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A Judicial Affirmation of the Public's Common Law Right to Use All of North Carolina's Dry-sand Beaches

BY JOSEPH J. KALO, GRAHAM KENAN PROFESSOR OF LAW EMERITUS AT THE UNC SCHOOL OF LAW

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Nov. 17, 2015, was a very important date for the people of North Carolina and the legal community. In a unanimous North Carolina Court of Appeals opinion issued on that day, the court expressly confirmed a common law right that the people of North Carolina long knew existed. In *Nies v. Town of Emerald Isle*, the Court unqualifiedly held that the "ocean beaches of North Carolina … are subject to public trust rights."

In late January 2016, the plaintiffs petitioned this case to the N.C. Supreme Court. For now, what this case means is that all the dry-sand beaches, whether natural or nourished, are open to public use for purposes related to the enjoyment of the State's ocean waters and shorelines. Private oceanfront landowners cannot exclude the public from any portion of the dry-sand beach even if the private landowner's legal title includes the dry-sand beach.

Until the Court's decision in the *Nies* case, no North Carolina court opinion directly addressed the question of whether all dry-sand beaches of the State were, in fact, open to public use. The question had arisen in past cases but each time, for different reasons, the court did not have to answer it in order to resolve the litigation before it. Now the question has been answered.

This article will examine the *Nies* decision and its implications for other litigation in which the public's right of use may play a role in the outcome.

Background of *Nies vs. Town of Emerald Isle*

The *Nies* litigation has its origins in the 2001 purchase by a New Jersey couple, the Nieses, of an oceanfront lot located in the Town of Emerald Isle (Town). According to the deed received by the couple, their title extended seaward to the mean high water mark, which meant that it included the dry-sand beach area lying between the foot of the dunes or first line of vegetation and the water.

Not long after the couple purchased the property, the Town engaged in one of its many beach nourishment projects. When the project was completed in 2003, the dry-sand beach in front of the Nieses' property had been extended from the pre-project mean high water mark to a new mean high water mark. As a result, the dry-sand beach in front of the Nieses' property consisted of an area that included the pre-project dry-sand beach and a new post-project beach created by the nourishment project.

Legally, there was no dispute over the ownership of these two parts of the dry-sand beach. Title to the portion landward of the pre-project mean high water mark was, and remained, with the Nieses. Title to the newly created portion seaward of the pre-project mean high water mark was owned by the State and held by the State as public trust lands. North Carolina General Statute 146-6(f) specifically provides that lands raised by a beach nourishment project paid for with public funds are the property of the State and not that of the adjacent oceanfront property owner. And the statute makes clear that such raised lands are open to public use.

In *Nies v. Town of Emerald Isle*, it was the Nieses' contention that the public did not have a right to use that portion of the dry-sand beach to which they held title. Their contention was that the public only had the right to use the area to which

the State held title — the raised lands seaward of the pre-project line.

The specific event that culminated in the Nieses filing suit against the Town was the adoption of ordinances that prohibited the placement of any beach equipment, at any time, "within an area twenty (20) feet seaward of the base of the frontal dunes." The justification for the prohibition was the Town's public-safety need "to maintain an unimpeded vehicle travel lane for emergency services personnel and other Town personnel providing essential services on the beach strand." Because this 20-foot-wide lane would be located on that part of the dry-sand beach to which the Nieses held title, the Nieses strongly objected to the restriction imposed by the ordinance. In their complaint filed in 2011, the Nieses asserted that the ordinance constituted an unconstitutional taking of their property without compensation.

In 2014, the Town filed a motion for summary judgment in the Superior Court for Carteret County, which the trial court granted in August of that year. The Nieses then appealed that order to the Court of Appeals, which affirmed the decision of the trial court.

The Public Right to Use All the Dry-sand Beaches in the State of North Carolina

To North Carolinians, it seems almost axiomatic that the public has the right to freely use and enjoy the dry-sand beaches of the State for all types of coastal recreational activities,[1] ranging from sun bathing, to fishing, to horseback, and even to driving on the beach in some areas. Therefore it may seem strange to North Carolinians that the existence of the public right could even be an issue.

To understand this, three things must be kept in mind. One is that the beautiful North Carolina coast attracts many people from all over the country. Some come as vacationers; many others are visitors who become permanent residents.

Second, in the majority of coastal states, unless the dry-sand beach is a nourished one, not only does the oceanfront property owner's title include the dry-sand beach, but the oceanfront property owner can exclude the public from the dry-sand beach.[2] So some of our visitors and new permanent residents arrive with the misunderstanding that the law of North Carolina is the same as the law of the states from which they come. When they look to the beach in front of their residence and see members of the public on the dry sand, they mistakenly think that the public is trespassing on private property and should be kicked off.

The third thing is a previous lack of legal clarity in the decisions of the North Carolina courts.[3] The public knows it has the right to use the dry-sand beaches but, until the *Nies* decision, no North Carolina appellate court had specifically affirmed the public's right to use all the dry-sand beaches within the State, although the right to use the dry-sand beach was strongly suggested in some cases, or was apparent by necessary implication in others.[4] The absence of that express affirmation left it open for some oceanfront property owners to claim that North Carolina law was the same as that of the states that allowed oceanfront property owners to exclude the public from the dry-sand beach. Now, that is no longer the case.

North Carolina Court of Appeals *Nies* Decision

The core of the Nieses' case was their objection to the Town's ordinances that (1) allowed the public to drive on the dry-sand beach during the period from Sept. 15 until April 30 of the following year and (2) reserved, during the period between May 1 and Sept. 14, a 20-foot-wide travel lane along the dunes, for exclusive use by municipal vehicles. Because both of these activities would result in vehicles crossing that portion of the beach to which the Nieses held title, the Nieses asserted that their right to exclude the public from their private lands was being taken by the Town of Emerald Isle without just compensation in violation of the Fifth Amendment to the United States Constitution and the due process clause of the North Carolina Constitution. In order to prevail under this theory, the Nieses needed to establish that, under North Carolina law, in the absence of the Town ordinances they had a common law property right to prevent beach driving on that portion of the beach to which they held title.

As a general matter, several fundamental common law rights are embedded in a landowner's title to land. The most basic is the right to exclude others from the land. But this right is not absolute because others may also have by grant or common law the right

1 In fact, the *Nies* court took judicial notice of the fact "that the public right of access to the dry-sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become part of the public consciousness. Native-born North Carolinians do not generally question whether the public has the right to move freely between the wet-sand and dry-sand portions of our ocean beaches." *Nies v. Town of Emerald Isle*, 2015 N.C. App. Lexis 958, 19 (N.C. Ct. App. Nov. 17, 2015).

2 In many states, the public has *no general right* to freely use all natural dry-sand beaches for recreational or commercial purpose.

3 For example, when our Supreme Court confirmed the public trust right to drive on the "foreshore" between the mean high and low water marks of the ocean beach in *West v. Slick*, it necessarily included driving on the dry-sand beach, because it is practically impossible to tell where the foreshore stops and the dry-sand beach starts. 313 N.C. 33, 326 S.E.2d 601, 618 (N.C. 1985).

4 See e.g., *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State*, 329 N.C. 37 (1991), *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601, 618 (N.C. 1985), and *Fabrikant v. Currituck County*, 174 N.C. App. 30 (2005).

to use all or some portion of the land. The most typical situation is when one person has an easement over the land of another. Where such an easement exists, the landowner cannot exclude the person or persons holding the easement. In legal parlance, the right to exclude the easement holder in that situation is not one of the "bundle of rights" that passed to the landowner upon receiving title.

Because the Court of Appeals held that the public has a customary public trust right to use all the dry-sand beaches of the State, any title that any oceanfront owner, such as the Nieses, received to the dry sand did not carry with it the right to exclude the public. That was not part of the bundle of rights inherent in their title. The public, however, may only use the privately owned dry-sand portion of the beach for what are referred to as "public trust uses." If the particular activity does not qualify as a public trust use, then the public has no right to engage in that activity on privately owned dry-sand beaches and the person holding title can exclude and stop that activity. Furthermore, if the town or State prevents the landowner from excluding anyone engaged in such an activity, then that would be a governmental taking of a private property right for which compensation is constitutionally required. Therefore, the second key issue for the Court was whether beach driving was a public trust use.

Because there is a long history on Emerald Isle[5] (and elsewhere in North Carolina[6]) of the public driving on the dry sand, the Court concluded this was one of the customary rights of the public. Therefore the ordinance limiting driving on the beach to the period from Sept. 15 to the following April 30 *did not create* a right to drive. The ordinance in fact *restricted* and *regulated* the public right to drive on the beach, a right that the public already enjoyed. Because the Town shared the same right as the public to drive on the dry sand, the ordinance reserving a 20-foot-wide strip was deemed to also be a valid exercise of the Town's police powers regulating that activity.

The *Nies* Decision and Houses on the Beach

The rights of private oceanfront property owners and the public's right to use the dry-sand beach conflict in settings other than the one in *Nies*. A common one is when, due to storm and wave activity, the shoreline erodes and houses, once nested safely behind protective dunes, end up on what is the dry-sand beach. The question then is: in order to protect the public right to use the dry-sand beach, what authority does a municipality or the State have to force the owners of such structures to move them off the dry-sand beach? That issue has been litigated in cases involving the Town of Nags Head.[7] The Town of Nags Head ended up settling these cases.[8]

Two central questions arose in those cases:(1) whether only the State could enforce public trust rights and (2) whether the public trust beach included the dry sand or was limited to the wet-sand area. On the first issue, the courts ruled against the Town of Nags Head, holding that, under North Carolina law, only the State, acting through the Attorney General, has the authority to enforce public trust rights. Although, in 2014 the General Assembly subsequently enacted legislation giving cities authority to enforce ordinances within public trust areas, that authority did not "apply to removal of permanent residential or commercial structures … from the State's ocean beaches."[9] So, until that impediment is lifted, coastal communities still lack the necessary authority to force the removal of houses stranded on the dry-sand beaches. As to the second issue, the law is now clear that the public trust beach includes the dry-sand area. Therefore, if erosion results in a house ending up on the dry-sand beach, its presence would interfere with the public's customary right to use the dry sand and the State, as the enforcer of public trust rights, could take action to compel the removal of the offending structure.

A Brief Summary of the Ownership and Right to Use Ocean Beaches

With the legal clarity the *Nies* decision provides — pending any decision the N.C. Supreme Court makes, if they take the case — the legal framework that describes our ocean beaches and their uses is as follows:

1. The dry-sand beach is defined as extending from the mean high water mark landward to "the foot of the most seaward dunes, if dunes are present; the regular vegetation line, if natural vegetation is present; or the storm debris line." These dry-sand areas are also called "ocean beaches" in a number of state statutes and coastal development regulations.

2. If the dry-sand beach is a natural beach, an oceanfront property owner's legal title includes all of the dry-sand beach to the mean high water mark unless instrument of conveyance states otherwise.

5 *Nies v. Town of Emerald Isle*, 2015 N.C. App. LEXIS 958, 5 (N.C. Ct.App. Nov. 17, 2015).

6 *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601, 618 (N.C. 1985) ("Therefore, we once again affirm the rule that passage by the public by foot, vehicle and boat must be free and substantially unobstructed over the entire width of the foreshore…").

7 *Town of Nags Head v. Cherry, Inc.*, 723 S.E.2d 156 (N.C. Ct. of App. 2012).

8 *See* Rob Morris, *Seagull Drive Legal saga finally ends with a $1.5 million deal*, The Outer Banks Voice, Mar. 22, 2015, http://outerbanksvoice.com/2015/03/22/seagull-drive-legal-saga-finally-ends-with-a-1-5-million-deal/.

9 "Ocean beaches" are defined as including the dry-sand area. NCGS 160A-205.

3. The private title to a natural dry-sand beach does not include the right to exclude the public. That private title is encumbered by a customary public right of use. Accordingly a natural dry-sand beach — together with the wet-sand portion, or "foreshore" — is often referred to as the "public trust beach." The use of that label is simply a way of recognizing the public's right to use the beach for what are called "public trust uses," also referred to as "public trust rights" or "customary public trust rights."

4. Public trust uses include all manner of recreational activities — sunbathing, fishing, hunting, volleyball playing, horseback riding, beach driving, etc. — which North Carolinians have historically engaged in on ocean beaches.

5. Public trust uses or rights are not limited to recreational activities. Commercial fishing also is a public trust use, including the launching of boats, and hauling and drying nets.

6. The area seaward of the mean high water mark is public trust submerged lands and waters, which includes the area referred to as the wet-sand beach. Title to the wet-sand beach and all submerged lands lying under ocean waters is held by the State as "public trust lands and waters."

7. These state-owned public trust lands and waters are also open to public trust uses.

8. The public right of use is subject to regulation by the State and, where authorized, by local government authorities.

9. If a beach has been the object of a nourishment project, once the project is completed, title to all of the newly created beach seaward of the pre-project mean high water mark is in the State. That newly created beach is State-owned public trust land open to public use.

10. After completion of a beach nourishment project, the pre-project mean high mark remains the seaward boundary of the affected oceanfront property owner. Any portion of the dry-sand beach lying landward of the pre-project high water mark remains the private property of the oceanfront property but also remains open to public use.

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