



*Office of*  
**INDIAN RIVER COUNTY**  
**ATTORNEY**

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### MEMORANDUM

**TO:** Board of County Commissioners

**FROM:** Kate Pingolt Cotner, Assistant County Attorney

**DATE:** May 16, 2018

**SUBJECT:** Customary Use

**Background:** 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."

The public also can access the dry sand areas of the beach above the MHWL if the activity has continued for a long time without interruption. This is commonly known as the "Customary Use Doctrine." While customary use is not an interest in the land itself, it is a right to enjoy the land for recreational purposes. In the past, Florida courts have recognized the Customary Use Doctrine applies to a specific area of a particular beach and not on a parcel by parcel basis.<sup>1</sup> It is determined on a case-by-case basis where the court must balance whether the proposed use of the land by the fee owners will interfere with such use enjoyed by the public in the past."<sup>2</sup>

Recently, there has been some confrontation in other jurisdictions between coastal homeowners who erected fences and/or "no trespassing signs" and beach goers who want to access and recreationally use the dry area of sand above the MHWL. Walton County, Volusia County and St. Johns County have each passed ordinances to address this issue, but not without some controversy. In particular, Walton County adopted an ordinance in 2016 declaring the dry sand areas of the county subject to the customary use doctrine. Based on that finding, the ordinance prohibits signs, fencing and other obstructions within the dry sand areas. The ordinance was quickly challenged by a group of coastal homeowners. In November of 2017, a federal judge in Pensacola sided with Walton County and ruled that it had not overstepped its bounds by passing an ordinance because it was not prohibited by Florida law.<sup>3</sup> The federal judge also ruled that coastal

<sup>1</sup> See *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974); See also *Trepanier v. County Of Volusia*, 965 So. 2d 276, 287-288 (Fla. 5<sup>th</sup> DCA 2007).

<sup>2</sup> *Reynolds v. Cty. of Volusia*, 659 So. 2d 1186, 1190 (Fla. 5<sup>th</sup> DCA 1995).

<sup>3</sup> *Alford v. Walton County*, No. 3:16CV362/MCR/CJK, 2017 WL 8785115, at \*16 (N.D. Fla. Nov. 22, 2017).

homeowners had a right to a judicial review and a determination of the existence of customary use rights.<sup>4</sup>

Subsequently, the Florida Legislature passed, and Governor Rick Scott signed, HB 631 in 2018. HB 631 prohibits a governmental entity from adopting or keeping in effect an ordinance or rule establishing customary use of privately owned dry sand areas. A governmental entity 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. A grandfather clause was put into place for any ordinance or rule adopted and in effect prior to January 1, 2016. HB 631 also includes a clause that states a governmental entity may raise customary use as an affirmative defense in proceedings challenging an ordinance or rule adopted prior to July 1, 2018.

Currently, Indian River County does not have an ordinance that pertains to customary use. The County Attorney's Office has reached out to other coastal counties across the State of Florida in an effort to give the Indian River County Board of County Commissioners (Board) some options on how to proceed forward. While some local governments-- like Flagler County-- are quickly drafting and approving ordinances in an attempt to be able to use customary use as a defense if they are challenged by coastal property owners, others are choosing not to move forward with an ordinance for fears that it may ignite a claim under the Bert J. Harris Act. While the responses of local governments differ between jurisdictions, there is a general consensus that HB 631 could bring unintended consequences like litigation and impacts to beach renourishment programs throughout the State of Florida.

One potential issue relates to whether a local government will be denied access to renourish part of a beach within its jurisdiction that is high in the dry sand. Indian River County is fortunate in that it partners with the State of Florida on most of our projects. To do so, Indian River County has established an erosion control line (ECL) on most of its beaches. Once an ECL has been established, it replaces the MHWL and the common law no longer applies. However, while the ECL is usually higher than the MHWL, it usually does not include the sand dunes. This creates a potential issue if the dunes need to be renourished due to a storm event or natural erosion because 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 coastal homeowner.<sup>5</sup> Moreover, while the State of Florida requires all beach projects receiving state funds to provide for adequate public access, protect natural resources, and provide protection for endangered and threatened species, it is unknown what will happen if a local government decides to pay for a beach renourishment project without the State's assistance.<sup>6</sup> If Indian River County is denied access to certain areas of the beach by coastal homeowners, the coastal management plan could be jeopardized.

Another potential issue relates to whether FEMA funding for an emergency storm event will be impacted by the new law. Indian River County has formalized a coastal management plan that includes interlocal agreements with City of Vero Beach and the Town of Orchid. Through these interlocal agreements, the County assumes legal responsibility of large-scale beach management projects. In the past, we have not had any issues with FEMA funding. This is not to say, however, that it will not be an issue in the future, especially in light of the recent change in the laws both at the state and federal level after post Hurricane Matthew.

The Board may wish to consider some options to address these issues. The first option includes researching

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<sup>4</sup> See *Id.*

<sup>5</sup> s. 161.191(2), F.S.

<sup>6</sup> s. 161.101(12), F.S.

the historical use of the beaches within Indian River County and adopting an ordinance declaring specific areas of the beach that have been used uninterrupted for a long period of time to be public under the customary use doctrine.

The second option is to enter into agreements with the individual property owners along the coastline in Indian River County to receive written permission to transverse and renourish the area of sandy beach between the unvegetated dune seaward to the MHWL or ECL.

The third option, which is more of a funding option, is to create a special taxing district (a.k.a. erosion control district) to "initiate and carry on such studies and investigations as may be necessary to plan a logical and suitable program for comprehensive beach and shore preservation."<sup>7</sup> There are at least three of these districts in Florida: the St. Lucie County Erosion District, the Town of Jupiter Island Beach Protection District, and the Captiva Erosion Prevention District (CEPD). Pursuant to Chapter 161, these districts are authorized to raise funds to support the county's beach and shore preservation program. The districts are also authorized under Chapter 161 to enter upon private property for purposes of making surveys, soundings, drillings and examinations, and such entry shall not be deemed a trespass.<sup>8</sup> Moreover, the CEPD has placed in its internal rules and regulations that it is authorized to issue an "emergency repair and/or maintenance order" for any project constructed by any person, firm, corporation, public or private, within the DEP's jurisdiction.

### **RECOMMENDATION.**

The County Attorney's Office recommends the Board determine whether to direct staff to draft an ordinance relating to the customary use doctrine, to draft an agreement for permission to access and renourish the area of sandy beach between the unvegetated dune seaward to the MHWL or ECL, or move forward with the next steps in establishing a special taxing district.

### **ATTACHMENT(S).**

A copy of the draft ordinance from Flagler County.

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<sup>7</sup> s. 161.28, F.S.

<sup>8</sup> s. 161.36(5), F.S.