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Florida Beach Access: Nothing but Wet Sand?

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FLORIDA BEACH ACCESS: NOTHING BUT WET SAND?

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Table of Contents

I. Introduction 167
II. Beach Access in Florida 168
A. Prescription 172
B. Customary Use 175
III. A Modern Day Example: Destin, Florida 186
IV. Recommendation and Conclusion 189
Appendix A: Destin Draft Ordinance 191

"No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches."[1]

I. INTRODUCTION

In *City of Daytona Beach v. Tona-Rama, Inc.*,[2] the Florida Supreme Court recognized the doctrine of custom[3] as a means by which the public can establish rights to utilize the dry sand areas of Florida beaches for traditional recreational uses.[4] Although twenty-five years have passed since the Supreme Court's decision, the issue of adequately preserving public beach access in Florida persists.[5] In particular, Florida cities continue to struggle with balancing the tension between the rights of private beachfront landowners to exclude persons from their property and the rights of the public to utilize the dry sand areas of Florida beaches.[6]

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1. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974).

2. 294 So. 2d 73 (Fla. 1974).

3. Also referred to within this Comment as either the doctrine of customary rights or the doctrine of customary use.

4. *See Tona-Rama, Inc.*, 294 So. 2d at 78.

5. *See generally* FLORIDA GOVERNOR'S OCEAN COMMITTEE, LOOKING SEAWARD: DEVELOPMENT OF A STATE OCEAN POLICY FOR FLORIDA, ch. XI, 17-30 (1997) (discussing the issue of beach access in Florida) [hereinafter FGOC].

6. *See* John Ledbetter, *Custom Dictates Use of Dry Sand for Public Use*, DESTIN LOG, June 5, 1999, at A1 (discussing how the City of Destin City Council may protect the public's right to utilize the dry sand areas of Destin beaches); *Destin Wades into Private Beach Dispute*, TALL. DEM., June 10, 1999, at C5 (discussing recent events in Destin, Florida, concerning public beach access) [hereinafter *Private Beach Dispute*].

Public beach access is especially important in a state such as Florida that has approximately 1,200 miles of general coastline, and more than 2,200 miles of tidal shoreline.[7] An estimated eighty-percent of Florida's population lives near the coast, illustrating the significance and beauty of Florida's beaches.[8] In addition, more than forty-one million people visit Florida annually.[9] Indeed, while tourists visiting Florida have the opportunity to experience a multitude of diverse attractions, Florida's beaches remain one of the most popular attractions.[10]

To save public access to this critical resource, this Comment argues that in the absence of any state legislation adequately preserving public beach access, local governments should adopt ordinances protecting the public's customary right to utilize the dry sand areas of their beaches.

II. BEACH ACCESS IN FLORIDA

The Florida State Constitution states, in pertinent part, that:

> [t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.[11]

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7. *See* C. Wythe Cooke, *Size & Structure of Florida*, Florida Geological Society, Bulletin No. 7, *reprinted in* THE FLORIDA HANDBOOK: 1997-1998 541, 542 (Allen Morris & Joan Perry Morris, eds., 26th ed. 1997). General coastline is the measurement of the general outline of Florida's seacoast, whereas, tidal shoreline includes the measurement of bays, sounds, and other water bodies to where these bodies narrow to a width of three statute miles. *Id. See also* BUREAU OF ECON. AND BUS. RESEARCH COLLEGE OF BUS. ADMIN., FLORIDA STATISTICAL ABSTRACT 1996, Table 8.01 (Univ. of Fla., 13th ed. 1996) (noting that Florida has approximately 1,350 statute miles of general coastline).

8. *See* Kenneth D. Haddad, *Florida's Marine Resources*, *in* THE FLORIDA HANDBOOK: 1997-1998 518, 518 (Allen Morris & Joan Perry Morris, eds., 26th ed. 1997).

9. *See* THE FLORIDA HANDBOOK: 1997-1998 591 (Allen Morris & Joan Perry Morris, eds., 26th ed. 1997). (based on 1995 statistics).

10. *See* FGOC, *supra* note 5, at XI-18. "Figures on the number of beach visitors and the number of jobs and amount of revenue created is no longer generated at the State level. However, exit polls rate beaches as third in Florida's attraction after 'shopping and restaurants' and 'rest and relaxation.'" *Id.* at 18 n.17.

11. FLA. CONST. art. X, § 11.

Thus, like most states, Florida recognizes the mean high water line as the boundary between public trust land and private property.[12] Florida law also provides that a policy of the State Comprehensive Plan shall be to "[e]nsure the public's right to reasonable access to beaches."[13] While this provision does not mandate public easements in the dry sand areas of beaches, it does represent legislative acknowledgement of the significance of public beach access in Florida.

Additional statutes provide varying degrees of mandated public beach access in Florida.[14] For example, perpendicular public beach access is a requirement for construction within a coastal building zone "[w]here the public has established an accessway through private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means."[15] If the developer impedes on this accessway, he or she must provide a comparable alternative.[16]

Likewise, section 161.053, *Florida Statutes*, which deals with the regulation of construction control setback lines, contains language that promotes the protection of public beach access.[17] In particular, section 161.053(1)(a) states that:

> the beaches in this state and the coastal barrier dunes adjacent to such beaches . . . represent one of the most valuable natural resources of Florida and . . . it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures,

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12. *See id.*; *see also* FLA. STAT. § 161.051 (1999) (stating that the state holds title to lands below the mean high-water mark); Karen Oehme, *Judicial Expansion of the Public Trust Doctrine: Creating a Right of Public Access to Florida's Beaches*, 3 J. LAND USE & ENVTL. L. 75, 76 (1987) (providing historical background of the public trust doctrine). For a more detailed discussion of the public's right to utilize the foreshore, see Luise Welby, Comment, *Public Access to Private Beaches: A Tidal Necessity*, 6 UCLA J. ENVTL. L. & POL'Y 69, 71-75 (1986).

13. FLA. STAT. § 187.201(9)(b)2 (1999).

14. For a more in-depth discussion of Florida's beach access laws, see Shawn M. Willson, *Exacting Public Beach Access: The Viability of Permit Conditions and Florida's State Beach Access Laws After* Dolan v. City of Tigard, 12 J. LAND USE & ENVTL. L. 303, 305-08 (1997). *See also* Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida*, 24 STET. L. REV. 351 (1995) (discussing the impact and significance of the Beach and Shore Preservation Act).

15. FLA. STAT. § 161.55(6) (1999).

16. *See id.*

17. *See id.* § 161.053.

> endanger adjacent properties, or *interfere with public beach access.*[18]

Florida courts have also recognized the importance of Florida's beaches to the public. For example, in *White v. Hughes,*[19] the Florida Supreme Court stated that:

> [t]here is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. . . . The attraction of the ocean for mankind is as enduring as its own changelessness. *The people of Florida – a State blessed with probably the finest bathing beaches in the world – are no exception to the rule. . . . We love the oceans which surround our State. We, and our visitors too, enjoy bathing in their refreshing waters.*[20]

Recently, however, scholars have noted an increased tension between private property rights and public access to beaches. In particular, one commentator has remarked that:

> [p]rivate ownership and control of the dry sand and uplands threatens public enjoyment of beaches in two ways. First, private littoral owners can restrict the use of the dry-sand area. This part of the beach is essential to recreation. Without it the public is left only the wet-sand portion of the beach to support its normal beach activities . . . . Second, owners can isolate many beaches by denying public access across private uplands.[21]

In Florida, perhaps an augmented tension between private and public rights regarding adequate public beach access and the use of

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18. *Id.* § 161.053(1)(a) (emphasis added).
19. 190 So. 446 (Fla. 1939).
20. *Id.* at 448-49 (emphasis added).
21. Steve A. McKeon, Note, *Public Access to Beaches,* 22 STAN. L. REV. 564, 565-66 (1970).

the dry sand areas exists because the majority of Florida's beaches are privately owned.[22]

Scholars and legal practitioners have used several legal theories to address the lack of public beach access including eminent domain,[23] express or implied dedication,[24] prescription,[25] the public trust doctrine,[26] and custom.[27] Florida courts have recognized implied and express dedication as means to secure public rights in the dry sand areas for traditional recreational activities and foreshore access.[28]

Unfortunately, dedication has not proven to be effective in adequately providing the public with a right to utilize the dry sand areas of Florida beaches.[29] Dedication is ineffective for two reasons: first, because public use of the dedicated property is regarded as a license, revocable by the private landowner; and second, because dedication involves a time-consuming tract-by-tract process.[30] Thus, prescrip-

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22. According to the Florida Department of Natural Resources (currently the Florida Department of Environmental Protection), 77% of all beaches in Florida are privately owned. *See* Susan P. Stephens, *Access to the Shore: A Coast to Coast Problem*, 3 J. LAND USE & ENVTL. L. 94, 94 n.3 (1987) (citing Maloney et al., *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. FLA. L. REV. 853, 853 n.3 (1977)).

23. *See* McKeon, *supra* note 21, at 566-67 (discussing the prohibitive expense of acquiring public beach easements either by ordinary sale or condemnation proceedings).

24. *See, e.g.*, Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970); Hollywood, Inc. v. Zinkil, 403 So. 2d 528 (Fla. 4th DCA 1981); City of Miami v. Eastern Realty Co., 202 So. 2d 760 (Fla. 3d DCA 1967).

25. *See, e.g.*, Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65 (Fla. 1975); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974).

26. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984). For an extended discussion of *Matthews*, see Charles M. Naselsky, Note, *Beach Access - The Public's Right to Cross and to Use Privately Owned Upper Beach Areas*, 15 SETON HALL L. REV. 344 (1985).

Florida courts and the State Legislature have not expanded the public trust doctrine to protect the public's right to use the dry sand areas of Florida beaches. *See generally* Oehme, *supra* note 12 (arguing for judicial expansion of the public trust doctrine in Florida in order to protect the public's right to use the dry sand).

27. *See, e.g.*, United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); *In re* Ashford, 440 P.2d 76 (Haw. 1968); State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969); Matcha v. Mattox, 711 S.W.2d 95 (Tx. App. 1986).

28. *See* Hollywood, Inc. v. Zinkil, 403 So. 2d 528 (Fla. 4th DCA 1981); City of Miami v. Eastern Realty Co., 202 So. 2d 760 (Fla. 3d DCA 1967), *cert. denied*, 210 So. 2d 866 (Fla. 1968).

29. *See* Oehme, *supra* note 12, at 87-88 (discussing dedication as a means to establish public beach access). *See also* W. Roderick Bowdoin, Comment, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 589-90 (1973) (discussing the short-comings of implied dedication for acquiring public beach access in Florida).

30. *See* Oehme, *supra* note 12, at 87-88.

tion and customary rights are the two primary ways to establish public beach access to Florida beaches.[31]

A. Prescription

In *Downing v. Bird*,[32] the Florida Supreme Court set forth the elements required to establish a prescriptive easement in Florida. According to *Downing*, to establish a prescriptive right a user must prove by clear, definite, accurate, and positive proof:

> (1) that the user has made a certain particular and actual use of lands owned by another, (2) that such use has been continuous and uninterrupted for the full prescriptive period of 20 years, (3) that during the whole prescribed period such use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use is imputed to the owner, (4) that such use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line, width and termini, (5) that during the whole prescribed period such use has been adverse to the owner; that is, (a) the use has been made without the permission of the owner and under some claim of right *other than permission from the owner*, (b) the use has been either exclusive of the owner or inconsistent with the rights of the owner of the land to its use and enjoyment and (c) the use has been such that, during the whole prescribed period, the owner had a cause of action against the user for the use being made.[33]

Furthermore, the court in *Downing* stated that "[a]cquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted."[34] Consequently, courts must resolve any doubts con-

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31. While eminent domain and public acquisition of easements are possible, the prohibitive expense of acquiring public beach access by such means makes them ineffective for most local governments. *See supra* note 23 and accompanying text.

32. 100 So. 2d 57 (Fla. 1958).

33. Crigger v. Florida Power Corp., 436 So. 2d 937, 944-45 (Fla. 5th DCA 1983) (summarizing *Downing*) (emphasis in original) (footnotes omitted).

34. *Downing*, 100 So. 2d at 65.

cerning the creation of a prescriptive right in favor of the private landowner.[35]

Moreover, it is well established in Florida law that a person cannot acquire a prescriptive easement where the use is by the express or implied permission or license of the private landowner.[36] Still, "[a]lthough there is a presumption that a use is permissive, that presumption is not conclusive. Rather, the courts should look to whether the use was beneficial to the actual owner, or was instead an interference with the owner's rights."[37]

Florida courts have, however, recognized that the public may establish a right to use the dry sand areas of beaches through prescription.[38] However, in *City of Miami Beach v. Undercliff Realty & Investment Co.*,[39] the court stated that "[t]he fact that the upland owners did not prevent or object to such use is not sufficient to show that the use was adverse or under claim of right."[40] Similarly, in *City of Miami Beach v. Miami Beach Improvement Co.*,[41] the court held that a prescriptive right to use the beach had not been established because "the public use of the beach was consistent with and not antagonistic to the ownership of the property."[42] Thus, while some courts have recognized a public prescriptive easement in beach land, Florida courts have consistently adhered to a strict adversity requirement. The courts' strict adherence to an adversity requirement has made satisfying the elements for a prescriptive easement difficult under Florida law.[43]

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35. *See id.*; *see also* Phelps v. Griffith, 629 So. 2d 304, 306 (Fla. 2d DCA 1993) ("All doubts as to the adverse character of a claimant's pattern of use must be resolved in favor of the lawful owner of the property.").

36. *See Crigger*, 436 So. 2d at 944-45 n.16. "That use with permission of the owner prevents acquisition of a prescriptive right has long been Florida law." *Id.*

37. *Phelps*, 629 So. 2d at 305-06 (citations omitted).

38. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974) (stating that "[i]t is possible for the public to acquire an easement in the beaches of the State by the finding of a prescriptive right to the beach land"); *see also* Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65, 69-70 (Fla. 1975) (noting that evidence of prescription satisfied adverse use and that trial court on remand would be well advised to consider facts in light of *Tona-Rama*).

39. 21 So. 2d 783 (Fla. 1945).

40. *Id.* at 786.

41. 14 So. 2d 172 (Fla. 1943).

42. *Id.* at 178.

43. Several roadway and trail cases exemplify the difficulty in establishing a claim by prescription in Florida due to the strict adversity requirement. *See, e.g.*, Burgess v. Burd, 654 So. 2d 1028, 1028 (Fla. 1st DCA 1995) (holding that the record failed to show that appellee's use of specific trails was adverse, thereby failing to prove a required element of a prescriptive easement); Phelps v. Griffith, 629 So. 2d 304, 306 (Fla. 2d DCA 1993) (finding no prescriptive easement since implicit evidence of consent pointed to a permissive, rather than adverse, use of the road); Osceola County v. Castelli, 435 So. 2d 417, 418 (Fla. 5th DCA 1983) (holding that

In *City of Daytona Beach v. Tona-Rama, Inc.*,[44] the Florida Supreme Court specifically addressed whether the public had acquired a prescriptive easement in a certain dry sand area of Daytona Beach. The plaintiffs in the case sought declaratory and injunctive relief to prevent the construction of an observation tower on the beach's dry sand area.[45] The observation tower was to complement a pre-existing public pier located on the subject property.[46] The tower's circular foundation was to be seventeen feet in diameter, while the diameter of the actual tower was to be four feet.[47] According to the court, the tower was to occupy only 225-230 square feet of the 15,300 square feet that the defendant actually owned.[48] By the time the Florida Supreme Court heard the case, the City of Daytona Beach had already issued the building permit, and the property owner had completed construction of the $125,000 tower.[49]

In attempting to block construction of the observation tower, the plaintiffs alleged, in part, that through continuous use for more than twenty-years, the public had acquired a prescriptive right to use the dry sand area that the observation tower would occupy.[50] In addressing this issue, the court noted that:

> [t]he 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 consequence of title. The sandy portion of the beaches are [sic] 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.[51]

Furthermore, the court recognized:

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county failed to prove public's use of road was adverse under claim of right to establish a prescriptive easement).

44. 294 So. 2d 73 (Fla. 1974).
45. *See id.* at 74.
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *Id.* at 77.

> the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. *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.[52]

Nevertheless, the court held, based on the facts of the case, that the use of the dry sand area was "not against, but was in furtherance of, the interest of the defendant owner. Such use was not injurious to the owner and there was no invasion of the owner's right to the property."[53] Furthermore, the court proclaimed that the public cannot obtain an easement by prescription unless a landowner loses something.[54] Accordingly, the court reversed the district court and held that the public had not established a prescriptive easement.[55]

B. Customary Use

The doctrine of custom[56] first arose in medieval England where, by immemorial custom, citizens would acquire the right to use land in specific localities.[57] The leading legal treatise discussing the doctrine of custom is Sir William Blackstone's *Commentaries on the Laws of England*.[58] Blackstone specifically identified seven requirements for every custom:

> (1) It must have been used so long, that the memory of man runneth not to the contrary.

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52. *Id.* at 75 (emphasis added).

53. *Id.* at 77.

54. *See id.* (citing J. C. Vereen & Sons, Inc. v. Houser, 167 So. 45 (Fla. 1936)). This language is another example of how Florida courts strictly adhere to the adversity requirement when deciding whether a prescriptive easement has been established.

55. *See id.* at 78.

56. "Custom" has been defined as a "usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates." BLACK'S LAW DICTIONARY 385 (6th ed. 1990).

57. *See* Bowdoin, *supra* note 29, at 591; *see also* McKeon, *supra* note 21, at 582-83.

58. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, (Bernard C. Gavit, ed. Washington Law Book Co. 1941) (1892). For outstanding discussions regarding the history of custom in England and its recent resurgence in the United States, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) and Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

> (2) It must have been continued. There must have been no interruption of the right, though there may have been of the possession.
>
> (3) It must have been peaceable and acquiesced in.
>
> (4) It must be reasonable, or at least no good reason can be assigned against it.
>
> (5) It ought to be certain.
>
> (6) It ought to be compulsory, although originally established by consent. It ought to be left to the option of every man, whether he will use it or not.
>
> (7) Customs must be consistent with each other, and must be construed strictly and submit to the king's prerogative.[59]

Historically, however, the doctrine of custom has never been widely accepted in American law.[60] Despite historical reluctance to apply the doctrine, several courts have recently utilized the doctrine of custom to establish public beach access.[61]

1. Oregon

The Oregon case of *State ex rel. Thornton v. Hay*,[62] is the leading case applying the doctrine of custom to establish public beach access.[63] In *Thornton*, owners of a tourist facility at Cannon Beach appealed an order enjoining them from constructing fences or other

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59. BLACKSTONE, *supra* note 58, at 43-44.

60. *See* McKeon, *supra* note 21, at 583-84 (discussing early American precedent applying the doctrine of custom and, for the most part, the rejection of the doctrine in early American case law). The primary argument used for the rejection of the doctrine of custom in early American law was that no custom in the United States has lasted long enough to satisfy the time immemorial requirement. *See id.* *See also* Bederman, *supra* note 58, at 1398-1407 (discussing early American treatment of customary rights).

61. *See generally* Bederman, *supra* note 58, at 1408-34 (discussing in depth the recent rebirth of the doctrine of customary rights and its application as a means to establish public beach access).

62. 462 P.2d 671 (Or. 1969).

63. For an excellent discussion of custom and its application in Oregon property law, see Lew E. Delo, Comment, *The English Doctrine of Custom in Oregon Property Law:* State *ex rel.* Thornton v. Hay, 4 ENVTL. L. 383 (1974).

improvements in the dry sand area between the elevation line and the mean high-tide line.[64] The issue was whether the State had the authority to prevent the landowners from fencing in the dry sand area included within the legal description of their property.[65] The State asserted two arguments: first, that the landowners' record title to the disputed area was encumbered by a superior right in the public to use the land for recreational purposes; and alternatively, that if the disputed area was not encumbered by the asserted public easement, then the State had the power under applicable State zoning regulations to prevent construction of the fences.[66]

In addressing the facts, the Oregon Supreme Court noted that "[t]he dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history."[67] Moreover, "from the time of the earliest settlement to the present day, the general public has assumed that that dry-sand area was a part of the public beach. . . ."[68] The *Thornton* court also noted that state and local officials had policed the dry sand areas in Cannon Beach, and that local municipal sanitary crews had worked to keep the area free from litter.[69] Despite the court's conclusion that the requirements for a prescriptive easement were met, the court *sua sponte* applied the doctrine of custom.[70]

In particular, the Oregon Supreme Court stated:

> The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.
>
> The other reason which commends the doctrine of custom over that of prescription as the principal basis

64. *See Thornton*, 462 P.2d at 672.
65. *See id.*
66. *See id.*
67. *Id.* at 673.
68. *Id.*
69. *See id.*
70. *See id.* at 676.

> for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has long been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.[71]

Paraphrasing the elements required to establish a custom according to Blackstone, the court recognized a customary use to be (1) ancient, (2) exercised without interruption, (3) peaceable and free from dispute, (4) reasonable, (5) certain, (6) obligatory, and (7) not repugnant.[72] In addition to finding that the seven requirements were met by the facts presented, the court added that "the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed."[73] Moreover, the court noted that the rule of the decision, based upon custom, "takes from no man anything which he has had a legitimate reason to regard as exclusively his."[74] By resting its decision on custom, several commentators have suggested that the court "breathed life into what had been for practical purposes a dead doctrine" since "[c]ustom never had any wide adherence in the United States."[75]

Several years later, the Oregon Supreme Court clarified *Thornton* in *McDonald v. Halvorson*.[76] In *McDonald*, the court addressed whether an inland cove was the same as the Pacific Coast for purposes of applying the doctrine of custom as enunciated in *Thornton*.[77] After a lengthy discussion of the facts and the appellate court's de-

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71. *Id.* at 676-77. The language used by the court regarding the uniform application of the custom doctrine from the state's northern to southern border, and its application to only the Pacific coast, would be the subject of subsequent litigation. *See infra* notes 76-80 and accompanying text.

72. *See Thornton*, 462 P.2d at 677.

73. *Id.* at 678.

74. *Id.* This language would result in additional litigation regarding whether the Oregon Supreme Court's recognition and application of customary use amounted to a taking. *See infra* notes 81-89 and accompanying text.

75. McKeon, *supra* note 21, at 583. *See also* Steven W. Bender, *Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches*, 77 OR. L. REV. 913, 913-14 (1998) (noting that "Oregon is credited with, and sometimes criticized for, resuscitating the custom doctrine as applied to beach rights"); Bederman, *supra* note 58, at 1417 ("Oregon is generally credited with resuscitating the doctrine of customary easements as applied to public rights of access to the beach.").

76. 780 P.2d 714 (Or. 1989).

77. *See id.* at 714-15.

cision, the Oregon Supreme Court held that "the record persuades us that Little Whale Cove is not a part of the ocean and, therefore, the narrow beach east of it is not a part of the 'dry-sand area along the Pacific shore,'" which, under *Thornton*, the public has a customary right to use.[78] In addition, the court explained that *Thornton* applies only to those areas that "abut the ocean . . . if their public use has been consistent with the doctrine of custom as explained in [*Thornton*]."[79] Accordingly, the court reversed the appellate court's decision and held that *Thornton* was inapplicable to the inland cove.[80]

Subsequent to *McDonald*, the Oregon Supreme Court once again revisited *Thornton* in *Stevens v. City of Cannon Beach*.[81] In *Stevens*, beachfront property owners filed an inverse condemnation action against the City of Cannon Beach and the Oregon Department of Parks and Recreation.[82] The property owners alleged that the denial of their applications for permits to construct a seawall constituted an uncompensated taking under both the State and Federal Constitutions.[83] Relying on *Thornton*, the trial court granted the defendants' motion to dismiss and the appellate court affirmed.[84] On appeal, the Oregon Supreme Court confronted the issue of whether the rule announced in *Thornton* survived the United States Supreme Court's takings analysis established in *Lucas v. South Carolina Coastal Council*.[85] Drawing analogies between the facts presented in the present case and *Thornton*, the court summarized the legal sig-

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78. *Id.* at 723.

79. *Id.* at 724.

80. *See id.* For a detailed discussion of *McDonald*, see Jo Anne C. Long, Note, McDonald v. Halvorson: *Oregon's Beach Access Law Revisited*, 20 ENVTL. L. 1001 (1990).

81. 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

82. *See id.* at 450-51.

83. *See id.*

84. *See id.*

85. 505 U.S. 1003 (1992).

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers. . . .

Id. at 1027.

nificance of *Thornton* and *McDonald* in Oregon law.[86] Applying *Lucas* to the facts presented, the court concluded that "the common-law doctrine of custom as applied to Oregon's shores in *Thornton* is not 'newly legislated or decreed'; to the contrary, . . . it inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership."[87] Furthermore, the court stated "[w]hen plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the 'bundle of rights' that they acquired."[88] Accordingly, the Oregon Supreme Court held that neither the City's actions, nor the Department's rules, constituted a taking of the beachfront landowners' property.[89]

2. *Florida*

Although the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*,[90] reversed the lower court's finding of a public prescriptive easement in the dry sand,[91] it did recognize the doctrine of custom as a means to establish public beach access in Florida.[92] In particular, the court noted:

> 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

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86. *See Stevens*, 854 P.2d at 453-55.

87. *Id.* at 456 (quoting, in part, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992)).

88. *Id.*

89. *See id.* at 460. *But see* Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J. *dissenting*) ("To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the landgrab (if there is one) may run the entire length of the Oregon coast.").

Several commentators have written on the *Stevens* decision and its impact, if any, on takings law. *See, e.g.*, Melody F. Havey, Note, Stevens v. City of Cannon Beach: *Does Oregon's Doctrine of Custom Find a Way Around Lucas?*, 1 OCEAN & COASTAL L.J. 109 (1994); Peter C. Meier, Note, Stevens v. City of Cannon Beach: *Taking Takings into the Post-Lucas Era*, 22 ECOLOGY L.Q. 413 (1995).

90. 294 So. 2d 73 (Fla. 1974).

91 *See supra* notes 44-55 and accompanying text.

92. *See Tona-Rama, Inc.*, 294 So. 2d at 78.

> of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.
>
> 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. Although this right of use cannot be revoked by the land owner, it is subject to appropriate governmental regulation and may be abandoned by the public. . . .[93]

Further, the court stated:

> [t]he 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.[94]

In recognizing the doctrine of custom, the court relied on decisions from Oregon and Hawaii.[95]

Shortly after *Tona-Rama,* the customary rights issue was once again raised in a Florida courtroom. In *Wymbs v. Arvida Corp.*,[96] the court addressed whether a class of persons had acquired public rights either under the doctrine of prescriptive use or custom to continue using a path, and sandy beach accessed by traversing through private property.[97] The court noted that "[t]he establishment of customary rights requires proof as to a longer period of time than prescriptive rights as the former requires proof of use from 'time immemorial' whereas the latter requires proof of use for twenty years."[98] Moreover, the court clearly summarized the requirements

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93. *Id.*

94. *Id.*

95. *See id.* (citing State *ex. rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969), *In re* Ashford, 440 P.2d 76 (Haw. 1968)). Several scholarly articles commented on the Florida Supreme Court's opinion in *Tona-Rama* shortly after it was decided. *See* Patricia Ireland, Comment, *Customary Use of Florida Beaches*, 29 U. MIAMI L. REV. 149 (1974); Comment, *Doctrine of Customary Rights – Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest*, 2 FLA. ST. U. L. REV. 806 (1974).

96. 48 Fla. Supp. 110 (Fla. 15th Cir.Ct. 1978).

97. *See id.* at 110.

98. *Id.* at 120. Implicit in this statement is that one must show continuous use for more than twenty-years at a bare minimum to establish a customary right since that is the time requirement to establish a prescriptive easement. *See supra* notes 32-33 and accompanying text (discussing the elements required to establish a prescriptive easement).

necessary to establish a customary right under Florida law. In particular, the court stated that "[c]ustomary public rights require a showing that the use of land is (1) ancient, (2) reasonable and peaceful, (3) exercised without interruption, (4) of certain boundaries, (5) obligatory or compulsory, (6) not inconsistent with other customs or law, and (7) by a multitudinous number of persons."[99] Although the court ultimately found that the plaintiffs failed to establish either a prescriptive or customary right, the case signifies the acceptance by at least one lower state court of the doctrine of custom recognized in *Tona-Rama.*

Nevertheless, some commentators have suggested that there are short-comings in the Florida Supreme Court's opinion in *Tona-Rama.* In particular, one commentator has noted that, although the decision seems to demonstrate a judicial policy favoring public use of privately owned beaches, the court did not adequately define the period of time required to establish a customary right.[100] In addition, the court did not clearly indicate the geographic scope of its decision.[101]

More recently, however, in *Reynolds v. County of Volusia,*[102] the Fifth District Court of Appeal clarified the geographic scope of the supreme court's opinion in *Tona-Rama.* The court stated that the doctrine of custom requires "courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to and, in addition, to balance whether the proposed use of the land by the fee owners will interfere with such use enjoyed by the public in the past."[103] Thus, unlike Oregon,[104] the doctrine of custom according to *Reynolds* is applied on a tract-by-tract basis in Florida.[105]

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99. *Wymbs,* 48 Fla. Supp. at 121-22.

100. *See* Comment, *Doctrine of Customary Rights – Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest, supra* note 95, at 814. As for the time requirement to establish a customary right, the court simply stated that the area in dispute had been used by "sunbathing tourists for untold decades." City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 76 (Fla. 1974).

101. *See* Comment, *Doctrine of Customary Rights – Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest, supra* note 95, at 814. Some of the court's language appears to support the contention that a customary right to utilize the dry sand exists generally in Florida, as in Oregon. However, the court did refer to customary rights acquired "to use this particular area." *Tona-Rama,Inc.,* 294 So. 2d at 78.

102. 659 So. 2d 1186 (Fla. 5th DCA 1995).

103. *Id.* at 1190.

104. *See* Bender, *supra* note 75, at 914.

105. Unfortunately, the Florida Supreme Court's failure to clearly apply the doctrine of customary use to the entire coastline of Florida has consequently hampered one of the doctrine's greatest benefits over prescriptive easements—that of avoiding costly and time-consuming tract-by-tract litigation to establish the public's right to use the dry sand areas of Florida beaches.

Despite the Florida Supreme Court's recognition of custom, one issue not addressed in *Tona-Rama* was the potential liability, if any, of private landowners for injuries sustained by the public while utilizing the dry sand areas of privately owned Florida beaches. Liability was simply not at issue in the case.[106] However, one can easily imagine the concern beachfront landowners in Florida may have regarding potential liability for injuries, especially in light of the court's decision in *Tona-Rama* prohibiting a private landowner from interfering with the public's customary right to use the dry sand area.[107]

Analyzing the issue from a strict tort law perspective, private beachfront landowners should not have any liability, under most circumstances, for injuries sustained by members of the public while using the dry sand areas of privately owned Florida beaches. The four basic requirements for negligence under tort law are (1) duty, (2) breach, (3) causation, and (4) damages.[108] In sum, "[t]o state a cause of action in negligence, a complaint must allege ultimate facts which establish a relationship between the parties giving rise to a legal duty in the defendant to protect the plaintiff from the injury of which he now complains."[109]

There are three classes that define the duty a landowner owes to an individual: (1) trespasser, (2) invitee, and (3) licensee,[110] and generally speaking, one must not:

> wil[l]fully and wantonly injure a trespasser; he must not wil[l]fully and wantonly injure a licensee, or intentionally expose him to danger; and, where the

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106. Even if liability was an issue in the case, a convincing argument could be made that, under the facts of *Tona-Rama*, members of the public were "invitees" of the private landowner since the landowner had an ocean pier on the property open to the public. Consequently, the private landowner would owe the highest duty under tort law to members of the public utilizing that specific area of the beach. *See infra* notes 111-15 and accompanying text (discussing duty owed to an invitee).

107. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974). The specific issue of potential liability, if any, of private beachfront landowners has yet to be addressed by any Florida courts. Thus, any initial concerns of private landowners appear justified.

108. *See* Paterson v. Deeb, 472 So. 2d 1210, 1214 (Fla. 1st DCA 1985) ("The four elements of negligence are (1) a legal duty owed by defendant to plaintiff, (2) breach of that duty by the defendant, (3) an injury to plaintiff legally caused by defendant's breach, and (4) damages as a result of the injury."). *See also* Landrum v. John Doe Pit Digger, 696 So. 2d 926, 928 (Fla. 2d DCA 1997).

109. Mather v. Northcutt, 598 So. 2d 101, 102 (Fla. 2d DCA 1992).

110. *See* Lukancich v. City of Tampa, 583 So. 2d 1070, 1072 (Fla. 2d DCA 1991). One should note that courts have also referred to a class known as uninvited licensees.

> visitor is an invitee, he must keep his property reasonably safe and protect the visitor from dangers of which he is, or should be aware.[111]

Florida courts have defined wanton and willful misconduct as "conduct in reckless disregard of the safety of others."[112]

Florida courts have defined licensees as "persons who choose to come upon the premises solely for their own convenience without invitation either expressed or reasonably implied under the circumstances."[113] In contrast, Florida courts have stated that:

> a finding of invitee status turns upon the coexistence of two factors, reflecting the viewpoint of each of the two parties involved: (1) The landowner must so conduct his activities on his property, by way of carrying out his business or arranging his premises, that (2) it reasonably appears to the person coming onto them that he has been welcomed or invited there for the visitor's intended purpose and is therefore entitled to expect that the owner has taken reasonable care for his safety.[114]

As for uninvited licensees, Florida courts have held that "[a]n uninvited licensee is neither an invitee nor a trespasser, but rather, a legal status in between whose presence is neither sought nor forbidden, but merely permitted or tolerated by the landowner."[115] Accordingly, a landowner owes a duty to an uninvited licensee:

> to refrain from wanton negligence or willful misconduct which would injure [the person], to refrain from intentionally exposing [the person] to danger, and to warn [the person] of a defect or condition known to the landowners to be dangerous when such

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111. Post v. Lunney, 261 So. 2d 146, 147 (Fla. 1972); *see also* Barrio v. City of Miami Beach, 698 So. 2d 1241, 1244 (Fla. 3d DCA 1997) (discussing duty owed to an uninvited licensee); Lindsey v. Bill Arflin Bonding Agency, Inc., 645 So. 2d 565, 567 (Fla. 1st DCA 1994) (discussing duty owed to an invitee); Libby v. West Coast Rock Co., Inc., 308 So. 2d 602, 604 (Fla. 2d DCA 1975) (discussing duty owed to a licensee).

112. Dyals v. Hodges, 659 So. 2d 482, 485 (Fla. 1st DCA 1995).

113. *Libby*, 308 So. 2d at 604 (quoting Wood v. Camp, 284 So. 2d 691 (Fla. 1973).

114. Iber v. R.P.A. Int'l Corp., 585 So. 2d 367, 369 (Fla. 3d DCA 1991).

115. Bishop v. First Nat'l Bank of Florida, Inc., 609 So. 2d 722, 725 (Fla. 5th DCA 1992).

> danger is not open to ordinary observation by the licensee.[116]

Given the tort law principles discussed above and the Florida Supreme Court's language in *Tona-Rama* prohibiting beachfront landowners from interfering with a person's customary right to use the dry sand, members of the public should be, in most circumstances, viewed as uninvited licensees, rather than invitees.[117] Accordingly, a private beachfront landowner would have the duty to refrain from wanton negligence or willful misconduct which would injure the public, to refrain from intentionally exposing the public to danger, and to warn members of the public of defects or conditions known to the landowner to be dangerous, when such danger is not open to ordinary observation by the licensee.[118] In addition, under *Tona-Rama*, a beachfront landowner would also have a clear obligation to refrain from interfering with the public's customary use of the dry sand areas.[119] Therefore, a private beachfront landowner would not likely be liable for an injury sustained by a member of the public using the dry sand area absent direct injurious actions by the landowner.

Clearly, there are significant advantages to using the doctrine of custom to establish public beach access over other approaches, especially prescription. For example, "[c]onsent of the owner to the use, which would destroy the adverseness necessary to establish prescription, is not similarly effective to defeat a right based on custom."[120] Thus, beachfront landowners would be unable to defeat a public easement claim, based on the doctrine of custom, by arguing

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116. *Id.*

117. The court stated that "this right of [customary] use cannot be revoked by the land owner." City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974). Clearly, many private beachfront landowners would prefer that the public not be permitted to use the dry sand area; thus, concluding that members of the public are invitees is difficult. However, under certain situations, like those present in *Tona-Rama* where there was an ocean pier on the landowner's property open to the public, members of the public could be considered invitees. Consequently, the landowner would owe the public a greater duty in such a situation.

118. *See Bishop*, 609 So. 2d at 725.

119. *See Tona-Rama*, 294 So. 2d at 77.

120. Ireland, *supra* note 95, at 153.

> The doctrine of custom is very useful in avoiding the question of adverseness. Florida courts have taken a hard line on finding the requisite adversity to show an easement. . . . Not only is the element of adversity absent from the doctrine of custom, but custom requires that the use be peaceful and free from dispute.

Stephens, *supra* note 22, at 115. *But see* Welby, *supra* note 12, at 90 (noting the potential difficulty in proving 'immemorial use' for a customary use claim in comparison to adverse use for the statutory period of twenty years for a prescription claim).

that they had granted permission for past public use.[121] Furthermore, any arguments made by beachfront landowners that they will be exposed to overwhelming personal liability for injuries sustained by the public while utilizing the dry sand should not weaken the application of the doctrine.[122] In addition, the doctrine has withstood a takings challenge brought by a beachfront property owner in Oregon.[123] Accordingly, the doctrine of custom, as recognized by the Florida Supreme Court in *Tona-Rama*, remains an effective legal tool for protecting the public's right to use the dry sand areas of Florida beaches.

III. A MODERN DAY EXAMPLE: DESTIN, FLORIDA

Recent developments over the past several years in Destin, Florida, exemplify the tension between private rights of beachfront landowners and the public's right to utilize the dry sand areas of Florida beaches.[124] During spring break this past year, two fifteen-year old teenagers were chased off a beach in Destin by a landowner claiming that they were on private property.[125] Scared by their encounter with the threatening landowner, the two teenagers did not return to the beach during the remainder of their vacation in Destin.[126] Such situations are the direct result of the Florida State Legislature's failure to adequately protect the public's right to utilize the dry sand areas for traditional recreational purposes. In areas along Florida's "panhandle," the issue is especially important since tidal fluctuations are so minute that the public is basically required

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121. *See* Ireland, *supra* note 95, at 153.

122. *See supra* notes 106-20 and accompanying text (discussing potential liability of landowners for injuries sustained by the public while using the dry sand areas of privately owned Florida beaches).

123. *See* Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994); *see also supra* notes 81-89 and accompanying text (discussing *Stevens*).

124. *See Private Beach Dispute*, *supra* note 6 (discussing recent disputes between private landowners and the public over the public's use of the dry sand areas of beaches in Destin, Florida); Neel Walker, Opinion, *Don't Abandon Your Rights*, NORTHWEST FLA. DAILY NEWS DESTIN EAST, Aug. 27, 1998, at 5 (arguing in support of an ordinance protecting the public's right to utilize the dry sand areas of Destin beaches and advising beachgoers not to abandon their customary rights under *Tona-Rama*).

125. *See Private Beach Dispute*, *supra* note 6.

126. *See id.* Similarly, many residents have complained about no-trespassing signs that beachfront landowners have placed in the dry sand, as well as many beach vendors purposely set-up chairs close to the water to prevent the public from walking on the dry sand. *See* Ledbetter, *supra* note 6.

to constantly walk in wet sand if there is no public right to use the dry sand areas.[127]

As a result of incidents like the one described above, the Destin City Council asked the city's land use attorney to research what steps, if any, the city could take to protect the public's right to utilize the dry sand area above the mean high tide line.[128] The attorney determined that, based upon the Florida Supreme Court's decision in *City of Daytona Beach v. Tona-Rama, Inc.*,[129] he believed the public has established a customary right to utilize the dry sand areas of Destin beaches.[130] Accordingly, the attorney recommended that the city adopt an ordinance protecting the public's long-standing customary use of the dry sand areas of Destin beaches.[131] As part of the ordinance adoption process, the attorney also advised the city to gather evidence supporting the public's long-standing use of the dry sand areas, such as testimony of individuals who have used Destin beaches for decades.[132]

The findings and recommendations of the city's land use attorney were front-page news in Destin,[133] and spurred reactions from local residents. For instance, one beachfront landowner threatened litigation and proclaimed any action by the City Council to "take control of [his] private property is *unethical and immoral*."[134] In contrast, several people, both beachfront landowners and tourists, wrote in support of the City Council's actions, thereby trying to protect the public's right to utilize the dry sand area of Destin beaches.[135]

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127. *See* John Ledbetter, *Melvin Tabbed for Question on Dry Sand Use*, DESTIN LOG, July 21, 1999, at A1 (stating that "in the panhandle, because of minimal tidal fluctuations, the strip of land that is conclusively public is minimal").

128. *See* Ledbetter, *supra* note 6.

129. 294 So. 2d 73 (Fla. 1974).

130. *See* Ledbetter, *supra* note 6.

131. *See id.*; *see also* Appendix A (Destin Draft Ordinance).

132. *See* Ledbetter, *supra* note 6.

133. *See id.*

134. Letter from Earl Richards to the Destin City Council and David A. Theriaque (June 17, 1999) (on file with the City of Destin) (emphasis added). *See also Private Beach Dispute*, *supra* note 6 (noting that a beachfront property owner said there may be a legal challenge to any attempt by the City Council to pass an ordinance protecting the public's right to utilize the dry sand areas of Destin beaches).

135. *See* Martin Siegel, Opinion, *Florida Beaches Require Separate Consideration*, DESTIN LOG, July 17, 1999, at A4 (arguing in support of a policy protecting the public's right to utilize the dry sand areas of Destin beaches and briefly discussing the potential impacts if a "no right to sit on the beach" policy is adopted); C.J. Riets, Letter to the Editor, *Don't Cut Off the Hand that Feeds You*, DESTIN LOG, July 10, 1999, at A5 (noting that tourists support the City of Destin and private landowners should be careful not to "cut off the hands that feed them").

Letters in support of action by the City Council to protect the public's right to utilize the dry sand areas of Destin beaches were also sent to the City Council prior to the latest actions. *See, e.g.*, Letter from Anne B. Spragins-Harmuth to Dewey Destin of the Destin City Council

Moreover, a general poll conducted by the city's newspaper showed that a majority of respondents favored unlimited access to area beaches.[136]

Despite legal precedent and the Destin City Council's initial promise to protect the public's right to utilize the dry sand areas by passing a beach access ordinance, the City Council has been somewhat slow to act.[137] The City Council's hesitancy is, in part, likely due to litigation threats from beachfront landowners.[138] Rather than pass a beach access ordinance, the City Council voted unanimously to ask State Representative Jerry Melvin to coordinate a meeting among groups and individuals affected by the beach access issue.[139] More recently, however, the City Council did approve the sending of ordinances regarding beach vendors and the public's right to use the

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(January 25, 1999) (on file with City of Destin) (writing in support of Mr. Destin's efforts as a member of the City Council to protect public beach access).

136. *See* THE LOG ONLINE, *What Do You Think?* (visited July 26, 1999) <http://www.destin.com/pollvault/question933013298.shtml>. When asked whether beachgoers in Destin and in South Walton should have unlimited access to all areas of all beaches, i.e. from water's edge to the nearest private structure, 426 of 566 voters (approximately 75%) said yes. *Id.*

137. *See* Editorial, *Give Us a Ruling on Beach-Use Issue*, DESTIN LOG, July 10, 1999, at A4 (arguing that the community deserves a concise response from the City Council regarding the "nagging confusion over beach use in Destin" and that the community is ready for "this issue to go away").

138. *See* John Ledbetter, *Whose Beach is it? Property Owner Predicts Lawsuit*, DESTIN LOG, Aug. 21, 1999, at A1 (noting that at least one beachfront property owner believes that any ordinance recognizing the public's customary use of the dry sand areas of Destin beaches would amount to a regulatory taking and that he had been in contact with a legal group to prepare for a legal battle with the City); *see also* Suzanne Hines, Guest Column, *Lots of People Would Object to City 'Taking Their Beach'*, DESTIN LOG, Oct. 6, 1999, at A4 (arguing that the proposed ordinance is a taking and that there "will be serious repercussions" if the Destin City Council passes the proposed beach access ordinance). More recently, the Southeast Legal Foundation, a conservative public interest law firm that fights for private property rights, informed the City Council that it intends to represent beachfront property owners if a beach access ordinance is adopted. *See* John Ledbetter, *Property Rights Firm enters Beach Dispute*, DESTIN LOG, Dec. 18, 1999, at A1. The organization alleges that the proposed ordinance is "illegal and unconstitutional" and that it will litigate the issue all the way to the Supreme Court to invalidate the measure. *See id.* A member of the City Council, as well as the city's land use attorney, however, disputed the organization's conclusions about the public's historical use of Destin beaches. *See id.* at A18.

139. *See* Ledbetter, *supra* note 127. In addition to seeking the assistance of State Representative Melvin, the City Council is planning to ask the Governor's office, Department of Environmental Protection, Corps of Engineers, Economic Development Council, Tourist Development Council, and other governmental agencies for assistance in resolving the dry sand issue. *See id.* The City Council's decision to involve Representative Melvin was applauded by some. *See, e.g.*, Editorial, *Council Serious About Beach Issues*, DESTIN LOG, July 24, 1999, at A4 (noting that with Representative Melvin involved there is a greater likelihood of parties reaching a consensus on the beach access issue facing the City Council).

dry sand to the city's planning commission.[140] While the City Council should be applauded for attempting to address the tension between the rights of private beachfront landowners and the public's right to utilize the dry sand areas of Destin beaches, whether the City Council will adopt any adequate measures to protect public beach access remains unclear.

IV. RECOMMENDATION AND CONCLUSION

Despite numerous calls during the past twenty-five years for legislation at the state level to protect the public's right to utilize the dry sand areas of Florida beaches,[141] state legislators have failed to do so.[142] In the absence of adequate state legislation, local governments and the judiciary have the burden and responsibility to protect public beach access. In *City of Daytona Beach v. Tona-Rama, Inc.*,[143] the Florida Supreme Court recognized the doctrine of customary use as a means by which the public may secure rights to utilize the dry sand areas of Florida beaches for traditional recreational activities.[144] Despite the supreme court's ruling in *Tona-Rama* twenty-five years

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140. *See* John Ledbetter, *Whose Beach is it? Destin City Council Offers Solutions*, DESTIN LOG, Aug. 21 1999, at A1. Although the City Council voted to send ordinances regarding beach vendors and the public's right to use the dry sand to the planning commission, what form the final ordinances will take is unclear. With regards to the ordinance pertaining to the public's right to use the dry sand, two City Council members expressed concerns over what constitutes "customary use" and the issue of "time immemorial." *Id.* In contrast, several members of the panel chaired by State Representative Melvin believed that Destin would be able to establish customary use. *See id.*

141. *See, e.g.*, Donna R. Christie, *Beach Access Legislation for Florida: A Proposal and Commentary*, *in* THE COMMON LAW, JUDICIAL INTERPRETATION & LEGISLATION: TOOLS TO PRESERVE ACCESS TO FLORIDA'S BEACHES 136, 136-58 (Fla. State Univ. College of Law Policy Studies Clinic, Feb. 1988) (proposing a state statute to protect public beach access in Florida); Bowdoin, *supra* note 29, at 593-96 (discussing a proposed Florida Open Beaches Act).

142. In contrast, both the Oregon and Texas legislatures have passed statutes recognizing the doctrine of customary use. *See* OR. REV. STAT. § 390.610(2) (Supp. 1998) (recognizing that when frequent and uninterrupted use of the ocean shore "has been legally sufficient to create rights . . . it is in the public interest to protect and preserve such public rights"); *id.* § 105.692(3) ("Nothing in this section shall be construed to diminish or divert any public right to use land for recreational purposes acquired by . . . custom or otherwise existing before October 5, 1973."); TEX. NAT. RES. CODE ANN. § 61.011(a) (West 1999) ("[I]f the public has acquired a right of use . . . or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress. . . ."); *id.* § 61.024 ("None of the provisions of this subchapter shall reduce, limit, construct, or vitiate the definition of public beaches which has been defined from time immemorial in law and custom.").

143. 294 So. 2d 73 (Fla. 1974).

144. *See id.* at 78.

ago, the issue of whether the public has a right to utilize the dry sand areas of Florida beaches persists.[145]

In a state such as Florida, which is a favorite tourist destination[146] known for its beautiful beaches,[147] the issue of adequate public beach access should be a priority. Few, if any, of the state's tourists are probably aware that the majority of Florida beaches are privately owned.[148] One can easily imagine the surprise and shock of unsuspecting visitors to Florida who are threatened with arrest for trespassing because the beach they are enjoying is private property.[149] Indeed, the frequency of such incidents is likely to increase, absent adequate protective measures, as tourists and coastal residents place more and more pressure upon Florida's coastal resources. Florida and its residents should not, and cannot afford to, "bite the hand that feeds," so to speak. In light of the State Legislature's failure to adequately protect public beach access, local governments should adopt ordinances protecting the public's long-standing customary use of the dry sand areas of their beaches.[150] Without such measures, the Florida public may very well be left with nothing but wet sand.

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145. *See supra* notes 125-41 and accompanying text (discussing recent events in Destin, Florida, and the city's attempts to reach a solution that protects the public's right to use the dry sand areas of Destin beaches while also protecting the interests of private landowners).

146. *See* THE FLORIDA HANDBOOK: 1997-1998, *supra* note 9, at 591 (noting that Florida had approximately 41,282,314 visitors in 1995).

147. *See* FGOC, *supra* note 5, at XI-18.

148. *See supra* note 22 and accompanying text.

149. *See* Louis Cooper, *This Sand is My Sand*, NORTHWEST FLA. DAILY NEWS, June 9, 1999, at A1 (noting how two fifteen-year old visitors who were run off a beach in Destin by a private landowner would not return to the beach for the remainder of their spring break); *see also Private Beach Dispute*, *supra* note 6.

150. The Florida Supreme Court in *Tona-Rama* specifically noted that the public's customary right to use the dry sand area "cannot be revoked by the land owner" and "*is subject to appropriate governmental regulation.*" City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d. 73, 78 (Fla. 1974) (emphasis added). In addition, the doctrine of customary use has already withstood a takings challenge in Oregon. *See supra* notes 81-89 and accompanying text (discussing Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994)). Moreover, a challenge by property owners under the Bert J. Harris, Jr., Private Property Rights Protection Act, section 70.001, *Florida Statutes*, should also fail since such an ordinance is not a new land use regulation, but rather a codification of the public's long-standing customary right to use the dry sand areas of Florida beaches. The right to the exclusive use of the dry sand areas of Florida beaches was simply never a part of a beachfront property owner's "bundle of rights."

Local governments could model their respective ordinances after the Draft Ordinance proposed by Destin's land use attorney or wait to see the final form of the ordinance, if any, adopted by the Destin City Council. *See* Appendix A (Destin's Draft Ordinance recognizing the public's customary right to use the dry sand areas of Destin beaches); *see also* Maloney et al., *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. FLA. L. REV. 853, 873-880 (proposing a model public beach access ordinance).

APPENDIX A: DESTIN DRAFT ORDINANCE

ORDINANCE NO:

AN ORDINANCE OF THE CITY OF DESTIN PROTECTING THE PUBLIC'S LONG-STANDING CUSTOMARY USE OF THE DRY SAND AREAS OF THE BEACHES; PROVIDING FOR A BUFFER AREA AROUND PRIVATE PERMANENT STRUCTURES, PROVIDING FOR PENALTIES FOR VIOLATION OF THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DESTIN, FLORIDA:

SECTION 1: AUTHORITY.

The authority for the enactment of this Ordinance is Article 1, Section 1.01 (b) of the City Charter, and Section 166.021, *Florida Statutes.*

SECTION 2: FINDINGS OF FACTS.

WHEREAS, the recreational use of the dry sand areas of the City's beaches is a treasured asset of the City which is utilized by the public at large, including residents and visitors to the City; and

WHEREAS, the dry sand areas of the City's beaches are a vital economic asset to the City, Okaloosa County, and the State of Florida; and

WHEREAS, the public at large, including residents and visitors to the City, have utilized the dry sand areas of the City's beaches since time immemorial; and

WHEREAS, the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974), has expressly recognized the doctrine of customary use in the state of Florida; and

WHEREAS, the City desires to ensure that the public's long-standing customary use of the dry sand areas of the City's beaches is protected; and

WHEREAS, the City recognizes and acknowledges the rights of private property owners to enjoy and utilize their property; and

WHEREAS, the City desires to minimize conflicts between the owners of property that includes a portion of the dry sand areas of the City's beaches, and the use of such dry sand areas by the public at large; and

WHEREAS, in order to minimize such conflicts, the City desires to establish a twenty-five (25) foot buffer zone around any permanent structure owned by a private entity that is located on, or adjacent to, the dry sand areas of the City's beaches; and

WHEREAS, the public at large, including the residents and visitors to the City, shall not utilize such twenty-five (25) foot buffer zone, except to utilize an existing beach access point for ingress and egress to the City's beaches; and

WHEREAS, such twenty-five (25) foot buffer zone is not intended to constitute an abandonment of the public's right, based upon its long-standing customary use, to utilize the dry sand areas in such buffer zone, but rather is provided voluntarily and solely as an accommodation to the private property rights of those individuals who own property on which a portion of the dry sand areas of the City's beaches is located; and

WHEREAS, no entity shall interfere with the public's ability to continue its long-standing customary use of the dry sand areas located outside of the twenty-five (25) foot buffer zone; and

WHEREAS, the owners of property that contains a portion of the dry sand areas of the City's beaches may make any use of their 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.

SECTION 3: REGULATION OF DRY SAND AREAS.

1. The public's long-standing customary use of the dry sand areas of the City's beaches is hereby protected. Except as stated in Paragraph 2, no entity shall impede or interfere with the right of the public at large, including the residents and visitors of the City, to utilize the dry sand areas of the City's beaches.

2. The public at large, including the residents and visitors of the City, voluntarily agrees to not utilize a twenty-five (25) foot buffer zone around any permanent structure owned by a private entity that is located on, or adjacent to, the dry sand areas of the City's beaches, except as is necessary to utilize an existing beach access point for ingress and egress to the City's beaches.

SECTION 4: PENALTY PROVISION.

A violation of this Ordinance shall be a misdemeanor punishable according to law; however, in addition to, or in lieu of, any criminal prosecution, the City of Destin shall have the power to sue for relief in civil court to enforce the provisions of this Ordinance.

SECTION 5: SEVERABILITY.

If any section, phrase, sentence, or portion of this Ordinance is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

SECTION 6: EFFECTIVE DATE.

This Ordinance shall take effect immediately upon its adoption by the City Council and the signature of the Mayor.