NO. 409PA15 THIRD JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

GREGORY P. NIES and DIANE S. NIES,	)	
Plaintiffs,	)	
	)	From Carteret County
v.	)	No. COA15-169
TOWN OF EMERALD ISLE, a North Carolina Municipality,	)	
Defendant.	)	

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BRIEF OF AMICI CURIAE OWNERS' COUNSEL OF AMERICA AND PROFESSOR DAVID L. CALLIES

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BRIEF OF AMICI CURIAE OWNERS' COUNSEL OF AMERICA, AND PROFESSOR DAVID L. CALLIES

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Owners' Counsel of America (OCA) and Professor David L. Callies respectfully submit this brief amici curiae in support of Plaintiffs-Appellants.

INTRODUCTION

The Court of Appeals permitted the Town of Emerald Isle (Town) to impress into public service the portion of the Nies family's property above the mean high water mark as a road and park. North Carolina

law has never subject this dry sand to public ownership, through the public trust doctrine or otherwise. The Court of Appeals, however, ignored this distinction, holding that the Town's permitting the public to use the Nies' dry sand was not a taking because the Nies never owned the right to exclude the public. This Court should reverse, and reconfirm—in accordance with its existing precedents and the vast majority of other jurisdictions—that the public trust is limited to land below the mean high water mark, and cannot be extended by the legislature or by a court to insulate the Town from avoiding its constitutional obligations to condemn the property and pay just compensation under the law of the land clause and the Fifth Amendment. Simply put, the public trust doctrine isn't a means to transform what has always been private property under North Carolina law into a public resource, without compensation.

INTEREST OF AMICI

A. Owners' Counsel of America

OCA is an invitation-only national network of experienced eminent domain and property rights attorneys. They have joined together

to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. OCA members have also authored and edited treatises, books, and law review articles on property law and property rights. OCA believes that its national perspective will aid the Court in resolution of the issues presented by this case.

B. David L. Callies

David L. Callies is the Benjamin A. Kudo Professor of Law at the University of Hawaii's William S. Richardson School of Law, where he teaches land use, state and local government, and real property. Callies is one of the nation's recognized authorities on the law of public trust

and regulatory takings, especially how they related to beaches and littoral property. Among the many books he has written, co-authored, or edited are *Property and the Public Interest* (3d ed. 2007); *Eminent Domain: A Handbook of Condemnation Law* (2011); *Preserving Paradise: Why Regulation Won't Work* (1994); *Regulating Paradise: Land Use Controls In Hawaii* (1984); *Cases and Materials on Land Use* (5th ed. 2008); and *The Role of Customary Law in Sustainable Development* (2006). His research focuses on the public trust, and among his scholarship are articles on *Background Principles, Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 46 Val. U. L. Rev. 339 (2002) (with J. David Breemer); *The Categorical (*Lucas*) Rule: "Background Principles," Per Se Regulatory Takings, and the State of Exceptions*, 30 Touro L. Rev. 371 (2014) (with David A. Robyak); *Custom and Public Trust: Background Principles of State Property Law?*, 30 Envtl. L. Rep. 10003 (2000); *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523 (1999); and *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 Washburn

L. Rev. 43 (2014). Professor Callies believes his scholarly perspective and extensive study of the doctrines which are at issue in this case will aid the Court.

ISSUES PRESENTED

This case presents the question of whether the public trust doctrine—which has always been limited to areas seaward of the mean high water mark—immunizes the Town from paying just compensation after it transformed the privately-owned dry sand portion of the Nies family's land into a public road and park.

STATEMENT OF THE FACTS

Amici adopt by reference the Statement of the Facts in the Plaintiffs-Appellants' New Brief. *See* N.C. R. App. P. 28(f).

ARGUMENT

This brief makes two points. *First*, property rights are the basis of a free society, and the foundation on which all other civil rights stand. Owners' rights to be secure in their property are only as secure as the judiciary's recognition of settled expectations. *Second*, since its inception, the scope of North Carolina's public trust doctrine has been strictly limited to state-owned beaches seaward of the mean high water mark;

until it was judicially extended by the Court of Appeals in this case to include the dry sand beach up to the vegetation line, the North Carolina public trust was consistent with the law of a vast majority of other jurisdictions.

I. Our Governments Were Formed In Large Measure To Protect Owners' Rights To Be Secure In Their Property

The law of the land clause in article I, section 19 of the North Carolina Constitution bars uncompensated takings of property. *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 13 (1989). Similarly, the Fifth Amendment to the United States Constitution provides, "nor shall private property be taken for public use, without just compensation." Both recognize the central role of property rights in our constitutional order, and recently, the United States Supreme Court affirmed this "essential principle: Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Court also has observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted). The

Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist"). The U.S. and the North Carolina Constitutions embrace the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society." John Locke, *Second Treatise on Civil* Government, XI § 138. *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). James Madison declared, "Government is instituted to protect property of every sort. ... This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." *The Complete Madison* 267-68 (Saul K. Padover ed., 1953) published in *National Gazette* (March 29, 1792).

We begin from these foundational principles because the people's right to be secure in their property is undermined—or, as in the present case, forfeited entirely—when the demarcation between publicly owned or used land and private property is not subject to clear rules and conforms to long-settled expectations. It is essential that courts faithfully

and consistently apply settled principles of property to secure an owner's fundamental rights, because settled expectations lie at the core of the protection of civil rights. The U.S. Supreme Court has recognized that the means to protect this foundation is a system which fosters "certainty and predictability" in land titles. *Leo Sheep Co. v. United States,* 440 U.S. 668, 687-88 (1979). State courts—including this court—also recognize this principle. For example, in *Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992), this Court reaffirmed North Carolina's jealous protection of fundamental rights, including the right to property, by giving the state's constitution "a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." Similarly, the Michigan Supreme Court held that "stability, predictability, and continuity" are the foundations of property law because they induce reliance, and that "[j]udicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital." *2000 Baum Family Trust v. Babel,* 793 N.W.2d 633, 655 (Mich. 2010) (internal citations omitted).

These principles are at their zenith in cases such as this, in which the Nies family justifiably relied on this state's long-established rule that the public trust ends at the mean high water mark. They could not have foreseen that the Town would claim—and the lower courts would affirm—that their dry sand, which had been private property for centuries, would, with the stroke of a pen, be deemed to never really have belonged to them at all, and that the Town could transform it into a public roadway without the bother of condemnation and the payment of just compensation.

II. The Public Trust Stops At The Mean High Water Mark

Against this background, we turn to the core issue in this case: does the public trust, as applied by this Court and a majority of other state courts, encompass the dry sand between the mean high water mark and the vegetation line? The short answer: no.

The public trust is limited to the area below the mean high water mark. Any extension of this demarcation line onto private dry sand—either by a legislature or a court—is a taking of private property that requires condemnation and the payment of just compensation. The question here is where the public beach ends and private property be-

gins; it goes nearly without saying that the long-standing demarcation between them cannot be altered without compensating littoral property owners, if what always was private property is simply declared by the legislature or a court (as did the Court of Appeals here) to be a public beach.

In American law, the public trust is a common law doctrine that each state as sovereign holds title to submerged land in trust for the public. The doctrine has its roots in the notion that certain resources are not capable of private ownership, but are common to all. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (state's use of land subject to public trust under state law is not a taking). The purpose of the trust is to ensure that the public has the ability to "navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the state." N.C. Gen. Stat. § 1-45.1. This includes the right to access the state's beaches. *Id.* While the list of activities which the public trust guarantees has grown over the years, the location of the boundary between the public's beaches and private property has not: it has always been the mean high water mark, not the vegetation line.

The U.S. Supreme Court recognized that the public trust under English law applied to lands subject to the ebb and flow of the tides. *See Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892). Adapted to the geography of the New World, the doctrine has been applied in a nearly uniform manner by the states—including this court, as set forth in *West v. Slick*, 313 N.C. 33, 60-61, 326 S.E.2d 601, 617 (1985) and other cases—to hold with few exceptions that the boundary between the state's public trust beach and private property is the mean high tide line or the mean high water mark. For example:

Alabama: *State v. Gill*, 66 So.2d 141 (Ala. 1953) (mean high water mark).

Alaska: *City of St. Paul v. Alaska*, 137 P.3d 261 (Alaska 2006) (mean high water mark).

California: *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (mean high water mark).

Connecticut: *State v. Knowles-Lombard Co.*, 188 A. 275 (Conn. 1936) (mean high water mark).

Florida: *Daytona Beach v. Tona-Rama, Inc.* 295 So.2d 73 (Fla. 1974) (mean high water mark).

Maryland: *Dep't of Nat. Resources v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975) (mean high water mark).

Mississippi: *Cinque Bambini P'ship v. State*, 491 So. 2d 508 (Miss. 1986) (mean high water mark).

New York: *People v. Steeplechase Park Co.*, 113 N.E. 521 (N.Y. 1916) (mean high water mark).

North Carolina: *Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 277 N.C. 297, 117 S.E.2d 513 (1970) (mean high water mark).

Rhode Island: R.I. Const. art. I, § 17 (mean high water mark).

Other states fix the border at the low water mark. *See, e.g., Hilton Head Plantation Property Owners Ass'n v. Donald*, 651 S.E.2d 614 (S.C. App. 2007). *See also* Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Envtl. L.J. 52, 57 (2011) ("In nearly all cases, the relevant lines for defining the limits of private title and public

access are the mean high water and mean low water marks, which are the averages of high and low tides over 18.6 years.") (citing *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935)).

Only three jurisdictions fix the public line elsewhere. Hawaii and Oregon do not rely on the public trust to do so, but on hyperlocal customary practices. *See*, e.g., *State* ex rel. *Thornton v. Hay*, 462 P.2d 671 (Or. 1969); *Cnty. of Hawaii v. Sotomura*, 517 P.2d 57 (Haw. 1973). The doctrine of custom requires proof of a particular custom on particular properties form "time immemorial." David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1384-88, 1448 (1996). This doctrine is not applicable in North Carolina:

> We did not import from the mother country any of the "special customs," which, in particular localities, are allowed to supercede the common law. All legislative power is vested in our General Assembly. We can recognise no other law-making power, and there is no intimation to be met with in any of our decisions, that special customs can grow up among us, whereby rights may be affected, or the common law be in anywise changed. By the common law an

> imaginary line is thrown around the land of every one, which may not be entered without subjecting the wrong-doer to an action. No custom or usage can change this law.

Winder v. Blake, 49 N.C. 332 (1857). Thus, is no help to the Town here, and it did not raise custom as a defense.

New Jersey remains the sole outlier in interpreting the public trust to prohibit private ownership of the dry sand beach. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984). There, the court concluded the public has the right to access privately-owned dry sand because it is reasonably necessary to the public's use of adjacent public beaches. *Id.* at 365-66. Over time, this right has been further expanded by the New Jersey court to include access from the nearest public road. *See Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 120-21 (N.J. 2005). The New Jersey court's rationale in these cases should be viewed for what it is, an exercise in judicial fiat, untethered from the fundamental principles outlined in the first part of this brief; policymaking in the guise of law. Moreover, the New Jersey court avoided the consequences of these rulings, because the main issue

present here (whether extending the public's ability to use property to private land is a taking), was not presented in those cases.

Unfortunately, the Court of Appeals joined New Jersey and took the same fundamentally wrong approach when it concluded that the public trust beach now includes the Nies' dry sand. The court ignored the common law foundation of the public trust and its limitation to the wet sand below the mean high water mark, instead concluding that a statute—N.C. Gen. Stat. § 77-20(d)—legislatively extended the reach of the public trust to the privately-owned dry sand beach. *See Nies v. Town of Emerald Isle*, No. COA15-169, slip op. at 14 (N.C. App. Nov. 17, 2015) ("[T]he General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights."). The court sought to distinguish between what it called "public trust rights" (the "portion of privately-owed dry sand beaches [which] are subject to public trust rights" (public access)), and actual public trust property (as detailed above, property below the mean high water mark *owned* by the state). *Id.* The court concluded that the statute only extended "public trust rights" even though it didn't impact actual ownership of the dry

sand. In other words, the legislature invited the public to use the Nies' dry sand, where prior to the statute, the Nies had the right to exclude the public.

However, the court's erroneous distinction fell apart just four pages later, because it conflated the two concepts—public use of private property, versus public ownership—which it had just sought to separate. The court concluded, "[t]he right to prevent the public from enjoying the dry sand portion of the Property was never part of the 'bundle of rights' purchased by the Plaintiffs in 2001." *Id.*, slip op. at 19. Thus, in the court's view, the legislature's extension of the public trust to encompass the Nies' dry sand was not a taking because the Nies never actually owned the right to keep the public out of the dry sand. *Id.*, slip op. at 20. This highlights the fundamental flaw in the Court of Appeals' reasoning: after acknowledging that the legislature's extension of "public trust rights" to allow public use of the private dry sand beach was a derogation of the common law but did not impact ownership, the court concluded the Nies never owned the right to keep the public off that property at all. *See id.*, slip op. at 22 ("Plaintiffs have never, since they purchased the Property in 2001, had the right to exclude public traffic,

whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property . . . [t]he contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulated a right that the public already enjoyed."). More critical than the Court of Appeals' internal inconsistencies, of course, is its conflict with this Court's holdings in cases such as *Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 277 N.C. 297, 117 S.E.2d 513 (1970), which hold that the demarcation line between private property and public beaches is the mean high water mark. *See id.* at 303, 117 S.E.2d at 516 ("[W]e hold that the seaward boundary of plaintiff's lots is fixed at the high-water mark. The high-water mark is generally computed as a mean or average high-tide, and not as the extreme height of the water.").

If the legislature or the Town determined that the public would be better served by moving the public/private border shorewards and expanding the publicly-owned or publicly-used beach to the dry sand, they almost certainly have the power to do so, provided they exercise the eminent domain power and provide the compensation which our constitutions require. But even if it might be a good idea to expand the public

beach, they cannot do it by fiat. After all, as Justice Holmes reminded us, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

For the reasons stated herein, OCA and Professor Callies respectfully request this Honorable Court reverse the judgment and opinion of the Court of Appeals.

Respectfully submitted,

DATED: May 23, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to N.C. App. P. 28(j)(2)(B), amici curiae states that this brief complies with the type and volume limitations because it contains 3,360 words, excluding those parts of the brief exempted by the Rules, and this document has been prepared in a proportionally-spaced type-face in font Century Schoolbook, point sized 14.

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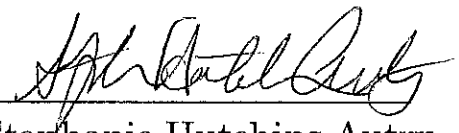
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I filed the foregoing Brief of Amici Curiae Owners' Counsel of America and Professor David L. Callies with the Clerk of Court. The following counsel of record were served with a copy via U.S. Mail, postage prepaid:

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