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Land Use; Beaches; Public Trust Rights; Police Power; Beach Vehicular Ordinance; Regulation of Beach Equipment

Nies v. Town of Emerald Isle, ___ N.C. App. ___, 780 S.E.2d 187 (No. COA15-169, Carteret– 11/17/15), *petition for disc. review allowed*, ___ N.C. ___ (No. 409PA15, 4/13/16), *appeal dismissed ex mero motu*, ___ N.C. ___, 793 S.E.2d 699 (No. 409PA15, 12/14/16), *cert. denied*, 583 U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___, 86 U.S.L.W. 3157 (No. 16-1305, 10/2/17)

- ***Holding***– The ocean beaches of North Carolina are subject to public trust rights unless those rights have been expressly abandoned by the State. Trial court properly granted defendant-Town's motion for summary judgment in plaintiffs' action alleging inverse condemnation arising from ordinances, as property owners had no right to exclude the public from public trust beaches. The regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was within the scope of the police power.

- ***Key Excerpt***– The Court rejected plaintiffs' argument that privately owned dry sand beaches in North Carolina are not subject to the public trust doctrine. "[G.S.] 77-20 establishes that some portion, at least, of privately-owned dry sand beaches are subject to public trust rights. Lacking further guidance from prior opinions of our appellate courts, we must determine the geographic boundary of public trust rights on privately-owned dry sand beaches. We adopt the test suggested in [G.S.] 77-20(e): '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.' *Id*. We adopt this test because it most closely reflects what the majority of North Carolinians understand as a 'public' beach. *See, e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 (2000) ('the custom of the dry sand beaches being open

to public trust uses has a long history in North Carolina'). We hold that the 'ocean beaches' of North Carolina include both the wet sand beaches — generally, but not exclusively, publically owned — and the dry sand beaches — generally, but not exclusively, privately owned."

"For the purposes of [G.S.] 77-20, the landward boundary of North Carolina ocean beaches is the discernable reach of the 'storm' tide. This boundary represents the extent of semi-regular submersion of land by ocean waters sufficient to prevent the seaward expansion of frontal dunes, or stable, natural vegetation, where such dunes or vegetation exist. Where both frontal dunes and natural vegetation exist, the high water mark shall be the seaward of the two lines. Where no frontal dunes nor stable, natural vegetation exists, the high water mark shall be determined by some other reasonable method, which may involve determination of the 'storm trash line' or any other reliable indicator of the mean regular extent of the storm tide. The ocean beaches of North Carolina, as defined in [G.S.] 77-20(e) and this opinion, are subject to public trust rights unless those rights have been expressly abandoned by the State. *See* Gwathmey [v. State of North Carolina], 342 N.C. [287] at 304, 464 S.E.2d [674] at 684 [(1995)]."

The Court then turned to the issue of whether the Town, pursuant to public trust rights or otherwise, could enforce ordinances reserving unimpeded access over portions of plaintiffs' dry sand beach without compensating plaintiffs. The Court held, on these facts, that it could. "Plaintiffs cannot establish that the contested beach driving ordinances constitute physical invasion of the Property for purposes of the Takings Clause. The majority of Plaintiffs' argument is predicated on Plaintiffs' contention that the dry sand portion of the Property is not encumbered by public trust rights. We have held that the dry sand portion of the Property is so encumbered. Because public beach driving across the Property is permissible pursuant to public trust rights, regulation of this behavior by the Town does not constitute a 'taking.' 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. The Town has the authority to both ensure public access to its ocean beaches, and to impose appropriate regulations pursuant to its police power. The contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulate a right that the public already enjoyed." (Citations omitted.)

". . . . We hold that passage of Section 5-102 of the 2010 Ordinances, and Section 5-19 of the 2013 Ordinances, constituted legitimate uses of the Town's police power. We hold that the regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was '"within the scope of the [police] power[.]"' Finch v. City of Durham, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989) (citation omitted). Further, the '"means chosen to regulate,"' prohibiting large beach equipment within a twenty-foot-wide strip along the landward edge of the ocean beach, were '"reasonable."' *Id.* (citation omitted)."

"The contested provisions in the 2010 Ordinances and the 2013 Ordinances did not result in a 'taking' of the Property. First, though Plaintiffs argue that the Ordinances deprived them of 'the right to control and deny access to others,' as discussed above, it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights. The Ordinances restrict and regulate certain public and private uses pursuant to the Town's police power. The Town's reservation of

an obstruction-free corridor on the Property for emergency use constitutes a greater imposition on Plaintiffs' property rights, but does not rise to the level of a taking. Though Plaintiffs argue that 'the Town has made it impossible for [them] to make any meaningful use of the dry [sand] [P]roperty[,]' Plaintiffs retain full use of, and rights in, the majority of the Property. Plaintiffs' rights in the dry sand portion of all but the twenty-foot-wide strip of the Property are the same as when they purchased the Property. *Id.* Concerning the twenty-foot-wide strip, Plaintiffs retain all the rights they had when they purchased the Property other than the right to use large beach equipment on that portion of the Property 'between May 1 and September 14 of each year.' The Town, along with the public, already had the right to drive on dry sand portions of the Property before Plaintiffs purchased it." (Citations omitted.)

- ***Synopsis***− Appeal by plaintiffs from August 2014 order. Affirmed. Opinion by Chief Judge McGee, with Judge Elmore and Judge Davis concurring. On April 13, 2016, plaintiffs' petition for discretionary review was allowed. On December 14, 2016, the N.C. Supreme Court dismissed the appeal *ex mero motu*. On October 2, 2017, the U.S. Supreme Court issued an order stating that the petition for writ of certiorari was denied.

Nota Bene (N.B.)
Other Recent Decision of Note

Procedure; Denial of Motion for Relief; Entry of Default Judgment Swan Beach Corolla, L.L.C. v. Cty. of Currituck, ___ N.C. App. ___ (No. COA17-411, Currituck− 10/17/17) (***unpublished***) ("The County of Currituck, the Currituck County Board of Commissioners, and members of that Board (collectively, 'Defendants') appeal from the trial court's denial of their motion for relief pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, following the entry of a default judgment in favor of Swan Beach Corolla, L.L.C., Ocean Associates, LP, Little Neck Towers, L.L.C., Gerald Friedman, Nancy Friedman, Charles S. Friedman, 'til Morning, LLC, and Second Star, LLC (collectively, 'Plaintiffs'). We dismiss Defendants' appeal as moot. Prior to appealing the trial court's denial of Defendants' Rule 60(b) motion, Defendants filed an appeal from the trial court's orders denying their motion to set aside the entry of default and entering default judgment in favor of Plaintiffs. *See* Swan Beach Corolla, L.L.C. v. Cty. of Currituck, __ N.C. App. __, __ S.E.2d __, 2017 WL 4364383 (N.C. Ct. App. Oct. 3, 2017) (Swan Beach III). This Court stayed Defendants' appeal from the denial of the motion to set aside the entry of default and the default judgment pending the outcome of the trial court's determination of the Rule 60(b) motion. *Id*. at __, __ S.E.2d at __, 2017 WL 4364383 at *3. Following the trial court's denial of Defendants' Rule 60(b) motion, this Court proceeded to consider the appeal raised in Swan Beach III and reversed the trial court's order denying Defendants' motion to set aside the entry of default and remanded the matter for further proceedings. *Id*. at __, __ S.E.2d at __, 2017 WL 4364383 at *6. The effect of that decision was that the trial court's entry of default judgment and the trial court's order denying Defendants' Rule 60(b) motion—the order from which this appeal arises—became void. Accordingly, we dismiss Defendants' appeal." (Appeal by defendants from December 2016 order. Dismissed. Opinion by Judge Inman, with Judge Bryant and Judge Davis concurring.))