PACIFIC LEGAL FOUNDATION

October 5, 2016

Honorable Chief Justice Mark Martin
and Associate Justices
Supreme Court of North Carolina
P.O. Box 2170
Raleigh, NC 27602-2170

Re: Sale of property and continuance of claims in *Nies v. Town of Emerald Isle*, No. 409PA15

To the Honorable Justices:

This letter is intended to notify the Court that Plaintiffs Gregory and Diane Nies (Nies) completed a sale of the property in Emerald Isle subject to the unconstitutional takings at issue in this case on September 30, 2016. However, in so doing, the Nieses have not abandoned, sold, assigned, or otherwise waived their takings claims against Defendant Town of Emerald Isle (Town). As the Court is aware, these claims arise from the Town's invasion of the property during the Nieses' ownership and seek damages for the period of the invasion. The Nieses retain such claims and continue to press them.[1]

Indeed, as a matter of law, physical takings claims, such as those here, do not transfer to subsequent property purchasers, but remain the personal property of those owning the subject land at the time of the taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 628, 121 S. Ct. 2448, 2463, 150 L. Ed. 2d 592 (2001) ("[W]hen a State has physically invaded the property . . . it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser."). Additionally, when takings claims seek damages for a past violation—as here—a sale of the subject property does not end the controversy; it simply shortens the period of available damages. *United States v. Dow*, 357 U.S. 17, 26, 78 S. Ct. 1039, 1046, 2 L. Ed. 2d 1109 (1958) (Termination of an already affected physical taking "results in an alteration in the property interest taken—from [one of] full ownership to one of temporary use and occupation. In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily." (citations omitted)); *Arkansas*

[1] In the contract for sale of the property, the Nieses specifically reserved all rights in this suit, including damages related to their unconstitutional takings claims.

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Game and Fish Comm'n v. United States, 133 S. Ct. 511, 515, 184 L. Ed. 2d 417 (2012) ("[I]f government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking."); *id.* at 519.

The Town may nevertheless argue the sale moots this case in its entirety. This is easily refuted. At the outset, it is important to recognize that the Nieses' takings claims arise under (1) state law, through North Carolina's Inverse Condemnation statute,[2] and the state constitution's Law of the Land Clause,[3] and (2) federal law, through 42 U.S.C. § 1983, which enforces the Takings Clause of the Fifth Amendment, as incorporated against the states through the Fourteenth Amendment. As noted above, all these claims seek monetary damages for a physical taking. *See* Record on Appeal pp. 33 ¶ 86(f); 36 ¶ 103; 37-38 ¶ 109. The Court would have to consider both state and federal law in weighing whether a property sale moots the Nieses' takings claims.

Under federal law, there is no doubt that the property sale does *not* moot the Nieses' Section 1983 takings claims. The Supreme Court has explicitly held that a Section 1983 claim survives developments ending the challenged constitutional violation when the claim (at least in part)[4] seeks damages for the past violation. *See Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978) (holding a due process property deprivation claim not moot, even though the property injury ended, because the claim sought damages); *Stokes v. Village of Wurtsboro*, 818 F.2d 4, 5 (2d Cir. 1997) (property rights claims under Section 1983 held not moot because damages were sought).[5] To the point here, the sale of property subject to a prior, alleged unconstitutional taking does not moot a 42 U.S.C. § 1983 takings claim for damages of the prior taking. *Adams v. Village of Wesley Chapel*, 259 Fed. Appx. 545, 548 (4th Cir. 2007) ("That they have since sold the property is irrelevant to the redressability of their claim since a damages award

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[2] N.C.G.S. § 136–111.

[3] N.C. Const. art. I, § 19.

[4] "Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court [can] still consider[ ] the remaining requests." *Powell v. McCormack*, 395 U.S. 486, 496 n.8, 89 S. Ct. 1944, 1951 n.8, 23 L. Ed. 2d 491 (1969).

[5] *See also*, *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421, 428, 429 n.4 (4th Cir. 2007); Wright & Miller, Federal Practice and Procedure § 3533.3 ("Claims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable. Damages should be denied on the merits, not on grounds of mootness." (footnote omitted)). For a state law analog, see *Carolina Power & Light Co. v. Reeves*, 198 N.C. 404, 151 S.E. 871 (1930) (completion of a power line mooted portion of a takings claim seeking an injunction but not the part seeking just compensation for the physical taking).

could redress the injury they allege."); *South-Suburban Housing Center v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 881 (7th Cir. 1991) ("sale of the three . . . homes after the initiation of this case fails to moot the Realtors' claims for damages"); *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1321 (D. Nev. 1992) ("Plaintiff's sale [of the property] did not moot her temporary taking claim . . . ."). Since the Nieses' federal Section 1983 claim seeks damages for a physical taking, the property sale does not moot that claim. *Id.*

The analysis is slightly different under state law, but ends with the same result; *i.e.*, the Nieses' physical takings claims remain justiciable. It is true that a profitable property sale may moot a *regulatory* takings case based on a claim that a property owner has lost all *value or reasonable use* of the property due to a zoning regulation. *Messer v. Town of Chapel Hill*, 346 N.C. 259, 261, 485 S.E.2d 269, 270 (1997). But the same logic does not apply to a physical taking claim based on an actual governmental occupation of land. This is because this type of takings claim rests on interference with the owner's *right of possession*, not on an alleged loss of all property use or value. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32, 107 S. Ct. 3141, 3145-46, 97 L. Ed. 2d 677 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S. Ct. 3164, 3176, 73 L. Ed. 2d 868 (1982). A physical invasion is a per se taking without regard for remaining property use or value. *Loretto*, 458 U.S. at 435; *see also*, *Rhyne v. Town of Mount Holly*, 251 N.C. 521, 112 S.E.2d 40 (1960).

Given the foregoing, a property sale showing that property has value has no impact, much less a mooting effect, on a claim, like that here, seeking compensation for a property invasion frustrating the owner's right of possession. A sale may shorten the plaintiff's injury, turning a permanent physical taking injury into a temporary one. But this has no effect on the justiciability of the underlying takings liability issues; those issues remain alive and unchanged. *Arkansas Game and Fish Comm'n*, 133 S. Ct. at 519.

In sum, in light of the damages remedy sought by the Nieses for the physical invasion of their land when they owned it, their physical invasion takings claims remain alive after the sale of their property. The shortening of their injury arising from the sale limits the period and amount of damages which the Nieses may claim, but it does not moot the fundamental constitutional liability questions pending before the Court. *Arkansas Game and Fish Comm'n*, 133 S. Ct. at 519; *Department of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983) ("If the jury finds that the injury [caused by an invasion of land] is permanent in nature, plaintiff would acquire a permanent [] easement over the property of defendants. If the jury finds that the injury is not permanent, defendants would be entitled to be compensated for the taking of a temporary drainage

easement." (footnote omitted)). The Nies accordingly look forward to the scheduling of oral argument in this important case.[6]

Sincerely,

s/ J. David Breemer
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cc: All Counsel

[6] If the Court desires additional briefing of any of the issues raised in this letter, the Nies are happy to provide it when requested.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing letter on counsel for the Appellee by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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