

SUPREME COURT OF NORTH CAROLINA

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

Plaintiff,)

v.)

TOWN OF EMERALD ISLE, a North)
Carolina Municipality,)

Defendant.)

From Carteret County
COA 15-169

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No. 409P15

THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

DEFENDANT'S RESPONSE TO PETITION

PLAINTIFFS' PETITION SHOULD BE DENIED

I. Plaintiffs do not have an appeal as of right under N.C. Gen. Stat. § 7A-30(1) because this case does not involve any substantial constitutional question which has not already been conclusively determined.

Plaintiffs have submitted a Notice of Appeal pursuant to Rule 14 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-30(1), based on their contention that this case involves "a substantial question of law arising under the constitutions of the United States and North Carolina." The Court should dismiss that appeal because the dispute in this

case is not over the constitutional principles involved, but is instead a dispute over an issue of North Carolina's real property law.

This Court's cases construing § 7A-30(1) hold that an appellant must "show the existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination or suffer dismissal." *Thompson v. Thompson*, 288 N.C. 120, 121, 215 S.E.2d 606, 607 (1975). An appellant cannot satisfy this requirement merely by "mouthing . . . constitutional phrases" when the actual dispute is over some other issue of law, such as property law. *Bundy v. Ayscue*, 276 N.C. 81, 83-84, 171 S.E.2d 1, 3 (1969) (dismissing appeal as of right under § 7A-30(1) because case involved "property right," rather than unresolved constitutional question).

The case is not a dispute over any unsettled question of constitutional law. Rather, the issue in this case is a dispute over a question of real property law—the contours of the "public trust doctrine." It is well established that the state law of each state determines property rights, including the rights of littoral property owners. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 707 (2010).

Plaintiffs concede that there is no constitutional "taking" if there is a pre-existing limitation inherent in the title on their property. This is known as the doctrine of "background principles." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-31, 112 S.Ct. 2886, 2899-2901 (1992). Plaintiffs expressly acknowledged this point in their brief to the Court of Appeals. (See Plfs' Brief, at pp. 22-23). The opinion below merely acknowledges the "background principle" of North Carolina law that oceanfront property owners do not have the right to exclude the public from the ocean beaches of North Carolina. As such, there is no constitutional question presented in this case.

This Court has already held that the "public trust doctrine" is a common law doctrine which does not implicate the North Carolina Constitution. See *Gwathmey v. State*, 342 N.C. 287, 303-04, 464 S.E.2d 674, 683-84 (1995).

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS AND IS CONSISTENT WITH THE GENERAL STATUTES DEALING WITH THE PUBLIC'S ACCESS TO AND USE OF THE DRY SAND BEACHES OF NORTH CAROLINA, AS WELL AS MUNICIPALITIES' AUTHORITY TO REGULATE THOSE DRY SAND BEACHES.

Contrary to the Plaintiffs' assertions, the opinion below does not conflict with this Court's prior decisions, the language of N.C. Gen. Stat. § 77-20, or constitutional takings law. Instead, the decision below is actually consistent with §

77-20, as well as other statutes dealing with access to the beaches of North Carolina and municipal authority to regulate those beaches.

A. The decision below is consistent with North Carolina's general statutes and local ordinances.

As a general rule, a statute must be construed in a manner that gives meaning and effect to all of the statute's provisions. *State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 120 (1975). In this case, N.C. Gen. Stat § 77-20 contains the following provisions:

(a) The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark. Provided, that this section shall not apply where title below the mean high water mark is or has been specifically granted by the State.

...

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

(e) *As used in this section, "ocean beaches" means the area adjacent to the ocean and ocean inlets that is subject to public trust rights. This area is in*

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

N.C. Gen. Stat. § 77-20 (emphasis added).

In the decision below, the panel held that the General Assembly had defined the portion of the "ocean beach" which was subject to "public trust rights" to be different from the area of the beach which is owned in fee by the State. This construction of the statute was the only reasonable construction that would give meaning and effect to all of the statute's provisions.

This construction of the statute did not "extend" the State's property line. The idea that a state can, as a matter of state property law, define public trust *rights* to be more extensive than the state's public trust *ownership* is well established. See *Phillips Petro. Co. v. Mississippi*, 484 U.S. 469, 483-84 (1987) ("Finally, even where States have given dominion over tidelands to private property owners, some States

have retained for the general public the right to fish, hunt, or bathe on these lands.”).

The decision below is also consistent with a number of other statutes addressing beach access and the public’s traditional use of the ocean beaches. For example, N.C. Gen. Stat. § 113-131 expressly recognizes that public trust rights extend to some areas that are privately owned. This statute defines “public trust resources” to include “both land and water areas, *both public and private*, subject to public trust rights as that term is defined in G.S. 1-45.1.” N.C. Gen. Stat. § 113-131(e) (emphasis added). N.C. Gen. Stat. 1-45.1 states that public trust *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.” *Id.*

Similarly, in N.C. Gen. Stat. § 113A-134.1 (entitled “Legislative Findings”), the General Assembly found that “[t]he public has traditionally fully enjoyed the State’s beaches and coastal waters and public access to and use of the beaches and coastal waters. . . . The General Assembly finds that that the beaches and coastal waters and resources of statewide significance and have been customarily freely used and enjoyed

by people throughout the State.” N.C. Gen. Stat. § 113A-134.1(b). The panel’s decision is certainly more consistent with this statute than the Plaintiffs’ proposed construction of § 77-20 would be.

These legislative findings are also consistent with the General Assembly’s grant of authority to municipalities to regulate beach access and driving on the beaches. For example, N.C. Gen. Stat. § 160A-205 expressly states that municipalities “may, by ordinance, define, prohibit, regulate, or abate acts, omissions, or conditions upon the State’s ocean beaches and prevent or abate any unreasonable restriction of the public’s right to use the State’s ocean beaches.” N.C. Gen. Stat. § 160A-205(a). This statute defines “ocean beaches” by reference to N.C. Gen. Stat. § 77-20(e). Significantly, this statute also expressly states that nothing in the statute shall be construed to “deny the existence of the authority recognized in this section prior to the date this section becomes effective,” or to “impair the right of the people of this State to the customary free use and enjoyment of the State’s ocean beaches, which rights remain reserved to the people of this State as provided in G.S. 77-20(d).” N.C. Gen. Stat. § 160A-205(b)(iii)-(iv).

Since at least 1973, the General Assembly has also expressly authorized municipalities to regulate driving on the beaches, including driving on the "foreshore, beach strand and the barrier dune system" of North Carolina's ocean beaches. See N.C. Gen. Stat. § 160A-308.

Finally, North Carolina's coastal municipalities have uniformly acted in accordance with these statutes, consistent with lower court's decision, by acknowledging the public's right and consistent use of the dry sand beach and enacting ordinances regulating these uses. (See, e.g., Defendant-Appellee's Brief, at p. 18 n. 7 & Appendix pp. 1-95).

As noted in the Plaintiffs' Petition, the Plaintiffs purchased the property at issue in this case in 2001. With the exception of N.C. Gen. Stat. § 160A-205 (which was enacted in 2013), all of these general statutes were in force prior to the time that Plaintiffs purchased the property. Thus, when Plaintiffs took title to the property, they were on notice that the General Assembly had described this preexisting limitation on their title. See *Lucas*, 505 U.S. at 1028-30.

B. The decision below does not conflict with the prior decisions of this Court.

The decision below does not conflict with the prior decisions of this Court. None of the cases cited by the

Plaintiffs addressed the issue of whether littoral property owners have the right to categorically exclude the public from the dry sand portion of the beach. The cases cited by the Plaintiffs deal with issues of *ownership* (not *use*) and generally stand for the proposition that the property inland of the mean high water mark is privately owned.

In *Gwathmey*, the primary issue was whether the State had retained ownership (under the public trust doctrine) to marshlands that had been deeded to private parties. More specifically, the Court addressed the issue of whether North Carolina used the "lunar tides test" or the "navigable in fact test" to determine which waters were considered "navigable" under the public trust doctrine. See *Gwathmey*, 342 N.C. at 293-303, 464 S.E.2d at 676-86. The Court did not address any issues relating to the dry sand portion of the beach.

Similarly, in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970), the Court stated the issue was "[w]here is the dividing line between the property of the State and that of the littoral property owner?" *Id.* at 301, 177 S.E.2d at 516. The Court proceeded to hold that North Carolina was a "high-tide" state, rather than a "low tide" state, and that littoral ownership did not include the foreshore. *Id.* at 302-03, 177 S.E.2d at 516-18. Again, the

aspect of the public trust doctrine at issue in this case (whether the littoral property owners could exclude the public from the dry sand portion of the beach) was not addressed.

Finally, in *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985), the Court dealt with the issue of whether a "neighborhood public road" had been established across the parcels of land in question. The Court specifically noted that it declined to address the "public trust" doctrine because it had not been raised in the proceedings below and was not briefed or argued on appeal. *West*, 313 N.C. at 45, 326 S.E.2d at 608.

In summary, the decision of the panel below does not conflict with the holdings of any of this Court's cases. The panel's central holding—that "[t]he right to prevent the public from enjoying the dry sand portion of the Property was never part of the 'bundle of sticks' purchased by the Plaintiffs in 2001"—is entirely consistent with existing law and custom of this State and does not disturb any settled principles of private property ownership up to the mean high water mark.

CONCLUSION

For the foregoing reasons, among others, Plaintiffs' Notice of Appeal should be dismissed and Plaintiffs' Petition should be denied.

Respectfully Submitted this the 22nd day of December, 2015.

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CERTIFICATE OF SERVICE

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

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This the 22nd day of December, 2015.

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Motion and Response received

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RESPONSE

Nies v Town of Emerald Isle

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