Carteret County NEWS-TIMES

Victory for public access

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EMERALD ISLE — Town officials are celebrating a victory in what they and many others in North Carolina consider a landmark court case that could have resulted in limitations on public access to the ocean beach.

According to Frank Rush, town manager, and the town's lead attorney, Brian Edes of Crossley, McIntosh, Collier, Hanley & Edes PLLC of Wilmington, the U.S. Supreme Court on Monday declined to take up the case, in which Gregory and Diane Nies, former residents of the town, sought to prohibit the town from using a portion of the dry sand beach in front of their home at 9099 Shipwreck Lane.

In a prepared statement Monday, Mr. Rush, said, "In a ruling issued earlier today, the United States Supreme Court has denied the Nies' request for the nation's highest court to review their claims. Unless reconsidered by the U.S. Supreme Court, this ruling effectively ends the town's six-year legal battle with the Nies.

"Thus, the November 2015 ruling of the N.C. Court of Appeals remains undisturbed as the definitive case law regarding the public's right to use the ocean beaches of North Carolina.

"The town is pleased with the U.S. Supreme Court's decision, and is even more pleased that the public's historical use of the beach since time immemorial remains intact, and that current and future generations will continue to enjoy this special place in Emerald Isle and every other N.C. beach community," he added.

Others in the area reacted positively to the Supreme Court's decision on Monday.

Art Schools, who was mayor of Emerald Isle when the Nieses filed the suit, called it, "… probably the most important decision ever for Emerald Isle and all North Carolina beach towns and counties.

"If the North Carolina beaches had been ruled private rather than public, like they have been forever, the general public for most part would not be able to enjoy the beach and coastal economies would have been severely affected," he said.

Mr. Schools also praised Mr. Rush's leadership.

"Over the last six years, there is no telling how many hours Frank spent preparing documents and answering questions for the lawyers in this case, informing other towns and counties of the importance of this case and the many other tasks that have brought this case to a successful conclusion," he said.

Greg "Rudi" Rudolph, manager of the Carteret County Shore Protection Office, also called it a landmark case with huge implications for public beaches.

"Obviously, we had great concerns about access to the beaches for beach nourishment," he said. "The health of our beaches are dependent to a large degree on our being able to get the equipment there for those projects, and those projects are important. The beaches are the key to our economy.

"But," Mr. Rudolph added, "even more important is what this means for all of our beaches in North Carolina. The decision (by the Supreme Court not to take the case) means that the court has recognized that the state statutes were carefully crafted to ensure public access to and use of the beaches. It's great to see that that held up."
Mr. Rush thanked the town's legal team, which included lead counsel Mr. Edes, plus attorneys Allen Jernigan, Ruthanne Deutsch and Richard Stanley, who represents the town normally.

And, he said, "The town also grateful to the N.C. League of Municipalities, the leaders of every other oceanfront county and municipality in North Carolina, former (N.C.) Governor Pat McCrory's and current Governor Roy Cooper's administrations and numerous other groups and individuals that supported the town's position that the public has, and always has had, the right to use the entire width of the ocean beaches of North Carolina between the base of the dunes and the water."

According to Mr. Edes, the Nieses have 25 days, from the day of the court's decision, to request reconsideration.
However, in an emailed response Tuesday, the Nieses' attorney, David Breemer, of the California-based Pacific Legal Foundation, said his clients would not exercise that option. In response to a specific question about the possibility, he simply stated, "No."

However, he added that, "The Nies are of course disappointed that the Supreme Court denied review of their case.
"But the fight for coastal property rights in North Carolina will continue. The Nies hope and expect that, in the next case, the state courts will get it right and void any need to go to the U.S. Supreme Court."

The Nieses initially filed their complaint against the town in civil court in Beaufort 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 the alleged damages.

Town officials said the intent did not create a public beach "driving lane," as the Nieses have alleged, but created a 20-feet strip free of obstructions along the entire 12 miles of beach in Emerald Isle 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, Mr. Breemer, then filed in April 2017 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 alleged 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 have been represented free of charge by Pacific, have 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 claim 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 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 was also backed by amicus briefs from like-minded organizations, including the Cato Institute.
In his answer to the Pacific foundation's filing for a Supreme Court review, 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.”

“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.”