No. COA15-169 Third Judicial District

NORTH CAROLINA COURT OF APPEALS

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GREGORY P. NIES and DIANE S. NIES, Plaintiff-Appellants, v. TOWN OF EMERALD ISLE, a North Carolina Municipality, Defendant-Appellee.	)	From Carteret County FILE NO. 11 CVS 1569

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DEFENDANT-APPELLEE'S BRIEF

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Plaintiff-Appellants,	)	From Carteret County
	)	FILE NO. 11 CVS 1569
v.	)	
TOWN OF EMERALD ISLE, a North Carolina Municipality,	)	
Defendant-Appellee.	)	

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DEFENDANT-APPELLEE'S BRIEF

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ISSUES PRESENTED

1. DO THE PLAINTIFF-APPELLANTS HAVE THE RIGHT TO EXCLUDE THE PUBLIC, INCLUDING THE TOWN, FROM THE "DRY-SAND BEACH"?

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INTRODUCTION

This case involves two ordinances passed by the Town of Emerald Isle ("Town"). Plaintiff-Appellants, Gregory P. and Diane S. Nies ("Nies"), allege that these ordinances constitute a "taking" of their property. In essence, the case turns on this question: When Plaintiff-Appellants' purchased the property did they obtain in their "bundle of sticks" the right to exclude the public from the dry-sand beach in front of their property?

They did not. The Nies' interest in the dry-sand beach, between the mean high-tide line of the Atlantic Ocean and the frontal dunes, is subject to the pre-existing limitation placed on it by the public trust doctrine as interpreted by the common law of the State of North Carolina and codified by the North Carolina General Assembly. Consequently, there has been no taking under the North Carolina Constitution. The Trial Court was correct in granting the Town's Motion for Summary Judgment and in dismissing the Nies' claims. Therefore, the Trial Court's judgment should be affirmed.

STATEMENT OF FACTS

Mr. and Mrs. Nies are the owners of an oceanfront home located at 9909 Shipwreck Lane in Emerald Isle. (R p 8 - ¶ 8; R p 231.) The Nies purchased the property in June of 2001. (R pp

234-35.) They currently use the property as a residence, (R p 232), and frequently rent it out for around $3,000 to $5,000 per week, (R p 426; R p 396.). The home is currently listed for sale at 1.6 million. (R p 282-83.)

The Nies contend that the public has no right of access to the dry sand beach area in front of their home without their permission. They also contend that the Town of Emerald Isle has no authority to regulate the dry sand area of the beach in front of their home. The Nies challenge two ordinances enacted by the Town and allege that they constitute a taking: Emerald Isle, NC, Ordinances ch. 5, art. 2 §§ 18-19 ("Beach Equipment Ordinance"), (R pp 544-45), and Emerald Isle, NC, Ordinances ch. 5, art. 2 §§ 21-34 ("Beach Driving Ordinance"), (R pp 536-40). [1]

Town Ordinances at Issue

A. Beach Equipment Ordinance.

Section 5-101 of the Town Code pertains to unattended beach equipment and requires all unattended beach equipment to be removed from the beach by 7:00 p.m. [2] This Section was adopted in part due to the safety hazard posed by unattended beach equipment being left on the beach overnight as well as in part due to the fact that unattended beach equipment would sometimes

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1 The Town's Ordinances wee revised in 2013. These sections have been re-codified as Emerald Isle, NC, Ordinances ch. 5, art. 5 §§ 60-66

2 Amended in 2013 to 8 p.m.

blow into the surf or otherwise present a littering problem for the Town. (R p 518 - ¶ 5.)

Section 5-102(a) of the Town Code prohibits the placement of beach equipment within 20 feet seaward of the base of the frontal dune. According to the Town's CAMA Land Use Plan, the population of the Town swells from approximately 4,000 to 40,000 people in the summer. As a consequence, the beach strand can become very congested, leaving little room for emergency vehicles to traverse the beach. (R. p. 552). This Town Code Section was adopted in an effort to provide an unimpeded path for emergency services vehicles and Town personnel providing essential services on the beach strand. (R p 518 - ¶ 6.) [3]

B. Beach Driving Ordinance.

Beach driving has been allowed within the Town since its incorporation in 1957. The Town's beach driving ordinance has in substance remained the same and, as far back as at least July 2000 (before the Nies purchased the property), has permitted driving on the beach in the "permitted driving area", defined as follows:

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[3] The Towns of Duck, Southern Shores, Nags Head, North Topsail Beach, Surf City, Topsail Beach, Wrightsville Beach, Carolina Beach, Kure Beach, Bald Head Island, Caswell Beach, Oak Island, Holden Beach, Ocean Isle Beach, and Sunset Beach have also enacted ordinances that prohibit unattended beach equipment. *See* App. pp 1-61.

> *Permitted Driving Area* means the foreshore and area within the Town consisting primarily of hardpacked sand and lying between the waters of the Atlantic Ocean and Bogue Sound and a point ten (10) feet seaward from the foot or toe of the dune closest to the waters of the Atlantic Ocean and Bogue Sound.

This definition remained in effect from at least July 2000 through October 2013.[4] (R p 518 - ¶ 3.) These ordinances are similar to ordinances passed by municipalities all along the coast of North Carolina.[5]

On 9 December 2011, the Nies sued the Town alleging four claims: (1) an inverse condemnation claim under N.C. Gen. Stat. § 40A-51, (2) a violation of Art. 1, Sec. 19 of the North Carolina Constitution-"Law of the Land" Clause, (3) a violation of the 5th Amendment to the U.S. Constitution, and (4) a claim under 42 U.S.C. § 1983. (R p 8.)

On September 19, 2013, the Nies filed their Amended Complaint alleging three additional claims: (5) a claim under the 4th and 14th Amendments to the U.S. Constitution, (6) a claim seeking refund of an assessment, and (7) a breach of contract claim. (R p 161.)

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[4] In 2013 the town revised its Beach and Shore Regulations. As part of that revision, the Town referenced the definition contained in N.C.G.S. § 77-20 regarding the public trust area of the beach, permitting driving in that area.

[5] The Towns of Duck, Kill Devil Hills, Nags Head, Atlantic Beach, North Topsail Beach, and Kure Beach allow the general public to drive on the beach. Of those coastal towns that prohibit driving by the general public, virtually all contain an exception for commercial fishermen and municipal vehicles. *See* App. pp 62-95.

The Plaintiff-Appellants' claims overlapped considerably and in essence all of their claims were premised upon two theories: (1) that the Town's adoption of ordinances regulating the dry sand areas of the beach in front of their home constitutes a "taking", and (2) that the Town's establishment of a municipal service district of which their property is a part was improper. (R p 8 - ¶¶ 53, 60, 80, 81, 88, 95, 101; R p 161 - ¶¶ 113, 116, 128(f), 153, 169.)

On 25 July 2014, the Town moved for summary judgment on all of Plaintiff-Appellants' claims. (R pp 497-98.) On 26 August 2014, the Honorable Jack W. Jenkins, presiding over the 4 August 2014 Civil Session of Carteret County Superior Court, granted the Town's motion for summary judgment and dismissed Plaintiff-Appellants' claims. (R p 757.) Plaintiff-Appellants appeal from this Order. (R p 758.)

On appeal, the Plaintiff-Appellants have abandoned their claim under the Fourth Amendment to the United States Constitution, their claim for a refund of a municipal assessment, and their claim for breach of contract. (Plaintiff-Appellants' Brief pp 14-15.) Plaintiffs-Appellants also acknowledge their 5th Amendment takings claim under the United States' Constitution is not ripe. (Plaintiff-Appellants' Brief p 14.) As a result, the only claims remaining subject to this

appeal are Plaintiff-Appellants' claims for inverse condemnation and for a taking under the North Carolina Constitution.

STANDARD OF REVIEW

Appellate review of a grant of summary judgment is *de novo*. *Asheville Sports Props.*, LLC v. City of Asheville, 199 N.C. App. 341, 344 (2009).

ARGUMENT

The Nies' interest in the dry-sand beach, between the mean high-tide line of the Atlantic Ocean and the frontal dunes, is subject to a pre-existing limitation placed on it by the public trust doctrine as interpreted by the common law of the State of North Carolina and as codified by the North Carolina General Assembly. Consequently, there has been no taking under the North Carolina Constitution and the Trial Court was correct in granting the Town's motion for summary judgment. Lastly, there has been no diminution in value of Plaintiff-Appellants' property and the precedent(s) on which they rely are distinguishable and inapplicable. Therefore, the Trial Court's judgment should be affirmed.

I. The Public Trust Doctrine Forms a Pre-Existing Limitation on Plaintiff-Appellants' Title to the Dry-Sand Beach

Background principles of state property law that exert pre-existing limitations upon the landowner's title do not amount to a "taking" under the United States Constitution. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-30 (1992). "[T]he Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by..."existing rules or understandings..." *Lucas* at 1030 (holding that if background principles of South Carolina nuisance and property law were identified proscribing the plaintiff's use of the property there would be no unconstitutional taking and remanding the case for a determination on that issue).

Subsequent United State Supreme Court decisions have followed the rationale addressed in *Lucas* to deny a takings claim. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 732 (2010) "The Florida Supreme Court decision before us is consistent with these background principles of state property law." *Stop the Beach Renourishment*, at 731 (citing *Lucas*). "Because the Florida Supreme Court's decision did not contravene the established property rights of petitioner's Members [under Florida state law], Florida has not violated the Fifth and Fourteenth Amendments." *Id.* at 733.

North Carolina Courts have also applied the U.S. Supreme Court opinion in *Lucas* regarding pre-existing limitations. In *Shell Island Homeowners Assoc., Inc. v. Tomlinson*, 134 N.C. App. 217, 231 (1999), this Court, citing *Lucas*, held that "because plaintiff's tract was subject to the challenged restrictions at the time the original permit was issued . . . there can be no claim of compensable taking by reason of the regulations." The *Shell Island* Court also dismissed plaintiffs' inverse condemnation claim as a result of their failure to state a viable claim for regulatory taking. *Id.* at 232.

In North Carolina, an oceanfront property owner's interest in the dry sand beach is a qualified one, limited by and subordinate to public trust protections. *See Slavin v. Town of Oak Island*, 160 N.C. App. 57, 61 (2003) ("appurtenant littoral rights are subordinate to public trust protections.") In *Slavin*, this Court held that oceanfront owners' takings claims based upon the erection of a fence by the town across their properties barring direct access to the beach was without merit. The Court held, "[p]laintiffs' contention that the Town may not, without compensation, in any way limit their right of access to the ocean is inconsistent with the qualified nature of that right." *Id.*

Furthermore, the general public's rights to use of (and the geographic extent of) the State's ocean beaches is a question of law that the General Assembly has also clearly and definitively answered. *See* N.C. Gen. Stat. §§ 77-20(d),(e); N.C. Gen. Stat. §§ 1-45.1. North Carolina's ocean beaches include the State owned portion of the beach located seaward of the mean high water ("MHW") mark (the "wet sand beach") and the portion of the beach located between the MHW mark and the landward extent of the ocean beach (the "dry sand beach"), which may be privately owned. *See* N.C. Gen. Stat. § 77-20(d),(e) (2011). "Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line." N.C. Gen. Stat. § 77-20(e).

The Legislature has declared that the entire area of the State's ocean beach is subject to public trust rights. *Id.* Such rights "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." N.C. Gen. Stat. § 1-45.1 (2011); *see also* N.C. Gen. Stat. § 113-131 (2011); *Fabrikant v. Currituck Co.*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 28 (2005); *Friends of the Hatteras*

Island v. Coastal Resources Comm., 117 N.C. App. 556, 452 S.E.2d 337 (1995).

When N.C. Gen. Stat. § 77-20(d) and (e) were enacted in 1998, they clarified the existence of public trust rights in the dry sand beach in response to prior judicial characterizations of the issue as being "unsettled" and "unclear." *See Cooper v. United States*, 779 F. Supp. 833 (E.D.N.C. 1991).

As stated in the aforementioned statute, the general public, including citizens and visitors to the State, have "made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial" and the public has rights "to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State as recognized by Article XIV, Section 5 of the Constitution of North Carolina." N.C. Gen. Stat. § 77-20(d) (2011). These clear legislative findings of fact support any neccessary legal conclusion that public trust rights exist (and have always existed) on the entire ocean beach under some or all of the following legal doctrines:

1. Easement By Prior Use/Quasi Easement - *See Hodges v.Winchester*, 86 N.C. App. 473, 358 S.E.2d 81 (1987); *Cash v. Craver*, 62 N.C. App. 257, 302 S.E.2d 819 (1983); *see also*, Hetrick, Patrick, Webster's Real

Estate Law in North Carolina, §§ 15-14 (along with cases cited therein).

2. Law of Custom - *State ex rel. Thorton v. Hay*, 462 P.2d 671, 673 (Or. 1969);

3. Prescriptive Easement - *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985); *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State*, 329 N.C. 37, 55, 404 S.E.2d 677, 688 (1991).

4. Expanded Public Trust Doctrine - *Matthews v. Bay Head Improvement Assoc.*, 95 N.J. 306, 471 A.2d 355, cert. denied, 469 U.S. 821, 105 S. Ct. 93, 83 L. Ed. 2d 39 (1984).

As such, the Nies' title to the dry sand beach is subordinate to the public's rights, and was so subordinate to those rights at the time they purchased the property in 2001.

Here, Plaintiff-Appellants' claims all rest on the assertion that they have the right to exclude the public from the dry sand beach in front of their house. However, North Carolina statutes and case law (*Slavin*) document that the dry sand beach area up to the first vegetation line / toe of the frontal dune are part of the ocean beaches of North Carolina and have been open for the public to access, use and enjoy from "time immemorial." As such, there has always been a pre-existing limitation on Plaintiff-Appellants' property that allows the public to use the portion of their property that is

within the beach public trust area. This is a background principle of North Carolina property law.

Plaintiff-Appellants cite to *Lucas* and two United States Court of Appeals decisions for the proposition that it is the Government's burden to prove the background principles of state property law. (Plaintiff-Appellants' Brief p 23.) Admittedly, *Lucas* does contain language stating that "South Carolina must identify background principles of nuisance and property law..." *Lucas* at 1031. However, to the extent that *Lucas* and the other cases Plaintiff-Appellants cite could be construed to stand for the proposition that the government bears the burden of proof on this issue, they have been overturned by the United States Supreme Court's decision in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702 (2010).

> Petitioner argues that the Florida Supreme Court took two of the property rights of the Members by declaring that those rights did not exist: the right to accretions, and the right to have littoral property touch the water (which petitioner distinguishes from the mere right of access to the water). Under petitioner's theory, because no prior Florida decision has said that the State's filling of submerged tidal lands could have the effect of depriving a littoral owner of contact with the water and denying him future accretions, the Florida Supreme Court's judgment in the present case abolished those two easements to which littoral property owners had been entitled. **This puts the burden on the wrong party. There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water**

superior to the State's right to fill in its submerged land.

Stop the Beach Renourishment, at 729-30 (emphasis added).

It makes sense to put the burden on the property owner. If background principles of property law allow the Government's action(s), no interest has been taken and a taking is one of the elements of a plaintiff's *prima facie* case for inverse condemnation under state law. *Adams Outdoor Advertising v. North Carolina Dep't Of Transp.*, 112 N.C. App. 120, 122 (1993) (holding that "[a]n action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose.")

For the sake of judicial efficiency, the Town submits the above-authority and precedent to establish that those background principles of North Carolina property law are proven, indeed obvious, even though it does not bear the burden of doing so. The legislative finding of facts found in N.C. Gen. Stat. § 77-20 conclusively establish the background principle of public use of the ocean beaches of North Carolina from "time immemorial".

North Carolina is by no means alone in allocating the competing rights of the public and littoral property owners in the dry-sand beach in this fashion. New Jersey, the state from which the Plaintiff-Appellants hail, (R p 235 ll. 19-22), has

adopted a similar view of the public's use in the dry-sand beach.

> Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public trust must be given both access to and use of privately-owned dry sand areas as reasonable necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

Matthews v. Bay Head Improv. Asso., 471 A.2d 355, 326, 95 N.J. 306, 365-66 (N.J. 1984), *cert. denied*, 469 U.S. 821. Furthermore, the United States Secretary of Commerce defines ocean beaches in a similar fashion.[6]

The North Carolina Supreme Court has likewise rejected the notion that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. *See Concerned Citizens of Brunswick County Taxpayers Ass'n v. State*, 329 N.C. 37, 55, 404 S.E.2d 677, 688 (1991).

> We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. As the statement was not necessary to the Court of Appeals opinion, nor is it clear that in its unqualified form the statement

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[6] "Beaches - the area affected by wave action directly from the sea. Examples are sandy beaches and rocky areas usually to the vegetation line." 15 CFR 923(a)(5).

> reflects the law of this state, we expressly disavow this comment.

Id. It stands to reason that if the public trust doctrine could secure public *access* to the beach then clearly the public trust doctrine secures the right to recreate on the beach.

II. The Town's Authority to Regulate the Ocean Beaches of North Carolina is Inherent in the Preexisting Limitation on Plaintiffs-Appellants' Title.

The North Carolina legislature has made it clear that local municipalities currently have, and have always had the right to impose and enforce regulations to promote the "health, safety, and welfare" of the public through regulation of the ocean beaches:

> [A] city may, in the interest of promoting the health, safety, and welfare of the public, regulate, restrict, or prohibit the placement, maintenance, location, or use of equipment, personal property, or debris upon the State's ocean beaches. A city may enforce any ordinance adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries...
>
> Nothing in this section shall be construed to . . . deny the existence of the authority recognized in this section prior to the date this section becomes effective...

N.C. Gen. Stat. § 160A-205 (2014).

The Town's ordinance prohibiting the placement of beach equipment within 20 feet seaward of the base of the frontal dune is an exercise of its lawful authority under § 160A-205. The statute authorizes the Town to regulate / prohibit the placement of personal property on the State's ocean beaches. During the tourist season the Town's population greatly increases and the vast majority of that population recreates on the beach. The Town's prohibition of personal property within 20 feet of the frontal dune unequivocally promotes public health and safety and is more akin to a building setback regulation that it is an easement.

Setbacks are generally designed to, among other things, allow for greater fire protection and emergency vehicle access. Building setback requirements are constitutional and not a taking. *See Goreib v. Fox*, 274 U.S. 603 (1927)(holding that a building setback requirements constitutional; "and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the federal constitution). Numerous other coastal towns, recognizing the need for unimpeded access to those on the beach/in the ocean who are in distress, have passed similar ordinances that

regulate the placement of beach equipment so as to not impede that access.[7]

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[7] ***See*** **Surf City** Ordinance 4-13 prohibits beach equipment from being placed within a 25 foot perimeter of an emergency access or any public beach access point. Depending on conditions, emergency personnel may impose greater setbacks on a case by case basis.; **Sunset Beach** Ordinance 95.07 prohibits any obstruction from being placed within a 30 foot perimeter of any emergency access or any public beach access. Tents, shading devices, canopies and umbrellas must be located at least 12 feet from the dune line.; **Oak Island** Ordinance 14-143 prohibits beach equipment, personal property, or obstructions from being place in an area within 15 feet of any duly marked and designated emergency beach access point on the seaward side of the access.; **Kure Beach** Ordinance 12-43 prohibits beach equipment from being placed with a 25 foot perimeter of an emergency access or any beach access.; **Nags Head** Ordinance8-8 prohibits any person to place any item on the beach which: (1) unreasonably restricts, prevents or disrupts the passage of public works, emergency or ocean rescue vehicles, or the public; or (2) impedes or obstructs the line of sight to the Atlantic Ocean from lifeguard stands or surveillance areas used by ocean rescue personnel.; **Ocean Isle** Ordinance 38-35 prohibits all beach equipment from impeding or retarding the free and unconstrained use and occupancy of the public beach by the public and in order to assist police and fire personnel in responding to emergency calls, absolutely no cabanas, canopies, tents or awnings are allowed on the beach at anytime.; **Southern Shores** Ordinance 34-55 prohibits the erection of a tent, cabana, or umbrella which, in the opinion of public safety personnel: (a) prevents or disrupts the passage of emergency or ocean rescue vehicles; or (b) hampers the ability to provide adequate ocean rescue service by obstructing the line of sight to the water from lifeguard stands or other surveillance areas.; **Topsail Beach** Ordinance 24-37 prohibits placing all beach equipment within a 25 foot perimeter of an emergency access or any public beach access.; **Carolina Beach** Ordinance 10-76 prohibits placing any obstruction on the beach that impedes or restricts the free and unconstrained use and occupancy of the public beach by the public and in order to assist, lifeguards and fire personnel in responding to emergency calls, absolutely no beach equipment is allowed on the beach at anytime within 20 feet from the eastern most edge of the dune slow or vegetative line. Depending on condition emergency personnel may impose greater set backs on a case to case basis. Carolina Beach further prohibits beach equipment from being placed within a 25 foot perimeter of an emergency access or any public beach access point furthermore, no beach equipment may be placed directly in front of a lifeguard stand seaward of the Atlantic for a distance of 10 feet north and south of a direct line between the stand and the Atlantic ocean. Emergency personnel may impose greater set back on a case by case basis.; **Duck Ordinance** 94-05 prohibits the erection of a tent, cabana, or sunshade within 15 feet of the base of the seaward toe of the primary dune. See App. pp 1-61.

Additionally, coastal towns like the Town of Emerald Isle have been explicitly authorized by the Legislature to permit and regulate driving on the beach since 1973. N.C. Gen. Stat. § 160A-308 provides:

> A municipality may by ordinance regulate, restrict and prohibit the use of dune or beach buggies, jeeps, motorcycles, cars, trucks, or any other form of power-driven vehicle specified by the governing body of the municipality on the foreshore, beach strand and the barrier dune system. Violation of any ordinance adopted by the governing body of a municipality pursuant to this section is a Class 3 misdemeanor.
>
> Provided, a municipality shall not prohibit the use of such specified vehicles from the foreshore, **beach strand** and barrier dune system by commercial fishermen for commercial activities. Commercial fishermen, however, shall abide by all other regulations or restrictions duly enacted by municipalities under this section. (emphasis added)

Implicit in the ability to prohibit is the ability to allow. Furthermore, the statute recognizes the pre-existing travel rights of commercial fishermen as local municipalities are prohibited from abridging those rights under the statute.

Plaintiff-Appellants do not contest that the North Carolina legislature has given the Town this authority, they simply argue that it only allows the Town to regulate their right to drive on the portion of dry-sand beach that fronts their own property. (Plaintiff-Appellants' Brief pp 29-30.) To adopt such an interpretation of Section 160A-308 would be to turn the statute on its head and would lead to the incongruous and absurd sight

of thousands of littoral property owners driving in small ellipses on the dry sand beach in front of their homes. Likewise, such a construction would completely ignore the fact that cities and towns cannot prohibit commercial fishermen from driving on the "beach strand".

Because the use of the public trust area by the public is a pre-existing limitation on Plaintiff-Appellants' title and because regulation of the public trust area by the Town of Emerald Isle had been explicitly authorized by the North Carolina legislature, there has been no taking by the Town. Therefore, the Plaintiff-Appellants are missing an essential element of their claims and the Honorable Jack W. Jenkins was correct in granting summary judgment for the Town. His judgment should be affirmed.[8]

III. Irrespective of the Public Trust Doctrine, the Ordinances do not Amount to a "Taking" Under the Law.

Irrespective of the exact nature and location of the public trust of rights of use thereto, the challenged regulations do not eliminate all economically beneficial uses of Plaintiff-Appellants' property. They simply place limitations on the use of that property. Accordingly, they are analyzed under the *Penn*

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[8] Plaintiffs' claims, to the extent they are premised on beach driving are time barred as the beach driving ordinance has been in effect for at least 10 years prior to Plaintiffs' filing suit, well beyond the two year statute of limitations for such claims. *See* N.C. Gen. Stat. §40A-51.

Central factors. An analysis of the challenged regulation under those factors leads to the conclusion that no taking has occurred.

A regulation that places limitations on land that does not eliminate all economically beneficial use of a parcel may still result in a taking, but depends on a series of three factors. *See Palazzo v. Rhode Island,* 533 U.S. 606, 617 (2001)(citing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 129 (1978), holding no regulatory taking occurred). These factors are: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with the claimant's reasonable investment-backed expectations; and 3) the "character" of the governmental action. *Id.*

In regards to the economic impact of the regulation on the claimant, the Court may consider economic deprivation, but a partial economic diminution by itself will not result in a taking. *Penn Cent.* at 130; *see also Finch v. City of Durham,* 325 N.C. 352 (1989). "'Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has affected a taking, this Court focuses . . . [on] interference with rights in the parcel as a whole . . . ." *Penn*

Cent, 438 U.S. at 130-31. Diminution in property value, even severe diminution, standing alone, does not establish a "taking". *Id.* at 130 (emphasis added); *see also Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (a 75% diminution in value caused by a zoning law was held not to be a regulatory taking), *Hedacheck v. Sebastian*, 239 U.S. 394 (1915) (an 87.5% diminution in value caused by a regulation was held not to be a taking).

Regarding the second factor, the extent to which the regulation interfered with the claimant's reasonable investment-backed expectations, as long as the regulation does not defeat a claimant's ability to obtain a reasonable return on their investment, then this factor does not further a takings claim, particularly if the regulation does not interfere with a present, pre-existing use of the property. *Penn Cent.* at 136 (holding that "the law does not interfere in any way with the present uses of the Terminal). Regarding the third factor, the "character" of the governmental action, the court focuses on the equitable distribution of benefits and burdens created by the regulation, *See Id.* at 134-35, or as the courts have sometimes characterized it: "a reciprocity of advantage".

Here, using the three factors taken from *Penn Central*, the Nies' claims fail as a matter of law: (1) Plaintiffs are still living on the property, they have listed it for sale at 1.2

million dollars, and are renting it out from $3,000 to $5,000 per week, (2) Plaintiffs have absolutely no reasonable investment-backed expectations in the use of this property given that under the common and statutory law of North Carolina the public had the right to use the ocean beach area up to the vegetation line since "time immemorial", and (3) Plaintiffs are not uniquely burdened by the regulation in that all coastal properties on Emerald Isle are similarly burdened.

Furthermore, as in *Penn Central*, the Nies also reap some benefit from the subject regulations because they cannot be excluded from the ocean beach area in front of other coastal homes on Emerald Isle and in that emergency vehicles continue to be at the ready in the event they find themselves on the beach in distress. Accordingly, the regulations at issue do not amount to a taking under the law, irrespective of the location of the public trust and North Carolina's common law regarding it.

IV. The Authority on Which Plaintiff-Appellants' Rely is Distinguishable and Inapplicable

The Nies cite *Nollan v. Cal. Com*, 483 U.S. 825 (1987) for the proposition that, by virtue of the Town's ordinances, a permanent physical taking has occurred because individuals are given a right to continuously traverse over private property. *Nollan* is inapplicable because: (1) it did not address the

public-trust doctrine and (2) subsequent cases have limited its application to land-use exactions.

In *Nollan*, the petitioners applied for a permit under California's Coastal Development Act to demolish an existing beach bungalow and replace it with a larger three-bedroom beach house. The California Coastal Commission granted the permit application to the Nollans on the condition that they allow the public an easement to pass across their property between the mean high tide line and their seawall. The Nollans objected to the condition and appealed the Commission's decision, which appeal eventually found its way to the United States Supreme Court.

The United Supreme Court in *Nollan* dealt with the narrow question of whether a permit condition mandating the conveyance of a property interest that does not serve the same governmental purpose as a development ban is a legitimate exercise of the government's police power or a "taking" under the Fifth Amendment. The case did not involve the public trust doctrine or answer the question of whether the public had a pre-existing right to use that portion of the beach.

> In light of these uncertainties, and given the fact that, as JUSTICE BLACKMUN notes, the Court of Appeal did not rest its decision on Art. X, § 4, *post*, at 865, we should assuredly not take it upon ourselves to resolve this question of California constitution law in the first instance. This would be doubly

> inappropriate since the Commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a pre-existing public right of access had to be asserted through a quiet title action, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring.

Nollan, at 833 (majority opinion, citations omitted and emphasis added). The quote by Justice Blackmun, to which the majority opinion refers to, reads: "I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine...The Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution...Nor did the parties base their arguments before this Court on the doctrine." *Nollan*, at 865. (dissent, emphasis added). In short, *Nollan* is not a public trust case. Any language in the opinion that seems to suggest otherwise is *dicta*.

As the Court noted in the majority opinion, the California Coastal Commission did not have standing to enforce the public trust rights in the ocean beaches. In contrast, the Town of Emerald Isle does have standing to assert this doctrine here. N.C. Gen. Stat. § 160A-205 (2015)("a city may...regulate [the] conditions upon the State's ocean beaches and prevent or abate any unreasonable restriction of the public's rights to use the State's ocean beaches"); *see also Fish House, Inc. v. Clarke*,

204 N.C. App. 130, 136-37 (2010)(allowing use of doctrine defensively).

Additionally, later Supreme Court cases have limited *Nollan's* holding to situations involving land-use exactions, i.e. instances in which a government, under the guise of land-use regulation, has required an individual to deed portions of their property. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)("[T]he conditions imposed were...a requirement that she deed portions of the property to the city. In *Nollan, supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments."); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 602 (1999)(citing to *Nollan*: "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions - land-use decisions conditioning approval of development on the dedication of property to public use.")

In this case the two subject ordinances do not involve any requirement that the Nies transfer any ownership in their property; they simply regulate the Nies' use of their property in accordance with the public's pre-existing rights to use the dry-sand beach under the public-trust doctrine. Consequently, *Nollan* is inapplicable. It should be noted that the Town does not disagree with the proposition espoused by Justice Scalia in

Nollan, that obtaining an easement across private property without compensation, where one did not exist before, would be an unconstitutional taking prohibited by the Fifth Amendment. However, as discussed above, that is not the situation in our case.

Beroth Oil Co. v. N.C. Dept. of Transp., 367 N.C. 333 (2014), cited by Plaintiff-Appellants dealt with the construction of a beltway in Forsyth County and has no application to the unique nature of the dry-sand beaches of North Carolina.

West v. Slick, 313 N.C. 33 (1985), concerned two unpaved and unimproved roads (the "Soundside Road" and the "Pole Line Road") on the Outer Banks, neither of which was located on the dry-sand beach. "The second road, known as the 'Pole Line Road' because of its location along established telephone line poles, is located behind the sand dune line." *West* at 43. Although the Court does recite North Carolina precedent regarding the "foreshore" and littoral property owners, *West* at 60-62, the opinion does not concern the public trust doctrine. "We do not discuss the so-called 'public trust' theory as it was not pled and not addressed by the trial court nor was it briefed or argued on appeal.

Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531 (1960), dealt with a condemnation in Burke County. The primary question in the case was whether a municipality could acquire a fee simple interest in property by condemnation. Accordingly, it is inapplicable.

Kaiser Aetna v. United States, 444 U.S. 164 (1979), dealt with a unique situation in which an originally un-navigable pond (Kuapa Pond) was made navigable exclusively through substantial amounts of private investment and effort. *Kaiser* at 165-68. "The question before us is whether...petitioners' improvements to Kuapa Pond...[converted] into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to Kaiser Aetna." *Kaiser* at 169. Plaintiff-Appellants here have not altered the character of the dry-sand beach through any investment on their part and *Kaiser* is inapplicable.

Opinion of the Justices, 649 A.2d 604, 609-10 (N.H. 1994) is just that, an opinion of the New Hampshire Supreme Court on the effect of proposed legislation. Given that it does not concern an actual controversy, its precedential value is questionable. Furthermore, the court did not address the question of whether New Hampshire's dry sand beaches were in the public trust; Instead, the court relied upon the assumption

contained in the proposed legislation. *Opinion* at 610. "Because, however, the bill states that the dry sand area is not within the public trust we will, for purposes of this opinion, base our analysis on that assumption." *Id.*

Hildebrand v. Southern Bell Telephone & Telegraph Co., 219 N.C. 40 (1941) is a case involving the placement of telephone and telegraph lines along a public highway in Buncombe County. It does not concern the ocean beaches or the unique character of the dry-sand beach.

Carolina Beach Fishing Pier, Inc. v. Carolina Beach, 277 N.C. 297 (1970), held that there was no taking by the Town of Carolina Beach in constructing a berm. The case concerned chiefly the doctrines of avulsion and accretion. The plaintiff's property had been eroded to such an extent that the mean high water mark was west of the western most property line of plaintiff's lots. The court held that, by virtue of the erosion, the subject property was vested in the State and the Town of Carolina Beach did not take any of plaintiff's property by constructing the berm.

Weeks v. NC Dept. of Natural Resources & Community Dev., 97 N.C. App. 215 (1990) dealt with the denial, by the Department of Natural Resources, of plaintiff's application to build a 900-foot long pier into Bogue Sound. Plaintiff alleged that the

denial constituted a taking. This Court disagreed, finding that the denial did not deprive plaintiff of all practical uses of his property. The Town of Emerald Isle completely agrees with this reasoning. Likewise, the challenged regulations in this case do not deprive Plaintiff-Appellants of all practical and economically beneficial uses of their property.

V. The Public Policy of Coastal North Carolina Should Not be Disturbed.

In Essence, Plaintiff seeks to change the long established policy and law of this state by having this Court hold that they have the right to exclude the public from the ocean beaches of North Carolina. The repercussions of such a holding would be severe and long lasting. It would eviscerate N.C. Gen. Stat. §§ 77-20; 160-205; 160A-308; 1-45.1; and 113-131 and would likewise invalidate existing ordinances in virtually every beach front municipality within the state. The effect such a holding would have on the State's 2.9 Billion dollar coastal tourist industry, (T pp 13-14), is incalculable.

CONCLUSION

For the foregoing reasons, the judgment of the Trial Court should be affirmed.

Respectfully Submitted this the 21st day of April, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing DEFENDANT-APPELLANT'S BRIEF was this day served upon the below-named parties by sending a copy of the same via electronic mail to the addresses below:

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