

THE FLORIDA SENATE JUDICIARY COMMITTEE

HB 631: ESTABLISHING THE CUSTOMARY USE OF PRIVATE BEACHFRONT PROPERTY

Like a lot of news articles, *Trips to Florida beaches will come with more restrictions*, by News4JAX, has a misleading title and fails to fully explain the effect of HB 631. This memo explains the significance of property rights, how easements are typically created, the facts leading to the enactment of HB 631, the effect of HB 631, and how HB 631 benefits both beachgoers and private property owners.

PROPERTY RIGHTS & EASEMENTS

To understand HB 631, one must first understand the nature of property rights. The most fundamental component of these rights is the right of a property owner to exclude others from his or her property. As a result, a person who is unlawfully on the private property of another is a trespasser and may be subject to criminal penalties.

One of the few things that can limit the right to exclude others is the existence of an easement. Sometimes, an easement might be recorded on the deed to a property. For example, recorded easements often exist to allow a person to travel across the property of another to access a landlocked parcel. A landlocked parcel is a parcel that has no direct access to a public road. Recorded easements are convenient as they make everyone's rights and obligations under the easement very clear.

In other cases, an easement might be the result of prescription. These easements, known as prescriptive easements, may be created when a person has openly and continuously used a specific portion of the land of another for many years. Easements acquired through prescription might not be recorded. When a person seeks to use a prescriptive easement over the objections of the property owner, the person seeking to use the property typically must go to court to have a judge declare that the easement exists. The right of the public to use private beachfront property based on the "customary use" of the property is a form of a prescriptive easement.

In sum, a private property owner generally has the right to tell others to "get off my land" unless an easement allows the non-owner to use the land. Whether an easement exists with 100 percent certainty cannot be known unless it is recorded or a court finds that the easement exists.

CUSTOMARY USE ORDINANCES

Now, let's turn our attention to HB 631 and the circumstances that led to its enactment. With respect to private beachfront property, some local governments have issued ordinances declaring that the public has an easement to use a portion of the dry sand beaches owned by private property owners. These easements, according to the ordinances, were created through the longstanding customary use of the property by the public. (However, the affected property owners believe that the findings of customary use by the local governments were not based on reliable evidence.) These ordinances further prohibited the owners of the property from erecting fences on their land or posting no trespassing signs. The local governments in declaring the existence of an easement by ordinance bypassed the courts.

EFFECT OF HB 631

The bill creates procedures for a governmental entity to follow if it believes that an easement for the public to use private beachfront property should be recognized. Under these procedures, the governmental entity must provide clear notice both to the public and to affected property owners of the intent to seek an easement based on the customary use of privately-owned beachfront property. The notice must detail the evidence that the entity believes will prove the existence of the easement.

After a public hearing on the entity's notice of intent to seek the easement, the entity may seek a judicial determination of the existence of the easement. If a court finds that the easement exists, the government entity may adopt ordinances regulating the right to use the private property by its owner and by the public.

What is notable about the bill in light of misleading news articles is not what the bill does, but what it does not do. The bill establishes procedures for determining whether the public has a right to use private property. The bill does not give private property owners any additional rights to exclude the public from their land. Similarly, the bill does not give the public any new rights to access private land. The bill is exclusively procedural.

WIN-WIN OF SORTS FOR BEACH GOERS & PRIVATE PROPERTY OWNERS

Members of the public who want to access the dry sand area of private beaches should take comfort in the fact that the bill does not divest them of any rights. On the contrary, the bill sets forth clear procedures that allow any rights that the public has to be championed by local governments and recognized by the courts.

Additionally, owners of beachfront property should take comfort in the fact that local governments seeking the recognition of easements must have their efforts supported by solid evidence that an easement exists, that the owners will have the right to a hearing, and that a more disinterested party, a judge, will be making the final determination as to whether an easement exists.