

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 527

Public Access to Beaches

**SPONSOR(S):** Sachs

**TIED BILLS:**

**IDEN./SIM. BILLS:**

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	<u>Agriculture &amp; Natural Resources Policy Committee</u>	<u>10 Y, 2 N, As CS</u>	<u>Deslatte</u>	<u>Reese</u>
2)	<u>Civil Justice &amp; Courts Policy Committee</u>	<u></u>	<u></u>	<u></u>
3)	<u>Military &amp; Local Affairs Policy Committee</u>	<u></u>	<u></u>	<u></u>
4)	<u>General Government Policy Council</u>	<u></u>	<u></u>	<u></u>
5)	<u></u>	<u></u>	<u></u>	<u></u>

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**SUMMARY ANALYSIS**

The bill creates part V of chapter 161, F.S., to address public access to beaches. The bill defines “beach access” as: “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 such right of public access unless a comparable alternative accessway is provided.”

The bill declares it is the policy of the state that the public, individually and collectively, have free and unrestricted right to enter and use Florida’s public beaches. The bill declares any sandy beach below the mean high water line or a recorded erosion control line public, and prohibits a private entity, absent a Board of Trustees of the Internal Improvement Trust Fund (BOT) deed or authorization, from restricting access along the shoreline across such beaches. The bill declares the new part V does not affect any beach management efforts to fund and manage the shoreline under part I of this chapter.

The bill prohibits persons from obstructing beach access unless the obstruction is authorized by law, and prohibits displaying signs that a public beach is private property. Persons violating these prohibitions commit a misdemeanor of the first degree. With limited exceptions, governmental entities are prohibited from placing obstructions upon a public beach. Furthermore, local governments are prohibited from limiting the public’s access to a public beach, unless alternative access that is of substantially similar quality and convenience to the public is provided.

The bill provides that in suits brought or defended under this part or whose determination is affected by this part, proof of record title to a sandy beach that is 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.

The bill could result in significant litigation costs for state agencies, local governments, and private land owners associated with enforcing and implementing the act’s provisions and resolving questions raised regarding the rights of the public to access public beaches.

The bill has an effective date of July 1, 2009.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current 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 (MHWL), or under Florida law the Erosion Control Line (ECL) is held by the state in trust for all the people. Unless conveyed out, lands waterward of these boundaries are titled to the Board of Trustees of the Internal Improvement Trust Fund (BOT) and administered by it for all the citizens of Florida. Public access along the shore and waterward of the MHWL or ECL (lateral access) may not be blocked by upland landowners.

The beach entails more than the portion belonging to the public under the public trust doctrine. Land above the mean high water line is subject to private ownership.<sup>1</sup> 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.<sup>2</sup>

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 beach land. In 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 pre-scribed 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, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.<sup>3</sup> 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.<sup>4</sup>

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

<sup>2</sup> *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).

<sup>3</sup> *Downing v. Bird*, 100 So.2d 57 (Fla.1958)

<sup>4</sup> *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73

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.”<sup>5</sup> The burden is on the government to prove dedication.<sup>6</sup> 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.”<sup>7</sup>

The doctrine of customary use has been used in Oregon, Texas, Hawaii, and Florida to preserve the public’s access to beaches.<sup>8</sup> In the 1969, the Oregon Supreme Court appeared to effectively open all Oregon beaches to the public through its customary use holding, although it subsequently backed away from the apparent breadth of the holding.<sup>9</sup> 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:

the 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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup>

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

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<sup>5</sup> *City of Palmetto v. Katsch*, 86 Fla. 506, 98 So. 352 (1923).

<sup>6</sup> *City of Miami Beach v. Miami Beach Improv. Co.*, 153 Fla. 107, 14 So.2d 172, 176 (1943).

<sup>7</sup> *Brevard County v. Blasky*, 875 So.2d 6, 11 (Fla. 5th DCA 2004),

<sup>8</sup> Jennifer Sullivan, ‘Laying Out an “Unwelcome Mat” To Public Beach Access,’ *Journal of Land Use*, (Vol. 18:2) Sping, 2003.

<sup>9</sup> *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.”

<sup>10</sup> Texas Open Beaches Act, TEX.NAT. RES.CODEANN.§61.020

<sup>11</sup> *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73

<sup>12</sup> *Ibid.*

custom to use this ***particular area of the beach*** as they have without dispute and without interruption for many years. [emphasis added]<sup>13</sup>

In the *Trepanier v. County of Volusia*, 965 So.2d, 276, the 5<sup>th</sup> District Court of Appeal confronted several questions regarding the doctrine of customary use raised but not clearly resolved in *Tona-Rama*. One question was:

Did *Tona-Rama* announce, as a matter of law, a right by “custom” for the public to use the entire dry sand beach of the entire coast of Florida? If so, does that right include the right to drive and park on the beach? If *Tona-Rama* did not establish a “customary” right, as a matter of law, how is the right established in an individual case such as this one?

The court concluded:

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

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<sup>13</sup> Ibid.

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 funding assistance programs are available to assist local governments in acquisition and development of beach access, including the Department of Environmental Protection's (DEP) Florida Recreation Development Assistance Program grants and DCA's Florida Communities Trust grants. DEP'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.

## **Effect of Proposed Changes**

### **Statutory Changes**

The bill creates part V of chapter 161, F.S., to address public access to beaches. The bill provides definitions for "public beach", "sovereign beach", and "beach access".

The bill defines "beach access" as:

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 such right of public access unless a comparable alternative accessway is provided.

"Public beach" is defined as:

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" is defined as:

that portion of a sandy beach lying seaward of the line of mean high water or a recorded erosion control line.

The bill declares it is the policy of the state that the public, individually and collectively, have free and unrestricted right to enter and use Florida's public beaches. The bill also declares any sandy beach below the mean high water line or a recorded erosion control line public, and prohibits a private entity, absent a board of trustees deed or authorization, from restricting access along the shoreline across such beaches.

The bill prohibits persons from:

- Obstructing or causing obstruction of beach access by fencing, barricading, or causing any other obstruction, unless such obstruction is otherwise authorized by law;
- Displaying or causing to be displayed on any public beach any sign, marker, or warning or communicating in any other manner that a public beach is private property.

The bill provides that a violation of these provisions is a misdemeanor of the first degree.

The bill provides that a governmental entity may not obstruct a public beach, unless the obstruction is necessary for the public health, safety, and welfare; erected for no more than 30 calendar days; necessary to protect wildlife, habitat, or other environmental resources; or otherwise authorized by law. This prohibition does not prevent any agency, department, institution, subdivision, or instrumentality of the state or of the Federal Government from erecting or maintaining any groin, seawall, barrier, pass,

channel, jetty, or other structure as an aid to navigation, as protection of the shore, or for fishing, safety, or other lawful purpose. Furthermore, the bill prohibits a governmental entity from limiting the public's access to a public beach, unless alternative access that is of substantially similar quality and convenience to the public is provided.

The bill provides for the use of prima facie evidence in suits brought or defended under this part or whose determination is affected by this part. The bill declares that proof of record title to a sandy beach that is 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.

### Effects on Current Case Law Relating to Public Beach Access

As noted in the discussion in the "Current Situation" section of the analysis, Florida courts have recognized that 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.<sup>14</sup> In *City of Daytona Beach v. Tona-Rama*, the Florida Supreme Court recognized this method of acquiring public access under Florida law, but left unsettled, at least in opinion of the 5<sup>th</sup> District Court of Appeal, several questions of law, including:

Did *Tona-Rama* announce, as a matter of law, a right by "custom" for the public to use the entire dry sand beach of the entire coast of Florida?

If *Tona-Rama* did not establish a "customary" right, as a matter of law, how is the right established in an individual case such as this one?

As noted in the "Current Situation," in *Tona-Rama*, the Florida Supreme Court found that the public retained its right to continue to use the property in question "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]<sup>15</sup>

In the *Trepanier v. County of Volusia*, 965 So.2d, 276, the 5<sup>th</sup> District Court of Appeal concluded:

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 court further concluded:

"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.

The bill declares it is the policy of this state that the public, individually and collectively, have the right to enter and use Florida's public beaches. The bill also provides that in a suit brought or defended under this part, proof of record title to a sandy beach that is 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.

The intent and effect of the declared policy, as informed by the provisions addressing prima facie evidence is unclear. Taken as a whole, the language resembles provisions included in the State of Texas' codified customary use policy, which created a presumption that the sandy beaches of the state are public beaches:

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<sup>14</sup> *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).

<sup>15</sup> *Ibid.*

the 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.<sup>16</sup>

**B. SECTION DIRECTORY:**

**Section 1.** Creates part V of ch. 161, F.S., providing definitions; providing a declaration of public policy and effect; prohibiting persons from restricting access; prohibiting obstruction of beach access except as otherwise authorized by law; 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; prohibiting a governmental entity from placing an obstruction upon or limiting public access to a public beach except under certain conditions; providing for the use of prima facie evidence in suits brought or defended under this part.

**Section 2.** Provides an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

See Fiscal Comments

2. Expenditures:

See Fiscal Comments

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

See Fiscal Comments

2. Expenditures:

See Fiscal Comments

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

See Fiscal Comments

**D. FISCAL COMMENTS:**

The fiscal impacts of the bill are unknown, but there could be potentially significant litigation costs associated with enforcing and implementing the provisions of the act.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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<sup>16</sup> Texas Open Beaches Act, TEX.NAT. RES.CODEANN.§61.020  
**STORAGE NAME:** h0527a.ANR.doc  
**DATE:** 3/24/2009

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

#### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 24, 2009, the Agriculture & Natural Resources Policy Committee amended and passed HB 527 favorably as a Committee Substitute.

The amendment:

- Replaced the definition of "beach access" included in the original bill with a definition that is consistent with the current definition of "access" or "public access" as defined and used in ss. 161.041, 161.052, and 161.053, F.S.
- Deleted the declaration in the original bill proclaiming that the new part V created by the bill does not affect the title held to land in this state that is adjacent to any beach on the Gulf of Mexico, the Atlantic Ocean, or the Straits of Florida, and does not reduce or limit the rights of the public in public beaches that have been defined in law or custom.
- Revised language that limits the authority of individuals and governmental entities to create barriers to the use of public beaches, and deleted language prohibiting a governmental entity from adopting an ordinance, resolution, or development order that has the effect of limiting the public's access to a public beach.
- Deleted language stating a showing that property lies within the area from mean low tide to the seasonal high-water line, as defined in s. 161.053 (6)(a), F.S., 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 and use of a public beach or for ingress and egress to the waters of the Gulf of Mexico, the Atlantic Ocean, or the Straits of Florida.
- Deleted language requiring, by January 1, 2010, each county and municipality to compile and provide a list to the BOT of each dead-end street within its jurisdiction that may be used for the purpose of accessing and using a public beach.
- Deleted language stating that a county or municipality may not sell or convey any interest in beachfront land or abandon, close, relinquish, or vacate a street, road, or easement that provides an accessway to a public beach until the BOT has an opportunity to receive or purchase such interest or accessway in accordance with provisions also deleted from the bill.