

SUPREME COURT OF NORTH CAROLINA

GREGORY P. NIES and DIANE S. NIES,)

)

Plaintiffs)

)

v.)

From Carteret County

No. COA 15-169

)

TOWN OF EMERALD ISLE, a)

)

North Carolina Municipality,)

)

Defendant)

)

v.)

)

BRIEF OF AMICI CURIAE

**NORTH CAROLINA TRAVEL AND TOURISM COALITION AND
NORTH CAROLINA VACATION RENTAL MANAGERS ASSOCIATION**

Interests of Amici Curiae In This Matter

North Carolina Travel and Tourism Coalition

The North Carolina Travel and Tourism Coalition (NCTTC) is a non-profit trade association which includes as members local tourism authorities, businesses, all of North Carolina’s top tier professional sports teams, industries, major North Carolina resorts, attractions, convention and visitor bureaus, and tourism-related groups and associations across North Carolina. Founded in 1991, the NCTTC has over thirty members. The members of the NCTTC include:

- Asheville Convention and Visitors Bureau
- Biltmore
- Carolina Hurricanes/PNC Arena
- Cabarrus County Convention and Visitors Bureau
- Carolina Panthers/Bank of America Stadium
- Charlotte Hornets/Time Warner Cable Arena
- Charlotte Regional Visitors Authority
- Crystal Coast Tourism Authority
- Visit Lake Norman/Destination Marketing Association of North Carolina
- Durham Convention and Visitors Bureau
- First Carolina Management
- Greater Raleigh Convention and Visitors Bureau
- Rutherford County Tourism Development Authority
- Greensboro Area Convention and Visitors Bureau
- The Omni Grove Park Inn Resort & Spa
- Heart of North Carolina Visitors Bureau
- Hospitality Alliance of North Carolina
- Live Nation
- Charlotte Motor Speedway
- Nash County Travel & Tourism Council
- VisitNC
- North Carolina Restaurant and Lodging Association
- NC Vacation Rental Managers Association
- Pinehurst Resort & Spa
- Summit Hospitality Group, Ltd.
- Tryon International Equestrian Center
- Turnpike Properties, Inc
- Visit Winston-Salem
- Wilmington and Beaches Convention and Visitors Bureau

The NCTCC and its individual members are committed to promoting policies that encourage the growth and development of North Carolina's travel, tourism and hospitality industry, which is essential to the economy in every county in North Carolina. NCTCC works with all interested parties to develop policies and goals for our State that impact the travel and tourism industry and advocates for the adoption of policies designed to improve North Carolina's economy through the travel and tourism industry.

North Carolina Rental Managers Associates

The North Carolina Vacation Rental Managers Association ("NCVRMA") is an association of management companies and their affiliates from across North Carolina who specialize in vacation rental management. This organization was formed to promote the vacation rental business in the State to the public, as well as to professionals employed in travel-related businesses.

The NCRVMA provides continuing education opportunities to its members, fosters networking opportunities across the state, and provides its members' collective insights and advice about proposed legislation and regulation affecting the travel and tourism industry. The NCRVMA promotes positive changes to laws, rules and regulations that govern the business and vacation rental industry in North Carolina.

Position of Amici

The NCTTC and NCVRMA do not have a direct stake in this particular dispute. However, because of their extensive experience, knowledge, and commitment to the tourism industry in our State, the NCTTC and NCVRMA are deeply concerned about the consequences of this case for its members and the public, if the decision of the Court of Appeals is not affirmed.

The NCTTC and NCVRMA support the decision of the Court of Appeals upholding North Carolina's long-settled recognition of the public's right to enjoy its beaches, and as reflected in our State's public trust doctrine, and respectfully request that this Court affirm the decision of the Court of Appeals.

ARGUMENT**I. NORTH CAROLINA LAW AND LONG-SETTLED CUSTOM RECOGNIZE THE PUBLIC'S RIGHT TO ACCESS THE DRY SAND BEACHES.**

The Court of Appeals' decision in favor of the public's right to access to the dry sand beach is supported by precedent and North Carolina statutes. As North Carolina's appellate courts have held, an oceanfront property owner's interest in the dry sand beach is a qualified one, limited by and subordinate to public trust rights. *See Slavin v. Town of Oak Island*, 160 N.C. App. 57, 61 (2003). Further, the North Carolina legislature has declared that the entirety of the State's ocean beaches are subject to public trust rights, including the right to swim, fish, and the right to freely

use and enjoy the State's ocean and estuarine beaches and to have public access to the beaches. N.C. Gen. Stat. § 1-45.1 (2011); *Fabrikant v. Currituck Co.*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 28 (2005); *Friends of the Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

The General Assembly has also recognized that the public, including North Carolina citizens and visitors to the State, have “made frequent, uninterrupted and unobstructed use of the full width and breadth of the ocean beaches.” N.C. Gen. Stat. § 77-20(d). Thus, it has been acknowledged that the public has rights to the “customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and which are part of the common heritage of the State as recognized by Article XIV, Section 5 of the Constitution of North Carolina.” *Id.*¹

The legal authority supporting the Town of Emerald Isle's legal position and the decision of the Court of Appeals is well covered in the brief of the Town and other Amici. Amici defer to those arguments, which confirm the settled legal

¹ An oceanfront property owner's rights to the dry sand beach are further limited where there has been a beach nourishment project. When a beach is nourished, title to the filled area of seaward of the pre-project mean high tide lines lies with the State, and there is no private property interest. *See* N.C. Gen. Stat. § 146-6(f). All beach areas subject to these nourishment projects “shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches, which are part of the common heritage of the people of this State.” *Id.*

framework in North Carolina holding that private property rights to the dry sand beach are subject to public trust rights, and apply in this case.

II. IF THE DRY SAND BEACH WERE HELD TO EXCLUDE PUBLIC TRUST RIGHTS, PUBLIC ACCESS TO OUR STATE'S BEACHES WOULD BE SEVERLY LIMITED.

- a. Long-standing expectations of beach access held by visitors to North Carolina beaches would be radically altered under Plaintiffs' arguments.**

North Carolina ranks sixth in visitation in the United States, meaning that over 45 million people visit the State each year.² One of the primary reasons for visiting this State is its beaches and coastal regions. Over 17% of overnight visitors to North Carolina visit the State's beaches,³ and the citizens of this State and its visitors have been long-accustomed to access along the dry sand oceanfront beaches. Beachgoers enjoy the dry sand beach for many activities, including walking, fishing, playing beach games, or relaxing on the sand. Enjoyment of the beach is the foundation of the tourism economy in our State's beachside communities. In fact, over 70% of respondents to a recent poll conducted by Public Policy Polling of North Carolina

² *Tourism Statistics for North Carolina*, Visit North Carolina, <https://media.visitnc.com/news/tourism-statistics-for-north-carolina> (last visited July 25, 2016).

³ *June 2015 Monthly Lodging Report*, Smith Travel Research, <https://partners.visitnc.com/files/files/lodging-reports/June-2015-Lodging-Report1.pdf> (last visited July 25, 2016).

(the “PPP Poll”) in July of 2016 answered that they believe that it is customary on North Carolina’s beaches for visitors to be able to use the dry sandy beach for recreational purposes.⁴ Furthermore, over 70% of respondents to the PPP Poll reported that they would be less likely to visit the beach if owners of beachfront property could prohibit visitors from walking on or enjoying the beaches in front of their homes.⁵

While we do not contend that the PPP Poll results or public opinion should determine the outcome of decisions of this or other courts, we believe it is relevant to the credibility of our arguments about public support for the long-standing public policy governing our beaches and the potential negative economic consequences should that policy change imposing limitations on the public's access to our beaches.

Access to our State’s beaches is the “common heritage of the people of this State,” as has been recognized by statute. N.C. Gen. Stat. § 146-6(f). The activities which State citizens and visitors alike enjoy on our State’s beaches, have been expressly defined as “public trust rights” by statute, including swimming and fishing. N.C. Gen. Stat. § 1-45.1 (2011).

⁴ Public Policy Polling: North Carolina Survey Results (July 25-26, 2016). Attached in its entirety hereto as App. 1. The PPP Poll surveyed 773 North Carolina registered voters on July 25 and July 26, 2016. This poll has a margin of error of 3.6%.

⁵ *Id.*

If the position of Plaintiffs' rejected by the trial court and the Court of Appeals were to prevail, beach access by the public to enjoy these recreational activities would be severely restricted. The public would be confined to only the limited areas of beach property that are publicly owned, *i.e.* property of the State or local towns. This would dramatically reduce the areas where beachgoers could do all the things they come to the beach to do: set up an umbrella, build a sandcastle, play a game of volleyball, and many other activities. The sea change in rights would crowd North Carolina's beaches by forcing visitors into smaller areas. Even beach walkers who dared to venture off public beaches would be forced to walk in the water during a portion of the day lest they "trespass" on any dry sand beach. According to the PPP Poll, if visitors were forced to walk in the water, rather than on the dry sand beach, during high tide, they would be less likely to visit the beach.⁶

Acceptance of Plaintiffs' arguments would forever alter the nature of the beach that North Carolina beachgoers have come to know and love, and would erase the "common heritage" of the people of this State. North Carolina beaches would be less appealing to visitors, including both our State's citizens and those traveling from out-of-state or abroad.

- b. Public safety personnel including police and lifeguard vehicles, would be restricted from vast areas of the beach under Plaintiff's arguments.**

⁶ *Id.*

Local governments currently use the dry sand beaches for a number of important purposes, and unencumbered access to the beach is essential to providing life-saving services regulating beach activities and promoting the safety of all beachgoers. Access to the dry sand beach by emergency vehicles to assist beachgoers in need of medical attention is a reasonable expectation of visitors to our beaches and could be prohibited if Plaintiffs' position is adopted by this Court. Lifeguard stands on the dry sand beach allow lifeguards to monitor and protect beachgoers. Local government employees patrol the beach to ensure beachgoers' safety, and use the dry sand beach to travel from point to point on the beach.

These activities are commonplace to beachgoers in this State. Beachgoers rely on local governments to ensure that the beaches are safe – whether by removing abandoned equipment that could cause injury, or by monitoring for dangerous ocean conditions, like rip tides. If the dry sand beach was held to exclude all public trust rights, lifeguards would be restricted in their access, limiting their ability to view the beach. Local government employees would be inhibited from driving on the beach to regulate activities or reach a visitor in distress. The limitations imposed on local government activities would clearly impact the safety of beachgoers, the quality of the beach, and the number of visitors to our coast. In fact, the vast majority of respondents to the PPP polls answered that the ability of emergency medical services personnel, emergency responders, and lifeguards to drive on the beach and quickly

reach visitors was very important to them. And if those services were limited, *i.e.* if emergency responders and lifeguards could not drive on the beach or were limited in where they could be located, over 63% of visitors would be less likely to visit North Carolina's beaches.⁷

The beaches of this State have become a popular place for tourism for many reasons, including their picturesque appearance. In order to maintain this appearance, local governments work hard to keep the beaches clean and regulated. Local government workers travel along the dry sand beaches to pick up debris and trash. If Plaintiffs were to prevail in their desire to exclude all public trust rights in the dry sand beach, local governments would not even have access to pick up trash or remove abandoned beach equipment. The condition of the beach would deteriorate and, make the State less appealing for tourists. In fact, 76% respondents to the PPP Poll stated that if workers could no longer access the beach to clean it and removed abandoned equipment, they would be less likely to visit the beach.⁸

III. TOURISM, A KEY COMPONENT OF THE STATE AND LOCAL COUNTIES' ECONOMIES, WOULD SUFFER IF THE DRY SAND BEACH WAS HELD TO EXCLUDE PUBLIC TRUST RIGHTS.

The North Carolina tourism industry is a key component of the State's economy. Travel and tourism generates \$20.2 billion a year in total economic

⁷ *Id.*

⁸ *Id.*

demand in North Carolina. Tourism demand generates \$31.3 in business sales, including indirect and induced impacts.⁹ For example, tourism in this State sustains 362,052 jobs, and 8.7% of all wage and salary employment in this State is dependent on tourism.¹⁰ Moreover, the tourism industry in North Carolina generates \$15.6 billion in tourism impact, or 4.0% of the State's economy.¹¹

The State's beaches are a primary driving force behind the North Carolina tourism industry. Tourism generates substantial economic benefits and supports local jobs, generates tax revenues, and provides tax savings for residents. For example, in 2014, Carteret County alone earned nearly \$325 million in tax receipts as a direct result of visitor expenditures.¹² In addition, the revenue generated from

⁹ *What Does Tourism Mean to North Carolina's Economy? The Economic Contribution of Tourism in North Carolina*, North Carolina Chamber of Commerce, <https://www.nccommerce.com/LinkClick.aspx?fileticket=t7p1cj-ZPAc%3D&tabid=636&mid=4669> (last visited July 25, 2016).

¹⁰ *What Does Tourism Mean to North Carolina's Economy? The Economic Contribution of Tourism in North Carolina*, North Carolina Chamber of Commerce, <https://www.nccommerce.com/LinkClick.aspx?fileticket=t7p1cj-ZPAc%3D&tabid=636&mid=4669> (last visited July 25, 2016).

¹¹ *What Does Tourism Mean to North Carolina's Economy? The Economic Contribution of Tourism in North Carolina*, North Carolina Chamber of Commerce, <https://www.nccommerce.com/LinkClick.aspx?fileticket=t7p1cj-ZPAc%3D&tabid=636&mid=4669> (last visited July 25, 2016).

¹² *Economic Impact Studies, Impact of Visitor Spending*, Visit North Carolina, <https://partners.visitnc.com/economic-impact-studies> (last visited July 25, 2016); see also *2014 County Tourism Statistics by NC Prosperity Zone*, Visit North Carolina, <https://partners.visitnc.com/files/files/teim/2014-Visitor-Spending-by-Prosperity-Zone.pdf> (last visited July 25, 2016).

Carteret County visitors created more than 3,000 jobs.¹³ The tax revenues earned from the visitors' spending amounted to \$449.62 in tax savings for each Carteret County resident.¹⁴

For coastal regions, the tourism industry is a crucial component of local economies. Restrictions to the public's beach access would not affect only the beach. It would have a cascading effect on all the businesses and residents which support beach visitors. The tourism industry sustains a substantial portion of many different job sectors in this State. It sustains 88% of the air transport sector, 100% of the lodging sector, 31% of the recreation/entertainment sector, and 25% of the food & beverage sector.¹⁵ A reduction in the number of beach visitors would have strong negative effects on numerous employment sectors and impact local

¹³ *Economic Impact Studies, Impact of Visitor Spending*, Visit North Carolina, <https://partners.visitnc.com/economic-impact-studies> (last visited July 25, 2016); see also *2014 County Tourism Statistics by NC Prosperity Zone*, Visit North Carolina, <https://partners.visitnc.com/files/files/teim/2014-Visitor-Spending-by-Prosperity-Zone.pdf> (last visited July 25, 2016).

¹⁴ Research Department of the US Travel Association for the North Carolina Department of Commerce, *Travel Economic Impact Model*, North Carolina Department of Commerce, <https://www.nccommerce.com/tourism/research/economic-impact/teim> (last visited July 25, 2016).

¹⁵ *What Does Tourism Mean to North Carolina's Economy? The Economic Contribution of Tourism in North Carolina*, North Carolina Chamber of Commerce, <https://www.nccommerce.com/LinkClick.aspx?fileticket=t7p1cj-ZPAc%3D&tabid=636&mid=4669> (last visited July 25, 2016).

business sales of goods and services, job opportunities, and tax savings for local residents in these coastal regions.

The negative impact that a decision adverse to the Town could have on tourism in the State is affirmed by the PPP Poll. 70% of the respondents agreed that it is customary for visitors to North Carolina beaches to be able to use the dry sand beaches for recreational purposes. And 92% of respondents agreed that is customary for emergency vehicles and lifeguards to be able to move freely up and down the beach to protect the public.

In addition, the PPP Poll confirms the serious adverse effects on tourism and coastal economies that would likely occur if public trust rights in the dry sand beach were not affirmed by this Court. 83% of respondents confirmed that they would be less likely to visit the beach if only the owners of beachfront properties could access the dry sand beaches in front of those properties. In addition, 75% of respondents indicated they would be less likely to visit the beach if they could no longer walk on the beach during some high tides, and 76% indicated they would be less likely to visit if local governments could not access the beach for cleaning purposes and to remove abandoned beach equipment.

The negative impact of a reduction in lifeguards, beyond the impact on safety of the beach, extends to and has consequences for the economic benefits of the beach. 79% of respondents indicated that a reduction in lifeguards would make it

less likely that they visit the beach in the future. The PPP Poll also showed that 79% of respondents have visited the State's beaches in the past five years—a very high percentage. As the full PPP Poll results show, across all ages, races, and gender, North Carolina's beaches will be a less attractive tourism destination, and will suffer, if public trust rights to the dry sand beach were impaired.¹⁶

Furthermore, restricting public trust rights in the dry sand beach would be likely to have an adverse effect on property values. North Carolina beaches are composed of a large percentage of second homes. The second home market in this State generates \$1.9 billion in direct economic activity within the real estate sector.¹⁷ Yet, the majority of beach community properties in North Carolina are not directly on the beach. A house located in the “first row” or “second row” back from the beach is still a house with ready beach access in North Carolina, because the owners and occupants of these properties rely on oceanfront access points to reach the beach, and are able to enjoy the dry sand beach. If these properties were suddenly held to

¹⁶ The poll also determined that 65% of respondents believe the property line for beachfront homes is at the sand dune in front of a home, and 74% believe that the dune should be the property line. To be sure, a poll cannot be the basis on determining property lines. But these polls reflect the public's general understanding that the public has rights – public trust rights – to the enjoyment of the State's beaches.

¹⁷ *What Does Tourism Mean to North Carolina's Economy? The Economic Contribution of Tourism in North Carolina*, North Carolina Chamber of Commerce, <https://www.nccommerce.com/LinkClick.aspx?fileticket=t7p1cj-ZPAc%3D&tabid=636&mid=4669> (last visited July 25, 2016).

only be able to access a strip of beach which at times is wholly under water, it would be a radical change in the expectations and rights which these properties currently enjoy. Indeed, it would eliminate the very basis on which these entire communities were developed. It is certain that this would have a significant impact on property values in beach communities, and depress occupancy tax revenues to a great extent.

Moreover, coastal communities rely on occupancy tax revenue to assist in the funding of beach nourishment projects. North Carolina is known to be prone to storms and other weather events that erode and diminish the width and contour of its beaches. Beach nourishment is essential to maintenance of quality, viable and attractive beaches. These projects replace sand to slow erosion, which protects the beaches and coastal residences. If fewer tourists visited North Carolina beaches, tax revenues will decrease and coastal communities will be unable to fund these critical nourishment projects. The resulting impact will further damage beach communities, and, somewhat ironically, the very beachfront owners whom Plaintiffs' purport to represent. North Carolina's public trust doctrine has allowed our beachfront communities to prosper, and that prosperity will be negatively impacted if it is held that there are no public trust rights in the dry sand beach.

CONCLUSION

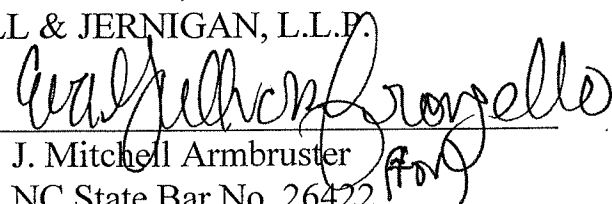
Amici respectfully submits that the decision of the Court of Appeals is in accordance with North Carolina precedent, tradition, and long-settled expectations

of property owners of beachfront property, owners of other properties in the beach area, as well as all North Carolinians. Amici urge this Court to affirm the Court of Appeals and uphold longstanding principles of the public trust doctrine as it applies to beachfront property. This will also serve to protect the economy in North Carolina's coastal regions.

This the 27th day of July, 2016.

SMITH, ANDERSON, BLOUNT, DORSETT,
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Rule 33(b) statement: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it:

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