

## MARCH 16, 2016 – SPECIAL WORKSHOP

The Board of County Commissioners, Walton County, held a Special Workshop on Wednesday, March 16, 2016 at 5:00 p.m. at the Emerald Coast Middle School in Santa Rosa Beach, Florida to discuss public access to the beach.

The following Board Members were present: Commissioner Sara Comander, Chairman; Commissioner Cecilia Jones, Vice-Chairman; Commissioner W. N. (Bill) Chapman; and Commissioner Cindy Meadows. Mr. Larry Jones, County Administrator, and Attorney Mark Davis, County Attorney, and Attorney Sidney Noyes, Assistant County Attorney, were also present. Attorney David Theriaque was present on behalf of Walton County.

Chairman Comander opened the meeting and announced Commissioner Imfeld was in Washington D.C. representing Walton County. She thanked the schoolboard for use of the facility.

Attorney David Theriaque, Law Firm of Theriaque and Spain, gave a power point presentation on Customary Use Doctrine. He began by stating everything seaward of the mean high water line is owned by the State. The dry sandy area lies between the mean high water line, landward, and the vegetation line. The Customary Use Doctrine (CUD) addresses whether individuals have a right to utilize the dry sandy area of the beaches for recreational uses. This portion is owned by the upland owner and not owned by the public. The CUD addresses whether there is a right for the public to use the sandy area and only addresses the use once you reach the dry sand and not how you get there. It does not address accesses. He explained the CUD was originated in Oregon. There were seven elements established by the Oregon Courts: The use of the dry sand area must be: 1. ancient; 2. exercised without interruption; 3. peaceable and free from dispute; 4. reasonable; 5. certain; 6. obligatory; and 7. not repugnant. Essentially, when a

custom is established on the beach, it's not a new right; it's recognition of traditional use that occurred prior to ownership of the property.

The CUD in Florida began by a decision of the Florida Supreme Court in a case referred to as *City of Daytona Beach v. Tona-Rama, Inc.* in 1974 with the following statement by the courts: "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" and "The beaches of Florida are of such a character as to use and potential development as to require separate consideration consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency-the traditional uses of land-but has 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." (*Tona-Roma* at 77). The following is a test set forth by the Supreme Court for establishing and recognizing customary use: "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." (*Tona-Roma* at 78). "This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself. . . . The rights of the owner of the dry sand area may be compared to the rights of a part-owner of a land-locked nonnavigable lake." (*Tona-Roma* at 78).

“The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.” (Tona-Rama at 78). The Supreme Court also stated the CUD does not create interest in the land itself and is not an easement. Florida further expanded the CUD in *Trepanier v. County of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007) as follows: “To establish a customary right, we do not suggest that the County must prove that cars, horses, or other modes of transportation have customarily traversed and parked on Appellants' specific parcels of property. Rather, we 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.” (Trepanier at 290). When showing customary use, the historic use does not need to be specific to the parcel at issue; instead, the use must be within the “general area” of the beach where the parcel is located. The following are additional States that recognize the Doctrine of Customary Use: Hawaii, Texas, Idaho, Rhode Island, and The Virgin Islands.

Attorney Theriaque presented the following information relating to the economic impacts of tourism: Tourism has a \$2.9 billion direct economic impact annually to Walton County; 19,500 jobs are directly related to tourism; \$202 million was spent on tourists' accommodations in June and July of 2015; south Walton County was the #1 Coastal Economy in Florida for tourism in June and July of 2015; and 3.2 million tourists visit south Walton County every year. By not allowing the public/tourists on the beaches it would bring substantial economic harm to the county.

In conclusion, Attorney Theriaque stated customary use is well recognized and established in Florida and other jurisdictions. Recognition of customary use is not a taking of private property. Customary use can be evidenced by eyewitness testimony, expert testimony, and aerial photographs of the general area of the beach. Attorney Theriaque represented Destin in the late 1990's and spoke about the evidentiary chain of information to determine if customary use exists.

Commissioner Meadows questioned if there were other doctrines that dictate the beaches are public. Attorney Theriaque said there are two other theories; one being adverse possession where one must determine that the public's use is adverse to the upland property owner and most cases fail. The second one is dedication which is more difficult.

Commissioner Meadows questioned if there was a Doctrine of Public Trust. Attorney Theriaque stated "Yes," but that is seaward of mean high water line, which is land owned by the State. He further stated New Jersey extended the Doctrine of Public Trust to include the dry sandy area for people to traverse; however, Florida has not addressed that.

Commissioner Jones asked for clarification that this is no taking of land, but only to say we recognize you own the beach, but we also recognize that customarily, in times back to the Indians, the beaches have been used. Attorney Theriaque stated that is precisely what is being said. He said the CUD does not take title. It establishes and recognizes the long standing tradition of customary use for recreational purposes.

Chairman Comander opened the floor for public comment.

Ms. Celeste Cobena stated she has been enjoying the beaches since the 1980's. In 2003 someone addressed the issues of customary use and felt it is time to move forward with some

regulations. She felt the commissioners need to take some courageous action and protect the beaches from the mean high water line to the toe of the dune.

Ms. Glenda Wood spoke about the courage of her grandparents who were pioneers of Walton County and asked the commissioners to have the same courage as her grandmother. People should not be intimidated when using the beach. She said customary use is for the public.

Ms. Dottie Culp stated she understands customary use, but felt the county should have a county owned gated access with a card swipe for people to enter, mainly for the Beach Commons Community. In addition, she felt something needs to be done to promote Tops'l Park.

Mr. Viou stated he has walked these beaches his entire 61 years. He thanked Attorney Theriaque for his presentation. He felt there is no question as to customary use and the no trespassing signs are hampering others. He asked the commissioners to not lose sight of the bigger picture.

Ms. Carol Geary stated she was for customary use and hopes the county will provide access for all the people. She also spoke about the number of people who will not be able to attend the meeting, but also favor customary use.

Ms. Linda Hildreth does not agree with everything Attorney Theriaque presented as truth and questioned why the State has not opened their beaches in front of the State Park. She also asked for definition of customary use for what the people from long ago used the beach for.

Mr. Emmett Hildreth stated that customary use is Socialism which is described as hostility toward private property rights. He asked if the public wanted to use the beach are they going to pay taxes, if not they shouldn't be allowed to use it. Tourism is important, but they don't pay taxes.

Mr. Ed Godwin stated he purchased property in Walton County in the 60's and it was owned by the US government prior. He disagrees with customary use. He read a portion of the Florida Statute and stated the county is taking the trespass protection rights away. He has no problem with people walking along the waterline. He stated beach sand landward of the mean high water line is private.

Mr. Tom McKee stated Attorney Theriaque is correct with the Customary Use Doctrine. He previously addressed the TDC Board regarding this issue requesting they bring it to the Board's attention in 2009. He has researched this issue with other attorneys and identified 156 witnesses who could testify to customary use of beaches being: walking, swimming, sunbathing, fishing, playing games, which goes back to the Indians. Customary use does not include disturbances. He asked the Board to rule in favor of customary use.

Mr. Butela stated based on newspapers going back over 100 years there has been uninterrupted customary use of the beaches. He requested the Board adopt an ordinance establishing customary use.

Mr. David Kramer stated he has been a beach goer since 1984. He stated the natural law pervades. This is an easement right issue and that is all the people are asking for. He felt there are two directions that could be taken. One would be to adopt an ordinance and change the LDC which would result in a Burt Harris taking which would be costly and would be imminent domain, or a slow taking. He spoke about soliciting the beach front owners giving them an opportunity to donate their right of easement. A second alternative would be to send a letter of threat of imminent domain allowing owners who are unwilling to donate their easement to take a 1033 tax deferred exchange on money. It would be important to give fair value. A third option would be immanent domain directly.

Mr. Gary Drake stated this issue is about respect of owner's quiet use of their private property. Customary use is not people creating a disturbance. He questioned the liability issue when someone gets hurt on private property.

Ms. Jacquie Markel agreed this is about respect for citizens of Walton County for access to the beaches for customary use. The activities on beaches are governed by ordinance and it should be looked at from an enforcement standpoint. She commented on the property ownership changes through the years and questioned if the land being taken is available to the owners who are taking it. She is in favor of customary use but felt there needs to be a multi-pronged approach. She also felt there should no longer be any abandonment of property or easements on the beaches. She requested Legal staff verify the history of transfer of titles to see if they were legal transfers.

Mr. Gary Fleming stated respect is the key. Rights come with obligations and felt these issues will most likely have to be litigated to be solved. Respect rights and achievements of property owners and also those who do not own property.

Mr. Robert Shelton, a Property Manager, stated his family has never been denied right to traverse the beach. He questioned what restrictions will be set. Mr. Shelton stated he worked with Mr. Ronnie Bell and Mr. Brad Pickle to establish the ECL Line and they promised every single property owner they would never have a negative impact on them. He asked the commissioners to not do anything that will impact our tourism or economy.

Ms. Karen Hart stated six generations of her family has been in Walton County. The beaches are the county's most valuable asset. She asked the commissioners to take whatever action is necessary to keep the beaches public. She commented on properties in her neighborhood of Old Seagrove that show ownership to the water despite the plat in public

records showing “beach for public use”. She questioned her right is as an inland property owner and the rights of tourists and commercial activity, stating clarification is needed. She requested more accesses be developed and not minimizing public beach. She asked the commissioners to fight to keep them publicly accessible in line with historical customary use.

Mr. Michael Strickland spoke in favor of customary use. In reading the town newspaper from 1915 there has been access for over 100 years with no restrictions. He spoke about his family who came to this area in 1921. Having public beach access has been a health benefit to his family.

Mr. Jimmy Kuhn, a member of the Emerald Coast Chapter of The Surfrider Foundation, spoke about their vision to keep the beaches open to everyone. They have a legal department who is eager to support the county in an effort to provide legislation for beach related issues. He offered three suggestions: 1) he urged the county to enforce obstructions in the Beach Ordinance; 2) step in and intervene to protect the public beach access use when threatened by beach front property owners; and 3) urge the county to pass a Customary Use Ordinance for all 26 miles of the beach from the base of the dunes to the Gulf of Mexico. He asked to keep the beaches public either by acquisition, legislation, enforcement, or even litigation. The Florida Supreme Court stated, “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.”

Mr. Richard Bryan stated he is thankful for customary use and the doctrine is there. However times have changed and that needs to be taken into consideration to protect property owners who are sharing their beach front. He suggested giving them a tax exempt for sharing.



Mr. Matthew Jones stated he is a native of Florida and has used the beaches for years. He stated the results could be catastrophic if not protected.

Mr. Paul Casarona stated he has vacationed in Walton County since 1983 and would not have invested so much if there had not been public access. People who do not own waterfront also need access.

Mr. Richard Butela stated there is considerable material in newspapers for over 100 years and felt there is no basis for restrictions on the use of beaches. He felt clarification of customary use of beaches is needed. He asked the Board be more proactive in protecting all beach accesses including those not dedicated to public use. He stated some people are changing their deeds and this issue needs to be investigated. He asked the county to purchase as much beach front property as possible and to remove all signs and fences that violate the public's use of the beach.

Mr. Rick Everitt stated he has been visiting the beaches as long as he can remember and there has always been a need for public beaches. He commended the county for their planning.

The commissioners recessed briefly at 6:25 p.m. and reconvened at 6:35 p.m.

Mr. David Ravschkolb spoke about the economic impacts which are self-evident. He suggested the County Commissioners work with the TDC to develop a uniform method of tracking parking spaces at each beach access and signage to limit additional vehicles from parking at private property above the available spaces. He felt the public should be ensured they will always have access. He also suggested working with the TDC to buy beachfront properties and acquire more accesses. Thirdly, define bad behavior to make it easier for the Sheriff.

Mr. Bruce Anderson, Okaloosa County resident and local attorney, stated he has spent much time on the beaches. Mr. Anderson stated he has assisted homeowners and associations regarding this issue relating to the impacts on homeowners. He stated there is a failure of

Sheriff's Office to enforce the trespass laws. He felt this Board is looking at taking property and overlooking the rights of landowners. His clients will pursue litigation.

Ms. Yvonne Parham asked the commissioners to not take the beaches away from the people and make them accessible.

Ms. Billie Jo Reifschneider stated she was told they have a deeded access at the Beach Highlands access. Beaches are a gift from God and should be accessible to everyone. Disorderly conduct should not be allowed.

Mr. Kent Safriet, Hopping Green & Sams, Tallahassee, stated he was present on behalf of multiple residents. Mr. Safriet felt Mr. Theriaque's information was presented as an advocate for the county and did not give both pros and cons to provide all of the necessary information. He spoke regarding the magnitude of a lawsuit. Mr. Safriet recommended obtaining independent neutral advice in order to do the right thing for taxpayers.

Ms. Lynn Nesmith read the definition of a Democracy. She spoke about property being fenced off, concrete markers in the lake's outflow, no trespassing signs, ropes, poles, markers which all create a dangerous situation. Ms. Nesmith stated customary use is important.

Mr. Garner Chandler felt customary use has been established for over 100 years. If customary use is removed it will devastate tourism and real estate values will plummet. He felt the Sheriff is wasting valuable resources on trespassing issues and further commented that fences need to be removed.

Ms. Anita Page stated customary use is an existing right. However, the existing right of customary use needs to be codified for peaceful use of the beach. Codification, in conjunction with the Beach Activities Ordinance, is needed to determine customary uses, determine inappropriate uses. People need to be respectful of others on both sides.

Mr. Eric Johnson, resident and beach vendor, stated he contributes to jobs and taxes, and asked the commissioners to keep the vendors in mind who provide services to the people.

Ms. Amanda Schuette spoke about the damage to the beaches after the oil spill and the economic suicide of not retaining customary use of the beaches. She stated she is in full support of the county should they need to pursue this issue in court.

Ms. Brenda Rees stated she is a native of Walton County and gave a detailed history of her heritage in Walton County.

Ms. Lisa Boushy spoke about the Beach Highlands court case and stated at no time did they seek to close the dedicated accesses to the beach. She felt this conflict is a result of the TDC's intentions of bringing in five million people over the next five years. She asked that customary use be defined.

Mr. Terry Bradley, a retired teacher, stated beaches are important and he has been coming here since 1960. He stated if people own beach front property that does not allow them to stop others. He stated commissioners are the voice of the people and it would be a huge disservice to put the pleasure of few in front of many and asked not to close the beaches.

Mr. Bill Hackmeyer said to put the rights of the public over the rights of private property owners is wrong. He spoke about Attorney General Pam Bondi's opinion on public beaches being used continuously and without interruption, however, he felt the public's use has been interrupted for 25 years. He stated he is against public beaches.

Mr. Bob Dobes said there is confusion on quiet titles and quit claim deeds. He stated if someone makes a claim and it was not previously their property he felt the county should take it back.

Ms. Dawn Currey spoke about the confusion of public vs. private. Public use of private land makes owners feel something is being taken from them. She implored the commissioners to make public beaches accessible to the public.

Ms. Betty Cork felt all beaches should be open and accessible to the public.

Ms. Joan Kennet stated she likes the quiet beach and wants it to remain safe. She asked the commissioners to look into opening a venue at Tops'l or Ed Walline for public use. Small neighborhoods cannot take the amount of traffic and tourists that are coming.

Ms. Sharon Higgins stated she has never tried to keep anyone from enjoying the beach. She spoke about liability and questioned responsibility when someone is injured on her property.

Ms. Nancy Meeha stated her family has owned their property for over 30 years. There used to be a public access and it has now disappeared. There are parking issues and a lack of infrastructure and accesses to accommodate everyone.

Mr. Chandler Williams voiced concerns over the environmental impacts and asked for an amendment that does not allow fencing, ropes or obstructions for animals and marine life. He stated beach cleanups now consist of cleaning their yards from vacationers. He said there are cultural and heritage rights that should also be considered.

Mr. David Hewins said there has been a pattern of gradual encroachment and felt private and public property rights both should exist.

Ms. Jennifer Preston felt her rights have been stripped to peacefully enjoy the beaches and asked the people to do their best to keep the historical precedence to be able to use the beaches.

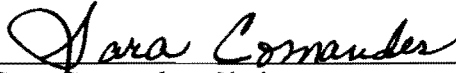
Chairman Comander thanked everyone for being respectful and voiced appreciation to staff for their work.

Commissioner Meadows questioned Attorney Theriaque if beaches are of customary use do they belong to the State. Attorney Theriaque said the State does not own the beach.

Commissioner Chapman questioned Attorney Theriaque regarding the liability issues for private property owners. Attorney Theriaque stated Tona Rama never addressed Liability Law. Under Regulatory Law a private property owner who showed gross negligence would be responsible; otherwise there would not be any exposure to the property owner. Commissioner Chapman said we need to remain cognizant of any obstructions that interfere with wildlife, turtles or the beach mouse.

Commissioner Jones believes in public beaches and the public's right to access those beaches. She commented on the importance of moving forward on this issue and stated it is time to make a decision. She believes in the residents of Walton County and private property owners. She asked staff to work with Attorney Theriaque to draft a plan of action to include fences and signs. Staff will bring back information next Tuesday for discussion.

There being no further business to discuss, the meeting was adjourned.

  
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Sara Comander, Chairman

  
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Alex Alford, Clerk of Courts and County Comptroller