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' REPLY BRIEF

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

In its Brief, the Town of Emerald Isle (Town) does not dispute the critical facts supporting the Nies' takings claims.[1] It does not dispute that the Nies' own property lying between the dunes and the mean high water mark. It does not dispute that this area is subject to its Beach Gear Ordinance and Beach Driving Ordinance and the

[1] The Town bizarrely asserts that the Nies' federal takings claim (arising under 42 U.S.C. § 1983) is not at issue here because the Nies have conceded it is unripe. Town Brief at 6. This is untrue. The Nies press the 5th Amendment claim and it is ripe in this Court. *See San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 346, 125 S. Ct. 2491, 2506, 162 L. Ed. 2d 315 (2005).

driving authorized by those laws.[2] Finally, the Town does not deny that, pursuant to the ordinances, Town and public vehicles regularly drive on the Nies' dry sand property. There is no material dispute, then, that the Town has physically invaded the Nies' land.

This is exactly why the Town recognizes that this case turns on whether there is a preexisting limitation in the Nies' title that allows the invasion. Yet, it does not argue there is an explicit title encumbrance that gives it access to their property. It does not claim such a right arises from the limited beach re-nourishment easement it obtained from the Nies in 2005-2006. The only source it identifies for the purported right to invade their land with government and public vehicles is North Carolina's "public trust doctrine."

Yet, despite being challenged by the Nies, the Town's still cannot point to any state common law precedent holding that the public trust doctrine extends to the vegetation line, thus covering the Nies' dry beach area. Nor does it cite any case that allows public driving and parking, or an exclusive Town driving lane, as a public trust right. As expected, the Town falls back on N.C.G.S. § 77-20, but ultimately, it (correctly) recognizes that the statute just codifies the common law—the same law

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[2] The challenged Town ordinances define the subject "public trust beach" area as "all land and water area between the Atlantic Ocean and the base of the frontal dunes." Appendix to Plaintiffs-Appellants' Opening Brief (App.) at 23 (Town Code § 5-1).

which terminates the public trust beach at the mean high water mark. Finally, the Town seeks help in inapposite common law easement theories, but it is too late because it never raised such theories below.

The Town has always relied on the public trust doctrine alone. But in the end, that doctrine is its undoing, not its savior. Bereft of public trust cover for its actions, the Town's ordinance-sponsored invasion of the Nies' land stands exposed as an unconstitutional taking.

REPLY ARGUMENT

I. THE BEACH GEAR ORDINANCE FUNCTIONS AS AN EASEMENT IMPOSITION, NOT AS A SET-BACK REGULATION, BECAUSE IT ALLOWS THE TOWN TO OCCUPY THE NIES' LAND AT ANY TIME, FOR ROUTINE PURPOSES

The Town contends the twenty-foot travel land in the Beach Gear Ordinance is really just a set back regulation, not authority for the occupation of property. Town Brief at 4. But this is refuted by both the text and enforcement of the Ordinance. The law states that it is "to provide sufficient area for unimpeded vehicle travel by emergency vehicles and town service vehicles on the public trust beach area." *See* App. at 25 (Town Code § 5-19(a)). It further states: "[T]own service vehicles *shall only utilize* said areas [the twenty foot strip of private dry sand areas] when no safe

alternative travel area is available elsewhere on the public trust beach area." *Id.* (Town Code § 5-19(b)) (emphasis added).

Even if one could ignore the Ordinance's text, it would have to be treated as authorization for a Town invasion in this case. This is because the Nies are challenging the Ordinance as *it is applied*, not on its face, and it is undisputed that Town garbage trucks, police vehicles and ATVs regularly drive on the twenty-foot strip of the Nies' land under the Ordinance. Thus, in application, the Ordinance creates a Town vehicle lane on the Nies' dry sandy land.

Certainly, the Ordinance does not function as a set back regulation. Such regulations may prohibit developmental use of slices of property for general health and safety purposes. *Gorieb v. Fox*, 274 U.S. 603, 608, 47 S. Ct. 675, 677, 71 L. Ed. 2d 1228 (1927). But they do not allow the government to routinely enter the land. They do not impose "a public easement . . . [or] deprive landowners of the right to exclude others." *Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.*, 285 Wis. 2d 472, 502-03, 702 N.W.2d 433, 447 (Ct. App. 2005). Yet, this is what is happening to the Nies. As applied, the Ordinance does not just command them to avoid using a portion of their property; it gives Town service vehicles the right to occupy that land whenever desired, in derogation of the Nies' fundamental right to deny unwanted occupation of their land.

II. *SLAVIN* AND *CONCERNED CITIZENS* DO NOT AUTHORIZE PUBLIC TRUST-BASED DRIVING ON THE NIES' PRIVATE DRY SANDY LAND

Implicitly recognizing the true effect of its ordinances, the Town spends the vast majority of its time arguing that the public trust justifies governmental and public occupation of the Nies' land.[3] But it fails to counter the extensive authority identified by the Neis holding that the public trust beach area extends inland only as far as the mean high water mark, and therefore, does not authorize occupation of private uplands, like the Nies'. *See* Opening Brief at 25-27; *see also*, *Gwathmey v. State*, 342 N.C. 287, 293, 464 S.E.2d 674, 678 (1995) ("[T]he public trust doctrine is not an issue in cases where the land involved is above water . . . ."). The two cases it cites, *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 584 S.E.2d 100 (2003), and *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State*, 329 N.C. 37, 404 S.E.2d 677 (1991), are inapposite.

The Town cites *Slavin* for the proposition that "an oceanfront property owner's interest in the dry sand beach is . . . subordinate to public trust protections," Town Brief at 9; *see also*, *id.* at 12. This is a very unusual reading of *Slavin* since it does not

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[3] In a brief footnote, the Town states: "Plaintiffs' claims, to the extent they are premised on beach driving are time barred . . . ." Town Brief at 20 n.8. Because the Town does not otherwise discuss this defense in its brief, or identify it in the "issues presented" section, it is waived. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 186 n.2, 594 S.E.2d 1, 18 n.2 (2004) (a party abandoned an issue by raising it only through "a short tangential reference in a footnote").

even involve a private dry sand beach area, much less a public invasion of such an area. The dispute was over access across a state-owned beach[4] on which the town had erected a fence. *Slavin*, 160 N.C. App. at 58-59, 584 S.E.2d at 101. The court did not consider rights in a private dry sand area, much less hold such property is subject to the public trust. It simply held that the erection of a fence to protect the State beach did not cause a taking of the littoral landowners' ability to access the water. *Id.* This has no bearing here.

The Town's reference to *Concerned Citizens* is also off-point. The 4-3 *Concerned Citizens* decision confirms that the public may acquire pedestrian access over private dry beaches upon proving all the elements of a prescriptive easement on the parcel it wishes to use—something the Town has never done on the Nies' land and which it does not attempt here. *Concerned Citizens*, 329 N.C. at 39, 404 S.E.2d at 679. The Town focuses, however, on the majority's parting commentary. That commentary states:

> 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

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[4] The beach area at issue was created by a Town beach re-nourishment project that placed sand over the State-owned wet beach, thereby creating a new dry beach on that area. Under North Carolina law, that new dry area remained State property. N.C.G.S. § 146-6(f) (2003).

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

Id. at 55, 688 (citation omitted).

This dicta does nothing. Certainly, it cannot be read to overturn, *sub silentio*, the supreme court's prior decisions limiting the public trust to state-owned beaches bounded on the landward side by the mean high water mark. *West v. Slick*, 313 N.C. 33, 60, 326 S.E.2d 601, 617 (1985) ("The long standing right of the public to pass over and along the strip of land lying *between the high-water mark and the low-water mark* . . . is well established . . . .") (emphasis added); *id.* at 62, 617 ("The high-water mark is generally computed as a mean or average high-tide . . . ."); *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 301-03, 177 S.E.2d 513, 516-17 (1970) ("The 'strip of land between the high- and low-tide lines' is called the foreshore;" "the high-water mark is generally computed as a mean or average high-tide;" "the foreshore is reserved for the use of the public.").

Even if the *Concerned Citizens* statement had some force (it does not), it would undercut, not help, the Town's position. In light of the facts of that case, and giving the statement the most generous reading, perhaps the Town could spin it to suggest the *Concerned Citizens* majority thought the public trust doctrine might, with some unknown qualifications, afford temporary pedestrian passage across private land. But that is not what is going on here. The Town has authorized people to drive their pick-

up trucks and cars onto the Nies' land to park, drive, and party. Opening Brief at 10-13. It drives and parks its own vehicles on the Nies' land. *Id.* Nothing in *Concerned Citizens* remotely sanctions this. In any event, the debate is academic, since actual holdings that limit the public trust to the mean high water mark trump the *Concerned Citizens* dicta and render it of no effect.

III. N.C.G.S. SECTION 77-20 DOES NOT EXTEND THE PUBLIC TRUST BEYOND THE COMMON LAW MEAN HIGH WATER MARK, AND DOES NOT AUTHORIZE THE TOWN'S ACTIONS

Without supporting case law, the Town turns to N.C.G.S. § 77-20. But this hope is misplaced.

A. The Statute Simply Codifies the Common Law Mean High Water Mark Public Trust Boundary

N.C.G.S. § 77-20 states in relevant part:

> (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.* . . .
>
> (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 . . . . *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.

(Emphasis added.)

The Town ignores the italicized sections. But, as they make clear, N.C.G.S. § 77-20 does not change common law public/private beach boundaries, such as the mean high water mark boundary, nor does it purport to create public rights in private dry sand areas located landward of the mean high water mark. It leaves the determination of public trust beach boundaries to the courts. N.C.G.S. § 77-20(d) & (e). As the statute implicitly acknowledges, "natural indicators" of boundaries are not the same as *legal* boundaries, and on the critical issue of legal boundaries, N.C.G.S. § 77-20 is clear that the common law controls. So the question is, what does that law say? As we have seen, every relevant state court decision halts the public trust boundary at the mean high water mark. None adopt the vegetation/ dune line. *See* Opening Brief at 25-27*; see West*, 313 N.C. at 60, 326 S.E.2d at 617; *Carolina Beach*, 277 N.C. at 302-03, 177 S.E.2d at 516-17. As a codification of these rules, N.C.G.S.

§ 77-20 cannot and does not justify the Town's application of the public trust doctrine to the vegetation/dune line.[5]

The North Carolina Division of Coastal Management, which has regulatory jurisdiction over Emerald Isle beach areas—including that adjoining the Nies' property—has adopted the same limited definition of the public trust, as the courts. *See* 15A N.C. Admin. Code 07H.0207 ("Public trust areas" are "all waters of the Atlantic Ocean and the lands thereunder from the *mean high water mark* to the seaward limit of state jurisdiction . . . .") (emphasis added). The Town's enforcement of a dune/vegetation public trust boundary radically departs from existing understandings, particularly those in the common law.

B. The Legislature's "Findings" Cannot Create a Common Law Public Easement

The Town very briefly argues that precatory language in N.C.G.S. § 77-20 stating that "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" constitutes a finding sufficient to convert all privately owned dry sand areas in the

[5] The Town's beach ordinances refer to § 77-20 in defining the "public trust beach area," but then go further and state that the trust area includes "all land and water area between the Atlantic Ocean and the base of the frontal dunes." App. at 23 (Town Code § 5-1).

state into a public beach under doctrines such as prescription and custom. Town Brief at 11-12. But the Town never plead or pressed such doctrines in the trial court. It cannot go down that road now. *See, e.g.*, *Smith v. Axelbank*, 222 N.C. App. 555, 560, 730 S.E.2d 840, 844 (2012) (contentions not raised in trial court are waived on appeal).

In any event, the idea is baseless. The doctrines of custom (assuming it even exists in this state),[6] prescription and implied dedication cannot create a state-wide easement that covers multiple parcels with different owners and histories; they establish easements only on a property-specific basis. *See* 3 R. Powell, *Powell on Real Property* § 34.11[6], at 34-171 (1994) ("prescriptive easements, by their nature, can be utilized only on a tract-by-tract basis, and thus cannot be applied to all beaches within a state."); *Trepanier v. County of Volusia*, 965 So. 2d 276, 289 (Fla. Dist. Ct. App. 2007) ("[A]cquisition of a right to use private property by custom is intensely local and anything but theoretical.").

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[6] The North Carolina Supreme Court has never recognized the English doctrine of customary law as a basis for rule making. Although not an issue, it is impossible to conceive of a customary driving right existing on dry sand from "time immemorial" since vehicles capable of driving on such areas were not invented until the mid to late twentieth century. It is particularly inconceivable in Emerald Isle, which, as a barrier island, was not opened for driving of any sort until 1972, when the Cameron Langston Bridge opened.

Perhaps most importantly, the issue is a judicial, not a legislative one. *Purdie v. Attorney General*, 143 N.H. 661, 664, 732 A.2d 442, 445 (1999) ("The determination of common law questions is a judicial, not a legislative, function."). Common law doctrines require an easement claimant to prove numerous, specific facts[7] in a judicial proceeding in which the subject property owner has a chance to rebut the evidence purportedly supporting an easement. *See generally, Concerned Citizens*, 329 N.C. at 45-49, 404 S.E.2d at 682-85. Neither the state legislature nor the Town can simply declare such facts exist with respect to all private parcels, and therefore create an easement by fiat. *Severance v. Patterson*, 370 S.W.3d 705, 733 (Tex. 2012) (Willett, J., concurring) (Public "[e]asements may well burden private Gulf Coast properties, including on West Galveston Island—but they must be proved, not merely presumed."). Doing so would constitute an uncompensated taking. *Id.* at 731-32. In any event, factual allegations are not at issue here, as the Town has relied on its legislative power to unilaterally declare the Nies' land open to Town and public

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[7] The factual elements needed to establish a prescriptive easement are set out in *West v. Slick*, 313 N.C. at 49-50, 326 S.E.2d at 610-11. In the few states where customary law exists, a customary right can only be established by proof of a particular custom in a particular locale from "time immemorial," as well as proof of its "peaceableness," "certainty," "reasonableness" and "consistency." *Trepanier*, 965 So. 2d at 289-90 (citing David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 1996 Colum. L. Rev. 1375). The multiple factual elements of an easement by implied dedication are outlined in *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 639-40, 684 S.E.2d 709, 723-24 (2009).

use. *Cf. Purdie*, 143 N.H. at 666-67, 732 A.2d at 447 (a statute that extended the public trust beyond the common law mean high water mark to the vegetation line caused a taking).

IV. THE SKY WILL NOT FALL IF THE COURT CONFIRMS THE LIMITED NATURE OF THE PUBLIC TRUST DOCTRINE AND FINDS A TAKING HERE, BUT TROUBLING RESULTS WOULD ARISE FROM A CONTRARY RULING

The Town's final argument is the venerable parade of horribles. First, the Town claims that many municipal ordinances would be invalidated if the Town's laws are held to cause a taking.[8] Town Brief at 30. Not so. No other Town laws are as intrusive as the Town's Beach Gear Ordinance.[9] Moreover, this is not a facial challenge to its ordinances. The Town's ordinances, and any others like it, might be constitutionally applied in many cases, for instance, where property owners have granted general access easements as part of beach re-nourishment projects. (R p 59). They may legitimately apply to other parcels subject to properly recorded or adjudged public beach access easements. But it is clear they cannot be constitutionally enforced

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[8] The Town further asserts that several state laws would be "eviscerate[d]." Town Brief at 30. Since no state law extends the public trust beach to the vegetation line or authorizes towns to occupy private land not subject to the public trust, such as the Nies', the contention is meritless.

[9] Few of the ordinances the Town identifies define the public trust beach as expansively as the Town. And, unlike the laws here, none explicitly create a government driving lane next to the dunes.

against the Nies, given the nature of the Nies' dry sand land and their clear title. No laws would be invalidated by a judgment along these lines; the Town would simply be required to compensate for the unconstitutional application of its laws.[10]

Second, the Town states that protecting the Nies' constitutional rights would have an "incalculable" effect on the state's "tourist industry." Town's Brief at 30. Assuming the Town is suggesting tourists will have no beach access if the government is not allowed to confiscate the Nies' and others' property, its contention is easily refuted.

North Carolina beaches are subject to numerous and varied public access points. State and town-owned wet and dry beaches exist and will always be open the public. Some private dry beaches are subject to dedicated or adjudicated easements that allow access. *See, e.g.*, *Concerned Citizens*, 329 N.C. at 45-49, 404 S.E.2d at 682-85. Like other communities, Emerald Isle has also dozens of public beach access areas. *See* http://www.emeraldisle-nc.org/eiprd/wateraccess.htm. The Town acquired additional access in connection with beach re-nourishment. Beachfront property owners also

[10] The Town could probably easily afford to pay for the land it has taken from the Nies by using some of the hundreds of thousands of dollars it has obtained through selling permits for the public to drive on private dry land like that owned by the Nies.

typically permit pedestrian use of dry sand property. This case would effect none of this.[11]

The real danger arises from the Town's attempt to re-write the public trust doctrine so it covers dry lands between the mean high water mark and vegetation/dune line. This would transfer all existing private dry beaches to the government. And it would legalize a perpetual land grab scheme in which the Town would acquire new areas of (currently vegetated) inland private areas, if and when those areas lose their vegetation or come to be in front of a dune, thereby putting them within the Town's public trust area.

[11] If the Town wants more public access, it can use the same lawful methods to obtain it; i.e., buy land/easements, prove up prescriptive easements, seek easements during beach re-nourishment (R p 59), get owner consent, and require access as a condition on new development if such development would harm public access.

CONCLUSION

The Court should declare that the Town's ordinances are unconstitutional in this case, enjoin their enforcement against the Nies without provision of just compensation, and remand for damages.

Respectfully submitted, this 29th day of April, 2015.

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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 3,750 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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This the 29th day of April, 2015.

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