No. 409PA15 THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

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GREGORY P. NIES and DIANE S. NIES, Plaintiffs, v. TOWN OF EMERALD ISLE, a North Carolina Municipality, Defendant.	)	From Carteret County

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AMICUS CURIAE BRIEF OF THE STATE OF NORTH CAROLINA _EX REL._ ATTORNEY GENERAL ROY COOPER

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

Secondary Sources

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The Court of Appeals' decision in *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. Nov. 17, 2015), explicitly recognizes the public's right of use in the dry sand beaches of the State of North Carolina. It is of the utmost importance to the State that this holding be affirmed. A contrary ruling from this Court would upend the understanding of the people of this State regarding their right to use commonly open areas of the State's renowned natural resources. This background understanding of public rights is so woven into the fabric of our common heritage that it touches everything from law enforcement and

transportation to recreation and the thriving coastal economy. The rule sought by the Plaintiffs-Appellants ("the Plaintiffs") has no foundation in law, would significantly disrupt an immemorial custom, and adversely affect the public welfare and economic wellbeing of the State.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT THE PUBLIC HAS A LONG-RECOGNIZED RIGHT TO USE NORTH CAROLINA'S DRY SAND BEACHES.

The State possesses rights in the ocean beaches of North Carolina that it holds in trust for the benefit of the people of this State. Although the ordinances at issue in this case specifically implicate the public's right to vehicular transport along the ocean strand, the rights of the people are by no means so limited. The public also enjoys, for example, the rights of fishing, pedestrian travel, hunting, and recreation. *See, e.g.*, N.C.G.S. § 1-45.1 (2015). These rights have been recognized at common law. They are a function of both the distinct physical nature of beaches and their unique place in our society. The Court of Appeals' imprimatur supports all of these public rights and a decision by this Court must be no narrower in scope. Consistent with the common law, the dry sand beaches are public ways that must remain open to the panoply of rights traditionally enjoyed by beachgoers.

A. The State Holds Rights Of Use In The Dry Sand Beach In Trust For The Public Subject To The State's Police Power.

The State holds these rights not for itself but for the benefit of the public. *See Gray v. Cent. Warehouse Co.*, 181 N.C. 166, 176, 178 (1921) (characterizing the common law as the "foundation of much of our liberty," including the principle that "the public welfare is the highest law" (emphasis omitted)). In its role as trustee, the State also utilizes its police power. *See Kirby v. N.C. DOT*, No. 56PA14-2, 2016 N.C. LEXIS 443, at *11 (N.C. Jun. 10, 2016) ("Under the police power, the government *regulates* property to prevent injury to the public."). The police power is directly connected "'with that protection to life, health, and property which each State owes to her citizens.'" *Id.* (quoting *City of Durham v. Eno Cotton Mills*, 141 N.C. 615, 642, 54 S.E. 453, 462 (1906)). As discussed in more detail below, the State has several times regulated the public's right to vehicular transport along the ocean beaches. By such enactments, the State has recognized the rights at issue alongside the State's own authority to manage those rights for the public good.

In addition, the State has delegated some of its police power to local governments, such as the Town of Emerald Isle ("the Town"). *See* N.C.G.S. § 160A-205 (granting limited, enumerated authority to municipalities, as creations of the State, to regulate in this sphere). It is the exercise of delegated power such as this about which the Plaintiffs complain in this case. That is, the Plaintiffs are

not alleging that the Town has too strictly regulated the rights and actions of the Plaintiffs themselves. Instead, they contend that the Town is unlawfully allowing the public to exercise its rights too much.

The Plaintiffs also are not contending that the ordinance at issue is an unlawfully arbitrary or irrational exercise of the State's delegated police power. The State and the Town (and many other local governments along the coast) have over the years carefully balanced the rights of the public on the State's ocean beaches in order to accommodate the often conflicting growing usage of one of the State's most cherished natural resources, and indeed one of its defining features. *See Boyden v. Achenbach*, 79 N.C. 539, 540 (1878) (explaining the mixture of uses historically involved in "public ways," including passage on foot, on horseback, and in wheeled vehicles); *Eno Cotton Mills*, 141 N.C. at 626, 54 S.E. at 457 ("The use by each must, therefore, be consistent with the rights of others, and the maxim of *sic utere tuo* observed by all."). In fact, this Court previously reviewed and upheld legislation to address the hazards that inhere in having vehicles and pedestrians in close proximity on the beaches in Emerald Isle. *Emerald Isle v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987). In that matter, as in many other instances, the State was only exercising its roles as trustee and sovereign to manage the public's various rights in the State's ocean beaches and promote public safety.

B. The Enactment Of N.C.S.G. § 77-20 Did Not Create The Public Rights At Issue In This Case; The Statute Merely Recognized Those Rights.

At the core of the Plaintiffs' contention is the asserted right to exclude the public from vehicular travel in an area of the State's beaches lying between the mean high water ("MHW") mark and the toe of the frontal dune. This area is often referred to as the "dry sand beach".[1] The Court of Appeals correctly held that public rights of use exist in the dry sand beaches of the State of North Carolina irrespective of the question of ownership. *Nies*, 780 S.E.2d at 194. The court properly recognized this right as part of the public trust doctrine, which it defined as "a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public." *Id*. (quoting *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (2005)).

Nevertheless, the Court of Appeals imprecisely states that "N.C. Gen. Stat. § 77-20 **establishes** that some portion, at least, of privately-owned dry sand beaches are subject to public trust rights." *Nies*, 780 S.E.2d at 196 (emphasis added). However, as noted by the Court of Appeals, both subsections (d) and (e) of N.C.G.S. § 77-20 indicate that the public's rights are "established" by "the

[1] The Plaintiffs suggest that this Court has determined that the MHW mark is not coextensive with the toe of the frontal dune. The Court need not resolve the question of the definition or location of the MHW mark because the law is clear that the public's rights extend to the toe of the frontal dune regardless of the location of this supposed mark.

common law as interpreted and applied by the courts of this State." *Id*. at 194. Indeed, at other times the Court of Appeals recognized that the public's rights at issue in this case were established at common law and long predate N.C.G.S. § 77-20. *E.g.*, *Nies*, 780 S.E.2d at 193-94.

As observed by the Plaintiffs (Pls.' Br. at 30-31 (emphasis added), the Attorney General has previously indicated that "the State of North Carolina does not rely on [N.C.G.S. § 77-20] to create public rights on the beaches, and it has no such effect." (R p 626) *See also* N.C. Atty. Gen., Advisory Op. Ocean Beach Renourishment Projects, 1996 N.C. AG LEXIS 55, at *5 (Oct. 15, 1996) (indicating, prior to the adoption of N.C.G.S. § 77-20(d) and (e), that the "dry sand beach" "is an area of private property which the State maintains is impressed with public rights of use" on various legal bases). Therefore, the Court of Appeals' suggestion that the statute "establishes" any rights must be understood to indicate only that the statute recognizes those rights. Because the rights at issue in this case were not created by N.C.G.S. § 77-20, but were established at common law, they are background principles of state property law and cannot effect a taking of the Plaintiffs' property.

C. The Public's Rights In The Dry Sand Beach Have Been Long Recognized By The Courts And The General Assembly.

The Court of Appeals properly concluded that the public enjoys rights in the dry sand beach. The public's use of the State's dry sand beach as a path for

vehicular travel is well-established and recognized at law. For example, in *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State*, 329 N.C. 37, 42, 404 S.E.2d 677, 681 (1991), this Court recounted testimony establishing vehicular travel on the beach strand as early as the 1920s.

In 1965 – thirty-six years before the Plaintiffs purchased their Emerald Isle property – the General Assembly enacted a prohibition on the operation of motor vehicles on Bogue Banks between Beaufort Inlet and Bogue Inlet. This area includes the Town of Emerald Isle among other local jurisdictions. The General Assembly defined the area in which the use of vehicles was prohibited as "that area lying" between "the line of sand dunes" and "the low water mark of the waters of the Atlantic Ocean," that is, "the beach strand." 1965 N.C. Sess. Laws 798, § 1. This prohibition included several exceptions. It did not apply to "vehicles operated for commercial or sports fishing," construction vehicles or federal, state or local government vehicles, which therefore continued to be permitted to drive on the beach strand in Emerald Isle and other jurisdictions. *Id.*; *see also* Thomas J. Schoenbaum, Islands, Capes, And Sounds: The North Carolina Coast 200 (John F. Blair 1982) (noting that when Cape Lookout National Seashore was established on nearby Core Banks in 1966, the National Park Service began removing "more than 2,500 abandoned vehicles once used . . . by fishermen on the banks").

The timing of this prohibition is not surprising. "Until the 1950s Bogue Banks was virtually undeveloped" but within two decades would become "the most rapidly developing barrier island on the North Carolina coast." Schoenbaum, *supra*, at 212-13. The influx of new residents undoubtedly warranted controls on the ongoing use of the beach for transportation.

Less than a decade after the General Assembly first restricted the use of vehicles on the beaches of Bogue Banks, lawmakers granted to local governments the power to "regulate, restrict and prohibit the use of dune or beach buggies, jeeps, motorcycles, cars, trucks, or any other form of power-driven vehicle . . . on the foreshore, beach strand and the barrier dune system." 1973 N.C. Sess. Laws 856 (codified at N.C.G.S. § 160A-308) and, in the 1980s, this Court specifically recognized that Emerald Isle's western beaches were particularly popular for beach driving due to the attractive fishing resource there.

> [T]he ocean front and inlet beaches within the Town of Emerald Isle are frequented on a regular basis by numerous sport fishermen operating vehicles on the beaches. These beach areas adjacent to Bogue Inlet in particular are noted for excellent fishing, and annually attract numerous fishermen. Because no parking is available within two miles of the vehicle access ramp in this area, many of the fishermen are forced to drive along the beaches in order to gain access to the fishing areas.

Emerald Isle, 320 N.C. at 651, 360 S.E.2d at 763. At that time, the Town was granting "beach access permits . . . authorizing vehicular access to the ocean and inlet beaches." *Id*. at 644, 360 S.E.2d at 759.

In order to address the growing difficulties of having vehicles and pedestrians using the same beach areas, the General Assembly in 1983 adopted a plan to reduce the amount of beach driving on the western Emerald Isle shore. The General Assembly directed the State to develop parking facilities and pedestrian walkways to the beach at the western end of Emerald Isle at Bogue Inlet. Once these pedestrian walkways were completed, allowing beachgoers to park near and walk to the beach, the Town was directed to close the existing vehicle access to the beach. In addition, once the existing vehicle access was closed, beach driving "on the ocean beaches and dunes" near the vehicle access was prohibited, except for "reasonable access by public service, police, fire, rescue or other emergency vehicles." 1983 N.C. Sess. Laws 539, § 1.

Some property owners sued, alleging that the prohibition of beach driving on the "public trust portions" of some residents' property amounted to an exclusive emolument. *Emerald Isle*, 320 N.C. at 652, 360 S.E.2d at 763-64. This Court never questioned the plaintiffs' characterization of the issue. It went on to reject the claim on the ground that the intent of the law was not to create an exclusive privilege but instead to "reserve the ocean beaches" in this area "for public pedestrian use." *Id.* at 654, 360 S.E.2d at 764-65.

Four years later, this Court again addressed a beach access question. The *Concerned Citizens* case involved whether the public in Brunswick County had

gained a prescriptive easement through private property behind the dune line in order to gain "access to the ocean strand and inlet for fishing and recreation." 329 N.C. at 39, 404 S.E.2d at 679. There was no objection raised as to the public's right to use the "ocean strand." After concluding that the trial court and the Court of Appeals erred to the prejudice of the public, the Court stated it would "expressly disavow" the Court of Appeals' *dictum* that "the public trust doctrine will not secure public access to a public beach across the land of a private property owner." *Id.* at 55, 404 S.E.2d at 688. The Court wrote that it was not clear that barring the public's use of privately owned beach property was the law in North Carolina. *Id.*

Meanwhile, in 1985 the General Assembly enacted N.C.G.S. § 1-45.1. 1985 N.C. Sess. Laws 227. By this statute, the State affirmed that "public trust rights" are "those rights held in trust by the State for the use and benefit of the people of the State" and "are established by common law as interpreted by the courts." The Legislature found that these rights include "the right to freely use and enjoy the State's ocean . . . beaches." *Id.*

In 1998, the General Assembly further recognized the common law rights of the people, finding that the public has "made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial" and that the public's right to use the State's beaches was recognized at common law. 1998 N.C. Sess. Laws 225, § 5.1 (codified at N.C.G.S.

§ 77-20(d)). Although "[t]he landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts," the General Assembly declared that the "full width and breadth of the ocean beaches of this State," the scope of which is indicated by, among other things, the "first line of stable, natural vegetation" and "the toe of the frontal dune," were within the public's common law rights. *Id.* (codified at N.C.G.S. § 77-20(e)). *See also* N.C.G.S. § 20-171.22 (2015) (allowing operation of all-terrain vehicles "on any ocean beach area where such vehicles are allowed by law" and defining "ocean beach area" as the area "subject to public trust rights," the "landward extent" of which is indicated by "the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line"). Additionally, the United States Court of Appeals for the Fourth Circuit recently recognized that North Carolina's "beaches have historically been used by the public for transportation and recreational activities." *Town of Nags Head v. Toloczko*, 728 F.3d 391, 393 (4th Cir. 2013).

The core concept underpinning these authorities is the basic understanding that beach driving (among other activities), including driving on the beach strand above the MHW mark, has always been an accepted and legally recognized practice in North Carolina. As the Court of Appeals found, "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*,

780 S.E.2d at 196; *see also* Schoenbaum, *supra*, at 253 (observing that most North Carolinians "consider the [beaches] to be open [to the public] at least up to the frontal dunes" and to them "[t]he high-water mark is not relevant"); *Graham v. Charlotte*, 186 N.C. 649, 663, 120 S.E. 466, 472 (1923) (Public ways "'belong, from side to side and end to end, to the public.'" (quoting Elliott on Roads and Streets, 2d Vol., sec. 828)). By whatever name – public trust, common law or otherwise – this is the law of North Carolina.

The Plaintiffs erroneously contend that this Court has "repeatedly stated that public rights associated with the public trust doctrine . . . terminate at the high water mark." (Pls.' Br. at 21 (emphasis removed)) The Plaintiffs make too much of their tightly excerpted language from this Court's opinions. For example, the Plaintiffs' first authority allegedly supporting this position is from *Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970). As the Plaintiffs acknowledge, this Court stated that "[t]he strip of land between the high- and low-tide lines is called the foreshore," *id*. at 301, 177 S.E.2d at 516 (quotation marks omitted), which "is reserved for the use of the public," *id*. at 303, 177 S.E.2d at 516. This is accurate, of course, but it does not define any rights in areas other than the foreshore, which is also known as the "wet sand beach". *Nies*, 780 S.E.2d

at 190.[2] It says nothing about the dry sand beach above the foreshore. Similarly, the Plaintiffs submit that this Court has stated that "[t]itle to public trust waters is held in trust for the people of the State." *RJR Technical Co. v. Pratt*, 339 N.C. 588, 592, 453 S.E.2d 147, 150 (1995) (quotation marks omitted). This is indisputable as well, but it too says nothing about rights in the dry sand beach adjacent to (and sometimes submerged by) those waters. The Plaintiffs' key authorities do not support their expansive position.

The Court of Appeals correctly held that the public maintains certain rights in the beaches of this State, from the ocean up to the frontal dune, and those rights must be respected by oceanfront property owners.

II. THE COURT OF APPEALS PROPERLY LOOKED TO IMMEMORIAL CUSTOM AS A BASIS FOR ITS HOLDING.

Whether considered in tandem with the public trust doctrine, or as a stand-alone legal theory, the doctrine of custom further supports the Court of Appeals' properly taking "notice" of the public's use of the dry sand beaches from time immemorial. *Nies*, 780 S.E.2d at 196.

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[2] It is worth observing that the terms "dry sand beach" and "wet sand beach" are poor, but frequently used, monikers for these areas of the shore. The wet sand beach is often dry and the dry sand beach is often wet.

A. The Issue Of Custom Is Properly Before This Court.

As an initial matter, the Plaintiffs' claim that custom is not properly before this Court lacks merit. (Pls. Br p 19) Regardless of whether the parties presented this theory to the trial court, the Court of Appeals had inherent authority consistent with N.C. R. App. P. 2 to consider it in the interests of justice. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). Moreover, because the Court of Appeals expressly based its decision on the doctrine of custom, this Court's review of this legal theory is necessary and appropriate. N.C. R. App. P. 16 (2016) (stating that the purpose of this Court's consideration is "to determine whether there is error of law in the decision of the Court of Appeals").

B. This Court May Affirm Based On The Doctrine Of Custom.

In essence, a custom is a practice or use existing from time immemorial that has matured into a cognizable legal right. As a principle of law, this Court has taken the position that "the precedents from time immemorial cannot be safely departed from." *Jackson v. Hampton*, 32 N.C. 579, 590 (1849). Such precedents may include court cases but extend to broader practices: "When we see the long and uniform custom of the country, so well, at least so firmly established as this is, we have no moral right to disturb it, although we should be of opinion, that the words were not originally correctly understood." *Washington ex rel. Jones v.*

Hunt, 12 N.C. 475, 480-81 (1828). As Chief Justice Ruffin declared in *Jackson*: "Of course, my rule, as the safe one is, *stare super antiquas vias* [to stand upon the old ways]; for I then know where I am." 32 N.C. at 590.

This Court has long applied immemorial custom as a basis for judicial notice. *See Stack v. Pepper*, 119 N.C. 434, 438, 25 S.E. 961, 962 (1896) (taking judicial notice of survey method to determine private property rights "both because it is a matter of general knowledge that such has been the custom and because the judicial annals of the State are corroborative of that fact"). Because custom is reliable and "not subject to reasonable dispute" for purposes of N.C.G.S. § 8C-1, Rule 201 it is a recognized basis for a hearsay exception in the Evidence Code. *See* N.C.G.S. § 8C-1, Rule 803(20) (2015) (discussing "[r]eputation in a community . . . as to boundaries of or **customs** affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located" (emphasis added)). Thus, to the extent *Amicus* Civitas claims that the Court of Appeals should not have taken judicial notice of customary usage, this Court should reject its arguments.[3] (Civitas Br. pp 17-19)

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[3] Recent examples of customs noticed by this Court come from the following cases: *Bacon v. Lee*, 353 N.C. 696, 703, 549 S.E.2d 840, 846 (2001) (clemency power having "been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance" (quotation marks omitted)); *In re Guess*, 327 N.C. 46, 52, 393 S.E.2d 833, 836 (1990) (regulation of the medical profession being "the

At English common law, according to Sir William Blackstone's *Commentaries on the Laws of England*, a seven-part test applied to the determination of custom. *State ex rel. Thornton v. Hay*, 254 Ore. 584, 595-97, 462 P.2d 671, 677 (1969) (applying Blackstone's test step-by-step to dry sand beaches and finding a customary public right of use). This Court has adopted a modified and condensed test in the context of contract law and business customs. *See Penland v. Ingle*, 138 N.C. 456, 458, 50 S.E. 850, 851 (1905). Under *Penland*, in order to be recognized at law, a custom "must be uniform, long established, generally acquiesced in, reasonable [rather than contrary to public policy] and so well known as to induce the belief that the parties contracted with reference to it." *Id*. (quotation marks omitted)).

Applying the doctrine of custom, the Court of Appeals found that (1) the public has made uniform use of the full extent of both the dry- and wet-sand beaches of the State, *Nies*, 780 S.E.2d at 195-96; (2) this use dates back to the

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practice of different States, from time immemorial" (quotation marks omitted)); *State v. Detter*, 298 N.C. 604, 622, 260 S.E.2d 567, 581 (1979) ("The use of informers has been approved from time immemorial." (quotation marks omitted)); *State v. Currie*, 293 N.C. 523, 530, 238 S.E.2d 477, 481 (1977) ("It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so."); *State v. Williams*, 286 N.C. 422, 427, 212 S.E.2d 113, 117 (1975) ("From time immemorial it has been standard practice in this State for prosecuting attorneys in capital cases to interrogate prospective jurors concerning their opposition, if any, to the imposition of the death penalty.").

Town's 1957 incorporation as applied to the beaches of Emerald Isle and from time immemorial as applied to the State's ocean beaches in general, *id.* at 191, 195; (3) this use has always been "'frequent, uninterrupted, and unobstructed,'" *id.* at 195 (quoting N.C.G.S. § 77-20(d)); (4) this use is in furtherance of public policy in the economic well-being of the State, *id.* at 194 (citing N.C.G.S. § 113A-134.1(b)); and (5) this use is so well-known that it "has become a part of the public consciousness," *id.* at 196. In fact, the first three elements are "uncontested by Plaintiffs." *Id.* at 196 n.2. On these bases, the Court of Appeals properly took notice of and recognized the public's "long-standing customary right of access . . . to the dry sand beaches of North Carolina." *Id.* at 196. Furthermore, these facts also satisfy the *Penland* test, demonstrating that the Court of Appeals did not err in use and application of the doctrine of custom.

C. Custom Is Part Of The Common Law Of North Carolina.

The Plaintiffs and their *amici* do not seriously contest that the public's historic usage of the dry sand beach satisfies the doctrine of custom.[4] Instead, they

[4] The only argument that is directed to the merits of the custom doctrine is leveled by the Plaintiffs, who argue in a footnote that the doctrine "would require an easement claimant to judicially prove facts on each claimed parcel." (Pls.' Br. p 13 n.11) In the leading national case that applied custom to dry sand beaches, the Oregon Supreme Court held that "[a]n established custom . . . can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly." *Thornton*, 254 Ore. at 595, 462 P.2d at 676.

do an end run around the analysis and claim that the doctrine of custom was never integrated into the common law of North Carolina but, instead, has been expressly rejected by this Court. (Pls. Br. pp 19 n.9, 32 n.11; Callies Br. pp 13-14) While one early opinion from this Court made such a suggestion, a substantial body of this Court's case law to the contrary manifestly contradicts this claim.

As the Court of Appeals recognized, the common law remains in full force in North Carolina to the extent it has not otherwise been abrogated or become inconsistent with "'the freedom and independence of this State and the form of government therein established.'" *Nies*, 780 S.E.2d at 193 (quoting N.C.G.S. § 4-1). The common law at statehood was "the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete." *Id.* at 193 (quoting *Gwathmey v. State ex rel. Dep't of Env't, Health, & Natural Res.*, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995)).

The doctrine of custom as a means for recognizing legal rights was part of North Carolina's common law at statehood. An early case from this Court concerned the interpretation of an "act of 1789, ch. 57, sec. 5," which enacted a statutory change in the common law. *Brown v. Clary*, 2 N.C. 107, 107-08 (1794). The act specified that it was the law of the land, "any law, usage or **custom** to the

contrary notwithstanding." *Id.* (emphasis added). There would have been no reason for the General Assembly to mention custom but for its receipt into the common law of the State.

Two cases involving state regulation of tobacco warehouses and utilities provide further evidence of the incorporation of custom into North Carolina's common law. *Gray v. Cent. Warehouse Co.*, 181 N.C. 166, 106 S.E. 657 (1921); *Griffin v. Goldsboro Water Co.*, 122 N.C. 206, 30 S.E. 319 (1898). This Court applied the principle that such private businesses are clothed with the public interest, which it traced "as far back as the history of the State extends." *Gray*, 181 N.C. at 171, 106 S.E. at 660. Looking back even further, this Court relied on the Supreme Court's opinion in *Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77 (1876):

> In [*Munn*] . . . it was held that, in England **from time immemorial** and in this country from its colonization, **it has been customary** to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and where the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and **must, to the extent of that interest, submit to be controlled by the public**.

Griffin, 122 N.C. at 207-08, 30 S.E. at 319 (emphasis added). This public-rights doctrine applies "to every class of interest affected with a public use." *Id.* at 208, 30 S.E. at 320; *see also Woolard v. McCullough*, 23 N.C. 432, 1 Ired. Law 432, 436 (1841) (applying the English "common law mode of creating and establishing

a public highway," much of which "'depends on common reputation'" (quoting a 17th Century King's Bench decision of Sir Matthew Hale)).

The Plaintiffs' suggestion (Pls.' Br. pp 19 n.9, 32 n.11) that this Court forever rejected the legal validity of custom in *Winder v. Blake*, 49 N.C. 332 (1857), is incorrect, as demonstrated by the irreconcilably conflicting later precedent cited herein. *Winder* is not good law on the issue. *See, e.g., Peterson v. South & W. R. R.*, 143 N.C. 260, 264-65 (1906) (citing *Winder* not for the proposition that the law does not recognize customs, but that on the facts of the case a custom had not been proven). Instead, North Carolina has long recognized the existence of customary rights.

In the alternative, *Amicus* Civitas suggests that any deviation from the common law in effect at the time of the American revolution is *ultra vires*. (Civitas Br. p 10) This claim cannot withstand scrutiny.

The "common law is not a static but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society. It inheres in the life of society, not in the decisions interpreting that life." *Corprew v. Geigy Chem. Corp.*, 271 N.C. 485, 495, 157 S.E.2d 98, 105 (1967) (quotation marks omitted). Accordingly, "this Court, as the court of last resort in North Carolina, may modify the common law of North Carolina to ensure that it has not become obsolete or repugnant to the freedom and independence of this state and

our form of government." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 472, 515 S.E.2d 675, 691 (1999). In fact, this Court has recognized customs that were contrary to the common law in England at statehood:

> In England the Common law did not permit stock to run at large. In this county the conditions were so different, owing to the vast forests and the small number of acres under cultivation, that the rule was practically changed and by common consent the custom obtained of allowing stock to run at large. It was rather the necessity of the situation than a rule of law, and this custom still continues, when not changed by Statute.

State v. Anderson, 123 N.C. 705, 709, 31 S.E. 219, 220 (1898); *see also Bost v. Mingues*, 64 N.C. 44, 46-47 (1870) (same).

Contrary to the Plaintiffs' and *amicus'* contentions, North Carolina's appellate courts may recognize customary rights, have done so on numerous occasions, and properly did so in this case.

III. THE PLAINTIFFS ACQUIRED THEIR PROPERTY SUBJECT TO EXISTING PUBLIC RIGHTS.

The Plaintiffs arrived as property owners in Emerald Isle in 2001, long after the State and the Town first expressly restricted vehicular traffic on the ocean beaches. Their complaint is that the Town, after they purchased their property, loosened restrictions on the public's (including the Town's) right to use the dry sand beach for vehicular travel. As the Court of Appeals correctly summarized, "[t]he 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." *Nies*, 780 S.E.2d at 198 (citing N.C.G.S. § 160A-308 (2013)). That is, the Plaintiffs are impacted not by the public's pre-existing right, but by the Town's decision not to limit that right as strictly as previously. They are asking the State's courts to require the government to compensate them for, in essence, the Town's partial repeal of its prohibition of beach driving. However, "no person has a vested right in a continuance of the common or statute law." *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 78, 40 S.E.2d 690, 694 (1946); *cf. Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684 (holding that the State is presumed to not have conveyed away public trust rights).

Nor did the Town's act of exercising its delegated police power to regulate that right for some period of time extinguish a right that the State held in trust for the people or transfer control of that public trust right to the Plaintiffs. Accordingly, the Plaintiffs never had the right that they now claim was taken from them.

IV. THE PUBLIC'S RIGHTS EXTEND TO THE FULL WIDTH OF THE BEACH AND ANY OTHER RULE WOULD LACK THE CERTAINTY REQUIRED OF THE LAW.

Any contention that the public's rights are restricted to an area below the MHW mark defies the nature of the estate. As the Court of Appeals recognized, there is a blurred, "continually changing" line between the wet- and dry-sand portions of the ocean beaches. *Nies*, 780 S.E.2d at 191, 196.

A. The Mean High Water Mark Is Invisible And Variable.

The MHW mark by which the Plaintiffs seek to define their rights is not a mark at all. It is the point at which a vertical height – mean high water – intersects the beach's sandy contour and forms a theoretical and ragged horizontal line. But beach property is unique in its lack of permanency and solidity. No other lands are subject to the "churning of the ocean on the shore" or "the sledge-hammering seas." *Carolina Beach*, 277 N.C. at 304, 177 S.E.2d at 517 (citation and quotation marks omitted). Therefore, "[t]he horizontal element of the boundary determination on a sandy beach is anything but stable." Donna R. Christie, "Of Beaches, Boundaries & SOBs," 25 J. Land Use & Envtl. Law 19, 34 (2009). Because "[t]he beach is one of the earth's most dynamic environments," "the beach changes its shape on almost a daily basis." Orrin H. Pilkey *et al*., The North Carolina Shore and Its Barrier Islands 55 (Duke Univ. Press 1998); Schoenbaum, *supra*, at 250 ("Mean high water changes constantly over time because the sea itself is variable."); Amy H. Moorman, "Let's Roll: Applying Land-Based Notions of Property to the Migrating Barrier Islands," 31 Wm. & Mary Envtl. L. & Pol'y Rev. 459, 465, 494 (2007) ("Barrier islands are inherently transient [and] unstable" and "do not behave like land."). "[E]ven the most accurate determination of the [MHW mark] for a dynamic sandy beach is no more than a snapshot of the boundary at that particular time and place." Christie, *supra*, at 34*; see also West v.*

Slick, 313 N.C. 33, 36, 326 S.E.2d 601, 603 (1985) (noting the "frequent battering by high winds and high seas and the accompanying shifting sands" of the Outer Banks); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 537 (4th Cir. 2013) (noting erosion rates on the Outer Banks of up to "approximately eight feet per year"); Pilkey, *supra*, at 56-59.

Not only is this theoretical line not stable, it is not even visible. "The mean-high-water line cannot be located on a beach. There is no physical mark, nor can there be." Schoenbaum, *supra*, at 250; *see also* Joseph J. Kalo, "The Changing Face of the Shoreline: Public & Private Rights to the Natural & Nourished Dry Sand Beaches of North Carolina," 78 N.C.L. Rev. 1869, 1893 n.104 (2000) ("[T]he mean high-water mark is not a visible line."); Christie, *supra*, at 34 ("a water boundary determined by tidal definition is not a fixed visible mark on the ground" (quotation marks, brackets and ellipses omitted)). There are no surveyor's pins on the beach, "apple trees," *Coffey v. Greer*, 249 N.C. 256, 258, 106 S.E.2d 209, 210 (1958), or other monuments to mark where any owner's sandy shore begins or ends. *See* Moorman, *supra*, at 459 ("[S]urveyors usually describe tracts of land by reference to fixed points that are marked by stakes placed in solid, immobile earth."). This has led one respected North Carolina scholar to conclude that "where it exists, the vegetation line serves as a more visible dividing line between beach which is purely private and beach which is subject to public use." Kalo,

supra, at 1893 n.104; *see also* Moorman, *supra*, at 460 ("[T]he laws of real property ownership depend upon the basic stability of land.").

B. The Mean High Water Mark Does Not Provide The Certainty Needed For Beach-Related Law Enforcement.

This is not just an academic problem. Fundamental due process requirements demand that penal statutes provide adequate public notice as to what conduct is punishable. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co*., 269 U.S. 385, 391, 70 L. Ed. 322, 328 (1926). Many criminal offenses are defined by whether an activity has occurred in a public or private place. Undoubtedly some of the State's penal laws have been violated on the State's beaches, leading to prosecutions. But the public nature of the beach is never questioned. The beachgoing public, law enforcement, judges, and juries have always understood that this area is public and is policed as such. It is an accepted legal axiom.

This only makes good legal and practical sense. The fact that the MHW mark is both transient and imperceptible would raise concerns regarding whether any criminal defendant had adequate notice that his actions were unlawful. But the State has never been held to prove beyond a reasonable doubt the location of the MHW mark on a particular day in the past relative to a criminal defendant's

location on that day. *But see Rhode Island v. Ibbison*, 448 A.2d 728, 733 (R.I. 1982) (voiding conviction for trespass on the beach and holding that no conviction could be obtained absent "pro[of] beyond reasonable doubt that the defendant knew the location of the boundary [MHW] line and intentionally trespassed across it"); *see also* Robert Thompson, "Emerging Issue: Coastal and Marine Spatial Planning: Beach Access, Tresspass, and the Social Enactment of Property," 17 Roger Wms. U. L. Rev. 351, 360 (2012) (concluding that, due to the lack of visibility and stability of the MHW mark, "the legally defined boundary between public and private is pretty much worthless for purposes of prosecuting criminal trespass"); *cf. Connally*, 269 U.S. at 395, 70 L. Ed. at 330 (holding statute to violate due process because the term "locality" was unconstitutionally vague).

These issues are not limited to the criminal context. For example, in order for a property owner to maintain an action for trespass to real property, the plaintiff must show actual or constructive possession. *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). Constructive possession often equates to showing title to the land in question. *Gordner v. Blades Lumber Co.*, 144 N.C. 110, 111, 56 S.E. 695, 696 (1907). But no layman could possibly know where the MHW mark is at any particular time, and even a surveyed line may not reliably show the location of the line at the time of any alleged trespass unless the survey was performed at the precise time of the alleged trespass.

The MHW mark does not establish the boundary between public and private rights along the beach strand in this State. The toe of the frontal dune, the first line of stable vegetation and other markers that are well-known to the beachgoing public have always delineated this line, as the General Assembly recognized when defining "ocean beaches" in N.C.G.S. § 77-20(e). They are, unlike the MHW mark, readily observable and they have always been generally respected by the public as the seaward extent of the public rights in this State. There is no cause for this Court now to disturb this legal regime. As this Court stated long ago regarding the delineation of public rights, "unless the line can be marked distinctly, it is better to have no line at all; otherwise, there will be an infinity of law suits growing out of these conflicting interests." *Lewis v. Keeling*, 46 N.C. 299, 306 (1854).[5]

* * *

The creation of private rights to North Carolina's beaches would unsettle a custom dating from time immemorial that serves as the foundation for a substantial portion of the State's economy and contributes to the physical and emotional well-being of its citizens. After vacationing at least annually in Emerald Isle since 1980 (R pp 236-37), the Plaintiffs knew or should have known at the time they acquired their private property in 2001 of the free usage the public makes of the ocean

[5] The Court in *Lewis* was referring to a legal line demarcating two conflicting public trust rights, and not a physical mark. The Court's words, however, are no less apt.

beaches in North Carolina. To trample on the public welfare to the benefit of the few after a "uniform opinion upon the subject for such a length of time . . . would be the height of impropriety." *Washington ex rel. Jones*, 12 N.C. at 480.

CONCLUSION

The Court of Appeals properly held that public rights exist and have existed in the State's dry sand beaches from time immemorial. This Court should affirm the decision below.

Respectfully submitted this the 27th day of July, 2016.

ROY COOPER
Attorney General

Electronically Submitted
John F. Maddrey
Solicitor General
State Bar No. 8890
jmaddrey@ncdoj.gov

N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this brief as if they had personally signed.

Elizabeth A. Fisher
Assistant Solicitor General
State Bar No. 38161
efisher@ncdoj.gov

Marc Bernstein
Senior Deputy Attorney General
State Bar No. 21642
mbernstein@ncdoj.gov

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *AMICUS CURIAE* BRIEF OF THE STATE OF NORTH CAROLINA *EX REL*. ATTORNEY GENERAL ROY COOPER, which was filed electronically with the North Carolina Supreme Court's official website, was served on this the 27th day of July, 2016, upon counsel for all parties and *amici* electronically via email to their correct and current email addresses as follows:

J. David Breemer
Pacific Legal Foundation
930 G. St.
Sacramento, CA 95814
Via email: jdb@pacificlegal.org

Keith P. Anthony
Morningstar Law Group
630 Davis Dr., Ste. 200
Morrisville, NC 28650
Via email: kanthony@morningstarlawgroup.com

Brian E. Edes
Norwood P. Blanchard, III
Crossley Mcintosh Collier Hanley & Edes, PLLC
5002 Randall Pkwy.
Wilmington, NC 28403
Via email: briane@cmclawfirm.com
norwood@cmclawfirm.com

Elliot Engstrom
Civitas Institute
100 S. Harrington St.
Raleigh, NC 28603
Via email: Elliot@engstromlawnc.com

Robert H. Thomas
Damon Key Leong Kupchak Hastert
1003 Bishop St., 16th Fl.
Honolulu, HI 96813
Via email: rht@hawaiilawyer.com

Jason T. Campell
Law Office of James Scott Farrin
7819 Emperor Blvd., Ste. 200
Durham, NC 27703
Via email: jcampbell@farrin.com

Electronically Submitted
John F. Maddrey
Solicitor General