

No. 409P15

THIRD DISTRICT

THE SUPREME COURT OF NORTH CAROLINA

GREGORY P. NIES and DIANE S. NIES,)
)
 Plaintiffs,)
)
 v.)
)
 TOWN OF EMERALD ISLE, a North)
 Carolina Municipality,)
)
 Defendant.)

From Carteret County
COA 15-169

**RESPONSE TO MOTION TO DISMISS APPEAL
BASED ON SUBSTANTIAL CONSTITUTIONAL QUESTION**

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals decided, in a published opinion, that Defendant-Appellee Town of Emerald Isle (Town) acted constitutionally in implementing ordinances allowing the public and Town itself to drive and park on privately owned dry sand areas, including the Nieses', without owner consent, just compensation, or proof of an easement. *Nies v. Town of Emerald Isle*, ___ S.E.2d ___, 2015 WL 8272743 (N.C. Ct. App. Nov. 17, 2015). The lower court concluded, for the first time in the state's history, that the state's public trust doctrine applies to dry sand property and functions as a total exception to the government's constitutional duty to pay for private land it occupies and takes.

Plaintiffs-Appellants Diane and Gregory Nies (Nieses) have appealed to this Court as of right under North Carolina General Statutes (N.C.G.S.) § 7A-30(1), on the ground that the lower court decision raises a substantial constitutional question.¹ The Town has now moved to dismiss the appeal, but its motion is baseless.

The Court of Appeals' decision strips countless coastal property owners of their most fundamental constitutional property right—to exclude unwanted government and public intrusions—and converts privately owned dry land along North Carolina's Atlantic coast into public property, without just compensation, on the basis of a novel

¹ The Nieses have also filed a Petition for Discretionary Review.

public trust doctrine theory. This dispute accordingly involves highly important issues, including constitutional ones.

Other state supreme courts have addressed these issues, typically upholding the constitutional right to exclude against expansive impositions of the public trust doctrine. However, this Court has not yet considered the existence and constitutional strength of the right to exclude when it comes to dry beach ownership within North Carolina. This case is an appropriate vehicle, and the Town has offered nothing to refute this truth. The fact that this case also involves important state property (public trust) issues hardly makes it a non-constitutional issue. “[C]ourts must often decide what state property rights exist in nontakings contexts . . . [a]nd indeed they must decide it to resolve claims that legislative or executive action has effected a taking.” *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 727 (2010) (citation omitted). Indeed, the presence of significant public trust issues only enhances the importance of the constitutional right to exclude issue. The Court should certify the appeal.

ARGUMENT

I. THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL ISSUE CONCERNING THE RIGHT TO EXCLUDE OTHERS FROM PRIVATE BEACHFRONT LAND

The Town argues the appeal should be dismissed because the case depends to some extent on important state property issues; *i.e.*, whether and to what degree the public trust doctrine burdens the Nieses' private, dry sandy land.² This argument has no merit.

A. This Case Involves a Fundamental Constitutional "Right to Exclude" Issue

There is no doubt that the public trust doctrine is an important issue in this case. However, it is important to recall how the public trust issue arose. The Town brought the issue into play as a defense to the Nieses' assertion of a violation of a constitutional right—their right to exclude and control access to their private dry sandy land or be compensated. This right is a fundamental constitutional right. David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39 (2000) (collecting cases establishing importance and constitutionally protected nature of the

² The Town overstates the extent to which the public trust issue controls the takings issue in this matter. Even if the public trust doctrine applies to private, dry sandy land (it does not), the Nieses have argued that the Town took their property by imposing additional (non-public trust) burdens on their land, without compensation. The Town's motion ignores this aspect of the Nieses' claim.

right); Jace C. Gatewood, *The Evolution of the Right to Exclude—More Than a Property Right, a Privacy Right*, 32 Miss. C. L. Rev. 447, 449 (2014) (“the right to exclude is as historically fundamental to the concept of private property as private property is to the concept of ownership”).

The constitutional right to exclude others is especially important in the beach context, where there are competing demands for land. *See Severance v. Patterson*, 370 S.W.3d 705, 724 (Tex. 2012) (noting the State’s attempt to impose public access on dry beach areas without proof of a legitimate easement “could divest private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners”); *Opinion of the Justices*, 139 N.H. 82, 93, 649 A.2d 604, 611 (1994) (rejecting law granting public access to private dry sandy beach lands because “[t]he interference with private property here involves a wholesale denial of an owner’s right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.” (citations omitted)); *Opinion of the Justices*, 365 Mass. 681, 689, 313 N.E.2d 561, 568 (1974) (same); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (emphasizing importance of constitutional right to exclude others in rejecting expansion of public trust).

In asserting the public trust doctrine as a defense to the Nieses’ takings claims, the Town’s underlying contention is that citizens owning private, dry sand parcels

along North Carolina's Atlantic coast do not have a constitutional right to exclude others, or to obtain just compensation (unlike other citizens) when the right is taken. The Nieves disagree. The dispute thus raises substantial constitutional *and* property rights issues.

If the issues here were insubstantial, as the Town contends, these types of cases would rarely be taken up by state supreme courts charged with reviewing important issues. But, in fact, they are almost always decided at that level. *See, e.g., Opinion of the Justices*, 139 N.H. 82, 649 A.2d 604 (reviewing public trust takings case under Article VI, Section 3, of the Maine Constitution, which allows advisory opinions for “important questions of law”); *Opinion of the Justices*, 365 Mass. 681, 313 N.E.2d 561 (reviewing public trust takings issue under Article 2 of Chapter 3, Part II of the Massachusetts Constitution, which allows advisory opinions for “important questions of law”).³

No court has ever suggested a “right to exclude” takings case is constitutionally insubstantial because of subsidiary state property issues. The Supreme Court has rejected a similar argument, *Stop the Beach*, 560 U.S. at 727, and the Town cites no contrary authority. Indeed, the only case it cites is *Bundy v. Ayscue*, 276 N.C. 81, 171

³ The last beach takings case taken up by the Supreme Court hinged in part on state property law issues, but the Court still considered the constitutional takings issue substantial enough to warrant review. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 557 U.S. 903 (2009) (granting certiorari).

S.E.2d 1 (1969). But that case involved a challenge to a denial of a motion to set aside a breach of contract judgment on grounds of mental incompetency. It is hardly in the same class as the decision here: a published opinion holding that the Town may convert private dry beach land into government beach property, without just compensation.

The constitutional right to exclude issue in this case is important, particularly because it arises in the beach access context, and the presence of controversial public trust questions only heightens its importance. *See Opinion of the Justices*, 139 N.H. 82, 649 A.2d 604. Unfortunately, this Court has never addressed these issues. It has never addressed the role of the right to exclude in takings analysis nor its viability on private dry beaches. It has never addressed its effect on the public trust doctrine. It should certify the appeal to do so.

B. Commentary Confirms That Public Trust Takings Cases Like This One Raise Substantial Issues

Few subjects have garnered as much attention from legal commentators as the interaction between the Takings Clause and the public trust doctrine. Commentators of all persuasions have deemed this issue important enough to justify copious amounts of debate—and ink. *See* David L. Callies & J. David Breemer, *Selected Legal 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); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375 (1996); 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 (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).

North Carolina is not immune from the great interest in takings issues in the public trust context. Indeed, the issue is particularly relevant in this state because this Court has not yet addressed whether it is a taking to authorize public access to private dry beachfront land under the public trust doctrine. *See* Valerie B. Spalding, *The Pearl in the Oyster: The Public Trust Doctrine in North Carolina*, 12 Campbell L. Rev. 23, 66 (1989); Alice Gibbon Carmichael, Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. Rev. 159, 162-75, 185-91 (1985); 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 (2000).

This case offers this Court the opportunity to clarify one of the great, unsettled issues in North Carolina law: is it a taking and violation of a property owner's fundamental right to exclude trespassers if the local government and public (with government permission) occupies and uses private, dry sand parcels as a public beach, without owner consent or compensation—or proof of a prescriptive easement. *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 404 S.E.2d 677 (1991). There is nothing insubstantial about this issue. *Chapel Hill Title and Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 653, 669 S.E.2d 286, 288 (2008) (Brady, J., concurring) (emphasizing “the importance of property rights and the duty the government has to compensate individuals when it chooses to take land for public use”).

The Court should deny the Town's motion and certify the appeal.

Respectfully submitted, this 4th day of January, 2016.

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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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellants has certifies that the foregoing brief, which is prepared using a proportional font, is less than 1,787 words (excluding cover, certificate of service, and this certificate of compliance, and appendixes) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the Appellee by electronic mail and by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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RESPONSE

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