ATTEMPTING TO UN-CONFUSE THE BEACH USE CONFUSION

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In the past six months there has been significant media attention given to the legislation enacted as Florida Laws 2018-94, and codified as Fla. Stat. § 163.035 (2018), by the Florida Legislature to address beach use. It has created a firestorm of controversy and considerable confusion has resulted. In reaction to its adoption, the City of Naples and Collier County enacted ordinances to declare all or parts of the beaches within those jurisdictions to be subject to public customary usage in advance of the July 1, 2018 effective date of the state legislation.

It is my purpose to objectively explain the significance, consequence, and the important legal principles that underlie the legislation and to place it all in the proper context. I do not advocate for or against a particular public policy.

The 2018 legislation is purely procedural and process oriented. It does not change or determine substantive property or use rights to any beach area in the State of Florida. The rights enjoyed by the public to use our beaches, and any claims a private beach owner might have to deny such use, that existed before the legislation was enacted, remain unchanged. The only effect of the 2018 legislation is to delay the effectiveness of any local government action, taken after July 1, 2018, that declares a privately owned beach area to be open to the public. Prior to July 1, 2018, nothing prevented a local government from taking such action. Several have, and it has resulted in litigation with affected property owners and uncertainty about enforcement of the government action (i.e. can the government compel the private owner to allow public use) while the litigation is pending and before the courts even rule? So to resolve this, the 2018 legislation requires that if after July 1, 2018, a government body wishes to declare a beach area that is held in private ownership to be open to the public, the government body must first go to court to prove that so called customary use has been established. The court then determines, based upon a review of all of the facts and evidence, if in fact the beach in question has become subject to what is called customary use, or not. But, until the court decides, the local government action cannot be implemented. Nothing in the 2018 legislation prevents a property owner who owns a beach from contending and proving that no customary use rights exists. This was the case before the 2018 legislation and it remains so.

So putting this process and procedure aside, what is the substantive law regarding ownership and public use of our beaches? Florida has more coast line than any other state except Alaska. Our beaches are one of our state's most valuable, if not our most valuable, assets. The state has every reason to protect and preserve our beaches and public access to, and use of, them. While this may surprise many people, most of the beaches in the State of Florida are owned or titled in private ownership - typically the owners of the adjoining uplands. The state does not own them nor does the public. But that does not mean the pubic cannot use the beaches. In the large majority of cases the

upland owners have no expectation to enjoy exclusive possession or use of the beach areas and do not try to prevent public use of the beaches – in part because of what is called customary usage. There are of course some exceptions, mostly in historically urban areas.

Customary usage is a concept which the courts have developed based on the English common law concept of prescriptive use or prescriptive easements, which is a corollary to the concept of title by adverse possession. Prescriptive easements exist where a person other than the legal title owner has made use of an area for access, or for other purposes, in a manner that is contrary to the rights of the title holder in an open and notorious way without permission from the underlying fee title holder. Such open, notorious and customary usage for period of 20 years can become the basis for establishing a prescriptive easement.

In the 1974 a case arose in Daytona Beach involving its' world famous beaches which have historically been used for automobile racing, as well as public recreational enjoyment. The Florida Supreme Court found that the public had acquired customary usage rights to use the beach area even though title to it was then, and remains, in the private upland owner's hands. The courts have made it clear that the determination of whether customary beach use has been established must be done on a case by case basis. The courts have not, indeed could not, declare that every privately owned beach has become then subject to customary public usage.

This is, has been, and remains the law in the State of Florida. The 2018 legislation did not change it at all. Nor have the ordinances adopted by the City of Naples and Collier County.

The new Collier County and City of Naples ordinances which declare certain beach areas to be subject to customary use can be challenged by an upland owner by proving that there has not been the requisite historic public customary use. But because those ordinances were enacted before July 1, 2018, the private landowner might not be prevented from successfully blocking public use or access unless and until a court resolves the issue. That could take years. In other words the government action would not be delayed pending a court decision. The 2018 legislation changed or reversed that – at least prospectively. As a consequence of the state legislation after July 1, 2018, government has the burden of first establishing customary usage if it wishes to declare a portion of the beach held in private ownership to be available for public use under the customary use doctrine.

The only thing that has now changed is who has the burden of demonstrating customary usage or the lack of customary usage to a court.

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