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Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy

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RECREATIONAL RIGHTS TO THE DRY SAND BEACH IN FLORIDA: PROPERTY, CUSTOM AND CONTROVERSY

Alyson Flournoy, Thomas T. Ankersen & Sasha Alvarenga*

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I. INTRODUCTION

At the close of the 2018 legislative session Florida Governor Rick Scott signed HB 631 into law. Included in the bill, which addressed a number of issues relating to actions for ejectment from real property, was an amendment to the Florida Community Planning Act entitled “Establishment of Recreational Customary Use.” The new statute immediately created a sandstorm of controversy as the media seized on what many in the public perceived to be a land

grab over the public's right to recreate on Florida's sandy beaches.¹ As it turns out, the story is considerably more nuanced, and neither the advocates on both sides nor the media did the public any favors in the commentary and reporting on this issue. However, both the background to the legislation and subsequent events indicate that the public is rightly concerned about efforts to limit recreational access, some of which have been spurred or exacerbated by what had been a largely localized controversy.

This paper begins by briefly describing the history of the current controversy, which had its origins in Walton County, Florida. The conflict centers on arguments about the public's right to use the dry sand beach -- that area of the beach that is between the line of vegetation and the mean high tide line, and is often privately owned. We then discuss the broader legal context that gives rise to boundary disputes along dynamic shorelines and provide the essential policy-relevant facts concerning public and private sandy beach ownership. In order to fully understand the legal basis for the public's claim of right to use the sandy beaches and the legislative response, we summarize the history of the relevant legal doctrine -- known as customary use -- that came over from England during the post-colonial era and made its way into the law of a number of states, including Florida. We offer a detailed review of the Florida Supreme Court's landmark case on the customary use doctrine along with subsequent lower court cases interpreting it. We then attempt to identify the legal issues that have created widespread confusion regarding the interplay among the common law property rights at issue, local ordinances that recognize and regulate those rights, and particularly, the state legislation that precipitated the widespread attention to and conflict over this issue -- HB 631, now codified in Fla. Stat. 163.035. After flagging several legal issues at the heart of the conflict, we provide an annotated summary of the statute that describes the interpretive issues it raises or may raise. We conclude by discussing some of the options available to the Florida legislature to resolve the sandstorm of controversy that HB 631 engendered.

a. A Sandstorm of Controversy

HB 631 has its origins in Walton County, Florida, where long simmering disputes between the beach-loving public and some privacy-loving beachfront property owners erupted into litigation in 2016. The litigation was precipitated by the County's efforts to mediate the ongoing conflict by passing a "customary use" ordinance. Landowners were seeking to enforce trespass laws against public beachgoers continuing the longstanding practice of using the landowners' privately-owned beach. The County sought to mediate through legislative action -- adoption of an ordinance -- the conflict over the extent of the public's right to use the dry sand beach. At issue was the right of the public to venture onto - and along - what is known as the "dry sand beach" -- that part of the sandy beach that is above mean high tide, and hence, if not publicly owned, likely to be private property. Relying on an ancient legal doctrine referred to as

¹ Craig Pittman, *New law Scott signed makes public access to beaches harder to establish*, TAMPA BAY TIMES (Apr. 4, 2018), http://www.tampabay.com/news/environment/New-law-Scott-signed-makes-public-access-to-beaches-harder-to-establish_167015546; Travis Cohen, *Rick Scott Just Signed a Bill That Could Make Many of Florida's Beaches Private*, MIAMI NEW TIMES (Apr. 4, 2018), <https://www.miaminewtimes.com/news/rick-scott-just-signed-a-bill-that-could-make-many-of-floridas-beaches-private-10231813>; John Kennedy, *Beach Lovers Push Back on New Property Rights Law*, HERALD TRIBUNE (Apr. 16, 2018), <http://www.heraldtribune.com/news/20180414/beach-lovers-push-back-on-new-property-rights-law>.

“customary use,” and a 1974 ruling by the Florida Supreme Court recognizing that doctrine,² Walton County sought to clarify and recognize the public’s right to reasonable use of the dry sand beach within its jurisdiction, while including regulatory safeguards to protect beachfront property owners. The ordinance reflected the County’s legislative determination, based on extensive research and analysis of the relevant law, that the public had customary use rights in the dry sand beach throughout Walton County. At its core, customary use doctrine holds that where the public has traditionally and continuously used the dry sand beach since “time immemorial” it may continue to do so, even though the property remains in private ownership.

Walton County’s 2017 ordinance sought to recognize and protect but also to regulate customary use rights, thereby providing landowners some privacy and imposing what the County believed to be reasonable limitations on the uses which the public could make of the beach. The ordinance contained three key provisions. First, it established a zone of fifteen feet seaward from the toe of the dune or from any permanent habitable structure owned by a private entity (whichever is more seaward) and prohibited the public at large from using this buffer zone, except as needed to utilize an authorized public beach access point.³ This provision provided a zone of privacy for private landowners who owned the dry sand beach. Second, it prohibited interference with the right of the public at large to engage in designated activities on the remainder of the privately-owned dry sand beach. Finally, it limited the nature and scale of the activities the public could engage in on the dry sand beach. The ordinance specifically prohibited use of tobacco, possession of animals, and erection or use of tents. It explicitly authorized the following exclusive list of activities: traversing the beach; sitting on the sand, a beach chair, a towel or blanket; using a beach umbrella seven feet or less in diameter; placement of surfing or fishing equipment; sunbathing; picnicking; fishing; swimming or surfing off the beach; and building sand creations.

As with any ordinance, Walton County followed its usual notice and hearing process prior to adopting the customary use ordinance. Various landowners who sought to challenge the ordinance filed at least seven different lawsuits against Walton County in 2016 and 2017, challenging the ordinance and a related ordinance limiting signs and obstructions on the beach. The plaintiffs variously claimed the ordinances were ultra vires, void for vagueness, and a violation of their rights under the First, Fourth, Fifth, and Fourteenth Amendments, as well as imposing unconstitutional conditions. Thus, the claims in these various lawsuits filed after the ordinance’s passage encompassed both objections to the substance of the ordinance (the validation of customary use rights) and to the process (use of an ordinance to codify these rights). Some Walton County landowners’ hostility to the ordinance fueled legislative intervention that ended up producing HB 631.

All but one of the claims related to Walton County’s ordinance have ultimately been dismissed without prejudice as unripe or moot or were voluntarily dismissed. The majority of the claims attacking the customary use ordinance asserted that the ordinance effected a taking of the landowners’ property without just compensation – claims that were almost uniformly dismissed as unripe due to the landowners’ failure to avail themselves of avenues to seek just compensation

² City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974).

³ WALTON COUNTY, FLA., CODE OF ORDINANCES § 23-2 (2017).

under state law.⁴ However, the landowners also raised ultra vires and due process claims, objecting to the fact that Walton County had sought to codify a common law right in the ordinance.⁵

In the midst of the Walton County litigation, the Florida legislature passed and the Governor signed HB 631, effectively preempting all but two counties with preexisting Customary Use ordinances-- Volusia and St. Johns-- from adopting or maintaining similar ordinances by any process other than a new process described in the bill. Although landowners seeking legislative action may also have wanted to substantively curtail customary use rights, the legislation that ultimately passed in 2018 did not effect any substantive change in common law customary use rights, as is explained in more detail below. One clear and intended impact of the bill was to invalidate the Walton County ordinance. This in turn mooted the remaining claims in most of the pending litigation. The sponsors of the bill expressed the hope that this reset would eliminate or at least reduce the level of conflict and litigation in Walton County and elsewhere.⁶ However, as is detailed below, the new law certainly did not end and arguably intensified the conflict. At least one bill has been filed in the Senate for the 2019 legislative session that would repeal HB 631.⁷

A last-minute floor amendment to the bill injected additional uncertainty into the preemptive intent of the statute: it allows local governments to raise customary use as an affirmative defense in any proceeding challenging an ordinance enacted prior to the new law's effective date of July 1, 2018. This arguably created a window after the bill's signing by the Governor and before its effective date in which any ordinances adopted by local governments would be exempt from the new procedure because, when challenged, these ordinances could nevertheless be defended based on customary use.⁸ However, the new law prohibited local governments from "keeping in effect"-- as well as adopting -- ordinances finding, determining, relying on or based upon customary use of the dry sand beach, unless they are enacted pursuant to the new process.⁹ This inconsistency created uncertainty and an arguable basis for local government action during the window before July 1, 2018. A number of counties and municipalities have taken advantage of this window to enact new ordinances.¹⁰

⁴ In one case that was resolved after the adoption of HB 631, the Takings claim and numerous others were held to be moot because the statute invalidated the Walton County ordinance. *Seaside Town Council v. Walton Cty.*, No. 3:17-cv-00682-MCR-CJK (N.D. Fla. Aug. 22, 2018).

⁵ These claims were eventually mooted by HB 631's invalidation of Walton County's ordinance and therefore dismissed without prejudice.

⁶ Shelby Danielsen, *Debate heats up over public beach access along private property in Florida*, FIRST COAST ABC NEWS (Jan. 11, 2018), <https://www.firstcoastnews.com/article/news/local/beaches/debate-heats-up-over-public-beach-access-along-private-property-in-florida/77-507298799>.

⁷ News Service of Florida, *Beach Access Law Gets Challenged, Rouson Files Repeal Bill*, TAMPA BAY TIMES (Nov. 21, 2018) <http://www.tampabay.com/florida-politics/buzz/2018/11/21/beach-access-law-gets-challenged-rouson-files-repeal-bill/>.

⁸ FLA. STAT. §163.035(4). F. S. JOUR. 689, 770 (Reg. Session 2018) (amendment 1 to Fla. CS for HB 631 (2018)).

⁹ FLA. STAT. §163.035(2).

¹⁰ NAPLES, FLA., CODE OF ORDINANCES ch. 42, art. II, div. V (2018); FERNANDINA BEACH, FLA. CODE OF ORDINANCES ch. 90, art. II, div. 3 (2018); VOLUSIA COUNTY, FLA., CODE OF ORDINANCES ch. 20 art. III (2018); WALTON COUNTY, FLA., CODE OF ORDINANCES § 23-2 (2018); Flagler County Board of County Commissioners, Public Hearing on Consideration of an Ordinance Recognizing the Right of Customary Use of the Beach by the Public (June 18, 2018); Indian Rocks Beach Special City Commission Meeting on Ordinance No. 2018-3 Customary Use of the Beach (June 28, 2018); Nassau County Board of County Commissioners, Agenda on the Adoption of Ordinance on Customary Use of Beach by the Public (June 25, 2018).

b. Underlying Currents of Conflict

There are several factors that have brought questions concerning the scope of the public's use rights to the fore and made public use a contentious issue. Some of these are social, cultural, and economic. But some of the undercurrents are legal.

First, many landowners don't understand that their title to beachfront land may be subject to customary use rights of the public. Some mistakenly think that beach ownership necessarily means an absolute right to exclude others. The right to exclude is an important attribute of property ownership, often viewed as one of the most important "sticks in the bundle" of property rights,¹¹ but it is not absolute. Land ownership has always been subject to various limitations, both regulatory and property-law based. As the late Justice Scalia noted in his opinion in *Lucas v. South Carolina Coastal Commission*,¹² landowners' property rights are subject to so-called "background principles" of property law. These background principles typically derive from the common law as it has evolved over time in the various states. And in the case of privately-owned dry sand beach in Florida, customary use rights, prescriptive easements, purpresture, and implied dedication are among the inherent limitations that comprise the background principles that may create exceptions to the right to exclude.

Second, property at the ocean edge has other unique challenges. For beachfront property, the seaward boundary is what is called an ambulatory boundary -- in other words, unlike a traditional surveyed property line fixed on a map, the boundary can and does move.¹³ Beachfront owners may think that there is a fixed line that determines where their property ends, but this is not always the case. There is a line in the sand, but it's one that can move in either direction over time. This is because the mean high tide is determined based on the average of 18.6 years of high tides.¹⁴ So locating the mean high tide line is not as easy as looking at where the sand is wet on a given day, as many beachgoers, property owners, and even some law enforcement officers assume.¹⁵ Changes that occur to the land sea interface as a result of slow changes over time (erosion & accretion) can cause the boundary between public and private land to move and deviate from the mean high tide line.¹⁶ As a result, it is all but impossible for one walking the beach collecting sea shells to know for sure on which side of a property line she is walking. Similarly, even for the landowner, tracing the contours of this boundary is likely to present significant challenges and may entail periodic modification. Erecting structures, fences, signs or other traditional signals of ownership is a fraught exercise on a high energy beach.

¹¹ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see Thomas W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV. 730 (1998), available at <https://digitalcommons.unl.edu/nlr/vol77/iss4/7>.

¹² 505 U.S. 1003, 1029 (1992).

¹³ Alyson C. Flournoy, *Beach Law Cleanup: How Sea-level Rise Has Eroded the Ambulatory Boundaries Framework*, 42 VT. L. REV. 89, 100-05 (2017).

¹⁴ Flournoy, *supra* note 13, at 101.

¹⁵ See, e.g., Tom McLaughlin, *Duo test limits of beach access, governor's order, enforcement*, WALTON SUN (Jul. 16, 2018), <http://www.waltonsun.com/news/20180716/duo-test-limits-of-beach-access-governors-order-enforcement>.

¹⁶ See Flournoy, *supra* note 13.

So, landowners who attempt to demarcate their sandy beach as private and off limits to the public may be wrong on two counts in any given case. First, even if that part of the beach is privately owned, the public may have customary use rights. Second, if the mean high tide line has migrated, what was once their property may no longer be. And even to understand what areas of the dry sand beach are private or public in the first place requires greater understanding of the sand on the beach, where it came from, when, and how.

II. SAND FACTS

The reach of HB 631 is limited to dry sand beach that is held in private ownership, a significant fraction of Florida's 825 miles of sandy beach.¹⁷ However, there is already considerable publicly owned dry sand beach, the result of federal, state, and local government ownership for public use as coastal parks or other protected areas, as well as for non-public or limited public use, such as military and civil works installations. While the data is difficult to come by,¹⁸ one "back of the envelope" estimate based on publicly available geospatial data has put the amount of beach already in public ownership as parks, protected areas, and other government lands at close to 50% of 829 miles of sandy beaches.

Florida's dry sand beaches may also become partially public as a result of the operation of the state beach management program.¹⁹ Of the approximately 825 miles of sandy beach, more than 229 miles are scheduled to be nourished or re-nourished with new sand in order to forestall erosion.²⁰ To be eligible for nourishment these beaches must first have been declared "critically eroded" by the Florida Department of Environmental Protection.²¹ The 2017 update to the State's Critical Erosion Report indicates that 420.9 miles of Florida's sandy beaches are critically eroded, and another 92.5 miles are "eroded."²² Hurricane Irma-induced erosion in 2017 meant that for the first time more than 50% of Florida's beaches are now critically eroded, and hence eligible for beach management.²³ The data for Florida's most recent storm, Hurricane Michael, has not been tallied.

¹⁷ FLA. DEP'T OF ENVTL. PROT., STRATEGIC BEACH MANAGEMENT PLAN: INTRODUCTION 1 (May 2018), https://floridadep.gov/sites/default/files/SBMP-Introduction_0.pdf.

¹⁸ According to one source at DEP, an official calculation for miles of private beach has not been measured. Determining what property deeds along Florida's entire coastline extend to the mean high water line (MHWL) is a labor-intensive, fact specific determination.

¹⁹ FLA. DEP'T OF ENVTL. PROT., *supra* note 17, at 14.

²⁰ *Id.*

²¹ "Critically eroded shoreline" is defined in subsection 62B-36.002(5), F.A.C., as "a segment of the shoreline where natural processes or human activity have caused, or contributed to, erosion and recession of the beach or dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which, although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects." FLA. ADMIN. CODE ANN. r. 62B-36.002(5) (2013).

²² FLA. DEP'T OF ENVTL. PROT., CRITICALLY ERODED BEACHES IN FLORIDA 5 (Dec. 2017), https://floridadep.gov/sites/default/files/CriticalErosionReport_0.pdf.

²³ The Program for the Study of Developed Shorelines at Western Carolina University maintains a state by state interactive website that tracks beach nourishment projects. BEACH NOURISHMENT VIEWER, <http://beachnourishment.wcu.edu/> ("[T]he PSDS beach nourishment database contains attribute information on the general location of sand placement, primary funding source and funding type, volume of sediment emplacement (in

Nourishment -- the placement of additional sand on the beach seaward of the mean high tide line -- pushes back the tide and resets the erosion clock. When a beach is nourished using federal or state dollars, the newly emergent dry sand beach – created from the submerged lands seaward of the mean high tide line and typically owned by the State of Florida - remains in state ownership up to former mean high tide line, which becomes a line in the dry sand, and is re-designated the “erosion control line (ECL).”²⁴ The beach landward of the ECL remains privately owned if it previously was so, while the new beach which has been created through the addition of sand remains in public ownership. While the private property owner retains riparian rights over the newly created public beach,²⁵ the public owns and has the right to use the newly emergent dry sand beach. This bifurcation of dry sand beach ownership remains until such time as the ocean or Gulf erodes the nourished public beach back to the ECL (the former Mean High Tide Line).²⁶ Once that occurs there is no longer a publicly owned dry sand beach, and the common law boundary is reinstated.

To date, new publicly owned dry sand beach has been created along more than 229 miles of Florida's coastline, under an increasingly robust – and increasingly necessary -- beach management program. Indeed, beach nourishment is one of the ways that funds can be spent under Florida's constitutionally enshrined land acquisition program. Federal cost-share represents a significant percentage of the funding for beach nourishment.²⁷ Moreover, once a beach has been nourished, it is eligible to be nourished at regular intervals.²⁸ While some of these nourished beach miles are already in public ownership as parks and protected areas, most are not, simply because a key impetus for nourishment – the protection of upland structures – does not obtain. As a result, it would appear conservatively that the dry sand beach on more than half of Florida's sandy beaches may be completely or partially open to public use based on public ownership or ongoing nourishment.²⁹ Of course, being open to public use does not necessarily mean that it is easily accessible. For example, many areas lack facilities for parking or easy public transit access, thus limiting the use to those who live or are staying in the immediate vicinity, as a practical matter.

Additionally, it is important to note that not all of Florida's beaches are eroding, even in the face of ongoing sea level rise. All coastal dynamics are local, and there are beaches that are stable or accreting. Beyond any natural accretion that may occur due to geomorphological variation, sand

cubic yards), length of beach nourished (in feet) and cost and inflated cost for 2,000 identified beach nourishment episodes dating back to 1923.”)

²⁴ FLA. STAT. §§ 161.141, 161.151(3) (2018).

²⁵ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 710 (2010).

²⁶ FLA. STAT. §161.211(2) (2018).

²⁷ There are 25 federally authorized projects addressing 134.4 miles of shoreline. Florida has the largest federal shore protection program in the Nation. Total Florida federal obligations to date for FY 1980-2016 are \$1,155,000,000. The federal funding obligation for Florida shore protection projects is projected to be \$1.3 billion over the next 20-year period (total cost \$2.2B, remainder non-federal share). *Beaches 2017 & Beyond, A Funding Initiative for Statewide Beach Management*, FLA. SHORE & BEACH PRESERVATION ASS'N (Oct. 3, 2016), <https://www.fsbpa.com/Beaches2017.pdf>.

²⁸ Water Resources Development Act (WRDA) 33 U.S.C. § 2213 (2007); 33 C.F.R. § 263.26 (2018).

²⁹ One commentator generally cites to the Florida Department of Environmental Protection for the proposition that sixty percent of Florida Beaches are in ownership. Erika Kranz, *Sand for the People: The Continuing Controversy Over Public Access to Florida's Beaches*, 83 FLA. BAR J. 10, n. 8 (2009).

accretes behind structures, especially inlet jetties, and sand from nourished beaches inevitably drifts beyond the project footprint, adding sand to unnourished beaches.³⁰ These processes do not affect the underlying substantive property relationships, and the growing dry sand beach may all become privately owned, though it may still be subject to the use rights that are the subject of this paper.

III. CUSTOMARY USE DOCTRINE

a. Origins and Theory

The notion of custom as a normative source of law extends across legal systems and is also recognized in international law.³¹ In the context of American property law, scholars and courts trace customary use to the English common law, dating back to medieval times when courts and communities found the law through social norms that emerged over time.³² Customary use is often lumped with other common law property doctrines that seek to order the relations between bona fide owners of particularized property and others who have made use of that property to the extent new property relations develop between them. In essence, one or more of the “bundle of sticks” that constitute the right to property has been either transferred or diminished. In this taxonomy, that stick is most commonly the right to exclude others.³³

Most well-known among these doctrines are adverse possession and prescriptive easements, followed by implied dedication and custom. All have been imported into U.S. jurisprudence from English common law and modified to varying extents upon arrival. Adverse possession recognizes that one can occupy another’s property for so long and under such conditions that it makes no sense to retain the absent owner’s actual ownership. In such cases, a new title can arise in the non-owning user, and the original owner is divested. A variation on this accounts for those circumstances where a trespassory use is made of private property by a user or users other than the owner to such an extent that the owner’s right to exclude must give way to the trespasser. This is referred to as a “prescriptive easement,” and is most often associated with footpaths and roadways. As with adverse possession, once the easement is perfected, a new interest in the property arises, and the owner’s rights are diminished.

Both adverse possession and easement by prescription have been recognized by the courts and/or codified in the law of many states, with distinct requirements that must be proved.³⁴ Key among these is the requirement that the use must be ‘adverse’ to the property owner. This element is often missing in cases where owners have invited, tolerated, or just ignored use of their property

³⁰ Jim Houston & Bob Dean, *Erosional Impacts of Modified Inlets on the East Coast of Florida (Beach Encroachment and Nourishment)*, <https://www.fsbpa.com/2016TechPresentations/Houston.pdf>.

³¹ See ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 47–50 (1971).

³² THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 307–09 (5th ed. 1956).

³³ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

³⁴ See, e.g., FLA. STAT. § 95.16 (2018) (codifying and modifying the common law doctrine of adverse possession). The leading case on adverse possession and prescription in Florida continues to be *Downing v. Bird*, 100 So. 2d 57 (1958).

by others without their permission under the doctrines of implied dedication and custom.³⁵ Implied dedication occurs where a landowner demonstrates an intent to surrender his or her land for use by the public, and the public demonstrates acceptance of that use.³⁶ Custom, the subject to this discussion concerning sandy beaches, entails its own unique requirements discussed further below.

Courts applying the common law have found that the customary use doctrine is well-suited to circumstances where adversity could not be easily proved, the geographic reach extends beyond an individual parcel and the use is made by an “unorganized public,” and have found no circumstance more appropriate than in the use of the sandy beach. In the case of customary use, neither title nor an easement arises in another interest holder. Instead, a right of use is conferred, a right which is limited to the custom being observed. There are a number of early cases where custom has been applied to resolve disputes over otherwise trespassory communal uses of private property. However, beachfront property appears to be the only instance where the doctrine has recently been applied in the United States.

1. Customary Use in England

The notion of customary use of property arose in feudal English land law as a means to recognize longstanding use of the property of another (often the “lord of the manor” by a community of persons (often the subjects of the manor) who were accustomed to conducting their use for specific purposes since “time immemorial,” which was also described as “until the memory of man runneth not,” or “time out of mind.”³⁷ In England this apparently required continuity of use back at least to the times preceding the Coronation of Richard I on September 3rd, 1189 – a concept referred to as “legal memory.” However, even in England more practical approaches were the norm. One scholar of the history of the common law asserts that the length of time for custom to ripen into law was and should be substantially shorter.³⁸

English law also suggests that custom was meant to be applied to geographically distinct areas such as counties, cities, towns, and manors, and not to the whole of England, and for the benefit of a community of people rather than individuals.³⁹ Most early English custom cases addressed

³⁵ Sheryl Strauss & Emily Wallace-Jackson, *Property Law—Common Law Dedication: A Landowner's Intent to Dedicate*—Security Federal Savings & Loan Association v. C & C Investments, Inc., 448 N.W.2d 83 (Minn. Ct. App. 1989), 17 WM. MITCHELL L. REV. 373, 373 (1991).

³⁶ *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65, 71 (1975) (finding an implied dedication of the dry sand beach).

³⁷ WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 67 (1765).

A good discussion of the English origins of the law of customary use can be found in: David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Hope M. Babcock, *Has The U.S. Supreme Court Finally Drained The Swamp Of Takings Jurisprudence?: The Impact Of Lucas v. South Carolina Coastal Council On Wetlands And Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995).

³⁸ “In modern times we hear a lot too much of the phrase ‘immemorial custom.’ In so far as this phrase implies that custom is or ought to be immemorially old it is historically inaccurate. In an age when custom was an active living factor in the development of society, there was much less insistence on actual or fictitious antiquity.” PLUCKNETT, *supra* note 32 at 342–43.

³⁹ According to Blackstone:

the customary use of property for productive, but non-extractive, purposes such as water access, storing sea weed, net-drying, etc. However, over time, these sorts of utilitarian uses faded, and the doctrine began to be asserted to support more contemporary routinized community rituals such as playing cricket and dancing around the maypole, foreshadowing the recreational use to which it is now almost exclusively applied in the United States.

Relying on English commentator William Blackstone, who has enjoyed tremendous, if sometimes criticized, influence as a chronicler of the common law in the United States, American commentators have broken down the proof required for customary use into a series of discrete elements, some of which courts have lumped together, due to their potential redundancy or overlap. The general formulation of the doctrine that has emerged is that the right to use by custom cannot be acquired unless it is proved that the use: 1) has continued from time immemorial 2) without interruption 3) and as of right; 4) is certain as to the place 5) and as to the persons; 6) and is certain and reasonable as to the subject matter or rights created.⁴⁰

2. Customary Use in the United States

The customary use doctrine clearly made its way across the Atlantic and into the common law of the states of the United States, albeit unevenly. Early recognition can be found in Maine,⁴¹ Massachusetts,⁴² and New Hampshire;⁴³ however Maine has subsequently given conflicting signals regarding the doctrine's viability.⁴⁴ Rejection can be found in Connecticut (1905),⁴⁵ New

And, first, the distinction between custom and prescription is this: that custom is properly a *local* usage, and not annexed to any *person*; such as a custom in the manor of Dale that lands shall descend to the youngest son; prescription is merely a *personal* usage; as, that Sempronius, and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. As for example; if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close at all times, for their recreation (which is held to be a lawful usage); this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*; but if the tenant, who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate.

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 263–64 (1893).

⁴⁰ 3 HERBERT THORNDIKE TIFFANY, LAW OF REAL PROPERTY, § 935 at 623 (3d ed. 1939); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75–78 (1893) (explaining the elements of custom).

⁴¹ *Hill v. Lord*, 48 Me. 83 (Me. 1861) (noting customary use rights as a potential basis for a claim for an easement but not available in circumstances like those presented which involved collection of a profit -- seaweed).

⁴² *Coolidge v. Learned*, 8 Pick. 504 (Mass. 1829).

⁴³ *Nudd v. Hobbs*, 17 N.H. 524 (N.H. 1845) (recognizing a right of passage, but denying defendants' claim which was based on a customary right to collect a profit -- seaweed); *Knowles v. Dow*, 22 N.H. 387 (N.H. 1851) (recognizing a customary right to deposit seaweed collected from the ocean on private land).

⁴⁴ *Compare Almeder v. Town of Kennebunkport*, 2014 ME 12, 34 (1984) (expressly rejecting doctrine of custom and noting that Supreme Judicial Court of Maine had never recognized an easement by custom as a viable cause of action), *with Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (appearing to recognize the existence of custom as a possible claim but upholding lower court's finding of lack of evidence to support Town's claim). In addition, the legislature seems to recognize the possibility that claims based on custom exist in ME. STAT. tit. 14, §§ 812 and 812A (2018).

⁴⁵ *Graham v. Walker*, 78 Conn. 130 (Conn. 1905).

York (1935),⁴⁶ and New Jersey (1825).⁴⁷ The rationale for rejection generally centered on the irrelevance of a feudal doctrine to a modern nation - the impossibility of envisioning a “time immemorial” in a young country such as the U.S., and concern over the introduction of uncertainty into a relatively well-formed system of land titling and registration.⁴⁸ A non-coastal outlier, Idaho confirmed the doctrine’s existence in that state in 1979, but refused to apply it.⁴⁹ And then there are the states (or territories) where the doctrine was recognized explicitly in the context of the contemporary dilemma of public recreational beach access: Oregon (1969),⁵⁰ Florida (1974),⁵¹ Hawaii,⁵² North Carolina,⁵³ Texas,⁵⁴ and the U.S. Virgin Islands.⁵⁵ These are discussed more fully below.

Thus, if one were keeping count, the score would appear to be at least 10 jurisdictions that have embraced or at least recognized customary use as an aspect of their common law, and at least 3 that have rejected it.⁵⁶ Interestingly, nearly all these cases involved disputes centering on access to and along water bodies.

3. *The Modern Customary Use Cases and Recreational Beach Access*

As noted above, five states and the Territory of the Virgin Islands have explicitly recognized customary use as the basis for resolving recreational beach access conflicts: Oregon, Hawaii, North Carolina, Texas, and Florida. Others, like New Jersey and California have eschewed or ignored customary use in favor of other doctrinal approaches, such as the expansion of the public trust doctrine beyond the mean high water line, and implied dedication.⁵⁷ The leading and most expansive customary use case is *State ex rel. Thornton v. Hayes*, decided in 1969 by the Supreme Court of Oregon. In that case, the Court effectively threw all of the dry sand beaches of Oregon open to the public on the theory that all of the beaches of the state had been used since time immemorial, referring back to the use of the beach by Native Americans. *Thornton* has been criticized for its lack of fealty to the common law roots of customary use, which suggest

⁴⁶ *Gillies v. Oriental Beach Club*, 159 Misc. 675 (N.Y. 1935).

⁴⁷ *Ackerman v. Shelp*, 8 N.J.L. 125 (N.J. 1825); *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 323 (N.J. 1984).

⁴⁸ See RICHARD R. POWELL, 4 POWELL ON REAL PROPERTY § 34.11[6].

⁴⁹ *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979).

⁵⁰ *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 454–55 (Or. 1993).

⁵¹ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974)

⁵² *Public Access Shoreline v. Hawai'i Cnty. Planning Comm'n*, 903 P.2d 1246, 1255–56 (Haw. 1995); Laura C. Harris, Case Note, *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission: Expanding Hawaii's Doctrine Of Custom*, 3 OCEAN & COASTAL L.J. 293 (1997).

⁵³ *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015); *appeal dismissed* 793 S.E. 2d 699 (N.C. 2016); *cert. denied* 138 S.Ct. 75 (2017).

⁵⁴ *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App. 1979).

⁵⁵ *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769, 772–73 (D.V.I. 1974).

⁵⁶ We limited our research to coastal states and did not exhaustively survey the law of inland states to determine whether the doctrine had been addressed in those states, for example in the riverine context. None of the secondary literature on customary use that we consulted referenced states other than those described above. As is noted *infra*, note 64, some of the states that have declined to adopt customary use have instead relied on other doctrines like the public trust to achieve a similar outcome.

⁵⁷ *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

that the use should be considered in geographically specific contexts.⁵⁸ Thornton was followed by *Stevens v. City of Cannon Beach*.⁵⁹ In that case, the Court found that customary use was a “background principle” of Oregon property law such that its application did not support a takings challenge, and that Oregon statutory law simply recognized and applied the doctrine for regulatory and local government planning purposes. The United States Supreme Court refused to consider the case, but the denial of certiorari was accompanied by a written dissent from Justice Scalia that should serve as a cautionary tale for those interpreting and applying the doctrine under state law.⁶⁰

Hawaii is unique due to the strong influence of indigenous (Native Hawaiian) customary law on its common law. While the Hawaii Supreme Court looked to the theories that underlie the importation of customary use from England, these seemed more designed to bolster the conclusion that traditional Hawaiians’ entitlement to use rights stemmed from the State’s recognition of the primacy of indigenous customary law.⁶¹

In 1998, North Carolina amended a statute that defined the seaward boundary of property within the state as the mean high water mark to add language recognizing the right of the public to use the full extent of the dry sand beaches throughout the state.⁶² The statute references both the “frequent, uninterrupted, and unobstructed” use of the full extent of the dry sand beach “from time immemorial” and the right of the people to “customary free use” under the common law and as part of the common heritage recognized in the state Constitution.⁶³ This same section also describes these rights as “public trust rights.” A 2015 decision by North Carolina’s intermediate appellate court confirmed that this statute and other provisions of state law recognized and codified public trust rights in privately-owned land.⁶⁴ The court noted that its opinion was the first appellate opinion to confirm the existence of these rights, and noted that it was unclear whether custom and public trust rights are separate doctrines in North Carolina or whether custom has been used to determine where and how public trust rights arise.⁶⁵ The court rejected the takings claim raised by landowner plaintiffs to an ordinance adopted by the Town of Emerald Isle authorizing driving on the dry sand beach, in part because the right to prevent the public from enjoying the dry sand portion of the Property was never part of the “bundle of rights” purchased by Plaintiffs.⁶⁶

Texas was the early adopter when it comes to explicitly recognizing the customary use doctrine for recreational beach access. In 1959, Texas passed the “Open Beaches Act,” which provides for recreational dry sand rights “... if the public has acquired a right of use or easement to or

⁵⁸ David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1418–26 (1996).

⁵⁹ *Stevens v. City of Cannon Beach*, 854 P.2d 449, 454–55 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

⁶⁰ *Id.*

⁶¹ *Public Access Shoreline v. Hawai’i Cnty. Planning Comm’n*, 903 P.2d 1246 (Haw. 1995).

⁶² N.C. GEN. STAT. §77-20(d) & (e) (2018).

⁶³ N.C. GEN. STAT. §77-20(d) (2018).

⁶⁴ *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 194 (N.C. Ct. App. 2015).

The other state statutes the court cited that recognize and codify customary free use of the beaches are N.C. GEN. STAT. §§ 1-45.1 (2018) (defining and protecting from adverse possession public trust use rights) and 113A-134.1(b) (2018) (legislative finding that beaches and coastal waters have been customarily freely used throughout the State).

⁶⁵ *Nies*, 780 S.E.2d at 196.

⁶⁶ *Id.* at 197.

over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public....”⁶⁷ While the application of the beach access law has had a number of twists and turns in Texas, the Open Beaches Act has consistently been interpreted by Texas courts as a recognition of common law custom (as well as dedication and prescription), and not as the creation or expansion of new rights.⁶⁸

The U.S. Virgin Islands arguably went further than Texas, by enacting legislation that made explicit legislative findings of customary use, as well as preserving and regulating customary use on the Island’s beaches. The Open Shorelines Act provides: “The Legislature recognizes that the public has made frequent, uninterrupted and unobstructed use of the shorelines of the Virgin Islands throughout Danish rule and under American rule as recently as the nineteen fifties. It is the intent of the Legislature to preserve what has been a tradition and to protect what has become a right of the public.”⁶⁹ It further declares and affirms that “the public, individually and collectively, has and shall continue to have the right to use and enjoy the shorelines of the United States Virgin Islands,” and defines the shorelines as the area from the low tide line fifty feet landward or to the vegetation line or a natural barrier, whichever is the shortest distance.⁷⁰ In 1979, the federal district court with jurisdiction in the Territory affirmed the validity of the statute under the United States Constitution and, citing Blackstone, reaffirmed the customary use doctrine as a recognized principle of property law in the Virgin Islands.⁷¹

Of the four states and one territory that have explicitly recognized customary use as a fundamental attribute of the law of property in their jurisdiction, only Florida had not recognized the doctrine in statute - until it passed the statute at hand. As a matter of the common law, Florida recognized the customary use doctrine in the case of *Tona-Rama*, discussed in detail below.

b. The *Tona-Rama* Case: Customary Use Rights in Florida

The first case in Florida to recognize the doctrine of customary use rights, *City of Daytona Beach v. Tona-Rama*,⁷² involved a conflict between the owner of an observation tower in Daytona Beach (*Tona-Rama*) and the owner of the Main Street Pier (McMillan and Wright) which sought to construct a competing observation tower that would cover approximately 230 square feet of dry sand beach directly adjacent to the pier. This area was a small portion of roughly 15,300 square feet of dry sand beach McMillan and Wright owned and on which it paid taxes.

McMillan and Wright had obtained a permit and begun construction when *Tona-Rama* sued. *Tona-Rama* claimed, in part, that the observation tower would interfere with *prescriptive rights*

⁶⁷ TEX. NAT. RES. CODE ANN. §§ 61.014 (West 2017) (emphasis added).

⁶⁸ *Matcha v. Mattox*, 711 S.W. 2d 95 (Tex. 1986); *Arrington v. Mattox*, 767 S.W. 2d 957 (Tex. 1989); *Brannan v. State*, 365 S.W. 3d 1 (Tex. 2010).

⁶⁹ V.I. CODE ANN. tit. 12, § 401 (2017).

⁷⁰ V.I. CODE ANN. tit. 12, § 402 (2017).

⁷¹ *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769 (V.I. 1974); see also Aliya T. Felix, Note, “*Take Back the Beach!*” *An Analysis of the Need for Enforcement of Beach Access Rights for Virgin Islanders*, 10 FLA. A&M U. L. REV. 419 (2015); Jesse Reiblich & Thomas T. Ankersen, *Got Guts? The Iconic Streams of the U.S. Virgin Islands and the Law’s Ephemeral Edge*, 32 J. ENVTL L. & LITIG. 71, 102-104 (2017).

⁷² *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974).

obtained by the public, under the theory that the use by the public was adverse, continuous for more than 20 years, and open and notorious. As is noted above, the elements for proving prescription are similar to those required under the doctrine of adverse possession; however, a claimant under prescription only asserts and only acquires *use* rights rather than *ownership* rights. Tona-Rama failed to secure a preliminary injunction and so by the time the case reached the Florida Supreme Court, McMillan & Wright's observation tower had been constructed at a cost of over \$125,000.

The Florida Supreme Court, in an opinion by Chief Justice Adkins joined by three other Justices, concluded that there was no prescriptive easement in the public because the public's use could not be deemed adverse to or inconsistent with the owner's use and enjoyment of the land.⁷³ It found that the public's use of the dry sand around the pier was in no way inimical to the landowner's interests, and that the public was "the lifeblood of the pier" and had "been welcomed to utilize the otherwise unused sands."⁷⁴

However, the Court went on to consider whether there were *other rights* that the public had to the beaches of Florida and concluded that such rights should and do exist in Florida pursuant to the doctrine of customary use. It held:

[i]f the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand areas as a recreational adjunct of the wet sand or foreshore area.⁷⁵

In its opinion, the Court made clear that the customary use right was not an interest in the land, but merely a right of use. The Court noted that the right of use cannot be revoked by the land owner, but is subject to appropriate governmental regulation, and that it may be abandoned by the public.

After its strong and unequivocal embrace of customary use rights, in a single sentence the Court concluded that construction of the tower was nonetheless *consistent* with the general recreational use by the public and therefore the tower could remain. There is little elaboration on this key point in the opinion.⁷⁶ Clearly, as to the 230 square feet covered by the tower, traditional beach recreation was completely precluded, which raises the question of why the Court found the tower to be consistent with customary recreational use.

One possible explanation for this conclusion that the tower was consistent with general recreational use is that when compared with the broad expanse of dry sand beach still available to the public, the small footprint of the tower was not significant enough to constitute an inconsistent use or interference by the landowner with the public's rights on that tract of land.

⁷³ *Id.* at 77.

⁷⁴ *Id.*

⁷⁵ *Id.* at 78.

⁷⁶ *Id.* at 79–82.

This reasoning would support the Court's conclusion that the tower was a reasonable use by the landowner and did not interfere with the public's use, even though it physically blocked any use of the 230 square feet beneath the tower. While not explicitly adopted by the Court, this type of proportionality analysis would seem consistent with the outcome. This explanation for the ruling also aligns with concerns expressed in both the majority and dissenting opinions – that the landowner paid taxes on the dry sand beach and that the public had use of most of the vast swath of dry sand owned by McMillan and Wright. With the tower, the owner only occupied a small proportion of the dry sand beach he owned (roughly 1.5% of the area).

Three Justices dissented from the majority's decision, all three of whom believed that the public's use in the case should be considered adverse to the landowner's and therefore that prescription had been established. The three also all concluded that the tower interfered with the public's rights.⁷⁷ Two of the dissenters also explicitly agreed with the finding of customary use. Nonetheless, two of the three dissenters expressed concern for the equities of requiring removal of the tower, with one of them therefore agreeing with the outcome (allowing the tower to stand) but dissenting from the rationale; the other agreed with the rationale but proposed a different remedy -- allowing the owner to recoup its investment and only then requiring removal of the tower.

This decision was later noted in two cases decided by Florida's Fifth District Court of Appeal, the lower court whose decision was appealed in the *Tona-Rama* case. In *Reynolds v. County of Volusia*, the court declined to apply the doctrine of customary use but in dictum wrote that the customary use doctrine "requires the 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."⁷⁸

In *Trepanier v. County of Volusia*, landowners challenged the public's use of their property for driving and parking, while conceding that the public had customary use rights for bathing, swimming, and general recreation.⁷⁹ In rejecting the trial judge's conclusion that customary use for driving and parking existed, the Fifth DCA emphasized the lack of reference in the court's findings to any proof that the specific lots of the plaintiffs had been used by cars, as opposed to use of the sand beach in the general area for driving and parking.⁸⁰

The Court in *Trepanier* acknowledged that it was unclear whether, in *Tona-Rama*, the Supreme Court had declared the right of customary use only for the area of beach at issue in that case, or whether it meant the dry sandy part of the beach in the general vicinity or something else.⁸¹ However, it expressed its view that the Supreme Court had not intended "to announce a right by custom for public use of the entire sandy beach area of the entire state of Florida."⁸² Based on this understanding, the court went on to offer guidance on the proof needed to support a finding of customary use.

⁷⁷ *Id.*

⁷⁸ *Reynolds v. Cty. of Volusia*, 659 So. 2d 1186, 1191 (Fla. 5th DCA 1995).

⁷⁹ *Trepanier v. Cty. of Volusia*, 965 So. 2d 276, 280 (Fla. 5th DCA 2007).

⁸⁰ *Id.* at 290.

⁸¹ *Id.* at 287.

⁸² *Id.* at 288.

The Court noted that it “read *Tona–Rama* to require proof that the general area of the beach where Appellants' property is located has customarily been put to such use and that the extent of such customary use on private property is consistent with the public's claim of right.”⁸³

The Court also questioned a conclusion by the trial judge that the public’s use rights could migrate as the tide line migrates. The trial judge had noted:

The easterly lot lines erode as the sovereign land shifts landward and, in between the moving boundary of the sovereign tideland (or foreshore) and the plaintiffs' lots, the public right also shifts with the tide.

....

The area of public use cannot be bounded with reference to a static line since the beach, and hence the public's use of it, fluctuates landward and seaward over time. The public right, if it is to reflect the reality of the public's actual use of the beach, must migrate. The law cannot freeze such a right at one place any more than the law can freeze the beach itself.⁸⁴

However, the Court did not rule on this legal question. Analyzing the factual record in the case, the Court ultimately concluded that migration of the public’s customary use of the beach is a matter of proof and that genuine issues of material fact regarding this remained to be determined. However, the Court expressed substantial uncertainty regarding whether customary use should migrate under Florida law.⁸⁵

c. A Note on Special Injury

To fully understand the dynamics of private and public rights in this context, it is important to mention a rule established by the Florida Supreme Court that affects who has standing to sue which places members of the beachgoing public at a disadvantage in gaining access to the courts to assert customary use rights. The special injury rule, as it is known, was established by the Florida Supreme Court in *Henry L. Doherty & Co. v. Joachin*.⁸⁶ In order to establish standing, the rule requires a party to allege an injury that is different in degree and kind from the injury suffered by the community at large. This rule has been held to apply in suits to enjoin a public nuisance based on purpresture, and for blocking public rights to the beach acquired through prescriptive easement, implied dedication, and/or custom.⁸⁷

This rule therefore acts as a significant obstacle for members of the beach-going public who might wish to assert customary use when this right is shared with a large share of the public, as it may be in many cases. This was not an obstacle in *Daytona Beach v. Tona-Rama* because the plaintiff in that case had an economic interest -- as the operator of a competing observation tower. Thus, *Tona-Rama* was able to assert the rights to use the dry sand beach that it shared

⁸³ *Id.* at 290.

⁸⁴ *Id.* at 282–83.

⁸⁵ *Id.* at 293.

⁸⁶ 200 So. 238 (Fla. 1941).

⁸⁷ *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974).

with the public. The Special Injury Rule is particularly burdensome for plaintiffs seeking access to a beach because, in most situations, everyone in the community would be denied the same access and therefore almost no one would have an injury different in degree and kind from the injury suffered by the community at large. In fact, the rule creates a paradox -- the more the community is harmed by a lack of access to the beach, the less likely a plaintiff is to be able to establish standing. This paradox has been noted in legal scholarship on this topic,⁸⁸ and some have suggested that the state legislature should address the situation.

IV. SOURCES OF CONFUSION AND CONFLICT

Incomplete or flawed understanding of three basic issues has fueled the conflict surrounding beach access in parts of Florida today. These are: (1) the status of common law customary use rights in the absence of a judicial determination of those rights, (2) the status of a local ordinance recognizing customary use rights in the absence of a judicial determination under the common law, and (3) the impact of HB 631 on the public's common law customary use rights and on beachfront landowner's property rights. Misunderstanding of these three topics has led to significant confusion over the effect of HB 631 and the relative public and private rights to the dry sand beach in the absence of a local ordinance.

a. Common Law Rights and the Judicial Process

As discussed above, both private rights to property generally and the public's right to use the privately-owned dry sand beach under the customary use doctrine are rights that have their roots in the common law. A landowner who claims fee simple title to a parcel of beachfront property that extends to the water claims that title under long-established background principles of the common law of property. Some of that common law has been codified and modified by statutes. Where a statute has validly modified the common law, it supersedes the common law. If no statutory provision has modified the underlying common law, the common law rights exist under the terms embodied in the common law. In either case, under background common law property principles and relevant statutory law, a landowner may have good title and a member of the public may have customary use rights, whether or not these rights have been challenged and established in court. This is a critical point at issue in the contest between private and public rights. A central argument articulated by some defending the new requirements imposed by HB 631 is that the new law was necessary to curb an incursion by local governments' legislative branches into the prerogatives of the judiciary. They argue that it is improper for a local government's legislative body to adopt an ordinance recognizing and regulating customary use rights before the judiciary has determined that these rights exist. But if this theory is correct, it could also be argued that county ordinances that seek to prohibit nuisances are similarly inappropriate. Like customary use, the existence of a nuisance is a determination under common law that can be made by a court.

Moreover, this argument reflects a basic misunderstanding about the nature of rights in the absence of a judicial determination. Were it correct that rights recognized at common law do not exist in advance of a judicial determination, this broader principle also could affect recognition of landowners' property rights to the dry sand beach.

⁸⁸ Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOL. L. Q.* 755 (2001)

Of course, landowners' property rights differ from customary use rights because they are property -- not merely use -- rights and are grounded not just in common law but in a deed that grants title. This is indeed a significant distinction. However, the broader point is that just like customary use rights, many aspects of landowners' rights, including, for example, the location of the oceanward boundary of their property, are heavily dependent on determinations requiring application of ancient, archaic, and complex common law to their particular parcel -- determinations that are within the purview of the judiciary. For example, determining property boundaries at the water's edge under the law of accretion, erosion, avulsion, and reliction is notoriously complex and highly fact-dependent. However, a judicial determination quieting title in the owner or determining where the boundary has never been a prerequisite to the landowner having or asserting valid ownership rights within the boundaries the landowner believes to be valid. The courts provide a mechanism for dispute resolution when conflicts arise, but there is no precondition that all rights must be judicially declared before they can exist.⁸⁹

The same is true for a person claiming rights under a contract. Those rights exist and can be asserted without a prior judicial determination that they exist. If someone wishes to challenge those asserted contractual rights, they can do so through litigation, which can result in a determination that the rights either do or do not exist as claimed. If the court rules in favor of the party claiming rights, the court generally is determining not whether to create those rights, but whether those rights existed before litigation was filed and before the court ruled that they were valid. Courts resolve disputes regarding parties' relative rights, but there is no rule requiring a judicial determination in order for the rights to be valid or to come into existence. Similarly, actions may constitute a nuisance and if they do, the nuisance exists before any judicial determination in a suit seeking a remedy. Indeed, an award of damages for past conduct inherently acknowledges the fact that the nuisance existed before the judicial determination that recognizes it.

While customary use rights differ in that they arise from use rather than a contract or deed or action constituting a nuisance, the use, like the contract or the deed or the action constituting a nuisance, is a preexisting fact with legal consequences. The rights arising from the use may exist without regard to whether a court has yet determined that they exist. In other words, the public may already have common law customary use rights on any given stretch of privately-owned beach in the state of Florida -- whether or not those rights have been either codified or judicially determined.⁹⁰ Yet property owners and others have shown confusion on this basic point. Understanding that the public's asserted rights may precede a judicial determination of their existence -- as do the rights of a landowner or a party to a contract -- is an important starting point for analyzing the relative rights of beachgoers and landowners.

Many of the more extravagant claims being made by landowners in coastal areas currently center on the idea that they have the right to exclude the public and that their claim to ownership trumps

⁸⁹ This is consistent with the understanding of the essential role of the judicial branch that underlies the rationale Judge Rodgers adopted in the ruling in the *Alford* case, discussed *infra*.

⁹⁰ Even scholars who favor a very limited approach to judicial adoption of customary use acknowledge this. See Bederman, *supra* note 37, at 1450 n. 453 (acknowledging that customary rights predate judicial determination).

even valid customary use rights that the public may already have.⁹¹ This is mistaken. Landowners may wish to challenge the public's customary use rights and can do so. Were a conflict to reach court, whether by virtue of a plaintiff beach user bringing a suit to claim customary use,⁹² or a landowner suing to eject the beach user, the burden of proof on the claim of customary use would lie with the beach user. Therefore, it is not necessarily true that members of the public are trespassing if they use the dry sand beach in the absence of a judicial determination of customary use; however, neither is there a presumption that the public *has* customary use rights in any given area.

This lack of clarity produces the dilemma that Walton County faced, which led to the enactment of its first ordinance on customary use rights. Lacking certainty, a local government must, in essence, take sides and either assume that the public lacks customary use rights or that the public has customary use rights in a given location. If it accedes to landowners' requests that beachgoers be removed as trespassers, it risks violating the public's customary use rights (and alienating tourists and beachgoers on whom the local economy may depend). If it fails to exercise its enforcement discretion to remove tourists in this murky situation, it risks angering beachfront property owners claiming the right to exclude the public. Similarly, if landowners erect barriers, law enforcement officers must decide whether the obstruction interferes with the public's customary use rights or not. In Walton County, this placed the Sheriff's office in the uncomfortable position of making judgments on complex and fact-intensive legal matters as well as deciding whether and how to exercise its enforcement in a politically-charged context.⁹³

Neither position is clearly correct or clearly wrong. Local governments must decide whether and how to mediate the respective rights of the public and beachfront landowners. If customary use rights exist, then the local government arguably should respect these rights and risks abusing its discretion should it wrongly treat the public as trespassers on the dry sand beach. But if the public has neither customary use rights, a prescriptive easement, nor other grounds for use (such as renourishment creating public beach below the Erosion Control Line), then the local government has grounds to act to protect the rights of the landowners against trespassers. However, because enforcement is a highly discretionary power,⁹⁴ and because of the uncertainty that surrounds these determinations in most situations, the local government has considerable discretion in deciding whether or not to devote enforcement resources to eject trespassers from the dry sand beach.

⁹¹ Annie Blanks, *Customary use battle reaches boiling point in Walton County*, NWF DAILY NEWS (July 14, 2018), <http://www.nwfdailynews.com/news/20180714/customary-use-battle-reaches-boiling-point-in-walton-county>; Ryan Nicol, *Banning the beach? Locals start enforcing new access law*, FLORIDA POLITICS (July 9, 2018), <http://floridapolitics.com/archives/268309-two-women-leave-private-beach>.

⁹² A substantial obstacle to a member of the public bringing such a suit is the special injury rule, discussed *supra* Part III(c).

⁹³ Steve Bousquet, *Rick Scott uses executive power in an attempt to quiet beach access furor*, TAMPA BAY TIMES (July 13, 2018), <http://www.tampabay.com/florida-politics/buzz/2018/07/13/rick-scott-uses-executive-action-in-attempt-to-quiet-beach-access-furor/>.

⁹⁴ See *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (“Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute.”).

b. The Interplay between Customary Use Ordinances and Common Law Customary Use Rights

By enacting an ordinance through the local legislative process in 2017,⁹⁵ the Walton County Commission sought to create clarity and reduce conflict. Adopting an ordinance to codify, clarify, and regulate customary use rights can be a highly effective way to mediate the conflicts that arise over beach use rights. It can clarify the murky physical and legal contours of the rights under the common law described above. Adopting an ordinance also allows the local government to build on the foundation of customary use rights and private landowners' property rights to design a set of rules that will be easier for people to understand and easier to enforce than the common law. It can provide needed transparency, helping to be sure everyone knows their rights and what the rules are. And the local government can regulate these rights, tailoring a solution that addresses the unique situation of their community – people's concerns, historic patterns of use, and the changing shoreline. However, in adopting the ordinance, the local government is asserting, at least preliminarily by legislative process, that customary use rights exist, as well as regulating those rights and ensuring they are protected from interference. Those affected by the ordinance can still seek judicial review of these findings as well as the legal basis for the ordinance.

Local governments have the authority to enact ordinances through their police powers. Police powers are broad and provide the power to protect public safety, public health, morality, peace and quiet, and law and order.⁹⁶ As a creature of the state, a local government may only exercise the powers that the state expressly grants to it.⁹⁷ Florida is a 'Home Rule' state because the Florida Constitution broadly delegated power to its local governments.⁹⁸ Local governments in Florida can now exercise "any power governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law."⁹⁹

Walton County's legislative determination that customary use existed was upheld by the Federal District Court in a ruling in *Alford v. Walton County*,¹⁰⁰ interpreting Florida law. The court concluded that Walton County had not acted outside the scope of its local home rule authority or usurped a function reserved for the judiciary – in this case making legislative findings on the existence of common law customary use on its beaches.¹⁰¹ The decision in the *Alford* case, later vacated by order of the Eleventh Circuit, referred back to the two counties that had already adopted customary use ordinances – St. Johns and Volusia – and to *Tona-Rama* and *Trepanier*

⁹⁵ WALTON COUNTY, FLA., CODE OF ORDINANCES § 23-2 (amended Mar. 28, 2017, effective Apr. 1, 2017).

⁹⁶ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

⁹⁷ JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 55 (1st ed. 1872).

⁹⁸ FLA. CONST. of 1968 art. VIII, § 2(b).

⁹⁹ *City of Boca Raton v. State*, 595 So.2d 25, 28 (Fla. 1992).

¹⁰⁰ *Alford v. Walton County*, No. 3:16-cv-362/MCR/CJK, 2017 WL 8785115, at *11

(N.D. Fla. Nov. 22, 2017) (ruling on cross motions for summary judgment on challenges to Customary Use Ordinance, holding that Customary Use Ordinance was "a valid exercise of constitutional and statutory 'home rule' authority" by Walton County and did not usurp judicial function by precluding individual property owners from seeking judicial review of the ordinance as applied to their property). This order and judgment were subsequently vacated at the direction of the Eleventh Circuit apparently in response to arguments that the legislative invalidation of the ordinance mooted the claim. *Alford v. Walton Cty.*, No. 17-15741-BB, 2018 BL 229216 (11th Cir. June 27, 2018) (granting appellants' motion to vacate District Court order and judgment concerning customary use ordinance claim).

¹⁰¹ *See supra* note 100.

for affirmation of the validity of this exercise of legislative power. The Court pointed out that in each case the counties had expressly stated that their ordinances were not intended to preclude private property owners subject to the ordinance from challenging its application to their property in court.¹⁰² And *Trepanier* demonstrates that they could do just that. It is noteworthy, that with the exception of *Trepanier*, Volusia and St. Johns County appear to have been free from litigation under their customary use ordinances.

c. Legislative Intervention: The Impact of HB 631 on Customary Use Rights

1. *Understanding What HB 631 Doesn't Do*

This leads to what is perhaps the heart of the confusion about HB 631: its impact on the public's rights to use any given beach along Florida's coast. As is explained above, those rights may exist without regard to whether there has been litigation determining their existence. If the public's use meets the test set forth in *Tona-Rama*, then those rights already exist. Perhaps the most important (and most frequently misunderstood) point about the new law, evidenced by the inaccurate media reporting, is that HB 631 in no way changes common law customary use rights that may exist presently - whether or not those rights have yet been judicially recognized.¹⁰³ Nor does it change the common law standards by which the public may have beach use rights under any other theories such as prescription, dedication, or public trust. In other words, the new law does not affect the public's *common law* rights to use the beach as it has been accustomed to, unless and until a local government chooses to go forward with the adoption of an ordinance under HB 631's statutorily prescribed process.

¹⁰² *Alford v. Walton County*, No. 3:16-cv-362/MCR/CJK, 2017 WL 8785115, at *11

(N.D. Fla. Nov. 22, 2017), Judge Rodgers quoted the Volusia County ordinance which stated:

It is not the intent of the Charter or of this chapter to affect in any way the title of the owner of land adjacent to the Atlantic Ocean, or to impair the right of any such owner to contest the existence of the customary right of the public to access and use any particular area of privately owned beach, or to reduce or limit any rights of public access or use that may exist or arise other than as customary rights.

Id. at *14 (quoting VOLUSIA COUNTY, FLA., CODE OF ORDINANCES § 20-82).

Judge Rodgers also noted that:

The Volusia County ordinance also stated that the county's intent was "to determine as a legislative fact binding on county government that since time immemorial the public has enjoyed access to the beach and has made recreational use of the beach; [and] that such use has been ancient, reasonable, without interruption, and free from dispute." (citing *Trepanier v. Cty. of Volusia*, 965 So. 2d 276, 281 (Fla. 5th DCA 2007).

Id.

The Order also noted almost identical language from the St. Johns County ordinance. *Id.* at n. 29.

¹⁰³ Examples of confusion beginning at the time of the bill's adoption abound. *See, e.g.*, Travis Cohen, *Rick Scott Just Signed a Bill That Could Make Many of Florida's Beaches Private*, MIAMI NEW TIMES (Apr. 4, 2018), <https://www.miaminewtimes.com/news/rick-scott-just-signed-a-bill-that-could-make-many-of-floridas-beaches-private-10231813>; Josh Cascio, *Public, landowner opinions split on Florida's new beach rules*, FOX 13 NEWS (Apr. 5, 2018), <http://www.fox13news.com/news/local-news/public-landowner-opinions-split-on-floridas-new-beach-rules>; Ryan Nicol, *Banning the beach? Locals start enforcing new access law*, FLORIDA POLITICS (July 9, 2018), <http://floridapolitics.com/archives/268309-two-women-leave-private-beach> (Walton County Sheriff reported as stating that under HB 631, beaches that are part of private property are now equivalent to a person's backyard. "There's absolutely no difference between a neighborhood home in the middle of somewhere, and walking on the beach.").

Nonetheless, HB 631 appears to have uniquely invalidated Walton County's ordinance¹⁰⁴ and imposed new procedural requirements on those local governments that seek to codify customary use rights of beachgoers after July 1, 2018.¹⁰⁵ The statute created a new judicial process which it required local governments to pursue before they could enact a customary use ordinance. The rationale articulated by the bill's sponsors for requiring counties to seek a judicial declaration of customary use— that enactment of an ordinance grounded in customary use constituted a legislative usurpation of a judicial function – has been rejected by a Federal District Court in a case challenging the ordinance.¹⁰⁶

However, prior to the effective date of the law, local governments were free to enact ordinances following their usual notice and hearing process, and the *Alford* court had affirmed that it was within their power to do so. Moreover, before the new law's enactment, landowners had a readily available judicial remedy in the event they believed an ordinance to be invalid either because it was ultra vires or because it effected a taking without just compensation or on other grounds. If landowners wanted to challenge such an ordinance, they could seek judicial review of the facial validity of the ordinance or challenge its specific application to their parcel, as the plaintiffs did in *Trepanier*. Thus, the claim that the new law was needed to protect the judiciary's prerogative is puzzling, since the judiciary could easily have rectified any such incursion if a local government's action generated controversy and a landowner sought judicial review, as a number of landowners had.¹⁰⁷ However, HB 631 required that after July 1, 2018, a local government adopting an ordinance premised on customary use rights first notify all the beachfront owners that might be implicated, and then proceed to court for a “declaration of customary use.”¹⁰⁸ Importantly, this court proceeding is not a suit directed against the landowners, but a request that the court decide the legal issue of whether there are customary use rights in a designated area, in the absence of a fact-specific dispute on any given parcel. The new law also gives every affected landowner the right to intervene in the proceeding if they want to, but they are not required to participate.¹⁰⁹ However, the law is silent as to whether members of the public or its advocates have any right to intervene. The result of the proceeding is to ensure that a court decides the question of whether the public has customary use rights in that area *before* any ordinance goes into effect.

This perhaps explains the widespread perception that the new law represented an attack on the public's rights: HB 631 did make codification and recognition of the public's customary use rights by local governments more difficult. In doing so, the law placed additional burdens on the preexisting process available for asserting and clarifying public customary use rights. If one

¹⁰⁴ The uncertainty on this point reflects an ambiguity in the statute discussed in the annotated statutory analysis below.

¹⁰⁵ Because they were in place before January 1, 2016, St. Johns County and Volusia County's ordinances were excluded from this preemption.

¹⁰⁶ See *supra* note 100.

¹⁰⁷ One further possible argument in favor of the statute is that it would reduce litigation by channeling all claims into one judicial proceeding. However, as is noted below, it is not at all clear whether all challenges to the ordinance would properly be raised in the new judicial proceeding or whether the existence of customary use rights is the sole issue. In addition, courts could address multiplicity of litigation, at least in part, by consolidating cases.

¹⁰⁸ FLA. STAT. §163.035(3) (2018).

¹⁰⁹ FLA. STAT. §163.035(b)(1).

seeks to assess the impact of HB 631 on the balance of public and private rights, it seems fair to say that the law placed a thumb on the scale in favor of beachfront landowners and against assertion of public customary use rights.¹¹⁰ When one adds this to the impact of the special injury rule, this is arguably not insignificant. Thus, despite the inaccurate and exaggerated nature of the claims regarding the law's impact on the public's use rights, there is a kernel of truth in characterizing it as an effort to weaken the public's rights. This kernel finds substance in the extensive advocacy on behalf of landowners and property rights advocates in the courts and the legislature seeking to diminish public customary use rights. While landowners and their advocates frame these efforts in terms of protecting private property rights, these efforts would be achieved by creating new hurdles for local governments to clear before recognizing and codifying customary use rights.

Nonetheless, nothing in the law can be fairly construed to affect the public's preexisting common law customary use rights or private landowners' preexisting common law rights to exclude in any way. These co-relative rights remain in theoretical equipoise until they are determined under the common law process or under the statutory process, pursuant to local ordinance. Private landowners have no greater right to exclude the public either by physical barrier or by invoking trespass laws than they had prior to the law's enactment. Moreover, beachgoers in those communities that choose not to enact an ordinance pursuant to the statute have every right to assert their customary use rights, until a court prohibits it. If a trespass claim were brought against them, the beachgoers would prevail if they successfully proved their claim of customary use rights. However, the likelihood of such a prosecution in the current climate seems low.¹¹¹

Whatever **common law** customary use rights beachgoers had in Walton County before the enactment of HB 631 remained after the enactment of the law and after its effective date of July 1, 2018. What HB 631 changed was that it appeared to uniquely invalidate the Walton County ordinance,¹¹² thereby invalidating the County's legislative overlay on the common law. However, any common law rights under the customary use doctrine are unaffected by the new

¹¹⁰ Statements by one of the bill's sponsors and by the incoming Senate President suggest that the intent of the bill was to protect private property rights. *See* Pittman, *supra* note 1 (quoting Sen. Kathleen Passidomo as stating that "she found it 'appalling' that a city or county can pass an ordinance undercutting private property rights. 'If you're going to take away somebody's property you have to do it through the courts'"); News Service of Florida, *supra* note 7 (quoting Senate President Bill Galvano as stating "I think there was a lot of misunderstanding around that bill, and I was very clear through the summer, and when members would call, to emphasize what we were doing was just bolstering private property rights")

¹¹¹ *Compare* Steve Bousquet, *Rick Scott uses executive power in an attempt to quiet beach access furor*, TAMPA BAY TIMES (July 13, 2018), <http://www.tampabay.com/florida-politics/buzz/2018/07/13/rick-scott-uses-executive-action-in-attempt-to-quiet-beach-access-furor/> (quoting State Attorney for judicial circuit that includes Walton County as stating "Any person trespassing on private property above the high water line may be subject to arrest"). *with* Brittany Weiner, *New Florida law changes beach access in the panhandle*, NEWS 4 (July 17, 2018), https://www.wsmv.com/news/new-florida-law-changes-beach-access-in-the-panhandle/article_fbe8ae36-5f9b-5452-ac19-4c2af5068338.html#.W08ICV9XpRE.email (quoting Walton County Sheriff explaining decision not to enforce trespass law on dry sand beach based on attorney's legal guidance that trespassing on the beach cannot result in prosecution) Governor Scott's Executive Order, while not addressing privately owned beaches also urged state attorneys to "take appropriate actions to ensure that the ability of the public to access Florida's public beaches in accordance with longstanding Florida law is preserved and is not infringed." Fla. Exec. Order No. 18-202 (July 12, 2018), <https://www.flgov.com/wp-content/uploads/2018/07/EO-18-202.pdf>.

¹¹² The ambiguity surrounding this issue is discussed further below.

law, a key point that the general public and private property owners, fueled by media coverage of the issue, often failed to grasp.¹¹³

By apparent design, under a grandparenting provision included in the measure, the Walton County ordinance was the only extant ordinance affected by the law – the provision preserved all other counties’ ordinances that predated Walton County’s. In fact, only two counties had adopted customary use ordinances prior to Walton County’s effort – Volusia County of *Tona-Rama* fame and St. Johns County, its northern neighbor. As noted above, neither of these ordinances have been facially challenged, and both explicitly preserve beachfront property owner’s right to challenge customary use on their dry sand beach.¹¹⁴

2. *A Confounding Wrinkle*

The story does not end with the statutory preemption of local home rule authority to enact customary use ordinances pursuant to local processes, however. Much of the detail of the new law was first introduced in a last-minute amendment on the floor of the House that replaced the initial two-sentence bill. The final version included a new provision that seemed to preserve the right of local governments to enact a customary use ordinance until the effective date of the statute, by providing that governmental entities may use “as an affirmative defense in a proceeding challenging an ordinance or rule adopted before July 1, 2018”¹¹⁵ seemingly in direct contradiction to the provision preserving from invalidating only ordinances passed before January 1, 2016. There is no legislative history to parse. While the rationale for this addition to the bill is unclear, its import is equally so. Arguably, this gave local governments the right until July 1, 2018, to adopt the same sorts of ordinances that were otherwise invalidated, and then to defend the validity of those ordinances when they are challenged – which is presumably what would be done in any case. This prompted another wave of public outcry and media attention as some local governments scrambled to meet the deadline.¹¹⁶ The import of these ordinances and how their legal status may differ from both the preexisting ordinances (Volusia and St. Johns), and post-enactment ordinances that use the statutorily mandated process are questions that may need to be resolved if these ordinances are challenged as preempted.

d. The Governor’s Executive Order

Governor Scott’s involvement with this topic did not end with his signing of HB 631. In the wake of the new law’s enactment, he repeatedly sought to correct the record on the impact of the new law. Perhaps because of the reality that the law made protection of public rights more difficult and energized landowners to assert greater rights, these efforts were not entirely successful; media reports continued to characterize the law as restricting the public’s rights to

¹¹³ Blanks, *supra* note 91; Josh Cascio, *Public, landowner opinions split on Florida’s new beach rules*, FOX 13 NEWS (Apr. 5, 2018), <http://www.fox13news.com/news/local-news/public-landowner-opinions-split-on-floridas-new-beach-rules>; Allie Raffa, *The battle over beach access in Florida heats up*, FOX NEWS (April 17, 2018), <http://www.foxnews.com/politics/2018/04/17/battle-over-beach-access-in-florida-heats-up.html>.

¹¹⁴ See VOLUSIA COUNTY, FLA., CODE OF ORDINANCES § 20-82; ST. JOHNS COUNTY, FLA., CODE OF ORDINANCES § 2.01.

¹¹⁵ F. S. JOUR. 689, 770 (Reg. Session 2018) (amendment 1 to Fla. CS for HB 631 (2018)).

¹¹⁶ There is no statewide clearinghouse for local ordinance adoption so it is difficult to know with certainty how many jurisdictions took advantage of this apparent loophole. However, at a minimum, “affirmative defense” ordinances have been adopted by Flagler County, Nassau County, Fernandina Beach, St Petersburg and Naples.

use the beach. Landowners' efforts to exclude tourists generated adverse publicity for a state dependent on tourism. Both the bill's sponsors¹¹⁷ and Governor Scott's office¹¹⁸ sought to distance themselves from these unanticipated adverse impacts on beachgoers and to emphasize that the bill's impact was limited to the process local governments were required to follow in adopting ordinances.

Following the law's effective date and the attendant renewed public attention, Governor Scott took an additional step. He issued an Executive Order on the subject "Preserving Public Beach Access".¹¹⁹ The general thrust of the executive order is to buttress public access to publicly-owned beaches; however, regulation of the area affected by HB 631 – privately owned beach – falls largely to local governments and outside the Governor's jurisdiction (absent legislation authorizing him to act). Thus, his Order focused primarily on state agencies and did little to resolve the conflict or alter the balance between public and private rights.

In Section 1, the Order directs the heads of state agencies headed by gubernatorial appointees not to adopt any rule restricting public access to any beach that has an *established* customary use unless necessary for public safety. Section 2 directs the Secretary of DEP and Director of the Florida State Parks system to engage in all appropriate efforts to ensure access to Florida's **public** beaches is not restricted. It specifically directs creation of an online reporting tool for the public to report violations of their right to public beach access, as well as requiring a report to the legislature.

Recognizing the Executive's lack of authority to direct local governments on this subject, Section 3 "urges" the heads of all other governmental entities to refrain from adopting rules or ordinances to restrict or eliminate access to Florida's **public** beaches. Section 4 urges State Attorneys to take appropriate actions to ensure the ability to access Florida's **public** beaches "in accordance with longstanding Florida law" is preserved and not infringed.

While the general direction of the order clearly seeks to protect public rights, its impact is circumscribed. First, in Section 1, the Order only affects agencies headed by an appointee serving at the governor's pleasure – in other words, a subset of state agencies. Given that there had been no suggestion before or after HB 631's passage that any state agencies had taken steps to interfere with the public's rights on privately-owned dry sand beach, this section doesn't address the root of the conflict over customary use. However, at the least, it preempted any

¹¹⁷ See Laura Ruane, *Private versus public beach rights: we're still sorting out what the new state law means*, NAPLES NEWS (July 29, 2018), <https://www.naplesnews.com/story/news/2018/07/29/southwest-florida-beaches-governments-closely-watching-access-laws/858869002/>; Raffa, *supra* note 113 (reporting Sen. Passidomo as saying that the bill will actually expand beach access – not take it away); Katie Edwards-Walpole, *Edwards-Walpole Defends Her Beach Access Law*, SUN SENTINEL (July 28, 2018), <http://www.sun-sentinel.com/opinion/fl-op-viewpoint-beach-access-edwards-walpole-20180727-story.html>.

¹¹⁸ John Kennedy, *Beach Lovers Push Back on New Property Rights Law*, HERALD TRIBUNE (Apr. 16, 2018), <http://www.heraldtribune.com/news/20180414/beach-lovers-push-back-on-new-property-rights-law>. (quoting John Tupps, a spokesperson for the Governor, as stating that the law does not ban the public from accessing private beach areas or privatize beach access in any way)

¹¹⁹ Fla. Exec. Order No. 18-202 (July 12, 2018), <https://www.flgov.com/wp-content/uploads/2018/07/EO-18-202.pdf>.

efforts that state agencies might have taken to restrict public access to private beaches subject to customary use.

Section 1 also refers specifically to not impairing access to beaches with “established” customary use. It is unclear what the term “established” is intended to signify. It could mean that the Order merely refers to customary use already established *in a judicial proceeding* pursuant to HB 631 or those counties with grandparented customary use ordinances (Volusia and St. Johns). If this is the meaning, then the Order leaves the balance where HB 631 had left it. If it means any customary use established through use, then it might seek to prevent impairment of access on other beaches where the public’s actions meet the standard for customary use. The latter seems highly unlikely since it would amount to executive recognition of customary use.

Sections 2, 3, and 4 of the Order are each of limited effect in that they address only access to **publicly owned** beaches. In a time of conflict over access to privately-owned dry sand, it makes sense to ensure that the public beaches are fully accessible. But these provisions do not address the conflict that HB 631 fueled. Section 2 of the Order explicitly addresses two state agencies with managerial responsibility for state-owned public beaches and directs them to ensure public access is not restricted. Sections 3 and 4, implicitly acknowledging the limits of the Governor’s power, are limited in an additional way – they are merely hortatory. Respectively, they exhort other governmental entities, including local governments, not to adopt rules restricting access to public beaches (Section 3), and urge State Attorneys to take appropriate steps to ensure public access to public beaches is not infringed (Section 4).

Thus, the Governor’s executive action bolstered and confirmed the commitment to protection of public access to *public* beaches but had limited impact on the heart of the conflict: public access to privately-owned dry sand beach.

V. ANALYSIS OF HB 631/FLA. STAT. 163.035

a. An Annotated Summary of Fla. Stat. §163.035

The law that has precipitated much of the uncertainty over public use of privately-owned dry sand beaches is now codified in the Florida Statutes as Fla. Stat. §163.035. This section provides a section-by-section summary of the statute and offers comments concerning legal issues surrounding the bill.

The statute’s central command is addressed to “governmental entities”, a term defined in subsection 1 of the statute to encompass state agencies and regional and local governments, including counties and municipalities. Subsection 2 of the statute provides that these entities “may not adopt or keep in effect an ordinance or rule that finds, determines, relies on, or is based upon customary use” of the dry sand beach unless it is based on “a judicial declaration affirming recreational customary use” on the beach in question.

This language creates ambiguity and seems to be inconsistent with subsection 3(b)(2) of the statute. The prohibition on adopting an ordinance or rule would seem to prohibit a governmental entity from taking action to adopt an ordinance after the statute’s effective date of July 1, 2018. However, the added prohibition on keeping in effect a rule or ordinance in effect would only seem to have independent meaning if it required governmental entities with existing ordinances to repeal them. Yet, subsection 3(b)(2)

specifically grandfathers in all ordinances in effect before January 1, 2016, and authorizes governmental entities to raise customary use as an affirmative defense in any proceeding challenging an ordinance or rule adopted any time before the statute's effective date. This seems to authorize governmental entities with ordinances adopted between January 1, 2016 and July 1, 2018 to keep their ordinances in effect by providing them the opportunity to defend them if challenged in court. This sends conflicting messages about whether the legislature sought to sanction local governments adopting ordinances before July 1, 2018.

Subsection 3 provides that a governmental entity seeking to affirm the existence of recreational customary use must follow a new procedure that entails both legislative and judicial components, further defined in that subsection. The new step in the legislative process outlined in subsection 3(a) requires that the governing board of the governmental entity first “must, at a public hearing, adopt a notice of intent to affirm the existence of a recreational customary use on private property.”¹²⁰ This notice of intent must specify the specific parcels or portions of parcels to be included, the “detailed, specific, and individual uses”, and “each source of evidence” the governmental entity plans to rely on to prove a recreational customary use has been “ancient, reasonable, without interruption, and free from dispute.”

It is unclear what meaning should be given to the modifier “individual” in reference to uses. It could mean only that each use must be identified individually, in keeping with the modifiers “detailed and specific”.

The language relating to the proof of customary use is drawn directly from the Florida Supreme Court's opinion in the Tona-Rama case, and embodies the common law standard articulated and applied in that case to find customary use of Daytona Beach's dry sand beaches.

Subsection 3 also requires that prior to the public hearing at which the governmental entity adopts its notice of intent, it must “provide notice” of the hearing to the owner of each affected parcel at the address reflected in the county property appraiser's records no later than 30 days before the hearing. In addition to sending the notice by certified mail, the entity must publish it in a newspaper of general circulation and post the notice on the entity's website.

Subsection (3)(b) outlines the judicial portion of the newly created process for obtaining a declaration of recreational customary use. The governmental entity must file a “Complaint for Declaration of Recreational Customary Use” within 60 days of the adoption of the notice of intent outlined in subsection 3(a). The entity must provide notice of the filing of the complaint to the owners of affected parcels in the same manner required in subsection 3(a), and then must provide the court with verification of service of the notice on the property owners required by the statute's terms.

In light of the reference to service in the same manner required by subsection 3(a), this appears to mean service by certified mail rather than any other legal form of service of process.

Subsection 3(b)(1) provides that the notice must “allow” the owner receiving the notice to intervene in the judicial proceeding within 45 days after receiving the notice.

It is unclear how the notice would actually allow the owner to intervene. It seems likely that this means that the notice must inform the owners of the right to intervene within 45 days of receipt. Subsection 3(b)(2)

¹²⁰ FLA. STAT. §163.035(3)(a).

specifically provides owners of parcels of property subject to the complaint the right to intervene as party defendants in the proceeding.

Subsection 3(b)(2) prescribes that the judicial proceeding shall be de novo, and that “[t]he 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.” It also provides that there is no presumption regarding the existence of a recreational customary use and that the governmental entity has the burden of proof. Subsection 3(b)(2) grants owners of parcels of property subject to the complaint the right to intervene as party defendants.

The final substantive provision of the statute grandparents in ordinances or rules adopted and in effect on or before January 1, 2016.

The effect of this date is to preserve the validity of the ordinances adopted by Volusia County and the St. Johns County while invalidating the Walton County ordinance, conflict over which seems to have been the motivating force behind the legislation.

It also provides that the statute “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.” Section 14 of H.B. 631 sets July 1, 2018, as the statute’s effective date.

As noted above, this provision appears to stand in some conflict with the language of subsection 2 which prohibits a governmental entity from “keep[ing] in effect” a rule or ordinance that finds, determines, relies on or is based upon customary use unless the ordinance is based on a judicial declaration. If a governmental entity successfully defends an ordinance based on customary use, presumably the ordinance is valid, and the entity can keep it in effect. One possible reading that reconciles the two provisions is that the governmental entity might arguably be in violation of the statute by “keeping in effect” the ordinance adopted between January 1, 2016, and July 1, 2018. However, if the entity successfully defends the ordinance based on customary use, the ordinance is then based on a judicial declaration of the existence of customary use and no longer in violation of subsection 1.

b. Additional Unanswered Questions Raised by Fla. Stat. 163.035

In addition to the issues noted in the annotations above, the unique judicial proceeding outlined in subsection 3(b) raises a number of significant questions. The parameters of the proceeding that are defined include:

- how and to whom notice of the complaint must be given;
- the de novo nature of the proceeding;
- the issue to be determined by the court and the legal standard to be applied;
- the allocation of the burden of proof; and
- the right of owners of property subject to the complaint to intervene.

Questions the statute does not address and which courts will need to decide include:

- the standard of proof to be applied in the proceeding for a judicial declaration;
- whether the court should make a parcel-by-parcel determination or a ruling on all parcels regarding the existence of customary use;
- whether the governmental entity seeking the declaration has authority to withdraw parcels as to which it has issued a notice of intent, in order to avoid challenge;

- if the governmental entity can withdraw a parcel, whether it thereby concedes any customary use rights the public may have on a given parcel;
- whether members of the public or their advocates have the right to intervene in a proceeding, and whether they must establish special injury;
- whether landowners who intervene in the judicial proceeding can raise any issues beyond the existence of customary use;
- whether the judicial declaration is immediately appealable or whether appeal is available only from the final ordinance or rule adopted by the governmental entity;
- whether landowners who have intervened can thereafter raise the same issue (the existence of adequate evidence to prove customary use) on judicial review of the ordinance or rule ultimately adopted by the governmental entity; and, if so, whether they are restricted to raising the issue as to their own parcel; and
- whether landowners who have not intervened in the proceeding seeking a judicial declaration can raise the issue of the adequacy of the evidence to support customary use on judicial review of the ordinance or rule ultimately adopted by the governmental entity.

VI. OPTIONS FOR LEGISLATIVE REFORM

A wide array of voices has called for the repeal of Fla. Stat. §163.035 since its enactment. The law cast a spotlight on beach access, but one that has shed distorted light, and resulted in widespread misunderstanding of the state of the law (both pre- and post- statute law) by beachfront property owners and members of the public. Indeed, Exhibit A in any customary use claim might be the outrage and disbelief expressed by members of the beachgoing public in the wake of the statute, which suggest how much of the public believed it had an existing right to use the dry sand beach. Although touted by its sponsors as a tool to resolve conflict and reduce litigation, it seems clear, at least to date, that the law has not achieved these goals. Indeed, it appears to have awakened a sleeping giant, albeit in part as a result of false narratives about the law's privatizing effect.

In an ironic twist, the actions by landowners emboldened by the enactment of the law claiming new-found rights to exclude the public have now given truth to the false narratives. Although perhaps unintended by many legislators who supported and even sponsored the bill, an indirect effect of the law's enactment has been not just to create conflict, but to threaten the ability of the public to continue uses of beaches located around the state which may or may not be longstanding customary uses.¹²¹ Thus, although the statute itself did not measurably shift the balance between public and private rights, it has prompted claims and actions by private landowners that do threaten public rights. The Governor's issuance of the Executive Order, while not affecting rights on privately-owned beaches, represented a clear acknowledgement of this threat and the need to take steps to take steps to ensure public rights are protected.

¹²¹ See Blanks, *supra* note 91; Kimberly Miller, *Palm Beach County residents fear beach access will be cut off after new law*, MY PALM BEACH POST (July 19, 2018), <https://www.mypalmbeachpost.com/weather/residents-fear-beach-access-will-cut-off-after-new-law/ZRinNeLg2DfsXjP3OF5D8K/>.

Given the importance of the issues at stake – public beach access and private property owners’ rights – and the broad and important recreational, economic, property, and dignity interests involved, consideration of further legislative action seems warranted. This section outlines three options and describes some of the advantages and disadvantages of each. These options include maintaining the status quo and letting the statute play itself out, repealing the statute and returning to the status quo that existed prior to the statute, and repealing and/or amending the statute, including some suggestions for policies to incorporate in a revised statute that enhance lateral beach access without resort to the customary use doctrine. Elements within these options, such as providing property tax relief to beachfront property owners who do not contest recreational use and recreational use exactions in coastal construction control line permitting, are not mutually exclusive.

1. Maintain the status quo and allow the statute play out over time

A first option is to take no further legislative action. It is possible that over time legal challenges resulting from the statute’s application could produce judicial decisions that clarify the true impact of the statute and eliminate or reduce conflict and confusion.

One scenario that could produce such a ruling would be a landowner might sue local law enforcement for failing to eject beachgoers from their property, (wrongly) claiming rights to do so under the statute. However, this type of claim seems likely to fail without necessarily producing a definitive interpretation of the statute because of the considerable discretion afforded to government agencies in enforcement decisions.¹²² Failure to enforce claims are extremely difficult to prosecute.

Also, some jurisdictions – including Walton County – have begun proceedings under HB 631’s new process for enactment of an ordinance. Before changing the law further, the legislature should assess carefully potential adverse impacts and costs to local governments that have sought to follow the legislature’s guidance.

However, an argument against doing nothing is that the status quo under HB 631 exacerbates an imbalance that existed before the statute’s enactment. The power to enact local ordinances rests with local elected bodies, and the statute appears to confer the ability to intervene in customary use judicial determination proceedings on beachfront property owners only. Except to the extent that the interests of beach-goers and advocates of beach access are represented *parens patriae* by the local government, their interests appear to be excluded. The statute thus exacerbates the imbalance already created by application of the special injury rule in this context, which remains a significant hurdle for this constituency. As noted above, the right of the public to intervene in the judicial proceeding under the new law remains unclear and untested.¹²³

¹²² State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986) (“Under Florida’s constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute.”).

¹²³ Even if members of the public are ultimately excluded from the judicial process by which customary use rights are determined under the new statute, it may be that creative litigants could find and assert distinct customary uses of the beach not covered by the ordinance. If these use rights were not covered by the ordinance or determined by the Court, their existence might remain a litigable issue, provided the party could overcome the Special Injury rule.

Importantly, the statute does not expressly preempt the common law, it only affects the process that local governments who choose to adopt an ordinance must use to give effect to the common law. As a result, it would appear that affirmative cases seeking to establish customary use can continue to be brought by non-governmental parties with standing do so -- such as beach-tourism dependent businesses, for example -- where local determinations have not been made by a court pursuant to the statute. It is also possible that individuals or entities adversely affected by property owners' actions could overcome the special injury rule and successfully challenge a local government's actions in ejecting beachgoers from the dry sand beach. Or, as in *Tona-Rama*, a business interest might challenge one or more private landowners' actions based on customary use rights of the public.

The no-action option described above has the advantage perhaps of creating no *additional* confusion by further legislative action. But it does little to address the ongoing widespread public confusion about beach access rights and the recent surge in actions by property owners to exclude the public. Whether this option is the best one available depends on a variety of factors, including the costs associated with ongoing conflict – in impact to public rights and impacts on beach tourism.

2. Repeal (revert to common law)

A second option is to repeal Fla. Stat. §163.035. The impact of a repeal would be yet another reset. One reason for repealing the statute would be to eliminate the confusion it has created. A repeal without further action, however, seems likely to produce conflicting and confusing counter-narratives -- narratives opposite to those narratives generated by the statute. These would likely be infected by the same distorted understanding of the statute. Property owners who have wrongly claimed that the statute granted them new rights would likely claim that the repeal deprived them of those same asserted rights. And some members of the public might wrongly believe that the repeal gave them rights beyond those afforded by common law and existing statutes and ordinances.

As is noted above, a central legal argument advanced as a justification for the statute is that legislative bodies should not recognize or rely on findings of customary use in ordinances or rules unless a court has already determined that customary use exists. Supporters of the statute have characterized ordinances that recognize customary use as “usurping a judicial function.”³ This claim was rejected by the District Court in *Alford*. However, if this were the correct view, then an existing or post-repeal ordinance adopted without a judicial determination could be viewed as legally invalid.

As a practical matter, however, there is still a clear remedy for this: the ordinance can be challenged. It could be argued that this is inadequate because the effect of allowing governmental entities to adopt these ordinances would be to shift the burden to landowners to seek judicial review of the ordinance. However, this seems a weak argument for legislative intervention, given that resort to judicial review is the typical remedy for invalid actions by governmental entities. It is unclear what threat to the judicial system is posed by allowing this issue to be resolved first as a legislative matter and then reviewed by a court on judicial review of an ordinance. Moreover, should a court determine that a governmental entity's rule or

ordinance is a usurpation of the judicial function, then governmental entities will be on notice and can act in accordance with this knowledge.

The strongest argument against repeal and in favor of requiring local governments to follow the new procedures imposed by HB 631 is a corollary to and depends on the validity of the claim that enactment of customary use ordinances is outside the authority of local governments. This argument in favor of the statute is that if local governments cannot adopt ordinances relying on or establishing customary use without a prior judicial determination, then governmental entities have no viable process for seeking proactively to resolve conflict over customary use. The only available judicial means for the government to seek a declaratory judgment would be to file a complaint naming the owners of all affected parcels as defendants. Both from a political and a practical standpoint, this is unworkable. First, it imposes potentially significant costs on the landowners, regardless of whether they object to public use or not. Second, elected officials are highly unlikely to want to sue their constituents in order to resolve this conflict. Thus, the argument in favor of the statute is that it creates a judicial process that is not a lawsuit against the landowners, but a proceeding more like a bond validation proceeding – a judicial proceeding in which the landowners have the option to intervene, but one in which they are not involuntarily named as defendants.

However, this argument in favor of keeping the statute remains seriously flawed. As is noted above, there is no apparent reason why the legislature needed to preempt the courts from determining the underlying legal issue of whether adoption of such an ordinance is appropriate.¹²⁴ This strengthens the argument for repealing the statute, a move that would leave the question of the propriety of governmental entities adopting customary use ordinances for the courts to determine.

Repeal alone would offer some other advantages. It would eliminate the newly created judicial process for seeking a declaration of customary use and the possibility that this will actually multiply the opportunities for litigation against local governments seeking to recognize and regulate customary use of beaches and the issues to be litigated, rather than reducing the multiplicity of litigation. However, several local governments have begun proceedings under the new statute. Thus, repeal alone would likely generate its own wave of confusion regarding the status of any ordinances adopted or in the process of being adopted under the statute. This leads to the third option: to amend or repeal and replace Fla. Stat. §163.035.

3. Amend or Repeal and Replace

Customary use of privately-owned beaches has moved from the shadows to the front pages and has become a topic of widespread public attention and interest. The history in Walton County demonstrates that relying on the common law as a vehicle for resolving conflicts over customary use or for determining whether customary use exists has numerous drawbacks. As noted above, these include legal, practical, and political obstacles to local governments or members of the

¹²⁴ One might even argue that the legislature is usurping a judicial function by trying to preclude judicial resolution of this separation of powers question – a question of constitutional interpretation and therefore one that clearly should be ultimately determined by the courts. The statute, by precluding local governments from adopting an ordinance would likely preclude a court from ever determining the validity of this claimed constitutional problem.

public who seek to obtain a judicial determination of customary use rights. The resulting void generated conflict, resulting in the legislation that has compounded that conflict.

Repealing or substantially amending the statute could remove the new hurdles the statute creates for governmental entities enacting ordinances or rules based on customary use, and eliminate any litigation over interpretive issues created by the statute. Thus, local governments would face fewer obstacles to enacting ordinances or rules meant to resolve conflict. However, conflict is not likely to dissipate with repeal of Fla. Stat. §163.035 alone. In Walton County, at least, it seems clear that some beachfront property owners and property rights advocates are committed to challenging the legality of the customary use doctrine as a background principle of the common law in Florida.

In addition, amendment of the statute could include retention of any aspects of the law the benefits of which outweigh their disadvantages. For example, to respect the interests of those government entities that have begun judicial proceedings for declarations of customary use, the legislature could retain the newly created judicial process but make it an *optional* avenue for local governments that want to ensure they have judicial confirmation of the bounds of customary use in their jurisdiction before they enact an ordinance. For those local governments for which this is a wiser path, the process would be available. For those that have sufficient confidence in the contours of customary use and the public support for its codification, this process would no longer be necessary. This would also moot any legal issues regarding the status of ordinances enacted in the window between the statute's enactment and July 1, 2018, thus eliminating another source of potential conflict.

The prospect of amendment raises the question of whether there are further steps outside the footprint of the current law that the legislature could take to reduce conflict over privately-owned dry sand beach -- regardless of whether the area is subject to customary use by the beach-going public. There are several areas of law and policy related to the balance of rights and duties of landowners and the public that are sources of conflict and that may aggravate or promote conflict over dry sand beach access. It is worth considering whether legislative measures addressing these issues might provide levers that help to alleviate conflict and promote a fairer, more consistent set of practices regarding beach access statewide. The suggestions provided below will require further research and analysis, both as a matter of law and public policy, but they offer starting points for consideration of the contours of further legislative action.

Property Tax Incentives. Tax policy is a widely recognized tool available to guide behavior and promote public policy. In this context, local property taxation is the most significant point of intersection with the dry sand beach. A factor discussed by the Florida Supreme Court in *Tona-Rama* and an argument raised by landowners who seek to restrict or oppose customary use currently is the fact that the owners pay taxes on the dry sand beach being used by the public,¹²⁵

¹²⁵ This was a factor noted by the Florida Supreme Court in its *Tona-Rama* decision as well as by Justice Boyd in his dissent in that case. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75, 80 (Fla. 1974). It has also been raised by plaintiffs in at least one of the cases challenging Walton County's ordinance. Second Amended Complaint at 31, *Seaside Town Council v. Walton Cty.*, No. 3:17-cv-00682-MCR-CJK (N.D. Fla. Aug. 22, 2018).

yet under the customary use doctrine their property rights are being restricted in a way most landowners do not experience.

Although methods vary, some local jurisdictions already relieve the tax burden of beachfront for dry sand beach that is used by the public.¹²⁶ Some counties do not assess property for tax purposes on this portion of the property at all,¹²⁷ and others reduce the valuation of the property or assess it at a reduced percentage to account for the regulatory constraints on development of the dry sand beach. The legislature could explicitly recognize landowners who allow public access by directing property appraisers to take this into consideration. In fact, this could be a default policy, and only when a property owner both possesses and asserts a valid right to exclude the public would the property be taxed at the value that recognizes the asserted exclusionary right.

Land Acquisition Programs. Florida is known for its robust history of land acquisition for conservation, including recreation, though not without its own recent controversies.¹²⁸ Another means to ensure beach access is to acquire recreational access easements over the dry sand beach. Easements are a remarkably flexible tool and can be tailored to include the regulatory and beach management requirements of local governments. Priority could be given to extending the recreational reach of existing state and local recreation areas, and in proximity to dune crossovers that provide beach access. Recreational access easements could incorporate other conservation values such as the protection of sea turtle and shore bird nesting habitat.¹²⁹

Additionally, funds generated under the 2014 land acquisition amendment to the Florida Constitution can likely be used for beach nourishment projects (as a form of “restoration”). Such projects create new publicly owned dry sand and provide public access to that sand. These funds could also be used to acquire the dry sand beach above the erosion control line in fee, or through less than fee arrangements, either in conjunction with nourishment projects or on their own.

However, both Florida and federal law constrains the use of public funds to nourishment projects that do not include adequate perpendicular access to the nourished beach, based on the public policy determination that state and federal dollars should not be spent nourishing beaches that the public cannot reach.¹³⁰ Although likely to be controversial, this policy could be revisited to

¹²⁶ The authors conducted an informal telephonic survey of coastal county property appraisers. Methods vary widely, and it seems clear that property appraisers exercise considerable discretion as to whether and how the dry sand beach is considered in assessing property taxes.

¹²⁷ Flagler County, in its post-HB 631 proposed Customary Use Ordinance asserts as an “additional finding” that: The Flagler County Property Appraiser does not assess the Dry Sand Beach portion of parcels along the coastline for the purposes of ad valorem taxation, whether owned by the property owner or not.”

¹²⁸ A 2014 voter approved constitutional amendment remains the subject of continuing litigation over the State’s use of the funds for what the plaintiffs argue are illegitimate uses such as general departmental administration. Fla. Defenders of the Env’t v. Detzner, Nos. 2015-CA-002682, 2015-CA-001423, 2018 WL 3519257 (Fla. Cir. Ct. June 28, 2018).

¹²⁹ See Jen Lomberk et al., *Less-Than-Fee Beachfront Acquisition Strategies to Protect and Enhance Sea Turtle Nesting Habitat in Florida* (Oct. 2017), <https://www.law.ufl.edu/law/wp-content/uploads/2017/11/Less-Than-Fee-Sea-Turtle-White-Paper-10.19.17.pdf>.

¹³⁰ 33 U.S.C. § 426g (2018); FLA. STAT. 161.101(12) (2012) See History and Evolution of Laws Relating to Beach Nourishment, NOAA Coastal Services Center, 3-4. Available at: <http://hamcamp.net/BeachNourishmentRev.pdf> “(Federal interest in a beach nourishment program is conditioned by: the public ownership of land or facilities

allow nourishment on beaches that do not qualify due to the lack of perpendicular access, by further conditioning nourishment on the provision of access between the dunes and the erosion control line, an area that would otherwise remain in private ownership following a nourishment project.

Revocable Licenses and Management Agreements. In addition to real property transfers, consideration could be given to creating a statutory framework for the use of revocable licenses as a property-based instrument to promote public beach access. Florida already encourages these arrangements where landowners open up their property to recreational uses such as hunting, fishing and hiking by providing liability protections to private property owners and eliminating the duty of care under the tort law of premises liability.¹³¹ These liability protections can be further augmented or even assumed by the state or local government through contract-based management agreements, which can also define the scope of recreational use. As noted above, property tax relief could provide an added incentive.

Shoreline Protection Exactions. Another issue that has and will increasingly generate conflict over public beach access is the pace of erosion. Shoreline hardening is a prevalent response by landowners, and the percentage of shoreline that has been hardened, or is eligible to be hardened will only increase with time. Although structures such as seawalls, revetments and geotextile tubes may successfully protect a structure for some period of time, shoreline hardening can exacerbate erosion both in front of structures and on adjacent properties. Over time, this can have the effect of eliminating the entirety of the dry sand beach, and potentially diminishing or eliminating even a wet sand beach, an area subject to the protections of the public trust doctrine.¹³² Compounded by often intense political pressure, current legislation and rules make it possible for beachfront landowners to obtain a permit to armor their beachfront,¹³³ even a permit for armoring in the future. Florida law currently addresses impediments to lateral beach access in coastal construction permitting and authorizes the DEP to require access as a condition of the permit. However, this requirement applies only to the extent there is interference with access at the time the permit is granted, and it is limited to the width of the interference.¹³⁴

While permitting seawalls to protect property may make sense to a property owner in the nearer-term, the long-term prospects are less clear. Under current projections for sea-level rise, many structures currently located on the oceanfront will likely be undermined, and eventually destroyed or abandoned. The question is when, not whether. The cost of a short-term strategy of shoreline hardening (in the absence of beach nourishment), includes the likely eventual loss of dry sand beach and any customary use rights that may have existed on that beach. Thus, it may be appropriate for the legislature to revisit the relationship between coastal construction permitting and public lateral beach access. Permits for seawalls and other construction activities

adjacent to the beach (or private ownership as long as public access and use is provided along with adequate parking”).

¹³¹ FLA. STAT. § 375.251.

¹³² See Carly Grimm et al., *Feeling the Squeeze: The Troubled Future of Lateral Beach Access In Florida*, 35 ENVTL. & LAND USE L. SEC. REP. 1 (2014).

¹³³ Thomas K. Ruppert, *Eroding Prospects for Florida’s Beaches: Florida’s Coastal Construction Control Line Program*, 1 SEA GRANT L. AND POL’Y J. 65, 84–95(2009) (outlining problems with Florida’s coastal construction and permitting programs).

¹³⁴ FLA. STAT. §161.053(4)(e); see Grimm et al., *supra* note 132.

seaward of the Coastal Construction Control Line could be conditioned on the provision of the public right to access the privately owned dry sand beach that lies in front of the permitted activity, subject to reasonable local regulation. Such a condition would be considered an “exaction” under federal and Florida law, and would be subject to, and tested by the United States Supreme Court’s essential nexus,¹³⁵ and rough proportionality tests.¹³⁶

Dune restoration is a preferred alternative to shoreline hardening and some local governments have provided resources to beachfront property owners to restore dunes in order relieve pressure to install hardened shorelines in an emergency situation where failing dunes would compromise structures, even though no public recreational benefit is conferred (a requirement for federal and state nourishment projects).¹³⁷ Here too, public assistance with dune restoration on privately owned beaches could be conditioned on recognition of customary use rights, or a property interest in recreational access could be conveyed in recognition of that assistance.

Right to Portage. Sea walls and other hardening techniques already also create barriers to even wet sand access along Florida’s beaches. There are examples throughout the state where the Atlantic Ocean or Gulf of Mexico consistently lap at the base of shoreline armoring, at least for some portion of the tidal cycle. In such cases, the public is deprived access to even a wet sand beach to move from one public beach to another, having to brave the shore break instead. In such instances, the legislature or the courts could recognize in the public a “right to portage” --, the right to limited trespass in order to go on, over, or around an obstruction – in this case a sea wall or other form of armoring. There is both common law and statutory precedent in other states for this right in streambeds, and the analogy should hold for navigation along the foreshore, to the next available beach.¹³⁸

A voluntary approach to advance judicial determination that includes non-governmental parties. Another issue related to customary use rights that legislative reform could address is the obstacle to obtaining clarity about the existence of customary use rights in a given location -- something the current statute partially sought to address. This includes the difficulty that both members of the public and local governments confront in seeking a judicial determination of the scope of customary use rights. For members of the public, the obstacle is the special injury rule, an issue the statute did not address. For local governments, the obstacle is the need to sue relevant landowners in order to establish customary use, a problem addressed by the creation of the new judicial process.

¹³⁵ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

¹³⁶ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹³⁷ This dilemma is nowhere better observed than in the herculean efforts of Flagler County to restore its beach-dune system, irrespective of ownership, in the aftermath of Hurricanes Matthew and Irma, and described in the finding of facts included in its post-HB 631 customary use ordinance. Flagler County Board of County Commissioners, Public Hearing on Consideration of an Ordinance Recognizing the Right of Customary Use of the Beach by the Public (June 18, 2018). Indeed, Flagler Beach was forced to resort to local funding precisely because it could not demonstrate to FEMA that there was adequate beach access to allow for the expenditure of public funding.

¹³⁸ Under the heading “Right to portage—establishment of portage route”, MONT. CODE §23-2-311 (1) provides: “A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of the landowner's rights.”; *see also* RESTATEMENT (SECOND) OF TORTS § 193 cmt. d (AM. LAW INST. 1965) (“The privilege of navigation carries with it the ancillary privilege to enter on riparian land to the extent that this is necessary for the accomplishment of the purpose of the principal privilege.”).

One option for reform that would alleviate the obstacles to resolution of conflict would draw on the contours of the mandatory judicial procedure outlined in Florida Statute §163.035. As is noted above, amended legislation could incorporate a new *voluntary* judicial process. Going beyond this, it could provide a mechanism not just for local governments but also for members of the public to seek a determination of the existence of customary use rights. This procedure could follow the general parameters of Florida Statute §163.035(3)(b), but also establish a right of action for members of the public. As long as the special injury rule established by the Florida Supreme Court is not a constitutional requirement, but merely a procedural rule, the legislature has the power to modify its application in this context. This would level the playing field. As is noted above, at present, landowners have opportunities to seek a judicial determination, but members of the public are constrained by the special injury rule.

As a practical matter, such a provision is not likely to open the floodgates to litigation. Preparation of the evidence needed to support a claim of customary use is not a simple or necessarily inexpensive undertaking. But motivated members of the public or advocates for public beach access could seek to assert the rights where conflict existed.

VII. CONCLUSION

HB 631 converted local dustups between beachgoers and beachfront landowners into a statewide sandstorm that pitted public access to the dry sand beach against landowners' private property rights. Like detritus left after a storm, widespread but latent confusion about the scope of and relationship between these respective rights was exposed to all. Confused, conflicting, and exaggerated narratives about the impacts of the new law added to the inherent lack of clarity in the underlying common law, creating widespread confusion and fueling ongoing conflict.

Despite the expressed goal of the sponsors of HB 631 to resolve conflict, it remains unclear that they will succeed in this ambition. The spate of lawsuits filed challenging Walton County's ordinance -- both before and after the enactment of the new law -- have been dismissed only because the new law invalidated that particular ordinance or because the County had not yet successfully adopted a new ordinance. But, given the substance of the claims raised, there is little reason to expect that landowners will not pursue many of the same claims in new litigation challenging any new ordinance.¹³⁹

Although the new law itself changed only the process governmental entities must follow in order to adopt ordinances or rules based on customary use, it arose out of a broader effort by some landowners to restrict or eliminate customary use in Florida. Thus, it was accurately perceived as a threat by members of the public and beach access advocates. Moreover, it has shed light on

¹³⁹ As is noted *supra* Part III.a.3, although the statute is unclear on this point, it seems unlikely that landowners could raise many of the claims that were at the heart of several of the dismissed cases -- such as as-applied takings challenges -- in the new judicial proceeding for declaring customary use. Thus numerous individual lawsuits seem likely to ensue. Only if the landowners are successful in challenging the factual finding of customary use on their particular parcels does it seem likely that they would drop their efforts.

a significant and not easily resolved set of law and policy issues. Customary use of Florida's beaches has broad policy implications – with significant impact on recreational, property, dignity, economic, and conservation values. Moreover, in an era of ongoing sea-level rise, the pressures on our coastal resources and the conflicts among these values will only increase.

For better or worse, this once arcane legal doctrine is now in the spotlight in Florida, and the contours of its application around Florida's coastline will likely be shaped through a blend of legislative and adjudicative processes. Law and policy makers face considerable challenges in navigating these issues as they seek to implement and build on the law in this area. This white paper is intended as a resource for law and policy makers, judges, advocates, the media, and the broader public. It is the authors' hope that it will provide useful information and legal analysis to assist those working to resolve conflict, discern the state of the law today, and shape the law and policy of beach access for the future.