No. COA 15-169 THIRD DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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

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PLAINTIFFS-APPELLANTS' BRIEF

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PLAINTIFFS-APPELLANTS' BRIEF

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ISSUES PRESENTED

I. DID THE TOWN UNCONSTITUTIONALLY TAKE THE NIES' BEACHFRONT PROPERTY BY ADOPTING AND APPLYING AN ORDINANCE THAT IMPOSES A TWENTY-FOOT-WIDE TOWN VEHICLE LANE ON THEIR LAND; A ROAD ON WHICH GARBAGE TRUCKS, POLICE, AND CONSTRUCTION VEHICLES REGULARLY DRIVE?

II. DID THE TOWN UNCONSTITUTIONALLY TAKE THE NIES' PROPERTY BY ADOPTING AND APPLYING AN ORDINANCE THAT AUTHORIZES THE PUBLIC TO DRIVE AND PARK ON THE NIES' PROPERTY BETWEEN SEPTEMBER AND MAY AFTER PAYING A FEE TO THE TOWN?

III. MAY THE TOWN EXTEND THE PUBLIC TRUST DOCTRINE—WHICH HISTORICALLY PROTECTS PUBLIC RIGHTS IN STATE-OWNED TIDELANDS SEAWARD OF THE MEAN HIGH WATER MARK—TO THE NIES' PRIVATE, DRY UPLANDS, AND UNCONSTITUTIONALLY OCCUPY THE LAND UNDER COLOR OF THAT DOCTRINE?

INTRODUCTION

> In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.

Hendler v. United States, 952 F.2d 1364, 1374 (Fed. Cir. 1991).

When Greg and Diane Nies (Nies) bought a beachfront home in Emerald Isle, North Carolina, in 2001, they acquired a fee simple title to land free of any unusual recorded easements allowing the government or strangers to enter their property. Their lot ran from inland of the first line of dunes on the landward side to the mean high water mark on the seaward side, and included the dry sand area between those markers. (R p 611) (*See* App. 1). The Nies enjoyed their home and dry sand backyard. (R pp 285-286).

Their property—and their experience—is different now. In 2010, the Town passed an ordinance giving itself an exclusive driving lane on a twenty-foot strip of the Nies' dry sand property closest to their home. (R p 98). Town vehicles of all sorts now consistently cruise across the Nies' property, destroying vegetation, and leaving deep ruts that make it difficult and unsafe for the Nies to walk from their home to the ocean. (R pp 314-316, 463). In 2013, the Town passed another ordinance that expanded permitted public beach driving onto the entirety of the Nies' dry sand property for the first time. (R pp 541, 549). People drive and park on the Nies'

property between September and May (the permitted driving period) leaving behind trash, and bringing more Town service vehicles to pick up after them. (R pp 311-312; 668-681) (*See* App. 2-15).

Typically, the government condemns property and pays just compensation when it creates or expands a highway on private land. But the Town denies this obligation here, despite its ordinances' undisputed effect in imposing vehicle traffic on the Nies' land. The Town claims that its acts do not take the Nies' property rights because (in its view) their title to dry sandy land has always been subject to an unwritten "public trust doctrine" encumbrance which allows the Town to occupy the land at will. This position is striking in its breadth, as it essentially transfers all private land lying seaward of the dunes now and that which will become seaward of the dunes if erosion causes them to migrate, to the public. But more importantly, it is legally unsupportable. State courts have invariably held that the public trust doctrine—which arises from the State's title to tidelands seaward of the mean high water mark—terminates at the mean high water mark. No court has applied it to landward, private dry sand areas like those here. The doctrine has never allowed the government to pick a slice of private land for its exclusive use.

The Nies' property is fee simple land, and their property rights are constitutionally protected. This means the Town has no option but to pay the Nies for

making their land—their backyard—into the first municipal road and public parking area near the sea.

STATEMENT OF THE CASE

The Nies commenced this action in the Carteret County Superior Court in December, 2011, by filing an Inverse Condemnation Memorandum of Action (MOA) under N.C.G.S. § 40A-51(b), and a related complaint.[1] (R p 8). These pleadings alleged the Town had taken the Nies' property in violation of their state and federal constitutional rights.

The Town attempted to remove the complaint to the federal court for the Eastern District of North Carolina (R pp 102-104), but that court remanded the entire case to the state Superior Court. (R pp 147-158). The Nies' case was then separated from the other plaintiffs and they proceeded to litigate on a pro se basis.

On August 25, 2014, Superior Court Judge Jack Jenkins granted the Town's motion for summary judgment on all the Nies' claims. (R p 757). Judgment was filed on August 26, 2014. (*Id.*). The Nies filed their notice of appeal on September 17, 2014. (R p 758).

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[1] The complaint included additional plaintiffs, George M. Tederick and Maria Tederick, John M. Foster and Barbara T. Foster, Gregory A. Watts, and Judy Swink Watts. None are parties to this appeal.

A transcript of the August 4, 2014, summary judgment hearing was ordered on October 2, 2014, and delivered on November 21, 2014. (R p 763). The proposed record was served on the Town on December 17, 2014; and timely settled by January 26, 2015. (*Id.*). The record was filed in the Court of Appeals on February 11, 2015, and the case docketed on February 18, 2015.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Judge Jenkins' order granting summary judgment to the Town on all the Nies' claims is a final judgment and therefore appealable to the Court of Appeals pursuant to N.C.G.S. § 7A-27(b).

STATEMENT OF FACTS AND PROCEDURE

A. The Nies' Property

After vacationing in Emerald Isle, North Carolina, for twenty years, the Nies finally bought a parcel of residential beachfront property in the Town in 2001. (*See* R p 105 ¶ 1 (Town admission)). The Nies acquired the property, 9909 Shipwreck Lane, through a fee simple deed. Since the purchase, the Nies have personally lived in the home for much of each year, though they occasionally rent it out during summer months. (*See* R p 8 ¶ 1).

Under both their deed and the law of this state, the Nies' property is bounded on the seaward side by the mean high water mark. (R p at 53 (survey); *id.* p 611 (survey)); *see generally*, *West v. Slick*, 313 N.C. 33, 60, 326 S.E.2d 601, 617 (1985) ("In North Carolina private property fronting coastal water ends at the high-water mark . . . ."). Tidelands seaward of the mean high water mark boundary (and of the Nies' dry sand property), are State-owned property. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970).

The Nies' title thus includes dry beach land lying between the mean high water mark and the first line of vegetation or dunes. (R pp 53, 611). This area is effectively the Nies' backyard. (R p 611). A survey accompanying the Nies' title shows that their dry sandy land measures about 150 feet in width (from mean high water mark to vegetation line) and 76 feet in length (parallel to the Atlantic), comprising approximately 11,000 square feet. (R p 611).

B. The Town Tries To Secure a Public Access Easement as Part of a Beach Re-nourishment Project

There is no recorded or adjudicated easement on the Nies' title that gives the Town or public the right to enter their property. (R p 611). Although the Town attempted to secure such an easement as part of a 2003-2005 Beach Renourishment Project (Project), it was unable to do so.

The Project began along Emerald Isle shores in 2003. To carry it out, the Town sought easements from beachfront owners, like the Nies, who owned dry sandy lands adjacent to the Project. In letters to owners (R pp 55-57), the Town provided a form easement that would have given the Town a perpetual easement. (*Id.* p 59). The Nies declined to sign the proposed easement, however, and instead executed a temporary easement that expired on March 31, 2005. (R p 61). Apparently finding this inadequate (R pp 630-631), the Town filed a complaint and a declaration of taking against the Nies in the Carteret County Superior Court, to obtain a more expansive easement by eminent domain. (R pp 75, 634-636). In so doing, the Town elected to use the expedited "quick take" condemnation procedure.[2]

Through the quick take procedure, the Town immediately condemned a perpetual easement over the dry sand portion of the Nies' property that gave access to the property to the Town and public. (R pp 633-635). The Nies contested the taking in Superior Court (R pp 637-645), but the court did not act before the Town used the easement and completed the Project in 2005.[3]

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[2] The quick take law allows a condemnor to take immediate possession of property upon filing a complaint and making a deposit of just compensation. N.C.G.S. § 40A-42(a)(1). The Town made no deposit for the Nies' taking.

[3] The Project did not raise any of the Nies' land above the mean high water mark, nor do the Nies' claims pertain to State-owned wet beach areas that were raised above the mean high water mark.

Approximately a year later, the Superior Court issued a "Consent Order Modifying Beach Re-nourishment Easement," (R pp 652-662) that significantly reduced the easement the Town acquired through the quick take procedure. The modified easement allowed the Town to access the Nies' dry beach property only to inspect and restore erosion damage from major storms. (R pp 659-660). It did not give the public a right to access the Nies' property, nor did it give the Town itself a right to use the property for general municipal purposes, such as driving. (R pp 659-661). This limited easement's landward boundary is 100 feet inland of the mean high water mark existing at the time of the execution of the easement. (R p 77). The easement declares that it is not to be construed to interfere with the Nies' right to use their property. (R p 661). The Town has acquired no other easement since then.

C. The Town Enacts and Enforces Laws Authorizing Public and Town Driving on the Nies' Land

1. The Town's Creation of a Twenty-Foot Express Lane on the Nies' Property

In 2010, the Town enacted a first-of-its-kind law giving Town officials an exclusive driving lane along dry beachlands owned by private citizens like the Nies. (R p 98). The preliminary sections of the law, entitled "Unattended Beach Equipment Prohibited" (Beach Gear Ordinance), restricted the placement of beach equipment during the night hours on the "beach strand," defined as "all land between the low water mark of the Atlantic Ocean and the base of the frontal dunes." (*Id.*). But

subsequent sections went further. They barred placement of beach equipment at all times on a strip of sand lying between the dunes and twenty feet seaward of the dunes, so Town vehicles could freely drive along this area.

The ordinance specifically stated:

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

(R p 98 (Town Code § 5-102(a)) (emphasis added)). It is undisputed that the strip of land lying "twenty feet seaward of the base of the frontal dunes" includes privately owned dry sand areas located landward of the mean high water mark, such as the Nies' dry sand property. (R p 611).

In 2011, the Town amended the law to make the "twenty-foot from the dunes" equipment ban applicable only from May 1 through September 14. (R p 545 (Town Code § 5-19(b))). In 2013, the Town amended the ordinance again. This amendment made no substantive changes but reiterated that the law was intended "for unimpeded travel by emergency vehicles and town service vehicles on the public trust beach area." (R p 541 (Town Code § 5-1); *id.* p 545 (Town Code § 5-19(a))).

A provision in the Beach Gear Ordinance allows beach owners to seek an exception from the prohibition on the overnight placement of beach equipment (R

p 544 (Town Code § 5-18(d))),[4] but the ordinance does not include any exception to the Town's "twenty-foot from the dunes" vehicle travel lane or to Town's asserted driving rights in general. (*See id.*).

Official Town vehicles of all varieties have driven on the Nies' land in the new twenty-foot Town lane, and regularly continue to do so. (R pp 311-312, 461-463 (Nies deposition)). "[G]arbage pickup trucks go back and forth three or four times a day. There are actually three different trucks that come by and they do that two or three times a day." (R p 461:21-24). "The other vehicles are the—the police SUV's. . . . They go up and down. And the—the third class of vehicle is the four-wheeler, the quads." (R pp 463:2-5). "[T]hey stop and . . . park on what's clearly . . . our property: beach patrol, police, and they'll just sit and be there." (R p 463:13-15). Walking on the area is unsafe and sometimes impossible for the older Nies. (R p 314:15-18 ("I would be run over like, you know, road kill"); *id.* p 315:5-12 ("[T]hey made what was the equivalent of a three-foot cliff, you'd need a stepladder to get up and down into the rest of our property because they wore such a deep rut. I mean, swear to God, we had to go to somebody else's house to get out of the beach because we couldn't get from one end of our property to our house.")).

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[4] The Town issued an exception from the night beach equipment ban to the Nies twice in 2011. (R p 264).

Moreover, because the Town's unimpeded travel lane is defined on the landward side by an ambulatory boundary (dunes), that lane—and the associated Town traffic—moved further into the Nies' lot after storms displaced the dunes inland. (R p 738 (Nies affidavit)). For instance, in 2011, Hurricane Irene moved the dunes inland by approximately thirty feet. (*Id.*). Immediately afterward, the Town began driving "vehicles over the whole [newly eroded] area including some with caterpillar treads . . . municipal vehicles were already using an additional 30 feet of our property." (*Id.*).

The Town never had a law of this kind before 2010. To the Nies' knowledge, no other North Carolina town has laws commandeering a strip of private, dry beach land for Town vehicles. The Nies have never consented to the Town's use of their private property.

2. <u>The Town's Creation of a Public Toll Road on the Nies' Property</u>

The Town has also authorized the general public (as well as Town officials) to drive on the Nies' dry beach land pursuant to a "Beach Driving Ordinance." Historically, the ordinance permitted public driving on

> the foreshore and area within the town consisting primarily of hardpacked sand and lying *between the waters of the Atlantic Ocean . . . and a point ten (ten) feet seaward from the foot or toe of the dune closest to the waters of the Atlantic Ocean . . . .*

(*See* R p 87 (2010 Ordinance) (emphasis added)). It is undisputed that the area lying between the hardpacked sand (the wet beach) and ten feet from the dunes includes privately owned dry sand property, such as that owned by the Nies. (R p 611). The Town issued beach driving permits to the public under this law until 2013.

In 2013, while the Nies' case was pending, the Town substantively amended the challenged Beach Driving Ordinance. The new ordinance expanded the driving area to the "public trust beach" defined as "*all land and water area between the Atlantic Ocean and the base of the frontal dunes*." (*See* R pp 541, 549). The amendment thus deleted the prior public road boundary set at ten feet seaward of the dunes. As a result, the new public driving lane now takes in all of the Nies' dry sand property from the dunes to the mean high water mark.

Under the 2013 law, the public is allowed to drive on dry sandy beach land between September and May (R p 88), upon paying a fee to the Town and obtaining a permit.[5] (*Id.*). The ordinance gives the Town manager discretion to control public vehicle use on private land.

There is no dispute that the Town has issued many permits allowing the public to drive on the Nies' land between the mean high water mark and dunes. In 2014, the

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[5] The current permit fee is $50 for Emerald Isle residents under 65 years of age, and $100 for non-residents. Emerald Isle residents 65 years and older are permitted to drive on the road without paying a fee.

Town issued 1,246 driving permits for this area and generated $78,000 in income in so doing. (R p 682). Under authority of these Town permits, the public regularly drives on the Nies' property, leaving trash and tire ruts in their wake. (R pp 443:18; 462, 661-682 (photos)). "[I]n the permitted driving time, [the Nies] get a lot of people who see that as their own personal dirt track." (R p 462:2-4). The driving public is not "just fisherman," but people "hotdogging" in their cars and trucks. (R p 462:8-12).

The Beach Driving Ordinance also sanctions governmental use of the Nies' private property. The ordinance allows "[R]egulatory, contract, and research activities conducted by government officials and researchers," and "construction activities specially authorized by the Town Manager," to drive on dry beaches without seasonal (Sept.-May) limitation. Town Code § 5-65.

D. Legal Procedure

In 2011, the Nies filed their complaint. (R p 3). It asserted inverse condemnation[6] claims (R p 3-38), a Law of the Land Clause claim under the North

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[6] The doctrine of "inverse condemnation" holds that when property is "*taken* for a public purpose by a[n] . . . agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner . . . may maintain *an action* to obtain just compensation therefor." *City of Charlotte v. Spratt*, 263 N.C. 656, 663, 140 S.E.2d 341, 346 (1965).

Carolina Constitution,[7] a Fifth and Fourteenth Amendment takings claim under the U.S. Constitution (R p 34), a 42 U.S.C. § 1983 claim as a statutory vehicle for the Nies' federal constitutional claims (R p 35), and a claim that state law does not authorize the Town or public use of the Nies' property. (R p 36-37). The complaint sought a declaration that the Town had unconstitutionally taken the Nies' property through the Beach Gear Ordinance and Beach Driving Ordinance, an injunction, and damages. (R pp 37-38).

After the Town removed the complaint to the federal court (R pp 102-104), the court remanded the case to state court. It did so because the federal takings claim was not ripe for federal review without prior state court litigation. (R pp 122; 147-159). In so remanding, the court awarded the Nies costs and attorneys fees for the improper removal. (R p 160).

When the case returned to the Superior Court, the Nies amended their complaint by adding a Fourth Amendment claim (R p 161), a violation of state law claim based on improper establishment of a municipal service district (R p 168), and a breach of contract claim (R p 180). The Nies have dropped these claims and they are not at

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[7] "[T]he North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation," *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989). But such a provision is inferred as "a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Id.* p 363, 384 S.E.2d at 14.

issue here. The court also issued an order separating the Nies' case from the other plaintiffs. (R p 219).

The Town eventually filed a motion for summary judgment on the Nies' claims. (R p 497). The Nies opposed the motion as pro se plaintiffs (R p 572) and asserted in their opposition that they were "entitled to *Summary Judgment in their favor on all of their claims*." (R pp 573, 607). A hearing was held before Superior Court Judge Jack Jenkins on August 4, 2014. On August 25, 2014, the court issued an order granting the Town summary judgment on all of the Nies' claims. (R p 757). The Nies timely appealed (R p 758), counsel made their appearances (R pp 760, 768), and the record was properly filed.

SUMMARY OF ARGUMENT

The one incontestable case of an unconstitutional taking[8] occurs when the government physically occupies private property, or authorizes the public to do so, without just compensation. *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 341, 757 S.E.2d 466, 473 (2014). Here, it is clear that the Town's Beach Gear Ordinance and the Beach Driving Ordinance authorize a physical occupation of the

[8] The framework for assessing a taking under article I, section 19, of the North Carolina Constitution is substantially the same as that governing Fifth Amendment takings claims. 325 N.C. at 371-72, 384 S.E.2d at 19.

Nies' property by imposing a Town vehicle express lane and public road on the Nies' land.

The effect of the Town's Beach Gear Ordinance in imposing a twenty-foot road on private dry sand areas near the dunes is uncontested. The record is clear that the strip of occupied land includes the Nies' property (R p 611), and that the Town regularly drives there. (R pp 461-463, 738). Similarly, there is no dispute the Beach Driving Ordinance allows the general public to drive on private dry sand areas, including that owned by the Nies, and that the Town has in fact issued permits for this to occur. (R p 682). The Town has never paid the Nies for the right to maintain either a Town land or public road on the Nies' property. Therefore, given these undisputed facts, the Town's laws unconstitutionally invade and take the Nies' property, as a matter of law.

The Town contends, however, that its acts simply implement an unwritten public easement that has always burdened the Nies' dry beach title under the state's common law public trust doctrine, and therefore that it has taken nothing from the Nies. While the public trust doctrine has historically protected the public right to access and use State-owned tidelands, the Town contends the doctrine applies to privately owned dry upland areas in Emerald Isle, and authorizes the Town to

physically use those private areas, without the consent of the owners or payment of compensation.

The Town is mistaken. North Carolina courts have never extended the public trust doctrine and related public beach rights landward of the mean high water mark that serves as the inland boundary of State-owned beaches. *West*, 313 N.C. at 60-61, 326 S.E.2d at 617. N.C.G.S. § 77-20 does not change this common law rule, it codifies it. N.C.G.S. § 77-20(d), (e).

Here, it is undisputed that the strip of dry sand land on which the Town's laws allow Town and public driving lies wholly landward of the mean high water line. (R p 611). This land is accordingly not within the public trust. *Id.* The Nies therefore held all normal incidents of fee simple title to the area of their land the Town laws open up for driving, including the right to control and deny access to others, until the Town invaded the land under its Beach Gear Ordinance and Beach Driving Ordinance. That invasion thus divested them of their property rights. *Opinion of the Justices*, 139 N.H. 82, 91, 649 A.2d 604, 609-10 (1994) (statute extending a public beach easement to the vegetation line and on private dry beach land caused an unconstitutional taking).

Even if the public trust doctrine has always encumbered the Nies' dry beach land (it has not), it would not authorize the Town's ordinances and their imposition of an "unimpeded" Town driving lane and public road on the Nies' land. The public

trust doctrine does not permit the government to take exclusive control of an area of private property, and it does not allow public driving and parking on private land. Indeed, any public trust easement on private land must respect and allow some reasonable use of the area by the landowner. *Hildebrand v. Southern Bell Telephone & Telegraph Co.*, 219 N.C. 40, 214 S.E.2d 252, 256 (1941) (when an easement holder unreasonably increases the use of an easement, it takes property). The Town's unimpeded vehicle and public driving laws fail this principle. Therefore, in exceeding the scope of any public trust easement, the Town laws take the Nies' property even if the public trust happens to apply.

In short, since the Town cannot bear its burden to prove that its Beach Gear Ordinance and Beach Driving Ordinance simply implement a pre-existing public trust limitation on the Nies' title, those laws have taken the Nies' property. Indeed, in the end, this case is not that much different from basic eminent domain cases in which the government seeks to put a road on private land. It can do so, of course, but only if it pays just compensation. *Town of Morgantown v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) ("Our Constitution, art. I, sec. 17, requires payment of fair compensation for the property so taken. This is the only limitation imposed on sovereignty with respect to taking."). The Court should therefore reverse the judgment of the Superior Court in favor of the Town and grant summary judgment to the Nies on all their federal and state law takings claims.

ARGUMENT

I. THE TOWN'S ORDINANCES UNCONSTITUTIONALLY AUTHORIZE THE PHYSICAL INVASION OF THE NIES' PRIVATE, DRY SAND PROPERTY BY TOWN AND PUBLIC VEHICLES

A. The Authorization of an Uncompensated Invasion of Private Land Is a Per Se Taking

1. Standards of Review

This case is here on review of a summary judgment order. Summary judgment is proper if there are no genuine issues of material fact and a party is entitled to judgment as a matter of law.[9] *Lawyer v. City of Elizabeth City*, 199 N.C. App. 304, 306, 681 S.E.2d 415, 417 (2009). The applicable law is that pertaining to unconstitutional takings.

Takings tests vary depending on whether the challenged imposition is a physical invasion of property or a regulatory restriction on the use of property. *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 110 (1982) (A "taking" includes " 'entering upon private property for more than a momentary period' " and

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[9] Although the Nies did not formally move for summary judgment in the trial court, summary judgment may be entered in favor of any party. *See* N.C. R. Civ. P. 56(c); *Greenway v. N.C. Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 314, 241 S.E.2d 339, 343 (1978). Moreover, the Nies specifically requested judgment in their opposition to the Town's Motion and at the hearing of August 4, 2014.

" 'devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.' " (quoting *Penn v. Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950))). While regulations limiting the allowable uses of property are often gauged for constitutionality under a balancing approach, those causing a physical invasion are per se unconstitutional. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S. Ct. 3164, 3175-76, 73 L. Ed. 2d 868 (1982). An uncompensated physical taking violates the Constitution "'without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner.'" *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32, 107 S. Ct. 3141, 3146, 97 L. Ed. 2d 677 (1987) (quoting *Loretto*, 458 U.S. at 434-35, 102 S. Ct. at 3175-76).

A per se physical taking occurs when the government itself decides to take over private land, such as when it devotes "private property to public use as a highway." *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 456 (1837) (per curiam). Yet, it also occurs when the government authorizes third parties to access and use private property. *Nollan*, 483 U.S. at 832, 97 L. Ed. 2d at 3146 (a physical taking occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed"). The imposition of an uncompensated public easement is as prohibited as outright governmental

confiscation. *Kaiser Aetna v. United States*, 444 U.S. 164, 180, 100 S. Ct. 383, 393, 62 L. Ed. 2d 332 (1979) ("[I]f the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *Preseault v. I.C.C.*, 494 U.S. 1, 24, 110 S. Ct. 914, 928, 108 L. Ed. 2d 1 (1990) (same).

The strict, per se takings standard applicable to public easements and other invasions of private land arises, at least in part, from the fact that such invasions eviscerate the owner's fundamental right to exclude non-owners from the land, "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan v. City of Tigard*, 512 U.S. 374, 393, 114 S. Ct. 2309, 2320, 129 L. Ed. 2d 304 (1994) (quoting *Kaiser Aetna*, 444 U.S. at 176, 100 S. Ct. at 391).

2. Liability for a Physical Taking Can Be Avoided Only If the Taking Implements a Restriction, Like an Easement, Inhering in the Landowner's Title

The government has few escapes from the Takings Clause when it carries out or authorizes a physical occupation. A claim that it is exercising the police power is not enough. *Kirby v. North Carolina Dep't of Transp.*, No. COA14-184, --- S.E.2d ---, 2015 WL 690834 (N.C. Ct. App. Feb. 17, 2015) (" 'an actual physical appropriation, under an attempted exercise of the police power, [is] in practical effect an exercise of the power of eminent domain'" (quoting Nichols on Eminent Domain § 1.42, at 1-157 (rev. 3d ed. 2013))); *see also*, Nichols on Eminent Domain § 1.42(1) (" '[W]hen land or other property is actually taken from the owner and put to use by

the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health, morals or safety.' ").

The government cannot immunize itself on the ground its physical taking serves an important public interest. *Loretto*, 458 U.S. at 426, 102 S. Ct. at 3171. Finally, a claim that the government's acts arose from a good faith attempt to comply with state law supplies no constitutional defense. *Tolbert v. County of Caldwell*, 121 N.C. App. 653, 655, 468 S.E.2d 504, 505 (1996) (rejecting a defendant's claim it was not liable for a taking because it was trying to comply with state and federal rules); *see also*, *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) (municipalities are not entitled to immunity under 42 U.S.C. § 1983 based on good faith). If the government has invaded property based on a mistaken view of the law, it may disavow the taking, but "no subsequent action . . . can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321, 107 S. Ct. 2378, 2389, 96 L. Ed. 2d 250 (1987).

The government's only way out of the constitutional duty to pay for a physical invasion of property is to show that the invasion is authorized by a lawful, pre-existing limitation on the subject property. This is known as the "background principles" defense. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-31, 112 S. Ct. 2886,

2899-2901, 120 L. Ed. 2d 798 (1992). Under it, the government must show a property restriction "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" to avoid takings liability. *Id.* at 1029, 112 S. Ct. at 2900. For instance, the Constitution "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title" without requiring just compensation. *Id.* at 1028-29, 112 S. Ct. at 2900. It is the government's burden to prove this defense. *Id.* at 1029, 112 S. Ct. at 2900; *see also*, *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000); *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 376 (2011).

Given the strict physical takings framework, the government's principal defense in many takings cases is that its acts do not rise to the level of a physical invasion. But that is not the situation here. The Town wisely does not dispute that its laws permit Town officials and the public to regularly occupy privately owned dry sand property for beach driving, including the Nies'. It does not assert there is an explicit easement on the Nies' title that allows the Town or public to occupy their land.

Instead, the Town rests its case on the "background principles" defense, specifically contending that the Nies' title to dry sand areas has always been implicitly burdened by the public trust doctrine. It asserts the challenged Town ordinances do not unconstitutionally occupy the Nies' property because they only implement the

alleged public trust limitation on their title. The problem is there is no such limitation, and so the defense fails.

B. The Town Cannot Show That the Public Trust Doctrine Has Always Burdened the Nies' Title or That the Doctrine Allows the Occupation of Their Property

At the outset, let's be clear that the Town's public trust defense is not based on public ownership of the dry sand property at issue. The Town agrees the Nies own the subject land, but contends their ownership is subservient to an implicit public trust servitude, one which authorizes the Beach Gear Ordinance and Beach Driving Ordinance. In so doing, the Town badly misunderstands the scope of North Carolina's public trust doctrine.

1. North Carolina Courts Have Repeatedly Held That the Public Trust Doctrine Does Not Encumber Land, Like the Nies', Located Landward of the Mean High Water Mark

When the United States came into existence, North Carolina assumed ownership of navigable, submerged tidelands in the state. *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39, 41 (1903). However, the State has never owned this property like it does other state property. Because of the usefulness of tidelands for various purposes, courts have held that the State generally holds (some of) them *in trust* for the public to engage in certain water-dependent activities. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002). This is the public trust doctrine. Public rights arising from the doctrine

include the right to " '*navigate*, swim, *hunt*, *fish* and enjoy all *recreational activities* in the watercourses of the State' " and the right to access " 'the State's' " beaches. *Friends of Hatteras Island Nat'l Historic Mar. Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n*, 117 N.C. App. 556, 574, 452 S.E.2d 337, 348 (1995) (quoting N.C.G.S. § 1-45.1 (1994)).

The nature and scope of public trust rights are determined by North Carolina courts applying state common law. N.C.G.S. § 77-20(d), (e). In this regard, North Carolina courts have arrived at two important conclusions over the last century. First, they have held that State-owned beaches end on the landward side at the mean high water mark. *West*, 313 N.C. at 60-61, 326 S.E.2d at 617 ("The high-tide states hold that private property ends at the high-water mark, and that the foreshore is the property of the state. The low-tide states, on the other hand, fix the boundary at the low-water mark, and the foreshore is said to belong to the littoral landowner unless it has been otherwise alienated . . . . *North Carolina is a high-tide state*.") (emphasis added); *id.* ("In North Carolina private property fronting coastal water ends at the high-water mark . . . .")).

Second, the courts have concluded that the public trust doctrine also terminates at the mean high water mark. *Carolina Beach*, 277 N.C. at 300-03, 177 S.E.2d at 515-16 ("The 'strip of land between the high- and low-tide lines' is called the foreshore" and "is reserved for the use of the public."); *West*, 313 N.C. at 60, 326

S.E.2d at 617 (recognizing public rights on "land lying between the high-water mark and the low-water mark"); *Town of Nags Head v. Toloczko*, 728 F.3d 391, 393 (4th Cir. 2013) (noting North Carolina defines the public trust area as "seaward of the mean high water mark"); *Cooper v. United States*, 779 F. Supp. 833, 835 (E.D.N.C. 1991) ("As applied to beach property, the public trust doctrine protects the public's right to freely use and enjoy state-owned property—the wet sand beach."); *see also*, Valerie B. Spalding, *The Pearl in the Oyster: The Public Trust Doctrine in North Carolina*, 12 Campbell L. Rev. 23, 63 (1989) ("The seashore boundary is still the mean high water mark.").

North Carolina's limitation of the public trust doctrine to lands seaward of the mean high water mark is not based on policy preferences. It arises from the very root of the doctrine: the State's *ownership* of submerged wetlands between the open sea and the mean high water mark. *Gwathmey v. State Through Dep't of Env't, Health, & Natural Res. Through Cobey*, 342 N.C. 287, 293, 464 S.E.2d 674, 677 (1995) (The public trust doctrine concerns " 'State-*owned* submerged land underlying navigable waters . . . and [embraces] asserted inherent public rights in *these* lands and waters.' " (quoting Monica Kivel Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine*

Marshes, Denial of Permits to Fill, and the Public Trust, 64 N.C. L. Rev. 565, 572 (1986)) (emphasis added)); *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 525, 369 S.E.2d 825, 827 (1988) (The public trust doctrine derives from the theory that "the Crown held *title* to tidal lands and waters for the benefit of the public.") (emphasis added); *Shepard's Point*, 132 N.C. 517, 44 S.E. at 44 ("The policy of the state . . . was . . . to preserve its *title* to the navigable waters . . . in trust for the free use of all of its citizens.") (emphasis added). The public trust doctrine flows from the State's title to submerged lands, not its regulatory authority over them. *Id.*

Since the State's title to shore lands ends at the mean high water mark, public rights flowing from the "in trust" nature of the title also terminate there. One comes to the same conclusion by considering title to property landward of the mean high water mark. That title is clearly privately held, *West*, 313 N.C. at 60, 326 S.E.2d at 617, and no law or doctrine holds that private landowners hold their title in a *trustee relationship with the general public*, rather than for their own enjoyment. This is exactly why no state court has ever held that land located landward of the mean high water mark is public trust property. Spalding, *The Pearl in the Oyster*, 12 Campbell L. Rev. at 64 ("in North Carolina . . . the public trust doctrine is aquatic, not amphibious").

2. N.C.G.S. § 77-20 Does Not, and Constitutionally Could Not, Move the Public Beach Inland of the Mean High Water Mark onto Private Land

The State will try to shore up its position by pointing to N.C.G.S. § 77-20. But that statute does not and could not change the boundary of public trust beaches from the common law mean high water mark boundary to the more inland vegetation or dune line. Indeed, while the statute notes the State's desire to protect public trust beaches, *id.* § 77-20(d), it leaves it to state courts to decide—under common law—how far inland such beaches extend. *Id.* at (d) & (e); *see also* N.C.G.S. § 1-45.1 (1994) (Public trust rights "are established by common law as interpreted by the courts of this State."). And, as shown above, state courts have placed that boundary at the mean high water mark, at the terminus of State (owned) beaches. N.C.G.S. § 77-20 simply codifies the judicially mandated mean high water mark boundary. *Id.*[10]

Even if one wanted to read N.C.G.S. § 77-20 as extending public trust beach rights to private dry uplands, it could not be construed that way without causing an unconstitutional taking. Given the long line of cases adopting the mean high water

[10] The Town may also cite N.C.G.S. § 160A-205, which allows Towns to regulate public trust areas. But that law does not extend the public trust beach to the dune or vegetation line, as it simply adopts the definition of public trust beaches set out in N.C.G.S. § 77-20. *See* § 160A-205(a). And N.C.G.S. § 77-20 itself merely confirms common law boundaries, like the mean high water mark.

mark as the public beach boundary, any law—including N.C.G.S. § 77-20—that expanded the public beaches to the more inland vegetation or dune line and onto private property would take vested property rights. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713, 130 S. Ct. 2592, 2601, 177 L. Ed. 2d 184 (2010) ("States effect a taking if they recharacterize as public property what was previously private property"); *see also*, *id.* at 710 n.2, 130 S. Ct. at 2599 n.2 (government concedes it would be a taking if it set an "erosion-control" line inland of the mean high tide line that allowed it to access private land beyond that line); *Opinion of the Justices*, 139 N.H. at 91, 649 A.2d at 609-10 (statute caused a taking by imposing a public beach easement inland of the common law mean high tide public beach boundary). Such an unconstitutional interpretation of N.C.G.S. § 77-20 must be avoided. *Matter of Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) (courts must avoid statutory interpretations raising constitutional problems). Fortunately, this is easy, since the statute declines to alter the mean high water mark boundary.

In light of the foregoing, the Town simply cannot show that North Carolina's public trust doctrine applies to the Nies' private property landward of the mean high water mark. It cannot cite a single North Carolina case applying the public trust to such lands. That the public trust does not burden private titles does not mean the Town is without power to reasonably regulate a property owner's use of private beach

land. It can do so.[11] But regulation of private uses is much different than overlaying a perpetual easement that allows continual *public* or governmental use. *City of Durham v. Eno Cotton Mills,* 141 N.C. 615, 638-39, 54 S.E. 453, 461 (1906) (discussing difference between police power restrictions and a physical appropriation requiring compensation).

C. Given the Absence of Public Trust Doctrine Support, It Is Clear the Town's Driving Ordinances Take the Nies' Property

Once the public trust justification falls away, there is no question that, as applied to the Nies, the Beach Gear Ordinance and Beach Driving Ordinance take property. *Lucas v. S.C. Coastal Council*, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992) (state defendant failed to show that pre-existing common law principles barred construction of a beach home and justified a taking). After all, given the lack of an implicit public trust encumbrance or explicit public easement on the Nies' title, the title must include the fundamental—and constitutionally protected—right to exclude others from their land. This right is not just about saying "no" to trespassers; it gives the Nies' the ability to allow access while controlling *the time, place, and manner* of any entry to protect their property and privacy. *See* Jace C. Gatewood, *The Evolution of the Right to Exclude—More than a Property Right, a Privacy Right*, 32 Miss. C. L. Rev. 447 (2014). The Nies might allow casual beachgoers to walk across their land,

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[11] *See, e.g.*, N.C.G.S. § 160A-308 (allowing regulation of driving on beach areas).

while limiting its use for partying and destructive driving. But the Beach Gear Ordinance and Beach Driving Ordinance give them no choice. The Town enters when and how it wants. Town Code § 5-65. The Town tells the public when it can enter and what it can do. Town Code §§ 5-50-5-66. The Town appropriated the role of owner with respect to the Nies' dry sand land and has physically taken their land.

In fact, it is worse than that. Under the Town's laws, the Town has a right not only to invade the Nies' (and others') dry beach land *currently* located seaward of the dunes, but also to perpetually extend its occupation inland onto additional areas of private property as they become part of the dry beach. This is due to the migratory nature of the dune/vegetation line the Town asserts as the public trust boundary. Storms have moved and will move the dunes landward. When this occurs, any asserted easement (or road) bounded by the dunes will also move deeper inland. (R pp 375-376 (after Hurricane Irene, Town driving moved landward onto the Nies' property by thirty feet)).

There is no limit to the expansion. If a weather event moves the dune boundary line fifty feet inland, the Town and public gains fifty feet of previously private property. *Id*. This is a radical departure from the mean high water mark regime that has historically governed the public trust doctrine. Like the dune line, the high water line is migratory. But the mean high water line boundary is based on an *average* of high tides *over an 18.6-year period*, *Carolina Beach*, 277 N.C. at 303, 177 S.E.2d at

516-17. As a result, it is not subject to extreme storm-based shifts and so, neither are private/state beach property lines. By switching to the volatile dune/vegetation public trust beach boundary, the Town's driving ordinances set up a far more extreme system that allows the Town to expand its occupation of private land with every erosive event. Soon, Emerald Isle homes may be at risk. *See Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 74, 723 S.E.2d 156, 160 (2012) (Town asserted the right to destroy a home because it came to be on alleged public trust lands). In any event, the challenged Town ordinances have already appropriated the Nies' existing dry sand areas and are already unconstitutional.

D. Even If the Public Trust Applied, It Does Not Authorize the Town's Occupation

The Town could not avoid takings liability for its Beach Gear Ordinance even if the state law recognizes the Nies' privately owned dry sandy land as public trust lands. This is because the public trust doctrine has never included a governmental right to take private land for its exclusive use or for a public road and parking lot. Public trust rights on private, riparian land could only give the public a right of temporary pedestrian passage, and would have to accommodate private rights.[12] *Weeks v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 97 N.C. App. 215, 226, 388 S.E.2d

[12] Private riparian rights include "[t]he right of access to the water." *Shepard's Point*, 132 N.C. at 537, 44 S.E. at 46, *overruled on other grounds by Gwathmey*, 342 N.C. 287, 464 S.E.2d 674.

228, 234 (1990) ("[P]ublic trust rights [are] always [] limited by [riparian owner's] right to retain some use or value of his property."). Indeed, any public trust encumbrance on private land must function as an easement, *Bell v. Town of Wells*, 510 A.2d 509, 516-17 & n.15 (Me. 1986) (characterizing public trust rights as an easement and collecting similar cases). And an easement is a *limited, non-exclusive*, interest in land. *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963) (" 'An easement in general terms is limited to a use which is reasonably necessary and convenient . . . for the use contemplated.' ") (quoting 12A Am. Jur. Easements § 113, pp. 720-21 (2015)). The easement holder cannot exceed the allowable use or destroy the servient landowner's own right to reasonably use the subject land. *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992) ("[T]he owner of land subject to an easement has the right to continue to use his land in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the easement.").

The Town's imposition of a Town express lane and public road and parking area on the Nies' land violates these basic principles. It exceeds the scope of any possible public trust easement and unreasonably limits the Nies' use. Indeed, the Town's driving laws cut through the Nies' entire bundle of property rights. Not only has the Town stripped the Nies of their right to control the time, manner, and frequency of access to their property by others, the Town has also made it impossible

for the Nies to make any meaningful use of the dry property. They cannot station any beach gear in the strip of land near the dunes during May-September (and many other times) due to the passing of Town vehicles, and for the same reason (and due to the ruts left by vehicles) they can barely walk on the land. (R p 314:15-18; *id*. pp 314-315). Building a permanent gazebo is impossible.

Therefore, the Town is liable for a taking whether or not the public trust doctrine applies to the Nies' dry land. More precisely, the Town has either taken a full easement (if the public trust doctrine never burdened the Nies' title), or imposed new and excessive burdens on an existing easement, without compensation. *Hildebrand*, 219 N.C. 402, 14 S.E.2d at 256 ("When the new use is of a different character from that for which the land was [originally] taken, it is not an exercise of the existing easement, but amounts to the imposition of a new and additional easement" which must be acquired by eminent domain.).[13] Either way, its ordinances violate the Constitution. *Id.*; *Opinion of the Justices*, 139 N.H. at 94, 649 A.2d at 611 ("the State has the power to permit a comprehensive beach access and use program

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[13] There will be a difference in damages owed to the Nies depending on the extent of the Town's taking. If the Town occupied their property in entire absence of a public trust encumbrance, it must pay for a new, expansive easement. Conversely, if Town "only" exceeded the lawful scope of a pre-existing easement, it would have to pay the lesser value of its excess use of the easement. Because of this important difference, the Court cannot address the second type of taking without addressing the first.

by using its eminent domain power . . . [but] it may not take property rights without compensation through legislative decree").

This does not mean there is no way for the public to acquire rights-of-way on private dry beach land. Like most states, North Carolina allows acquisition of such easements through the common law of prescription and dedication, when the facts necessary for their creation are properly pled and proven in a court of law. *Concerned Citizens v. State ex rel. Rhodes*, 329 N.C. 37, 45, 404 S.E.2d 677, 682-83 (1991) (prescriptive rules for public way); *West*, 313 N.C. at 49-60, 326 S.E.2d at 610-17 (same). But the Town has not pled or utilized these lawful avenues here. (R pp 116-120 (Answer)). It has instead tried to create a Town-wide easement by public trust doctrine fiat, thus avoiding the effort and expense of proving the elements of prescription or dedication on each parcel it wishes to access. *Cf. Severance v. Patterson*, 55 Tex. Sup. Ct. J. 501, 370 S.W.3d 705, 721, 724 (2012) (rejecting Texas' attempt to impose a public easement on private dry beach land, without proof of a prescriptive or dedicated easement).

The Town may believe it expeditious to impose an exclusive travel lane and public vehicle area without going through established common law (prescription) principles or eminent domain. But the price for the Town's short cut is just compensation.

CONCLUSION

The Court should reverse the decision below, grant summary judgment to the Nies, and remand the case for a determination of damages.

Respectfully submitted, this 19th day of March, 2015.

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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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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellants has certified that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, table of authorities, certificates of service, 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 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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