

MEMORANDUM

TO: Jason E. Brown, County Administrator

THROUGH: Richard B. Szyrka, P.E., Public Works Director

FROM: James D. Gray, Jr., Natural Resources Manager

DATE: September 24, 2018

SUBJECT: Notice of Intent to Affirm the Existence of a Recreational Customary Use on Private Property

BACKGROUND

The common law public trust doctrine is embodied in Art. 10, s. 11 of the state's Constitution. Under that provision, title to the portion of lands beneath navigable waters up to the mean high water line is owned by the state and held in trust for the people. The doctrine applies to all navigable waters, both freshwater and salt water.

While areas above the mean high water line are generally subject to private ownership, Florida courts have recognized the public may acquire rights to the dry sand areas of privately owned portions of a beach through common law prescription, dedication, and custom. This is commonly referred to as the customary use doctrine. The customary use doctrine 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.

Florida courts have recognized the customary use doctrine. In the case of *City of Daytona Beach v. Tona-Rama*, the Florida Supreme Court 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."¹ The Fifth District Court of Appeal later clarified this recognition further, requires "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."² It is important to note the courts have determined that when showing customary use, the historic use does not need to be specific to the parcel at issue; rather, the use must be within the "general area" of the beach where the parcel is located.³

Early this year, the Florida Legislature created section 163.035, Florida Statutes, concerning the establishment of recreational customary use. Section 163.035, Florida Statutes, sets forth a new statutory framework for a governmental entity that seeks to affirm the existence of a recreational customary use on private property. Pursuant to the statute, the 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 *City of Daytona Beach v. Tona-Rama*, 294 So.2d 73, 78 (Fla. 1974).

² *Reynolds v. County of Volusia*, 659 S0. 2d 1186, 1190 (Fla. 5th DCA 1995).

³ *Trepanier v. County of Volusia*, 965 So. 2d 276, 290 (Fla. 5th DCA 2007).

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 is required to provide notice of the public hearing no later than 30 days before the public meeting through certified mail, 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.

In addition to conducting the public hearing, the statute also requires that the governmental entity file a Complaint for Declaration of Recreational Customary Use in circuit court in the county in which the properties subject to the notice of intent are located. The governmental entity must file the complaint within 60 days. The governmental entity is required to provide notice of the filing of the complaint in the same manner as was required for the public hearing.

Under the statute, the court proceeding is *de novo*. The court will 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 in favor of the governmental entity.

Since the creation of section 163.035, Florida Statutes, the County has received a complaint from various citizens that an individual who owns a parcel of real property in the Summerplace development has erected a barrier on the beach to prevent public access. In an effort to affirm the existence of a recreational customary use in the area in and around the barrier, Indian River County is holding this public hearing. This public hearing was properly noticed to the public and all interested parties.

The following evidence supports Indian River County's position that the area in question should be open and unrestricted to the general public for usual recreational activities:

- various pictures of from citizens of Indian River County of individuals on the beach in the area at issue;
- an advertisement for Summerplace Homes from the 1960's that clearly states all property owners have equal access to the beach in front of Summerplace and the beach is owned by members of Summerplace Improvement Association;
- testimony of James Gray, former Coastal Engineer and current Natural Resources Manager for Indian River County, who visits the area at issue once a month and regularly observes people on the beach collecting shells, sunbathing, surfing, exercising, etc.;
- testimony from Kendra Cope, Coastal Environmental Specialist for Indian River County, who visits the area at issue approximately six times a year and observes people collecting shells, sunbathing, exercising, cleaning the beach, surfing/skim boarding, etc.; and
- email correspondence received from the public about their personal recreational use and enjoyment in the area at issue.

FUNDING:

If the Board moves forward with the process of affirming the existence of a recreational customary use on private property under section 163.035, Florida Statutes, in order to reduce costs, the County Attorney's Office will handle the required litigation in-house. Funding is budgeted and available to cover expenses such as recording fees in the General Fund/County Attorney/Recording Fees account. However, it may be necessary for the County Attorney's Office to hire experts for such litigation. The County Attorney's Office may need up to \$30,000 for such experts. The funding for the litigation would come from General Fund Reserves.

RECOMMENDATION:

Staff recommends that the Indian River County Board of County Commissioners open the public hearing, take evidence as to the customary use of the beach, close the public hearing and adopt a formal notice of intent to affirm the existence of a recreational customary use in the area at issue. Staff also recommends that the Indian River County Board of County Commissioners direct the County Attorney's Office to file a Complaint for Declaration of Recreational Customary Use in circuit court, and direct the County Attorney's Office to notify all interested parties of the Complaint for Declaration of Recreational Customary Use.

ATTACHMENT

Draft Formal Notice of Intent

APPROVED AGENDA ITEM FOR: OCTOBER 2, 2018