TRASK DAIGNEAULT LLP ATTORNEYS

THOMAS J. TRASK, B.C.S.*
JAY DAIGNEAULT
RANDY MORA
ERICA F. AUGELLO
JOHN E. SCHAEFER
DAVID E. PLATTE
PATRICK E. PEREZ
ROBERT M. ESCHENFELDER, B.C.S.*

** Board Certified by the Florida Bar in City, County and Local Government Law*

M E M O R A N D U M

DATE:	May 2, 2018
TO:	Mayor Nick Simons Vice Mayor David Will Commissioner Fred Steiermann Commissioner Tom Dorgan Commission Tim Kornijtschuk
FROM:	Jay Daigneault, Esq., Town Attorney
RE:	2018 Florida Legislative Session Bills of Concern – CS/HB 631 (Chapter Law 2018-94) – Customary Use and Beach Access

Dear Mayor, Vice Mayor, and Commissioners:

In follow-up and supplement to my memorandum dated April 6, 2018 and in advance of tonight's regular session, please accept this memo as additional detailed information regarding the aforementioned legislation and this office's revised recommendation regarding same.

RIPARIAN RIGHTS, BEACH ACCESS, AND CHAPTER LAW 2018-94

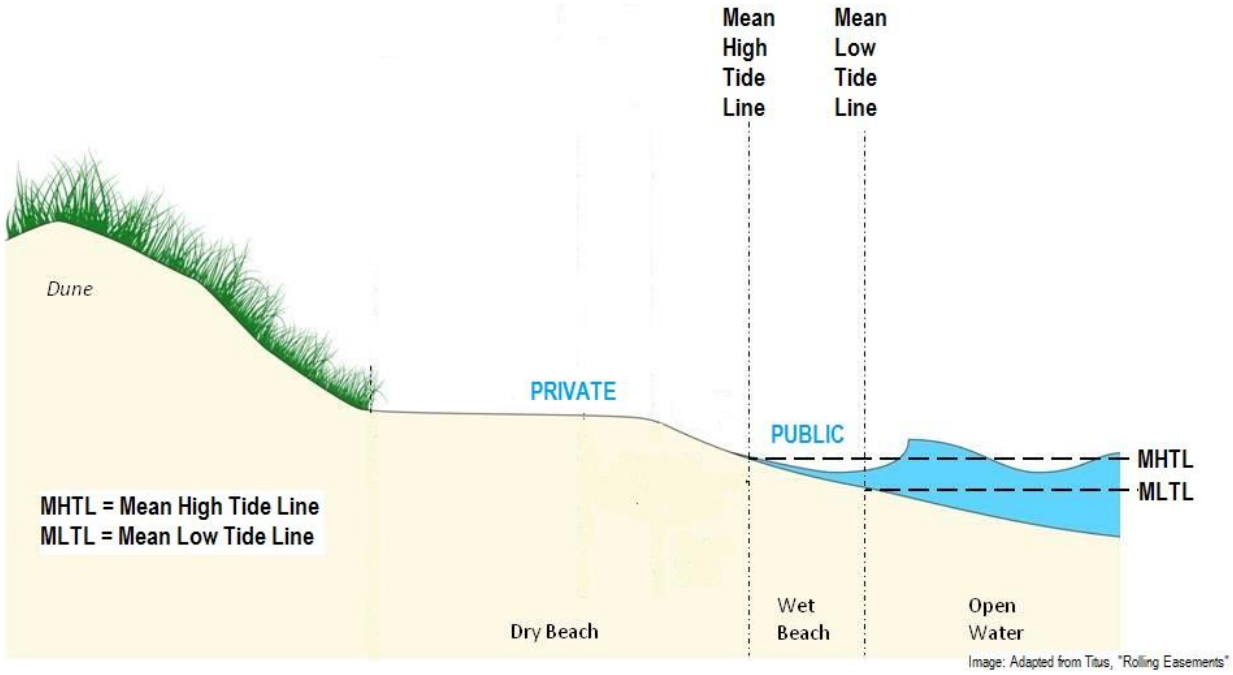
Additional General Background

According to the state's Department of Environmental Protection, at least 60 percent of Florida beaches are private, offering little or no public access. Many beachfront homeowners have claimed these beaches as their own. *See* Costello, *Beach Access: Where Do You Draw the Line in the Sand?*, NY Times, Jan. 21, 2005.

While Florida law requires the state to ensure "the public's right to reasonable access to beaches," Fla. Stat. §187.201 (8) (b)(2), over the last two decades local governments have often ceded public access points to developers, allowing waterfront communities to exclude others from the dry sand beach in exchange for the significant tax revenues these developments provide. Jennifer Sullivan, *Laying Out an "Unwelcome Mat" to Public Beach Access*, 18 J. Land Use 331, 346 (2003).

Visualization of Terms

Since this topic involves a discussion of phrases such as "Mean High Tide Line, Mean Low Tide Line, Wet Sand Beach, Dry Sand Beach," etc., the following illustration is provided to assist in visualizing these terms:



Riparian Rights

While owning waterfront property in Florida is desirable for many, it often involves unique real property considerations. When it comes to private waterfront property ownership, it can be difficult to distinguish where the private land rights cease and the sovereign land ownership begins. As a result, a subset of real property law has emerged to address what are called "riparian rights."

Riparian rights include the rights of ingress, egress, boating, bathing, fishing, and even the right, in some cases, to an unobstructed view of the water. Examples of situations that riparian rights address include:

(1) the general use of water adjacent to property;
(2) wharfing out to navigability in the channel;
(3) actual access to navigable waters; and,
(4) the right to accretions.

***Shore Village Property Owners' Ass'n, Inc. v. State Dept. of Environmental Protection*, 824 So.2d 208 (Fla. 4th DCA 2002)**. Such rights inure to the owner of the upland; however, the actual land covered by the water is not owned by the upland owner.

After the United States acquired Florida from Spain in the early 1800's, the lands under the navigable waters, including the shores, were held by the United States for the benefit of the people. That land would eventually go to the future state for the use of its citizens. ***Ex parte Powell*, 70 So. 392 (Fla. 1915)**. The State of Florida, in its sovereign capacity, holds title to the

beds of navigable waters, including the shore and the space between high and low water marks, in trust for the people of the state who have rights of navigation, commerce, fishing, boating and other public uses. ***Brickell v. Trammell*, 82 So. 221 (Fla. 1919)**. Subject to these public rights, the State of Florida's legislature has control over such sovereign trust lands, and the state may sell tracts of the submerged sovereign lands to private owners as long as the public and private rights are not impaired. ***State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (Fla. 1908)**.

The various types of submerged sovereign lands involved in riparian rights legislation was succinctly explained by R. Lynn Lovejoy in Florida Real Property Complex Transaction, Chapter 8 "*Waterfront Property*", (2011):

> The shore has since been defined as the space between the high and low water lines, and is held by the state in trust for the public. ***State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (Fla. 1908)**. "Shore" has also been defined statutorily to mean the land bordering sovereign waters from the mean high water line seaward. Florida Statutes § 379.101(2). Today, according to Florida Statutes § 161.54(3), "shore" is synonymous with "beach" and "beach" is defined as that land extending landward from the mean low-water line to the line of permanent vegetation. The "bed" of a waterbody includes the shores. ***Apalachicola Land & Development Co. v. McRae*, 98 So. 505 (Fla 1923)**. "Tideland," which can also be interpreted as a shore, is that land covered and uncovered daily by water affected by the ordinary ebb and flow of the normal tides.

An instance of the state transferring submerged sovereign land occurred when Florida deeded a swath of land to the railroad. If that land included a river, lake, or swamp, the submerged land owned by the state transferred to the private land owner from that point forward. The state effectively deeded away any jurisdiction over that submerged land and had no jurisdiction thereafter. As time went on, however, this presented another crucial point of contention–how do the natural changes to earth's surface affect private shoreline property rights?

Similar to shifting sands due to flood, tides, and drought, water boundaries and property lines can change. This can also lead to disputes between private landowners and the state as to the ownership of that newly created land. However, the owners of uplands bordering navigable water usually have riparian rights, which include the right to an increase of their lands by accretion and reliction. Accretion is the extension of land area due to a gradual and natural build-up of additional land by the accumulation of loose deposit material. Reliction is a similar increase of land area due to the lowering of the water level by natural causes. Under the doctrine of accretion and reliction, the added land belongs to the riparian owner and not the state. ***Mexico Beach Corp. v. St. Joe Paper Co.*, 97 So.2d 708 (Fla. 1st DCA 1957)**.

As people began developing their waterfront property, docking rights became another area of dispute. Riparian rights address this area of property ownership as well. For example, the construction of a dock does not vest the waterfront property owner with title in the submerged lands underneath the dock. ***Williams v. Guthrie*, 137 So. 682 (Fla. 1931)**. Docking is a near-shore consideration and is limited by the line of deep water (line of navigability). The line of navigability is defined as that location off shore where the depth of water is sufficient for navigation.

Along a straight river without a marked channel, the most common method for determining this location is to draw dividing lines perpendicular to the line of deep water. Those lines are drawn from the channel to the shoreline, thus outlining the area for the upland property owner's riparian rights. Along a river or other waterbody with a nearby marked navigation channel, the perpendiculars are constructed using the nearest limit of the channel rather than using the line of deep water. When the shoreline is irregular in the form of a cove or projection into an ocean, ocean bay, lake, or river, the apportionment of land is typically aimed at dividing dock rights equally, rather than using any perpendicular method. Where there is a cove and a curving shoreline, the allocation of riparian rights is made by picking a point within the navigable channel or offshore and (much like a pie shape) drawing lines from the upland boundary lines to the selected point offshore or in the channel.

In summary, with the subset of property law known as riparian rights, Florida law recognizes that waterfront property ownership often results in disputes and litigation among neighboring landowners and the state concerning the use of the shorelines and waterways. Riparian rights ensure that the rights of such property owners are weighed fairly and equitably in regards to their ownership of waterfront property. Ultimately, the goal of riparian rights is to promote a policy of "reasonable use" of the shared shorelines and waterways among private property owners.

Natural Accretion and Beach Nourishment

Accretion is the gradual addition of soil to the shore of a riparian owner's land, caused by natural shifting tides, winds, or storms. This natural phenomenon can have an impact on what land a beachfront landowner "owns" as time goes on and sands are lost naturally, and replaced by beach re-nourishment projects.

Florida follows the common law standard for natural accretions: title to accreted land vests in the riparian owner whose land has been extended seaward. ***Bd. of Trs. v. Sand Key Assocs.*, 512 So. 2d 934, 936 (Fla. 1987)**. Normally, accretion occurs at an imperceptibly slow rate; riparian owners take the bitter with the sweet, gradually gaining or losing land as sand accretes or is eroded. Sometimes, the natural process is sped up through unnatural means. Beach nourishment generally involves adding sand dredged from the ocean floor to the seaward slope of beaches shrunken by natural or human-caused erosion. Under Florida's Beach and Shore Preservation Act, when public money is used to fund the expansion of a beach, the added sand becomes property of the state, free for public use. Beach and Shore Preservation Act, Florida Statutes § 161.011, *et seq*.

In 2006, a Florida appeals court challenged this option for retaining public access to dry sand beach, ruling in favor of property owners who argued that application of the act effected an unconstitutional taking of riparian owners' property without just compensation, particularly their littoral right to accretions. ***Save our Beaches, Inc. v. Fla. Dept. of Envt'l Protection*, 27 So.3d 48 (Fla. 1st DCA 2006)**. Had this ruling stood, the state and counties would have had to obtain property owner permission before initiating restoration projects, potentially meaning the end of publicly funded projects abutting private property and the creation of no new public beachfront.

However, the Florida Supreme Court reversed the district court of appeal's decision and upheld the constitutionality of the Beach and Shore Preservation Act. ***Walton County v. Stop Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008)**. Noting that the act balances public and

private interests and fulfills the state's "obligation to conserve and protect Florida's beaches," the court found no material or substantial impairment of upland owners' littoral rights. The court explained that upland owners' littoral rights of access, use, and view are akin to nonpossessory easements; the right to accretions a contingent, future interest; and upland property's physical contact with the water was ancillary to the littoral right of access to the water.

Similarly, in 2007, the legislature passed Chapter Law 2007-99, Laws of Florida, requiring that, in takings disputes concerning beach restoration, courts must weigh any loss in value against enhancements of value created by the nourishment project. See Florida Statutes § 141.161. If the enhancement in value exceeds the level of damage, the property owner may not recover against the state. If the level of damage to value is greater than the enhancement, the level of enhancement shall be offset against the damage caused by the restoration project.

Methods to Gain Public Beach Access

Prior to further discussing the terms and implications of Chapter Law 2018-94 (HB 631), it would be helpful to set forth the various methods a governmental entity might acquire public beach access, and the benefits or limitations of each.

Prescriptive Easement.

Prescriptive easement is another channel through which the public may acquire access to private property. A claimant may establish such a right-of-way after demonstrating his or her uninterrupted use of the property for a set number of years — 20, as defined by the Florida Supreme Court. ***Downing v. Bird*, 100 So. 2d 45 (Fla. 1958)**. To prove adverse use, the claimant must also establish that his or her use of the private property was open, notorious, and visible, and against the owner's will. ***J.C. Vereen & Sons, Inc. v. Houser*, 167 So. 45 (Fla. 1936)**. Further, a claimant must demonstrate that the owner did not succeed in causing a "substantial interruption" in his or her use of the property. The use must also be related to a certain limited and defined area of land: If a right-of-way is a path, that corridor must have a reasonably certain route. ***Downing*, 100 So. 2d 45**.

The use of prescriptive easement to establish access to the dry sand beach for the general public involves a fairly difficult burden of proof. Unlike other states, which have allowed for a relaxation of the adverse use requirement, Florida courts have not generally found prescriptive easements over private dry sand beach because they have found the public's use of these areas has not been adverse. See ***City of Daytona Beach v. Tona-Rama, Inc*., 294 So. 2d 73, 75-76 (Fla. 1974)**. For a prescriptive easement to be established, there must be some claim of right other than permission from the owner. ***Downing*, 100 So. 2d 45**. In ***City of Miami Beach v. Undercliff Realty & Investment Co.*, 21 So. 2d 783 (Fla. 1945)**, the court refused to designate a prescriptive easement after finding no evidence that the use was adverse; similarly, in ***City of Miami Beach v. Miami Beach Improvement Co.*, 14 So. 2d 172 (Fla. 1943)**, the court found that public use of the beach was "not antagonistic to the ownership of the property." In *Tona-Rama,* though the public had used the area for more than the required 20 years, the court found that use to be consistent with the rights and interests of the property owner, who had in fact encouraged the public to come onto his land in order to derive a profit. ***Tona-Rama*, 294 So. 2d at 77**. Adding to the difficult set of standards for establishing a prescriptive easement, judges have typically disfavored such easements. Holland, *Public Access to the Florida Coast*: *1995 Issues* at 28 (Fla. Dep't of Comm. Affairs 1995).

The inquiry into whether an easement has been established is necessarily ad hoc and intensely fact-based. Portions of the dry sand beach are only public under this theory after claimants have prevailed in litigation. This piecemeal approach is inadequate to fully deliver the public's right to access the coast, as launching lawsuits against every beachfront property owner in the state would be prohibitively expensive and time consuming.

Express or Implied Dedication.

Related to, but distinct from, the concept of prescriptive easement is that of implied dedication, which may be either demonstrated through express statements of the property owner or manifested through actions. ***Miami Beach*, 14 So. 2d at 175**. Florida courts have recognized both express and implied dedications as sources of public rights to the dry sand beach; however, dedications are both revocable by the landowner and available only on a tract-by-tract basis, making them an unworkable source of widespread and lasting beach access rights. Brent Spain, Comment: *Florida Beach Access: Nothing But Wet Sand*, 15 J. Land Use & Envtl. L. 167, 171 (1999).

Mandatory Dedication.

Local governments have for many years conditioned large-scale development approval on developers' dedication of essential services such as streets, sidewalks, and water or sewer infrastructure. Holland, *Public Access to the Florida Coast: 1995 Issues* at 31 (Fla. Dep't of Comm. Affairs 1995). However, states may be forestalled from requiring express dedications of beach access from property owners under ***Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)**. In *Nollan*, the California Coast Commission agreed to issue a permit for the expansion of a beachfront house on the condition that the property owners grant lateral public access across the beachfront. The Supreme Court held that a mandatory dedication of beachfront property for a public beach access was an unconstitutional taking. ***Nollan*, 483 U.S. 825 (1987)**. Though *Nollan* concerned the dedication of upland, rather than the dry sand beach, this holding has since been extended to all such required "exactions." ***Dolan v. City of Tigard*, 512 U.S. 374 (1994)**; ***Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013)**.

Public Trust Doctrine and the Wet Sand Beach.

The public trust doctrine has its roots in Roman laws that required that the seas and tidal land remain open to all for fishing and navigation. As history tells, in A.D. 530, the Roman Emperor Justinian asked his legal scholars to codify the empire's laws; the resulting Institutes of Justinian included the provision that "by the law of nature these things are common to all mankind; the air, running water, the sea and consequently the shores of the sea." Thus was born the idea of a public trust seashore. See, Steve Strunsky, *A Walk Along the Water Is Not a Simple Matter*, NY Times, Jan. 13, 2002:

http://query.nytimes.com/gst/fullpage.html?res=9401E7DE1139F930A25752C0A9649C8B63&sec=&spon=&pagewanted=all.

The idea has been passed down through the legal systems of many other nations. The United States and Florida inherited it as part of our country's English common law legacy. ***Brickell v. Trammell*, 82 So. 221, 226 (Fla. 1919)**. The doctrine was first incorporated into American law

during the Revolutionary War, and the Supreme Court's first assertion of the doctrine to establish federal sovereignty over navigable waters came with ***Martin v. Waddell,* 41 U.S. 367 (1842)**. Today, nearly every state's laws have incorporated the doctrine, though variation between states exists.

Florida's public trust ownership began with statehood in 1845, when the state took title to all sovereign lands within its jurisdiction not expressly granted to private interests by the Spanish government prior to the 1819 Treaty of Cession or conveyed by the federal government while Florida remained a territory.

The public has a right of access along Florida's beaches and shorelines below the mean high-water line. Article X, Section 11 of the Florida Constitution provides that the state holds the land seaward of the mean high-water line (MHWL) in trust for the people. This is commonly known as the "Public Trust Doctrine."

With control over public trust lands came the state's responsibility to ensure that these lands remain free for public use. Holland, *Public Access to the Florida Coast: 1995* Issues at 24 (Fla. Dep't of Comm. Affairs 1995). However, one of the few cases where the topic of public beach access was discussed by the Florida Supreme Court, ***City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974)**, does not suggest the public trust doctrine will be expanded by the court since in that case the court affirmed the public's right to use the dry sand beach based on a different theory, that of "customary use."

Customary Use.

Where the public has established over time a right to use the beach, private property owners may not interfere with continued enjoyment of that right. However, to establish a customary right, the use must be "ancient, exercised without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and consistent with other customs or other law." Sullivan, *Laying Out an "Unwelcome Mat" to Public Beach Access*, 18 J. Land Use at 336 (2003).

"Customary use" refers to public use of the dry sandy areas of the beach and is an extension of the common law doctrine of custom. This is a broad principle of property law which generally provides that, if an activity has continued for a long time without interruption, the law will eventually recognize that activity and provide a legal right for it to continue. Some states, such as Oregon, Texas, and Hawaii, have applied the doctrine of custom broadly to the entire shoreline of the state.

Florida courts have recognized common law customary use in a more limited way, as applied to a specific area of a particular beach. See ***City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974)**; See also ***Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995)**. The Florida Supreme Court has stated that "the general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years." ***Tona-Roma, Inc*., 294 So. 2d 73 at 78**. But the Fifth District Court of Appeal clarified this recognition further, requiring "courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to and, in addition, to balance whether the proposed use of the land by the fee owners will interfere with such use enjoyed by the public in the past." ***Reynolds*, 659 S0. 2d 1186 at 1190**.

Florida's Supreme Court has used this doctrine to ensure public access to beaches in the past. In ***City of Daytona Beach v. Tona-Rama Inc.*, 294 So. 2d 73 (Fla. 1974)**, the court recognized a common law principle of the public's "customary use" of the state's dry sand beaches. The court declined to find that the public had established a public easement over a private ocean pier because of lack of adversity (***Tona-Rama, Inc*., 294 So. 2d at 77**), but stated that "[t]he general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years." **Id. at 78**. *Tona-Rama* may have looked like major step toward universal beach access, but several years later in ***Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995)**, the court clarified the scope of the prior case, stating that courts must determine the degree of customary and ancient use that particular beaches have supported. *Tona-Rama*'s holding has thus been limited to the beach that was the subject of the original litigation; under *Reynolds*, the doctrine of custom must be applied on a case-by-case basis.

It must be emphasized that the part of the beach under contention is the *dry sand beach*, that part of the beach falling above the mean high-water mark, calculated as an average of high tides over a number of years. The federal rule for calculating this all-important line is determined by "the average height of all waters over a period of 18.6 years." ***Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935)**. The wet sand beach falling seaward of this line is governed by the public trust doctrine. This doctrine holds that these parts of the beach that have traditionally been used for travel, hunting, fishing, and more recently recreation are held by the state in trust for the use of its citizens. See, ***City of W. Palm Beach v. Bd. of Trs. of the Internal Improvement Trust Fund*, 746 So. 2d 1085, 1089 (Fla. 1999)**. Like the beds of navigable rivers, private landowners may not hold this part of the beach to the exclusion of others. Following the federal rule for measuring the mean high-water mark, Florida's constitution asserts state ownership of beaches below these "mean high water lines... in trust for all the people." Article X, § 11 of the Florida Constitution.

Further complicating the issue is the fact that the mean high tide mark, calculated as an average of high tides over a historical period, may be much different than current high tides. If this line is higher than the actual high tide, under the public trust doctrine, the state has sovereignty over the dry sand beach falling below this line. However, if the mean high tide line, the dividing line between private and public property, falls below current high tide levels, the public may find itself having to wade in waist-deep water to avoid privately owned property. See Strunsky, *A Walk Along the Water Is Not a Simple Matter*, NY Times, Jan. 13, 2002. Among other things, beach access advocates identify this absurdity as supporting the need to open expanded areas of the beach to the public if the right to use and enjoyment of the coast is to be fully realized.

Chapter Law 2018-94 and its Application to Redington Beach

As noted previously, the majority of the new law dealt with amending the State's statutory scheme for actions for ejectment and other related statutes. However, the bill was amended during the legislative session to add Section 10. That section created a new § 163.035 of the Florida Statutes, to read:

163.035. Establishment of recreational customary use

(1) Definition.—The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority.

(2) Ordinances and rules relating to customary use.—A governmental entity may not adopt or keep in effect an ordinance or rule that finds, determines, relies on, or is based upon customary use of any portion of a beach above the mean high-water line, as defined in s. 177.27, unless such ordinance or rule is based on a judicial declaration affirming recreational customary use on such beach.

(3) Notice of intent to affirm recreation public use on private property; judicial determination.—A governmental entity that seeks to affirm the existence of a recreational customary use on private property must follow the procedures set forth in this subsection.

(a) Notice.—The governing board of a governmental entity must, at a public hearing, adopt a formal notice of intent to affirm the existence of a recreational customary use on private property.

The notice of intent must specifically identify the following:

1. The specific parcels of property, or the specific portions thereof, upon which a customary use affirmation is sought;

2. The detailed, specific, and individual use or uses of the parcels of property to which a customary use affirmation is sought; and

3. Each source of evidence that the governmental entity would rely upon to prove a recreational customary use has been ancient, reasonable, without interruption, and free from dispute.

The governmental entity must provide notice of the public hearing to the owner of each parcel of property subject to the notice of intent at the address reflected in the county property appraiser's records no later than 30 days before the public meeting. Such notice must be provided by certified mail with return receipt requested, publication in a newspaper of general circulation in the area where the parcels of property are located, and posting on the governmental entity's website.

(b) Judicial determination.—

1. Within 60 days after the adoption of the notice of intent at the public hearing, the governmental entity must file a Complaint for Declaration of Recreational Customary Use with the circuit court in the county in which the properties subject to the notice of intent are located. The governmental entity must provide notice of the filing of the complaint to the owner of each parcel of property subject to the complaint in the same manner as is required for the notice of intent in paragraph (a). The notice must allow the owner receiving the notice to intervene in the proceeding within 45 days after receiving the notice. The

governmental entity must provide verification of the service of the notice to the property owners required in this paragraph to the court so that the court may establish a schedule for the judicial proceedings.

2. All proceedings under this paragraph shall be de novo. The court must determine whether the evidence presented demonstrates that the recreational customary use for the use or uses identified in the notice of intent have been ancient, reasonable, without interruption, and free from dispute. There is no presumption regarding the existence of a recreational customary use with respect to any parcel of property, and the governmental entity has the burden of proof to show that a recreational customary use exists. An owner of a parcel of property that is subject to the complaint has the right to intervene as a party defendant in such proceeding.

(4) Applicability.—This section does not apply to a governmental entity with an ordinance or rule that was adopted and in effect on or before January 1, 2016, and does not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding challenging an ordinance or rule adopted before July 1, 2018.

This new law prohibits Florida counties and cities from adopting or keeping in effect an ordinance or rule establishing customary use of privately owned dry sand areas unless they comply with the procedures set forth in the law.

A city or county seeking to establish the customary use of privately owned lands is required to adopt, at a public hearing, a formal notice of intent, provide notice to affected parcel owners, and file a complaint with a circuit court to determine whether the land is subject to the customary use doctrine.

This part of the bill does not apply to a city or county that had an ordinance or rule adopted and in effect prior to January 1, 2016. A city or county may raise customary use as an affirmative defense in proceedings challenging an ordinance or rule adopted prior to July 1, 2018.

The bill provides an effective date of July 1, 2018, and states that these customary use provisions do not apply to local governments having an ordinance or rule that was adopted and in effect on or before January 1, 2016. Additionally, the provisions do not deprive a local government from raising customary use as an affirmative defense in any proceeding that challenges an ordinance or rule that was adopted before July 1, 2018.

The new statute does not affect the statewide beach management program or any beach restoration, nourishment, or erosion control projects that participate in the program. Any beach restoration, nourishment, or erosion control project is part of the state's beach management program and must have an erosion control line (ECL) established. Once an ECL has been established in accordance with Florida Statutes Chapter 161, the ECL replaces the MHWL and the common law no longer applies. Title to all lands seaward of the ECL is vested in the state as sovereign, and title to all lands landward of the ECL is vested in the riparian upland owner. Florida Statutes § 161.191(2). Additionally, the program requires the provision of upland access to the beach. Florida Statutes § 161.101(12).

The state's beach management program is well-established and the process for fixing an ECL to replace a fluctuating MHWL prior to initial project construction is well-settled, having

been established in 1965 and upheld by the United States Supreme Court in an opinion written by Justice Antonin Scalia in 2010. ***Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. 702 (2010)**. The petitioner for this United States Supreme Court case and the preceding case in the Florida Supreme Court was Stop the Beach Renourishment, Inc., the same group of Walton County property owners that were the proponents for this new law. However, the process created by the new law for establishing customary use by a city or county through a circuit court was amended to contain negotiated language. Additionally, the existence of customary use was a judicial determination prior to the new law, and the law requires courts to determine whether the recreational use or uses at issue "have been ancient, reasonable, without interruption, and free from dispute." This is a similar standard to that established in the *Reynolds* case.

The Town's Current Legal Position

Currently, the Town has in place an ordinance that the courts would likely find to be a customary use ordinance sufficient to exempt the Town from the proposed application of the new law. Specifically, the Town Code provides:

> **Sec. 6-134. - Public access.**
>
> Where the public has established an accessway through private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement or other legal means, development or construction shall not interfere with such right of access unless a comparable alternative accessway is provided. The developer shall have the right to improve, consolidate or relocate such public accessways so long as they are:
>
> (1) Of substantially similar quality and convenience to the public;
>
> (2) Approved by the local government and approved by the department of natural resources whenever improvements are involved seaward of the coastal construction control line; and
>
> (3) Consistent with the coastal management element of the local comprehensive plan adopted pursuant to F.S. § 163.3178.

The Town also has a second provision in place related to customary use which may also support a judicial determination that the new law would not apply. Specifically, the Town's Comprehensive Plan provides:

> **Sec. 15-57. - Adoption by reference of beach and shore regulations**.
>
> The town adopts the standards and regulations for the preservation and protection of beaches and shores set forth in F.S. ch. 161, Beach and Shore Preservation Act.

Because these ordinances were in effect prior to January 1, 2016, the Town would not likely be subject to the new legislation. However, should the Town elect to adopt an even more detailed customary use ordinance in advance of the deadline, such effort could only help the Town's legal position. In ***Alford v. Walton County*, 2017 WL 8785115, n. 28 (N.D. Fla. November 22, 2017)**, the most recent federal court opinion to uphold a Florida local government's

authority to adopt a "customary use" ordinance concerning its beaches, the court notes, in a footnote:

> The Alfords also contend that there is a "serious Fifth Amendment" question as to whether the application of custom effected an uncompensated taking. However, the Alfords have not raised a Fifth Amendment challenge in this suit.

However, I believe that since the doctrine of "customary use" recognizes that the owner's right to his or her dry sand beachfront property has been compromised by, as the Florida Supreme Court describes it, a "right gained through custom [of the public] to use this particular area of the beach." So long as a reviewing court would be able to find that, as to the Town's beaches, the public's use of the dry sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute," then the Town, even if it adopted a more detailed customary use ordinance recognizing the customary use of its beaches by the public, this ordinance would not be a "taking" under either Florida or federal law since the Town's ordinance would be taking nothing the owners actually had (a right to exclude the public from this part of the beaches). Accordingly, though my opinion has not changed that the Town's position in this matter is strong, I am requesting the Board's permission to draft a supplemental customary use ordinance for consideration prior to the July 1, 2018 deadline set forth in the new law.

As always, please do not hesitate to contact me should you have concerns regarding this matter.

/s/ Jay Daigneault, Esq.
Town Attorney