

No. COA26-2

FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

CHERRY, INC.,

Plaintiff-Appellant,

v.

TOWN OF NAGS HEAD,

Defendant-Appellee.

From Dare County

No. 23CVS000248-270

BRIEF OF *AMICI CURIAE* THE SURFRIDER FOUNDATION, NORTH CAROLINA LAND OF WATER, DR. ROBERT YOUNG, AND DR. STANLEY RIGGS IN SUPPORT OF DEFENDANT-APPELLEE

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Pursuant to Rule 28.1 of the North Carolina Rules of Appellate Procedure, *Amici Curiae* the Surfrider Foundation, North Carolina Land of Water, Dr. Robert Young, and Dr. Stanley Riggs respectfully submit this brief in support of Defendant-Appellee and urge the Court to affirm the judgment of the Superior Court.¹

INTERESTS OF AMICI CURIAE

As described in more detail in the Motion for Leave to File Amicus Brief, *Amici* have long fought to protect North Carolina's coastal lands and waters, which the General Assembly recognizes as "among North Carolina's most valuable resources." N.C.G.S. § 113A-102(a). The Surfrider Foundation is a national non-profit organization dedicated to the protection and enjoyment of the world's ocean, waves, and beaches for all people. North Carolina Land of Water specifically seeks to sustain North Carolina's dynamic water, land, and air systems for future generations, with a focus on coastal waters and land. Drs. Robert Young and Stanley Riggs are renowned professors at well-respected state universities who have devoted their careers to studying coastal processes and translating their knowledge into science-based recommendations for managing developed shorelines. All their

¹ Pursuant to N.C. R. App. P. 28.1(b)(3)(c), *Amici* disclose that no one helped undersigned counsel write this brief or contributed money for its preparation.

interests would be harmed by granting the relief sought by Plaintiff-Appellant.

Amici respectfully submit this brief to offer additional information and perspective supporting the Defendant-Appellee's position.

ISSUES ADDRESSED

1. Whether, in light of persistent natural forces eroding the shoreline, encroaching on Plaintiff-Appellant's house, and washing away access, the Superior Court properly ruled that the Town has not committed any compensable taking of Plaintiff-Appellant's property.
2. Whether the Superior Court properly ruled that Plaintiff-Appellant failed to make a *prima facie* takings case where their evidence shows only that the Town never provided a bespoke "plan for permanent access" to their property, not that the Town actively denied or obstructed access.

ARGUMENT

For centuries, North Carolina's Outer Banks have been governed by winds, waves, tides, and storms. These natural forces are intensifying amid rising sea levels and increasingly catastrophic storms. Despite government-sponsored efforts to hold erosion at bay, the shoreline has retreated by hundreds of feet since the 1980s. Structures that were once several rows of houses back from the beach now teeter in the surf, battered by tides and

storm surges. When owners fail to take responsibility for them, these structures collapse, strewing nail-studded boards, chunks of concrete, and other harmful debris along the same beaches where North Carolina citizens stroll, swim, fish, and play.

This case centers on one such hazardous structure, built on North Carolina's dynamic coast in 1979 and purchased by Plaintiff-Appellant's owners in 2003. The structure was damaged by severe storms and remained uninhabited since 2009. The adjacent public road washed away until it was only a strip of sand, resulting in its 2016 closure and leaving behind a private right-of-way. By 2022, natural forces had damaged the structure's foundation beyond repair. Rain entered through holes in the roof, and parts of the floor had rotted, among other defects. Recognizing the danger to the public, the Town condemned the structure in 2022 and removed it nearly ten months later.

Plaintiff-Appellant is among hundreds of landowners along North Carolina's coast whose property is being claimed by rising seas; the Town is among dozens of coastal communities that must make difficult choices as it balances individual interests against its obligation to protect public health and safety. As the sea advanced to claim many properties in the Town, Plaintiff-Appellant refused to remove or relocate the hazard its house had become and instead insists its interests are superior to others, asserting the

Town – not the sea – has taken its property by failing to provide permanent vehicular access on a retreating shoreline. If Plaintiff-Appellant prevails, local governments statewide will have limited ability to respond to emerging threats and natural forces in ways that protect all members of the community. Plaintiff-Appellant’s folly should not upend centuries of law—reflected in North Carolina’s Constitution and modern statutes—that recognize the limits of human control over the sea.

I. NAGS HEAD AND OTHER OUTER BANKS TOWNS MUST NAVIGATE SIGNIFICANT PUBLIC SAFETY HAZARDS DUE TO OCEANFRONT EROSION.

Erosion has been a fact of life along North Carolina’s 320-mile-long ocean shoreline for centuries, especially along the barrier islands that comprise the Outer Banks. These barrier islands protect the mainland by absorbing energy from waves and storms and naturally migrate landward through the process of overwash and rollover as sea level rises or sediment supplies shift.² Composed entirely of sand, they are shaped by “wind, waves, tides, and storms,” N.C.G.S. § 77-20(e)—including alongshore currents that pick up and deposit sand.³

² K. A. Anarde et al., *The Future of Developed Barrier Systems: 2. Alongshore Complexities and Emergent Climate Change Dynamics*, 12 *Earth’s Future* Apr. 2024, <https://doi.org/10.1029/2023EF004200>.

³ Stanley R. Riggs, Volume 1–Cape Lookout National Seashore: Paradigm for a Coastal System Ethic 29–36 (2025); Robert Dolan & Harry Lins, U.S Geological

As those forces shift, so, too, does the shoreline: some areas accrete while others erode. Because property boundaries cannot be fixed in this dynamic environment, the common law developed rules that are now enshrined in state statutes: if natural forces result in the addition of land, then title to that land vests in the directly adjoining landowner. N.C.G.S. § 146-6(a). Conversely, if natural processes erode the shoreline, then the adjoining landowner loses title. *See* N.C.G.S. § 77-20(a) (“The seaward boundary of all property . . . is the mean high-water mark.”). As the North Carolina Supreme Court ruled in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, when the water body gradually shifts through accretion or erosion, the property boundary is extended or restricted accordingly, and the owner of the land “loses title to such portions as are so worn or washed away or encroached upon by the water.” 277 N.C. 297, 304, 177 S.E.2d 513, 517 (1970).

While all oceanfront beaches sustain cycles of accretion and erosion, the Outer Banks experience some of the most rapid rates of erosion and sea-level rise along the U.S.’s east coast.⁴ In South Nags Head, where Plaintiff-

Survey, The Outer Banks of North Carolina, Professional Paper 1177-B 3–6 (1986), <https://pubs.usgs.gov/pp/1177b/report.pdf>.

⁴ As Dr. Stanley Riggs observed, the land-sea-air interface along the Outer Banks “is really the highest energy place that we’ve got on our planet.” Catherine Kozak, *Study of Past Erosion-Control Lessons Key to Ongoing Review*, Coastal Review (Mar. 26, 2026), <https://coastalreview.org/2026/03/study-of-past-erosion-control-lessons-key-to-ongoing-review/>.

Appellant's house was located, the beach is eroding at a rate of approximately 6.7 feet/year;⁵ along some stretches of the Outer Banks, beaches are vanishing at an average of 14 feet/year.⁶ This rate will likely accelerate as sea levels rise: scientists advise that sea level along North Carolina's coast is expected to rise 1–1.4 feet by 2050 compared to a 2000 baseline,⁷ and “a 1-ft rise in sea level over a 30-year period will result in 20 ft of landward movement in shoreline position over the same period.”⁸

As a result, roads and oceanfront structures are increasingly at risk. In the past six years alone, more than 30 houses have fallen into the sea in Rodanthe and Buxton,⁹ leaving down-shore beaches littered with septic tanks, nail-studded boards and siding, electric wires, insulation, glass, and chunks of concrete and asphalt—and forcing their closure to protect public

⁵ See N.C. Div. of Coastal Mgmt., *Online GIS Layer: Oceanfront Erosion Rates 2020*, <https://experience.arcgis.com/experience/14cdb4dfacbf48bca8d49e00d66514e7/page/Page?views=Map-Layers> (last accessed May 11, 2026); N.C. Dep't of Env't Quality, *North Carolina 2025 Oceanfront Setback Factors & Long-Term Average Annual Erosion Rate Update Study: Methods Report 251–257* (Aug. 10, 2025), <https://www.deq.nc.gov/coastal-management/north-carolina-2025-oceanfront-setback-factors-long-term-average-annual-erosion-rate-update-study/open>.

⁶ See *id.* at 200–38; see also Gilbert M. Gaul, *Shifting Sands: Carolina's Outer Banks Face a Precarious Future*, *Yale Env't* 360 (July 14, 2022) <https://e360.yale.edu/features/outer-banks-climate-change-flooding>.

⁷ N.C. Coastal Res. Comm'n Sci. Panel, *2024 Sea Level Rise Science Update 2*, 6 (Oct. 2024), <https://www.deq.nc.gov/2024-north-carolina-sea-level-rise-science-update/open>.

⁸ Coastal Sci. & Eng'g, *Rodanthe Sand Needs Assessment 26* (May 2023), <https://www.darenc.gov/home/showpublisheddocument/12218/638194963727970000>.

⁹ *Beach Erosion*, Dare Cnty., <https://www.darenc.gov/government/current-issues/beach-erosion> (last accessed May 11, 2026).

health and safety.¹⁰ Over 750 oceanfront structures are threatened by oceanfront erosion, a “situation [that] is anticipated to worsen with increasing sea level rise and coastal storms.”¹¹

Community infrastructure such as wastewater systems, stormwater systems, and roads is also at risk. Dare and Hyde Counties have more threatened roads than North Carolina’s other 19 coastal counties.¹² These impacts are not limited to residential roads along the shoreline: a task force convened by Dare County cautioned that even NC 12, the backbone of the region’s transportation system, is increasingly vulnerable to “[n]atural barrier island dynamics, coupled with projections of 10-14 [inches] of sea-level rise by 2050 and a 10-fold increase in the frequency of moderately damaging flooding events.”¹³

¹⁰ See N.C. Dep’t of Env’t Quality & Nat’l Park Serv., *Managing Threatened Oceanfront Structures: Ideas From an Interagency Working Group 2* (Aug. 2024), <https://www.deq.nc.gov/managing-threatened-oceanfront-structures-ideas-interagency-work-group/open>; *Cape Hatteras Alerts & Conditions*, Nat’l Park Serv., <https://www.nps.gov/caha/planyourvisit/conditions.htm> (last accessed May 11, 2026) (national seashore near Buxton closed due to threatened structures and associated septic systems).

¹¹ *Id.*

¹² Heather Payne & Ian Brown, *Legal Issues When Managing Public Roads Affected by Sea Level Rise: North Carolina 7–8* (Spring 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441444#.

¹³ Dare Cnty., *Highway 12 Task Force Report 1* (Feb. 7, 2023) (citing Sweet et al., Nat’l Oceanic & Atmospheric Admin., *Global and Regional Sea Level Rise Scenarios for the United States: Updated Mean Projections and Extreme Water Level Probabilities Along U.S. Coastlines* (2022)), <https://www.darenc.gov/home/showpublisheddocument/11865/638114401900770000>.

Protecting coastal property and infrastructure imposes significant costs on local governments, which are finding these escalating costs to be prohibitive.¹⁴ Moreover, beach renourishment, a commonly used intervention to buffer eroding coastlines, can no longer keep up; towns like Nags Head find they must replenish the sand washed away by ocean currents every few years.¹⁵ With federal funding for these projects disappearing, these communities can no longer afford the expense and are confronting painful choices and tradeoffs. Local governments must be able to align their budgets with their respective priorities—including policies for public health and safety—to address the coming changes in this dynamic environment.

II. THE GOVERNMENT IS NOT TO BLAME WHEN NATURAL FORCES TAKE OCEANFRONT PROPERTY.

Faced with this ever-shifting shoreline, oceanfront lot owners may seek to cast blame and attempt to recoup investment losses on their diminishing properties. Indeed, Plaintiff-Appellant’s lawsuit is the most recent in a line of cases that have attempted to frame the natural consequences of littoral

¹⁴ See W. Carolina Univ. Program for the Study of Developed Shorelines, *Coastal Hazards & Targeted Acquisitions: A Reasonable Shoreline Management Alternative for North Topsail Beach, North Carolina Case Study* (July 2019), <https://psds.wcu.edu/projects-and-research/municipalprojects/north-topsail-shoreline-management/> [hereinafter “North Topsail Case Study”].

¹⁵ See *Outer Banks Shoreline Management*, Dare Cnty., <https://www.darenc.gov/government/beach-nourishment/upcoming-projects> (last accessed May 11, 2026).

landownership as a government taking. But North Carolina courts have consistently ruled that the government is not to blame when *the ocean and natural processes of erosion* encroach on and threaten beachfront property and infrastructure. Rather, when beachfront property owners' lots are gradually worn away by shoreline erosion, their titles are "divested by the sledge-hammering seas[,] the inscrutable tides of God." *Carolina Beach Fishing Pier*, 277 N.C. at 304, 177 S.E.2d at 517 (citations omitted); *see also supra* Section I.

Applying this principle, this Court held in *Shell Island Homeowners Association, Inc. v. Tomlinson* that the North Carolina Coastal Resources Commission's enforcement of its rule banning ocean seawalls, and resultant denial of a construction permit, did not cause a regulatory taking. 134 N.C. App. 217, 229–30, 517 S.E.2d 406, 415 (1999). Natural forces— not the State—took the plaintiffs' property. *Id.* The Court explained:

[P]laintiffs' complaint does not allege that the migration of Mason's Inlet and the resulting erosion of plaintiffs' property have been caused by any regulatory action taken by defendants, and *these naturally occurring phenomena are the primary causes of any loss sustained by plaintiffs*. Defendants' consistent enforcement of the hardened structure rules, consistent with its statutory powers, is merely incidental to these naturally occurring events.

Id. (emphasis added).

In this case, Plaintiff-Appellant frames its argument around an alleged denial of access to its property but ignores the fact that any practical

reductions in ease of access or ability to repair its house were in fact caused by the ocean—not by any action of the Town. Nags Head reached its decision to formally “close” and cease maintaining the north-south portion of Seagull Drive in 2016 because the road, as shown below in Figure 1, was “constantly threatened and damaged by the relentless wave action of the Atlantic Ocean resulting in chronic, persistent and inevitable erosion of that portion of the road.” (R p 11); Fig. 1 (showing Seagull Drive and Plaintiff-Appellant’s house circa April 2016); *see also* (R pp 343–44); *Kirkpatrick v. Town of Nags Head*, 213 N.C. App. 132, 141–42, 713 S.E.2d 151, 157–58 (2011) (Town not liable for alleged economic losses caused by its decision to close a road to vehicular traffic after a nor’easter and to barricade the formerly traversed route).

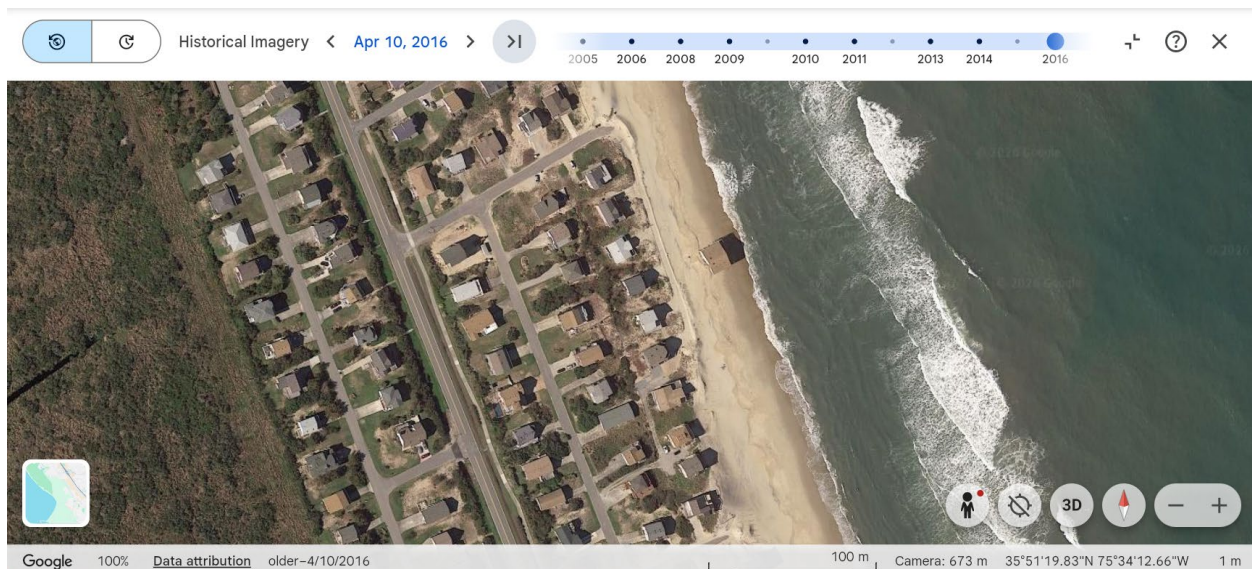


Figure 1: Maps Data: Google Earth, ©2016 Maxar Technologies

Furthermore, Plaintiff-Appellant’s house was repeatedly damaged by storms for over a decade, *see* (R pp 30–38, 54–65), and had come to be located

so far out onto the ocean beach that the ocean washed underneath the pilings of the house, (R pp 46–53). Plaintiff-Appellant did not even complete the application process for a CAMA permit to rebuild its house, (R pp 86–87), after being informed that its house would not meet applicable setback requirements and would thus require a variance request, *see* (R p 146).

Unable to fault the government for these losses, Plaintiff-Appellant latched onto the Town’s longstanding regulation of beach driving as an alleged root of its problem. Yet this argument ignores the underlying reality: the only reason Plaintiff-Appellant’s ability to access its house would become subject to such regulations is because, as the shoreline eroded, the house migrated onto the ocean beach—a fact Plaintiff-Appellant does not dispute. *See* (T p 33); *see also Six At 109, LLC v. Town of Holden Beach*, 238 N.C. App. 469, 478, 767 S.E.2d 400, 407 (2014) (upholding Town’s order to condemn and demolish a structure where “erosion, tidal action and/or other natural events materially changed the real property upon which the ocean-side structure was located . . . [and] created a hazard”).

In every respect, the primary cause of any interference with property rights is not the Town, but natural forces. In such cases, North Carolina law makes clear that no compensable taking has occurred.

III. ACCEPTING PLAINTIFF-APPELLANT'S PERMANENT ACCESS ARGUMENT WOULD CREATE AN UNDUE AND UNWORKABLE BURDEN FOR LOCAL GOVERNMENTS.

Plaintiff-Appellant does not, and cannot, challenge the closure of Seagull Drive directly. Plaintiff-Appellant concedes that: (1) the closure of Seagull Drive did not change its rights of ingress and egress, *see* (T pp 8, 40–41); *see also* Nags Head, N.C., Code of Ordinances § 8-87(b); (2) access immediately following the road closure remained “fine,” (T p 48), including for purposes of obtaining contractor estimates, (R pp 108–09, 117–21); and (3) Plaintiff-Appellant did not exercise its right to contest or appeal this road closure, Plaintiff-Appellant’s Br. at 19, as “[t]here really wasn’t a basis” to do so, *see* (T pp 35–36). Instead, Plaintiff-Appellant asserts that, following the road closure and amid chronic erosion, the Town had a duty to affirmatively provide a “plan for permanent access” to their house. Plaintiff-Appellant’s Br. at 6. North Carolina law imposes no such continuing burden, nor would it be wise to create one.

A. NORTH CAROLINA LAW DOES NOT REQUIRE NAGS HEAD TO PROVIDE PLAINTIFF-APPELLANT WITH A BESPOKE “PLAN FOR PERMANENT ACCESS.”

Once a roadway is closed, the town’s continuing maintenance obligation ends. *See Kirkpatrick*, 213 N.C. App. at 142, 713 S.E.2d at 158; *Parker v. Town of Erwin*, 243 N.C. App. 84, 106–07, 776 S.E.2d 710, 727 (2015).

Although Plaintiff-Appellant cites several cases for its argument that the

government is liable for a taking when it impedes access, *see* Plaintiff-Appellant's Br. at 17–18, these cases are inapplicable because each addresses instances where the government physically obstructed access to a public road. *See* Defs. Br. at 21–22. It is entirely different to demand that the government permanently maintain access to a structure on the ocean beach in the face of persistent, countervailing natural forces. Plaintiff-Appellant offers no authority for the proposition that the government is liable for a taking when nature interferes with property access.

While Plaintiff-Appellant attempts to frame Nags Head's beach driving regulations as an impediment, such attempts only reinforce the lack of factual and legal basis for its access claim. As a preliminary matter, any such permits were only required, if at all, for Plaintiff-Appellant to traverse oceanward of the historical roadway, (R p 263), *not* to access the abandoned Seagull Drive, (T pp 40–41). Additionally, while Plaintiff-Appellant asserts ambiguity in the record regarding the permitting scheme's requirements, any lack of clarity is attributable to the fact that Plaintiff-Appellant never meaningfully attempted to navigate it. *See* (R p 97) (admitting that Plaintiff-Appellant failed to pick up a beach driving permit for several weeks when it was offered); (R pp 97, 264) (indicating that Plaintiff-Appellant made no attempt to renew the permit).

Moreover, Plaintiff-Appellant's attacks on the beach driving permit scheme, as part of its demand for "permanent access" to its house, are inappropriate given that erosion had shifted its house onto the ocean beach. *See* (T pp 33, 40). As the Court of Appeals has recognized, littoral landowners possess a fundamentally limited bundle of property rights with respect to the ocean beach. *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 94, 780 S.E.2d 187, 197 (2015). Municipalities have long regulated vehicular traffic to protect public safety on the ocean beach, *id.* at 95–96, 780 S.E.2d at 198, including where houses are only accessible via the beach.¹⁶ Indeed, Nags Head itself has regulated beach driving for decades, *see* Nags Head, N.C., Code of Ordinances §§ 12-34.1 to 12-34.10 (1973), long before Plaintiff-Appellant purchased its property, *see* Plaintiff-Appellant's Br. at 4. Plaintiff-Appellant cannot fault the Town for declining to guarantee a use to which it was never entitled. *See Nies*, 244 N.C. App. at 93–94, 780 S.E.2d at 197 (recognizing that takings claims fail where "the proscribed use interests were not part of [the landowner's] title to begin with") (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)).

¹⁶ *See, e.g., Beach Driving & Parking on the Off Road*, Currituck Cnty., <https://currituckcountync.gov/beach-parking/> (last accessed May 11, 2026).

B. PLAINTIFF-APPELLANT’S ARGUMENT UPENDS WELL-ESTABLISHED PRINCIPLES OF COASTAL PROPERTY LAW.

Under Plaintiff-Appellant’s theory, even where erosion fundamentally alters the position of a structure, *see* (T p 40), and the ocean repeatedly washes away access, *see* (R p 11), the government commits a taking unless it furnishes a “permanent plan” to offset that damage, *see* (R p 109). Yet the contention that coastal landowners are entitled to “a permanent solution to the erosion that threatens” their property has “no support in the law.” *Shell Island*, 134 N.C. App. at 228, 517 S.E.2d at 414. In *Shell Island*, this Court rejected a takings claim where the interference with plaintiffs’ property stemmed from erosion, the natural “consequence of being a . . . littoral landowner,” and state regulations merely prohibited plaintiffs’ desired method for guarding against this threat. *Id.* Having held that the state is not obligated to *permit* every proposal to address the hazards of oceanfront property, the Court must likewise reject Plaintiff-Appellant’s contention that Nags Head must *provide* a personalized “plan for permanent access” to each littoral landowner. *See* Plaintiff-Appellant’s Br. at 6.

C. THE BURDEN OF PROVIDING PERMANENT ACCESS WOULD BE IMPRACTICAL, IF NOT IMPOSSIBLE, FOR LOCAL GOVERNMENTS TO SATISFY.

Coastal municipalities face an endless and escalating onslaught of erosion, severe storms, and rising sea levels, all of which necessitate complex

tradeoffs. *See supra* Section I. Requiring coastal municipalities to either continuously maintain paved vehicular access to erosion-threatened structures or face takings claims would undermine the well-considered public policy and safety choices that such challenges demand and favor a dangerous, Sisyphean cycle of publicly funded road repairs. *See* (R p 11) (reflecting that the Town determined that “the cost to maintain and continually repair the north-south portion of Seagull Dr. due to frequent and inevitable erosion is not justified by the [public] benefit” of keeping it “open as a public street”). Maintaining roadways along the sand would mar the state’s coastal resources and improperly prioritize private access at the expense of public enjoyment of the ocean beach.

Moreover, accepting Plaintiff-Appellant’s logic would create a slippery slope. Governments along the Outer Banks spend millions of dollars every few years dredging sand from diminishing deposits offshore and then pumping it onto the beach in effort to maintain the shoreline,¹⁷ yet houses still migrate seaward and collapse as alongshore currents move that sand elsewhere. Plaintiff-Appellant’s argument risks inviting even more egregious claims that governments must continuously undertake costly and

¹⁷ *See* W. Carolina Univ. Program for the Study of Developed Shorelines, *Beach Nourishment: North Carolina*, <https://beachnourishment.wcu.edu/state/NC> (last accessed May 11, 2026).

environmentally damaging shoreline modifications in a vain attempt to halt the ocean from impeding “permanent” access to a few threatened private structures, a number of which already lie in the surf. Such reasoning faults municipalities for losing a battle they cannot win,¹⁸ and burdens the tax-paying public with the foreseeable losses of private oceanfront property owners.

CONCLUSION

For these reasons, Plaintiff-Appellant failed to make a *prima facie* case that the Town’s efforts to protect the public from persistent road washouts and collapsing oceanfront structures, amid chronic erosion and rising sea levels, caused a compensable taking of its property. Rather, any losses are attributable to Plaintiff-Appellant’s own inactions, and the actions of the ocean. *Amici* respectfully recommend that this Court affirm the Superior Court’s decision.

Respectfully submitted, this 12th day of May, 2026.

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¹⁸ See *Beach Erosion*, Dare Cnty., <https://www.darenc.gov/government/current-issues/beach-erosion> (last accessed May 11, 2026); see also North Topsail Case Study.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Amicus Curiae certifies that the foregoing brief, which was prepared using a 13-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

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The undersigned hereby certifies that the foregoing AMICUS CURIAE BRIEF has been served this day by email, addressed as follows to the Parties'

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