

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Environmental Preservation and Conservation Committee

BILL: CS/SB 488

INTRODUCER: Committee on Environmental Preservation and Conservation and Senator Justice

SUBJECT: Relating to Beaches/Public Access

DATE: March 31, 2009 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Kiger	EP	Fav/CS
2.			CA	
3.			JU	
4.			GA	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The Committee Substitute (CS) creates Part V of Chapter 161, F.S.; providing definitions; declaring policy and effect; declaring certain areas of sandy beaches in this state public; prohibiting private entities from restricting access; prohibiting obstruction of beach access under certain conditions; prohibiting the use of signs declaring that a public beach is private property; providing that a violation of such prohibition is a first-degree misdemeanor; providing a penalty; prohibiting a governmental agency from placing an obstruction upon a public beach under certain conditions; and providing for prima facie evidentiary standards for titles of littoral owners.

The CS provides for an effective date of July 1, 2009.

The CS creates Part V of chapter 161, Florida Statutes, consisting of sections 161.80, 161.81, 161.82, and 161.83.

II. Present Situation:

Beach Access – Common Law and Florida Constitutional Law

Under the common law public trust doctrine and Article 10, section 11 of the Florida Constitution, title to the portion of the beach below the Mean High Water Line, or under Florida law the Erosion Control Line is held by the state in trust for all the people.¹ Unless conveyed, lands waterward of these boundaries are titled to the Board of Trustees of the Internal Improvement Trust Fund (Board) and administered by it for all the citizens of Florida. Lateral public access along the shore and waterward of the mean high water line or erosion control line may not be blocked by upland landowners.

The beach entails more than the portion belonging to the public under the public trust doctrine. Sandy beach landward of the mean high water line or erosion control line is subject to private ownership.² Florida courts have recognized the public may acquire rights to the dry sand areas of privately owned portions of the beach through the methods of prescription, dedication, and custom.³

It is possible for the public to acquire an easement in the beaches of the state by the finding of a prescriptive right to the upland sandy beach. Through either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition, the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights, the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use. The use must be such that the record owner has a legal right to stop it by an action for trespass, ejectment, or other legal remedy.⁴ Florida courts have not found such prescriptive rights in the public for major recreational beach areas because of the absence of an adverse nature in the public's use of the private beach land.⁵

The public may acquire a right to use upland property by dedication. The dispositive issue in determining whether or not property has been dedicated appears to be whether the private property owner has expressed "a present intention to appropriate his lands to public use."⁶ The burden is on the government to prove dedication.⁷ The "proof required of the intention to dedicate is 'clear and unequivocal,' and the burden of proof is on the party asserting the existence of the dedication."⁸

The doctrine of customary use has been used in Oregon, Texas, Hawaii, and Florida to preserve the public's access to beaches.⁹ In the 1969, the Oregon Supreme Court appeared to effectively open all Oregon beaches to the public through its customary use holding, although it

¹ Sections 161.151(3) and 161.161(5), F.S.

² Section 177.28(1), F.S.; *Clement v. Watson*, 63 Fla. 109, 58 So. 25, 26 (1912).

³ *Trepanier v. County of Volusia*, 965 So.2d, 276; *S. Brent Spain, Florida Beach Access: Nothing but Wet Sand?*, 15 J. Land Use & Envtl. L. 167, 171-172 (1999).

⁴ *Downing v. Bird*, 100 So.2d 57 (Fla.1958).

⁵ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73.

⁶ *City of Palmetto v. Katsch*, 86 Fla. 506, 98 So. 352 (1923).

⁷ *City of Miami Beach v. Miami Beach Improv. Co.*, 153 Fla. 107, 14 So.2d 172, 176 (1943).

⁸ *Brevard County v. Blasky*, 875 So.2d 6, 11 (Fla. 5th DCA 2004).

⁹ Jennifer Sullivan, 'Laying Out an "Unwelcome Mat" To Public Beach Access,' *Journal of Land Use*, (Vol. 18:2) Spring, 2003.

subsequently backed away from the apparent breadth of the holding.¹⁰ The State of Texas codified its customary use policy in statute, creating a presumption that the sandy beaches of the state are public beaches by stating that it is the policy of the State of Texas that:

[T]he public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over any area by prescription, dedication, 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 to the larger area extending from the line of mean low tide to the line of vegetation bordering the Gulf of Mexico.¹¹

In *City of Daytona Beach v. Tona-Rama*, the Florida Supreme Court declared:

The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency-the traditional uses of land-but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected.¹²

Noting that Oregon and Hawaii have used the customary rights doctrine to provide public rights in beach property, the court found:

If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.¹³

Regarding the dispute in question in the case, the court concluded:

The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this **particular area of the beach** as they have without dispute and without interruption for many years. [emphasis added]¹⁴

¹⁰ State ex rel. Thornton v. Hay, 462 P. 2d (Or. 1969); The Oregon Supreme Court revisited *Hay* in *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989). The court explained: [N]othing in *Hay* fairly can be read to have established beyond dispute a public claim by virtue of “custom” to the right to recreational use of the entire Oregon coast, no matter what the topography of a particular place. *Hay* might make it clear that the doctrine of custom would apply to places “similarly situated,” but it has to have been obvious to the court and the parties that not all areas of the coast necessarily were “similarly situated.”

¹¹ Texas Open Beaches Act, TEX.NAT. RES.CODEANN.§61.020

¹² *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73.

¹³ *Id.*

¹⁴ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73.

In *Trepanier v. County of Volusia*, 965 So.2d, 276, the 5th District Court of Appeal confronted several questions raised but not clearly resolved in *Tona-Rama*. The first was, may the public use all of Florida's sandy beaches, or did the court only address the particular beach at issue in *Tona-Rama*? The 5th District Court of Appeals held:

Although we recognize that the issue is far from clear, we conclude, both from our reading of the supreme court's various opinions in *Tona-Rama* and from reading the underlying decision of the First District Court of Appeal in *City of Daytona Beach v. Tona-Rama, Inc.*, 271 So.2d 765 (Fla. 1st DCA 1972), that the intent of the supreme court was to declare the right of customary use in the public only for the area of beach at issue in that case, for which it had an extensive factual record of customary public use.

Given this answer, the next question the court posed was:

What evidence is required in order to establish entitlement of the public to use of a particular parcel, based on custom?

In essence, the court concluded:

While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical. "Custom" is inherently a source of law that emanates from long-term, open, obvious and widely-accepted and widely-exercised practice. It is accordingly impossible precisely to define the geographic area of the beach for which evidence of a specific customary use must be shown, because it will depend on the particular geography and the particular custom at issue.

Florida Statutory Law

Part I of Chapter 161, F.S., the Beach and Shore Preservation Act, regulates coastal construction seaward of the Coastal Construction Control Line in order to address: the protection of the beach and dune system; any building development from storm damage; adjacent properties; and the preservation of public beach access. This part defines public beach access as:

"Access" or "public access" as used in ss. 161.041, 161.052, and 161.053, F.S., means the public's right to laterally traverse the sandy beaches of this state where such access exists on or after July 1, 1987, or where the public has established an access way through private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means. Development or construction shall not interfere with such right of public access unless a comparable alternative access way is provided.

Beach access is obstructed by local governments in certain cases when construction activities create a safety hazard, when law enforcement is deemed inadequate to protect the beach-going public (night-time closing of the beach), and when weather conditions are severe. Access may

also be restricted by state and federal natural resource agencies to protect threatened and endangered species on the beach, primarily nesting shorebirds.

Florida's Growth Management Act, Chapter 163, F.S., and its implementing rule, 9J-5, F.A.C., specify that cities and counties must include beach access in their comprehensive plans. The Department of Community Affairs (DCA) is responsible for implementing this policy. Several state funded assistance programs are available to assist local governments in acquisition and development of beach access, including the Department of Environmental Protection's (department) Florida Recreation Development Assistance Program grants and DCA's Florida Communities Trust grants. The department's Coastal Zone Management Program provides signs at no cost to local governments who request them. In addition, most local governments promote their beach access and amenities as part of their economic development and recreational activities programs.

Erosion Control Line Demarcation of Public/Private Beach

As established by the Board, the erosion control line is the line which demarks the landward extent of the state as the sovereign titleholder. The land seaward of the erosion control line is sovereign, and the sand placed seaward of the line as part of a renourishment project becomes public beach.

Section 161.191, F.S., states that upon the filing of a copy of a Board's resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided is s. 161.181, F.S., title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the Board's survey was recorded.

III. Effect of Proposed Changes:

Section 1 creates Part V of Chapter 161, F.S., to address public beach access as follows:
Section 161.80, F.S., provides for definitions:

- "Beach Access" means the public's right to laterally traverse and make recreational use of the sandy beaches of this state where such access exists on or after July 1, 1987, or 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. Development or construction shall not interfere with the right of public access unless a comparable alternative accessway is provided.
- "Public beach" means any sovereign beach, any recreational beach owned or operated by the state or a local government, or any sandy beach area where the public has established or acquired a right of use by prescription, dedication, custom, or any other legal means.
- "Sovereign beach" means that portion of a sandy beach titled to the Board of Trustees of the Internal Improvement Trust Fund lying seaward of the line of mean high water or a recorded erosion control line.

Section 161.81, F.S., declares policy and effect:

- Reaffirming that public beaches are natural resources of the state and establishing that the public, individually and collectively, have the right to enter and use this resource.
- Declaring that all sandy beaches seaward of the mean high water line or recorded erosion control line are public beaches.
- Establishing that a private entity may not restrict lateral access along the shoreline to public beaches absent specific authorization or deed by the Board.
- Providing that this part does not affect any beach management efforts to fund and manage the shoreline pursuant to part I of chapter 161, F.S.

Section 161.82, F.S., addresses unlawful barriers to access to public beaches in the following ways:

- Prohibiting a person from:
 - Obstructing or causing an obstruction to beach access with physical barriers, unless permitted by law to do so; and
 - Displaying or causing to be displayed any signs, markers, warnings or other communications that a public beach is private property.
- Providing that a person who violates this section commits a first degree misdemeanor, punishable as provided in s.775.082, or s. 775.083, F.S.
- Prohibiting a governmental entity from:
 - Placing or causing to be placed any physical obstruction upon a public beach unless such obstruction is required to protect public safety, is erected for 30 days or less, is necessary to protect wildlife, habitat or environmental resources, or is otherwise authorized by law.
 - Limiting public access unless alternative access is provided that is substantially similar and convenient to the public.
 - This prohibition does limit a governmental entity from placing or erecting structures that control erosion, aid navigation, serve fishing interests or fulfill any other lawful purpose.

Section 161.83, F.S., sets an evidentiary standard that record title to a sandy beach landward of a sovereign beach is not prima facie evidence that the titleholder has a right to exclude the public from accessing and using the sandy beach or any associated accessway.

Section 2 provides for an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The CS requires governmental entities to take specific actions that may require the expenditure of funds in excess of \$1.9 million (the monetary mandate trigger).

Governmental entities cannot limit the public's access to a public beach without providing a substantially similar and convenient access point to the public. Therefore, for county and municipal governments to be bound by this requirement, the legislature must determine that the CS fulfills an important state interest and the CS must have a 2/3 vote of the membership of each house of the Legislature.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The costs to the private sector, if any, are indeterminate.

C. Government Sector Impact:

If a county or municipality obstructs the public's access to a public beach, it will be required to provide a substantially similar and convenient accessway. There are no exemptions or exceptions provided for this requirement. While the cost of conformance with this provision is indeterminate, it may exceed the \$1.9 million mandate trigger.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The CS removes the "free and unrestricted" right of the public to enter and use the public beaches of the state and instead only reaffirms the public's general right to do so. In so doing, the CS acknowledges that the public's right to enter and use the public beaches of the state is conditioned. One of the tenants of private property allows owners to exclude others from their lands, with limited exceptions. A general right of the public to enter and use the public beaches of the state is not one of these limited exceptions. Therefore, although the potential exists, it seems unlikely that the Bert J. Harris, Jr., Private Property Protection Act applies to the provisions of the CS.

There are two parts to the Bert J. Harris, Jr., Act:

- Real property owners must demonstrate that unreasonably "disproportionate" limitations or restrictions have been placed on investment-backed expectations for the existing use of the real property or a vested right to a specific use of the real property was denied by a governmental action; and
- Real property disputes must go through a mediation process. The property owner may apply for relief if he alleges that the governmental action is "unreasonable" or "unfairly burdens" the property's use.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environmental Preservation and Conservation on March 31, 2009:

The CS provides for the following changes from the originally filed bill:

- Conforming the definition of “beach access” to the definitions of “access” or “public access” in s. 161.021, F.S.
- Removing the provision that the public has a free and unrestricted right to enter and use public beaches in both ss. 161.80 and 161.81, F.S.
- Removing the definition for “recreational use.”
- Clarifying that “sovereign beach” means a beach titled to the Board lying seaward of the mean high water line.
- Removing the provision that this part does not affect title to land that is adjacent to any beach or reduce or limit the public’s rights to public beaches that have been defined by law or custom.
- Providing that this part does not affect beach management efforts to fund and manage the shoreline under part I, chapter 161, F.S.
- Providing for additional exceptions for governmental entities to obstruct beach access.
- Providing that if a governmental entity blocks beach access, it shall provide an alternative access point that is substantially similar and convenient.
- Removing the provisions for private land owners to record or revoke a notice concerning the granting of permission for the public’s recreational use of the land and limiting liability for those owners who do file recorded permissions for the public’s use of their land.
- Removing the requirement and associated provisions that counties and municipalities first offer accessways, beachfront land, or other interests to the Board for purchase or acquisition before they accept any private offers.
- Removing the provision that providing accessways or other interests for public beach access is a public purpose.
- Removing the evidentiary standard that record title to the area from mean low tide to the seasonal high-water line is prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the property for access to public beaches.

- B. **Amendments:**

None.