Carteret County NEWS-TIMES

EI attorney: Don't take Nieses' case

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Attorneys for the town have filed an answer to former property owners Gregory and Diane Nies' petition that asks the U.S. Supreme Court to review their potentially landmark beach property rights case against the town.

The document, filed by attorney Brian Edes of Crossley, McIntosh, Collier, Hanley & Edes PLLC of Wilmington, states that the high court shouldn't take the case, in part because it's a "poor vehicle" for the property rights issue it seeks to address, but also because North Carolina courts have already answered it correctly, in favor of the town.

The Nieses initially filed their complaint against the town in Carteret County Superior Civil Court in 2011. In it, they alleged the town took property and cost them property value for a beachfront lot at 9099 Shipwreck Lane when Emerald Isle officials claimed eminent domain and created a perpetual and assignable easement and right-of-way for vehicles across part of the property there. The Nieses alleged the town took this property without compensation and sought over $3 million in compensation for damages.

Town officials have said the intent did not create a public beach "driving lane," as the Nieses have alleged, but created a 20-foot strip free of obstructions along the entire 12 miles of beach in Emerald Isle in order to facilitate access by emergency vehicles and for other municipal services along the oceanfront.

The town relied upon a state statute that says the beach is public, from the toe of the dune line to the high water mark of the ocean, even if some of that dry sand beach is artificially created by nourishment.

The Nieses lost their case in Carteret County court, then appealed to the N.C. Court of Appeals, but lost there, as well. The N.C. Supreme Court then agreed to hear the case, but ultimately dismissed it in December 2016.

The Nieses and their attorney, David Breemer of the Pacific Legal Foundation in Sacramento, Calif., then filed in April a petition for a writ of certiorari, asking the U.S. Supreme Court to take the case to decide the question of, "Whether the takings clause permits a state to statutorily redefine an entire coastline of privately owned dry beach parcels as a 'public trust' area open for public use, without just compensation."

In it, they allege that under common state law, private dry beaches have never been subject to public trust uses; that the N.C. courts' decisions on the state statutes destroy common law property rights in order to create public trust rights on private beaches; and that the court decisions conflict with previous Supreme Court decisions.

The Nieses, who are represented free of charge by Pacific, sold the property in question since they began their legal action. However, their attorney has said the selling of the property didn't waive the claims they made against the town.

The long-running case has been a matter of public interest because of concerns that the outcome might impact public use of beaches, public safety and beach nourishment projects.

As a result, several other Carteret County municipalities, tourism interests and the state Coastal Resources Commission have backed Emerald Isle on its case with amicus briefs – briefs submitted to a court by parties or organizations interested in an issue who wish to submit arguments in cases in which they're not litigants – and with financial contributions to help pay Emerald Isle's legal fees.

Pacific has also been backed by amicus briefs from like-minded organizations, including the Cato Institute.

In his answer to the Pacific foundation's filing, Mr. Edes said the petitioners "point to no error in the North Carolina Court of Appeal's understanding or application of federal law," and that the "Nieses' clam that the North Carolina's legislature redefined property rights boils down to an assertion that the intermediate state court misinterpreted North Carolina's common law.

"But," he adds, "… the North Carolina Supreme Court is the proper body to correct errors of North Carolina common law, and declined to review this case, for many good reasons. Among them: the absence of a substantial constitutional question, multiple affirmative grounds for affirmance and Petitioners' profitable property sale while the case was pending.

"To reach any federal question, this Court would first have to impose new limits on the public trust doctrine in North Carolina and then resolve questions about the scope of that State's custom doctrine, all without the benefit of a definitive ruling from the State's highest court on these issues."

"Even if the Court were willing to wade through these obstacles and address threshold state law questions that Petitioners stated were unsettled … it would be for naught," Mr. Edes added.

"There has been no statutory redefinition of property rights here. The Town has allowed beach driving since its incorporation 60 years ago … and has done so under North Carolina's long-standing common law doctrines of public trust and custom.

"While other States may have different beachfront property laws, there is no one-size-fits-all public trust doctrine that exists apart from each State's common law, and Petitioners' claimed conflict proves only that.

"As our federalist system promotes, every State shapes its own beach property law given its own unique history and circumstances," Mr. Edes added. "Petitioners do not ask this Court to resolve federal law, only to 'confirm' it … and seek reversal only of claimed errors in the intermediate appellate court's interpretation of North Carolina common law.

“This plea for error correction – and error correction of state law, to boot – falls far short of the Court’s criteria for certiorari review, even more so because the decision … was correct.”

The N.C. Supreme Court, Mr. Edes goes on to say, “… rightly deemed this case unworthy of its attention…

“The predicate of Petitioners’ claimed constitutional wrong – that the ruling … destroyed their pre-existing right to exclude the public from an unknown portion of the dry sand beach on property they once owned – assumes that such a right to exclude was well-established under North Carolina law.

“But the opposite is true,” Mr. Edes wrote. “No source of North Carolina law establishes such a pre-existing right, and all authority points in the opposite direction.

“Under North Carolina’s own unique and long established doctrines of public trust and custom, Petitioners never possessed a right to exclude the North Carolina public from the dry sand beach.

“That asserted right underpins their federal claim, and Petitioners concede that their federal takings claim rises or falls with that state law predicate.

“That leaves this Court with no federal question to answer, only assertions of state law errors to correct.

“But there is no need to take the extraordinary step of ruling on complex questions of state property law when the State’s highest court has declined to do so. What’s more, no conflict begs this Court’s review.

“All Petitioners’ ‘conflict’ argument confirms is that property law is state law, which each State is free in our federal system to arrange as it sees fit … and the States have done so.”

Mr. Breemer, in an email response, said the “town’s opposition brief is full of falsehoods.”

He also said the “case is very important because it raises the issue of whether a state can simply declare that private dry beach lots are open for government and public use simply by passing a statute saying so.

“The North Carolina Court of Appeals held that North Carolina had done this with passage of NCGS 77-20,” he wrote. “This is a cheap and unconstitutional way to transfer private land to public use without proper court processes or payment of just compensation, and if state can get away with this, the Fifth Amendment’s prohibition against uncompensated ‘takings’ of property will be severely weakened.”

Frank Rush, Emerald Isle manager, referred questions to Mr. Edes, who could not be reached by presstime.