

IN THE FIRST COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Case No. 1D22-0895

Northshore Holdings, LLC and
Lavin Family Development, LLC,
Louisiana Limited Liability Companies,

Appellants,

v.

Walton County, Florida,
a political subdivision of
the State of Florida,

Appellee.

Appeal from the Circuit Court, First Judicial Circuit,
in and for Walton County, Florida
(Case No. 2021-CA-00210)

**AMICUS CURIAE BRIEF OF THE SURDRIDER FOUNDATION
IN SUPPORT OF WALTON COUNTY**

September 3, 2022

/s/ Byron Flagg, Esq.
Florida Bar No. 14311
Ph: 352-262-7444
Counsel for Amicus Curiae

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IDENTITY AND INTERESTS OF THE AMICUS CURIAE

The Surfrider Foundation (“Surfrider”) is a national nonprofit organization whose mission is the protection and enjoyment of our world’s ocean, waves, and beaches, for all people. Surfrider’s five primary initiatives include protection of low impact public beach access.

Surfrider has approximately 350,000 members and supporters organized into approximately 80 volunteer driven Chapters and 134 school clubs. In Florida, there are 11 Surfrider Chapters, 6 Surfrider clubs, and 1,146 members. Surfrider’s Emerald Coast Chapter, in the panhandle, includes beachgoers of all types.

Since 2015, one of the Chapter’s primary campaigns has focused on protecting the public’s “customary use” right to access the dry sand beach above the Mean High Water Line (MHWL). The Chapter supported Walton County’s adoption of its “Customary Use Ordinance” in 2017, which recognized the public’s historic recreational use of County beaches. Chapter Treasurer Mike Sturdivant served on Walton County’s Customary Use Committee.

In addition to recreation, Surfrider members regularly undertake beach stewardship activities. Surfrider holds beach

cleanups and led multi-year testing and monitoring for oil and chemical dispersants on the beach following the 2010 BP oil spill.¹

Customary use rights are critical to Surfrider members' stewardship and enjoyment of public trust rights. Customary use rights often allow people to reach the public trust tidelands, and enhance public trust access, giving people a place to sit on a towel or place their belongings out of the tides' reach. As such, Surfrider would suffer special injury different in degree and kind than the general public should the Court rule in Appellants' favor.

Summary of The Argument

Florida's beaches are a mecca for residents and tourists alike as evidenced by Florida's overwhelmingly favorable economic statistics tied to beach tourism. Florida's beaches would not be such a mecca were it not for the public perception that at least some portions of dry-sandy beaches are publicly accessible. As early as 1939, the Florida Supreme Court recognized the universal custom of "...bathing in the salt waters of the ocean and the enjoyment of the wholesome *recreation incident thereto*." (See, *White v. Hughes*, 190 So. 446, 139 Fla. 54, 58-59 (Fla. 1939)). In fact, the Court in *White v.*

¹ See <https://emeraldcoast.surfrider.org/beach-report/>

Hughes characterized this custom as a uniquely American common law right. *Id.* at 59. This longstanding Florida custom referred to in White v. Hughes is not only reflected in Florida’s vibrant tourist economy, but also in the fact that local governments, businesses, and inland property owners also depend on public access to Florida’s beaches.

Nearly 50 years ago, the Florida Supreme Court recognized the importance of protecting public access to Florida’s beaches in City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 holding that Florida common-law may give rise to the public’s right of recreational use over dry, sandy beach areas “as a matter of custom.” *Id.* at 78.

For nearly half a century, Tona-Rama has been relied upon by Florida courts, Federal courts, local governments, property owners, and title insurance companies. “Customary Use” is a solid background principle of Florida property law, similar to other principles which may also provide a right of use to beaches above the MHWL – prescription, dedication, and adverse possession. Customary use is a preexisting fact with legal consequences. At some beach locations, there may be no previously articulated court opinion with respect to customary use, simply because the custom at that particular location hasn’t been opposed. Such was the case when

the Florida Supreme Court decided *Tona-Rama* in 1974 – customary use of Florida’s dry sandy beaches was engrained in Florida culture and had not been disputed in that location. *Id.* at 76-77.

States may establish their own body of property law and several coastal states whose economies depend on beach recreation have embraced “customary use”.

ARGUMENT

I. “Bathing In The Salt Waters Of The Ocean And The Enjoyment Of The Wholesome Recreation *Incident Thereto*” Has Been Recognized By The Florida Supreme Court As An Inherent Florida Custom Since At Least 1939 And This Custom Is Evident in the State’s Economy.

As far back as 1939, the Florida Supreme Court has recognized the inherent custom of the public’s historic use of Florida’s beaches:

“There is probably no custom more universal, more natural or more ancient, on the seacoasts, 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. Many are they who have felt the lifegiving touch of its healing waters and its clear dust free air. The people of Florida – a State blessed with probably the finest bathing beaches in the world – are no exception to the rule.”²

² See *White v. Hughes*, 139 Fla. 54 (1939).

This longstanding custom is reflected in Florida’s vibrant tourism and recreation economy. Florida's sandy beaches are one of the state’s most economically valuable natural resources. Florida’s coastline wraps 8,436 statute miles around the peninsula – the longest coastline of the 48 contiguous U.S. States.³ With over 76% of the state’s population living in coastal areas and \$302.8 billion in annual wages related to coastal employment, Florida beaches are a fixture in the lives of Floridians⁴.

Florida's beaches are treasured by millions of Floridians and tourists. On May 13, 2022, Governor Ron DeSantis announced that Florida welcomed 36 million visitors during the first quarter of 2022 alone.⁵ As reported in “The Economic Value of Florida’s Beaches”:

“The Florida Office of Economic and Demographic Research (2015) said that “beaches are the most important feature of Florida’s brand and have the strongest effect in terms of attracting tourists.”⁶ A 2017 survey of Florida

³ *Shoreline Mileage Of the United States*, NOAA, <https://coast.noaa.gov/data/docs/states/shorelines.pdf>

⁴ NOAA Office for Coastal Management, <https://coast.noaa.gov/states/florida.html> (2015)

⁵ See “Florida’s Tourism Continues To Grow in Q1 2022,” Press Release From Office of Florida Governor Ron DeSantis, May 13, 2022. Available at: <https://www.flgov.com/2022/05/13/florida-tourism-continues-to-grow-in-q1-2022/>

⁶ See *Economic Evaluation of Florida’s Investment in Beaches*, Florida Office of Economic and Demographic Research, available at: <http://edr.state.fl.us/content/returnoninvestment/beachreport.pdf> p, 8-9.

destination and marketing organizations showed that “beaches” was the most popular answer to the survey question: “What makes Florida attractive to tourists?” (Florida Office of Economic and Demographic Research 2018). Moreover, “the majority of Florida’s economic boom comes from tourism — access to its beaches and the sunny skies above them,” making beaches the most popular Florida tourist attraction in 2016 (Hayride 2018; VisitFlorida 2017b). Local surveys also show that beaches are the most popular Florida tourist attraction.”⁷

A 2013 study found that “sandy beaches” are a strong factor for tourism.⁸ Over 32 million people visited Florida’s beaches in 2021⁹ and at least 19 million tourists visit Florida primarily to go to the beach annually.¹⁰ Recent visitors to South Walton rated its “sugary white sand and turquoise blue waters” 9.3 on a ten-point scale in terms of importance to their vacation.¹¹

These statistics demonstrate a public expectation that certain areas of dry, sandy beach are customarily open for public use and that significant investments in promoting this concept have been made – in both public and private sectors. It is critical for Florida’s

⁷ See, Dr. Houston, James, R. “The economic value of Florida’s beaches” *Shore & Beach Journal*, Vol. 86, No. 3, Summer 2018 p.3.

⁸ *Id.* at 12.

⁹ *Statistics by Region*, United States Lifesaving Association: <http://arc.usla.org/Statistics/View/byState.asp>.

¹⁰ *Beaches*, Florida Department of Environmental Protection: <https://floridadep.gov/rcp/beaches>.

¹¹ *Id.* at 37.

economy that this expectation and historic customary use continue as it has for generations. Just as the Tona-Rama court recognized that sunbathing tourists who utilized the subject beach for untold decades were the “lifeblood of the pier,” so too are Walton County’s beachgoers who recreate on its beaches the lifeblood of the County’s culture and economy.

II. The Florida Supreme Court’s 1974 Precedent in Tona-Rama Properly Articulated How The Public May Obtain A Right of Use On Florida’s Beaches “As a Matter of Custom” and Should Not Be Receded From or Abrogated.

Most people would probably agree that the common perception among Florida citizens and tourists when they visit a Florida beach, is that they are free to walk, lie, picnic, and recreate upon dry, sandy areas above the water’s edge without fear of being arrested for trespass. When people say, “we’re going to the beach,” they “customarily” mean more than swimming or playing in the ocean (activities that can only take place in or over state sovereign submerged lands); they also mean recreating upon the beach above the MHWL far enough to avoid incoming waves. How could such common public perception and practice arise? The answer must be because there is an established “custom” at that particular beach.

The Florida custom of “going to the beach” at certain coastal locations has existed, as Justices Ervin and Boyd note in their dissenting opinions in Tona-Rama, since “time immemorial.” Tona-Rama, 294 So. 2d at 81. Yet at some beach locations there may be no applicable written law, or previously articulated court opinion determining public use *simply because much customary public use has never been opposed* at that particular location – rather there is an established, publicly understood local use as a matter of custom. Such was the case when the Florida Supreme Court properly decided Tona-Rama.

Prior lack of a judicial determination regarding the scope and scale of the public’s customary use, does not necessarily mean the public has never acquired some right to use portions of a beach above the MHWL. A legal analysis on the issue notes:

“While customary use rights differ in that they arise from use rather than a contract or deed or action constituting a nuisance, the use, like the contract or the deed or the action constituting a nuisance, is a preexisting fact with legal consequences. The rights arising from the use may exist without regard to whether a court has yet determined that they exist. In other words, the public may already have common law customary use rights on any given stretch of privately-owned beach in the state of Florida -- whether or not those rights have been either codified or judicially determined. Yet property owners and others have shown confusion on this basic point. Understanding that the public’s asserted rights may

precede a judicial determination of their existence -- as do the rights of a landowner or a party to a contract -- is an important starting point for analyzing the relative rights of beachgoers and landowners.¹²

Such was the starting point when the Florida Supreme Court decided *Tona-Rama* in 1974. Now, for nearly half a century, this decision has been relied upon by Florida courts,¹³ Federal courts,¹⁴ coastal local governments, private property owners, and title insurance companies.¹⁵

¹²See, Flournoy, Ankersen, Alvarenga, *Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy* (2019), p. 18, available at: <https://scholarship.law.ufl.edu/facultypub/831/> (last visited Aug. 7, 2022).

¹³ *Reynolds v. Cty. of Volusia*, 659 So. 2d 1186 (Fla. Dist. Ct. App. 1995); *Trepanier v. Cty. of Volusia*, 965 So. 2d 276 (Fla. Dist. Ct. App. 2007); *Hollywood, Inc. v. Hollywood*, 321 So. 2d 65 (Fla. 1975).

¹⁴ *Buending v. Town of Redington Beach*, 10 F.4th 1125 (U.S. 11th Cir. 2021)

¹⁵ Title Note **32.02.02 Recreational Public Rights**, “Fund Title Notes,” Attorney’s Title Fund Services, LLC (2022), stating:

Chapter 3 Exceptions; L. Water /Related Exceptions; E 12.4, TN 32.02.02

A. When insuring waterfront property, a portion of which upland property is or was historically used by the public for recreational purposes, a title policy must contain an exception for the rights of the public to use the recreation or beach area. In addition to oceanfront beaches, such properties may also consist of lakeside or riverside recreational areas and beaches.

Appellants decry this long-standing precedent as unconstitutional, but appellants ignore the Tona-Rama court's balanced consideration of the legal nature of the public's long-standing relationship and use of Florida's beaches on a localized, case-by-case basis against the backdrop of Florida property law principles. Principally, as the Tona-Rama Court noted, Florida law has always upheld the common law principle that the public can obtain a right to use a portion of a beach above the MHWL by prescriptive easement if such use is adverse to the upland owner.¹⁶ Similarly, the Court recognized that in some instances, if the public's use of the dry beach areas above the MHWL is not adverse, yet

In City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, at 78 (Fla. 1974), which involved oceanfront beach property, the court stated:

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 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.

See also Reynolds v. County of Volusia, 659 So.2d 1186 (Fla. 5th DCA 1995).

¹⁶ Miami Beach v. Undercliff Realty & Inv. Co., 155 Fla. 805, 21 So. 2d 783 (1945); Miami Beach v. Miami Beach Improv.Co., 153 Fla. 107, 14 So. 2d 172 (1943), recognizing the potential for public easement by prescription.

demonstrates a long-term, uncontested use, then such use may reasonably be found to be a “customary use” easily ascertainable in a particular area. Citing to Tiffany Real Property, (Third Edition), Vol. 3 and to states which similarly uphold the customary use doctrine, the *Tona-Rama* Court recognized the common, customary tradition of public access to Florida’s beaches, and the public’s right of continued reasonable, recreational use. *Id.* at 78.

The Court further recognized the fundamental public importance of beach access, and that the portions of Florida’s beaches that are privately owned are unique from other types of private property:

“[...] 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.” *Id.* at 75.

The Court further explained:

“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.” (emphasis added)

The Tona-Rama opinion concluded narrowly, balancing the public's actual customary use with upland property owner rights. The Court noted that an owner is not restricted from all uses, and 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." *Id.* (emphasis added)

Interestingly, Appellants' arguments ignore the reality that purchasers of beach-front property can readily ascertain the public's historic use of virtually any beach in Florida. Bona fide purchasers of land should conduct due diligence about potential unrecorded claims by prescriptive easement, adverse possession, encroachment, or other claimed right of use over property they seek to purchase. Such unrecorded claims can affect value and many title insurance companies list such conditions as standard exceptions to title insurance policies. Here, appellants should have been on notice simply by observing beach usage, and in Lavin Family Development's

case, since a regional beach with public parking and bathrooms is located in close proximity.¹⁷

Justice Boyd's dissenting opinion in Tona-Rama agreed that new buyers of beachfront property should be on constructive, if not actual, notice of the status of public use:

“Historians estimate that the North American continent has been inhabited by man for at least ten thousand years, and that, at the time Columbus discovered America, twenty-five thousand Indians lived in Florida. (*citation omitted*).

One does not have to be a Chamber of Commerce publicity director to assume that these earliest of Floridians enjoyed the beautiful sandy beaches at Daytona. They were followed by countless Europeans, and for many decades, the City of Daytona Beach has exercised dominion over the beaches, as if the beaches were owned and controlled by the City government. Thus, the case before us obviously presents a unique situation in which the land has been treated by the public and local government for many decades as publicly owned land. The public has used it for swimming, hiking, auto driving, and related purposes for a period much longer than twenty years, without interruption. The City has furnished police, sanitation, lifeguard, and other municipal services, normally provided to City-owned beach property, during said time. With the exceptions of being registered in the public records as privately owned, and the payment of taxes, the property has had all the attributes of a publicly owned beach continuously for more than twenty years. Surely, when the present owner purchased the land in question, *it was common knowledge that the public had, for*

¹⁷ See Walton County Property Appraiser Map available at: <https://beacon.schneidercorp.com/Application.aspx?AppID=835&L ayerID=15172&PageTypeID=1&PageID=6826&Q=325646391&KeyV alue=02-3S-20-34200-000-0020>

centuries, used both the wet and dry sand near the ocean for recreational purposes.” Id. At 79. (emphasis added).

This observation goes to the heart of Appellants’ “takings” arguments. Critical to any takings analysis is consideration of a property owner’s “investment backed expectations.” Justice Kennedy’s concurring opinion in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034–35 (1992) emphasized that, “Property is bought and sold, investments are made, subject to the State’s power to regulate . . . The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.” Certainly, “going to the beach” to recreate upon the dry-sand portions of certain Florida beaches above the MHWL is inherently understood to be a Florida “custom.”

After *Tona-Rama*, courts have continued to protect this custom. In *Trepanier v. Cty. of Volusia*, 965 So. 2d 276 (Fla. Dist. Ct. App. 2007), the Fifth DCA reiterated that the public can obtain a right of use on portions of dry, sandy beach above the MHWL through prescription, dedication, or custom. *Id.* at 284. The Court explained its reading of *Tona-Rama* and provided guidance on how a customary use right might be obtained for a “general area of the beach.” *Id.* at

286-291. The doctrine is clearly rooted as an important background principle of Florida property law.

Appellants grasp at straws arguing that customary use is somehow not a common law background principle of Florida property law. As noted above, more than 80 years ago, the Florida Supreme Court addressed the public’s right to use the “fore-shore” of Florida beaches and to enjoy activities protected by the public trust doctrine as a uniquely American common-law right, not only derived from English common-law. In *White v. Hughes*, 139 Fla. 54, 58-59 (1939), the Court expounded:

“There 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* (emphasis added).

. . .

The constant enjoyment of this privilege of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an *American common-law right* (emphasis added), similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has.”

While *White v. Hughes* related to the public trust intertidal fore-shore, the Court’s reference to “enjoyment of the wholesome recreation *incident thereto*” further encompasses incidental

recreation upland of the MHWL that customarily attends enjoyment of the public trust. Florida Courts have amply recognized the interconnectedness of the public trust and customary use (See, e.g., Trepanier v. County of Volusia, at 284, “[t]he ‘beach’ ... includes more land than that set aside for the people under the public trust doctrine.”)

Just as the Florida Supreme Court in White v. Hughes plainly recognized the public’s constant use and enjoyment of the foreshore was sufficient to establish it as an “American common law right,” so too does the public’s customary use above the MHWL since “time immemorial” establish it as an American common law right, and background principle of State property law.

III. States May Establish Their Own Body of Property Law Not Contrary to the U.S. Constitution and Several States Whose Tourist Economies Depend on Beach Recreation Have Embraced “Customary Use” as an Aspect of Common Law.

“Surely it must be conceded as a *general proposition* that the law of real property is, under our Constitution, left to the individual States to develop and administer.” (See Justice Stewart’s concurring opinion in Hughes v. Washington, 389 U.S. 290, 295 (1967)). In

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988), the U.S. Supreme Court saw no reason to disturb this general proposition ceding the *development and administration of real property law* to the individual States.¹⁸

This general proposition adheres to bedrock principles of federalism. Real property law adopted by each state may not violate the Fifth Amendment’s “taking clause.” However, many coastal states have taken into consideration the unique geography and customary uses of coastal property.¹⁹ States must be allowed to craft their property law responsive to unique geophysical characteristics and the population’s use of natural resources, while respecting private property rights. Several important court opinions agree. (See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 364 (N.J. 1984) (“Oceanfront property is uniquely suitable for bathing and

¹⁸ See also, *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944)(“The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.”), and *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935)(“Rights and interests in the tideland, which is subject to the sovereignty of the state, are matters of local law.”)

¹⁹ See, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988)

other recreational activities.”²⁰ (quoting *Lusardi v. Curtis Point Prop. Owners Ass’n*, 430 A.2d 881 (N.J. 1981)); (See also, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) (“Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.”); See also, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945–46 (2017) (“[I]t may be relevant that the property is located in an area that is subject to, or likely to be subject to, environmental or other regulation.”).

An example of how states may “develop and administer” their own body of property law in response to their unique characteristics is seen in the adoption and modification of common-law water right doctrines. In some western states where water is scarce, the law which developed is based on the common law doctrine of “prior appropriation,” which determines water rights based on timing, place and purpose of use. Meanwhile, many eastern states adopted and

²⁰ The New Jersey Supreme Court’s opinion included, “All we decide here is that private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.”

modified a different common-law doctrine - the “riparian right” or “reasonable use” doctrine. This requires riparian property owners to use water in a reasonable manner without depriving neighboring landowners of an equitable use. Although beyond the scope of this brief, state water-law regimes provide examples of early adoption of common-law doctrines most appropriate for the geography, with case-law and statutory modification over time.²¹

Similarly, with respect to beach access rights, several coastal states blessed with hundreds of miles of coastline and sandy beaches adopted the customary use doctrine as an established background principle of their property law or recognized long-standing, historic public use as a custom.

Hawaii, like Florida, has world-renowned beaches that are not only an inherent part of indigenous culture, but of the State’s modern tourist economy. Hawaii broadly allows for public use on the dry

²¹ Florida follows a modified version of the “reasonable use doctrine” – a common-law doctrine that the Florida Supreme Court identified as the “so-called American rule” now followed by many American jurisdictions instead of the English common-law governing water rights. (See, *Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 673 (Fla. 1979).

sandy portions of all beaches above the MHWL. (See, Maunalua Bay Beach Ohana 28 v. State, 222 P.3d 441, 451 (Haw. Ct. App. 2009)).

Likewise, the Supreme Court of Oregon applied the customary use doctrine to the state's entire coastline. Per State ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969):

“The 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. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam-digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede. [...] state and local officers have policed the dry sand, and municipal sanitary crews have attempted to keep the area reasonably free from man-made litter.”

North Carolina also recognizes the public's ability to obtain customary rights above the MHWL. In Nies v. Town of Emerald Isle, 780 S.E. 2d 187, 196 (N.C. Ct. App. 2015), the Court stated:

“We acknowledge both the longstanding customary right of access of the public to the dry sand beaches of North Carolina as well as current legislation mandating such. [...] It is unclear from prior North Carolina appellate court opinions whether the common law doctrine of custom is recognized as an independent doctrine in North

Carolina or whether longstanding “custom” has been used to help determine where and how the public trust doctrine might apply in certain circumstances.

...
In any event, we take notice that public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness. Native-born North Carolinians do not generally question whether the public has the right to move freely between the wet sand and dry sand portions of our beaches.

Texas property law similarly includes customary use. In *Moody v. White*, 593 S.W. 2d 372, 377 (Tex. Civ. App. 1979), the court identified that under the Texas Open Beaches Act there are three means by which the public can acquire a right of use at the beach – prescription, dedication, or by “continuous right.” With regard to “continuous right,” the Court stated:

“The last means by which the public can acquire a right of use or easement to or over the beaches according to the Open Beaches Act is “by virtue of continuous right in the public.” In effect, the Legislature of this State has recognized the common law doctrine of custom and usage as a means for acquiring the beaches of Texas for the general public.”²²

²² While the Court determined that the trial court's judgment could be affirmed on either the theory of prescription or dedication, it nonetheless recognized the doctrine of custom and found the jury's findings in that regard were supported by sufficient evidence.

Furthermore, Texas voters have protected this public right in the State's Constitution, Article 1, Section 33(a)-(b).

The U.S. Virgin Islands' ("USVI") body of property law also protects public customary use. In United States v. Saint Thomas Beach Resorts, Inc., 386 F. Supp. 769, 772-73 (D.V.I. 1974) the federal District Court affirmed the constitutionality of the Open Shorelines Act and reaffirmed the customary use doctrine in the USVI. In the Act, the legislature recognized the public's frequent, uninterrupted and unobstructed use of USVI shorelines throughout Danish rule and under American rule and declared its intent to protect that tradition and right. The Court stated:

"...whatever defendant's property right in and to Bolongo Bay Beach, they have always been subject to the paramount right of the public to use the said beach as established by firmly, well settled, long standing custom. [...] the [...] Act does no more than merely codify this confirmed right."

Conclusion

Florida's history is replete with stories of public beach usage from time immemorial – dating back to the earliest days of indigenous habitation. This customary use has continued to the present day and become engrained as a significant part of Florida culture.

Recognized by the Florida Supreme Court nearly 85 years ago, it is a vital background principle of Florida property law, which has been relied upon by courts, local governments, property owners, title insurance companies, and Floridians. Tona-Rama and the doctrine of customary use must be upheld as a critical part of Florida property law and way of life.

Respectfully submitted this 3rd day of September 2022.

/s/ Byron D. Flagg
Byron D. Flagg, Esq.
FBN 14311
Byron Flagg, P.A.
Of Counsel to Amicus Curiae
P.O. Box 358253
Gainesville, FL 32635-8253
(352) 262-7444
Byron@flaggattorney.com

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Old Bookman Style, 14-point font in compliance with Fla. R. App. P. 9.210(a)(2). I further certify that the word count of this brief is less than 5,000 words in compliance with Fla. R. App. 9.370(b).

Dated: September 3, 2022

/s/ Byron D. Flagg
Byron D. Flagg, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2022, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be made through the appellate CM/ECF system.

/s/ Byron D. Flagg

Byron D. Flagg, Esq.