

May 7, 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 2018-094, 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 property, 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 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 accordingly must act to secure the right of the public's customary use of the beach for recreational purposes.

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.*
3. 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.

4. The Coastal Management Element of the Flagler County Comprehensive Plan includes objectives to ensure beach access and the overall quality of the beach environment.
5. The United States District Court for the Northern District recently held 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.
6. 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.
7. 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. 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.
8. 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 submitted testimony, photographs, records, and statements demonstrating longstanding, continuous Customary Use of the Dry Sand Beach, which statements 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 and set-aside areas staked as sea turtle nesting sites. 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 beach 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, identified in many of the early plats of the Dry Sand Beach area, was a public right of way. The County has not abandoned the road 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 inadvertent exception, 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 permit 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 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 additional 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 and May 21, 2018, and June 4, 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 is 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.
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.

(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 only authorizes the following activities by the public on the privately owned Dry Sand Beach: swimming, fishing, hiking, bicycling, picnicking, shelling, surfing, sunbathing, kiting and building sand castles and other such sand objects.

(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 4th 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