

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIRST DISTRICT**

**WALTON COUNTY, FLORIDA,
Appellant,**

vs.

CASE NO. 1D21-3532

L.T. No. 18-CA-547

ALAN R. GIBSON, et al.,

Appellees.

_____ /

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

August 4, 2022

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IDENTITY AND INTERESTS OF THE AMICUS CURIAE

The Surfrider Foundation (“Surfrider”) is a national nonprofit organization dedicated to the protection and enjoyment of our world’s ocean, waves, and beaches for all people. Surfrider has approximately 350,000 members and supporters nationwide and 79 volunteer driven Chapters and 134 school Clubs across the U.S., including 11 Chapters and 14 Clubs in Florida, working towards this mission. Surfrider’s five primary initiatives include protecting low impact public beach access.

Towards this initiative, Surfrider’s Emerald Coast Chapter, located in the Florida panhandle region, works to support the public’s low impact beach access rights in Walton County. While Surfrider members include surfers, they are beachgoers of all types. Members recreate along Walton County’s beaches, including the dry sandy beaches, for beach walks, gatherings, educational activities, and pursuits like swimming, paddling, and fishing. Surfrider members advocated for the County’s adoption of its “Customary Use Ordinance” recognizing, protecting, and regulating the public’s rights gained through centuries of use, and member Mike Sturdivant served on the County’s Customary Use Committee in 2017. In addition to recreational activities, Surfrider members utilize the County’s dry

sand beaches for stewardship. Members hold regular beach cleanups and led multi-year, local efforts to test for and monitor oil and dispersants in the ocean and on the beach following the 2010 BP oil spill.¹ As part of this Gulf oil spill effort, Surfrider and our partners walked nearly the entirety of the County coast.

While Surfrider members recreate up and down along the sandy beaches of Walton County, they also specifically use the beach at issue in this appeal, including for access to and in conjunction with surfing at the popular “Bramble” surf spot located near the subject properties. When people surf, or engage in other ocean activities, they must cross the dry sand beach landward of the mean high tide line in order to reach the ocean. They’ll often set down their belongings in the sand – a towel, bag, or other equipment; and once in the water, may drift, sometimes quite far, requiring them to walk back along the beach when they exit the ocean.

For these reasons and more, Surfrider has a special interest in reversal of the trial court’s order finding the County abandoned any and all customary use rights with respect to the properties in Blocks 17, 18, 19, and 20 of the Gulf Shore Manor plat which might have existed as of 1978.

¹ See <https://emeraldcoast.surfrider.org/beach-report/>, and <https://emeraldcoast.surfrider.org/2012/04/surfrider-foundation-oil-study-reports-available-for-download/>

Surfrider members have fought for the recognition and protection of customary rights throughout the panhandle, and rely on customary use in order to recreate on and protect the beach and coastline. Surfrider's participation as an amicus curiae will assist this Court in determining the significant public rights and public policy issues at stake in this appeal, which will directly affect Surfrider's members and the public at large.

SUMMARY OF ARGUMENT

Recreational public use of Florida's beaches is intrinsic to Florida's culture, and public beach access is vital to the state and its economy. Given this significance, public access to Florida's beaches has thus been protected by Florida's courts, the Florida Constitution, and the Florida Legislature. The lower court's decision holding that a local government may abandon the public's customary use rights contravenes these protections and established law.

Under the Florida Supreme Court's decision in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974), while the government may regulate the public's customary use rights, only the public has the authority to abandon their rights. Therefore, Walton County could not have abandoned the public's customary use, which the public acquired through generations of use. The proper test for abandonment is whether

the public actually stopped using the dry sand beach, which is a fact-based inquiry not appropriately decided on a motion for summary judgment.

However, should a Court find that a local government can abandon customary use rights, which Surfrider disputes, such action must meet a heightened standard. The public trust doctrine, a common law doctrine, largely codified in Article 10, section 11 of the Florida Constitution, provides that the State of Florida holds the lands seaward of the mean high tide line in trust for the public. Sovereign lands may only be sold when in the public interest, Art. X, § 11, Fla. Const., and with clear intent and proper authority. See *Coastal Petroleum Company v. American Cyanamid Company, et al*, 492 So. 2d 339, 343 (Fla. 1986).

Customary use of the dry sand beach is closely linked to the exercise of the public's public trust rights, and Florida Courts have recognized their interconnectedness. The right to exercise public trust rights seaward of the mean high water private property boundary can be meaningless if the public does not have customary use rights necessary to reach that boundary. Second, customary use rights add significant value to the public's exercise of their public trust rights. Given the symbiotic relationship, customary use deserves similar heightened protection afforded the public trust.

Therefore, should a court find a local government can abandon the public's right of customary use, which Surfrider disputes, such action must meet the heightened standard for the transfer of public trust property, which requires (1) specific intent and (2) that the transfer be in the public interest. Walton County's 1978 Resolution fails to meet either requirement.

For these reasons, the trial court's decision must be reversed.

ARGUMENT

1. Public Use of Florida's Beaches is Vital to Florida's Economy and Intrinsic to Florida's Culture.

Florida's sandy beaches are one of the state's most valuable natural resources and are vital to sustaining Florida's economy. Florida's beaches are treasured not only by the millions of Floridians who use them but also the tourists who are drawn to them from around the world.

Public beach access is vital to the state and its economy. In 2019, a record 130.9 million out-of-state visitors contributed \$96.5 billion to Florida's GDP, including \$27.6 billion in taxes.² Tourism's contribution to GDP has grown year-after-year; 34% between 2013 and 2019.³ Travel and

² Rockport Analytics, *Florida's Tourism Economy Experiences Another Record Year in 2019 But Shifts into a Lower Gear of Growth*, 3, VisitFlorida, <https://www.visitflorida.org/media/30679/florida-visitor-economic-large-impact-study.pdf>.

³ *Id.* at 19.

tourism is the fourth largest employment sector in Florida, supporting 1.6 million jobs and \$57.2 billion in total wages and salaries.⁴ Tourism employment likewise grew between 2013 and 2019, with direct-tourism employment (e.g. hotels, restaurants, retail, entertainment) increasing over 20%, and wages increasing over one-third.⁵

Florida's beaches are a major driver of Florida's travel and tourism sector. Over 32 million people visited Florida's beaches in 2021⁶ and 19 million tourists visit Florida primarily to go to the beach annually.⁷ In 2019, 44% of domestic visitors participated in beach and waterfront activities, making such activities the most popular among such visitors.⁸ Among recent visitors to South Walton, an area of Walton County, that figure jumps to 88%.⁹ These visitors rated South Walton's "sugary white sand and turquoise blue waters" 9.3 on a ten-point scale in terms of importance to

⁴ *Id.* at 4; *Tourism is Vital to Florida*, VisitFlorida, https://www.visitflorida.org/media/5166/power_of_florida_tourism.pdf.

⁵ Rockport Analytics, *supra*, at 21.

⁶ *Statistics by Region*, United States Lifesaving Association, <http://arc.usla.org/Statistics/View/byState.asp>.

⁷ *Beaches*, Florida Department of Environmental Protection, <https://floridadep.gov/rcp/beaches>.

⁸ *Research FAQ*, VisitFlorida, <https://www.visitflorida.org/resources/research/research-faq/>.

⁹ *Visit South Walton: Fall 2021 Visitor Tracking Study*, 30, Visit South Walton, https://www.visitsouthwalton.com/userfiles/VSW_2021_Fall_Visitor_Tracking_Report.pdf.

their vacation.¹⁰ As these numbers demonstrate, public beach access is a crucial component of Florida's economy.

2. Florida's Constitution, Legislature, and Courts Recognize the Importance of Safeguarding Public Use of Florida's Beaches.

The Florida Constitution, Legislature, and Judiciary have recognized the significance of Florida's beaches, and sought to safeguard public use.

Article 10, section 11 of Florida's Constitution provides in part that "the title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, are held by the state, by virtue of its sovereignty, in trust for all the people."

Florida's Comprehensive Plan, codified at Florida Statutes, Chapter 187, provides as a Coastal and Marine Resources Policy that the state shall: "Ensure the public's right to reasonable access to beaches." § 187.201(8)(b)(2), Fla. Stat. (2018)

In the Beach and Shore Preservation Act (the "BSPA"), Florida Statutes, Chapter 161, the Florida Legislature has addressed the protection of the state's beaches to ensure that "the very features which make coastal areas economically, aesthetically, and ecologically rich will [not] be

¹⁰ *Id.* at 37.

destroyed.” §161.53(1), Fla. Stat. (2018). The BSPA not only protects the value of beaches as natural resources, but also recognizes their importance to public recreation and the state’s economy. Part I of the BSPA calls for a beach management program which identifies “critically eroded,” §161.088, Fla. Stat. (2018), beaches and provides a process for renourishment of those beaches. §161.141, Fla. Stat. (2018). Public access is assured on state lands recovered below the mean high water and, if any additions are made to upland private property, those lands “are also subject to a public easement for *traditional uses of the sandy beach* consistent with uses that would have been allowed prior to the need for the restoration project.” Id. at §161.141.

The Florida Supreme Court has similarly long recognized the significance of Florida’s beaches, and their critical role in enjoying public trust rights in sovereignty lands. In *White v. Hughes*, 139 Fla. 54, 190 So. 446 (Fla. 1939), the Supreme Court observed that “[t]here is probably *no custom* more universal, more natural or more ancient, on the sea-coasts ... than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto.” *White v. Hughes*, 139 Fla. 54, 190 So. 446, 448-449 (Fla. 1939). The Court in *White v. Hughes* adjudged that a government’s authorization of other uses of the beach are subject to

“reasonable use of the beach or shore for its primary and long-established public purposes [bathing and recreational purposes], for which the State holds it in trust, and subject to lawful governmental regulations.” *Id.* at 448.

Subsequently, in acknowledging the existence of customary use rights, the Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, rightly observed that the use of Florida’s beaches is inherently different from that of other Florida lands and that beaches “require separate consideration from other lands with respect to the elements and consequences of title. ...the sandy portion of the beaches ... 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.*” *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77 (Fla. 1974). (*Emphasis added*). Please also see footnote 11 below.¹¹ Florida’s highest court further celebrated the significance of Florida’s beaches to the public as follows:

¹¹ Justice Erwin further emphasized that “the judiciary has a positive and solemn duty as a last resort to protect the public's rights to the enjoyment and use of [‘public coastal areas, navigable waters, tide lands and sovereignty lands’].” *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 81 (Fla. 1974) Justice Erwin agreed, “the law of custom applies” in the case but dissented to assert that the public should be further protected through a property interest in the publicly-used land. *Id.*

“We recognize 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.” *Tona-Rama, Inc.*, 294 So. 2d at 75.

As the above illustrates, public beach access is critical to Florida, and deserving of the utmost protection.

3. Customary Use of Florida’s Beaches is a Public Right, Which Only the Public Can Abandon.

The Florida Supreme Court, in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), recognized the existence of the doctrine of custom in Florida. The Court held that the public’s customary use right to recreate on the state’s dry sand beaches is established whenever “the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute....” *Tona-Rama, Inc.*, 294 So. 2d. at 78. Where such use exists, “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 areas as a recreational adjunct of the wet sand or foreshore area.” *Id.* at 78. (*Emphasis added*) The Court was thus clear that customary use rights belong to the public.

Moreover, the Court was crystal clear that while a government may regulate the public's customary use rights, only the public may abandon those rights. The Court specifically stated that the public's right of use cannot be revoked by the landowner, but "it is subject to *appropriate governmental regulation, and may be abandoned by the public.*" *Id.* at 78. (*Emphasis added*). The Court referenced both abandonment and governmental regulation in the same sentence, but the Court plainly does not say that the government may abandon the public's rights; it only provides that the public may do so. If the Court believed that the government could abandon or otherwise dispense with the public's rights, it would have said so. As such, local government can *regulate* customary use rights but not give them away. Thus, as a matter of law, under *Tona-Rama*, while the government may regulate and control public uses for public health, safety and welfare (as Walton County does through its Code of Ordinances Chapter 22-Waterways and Beach Activities Ordinance), the government cannot abandon the public's customary use rights.

The proper test for abandonment under *City of Daytona Beach v. Tona-Rama, Inc.*, is whether there was an actual interruption in the public's use – in other words, did the public actually stop using the dry sand beach? This is a fact-based inquiry that cannot be decided on a motion for

summary judgment. Substantial evidence was presented by the County that the beach involved in this appeal was subject to an existing right of public customary use in 1978; the time of the purported abandonment of the public's customary rights. The public, including members of Surfrider, continued and still continues to this day to use this area of beach, as they never abandoned their use even after the County's 1978 Resolution. The trial court's ruling must be overturned.

4. Should a Court Find the Government Can Abandon Customary Use Rights, Which Surfrider Strongly Disputes, Such Action Must Meet A Heightened Standard Regarding Intent and Public Interest.

a. Public Customary Use Rights of Florida's Sandy Beaches are Closely Intertwined with Public Rights Under the Public Trust Doctrine.

As referenced above, the public trust doctrine, codified in Article 10, section 11 of the Florida Constitution, provides that the state holds the lands seaward of the mean high tide line in trust for the public, for trust purposes, including recreation.

The public's customary use of the dry sand beach is so closely linked to the exercise of the public's rights in waters and land below the mean high water line and to the value of sovereignty lands to the state and public, that customary use must be protected as an adjunct to the public trust

doctrine – a public trust interest.¹² Florida caselaw recognizes this interconnectedness. In *Trepanier v. County of Volusia*, the Fifth District Court of Appeal stated that “[t]he ‘beach’... includes more land than what is set aside for the people under the public trust doctrine.” *Trepanier v. County of Volusia*, 965 So. 2d 276, 284 (Fla. 5th DCA 2007). In *City of Daytona Beach v. Tona-Rama, Inc.*, the Supreme Court referred to customary use rights in the dry sand area as “a recreational adjunct of the wet sand or foreshore area”, i.e., an adjunct of public trust lands. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974).

As these cases recognize, the right of customary use of the dry sand is often an indispensable element of exercising public trust rights below the mean high water line. First, the right to exercise public trust rights seaward of the mean high water private property boundary can be meaningless if the public does not have customary use rights to the dry sand beach necessary to reach the coastline. Second, customary use rights add significant value to the public’s exercise of their public trust rights. For example, without customary use rights, a fisherman at high tide is expected to put their chair and tacklebox in the water. Surfers and other

¹² North Carolina, for example, has aptly recognized customary access to the beach as a “public trust resource.” See *Nies v. Town of Emerald Isle*, 244 N.C.App. 81, 88-89 (N.C. Ct. App. 2015).

water users could not leave their belongings safely away from the tide's reach on the dry sand; and beachgoers would have no dry place to sit on a towel. Without customary use rights, a parent may not place their child safely on the dry sand and children can't build sand castles in the dry sand. Beach users of all ages and abilities who wish to simply sit and enjoy the beach and view of the sea would in many cases be required to physically reach the water's edge and sit in the wet sand. This is what the public is left with without customary use rights. Plainly, abandonment of customary use rights would directly affect the value of adjacent public trust lands to the public, who are the beneficiaries of the trust.

However, when customary use of the beach exists, the public may engage in these reasonable and traditional beach activities. The public trust and customary use share a symbiotic relationship. Accordingly, as with the public trust, customary use rights must be specially protected.

b. Abandonment of Customary Use, A Public Trust Interest, Requires Specific Intent and Must Be In the Public Interest.

The Florida Supreme Court has not provided a test for the government's abandonment of the public's customary use rights. Indeed, the Court has only referenced the *public's* ability to abandon their rights. The Court has neither considered the government's authority to do so, nor

the level of government that would hold such authority. Given that the public's customary use of dry sand beach is so closely linked to the exercise of the public trust rights below the mean high water line, and serves as a recreational adjunct to the public trust, without conceding that the government may abandon customary use rights (which Surfrider disputes), any purported local government transfer of customary use rights should be treated as a public trust interest and subject to the same standard for transfers of public trust lands.

The transfer of public trust property requires specific intent and must be in the public interest. Art. X, § 11, Fla. Const.; *Coastal Petroleum v. American Cyanamid*, 492 So. 2d 339 (Fla. 1986).

In Coastal Petroleum v. American Cyanamid, the Florida Supreme Court addressed whether the Florida Legislature could divest the state of public trust lands through legislation that included no specific intent to divest the state and public of these lands. The Court applied a two-part analysis: (1) whether the Legislature intended to transfer sovereignty lands; and (2) whether the Legislature could constitutionally divest sovereignty lands without explicitly basing it on the public interest. *American Cyanamid*, 492 So. 2d at 344. First, the Court rejected the notion that a deed from the state or a legislative act that purported to divest sovereignty lands could be

effective without a specific intent. Neither mistake nor estoppel is relevant.

The Court found:

We are persuaded that had the legislature intended to revoke the public trust doctrine by making MRTA [Marketable Records Title Act] applicable to sovereignty lands, it would have, by special reference to sovereignty lands, given some indication that it recognized *the epochal nature of such revocation*. We see nothing in the act itself or the legislative history presented to us suggesting that the legislature *intended to casually dispose of irreplaceable public assets*. *Coastal Petroleum v. American Cyanamid*, 492 So. 2d at 344 (Fla. 1986). (*Emphasis added*).

Because the Court held that the Legislature could not have transferred sovereignty lands without a specific intent, the Court did not reach the question of whether the Legislature could constitutionally make such a divestment of sovereignty lands without explicitly basing it on the public interest. *American Cyanamid*, 492 So. 2d at 344. The Court did note, however, the subsequent adoption of Article 10, section 11 of the Florida Constitution “which is largely a constitutional codification of the public trust doctrine contained in our case law.” *Id.* at 344.

Article 10, section 11 of the Florida Constitution provides:

The 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. (*Emphasis Added*).

Thus, sovereignty lands can only be sold when in the public interest.

As illustrated above, public customary rights to use the beach to access sovereignty lands and to complement the use and enjoyment of sovereignty lands and waters are so closely linked to the public trust in sovereignty lands, and directly affect the value to the public of the adjacent sovereignty land, that any purported local government abandonment of the public's customary use must similarly have been specifically intended and in the public interest.

c. Walton County's 1978 Resolution Could Not Have Abandoned the Public's Customary Use Rights.

As an initial matter, Surfrider maintains that pursuant to the clear language of the Court in *City of Daytona Beach v. Tona-Rama, Inc.*, the government cannot abandon the public's customary use. However, even if it could, which Surfrider disputes, Walton County's 1978 Resolution demonstrates neither specific intent nor that abandoning the public's rights to access the dry sand beach was in the public's interest.

With respect to specific intent, just as the Court in *Coastal Petroleum v. American Cyanamid* found there was no special reference to sovereignty lands, nowhere in the 1978 Resolution is "custom" or "customary use"

mentioned, or any recognition of the epochal nature of curtailing the public's historic use of the sandy beach. The court below erred in finding that the plain language of the Walton County Resolution showed the clear intent of the County to disclaim the public's customary use rights.

Even if that finding stands, the County did not establish that the action would be in the public interest. The record does not support the conclusion that the County made affirmative findings or even considered whether abandonment of customary rights gained by the public's generations of use was in the public interest or even what interests might be served.

The first "WHEREAS" clause in the Walton County 1978 Resolution indicates the purported renouncement was in response to a request by four individuals, stating as follows:

"WHEREAS the Board of County Commissioners of Walton County, Florida, has been requested by A.B. Lowery, H. H. McCallum, George Dickenson and Willie Kennedy, to renounce and disclaim any right of the county and public in and to portions of the property in Gulf Shore Manor Subdivision lying between their lots and the Gulf of Mexico..."

The record is so sparse that the reason for the request is unclear, though presumably this was a developer's request, which had nothing to do with the public's interest. As Justice Ervin warned in *City of Daytona Beach*

v. Tona-Rama, Inc., “the State’s courts can ill afford any longer to be profligate with its public areas and allow them to be frittered away upon outmoded pretexts for commercial exploitation.” *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 81 (Fla. 1974).

The value of the public’s use of beaches to the people, the County or the State of Florida, as illustrated above, was never mentioned or considered; no balancing of conflicting values or interests is documented. The lack of any record of why the circumstances would lead to private commercial interests outweighing the compelling public interests in the state’s beaches surely makes summary judgment inappropriate in this case.

In the words of the Florida Supreme Court, there is no evidence that the County considered the “epochal nature [of] casually dispos[ing] of irreplaceable public assets.” *Coastal Petroleum v. American Cyanamid*, 492 So. 2d at 344 (Fla. 1986). Public customary use rights gained through the reasonable, uninterrupted and peaceful use of the dry sandy beach by generations of Floridians are irreplaceable public assets. As illustrated above, they play an integral role in both beachgoers getting to the water, and complementing the value of public trust recreation and stewardship. Abandoning customary use critically diminishes coastal recreational

opportunities for residents and visitors alike – a major reason people choose to live in or visit Walton County and Florida; leads to more disputes; and raises significant environmental justice issues. Not everyone can afford to live on the ocean, and beach access, including the right to sit on a towel in the dry sand, should not be reserved for those privileged few who can. Diminished beach access opportunities also discourage newcomers and visitors, and thereby negatively impact Florida’s vibrant tourism and recreation economy. Simply put, erasing customary use is not in the public’s interest, and the purported 1978 abandonment could not have possibly served the public interest.

Should the trial court ruling stand, it sets a very dangerous precedent that the government is the one with the right of customary use, not the public, and that even a local government can simply dispense with a public interest right without any specific intent or consideration of the public interest.

For these reasons, the trial court’s order must be reversed.

CONCLUSION

The public’s customary use to recreate on Florida’s sandy beaches is an intrinsic, invaluable part of the Florida experience. It is what draws people to live in and visit the state. The Circuit Court’s Final Summary Judgement

in the Appellee's favor, holding that a local government can casually dispose of the public's customary use, creates significant public resource repercussions along Florida's coasts and to the state as a whole; an error of sufficient gravity to warrant reversal. Accordingly, this Court must reverse the Partial Final Judgment and remand for further proceedings.

RESPECTFULLY SUBMITTED on this 4th day of August, 2022.

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On this 4th day of August, 2022.

/s/ Martha M. Collins
Martha M. Collins, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(b), counsel for the above named Amicus Curiae hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Arial font. Pursuant to Florida Rule of Appellate Procedure 9.045(e), counsel the above named Amicus Curiae further certifies that the foregoing brief contains under 5,000 words, excluding the parts of the brief exempted from the word count by Rule 9.045(e).

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