular locality").

In short, custom is not a source of state-wide law; the common law has that role. *Id.*; *see also*, *Earl of Coventry v. Willes*, 12 W.R. 127, 128 (Q.B. 1863) (declining to legalize a proposed custom for the general public to watch horse racing at a manor where "the rights possessed by the Queen's subjects generally are part of the general law of the land, and not the customs of a particular place"). Custom thus cannot legitimately be invoked to impose state-wide public rights in all dry sand areas.

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[10] This understanding derives from the required element of "certainty" as to the custom.

1 William Blackstone, *Commentaries on the Laws of England* *74 (1753) (custom means "particular customs, or laws, which affect only the inhabitants of particular districts"). But this is exactly what the Amici propose.

Third, Amici fail to understand the specificity required by the idea of a "custom." One seeking a customary right on private land must show that the particular, desired practice has occurred from time immemorial. *Id.* at *76 ("customs must be particularly pleaded, and as well the existence of such customs must be sh[o]wn, as that the thing in dispute is within the custom alleged"). The activity at issue which the Town defends in this case is public and Town driving on the Nieses' dry sand property. Yet, the Amici focus on Native Americans[11] and more recent citizens walking on, or fisherman pulling nets onto, certain beaches. This is irrelevant to public driving. and the Town's practice of using the Nieses' land for municipal service vehicles. *Id.*

The Amici's few references to beach driving on Emerald Isle distort the truth. For instance, the Brief Amicus of Professor Kalo, *et al.*, points to *Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987), claiming that decision recognized Emerald Isle beach driving. Amicus implies the decision recognized driving on private

[11] If a Native American presence is enough to create an easement on private land, as Amici imply, then the entire state may be subject to public customary access and use under the same theory.

dry beaches near the Nieses' land. It did not. *Emerald Isle* recognized, according to stipulated facts, that fishermen frequently drove on beaches fronting Bogue Inlet at the time. *Id.* at 651, 360 S.E.2d at 763. What Amicus fails to tell the court is that the *State owns* the dry beaches around the Inlet. Amicus also fails to note that the property at issue here is not on Bogue Inlet; it is a mile and half away.[12] The beaches adjacent to the Nieses' land have a different topography, history and ownership than Bogue Inlet.[13]

The Amici misconstrue other elements of custom. Most noticeably, they fail to recognize the length of time required to meet the "time immemorial" factor. A practice occurring for a few decades or even a generation is not enough to create a binding custom. *State ex rel. Haman v. Fox*, 100 Idaho 140, 149, 594 P.2d 1093, 1102 (1979) ("use of property from 1912 was not long enough"). The practice must go back much further. Joseph J. Kalo & Lisa Schiavinato, *Customary Right of Use: Potential Impacts of Current Litigation to Public Use of North Carolina's Beache*s, 6 Sea Grant L. & Pol'y J. 26, 38 (2014) (proving a customary right on private land may "involve proving that [the alleged] customary use of the dry sand beaches has existed since

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[12] These factual issues confirm that custom is not a proper issue on appeal in the absence of proper presentation of evidence and trial court fact finding.

[13] Similarly, Amicus fails to note that any driving occurring near Bogue Inlet is a recent phenomena, as Ferry Service did not exist onto Emerald Isle until 1960 and a bridge capable of bringing cars in any number was not built until 1971.

colonial times" (emphasis added)). The Amici also fail to properly address the element of reasonableness as a "free from dispute" factor. *Id.*; *Bell*, 557 A.2d at 179. If the Town had properly raised custom in trial court, the Nieses would have proven that this element cannot be satisfied with respect to dry sand driving on Emerald Isle.

Finally, a few Amici suggest a customary easement exists because the legislature "declared" the public has customarily enjoyed the beach. *See, e.g.*, State's Brief at 12-13. This is not how easements are found. Finding and declaring common law easements, including under custom, is a judicial function, one which involves presentation and adjudication of evidence in a trial proceeding in which property owners participate. *Purdie v. Attorney General*, 143 N.H. 661, 664, 732 A.2d 442, 445 (1999) (noting in a beach case that "[t]he determination of common law [easement] questions is a judicial, not a legislative, function"). Legislatures cannot "find" or "declare" public rights-of-ways on private land. To do so is to legislate an easement, and that is a taking of property.[14] *Id*. at 666-67, 732 A.2d at 446-47; *see also*, *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E.2d 371, 374 (1946).

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[14] In any event, the Amici read too much into the legislature's statements. Consider the reference to the State in the statement in N.C.G.S. § 113A-134.1(b), that the "public has traditionally fully enjoyed the *State's* beaches." (Emphasis added.) The State's beaches—as in the beaches owned by the State—are wet beaches to the mean high water mark, not dry beaches held in private ownership.

The bottom line is that Amici fail to apprehend the nature, scope, and factual elements of the doctrine of custom.[15] As a result, their briefing on the issue is incomplete, at best, and irrelevant at worst. This confirms the propriety of declining to address custom until this Court is presented with a case with a developed record and briefing, where custom is properly presented and tried below.[16]

C. Imposing the Amici's State-Wide Easement by Judicial Fiat Would Convert Thousands of Different Parcels into Public Land, in Violation of the Takings and Due Process Clauses

The Amici's pursuit of a judicially declared customary easement across the entire coast is troubling not only for its inconsistency with the law of custom, but also

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[15] What the Amici really mean when they say public rights exist by custom is that the rights should have credence due to "tradition." But there is no "easement by tradition" doctrine, nor is there an easement by "assumption."

[16] The Nieses note that the Amici's most-cited precedent on custom, the highly criticized Oregon decision in *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), would be inapplicable here if custom were an issue. First, unlike in Oregon, this Court rejected the doctrine of custom. *Winder v. Blake*, 49 N.C. (4 Jones) 332. Second, in *Hay*, the appeal followed a trial proceeding adjudicating facts pertaining to the particular property at issue. 254 Or. at 589, 462 P.2d at 674 (referring to "evidence in the trial below"). Here, there was no such proceeding. Third, the dry sand area was found to be stable in Oregon, thus minimizing (to some degree) the extent to which a dry sand easement could encroach on upland private rights with erosion or storms. *Id.* In contrast, North Carolina's dry sand areas are subject to appreciable inland shifts. (*See* R. p. 738.) Finally, though the Amici do not mention it, the Oregon Supreme Court later limited *Hay* in *McDonald v. Halvorson*, 308 Or. 340, 359-60, 780 P.2d 714, 724 (1989) (custom must be applied to the particular parcels alleged to host an easement).

because it tempts this Court to violate the Constitution and is flawed as a matter of policy.

1. The Super Easement Proposed by Amici Ignores the Diverse and Fragmented Nature of Dry Sand Areas

The Amici treat the dry sand beaches on the North Carolina coast as if they are one connected mass that is historically uniform and owned by no one in particular. The opposite is true. The Atlantic coastline includes barrier islands and mainland shores with unique histories of development and use. The dry sand is split among countless private parcels and owners. Many private dry beach parcels are part of residentially and commercially developed lots; others are not. In certain places (like Nags Head), coastal homes and businesses are very near or partly on dry sand areas the Amici want declared public. Moreover, many dry beaches, including those at Bogue Inlet, Masonboro Island, Huntington Beach State Park and others are publicly owned (and often environmentally protected).

The Amici's demand for a customary easement on all dry beaches fails to account for this diversity. By ignoring distinct parcel histories, uses, and geographies, the Amici fail to respect the courts' need to consider the legal and policy ramifications of particular property facts when weighing private and public property rights. Indeed, the Amici's "one easement fits all" argument is inconsistent with even the loosest versions of the doctrine of custom. *McDonald*, 308 Or. at 359-60, 780 P.2d at 724

(clarifying that, under *Hay*, the elements of custom must still be proved on individual parcels when subject to a claim of an customary law easement).[17]

2. The Amici's Proposed Easement Would Result in a Taking of Private Property and Violate Due Process

The Amici's pursuit of a coast-wide customary easement disrespects individual dry beach owners' rights to fair and constitutional treatment. In urging the Court to impose an easement without respect to differences among dry beach parcels, and without individualized adjudication, the Amici are essentially asking this Court to *legislate* a public right on private property. This is improper and a taking of property. *Trepanier*, 965 So. 2d at 289 (rejecting the idea that "custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches"); *McDonald*, 308 Or. at 358, 780 P.2d at 723 ("declaring the right of the public to use private property for recreation could constitute a taking of that property"); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 713, 130 S. Ct. 2592, 2601, 177 L. Ed. 2d 184 (2010).

Even Professor Kalo, one of the Amici supporting the Town, concedes, "there is a serious issue as to whether the application of the doctrine of custom to establish public rights in privately-owned dry sand beaches is a violation of the taking clause

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[17] *Hay*'s declaration of public rights on beach areas landward of the mean high water mark applies to specific areas "*if* their public use has been consistent with the doctrine of custom as explained in *Hay*." *Id.* (emphasis added).

of the Fifth Amendment." 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, 1894 n.110 (2000). The Court should not violate the Constitution by declaring the existence of a novel, super-easement.

The Amici's proposal also raises significant due process concerns because they seek imposition of an encumbrance across countless private dry beach parcels without the participation of the affected property owners. It is basic due process law that owners of private property must have notice and an opportunity to be heard before the government deprives them of property. *Monroe v. City of New Bern*, 158 N.C. App. 275, 278-79, 580 S.E.2d 372, 374-75 (2003). More to the point, when a person claims a public easement on private land, the owner of the subject land is normally notified of the claim by suit and given a chance to rebut the claimed easement in court before it is adjudicated on the land. *See, e.g.*, *West v. Slick*, 313 N.C. 33, 34, 326 S.E.2d 601, 602 (1985).

Here, the Amici do not and cannot deny that North Carolina's dry beaches are comprised of multiple parcels held by different owners. Only one owner, the Nieses, is a party to this case. Yet, the Amici want the court to declare that every private dry beach parcel in this State is subservient to a public easement, without the owners of the subject land having notice of this proposed limitation on their rights or a day in court. This presents a significant risk of violating basic due process principles.

3. The Amici's Position Would Turn Historically Private, Developed Lots into Public Property When the Vegetation Shifts Inland, Exposing Dry Sand

The Amici are so focused on acquiring an easement that instantly attaches to existing dry sand areas outside normal legal processes that they fail to consider the consequences of their easement when erosion creates or expands new dry beaches areas on private land. It is undeniable that this happens. (R. p. 738); *see also*, Opinion of Attorney General Re: Advisory Opinion Ocean Beach Renourishment Projects, 1996 WL 925134, at *2 (noting that "the beach area erodes"). Indeed, storms can suddenly make private beachfront lots that were vegetated, and thus never previously treated as a "beach," into dry sand. *Severance v. Patterson*, 566 F.3d 490, 494 (5th Cir. 2009) ("erosion caused by Hurricane Rita in September 2005 shifted the vegetation line farther landward, causing a large segment of Severance's properties . . . to be located on the dry beach"). Under the Amici's theory, such newly created dry beach areas would automatically become public parks. This raises significant legal and practical problems.

First, the Amici's theory effectively gives the public a contingent future interest in beachfront parcels that are near, but not currently on, the dry sand. Such vegetated parcels are absolutely private now, even in the Amici's eyes. Yet, if and when the beach grass disappears, for whatever reason, the Amici's theories grant the public the right to immediately use the very same land. This imposition of public rights is not

based on any prior public occupation of the area or related, proven easement (such as by prescription). It is based purely on the happenstance of a change from vegetation to sand. This is wrong and unlawful. *See Severance v. Patterson*, 370 S.W.3d 705, 724 (Tex. 2012).

> [W]hile losing property to the *public trust* as it becomes part of the *wet beach* or *submerged* under the ocean is an ordinary hazard of ownership for coastal property owners, it is far less reasonable, and unsupported by ancient common law precepts, to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property or a different landowner's property that was not previously subject to that right of use.

Id. at 723 (emphasis added).

Second, any rule that subjects private land to public use as soon as (and simply because) the vegetation migrates landward and sand appears will spawn tremendous conflict between property owners and beachgoers with different expectations. The North Carolina coastline is now highly developed with homes and businesses. If such developed coastal lots become public beaches the moment they lose their vegetation and come to rest partly or wholly on dry sand, the owners of pre-existing homes and businesses will have to accept strangers around (and maybe even on) their property at that time. This is a recipe for conflict between property owners used to engaging in

traditional, private beachfront uses and surfers and others told they may occupy any dry sand area as a "custom."[18]

Ultimately, the Amici's proposal to treat all dry sand as public land endangers long-standing and lawfully constructed homes. When erosion causes the vegetation and dune line to retreat in the future, some homes will come to be wholly or partly on dry sand. *See Town of Nags Head v. Toloczko*, No. 2:11-cv-1-D, 2014 WL 421951, at *4 (E.D.N.C. 2014) ("[T]he Cottage came to be located (in the Town's view) on the beach itself, as did several other nearby cottages."). If that sand is public land, one can expect calls for homes to be removed so that the public can use the underlying and surrounding area. *See Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 723 S.E.2d 156, *disc. rev. denied*, 366 N.C. 386, 733 S.E.2d 85 (2012) (Town demands demolition of a home on allegedly a public dry sand area and fines owner for every day home remains). The result will be conflict and a new wave of litigation. *Id.* Regardless of how it plays out, the very prospect of clashes between owners of lawful homes and advocates who claim the "customary" public right to dry sand requires removal of a home should cause the Court to reject the Amici's position.

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[18] The possibility of public rights encumbering private beachfront lots the moment dry sand appears would be especially problematic for restaurants and other businesses that require an element of control over those in and around their business. It also poses special difficulties for families that own or rent beach homes with an expectation of being able to keep strangers from the doorstep.

In short, the Amici's arguments for a customary state-wide easement are not only misplaced in this case, they are unconstitutional and would create multiple policy problems which the Amici do not even address. Moreover, the Amici's radical solution is totally unnecessary to address the public access issues with which the Amici are concerned. The Amici act as if the only way to advance public access is through judicial activism. They ignore the existence of state-owned dry beaches, role of owner consent, and the efficacy of beach re-nourishment easements in maintaining the general status quo. They also ignore the many traditional, lawful options for obtaining additional access, including by eminent domain and proving easements in court. *See* Plaintiff-Appellant's New Brief at 36-37.

The arguments of the Amici, mostly government agencies, accordingly boil down to this: the Court should spare the government from the hassle of condemning easements on private land, or fee simple titles, or proving easements in court under prescription and dedication theories because this is inconvenient and time consuming. It is to spare themselves from such processes that they urge the Court to judicially impose a state-wide easement, without trial or compensation to owners. The irony and unfairness is palpable. Government demands that citizens go through proper legal processes every day when they want to use their *own* property, no matter how inconvenient, expensive, or time consuming it may be. In our system, the government is not above the law. The least it can do, in fact, what it is required to do, is go through

the proper process of law when it wants to use *other's* private land, even if it may be inconvenient.

Rejecting the Amici's arguments and holding in favor of the Nieses will not change existing public beach access, stop tourism,[19] or take away any of the government's lawful options for acquiring private land for more public access, or even for creation of a government road. It will simply continue this state's policy of "jealously guard[ing] against the governmental taking of property." *Kirby v. North Carolina Department of Transportation*, 786 S.E.2d 919, 924 (N.C. 2016). It will

[19] The aftermath of the *Severance* case proves the fallacy of prophecies that economic and access doom will follow from recognition of beach property rights. Texas governments and amici barraged the Texas Supreme Court with the exact same fearful prognostications as Amici here when the Texas court considered whether the State could impose public access on dry beaches without proving an easement under common law. But when the Court answered "no," people did not stop playing at the beach, fences did not go up, and tourism did not stop on Galveston Island. In fact, the year after *Severance*, tourism and related revenue hit a high. *See, e.g.*, http://www.bizjournals.com/houston/morning_call/2014/05/galveston-broke-tourism-revenue-record-in-2013.html (last visited Aug. 18, 2016).

make clear that, consistent with historic constitutional policy, the Town must pay just compensation for invading the Nieses' private land for public purposes.

Respectfully submitted, this 19th day of August, 2016.

Pacific Legal Foundation

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N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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This the 19th day of August, 2016.

Electronically submitted
J. DAVID BREEMER

Contents of Appendix

State of North Carolina
Office of Administrative Hearings

Certification

I hereby certify the attached 12 sheets to be a true copy of

15A NCAC 07M .0302 – DEFINITIONS

(Adoption Eff. March 1, 1979 – Amendment Eff. February 1, 2009)

The original of which is filed in this office in conformance with Chapter 150B of the General Statutes of the State of North Carolina.

In witness whereof, I authorize this certification and affix the official seal of the North Carolina Office of Administrative Hearings at Raleigh, this 13th day of September 2011.

Julian Mann, III
Chief Administrative Law Judge, Director
By: Julie B. Edwards

SECTION .0300 - SHOREFRONT ACCESS POLICIES

.0301 DECLARATION OF GENERAL POLICY

It is hereby declared to be the policy of the State of North Carolina to foster, protect, improve and ensure optimum access to recreational opportunities at beach areas consistent with public rights, rights of private property owners and the need to protect natural resources from overuse. These policies reflect the position that in areas other than State parks, the responsibility of providing adequate beach access rests primarily with local units of government. Thus, the following policies are intended to supplement and strengthen any local efforts.

History Note: Statutory Authority G.S. 113A-102(b); 113A-107; 113A-124;
Eff. March 1, 1979

.0302 DEFINITIONS

The term "Beach" as used in these policies is defined as areas extending from the mean low to the mean high water line and beyond this line to where either the growth of vegetation occurs, or a distinct change in slope or elevation occurs, or riparian owners have specifically and legally restricted access above the mean high water line.

This definition is intended to describe those shorefront areas historically used by the public. Whether or not the public has rights in the defined areas above the MHW mark can only be answered by the courts. The public does have clear rights below the MHW mark. The following policies recognize public use rights in the beach areas as defined but do not in any way require private property owners to provide public access to the beach.

History Note: Statutory Authority G.S. 113A-102(b); 113A-107; 113A-124;
Eff. March 1, 1979

.0303 POLICY STATEMENTS

(a) Development shall not interfere with the public's right of access to the shorefront where acquired through public acquisition, dedication, or customary use as established by the courts.

(b) The responsibility of insuring that the public can obtain adequate access to public trust resources or the ocean, sounds, rivers and tributaries is primarily that of local governments to be shared and assisted by state and federal government.

(c) Public beach area projects funded by the state and federal government will not receive initial or additional funds unless provisions are made for adequate public access. This must include access rights, adequate identification and adequate parking.

(d) Policies regarding State and Federal properties with shorefront areas intended to be used by the public must encourage, permit and provide public access and adequate parking so as to

15 NCAC 7M .0301 - .0303 have been amended to read as follows:

.0301 DECLARATION OF GENERAL POLICY

It is the policy of the State of North Carolina to foster, protect, improve and ensure optimum access to recreational opportunities at ocean beach areas consistent with public rights, rights of private proprty owners and the need to protect natural resources, especially sand dunes. The State's ocean beaches are a resource of statewide significance held in trust for the use and enjoyment of all the citizens. The public has traditionally and customarily freely used and had access to these resources and the State has a responsibility to provide continued reasonable access to its beaches. The State of North Carolina, therefore, has created a Coastal Beach Access Program for the purpose of acquiring, improving and maintaining recreational property along the oceanfront.

Many privately owned properties in close proximity to the Atlantic Ocean have been and will be adversely affected by coastal hazards, making them unsuitable for permanent residences. A public purpose can be served by the acquisition and/or improvement of such properties for beach access use by the general public, provided that such properties are appropriately maintained for this and future generations.

History Note: Statutory Authority G.S. 113A-134.1; 113A-134.3;
Eff. March, 1, 1979;
Amended Eff. July 1, 1982.

*.0302 DEFINITIONS

(a) "Beach Access" is defined to include the acquisition and/or improvement of properties situated along the Atlantic Ocean for parking and public pedestrian passage to the oceanfront. Beach access facilities may include, but are not limited to, parking areas, restrooms, showers, picnic areas, dressing/shower rooms, concession stands, litter receptacles, water fountains, dune crosswalks, and other appropriate facilities.

(b) The term "beach" as used in these policies is defined as an area extending from the mean low to the mean high water line and beyond this line to where either the growth of vegetation occurs or a distinct change in slope or elevation occurs, or riparian owners have specifically and legally restricted access above the mean high water line.

This definition is intended to describe those shorefront areas customarily freely used by the public. The following policies recognize public use right into the beach areas as defined but do not in any way require private property owners to provide public access to the beach.

(c) Local accessways are defined to include those points which offer minimal facilities if any at all. Generally, these accessways will only have a dune crosswalk, if needed, and trash receptable and are for the use of pedestrians within a few hundred yards of the site.

(d) Neighborhood accessways are defined as those areas offering limited parking, usually space for no more than five to ten vehicles, a dune crosswalk and a trash receptacle. Such accessways are primarily for the use of pedestrians within the immediate subdivision or area of the site.

(e) Regional accessways are of such size and offer such facilities that they serve primarily pedestrians throughout an island, including day users of the beach. These sites normally provide parking for twenty-five to sixty vehicles, restrooms, a dune crosswalk, foot showers and trash receptacles.

(f) Multi-regional accessways, usually administered by the State, are in the category of state parks, and offer the full complement of improvements associated with such facilities. Although the Coastal Beach Access Program will provide funds to the extent possible to improve or coordinate beach access as these sites, multi-regional accessways are seen, in most cases, as being beyond the scope and intent of the state beach access program.

(g) Improvements, as related to beach access, are any facilities which promote pedestrian access at a specific site. The most common improvements include dune crosswalks, trash receptacles, parking areas, restrooms, gazebos and footshowers.

(h) Maintenance is the proper upkeep and repair of beach access sites and their facilities in such a manner that public health and safety is ensured.

History Note: Statutory Authority G.S. 113A-134.3;
Eff. March 1, 1979;
Amended Eff. July 1, 1982.

.0303 POLICY STATEMENTS

(a) Development shall not interfere with the public's right of access to the shorefront where acquired through public acquisition, dedication, or customary use as established by the courts.

(b) Public beach area projects funded by the state and federal government will not receive initial or additional funds unless provisions are made for adequate public access. This must include access rights, adequate identification and adequate parking.

(c) Policies regarding state and federal properties with shorefront areas intended to be used by the public must encourage, permit and provide public access and adequate parking so as to achieve maximum public use and benefit of these areas consistent with establishing legislation.

(d) State and federal funds for beach access shall be provided only to localities that also provide protection of the frontal dunes.

(e) The state should continue in its efforts to supplement and improve highway, bridge and ferry access to and wtihin the 20 county coastal area consistent with the approved local land use plans. Further, the state should wherever practical work to add public fishing catwalks to appropriate highway bridges and should incorporate catwalks in all plans for new construction and for remodeling bridges. It is the policy of the state to seek repeal of ordinances preventing fishing from bridges except where public safety would be compromised.

15 NCAC 7M .0301 - .0304; have been amended as follows:

.0301 DECLARATION OF GENERAL POLICY

It is the policy of the State of North Carolina to foster, protect, improve and ensure optimum access to recreational opportunities at ocean and estuarine water beach areas consistent with public rights, rights of private property owners and the need to protect natural resources, especially sand dunes and marsh vegetation. The State's ocean and estuarine water beaches are a resource of statewide significance held in trust for the use and enjoyment of all the citizens. The public has traditionally and customarily freely used and had access to these resources and the State has a responsibility to provide continued reasonable access to its beaches and estuarine waters. The State of North Carolina, therefore, has created a Coastal and Estuarine Water Beach Access Program for the purpose of acquiring, improving and maintaining recreational property along the oceanfront and estuarine shoreline.

Many privately owned properties in close proximity to the Atlantic Ocean and to estuarine shorelines have been and will be adversely affected by coastal hazards, making them unsuitable for permanent residences. A public purpose can be served by the acquisition and/or improvement of such properties for beach access use by the general public, provided that such properties are appropriately maintained for this and future generations. The state should acquire the lands which are most vulnerable to severe erosion only when these lands may be used for some valid public purpose, such as beach access and use. The state should seek opportunities for the acquisition of inexpensive properties. Where feasible, donations and bargain acquisitions should be encouraged.

History Note: Statutory Authority G.S. 113A-134.1: 113A-134.3;
Eff. March 1, 1979;
Amended Eff. March 1, 1985;
July 1, 1982.

*.0302 DEFINITIONS

(a) "Ocean Beach Access" is defined to include the acquisition and/or improvement of properties situated along the Atlantic Ocean for parking and public passage to the oceanfront. Beach access facilities may include, but are not limited to, parking areas, restrooms, showers, picnic areas, dressing/shower rooms, concession stands, gazebos, litter receptacles, water fountains, dune crossovers, interpretive and public beach access signs, and other appropriate facilities.

(b) "Estuarine Water Beach Access" is defined to include the acquisition and/or improvement of properties located in the twenty county area under CAMA jurisdiction that are situated along estuarine waters as defined by the North Carolina Wildlife Resources Commission and the Division of Marine Fisheries for parking, boating and pedestrian access to estuarine waters. Estuarine water beach access facilities may include, but are not limited to parking areas, restrooms, showers, picnic areas, boat ramps, fishing piers, boardwalks, dressing/shower rooms,

concession stands, litter receptacles, interpretive and public beach access signs, gazebos, water fountains, and other appropriate facilities.

(c) The term "beach" as used in these policies is defined as an area extending from the mean low to the mean high water line and beyond this line to where either the growth of vegetation occurs or a distinct change in slope or elevation occurs, or riparian owners have specifically and legally restricted access above the mean high water line.

This definition is intended to describe those shorefront areas customarily freely used by the public. The following policies recognize public use right into the beach areas as defined but do not in any way require private property owners to provide public access to the beach.

(d) Local accessways are defined to include those points which offer minimal facilities if any at all. Generally, these accessways will only have a dune crossover or pier, if needed, and litter receptacles and public beach access signs and are for the use of pedestrians within a few hundred yards of the site.

(e) Neighborhood accessways are defined as those areas offering parking, usually for five to ten vehicles, a dune crossover or pier, litter receptacles and public beach access signs. Such accessways are primarily for the use of individuals within the immediate subdivision or vicinity of the site.

(f) Regional accessways re of such size and offer such facilities that they serve individuals, from throughout an island or community including day visitors. These sites are handicapped accessible and normally provide parking for 25 to 60 vehicles, restrooms, a dune crossover, pier, boat ramp, foot showers, litter receptacles and public beach access signs.

(g) Multi-regional accessways, usually administered by the State, are in the category of state parks, and offer the full complement of improvements associated with such facilities. Although the Coastal and Estuarine Water Beach Access Program will provide funds to the extent possible to improve or coordinate beach access as these sites, multi-regional accessways are seen, in most cases, as being beyond the scope and intent of the state coastal and estuarine water beach access program.

(h) Improvements, as related to beach access, are any facilities which promote access at a specific site. The most common improvements include dune crossovers, piers, boardwalks, litter receptacles, parking areas, restrooms, gazebos, foot showers, boat ramps, and public beach access signs.

(i) Maintenance is the proper upkeep and repair of beach access sites and their facilities in such a manner that public health and safety is ensured. Maintenance is to be a responsibility of the local government unless another suitable party is identified.

History Note: Statutory Authority G.S. 113A-134.3;
Eff. March 1, 1979;
Amended Eff. March 1, 1985;
July 1, 1982.

.0303 POLICY STATEMENTS

(a) Development shall not interfere with the public's right of access to the shorefront where established through public

15 NCAC 7M .0302(a)-(i), and the addition of (j); has been amended as published in NCR, Volume 2, Issue 4, pages 264-265 with changes in (g)-(h) as follows:

.0302 DEFINITIONS

(a) "Ocean Beach Access" is defined to include the acquisition and/or improvement of properties situated along the Atlantic Ocean for parking and public passage to the oceanfront. Beach access facilities may include, but are not limited to, parking areas, restrooms, showers, picnic areas, dressing/shower rooms, concession stands, gazebos, litter receptacles, water fountains, dune crossovers, security lighting, emergency and pay telephones, interpretive and public beach access signs, and other appropriate facilities.

(b) "Estuarine Water Beach Access" is defined to include the acquisition and/or improvement of properties located in the twenty county area under CAMA jurisdiction that are situated along estuarine waters as defined by the North Carolina Wildlife Resources Commission and the Division of Marine Fisheries for parking, boating and pedestrian access to estuarine waters. Estuarine water beach access facilities may include, but are not limited to, parking areas, restrooms, showers, picnic areas, boat ramps, fishing piers, boardwalks, dressing/shower rooms, concession stands, litter receptacles, security lighting, emergency and pay telephones, interpretive and public beach access signs, gazebos, water fountains, and other appropriate facilities.

(c) "Inlet Beach Access" is defined to include the acquisition and/or improvement of buildable and unbuildable properties situated along the confluence of estuarine and ocean waters for parking and public passage to the beach area. Inlet beach access facilities may include but are not limited to parking areas, restrooms, litter receptacles, security lighting, emergency and pay telephones, and public beach access signs. Facilities should be sited to minimize potential destruction by movement of the inlet.

(d) The term "beach" as used in these policies is defined as an area extending from the mean low to the mean high water line and beyond this line to where either the growth of vegetation occurs or a distinct change in slope or elevation occurs, or riparian owners have specifically and legally restricted access above the mean high water line.

This definition is intended to describe those shorefront areas customarily freely used by the public. The following policies recognize public use right into the beach areas as defined but do not in any way require private property owners to provide public access to the beach.

(e) Local accessways are defined to include those points which offer minimal facilities if any at all. Generally, these accessways are a minimum of 10 feet in width and provide only a dune crossover or pier, if needed, and litter receptacles and public beach access signs and are for the use of pedestrians within a few hundred yards of the site.

(f) Neighborhood accessways are defined as those areas offering parking, usually for five to twenty-five vehicles, a dune crossover or pier, litter receptacles and public beach access signs. Such accessways are typically 40 to 60 feet in width and are primarily for the use of individuals within the immediate subdivision or vicinity of the site. If more than 15 parking spaces are provided, sanitation facilities should be installed. Portable sanitation facilities are the minimum acceptable; septic systems and vault privies, where appropriate, are preferred.

(g) Regional accessways are of such size and offer such facilities that they serve individuals from throughout an island or community including day visitors. These sites are handicapped accessible and normally provide parking for 25 to 80 vehicles, restrooms, a dune crossover, pier, boat ramp, foot showers, litter receptacles and public beach access signs.

It is recommended that where possible one-half acre of open space in addition to all required setback areas be provided for buffering, day use, nature study or similar purposes.

(h) Multi-regional accessways are generally larger than regional accessways but smaller than state parks. Such facilities should be undertaken and constructed with the involvement and support of state and local government agencies. Multi-regional accessways provide parking for a minimum of 80 and a maximum of 200 cars, large restrooms with indoor showers and changing rooms, concession stands, and are accessible to the handicapped. It is recommended that where possible two acres of open space in addition to all required setback areas be provided for buffering, day use, nature study or similar purposes.

Reletter existing (h) and (i) as (i) and (j).

History Note: Statutory Authority G.S. 113A-124; 113A-134.3;
Eff. March 1, 1979
Amended Eff. March 1, 1988; March 1, 1985; July 1, 1982.

Original

15A NCAC 7M .0302 has been amended as published in 11:11 NCR 926-927 as follows:

.0302 DEFINITIONS

The primary purpose of the Public Beach and Coastal Waterfront Access program is to provide pedestrian access to the public trust waters for the 20 coastal counties.

~~(a)~~(1) "Ocean Beach Access" is defined to include the acquisition ~~and/or~~ and improvement of properties situated along the Atlantic Ocean for parking and public passage to the oceanfront. Beach access facilities may include, but are not limited to, parking areas, restrooms, showers, picnic areas, dressing/shower rooms, concession stands, gazebos, litter receptacles, water fountains, dune crossovers, security lighting, emergency and pay telephones, interpretive and public beach access signs, and other appropriate facilities.

~~(b)~~(2) ~~"Estuarine Water Beach Access"~~ "Coastal Waterfront Access" is defined to include the acquisition ~~and/or~~ and improvement of properties located in the ~~twenty~~ 20 county area under the Coastal Area Management Act (CAMA) ~~CAMA~~ jurisdiction ~~that are situated along estuarine waters as defined by the North Carolina Wildlife Resources Commission and the Division of Marine Fisheries for parking, boating and pedestrian access to estuarine waters.~~ that are coastal waterways to which the public has rights of access or public trust rights. ~~Estuarine water beach~~ Coastal Waterfront access facilities may include, but are not limited to parking areas, restrooms, showers, picnic areas, ~~boat ramps,~~ fishing piers, boardwalks, dressing/shower rooms, concession stands, gazebos, litter receptacles, water fountains, security lighting, emergency and pay telephones, interpretive and ~~public beach~~ coastal waterfront access signs, ~~gazebos, water fountains,~~ and other appropriate facilities.

~~(c)~~(3) "Inlet Beach Access" is defined to include the acquisition ~~and/or~~ and improvement of buildable and unbuildable properties situated along the confluence of estuarine and ocean waters for parking and public passage to the beach area. ~~Inlet beach access facilities may include but are not limited to parking areas, restrooms, litter receptacles, security lighting, emergency and pay telephones, and public beach access signs. Facilities should be sited to minimize potential destruction by movement of the inlet.~~ The constructoin of facilities other than parking, litter receptacles and public access signs is not encouraged.

(4) "Public Trust Waters" is defined in 15A NCAC 7H .0207(a).

~~(d)~~(5) ~~The term "beach" as used in these policies~~ "Beach" is defined as an area adjacent to the ocean extending from the mean low to the mean high water line and beyond this line to where either the growth of vegetation occurs or a distinct change in slope or elevation occurs, or riparian owners have specifically and legally restricted access above the mean high water line. This definition is intended to describe those shorefront areas customarily freely used by the public. ~~The following policies recognize public use right into the beach areas as defined but do not in any way require private property owners to provide public access to the beach.~~

~~(e)~~(6) ~~Local accessways~~ "Local Access Sites" are defined to include those public access points which offer minimal or no facilities. ~~facilities if any at all.~~ They are primarily used by pedestrians who reside within a few hundred yards of the site. Generally, these accessways are a minimum of ~~ten~~ 10 feet in width and provide only a dune crossover or pier, if needed, ~~and~~ litter receptacles and public ~~beach~~ access signs ~~and are for the use of pedestrians within a few hundred yards of the site.~~ Vehicle parking is generally not available at these access sites. However, bicycle racks may be provided.

~~(f)~~(7) ~~Neighborhood accessways~~ "Neighborhood Access Sites" are defined as those public access areas offering parking, usually for ~~five to twenty-five~~ 5 to 25 vehicles, a dune crossover or pier, litter receptacles and public ~~beach~~ access signs. Such accessways are typically 40 to 60 feet in width and are primarily ~~for the use of~~ used by individuals within the immediate subdivision or vicinity of the site. ~~If more than 15 parking spaces are provided, sanitation facilities should~~ Restroom facilities may be installed. ~~Portable sanitation facilities are the minimum acceptable; septic systems and vault privies, where appropriate, are preferred.~~

~~(g)~~(8) ~~Regional accessways~~ "Regional Access Sites" are of such size and offer such facilities that they serve ~~individuals,~~ the public from throughout an island or community including day visitors. These sites ~~are handicapped accessible and~~ normally provide parking for 25 to 80 vehicles, restrooms, a dune crossover, pier, ~~boat ramp,~~ foot showers, litter receptacles and public ~~beach~~ access signs. ~~It is recommended that where~~ Where possible one-half acre of open space in addition to all required setback areas should be provided for buffering, day use, nature study or similar purposes.

~~(h)~~(9) ~~Multi-regional accessways~~ "Multi-regional Access Sites" are generally larger than regional accessways but smaller than state parks. Such facilities ~~should~~ may be undertaken and constructed with the involvement and support of state and local government agencies. Multi-regional accessways provide parking for a minimum of 80 and a maximum of 200 cars, ~~large~~ restrooms with indoor showers and changing rooms, and concession stands. ~~stands, and are accessible to the handicapped. It is recommended that where~~ Where possible two acres of open space in addition to all required setback areas should be provided for buffering, day use, nature study or similar purposes.

(10) "Urban Waterfront Redevelopment Projects" improve public access to deteriorating or under utilized urban waterfronts. Such projects include the establishment or rehabilitation of boardwalk areas, shoreline stabilization measures such as the installation or rehabilitation of bulkheads, and the placement or removal of pilings for the purpose of public safety and increased access and use of the urban waterfront.

~~(i)~~(11) ~~Improvements, as related to beach access, are any~~ "Improvements" are facilities which are added to promote public access at a ~~specific~~ designated access site. The most common improvements include

dune crossovers, piers, boardwalks, litter receptacles, parking areas, restrooms, gazebos, bicycle racks and foot ~~showers, boat ramps, and public beach access signs.~~ showers.

~~(j)~~(12) ~~Maintenance~~ "Maintenance" is the proper upkeep and repair of ~~beach~~ public access sites and their facilities in such a manner that public health and safety is ensured. ~~Maintenance is to be a responsibility of the local government unless another suitable party is identified.~~ Where the local government uses or has used access funds administered by the North Carolina Coastal Management Program (NCCMP), it shall be the local government's responsibility to provide operation and maintenance of the facility for the usefule life of that facility.

(13) "Handicapped Accessible" is defined as meeting the standards of the State Building Code and federal guidelines for handicapped accessibility. Any facility constructed with these grant funds must meet State and Federal regulations for handicapped accessibility.

History Note: ~~*Statutory*~~ *Authority G.S. 113A-124; 113A-134.3;*
Eff. March 1, 1979;
Amended Eff. ~~*August 1, 1998;*~~ *March 1, 1988; March 1, 1985; July 1, 1982.*

January 1, 1998; RC

Original
1/20/09

15A NCAC 07M .0302 is amended with changes as published in 23:03 NCR 209-210 as follows:

15A NCAC 07M .0302 DEFINITIONS

~~The primary purpose of~~ As used in this Section: the Public Beach and Coastal Waterfront Access program is to provide ~~pedestrian~~ public access to the public trust beaches and waters ~~for~~ in the 20 coastal counties.

(1) "Ocean Beach Access" ~~is defined to include~~ includes the acquisition and improvement of properties ~~situated along~~ adjacent or proximate to the Atlantic Ocean for parking and public passage to the oceanfront. ~~Beach access facilities may include, but are not limited to, parking areas, restrooms, showers, picnic areas, dressing/shower rooms, concession stands, gazebos, litter receptacles, water fountains, dune crossovers, security lighting, emergency and pay telephones, interpretive and public beach access signs, and other appropriate facilities.~~

(2) "Coastal Waterfront Access" ~~is defined to include~~ includes the acquisition and improvement of properties located in the 20 county area under the Coastal Area Management Act (CAMA) jurisdiction that are adjacent or proximate to coastal waterways to which the public has rights of access or public trust rights. ~~Coastal Waterfront access facilities may include, but are not limited to parking areas, restrooms, showers, picnic areas, fishing piers, boardwalks, dressing/shower rooms, concession stands, gazebos, litter receptacles, water fountains, security lighting, emergency and pay telephones, interpretive and coastal waterfront access signs, and other appropriate facilities.~~

(3) "Inlet Beach Access" ~~is defined to include~~ includes the acquisition and improvement of ~~buildable and unbuildable~~ properties ~~situated along the confluence of estuarine and ocean waters for parking and public passage to the beach area.~~ located within Inlet Hazard Areas as defined in 15A NCAC 07H .0304(3). ~~The construction of facilities other than parking, litter receptacles and public access signs is not encouraged.~~

(4) "Public Trust Waters" is defined in 15A NCAC 7H .0207(a).

(5) "Beach" is defined as an area adjacent to the ocean extending landward from the mean low ~~to the mean high~~ water line ~~and beyond this line~~ to a point where either the growth of vegetation occurs or a distinct change in slope or elevation ~~occurs,~~ alters the configuration of the landform, whichever is farther landward, or riparian owners have specifically and legally restricted access above the mean high water line. This definition is intended to describe those shorefront areas customarily freely used by the public.

(6) "Local Access Sites" ~~are defined to~~ include those public access points which offer minimal or no facilities. ~~They are primarily used by pedestrians who reside within a few hundred yards of the site.~~ Generally, these accessways ~~are a minimum of 10 feet in width and~~ provide only a dune crossover or pier, if needed, litter receptacles and public access signs. Vehicle parking is generally not available at these access sites. However, bicycle racks may be provided.

(7) "Neighborhood Access Sites" ~~are defined as~~ includes those public access areas offering parking, usually for 5 to 25 vehicles, a dune crossover or pier, litter receptacles and public access signs. ~~Such accessways are typically 40 to 60 feet in width and are primarily used by individuals within the immediate subdivision or vicinity of the site.~~ Restroom facilities may be installed.

(8) "Regional Access Sites" are of such size and offer such facilities that they serve the public from throughout an island or community including day visitors. These sites normally provide parking for 25 to 80 vehicles, restrooms, a dune crossover, pier, foot showers, litter receptacles and public access signs. ~~Where possible one-half acre of open space in addition to all required setback areas should be provided for buffering, day use, nature study or similar purposes.~~

(9) "Multi-regional Access Sites" are generally larger than regional accessways but smaller than state parks. Such facilities may be undertaken and constructed with the involvement and support of state and local government agencies. Multi-regional accessways provide parking for a minimum of 80 ~~and a maximum of 200 cars,~~ vehicles, restrooms with indoor showers and changing rooms, and concession stands. ~~Where possible two acres of open space in addition to all required setback areas should be provided for buffering, day use, nature study or similar purposes.~~

(10) "Urban Waterfront ~~Redevelopment~~ Access Projects" improve public access to deteriorating or under utilized urban waterfronts. Such projects include the establishment or rehabilitation of boardwalk areas, shoreline stabilization measures such as the installation or rehabilitation of bulkheads, and the placement or removal of pilings for the purpose of public safety and increased access and use of the urban waterfront.

(11) "Improvements" are facilities ~~which~~ that are added to promote public access at a designated access site. The most common improvements include dune crossovers, piers, boardwalks, litter receptacles, parking areas, restrooms, gazebos, boat ramps, canoe/kayak launches, bicycle racks and foot showers.

(12) "Maintenance" is the ~~proper~~ upkeep and repair of public access sites and their facilities in such a manner that public health and safety is ensured. Where the local government uses or has used access funds administered by the North Carolina Coastal Management Program (NCCMP), ~~it shall be~~ the local ~~government's responsibility to~~ government shall provide operation and maintenance of the facility for the useful life of that facility. The useful life of a facility shall be defined in the individual grant contract.

(13) "Handicapped Accessible" is defined as meeting the standards of the State Building Code ~~and federal guidelines~~ for handicapped accessibility. ~~Any facility constructed with these grant funds must meet State and Federal regulations for handicapped accessibility.~~

History Note: *Authority G.S. 113A-124; 113A-134.3;*
Eff. March 1, 1979;
Amended Eff. ~~*December 1, 2008;*~~ *January 1, 1998; March 1, 1988; March 1, 1985; July 1, 1982.*
February 1, 2009;