Naples Daily News
Commentary: Customary Use Beach Bill Widely Misunderstood

State Sen. Kathleen Passidomo, R-Naples Published 6:43 a.m. ET April 9, 2018 | Updated 11:58 a.m. ET April 9, 2018

While I worked on many complex bills during the recently concluded legislative session, few seem to be as misunderstood as House Bill 631/Senate Bill 804 — Possession of Real Property (commonly known as customary use) signed by Gov. Rick Scott on March 23.

Some people have been led to believe that this bill restricts access to Florida's beaches. Nothing could be further from the truth.

The Florida Constitution provides that all land seaward of the mean high-tide line belongs to the public. No private individual or governmental entity can deny access to it.

In many cases, additional land above the mean high-tide line is also public, providing the wide public beaches that many of us enjoy.

Adjacent to this public land there may be privately owned property, and while it may appear indistinguishable as just more sand, that land may have been privately owned for years. Development and building permit approvals, collection of impact fees and real estate taxes all serve as documentation that the local governments have acknowledged private ownership and the recorded boundaries of these private properties adjacent to the public beach.

Nevertheless, in certain instances, such as when the beach has eroded to the point that there is no publicly owned "dry sand" left for the public to enjoy, it may be necessary to enlarge the public beach into adjacent private property. (This hasn't been an issue in Collier County, which places a priority on beach renourishment to ensure there is an abundance of publicly owned property between the mean high-tide line and private property.)

Unfortunately, some local governments have appropriated portions of private property adjacent to the public beach by merely passing a local "customary use" ordinance. Customary use is a common law judicial doctrine that provides for the recreational use of privately owned land by the public if the recreational use has been "ancient, reasonable, without interruption, and free from dispute."

Even when a public benefit results, private property should never be "taken" through the creation of a local ordinance, nor should the state be allowed to make such a determination by statute.

State and local governments are both political bodies that are subject to political pressures and aren't held to the same due process standards as the courts when making decisions about private property rights.

The courts are nonpolitical, nonpartisan objective bodies that are required to take testimony, listen to expert witnesses and weigh that testimony to make impartial decisions based on legal

precedent of what portions of private property adjacent to our beaches should be open to the public under the judicial doctrine of "customary use."

We wouldn't find it acceptable for a local government to merely pass a local ordinance allowing for the "taking" of private property to build a road. Instead, we require the local government to prove in a court of law that the taking is necessary and in the public interest. Additionally, the owner of that property has an opportunity to present evidence and testimony to back up any opposing positions. After hearing the testimony of all parties and weighing the evidence, the court, as the neutral third party, makes the decision.

By the same token, a local government should also be required to establish through the courts the necessity of taking private property adjacent to the beach for public recreational use.

This bill only serves to establish a simple and equitable process by which local governments may seek a judicial determination of customary use that certain private property adjacent to the public beach should be open to the public.

Passidomo represents Florida Senate District 28.