

**FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS
PUBLIC HEARING / AGENDA ITEM # 9e**

SUBJECT: Consideration of an Ordinance Recognizing the Right of Customary Use of the Beach by the Public Subject to Limitations, Fourth and Final Public Hearing.

DATE OF MEETING: June 18, 2018

OVERVIEW:

I. The Doctrines of Public Trust and Customary Use

Art. X, §11 of the Florida Constitution declares that the State holds title to land under navigable waters up to the mean high tide line in trust for the people. This is known as the Public Trust Doctrine, and the Ordinance being considered today does not affect this portion of the beach below the mean high water line (sometimes referred to as the “wet sand” area). Instead, this Ordinance pertains to the dry sand portion of the beach between the mean high water line and the toe of the dune. This part of the beach is subject to a different legal doctrine: Customary Use.

Customary Use is a doctrine whereby the public gains the right of access and use of private real property by way of custom. The right to use property in such cases does not amount to creating an interest in land, such as an easement or a license. Additionally, while a landowner cannot exclude the public where a right to Customary Use exists, the owner can continue to make any use of his/her land that does not interfere with the public use. Finally, the existence of Customary Use rights do not limit the government’s ability to regulate activities on the land.

Customary Use has deep roots in western civilization relative to beaches. Emperor Justinian of ancient Rome is thought to be the first to codify the doctrine as a corollary to navigation, fishing, and bathing. It was included in the thirteenth century Magna Carta and has always been a part of English common law. The Florida Supreme Court succinctly described the elements of Customary Use as it pertains to beaches in the seminal 1974 case of *City of Daytona Beach v. Tona-Rama, Inc.*:

“No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida’s oceans and beaches has long been recognized by this Court... ***If 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 area as a recreational adjunct of the wet sand or foreshore area.” (emphasis added)

II. House Bill 631, 2018 Fla. Laws

Volusia and St. Johns counties long ago passed Customary Use ordinances for their beaches. Walton County also passed a Customary Use ordinance in 2016, which spurred litigation in federal court and the introduction of HB 631 in the most recent legislative session. (HB 631 passed both houses overwhelmingly and was signed into law by Governor Scott. The relevant portions of the bill are attached to this staff report.)

One provision of HB 631 contains a traditional grandfathering clause to protect Customary Use ordinances adopted prior to 2016, i.e., St. Johns' and Volusia's. However, another provision of HB 631 says that the bill "...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.***" (emphasis added) Nothing in the legislative history of the bill elaborates on the meaning of the 2018 provision or how it relates to the 2016 provision. A fundamental rule of statutory interpretation is that every word must be given its plain meaning. Put another way, one cannot ignore portions of a statute in order to make another portion make more sense. Other principles of statutory construction provide that an entire statute should be read as a cohesive, integrated whole and that statutes should not be read to reach an absurd result. Thus, despite the traditional 2016 grandfathering clause, the Legislature must have envisioned that a local government could pass a Customary Use ordinance prior to July 1, 2018. Any other interpretation would render the clause meaningless, a result not permitted in statutory construction.

The proposed Ordinance could be challenged in court on the basis that it is not grandfathered, and the court would have to determine the legislative intent behind the 2018 provision. On the other hand, if the County were to do nothing, there may never be another chance after July 1st to recognize the right of Customary Use of the beaches by the public without going through the expensive and impractical judicial process created by the bill, especially with our aim to be able to address beach repair issues from county line to county line.

The process created by the bill is believed to be the first of its kind in the nation. To summarize, under the new law, the County would have to provide notice to each beachfront parcel owner of the County's intent to pass a Customary Use ordinance. The notice would contain the specific evidence the County would rely upon for each specific use for each parcel. The County would then file a complaint in the Circuit Court, and any or all beachfront parcel owners in the County could intervene as defendants to dispute the existence of Customary Use rights. Although any ordinance may be challenged after its passage, our research has not revealed a single instance in which a court has forbidden the initial passage of a Customary Use ordinance, prior to the date this new law takes effect. Nor are we aware of any instance in Florida law, whether in the context of the Customary Use doctrine or otherwise, in which a local government must have its ordinance approved by a court prior to its adoption. This position of needing a court determination prior to the adoption of a county ordinance was argued by the parties opposed to Walton County's Customary Use ordinance. However, this approach was not accepted by any of the courts that considered that issue.

A right to Customary Use exists if the use is reasonable and without dispute or interruption since ancient times. Until the passage of HB 631, courts were only called upon to declare the existence or non-existence of Customary Use rights in the event of a case or controversy, but the right itself exists based on customary practices, not judicial determination.

There is a misconception that the bill does nothing to change the status quo. On the contrary, the bill creates an onerous procedure to pass a Customary Use ordinance where it did not previously exist. Moreover, the bill creates room for those who wish to exclude the public from privately owned beaches. There is a possibility that slowly and incrementally, private landowners may obstruct the beach, and due to the passage of HB 631, the burden shifts to the public to establish the right of access and use under the more onerous process.

It is entirely possible, however, that the County's Customary Use ordinance if adopted might be challenged on the basis that it has to use the more exacting procedures after July 1, 2018. That brings into question why the Legislature granted a right to pass a customary use ordinance,

although without a grandfathering effect, that legally expires on July 1, 2018. This would make no sense. However, neither we nor anyone else can predict how a court would view this issue. Be aware we may need to prepare to address this issue in a court of law should the Board enact an ordinance.

III. The Proposed Ordinance

First and foremost, the proposed Ordinance attempts to codify the status quo. It does not create any rights of use or access by the public not already in place since time immemorial. The County does not intend to pit the public against beachfront property owners, but rather is utilizing a narrow window of opportunity to recognize the traditional recreational uses of the public on the beach prior to the deadline recently imposed by the Legislature as already discussed. The Ordinance recognizes the traditional Customary Uses of the public on all of the beaches of the County, including within the municipalities, between the mean high tide line and the toe of the dune. The Ordinance does not create any easement in private property, nor does it authorize commercial and other non-traditional activities not previously enjoyed by beachgoers. The proposed ordinance also includes limits on the Customary Use so it does not open a door to unruly or inappropriate activity on the beachfronts of private homes or businesses.

By recognizing the existing Customary Use rights of the public on the beaches of the County, the Board furthers the ongoing emergency response in relation to the beaches. The County has begun installing an emergency berm and seawall as part of an overall dune restoration project. The project will cost over \$40 million and serves a paramount public purpose of protecting neighborhoods and infrastructure on the barrier island. The expenditure of public funds to restore the dunes is in part justified by the importance of the beaches to the County's economy and its use by the public for recreational uses.

In order to protect dune vegetation and thereby reduce erosion, the Ordinance prohibits traversing across dune vegetation. This particular provision does not depend on the Customary Use doctrine and is simply based on the police powers of the County as a political subdivision of the State. However, it does provide an incidental benefit to beachfront parcel owners by providing a buffer between beachgoers and the upland portion of the owners' parcels. Until now, the County has relied on DEP regulations in order to protect the dune vegetation. This matter has become more critical as the County replants the newly restored dunes and implements the "Dodge the Dunes" campaign. The proposed Ordinance will authorize Code Enforcement and law enforcement to issue citations or take action for beachgoers who cross the dunes without utilizing appropriate dune crossovers.

Due to the compressed timeframe in which this Ordinance must be drafted, a time frame imposed by HB 631, the draft attached to this memo is not in final form. As stated in the April 16th workshop and May 7th and 21st public hearings, staff continues to gather evidence from community stakeholders and legal experts and will continue to revise the draft Ordinance. Material revisions will be either re-published or presented at the June 4 public hearing for the record. Staff also requests the Board to approve a fourth and final reading at the Board's regular meeting on June 18th in order to continue to supplement the evidentiary record and to refine the ordinance.

The hearing today is for other witnesses to discuss their knowledge of public use of the beach, to address any issues concerning the Ordinance, and to submit further evidence for the record.

FUNDING INFORMATION: N/A

DEPT., CONTACT, PHONE: County Attorney Al Hadeed, (386) 313-4005

RECOMMENDATION: Request the Board Conduct the Hearing and Consider Whether Adopt the Ordinance on Fourth and Final Reading.

ATTACHMENTS:

1. Ordinance Draft
2. Legal Ad
3. Excerpts of HB 631

Craig M. Coffey

Craig M. Coffey, County Administrator

15 June 2018

Date

Draft of Customary Use Ordinance

June 18, 2018

ORDINANCE 2018 - _____**AN ORDINANCE OF THE FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS RECOGNIZING THE RIGHT OF CUSTOMARY USE OF THE BEACH BY THE PUBLIC SUBJECT TO LIMITATIONS; PROVIDING FOR FINDINGS; PROVIDING FOR CODIFICATION AND SCRIVENER ERRORS; PROVIDING FOR JUDICIAL REVIEW AND SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.**

Whereas, the State of Florida recognizes that private property along the State's beaches may extend to the mean high tide line as defined by Florida Statutes, and that the portion of the exposed beach below mean high tide is typically owned by the State, held in trust for all the people; and

Whereas, most of the public do not realize that many of the sandy beaches of the State including within Flagler County may be comprised partly of privately owned parcels along the coastline; and;

Whereas, the public regularly traverses along, and recreates on, the entire beach without regard to ownership; and

Whereas, it is nearly impossible for a beachgoer to know where the mean high tide line is on any given day since that line is dynamic, arrived at using a mathematical average of the movement of the high tide line over a constantly rolling period of time; and

Whereas, the recent passage of Chapter 2018-94, Laws of Florida, means that the County may pass an ordinance prior to July 1, 2018, recognizing the right of members of the public to utilize the dry sand beaches of the County as they have without dispute since time immemorial; and

Whereas, after July 1, 2018, the County may still pass an ordinance recognizing the customary use of the beaches by the public, but only after filing a declaratory complaint in the Circuit Court against its property owners who own property to the mean high tide line; and

Whereas, the County is engaged in the largest capital project of its existence in repairing its 18 mile coastline from the catastrophic damages wrought by Hurricanes

Matthew and Irma in order that neighborhoods on the barrier island will be protected and the public can enjoy the beaches; and

Whereas, the damages from the hurricanes exposed the County's beachfront property, both public and private, to extensive loss and made the properties vulnerable to further damage from nor'easters and extreme high tide events; and

Whereas, some of the County's oceanfront homes were "red tagged," preventing homeowners from entering or using their homes with some homes perched perilously on escarpments at risk of collapsing; and

Whereas, due to the destruction of the dunes, including the obliteration of any of the stabilizing vegetation of the dunes, some homes flooded two and three times as ocean water poured inland from the hurricanes and from later tidal events; and

Whereas, portions of State Road A1A were closed due to severe damage with a risk of the roadway collapsing onto the beach and further threatening the collapse of homes and businesses to the roadway's west, landward side; and

Whereas, the County remains under a declared state of local emergency due to the extensive damage to the beach-dune system and to private and public property and the continuing exposure and vulnerability to additional loss; and

Whereas, the County was unable to secure funding from the Federal Emergency Management Agency to assist in the installation of the emergency protective berm along most of the beach, in part, because the County lacked a customary use ordinance or similar legal instrument establishing its responsibility for, and relationship to, the dry sand beach for the use of the public; and

Whereas, Congress has not appropriated funding for nourishment (or "renourishment" as it is commonly called) of the beaches within the County, and absent federal funding the County has not been able to pursue a nourishment project; and

Whereas, the County had to reconstruct as much of the beach-dune system as available public and private funds would allow for the length of the County's coastline to reduce the risk of further catastrophic damage due to the absence of a stable, protective dune system; and

Whereas, in furtherance of this effort, the County procured state funds and resources as it could from the Legislature, the Governor, the Florida Department of Environmental Protection, and the Florida Department of Transportation; and

Whereas, the County voted to increase its Tourism Development Tax and apply additional revenue from this source of funding to help the County partially defray the costs of rebuilding its beach; and

Whereas, the County has used its borrowing capacity and took on additional debt to add public dollar resources to the beach-dune repair project; and

Whereas, some private property associations assisted by pledging substantial funding for the project as part of the County's financing of the project; and

Whereas, the County hired specialized consultants and dedicated its engineering staff to procure permits from the state and obtain compatible sand from sources outside the County to carry out the work; and

Whereas, the County leased large-track vehicles and other specialized equipment to conduct the work using its own employees and hired extra employees to further the progress of the work; and

Whereas, the County secured native dune vegetation that would stabilize the newly constructed beach berms and to procure contractors to install the vegetation; and

Whereas, the pursuit of this unprecedented community effort required intergovernmental coordination among Flagler's municipalities and the State, and the full cooperation of the beachfront residents and businesses, as well as support from citizens and businesses generally; and

Whereas, the enormity of the permitting hurdles, the engineering and procurement challenges, and the need to construct an integrated project without gaps or openings along the coastline placed the project outside of the capability of any private owner or association of owners; and

Whereas, beachfront property owners substantially supported the project and wanted the County to master plan and perform the work; and

Whereas, Flagler County's general public and taxpayers supported the expenditure of public funds and resources to perform the project because it would provide a beach that the public could continue to use for recreational purposes; and

Whereas, Flagler County pursued the project and applied its public resources to the entirety of the beach, from County line to County line, on the basis that the work would primarily benefit the public by restoring the beach-dune system for their longstanding and economically valuable recreational use; and

Whereas, some of the properties that received the benefits of the project were privately owned parcels extending onto the dry sandy portion of the beach to the mean high tide line; and

Whereas, it was never the intention of the County or its citizens to confer a primary private benefit through its public investments without the ability to continue the public's customary right to use the dry sand beaches for recreation and enjoyment; and

Whereas, the passage of Florida Chapter 2018-94 creates severe hurdles to Flagler County's ability to apply public resources presently and in the future to that portion of its beaches which are private property; and

Whereas, the County's intent in recognizing the customary use of the beaches within the County is not only to preserve the status quo in regards to public access and use, but also to ensure the present and future ability to expend public resources on beachfront property that may be privately owned by deed or other instrument from the dune system to the mean high water line (commonly known as the sandy beach or dry sand beach); and

Whereas, the County's intent in now enacting a customary use ordinance also is to collect the body of evidence firmly establishing the public's customary use, which evidence would be legally relevant regardless of how Florida Chapter 2018-94 might be interpreted or applied by a future court; and

Whereas, the four public hearings conducted by the County to consider this customary use ordinance, coupled with the ordinance receiving wide local media coverage, have provided ample opportunity for property owners or property owner associations to contest the evidence that the public has made customary use of the beaches of Flagler County, including specifically all of its dry sand beaches, since ancient times and, further, that such use has been reasonable, without interruption and free from dispute; and

Whereas, no property owner or property owner association has contested the public's customary use of the dry sand beaches within Flagler County; and

Whereas, the County has sought to balance and reasonably protect the rights of private property owners and the public in declaring customary use of its dry sand beaches; and

Whereas, accordingly the County must act to secure the right of the public's customary use of the beach for recreational purposes for the reasons stated herein and subject to the limitations provided in this ordinance.

NOW THEREFORE, BE IT ORDAINED by the Flagler County Board of County Commissioners, as follows:

Section I. Findings. The foregoing shall be incorporated as findings of fact.

Section II. Additional Findings.

A.) The Customary Use Doctrine

1. Art. X, §11 of the Florida Constitution declares that the State holds title to land under navigable waters, including beaches of the Atlantic Ocean below the mean high water lines, in trust for all the people.
2. The Florida Supreme Court has long recognized the right of the public to access and enjoy Florida's oceans and beaches as a natural adjunct to use of the foreshore (wet sand) area—most notably in the 1939 case of *White v. Hughes* and the 1974 case of *City of Daytona Beach v. Tona-Rama, Inc.* According to the Court, as a matter of custom, the public acquires rights to utilize dry sandy areas of privately owned beaches for recreational purposes if the public's use of those beaches has been ancient, reasonable, without interruption and free from dispute. However, the right of customary use of privately owned beaches does not create any interest in the land. Additionally, the right can also be abandoned by the public and is subject to appropriate regulations.
3. In deciding the *Tona-Roma* case, the Florida Supreme Court concluded that privately titled Florida beaches are used differently than other privately titled land: "The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portions of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but have served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected."
4. The State Comprehensive Plan, as codified at Section 187.201(8)(b)2, *Florida Statutes*, expresses the Legislature's intent to preserve the public's right to reasonable access to beaches.
5. The Coastal Management Element of the Flagler County Comprehensive Plan includes objectives to ensure beach access and the overall quality of the beach environment.

6. The United States District Court for the Northern District recently recognized in the 2017 case of *Alford v. Walton County*, that the public's right to utilize the dry sand area of Florida beaches does not arise by judicial recognition but is acquired by custom, which emanates from long-term, open, obvious and widely accepted and widely-exercised public use. The court further held that Walton County was legally empowered to enact a customary use ordinance under present law.
7. In the 2007 case of *Trepanier v. County Of Volusia*, the Fifth District Court of Appeal explained that evidence of the long-term, customary use of a beach by the public could be demonstrated by reference to a general area of the beach and need not be proven on a parcel-by-parcel basis.
8. The Florida Legislature passed and the Governor signed into law House Bill 631, Florida Chapter 2018 - 94, to be codified as a new section to the Florida Statutes, with an effective date of July 1, 2018. The new section, Section 163.035, *Florida Statutes*, provides a difficult, impractical and expensive legal process to ensure public access to beaches for local jurisdictions that fail to enact a customary use ordinance prior to July 1, 2018.
9. An amendment to House Bill 631, Florida Chapter 2018-94, was added on the floor of the Senate and adopted by the House, which granted more leeway for the County to adopt a customary use ordinance prior to July 1, 2018 as follows: "APPLICABILITY.—This section does not apply to a governmental entity with an ordinance or rule that was adopted and in effect on or before January 1, 2016, and 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." (Emphasis added)

B.) Customary Use of the Beaches of Flagler County

1. The public has utilized every part of the dry sandy (and in some cases rocky) areas of the approximately eighteen miles of the Atlantic Ocean beach of Flagler County landward of the mean high water line to the easternmost seaward side of any sea wall, dune bluff, dune crest, rock revetment crest, or line of permanent dune vegetation, (the "Dry Sand Beach") for fishing, bathing, sunbathing, walking, navigation, surfing, exercising, kiting, photographing, picnicking, and other recreational and, in earlier ancient and historic times, subsistence activities without dispute or interruption since time immemorial (collectively, "Customary Use").

2. There is extensive documentation of historical Customary Use of the Beach. Numerous members of the public and experts submitted testimony, photographs, records, and statements demonstrating longstanding, continuous Customary Use of the Dry Sand Beach, which statements/matters have been made part of the record of this Ordinance's adoption.
3. County staff has also documented some of the historical Customary Use activities in the twentieth and twenty-first centuries, and the County will continue to further document the public's ancient, historic and more recent Customary Use of the Dry Sand Beach, including ancient use by Native Americans, conquistadors and the area's earliest colonists and will enter such documentation and history into the record of the Board of County Commissioners (the "Board") at its public hearings.
4. Public access to the Dry Sand Beach has never been hindered, nor have fencing, barriers or other obstructions segmented the Dry Sand Beach. The only exceptions have been for prohibiting driving on the Dry Sand Beach, for set-aside areas staked as sea turtle nesting sites, and when the beach has been closed due to hurricanes under the County's emergency powers. The Customary Use of the Dry Sand Beach has been without dispute and uninterrupted since ancient times. There has been no specific or general dispute in Flagler County about the Customary Use of the Dry Sand Beach by the public or by beachfront property owners.
5. The annual Independence Day celebration and fireworks display from the Flagler Beach Pier attracts thousands of observers to the beach. Other events draw residents and tourists to the beaches of Flagler County in ever increasing numbers as the Tourist Development Office succeeds in promoting the County as an eco-tourism destination.
6. The Volusia Flagler Sea Turtle Patrol is a nonprofit corporation that patrols the entire length of the beach in Flagler County utilizing all-terrain vehicles in order to ensure the protection of sea turtles.
7. Florida State Road 140 and other beachside roadways, some identified in many of the early surveys and plats of the Dry Sand Beach area, was/were a public rights of way. The County has not abandoned some of the roads and successor roads to State Road 140 located on the Dry Sand Beach, although the County has prohibited beach driving except by government vehicles for emergencies, repairs or for protecting habitat and species.

C.) Local Government Action Consistent with Customary Use

1. For decades, the Board has demonstrated a commitment to ensuring public access to the Dry Sand Beach by purchasing or dedicating beachfront for public parks, and by building parking lots, dune crossovers, restrooms and other amenities strategically spaced along the beach to accommodate broad public access and recreational use of the entire beach.
2. Since the mid-1980's, with one two inadvertent exceptions, the Board has not permitted any new platting of the Dry Sand Beach to be parceled for development, instead requiring the platting of conservation parcels which do not allow any construction or development except for limited dune crossovers.
3. 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.
4. Flagler County with the municipalities of Flagler Beach, Beverly Beach and Marineland sought National Scenic Byway designation for State Road A1A based on its open, public beaches and their rural ambiance. The National Scenic Byway designation was based in part on the amount and ease of the public's accessibility to the County's beaches.
5. The Board contributes funding to ocean rescue services on the beach including for rescues conducted using ATV's in unincorporated Flagler County and for lifeguard services in the City of Flagler Beach.
6. Since 2016, Flagler County has remained under a State of Local Emergency primarily because of the extreme vulnerability of the barrier island after Hurricanes Matthew and Irma and other storms battered the beach and the dunes. The Board is currently engaged in a dune restoration project along approximately twelve miles of the Dry Sand Beach north of the City of Flagler Beach at a cost of over \$20 million with funding from County, State, and Federal governments and private sources in order to protect the Dry Sand Beach from erosion and protect public infrastructure and residential neighborhoods from flooding. The Board has begun planning the restoration of an additional six miles of the dune system along the Dry Sand Beach within the Town of Beverly Beach and the City of Flagler Beach, a project to commence in 2019 and also estimated at a cost of over \$20 million. Ensuring the continued Customary Use of the Dry Sand Beach by the public justifies the expenditure of public funds to restore the dunes and serves a paramount public purpose in furtherance of the emergency recovery.

7. Formally declaring the Customary Use of the Dry Sand Beach will aid Flagler County in securing and applying for outside agency funding for protection and preservation of the Dry Sand Beach, including those areas of the Dry Sand Beach under private ownership.
8. The Board has enacted regulatory ordinances to enhance the safety and enjoyment of visitors to the Beach including the prohibition of driving on the Beach, the prohibition of the removal of coquina from the Beach, and the protection of nesting sea turtles and their habitat.
9. The Board has undertaken measures when necessary to improve the safety, environment, and aesthetics of the Dry Sand Beach, including the removal of abandoned vessels, contraband, and deceased marine animals and the preservation of historical artifacts found on the Beach. Local conservation organizations conduct regular beach clean ups with the support of the County.
10. The Board, through its Tourist Development Office and in partnership with community stakeholders, has implemented a campaign titled, "Dodge the Dunes," in order to educate the public about the dangers of erosion exacerbated by beachgoers who damage dune vegetation by not utilizing designated crossovers.

D.) Customary Use Declared within the Municipalities

1. The City of Flagler Beach and the Towns of Beverly Beach and Marineland have also enacted regulatory codes and/or implemented management plans to ensure the safety and enjoyment of the Dry Sand Beach for visitors.
2. The governing boards of the City of Flagler Beach and the Towns of Beverly Beach and Marineland acknowledge the public's right to Customary Use of the Dry Sand Beach within their respective jurisdictions and support the application of this Ordinance within their municipal boundaries.

E.) Authority to Adopt Customary Use Ordinance

1. Art. VIII, §1(f) of the Florida Constitution grants non-charter counties the power of self-government and authorizes the Board to enact ordinances not inconsistent with general or special law.
2. Section 125.01(1), *Florida Statutes*, provides the Board with the power to carry on county government consistent with law, and Section 125.01(3)(b), *Florida Statutes*, states that the provisions of that section shall be liberally construed in order to secure for counties the broad exercise of home rule powers.

3. Florida Chapter 2018-94 does not prohibit enactment of a customary use ordinance prior to July 1, 2018.
4. The Board conducted a Workshop on April 16, 2018 to hear, discuss, and consider the issues raised by this Ordinance.
5. The Board held duly noticed public hearings on May 7, 2018, May 21, 2018, June 4, 2018, and June 18, 2018, and approved this Ordinance.

F.) Legislative Intent

1. The Board finds as a legislative fact binding on the County government: that the beach, including the Dry Sand Beach, is a treasured asset of Flagler County, vital to quality of life for residents and visitors, the primary attraction of tourists to the County, and a critical component of the County's economic development; that since time immemorial, the public has enjoyed access to the Dry Sand Beach and has made recreational use of the Dry Sand Beach; that such use has been ancient, reasonable, without interruption, and free from dispute; and that because of this customary access and use, the public has the right of access to the Beach and a right to use the Beach for customary recreational purposes.
2. The Board further finds that it can engage in reasonable regulation of both the privately owned beachfront and the public's customary use of the Dry Sand Beach.
3. The Board has a significant and legitimate government interest in ensuring public access to, and Customary Use of, the Dry Sand Beach, and the provisions in this Ordinance are narrowly tailored to achieve that goal.
4. At the same time, the Board acknowledges that some areas of the Dry Sand Beach are privately owned and those landowners may make any use of their property subject to reasonable regulation and consistent with the Customary Use of the Dry Sand Beach by the public. It is not the intent of this Ordinance to affect in any way the title of the owner of land adjacent to the Atlantic Ocean, nor to impair the right of such owner to contest the existence of the customary right of the public to access and use any particular area of the privately owned beach.
5. The Board desires to balance all reasonable competing uses of the Beach.
6. The Board wishes to preserve the status quo of the open beaches of Flagler County and maintain the rural character of its beaches.

Section II. Code of Ordinances Amendment. Section 7-1 of the Flagler County Code of Ordinances is amended as follows (additions shown in underline, deletions shown as strikethrough):

Sec. 7-1. – ~~Penalty.~~ Violations of this chapter are punishable as provided in section 1-6. **Customary Use of the Beach.**

(a) For purposes of this Section, the term, "Dry Sand Beach," shall mean the entirety of the dry sandy (in some cases rocky) areas of the Atlantic Ocean beaches in Flagler County extending landward of the mean high water line to the easternmost seaward side of any sea wall, dune bluff, dune toe, rock revetment toe or any permanent dune vegetation.

(b) *Public Access and Use.*

(1) The public's longstanding customary use of the Dry Sand Beach for recreational purposes is hereby recognized and protected. The public, individually and collectively, subject to the provisions herein, shall have the right of personal ingress and egress to, from and along the Dry Sand Beach from public approaches, public dune crossovers or from the wet sand beach, and the right to make customary recreational use of the Dry Sand Beach.

(2) It is prohibited for any person to obstruct or hinder the right of the public, individually and collectively, to enter or leave the Dry Sand Beach by way of any public approach, public dune crossover or from the wet sand beach to use lawfully any part of the Dry Sand Beach for customary recreational purposes. It is further prohibited for any person to display any non-governmentally authorized warning, in whatever form, in an attempt to prohibit or hinder public access to, or use of, the Beach.

(c) *Limitations.*

(1) This Ordinance does not authorize the access and use of privately owned areas of the Dry Sand Beach after 10 p.m. and before sunrise, nor does it authorize any commercial use of the Dry Sand Beach adjoining residential areas at any time. Any activities or uses prohibited in public beachfront parks are also prohibited in the Dry Sand Beach.

(2) It shall be unlawful for any person to walk upon or otherwise traverse the dune areas of the Dry Sand Beach except when utilizing designated crossovers.

(3) This Ordinance authorizes only the following activities by the public on the privately owned Dry Sand Beach: swimming, fishing, hiking, jogging, bicycling, picnicking, shelling, surfing, sunbathing, kiting and building sand castles.

(d) Exceptions.

(1) This Section shall not apply to individuals authorized by Federal, State, or local law to engage in activities otherwise prohibited herein, including, but not limited to, Sea Turtle Patrol, other conservation entities when governmentally authorized, emergency responders, and those engaged in permitted dune restoration and flood control.

(2) Notwithstanding anything in this Section to the contrary, the County Administrator, the Emergency Management Chief, the Sheriff, or their designees shall have the authority to temporarily close the entire beach or any portion thereof for use by the public during storms or other emergency situations.

(e) Violations of the provisions herein shall be punishable as provided for in Chapter 9 of this Code, provided however, that imposition of a penalty does not prevent the pursuit and issuance of injunctive relief.

Section III. Codification and Scrivener Errors. Section 2 of this Ordinance shall be included and incorporated into the Code of Ordinances of Flagler County, Florida, as additions and amendments thereto, and shall be appropriately renumbered or re-lettered to conform to the uniform numbering system of the code. Scrivener's errors may be corrected as deemed necessary.

Section IV. Judicial Review and Severability.

A.) This Ordinance is subject to judicial review in the Seventh Judicial Circuit in and for Flagler County. In any proceeding in which a landowner or citizen challenges this Ordinance, the County may raise customary use as an affirmative defense.

B.) If any section, sentence, clause, or phrase of this Ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

Section V. Effective Date. Pursuant to Section 125.66, Florida Statutes, this Ordinance shall take effect upon filing with the Secretary of State.

PASSED AND ADOPTED by the Flagler County Board of County Commissioners this 18th day of June 2018.

**FLAGLER COUNTY BOARD OF
COUNTY COMMISSIONERS**

Gregory L. Hansen, Chair

ATTEST:

APPROVED AS TO FORM:

Tom Bexley, Clerk of the Circuit
Court and Comptroller

Al Hadeed, County Attorney

NOTICE OF ADOPTION
OF AN ORDINANCE

Pursuant to Chapter 125, Florida Statutes, the Flagler County Board of County Commissioners hereby provide notice of consideration and possible adoption of an Ordinance titled similar to:

AN ORDINANCE OF THE FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS RECOGNIZING THE RIGHT OF CUSTOMARY USE OF THE BEACH BY THE PUBLIC SUBJECT TO LIMITATIONS; PROVIDING FOR FINDINGS; PROVIDING FOR CODIFICATION AND SCRIVENER ERRORS; PROVIDING FOR JUDICIAL REVIEW AND SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

Public hearing on the above-captioned matter will be held as follows:

FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS - Fourth reading and adoption - June 18, 2018 at 5:30 p.m. or as soon thereafter as possible in the Flagler County Government Services Building, Board Chambers, 1769 E. Moody Boulevard, Building 2, Bunnell, Florida.

All interested persons are urged to attend these public hearings and be heard. Anyone wishing to express their opinion may attend, telephone 386-313-4001 or write to: Flagler County Administration, 1769 E. Moody Blvd, Building 2, Bunnell, FL 32110 or email to publicbeachaccess@flaglercounty.org. Copies of the proposal, supporting data and analysis, staff reports and other pertinent information are available for review at the Flagler County Administration, 1769 East Moody Boulevard, Bldg. 2, Bunnell, Florida 32110.

IF A PERSON DECIDES TO APPEAL ANY DECISION MADE BY THE BOARD OF COUNTY COMMISSIONERS WITH RESPECT TO ANY MATTER CONSIDERED AT THE MEETING, A RECORD OF THE PROCEEDINGS MAY BE NEEDED AND, FOR SUCH PURPOSES, THE PERSON MAY NEED TO ENSURE THAT A VERBATIM RECORD IS MADE, WHICH RECORD INCLUDES THE TESTIMONY AND EVIDENCE UPON WHICH APPEAL IS TO BE BASED. IN ACCORDANCE WITH THE AMERICANS WITH DISABILITIES ACT, PERSONS NEEDING ASSISTANCE TO PARTICIPATE IN ANY OF THESE PROCEEDINGS SHOULD CONTACT COUNTY ADMINISTRATION AT LEAST 48 HOURS PRIOR TO THE MEETING.

NT2291993 June 6, 2018 lt

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

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2018 Legislature

351 the plaintiff or the defendant bars any action of trespass for
 352 injury to the real property or ejectment between the same
 353 parties respecting the same real property. A judgment is not
 354 conclusive as to ~~No verdict is conclusive of~~ the facts therein
 355 ~~found~~ in any future action for ~~of~~ trespass, ejectment, or quiet
 356 title. A judgment rendered either for the plaintiff or the
 357 defendant pursuant to this chapter may be superseded, in whole
 358 or in part, by a subsequent judgment in an action for trespass
 359 for injury to the real property, ejectment, or quiet title
 360 involving the same parties with respect to the same real
 361 property or ejectment.

362 Section 10. Section 163.035, Florida Statutes, is created
 363 to read:

364 163.035 Establishment of recreational customary use.—

365 (1) DEFINITION.—The term "governmental entity" includes an
 366 agency of the state, a regional or a local government created by
 367 the State Constitution or by general or special act, any county
 368 or municipality, or any other entity that independently
 369 exercises governmental authority.

370 (2) ORDINANCES AND RULES RELATING TO CUSTOMARY USE.—A
 371 governmental entity may not adopt or keep in effect an ordinance
 372 or rule that finds, determines, relies on, or is based upon
 373 customary use of any portion of a beach above the mean high-
 374 water line, as defined in s. 177.27, unless such ordinance or
 375 rule is based on a judicial declaration affirming recreational

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376 customary use on such beach.

377 (3) NOTICE OF INTENT TO AFFIRM RECREATION PUBLIC USE ON
 378 PRIVATE PROPERTY; JUDICIAL DETERMINATION.—A governmental entity
 379 that seeks to affirm the existence of a recreational customary
 380 use on private property must follow the procedures set forth in
 381 this subsection.

382 (a) Notice.—The governing board of a governmental entity
 383 must, at a public hearing, adopt a formal notice of intent to
 384 affirm the existence of a recreational customary use on private
 385 property. The notice of intent must specifically identify the
 386 following:

387 1. The specific parcels of property, or the specific
 388 portions thereof, upon which a customary use affirmation is
 389 sought;

390 2. The detailed, specific, and individual use or uses of
 391 the parcels of property to which a customary use affirmation is
 392 sought; and

393 3. Each source of evidence that the governmental entity
 394 would rely upon to prove a recreational customary use has been
 395 ancient, reasonable, without interruption, and free from
 396 dispute.

397
 398 The governmental entity must provide notice of the public
 399 hearing to the owner of each parcel of property subject to the
 400 notice of intent at the address reflected in the county property

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401 | appraiser's records no later than 30 days before the public
 402 | meeting. Such notice must be provided by certified mail with
 403 | return receipt requested, publication in a newspaper of general
 404 | circulation in the area where the parcels of property are
 405 | located, and posting on the governmental entity's website.

406 | (b) Judicial determination.-

407 | 1. Within 60 days after the adoption of the notice of
 408 | intent at the public hearing, the governmental entity must file
 409 | a Complaint for Declaration of Recreational Customary Use with
 410 | the circuit court in the county in which the properties subject
 411 | to the notice of intent are located. The governmental entity
 412 | must provide notice of the filing of the complaint to the owner
 413 | of each parcel of property subject to the complaint in the same
 414 | manner as is required for the notice of intent in paragraph (a).
 415 | The notice must allow the owner receiving the notice to
 416 | intervene in the proceeding within 45 days after receiving the
 417 | notice. The governmental entity must provide verification of the
 418 | service of the notice to the property owners required in this
 419 | paragraph to the court so that the court may establish a
 420 | schedule for the judicial proceedings.

421 | 2. All proceedings under this paragraph shall be de novo.
 422 | The court must determine whether the evidence presented
 423 | demonstrates that the recreational customary use for the use or
 424 | uses identified in the notice of intent have been ancient,
 425 | reasonable, without interruption, and free from dispute. There

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426 is no presumption regarding the existence of a recreational
427 customary use with respect to any parcel of property, and the
428 governmental entity has the burden of proof to show that a
429 recreational customary use exists. An owner of a parcel of
430 property that is subject to the complaint has the right to
431 intervene as a party defendant in such proceeding.

432 (4) APPLICABILITY.—This section does not apply to a
433 governmental entity with an ordinance or rule that was adopted
434 and in effect on or before January 1, 2016, and does not deprive
435 a governmental entity from raising customary use as an
436 affirmative defense in any proceeding challenging an ordinance
437 or rule adopted before July 1, 2018.

438 Section 11. Section 82.061, Florida Statutes, is repealed.

439 Section 12. Section 82.071, Florida Statutes, is repealed.

440 Section 13. Section 82.081, Florida Statutes, is repealed.

441 Section 14. This act shall take effect July 1, 2018.